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1 IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF  
2 THE NORTH AMERICAN FREE TRADE AGREEMENT  
3 AND THE UNCITRAL ARBITRATION RULES,

4 BETWEEN:

5 WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS  
6 CLAYTON AND DANIEL CLAYTON AND BILCON OF DELAWARE INC.

Claimants

- and -

7 GOVERNMENT OF CANADA

Respondent

8 ARBITRATION HELD BEFORE  
9 THE HONOURABLE JUSTICE BRUNO SIMMA (PRESIDING ARBITRATOR),  
10 PROFESSOR DONALD McRAE, and PROFESSOR BRYAN SCHWARTZ  
11 held at ASAP Reporting Services Inc.,  
12 Bay Adelaide Centre, 333 Bay St., Suite 900,  
13 Toronto, Ontario  
14 on Tuesday, October 22, 2013 at 9:41 a.m.

VOLUME 1A - PUBLIC

15 APPEARANCES:

16 Barry Appleton For the Claimants  
17 Gregory Nash  
18 Frank S Borowicz, QC  
19 Kyle Dickson-Smith  
20 Scott Little For the Respondent  
21 Shane Spelliscy  
22 Jean-François Hebert  
23 Stephen Kurelek  
24 Adam Douglas  
25 Reuben East  
26 Dirk Pulkowski For the Tribunal

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ALSO PRESENT:

Elizabeth Hrubesz

Cheryl Fabian-Bernard

Alex Miller

Chris Reynolds

Jasmine Rokolj

Alex George

David Bartol

Kevin LeBlanc

Kathleen Claussen

Teresa Forbes

Assistant to Tribunal  
Court Reporter

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1 Toronto, Ontario

2 --- Upon commencing on Tuesday, October 22, 2013

3 at 9:41 a.m.

4 MR. PULKOWSKI: Just a brief  
5 reminder before we get started regarding the  
6 microphones. You will see now a demonstration that  
7 wasn't possible to do completely in the other room.  
8 Right now the lights are red, meaning that  
9 microphone is off. I see the Tribunal microphones  
10 are all on right now. So if you want to turn this  
11 one off, this one is green now, meaning that you  
12 are connected.

13 PRESIDING ARBITRATOR: Okay. Can  
14 we start? All right. I think we are ready to  
15 start. So good morning, everybody. Good morning,  
16 ladies and gentlemen, and welcome.

17 I open the hearing on the  
18 jurisdiction and liability in the case of Bilcon of  
19 Delaware et al versus the Government of Canada.

20 There is a German saying, I don't  
21 know how your German is, 'Gut Ding braucht Weil',  
22 which means a good thing takes a while to become  
23 good and solid, and I think this has certainly been  
24 the case here.

25 But I think you are all relieved

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1 and, in a sense, probably happy that we have now  
2 reached a stage of the hearing.

3                   Actually, this is a hearing, as  
4 you will see, which is being streamlined live,  
5 streamed live on the PCA website.

6                   We have had a short discussion  
7 with some of you at 9:00 on a few items, and I  
8 think I don't have to go into details here. It had  
9 to do with the confidentiality that has to be  
10 assured on the part of the witnesses, that they are  
11 not going to listen to or watch parts of the  
12 proceedings which are -- before they have done  
13 their or suffered through their examinations.

14                   I think transcripts will be ready  
15 in a rough format very soon after the hearing, and  
16 around 9:00 p.m. the final transcript will be  
17 available electronically, and I have heard in the  
18 morning we are going to get the printed-out  
19 transcript.

20                   The hearing will be based on a six  
21 working hours a day, more or less three plus three,  
22 coffee break at a convenient time more or less in  
23 the middle. So you can indicate if that is a good  
24 time in your presentations; a lunch break which  
25 will -- the precise timing will be decided as time

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1 goes by of about one hour. Yes, is that... Okay.

2 So the other things I have, the  
3 exclusion of fact witnesses is clear by now. We  
4 have gotten the assurances, the signed statements  
5 of the witnesses.

6 Let me maybe ask now for lead  
7 counsel to very briefly present their teams. So  
8 let me first start with the PCA team. My name is  
9 Bruno Simma. There is Professor Bryan Schwartz  
10 from Winnipeg. There is Professor Donald McRae  
11 from Ottawa.

12 Then we have two people, two PCA  
13 employees, Dirk, who is known already familiar to  
14 most of us, and then there is Kathleen Claussen,  
15 who is the young lady right in the back of the  
16 room. Your name is Teresa Forbes.

17 And maybe if you could, claimant,  
18 could you just very briefly introduce your people.

19 MR. APPLETON: Good morning,  
20 Mr. President. I am Barry Appleton. I am here on  
21 behalf of the claimant. I would like to introduce  
22 our team today, but first I would like to be able  
23 to say hello to all of the people on the Internet  
24 who will be watching this hearing and being able to  
25 participate in the transparent process. The

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1 claimant in this matter, the investors, Bilcon et  
2 al, they have all been strongly in favour of  
3 transparent, open hearings, and we thank the  
4 Members of the Tribunal, the Government of Canada,  
5 the very fine people at Arbitration Place to be  
6 able to put this together. We just wanted to put  
7 that formally on the record to begin.

8                   With respect to our delegation  
9 here today, we're going to introduce the counsel  
10 who we would expect to participate in this hearing,  
11 and also the client representative and one advisor  
12 to this delegation.

13                   So in addition to myself, there is  
14 Mr. Gregory Nash. I will ask each person to stand  
15 as we go through. Frank Borowicz, Q.C., Kyle  
16 Dickson-Smith, Dr. Alan Alexandroff. We also are  
17 joined by Professor Robert Howse from the New York  
18 University faculty of law who is here as an advisor  
19 and expert on public international law during these  
20 hearings.

21                   And we also have a party  
22 representative, one of the claimants in fact in a  
23 personal capacity, Mr. Bill Clayton Jr. here at the  
24 back.

25                   You will be hearing from



1 Mr. Clayton, I believe, later today in terms of  
2 witness examination.

3 I would like to thank the court  
4 reporter in advance. We hope to not put you  
5 through too much of a difficult pace over the next  
6 few days, and we thank everyone for bringing this  
7 hearing on today. Thank you.

8 PRESIDING ARBITRATOR: Thank you,  
9 Mr. Appleton. For the respondent, Mr. Little?

10 MR. LITTLE: Good morning, Judge  
11 Simma, Professor Schwartz, Professor McRae, Dirk,  
12 and good morning, Kathleen.

13 I am Scott Little. I am the lead  
14 counsel for the Government of Canada, and today I'm  
15 accompanied by Mr. Shane Spelliscy, Jean-François  
16 Hebert, Stephen Kurelek, counsel Adam Douglas in  
17 the third row, Reuben East, very capable legal  
18 paralegals Cheryl Fabian-Bernard and Elizabeth  
19 Hrubesz.

20 We have Chris Reynolds, who is  
21 part of our technical support team, and then we  
22 have our two experts, Lawrence Smith and Robert  
23 Connelly. In the very back, the gentleman is David  
24 Bartol. He is counsel for the Government of Nova  
25 Scotia.

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1                   Then finally, beside Mr. Bartol we  
2 have Jasmine Rokolj from DFAIT. Thank you.

3                   PRESIDING ARBITRATOR: Thank you.  
4 Thank you very much, Mr. Little.

5                   So the program of today is going  
6 to be we are going to have the opening statements  
7 of around 90 minutes each, and followed by  
8 examination of witnesses. And, yes, I think that  
9 is all I need to say at the moment. So I give the  
10 floor to representative claimant, Mr. Appleton, for  
11 his opening statement. I hope I haven't forgotten  
12 anything.

13                   MR. APPLETON: These don't bend.  
14 You're on.

15                   PRESIDING ARBITRATOR: I think we  
16 were told they are all individual microphones, so  
17 it is of no -- if one is left on, it doesn't  
18 matter; right? That is how I understood it, but I  
19 gladly will turn....

20                   MR. APPLETON: Right. You can  
21 hear me?

22                   PRESIDING ARBITRATOR: Well, we  
23 can hear you.

24 OPENING STATEMENT BY MR. APPLETON:

25                   MR. APPLETON: Yes, excellent.

00010

1 Good morning. Thank you very much. I will begin  
2 by briefly taking the Tribunal through our  
3 understanding of the governing legal principles in  
4 this dispute.

5 I do not propose in the opening  
6 statement to address the legal questions before you  
7 in detail, as this has been covered in the briefs.  
8 I will provide an overview of the main legal  
9 principles which constitutes the legal framework  
10 for your consideration in this case.

11 When I finish, my colleague, Greg  
12 Nash, will address some factual issues, which we  
13 believe will assist the Tribunal during the witness  
14 examination phase of this hearing.

15 At the outset, it is helpful to  
16 consider the fundamental interpretive approach that  
17 the NAFTA mandates. Slide 1, which will appear on  
18 the screens before you, sets out the text of NAFTA  
19 article 1131(1). This mandates that in its  
20 interpretation of the NAFTA, that the Tribunal  
21 shall decide the issues in dispute in accordance  
22 with the NAFTA agreement and with applicable rules  
23 of international law.

24 In this regard, the NAFTA actually  
25 prescribes how it is to be interpreted. Slide 2

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1 sets out the objectives of the NAFTA, which appear  
2 at paragraph 1 of NAFTA article 102. This directs  
3 the Tribunal to interpret the NAFTA in a manner  
4 consistent with specific objectives contained in  
5 that article and in accordance with three  
6 principles and rules of the NAFTA; namely, national  
7 treatment, most-favored nation treatments and  
8 transparency. Each of these principles and rules  
9 is at issue in this arbitration.

10                   The NAFTA's principles of  
11 most-favored nation treatment and national  
12 treatment require that Bilcon be treated no less  
13 favorably than others seeking similar licensing  
14 permissions.

15                   The NAFTA principle of  
16 transparency requires an open process that enables  
17 a foreign investor to be aware of its actual status  
18 and rights in relation to others. All of these  
19 principles need to be understood in relation to  
20 others. They need to be understood in relation to  
21 the broad context of North American democratic and  
22 constitutional values and the common adoption  
23 amongst the three NAFTA members of conventions  
24 protecting the rule of law, due process and  
25 international civil, economic, environmental and

1 human rights.

2                   Within this interpretive context  
3 we would like to turn to national treatments. In  
4 addition to being a principle and rule of the NAFTA  
5 set out in NAFTA article 102, national treatment is  
6 an obligation that is set out in seven different  
7 chapters of the NAFTA.

8                   The terms "national treatment"  
9 "most-favored nation treatment", and "fair and  
10 equitable treatment" are not specifically defined  
11 in the NAFTA, but they have been used in an  
12 undefined fashion in more than 1,000 bilateral  
13 investment treaties.

14                   So the NAFTA, like these many  
15 other agreements, chose to rely on the living  
16 meaning of these well-known international law  
17 terms, a meaning that comes from a large number of  
18 international tribunal decisions and from customary  
19 international law.

20                   The meaning of national treatments  
21 must accordingly be based on the ordinary meaning  
22 of the words in their context and in light of the  
23 NAFTA's objects and purposes as the NAFTA -- sorry,  
24 as the NAFTA itself and the Vienna Convention  
25 mandates.

1                   NAFTA Article 1102(1), which  
2 enshrines national treatments, is set out on slide  
3 3, which appears on the monitors before you.

4                   NAFTA Article 1102 has two simple  
5 criteria: Are their investors or investments of  
6 those investors in like circumstances? Two, is  
7 there treatment less favorable provided to them?

8                   That is all that Bilcon has to  
9 show to validate its claim.

10                  With regard to the first  
11 requirement of likeness, NAFTA Article 1102 only  
12 requires investments to be in like circumstances.  
13 It does not require them to be in identical  
14 circumstances.

15                  The comparison between  
16 circumstances of foreign and domestic investments  
17 only needs to be like, and there can be many  
18 differences in circumstances, but once the  
19 threshold of likeness is met, a comparison of  
20 treatment follows.

21                  What is clear is that likeness  
22 needs to be considered in the circumstances, and  
23 where a question of likeness arises in the context  
24 of government regulations, likeness requires the  
25 Tribunal to consider all of those who are competing

1 for similar regulatory permissions.

2 This was the same approach taken  
3 by the NAFTA Tribunal in Grand River and the  
4 approach taken in Occidental Petroleum.

5 In this NAFTA claim, all of those  
6 who, like Bilcon, sought regulatory permission from  
7 governments are in like circumstances. This is the  
8 class of investments whose treatment needs to be  
9 considered.

10 Now, of course the determination  
11 of likeness is not a mechanical exercise. The  
12 GATT, and then later the WTO, frequently have been  
13 asked to consider this very question. As the GATT  
14 has recognized, judgment needs to be applied in  
15 this determination, and the interpretation and  
16 application of the test of likeness must further  
17 the objectives of equality of competitive  
18 opportunity. In other words the analysis is, in  
19 substance, a matter of functional common sense.

20 NAFTA Article 1102 requires the  
21 Tribunal to consider treatment after like  
22 circumstances. The interpretive task for the  
23 Tribunal therefore begins with the text of NAFTA  
24 Article 1102, but it is not completed until NAFTA  
25 Article 1102 is examined in the context of the

1 NAFTA as a whole.

2                   The context objectives of the  
3 NAFTA make clear that NAFTA Article 1102 requires  
4 the NAFTA parties to provide equality of  
5 competitive opportunities.

6                   The notion of equality of  
7 competitive opportunities allows for different  
8 treatment that is not less favorable treatment. It  
9 allows a regulatory process to produce different  
10 outcomes, as long as the process demonstrably  
11 treats the parties with evenhandedness to ensure  
12 all investments are granted equal opportunities.  
13 To be even-handed, treatment need not be identical.

14                   Where there is different treatment  
15 of likes, the burden is on Canada to show that the  
16 different treatment is not less favorable. Canada  
17 simply cannot meet that burden.

18                   The Government of the United  
19 States America stated in its 1128 submission that  
20 national treatment requires proof of  
21 nationality-based discrimination. This is simply  
22 not a requirement of a violation of national  
23 treatment.

24                   The text of NAFTA Article 1102  
25 makes clear that there is a requirement to



1 demonstrate a divergence of nationality between the  
2 more favorably treated investment and the  
3 claimants, but there is no requirement to prove  
4 intent of nationality-based discrimination.  
5 National treatment can be easily violated when  
6 there is a presence of nationality-based  
7 discrimination, but it is simply not required.

8                   Now, I would like to turn to slide  
9 5, which appears on the monitors before you. This  
10 sets out the text of Chapter 11's most-favored  
11 nation treatment obligation.

12                   The text of this obligation is  
13 very similar to the text of the national treatment  
14 obligation in Chapter 11, but the focus here on the  
15 likeness comparator is not a better-treated local  
16 person, but a better-treated non-local, either an  
17 investment or investor of an investment from  
18 another NAFTA party or from a non-NAFTA party  
19 state.

20                   In this arbitration, the Tribunal  
21 will see that treatment has been provided to others  
22 in like circumstances with Bilcon from non-NAFTA  
23 party states, as well as from other NAFTA party  
24 states. In such circumstances, there is a clear  
25 most-favored nation treatment violation.

1                   I would like to turn to the  
2 international standard of treatment. That is  
3 Article 1105. This requires Canada to accord the  
4 international law standard of treatment to  
5 investments of investors of the NAFTA parties.

6                   The text of this obligation is set  
7 out on slide 6, which will appear -- it does appear  
8 on the monitors before you. Paragraph 1 of NAFTA  
9 Article 1105 provides that the international law  
10 standard of treatment includes the provision of  
11 fair and equitable treatment and full protection  
12 and security. These international law obligations  
13 are well established and are well known.

14                   Good faith is an integral part of  
15 the fair and equitable treatment standard. Many  
16 NAFTA and non-NAFTA awards recognize the duty to  
17 act in good faith is a distinct international  
18 obligation within the international law standard.

19                   An example might be a lack of  
20 candour concerning the policy basis for government  
21 decisions. This fundamental obligation of good  
22 faith needs to be considered in the context of the  
23 highly developed legal and regulatory framework in  
24 North America where citizens have basic  
25 expectations of fairness, transparency and the

1 applicability of the rule of law.

2                   Looking at the obligation of full  
3 protection of security, this is a specific element  
4 of the international law standard. In its modern  
5 expression, this obligation requires governments to  
6 provide a stable, legal and business environment to  
7 foreign investors, and full protection and security  
8 itself includes protection of the rule of law and  
9 of fundamental fairness obligations within the  
10 international law standard.

11                   The international law standard  
12 also includes other obligations. It ensures that  
13 regulatory process is free from nationality-based  
14 discrimination. This protection against  
15 discrimination is an essential part of the NAFTA  
16 Article 1105 international law standard, and it  
17 itself is reflected in numerous international human  
18 rights agreements, such as the International  
19 Covenant on Civil and Political Rights that have  
20 been ratified by each of the three NAFTA parties.

21                   Protection -- well, with respect  
22 to the protection against arbitrariness, the state  
23 breaches its customary international law  
24 obligations when it acts on prejudice or preference  
25 rather than on reason or on facts.

1                   Arbitrariness also occurs when  
2 discretionary decisions by governments are based on  
3 irrelevant considerations and when relevant  
4 considerations are ignored.

5                   The long-standing international  
6 customary law protection against the abuse of  
7 rights applies in the context of abuses of  
8 administrative authority.

9                   Slide 7 on the monitors before you  
10 give examination of three basic forms of abuse of  
11 rights: Where the state hinders an investor in the  
12 enjoyment of rights; where there is a fictitious  
13 exercise of a right; or where there is an abuse of  
14 discretion in the exercise of a governmental power.

15                  A government cannot exercise its  
16 power to abuse a foreign investor by capriciously  
17 exercising discretionary rights. In the words of  
18 Judge Charles Brower, heightens abuses of  
19 administrative decision making, violate the fair  
20 and equitable treatment standard, as do  
21 unreasonable regulatory burdens, artificial delays,  
22 unduly extensive information requests, and  
23 deliberate cost-raising tactics.

24                  The duty of transparency is also  
25 clearly contained in the NAFTA. It compels

1 openness and clarity of a host state's legal regime  
2 and procedures.

3                   The need for transparency is a  
4 necessary aspect of both good faith and due process  
5 rights. Each of these aspects of the international  
6 law standard is central to this arbitration.

7                   Now, in the context of each of  
8 these three NAFTA obligations, Articles 1102, 1103  
9 and 1105, it is clear that the NAFTA parties did  
10 not need to define the key terms in the NAFTA, such  
11 as most-favored nation treatment, national  
12 treatment and the international law standard of  
13 treatment, not because they did not know what these  
14 obligations meant, but precisely because they did.

15                   They wanted to ensure that the  
16 protections to investors from an evolving  
17 international law meaning of these terms would  
18 continue to be applied in the way that harmonizes  
19 all of the law.

20                   The Vienna Convention tells us to  
21 look at the context of the NAFTA as a whole since,  
22 for example, the most-favored nation treatment  
23 obligation in Chapter 11 only applies to treaties  
24 which came into force after the NAFTA.

25                   The use of common terms was

1 clearly meant to incorporate an international law  
2 key into the NAFTA by incorporating an  
3 international common law through the meaning of  
4 these key terms.

5                   The NAFTA was drafted to ensure a  
6 holistic view of the law that would embrace  
7 international public law and international economic  
8 law, as well.

9                   Slide 9 on your monitor sets out  
10 Article 31(3) of the Vienna Convention. Such an  
11 understanding is also consistent within the meaning  
12 of Article 31(3)(c) of the Vienna Convention, which  
13 not only allows, but mandates the Tribunal in its  
14 interpretation to take into account all of the  
15 relevant rules of international law which have been  
16 applicable to the parties.

17                   This rule is enhanced by a similar  
18 instruction in NAFTA Article 1131 that the  
19 governing law includes international law.

20                   In our closing, I will return in  
21 some detail to the proper application of the  
22 international law standard and the requirement of  
23 proper reliance on the rules of international law,  
24 including those in the International Law Commission  
25 articles on state responsibility, the Vienna

1 Convention on the law of treaties, and other rules  
2 of international law which have been adopted by the  
3 parties pursuant to article 31(1)(c) of the Vienna  
4 Convention.

5 Now, since a finding of the breach  
6 of the NAFTA requires a careful review of the  
7 facts, we will now ask Mr. Nash to address the  
8 Tribunal on factual issues which arise in this  
9 claim. Mr. Nash.

10 OPENING STATEMENT BY MR. NASH:

11 MR. NASH: Thank you,  
12 Mr. Appleton. Mr. President, Members of the  
13 Tribunal, I will be referring to documents that  
14 have been introduced into evidence.

15 MR. APPLETON: Excuse me,  
16 Mr. Nash, I'm sorry. I omitted something. Would  
17 you explain to the Tribunal about the... or I will  
18 explain?

19 MR. NASH: You are about to get a  
20 binder of documents which include slides for all of  
21 the slides that Mr. Appleton has referred to and  
22 will include slides over the course that I will be  
23 referring to.

24 PRESIDING ARBITRATOR: Could you  
25 put the microphone a bit closer to you?

00023

1 MR. NASH: How is that? Is that  
2 better?

3 PRESIDING ARBITRATOR: Can you  
4 move it a little?

5 MR. APPLETON: It doesn't move.

6 MR. NASH: It moves, but it goes  
7 down.

8 PRESIDING ARBITRATOR: Well, as  
9 close as possible.

10 MR. NASH: Mr. President, Members  
11 of the Tribunal, the story of the Bilcon Quarry is  
12 a story of systemic lack of good faith by  
13 government. It is a story of the politicization of  
14 a regulatory process that was intended and that  
15 Bilcon was entitled to expect to be administered  
16 fairly, objectively and honestly.

17 It is a story of arbitrary and  
18 capricious government measures that resulted in  
19 officials withholding information, manipulating and  
20 misrepresenting the truth and turning a blind eye  
21 to what was really going on.

22 It is a story of a government  
23 apparatus doing what its officials knew was wrong.  
24 Whether the officials involved were good servants  
25 of their political masters and whether their



1 directions were express or implied, there is no  
2 justifiable excuse for abuse of authority and  
3 breach of public trust.

4                   No delegated authority, no matter  
5 how discretionary, is unfettered. It must always  
6 be exercised in good faith, fairly, and on the  
7 basis of relevant considerations and for the  
8 purpose for which it was intended.

9                   The Bilcon story begins in 2001  
10 when Bilcon was approached by Nova Stone to invest  
11 in a quarry Nova Stone had in Nova Scotia. The  
12 quarry became known as the Bilcon Quarry at Whites  
13 Point. Bilcon is a family-owned company started by  
14 Bill Clayton Sr. It is now operated by his three  
15 sons.

16                   The Clayton family has been in the  
17 concrete business for over 50 years. Their  
18 corporate headquarters are in New Jersey, and they  
19 have operations in over 25 locations across the  
20 United States.

21                   The Clayton family companies  
22 employ over 750 people and have won many awards for  
23 community service, leadership and philanthropy.

24                   When Nova Stone approached the  
25 Claytons, they were already familiar with Nova

1 Scotia because they had been purchasing rock from  
2 the quarry in New Brunswick on the other side of  
3 the Bay of Fundy. The rock from that quarry was  
4 shipped through the Bay of Fundy to their  
5 facilities in New York.

6 The quarry at Whites Point also  
7 had extremely high rock that was suitable for  
8 export by ship to New Jersey and New York.

9 The key factor in the Clayton's  
10 decision to invest in Nova Scotia was the  
11 government's policy to actively encourage investors  
12 to come to Nova Scotia to develop quarries. Nova  
13 Scotia had published many documents designed to  
14 attract investors specifically to develop mines and  
15 quarries.

16 Nova Scotia has historically been  
17 a resource extraction province, and governments of  
18 all political stripes have long considered quarry  
19 development to be important to the Nova Scotia  
20 economy.

21 Bilcon's representative in Nova  
22 Scotia was Paul Buxton, who was a professional  
23 engineer who lived and practiced his profession in  
24 Nova Scotia for over 40 years. Mr. Buxton was  
25 known for his successful management of public and

1 private projects and was uniquely qualified to help  
2 Bilcon develop the Whites Point quarry.

3                   The Nova Scotia minister of  
4 economic development at the time was the Honourable  
5 Gordon Balser, who was also the member of the  
6 legislative assembly for the Digby area where the  
7 quarry was located.

8                   Mr. Buxton had over 15 meetings  
9 with Mr. Balser, who assured him that Nova Scotia  
10 wanted Bilcon to develop the quarry, and spoke of  
11 the positive impact it would have on creating jobs  
12 and stimulating investment in the area.

13                   Minister Balser invited Bill  
14 Clayton Jr. and his father to meet with him in Nova  
15 Scotia, and they did, and were personally assured  
16 by Minister Balser that Nova Scotia had a friendly  
17 business environment, supportive of foreign  
18 investment and that he was personally committed to  
19 doing everything in his power to bring jobs into  
20 the area.

21                   Encouraged by Minister Balser,  
22 Bilcon sent its geologist, John Lizak, who will be  
23 a witness today, to evaluate and inspect the quarry  
24 site.

25                   Senior government officials

1 provided Mr. Lizak with much information about  
2 quarry development in Nova Scotia, and also  
3 provided a personal two-day helicopter tour of the  
4 area.

5                   Among the materials the officials  
6 gave Mr. Lizak were copies of published policies  
7 which were expressly focussed on international  
8 investments in marine quarries.

9                   One of the government's published  
10 policies which senior Nova Scotia officials gave to  
11 Mr. Lizak was entitled "Industrial Minerals in Nova  
12 Scotia". It highlighted the historic importance of  
13 exporting rock from Nova Scotia quarries dating  
14 back to the 1800s and promised a bright future of  
15 continued governmental and social commitment to  
16 "ensuring a long and prosperous future for this  
17 vital industry."

18                   Bilcon believed what it was told  
19 by Nova Scotia government and decided to commit to  
20 the quarry. They engaged John Wall, an experienced  
21 quarry manager, to move to Nova Scotia and to work  
22 with Mr. Buxton to establish the quarry.

23                   The quarry was expected to provide  
24 Bilcon with a secured supply of the highest quality  
25 aggregate available in close proximity to the east

1 coast of the United States for 50 years.

2                   The quarry was located at Whites  
3 Point on Digby Neck, a remote rural peninsula of  
4 southwest Nova Scotia. "The Neck", as it is  
5 called, is divided by a mountain of basalt rock  
6 which makes the area particularly suited for  
7 gathering aggregate.

8                   The quarry site was on the western  
9 slope of the basalt rock mountain facing the Bay of  
10 Fundy. The land has been clearcut logged. No one  
11 lived in the shoreline, which is littered with  
12 trash and abandoned refuse from fishing boats.

13                   The few homes in the area are on  
14 the other side of the mountain from which the  
15 quarry site could not be seen. The landscape of  
16 Whites Point is bleak. The one road that runs  
17 along the Digby Neck was built from rock taken from  
18 the gravel pit on this property that had been  
19 operated on the quarry site, and today Whites Point  
20 is still designated as a quarry site on the Nova  
21 Scotia geological maps.

22                   The Bay of Fundy is a major  
23 international shipping lane. Directly across from  
24 the Bay of Fundy from Whites Point is the Irving  
25 Oil refinery, from which large tankers ship

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1 thousands of barrels of oil through the Bay of  
2 Fundy each year, and further up the Bay of Fundy is  
3 the Hantsport Marine Terminal from which for  
4 decades gypsum rock was shipped to the United  
5 States in large ships.

6 I would now invite the Tribunal to  
7 watch a video referenced in Mr. Buxton's  
8 supplementary witness statement.

9 It will be coming momentarily. It  
10 is on its way.

11 --- Video played at 10:16 a.m.

12 MR. APPLETON: Where is the sound?

13 MR. NASH: We have some technical  
14 difficulties with the sound, so what I will do is  
15 continue on.

16 PRESIDING ARBITRATOR: We are  
17 waiting for the tone.

18 --- Video played 10:17 a.m.

19 PRESIDING ARBITRATOR: Excuse me.  
20 Are we supposed to listen to understand what...

21 MR. NASH: You're not able to  
22 hear? Okay.

23 --- Video being played.

24 MR. NASH: What we will do is we  
25 will wait until we have the proper feed for that.

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1                   PRESIDING ARBITRATOR: I think  
2 probably the best thing would be --

3                   MR. NASH: We will start at the  
4 beginning at a point where we have the technology  
5 working. What we will do is we will wait until the  
6 video is properly ready to go, and I will continue  
7 on with my presentation.

8                   PRESIDING ARBITRATOR: In the  
9 meantime.

10                  MR. NASH: Yes.

11                  PRESIDING ARBITRATOR: That's a  
12 good idea.

13                  MR. NASH: That is what I will do.

14                  PRESIDING ARBITRATOR: At some  
15 other point?

16                  MR. NASH: Yes.

17                  PRESIDING ARBITRATOR: Yes.

18                  MR. NASH: I would like to turn to  
19 the actual application for the quarry in 2002.

20                  Bilcon's pending partner, Nova  
21 Stone, applied to the Nova Scotia department of  
22 environment and labour, commonly called NSDEL, for  
23 approval to operate a small ten-acre quarry at  
24 Whites Point.

25                  In Nova Scotia, quarries under

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1 4 hectares, which is approximately 10 acres, were  
2 exempt from any kind of environmental assessment.

3 The purpose of the small quarry  
4 was to do test blasting in anticipation of  
5 developing a larger 152 hectare quarry on the same  
6 site.

7 In March of 2002, Robert Balcom,  
8 the NSDEL engineer who reviewed the application for  
9 the small quarry, recommended approval of that  
10 10-acre quarry.

11 The NSDEL district manager, Bob  
12 Petrie, was the official responsible for the  
13 approval of the application for the quarry.  
14 Mr. Balcom and Mr. Brad Langille, the NSDEL  
15 inspector for the quarry, worked under Mr. Petrie.

16 In early April of 2002,  
17 Mr. Langille sent a copy of the application for the  
18 10-acre quarry to Jerry Conway, and Jerry Conway  
19 was the marine mammal expert and coordinator at  
20 DFO.

21 In a conversation with Mr. Conway,  
22 Mr. Langille confirmed that the 10-acre quarry was  
23 exempt from any environmental assessment in Nova  
24 Scotia, because the quarry was smaller than  
25 4 hectares. Shortly thereafter, however, another



1 NSDEL official advised that 10 acres was actually  
2 slightly more than 4 hectares and that a revised  
3 application would be filed for a 3.9 hectare  
4 quarry, which we will call during the course of  
5 this proceeding the 3.9-hectare quarry.

6                   A few weeks later, Mr. Brian  
7 Jollymore, still in April of 2002, a habitat  
8 assessment biologist with the DFO, wrote to Mr.  
9 Petrie, who is at the province, by email and  
10 advised him that Mr. Conway, the marine mammal  
11 expert, was concerned about the possible effects of  
12 blasting at the 3.9 hectare quarry on marine  
13 mammals.

14                   Mr. Jollymore asked Mr. Petrie to  
15 address that concern by adding two conditions to  
16 his provincial approval of the permit for the 3.9  
17 hectare quarry. Mr. Petrie complied.

18                   Those two conditions were  
19 conditions 10(h) and (i). Condition 10(h) required  
20 as follows:

21                                 "Blasting shall be conducted  
22                                 in accordance with the  
23                                 Department of Fisheries and  
24                                 Oceans Guidelines for the Use  
25                                 of Explosives In or Near

1 Canadian Fisheries Waters."

2 Those guidelines had been authored  
3 by -- co-authored by a person named Dennis Wright  
4 in 1998 just a few years before.

5 That condition was not  
6 controversial. Bilcon had always planned to blast  
7 in accordance with the blasting guidelines. So  
8 achieving the standard under 10(h) was not an  
9 issue.

10 Condition 10(i), however, was on  
11 its face extraordinary. During the course of this  
12 hearing, the Tribunal will see how condition 10(i)  
13 was improperly used by officials to prevent even  
14 test blasting on the 3.9 hectare quarry site.

15 Condition 10(i) required:

16 "A report shall be completed  
17 by the proponent in advance  
18 of any blasting activity  
19 verifying the intended charge  
20 size and blast design will  
21 not have an adverse effect on  
22 marine mammals in the area.  
23 This report shall be  
24 submitted to the Department  
25 of Fisheries and Oceans

1 (DFO), Maritimes Aquatic  
2 Species at Risk Office and  
3 written acceptance of the  
4 report shall be received from  
5 DFO and forwarded to the  
6 Department before blasting  
7 commences."

8 I will just repeat that:

9 "... written acceptance of  
10 the report shall be received  
11 from DFO and forwarded to the  
12 Department before blasting  
13 commences."

14 Condition 10(i) effectively  
15 operated as a federal veto over the proponent's  
16 ability to exercise its rights under the provincial  
17 approval, which the Nova Scotia legislature had  
18 plainly intended to be exempt from these kinds of  
19 onerous conditions.

20 The Tribunal will appreciate how  
21 difficult it is to prove a negative. Moreover, in  
22 the same email, which asked Mr. Petrie to include  
23 conditions 10(h) and (i), Mr. Jollymore also  
24 clearly confirmed the following, and I quote:

25 "A quarry of this size will

1 not trigger the need for an  
2 environmental assessment  
3 under your legislation..."

4 I.e., the provincial legislation.  
5 And with regard to any federal government  
6 involvement, Mr. Jollymore confirmed, "Because they  
7 have not yet applied for a wharf, we", meaning the  
8 DFO, "have no legislative trigger to request an  
9 environmental assessment."

