

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

BETWEEN:

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

Claimants

AND:

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

**COUNTER-MEMORIAL
PUBLIC VERSION**

December 9, 2011

Departments of Justice and of
Foreign Affairs
and International Trade
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APPENDICES

TABLE OF AUTHORITIES REFERRED TO IN COUNTER-MEMORIAL

TABLE OF ABBREVIATIONS USED IN COUNTER-MEMORIAL

ABBREVIATION	DEFINITION
ACOA	Atlantic Canada Opportunities Agency
ADM	Assistant Deputy Minister
ANFO	Ammonium Nitrate Fuel Oil
CEAA	<i>Canadian Environmental Assessment Act</i>
CLC	Community Liaison Committee
CS	Comprehensive Study
CSLR	Comprehensive Study List Regulations
CSR	Comprehensive Study Report
DFO	Department of Fisheries and Oceans
DIAND	Department of Indian Affairs and Northern Development
DWT	Dead Weight Tonne
EA	Environmental Assessment
EAB	Environmental Assessment Branch
EC	Department of the Environment
EIS	Environmental Impact Statement
FTC	Free Trade Commission
GATT	General Agreement on Tariffs and Trade
GQP	Global Quarry Products
ha	Hectare
HADD	Harmful Alteration, Disruption or Destruction of Fish Habitat
iBoF Salmon	Inner Bay of Fundy Salmon
JRP	Joint Review Panel
LOI	Letter of Intent
LNG	Liquefied Natural Gas
MOU	Memorandum of Understanding
NGO	Non-Governmental Organization
NRCan	Department of Natural Resources
NSDEL	Nova Scotia Department of Environment and Labour
NSEA	<i>Nova Scotia Environment Act</i>
NWP	Navigable Waters Protection

ABBREVIATION	DEFINITION
NWPA	<i>Navigable Waters Protection Act</i>
NWT	North West Territories
OECD	Organization for Economic Co-operation and Development
RA	Responsible Authority
RDG	Regional Director-General
SARA	<i>Species at Risk Act</i>
TC	Department of Transport
TERMPOL	Technical Review Process of Marine Terminal Systems and Transshipment Sites
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
WPQ	Whites Point Quarry

WHITES POINT PROJECT CHRONOLOGY OF KEY EVENTS

Date	Event
February 4, 2002	Nova Stone Exporters Inc. (“Nova Stone”) and Claimants discuss the possibility of forming a partnership to construct and operate the Whites Point Quarry and Marine Terminal (“Whites Point project”).
February 18, 2002	Nova Stone submits defective application to the Nova Scotia Department of Environment and Labour (“NSDEL”) for an industrial approval to construct and operate a 3.9 hectare quarry on Whites Point project site. Application later rejected.
March 28, 2002	Claimants issue a letter of intent to Nova Stone regarding the formation and funding of their partnership, Global Quarry Products (“GQP”).
April 3, 2002	Nova Stone enters into an aggregate lease agreement with the owners of the Whites Point property.
April 9, 2002	NSDEL reaches out to the Department of Fisheries and Oceans (“DFO”) to determine whether Nova Stone’s application for approval of a 3.9 hectare quarry engages fisheries concerns.
April 23, 2002	Nova Stone submits a second application to NSDEL for an industrial approval to construct and operate a 3.9 hectare quarry on Whites Point project site.
April 24, 2002	Claimants’ subsidiary, Bilcon of Nova Scotia (“Bilcon”) incorporated in the province of Nova Scotia.
April 25, 2002	GQP partnership between Nova Stone and Bilcon registered in the province of Nova Scotia.
April 26, 2002	DFO requests that any industrial approval issued to Nova Stone for 3.9 ha quarry on Whites Point project site should contain conditions requiring Nova Stone to: (1) conduct blasting in accordance with DFO <i>Blasting Guidelines</i> ; and, (2) provide DFO a blasting plan verifying blasting activity will not adversely affect endangered marine mammals in the area (the “blasting conditions”).
April 30, 2002	NSDEL issues industrial approval to Nova Stone for the construction and operation of 3.9 ha quarry on Whites Point project

Date	Event
	site. Industrial approval contains the blasting conditions.
May 2, 2002	Nova Stone and Bilcon enter into a partnership agreement.
June 14, 2002	GQP meets with NSDEL and explains plan for Whites Point project. NSDEL advises GQP that the project will require provincial environmental assessment (“EA”) and may also require a federal EA.
June 19, 2002	Nova Stone consults Marine Mammals Research Scientist Dr. Paul Brodie, in connection with blasting conditions on 3.9 ha quarry. Dr. Brodie raises concerns about proposed blasting activity advising: “a high level of caution is necessary in planning any long-term industrial venture within or proximal to [North Atlantic Right Whale] habitats” and that he did not “wish to mislead the proponents of the quarry project into assuming that there are measures to mitigate the environmental consequences of blasting and ship-loading activity, sufficient to satisfy an informed review board.”
July 25, 2002	GQP meets with DFO officials and describes plan for Whites Point project. DFO advises that project would require a federal EA encompassing the entire project (both the terrestrial and marine components). DFO also advises GQP that it takes public consultation “very seriously”.
September 17, 2002	Nova Stone submits deficient blasting plan to NSDEL and DFO in connection with blasting conditions applicable to 3.9 hectare quarry.
September 30, 2002	GQP submits first deficient project description for Whites Point project to NSDEL.
October 15, 2002	Nova Stone submits second deficient blasting plan to NSDEL and DFO in connection with blasting conditions applicable to 3.9 hectare quarry.
November 20, 2002	Nova Stone submits a third, more detailed blasting plan to NSDEL and DFO in connection with blasting conditions applicable to 3.9 hectare quarry. DFO scientists review and provide comments and follow up questions on blasting plan (over following months).
December 3, 2002	Intergovernmental meeting on GQP’s first deficient project description for Whites Point project. Participants discuss possible

Date	Event
	federal triggers, harmonization of the federal and provincial EAs, possibility that the project may be referred to a review panel and identify missing information in the project description.
January 6, 2003	GQP meets federal and provincial government officials on Whites Point project and is advised the project would require a federal and provincial EA, that a comprehensive study “is more than likely” and that there is the “possibility of a panel”.
January 8, 2003	GQP files a Navigable Waters Protection Application with Canadian Coast Guard seeking permission under the <i>Navigable Waters Protection Act</i> to build a marine terminal at Whites Point.
February 3, 2003	GQP files a second, incomplete project description for Whites Point project.
February 17, 2003	Canadian Coast Guard confirms GQP’s marine terminal requires a permit under <i>Navigable Waters Protection Act</i> , a trigger for a federal EA.
March 10, 2003	GQP files a third project description for Whites Point project.
March 31, 2003	Intergovernmental meeting on third project description for Whites Point project. Participants agree in principle to harmonize the required federal and provincial EAs. A comprehensive study is determined to be “the most likely federal EA track” but participants recognize that public reaction “may influence [the] EA track decision”.
April 7, 2003	DFO determines Whites Point project requires approval for harmful alteration, disruption or destruction of fish habitat (a “HADD authorization”) under s. 35(2) of <i>Fisheries Act</i> , another trigger for a federal EA. DFO notes other potential trigger under s. 32 of <i>Fisheries Act</i> for the killing of fish by means other than fishing.
April 14, 2003	DFO advises GQP that scope of project for the EA will include both quarry and marine terminal and that while type of assessment would be a comprehensive study the project could still be referred to a review panel.
May 26, 2003	Senior DFO officials prepare recommendation that Whites Point project should be referred for referral to review panel.

Date	Event
May 29, 2003	DFO determines Nova Stone’s proposed blasting activity on 3.9 ha quarry will require authorization under s. 32 of <i>Fisheries Act</i> given proximity of activity to marine environment endangered species.
June 20, 2003	DFO and NSDEL reach agreement in principle to conduct a joint EA of the Whites Point project by way of Joint Review Panel (“JRP”).
June 26, 2003	DFO Minister refers Whites Point project to the Minister of the Environment for a referral to a review panel.
August 7, 2003	Federal Minister of the Environment refers Whites Point project to JRP with Nova Scotia.
August 11, 2003	Federal Minister of the Environment and provincial Minister of NSDEL release draft JRP Agreement and Terms of Reference for public comment.
August 29, 2003	GQP meets with NSDEL and Canadian Environmental Assessment Agency (the “Agency”). Agency requests comments on the draft JRP Agreement and Terms of Reference.
September 10, 2003	Agency again solicits comments from GQP on draft JRP Agreement and Terms of Reference.
October 22, 2003	Public review period for draft JRP Agreement and Terms of Reference closes. Agency receives close to a hundred comments from the public on the draft JRP Agreement and Terms of Reference. GQP provides no comments.
November 11, 2003	GQP writes to NSDEL explaining it did not comment on the draft JRP Agreement and Terms of Reference because it considered it to be a “a reasonable document and hence did not feel the need for comment”.
February 11, 2004	JRP Agreement and Terms of Reference ready for ministerial approval.
February 27, 2004	GQP contacts the Agency to request that finalization of JRP Agreement be postponed until the partnership is re-structured.
May 1, 2004	Bilcon enters into a lease agreement with the owners of the Whites Point property.

Date	Event
August 13, 2004	Bilcon advises Agency that GQP has been dissolved and that Bilcon is the sole proponent of the Whites Point project. Bilcon requests Agency to “proceed with the agreement to establish the joint review panel”.
August 26-27, 2004	Agency and NSDEL interview candidates for the JRP.
October 26, 2004	Agency and NSDEL meet with Bilcon to provide advance notice of the finalization of JRP Agreement and the appointment of the JRP consisting of Drs. Fournier, Muecke and Grant.
November 5, 2004	Minister of the Environment and Minister of NSDEL jointly announce establishment of JRP and appointment of the panellists.
November 10, 2004	Agency and NSDEL invite public comments on draft EIS Guidelines.
November 24, 2004	Bilcon representative Paul Buxton advises Community Liaison Committee that, “[t]he chair, Bob Fournier has been on several other panel reviews in the past and is very well respected,” and that “if they [Bilcon] had the option to choose they may well have chosen these professionals.”
December 15, 2004	JRP writes to Bilcon to request that it review draft EIS Guidelines and to provide comments on same.
January 6-9, 2004	JRP holds four public scoping meetings on draft EIS Guidelines in four different locations in southwest Nova Scotia.
January 16, 2005	Bilcon submits cursory comments on draft EIS Guidelines.
January 21, 2005	Public comment period on the draft EIS Guidelines closes. Agency receives 148 public submissions.
March 31, 2005	JRP issues final EIS Guidelines after taking into account Bilcon’s comments as well as those from the public.
April 26, 2006	Bilcon submits its EIS to the JRP, thirteen months after issuance of EIS Guidelines.
April 27, 2006	JRP invites the public and governments of Canada and Nova Scotia to comment on Bilcon’s EIS.

Date	Event
June 28, 2006	JRP issues Bilcon a series of comments and information requests in relation to the EIS.
July 28, 2006	JRP issues Bilcon another series of comments and information requests in relation to the EIS.
August 11, 2006	Public comment period on Bilcon's EIS closes. JRP receives approximately 250 comments and forwards them to Bilcon.
February 12, 2007	Bilcon completes responses to information requests and public comments, but many issues raised by JRP and public left unaddressed.
May 1, 2007	JRP announces two weeks of public hearings on Whites Point project in Digby, Nova Scotia, commencing June 16, 2007.
June 16-30, 2007	JRP holds public hearings in Digby, Nova Scotia.
October 22, 2007	JRP submits its report to the federal Minister of the Environment and to the Nova Scotia Minister of NSDEL recommending that the Whites Point project not be permitted to proceed.
October 23, 2007	Governments of Canada and Nova Scotia release JRP's report to public.
October 29 and November 8 and 16, 2007	Bilcon lobbies the government of Nova Scotia via written correspondence to reject JRP recommendations.
November 20, 2007	Nova Scotia announces its acceptance of the JRP's recommendations and that Whites Point project will not be approved.
November 21, 2007	Bilcon lobbies federal Minister of the Environment via written correspondence to reject JRP recommendations.
December 17, 2007	Canada announces decision to not issue permits and authorizations requested by Bilcon in connection with Whites Point project.

I. INTRODUCTION

A. Overview of the Case

1. In the spring of 2002, the Claimants set about implementing their plan to construct the Whites Point Quarry and Marine Terminal in south-western Nova Scotia.¹ They located their proposed project immediately adjacent to the Bay of Fundy on a narrow peninsula of land known as the Digby Neck. It was to be of a size, duration and magnitude the likes of which the Digby Neck had never before seen. As is required by provincial and federal law in Canada, the Whites Point project underwent an environmental assessment (“EA”). The EA concluded in the fall of 2007 with decisions by the governments of Nova Scotia and Canada that the project would not be permitted to proceed.

2. The Claimants characterize the Whites Point EA process as an “artifice of process and procedure”² based on “dishonesty, deception, and bad faith.”³ They even go so far as to allege that it had a “predetermined outcome.”⁴ They suggest that “quarry permits are routinely granted in Nova Scotia, and other provinces of Canada, with either no environmental assessment or with minimal environmental assessment,”⁵ because, they say, a “quarry is simply a hole in the ground, with minimal environmental impact.”⁶ Their premise and their characterization of the Canadian regulatory landscape are both deeply flawed.

¹ In this Counter-Memorial the Whites Point Quarry and Marine Terminal project is also referred to as the “Whites Point project” or “the project.”

² Claimants’ Memorial, ¶ 2.

³ Claimants’ Memorial, ¶ 2.

⁴ Claimants’ Memorial, ¶ 2.

⁵ Claimants’ Memorial, ¶ 14.

⁶ Claimants’ Memorial, ¶ 14.

3. A quarry is not “simply a hole in the ground, with minimal environmental impact.” A hole in the ground is the scar indelibly imprinted upon the landscape once a quarry is no longer operational. The act of quarrying involves the use of explosives and heavy machinery to blast and crush rock. A quarry operation also requires a means of economically shipping rock to market and here would require the construction of a massive marine terminal and reliance on huge container ships. All of these activities can cause significant environmental impacts. Depending on where the project is proposed, such a project may also give rise to significant public concern, as was the case here. As a result, quarries and marine terminals are heavily regulated in both Nova Scotia and Canada, and permits are not routinely granted.

4. The record in this case shows that the Claimants either failed to appreciate or simply ignored these fundamental facts when they set about developing the Whites Point project. The consequence of this failure can be seen in the short history of the project — it portrays an ill-informed and ill-prepared proponent that failed to take the EA process seriously and to provide the information required under both the *Canadian Environmental Assessment Act* (the “CEAA”) and the Nova Scotia *Environment Act* (the “NSEA”), on the assumption that in the end, it would be entitled to the permits and authorizations it sought.

5. The Whites Point Quarry and Marine Terminal project was first proposed in 2002 by a Canadian enterprise called Global Quarry Products (“GQP”). GQP was a partnership between a locally owned Nova Scotia company, Nova Stone Exporters Inc., and the Claimants’ Nova Scotia subsidiary, Bilcon of Nova Scotia, Corporation. The proposed project had two interrelated components: *first*, a 152 ha quarry, from which millions of tons of rock would be blasted, crushed, washed and stockpiled year-round; and *second*, a marine terminal, jutting 170 metres out into the Bay of Fundy, to which huge ships would moor so they could be loaded with processed aggregate. The project was to operate for 50 years, and virtually every week of every year, it would ship 40,000 tons of aggregate out of the Digby Neck — a total of 2,000,000 tons annually and

100,000,000 tons over the life of the project.⁷ The Whites Point Quarry and Marine Terminal essentially entailed the moving of a mountain.

6. The proposed location for the Whites Point project, the Digby Neck, is the antithesis of the sort of industrial zone where such a development might be appropriate. The Neck is immediately adjacent to the Bay of Fundy, and as such is surrounded by a pristine, diverse and plentiful, but fragile, environment. It is home to a complex ecosystem supporting a number of endangered species. It is also home to some of Canada's most lucrative fisheries and an ever-growing ecotourism industry, the backbone of which was, and continues to this day to be, its whale watching industry. The communities and the economy of the Digby Neck have developed over the past two hundred years in concert with the surrounding environment,⁸ and they are reliant on the state of that surrounding environment for their well-being.

7. Given the surrounding biophysical and human environment of the Digby Neck and the sheer magnitude of the Whites Point project, any proponent who had seriously considered the regulatory environment would have known that it was naive to believe that only a "minimal environmental assessment" would be required. Indeed, an informed proponent would have known that given the project's profound effects on both the terrestrial and marine environments, it would be subject to EAs by both the province of Nova Scotia and by the federal government.

8. Moreover, given the likely significance of the project's environmental effects, and the public concerns they would engender in a location like the Digby Neck, it also would

⁷ See Project Description — Whites Point Quarry & Marine Terminal, Digby County, Nova Scotia, March 2003, **Exhibit R-141**. Note that, as reflected above, the Whites Point Project Description uses imperial units of measurement.

⁸ In recognition of the special relationship existing between the communities of the Digby Neck and their surrounding environment, in 2001, just a year prior to the Whites Point project proposal, the area of south-west Nova Scotia (including the Neck) was designated as a Biosphere Reserve under the Man and the Biosphere Programme of the United Nations Educational, Scientific and Cultural Organization ("UNESCO"). See **Exhibit R-282** and **Exhibit R-460**.

have come as no surprise to an informed proponent that the project would attract public scrutiny and entail the possibility of public hearings under the *CEAA*, the *NSEA*, or both, in order to ensure maximum participation in the decision-making process, a cornerstone objective of EA in Canada.

9. All of these possibilities, and the workings of the provincial and federal EA regimes, were made clear to the Claimants at the earliest stages of the Whites Point project by provincial and federal regulators — respectively the Nova Scotia Department of Environment and Labour (“NSDEL”) and the Department of Fisheries and Oceans Canada (“DFO”).

10. When the Claimants did file their project description for the Whites Point Quarry and Marine Terminal in the spring of 2003, what transpired was not “an artifice of process and procedure” but rather a *bona fide* EA grounded firmly in applicable law and policy in Nova Scotia and in Canada. Provincially, NSDEL was statutorily mandated by the *NSEA* to conduct an EA of the proposed quarry. Federally, given the impacts of the marine terminal on navigation and fish habitat, and given that blasting on the quarry so close to the Bay of Fundy posed a lethal threat to fish, DFO was likewise required to issue authorizations requiring an EA under the *CEAA*. As the project engaged concurrent provincial and federal jurisdiction, steps were taken to harmonize the respective EAs so that the Claimants would ultimately only have to prepare one EA submission to satisfy both governments’ regulatory regimes. Like public participation, harmonization is a cornerstone objective of EA in Canada.

11. The decision as to the type of EA used to review the project — a three member Joint Review Panel (“JRP”) — was equally legitimate. Panel reviews are not reserved for specific types of projects “like deep sea hydrocarbon drilling,” as suggested by the Claimants.⁹ They are rather to be used where a proposed project — regardless of its

⁹ Claimants’ Memorial, ¶ 17.

nature — poses a risk of significant adverse environmental effects or where public concerns are such that they warrant referral to panel review. Both criteria were engaged by the Whites Point project. And, given the benefits of harmonization for both regulators and stakeholders, it was perfectly reasonable here for the project to be assessed by a federal-provincial JRP.

12. In every EA process, a decision must ultimately be made as to whether a project should be permitted to proceed. The Claimants never really appreciated this point. In fact, their approach was based on the assumption that the EA process was nothing more than “hoops to jump through,”¹⁰ and that in the end they were entitled to realize their project. They were not. As proponents, the Claimants bore the burden of navigating the EA process *and* of demonstrating that their project would not result in significant adverse environmental effects that could not be mitigated. The Claimants failed, from start to finish, to meet either burden, mishandling the EA process at every turn.

13. For example, while the ultimate objective was to operate a large-scale, 152 ha quarry and marine terminal, the first step taken to advance the plan, oddly, was for Nova Stone, the Claimants’ partner, to apply in the spring of 2002 to construct and operate a small 3.9 ha quarry on the very land intended for the larger quarry. As even this smaller project involved large-scale blasting right beside the Bay of Fundy, it engaged fisheries concerns and DFO biologists determined that it would, itself, require a federal EA under the *CEAA*. But in early 2003, as DFO was making its determination on the 3.9 ha quarry, the Claimants filed their proposal for the larger quarry and marine terminal, triggering provincial and federal EAs and constraining DFO’s ability under the *CEAA* to further assess or authorize the 3.9 ha quarry. The Claimants expend considerable energy in their Memorial complaining that DFO wrongfully withheld authorization for the 3.9 ha quarry, notwithstanding that it involved the very land and quarrying activities under EA in the

¹⁰ *Infra*, ¶ 206.

larger project. But in the end, the situation in which they found themselves resulted from their own haphazard approach to the process.

14. Likewise, the Claimants failed to discharge their burden before the JRP of demonstrating that the project would not result in significant adverse environmental effects that could not be mitigated. The public record of this process does not reveal “biased anti-development activists” imposing “capricious and arbitrary demands,”¹¹ but rather a proponent both ill-equipped to provide the required information, and unresponsive to requests for such information. Moreover, despite the shortcomings in the Claimants’ approach, the JRP carried out the EA of the Whites Point project in full compliance with the practices and procedures applicable to review panels of the day. In particular, it took all of the required steps to gather the relevant information, to engage the proponent and the public, and to make the required recommendation so that it could fulfill its mandate. In the end, the JRP’s recommendation was that the Whites Point project should not be permitted to proceed. This recommendation was based squarely upon environmental considerations within both the JRP’s Terms of Reference and the purview of the provincial and federal EA regimes under which it operated. In the fall of 2007, the JRP’s recommendation was accepted, first by the government of Nova Scotia and then, a month later, by the federal government.

15. In this NAFTA arbitration, the Claimants challenge as a violation of Chapter Eleven virtually every measure, action, recommendation and decision taken in the course of the Whites Point EA process. The Claimants allege that the process was inconsistent with the minimum standard of treatment under NAFTA Article 1105(1), and with Canada’s national treatment and most-favoured nation treatment obligations, respectively under NAFTA Articles 1102 and 1103. The Claimants’ contentions are without merit. They have no basis, in fact or in law, and must be dismissed.

¹¹ Claimants’ Memorial, ¶ 19.

16. As a preliminary matter, this Tribunal lacks jurisdiction to hear many of the Claimants' claims. *First*, the entirety of the Claimants' claims relating to the industrial approval granted for the 3.9 ha quarry to a Canadian company, Nova Stone, are outside the jurisdiction of this Tribunal. The measures relating to the industrial approval do not "relate to" the Claimants or their investment, as required by NAFTA Article 1101(1). *Second*, the Claimants make claims based on a number of measures taken more than three years prior to the commencement of this arbitration. These claims are time-barred from consideration by this Tribunal pursuant to NAFTA 1116(2). *Third*, the Claimants advance numerous claims in respect of acts of the JRP. But given that the acts of the JRP are not measures "adopted or maintained" by Canada, they are beyond the Tribunal's jurisdiction. *Finally*, the Claimants make claims against measures that could not, as a matter of law, cause them loss or damage. Pursuant to NAFTA Article 1116(1), such measures are not within the jurisdiction of the Tribunal.

17. On the merits, the Claimants allege that many of the government measures taken over the course of the Whites Point EA process, in addition to the acts of the JRP, breach Article 1105(1), the "minimum standard of treatment" provision of NAFTA. But even assuming that the Tribunal has the jurisdiction to consider these measures, the Claimants have failed to demonstrate that the measures meet the high threshold required to prove a breach of the customary international law minimum standard of treatment under Article 1105(1). The Claimants' arguments here are really nothing more than an attempt to manufacture a NAFTA claim out of regulatory, policy and science-based decisions with which they disagree. While they may well be disappointed with the decisions made by government officials, NAFTA does not provide "blanket protection"¹² against such disappointment. Moreover, it is not the job of this Tribunal to second-guess these heavily fact-based and scientifically grounded decisions — the trifling legal complaints the Claimants and their expert have raised could have been raised with officials during the

¹²*Azinian, Davitian, & Baca v. United Mexican States* (ICSID No. ARB (AF)/97/2) Award, 1 November 1999, ("*Azinian – Award*"), ¶ 83, **RA-5**.

course of the process, and ultimately pursued in Canada's domestic courts. They were not. Instead, the Claimants now try to elevate these allegations to the level of an international wrong. Their claim under Article 1105(1) is without merit.

18. The Claimants also allege that measures taken in the course of the Whites Point EA violate Canada's national treatment and most-favoured nation treatment obligations, respectively contained in NAFTA Articles 1102 and 1103, because of some differences in treatment accorded to some EA proponents in very different circumstances. But to establish a breach of these provisions the Claimants must demonstrate that Canada and Nova Scotia accorded Bilcon less favourable treatment than other domestic and foreign investors or investments in like circumstances. The Claimants have presented no such evidence to support their claims. The nationality of the proponents had absolutely nothing to do with decisions made in the Whites Point EA.

19. In attempting to make out their claim under Articles 1102 and 1103, the Claimants seek to draw comparisons with EAs not conducted jointly by Canada and Nova Scotia, but rather by Nova Scotia alone, by the federal government alone, or by the federal government with other provincial governments. Moreover, the EAs they identify were of projects of a different nature than the Whites Point project — they were often small in size, and located in remote or already industrialized areas where their impacts were limited and the public concern less pronounced. The Claimants take such an approach based on the misguided assertion that “*all* enterprises affected by the environmental assessment regulatory process” are “in like circumstances with Bilcon.”¹³ This dubious proposition glosses over the requirement to consider the very factors and circumstances existing in *every* EA that result in legitimate, not discriminatory, differences in the treatment accorded to various EA proponents. In this Counter-Memorial, Canada demonstrates that the treatment being complained of in the Whites Point EA was not less favourable or accorded “in like circumstances” to that accorded in

¹³ Claimants' Memorial, ¶ 407.

any of the comparator EAs cited in the Claimants' Memorial. The claims under Articles 1102 and 1103 are unsupported.

20. For all of the above reasons, Canada requests that the Claimants' claim be dismissed in its entirety, with costs.

B. Materials Submitted by Canada

21. Canada's Counter-Memorial is accompanied by 9 volumes of Exhibits and 7 volumes of Authorities. In addition, Canada submits the following Affidavits and Expert Reports in support of its Counter-Memorial:

- **AFFIDAVIT OF BOB PETRIE:** Bob Petrie was the District Manager in the Regional Environmental Monitoring and Compliance Division of NSDEL. Mr. Petrie's Affidavit outlines the industrial approval process in Nova Scotia for quarries under 4 ha in size. He also describes his involvement in issuing the industrial approval for the 3.9 ha quarry that Nova Stone sought to operate on the Whites Point project site.
- **AFFIDAVIT OF MARK McLEAN:** Mark McLean worked at NSDEL, DFO and the Canadian Environmental Assessment Agency (the "Agency") over the course of the Whites Point EA. He is the current Section Head of the Marine Habitat Protection Section in the Maritimes Regional Office of DFO.¹⁴ Mr. McLean's Affidavit provides an overview of the DFO Maritimes Regional Office's involvement in Nova Stone's application for the 3.9 ha quarry, its initial determinations regarding the Whites Point EA, and its participation in the Whites Point JRP process.

¹⁴ DFO's Maritimes Regional Office was responsible for making many of the initial determinations on the Whites Point EA, after GQP filed the project description for the Whites Point project.

- **AFFIDAVIT OF BRUCE HOOD:** Bruce Hood was a Senior Liaison Officer for Habitat Operations in DFO’s Ottawa Headquarters during the Whites Point EA. Mr. Hood’s Affidavit explains DFO Headquarters’ involvement in the Whites Point EA, and in particular, corrects the Claimants’ many mischaracterizations of his personal notes which were produced in this arbitration.
- **AFFIDAVIT OF NEIL BELLEFONTAINE:** Neil Bellefontaine was the Regional Director-General of DFO in the Maritimes Region for over a decade, including during the Whites Point EA. As the senior DFO executive in the Maritimes Region, Mr. Bellefontaine provides an overview of the EAs of similar projects in the Region, the environmental concerns engaged by the Whites Point project, and the initial determinations made by the DFO Maritimes Regional Office regarding the Whites Point EA.
- **AFFIDAVIT OF ROBERT THIBAUT:** Robert Thibault is the former Minister of DFO and was the Member of Parliament for the riding in which the Whites Point project was proposed. Mr. Thibault’s Affidavit provides an overview of his involvement with the Whites Point project and EA, and the process through which he, as Minister of DFO, decided to refer the project for referral to a review panel.
- **AFFIDAVIT OF CHRISTOPHER DALY:** Christopher Daly was the Manager of the Environmental Assessment Branch of NSDEL during the Whites Point EA. Mr. Daly’s Affidavit provides an overview of the workings and requirements of the EA process under the *NSEA*. Mr. Daly also explains NSDEL’s perspective on the Whites Point EA, including initial meetings on the project, the harmonization of the EA between the provincial and federal governments, and the Whites Point JRP process.

- **AFFIDAVIT OF STEPHEN CHAPMAN:** Stephen Chapman served as the Agency’s Panel Manager for the Whites Point JRP. Mr. Chapman’s Affidavit provides an overview of the Agency’s role in the Whites Point EA and details the establishment of the Whites Point JRP and the workings of the Whites Point JRP process.
- **EXPERT REPORT OF ROBERT CONNELLY:** Robert Connelly is the former Vice President, Policy, and the former Acting President of the Agency. Mr. Connelly has over 35 years’ experience in the field of EA, was involved in the design and enactment of the *CEAA*, and has served as the chair of several EA review panels. In his Expert Report, Mr. Connelly provides a brief overview of the evolution of EA in Canada and describes the application and operation of the *CEAA*, as it applied to the Whites Point project. He also describes the steps typically taken by a JRP in conducting an EA of a project.
- **EXPERT REPORT OF LAWRENCE E. SMITH, Q.C.:** Lawrence E. Smith, Q.C., is a partner with the law firm of Bennett Jones, LLP in Calgary, Alberta, and has practised exclusively in the area of regulatory and environmental law for over 25 years. He has represented proponents in harmonized EA processes in the province of Nova Scotia, and elsewhere in Canada, including an appearance as lead regulatory counsel in a JRP chaired by Dr. Robert Fournier, who was also the chair of the Whites Point JRP. Mr. Smith responds to the opinions offered by the Claimants’ expert, Mr. David Estrin, and provides his own opinions on the reasonableness of the Whites Point EA process.

II. THE FACTS

A. The Environment Surrounding Whites Point, Nova Scotia

22. The modern concept of the “environment” encompasses both biophysical components like the air, land, water, flora and fauna, and human components such as socio-economic conditions, environmental health and the physical and cultural heritage of a place.¹⁵ In this case, the Claimants proposed to construct and operate a huge quarry and marine terminal for fifty years on a narrow spit of land in south-western Nova Scotia known as the Digby Neck (or the “Neck”). To understand both how their project would affect the environment, and the EA that was conducted, it is necessary to first understand both the biophysical and human environment of the Digby Neck and the adjacent Bay of Fundy.

1. The Biophysical Environment

23. Nova Scotia is on Canada’s Atlantic coast and consists primarily of a mainland peninsula and the island of Cape Breton. Off of Nova Scotia’s south-west coast, sandwiched between the Bay of Fundy on the west and St. Mary’s Bay on the east is the Digby Neck. The Neck is 58km long and at its broadest, 5km wide.¹⁶ It is divided by the Petite Passage and the Grande Passage which split the Neck into a main peninsula and two associated islands, called Long Island and Brier Island.¹⁷ The Neck is home to many rare, and in some cases endangered, coastal plants and wildflowers.¹⁸ It also plays host to

¹⁵ See Expert Report of Robert Connelly, ¶¶ 16-18. See also International Association for Impact Assessment, p. 1, **Exhibit R-4**; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, p. 9, **Exhibit R-3**; *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (“CEAA”), s. 2(1), **Exhibit R-1**. See also *Environment Act*, 1994-95, c. 1 (“NSEA”), s. 3(r), **Exhibit R-5**.

¹⁶ At the site of the Claimants’ proposed project it is only 2.75 km wide, **Exhibit R-261**.

¹⁷ Map of Nova Scotia, **Exhibit R-261**.

¹⁸ See Presentation by Mark Elderkin, Species-at-Risk Biologist, Nova Scotia Department of Natural Resources to the Whites Point Quarry and Marine Terminal JRP, June 19, 2007, p. 7. See also Digby Neck/Islands, Economic Profile, Gardner Pinfold, p. 15, **Exhibit R-279**; Environmental Assessment of the Whites Point Quarry and Marine Terminal Project, Joint Review Panel Report (“JRP Report”), pp. 7-8, 44-45, **Exhibit R-212**.

many of the migratory birds that pass through the Bay of Fundy ecosystem.¹⁹ Whites Point, the proposed site of the Claimants' project, is located approximately halfway down the Digby Neck, on the Bay of Fundy side.²⁰

24. The Bay of Fundy is 270 km long and approximately 80 km wide at its mouth.²¹ The tides in the Bay are the highest in the world at approximately 50 feet.²² Each day, 100 billion tonnes of seawater flows in and out of the Bay – an amount greater than the combined flow of the world's entire freshwater river systems.²³

25. Due in part to this extraordinary tidal cycle, the Bay is recognized worldwide as a complex and diverse ecosystem with a rich food web and unique plant and marine life.²⁴ The Bay's strong tides and currents churn up plankton to create an ideal food source for the fifteen species of whales that spend their summers in the Bay, including the endangered North Atlantic Right Whale.²⁵ Other endangered species in the Bay include the inner Bay of Fundy population of Atlantic salmon,²⁶ blue whales²⁷ and leatherback turtles.²⁸ Other species of concern include fin whales,²⁹ harbour porpoises,³⁰ American

¹⁹ Environment Canada's written submission to the Joint Review Panel for the Whites Point Quarry and Marine Terminal Project, dated June 15, 2007, p. 8, **Exhibit R-263**. See also JRP Report, pp. 6, 47, **Exhibit R-212**.

²⁰ Map of Nova Scotia, **Exhibit R-261**.

²¹ Map of Nova Scotia, **Exhibit R-261**.

²² *Bay of Fundy Map & Activity Guide*, p. 1, **Exhibit R-332**.

²³ *Bay of Fundy Map & Activity Guide*, p. 1, **Exhibit R-332**.

²⁴ JRP Report, p. 50, **Exhibit R-212**.

²⁵ *Bay of Fundy Map & Activity Guide*, p. 1, **Exhibit R-332**. See also JRP Report, pp. 50-54, **Exhibit R-212**; Aquatic Species at Risk – North Atlantic Right Whale, Fisheries and Oceans Canada, **Exhibit R-264**.

²⁶ *Atlantic Salmon Outer Bay of Fundy population*, Government of Canada Species at Risk Public Registry, **Exhibit R-265**.

²⁷ *Blue Whale Atlantic population* Government of Canada Species at Risk Public Registry, **Exhibit R-266**.

²⁸ *Aquatic Species at Risk – Leatherback Turtle*, Fisheries and Oceans Canada, **Exhibit R-267**.

²⁹ *Fin Whale Atlantic Population*, Government of Canada Species at Risk Public Registry, **Exhibit R-268**.

³⁰ *Harbour Porpoise Northwest Atlantic population*, Government of Canada Species at Risk Public Registry, **Exhibit R-269**.

eel³¹ and harlequin ducks.³² The Bay is also home to many other more common marine mammals, including the white-sided dolphin, the finback whale, the humpback whale and the minke whale.³³ Given this ecological diversity, the Government of Canada has recognized areas of the Bay of Fundy as a Right Whale Conservation Area,³⁴ a National Wildlife Area,³⁵ and a Migratory Bird Sanctuary.³⁶

26. As mentioned above, off the east coast of the Digby Neck is St. Mary's Bay.³⁷ Before merging with the larger Bay of Fundy at its mouth, St. Mary's Bay also connects to the Bay through the Petite Passage and the Grand Passage and because of the strong tidal currents in these passages, the two ecosystems are connected. St. Mary's Bay is home to lobsters, urchins, herring and scallops, and serves as a juvenile habitat and nursery ground for a substantial amount of marine wildlife.³⁸

2. The Human Environment

27. The human population on the Neck has developed in concert with the unique ecosystem that surrounds it. Modern day Digby Neck exhibits many of the same characteristics as the Neck has for the past several hundred years. It is still a primarily rural and residential area, and most of its inhabitants continue to reside in small coastal communities.³⁹

³¹ *American Eel*, Government of Canada Species at Risk Public Registry, **Exhibit R-270**.

³² *Harlequin Duck Eastern Population*, Environment Canada, **Exhibit R-271**.

³³ *Bay of Fundy Map & Activity Guide*, p. 1, **Exhibit R-332**.

³⁴ *Roseway Basin "Area To Be Avoided" for Protection of Right Whales Now In Effect*, Transport Canada, **Exhibit R-272**.

³⁵ *National Wildlife Areas- Nova Scotia National Wildlife Areas Facts*, Environment Canada, **Exhibit R-273**.

³⁶ *The Atlas of Canada, Migratory Bird Sanctuaries*, Natural Resources Canada, **Exhibit R-274**.

³⁷ Map of Nova Scotia, **Exhibit R-261**.

³⁸ Presentation to the Joint Review Panel, LFA 34 Management Board, p. 3, **Exhibit R-275**.

³⁹ JRP Report, p. 66, **Exhibit R-212**.

28. For example, commercial activity along the Digby Neck has always been founded on the commercial fishery.⁴⁰ The Neck is world-renowned for its lobster and scallop fishery. In fact, the lobster fishery along the Neck is one of the most productive in the world, and is part of “Lobster Fishery Area 34” which accounts for hundreds of millions of dollars in sales and more than ten thousand jobs.⁴¹ The scallop fleet produces the Bay of Fundy fishery’s largest annual landings.⁴² Digby Neck also supports the most successful herring harvest in Nova Scotia,⁴³ a lucrative halibut and haddock longline fishery and successful periwinkle and dulse harvesting.⁴⁴ In addition to these various forms of harvesting, the Neck also supports fish processing plants and aquaculture operations which account for roughly 600 jobs in the region.⁴⁵ Overall, the estimated value of the Digby Neck fishery’s landings averaged roughly \$22.1 million a year between the years 1998 and 2004.⁴⁶

29. The commercial fishery is but one element of the modern local economy along the Neck. More recently, the ecological uniqueness of the region, and the quaint seaside towns and fishing villages along the peninsula, have transformed the Neck into an ecotourism centre.⁴⁷ Whale watching, birding, hiking, beachcombing, photography,

⁴⁰ JRP Report, p. 11, **Exhibit R-212**.

⁴¹ See Digby Neck Community Development Association — Response to the EIS on the Whites Point Quarry and Marine Terminal, p. 5, **Exhibit R-276**. See also DFO Science Stock Status Report — Lobster Fishing Area 34, **Exhibit R-51**, Nova Scotia Fish and Seafood 2003 Statistics, p. 4, **Exhibit R-280**, and Presentation to the JRP by LFA 34 Management Board, p. 1, **Exhibit R-275**.

⁴² Commercial Fisheries: Invertebrate Sector 2006, **Exhibit R-281**.

⁴³ See Digby Neck Community Development Association — Response to the EIS on the Whites Point Quarry and Marine Terminal, p. 8, **Exhibit R-276**.

⁴⁴ See Digby Neck Community Development Association — Response to the EIS on the Whites Point Quarry and Marine Terminal, p. 10, **Exhibit R-276**.

⁴⁵ Digby Neck/Islands, Economic Profile, Gardner Pinfold, p. 13, **Exhibit R-279**.

⁴⁶ Digby Neck/Islands, Economic Profile, Gardner Pinfold, pp. 11-12, **Exhibit R-279**.

⁴⁷ See Digby Neck and Islands — Nova Scotia’s Premier Ecotourism Destination Ecotour Map, **Exhibit R-333** (“Digby Neck and Islands. A special place to appreciate nature’s beauty and variety. Its unique combination of rich land and marine ecosystems, together with its traditional way of life, makes Digby

kayaking, canoeing and exploring towns and villages are popular tourist activities.⁴⁸ Approximately 43,000 tourists visit the Neck during a typical tourism season, generating over \$3 million a year in revenue.⁴⁹ The whale watching industry alone accounts for over a quarter of that revenue, averaging almost 19,000 visitors a year between 1997 and 2001.⁵⁰ Outdoor enthusiasts are also drawn to the area's natural attractions, including the Central Grove and Lake Midway Provincial Parks, the Balancing Rock Trail on Long Island and the Brier Island Nature Preserve. All of these attractions have in turn spawned a considerable service and accommodation sector within the local economy.⁵¹

30. Consistent with the region's burgeoning ecotourism industry, in 2001, the five counties comprising south-west Nova Scotia, including the Digby Neck, were designated as a Biosphere Reserve under the Man and the Biosphere Programme of UNESCO.⁵² A Biosphere Reserve is a terrestrial and coastal ecosystem that promotes biodiversity, conservation, and sustainable resources.⁵³

31. In line with the approach to economic development on the Digby Neck over the past 200 years, there are no large-scale quarries or other industrial developments and no significant marine terminals. Further, efforts to establish such projects have been firmly resisted by the community. For example, in the early 1990s a proposal was brought before the Town of Digby Industrial Commission for the development of a quarry on Eastern Head in St. Mary's Bay. The project was overwhelmingly opposed by the

Neck and Islands a perfect setting for visitors interested in hiking, whale watching, birding, beachcombing, or simply enjoying the breathtaking scenery.”)

⁴⁸ See Digby Neck Community Development Association – Response to the EIS on the Whites Point Quarry and Marine Terminal, pp. 12-16, **Exhibit R-276**.

⁴⁹ Digby Neck/Islands, Economic Profile, Gardner Pinfold, pp. 20-21, **Exhibit R-279**.

⁵⁰ Digby Neck/Islands, Economic Profile, Gardner Pinfold, p. 17, **Exhibit R-279**.

⁵¹ Digby Neck/Islands, Economic Profile, Gardner Pinfold, pp. 16-17, **Exhibit R-279**.

⁵² The Atlas of Canada, *UNESCO Biosphere Reserves*, Natural Resources Canada, **Exhibit R-282**. See also UNESCO Biosphere Reserve Information, Southwest Nova, **Exhibit R-460**.

⁵³ UNESCO, *FAQ – Biosphere Reserves?*, **Exhibit R-283**.

community in the preliminary stages of consultation and was promptly abandoned by the proponent as a result.⁵⁴

32. It was in the middle of this biophysical, socio-economic and cultural environment that the Claimants sought to construct and operate, for up to fifty years, a large-scale quarry and marine terminal.

B. The Plan to Construct and Operate a Quarry and Marine Terminal at Whites Point, Nova Scotia

1. The Proponents

33. Over the duration of the Whites Point EA process the following enterprises were involved as proponents of the project:

- **Nova Stone Exporters Inc. (“Nova Stone”)**, a Nova Scotia limited liability company, unrelated to any of the Claimants. As explained below, the principals of Nova Stone, including Mr. Mark Lowe, conceived of the plan to construct and operate a quarry and marine terminal at Whites Point. Nova Stone also obtained an industrial approval to construct and operate a 3.9 ha quarry on the land that was designated for the larger 152 ha quarry.
- **Bilcon of Nova Scotia, Corporation (“Bilcon”)**, a Nova Scotia limited liability company incorporated on April 24, 2002 and allegedly owned and operated by the Claimants in this arbitration.⁵⁵ Bilcon formed a partnership with Nova Stone, known as “Global Quarry Products,” with

⁵⁴ Paul Buxton, the Claimants’ representative in the Whites Point EA, was well aware of the opposition of the Digby Neck community to this proposal as he was acting, on a consulting basis, as Executive Director of the Town of Digby and Municipality Industrial Commission at the time. Mr. Buxton reviewed the proposal with the Industrial Commission and suggested to the proponents that they hold a public meeting to discuss their plan. In testimony before the Whites Point JRP, Mr. Buxton explained the outcome of this public meeting on the quarry proposal as follows: “Following that meeting, and I think there were probably well over 200 people there, very clear that this was a very unpopular proposal at the time, it was on Eastern Head, on St. Mary’s Bay. And I advised the Silvas [the proponents] that in fact, you know, there would be significant difficulty and public opposition to the project, and I so reported to the Industrial Commission and to the Municipal Councils. See Whites Point Quarry and Marine Terminal Public Hearing Transcript (“JRP Hearing Transcript”), Day 5, pp. 1062-1063, **Exhibit R-284**.”

⁵⁵ Specifically, William Ralph Clayton, William Richard Clayton, Douglas Clayton and Daniel Clayton, and Bilcon of Delaware Incorporated.

the objective of constructing and operating the Whites Point Quarry and Marine Terminal, but when Nova Stone withdrew from the partnership in 2004, Bilcon became the sole proponent of the entire project.

- **Global Quarry Products (“GQP”)**, a Nova Scotia partnership registered on April 25, 2002 and consisting of Nova Stone and Bilcon. GQP was the initial proponent of the 152 ha quarry and marine terminal but was dissolved in 2004, leaving Bilcon as the sole project proponent.

34. While Nova Stone and Bilcon were separately owned and operated, they were both represented in dealings with government officials by Mr. Paul Buxton. Mr. Buxton, a resident of Nova Scotia and an engineer by training, was apparently retained by Nova Stone in early 2002 to assist with the plan.⁵⁶ He served as GQP’s representative in all dealings with government officials and then, later, after the dissolution of GQP, as Bilcon’s Project Manager during the Whites Point EA.

2. The Plan

35. In late 2001, Nova Stone was searching for partners to develop a quarry and marine terminal on the Digby Neck.⁵⁷ Nova Stone had identified the Digby Neck as a suitable location for a quarry because of its significant basalt resources. When crushed, basalt is often used as aggregate which is then used in the construction of everything from roads to private homes.⁵⁸

36. The Digby Neck is located next to the Bay of Fundy and is relatively close to major shipping lanes. This proximity apparently offered, to Nova Stone’s mind, advantages for the cheap transport of the quarried basalt. In particular, the Digby Neck was relatively close to the eastern seaboard of the United States where demand for aggregate is high because of the heavily industrialized nature of the area, and because

⁵⁶ Witness Statement of Paul Buxton, July 20, 2011, ¶¶ 1-8.

⁵⁷ Witness Statement of William Richard Clayton, ¶ 5.

⁵⁸ See Mineral Resources Program, *Natural Aggregates—Foundation of America’s Future*, **Exhibit R-285**. See also JRP Report, p. 21, **Exhibit R-212**.

quarrying permits are nearly impossible to obtain due to the destructive nature of the activity. As Paul Buxton explained at the JRP hearings “a quarry has not been permitted in New Jersey [where the Claimants are from] since 1965... [and] it would be a very difficult if not impossible situation to get a permit for a quarry in New Jersey.”⁵⁹

37. To obtain financial backing for its plan and a market for the exported aggregate, Nova Stone approached the individual Claimants in this arbitration, the Claytons. The Claytons own and operate a number of construction and aggregates companies in and around the State of New Jersey.⁶⁰ On February 4, 2002 Nova Stone represented to the Claytons that it [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

⁶¹ Nova Stone’s representations were not accurate at the time. It had not applied to obtain permits to mine the entire site. Nor had it applied for or obtained a permit for a docking facility at the site.⁶²

38. Nova Stone and the Claytons continued negotiations over the next month and on March 28, 2002 the Claytons sent Nova Stone a Letter of Intent (the “LOI”) outlining the terms of a potential partnership.⁶³ Pursuant to this LOI [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

⁵⁹ See JRP Hearing Transcripts, Day 1, p. 142, **Exhibit R-286**.

⁶⁰ Environmental Impact Statement, Volume 1, Section 2, page 6, ¶¶ 1-3, **Exhibit R-287**.

⁶¹ Letter from Mark Lowe to Bill Clayton re: Business Proposal regarding NSE, February 4, 2002, **Exhibit R-288**. A post-Panamax class ship is one that is too large to even fit through the Panama Canal — see Lloyd’s Register Infosheet No. 30, *Modern ship size definitions*, July 26, 2007, **Exhibit R-464**.

⁶² As of February 4, 2002, the only item Nova Stone had obtained was the assignment of a lease for the property. See Nova Stone, Application for an Industrial Approval to Operate a 3.9ha Quarry and attachments, February 18, 2002, **Exhibit R-75**.

⁶³ Letter from William R. Clayton to Mark Lowe, March 28, 2002, **Exhibit R-289**.

⁶⁴ Letter from William R. Clayton to Mark Lowe, March 28, 2002, ¶ 3, **Exhibit R-289**.

[REDACTED]
[REDACTED]⁶⁵ [REDACTED]
[REDACTED]
[REDACTED]⁶⁶

39. Prior to the execution of the LOI, there is no evidence demonstrating the Claimants carried out any due diligence to verify the truth of the representations made by Nova Stone, or to investigate the regulatory and legal requirements for developing a quarry and marine terminal in Nova Scotia. In fact, [REDACTED]
[REDACTED]⁶⁷ In light of this, it is not surprising that, as Neil Bellefontaine, DFO’s then Regional Director-General in the Maritimes, explains in his Affidavit, the Claimants have displayed a “lack of understanding of the Canadian regulatory environment” when it comes to the EA of quarries and marine terminals in Canada.⁶⁸

40. On April 3, 2002, Nova Stone finally did enter into an aggregate lease agreement with the owners of the Whites Point property.⁶⁹ [REDACTED]
[REDACTED]
[REDACTED]⁷⁰ It still did not have, however, permits necessary for either the quarry or marine terminal.

⁶⁵ Letter from William R. Clayton to Mark Lowe, March 28, 2002, ¶ 1 **Exhibit R-289**.

⁶⁶ Letter from William R. Clayton to Mark Lowe, March 28, 2002, ¶¶ 4-5, **Exhibit R-289**.

⁶⁷ Letter from William R. Clayton to Mark Lowe, March 28, 2002, ¶ 4(b), **Exhibit R-289**.

⁶⁸ Affidavit of Neil Bellefontaine, ¶ 12.

⁶⁹ Aggregate Lease Agreement between Nova Stone and Linebergers and Johnsons, April 3, 2002, **Exhibit R-113**.

⁷⁰ Aggregate Lease Agreement between Nova Stone and Linebergers and Johnsons, April 3, 2002, **Exhibit R-113**.

41. On April 24, 2002 the Claytons incorporated Bilcon of Nova Scotia Corporation.⁷¹ The next day, on April 25, 2002, Nova Stone and Bilcon registered the Global Quarry Products partnership.⁷² Bilcon and Nova Stone executed a formal partnership agreement incorporating the terms of the LOI on May 2, 2002.⁷³ In particular, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷⁴

42. As explained below, in order to meet its obligations under the partnership agreement, Nova Stone would have to approach both Nova Scotia and Canadian regulators for the necessary permits and authorizations and the project would have to undergo EAs under both provincial and federal law.

C. Environmental Assessment Laws and Regulations Applicable to the Planned Quarry and Marine Terminal

43. As explained by Robert Connelly in his Expert Report, in Canada, responsibility for assessing the potential environmental effects of proposed projects is shared between provincial and federal governments.⁷⁵ This shared regulatory jurisdiction exists with respect to quarries and marine terminals of the magnitude and duration that GQP planned for Whites Point. In order to understand the EA process engaged by such a project, it is necessary to look to both the provincial and federal regimes.

⁷¹ Certificate of Registration for Bilcon of Nova Scotia, Corporation, April 24, 2002, **Exhibit R-290**.

⁷² Application for Registration of a Business Name, Sole Proprietorship or Partnership by Nova Stone Exporters Inc. and Bilcon of Nova Scotia, Corp., April 24, 2002, **Exhibit R-291**. *See also* Global Quarry Products Certificate of Registration, April 25, 2002, **Exhibit R-292**.

⁷³ Partnership Agreement between Bilcon and Nova Stone, May 2, 2002, **Exhibit R-293**.

⁷⁴ Partnership Agreement between Bilcon and Nova Stone, May 2, 2002, ¶ 3, **Exhibit R-293**.

⁷⁵ Expert Report of Robert Connelly, ¶ 20.

44. In addition, both the provincial and federal regimes expressly contemplate the harmonization of EAs where both levels of government are involved. Harmonization avoids overlap and duplication in the EA process and is of benefit to the proponent, regulators and interested members of the public. But while two processes can be harmonized, the criteria ultimately applied, and the decisions ultimately made, remain the unique domain of each involved government, based on their own respective legislation.

1. Nova Scotia’s Environmental Assessment Laws and Regulations with Respect to Large Quarries and Marine Terminals

45. The *Nova Scotia Environment Act* (“*NSEA*”) requires an EA of any “undertaking” in the province, before any work on that undertaking can begin.⁷⁶ An undertaking is defined broadly under this Act as including “an enterprise, activity, project, structure, work or proposal and may include in the opinion of the Minister, a policy, plan or program that has an adverse effect or an environmental effect.”⁷⁷

46. An EA under Nova Scotia law is designed to determine the “environmental effects” of an undertaking and whether those “environmental effects” are “adverse effects”. The *NSEA* defines “environmental effect” to include “any change, whether negative or positive, that the undertaking may cause in the environment, including any effect on socio-economic conditions, on environmental health, physical and cultural heritage or on any structure, site or thing.”⁷⁸ The *NSEA* defines “adverse effect” as “an effect that impairs or damages the environment, including an adverse effect respecting the health of humans or the reasonable enjoyment of life or property.”⁷⁹ This broad conception of the environment, and the importance of the human environment is also emphasized in the *NSEA*’s definition of “environment” which includes “for the purpose

⁷⁶ *NSEA*, ss. 31-32, **Exhibit R-5**.

⁷⁷ *NSEA*, s. 3, **Exhibit R-5**.

⁷⁸ *NSEA*, s. 3, **Exhibit R-5**.

⁷⁹ *NSEA*, s. 3, **Exhibit R-5**.

of Part IV [the Part of the Act dealing with EA], the socio-economic, environmental health, cultural and other items referred to in the definition of environmental effect.”⁸⁰

47. The purpose of the *NSEA* in regulating the development of undertakings like quarries is to support and promote the protection, enhancement and prudent use of the environment while recognizing the goals of:

- a) maintaining environmental protection as essential to the integrity of ecosystems, human health and the socio-economic well-being of society;
- b) maintaining the principles of sustainable development, including:
 - i) the principle of ecological value, ensuring the maintenance and restoration of essential ecological processes and the preservation and prevention of loss of biological diversity,
 - ii) the precautionary principle will be used in decision-making so that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation....
 - vi) the linkage between economic and environmental issues, recognizing that long-term economic prosperity depends upon sound environmental management and that effective environmental protection depends on a strong economy, and
 - vii) the comprehensive integration of sustainable development principles in public policy making in the Province....⁸¹

48. The Nova Scotia *Regulations Respecting Environmental Assessment* (the “Nova Scotia *EA Regulations*”) identify different types of undertakings that are subject to EA in the province. The *EA Regulations* provide that “a pit or quarry in excess of 4 ha in area

⁸⁰ *NSEA*, s. 3, **Exhibit R-5**.

⁸¹ *NSEA*, s. 2(a) and (b), **Exhibit R-5**.

primarily engaged in the extraction of ordinary stone, building or construction stone, sand, gravel or ordinary soil”⁸² is a Class I undertaking for EA purposes. As described in the Affidavit of Christopher Daly, the EA of a Class I undertaking is generally a documentary assessment, in which, pursuant to s. 9(1) of the Nova Scotia *EA Regulations*, the proponent must describe, among other things, the nature, purpose and location of the undertaking, and approvals and other forms of authorization which will be required.⁸³

49. The Minister of the Environment, in consultation with relevant officials, must decide on the basis of these documents whether the project should be approved, with or without conditions, or rejected. The factors that the Minister must consider include: the location, size, scope and schedule of the proposed undertaking; any concerns expressed by the public and the steps taken by the proponent to address these concerns; the potential and known adverse effects or environmental effects of the technology to be used in the proposed undertaking; and, any planned or existing land used in the area of the undertaking.⁸⁴ If the Minister of the Environment believes he does not have enough information to make an informed decision, he can require more information, a focus report⁸⁵ on a particular subject, or an EA report,⁸⁶ including a public hearing.⁸⁷ In his Affidavit, Mr. Daly provides examples of EAs of a Class I undertakings that have been subject to a public hearing.⁸⁸ Once such a public hearing is complete the Minister of the

⁸²Nova Scotia *EA Regulations*, N.S. Reg. 44/2003, Schedule ‘A’, (B)(2)(1) (“Nova Scotia *EA Regulations*”), **Exhibit R-6**.

⁸³ Nova Scotia *EA Regulations*, s. 9(1), **Exhibit R-6**; Affidavit of Christopher Daly, ¶¶ 7-15.

⁸⁴ Nova Scotia *EA Regulations*, s. 12, **Exhibit R-6**.

⁸⁵ A “focus report” is defined under s. 2(o) of the the Nova Scotia *EA Regulations*, **Exhibit R-6**, as “a report that presents the results of an environmental assessment of a limited range of adverse effects that may be caused by the undertaking.”

⁸⁶ An “EA report” is defined under s. 2(k) of the the Nova Scotia *EA Regulations*, **Exhibit R-6**, to mean “a report that presents the results of an environmental assessment.”

⁸⁷ Nova Scotia *EA Regulations*, s. 13(1), **Exhibit R-6**.

⁸⁸ Affidavit of Christopher Daly, ¶¶ 16-18.

Environment must again decide whether or not the project should be accepted or rejected, or approved with conditions.

2. Canada's Federal Environmental Assessment Laws and Regulations with Respect to Large Quarries and Marine Terminals

50. In contrast to the approach of the Nova Scotia regime, which prohibits the commencement of work on proposed undertakings prior to an EA and an approval from the Minister of the Environment, the *CEAA* applies when federal authorities are called upon to exercise a prescribed power in respect of a project.⁸⁹ As noted by Robert Connelly in his Expert Report, the *CEAA* requires federal authorities to conduct an EA prior to issuing a prescribed permit or licence, granting a prescribed approval, or taking any other prescribed action (often referred to as a “trigger”), “for the purpose of enabling a project to be carried out in whole or in part.”⁹⁰

51. Because the *CEAA* applies to government officials rather than to projects or proponents, it is always open to a proponent to push ahead with a project *without* a federal authorization and an EA (i.e. assuming the risk that it could violate federal law). However, if it does so, and ends up, for example, destroying fish habitat or killing fish without an authorization, enforcement action, including fines and other criminal penalties, can result.⁹¹

⁸⁹ Expert Report of Robert Connelly, ¶ 38.

⁹⁰ *CEAA*, s. 5(1)(d), **Exhibit R-1**. See also Expert Report of Robert Connelly, ¶ 39.

⁹¹ See *Fisheries Act*, R.S.C., 1985, c. F-14 (“*Fisheries Act*”), ss. 40, 78, **Exhibit R-82**. In fact, Nova Stone actually found itself in such a predicament on one of its other projects in late 2002 at the same time that it was taking steps to advance the Whites Point project. Nova Stone had dumped infill next to the LaHave River and caused an uncontrolled flow of sediment into sensitive fish habitat. As this constituted an unauthorized “HADD” of fish habitat, DFO served an Inspector’s Direction on Nova Stone requiring immediate remediation, failing which “the next step is court action.” See Statement of Bradley Yeaton, Fisheries Officer, Subject: Service of Inspector’s Direction on Mark Lowe, December 12, 2002, and attached Inspector’s Direction, **Exhibit R-294**. While Nova Stone addressed DFO’s immediate concerns, several years later it was convicted and fined more than \$18,000 in connection with the infill. See for example Judge Wants Nova Stone Exporters to Comply or Else, Southshorenova.ca, September 3, 2008,

52. A quarry and marine terminal project like the one contemplated here would engage several triggers for an EA under the *CEAA*. For example the construction and operation of the marine terminal, would require an approval under s. 5(1) of the *Navigable Waters Protection Act* (“*NWPA*”).⁹² A marine terminal would also require an authorization under the *Fisheries Act*, if its design were to result in the “harmful alteration, disruption or destruction of fish habitat” (a “HADD authorization”) (*Fisheries Act*, s. 35(2)).⁹³

53. With respect to the construction and operation of a large coastal quarry, a HADD authorization could also be required due to the destructive impact of near-shore blasting activities. Quarrying could also require an authorization for “the killing of fish by means other than fishing” (*Fisheries Act*, s. 32), another EA “trigger” under *CEAA*.⁹⁴ These potential impacts of blasting are actually recognized by the *Guidelines for the Use of Explosives in or Near Canadian Waters*⁹⁵ (the “*Blasting Guidelines*”) which “provide information to proponents who are proposing works or undertakings that involve the use

Exhibit R-295. See also the Canadian Press, Nova Scotia Woman Fined \$18,000 for Infilling Environmentally Sensitive Salt Marsh, August 20, 2009, **Exhibit R-296**.

⁹² Subsection 5(1) of the *Navigable Waters Protection Act*, R.S.C., 1985, c. N-22 (“*NWPA*”) requires approval by the Minister of the plans and site for any work to be “built or placed in, on, over, under, through or across any navigable waterway”, **Exhibit R-297**. See also Expert Report of Robert Connelly, ¶ 40.

⁹³ Subsection 35(2) of the *Fisheries Act* requires authorization “by the Minister or under regulations made by the Governor in Council” in order to “carry on any work or undertaking that results in the harmful alteration, disruption or destruction of fish habitat,” **Exhibit R-82**. See also Expert Report of Robert Connelly, ¶ 40.

