

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

4 BETWEEN:

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

7 Claimants

8 - and -

9 GOVERNMENT OF CANADA

10 Respondent

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

18 VOLUME 1A - PUBLIC
19 CONDENSED TRANSCRIPT WITH INDEX

20 APPEARANCES:

21 Barry Appleton For the Claimants
22 Gregory Nash
23 Frank S Borowicz, QC
24 Kyle Dickson-Smith

25 Scott Little For the Respondent
Shane Spelliscy
Jean-François Hebert
Stephen Kurelek
Adam Douglas
Reuben East

Dirk Pulkowski For the Tribunal

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ALSO PRESENT:

Elizabeth Hrubesz

Cheryl Fabian-Bernard

Alex Miller

Chris Reynolds

Jasmine Rokolj

Alex George

David Bartol

Kevin LeBlanc

Kathleen Claussen

Assistant to Tribunal

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<p>1 Toronto, Ontario</p> <p>2 --- Upon commencing on Tuesday, October 22, 2013</p> <p>3 at 9:41 a.m.</p> <p>4 MR. PULKOWSKI: Just a brief</p> <p>5 reminder before we get started regarding the</p> <p>6 microphones. You will see now a demonstration that</p> <p>7 wasn't possible to do completely in the other room.</p> <p>8 Right now the lights are red, meaning that</p> <p>9 microphone is off. I see the Tribunal microphones</p> <p>10 are all on right now. So if you want to turn this</p> <p>11 one off, this one is green now, meaning that you</p> <p>12 are connected.</p> <p>13 PRESIDING ARBITRATOR: Okay. Can</p> <p>14 we start? All right. I think we are ready to</p> <p>15 start. So good morning, everybody. Good morning,</p> <p>16 ladies and gentlemen, and welcome.</p> <p>17 I open the hearing on the</p> <p>18 jurisdiction and liability in the case of Bilcon of</p> <p>19 Delaware et al versus the Government of Canada.</p> <p>20 There is a German saying, I don't</p> <p>21 know how your German is, 'Gut Ding braucht Weil',</p> <p>22 which means a good thing takes a while to become</p> <p>23 good and solid, and I think this has certainly been</p> <p>24 the case here.</p> <p>25 But I think you are all relieved</p>		<p>1 goes by of about one hour. Yes, is that... Okay.</p> <p>2 So the other things I have, the</p> <p>3 exclusion of fact witnesses is clear by now. We</p> <p>4 have gotten the assurances, the signed statements</p> <p>5 of the witnesses.</p> <p>6 Let me maybe ask now for lead</p> <p>7 counsel to very briefly present their teams. So</p> <p>8 let me first start with the PCA team. My name is</p> <p>9 Bruno Simma. There is Professor Bryan Schwartz</p> <p>10 from Winnipeg. There is Professor Donald McRae</p> <p>11 from Ottawa.</p> <p>12 Then we have two people, two PCA</p> <p>13 employees, Dirk, who is known already familiar to</p> <p>14 most of us, and then there is Kathleen Claussen,</p> <p>15 who is the young lady right in the back of the</p> <p>16 room. Your name is Teresa Forbes.</p> <p>17 And maybe if you could, claimant,</p> <p>18 could you just very briefly introduce your people.</p> <p>19 MR. APPLETON: Good morning,</p> <p>20 Mr. President. I am Barry Appleton. I am here on</p> <p>21 behalf of the claimant. I would like to introduce</p> <p>22 our team today, but first I would like to be able</p> <p>23 to say hello to all of the people on the Internet</p> <p>24 who will be watching this hearing and being able to</p> <p>25 participate in the transparent process. The</p>	
<p>1 and, in a sense, probably happy that we have now</p> <p>2 reached a stage of the hearing.</p> <p>3 Actually, this is a hearing, as</p> <p>4 you will see, which is being streamlined live,</p> <p>5 streamed live on the PCA website.</p> <p>6 We have had a short discussion</p> <p>7 with some of you at 9:00 on a few items, and I</p> <p>8 think I don't have to go into details here. It had</p> <p>9 to do with the confidentiality that has to be</p> <p>10 assured on the part of the witnesses, that they are</p> <p>11 not going to listen to or watch parts of the</p> <p>12 proceedings which are -- before they have done</p> <p>13 their or suffered through their examinations.</p> <p>14 I think transcripts will be ready</p> <p>15 in a rough format very soon after the hearing, and</p> <p>16 around 9:00 p.m. the final transcript will be</p> <p>17 available electronically, and I have heard in the</p> <p>18 morning we are going to get the printed-out</p> <p>19 transcript.</p> <p>20 The hearing will be based on a six</p> <p>21 working hours a day, more or less three plus three,</p> <p>22 coffee break at a convenient time more or less in</p> <p>23 the middle. So you can indicate if that is a good</p> <p>24 time in your presentations; a lunch break which</p> <p>25 will -- the precise timing will be decided as time</p>	Page 5	<p>1 claimant in this matter, the investors, Bilcon et</p> <p>2 al, they have all been strongly in favour of</p> <p>3 transparent, open hearings, and we thank the</p> <p>4 Members of the Tribunal, the Government of Canada,</p> <p>5 the very fine people at Arbitration Place to be</p> <p>6 able to put this together. We just wanted to put</p> <p>7 that formally on the record to begin.</p> <p>8 With respect to our delegation</p> <p>9 here today, we're going to introduce the counsel</p> <p>10 who we would expect to participate in this hearing,</p> <p>11 and also the client representative and one advisor</p> <p>12 to this delegation.</p> <p>13 So in addition to myself, there is</p> <p>14 Mr. Gregory Nash. I will ask each person to stand</p> <p>15 as we go through. Frank Borowicz, Q.C., Kyle</p> <p>16 Dickson-Smith, Dr. Alan Alexandroff. We also are</p> <p>17 joined by Professor Robert Howse from the New York</p> <p>18 University faculty of law who is here as an advisor</p> <p>19 and expert on public international law during these</p> <p>20 hearings.</p> <p>21 And we also have a party</p> <p>22 representative, one of the claimants in fact in a</p> <p>23 personal capacity, Mr. Bill Clayton Jr. here at the</p> <p>24 back.</p> <p>25 You will be hearing from</p>	Page 7

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<p>1 Mr. Clayton, I believe, later today in terms of 2 witness examination.</p> <p>3 I would like to thank the court 4 reporter in advance. We hope to not put you 5 through too much of a difficult pace over the next 6 few days, and we thank everyone for bringing this 7 hearing on today. Thank you.</p> <p>8 PRESIDING ARBITRATOR: Thank you, 9 Mr. Appleton. For the respondent, Mr. Little?</p> <p>10 MR. LITTLE: Good morning, Judge 11 Simma, Professor Schwartz, Professor McRae, Dirk, 12 and good morning, Kathleen.</p> <p>13 I am Scott Little. I am the lead 14 counsel for the Government of Canada, and today I'm 15 accompanied by Mr. Shane Spelliscy, Jean-François 16 Hebert, Stephen Kurelek, counsel Adam Douglas in 17 the third row, Reuben East, very capable legal 18 paralegals Cheryl Fabian-Bernard and Elizabeth 19 Hrubesz.</p> <p>20 We have Chris Reynolds, who is 21 part of our technical support team, and then we 22 have our two experts, Lawrence Smith and Robert 23 Connelly. In the very back, the gentleman is David 24 Bartol. He is counsel for the Government of Nova 25 Scotia.</p>		<p>1 Good morning. Thank you very much. I will begin 2 by briefly taking the Tribunal through our 3 understanding of the governing legal principles in 4 this dispute.</p> <p>5 I do not propose in the opening 6 statement to address the legal questions before you 7 in detail, as this has been covered in the briefs. 8 I will provide an overview of the main legal 9 principles which constitutes the legal framework 10 for your consideration in this case.</p> <p>11 When I finish, my colleague, Greg 12 Nash, will address some factual issues, which we 13 believe will assist the Tribunal during the witness 14 examination phase of this hearing.</p> <p>15 At the outset, it is helpful to 16 consider the fundamental interpretive approach that 17 the NAFTA mandates. Slide 1, which will appear on 18 the screens before you, sets out the text of NAFTA 19 article 1131(1). This mandates that in its 20 interpretation of the NAFTA, that the Tribunal 21 shall decide the issues in dispute in accordance 22 with the NAFTA agreement and with applicable rules 23 of international law.</p> <p>24 In this regard, the NAFTA actually 25 prescribes how it is to be interpreted. Slide 2</p>	
<p>1 Then finally, beside Mr. Bartol we 2 have Jasmine Rokolj from DFAIT. Thank you.</p> <p>3 PRESIDING ARBITRATOR: Thank you. 4 Thank you very much, Mr. Little.</p> <p>5 So the program of today is going 6 to be we are going to have the opening statements 7 of around 90 minutes each, and followed by 8 examination of witnesses. And, yes, I think that 9 is all I need to say at the moment. So I give the 10 floor to representative claimant, Mr. Appleton, for 11 his opening statement. I hope I haven't forgotten 12 anything.</p> <p>13 MR. APPLETON: These don't bend. 14 You're on.</p> <p>15 PRESIDING ARBITRATOR: I think we 16 were told they are all individual microphones, so 17 it is of no -- if one is left on, it doesn't 18 matter; right? That is how I understood it, but I 19 gladly will turn....</p> <p>20 MR. APPLETON: Right. You can 21 hear me?</p> <p>22 PRESIDING ARBITRATOR: Well, we 23 can hear you.</p> <p>24 OPENING STATEMENT BY MR. APPLETON: 25 MR. APPLETON: Yes, excellent.</p>	Page 9	<p>1 sets out the objectives of the NAFTA, which appear 2 at paragraph 1 of NAFTA article 102. This directs 3 the Tribunal to interpret the NAFTA in a manner 4 consistent with specific objectives contained in 5 that article and in accordance with three 6 principles and rules of the NAFTA; namely, national 7 treatment, most-favored nation treatments and 8 transparency. Each of these principles and rules 9 is at issue in this arbitration.</p> <p>10 The NAFTA's principles of 11 most-favored nation treatment and national 12 treatment require that Bilcon be treated no less 13 favorably than others seeking similar licensing 14 permissions.</p> <p>15 The NAFTA principle of 16 transparency requires an open process that enables 17 a foreign investor to be aware of its actual status 18 and rights in relation to others. All of these 19 principles need to be understood in relation to 20 others. They need to be understood in relation to 21 the broad context of North American democratic and 22 constitutional values and the common adoption 23 amongst the three NAFTA members of conventions 24 protecting the rule of law, due process and 25 international civil, economic, environmental and</p>	Page 11

<p style="text-align: right;">Page 12</p> <p>1 human rights. 2 Within this interpretive context 3 we would like to turn to national treatments. In 4 addition to being a principle and rule of the NAFTA 5 set out in NAFTA article 102, national treatment is 6 an obligation that is set out in seven different 7 chapters of the NAFTA. 8 The terms "national treatment" 9 "most-favored nation treatment", and "fair and 10 equitable treatment" are not specifically defined 11 in the NAFTA, but they have been used in an 12 undefined fashion in more than 1,000 bilateral 13 investment treaties. 14 So the NAFTA, like these many 15 other agreements, chose to rely on the living 16 meaning of these well-known international law 17 terms, a meaning that comes from a large number of 18 international tribunal decisions and from customary 19 international law. 20 The meaning of national treatments 21 must accordingly be based on the ordinary meaning 22 of the words in their context and in light of the 23 NAFTA's objects and purposes as the NAFTA -- sorry, 24 as the NAFTA itself and the Vienna Convention 25 mandates.</p>	<p style="text-align: right;">Page 14</p> <p>1 for similar regulatory permissions. 2 This was the same approach taken 3 by the NAFTA Tribunal in Grand River and the 4 approach taken in Occidental Petroleum. 5 In this NAFTA claim, all of those 6 who, like Bilcon, sought regulatory permission from 7 governments are in like circumstances. This is the 8 class of investments whose treatment needs to be 9 considered. 10 Now, of course the determination 11 of likeness is not a mechanical exercise. The 12 GATT, and then later the WTO, frequently have been 13 asked to consider this very question. As the GATT 14 has recognized, judgment needs to be applied in 15 this determination, and the interpretation and 16 application of the test of likeness must further 17 the objectives of equality of competitive 18 opportunity. In other words the analysis is, in 19 substance, a matter of functional common sense. 20 NAFTA Article 1102 requires the 21 Tribunal to consider treatment after like 22 circumstances. The interpretive task for the 23 Tribunal therefore begins with the text of NAFTA 24 Article 1102, but it is not completed until NAFTA 25 Article 1102 is examined in the context of the</p>
<p style="text-align: right;">Page 13</p> <p>1 NAFTA Article 1102(1), which 2 enshrines national treatments, is set out on slide 3 3, which appears on the monitors before you. 4 NAFTA Article 1102 has two simple 5 criteria: Are their investors or investments of 6 those investors in like circumstances? Two, is 7 there treatment less favorable provided to them? 8 That is all that Bilcon has to 9 show to validate its claim. 10 With regard to the first 11 requirement of likeness, NAFTA Article 1102 only 12 requires investments to be in like circumstances. 13 It does not require them to be in identical 14 circumstances. 15 The comparison between 16 circumstances of foreign and domestic investments 17 only needs to be like, and there can be many 18 differences in circumstances, but once the 19 threshold of likeness is met, a comparison of 20 treatment follows. 21 What is clear is that likeness 22 needs to be considered in the circumstances, and 23 where a question of likeness arises in the context 24 of government regulations, likeness requires the 25 Tribunal to consider all of those who are competing</p>	<p style="text-align: right;">Page 15</p> <p>1 NAFTA as a whole. 2 The context objectives of the 3 NAFTA make clear that NAFTA Article 1102 requires 4 the NAFTA parties to provide equality of 5 competitive opportunities. 6 The notion of equality of 7 competitive opportunities allows for different 8 treatment that is not less favorable treatment. It 9 allows a regulatory process to produce different 10 outcomes, as long as the process demonstrably 11 treats the parties with evenhandedness to ensure 12 all investments are granted equal opportunities. 13 To be even-handed, treatment need not be identical. 14 Where there is different treatment 15 of likes, the burden is on Canada to show that the 16 different treatment is not less favorable. Canada 17 simply cannot meet that burden. 18 The Government of the United 19 States America stated in its 1128 submission that 20 national treatment requires proof of 21 nationality-based discrimination. This is simply 22 not a requirement of a violation of national 23 treatment. 24 The text of NAFTA Article 1102 25 makes clear that there is a requirement to</p>

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<p>1 demonstrate a divergence of nationality between the 2 more favorably treated investment and the 3 claimants, but there is no requirement to prove 4 intent of nationality-based discrimination. 5 National treatment can be easily violated when 6 there is a presence of nationality-based 7 discrimination, but it is simply not required. 8 Now, I would like to turn to slide 9 5, which appears on the monitors before you. This 10 sets out the text of Chapter 11's most-favored 11 nation treatment obligation. 12 The text of this obligation is 13 very similar to the text of the national treatment 14 obligation in Chapter 11, but the focus here on the 15 likeness comparator is not a better-treated local 16 person, but a better-treated non-local, either an 17 investment or investor of an investment from 18 another NAFTA party or from a non-NAFTA party 19 state. 20 In this arbitration, the Tribunal 21 will see that treatment has been provided to others 22 in like circumstances with Bilcon from non-NAFTA 23 party states, as well as from other NAFTA party 24 states. In such circumstances, there is a clear 25 most-favored nation treatment violation.</p>	<p>1 applicability of the rule of law. 2 Looking at the obligation of full 3 protection of security, this is a specific element 4 of the international law standard. In its modern 5 expression, this obligation requires governments to 6 provide a stable, legal and business environment to 7 foreign investors, and full protection and security 8 itself includes protection of the rule of law and 9 of fundamental fairness obligations within the 10 international law standard. 11 The international law standard 12 also includes other obligations. It ensures that 13 regulatory process is free from nationality-based 14 discrimination. This protection against 15 discrimination is an essential part of the NAFTA 16 Article 1105 international law standard, and it 17 itself is reflected in numerous international human 18 rights agreements, such as the International 19 Covenant on Civil and Political Rights that have 20 been ratified by each of the three NAFTA parties. 21 Protection -- well, with respect 22 to the protection against arbitrariness, the state 23 breaches its customary international law 24 obligations when it acts on prejudice or preference 25 rather than on reason or on facts.</p>
<p>1 I would like to turn to the 2 international standard of treatment. That is 3 Article 1105. This requires Canada to accord the 4 international law standard of treatment to 5 investments of investors of the NAFTA parties. 6 The text of this obligation is set 7 out on slide 6, which will appear -- it does appear 8 on the monitors before you. Paragraph 1 of NAFTA 9 Article 1105 provides that the international law 10 standard of treatment includes the provision of 11 fair and equitable treatment and full protection 12 and security. These international law obligations 13 are well established and are well known. 14 Good faith is an integral part of 15 the fair and equitable treatment standard. Many 16 NAFTA and non-NAFTA awards recognize the duty to 17 act in good faith is a distinct international 18 obligation within the international law standard. 19 An example might be a lack of 20 candour concerning the policy basis for government 21 decisions. This fundamental obligation of good 22 faith needs to be considered in the context of the 23 highly developed legal and regulatory framework in 24 North America where citizens have basic 25 expectations of fairness, transparency and the</p>	<p>1 Arbitrariness also occurs when 2 discretionary decisions by governments are based on 3 irrelevant considerations and when relevant 4 considerations are ignored. 5 The long-standing international 6 customary law protection against the abuse of 7 rights applies in the context of abuses of 8 administrative authority. 9 Slide 7 on the monitors before you 10 give examination of three basic forms of abuse of 11 rights: Where the state hinders an investor in the 12 enjoyment of rights; where there is a fictitious 13 exercise of a right; or where there is an abuse of 14 discretion in the exercise of a governmental power. 15 A government cannot exercise its 16 power to abuse a foreign investor by capriciously 17 exercising discretionary rights. In the words of 18 Judge Charles Brower, heightens abuses of 19 administrative decision making, violate the fair 20 and equitable treatment standard, as do 21 unreasonable regulatory burdens, artificial delays, 22 unduly extensive information requests, and 23 deliberate cost-raising tactics. 24 The duty of transparency is also 25 clearly contained in the NAFTA. It compels</p>