10 Thus, at the time Mr. Petrie  
11 imposed conditions 10(h) and (i) at the behest of  
12 the DFO, officials of both governments knew that  
13 neither government had any legal basis whatsoever  
14 to conduct any kind of environmental assessment of  
15 the 3.9 hectare quarry.

16 With regard to conditions 10(h)  
17 and (i) requiring compliance with the blasting  
18 guidelines, we would ask the Tribunal to keep in  
19 mind that using the equations in the guidelines  
20 generated a blasting setback of approximately  
21 35 metres, precisely 35.6 metres, from the  
22 shoreline. In other words, blasting could not  
23 occur within 35.6 metres of the shoreline.

24 The corresponding Nova Scotia  
25 policy provided for a blasting setback of 30

1 metres. From the beginning, Bilcon's blasting  
2 plans for this ordinary, run-of-the-mill 3.9  
3 hectare quarry, of which many were in the  
4 neighbourhood, were in full compliance with all  
5 applicable federal and provincial blasting  
6 requirements.

7                   By December of 2002, seven months  
8 after M. Petrie had issued the blasting approval  
9 for the 3.9 hectare quarry, Mr. Conway, the DFO  
10 marine mammal expert, had concluded that there was,  
11 in fact, no concern about blasting. He wrote by  
12 email to Jim Ross, the DFO section head of habitat  
13 management, stating:

14                   "In respect to the Whites  
15 Cove blasting, based on the  
16 information provided and the  
17 undertakings that the  
18 proponent is prepared to  
19 take, I have no concerns in  
20 respect to marine mammal  
21 issues in respect to this  
22 specific proposal."

23                   Thus, Mr. Conway, whose concern  
24 had originally led the insertion of conditions  
25 10(h) and (i), by December of 2002 had no concerns



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1 are not to accept a report on  
2 the effects of blasting on  
3 Marine Mammals as per section  
4 I of item 10 of the Nova  
5 Scotia approval issued April  
6 30th until such time as the  
7 Minister's office has  
8 reviewed the application."

9 "Until such time as the Minister's  
10 office has reviewed the application". This is an  
11 ordinary, run of the mill, no environmental  
12 assessment necessary, 3.9 hectare quarry and has  
13 now gone up to the Minister of Fisheries and Oceans  
14 in Ottawa, and no report that would be prepared by  
15 Bilcon is to be accepted until the Minister's  
16 office has reviewed the application. It is  
17 extraordinary.

18 Condition 10(i) of the 3.9 hectare  
19 quarry approval then became the hook the two  
20 governments used to effectively obstruct Bilcon  
21 from conducting even a test blast on the 3.9  
22 hectare quarry. Instead of telling Bilcon that  
23 there was in fact no concern about marine mammals,  
24 the governments repeatedly used condition 10(i) to  
25 throw up bureaucratic obstacles in Bilcon's way.

1                   The Minister referred to in  
2 Mr. Surette's email, who is Robert Thibault, the  
3 federal Minister of Fisheries and Oceans, he had  
4 been appointed to the cabinet in January of 2002.

5                   Minister Thibault also happened to  
6 be the federal member of parliament for the Digby  
7 Neck area. His constituency assistant was Nadine  
8 Belliveau. She faxed a copy of the quarry approval  
9 to give to a DFO official working in Nova Scotia  
10 working under Mr. Ross with a cover note saying:

11                                 "The Digby municipality faxed  
12                                 it to me. They are on side  
13                                 with the community and are  
14                                 desperately looking for a way  
15                                 to slow the process."

16                   In hindsight, it is now obvious  
17 that Minister Thibault's involvement was persistent  
18 and pervasive. E-mails between the government  
19 officials involved are full of directions and  
20 admonishments made on behalf of the Minister. One  
21 said, and I quote:

22                                 "Any Digby quarry or marine  
23                                 related emails or other  
24                                 correspondence being sent by  
25                                 DFO staff to the local



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1 constituency office should be  
2 copied so that the Minister  
3 is simultaneously aware of  
4 any developments on this  
5 file." [As read]

6 Another said:

7 "The Minister's office is  
8 concerned about the flow  
9 between region and their  
10 office with respect to Digby  
11 Quarry... The Minister's  
12 office would like to be  
13 informed of these  
14 transactions as well on a  
15 timely basis."

16 Another one said:

17 "The Minister's office has  
18 requested that when we are  
19 requested to brief or pass  
20 information onto his  
21 constituency office  
22 concerning the Digby quarry,  
23 we also inform the Minister's  
24 office concurrently."

25 Another said:

1 "I suggest we adopt what  
2 Ottawa wants. When we brief  
3 the constituency office, we  
4 will cc or provide an outline  
5 of the information conveyed  
6 to them to both... They can  
7 do with it what they will."

8 When a routine notice was  
9 published in a newspaper without the Minister's  
10 knowledge, Mr. Surette left no doubt the Minister  
11 was watching, and I quote:

12 "This file is extremely  
13 important to the Minister,  
14 and the Minister may invoke  
15 an inquiry into this matter."

16 The message was clear and  
17 categorical and clearly received by Ministry  
18 officials if anything related to the Bilcon quarry  
19 was done without the Minister's approval, heads  
20 would roll. Indeed one DFO official wrote to  
21 another:

22 "This is such a politically  
23 hot file. I don't want to  
24 make any wrong decisions."

25 After conditions 10(h) and (i)

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1 were imposed, the Minister himself wrote a letter  
2 to the Digby Courier newspaper:

3 "DFO was involved in this  
4 review. Through this process  
5 the province agreed to  
6 include in its approval a  
7 condition that requires the  
8 proponent to provide DFO with  
9 a blasting design report in  
10 advance of any blasting."

11 And Bruce Hood, the DFO's senior  
12 liaison officer on the file, wrote in his journal:

13 "Thibault wants process  
14 dragged out as long as  
15 possible."

16 One senior DFO official was  
17 incredulous about the Minister's involvement. She  
18 asked:

19 "The Minister's office is  
20 reviewing the application?  
21 Which application? Do we  
22 know which application they  
23 are talking about?"

24 This is in response to  
25 Mr. Surrette's email about condition 10(i)

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1 requiring approval only after review by the  
2 Minister's office:

3 "Do you know which  
4 application they are talking  
5 about?"

6 My question was: "Where is the  
7 expertise within DFO to assess whether the proposed  
8 blasting will affect whales?"

9 Federal officials also knew that  
10 the federal blasting guidelines were not designed  
11 for whales, but were designed mainly for fish.  
12 Mr. Wright, the co-author of the guidelines, wrote  
13 in an email to Jim Ross about this application, the  
14 DFO section head of habitat management advising:

15 "The explosives guidelines  
16 are designed chiefly to  
17 protect fish. The easiest  
18 mitigation is, if whales are  
19 present within visual limits  
20 (about 1 KM), the blast is to  
21 be delayed until the whales  
22 vacate that perimeter."

23 Astonishingly, this critical  
24 information about DFO's best practice for avoiding  
25 adverse effects on whales, which was simply to

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1 observe if there were whales in the area prior to  
2 blasting, was also never disclosed to Bilcon. That  
3 too was kept secret.

4                   Despite Mr. Wright's very clear  
5 advice on that very same day, Mr. Ross received the  
6 advice. He wrote Mr. Ross, now writing for DFO,  
7 wrote back to Mr. Petrie at NSDEL in response to  
8 the submission of a blasting plan:

9                   "It is our opinion that  
10                   although the plan seems to be  
11                   within the guidelines...  
12                   there is insufficient detail  
13                   to make an assessment on its  
14                   effects on threatened or  
15                   endangered marine mammals  
16                   that may be present at  
17                   various times of the year."

18                   So instead of passing on  
19 Mr. Wright, the author of the guideline, his very  
20 helpful information about when to blast and when  
21 not to blast, they asked for more detail about the  
22 blasting.

23                   Mr. Ross knew that was untrue; yet  
24 neither he nor anyone else ever corrected the  
25 statement. Instead of telling Bilcon the truth

1 Mr. Ross, after receiving a further very extensive  
2 blasting plan from Bilcon, wrote again to Mr.  
3 Petrie stating:

4 "The information provided is  
5 inadequate to give DFO-HMD a  
6 sufficient level of  
7 confidence that fish, marine  
8 mammals, and fish habitat  
9 will be adequately protected  
10 from the effects of blasting  
11 operations at the Whites Cove  
12 quarry."

13 The Tribunal will be reminded that  
14 condition 10(i) made no reference whatsoever to  
15 fish or fish habitat. Conditions 10(h) and (i)  
16 were about marine mammals. That is how the federal  
17 government got involved. This pivot to fish by Mr.  
18 Ross came nine days after Mr. Conway, the marine  
19 mammal expert, had advised he had no concerns with  
20 respect to marine mammals and with respect to  
21 Bilcon's blasting plan.

22 Nonetheless, in May of 2003, the  
23 DFO increased the blasting set back from  
24 35.6 metres to 500 metres, a half a kilometre away  
25 from the shoreline.

1                   The reason for the new 500-metre  
2 setback was now said to be for the protection of  
3 Inner Bay of Fundy salmon, sometimes called IBoF.  
4 To justify this requirement, the DFO purported to  
5 have a computer simulation model which Mr. Buxton  
6 was told he could review.

7                   Mr. Buxton repeatedly asked DFO  
8 officials for the data. DFO told him they would  
9 provide it, but they never did, not to this day.

10                   In fact, the DFO knowingly and  
11 purposely withheld it from him for months and  
12 months, for critical months during the process.

13                   In the meantime, Dennis Wright,  
14 the co-author of the blasting guidelines, advised  
15 Phil Zamora, by then the DFO habitat person dealing  
16 with the quarry, that the model, which the DFO told  
17 Mr. Buxton was relying on to establish the  
18 500-metre blasting setback from the shoreline, was  
19 designed for blasting in water and not for blasting  
20 on land. It, therefore, did not apply to the  
21 quarry, for which a setback of about 100 metres  
22 would be sufficient if there were endangered  
23 species in the area.

24                   Bilcon would have had no issue  
25 with a 100-metre setback.

1                   On July 30th, 2003, 15 months  
2 after Mr. Petrie had approved the 3.9 hectare  
3 quarry, Mr. Zamora confirmed to Derek McDonald of  
4 the Canadian Environmental Assessment Agency, CEAA,  
5 that the 500-metre setback was not required and  
6 that a 100-metre setback would be sufficient.

7                   Mr. MacDonald recorded:

8                   "Have received advice from  
9                   Dennis Wright that I-Blast  
10                  model is for open water, not  
11                  explosives used on land.  
12                  They should use the table  
13                  provided in the DFO Explosive  
14                  Guidelines."

15                  I pause to say here Mr. Buxton had  
16 always used the table in the guidelines from the  
17 beginning in order to calculate the proper setback  
18 distance from the blast to the shoreline.

19                  If proponent were to modify the  
20 plan, it could be acceptable to DFO and they would  
21 be in a position to enable the provincial approval.

22                  On that same day, July 30th, 2003,  
23 Mr. Zamora drafted a letter to Mr. Buxton advising  
24 him that the model did not apply to blasting at the  
25 quarry. I say drafted because, as we will come to



1 see, the letter wasn't sent at that time:

2                    "We have contacted Mr. Wright  
3                    for advice on the use of the  
4                    I-Blast model for your  
5                    application. Mr. Wright is  
6                    not comfortable using this  
7                    model for the blasting plan  
8                    you have proposed. He is  
9                    suggesting that you apply the  
10                    equations used for the  
11                    guidelines. However, because  
12                    of the presence of endangered  
13                    species in the area, it is  
14                    recommended that the setback  
15                    distance be at least triple  
16                    that determined by the  
17                    equations in the guidelines."

18                    Then the email goes on to say  
19                    approximately 100 metres.

20                    A few days later, on August 5th,  
21                    2003, two days before Minister Anderson's referral  
22                    of the Bilcon Quarry to a review panel -- you will  
23                    recall that the referral by Minister Anderson to  
24                    the review panel was on August 7th, 2003, which was  
25                    two days after provincial election -- Mr. Zamora

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1 wrote to Mr. Hood, the DFO senior liaison officer:

2 "We feel that we cannot sit  
3 for very long on this new  
4 information..."

5 The new information being that  
6 they have used the wrong model to get to 500  
7 metres, the I-Blast model:

8 "... that the proponent could  
9 use to adjust the Blasting  
10 Plan. The last word from  
11 Derek McDonald was that he  
12 did not see any problems with  
13 us working with the proponent  
14 in tweaking the Blasting  
15 Plan."

16 But Mr. Zamora did not send the  
17 July 30th draft letter to Mr. Buxton. This  
18 critical information was also withheld from Bilcon  
19 until November 2004, over 15 months later, after  
20 the JRP, the Joint Review Panel, had been struck.

21 At a meeting with NSDEL and CEAA  
22 officials later in August of 2003, when Mr. Buxton  
23 expressed frustration that at another quarry close  
24 by, Tiverton, blasting was allowed much closer to  
25 the shoreline, he was not told that the DFO and

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1 CEAA knew full well, at that point in time during  
2 that meeting, that the 500-metre setback was wrong  
3 and unnecessary.

4 By then, though, not only had the  
5 DFO already internally revised the blasting setback  
6 from 500 to approximately 100 metres, but  
7 critically it had also confirmed internally that  
8 blasting at the Bilcon Quarry would not engage  
9 section 32 of the Fisheries Act. I will say more  
10 about section 32 in a few moments.

11 On May 29th, 2003 Mr. Zamora has  
12 written to Mr. Buxton stating, and I ask the  
13 Members of the Tribunal to focus on these words,  
14 "DFO has concluded":

15 "DFO has concluded the  
16 proposed work is likely to  
17 cause destruction of fish,  
18 contrary to section 32 of the  
19 Fisheries Act..."

20 We will see that DFO had not  
21 arrived at any such conclusion. They were telling  
22 Mr. Buxton one thing and they were telling each  
23 other internally another, and they were telling the  
24 government of Nova Scotia the same as they were  
25 telling themselves internally.

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1                   Mr. Buxton was being told one  
2 thing and, in fact, the truth was to the contrary.

3                   By August of 2003, Derek McDonald  
4 had written to another CEAA official:

5                                 "In fact DFO has since  
6                                 revised its blasting  
7                                 calculations..."

8                   That is the same blasting  
9 calculation we have been talking about:

10                                "... and has determined that  
11                                it does not have a section 32  
12                                trigger."

13                   Instead of telling Bilcon the  
14 truth, the government officials also withheld this  
15 critically important information from Mr. Buxton.

16                   On December 3rd, 2003 -- we are  
17 now 20 months after the approval had been first  
18 granted for the 3.9 hectare quarry -- the Nova  
19 Scotia Minister of Environment and Labour wrote to  
20 Buxton:

21                                "We understand that Fisheries  
22                                and Oceans Canada DFO remains  
23                                concerned that blasting at  
24                                this location may cause  
25                                adverse effects to marine

1 mammals, as well as  
2 endangered Inner Bay of Fundy  
3 Atlantic salmon." [As read]

4 This is a year after Mr. Conway,  
5 the marine mammal expert, has said, I have no  
6 concerns about marine mammals in the proponent's  
7 blasting plan.

8 The reason for the deception and  
9 double dealing and concealing the truth from Bilcon  
10 about the blasting setback was that the quarry was  
11 being referred to a JRP, a joint federal provincial  
12 environmental assessment by a review panel.

13 Even though it is elementary that  
14 no notion of fairness could ever justify  
15 withholding such critical information from a  
16 project proponent, the Tribunal will see that the  
17 referral of the quarry to a Joint Review Panel was  
18 nothing short of a hypocritical manipulation used  
19 to hijack the regulatory process for political  
20 purposes. And it will become obvious.

21 I will turn now to provide a short  
22 review of the applicable legislation.

23 An environmental assessment under  
24 CEAA could be conducted at one of three levels.  
25 The most common level of administrative assessment

1 is called a screening. A high level of  
2 administrative assessment is reserved for major  
3 projects, and in a rare and extraordinary  
4 circumstances involving mega projects and the  
5 largest and most complex projects, oil sands, major  
6 national pipelines, an environmental assessment  
7 could be referred to a review panel.

8 All three levels of environmental  
9 assessment are part of the planning phase of an  
10 industrial project. The final design of a project  
11 is done after the environmental assessment is  
12 completed, and the project is then implemented  
13 through the granting of requisite permits.

14 Every year the federal government  
15 conducts thousands of screenings. From 1995 to  
16 2003 -- CEAA came into effect in 1995 -- to this  
17 point in 2003, in July of 2003, there were  
18 approximately 60,000 environmental assessments  
19 conducted by the federal government.

20 Of those, only 11 were referred to  
21 a Joint Review Panel or JRP. Eleven out of 60,000  
22 went to a JRP.

23 A JRP requires a formal agreement  
24 between the federal minister of environment and a  
25 provincial environment minister authorized under

1 their respective enabling legislation. Any form of  
2 review panel is rare. A joint federal-provincial  
3 review panel is rare in the extreme.

4                   The constitutional context for a  
5 Joint Review Panel is that the constitution divides  
6 legislative powers between the federal and  
7 provincial government. The general effect of this  
8 division of legislative power is that the federal  
9 and provincial governments to legislate within the  
10 respective areas of their jurisdiction.

11                   The corollary is that one level of  
12 government cannot usurp or trench on the  
13 legislative authority of another.

14                   At the root of the Canadian  
15 Constitution is the bedrock principle that Canada's  
16 legal and governmental system is based on the rule  
17 of law. And in the context of an environmental  
18 assessment, the legislative authority of federal  
19 officials is derived from the CEAA.

20                   Under the CEAA, the federal  
21 government can undertake an environmental  
22 assessment if the proponent of a project is seeking  
23 an authorization for an activity which is federally  
24 regulated. That's where the CEAA clicks in, is  
25 with respect to federal jurisdiction, projects

1 within federal jurisdiction.

2                   In Nova Scotia, an environmental  
3 assessment can be initiated after a proponent  
4 registers the project with the department, with the  
5 assessment division; after registration.

6                   And part of that registration is  
7 filing registration documents and paying a fee. At  
8 that point in time, the environmental assessment of  
9 a project clicks in. Until then, there is no  
10 trigger.

11                   In general, when the quarry was  
12 being considered, industrial activity came -- on  
13 land came under provincial authority, and  
14 industrial activity that affected rivers and  
15 oceans, which are habitat for fish and for marine  
16 life, came under federal regulatory authority.

17                   Federal government authority to  
18 regulate the activity is sometimes called a  
19 trigger. It is a statutory trigger which engages  
20 the environmental assessment process.

21                   The federal government had only  
22 three possible triggers for a federal environmental  
23 assessment of a proposed marine terminal. A marine  
24 terminal standing alone, attached to the land, the  
25 federal government has three triggers.



1                   One trigger was under the  
2 Navigable Waters Protection Act, section 5, which  
3 required a permit for the construction of a marine  
4 terminal. So proponent applies for permission to  
5 build a marine terminal, and that triggers the  
6 environmental assessment of that marine terminal.

7                   The other two triggers were under  
8 the Fisheries Act, which in section 32 prohibits  
9 the killing of fish, and section 35 prohibits  
10 activity resulting in the harmful alteration,  
11 disruption or destruction of fish habitat,  
12 sometimes called a HADD, and you will hear the term  
13 HADD used throughout this proceeding. That is  
14 section 35. Fish habitat, section 35; killing  
15 fish, section 32.

16                   There were only two possible  
17 federal triggers for the quarry. Section 35, if  
18 activity on the quarry would result in a HADD, if  
19 there was marine life or fish-bearing stream on the  
20 quarry, that would engage federal concerns. If  
21 activity on the quarry would kill fish, then  
22 section 32 would be engaged.

23                   In the absence -- and, for  
24 example, the kind of activity in the quarry that  
25 could potentially kill fish, you have to look at

1 it, would be blasting on the quarry. If that is  
2 likely to cause destruction of fish, that would  
3 engage the federal government's environmental  
4 assessment of the quarry, and that is where section  
5 32 becomes absolutely critical in this case.

6 In the absence of either a section  
7 32 or a section 35 trigger, the federal government  
8 had no jurisdictional authority to conduct any kind  
9 of environmental assessment of the quarry.

10 For the quarry in this case,  
11 section 35 did not come into play, because there  
12 was no fish habitat on the quarry and, therefore,  
13 the only real potential federal trigger for the  
14 quarry was section 32.

15 Even though the federal government  
16 had a trigger for the marine terminal, the CEAA  
17 provided that an environmental assessment could  
18 only be referred to a review panel of that  
19 assessment of the terminal on one of two expressly  
20 designated bases. The first was, number 1, if  
21 there was public concern about a matter within  
22 federal jurisdiction, like a marine terminal, if  
23 there is public concern about the marine terminal,  
24 that would engage the potential for a referral to a  
25 panel review.

1                   And number two, if after taking  
2 into account mitigation measures, the project may  
3 cause a significant -- significant adverse  
4 environmental effect, sometimes called SAEE;  
5 significant adverse environmental effect.

6                   The latter was the statutory basis  
7 used for the referral of the marine terminal to a  
8 review panel. The rule of law required that  
9 determination to be made fairly and reasonably.

10                   The CEAA guide for the conduct of  
11 its officials, called "Responsible Authority's  
12 Guide", reminds officials that they act, and I  
13 quote, "The Act requires" -- I am at slide 46, page  
14 46 of your hard copy materials:

15                                 ".... requires that  
16   mitigation measures be  
17   developed to address  
18   significant effects. As  
19   well, mitigation measures are  
20   considered part of the  
21   project when determining the  
22   significance of any adverse  
23   environmental effects under  
24   the Act."

25                   The guide goes on to say, and I

1 quote, page 47:

2 "The conclusions of the  
3 screening report and  
4 comprehensive study report  
5 with respect to the  
6 significance of the adverse  
7 environmental effects are  
8 'objective' in the sense that  
9 they are based on scientific  
10 evidence and analysis and do  
11 not stem from the opinion of  
12 either the Minister or the  
13 RA."

14 The RA is the Responsible  
15 Authority in this context. When we're talking  
16 about an RA, that is the DFO, the Department of  
17 Fisheries and Oceans.

18 Even if the federal authorities  
19 had a reasonable and honest basis under the  
20 Fisheries Act or the Navigable Waters Protection  
21 Act to refer some ocean-related aspect of the  
22 project to a review panel, the federal government  
23 could not include the quarry itself in the scope of  
24 the review to be conducted by the review panel.

25 If the proposed activity on the



1 narrow ground of federal  
2 jurisdiction to conduct a  
3 far-ranging inquiry into  
4 matters that are exclusively  
5 within provincial  
6 jurisdiction."

7 The Federal Court in Red Hill then  
8 concluded that the Environment Minister's decision  
9 to refer this project was not supported by a valid  
10 head of power and thus was ultra vires.

11 For the Bilcon Quarry, the only  
12 land-based activity that might have triggered the  
13 operation of a federal statutory provision was  
14 blasting, and only blasting on the quarry could  
15 reasonably be expected to kill fish contrary to  
16 section 32.

17 It was under the pretext of that  
18 trigger that in May of 2003 the DFO threw up  
19 another roadblock to restrict Bilcon from any  
20 blasting at the site, including any test blasting.

21 Ultimately, section 32 would be  
22 the pretext the DFO used to insinuate itself into a  
23 review of and ultimately exercise an effective veto  
24 over the operation of the quarry.

25 Senior DFO officials were acutely

1 aware of the Red Hill case at the very time. They  
2 discussed it in the context of this quarry. The  
3 referral to a Joint Review Panel was a device. It  
4 was concocted, as Mr. Hood reflected in his  
5 journal, to get the Minister "off the hook".

6                   The construction of the piles for  
7 the contemplated docking facility -- and we see it  
8 on the monitor -- involved no blasting at all,  
9 either on land or in the water.

10                   Although the piles did involve a  
11 very slight disruption of 40 square metres -- and  
12 you see on the graphic illustration, you see the  
13 amount of habitat that is going to be disturbed, 40  
14 square -- the total of all of those supports going  
15 down into the ocean would disturb an area of 40  
16 metres of habitat. And that might have  
17 legitimately triggered an environmental assessment  
18 under section 35, destroying, harming, altering  
19 destroying, disrupting fish habitat.

20                   The scope of that assessment of  
21 the marine terminal could not lawfully or logically  
22 extend to the quarry on land itself, which was  
23 wholly within provincial jurisdiction.

24                   Yet as early as February of 2003,  
25 Phil Zamora, the DFO, advised CEAA that it was

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1 intending to refer the project to a review panel,  
2 and the project included both the marine terminal  
3 and the quarry, talking about referring the project  
4 to a review panel:

5 "I just received a call from  
6 Phil Zamora, DFO, providing a  
7 heads up that DFO is  
8 intending to refer this  
9 project to the Minister for a  
10 referral to a Panel." [As  
11 read]

12 And that is in February of 2003,  
13 and I think we should keep the time context in  
14 mind. April of 2002 we had the approval of 3.9.  
15 September 30th of 2002, Dennis Wright is saying  
16 best mitigation measure to protect whales is to  
17 wait until they're a kilometre offshore away from  
18 the blasting area, if they're in the area at all.  
19 We will get to endangered Right whales, which was a  
20 major concern, which only come to the area in the  
21 early summer and they leave in the late fall. So  
22 they're not in the area at all, in the region  
23 during that period. They go down south.

24 December 2nd, 2002, Jerry Conway,  
25 the marine mammal expert, says, No problem, no



1 concerns with the marine mammal area with respect  
2 to blasting of this proposal.

3 February of 2003, Phil Zamora,  
4 DFO, is saying, We intend to refer to a review  
5 panel.

6 And the evidence, when we follow  
7 from there, shows that at the time of the referral  
8 to the review panel, DFO officials knew, they knew,  
9 that they did not have a trigger for the quarry and  
10 that there was no proper basis for scoping the  
11 quarry into any federal assessment. And they knew  
12 it at the time of the referral. And we will come  
13 back to the 500 metre, the half-kilometre setback,  
14 that by that time they knew was wrong.

15 In his notes of telephone  
16 conferences with Jim Ross and others from February  
17 through April of 2003, Mr. Hood, the DFO's senior  
18 liaison officer who played a critical role in this  
19 piece, wrote the following entries into his  
20 journal, and I quote, starting at page 52 of your  
21 slides:

22 "...CEAA agency feels this  
23 will go to a panel. Minister  
24 believed to have said public  
25 review - meaning

00065

1 consultations... No DFO  
2 trigger... We should scope  
3 to terminal - our trigger."

4 "We should scope to terminal - our  
5 trigger":

6 "Don't need to scope in the  
7 quarry. No DFO triggers. If  
8 it's scoped in, get into  
9 other concerns... Scope to  
10 our triggers - would be wharf  
11 and what they need to do to  
12 build it.

13 "If we include the quarry in  
14 the assessment it implies  
15 that we, DFO, are approving  
16 the quarry after the  
17 assessment if it went to  
18 panel.

19 "We have NWPA..."

20 Which is Navigable Waters

21 Protection Act:

22 "... FA, Fisheries Act,  
23 section 35, and probably  
24 section 32 trigger for the  
25 marine terminal, but no

1 trigger for the quarry.

2 Therefore, limit scope of

3 project to terminal."

4 And at page 55, quote:

5 "Don't screw up on scope to

6 please province - we will end

7 up in court... What does the

8 Minister want? We should

9 talk to Minister's staff.

10 Every time we scope broadly

11 to accommodate someone else

12 we get screwed... We want to

13 get our Minister off this

14 file."

15 "This is like Red Hill where

16 DFO trigger was section 35

17 for realignment of a stream,

18 but we scoped in highway too.

19 ... Judge ruled we had no

20 regulatory authority over the

21 highway and therefore were

22 abusing the CEAA process."

23 That was the case in Red Hill.

24 Mr. Estrin, who you will hear from, was counsel in

25 Red Hill:

1 "Shouldn't be scoping things  
2 in to satisfy public or other  
3 agency pressure."

4 "Public will likely be mad if  
5 DFO doesn't scope in Quarry  
6 because they would be want us  
7 to be assessing it. However,  
8 it is easy to explain why  
9 quarry isn't scoped in, i.e.,  
10 we don't have the legal  
11 mandate to scope it in - no  
12 trigger."

13 Nonetheless, the deceptive pretext  
14 that was to be used for the referral was that the  
15 DFO had a section 32 trigger for the quarry,  
16 because blasting on the quarry site might affect  
17 marine mammals and IBoF salmon.

18 Nova Scotia officials had been  
19 hectoring the federal government to scope in the  
20 quarry for their own reasons, and they pressed the  
21 DFO and CEAA to engage in a subterfuge because  
22 there was no environmental registration of the  
23 quarry in Nova Scotia.

24 At that point, there is no  
25 environmental registration of the quarry that would



1 project will require an  
2 environmental assessment  
3 pursuant to the CEAA. The  
4 type of assessment required  
5 on the terminal is a  
6 comprehensive study."

7 Now, remember there were three  
8 levels of environmental review, screening,  
9 comprehensive study and panel review.

10 At that point, June 4th, 2003, DFO  
11 is writing NSDEL saying there is going to be a  
12 comprehensive study. The quote continues:

13 "DFO is presently reviewing  
14 the proponent's blasting  
15 plan...to determine if  
16 approvals are required under  
17 the Fisheries Act, section  
18 35(2) or section 32."

19 Five days before, Mr. Zamora has  
20 written to Mr. Buxton saying DFO has concluded that  
21 the proposed work is likely to cause destruction.  
22 Five days later, apparently they're still studying  
23 it looking to determine whether the proponent's  
24 blasting plan, approvals would be required for them  
25 under sections 35(2) or section 32.

1                   In the meantime, in that  
2 intervening period, a few days after the May 29th  
3 letter was sent to Mr. Buxton, an NSDEL official  
4 circulated an email saying:

5                   "DFO is drafting a letter to  
6 us regarding their intentions  
7 to go to a panel... but at  
8 this point everything remains  
9 confidential (the company  
10 does not even know we are  
11 planning on going this route  
12 yet).

13                   Over the next few weeks, Derek  
14 McDonald exchanged emails with Steve Chapman,  
15 another CEAA official, expressing discomfort with  
16 the approach being taken.

17                   Remember CEAA is an independent  
18 agency. At least it says that it is:

19                   "The proponent is, to my  
20 knowledge, unaware of DFO's  
21 desire to refer. I still  
22 feel that a comp study, with  
23 an appropriate scope and  
24 public participation plan,  
25 would be the correct path -

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1 and I have said this to Phil  
2 Zamora. To me, a referral to  
3 facilitate harmonization  
4 reflects poorly on both  
5 governments and is perhaps an  
6 undesirable precedent."

7 Harmonization refers to  
8 harmonizing the federal and provincial processes,  
9 having the two go hand in hand as the harmonized  
10 process:

11 "Do you think we should try  
12 to buy time until the  
13 referral is made? The  
14 proponent is clearly  
15 frustrated and with good  
16 reason, I think. Things are  
17 dragging. I find it  
18 frustrating myself and it's  
19 not even my money. Maybe  
20 CEAA should bite the bullet,  
21 recognize the province's  
22 jurisdiction, and chalk  
23 (sic) it up as a lesson  
24 learned."

25 Steve Chapman replied with a



1 rebuke:

2                                   "... we should communicate  
3                                   via telephone for discussions  
4                                   of this nature. Give me a  
5                                   call."

6                                   It is no wonder Mr. Chapman did  
7 not want a paper trail documenting what was  
8 actually going on.

9                                   A flurry of emails between  
10 officials were then exchanged. Mr. McDonald wrote,  
11 "My suggestion is", and I am at page 65:

12                                   "... to wait until next week.  
13                                   By then, we may have some  
14                                   further clarity on where the  
15                                   process is headed and may  
16                                   even be in a position to  
17                                   share that with the  
18                                   proponent. instead of  
19                                   sitting there awkwardly being  
20                                   evasive. I have also learned  
21                                   that the partnership for  
22                                   sustainable development of  
23                                   Digby Neck and Islands is  
24                                   scheduled to meet with  
25                                   Minister Thibault next

1 Thursday - not sure how this  
2 could play into timing of an  
3 announcement. Will he say  
4 something about it?"

5 Chris Daly, the manager of the  
6 provincial environmental department, quote:

7 "The end of June should be  
8 our target for a release..."

9 "The end of June should be our  
10 target for a release":

11 "... but that may not happen  
12 if our governments decide to  
13 hold on to things. In terms  
14 of the Minister Thibault's  
15 meeting next week, we all  
16 agree that we would  
17 coordinate our communication  
18 on this issue."

19 He then concluded:

20 "I would like to take a  
21 little more control on this  
22 file and suggest that project  
23 assessment lead any  
24 discussion related to review  
25 panel."

1                                   And Bruce Young, a senior  
2 official, replied:

3                                   "Absolutely, headquarters  
4                                   should now be leading."

5                                   Mr. Daly from the NSDEL then  
6 wrote:

7                                   "Any word on the revised  
8                                   draft letter from DFO? We  
9                                   need it soon if we are going  
10                                  to get this show on the road.  
11                                  Our communication people are  
12                                  drafting a press release as  
13                                  we speak.

14                                  "Our first order of business  
15                                  is to make sure we get the  
16                                  exchange of letters  
17                                  completed, press release  
18                                  approved, and referral letter  
19                                  to CEAA from DFO before the  
20                                  end of June."

