

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL
ARBITRATION RULES OF 1976**

BETWEEN:

**WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS
CLAYTON AND BILCON OF DELAWARE INC.**

Claimants/Investors

and

GOVERNMENT OF CANADA

Respondent

INVESTORS' COSTS SUBMISSIONS

January 14, 2026

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I. OVERVIEW

1. The Investors request that the Tribunal order Canada to pay the Investors' costs of the arbitration, as defined in Article 38 of the UNCITRAL Arbitration Rules (1976).
2. In this arbitration, the parties submitted two specific questions to the Tribunal for determination:
 - a) Did Canada take measures inconsistent with its obligations under Articles 1102, 1105, or 1103 of the NAFTA?
 - b) If the answer to the above question is yes, what is the quantum of compensation to be paid to the Investors as a result of the failure by Canada to comply with its obligations arising under Chapter 11 of the NAFTA?¹
3. The arbitration costs incurred by the Investors were necessary to tender to the Tribunal the evidence required to answer these two questions. The Investors prevailed in their claims that Canada breached the NAFTA and caused the resulting loss. Accordingly, the Investors are entitled to their costs.
4. The arbitration to determine these two questions was commenced in 2008. It has been a lengthy, complex, vigorously contested, and expensive proceeding. At Canada's request and over the Investors' objection, the arbitration was bifurcated in 2009 into a jurisdiction/liability phase and a damages phase. Canada's bifurcation initiative resulted in longer, more costly, and more involved proceedings.
5. The jurisdiction/liability hearing did not proceed until 2013, due in large part to issues with Canada's document production that involved multiple requests, motions, and procedural orders. Ultimately, after an eight day hearing in October 2013, the Tribunal rejected all but one of Canada's jurisdictional arguments, held that it had jurisdiction, substantially accepted the Investors' claims, and found Canada liable for breaching NAFTA Articles 1102 and 1105.
6. In its March 17, 2015 Award on Jurisdiction and Liability, the Tribunal broadly impugned Canada's conduct, finding *inter alia* as follows:

¹ Notice of Arbitration, paras. 38-39:

450. [...] the JRP, by its own acknowledgement, adopted an unprecedented approach [to the Investors]. This approach was inimical to the [Investors] having any real chance of success based on an assessment of their individual project on its merits in accordance with the laws in force at the time.

...

592. Viewing the actions of Canada as a whole, it is unjust for officials to encourage coastal mining projects in general and specifically encourage the pursuit of the project at the Whites Point site, and then, after a massive expenditure of effort and resources by Bilcon on that basis, have other officials effectively determine that the area was a "no go" zone for this kind of development rather than carrying out the lawfully prescribed evaluation of its individual environmental merits.

...

453. In the result, the Investors were encouraged to engage in a regulatory approval process costing millions of dollars and other corporate resources that was in retrospect unwinnable from the outset, even though the Investors were specifically encouraged by government officials and the laws of federal Canada to believe that they could succeed on the basis of the individual merits of their case.

[emphasis added]

7. The outcome of the jurisdiction/liability phase demonstrated that the Investors' five year effort and \$5.5M investment to obtain environmental approval for the Whites Point project was doomed to failure "from the outset" and, as such, was a colossal waste of time, money, and resources. The Investors were required to commence this arbitration to uncover Canada's unfair and discriminatory conduct.

8. The arbitration then proceeded to the damages phase to determine the second question: the "quantum of compensation to be paid" by Canada "as a result of" its breaches of the NAFTA. An eight day hearing took place in 2018. Canada's principal submission in the damages phase was that the Tribunal should dismiss the Investors' claim for damages "in its entirety".

9. In its January 10, 2019 Award on Damages, the Tribunal rejected Canada's positions, held that the Investors had suffered resulting loss, and awarded damages to the Investors. Although the amount awarded was less than the amount sought, the Investors proved resulting loss and, as such, were the mainly successful party.

10. The Investors are accordingly entitled to recover their costs of arbitration, as defined in Article 38 of the UNCITRAL Arbitration Rules (1976), in the amount of USD **\$29,878,231**. Of

that total, \$14,341,897 was incurred in the jurisdiction/liability phase of the proceeding, and \$15,536,334 was incurred in the damages phase.

11. These include the following costs, as set out in greater detail in the Annexes to this costs submission:

- a) legal fees of \$14,048,553;
- b) costs of expert witnesses, third-party service providers and witness travel costs of \$13,411,429;
- c) disbursements of \$1,103,249; and
- d) Tribunal and Permanent Court of Arbitration costs of \$1,315,000.

12. These costs were necessarily incurred to fully answer the two questions referred to arbitration. They are entirely reasonable, especially in light of the complexity of the issues, the bifurcated and lengthy proceedings, and Canada's efforts to impede the Investors' discovery of the relevant documentary record.

13. Presenting this case required specialized technical expertise across multiple disciplines in both the jurisdiction/liability and damages phases. In the jurisdiction/liability phase, the Investors spent significant time and expense on compelling disclosure of, reviewing, and having experts opine on materials that ultimately revealed Canada's illegal conduct. In the damages phase, the Investors tendered evidence directed at the conditions that, "but for" Canada's breaches of the NAFTA, would have existed, including evidence that the Investors would in the ordinary course have received approval for and constructed and operated a quarry and marine terminal to produce and supply aggregate for their established businesses.

II. THE INVESTORS ARE ENTITLED TO THEIR COSTS

A. The successful party is entitled to its costs.

14. It is well-established international law that “the costs of arbitration shall in principle be borne by the unsuccessful party.” The pertinent rules are:

- a) Article 1135(1) of the NAFTA: “[a] tribunal may also award costs in accordance with the applicable arbitration rules.”
- b) Article 38 of the UNCITRAL Arbitration Rules: “[t]he arbitral tribunal shall fix the costs of arbitration in its award.” Costs are defined to include the fees, travel and expenses of the tribunal, the costs of expert advice, the expenses of witnesses to the extent such expenses are approved by the tribunal, “the costs for legal representation and assistance of the successful party” and the fees and expenses of the PCA.
- c) Article 40(1) of the UNCITRAL Arbitration Rules: the “costs of the arbitration shall in principle be borne by the unsuccessful party or parties,” but the tribunal “may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.”
- d) Article 40(2) of the UNCITRAL Arbitration Rules: the tribunal, “taking into account the circumstances of the case, shall be free to determine which party shall bear” the costs of legal representation and assistance “or may apportion such costs between the parties if it determines that apportionment is reasonable.”