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<p>1 openness and clarity of a host state's legal regime 2 and procedures.</p> <p>3 The need for transparency is a 4 necessary aspect of both good faith and due process 5 rights. Each of these aspects of the international 6 law standard is central to this arbitration.</p> <p>7 Now, in the context of each of 8 these three NAFTA obligations, Articles 1102, 1103 9 and 1105, it is clear that the NAFTA parties did 10 not need to define the key terms in the NAFTA, such 11 as most-favored nation treatment, national 12 treatment and the international law standard of 13 treatment, not because they did not know what these 14 obligations meant, but precisely because they did.</p> <p>15 They wanted to ensure that the 16 protections to investors from an evolving 17 international law meaning of these terms would 18 continue to be applied in the way that harmonizes 19 all of the law.</p> <p>20 The Vienna Convention tells us to 21 look at the context of the NAFTA as a whole since, 22 for example, the most-favored nation treatment 23 obligation in Chapter 11 only applies to treaties 24 which came into force after the NAFTA.</p> <p>25 The use of common terms was</p>	<p>1 Convention on the law of treaties, and other rules 2 of international law which have been adopted by the 3 parties pursuant to article 31(1)(c) of the Vienna 4 Convention.</p> <p>5 Now, since a finding of the breach 6 of the NAFTA requires a careful review of the 7 facts, we will now ask Mr. Nash to address the 8 Tribunal on factual issues which arise in this 9 claim. Mr. Nash.</p> <p>10 OPENING STATEMENT BY MR. NASH: 11 MR. NASH: Thank you, 12 Mr. Appleton. Mr. President, Members of the 13 Tribunal, I will be referring to documents that 14 have been introduced into evidence.</p> <p>15 MR. APPLETON: Excuse me, 16 Mr. Nash, I'm sorry. I omitted something. Would 17 you explain to the Tribunal about the... or I will 18 explain?</p> <p>19 MR. NASH: You are about to get a 20 binder of documents which include slides for all of 21 the slides that Mr. Appleton has referred to and 22 will include slides over the course that I will be 23 referring to.</p> <p>24 PRESIDING ARBITRATOR: Could you 25 put the microphone a bit closer to you?</p>
<p>Page 21</p> <p>1 clearly meant to incorporate an international law 2 key into the NAFTA by incorporating an 3 international common law through the meaning of 4 these key terms.</p> <p>5 The NAFTA was drafted to ensure a 6 holistic view of the law that would embrace 7 international public law and international economic 8 law, as well.</p> <p>9 Slide 9 on your monitor sets out 10 Article 31(3) of the Vienna Convention. Such an 11 understanding is also consistent within the meaning 12 of Article 31(3)(c) of the Vienna Convention, which 13 not only allows, but mandates the Tribunal in its 14 interpretation to take into account all of the 15 relevant rules of international law which have been 16 applicable to the parties.</p> <p>17 This rule is enhanced by a similar 18 instruction in NAFTA Article 1131 that the 19 governing law includes international law.</p> <p>20 In our closing, I will return in 21 some detail to the proper application of the 22 international law standard and the requirement of 23 proper reliance on the rules of international law, 24 including those in the International Law Commission 25 articles on state responsibility, the Vienna</p>	<p>Page 23</p> <p>1 MR. NASH: How is that? Is that 2 better?</p> <p>3 PRESIDING ARBITRATOR: Can you 4 move it a little?</p> <p>5 MR. APPLETON: It doesn't move. 6 MR. NASH: It moves, but it goes 7 down.</p> <p>8 PRESIDING ARBITRATOR: Well, as 9 close as possible.</p> <p>10 MR. NASH: Mr. President, Members 11 of the Tribunal, the story of the Bilcon Quarry is 12 a story of systemic lack of good faith by 13 government. It is a story of the politicization of 14 a regulatory process that was intended and that 15 Bilcon was entitled to expect to be administered 16 fairly, objectively and honestly.</p> <p>17 It is a story of arbitrary and 18 capricious government measures that resulted in 19 officials withholding information, manipulating and 20 misrepresenting the truth and turning a blind eye 21 to what was really going on.</p> <p>22 It is a story of a government 23 apparatus doing what its officials knew was wrong. 24 Whether the officials involved were good servants 25 of their political masters and whether their</p>

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<p>1 directions were express or implied, there is no 2 justifiable excuse for abuse of authority and 3 breach of public trust.</p> <p>4 No delegated authority, no matter 5 how discretionary, is unfettered. It must always 6 be exercised in good faith, fairly, and on the 7 basis of relevant considerations and for the 8 purpose for which it was intended.</p> <p>9 The Bilcon story begins in 2001 10 when Bilcon was approached by Nova Stone to invest 11 in a quarry Nova Stone had in Nova Scotia. The 12 quarry became known as the Bilcon Quarry at Whites 13 Point. Bilcon is a family-owned company started by 14 Bill Clayton Sr. It is now operated by his three 15 sons.</p> <p>16 The Clayton family has been in the 17 concrete business for over 50 years. Their 18 corporate headquarters are in New Jersey, and they 19 have operations in over 25 locations across the 20 United States.</p> <p>21 The Clayton family companies 22 employ over 750 people and have won many awards for 23 community service, leadership and philanthropy.</p> <p>24 When Nova Stone approached the 25 Claytons, they were already familiar with Nova</p>	<p>1 private projects and was uniquely qualified to help 2 Bilcon develop the Whites Point quarry.</p> <p>3 The Nova Scotia minister of 4 economic development at the time was the Honourable 5 Gordon Balser, who was also the member of the 6 legislative assembly for the Digby area where the 7 quarry was located.</p> <p>8 Mr. Buxton had over 15 meetings 9 with Mr. Balser, who assured him that Nova Scotia 10 wanted Bilcon to develop the quarry, and spoke of 11 the positive impact it would have on creating jobs 12 and stimulating investment in the area.</p> <p>13 Minister Balser invited Bill 14 Clayton Jr. and his father to meet with him in Nova 15 Scotia, and they did, and were personally assured 16 by Minister Balser that Nova Scotia had a friendly 17 business environment, supportive of foreign 18 investment and that he was personally committed to 19 doing everything in his power to bring jobs into 20 the area.</p> <p>21 Encouraged by Minister Balser, 22 Bilcon sent its geologist, John Lizak, who will be 23 a witness today, to evaluate and inspect the quarry 24 site.</p> <p>25 Senior government officials</p>
Page 25	Page 27
<p>1 Scotia because they had been purchasing rock from 2 the quarry in New Brunswick on the other side of 3 the Bay of Fundy. The rock from that quarry was 4 shipped through the Bay of Fundy to their 5 facilities in New York.</p> <p>6 The quarry at Whites Point also 7 had extremely high rock that was suitable for 8 export by ship to New Jersey and New York.</p> <p>9 The key factor in the Clayton's 10 decision to invest in Nova Scotia was the 11 government's policy to actively encourage investors 12 to come to Nova Scotia to develop quarries. Nova 13 Scotia had published many documents designed to 14 attract investors specifically to develop mines and 15 quarries.</p> <p>16 Nova Scotia has historically been 17 a resource extraction province, and governments of 18 all political stripes have long considered quarry 19 development to be important to the Nova Scotia 20 economy.</p> <p>21 Bilcon's representative in Nova 22 Scotia was Paul Buxton, who was a professional 23 engineer who lived and practiced his profession in 24 Nova Scotia for over 40 years. Mr. Buxton was 25 known for his successful management of public and</p>	<p>1 provided Mr. Lizak with much information about 2 quarry development in Nova Scotia, and also 3 provided a personal two-day helicopter tour of the 4 area.</p> <p>5 Among the materials the officials 6 gave Mr. Lizak were copies of published policies 7 which were expressly focussed on international 8 investments in marine quarries.</p> <p>9 One of the government's published 10 policies which senior Nova Scotia officials gave to 11 Mr. Lizak was entitled "Industrial Minerals in Nova 12 Scotia". It highlighted the historic importance of 13 exporting rock from Nova Scotia quarries dating 14 back to the 1800s and promised a bright future of 15 continued governmental and social commitment to 16 "ensuring a long and prosperous future for this 17 vital industry."</p> <p>18 Bilcon believed what it was told 19 by Nova Scotia government and decided to commit to 20 the quarry. They engaged John Wall, an experienced 21 quarry manager, to move to Nova Scotia and to work 22 with Mr. Buxton to establish the quarry.</p> <p>23 The quarry was expected to provide 24 Bilcon with a secured supply of the highest quality 25 aggregate available in close proximity to the east</p>

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<p>1 coast of the United States for 50 years.</p> <p>2 The quarry was located at Whites</p> <p>3 Point on Digby Neck, a remote rural peninsula of</p> <p>4 southwest Nova Scotia. "The Neck", as it is</p> <p>5 called, is divided by a mountain of basalt rock</p> <p>6 which makes the area particularly suited for</p> <p>7 gathering aggregate.</p> <p>8 The quarry site was on the western</p> <p>9 slope of the basalt rock mountain facing the Bay of</p> <p>10 Fundy. The land has been clearcut logged. No one</p> <p>11 lived in the shoreline, which is littered with</p> <p>12 trash and abandoned refuse from fishing boats.</p> <p>13 The few homes in the area are on</p> <p>14 the other side of the mountain from which the</p> <p>15 quarry site could not be seen. The landscape of</p> <p>16 Whites Point is bleak. The one road that runs</p> <p>17 along the Digby Neck was built from rock taken from</p> <p>18 the gravel pit on this property that had been</p> <p>19 operated on the quarry site, and today Whites Point</p> <p>20 is still designated as a quarry site on the Nova</p> <p>21 Scotia geological maps.</p> <p>22 The Bay of Fundy is a major</p> <p>23 international shipping lane. Directly across from</p> <p>24 the Bay of Fundy from Whites Point is the Irving</p> <p>25 Oil refinery, from which large tankers ship</p>	<p>1 PRESIDING ARBITRATOR: I think</p> <p>2 probably the best thing would be --</p> <p>3 MR. NASH: We will start at the</p> <p>4 beginning at a point where we have the technology</p> <p>5 working. What we will do is we will wait until the</p> <p>6 video is properly ready to go, and I will continue</p> <p>7 on with my presentation.</p> <p>8 PRESIDING ARBITRATOR: In the</p> <p>9 meantime.</p> <p>10 MR. NASH: Yes.</p> <p>11 PRESIDING ARBITRATOR: That's a</p> <p>12 good idea.</p> <p>13 MR. NASH: That is what I will do.</p> <p>14 PRESIDING ARBITRATOR: At some</p> <p>15 other point?</p> <p>16 MR. NASH: Yes.</p> <p>17 PRESIDING ARBITRATOR: Yes.</p> <p>18 MR. NASH: I would like to turn to</p> <p>19 the actual application for the quarry in 2002.</p> <p>20 Bilcon's pending partner, Nova</p> <p>21 Stone, applied to the Nova Scotia department of</p> <p>22 environment and labour, commonly called NSDEL, for</p> <p>23 approval to operate a small ten-acre quarry at</p> <p>24 Whites Point.</p> <p>25 In Nova Scotia, quarries under</p>
<p>1 thousands of barrels of oil through the Bay of</p> <p>2 Fundy each year, and further up the Bay of Fundy is</p> <p>3 the Hantsport Marine Terminal from which for</p> <p>4 decades gypsum rock was shipped to the United</p> <p>5 States in large ships.</p> <p>6 I would now invite the Tribunal to</p> <p>7 watch a video referenced in Mr. Buxton's</p> <p>8 supplementary witness statement.</p> <p>9 It will be coming momentarily. It</p> <p>10 is on its way.</p> <p>11 --- Video played at 10:16 a.m.</p> <p>12 MR. APPLETON: Where is the sound?</p> <p>13 MR. NASH: We have some technical</p> <p>14 difficulties with the sound, so what I will do is</p> <p>15 continue on.</p> <p>16 PRESIDING ARBITRATOR: We are</p> <p>17 waiting for the tone.</p> <p>18 --- Video played 10:17 a.m.</p> <p>19 PRESIDING ARBITRATOR: Excuse me.</p> <p>20 Are we supposed to listen to understand what...</p> <p>21 MR. NASH: You're not able to</p> <p>22 hear? Okay.</p> <p>23 --- Video being played.</p> <p>24 MR. NASH: What we will do is we</p> <p>25 will wait until we have the proper feed for that.</p>	<p>1 4 hectares, which is approximately 10 acres, were</p> <p>2 exempt from any kind of environmental assessment.</p> <p>3 The purpose of the small quarry</p> <p>4 was to do test blasting in anticipation of</p> <p>5 developing a larger 152 hectare quarry on the same</p> <p>6 site.</p> <p>7 In March of 2002, Robert Balcom,</p> <p>8 the NSDEL engineer who reviewed the application for</p> <p>9 the small quarry, recommended approval of that</p> <p>10 10-acre quarry.</p> <p>11 The NSDEL district manager, Bob</p> <p>12 Petrie, was the official responsible for the</p> <p>13 approval of the application for the quarry.</p> <p>14 Mr. Balcom and Mr. Brad Langille, the NSDEL</p> <p>15 inspector for the quarry, worked under Mr. Petrie.</p> <p>16 In early April of 2002,</p> <p>17 Mr. Langille sent a copy of the application for the</p> <p>18 10-acre quarry to Jerry Conway, and Jerry Conway</p> <p>19 was the marine mammal expert and coordinator at</p> <p>20 DFO.</p> <p>21 In a conversation with Mr. Conway,</p> <p>22 Mr. Langille confirmed that the 10-acre quarry was</p> <p>23 exempt from any environmental assessment in Nova</p> <p>24 Scotia, because the quarry was smaller than</p> <p>25 4 hectares. Shortly thereafter, however, another</p>

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<p>1 NSDEL official advised that 10 acres was actually 2 slightly more than 4 hectares and that a revised 3 application would be filed for a 3.9 hectare 4 quarry, which we will call during the course of 5 this proceeding the 3.9-hectare quarry.</p> <p>6 A few weeks later, Mr. Brian 7 Jollymore, still in April of 2002, a habitat 8 assessment biologist with the DFO, wrote to Mr. 9 Petrie, who is at the province, by email and 10 advised him that Mr. Conway, the marine mammal 11 expert, was concerned about the possible effects of 12 blasting at the 3.9 hectare quarry on marine 13 mammals.</p> <p>14 Mr. Jollymore asked Mr. Petrie to 15 address that concern by adding two conditions to 16 his provincial approval of the permit for the 3.9 17 hectare quarry. Mr. Petrie complied.</p> <p>18 Those two conditions were 19 conditions 10(h) and (i). Condition 10(h) required 20 as follows:</p> <p>21 "Blasting shall be conducted 22 in accordance with the 23 Department of Fisheries and 24 Oceans Guidelines for the Use 25 of Explosives In or Near</p>	<p>1 (DFO), Maritimes Aquatic 2 Species at Risk Office and 3 written acceptance of the 4 report shall be received from 5 DFO and forwarded to the 6 Department before blasting 7 commences."</p> <p>8 I will just repeat that: 9 "... written acceptance of 10 the report shall be received 11 from DFO and forwarded to the 12 Department before blasting 13 commences."</p> <p>14 Condition 10(i) effectively 15 operated as a federal veto over the proponent's 16 ability to exercise its rights under the provincial 17 approval, which the Nova Scotia legislature had 18 plainly intended to be exempt from these kinds of 19 onerous conditions.</p> <p>20 The Tribunal will appreciate how 21 difficult it is to prove a negative. Moreover, in 22 the same email, which asked Mr. Petrie to include 23 conditions 10(h) and (i), Mr. Jollymore also 24 clearly confirmed the following, and I quote: 25 "A quarry of this size will</p>
<p>1 Canadian Fisheries Waters."</p> <p>2 Those guidelines had been authored 3 by -- co-authored by a person named Dennis Wright 4 in 1998 just a few years before.</p> <p>5 That condition was not 6 controversial. Bilcon had always planned to blast 7 in accordance with the blasting guidelines. So 8 achieving the standard under 10(h) was not an 9 issue.</p> <p>10 Condition 10(i), however, was on 11 its face extraordinary. During the course of this 12 hearing, the Tribunal will see how condition 10(i) 13 was improperly used by officials to prevent even 14 test blasting on the 3.9 hectare quarry site.</p> <p>15 Condition 10(i) required: 16 "A report shall be completed 17 by the proponent in advance 18 of any blasting activity 19 verifying the intended charge 20 size and blast design will 21 not have an adverse effect on 22 marine mammals in the area. 23 This report shall be 24 submitted to the Department 25 of Fisheries and Oceans</p>	<p>1 not trigger the need for an 2 environmental assessment 3 under your legislation..."</p> <p>4 I.e., the provincial legislation. 5 And with regard to any federal government 6 involvement, Mr. Jollymore confirmed, "Because they 7 have not yet applied for a wharf, we", meaning the 8 DFO, "have no legislative trigger to request an 9 environmental assessment."</p> <p>10 Thus, at the time Mr. Petrie 11 imposed conditions 10(h) and (i) at the behest of 12 the DFO, officials of both governments knew that 13 neither government had any legal basis whatsoever 14 to conduct any kind of environmental assessment of 15 the 3.9 hectare quarry.</p> <p>16 With regard to conditions 10(h) 17 and (i) requiring compliance with the blasting 18 guidelines, we would ask the Tribunal to keep in 19 mind that using the equations in the guidelines 20 generated a blasting setback of approximately 21 35 metres, precisely 35.6 metres, from the 22 shoreline. In other words, blasting could not 23 occur within 35.6 metres of the shoreline.</p> <p>24 The corresponding Nova Scotia 25 policy provided for a blasting setback of 30</p>
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<p>1 metres. From the beginning, Bilcon's blasting 2 plans for this ordinary, run-of-the-mill 3.9 3 hectare quarry, of which many were in the 4 neighbourhood, were in full compliance with all 5 applicable federal and provincial blasting 6 requirements.</p> <p>7 By December of 2002, seven months 8 after M. Petrie had issued the blasting approval 9 for the 3.9 hectare quarry, Mr. Conway, the DFO 10 marine mammal expert, had concluded that there was, 11 in fact, no concern about blasting. He wrote by 12 email to Jim Ross, the DFO section head of habitat 13 management, stating:</p> <p>14 "In respect to the Whites 15 Cove blasting, based on the 16 information provided and the 17 undertakings that the 18 proponent is prepared to 19 take, I have no concerns in 20 respect to marine mammal 21 issues in respect to this 22 specific proposal."</p> <p>23 Thus, Mr. Conway, whose concern 24 had originally led the insertion of conditions 25 10(h) and (i), by December of 2002 had no concerns</p>	<p>1 are not to accept a report on 2 the effects of blasting on 3 Marine Mammals as per section 4 I of item 10 of the Nova 5 Scotia approval issued April 6 30th until such time as the 7 Minister's office has 8 reviewed the application." 9 "Until such time as the Minister's 10 office has reviewed the application". This is an 11 ordinary, run of the mill, no environmental 12 assessment necessary, 3.9 hectare quarry and has 13 now gone up to the Minister of Fisheries and Oceans 14 in Ottawa, and no report that would be prepared by 15 Bilcon is to be accepted until the Minister's 16 office has reviewed the application. It is 17 extraordinary.</p> <p>18 Condition 10(i) of the 3.9 hectare 19 quarry approval then became the hook the two 20 governments used to effectively obstruct Bilcon 21 from conducting even a test blast on the 3.9 22 hectare quarry. Instead of telling Bilcon that 23 there was in fact no concern about marine mammals, 24 the governments repeatedly used condition 10(i) to 25 throw up bureaucratic obstacles in Bilcon's way.</p>
<p>1 about the effects of blasting on marine mammals, 2 and marine mammals were all that was in issue with 3 respect to the insertion of conditions 10(h) and 4 (i).</p> <p>5 The government officials knowingly 6 withheld that information, purposely withheld it, 7 and it was critical information, and they kept it 8 secret throughout. That was never disclosed to 9 Mr. Buxton or to Bill Conway.</p> <p>10 The evidence is clear that from 11 the beginning, raw politics cast a dark shadow over 12 the regulatory process. This too was unbeknownst 13 to Bilcon, which of course was entitled to expect 14 that the process would be immune from political 15 interference.</p> <p>16 In an email in June of 2002 to 17 several DFO officials, including Neil 18 Bellefontaine, who by then was the most senior DFO 19 official in Atlantic Canada -- he was the Director 20 General for Atlantic Canada -- in an email, the DFO 21 area director Tim Surrette said this about 22 condition 10(i), and this is within two months of 23 the approval having been issued by Mr. Petrie: 24 "I have been advised by the 25 Minister's office...that we</p>	<p>1 The Minister referred to in 2 Mr. Surrette's email, who is Robert Thibault, the 3 federal Minister of Fisheries and Oceans, he had 4 been appointed to the cabinet in January of 2002.</p> <p>5 Minister Thibault also happened to 6 be the federal member of parliament for the Digby 7 Neck area. His constituency assistant was Nadine 8 Belliveau. She faxed a copy of the quarry approval 9 to give to a DFO official working in Nova Scotia 10 working under Mr. Ross with a cover note saying: 11 "The Digby municipality faxed 12 it to me. They are on side 13 with the community and are 14 desperately looking for a way 15 to slow the process." 16 In hindsight, it is now obvious 17 that Minister Thibault's involvement was persistent 18 and pervasive. E-mails between the government 19 officials involved are full of directions and 20 admonishments made on behalf of the Minister. One 21 said, and I quote: 22 "Any Digby quarry or marine 23 related emails or other 24 correspondence being sent by 25 DFO staff to the local</p>