⁹⁴ Section 32 of the *Fisheries Act* provides that “No person shall destroy fish by any means other than fishing except as authorized by the Minister or under regulations made by the Governor in Council,” **Exhibit R-82**. See also Expert Report of Robert Connelly, ¶ 40.

⁹⁵ *Guidelines for the Use of Explosives In or Near Canadian Fisheries Waters*, D.G. Wright and G.E. Hopky, 1998 (“*Blasting Guidelines*”), **Exhibit R-115**.

of confined or unconfined explosives in or near Canadian fisheries waters and to which the *Fisheries Act*, Sections 32 and 35, in particular, may apply.”⁹⁶

54. The purposes of the *CEAA* in requiring EAs of projects like quarries and marine terminals include “ensuring environmental effects of projects receive careful consideration before decisions are taken, encouraging sustainable development, eliminating unnecessary duplication and ensuring an opportunity for public participation.”⁹⁷ In meeting these purposes, an EA must also respect the principles on which the *CEAA* is based including, “achieving sustainable development, anticipating and preventing the degradation of environmental quality, ensuring that economic development is compatible with the high value Canadians place on environmental quality, and facilitating public participation in the environmental assessment process.”⁹⁸

55. If the *CEAA* applies to a proposed project, responsible authorities (“RAs”) must make determinations regarding the EA process. One of these is a determination on the scope of project to be assessed. As explained by Robert Connelly, this phrase refers to the components of a project or projects that are to be included in the EA. Under *CEAA* s.15 the “scope of project” can include components of a project, or projects, in addition to those that triggered the *CEAA* in the first place.⁹⁹

56. A second determination relates to the type of assessment to be used in gathering the information necessary to make a decision on a project proposal. As Robert Connelly explains, three types of EA processes are routinely used: screenings, comprehensive

⁹⁶ *Blasting Guidelines*, Abstract, p. iv, **Exhibit R-115**. As the DFO *Blasting Guidelines* themselves note at p. 3, a “decision to issue an Authorization under Section 32 or Subsection 35(2) of the Fisheries Act triggers an environmental assessment under the Canadian Environmental Assessment Act” (emphasis added). Where this is the case, “the Department of Fisheries and Oceans as the Responsible Authority must conduct an environmental assessment of the relevant proposed works or undertakings before an Authorization can be issued” (p. 13).

⁹⁷ *CEAA*, s. 4, **Exhibit R-1**. See also Expert Report of Robert Connelly, ¶ 33.

⁹⁸ *CEAA*, Preamble, **Exhibit R-1**. See also Expert Report of Robert Connelly, ¶ 32.

⁹⁹ *CEAA*, s. 15, **Exhibit R-1**. See also Expert Report of Robert Connelly, ¶¶ 42-44.

studies and review panels.¹⁰⁰ The determination of type of assessment is heavily dependent on the particular facts of a project, and thus, is made on a case-by-case basis.¹⁰¹ In general, however, the following three factors, all set out in the *CEAA*, determine the type of EA that is applied to a project: (1) whether the project is included in the *Comprehensive Study List Regulations*;¹⁰² (2) the project’s potential for “significant adverse environmental effects;” and (3) the “public concerns” associated with the project.¹⁰³

57. Of particular note, the construction of a marine terminal designed to handle post-Panamax class ships (specifically ships larger than 25,000 DWT¹⁰⁴) is a project on the *Comprehensive Study List Regulations*, and as such, it would be required to undergo, at the very least, a comprehensive study before any permits can be issued.¹⁰⁵ However, a project identified as requiring at least a comprehensive study can be referred to a review panel, which entails a public hearing, if it might cause “significant adverse environmental effects” or if “public concerns” over the project warrant referral to a panel. When the Claimants proposed the Whites Point project such a referral could be made at any time,¹⁰⁶

¹⁰⁰ Expert Report of Robert Connelly, ¶ 47.

¹⁰¹ See discussion in the Expert Report of Robert Connelly, ¶¶ 47-52.

¹⁰² As described in the Expert Report of Robert Connelly at ¶ 47, the *Comprehensive Study List Regulations* (SOR/94/638) (“*Comprehensive Study List Regulations*”), “contain a list of projects that have been predetermined to be “likely to have significant adverse environmental effects”, as provided under s 59(d) of the Act.”

¹⁰³ Expert Report of Robert Connelly, ¶ 47.

¹⁰⁴ *Comprehensive Study List Regulations*, s.28(c), **Exhibit R-10**.

¹⁰⁵ *Comprehensive Study List Regulations*, s. 28(c), **Exhibit R-10**. See also Expert Report of Robert Connelly, ¶ 48. The Claimants’ expert, David Estrin, has offered an opinion at ¶¶ 162-164 of his Expert Report that DFO committed an error of law in determining that the Whites Point marine terminal was subject to a comprehensive study under the *Comprehensive Study List Regulations*, s. 28(c). The Expert Report of Lawrence Smith, Q.C., at ¶¶ 182-203, demonstrates the flaws inherent in Mr. Estrin’s analysis and why his opinion must be rejected. Mr. Smith also explains how Mr. Estrin’s opinion is inconsistent with and contradicted by DFO practice in a number of other EAs of marine terminals.

¹⁰⁶ *CEAA*, ss. 25, 28, **Exhibit R-1**. While at the time of the Whites Point project a referral to a review panel could be made “at any time” (e.g. before, during or at the end of a comprehensive study), Robert Connelly explains, at ¶ 68 of his Expert Report, that the *CEAA* was amended in October 2003 to require the Minister

including after the completion of a comprehensive study process. However, such a determination was typically made at the outset of a comprehensive study process on the basis of preliminary information available to authorities.

58. In addition to the scope of project and type of assessment, a third determination relates to the factors to be considered in the scope of the EA. As Robert Connelly explains, these factors are “the components of the environment” that are to be addressed in the EA, for example species at the project site or their habitat.¹⁰⁷ In considering these components the EA examines the “environmental effects” of a project, which *CEAA* defines as “any change that the project may cause in the environment,¹⁰⁸ including any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species, as those terms are defined in the *Species at Risk Act*.” The socio-economic effects of a project are also to be considered in a *CEAA* EA as the Act requires consideration of “any effect of any change [in the environment]” on health and socio-economic conditions, physical and cultural heritage, the use of lands by aboriginal persons and sites of archaeological importance.¹⁰⁹

59. Once the information gathering process on the “environmental effects” of a project in a *CEAA* EA is complete, government officials must decide whether or not to issue the requested permits or authorizations. In making such a decision, the question is ultimately whether or not the proposed project is likely to cause, taking into account appropriate mitigation measures, “significant adverse environmental effects” that cannot

of the Environment to “make a “track decision” early on in the process so that a project could only be assessed as a comprehensive study or by a review panel, but not by both.”

¹⁰⁷ Expert Report of Robert Connelly, ¶ 71.

¹⁰⁸ “Environment” is also a defined term under the Act. “Environment” means “the components of the Earth, and includes ... “land, water and air”, “all organic and inorganic matter and living organisms” and “the interacting natural systems” that include these components. *CEAA*, s. 2, **Exhibit R-1**.

¹⁰⁹ The term “environmental effect” is defined in *CEAA*, s. 2, **Exhibit R-1**. See also Expert Report of Robert Connelly, ¶ 73.

be justified in the circumstances. If the project is likely to do so, then government officials cannot issue the requested permits and authorizations.¹¹⁰

3. The Harmonization of Provincial and Federal Environmental Assessments

60. As the environment is an area of concurrent provincial and federal jurisdiction, project proposals, like the Whites Point project, will often engage EAs under provincial and federal law. In such circumstances, the EAs can be harmonized. As explained by Lawrence Smith, harmonization creates “one-stop-shopping” for project proponents¹¹¹ and decreases the risk of duplication in the EA process, one of the express purposes of *CEAA*.¹¹² The benefits to be realized by harmonization include the sharing of expertise and resources between each of the involved governments and the fact that the information gathered through one process can be used by both governments in making their respective decisions.¹¹³

61. Harmonization is accomplished through an agreement between the federal and provincial governments on a specific project.¹¹⁴ The agreement typically provides for the coordination of information gathering that allows for both governments to satisfy their regulatory requirements. Once all relevant information has been gathered through the harmonized process, each participating government can render a decision in accordance with their respective EA regime.¹¹⁵

¹¹⁰ See for example, *CEAA*, s. 37(1), **Exhibit R-1**. See also Expert Report of Robert Connelly, ¶¶ 87, 88.

¹¹¹ Expert Report of Lawrence Smith, Q.C., ¶¶ 83, 95.

¹¹² *CEAA*, s. 4(b.1), **Exhibit R-1**. See also *NSEA*, s. 2(g) which speaks to the “co-ordination of legislative and regulatory initiatives” with the Government of Canada, **Exhibit R-5**.

¹¹³ See Expert Report of Robert Connelly, ¶ 92.

¹¹⁴ See *CEAA*, s. 40, **Exhibit R-1**. See also *NSEA*, s. 47, **Exhibit R-5**.

¹¹⁵ See Expert Report of Robert Connelly, ¶¶ 125-131.

D. The Requests for Regulatory Approval to Develop a Quarry and Marine Terminal at Whites Point

62. As explained above, in order to develop their project, Nova Stone and Bilcon required authorizations and approvals from both the provincial and federal governments to develop a 152 ha quarry and a marine terminal capable of serving post-Panamax size ships. However, instead of approaching regulators about the entire project and submitting applications for the necessary permits and approvals, the first step that Nova Stone took was to apply to Nova Scotia for an industrial approval to construct and operate a small 3.9 ha quarry, located entirely within the property on which GQP intended to develop the Whites Point project and immediately adjacent to the Bay of Fundy. This first step in the partners' piecemeal approach created numerous difficulties in the EA of the project, for both GQP and the regulators considering the application.

1. Nova Stone Attempts to Commence Quarry Operations at Whites Point Without an Environmental Assessment – The 3.9 ha Quarry Application

a) Nova Stone's Applications for an Industrial Approval to Operate a 3.9 ha Quarry

63. As Canada has explained above, while an EA is generally required for quarries in Nova Scotia, an EA is not required for quarries of less than 4 ha. However, a proponent of such a quarry must still apply for a permit — known as an industrial approval — under Part V of the *NSEA*.¹¹⁶

64. Nova Stone's initial application to NSDEL for such an industrial approval to operate a 3.9 ha quarry at Whites Point was received on February 18, 2002.¹¹⁷ In accordance with NSDEL procedures for processing such applications,¹¹⁸ Bob Petrie, a

¹¹⁶ Affidavit of Bob Petrie, ¶ 4.

¹¹⁷ Nova Stone, Application for Approval, February 18, 2002, **Exhibit R-75**. See also Affidavit of Bob Petrie, ¶ 7.

¹¹⁸ The process is outlined in further detail in ¶¶ 7-14 of the Affidavit of Bob Petrie.

District Manager in Environmental Monitoring and Compliance at NSDEL, and his colleagues – Robert Balcom, an engineer, Brad Langille, an inspector, and Mark McLean, an Environmental Assessment Officer – were assigned to review the application to ensure that it complied with the basic requirements for an industrial approval.¹¹⁹ The first step in this review was the completion of an Engineering Report on the proposal by Robert Balcom.

65. Mr. Balcom’s Report makes clear that while Nova Stone had only applied for approval to operate a 3.9 ha quarry, Nova Scotia officials were already aware that this was the first step in a much larger operation that would consist of a quarry of over 150 ha in area, and a marine terminal. In particular, Mr. Balcom noted in his report that “[t]otal leased area is about 350 acres,” that “[a]pproximately one million tons per year of crushed rock will be shipped from the quarry,” and that a “ship loading facility will be constructed in the cove.”¹²⁰

66. Ultimately, NSDEL concluded that, if all of the associated elements of Nova Stone’s proposed 3.9 ha quarry were taken into account, the quarry’s footprint actually exceeded 4 ha.¹²¹ As explained above, a quarry over 4 ha in size requires an EA before it can proceed in Nova Scotia.¹²² Mr. Petrie so advised Nova Stone on April 15, 2002.¹²³ As a result, and in order to avoid an EA, Nova Stone redesigned its plan, and on April 23, 2002, filed a new application.¹²⁴ This new application met the size limits for an industrial

¹¹⁹ Affidavit of Bob Petrie, ¶¶ 7-10.

¹²⁰ Engineering Report on the Nova Stone Exporters, Inc. Quarry, by Robert Balcom, March 21, 2002, p. 2, **Exhibit R-79**. See also Affidavit of Bob Petrie, ¶ 9.

¹²¹ Affidavit of Bob Petrie, ¶ 8.

¹²² Email from Mark McLean to Brad Langille and Bob Petrie, April 11, 2002, **Exhibit R-76**. See also Affidavit of Bob Petrie, ¶¶ 4, 8.

¹²³ Letter from Bob Petrie to Paul Buxton, April 15, 2002, **Exhibit R-77**. See also Affidavit of Bob Petrie, ¶ 8.

¹²⁴ Application for Approval, April 23, 2002, **Exhibit R-78**. See also Affidavit of Bob Petrie, ¶ 8.

approval and accordingly, NSDEL began a review of the blasting activity proposed in Nova Stone’s application.¹²⁵

b) NSDEL’s Review of Nova Stone’s Application

67. As explained by Bob Petrie in his Affidavit, it was and still is common for industrial approvals for small quarries to be granted subject to conditions.¹²⁶ The conditions that might be placed on an approval are developed in accordance with Nova Scotia’s *Pit and Quarry Guidelines*, and can address any number of issues, including ground water impacts, air quality, blasting vibration, fly rock, and clearance distances from private property.¹²⁷ Conditions might also relate to the concerns and questions of other federal or provincial departments that are consulted on the application.¹²⁸

68. In this case, NSDEL Engineer Robert Balcom noted that the proposed blasting would be conducted adjacent to the Digby Neck coastline and questioned “the effect that the blasting operations will have on marine mammals in the Bay of Fundy.”¹²⁹ Accordingly, he noted in his report that “[i]t may be necessary to restrict blasting in the quarry to when the Right Whales are not in the Bay of Fundy.”¹³⁰ He also felt the application did not contain sufficient information as the “[u]nder water concussion from the on shore blasting has not been defined” and that “[t]he applicant has not supplied any

¹²⁵ Affidavit of Bob Petrie, ¶¶ 7-10.

¹²⁶ Affidavit of Bob Petrie, ¶¶ 5-6.

¹²⁷ Nova Scotia Department of the Environment, *Pit & Quarry Guidelines*, May 1999, **Exhibit R-74**. See also Affidavit of Bob Petrie, ¶ 6.

¹²⁸ As explained by Bob Petrie, when reviewing a proposed undertaking, NSDEL will consult with federal departments, such as DFO, to address issues not within its area of expertise or jurisdiction. As Mr. Petrie explains, “[t]he alternative is that an uninformed proponent — and the province of Nova Scotia if it authorizes the activity in question — run the risk of violating federal fisheries law and facing prosecution under the *Fisheries Act*.” See Affidavit of Bob Petrie, ¶¶ 6, 11-12.

¹²⁹ Engineer’s Report on the Nova Stone Exporters, Inc. Quarry, by Robert Balcom, March 21, 2002, p. 3, **Exhibit R-79**. See also Affidavit of Bob Petrie, ¶ 10.

¹³⁰ Engineer’s Report on the Nova Stone Exporters, Inc. Quarry, by Robert Balcom, March 21, 2002, p. 3, **Exhibit R-79**. See also Affidavit of Bob Petrie, ¶ 10.

information that would indicate what affect [*sic*] blasting will have on the whales in the Bay of Fundy.”¹³¹

c) NSDEL’s Outreach to the Department of Fisheries and Oceans

69. Given Mr. Balcom’s concerns, NSDEL reached out to DFO for advice and input. Specifically, on April 9, 2002 NSDEL’s Brad Langille contacted DFO’s marine mammals advisor, Jerry Conway, to discuss whether Nova Stone’s proposed blasting engaged DFO concerns.¹³² This initial outreach was followed up by a telephone call between Mr. Langille and Brian Jollymore, a DFO Habitat Evaluation Engineer, to further discuss the potential effects of the proposed blasting activities.¹³³

70. NSDEL’s outreach to DFO would not have come as a surprise to an informed proponent. As Lawrence Smith notes in his Expert Report, “due to the nature of Canadian federalism, where a proposed project has the potential to impact fish-bearing waters, there is no such thing as a purely provincial assessment process. Whether inland or offshore, the DFO has jurisdiction to regulate the project, regardless of concurrent provincial jurisdiction.”¹³⁴

71. Nova Scotia therefore frequently reaches out to DFO when a proposed development poses a risk to either fish or fish habitat — a point made clear in the *Pit and Quarry Guidelines*, which were in fact provided to Nova Stone.¹³⁵ As DFO’s Mark McLean explains in his Affidavit this was not unusual. Nova Scotia has reached out for DFO’s advice and expertise on blasting activities that had the potential to harm both fish

¹³¹ Engineer’s Report on the Nova Stone Exporters, Inc. Quarry, by Robert Balcom, March 21, 2002, p. 4, **Exhibit R-79**. See also Affidavit of Bob Petrie, ¶ 10.

¹³² Letter from Brad Langille of NSDEL to Jerry Conway of DFO, April 9, 2002, **Exhibit R-83**. See also Affidavit of Bob Petrie, ¶¶ 11, 13.

¹³³ Telephone Log of call by Brad Langille to Brian Jollymore, April 22, 2002, **Exhibit R-85**. See also Affidavit of Bob Petrie, ¶¶ 11, 13.

¹³⁴ Expert Report of Lawrence Smith, Q.C., ¶ 144.

¹³⁵ Nova Scotia Department of the Environment, *Pit & Quarry Guidelines*, May 1999, **Exhibit R-74**.

and fish habitat on other Nova Scotia projects,¹³⁶ such as the Troy Quarry Expansion,¹³⁷ the Elmsdale Quarry Expansion¹³⁸, the Glenholme Gravel Pit Expansion¹³⁹ and the Nictaux Pit Development Project.¹⁴⁰ Moreover, as a condition of the authorizations granted, Nova Scotia required these proponents to satisfy DFO requirements.¹⁴¹

d) DFO’s Concerns Regarding the Proposed Blasting

72. On learning of Nova Stone’s proposed activities, DFO voiced concerns about the potential impact of the blasting on marine mammals, including the endangered North Atlantic Right Whale. These concerns were heightened because DFO had “on file here a copy of an original draft submission showing . . . a 30 year lease agreement to extract aggregate from a 350 acre parcel of land.”¹⁴² DFO was aware that more than just a few blasts were contemplated for Whites Point and that prolonged blasting activity would be an ongoing feature of this project proposal. DFO’s Brian Jollymore relayed these concerns to NSDEL in an April 26, 2002 email which stated:

Our Marine Mammal Coordinator, Jerry Conway has expressed significant concerns about possible blasting impacts on marine mammals in the area. Jerry wanted documented proof the charges to be employed would not have any disruptive influence on the species. I am sure the local people

¹³⁶ See Affidavit of Mark McLean, ¶¶ 8-10, for a further explanation of Nova Scotia’s outreach to DFO on these projects.

¹³⁷ Letter from Guy Robichaud of DFO to Cheryl Benjamin of NSDEL regarding Troy Quarry Extension, undated, **Exhibit R-298**. See also Affidavit of Mark McLean, ¶¶ 9, 10.

¹³⁸ Environmental Assessment Approval for Elmsdale Quarry Expansion, July 24, 2007, clauses 2.1(e), 2.3 and 3.1, **Exhibit R-109**. See also Affidavit of Mark McLean, ¶ 10.

¹³⁹ Environmental Assessment Approval for Glenholme Gravel Pit Expansion, August 3, 2007, clause 2.2, **Exhibit R-111**. See also Affidavit of Mark McLean, ¶ 10.

¹⁴⁰ Environmental Assessment Approval for Nictaux Pit Development Project, October 28, 2005, clause 5.1, **Exhibit R-112**. See also Affidavit of Mark McLean, ¶ 10.

¹⁴¹ Affidavit of Mark McLean, ¶ 10.

¹⁴² Email from Brian Jollymore to Bob Petrie, April 26, 2002, **Exhibit R-86**.

who make their living charting vessels to tourist [*sic*] wishing to see the whales would be equally concerned.¹⁴³

73. In light of these concerns, Mr. Jollymore requested that any industrial approval issued to Nova Stone reflect two conditions relating to the blasting activity. The first condition was that “all blasting would be in accordance with *Guidelines for the Use of explosives In or Near Canadian Fisheries Waters*.”¹⁴⁴

74. The DFO *Blasting Guidelines* were prepared to protect against the potentially harmful effects of blasting on fish, marine mammals and their habitats. They describe these potential effects on fish and marine mammals as follows:

The primary site of damage in finfish is the swimbladder, the gas-filled organ that permits most pelagic fish to maintain neutral buoyancy. The kidney, liver, spleen, and sinus venous also may rupture and haemorrhage. Fish eggs and larvae also may be killed or damaged (Wright 1982).

Studies (Wright 1982) show that an overpressure in excess of 100 kPa will result in these effects. The degree of damage is related to type of explosive, size and pattern of the charge(s), method of detonation, distance from the point of detonation, water depth and species, size and life stage of fish.

Vibrations from the detonation of explosives may cause damage to incubating eggs (Wright 1982, Wright in prep.). Sublethal effects, such as changes in behaviour of fish, have been observed on several occasions as a result of noise produced by explosives. The effects may be intensified in the presence of ice and in areas of hard substrate (Wright 1982, Wright in prep.).

The detonation of explosives may be lethal to marine mammals and may cause auditory damage under certain conditions. The detonation of

¹⁴³ Email from Brian Jollymore to Bob Petrie, April 26, 2002, **Exhibit R-86**. See also Affidavit of Mark McLean, ¶ 13.

¹⁴⁴ Email from Brian Jollymore to Bob Petrie, April 26, 2002, **Exhibit R-86**. See also Affidavit of Mark McLean, ¶ 15.

explosives in the proximity of marine mammals also has been demonstrated to induce changes in behaviour (Wright in prep.).¹⁴⁵

75. Regarding the potential effects of blasting on fish habitat, the DFO *Blasting Guidelines* explain:

The use of explosives in and near fish habitat may also result in the physical and/or chemical alteration of that habitat. For example, sedimentation resulting from the use of explosives may cover spawning areas or may reduce or eliminate bottom-dwelling life forms that fish use for food. By-products from the detonation of explosives may include ammonia or similar compounds and may be toxic to fish and other aquatic biota.¹⁴⁶

76. To protect against these adverse effects, the *Blasting Guidelines* detail appropriate blasting practices and provide formulas to calculate safe setback distances when using explosives near fish habitat.¹⁴⁷ However, in doing so they recognize that these formulas cannot be applied mechanically. For example, when marine mammals are potentially present, the *Blasting Guidelines* recognize that “[u]pon review of a proposal, the DFO Regional/Area authority may impose a greater avoidance distance, depending on the size of the charge or other project specific or fishery resource conditions.”¹⁴⁸

77. The second condition that Mr. Jollymore requested for inclusion in Nova Stone’s industrial approval was that “a report be completed in advance of any blasting activity verifying the intended charge size will not have an impact on marine mammals in the area.”¹⁴⁹ Of this second point, he observed that “[t]his is of particular importance because

¹⁴⁵ *Blasting Guidelines*, pp. 3-4, **Exhibit R-115**.

¹⁴⁶ *Blasting Guidelines*, pp. 3-4, **Exhibit R-115**.

¹⁴⁷ *Blasting Guidelines*, pp. 4-6 and Tables 1 and 2, Appendixes II & III, **Exhibit R-115**.

¹⁴⁸ *Blasting Guidelines*, p. 5, **Exhibit R-115**.

¹⁴⁹ Email from Brian Jollymore to Bob Petrie, April 26, 2002, **Exhibit R-86**.

in the draft submission, the proponent only intended one blast per month. Needless to say, it would be a big one.”¹⁵⁰

78. In his Expert Report, Lawrence Smith explains that it is “not unusual for DFO to require that project proponents furnish evidence that their activities will not result in HADD.”¹⁵¹ In fact, as Mr. Smith explains, DFO is expressly authorized by s. 37 of the *Fisheries Act* to request reports such as the one requested of Nova Stone.¹⁵² Section 37 “permits the DFO to impose information gathering obligations on project proponents so that the DFO can assess the potential impact of existing or proposed works and undertakings on fisheries resources.”¹⁵³ It specifically “allows the DFO to require that project proponents ... provide DFO with such plans, specifications, studies, procedures, schedules, analyses, samples or other information as will enable the DFO to determine whether the proposed work or undertaking is likely to result in any HADD.”¹⁵⁴

e) The Conditional Industrial Approval Granted to Nova Stone

79. NSDEL issued Nova Stone its industrial approval to construct and operate a 3.9 ha quarry at Whites Point on April 30, 2002.¹⁵⁵ The industrial approval was for a ten year period but was subject to certain conditions. First, it required Nova Stone to remain in control of the land on which the quarry was located.¹⁵⁶ In this regard, the approval was issued to Nova Stone and to Nova Stone only. It could not be transferred, sold, leased,

¹⁵⁰ Email from Brian Jollymore to Bob Petrie, April 26, 2002, **Exhibit R-86**.

¹⁵¹ Expert Report of Lawrence Smith, Q.C., ¶ 149.

¹⁵² *Fisheries Act*, s. 37, **Exhibit R-82**.

¹⁵³ Expert Report of Lawrence Smith, Q.C., ¶ 148.

¹⁵⁴ Expert Report of Lawrence Smith, Q.C., ¶ 148.

¹⁵⁵ Affidavit of Bob Petrie, ¶ 14. *See also* Nova Stone Approval, April 30, 2002, **Exhibit R-87**.

¹⁵⁶ Nova Stone Approval, April 30, 2002, ¶¶ 3(b), **Exhibit R-87**. *See also* Affidavit of Bob Petrie, ¶ 14.

assigned or otherwise disposed of without the written consent of the Minister of the Environment in Nova Scotia.¹⁵⁷

80. Second, Nova Scotia knew that the 3.9 ha quarry was the first step in a much larger undertaking and public concerns were already being voiced about a large quarry and marine terminal operation on the Digby Neck.¹⁵⁸ As such, the industrial approval was conditional on Nova Stone undertaking a public information program that would address, among other issues, the future of the project.¹⁵⁹ This condition resulted in the establishment of a Community Liaison Committee (“CLC”).¹⁶⁰ The CLC held a series of 14 public meetings between July 18, 2002 and October 8, 2003.¹⁶¹ In addition to the persistent flow of letters of concern sent to both the federal and provincial governments over this period, the CLC revealed the high level of public concern over the larger project proposal.¹⁶²

¹⁵⁷ *NSEA*, s.59(1), **Exhibit R-5**. See also Nova Stone Approval, April 30, 2002, **Exhibit R-87**, and Affidavit of Bob Petrie, ¶ 15.

¹⁵⁸ See Brad Langille note to file re: conversation with Mary Linyak, March 27, 2002, **Exhibit R-88**. See also Brad Langille note to file re: conversation with Jim Thurber, April 2, 2002, **Exhibit R-89** and Brad Langille note to file re: conversation with Tonya Wimmer, April 3, 2002, **Exhibit R-90**. See also email from Brad Langille to Bob Petrie advising of inquiry from *Chronicle Herald* newspaper on quarry information, April 9, 2002, **Exhibit R-91**, and Briefing Note by Brad Langille of May 1, 2002 that notes “there is a high degree of public concern over this project and inquiries have been received from the public, media and the NDP caucus”, **Exhibit R-92**. See also Affidavit of Bob Petrie, ¶ 14.

¹⁵⁹ Nova Stone approval, April 30, 2002, ¶ 11, **Exhibit R-87**. See also NSDEL Briefing Note, Nova Stone Exporters Inc., Quarry Application, Little River, Digby County, May 1, 2002, **Exhibit R-92** and Affidavit of Bob Petrie, ¶ 14.

¹⁶⁰ NSDEL Briefing Note, Nova Stone Exporters Inc. Quarry Application, Little River, Digby County, May 1, 2002, p. 2, **Exhibit R-92**.

¹⁶¹ Community Liaison Committee Minutes (“CLC Minutes”), **Exhibit R-299**.

¹⁶² See for example, CLC Minutes, p. 37, August 29, 2002, **Exhibit R-299**, wherein Mr. Buxton notes that “while the CLC was set up to monitor the 3.9 ha quarry 90% of the questions are for the larger quarry.” See also concerns expressed regarding impact of the project on the lobster fishery, CLC Minutes, p. 88, October 24, 2002, **Exhibit R-299**.

81. Third, conditions on the proposed blasting activity were imposed to reflect the concerns that had been raised by DFO.¹⁶³ In particular, conditions 10(h) and 10(i) of the industrial approval provided:

(h) Blasting shall be conducted in accordance with the Department of Fisheries and Oceans Guidelines for the Use of Explosives In or Near Canadian Waters – 1998.

(i) A report shall be completed by the proponent in advance of any blasting activity verifying the intended charge size and blast design will not have an adverse effect on marine mammals in the area. This report shall be submitted to the Department of Fisheries and Oceans (DFO), Maritimes Aquatic Species at Risk Office and written acceptance of the report shall be received from DFO and forwarded to the Department before blasting commences.¹⁶⁴

As noted by Mr. Petrie at one of the very first CLC meetings, these “conditions regarding blasting and marine mammals were added and are unique [and] site specific.”¹⁶⁵

f) Initial Steps Taken by Nova Stone to Comply with the Blasting Conditions

82. On obtaining the industrial approval, Nova Stone took steps to satisfy the blasting conditions. However, as explained below, it was not until seven months later, in November of 2002, that Nova Stone finally provided a report on the proposed blasting activities that contained enough information for it to be reviewed by DFO.

(1) Nova Stone Obtains an Initial Opinion on its Proposed Blasting Activity – “A High Level of Caution is Necessary”

83. One of the first steps Nova Stone took in connection with the blasting conditions was to retain Dr. Paul Brodie, Ph.D, a Research Scientist in Marine Mammals and

¹⁶³ Affidavit of Bob Petrie, ¶ 13.

¹⁶⁴ Nova Stone approval, April 30, 2002, ¶¶ 10(i) and 10(h), **Exhibit R-87**.

¹⁶⁵ CLC Minutes, August 8, 2002, pp. 23-24, **Exhibit R-299**.

Fisheries Oceanography. On June 3, 2002 Nova Stone asked Dr. Brodie to provide a “report on how the operations of the quarry will impact the marine mammals in the general area and what steps should be taken to mitigate any possible effects,”¹⁶⁶ the very issues that are to be addressed in blasting proposals under the DFO *Blasting Guidelines*. Before even visiting the proposed quarry site and learning the specifics of Nova Stone’s plans, Dr. Brodie commented that “marine mammals are a high profile component of this Fundy area.”¹⁶⁷

84. After an onsite visit with Mr. Buxton, Dr. Brodie prepared a June 19, 2002 report that explained “[w]hat is important, is that the quarry site is proximal to an area known for marine mammals. What must be addressed here, is the potential for interaction.”¹⁶⁸ Dr. Brodie noted there “is potential for marine mammals to be within 10s of m to 300 m from the undisturbed sited as it now stands at Whites Point,”¹⁶⁹ and that “the basalt is directly exposed to the water, which could result in large surface for transmission directly into seawater.”¹⁷⁰ He added, that the “[t]emporary effects [of blasting] on hearing and orientation can have serious consequences in an area of extreme tides and complex coastlines, where there is fishing gear and commercial shipping.”¹⁷¹

85. Dr. Brodie concluded that “[t]he worst-case-scenario at this site would be the presence of an adult female right whale and calf in the immediate vicinity of the quarry when blasting is being conducted. An adult female right whale, capable of reproduction,

¹⁶⁶ Email exchange between Paul Buxton and Dr. Paul Brodie, June 3, 2002, **Exhibit R-300**.

¹⁶⁷ Email exchange between Paul Buxton and Dr. Paul Brodie, June 3, 2002, **Exhibit R-300**.

¹⁶⁸ Report of Dr. Paul Brodie re: Proposed blasting activity at Whites Point, June 19, 2002, p. 1, **Exhibit R-301**.

¹⁶⁹ Report of Dr. Paul Brodie re: Proposed blasting activity at Whites Point, June 19, 2002, p. 2, **Exhibit R-301**.

¹⁷⁰ Report of Dr. Paul Brodie re: Proposed blasting activity at Whites Point, June 19, 2002, p. 3, **Exhibit R-301**.

¹⁷¹ Report of Dr. Paul Brodie re: Proposed blasting activity at Whites Point, June 19, 2002, p. 3, **Exhibit R-301**.

represents the most critical parameter in the recovery of this population.”¹⁷² Given the “increasing profile of marine mammals, and the North Atlantic Right whale in particular” he advised that “a high level of caution is necessary in planning any long-term industrial venture within or proximal to their habitats.”¹⁷³ But even then, Dr. Brodie made it clear he did not “wish to mislead the proponents of the quarry project into assuming that there are measures to mitigate the environmental consequences of blasting and ship-loading activity, sufficient to satisfy an informed review board.”¹⁷⁴

(2) Nova Stone Submits Blasting Plans but Not in Accordance with the DFO *Blasting Guidelines*

86. Dr. Brodie’s report was of no assistance to Nova Stone’s objective, so the company decided to submit a “blasting plan” that simply avoided the issue of marine mammals. Nova Stone submitted this plan on September 17, 2002, almost five months after issuance of the conditional industrial approval for the 3.9 ha quarry.¹⁷⁵ The plan consisted of but one page and was missing the information to be provided under the DFO *Blasting Guidelines*, such as information regarding potentially affected species, their habitat and mitigation and compensation plans.¹⁷⁶ On September 30, 2002, after concluding that there was insufficient detail provided for it to make an assessment, DFO requested the additional information that Nova Stone should have provided under the *Blasting Guidelines*.¹⁷⁷

¹⁷² Report of Dr. Paul Brodie re: Proposed blasting activity at Whites Point, June 19, 2002, p. 3, **Exhibit R-301**.

¹⁷³ Report of Dr. Paul Brodie re: Proposed blasting activity at Whites Point, June 19, 2002, p. 4, **Exhibit R-301**.

¹⁷⁴ Report of Dr. Paul Brodie re: Proposed blasting activity at Whites Point, June 19, 2002, p. 4, **Exhibit R-301**.

¹⁷⁵ Letter from Paul Buxton to Bob Petrie, September 17, 2002, **Exhibit R-116**.

¹⁷⁶ *Blasting Guidelines*, Application Procedure, p. 8, **Exhibit R-115**.

¹⁷⁷ Letter from Jim Ross to Bob Petrie, September 30, 2002, **Exhibit R-117**.

87. Nova Stone filed an additional one page document regarding its blast design on October 15, 2002, again with no accompanying information regarding the potential impact of blasting on marine mammals.¹⁷⁸ Again, DFO had to request more information on October 30, 2002, this time providing a detailed list of the type of information that should accompany a complete blasting plan and making clear that this information was required before the plan could undergo internal review within DFO.¹⁷⁹

88. DFO's requests for more information should not have come as a surprise to Nova Stone. The DFO *Blasting Guidelines* set out a detailed application and review process that proponents are to follow when filing blasting proposals with DFO. They also make expressly clear that it is the proponent's responsibility to provide adequate information:

Proponents should be aware that subsequent to filing the application, DFO may request additional information concerning fish and fish habitat, the mitigation and/or compensation plans, the contingency and monitoring and follow-up programs, and other matters as required to complete the Fisheries Act review. If the appropriate information is not already available, it is the proponent's responsibility to provide it and, also, to assure DFO that the proposed mitigation and/or compensation measures will be effective.¹⁸⁰

89. The *Blasting Guidelines* also describe the review of blasting proposals as an "iterative process," depending on the circumstances of each case:

Note that prior to finalizing its review of the proposal DFO may, among other matters, advise the proponent of the need for more information, re-assess a revised project proposal, suggest that the proponent seek authorization, etc. The review of a proposal is often an iterative process depending on a number of factors, such as the type of referral received by

¹⁷⁸ Letter from Paul Buxton to Bob Petrie, October 8, 2002, received by NSDEL October 15, 2002, **Exhibit R-118**.

¹⁷⁹ Letter from Jim Ross to Bob Petrie, October 30, 2002, **Exhibit R-119**.

¹⁸⁰ *Blasting Guidelines*, p. 5, **Exhibit R-115**.

DFO, its completeness, its potential impacts on fish and/or fish habitat and the potential to mitigate and/or compensate for such impacts.¹⁸¹

90. Nova Stone finally provided a more detailed blasting plan on November 20, 2002, almost seven months after NSDEL issued the industrial approval.¹⁸² This plan contained sufficient detail for internal DFO review, which was commenced immediately after submission of the plan. However, as explained below, by the time the plan was submitted, GQP had already taken steps that triggered an EA of the Whites Point project, which subsumed the 3.9 ha quarry. As such, the outcome of DFO’s review of the 3.9 ha quarry blasting plan became tied to the determinations that had to be made in connection with the EA of the Whites Point project.

2. Global Quarry Products Requests Approval to Construct and Operate a 152 ha Quarry and Marine Terminal at Whites Point

a) GQP Meetings with Government Officials Regarding the Whites Point Project

91. NSDEL and DFO officials were aware from the outset that the proponent had plans for a project of significant scope and duration at Whites Point. This knowledge of the full extent of the planned project shaped many of the interactions on the file in its early phases, despite the fact that Nova Stone and Bilcon waited months before officially engaging with provincial and federal officials on the construction and operation of the 152ha quarry and marine terminal.

¹⁸¹ *Blasting Guidelines*, pp. 10-11, **Exhibit R-115**.

¹⁸² Letter from Paul Buxton to Bob Petrie, November 20, 2002, attaching “Whites Point Quarry Blasting Plan” dated November 18, 2002, **Exhibit R-80**.

**(1) Initial Meeting with Provincial Officials at the
Department of Environment and Labour**

92. GQP requested a meeting with NSDEL officials “to discuss preparations for an EA registration” in late May 2002.¹⁸³ The meeting took place on June 14, 2002 at NSDEL’s Environmental Assessment Branch offices in Halifax, Nova Scotia.¹⁸⁴ At the meeting GQP explained its plans for a large quarry as well as a marine terminal which it described as an “integral part of this project.”¹⁸⁵ In addition to discussing Nova Scotia’s EA requirements, NSDEL also informed GQP’s Paul Buxton that the project being described might trigger a federal EA under the *CEAA* because the marine terminal required a potential HADD authorization for the destruction of fish habitat.¹⁸⁶ Neither Mr. Buxton nor anyone from GQP took issue with the suggestion that a federal EA might be engaged by the project proposal.

**(2) Initial Meeting with Federal Officials at the Department
of Fisheries and Oceans**

93. After meeting with NSDEL officials, GQP organized a meeting with DFO officials on July 25, 2002.¹⁸⁷ At this meeting, GQP explained the nature of the proposed development to DFO, noting that the “[s]ite is 368 acres [approximately 150 ha.]”¹⁸⁸ and that it planned to start developing the quarry on the mid-east side close to the ocean

¹⁸³ Email from Bob Petrie to Christopher Daly, May 22, 2002, **Exhibit R-302**; Email from Brad Langille to Robert Balcom, Helen MacPhail, Paul Buxton & Bob Petrie, June 6, 2002 setting up a meeting at NSDEL offices in Halifax, **Exhibit R-303**.

¹⁸⁴ Affidavit of Christopher Daly, ¶ 24. Inexplicably, Mr. Buxton has ignored these meetings and claims that the first meeting with government officials was not held until August 28, 2003 — see Witness Statement of Paul Buxton, ¶ 14.

¹⁸⁵ Notes of Helen MacPhail, June 14, 2002, p. 2, **Exhibit R-171**. See also Affidavit of Christopher Daly, ¶ 25.

¹⁸⁶ Notes of Helen MacPhail, June 14, 2002, p. 2, **Exhibit R-171**.

¹⁸⁷ See Attendance list of meeting between DFO and GQP, July 25, 2002, **Exhibit R-126**. See also Affidavit of Mark McLean, ¶ 24.

¹⁸⁸ Thomas Wheaton’s notes of meeting between DFO and GQP, July 25, 2002, p. 1, **Exhibit R-127**. See also Affidavit of Mark McLean, ¶ 25.

line.¹⁸⁹ GQP again explained that the quarry and marine terminal were one, integrated project as “quite frankly, if they cannot put in a wharf structure they are not interested in the quarry.”¹⁹⁰ Recognizing that the project would engage provincial and federal jurisdiction, GQP asked “whether or not the Fed and Prov EA can be done as a joint effort.”¹⁹¹

94. DFO explained that the project being described would require an EA under the *CEAA* that “will have to take into consideration the whole”¹⁹² (i.e., that the “entire project both on land and marine including shipping, etc. would be included in scope of any *CEAA* assessment.”¹⁹³) Given the public concerns that were already being voiced over the project DFO also explained that it took public consultation “very seriously.”¹⁹⁴ DFO added that the EA process could be conducted jointly with Nova Scotia.¹⁹⁵ Again, there is no evidence that any GQP representative took issue with the potential approaches to an EA being laid out by DFO.

¹⁸⁹ Thomas Wheaton’s notes of meeting between DFO and GQP, July 25, 2002, p. 2, **Exhibit R-127**.

¹⁹⁰ Thomas Wheaton’s notes of meeting between DFO and GQP, July 25, 2002, p. 3, **Exhibit R-127**. *See also* Affidavit of Mark McLean, ¶ 25.

¹⁹¹ Thomas Wheaton’s notes of meeting between DFO and GQP, July 25, 2002, p. 3, **Exhibit R-127**. *See also* Affidavit of Mark McLean, ¶ 25.

¹⁹² Thomas Wheaton’s notes of meeting between DFO and GQP, July 25, 2002, **Exhibit R-127**. *See also* Affidavit of Mark McLean, ¶ 25.

¹⁹³ *See* email from Jim Ross to Faith Scattalon, July 25, 2002, reporting on the meeting between DFO and GQP, **Exhibit R-128**. Ms. Scattalon reported directly to Neil Bellefontaine, the Regional Director-General (and head DFO executive) of DFO in the region.

¹⁹⁴ *See* email from Jim Ross to Faith Scattalon, July 25, 2002, reporting on the meeting between DFO and GQP, **Exhibit R-128**. *See also* Affidavit of Mark McLean, ¶ 25.

¹⁹⁵ Thomas Wheaton’s notes of meeting between DFO and GQP, July 25, 2002, **Exhibit R-127**. *See also* Affidavit of Mark McLean, ¶ 25.

b) GQP Files Successive Project Descriptions**(1) The First Project Description**

95. On September 30, 2002 GQP submitted a rudimentary and incomplete project description to NSDEL for the construction of a quarry and marine terminal.¹⁹⁶ This project description described the project infrastructure as consisting of “Land Based Construction” (the quarry) and “Marine Based Construction” (the marine terminal).¹⁹⁷ It added that, “[s]hipment of the aggregate by water will involve approximately 40 to 50 shipments per year by bulk carrier. The proposed ship is the Canadian Steamship Lines “Spirit”¹⁹⁸ with an overall length of 225.02 meters and a gross tonnage of 41,428.”¹⁹⁹ Aside from briefly explaining how the quarry and marine terminal would be constructed and would operate, the draft project description provided no information as to how the project might affect the surrounding environment. In fact, it appeared hastily and haphazardly put together, ending abruptly and inexplicably with the random digits “5” and “10.”²⁰⁰

96. While the project being described would require a Class I EA under the *NSEA*, NSDEL, recognizing that it was fairly certain that the project would also trigger a federal EA, sought to coordinate the review of the project with the federal government. Specifically, on October 1, 2002, NSDEL’s Helen MacPhail forwarded the September 30 project description to Bill Coulter, the Director of the Agency’s Atlantic Regional

¹⁹⁶ Whites Point Quarry – Project Description, faxed from Paul Buxton to Helen MacPhail, September 30, 2002, **Exhibit R-129**.

¹⁹⁷ Whites Point Quarry – Project Description, faxed from Paul Buxton to Helen MacPhail, September 30, 2002, **Exhibit R-129**.

¹⁹⁸ See photographs of the Canadian Steamship Lines “Spirit”, **Exhibit R-304**.

¹⁹⁹ Whites Point Quarry – Project Description, faxed from Paul Buxton to Helen MacPhail, September 30, 2002, **Exhibit R-129**.

²⁰⁰ Whites Point Quarry – Project Description, faxed from Paul Buxton to Helen MacPhail, September 30, 2002, **Exhibit R-129**.

Office.²⁰¹ Ms. MacPhail requested a meeting with the Agency and other federal officials to “discuss the scope of the project and possible options for the coordination of the environmental review process,” in light of the fact “that the company might be looking at registering in mid-December.”²⁰²

97. On November 25, 2002, Mr. Coulter arranged a meeting between NSDEL and officials from DFO, Environment Canada and Natural Resources Canada (“NRCan”).²⁰³ Given the information provided in the September 30, 2002 project description, Mr. Coulter noted, “[i]t appears that a comprehensive study [under the *CEAA*] may be required based on the tonnage of the selected ship for transportation of product to market.”²⁰⁴ He also made clear Nova Scotia’s willingness to carry out any EA as a joint effort: “Because this is likely to require a CEAA environmental assessment as well as a provincial EA the province is seeking a meeting with federal authorities to discuss how we may be able to coordinate our likely EA requirements.”²⁰⁵

98. This intergovernmental meeting took place on December 3, 2002. Again, NSDEL made clear that it wanted to look “at a joint review option (subject to their Minister’s approval).”²⁰⁶ DFO also noted that the marine terminal would require an application under s. 5(1) of the *NWPA* and that this “triggers CEAA.” It also noted that “Other possible

²⁰¹ Email from Helen MacPhail to Bill Coulter, October 1, 2002, **Exhibit R-173**. See also facsimile from Helen MacPhail to Bill Coulter, October 1, 2002, **Exhibit R-305**.

²⁰² Email from Helen MacPhail to Bill Coulter, October 1, 2002, **Exhibit R-173**.

²⁰³ Facsimile from Bill Coulter to Jim Ross, Melinda Donovan and other federal and provincial officials, attaching rough project description, November 25, 2002, **Exhibit R-174**.

²⁰⁴ Facsimile from Bill Coulter to Jim Ross, Melinda Donovan and other federal and provincial officials, attaching rough project description, November 25, 2002, **Exhibit R-174**. Here, Mr. Coulter was implicitly referring to s. 28(c) of the *Comprehensive Study List Regulations*, which requires a comprehensive study for a “marine terminal designed to handle vessels larger than 25 000 DWT”, discussed *supra*, ¶ 54.

²⁰⁵ Facsimile from Bill Coulter to Jim Ross, Melinda Donovan and other federal and provincial officials, attaching rough project description, November 25, 2002, **Exhibit R-174**.

²⁰⁶ Email from Reg Sweeney to Jim Ross and Thomas Wheaton, December 4, 2002 reporting on interagency meeting of December 3, 2002, **Exhibit R-175**.

federal triggers include DFO 35 [a request for a HADD authorization], blasting, Comm [communication] towers, explosive magazine, explosive manufacture, etc.”²⁰⁷

99. Regarding the type of federal EA that would have to be used, it was clear, even on the basis of the rudimentary project description, that GQP’s proposal required, at a minimum, a comprehensive study. On this point, DFO noted that “[o]nce NWP triggers CEAA, the project is on the comp. study list Section 28(c) Construction of a marine terminal designed to handle vessels larger than 25,000 DWT.”²⁰⁸ However, there was “general agreement” that the “size, extent, duration, environmental issues, and extensive public concern” meant that DFO, as a lead RA, “may wish to kick the project up to a panel review.”²⁰⁹

100. As more information on the project was required for officials to determine “the level of environmental assessment to be conducted and to discuss environmental assessment coordination,”²¹⁰ Ms. MacPhail contacted Mr. Buxton on December 10, 2002, advising him of the intergovernmental meeting and requesting a more detailed project description.²¹¹ She added that “it was felt that it would be useful for us all to meet as a

²⁰⁷ Email from Reg Sweeney to Jim Ross and Thomas Wheaton, December 4, 2002 reporting on interagency meeting of December 3, 2002, **Exhibit R-175**.

²⁰⁸ Email from Reg Sweeney to Jim Ross and Thomas Wheaton, December 4, 2002 reporting on interagency meeting of December 3, 2002, **Exhibit R-175**.

²⁰⁹ See email report of Barry Jeffrey on interagency meeting of December 3, 2002, **Exhibit R-176**, wherein it is noted that “[T]he merits of a joint panel review were also discussed.”

²¹⁰ Letter from Helen McPhail to Paul Buxton, December 10, 2002, attaching CEAA Operational Policy Statement on “Preparing Project Descriptions Under the *Canadian Environmental Assessment Act*”, December 10, 2002, **Exhibit R-131**.

²¹¹ Letter from Helen McPhail to Paul Buxton, December 10, 2002, attaching CEAA Operational Policy Statement on “Preparing Project Descriptions Under the *Canadian Environmental Assessment Act*”, **Exhibit R-131**.

group to discuss the project and its requirements” and requested Mr. Buxton to contact her in order to make arrangements for such a meeting.²¹²

101. This meeting between NSDEL, federal officials and GQP took place on January 6, 2003.²¹³ Acknowledging that the project would engage federal and provincial jurisdiction GQP requested “advice as to whether a joint application” should be filed “with province/feds.”²¹⁴ As to the type of EA that would be used, officials advised GQP that while “comp study is more than likely” there was “possibility of a panel” in light of the “likely significant effects” and “public concerns” being voiced over the project.²¹⁵ So that a decision could be made on the type of assessment, officials requested GQP to submit a more thorough project description.²¹⁶

102. After this meeting, NSDEL officials briefed their Minister, Ronald Russell, and DFO officials briefed their Minister, the Honourable Robert Thibault. In its briefing, NSDEL reiterated its view that as the project would require a federal and a provincial EA “[o]ur position is that a joint federal/provincial EA should be pursued.”²¹⁷ For their part, DFO officials recommended to Minister Thibault that while the project was subject to a comprehensive study, there were a number of grounds on which it could be referred to a review panel:

The anticipated scale of the terminal project would likely require a Comprehensive Study Review (CSR) pursuant to the *CEAA* – Comprehensive Study List Section 28(c). However, given the level of

²¹² Letter from Helen McPhail to Paul Buxton, December 10, 2002, attaching CEAA Operational Policy Statement on “Preparing Project Descriptions Under the *Canadian Environmental Assessment Act*”, **Exhibit R-131**.

²¹³ Notice of Meeting and Agenda, January 6, 2003, **Exhibit R-177**.

²¹⁴ Lorilee Langille’s notes of January 6, 2003 meeting with GQP, **Exhibit R-132**.

²¹⁵ Christopher Daly’s notes of January 6, 2003 meeting with GQP, **Exhibit R-178**.

²¹⁶ Lorilee Langille’s notes of January 6, 2003 meeting with GQP, **Exhibit R-132**.

²¹⁷ NSDEL Briefing Note -- Environmental Assessment – Nova Stone Exporter Inc.’s Proposed Expansion of Whites Point Quarry at Little River, Digby County, January 14, 2003, **Exhibit R-179**.

public concern, potential for numerous federal *CEAA* triggers and environmental issues as well as the size, extent and duration of the overall project, a panel Review may be warranted. In either EA scenario a public consultation component would be appropriate.²¹⁸

(2) The Second Project Description

103. In response to the guidance provided by federal and provincial officials, GQP filed another “Draft Project Description” for the “Whites Point Quarry and Marine Terminal” on January 28, 2003.²¹⁹ This project description described a “physical plant for construction aggregate processing and a marine terminal for ship loading of the aggregate.”²²⁰

104. The Agency received the second project description on February 3, 2003 and promptly forwarded it to DFO and other federal departments on February 5, 2003 requesting a determination as to whether they believed the description contained sufficient information for them to ascertain whether they would be involved in a federal EA or needed more information to make this determination.²²¹ Again, given the limited information provided, several federal authorities advised that they required more information.²²² For example, DFO’s Thomas Wheaton, a Fisheries Enforcement Officer responsible for the Digby Neck, concluded that “additional information is required to determine whether or not we are likely to be a Responsible Authority (RA).”²²³ This included details regarding the nearshore fish habitat, the dimensions of the marine

²¹⁸ Memorandum for the Minister – Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, January 14, 2003, **Exhibit R-65**.

²¹⁹ Letter of Paul Buxton to Derek MacDonald, copied to Christopher Daly, January 28, 2003, attaching draft project description, January 28, 2003, **Exhibit R-180**.

²²⁰ Letter of Paul Buxton to Derek MacDonald, copied to Christopher Daly, January 28, 2003, attaching draft project description, January 28, 2003, p. 3 **Exhibit R-180**.

²²¹ Facsimile from Derek MacDonald to federal and provincial agencies, attaching draft project description, February 5, 2003, **Exhibit R-137**.

²²² Letter from Derek MacDonald to Paul Buxton, February 17, 2003, **Exhibit R-140**.

²²³ Letter from Thomas Wheaton to Derek MacDonald, February 14, 2003, **Exhibit R-139**.

terminal (construction details, impacts to tidal and nearshore currents and effluent discharge) and the impact of blasting—all necessary information for DFO to determine whether the project would trigger an EA.²²⁴

105. The Agency forwarded the comments and concerns of the various federal authorities to GQP on February 17, 2003, requesting a revised project description that addressed the noted deficiencies.²²⁵

(3) The Third Project Description

106. GQP filed a third project description on March 10, 2003, several weeks after receiving the Agency’s request for further information.²²⁶ This document described the project as the construction, operation and decommissioning of a “basalt quarry with a marine terminal located on Digby Neck.” It provided, in part, as follows:

The main components of the project include the physical plant for construction aggregate processing and a marine terminal for ship loading of the aggregate.

Land based permanent structures would include rock crushers, screens, closed circuit wash facilities, conveyors, load out tunnel, support structures (shop, office, fuel tanks) and environment control measures.

Marine facilities would include a conveyor, ship loader, berthing dolphins and mooring buoys. ...

The quarry property comprises approximately 380 acres. Land based infrastructure would occupy approximately 27 acres while marine based infrastructure would occupy approximately 10 acres. Quarrying could potentially take place on 300 acres. Quarry production would be approximately 2 million tons of processed aggregate per year.

²²⁴ Letter from Thomas Wheaton to Derek MacDonald, February 14, 2003, **Exhibit R-139**.

²²⁵ Letter from Derek MacDonald to Paul Buxton, February 17, 2003, **Exhibit R-140**.

²²⁶ Letter from Paul Buxton to Derek MacDonald, copied to Christopher Daly, attaching third project description, March 10, 2003, **Exhibit R-181**.

Approximately 10 acres of new quarry would be opened each year with restoration of previously quarried areas every five years.

The life of the quarry is projected to be 50 years. ...

The land based quarry operations are expected to be year round with aggregate stockpiled for ship loading once per week. Approximately 40,000 tons of aggregate would be produced for loading each week. Ship loading is expected to take 10 hours into ships similar to the CSL Spirit with a length of approximately 625 feet.²²⁷

107. As there was adequate information contained in this project description the federal coordination process under the *Federal Coordination Regulations*²²⁸ could commence. As noted by Robert Connelly, these regulations establish procedures for determining which federal departments will be the RA.²²⁹ As the most obvious RA, DFO agreed to lead the coordination process, circulating the project description to Environment Canada, Industry Canada, Transport Canada and NRCan, and advising that DFO was “likely to require an environmental assessment of this project.”²³⁰ This process was conducted with the knowledge that any federal EA would be harmonized with a provincial EA — as the Agency had reminded DFO and others, “[o]nce the federal players are identified, discussion with the province will be in order to sort out respective roles and to ensure that the environmental assessment satisfies both processes.”²³¹

²²⁷ Letter from Paul Buxton to Derek MacDonald, copied to Christopher Daly, attaching third project description, March 10, 2003, pp. 2-3, **Exhibit R-181**.

²²⁸ *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, SOR/97-181, **Exhibit R-12**. Affidavit of Stephen Chapman, ¶ 11; *see also* Expert Report of Robert Connelly, ¶ 41.

²²⁹ Expert Report of Robert Connelly, ¶ 41.

²³⁰ *See* for example, letter from Phil Zamora to John Janes of Industry Canada, March 26, 2003, **Exhibit R-213**.

²³¹ Email from Derek McDonald to Jim Ross et al., March 19, 2003, **Exhibit R-183**.

E. Government Determinations Regarding the EA of the Whites Point Project

108. Once GQP submitted its third project description, a number of determinations had to be made regarding the approach to the EA. These determinations are summarized in the following sections.

1. Provincial and Federal Officials Determine that the Whites Point EA Process Will be Harmonized

109. The harmonized approach was officially adopted and formalized at a March 31, 2003 intergovernmental meeting, convened at NSDEL’s request,²³² to discuss roles and coordination between the two levels of government.²³³

110. At this meeting, federal and provincial officials agreed in principle to enter into a Memorandum of Understanding (“MOU”) harmonizing their respective EAs in order to avoid the inherent inefficiencies in running two separate parallel processes for the same project.²³⁴ This type of coordinated approach had recently been taken in the EA of a project engaging Nova Scotia and federal jurisdiction²³⁵ and so a draft MOU for the Whites Point project was prepared.²³⁶

²³² See email from Christopher Daly to Derek McDonald and others, March 20, 2003, wherein Mr. Daly requests “a meeting ASAP to discuss federal/provincial coordination” in light of the fact that “regulatory coordination of these projects (*sic*) can take some time”, **Exhibit R-306**.

²³³ Email from Derek MacDonald to federal and provincial agencies, March 26, 2003, **Exhibit R-184**.

²³⁴ See Mark McLean’s notes of interagency meeting, March 31, 2003, **Exhibit R-144** and Christopher Daly’s notes of interagency meeting, March 31, 2003, **Exhibit R-185**. See also Affidavit of Mark McLean, ¶ 32; Affidavit of Stephen Chapman, ¶ 14; and Affidavit of Christopher Daly, ¶¶ 33-35. See also Expert Report of Robert Connelly, ¶ 92.

²³⁵ Memorandum of Understanding on Environmental Assessment process for the Deep Panuke Project, December 2001, **Exhibit R-143**.

²³⁶ Email from NSDEL Cheryl Benjamin to CEAA and DFO, attaching draft Memorandum of Understanding, April 23, 2003, **Exhibit R-188**. This draft of the MOU contemplated a comprehensive study, since the decision to refer to the project to panel review was not made until June 26, 2003. However, as federal and provincial officials anticipated that the project could be referred to a panel review, the preamble contemplated that possibility at page 2.

111. The approach was also consistent with GQP’s expectations. Less than three months earlier, Mr. Buxton noted, at a CLC meeting, that the “Proponent will file a joint application” and that “if this direction is taken it will mean a slightly different process.... [I]nstead of looking at the procedure for the Provincial Environmental Assessment Act and the procedure for the Federal Act there will be a combination of the two....”²³⁷

2. DFO Determines the Project Will Require Multiple Authorizations Triggering the Application of the *Canadian Environmental Assessment Act*

112. GQP’s project engaged multiple triggers that would require an EA under the *CEAA*. First, the project entailed the construction of a massive marine terminal. As explained by Robert Connelly, s. 5(1) of the *Navigable Waters Protection Act* provided that “[n]o work shall be built or placed in, on, over, under, through or across any navigable water unless ... the work and the site and plans ... have been approved by the Minister.”²³⁸ Recognizing this fact, GQP actually filed a “Navigable Waters Protection Application for the marine terminal, independent of its project descriptions, on January 8, 2003.”²³⁹ This was actually the second *NWPA* application filed by the proponents—as with much of the documentation submitted to regulators over the course of the EA process, the first *NWPA* application, filed February 7, 2002, was rejected because it was not accompanied by adequate engineering plans.²⁴⁰

²³⁷ CLC Minutes, January 9, 2003, p. 108, **Exhibit R-299**.

²³⁸ Affidavit of Robert Connelly, ¶ 40. Note that while the DFO administered the *NWPA* at the time the Whites Point EA was commenced, the administration of this Act has since been transferred to the Department of Transport.

²³⁹ Navigable Waters Protection Application – Whites Point Quarry Marine Terminal”, December 1, 2002, received by Canadian Coast Guard January 8, 2003, **Exhibit R-133**. Note that while the Claimants describe their marine terminal as a “dock” the materials in the package included a covering letter regarding not a “dock,” but rather the “Whites Point Quarry Marine Terminal,” an *NWPA* application form describing the project as a “Marine Terminal,” a written consent of the landowners for Mr. Buxton “to make application for a marine terminal,” and maps and plans depicting the “proposed marine terminal.”

²⁴⁰ See facsimile from Mark Lowe to Jon Prentiss, February 7, 2002, attaching NWP application and related maps and diagrams, **Exhibit R-134**. See also note to file prepared by Oz Smith, Navigable Waters Protection Officer, March 20, 2002, **Exhibit R-135**.