21                                  And before the end of June 2003  
22 becomes critical. The reason for the haste is now  
23 evident. Nova Scotia was about to announce a  
24 provincial election, which was announced on July  
25 5th. That was expected to be announced by the end

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1 of June.

2                                 Bruce Hood, the senior liaison  
3 officer for DFO, wrote to senior DFO officials, and  
4 this is extraordinary:

5                                 "It is a distinct possibility  
6                                 that the province of Nova  
7                                 Scotia will be announcing an  
8                                 election before or on June 30  
9                                 and will send out a media  
10                                release preceding this,  
11                                indicating that the Whites  
12                                Point Project, which is very  
13                                contentious, has been  
14                                referred to a Panel Review."

15                                Another official then confirmed  
16 the reason, and this is on page 72:

17                                "The Canadian Environmental  
18                                Assessment Agency is in the  
19                                process of negotiating a MOU  
20                                for a joint  
21                                federal-provincial review  
22                                panel process for this  
23                                project and they cannot  
24                                complete the process until  
25                                Minister Thibault has

1                   officially referred the  
2                   project to Minister Anderson.  
3                   "The province has very  
4                   serious reasons for issuing a  
5                   press release by the end of  
6                   this week announcing the  
7                   joint federal-provincial  
8                   panel review process.  
9                   "...the project is located in  
10                  our Minister's riding, as  
11                  well as in the electoral  
12                  circumscription of the  
13                  provincial Minister  
14                  responsible for making  
15                  decisions on this project..."

16                  And here is the kicker:

17                  "... and the announcement of  
18                  the joint panel review is of  
19                  the nature to take a lot of  
20                  public pressure off the  
21                  Ministers' shoulders for the  
22                  summer months."

23                  And I ask the Tribunal to consider  
24                  what a fair and objective environmental process  
25                  carried out in good faith and with integrity has to

1 do with taking a lot of pressure off the Minister's  
2 for the summer months.

3 That same day, June 25th, Minister  
4 Thibault received an official memorandum stating:

5 "The province has expressed  
6 concern regarding the extent  
7 to which a joint EA could be  
8 harmonized. DFO may not have  
9 a legislative trigger to  
10 include the quarry."

11 They have told Mr. Buxton on May  
12 29th, 2003 that they have concluded that they do  
13 have a trigger under section 32, and they are still  
14 obviously debating it internally. And the  
15 documents will show, as the hearing proceeds, and  
16 various witnesses comment that they were still  
17 apparently doing some work to consider whether they  
18 had a section 32 trigger. There is not much  
19 evidence of any work being done.

20 The memorandum also said:

21 "It is likely due to public  
22 opposition to the proposal  
23 that there will be a court  
24 challenge if the scope work  
25 of project for the CEAA



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1                   Look at that language, "various  
2 components", no specificity at all:

3                   "... of the proposed project  
4 will likely require  
5 authorization under  
6 subsection 35(2) of the  
7 Fisheries Act to harmfully  
8 alter, disrupt or destroy  
9 fish habitat, and section 32  
10 to destroy fish by means  
11 other than fishing.

12                   "In light of the information  
13 provided by the proponent,  
14 DFO believes that the Whites  
15 Point Quarry and Marine  
16 Terminal, as proposed, are  
17 likely to cause environmental  
18 effects..."

19                   I will come back to that language:

20                   "... over a large area of  
21 both the marine and  
22 terrestrial environments.  
23 The project is also subject  
24 to an environmental  
25 assessment by the Province of



1 Nova Scotia."

2 Which, by the way, had not yet  
3 been legally consecrated, because there was no  
4 registration:

5 "The province has expressed  
6 interest to DFO in  
7 participating in a joint  
8 assessment of the project."  
9 [As read]

10 This artful sophistry is indeed  
11 notable for what it omits, as well as what it  
12 misrepresents. The Tribunal will note that the  
13 Minister referred to "environmental effects" when  
14 the actual statutory test was "significant adverse  
15 environmental effects after taking mitigation  
16 measures into account."

17 Given what the officials of his  
18 department actually knew, neither Minister Thibault  
19 nor his officials could, in good faith, have  
20 concluded that the federal government had any  
21 jurisdiction over the quarry.

22 The day after, on June 27th, 2003,  
23 Mr. Hood wrote to DFO officials to advise that  
24 Bilcon did not yet know the project was being  
25 referred to a review panel. He said:

1 "The proponent does not know  
2 the project is being referred  
3 to panel. He knows that a  
4 comprehensive study is  
5 required on the terminal and  
6 that the DFO review of the  
7 quarry isn't complete."

8 So they say:

9 "So we don't know yet if  
10 there are DFO triggers for a  
11 CEAA assessment of the  
12 quarry."

13 On July 3rd, 2003, the Chronicle  
14 Herald newspaper in Halifax published an article  
15 titled, "Thibault calls for full review of Digby  
16 Neck Quarry plans". The Minister had his headline.  
17 That is how Bilcon learned its quarry, over a year,  
18 almost a year and a half, after it had its first  
19 approval to go ahead and blast on the 3.9 hectare  
20 quarry, learned its quarry was being referred to a  
21 Joint Review Panel.

22 It turns out the story had been  
23 leaked to the press, and the lawyer for a group  
24 opposed to the quarry had been given a copy of  
25 Minister Thibault's letter. Ironically, later in

1 August when Mr. Buxton asked for a copy of that  
2 letter, he was told that communications between  
3 Ministers was confidential and that he could not  
4 have a copy.

5                   This letter had been waived at an  
6 election meeting. It had been released and leaked  
7 to supporters of opposition groups.

8                   When Mr. Buxton asked Mr. Chapman  
9 from CEAA what the reasons were for referring the  
10 quarry to a review panel, Mr. Chapman refused to  
11 answer. Two days after Minister Thibault's victory  
12 lap headline, on July 5th, 2003 the Nova Scotia  
13 election was called for August 5th, 2003.

14                   So the reason for that flurry of  
15 activity between officials all through June of 2003  
16 was to get the deal done before the election was  
17 called and get the pressure off the Ministers for  
18 the summer months.

19                   July 5th, the election is called.  
20 The election is held on August 5th, a month later,  
21 and on August 7th, two days after that, Minister  
22 Anderson referred the Bilcon Quarry to a Joint  
23 Review Panel.

24                   I would now like to turn to a  
25 discussion of some of the comparators which go to

1 the likeness that Mr. Appleton referred to in his  
2 portion.

3                               Compared to other companies  
4 seeking environmental approvals with respect to  
5 their investments in industrial projects, the  
6 difference in the way Bilcon was treated by the  
7 regulatory process cannot be explained by reference  
8 to any reasonable policy. It certainly cannot be  
9 justified by Minister Thibault's declared animosity  
10 towards the United States.

11                              Within weeks of DFO telling Bilcon  
12 it required the 500 metre setback for onshore  
13 blasting, on the pretext of protecting marine  
14 mammals and IBoF salmon, operation of another  
15 quarry was under way at a neighbouring town called  
16 Tiverton.

17                              Tiverton is about 10 kilometres  
18 down the coast from Whites Point and was also in  
19 Minister Thibault's riding. Local fishermen  
20 supported the Tiverton quarry because rock from the  
21 quarry was going to be used to build a breakwater  
22 for them.

23                              In allowing blasting to go ahead  
24 on the Tiverton quarry, the officials acted  
25 accordingly, because of course Minister Thibault

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1 was in favor of the Tiverton quarry. The  
2 application for approval of the Tiverton quarry was  
3 made on February 27th, 2003. So we are in exactly  
4 the same time frame.

5 The cover letter said:

6 "Rehabilitation of the  
7 fisherman's wharf has a  
8 completion date of March 31,  
9 2003. Given the time frame,  
10 the issuance of the quarry  
11 permit is required as quickly  
12 as possible."

13 "Given the time frame the issuance  
14 of the quarry permit is required as quickly as  
15 possible."

16 A few days later, on March 3rd,  
17 2003, it was reported to a provincial NSDEL  
18 official that Minister Thibault had asked if there  
19 was anything he could do to speed up the process of  
20 the Tiverton Quarry. So application is February  
21 27th, 2003, and March 2003 there is a note to file  
22 saying that the Minister has asked if there is  
23 anything he can do to speed up the Tiverton Quarry.

24 Bob Petrie at NSDEL asked Jim Ross  
25 of DFO if the Tiverton Quarry could be given

1 priority, and Mr. Ross for the feds said he would  
2 flag it. Although the Tiverton Quarry was believed  
3 to be -- at that time believed to be about 160  
4 metres from the ocean, well within the 500-metre  
5 zone that would be applied to Whites Point, to the  
6 Bilcon Quarry, the NSDEL engineers' recommendation  
7 for the approval stated:

8                   "The blasting effect on  
9                   marine mammals should not be  
10                   a problem."

11                   160 metres, and the setback had  
12 said 500 metres for Bilcon down the road. For the  
13 Tiverton, the blasting effect on marine mammals  
14 should not be a problem.

15                   Three weeks later, Mr. Petrie, the  
16 same official who had imposed conditions 10(h) and  
17 (i) on the Whites Point quarry approval, approved  
18 the application for the Tiverton quarry.

19                   He approved the Tiverton project  
20 with simple mitigation measures relating to  
21 blasting that the officials knew could easily have  
22 been applied and conformed to on the 3.9 quarry at  
23 Whites Point.

24                   At the moment, on March 24th when  
25 the blasting is actually approved, it had already



1                   When Mr. Zamora at DFO wrote to  
2 Mr. McLean at NSDEL about the blasting requirements  
3 being imposed by Bilcon -- so this is now DFO  
4 writing to the province, Mr. McLean -- he stated:

5                   "Paul Buxton was  
6                   understandably very upset at  
7                   our position on the blasting  
8                   plan, especially with the  
9                   neighbouring Tiverton  
10                  operations going on.  
11                  However, we had no choice in  
12                  the matter."

13                  And that is at page 83 of your  
14 slides. "We had no choice in the matter". The  
15 subtext was clear. What the Minister wanted the  
16 Minister got. Mr. Thibault wanted the Whites Point  
17 quarry dragged out as long as possible, according  
18 to Mr. Hood's note, and that is what he got. And  
19 he wanted the Tiverton quarry sped up.

20                  Ironically, on the day before  
21 Minister Thibault referred the Bilcon quarry to a  
22 Joint Review Panel, he announced federal funding  
23 approval for the construction of Tiverton Harbour,  
24 and you have in your materials an aerial photo of  
25 the Tiverton Harbour and the point at Tiverton,



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1 which juts out into the Bay of Fundy.

2                                 And it shows the breakwater. It  
3 shows there are two wharfs in that area and it  
4 shows all of that quite clearly.

5                                 So the Tiverton Harbour project  
6 was related to the quarry in the sense that rock  
7 was going to be used for the Tiverton quarry for  
8 the harbour project, but the harbour project was  
9 also its own project.

10                                That included blasting in the  
11 water. Bilcon was never going to blast in the  
12 water for any purpose, either marine terminal,  
13 quarry or anything else.

14                                The Tiverton Harbour project  
15 included blasting in the water and construction of  
16 a breakwater, and that breakwater was 213 metres  
17 long, five metres wide at the crest and  
18 approximately 50 metres wide at the base.

19                                Approximately, 150,000 tonnes of  
20 stone was used in the construction of that  
21 breakwater. The construction of the Tiverton  
22 Harbour destroyed over 21,000 square metres of fish  
23 habitat - 21,000 square metres of fish habitat.

24                                By way of comparison, the piles  
25 that we showed you on the graphic would have

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1 disturbed 40 square metres of the ocean floor at  
2 the Bilcon Quarry and involved no blasting of the  
3 ocean at all. 21,000 square metres, that is a huge  
4 area of fish habitat that was going to be destroyed  
5 by dredging and blasting in the Tiverton Harbour.

6 PRESIDING ARBITRATOR: Mr. Nash,  
7 may I briefly interrupt you. I think you have  
8 about in five more minutes. The 90 minutes -- your  
9 90 minutes are up.

10 MR. NASH: Yes.

11 PRESIDING ARBITRATOR: How are we  
12 going to handle, because we are going to see the  
13 video also; right?

14 MR. NASH: Yes, yes.

15 PRESIDING ARBITRATOR: How much  
16 time would you need to come to the end of your...

17 MR. NASH: Perhaps I will confer  
18 with my colleagues.

19 PRESIDING ARBITRATOR: Yes,  
20 please.

21 MR. NASH: I expect to be ten-plus  
22 minutes, and we will do the video -- the technology  
23 is apparently not set up to do that video. So we  
24 could do that after, if I could have the indulgence  
25 of the Tribunal.

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1                   PRESIDING ARBITRATOR: Okay. So  
2 the time that exceeds the time that Canada will  
3 need will go off the time allocated.

4                   MR. NASH: Yes, that is fine. We  
5 can take that time off the cross-examination time.

6                   PRESIDING ARBITRATOR: Can we let  
7 Mr. Nash continue to the end of his presentation  
8 before we have to break? Is there any physical  
9 emergency?

10 --- Laughter

11                   PRESIDING ARBITRATOR: There  
12 doesn't seem to be. So why don't we go on.

13                   Just go on, please.

14                   MR. NASH: I would actually like  
15 to invite the Tribunal to observe what a blast of  
16 the kind at Tiverton in the harbour actually looks  
17 like, and hopefully this video will actually come  
18 on.

19 --- Video played at 11:29 a.m.

20                   MR. NASH: That blasting and  
21 dredging was taking place ten kilometres down the  
22 road from Whites Point.

23                   At the same time the Joint Review  
24 Panel was considering the Bilcon Quarry, CEAA was  
25 also conducting an environmental assessment of the

1 Continental Quarry and Marine Terminal in  
2 Belleoram, Newfoundland. The Belleoram Quarry and  
3 Marine Terminal was approved in 2007 with a  
4 comprehensive study assessment of the project and  
5 without any reference to any review panel.

6 A comparison of Belleoram to  
7 Bilcon is telling. The Belleoram Quarry was 900  
8 hectares in size, shipping 6 million tonnes per  
9 year from the marine terminal in Belleoram to  
10 Europe and the United States.

11 The expected life of the quarry  
12 was for 50 years, with regular blasting for the  
13 operation of that quarry as close as 25 metres from  
14 the shoreline. It was approved in 17 months with a  
15 comprehensive study, not a review panel, and a  
16 comprehensive study of the marine terminal only,  
17 without the quarry being scoped in to the  
18 environmental assessment.

19 By contrast, the Joint Review  
20 Panel for the Bilcon Quarry took over four years.

21 Also telling is that just after  
22 the Joint Review Panel of the Bilcon Quarry was  
23 concluded, the Miller Creek Mine Extension in Nova  
24 Scotia was also approved, again without referral to  
25 a review panel.

1                   The Miller Creek Quarry was  
2 located near the Hantsport Marine Terminal further  
3 up the Bay of Fundy.

4                   A gypsum rock quarry had been  
5 operated at Miller's Creek since 1956 by a  
6 subsidiary of a US company. It occupied  
7 approximately 477 hectares. The application to  
8 expand, which was made in 2008, was to extend the  
9 quarry by an additional 420 hectares. So the total  
10 was going to be almost 900 hectares for the Miller  
11 Creek quarry.

12                   Rock from that quarry was already  
13 being shipped through the Bay of Fundy to the  
14 United States in large cargo ships. The quarry  
15 extension for was for a period of 35 to 50 years,  
16 and projected shipments of up to 1.5 to 2 million  
17 tonnes per year, which was in the range of what was  
18 expected to be exported from the Bilcon Quarry.

19                   The Miller Creek Quarry was also  
20 very close to an established community. It had  
21 streams with fish running nearby, and was very  
22 close to suspected IBoF salmon habitat.

23                   Despite public concern about the  
24 expansion and its purported detrimental effect on  
25 the so-called unique geographic nature of the area

1 and the historic lifestyles of its local residents,  
2 the EA did not consider any socio-economic effects  
3 of the expansion at all, and the expansion of the  
4 quarry was approved without any federal  
5 involvement; no federal involvement in the  
6 expansion of the 420 hectare expansion of that  
7 quarry.

8                   Also, at the same time, the Bilcon  
9 quarry was undergoing a Joint Review Panel called  
10 the Keltic Petrochemicals Project, which was  
11 proposed in Nova Scotia.

12                   At Keltic, there was a marine  
13 terminal and there was also petrochemical  
14 facilities, a dam and a highway. Yet the project  
15 only underwent a federal comprehensive study in  
16 conjunction with a Nova Scotia provincial panel  
17 review.

18                   The project was also opposed by  
19 local residents, 90 percent of whom signed a  
20 petition advocating for a joint federal-provincial  
21 panel review. The importance of that is a question  
22 of public concern and how pleasing it is.

23                   In the case of Keltic, DFO's  
24 approach was to actively advise the proponents  
25 about how to avoid the onerous federal panel review

1 level of EA, and in the result, despite numerous  
2 significant adverse environmental effects of the  
3 Keltic project, the federal comprehensive study and  
4 the Nova Scotia review panel recommended approval  
5 of the project with appropriate mitigation  
6 measures.

7                   And of course you will hear that  
8 Bilcon never had any difficulty with appropriate  
9 mitigation measures. They spent hundreds and  
10 hundreds of thousands of dollars, millions of  
11 dollars doing studies which would take into account  
12 mitigation measures, monitoring and all of that.

13                   Similarly, the massive Rabaska LNG  
14 terminal in Quebec, which was referred to a Joint  
15 Review Panel, resulted in both federal and  
16 provincial approval after a panel report, which  
17 referenced extensive community opposition and  
18 provided for mitigation measures to address the  
19 "social acceptance of the project".

20                   From 2000 to 2012, 30 quarries  
21 were approved in Nova Scotia without being  
22 referenced to a review panel, let alone a Joint  
23 Review Panel with the federal government. Thirty  
24 quarries were approved in Nova Scotia during that  
25 period.

1                   Since the CEAA had come into force  
2 in 1995, no quarry in Canada has ever been referred  
3 to a review panel, let alone a Joint Review Panel,  
4 not one quarry across this great country, and many,  
5 many of them, have ever been referred to a review  
6 panel.

7                   And no marine terminal ever on its  
8 own has been subject to a review panel, let alone a  
9 Joint Review Panel.

10                  So if the federal government had  
11 jurisdiction, which we say it did, and it obviously  
12 did only over the marine terminal, the reference of  
13 construction to a joint -- of this marine terminal  
14 to a Joint Review Panel was extraordinary. It was  
15 unique and exceptional.

16                  As I noted earlier, from 1995 to  
17 2003, only 11 Joint Review Panels were completed in  
18 total across the country, and each of them was of  
19 an entirely different nature and magnitude than a  
20 quarry.

21                  They included a terminal in Quebec  
22 for the reclassification of 14.2 million cubic  
23 metres per day of liquified natural gas, oil and  
24 gas pipelines and oil sands developments in  
25 Alberta, nuclear waste storage and hydro dam



1 projects.

2                   Only two of the 29 projects  
3 referred to Joint Review Panels over the course of  
4 15 years, from 1995 to 2010, were in Nova Scotia.

5                   One was the Sable Gas offshore  
6 pipeline, a massive project which covered a total  
7 area of 120,000 square kilometres and involved 558  
8 kilometres of onshore pipeline. The other was the  
9 Sydney Tar Ponds.

10                   So two projects in Nova Scotia  
11 went to review panels, Sable Gas and Sydney Tar  
12 Ponds, in 2006, which involved the disposition of  
13 hazardous waste.

14                   From 2004 to 2009, at least five  
15 mega projects were approved in Nova Scotia with a  
16 simple screening. They included: The Sydport  
17 Container Terminal; the Milford deep water port and  
18 international container terminal; the Bear Head LNG  
19 terminal, involving onshore liquified natural gas  
20 storage tanks of 180,000 cubic metres and over 100  
21 ships per year, each carrying 250 cubic metres; and  
22 the Point Tupper marine terminal facility, with a  
23 capacity of 3,000 tonnes per hour.

24                   Far from joint federal-provincial  
25 review panels, the EA processes was for these five

1 major mega projects in Nova Scotia did not have a  
2 provincial review panel or even a comprehensive  
3 study. The only environmental assessment carried  
4 out on those five projects that I have just listed  
5 at all was the lowest, environmental assessment  
6 level, a simple screening, the vast majority, and  
7 over 99 percent had simple screenings.

8 I turn now to a short discussion  
9 of the actual report and processes of the Joint  
10 Review Panel.

11 Bilcon expected the panel process  
12 to be fair, honest, objective and scientific. It  
13 directed Mr. Buxton to engage the very best experts  
14 in every field of scientific expertise that would  
15 be the subject of the panel's review.

16 In the result, the environmental  
17 impact statement, which is called the EIS, which  
18 you will hear much about, was comprised of 35  
19 expert reports, seven volumes of detailed responses  
20 to additional information requests from the panel,  
21 and two volumes of undertakings made to the panel  
22 in the course of the hearing.

23 Each of the 35 experts Bilcon  
24 engaged submitted a comprehensive written report,  
25 and 19 of them attended the hearing to answer any

1 questions from the panel, of which notably very few  
2 were asked.

3                   Because of the extensive volume of  
4 the EIS materials, they were organized around a  
5 master table of contents, as well as a concordance  
6 table and, for maximum ease of reference, a plain  
7 language summary.

8                   The entire EIS was consolidated  
9 into an impact summary, which was specifically  
10 categorized in reference to every environmental  
11 effect which the project might have, including  
12 socio-economic effects for which they had expert  
13 evidence, so as to facilitate the consideration of  
14 mitigation which the panel was required to  
15 undertake.

16                   It is a fundamental, integral  
17 component of the environmental assessment process.  
18 Are there serious adverse environmental effects,  
19 and can they be mitigated? And after taking those  
20 mitigation measures into account, what will be the  
21 effect on the environment?

22                   To assist the panel with the  
23 assessment of mitigation, Bilcon correlated a  
24 complete commitment table which reflected all of  
25 the additional mitigation commitments Bilcon made

1 in the course of the panel process.

2 All of it was ignored by the panel  
3 report to the Ministers, and the panel recommended  
4 that the Bilcon Quarry not be approved.

5 The panel's conclusions were not  
6 based on facts or science or a fair assessment of  
7 the science, but on purely subjective beliefs and a  
8 motivation to change legislative policy.

9 The panel's conclusion was based  
10 on its view of what it called "core values" of the  
11 community. In its report, the panel said, and this  
12 is at page 85 of your slides:

13 "Core values are beliefs  
14 shared by individuals within  
15 groups. Communities on Digby  
16 Neck and Islands have been  
17 engaged for almost a decade  
18 in various activities that,  
19 although designed to  
20 encourage economic  
21 development, required a form  
22 of introspection that  
23 revealed the community's  
24 beliefs."

25 "Introspection that revealed the

00100

1 community's beliefs". The panel then went so far  
2 as to describe the desolate clearcut quarry site as  
3 a sacred landscape, for which it cited a  
4 definitional reference. Bilcon was always  
5 sympathetic and sensitive to any aboriginal  
6 concerns, but there was no evidence at all of  
7 aboriginal habitation of this property:

8 "Sacred landscapes then are  
9 places that are consecrated  
10 by sacrifice and special  
11 treatment and endowed by a  
12 community with the power of  
13 highly revered convictions,  
14 values and virtues."

15 After the panel rendered its  
16 report, the panel chairman, Professor Fournier, was  
17 interviewed on CBC Radio and confirmed that the  
18 panel report had little to do with objective  
19 assessment of the overwhelming scientific and  
20 engineering evidence presented by Bilcon or the  
21 legal mandate of the panel's terms of reference.

22 It was instead based entirely on  
23 the panel's subjective view of core values and the  
24 panel's own belief that the Nova Scotia -- that  
25 Nova Scotia should legislate a coastal zone policy.

00101

1 The panel chairman said, and I quote, and this is  
2 at page 87:

3 "The decision hinges on core  
4 values, and the other thing  
5 that you have to realize,  
6 too, in one of these  
7 assessment processes is what  
8 you are looking for is  
9 significant adverse  
10 environmental effects. So we  
11 were so certain that this was  
12 a bad thing that it was  
13 inappropriate for that  
14 particular environment that  
15 we did not provide any of  
16 those mitigation  
17 recommendations at all ...and  
18 that was a very conscious  
19 effort on our part." [As  
20 read]

21 So they didn't consider  
22 mitigation. Of course, beliefs can't be mitigated  
23 against:

24 "We felt that if there was a  
25 coastal zone policy present

1 in the province, now this  
2 thing might never have come  
3 to an assessment... So we  
4 think, okay, by extension  
5 that policy should exist  
6 because there will be more  
7 attempts to open quarries and  
8 so forth.

9 "We strongly urged a  
10 moratorium, because we felt  
11 that why go through this  
12 process again in an ad hoc  
13 way when, if you put a policy  
14 together, everybody knows  
15 what to expect and you don't  
16 is to spend time and money  
17 and effort..." [As read]

18 The fact is there wasn't such a  
19 coastal zone prohibition policy or regulation or  
20 rule in effect. There are at least 100  
21 jurisdictions in the world that have coastal zone  
22 policies, and we don't.

23 You have to ask yourself, I mean,  
24 What are we waiting for?

25 So the message from the panel to

1 the Governments of Nova Scotia and Canada did not  
2 emanate from a fair and impartial, objective and  
3 scientific environmental assessment of the actual  
4 Bilcon quarry itself, but was based first on the  
5 subjective perception of community beliefs and the  
6 personal view of the panel members that, second,  
7 there should be a coastal policy prohibiting  
8 quarries on Canadian coasts, which there was not.

9                   The legal mandate of the panel was  
10 set out in its terms of reference, and nowhere in  
11 that mandate or in any related federal or  
12 provincial statute or regulation was there any  
13 reference at all to core values or to coastal  
14 policy.

15                   Indeed, the notion of core values  
16 is not a concept or a standard known to  
17 environmental or environmental assessment at all.

18                   It is entirely subjective. It is  
19 not capable of objective assessment, and we saw  
20 earlier that the guide to the officials who were  
21 supposed to conduct these activities is to conduct  
22 the objective science-based analysis.

23                   The panel's view of core values  
24 had nothing to do with proven facts, objective  
25 science, socio-economic effect or benefit, or



1 socio-scientific assessment of the actually effects  
2 of the quarry.

3                   It was purely philosophical and, I  
4 would submit, political. And this, in turn, caused  
5 the panel to skirt any objective assessment of  
6 mitigating factors.

7                   Moreover, and importantly, Bilcon  
8 was given no notice, either before or during the  
9 hearing, that core values would be fundamental to  
10 the outcome of the environmental assessment.

11                   It had no opportunity to present  
12 real social science evidence about what the values  
13 of the community actually were. There was some  
14 opposition to this quarry in the community, but the  
15 community did not speak with one voice.

16                   Other members of the community  
17 supported the quarry and the jobs and the economic  
18 benefits it would bring. The evidence before the  
19 panel, Bilcon receiving over 400 job applications  
20 from members of this small community, 400 job  
21 applications, was telling.

22                   The panel's profound bias against  
23 the Bilcon quarry was manifest from the beginning.  
24 Internal communications between the members reveal  
25 the panel members sneering dismissively at the EIS



1 at page 91:

2 "On day 11, the local member  
3 of parliament for the Digby  
4 region and former Minister of  
5 the DFO, Robert Thibault,  
6 also made a presentation to  
7 the panel. He was critical  
8 of the project particularly  
9 because the basalt was to be  
10 exported to the United  
11 States.

12 "The panel did nothing to  
13 discourage emotional,  
14 unsubstantiated and patently  
15 biassed comments by opponents  
16 to the Bilcon project and  
17 actively expressed its own  
18 suspicion of Bilcon's  
19 representative, Mr. Buxton,  
20 took little interest in other  
21 Bilcon experts and  
22 consistently, negatively  
23 focussing on the American  
24 nationality of Bilcon.

25 "Neither at the hearing or in

1                   its report did the panel ever  
2                   dissociate itself from the  
3                   manifest anti-American and  
4                   anti-foreign sentiments  
5                   expressed during that  
6                   hearing.  
7                   "Nevertheless both the  
8                   responsible provincial and  
9                   federal ministers, without  
10                  giving Bilcon any opportunity  
11                  to make representations,  
12                  chose to arbitrarily accept  
13                  the report, made the decision  
14                  to deny the Bilcon quarry and  
15                  the Minister did so with full  
16                  knowledge of the panel  
17                  process. The panel report  
18                  was fundamentally flawed.  
19                  "After the panel issued its  
20                  report, Mr. Buxton wrote to  
21                  Nova Scotia Minister Parent  
22                  asking for an opportunity to  
23                  make representations about  
24                  the panel's report and  
25                  recommendations before making

1 a decision, so that he could  
2 consider the manifest  
3 unfairness of the panel's  
4 process, his complete and  
5 obvious bias, and his  
6 disregard of the scientific  
7 and engineering information.  
8 "Bilcon wanted the  
9 opportunity to correct key  
10 errors of fact and fairness  
11 in the report. Mr. Parent,  
12 however, never gave Bilcon  
13 the opportunity to address  
14 the flaws and biases in the  
15 Panel's process and report,  
16 and neither did the  
17 Minister's deputy meet with  
18 Bilcon. Instead, on November  
19 20th, the Minister issued its  
20 decision denying the Bilcon  
21 quarry." [As read]

22 And the quote is there for you. I  
23 won't read it.

24 Moreover, before the Minister made  
25 the decision, the officials in his Ministry had

1 prepared a PowerPoint presentation entitled  
2 "Response to Panel Report" that concluded that six  
3 of the seven recommendations made by the panel were  
4 "outside the scope of the panel's terms of  
5 reference".

6                   The panel's terms of reference of  
7 course define the scope of its mandate. And then,  
8 similarly, Mr. Buxton also wrote to Minister Baird,  
9 the federal Minister, advising -- and, again, I've  
10 excerpted a quote there which is in your materials  
11 at page 94.

12                   Members of the Tribunal, the rule  
13 of law is the bedrock of Canadian constitutional  
14 and administrative law. The Supreme Court of  
15 Canada has said, and this is page 95:

16                   "The principles of  
17                   constitutionalism and the  
18                   rule of law lie at the root  
19                   of our system of government.  
20                   At its most basic level, the  
21                   rule of law vouchsafes to the  
22                   citizens and residents of the  
23                   country a stable, predictable  
24                   and ordered society in which  
25                   to conduct their affairs. It

1 provides a shield for  
2 individuals from arbitrary  
3 state action."

4 The rule of law is what this case  
5 is all about. The story of the Bilcon quarry is a  
6 story of the regulatory process and the legal  
7 process itself being subverted and hijacked for  
8 political purposes.

9 The integrity of Canada's  
10 environmental regulatory system depends on the good  
11 faith of the officials administering it and on its  
12 protection from political interference.

13 The absolute application of these  
14 basic principles is affirmed in the values and  
15 ethics code for the public sector of the Government  
16 of Canada, which proclaims, "Public servants shall  
17 uphold" -- I am quoting here:

18 "... the Canadian  
19 parliamentary democracy and  
20 its institutions by  
21 respecting the rule of law  
22 and carrying out their duties  
23 in accordance with  
24 legislation, policies and  
25 directives in a

00111

1 non-partisan..."

2 It is at page 98, Mr. President:

3 "... in a non-partisan and  
4 impartial manner. Public  
5 servants shall serve the  
6 public interest by: Acting  
7 at all times with integrity  
8 and in a manner that will  
9 bear the closest public  
10 scrutiny, an obligation that  
11 may not be fully satisfied by  
12 simply acting within the  
13 law."

14 These values are echoed simply and  
15 clearly in "The Values, Ethics and Conduct Code For  
16 Nova Scotia for Public Servants", which says:

17 "We are objective, fair and  
18 transparent."

19 That is their mandate. That is  
20 what they are required to be. Bilcon always  
21 intended to treat the Nova Scotia environment with  
22 respect and to act in full compliance with Canadian  
23 environmental values, laws and regulations.

24 Bilcon believed that it was  
25 engaged in an honest and transparent environmental



1 assessment that would be administered by  
2 responsible government officials, fairly and in  
3 good faith, and that it would be determined by an  
4 objective scientific truth.

5                   Bilcon did not expect to be duped  
6 by public officials and to be denied basic fairness  
7 by an administration it was entitled to expect  
8 would treat it fairly.

9                   Simply put, Bilcon was not treated  
10 fairly and it was not treated with good faith, and  
11 that is why this proceeding is proceeding today.

12                   Thank you, Mr. President, Members  
13 of the Tribunal.

14                   PRESIDING ARBITRATOR: Thank you  
15 very much, Mr. Nash.

16                   MR. APPLETON: Mr. President, I am  
17 told that the audio-visual technicians believe that  
18 we could actually run that video now, if you  
19 wanted, or you could run it at the beginning, after  
20 the break, whichever you would like.

21                   But technologically, they have the  
22 right cables and everything should work now.

23                   PRESIDING ARBITRATOR: How long is  
24 it going to take?

25                   MR. NASH: It is three-and-a-half

00113

1 minutes.

2 MR. APPLETON: Three minutes, 30  
3 seconds.

4 PRESIDING ARBITRATOR: I think  
5 let's add that, three minutes, 30 seconds.

6 MR. APPLETON: We should try it  
7 now?

8 PRESIDING ARBITRATOR: Yes, try  
9 again.

10 MR. APPLETON: Yes, all right.  
11 Can you run this now?

12 --- Video played at 11:47 a.m.