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<p>1 constituency office should be 2 copied so that the Minister 3 is simultaneously aware of 4 any developments on this 5 file." [As read] 6 Another said: 7 "The Minister's office is 8 concerned about the flow 9 between region and their 10 office with respect to Digby 11 Quarry... The Minister's 12 office would like to be 13 informed of these 14 transactions as well on a 15 timely basis." 16 Another one said: 17 "The Minister's office has 18 requested that when we are 19 requested to brief or pass 20 information onto his 21 constituency office 22 concerning the Digby quarry, 23 we also inform the Minister's 24 office concurrently." 25 Another said:</p>		<p>1 were imposed, the Minister himself wrote a letter 2 to the Digby Courier newspaper: 3 "DFO was involved in this 4 review. Through this process 5 the province agreed to 6 include in its approval a 7 condition that requires the 8 proponent to provide DFO with 9 a blasting design report in 10 advance of any blasting." 11 And Bruce Hood, the DFO's senior 12 liaison officer on the file, wrote in his journal: 13 "Thibault wants process 14 dragged out as long as 15 possible." 16 One senior DFO official was 17 incredulous about the Minister's involvement. She 18 asked: 19 "The Minister's office is 20 reviewing the application? 21 Which application? Do we 22 know which application they 23 are talking about?" 24 This is in response to 25 Mr. Surrette's email about condition 10(i)</p>	
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<p>1 "I suggest we adopt what 2 Ottawa wants. When we brief 3 the constituency office, we 4 will cc or provide an outline 5 of the information conveyed 6 to them to both... They can 7 do with it what they will." 8 When a routine notice was 9 published in a newspaper without the Minister's 10 knowledge, Mr. Surrette left no doubt the Minister 11 was watching, and I quote: 12 "This file is extremely 13 important to the Minister, 14 and the Minister may invoke 15 an inquiry into this matter." 16 The message was clear and 17 categorical and clearly received by Ministry 18 officials if anything related to the Bilcon quarry 19 was done without the Minister's approval, heads 20 would roll. Indeed one DFO official wrote to 21 another: 22 "This is such a politically 23 hot file. I don't want to 24 make any wrong decisions." 25 After conditions 10(h) and (i)</p>		<p>1 requiring approval only after review by the 2 Minister's office: 3 "Do you know which 4 application they are talking 5 about?" 6 My question was: "Where is the 7 expertise within DFO to assess whether the proposed 8 blasting will affect whales?" 9 Federal officials also knew that 10 the federal blasting guidelines were not designed 11 for whales, but were designed mainly for fish. 12 Mr. Wright, the co-author of the guidelines, wrote 13 in an email to Jim Ross about this application, the 14 DFO section head of habitat management advising: 15 "The explosives guidelines 16 are designed chiefly to 17 protect fish. The easiest 18 mitigation is, if whales are 19 present within visual limits 20 (about 1 KM), the blast is to 21 be delayed until the whales 22 vacate that perimeter." 23 Astonishingly, this critical 24 information about DFO's best practice for avoiding 25 adverse effects on whales, which was simply to</p>	

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<p>1 observe if there were whales in the area prior to 2 blasting, was also never disclosed to Bilcon. That 3 too was kept secret.</p> <p>4 Despite Mr. Wright's very clear 5 advice on that very same day, Mr. Ross received the 6 advice. He wrote Mr. Ross, now writing for DFO, 7 wrote back to Mr. Petrie at NSDEL in response to 8 the submission of a blasting plan:</p> <p>9 "It is our opinion that 10 although the plan seems to be 11 within the guidelines... 12 there is insufficient detail 13 to make an assessment on its 14 effects on threatened or 15 endangered marine mammals 16 that may be present at 17 various times of the year."</p> <p>18 So instead of passing on 19 Mr. Wright, the author of the guideline, his very 20 helpful information about when to blast and when 21 not to blast, they asked for more detail about the 22 blasting.</p> <p>23 Mr. Ross knew that was untrue; yet 24 neither he nor anyone else ever corrected the 25 statement. Instead of telling Bilcon the truth</p>	<p>1 The reason for the new 500-metre 2 setback was now said to be for the protection of 3 Inner Bay of Fundy salmon, sometimes called IBoF. 4 To justify this requirement, the DFO purported to 5 have a computer simulation model which Mr. Buxton 6 was told he could review.</p> <p>7 Mr. Buxton repeatedly asked DFO 8 officials for the data. DFO told him they would 9 provide it, but they never did, not to this day.</p> <p>10 In fact, the DFO knowingly and 11 purposely withheld it from him for months and 12 months, for critical months during the process.</p> <p>13 In the meantime, Dennis Wright, 14 the co-author of the blasting guidelines, advised 15 Phil Zamora, by then the DFO habitat person dealing 16 with the quarry, that the model, which the DFO told 17 Mr. Buxton was relying on to establish the 18 500-metre blasting setback from the shoreline, was 19 designed for blasting in water and not for blasting 20 on land. It, therefore, did not apply to the 21 quarry, for which a setback of about 100 metres 22 would be sufficient if there were endangered 23 species in the area.</p> <p>24 Bilcon would have had no issue 25 with a 100-metre setback.</p>
<p>1 Mr. Ross, after receiving a further very extensive 2 blasting plan from Bilcon, wrote again to Mr. 3 Petrie stating:</p> <p>4 "The information provided is 5 inadequate to give DFO-HMD a 6 sufficient level of 7 confidence that fish, marine 8 mammals, and fish habitat 9 will be adequately protected 10 from the effects of blasting 11 operations at the Whites Cove 12 quarry."</p> <p>13 The Tribunal will be reminded that 14 condition 10(i) made no reference whatsoever to 15 fish or fish habitat. Conditions 10(h) and (i) 16 were about marine mammals. That is how the federal 17 government got involved. This pivot to fish by Mr. 18 Ross came nine days after Mr. Conway, the marine 19 mammal expert, had advised he had no concerns with 20 respect to marine mammals and with respect to 21 Bilcon's blasting plan.</p> <p>22 Nonetheless, in May of 2003, the 23 DFO increased the blasting set back from 24 35.6 metres to 500 metres, a half a kilometre away 25 from the shoreline.</p>	<p>1 On July 30th, 2003, 15 months 2 after Mr. Petrie had approved the 3.9 hectare 3 quarry, Mr. Zamora confirmed to Derek McDonald of 4 the Canadian Environmental Assessment Agency, CEAA, 5 that the 500-metre setback was not required and 6 that a 100-metre setback would be sufficient.</p> <p>7 Mr. MacDonald recorded: 8 "Have received advice from 9 Dennis Wright that I-Blast 10 model is for open water, not 11 explosives used on land. 12 They should use the table 13 provided in the DFO Explosive 14 Guidelines."</p> <p>15 I pause to say here Mr. Buxton had 16 always used the table in the guidelines from the 17 beginning in order to calculate the proper setback 18 distance from the blast to the shoreline.</p> <p>19 If proponent were to modify the 20 plan, it could be acceptable to DFO and they would 21 be in a position to enable the provincial approval.</p> <p>22 On that same day, July 30th, 2003, 23 Mr. Zamora drafted a letter to Mr. Buxton advising 24 him that the model did not apply to blasting at the 25 quarry. I say drafted because, as we will come to</p>

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<p>1 see, the letter wasn't sent at that time: 2 "We have contacted Mr. Wright 3 for advice on the use of the 4 I-Blast model for your 5 application. Mr. Wright is 6 not comfortable using this 7 model for the blasting plan 8 you have proposed. He is 9 suggesting that you apply the 10 equations used for the 11 guidelines. However, because 12 of the presence of endangered 13 species in the area, it is 14 recommended that the setback 15 distance be at least triple 16 that determined by the 17 equations in the guidelines." 18 Then the email goes on to say 19 approximately 100 metres. 20 A few days later, on August 5th, 21 2003, two days before Minister Anderson's referral 22 of the Bilcon Quarry to a review panel -- you will 23 recall that the referral by Minister Anderson to 24 the review panel was on August 7th, 2003, which was 25 two days after provincial election -- Mr. Zamora</p>	<p>1 CEAA knew full well, at that point in time during 2 that meeting, that the 500-metre setback was wrong 3 and unnecessary. 4 By then, though, not only had the 5 DFO already internally revised the blasting setback 6 from 500 to approximately 100 metres, but 7 critically it had also confirmed internally that 8 blasting at the Bilcon Quarry would not engage 9 section 32 of the Fisheries Act. I will say more 10 about section 32 in a few moments. 11 On May 29th, 2003 Mr. Zamora has 12 written to Mr. Buxton stating, and I ask the 13 Members of the Tribunal to focus on these words, 14 "DFO has concluded": 15 "DFO has concluded the 16 proposed work is likely to 17 cause destruction of fish, 18 contrary to section 32 of the 19 Fisheries Act..." 20 We will see that DFO had not 21 arrived at any such conclusion. They were telling 22 Mr. Buxton one thing and they were telling each 23 other internally another, and they were telling the 24 government of Nova Scotia the same as they were 25 telling themselves internally.</p>
<p>Page 49</p> <p>1 wrote to Mr. Hood, the DFO senior liaison officer: 2 "We feel that we cannot sit 3 for very long on this new 4 information..." 5 The new information being that 6 they have used the wrong model to get to 500 7 metres, the I-Blast model: 8 "... that the proponent could 9 use to adjust the Blasting 10 Plan. The last word from 11 Derek McDonald was that he 12 did not see any problems with 13 us working with the proponent 14 in tweaking the Blasting 15 Plan." 16 But Mr. Zamora did not send the 17 July 30th draft letter to Mr. Buxton. This 18 critical information was also withheld from Bilcon 19 until November 2004, over 15 months later, after 20 the JRP, the Joint Review Panel, had been struck. 21 At a meeting with NSDEL and CEAA 22 officials later in August of 2003, when Mr. Buxton 23 expressed frustration that at another quarry close 24 by, Tiverton, blasting was allowed much closer to 25 the shoreline, he was not told that the DFO and</p>	<p>Page 51</p> <p>1 Mr. Buxton was being told one 2 thing and, in fact, the truth was to the contrary. 3 By August of 2003, Derek McDonald 4 had written to another CEAA official: 5 "In fact DFO has since 6 revised its blasting 7 calculations..." 8 That is the same blasting 9 calculation we have been talking about: 10 "... and has determined that 11 it does not have a section 32 12 trigger." 13 Instead of telling Bilcon the 14 truth, the government officials also withheld this 15 critically important information from Mr. Buxton. 16 On December 3rd, 2003 -- we are 17 now 20 months after the approval had been first 18 granted for the 3.9 hectare quarry -- the Nova 19 Scotia Minister of Environment and Labour wrote to 20 Buxton: 21 "We understand that Fisheries 22 and Oceans Canada DFO remains 23 concerned that blasting at 24 this location may cause 25 adverse effects to marine</p>

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<p>1 mammals, as well as 2 endangered Inner Bay of Fundy 3 Atlantic salmon." [As read] 4 This is a year after Mr. Conway, 5 the marine mammal expert, has said, I have no 6 concerns about marine mammals in the proponent's 7 blasting plan. 8 The reason for the deception and 9 double dealing and concealing the truth from Bilcon 10 about the blasting setback was that the quarry was 11 being referred to a JRP, a joint federal provincial 12 environmental assessment by a review panel. 13 Even though it is elementary that 14 no notion of fairness could ever justify 15 withholding such critical information from a 16 project proponent, the Tribunal will see that the 17 referral of the quarry to a Joint Review Panel was 18 nothing short of a hypocritical manipulation used 19 to hijack the regulatory process for political 20 purposes. And it will become obvious. 21 I will turn now to provide a short 22 review of the applicable legislation. 23 An environmental assessment under 24 CEAA could be conducted at one of three levels. 25 The most common level of administrative assessment</p>		<p>1 their respective enabling legislation. Any form of 2 review panel is rare. A joint federal-provincial 3 review panel is rare in the extreme. 4 The constitutional context for a 5 Joint Review Panel is that the constitution divides 6 legislative powers between the federal and 7 provincial government. The general effect of this 8 division of legislative power is that the federal 9 and provincial governments to legislate within the 10 respective areas of their jurisdiction. 11 The corollary is that one level of 12 government cannot usurp or trench on the 13 legislative authority of another. 14 At the root of the Canadian 15 Constitution is the bedrock principle that Canada's 16 legal and governmental system is based on the rule 17 of law. And in the context of an environmental 18 assessment, the legislative authority of federal 19 officials is derived from the CEAA. 20 Under the CEAA, the federal 21 government can undertake an environmental 22 assessment if the proponent of a project is seeking 23 an authorization for an activity which is federally 24 regulated. That's where the CEAA clicks in, is 25 with respect to federal jurisdiction, projects</p>	
<p>1 is called a screening. A high level of 2 administrative assessment is reserved for major 3 projects, and in a rare and extraordinary 4 circumstances involving mega projects and the 5 largest and most complex projects, oil sands, major 6 national pipelines, an environmental assessment 7 could be referred to a review panel. 8 All three levels of environmental 9 assessment are part of the planning phase of an 10 industrial project. The final design of a project 11 is done after the environmental assessment is 12 completed, and the project is then implemented 13 through the granting of requisite permits. 14 Every year the federal government 15 conducts thousands of screenings. From 1995 to 16 2003 -- CEAA came into effect in 1995 -- to this 17 point in 2003, in July of 2003, there were 18 approximately 60,000 environmental assessments 19 conducted by the federal government. 20 Of those, only 11 were referred to 21 a Joint Review Panel or JRP. Eleven out of 60,000 22 went to a JRP. 23 A JRP requires a formal agreement 24 between the federal minister of environment and a 25 provincial environment minister authorized under</p>	Page 53	<p>1 within federal jurisdiction. 2 In Nova Scotia, an environmental 3 assessment can be initiated after a proponent 4 registers the project with the department, with the 5 assessment division; after registration. 6 And part of that registration is 7 filing registration documents and paying a fee. At 8 that point in time, the environmental assessment of 9 a project clicks in. Until then, there is no 10 trigger. 11 In general, when the quarry was 12 being considered, industrial activity came -- on 13 land came under provincial authority, and 14 industrial activity that affected rivers and 15 oceans, which are habitat for fish and for marine 16 life, came under federal regulatory authority. 17 Federal government authority to 18 regulate the activity is sometimes called a 19 trigger. It is a statutory trigger which engages 20 the environmental assessment process. 21 The federal government had only 22 three possible triggers for a federal environmental 23 assessment of a proposed marine terminal. A marine 24 terminal standing alone, attached to the land, the 25 federal government has three triggers.</p>	Page 55

<p style="text-align: right;">Page 56</p> <p>1 One trigger was under the 2 Navigable Waters Protection Act, section 5, which 3 required a permit for the construction of a marine 4 terminal. So proponent applies for permission to 5 build a marine terminal, and that triggers the 6 environmental assessment of that marine terminal. 7 The other two triggers were under 8 the Fisheries Act, which in section 32 prohibits 9 the killing of fish, and section 35 prohibits 10 activity resulting in the harmful alteration, 11 disruption or destruction of fish habitat, 12 sometimes called a HADD, and you will hear the term 13 HADD used throughout this proceeding. That is 14 section 35. Fish habitat, section 35; killing 15 fish, section 32. 16 There were only two possible 17 federal triggers for the quarry. Section 35, if 18 activity on the quarry would result in a HADD, if 19 there was marine life or fish-bearing stream on the 20 quarry, that would engage federal concerns. If 21 activity on the quarry would kill fish, then 22 section 32 would be engaged. 23 In the absence -- and, for 24 example, the kind of activity in the quarry that 25 could potentially kill fish, you have to look at</p>	<p style="text-align: right;">Page 58</p> <p>1 And number two, if after taking 2 into account mitigation measures, the project may 3 cause a significant -- significant adverse 4 environmental effect, sometimes called SAAEE; 5 significant adverse environmental effect. 6 The latter was the statutory basis 7 used for the referral of the marine terminal to a 8 review panel. The rule of law required that 9 determination to be made fairly and reasonably. 10 The CEEA guide for the conduct of 11 its officials, called "Responsible Authority's 12 Guide", reminds officials that they act, and I 13 quote, "The Act requires" -- I am at slide 46, page 14 46 of your hard copy materials: 15 ".... requires that 16 mitigation measures be 17 developed to address 18 significant effects. As 19 well, mitigation measures are 20 considered part of the 21 project when determining the 22 significance of any adverse 23 environmental effects under 24 the Act." 25 The guide goes on to say, and I</p>
<p style="text-align: right;">Page 57</p> <p>1 it, would be blasting on the quarry. If that is 2 likely to cause destruction of fish, that would 3 engage the federal government's environmental 4 assessment of the quarry, and that is where section 5 32 becomes absolutely critical in this case. 6 In the absence of either a section 7 32 or a section 35 trigger, the federal government 8 had no jurisdictional authority to conduct any kind 9 of environmental assessment of the quarry. 10 For the quarry in this case, 11 section 35 did not come into play, because there 12 was no fish habitat on the quarry and, therefore, 13 the only real potential federal trigger for the 14 quarry was section 32. 15 Even though the federal government 16 had a trigger for the marine terminal, the CEEA 17 provided that an environmental assessment could 18 only be referred to a review panel of that 19 assessment of the terminal on one of two expressly 20 designated bases. The first was, number 1, if 21 there was public concern about a matter within 22 federal jurisdiction, like a marine terminal, if 23 there is public concern about the marine terminal, 24 that would engage the potential for a referral to a 25 panel review.</p>	<p style="text-align: right;">Page 59</p> <p>1 quote, page 47: 2 "The conclusions of the 3 screening report and 4 comprehensive study report 5 with respect to the 6 significance of the adverse 7 environmental effects are 8 'objective' in the sense that 9 they are based on scientific 10 evidence and analysis and do 11 not stem from the opinion of 12 either the Minister or the 13 RA." 14 The RA is the Responsible 15 Authority in this context. When we're talking 16 about an RA, that is the DFO, the Department of 17 Fisheries and Oceans. 18 Even if the federal authorities 19 had a reasonable and honest basis under the 20 Fisheries Act or the Navigable Waters Protection 21 Act to refer some ocean-related aspect of the 22 project to a review panel, the federal government 23 could not include the quarry itself in the scope of 24 the review to be conducted by the review panel. 25 If the proposed activity on the</p>