113. On February 17, 2003, after reviewing GQP’s NWP application, officials concluded that the proposed design would require an approval under s. 5(1) of the *NWPA*.²⁴¹ As *NWPA* s. 5(1) is listed in the *Law List Regulations*, GQP’s *NWPA* application triggered an EA under the *CEAA*. Again, contrary to the assertions made in the Claimants’ Memorial, this determination should have come as no surprise to Mr. Buxton or to GQP—as Mr. Buxton noted at a January 9, 2003 CLC meeting in reference to the *NWPA* application, “the intent is to trigger a CEA.”²⁴²

114. As the *NWPA* approval fell under DFO jurisdiction at the time, DFO was the most appropriate federal department to serve as lead RA for the assessment process.²⁴³ DFO also had to review other proposed project activities to determine whether they would require additional authorizations under the *Fisheries Act*, a determination that was made shortly after the submission of the third project description. On April 7, 2003, DFO’s Thomas Wheaton determined that authorizations would also be required under the *Fisheries Act*.²⁴⁴ Noting the diverse marine habitat and active fishery adjacent to the proposed quarry site, he concluded that the construction of the marine terminal would require a HADD authorization for loss of fish habitat under s. 35(2) of the *Fisheries Act*. Questions also remained as to whether streams on site, that would be affected by the

²⁴¹ Memo from Melinda Donovan of NWP to Paul Boudreau of DFO Habitat Management Division, February 17, 2003, **Exhibit R-136**.

²⁴² CLC Minutes, January 9, 2003, p. 117, **Exhibit R-299**. Mr. Buxton also stated at this meeting: “there are a number of ways to trigger a CEA.... i.e. if explosives are stored on site, erect a tele-communications tower, or build a wharf, these will trigger a CEA and they will advise you what elements they expect you to cover” (see CLC Minutes, January 9, 2003, p. 108, **Exhibit R-299**). In fact, contrary to the Claimants’ misrepresentation of the content of Bruce Hood’s notes (which have nothing to do with the marine terminal, *contrast* Claimants’ Memorial ¶¶ 105, 112) there was never really any question amongst either DFO officials or GQP that a federal EA of the marine terminal would be required.

²⁴³ See Christopher Daly’s notes of interagency meeting, March 31, 2003, describing DFO as the “lead RA,” **Exhibit R-185**.

²⁴⁴ Letter from Thomas Wheaton to Phil Zamora, April 7, 2003, **Exhibit R-147**.

project, contained fish habitat.²⁴⁵ He also noted that blasting on the quarry could require a s. 32 *Fisheries Act* authorization for the killing of fish by means other than fishing.²⁴⁶

115. On April 14, 2003 DFO advised GQP that the *NWPA* application had triggered the *CEAA*. DFO also noted the project would likely cause the destruction of fish habitat and consequently requested GQP to submit an application for a HADD authorization in accordance with s. 35(2) of the *Fisheries Act*. Finally, DFO highlighted that other authorizations may be required by the project, in particular an authorization under s. 32 of the *Fisheries Act* for the killing of fish by means other than fishing (as a result of blasting activity close to the marine environment).²⁴⁷ At no time did GQP ever object to DFO's determinations. To the contrary, on May 14, 2003, Mr. Buxton applied to DFO for a s. 35(2) HADD authorization in connection with the proposed blasting activities on the quarry.²⁴⁸

3. DFO Determines the Scope of Project For the Purposes of an EA Includes the Quarry and Marine Terminal

116. Once DFO determined that an EA was required, it had to next determine the scope of the project that would be considered in the EA, in accordance with *CEAA* s. 15. As explained by Robert Connelly, s. 15 of the *CEAA* provides that the scope of project is not merely dictated by the project component(s) that trigger the application of the *Act*.²⁴⁹

²⁴⁵ Letter from Thomas Wheaton to Phil Zamora, April 7, 2003, **Exhibit R-147**.

²⁴⁶ See also email from Phil Zamora to Cheryl Benjamin, April 22, 2003, **Exhibit R-308**, wherein Mr. Zamora notes, “[t]here may be another F.A. trigger – s. 32 – if the blasting is likely to kill fish.... Section 32 prohibits the killing of fish by means other than fishing. An authorization must be issued here as well if fish are likely to be killed by blasting or any other physical activity associated with the project. We will need more information to determine this.”

²⁴⁷ Letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**.

²⁴⁸ Letter from Paul Buxton to Phil Zamora, attaching application for HADD authorization, May 14, 2003, **Exhibit R-148**.

²⁴⁹ *CEAA*, s. 15, **Exhibit R-1**. See also Expert Report of Robert Connelly, ¶¶ 43-46.

117. In this case, DFO determined that the scope of project for the purposes of the EA would include the marine terminal and the quarry. DFO advised GQP on April 14, 2003 that the scope of the project would include “the construction, installation, operation, maintenance, modification, decommissioning and abandonment of the quarry and marine terminal.”²⁵⁰ In making its decision, DFO received input from the Agency.²⁵¹ Ultimately, all officials involved in reviewing the project description concluded that the scope of the project should include both the marine terminal and the quarry and GQP never challenged the determination. As explained in the Affidavits of Neil Bellefontaine, Mark McLean, Bruce Hood, and Stephen Chapman, the determination was a reasonable one for several reasons.²⁵²

118. First, GQP had been clear from the outset that the quarry and marine terminal were interdependent – one would not exist without the other.²⁵³ As Mr. Buxton told the CLC on January 9, 2003 “unless you can ship it [the rock] no one will produce it.”²⁵⁴ On this point, Lawrence Smith observes “the Proponent intended the marine terminal and quarry components ... to operate as a single project rather than discrete, standalone works and undertakings” and that the “viability of the quarry was dependent on being able to ship the produced aggregate.”²⁵⁵ As explained by Robert Connelly in his Expert Report, when two projects are physically linked they may be scoped together for the purposes of the EA.²⁵⁶

²⁵⁰ Letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**.

²⁵¹ Affidavit of Stephen Chapman, ¶¶ 15-18.

²⁵² See Affidavit of Neil Bellefontaine, ¶¶ 29-34; Affidavit of Mark McLean, ¶¶ 36-38; Affidavit of Bruce Hood, ¶¶ 11-17; and Affidavit of Stephen Chapman, ¶¶ 15-18.

²⁵³ See overview of proponents’ initial meetings with both provincial and DFO officials on the project proposal, *supra*, ¶¶ 92-93.

²⁵⁴ CLC Minutes, January 9, 2003, p. 109, **Exhibit R-299**.

²⁵⁵ Expert Report of Lawrence Smith, Q.C., ¶ 113.

²⁵⁶ Expert Report of Robert Connelly, ¶ 45.

119. Second, DFO's Thomas Wheaton had determined that blasting on the quarry might in fact require authorizations under the *Fisheries Act*, both because of potential effects in the Bay of Fundy and because of the potential existence of fish bearing streams on the quarry site, which had not yet been assessed due to winter conditions.²⁵⁷ As explained by Neil Bellefontaine, given DFO's general knowledge of the effects of blasting and quarrying activities,²⁵⁸ "it was both reasonable and prudent" to include the quarry within the scope of the EA.²⁵⁹

120. Subsequent to DFO's initial scope of project determination, an internal debate arose within DFO as to whether or not the quarry should be included within the scope of the project if DFO did not have to issue an approval or authorization with respect to its construction or operation.²⁶⁰ As Neil Bellefontaine explains in his Affidavit, this debate played out in a number of EAs on which DFO served as the RA during this period.²⁶¹ The debate would continue until its definitive resolution by the Supreme Court of Canada in 2010.²⁶² Here, as explained by Neil Bellefontaine,²⁶³ Bruce Hood²⁶⁴ and Stephen Chapman,²⁶⁵ the debate was based, however, on a hypothetical scenario (i.e. that DFO

²⁵⁷ Letter from Thomas Wheaton to Phil Zamora, April 7, 2003, **Exhibit R-147**. This potential determination was also highlighted to GQP on April 14, 2003. See letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**; see also Affidavit of Mark McLean, ¶¶ 35, 37.

²⁵⁸ For example, the DFO *Blasting Guidelines* (**Exhibit R-115**), discussed *supra*, ¶¶ 53, 73-76, 87-89, make clear that blasting adjacent to the marine environment can result in the need to issue authorizations under s. 32 or s. 35(2) of the *Fisheries Act*.

²⁵⁹ Affidavit of Neil Bellefontaine, ¶ 31.

²⁶⁰ See for example, notes of Bruce Hood Notes, March-June 2003, pp. 801602-801604, **Exhibit R-260**. See also Affidavit of Neil Bellefontaine, ¶ 32.

²⁶¹ Affidavit of Neil Bellefontaine, ¶ 32.

²⁶² In *Mining Watch Canada v. Canada (Fisheries and Oceans)*, SCC 2, [2010] 1 S.C.R. 6, ¶ 39, **Exhibit R-15**, the Supreme Court of Canada determined that under *CEAA* s. 15 "the minimum scope is the project as proposed by the proponent," making it clear that it was reasonable in the Whites Point EA process for officials to have included both the marine terminal and quarry in the scope of project. See also Expert Report of Robert Connelly, ¶ 46.

²⁶³ Affidavit of Neil Bellefontaine, ¶ 34.

²⁶⁴ Affidavit of Bruce Hood, ¶ 14.

²⁶⁵ Affidavit of Stephen Chapman, ¶¶ 16, 19.

would *not* be required to issue a permit or authorization in connection with the quarry) because DFO scientists were not able to visit the quarry site to assess the potential impacts of the quarrying activity until late April and early May 2003.

121. Moreover, this question never became anything more than hypothetical with respect to the Whites Point EA. As explained below, DFO scientists eventually determined in May 2003 that proposed blasting on Nova Stone’s 3.9 ha quarry (now subsumed by the larger quarry) would require an authorization under s. 32 of the *Fisheries Act* and would trigger an EA. Thus, while the internal debate over the approach to determining the scope of project may have been interesting theoretically, it was also based on the premise that there was no trigger for the quarry — a premise that Neil Bellefontaine characterizes as “uninformed and certainly premature.”²⁶⁶ As noted by Lawrence Smith, once it was determined a s. 32 authorization was required “there was clear jurisdiction pursuant to subsection 15 of the *CEAA* for DFO to combine the assessments of the quarry and its associated blasting activities with that of the marine terminal.”²⁶⁷

4. DFO Determines Blasting Activity Requires a *Fisheries Act* Authorization

122. As explained above, from the time that DFO was asked to review Nova Stone’s application to construct and operate a quarry on the 3.9 ha parcel of land at Whites Point, now subsumed in the larger proposed quarry site, officials were concerned that blasting so close to the Bay of Fundy could result in the destruction of fish habitat or the killing of

²⁶⁶ Affidavit of Neil Bellefontaine, ¶ 34. The Claimants’ frequent assertions that DFO “acknowledged” the lack of a trigger for the quarry — *see* Claimants’ Memorial ¶¶ 108-109, 492 — are, in fact, examples of this academic discussion because they all occurred *prior* to the visit to the site by DFO scientists.

²⁶⁷ Expert Report of Lawrence Smith, Q.C., ¶ 110.

fish by means other than fishing. These concerns were not alleviated on DFO’s review of Nova Stone’s November 18, 2002 blasting plan.²⁶⁸

123. In fact, DFO’s internal review found that a s. 32 *Fisheries Act* authorization would be required for the proposed blasting activity on the 3.9 ha quarry (thereby requiring an EA of the blasting activity). However, given that the 3.9 ha quarry formed part of the larger project, itself now under EA, DFO was statutorily precluded from reviewing the blasting on the 3.9 ha quarry (and issuing a s. 32 authorization) separate and apart from the larger project. Below, Canada explains DFO’s review of the 3.9 ha quarry blasting plan that had been submitted by Nova Stone, and the implications of the determination that it would require a s. 32 *Fisheries Act* authorization.

a) DFO Reviews the 3.9 ha Quarry Blasting Plan and Determines that a s. 32 *Fisheries Act* Authorization is Required

124. Within a week of DFO’s receipt of the Nova Stone blasting plan, Norm Cochrane, a scientist in DFO’s Ocean Physics Section, reviewed the plan and raised “areas of concern” such as: whether the plan covered just an initial blast or all subsequent blasts; the fact that the DFO *Blasting Guidelines* provide that ammonium nitrate-fuel oil (which was to be used for the blasts) was not to be used near water; the fact that simultaneous blasts could cause “beaming” (blast waves from two or more shot holes combining to have greater concussive effect in excess of that permitted under the *Blasting Guidelines*); impacts caused by “fly-rock”; and, impacts on a nearby seal colony. Mr. Cochrane was also concerned that while the *Blasting Guidelines* were designed to ensure that blasting was conducted in a manner that would avoid lethal effects on swim-bladdered fish, they

²⁶⁸ Letter from Paul Buxton to Bob Petrie, November 20, 2002, attaching “Whites Point Quarry Blasting Plan” dated November 18, 2002, **Exhibit R-80**.

did not afford “extremely high precision” in dealing with the potential sub-lethal (i.e., not fatal) effects that near shore blasting could cause.²⁶⁹

125. Another scientist in DFO’s Gulf of Maine Section, Robert Stephenson, wrote:

I note that the proposal admits to fisheries in the area, to small whales and seals within one mile of shore, and to an active whale watching activity and the presence of humpback and right whales at 5 miles from shore. The presence of an endangered species within a few miles of the site requires special consideration and the recommendations of the right whale recovery plan must be considered explicitly. Jerry Conway can provide this context.

The section on marine mammals (p5-6) suggests that the scientific information regarding the impact of noise on marine mammals in (sic) inconclusive (the report says ‘inclusive’ – but I assume it means inconclusive). I argue that this is a misrepresentation. Marine mammals are well known to be acoustic animals that react to and are adversely affected by noise.

The distance of disturbance of marine organisms by sound may well be beyond the 500 m suggested in the proposal.²⁷⁰ (emphasis added)

126. DFO conveyed its concerns and information requirements on December 11, 2002,²⁷¹ to which Nova Stone responded on January 28, 2003.²⁷² Nova Stone’s responses were circulated within DFO for review²⁷³ and questions still remained regarding the potential impacts of the proposed blasting activity on the 3.9 ha quarry.²⁷⁴ For example,

²⁶⁹ Email from Norman Cochrane to Jim Ross, November 27, 2002, attaching comments of Norman Cochrane on Whites Point Quarry Blasting Plan, **Exhibit R-120**.

²⁷⁰ Email from Robert Stephenson to Jim Ross, December 12, 2002, **Exhibit R-121**.

²⁷¹ Letter from Jim Ross to Bob Petrie, attaching DFO concerns on Whites Point Quarry Blasting Plan, December 11, 2002, **Exhibit R-122**.

²⁷² Letter from Paul Buxton to Bob Petrie, January 28, 2003, **Exhibit R-123**.

²⁷³ Memorandum from Phil Zamora to various DFO officials, February 4, 2003, **Exhibit R-309**.

²⁷⁴ See for example, email from Norman Cochrane to Phil Zamora, February 17, 2003, **Exhibit R-125**. See also facsimile from Phil Zamora to Paul Buxton, March 27, 2003, attaching one of Mr. Cochrane’s concerns for comment, **Exhibit R-310**.

on April 2, 2003, DFO's Phil Zamora noted that mitigation measures would need to be taken to protect marine mammals (such as the North Atlantic Right Whale) from the effects of blasting on the 3.9 ha quarry. This was an important concern at the time as the *Species at Risk Act* ("SARA")²⁷⁵ was to enter into force in June 2003 and would "influence how we approach mitigation for protected species," such as the North Atlantic Right Whale, under the legislation.²⁷⁶

127. The pending implementation of Canada's species at risk legislation raised concerns regarding other species at risk known to be in the vicinity of the 3.9 ha quarry, in particular the inner Bay of Fundy Atlantic salmon ("iBoF Salmon"). iBoF salmon were declared endangered by the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") in May of 2001 after marked population declines in the 1990s. In May of 2003, DFO's Phil Zamora sought the advice of the department's diadromous fish²⁷⁷ experts regarding the presence of iBoF salmon in the vicinity of the proposed quarry.²⁷⁸ On May 27, 2003, Peter Amiro, a Stock Assessment Biologist in DFO's Diadromous Fish Division provided his opinion that iBoF salmon were likely to be in close proximity to the shore line of Whites Point during certain months of the year:

The coastal area of Digby Neck on the Bay of Fundy is a known area of cooler oceanic water entering the Bay of Fundy. These currents enter through the trough north of George's Bank, are driven to the surface and circulate in a counter clockwise pattern. The cooler portions are located toward the mouth of Bay of Fundy and are preferred (sic) habitat areas for Atlantic salmon. These cool water areas fluctuate monthly. Habitat area, suitable for Atlantic salmon, is available in this area during May and June and again in October and November. During July to September the cool

²⁷⁵ *Species at Risk Act*, S.C. 2002, c. 29, Assented to 2002-12-12 ("SARA"), **Exhibit R-438**.

²⁷⁶ Email from Phil Zamora to Jim Ross, reporting on meeting with DFO's marine mammals expert, Jerry Conway, April 2, 2003, **Exhibit R-152** (Note that while Mr. Zamora's email provides that "SARA legislation will be introduced in Parliament ... on June 1, 2003," the *SARA* had actually received royal assent on December 12, 2002 and most of its provisions entered into force on June 5, 2003).

²⁷⁷ Diadromous fish are those that migrate between fresh and salt water and include iBoF salmon.

²⁷⁸ Email from Larry Marshall to Peter Amiro and Rod Bradford, May 23, 2003, **Exhibit R-149**.

water south of Digby Neck is perhaps critical to iBoF salmon. In general from December to April there is virtually no habitat suitable for Atlantic salmon in that area and few migrating Atlantic salmon.

Of particular note is the fact that Atlantic salmon, both post-smolt (50 to 150 g) and adult, (1000 to 2500 g) tend to travel in very close proximity to the shoreline. In fact, many shore mounted stake nets were once fished in the inter tidal zone along the southeast shore of the Bay of Fundy. This fishery was a consistent source of tagged smolt, many from inner Bay of Fundy rivers. The fisheries were closed or restricted since 1983.

Based on these observations it is likely that Atlantic salmon of iBoF could be found in close proximity to the shore line of White Point from May to October.²⁷⁹

128. Nova Stone's blasting activity was to take place as close as 35.6 metres from the Bay of Fundy. Given the scientific opinion that iBoF salmon could pass in close proximity to the blasting activity, DFO determined that a s. 32 *Fisheries Act* authorization would be required for the killing of fish by means other than fishing. DFO so advised Nova Stone, stating that a setback of 500 meters would be required to protect endangered iBoF salmon during the period in which they could be found in close proximity to Whites Point (May to October). DFO also highlighted its concerns relating to the potentially harmful effects of blasting on endangered marine mammals in the vicinity of the 3.9 ha quarry, although it did not determine that the potential impact of blasting on marine mammals would require a s. 32 authorization.²⁸⁰

b) CEEA s. 5(1)(d) Precludes DFO from Issuing a s. 32 *Fisheries Act* Authorization Until EA of the Larger Project is Complete

129. As the proposed blasting on the 3.9 ha quarry was to be used to commence quarry operations and to construct infrastructure for the larger project (which subsumed the 3.9 ha quarry and was now under EA), *CEEA* s. 5(1)(d) precluded DFO from issuing a s. 32

²⁷⁹ Email from Peter Amiro to Phil Zamora, May 27, 2003, **Exhibit R-150**.

²⁸⁰ Letter from Phil Zamora to Paul Buxton, May 29, 2003, **Exhibit R-55**.

authorization in connection with the 3.9 ha blasting plan. In its May 29, 2003 letter, DFO so advised Nova Stone:

... the 3.9-hectare quarry is within the larger area of the proposed **Whites Point Quarry and Marine Terminal, Digby County, Nova Scotia**, which is currently undergoing an environment assessment (EA) under the Canadian Environmental Assessment Act (CEAA). DFO is the federal authority conducting this EA and is subject to laws governing this CEAA assessment including Section 5(2)(d) (sic²⁸¹) which requires that an EA of a project be completed before a federal authority “*under a provision prescribed pursuant to paragraph 59(f), issues a permit or licence, grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.*”

A Fisheries Act Section 32 Authorization is in the Law List Regulations of CEAA and therefore DFO would not be able to issue a Section 32 Authorization for the four-hectare blasting plan until the CEAA assessment for **Whites Point Quarry and Marine Terminal, Digby County, Nova Scotia** has been completed.²⁸²

130. The requirement for a s. 32 authorization had serious implications for DFO’s review of Nova Stone’s blasting plan for the 3.9 ha quarry. As explained above, CEAA s. 5(1)(d) prevented DFO from issuing a s. 32 authorization that would enable the Whites Point project from being carried out in whole or in part.²⁸³ In this light, prior to making a determination that a s. 32 authorization would be required, regulators had inquired about the purpose of the blasting on the 3.9 ha quarry (in order to ascertain whether it would be to enable the Whites Point project to be carried out in whole or in part). On April 20, 2003, Nova Stone’s Paul Buxton responded that Nova Stone’s “intentions for the 3.9 Ha quarry are to open it in accordance with the Approval and crush rock . . . [to] be used

²⁸¹ The reference in Mr. Zamora’s letter should have been to s. 5(1)(d) of the CEAA.

²⁸² Letter from Phil Zamora to Paul Buxton, May 29, 2003, **Exhibit R-55** (emphasis in original).

²⁸³ As Lawrence Smith, Q.C., explains, “had the DFO issued a section 32 authorization for the 3.9 ha quarry prior to the conclusion of the environmental assessment of the Whites Point project, DFO would have been in contravention of subsection 5(1)(d) of the CEAA, which requires that an environmental assessment of project must be carried out before a responsible authority may issue any form of approval enabling a project to be carried out ‘in whole or in part’” — see Expert Report of Lawrence Smith, Q.C., ¶ 177.

initially for the construction of the various environmental controls as set out in the application for the 3.9 Ha quarry and to construct a new access road to the 3.9 Ha quarry,²⁸⁴ making clear that Nova Stone’s 3.9 ha quarrying activities *were* intended to further carry out the Whites Point project.

131. DFO did not, however, “close the door” on its consideration of the 3.9 ha quarry blasting plan. Rather, in acknowledgement of GQP’s representation in the March 2003 project description for the Whites Point Quarry and Marine Terminal that blasting activity on the 3.9 ha quarry would be used “to gather on-site data for further assessment of potential impact on the marine environment from blasting operations... during the environmental assessment process for the Whites Point Quarry,”²⁸⁵ DFO suggested that Nova Stone “may wish to redesign the blasting plan to mitigate the potential destruction of endangered fish and some other potential harmful effects to endangered marine mammals that have been identified by DFO Scientists during our review” and that the “revised plan should also state clearly, the purpose of the blast and the intended use of the blasted rock.”²⁸⁶

132. As explained by Mark McLean, DFO remained open to allowing a test blast on the 3.9 ha quarry site, as test blasts for the purpose of gathering data for an EA are not considered to “enable a project to proceed in whole or in part.”²⁸⁷ However, Nova Stone never took steps to redesign the blasting plan as suggested by DFO in its May 29, 2003 letter. Nor did it ever agree to limit blasting on the 3.9 ha quarry to the generation of data

²⁸⁴ Email from Derek McDonald to Phil Zamora, April 22, 2003, attaching letter from Paul Buxton to Derek McDonald, April 20, 2003, **Exhibit R-151**. See also memo from Paul Buxton to Bill Clayton, April 10, 2003, noting that the 8,000 tons of rock produced by what Mr. Buxton referred to as a “test blast” would be used for “the environmental control structures” and for “constructing a new access to the quarry” which would require “a portable crusher ... [to] crush sufficient 2 inches minus for the road bed”, **Exhibit R-467**.

²⁸⁵ Final Project Description for the Whites Point Quarry and Marine Terminal, March 2003, **Exhibit R-141**.

²⁸⁶ Letter from Phil Zamora to Paul Buxton, May 29, 2003, **Exhibit R-55**.

²⁸⁷ Affidavit of Mark McLean, ¶ 44.

for the EA process. Further, neither Nova Stone, nor GQP, nor Bilcon, ever submitted a blasting plan describing a test blast or requesting a *Fisheries Act* authorization in connection with the impacts that a test blast might have on fish or fish habitat.²⁸⁸

5. DFO Determines GQP’s Project Should be Assessed by a Review Panel

a) Early Identification of a Panel Review as Appropriate for the Assessment of a Quarry and Marine Terminal at Whites Point

133. The final issue to be decided by DFO was the type of assessment that would be used to review GQP’s proposed project. As described above, in both its project description and its *NWPA* application, GQP proposed the construction of a marine terminal capable of serving ships in excess of 25,000 DWT.²⁸⁹ A marine terminal of this size is described in the *Comprehensive Study List Regulations* and thus, officials concluded very early on that at a minimum, the project would require a comprehensive study.²⁹⁰

134. However, this determination was only a starting point. In his Expert Report, Robert Connelly notes that the bases for elevating a comprehensive study to an assessment by a review panel under the *CEAA* are that the proposed project may cause significant adverse environmental effects or that public concerns warrant referral of a project to a review panel.²⁹¹ From the time of their review of GQP’s first rudimentary project description, government officials believed that these statutory grounds were likely

²⁸⁸ Affidavit of Mark McLean, ¶ 44.

²⁸⁹ See *supra*, ¶¶ 99, 112-113.

²⁹⁰ Letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**. In his Expert Report, Lawrence Smith, Q.C., explains how DFO’s application of the *Comprehensive Study List Regulations* to GQP’s proposed marine terminal was consistent with past and future EA practice regarding numerous other marine terminals in Canada (see ¶¶ 186-188). Further, and contrary to the Claimants’ absurd assertion that this component of GQP’s project was a “docking facility,” and thereby exempt from a comprehensive study, the component was what GQP and its representatives always described it as — a “marine terminal” capable of serving ships in excess of 25,000 DWT (see ¶¶ 189-194).

²⁹¹ *CEAA*, ss. 20(1)(c), 23(b), 25 and 28, **Exhibit R-1**. See also Expert Report of Robert Connelly, ¶ 64.

to be engaged by this project. In particular, DFO officials commented early on that “given the level of public concern, potential for numerous federal CEAA triggers and environmental issues as well as the size, extent and duration of the overall project a Panel Review may be warranted.”²⁹² They even discussed this possibility with GQP representatives at their January 6, 2003 meeting.²⁹³

135. Similarly, in discussions with Agency officials after reviewing GQP’s second project description in late January 2003, DFO officers stated their belief that referral of the project to a review panel could be appropriate in the circumstances.²⁹⁴ As a result, Agency officials began “the thinking process concerning whether the province will also be leaning towards a public review and whether it will be interested in consideration of a joint public review.”²⁹⁵ Agency officials also noted, with respect to the potential type of federal assessment that would be used, that “[p]ublic review is not out of the question.”²⁹⁶

136. Discussion regarding the potential for an assessment by a review panel continued after GQP’s submission of its March 2003 project description. At the March 31, 2003 intergovernmental meeting for example, both a comprehensive study and panel review were discussed. In particular, a “Highlights and Action Items” summary prepared after the meeting acknowledged the possibility that the project could be referred to a review panel, indicating that “Comprehensive Study is the most likely federal EA track” but that “[p]ublic reaction to Scope and MOU may influence EA track decision.”²⁹⁷ Mark

²⁹² Email from Reg Sweeney to Jim Ross and Thomas Wheaton, December 4, 2002, **Exhibit R-130**. See also, Memorandum for the Minister -- Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, January 14, 2003, **Exhibit R-65**.

²⁹³ Christopher Daly’s Notes of January 6, 2003 meeting with GQP, **Exhibit R-178**. The Claimants’ assertion in their Memorial (see ¶ 115) that it was “agreed” at the January 6, 2003 meeting that the type of EA would be a comprehensive study is, thus, demonstrably wrong.

²⁹⁴ Email from Bill Coulter to Bruce Young, February 17, 2003, **Exhibit R-222**.

²⁹⁵ Email from Bill Coulter to Bruce Young, February 17, 2003, **Exhibit R-222**. See also Affidavit of Stephen Chapman, ¶ 22-23.

²⁹⁶ Early Warning System Memorandum, January 21, 2003, **Exhibit R-221**.

²⁹⁷ Highlights and Action Items Whites Point Inter-Agency EA Meeting, March 31, 2003, **Exhibit R-145**.

McLean’s notes of this meeting also indicate that “public review/concerns can bump CSR [Comprehensive Study Review] to panel” and “will be challenged on decision on comp study,”²⁹⁸ implicitly acknowledging the public concerns that could warrant referral to a panel.

137. This possibility was communicated to GQP in DFO’s April 14, 2003 letter to Paul Buxton. In this letter, DFO’s Phil Zamora noted that because of the size of the marine terminal “the type of screening used for the EA will therefore be a Comprehensive Study.”²⁹⁹ However, he made clear that “although the type of assessment being used for this project is a CS [Comprehensive Study], CEAA (Section 23) includes the provision that the project could be referred to a mediator or review panel.”³⁰⁰

138. Throughout April and May 2003, DFO continued its analysis of the potential effects of the proposed project. As Robert Connelly notes in his Expert Report, the work being done by officials at this point on the EA would necessarily have been based on available preliminary information, for the simple reason that the scientific review and information gathering actually conducted in the course of an EA had not yet commenced.³⁰¹ Nevertheless, DFO officials were able to satisfy themselves, in full compliance with the *CEAA*, that the potential for significant adverse environmental effects, and public concerns, both warranted a recommendation to the Minister of DFO that the project should be referred to a review panel.

²⁹⁸ Notes of Mark McLean of March 31, 2003 interagency meeting, **Exhibit R-144**.

²⁹⁹ Letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**.

³⁰⁰ Letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**.

³⁰¹ Expert Report of Robert Connelly, ¶ 52.

b) The Possible Significant Adverse Environmental Effects Resulting from the Construction and Operation of a Quarry and Marine Terminal at Whites Point

139. As explained by the Regional Director-General of DFO in the Maritimes Region, Neil Bellefontaine, DFO officials were well aware that a fifty year quarry and marine terminal project on the Bay of Fundy would be a major undertaking involving far more than just leaving “a hole in the ground.”³⁰² As Dr. Paul Brodie, the first expert retained by Nova Stone, explained, quarrying is an “aggressive restructuring” of the landscape³⁰³ that involves denuding it of vegetation and leaving surface soils exposed to erosion, and using highly toxic chemicals to blast the rock. As such, quarrying “has the potential to cause an array of environmental impacts and public concerns, which can be all the more pronounced when quarrying is conducted close to rivers, lakes or the marine environment.”³⁰⁴

140. These concerns were heightened in this case because of the planned size of the quarry – it would rival the largest quarry in Nova Scotia – and its location, next to the ecologically unique and commercially important Bay of Fundy.³⁰⁵ As discussed above,³⁰⁶ DFO scientists were especially concerned, from the very beginning, about the potential impacts of blasting on endangered species such as the North Atlantic Right Whale.

141. DFO officials were also particularly aware during this time period of the potentially significant adverse impacts of the first large marine terminal to be constructed on the Digby Neck.³⁰⁷ Neil Bellefontaine explains that “the introduction of foreign

³⁰² As suggested by the Claimants in their Memorial at ¶ 14; Affidavit of Neil Bellefontaine, ¶¶ 21-28.

³⁰³ See Report of Dr. Paul Brodie re: Proposed blasting activity at Whites Point, June 19, 2002, p. 1, **Exhibit R-301**.

³⁰⁴ Affidavit of Neil Bellefontaine, ¶ 12.

³⁰⁵ Affidavit of Neil Bellefontaine, ¶¶ 21-28.

³⁰⁶ See *supra*, ¶¶ 72, 85, 125-126.

³⁰⁷ Affidavit of Neil Bellefontaine, ¶ 21.

invasive species as a result of the discharge of ballast water by large ships and fouling from ship hulls (i.e. the living animals that are attached to ship hulls) are some of the most significant impacts of shipping on the marine environment.³⁰⁸ In his Affidavit, Mr. Bellefontaine points to the example of the MSX parasite that shut down the Bras D'Or oyster fishery in Nova Scotia in 2002-2003, the very point in time at which officials were reviewing GQP's Whites Point proposal. This situation was suspected to have resulted from ballast water discharge by vessels arriving from MSX afflicted waters in the northeast United States.³⁰⁹

142. The potential for significant adverse environmental effects was amplified by the Whites Point proposal given the ecological diversity of the Bay of Fundy, the lucrative fishery along the Digby Neck, and the importance of ecotourism activities, such as whale watching, to the local economy. The Digby Neck was not just another industrial zone that could accommodate yet another major industrial development. It encompassed a pristine environment and a local economy that was reliant upon that environment. As Robert Connelly notes, a project's potential negative effects on the surrounding environment, and the ensuing negative effects on the local economy that can result, are legitimate factors in assessing the likelihood of significant adverse environmental effects.³¹⁰ These factors were front and centre as regulators considered the Whites Point project during the spring of 2003.³¹¹

³⁰⁸ Affidavit of Neil Bellefontaine, ¶ 23.

³⁰⁹ Affidavit of Neil Bellefontaine, ¶ 24.

³¹⁰ Expert Report of Robert Connelly, ¶ 77.

³¹¹ See for example, Memorandum for the Minister -- Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, January 14, 2003, **Exhibit R-65** and Memorandum for the Minister -- Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, March 13, 2003, **Exhibit R-66**.

c) The Significant Public Concern Regarding the Construction and Operation of a Quarry and Marine Terminal at Whites Point

143. At the same time that officials were completing their review of the project’s likely significant and adverse environmental effects, DFO officials were also cognizant of significant and growing public concerns. These concerns were voiced about the project from its inception, through to the spring of 2003, and indeed throughout the entire history of the Whites Point EA process. Concerns were voiced at community meetings convened over the project,³¹² in the persistent media coverage of the project proposal,³¹³ and in the hundreds of letters of opposition sent to both the federal and provincial governments. These concerns came not just from residents of the Digby Neck, but from people across the province of Nova Scotia.³¹⁴

144. There were also significant spikes in public concern in the months leading up to DFO’s determination regarding the appropriate type of assessment to be used. In particular, DFO received a huge volume of letters and phone calls in early March 2003 as a result of the publication of a notice regarding GQP’s *NWPA* application.³¹⁵ As Neil Bellefontaine explains, “[t]his event revealed [to DFO Officials] how engaged and opposed the local community was to the project.”³¹⁶

³¹² See email from Melanie MacLean to Greg Peacock, May 16, 2002, discussing meeting at Sandy Cove School on proposed quarry development, **Exhibit R-311**.

³¹³ See Memorandum for the Minister -- Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, January 14, 2003, **Exhibit R-65**, which refers to “considerable media and public interest” in the project.

³¹⁴ Affidavit of Robert Thibault, ¶ 18. In response to the Claimants’ assertion in their Memorial that “[t]here was no empirical evidence of any public concern” (Claimants’ Memorial, ¶ 134) over the Whites Point proposal, Canada has prepared an exhibit consisting of letters of concern over the proposal from April of 2002 to August of 2003, **Exhibit R-170**, the point in time at which the referral of the project to a review panel had been confirmed.

³¹⁵ Public notice pursuant to *NWPA*, R.S.C. 1985, Chapter M-22, *Halifax Chronicle Herald*, March 3, 2003, **Exhibit R-56**. See also email from Melinda Donovan to Tim Surette, Neil Bellefontaine and others, March 4, 2003, **Exhibit R-57**.

³¹⁶ Affidavit of Neil Bellefontaine, ¶¶ 36, 37.

145. Then, in late May 2003, there was another spike in public concern when, after a prolonged rain, Digby Neck residents complained about a silt plume that had entered the Bay of Fundy from the 3.9 ha quarry site (which Nova Stone had, by this time, cleared of trees and overburden). This plume of silt threatened fish habitat and had resulted from Nova Stone's inadequate sedimentation controls.³¹⁷ Aside from further increasing public concern, this latter incident exemplified just one of the negative effects that quarrying activity could have on the marine environment.

d) The Referral to a Review Panel

146. As DFO officials believed that the statutory criteria had been satisfied, Regional Director-General Neil Bellefontaine met with Acting Regional Director of Oceans and Habitat in the Region, Carol Anne Rose, and the Assistant Deputy Minister of Oceans and Habitat, Sue Kirby, in late May 2003 to discuss a recommendation to the Minister that the Whites Point project be referred to a review panel.³¹⁸ Subsequently, DFO officials prepared a briefing note, outlining the reasons they believed that a referral to a review panel was warranted,³¹⁹ for ADM Kirby in advance of her meeting with the Associate Deputy Minister of DFO.³²⁰

147. DFO officials also worked to confirm with provincial officials that they would be willing to participate in an assessment by a JRP, given Nova Scotia had expressed a willingness to coordinate the federal and provincial processes. On being briefed on the

³¹⁷ See complaints to Minister Thibault's office regarding siltation incident of May 25, 2003, **Exhibit R-58**. See also Inspector's Direction issued by DFO's Thomas Wheaton to Nova Stone Exporters, Paul Buxton and Brian Lowe, May 28, 2003 requiring the taking of corrective measures, **Exhibit R-59**. Affidavit of Neil Bellefontaine, ¶ 38.

³¹⁸ Affidavit of Neil Bellefontaine, ¶ 40.

³¹⁹ Memorandum for the Assistant Deputy Minister, Oceans – Environmental Assessment of Proposed Quarry and Shipping Terminal, Whites Cove Digby County, Nova Scotia Pre-Meeting for Meeting with Associate Deputy Minister, May 26, 2003, **Exhibit R-69**.

³²⁰ The Associate Deputy Minister holds the rank of Deputy Minister of DFO and can act for or on behalf of the Deputy Minister in briefing the Minister if the Deputy Minister is not available. At this point in time the Associate Deputy Minister was Jean-Claude Bouchard and the Deputy Minister was Larry Murray.

matter, Nova Scotia’s Minister of Environment and Labour, Ronald Russell, agreed to the appointment of a JRP. In conveying Minister Russell’s decision to NSDEL officials, Deputy Minister Ronald L’Esperance noted that, “[g]iven the local concerns, the magnitude of the proposed future operation (it would have been required to go thru EA beyond the existing 3.9h) and the intersecting jurisdiction with the Fed, we think it is appropriate to proceed with a joint assessment. We favor the panel approach.”³²¹

148. To confirm the agreement in principle between the federal and provincial governments, DFO’s Acting Manager of Habitat Management, Paul Boudreau, wrote to NSDEL’s Christopher Daly on June 20, 2003, advising that “DFO believes that the Whites Point Quarry and Marine Terminal Project as proposed is likely to cause environmental effects over a large area on both the land and marine environments” and that “[i]n the context of harmonizing the provincial and federal environmental assessment processes for this project [...] I am interested to know if your Department would be interested in participating in a joint review panel of this project.”³²² On the same day, Mr. Daly responded, confirming that Nova Scotia was “willing to participate in a joint environmental assessment review panel”.³²³

149. Once Nova Scotia confirmed its interest, DFO officials prepared a briefing note for decision to DFO Minister Thibault, recommending that he refer the project to the Minister of the Environment for referral to a review panel.³²⁴ This was the first decision DFO officials had requested from their Minister in the context of the Whites Point EA. Over the course of the previous ten months, DFO officials had provided him with

³²¹ Email from Ronald L’Esperance to Bob Langdon (Executive Director of NSDEL), May 28, 2003, reporting on the Minister’s approval to proceed with a JRP, **Exhibit R-189**.

³²² Letter from Paul Boudreau to Christopher Daly, June 20, 2003, **Exhibit R-70**.

³²³ Letter from Christopher Daly to Paul Boudreau, June 20, 2003, **Exhibit R-71**.

³²⁴ Memorandum for the Minister – Referral of Proposed Whites Point Quarry and Shipping Terminal to the Minister of the Environment for a Panel Review, June 25, 2003, **Exhibit R-72**.

informational briefings to keep him and his office advised on the matter.³²⁵ Given that Minister Thibault was the Member of Parliament for Southwest Nova (which includes the Digby Neck), it is not surprising that he was interested in the proposal.³²⁶ However, as both Minister Thibault and Neil Bellefontaine make clear, the determinations made by DFO officials were their own, and Minister Thibault did not in any way interfere in the work of officials, or otherwise direct or instruct them in their work.³²⁷ The only guidance that the Minister ever offered was that the EA process used to review the Whites Point project would “need to ensure public concerns over the project were adequately heard and addressed”³²⁸ and that it was to be “a full and fair comprehensive environmental assessment of the proposal that strictly complied with the rules, did not cut any corners and allowed the public to have a voice.”³²⁹

150. On June 26, 2003, Minister Thibault accepted the recommendation of DFO officials, and referred GQP’s project, as proposed, to his colleague, the Honourable David Anderson, the Minister of the Environment, for referral to a review panel.³³⁰ As Minister Thibault explains in his Affidavit, in reviewing the recommendation of officials, he was convinced that the overwhelming amount of public concern that had been

³²⁵ Memorandum for the Minister -- Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, September 24, 2002, **Exhibit R-63**; Memorandum for the Minister -- Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, October 9, 2002, **Exhibit R-64**; Memorandum for the Minister -- Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, January 14, 2003, **Exhibit R-65**; Memorandum for the Minister – Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, March 13, 2003, **Exhibit R-66**; Memorandum for the Minister – Proposed Rock Quarry and Shipping Terminal Whites Cove, Digby County, Nova Scotia, April 28, 2003, **Exhibit R-68**.

³²⁶ Affidavit of Robert Thibault, ¶ 14.

³²⁷ Affidavit of Neil Bellefontaine, ¶ 42. *See also* Affidavit of Robert Thibault ¶ 14.

³²⁸ Affidavit of Neil Bellefontaine, ¶ 43.

³²⁹ Affidavit of Robert Thibault, ¶ 16.

³³⁰ Letter from the Honourable Robert Thibault to the Honourable David Anderson, June 26, 2003, **Exhibit R-73**.

expressed over the project, as well as the significant environmental concerns associated with it, more than justified a referral to a review panel.³³¹

151. Minister Anderson informed Minister Thibault on August 7, 2003 that he had referred the project to a JRP with the province of Nova Scotia pursuant to s.40 of the *CEAA*.³³²

F. Harmonization of Federal and Provincial EA Processes Through the Establishment of a JRP

1. Preparation of the Draft JRP Agreement and Its Terms of Reference

152. In order to harmonize the federal and provincial processes into a single JRP process, Nova Scotia and the federal government were required to enter into a Joint Review Panel Agreement (“JRP Agreement”), and to draft Terms of Reference for the JRP that would ensure that the statutory requirements of both jurisdictions were satisfied.³³³ NSDEL and Agency officials finalized a draft JRP Agreement and Terms of Reference by July 18, 2003,³³⁴ and after receiving approvals from both the Nova Scotia and federal Minister to proceed,³³⁵ on August 11, 2003 they issued a joint news release inviting the public to comment on the documents by September 18, 2003.³³⁶ The draft JRP Agreement and Terms of Reference were based on similar agreements and Terms of

³³¹ Affidavit of Robert Thibault, ¶ 18.

³³² Letter from Minister Anderson to Minister Thibault, August 7, 2003, **Exhibit R-195**.

³³³ Expert Report of Robert Connelly, ¶¶ 102-105.

³³⁴ Email from Bruce Young to Christopher Daly, July 18, 2003 attaching the draft Joint Review Panel Agreement and Terms of Reference, **Exhibit R-196**.

³³⁵ Affidavit of Christopher Daly, ¶ 42. *See also* Affidavit of Stephen Chapman, ¶ 29.

³³⁶ News Release, Whites Point Quarry and Marine Terminal – Draft Agreement Released for Public Comment on Joint Environmental Assessment Review Panel Process, August 11, 2003, **Exhibit R-226**. Note that the September 18, 2003 deadline was subsequently extended to October 22, 2003.

Reference prepared in other EAs and were consistent with the Agency's 1997 *Procedures for an Assessment by a Review Panel*.³³⁷

153. As Robert Connelly notes in his Expert Report, “[a]n assessment by a joint review panel must generate the type and quality of information required to meet the legal requirements of each party.”³³⁸ Likewise, Lawrence Smith states that “[r]eferral to a joint review panel involves combining two separate environmental assessment process into one; in effect, a one-stop-shopping approach.”³³⁹ The draft JRP Agreement therefore required the JRP to “conduct its review in a manner that discharges the requirements set out in the *Canadian Environmental Assessment Act*, Part IV of the *Nova Scotia Environment Act* and in the Terms of Reference attached hereto.”³⁴⁰ It also required the JRP’s final report to “include recommendations on all matters set out in the *Canadian Environmental Assessment Act* and Part IV of the *Nova Scotia Environment Act*.”³⁴¹

154. The draft Terms of Reference, which were appended to the draft JRP Agreement, also reflected the requirements of both jurisdictions. For example, they required the JRP to consider not just the proposed project’s “environmental effects” (as defined under the *CEAA*), but also the “socio-economic effects of the Project,”³⁴² an express requirement of

³³⁷ *Procedures for an Assessment by a Review Panel*, November 1997, **Exhibit R-26**.

³³⁸ Expert Report of Robert Connelly, ¶ 102.

³³⁹ Expert Report of Lawrence Smith, Q.C., ¶ 83.

³⁴⁰ Draft Agreement – Establishment of a Joint Review Panel for the Whites Point Quarry Project Between The Minister of the Environment, Canada and The Minister of the Environment and Labour, Nova Scotia, Whites Point Quarry Public Registry Document, August 11, 2003, ¶ 4.1, **Exhibit R-278**.

³⁴¹ Draft Agreement – Establishment of a Joint Review Panel for the Whites Point Quarry Project Between The Minister of the Environment, Canada and The Minister of the Environment and Labour, Nova Scotia, Whites Point Quarry Public Registry Document, August 11, 2003, ¶ 6.3, **Exhibit R-278**.

³⁴² Draft Agreement – Establishment of a Joint Review Panel for the Whites Point Quarry Project Between The Minister of the Environment, Canada and The Minister of the Environment and Labour, Nova Scotia, Whites Point Quarry Public Registry Document, August 11, 2003, Appendix – Terms of Reference for the Joint Review Panel, Part III – Scope of the Environmental Assessment and Factors to be Considered in the Review, ¶ j, **Exhibit R-278**.

the EA process under Nova Scotia law.³⁴³ The draft Terms of Reference detailed the scope of the project to be assessed as including both the quarry and the marine terminal, and they laid out the opportunities for the public involvement including the holding of public scoping meetings, written comments on the proponent’s environmental impact statement, and oral presentations at the public hearings.³⁴⁴ All of these provisions were included in the Terms of Reference that were ultimately finalized by Nova Scotia and Canada.³⁴⁵

155. Federal and provincial officials met with GQP on August 29, 2003 to discuss the JRP process and to invite comments on the draft JRP Agreement and Terms of Reference.³⁴⁶ As GQP provided no comments, the Agency again requested GQP’s input on September 10, 2003.³⁴⁷ Again, GQP remained silent. In contrast, the Agency received close to a hundred public comments on the draft JRP Agreement and Terms of Reference by October 22, 2003.³⁴⁸

156. It was only on November 11, 2003 that Mr. Buxton advised NSDEL that GQP “regarded the Draft Memorandum of Understanding as a reasonable document and hence did not feel the need for comment.” (*sic*)³⁴⁹ Mr. Buxton added that “[t]he fact that we did

³⁴³ *NSEA*, s. 3(v), **Exhibit R-5**. See discussion of “environmental effects” under the *NSEA*, see *supra*, ¶ 46.

³⁴⁴ Draft Agreement – Establishment of a Joint Review Panel for the Whites Point Quarry Project Between The Minister of the Environment, Canada and The Minister of the Environment and Labour, Nova Scotia, Whites Point Quarry Public Registry Document, August 11, 2003, Appendix – Terms of Reference for the Joint Review Panel, Part I – Project Description and Part II – Components of the Review, **Exhibit R-278**.

³⁴⁵ Agreement concerning The Establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal Project between the Minister of the Environment, Canada and the Minister of Environment and Labour, Nova Scotia, November 3, 2004, (“JRP Agreement”) **Exhibit R-27**.

³⁴⁶ Affidavit of Stephen Chapman, ¶ 30.

³⁴⁷ Letter from Stephen Chapman to Paul Buxton, September 10, 2003, **Exhibit R-228**.

³⁴⁸ Affidavit of Stephen Chapman, ¶ 32.

³⁴⁹ Letter from Paul Buxton to Christopher Daly, November 11, 2003, **Exhibit R-229**. Although Mr. Buxton erroneously refers to a “Draft Memorandum of Understanding,” it is clear his comment concerns the draft JRP Agreement and Terms of Reference.

not comment should not be construed as a blanket endorsement of the document or of the fact that a Panel Review is required for this project.”³⁵⁰

157. After the close of the public comment period, the Agency and NSDEL worked to finalize the JRP Agreement.³⁵¹ By February 11, 2004 both levels of government had reached agreement on outstanding issues,³⁵² and while the JRP Agreement was ready for approval and signature by this date, its execution was delayed by the proponent. Specifically, on February 27, 2004, Bilcon, acting on its own, requested the Agency to stay the issuance of the JRP Agreement and to delay constitution of the JRP pending the resolution of issues relating to the GQP partnership.³⁵³

2. GQP’s Corporate Restructure Delays the JRP Process

158. On March 1, 2004, a lawyer representing Bilcon confirmed with the Agency that indeed, Bilcon was requesting a postponement, until further notice, of the execution and release of the JRP Agreement.³⁵⁴ The lawyer explained that the GQP partners, Bilcon and Nova Stone, were engaged in discussions that “may result in a change in the proponents.”³⁵⁵ He requested that “the execution and release of the agreement be postponed until this [the GQP ownership issue] is finalized.”³⁵⁶ This request was apparently made without the knowledge of Nova Stone who on March 5, 2004 requested an update “on the status of the memorandum of understanding” and “some definitive

³⁵⁰ Letter from Paul Buxton to Christopher Daly, November 11, 2003, **Exhibit R-229**.

³⁵¹ Email from Jean Crépault to Christopher Daly and Cheryl Benjamin, October 31, 2003, **Exhibit R-201**.

³⁵² See email from Jean Crépault to Derek McDonald, attaching draft Memorandum to Minister of the Environment, and draft JRP Agreement, February 11, 2004, **Exhibit R-202**.

³⁵³ See email from Jean Crépault to Brian Torrie, February 27, 2004, wherein Mr. Crépault states that GQP’s lawyer contacted him to advise “that his clients would prefer to sort out this issue of two projects [the 3.9 ha quarry and the larger quarry and marine terminal] and two proponents [Nova Stone and GQP] first before signing the joint review agreement,” **Exhibit R-230**.

³⁵⁴ Email from Boris de Jonge to Jean Crépault, March 1, 2004, **Exhibit R-203**.

³⁵⁵ Email from Boris de Jonge to Jean Crépault, March 1, 2004, **Exhibit R-203**.

³⁵⁶ Email from Boris de Jonge to Jean Crépault, March 1, 2004, **Exhibit R-203**.

answers and timelines now.”³⁵⁷ The Agency had to advise Nova Stone of Bilcon’s request to postpone the release of the JRP Agreement.³⁵⁸

159. Although Bilcon’s counsel had indicated that the ownership issues related to the project would be resolved in “two to four weeks”³⁵⁹ it was not until five months later, on August 13, 2004, that Bilcon finally confirmed with the Agency that, as of May 1, 2004, the GQP partnership had been dissolved, that Bilcon had taken over the lease of the land, and that Bilcon was now the sole proponent of the Whites Point quarry and marine terminal project.³⁶⁰ Four days later, Mr. Buxton, now acting on behalf of Bilcon, asked the Agency to amend the draft JRP Agreement to reflect the change of ownership³⁶¹ and noted that “[t]he Permit issued by the Nova Scotia Department of Environment and Labour to Nova Stone Exporters Inc. for a 3.9 ha quarry at Whites Point is no longer valid since Nova Stone Exporters Inc. no longer holds the lease to the subject property.”³⁶²

160. As noted by NSDEL’s Bob Petrie, the permit for the 3.9 ha quarry was actually null and void as of May 1, 2004. This was the date on which Bilcon had entered into a lease agreement with the owners of the land on which Nova Stone’s 3.9 ha parcel was situated and, in the words of Mr. Petrie, “the point at which Nova Stone no longer controlled the land on which the 3.9 ha parcel was located, as required by paragraph 3(b)

³⁵⁷ Email from Nova Stone to Stephen Chapman, March 5, 2004, **Exhibit R-231**.

³⁵⁸ Email from Jean Crépault to Christopher Daly, March 10, 2004, explaining Mr. Crépault’s telephone conversation with Nova Stone’s Mark Lowe, **Exhibit R-232**.

³⁵⁹ Email from Jean Crépault to Brian Torrie, March 3, 2004, **Exhibit R-204**.

³⁶⁰ Letter from Paul Buxton to Jean Crépault, August 13, 2004, **Exhibit R-93**.

³⁶¹ Letter from Paul Buxton to Jean Crépault, August, 17, 2004, **Exhibit R-94**.

³⁶² Letter from Paul Buxton to Jean Crépault, August 17, 2004, **Exhibit R-94**.

of the approval.”³⁶³ Bilcon did not apply for a new permit to operate a 3.9 ha quarry at the Whites Point project site.

3. The Appointment of the JRP and the Approval of the JRP Agreement and Terms of Reference

161. While the proponents carried out their corporate restructuring, the Agency and NSDEL officials did not stop or slow down the Whites Point EA. Instead, they worked to identify appropriate candidates to sit as panellists on the JRP. The *CEAA* requires that members of a review panel be “unbiased and free from any conflict of interest relative to the project and [...] have knowledge or experience relative to the anticipated environmental effects of the project.”³⁶⁴ Given the nature of the Whites Point project, officials sought individuals with expertise in marine sciences, geology, mining operations, mineral engineering, and socio-economic studies.³⁶⁵

162. On the basis of internal consultations and in consideration of unsolicited requests from individuals who wished to be considered for appointment,³⁶⁶ the Agency prepared a

³⁶³ See Affidavit of Bob Petrie, ¶ 17. Paragraph 3(b) of the industrial approval provided that “No authority is granted by this Approval to enable the Approval Holder to construct the Facility on lands which are not in the control or ownership of the Approval Holder. It is the responsibility of the Approval Holder to ensure that such a contravention does not occur. The Approval Holer shall provide, to the Department, proof of such control or ownership upon expiry of any relevant lease or agreement. Failure to retain said authorization will result in this Approval being null and void.” (emphasis added) As Nova Stone no longer controlled the land on which the 3.9 ha quarry was to be constructed by May 1, 2004, the industrial approval was null and void.

³⁶⁴ *CEAA*, s. 41(b), **Exhibit R-1**. The JRP Agreement, which was being negotiated at the time between the Agency and NSDEL, contains an identical requirement at Article 3.3, **Exhibit R-27**.

³⁶⁵ Affidavit of Stephen Chapman, ¶ 39.

³⁶⁶ After media reports announced that the project had been referred to a JRP, the Agency received unsolicited requests from several individuals who wished to be considered for appointment. These individuals included Professor Gunter Muecke, a professor of Geochemistry, Geology and Environmental Studies at Dalhousie University and Mr. John Amirault, a mining engineer and former Nova Scotia civil servant (see email from Bruce Young to Bill Coulter, July 15, 2003, **Exhibit R-312**). They also included Mr. Jim Ross (see email from Jean Blane to Stephen Chapman and Bruce Young, August 18, 2003, **Exhibit R-237**). Mr. Ross was not considered as a potential candidate because he had just retired from DFO in May of 2003 and his appointment could have been perceived as a conflict of interest given his prior involvement with the project (see email from Jean Blane to Stephen Chapman and Bill Coulter, August 18, 2003, **Exhibit R-237**). Similarly, as Mr. Amirault had previously worked as a consultant for a proponent of a

short list of suitable candidates for the JRP. Among others, this list included Dr. Robert Fournier, a Professor of Oceanography at Dalhousie University, and the former chair of the Sable Gas JRP. The Sable Gas JRP had been tasked with the EA of a natural gas project in Nova Scotia proposed by a consortium of U.S. investors. Dr. Fournier presided over almost sixty days of hearings in this review and therefore was well qualified to sit as the chair of the JRP of the Whites Point EA.³⁶⁷

163. The short list also included Dr. Gunter Muecke, a Professor Emeritus at Dalhousie University in the areas of Geochemistry, Geology, and Environmental Studies. Dr. Muecke had long-standing involvement in the geological aspects of environmental issues, and was a former member of the JRP that had been established for the EA of the Kelly's Mountain Aggregate Quarry in Nova Scotia in 1991.³⁶⁸

164. After reviewing the Agency's short list, NSDEL suggested that Dr. Jill Grant also be added to the list.³⁶⁹ Dr. Grant was a Professor at Dalhousie University's School of Planning, a member of the Canadian Institute of Planners, and held a Ph.D in Regional Planning and Resource Development.³⁷⁰ As Christopher Daly explains, Dr. Grant's professional background was relevant to, among other things, the assessment of the

similar project on the Digby Neck he was not brought forward as a candidate (*see* email from Bill Coulter to Jean Crépault, January 19, 2004, **Exhibit R-236**). Mr. Amirault would also later be retained by Bilcon as a consultant in the course of the Whites Point EA. Affidavit of Stephen Chapman, ¶ 40.

³⁶⁷ *See* Affidavit of Christopher Daly, ¶ 51. Professor Fournier had also chaired other public bodies in Nova Scotia, including the provincial Electricity Marketplace Governance Committee (2002-2003), the Provincial Energy Strategy Public Meetings (which he co-chaired) (2001), and the Halifax Cleanup Task Force (1989-1990). *See* Backgrounder – Whites Point Quarry and Marine Terminal Project Joint Review Panel Members Biographical Notes, **Exhibit R-313**. *See also curriculum vitae* of Dr. Robert Fournier, **Exhibit R-380**.

³⁶⁸ Backgrounder – Whites Point Quarry and Marine Terminal Project Joint Review Panel Members Biographical Notes, **Exhibit R-313**. Further background on the JRP that was established for the Kelly's Mountain Aggregate Quarry is provided in the Affidavit of Neil Bellefontaine at ¶¶ 14-15. *See also curriculum vitae* of Dr. Gunter Muecke, **Exhibit R-379**.

³⁶⁹ Affidavit of Christopher Daly, ¶ 49.

³⁷⁰ Backgrounder – Whites Point Quarry and Marine Terminal Project Joint Review Panel Members Biographical Notes, **Exhibit R-313**. *See also curriculum vitae* of Dr. Jill Grant, **Exhibit R-381**.

effects of the proposed project on socio-economic conditions, which would be required under the *NSEA*.³⁷¹

165. On August 26 and 27, 2004, ten days after Mr. Buxton’s request on behalf of Bilcon that the EA process be re-initiated, the Agency and NSDEL officials interviewed panel candidates at the Agency’s Atlantic Regional Office.³⁷² During these interviews, the candidates were asked about their familiarity with the panel review process, their relevant expertise and knowledge, and any grounds of real or perceived bias in favour of or against Bilcon or the proposed project.³⁷³ Following the interviews, the Agency and NSDEL conducted a best fit analysis which took into account the expertise and knowledge of each candidate, how their respective skills would complement the other potential panel members, and their ability to work together with other potential panellists.³⁷⁴ On October 20, 2004 the Agency and NSDEL decided to recommend the appointment of Drs. Fournier, Muecke and Grant to the JRP.³⁷⁵

166. In light of all these developments, the Agency and NSDEL met with Bilcon on October 26, 2004 to provide advance notice that an announcement would be made by “the next week” regarding panel members and a joint panel agreement.³⁷⁶ The federal and Nova Scotia Ministers of the Environment actually signed the JRP Agreement and Terms of Reference on October 29, 2004 and November 3, 2004 respectively.³⁷⁷ Also on November 3, 2004, the federal Minister of the Environment accepted the Agency’s

³⁷¹ Affidavit of Christopher Daly, ¶¶ 49, 51.

³⁷² Affidavit of Stephen Chapman, ¶ 40.

³⁷³ See Questions for Interviewing Review Panel Candidates, **Exhibit R-206**. See also Affidavit of Stephen Chapman, ¶ 40.

³⁷⁴ Affidavit of Stephen Chapman, ¶ 41. See also Affidavit of Christopher Daly, ¶ 50.

³⁷⁵ Affidavit of Stephen Chapman, ¶ 38. See also Memo to Minister of the Environment — Joint Panel Review of the Whites Point Quarry and Marine Terminal Project, October 20, 2004, **Exhibit R-392**.

³⁷⁶ Helen MacPhail’s notes of meeting between Stephen Chapman, Christopher Daly, Paul Buxton and Helen MacPhail, October 26, 2004, **Exhibit R-207**.

³⁷⁷ JRP Agreement, **Exhibit R-27**.

recommendation and appointed Dr. Fournier (as chair), Dr. Muecke and Dr. Grant to the JRP.³⁷⁸ With these steps complete, on November 5, 2004, the Governments of Canada and Nova Scotia issued a joint News Release announcing the establishment of a JRP for the Whites Point Quarry and Marine Terminal Project.³⁷⁹

167. Bilcon did not take issue with the appointment of the panellists that would sit on the Whites Point JRP. In fact, on November 24, 2004 Mr. Buxton told the CLC that, “[t]he chair, Bob Fournier has been on several other panel reviews in the past and is very well respected,” and that “if they [Bilcon] had the option to choose they may well have chosen these professionals.”³⁸⁰

168. On November 15, 2004, the Agency and NSDEL officials briefed the panellists on the legislative requirements of the *CEAA* and the *NSEA* and associated Regulations, explained the roles and responsibilities of the participants in a JRP process, provided an overview of the panel process, and answered the panellists’ questions.³⁸¹

G. The JRP’s Review of the Whites Point Quarry and Marine Terminal

1. Determination of Factors to be Considered in the Scope of the Environmental Assessment

169. As explained by Robert Connelly, once a JRP process is underway the proponent typically prepares an Environmental Impact Statement (“EIS”),³⁸² “a document [that] describes the project and the biophysical and socio-economic environment in the project area. It also predicts the environmental effects of the project...” Mr. Connelly adds that

³⁷⁸ See for example, letter from Minister of the Environment Stéphane Dion to Dr. Robert Fournier, November 3, 2004, **Exhibit R-208**.