15. In exercising their discretion in awarding costs, tribunals will consider various factors including the complexity of the issues, the conduct of the parties, and the parties' relative success.

16. While Article 40(2) of the 1976 Rules provides the Tribunal with discretion as to legal costs, the paramount principle remains that the successful party is entitled to recover its costs. The principle is also consistent with the updated UNCITRAL Rules and practice in investment arbitration and aligns with the principle of “full reparation” in *Chorzów Factory*.

B. The Investors are the successful party and are thus entitled to their costs.

17. The Investors prevailed in the jurisdiction/liability phase. The Tribunal rejected all but one of Canada's objections to jurisdiction, substantially accepted the Investors' evidence and arguments and, in the result, found Canada liable for breaching Articles 1102 and 1105 of the NAFTA. The Investors were unquestionably the successful party.

18. In the damages phase, the Investors established compensable loss and were awarded approximately USD\$7,000,000. Although the Tribunal did not accept "discounted cash flow" or DCF damages as the appropriate approach for assessing full reparation of their loss, it rejected Canada's submissions that:

- a) The Investors' damages claim should be dismissed "in its entirety";
- b) The Investors failed to "mitigate" their losses by seeking domestic judicial review and should only recover "mitigation costs" of approximately \$1,000,000;
- c) The Investors should only be entitled to the reimbursement of the costs of the faulty JRP process, which it claimed totaled approximately \$3,107,608; and,
- d) Compensation is precluded by the prohibition against awarding "reflective loss."

19. In the result, the Tribunal determined these issues in the Investors' favor and awarded them an amount of damages that was greater than the highest amount argued for by Canada. The Investors were accordingly the mainly successful party in the damages phase.

20. The Investors should also receive their costs because they were required to bring this arbitration to uncover Canada's unlawful conduct – encapsulated by the process that the Tribunal found was "unwinnable from the outset" – and, ultimately, to obtain a measure of justice.

21. Tribunals have recognized that claimants should not be penalized for having been required to bring an arbitration in order to reveal treaty breaches. As the tribunal in *Gold Reserve v. Venezuela* explained, "[c]ompensating [the] Claimant for the cost of bringing this proceeding is

required to wipe out the consequence of [the] Respondent's breach" of the treaty.² In *Unión Fenosa v. Egypt*, the tribunal stated its support for the "loser pays" principle, as "[w]ithout such compensation, a successful claimant would be penalized for resorting" to ICSID arbitration.³ Similarly, in *ACF v. Bulgaria*, the tribunal held that:

it [is] a well-established principle of international arbitration, and indeed part of the attempt to wipe out all consequences of an unlawful act, that the loser pay the costs of the arbitration unless particular circumstances of the case warrant a different allocation of the costs. After all, had the "loser" immediately paid up, it would have saved the claimant the costs of the arbitration in the first place⁴

22. Further, where – as here – a claimant prevails on jurisdiction, liability, and damages but recovers an amount of damages that is lower than the amount sought, international arbitration cases show that claimants nonetheless recover the bulk of their costs. Numerous tribunals have awarded claimants their costs where the damages awarded are less than the amount claimed, including, for example:

- a) ***Bear Creek v. Peru***⁵. The claimant prevailed on jurisdiction, liability and damages, but was ultimately awarded a lower quantum than claimed. The tribunal did not accept the claimant's DCF method of valuation and awarded only 3% of the claimant's total claim in value. Nonetheless, the tribunal found that the respondent should pay the claimant 75% of its reasonable costs incurred.
- b) ***Perenco v. Ecuador***⁶. This was a trifurcated proceeding and the claimant prevailed on jurisdiction, liability and damages in its principal claim. The claimant claimed USD\$1.4 billion in damages and was awarded approximately 31%. The respondent asked the Tribunal to reduce the costs claim to take into account the fact that the claim was "grossly inflated." The tribunal noted that "it is not uncommon for an award to be a sum less than that claimed." Similar to this case, the tribunal in that

² *Gold Reserve Inc. v. Bolivian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/01, Award, 22 September, 2014, ¶ 860.

³ *Unión Fenosa Gas, S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, 31 August 2018, ¶ 12.15.

⁴ *ACF Renewable Energy Limited v. Republic of Bulgaria*, ICSID Case No. ARB/18/1, Award 5 January, 2024, ¶ 1837.

⁵ *Bear Creek Mining Corporation v. Republic of Perú*, ICSID Case No. ARB/14/21, Award 30 November, 2017, ¶¶ 730-731.

⁶ *Perenco Ecuador Limited v. The Republic of Ecuador*, ICSID Case No. ARB/08/06, Award 27 September 2019, ¶¶ 985-990.

case declined to award damages on the basis that the contract would have been extended (or here, that the project would have proceeded), but “only for the loss of opportunity” of the possible extension. The tribunal noted that its decision to take a different approach did not mean the claimant's approach was frivolous. The tribunal awarded the claimant 78% of its claimed costs (USD\$23 million instead of USD\$29.4 million).

- c) ***Mason Capital v. Korea***⁷. The claimants prevailed on three of four jurisdiction issues and were largely successful on liability, but were awarded one sixth of the damages claimed. The tribunal ordered the respondent to bear 60% of the claimants’ legal fees and expenses and 75% of the arbitration fees for the main phase of the proceedings.
- d) ***PSEG v. Turkey***⁸. The claimants prevailed on jurisdiction and liability, but not on the main parts of their damages claim. However, “to obtain justice, they had no option but to bring this arbitration forward and to incur the related costs.” The tribunal therefore found it fair for Turkey to bear 65% of the costs incurred by the parties.
- e) ***Windstream v. Canada***⁹. The claimant prevailed on one of its two principal claims, and the tribunal did not accept the claimant’s “principal method of valuation, to which much of the evidence, in particular expert evidence related, and on which much of the time at the hearing was spent.” Despite this, the respondent was ordered to reimburse 50% of the claimant’s legal costs.