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<p>1 quarry site did not come under a federal head of 2 legislative authority, thus if blasting on land did 3 not kill fish in the ocean, it had no jurisdiction 4 over the quarry.</p> <p>5 The scope of what could lawfully 6 be included in the environmental assessment of the 7 marine terminal, sometimes referred to as scoping 8 in, could not include any land-based activities in 9 relation to the Bilcon Quarry unless that 10 land-based activity triggered the operation of the 11 federal statute.</p> <p>12 For that purpose, the Federal 13 Court of Canada in a well-known case called Red 14 Hill affirmed that, "a pretext" of federal 15 authority was not sufficient". The federal 16 authority had to be real. The Red Hill case is 17 very important in our case, and we will see, 18 because it comes up, there were significant 19 discussions between federal officials about the Red 20 Hill case.</p> <p>21 The Federal Court quoted from the 22 decision of the Oldman River case where the Supreme 23 Court of Canada said simply and clearly: 24 "The federal government may 25 not use 'the pretext of some</p>	<p>1 aware of the Red Hill case at the very time. They 2 discussed it in the context of this quarry. The 3 referral to a Joint Review Panel was a device. It 4 was concocted, as Mr. Hood reflected in his 5 journal, to get the Minister "off the hook".</p> <p>6 The construction of the piles for 7 the contemplated docking facility -- and we see it 8 on the monitor -- involved no blasting at all, 9 either on land or in the water.</p> <p>10 Although the piles did involve a 11 very slight disruption of 40 square metres -- and 12 you see on the graphic illustration, you see the 13 amount of habitat that is going to be disturbed, 40 14 square -- the total of all of those supports going 15 down into the ocean would disturb an area of 40 16 metres of habitat. And that might have 17 legitimately triggered an environmental assessment 18 under section 35, destroying, harming, altering 19 destroying, disrupting fish habitat.</p> <p>20 The scope of that assessment of 21 the marine terminal could not lawfully or logically 22 extend to the quarry on land itself, which was 23 wholly within provincial jurisdiction.</p> <p>24 Yet as early as February of 2003, 25 Phil Zamora, the DFO, advised CEAA that it was</p>
<p>Page 61</p> <p>1 narrow ground of federal 2 jurisdiction to conduct a 3 far-ranging inquiry into 4 matters that are exclusively 5 within provincial 6 jurisdiction."</p> <p>7 The Federal Court in Red Hill then 8 concluded that the Environment Minister's decision 9 to refer this project was not supported by a valid 10 head of power and thus was ultra vires.</p> <p>11 For the Bilcon Quarry, the only 12 land-based activity that might have triggered the 13 operation of a federal statutory provision was 14 blasting, and only blasting on the quarry could 15 reasonably be expected to kill fish contrary to 16 section 32.</p> <p>17 It was under the pretext of that 18 trigger that in May of 2003 the DFO threw up 19 another roadblock to restrict Bilcon from any 20 blasting at the site, including any test blasting.</p> <p>21 Ultimately, section 32 would be 22 the pretext the DFO used to insinuate itself into a 23 review of and ultimately exercise an effective veto 24 over the operation of the quarry. 25 Senior DFO officials were acutely</p>	<p>Page 63</p> <p>1 intending to refer the project to a review panel, 2 and the project included both the marine terminal 3 and the quarry, talking about referring the project 4 to a review panel:</p> <p>5 "I just received a call from 6 Phil Zamora, DFO, providing a 7 heads up that DFO is 8 intending to refer this 9 project to the Minister for a 10 referral to a Panel." [As 11 read]</p> <p>12 And that is in February of 2003, 13 and I think we should keep the time context in 14 mind. April of 2002 we had the approval of 3.9. 15 September 30th of 2002, Dennis Wright is saying 16 best mitigation measure to protect whales is to 17 wait until they're a kilometre offshore away from 18 the blasting area, if they're in the area at all. 19 We will get to endangered Right whales, which was a 20 major concern, which only come to the area in the 21 early summer and they leave in the late fall. So 22 they're not in the area at all, in the region 23 during that period. They go down south.</p> <p>24 December 2nd, 2002, Jerry Conway, 25 the marine mammal expert, says, No problem, no</p>

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<p>1 concerns with the marine mammal area with respect 2 to blasting of this proposal. 3 February of 2003, Phil Zamora, 4 DFO, is saying, We intend to refer to a review 5 panel. 6 And the evidence, when we follow 7 from there, shows that at the time of the referral 8 to the review panel, DFO officials knew, they knew, 9 that they did not have a trigger for the quarry and 10 that there was no proper basis for scoping the 11 quarry into any federal assessment. And they knew 12 it at the time of the referral. And we will come 13 back to the 500 metre, the half-kilometre setback, 14 that by that time they knew was wrong. 15 In his notes of telephone 16 conferences with Jim Ross and others from February 17 through April of 2003, Mr. Hood, the DFO's senior 18 liaison officer who played a critical role in this 19 piece, wrote the following entries into his 20 journal, and I quote, starting at page 52 of your 21 slides: 22 "...CEAA agency feels this 23 will go to a panel. Minister 24 believed to have said public 25 review - meaning</p>	<p>1 trigger for the quarry. 2 Therefore, limit scope of 3 project to terminal." 4 And at page 55, quote: 5 "Don't screw up on scope to 6 please province - we will end 7 up in court... What does the 8 Minister want? We should 9 talk to Minister's staff. 10 Every time we scope broadly 11 to accommodate someone else 12 we get screwed... We want to 13 get our Minister off this 14 file." 15 "This is like Red Hill where 16 DFO trigger was section 35 17 for realignment of a stream, 18 but we scoped in highway too. 19 ... Judge ruled we had no 20 regulatory authority over the 21 highway and therefore were 22 abusing the CEAA process." 23 That was the case in Red Hill. 24 Mr. Estrin, who you will hear from, was counsel in 25 Red Hill:</p>
Page 65	Page 67
<p>1 consultations... No DFO 2 trigger... We should scope 3 to terminal - our trigger." 4 "We should scope to terminal - our 5 trigger": 6 "Don't need to scope in the 7 quarry. No DFO triggers. If 8 it's scoped in, get into 9 other concerns... Scope to 10 our triggers - would be wharf 11 and what they need to do to 12 build it. 13 "If we include the quarry in 14 the assessment it implies 15 that we, DFO, are approving 16 the quarry after the 17 assessment if it went to 18 panel. 19 "We have NWPA..." 20 Which is Navigable Waters 21 Protection Act: 22 "... FA, Fisheries Act, 23 section 35, and probably 24 section 32 trigger for the 25 marine terminal, but no</p>	<p>1 "Shouldn't be scoping things 2 in to satisfy public or other 3 agency pressure." 4 "Public will likely be mad if 5 DFO doesn't scope in Quarry 6 because they would be want us 7 to be assessing it. However, 8 it is easy to explain why 9 quarry isn't scoped in, i.e., 10 we don't have the legal 11 mandate to scope it in - no 12 trigger." 13 Nonetheless, the deceptive pretext 14 that was to be used for the referral was that the 15 DFO had a section 32 trigger for the quarry, 16 because blasting on the quarry site might affect 17 marine mammals and IBoF salmon. 18 Nova Scotia officials had been 19 hectoring the federal government to scope in the 20 quarry for their own reasons, and they pressed the 21 DFO and CEAA to engage in a subterfuge because 22 there was no environmental registration of the 23 quarry in Nova Scotia. 24 At that point, there is no 25 environmental registration of the quarry that would</p>

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<p>1 lawfully entitle it, the province, to undertake an 2 environmental assessment. 3 The registration of an 4 environmental assessment plan was much, much later. 5 So the province didn't have any legal entitlement 6 to go ahead, either, unless the feds scoped in the 7 quarry. 8 I will return now to the May 29th, 9 2003 letter of Mr. Zamora to Mr. Buxton. I am on 10 page 58 of the slide that you are following in the 11 paper copy. 12 DFO has concluded -- and I 13 reinforced that before. They have concluded, they 14 say: 15 "... the proposed work is 16 likely to cause destruction 17 of fish, contrary to section 18 32 of the Fisheries Act..." 19 That is their basis for scoping in 20 the quarry, but five days later, on June 4th, 2003, 21 the DFO wrote to NSDEL: 22 "Due to the need for a 23 Navigable Waters Protection 24 Act, Section 5(1) approval, 25 the terminal portion of the</p>	<p>1 In the meantime, in that 2 intervening period, a few days after the May 29th 3 letter was sent to Mr. Buxton, an NSDEL official 4 circulated an email saying: 5 "DFO is drafting a letter to 6 us regarding their intentions 7 to go to a panel... but at 8 this point everything remains 9 confidential (the company 10 does not even know we are 11 planning on going this route 12 yet). 13 Over the next few weeks, Derek 14 McDonald exchanged emails with Steve Chapman, 15 another CEAA official, expressing discomfort with 16 the approach being taken. 17 Remember CEAA is an independent 18 agency. At least it says that it is: 19 "The proponent is, to my 20 knowledge, unaware of DFO's 21 desire to refer. I still 22 feel that a comp study, with 23 an appropriate scope and 24 public participation plan, 25 would be the correct path -</p>
Page 69	Page 71
<p>1 project will require an 2 environmental assessment 3 pursuant to the CEAA. The 4 type of assessment required 5 on the terminal is a 6 comprehensive study." 7 Now, remember there were three 8 levels of environmental review, screening, 9 comprehensive study and panel review. 10 At that point, June 4th, 2003, DFO 11 is writing NSDEL saying there is going to be a 12 comprehensive study. The quote continues: 13 "DFO is presently reviewing 14 the proponent's blasting 15 plan...to determine if 16 approvals are required under 17 the Fisheries Act, section 18 35(2) or section 32." 19 Five days before, Mr. Zamora has 20 written to Mr. Buxton saying DFO has concluded that 21 the proposed work is likely to cause destruction. 22 Five days later, apparently they're still studying 23 it looking to determine whether the proponent's 24 blasting plan, approvals would be required for them 25 under sections 35(2) or section 32.</p>	<p>1 and I have said this to Phil 2 Zamora. To me, a referral to 3 facilitate harmonization 4 reflects poorly on both 5 governments and is perhaps an 6 undesirable precedent." 7 Harmonization refers to 8 harmonizing the federal and provincial processes, 9 having the two go hand in hand as the harmonized 10 process: 11 "Do you think we should try 12 to buy time until the 13 referral is made? The 14 proponent is clearly 15 frustrated and with good 16 reason, I think. Things are 17 dragging. I find it 18 frustrating myself and it's 19 not even my money. Maybe 20 CEAA should bite the bullet, 21 recognize the province's 22 jurisdiction, and chalk 23 (sic) it up as a lesson 24 learned." 25 Steve Chapman replied with a</p>

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<p>1 rebuke:</p> <p>2 "... we should communicate</p> <p>3 via telephone for discussions</p> <p>4 of this nature. Give me a</p> <p>5 call."</p> <p>6 It is no wonder Mr. Chapman did</p> <p>7 not want a paper trail documenting what was</p> <p>8 actually going on.</p> <p>9 A flurry of emails between</p> <p>10 officials were then exchanged. Mr. McDonald wrote,</p> <p>11 "My suggestion is", and I am at page 65:</p> <p>12 "... to wait until next week.</p> <p>13 By then, we may have some</p> <p>14 further clarity on where the</p> <p>15 process is headed and may</p> <p>16 even be in a position to</p> <p>17 share that with the</p> <p>18 proponent. instead of</p> <p>19 sitting there awkwardly being</p> <p>20 evasive. I have also learned</p> <p>21 that the partnership for</p> <p>22 sustainable development of</p> <p>23 Digby Neck and Islands is</p> <p>24 scheduled to meet with</p> <p>25 Minister Thibault next</p>	<p>1 And Bruce Young, a senior</p> <p>2 official, replied:</p> <p>3 "Absolutely, headquarters</p> <p>4 should now be leading."</p> <p>5 Mr. Daly from the NSDEL then</p> <p>6 wrote:</p> <p>7 "Any word on the revised</p> <p>8 draft letter from DFO? We</p> <p>9 need it soon if we are going</p> <p>10 to get this show on the road.</p> <p>11 Our communication people are</p> <p>12 drafting a press release as</p> <p>13 we speak.</p> <p>14 "Our first order of business</p> <p>15 is to make sure we get the</p> <p>16 exchange of letters</p> <p>17 completed, press release</p> <p>18 approved, and referral letter</p> <p>19 to CEAA from DFO before the</p> <p>20 end of June."</p> <p>21 And before the end of June 2003</p> <p>22 becomes critical. The reason for the haste is now</p> <p>23 evident. Nova Scotia was about to announce a</p> <p>24 provincial election, which was announced on July</p> <p>25 5th. That was expected to be announced by the end</p>
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<p>1 Thursday - not sure how this</p> <p>2 could play into timing of an</p> <p>3 announcement. Will he say</p> <p>4 something about it?"</p> <p>5 Chris Daly, the manager of the</p> <p>6 provincial environmental department, quote:</p> <p>7 "The end of June should be</p> <p>8 our target for a release..."</p> <p>9 "The end of June should be our</p> <p>10 target for a release":</p> <p>11 "... but that may not happen</p> <p>12 if our governments decide to</p> <p>13 hold on to things. In terms</p> <p>14 of the Minister Thibault's</p> <p>15 meeting next week, we all</p> <p>16 agree that we would</p> <p>17 coordinate our communication</p> <p>18 on this issue."</p> <p>19 He then concluded:</p> <p>20 "I would like to take a</p> <p>21 little more control on this</p> <p>22 file and suggest that project</p> <p>23 assessment lead any</p> <p>24 discussion related to review</p> <p>25 panel."</p>	<p>1 of June.</p> <p>2 Bruce Hood, the senior liaison</p> <p>3 officer for DFO, wrote to senior DFO officials, and</p> <p>4 this is extraordinary:</p> <p>5 "It is a distinct possibility</p> <p>6 that the province of Nova</p> <p>7 Scotia will be announcing an</p> <p>8 election before or on June 30</p> <p>9 and will send out a media</p> <p>10 release preceding this,</p> <p>11 indicating that the Whites</p> <p>12 Point Project, which is very</p> <p>13 contentious, has been</p> <p>14 referred to a Panel Review."</p> <p>15 Another official then confirmed</p> <p>16 the reason, and this is on page 72:</p> <p>17 "The Canadian Environmental</p> <p>18 Assessment Agency is in the</p> <p>19 process of negotiating a MOU</p> <p>20 for a joint</p> <p>21 federal-provincial review</p> <p>22 panel process for this</p> <p>23 project and they cannot</p> <p>24 complete the process until</p> <p>25 Minister Thibault has</p>

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<p>1 officially referred the 2 project to Minister Anderson. 3 "The province has very 4 serious reasons for issuing a 5 press release by the end of 6 this week announcing the 7 joint federal-provincial 8 panel review process. 9 "...the project is located in 10 our Minister's riding, as 11 well as in the electoral 12 circumscription of the 13 provincial Minister 14 responsible for making 15 decisions on this project..." 16 And here is the kicker: 17 "... and the announcement of 18 the joint panel review is of 19 the nature to take a lot of 20 public pressure off the 21 Ministers' shoulders for the 22 summer months." 23 And I ask the Tribunal to consider 24 what a fair and objective environmental process 25 carried out in good faith and with integrity has to</p>	<p>1 assessment does not include 2 both the quarry and the 3 terminal." 4 In other words, there will be a 5 court challenge by environmental groups. They had 6 already been through this in Red Hill. They tried 7 to scope in something that was provincial. They 8 had been knocked down by the courts. It was an 9 abuse of their powers under the court, and now 10 they're going through the same thing. 11 The following day, June 26th, 12 2003, Minister Thibault referred the Bilcon Quarry 13 to the federal minister of environment, Minister 14 Anderson, for a Joint Review Panel with Nova 15 Scotia. 16 Contrary to what was actually 17 known by the DFO at the time and contrary to the 18 information he received in a memorandum the day 19 before, Minister Thibault's letter to the federal 20 Minister of environment said: 21 "Dear colleague: On the 22 basis of an analysis of the 23 information received from the 24 proponent, DFO has concluded 25 that various components..."</p>
Page 77	Page 79
<p>1 do with taking a lot of pressure off the Minister's 2 for the summer months. 3 That same day, June 25th, Minister 4 Thibault received an official memorandum stating: 5 "The province has expressed 6 concern regarding the extent 7 to which a joint EA could be 8 harmonized. DFO may not have 9 a legislative trigger to 10 include the quarry." 11 They have told Mr. Buxton on May 12 29th, 2003 that they have concluded that they do 13 have a trigger under section 32, and they are still 14 obviously debating it internally. And the 15 documents will show, as the hearing proceeds, and 16 various witnesses comment that they were still 17 apparently doing some work to consider whether they 18 had a section 32 trigger. There is not much 19 evidence of any work being done. 20 The memorandum also said: 21 "It is likely due to public 22 opposition to the proposal 23 that there will be a court 24 challenge if the scope work 25 of project for the CEAA</p>	<p>1 Look at that language, "various 2 components", no specificity at all: 3 "... of the proposed project 4 will likely require 5 authorization under 6 subsection 35(2) of the 7 Fisheries Act to harmfully 8 alter, disrupt or destroy 9 fish habitat, and section 32 10 to destroy fish by means 11 other than fishing. 12 "In light of the information 13 provided by the proponent, 14 DFO believes that the Whites 15 Point Quarry and Marine 16 Terminal, as proposed, are 17 likely to cause environmental 18 effects..." 19 I will come back to that language: 20 "... over a large area of 21 both the marine and 22 terrestrial environments. 23 The project is also subject 24 to an environmental 25 assessment by the Province of</p>