13 MR. APPLETON: You have to run it  
14 from the beginning.

15 PRESIDING ARBITRATOR: Yes.

16 --- Video played.

17 PRESIDING ARBITRATOR: All right.

18 That brings us to the end of the video. Two  
19 questions related to the video. First, what is the  
20 source of this video? And, secondly, was it  
21 submitted to the Tribunal as an exhibit already or  
22 not? But if the answer takes longer than ten  
23 seconds, give it after the break, because...

24 MR. APPLETON: It is part of the  
25 record. The video was part of the witness

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1 statement of Mr. Buxton. He submitted it with his  
2 witness statement. I believe it is in the record  
3 as document C-911. We thought it might have been  
4 possible, because of its unique format, that the  
5 Tribunal might not have seen it as it was being  
6 submitted, and, therefore, we thought it was useful  
7 to present it as part of the opening today.

8 PRESIDING ARBITRATOR: Okay.  
9 Thank you very much.

10 MR. APPLETON: Sorry, 910.

11 PRESIDING ARBITRATOR: 910. Okay.  
12 Thank you very much. My watch, which is the  
13 authoritative one, it is now eight to 12:00, which  
14 means we will start again at 12:10 sharp. 12:10  
15 sharp.

16 I think you will have all of the  
17 time you need and we will have a later lunch break.

18 MR. LITTLE: That was my question,  
19 Judge Simma. I am mindful of the fact that we do  
20 have a lunch break at some point in time. We have  
21 been over two hours now. I could have very likely  
22 finished well in advance of the lunch break had we  
23 kept to an hour and a half, but now we are going to  
24 be pushing up against a late lunch.

25 We are seeking your guidance on

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1 whether we break for our lunch now, and then allow  
2 me to complete my presentation in its entirety  
3 after the lunch break.

4 PRESIDING ARBITRATOR: Let me have  
5 a quick consultation with my colleagues.

6 --- Tribunal members confer.

7 PRESIDING ARBITRATOR: Okay.

8 Claimant have any view? Let's break for lunch now  
9 and start at 1:00 sharp. Thank you very much.

10 --- Luncheon recess at 11:53 a.m.

11 --- Upon resuming at 1:11 p.m.

12 PRESIDING ARBITRATOR: Okay. So  
13 we are all set? Is that all right?

14 MR. PULKOWSKI: Let's go online.

15 PRESIDING ARBITRATOR: Yes, let's  
16 go online. Good afternoon, everybody. And I will  
17 give the floor to Mr. Little for the respondent.

18 OPENING SUBMISSIONS BY MR. LITTLE:

19 MR. LITTLE: Yes. Good afternoon,  
20 Members of the Tribunal and to the viewers on the  
21 live screen and live stream.

22 Canada has prepared a series of  
23 slides that will accompany my opening statement  
24 today, and it would probably be most beneficial and  
25 helpful for these to be presented on the live

1 stream. So we will commence with those, please.

2 Okay, thank you.

3 This case challenges the  
4 environmental assessment, or EA, of the Whites  
5 Point Quarry and Marine Terminal Project. Now, as  
6 we know, the process culminated in decisions by the  
7 Government of Nova Scotia, and later by the federal  
8 government, that the Whites Point project would not  
9 be approved.

10 Now, the claimants allege, as we  
11 have heard today, that a whole host of measures  
12 taken in the Whites Point EA breached Canada's  
13 NAFTA obligations.

14 They specifically allege that  
15 decisions made in the course of the Whites Point EA  
16 breached Canada's minimum standard of treatment  
17 obligation under NAFTA Article 1105.

18 But to establish such a breach,  
19 they must demonstrate that they were subjected to  
20 government conduct that was so egregious and  
21 shocking it amounted to a gross denial of justice,  
22 arbitrariness, a complete lack of due process or  
23 evident discrimination. They have not.

24 The claimants' Article 1105 claim  
25 is nothing more than an attempt to manufacture a

1 NAFTA claim out of rational and legitimate  
2 decisions taken during the EA process with which  
3 they disagree and which don't rise to the level  
4 required to prove a breach of the minimum standard  
5 of treatment.

6 Now, the claimants also allege  
7 that Canada breached its national treatment and  
8 most-favored nation treatment obligations under  
9 NAFTA Articles 1102 and 1103.

10 But to make out this claim, it is  
11 incumbent on them to demonstrate that they were  
12 treated less favorably than other EA proponents in  
13 like circumstances by reason of their nationality.  
14 Again, they have not.

15 All that they've shown is that  
16 other EA proponents of different projects proposed  
17 for different environments happen to have been  
18 accorded different treatment that was in no way  
19 related to their nationality. This does not  
20 demonstrate a violation of Articles 1102 or 1103.

21 Now, beyond these substantive  
22 failings, many of the measures which the claimants  
23 complain of are simply beyond this Tribunal's  
24 jurisdiction.

25 Now, in my opening remarks, I want

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1 to provide you with an overview of the salient  
2 factual elements of the Whites Point EA which you  
3 will be hearing about in the coming days.

4 I will then briefly outline for  
5 you the fundamental flaws in the claimants' NAFTA  
6 claims, which I have just noted here in passing,  
7 and explain why the only award that can be made in  
8 this case is one dismissing these claims in their  
9 entirety.

10 But as you listen to Canada's  
11 opening statement and over the coming days as you  
12 listen to the claimants' allegations and Canada's  
13 responses, I would ask you to keep the following  
14 three overarching considerations in mind.

15 The first is: Have the claimants  
16 proven the facts that they must in order to make  
17 out their claims?

18 Now, the size and duration of the  
19 Whites Point project and the environmental  
20 sensitivities of the location for which it was  
21 proposed engaged the potential for a wide range of  
22 likely adverse environmental effects and  
23 significant public concern over these effects.

24 These most basic facts explain why  
25 the project was assessed by a Joint Review Panel.

1 The decision made in the end that the Whites Point  
2 project would not be approved was equally based  
3 upon findings made through the EA process regarding  
4 the project's adverse environmental effects.

5 Now, rather than acknowledging  
6 these basic facts, the claimants have cast their  
7 claim and their pleadings in the dramatic language  
8 of a conspiracy against the Whites Point project.  
9 They assert that the EA was concocted and that it  
10 was an artifice of process and procedure.

11 Their tale, as we have heard, is  
12 populated by officials acting in bad faith to carry  
13 out a secret scheme to bring about a predetermined  
14 outcome for their project that it would be  
15 rejected, but they have provided you with nothing  
16 more than assertions and not the facts that they  
17 need to prove to make out their case.

18 And their assertions are not only  
19 not borne out by the facts; they often distort the  
20 facts beyond recognition.

21 So while you will hear a whole  
22 host of assertions that suit the theory of the  
23 claimants' case in the coming days, please consider  
24 whether they have provided you with substantive  
25 evidence, facts to back up their account. We say



1 that they haven't, because such facts do not exist.

2 Now, the second overarching  
3 consideration we would like you to keep in mind is  
4 whether the controversies that have been  
5 manufactured by the claimants in this case really  
6 matter.

7 Now, the claimants have filed  
8 hundreds of pages of pleadings, witness statements,  
9 expert reports, all challenging the many decisions  
10 that had to be made in the Whites Point EA.

11 And while some of the debates that  
12 they have raised might be of academic interest, as  
13 you consider each, please ask the question: But  
14 would the outcome of the Whites Point EA have been  
15 any different?

16 On many accounts, we say the  
17 answer is "no" and that much of the time and  
18 expense that has been incurred to date and that  
19 will be incurred in the coming days could have been  
20 avoided had the claimants not bogged down this case  
21 in issues that are irrelevant to whether their  
22 project could have proceeded.

23 I will highlight some of these  
24 later on in my remarks.

25 The third overarching

1 consideration: Do the measures that the claimants  
2 challenge really amount to NAFTA violations?

3 Now, decisions made in the EA  
4 process, they're not black and white propositions.  
5 They are based upon the professional judgment and  
6 experience of those conducting the EA.

7 They are fact specific. They are  
8 dependent on the environmental, the scientific, the  
9 socio-economic, the policy and the statutory  
10 conduct and context of each EA, and they can't  
11 possibly be uniform across EA processes as the  
12 claimants would like you to think, in a country as  
13 ecologically diverse as Canada.

14 Now, it is clear the claimants  
15 disagree with virtually every decision made in the  
16 Whites Point EA, but in considering their claims,  
17 please keep in mind the NAFTA is not a security  
18 blanket against the disappointment that the  
19 claimants feel because they disagree, and the  
20 number of past NAFTA awards confirm that it isn't  
21 this Tribunal's role to second-guess each decision  
22 merely because they do.

23 So keeping these three overarching  
24 considerations in mind, let's now turn to the  
25 salient facts of this case.

1                   Now, the Tribunal has been  
2 provided with a huge volume of facts. It is  
3 obviously not my aim to review all of these today.  
4 What I want to accomplish is to, first, recall the  
5 fundamental underpinnings of the Whites Point EA,  
6 factors that are determinative of the course and  
7 conduct of every EA and that were determinative of  
8 the course and conduct of the Whites Point EA.

9                   Second, I am going to distill for  
10 you the key features of the two EA regimes at issue  
11 in this case, the Nova Scotia Environment Act and  
12 the Canadian Environmental Assessment Act.

13                   I am then going to summarize the  
14 key points and decisions made over the course of  
15 the Whites Point EA.

16                   So let's first consider three  
17 fundamental factual underpinnings of the Whites  
18 Point EA. These are: First, the nature of the  
19 Whites Point project; second, the environment in  
20 which it was to be located, and, third, the public  
21 concerns that it engaged.

22                   We will start with the Whites  
23 Point project. Now, the Whites Point project  
24 started as a proposal of a company known as Nova  
25 Stone Exporters, a locally owned Nova Scotia

1 company that, in 2001, was searching for partners  
2 to build a quarry and a marine terminal in Nova  
3 Scotia.

4 In February of 2002, Nova Stone  
5 approached the claimants in this arbitration, the  
6 Claytons, to gauge their interest in the project,  
7 and shortly thereafter a plan fell into place.

8 Specifically, on April 3rd, 2002,  
9 Nova Stone signed an aggregate lease agreement with  
10 the owners of the Whites Point property allowing it  
11 to quarry on the land.

12 Three weeks later, the Claytons  
13 incorporated their own Nova Scotia-based company,  
14 called Bilcon of Nova Scotia Corporation.

15 And a week after that, Nova Stone  
16 and Bilcon formed a partnership called "Global  
17 Quarry Products", and this partnership would be the  
18 proponent of the project.

19 Now, the project, as we can see  
20 here, was to consist of two elements, a quarry and  
21 a marine terminal. The quarry would cover over 150  
22 hectares, on which rock would be blasted, crushed,  
23 washed and stockpiled into processed aggregate.

24 The marine terminal would jut 170  
25 metres off the quarry site. Huge ships would moor

1 to it so they could be loaded with processed  
2 aggregate for export.

3 Now, the Whites Point project was  
4 to operate for 50 years. It aimed to blast,  
5 process and ship 40,000 imperial tons of aggregate,  
6 and that's imperial tons of aggregate, almost every  
7 week of every one of those years, a total of  
8 2 million imperial tons annually and 100 million  
9 imperial tons over the life of the project.

10 This project would be large-scale  
11 and it would be long-term.

12 Now, it is also important to  
13 recall that the claimants' plan was obviously not  
14 realizable without both the quarry and the marine  
15 terminal. The claimants never intended to operate  
16 one element of the project without the other.

17 In fact, at one of their very  
18 first meetings with government officials, their  
19 representatives explained that if they cannot put  
20 in a wharf structure, they are not interested in  
21 the quarry.

22 So while the project consisted of  
23 two constituent elements, these elements comprised  
24 one integrated, interdependent whole.

25 Now, turning back to the

1 fundamental factual underpinnings, the second one  
2 that we want you to keep in mind is the environment  
3 in which this project was to be located.

4                   The project was to be constructed  
5 and operate at Whites Point on the Digby Neck in  
6 southwest Nova Scotia. Nova Scotia, as we know, is  
7 one of the Maritime provinces on the east coast of  
8 Canada.

9                   The Digby Neck is a narrow  
10 58-kilometre-long spit of land running parallel to  
11 the southwest coast of Nova Scotia along the Bay of  
12 Fundy to the west and St. Mary's Bay to the east.

13                   Whites Point, as we can see, is  
14 approximately halfway down the Neck on the Bay of  
15 Fundy side. Now, there is no major industrial  
16 development or marine terminal on the Neck and  
17 certainly no project of the scale contemplated by  
18 the claimants.

19                   The Bay of Fundy itself is a  
20 diverse and rich marine ecosystem owing to its  
21 extraordinary tidal cycle. It is the habitat of  
22 many endangered species, including the North  
23 Atlantic Right Whale and the Inner Bay of Fundy  
24 population of Atlantic Salmon, or IBoF salmon.

25                   Moreover, the local economy of the

1 Digby Neck was and continues to be based on the  
2 region's ecological assets. For centuries, for  
3 example, economic activity has been founded on the  
4 commercial fishery.

5                   The proposed site of the project  
6 encompassed lobster area 34, which was one of the  
7 world's most productive lobster fisheries and the  
8 backbone of the southwest Nova Scotia economy.

9                   As well, the Digby scallop fleet  
10 yields the largest annual landings of scallops on  
11 the Bay of Fundy.

12                   There are also active herring,  
13 halibut and haddock industries, and there are  
14 spin-off industries, as well, such as fish  
15 processing plants.

16                   Now, more recently, an ecotourism  
17 industry has blossomed on the Digby Neck. Whale  
18 watching tours are a central pillar of the  
19 ecotourism industry, and the waters along the Neck  
20 have been dubbed the Fundy aquarium ecozone.

21                   Ecotour maps also promote the Neck  
22 as Nova Scotia's premier ecotourism destination and  
23 tout its marine life, its geology, its bird life,  
24 its land ecology, and its history and culture as  
25 natural attractions of the region.

1                   Now, in light of its unique  
2 attributes, the Digby Neck and several other  
3 counties of southwest Nova Scotia were designated  
4 in 2001 as a biosphere reserve under the UNESCO Man  
5 and Biosphere Program.

6                   A biosphere reserve is a  
7 terrestrial and coastal ecosystem that promotes  
8 biodiversity, conservation and sustainable  
9 resources.

10                  On sum, the Digby Neck was and is  
11 a unique environment, and the plan to build and  
12 operate the Whites Point project in the midst of  
13 this environment, given the project size, its  
14 duration and its potential biophysical and human  
15 impacts naturally gave rise to legitimate questions  
16 over the claimants' proposal.

17                  Now, this gets us to the third  
18 fundamental factual underpinning to keep in mind,  
19 namely that it is hardly surprising the Whites  
20 Point project engaged major public concern.

21                  Now, the claimants appear at  
22 points to deny the existence of such concern. In  
23 their memorial, for example, they assert there was  
24 no empirical evidence of any public concern.

25                  Now, this assertion is as



1 remarkable as it is unsupported by the facts.

2                   Even the claimants' expert,  
3 Mr. David Estrin, has testified the project was  
4 very controversial. Canada has also provided in  
5 its exhibits over 400 pages of empirical evidence  
6 of public concern, which include letters to  
7 government officials and Ministers expressing  
8 concern over the project, and these letters covered  
9 only the first 16 months of the public's knowledge  
10 of the project.

11                   Public concern over the Whites  
12 Point project was acute from the outset. It  
13 persisted throughout the EA process all the way to  
14 the government decisions that the project would not  
15 be approved.

16                   And why wouldn't it? The prospect  
17 of 50 years of quarrying along the Bay of Fundy  
18 that would consume 150 hectares of land and entail  
19 weekly visits by huge ships travelling to and from  
20 distant ports gave rise to immediate concerns over  
21 the impact of blasting on endangered marine species  
22 and other fish, the effects of siltation and  
23 sedimentation from the quarry site on the local  
24 fisheries, the impact of a large marine terminal on  
25 the safety and livelihood of local fishers, the

1 risks associated with ballast water and the  
2 introduction of invasive species in the waters  
3 adjacent to the site, and the project's impact on  
4 the tourist industry and the general way of life  
5 along the Neck.

6                   Now, in another location, one  
7 founded upon and familiar with heavy industrial  
8 development, the Whites Point project may have  
9 engaged less concern, but given where the project  
10 was to be located, this was simply not the case.

11                   So with these three fundamental  
12 factual underpinnings in mind, the nature of the  
13 Whites Point project, the sensitivities of the  
14 surrounding environment and the public concern over  
15 the project's potential effects, I want to turn now  
16 to some of the key features of the EA regimes under  
17 which the Whites Point project was to be assessed.

18                   Now, as it was proposed, the  
19 Whites Point project required an environmental  
20 assessment under both Nova Scotia's EA regime  
21 pursuant to the Nova Scotia Environment Act, and  
22 Canada's EA regime, pursuant to the Canadian  
23 Environmental Assessment Act.

24                   Now, I will explain why and some  
25 key features of these regimes, but before doing so,

1 a helpful starting point is to recall what is an  
2 environmental assessment, because from Mr. Nash's  
3 comments of earlier this morning, it appears we  
4 disagree on the meaning.

5                   An EA is not, as Mr. Nash states,  
6 merely part of the planning phase of an industrial  
7 project. Canada's expert, Robert Connelly, who  
8 sits behind me in this room, articulated the  
9 meaning of environmental assessment in his expert  
10 report. Mr. Connelly, as we can see, explains:

11                   "Environmental assessment is  
12                   a process used to identify  
13                   and gather information about  
14                   the expected future  
15                   consequences of a proposed  
16                   project before a decision is  
17                   made as to whether it should  
18                   proceed."

19                   Thus, an EA process has an  
20 information-gathering phase aimed at learning what  
21 are the potential environmental effects of this  
22 project, and a decision-making phase which, based  
23 on the information gathered, results in a decision  
24 as to whether the project should be permitted to  
25 proceed.

1                   Now, let's look closer at the EA  
2 regimes at issue in this case, and as I noted there  
3 were two, provincial regime and the federal regime,  
4 because, in Canada, the provinces and federal  
5 government have shared jurisdiction over the  
6 environment.

7                   Now, I should also note that  
8 though I refer to the regimes in the present tense,  
9 I am describing the regimes as they existed at the  
10 time of the Whites Point EA. They have since been  
11 amended.

12                   First, the Nova Scotia Environment  
13 Act, also known as the NSEA. Now, the NSEA  
14 requires an EA of prescribed undertakings.  
15 Included in this list of undertakings are quarries  
16 over 4 hectares in size, like the proposed Whites  
17 Point quarry.

18                   The EA is generally conducted by  
19 officials in the Nova Scotia Department of  
20 Environment and Labour, also known as NSDEL, which  
21 is an acronym you have already heard today and you  
22 will hear in the coming days.

23                   Now, an EA under the NSEA must  
24 consider the environmental effects of an  
25 undertaking. The term "environmental effects" is

1 defined broadly under the NSEA to include:

2                                   "... any change...in the  
3                                   environment, i.e., any  
4                                   biophysical change, including  
5                                   any effect on socioeconomic  
6                                   conditions."

7                                   Now, an EA under the NSEA must  
8 also determine whether the undertaking will have an  
9 adverse effect respecting the reasonable enjoyment  
10 of life or property. So to illustrate, if the  
11 information gathered in the EA demonstrates that  
12 the undertaking will adversely affect an endangered  
13 specie, well, this biophysical environmental effect  
14 is relevant to government decision-making.

15                                   But just as important, if it is  
16 determined that tourists are likely to stop  
17 visiting the area because of the undertaking and  
18 the tourist industry would suffer, well, this  
19 socioeconomic effect is equally relevant to  
20 decision-making.

21                                   The NSEA mandates consideration of  
22 such socioeconomic effects regardless of the  
23 undertaking's biophysical effects.

24                                   Let's now look at the CEAA, the  
25 Canadian Environmental Assessment Act. Unlike the

1 NSEA, which requires an EA of prescribed  
2 undertakings, the CEAA requires an EA if a project  
3 is likely to have an effect requiring the issuance  
4 of prescribed authorizations by the federal  
5 government.

6                   Now, these authorizations are  
7 called "triggers" because they trigger an EA, and  
8 they include, for example, a permit issued by the  
9 Department of Fisheries and Oceans under the  
10 federal Navigable Waters Protection Act for a  
11 marine terminal that would interfere with marine  
12 navigation.

13                   They also include an authorization  
14 issued by DFO under the federal Fisheries Act for  
15 destruction of fish habitat or the killing of fish  
16 by means other than fishing, both of which could  
17 result from the construction of a marine terminal  
18 or long-term quarrying next to the marine  
19 environment.

20                   Now, the EA under CEAA is  
21 generally conducted by the federal department  
22 responsible for the trigger. This department is  
23 called "the responsible authority".

24                   Like the NSEA, an EA under the  
25 CEAA assesses a project's environmental effects,

1 which is its own defined term under the CEAA, also  
2 requiring consideration of socioeconomic effects,  
3 albeit through a slightly different approach.

4           The CEAA requires consideration of  
5 any change that the project may cause in the  
6 environment. Again, any biophysical change,  
7 including any effect of any change in the  
8 environment on socio-economic conditions.

9           So, again, to illustrate, if an EA  
10 under the CEAA finds that the project will have an  
11 adverse effect on fish habitat, well, this  
12 biophysical effect is relevant to government  
13 decision-making. But just as important, if this  
14 effect on fish habitat, an environmental change  
15 that is caused by the project, has an adverse  
16 effect on the productivity of the local fishery,  
17 well, then this effect on socioeconomic conditions  
18 is equally relevant to government decision-making.

19           Now, I want to highlight just a  
20 couple of other features of the two EA regimes.  
21 First, an underlying purpose of the NSEA and CEAA,  
22 and all Canadian EA regimes for that matter, is to  
23 facilitate meaningful public participation. In  
24 fact, public participation is inscribed as an  
25 overarching purpose of both statutes.

1                   This is why both statutes provide  
2 for the possibility of public hearings when certain  
3 criteria are met.

4                   For example, we're looking at an  
5 excerpt from the expert report of Robert Connelly,  
6 which shows that under the CEAA all projects  
7 subject to EA are required to undergo, at the very  
8 least, a screening or a comprehensive study.

9                   Now, a screening is required for  
10 any project subject to an EA under the CEAA that is  
11 not subject to a comprehensive study. A  
12 comprehensive study is a more involved EA process  
13 than a screening, and it is required for projects  
14 subject to EA under the CEAA that are listed in  
15 what is known as the Comprehensive Study List  
16 Regulations.

17                   Now, these are larger projects  
18 that are assumed to be capable of causing  
19 significant environmental damage. Projects on the  
20 list include: Marine terminals, like the one  
21 proposed for the Whites Point project, that can  
22 handle very sells larger than 25,000 dead weight  
23 tons.

24                   Projects on the comprehensive  
25 study list also include a quarry, like the Whites



1 Point quarry, with a production capacity of over a  
2 million metric tonnes per annum.

3 Now, screenings and comprehensive  
4 studies, they don't entail public hearings. They  
5 are conducted on paper by the proponent and the  
6 responsible authority. But if a project has  
7 potential for significant adverse environmental  
8 effects or where public concerns warrant, its EA  
9 can be referred from a screening or a comprehensive  
10 study to a review panel, which entails public  
11 hearings.

12 Now, this can happen at any time  
13 in the EA process. It can happen at the end of a  
14 comprehensive study or screening, during a  
15 comprehensive study or screening, or before a  
16 comprehensive study or screening has commenced.

17 A review panel is independent of  
18 and autonomous from the government, the proponent,  
19 or any other stakeholder.

20 Canada's expert Robert Connelly in  
21 his report has explained that the review panel  
22 members must be unbiased and free of any conflict  
23 of interest relative to a component and a project,  
24 and have knowledge or experience relevant to the  
25 anticipated environmental effects of a project.



1                   A secondary, related purpose, is  
2 to legitimize government decisions about proposals.  
3 Opponents of a project that gets approved, and  
4 supporters of a project that gets rejected, are  
5 more likely to accept the outcome if they have been  
6 given a chance to have their say.

7                   Now, Canada and the claimants  
8 disagree on much in this case, but we can agree  
9 that this passage aptly captures the important  
10 objectives of the review panel process.

11                   Now, a second feature of the EA  
12 regimes to keep in mind is that of harmonization,  
13 which recognizes the shared federal-provincial  
14 jurisdiction over the environment in Canada.

15                   Projects like the Whites Point  
16 project can require an EA under more than one EA  
17 regime. The provincial and federal governments can  
18 agree to harmonize; that is, to carry out one EA  
19 meeting the informational and decision-making  
20 requirements of each involved jurisdiction.

21                   Now, the ability to harmonize is  
22 what allowed a CEAA review panel to be conducted as  
23 a joint review panel operating pursuant to the CEAA  
24 and the NSEA in the case of the Whites Point EA.

25                   Now, harmonization results in

1 improved efficiency, including the sharing of  
2 expertise by each level of government, elimination  
3 of duplication in information gathering, and the  
4 ability of both governments to base decision-making  
5 on the results of one information-gathering  
6 process.

7                   Now, the benefits of harmonization  
8 were not lost on the claimants in this case. In  
9 fact, in their very first meeting with federal  
10 officials, they asked for comment on whether or not  
11 the federal and provincial EA can be done as a  
12 joint effort.

13                   Now, the answer, as we know, was  
14 indeed "yes".

15                   So with the basic factual  
16 underpinnings of the Whites Point EA that I have  
17 gone over and key features of the EA regimes in  
18 mind, let's now turn to some of the key points and  
19 decisions that were made in the Whites Point EA  
20 process.

21                   Now, the first step in any EA  
22 process is for the proponent to inform government  
23 officials of what it proposes to do. The  
24 claimants' project manager, Paul Buxton, did this  
25 by submitting this rudimentary draft project

1 description to NSDEL on September 30, 2002.

2                   Now, this draft spoke of a  
3 land-based construction, which was the quarry, and  
4 a marine-based construction, which was the marine  
5 terminal.

6                   It also made clear that quarrying  
7 would last from 30 to 50 years with approximately  
8 10 acres or 4 hectares of quarry being opened each  
9 year. It also made clear that 40 to 50 shipments  
10 of crushed aggregate would be shipped out of the  
11 Digby Neck each year in ships measuring up to 225  
12 metres in length.

13                   Now, the submission of this draft  
14 initiated a series of steps culminating in  
15 government decisions regarding the EA of the Whites  
16 Point project.

17                   Nova Scotia and federal officials  
18 met to discuss the proposal on December 3rd, 2002,  
19 and even though they were just presented with a  
20 draft project description, it was immediately  
21 apparent that the proposed project engaged several  
22 EA considerations which were set out in the DFO  
23 email that you see before you prepared the day  
24 after this meeting.

25                   First, the Navigable Waters

1 Protection Permit required for the marine terminal  
2 would trigger an EA under the Canadian  
3 Environmental Assessment Act, and the size of the  
4 marine terminal met the threshold under the  
5 comprehensive study list regulations the project  
6 would require at the very least a comprehensive  
7 study.

8                   Second, due to the size, extent,  
9 duration, environmental issues and extensive public  
10 concern over the proposal, DFO may wish to kick the  
11 project up to a panel review.

12                   Third, as an EA would be required  
13 under provincial and federal law, given the  
14 benefits to be realized by harmonization that I  
15 have described earlier, a joint review option was  
16 being explored.

17                   Now, these were the observations  
18 of the on-the-ground officials at the very first  
19 intergovernmental meeting on the project on  
20 December 3rd, 2002.

21                   Five months later, after the  
22 proponents filed an application for the marine  
23 terminal, after it was determined that the marine  
24 terminal application triggered an EA under the  
25 CEAA, after the proponents filed a complete project

1 description making it clear the project would also  
2 require an EA under the NSEA due to the size of the  
3 quarry, after visits to the project site were  
4 conducted and preliminary views on the potential  
5 environmental effects of the project were  
6 formulated, and after the outcry of public concern  
7 over the project continued to mount, all of those  
8 initial observations that I just went over were  
9 considered and analyzed and discussed, debated  
10 within both the Nova Scotia and federal  
11 governments, and given the project's potential  
12 environmental effects, the public concerns these  
13 engaged and the requirement for an EA at both  
14 provincial and federal levels, senior officials in  
15 NSDEL and DFO recommended to their respective  
16 ministers that the project should be assessed by a  
17 review panel conducted jointly under the Nova  
18 Scotia and federal EA regimes.

19                   The wheels for a review panel were  
20 then set in motion when DFO Minister Robert  
21 Thibault referred the project to the federal  
22 Minister of the Environment, David Anderson, for  
23 referral to a review panel on June 26th, 2003.

24                   And just over a month later,  
25 Minister Anderson confirmed the Whites Point

1 project would be assessed by a Joint Review Panel.

2 Now, I want to pause for a moment  
3 and take you back to one of those overarching  
4 considerations that I noted at the outset,  
5 specifically, how the claimants' case is long on  
6 dramatic assertions, but short on facts.

7 I am pausing here to do so,  
8 because one of the claimants' primary complaints  
9 appears to be that the Whites Point project was  
10 referred to a Joint Review Panel.

11 Now, instead of acknowledging how  
12 and why the facts that I have just described  
13 warranted the referral, the claimants' take is that  
14 the referral was unjustified and an element of the  
15 conspiracy to ensure the failure of the Whites  
16 Point project.

17 Many other allegations here are  
18 directed at the DFO minister that I just mentioned,  
19 Robert Thibault, who made the referral. If there  
20 is central bad guy in the claimant's story, its  
21 Minister Thibault.

22 The claimants' pleadings are  
23 loaded with inflammatory allegations against him,  
24 that his office abused its power by interfering in  
25 the work of government officials working on the EA,



1 that he used his position to make the EA take as  
2 much time and be as difficult and as expensive as  
3 possible.

4 But this is nothing more than  
5 unsubstantiated spin, and the spin is not borne out  
6 by the facts, and I want to cite but two examples  
7 here to provide you of a flavour of their approach.

8 At paragraph 759 of the claimants'  
9 memorial, they allege:

10 "The Minister of Fisheries  
11 and Oceans was advised by his  
12 officials that the Department  
13 did not have the legislative  
14 authority to carry out the  
15 Minister's desire to control  
16 this environmental review."

17 Now, here we have DFO officials  
18 apparently telling their Minister to back off, that  
19 he didn't have the authority to allegedly control  
20 the EA, but when you look at the document cited in  
21 support, the June 25th, 2003 briefing note DFO  
22 prepared recommending referral of the EA to a  
23 review panel, it says nothing of the sort.

24 This document doesn't speak to any  
25 desire by Minister Thibault to "control this

1 environmental review", and it most certainly  
2 doesn't advise him that he didn't have the  
3 authority to carry out such a desire.

4                   What the note did was explain the  
5 reasons why the Whites Point project could be  
6 referred to a review panel and, in light of these  
7 facts, it recommended to Minister Thibault, that  
8 such a referral could be made. It doesn't come  
9 close to supporting the claimants' loaded language  
10 and nor do the facts of this case.

11                   If Minister Thibault really wanted  
12 to control the review, why would he refer it to an  
13 independent review panel over which he would have  
14 no control?

15                   Take a look now at paragraph 500  
16 of the claimant's memorial where they allege it was  
17 Minister Thibault who used his political position  
18 to deceive the Minister of Environment to look into  
19 a marine terminal that would harmfully alter,  
20 disrupt or destroy fish habitat, destroy fish and  
21 interfere substantially with navigation.

22                   Now, here we have more loaded  
23 language alleging that Minister Thibault used his  
24 political position to deceive another cabinet  
25 minister in connection with the Whites Point EA.

1                   But in support the claimants' cite  
2 to Minister Thibault's June 26th, 2003 letter to  
3 the Minister of the Environment, referring the  
4 Whites Point project for referral to a review  
5 panel.

6                   Now, you can see the letter on the  
7 screen. It is not clear how this letter supports  
8 the allegation that Minister Thibault used his  
9 political position to carry out some deception or  
10 even what the deception was. It is a standard  
11 letter explaining the potential effects of the  
12 Whites Point project and why these warranted  
13 referral of the project to a review panel.

14                   Now, I will note at this point  
15 that in light of all of these allegations in the  
16 claimants' memorial, Mr. Thibault, who is now a  
17 private citizen and no longer serves as a member of  
18 parliament, was compelled to file an affidavit in  
19 this arbitration to explain his role in decision  
20 making in the Whites Point EA and to address the  
21 claimants' absurd account of his involvement.

22                   And here is what Robert Thibault  
23 has sworn under oath to be true. First, in  
24 paragraph 14 of his affidavit:

25                   "I wanted to be informed

1 about the Whites Point EA for  
2 a simple reason. This was a  
3 major development in my  
4 electoral district and I  
5 wanted to make sure that I  
6 stayed informed of events so  
7 that neither I nor my staff  
8 would be surprised by claims  
9 being made about the project  
10 by my constituents. I was,  
11 however, at all times aware  
12 of the need to let officials  
13 complete their work. At no  
14 time did I ever direct or  
15 otherwise interfere with the  
16 work of these officials, nor  
17 did I ever make a decision  
18 before they requested one  
19 from me."