23. As in *Perenco*, there can be no reasonable suggestion that the Investors' DCF valuation methodology was frivolous or inappropriate: to the contrary, it was a serious and principled effort to fully address the second question submitted for determination of what compensation was

⁷ *Mason Capital L.P., Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Award, 11 April 2024, ¶¶ 1142-1143.

⁸ *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶¶ 352-35 ["**PSEG**"].

⁹ *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016, ¶ 514.

required as a result of Canada's failure to comply with its NAFTA obligations. Indeed, in his concurring opinion, Arbitrator Schwartz addressed the Investors' case and said at para. 4:

the evidence shows, in my respectful view, that the Investors actually had a high probability of obtaining a permit on economically viable terms had the environmental assessment been carried out in a NAFTA-compliant manner in the first place.

24. In short, the Investors should receive their full costs for the jurisdiction/liability phase – where they were in substance wholly successful – and not less than the bulk of their costs for the damages phase. Any reduction that the Tribunal may consider appropriate in relation to the Investors recovery being less than the amount they claimed should apply only to the costs of the damages phase and should be minimal.

C. Canada's approach to documentary disclosure resulted in additional costs.

25. Canada repeatedly resisted disclosing documents in answer to the Investors' requests, which led to additional procedural steps and the Tribunal's involvement and resulted in greater cost for the Investors.

26. Canada's approach is reflected in various requests, hearings, and procedural orders following the Investors' July 2, 2009 document requests. For example, on August 27, 2010, following a motion by the Investors regarding Canada's inadequate document disclosure, the Tribunal requested that Canada contact the former Joint Review Panel members – which, to the Investors' surprise Canada had not done – to determine whether any electronic correspondence in relation to the environmental assessment was recoverable.

27. Further, over one and a half years after requesting them, the Investors finally received scores of documents that were critical to their success in the liability phase, including journal notes of a DFO representative (Bruce Hood) showing that Canada deliberately delayed test blasting for 15 months to prevent the Investors from collecting data that was required for the EIS, and a letter written by Minister Robert Thibault evidencing his efforts to lengthen the environmental assessment of the Whites Point Quarry. Similarly, Paul Buxton detailed his experience with representatives of Canada, and referred to documents showing “what was actually happening behind the scenes” and demonstrating that “government officials were in fact not forthright” with him.

28. In the end, Canada finally disclosed documents that revealed Canada's concerted and orchestrated efforts at the environmental assessment stage to withhold highly relevant information from the Investors, to mislead the Investors, and to obstruct the Investors' efforts to obtain environmental approval for the project (as detailed in Paul Buxton's Supplemental Witness Statement dated December 20, 2012, at paras. 20 – 27, 63 – 94).

29. Canada's obstructive approach to document disclosure in the damages phase similarly put the Investors to unnecessary cost.

30. For example, in a letter dated November 6, 2017, amidst a dispute over confidentiality designations, the Investors defended their confidentiality designations as being consistent with the Tribunal's directions and Procedural Orders.

31. And, on January 5, 2018, the Investors specified 107 instances where Canada's confidentiality redactions were inconsistent with the Tribunal's rulings. Canada then withdrew many of its objections and, on January 26, 2018, the Tribunal issued its decision on redactions, the majority of the Investors' designations were maintained.

III. THE INVESTORS' COSTS ARE REASONABLE

32. In assessing the reasonableness of costs, tribunals have similarly considered various factors, including the complexity of the issues raised, the duration and nature of the proceedings, and the size of the record.

33. This arbitration has been complex, lengthy, and hard-fought, and involved a voluminous record. The Investors' claims gave rise to extensive liability and damages issues, many of which were technical, none of which was conceded, and almost all of which were thoroughly contested. The arbitration occupied 16 hearing days with a total of 33 witnesses providing oral testimony. The parties submitted a total of 82 reports/witness statements and produced a significant volume of documents, all of which had to be reviewed by counsel and many of which were incorporated into 2,388 exhibits.

34. In the circumstances, the Investors' costs are reasonable. The Investors carried the burden, of proof throughout and were required to meet the deep resources of federal Canada. The Investors

use of legal counsel was appropriate, and the fact and expert witnesses and reports that were tendered were relevant to – and fundamentally necessary for – addressing the two questions submitted to arbitration.

A. The Investors’ legal costs are reasonable.

35. The Investors’ legal costs total \$14,048,553 and are within the range of legal costs incurred by claimants in investment treaty arbitrations.¹⁰ These amounts reflect the fees actually paid by the Investors. As set out in the Annexes, these costs were incurred over both the jurisdiction/liability and damages phases of the arbitration.

36. The Investors’ legal costs reflect that they were compelled to litigate the arbitration in two distinct phases due to Canada's bifurcation initiative. In seeking and obtaining bifurcation, Canada must have recognized that if it was found liable – as it was – then the parties would have to incur greater costs given the necessary multiple rounds of submissions, evidence, and hearings.

37. The jurisdiction/liability phase was detailed, lengthy, and complex. The documentary production phase lasted several years, and resulted in the review and production of thousands of documents. There were four rounds of lengthy written pleadings, 22 witness statements and expert reports, and eight days of hearing involving 12 witnesses. In total, the Investors incurred \$14,341,897 in costs in respect of this phase of the arbitration.

38. The damages phase was similarly detailed, complex, and time-consuming. There were four rounds of lengthy written memorials, which involved the exchange of 62 witness statements/expert reports, and 816 exhibits. The hearing occupied eight days with live testimony from 21 witnesses. In total, the Investors incurred \$15,536,334 in costs in respect of this phase of the arbitration.