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<p>1 Nova Scotia."</p> <p>2 Which, by the way, had not yet</p> <p>3 been legally consecrated, because there was no</p> <p>4 registration:</p> <p>5 "The province has expressed</p> <p>6 interest to DFO in</p> <p>7 participating in a joint</p> <p>8 assessment of the project."</p> <p>9 [As read]</p> <p>10 This artful sophistry is indeed</p> <p>11 notable for what it omits, as well as what it</p> <p>12 misrepresents. The Tribunal will note that the</p> <p>13 Minister referred to "environmental effects" when</p> <p>14 the actual statutory test was "significant adverse</p> <p>15 environmental effects after taking mitigation</p> <p>16 measures into account."</p> <p>17 Given what the officials of his</p> <p>18 department actually knew, neither Minister Thibault</p> <p>19 nor his officials could, in good faith, have</p> <p>20 concluded that the federal government had any</p> <p>21 jurisdiction over the quarry.</p> <p>22 The day after, on June 27th, 2003,</p> <p>23 Mr. Hood wrote to DFO officials to advise that</p> <p>24 Bilcon did not yet know the project was being</p> <p>25 referred to a review panel. He said:</p>		<p>1 August when Mr. Buxton asked for a copy of that</p> <p>2 letter, he was told that communications between</p> <p>3 Ministers was confidential and that he could not</p> <p>4 have a copy.</p> <p>5 This letter had been waived at an</p> <p>6 election meeting. It had been released and leaked</p> <p>7 to supporters of opposition groups.</p> <p>8 When Mr. Buxton asked Mr. Chapman</p> <p>9 from CEAA what the reasons were for referring the</p> <p>10 quarry to a review panel, Mr. Chapman refused to</p> <p>11 answer. Two days after Minister Thibault's victory</p> <p>12 lap headline, on July 5th, 2003 the Nova Scotia</p> <p>13 election was called for August 5th, 2003.</p> <p>14 So the reason for that flurry of</p> <p>15 activity between officials all through June of 2003</p> <p>16 was to get the deal done before the election was</p> <p>17 called and get the pressure off the Ministers for</p> <p>18 the summer months.</p> <p>19 July 5th, the election is called.</p> <p>20 The election is held on August 5th, a month later,</p> <p>21 and on August 7th, two days after that, Minister</p> <p>22 Anderson referred the Bilcon Quarry to a Joint</p> <p>23 Review Panel.</p> <p>24 I would now like to turn to a</p> <p>25 discussion of some of the comparators which go to</p>	
<p>1 "The proponent does not know</p> <p>2 the project is being referred</p> <p>3 to panel. He knows that a</p> <p>4 comprehensive study is</p> <p>5 required on the terminal and</p> <p>6 that the DFO review of the</p> <p>7 quarry isn't complete."</p> <p>8 So they say:</p> <p>9 "So we don't know yet if</p> <p>10 there are DFO triggers for a</p> <p>11 CEAA assessment of the</p> <p>12 quarry."</p> <p>13 On July 3rd, 2003, the Chronicle</p> <p>14 Herald newspaper in Halifax published an article</p> <p>15 titled, "Thibault calls for full review of Digby</p> <p>16 Neck Quarry plans". The Minister had his headline.</p> <p>17 That is how Bilcon learned its quarry, over a year,</p> <p>18 almost a year and a half, after it had its first</p> <p>19 approval to go ahead and blast on the 3.9 hectare</p> <p>20 quarry, learned its quarry was being referred to a</p> <p>21 Joint Review Panel.</p> <p>22 It turns out the story had been</p> <p>23 leaked to the press, and the lawyer for a group</p> <p>24 opposed to the quarry had been given a copy of</p> <p>25 Minister Thibault's letter. Ironically, later in</p>	Page 81	<p>1 the likeness that Mr. Appleton referred to in his</p> <p>2 portion.</p> <p>3 Compared to other companies</p> <p>4 seeking environmental approvals with respect to</p> <p>5 their investments in industrial projects, the</p> <p>6 difference in the way Bilcon was treated by the</p> <p>7 regulatory process cannot be explained by reference</p> <p>8 to any reasonable policy. It certainly cannot be</p> <p>9 justified by Minister Thibault's declared animosity</p> <p>10 towards the United States.</p> <p>11 Within weeks of DFO telling Bilcon</p> <p>12 it required the 500 metre setback for onshore</p> <p>13 blasting, on the pretext of protecting marine</p> <p>14 mammals and IBoF salmon, operation of another</p> <p>15 quarry was under way at a neighbouring town called</p> <p>16 Tiverton.</p> <p>17 Tiverton is about 10 kilometres</p> <p>18 down the coast from Whites Point and was also in</p> <p>19 Minister Thibault's riding. Local fishermen</p> <p>20 supported the Tiverton quarry because rock from the</p> <p>21 quarry was going to be used to build a breakwater</p> <p>22 for them.</p> <p>23 In allowing blasting to go ahead</p> <p>24 on the Tiverton quarry, the officials acted</p> <p>25 accordingly, because of course Minister Thibault</p>	Page 83

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<p>1 was in favor of the Tiverton quarry. The 2 application for approval of the Tiverton quarry was 3 made on February 27th, 2003. So we are in exactly 4 the same time frame.</p> <p>5 The cover letter said: 6 "Rehabilitation of the 7 fisherman's wharf has a 8 completion date of March 31, 9 2003. Given the time frame, 10 the issuance of the quarry 11 permit is required as quickly 12 as possible."</p> <p>13 "Given the time frame the issuance 14 of the quarry permit is required as quickly as 15 possible."</p> <p>16 A few days later, on March 3rd, 17 2003, it was reported to a provincial NSDEL 18 official that Minister Thibault had asked if there 19 was anything he could do to speed up the process of 20 the Tiverton Quarry. So application is February 21 27th, 2003, and March 2003 there is a note to file 22 saying that the Minister has asked if there is 23 anything he can do to speed up the Tiverton Quarry.</p> <p>24 Bob Petrie at NSDEL asked Jim Ross 25 of DFO if the Tiverton Quarry could be given</p>	<p>1 begun at Tiverton six days earlier, March 18th. 2 And of course in the Tiverton 3 approval, there were no conditions, 10(h) and (i). 4 So the 10(i), which had been used as a bureaucratic 5 roadblock to prevent Bilcon from doing any blasting 6 on the 3.9 ten kilometres down the road, was 7 nowhere to be found in the Tiverton quarry 8 approval.</p> <p>9 A month after Mr. Petrie approved 10 the Tiverton quarry, and after blasting had been 11 going on at Tiverton for weeks, the DFO advised 12 NSDEL much later, in April of 2003, that the 13 Tiverton quarry did not need a section 35 permit 14 under the Fisheries Act. The DFO letter said: 15 "The Department of Fisheries 16 and Oceans has reviewed the 17 plans and has concluded that 18 the proposed work is not 19 expected to result in the 20 harmful alteration, 21 disruption or destruction of 22 fish habitat. Therefore, an 23 authorization under section 24 35(2) of the Fisheries Act 25 will not be necessary."</p>
<p>1 priority, and Mr. Ross for the feds said he would 2 flag it. Although the Tiverton Quarry was believed 3 to be -- at that time believed to be about 160 4 metres from the ocean, well within the 500-metre 5 zone that would be applied to Whites Point, to the 6 Bilcon Quarry, the NSDEL engineers' recommendation 7 for the approval stated: 8 "The blasting effect on 9 marine mammals should not be 10 a problem." 11 160 metres, and the setback had 12 said 500 metres for Bilcon down the road. For the 13 Tiverton, the blasting effect on marine mammals 14 should not be a problem.</p> <p>15 Three weeks later, Mr. Petrie, the 16 same official who had imposed conditions 10(h) and 17 (i) on the Whites Point quarry approval, approved 18 the application for the Tiverton quarry.</p> <p>19 He approved the Tiverton project 20 with simple mitigation measures relating to 21 blasting that the officials knew could easily have 22 been applied and conformed to on the 3.9 quarry at 23 Whites Point.</p> <p>24 At the moment, on March 24th when 25 the blasting is actually approved, it had already</p>	<p>1 When Mr. Zamora at DFO wrote to 2 Mr. McLean at NSDEL about the blasting requirements 3 being imposed by Bilcon -- so this is now DFO 4 writing to the province, Mr. McLean -- he stated: 5 "Paul Buxton was 6 understandably very upset at 7 our position on the blasting 8 plan, especially with the 9 neighbouring Tiverton 10 operations going on. 11 However, we had no choice in 12 the matter." 13 And that is at page 83 of your 14 slides. "We had no choice in the matter". The 15 subtext was clear. What the Minister wanted the 16 Minister got. Mr. Thibault wanted the Whites Point 17 quarry dragged out as long as possible, according 18 to Mr. Hood's note, and that is what he got. And 19 he wanted the Tiverton quarry sped up.</p> <p>20 Ironically, on the day before 21 Minister Thibault referred the Bilcon quarry to a 22 Joint Review Panel, he announced federal funding 23 approval for the construction of Tiverton Harbour, 24 and you have in your materials an aerial photo of 25 the Tiverton Harbour and the point at Tiverton,</p>

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<p>1 which juts out into the Bay of Fundy. 2 And it shows the breakwater. It 3 shows there are two wharfs in that area and it 4 shows all of that quite clearly. 5 So the Tiverton Harbour project 6 was related to the quarry in the sense that rock 7 was going to be used for the Tiverton quarry for 8 the harbour project, but the harbour project was 9 also its own project. 10 That included blasting in the 11 water. Bilcon was never going to blast in the 12 water for any purpose, either marine terminal, 13 quarry or anything else. 14 The Tiverton Harbour project 15 included blasting in the water and construction of 16 a breakwater, and that breakwater was 213 metres 17 long, five metres wide at the crest and 18 approximately 50 metres wide at the base. 19 Approximately, 150,000 tonnes of 20 stone was used in the construction of that 21 breakwater. The construction of the Tiverton 22 Harbour destroyed over 21,000 square metres of fish 23 habitat - 21,000 square metres of fish habitat. 24 By way of comparison, the piles 25 that we showed you on the graphic would have</p>	<p>1 PRESIDING ARBITRATOR: Okay. So 2 the time that exceeds the time that Canada will 3 need will go off the time allocated. 4 MR. NASH: Yes, that is fine. We 5 can take that time off the cross-examination time. 6 PRESIDING ARBITRATOR: Can we let 7 Mr. Nash continue to the end of his presentation 8 before we have to break? Is there any physical 9 emergency? 10 --- Laughter 11 PRESIDING ARBITRATOR: There 12 doesn't seem to be. So why don't we go on. 13 Just go on, please. 14 MR. NASH: I would actually like 15 to invite the Tribunal to observe what a blast of 16 the kind at Tiverton in the harbour actually looks 17 like, and hopefully this video will actually come 18 on. 19 --- Video played at 11:29 a.m. 20 MR. NASH: That blasting and 21 dredging was taking place ten kilometres down the 22 road from Whites Point. 23 At the same time the Joint Review 24 Panel was considering the Bilcon Quarry, CEEA was 25 also conducting an environmental assessment of the</p>
Page 89	Page 91
<p>1 disturbed 40 square metres of the ocean floor at 2 the Bilcon Quarry and involved no blasting of the 3 ocean at all. 21,000 square metres, that is a huge 4 area of fish habitat that was going to be destroyed 5 by dredging and blasting in the Tiverton Harbour. 6 PRESIDING ARBITRATOR: Mr. Nash, 7 may I briefly interrupt you. I think you have 8 about in five more minutes. The 90 minutes -- your 9 90 minutes are up. 10 MR. NASH: Yes. 11 PRESIDING ARBITRATOR: How are we 12 going to handle, because we are going to see the 13 video also; right? 14 MR. NASH: Yes, yes. 15 PRESIDING ARBITRATOR: How much 16 time would you need to come to the end of your... 17 MR. NASH: Perhaps I will confer 18 with my colleagues. 19 PRESIDING ARBITRATOR: Yes, 20 please. 21 MR. NASH: I expect to be ten-plus 22 minutes, and we will do the video -- the technology 23 is apparently not set up to do that video. So we 24 could do that after, if I could have the indulgence 25 of the Tribunal.</p>	<p>1 Continental Quarry and Marine Terminal in 2 Belleoram, Newfoundland. The Belleoram Quarry and 3 Marine Terminal was approved in 2007 with a 4 comprehensive study assessment of the project and 5 without any reference to any review panel. 6 A comparison of Belleoram to 7 Bilcon is telling. The Belleoram Quarry was 900 8 hectares in size, shipping 6 million tonnes per 9 year from the marine terminal in Belleoram to 10 Europe and the United States. 11 The expected life of the quarry 12 was for 50 years, with regular blasting for the 13 operation of that quarry as close as 25 metres from 14 the shoreline. It was approved in 17 months with a 15 comprehensive study, not a review panel, and a 16 comprehensive study of the marine terminal only, 17 without the quarry being scoped in to the 18 environmental assessment. 19 By contrast, the Joint Review 20 Panel for the Bilcon Quarry took over four years. 21 Also telling is that just after 22 the Joint Review Panel of the Bilcon Quarry was 23 concluded, the Miller Creek Mine Extension in Nova 24 Scotia was also approved, again without referral to 25 a review panel.</p>

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<p>1 The Miller Creek Quarry was 2 located near the Hantsport Marine Terminal further 3 up the Bay of Fundy.</p> <p>4 A gypsum rock quarry had been 5 operated at Miller's Creek since 1956 by a 6 subsidiary of a US company. It occupied 7 approximately 477 hectares. The application to 8 expand, which was made in 2008, was to extend the 9 quarry by an additional 420 hectares. So the total 10 was going to be almost 900 hectares for the Miller 11 Creek quarry.</p> <p>12 Rock from that quarry was already 13 being shipped through the Bay of Fundy to the 14 United States in large cargo ships. The quarry 15 extension for was for a period of 35 to 50 years, 16 and projected shipments of up to 1.5 to 2 million 17 tonnes per year, which was in the range of what was 18 expected to be exported from the Bilcon Quarry.</p> <p>19 The Miller Creek Quarry was also 20 very close to an established community. It had 21 streams with fish running nearby, and was very 22 close to suspected IBoF salmon habitat.</p> <p>23 Despite public concern about the 24 expansion and its purported detrimental effect on 25 the so-called unique geographic nature of the area</p>		<p>1 level of EA, and in the result, despite numerous 2 significant adverse environmental effects of the 3 Keltic project, the federal comprehensive study and 4 the Nova Scotia review panel recommended approval 5 of the project with appropriate mitigation 6 measures.</p> <p>7 And of course you will hear that 8 Bilcon never had any difficulty with appropriate 9 mitigation measures. They spent hundreds and 10 hundreds of thousands of dollars, millions of 11 dollars doing studies which would take into account 12 mitigation measures, monitoring and all of that.</p> <p>13 Similarly, the massive Rabaska LNG 14 terminal in Quebec, which was referred to a Joint 15 Review Panel, resulted in both federal and 16 provincial approval after a panel report, which 17 referenced extensive community opposition and 18 provided for mitigation measures to address the 19 "social acceptance of the project".</p> <p>20 From 2000 to 2012, 30 quarries 21 were approved in Nova Scotia without being 22 referenced to a review panel, let alone a Joint 23 Review Panel with the federal government. Thirty 24 quarries were approved in Nova Scotia during that 25 period.</p>	
<p>1 and the historic lifestyles of its local residents, 2 the EA did not consider any socio-economic effects 3 of the expansion at all, and the expansion of the 4 quarry was approved without any federal 5 involvement; no federal involvement in the 6 expansion of the 420 hectare expansion of that 7 quarry.</p> <p>8 Also, at the same time, the Bilcon 9 quarry was undergoing a Joint Review Panel called 10 the Keltic Petrochemicals Project, which was 11 proposed in Nova Scotia.</p> <p>12 At Keltic, there was a marine 13 terminal and there was also petrochemical 14 facilities, a dam and a highway. Yet the project 15 only underwent a federal comprehensive study in 16 conjunction with a Nova Scotia provincial panel 17 review.</p> <p>18 The project was also opposed by 19 local residents, 90 percent of whom signed a 20 petition advocating for a joint federal-provincial 21 panel review. The importance of that is a question 22 of public concern and how pleasing it is.</p> <p>23 In the case of Keltic, DFO's 24 approach was to actively advise the proponents 25 about how to avoid the onerous federal panel review</p>	Page 93	<p>1 Since the CEAA had come into force 2 in 1995, no quarry in Canada has ever been referred 3 to a review panel, let alone a Joint Review Panel, 4 not one quarry across this great country, and many, 5 many of them, have ever been referred to a review 6 panel.</p> <p>7 And no marine terminal ever on its 8 own has been subject to a review panel, let alone a 9 Joint Review Panel.</p> <p>10 So if the federal government had 11 jurisdiction, which we say it did, and it obviously 12 did only over the marine terminal, the reference of 13 construction to a joint -- of this marine terminal 14 to a Joint Review Panel was extraordinary. It was 15 unique and exceptional.</p> <p>16 As I noted earlier, from 1995 to 17 2003, only 11 Joint Review Panels were completed in 18 total across the country, and each of them was of 19 an entirely different nature and magnitude than a 20 quarry.</p> <p>21 They included a terminal in Quebec 22 for the reclassification of 14.2 million cubic 23 metres per day of liquified natural gas, oil and 24 gas pipelines and oil sands developments in 25 Alberta, nuclear waste storage and hydro dam</p>	Page 95