20 In paragraph 15, Mr. Thibault  
21 states that he:

22 "... never provided any  
23 direction to officials  
24 regarding blasting on the  
25 proposed quarry, the scope of

1 the project or the assessment  
2 or the type of assessment  
3 that was most appropriate,  
4 nor did I, nor to the best of  
5 my knowledge, anyone on my  
6 staff ever request that any  
7 decision on the project be  
8 delayed or dealt with in a  
9 manner that was different  
10 than the normal course. In  
11 fact, I am at a loss to  
12 understand why anyone would  
13 believe that slowing down the  
14 process would be in my  
15 interest. There was nothing  
16 to be gained by my avoiding  
17 making a decision on the  
18 project, and I certainly  
19 never expressed that there  
20 would be." [As read]

21 In paragraph 16, Robert Thibault  
22 states:

23 "The only comment that I  
24 made, both to my own staff  
25 and publicly to the press,

1                   was that I would not use the  
2                   Fisheries Act or the CEAA to  
3                   'kill the project'. I made  
4                   clear that my only interest  
5                   was in a full and fair  
6                   environmental assessment of  
7                   the proposal that strictly  
8                   complied with the rules, did  
9                   not cut any corners and  
10                  allowed for meaningful public  
11                  participation."

12                               Then finally in paragraph 19,  
13   Mr. Thibault states that:

14                               "While it was not the reason  
15                               that I agreed to make the  
16                               referral, I also believed  
17                               that the independent nature  
18                               of a review panel was the  
19                               best way to assess a  
20                               contentious project located  
21                               in my riding and directly  
22                               affecting my constituents. I  
23                               was certainly aware that if  
24                               DFO had conducted the  
25                               assessment itself, there

1                   might have been allegations  
2                   of bias because of my role as  
3                   the local MP, regardless of  
4                   whether the conclusion came  
5                   out in favour of or against  
6                   the proposed development."

7                   Now, given the serious nature of  
8                   the claimants' allegations and their apparent  
9                   importance to this claim, we are puzzled as to why,  
10                  of all of the fact witnesses that have testified on  
11                  behalf of Canada in the arbitration, the claimants  
12                  chose not to call Robert Thibault to be  
13                  cross-examined. This evidence that I have just  
14                  recited stands unchallenged.

15                  Whatever the claimants' reasons,  
16                  all that they have put before you are the type of  
17                  unsubstantiated and misleading allegations that I  
18                  have just described, allegations that don't stand  
19                  against Mr. Thibault's sworn testimony in his  
20                  affidavit, testimony that he was prepared to defend  
21                  in this forum.

22                  Now, let's move back to the next  
23                  steps in the Whites Point environmental assessment  
24                  process. This is the establishment of the Joint  
25                  Review Panel.

1                   With the decision that the Whites  
2 Point EA would be referred to a panel review, NSDEL  
3 and CEAA officials set about establishing the JRP  
4 by preparing the draft Joint Review Panel agreement  
5 and terms of reference.

6                   Now, the JRP agreement appears on  
7 the screen, and we will be looking at it in the  
8 coming days, but for now I will just note that this  
9 document serves as a type of constitution for the  
10 Joint Review Panel.

11                   The JRP agreement itself explains  
12 the legislative basis for the review and the  
13 requirements of the panel report which, as the  
14 product of a joint review, had to satisfy the  
15 information-gathering requirements of the NSEA and  
16 the CEAA.

17                   Now, the terms of reference which  
18 are attached to the JRP agreement, they set the  
19 parameters of the review, including the scope of  
20 the project to be assessed and the factors to be  
21 considered.

22                   Now, again, these factors had to  
23 generate sufficient information to meet the  
24 decision-making requirements of each jurisdiction.  
25 The public and the proponent were given the



1 opportunity to comment on the draft JRP agreement  
2 and terms of reference in the fall of 2003, but  
3 before it could be finalized, the Bilcon side of  
4 the Global Quarry Products Partnership requested a  
5 delay in the constitution of the JRP in February of  
6 2004 in order to resolve corporate issues relating  
7 to its partnership with Nova Stone.

8                   Now, these issues were resolved  
9 five months later when Bilcon notified officials  
10 that its partnership with Nova Stone had been  
11 dissolved and that it would be the sole proponent  
12 of the project.

13                   So the JRP agreement was then  
14 updated, and both it and the panellists that were  
15 appointed to the Whites Point JRP were announced to  
16 the public on November 5th, 2004.

17                   Now, here I want to pause again to  
18 highlight the claimants' take on the three JRP  
19 members, which is just as negative as their take on  
20 Minister Thibault. The claimants allege that the  
21 panel was not comprised of persons with the  
22 requisite professional credentials and experience.

23                   They further allege that the  
24 Governments of Nova Scotia and Canada had the  
25 political purpose of preventing the export of

1 Canadian aggregate to the United States and that to  
2 implement their scheme, they appointed to the JRP  
3 persons known to be biased anti-development  
4 activists.

5 Now, here are more fantastic  
6 assertions, but no facts to substantiate the  
7 existence of a scheme, nor that the panellists were  
8 biased anti-development activists.

9 What the facts do disclose is that  
10 the JRP members were qualified, they were  
11 unbiased, and they were possessed of the required  
12 expertise.

13 They were, first, Dr. Robert  
14 Fournier, a professor of oceanography at Halifax's  
15 Dalhousie University. Now, Dr. Fournier was  
16 appointed chair of the Whites Point JRP. He had  
17 served several years earlier as the chair of the  
18 five-member Joint Review Panel that assessed the  
19 Sable Gas projects.

20 Now, the Sable Gas projects were  
21 proposed by a consortium of US investors and they  
22 entailed the collection and the processing and  
23 shipment by pipeline of natural gas from Nova  
24 Scotia to US markets.

25 This multi-jurisdictional EA

1 process included almost 60 days of public hearings  
2 and culminated in the Sable Gas JRP's  
3 recommendation for project approval.

4                   Canada's expert witness in this  
5 arbitration, Lawrence Smith, who sits behind me,  
6 served as lead counsel for the proponent in the  
7 Sable Gas EA, and he will be available later on to  
8 answer any questions that you might have about his  
9 experiences in a JRP process chaired by  
10 Dr. Fournier.

11                   Now, the Whites Point JRP also  
12 included Dr. Gunter Muecke, a professor emeritus in  
13 geochemistry, geology and environmental studies at  
14 Dalhousie University.

15                   Dr. Muecke was a former member of  
16 the JRP established for the EA of the Kelly's  
17 Mountain Quarry and Marine Terminal in 1991. This  
18 is a Nova Scotia project similar to the Whites  
19 Point project that is described in the affidavit of  
20 Neil Bellefontaine, one of Canada's witnesses that  
21 we will be hearing from next week.

22                   The JRP also included Dr. Jill  
23 Grant, the director of Dalhousie's school of  
24 planning. Now, as is explained in the affidavit of  
25 Christopher Daly, Dr. Grant's expertise, which

1 included the cultural context of community  
2 planning, social impact assessment and site  
3 planning for sustainable development, was relevant  
4 to the potential social-economic effects of the  
5 project which, as we have seen, would be an  
6 important component of this environmental  
7 assessment..

8                   Now, these three individuals had  
9 the requisite experience to serve, and in stark  
10 contrast to what the claimants now plead, just  
11 three weeks after their appointment, Mr. Buxton,  
12 Bilcon's project manager, is recorded to have  
13 stated in a public meeting that if "they", that is  
14 Bilcon, had the option to choose, they may well  
15 have chosen these professionals.

16                   Now, moving on, once the JRP was  
17 constituted, it then took the required steps to  
18 engage the public and gather information from  
19 Bilcon on the potential environmental effects of  
20 the Whites Point project.

21                   I want to highlight some of the  
22 key steps in the JRP's process, but I pause here  
23 briefly to note that Bilcon chose not to retain a  
24 leading environmental consulting firm that would  
25 typically be called upon to represent a proponent

1 by this point in the process.

2 It, rather, chose to conduct the  
3 EA through its project manager, Mr. Buxton, who,  
4 with respect, doesn't appear to have had past  
5 experience in preparing an EA for a proponent whose  
6 project was to be assessed by a Joint Review Panel.

7 Canada's expert, Lawrence Smith,  
8 is an EA practitioner who has represented multiple  
9 proponents in JRP proceedings, and he has described  
10 the apparent shortcomings in Bilcon's approach in  
11 his first expert report and how these impacted the  
12 Whites Point EA.

13 Now, turning to the process  
14 itself, at each and every point of this process,  
15 Bilcon was afforded adequate notice and due process  
16 and it was treated fairly.

17 Within one week of being  
18 announced, the JRP released draft environmental  
19 impact statement guidelines for Bilcon's review and  
20 for public comment. Now, EIS guidelines are  
21 detailed instructions on the information regarding  
22 the environmental effects of a proposed project  
23 that a proponent is to provide in its environmental  
24 impact statement or EIS.

25 The EIS is the cornerstone

1 document used in the JRP process. EIS guidelines  
2 are naturally tailored to the issues engaged by the  
3 project and environment in issue, in addition to  
4 the informational requirements of the involved  
5 jurisdictions.

6                   From January 6th to 9th 2005, the  
7 JRP held scoping meetings at four locations in  
8 southwest Nova Scotia to facilitate public comments  
9 on the draft EIS guidelines. Now, Bilcon was  
10 welcome to participate in these meetings.

11                   Three months later the JRP issued  
12 the final EIS guidelines, giving Bilcon notice of  
13 the issues its EIS would have to address. The  
14 final EIS guidelines provided Bilcon was to address  
15 both the biological impacts of the project, but  
16 also its human impacts, including its impact on  
17 factors such as community profile, the economy,  
18 human health and community wellness, and social and  
19 cultural patterns.

20                   Now, these latter requirements,  
21 again, aren't surprising given that the NSEA and  
22 CEAA require an EA to consider effects of the  
23 project on socioeconomic conditions.

24                   Now, in April 26th, 2006, after  
25 almost 13 months, Bilcon filed its environmental

1 impact statement, and this was followed by a period  
2 during which members of the public and government  
3 officials commented on Bilcon's EIS and during  
4 which the JRP issued information requests on issues  
5 not adequately addressed in the EIS.

6                   Bilcon was given full opportunity  
7 to respond to the public comments and to the JRP's  
8 information requests, many of which it simply  
9 ignored.

10                   It was also during this period  
11 that Bilcon, recognizing that it required some  
12 assistance in the process, retained AMEC, which was  
13 an international environmental consulting firm, to  
14 assist Mr. Buxton with the process.

15                   Finally, from June 16th to 30th,  
16 2007, the JRP held public hearings in Digby, Nova  
17 Scotia, hearings at which Bilcon and its  
18 representatives were again able to make the  
19 presentations they deemed necessary and to ask  
20 questions of every other presenter.

21                   Now, consistent with their take on  
22 every decision made in the Whites Point EA, the  
23 claimants are extremely critical of the Joint  
24 Review Panel, alleging that it imposed capricious  
25 and arbitrary demands on Bilcon.

1                   Now, the requirements Bilcon was  
2 asked to fulfil were neither arbitrary nor  
3 capricious, but were no doubt perceived as such by  
4 a proponent that does not appear to have  
5 appreciated the nature of the process in which it  
6 was engaged. The record reveals a proponent that  
7 assumed it was in a mere permitting process, that  
8 it was entitled to a permit, when at the end of the  
9 day and on the basis of information gathered during  
10 the EA, a decision had to be made as to whether or  
11 not the project should be allowed to proceed.

12                   And their flawed understanding of  
13 the process is well documented. For example, just  
14 a few weeks after the JRP was appointed, the  
15 minutes of a public meeting provide that Mr. Buxton  
16 explained the following. Mr. Buxton noted this  
17 project is a legal project and there is nothing in  
18 law to prevent this project from going ahead.

19                   He noted there are hoops to jump  
20 through and satisfy to obtain permits, but there is  
21 nothing to say that the quarry can't proceed at  
22 Whites Cove.

23                   And then in a later presentation  
24 to four ministers of the government of Nova Scotia,  
25 Bilcon explained its view that the federal and



1 provincial environmental assessment acts are  
2 clearly in place to determine the specific terms  
3 and conditions which must be adhered to by a  
4 proponent for the project to receive permitting.

5                   Now, these assertions are simply  
6 not correct. An EA conducted under the federal or  
7 provincial EA regimes is not just a mere permitting  
8 process. It is, rather, used to gather information  
9 about the expected future consequences of a project  
10 to allow for government decision-makers to make an  
11 informed decision as to whether they should take  
12 action that would allow the project, as its been  
13 proposed, to proceed.

14                   But if these are the types of  
15 assumptions that the claimants took into the EA  
16 process, if in their minds the EA was nothing more  
17 than hoops to jump through to get a permit or that  
18 a proponent just needed to cobble something  
19 together to satisfy the system, well, it is not  
20 surprising that they take issue with what was  
21 required of them, but this doesn't mean that their  
22 complaints or characterizations of the process are  
23 either accurate or justified.

24                   Now, after the JRP completed its  
25 information-gathering, they prepared a report

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1 detailing its recommendations to government  
2 decision-makers.

3 I pause here to highlight that the  
4 record shows the JRP to have been hindered in its  
5 efforts by the quality of the information that had  
6 been provided by Bilcon. In its report, the JRP  
7 noted that:

8 "In many ways the information  
9 provided by the Proponent was  
10 inadequate for the  
11 requirements of an  
12 environmental assessment,  
13 that the Proponent declined  
14 to provide some of the  
15 information requested by the  
16 Panel... and that a more  
17 adequate EIS document and  
18 responses to information  
19 requests would have  
20 facilitated the review  
21 process."

22 And that:

23 "The accumulation of concerns  
24 about adequacy leads the  
25 Panel to question the

1 Project."

2 Now the JRP issued its report on  
3 October 22nd, 2007. And, as we know, it  
4 recommended that the Whites Point project should  
5 not be approved.

6 Its recommendation was based on  
7 the following conclusions: That the project would  
8 have an adverse effect on the people, communities  
9 and economy of Digby Neck and Islands, whose core  
10 values support the principles of sustainable  
11 development based on the quality of the local  
12 environment; that the project would undermine  
13 community-driven economic development planning and  
14 threaten an area recognized and celebrated as a  
15 model of sustainability by local, regional,  
16 national and international authorities; and that  
17 the imposition of a major long-term industrial site  
18 would introduce a significant and irreversible  
19 change to Digby Neck and Islands, resulting in  
20 sufficiently important changes to the community's  
21 core's values to warrant the Panel assessing them  
22 as a Significant Adverse Environmental Effect that  
23 cannot be mitigated.

24 The claimants and their experts  
25 make much of the three words "community's core

1 values" into these pleadings. They have  
2 characterized them as a fabrication over which  
3 Bilcon was given no notice. But even the  
4 claimants' expert, Mr. Estrin, agrees that effects  
5 on a community's core values are socioeconomic  
6 effects, and the passages I just cited from the  
7 report make it clear that the JRP concluded the  
8 Whites Point project would undermine the very  
9 socioeconomic conditions existing on the Digby Neck  
10 that I described earlier, and that given the  
11 fundamental inconsistency between the project and  
12 the local environment, there was nothing that could  
13 be done to mitigate this significant adverse  
14 environmental effect.

15                   This was a factor that the JRP was  
16 entitled and, indeed, required to consider under  
17 both the NSEA and the CEAA, and its recommendation  
18 to reject the project on this ground was made well  
19 within its mandate.

20                   Now, as I have explained, in every  
21 EA a decision has to be made on the basis of the  
22 information that's been gathered as to whether  
23 permits should be issued or approvals granted that  
24 would allow the project or activity in question to  
25 proceed.

1                   In the case of the Whites Point  
2 EA, as two governments were carrying out the EAs,  
3 two decisions had to be made.

4                   These decisions were independent  
5 of one another, in that each government had its own  
6 decision to make in accordance with its own  
7 legislation.

8                   However, the ability of the Whites  
9 Point project to proceed was dependent on both  
10 governments deciding that it should be approved.

11                   Nova Scotia made its decision  
12 first. On November 20th, 2007, Mark Parent, the  
13 Minister of NSDEL, notified Mr. Buxton in a  
14 personal phone call and in writing that he would be  
15 accepting the JRP's recommendation.

16                   Now, this decision rendered the  
17 federal decision that had to be made moot as the  
18 project could not proceed at this point under Nova  
19 Scotia law.

20                   But as the federal government was  
21 still required to respond to the report under the  
22 CEAA, it did so a month later, confirming that  
23 Canada had accepted the recommendations of the  
24 Joint Review Panel.

25                   Now, as they have with the rest of

1 their story, the claimants allege these decisions  
2 were the final act in a scheme to bring about the  
3 predetermined outcome that the Whites Point project  
4 was to fail, but if such a scheme existed, it was  
5 both multi-jurisdictional and incredibly  
6 bipartisan. By this point, the process had spanned  
7 five years and several provincial, and federal  
8 governments led by different ministers from  
9 different political parties.

10                   And as implausible as such a  
11 scheme is, the claimants' complaints about this  
12 phase of the EA don't detract from the fact that  
13 the decisions fell squarely within each  
14 government's mandate and were reasonable in light  
15 of the panel's recommendation.

16                   Now, what I have provided to you  
17 thus far is an overview of the salient facts of the  
18 Whites Point EA, and it is on the basis of these  
19 facts that you are going to need to decide the  
20 claimants' claims.

21                   Before turning to these claims,  
22 though, I want to revert to my comments at the  
23 outset regarding those overarching considerations  
24 that we would like you to keep in mind, in  
25 particular, my comment that the claimants focussed

1 on a whole host of matters that need not be  
2 debated, as they are irrelevant to the outcome of  
3 the EA process that I just described.

4 I want to briefly touch on four  
5 here. First, we anticipate that there will be much  
6 focus on decisions made regarding a 3.9 hectare  
7 quarry for which Nova Stone, Bilcon's Canadian  
8 partner, was a proponent at the outset of plans for  
9 the Whites Point project.

10 Now, it is important to note that  
11 Mr. Nash's comments today regarding blasting  
12 setbacks and Mr. Buxton's interactions with DFO in  
13 2002 and 2003 were in relation to this 3.9 hectare  
14 quarry. In many instances, he confused and  
15 conflated decisions and comments made in respect of  
16 the 3.9 hectare quarry with decisions and comments  
17 made in respect of the Whites Point project, in  
18 particular, in slides 58 to 60 of his presentation.

19 Now, Nova Stone applied for the  
20 3.9 hectare quarry separately from the larger  
21 Whites Point project. As this map shows, the 3.9  
22 hectare quarry was contained within the property  
23 that had been leased for the Whites Point project  
24 site.

25 The claimants expend so much time

1 and effort complaining about decisions made  
2 regarding the 3.9 hectare quarry that one might  
3 think this was the project they had proposed. It  
4 was not.

5                   What it was was a small operation  
6 for which Nova Stone obtained an industrial  
7 approval from NSDEL on April 30th, 2002, well  
8 before the draft project description was filed for  
9 the larger project.

10                   They did so because quarries under  
11 four hectares are not undertakings under the NSEA  
12 that require a EA. They only require an industrial  
13 approval.

14                   Now, essentially the claimants  
15 wanted to get a head start through Nova Stone's 3.9  
16 hectare quarry in developing the Whites Point  
17 project.

18                   In fact, the final project  
19 description for the Whites Point project showed  
20 Nova Stone's 3.9 hectare quarry to be entirely  
21 contained within the larger Whites Point project,  
22 and the site of infrastructure for the larger  
23 project including a sedimentation retention pond  
24 and quarry buildings.

25                   The claimants advance a number of



1 meritless allegations over this 3.9 hectare quarry.  
2 They challenge DFO's involvement in the review of  
3 blasting on the 3.9 hectare quarry, notwithstanding  
4 the potential impact of this activity on fisheries  
5 issues.

6                   They complain that Nova Stone  
7 wasn't allowed to operate the 3.9 hectare quarry,  
8 notwithstanding it was on the very land and  
9 entailed the very activities to be assessed by the  
10 JRP in the EA of the Whites Point project.

11                   They claim their inability to  
12 conduct a test blast on the 3.9 hectare quarry  
13 denied them data needed for the JRP process,  
14 notwithstanding that they didn't need an  
15 operational quarry to conduct a simple test blast.

16                   So while these allegations are all  
17 groundless, they are also irrelevant to what you  
18 have to decide, because the claimants didn't come  
19 to Nova Scotia to operate a 3.9 hectare quarry.  
20 They came to operate the Whites Point project.

21                   Now, the lack of importance of the  
22 3.9 hectare quarry to the realization of their plan  
23 is no better illustrated by the fact that they  
24 chose to abandon the 3.9 hectare quarry on May 1st,  
25 2004, three years before the JRP hearings, as part

1 of the corporate reorganization that I have alluded  
2 to earlier.

3                   Now, in the end, also, the JRP's  
4 recommendation that the project should not be  
5 approved, it wasn't related to data that could be  
6 derived from conducting a test blast on the 3.9  
7 hectare quarry site. It was based on the JRP's  
8 findings regarding the project's significant  
9 adverse environmental effects, including its  
10 inconsistency with socioeconomic development on the  
11 Digby Neck.

12                   So in the coming days, please ask  
13 yourselves: Does the issue of the 3.9 hectare  
14 quarry matter in the end? We say that the answer  
15 is "no" and that much paper and hearing time could  
16 have been saved had the claimants not fixated so  
17 much on this issue.

18                   Now, another debate we anticipate  
19 in the coming days, and Mr. Nash has confirmed it  
20 for us this morning, will relate to DFO's  
21 preliminary decision in April of 2003 that the  
22 scope of the Whites Point project for the purposes  
23 of the EA would include the marine terminal and the  
24 quarry.

25                   The claimants challenge this

1 decision on the misguided notion that DFO had no  
2 authority over the quarry element of the Whites  
3 Point project, and, hence, no jurisdiction to  
4 include it in the scope of project for the purposes  
5 of the EA.

6                   The claimants characterize DFO's  
7 scope of project determination as unusual and  
8 unlawful. They are wrong. DFO's scope of project  
9 decision was both rational and legally correct, but  
10 the most apt characterization for the decision in  
11 this case is, in our view, irrelevant.

12                   Why? Because no matter what, the  
13 Whites Point project required EAs under both the  
14 NSEA and the CEAA. Given the harmonized approach  
15 that was to be taken, the scope of project for the  
16 EA had to be broad enough to meet the informational  
17 needs of both jurisdictions.

18                   Further and finally, in the end,  
19 the scope of project was not decided by DFO. It  
20 was decided by the Nova Scotia Minister of NSDEL  
21 and the federal Minister of the Environment in the  
22 agreement establishing the JRP.

23                   Now, the claimants and their  
24 experts also challenge how the Joint Review Panel  
25 conducted the EA process, for example, that it

1 misapplied EA concepts like the precautionary  
2 principle, adaptive management and cumulative  
3 environmental effects. Now, again, we disagree  
4 with all of these claims.

5                   Canada's expert, Lawrence Smith,  
6 when he testifies, can explain for you while  
7 they're all unfounded, but they are also simply not  
8 debates on which we need to spend hearing time,  
9 because no matter how they might be resolved, the  
10 claimants provide no explanation that but for these  
11 issues, the outcome of the Whites Point EA would  
12 have been different.

13                   Finally, the claimants challenge  
14 the constitutionality of the federal government's  
15 decision to accept the Joint Review Panel's  
16 recommendation.

17                   While we are of the view these  
18 arguments have no basis, they are again irrelevant,  
19 as Nova Scotia's prior rejection of the Whites  
20 Point project meant that, no matter what, the  
21 project could not proceed.

22                   Now, let's turn to the legal  
23 issues that the Tribunal will have to decide in  
24 this arbitration. They fall under three general  
25 headings: First, the jurisdictional bars to the

1 claimants' claims; second, the claim that Canada  
2 violated its minimum standard of treatment  
3 obligation under Article 1105; and, third, the  
4 claim that Canada violated its national treatment  
5 and MFN obligations under Articles 1102 and 1103.

6                   Now, the first key legal issue  
7 that the Tribunal will have to address is whether  
8 it has jurisdiction over a number of claims in  
9 light of certain threshold provisions in the NAFTA,  
10 in particular, claims relating to Nova Stone's 3.9  
11 hectare quarry, claims that are time barred, claims  
12 regarding the JRP's administration of the EA, and  
13 claims pertaining to measures that didn't cause the  
14 claimants' damage.

15                   We will review each of these.  
16 Let's first consider measures relating to Nova  
17 Stone's 3.9 hectare quarry.

18                   Now, I have already explained why  
19 the claimants' complaints here are really  
20 irrelevant to what you have to decide, but they  
21 also face jurisdictional bars.

22                   First, under NAFTA Article 1101,  
23 paragraph 1, a tribunal only has jurisdiction to  
24 consider measures relating to investors of another  
25 party or investments of investors of another party.

1                    Measures that don't relate to the  
2 claimants or their investments cannot be considered  
3 by a NAFTA tribunal.

4                    Now, the claimants take great  
5 liberties with the facts here. They are fond of  
6 asserting that the industrial approval issued for  
7 the 3.9 hectare quarry was Bilcon's. It was not.

8                    As we can see, it was Nova  
9 Stone's. Nova Stone applied for and was issued the  
10 industrial approval for the 3.9 hectare quarry, and  
11 under Nova Scotia law, it couldn't be transferred  
12 without Ministerial consent.

13                    So any measures relating to the  
14 industrial approval related to Nova Stone. The  
15 fact that Bilcon entered into a business  
16 relationship with Nova Stone after issuance of the  
17 approval doesn't mean that measures taken with  
18 regards to the 3.9 hectare quarry related to  
19 Bilcon.

20                    As measures relating to Nova  
21 Stone's industrial approval did not relate to the  
22 claimants, they are beyond the Tribunal's  
23 jurisdiction.

24                    A second jurisdictional bar to the  
25 Tribunal's consideration of certain measures that

1 the claimants challenge is NAFTA Article 1116,  
2 paragraph 2, which provides for a time bar to  
3 certain claims in this case.

4 Article 1116, paragraph 2,  
5 specifically provides that a claimant may not make  
6 a claim if more than three years has elapsed from  
7 the date on which it first had knowledge of the  
8 alleged breach and resulting damage.

9 Let me recap some key dates here  
10 that are relevant to the three-year time bar under  
11 Article 1116, paragraph 2.

12 First, the disputing parties have  
13 agreed that the commencement date of this  
14 arbitration was June 17th, 2008. As such, the  
15 Tribunal doesn't have jurisdiction to entertain  
16 claims relating to measures for which the claimants  
17 had knowledge of the alleged breach and resultant  
18 loss more than three years prior to this date,  
19 i.e., prior to June 17th, 2005.

20 And there are several such  
21 measures. First, the evidence is overwhelming that  
22 for any and all measures relating to Nova Stone's  
23 3.9 hectare quarry, the claimants first knew of any  
24 alleged breach and loss incurred well in advance of  
25 June 17th, 2005.

1                   In fact, as I noted, the 3.9  
2 hectare quarry was voluntarily abandoned as of May  
3 1st, 2004, 13 months prior to the June 17, 2005  
4 cutoff date.

5                   No measures could have been taken  
6 with respect to the 3.9 hectare quarry after May  
7 1st, 2004, let alone after June 17, 2005, and no  
8 measures that had been taken with respect to the  
9 3.9 hectare quarry could have possibly continued  
10 into the three-year time period, because this  
11 project was a dead issue by May 1st, 2004.

12                   Several other claims are similarly  
13 time barred, including the claimants' claim  
14 pertaining to Minister Thibault's June 26, 2003  
15 referral of the Whites Point project to a review  
16 panel, a measure that pre-dated the time bar cutoff  
17 by 24 months.

18                   The claimants' claims pertaining  
19 to DFO's April 14th, 2003 determinations that the  
20 Whites Point project would require, at the very  
21 least, a comprehensive study and that the quarry  
22 element of the project should be included in the  
23 scope of project for the purposes of the EA are  
24 similarly time barred. They are measures that  
25 pre-dated the time bar cutoff by 26 months.



1                   Now, none of these measures  
2 warrant a finding of a NAFTA breach in the first  
3 place, but putting this issue aside, each was known  
4 to the claimants prior to June 17, 2005, and to the  
5 extent that they resulted in the claimants  
6 incurring additional cost or expense, well, the  
7 claimants knew this as well before June 17, 2005.

8                   These claims are accordingly  
9 time-barred.

10                  Now, as I have noted, the  
11 claimants also challenge how the Whites Point JRP  
12 conducted the EA, but the acts of the Joint Review  
13 Panel, a non-governmental body composed of private  
14 citizens, are not measures adopted or maintained by  
15 a party, as required by NAFTA Article 1101,  
16 paragraph 1, and, hence, are not attributable to  
17 Canada in international law.

18                  Now, the claimants' response to  
19 this jurisdictional bar has been, to say the least,  
20 confused. They have alleged that the JRP is an  
21 organ of Canada, that it exercised delegated  
22 governmental authority, and that it acted under  
23 Canada's instructions.

24                  Now, each allegation ignores the  
25 fundamental nature of a JRP and the facts of this

1 case. The JRP is and was not an organ of Canada.  
2 The JRP was not exercising delegated governmental  
3 authority with respect to the acts that the  
4 claimants allege are NAFTA breaches, nor did the  
5 JRP act under Canada's control or instructions at  
6 any time.

7                   Its acts are accordingly not  
8 attributable to Canada for the purposes of this  
9 case.

10                   Finally, the claimants challenge  
11 governmental acts that, by virtue of acts preceding  
12 them, were incapable of causing them any alleged  
13 damage. As NAFTA Article 1116, paragraph 1  
14 provides that a claim may be submitted only where a  
15 claimant has incurred loss or damage by reason of,  
16 or arising out of, an alleged breach, measures not  
17 capable of causing loss or damage are beyond the  
18 Tribunal's jurisdiction.

19                   Now, here we are referring to the  
20 federal government's December 17th, 2007 acceptance  
21 of the JRP's recommendation. As I noted earlier,  
22 Nova Stone's decision to reject the Whites Point  
23 project one month earlier rendered the federal  
24 decision moot.

25                   But it also meant that no alleged

1 loss or damaged could possibly flow from the  
2 federal decision as required by Article 1116,  
3 paragraph 1.

4                   Let's turn briefly now to the  
5 substantive failings of the claimants' claims.  
6 First, the claimants allege that governmental  
7 measures taken in the Whites Point EA and the acts  
8 of the JRP violated Canada's minimum standard of  
9 treatment obligation under NAFTA Article 1105.

10                   This article provides that:

11                   "Each party shall accord to  
12 investments of investors of  
13 another party treatment in  
14 accordance with international  
15 law, including fair and  
16 equitable treatment and full  
17 protection and security."

18                   With respect to the claimants'  
19 Article 1105 claim, for now we simply wish to make  
20 three points clear. First, the FTC note, the Free  
21 Trade Commission's note of interpretation of  
22 Article 1105, defines the substantive content of  
23 the obligation by providing that the obligation  
24 prescribes the customary international law minimum  
25 standard of treatment of aliens as the minimum

1 treatment of treatment to be afforded to  
2 investments of investors of another party.

3 Now, the claimants have advanced a  
4 number of novel theories as to why this Tribunal  
5 should be the first to ignore the content of the  
6 FTC note and to accept their interpretation of  
7 NAFTA Article 1105.

8 My colleagues will address the  
9 intricacies of the claimants' theories in argument,  
10 but for now I will simply say the note provides,  
11 pursuant to NAFTA Article 1131, paragraph 2, the  
12 interpretation of Article 1105 that this Tribunal  
13 must follow.

14 Second, the threshold for a  
15 violation of the minimum standard of treatment is  
16 extremely high. It is not one that converts a  
17 proponent's disappointment into an international  
18 wrong.

19 It also isn't one that calls for  
20 second guessing of government decision-making,  
21 especially the type of decisions that have to be  
22 made in the EA process, which are heavily-dependent  
23 upon scientific analysis and expertise.

24 Finally, consider the actual  
25 measures in issue. Once you get beyond the

1 universally negative gloss that the claimants have  
2 cast upon them, it is clear that they are nothing  
3 more than the decisions made in EA processes every  
4 day.

5                   They were neither shocking nor  
6 were they egregious in light of the facts of this  
7 case, which I have just described. They are the  
8 type of decisions that, if a proponent really takes  
9 issue with them, are typically addressed at the  
10 time they are made with officials administering the  
11 EA process or in Canada's domestic courts.

12                   They don't belong in this forum,  
13 and they simply don't, not on their own or  
14 collectively, breach the minimum standard  
15 established by Article 1105.

16                   Let's now turn to the claimants'  
17 other claim that Canada breached its national  
18 treatment and MFN obligations of Articles 1102 and  
19 1103.

20                   Now, these provisions require that  
21 treatment accorded to investors or investments of a  
22 NAFTA party must be no less favourable than that  
23 accorded, in like circumstances, to Canadian  
24 investors or investments or to the investors or  
25 investments of another NAFTA party or non-NAFTA

1 party.

2 Article 1102 and 1103 are intended  
3 to protect against nationality-based  
4 discrimination, and there is not a shred of  
5 evidence in this case that the claimants suffered  
6 this in the Whites Point EA.

7 Now, the claimants seem to think  
8 that Canada breached its obligations under these  
9 provisions because, after gaining access to tens of  
10 thousands of documents from over 70 EAs conducted  
11 across Canada, they have been able to identify some  
12 differences in the treatment accorded to other EA  
13 proponents under very different circumstances.

14 But merely identifying differences  
15 in the conduct or the outcome of EA processes,  
16 which are inherently context-dependent, simply does  
17 not cut it.

18 The claimants bear the burden of  
19 making out a national treatment claim and MFN  
20 claim, and this is to demonstrate that they were  
21 accorded treatment less favourable than that  
22 accorded to other EA proponents in like  
23 circumstances.