39. Further, Canada’s costs – whatever they may be – are not indicative of the reasonableness of the Investors’ costs. Tribunals have consistently held that it is typical for the claimants to spend more than the respondent because it is the claimant who bears the burden of proof. Tribunals have

¹⁰ *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, Award, 12 July 2019, ¶ 1855 (claimant was awarded USD\$59,447,596.60 in legal costs); *PSEG, supra*, ¶ 353 (claimant was awarded USD\$13,553,563.80 in legal costs which is approximately USD\$21,000,000 in today's dollars); *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, Award, 18 July 2014, ¶ 1887 (claimant was awarded USD\$60,000,000 in legal representation and assistance costs).

also observed that a respondent “state’s billing practices with its legal representation”¹¹ are different, which can impact the costs claimed. Canada was not represented by external counsel but by a team of salaried lawyers employed by Global Affairs Canada. It thus did not incur private sector legal fees as out-of-pocket expenses.

B. The Investors’ witness fees and third-party costs are reasonable.

40. The Investors incurred \$13,411,429 in costs for experts and witnesses (and travel costs) and other third-party costs. These costs are further delineated in the Annexes.

41. The Investors’ witness costs are reasonable. As set out above, the Investors were required to tender evidence to fully answer both of the questions submitted to arbitration, which required detailed fact and expert evidence on many specialized and technical points. The fact and expert evidence presented by the Investors is summarized below.

i. Liability

42. The evidence and submissions were directed mainly at the Investors' dealings with Canada over the Whites Point Quarry project, and Canada's "behind the scenes" efforts to undermine the project. The Investors' witnesses were:

- a) **John Lizak:** Mr. Lizak was the Investors' geologist. Mr. Lizak's witness statement described the extent to which government officials organized and hosted tours of areas in Nova Scotia that could be developed as an aggregate quarry. Mr. Lizak wrote that he was surprised when the JRP rejected the project, as that was “completely contradictory to the encouragement to invest in Nova Scotia” that he had experienced.
- b) **Paul Buxton:** Mr. Buxton was the Investors' Project Manager in Nova Scotia. He provided two witness statements, which addressed the ways in which Canada treated the Investors differently from other proponents and the hostility he experienced at the JRP hearing. Mr. Buxton explained that he was not aware of the extent to which the consideration of the project “had become politicized within the Federal and Provincial Governments, or of the behind-the-scenes political orchestrations between the Governments and the CEAA”

¹¹ *Gemplus Industrial S.A. de C.V. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/3) Award, 16 June 2010, ¶¶ 17-25.

surrounding the project. Mr. Buxton, a professional engineer, was the project manager of the Whites Point Quarry project and served as a consultant supporting legal counsel in the arbitration.

- c) ***William Richard Clayton:*** Mr. Clayton is a principal and owner. His witness statement set out the history of the Clayton Group of Companies (the "Clayton Group"), his concerns over the JRP process, and the impact of Canada's conduct on his family's operations. Mr. Clayton gave evidence of the encouragements that he personally received from Minister Gordon Balser that "went a long way to confirming in [his] mind that Nova Scotia had a friendly business environment that was supportive to foreign investment."
- d) ***David Estrin, Gowling WLG:*** Mr. Estrin is a preeminent environmental law expert. He provided two expert reports addressing the federal and provincial legislative framework for approving environmental projects in Nova Scotia, and his examination of government records disclosed in the arbitration revealed that "there was a pattern by officials of making life difficult for the proponent." His report confirmed that between 2000 and 2016, 50 permit applications for quarries, pits and mines were filed in Nova Scotia. The only permit denied was that of the Investors. He concluded that the JRP's approach did not provide the legally requisite, usual or fair consideration required under the legislation, including its problematic reliance on the "previously unknown" concept of "community core values."
- e) ***Professor Murray Rankin, K.C.:*** Mr. Rankin is a preeminent constitutional and administrative law expert. His expert report analyzed the JRP process and concluded, among other things, that the JRP did not fulfill its mandate and that the process was "fundamentally flawed."

ii. Damages

43. The Investors tendered reports from David Estrin and Lorne Sossin (now Mr. Justice Sossin) that addressed Canadian environmental and administrative law in respect of causation:

- a) ***David Estrin, Gowling WLG:*** Mr. Estrin prepared three expert reports in the damages phase. He opined that that the Whites Point Quarry would have been approved "if standard federal Canada and Nova Scotia environmental assessment

criteria and practices were fairly and objectively applied to the project”, as the JRP had “no legitimate basis to recommend the project not proceed.”

- b) **Lorne Sossin, Dean, Osgoode Hall Law School:** Dr. Sossin prepared three expert reports focused on the discretion available to ministers in denying approval to the Investors of the Whites Point Quarry. He opined that in all the circumstances the Ministers, acting reasonably, were legally compelled to approve the Whites Point Quarry. He also opined that there was no doctrine requiring parties to exhaust domestic remedies (such as judicial review) before seeking redress for unfair treatment under the NAFTA.

44. The Investors also engaged specialized technical expertise across multiple disciplines, including geology, project management, engineering, permitting, transportation/logistics, and markets in respect of their claimed loss. The Investors' fact and expert witnesses were:

- a) **William Richard Clayton:** Mr. Clayton provided two witness statements describing the Clayton Groups' business, the experience of being subjected to an unfair environmental assessment process, and the Whites Point Quarry's forecasted production volumes.
- b) **Joe Forestieri:** Mr. Forestieri is the Chief Financial Officer of the Clayton Group. His two witness statements provided evidence on the Clayton Group's structure, financial performance, business interests, and tax treatment.
- c) **William Ralph Clayton:** Mr. Clayton provided a witness statement explaining the history of the Clayton Group and how the Whites Point Quarry was to be an important part of the future of his family's business.
- d) **Paul Buxton:** Mr. Buxton's two witness statements in the damages phase provided evidence of operating costs, reclamation costs, the expected future of the project and the costs (\$5,565,340.25) incurred by the Investors in the JRP process.
- e) **Daniel Kontak:** Mr. Kontak is a professor of geology formerly employed by the Government of Nova Scotia. He provided a witness statement addressing the

established policy and efforts that the Nova Scotia government undertook to attract investors to the Province and worked with John Lizak evaluating the Whites Point Quarry basalt.