<p style="text-align: right;">Page 96</p> <p>1 projects.</p> <p>2 Only two of the 29 projects</p> <p>3 referred to Joint Review Panels over the course of</p> <p>4 15 years, from 1995 to 2010, were in Nova Scotia.</p> <p>5 One was the Sable Gas offshore</p> <p>6 pipeline, a massive project which covered a total</p> <p>7 area of 120,000 square kilometres and involved 558</p> <p>8 kilometres of onshore pipeline. The other was the</p> <p>9 Sydney Tar Ponds.</p> <p>10 So two projects in Nova Scotia</p> <p>11 went to review panels, Sable Gas and Sydney Tar</p> <p>12 Ponds, in 2006, which involved the disposition of</p> <p>13 hazardous waste.</p> <p>14 From 2004 to 2009, at least five</p> <p>15 mega projects were approved in Nova Scotia with a</p> <p>16 simple screening. They included: The Sydport</p> <p>17 Container Terminal; the Milford deep water port and</p> <p>18 international container terminal; the Bear Head LNG</p> <p>19 terminal, involving onshore liquified natural gas</p> <p>20 storage tanks of 180,000 cubic metres and over 100</p> <p>21 ships per year, each carrying 250 cubic metres; and</p> <p>22 the Point Tupper marine terminal facility, with a</p> <p>23 capacity of 3,000 tonnes per hour.</p> <p>24 Far from joint federal-provincial</p> <p>25 review panels, the EA processes was for these five</p>	<p style="text-align: right;">Page 98</p> <p>1 questions from the panel, of which notably very few</p> <p>2 were asked.</p> <p>3 Because of the extensive volume of</p> <p>4 the EIS materials, they were organized around a</p> <p>5 master table of contents, as well as a concordance</p> <p>6 table and, for maximum ease of reference, a plain</p> <p>7 language summary.</p> <p>8 The entire EIS was consolidated</p> <p>9 into an impact summary, which was specifically</p> <p>10 categorized in reference to every environmental</p> <p>11 effect which the project might have, including</p> <p>12 socio-economic effects for which they had expert</p> <p>13 evidence, so as to facilitate the consideration of</p> <p>14 mitigation which the panel was required to</p> <p>15 undertake.</p> <p>16 It is a fundamental, integral</p> <p>17 component of the environmental assessment process.</p> <p>18 Are there serious adverse environmental effects,</p> <p>19 and can they be mitigated? And after taking those</p> <p>20 mitigation measures into account, what will be the</p> <p>21 effect on the environment?</p> <p>22 To assist the panel with the</p> <p>23 assessment of mitigation, Bilcon correlated a</p> <p>24 complete commitment table which reflected all of</p> <p>25 the additional mitigation commitments Bilcon made</p>
<p style="text-align: right;">Page 97</p> <p>1 major mega projects in Nova Scotia did not have a</p> <p>2 provincial review panel or even a comprehensive</p> <p>3 study. The only environmental assessment carried</p> <p>4 out on those five projects that I have just listed</p> <p>5 at all was the lowest, environmental assessment</p> <p>6 level, a simple screening, the vast majority, and</p> <p>7 over 99 percent had simple screenings.</p> <p>8 I turn now to a short discussion</p> <p>9 of the actual report and processes of the Joint</p> <p>10 Review Panel.</p> <p>11 Bilcon expected the panel process</p> <p>12 to be fair, honest, objective and scientific. It</p> <p>13 directed Mr. Buxton to engage the very best experts</p> <p>14 in every field of scientific expertise that would</p> <p>15 be the subject of the panel's review.</p> <p>16 In the result, the environmental</p> <p>17 impact statement, which is called the EIS, which</p> <p>18 you will hear much about, was comprised of 35</p> <p>19 expert reports, seven volumes of detailed responses</p> <p>20 to additional information requests from the panel,</p> <p>21 and two volumes of undertakings made to the panel</p> <p>22 in the course of the hearing.</p> <p>23 Each of the 35 experts Bilcon</p> <p>24 engaged submitted a comprehensive written report,</p> <p>25 and 19 of them attended the hearing to answer any</p>	<p style="text-align: right;">Page 99</p> <p>1 in the course of the panel process.</p> <p>2 All of it was ignored by the panel</p> <p>3 report to the Ministers, and the panel recommended</p> <p>4 that the Bilcon Quarry not be approved.</p> <p>5 The panel's conclusions were not</p> <p>6 based on facts or science or a fair assessment of</p> <p>7 the science, but on purely subjective beliefs and a</p> <p>8 motivation to change legislative policy.</p> <p>9 The panel's conclusion was based</p> <p>10 on its view of what it called "core values" of the</p> <p>11 community. In its report, the panel said, and this</p> <p>12 is at page 85 of your slides:</p> <p>13 "Core values are beliefs</p> <p>14 shared by individuals within</p> <p>15 groups. Communities on Digby</p> <p>16 Neck and Islands have been</p> <p>17 engaged for almost a decade</p> <p>18 in various activities that,</p> <p>19 although designed to</p> <p>20 encourage economic</p> <p>21 development, required a form</p> <p>22 of introspection that</p> <p>23 revealed the community's</p> <p>24 beliefs."</p> <p>25 "Introspection that revealed the</p>

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<p>1 community's beliefs". The panel then went so far 2 as to describe the desolate clearcut quarry site as 3 a sacred landscape, for which it cited a 4 definitional reference. Bilcon was always 5 sympathetic and sensitive to any aboriginal 6 concerns, but there was no evidence at all of 7 aboriginal habitation of this property: 8 "Sacred landscapes then are 9 places that are consecrated 10 by sacrifice and special 11 treatment and endowed by a 12 community with the power of 13 highly revered convictions, 14 values and virtues." 15 After the panel rendered its 16 report, the panel chairman, Professor Fournier, was 17 interviewed on CBC Radio and confirmed that the 18 panel report had little to do with objective 19 assessment of the overwhelming scientific and 20 engineering evidence presented by Bilcon or the 21 legal mandate of the panel's terms of reference. 22 It was instead based entirely on 23 the panel's subjective view of core values and the 24 panel's own belief that the Nova Scotia -- that 25 Nova Scotia should legislate a coastal zone policy.</p>	<p>1 in the province, now this 2 thing might never have come 3 to an assessment... So we 4 think, okay, by extension 5 that policy should exist 6 because there will be more 7 attempts to open quarries and 8 so forth. 9 "We strongly urged a 10 moratorium, because we felt 11 that why go through this 12 process again in an ad hoc 13 way when, if you put a policy 14 together, everybody knows 15 what to expect and you don't 16 is to spend time and money 17 and effort..." [As read] 18 The fact is there wasn't such a 19 coastal zone prohibition policy or regulation or 20 rule in effect. There are at least 100 21 jurisdictions in the world that have coastal zone 22 policies, and we don't. 23 You have to ask yourself, I mean, 24 What are we waiting for? 25 So the message from the panel to</p>
Page 101	Page 103
<p>1 The panel chairman said, and I quote, and this is 2 at page 87: 3 "The decision hinges on core 4 values, and the other thing 5 that you have to realize, 6 too, in one of these 7 assessment processes is what 8 you are looking for is 9 significant adverse 10 environmental effects. So we 11 were so certain that this was 12 a bad thing that it was 13 inappropriate for that 14 particular environment that 15 we did not provide any of 16 those mitigation 17 recommendations at all ...and 18 that was a very conscious 19 effort on our part." [As 20 read] 21 So they didn't consider 22 mitigation. Of course, beliefs can't be mitigated 23 against: 24 "We felt that if there was a 25 coastal zone policy present</p>	<p>1 the Governments of Nova Scotia and Canada did not 2 emanate from a fair and impartial, objective and 3 scientific environmental assessment of the actual 4 Bilcon quarry itself, but was based first on the 5 subjective perception of community beliefs and the 6 personal view of the panel members that, second, 7 there should be a coastal policy prohibiting 8 quarries on Canadian coasts, which there was not. 9 The legal mandate of the panel was 10 set out in its terms of reference, and nowhere in 11 that mandate or in any related federal or 12 provincial statute or regulation was there any 13 reference at all to core values or to coastal 14 policy. 15 Indeed, the notion of core values 16 is not a concept or a standard known to 17 environmental or environmental assessment at all. 18 It is entirely subjective. It is 19 not capable of objective assessment, and we saw 20 earlier that the guide to the officials who were 21 supposed to conduct these activities is to conduct 22 the objective science-based analysis. 23 The panel's view of core values 24 had nothing to do with proven facts, objective 25 science, socio-economic effect or benefit, or</p>

<p style="text-align: right;">Page 104</p> <p>1 socio-scientific assessment of the actually effects 2 of the quarry.</p> <p>3 It was purely philosophical and, I 4 would submit, political. And this, in turn, caused 5 the panel to skirt any objective assessment of 6 mitigating factors.</p> <p>7 Moreover, and importantly, Bilcon 8 was given no notice, either before or during the 9 hearing, that core values would be fundamental to 10 the outcome of the environmental assessment.</p> <p>11 It had no opportunity to present 12 real social science evidence about what the values 13 of the community actually were. There was some 14 opposition to this quarry in the community, but the 15 community did not speak with one voice.</p> <p>16 Other members of the community 17 supported the quarry and the jobs and the economic 18 benefits it would bring. The evidence before the 19 panel, Bilcon receiving over 400 job applications 20 from members of this small community, 400 job 21 applications, was telling.</p> <p>22 The panel's profound bias against 23 the Bilcon quarry was manifest from the beginning. 24 Internal communications between the members reveal 25 the panel members sneering dismissively at the EIS</p>		<p style="text-align: right;">Page 106</p> <p>1 at page 91:</p> <p>2 "On day 11, the local member 3 of parliament for the Digby 4 region and former Minister of 5 the DFO, Robert Thibault, 6 also made a presentation to 7 the panel. He was critical 8 of the project particularly 9 because the basalt was to be 10 exported to the United 11 States.</p> <p>12 "The panel did nothing to 13 discourage emotional, 14 unsubstantiated and patently 15 biased comments by opponents 16 to the Bilcon project and 17 actively expressed its own 18 suspicion of Bilcon's 19 representative, Mr. Buxton, 20 took little interest in other 21 Bilcon experts and 22 consistently, negatively 23 focussing on the American 24 nationality of Bilcon. 25 "Neither at the hearing or in</p>
<p style="text-align: right;">Page 105</p> <p>1 prepared by Bilcon.</p> <p>2 When Mr. Buxton spoke at the 3 hearings, it is uncontroverted evidence out of his 4 witness statement that the panel chairman swivelled 5 his chair and turned his back on Mr. Buxton, 6 flaunting his disdain for Bilcon to everyone 7 present.</p> <p>8 I can't imagine that in a fair 9 administrative hearing, the chairman turning his 10 chair swivelling around and not listening to 11 Mr. Buxton.</p> <p>12 The witness statement of Hugh 13 Fraser, a Nova Scotia communications and public 14 relations professional, which stands again 15 uncontroverted in these proceedings, describes the 16 panel's daily conduct of the hearing, its manifest 17 anti-Bilcon, anti-American and anti-NAFTA attitudes 18 and its total disregard of Bilcon's engineers and 19 scientists.</p> <p>20 In addition to showing its 21 contempt of Bilcon through the hearing, the panel 22 was clearly aligned with the politics that had 23 caused the Bilcon quarry to be reviewed to a Joint 24 Review Panel in the first place.</p> <p>25 Hugh Fraser recounts, and this is</p>		<p style="text-align: right;">Page 107</p> <p>1 its report did the panel ever 2 dissociate itself from the 3 manifest anti-American and 4 anti-foreign sentiments 5 expressed during that 6 hearing.</p> <p>7 "Nevertheless both the 8 responsible provincial and 9 federal ministers, without 10 giving Bilcon any opportunity 11 to make representations, 12 chose to arbitrarily accept 13 the report, made the decision 14 to deny the Bilcon quarry and 15 the Minister did so with full 16 knowledge of the panel 17 process. The panel report 18 was fundamentally flawed. 19 "After the panel issued its 20 report, Mr. Buxton wrote to 21 Nova Scotia Minister Parent 22 asking for an opportunity to 23 make representations about 24 the panel's report and 25 recommendations before making</p>

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<p>1 a decision, so that he could</p> <p>2 consider the manifest</p> <p>3 unfairness of the panel's</p> <p>4 process, his complete and</p> <p>5 obvious bias, and his</p> <p>6 disregard of the scientific</p> <p>7 and engineering information.</p> <p>8 "Bilcon wanted the</p> <p>9 opportunity to correct key</p> <p>10 errors of fact and fairness</p> <p>11 in the report. Mr. Parent,</p> <p>12 however, never gave Bilcon</p> <p>13 the opportunity to address</p> <p>14 the flaws and biases in the</p> <p>15 Panel's process and report,</p> <p>16 and neither did the</p> <p>17 Minister's deputy meet with</p> <p>18 Bilcon. Instead, on November</p> <p>19 20th, the Minister issued its</p> <p>20 decision denying the Bilcon</p> <p>21 quarry." [As read]</p> <p>22 And the quote is there for you. I</p> <p>23 won't read it.</p> <p>24 Moreover, before the Minister made</p> <p>25 the decision, the officials in his Ministry had</p>		<p>1 provides a shield for</p> <p>2 individuals from arbitrary</p> <p>3 state action."</p> <p>4 The rule of law is what this case</p> <p>5 is all about. The story of the Bilcon quarry is a</p> <p>6 story of the regulatory process and the legal</p> <p>7 process itself being subverted and hijacked for</p> <p>8 political purposes.</p> <p>9 The integrity of Canada's</p> <p>10 environmental regulatory system depends on the good</p> <p>11 faith of the officials administering it and on its</p> <p>12 protection from political interference.</p> <p>13 The absolute application of these</p> <p>14 basic principles is affirmed in the values and</p> <p>15 ethics code for the public sector of the Government</p> <p>16 of Canada, which proclaims, "Public servants shall</p> <p>17 uphold" -- I am quoting here:</p> <p>18 "... the Canadian</p> <p>19 parliamentary democracy and</p> <p>20 its institutions by</p> <p>21 respecting the rule of law</p> <p>22 and carrying out their duties</p> <p>23 in accordance with</p> <p>24 legislation, policies and</p> <p>25 directives in a</p>	
<p>1 prepared a PowerPoint presentation entitled</p> <p>2 "Response to Panel Report" that concluded that six</p> <p>3 of the seven recommendations made by the panel were</p> <p>4 "outside the scope of the panel's terms of</p> <p>5 reference".</p> <p>6 The panel's terms of reference of</p> <p>7 course define the scope of its mandate. And then,</p> <p>8 similarly, Mr. Buxton also wrote to Minister Baird,</p> <p>9 the federal Minister, advising -- and, again, I've</p> <p>10 excerpted a quote there which is in your materials</p> <p>11 at page 94.</p> <p>12 Members of the Tribunal, the rule</p> <p>13 of law is the bedrock of Canadian constitutional</p> <p>14 and administrative law. The Supreme Court of</p> <p>15 Canada has said, and this is page 95:</p> <p>16 "The principles of</p> <p>17 constitutionalism and the</p> <p>18 rule of law lie at the root</p> <p>19 of our system of government.</p> <p>20 At its most basic level, the</p> <p>21 rule of law vouchsafes to the</p> <p>22 citizens and residents of the</p> <p>23 country a stable, predictable</p> <p>24 and ordered society in which</p> <p>25 to conduct their affairs. It</p>	<p>Page 109</p>	<p>1 non-partisan..."</p> <p>2 It is at page 98, Mr. President:</p> <p>3 "... in a non-partisan and</p> <p>4 impartial manner. Public</p> <p>5 servants shall serve the</p> <p>6 public interest by: Acting</p> <p>7 at all times with integrity</p> <p>8 and in a manner that will</p> <p>9 bear the closest public</p> <p>10 scrutiny, an obligation that</p> <p>11 may not be fully satisfied by</p> <p>12 simply acting within the</p> <p>13 law."</p> <p>14 These values are echoed simply and</p> <p>15 clearly in "The Values, Ethics and Conduct Code For</p> <p>16 Nova Scotia for Public Servants", which says:</p> <p>17 "We are objective, fair and</p> <p>18 transparent."</p> <p>19 That is their mandate. That is</p> <p>20 what they are required to be. Bilcon always</p> <p>21 intended to treat the Nova Scotia environment with</p> <p>22 respect and to act in full compliance with Canadian</p> <p>23 environmental values, laws and regulations.</p> <p>24 Bilcon believed that it was</p> <p>25 engaged in an honest and transparent environmental</p>	<p>Page 111</p>

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<p>1 assessment that would be administered by 2 responsible government officials, fairly and in 3 good faith, and that it would be determined by an 4 objective scientific truth.</p> <p>5 Bilcon did not expect to be duped 6 by public officials and to be denied basic fairness 7 by an administration it was entitled to expect 8 would treat it fairly.</p> <p>9 Simply put, Bilcon was not treated 10 fairly and it was not treated with good faith, and 11 that is why this proceeding is proceeding today.</p> <p>12 Thank you, Mr. President, Members 13 of the Tribunal.</p> <p>14 PRESIDING ARBITRATOR: Thank you 15 very much, Mr. Nash.</p> <p>16 MR. APPLETON: Mr. President, I am 17 told that the audio-visual technicians believe that 18 we could actually run that video now, if you 19 wanted, or you could run it at the beginning, after 20 the break, whichever you would like.</p> <p>21 But technologically, they have the 22 right cables and everything should work now.</p> <p>23 PRESIDING ARBITRATOR: How long is 24 it going to take?</p> <p>25 MR. NASH: It is three-and-a-half</p>	<p>1 statement of Mr. Buxton. He submitted it with his 2 witness statement. I believe it is in the record 3 as document C-911. We thought it might have been 4 possible, because of its unique format, that the 5 Tribunal might not have seen it as it was being 6 submitted, and, therefore, we thought it was useful 7 to present it as part of the opening today.</p> <p>8 PRESIDING ARBITRATOR: Okay. 9 Thank you very much.</p> <p>10 MR. APPLETON: Sorry, 910. 11 PRESIDING ARBITRATOR: 910. Okay. 12 Thank you very much. My watch, which is the 13 authoritative one, it is now eight to 12:00, which 14 means we will start again at 12:10 sharp. 12:10 15 sharp.</p> <p>16 I think you will have all of the 17 time you need and we will have a later lunch break.</p> <p>18 MR. LITTLE: That was my question, 19 Judge Simma. I am mindful of the fact that we do 20 have a lunch break at some point in time. We have 21 been over two hours now. I could have very likely 22 finished well in advance of the lunch break had we 23 kept to an hour and a half, but now we are going to 24 be pushing up against a late lunch. 25 We are seeking your guidance on</p>
<p>1 minutes.</p> <p>2 MR. APPLETON: Three minutes, 30 3 seconds.</p> <p>4 PRESIDING ARBITRATOR: I think 5 let's add that, three minutes, 30 seconds.</p> <p>6 MR. APPLETON: We should try it 7 now?</p> <p>8 PRESIDING ARBITRATOR: Yes, try 9 again.</p> <p>10 MR. APPLETON: Yes, all right. 11 Can you run this now?</p> <p>12 --- Video played at 11:47 a.m.</p> <p>13 MR. APPLETON: You have to run it 14 from the beginning.</p> <p>15 PRESIDING ARBITRATOR: Yes. 16 --- Video played.</p> <p>17 PRESIDING ARBITRATOR: All right. 18 That brings us to the end of the video. Two 19 questions related to the video. First, what is the 20 source of this video? And, secondly, was it 21 submitted to the Tribunal as an exhibit already or 22 not? But if the answer takes longer than ten 23 seconds, give it after the break, because...</p> <p>24 MR. APPLETON: It is part of the 25 record. The video was part of the witness</p>	<p>1 whether we break for our lunch now, and then allow 2 me to complete my presentation in its entirety 3 after the lunch break.</p> <p>4 PRESIDING ARBITRATOR: Let me have 5 a quick consultation with my colleagues. 6 --- Tribunal members confer.</p> <p>7 PRESIDING ARBITRATOR: Okay. 8 Claimant have any view? Let's break for lunch now 9 and start at 1:00 sharp. Thank you very much. 10 --- Luncheon recess at 11:53 a.m. 11 --- Upon resuming at 1:11 p.m.</p> <p>12 PRESIDING ARBITRATOR: Okay. So 13 we are all set? Is that all right?</p> <p>14 MR. PULKOWSKI: Let's go online. 15 PRESIDING ARBITRATOR: Yes, let's 16 go online. Good afternoon, everybody. And I will 17 give the floor to Mr. Little for the respondent.</p> <p>18 OPENING SUBMISSIONS BY MR. LITTLE: 19 MR. LITTLE: Yes. Good afternoon, 20 Members of the Tribunal and to the viewers on the 21 live screen and live stream.</p> <p>22 Canada has prepared a series of 23 slides that will accompany my opening statement 24 today, and it would probably be most beneficial and 25 helpful for these to be presented on the live</p>