24 They failed to discharge their  
25 burden, and let me briefly explain why. First,

1 with respect to treatment, the claimants draw  
2 haphazard comparisons between treatment accorded by  
3 the federal government and Nova Scotia government  
4 and the Whites Point EA, and that accorded by  
5 governments to relevant proponents of other EAs,  
6 often in other provinces, upending what must be  
7 inherent in the notion of discrimination, that it  
8 must be the same government actor or actors  
9 according the allegedly discriminatory treatment.

10                   Second, the claimants must  
11 discharge the burden of proving that the treatment  
12 was less favourable. This is the claimants'  
13 burden, not Canada's. Now, the claimants do  
14 identify differences in individual instances of  
15 treatment accorded to EA proponents, but different  
16 does not automatically equate to less favourable.

17                   All that it really confirms is  
18 that given the factors influencing each EA, no two  
19 EAs will ever proceed in exactly the same way.

20                   Finally, the treatment in issue  
21 must have been accorded in "like circumstances",  
22 the requirement that brings us to the claimants'  
23 theory that all EA proponents are automatically in  
24 like circumstances.

25                   Now, the implication of this

1 theory is that it would be impossible for  
2 government officials to conduct an effective EA  
3 process, as any differences with treatment accorded  
4 in other EAs across the country could violate the  
5 NAFTA.

6 More is required than blithely  
7 stating that like circumstances exist because two  
8 proponents are subject to the EA process.

9 Now, as I have already noted, EAs  
10 are highly context-dependent. Consideration must  
11 be given to the factors influencing why the  
12 treatment in issue was accorded, for example,  
13 differences in the nature of the projects in issue  
14 or the environments in which two projects are to be  
15 located, or in the level of public concern that has  
16 been engaged, or in the quality of the information  
17 that has been provided by two EA proponents.

18 These differences can result in  
19 differences in treatment and explain why like  
20 circumstances don't exist. We aren't saying  
21 circumstances have to be identical, just "like",  
22 and to demonstrate like circumstances you must look  
23 at why certain treatment was accorded.

24 Now, this is why it is  
25 inappropriate for claimants to claim a NAFTA



1 violation merely on the basis of differences in the  
2 treatment accorded in the Whites Point EA to that  
3 accorded in EAs of diamond mines in the tundra of  
4 the Northwest Territories, or a port facility in  
5 Vancouver or liquid natural gas terminals in heavy  
6 industrial zones.

7                   It also explains why the claimants  
8 are wrong to claim a NAFTA breach arising from the  
9 treatment accorded in the government reviews of  
10 several smaller, shorter-term and unlike projects  
11 carried out in Tiverton, which is a small fishing  
12 village down the Digby Neck from the Whites Point  
13 project site that we heard about earlier this  
14 morning.

15                   Now, these government reviews  
16 were, first, NSDEL's review of an application by a  
17 Nova Scotia company to operate a small 1.8 hectare  
18 quarry at Tiverton. They were also DFO's two  
19 screening level EAs on repairs made to the public  
20 infrastructure at Tiverton, specifically repairs to  
21 the Tiverton wharf and dredging and improvements  
22 made to the Tiverton Harbour.

23                   Now, the claimants make much of  
24 the Tiverton project in their pleadings, and they  
25 did earlier today, so I want to make a few points

1 about them clear now.

2 First, the Tiverton quarry. Yes,  
3 it was a quarry and, yes, it was located down the  
4 Digby Neck from Whites Point, but that is where the  
5 similarity between the two projects ends.

6 Now, as I have noted, the Tiverton  
7 quarry footprint was all of 1.8 hectares. The  
8 footprint of the proposed Whites Point quarry at  
9 152 hectares was over 80 times larger.

10 Blasting on the Tiverton quarry  
11 was to be limited to a few blasts to generate rock,  
12 the Tiverton wharf and harbour projects, as opposed  
13 to what was proposed for the Whites Point project,  
14 blasting and processing of aggregate, the  
15 construction and the use of a massive marine  
16 terminal, and weekly visits from huge super tankers  
17 all over a 50-year period.

18 Now, blasting on the Tiverton  
19 quarry was also to be conducted significantly away  
20 from the marine environment than what was proposed  
21 for initial blasting at Whites Point.

22 Further, blasting on the Tiverton  
23 quarry, as it was in furtherance of improvements to  
24 essential pieces of the public infrastructure of a  
25 fishing village, a wharf and a harbour, received

1 public support. This is to be contrasted with the  
2 outright opposition engaged by the Whites Point  
3 project.

4                   Now, the claimants also seem to  
5 want to compare the Tiverton quarry with Nova  
6 Stone's 3.9 hectare quarry proposal, but this, too,  
7 is inappropriate, as the Tiverton quarry wasn't the  
8 first step in the construction and the operation of  
9 a 50-year quarrying for export project, the likes  
10 of which the Digby Neck had never seen.

11                   It entailed a few months of  
12 blasting for wharf and for harbour repairs, and  
13 then it would be done.

14                   And with respect to repairs to the  
15 Tiverton wharf and the dredging and improvements to  
16 the Tiverton harbour, these two small projects  
17 simply didn't engage the wide array of  
18 environmental and socioeconomic effects and  
19 concerns that had been engaged by the Whites Point  
20 project.

21                   It is true that the dredging of  
22 the Tiverton harbour required limited blasting in  
23 the water, but this activity was subjected to  
24 workable and effective mitigation measures that  
25 were determined through the EA process.

1                   Moreover, the Tiverton wharf and  
2 harbour projects were integral to the local  
3 economy, unlike the Whites Point project proposal,  
4 and the repairs that had to be carried out to them  
5 simply didn't give rise to any public opposition.

6                   So while the claimants might  
7 identify differences in the reviews conducted of  
8 the Whites Point and Tiverton projects, the fact is  
9 that given the nature of these projects, the  
10 treatment in issue was accorded under different  
11 circumstances and did not breach Canada's  
12 obligation under NAFTA Article 1102.

13                   Well, this brings Canada's opening  
14 statement to a close. I want to thank all of you  
15 for your attention this morning -- or this  
16 afternoon, and subject to any questions that the  
17 Tribunal might have, we look forward to expanding  
18 on the points that I have just highlighted and we  
19 look forward to a productive and efficient hearing.

20                   Thank you.

21                   MR. LITTLE: I should add we will  
22 be handing up binders of the PowerPoint  
23 presentation that I just made.

24                   PRESIDING ARBITRATOR: Thank you  
25 very much, Mr. Little.

1                   Okay, I think you were speaking  
2 for just quite precisely 90 minutes, and you say  
3 you are now followed by -- this is followed by  
4 presentations. For how much time, approximately?

5                   MR. APPLETON: He is distributing  
6 them.

7                   PRESIDING ARBITRATOR: Sorry.

8                   MR. APPLETON: His presentation is  
9 finished.

10                  MR. LITTLE: That comprises  
11 Canada's opening statement, Judge Simma, so we can  
12 move on with the examinations.

13                  PRESIDING ARBITRATOR: You used  
14 the term that your colleagues would proceed or  
15 continue.

16                  MR. LITTLE: These are them. It  
17 is the PowerPoint presentation I just presented.  
18 They are hard copies of them.

19                  PRESIDING ARBITRATOR: Thank you.  
20 That was my misunderstanding. So I suggest that we  
21 have a break. So I think there the time has come  
22 for a break of 15 minutes which will take us  
23 precisely to 3 o'clock. Thank you.

24 --- Recess at 2:46 p.m.

25                  PRESIDING ARBITRATOR: So

1 Mr. Clayton, I welcome you in the witness stand so  
2 to say.

3 MR. CLAYTON: Thank you.

4 PRESIDING ARBITRATOR: Could you  
5 read the declaration that you have, should have in  
6 front of you.

7 MR. CLAYTON: I solemnly declare  
8 upon my honour and conscience that I will speak the  
9 truth, the whole truly and nothing but the truth.

10 AFFIRMED: WILLIAM RICHARD CLAYTON, JR.

11 PRESIDING ARBITRATOR: Thank you.  
12 I think the examination can go underway, a short  
13 introduction.

14 MR. NASH: We have no questions  
15 for direct. So Mr. Clayton can go directly into  
16 cross-examination.

17 PRESIDING ARBITRATOR: So, yes.

18 MR. SPELLISCY: I am not going to  
19 block the screen. Everybody can see the screen for  
20 the Tribunal?

21 PRESIDING ARBITRATOR: Yes.

22 CROSS-EXAMINATION MR. SPELLISCY:

23 Q. Good afternoon, Mr. Clayton.  
24 My name is Shane Spelliscy. I am counsel for the  
25 Government of Canada. I am going to be asking you

1 a few questions about your witness statement today,  
2 and I just want to go over a few things at the  
3 beginning.

4                   If you don't understand a question  
5 I ask, just ask me to rephrase it. I want to make  
6 sure I understand. Similarly, if I have  
7 misunderstood something you said, just let me know.  
8 I want to make sure we're all on the same page.

9                   I don't expect to be going all  
10 that long today, but if you do need a break at any  
11 point, let me know and we will try to find a good  
12 time for that, and also at this time I would like  
13 to hand to you a smaller bundle of documents so we  
14 don't have to take you through the eight or nine  
15 exhibits. If I could ask Cheryl to come up and do  
16 that, I think we have one for the complainant, as  
17 well, and for the Tribunal members I think you have  
18 yours already behind you.

19                   Now, Mr. Clayton, the first  
20 document in this bundle is the witness statement  
21 attached to the claimants' memorial. If you take a  
22 look at this witness statement, this is the witness  
23 statement you filed in this arbitration.

24                   A. Yes.

25                   Q. If you could turn just for a

1 second, I want to just confirm something for the  
2 record. If you could turn to the last page of this  
3 witness statement, you will see -- it is on page 5.  
4 You will see a line for -- a signature line for  
5 yourself. You haven't signed this witness  
6 statement; is that correct?

7 A. Apparently I haven't signed  
8 this yet.

9 Q. So I take it, then, that you  
10 drafted this witness statement?

11 A. No. This is my witness  
12 statement.

13 Q. But just to confirm, and  
14 maybe there is a signed copy on the record. I want  
15 to confirm for the record that looking at this,  
16 this is your testimony and there is not going to be  
17 any difficulty in the witness statements later?

18 MR. NASH: Mr. President, there is  
19 a signed copy of the witness statement. It is not  
20 the one in the record, but it there is a signed  
21 copy.

22 BY MR. SPELLISCY:

23 Q. That's great. If you could  
24 take a look at it now, since this is the one in  
25 your book, and this is the one that came with the



1 claimants' memorial, and confirm this is the  
2 witness statement?

3 A. Yes, it looks like it.

4 Q. All right, thank you. Now,  
5 let's turn, then, we've got that aside, to the  
6 testimony that you have offered in this matter. I  
7 want to start at the beginning and understand a  
8 little bit about the investment that your family  
9 made.

10 So did I understand Bilcon of  
11 Delaware, this is one of the corporations that is  
12 owned by members of your family; correct?

13 A. Yes, it is.

14 Q. In fact, it is owned by  
15 yourself and your two brothers; correct?

16 A. Yes.

17 Q. Your father has no ownership  
18 in Bilcon of Delaware?

19 A. No.

20 Q. And Bilcon of Delaware, that  
21 is the sole shareholder of Bilcon of Nova Scotia;  
22 correct?

23 A. Yes, it is.

24 Q. And, again, you and your two  
25 brothers, you are the directors of Bilcon of

1 Delaware; correct?

2 A. Yes.

3 Q. Your father is not a director  
4 of Bilcon of Delaware?

5 A. Right.

6 Q. And the directors of Bilcon  
7 of Nova Scotia, that is you and your brothers, as  
8 well?

9 A. Yes, it is.

10 Q. And the officers of Bilcon of  
11 Nova Scotia, that is solely you and your brothers,  
12 as well?

13 A. Yes.

14 Q. So your father, then, didn't  
15 actually exercise control over Bilcon of Nova  
16 Scotia. This was a project that he left to you and  
17 your brothers to run; correct?

18 A. For as much as he leaves it  
19 to run, yes.

20 Q. But as a legal matter, your  
21 brothers and -- your brothers and you are the  
22 directors and the officers of the corporation;  
23 right?

24 A. Yes.

25 Q. At all times; right?

1 A. Yes.

2 Q. So in 2001, I think we have  
3 heard earlier that you were approached by a company  
4 about the possibility of investing in an aggregate  
5 quarry and marine terminal in Nova Scotia; is that  
6 right?

7 A. Yes.

8 Q. And at the time, your  
9 companies were actually engaged in buying aggregate  
10 from a quarry in New Brunswick; right?

11 A. One of our companies, yes.

12 Q. Now, you were buying from  
13 this quarry, but you actually never invested into  
14 Canada before; right?

15 A. No. We were buying from a  
16 quarry and bringing it to New York.

17 Q. But you hadn't actually made  
18 an investment into Canada before this?

19 A. No.

20 Q. In fact, your family had  
21 never invested outside of the United States before;  
22 correct?

23 A. No.

24 Q. So prior to this project, you  
25 had no experience with actually trying to develop a

1 major project in Canada; correct?

2 A. No.

3 Q. Now, the individual who  
4 approached your family, that was Mr. Mark Lowe;  
5 correct?

6 A. That's correct.

7 Q. You didn't know Mr. Lowe  
8 prior to this contact, did you?

9 A. No.

10 Q. And now Mr. Lowe's company  
11 that was called Nova Stone Exporters; right?

12 A. Yes, I believe so.

13 Q. And you didn't know of Nova  
14 Stone Exporters prior to being contacted by  
15 Mr. Lowe?

16 A. No.

17 Q. I think at this point, with  
18 apologies to those on the Internet, they may see a  
19 grey screen, but we are going to look at some  
20 documents at this point in some of your witness  
21 statements, so if you could change the feed over so  
22 we can look at some documents.

23 I would like to look particularly  
24 at your witness statement at paragraph 6 for now.  
25 So this paragraph follows in your witness statement

1 after you mentioned the 2001 contact by Nova Stone,  
2 and you say, "after researching the investment  
3 climate in Nova Scotia"; do you see that?

4 A. Yes, I do.

5 Q. And this was after you  
6 were -- this research you did was after you were  
7 contacted by Mr. Lowe, but before you actually  
8 committed to make an investment in this company;  
9 correct?

10 A. Yes.

11 Q. And what you cite here at the  
12 end of that sentence, you will see where you talk  
13 about what your research -- at the end of the  
14 paragraph, you say -- your reference to the Nova  
15 Scotia Department of Natural Resources, "Minerals:  
16 A Policy for Nova Scotia"; correct?

17 A. In number 6?

18 Q. In footnote number 2, which  
19 is at the end of paragraph 6 there.

20 A. Okay. Yes.

21 Q. That's the document that you  
22 referred to when you say you were researching the  
23 investment climate; correct?

24 A. I don't recall it directly.

25 Q. You don't recall reviewing

1 that document and researching the investment  
2 climate?

3 A. No. I don't recall that  
4 document exactly.

5 Q. All right. If you look at  
6 footnote 2 there, you reference a particular  
7 section of that document. I am wondering if you  
8 could turn to this policy right now where you have  
9 it attached to the witness statement.

10 It is in Clayton Exhibit No. 2.

11 MR. NASH: Perhaps counsel could  
12 direct the witness to where that is in the  
13 materials, what tab it is under in the binder.

14 BY MR. SPELLISCY:

15 Q. Clayton Exhibit 2, as I said,  
16 and it starts at page -- well, we're going to turn  
17 to section 4, section 4.5. And if you turn to the  
18 page marked on the bottom right as 744703, you will  
19 see you cited this section 4.5, but there is no 4.5  
20 in this document; correct? It ends at 4.4; right?

21 A. I assume so.

22 Q. And to be clear, though, then  
23 you don't actually recall reviewing this document  
24 prior to investing or making a decision to invest  
25 in Nova Scotia?

1                   A.    Well, there was a lot of  
2 things I don't remember ten years ago.

3                   Q.    But I take it you remember  
4 reviewing this document at the time the witness  
5 statement was filed since it is referred to?

6                   A.    Not directly.

7                   Q.    All right.  Well, let's just  
8 take a quick look and let me ask you a general  
9 question, as well.  If you look at section 5 of  
10 this document, which is on the next page and, in  
11 particular, if you look at section 5.2, you will  
12 see that this refers to an environmental assessment  
13 process; correct?

14                  A.    Yes.

15                  Q.    So you were -- now, were you  
16 aware, then, when you were doing your initial  
17 research into the investment climate, that in fact  
18 there would have to be an environmental assessment  
19 of the project that you were looking at developing  
20 in Nova Scotia?

21                  A.    Yes.  We heard that.

22                  Q.    Now, I just want to flip back  
23 to your witness statement again here in paragraph  
24 6, and see if I can understand again.  So you  
25 didn't remember reviewing this document.  When you

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1 say you were researching the investment climate in  
2 Nova Scotia, do you remember any document you  
3 reviewed in researching that investment climate?

4 A. Not directly, no.

5 Q. Did you review the Nova  
6 Scotia Environment Act when researching the  
7 investment climate?

8 A. Not that I recall.

9 Q. Would you have reviewed the  
10 Canadian Environmental Assessment Act?

11 A. Not that I recall.

12 Q. Would you have reviewed any  
13 documents, that you recall, discussing what those  
14 Acts were?

15 A. No.

16 Q. I think at this point I am  
17 going to start to discuss some of the information  
18 that has been designated as confidential in this  
19 arbitration, so I would ask the live feed be cut,  
20 and then we can have the -- now, the live feed is  
21 cut, do we actually have the ability to put the  
22 documents on the screen still? Yes, we do, good.

23 --- Upon commencing confidential session under  
24 separate cover at 3:25 p.m.

25 --- Upon resuming public session at 3:46 p.m.



1                               PRESIDING ARBITRATOR: Are we  
2 on? Okay, we're on.

3                               BY MR. SPELLISCY:

4                               Q. Now, Mr. Paul Buxton  
5 represented the partnership and Bilcon in its  
6 attempts to develop this quarry in Nova Scotia;  
7 correct?

8                               A. Yes.

9                               Q. And, now, he had actually  
10 been working with Nova Stone and Mr. Lowe before?

11                              A. Originally, yes.

12                              Q. And before you became  
13 partners with Nova Stone, you had never met  
14 Mr. Buxton before?

15                              A. No.

16                              Q. You had no experience with  
17 any of his operations or of any of his companies;  
18 correct?

19                              A. No. We did not know Paul.

20                              Q. Now, if you turn to paragraph  
21 12 of your witness statement-- and I will ask the  
22 document to come up on the screen again -- you  
23 describe Mr. Buxton as a professional engineer in  
24 Nova Scotia and note that he headed the approvals  
25 process for the Whites Point quarry; correct?

1 A. Yes.

2 Q. Now, at the time that you  
3 placed your trust and reliance in Nova Stone to do  
4 this, and you said you weren't familiar with  
5 Mr. Buxton, so then you weren't aware of whether or  
6 not he ever headed an approvals process for a  
7 project like this before; correct?

8 A. No. We met him through Nova  
9 Stone.

10 Q. And when you met him through  
11 Nova Stone, did you inquire with him as to whether  
12 or not he ever headed an approvals process for a  
13 project of this size before?

14 A. We felt that he was very good  
15 candidate and we felt that he was -- you know, from  
16 having dealt with him a little bit, that he was  
17 good to go.

18 Q. But you knew that he had  
19 never worked on a federal environmental assessment  
20 before; correct?

21 A. Not really.

22 Q. You didn't ask whether or not  
23 he worked on a federal environmental assessment for  
24 your project?

25 A. (No answer.)

1 Q. You have to say "no" for the  
2 record.

3 A. I'm sorry, no.

4 Q. At this time, then, you said  
5 you were confident in him, but you didn't retain an  
6 environmental consulting firm, then, to deal with  
7 what the required environmental assessments were  
8 going to be at this time in --

9 A. No, we did not.

10 Q. -- 2002. Now, in your  
11 witness statement, you describe how -- and it is in  
12 paragraph 13 -- how Mr. Buxton met with Mr. Balser,  
13 a Nova Scotia minister who was the representative  
14 for Digby, many times in 2002; correct?

15 A. Yes.

16 Q. But in your witness statement  
17 in the next paragraph, paragraph 17, you confirmed  
18 that you didn't meet with Minister Balser until  
19 June 24th, 2002; correct?

20 A. Yes.

21 Q. So then to be clear, by this  
22 time that you had met with Minister Balser in June,  
23 in fact, you had already entered into the letter of  
24 intent with Nova Stone and you had actually already  
25 registered the partnership Global Quarry Products;

1 correct?

2 A. I don't recall the dates.

3 Q. Okay. We can go back and  
4 look. We had just looked at them for a second.  
5 You will recall, when we were looking at Exhibit  
6 R-289, the date of that was March 28th, 2002, and  
7 that is when it was signed and that was the first  
8 letter of intent; correct?

9 A. Okay.

10 Q. And you will recall when we  
11 looked at your Exhibit 3 to your witness statement,  
12 that that was a letter of intent that was actually  
13 signed on May of 2002; correct?

14 A. Okay.

15 Q. And then you recall we looked  
16 very briefly at the formation of the partnership,  
17 and that was at R-292, and that was the formation  
18 of the partnership. The registration of the  
19 partnership was on April 25th, 2002. Do you recall  
20 that?

21 A. Okay.

22 Q. And so by the time that you  
23 had met with Mr. Balser, all of these things had  
24 occurred already. Bilcon had already signed a  
25 letter of intent with Nova Stone to invest in this

1 project; correct?

2 A. Evidently.

3 Q. Now, Mr. Balser, he was the  
4 Minister of economic development in Nova Scotia.  
5 He was not the Minister of environment and labour  
6 at the time; right?

7 A. I'm not sure.

8 Q. Well, you say that Minister  
9 Balser was supportive of the project; correct?

10 A. Yes. He was very nice.

11 Q. But you don't say, and  
12 nowhere in your testimony do you say, that he  
13 promised there would be no environmental assessment  
14 of the project?

15 A. No, he did not.

16 Q. He did not promise that,  
17 right. Nowhere in your testimony do you say he  
18 promised a specific outcome with respect to the  
19 project; correct?

20 A. No, I don't think he would do  
21 that.

22 Q. He didn't make any such  
23 representations to you at any time; right?

24 A. No. He was very encouraging.  
25 He had just received these, as part of his mission

1 from his new job, to do whatever he needed to do to  
2 bring jobs into his district, and that is what --  
3 it was kind of very soon to when we showed up that  
4 he was on a mission to bring in jobs.

5 Q. But you understood that his  
6 mission to bring in jobs was still subject to  
7 environmental assessments in Nova Scotia?

8 A. Yes. He didn't make any  
9 promises.

10 Q. Right. Now, I want to get  
11 some timing, as well, down here, too, because in  
12 the opening I thought I heard that your counsel,  
13 Mr. Nash, had said that after you met with Minister  
14 Balser and based on the encouragement he gave you,  
15 you sent Mr. Lizak down to Nova Scotia and took a  
16 helicopter tour.

17 You talk about that helicopter  
18 tour in paragraph 19 and 20 of your witness  
19 statement. Perhaps we can turn there now.

20 A. Yes.

21 Q. And so if you look halfway  
22 down or three-quarters of the way down the  
23 paragraph, you will see that that helicopter tour  
24 was on June 4th of 2003; correct?

25 A. Yes.

1 Q. So that is a year after, in  
2 fact, your meeting with Minister Balser; correct?

3 A. Yes.

4 Q. That trip down to take this  
5 helicopter tour by Mr. Lizak didn't have anything  
6 to do with your meeting with Minister Balser, other  
7 than the general sense he was encouraging of the  
8 project?

9 A. I don't think the helicopter  
10 ride had anything to do with Balser. It was  
11 natural resources.

12 Q. Okay. Now, in your witness  
13 statement, you state at paragraph 20 at the very  
14 last -- before you get to the A, B and C, that:

15 "Mr. Lizak provided to me  
16 documents referencing the  
17 following government  
18 policies."

19 See that, A, B and C?

20 A. Yes.

21 Q. Did you review those  
22 documents when he gave them to you?

23 A. Yeah. They were like, you  
24 know, pamphlets and policies that were being put  
25 forth to encourage investment.

1 Q. I would like to -- at  
2 subparagraph (c) or subparagraph(c) of paragraph  
3 20, you mention the official policy of the  
4 Government of Nova Scotia to have efficient one  
5 window environmental assessments. Do you see that?

6 A. Yes. They were talking about  
7 making the process more efficient.

8 Q. And if you look down to the  
9 footnote, that is in Clayton Exhibit 8. So if we  
10 could just turn to Clayton Exhibit 8, which has the  
11 number 8 on it in your book. Is this the document  
12 that you remember Mr. Lizak giving to you?

13 A. I don't recall it exactly.

14 Q. Well, if you could just turn  
15 now to the table of contents, it is on the page  
16 little Roman numeral iii is where it begins.

17 A. Mm-hm.

18 Q. You will see this lays out  
19 the table of contents, and you will see there is a  
20 section called "Section 7. Environmental  
21 Assessment Process." Do you see that?

22 A. Yes.

23 Q. Okay. It says it begins on  
24 page 15. Can you turn to the last page of your  
25 exhibit here? You will see that you ended on page



1 13. So this exhibit here is actually incomplete,  
2 then. It doesn't include the environmental  
3 assessment --

4 A. Okay.

5 Q. -- regime there. Do you  
6 remember if you reviewed the discussion of the  
7 environmental assessment?

8 A. I don't recall that, no.

9 Q. Let's go back to paragraph 21  
10 of your witness statement. You start paragraph 21  
11 of your witness statement by saying:

12 "Based on all of these  
13 actions, statements,  
14 publications and documents, I  
15 felt confident that investing  
16 in Nova Scotia would be a  
17 safe and predictable  
18 venture."

19 Correct?

20 A. Yes.

21 Q. But, again, the documents  
22 that you just referred to here, you only received  
23 those in June of 2003; right?

24 A. I don't know. I assume so.

25 Q. Well, in the paragraph

1 before, you testified or two paragraphs before you  
2 testified that the helicopter tour was on June 4th,  
3 2003. Is that your testimony?

4 A. Yes.

5 Q. And in paragraph 20, you said  
6 that you discussed what Mr. Lizak received and said  
7 he told me he received documents from government  
8 staff and he provided to you these documents. So  
9 that would be presumably after of course he met  
10 with the staff; correct?

11 A. Yes.

12 Q. So you then received these  
13 documents and publications in June of 2003, at the  
14 earliest; correct?

15 A. I assume.

16 Q. So by this time, again, not  
17 only had -- we have been through this. The  
18 partnership had been formed; correct?

19 A. Yes.

20 Q. And in fact Bilcon had  
21 already invested money into that partnership;  
22 right?

23 A. Yes.

24 Q. And in fact by June of 2003,  
25 the final project description for the project had

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1 actually been filed with the relevant Nova Scotia  
2 and federal officials; correct?

3 A. I assume.

4 Q. You're not aware of exactly  
5 when the project description was filed?

6 A. No.

7 Q. In fact, I think we saw the  
8 slide. I think we had some discussion of it  
9 earlier in one of the slides in Canada's opening,  
10 but if I said to you the project description was  
11 filed in March of 2003, would that sound right?

12 A. I'm not sure.

13 Q. Now, in fact, given all of  
14 this that had already happened, the helicopter tour  
15 that Mr. Lizak took, it wasn't really about the  
16 Whites Point project, was it?

17 A. They covered a lot of  
18 projects. I'm not sure if it was over Whites Point  
19 or they were showing him alternatives to invest in.

20 Q. Mm-hm.

21 A. They were interested in  
22 investing in more than one.

23 Q. When you say "they" were, you  
24 say the Nova Scotia --

25 A. Natural Resources.

1 Q. Natural Resources?

2 A. Yes.

3 Q. So you're not even sure that  
4 this helicopter tour at all related to the Whites  
5 Point project at all?

6 A. You will have to ask John.

7 Q. But your understanding from  
8 him, and he reported to you, was in fact it  
9 involved potentially other investments --

10 A. Yes.

11 Q. -- in Nova Scotia that Bilcon  
12 or the Clayton Group might make? Okay.

13 Now I want to come back to, then,  
14 what you recall about the environmental assessment  
15 process and with respect to your earlier  
16 confirmation that you felt comfortable relying on  
17 people like Mr. Lowe and Mr. Buxton.

18 At some point, you actually do --  
19 Bilcon actually does hire actual EA consultants;  
20 correct?

21 A. Yes.

22 Q. And if we turn to the  
23 document at tab R-317 in your book, this is an  
24 email from a Ms. Josephine Lowry. Do you know who  
25 she was?

1                   A.    I remember the name, but I  
2 don't remember her, no.

3                   Q.    But she was somebody who  
4 worked for you at Bilcon Nova Scotia?

5                   A.    I was really not involved day  
6 to day.  You know, that would be something Paul was  
7 doing.  I remember the name.

8                   Q.    But in terms -- if we look at  
9 the email, in the second email in that chain, which  
10 she sends to Uwe Wittkugel on August 31st, you see  
11 right above her signature she talks, "Paul and I",  
12 which is Paul Buxton:

13                                 "... feel a great deal more  
14                                 comfortable with the entire  
15                                 process now that AMEC is on  
16                                 boards for guidance."

17                   Do you see that?

18                   A.    Yes.

19                   Q.    So AMEC had been retained, so  
20 you presumably could have been consulted on their  
21 retention; correct?

22                   A.    Yes.

23                   Q.    So by August 2006, I take it  
24 then that Mr. Buxton or Ms. Lowry, somebody at your  
25 operations, had indicated to you that in fact they

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1 were no longer comfortable with the entire process  
2 as it was; is that right?

3 A. Paul was driving that. I  
4 don't recall exactly.

5 Q. Just to be clear here, if we  
6 can get your recollection of these dates, this  
7 retention, you will see this email is sent in  
8 August of 2006; correct?

9 A. Yes.

10 Q. Okay. Now, that was long  
11 after the environmental assessment of the project  
12 had started; right?

13 A. Yes.

14 Q. And in fact Bilcon had  
15 already done its environmental impact assessment by  
16 the time it had actually retained these  
17 environmental consultants; correct?

18 A. I assume.

19 Q. Just a few more questions  
20 here, one or two. You are aware that there was a  
21 community liaison committee set up to engage with  
22 the local population on the 3.9 hectare quarry;  
23 correct?

24 A. Yes.

25 Q. You never attended any of

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1 those meetings of that liaison committee, did you?

2 A. We went up there a few times  
3 and had meetings with the locals, but I don't  
4 remember if it was in that setting.

5 Q. Now, at the hearing of the --  
6 you will recall there were several hearings held by  
7 the Joint Review Panel, the hearing on scoping, and  
8 there was the actual hearing. You didn't attend  
9 any of those hearings?

10 A. I don't think so.

11 Q. Thank you. I don't have any  
12 further questions for you.

13 PRESIDING ARBITRATOR: Thank you,  
14 Mr. Spelliscy.

15 MR. NASH: I am going to ask  
16 Mr. Clayton some questions on confidential matters,  
17 so I would ask that the Internet be turned off.

18 PRESIDING ARBITRATOR: Confidential  
19 matters.

20 --- Upon resuming confidential session under  
21 separate cover at 4:01 p.m.

22 --- Upon resuming public session at 4:15 p.m.

23 PRESIDING ARBITRATOR: If I am  
24 right, this concludes the witness examination of  
25 you, Mr. Clayton. So let me just raise one

1 question; namely, the confidentiality with regard  
2 to the written, to the transcript, because we are  
3 going to have transcripts.

4 Now, of course the transcripts are  
5 not available to the general public. You will have  
6 them, so the parties will have them.

7 So would it be sufficient or would  
8 the parties regard it as sufficient with regard to  
9 keeping the pages of the transcript that were  
10 excluded from the video, that if both sides confirm  
11 that they will treat the confidential parts of the  
12 transcript as "confidential information" within the  
13 meaning of P.O. No. 2? Then we could just have you  
14 agree on the record, and that would be fine.

15 But you would have to consider  
16 that as sufficient to secure the confidentiality.  
17 So do you want to just think about that for a  
18 moment, or....

19 I think my point was clear; right?

20 MR. APPLETON: Yes.

21 Mr. President, this has been a way that has been  
22 done in other tribunals already. We think that is  
23 a very easy way to proceed and also very effective  
24 to be able to deal with the objective, which is to  
25 protect this information, but otherwise have the



1 rest of the transcript public.

2 I noticed from the transcript that  
3 the quite excellent court reporter has been  
4 identifying which sections have been confidential  
5 and which are not, and so I think that would make  
6 it easy to be able to deal with. So we would be  
7 very much in favour of this.

8 PRESIDING ARBITRATOR: I saw you  
9 taking notes on the side. You put it in the  
10 transcript.

11 MR. APPLETON: I did understand,  
12 though, there may be a lag time to permit this to  
13 be vetted by the parties. So my colleague,  
14 Mr. Dickson-Smith, has pointed that out to me. I  
15 am not sure what that lag time is, but it would be  
16 useful to identify that.

17 So, in other words, for the  
18 confidential transcripts could be made available in  
19 the normal course, and the non-confidential  
20 transcripts would take whatever the lag time would  
21 be to make sure that we ensured that that material  
22 was not in the transcript. That's all.