³⁷⁹ Joint Canada-Nova Scotia News Release – Canada and Nova Scotia Establish Joint Review Panel for the Whites Point Quarry and Marine Terminal Project, November 5, 2004, **Exhibit R-235**.

³⁸⁰ CLC Minutes, November 24, 2004, p. 235, **Exhibit R-299**.

³⁸¹ See Draft Agenda – Whites Point Quarry and Marine Terminal Project Joint Review Panel Orientation Session, November 15, 2004, **Exhibit R-474**.

³⁸² Expert Report of Robert Connelly, ¶ 110.

the EIS “is the primary document that the panel relies on in conducting the assessment.”³⁸³

170. To guide the proponent in preparing its EIS the government prepares EIS Guidelines, which Mr. Connelly describes as “detailed instructions to the proponent on the information regarding the environmental effects of a proposed project that must be addressed in the EIS.”³⁸⁴ Lawrence Smith explains in his Expert Report that EIS Guidelines are “the framework for the completion of the EIS by the proponent” and that “detailed evidence in respect of each point in the Guidelines” is required in order to determine the likelihood of significant adverse effects and the efficacy of the measures proposed to mitigate those effects, if any.”³⁸⁵

171. Over the course of the spring and summer of 2004, federal and provincial officials had prepared draft EIS Guidelines setting out the factors that Bilcon would likely need to address in the EA of the Whites Point Quarry and Marine Terminal.³⁸⁶ The JRP released the draft EIS Guidelines for public comment on November 10, 2004.³⁸⁷ As Bilcon provided no comments, Dr. Fournier reached out to Mr. Buxton on December 15, 2004, noting that “[t]he Joint Review Panel believes that it is important for Bilcon of Nova Scotia’s views regarding the draft guidelines to become part of the public record.”³⁸⁸

³⁸³ Expert Report of Robert Connelly, ¶ 110.

³⁸⁴ Expert Report of Robert Connelly, ¶ 111.

³⁸⁵ Expert Report of Lawrence Smith, Q.C., ¶ 250.

³⁸⁶ Draft EIS Guidelines, November 10, 2004, **Exhibit R-209**. The draft EIS Guidelines were based on those used by the Agency in prior EAs. They contained instructions to Bilcon on the content required to be included in its EIS, including a particular requirement that it assess the effects of the project on both the biophysical environment and socio-economic conditions of the region. *See* Affidavit of Stephen Chapman, ¶ 43.

³⁸⁷ News Release – Whites Point Quarry and Marine Terminal Project – Joint Review Panel – The Public is Invited to Comment on the Draft Guidelines for the Preparation of the Environmental Impact Statement, November 10, 2004, **Exhibit R-239**.

³⁸⁸ Letter from Robert Fournier to Paul Buxton, December 15, 2004, **Exhibit R-242**.

Again, Bilcon provided no comment on the draft EIS Guidelines prior to the JRP’s scoping meetings, which were held from January 6 to January 9, 2005.³⁸⁹

172. As Robert Connelly explains, scoping meetings “allow the public an opportunity to identify issues to be examined in the environmental assessment.” They also permit the proponent to “comment on suggestions made by participants” and “allow the panel to understand which subjects and environmental factors are important.”³⁹⁰ In the Whites Point EA, the scoping meetings spanned four days, were convened at four different locations in south-west Nova Scotia, were attended by approximately 320 people and saw presentations by 28 individuals.³⁹¹ The presentations at the scoping meetings influenced the content of the EIS Guidelines that were ultimately finalized for the JRP process. While Mr. Buxton attended the scoping meetings, neither he nor anyone from Bilcon presented at the scoping meetings.

173. Bilcon did, eventually, provide comments on the draft EIS Guidelines.³⁹² In a cursory two and a half page letter filed with the JRP on January 16, 2005, Mr. Buxton commented briefly on just 4 sections of the draft EIS Guidelines and requested that the final EIS Guidelines be expanded to include the concept of “adaptive management.” At no point in that submission, nor at any other point for that matter, did Bilcon ever register a concern that the draft EIS Guidelines went beyond the scope of the JRP’s Terms of Reference.³⁹³

³⁸⁹ News Release – Whites Point Quarry and Marine Terminal Project Joint Review Panel Announce Public Meetings and Public Operational Procedures, December 2, 2004, **Exhibit R-240**.

³⁹⁰ Expert Report of Robert Connelly, ¶112.

³⁹¹ Affidavit of Stephen Chapman, ¶ 45.

³⁹² Letter from Paul Buxton to Stephen Chapman, January 16, 2005, **Exhibit R-243**.

³⁹³ Affidavit of Stephen Chapman, ¶ 46.

174. In contrast to Bilcon’s apparent lack of engagement in commenting on the draft EIS Guidelines, by the end of the comment period (January 21, 2005)³⁹⁴ the JRP had received close to 150 public submissions on the Guidelines. These submissions raised concerns relating to transportation, international shipping, invasive species, species at risk, tourism, economic impacts, values on healthy environments and communities, international protocols and regulations, sustainable development, enhancement and mitigation measures.³⁹⁵

175. After taking into account both Bilcon’s and the public’s comments on the draft EIS Guidelines, the JRP issued final EIS Guidelines on March 31, 2005.³⁹⁶ The Guidelines made clear that Bilcon’s EIS needed to address not only the biophysical impacts of their project but also its impact on the human environment by providing evidence of its impact on “Human Health and Community Wellness”, “Social and Cultural Patterns” and the economy.

176. Dr. Fournier sent a copy of the final EIS Guidelines to Bilcon on March 31, 2005, noting that “[a]fter thoroughly considering the written submissions and the transcripts from the public meetings held in January 2005” the panel had “restructured the EIS Guidelines to reflect the comments received, and to make them more specific to the proposed project.” The JRP made clear that the Guidelines “outline the minimum information required by the Panel” and requested that Bilcon advise the JRP prior to April 30, 2005 as to when an EIS would be submitted.³⁹⁷ Again, Bilcon never objected to the scope or the content of the EIS Guidelines.

³⁹⁴ Affidavit of Stephen Chapman, ¶ 44.

³⁹⁵ Affidavit of Stephen Chapman, ¶ 44.

³⁹⁶ Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project, March 2005, **Exhibit R-210**.

³⁹⁷ Letter from Robert Fournier to Paul Buxton, March 31, 2005, **Exhibit R-210**.

2. Bilcon’s Environmental Impact Statement

177. While Bilcon had represented to government officials as early as August 2003 that it had already prepared a “comprehensive EIS”,³⁹⁸ the release of the final EIS Guidelines should have enabled it to tailor an EIS document to the specific factors that needed to be addressed in the JRP process. On April 24, 2005, Bilcon advised the JRP that it would require six months to complete the EIS.³⁹⁹ Bilcon missed this deadline, and over the course of the next year it would need to seek multiple extensions before it could actually file its EIS.⁴⁰⁰

178. These delays are not surprising in light of Bilcon’s approach to the preparation of the EIS. An EIS is a substantive document requiring input from multiple experts in a number of fields. Robert Connelly notes that as such, the EIS “is usually prepared by a lead consulting firm which may also need to engage other consultants given the requirement for expertise from many different disciplines.”⁴⁰¹ Bilcon appears not to have retained such a consulting firm, rejecting DFO’s suggestion, made at the very outset of the process, that it “engage a consultant with extensive experience in conducting environmental assessments under CEAA as early in the process as possible” as “[e]xperience has proven this to be a more efficient and timely approach with projects of this size.”⁴⁰² Instead, it appears that Bilcon’s EIS was prepared by David Kern, who Mr.

³⁹⁸ Memo from Paul Buxton to Bill Clayton et al., September 3, 2003, **Exhibit R-314**. See also letter from Paul Buxton to Christopher Daly, November 11, 2003, **Exhibit R-229**.

³⁹⁹ Letter from Paul Buxton to Robert Fournier, April 24, 2005, **Exhibit R-244**.

⁴⁰⁰ For example, on August 30, 2005, Mr. Buxton informed the JRP that it now expected to submit the EIS “between November 30 and December 15, 2005” — see letter from Paul Buxton to Robert Fournier, August 30, 2005, **Exhibit R-245**. Again, Bilcon was unable to meet this new deadline. On December 8, 2005 Mr. Buxton wrote that it “will now submit the document no later than March 31, 2006, and earlier, if possible” — see letter from Paul Buxton to Stephen Chapman, December 8, 2005, **Exhibit R-246**.

⁴⁰¹ Expert Report of Robert Connelly, ¶ 114.

⁴⁰² Letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**.

Buxton referred to as “our principle writer,”⁴⁰³ and Mr. Buxton himself, with expert consultants being retained in specific areas.⁴⁰⁴

179. Over the course of the one year period that Bilcon took to prepare the EIS, it sought and received significant assistance from officials at both DFO and the Agency. These officials met with Bilcon as it prepared its EIS. DFO’s Mark McLean, for example, outlines in his Affidavit how DFO “met with Bilcon numerous times to discuss fish and fish habitat issues that would have to be addressed in its Environmental Impact Statement,” in addition to assisting Bilcon in other areas.⁴⁰⁵ Likewise, the Agency reviewed and commented on the sections of Bilcon’s draft EIS relating to the EA process and approvals as well as the regulatory environment.⁴⁰⁶

180. The Agency did not finally receive Bilcon’s EIS until April 26, 2006. The following day, the JRP made the EIS available for public comments, advising that the comment period would be open until August 4, 2006,⁴⁰⁷ a deadline that was later extended by one week to August, 11, 2006.⁴⁰⁸

⁴⁰³ While Mr. Kern was the “principle writer of the EIS” his *curriculum vitae* does not indicate that he had any experience in preparing an EIS for submission to a JRP conducting a harmonized EA under the *CEAA* and the *NSEA* — see *curriculum vitae* of David W. Kern, **Exhibit R-503**.

⁴⁰⁴ See Memo from Paul Buxton to Bill Clayton Jr. and John Wall, April 25, 2005, **Exhibit R-315**, wherein Mr. Buxton noted that in order to complete the EIS by the end of October 2005, “I have asked David Kern (our principal writer) to provide me with 40 hours work a week until the Permit is granted,” and that “I have ceased to take on any new clients ... and will be spending a minimum of 44 hours a week to get the EIS completed and a permit granted.”

⁴⁰⁵ Affidavit of Mark McLean, ¶¶ 50-53. In total, DFO participated in six meetings with Bilcon on November 2, 2004, December 10, 2004, February 7, 2005, May 5, 2005, July 29, 2005 and October 28, 2005. See email from Phil Zamora to Mark McLean, March 9, 2006, attaching the meeting notes of the six meetings held between Bilcon and DFO, **Exhibit R-153**.

⁴⁰⁶ Affidavit of Stephen Chapman, ¶ 49.

⁴⁰⁷ News Release – Whites Point Quarry and Marine Terminal Project – Public Consultation on the Environmental Impact Statement is Extended, August 4, 2006, **Exhibit R-247**.

⁴⁰⁸ News Release – Whites Point Quarry and Marine Terminal Project – Public Consultation on the Environmental Impact Statement is Extended, August 4, 2006, **Exhibit R-247**.

3. Review of Bilcon’s Environmental Impact Statement and the Requests for Further Information

181. The JRP reviewed Bilcon’s EIS and found it significantly deficient in a number of respects, including in its description of “how the concept of adaptive management will be implemented,”⁴⁰⁹ and the fact that it contained several apparent contradictions.⁴¹⁰ The EIS was also significantly deficient as a matter of form, in that “the Proponent did not follow the structure of the EIS Guidelines” which required a description of the project and the existing environment, an assessment of the effects of the interactions between environmental components and project components, and the collective presentation of “[m]itigation, monitoring and management.”⁴¹¹

182. The Panel highlighted these deficiencies and contradictions and requested additional information from Bilcon on June 28 and July 28, 2006.⁴¹²

183. A number of federal and provincial departments also reviewed and commented on the EIS. Several DFO scientists found the EIS to be highly deficient.⁴¹³ DFO submitted a

⁴⁰⁹ Information Request No.1 from the JRP to Bilcon, June 28, 2006, **Exhibit R-250**.

⁴¹⁰ For example, a “claim that quarrying will not intersect the middle unit or the water table,” given that a “final site drawing ... [that] shows that such an intersection could have occurred” — *see* letter from Robert Fournier to Paul Buxton, July 28, 2006, attaching EIS Information Request of July 28, 2006, p. 9, **Exhibit R-219**. In another section of the EIS, the JRP was confused as to “why tourism and ecotourism are not included as industries, either separately or together” in a table summarizing local industries — *see* letter from Robert Fournier to Paul Buxton, July 28, 2006, attaching EIS Information Request of July 28, 2006, p. 20, **Exhibit R-219** (Bilcon had actually commissioned a public consultation study revealing “[t]he direct and indirect impacts of the project on tourism are a key issue to stakeholders” — *see* AMEC, Report on Public Consultation for Proposed Whites Point Quarry and Marine Terminal Project, Prepared for Bilcon of Nova Scotia, December 1, 2005, p. 015836, **Exhibit R-316**).

⁴¹¹ The JRP accordingly instructed Bilcon “to provide an environmental component (VEC)/Project component matrix that will clearly demonstrate where components of the Project may interact with the environment to cause effects.” In requesting the matrix, the JRP provided precedent matrices that had been prepared by lead consulting firms in the context of past EAs. *See* letter from Robert Fournier to Paul Buxton, July 28, 2006, attaching EIS Information Request of July 28, 2006, p. 3, and Appendix 1, **Exhibit R-219**.

⁴¹² *See* letter from Robert Fournier to Paul Buxton, June 28, 2006, attaching Information Request Nos. 1 to 9, **Exhibit R-250**, and letter from Robert Fournier to Paul Buxton, July 28, 2006, attaching Information Request Nos. 1 to 9, **Exhibit R-219**.

report to the panel on August 3, 2006, outlining problems in the EIS and outstanding questions that Bilcon would need to address, including areas in which the EIS had not demonstrated full consideration of potential environmental impacts.⁴¹⁴

184. The public was similarly critical of the quality of the information in the EIS. By August 11, 2006, the close of the public comment period, the JRP had received approximately 250 mostly critical submissions. These submissions were forwarded to Bilcon for a response, as required by the Terms of Reference.⁴¹⁵ Among the chief concerns expressed in these submissions were the potential for adverse effects of the project on the marine environment, groundwater, tourism and community well-being.⁴¹⁶

185. On August 30, 2006, Bilcon informed the JRP that it would submit “a comprehensive response” to the information requests and comments it had received by November 15, 2006.⁴¹⁷ It also appears that around this time Bilcon, recognizing the deficiencies in its approach, heeded the advice of DFO, and retained an EA consulting firm, AMEC, to provide it with guidance in responding to information requests. In retaining AMEC, Bilcon’s Josephine Lowry noted, “Paul and I feel a great deal more comfortable with the entire process now that AMEC is on board.”⁴¹⁸

186. But despite its undertaking to the JRP that it would respond to the JRP’s information requests and the other questions and comments by November 15, 2006,

⁴¹³ DFO Science Expert Opinion on Whites Point Quarry & Marine Terminal Environmental Impact Statement, **Exhibit R-158**: p. 4 (“In general, this section was difficult to read, poorly referenced and contained several inaccuracies.”); p. 8 (“The above information indicates a deeply flawed sampling design and field execution.”); p. 9 (“Typical analysis of benthic grab samples involves checking for organisms >0.5mm in size, the perpetrators of this farce obviously did not even attempt to look for organisms on that scale as they tossed out sample G8 as “biological insignificant” in the field!”).

⁴¹⁴ See email from Mark McLean to Debra Myles, August 3, 2006, attaching DFO Comments on the Whites Point Quarry and Marine Terminal Project to the Joint Review Panel August 2006, **Exhibit R-159**.

⁴¹⁵ Affidavit of Stephen Chapman, ¶ 50.

⁴¹⁶ Affidavit of Stephen Chapman, ¶ 50.

⁴¹⁷ Email from Paul Buxton to Debra Myles, August 30, 2006, **Exhibit R-253**.

⁴¹⁸ See email between Uwe Wittkugel and Josephine Lowry (Bilcon), August 31, 2006, **Exhibit R-317**.

Bilcon failed to meet its self-imposed deadline. Instead, Bilcon filed piecemeal responses up until February 12, 2007.⁴¹⁹

187. Moreover, Bilcon’s responses did not constitute a serious effort to provide comprehensive or complete responses. As Mr. Buxton himself noted internally in reference to one of the JRP’s information requests, “we are not prepared to do detailed design at this stage,” but “we need to cobble something together to satisfy the system.”⁴²⁰ Further, with respect to many of the public’s comments or questions, Bilcon only responded “noted” without further comment.⁴²¹ Overall, the JRP observed in its report that Bilcon’s approach “had the dual effect of reducing the amount of critical and substantive input into the process while exacerbating negative relations between the Proponent and members of the various communities who would be directly impacted by the Project.”⁴²²

188. It was not until May 1, 2007, over two years after issuance of the EIS Guidelines, that the JRP concluded that it was finally appropriate to end the document phase of the EA, and convene public hearings which would commence on June 16, 2007 in Digby, Nova Scotia.⁴²³ By then, Bilcon’s ill-prepared EIS and incomplete responses to the JRP’s information requests and the public comments had raised more questions than answers and had eroded the JRP’s confidence “in the conceptual design and associated quantitative underpinnings”⁴²⁴ of the project.

⁴¹⁹ Email from Josephine Lowry to Debra Myles, February 12, 2007, **Exhibit R-256**. See also letter from Robert Fournier to Paul Buxton, February 27, 2007, **Exhibit R-252**.

⁴²⁰ See email from Paul Buxton to Uwe Wittkugel, March 26, 2007, **Exhibit R-318**.

⁴²¹ JRP Report, p. 87, **Exhibit R-212**.

⁴²² JRP Report, p. 87, **Exhibit R-212**.

⁴²³ News Release – Whites Point Quarry and Marine Terminal Joint Review Panel Announces Public Hearings, May 1, 2007, **Exhibit R-258**.

⁴²⁴ JRP Report, pp. 86-87, **Exhibit R-212**.

4. The JRP's Public Hearings

189. The JRP held its public hearings over thirteen days from June 16 to June 30, 2007.⁴²⁵ Pursuant to the procedures developed by the JRP, and pursuant to s. 16(1)(c) of the *CEAA*, the objectives of the public hearings were:

(a) to provide an opportunity for the project proponent, Bilcon of Nova Scotia Corporation (Bilcon), to explain the proposed project and respond to concerns and questions raised by the Panel and other participants in the hearings;

(b) to enable government representatives and interested parties to provide their views on the implications of the proposed project; and

(c) to facilitate the receipt of information by the Panel so that it may properly address all factors identified in the Joint Panel Agreement and detailed in the Panel's Environmental Impact Statement Guidelines (March 2005), thereby permitting it to properly prepare a report for submission to the Ministers.⁴²⁶

190. As such, the hearings included presentations by Bilcon about the proposed project, by government departments and agencies about aspects of the proposed project that affected their mandate, and by members of the local Digby Neck community and public interest groups. In addition to this oral evidence, Bilcon and a number of government departments undertook to collect and provide further information to the Tribunal at a later date.⁴²⁷

191. During the hearings, the JRP conducted thematic sessions in order to give in depth consideration to topics such as hydrology, the marine environment and socio-economics. While many of the presentations focussed on the impacts of the proposed project on the

⁴²⁵ Affidavit of Stephen Chapman, ¶ 52.

⁴²⁶ Procedures for Public Hearings, ¶1.2, **Exhibit R-194**.

⁴²⁷ Whites Point Quarry and Marine Terminal, Public Hearings from June 16 to June 30, 2007, Listing of Undertakings, **Exhibit R-277**.

biophysical environment, the panel also heard numerous presentations on the potential effects of a large quarry and marine terminal on the way of life and the local economy on the Digby Neck.⁴²⁸

192. While no individual Claimant in this arbitration presented at, or even attended the hearings, Bilcon had full opportunity, through its representatives and experts, to provide an overview of the Whites Point Quarry and Marine Terminal project and to present scientific and socio-economic information and data in support of the proposal. Bilcon was also afforded the opportunity to hear each and every presentation made at the hearings, either for or against the project proposal, and to ask follow-up questions of each and every presenter.

193. In addition, the interested members of the public were also given the opportunity to be heard. Many of the presenters were critical of the project, but at all times, Dr. Fournier, as panel chair, maintained order and efficiency while doing what he was supposed to — allow the public to provide their comments on the project.

194. The JRP found, however, that Bilcon was ill-prepared and, thus, unable to take full advantage of the participation and public engagement opportunity it was being offered. For example, the JRP noted that Bilcon appeared not to have incorporated local

⁴²⁸ These included presentations by, among others: individuals operating whale watching operations and involved in Digby Neck community development initiatives (*see* JRP Hearing Transcript, Day 3, pp. 577-588, **Exhibit R-319**); lobster fishermen who fished off of Whites Point (*see* JRP Hearing Transcript, Day 7, pp. 1608-1627, **Exhibit R-320**); ground fishermen that fished along the Digby Neck, including off of Whites Point (*see* JRP Hearing Transcript, Day 11, pp. 2576-2586, **Exhibit R-321**); representatives of an arts council who noted the importance of a healthy tourist trade to their livelihood (*see* JRP Hearing Transcript, Day 7, pp. 1412-1426, **Exhibit R-322**); officials from the Nova Scotia Department of Tourism, Culture and Heritage (*see* JRP Hearing Transcript, Day 8, pp. 1737-1745, **Exhibit R-323**); the Warden for the Municipality of Digby (*see* JRP Hearing Transcript, Day 8, pp. 1773-1778, **Exhibit R-324**); several bed and breakfast or inn owners (*see* for example, JRP Hearing Transcript, Day 10, pp. 2276-2284, **Exhibit R-325**); and, numerous other residents, retirees, or annual visitors to the Digby Neck, who contributed to the local economy (*see* JRP Hearing Transcript, Day 9, pp. 2172-2173, **Exhibit R-326**).

knowledge into its project planning, as required by the EIS Guidelines,⁴²⁹ and Bilcon’s representatives could offer no good reason at the hearing as to why.⁴³⁰

195. Bilcon’s failure here is especially telling. On October 31, 2006, nine months prior to the commencement of the hearings, Bilcon’s EA consultant, AMEC, cautioned that public consultation in project planning is a “critical piece” and “the one area that sometimes fails a project:”

The panel also asked several times how has Bilcon incorporated public consultation into their project planning. This is perhaps the most critical piece of any Public Consultation and Disclosure Plan and is the one area that sometimes fails a project. The whole purpose of public consultation is to get public input into the project so that the project is improved and reflects the concerns of the public, not just acknowledges them in the EIS. So it is critical to show some examples of how Bilcon has used public input to modify or mitigate the project.⁴³¹ (emphasis added)

196. In the end, the JRP noted “the failure of the EIS to include traditional community knowledge”⁴³² through public consultation on key issues such as the design and location of the marine terminal.⁴³³

⁴²⁹ Established as a principle of the EIS Guidelines in subsection 3.1 entitled *Use and Respect for Traditional and Community Environmental Knowledge*, p. 8-9, **Exhibit R-210**. Also referred to at: Subsection 4.1 – *Use of Existing information*, p. 13; Subsection 7.2 – *Alternative Means of Carrying out the Project*, p. 17; Subsection 8.1 – *Method*, p. 22; Section 9 – *Description of Existing Environments*, p. 25; Subsection – 9.1.4 *Climate*, p. 29; Subsection – 9.3.1 *Community Profile*, p. 33; Subsection – 9.3.3.1 *Fisheries and Harvesting*, p. 35; Subsection – 12.1 *Management Criteria*, p. 52; Subsection – 12.7 *Residual Impacts*, p. 58, **Exhibit R-210**.

⁴³⁰ JRP Hearing Transcript, Day 1, pp. 75-90, **Exhibit R-327**.

⁴³¹ Email from Susan Sherk of AMEC to Bilcon, October 31, 2006, **Exhibit R-328**.

⁴³² JRP Report, p. 12, **Exhibit R-212**.

⁴³³ With respect to the design of the marine terminal the JRP report provided that the “EIS treated oceanographic conditions on the eastern side of the Bay of Fundy, adjacent to the proposed quarry and marine terminal, as well known and sufficiently predictable such that planning for the proposed Project holds few surprises. The Proponent advanced this confident view on an exceedingly modest base of supporting documentation. However, a substantial literature reports on the physical oceanography of the Bay of Fundy; and a substantial body of traditional knowledge draws from more than 250 years of close interaction with surrounding waters by the residents of Digby Neck and Islands. Unfortunately the Panel saw little evidence that the Proponent tapped either of these two data sources.... Hearing interveners

197. The JRP also expressed concern over the lack of baseline data supporting elements of the EIS, which Bilcon tried to pass off through a heavy reliance on the concept of adaptive management in the face of uncertainty over environmental effects. While the panel acknowledged that adaptive management could be used “as a tool to rectify unexpected environmental changes... [b]aseline information, as the name implies is the starting point for all future comparative studies. Without it, subsequent observations are meaningless.”⁴³⁴

198. Dr. Fournier encapsulated the JRP’s concern with Bilcon’s reliance on adaptive management by stating at the hearing that it “strikes us as it is absolutely central to what you are planning to do” but that “[e]very time there is uncertainty, it seems that adaptive management has been invoked.”⁴³⁵ He therefore asked Bilcon to elaborate on the concept and, on hearing Bilcon’s explanation, could only comment, “[w]ith respect, that sounds like trial and error.”⁴³⁶ Dr. Fournier later commented on how the lack of solid baseline data in the EIS made it difficult for the panel to be comfortable with Bilcon’s reliance on adaptive management, explaining that:

[a] cornerstone to the process that you’re involved in is the gathering of data of a certain level of respectability, a certain acceptable level which we would call the baseline level....

That baseline level, it would subsequently be used to monitor. It’s the baseline against which monitoring is done. And in addition, adaptive management depends on baselines that are rigorously prescribed. ...

pointed out that some of the planned activities would be exceedingly difficult, if not actually impossible, given conditions at the site.... [T]he Panel can only conclude that the physical setting of the marine terminal, situated on this exposed coast, carries a very high potential risk of an accident over the lifetime of the proposed Project.” See JRP Report, pp. 52-54, **Exhibit R-212**.

⁴³⁴ JRP Report, page 51, **Exhibit R-212**.

⁴³⁵ JRP Hearing Transcript, Day 1, pp. 118-120, **Exhibit R-457**.

⁴³⁶ JRP Hearing Transcript, Day 1, pp. 118-120, **Exhibit R-457**.

[T]he question then becomes, is it adequate? Is it sufficient, in fact, to make comparisons with or is it sufficient to monitor against?⁴³⁷

199. In the end, the JRP Report cited numerous instances in which a lack of baseline data created uncertainty, to the JRP’s mind, on the potential effects of the project.⁴³⁸ The JRP further found that given the “Proponent’s flawed understanding, the eventual application of these tools [such as adaptive management] could negate any positive intention to offset potential environmental impacts.”⁴³⁹

200. Finally, the JRP found that the data presented by Bilcon was unreliable because it was a moving target through the entire EA. Bilcon presented entirely new information and data at the hearing that had not previously been provided to the JRP or to the public and that sometimes contradicted the previous information that it had submitted. While Bilcon’s justification was that its efforts were “a moving work,” Dr. Fournier could only respond that “the purpose of the hearings is to assess your Environment Impact Statement” and that if Bilcon presented information “five minutes before the discussion begins”, it is an unfair disadvantage for the JRP as “the community, as well as the Panel,

⁴³⁷ JRP Hearing Transcript, Day 2, pp. 259-265, **Exhibit R-329**. See also JRP Report, pp. 52-54, **Exhibit R-212**.

⁴³⁸ See for example, JRP Report, **Exhibit R-212**: pp. 5-6 (“Because of the lack of specificity in the Project Description, many questions remain regarding specific impacts on nesting or migrating birds, mammals, lobster, herring, waterfowl etc.”); p. 7 (“The Panel’s determination of the full extent of possible adverse impacts on the coastal fen was hampered by the lack of baseline data on its hydrologic requirements and of a viable strategy to assure its continued existence”); p. 8 (“The Panel found that the general survey of the inshore and offshore biological environment presented in the EIS was adequate for the purpose of environmental characterization and to judge potential effects of the project. However, the level of baseline information was often inadequate and insufficient to implement meaningful monitoring programs that would detect long-term changes and trigger mitigative action.”); p. 9 (“The waters adjacent to the proposed quarry are the site of current fisheries for lobster, herring, sea urchins and periwinkles. Fishers raised the issue of whether a small portion of the coastal zone could become sufficiently altered such that it could become less habitable for these species, thereby influencing long-shore migrations and affecting the interconnectivity of populations. Without the benefit of good baseline information on the species involved, extensive monitoring, and extensive ecosystem analysis, it becomes difficult to establish quantitative predictions.”); p. 33 (“Evaluation of possible impacts on the coastal wetland is hampered by the lack of baseline data in the EIS on the hydrologic requirements of the wetland.”).

⁴³⁹ JRP Report, pp. 12-13, **Exhibit R-212**.

has the right to expect a reasonably well-developed plan which they can judge and gauge in terms of the future.”⁴⁴⁰

5. The JRP Report and Recommendations

201. On October 22, 2007, the JRP submitted its report to the federal Minister of the Environment and the Nova Scotia Minister of Environment and Labour.⁴⁴¹ In accordance with its mandate,⁴⁴² the panel’s primary recommendation was that “the Minister of Environment and Labour (Nova Scotia) reject the proposal made by Bilcon of Nova Scotia to construct the Whites Point Quarry and Marine Terminal.”⁴⁴³ The JRP also recommended to the Government of Canada “that the Project is likely to cause significant adverse environmental effects that, in the opinion of the Panel, cannot be justified in the circumstances.”⁴⁴⁴

202. In arriving at this recommendation, the JRP found that the potential effects of the project on biophysical, social and economic factors⁴⁴⁵ all supported the conclusion that the project “is likely to have a significant adverse environmental effect” on the people, communities and the economy of the Digby Neck:

A primary consideration influencing the Panel’s decision to recommend rejection of the Project is the adverse impact on a Valued Environmental Component: the people, communities and economy of Digby Neck and

⁴⁴⁰ JRP Hearing Transcript, Day 6, pp. 1180-1181, **Exhibit R-458** and JRP Hearing Transcript, Day 6, p. 1212, **Exhibit R-459**.

⁴⁴¹ Affidavit of Stephen Chapman, ¶ 54.

⁴⁴² JRP Agreement, ¶¶ 6.6 and 6.7, **Exhibit R-27**.

⁴⁴³ JRP Report, p. 103, **Exhibit R-212**.

⁴⁴⁴ JRP Report, p. 103, **Exhibit R-212**.

⁴⁴⁵ At pp. 13-14 of the JRP Report, **Exhibit R-212**, for example, wherein the panel concluded “[t]he economic burdens would fall upon the local fishers, harvesters and tourism operators. Local fishers could experience loss of commercial stocks due to introduction of invasive species, loss of gear, and the displacement due to marine terminal activities and ship movements. Tourism operators could be impacted through the tarnishing of a marketing image that promotes a pristine environmental setting, and the reduction of opportunities to promote present and potential eco-tourism activities.”

Islands. The region of Nova Scotia is unique in its history and in its community development activities and trajectory. Its core values, defined by the people and their governments, support the principles of sustainable development based on the quality of the local environment. Local residents are deeply embedded within and dependent on the terrestrial and marine ecosystems of the region: human health and well-being is intrinsically linked with the viability of the ecosystem. The Panel believes that the Project as proposed would undermine community-driven economic development planning and threaten an area recognized and celebrated as a model of sustainability by local, regional, national and international authorities. The Project is inconsistent with many government policies and principles at local, provincial and national levels. The Project does not make a net contribution to sustainability and is likely to have a significant adverse environmental effect on the people and communities that comprise Digby Neck and Islands, which are without doubt integral, essential and valued components of that environment.⁴⁴⁶

203. The JRP further concluded that, “[t]he imposition of a major long-term industrial site would introduce a significant and irreversible change to Digby Neck and Islands, resulting in sufficiently important changes to that community’s core values to warrant the Panel assessing them as a Significant Adverse Environmental Effect that cannot be mitigated.”⁴⁴⁷

204. While the JRP made six additional recommendations in its report⁴⁴⁸ the recommendation summarized above was the one that was relevant to whether the Government of Nova Scotia should approve or reject the project, and to whether the Government of Canada should issue the authorizations that had been requested by Bilcon.

H. The Decisions of the Government of Nova Scotia and the Government of Canada

205. The submission of the JRP report constituted the end of the information gathering process and the EA process then moved into a decision making phase in which Nova

⁴⁴⁶ JRP Report, p. 103, **Exhibit R-212**.

⁴⁴⁷ JRP Report, p. 14, **Exhibit R-212**.

⁴⁴⁸ JRP Report, pp. 103-106, **Exhibit R-212**.

Scotia and the federal government would review the report and determine the appropriate response in accordance with their respective legislative regimes.⁴⁴⁹ Among the potential responses, for both levels of government, were decisions that the project *not* be permitted to proceed, an outcome expressly recognized by both the *NSEA* and the *CEAA*.⁴⁵⁰

206. But despite the clear wording of applicable legislation and the JRP Agreement, Bilcon operated under the misguided assumption throughout the EA that it was engaged in a mere licensing process — “hoops to jump through” in the words of Mr. Buxton before the CLC on November 24, 2004:

[Y]ou can refer to the Canadian Environmental Assessment Act and the verbiage that goes with it.... It essentially says that the Canadian Environment Assessment Agency is to ensure that projects are carried out in an environmentally safe manner. He further noted it does not say that CEAA will determine whether or not a project will go ahead.

Mr. Buxton noted this project is a legal project and there is nothing in law to prevent this project from going ahead. He noted there are hoops to jump through and satisfy to obtain permits but there is nothing to say that the quarry can't proceed at Whites Cove.⁴⁵¹

Mr. Buxton and Bilcon maintained this ill-founded view throughout the EA process. For example, in a presentation to four Ministers of the Government of Nova Scotia, Bilcon noted that “the federal and provincial Environmental Assessment Acts are clearly in place

⁴⁴⁹ Expert Report of Robert Connelly, ¶¶ 124-125.

⁴⁵⁰ See for example *NSEA*, s. 43(d), **Exhibit R-5** (the Environmental Assessment Board shall “recommend ... the approval or rejection of an undertaking, or conditions that ought to be imposed upon an undertaking if it proceeds”). See also *CEAA*, s. 37(1), **Exhibit R-1**, which provides that, after a panel report is issued, “where the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function ... that would permit the project to be carried out in whole or in part.”

⁴⁵¹ CLC Minutes, November 24, 2003, p. 234, **Exhibit R-299**.

to determine the specific terms and conditions which must be adhered to by a proponent for the project to receive permitting.”⁴⁵²

1. The Decision of the Government of Nova Scotia

207. Pursuant to clause 6.7 of the JRP Agreement, the Nova Scotia Minister of the Environment and Labour Mark Parent was to “consider the recommendation of the Panel, and either approve with conditions, or reject the Project.”⁴⁵³ The Minister did not meet with Bilcon, or any member of the public for that matter, with respect to his decision.⁴⁵⁴ However, NSDEL reviewed each and every one of the letters Bilcon sent to Nova Scotia between the issuance of the JRP Report and the Minister’s decision.⁴⁵⁵

208. On November 20, 2007, the Minister wrote to Bilcon and advised that following “careful consideration” of the JRP report, he had determined that the proposed quarry and marine terminal “poses the threat of unacceptable and significant adverse effects to the existing and future environmental, social and cultural conditions... .”⁴⁵⁶ Thus, in accordance with the *NSEA*, he decided that the proposed project would not be approved. Mr. Buxton was advised of the decision both in writing and by personal phone calls on the day of the decision, first from the Minister himself and then from the Deputy Minister of NSDEL, Nancy Vanstone.⁴⁵⁷

⁴⁵² See Presentation of Bilcon to Various Ministers of the Government of Nova Scotia, January 10, 2007, p. 12, ¶ 6, **Exhibit R-330**.

⁴⁵³ JRP Agreement, ¶ 6.7, **Exhibit R-27**.

⁴⁵⁴ See letter from Minister Mark Parent to Paul Buxton, September 25, 2007, **Exhibit R-468**.

⁴⁵⁵ See email from Nancy Vanstone to Lorrie Roberts reporting on Ms. Vanstone’s telephone call with Paul Buxton, November 20, 2007, **Exhibit R-469**.

⁴⁵⁶ Letter from Minister of the Environment and Labour to Paul Buxton, November 20, 2007, **Exhibit R-331**.

⁴⁵⁷ See email from Nancy Vanstone to Lorrie Roberts reporting on Ms. Vanstone’s telephone call with Paul Buxton, November 20, 2007, **Exhibit R-469**.

2. The Decision of the Government of Canada

209. On receipt of the JRP report, DFO, working with Transport Canada and in consultation with other federal departments, undertook a detailed analysis of the JRP's recommendations in order to respond to the report in accordance with clause 6.6 of the JRP Agreement.⁴⁵⁸

210. Nova Scotia's November 20, 2007 decision to reject the project effectively rendered any decision that could be made by the federal government moot, as the project could not proceed under Nova Scotia law. However, as explained by DFO's Mark McLean, given that *CEAA* s. 37(1.1) requires the RA to respond to the report, and as there were still applications for permits and approvals pending, the federal government was mandated to complete its work.⁴⁵⁹

211. In the end, federal officials accepted the JRP recommendation that the Whites Point project was likely to cause significant adverse environmental effects that could not be justified in the circumstances.⁴⁶⁰ In accordance with *CEAA* s. 37(1.1), federal officials sought the Governor-in-Council's approval of a response to the JRP's report indicating a refusal to issue the requested permits and authorizations.

212. Similar to Minister Parent in Nova Scotia, members of Cabinet did not meet with either the Claimants or members of the public regarding the decision that they had to make. The Governor-in-Council provided its approval on December 13, 2007.⁴⁶¹ As a result, pursuant to *CEAA* s. 37(1.1)(c), DFO and Transport Canada could not issue the permits and authorizations requested by Bilcon to allow it to proceed with the project.

⁴⁵⁸ JRP Agreement, ¶ 6.6, **Exhibit R-27**; Affidavit of Mark McLean, ¶¶ 60-62.

⁴⁵⁹ Affidavit of Mark McLean, ¶ 61.

⁴⁶⁰ Affidavit of Mark McLean, ¶ 62.

⁴⁶¹ Email from Ginny Flood to Stuart Dean, December 14, 2007, **Exhibit R-393**.

Consistent with its standard practice, the Government of Canada announced this decision in a press release on December 18, 2007.⁴⁶²

⁴⁶² News Release – The Government of Canada Accepts Panel Conclusion for the Whites Point Quarry and Marine Terminal, December 18, 2007, **Exhibit R-161**.

III. THE TRIBUNAL LACKS JURISDICTION TO HEAR CERTAIN OF THE CLAIMANTS' ALLEGATIONS

A. Summary of Canada's Position

213. The Claimants make several arguments relating to measures that are outside of the jurisdiction of this Tribunal. First, they make claims in respect of an industrial approval for a 3.9 ha quarry granted to another company that does not in any way relate to them. This Tribunal only has jurisdiction to consider measures that relate to the Claimants or their investment. Second, they make claims against a number of measures and actions that took place more than three years prior to the date on which they filed their NAFTA claim. This Tribunal does not have jurisdiction to consider such measures as they are time-barred by the NAFTA Chapter Eleven limitation period. Third, the Claimants make allegations against the JRP, which is not an organ of Canada and whose actions cannot be attributable to Canada. Finally, they make claims against measures that could not have caused them any loss. Each of these points will be addressed below.

B. The Tribunal has no Jurisdiction to Consider Claims Relating to Nova Stone's Industrial Approval for the 3.9 ha Quarry

214. The Claimants have challenged measures relating to the industrial approval for the 3.9 ha quarry issued by NSDEL to Nova Stone on April 30, 2002.⁴⁶³ The Tribunal does not have jurisdiction to consider claims relating to the industrial approval. First, measures taken in connection with the industrial approval do not "relate to" the Claimants, as required by NAFTA Article 1101. Second, even if the Claimants could assert claims in connection with the industrial approval, the evidence here demonstrates overwhelmingly that they are time-barred by NAFTA Article 1116(2).

⁴⁶³ Claimants' Memorial, ¶¶ 459, 460.

1. Measures Taken in Connection with Nova Stone’s Industrial Approval do not “Relate to” Investors or Investments of Another Party

215. Pursuant to NAFTA Article 1101(1), a tribunal only has jurisdiction to consider “measures ... relating to ... investors of another Party” or “investments of investors of another Party in the territory of the Party.” Measures that do not “relate to” investors or investments of investors of another Party cannot be the subject of a claim under Chapter Eleven.

216. The Claimants allege violations of Chapter Eleven in connection with the industrial approval issued to Nova Stone – specifically, that DFO lacked competence to request the blasting conditions included in the industrial approval, and that DFO unreasonably, and without basis in law, refused to authorize Bilcon’s blasting plan for the 3.9 ha quarry.⁴⁶⁴ Aside from being both legally and factually incorrect, these allegations are not within the scope of Canada’s consent to arbitrate under Chapter Eleven because the measures do not “relate to” the Claimants or their investment, as required by Article 1101. DFO’s actions and decisions in relation to the application for an industrial approval to operate a 3.9 ha quarry by a Canadian company, Nova Stone, in 2002 are not measures relating to the Claimants or their investment. The fact that the Claimants had a business relationship with Nova Stone or entered into discussions with them with respect to the project does not suffice to bring these measures relating to Nova Stone within the scope of NAFTA Chapter Eleven.

217. The *Methanex* Tribunal thoroughly considered the meaning of the phrase “relating to” in Article 1101. In that case, California had imposed a ban on the use of the gasoline additive MTBE. Methanex, a producer of methanol (an ingredient used in the manufacture of MTBE) challenged the measure as it had an economic impact on its business. While the measure may have carried economic repercussions for Methanex, the

⁴⁶⁴ Claimants’ Memorial, ¶¶ 459, 460.

Tribunal rejected the proposition that it met the “relating to” threshold under Article 1101:

If the threshold provided by Article 1101(1) were merely one of ‘affecting,’ as Methanex contends, it would be satisfied wherever any economic impact was felt by an investor or an investment. For example, in this case, the test could be met by suppliers to Methanex who suffered as a result of Methanex’s alleged losses, suppliers to those suppliers and so on, towards infinity. As such, Article 1101(1) would provide no significant threshold to a NAFTA arbitration. A threshold which could be surmounted by an indeterminate class of investors making a claim alleging loss is no threshold at all; and the attractive simplicity of Methanex’s interpretation derives from the fact that it imposes no practical limit.⁴⁶⁵ (emphasis added)

218. The *Methanex* Tribunal found that the phrase “relating to” in Article 1101(1) signifies something more than the mere effect of a measure on an investor or an investment and that it requires a “legally significant connection between them”.⁴⁶⁶ A lower threshold, under which Article 1101(1) would be satisfied merely by the impact or effect of a measure, “would produce a surprising, if not an absurd, result.”⁴⁶⁷ The *Methanex* tribunal did not define “legally significant connection,” noting that while “it is perhaps not easy to define the exact dividing line ... it should still be possible to determine on which side of the divide a particular claim must lie.”⁴⁶⁸ As such, the determination of a “legally significant connection” between an impugned measure and an investor or investment must be conducted on a case-by-case basis.

⁴⁶⁵ *Methanex Corporation v. United States of America* (UNCITRAL) Preliminary Award, 7 August 2002 (“*Methanex – Preliminary Award on Jurisdiction*”), ¶ 137, **RA-45**.

⁴⁶⁶ *Methanex – Preliminary Award on Jurisdiction*, ¶ 147, **RA-45**. The Claimants assert that “NAFTA tribunals have interpreted Article 1101 consistently with its ordinary meaning and NAFTA’s objectives by deciding that a measure ‘relates to’ an investor or investment if it affects the investor or investment” (Claimants’ Memorial, ¶ 748). The *Methanex* tribunal plainly rejected this proposition.

⁴⁶⁷ *Methanex – Preliminary Award on Jurisdiction*, ¶ 138, **RA-45**.

⁴⁶⁸ *Methanex – Preliminary Award on Jurisdiction*, ¶ 139, **RA-45**.

219. In this case, measures taken in connection with the industrial approval issued to Nova Stone do not “relate to” the Claimants or to their investment. Industrial approvals are by their very nature specific to one company or person. They do not apply to an indeterminate number of investors, but rather apply only to the company or person to whom they are issued. As explained in the Affidavit of Bob Petrie, the industrial approval was issued to Nova Stone and, as a matter of Nova Scotia law, neither the Claimants nor their investment had any rights or obligations under that approval.⁴⁶⁹ In fact, the *NSEA* provides that Nova Stone was prohibited from transferring, selling, leasing, assigning or otherwise disposing of the approval without the written consent of the Nova Scotia Minister of Environment and Labour.⁴⁷⁰ The industrial approval could not, therefore, have any “legally significant connection” to the Claimants. The approval’s terms and conditions, and any subsequent steps taken in connection with them, applied to Nova Stone and to Nova Stone only.⁴⁷¹

220. Further, the Claimants’ business relationship with Nova Stone, a relationship ultimately giving rise to the allegations they make in this arbitration in connection with measures relating to Nova Stone’s industrial approval, fails to demonstrate a “legally significant connection” between the measures in issue and the Claimants. The “relating to” language of Article 1101(1) does not mean that any national or enterprise of the United States or Mexico, with whom Nova Stone entered into a business relationship, is entitled to bring a NAFTA claim against Canada on the basis that they were indirectly affected by the conditions of that industrial approval. Such an interpretation would expose the NAFTA states to a potentially limitless class of claimants for every measure

⁴⁶⁹ Affidavit of Bob Petrie, ¶¶ 15-17.

⁴⁷⁰ *NSEA*, s. 59(1), **Exhibit R-5**. Given that the industrial approval had a limited application to one Canadian company, and was never assigned to the Claimants or Bilcon, it was not a measure of general application like the export ban in *S.D. Myers Inc. v. Canada* (UNCITRAL) Final Partial Award, 13 November 2000 (“*S.D. Myers – Partial Award*”) **RA-63**, which had the potential to impact any number of investors and investments.

⁴⁷¹ Affidavit of Bob Petrie, ¶¶ 15-17.

that they adopt or maintain. Nor do any of the cases cited by the Claimants provide support for such an expansive interpretation of the words “relating to.”⁴⁷²

221. The Claimants’ argument that the industrial approval “relates to” their investment is thus without merit. As the industrial approval for the 3.9 ha quarry “related to” Nova Stone and Nova Stone only, this Tribunal does not have the jurisdiction to consider the measures the Claimants complain of in connection with the approval.

2. In Any Event, The Claims Relating to Measures Taken in Connection with Nova Stone’s Industrial Approval are Time-Barred under NAFTA Article 1116(2)

222. Even if measures taken in connection with Nova Stone’s industrial approval “relate to” the Claimants or their investment, which they do not, the Claimants’ allegations are time-barred under NAFTA Article 1116(2) because they had actual knowledge of both the measures they now allege are NAFTA violations and of the loss or damage allegedly incurred, more than three years prior to the June 17, 2008 date of

⁴⁷² The Claimants cite at ¶ 744 of their Memorial the WTO Appellate Body report in *United States – Subsidies on Upland Cotton*, Report of the Appellate Body, WT/DS267/AB/R (3 March 2005) at ¶ 261 (*Investors’ Book of Authorities*, Tab CA 93) who interpreted the word “affecting” in Article 4.2 of the WTO Dispute Settlement Understanding. NAFTA Article 1101 does not contain the word “affecting” and the WTO’s interpretation of that word is therefore irrelevant. As pointed out by the NAFTA tribunal in *Methanex*, the words “relating to” in Article 1101 are different than the word “affecting” (*see Methanex – Preliminary Award on Jurisdiction*, ¶¶ 137-138, RA-45). Similarly, the Claimants rely on the WTO case of *Indonesia – Automobiles (Indonesia – Certain Measures Affecting the Automobile Industry)*, Report of the Panel, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998) at ¶ 14.82 (*Investors’ Book of Authorities*, Tab CA 96) but fail to explain how that case is relevant to an interpretation of NAFTA Article 1101 (Claimants’ Memorial, ¶¶ 750-751). The Claimants also misapply the reasoning from *Pope & Talbot Inc. v. Canada* (UNCITRAL) Decision on Canada’s Motion, 26 January 2000, ¶¶ 33-34 (*Investors’ Book of Authorities*, Tab CA 58) (Claimants’ Memorial, ¶ 748). There, the tribunal found that “the fact that a measure may primarily be concerned with trade in goods does not necessarily mean that it does not also relate to investment or investors.” That a measure focussed on trade in goods might “relate to” an investment does not provide support to the Claimants’ argument. Finally, the Claimants cite *GAMI Investments Inc. v. United Mexican States* (UNCITRAL) Final Award, 15 November 2004 (“*GAMI – Final Award*”), RA-27 as support for its interpretation of “relating to”, but provide no citation or reference for this claim (Claimants’ Memorial, ¶ 749). The Award in *GAMI* does not mention Article 1101. Contrary to what the Claimants assert the measure at issue in that case was not “general”; it specifically expropriated five of *GAMI*’s sugar mills (*see GAMI – Final Award*, ¶ 17).

commencement of this arbitration — i.e., prior to June 17, 2005.⁴⁷³ In fact, the industrial approval was actually null and void as of May 1, 2004,⁴⁷⁴ well in advance of June 17, 2005. The Claimants are accordingly time-barred under Article 1116(2) from advancing any claims in connection with the industrial approval.

223. Below, Canada explains how Article 1116(2) bars a Tribunal from considering claims not brought within three years of a claimant first acquiring knowledge of an alleged breach of NAFTA and resultant loss. Canada also addresses why the Claimants’ interpretation of Article 1116(2) – that the provision does not bar claims where a claimant continues to experience the “ongoing effect” of impugned measures – is without merit and would render Article 1116(2) meaningless. Finally, the evidence overwhelmingly demonstrates that any claims related to Nova Stone’s industrial approval are time-barred by Article 1116(2) as properly interpreted.

a) Article 1116(2) Bars NAFTA Claims Not Brought Within Three Years of the Claimant “First Acquiring” Knowledge of an Alleged Breach and Loss

224. The Claimants commenced this arbitration pursuant to NAFTA Article 1116(1).⁴⁷⁵ Article 1116(2) limits the time within which they may bring a NAFTA claim against an impugned measure under Chapter Eleven:

An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

⁴⁷³ The disputing Parties have agreed that the commencement date of this arbitration was June 17, 2008, making the relevant date for purposes of the time bar under Article 1116(2) June 17, 2005 – see correspondence from Meg Kinnear to Barry Appleton, June 18, 2008, **Exhibit R-501**. See also correspondence from Barry Appleton to Meg Kinnear, August 5, 2008, **Exhibit R-502**.

⁴⁷⁴ Affidavit of Bob Petrie, ¶ 17.

⁴⁷⁵ See *Bilcon et al. v. Government of Canada*, Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, February 5, 2008. See also *Bilcon et al v. Government of Canada*, Notice of Arbitration, May 26, 2008, ¶ 1.

225. Like Article 1101, Article 1116(2) is a jurisdictional pre-condition to a Chapter Eleven claim.⁴⁷⁶ It establishes that a challenge of a measure under Chapter Eleven must be made by an investor within three years of its first acquiring (i) knowledge of the measure giving rise to the breach; and (ii) knowledge that it has incurred some form of loss or damage as a result of the breach. If a challenge is not made within those three years, Article 1116(2) provides for an absolute time bar against such a claim.

226. The word “first” means “earliest in occurrence, existence.”⁴⁷⁷ It identifies the start of a period or event, and not the middle or end of a continuing situation. The inclusion of “first” to modify the phrase “acquired knowledge” in Article 1116(2) was a deliberate drafting choice intended to mark the beginning of time when knowledge of a breach and loss existed.

227. A comparison of Article 1116(2) with other timing provisions in NAFTA further demonstrates its specific meaning. Other provisions of Chapter Eleven establish times within which investor-State dispute settlement must be commenced or a step in dispute settlement must be taken. Generally, the NAFTA Parties inserted temporal conditions in a provision by using phrases such as “within,” “at least” or “no later than.”⁴⁷⁸ Other than the parallel time limitation provision in Article 1117(2) for claims on behalf of an enterprise, no other article in NAFTA adopts the formula in Article 1116(2) of counting time from a date on which an investor “first” acquired knowledge.

⁴⁷⁶ *Methanex – Preliminary Award on Jurisdiction*, ¶ 120, **RA-45**.

⁴⁷⁷ *Shorter Oxford Dictionary*, 5th ed. (Oxford University Press, 2002) (“*Shorter Oxford Dictionary*”), p. 965, **RA-69**.

⁴⁷⁸ See for example, Article 1119(1) requiring delivery of a notice of intent “at least 90 days” before submitting a claim; Article 1120 allowing submission of a claim “provided six months have elapsed”; Article 1124 allowing Secretary-General appointments of tribunal members if a tribunal has not been constituted “within 90 days” of submission of a claim; Article 1126(5) and (11) requiring steps to be taken “within” 15 or 60 days of a prior step in consolidation; Article 1127(1) requiring notice of a claim to be given “no later than 30 days after” submission of a claim. See also Articles 1132, 1136(a)(i) and 1137.

228. In short, the approach mandated by Article 1116(2) is to pinpoint the moment at which knowledge of an alleged breach and loss were first acquired, and to bar claims made more than three years after that point in time. The ordinary meaning of the words in Article 1116(2) cannot sustain an interpretation under which the three year period running from first acquisition of knowledge of breach and loss can be extended or prolonged.

229. All three NAFTA Parties agree with this interpretation. In *Merrill & Ring Forestry L.P. v. Canada*,⁴⁷⁹ where the proper interpretation of NAFTA Article 1116(2) was an issue, the United States wrote the following to the Tribunal:

An investor *first* acquires knowledge of an alleged breach and loss at a particular moment in time: under Article 1116(2), that knowledge is acquired on a particular “date.” Such knowledge cannot *first* be acquired on multiple dates, nor can such knowledge *first* be acquired on a recurring basis.⁴⁸⁰

230. Both Mexico⁴⁸¹ and Canada⁴⁸² agreed with this interpretation. This agreement of the NAFTA Parties constitutes “subsequent practice” under Article 31(3)(b) of the *Vienna Convention*, which “shall be taken into account”⁴⁸³ when interpreting the NAFTA.

231. Past NAFTA awards also support this approach. The most detailed consideration of Article 1116(2) by a NAFTA Tribunal to date is the *Grand River* Tribunal’s Decision

⁴⁷⁹ *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) Award, 31 March 2010 (“*Merrill & Ring – Award*”), **RA-38**.

⁴⁸⁰ *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) 1128 Submission of the United States, 14 July 2008 (“*Merrill & Ring – Submission of the United States*”), ¶ 5, **RA-36**.

⁴⁸¹ *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) 1128 Submission of the United Mexican States, 2 April 2009 (“*Merrill & Ring – Submission of Mexico*”), **RA-37**.

⁴⁸² *Merrill & Ring Forestry L.P. v. Canada* (UNCITRAL) Counter-Memorial, 13 May 2008 (“*Merrill & Ring – Counter Memorial*”), ¶¶ 149-151, **RA-40**.

⁴⁸³ *Vienna Convention on the Law of Treaties* (1969) (“*Vienna Convention*”), Article 31(3)(b), *Investors’ Book of Authorities*, Tab **CA 44** (“There shall be taken into account... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”)

on Objections to Jurisdiction.⁴⁸⁴ In *Grand River*, the Claimant commenced a Chapter Eleven claim on March 12, 2004, alleging NAFTA violations arising from a Master Settlement Agreement (MSA) for tobacco litigation entered into in 1998, and “subsequent state actions taken pursuant to the MSA, including adoption and enforcement of the escrow statutes, more recent amendments to those statutes, and other enactments and actions aimed at cigarette manufacturers outside the MSA regime.”⁴⁸⁵ The United States challenged the Tribunal’s jurisdiction to entertain the claim on the ground that it was time barred by Article 1116(2).

232. The *Grand River* Tribunal agreed with the United States, finding that claims based on the MSA and subsequent measures taken pursuant to the MSA are time-barred. The only claim it reserved for consideration on the merits was one based on distinct legislation adopted by individual states after March 12, 2001 (i.e., within the applicable three-year limitation period).⁴⁸⁶

233. In its award, the Tribunal noted that “Articles 1116(2) and 1117(2) introduced a clear and rigid limitation defense – not subject to any suspension, prolongation or other qualification.”⁴⁸⁷ It explained that an investor cannot bring a NAFTA Chapter Eleven claim if more than three years have elapsed from when the investor first acquired, or

⁴⁸⁴ *Grand River Enterprises Six Nations Ltd. v. The United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006 (“*Grand River – Jurisdiction Decision*”), **RA-30**.

⁴⁸⁵ *Grand River – Jurisdiction Decision*, ¶¶ 4, 24, **RA-30**. See also ¶¶ 6-24 for a comprehensive description of the measures at issue in *Grand River*.

⁴⁸⁶ *Grand River – Jurisdiction Decision*, ¶¶ 84-94, **RA-30**.

⁴⁸⁷ *Grand River – Jurisdiction Decision*, ¶ 29, **RA-30**. See also *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award and Dissenting Opinion, 16 December 2002 (“*Feldman – Award*”), ¶ 63, **RA-35** (“...NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defence which, as such, is not subject to any suspension ... prolongation or other qualification. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three years, and does so in full knowledge of the fact that a State, i.e., one of the three Member Countries, will be the Respondent, interested in presenting a limitation defence.”)

should have first acquired, knowledge of the alleged breach and that it incurred loss or damage as a result of that alleged breach.⁴⁸⁸

234. The *Grand River* Tribunal characterized “actual knowledge” of the breach and of loss or damage as “foremost a question of fact,”⁴⁸⁹ whereas constructive knowledge could be imputed to an investor if it would have known that fact had it exercised reasonable care or diligence.⁴⁹⁰ It also found that knowledge of loss or damage exists for the purposes of Article 1116(2) even if the amount or extent of that loss or damage may not become known until some future time.⁴⁹¹ The loss or damage need not be precisely quantified at the time of first knowledge of the loss.⁴⁹²

b) The Claimants’ Interpretation of Article 1116(2) is Wrong in Law

235. Although the Claimants recognize that they are prohibited from making claims against measures that pre-date June 17, 2005, they attempt to save their otherwise time-barred claims by arguing that the measures complained of are “continuing”. Below, Canada explains that these measures are not “continuing”. Canada also explains that, even if the measures are “continuing”, the limitation period under Article 1116(2) applies and the measures are still time-barred.

⁴⁸⁸ *Grand River – Jurisdiction Decision*, ¶ 38, **RA-30**.

⁴⁸⁹ *Grand River – Jurisdiction Decision*, ¶ 54, **RA-30**.

⁴⁹⁰ *Grand River – Jurisdiction Decision*, ¶¶ 58-59, **RA-30**.

⁴⁹¹ *Grand River – Jurisdiction Decision*, ¶¶ 77-78, **RA-30**.

⁴⁹² *Mondev International Ltd. v. The United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 (“*Mondev – Award*”), ¶ 87, **RA-46** wherein the Tribunal found in connection with Article 1116(2) that “a claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.”

(1) Measures Pre-Dating June 17, 2005 are not “Continuing”

236. The Claimants ignore the ordinary meaning of Article 1116(2) and the sound reasoning of the decision in *Grand River*. They acknowledge that Article 1116(2) prohibits them from making claims against measures taking place prior to June 17, 2005,⁴⁹³ and they admit that measures relating to the industrial approval pre-date June 17, 2005.⁴⁹⁴ Yet, they attempt to evade the time bar by arguing that the measures “continued after June 17, 2005, and are continuing today.”⁴⁹⁵ (emphasis added) According to the Claimants, a “continuing measure” is not capable of triggering the three year limitation period under Article 1116(2).⁴⁹⁶ Instead, the “ongoing effect” or “ongoing impact” of a measure give it a “continuing character”⁴⁹⁷ and the limitation period under Article 1116(2) does not begin to run until the measure ends.⁴⁹⁸ In sum, the Claimants assert that the alleged “ongoing effects” of pre-June 17, 2005 measures relating to the industrial approval result in those measures “continuing today,” and preclude those measures from being time-barred under Article 1116(2).

237. It is difficult to conceive of an interpretation that could render Article 1116(2) any more meaningless. Under the Claimants’ theory, the three year time bar period has not even begun to run, despite the fact that the Whites Point EA process was completed nearly four years ago. Such an interpretation would read any time limitation on claims out of the NAFTA.

⁴⁹³ Claimants’ Memorial, ¶ 723 (“The effective date of receipt of Bilcon’s Notice of Arbitration is June 17, 2008. Article 1116(2) allows a claim if the Investor first acquired, or should have first acquired, knowledge of the breach and knowledge that it incurred damage after June 17, 2005.”).

⁴⁹⁴ Claimants’ Memorial, ¶¶ 752-753.

⁴⁹⁵ Claimants’ Memorial, ¶ 724.

⁴⁹⁶ The Claimants argue that “time limits only begin at the end of a continuing act” (Claimants’ Memorial, ¶ 725).