- f) ***John Wall:*** Mr. Wall was the quarry manager that the Investors hired to operate the Whites Point Quarry. He provided two witness statements regarding its concept, design and related capital and operating costs. Mr. Wall also gave evidence on Whites Point's geographic and other advantages based on his decades of experience in the aggregates industry.
- g) ***George Bickford, LB&W Engineering:*** Mr. Bickford provided two witness statements outlining LB&W Engineering's design and engineering process and associated capital costs for the Whites Point Quarry.
- h) ***Michael Washer, LB&W Engineering:*** Mr. Washer provided two witness statements setting out, in detail, the plant/infrastructure and mobile equipment costing of the Whites Point Quarry, including likely maintenance and repair costs on the basis of a 50-year lifespan.
- i) ***Dan Fougere:*** Mr. Fougere is a chartered accountant with a long history and extensive expertise in the aggregates industry who gave evidence over two witness statements on analogous quarries in the Maritimes (such as Auld's Cove, Bayside Quarry and Black Point), in addition to projected operating costs and quantity of sales from the Whites Point Quarry.
- j) ***Michael Cullen, Mercator Geological Services:*** Mr. Cullen provided two expert reports which quantified (with extensive support) the bedrock basalt deposit at the Whites Point Quarry.
- k) ***Ryan MacPherson, SNC-Lavalin Inc.:*** Mr. MacPherson (along with Christopher Fudge) provided an expert report addressing the estimated capital cost to build a marine terminal at the Whites Point Quarry.

- l) **Bill Collins, SNC-Lavalin Inc.:** Mr. Collins provided an expert report addressing assertions raised by Canada with respect to maintenance costs for the proposed marine terminal.
- m) **Wayne Morrison, Tamarack Resources:** Mr. Morrison provided two expert reports opining on the estimated freight rates of transporting aggregate from the Whites Point Quarry site to the Investors' docks in New York and New Jersey.
- n) **Jussi Jaakkola, SNC-Lavalin Inc.:** Mr. Jaakkola provided a reply report addressing specific freight rate analyses presented by one of Canada's experts.
- o) **Michael F. Wick, John T. Boyd Company:** Mr. Wick provided two reports addressing the crushed stone aggregate market in the New York City area and the concrete sand market in northern New Jersey, which were the established markets for aggregate that was to be produced from the Whites Point Quarry.
- p) **Tom Dooley:** In his two witness statements, Mr. Dooley described the Investors' operations in New Jersey, how the Whites Point Quarry fit into their long-term planning, and the marketability, quantity and characteristics of aggregates from the Whites Point Quarry. He also addressed the historical and expected demand for aggregates in the relevant market.
- q) **John Lizak, Mineral Valuation & Capital, Inc.:** Mr. Lizak provided two expert reports in the damages phase analyzing the larger, regional market for crushed stone and providing facts pertaining to the Investors' assessment and ranking of the Whites Point Quarry alongside other potential sites. He also rebutted various deficiencies and methodological errors in Canada's experts' evidence.
- r) **George Seaman, GS Management Inc.:** Mr. Seaman provided one reply report addressing the difference in focus between privately held companies (like the Clayton Group) and large, public aggregate companies (like Martin Marietta) to assist the Tribunal in understanding the Investors' long-term horizon.

- s) ***Stephen Shay, Harvard Law School:*** Mr. Shay provided a reply opinion describing how U.S. taxes would apply to Bilcon of Nova Scotia's operating income in the hands of the individual shareholders of Bilcon of Delaware. Mr. Rosen incorporated Professor Shay's tax gross-up factor in his calculation of lost profits.
- t) ***Michael W. Colborne, Thorsteinssons LLP:*** Mr. Colborne provided a reply opinion on the Canadian tax implications of any payment made by Canada to the Investors.
- u) ***Christopher Fudge, SNC-Lavalin Inc.:*** Mr. Fudge provided an expert report regarding specific permits which would have been required and which were routinely issued for the construction of marine terminals.
- v) ***Peter Oram, GHD Ltd.:*** Mr. Oram provided two expert reports concluding that if the Whites Point Quarry had received environmental assessment approval, he had "no doubt" it would have obtained industrial approval.
- w) ***Howard Rosen, FTI Consulting.:*** Mr. Rosen assisted with valuation, which included considering the Whites Point Quarry project's operating term, production level, selling price, freight, operating costs, overhead, income taxes, and capital outlays. He relied on witness statements and expert reports and provided a reply to Canada's valuation expert.
- x) ***John McCamus:*** Professor McCamus provided an expert report addressing the concepts of compensable loss in domestic contract and tort law, including future profits.

45. In addition to the costs associated with its expert reports, the Investors incurred reasonable costs for other third-party service providers, for witness travel costs and for other disbursements, as described in the Annexes. The Investors request that the Tribunal order Canada to pay for these costs.

IV. SUMMARY

46. The Tribunal found that Canada deliberately subjected the Investors to a process that was "unwinnable from the outset" – effectively a complete sham – costing "millions of dollars and other corporate resources", which the Tribunal determined breached Canada's obligations under NAFTA Articles 1102 and 1105 and resulted in damages to the Investors. As such, the Investors were in substance entirely successful in the jurisdiction/liability phase and were mainly successful in the damage phase of this arbitration.

47. As is apparent from the above, the Investors' incurred the arbitration costs in order to uncover, obtain, develop, and present evidence – including documentation, fact witnesses, and expert reports – and make submissions necessary to answer the two questions submitted for determination. The Investors made proper use of legal counsel and consultants, and their fact and expert witnesses were necessary and relevant to answering the two questions. The Investors' costs were appropriately incurred and are reasonable, particularly given the bifurcated nature, length, and complexity of the proceedings.