23 PRESIDING ARBITRATOR: I'm not  
24 sure I understood what you mean.

25 In another case in which I was

1 president, the problem was solved by issuing  
2 separate pages so that there is a separate  
3 manuscript, if you want, of the confidential  
4 conversation so that the official transcript did  
5 not contain -- it probably said -- I don't  
6 remember, but from now on confidential, and then  
7 you got the pages -- the parties got the page  
8 separate. So that would be the alternative.

9 MR. SPELLISCY: I think from our  
10 perspective if the transcripts that come this  
11 evening and tomorrow morning we would treat as  
12 confidential, and then we would have a period of  
13 time afterwards, I think is what my client is  
14 talking about, to actually redact those  
15 transcripts, give our redactions to the court  
16 reporter, and then a confidential version of the  
17 transcript could be produced, but the ones we get  
18 tonight, surely, yes, the parties will treat them  
19 as the confidential versions.

20 That is the way we have done it in  
21 other NAFTA arbitrations.

22 PRESIDING ARBITRATOR: Would that  
23 be fine with you, Mr. Appleton?

24 MR. APPLETON: That is what I was  
25 suggesting. In fact, the procedural orders

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1 suggests a 20-day period. I think that would  
2 probably be more than sufficient. It was exactly  
3 to make sure that -- we don't want to slow down the  
4 ability to do this arbitration, but at the same  
5 time we need to be able to protect that information  
6 for what would be made available on transcripts to  
7 the public. They would reflect exactly what is  
8 being live streamed now, and it is very important  
9 that the public has that access to the process.

10 We just want to make sure that we  
11 deal with it in a responsible and fair manner.

12 PRESIDING ARBITRATOR: So you  
13 would agree to the way that Mr. Spelliscy spelled  
14 out? So I think we can regard this problem as  
15 being solved, if you don't hear differently  
16 tomorrow. Okay.

17 So let's have -- thank you,  
18 Mr. Clayton, once again.

19 THE WITNESS: Thank you.

20 PRESIDING ARBITRATOR: We will  
21 have a short break, I think, just five minutes. So  
22 we have a break until, what is it, 4:25, and then  
23 continue with the examination of Mr. Lizak.

24 --- Recess at 4:20 p.m.

25 --- Upon resuming at 4:28 p.m.

1                   PRESIDING ARBITRATOR: Mr.  
2 Spelliscy, are you continuing?

3                   Well, it looks like we are  
4 complete again. Of course it is an experience I  
5 make as a public international lawyer, more or less  
6 frequently, that compliance is a relative thing.

7 --- Laughter

8                   PRESIDING ARBITRATOR: Of course,  
9 I learn we won't have breaks for shorter times than  
10 ten minutes. That's probably more practical.  
11 Thanks for being back. And I welcome Mr. Lizak.

12                   Mr. Lizak, you should have in  
13 front of you a statement, a declaration for a  
14 witness. Would you be so kind and read it out.

15                   MR. LIZAK: I would.

16                   PRESIDING ARBITRATOR: Yes. The  
17 microphone is supposed to be green.

18                   MR. LIZAK: I solemnly declare  
19 upon my honour and conscience I will speak the  
20 truth, the whole truth, and nothing but the truth.

21 AFFIRMED: JOHN LIZAK

22                   PRESIDING ARBITRATOR: Mr. Lizak,  
23 may I also remind you you have signed the  
24 statement, the assurance with regard to your not  
25 having heard other witness statements. That would

1 only be of course Mr. Clayton before.

2 THE WITNESS: I have signed that,  
3 sir, yes.

4 PRESIDING ARBITRATOR: Thank you.

5 EXAMINATION IN-CHIEF MR. NASH:

6 Q. Thank you, Mr. President.  
7 Mr. Lizak, could you speak a bit about your  
8 occupational background.

9 A. Yes. I am a professional  
10 geologist and mineral appraiser. I was a  
11 consultant for Bilcon on this particular project.

12 I have been asked to come here  
13 today to provide some background information on the  
14 Whites Point project and to provide some assistance  
15 to the Tribunal, if need be.

16 I have a bachelor's degree in  
17 fundamental science from Lehigh University with a  
18 specialty in geology and geotechnical engineering;  
19 a master's degree in geology from Purdue  
20 University.

21 I also have postgraduate training  
22 in mineral economics, hydrogeology, and mining  
23 engineering. I am a licensed professional  
24 geologist in four states.

25 I have roughly 35 years of

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1 experience in a whole host of projects, hundreds of  
2 projects in literally dozens of countries, numerous  
3 commodities.

4                   During that 35 years, I worked  
5 with Exxon Coal & Minerals, Inc. as a senior  
6 geologist. I also worked with British Petroleum in  
7 its mineral acquisition group.

8                   I was also the manager of  
9 regulatory affairs and chief geologist for the  
10 Millington Group of Companies. I also had quite a  
11 few projects in Canada ranging from tar sands in  
12 Alberta to gold projects in Timmins, construction  
13 materials projects in Ontario, and also industrial  
14 mineral projects in Maritimes, and also some coal  
15 projects in Cape Breton, for example.

16                   I have a rather diverse client  
17 base. Unlike a lot of my peers and my competitors,  
18 I don't work exclusively for the industry. My  
19 client base is fairly mixed. I do have a large  
20 number of Fortune 50 and smaller companies,  
21 privately-held companies, but I also work for  
22 state, local and federal governments.

23                   One of my major clients is the US  
24 Department of Justice, their environmental and  
25 resources group. I recently provided expert

1 testimony in some litigation related to Hurricane  
2 Katrina in the Federal Court in New Orleans.

3 I also represent quite a few  
4 international environmental groups. I work for the  
5 Nature Conservancy and the Trust for Public Land.  
6 I have been certified as an expert in numerous  
7 federal and state courts. I have also been  
8 appointed a court master to arbitrate mining  
9 litigation.

10 I have numerous publications.  
11 Probably the one most relevant to this particular  
12 hearing is the publication titled "Aquifer  
13 Protection Within And Near Aggregate Operations".

14 Q. I would like to go  
15 confidential, if we could, please.

16 PRESIDING ARBITRATOR:  
17 Confidential.

18 --- Upon resuming confidential session under  
19 separate cover at 4:20 p.m.

20 --- Upon resuming public session at 4:24 p.m.

21 PRESIDING ARBITRATOR: We are  
22 public again. Who are you?

23 MR. EAST: I will introduce  
24 myself.

25 --- Laughter.

1 MR. LIZAK: Somebody without a  
2 name.

3 CROSS-EXAMINATION BY MR. EAST:

4 Q. Yes. Good afternoon. My  
5 name is Reuben East. I am counsel at the  
6 Government of Canada. And, Mr. Lizak, I will be  
7 asking you a few questions this afternoon.

8 But before I do, I just want to  
9 check that everyone has a copy of the core bundle  
10 that we provided to you. This is a set of  
11 documents that I will be asking you about today.

12 I want to make sure that you, sir,  
13 have a copy of that. I want to make sure the  
14 claimants have a copy, and of course Members of the  
15 Tribunal, before we begin.

16 A. Is that my witness statement?

17 Q. It includes your witness  
18 statement, sir.

19 A. Okay.

20 Q. And exhibits. I will take a  
21 moment to ensure everyone has it before I begin.

22 Well, I don't think -- I was going  
23 to ask a few questions about your professional  
24 background, but we had that introduction. So I  
25 will go straight into the matter.



1                   Mr. Lizak, other than evaluating  
2 the viability of investing in a quarry site in Nova  
3 Scotia, has the Clayton Group of Companies asked  
4 you to evaluate the liability of a quarry site  
5 elsewhere in Canada.

6                   A. They have.

7                   Q. Can you tell me where?

8                   A. I could. As I said, I  
9 started, and my initial role was, to investigate or  
10 to determine the quality and quantity, essentially  
11 the suitability, of the Whites Point quarry project  
12 for export to the United States.

13                   But as part of the process, we  
14 wanted to get a very clear understanding of how  
15 that operation, you know, fit into essentially the  
16 competitive overview, and essentially was this the  
17 best property? And as part of that undertaking, I  
18 visited numerous sites within not only Nova Scotia  
19 but also in British Columbia -- I'm sorry, also in  
20 New Brunswick. And, if memory serves, I think we  
21 even looked at a few possible joint venture  
22 opportunities in New Brunswick, and possibly even  
23 Labrador.

24                   I will give you an example. I  
25 mean, not only did I look at a lot of sites -- and

1 I want to emphasize, you know, one of the most  
2 extensive trips that I had was a trip that was  
3 essentially established by the Nova Scotia  
4 Department of Environment Resources -- I'm sorry,  
5 Nova Scotia Department of Natural Resources,  
6 Mr. Phil Finck set up a helicopter tour as part of  
7 that we visited.

8 Q. Sir, we will come to that. I  
9 will ask questions about that. It was just again  
10 to ask if you --

11 A. Dozens, literally dozens of  
12 operating greenfield and competitor sites.

13 Q. And when you typically  
14 complete an assignment for a client such as the  
15 Clayton Group, do you typically produce a report  
16 with your recommendations?

17 A. I do, sir, and I did in this  
18 particular assignment.

19 Q. And in respect of this  
20 particular project, sir, that report was completed  
21 in December 2002; correct?

22 A. Are you referring to Exhibit  
23 1?

24 Q. You could refer to Exhibit 1.

25 A. Yes, yes, exactly, December

1 2002.

2 Q. And Mr. Lizak, in the course  
3 of your work in the field or in developing a  
4 report, do you typically carry and use a notebook?

5 A. Sometimes. I mean, well,  
6 typically what I do, for example, if you look at  
7 the attachments on my exhibit.

8 Q. Yes.

9 A. There is a core sheet, and  
10 that is where the lion's share of the data goes,  
11 but, yes, I make some field notes, sure.

12 Q. So you usually take notes?

13 A. Yes.

14 Q. And when you undertake an  
15 assessment for a client, do you usually provide  
16 periodic updates on your progress?

17 A. Definitely.

18 Q. And do you typically update  
19 by email or other written communications or...

20 A. I would say this particular  
21 project, most of the update was probably  
22 face-to-face meetings at the client's headquarters.

23 Q. Most, but do you recall if  
24 you would have also updated by email or letter or  
25 anything like that?

1                   A.   Probably not a lot of email,  
2 but, you know -- and probably not a lot of letters,  
3 but maybe an occasional phone call, but, again,  
4 pretty comprehensive face-to-face meetings in New  
5 Jersey.

6                   Q.   Mr. Lizak, your statement  
7 indicates that your involvement in the Whites Point  
8 project began in 2002; is that correct?

9                   A.   Yes.

10                  Q.   According to your statement,  
11 the purpose of your involvement was to evaluate for  
12 the Clayton Group of companies the potential for  
13 investment in the Province of Nova Scotia; correct?

14                  A.   That is correct.

15                  Q.   Now, you have indicated in  
16 your statement your involvement began in March of  
17 2002, but on what date were you actually engaged by  
18 the Clayton Group? I think we heard in an answer  
19 just now that you indicated April 2002. I just  
20 want to clear something up here.

21                  A.   It was somewhere around my  
22 birthday, which was April 26th.

23                  Q.   Okay.

24                  A.   It would depend upon what the  
25 actual execution date on the contract was.

1 Q. So you would have signed a  
2 contract then with the Clayton Group?

3 A. A consulting services  
4 contract, yes, sir.

5 Q. Okay. And just to confirm  
6 not necessarily the exact date, but would you say  
7 that was in April of 2002; is that accurate?

8 A. I think so. Like I said, I  
9 think it was around my birthday.

10 Q. Okay. Which you indicated  
11 was April 26th?

12 A. 26th.

13 Q. Okay. Now, your first  
14 meetings with Nova Scotia officials, in your  
15 statement, you indicated were on April 29th and  
16 April 30th of 2002; correct?

17 A. That sounds about right.  
18 Again, not to -- because I know it was around my  
19 birthday.

20 Q. Sure. That's not a problem.  
21 We can confirm that. But if you look at paragraph  
22 9 of your statement, sir, if you can turn to that  
23 briefly, it is the first item in the bundle we  
24 provided to you. It should be, in any event.

25 So again paragraph 9, sir, if you

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1 could take a look at that, you will see there is a  
2 footnote to that paragraph. If you look at the  
3 footnote, you will see a list of dates for  
4 meetings. Do you see that?

5 A. The one that is the paragraph  
6 that starts "From 2002 to 2005".

7 Q. Correct.

8 A. Okay.

9 Q. And the first --

10 A. Footnote number 2?

11 Q. I will just double check. I  
12 think it is 3.

13 A. Okay.

14 Q. You would agree with me that  
15 the first meetings are April 29th, April 30th,  
16 2002?

17 A. Yes, I would.

18 Q. So, in effect, just to be  
19 clear on this, your actual involvement began in  
20 April of 2002, not March 2002; is that true?

21 A. I think there were some  
22 preliminary discussions in March of 2002, just kind  
23 of a general overview of a possible project in Nova  
24 Scotia.

25 Q. And you state, sir, that you

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1 had 13 meetings with the Nova Scotia's Department  
2 of Natural Resources to discuss potential aggregate  
3 investments; correct?

4 A. Correct.

5 Q. And your statement indicates  
6 the precise dates in which these 13 meetings took  
7 place; correct?

8 A. Yes, it does.

9 Q. And we've confirmed or you  
10 confirmed that the earliest of those meetings was  
11 April 29th, 2002?

12 A. Yes, it was.

13 Q. Okay.

14 A. I might have had a phone call  
15 or two before that. As a matter of fact, I'm sure  
16 I did to set up the logistics of the meetings.

17 Q. I see. But the meetings  
18 themselves listed, the first one is April 29th.  
19 Your statement was signed on July 8th of 2011;  
20 correct?

21 A. Yes, it was.

22 Q. So that meeting would have  
23 been almost nine years after you signed that  
24 agreement or signed your statement, I should say;  
25 correct?

1 A. Correct.

2 Q. Now, Mr. Lizak -- or  
3 Mr. Lizak, pardon me, these are precise dates you  
4 have indicated in your statement. Did you rely on  
5 a calendar, notebook, anything written, electronic  
6 to arrive at these dates?

7 A. I derived them from several  
8 sources. I would say probably the most dependable  
9 one is I went back and reviewed my billable  
10 invoices. For tax purposes, I keep all of my  
11 invoices and they're very detailed. So I would  
12 have looked at that.

13 I also keep, you know, a simple  
14 12-month calendar where I make a note on what I  
15 did, when I had meetings, et cetera. There were  
16 probably some notes in there, also.

17 Q. Just to confirm, then,  
18 billable invoices, you mentioned a calendar, and in  
19 addition there were probably some notes; is that  
20 your evidence?

21 A. Correct.

22 Q. And in addition to the  
23 meetings with members of the Nova Scotia's  
24 Department Of Natural Resources, you also note in  
25 your statement that you had further discussions



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1 with department officials by teleconference;  
2 correct?

3 A. Yes.

4 Q. And you have also indicated  
5 precise dates for those teleconferences, as well?

6 A. I did, sir.

7 Q. Does your statement attach  
8 any documents in relation to either of the 13  
9 meetings that you note in your statement, or the  
10 teleconferences that you also mentioned in your  
11 statement?

12 A. Sorry, would you...

13 Q. Sure. Did you attach any  
14 documents to your statement in relation to the  
15 meetings that you note took place with department  
16 officials? That's with respect to paragraph 9 of  
17 your statement. And then further on, we  
18 established that your statement also indicates that  
19 you had teleconferences with these same officials.

20 And in respect of those  
21 teleconferences, did you attach any documents, your  
22 notes, the calendar and so on?

23 A. No. What is attached are  
24 essentially documents that were provided by the  
25 Nova Scotia Department of Natural Resources, I

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1 think a couple of letters, and that's it.

2 Q. We will come to those.

3 A. Okay.

4 Q. I just wanted to confirm  
5 there are no notes and so on attached in relation  
6 to those meetings or those teleconferences?

7 A. Correct.

8 Q. Any reason why you didn't  
9 attach those notes, calendars and so on,  
10 information?

11 A. No. I wasn't asked to. I  
12 was simply asked to provide documents that were  
13 submitted to me by the Department of Natural  
14 Resources.

15 Q. Thank you. Mr. Lizak, I  
16 would now just like to turn to the Tribunal,  
17 because I am about to ask some questions relating  
18 to documents that are marked "confidential".

19 PRESIDING ARBITRATOR: Okay. So  
20 we will go off.

21 MR. EAST: I grouped those in  
22 together in convenience, and I think it is  
23 appropriate we go off camera.

24 PRESIDING ARBITRATOR: Just give  
25 it a second.

1 --- Upon resuming confidential session under  
2 separate cover at 4:47 p.m.

3 --- Upon resuming public session at 4:53 p.m.

4 PRESIDING ARBITRATOR: We are back  
5 in public.

6 BY MR. EAST:

7 Q. Okay, very good. Mr. Lizak,  
8 I would now like to turn back to your statement.

9 Sir, your evidence is that you  
10 were told by Nova Scotia's Department of Natural  
11 Resources that the province was encouraging of  
12 investments of land-based quarries; correct.

13 A. Correct.

14 Q. And which specifically  
15 included the Whites Point quarry site?

16 A. Well, I didn't specifically  
17 say that it included the Whites Point quarry site.

18 Q. Okay?

19 A. Just generally they were  
20 encouraging tidewater development.

21 Q. So they were generally  
22 encouraging of investments in land-based quarries?

23 A. Yes.

24 Q. All right. You also state,  
25 sir, that you relayed the Government of Nova

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1 Scotia's words of encouragement to the Clayton  
2 Group; is that correct?

3 A. That is correct.

4 Q. Mr. Lizak, did any Nova  
5 Scotia government official represent to you that  
6 the project would not be subject to an  
7 environmental assessment?

8 A. I don't recall that they said  
9 it would not. That was not my role in the project,  
10 sir. My role was to look at the quarry, to rank it  
11 in context of other quarries, and, like I said, to  
12 participate in the environmental impact statement.

13 Q. Sure. So I understand you're  
14 describing your role, but do you recall whether any  
15 official would have represented to you that the  
16 project would not be subject to an environmental  
17 assessment?

18 A. No, I don't recall that.

19 Q. Okay. Now, does your  
20 statement attach any documents from officials of  
21 the Nova Scotia's Department of Natural Resources  
22 that solicit or ask for the investment of the  
23 Clayton Group of Companies in the development of a  
24 quarry and marine terminal at Whites Point?

25 A. Are you asking me, sir, if

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1 these documents specifically mention the Whites  
2 Point quarry?

3 Q. Right. Not just the  
4 documents, but also do you attach any documents  
5 where officials are asking for that? Are there any  
6 documents, whether they're publications or any  
7 documents, period?

8 A. Again, sir, what is the  
9 context?

10 Q. I will repeat that question.

11 A. Okay.

12 Q. Do any documents attached to  
13 your statement from officials of the Nova Scotia's  
14 Department of Natural Resources ask for or solicit  
15 the investment of the Clayton Group of companies in  
16 the development of a quarry and marine terminal at  
17 Whites Point?

18 A. No, not specifically the  
19 Whites Point quarry.

20 Q. Okay. Do any documents  
21 attached to your statement ask for or solicit the  
22 investment from, again, the Clayton Group in the  
23 development of a quarry and marine terminal in the  
24 Digby Neck?

25 A. I want to be clear here. Are

00237

1 you asking me if any of these statements  
2 specifically say or ask the Claytons specifically  
3 to invest money in the Whites Point quarry, the  
4 specific quarry?

5 Q. Correct, or the Digby Neck.

6 A. You know, not specifically  
7 Digby Neck, no. This was -- you know, generally  
8 the encouragement was -- you know, obviously at  
9 some point the province knew that we were working  
10 on Whites Point.

11 Q. Right.

12 A. But the encouragement was  
13 broad based in terms of investment within the  
14 province.

15 Q. Okay. Now, you have alluded  
16 to this and your statement indicates that Nova  
17 Scotia's Department of Natural Resources did  
18 provide you with some publications; is that  
19 correct?

20 A. Yes, sir.

21 Q. And your statement also  
22 indicates that these publications, as I think you  
23 said, but just to confirm, were encouraging of  
24 investment generally in Nova Scotia?

25 A. Generally, but specifically

1 quarry investment and specifically tidewater quarry  
2 investment.

3 Q. And most of the Government of  
4 Nova Scotia publications you referred to are listed  
5 in footnote 5 of your statement; is that right?

6 A. Yes, I think that's fair, sir.

7 Q. I would now like to take you  
8 to some of those documents that you attach as  
9 exhibits to your statement.

10 A. Okay.

11 Q. Before we -- no, actually we  
12 will go straight there.

13 Before I do, actually, pardon me,  
14 just ask you if you are aware that several of these  
15 publications that you have listed in this footnote  
16 and attached to your statement predate the  
17 enactment of the Nova Scotia Environmental  
18 Assessment Act that was in place during the  
19 assessment of the Whites Point quarry project.

20 A. Again, sir, that wasn't my  
21 role. I mean, I'm not an environmental expert,  
22 and, you know,, my charge was not to concern myself  
23 with the details of the environmental impact  
24 statement.

25 Q. Sir, just to confirm, I asked

1 you this question more generally before, but just  
2 so I am clear, the exhibits that are attached to  
3 this particular footnote, footnote 5, none of those  
4 documents specifically solicit or ask for  
5 investment of the Clayton Group, investment in  
6 Whites Point or in the Digby Neck; is that correct?

7 A. No. They don't specifically  
8 ask Clayton for investment on that specific site.

9 Q. If we could turn to Exhibit 3  
10 in your bundle, it is dated November 1987; correct?

11 A. Yes, it is.

12 Q. It its title is "Potential  
13 Crushed Stone Deposits on Tidewater in Nova  
14 Scotia"; correct?

15 A. Correct.

16 Q. And you also referred to this  
17 exhibit in your statement at paragraph 13  
18 specifically, and indeed quote from it, don't you?

19 A. Where do I do that, sir?

20 Q. I will give you an  
21 opportunity to have a look at your statement. It  
22 is at the beginning of the bundle?

23 A. Okay.

24 Q. I referred to paragraph 13 of  
25 your statement. There you quote from the document



1 that we have just established as Exhibit 3.

2 A. Correct.

3 Q. If we could go back to  
4 Exhibit 3, if you could turn to page 4 of that  
5 document?

6 A. Okay.

7 Q. And, again, just so we're  
8 clear on what these documents establish, if you  
9 could look at the heading "Surface and Mineral  
10 Rights", do you see that?

11 A. I do.

12 Q. And the second sentence  
13 directly underneath that heading states, "It is  
14 not", and the word "not" is underlined:

15 "... asking for or soliciting  
16 proposals for the development  
17 of the properties."

18 Is that correct?

19 A. That's correct.

20 Q. Now, you're generally  
21 familiar with this document, sir?

22 A. Generally, yes.

23 Q. And this publication has been  
24 prepared by the mineral development division of  
25 Nova Scotia Department of Mines and Energy;

1 correct?

2 A. Yes, it has.

3 Q. And it identifies a series of  
4 locations as suitable for development; is that  
5 correct?

6 A. It does.

7 Q. Now, just to be clear,  
8 Mr. Lizak, you're not suggesting that any of the  
9 projects that are listed in -- or, sorry, any of  
10 the sites, rather, that are listed in this document  
11 referred to the location of the Whites Point quarry  
12 site, are you?

13 A. No, I'm not suggesting that.  
14 There are several sites. I note that we did visit  
15 several sites listed in those publications, right.

16 Q. I just wanted to clarify.  
17 The reason is, and I take that, sir, is I wouldn't  
18 want anyone reviewing the document to be confused,  
19 because one of the sites that are listed in this  
20 document is a White Point. It sounds remarkably  
21 similar, and I am not suggesting anything to it. I  
22 just wanted to be clear that that is not the --  
23 that's not Whites Point in Digby County?

24 A. No. You're correct. It's a  
25 totally different county.

1 Q. In fact, just to be clear for  
2 those reviewing that document, if you could turn to  
3 page 8, that is where it is listed. Do you see  
4 that?

5 A. I do.

6 Q. It indicates that White Point  
7 is in fact located in Victoria County. Do you see  
8 that?

9 A. Yes.

10 Q. Are you generally familiar  
11 with the geography of Nova Scotia and where it  
12 might be?

13 A. Somewhat. It is not Digby  
14 County.

15 Q. No. It indicates further  
16 down that it is near the Cabot Trail. Are you  
17 aware that the Cabot Trail is in fact on Cape  
18 Breton Island?

19 A. I think. I think I have  
20 hiked on that trail, actually.

21 Q. I would like to take you to  
22 another exhibit that you attach. It is an exhibit  
23 to your statement, Exhibit No. 5, sir.

24 A. Okay.

25 Q. It is entitled "Minerals - A

1 Policy for Nova Scotia", 1996; correct?

2 A. Correct.

3 Q. You are familiar with this  
4 document, sir?

5 A. I am, sir.

6 Q. If we could go to page 4,  
7 please, of this document, near the bottom of the  
8 page is a text box. Do you see that?

9 A. Under "present"?

10 Q. I am not sure.

11 A. Page 4 of this publication?

12 Q. You should be at Exhibit 5.

13 A. I'm sorry. I was on Exhibit  
14 4.

15 Q. So just to make sure, you are  
16 at the exhibit that is entitled "Minerals - A  
17 Policy for Nova Scotia", 1996?

18 A. Yes.

19 Q. Okay. Now if you could turn  
20 to page 4.

21 A. Okay.

22 Q. So at the bottom of that page  
23 is a text box. Do you see that?

24 A. I do.

25 Q. And it includes the

1 Department of Natural Resources' missions and  
2 goals; correct?

3 A. It does.

4 Q. Can you confirm that these  
5 goals include: To achieve sound natural resources  
6 stewardship and sustainable development, and also  
7 to maintain the diversity of the province's natural  
8 environment? These are a couple of the goals, if  
9 you will, that are listed?

10 A. That is a fair quote.

11 Q. Now, if you could turn to the  
12 bottom of that page, page 4, and it continues on to  
13 page 5. This is a list of conditions of the  
14 mineral policy designed to ensure successful  
15 mineral resource sector in Nova Scotia; is that  
16 correct?

17 A. Where are we, sir?

18 Q. The bottom of page 4. There  
19 is a number of conditions that start at the bottom  
20 of page 4 and continues to page 5. Do you see  
21 that?

22 A. I do.

23 Q. And condition number 5 in  
24 that list it is entitled "The protection of the  
25 environment"; correct?

00245

1 A. Correct.

2 Q. And, finally, page 12 of this  
3 document, policy 5.0, do you see that?

4 A. I do.

5 Q. It is entitled "Ensure the  
6 protection of the environment"; correct?

7 A. Correct.

8 Q. And this section mentions  
9 environmental assessment of mineral projects,  
10 doesn't it?

11 A. It does.

12 Q. So, again, just to be clear,  
13 sir, this document doesn't talk about the Whites  
14 Point or the Digby Neck, does it?

15 A. No, not specifically, but it  
16 is very generally encouraging of investment in Nova  
17 Scotia.

18 Q. Okay.

19 A. And, you know, if I might  
20 add, sir, on page 4 --

21 Q. Mm-hm.

22 A. -- Nova Scotia's colourful  
23 history ... having the lifestyles, values,  
24 location, the time zone many companies are seeking,  
25 and from my perspective when I looked at this, I

1 mean, I also know that page 7, it says "to ensure  
2 that the" -- "minimize the effort and cost required  
3 to meet regulatory requirements".

4 And on page 13, it says, you know,  
5 basically support an effective and timely  
6 environmental assessment process.

7 I mean, so it does not  
8 specifically reference Whites Point, but, you know,  
9 this is the kind of information I passed along to  
10 my client.

11 You know, this is what was given  
12 to me. All I know is, again, I'm not an  
13 environmental expert. That was not part of my  
14 charge, but this is what I read and this is also,  
15 you know, what I was told by the gentleman I worked  
16 with at the Department of Natural Resources.

17 Q. Okay.

18 A. So...

19 Q. That's fine. Just to be  
20 clear, this document doesn't say that -- you  
21 mentioned environmental assessment at a couple of  
22 the pages in this document. This document doesn't  
23 say that it would abbreviate or in any way not  
24 subject mineral development to environmental  
25 assessment; correct?

1                   A.    No, but it does say it will  
2 be done cost effectively in a timely manner.

3                   Q.    Right. I just have a couple  
4 more documents that are exhibits in this area that  
5 I would like to take you to very briefly. If we  
6 could look at Exhibit 6, this was attached to your  
7 statement and it is called "A Look at Nova Scotia's  
8 Mineral Industry"; correct?

9                   A.    Correct.

10                  Q.    It is dated July 1999?

11                  A.    Yes, it is.

12                  Q.    Your statement notes that --  
13 let me start first. If you could turn to page 2 of  
14 this document, you will see there is a map there?

15                  A.    I do, sir.

16                  Q.    Your statement notes that  
17 this map showcases over 42 current mining  
18 operations in Nova Scotia; correct?

19                  A.    Yes, it does.

20                  Q.    So if we look at this map,  
21 there are no marine terminals or quarries along the  
22 coast of the Digby region, are there?

23                  A.    No, there are not.

24                  Q.    And, in fact, there are no  
25 projects highlighted on the coast of the Digby Neck



1 region, are there, along the coast?

2 A. There are not.

3 Q. If we could -- sorry. Your  
4 statement also specifically identifies one of the  
5 Nova Scotia government publications called "One  
6 Window Process For Mine Development Approvals";  
7 correct?

8 A. Correct. That was one of the  
9 publications that was recommended to me.

10 Q. That is attached at Exhibit 7  
11 to your statement; correct?

12 A. Yes, it is. I think it is  
13 also referenced in one of the prior publications  
14 under the section that talks about expedited  
15 process and referring to the one window process.

16 Q. Okay. Now, you referred to  
17 this publication as outlining a formalized and  
18 streamlined review process for the mining industry;  
19 correct?

20 A. Correct. And that was what  
21 was emphasized by the gentleman that I worked with  
22 at DNR.

23 Q. And does this document  
24 indicate that the Whites Point project would not  
25 have to undergo an environmental assessment or any

1 mining or project quarry development project?

2 A. Well, again, sir, I believe  
3 not. I mean, I don't -- you know, I'm not trying  
4 to be flippant, but I don't think any of these  
5 publications, other than Minister contacts,  
6 specifically refer to Whites Point.

7 Q. So would it be accurate to  
8 say, then, that the one window process, as you  
9 understand it, refers to the streamlining of the  
10 process a project would undergo, in general, rather  
11 than specifically in respect of the environmental  
12 assessment process?

13 A. Yes. I mean, you know, I  
14 would like to provide a little context here. These  
15 documents were given to me by the Department of  
16 Natural Resources.

17 Q. Right?

18 A. And, you know, again, they  
19 weren't -- there was one couple of individuals  
20 within the Department of Natural Resources that did  
21 work extensively with me, encouraged me, supported  
22 me on developing the Whites Point quarry project,  
23 and that would be Dan Kontak.

24 Mr. Phil Finck took more of a  
25 global view to essentially give us an overlay of

1 the general markets within Nova Scotia, provided  
2 the helicopter tour, you know, just contributed  
3 timeless amounts of money, effort and research. I  
4 mean, these guys were tremendously helpful.

5                   They didn't say, you know, We want  
6 you to invest specifically in Digby Neck, okay?

7                   Now, Dan Kontak did assist me in  
8 doing everything possible to help me with that  
9 analysis.

10                   Q. Mm-hm?

11                   A. But, generally, there was  
12 tremendous encouragement, tremendous support.  
13 These are some of the most competent couple of guys  
14 I ever worked with.

15                   Q. Is it accurate to say this  
16 was more general encouragement than specifically  
17 encouraging the Clayton Group to invest in Whites  
18 Point?

19                   A. I can't say that they said  
20 specifically Whites Point, although they did -- you  
21 know, when they became familiar with the project,  
22 you know, there was tremendous encouragement. They  
23 wanted this to go. It is part of their charge,  
24 sir. You know, it is what they do, and there are  
25 some publications referenced in here that

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1 specifically talk about tidewater, you know,  
2 opportunities, things done by Dan Kontak, things  
3 done by the department, in general.

4 Q. But outside these  
5 publications, there is no -- there are no documents  
6 that you attach to your statement that would  
7 specifically ask for, solicit, specifically  
8 encourage investment in the Whites Point region;  
9 correct?

10 A. Well, again, sir, when  
11 they're providing countless hours -- you know, Dan  
12 Kontak, for example, who is one of the most  
13 competent guys I ever had an opportunity to work  
14 with. You know, he visited the site with me  
15 several times, overnighted on the site, provided  
16 countless publications. He sampled our core. He  
17 analyzed our core.

18 He also reviewed, you know,  
19 documents that we prepared for the Whites Point  
20 quarry. It was a very collaborative process. I  
21 mean, I didn't ask for this help. You know, had I  
22 essentially had to pay for this, it would have cost  
23 tens of thousands of dollars.

24 Likewise, Phil Finck submitted all  
25 kinds of documents, you know, on properties within

1 Nova Scotia, prepared a helicopter tour. We  
2 visited, you know, six to ten sites. He set up  
3 meetings with -- with owners. He talked about  
4 funding mechanisms. He basically talked -- said,  
5 If you have First Nations problems, my wife works  
6 with First Nations.

7                   So, I mean, it was just -- you  
8 know, again, to have a helicopter for two days,  
9 have two staff members, I had died and gone to  
10 heaven. This was kind of a dream project.