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<p>1 stream. So we will commence with those, please. 2 Okay, thank you. 3 This case challenges the 4 environmental assessment, or EA, of the Whites 5 Point Quarry and Marine Terminal Project. Now, as 6 we know, the process culminated in decisions by the 7 Government of Nova Scotia, and later by the federal 8 government, that the Whites Point project would not 9 be approved. 10 Now, the claimants allege, as we 11 have heard today, that a whole host of measures 12 taken in the Whites Point EA breached Canada's 13 NAFTA obligations. 14 They specifically allege that 15 decisions made in the course of the Whites Point EA 16 breached Canada's minimum standard of treatment 17 obligation under NAFTA Article 1105. 18 But to establish such a breach, 19 they must demonstrate that they were subjected to 20 government conduct that was so egregious and 21 shocking it amounted to a gross denial of justice, 22 arbitrariness, a complete lack of due process or 23 evident discrimination. They have not. 24 The claimants' Article 1105 claim 25 is nothing more than an attempt to manufacture a</p>	<p>1 to provide you with an overview of the salient 2 factual elements of the Whites Point EA which you 3 will be hearing about in the coming days. 4 I will then briefly outline for 5 you the fundamental flaws in the claimants' NAFTA 6 claims, which I have just noted here in passing, 7 and explain why the only award that can be made in 8 this case is one dismissing these claims in their 9 entirety. 10 But as you listen to Canada's 11 opening statement and over the coming days as you 12 listen to the claimants' allegations and Canada's 13 responses, I would ask you to keep the following 14 three overarching considerations in mind. 15 The first is: Have the claimants 16 proven the facts that they must in order to make 17 out their claims? 18 Now, the size and duration of the 19 Whites Point project and the environmental 20 sensitivities of the location for which it was 21 proposed engaged the potential for a wide range of 22 likely adverse environmental effects and 23 significant public concern over these effects. 24 These most basic facts explain why 25 the project was assessed by a Joint Review Panel.</p>
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<p>1 NAFTA claim out of rational and legitimate 2 decisions taken during the EA process with which 3 they disagree and which don't rise to the level 4 required to prove a breach of the minimum standard 5 of treatment. 6 Now, the claimants also allege 7 that Canada breached its national treatment and 8 most-favored nation treatment obligations under 9 NAFTA Articles 1102 and 1103. 10 But to make out this claim, it is 11 incumbent on them to demonstrate that they were 12 treated less favorably than other EA proponents in 13 like circumstances by reason of their nationality. 14 Again, they have not. 15 All that they've shown is that 16 other EA proponents of different projects proposed 17 for different environments happen to have been 18 accorded different treatment that was in no way 19 related to their nationality. This does not 20 demonstrate a violation of Articles 1102 or 1103. 21 Now, beyond these substantive 22 failings, many of the measures which the claimants 23 complain of are simply beyond this Tribunal's 24 jurisdiction. 25 Now, in my opening remarks, I want</p>	<p>1 The decision made in the end that the Whites Point 2 project would not be approved was equally based 3 upon findings made through the EA process regarding 4 the project's adverse environmental effects. 5 Now, rather than acknowledging 6 these basic facts, the claimants have cast their 7 claim and their pleadings in the dramatic language 8 of a conspiracy against the Whites Point project. 9 They assert that the EA was concocted and that it 10 was an artifice of process and procedure. 11 Their tale, as we have heard, is 12 populated by officials acting in bad faith to carry 13 out a secret scheme to bring about a predetermined 14 outcome for their project that it would be 15 rejected, but they have provided you with nothing 16 more than assertions and not the facts that they 17 need to prove to make out their case. 18 And their assertions are not only 19 not borne out by the facts; they often distort the 20 facts beyond recognition. 21 So while you will hear a whole 22 host of assertions that suit the theory of the 23 claimants' case in the coming days, please consider 24 whether they have provided you with substantive 25 evidence, facts to back up their account. We say</p>

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<p>1 that they haven't, because such facts do not exist. 2 Now, the second overarching 3 consideration we would like you to keep in mind is 4 whether the controversies that have been 5 manufactured by the claimants in this case really 6 matter. 7 Now, the claimants have filed 8 hundreds of pages of pleadings, witness statements, 9 expert reports, all challenging the many decisions 10 that had to be made in the Whites Point EA. 11 And while some of the debates that 12 they have raised might be of academic interest, as 13 you consider each, please ask the question: But 14 would the outcome of the Whites Point EA have been 15 any different? 16 On many accounts, we say the 17 answer is "no" and that much of the time and 18 expense that has been incurred to date and that 19 will be incurred in the coming days could have been 20 avoided had the claimants not bogged down this case 21 in issues that are irrelevant to whether their 22 project could have proceeded. 23 I will highlight some of these 24 later on in my remarks. 25 The third overarching</p>	<p>1 Now, the Tribunal has been 2 provided with a huge volume of facts. It is 3 obviously not my aim to review all of these today. 4 What I want to accomplish is to, first, recall the 5 fundamental underpinnings of the Whites Point EA, 6 factors that are determinative of the course and 7 conduct of every EA and that were determinative of 8 the course and conduct of the Whites Point EA. 9 Second, I am going to distill for 10 you the key features of the two EA regimes at issue 11 in this case, the Nova Scotia Environment Act and 12 the Canadian Environmental Assessment Act. 13 I am then going to summarize the 14 key points and decisions made over the course of 15 the Whites Point EA. 16 So let's first consider three 17 fundamental factual underpinnings of the Whites 18 Point EA. These are: First, the nature of the 19 Whites Point project; second, the environment in 20 which it was to be located, and, third, the public 21 concerns that it engaged. 22 We will start with the Whites 23 Point project. Now, the Whites Point project 24 started as a proposal of a company known as Nova 25 Stone Exporters, a locally owned Nova Scotia</p>
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<p>1 consideration: Do the measures that the claimants 2 challenge really amount to NAFTA violations? 3 Now, decisions made in the EA 4 process, they're not black and white propositions. 5 They are based upon the professional judgment and 6 experience of those conducting the EA. 7 They are fact specific. They are 8 dependent on the environmental, the scientific, the 9 socio-economic, the policy and the statutory 10 conduct and context of each EA, and they can't 11 possibly be uniform across EA processes as the 12 claimants would like you to think, in a country as 13 ecologically diverse as Canada. 14 Now, it is clear the claimants 15 disagree with virtually every decision made in the 16 Whites Point EA, but in considering their claims, 17 please keep in mind the NAFTA is not a security 18 blanket against the disappointment that the 19 claimants feel because they disagree, and the 20 number of past NAFTA awards confirm that it isn't 21 this Tribunal's role to second-guess each decision 22 merely because they do. 23 So keeping these three overarching 24 considerations in mind, let's now turn to the 25 salient facts of this case.</p>	<p>1 company that, in 2001, was searching for partners 2 to build a quarry and a marine terminal in Nova 3 Scotia. 4 In February of 2002, Nova Stone 5 approached the claimants in this arbitration, the 6 Claytons, to gauge their interest in the project, 7 and shortly thereafter a plan fell into place. 8 Specifically, on April 3rd, 2002, 9 Nova Stone signed an aggregate lease agreement with 10 the owners of the Whites Point property allowing it 11 to quarry on the land. 12 Three weeks later, the Claytons 13 incorporated their own Nova Scotia-based company, 14 called Bilcon of Nova Scotia Corporation. 15 And a week after that, Nova Stone 16 and Bilcon formed a partnership called "Global 17 Quarry Products", and this partnership would be the 18 proponent of the project. 19 Now, the project, as we can see 20 here, was to consist of two elements, a quarry and 21 a marine terminal. The quarry would cover over 150 22 hectares, on which rock would be blasted, crushed, 23 washed and stockpiled into processed aggregate. 24 The marine terminal would jut 170 25 metres off the quarry site. Huge ships would moor</p>

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<p>1 to it so they could be loaded with processed 2 aggregate for export.</p> <p>3 Now, the Whites Point project was 4 to operate for 50 years. It aimed to blast, 5 process and ship 40,000 imperial tons of aggregate, 6 and that's imperial tons of aggregate, almost every 7 week of every one of those years, a total of 8 2 million imperial tons annually and 100 million 9 imperial tons over the life of the project.</p> <p>10 This project would be large-scale 11 and it would be long-term.</p> <p>12 Now, it is also important to 13 recall that the claimants' plan was obviously not 14 realizable without both the quarry and the marine 15 terminal. The claimants never intended to operate 16 one element of the project without the other.</p> <p>17 In fact, at one of their very 18 first meetings with government officials, their 19 representatives explained that if they cannot put 20 in a wharf structure, they are not interested in 21 the quarry.</p> <p>22 So while the project consisted of 23 two constituent elements, these elements comprised 24 one integrated, interdependent whole.</p> <p>25 Now, turning back to the</p>	<p>1 Digby Neck was and continues to be based on the 2 region's ecological assets. For centuries, for 3 example, economic activity has been founded on the 4 commercial fishery.</p> <p>5 The proposed site of the project 6 encompassed lobster area 34, which was one of the 7 world's most productive lobster fisheries and the 8 backbone of the southwest Nova Scotia economy.</p> <p>9 As well, the Digby scallop fleet 10 yields the largest annual landings of scallops on 11 the Bay of Fundy.</p> <p>12 There are also active herring, 13 halibut and haddock industries, and there are 14 spin-off industries, as well, such as fish 15 processing plants.</p> <p>16 Now, more recently, an ecotourism 17 industry has blossomed on the Digby Neck. Whale 18 watching tours are a central pillar of the 19 ecotourism industry, and the waters along the Neck 20 have been dubbed the Fundy aquarium ecozone.</p> <p>21 Ecotour maps also promote the Neck 22 as Nova Scotia's premier ecotourism destination and 23 tout its marine life, its geology, its bird life, 24 its land ecology, and its history and culture as 25 natural attractions of the region.</p>
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<p>1 fundamental factual underpinnings, the second one 2 that we want you to keep in mind is the environment 3 in which this project was to be located.</p> <p>4 The project was to be constructed 5 and operate at Whites Point on the Digby Neck in 6 southwest Nova Scotia. Nova Scotia, as we know, is 7 one of the Maritime provinces on the east coast of 8 Canada.</p> <p>9 The Digby Neck is a narrow 10 58-kilometre-long spit of land running parallel to 11 the southwest coast of Nova Scotia along the Bay of 12 Fundy to the west and St. Mary's Bay to the east.</p> <p>13 Whites Point, as we can see, is 14 approximately halfway down the Neck on the Bay of 15 Fundy side. Now, there is no major industrial 16 development or marine terminal on the Neck and 17 certainly no project of the scale contemplated by 18 the claimants.</p> <p>19 The Bay of Fundy itself is a 20 diverse and rich marine ecosystem owing to its 21 extraordinary tidal cycle. It is the habitat of 22 many endangered species, including the North 23 Atlantic Right Whale and the Inner Bay of Fundy 24 population of Atlantic Salmon, or IBoF salmon.</p> <p>25 Moreover, the local economy of the</p>	<p>1 Now, in light of its unique 2 attributes, the Digby Neck and several other 3 counties of southwest Nova Scotia were designated 4 in 2001 as a biosphere reserve under the UNESCO Man 5 and Biosphere Program.</p> <p>6 A biosphere reserve is a 7 terrestrial and coastal ecosystem that promotes 8 biodiversity, conservation and sustainable 9 resources.</p> <p>10 On sum, the Digby Neck was and is 11 a unique environment, and the plan to build and 12 operate the Whites Point project in the midst of 13 this environment, given the project size, its 14 duration and its potential biophysical and human 15 impacts naturally gave rise to legitimate questions 16 over the claimants' proposal.</p> <p>17 Now, this gets us to the third 18 fundamental factual underpinning to keep in mind, 19 namely that it is hardly surprising the Whites 20 Point project engaged major public concern.</p> <p>21 Now, the claimants appear at 22 points to deny the existence of such concern. In 23 their memorial, for example, they assert there was 24 no empirical evidence of any public concern.</p> <p>25 Now, this assertion is as</p>

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<p>1 remarkable as it is unsupported by the facts. 2 Even the claimants' expert, 3 Mr. David Estrin, has testified the project was 4 very controversial. Canada has also provided in 5 its exhibits over 400 pages of empirical evidence 6 of public concern, which include letters to 7 government officials and Ministers expressing 8 concern over the project, and these letters covered 9 only the first 16 months of the public's knowledge 10 of the project. 11 Public concern over the Whites 12 Point project was acute from the outset. It 13 persisted throughout the EA process all the way to 14 the government decisions that the project would not 15 be approved. 16 And why wouldn't it? The prospect 17 of 50 years of quarrying along the Bay of Fundy 18 that would consume 150 hectares of land and entail 19 weekly visits by huge ships travelling to and from 20 distant ports gave rise to immediate concerns over 21 the impact of blasting on endangered marine species 22 and other fish, the effects of siltation and 23 sedimentation from the quarry site on the local 24 fisheries, the impact of a large marine terminal on 25 the safety and livelihood of local fishers, the</p>	<p>1 a helpful starting point is to recall what is an 2 environmental assessment, because from Mr. Nash's 3 comments of earlier this morning, it appears we 4 disagree on the meaning. 5 An EA is not, as Mr. Nash states, 6 merely part of the planning phase of an industrial 7 project. Canada's expert, Robert Connelly, who 8 sits behind me in this room, articulated the 9 meaning of environmental assessment in his expert 10 report. Mr. Connelly, as we can see, explains: 11 "Environmental assessment is 12 a process used to identify 13 and gather information about 14 the expected future 15 consequences of a proposed 16 project before a decision is 17 made as to whether it should 18 proceed." 19 Thus, an EA process has an 20 information-gathering phase aimed at learning what 21 are the potential environmental effects of this 22 project, and a decision-making phase which, based 23 on the information gathered, results in a decision 24 as to whether the project should be permitted to 25 proceed.</p>
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<p>1 risks associated with ballast water and the 2 introduction of invasive species in the waters 3 adjacent to the site, and the project's impact on 4 the tourist industry and the general way of life 5 along the Neck. 6 Now, in another location, one 7 founded upon and familiar with heavy industrial 8 development, the Whites Point project may have 9 engaged less concern, but given where the project 10 was to be located, this was simply not the case. 11 So with these three fundamental 12 factual underpinnings in mind, the nature of the 13 Whites Point project, the sensitivities of the 14 surrounding environment and the public concern over 15 the project's potential effects, I want to turn now 16 to some of the key features of the EA regimes under 17 which the Whites Point project was to be assessed. 18 Now, as it was proposed, the 19 Whites Point project required an environmental 20 assessment under both Nova Scotia's EA regime 21 pursuant to the Nova Scotia Environment Act, and 22 Canada's EA regime, pursuant to the Canadian 23 Environmental Assessment Act. 24 Now, I will explain why and some 25 key features of these regimes, but before doing so,</p>	<p>1 Now, let's look closer at the EA 2 regimes at issue in this case, and as I noted there 3 were two, provincial regime and the federal regime, 4 because, in Canada, the provinces and federal 5 government have shared jurisdiction over the 6 environment. 7 Now, I should also note that 8 though I refer to the regimes in the present tense, 9 I am describing the regimes as they existed at the 10 time of the Whites Point EA. They have since been 11 amended. 12 First, the Nova Scotia Environment 13 Act, also known as the NSEA. Now, the NSEA 14 requires an EA of prescribed undertakings. 15 Included in this list of undertakings are quarries 16 over 4 hectares in size, like the proposed Whites 17 Point quarry. 18 The EA is generally conducted by 19 officials in the Nova Scotia Department of 20 Environment and Labour, also known as NSDEL, which 21 is an acronym you have already heard today and you 22 will hear in the coming days. 23 Now, an EA under the NSEA must 24 consider the environmental effects of an 25 undertaking. The term "environmental effects" is</p>

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<p>1 defined broadly under the NSEA to include: 2 "... any change...in the 3 environment, i.e., any 4 biophysical change, including 5 any effect on socioeconomic 6 conditions." 7 Now, an EA under the NSEA must 8 also determine whether the undertaking will have an 9 adverse effect respecting the reasonable enjoyment 10 of life or property. So to illustrate, if the 11 information gathered in the EA demonstrates that 12 the undertaking will adversely affect an endangered 13 specie, well, this biophysical environmental effect 14 is relevant to government decision-making. 15 But just as important, if it is 16 determined that tourists are likely to stop 17 visiting the area because of the undertaking and 18 the tourist industry would suffer, well, this 19 socioeconomic effect is equally relevant to 20 decision-making. 21 The NSEA mandates consideration of 22 such socioeconomic effects regardless of the 23 undertaking's biophysical effects. 24 Let's now look at the CEAA, the 25 Canadian Environmental Assessment Act. Unlike the</p>	<p>1 which is its own defined term under the CEAA, also 2 requiring consideration of socioeconomic effects, 3 albeit through a slightly different approach. 4 The CEAA requires consideration of 5 any change that the project may cause in the 6 environment. Again, any biophysical change, 7 including any effect of any change in the 8 environment on socio-economic conditions. 9 So, again, to illustrate, if an EA 10 under the CEAA finds that the project will have an 11 adverse effect on fish habitat, well, this 12 biophysical effect is relevant to government 13 decision-making. But just as important, if this 14 effect on fish habitat, an environmental change 15 that is caused by the project, has an adverse 16 effect on the productivity of the local fishery, 17 well, then this effect on socioeconomic conditions 18 is equally relevant to government decision-making. 19 Now, I want to highlight just a 20 couple of other features of the two EA regimes. 21 First, an underlying purpose of the NSEA and CEAA, 22 and all Canadian EA regimes for that matter, is to 23 facilitate meaningful public participation. In 24 fact, public participation is inscribed as an 25 overarching purpose of both statutes.</p>
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<p>1 NSEA, which requires an EA of prescribed 2 undertakings, the CEAA requires an EA if a project 3 is likely to have an effect requiring the issuance 4 of prescribed authorizations by the federal 5 government. 6 Now, these authorizations are 7 called "triggers" because they trigger an EA, and 8 they include, for example, a permit issued by the 9 Department of Fisheries and Oceans under the 10 federal Navigable Waters Protection Act for a 11 marine terminal that would interfere with marine 12 navigation. 13 They also include an authorization 14 issued by DFO under the federal Fisheries Act for 15 destruction of fish habitat or the killing of fish 16 by means other than fishing, both of which could 17 result from the construction of a marine terminal 18 or long-term quarrying next to the marine 19 environment. 20 Now, the EA under CEAA is 21 generally conducted by the federal department 22 responsible for the trigger. This department is 23 called "the responsible authority". 24 Like the NSEA, an EA under the 25 CEAA assesses a project's environmental effects,</p>	<p>1 This is why both statutes provide 2 for the possibility of public hearings when certain 3 criteria are met. 4 For example, we're looking at an 5 excerpt from the expert report of Robert Connelly, 6 which shows that under the CEAA all projects 7 subject to EA are required to undergo, at the very 8 least, a screening or a comprehensive study. 9 Now, a screening is required for 10 any project subject to an EA under the CEAA that is 11 not subject to a comprehensive study. A 12 comprehensive study is a more involved EA process 13 than a screening, and it is required for projects 14 subject to EA under the CEAA that are listed in 15 what is known as the Comprehensive Study List 16 Regulations. 17 Now, these are larger projects 18 that are assumed to be capable of causing 19 significant environmental damage. Projects on the 20 list include: Marine terminals, like the one 21 proposed for the Whites Point project, that can 22 handle very sells larger than 25,000 dead weight 23 tons. 24 Projects on the comprehensive 25 study list also include a quarry, like the Whites</p>