⁴⁹⁷ Claimants’ Memorial, ¶¶ 752-753.

⁴⁹⁸ Claimants’ Memorial, ¶ 725.

238. Moreover, none of the awards cited in the Memorial support the Claimants' proposition that measures are "continuing" and not time-barred by Article 1116(2) because of their "ongoing effect."⁴⁹⁹ In fact, the *Mondev* Tribunal noted that "there is a distinction between an act of a continuing character and an act, already completed, which continues to cause loss or damage."⁵⁰⁰ The *Mondev* Tribunal's reasoning reflects Article 14(1) of the *ILC Articles on Responsibility of States for Internationally Wrongful Acts* (the "ILC Articles") which provides that "[t]he breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue."⁵⁰¹ Thus, contrary to the Claimants' belief, the continuing "effects" of a measure do not transform it into a "continuing measure".

(2) Even If Measures Taken in Connection with Nova Stone's Industrial Approval are Continuing, They are Time-Barred

239. Even if the pre-June 17, 2005 measures taken in connection with Nova Stone's industrial approval can be construed as "continuing", which they are not, the limitation period under Article 1116(2) applies, and those measures are time-barred.

240. The NAFTA Parties contemplated that measures which might be construed as "continuing" could be challenged under Chapter Eleven. This is made clear by Article 1101 which provides that Chapter Eleven applies to "measures adopted or maintained" by a Party.⁵⁰² Mindful that continuing conduct could be challenged by investors, the NAFTA

⁴⁹⁹ The Claimants attempt to defend their approach by arguing that "maintaining a law is a continuing act" (Claimants' Memorial, ¶¶ 727-731). However, the Claimants do not challenge any "law" in this arbitration, but how particular laws were applied to them in their EA process.

⁵⁰⁰ *Mondev – Award*, ¶ 58, **RA-46**.

⁵⁰¹ *Responsibility of States for Internationally Wrongful Acts 2001*, Report of the ILC, Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supp. No. (A/56/49, Corr.4.), United Nations, New York ("ILC Articles"), ¶ 14(1), **RA-61**.

⁵⁰² Similarly, various substantive obligations envisage claims concerning continuing measures. For example, Article 1105(2) provides for non-discriminatory treatment by measures a Party "adopts or maintains" relating to losses owing to armed conflict or civil strife. Article 1108(2), (2) and (3) addresses non-conforming measures "maintained" by a Party. Article 1113 allows a Party to deny benefits as a result

Parties nonetheless addressed the precise moment at which the time bar applicable to such claims would apply. The running of the time bar is to be calculated from the “first” acquisition of relevant knowledge, not subsequent, repeated or ultimate acquisition of such knowledge.

241. The Claimants rely on *UPS v. Canada* to support their claim of a “continuing breach.”⁵⁰³ In that case, UPS challenged various aspects of Canada’s enforcement of customs laws, access to the Canadian postal infrastructure, application of the *Postal Assistance Program* and an allegedly unfair contract.⁵⁰⁴ The measures at issue were first implemented by Canada three years before the claim was made, but UPS argued that Canada’s conduct was ongoing and constituted a new violation of NAFTA each day.⁵⁰⁵

242. In a mere few paragraphs that do not even cite the important *Grand River* case described above, the *UPS* tribunal agreed, holding:

The generally applicable ground for our decision is that, as UPS urges, continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly. This is true generally in the law, and Canada has provided no special reason to adopt a different rule here. The use of the term “first acquired” is not to the contrary, as that logically would mean that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period, even if the investor later acquires further information confirming the conduct or allowing more precise computation of loss.⁵⁰⁶

243. This case was wrongly decided. In particular, the *UPS* Tribunal ignores the fact that Article 1116(2) is a clear *lex specialis* which supersedes general international law

of measures it “adopts or maintains,” while Article 1114 states that nothing in Chapter Eleven prevents a Party from “adopting, maintaining or enforcing” a measure to ensure investment activity is sensitive to environmental concerns.

⁵⁰³ Claimants’ Memorial, ¶¶ 735-736.

⁵⁰⁴ *United Parcel Service v. Canada* (UNCITRAL) Award on Merits and Dissenting Opinion, 24 May 2007 (“*UPS – Award*”), ¶¶ 11-13, **RA-79**.

⁵⁰⁵ *UPS – Award*, ¶¶ 22-24, **RA-79**.

⁵⁰⁶ *UPS – Award*, ¶ 28, **RA-79**.

that might otherwise be applicable. The Tribunal’s interpretation gives the word “first” no meaning and ignores the expressed intent of the NAFTA Parties.⁵⁰⁷

244. All three NAFTA Parties agree that the decision in *UPS* was wrong on this particular point. In *Merrill & Ring v. Canada*, the Claimant challenged, among other things, legislation that was enacted prior to the relevant limitation period. The Claimant argued, relying on *UPS*, that the legislation was a “continuing measure” that tolled the limitation period. The United States and Mexico made submissions in the arbitration pursuant to NAFTA Article 1128. They agreed that:

Under the *UPS* tribunal’s reading of Article 1116(2), for any continuing course of conduct the term “first acquired” would in effect mean “last acquired,” given that the limitations period would fail to renew only after an investor acquired knowledge of the state’s *final* transgression in a series of similar and related actions. Accordingly, the specific use of the term “first acquired” under Article 1116(2) is contrary to the *UPS* tribunal’s finding that a continuing course of conduct renews the NAFTA Chapter Eleven limitations period.⁵⁰⁸

245. Canada supported this interpretation in that arbitration.⁵⁰⁹ The United States and Mexico concluded that a measure, even if it is continuing, does not renew the limitation period under Article 1116(2):

[O]nce an investor first acquires knowledge of breach and loss, subsequent transgressions by the state arising from a continuing course of conduct do not renew the limitations period under Article 1116(2).⁵¹⁰

⁵⁰⁷ In addition, the reliance placed by the *UPS* Tribunal on whether an investor might acquire further information or might be able to do a more precise calculation of loss is also misplaced. The time bar in Article 1116(2) commences when the investor first has the requisite knowledge of breach and loss. Knowledge of how long the measure will continue or a precise computation of damages are not needed to commence a claim. See *Grand River – Jurisdiction Decision*, ¶¶ 77-78, **RA-30**.

⁵⁰⁸ *Merrill & Ring – Submission of the United States*, ¶ 10, **RA-36**. This submission was supported by Mexico; see *Merrill & Ring – Submission of Mexico*, **RA-37**.

⁵⁰⁹ *Merrill & Ring – Counter Memorial*, ¶¶ 149-151, 211-213, **RA-40**.

⁵¹⁰ *Merrill & Ring – Submission of the United States*, ¶ 17, **RA-36**. This submission was supported by Mexico; see *Merrill & Ring – Submission of Mexico*, **RA-37**.

246. All three NAFTA Parties therefore agree that a “continuing measure” does not renew the limitation period under NAFTA Article 1116(2).⁵¹¹ Whether a measure continues or ends is irrelevant to the operation of the NAFTA time bar because calculation of the three-year period is triggered by “first” knowledge of breach and loss.⁵¹²

247. In sum, the Claimants’ attempt to evade the running of the time bar by invoking the alleged “ongoing effects” of otherwise time-barred measures finds no support in the ordinary meaning of Article 1116(2) and it conflicts with the subsequent agreement of the NAFTA Parties. Where it can be demonstrated that the Claimants had knowledge of a measure allegedly giving rise to a NAFTA breach and resultant loss or damage prior to June 17, 2005, this Tribunal does not have the jurisdiction to consider the measure.

248. Canada now turns to the evidence demonstrating that the Claimants had knowledge of the measure, alleged loss and breach, well in advance of June 17, 2005.

c) The Evidence Overwhelmingly Demonstrates that Claims Relating to Nova Stone’s Industrial Approval are Time Barred under NAFTA Article 1116(2)

249. The Claimants allege violations of Chapter Eleven in connection with the industrial approval issued to Nova Stone – specifically, that DFO “lacked competence to

⁵¹¹ This agreement of the NAFTA Parties constitutes “subsequent practice” under Article 31(3)(b) of the *Vienna Convention, Investors’ Book of Authorities*, Tab CA 44.

⁵¹² The Claimants also cite *Feldman – Award*, ¶¶ 187-188, RA-35 to support their interpretation (Claimants’ Memorial, ¶ 737). However, as Canada (*Merrill & Ring – Counter Memorial*, ¶¶ 236-238, RA-40) the United States (*Merrill & Ring – Submission of the United States*, ¶¶ 11-13, RA-36), and Mexico (*Merrill & Ring – Submission of Mexico*, RA-37) have explained, neither the *Interim Decision on Preliminary Jurisdictional Issues* in the *Feldman* case, nor its *Award*, support the conclusion that a continuing course of conduct renews the limitations period under Article 1116(2). The time-bar issues considered by the *Feldman* tribunal did not address the “first acquired” language under Article 1116(2) in connection with a continuing course of conduct. Rather, the tribunal considered whether state action short of “formal and authorized recognition” of a claim could “either bring about interruption of the running of limitation or estop the Respondent State from presenting a regular limitation defense” (*Feldman – Award*, ¶ 63, RA-35). The Tribunal found that no such interruption or estoppel applied (*Feldman – Award*, ¶ 65, RA-35).

request” the blasting conditions included in the industrial approval, and that DFO “[u]nreasonably, and without basis in law, refused to authorize Bilcon’s blasting plan” for the 3.9 ha quarry.⁵¹³ The evidence in this arbitration demonstrates that the Claimants had actual or constructive knowledge of the alleged breaches and loss well in advance of June 17, 2005.

250. First, the blasting conditions resulting from DFO’s concerns form part of the terms and conditions of Nova Stone’s industrial approval, issued by NSDEL on April 30, 2002.⁵¹⁴ The blasting conditions required, among other things, the preparation and submission of a report verifying that blasting activity would not have an adverse impact on marine mammals in the region and costs were incurred in the preparation of that report.⁵¹⁵

251. Second, DFO’s alleged unlawful refusal “to authorize...blasting”⁵¹⁶ was communicated on May 29, 2003.⁵¹⁷ In actual fact, DFO’s determination was based upon scientific opinion that Nova Stone’s proposed blasting activity could harm endangered species in proximity to the quarry and would therefore require an EA under the *CEAA*. Mr. Buxton took issue with this determination, advising NSDEL on June 25, 2003 (on behalf of Nova Stone) that there “are serious financial consequences which arise from our inability to operate in accordance with the Permit,” that the “Company has suffered significant costs,” and that “[f]ailure to act [i.e., to allow Nova Stone to blast] will cause severe economic hardship to the Company and the project.”⁵¹⁸ (emphasis added)

⁵¹³ Claimants’ Memorial, ¶¶ 459, 460.

⁵¹⁴ Affidavit of Bob Petrie, ¶ 14.

⁵¹⁵ See for example, the report prepared by Dr. Paul Brodie for Paul Buxton on the potential impact of blasting on the 3.9 ha quarry on marine mammals, June 19, 2002, **Exhibit R-301**. See also Nova Stone’s blasting plan filed with NSDEL on November 18, 2002, **Exhibit R-80**.

⁵¹⁶ Claimants’ Memorial, ¶ 459.

⁵¹⁷ Affidavit of Mark McLean, ¶¶ 41-44.

⁵¹⁸ Letter from Paul Buxton to NSDEL, June 25, 2003, **Exhibit R-382**.

252. Thus, even assuming that these measures “related to” the Claimants or their investment, which they do not, the evidence demonstrates that Mr. Buxton, and therefore the Claimants, “first acquired” knowledge of the breach and loss that they now allege, at the very least, five years prior to the filing of the Notice of Arbitration, well outside the timeframe for this Tribunal to have jurisdiction to consider the Claimants’ allegations.

253. In an attempt to get around their failure to bring the claim forward within the three year time limit, the Claimants make the unfounded assertion that the measures summarized above are “continuing measures” on the ground that they had an “ongoing effect”; here because they allowed “DFO to continue to refuse permission to Bilcon to undergo test blasting throughout the remainder of the Environmental Assessment” and that the lack of test blasting “was relied on by the Joint Review Panel as a reason to recommend against the approval of the ... quarry”.⁵¹⁹

254. This assertion must be rejected outright on the simple ground that the “ongoing effect” of a measure does not make it “continuing” and, even if that were the case, continuing measures do not renew the limitations period under Article 1116(2).

255. However, the Claimants’ assertion is also plainly contradicted by the evidence in this case as Nova Stone and Bilcon took steps in 2004 that voided the industrial approval. Specifically, on May 1, 2004 Bilcon entered into a new lease agreement with the owners of the land containing the 3.9 ha parcel that was subject to the industrial approval. As Nova Stone no longer controlled the land on which the 3.9 ha parcel was situated, both the industrial approval and the blasting conditions contained therein were null and void by this date⁵²⁰ — a point later confirmed by Mr. Buxton on August 17, 2004 when he advised the Agency that “[t]he Permit issued ... to Nova Stone Exporters Inc. for a 3.9 ha

⁵¹⁹ Claimants’ Memorial, ¶ 757.

⁵²⁰ Affidavit of Bob Petrie, ¶ 17.

quarry at Whites Point is no longer valid since Nova Stone ... no longer holds the lease to the subject property.”⁵²¹

256. The blasting conditions in the industrial approval therefore could not have allowed DFO “to continue to refuse permission to undergo test blasting throughout the remainder of the EA” because they had been invalidated by Nova Stone and the Claimants themselves, by mid-2004.

257. In sum, the evidence demonstrates that Nova Stone’s industrial approval was issued and subsequently invalidated by Nova Stone well in advance of June 17, 2005. It also demonstrates that the Claimants had knowledge of the measures they complain of now in connection with the industrial approval, and of the losses they allege, well in advance of this June 17, 2005. Further, given that Nova Stone and Bilcon took steps that voided the industrial approval by mid-2004, the measures in issue cannot be construed as “continuing,” regardless of their unsubstantiated “ongoing effects”, which is an irrelevant consideration in any event when interpreting Article 1116(2).

258. The Claimants’ allegations in connection with Nova Stone’s industrial approval are time barred and the Tribunal should dismiss them as a preliminary matter without further consideration of the substantive obligations pleaded.

C. This Tribunal Has No Jurisdiction to Consider Allegations Relating to DFO Determinations on the EA of the Whites Point Quarry and Marine Terminal

259. The Claimants’ allegations regarding DFO’s determinations on the EA of the Whites Point Quarry and Marine Terminal are similarly time-barred under Article 1116(2). These determinations were made well in advance of June 17, 2005 and the Claimants knew or should have known the measures would entail alleged breaches of

⁵²¹ Affidavit of Bob Petrie, ¶ 16. *See also* Letter from Paul Buxton to Jean Crépault, August 17, 2004, **Exhibit R-94**.

NAFTA and costs in addition to those that they would have incurred had they been subjected to the *de minimus* EA process contemplated in their Memorial.⁵²²

260. Canada will not repeat its submissions in Section III(B)(2) regarding the proper interpretation of Article 1116(2), and below only demonstrates the time at which the Claimants acquired knowledge, or should have acquired knowledge, of the alleged breach and loss in connection with DFO's determinations regarding the EA of the Whites Point Quarry and Marine Terminal. Given the plain and ordinary meaning of Article 1116(2), the DFO determinations are time-barred and beyond the jurisdiction of this Tribunal.

261. The Claimants have alleged that the following DFO determinations violated Articles 1102, 1103 and 1105 of NAFTA:

- The determination that the quarry and marine terminal should be included in the scope of project for the purposes of the EA;⁵²³
- The determination that the quarry and marine terminal were to undergo a comprehensive study;⁵²⁴ and
- The determination that the quarry and marine terminal should be referred for referral to a JRP.⁵²⁵

262. Each one of these measures was known to the Claimants prior to June 17, 2005. First, DFO made an initial determination to scope the quarry and marine terminal together on April 14, 2003⁵²⁶ and this determination was later confirmed in the draft JRP Agreement which, as noted in Canada's overview of the Facts, the Claimants had full opportunity to review. Second, the legislative requirement that the quarry and marine

⁵²² The Claimants suggest that there should not have been any federal involvement in the EA of the Whites Point Quarry and Marine Terminal. See Claimants' Memorial, ¶¶ 486-489.

⁵²³ Claimants' Memorial, ¶¶ 758-760.

⁵²⁴ Claimants' Memorial, ¶¶ 761-763.

⁵²⁵ Claimants' Memorial, ¶¶ 764-767.

⁵²⁶ Letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**.

terminal had to undergo a comprehensive study was communicated by DFO on April 14, 2003.⁵²⁷ Finally, the decision to refer the quarry and marine terminal for referral to a review panel was made on June 26, 2003 and known to the Claimants by August 29, 2003.⁵²⁸

263. Also, assuming these measures constitute breaches of Canada's obligations under Articles 1102, 1103 and 1105, an allegation Canada specifically denies, the Claimants knew or should have known of these breaches before June 17, 2005. With respect to Article 1105, the alleged breach would have materialized as soon as the determinations were actually imposed on the Claimants' investment. With respect to the Claimants' claims under Articles 1102 and 1103 they also knew or should have known of the alleged less favourable treatment prior to June 17, 2005, because the treatment which they claim was *more* favourable in a number of the comparator EAs had already been accorded to other domestic and foreign investors.⁵²⁹

264. Moreover, the Claimants knew or should have known before June 17, 2005, that each measure carried an economic cost – the effect of the DFO determinations entailed a more costly EA process than the unrealistic process to which the Claimants claim they were entitled (apparently an EA process with no federal involvement at all).⁵³⁰

265. The Claimants assert that these measures “continued after June 17, 2005, and are continuing today” because of their “ongoing effects.”⁵³¹ As discussed above, the “ongoing effects” of a measure do not make it “continuing.” To the contrary, each DFO

⁵²⁷ Letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**.

⁵²⁸ Affidavit of Stephen Chapman, ¶¶ 24, 30.

⁵²⁹ For example, the NWT Diamonds Project (*see* Claimants' Memorial, ¶¶ 630-633) and the Diavik Diamond Project (*see* Claimants' Memorial, ¶¶ 634-638), both proposed by non-NAFTA proponents, as well as the Tiverton Quarry (*see* Claimants' Memorial, ¶¶ 547-552), proposed by a Canadian proponent, received allegedly more favourable treatment before the treatment granted to the Claimants' investment.

⁵³⁰ *See* Claimants' Memorial, ¶¶ 486-489.

⁵³¹ Claimants' Memorial, ¶¶ 724, 753.

determination was a distinct measure, instantaneous, completed well in advance of June 17, 2005, communicated in writing to the Claimants, and involving costs additional to those the Claimants appear to have originally contemplated in connection with the review of their project proposal.

266. The Claimants’ allegations regarding DFO’s determinations on the EA process for the Whites Point Quarry and Marine Terminal are time-barred and should be dismissed by the Tribunal without further consideration of the substantive obligations pleaded.

D. The Tribunal Has No Jurisdiction to Consider the Acts of the JRP

267. The Claimants allege that Canada has breached its obligations under NAFTA as a result of the JRP’s unreasonable, unfair, arbitrary and discriminatory treatment of their investment, Bilcon, during the organization and administration of the EA process. As explained below, none of these claims has any merit. Moreover, as a preliminary matter, this Tribunal should refuse to even consider these allegations because it has no jurisdiction over the actions of a private, non-governmental body such as the JRP.

268. Pursuant to NAFTA Articles 1101 and 1116, the Tribunal only has jurisdiction over measures “adopted or maintained by a Party.”⁵³² The Claimants allege that the acts of the JRP are such measures because it is (a) an organ of the Government of Canada; or, in the alternative, (b) an entity empowered by Canada to exercise governmental authority.⁵³³ They also allege that the members of a JRP are agents of CEAA, and hence, organs of Canada.⁵³⁴

⁵³² *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, 32 I.L.M. 289, (“NAFTA”), **RA-47**. Article 1101 provides “This Chapter applies to measures adopted or maintained by a Party . . .” and Article 1116 provides, in relevant part, “[a]n investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A [of Chapter Eleven]...”.

⁵³³ Claimants’ Memorial, ¶¶ 703-717.

⁵³⁴ Claimants’ Memorial, ¶ 706.

269. The Claimants' arguments are baseless and result from a misunderstanding and a misapplication of the relevant rules of both Canadian and international law. First, contrary to the Claimants' arguments, the JRP is not an organ of the Government of Canada and cannot be equated with one. Second, the Claimants cite no support, under either Canadian or international law, for the proposition that the members of a JRP are agents of the Agency, and hence, organs of Canada. Third, while the JRP did have certain governmental powers, the Claimants do not make claims against Canada with respect to those powers.

270. For the above reasons, explained in more detail below, the Claimants have failed to prove that the actions of the JRP or the members of the JRP are in fact actions of the government of Canada.⁵³⁵

a) The JRP is Not an Organ of Canada

271. Canada is responsible for the acts of any organ of its federal government, as well as the acts of any organ of any of its sub-national governments, such as provincial or municipal governments.⁵³⁶ Indeed, such responsibility is a cornerstone rule of the customary international law regarding State responsibility.⁵³⁷ It is reflected in Article 4 of the ILC Articles,⁵³⁸ which provides:

⁵³⁵ In an apparent recognition that none of the other potential grounds for attributing the conduct of a non-State actor to a State apply in this case, the Claimants have only argued these two grounds for attributing the conduct of the JRP to Canada. Accordingly, Canada will not take the time here to demonstrate that when undertaking the actions that the Claimants allege were wrongful, the JRP was neither under the instruction nor the effective control of Canada. Nor will Canada take the time to demonstrate that Canada never adopted any of the alleged violations of international law by the JRP as its own.

⁵³⁶ Canada's responsibility at international law for measures of its subnational governments was reaffirmed in Article 105 of NAFTA, **RA-47**: ("The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.")

⁵³⁷ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), International Court of Justice, Judgment of 26 February 2007 (the "*Genocide Convention case*"), ¶ 385, **RA-12**.

⁵³⁸ *ILC Articles*, Article 4, **RA-61**.

Article 4. Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

272. At customary international law, a person or entity is an “organ” of a State if it is one of the individuals or collective entities that “make up the organization of the state and acts on its behalf.”⁵³⁹ This definition can be met in one of two ways: 1) if the person or entity has the status of an organ under the law of the State in question (i.e. it is a *de jure* organ); or 2) if the person or entity may, for the purposes of international responsibility, be equated with a State organ even if it does not have that status in the internal law of the State (i.e. it is a *de facto* organ).⁵⁴⁰ The Claimants have failed to prove that the JRP satisfies either of these tests.

(1) The JRP is Not a *De Jure* Organ of Canada

273. As codified in paragraph 2 of Article 4 of the ILC Articles, a person or entity is an organ of a State at international law if it has the status of an organ in a State’s internal law.⁵⁴¹ Neither JRPs as entities, nor the individual members of those panels, have that status in Canadian law.

⁵³⁹ *Responsibility of States for Internationally Wrongful Acts with Commentaries*, Text adopted by the International Law Commission at its fifty-third session, in 2001, (A/56/10), United Nations, New York 2001 (“*Commentary on the ILC Articles*”), p. 40, ¶ 1, **RA-60**. See also *Genocide Convention case*, ¶ 388, **RA-12**.

⁵⁴⁰ *Genocide Convention case*, ¶¶ 386, 392, **RA-12**.

⁵⁴¹ *Genocide Convention case*, ¶ 386, **RA-12**.

274. The Claimants’ assertion that “the internal law of Canada has expressly recognized the Joint Review Panel itself as an organ of the State”⁵⁴² is unsupported. In fact, there is no Canadian law that *expressly* defines the organs of the Government of Canada. There are, however, a number of key statutes regarding the functioning and operation of the entities that make up the Government of Canada. While their application to a particular entity does not necessarily mean the entity is an organ of Canada, if they do not apply to a particular entity, then this is a good indication that the entity is not an organ of the Government of Canada at Canadian law. None of these key statutes apply to a JRP or its members.

275. For example, the *Financial Administration Act* provides for the financial administration of the Government of Canada, and in various schedules attached to it, lists the departments, divisions, branches, departmental corporations, Crown corporations, tribunals, commissions, boards and other “portions” that make up the federal government.⁵⁴³ These lists include obvious organs such as departments like DFO and agencies like CEAA.⁵⁴⁴ They also include tribunals and other boards responsible for making recommendations to the government, including in the EA context, such as the National Energy Board.⁵⁴⁵ They do not include JRPs established pursuant to the *CEAA*, nor the individual members of those panels.

276. In addition, under Canadian law, government records and records of government personnel are generally subject to the *Library and Archives Act*,⁵⁴⁶ the *Access to*

⁵⁴² Claimants’ Memorial, ¶ 706.

⁵⁴³ *Financial Administration Act: An Act to provide for the financial administration of the Government of Canada, the establishment and maintenance of the accounts of Canada and the control of Crown corporations*, R.S.C., 1985, c. F-11 (“*Financial Administration Act*”), Schedules I-VI, **Exhibit R-387**.

⁵⁴⁴ *Financial Administration Act*, Schedules I and I.1, **Exhibit R-387**.

⁵⁴⁵ *Financial Administration Act*, Schedule I.1, **Exhibit R-387**.

⁵⁴⁶ *Library and Archives of Canada Act: An Act to establish the Library and Archives of Canada, to amend the Copyright Act and to amend certain Acts in consequence*, S.C. 2004, c. 11 (“*Library and Archives Act*”), **Exhibit R-388**.

Information Act,⁵⁴⁷ and the *Privacy Act*.⁵⁴⁸ The first Act prohibits the destruction of government records⁵⁴⁹ and the latter two allow public access to those records, subject to defined exceptions.⁵⁵⁰ All three statutes contain the same broad definition of a “government institution” as including the same types of entities listed in the *Financial Administration Act*.⁵⁵¹ Accordingly, they list departments like DFO and agencies like CEAA. Further, like the *Financial Administration Act*, they also include tribunals and boards, like the National Energy Board, that provide recommendations to government decision-makers in the EA context. JRPs are not included in the definition of a government institution under these Acts. Moreover, as Robert Connelly explains in his Expert Report, the records of the members of a JRP are not subject to these Acts.⁵⁵²

277. The Claimants ignore the fact that these statutes do not apply to JRPs. Instead, they argue that JRPs are organs of Canada solely because they are subject to judicial review by Canadian courts⁵⁵³ and that these courts have recognized them as organs.⁵⁵⁴

278. Not one of the court decisions cited by the Claimants concludes that JRPs are organs of the State. In fact, whether or not JRPs are organs of Canada is an issue that does not even arise in these cases. Under the *Federal Court Act*,⁵⁵⁵ the statute governing

⁵⁴⁷ *Access to Information Act: An Act to extend the present laws of Canada that provide access to information under the control of the Government of Canada*, R.S.C., 1985, c. A-1 (“*Access to Information Act*”), **Exhibit R-389**.

⁵⁴⁸ *Privacy Act: An Act to extend the present laws of Canada that protect the privacy of individuals and that provide individuals with a right of access to personal information about themselves*, R.S.C., 1985, c. P-21 (“*Privacy Act*”), **Exhibit R-390**.

⁵⁴⁹ *Library and Archives Act*, s.12(1), **Exhibit R-388**.

⁵⁵⁰ *Access to Information Act*, s. 4, **Exhibit R-389**; *Privacy Act*, s. 12, **Exhibit R-390**.

⁵⁵¹ *Library and Archives Act*, s. 2, **Exhibit R-388**; *Access to Information Act*, s. 3 and Schedule I, **Exhibit R-389**; *Privacy Act*, s. 3 and Schedule, **Exhibit R-390**.

⁵⁵² Expert Report of Robert G. Connelly, ¶ 63.

⁵⁵³ Claimants’ Memorial, ¶¶ 707-711.

⁵⁵⁴ Claimants’ Memorial, ¶¶ 709-710.

⁵⁵⁵ *Federal Court Act: An Act respecting the Federal Court of Appeal and the Federal Court*, R.S.C., 1985, c. F-7 (“*Federal Court Act*”), **Exhibit R-391**.

judicial review in the cases cited by the Claimants, judicial review is, in theory, available with respect to any entity that is a creature of statute.⁵⁵⁶ Thus, the mere fact that an entity is subject to judicial review in Canada does not mean that it is an organ of the government. The Supreme Court of Canada has made this clear. In *McKinney v. University of Guelph*, it explained:

While universities are statutory bodies performing a public service and may be subjected to the judicial review of certain decisions, this does not in itself make them part of government The basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision makers. . . . The fact that a university performs a public service does not make it part of government.⁵⁵⁷

279. Accordingly, merely because a JRP may be subjected to judicial review does not mean that it is an organ of the Government of Canada under the applicable Canadian law.

(2) The JRP is Not a *De Facto* Organ of Canada

280. The JRP is also not a *de facto* organ of Canada. In the *Genocide Convention* case the International Court of Justice (“ICJ”) explained that, in “exceptional” circumstances, persons or entities without the status of organs at internal law, can be considered organs at international law.⁵⁵⁸ However, the ICJ further explained that

...persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not

⁵⁵⁶ Under s. 18 of the *Federal Court Act*, **Exhibit R-391**, the Federal Court has exclusive jurisdiction to judicially review any decision or order of a “federal board, commission or other tribunal.” The term “federal board, commission or other tribunal” is defined broadly in s. 2 to include “any body or person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*”.

⁵⁵⁷ *McKinney v. University of Guelph* [1990] 3 S.C.R. 229, **Exhibit R-384**. In this case, the issue was whether the University of Guelph was an organ of Government such that it was subject to the Canadian *Charter of Rights and Freedoms*.

⁵⁵⁸ *Genocide Convention case*, ¶ 393, **RA-12**.

follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument.⁵⁵⁹ (emphasis added)

281. In applying this standard, the ICJ has made it clear that customary international law requires an extraordinarily high degree of dependence, on the one hand, and control, on the other hand, in order for a person or entity that is not *de jure* an organ of a State to be considered a *de facto* organ.⁵⁶⁰ NAFTA tribunals have followed this guidance in practice. For example, in *Fireman’s Fund Insurance Company v. Mexico*, the Tribunal refused to attribute to Mexico the conduct of a working group composed of government officials, noting that its recommendations were “subject at all times to ratification or rejection by the competent government authorities.”⁵⁶¹ Similarly, in *GAMI Investments Inc. v. Mexico*, the Tribunal rejected a claim that the failures of an agricultural group composed in part of government officials, could be attributed to Mexico as “[t]he Mexican government was not the only actor in important aspects of the [Program].”⁵⁶²

282. In this case, the JRP is not a *de facto* organ of the State because it is not in a relationship of “complete dependence” on the Government of Canada. In fact, such a relationship of dependence and control would be antithetical to the independent nature of the review panel. As explained by Robert Connelly in his Expert Report, EA review panels in Canada were initially composed of government officials.⁵⁶³ However, in 1977, a decision was made that in order to ensure the impartial and independent assessment of

⁵⁵⁹ *Genocide Convention case*, ¶ 392, **RA-12**.

⁵⁶⁰ *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, (Nicaragua v. United States of America), International Court of Justice, Judgment of 27 June 1986 (“*Nicaragua v. United States of America – Judgement*”), ¶¶ 109, 115-116, **RA-16**; *Genocide Convention case*, ¶¶ 388, 394-395, **RA-12**.

⁵⁶¹ *Fireman’s Fund Insurance Company v. United Mexican States* (ICSID Case No. ARB(AF)/02/1) Award, 14 July 2006 (“*Fireman’s Fund – Award*”), ¶¶ 149-150, **RA-26**.

⁵⁶² *GAMI – Award*, ¶ 110, **RA-27**.

⁵⁶³ Expert Report of Robert Connelly, ¶ 23.

projects, it was necessary for the members of a review panel to be non-governmental officials.⁵⁶⁴ This feature of JRPs has been maintained to the present day.

283. As such, while JRPs are created by government, they govern their own process from the time of their constitution until the time they finish their report. In particular, once the review panel is constituted, it takes no instruction from government, and operates completely independently.⁵⁶⁵ For example, while a JRP is provided with a Secretariat consisting of Agency staff to help with administrative functions,⁵⁶⁶ if it needs legal advice, it does not have access to Department of Justice counsel.⁵⁶⁷

284. In fact, even when a government organ offers evidence to the JRP on a topic within its expertise, it is treated as offering merely an expert opinion, not direction.⁵⁶⁸ The JRP is free to disregard that opinion if it finds other evidence more persuasive on that point.⁵⁶⁹ The fact that a JRP is not obliged to follow the opinions offered by government bodies is more than sufficient evidence of its independent nature.

285. In light of the above, a JRP cannot be in a relationship of “complete dependence” and the Claimants have thus failed to establish that the JRP should be treated as a *de facto* organ of Canada in this case.

b) The JRP Was Not Exercising Elements of Governmental Authority with Respect to the Alleged Breaches

286. The actions of persons or entities which are not organs or equivalent to organs can be attributed to a State where the person or entity is “empowered” by the law of the State

⁵⁶⁴ Expert Report of Robert Connelly, ¶ 24.

⁵⁶⁵ Expert Report of Robert Connelly, ¶ 63.

⁵⁶⁶ Affidavit of Stephen Chapman, ¶¶ 3-6; JRP Agreement, **Exhibit R-27**.

⁵⁶⁷ Expert Report of Robert Connelly, ¶ 63.

⁵⁶⁸ Expert Report of Robert Connelly, ¶ 63.

⁵⁶⁹ Expert Report of Robert Connelly, ¶ 63.

to exercise certain elements of governmental authority. However, when a person or entity that is not an organ is empowered to exercise certain government authority, only actions that occur during the exercise of that authority are attributable to the State.⁵⁷⁰

287. Article 5 of the ILC Articles summarizes these rules of customary international law, providing:

Article 5. Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance. (emphasis added).

288. As the Tribunal in *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* explained, this rule requires a two-part test: “first, the act must be performed by an entity empowered to exercise elements of governmental authority [and] second, the act itself must be performed in the exercise of governmental authority”.⁵⁷¹ Applied to this case, none of the alleged wrongful acts committed by the JRP can be attributed to Canada.

289. As explained by Robert Connelly in his Expert Report, under Canadian law, an EA has two components: information gathering and decision making.⁵⁷² In an assessment

⁵⁷⁰ The Claimants’ position is not entirely clear in this regard, but it appears from ¶ 715 of their Memorial that they acknowledge this standard rule.

⁵⁷¹ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13) Award, 6 November 2008 (“*Jan de Nul – Award*”), ¶ 163, **RA-33**. See also *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award, 18 June 2010, (“*Gustav – Award*”), ¶ 175, **RA-31** (expressly applying the same two part test). See also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Award, 27 August 2009 (“*Bayindir – Award*”), ¶¶ 121-122, **RA-7** (explaining that the “general” empowerment of an entity to exercise elements of governmental authority is insufficient in itself for purposes of attribution).

⁵⁷² Expert Report of Robert Connelly, ¶ 17 (quoting *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, p. 79, **Exhibit R-3**).

by a JRP, the JRP is responsible for the information gathering component, but government officials are responsible for the decision making component.

290. During the information gathering component, a JRP's role is to collect, assemble and marshal the relevant evidence. Section 35 of the *CEAA*, entitled "Powers of a Review Panel,"⁵⁷³ invests JRPs with certain elements of governmental authority in order to facilitate these tasks. Specifically, s. 35 provides that a review panel has the power to: (1) summon witnesses to testify or produce documents;⁵⁷⁴ (2) enforce such summonses as if it was a domestic court in Canada;⁵⁷⁵ and (3) close otherwise public hearings in order to protect a witness or the environment.⁵⁷⁶ Neither s. 35 nor any other provision enumerates any other type of governmental authority for JRPs.

291. During the "decision-making" phase, the JRP's only role is to provide its recommendation to government officials for their decision. Indeed, with respect to this component of an EA, a JRP is not empowered to exercise any governmental authority under Canadian law. To the contrary, under s. 34 of the *CEAA*, a review panel does no more than submit to the Minister of the Environment and the RA a report containing its rationale, conclusions and recommendation relating to the EA of the project.⁵⁷⁷ The decision on the EA, and whether to allow the project to proceed remains exclusively with the relevant government organs.

292. The Claimants argue that the actions of the JRP can be attributed to Canada because it exercised "governmental authority" relating to the "determination of the agenda for the hearings, the calling of witnesses, the allocation of time for witnesses, the

⁵⁷³ While these powers are expressly provided to a review panel under s. 35 of the *CEAA*, s. 41(d) mandates that a JRP be afforded these same powers.

⁵⁷⁴ *CEAA*, s. 35(1), **Exhibit R-1**.

⁵⁷⁵ *CEAA*, ss. 35(2), 35(5), **Exhibit R-1**.

⁵⁷⁶ *CEAA*, ss. 35(3)-(4.1), **Exhibit R-1**.

⁵⁷⁷ *CEAA*, s. 34, **Exhibit R-1**.

questioning of witnesses, the control of the hearings, and the activities involved in making recommendations...”⁵⁷⁸

293. The Claimants do not explain how any one of these actions constitutes the exercise of “governmental authority.” In fact, none of the acts identified relate to the governmental authority granted to JRPs under s. 35 of *CEAA*, i.e. the issuance of summonses or the closing of the otherwise public hearings. Indeed, no allegations relating to the exercise of such powers is even possible for a simple reason: during the Whites Point EA, the JRP did not once issue a summons or close the hearings or otherwise exercise any of the governmental authority it had been granted.

294. All of the identified acts relate not to governmental authority, but rather to the JRP’s own internal organization of its process. While there is no question that the JRP’s organization and conduct of the public hearings in the Whites Point EA were done in the general fulfillment of both the public and government interest in environmental assessment, this is not enough to show that these actions are governmental in nature. The question that is raised by the Claimants’ allegations is whether or not the JRP was exercising governmental authority in organizing its process.

295. For example, in *Jan de Nul*, the Tribunal was considering a claim against Egypt based on the conduct of the Suez Canal Authority, an entity that the Egyptian government had created by statute to manage maintain and develop the Suez Canal.⁵⁷⁹ The claim in question involved the Authority’s exercise of that statutory mandate related to a contract to widen and deepen the southern regions of the Canal.⁵⁸⁰ The Tribunal explained that the fact that the “subject matter” of the disputed conduct “related to the core functions of the SCA” which were acting for the government’s and public’s benefit in managing the Suez

⁵⁷⁸ Claimants’ Memorial, ¶ 715.

⁵⁷⁹ *Jan de Nul – Award*, ¶ 45, **RA-33**.

⁵⁸⁰ *Jan de Nul – Award*, ¶ 46, **RA-33**.

Canal, was “irrelevant.”⁵⁸¹ In particular, it held that “[w]hat matters is not the “*service public*” element, but the use of “*prérogatives de puissance publique*” or governmental authority.”⁵⁸²

296. Similarly, the *UPS* Tribunal considered a claim against Canada, based on the conduct of Canada Post. The Claimants had alleged that as a creature of statute that was performing an essential government function, all of Canada Post’s acts were “under governmental authority.”⁵⁸³ The Tribunal disagreed. It held that although Canada Post was indeed a creature of statute created to serve the public interest and with “an essential role in the economic, social and cultural life of Canada,”⁵⁸⁴ not all of its acts in the exercise of its statutory mandate were done in the exercise of governmental authority.⁵⁸⁵ In particular, the Tribunal found that the decisions relating to the use of Canada Post of its own infrastructure were not made in the exercise of public authority.⁵⁸⁶

297. The same conclusion should be reached here. Regardless of the public character of the decisions made by the JRP and the fact that they were in furtherance of its statutory mandate, they were not decisions exercising governmental authority, and hence they, cannot be attributed to Canada as a matter of international law.

E. This Tribunal May Not Consider Measures Not Capable of Causing Damage

298. NAFTA Article 1116(1) prescribes the pre-conditions to a Chapter Eleven claim; specifically, a breach of a Chapter Eleven obligation and loss or damage arising out of that breach. Article 1116(1) provides:

⁵⁸¹ *Jan de Nul – Award*, ¶ 169, **RA-33**.

⁵⁸² *Jan de Nul – Award*, ¶ 170, **RA-33**; *Gustav – Award*, ¶ 202, **RA-31** (explaining that “[i]t is not enough for an act of a public entity to have been performed in the general fulfilment of some general interest, mission or purpose to qualify as an attributable act.”).

⁵⁸³ *UPS – Award*, ¶ 71, **RA-79**.

⁵⁸⁴ *UPS – Award*, ¶ 57, **RA-79**.

⁵⁸⁵ *UPS – Award*, ¶ 77, **RA-79**.

⁵⁸⁶ *UPS – Award*, ¶ 78, **RA-79**.

An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

299. Article 1116 thus stipulates that investors may only submit their claim to arbitration if the investor has “incurred loss, or damage, by reason of, or arising out of” the alleged breach of the NAFTA. It follows that measures not capable of causing loss or damage may not be considered by the Tribunal.

300. The Claimants allege that the federal government's December 17, 2007 determination to accept the recommendation of the JRP⁵⁸⁷ was unlawful.⁵⁸⁸ However, the federal government's acceptance of the recommendation was incapable of causing the Claimants loss or damage because, one month earlier, on November 20, 2007, Nova Scotia's Minister of Environment and Labour had already rejected the proposal to construct and operate the Whites Point Quarry and Marine Terminal.⁵⁸⁹ Once the province decided to reject the proposal, the project was effectively terminated and could not proceed, rendering moot any determination to be made by the federal government.

301. Measures not capable of causing loss or damage may not be considered by the Tribunal. Any allegations made by the Claimants relating to the federal government's

⁵⁸⁷ *The Government of Canada's Response to the EA Report of the JRP on the Whites Point Quarry and Marine Terminal Project (the Project)*, December 17, 2007, **Exhibit R-383**.

⁵⁸⁸ See for example Claimants' Memorial, ¶ 455.

⁵⁸⁹ Letter from Minister of the Environment and Labour to Paul Buxton, November 20, 2007, **Exhibit R-331**.

acceptance of the recommendation of the JRP must therefore be disregarded by this Tribunal.

F. Conclusions on Jurisdiction

302. The Claimants make several arguments relating to measures that are outside of the jurisdiction of this Tribunal. The industrial approval for the 3.9 ha quarry granted to Nova Stone, a Canadian company, does not “relate to” the Claimants. Even if it does “relate to” the Claimants, the measure is clearly time-barred, along with the decision to scope the quarry and marine terminal together, the decision to conduct a comprehensive study, and the decision to undergo a JRP hearing. The Claimants also make allegations against the JRP when its actions are not attributable to the Government of Canada. Finally, the Claimants make claims against several measures that were incapable of causing them loss.

IV. CANADA HAS NOT VIOLATED ITS NAFTA OBLIGATIONS

A. The Claimants Have Failed to Demonstrate a Violation of Article 1105(1) – Minimum Standard of Treatment

1. Summary of Canada’s Position

303. The Claimants allege that the actions of various federal and provincial government departments and agencies, as well as the actions of the JRP, in initiating, administering, and concluding the EA of the Whites Point project violated Article 1105 of NAFTA. But in doing so they ignore both the content of Canada’s obligation under Article 1105 – the customary international law minimum standard of treatment – and that the threshold for demonstrating a breach of Article 1105 is high.

304. Moreover, on the facts of this case, the Claimants fail to establish that any of the measures complained of rise to the level required to result in a breach of the high standard set by Article 1105. First, the actions of Canada and Nova Scotia in initiating, administering and concluding the EA of the Whites Point project were reasonable, fair and fully within the applicable legislative and regulatory regime. Second, the actions of the JRP, even if attributable to Canada, provided Bilcon with a fair process in which it had every opportunity to present the information and data that it was supposed to in the Whites Point EA. Finally, the Claimants fail to establish that NAFTA Article 1105 even requires the protection of either a “stable legal and business environment” or “legitimate expectations.”⁵⁹⁰

305. In the end, if the Claimants had issues with any of the actions of which they now complain, they could and should have challenged them before Canada’s domestic courts. It is not the role of this Tribunal under Article 1105 to serve as the arbiter of the rightness or wrongness, years after the fact, of the many acts now being challenged by the Claimants. As the *Chemtura* tribunal found: “the role of a Chapter 11 Tribunal is not to

⁵⁹⁰ Claimants’ Memorial, ¶¶ 364, 340.

second-guess the correctness of the science-based decision-making of highly specialized national regulatory agencies.”⁵⁹¹ The Claimants’ Article 1105 claim is therefore unsupported and without merit.

2. Customary International Law is the Applicable Source of Law for Article 1105(1)

306. Article 1105(1), the “minimum standard of treatment” provision of NAFTA Chapter Eleven, provides:

Article 1105: Minimum Standard of Treatment

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

307. The proper interpretation of Article 1105(1) was confirmed by the NAFTA Free Trade Commission’s (“FTC’s”) July 31, 2001 *Note of Interpretation* which states:

- 1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
- 2) The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

⁵⁹¹ *Chemtura – Award*, ¶ 134, **RA-18**; *See also S.D. Myers – Partial Award*, ¶ 261, **RA-65** (“When interpreting and applying the ‘minimum standard’, a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive.”). To the same effect *see: S.D. Myers Inc. v. Canada* (UNCITRAL) Separate Opinion of Professor Bryan Schwartz, concurring except with respect to performance requirements, in the partial award of the tribunal, 12 November 2000, ¶ 230, **RA-63**. The *S.D. Myers* Tribunal’s statement was cited with approval by the *GAMI* and *Cargill* Tribunals (*GAMI – Final Award*, ¶ 93, **RA-27**; *Cargill Incorporated v. United Mexican States*, (ICSID Case No. ARB (AF)/05/02) Award, 18 September 2009 (“*Cargill – Award*”), ¶ 292, **RA-11**).

- 3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).⁵⁹²

308. As NAFTA Article 1131(2) indicates and subsequent NAFTA tribunals have confirmed, the FTC *Note of Interpretation* represents the definitive interpretation of Article 1105(1) and it is binding on all tribunals constituted under NAFTA Chapter Eleven.⁵⁹³

309. The *Note of Interpretation*'s reference to customary international law clarifies that Article 1105 does not create an open-ended obligation to be defined by tribunals. As the *Mondev* Tribunal stated, it is not for the Tribunal to “apply its own idiosyncratic standard in lieu of the standard laid down in Article 1105(1).”⁵⁹⁴ Instead, Article 1105(1) is an “objective” standard of treatment for investors set by rules of customary international law.

⁵⁹² NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter Eleven Provisions, 31 July 2001 (“*Note of Interpretation*”), at B, **RA-49**. Indeed, Canada’s Statement of Implementation for NAFTA indicated that the intent of Article 1105 is “to assure a minimum standard of treatment of investments of NAFTA investors” and to provide for “a minimum absolute standard of treatment, based on long-standing principles of customary international law”. See Canada, Department of Foreign Affairs and International Trade, *Statement of Implementation: North American Free Trade Agreement*, vol.128, no.1 (Ottawa: Canada Gazette, 1994), p.149 (“*Statement of Implementation: NAFTA*”), **RA-85**.

⁵⁹³ NAFTA Article 1131(2) provides that “an interpretation by the [Free Trade] Commission of a provision of [the NAFTA] shall be binding on a Tribunal established under this Section”, NAFTA, **RA-47**. NAFTA Tribunals have consistently recognized that the Note of Interpretation is binding on them. See for example *Glamis – Award*, ¶ 599, **RA-29**; *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL) Final Award, 26 January 2006 (“*Thunderbird – Final Award*”), ¶ 192 *et seq.*, **RA-32**; *Methanex-Award on Jurisdiction*, Part IV, Chapter C, ¶ 20, **RA-44**; *Mondev – Award*, ¶ 100 *et seq.*, **RA-46**; *The Loewen Group Inc. and Raymond L. Loewen v. United States of America* (ICSID No. ARB/98/3) Award on Merits, 26 June 2003, ¶ 126 (“*Loewen – Award*”), **RA-75**; *Waste Management Inc. v. United Mexican States* (ICSID No. ARB(AF)00/3) Award, 30 April 2004, ¶ 90 *et seq.*, (“*Waste Management – Award*”), **RA-82**; *Cargill – Award*, ¶¶ 135, 267-268, **RA-11**; *ADF Group Inc. v. United States of America*, (ICSID Case No. ARB (AF)/00/1) Award, 9 January 2003 (“*ADF – Award*”), ¶ 176, **RA-1**.

⁵⁹⁴ *Mondev – Award*, ¶ 120, **RA-46**. Contrary to the Claimants’ suggestion and as the *Loewen* Tribunal noted, fair and equitable treatment and full protection and security are “not free standing obligations”, “[t]hey constitute obligations only to the extent they are recognized by customary international law”. See *Loewen – Award*, ¶ 128, **RA-75**; see also *United Parcel Service v. Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002 (“*UPS – Award on Jurisdiction*”), ¶ 97, **RA-80** (“The obligation to accord fair and equitable treatment is not in addition to or beyond the minimum standard”).

310. The Claimants acknowledge that the FTC *Note of Interpretation* is binding on this Tribunal⁵⁹⁵ but inexplicably assert that “[d]etermining the content of that NAFTA Article 1105 international law standard is not an issue of proving the existence of custom,”⁵⁹⁶ and that Article 1105 only “sets out a standard of treatment that includes, at a minimum, a requirement that Canada follow customary international law.”⁵⁹⁷

311. This interpretation finds no support in the plain language of the FTC *Note of Interpretation*. In fact, the *Note* confirms the exact opposite of the interpretation being advanced by the Claimants — specifically, it provides that customary international law is the applicable source of law to determine the minimum standard of treatment under Article 1105(1). NAFTA tribunals have accordingly found that “Article 1105(1) requires no more, no less, than the minimum standard of treatment demanded by customary international law.”⁵⁹⁸

312. The Claimants are therefore misguided in suggesting that the substantive content of Article 1105 is modified by Article 1103, Chapter Eleven’s MFN provision, through the incorporation of standards of treatment found in Bilateral Investment Treaties (“BITs”) to which Canada is not a Party.⁵⁹⁹ All three NAFTA Parties have consistently rejected this proposition⁶⁰⁰ and the *Note of Interpretation* makes clear that “[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of

⁵⁹⁵ Claimants’ Memorial, ¶ 288.

⁵⁹⁶ Claimants’ Memorial, ¶ 290.

⁵⁹⁷ Claimants’ Memorial, ¶ 289.

⁵⁹⁸ *Cargill – Award*, ¶ 268, RA-11.

⁵⁹⁹ Claimants’ Memorial, ¶¶ 443-453.

⁶⁰⁰ See for example the Parties’ submissions in *Chemtura v. Canada*: Canada’s Counter-Memorial, 20 October 2008, ¶¶ 859-911 (“*Chemtura – Counter-Memorial*”), R-21; The United States’ 1128 submission of 31 July 2009 (“*Chemtura – U.S. 1128*”), R-20; Mexico’s 1128 submission of 31 July 2009 (“*Chemtura – Mexico 1128*”), R-19.

Article 1105(1)”. NAFTA Tribunals have also consistently rejected the Claimants’ argument, the most recent being the *Chemtura* Tribunal in August of 2010.⁶⁰¹

3. The Claimants Bear the Burden of Establishing the Existence of a Rule of Customary International Law

313. The party alleging the existence of a rule of customary international has the burden of proving it. The ICJ has confirmed this fundamental point, as have prominent scholars, and several NAFTA Tribunals.⁶⁰² In the NAFTA context, a number of tribunals have explained the burden to be discharged under Article 1105(1). The *UPS* Tribunal articulated the burden as follows: “to establish a rule of customary international law two requirements must be met: consistent State practice and an understanding that the practice is required by law”⁶⁰³ (*opinio juris*). More recently, the *Cargill* Tribunal held that where

⁶⁰¹ See *Chemtura – Award*, ¶¶ 235-236, **RA-18** (“The Tribunal can dispense with resolving this issue as a matter of principle. Indeed, even if it were admissible to import a BIT FET clause... Claimant has not established that the FET clause of any of the treaties to which it indistinctly refers grants any additional measure of protection not afforded by Article 1105 of NAFTA”).

⁶⁰² *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. United States)*, [1952] I.C.J. Rep. 176, 27 August 1952 (“*Rights of Nationals case*”), p. 200, citing *The Asylum Case (Colombia v. Peru)*, [1950] I.C.J. Rep. 266, **RA-13** (“The Party which relies on custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”); see also Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008), p.330, **RA-58** (“In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings”); *ADF – Award*, ¶ 185, **RA-1** (For example, the *ADF* Tribunal stated: “The investor, of course, in the end has the burden of sustaining its charge of inconsistency with Article 1105(1). That burden has not been discharged here and hence, as a strict technical matter, the Respondent does not have to prove that the current customary international law concerning standards of treatment consists only of discrete, specific rules applicable to limited contexts.”); see also *UPS – Award on Jurisdiction*, ¶ 84, **RA-80** (“the obligations imposed by customary international law may and do evolve. The law of state responsibility of the 1920s may well have been superseded by subsequent developments. It would be remarkable were that not so. *But relevant practice and the related understandings must still be assembled in support of a claimed rule of customary international law.*”[emphasis added]).

⁶⁰³ *UPS – Award on Jurisdiction*, ¶ 84, **RA-80**; see also *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* [1969], I.C.J. Rep. 4, Judgment, 20 February 1969 (“*North Sea Continental Shelf Cases – Judgement*”), ¶ 74, **RA-51** (“it is an ‘indispensable requirement’ to show that State practice, including that of States whose interests are specifically affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved”); *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)* [1985] I.C.J. Rep.13 (“*Libyan Arab Jamahiriya*”), ¶ 27, **RA-14** (“it is of course axiomatic that the

the existence of custom has not been demonstrated, “it is not the place of the Tribunal to assume this task. Rather, the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.”⁶⁰⁴

314. The Claimants misstate these most basic elements of demonstrating the existence of a rule of customary international law and instead propose that “the content of customary international law can be sourced through international tribunal decisions and that it is not necessary to specifically prove the elements of state practice and *opinio juris*.”⁶⁰⁵ While investment arbitration awards may contain valuable analysis of State practice and *opinio juris* in relation to a particular rule of custom, they cannot themselves substitute for actual evidence of State practice and *opinio juris*. As the Tribunal in *Glamis* noted, awards of international tribunals can “serve as illustrations of customary international law if they involve an examination of customary international law,” but they “do not constitute State practice and thus cannot create or prove customary international law.”⁶⁰⁶

315. The cases cited by the Claimants in their Memorial apply an autonomous standard of “fair and equitable treatment”⁶⁰⁷ that makes no link to the customary law minimum standard of treatment. NAFTA tribunals have consistently found that arbitral awards

material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states...”); *Nicaragua v. United States of America – Judgment*, ¶ 207, **RA-16** (“For a new customary rule to be formed, not only must the acts concerned ‘amount to settled practice’, but they must be accompanied by the *opinio juris sive necessitates*. Either the States taking such action or the other States in a position to react to it must have behaved so that their conduct is ‘evidence of a belief that this is practice is rendered obligatory by the existence of a rule of law requiring it.’”).

⁶⁰⁴ *Cargill – Award*, ¶¶ 271, 273, **RA-11**.

⁶⁰⁵ Claimants’ Memorial, ¶ 292.

⁶⁰⁶ *Glamis – Award*, ¶ 605, **RA-29**; see also *Cargill – Award*, ¶ 277, **RA-11** (“It is important to emphasize, however, as Mexico does in this instance that the awards of international tribunals do not create customary international law but rather, at most, reflect customary international law. Moreover, in both the case of scholarly writings and arbitral decisions, the evidentiary weight to be afforded such sources is greater if the conclusions therein are supported by evidence and analysis of custom.”).

⁶⁰⁷ Claimants’ Memorial, ¶ 303.

applying “autonomous standards provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom.”⁶⁰⁸ This is borne out by the fact that none of the awards cited by the Claimants undertake the requisite examination of State practice and *opinio juris* to demonstrate the existence of a rule of customary international law that guarantees, for example, “treatment free from political motivation,” or a “stable legal and business environment” or “legitimate expectations.”⁶⁰⁹

316. The Claimants also misconstrue their burden by asserting that “[t]ribunals, NAFTA and non-NAFTA alike, have also recognized that the customary international law standard has been influenced by the many bilateral investment treaties obliging states to provide fair and equitable treatment and full protection and security.”⁶¹⁰ While they cite to the *Mondev* Tribunal in support of this proposition, the *Mondev* award actually provides that Article 1105(1) “refers to a standard existing under customary international law, and not to standards established by other treaties of the three NAFTA Parties.”⁶¹¹

⁶⁰⁸ *Glamis – Award*, ¶ 608, **RA-29**; see also *Cargill – Award*, ¶ 278, **RA-11** (Arbitral awards are “relevant to the issue presented in Article 1105(1) only if the fair and equitable treatment clause of the BIT in question was viewed by the Tribunal as involving, like Article 1105, an incorporation of the customary international law standard rather than autonomous treaty language.”).

⁶⁰⁹ See Claimants’ Memorial, ¶¶ 335, 364 and ¶ 340. For example, there was no reference to the minimum standard of treatment under customary international law in the relevant BITs in any of the arbitral decisions in *Tecmed*, *Eureko*, *Saluka*, *Biwater Gauff*, or *Azurix*, all of which are relied on by the Claimants (Claimants’ Memorial, ¶¶ 286, 303). Similarly, none of these tribunals undertook an analysis of State practice or *opinio juris*. See for example *Tecnicas Medioambientales TECMED S.A. v. Mexico* (ICSID No. ARB(AF)00/2) Award, 29 May 2003 (“*Tecmed – Award*”), ¶¶ 152-174, **RA-73**; *Eureko v. Republic of Poland*, Partial Award, 19 August 2005 (“*Eureko – Partial Award*”), ¶¶ 77, 231-235, **RA-25**; *Saluka Investments B.V. v. Czech Republic* (UNCITRAL) Partial Award, 17 March 2006 (“*Saluka Investments – Partial Award*”), ¶¶ 294, 296, **RA-86**; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22) Award, 24 July 2008 (“*Biwater Gauff – Award*”), ¶¶ 586, 590, **RA-9**; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12) Award, 14 July 2006 (“*Azurix – Award*”), ¶¶ 361- 363, **RA-6**. The *National Grid* award is equally inapplicable since, as the Tribunal noted, “there is no reference to the minimum standard of treatment under international law in the Treaty in contrast to the language of NAFTA, the Tribunal will proceed to examine the ordinary meaning of ‘fair’ and ‘equitable’” (*National Grid P.L.C. v. Argentine Republic* (UNCITRAL) Award, 3 November 2008 (“*National Grid – Award*”), ¶ 167, **RA-50**).

⁶¹⁰ Claimants’ Memorial, ¶ 294.

⁶¹¹ *Mondev – Award*, ¶ 121, **RA-46**; see also *ADF – Award*, ¶ 183, **RA-1**.

317. More recently, *Cargill* Tribunal rejected the Claimants’ proposed approach, finding that “significant evidentiary weight should not be afforded to autonomous clauses inasmuch as it could be assumed that such clauses were adopted precisely because they set a standard other than required by custom.”⁶¹² For example, the *Enron* Tribunal concluded “that the fair and equitable treatment standard, at least in the context of the Treaty applicable in this case [the U.S.- Argentina BIT], can also require a treatment additional to, or beyond that of, customary international law.”⁶¹³ By contrast, the *Note of Interpretation* makes it clear that, “[t]he concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.”⁶¹⁴

318. In sum, there can be no violation of Article 1105 unless the Claimants discharge the burden of establishing the existence of a rule that is recognized as part of the customary international law minimum standard of treatment of aliens through *opinio juris* and State practice, and of demonstrating that Canada breached that customary rule.

⁶¹² *Cargill – Award*, ¶ 276, **RA-11**. See also *UPS – Award on Jurisdiction*, ¶ 97, **RA-80** (“in terms of *opinio juris* there is no indication that [the BITs] reflect a general sense of obligation.”).

⁶¹³ *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID No. ARB/01/3) Award, 22 May 2007 (“*Enron – Award*”), ¶ 258, **RA-24**; see also *Sempra Energy International v. Argentine Republic* (ICSID No. ARB/02/16) Award, 28 September 2007 (“*Sempra – Award*”), ¶ 302, **RA-66**.

⁶¹⁴ All three NAFTA Parties have expressly rejected the notion that BITs establish customary international law. *The Loewen Group Inc. and Raymond Loewen v. United States of America* (ICSID No. ARB/98/3) U.S. Response to Article 1128 Submissions, 19 July 2002 (“*Loewen – US Response to 1128 Submissions*”), p. 3, **RA-74** (“no rule of customary international law relevant to this NAFTA proceeding is established by the various bilateral investment agreements between States not parties to NAFTA”); *The Loewen Group Inc., and Raymond L. Loewen v. The United States of America*, (ICSID Case No. ARB (AF)/98/3, Mexico’s Submission Pursuant to NAFTA Article 1128, 2 July 2002 (“*Loewen – Mexico’s 1128 submission*”), **RA-76**; *The Loewen Group Inc., and Raymond L. Loewen v. The United States of America*, (ICSID Case No. ARB (AF)/98/3) Second Submission of the Government of Canada Pursuant to NAFTA Article 1128, 27 June 2002 (“*Loewen – Canada Second 1128 Submission*”), ¶ 11, **RA-78** (“Canada submits that the provision at issues in this case contained in the more than 180 BITs and in the ICSID Convention in existence have not been transformed into rules of customary international law consistent with Article 38(1) of the ICJ Statute.”).