11                   Q. Let's come to that --

12                   A. Okay.

13                   Q. -- helicopter tour, if we  
14 could. Just before I come there, if you could just  
15 tell me if you have ever personally visited the  
16 Digby Neck?

17                   A. The Digby Neck site?

18                   Q. Yes, yes?

19                   A. On numerous occasions, yes,  
20 sir.

21                   Q. Could you tell me what year,  
22 the first time you visited it?

23                   A. Well, on this project it was  
24 2002, but I have been to Nova Scotia before, and,  
25 quite frankly, I'm not certain if I visited Digby

1 Neck, but I may have. I have had other projects.  
2 I have been to trade meetings in Halifax and, you  
3 know, things of that nature.

4 Q. Okay. And just to confirm,  
5 your statement doesn't indicate specifically that  
6 you visited Digby Neck in 2002, does it?

7 A. My report does, and I think  
8 my statement does indicate that I visited. I mean,  
9 I did visit it around my birthday. I was on site  
10 when we were doing the coring.

11 Q. So late April 2002?

12 A. I also visited the Department  
13 of Natural Resources, you know, on the initial part  
14 of that trip and the following part of that trip,  
15 the end of that trip.

16 Q. Now, we have just been -- you  
17 have just been referring to the helicopter tour  
18 that the Department of Natural Resources organized  
19 for you. This took place in June 4th, June 5th,  
20 2003; correct?

21 A. Roughly around there, because  
22 that was my fiancée's birthday, so it seems to me  
23 it is all around birthdays. I was up for our  
24 birthdays.

25 --- Laughter.

1                   Q.    Just to ensure that we've got  
2 the precise dates, sir, if we could look at -- if  
3 you could just refer briefly to paragraph 19 of  
4 your statement. Do you see that?

5                   A.    Yes.

6                   Q.    And in that paragraph, you  
7 have stated that June 4th and 5th, 2003 is when  
8 this helicopter tour took place?

9                   A.    Yes. Her birthday was June  
10 6th, so...

11                  Q.    And the purpose of the  
12 helicopter tour you stated was to review potential  
13 quarry sites that could be suitable for your client  
14 to invest in; correct?

15                  A.    Correct.

16                  Q.    Just to be clear, did this  
17 tour include the Digby Neck?

18                  A.    No, it did not. There was  
19 sort of a bifurcation of effort, in that Dan Kontak  
20 being, you know, bar none, the resident expert on  
21 the Digby Neck basalt. That was his niche, you  
22 know.

23                                Like I said, I met Dan on several  
24 instances there. He was focussing on that core  
25 area, essentially assisting me. Again,

1 phenomenally impressive guy, and I am not easily  
2 impressed.

3 Part of this is not only did we  
4 want to know that Whites Point was a very viable  
5 enterprise, but we needed to put it into context of  
6 other opportunities with Nova Scotia to rank it,  
7 okay? Essentially, how does this compare not only  
8 to other operating quarries but, equally important,  
9 competitive operations?

10 So we visited the Port Hawkesbury  
11 Martin Marietta operation. This was to put this in  
12 context.

13 Q. Okay. So just to confirm,  
14 then, sir, the purpose of the visit, the helicopter  
15 tour, then, was to generally tour other potential  
16 quarry sites?

17 A. Right, because basically, you  
18 know, I was taking care of what was going on at  
19 Whites Point in collaboration with Dan Kontak, and  
20 this was to give us an opportunity to rank this  
21 site. And I want to emphasize, after doing this  
22 exhaustive study, the Whites Point quarry was the  
23 gem in the crown. When we looked at the criteria,  
24 it was the best property, but we don't know that  
25 until we look at the other sites.



1 Q. Now, Mr. Lizak, just so I am  
2 clear on this sort of time frame of events here,  
3 looking at your statement, you would agree with me  
4 that by this time -- and I took you to a number of  
5 documents before -- that it is over a year since  
6 Bilcon of Nova Scotia has been incorporated?

7 A. Since --

8 Q. I am talking about the  
9 helicopter tour in relation to this.

10 A. -- incorporation, it sounds  
11 like about 13 months.

12 Q. Okay. And over a year since  
13 the partnership Global Quarry Products was  
14 incorporated?

15 A. It sounds about right.

16 Q. So those events I just  
17 referred to just now all took place before the  
18 helicopter tour in June 4th, 5th, 2003; correct?

19 A. Yes, they did.

20 Q. Now, in your statement, it  
21 indicates that Dan Kontak, who you referred to,  
22 informed you that the Whites Point joint review  
23 panel would be consulting a Ms. Sandra Johnston to  
24 provide analysis in respect of the environmental  
25 impact statement guidelines; is that correct?

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1                   A.    Yes, he did.  That's  
2    somewhere in my statement.

3                   Q.    We can come to that.  And it  
4    is actually paragraph 25, if you would like to  
5    review that.

6                   A.    Actually, I am looking at it,  
7    sir.

8                   Q.    And that the Joint Review  
9    Panel preferred Ms. Johnston to Mr. Kontak himself;  
10   correct?  That is what you referred to in that  
11   paragraph?

12                  A.    Well, he said that he was  
13   replaced by Sandra Johnston, correct.

14                  Q.    And you state that Mr. Kontak  
15   informed you of this specifically on April 14th,  
16   2005; correct?

17                  A.    Yes.

18                  Q.    Just to confirm, Mr. Lizak,  
19   Mr. Kontak and Ms. Johnston at that time were  
20   officials of the Nova Scotia Department of Natural  
21   Resources; correct?

22                  A.    Correct.  I believe they were  
23   both regional geologists.  Dan was a regional  
24   geologist with the relevant office, and Sandra, I  
25   believe, was regional geologist with I think the

1 central division or the western division.

2 Q. So both regional geologists.  
3 And you also state Mr. Kontak told you that he  
4 believed that the Joint Review Panel's decision to  
5 consult Ms. Johnston rather than himself was  
6 political; correct?

7 A. Correct.

8 Q. And just to confirm, to the  
9 best of your knowledge, Mr. Lizak, Mr. Kontak has  
10 not entered a statement in these proceedings, has  
11 he?

12 A. Not to my knowledge.

13 Q. So it is your understanding  
14 on April 14th, 2005 Mr. Kontak was requested by the  
15 Joint Review Panel not to provide advice on the EIS  
16 guidelines?

17 A. I don't know if that was the  
18 specific day. Here's what I know.

19 Q. Okay.

20 A. Dan was, as I said, bar none  
21 the expert on the Whites Point basalt, the quarry  
22 project. He worked tirelessly with me. We met on  
23 site on numerous occasions. Like I said, he  
24 sampled the core. He tested the core, read some of  
25 our reports. He was -- he's the expert.

1                   And at some point, he indicated  
2 that he was going to be an advisor to the Joint  
3 Review Panel, and at some point when we're -- you  
4 know, I'm submitting him documents, I'm soliciting  
5 his input, he let me know that that was not the  
6 case.

7                   And my question was, Why  
8 not? You're the guy. And it was a simple comment  
9 it's political.

10                  Q. We will come to that again,  
11 sir, but just to be clear a bit on the time frame  
12 of events here, Joint Review, would you agree with  
13 me the Joint Review Panel issued the environmental  
14 impact assessment guidelines on March 31st, 2005?

15                  A. That I can't testify to, sir,  
16 because again that was not part of my charge.

17                  Q. No, no. The reason I ask you  
18 that question, sir, is that in paragraph 25 you  
19 make reference to Mr. Kontak telling you about a  
20 specific request, and that request is in relation  
21 to the environmental impact assessment guidelines.  
22 So that is why I ask you that.

23                  But in terms of confirming that  
24 statement - that is, that the environmental impact  
25 assessment guidelines were finalized on March 31st,

1 2005 - if we could just turn to the documents in  
2 the bundle, it is R-210. Do you see that?

3 A. I do, sir.

4 Q. And these are the final  
5 environmental impact assessment guidelines;  
6 correct?

7 A. I'm going to take your word  
8 for that, sir. I haven't seen this document.

9 Q. You haven't seen this  
10 document before. You see that the first page of  
11 that document is date stamped 31st, March, 2005;  
12 correct?

13 A. I do, sir.

14 Q. So just in terms of  
15 understanding what you're saying in paragraph 25 of  
16 your statement, not in this particular document, I  
17 just want to be clear that your evidence,  
18 Mr. Lizak, is that the Joint Review Panel  
19 specifically requested that Mr. Kontak specifically  
20 be excluded from providing analysis in respect of  
21 the environmental impact assessment guidelines and,  
22 instead, that the Joint Review Panel requested  
23 Ms. Johnston's analysis. Is that your evidence,  
24 sir?

25 A. I don't know if the panel,

1 you know, specifically requested her, or what the  
2 logistics were. I simply know what Dan told me.

3 Q. Is that a reflection of what  
4 Mr. Kontak reported to you; is that your evidence?

5 A. Yes. Yes. And, again, this  
6 was kind of bewildering to me. I mean, again I  
7 don't know. My charge was not environmental law  
8 and the specific Environmental Assessment  
9 Regulations.

10 My charge was basically assess the  
11 site in the context of all of the other sites. That  
12 was not my not my assignment.

13 Q. Understood. Okay. And just  
14 to be clear, Mr. Lizak, are there any documents  
15 attached to your statement to support what you  
16 stated in paragraph 25 of your statement?

17 A. No, just what I said. Just  
18 what I reported.

19 Q. Okay?

20 A. Again, not to be flippant,  
21 but that is my sister's birthday, okay.

22 Q. Okay, sure. If we could look  
23 at the last page of your statement, and you will be  
24 glad to know this is the last set of questions I  
25 will ask you, sir.

1 A. Where are we, sir?

2 Q. The last page of your  
3 statement?

4 Q. You will see actually there  
5 are two paragraph 26s listed?

6 A. Oh, there are.

7 Q. If you look at the second  
8 one, do you see that?

9 A. Yes, I do.

10 Q. Here you state that the  
11 natural resources officials expressed surprise and  
12 annoyance at the aggressive opposition from other  
13 government officials and the Joint Review Panel.  
14 Correct?

15 A. Correct.

16 Q. This is a strong statement,  
17 sir. Has your statement named these officials?

18 A. I can name these officials.

19 Q. Okay.

20 A. You know, let me put this in  
21 context. You know, throughout the process, from  
22 the time I set foot in Nova Scotia, the officials  
23 did everything they could to support and provide  
24 encouragement. Again, they were the most helpful,  
25 competent guys I ever had the opportunity to work

1 with, you know, and I developed a trust with these  
2 guys. These guys became, you know, close  
3 collaborators in all aspects of the project.

4                   They would visit me on site on  
5 numerous occasions, spent countless provincial  
6 dollars essentially supporting our project, and  
7 always relayed to me that they thought the project  
8 was a "go", you know.

9                   And, again, let me provide some  
10 context. When I took the helicopter tour with Phil  
11 Finck, we looked at a lot of different properties,  
12 and I remember one we looked at at Guysborough, and  
13 I said, Phil, it is next to a provincial park. Is  
14 that going to be a problem? He said, That's  
15 manageable, okay.

16                   But they were also following --  
17 you know, they were following the project on Whites  
18 Point.

19                   Q. But just to be clear,  
20 Mr. Lizak, would any of these officials be able to  
21 tell you --

22                   MR. NASH: Excuse me,  
23 Mr. President. Could the witness be allowed to  
24 answer the question?

25                   PRESIDING ARBITRATOR: Sorry, I



1 didn't hear you.

2 MR. NASH: Could the witness be  
3 allowed to answer the question in full. He asked  
4 to put it in context, and he was continuing to do  
5 so before he was interrupted.

6 PRESIDING ARBITRATOR: Okay. I  
7 think acoustically I had a problem, but you said  
8 would the witness be allowed to --

9 MR. NASH: Could the witness be  
10 allowed to answer the question as he was trying to?

11 PRESIDING ARBITRATOR: Yes, I  
12 think so. Yes, you are, of course.

13 THE WITNESS: You know,  
14 specifically back to Dan Kontak, Dan Kontak and I  
15 remained in contact after the project was  
16 essentially denied, and, you know, we spoke a  
17 couple of months ago and he reiterated that the  
18 process was improper. I am quoting, and anyone  
19 feel free to call Dan up and ask him that.

20 Similarly, I would go out with  
21 Phil, I would go out with Garth. We would go to  
22 the pubs. They were surprised, as I was surprised,  
23 I mean, just given the context of the size of the  
24 project. You know, that is what I can say.

25 BY MR. EAST:

1 Q. Okay. I just wanted to be  
2 clear, in particular, in respect of this paragraph,  
3 sir, and I wanted just to ask you some questions  
4 there. And we were talking about whether your  
5 statement named officials, and it is just -- is  
6 that true? Are officials named in that paragraph?

7 A. No, sir, they're not.

8 Q. And just to be clear, also,  
9 has your statement indicated the dates attached to  
10 what you describe in paragraph 26 of your  
11 statement?

12 A. No, sir.

13 Q. And also just to ask, have  
14 you attached any documents to substantiate what you  
15 have described in paragraph 26 of your statement?

16 A. In terms of specific dates?

17 Q. In terms of any documents  
18 attached to support that statement?

19 A. No, sir, I have not.

20 Q. Okay. Thank you, Mr. Lizak.  
21 Those are all of my questions.

22 PRESIDING ARBITRATOR: Okay.  
23 Thank you very much.

24 PRESIDING ARBITRATOR: Thank you,  
25 Mr. Nash?

1 RE-EXAMINATION BY MR. NASH:

2 Q. I have a few questions in  
3 follow-up to the questions of my friend.

4 You went to Nova Scotia, you  
5 believe, in April of 2002?

6 A. Correct.

7 Q. You met with officials at the  
8 Nova Scotia Department of Natural Resources in  
9 April 29th and 30th, 2002?

10 A. I did.

11 Q. Who were they?

12 A. They would have been Dan  
13 Kontak, Garth Prime and Phil Finck.

14 Q. Was that your first  
15 introduction to them?

16 A. First physical meeting. I  
17 had some conversations with some of them, like I  
18 say, prior to that, but that was my first physical  
19 meeting.

20 Q. You have given evidence that  
21 you were given a number of documents by the  
22 officials from the Department of Natural Resources?

23 A. I did.

24 Q. Could you go to Exhibit 2,  
25 please, of your affidavit. You mentioned that Dan

1     Kontak you found to be a competent, knowledgeable  
2     person?

3                     A.     Extremely competent, one of  
4     the most competent people I ever had the privilege  
5     to work with.

6                     Q.     Is he a geologist?

7                     A.     He's a Ph.D. geologist.

8                     Q.     Did he offer to do studies of  
9     the Whites Point area with respect to the nature of  
10    the rock in that area?

11                    A.     He not only offered; he did.  
12    He met me several times on site at Digby Neck, not  
13    only at the Whites Point quarry site, but we also  
14    visited the Tiverton quarry, Parker Mountain  
15    quarry, several other quarries. He was gracious  
16    enough to describe the core.

17                    One of the things we do in  
18    analysis like this, we drill the property. We  
19    literally get like a two-inch core. He described  
20    it. He sampled it. He did what we call a  
21    petrographic analysis. Not to bore you with the  
22    details, but essentially you thin-section the rock.  
23    You grind it down to the point where it is -- you  
24    know, visible light goes through it. And he  
25    analyzed it.

1                   I mean, that is the kind of thing  
2 I normally do. My client normally does that. It  
3 costs a tremendous amount of money. Again, he was  
4 tremendously helpful and competent.

5                   Q. Compared to other  
6 jurisdictions you have worked in and other  
7 governments you have worked in numerous  
8 jurisdictions, how did the reception you received  
9 in Nova Scotia compare to those?

10                  A. It is not exaggeration to say  
11 it was, bar none, the best. I mean, this was kind  
12 of my dream team and dream project. I have had the  
13 opportunity to work in dozens of countries, dozens  
14 of provinces, dozens of states. Usually I'm the  
15 one that has to do the courting. You know, usually  
16 I've got to do the begging for assistance.

17                  In this case, I had some of the  
18 most competent people I ever had the opportunity to  
19 work with. They were incredibly helpful,  
20 incredibly resourceful.

21                  I died and went to geologic  
22 heaven, okay? It doesn't get any better than this.  
23 When I was thinking about this, in hindsight, I  
24 miss this project, okay? Just a tremendous  
25 project.

1 Q. Can you describe for the  
2 Tribunal what Exhibit 2 is.

3 A. Exhibit 2 is a study that Dan  
4 did on essentially the North Mountain Basalt, which  
5 is the rock we were mining on the Whites Point  
6 quarry, a very in-depth analysis. Again, this is  
7 the expert on the basalt rock.

8 Q. And in thumbnail sketch, what  
9 was the conclusion of that study?

10 A. On a thumbnail sketch, if you  
11 want, I can point to specific areas.

12 Q. Why don't you?

13 A. Okay. If you look at table  
14 1.

15 Q. On which page?

16 A. I'm sorry, page 71. Top  
17 flow, greenish black to grayish black columnar  
18 jointed, you know, to those of you that are not  
19 geologists, that is telling us that is as good at  
20 it gets. As a matter of fact, when I would pull  
21 the core out, literally I got a two-inch core and  
22 we would break the core to put it into a core box.  
23 I in many instances could not break the core with  
24 my hammer. I have never seen that before.

25 So that is sort of the anecdotal

1 evidence, but this is the specific hallmark of why  
2 this is extremely good rock.

3 Q. Is that why it is the gem in  
4 the crown?

5 A. It is one of the reason it is  
6 the gem in the crown. There is a whole host of  
7 criteria that one looks at, quality, quantity,  
8 proximity to the States, you know, environmental  
9 components, but that is one of the reasons that it  
10 met, definitely met, the quality criteria.

11 These criteria are pretty  
12 sophisticated. People tend to think that this  
13 is -- you know, all rocks are created equal. They  
14 are not. States have various tough specifications,  
15 chemical, you know, specifications, physicochemical  
16 specifications, and this rock met it.

17 As a matter of fact, it was so  
18 hard I had a little bit of concern about crushing  
19 costs. It was tremendous rock.

20 Q. If you look on the previous  
21 page, page 70, there is a map which I take to be a  
22 map of Digby Neck. What do all of those Bs on  
23 Digby Neck mean?

24 A. Those are areas that I  
25 believe that he sampled and described.

1 Q. Did the officials of the  
2 Department of Natural Resources ever try to  
3 dissuade you and the client from going to the  
4 Whites Point quarry?

5 A. No. Contrarily. I would  
6 argue that they encouraged us, as evidenced by all  
7 of the work they did for me. You know, again,  
8 usually I've got to bring competent people in on a  
9 project like this, typically. In this case, I had  
10 them. I mean, I had the best guys working for me.

11 Q. In the government?

12 A. At provincial expense. This  
13 would have cost me hundreds of thousands of  
14 dollars. You know, again you know, bar none, some  
15 of the best guys on the planet.

16 Q. Have you ever been taken on a  
17 helicopter tour by a government trying to attract  
18 investors to their jurisdiction?

19 A. I had not. That would have  
20 cost me tens of thousands of dollars, and I was a  
21 little breathtaken when I saw that was set up.

22 But in addition to that, I had two  
23 staff members from the Department of Natural  
24 Resources, a two- to three-inch dossier, which  
25 essentially categorized various, you know, mining



1 properties.

2 I met owners on sites. I mean,  
3 logistically we need to think about this. We are  
4 flying around from site to site to site, and when  
5 we'd land, the owners would be there.

6 There was guidance on financing.  
7 There was guidance on, you know, First Nations. I  
8 mean, just -- again, there was maps. I mean,  
9 phenomenal. It would have taken me hundreds of  
10 hours to work on this kind of stuff.

11 Q. What did the officials say  
12 about the marine-based quarries?

13 A. They were -- again, it is no  
14 secret that the province has been encouraging us  
15 for years. This was not my first trip to Nova  
16 Scotia on this thing. I mean, I have been to the  
17 province. I have been to Toronto, and generally  
18 they have a marketing budget. This is what these  
19 guys do.

20 Prior to the helicopter tour with  
21 Phil, we took a trip to his family island. He grew  
22 up on an island, a one-man schoolhouse. There was  
23 the obligatory stop at a lobster shop. I said, Let  
24 me take care of this. He said, No, the province is  
25 doing this. This is part of the provincial

1 promotional budget.

2 Q. So they gave you a number of  
3 documents. One of them was at Exhibit 4, which is  
4 entitled "Industrial Minerals in Nova Scotia."

5 A. Yes.

6 Q. And if you turn to page, at  
7 the very bottom, 019518.

8 A. Sorry, 019?

9 Q. 019518. At the top, it says,  
10 "A thriving industry." You will see there it gives  
11 a historical perspective. Then down to the second  
12 column, halfway down the page, it says, "The  
13 present." And over to the next page, 519, in the  
14 third column, it says "A bright future."

15 A. Correct.

16 Q. Do you remember reading that,  
17 and what conclusions did you draw from that?

18 A. What I remember reading,  
19 there is a couple of references in here, and I'd  
20 have to look for them, but where they specifically  
21 talk -- I know there is two references where they  
22 specifically mention tidewater quarries, and they  
23 specifically mention basalt.

24 And that is -- you know, that is  
25 kind of what I honed in. It is no secret that Nova

1 Scotia has a vibrant mining industry. I mean, all  
2 of the publications purport to that.

3                   It is apparent. It is part of  
4 what Nova Scotia does. And, I mean, they've looked  
5 in the province at numerous quarries. There's the  
6 Port Hawkesbury quarry. There is also -- there's a  
7 quarry in St Andrew that had been run by Balcan  
8 Materials in New Brunswick. That is New Brunswick.

9                   But this is what -- you know, this  
10 is it's not a surprise. I have been here before.  
11 I was here in '94 for the forum on industrial  
12 minerals, where presentations were made by the  
13 department promoting mineral development.

14                   I have been in Toronto, the  
15 industrial mineral forum. Again, the province  
16 travels. They have a budget.

17                   Q. Nova Scotia?

18                   A. Nova Scotia. One of the  
19 gentlemen I met was Michael McDonald. His title is  
20 exploration promotional manager. This is what  
21 these guys do. I don't think it is a secret.

22                   Q. Thank you. Those are my  
23 questions.

24                   PRESIDING ARBITRATOR: Thank you,  
25 Mr. Nash. Let me ask my colleagues if they have

1 questions.

2 QUESTIONS BY THE TRIBUNAL:

3 PROFESSOR SCHWARTZ: Just to  
4 clarify some terminology for us, you were asked  
5 several times about land-based quarries. You gave  
6 a number of answers and you referred to tidewater  
7 developments.

8 Could you clarify how you  
9 understand land-based quarry and how you understand  
10 tidewater development?

11 THE WITNESS: Sure. Tidewater  
12 development simply means -- you know, there's a  
13 whole list of salient criteria that you look at  
14 when you're evaluating a quarry.

15 I mean, one of the key components,  
16 this is a very low-cost, high-weight product, so  
17 the transportation costs of the product is key.

18 Now, this quarry is going to be  
19 shipped via ship, okay? So obviously proximity to  
20 tidewater is important. And you will see that  
21 referenced not only in my -- not only in my  
22 publications, but also in Nova Scotia publications,  
23 where they are essentially encouraging tidewater or  
24 essentially export, the exportation of stone.

25 And, again, this is not a

1 surprise. There is a large quarry in Port  
2 Hawkesbury, which is, you know, near the Canso  
3 locks, which is exporting stone that's owned by  
4 Martin Marietta to the States, but essentially you  
5 don't want to be quarrying far from the ocean if  
6 you are going to be shipping it via the ocean.

7                   One of the keys also is that the  
8 cheapest way to move stone is via boat, you know.  
9 Next cheapest is rail. Most expensive is via  
10 truck. And, you know, that is an important  
11 component of this, also. I mean, we're on  
12 tidewater, but unlike a land-based quarry, you  
13 can't see this operation. We're not going to have  
14 a lot of trucks. You know, that is typically --  
15 you know, neighbours worry about trucks. This is  
16 all going out via ocean-going vessel.

17                   PROFESSOR SCHWARTZ: So land-based  
18 quarry means a quarry where the transportation mode  
19 is going to be by road rather than by sea?

20                   THE WITNESS: It is essentially by  
21 truck.

22                   PROFESSOR SCHWARTZ: Just one more  
23 question. You said somewhere there were several  
24 references in Nova Scotia's materials to tidewater  
25 development.

1 THE WITNESS: Mm-hm.

2 PROFESSOR SCHWARTZ: I see that  
3 Exhibit 3 talks about potential crushed stone  
4 deposits of tidewater in Nova Scotia.

5 THE WITNESS: These are all --

6 PROFESSOR SCHWARTZ: That's the  
7 document.

8 THE WITNESS: These are all sites  
9 that were investigated by the department that are  
10 essentially on tidewater, which provide the  
11 potential to export stone via boat.

12 But I want to emphasize, when you  
13 compare these sites to the site that we looked at,  
14 we had the gem in the crown for a whole host of  
15 reasons.

16 If you have any interest, I will  
17 go through the 12, 13 criteria, but, you know, safe  
18 to say this was the gem in the crown.

19 PROFESSOR SCHWARTZ: Okay. Just  
20 one more question. If you look at figure 2 in  
21 Exhibit 3.

22 THE WITNESS: Sorry?

23 PROFESSOR SCHWARTZ: In Exhibit 3,  
24 the potential crushed stone deposit tidewater in  
25 Nova Scotia.

1 THE WITNESS: Yes.

2 PROFESSOR SCHWARTZ: There's a map  
3 there.

4 THE WITNESS: Mm-hm.

5 PROFESSOR SCHWARTZ: We understand  
6 the White Point at the right is not Whites Point.

7 THE WITNESS: Right.

8 PROFESSOR SCHWARTZ: We are on top  
9 of that. There is coloured-in areas where there is  
10 deposits.

11 Can you tell from this map what  
12 counts as a tidewater development, or does it  
13 depend on what is economic in context?

14 THE WITNESS: What this does is it  
15 is locations of potential crushed stone deposits in  
16 Nova Scotia. It doesn't specifically reference a  
17 specific location.

18 For us geologists, if you look at  
19 the legend, this kind of gives you an overview of  
20 the regional geology, but you've got to get very  
21 specific. But you do have some of the locations  
22 that were studied marked on this map, White Point,  
23 Kelly's Cove, Flagstaff Hill, Terence Bay, and I  
24 want to point out that actually we looked at a site  
25 in proximity to Terence Bay. We looked at a site

1 at Kelly's Cove. We looked at a site which I  
2 called Cape Breton in the northeast corner, which  
3 is close to White Point, to, again, put our site in  
4 context to see how it ranked.

5 And it was, you know -- again, it  
6 was, bar none, the gem in the Crown. And I think  
7 it is fortuitous that, you know, one of the reasons  
8 we may have been fortunate enough to get that site  
9 was because nobody else had really looked at that  
10 area prior to Dan Kontak, you know, getting on side  
11 with his publication.

12 PROFESSOR SCHWARTZ: Thank you  
13 very much.

14 THE WITNESS: Sure.

15 PRESIDING ARBITRATOR: Okay. I  
16 have one-and-a-half questions.

17 --- Laughter

18 PRESIDING ARBITRATOR: Why a  
19 tidewater? I understood that what it means is it  
20 is right there at the beach so that ships can  
21 transport the stuff away; right?

22 What does "tide" mean? I mean, I  
23 know what a tide is, but why is it tidewater?

24 THE WITNESS: I don't know why  
25 they call it that, but that is the euphemism we



1 use, just you nailed it. It just means it's on the  
2 water. And, again, it just can't be on the water.  
3 There is a whole host of other things that have to  
4 occur.

5                   You have to have adequate depth of  
6 water. You know, there's a lot of things, but  
7 ultimately it starts with the rock and the  
8 proximity to the end destination, and it is not  
9 just -- you know, there's two parts to this puzzle.

10                   The first part is the area where  
11 you are mining the stone, but the other thing that  
12 is crucial is that my client had the ability to  
13 import stone, and that is unusual, you know, to  
14 have. He had the dock down in Nova Scotia --  
15 or down in New Jersey. He had the adequate depth.  
16 That is unusual, because most facilities, they  
17 don't have the area. They don't have the water  
18 depth.

19                   You need two components, the  
20 quarry, and then the end use component. And,  
21 again, this was, you know, the gem in the crown  
22 with the project, with the site, and also  
23 essentially, you know, tremendous, you know,  
24 opportunity at the other end of the equation.

25                   PRESIDING ARBITRATOR: You gave me

1 one-and-a half answers.

2 THE WITNESS: I'm sorry. You get  
3 geologists talking about this, we can't stop.

4 PRESIDING ARBITRATOR: The full  
5 question refers to your helicopter tour. I mean,  
6 you were very fortunate. I was taken for rides by  
7 government, but never for a helicopter tour.

8 THE WITNESS: You know, well, let  
9 me -- I have one other story on that. On the way  
10 back...

11 PRESIDING ARBITRATOR: All right.  
12 You said that you were taken on a helicopter tour.  
13 You were taken to a number of sites, and what  
14 wasn't quite clear to me, I think once you said to  
15 sites that were operating, and then you said  
16 "potential sites." You used to -- so did you visit  
17 both types of sites, and some of them as an  
18 alternative to the one that is in...

19 THE WITNESS: Yes. No pun  
20 intended. We left no stone unturned, okay?

21 We look at what we called  
22 greenfield sites, which are sites that have no  
23 development at all, sites that would be -- you  
24 know, essentially you would have to start from  
25 scratch.

1                   The Whites Point site is kind of  
2 in between. One of the advantages of the Whites  
3 Point site is it had a quarry on site with a  
4 permit. Then the other extreme, though, are sites  
5 that are completely operating.

6                   And so we looked at the whole  
7 range of sites. I would say, you know, there was  
8 an even mix. We looked at -- my client also looked  
9 at some joint venture opportunities with other  
10 people. He not only looked at Nova Scotia, but  
11 also looked at New Brunswick.

12                   And when we ranked everything,  
13 this was the gem in the crown, and I would like to  
14 sit here and tell you that -- you know, usually the  
15 way you do a study like this is you investigate all  
16 of these other options and you rank these sites and  
17 you go after that.

18                   Fortuitously we landed on the  
19 right spot. It happened to be, you know, the best  
20 project, but I can't call it the best project till  
21 I investigate the other alternatives.  
22 Additionally, it was far superior to the existing  
23 operations.

24                   So our stone quality was superior  
25 to what occurred at the Martin Marietta site in

1 Port Hawkesbury. It was superior to what was  
2 coming out of St. Andrew in New Brunswick. So we  
3 had a competitive advantage.

4                   And we looked at those sites. I  
5 looked at Tiverton. I looked at Parker Mountain.  
6 I would be hard pressed -- maybe we missed  
7 something, but, boy, we cast a wide net. And,  
8 again, so much of this was because of the  
9 assistance provided with the province.

10                   I mean, you know, I didn't know  
11 about this stuff. It would have taken me years to  
12 put this information together.

13                   PRESIDING ARBITRATOR: Thank you  
14 very much.

15                   THE WITNESS: My pleasure.

16                   PROFESSOR SCHWARTZ: I have  
17 another half question.

18 --- Laughter.

19                   THE WITNESS: I don't know what  
20 that means. Can I give a half answer?

21                   PROFESSOR SCHWARTZ: I won't put  
22 any analysis on "half".

23                   You probably answered this. It is  
24 probably in the materials. But the helicopter ride  
25 when you died and went to heaven, was Digby Neck

1 any part of heaven that you went to on these  
2 helicopter rides?

3 THE WITNESS: Well, what I meant  
4 was this was just such an unusual effort, okay,  
5 to -- again, I mean, I could not have put together  
6 a better staff. It would have taken me hours to  
7 put together this information. I've got a chopper  
8 waiting for me that would have cost thousands of  
9 dollars.

10 What I'm saying is that the  
11 process was just so enlightening and wonderful.

12 PROFESSOR SCHWARTZ: But very  
13 specifically, were you ever escorted by Nova Scotia  
14 officials to anywhere on Digby Neck?

15 THE WITNESS: Not via helicopter,  
16 but I met Dan Kontak on site on quite a few  
17 occasions. We met him on site. He overnighted  
18 there on several occasions. And, I mean, we spent  
19 probably a good week or two on site, Dan and I, in,  
20 you know, working on that specific project.

21 We also went to the core shed on  
22 Paul Buxton's property where, you know, literally  
23 he went through all of the core. I'm a very  
24 competent guy. I'm the best at what I do, but I am  
25 not going to ignore, you know, the advice and

1 assistance of those who are, bar none, the experts.

2 I am going to solicit his input  
3 every step of the way, and he graciously gave it to  
4 me.

5 PROFESSOR SCHWARTZ: Okay, thank  
6 you. No more questions, not even a fractional one.

7 PRESIDING ARBITRATOR: If I am  
8 right, this concludes this first day's program,  
9 Dirk? Okay. So thank you, Mr. Lizak.

10 Thank you. It was a pleasure  
11 listening to somebody who has so much fun in his  
12 job.

13 --- Laughter.

14 MR. LIZAK: We do. We do.

15 PRESIDING ARBITRATOR: And so it  
16 was an interesting day. It was a long day. So we  
17 are going to see each other again tomorrow at 9:30.

18 Thank you very much.

19 --- Whereupon the hearing adjourned at 5:50 p.m.,  
20 to be resumed on Wednesday, October 23, 2013  
21 at 9:30 a.m.

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