48. Further, Canada's conduct in the proceedings – including by initiating bifurcation of the proceedings, advancing weak or meritless jurisdiction arguments, and resisting and impeding documentary disclosure – contributed materially to the proceedings' length and complexity and, as such, increased the Investors' costs. Given the ultimate importance of Canada's documents to the Investors' claims, Canada's efforts to impede the Investors' discovery effectively amounted to a continuation of Canada's unfair treatment of the Investors in the environmental assessment process.

49. In summary, the Investors request that Canada be ordered to pay the total arbitration costs and costs for legal representation and assistance in an amount of USD **\$29,878,231**.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14TH DAY OF JANUARY 2026.



Gregory J. Nash, K.C.

ANNEX I – SUMMARY OF COSTS

Summary	Amount (USD)
Appleton & Associates - Legal Fees	7,508,509
Nash & Company / Nash Johnston LLP - Legal Fees	6,540,044
Appleton & Associates - Disbursements	392,208
Nash & Company / Nash Johnston LLP - Disbursements	711,041
Witnesses / Experts / Third Parties / Frank Borowicz, K.C. / Paul Buxton	13,411,429
Arbitration Costs	1,315,000
Total \$29,878,231	

Phase	Amount (USD)
Jurisdiction & Liability (November 20, 2007 – March 17, 2015)	14,341,897
Damages (March 18, 2015 – April 30, 2019)	15,536,334
Total \$29,878,231	

ANNEX II – COST OF LEGAL REPRESENTATION
Appleton & Associates (2007-2015)

Breakdown of Lawyers' Fees – Appleton		
Year	Hours Billed	Fees (USD)
2007	-	108,912
2008	1,748	532,627
2009	2,787	821,289
2010	3,335	966,838
2011	5,007	1,474,745
2012	6,340	1,935,486
2013	5,706	1,462,929
2015	596	205,683
Total - Appleton 25,623		\$7,575,459

2007	Hourly Rate	Hours Billed	Fees (USD)
No Breakdown Provided	-	-	108,912
2007 Total - Appleton		-	108,912

2008	Hourly Rate	Hours Billed	Fees (USD)
Adam Kay	291	392	113,994
Alan Alexandroff	542	37	19,976
Barry Appleton	614	230	141,336
Carolina Gonzalez	223	99	22,132
Fee Reduction - Appleton	-	-	(19,309)
Hernando Otero	415	201	83,591
Jonathan Morse	292	221	64,730
Kirk Haywood	188	169	31,738
Mona Davies	46	26	1,185
Regis Figur	127	102	12,980
Sue Ki	222	271	60,275
2008 Total – Appleton		1,748	\$532,627

2009	Hourly Rate	Hours Billed	Fees (USD)
Adam Kay	235	159	37,365
Alan Alexandroff	509	48	24,430
Alan Fraser	154	2	308
Allison McCabe	151	143	21,651
Barry Appleton	588	364	213,901
Charissa Jattan	175	48	8,356
Fee Reduction - Appleton	-	-	(483)
Jordan Feurstein	170	182	31,022
Kirk Haywood	156	75	11,740
Kyle Dickson-Smith	376	495	186,060
Loreto Gonzalez	134	39	5,172
Martin Endicott	495	184	90,904
Mona Davies	150	71	10,637
Nenad Nevajda	167	260	43,460
Patrick Bauer	161	124	19,872
Regis Figur	162	55	8,861
Sue Ki	203	487	99,064
Tara Bridge	175	51	8,969
2009 Total - Appleton 2,787			\$821,289

2010	Hourly Rate	Hours Billed	Fees (USD)
Alan Alexandroff	546	128	70,001
Andrea See	160	18	2,963
Barry Appleton	624	362	226,336
Evgheni Gusilic	162	25	4,071
John Wires	197	80	15,805
Jordan Feurstein	169	384	64,953
Juliet French	161	241	38,834
Kyle Dickson-Smith	382	610	232,765
Martin Endicott	524	131	68,562
Martin Kocandrle	162	29	4,703
Mona Davies	170	203	34,622
Nenad Nevajda	168	557	93,882
Patrick Bauer	170	200	34,136
Paul Blyschak	221	25	5,469
Sue Ki	216	142	30,585
Tara Bridge	166	8	1,327
Ugo Popadic	199	190	37,823
2010 Total - Appleton 3,335			\$966,838

2011	Hourly Rate	Hours Billed	Fees (USD)
Alan Alexandroff	581	334	194,154
Alan Fraser	171	11	1,914
Barry Appleton	648	487	315,758
Darius Kuras	173	42	7,277
Evgheni Gusilic	165	5	824
Fee Reduction - Appleton	-	-	(76,798)
Kyle Dickson-Smith	397	604	239,730
Kyle Hampson	165	749	123,348
Marie-France Fortin	302	234	70,867
Martin Kocandrle	170	63	10,668
Mona Davies	159	158	25,210
Mona Pinchis	301	404	121,593
Nenad Nevajda	173	458	79,014
Sue Ki	226	381	86,028
Timofey Pavlov	186	142	26,381
Ugo Popadic	266	935	248,777
2011 Total - Appleton 5,007			\$1,474,745

2012	Hourly Rate	Hours Billed	Fees (USD)
Alan Alexandroff	566	516	291,873
Alan Fraser	226	29	6,611
Barry Appleton	619	382	236,084
Celeste Mowatt	275	158	43,493
Elizabeth Kagedan	168	36	6,102
Eric van Eyken	296	243	71,862
Fee Reduction - Appleton	-	-	(1,801)
Joanna Langille	357	25	8,958
Josh Scheinert	322	629	202,309
Kyle Dickson-Smith	395	789	311,872
Kyle Hampson	234	353	82,835
Mona Pinchis	256	652	166,763
Nenad Nevajda	175	1,516	265,715
Sergey Kukov	167	55	9,218
Sue Ki	211	435	91,974
Timofey Pavlov	166	65	10,786
Ugo Popadic	287	457	130,833
2012 Total - Appleton 6,340			\$1,935,486