4. The Threshold for Demonstrating a Violation of Article 1105 is High

319. The Claimants misconstrue not only the burden imposed by Article 1105(1), but also the fact that the threshold for a violation of Article 1105(1) is high. Article 1105(1) was incorporated in NAFTA Chapter Eleven “to avoid what might otherwise be a gap.”⁶¹⁵ For example, while Chapter Eleven contains national treatment and most-favoured nation treatment obligations that are contingent on the treatment accorded by a host State to its nationals and to others, Article 1105(1) was included in order to establish a “floor below which treatment of foreign investors must not fall, even if a government were not acting in a discriminatory manner.”⁶¹⁶

320. This “floor” does not call for NAFTA tribunals to second-guess government policy and decision-making. To the contrary, international law provides a “high measure of deference ... to the right of domestic authorities to regulate matters within their own borders.”⁶¹⁷ While the exercise of such regulatory powers inevitably results in outcomes that may be perceived by some stakeholders as unfair or inequitable, NAFTA Chapter Eleven, and in particular Article 1105(1), “was not intended to provide foreign investors with blanket protection from this kind of disappointment.”⁶¹⁸ To provide otherwise — to find a State liable for exercising its powers in a manner merely *perceived* as being unfair or inequitable — would ultimately cripple governments from being able to govern altogether.⁶¹⁹ As noted by the *S.D. Myers* Tribunal, “[w]hen interpreting and applying the ‘minimum standard’, a Chapter Eleven tribunal does not have an open-ended mandate to second-guess government decision-making” as “[g]overnments have to make many

⁶¹⁵ *S.D. Myers – Partial Award*, ¶ 259, **RA-65**.

⁶¹⁶ *S.D. Myers – Partial Award*, ¶ 259, **RA-65**.

⁶¹⁷ *S.D. Myers – Partial Award*, ¶ 263, **RA-65**.

⁶¹⁸ *Azinian – Award*, ¶ 83, **RA-5**.

⁶¹⁹ *Glamis – Award*, ¶ 804, **RA-29** (“governments must compromise between the interests of competing parties and, if they were bound to please every constituent and address every harm with each piece of legislation, they would be bound and useless.”).

potentially controversial choices.”⁶²⁰ This is also why the *Glamis* Tribunal found that “it is not for an international tribunal to delve into the details of and justifications for domestic law” – the “proper venue” for a challenge to the alleged misapplication of domestic law is “domestic court.”⁶²¹

321. The customary international law minimum standard of treatment under Article 1105(1) is therefore an *absolute* minimum standard of treatment and NAFTA tribunals have consistently ruled that the threshold for proving a violation of that standard is extremely high.⁶²² The *S.D. Myers* Tribunal considered that “a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective,”⁶²³ a determination that “must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate within their own borders.”⁶²⁴

322. Likewise, the *Thunderbird* Tribunal observed that “the threshold for a violation of the minimum standard of treatment still remains high” holding that the conduct of the

⁶²⁰ *S.D. Myers – Partial Award*, ¶ 261, **RA-65**.

⁶²¹ *Glamis – Award*, ¶¶ 762, 779, **RA-29**.

⁶²² NAFTA tribunals since the *FTC Note of Interpretation* was issued in July 2001 have confirmed that the threshold for a violation of Article 1105 is high and requires an action that amounts to gross misconduct or manifest unfairness such that it breached the international minimum standard of treatment. *See Mondev – Award*, ¶ 127, **RA-46** (“In the end the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in light of all the available facts that the impugned decision was clearly improper and discreditable...”). The *ADF* Tribunal held that “something more than simple illegality or lack of authority under the domestic law of a State is necessary” to establish a violation of Article 1105(1) (*ADF – Award*, ¶ 190, **RA-1**). In summarizing the consideration of what constituted a breach of the minimum standard of treatment, the *Waste Management* Tribunal indicated that the standard would be breached by conduct that is “arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in the administrative process.” (*Waste Management – Award*, ¶ 98, **RA-82**).

⁶²³ *S.D. Myers – Partial Award*, ¶ 263, **RA-65**.

⁶²⁴ *S.D. Myers – Partial Award*, ¶ 263, **RA-65**.

host State would have to be “manifestly arbitrary or unfair” in order to breach Article 1105.⁶²⁵ In that case, mere “arbitrary” conduct of an administrative agency was insufficient to constitute a breach of Article 1105(1); rather, the regulatory action must amount to a “gross denial of justice or manifest arbitrariness falling below accepted international standards” in order to breach the minimum standard of treatment.⁶²⁶

323. More recently, the *Glamis* Tribunal summarized the customary international law minimum standard of treatment under Article 1105(1) as follows:

[A] violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of Article 1105.⁶²⁷ (emphasis added)

324. Similarly, the *Cargill* Tribunal found that the customary international minimum standard of treatment remains that which was set out in the *Neer* case:

The Tribunal holds that the current customary international law standard of “fair and equitable treatment” at least reflects the adaptation of the agreed *Neer* standard to current conditions.... If the conduct of the government toward the investment amounts to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, bad faith or willful neglect of duty, whatever the particular context the actions taken in regard

⁶²⁵ *Thunderbird – Final Award*, ¶¶ 194, 197, RA-32: “The Tribunal cannot find sufficient evidence on the record establishing that the SEGOB proceedings were arbitrary or unfair, *let alone as manifestly arbitrary or unfair as to violate the minimum standard of treatment*”. (emphasis added) It is also noteworthy that the Tribunal acknowledged that administrative proceedings “may have been affected by certain procedural irregularities”. However, the Tribunal held that there were no “administrative irregularities that were grave enough to shock a sense of judicial propriety and thus give rise to a breach of the minimum standard of treatment.” (¶ 200).

⁶²⁶ *Thunderbird – Final Award*, ¶ 194, RA-32.

⁶²⁷ *Glamis – Award*, ¶ 627, RA-29.

to the investment, then such conduct will be a violation of the customary obligation of fair and equitable treatment.⁶²⁸ (emphasis added)

325. The use of adjective modifiers by these tribunals such as “*egregious*,” “*shocking*,” “*gross*,” “*blatant*,” “*manifest*,” “*complete*,” and “*wilful*”, in describing the threshold for a violation of Article 1105(1), speaks to the high level of deference to be accorded to domestic authorities in governing affairs within their own borders and to the fact that the threshold for establishing a breach of Article 1105 is accordingly extremely high.

5. The Claimants Have Not Established that Any of the Complained of Measures Rise to the Level Required to Breach Article 1105

326. The disorganization of the Claimants’ Memorial, taken together with their penchant for creating “novel” rules of customary international law, makes it difficult to understand and respond to their allegations with respect to Article 1105.⁶²⁹

327. Ultimately, as Canada understands it, the Claimants appear to be challenging the actions of various agencies and departments of the governments of Canada and Nova Scotia throughout the EA process, specifically: (i) the determination that the Whites Point project required a federal EA; (ii) DFO’s request for and review of a blasting plan in connection with the industrial approval NSDEL issued to Nova Stone; (iii) the determination that the quarry should be included in the scope of project; (iv) the decision to refer the Whites Point EA to a review panel; (v) the selection and appointment of the JRP members; and, (vi) Canada’s decision to accept the recommendation of the JRP and

⁶²⁸ *Cargill* – Award, ¶ 286, **RA-11**. Notwithstanding the clear and consistently held view of NAFTA tribunals that there is a threshold for a breach of the minimum standard of treatment, the Claimants attempt to dispense with a threshold, and in particular the *Neer* standard, by claiming that “the notion that it is not enough that the governmental act falls short of the international standard was put to rest with the adoption of the ILC Articles on State Responsibility.” See Claimants’ Memorial, ¶ 370.

⁶²⁹ For example, the Claimants allege that Article 1105 contains, as a legal matter, seven separate obligations. However, when purporting to apply the “international law standard of treatment” the Claimants, for the most part fail to even refer to the alleged standards they argued for only pages earlier. In some cases they have pled a legal standard without subsequently applying the facts of this case to it (e.g. “legitimate expectations”) whereas in others they have pled a category of factual allegation not tied to any of the legal standards they identified (e.g. “abuse of process”, “delay”).

to refuse the requested authorizations. The Claimants also challenge the actions of the JRP itself, both with respect to how it gathered information and how it arrived at its recommendations.

328. The basis of the Claimants claim under Article 1105 essentially boils down to an allegation that the above measures were illegal, unreasonable, abusive, grossly unfair, and taken in bad faith with a manifest lack of legitimate reasons.⁶³⁰ Whether the measures are considered individually or collectively, this allegation has no merit. First, all of the measures being complained of fall within the scope of legitimate regulatory decision-making and should be accorded considerable deference by this Tribunal. As explained in *Glamis* “[i]t is not the role of this Tribunal, or any international tribunal, to supplant its own judgment of underlying factual material and support for that of a qualified domestic agency.”⁶³¹ This is all the more important in a sensitive area such as the protection of the environment where the NAFTA Parties have “a wide regulatory ‘space’ for regulation.”⁶³²

329. But just as important, absolutely *none* of the various measures challenged by the Claimants with respect to the EA of the Whites Point project were in any way wrongful, arbitrary or unfair, let alone of the egregious and shocking nature required for this Tribunal to find a breach of Article 1105. As more fully explained in the following paragraphs, the Claimants’ allegations do not survive even minimal scrutiny, and as such, the claim under Article 1105 must fail.

⁶³⁰ See for example Claimants’ Memorial, ¶¶ 459, 496, 536.

⁶³¹ *Glamis* – Award, ¶ 779, **RA-29**.

⁶³² *Thunderbird – Final Award*, ¶ 127, **RA-32** (holding that “in the gambling industry, governments have a particularly wide scope of regulation reflecting national views on public morals.”). On the importance of the protection of the environment, the Appellate Body of the WTO has noted that “it is within the authority of a WTO Member to set the public health or environmental objectives it seeks to achieve, as well as the level of protection that it wants to obtain, through the measure or the policy it chooses to adopt.” *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, p. 69, **RA-10**. See also pp. 75-77, 91.

a) The Claimants Have Not Established that Any Measures of the Governments of Canada or of Nova Scotia Breached Article 1105

(1) The Determination that an EA of the Whites Point Project was Required Did Not Violate Article 1105

330. From its very first meetings with DFO, GQP was informed that an EA of the Whites Point project would be required.⁶³³ Not once did GQP or the Claimants ever dispute this possibility. In fact, their contemporaneous statements show that not only were they aware that a federal EA would be required, but also that they actively sought to trigger a federal EA.⁶³⁴

331. The decision that the marine terminal would require a federal EA was neither manifestly arbitrary nor taken with a manifest lack of reasons.⁶³⁵ Given the nature of their project, it was also the *only* possible decision that could be in accordance with Canadian law. As explained above, s. 5(1) of the *NWPA* provides that an approval is required for a structure to be “built or placed on, over, under, through, or across any navigable waterway.”⁶³⁶ Further, under s. 35(2) of the *Fisheries Act* an authorization is required when a project will result in the loss of fish habitat. Both a s. 5(1) *NWPA* approval and a s. 35(2) *Fisheries Act* authorization are on the *Law List Regulations* and thus, trigger an EA under the *CEAA*.⁶³⁷ As the Claimants no doubt knew, a 170 m long marine terminal sticking out into the Bay of Fundy adjacent to both a diverse marine habitat frequented by

⁶³³ See *supra*, ¶¶ 93-94; Thomas Wheaton’s notes of meeting between DFO and GQP, July 25, 2002, p. 1; **Exhibit R-127**; Affidavit of Mark McLean, ¶ 25.

⁶³⁴ See *supra*, ¶¶ 91-95, 113; See also CLC Minutes, January 9, 2003, p. 117, **Exhibit R-299**, where, in reference to the *NWPA* application, Mr. Buxton states “the intent is to trigger a CEA.”

⁶³⁵ *Glamis – Award*, ¶ 627, **RA-29** (“The Tribunal therefore holds that a violation of the customary international law minimum standard of treatment, as codified in Article 1105 of the NAFTA, requires an act that is sufficiently egregious and shocking—a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons—so as to fall below accepted international standards and constitute a breach of Article 1105.”)

⁶³⁶ *NWPA*, s. 5(1), **Exhibit R-297**; See *supra*, ¶ 112.

⁶³⁷ *Law List Regulations*, Part 1, items 6(d) and 11(a), **Exhibit R-10**; *CEAA*, s. 5(1)(d), **Exhibit R-1**; see also Expert Report of Robert Connelly, ¶¶ 38-41.

endangered species and an active and lucrative fishery would require such approvals or authorizations.⁶³⁸ Even the Claimants’ own expert witness in this arbitration, David Estrin agrees, stating twice in his report that the proposed marine terminal triggered an EA under the *CEAA*.⁶³⁹

332. Notwithstanding these facts, and the Claimants’ own acknowledgment that the project activities would trigger an EA, the Claimants have manufactured a claim that the “CEA Agency and the federal ministries and departments were complicit in contriving triggers ...to open up federal jurisdiction”⁶⁴⁰ and that the former DFO Minister Robert Thibault “curr[ied] favours with opponents of the project”⁶⁴¹ and “deceive[d] the Minister of the Environment to look into a marine terminal.”⁶⁴² The Claimants’ allegations in this regard are based on a complete lack of evidence. Indeed, all of the officials involved in the EA of the Whites Point project have expressly denied any sort of conspiracy or improper interference by Minister Thibault.⁶⁴³ Further, there is not a single document in the tens of thousands of pages produced by Canada in this arbitration that evidence any such conspiracy or improper interference. Faced with this, the Claimants have resorted to either bald assertions⁶⁴⁴ or blatant misrepresentations.

⁶³⁸ Navigable Waters Protection Application – Whites Point Quarry Marine Terminal, December 1, 2002, received by Canadian Coast Guard January 8, 2003, **Exhibit R-133**. Affidavit of Mark McLean, ¶ 35.

⁶³⁹ Report of David Estrin, ¶¶ 160 and 170.

⁶⁴⁰ Claimants’ Memorial, ¶ 488.

⁶⁴¹ Claimants’ Memorial, ¶ 502.

⁶⁴² Claimants’ Memorial, ¶ 500.

⁶⁴³ Affidavit of Robert Thibault, ¶¶ 11-16; Affidavit of Neil Bellefontaine, ¶ 42; Affidavit of Bruce Hood, ¶¶ 8-10.

⁶⁴⁴ For example, at one point the Claimants simply reproduce text from the *Biwater Gauff* decision, (Claimants’ Memorial, ¶ 507) as to “the Minister’s public statements” that “constituted an unwarranted interference that inflamed the situation and polarized public opinion” without providing any context or explanation as to what “public statements” were made, by which Minister in this case, and how they “constituted an unwarranted interference that inflamed the situation and polarized public opinion.”

333. For example, the Claimants assert that the notes of Bruce Hood reflect that the DFO was “concerned over its lack of lawful authority to require an *NWPA* application be made by the proponent.”⁶⁴⁵ This is utterly false. The Claimants cite notes from an April 25 and a May 1, 2003 teleconference to support their allegations. In fact, Mr. Hood’s notes of the April 25, 2003 call expressly reflect the fact that DFO was certain that an EA of the project would be required, precisely because of the marine terminal. In particular, Mr. Hood noted that the terminal was “our trigger” and that “we have *NWPA*, FA s. 35 and probably s. 32 trigger[s] for marine terminal.”⁶⁴⁶

334. In addition, the Claimants actually misconstrue and misrepresent an argument that Mr. Estrin, their own expert, advances⁶⁴⁷ in order to support their allegation that no federal EA of the project was required. In particular, they allege that Mr. Estrin’s belief that the marine terminal was not subject to a comprehensive study, supports a conclusion that the project was “excluded ... from the scope of [Canada’s] authority.”⁶⁴⁸ As explained in more detail in the Expert Report of Lawrence Smith, Mr. Estrin’s argument ignores how the Claimants themselves described the marine terminal,⁶⁴⁹ is baseless as a matter of legislative interpretation,⁶⁵⁰ and is completely inconsistent with DFO’s practice throughout years.⁶⁵¹ More importantly, however, it is completely irrelevant to the argument for which it is employed by the Claimants. As noted above, for Mr. Estrin, the question is not at all whether an EA was triggered, but rather the type of EA that had to be used.

⁶⁴⁵ Claimants’ Memorial, ¶ 105.

⁶⁴⁶ See Notes of Bruce Hood, March to June 2003, Bates Pages 801602-03, **Exhibit R-260**.

⁶⁴⁷ Report of David Estrin, ¶¶ 162-164.

⁶⁴⁸ Claimants’ Memorial, ¶ 488.

⁶⁴⁹ Expert Report of Lawrence Smith, Q.C., ¶¶ 189-194.

⁶⁵⁰ Expert Report of Lawrence Smith, Q.C., ¶¶ 195-203.

⁶⁵¹ Expert Report of Lawrence Smith, Q.C., ¶¶ 186-188.

(2) Canada’s Review of the Proposed Quarrying Activities Did Not Violate Article 1105

(a) DFO’s Request for and Review of a Blasting Plan in Connection with Nova Stone’s Industrial Approval for the 3.9 ha Quarry Did Not Violate Article 1105

335. As explained above, this Tribunal does not have jurisdiction to consider measures with respect to the 3.9 ha industrial approval NSDEL granted to Nova Stone both because they are *not* measures relating to the Claimants, and because they are time-barred. However, even if the Tribunal finds that it has jurisdiction to consider them, they do not violate the standard set by Article 1105.

336. The Claimants allege that DFO’s request for the blasting conditions to be incorporated in the industrial approval issued to Nova Stone, as well as DFO’s review of the proposed blasting by Nova Stone, somehow violates Article 1105.⁶⁵² The Claimants base their Article 1105 claim in part on the allegation that DFO “impos[ed] itself into the provincial process without any jurisdiction or authority.”⁶⁵³

337. As explained above, this allegation is simply wrong. DFO did not impose itself on anyone. It first became involved in considering the effects of the quarrying activities at the request of Nova Scotia.⁶⁵⁴ Specifically, the Nova Scotia engineer reviewing Nova Stone’s request for an industrial approval to establish a 3.9 ha quarry on the site of the intended 152 ha quarry was concerned about the possible effects of nearshore blasting on marine life in the Bay of Fundy, and hence requested DFO review.⁶⁵⁵ Mark McLean and Bob Petrie comment that such requests from Nova Scotia are common, and a part of good

⁶⁵² See for example Claimants’ Memorial, ¶¶ 459, 460, 489, 491-493.

⁶⁵³ Claimants’ Memorial, ¶¶ 459-460.

⁶⁵⁴ See *supra*, ¶¶ 69-71.

⁶⁵⁵ Engineer’s Report on the Nova Stone Exporters, Inc. Quarry, by Robert Balcom, March 21, 2002, p. 3, **Exhibit R-79**; Affidavit of Bob Petrie, ¶¶ 10-12; Affidavit of Mark McLean, ¶ 13.

regulatory practice.⁶⁵⁶ Lawrence Smith also notes that “it is not unusual for DFO to require that project proponents furnish evidence that their activities will not result in HADD of fish habitat.”⁶⁵⁷

338. Further, DFO scientists shared the concerns of Nova Scotia officials.⁶⁵⁸ So too, did Dr. Brodie, the expert originally retained by Nova Stone, who concluded that a “high level of caution” was necessary in moving forward with blasting at Whites Point.⁶⁵⁹ In requesting the blasting conditions, therefore, there is no evidence to suggest that the DFO scientists were doing anything other than acting in good faith. DFO followed established procedures and practices set out in its *Blasting Guidelines*.⁶⁶⁰ As explained by Lawrence Smith, DFO was also authorized by law to request the information that it did under s. 37(1) of the *Fisheries Act*.⁶⁶¹ Mr. Smith has added that “[t]here is no discretion on the part of DFO to ignore the prohibition in the *Fisheries Act* against destroying fish by means other than fishing,”⁶⁶² which is what the Claimants appear to propose here.

339. Finally, the refusal of DFO officials to allow Nova Stone to skirt the EA process and to begin quarrying activities on the 3.9ha parcel prior to the completion of the EA was not only a reasonable and fair option, it was the *only* option. Under s. 5(1)(d) of the *CEAA*, DFO officials could not issue the required s. 32 authorization because Nova Stone had represented to DFO officials that the purpose of the blasting on the 3.9 ha quarry was to begin quarrying operations, thereby “enabling the project to be carried out in whole or

⁶⁵⁶ Affidavit of Mark McLean, ¶¶ 8-10; Affidavit of Bob Petrie, ¶ 12.

⁶⁵⁷ Expert Report of Lawrence Smith, Q.C., ¶ 149.

⁶⁵⁸ See *supra*, ¶¶ 72-78; Email from Brian Jollymore to Bob Petrie, April 26, 2002, **Exhibit R-86**.

⁶⁵⁹ See *supra*, ¶¶ 83-85; Report of Dr. Paul Brodie re: Proposed blasting activity at Whites Point, June 19, 2002, p. 4, **Exhibit R-301**.

⁶⁶⁰ See *supra*, ¶¶ 72-78; *Blasting Guidelines*, **Exhibit R-115**; Affidavit of Mark McLean, ¶¶ 13, 15-18.

⁶⁶¹ Expert Report of Lawrence Smith, Q.C., ¶ 148.

⁶⁶² Expert Report of Lawrence Smith, Q.C., ¶ 156.

in part.”⁶⁶³ As quarrying activity on the smaller project was tied to the advancement of the larger project, Lawrence Smith concludes that “had the DFO issued a section 32 authorization for the 3.9 ha quarry prior to the conclusion of the environmental assessment of the Whites Point project, DFO would have been in contravention of subsection 5(1)(d) of the *CEAA*.”⁶⁶⁴ Mr. Smith adds that “DFO does not exhibit bad faith when it complies with its statutory mandate.”⁶⁶⁵

340. The Claimants have offered no explanation of how the good faith application of Canada’s legislative regime, explained above, based on the information provided to officials by Nova Stone, can possibly amount to a violation of Article 1105. NAFTA Chapter Eleven arbitration, and in particular an Article 1105 claim, is not the proper forum to second-guess science-based decisions, made fully in accordance with applicable law and policy.

(b) The Determination that the Quarry Should be Included within the Scope of the Project Subject to a Federal EA Did Not Violate Article 1105

341. Federal officials made it clear to the Claimants from the initial meeting in July 2002 that the scope of the project that would be assessed would include not only the marine terminal, but also the quarry.⁶⁶⁶ DFO ultimately made such a determination on April 14, 2003, and this determination was later confirmed by the JRP Agreement of

⁶⁶³ See *supra*, ¶¶ 129-132; Affidavit of Mark McLean, ¶¶ 42-43; Expert Report of Lawrence Smith, Q.C., ¶¶ 151-153. Paragraph 5(1)(d) of *CEAA*, **Exhibit R-1**, provides: “An environmental assessment of a project is required before a federal authority exercises one of the following powers or performs one of the following duties or functions in respect of a project, namely, where a federal authority [...] (d) under a provision prescribed pursuant to paragraph 59(f), issues a permit or license grants an approval or takes any other action for the purpose of enabling the project to be carried out in whole or in part.”

⁶⁶⁴ Expert Report of Lawrence Smith, Q.C., ¶ 176.

⁶⁶⁵ Expert Report of Lawrence Smith, Q.C., ¶ 156.

⁶⁶⁶ See *supra*, ¶¶ 93-94; Thomas Wheaton’s notes of meeting between DFO and GQP, July 25, 2002, p. 1; **Exhibit R-127**; Affidavit of Mark McLean, ¶ 25.

November 2004.⁶⁶⁷ There is nothing on the record reflecting a single objection or complaint by either GQP or Bilcon that including the quarry within the scope of the project subject to an EA was somehow inappropriate.

342. Including the quarry within the scope of the project being environmentally assessed is contemplated by s. 15 of the *CEAA* and conformed to the Agency's *Operational Policy Statement on Scoping*.⁶⁶⁸ This is because GQP's own project descriptions made abundantly clear that the marine and land components of the project were indissociable. Of course, DFO scientists later concluded that the quarrying itself would likely result in the death of fish requiring an authorization under the *Fisheries Act*,⁶⁶⁹ a determination that in the words of Lawrence Smith provided "clear jurisdiction ... for DFO to combine the assessments of the quarry and its associated blasting activities with that of the marine terminal."⁶⁷⁰

343. The Claimants' attempts to second-guess, now, the scoping decision made in good faith by DFO officials is meritless. The basis of their challenge rests on what Bruce Hood himself has testified to be a significant distortion of his notes. For example, at one point, the Claimants allege that Mr. Hood's notes show that "DFO knew that a decision to scope in the quarry was contrary to environmental assessment practices across Canada". In fact, Mr. Hood's notes clearly say the exact opposite: "if we don't scope in

⁶⁶⁷ See Letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**; JRP Agreement, **Exhibit R-27**.

⁶⁶⁸ Expert Report of Lawrence Smith, Q.C., ¶ 114; see also *Operational Policy Statement, Establishing the Scope of the Environmental Assessment*, OPS-EPO/1, Canadian Environmental Assessment Agency, **Exhibit R-14**.

⁶⁶⁹ See *supra*, ¶¶ 124-128; Affidavit of Neil Bellefontaine, ¶ 34; Affidavit of Bruce Hood, ¶ 17; Affidavit of Stephen Chapman, ¶ 20; Affidavit of Mark McLean, ¶ 41; Letter from Phil Zamora to Paul Buxton, May 29, 2003, **Exhibit R-55**.

⁶⁷⁰ Expert Report of Lawrence Smith, Q.C., ¶ 110.

the quarry, [we will be] contrary to the advice of [the] Agency and EA practices across Canada.”⁶⁷¹

344. As Mr. Hood himself has testified, his notes reflect a debate within DFO as to whether or not DFO should, as a matter of policy, exercise the legislative authority granted to it under s. 15 of the *CEAA* in order to scope projects to include aspects for which they do not have an independent trigger.⁶⁷² The existence of such a debate is neither egregious nor shocking—in fact, as Neil Bellefontaine notes, the existence of such a debate where officials feel comfortable voicing positions and engaging in vigorous discussion prior to decision-making is a bellwether of a healthy regulatory process.⁶⁷³ Simply put, the fact that some officials may have disagreed with a decision that more senior officials ultimately made is *not* evidence of wrongful conduct, let alone of the sort of egregious and shocking conduct required to breach Article 1105. If it were, then decision-making in democratic and independent government institutions would grind to a halt as officials would be hamstrung by a fear of international arbitration.

345. The initial decision to scope the marine terminal with the quarry for the purpose of the federal EA “was reasonable and supported by legislative authority,”⁶⁷⁴ as well as by the guidance set out in the Agency’s *Operational Policy Statement on Scoping*. It was not the result of conspiracy or collusion, but rather the reasonable exercise of a lawfully granted discretionary authority. It therefore cannot give rise to a claim under NAFTA Article 1105.

346. Finally, and perhaps most important here, the whole debate about the appropriateness of DFO’s early scoping determination to assess the quarry is nothing

⁶⁷¹ Notes of Bruce Hood, March to June 2003, Bates Page 801617, **Exhibit R-260**; Affidavit of Bruce Hood, ¶ 16.

⁶⁷² See *supra*, ¶¶ 120-121; Affidavit of Neil Bellefontaine, ¶¶ 32-22; Affidavit of Bruce Hood, ¶¶ 12-13.

⁶⁷³ Affidavit of Neil Bellefontaine, ¶ 33.

⁶⁷⁴ Expert Report of Lawrence Smith, Q.C., ¶ 115

more than a red herring. Pursuant to sections 15(1) and 41(c) of the *CEAA*, the final decision on the scope of the project subject to an EA was made not by DFO, but rather by the federal Minister of the Environment. As explained by Robert Connelly in his Expert Report, once a project is referred to a JRP, the scope of the project being assessed must include the aspects of the project that each jurisdiction must assess.⁶⁷⁵ As such, because Nova Scotia required the quarry to be subject to an EA under its legislation, as soon as there was an agreement to establish a JRP, the issue of whether DFO could scope the quarry and the marine terminal together for the purpose of the EA of the Whites Point project was rendered moot. As Lawrence Smith puts it “[t]he scope of project selected for the joint panel review ... superseded any discussion or determinations made earlier by the DFO regarding the scope of the project.”⁶⁷⁶

(3) The Referral of the Whites Point EA to a JRP Did Not Breach Article 1105

347. Under the *CEAA*, s. 21 an RA such as DFO has the ability to refer any project that is a comprehensive study to the Minister for referral to a review panel at any time.⁶⁷⁷ As Robert Connelly explains in his Expert Report, while the *CEAA* affords the RA complete discretion to make a referral to the Minister of the Environment for a referral to a review panel under s. 21, RAs typically require the likelihood of either significant adverse environmental effects or significant public concern to do so.⁶⁷⁸

348. In this case, DFO officials concluded that both of these factors were present based on their scientific work and the enormous volume of letters of concern received from all across the province of Nova Scotia.⁶⁷⁹ They briefed the senior DFO officials who would

⁶⁷⁵ Expert Report of Robert Connelly, ¶¶ 102-103.

⁶⁷⁶ Expert Report of Lawrence Smith, Q.C., ¶ 132.

⁶⁷⁷ *CEAA*, s. 21, **Exhibit R-1**.

⁶⁷⁸ Expert Report of Robert Connelly, ¶ 64, fn. 54.

⁶⁷⁹ *See supra*, ¶¶ 133-145; Affidavit of Neil Bellefontaine, ¶¶ 35-40; Affidavit of Mark McLean, ¶¶ 45-49.

have to make a recommendation to the Minister,⁶⁸⁰ and ultimately, relying on the advice of these officials, Minister Thibault, referred the project to the Minister of the Environment for a referral to a review panel.⁶⁸¹

349. The Claimants have chosen to ignore that the factors laid out in the *CEAA* for referral to a JRP were clearly present. Instead, they have concocted a conspiracy theory, alleging that DFO manipulated other authorities such as the Agency to be complicit in the referral of the project to a review panel.⁶⁸² The Claimants' conspiracy theory alleges that DFO's motive was a desire to relieve the Fisheries Minister of "public pressure" for the "summer months"⁶⁸³ and to delay the ultimate EA process as long as possible.⁶⁸⁴

350. Minister Thibault, Neil Bellefontaine and Bruce Hood have all denied the existence of any conspiracy and made it clear that while Minister Thibault kept himself informed with respect to the project, he in no way interfered with the work of officials to direct one particular review process over another or in any other aspect of the EA.⁶⁸⁵ The Claimants offer no evidence to the contrary and indeed do no more than rely on

⁶⁸⁰ See *supra*, ¶¶ 146-150; Memorandum for the Minister, Oceans, "Referral of Proposed Whites Point Quarry and Shipping Terminal to the Minister of the Environment for a Panel Review, June 25, 2003, **Exhibit R-72**.; see also Memorandum for the Minister – Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, September 24, 2002, **Exhibit R-63**; Memorandum for the Minister – Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, October 9, 2002, **Exhibit R-64**; Memorandum for the Minister – Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, January 14, 2003, **Exhibit R-65**; Memorandum for the Minister – Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, March 13, 2003, **Exhibit R-66**; Memorandum for the Minister – Proposed Rock Quarry and Shipping Terminal Whites Cove, Digby County, Nova Scotia, April 28, 2003, **Exhibit R-68**; Memorandum for the Assistant Deputy Minister, Oceans – Environmental Assessment of Proposed Quarry and Shipping Terminal, Whites Cove Digby County, Nova Scotia Pre-Meeting for Meeting with Associate Deputy Minister, May 26, 2003, **Exhibit R-69**.

⁶⁸¹ Affidavit of Robert Thibault, ¶¶ 17-20; Letter from the Honourable Robert Thibault to the Honourable David Anderson, June 26, 2003, **Exhibit R-73**.

⁶⁸² Claimants' Memorial, ¶ 523.

⁶⁸³ Claimants' Memorial, ¶ 523.

⁶⁸⁴ Claimants' Memorial, ¶ 522.

⁶⁸⁵ Affidavit of Robert Thibault, ¶¶ 11-16; Affidavit of Neil Bellefontaine, ¶¶ 42-43; Affidavit of Bruce Hood, ¶ 22.

conjecture and misrepresentation to make out their story. The only foundation they do offer for their story is two excerpts from Mr. Hood’s notes and a single email from Mr. Hood’s supervisor at the time, Mr. Nadeau. None of these documents provide any support for the allegation that a conspiracy existed to refer this EA to a JRP for reasons other than the statutory ones.⁶⁸⁶

351. First, as Mr. Hood has himself explained, rather than a conspiracy or bad faith, his notes actually reflect that the decision of DFO officials to recommend that the EA be referred to the Minister of the Environment for a referral to a review panel was made after a healthy debate between officials as to the appropriate type of assessment for this project.⁶⁸⁷ This debate shows that DFO considered all possible options for the project, including keeping it as a comprehensive study,⁶⁸⁸ “start[ing] as a comp study” and later “refer[ing] to a panel,” and immediately “[r]efer[ing] it to Min of Env as Panel,” before more senior officials concluded in May 2003 that the “preferred” option was an immediate referral to a review panel.⁶⁸⁹ Nothing in this evidence suggests bad faith or a conspiracy, but rather due diligence by DFO officials.

352. Mr. Hood has also clarified that, while he now agrees that this EA should have been referred to a review panel, at the time, he personally did not believe it was appropriate.⁶⁹⁰ Regional officials and senior officials at DFO headquarters, and officials at

⁶⁸⁶ Memorandum for the Assistant Deputy Minister, Oceans – Environmental Assessment of Proposed Quarry and Shipping terminal, Whites Cove, Digby County, Nova Scotia, Pre-Meeting for Meeting with Associate Deputy Minister, May 29, 2003, **Exhibit R-69**; Memorandum for the Minister – Referral of Proposed Whites Point Quarry and Shipping Terminal to the Minister of the Environment for a Panel Review, June 25, 2003, **Exhibit R-72**.

⁶⁸⁷ Affidavit of Bruce Hood, ¶¶ 19-21.

⁶⁸⁸ As explained above, the size of the marine terminal proposed by the Claimants was such that a comprehensive study was the minimum level of EA required under Canadian law, *see Comprehensive Study List Regulations*, s. 28(c), **Exhibit R-10**.

⁶⁸⁹ Notes of Bruce Hood, March to June 2003, Bates Pages 801609-10, **Exhibit R-260**.

⁶⁹⁰ Affidavit of Bruce Hood, ¶ 20.

the Agency,⁶⁹¹ felt differently than Mr. Hood based on the evidence pointing to the likelihood that the project would cause significant adverse environmental effects and the letters that were piling up indicating significant public concern.⁶⁹² The fact that Mr. Hood had a different opinion is not evidence of any sort of wrongful action on the part of DFO, let alone action that rises to the level of a breach of Article 1105.

353. Second, the email of Mr. Hood's supervisor relied upon by the Claimants to show that the referral to the review panel was made in bad faith,⁶⁹³ has, in reality, nothing to do with the referral decision itself. As is evident on the face of the email, Mr. Nadeau is writing to Ministerial administrative staff requesting that the letter formalizing the referral be signed before the Minister left to Nova Scotia for Parliament's summer recess.⁶⁹⁴ In fact, Mr. Nadeau's email was part of a series of requests made by officials to Ministerial staff asking for the referral letter to be formalized, signed and sent.⁶⁹⁵ The reason for the urgency had nothing to do with a conspiracy, bad faith or a desire to prejudice the Claimants. Rather, DFO officials were anxious because Nova Scotia had indicated that it intended to issue a press release announcing the formation of a JRP for the project.⁶⁹⁶ Obviously, it would be problematic if such a press release were issued before officials at the federal level had completed the formal referral process by having Minister Thibault sign and send the necessary letter to the Minister of the Environment.

⁶⁹¹ The Claimants allege that DFO pressured the Agency to refer the EA to a review panel based solely on the views expressed by a single lower level Agency official, Mr. Derek McDonald. Like Mr. Hood, Mr. McDonald believed that the project could be adequately assessed via a comprehensive study. However, as Stephen Chapman has testified, the Agency in fact believed that a review panel was an appropriate type of review in this case. *See* Affidavit of Stephen Chapman, ¶ 23.

⁶⁹² Affidavit of Neil Bellefontaine, ¶¶ 35-40; Affidavit of Mark McLean, ¶¶ 45-49.

⁶⁹³ Claimants' Memorial, ¶ 523.

⁶⁹⁴ Email from Richard Nadeau to Kaye Love, June 25, 2003, **Exhibit R-385**.

⁶⁹⁵ *See* for example email from Carol Ann Rose to Josée Bériault, June 25, 2003, **Exhibit R-386**.

⁶⁹⁶ Email from Carol Ann Rose to Josée Bériault, June 25, 2003, **Exhibit R-386**.

354. The decision to refer the Whites Point project to a JRP should not have come as a complete shock or as a surprise to the Claimants. As Lawrence Smith explains it was both “lawful” and “logical.”⁶⁹⁷ GQP and Bilcon knew, or should have known, that by choosing to locate a quarry and a marine terminal in the middle of a pristine environment, in proximity to a productive marine habitat and endangered species, their project would be more likely to be referred to a review panel under the *CEAA*. Even if the Claimants were wilfully blind to the requirements of the applicable legislation, DFO specifically informed GQP, as early as January 6, 2003, that referral to a review panel was a distinct possibility in light of the project’s potential significant adverse environmental effects and the public concern that it had created.⁶⁹⁸ Further, in initially notifying GQP that the project would be assessed, at the very least, through a comprehensive study, DFO made expressly clear that “although the type of assessment being used for this project is a CS [comprehensive study], *CEAA* (Section 23) includes the provision that the project could be referred to a mediator or review panel.”⁶⁹⁹

355. DFO’s ultimate decision to recommend the referral of the Whites Point project to a JRP was based on its determination that GQP’s project may cause significant adverse environmental effects, including adverse effects on endangered species such as iBoF salmon and North Atlantic Right Whales, as well as the fact that the project attracted substantial public concern.⁷⁰⁰ As the evidence does not reveal that DFO’s referral of the Whites Point project to the Minister of the Environment for a referral to a review panel was either arbitrary, unfair or based on anything other than a *bona fide* application of the relevant legislative and regulatory framework, these determinations must be accorded considerable deference by the Tribunal — as Dean Cass stated in the *UPS* arbitration,

⁶⁹⁷ Expert Report of Lawrence Smith, Q.C., ¶ 77.

⁶⁹⁸ Christopher Daly’s notes of January 6, 2003 meeting with GQP, **Exhibit R-178**.

⁶⁹⁹ Letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**.

⁷⁰⁰ Affidavit of Mark McLean, ¶¶ 47-49.

“NAFTA has a general reluctance to substitute arbitral for governmental decision-making on matters within the purview of each Party.”⁷⁰¹

(4) The Joint Decision of the Federal Minister of the Environment and the Province of Nova Scotia on the Members of the JRP Did Not Breach Article 1105

356. The Claimants allege that the appointment of Drs. Fournier, Muecke and Grant to the JRP constituted a violation of Article 1105 on the grounds that they did not have the “requisite professional credentials and experience,” and were “manifestly biased” against Bilcon.⁷⁰² Both of these allegations are nothing more than unsubstantiated, meritless and gratuitous attacks on the members of the JRP that should be dismissed.

357. First, all three professors selected to serve on the JRP had exactly the experience and expertise necessary to fairly and effectively assess the Whites Point project. As explained in the Affidavits of Stephen Chapman and Christopher Daly, both Canada and Nova Scotia went through a thorough selection process, considering numerous potential panellists possessing experience in working on review panels and expertise in relevant subject matter areas.⁷⁰³ The three professors were selected because they were exceptional candidates of impeccable qualifications in their relevant academic fields, and together provided the JRP with expertise on the primary topics that could be covered during the EA.⁷⁰⁴

358. Moreover, the Chair, Dr. Fournier, and another of the panellists, Dr. Muecke, had previously served on JRPs involving the EA of projects under federal and Nova Scotia

⁷⁰¹ *UPS – Award*, Separate Statement of Dean Ronald A. Cass, ¶ 125, **RA-79**.

⁷⁰² Claimants’ Memorial, ¶¶ 461-462.

⁷⁰³ *See supra*, ¶¶ 161-165; Affidavit of Stephen Chapman, ¶¶ 38-42; Affidavit of Christopher Daly, ¶¶ 48-52.

⁷⁰⁴ *See supra*, ¶¶ 161-164; Affidavit of Stephen Chapman, ¶¶ 39-41; Affidavit of Christopher Daly, ¶¶ 50-51; *Curriculum Vitae* of Dr. Robert Fournier, **Exhibit R-380**; *Curriculum Vitae* of Dr. Gunter Muecke, **Exhibit R-379**; *Curriculum Vitae* of Dr. Jill Grant, **Exhibit R-381**.

jurisdiction.⁷⁰⁵ As such, they had excellent experience in similar processes. In fact, Lawrence Smith appeared as counsel before Dr. Fournier through almost 60 days of hearings in the Sable Gas JRP. Noting Dr. Fournier’s Ph.D in oceanography and his work on the Sable Gas JRP and other public reviews, Mr. Smith notes in his Expert Report that “Dr. Fournier not only possessed background qualifications in a subject of particular relevance to the issues of significance in the Whites Point project EA, he also had experience in the public hearing process.”⁷⁰⁶ In Mr. Smith’s opinion, “Dr. Fournier, therefore, appeared to be a uniquely well-qualified candidate.”⁷⁰⁷

359. The Claimants themselves recognized the qualifications of the panel members upon their appointment in 2004. At the CLC meeting on November 24, 2004, a little less than three weeks after the announcement of the composition of the panel, Mr. Buxton stated that “the Proponent is comfortable that the panel members understand the science,” that “Bob Fournier has been on several other panel reviews in the past and is very well respected,” and if Bilcon “had the option to choose they may well have chosen these professionals.”⁷⁰⁸ Similarly, Ms. Kristy Herron, who worked for Bilcon, stated that “all 3 [panel members] are current Dalhousie professors and are competent and are respected in their fields.”⁷⁰⁹

360. Second, there is simply no basis to conclude now, and certainly none that would have led to a conclusion at the time, that Drs. Fournier, Muecke and Grant were in any way biased against Bilcon or the Whites Point project. All of the panellists were appropriately screened for bias as part of the selection process and absolutely no issues

⁷⁰⁵ See *supra*, ¶¶ 162-163; Affidavit of Stephen Chapman, ¶ 42; Affidavit of Christopher Daly, ¶ 51.

⁷⁰⁶ Expert Report of Lawrence Smith, Q.C., ¶ 210.

⁷⁰⁷ Expert Report of Lawrence Smith, Q.C., ¶ 211.

⁷⁰⁸ CLC Minutes, November 24, 2004, p. 235, **Exhibit R-299**.

⁷⁰⁹ CLC Minutes, November 24, 2004, p. 235, **Exhibit R-299**.

were identified.⁷¹⁰ The Claimants’ attempt now to find evidence of bias strains credulity. For example, the fact that Dr. Grant merely participated in an academic “conference that advocated the ‘greening’ of Nova Scotia”⁷¹¹ cannot possibly be credible evidence of bias. Nor is the fact that Drs. Fournier and Muecke had been board members of the Ecology Action Centre, an NGO based in Halifax that ultimately opposed the Whites Point project, over a dozen years before they were appointed to the JRP.⁷¹² In his Expert Report Lawrence Smith notes that “Dr. Fournier never displayed any indication of a bias or predisposition in favour of groups such as the Ecology Action Centre at the Sable hearings.”⁷¹³ On reviewing the Whites Point hearing transcripts Mr. Smith states, “I draw the same conclusion. Dr. Fournier, in my experience, was careful, thorough, inquisitive and objective throughout.”⁷¹⁴

(5) The Decision of Canada to Accept the Recommendation of the JRP and Refuse to Issue the Requested Authorizations Did Not Violate Article 1105

361. Finally, the Claimants also allege that Canada violated Article 1105 because the federal Minister of the Environment failed to give reasons “for the decision to reject the Whites Point Quarry” and “abdicated his responsibility” by failing to determine “whether the project was justified in light of any environmental effects in his decision.”⁷¹⁵ As explained above, this measure is not subject to the jurisdiction of this Tribunal because it was not a measure even capable of causing damage in light of Nova Scotia’s rejection of the Whites Point project a month earlier – a measure which the Claimants do not

⁷¹⁰ Questions for Interviewing Review Panel Candidates, **Exhibit R-206**; Affidavit of Stephen Chapman, ¶ 41; Affidavit of Christopher Daly, ¶ 48-49.

⁷¹¹ Claimants’ Memorial, ¶ 153.

⁷¹² Affidavit of Stephen Chapman, ¶ 41, fn. 66.

⁷¹³ Expert Report of Lawrence Smith, Q.C., ¶ 218.

⁷¹⁴ Expert Report of Lawrence Smith, Q.C., ¶ 218.

⁷¹⁵ Claimants’ Memorial, ¶ 482.

challenge as a breach of Article 1105.⁷¹⁶ Nevertheless, even if this measure were considered on its merits, it is clear that the Claimants' allegations are not only unsubstantiated but also untenable as a matter of Canadian or international law.

362. First, pursuant to s. 37 of the *CEAA*, it was the Minister of Fisheries and Oceans, as lead RA, not the federal Minister of the Environment, that was required to prepare a response to the JRP report, seek the approval of the Governor-in-Council, and issue the response.⁷¹⁷ Accordingly, the Minister of the Environment had no responsibility to abdicate.

363. Second, even correcting the Claimants' obvious misunderstanding of the way the *CEAA* operates, the Claimants' allegations are meritless. In reality, on receipt of the JRP report, DFO, and for that matter the Minister of NSDEL, undertook a careful study of the document and its recommendations, and came to reasoned and considered decisions to accept those recommendations.⁷¹⁸ In the words of Lawrence Smith each level of government "reached their own conclusion and did not abdicate any responsibility for the ultimate approval or rejection of the Project."⁷¹⁹ Moreover, the evidence reveals that the Nova Scotia Minister *did* in fact carefully consider numerous written submissions that Bilcon prepared for his attention, after the public release of the JRP report, but before accepting the recommendations of the JRP.⁷²⁰

⁷¹⁶ See *supra*, ¶¶ 298-301.

⁷¹⁷ *CEAA*, s. 37, **Exhibit R-1**; Expert Report of Robert Connelly, ¶¶ 87, 126-129.

⁷¹⁸ Affidavit of Stephen Chapman, ¶ 56; Affidavit of Mark McLean, ¶ 60; Affidavit of Christopher Daly, ¶ 61.

⁷¹⁹ Expert Report of Lawrence Smith, Q.C., ¶ 429.

⁷²⁰ Email from Nancy Vanstone to Lorrie Roberts, **Exhibit R-469** ("I indicated that we did review all his [Buxton's] letters, including the one received last Friday"). See also letter from Paul Buxton to Minister Parent, October 29, 2007 **Exhibit R-494**; Letter from Paul Buxton to Minister Parent, November 8, 2007, **Exhibit R-495**; Letter from Paul Buxton to Minister Parent, November 16, 2007, **Exhibit R-496**.

364. Apparently, the Claimants believe that they should have been afforded the right to lobby government officials during the decision-making process.⁷²¹ As Robert Connelly explains there is neither a requirement in Canadian law that such lobbying be permitted, nor a practice wherein it is consistently allowed. Instead, the decision to hear either proponents or the public in connection with a JRP report is left entirely to the discretion of the relevant Ministers.⁷²² In this case, the provincial and federal Ministers chose to meet neither side in the debate over the recommendation of the Whites Point JRP. This conduct was reasonable, fair, and comes nowhere close to the type of conduct that would breach Canada's obligations under Article 1105.

b) Even if the Actions of the JRP Are Attributable to Canada, the Claimants Have Not Established that they Breached Article 1105

365. As explained above, the measures of the JRP about which the Claimants complain are not attributable to Canada as a matter of international law. They are therefore incapable of breaching Canada's obligations under Article 1105.⁷²³ However, even if the actions of the JRP are considered by this Tribunal, they were consistent with the standard set out in Article 1105.

366. The role of a JRP in an EA in Canada is to gather information in order to make recommendations that will be presented to the governments in question.⁷²⁴ It does not make decisions outside of the information gathering process, and as such, in considering its actions, the only relevant question is whether the JRP's actions in any way deprived the Claimants of a fair process during the information gathering stage of the EA. While the Claimants may be disappointed in the recommendations that the JRP made, their attacks against the process as somehow being unfair, biased and *ultra vires* are

⁷²¹ Claimants' Memorial, ¶ 483.

⁷²² Expert Report of Robert Connelly, ¶ 127.

⁷²³ See *supra*, ¶¶ 267-297.

⁷²⁴ See *supra*, ¶¶ 290-291.

completely baseless. In fact, the actions of the JRP were reasonable, fair, and at all times conformed to the applicable legislative and regulatory framework. The Claimants recognized this themselves in a letter to the JRP after the close of the hearings wherein they thanked the panel and stated that “[t]he process ran smoothly and efficiently in large part due to your efforts.”⁷²⁵

(1) Bilcon was Afforded a Reasonable Opportunity to be Heard Throughout the EA Process

367. The Claimants were offered extensive opportunities to be heard throughout the EA, including with respect to the very measures of the JRP which they now challenge. For example, even before the JRP was constituted, GQP was offered the opportunity to comment on a draft of the JRP Agreement and Terms of Reference.⁷²⁶ It chose not to.

368. The JRP also sought Bilcon’s comments on the draft EIS Guidelines.⁷²⁷ Bilcon chose not to speak at the scoping hearings, and submitted only brief written comments on the draft EIS Guidelines.⁷²⁸ In reference to Bilcon’s failure to meaningfully take advantage of these opportunities, Lawrence Smith comments that “[i]t is somewhat remarkable that, if these issues [in the EIS Guidelines] were of such concern, why were they not raised with the Panel when Bilcon was expressly invited to do so.”⁷²⁹

369. Similarly, at the public JRP hearings Bilcon was also afforded every opportunity to present its project to the JRP as well as to ask questions of every presenter who spoke.⁷³⁰ Indeed, Bilcon’s complaint that the JRP erred by not asking more questions of

⁷²⁵ Letter from Paul Buxton to Debra Myles, July 9, 2007, **Exhibit R-259**.

⁷²⁶ *See supra*, ¶¶ 155-156; Letter from Stephen Chapman to Paul Buxton, September 10, 2003, **Exhibit R-228**.

⁷²⁷ *See supra*, ¶¶ 171-174; Letter from Robert Fournier to Paul Buxton, December 15, 2004, **Exhibit R-242**.

⁷²⁸ Letter from Paul Buxton to Stephen Chapman, January 16, 2005, **Exhibit R-243**.

⁷²⁹ Expert Report of Lawrence Smith, Q.C., ¶ 274.

⁷³⁰ *See supra*, ¶¶ 189-192.

it and its experts⁷³¹ simply misses the entire point of the EA exercise. As made clear in the EIS Guidelines, it was Bilcon who bore the burden of proving the likelihood that their project would or would not cause significant adverse environmental effects.⁷³²

370. Nor is the fact that Bilcon failed to discharge its burden before the panel evidence of wrongful conduct on the part of the JRP. The Claimants essentially allege that the JRP effectively denied Bilcon the right to be heard by imposing “an impossible standard of ‘perfect certainty.’”⁷³³ The truth, however, is the exact opposite. As noted by Lawrence Smith, EA “requires sufficient detail about the project to predict the “likelihood” that there will or will not be “significant, adverse” environmental effects. It also requires sufficiently detailed information to assess whether or not, or to what extent, the mitigative measures the proponent proposes will work.”⁷³⁴ The JRP recognized that EA is a future-looking predictive process that cannot achieve perfect certainty.⁷³⁵ However, given their experience on previous review panels, and in particular, Dr. Fournier’s experience on the Sable Gas EA, the JRP was also aware that the predictive nature of an

⁷³¹ Claimants’ Memorial, ¶¶ 206-207.

⁷³² Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project, March 2005, p. 7. **Exhibit R-210**: “It is the responsibility of the Proponent to provide sufficient data and analysis on any potential adverse environmental effects to permit proper evaluation by the Panel, the public, and technical and regulatory agencies. The Guidelines outline the minimum information required by the Panel while leaving the Proponent some latitude in selecting methods to compile the EIS.” *See also* Expert Report of Lawrence Smith, Q.C., ¶¶ 296-315 (“Whether a proponent prevails at the end of the day, however, depends on its credibility and its ability to address the Panel’s concerns. The burden of persuasion rests with the proponent. Not all proponents successfully discharge that practical onus. From my review of the EIS, Bilcon’s IR responses and transcripts of the public hearing, it appears that Bilcon had significant difficulty in providing clarity and the level of detail in the information it provided that would allow it to ultimately satisfy its burden in a public review process.” (¶ 316).

⁷³³ Claimants’ Memorial, ¶ 469.

⁷³⁴ Expert Report of Lawrence Smith, Q.C., ¶ 341.

⁷³⁵ JRP Report, p. 20, **Exhibit R-212**.

EA is not an excuse for a proponent to provide incomplete and deficient information, as the Claimants provided here.⁷³⁶

(2) The JRP Conducted the EA in a Balanced, Impartial and Unbiased Manner

371. The JRP was unbiased and exhibited no prejudice towards the proponents or their project during the EA process. The Claimants offer no credible evidence of bias on the part of the members of the JRP, relying instead on a bald accusation that the Panel shared and was sympathetic to the anti-American sentiment⁷³⁷ that some members of the public allegedly expressed at the hearing.

372. There is no question that Bilcon had done a poor job managing its relationship with the public and that the public was distrustful of it.⁷³⁸ In fact, the failure of the proponent to get the information out to the community was something that Paul Buxton himself admitted.⁷³⁹ However, there are no grounds to attribute to the JRP any of the statements of individuals who made presentations at the JRP hearings. The fact that the JRP allowed everyone an opportunity to speak and did not cut anyone off is not evidence of any bias or wrongful conduct on their part.⁷⁴⁰

373. Ultimately, the JRP produced a 107 page report which contained its recommendation and all of the reasons for that recommendation, including the evidence

⁷³⁶ Expert Report of Lawrence Smith, Q.C., ¶ 344 (“In sum, the Panel was not insisting on perfect certainty; rather it sought sufficiently detailed information to do its job.”).

⁷³⁷ Claimants’ Memorial, ¶ 214.

⁷³⁸ That adequate facts were not being provided to the community members was a constant source of concern during CLC meetings. Also, instead of engaging with the public concerns, the proponents chose to initiate a defamation lawsuit against certain community members. This tactic only served to further sour the atmosphere and relationship, with the public seeing it as a specific attempt to shut down public participation in the process. *See* CLC Minutes, October 8, 2003, pp. 215-216, **Exhibit R-299**.

⁷³⁹ CLC Minutes, April 30, 2003, p. 157, **Exhibit R-299**.

⁷⁴⁰ Nor is the fact that the JRP was cognizant of the reality that Canada is a party to NAFTA and that a comprehensive trade treaty might have implications that needed to be evaluated in the review.

from the hearings upon which it had relied.⁷⁴¹ Nothing in that report suggests that the members of the JRP were biased against Bilcon or the project. Indeed, if anything, the critical comments the Claimants complain of reflect nothing more than the JRP's frustration with the poor job done by Bilcon in preparing both its EIS and its presentations.⁷⁴² It is true that the JRP asked hard questions of Bilcon, and it is also true that Bilcon was ill-prepared to answer. However, that is not proof of bias, and certainly not proof of a breach of Article 1105. As explained by Lawrence Smith, "[t]he Joint Review Panel and the federal and provincial governments can hardly be blamed for Bilcon's deficiencies in approach."⁷⁴³

(3) The JRP Considered Only Factors that Were Consistent with its Function and Mandate

374. Not only did the JRP provide Bilcon with significant advance notice regarding the factors it intended to assess during the EA, the factors it chose to review were reasonable and tied to its mandate. The Claimants' allegations in this regard are nothing more than the same sweeping and unsupported accusations that characterize their entire attack against the JRP.

375. First, Bilcon was given sufficient advance notice, *via* the EIS Guidelines, of the factors that the JRP intended to consider during its review of the Whites Point project. In particular, in addition to looking at the effects on traditional biophysical components, the EIS Guidelines made it clear that the JRP would be focusing on concepts like "traditional

⁷⁴¹ JRP Report, **Exhibit R-212**.

⁷⁴² See for example JRP Hearing Transcript, pp. 118-120 (**Exhibit R-457**), pp.263-265 (**Exhibit R-330**), pp. 1180-81 (**Exhibit R-458**), p. 1212 (**Exhibit R-495**); with respect to the JRP's apparent view of the quality of the work done by Bilcon, *see supra*, ¶¶ 181-200.

⁷⁴³ Expert Report of Lawrence Smith, Q.C., ¶ 299.

knowledge,⁷⁴⁴ the precautionary principle,⁷⁴⁵ and the project's socio-economic effects, such as the effects on core community values.⁷⁴⁶

376. While the Claimants now allege that the JRP's "addition" of some of these factors as a result of public comments made in writing and at the scoping meetings⁷⁴⁷ was wrongful,⁷⁴⁸ at the time, Bilcon did not object. The Claimants' objection now is not only ill-timed, it is ill-founded. In fact, the ability of the JRP to modify the draft EIS Guidelines in the wake of public consultations was exactly what Canada and Nova Scotia provided for in the JRP Agreement.⁷⁴⁹ Indeed, it would be contrary to the very purpose of public participation if the public consultation exercise had been little more than the *pro forma* consultations that the Claimants seem to allege are appropriate.⁷⁵⁰

377. Further, the factors that the JRP was entitled to include in the scope of the EA were not, as the Claimants allege, limited "to the relevant criteria of an environmental assessment under the *CEAA*".⁷⁵¹ Not only is no such limitation present in the JRP

⁷⁴⁴ Draft EIS Guidelines, November 10, 2004, p. 4, **Exhibit R-209**; Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project, March 2005, p. 8, **Exhibit R-210**.

⁷⁴⁵ Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project, March 2005, p. 12, **Exhibit R-210**.

⁷⁴⁶ Draft EIS Guidelines, November 10, 2004, p. 4, **Exhibit R-209**; Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project, March 2005, p. 8, **Exhibit R-210**.

⁷⁴⁷ See *supra*, ¶¶ 172-176. For example, the additional factors scoped into the assessment were raised by members of the public at the following public meetings: Scoping Meeting No.1, Sandy Cove, January 6, 2005, p.77; Scoping Meeting No. 3, Wolfville, January 8, 2005, p.74; Scoping Meeting No.1, Sandy Cove, January 6, 2005, p.38; Scoping Meeting No. 2, Digby, January 7, 2005, p. 31; Scoping Meeting No.3, Wolfville, January 8, 2005, p.49; and Scoping Meeting No.4, Meteghan, January 9, 2005, pp. 27-28. Transcripts of Scoping Hearings, **Exhibit R-500**.

⁷⁴⁸ Claimants' Memorial, ¶ 465.

⁷⁴⁹ JRP Agreement, Part II, Article 2 (mandating the JRP to seek public comment) and p. 8 (allowing the modification of the draft EIS Guidelines as a result of the scoping meetings), **Exhibit R-27**.

⁷⁵⁰ See also Expert Report of Lawrence Smith, Q.C., ¶¶ 259 ("Moreover, Bilcon was well aware of the broad interpretation of socio-economic effects being urged upon the Panel by members of the public at the public scoping meetings.").

⁷⁵¹ Claimants' Memorial, ¶ 465.

Agreement, but it would have no sense in this case, where the project was a joint assessment and accordingly the requirements of the *NSEA* also had to be met.

378. Second, as evidenced by the Claimants' lack of objection at the time, the factors that the JRP addressed in the EA were rooted in the relevant legal and regulatory frameworks of Canada and Nova Scotia. For example, the Claimants allege that the JRP's reliance on the notion of "community core values" was a "flagrant departure from the rule of law".⁷⁵² This allegation demonstrates how poorly the Claimants understood and understand the regulatory framework governing EAs in Canada and Nova Scotia. The JRP Agreement directed the JRP to apply not only the *CEAA* but also Part IV of the *NSEA*, which expressly requires consideration of broad socio-economic effects.⁷⁵³ As explained by Lawrence Smith, the Claimants, in effect, "ignore the breadth of the socio-economic considerations, which are mandated by the Nova Scotia legislation. Those requirements also governed the assessment."⁷⁵⁴

379. The Claimants nowhere dispute that the effect of the project on the community's core values is in fact a socio-economic effect. In fact, the Claimants' own expert witness, David Estrin, has made clear that effects on "core community values" are socio-economic effects.⁷⁵⁵ Accordingly, far from being a "flagrant" violation of applicable law, the JRP's consideration of the effects of the project on the "core community values" was well within the JRP's mandate.⁷⁵⁶

⁷⁵² Claimants' Memorial, ¶ 474.

⁷⁵³ JRP Agreement, Part III, **Exhibit R-27**.

⁷⁵⁴ Expert Report of Lawrence Smith, Q.C., ¶ 236.

⁷⁵⁵ Expert Report of David Estrin, ¶¶ 230, 243.

⁷⁵⁶ See also Expert Report of Lawrence Smith, Q.C., ¶ 229 ("[I]t is important to recognize that Mr. Estrin acknowledges that "inconsistency with community core values ... is a pure socio-economic effect." If consideration of socio-economic effects was within the Panel's mandate, then it follows that consideration of community core values was also within its mandate. In my view, consideration of socio-economic effects was within the Panel's mandate, which includes community core values.")

380. As explained above, it was the JRP’s conclusion, based on the evidence presented to it, that the proposed project would introduce such “changes to [the] community’s core values to warrant the Panel assessing them as a Significant Adverse Environmental Effect that cannot be mitigated”⁷⁵⁷ which led them to recommend that the Nova Scotia government reject the project, and the federal government refuse to issue the requested authorizations.⁷⁵⁸ Despite this conclusion being the only operative one, the Claimants crowd their Memorial with various assertions challenging other minor considerations of the JRP during the course of the EA.

381. In particular, the Claimants spend time challenging (1) the consideration by the JRP of the potential cumulative environmental effects of the project,⁷⁵⁹ (2) the review by the JRP of the traditional knowledge of the community (not just aboriginal people),⁷⁶⁰ (3) the use by the JRP of the precautionary principle,⁷⁶¹ (4) the rejection by the JRP of Bilcon’s overreliance on the concept of adaptive management,⁷⁶² and (5) the consideration by the JRP of whether the project could be justified.⁷⁶³ What the Claimants do not spend sufficient time doing, however, is proving how any of this rises to the level of the shocking and egregious conduct required for a violation of Article 1105. Instead, they allege that the consideration of such factors is inconsistent with standard EA practice in Canada. As explained in the Expert Report of Lawrence Smith, they are wrong.⁷⁶⁴

⁷⁵⁷ JRP Report, p. 14, **Exhibit R-212**.

⁷⁵⁸ *See supra*, ¶¶ 205-212.

⁷⁵⁹ Claimants’ Memorial, ¶ 467, 476, 478.

⁷⁶⁰ Claimants’ Memorial, ¶ 470.

⁷⁶¹ Claimants’ Memorial, ¶ 473.

⁷⁶² Claimants’ Memorial, ¶ 473.

⁷⁶³ Claimants’ Memorial, ¶ 499.

⁷⁶⁴ Expert Report of Lawrence Smith, Q.C., *see in particular*: (1) on cumulative environmental effects, ¶¶ 369-389; (2) on review of traditional knowledge, ¶¶ 264-266; (3) on use of precautionary principle, ¶¶ 320-326; (4) on JRP’s rejection of Bilcon’s reliance on adaptive management principle, ¶¶ 355-368; and, (5) on the issue of JRP’s consideration of whether the project could be justified, ¶¶ 390-401.

382. More importantly, however, as explained above, the role of this Tribunal is not that of a court of appeal sitting in judicial review to determine whether the JRP should or should not have considered a particular factor in its assessment of a project.⁷⁶⁵ Even if any of the factors considered by the JRP were inconsistent with typical practice in Canadian law, or were outside of the Panel’s mandate, that does not amount to a breach of Article 1105. The *Cargill* Tribunal held that a measure would breach the standard set out in Article 1105 only if it was:

“arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy so as to constitute an unexpected and shocking repudiation of a policy’s very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety.”⁷⁶⁶

383. All of the Claimants’ complaints regarding the conduct of the JRP, summarized above, fall far short of this standard. Even assuming the JRP erred in its approach to the EA of the Whites Point project – and the Claimants have not even come close to demonstrating such an error – these errors would not amount to a repudiation or subversion of the EA process. Moreover, they were apparently not substantial enough for the Claimants to raise a timely complaint in Canada’s domestic courts. Nor were they important enough to prevent the Claimants’ contemporaneous comment to the effect that “[t]he [JRP] process ran smoothly and efficiently.”⁷⁶⁷

⁷⁶⁵ *Loewen – Award*, ¶ 134, **RA-75**.

⁷⁶⁶ *Cargill – Award*, ¶ 296, **RA-11**; *see also* ¶ 292: “[a]n actionable finding of arbitrariness must not be based simply on a tribunal’s determination that a domestic agency or legislature incorrectly weighed the various factors, made legitimate compromises between disputing constituencies, or applied social or economic reasoning in a manner that the tribunal criticizes.” To the same effect, *see S.D. Myers – Partial Award*, ¶ 261, **RA-65**; *GAMI – Final Award*, ¶ 93, **RA-27**; *Chemtura – Award*, ¶ 134, **RA-18**.

⁷⁶⁷ Letter from Paul Buxton to Debra Myles, July 9, 2007, **Exhibit R-259**.

6. The Claimants Have Not Established that Canada Failed to Afford them or their Investments Full Protection and Security

384. The Claimants allege that Canada failed to provide full protection and security because Canada failed to provide a stable legal and business environment during the EA of the Whites Point project.⁷⁶⁸ In particular, they challenge: the JRP’s alleged failure to “cut off” individuals critical of Bilcon and otherwise provide a fair hearing; Canada and Nova Scotia’s alleged failures in following domestic law; and, the Department of Foreign Affairs and International Trade’s response to the request of the JRP for a summary of NAFTA.⁷⁶⁹ The measures in question have already been shown to be fair, reasonable and in accordance with Canada and Nova Scotia’s EA laws and regulations, and as such, claims that they violated Article 1105 are meritless. The Claimants’ recasting them as a violation of full protection and security does not change that fact.

385. Moreover, the obligation to provide an investment full protection and security under the customary international law minimum standard of treatment of aliens extends only to the physical security of the investors and their investments.⁷⁷⁰ It does not extend to “regulatory security”⁷⁷¹ and certainly not to the type of “protection” the Claimants seek.

⁷⁶⁸ Claimants’ Memorial, ¶¶ 528-531, 535; *see also* ¶ 364. The Claimants’ claim that full protection and security includes an obligation to provide a stable and legal business environment on the basis of one single authority (*Azurix – Award*, RA-6) which applied the autonomous fair and equitable treatment standard pursuant to the Argentina-United States BIT. As Canada has noted previously, this standard is irrelevant to Article 1105(1). As confirmed by paragraph 2(2) of the binding *FTC Note of Interpretation*, RA-49, full protection and security under Article 1105 embodies customary international law (“The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens”). The Claimants have not even attempted to prove custom in this regard.

⁷⁶⁹ Claimants’ Memorial, ¶¶ 526-527.

⁷⁷⁰ *See for example PSEG v. Turkey* where the Tribunal confirmed that the obligation to provide full protection and security is generally limited to physical security, *PSEG Global Inc. and Konya Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID) (No.ARB/02/05) Award, 17 January 2007 (“*PSEG Global*”), ¶¶ 257-259, RA-59. Indeed, several of the cases cited by the Claimants themselves properly speak to the content of the obligation of physical security in the context of the obligation to provide full protection and security: *see Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3) Award, 27 June 1990 (“*Asian Agricultural – Award*”), ¶¶ 46-54, RA-4; *see also American Manufacturing & Trading Inc. v. Republic of Zaire* (ICSID) (No.ARB/93/1) Award, 21

386. The obligation to provide full protection and security was summarized as follows in an UNCTAD Study:

The standard of full protection and security has traditionally applied to foreign investors in periods of insurrection, civil unrest, and other public disturbances, although it is not explicitly limited to those circumstances. [Investor-state dispute settlement] jurisprudence has traditionally held that the full protection and security standard encompasses damages or losses sustained by an investor as a result of such violent episodes, whether directly due to government acts or to a lack of adequate protection of the investment by government officials or police.⁷⁷²

387. In this case, there was no civil unrest or insurrection, no destruction of physical property, no mob looting, and no threats to the safety of the Claimants or their investment. As such, their claim of a denial of full protection and security must be dismissed.

7. The Claimants Have Not Established That Legitimate Expectations Are Protected By Article 1105, or That They Had Any Legitimate Expectations to Begin With

388. Finally, while the Claimants have not argued in the Memorial that *any* measure actually breached their legitimate expectations – and as shown below, given the timing of the facts in question such an assertion would be impossible – they have devoted considerable time to arguing that Article 1105 includes an obligation to protect an

February 1997 (“*American Manufacturing – Award*”), 6.10, p. 30, **RA-2**; *Wena Hotels Ltd. (U.K.) v. Arab Republic of Egypt* (ICSID) (No.ARB/98/4) Award, 8 December 2000 (“*Wena Hotels – Award*”), **RA-83**.

⁷⁷¹ The Tribunal in the consolidated cases of *AWG and Suez* and *Vivendi* concluded that under the three applicable BITs: “Argentina is obliged to exercise due diligence to protect investors and investments primarily from physical injury, and that in any case Argentina’s obligations under the relevant provisions do not extend to encompass the maintenance of a stable legal and commercial environment. See *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/19) Decision of Liability, 30 July 2010 (“*Suez – Decision on Liability*”), ¶ 179, **RA-72**.

⁷⁷² UNCTAD, *Investor-State Dispute Settlement and Impact on Investment Rulemaking* (Switzerland: UN, 2007), p.46, **RA-8**.

investor's legitimate expectations.⁷⁷³ As such, while not ultimately relevant, the reasons why such allegations are without merit are outlined briefly below.

389. The Claimants have failed to demonstrate that the customary international law minimum standard of treatment of aliens includes protection of an investor's "legitimate expectations". Indeed, they have presented no evidence of State practice and *opinio juris*, instead relying on the *Tecmed* decision⁷⁷⁴ – a non-NAFTA arbitration interpreting not the customary international law minimum standard of treatment, but rather the "autonomous" fair and equitable treatment standard found in the Spain-Mexico bilateral investment treaty that was intended to "create favourable conditions for investments."⁷⁷⁵

390. In doing so, they ignore the fact that this approach generally, and the *Tecmed* decision in particular, has been rejected by two of the most recent NAFTA Chapter 11 arbitrations to consider it, *Glamis* and *Cargill*.⁷⁷⁶ As the *Cargill* Tribunal explained, "[t]he award and statements of the *Tecmed* tribunal [...] do not bear on the customary international law minimum standard of treatment, but rather reflect an *autonomous* standard based on an interpretation of the text."⁷⁷⁷ This explanation, also used in *Glamis*, led these two tribunals to conclude that "the holding in *Tecmed* is not instructive ... as to the scope and bounds of the fair and equitable treatment required by Article 1105 of the NAFTA."⁷⁷⁸ The other awards relied upon by the Claimants, i.e. *MTD* and *CMS*, are irrelevant for the same reason. Further, the Claimants ignore the fact that the *Metalclad* award on which they rely was in fact partially set aside on the grounds that the Tribunal's

⁷⁷³ Claimants' Memorial, ¶¶ 340-346.

⁷⁷⁴ *Tecmed – Award*, RA-73.

⁷⁷⁵ *Tecmed – Award*, ¶¶ 155-156, RA-73.

⁷⁷⁶ *Glamis – Award*, ¶ 610, RA-29: "Neither the language or analysis of the *Tecmed* award is not relevant to the Tribunal's consideration of an Article 1105 breach"; see also *Cargill – Award*, ¶ 280, RA-11: "the Tribunal determines that the holding in *Tecmed* is not instructive in this arbitration as to the scope and bounds of the fair and equitable treatment required by Article 1105 of the NAFTA."

⁷⁷⁷ *Cargill – Award*, ¶ 280, RA-11 [emphasis added].

⁷⁷⁸ *Cargill – Award*, ¶ 280, RA-11; *Glamis – Award*, ¶ 610, RA-29.

finding that Article 1105 required a “transparent and predictable framework for Metalclad’s business planning and investment,” was “a matter beyond the scope of the submission to arbitration.”⁷⁷⁹

391. In contrast, tribunals appropriately applying the customary international law minimum standard of treatment have been consistently unconvinced that Article 1105(1) requires the NAFTA Parties “to provide a stable and predictable environment in which reasonable expectations are upheld.”⁷⁸⁰ For example, in *Glamis*, while the Tribunal considered it *possible* that “the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations” could be a factor as to whether there was an egregious and shocking act in violation of Article 1105,⁷⁸¹ it clarified that “[m]erely not living up to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA.”⁷⁸² Similarly, the Tribunal in *Thunderbird* only considered the frustration of a claimant’s expectations as part of the “context” when determining whether the measures in question were a “gross denial of justice or manifest arbitrariness.”⁷⁸³

⁷⁷⁹ While the Claimants acknowledge in a footnote that the *Metalclad* award was partially set aside, they imply that the parts of the award they are relying on “were not questioned” (Claimants’ Memorial, fn. 468). This is incorrect. In fact, this finding is precisely the finding that was overturned by Judge Tysoe. At ¶ 72 of his judgement, he explains: “In its reasoning, the Tribunal discussed the concept of transparency after quoting Article 1105 and making reference to Article 102. It set out its understanding of transparency and it then reviewed the relevant facts. After discussing the facts and concluding that the Municipality’s denial of the construction permit was improper, the Tribunal stated its conclusion which formed the basis of its finding of a breach of Article 1105; namely, Mexico had failed to ensure *a transparent and predictable framework for Metalclad’s business planning and investment*. Hence, the Tribunal made its decision on the basis of transparency. This was a matter beyond the scope of the submission to arbitration because there are no transparency obligations contained in Chapter 11.” [emphasis added] *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664, 2 May 2001, **Exhibit R-395**.

⁷⁸⁰ *Cargill – Award*, ¶¶ 289-290, **RA-11**.

⁷⁸¹ *Glamis – Award*, ¶ 627, **RA-29**.

⁷⁸² *Glamis – Award*, ¶ 620, **RA-29**.

⁷⁸³ *Thunderbird – Final Award*, ¶¶ 147, 194, **RA-32**. See also *Waste Management – Award*, ¶ 98, **RA-82**. In *Waste Management II*, the Tribunal held that the failure of Mexico to adhere to the representations made to the claimant were merely “relevant” to the determination of whether Mexico had acted in a “grossly unfair, unjust, or idiosyncratic” way.

392. In order for any of their expectations to be at all relevant context to assessing whether or not the conduct in question here rises to the level of a breach of Article 1105, the Claimants must prove that their expectations (1) arose from a specific assurance made by Canada,⁷⁸⁴ (2) made in order to induce their investment at Whites Point (i.e. it must have been made before the investment was made),⁷⁸⁵ and (3) that their expectations were objective rather than subjective.⁷⁸⁶ They do not even attempt to do so here, because they cannot. Instead, all they can point to is meetings with officials and politicians at which they were “encouraged” or “invited” to invest in Nova Scotia.⁷⁸⁷

393. Not only do such standard investment promotion activities fail to amount to the specific sort of inducement and specific assurances required, they all occurred in late 2002 and well into 2003, months *after* the Claimants reached an agreement with Nova

⁷⁸⁴ See, e.g., *Glamis – Award*, ¶ 620, **RA-29**: “Merely not living up to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA. Instead, Article 1105(1) requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations.”; see also *Waste Management – Award*, ¶ 98, **RA-82**: there must have been a “breach of representations made by the host State which were reasonably relied on by the claimant.”; see also *ADF – Award*, ¶ 189, **RA-1**: denying the investor’s claim of legitimate expectations because “any expectations that the Investor had ... were not created by any misleading representations made by authorized officials of the U.S. Federal Government”

⁷⁸⁵ See, e.g., *Bayindir – Award*, ¶¶ 190-191, **RA-7**: “Several awards have stressed that the expectations to be taken into account are those existing at the time when the investor made the decision to invest. There is no reason not to follow this view here.”; see also *Enron – Award*, ¶ 262, **RA-24**: “these expectations derived from the conditions that were offered by the State to the investor at the time of the investment.”; see also *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (“*LG&E – Decision on Liability*”), ¶ 130, **RA-34**: “the investor’s fair expectations” have several “characteristics”, the first being that “they are based on the conditions offered by the host State at the time of the investment”; see also *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador* (ICSID Case No. ARB/04/19) Award, 18 August 2008 (“*Duke Energy – Award*”) at ¶ 340, **RA-22**: “To be protected, the investor’s expectations must be legitimate and reasonable at the time when the investor makes the investment.”

⁷⁸⁶ See e.g., *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13) Award, 8 October 2009 (“*EDF – Award*”), ¶ 219, **RA-23**: “Legitimate expectations cannot be solely the subjective expectations of the investor. They must be examined as the expectations at the time the investment is made, as they may be deduced from all of the circumstances of the case, due regard being paid to the host State’s power to regulate its economic life in the public interest.” See also, *Glamis – Award*, ¶ 627, **RA-29**: “Creation by the state of objective expectations in order to induce investment”

⁷⁸⁷ See for example Affidavit of Paul Buxton, ¶¶ 19, 22; Affidavit of William Richard Clayton, ¶¶ 8, 14, 19.

Stone to invest in the Whites Point Quarry and Marine Terminal.⁷⁸⁸ As such, any claims that the meetings with officials and politicians actually induced the Claimants to invest are unsupported – the Claimants had already made the decision to invest.

8. Conclusions -- The Claim Under NAFTA Article 1105 Should be Rejected

394. The Claimants' Article 1105 claim is nothing more than a jumble of unsubstantiated statements from their expert, journal notes of a DFO official taken out of context, and irrelevant quotes from arbitral awards.⁷⁸⁹ The resulting narrative is as improbable as it is unfounded. The Claimants' theory that the governments of Canada and Nova Scotia conspired against their project implies the participation of numerous cabinet ministers from different political parties both at the federal and provincial levels of government as well as an untold number of professional civil servants in Ottawa and Halifax.⁷⁹⁰ That none of the thousands of pages of documents produced in this arbitration reveal the existence of such a grand conspiracy speaks volumes about the credibility of the Claimants' narrative. Their claim under Article 1105 is unsupported and must be dismissed.

B. Canada Has Not Breached NAFTA Articles 1102 or 1103

1. Summary of Canada's Position

395. The Claimants have alleged that, in violation of Articles 1102 and 1103, Canada and Nova Scotia jointly accorded Bilcon treatment that was less favourable than the treatment accorded, in like circumstances, to other Canadian and foreign investors and

⁷⁸⁸ See *supra*, ¶¶ 35-41.

⁷⁸⁹ See for example Claimants' Memorial, ¶¶ 506, 507, 522.

⁷⁹⁰ Ministers Thibault and Anderson were members of the Liberal Party of Canada. Ministers Baird, MacKay and Hearn are members of the Conservative Party of Canada. Provincially, Ministers Russell and Parent are members of the Progressive Conservative Party of Nova Scotia while the Honourable Harold Theriault Jr. is a member of the Liberal Party of Nova Scotia.

investments. However, they have failed to meet their burden to prove the most basic elements of their claims.

396. First, as shown below, not all the facts of which the Claimants complain can even be considered “treatment” under Articles 1102 and 1103. In addition, they have failed to compare treatment accorded by the same government actors. For the most part, they impermissibly attempt to compare treatment jointly accorded to their proposed project by Nova Scotia and Canada, with the treatment accorded by either Nova Scotia alone, the federal government alone, or the federal government jointly with a different province. Second, they have failed to show the treatment they were jointly accorded by Canada and Nova Scotia was less favourable than the treatment accorded to the other domestic or third country investors or investments they have identified. Inexplicably, comparisons are drawn to projects where a JRP was also undertaken and, hence, the same treatment was accorded. Finally, they have failed to demonstrate that any of the alleged discriminatory treatment was accorded “in like circumstances”. In fact, they propose comparisons with investors and investments in entirely dissimilar projects – i.e. projects with limited impacts on remote, unpopulated or already industrialized areas about which there was little public concern.

397. After being granted unprecedented access to tens of thousands of documents relating to the EAs of more than 70 projects across Canada, this is all that the Claimants can apparently offer to support their allegations. It is not enough, and thus, their Article 1102 and 1103 claims must fail.

2. The Claimants Fail to Discharge the Burden They Must Meet under Articles 1102 And 1103

398. NAFTA Article 1102 imposes the following national treatment obligation on the NAFTA Parties:

- (1) Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors

with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

(2) Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

(3) The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favourable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

399. NAFTA Article 1103 prescribes a similar obligation but on a most-favoured nation basis. Under Article 1103, the treatment accorded to investors or investments of a NAFTA party must be no less favourable than that accorded, in like circumstances, to investors or investments of “any other Party or of a non-Party.”

400. Accordingly, for the Claimants to make out a claim under Article 1102 or 1103, they bear the burden⁷⁹¹ of showing that: (1) a government accorded them “treatment” during the EA of the Whites Point project and that the same government accorded treatment to other domestic or foreign investors or investments;⁷⁹² (2) the treatment this government accorded to the Claimants or their investment was “less favourable” than that which it accorded to these other domestic or foreign EA proponents;⁷⁹³ and (3) the

⁷⁹¹ *UPS – Award*, ¶¶ 83-84, **RA-79** (“[The] legal burden . . . rests squarely with the Claimant. That burden never shifts to the Party, here Canada.”). See also *Thunderbird – Final Award*, ¶ 176, **RA-32** (“The burden of proof lies with Thunderbird, pursuant to Article 24(1) of the UNCITRAL Rules. In this respect, Thunderbird must show that its investment received treatment less favourable than Mexico has accorded, in like circumstances, to investments of Mexican Nationals.”).

⁷⁹² *Merrill & Ring – Award*, ¶¶ 81-82, **RA-38**; *UPS – Award*, ¶ 83, **RA-79**.

⁷⁹³ *UPS – Award*, ¶ 83, **RA-79**; *Loewen – Award*, ¶ 139, **RA-75**; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/05) Award, 21 November 2007 (“*ADM – Award*”), ¶ 205, **RA-3**; *S.D. Myers – Partial Award*, ¶ 252, **RA-65**.

government accorded the allegedly discriminatory treatment in question “in like circumstances”⁷⁹⁴.

401. This analysis has to be conducted in light of the object and purpose of Articles 1102 and 1103, which is to prevent discriminatory treatment based on the nationality of an investor or its investment. In past NAFTA Chapter Eleven arbitrations, all three NAFTA Parties have agreed that the national treatment obligation is designed to protect against discrimination on the basis of nationality.⁷⁹⁵ The statements of the NAFTA Parties on Article 1102 apply equally to the MFN obligation under Article 1103.

402. Likewise, NAFTA Chapter Eleven Awards reflect that the central object of Article 1102 is to prevent nationality-based discrimination. The *Loewen* Tribunal found that “Article 1102 is direct [*sic*] only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the

⁷⁹⁴ *UPS – Award*, ¶ 83, **RA-79**.

⁷⁹⁵ On behalf of the United States, see *The Loewen Group Inc., and Raymond L. Loewen v. The United States of America*, (ICSID Case No. ARB (AF)/98/3) Counter Memorial of the United States of America, 30 March 2001 (“*Loewen – US Counter Memorial*”), p. 123, **RA-77** (“[T]hey have no evidence of any “nationalistic” bias on the part of the Mississippi judiciary.”). On behalf of Mexico see *GAMI Investments, Inc. v. Mexico* (UNCITRAL) Statement of Defense, 24 November 2003 (“*GAMI – Statement of Defense*”), ¶ 273, **RA-28** (“A violation of national treatment requires discrimination on the basis of nationality.”). See also *Methanex Corporation v. The United States of America* (UNCITRAL) Mexico Fourth Submission pursuant to Article 1128, 30 January 2004 (“*Methanex – Fourth Submission of Mexico*”), ¶ 16, **RA-43** (“When applying the national treatment rule, the *only* relevant issue of status is the investor’s nationality. Where a breach of Article 1102 is alleged, it is less favourable treatment based on the Claimant’s Canadian nationality *only* that can give rise to a finding of breach of Article 1102”). On behalf of Canada, see *Pope & Talbot v. Government of Canada*, (UNCITRAL) Counter Memorial, 29 March 2000 (“*Pope & Talbot – Counter Memorial*”), ¶ 166, **RA-56** (“Article 1102(2) does not prevent a Party from implementing a measure that affects investments differently as long as the measure neither directly nor indirectly discriminates on the basis of nationality as between foreign and domestic investments.”). See also *United Parcel Service v. Canada* (UNCITRAL) Counter Memorial, 22 June 2005 (“*UPS – Counter Memorial*”), ¶ 585, **RA-81** (“The terms of Article 1102... reveal the article’s general purpose of preventing nationality-based discrimination.”). See also *Methanex Corporation v. The United States of America* (UNCITRAL) Canada’s Fourth Submission pursuant to Article 1128, 30 January 30 2004 (“*Methanex – Fourth Submission of Canada*”), ¶ 5, **RA-42** (“[Article 1102] prohibits treatment which discriminates on the basis of the foreign investment’s nationality.”). This agreement of the NAFTA Parties constitutes “subsequent practice” under Article 31(3)(b) of the *Vienna Convention, Investors’ Book of Authorities*, Tab **CA 44**.

basis of nationality....”⁷⁹⁶ Similarly, the *ADM* Tribunal found that “Article 1102 prohibits treatment which discriminates on the basis of the foreign investor’s nationality. Nationality discrimination is established by showing that a foreign investor has unreasonably been treated less favourably than domestic investors in like circumstances.”⁷⁹⁷

403. As is shown below, the Claimants here make no attempt to demonstrate that Bilcon was “unreasonably” treated “less favourably” than any of the domestic or foreign investors they identify as potential comparators. Nor can they. The treatment accorded to Bilcon was identical to the treatment accorded to many other domestic or foreign proponents. Further, to the extent that any of the treatment was different, the individual circumstances present in each of the cases resulted in their being reasonable scientific and policy reasons for the different treatment.

a) The Claimants Have Failed to Meet Their Burden to Show that Canada and Nova Scotia Accorded “Treatment”

404. While the term treatment is not expressly defined in NAFTA, in light of Article 1101, any complained of “treatment” must be a “measure,”⁷⁹⁸ i.e. a “law, regulation, procedure, requirement, or practice,”⁷⁹⁹ that is “adopted or maintained” by some person or entity for which Canada is responsible at international law. As such, consistent with these requirements and its ordinary meaning,⁸⁰⁰ treatment requires “behaviour in respect of an entity or a person.”⁸⁰¹

⁷⁹⁶ *Loewen – Award*, ¶ 139, **RA-75**.

⁷⁹⁷ *ADM – Award*, ¶ 205, **RA-3**.

⁷⁹⁸ NAFTA, Article 1101, **RA-47**.

⁷⁹⁹ NAFTA, Article 201, **RA-47**.

⁸⁰⁰ *Shorter Oxford Dictionary*, p. 3338, **RA-67** (defining treatment as “[t]he process or manner of behaving towards or dealing with a person or thing.”).

⁸⁰¹ *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8) Decision on Jurisdiction, 3 August 2004 (“*Siemens – Jurisdiction Decision*”), ¶ 85, **RA-64**.

405. The Claimants have generally alleged that the following instances⁸⁰² of “treatment” jointly accorded to them by Canada and Nova Scotia, were in breach of Articles 1102 and 1103: (1) the “duration” of the EA of their project; (2) the decision by the Governments of Canada and Nova Scotia to include the quarry within the scope of the project subject to a joint federal-provincial EA; (3) the decision of Canada and Nova Scotia to refer the project to a JRP; and (4) alleged differences in the cumulative environmental effects assessment and the application of the precautionary principle in the course of the EA. As shown below, the Claimants have failed to prove that duration is even treatment under Articles 1102 and 1103. Moreover, they have impermissibly attempted to compare treatment accorded by different governments.⁸⁰³

(1) The Claimants’ Contention that “Duration” Constitutes Treatment for the Purposes of Articles 1102 and 1103 is Wrong

406. The Claimants’ attempt to shoehorn the “duration” of Bilcon’s EA into the definition of treatment must be rejected. Duration, meaning “the continuance or length of time [or] the time during which anything continues,”⁸⁰⁴ is a consequence of treatment and other factors, not treatment in and of itself. As a result, the Claimants cannot directly challenge the duration of the EA of the Whites Point project under Article 1102 or 1103.

407. What they may challenge is the treatment accorded by Canada and Nova Scotia that they allege resulted in the unreasonable duration of the Whites Point EA. They have not done so, and a review of the facts outlined above makes it clear why they cannot. As Canada has explained above, it was primarily Bilcon’s own actions, including requesting a delay during its corporate reorganization, consistently missing self-imposed deadlines, and taking more than two years to prepare an EIS and respond to relevant information

⁸⁰² The other alleged instances of treatment in the Claimants’ Memorial (e.g., alleged differences in the approach to assessing cumulative effects) are so insignificant as to not warrant further consideration here.

⁸⁰³ See generally Claimants’ Memorial, ¶¶ 546-596 and ¶¶ 614-638.

⁸⁰⁴ *Shorter Oxford Dictionary*, p. 775, **RA-70**.

requests from the JRP, rather than any treatment accorded by Canada and Nova Scotia, which caused the process to take as long as it did.⁸⁰⁵

(2) The Claimants’ Attempt to Compare the Treatment Accorded to Other Investors and Investments by Other Governments Must Be Rejected

408. Canada does not dispute that the joint decisions of Canada and Nova Scotia to include the quarry within the scope of the project subject to a joint federal-provincial EA and to refer the project to a JRP were treatment. Similarly, the decisions of other government authorities on the scope of project and type of assessment in the comparator EAs were also treatment. However, the fact that all of the decisions are, on their own, treatment, does not mean that they are proper comparators in an Article 1102 or 1103 analysis.

409. Rather, as the Tribunal confirmed in *Merrill & Ring*, “[t]reatment accorded to foreign investors by the national government needs to be compared to that accorded by the same government to domestic investors, subject to meeting the requirement to be in ‘like circumstances’, just as the treatment accorded by a province ought to be compared to the treatment of that province in respect of like investments.”⁸⁰⁶ (emphasis added) This requirement of identifying the level of government according the treatment is derived from the plain language of Articles 1102 and 1103. Both articles obligate a Party to accord to investors of another Party “treatment no less favourable than *it* accords”⁸⁰⁷ to its own or other foreign investors. Similarly, Article 1102(3) provides that when a sub-national government is involved, the relevant treatment for comparison purposes is only that accorded to other investors or investments by the same sub-national government.⁸⁰⁸

⁸⁰⁵ See *supra*, ¶¶ 158-160, 177-180, 185-188.

⁸⁰⁶ *Merrill & Ring – Award*, ¶ 82, **RA-38**.

⁸⁰⁷ NAFTA, Article 1102, 1103 (emphasis added), **RA-47**.

⁸⁰⁸ NAFTA, Article 1102(3), **RA-47** (“The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favourable than the most favourable treatment

Indeed, that it must be the same government affording the allegedly discriminatory treatment is inherent in the concept of discrimination. It makes little sense to complain that, for example, the federal Government of Canada has discriminated against an investor because the provincial Government of Nova Scotia has accorded a different investor different treatment. Differences in treatment accorded by governments in a federal State, like Canada, are simply inevitable given the way the State is structured (otherwise it would require harmonization of all federal and provincial laws) but they are not necessarily violations of either national or most-favoured nation treatment obligations.

410. As the *Merrill & Ring* Tribunal noted, when the challenged treatment has been accorded by concurrent jurisdictions, the analysis becomes more difficult, but the correctness of the approach does not change.⁸⁰⁹ In this case, the treatment was accorded to Bilcon jointly by Canada and Nova Scotia. The type and scope of EA were determined by, and as a result of, involvement from both the province of Nova Scotia and the federal government because they shared regulatory jurisdiction over the activities in question and both were interested in harmonizing their respective reviews of the proposed project. Accordingly, comparisons with treatment accorded by Nova Scotia or the federal government alone, or by the federal government jointly with another province, are not useful or appropriate as a tool to assess whether there was a breach of either Article 1102 or 1103.

411. In this case, the Claimants have failed to abide by this rule and have instead drawn haphazard comparisons with treatment accorded by different governments and levels of government. In fact, out of the 15 projects the Claimants identify, only two were subject to both federal and Nova Scotia jurisdiction leading to a joint EA process: the

accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.”).

⁸⁰⁹ *Merrill & Ring – Award*, ¶ 82, **RA-38**.

Bear Head LNG Terminal and the Keltic LNG terminal. As such, only the treatment accorded to the EA proponents of these two projects is even potentially comparable treatment under Article 1102 and 1103. However, as is shown below, the Claimants fail to demonstrate that Bilcon received less favourable treatment than that accorded to the EA proponents in these projects. Indeed, the Claimants have also failed to show generally that any of the other domestic or foreign investors or investments that they identify as comparators were accorded more favourable treatment than Bilcon was accorded.

b) The Claimants Have Failed to Prove that They or Their Investment Were Accorded Less Favourable Treatment

412. As Canada has explained above, for the Claimants to establish that Bilcon was accorded less favourable treatment they must prove that it was discriminated against on the basis of the nationality of its owners.⁸¹⁰ As the *S.D. Myers* Tribunal explained, the question is: does the “practical effect of the measure . . . create a disproportionate benefit for nationals over non-nationals” or does the “measure, on its face, [appear to] favour its nationals over non-nationals. . . .”⁸¹¹

(1) The Claimants’ Unsupported Assertions Are Insufficient to Meet their Burden to Prove Less Favourable Treatment

413. The Claimants have offered no explanation or analysis of how the decisions in the Whites Point EA to include the quarry within the scope of the project being assessed and to refer the project for an assessment by a JRP were less favourable than the treatment accorded to any of the other comparators they identify. In fact, the Claimants’ analysis of how the scoping and type of assessment decisions in these projects was more favourable typically begins and ends with the unsubstantiated assertion that these other proponents

⁸¹⁰ See *supra*, ¶ 401-402.

⁸¹¹ *S.D. Myers – Partial Award*, ¶ 252, RA-65.

received “far more favourable treatment.”⁸¹² Merely stating this is not sufficient to meet the Claimants’ burden under Article 1102 and 1103.

414. Moreover, the basis for their conclusory assertion is far from obvious. In cases where there is shared federal and provincial jurisdiction, as in these cases, a broad scope and an immediate referral to a review panel can make the assessment more efficient. In fact, as Lawrence Smith explains in his Expert Report, an all inclusive scope and an immediate referral to a review panel is sometimes a proponent’s preferred option as it limits the possibility of disruptive litigation.⁸¹³ Mr. Smith also explains how, at the time of the Whites Point EA, a proponent may have preferred a review panel from the outset, instead of having to undergo both a comprehensive study and an assessment by a review panel.⁸¹⁴ This way of proceeding avoids the risks of an EA becoming complex, duplicative and burdensome.⁸¹⁵

415. For example, the EA of the Keltic project was completed through two separate, but factually overlapping federal EAs⁸¹⁶ as well as a separate Nova Scotia process that included 5 days of public hearings.⁸¹⁷ This is to be contrasted with the “one-stop-shop” approach in the Whites Point EA. In light of all of this overlap and duplication, it is unclear on what grounds the Claimants could contend that the proponents in Keltic were afforded more favourable treatment than they were.

⁸¹² See for example Claimants’ Memorial, ¶ 570 (Keltic LNG Terminal), ¶ 566 (Bear Head LNG Terminal).

⁸¹³ Expert Report of Lawrence Smith, Q.C., ¶¶ 117-125.

⁸¹⁴ Expert Report of Lawrence Smith, Q.C., ¶¶ 58-60, 93-94.

⁸¹⁵ Expert Report of Lawrence Smith, Q.C., ¶ 93.

⁸¹⁶ Keltic CEAA Scoping Report, pp. 8-9, **Exhibit R-512**.

⁸¹⁷ Keltic EAB Report, p. 21, **Exhibit R-513**.

416. Likewise, the Claimants allege differences in the application of “cumulative environmental effects assessments”⁸¹⁸ (in particular consideration of hypothetical projects) and of the “precautionary principle”⁸¹⁹ in the Whites Point and comparator projects. But they fail to explain how or why the alleged differential treatment was less favourable. Merely alleging, for example, that “there is no mention of the precautionary principle”⁸²⁰ in a comprehensive study report submitted in a comparator project, as the Claimants do, without any analysis, does not mean less favourable treatment was accorded to Bilcon. Again the basis for their conclusory assertions is far from obvious given the inconsequential impact of the treatment. Indeed, in arguing that this treatment was less favourable, the Claimants ignore the fact that these factors ultimately were not determinative of the recommendation made by the JRP.

(2) The Claimants Fail to Recognize that the Treatment Bilcon Received was The Same as that Accorded to Other EA Proponents

417. In attempting to substantiate their claims under Article 1102 and 1103, the Claimants inexplicably invoke two other EAs that were assessed in the same way as the Whites Point project – by way of JRP and that considered all of the components of the proposed project (Voisey’s Bay and NWT Diamonds).

418. Moreover, the actual list includes many other projects, such as the Kelly’s Mountain Quarry, which, as described by Neil Bellefontaine, was a proposed quarry and marine terminal with a Canadian proponent, that was subjected to a joint Nova Scotia-Canada JRP.⁸²¹ The list also includes, among other projects, Gros Cacouna, Rabaska, and

⁸¹⁸ See Claimants’ Memorial, ¶ 564 (Deltaport), ¶¶ 575-591 (Voisey’s Bay), ¶¶ 592-593 (Eider Rock), ¶¶ 595-596 (Belleoram), ¶¶ 619-620 (Southern Head), ¶ 623 (Victor Diamond), ¶ 626 (Sechelt), ¶ 629 (Surface Gold), ¶ 632 (NWT Diamonds), and ¶¶ 636-637 (Diavik).

⁸¹⁹ See Claimants’ Memorial, ¶ 557 (Aguathuna), ¶ 565 (Deltaport), ¶ 577 (Voisey’s Bay), ¶ 621 (Southern Head), ¶ 623 (Victor Diamond), ¶ 629 (Surface Gold), ¶ 633 (NWT Diamonds) and ¶ 638 (Diavik).

⁸²⁰ See Claimants’ Memorial, ¶ 621 and ¶ 629.

⁸²¹ Affidavit of Neil Bellefontaine, ¶¶ 14-15.

Kemess, each of which were subject to the Claimants' Document Requests in this arbitration, and for which Canada has produced hundreds of documents. Gros Cacouna, Rabaska and Kemess were proposed, at least in part, by Canadian investors.⁸²² Each was subjected to an EA by way of JRP and an "all in scope." As noted by Lawrence Smith, the Kemess JRP actually recommended outright rejection of the Kemess project on the basis that the "economic and social benefits provided by the Project, on balance, are outweighed by the risks of significant adverse environmental, social and cultural effects," a recommendation that was accepted by the federal and British Columbia governments.⁸²³

419. Further, while the Claimants may disagree with the Whites Point JRP's cumulative environmental effects assessment and its application of the precautionary principle, Lawrence Smith explains that, not only were they entirely reasonable,⁸²⁴ but many other EA proponents, not acknowledged by the Claimants, were accorded the same treatment. For example, Lawrence Smith explains that "the Whites Point Panel was not the only panel review which has considered induced [i.e. hypothetical] effects in a cumulative effects assessment. There are at least two others: the Lower Churchill Hydroelectric Generation JRP Report ("Lower Churchill") and the Mackenzie Valley Gas Projects Joint Panel Report."⁸²⁵ Mr. Smith also notes that "previous JRPs have made reference to the precautionary principle: the Sable/M&NP JRP (1997) and the Voisey's Bay Mine and Mill Project JRP (1999)."⁸²⁶

⁸²² Specifically: the proponents of Gros Cacouna was Petro-Canada and TransCanada Pipelines (both Canadian owned at the time); the proponent of Rabaska was the Rabaska Limited Partnership, comprised of Gaz Métro (a Canadian energy company), Enbridge (a Canadian company), and Gaz de France (a French Company); and the proponent of Kemess was Northgate Minerals Corporation (at the time a Canadian company). See Nationality of the Proponents of the Gros Cacouna, Rabaska and Kemess Projects, **Exhibit, R-378**.

⁸²³ See Expert Report of Lawrence Smith, ¶ 278.

⁸²⁴ See Expert Report of Lawrence Smith, Q.C., ¶¶ 369-389 (with respect to cumulative environmental effects assessment) and ¶¶ 320-326 (with respect to the precautionary principle).

⁸²⁵ See Expert Report of Lawrence Smith, Q.C., ¶ 380.

⁸²⁶ See Expert Report of Lawrence Smith, Q.C., ¶ 324.

420. Ultimately, the most that the Claimants have established with respect to *some* of the projects they identify is that Bilcon was accorded *somewhat* different treatment. But they have not demonstrated that this treatment was “less favourable treatment” under Articles 1102 or 1103. Moreover, as explained below, the differences in treatment were wholly a result of the different circumstances of the projects being assessed, and accordingly, are not grounds for a claim under Article 1102 or 1103.

c) The Claimants Have Not Established that the Challenged Treatment was Accorded to Bilcon “In Like Circumstances” to the Treatment Accorded to the Other Identified Investors and Investments

(1) The Claimants Fail to Identify the Correct Factors Necessary to Prove “Like Circumstances”

421. Even if the Tribunal were to accept that Bilcon was accorded treatment that was less favourable than the comparable treatment accorded to other investments, the Claimants have failed to prove that such treatment was accorded “in like circumstances.” For this reason as well, their claims under Articles 1102 and 1103 fail.

422. The Claimants’ approach to “in like circumstances” is ill-founded and ultimately unsustainable. They simply assert that “all enterprises affected by the environmental assessment regulatory process [are] in like circumstances with Bilcon.”⁸²⁷ This approach glosses over the meaning of “like circumstances” and leads to an extreme result. As such it must be rejected.

423. Every EA process is driven by a host of environmental, economic, social, legislative, and policy factors unique to the project under assessment and the environment for which it is proposed. If every project subject to an EA was in like circumstances, these factors would have to be ignored and the environmental assessment process would not be an “assessment” or a “process” at all. To ensure against a violation of Article

⁸²⁷ Claimants’ Memorial, ¶¶ 407, 411.

1102 or 1103, a single EA process would have to be applied, regardless of the area, type of project and issues raised. This sort of “race to the bottom” is not what Articles 1102 and 1103 require.

424. To the contrary, in light of the ordinary meaning of the phrase “in like circumstances,”⁸²⁸ NAFTA requires an analysis that accounts for the very factors that influence decision-making in the course of each EA. As past NAFTA Chapter Eleven tribunals have recognized, the relevant circumstances in an Article 1102 or 1103 analysis “are context-dependent.”⁸²⁹ As such, a true “like circumstances” analysis requires a detailed consideration of the particular facts of each case.⁸³⁰ It also requires an analysis of any public policy considerations that justify the differential treatment by showing that it bears a “reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments.”⁸³¹ As the Tribunal in *GAMI v. Mexico* explained:

The Government may have been misguided. That is a matter of policy and politics. The Government may have been clumsy in its analysis of the relevant criteria for the cutoff line between candidates and non-candidates for expropriation. Its understanding of corporate finance may have been

⁸²⁸ The ordinary meaning of “like” is “having the characteristics of; similar to”, “characteristic of”, befitting or “resembling”, see *Shorter Oxford Dictionary*, at 1595, **RA-71**. The ordinary meaning of the word “circumstance” is “that which stands around or surrounds; surroundings” or “the material, logical or other environmental conditions of an act or event”, see *Shorter Oxford Dictionary*, at 413, **RA-68**.

⁸²⁹ *Pope & Talbot v. Government of Canada*, (UNCITRAL) Award on the Merits of Phase 2, 10 April 2001 (“*Pope & Talbot – Award on Merits*”), ¶ 75, **RA-55** (“Circumstances are context-dependent.”).

⁸³⁰ *Merrill & Ring – Award*, ¶ 88, **RA-38**; *UPS – Award*, ¶ 87, **RA-79** (holding that the determination of whether treatment was accorded in like circumstances “will require consideration ... of all the relevant circumstances in which the treatment was accorded.”).

⁸³¹ *Pope & Talbot – Award on Merits*, ¶¶ 79, 87-88, **RA-55**. See also *Merrill & Ring – Award*, ¶ 88, **RA-38**; *S.D. Myers – Partial Award*, ¶¶ 248, 250, **RA-65** (holding that differences in treatment can be justified where related to public policies adopted “in order to protect the public interest”); OECD Declaration, *National Treatment for Foreign-Controlled Enterprises*, OECD: 1993 (“*OECD – National Treatment*”), at 22, **RA-53** (“More general considerations, such as the policy objectives of Member countries, could be taken into account to define the circumstances in which comparison between foreign-controlled and domestic enterprises is permissible inasmuch as those objectives are not contrary to the principle of national treatment.”).

deficient. But ineffectiveness is not discrimination. The arbitrators are satisfied that a reason exists for the measure which was not itself discriminatory. That measure was plausibly connected with a legitimate goal of policy (ensuring that the sugar industry was in the hands of solvent enterprises) and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity.⁸³²

425. Similarly, in interpreting the concept of “like circumstances,” the Tribunal in *Parkerings-Compagniet AS v. Lithuania* held that “less favourable treatment is acceptable if a State’s legitimate objective justifies such different treatment in relation to the specificity of the investment.”⁸³³ For example, in *Parkerings* the measure at issue prevented the construction of a parking facility near the historic old city in Vilnius.⁸³⁴ In light of this, the Tribunal determined that the relevant factors for a “like circumstances” analysis included the “considerable size” of the project proposal, “its proximity with the culturally sensitive area”⁸³⁵, and the “numerous and solid oppositions from various bodies that relied on archaeological and environmental concerns.”⁸³⁶

426. The Claimants ignore the overwhelmingly consistent approach employed by tribunals in analysing the concept of “like circumstances.” Instead, they rely heavily on the award in *Occidental Exploration v. Ecuador*. However, this reliance is misplaced. The decision in *Occidental* offers no support for their overbroad interpretation of “like circumstances”. The Tribunal in *Occidental* did not find that domestic and foreign investors or investments are “in like circumstances” merely because they are subject to the same regulatory process. Rather, it rejected Ecuador’s argument that “in like situations,” meant that the two investors or investments being compared had to be

⁸³² *GAMI – Award*, ¶ 114, **RA-27**.

⁸³³ *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8) Award, 11 September 2007 (“*Parkerings – Award*”), ¶ 371, **RA-54**.

⁸³⁴ *Parkerings – Award*, ¶ 363, **RA-54**.

⁸³⁵ *Parkerings – Award*, ¶ 392, **RA-54**.

⁸³⁶ *Parkerings – Award*, ¶ 396, **RA-54**.

involved in the same economic sector as Occidental.⁸³⁷ Economic sector is neither a sufficient nor determinative factor, and its relevance depends on the measures at issue.

427. In this case, the measures at issue were adopted under the frameworks created by the *NSEA* and the *CEAA*. While there are differences in approach and content,⁸³⁸ both of these statutes have as their purpose the protection of environmental quality and the pursuit of sustainable development.⁸³⁹ In this vein, both create or mandate the creation of EA processes that are designed to assess the likelihood and significance of the effects of a project on both the human and biophysical environments.⁸⁴⁰ Further, both the *NSEA* and the *CEAA* are expressly intended to foster public participation in the EA process.⁸⁴¹ Accordingly, the legislative and regulatory framework which guides EAs conducted by Canada and Nova Scotia makes clear that at least three factors must be considered in determining whether the treatment accorded to investors or the investments in an EA process is “in like circumstances”: (1) the biophysical and socio-economic environment surrounding a proposed project; (2) the nature of the proposed project (including, among other things, its size, duration, and activities involved); and (3) the level of public concern over a proposed project.

428. All of these factors can variously affect the course of the EA process — from the legislative triggers for the EA, the government departments involved in the EA, the type of assessment used, and the scope and complexity of the factors to be addressed in the assessment. These decisions are based on scientific and policy judgments made by experts and officials. None of them are black and white, and all that the officials and

⁸³⁷ *Occidental Exploration and Production Company v. The Republic of Ecuador* (LCIA No. UN 3467, IIC 202) Award, 1 July 2004 (“*Occidental Exploration – Award*”), ¶¶ 171, 173, **RA-52**.

⁸³⁸ See Affidavit of Christopher Daly, ¶¶ 4-6, see also Expert Report of Robert Connelly, ¶¶ 76-86.

⁸³⁹ *CEAA*, Preamble, **Exhibit R-1**; *NSEA*, s. 2, **Exhibit R-5**.

⁸⁴⁰ Expert Report of Robert Connelly, ¶¶ 32-33; Expert Report of Lawrence Smith, ¶¶ 235-236; Affidavit of Christopher Daly, ¶¶ 3-6.

⁸⁴¹ *NSEA*, s. 2, **Exhibit R-5**; *CEAA*, s. 4, **Exhibit R-1**. See also Expert Report of Robert Connelly, ¶ 32.

experts can be asked to do is to make their best efforts to draw the best conclusions they can in a fair and reasonable manner. As explained above, absent any evidence of nationality based discrimination, it is not the role of this Tribunal to second-guess the reasonable decisions of such officials in this regard. Simply put, the differences in the above-described factors can result in perfectly legitimate differential treatment of EA proponents under both the *NSEA* and the *CEAA*. This is exactly what happened with respect to the other comparator projects identified by the Claimants.

(2) The Treatment in the EA Processes Identified by the Claimants Was Not Accorded in Like Circumstances to the Treatment Accorded to the Claimants and their Investment

429. The Claimants' proposed project was located on the Digby Neck, which is a pristine environment with no existing industrial activity, adjacent to the vibrant Bay of Fundy ecosystem—a critical habitat for at least two endangered species. Moreover, the well-being of the inhabitants of the Digby Neck is founded upon the continued existence of that pristine environment.⁸⁴² The Claimants' proposed project was a 152 ha quarry and a post-Panamax sized marine terminal. The Whites Point quarry would rival the largest quarry in the entire province of Nova Scotia and the size of the marine terminal would dwarf any of the other facilities along the entire Digby Neck. This proposal resulted in significant public concern not only in local communities, but across the entire Province of Nova Scotia.⁸⁴³

430. As explained above, the Claimants ignore more similar projects, and focus instead on fifteen comparator EAs⁸⁴⁴ which in fact, do not present circumstances like those in the Whites Point EA. As the Claimants' selection and presentation of the alleged comparator

⁸⁴² See *supra*, ¶¶ 27-31, 142.

⁸⁴³ See *supra*, ¶¶ 80, 143-145.

⁸⁴⁴ In the Article 1102 section of their Memorial, the Claimants inexplicably refer to the Belleoram project as having engaged two separate EAs, first at ¶¶ 558-560 and then again at ¶¶ 594-560. There is, however, only one Belleoram project and EA, and Canada has therefore only considered Belleoram once.

EAs fails to respond to the factors outlined above that are required to be considered in an Article 1102 or 1103 analysis, Canada has undertaken to address the Claimants' comparator EAs in the following order: first, Canada addresses the EAs of the two projects which were accorded treatment by the same government actors that accorded treatment to Bilcon (i.e. Nova Scotia and Canada together), Bear Head and Keltic.

431. Should the Tribunal find other treatment accorded by other governments, or combinations of governments, to be relevant, Canada next addresses the remaining three projects proposed for the province of Nova Scotia — Surface Gold, the Tiverton Quarry,⁸⁴⁵ and the Tiverton Harbour. Should the Tribunal further wish to consider EAs of projects outside of Nova Scotia, Canada then considers the remaining five Atlantic Canada EAs: Eider Rock (New Brunswick), Voisey's Bay, Aguathuna, Belleoram, and Southern Head (all Newfoundland). Canada then addresses the comparator EAs of two projects proposed for Canada's west coast in the province of British Columbia — Deltaport Third Berth and Sechelt Carbonate. Finally, Canada turns to the remaining three comparator EAs, all of which concern diamond mine projects in the northern parts of Canada, far away from any coastal environment — Victor Diamond (Ontario), NWT (Ekati) Diamonds (Northwest Territories) and Diavik Diamonds (Northwest Territories). For ease of reference, Canada has prepared a map itemizing the names, locations, and nature of all fifteen of the Claimants' comparator projects.⁸⁴⁶

432. As is shown below, in all of these cases, the location, type of project, impacts on the surrounding biophysical and human environments, and level of public concern, either on their own or in combination, explain all of the different treatment that some of the EA proponents in these projects received.

⁸⁴⁵ Note that the Tiverton Quarry, due to its small size, was not, under Nova Scotia or federal law, even subject to an EA. On this ground alone Tiverton Quarry is an inappropriate comparator.

⁸⁴⁶ See Map entitled *Location of Bilcon's Comparator Projects*, **Exhibit R-334**.

(i) **The Bear Head LNG Terminal (Nova Scotia)**

433. The Bear Head Liquid Natural Gas (“LNG”) Terminal was proposed in 2003 for the Point Tupper/Bear Head Industrial Park along the Strait of Canso, Nova Scotia.⁸⁴⁷ It consisted of a marine terminal, an LNG storage tank, and a regasification area. An LNG storage tank is a Class I undertaking pursuant to the Nova Scotia *Environmental Assessment Regulations*⁸⁴⁸ and as such, requires an EA under Nova Scotia law. Federally, the marine terminal aspect of the project required an *NWPA* approval, which triggered an EA under the *CEAA*.⁸⁴⁹ The two EAs were conducted jointly,⁸⁵⁰ and accordingly, while the formal scope of the federal project was limited to the marine terminal, as the only aspect requiring federal approval,⁸⁵¹ the joint EA assessed both the land-based and marine-based activities.

434. The marine terminal at the Bear Head project required only a screening assessment because the Bear Head site had been zoned “Port Industrial”, suitable for “fuel bunkering, marine terminals and other heavy industrial or port activities as required” in a municipal planning strategy.⁸⁵² This zoning, which had been subject to public consultation, statutorily exempted the marine terminal from an EA as a comprehensive study pursuant to the express wording of the *Comprehensive Study List*

⁸⁴⁷ Note that while the Bear Head project received federal and provincial approvals, the proponent has not constructed the project due to financial considerations.

⁸⁴⁸ Nova Scotia *Environmental Assessment Regulations*, Schedule A, Class I, A.2, **R-6** (“a storage facility with a total capacity of over 5000 m³ intended to hold liquid or gaseous substances, including, but not limited to hydrocarbons or chemicals, but excluding water.”)

⁸⁴⁹ *DFO CEAA Screening Environmental Assessment Report: Bear Head* (12 July 2004), p. 6, **Exhibit R-335**.

⁸⁵⁰ *DFO CEAA Screening Environmental Assessment Report: Bear Head* (12 July 2004), p. 1, **Exhibit R-335**.

⁸⁵¹ *DFO CEAA Screening Environmental Assessment Report: Bear Head* (12 July 2004), p. 1, **Exhibit R-335**.

⁸⁵² See excerpt from *ANEI Bear Head LNG Terminal Environmental Assessment* (May 2004), p. 1-1, **Exhibit R-337**.

Regulations.⁸⁵³ There was no such zoning designating Whites Point for use as a marine terminal and, as such, contrary to the Claimants' allegation,⁸⁵⁴ the Whites Point project could not, as a matter of law, be granted the same exemption from a comprehensive study.

435. In light of the nature of the surrounding environment, the type of activity involved, and the lack of public opposition, there was no need to elevate the EA of the Bear Head project from a screening to a review panel. Unlike the Digby Neck, the Strait of Canso has focused heavily on industrial development. It is "one of the busiest ports on the Atlantic coast of Canada"⁸⁵⁵ and existing industrial development there includes Statia Terminals' oil and gas transshipment terminal (80 employees), ExxonMobil Canada's natural gas processing plant (70 employees), Nova Scotia Power's coal fired electrical generating plant (75 employees) and the Stora Enso pulp and paper mill (800 employees).⁸⁵⁶

436. Further, as explained by Lawrence Smith in his Expert Report, the nature of an LNG terminal is very different from a quarry and marine terminal. The act of quarrying entails the removal of land and as such, its terrestrial impacts are significantly greater than those of an LNG terminal. Moreover, in terms of the ongoing effects of quarrying activities, such as blasting, airborne dust, heavy equipment noise, and continual surface

⁸⁵³ *Comprehensive Study List Regulations*, s.28(c), **Exhibit R-10**, provides that a comprehensive study is required for a marine terminal designed to handle vessels larger than 25,000 DWT "unless the terminal is located on lands that are routinely and have been historically used as a marine terminal or that are designated for such use in a land-use plan that has been the subject of public consultation" (emphasis added). See also email from Mark McLean to Jim Knight and others, February 11, 2004, **Exhibit R-338**, discussing the applicability of the exemption to the Bear Head project.

⁸⁵⁴ Claimants' Memorial, ¶ 566(c).

⁸⁵⁵ *DFO CEAA Screening Environmental Assessment Report: Bear Head* (12 July 2004), p. 5, **Exhibit R-335**.

⁸⁵⁶ See excerpt from *ANEI Bear Head LNG Terminal Environmental Assessment* (May 2004), pp. 6-92, **Exhibit R-336**.

and sub-surface disturbances, the impacts of quarrying on the surrounding environment are more significant than those resulting from an LNG terminal.⁸⁵⁷

437. Finally, unlike the Whites Point project, there was limited public concern and no apparent public opposition to the Bear Head project.⁸⁵⁸ As such, officials were comfortable that a screening of the project would be adequate to allow for the necessary public participation in the EA process, and sufficient to accommodate any of the concerns expressed.

(ii) Keltic LNG Terminal (Nova Scotia)

438. The Keltic LNG terminal was proposed in 2005 for Goldboro, Nova Scotia. It consisted of a marine LNG terminal, LNG storage tanks, a marginal wharf, a regasification plant, a petro-chemical complex and an electric co-generation facility.⁸⁵⁹ It also required the construction of a dam and the impoundment of a lake for the process water supply.⁸⁶⁰ The construction of a petro-chemical plant is a Class II undertaking under Nova Scotia law, and thus, triggered a Nova Scotia EA.⁸⁶¹ Further, the marine LNG terminal and the marginal wharf required an *NWPA* approval, triggering an EA for Transport Canada under the *CEAA*.⁸⁶² DFO scientists further concluded that the marginal wharf would result in the destruction of fish habitat requiring an approval under s. 35(2) of the *Fisheries Act* and also triggering an EA for DFO under the *CEAA*.⁸⁶³ Finally, the

⁸⁵⁷ Expert Report of Lawrence Smith, Q.C., ¶ 55, fn. 49.

⁸⁵⁸ See excerpt from *ANEI Bear Head LNG Terminal Environmental Assessment*, (May 2004), Chapter 5, Table 5.4, **Exhibit R-339**. See also email from Mark McLean to Jim Knight and others, February 11, 2004, **Exhibit R-338**.

⁸⁵⁹ See excerpt from *Keltic Petrochemicals Final Comprehensive Study Report* (October 2007), p. 1-1, **Exhibit R-348**.

⁸⁶⁰ See excerpt from *Keltic Petrochemicals Final Comprehensive Study Report* (October 2007), p. 1-6, **Exhibit R-348**.

⁸⁶¹ Nova Scotia *EA Regulations*, Schedule A, Class II, A.2, **Exhibit R-6**.

⁸⁶² See *Keltic Track Report* (14 October 2005), p. 4, **Exhibit R-349**.

⁸⁶³ See *Keltic Track Report* (14 October 2005), p. 4, **Exhibit R-349**.

construction of the dam and the impoundment of the lake required both an *NWPA* approval and a *Fisheries Act* s. 35(2) authorization, triggering further EAs for both Transport Canada and DFO.⁸⁶⁴

439. Unlike the Whites Point EA, the required EAs were neither coordinated nor harmonized into a single efficient process. Rather, there were three separate, overlapping EAs, although the third was never completed because the project was withdrawn.⁸⁶⁵ First, like the Whites Point project, Keltic was reviewed through a public hearing process, though in this case, it was organized solely by Nova Scotia.⁸⁶⁶ Second, Transport Canada and DFO conducted a coordinated comprehensive study on the LNG terminal and the marginal wharf.⁸⁶⁷ Third, Transport Canada and DFO began a screening of the dam construction and lake impoundment.

440. In the case of Keltic, it was not necessary to refer the project to a review panel because of the industrialized setting of the proposed project, the more minimal impacts of an LNG terminal, and the lack of public opposition. In particular, the Goldboro area is located on the northeastern shore of Nova Scotia in the Goldboro Industrial Park, which already included the ExxonMobil natural gas plant and the Maritimes and Northeast Pipeline.⁸⁶⁸ Further, as explained above in the discussion of the Bear Head LNG terminal, the impacts of an LNG terminal are much less significant than those of a quarry.

441. Finally, while public response to the Keltic project was mixed, the level of opposition — a mere 20 written submissions were sent regarding the draft scoping

⁸⁶⁴ See excerpt from *Keltic Petrochemicals Final Comprehensive Study Report*, p. 1-6, **Exhibit R-348**.

⁸⁶⁵ The Keltic Project was withdrawn by the proponent and has not proceeded. See Transport Canada notice regarding November 5, 2010 termination of follow-up program for the Keltic EA, **Exhibit R-350**.

⁸⁶⁶ See excerpt from *Keltic Petrochemicals Final Comprehensive Study Report* (October 2007), pp. 1-9 to 1-10, **Exhibit R-348**.

⁸⁶⁷ See excerpt from *Keltic Petrochemicals Final Comprehensive Study Report* (October 2007), pp. 1-5 to 1-6, **Exhibit R-348**.

⁸⁶⁸ See excerpt from *Keltic Petrochemicals Final Comprehensive Study Report* (October 2007), p. 1-1, **Exhibit R-348**.

document⁸⁶⁹ — was not significant enough to require tracking the assessment as a panel review under the *CEAA*.⁸⁷⁰ In this regard, it is important to note that, as described by Robert Connelly in his Expert Report, the *CEAA* had undergone important amendments in October of 2003 which enhanced opportunities for public participation in the comprehensive study process.⁸⁷¹ As such, to the extent there existed public concern, an EA by way of comprehensive study in this post-amendment era provided an effective forum for addressing these concerns. The October 2003 amendments did not apply to the Whites Point EA, and thus, in contrast to the situation with Keltic, the best way to ensure effective public participation there was an assessment by a review panel.