2013	Hourly Rate	Hours Billed	Fees (USD)
Alan Alexandroff	548	522	285,935
April Jangkamolkulchai	158	58	9,103
Barry Appleton	627	425	266,221
Celeste Mowatt	281	176	49,494
Eric van Eyken	282	306	86,355
Fee Reduction - Appleton	-	-	(200,795)
Jessica McKeachie	158	203	31,969
John Evers	100	330	32,848
Josh Scheinert	316	977	308,678
Joshua Hauser	105	153	16,140
Kyle Dickson-Smith	378	603	227,574
Michael Pogorzelski	158	145	22,996
Mona Pinchis	315	3	1,084
Nenad Nevajda	171	1,348	231,089
Sergey Kukov	188	9	1,688
Sue Ki	218	300	65,464
Vasyl Didukh	182	149	27,086
2013 Total - Appleton			5,706
			\$1,462,929

2015	Hourly Rate	Hours Billed	Fees (USD)
Alan Alexandroff	479	44	21,005
Barry Appleton	561	203	114,099
David Consky	102	12	1,194
Gigi van Leeuwen	135	10	1,346
Joshua Hauser	126	88	11,045
Ringo Chan	156	17	2,616
Sean Stephenson	288	130	37,497
Sue Ki	183	92	16,881
2015 Total - Appleton 596			\$205,683

Nash & Company / Nash Johnston LLP (2009-2025)

Breakdown of Lawyers' Fees – Nash		
Year	Hours Billed	Fees (USD)
2009	7	2,615
2012	892	297,861
2013	2,373	814,235
2014	13	3,863
2015	2,832	738,939
2016	6,725	1,581,712
2017	8,474	2,081,750
2018	3,985	947,849
2019	263	71,220
Total - Nash	25,563	\$6,540,044

2009	Hourly Rate	Hours Billed	Fees (USD)
Gregory J. Nash, K.C.	374	7	2,615
2009 Total - Nash			7
			\$2,615

2012	Hourly Rate	Hours Billed	Fees (USD)
Chris Elrick	222	409	90,946
Dana Duncan	352	54	19,115
Gregory J. Nash, K.C.	454	407	184,739
Susan Grimshire, Paralegal	143	21	3,061
2012 Total - Nash			892
			\$297,861

2013	Hourly Rate	Hours Billed	Fees (USD)
Chris Elrick	227	1,064	241,238
Dana Duncan	349	41	14,346
Gregory J. Nash, K.C.	450	1,230	553,541
Susan Grimshire, Paralegal	136	38	5,109
2013 Total - Nash			2,373
			\$814,235

2014	Hourly Rate	Hours Billed	Fees (USD)
Chris Elrick	188	6	1,110
Gregory J. Nash, K.C.	372	7	2,754
2014 Total - Nash			13 \$3,863

2015	Hourly Rate	Hours Billed	Fees (USD)
Alexander Little	170	269	45,718
Brent Johnston	319	128	40,854
Chris Elrick	226	658	148,755
Dana Duncan	337	115	38,679
Fee Reduction - Nash & Company	-	-	(24,875)
Gregory J. Nash, K.C.	450	917	412,620
Research Assistant	85	279	23,764
Summer Law Students	114	410	46,690
Susan Grimshire, Paralegal	120	56	6,733
2015 Total - Nash			2,832 \$738,939

2016	Hourly Rate	Hours Billed	Fees (USD)
Alex Baer	173	714	123,467
Alexander Little	176	1,363	239,696
Brent Johnston	320	648	207,400
Chris Elrick	222	1,092	242,575
Dana Duncan	318	143	45,607
Fee Reduction - Nash & Company	-	-	(19,420)
Gregory J. Nash, K.C.	441	1,400	617,196
Research Assistant	87	1,172	102,549
Susan Grimshire, Paralegal	117	193	22,641
2016 Total - Nash			6,725
			\$1,581,712

2017	Hourly Rate	Hours Billed	Fees (USD)
Alex Baer	195	1,309	255,418
Alexander Little	196	1,419	277,838
Alison Bruneau	318	33	10,407
Alison Burns, Paralegal	122	186	22,718
Brent Johnston	337	476	160,273
Cheryl L. Jang, Paralegal	120	743	88,974
Chris Elrick	241	1,286	309,900
Dana Duncan	316	14	4,419
Gregory J. Nash, K.C.	455	1,848	840,773
Lorinda Edmunds, Paralegal	122	110	13,381
Research Assistant	90	953	85,547
Susan Grimshire, Paralegal	124	97	12,102
2017 Total - Nash		8,474	\$2,081,750

2018	Hourly Rate	Hours Billed	Fees (USD)
Alex Baer	193	550	106,011
Alexander Little	193	557	107,372
Alison Burns, Paralegal	120	294	35,167
Brent Johnston	328	419	137,341
Chris Elrick	239	483	115,420
Dana Duncan	321	103	32,933
Fee Reduction - Nash & Company	-	-	(1,444)
Gregory J. Nash, K.C.	451	733	330,470
Lorinda Edmunds, Paralegal	119	313	37,390
Research Assistant	89	532	47,189
2018 Total - Nash			3,985
			\$947,849

2019	Hourly Rate	Hours Billed	Fees (USD)
Alexander Little	188	33	6,274
Auke Visser	188	10	1,899
Brent Johnston	317	67	21,129
Dana Duncan	320	36	11,595
Fee Reduction - Nash & Company	-	-	(20,702)
Gregory J. Nash, K.C.	439	116	51,024
2019 Total - Nash			263
			\$71,220

ANNEX III – DISBURSEMENTS

Disbursements	
Appleton's Disbursements	Amount (USD)
Document Imaging/Photocopying	275,792
Other (subscription licenses, meals, minor disbursements, non-hourly staff overtime, etc.)	42,394
Platinum Legal Group - Load File Creation	16,212
Research	20,436
SDD Global Solutions - Legal Document Review	16,372
Shipping	12,080
Taxi & Travel	34,784
Total for Appleton Disbursements	\$405,572
Credit Note	(13,364)
Net Total for Appleton Disbursements	\$392,208