(iii) Surface Gold Mine (Nova Scotia)

442. The Torquoy Gold Project (referred to as “Surface Gold Mine” by the Claimants) was an open pit gold mine proposed in 2007 for a location near the settlement known as the Moose River Gold Mines, in the middle of Nova Scotia.⁸⁷² Pursuant to the Nova Scotia *EA Regulations*, a mine is a Class I undertaking, and subject to an EA.⁸⁷³

443. Consistent with EA practice in Nova Scotia,⁸⁷⁴ DFO was asked to review the Surface Gold project proposal. Unlike the Whites Point project, the proposed site was located far inland from the coast of Nova Scotia.⁸⁷⁵ As a result, DFO scientists determined

⁸⁶⁹ See *Keltic Track Report* (14 October 2005), p. 8, **Exhibit R-349**.

⁸⁷⁰ See *Keltic Track Report* (14 October 2005), pp. 13-14, **Exhibit R-349**.

⁸⁷¹ See Expert Report of Robert Connelly, ¶¶ 67-70.

⁸⁷² Focus Report Touquoy Gold Project Moose River Gold Mines, Nova Scotia, pp. 1, 3, **Exhibit R-345**.

⁸⁷³ Nova Scotia *Environmental Assessment Regulations*, Schedule A, Class I, Section B: Mining, pp. 13-14, **Exhibit R-6**. Contrary to the Claimants’ suggestion at ¶ 628(a) of their Memorial that the Surface Gold Mine project was somehow improperly “assessed through the Nova Scotia Environmental Agency only as a Class I Screening, the least onerous assessment under that legislation,” there was no other form of assessment under the *NSEA* to which the project could have been subjected.

⁸⁷⁴ See Affidavit of Bob Petrie, ¶ 12; Affidavit of Mark McLean, ¶¶ 13-18.

⁸⁷⁵ See excerpt from Focus Report Touquoy Gold Project Moose River Gold Mines, Nova Scotia, pp. 1-2, **Exhibit R-345**.

that the proposed project would not require any *Fisheries Act* authorizations.⁸⁷⁶ As such, unlike the Claimants' project, there was no federal jurisdiction over the Surface Gold project, and it could not be referred to a joint federal-provincial review panel as suggested by the Claimants.⁸⁷⁷

444. Further, there was no reason for the province of Nova Scotia to require any more of a review than the focus report they requested of the proponents after review of the EA Registration document.⁸⁷⁸ Indeed, unlike the site proposed for the Whites Point project, the area of the Moose River Gold Mines was far from pristine – in fact, it had long been the site of historical gold mining operations.⁸⁷⁹ Moreover, the project was operationally quite limited. The open pit mine was to be operational for just 5 to 7 years (not 50 years like Whites Point), and it was not reliant on marine transportation.⁸⁸⁰

445. Finally, unlike the Whites Point project, there was broad public support for the Moose River Gold Mine project. A public opinion survey showed that of the survey respondents aware of the project, two thirds supported it.⁸⁸¹ Given the intended location

⁸⁷⁶ Letter from Mark McLean to Sue Belford, March 7, 2008, **Exhibit R-347**. Further, contrary to the Claimants' assertion at ¶ 628(c) of the Memorial, this letter indicates DFO did review and provide its views on the proponent's proposed blasting activity.

⁸⁷⁷ However, in light of the project's potential impact on the Tangier-Grand Lake Wilderness Area it was not immediately approved by Nova Scotia, but rather subject to a "Focus Report" requirement under the Nova Scotia *EA Regulations* (see Terms of Reference for the Preparation of a Focus Report, Torquoy Gold Project, Moose River Gold Mines, May 7, 2007, **Exhibit R-346**). The Focus Report was subsequently reviewed by various departments of the federal and provincial government and by members of the public.

⁸⁷⁸ See *supra*, ¶¶ 45-49 for a description of the Nova Scotia Environmental Assessment regime and the potential types of review which projects can be required to undergo. See also Affidavit of Christopher Daly, ¶¶ 14-15.

⁸⁷⁹ See excerpt from Focus Report Touquoy Gold Project Moose River Gold Mines, Nova Scotia, pp. 3, 20, **Exhibit R-345**.

⁸⁸⁰ See excerpt from Focus Report Touquoy Gold Project Moose River Gold Mines, Nova Scotia, Executive Summary, p. i, **Exhibit R-345**.

⁸⁸¹ See excerpt from Focus Report Touquoy Gold Project Moose River Gold Mines, Nova Scotia, Executive Summary, p. 168, **Exhibit R-345**.

and the nature of the proposed activities, this project did not raise the concerns engaged by the Whites Point project over impacts of quarrying.

(iv) Tiverton Quarry (Nova Scotia)

446. The Tiverton Quarry was a small 1.8ha open pit quarry – approximately 1% the size of the Whites Point quarry – proposed in 2003 for a site above the town of Tiverton, Nova Scotia.⁸⁸² It operated for less than two years, supplying a total of approximately 65,000 tonnes of rock⁸⁸³ for two discrete projects, the Tiverton Harbour project and the Tiverton Wharf project.⁸⁸⁴ As it was a quarry less than 4ha in size, it did not qualify as either a Class I or Class II undertaking pursuant to the Nova Scotia *Environmental Assessment Regulations*. As such, Nova Scotia did not have jurisdiction to require an EA.⁸⁸⁵

447. Similarly, there was also no federal jurisdiction over the project that would have allowed an EA under the *CEAA*. In contrast to the weekly blasting at Whites Point which was to be a mere 35 metres from the Bay of Fundy,⁸⁸⁶ the blasting at the Tiverton site was

⁸⁸² Tiverton is a small town located on the Petit Passage at the eastern end of Long Island, Nova Scotia. Petit Passage is a small channel (about 400 to 800 meters wide) that links the Bay of Fundy to St. Mary's Bay and separates Long Island from the mainland. The Tiverton Quarry was also situated at the top of a large hill approximately 62-63 meters above sea level (*see* Affidavit of Bob Petrie, ¶ 21).

⁸⁸³ Expert Report of David Estrin, Appendix G, p. 1.

⁸⁸⁴ The permit to quarry at the Tiverton site terminated on December 8, 2004 (*see* letter from Bruce Arthur to Michael Lowe, December 15, 2004, **Exhibit R-340**). Its total duration was thus under 1 year and 9 months. The application to quarry at Whites Point was for 50 years.

⁸⁸⁵ Affidavit of Bob Petrie, ¶ 18.

⁸⁸⁶ In light of these substantial differences, the Tiverton Quarry did not warrant additional conditions on blasting to account for the marine environment. The Claimants' assertion that impacts on iBoF Atlantic salmon and North Atlantic Right Whales were not considered during the Tiverton Quarry project is also false (Claimants' Memorial, ¶ 552; Witness Statement of Paul Buxton, ¶ 41). The Terms and Conditions permitting blasting at the Tiverton Quarry prevented the proponent from endangering any structure within 800 meters of the site. This requirement, in addition to the fact that blasting was to take place hundreds of meters away from the Bay of Fundy and Petit Passage, made any impact from blasting on marine life minimal (*see* Affidavit of Bob Petrie, ¶ 22; Engineering Report of Robert Balcom on the Parker Mountain Aggregates Ltd. Quarry, Tiverton, Digby County, March 21, 2003, **Exhibit R-101**). Moreover, DFO ultimately re-reviewed the blasting at the Tiverton Quarry project and confirmed that no harm would come

infrequent and took place no closer than 400 meters from the Bay of Fundy.⁸⁸⁷ As a result, DFO scientists determined that the blasting would not require the *Fisheries Act* authorizations that had been required for the proposed near-shore blasting at Whites Point.⁸⁸⁸

448. While it was not subject to an EA, blasting on the Tiverton Quarry could only be conducted with the consent of local residents. There was no public opposition and the proponent obtained the required consents to proceed.⁸⁸⁹ By contrast, the Whites Point project was subject to strong opposition.

(v) Tiverton Harbour (Nova Scotia)

449. The Tiverton Harbour proposal, made in 2004, called for the development of a small craft harbour intended to provide improved access and facilities for local fishing vessels in the town of Tiverton, Nova Scotia. A harbour is not a Class I or Class II undertaking under the Nova Scotia *EA Regulations*,⁸⁹⁰ and as such, unlike the Claimants' project, Nova Scotia did not have jurisdiction to conduct an EA. As a harbour, its construction would result in the loss of fish habitat and thus it required an authorization under s. 35(2) of the *Fisheries Act*, which in turn triggered an EA under *CEAA*.⁸⁹¹ Ultimately, the project was assessed as a screening.⁸⁹²

to iBoF Atlantic Salmon as a result of it (see letter from Thomas Wheaton to NSDEL, March 15, 2004, **Exhibit R-341**).

⁸⁸⁷ See Affidavit of Bob Petrie, ¶ 21. See also Maps Illustrating the Setbacks at Parker Mountain Aggregates' 1.8 ha Quarry at Tiverton, **Exhibit R-100**.

⁸⁸⁸ Letter from Peter Winchester to NSDEL, April 25, 2003, **Exhibit R-104**.

⁸⁸⁹ See Consent of 93 individuals allowing Parker Mountain Aggregates Ltd. to operate a quarry, **Exhibit R-98**.

⁸⁹⁰ Nova Scotia *Environmental Assessment Regulations*, S.N.S. 1994-95, c. 1, **Exhibit R-6**.

⁸⁹¹ Tiverton Harbour Screening Report, p. 14, **Exhibit R-342**.

⁸⁹² Tiverton Harbour Screening Report, p. 1, **Exhibit R-342**.

450. As Lawrence Smith explains in his Expert Report, “[g]iven the limited potential environmental effects from such a small, short term project, and the apparent low level of public concern, it is reasonable that the type of EA undertaken was a screening.”⁸⁹³ First, Tiverton Harbour was intended to provide improved access and facilities for 15 local inshore fishing vessels,⁸⁹⁴ which are normally less than 15 metres in length.⁸⁹⁵ In contrast, the Whites Point project contemplated a marine terminal designed to accommodate ships over 200 meters in length and weighing over 25,000 DWT.⁸⁹⁶ Not surprisingly, a harbour the size of Tiverton is not on the *Comprehensive Study List*, but a marine terminal of the size proposed by Bilcon is.⁸⁹⁷

451. Further, the limited blasting at the Tiverton Harbour was not for quarrying, but was rather simply to dredge the harbour area in furtherance of the project. As such, it lasted no more than two months and was not significant.⁸⁹⁸ More importantly, the blasting plan was reviewed by DFO Habitat Management and was subject to several

⁸⁹³ Expert Report of Lawrence Smith, Q.C., Appendix 4, ¶ 2.

⁸⁹⁴ Tiverton Harbour Screening Report, p. 3, **Exhibit R-342** (“Tiverton Small Craft Harbour is home to a fleet of approximately 15 vessels. The proposed harbour development (breakwater, floating dock, dredging and services area) will provide improved access and facilities for local users. There are two nearby Harbour Authorities with wharves that are operationally inadequate and serve only as storage areas for traps. The development of a more operationally efficient harbour could lead to the eventual redeployment of these vessel fleets to Tiverton on a permanent basis.”).

⁸⁹⁵ News Release, Department of Fisheries and Oceans, June 19, 2003, **Exhibit R-343**.

⁸⁹⁶ The draft project description for the Whites Point Quarry and Marine Terminal described the terminal as being built to accommodate vessels such as the CSL Spirit (see facsimile from Derek McDonald to Jim Ross and other provincial and federal agencies, attaching Draft Project Description for Whites Point Quarry & Marine Terminal, February 5, 2003, **Exhibit R-137**). The CSL Spirit is 70,018 DWT and over 225 meters in length (see CSL Spirit, Information Sheet, **Exhibit R-344**).

⁸⁹⁷ *Comprehensive Study List Regulations*, s. 28(c), **Exhibit R-10**.

⁸⁹⁸ Tiverton Harbour Screening Report, p. 6, Appendix G, **Exhibit R-342** (“Dredging of the basin (including blasting of Class A material within the basin) will likely require 1.5 – 2 months to complete.”). The Claimants suggest that the type of explosive used for the Tiverton Harbour dredging (called Apex Super 400) has “worse effects” than the type of explosives proposed at the Whites Point Quarry (called ANFO – Ammonium Nitrate Fuel Oil) (see Witness Statement of Paul Buxton, ¶ 75). However, the DFO *Blasting Guidelines*, p. 5, **Exhibit R-115**, do not allow the use of ANFO in and near water due to the production of toxic by-products (ammonia). Moreover, the Claimants do not specify the “worse effects” they complain of.

mitigation measures to address potential impacts to iBoF Atlantic salmon and North Atlantic Right Whales.⁸⁹⁹ The primary mitigation measure was that no blasting would take place between July and late December, which is the period during which these species could be present in the area.⁹⁰⁰ A similar mitigation measure could not be applied to the proposed Whites Point project, as it required consistent and large-scale blasting adjacent to the Bay of Fundy every two weeks in order to maintain a steady supply of rock for a project scheduled to operate over 50 years.⁹⁰¹

452. Finally, unlike the Whites Point project, there were no known public concerns or opposition to the Tiverton Harbour project.⁹⁰² In fact, had the project not been completed, existing facilities would have continued to deteriorate and the local fishing boats would have had to relocate to private wharves or discontinue their operations at Tiverton.⁹⁰³

(vi) Eider Rock Oil Refinery and Marine Terminal (New Brunswick)

453. The Eider Rock oil refinery and marine terminal was proposed in 2007 for the city of St. John, New Brunswick, and was to be sandwiched between two existing industrial projects. The whole project was subject to a comprehensive provincial environmental

⁸⁹⁹ Tiverton Harbour Screening Report, p. 17, **Exhibit R-342**.

⁹⁰⁰ Tiverton Harbour Screening Report, p. 17, **Exhibit R-342** (“Blasting will not be permitted from July until late December when Atlantic Right Whale and other species at risk [including iBoF Atlantic salmon] are present in the Tiverton area. Blasting will only be conducted from January through to the end of June.”) Other blasting requirements listed on p. 17 of the Screening Report include: “A predictive analysis of the proposed blast will be conducted to assess the zone of influence of blasting activities; [s]hock wave padding (bubble curtain or air curtain) will be installed to minimize the transmission of the blast through the water; [b]lasting activities will be done in a manner than ensures that the number and magnitude of explosion are limited to which is absolutely necessary.”

⁹⁰¹ JRP Report, pp. 1, 28, **Exhibit R-212**.

⁹⁰² Tiverton Harbour Screening Report, p. 29, **Exhibit R-342** (“There are no known public concerns or opposition to the project. The proposed harbour development (breakwater, floating dock, dredging and service area) will provide improved access and facilities for local users. Most residents in the area would not be negatively affected by the harbour development project and therefore would likely support this necessary work.”)

⁹⁰³ Tiverton Harbour Screening Report, p. 3, **Exhibit R-342**.

assessment under s.5(1) of the *New Brunswick Impact Assessment Regulation* 87-83 (*Clean Environment Act*).⁹⁰⁴ The construction of the marine terminal also required the issuance of an *NWPA* approval, and an authorization under s.35(2) of the *Fisheries Act*.⁹⁰⁵ In addition, Environment Canada had to issue a permit for disposal at sea under s.127(1) of the *Canadian Environmental Protection Act*.⁹⁰⁶ All three of these authorizations required an EA under the *CEAA*. While there was some coordination between the federal and provincial assessments, unlike in the Whites Point EA, they were not able to be harmonized into a single, more efficient process.⁹⁰⁷ As a result, a separate federal EA of the marine terminal was completed. Because of the marine terminal's size, the federal EA was done as a comprehensive study.

454. The Claimants do not allege that the treatment accorded to this project in terms of the scope of the project and the type of referral is comparable to the treatment accorded to Bilcon. Indeed, given its location in an existing industrial area, its nature, and the lack of public concern, the circumstances of the two projects are different. Instead, the Claimants only complain about alleged differences in the cumulative effects assessments done in the two projects.⁹⁰⁸ As explained above, the Claimants have not demonstrated that any difference in treatment in terms of the cumulative effects assessment had an impact on the ultimate outcome in the Whites Point project. As such, they have not proven that they were accorded less favourable treatment in this regard.⁹⁰⁹

⁹⁰⁴ Eider Rock Comprehensive Study Report, September 2009, p. 7, **Exhibit R-364**.

⁹⁰⁵ Eider Rock Comprehensive Study Report, September 2009, p. 9, **Exhibit R-364**.

⁹⁰⁶ Eider Rock Comprehensive Study Report, September 2009, p. 9, **Exhibit R-364**.

⁹⁰⁷ Eider Rock Comprehensive Study Report, September 2009, p. 10, **Exhibit R-364**.

⁹⁰⁸ Claimants' Memorial, ¶¶ 592-593.

⁹⁰⁹ See *supra*, ¶¶ 412-420.

**(vii) Voisey’s Bay Nickel Mine
(Newfoundland)**

455. The Voisey’s Bay project was an open pit nickel mine proposed in 1996 near Nain, on the northeastern coast of Labrador.⁹¹⁰ Voisey’s Bay is in the remote subarctic, where the climate is harsh, the terrain is rugged, the area is sparsely populated, and the primary transportation artery is an ice road that exists only during the colder months.⁹¹¹ The project triggered an EA under the law of Newfoundland and Labrador and, as it required authorizations under both the *Fisheries Act* and the *NWPA*, it also triggered an EA under the *CEAA*. The federal and provincial EAs were harmonized and, like the Whites Point EA, the scope of the project included all components of the project.

456. Further, like the Whites Point project, and as acknowledged by the Claimants,⁹¹² the Voisey’s Bay project was assessed by way of a JRP – this one having five members.⁹¹³ The Voisey’s Bay JRP conducted an EA similar to, and in many cases more burdensome than that carried out by the Whites Point JRP. First, the JRP followed virtually the same process as did the Whites Point JRP including: the issuance of draft EIS Guidelines, the holding of scoping meetings, the issuance of final EIS Guidelines, the submission of an EIS by the proponent, a period of time during which the public could review and comment on the EIS, an information request phase, an additional period of time to review responses to information requests, and a public hearing.⁹¹⁴ Second, scoping meetings were far more extensive than in the Whites Point EA as they were held

⁹¹⁰ Voisey’s Bay Mine and Mill Environmental Assessment Panel Report, March 1999, pp. vii, xvi, **Exhibit R-351**.

⁹¹¹ See Media Backgrounder 2 – *Voisey’s Bay Mine-Mill Project Joint Environmental Assessment Panel: Project Description and Factors to be Considered During The Review*, **Exhibit R-352**.

⁹¹² Claimants’ Memorial, ¶ 574(a).

⁹¹³ Voisey’s Bay Mine and Mill Environmental Assessment Panel Report, March 1999, p.1, **Exhibit R-351**. This referral to a JRP was made notwithstanding that the Voisey’s Bay project enjoyed public support. See Voisey’s Bay Mine and Mill Environmental Assessment Panel Report, pp. 7-8, **Exhibit R-351**.

⁹¹⁴ Voisey’s Bay Mine and Mill Environmental Assessment Panel Report, March 1999, p. 2, **Exhibit R-351**.

over 17 days at 10 different locations.⁹¹⁵ Third, the Voisey’s Bay public hearings were held over 32 days at 11 different locations,⁹¹⁶ and the panel reviewed the project’s anticipated effects on a wide range of socio-economic factors such as “aboriginal land use”, “employment and business”, and “family and community life, and public services.”⁹¹⁷

457. In light of these features of the Voisey’s Bay JRP process, and notwithstanding that it is not in like circumstances, Canada is at a loss as to why the Claimants assert, as they do, that the Voisey’s Bay project received more favourable “scope and level of assessment” treatment.

**(viii) Aguathuna Quarry and Marine Terminal
(Newfoundland and Labrador)**

458. The Aguathuna quarry and marine terminal was proposed in 1998 for the south coast of Newfoundland.⁹¹⁸ The Aguathuna project was subjected to a screening assessment under Newfoundland and Labrador’s *Environmental Protection Act* and related regulations. Newfoundland and Labrador did not take steps to coordinate and harmonize provincial and federal EA processes, and in fact completed its EA prior to federal officials even becoming involved.⁹¹⁹ As a result, a separate federal comprehensive study assessment was conducted by the Atlantic Canada Opportunities Agency

⁹¹⁵ Voisey’s Bay Mine and Mill Environmental Assessment Panel Report, March 1999, p. 210, **Exhibit R-351**.

⁹¹⁶ Voisey’s Bay Mine and Mill Environmental Assessment Panel Report, March 1999, p. 210, **Exhibit R-351**.

⁹¹⁷ Voisey’s Bay Mine and Mill Environmental Assessment Panel Report, March 1999, pp. iv-v, **Exhibit R-351**.

⁹¹⁸ Aguathuna Quarry Development Environmental Impact Comprehensive Study Report, July 1999, pp. 1-2 and Figure 1, **Exhibit R-353**. Notably, despite receiving government approval, due to a change in economic circumstances, the Aguathuna project did not proceed.

⁹¹⁹ See Aguathuna Quarry Development Environmental Impact Comprehensive Study Report, p. 3, **Exhibit R-353**.

(“ACOA”).⁹²⁰ Like the Whites Point EA, this assessment considered both the quarry and the marine terminal.⁹²¹

459. As explained by Lawrence Smith in his Expert Report, there was nothing that warranted a referral of the Aguathuna project to a review panel.⁹²² First, in contrast to the pristine and undisturbed environment existing at Whites Point on the Digby Neck, the Aguathuna project site had operated as a limestone quarry and shipping facility from 1913 to 1964, having generated over 12 million tonnes of limestone over this 50 year period,⁹²³ and so was already developed industrially.⁹²⁴

460. Moreover, the quarrying at Aguathuna was to take place significantly further back from the water than at Whites Point and in fact would be separated from the coast by a highway.⁹²⁵ Further, the major fisheries concern over the Aguathuna marine terminal was that the rubble associated with the old wharf from the previous quarry be preserved as lobster habitat (as the new marine terminal was initially to have been constructed on the site of the old wharf).⁹²⁶ The proponent addressed this concern by shifting the proposed marine terminal site 600 metres to the east, an area that consultations with

⁹²⁰ A comprehensive study was required because the marine terminal was designed to handle vessels larger than 25,000 DWT. See Aguathuna Comprehensive Study Report, July 1999, p. 3, **Exhibit-353**.

⁹²¹ Aguathuna Comprehensive Study Report, July 1999, pp. 12, 30, **Exhibit-353**. For reasons that are unclear, the Claimants allege that federal EA considered only the marine terminal. (Claimants’ Memorial, ¶ 556(c)). They are wrong.

⁹²² Expert Report of Lawrence Smith, Q.C., Appendix 3, ¶¶ 10-12.

⁹²³ See Project Registration for Aguathuna Quarry Development, January 1998, p. 2, **Exhibit R-354**.

⁹²⁴ Aguathuna Quarry Development Environmental Impact Comprehensive Study Report, July 1999, p. 12, **Exhibit R-353**.

⁹²⁵ See Aguathuna Quarry Development Environmental Impact Comprehensive Study Report, July 1999, p. 15, **Exhibit R-353**, which provides “only the new dolomite quarry will be developed.” The location of the dolomite quarry can be seen on the map between of the Aguathuna Quarry Development Environmental Impact Comprehensive Study Report, pp. 12-13.

⁹²⁶ See Aguathuna Quarry Development Environmental Impact Comprehensive Study Report, July 1999, pp. 28 and 20-21 (“As discussed, lobsters are fished in the rocky debris of the former quarry dock”), **Exhibit R-353**.

fishers revealed was not frequented by lobsters and would hence not require a HADD authorization.⁹²⁷

461. Second, in contrast to the overwhelming opposition to the Whites Point project, the Aguathuna project enjoyed public support largely due to its expected economic benefits.⁹²⁸ Even the Claimants admit “there was little public concerns” [*sic*] regarding the Aguathuna project.⁹²⁹

**(ix) Belleoram Quarry and Marine Terminal
(Newfoundland and Labrador)**

462. The Belleoram Quarry and Marine Terminal was proposed in 2006 for the south coast of Newfoundland.⁹³⁰ Newfoundland and Labrador conducted its own independent EA of the Belleoram quarry which was subject to an Environmental Preview Report (EPR) under the provincial *Environmental Protection Act*.⁹³¹ Newfoundland and Labrador did not reach out to the federal government to coordinate and harmonize the provincial and federal EA processes. Accordingly, a separate federal EA was conducted by Transport Canada, DFO, and the ACOA. The federal EA considered only the marine terminal aspect of the project because scientists at DFO determined that the blasting at the Belleoram quarry would not require the *Fisheries Act* authorizations that were

⁹²⁷ See Aguathuna Quarry Development Environmental Impact Comprehensive Study Report, July 1999, pp. 19, 28, **Exhibit R-353** (“Their issues and concerns [local fishermen’s] centred on the protection of the marine and freshwater environment and the preservation of the rubble associated with the old quarry wharf as lobster habitat. This information was used over the course of the initial consideration of the scope of the project ... to shift the wharf site 600 meters east.”) See also p. 41 wherein it is noted that the “proposed infill area [for the marine terminal] does not contain any unique or highly concentrated marine species.” See also letter from M.A. Barnes to Stephen Barbour, July 6, 1998, **Exhibit R-355**.

⁹²⁸ See Aguathuna Quarry Development Environmental Impact Comprehensive Study Report, July 1999, pp. 28-29, **Exhibit R-353**.

⁹²⁹ See Expert Report of David Estrin, Appendix F, p. 5.

⁹³⁰ Belleoram Marine Terminal Project Comprehensive Study Report, August 2007, pp. 1-2, **Exhibit R-357**. Notably, despite receiving the requisite approval to proceed after the completion of the provincial and federal EAs, for economic reasons, the project did not proceed. See email from Robert Rose of Continental Stone to Randy Decker, November 3, 2008, **Exhibit R-360**.

⁹³¹ Belleoram Scoping Document, September 19, 2006, p. 15, **Exhibit R-358**.

required at Whites Point (i.e. an authorization to destroy fish habitat under s. 35(2) and to kill fish by means other than fishing under s. 32).⁹³²

463. In light of the nature of the area proposed for the Belleoram project, and the lack of any public opposition to its development, there was no reason to refer the assessment to a review panel.⁹³³ In particular, the Belleoram project was proposed for a remote location in the province of Newfoundland and Labrador, with no apparent tourist industry.⁹³⁴ Further, the project faced no public opposition. Not a single letter of concern was registered during the Belleoram EA process.⁹³⁵ To the contrary, as the Claimants have admitted, there was “[p]ublic support including the Town of Belleoram and from the Coast of Bays Corporation.”⁹³⁶ As an illustration of the lack of public concern, not a single person or organization applied for the \$10,000 grant that was available for public participation in the EA.⁹³⁷

⁹³² See for example Email from Marvin Barnes to Randy Decker, May 22, 2007, **Exhibit R-450**.

⁹³³ Canada notes that at ¶¶ 594-596 of the Claimants’ Memorial, they complain of differences in approach taken to assessing cumulative environmental effects in the Belleoram and Whites Point EAs. While the unique factors existing in each EA mean that the cumulative environmental effects assessments were not carried out in like circumstances, the Claimants ignore that *CEAA* policy and practice afford responsible authorities full discretion to consider hypothetical projects in a cumulative effects assessment – see Expert Report of Lawrence Smith, ¶¶ 369-389.

⁹³⁴ Belleoram Marine Terminal Project Comprehensive Study Report, August 2007, pp. 1-2, **Exhibit R-357**.

⁹³⁵ Environmental Assessment Track Report for Belleoram Quarry, November 30, 2006, pp. 8, 12, **Exhibit R-359**.

⁹³⁶ Expert Report of David Estrin, Appendix E, p. 19; Belleoram Marine Terminal Project Comprehensive Study Report, August 2007, pp. IV, 46, **Exhibit R-357**.

⁹³⁷ Environmental Assessment Track Report for Belleoram Quarry, November 30, 2006, p. 9, **Exhibit R-359**.

(x) **Southern Head Oil Refinery and Marine Terminal (Newfoundland and Labrador)**

464. The Southern Head Oil Refinery was proposed in 2006 for the north end of Placentia Bay, on the southern coast of Newfoundland.⁹³⁸ Newfoundland and Labrador conducted an EA of the entire project.⁹³⁹ The proposed marine terminal, desalination plant, and a stream crossing required authorizations from Transport Canada under the *NWPA* and the marine terminal, intakes and outfalls, stream crossing structures, and infill waters within the project footprint required a s. 35(2) *Fisheries Act* authorization from DFO.⁹⁴⁰ While efforts were made to coordinate the two assessments, unlike Nova Scotia in the Whites Point EA, Newfoundland did not seek to harmonize its EA with the federal EA.⁹⁴¹ As a result, the proponent had to prepare two EA reports, one to satisfy the provincial *Environmental Protection Act* and the other to satisfy *CEAA* requirements.⁹⁴²

465. The federal assessment was carried out as a comprehensive study because of the size of the proposed marine terminal. There were several reasons why the circumstances of the Southern Head project did not necessitate an assessment by a review panel. First, in contrast to Digby Neck, Placentia Bay is populated by heavy industrial activity such as the Come By Chance Refinery, the Argentia Hydrometallurgical Demonstration Plant, the Cows Head Fabrication Facility, and the Marystown Shipyard.⁹⁴³ Second, as noted

⁹³⁸ Comprehensive Study Report for the Southern Head Marine Terminal, December 2007, pp. 1, 6, **Exhibit R-361**.

⁹³⁹ Comprehensive Study Report for the Southern Head Marine Terminal, December 2007, p. 39, **Exhibit R-361**.

⁹⁴⁰ Comprehensive Study Report for the Southern Head Marine Terminal, December 2007, pp. 31-32, **Exhibit R-361**.

⁹⁴¹ Newfoundland and Labrador Refining Corporation Crude Oil Refinery & Marine Terminal Environmental Assessment Track Report, March 22, 2007, p. 7, **Exhibit R-362** (“The provincial assessment has scoped the project in its entirety.”)

⁹⁴² Comprehensive Study Report for the Southern Head Marine Terminal, December 2007, p. 39, **Exhibit R-361**.

⁹⁴³ Comprehensive Study Report for the Southern Head Marine Terminal, December 2007, pp. 6, 8, **Exhibit R-361**.

above with respect to the Bear Head and Keltic projects, very different EA considerations are engaged by an oil refinery than by a quarry. Finally, unlike the Whites Point project, the Southern Head project was subject to only minimal public opposition. In fact, only 16 letters were filed in connection with the scope of the EA, and there were no requests for a panel review.⁹⁴⁴

(xi) Deltaport Third Berth (British Columbia)

466. The Deltaport Third Berth expansion project, proposed in 2004 included a 20 ha expansion of an existing port facility just south of Vancouver, B.C.,⁹⁴⁵ on Canada's West coast, over 4,200 km away from the Digby Neck. The project was subject to an EA under the British Columbia *Environmental Assessment Act*.⁹⁴⁶ A federal EA under the *CEAA* was also required as the port needed multiple authorizations, including a s.35(2) *Fisheries Act* authorization from DFO and a s.127(1) *Canadian Environmental Protection Act* (disposal at sea) permit from Environment Canada.⁹⁴⁷ Moreover, due to the fact that the proponent was the Vancouver Port Authority, an assessment was also required under the *Canada Port Authority Environmental Assessment Regulations*.⁹⁴⁸ The size of the marine terminal, which permitted the berthing of vessels larger than 25,000 DWT, triggered a comprehensive study. Like the Whites Point EA, the federal

⁹⁴⁴ Newfoundland and Labrador Refining Corporation Crude Oil Refinery & Marine Terminal Environmental Assessment Track Report, March 22, 2007, p. 10, Table 1, **Exhibit R-362**.

⁹⁴⁵ Deltaport Third Berth Project, Port Metro Vancouver, **Exhibit R-365**.

⁹⁴⁶ British Columbia EA Office, Application Terms of Reference for Deltaport Third Berth Project, October 8, 2004, pp. 10-14, **Exhibit R-368**.

⁹⁴⁷ Excerpt from Deltaport Comprehensive Study Report, Executive Summary, pp. iii, 1-3, July 5, 2006, **Exhibit R-367**.

⁹⁴⁸ Excerpt from Deltaport Comprehensive Study Report, Executive Summary, pp. iii-iv, 3, July 5, 2006, **Exhibit R-367**.

and provincial processes were harmonized and the whole project was considered in a single EA.⁹⁴⁹

467. There were several reasons why the circumstances of the Deltaport project did not necessitate an assessment by a review panel. First, the project was merely an expansion of an existing port facility and it was located in an already busy industrial area – just 15 km south of the busy Vancouver International Airport, and 2 km north of the large Tsawwassen Ferry Terminal.⁹⁵⁰ Second, unlike the Whites Point project, the Deltaport project did not involve large-scale blasting, extraction and shipment of a resource, but rather a relatively small addition to a large existing coastal container port facility serving one of the largest cities in Canada.⁹⁵¹ Finally, while there was some public opposition to the Deltaport project, all of the substantive comments were addressed in the EA.⁹⁵² Further, like the Keltic project, the Deltaport project was subject to the post October 2003 version of the *CEAA*. As such, public concerns could be addressed by the enhanced opportunities for public involvement in the comprehensive study process⁹⁵³ that Robert Connelly describes in his Expert Report.⁹⁵⁴

(xii) Sechelt Carbonate Mine (British Columbia)

468. The Sechelt Carbonate Mine was proposed in 2005 for a site 15 kms north of Sechelt, British Columbia, on the west coast of Canada and more than 4,000 kms from

⁹⁴⁹ Excerpt from Deltaport Comprehensive Study Report, Executive Summary, pp. iii-iv, 1-4, July 5, 2006, **Exhibit R-367**.

⁹⁵⁰ Excerpt from Deltaport Third Birth Project Scoping Document, p. 6, Figure 1, July 23, 2004, **Exhibit R-366**.

⁹⁵¹ Excerpt from Deltaport Comprehensive Study Report, Executive Summary, p. ii, July 5, 2006, **Exhibit R-367**.

⁹⁵² Excerpt from Deltaport Comprehensive Study Report, Executive Summary, pp. 29-31, July 5, 2006, **Exhibit R-367**.

⁹⁵³ See in particular Environmental Assessment Track Report – Vancouver Port Authority Deltaport Third Berth Project, section 6, pp. 8-11, November 16, 2004, **Exhibit R-369**.

⁹⁵⁴ See Expert Report of Robert Connelly, ¶¶ 67-70.

Nova Scotia. The proposal was for a 215 ha open pit calcium and magnesium mine that was to operate for 25 years, a processing plant, a conveyor system to transport the rock to the coast, and a marine terminal capable of accommodating 6,000 DWT vessels.⁹⁵⁵ Under the British Columbia *Environmental Assessment Act*⁹⁵⁶ and its *Reviewable Projects Regulations*, the project required an Environmental Assessment Certificate.⁹⁵⁷ Federally, the marine terminal aspect of the project required a *NWPA* approval and a *Fisheries Act* s.35(2) authorization.⁹⁵⁸ Under the *Canada-BC Environmental Assessment Cooperation Agreement*, the federal and provincial governments agreed that they would harmonize their respective EAs.⁹⁵⁹ Like the Whites Point EA, this harmonization meant that the entire project, including the mine and the marine terminal, would be included in the EA.⁹⁶⁰

469. There was public concern over elements of the Sechelt Project from the outset.⁹⁶¹ In 2006, the proponent undertook significant revisions to the project description in order to address the public concern, including moving the proposed marine terminal from the smaller, more fragile Sechelt Inlet to a location closer to the larger, more industrial

⁹⁵⁵ Sechelt Carbonate Project, Project Description Submitted to the BCEAO, November 23, 2005, p. 7, **Exhibit R-370**.

⁹⁵⁶ British Columbia *Environmental Assessment Act*, S.B.C 2002, Chapter 43, **Exhibit R-30**.

⁹⁵⁷ British Columbia *Reviewable Projects Regulations*, **Exhibit R-505**; Sechelt Carbonate Project, Project Description Submitted to the BCEAO, November 23, 2005, p. 15-16, **Exhibit R-370**.

⁹⁵⁸ Sechelt Carbonate Project, Project Description Submitted to the BCEAO, November 23, 2005, p. 18, **Exhibit R-370**.

⁹⁵⁹ *Canada-British Columbia Agreement for Environmental Assessment Cooperation* (2004), s. 12(2), **Exhibit R-507**.

⁹⁶⁰ The Claimants suggest in ¶625(c) of their Memorial that the quarry and conveyer belt in the Sechelt project were excluded from the EA process. This assertion is false. As illustrated by the very document the Claimants cite in support – see Claimants’ Memorial, fn. 888 (referring to Claimant’s Exhibit Exhibit C 341) – while “DFO and TC [were] proposing to scope narrowly to their regulatory triggers...the BC Environmental Assessment Office (BC EAO) [would] scope the project broadly to include the entire mine, including all the components...”.

⁹⁶¹ *Approval Process; Tracking the Sechelt Carbonate Project, A summary report for the Sunshine Coast Conservation Association website*, Daniel Bouman and Kathy Turner, July 2007, p. 2, **Exhibit R-508**.

Georgia Strait.⁹⁶² Given the increased size of the relocated marine terminal, a comprehensive study would have been required.⁹⁶³ However, whether or not the public concern would require a referral to a review panel was never decided, because in June 2007 – the proponent abruptly postponed the project indefinitely.⁹⁶⁴ As a result, the analysis to determine the appropriate type of assessment was never completed by officials.

(xiii) Victor Diamond Mine (Ontario)

470. The Victor Diamond Mine was an open-pit diamond mine proposed in 2003 for a remote area of northern Ontario known as the James Bay lowlands. The site was not located on the ocean but inland, 90 km west of the town of Attawapiskat, 100 km from the James Bay coast,⁹⁶⁵ and 1,500 km from Whites Point. The project would consist of the mine, a processing plant and an all-weather airstrip, as well as possible barge facilities to be used for construction supplies.⁹⁶⁶ Three separate EAs were required under Ontario provincial law, as well as numerous other approvals.⁹⁶⁷ Federally, the project required a *NWPA* approval and a *Fisheries Act* s.35(2) authorization.⁹⁶⁸ Due to the all-season runway and the size of the groundwater extraction facility,⁹⁶⁹ the project was subject to a comprehensive study. While not formally harmonized, the federal and provincial

⁹⁶² Letter from Cal Mark to Derek Griffin, June 2, 2006, **Exhibit R-371**.

⁹⁶³ Letter from Robert Sisler to Cal Mark, March 9, 2007, **Exhibit R-506**. The Claimants also allege that DFO considered a possible exemption from the comprehensive study requirement under s. 28(c) of the *Comprehensive Study List Regulations*, citing to a DFO memorandum prepared by Mike ‘Engelsfjord’ (sic) sent to Adam Silverstein, February 23, 2007 (*Investors’ Schedule of Documents*, Tab **C-340**). This is a blatant misrepresentation of that document. This document confirms the requirement of a comprehensive study and makes no mention of any possible exemption. Moreover, it is absurd to suggest that considering an exemption and subsequently determining that it is not applicable is better treatment.

⁹⁶⁴ Email from Mandy Sarfi to Karen Hall et al., June 12, 2007, **Exhibit R-372**.

⁹⁶⁵ DeBeers Canada, About the Victor Mine, **Exhibit R-373**.

⁹⁶⁶ Excerpt from Victor Diamond Comprehensive Study Report, p. 1-1, **Exhibit R-374**.

⁹⁶⁷ Excerpt from Victor Diamond Comprehensive Study Report, p. 1-10 – 1-10, **Exhibit R-374**.

⁹⁶⁸ Excerpt from Victor Diamond Comprehensive Study Report, p. 1-7, **Exhibit R-374**.

⁹⁶⁹ Excerpt from Victor Diamond Comprehensive Study Report, p. 1-7, **Exhibit R-374**.

regulatory agencies did attempt to coordinate their respective EAs, and in particular provincial authorities participated in the federal comprehensive study and decided to screen the project based on the outcome of that process.⁹⁷⁰ Like Whites Point, the scope of the project included all of its components.⁹⁷¹

471. Unlike at Whites Point, there were no grounds to refer the assessment of the Victor Diamond Mine to a review panel. First, unlike at Whites Point, the project was located in an isolated area consisting of muskeg (a vast, peaty marshland), accessible in the winter by ice road and only by helicopter in the summer.⁹⁷² Furthermore, unlike Whites Point, there was certainly no ecotourism industry. Moreover, the Victor Diamond Mine was scheduled to operate for only 12 years,⁹⁷³ roughly a quarter of the duration of the Whites Point project.

472. Finally while there was some public concern,⁹⁷⁴ as explained above in the section on the Keltic project,⁹⁷⁵ the *CEAA* had undergone important amendments in October of 2003, applicable to this project, which enhanced opportunities for public participation in the comprehensive study process.⁹⁷⁶ As such, to the extent there existed public concern, an EA by way of comprehensive study in this post-amendment era provided an effective forum for addressing these concerns.

⁹⁷⁰ Excerpt from Victor Diamond Comprehensive Study Report, p. 1-6, p. 1-10, **Exhibit R-374**.

⁹⁷¹ Excerpt from Victor Diamond Comprehensive Study Report, pp. 1-14 – 1-15, **Exhibit R-374**.

⁹⁷² Excerpt from Victor Diamond Comprehensive Study Report, p. 1-1, **Exhibit R-374**.

⁹⁷³ Excerpt from Victor Diamond Comprehensive Study Report, p. 1-1, **Exhibit R-374**.

⁹⁷⁴ See Victor Diamond Mine Public Registry, **Exhibit R-514**. The comment letters received on the Victor Diamond Comprehensive Study Report are listed as 'Response Letters' or 'Comments' in the Victor Diamond Registry. They are records 402-458, 460-464, 466-513, 516-517 and 520-521. Of these, only 422, 424, 479, 496, 500, 501, 502, 520 and 521 are not a form letter.

⁹⁷⁵ See *supra*, ¶¶ 441.

⁹⁷⁶ See Expert Report of Robert Connelly, ¶¶ 67-70.

(xiv) NWT (Ekati) Diamond Mine (Northwest Territories)

473. The NWT (Ekati) Diamonds Project was proposed in 1994 – prior to the enactment of the *CEAA* – for the Lac des Gras area of the Northwest Territories: 300 kms northeast of Yellowknife, only 200 kms south of the Arctic Circle, and over 3,500 kms from Whites Point. The site, accessible only by airplane or a 475 km ice road during the winter,⁹⁷⁷ consisted of an open pit diamond mine and associated processing facilities.⁹⁷⁸ As the project was located in one of Canada’s northern territories, jurisdiction rested solely with the federal Government of Canada. Like the Whites Point EA, the scope of the project for the EA of the NWT Diamond Mine included all of the components of the project.

474. Further, like the Whites Point project, the NWT Diamond Mine was referred to a review panel (constituted under the *Environmental Assessment and Review Process Guidelines Order*, the federal precursor to the *CEAA*⁹⁷⁹) because of the project’s potentially adverse environmental effects and the public concern associated with it.⁹⁸⁰ Also like the Whites Point EA, the four member review panel here was charged with assessing the biophysical and socio-economic effects of the proposed project.⁹⁸¹ The Panel held scoping meetings that lasted over three weeks, and 18 days of public hearings over the course of a month in 1996.⁹⁸² In short, the NWT Diamond Mine received the same treatment received by Bilcon.

⁹⁷⁷ NWT Diamonds, Report of the Environmental Assessment Panel, June 1996, p. 5, **Exhibit R-376**.

⁹⁷⁸ NWT Diamonds, Report of the Environmental Assessment Panel, June 1996, p. 5, **Exhibit R-376**.

⁹⁷⁹ *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467, **Exhibit R-8**. See Expert Report of Robert Connelly, ¶ 25-27. Under the transitional provisions of the *CEAA*, the review panel was automatically transformed into a *CEAA* review panel in 1995 when the *CEAA* came into force.

⁹⁸⁰ NWT Diamonds, Report of the Environmental Assessment Panel, June 1996, p. 5, **Exhibit R-376**.

⁹⁸¹ NWT Diamonds, Report of the Environmental Assessment Panel, June 1996, p. 74 (Appendix B: Terms of Reference), **Exhibit R-376**.

⁹⁸² NWT Diamonds, Report of the Environmental Assessment Panel, June 1996, p. 9, **Exhibit R-376**

(xv) Diavik Diamond Mine (Northwest Territories)

475. The Diavik Diamond Mine was first proposed in 1995 for the Lac des Gras area of the Northwest Territories. This mine is located only 30 kms from the NWT Diamonds project,⁹⁸³ and mirrored that project in numerous respects: it is only accessible by airplane or the above-mentioned ice road,⁹⁸⁴ it consisted of an open pit mine and associated processing infrastructure,⁹⁸⁵ and it is located in the same Canadian Territory and therefore jurisdiction rested solely with the federal Government of Canada. The federal government was required to do an EA because the project required authorizations under the *NWPA*, the *Fisheries Act* and the *Explosives Act*.⁹⁸⁶ Like the NWT Diamonds EA and the Whites Point EA, the scope of the project for the EA of the Diavik Diamond Mine included all of the components of the project.⁹⁸⁷

476. The Diavik project was referred to a comprehensive study under the *CEAA* because of the construction of the airstrip.⁹⁸⁸ There was no need to send this project to a review panel, largely because an EA by way of a review panel had been completed on the adjacent NWT Diamonds project in June 1996.⁹⁸⁹ No similar circumstances existed with respect to the Whites Point project.

477. Moreover, the project also had to be considered by the Mackenzie Valley Environmental Impact Review Board before the Minister of the Environment could make

⁹⁸³ Diavik Diamonds Project Comprehensive Study Report, p. 1, June 1999, **Exhibit R-377**.

⁹⁸⁴ Diavik Diamonds Project Comprehensive Study Report, p. 1, June 1999, **Exhibit R-377**.

⁹⁸⁵ Diavik Diamonds Project Comprehensive Study Report, p. 67, June 1999, **Exhibit R-377**.

⁹⁸⁶ Diavik Diamonds Project Comprehensive Study Report, p. 16, June 1999, **Exhibit R-377**.

⁹⁸⁷ Diavik Diamonds Project Comprehensive Study Report, p. 67, June 1999, **Exhibit R-377**.

⁹⁸⁸ Diavik Diamonds Project Comprehensive Study Report, p. 16, June 1999, **Exhibit R-377**.

⁹⁸⁹ Diavik Diamonds Project Comprehensive Study Report, p. i, June 1999, **Exhibit R-377**.

a decision on the project.⁹⁹⁰ This nine-member⁹⁹¹ Review Board participated in all phases of the *CEAA*-initiated comprehensive study of Diavik.⁹⁹²

3. Conclusion: Canada Has Not Breached NAFTA Articles 1102 or 1103

478. The Claimants have failed to meet their burden to prove that the treatment Canada and Nova Scotia accorded to Bilcon during the EA of the Whites Point project discriminated against them on the basis of their nationality. At most the Claimants have established that in comparison with some EA proponents, though not all, Bilcon was accorded different treatment. What they have failed to show, however, is that all of what they challenge is treatment covered by Articles 1102 and 1103. Similarly, they have failed to provide any analysis of how the treatment they received was in any way less favourable. Finally, the evidence presented above concerning the fifteen comparators identified by the Claimants demonstrates that any differences in treatment resulted from the significantly different circumstances of the comparator projects, including (1) the biophysical and socio-economic environments; (2) the nature of the projects (including, among others, size, duration, and activities involved); and (3) the level of public concern. For all of these reasons, the treatment accorded to Bilcon is no basis for a claim under 1102 or 1103. To hold otherwise would negate the right of the NAFTA States to make reasonable distinctions based on valid policy and scientific reasons.

⁹⁹⁰ The *Mackenzie Valley Resource Management Act* came into force in December 1998 and superceded the *CEAA* in the Diavik project area. Diavik Diamonds Project Comprehensive Study Report, pp. 19-20, June 1999, **Exhibit R-377**.

⁹⁹¹ “About the Review Board”, Mackenzie Valley Review Board, p. 1, **Exhibit R-511**.

⁹⁹² Diavik Diamonds Project Comprehensive Study Report, June 1999, p. 20, **Exhibit R-377**.

V. THE CLAIMANTS' ALLEGATIONS REGARDING DEFICIENCIES IN CANADA'S DOCUMENT PRODUCTION ARE WITHOUT MERIT

479. Canada is compelled to respond to the Claimants' attempt to re-litigate their arguments with respect to the document production phase of this case, and to their request that this Tribunal draw an adverse inference against Canada.

480. At great cost, Canada has made best efforts to produce for the Claimants all non-privileged documents responsive to their requests. To date, Canada has produced for the Claimants over 50,000 documents from 170 different individuals and more than 12 different government departments.

481. Despite the significant number of documents provided to them, the Claimants now make the unsupported assertion that "Canada has deliberately, recklessly, or negligently failed to disclose documents."⁹⁹³ They ask the Tribunal to "draw an adverse inference against Canada wherever any conflict, insufficiency, or uncertainty occurs in the evidence adduced."⁹⁹⁴ To substantiate their accusation, the Claimants spend fifteen pages of their Memorial identifying documents that "should" exist or that Canada has failed to produce.

482. While the Claimants may be disappointed that their extensive fishing expedition during document disclosure did not yield the evidence that they had hoped to find, this is not grounds for an inference that Canada has failed to disclose relevant documents. The simple fact is that the evidence that the Claimants had hoped to find does not exist. As Canada has maintained since the beginning of this arbitration, the Claimants allegations of impropriety are meritless.

483. In fact, Canada has disclosed all relevant documents and the arguments made by the Claimants to the contrary are meritless and misrepresent the facts. For example, the

⁹⁹³ Claimants' Memorial, ¶ 702.

⁹⁹⁴ Claimants' Memorial, ¶ 702.

Claimants argue that Canada had an obligation to produce documents relating to the Tiverton Quarry project under Document Request *4bis*.⁹⁹⁵ This is incorrect. The chapeau to Document Request 4 and *4bis* makes it clear that the request relates to projects that were subject to an environmental assessment:

Documents regarding the projects below assessed under CEAA and/or Nova Scotia Environmental [*sic*] Act and/or by the Nova Scotia Department of Environment and labour (also set out in Appendix B) related to all mines, quarries and marine terminals in where no Panel Review or Joint Panel Review with another jurisdiction was held. The request is for Documents other than those available on the CEAA registry or CEAA website....⁹⁹⁶

484. The Tiverton Quarry was not subject to a Nova Scotia EA because it was smaller than 4 ha.⁹⁹⁷ As the Claimants acknowledge themselves in their Memorial: “In Nova Scotia, an application to construct and operate a quarry of less than 4ha does not generally require...an environmental assessment.”⁹⁹⁸ Nor was the Tiverton Quarry subject to a federal EA. Documents related to the Tiverton Quarry are thus outside the scope of the Claimants’ *4bis* request and Canada was not obligated to produce any documents relating to the Tiverton Quarry. In any event, the Claimants have admitted that it was “easy” for them to obtain documents related to the Tiverton Quarry by other means.⁹⁹⁹ It is thus not clear what possible “adverse inference” could be drawn.

485. The Claimants also fault Canada for producing “peripheral” documents¹⁰⁰⁰ when it was the Claimants’ own requests that compelled the production of such documents. Had

⁹⁹⁵ Claimants’ Memorial, ¶ 655.

⁹⁹⁶ Joint Redfern, Claimants’ Document Request 4. Claimants’ Request *4bis* incorporates the substance of Document Request 4 by reference.

⁹⁹⁷ Affidavit of Bob Petrie, ¶¶ 4. 18.

⁹⁹⁸ Claimants’ Memorial, ¶ 5.

⁹⁹⁹ Claimants’ Memorial, ¶ 656.

¹⁰⁰⁰ Claimants’ Memorial, ¶¶ 670, 676, 680, 683.

the Claimants tailored their requests to be more specific, the wasted time and labour to review and produce such documents could have been avoided.

486. For the foregoing reasons, the Claimants' allegations regarding Canada's document production should be dismissed and their claim for a blanket adverse inference to be drawn should be rejected.

VI. COSTS

487. Article 1135 allows a Tribunal to award costs in accordance with the applicable arbitration rules.

488. Articles 38 to 40 of the UNCITRAL Arbitration Rules address awards of costs in arbitrations conducted pursuant to those rules.¹⁰⁰¹ They allow awards of costs indemnifying a disputing party for arbitration costs and for reasonable legal costs.

489. In principle, the costs of UNCITRAL arbitration are to be borne by the unsuccessful party. For example, after ruling that Canada had prevailed in the recent *Chemtura* arbitration, the tribunal held that it “finds it fair that the Claimant bear the entire costs of the arbitration,” a total sum of USD \$688,219.¹⁰⁰² The Tribunal further found it “appropriate and just that the Claimant bear one half of the fees and costs expended by the Respondent in connection with this arbitration,” a total amount of CAD \$2,889,233.80.¹⁰⁰³

490. Canada requests that the Tribunal order the Claimants to pay the arbitration costs for this claim and to indemnify Canada for its legal fees and costs, including all of the costs associated with the extensive and overbroad document requests that has yielded absolutely no evidence of any breach of NAFTA. Canada respectfully requests the opportunity to submit a more detailed submission on costs so that it can fully address all relevant considerations.

¹⁰⁰¹ Arbitration Rules of the United Nations Commission on International Trade Law, GA Res. 31/98, 15 December 1976, Articles 38-40.

¹⁰⁰² *Chemtura – Award*, ¶ 272.

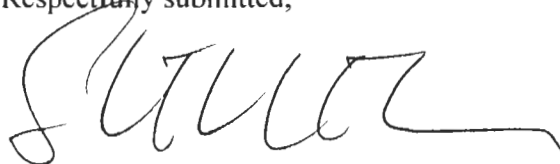
¹⁰⁰³ *Chemtura – Award*, ¶ 273.

VII. ORDER REQUESTED

491. For the foregoing reasons, Canada respectfully requests that this Tribunal render an award dismissing the Claimants' claims in their entirety and ordering the Claimants to bear the costs of the arbitration in full and to indemnify Canada for its legal fees and costs in this arbitration.

Dated: December 9, 2011

Respectfully submitted,



Sylvie Tabet
Scott Little
Shane Spelliscy
Reuben East
Jean-Francois Hebert
Stephen Kurelek
Adam Douglas
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On behalf of the Respondent,
The Government of Canada

APPENDICES**TABLE OF AUTHORITIES REFERRED TO IN THIS COUNTER-MEMORIAL**

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1	RA-10		<i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , Report of the Appellate Body, WT/DS332/AB/R, 3 December 2007
1	RA-11	<i>Cargill v. Mexico- Award</i>	<i>Cargill Incorporated v. United Mexican States</i> , (ICSID Case No. ARB (AF)/05/02) Award, 18 September 2009

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4	RA-35	<i>Feldman – Award</i>	<i>Marvin Roy Feldman Karpa v. United Mexican States</i> (ICSID Case No. ARB(AF)99/1) Award and Dissenting Opinion, 16 December 2002

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5	RA-42	<i>Methanex – Fourth Submission of Canada</i>	<i>Methanex Corporation v. The United States of America</i> (UNCITRAL) Canada's Fourth Submission pursuant to Article 1128, 30 January 30 2004
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5	RA-44	<i>Methanex – Award on Jurisdiction</i>	<i>Methanex Corporation v. United States of America</i> , (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005
5	RA-45	<i>Methanex – Preliminary Award on Jurisdiction,</i>	<i>Methanex Corporation v. United States of America</i> , (UNCITRAL) Preliminary Award on Jurisdiction, 7 August 2002
5	RA-46	<i>Mondev – Award</i>	<i>Mondev International Ltd. v. The United States of America</i> (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002

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5	RA-48	<i>NAAEC</i>	<i>North American Agreement on Environmental Cooperation</i> , 14 September 1993, 32 I.L.M. 1480
5	RA-49	<i>Note of Interpretation</i>	NAFTA Free Trade Commission, <i>Notes of Interpretation of Certain Chapter Eleven Provisions</i> , 31 July 2001
5	RA-50	<i>National Grid - Award</i>	<i>National Grid P.L.C. v. Argentine Republic</i> (UNCITRAL), Award, 3 November 2008
5	RA-51	<i>North Sea Continental Shelf Cases - Judgment</i>	<i>North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)</i> [1969], I.C.J. Rep. 4, Judgment, 20 February 1969
5	RA-52	<i>Occidental Exploration – Award</i>	<i>Occidental Exploration and Production Company v. The Republic of Ecuador</i> (LCIA No. UN 3467, IIC 202) Award, 1 July 2004
5	RA-53	<i>OECD - National Treatment</i>	<i>Organisation for Economic Co-Operation and Development (OECD) National Treatment for Foreign-Controlled Enterprises</i> , OECD: 1993
6	RA-54	<i>Parkerings – Award</i>	<i>Parkerings-Compagniet AS v. Republic of Lithuania</i> (ICSID Case No. ARB/05/8) Award, 11 September 2007
6	RA-55	<i>Pope & Talbot – Award on Merits</i>	<i>Pope & Talbot v. Government of Canada</i> , (UNCITRAL) Award on the Merits of Phase 2, 10 April 2001
6	RA-56	<i>Pope & Talbot – Counter Memorial</i>	<i>Pope & Talbot v. Government of Canada</i> , (UNCITRAL) Counter Memorial, 29 March 2000
6	RA-57	<i>Pope & Talbot – Interim Award</i>	<i>Pope & Talbot v. Government of Canada</i> , (UNCITRAL) Interim Award, 26 June 2000

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6	RA-58	Ian Brownlie, <i>Principles of Public International Law</i>	<i>Principles of Public International Law</i> , Brownlie, Ian, 6th ed. (Oxford University Press, 2003)
6	RA-59	<i>PSEG Global – Award</i>	<i>PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey</i> (ICSID No. ARB/02/5) Award, 17 January 2007
6	RA-60	<i>Commentary on the ILC Articles</i>	<i>Responsibility of States for Internationally Wrongful Acts with Commentaries</i> , Text adopted by the International Law Commission at its fifty-third session, in 2001, (A/56/10), United Nations, New York 2001
6	RA-61	<i>Responsibility of States for Internationally Wrongful Acts</i>	<i>Responsibility of States for Internationally Wrongful Acts 2001</i>
6	RA-62	<i>Rio Declaration</i>	<i>Rio Declaration on Environment and Development</i> , 16 June 1972
6	RA-63	<i>S.D. Myers – Separate Opinion of B. Schwartz</i>	<i>S.D. Myers Inc. v. Canada</i> (UNCITRAL) Separate Opinion of Professor Bryan Schwartz, concurring except with respect to performance requirements, in the partial award of the tribunal, 12 November 2000
6	RA-64	<i>Siemens – Award</i>	<i>Siemens A.G. v. The Argentine Republic</i> (ICSID Case No. ARB/02/8) Decision on Jurisdiction, 3 August 2004
6	RA-65	<i>S.D. Myers – Partial Award</i>	<i>S.D. Myers Inc. v. Canada</i> (UNCITRAL) First Partial Award, 13 November 2000
6	RA-66	<i>Sempra – Award</i>	<i>Sempra Energy International v. Argentine Republic</i> (ICSID Case No. ARB/02/16) Award, 28 September 2007
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6	RA-68		<i>Shorter Oxford Dictionary</i> , 5 th ed. (Oxford University Press, 2002) Page 413
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6	RA-71		<i>Shorter Oxford Dictionary</i> , 5 th ed. (Oxford University Press, 2002) Page 1595
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7	RA-73	<i>Tecnicas - Award</i>	<i>Tecnicas Medioambientales TECMED S.A. v. United Mexican States</i> (ICSID Case No. ARB(AF)00/2) Award, 29 May 2003
7	RA-74	<i>Loewen –US Response to 1128 submissions</i>	<i>The Loewen Group Inc. and Raymond L. Loewen v. The United States of America</i> (ICSID Case No. ARB(AF)/98/3) U.S. Response to Article 1128 Submissions, 19 July 2002
7	RA-75	<i>Loewen – Award</i>	<i>The Loewen Group Inc. and Raymond L. Loewen v. The United States of America</i> (ICSID Case No. ARB(AF)/98/3) Award on Merits, 26 June 2003
7	RA-76	<i>Loewen – Mexico's 1128 submission</i>	<i>The Loewen Group Inc., and Raymond L. Loewen v. The United States of America</i> , (ICSID Case No. ARB (AF)/98/3) Mexico's Submission Pursuant to NAFTA Article 1128, 2 July 2002
7	RA-77	<i>Loewen – US Counter Memorial</i>	<i>The Loewen Group Inc., and Raymond L. Loewen v. The United States of America</i> , (ICSID Case No. ARB (AF)/98/3) Counter Memorial of the United States of America, 30 March 2001
7	RA-78	<i>Loewen – Canada Second 1128 Submission</i>	<i>The Loewen Group Inc., and Raymond L. Loewen v. The United States of America</i> , (ICSID Case No. ARB (AF)/98/3) Second Submission of the Government of Canada Pursuant to NAFTA Article 1128, 27 June 2002
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7	RA-81	<i>UPS – Counter Memorial</i>	<i>United Parcel Service v. Canada</i> (UNCITRAL) Counter Memorial, 22 June 2005

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7	RA-84	<i>Stockholm Declaration</i>	<i>Declaration of the United Nations Conference on the Human Environment - Stockholm 1972</i>
7	RA-85	<i>Statement of Implementation: NAFTA</i>	Canada, <i>Statement of Implementation: North American Free Trade Agreement</i> , Canada Gazette, Part I, 1 January 1994
7	RA-86	<i>Saluka Investments – Partial Award</i>	<i>Saluka Investments BV (The Netherlands) v. The Czech Republic</i> (UNCITRAL) Partial Award, 17 March 2006