Disbursements	
Nash & Company / Nash Johnston LLP Disbursements	Amount (USD)
Sublease Rent for Document Storage and Preparation	16,641
Commonwealth Legal - Professional Services for Nash & Company (Document management)	38,012
Hearing Preparation	10,375
Meals	10,970
Additional Office Lease for Document Storage and Preparation (Heathcliff Properties)	16,863
Other (information requests, document management, subscription services and related consulting, etc.)	14,728
Photocopying & Printing	75,826
Shipping	42,860
Storage	1,508
Taxi & Travel	468,803
Technology	14,455
Net Total for Nash Disbursements \$711,041	

ANNEX IV: WITNESSES / EXPERTS / THIRD PARTIES

Witnesses/Experts - Liability		
Party	Description	Amount (USD)
Gowling WLG (Canada) LLP / Gowling Lafleur Henderson LLP (David Estrin)	Two expert reports addressing environmental law issues. Preparation for and attendance at hearing. Mr. Estrin also received assistance from others	1,927,566
Mineral Valuation & Capital Inc. (John Lizak)	Witness statement addressing experience with government officials. Preparation for and attendance at the hearing	46,353
Murray Rankin, K.C.	One expert report addressing flawed environmental assessment. Preparation for and attendance at hearing	240,159
Total		\$2,214,078

Witnesses / Experts - Damages		
Party	Description	Amount (USD)
Dan Fougere, CPA, CA	Two witness statements addressing operating costs and comparable quarries. Preparation for and attendance at hearing	81,259
Dr. Daniel J. Kontak	One witness statement addressing Nova Scotia policy and related consulting services	7,654
FTI Consulting Canada ULC	Two expert valuation reports. Preparation for and attendance at hearing	904,040
GHD Limited	Two expert reports addressing permitting and related costs issues	55,609
Gowling WLG (Canada) LLP / Gowling Lafleur Henderson LLP / Sue Vern Tan (David Estrin)	Three expert reports, preparation for and attendance at hearing addressing environmental law issues. Mr. Estrin also received assistance from others	1,284,637*
GS Management Inc.	One expert report addressing issues for public and private companies	9,069
John D. McCamus	One expert opinion addressing concepts of compensable loss	149,177
John T Boyd. Company	Two expert reports addressing crushed stone aggregate markets. Preparation for and attendance at hearing	282,156
John Wall	Two witness statements, consulting and related costs	75,917
LB&W Engineering Inc	Four witness statements (George Bickford and Michael Washer) addressing engineering-related costs, including modelling and analysis. Preparation for and attendance at hearing	475,266
Lorne Sossin	Three reports addressing ministerial discretion and related issues. Preparation for and attendance at hearing	85,050*

*The total of Mr. Estrin and Dr. Sossin's costs incurred in the Damages phase were reduced by 10% to reflect that their third reports were not admitted into evidence.

Witnesses / Experts – Damages (Continued)		
Party	Description	Amount (USD)
Mercator Geological Services	Two expert reports addressing basalt deposit at Whites Point Quarry	282,480
Mineral Valuation & Capital Inc.	Two expert reports regarding the wider aggregates market and related issues. Preparation for and attendance at hearing	239,315
Ropes & Gray LLP	One expert report addressing applicability of U.S. taxes and gross-up	427,272
SNC Lavalin Inc	Four expert reports addressing marine terminal, permitting issues and freight rates	17,397
Tom Dooley / Stonehenge Materials LLC	Two witness statements, consulting fees and related costs (travel). Preparation for and attendance at hearing	247,171
Tamarack Coal & Resources	Two expert reports and related costs regarding freight rates. Preparation for and attendance at hearing	85,658
Thorsteinssons LLP	One expert report addressing Canadian tax implications of damages award	52,761
Total		\$4,761,888

Costs of Third Parties - Liability		
Party	Description	Amount (USD)
Birchall Northey LLP	Federal environmental assessment law advice	60,385
DLF Communications Ltd	Consulting, research and communication services	39,404
Fogler, Rubinoff LLP	Provincial environmental assessment law advice	21,267
Professor Robert Howse	Arbitration law advice	131,300
Warren Jefferies, Giselle Melanson and Hugh Fraser	Video production services for hearing	34,523
Willms & Shier Environmental Lawyers LLP	Environmental assessment advice	78,921
Total		\$382,172

Costs of Third Parties - Damages		
Party	Description	Amount (USD)
CBCL Limited	Federal authorizations-related consulting to assist with preparation of Paul Buxton's witness statement	21,680
DLF Communications Ltd	Witness preparation and related services ahead of hearing	122,525
MEG Consulting Ltd	Consulting services regarding geotechnical inputs for marine terminal costing	16,552
MOC Enterprizes	Consulting services regarding the aggregates market and considerations arising	46,003
Norton Rose Fulbright LLP	Professional services regarding international law and costs issues, document review, including research, analysis, memoranda and conferences	504,517
Weberman Associates Inc.	Assistance with answering document requests regarding New York Sand & Stone and supporting witness statements of Tom Dooley	7,600
Total		\$718,876

Costs of Additional Third Parties			
Frank Borowicz, K.C.			
	Fees (USD)	Less 10% of all costs after March 17, 2015	Total
Total - Frank Borowicz, K.C. Fees	\$3,095,529	(244,890)	\$2,850,639*

*Mr. Borowicz's fees after March 17, 2015 have been reduced by 10% for services rendered unrelated to the arbitration.

Mr. Borowicz provided consulting services regarding arbitration and strategic advice throughout the arbitral proceeding, including the marshalling and presentation of evidence and submissions.

Costs of Additional Third Parties			
Paul Buxton			
Phase	Amount (USD)	Less 5% of all costs	Total
Liability	1,145,335	(57,267)	1,088,068
Damages	1,556,308	(77,815)	1,478,493
Total – Paul Buxton Fees	2,701,643	(135,082)	\$2,566,561*

* Mr. Buxton's fees have been reduced by 5% throughout for services rendered unrelated to the arbitration.

ANNEX V: ARBITRATION COSTS

Description	Costs (USD)
Permanent Court of Arbitration	1,315,000
Costs Total	\$1,315,000