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<p>1 Point quarry, with a production capacity of over a 2 million metric tonnes per annum.</p> <p>3 Now, screenings and comprehensive 4 studies, they don't entail public hearings. They 5 are conducted on paper by the proponent and the 6 responsible authority. But if a project has 7 potential for significant adverse environmental 8 effects or where public concerns warrant, its EA 9 can be referred from a screening or a comprehensive 10 study to a review panel, which entails public 11 hearings.</p> <p>12 Now, this can happen at any time 13 in the EA process. It can happen at the end of a 14 comprehensive study or screening, during a 15 comprehensive study or screening, or before a 16 comprehensive study or screening has commenced.</p> <p>17 A review panel is independent of 18 and autonomous from the government, the proponent, 19 or any other stakeholder.</p> <p>20 Canada's expert Robert Connelly in 21 his report has explained that the review panel 22 members must be unbiased and free of any conflict 23 of interest relative to a component and a project, 24 and have knowledge or experience relevant to the 25 anticipated environmental effects of a project.</p>	<p>1 A secondary, related purpose, is 2 to legitimize government decisions about proposals. 3 Opponents of a project that gets approved, and 4 supporters of a project that gets rejected, are 5 more likely to accept the outcome if they have been 6 given a chance to have their say.</p> <p>7 Now, Canada and the claimants 8 disagree on much in this case, but we can agree 9 that this passage aptly captures the important 10 objectives of the review panel process.</p> <p>11 Now, a second feature of the EA 12 regimes to keep in mind is that of harmonization, 13 which recognizes the shared federal-provincial 14 jurisdiction over the environment in Canada.</p> <p>15 Projects like the Whites Point 16 project can require an EA under more than one EA 17 regime. The provincial and federal governments can 18 agree to harmonize; that is, to carry out one EA 19 meeting the informational and decision-making 20 requirements of each involved jurisdiction.</p> <p>21 Now, the ability to harmonize is 22 what allowed a CEAA review panel to be conducted as 23 a joint review panel operating pursuant to the CEAA 24 and the NSEA in the case of the Whites Point EA.</p> <p>25 Now, harmonization results in</p>
<p>1 Now, the review panel facilitates 2 public participation in the EA by allowing the 3 public to comment on the factors to be assessed and 4 the materials that were prepared by the proponent 5 and by ultimately holding public hearings.</p> <p>6 Once these steps are completed, 7 the review panel then makes recommendations to 8 government decision-makers on the basis of 9 information gathered during the public review.</p> <p>10 Government decision makers then 11 review the record and recommendations and make an 12 EA decision.</p> <p>13 Now, the robust public 14 participation afforded by a review panel serves an 15 integral role in any democracy, as does any public 16 hearing process. As the claimant's expert, 17 Mr. Estrin, himself has explained:</p> <p>18 "In my view, the main purpose 19 of hearings under CEAA and 20 provincial EA legislation is 21 to ensure that the public's 22 concerns about a proposal can 23 be heard and considered by 24 the proponent and the 25 government decision-makers."</p>	<p>1 improved efficiency, including the sharing of 2 expertise by each level of government, elimination 3 of duplication in information gathering, and the 4 ability of both governments to base decision-making 5 on the results of one information-gathering 6 process.</p> <p>7 Now, the benefits of harmonization 8 were not lost on the claimants in this case. In 9 fact, in their very first meeting with federal 10 officials, they asked for comment on whether or not 11 the federal and provincial EA can be done as a 12 joint effort.</p> <p>13 Now, the answer, as we know, was 14 indeed "yes".</p> <p>15 So with the basic factual 16 underpinnings of the Whites Point EA that I have 17 gone over and key features of the EA regimes in 18 mind, let's now turn to some of the key points and 19 decisions that were made in the Whites Point EA 20 process.</p> <p>21 Now, the first step in any EA 22 process is for the proponent to inform government 23 officials of what it proposes to do. The 24 claimants' project manager, Paul Buxton, did this 25 by submitting this rudimentary draft project</p>
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<p>1 description to NSDEL on September 30, 2002. 2 Now, this draft spoke of a 3 land-based construction, which was the quarry, and 4 a marine-based construction, which was the marine 5 terminal. 6 It also made clear that quarrying 7 would last from 30 to 50 years with approximately 8 10 acres or 4 hectares of quarry being opened each 9 year. It also made clear that 40 to 50 shipments 10 of crushed aggregate would be shipped out of the 11 Digby Neck each year in ships measuring up to 225 12 metres in length. 13 Now, the submission of this draft 14 initiated a series of steps culminating in 15 government decisions regarding the EA of the Whites 16 Point project. 17 Nova Scotia and federal officials 18 met to discuss the proposal on December 3rd, 2002, 19 and even though they were just presented with a 20 draft project description, it was immediately 21 apparent that the proposed project engaged several 22 EA considerations which were set out in the DFO 23 email that you see before you prepared the day 24 after this meeting. 25 First, the Navigable Waters</p>	<p>1 description making it clear the project would also 2 require an EA under the NSEA due to the size of the 3 quarry, after visits to the project site were 4 conducted and preliminary views on the potential 5 environmental effects of the project were 6 formulated, and after the outcry of public concern 7 over the project continued to mount, all of those 8 initial observations that I just went over were 9 considered and analyzed and discussed, debated 10 within both the Nova Scotia and federal 11 governments, and given the project's potential 12 environmental effects, the public concerns these 13 engaged and the requirement for an EA at both 14 provincial and federal levels, senior officials in 15 NSDEL and DFO recommended to their respective 16 ministers that the project should be assessed by a 17 review panel conducted jointly under the Nova 18 Scotia and federal EA regimes. 19 The wheels for a review panel were 20 then set in motion when DFO Minister Robert 21 Thibault referred the project to the federal 22 Minister of the Environment, David Anderson, for 23 referral to a review panel on June 26th, 2003. 24 And just over a month later, 25 Minister Anderson confirmed the Whites Point</p>
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<p>1 Protection Permit required for the marine terminal 2 would trigger an EA under the Canadian 3 Environmental Assessment Act, and the size of the 4 marine terminal met the threshold under the 5 comprehensive study list regulations the project 6 would require at the very least a comprehensive 7 study. 8 Second, due to the size, extent, 9 duration, environmental issues and extensive public 10 concern over the proposal, DFO may wish to kick the 11 project up to a panel review. 12 Third, as an EA would be required 13 under provincial and federal law, given the 14 benefits to be realized by harmonization that I 15 have described earlier, a joint review option was 16 being explored. 17 Now, these were the observations 18 of the on-the-ground officials at the very first 19 intergovernmental meeting on the project on 20 December 3rd, 2002. 21 Five months later, after the 22 proponents filed an application for the marine 23 terminal, after it was determined that the marine 24 terminal application triggered an EA under the 25 CEAA, after the proponents filed a complete project</p>	<p>1 project would be assessed by a Joint Review Panel. 2 Now, I want to pause for a moment 3 and take you back to one of those overarching 4 considerations that I noted at the outset, 5 specifically, how the claimants' case is long on 6 dramatic assertions, but short on facts. 7 I am pausing here to do so, 8 because one of the claimants' primary complaints 9 appears to be that the Whites Point project was 10 referred to a Joint Review Panel. 11 Now, instead of acknowledging how 12 and why the facts that I have just described 13 warranted the referral, the claimants' take is that 14 the referral was unjustified and an element of the 15 conspiracy to ensure the failure of the Whites 16 Point project. 17 Many other allegations here are 18 directed at the DFO minister that I just mentioned, 19 Robert Thibault, who made the referral. If there 20 is central bad guy in the claimant's story, its 21 Minister Thibault. 22 The claimants' pleadings are 23 loaded with inflammatory allegations against him, 24 that his office abused its power by interfering in 25 the work of government officials working on the EA,</p>

<p style="text-align: right;">Page 144</p> <p>1 that he used his position to make the EA take as 2 much time and be as difficult and as expensive as 3 possible. 4 But this is nothing more than 5 unsubstantiated spin, and the spin is not borne out 6 by the facts, and I want to cite but two examples 7 here to provide you of a flavour of their approach. 8 At paragraph 759 of the claimants' 9 memorial, they allege: 10 "The Minister of Fisheries 11 and Oceans was advised by his 12 officials that the Department 13 did not have the legislative 14 authority to carry out the 15 Minister's desire to control 16 this environmental review." 17 Now, here we have DFO officials 18 apparently telling their Minister to back off, that 19 he didn't have the authority to allegedly control 20 the EA, but when you look at the document cited in 21 support, the June 25th, 2003 briefing note DFO 22 prepared recommending referral of the EA to a 23 review panel, it says nothing of the sort. 24 This document doesn't speak to any 25 desire by Minister Thibault to "control this</p>	<p style="text-align: right;">Page 146</p> <p>1 But in support the claimants' cite 2 to Minister Thibault's June 26th, 2003 letter to 3 the Minister of the Environment, referring the 4 Whites Point project for referral to a review 5 panel. 6 Now, you can see the letter on the 7 screen. It is not clear how this letter supports 8 the allegation that Minister Thibault used his 9 political position to carry out some deception or 10 even what the deception was. It is a standard 11 letter explaining the potential effects of the 12 Whites Point project and why these warranted 13 referral of the project to a review panel. 14 Now, I will note at this point 15 that in light of all of these allegations in the 16 claimants' memorial, Mr. Thibault, who is now a 17 private citizen and no longer serves as a member of 18 parliament, was compelled to file an affidavit in 19 this arbitration to explain his role in decision 20 making in the Whites Point EA and to address the 21 claimants' absurd account of his involvement. 22 And here is what Robert Thibault 23 has sworn under oath to be true. First, in 24 paragraph 14 of his affidavit: 25 "I wanted to be informed</p>
<p style="text-align: right;">Page 145</p> <p>1 environmental review", and it most certainly 2 doesn't advise him that he didn't have the 3 authority to carry out such a desire. 4 What the note did was explain the 5 reasons why the Whites Point project could be 6 referred to a review panel and, in light of these 7 facts, it recommended to Minister Thibault, that 8 such a referral could be made. It doesn't come 9 close to supporting the claimants' loaded language 10 and nor do the facts of this case. 11 If Minister Thibault really wanted 12 to control the review, why would he refer it to an 13 independent review panel over which he would have 14 no control? 15 Take a look now at paragraph 500 16 of the claimant's memorial where they allege it was 17 Minister Thibault who used his political position 18 to deceive the Minister of Environment to look into 19 a marine terminal that would harmfully alter, 20 disrupt or destroy fish habitat, destroy fish and 21 interfere substantially with navigation. 22 Now, here we have more loaded 23 language alleging that Minister Thibault used his 24 political position to deceive another cabinet 25 minister in connection with the Whites Point EA.</p>	<p style="text-align: right;">Page 147</p> <p>1 about the Whites Point EA for 2 a simple reason. This was a 3 major development in my 4 electoral district and I 5 wanted to make sure that I 6 stayed informed of events so 7 that neither I nor my staff 8 would be surprised by claims 9 being made about the project 10 by my constituents. I was, 11 however, at all times aware 12 of the need to let officials 13 complete their work. At no 14 time did I ever direct or 15 otherwise interfere with the 16 work of these officials, nor 17 did I ever make a decision 18 before they requested one 19 from me." 20 In paragraph 15, Mr. Thibault 21 states that he: 22 "... never provided any 23 direction to officials 24 regarding blasting on the 25 proposed quarry, the scope of</p>

<p style="text-align: right;">Page 148</p> <p>1 the project or the assessment 2 or the type of assessment 3 that was most appropriate, 4 nor did I, nor to the best of 5 my knowledge, anyone on my 6 staff ever request that any 7 decision on the project be 8 delayed or dealt with in a 9 manner that was different 10 than the normal course. In 11 fact, I am at a loss to 12 understand why anyone would 13 believe that slowing down the 14 process would be in my 15 interest. There was nothing 16 to be gained by my avoiding 17 making a decision on the 18 project, and I certainly 19 never expressed that there 20 would be." [As read] 21 In paragraph 16, Robert Thibault 22 states: 23 "The only comment that I 24 made, both to my own staff 25 and publicly to the press,</p>	<p style="text-align: right;">Page 150</p> <p>1 might have been allegations 2 of bias because of my role as 3 the local MP, regardless of 4 whether the conclusion came 5 out in favour of or against 6 the proposed development." 7 Now, given the serious nature of 8 the claimants' allegations and their apparent 9 importance to this claim, we are puzzled as to why, 10 of all of the fact witnesses that have testified on 11 behalf of Canada in the arbitration, the claimants 12 chose not to call Robert Thibault to be 13 cross-examined. This evidence that I have just 14 recited stands unchallenged. 15 Whatever the claimants' reasons, 16 all that they have put before you are the type of 17 unsubstantiated and misleading allegations that I 18 have just described, allegations that don't stand 19 against Mr. Thibault's sworn testimony in his 20 affidavit, testimony that he was prepared to defend 21 in this forum. 22 Now, let's move back to the next 23 steps in the Whites Point environmental assessment 24 process. This is the establishment of the Joint 25 Review Panel.</p>
<p style="text-align: right;">Page 149</p> <p>1 was that I would not use the 2 Fisheries Act or the CEAA to 3 'kill the project'. I made 4 clear that my only interest 5 was in a full and fair 6 environmental assessment of 7 the proposal that strictly 8 complied with the rules, did 9 not cut any corners and 10 allowed for meaningful public 11 participation." 12 Then finally in paragraph 19, 13 Mr. Thibault states that: 14 "While it was not the reason 15 that I agreed to make the 16 referral, I also believed 17 that the independent nature 18 of a review panel was the 19 best way to assess a 20 contentious project located 21 in my riding and directly 22 affecting my constituents. I 23 was certainly aware that if 24 DFO had conducted the 25 assessment itself, there</p>	<p style="text-align: right;">Page 151</p> <p>1 With the decision that the Whites 2 Point EA would be referred to a panel review, NSDEL 3 and CEAA officials set about establishing the JRP 4 by preparing the draft Joint Review Panel agreement 5 and terms of reference. 6 Now, the JRP agreement appears on 7 the screen, and we will be looking at it in the 8 coming days, but for now I will just note that this 9 document serves as a type of constitution for the 10 Joint Review Panel. 11 The JRP agreement itself explains 12 the legislative basis for the review and the 13 requirements of the panel report which, as the 14 product of a joint review, had to satisfy the 15 information-gathering requirements of the NSEA and 16 the CEAA. 17 Now, the terms of reference which 18 are attached to the JRP agreement, they set the 19 parameters of the review, including the scope of 20 the project to be assessed and the factors to be 21 considered. 22 Now, again, these factors had to 23 generate sufficient information to meet the 24 decision-making requirements of each jurisdiction. 25 The public and the proponent were given the</p>

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<p>1 opportunity to comment on the draft JRP agreement 2 and terms of reference in the fall of 2003, but 3 before it could be finalized, the Bilcon side of 4 the Global Quarry Products Partnership requested a 5 delay in the constitution of the JRP in February of 6 2004 in order to resolve corporate issues relating 7 to its partnership with Nova Stone.</p> <p>8 Now, these issues were resolved 9 five months later when Bilcon notified officials 10 that its partnership with Nova Stone had been 11 dissolved and that it would be the sole proponent 12 of the project.</p> <p>13 So the JRP agreement was then 14 updated, and both it and the panellists that were 15 appointed to the Whites Point JRP were announced to 16 the public on November 5th, 2004.</p> <p>17 Now, here I want to pause again to 18 highlight the claimants' take on the three JRP 19 members, which is just as negative as their take on 20 Minister Thibault. The claimants allege that the 21 panel was not comprised of persons with the 22 requisite professional credentials and experience.</p> <p>23 They further allege that the 24 Governments of Nova Scotia and Canada had the 25 political purpose of preventing the export of</p>	<p>1 process included almost 60 days of public hearings 2 and culminated in the Sable Gas JRP's 3 recommendation for project approval.</p> <p>4 Canada's expert witness in this 5 arbitration, Lawrence Smith, who sits behind me, 6 served as lead counsel for the proponent in the 7 Sable Gas EA, and he will be available later on to 8 answer any questions that you might have about his 9 experiences in a JRP process chaired by 10 Dr. Fournier.</p> <p>11 Now, the Whites Point JRP also 12 included Dr. Gunter Muecke, a professor emeritus in 13 geochemistry, geology and environmental studies at 14 Dalhousie University.</p> <p>15 Dr. Muecke was a former member of 16 the JRP established for the EA of the Kelly's 17 Mountain Quarry and Marine Terminal in 1991. This 18 is a Nova Scotia project similar to the Whites 19 Point project that is described in the affidavit of 20 Neil Bellefontaine, one of Canada's witnesses that 21 we will be hearing from next week.</p> <p>22 The JRP also included Dr. Jill 23 Grant, the director of Dalhousie's school of 24 planning. Now, as is explained in the affidavit of 25 Christopher Daly, Dr. Grant's expertise, which</p>
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<p>1 Canadian aggregate to the United States and that to 2 implement their scheme, they appointed to the JRP 3 persons known to be biased anti-development 4 activists.</p> <p>5 Now, here are more fantastic 6 assertions, but no facts to substantiate the 7 existence of a scheme, nor that the panellists were 8 biased anti-development activists.</p> <p>9 What the facts do disclose is that 10 the JRP members were qualified, they were 11 unbiased, and they were possessed of the required 12 expertise.</p> <p>13 They were, first, Dr. Robert 14 Fournier, a professor of oceanography at Halifax's 15 Dalhousie University. Now, Dr. Fournier was 16 appointed chair of the Whites Point JRP. He had 17 served several years earlier as the chair of the 18 five-member Joint Review Panel that assessed the 19 Sable Gas projects.</p> <p>20 Now, the Sable Gas projects were 21 proposed by a consortium of US investors and they 22 entailed the collection and the processing and 23 shipment by pipeline of natural gas from Nova 24 Scotia to US markets.</p> <p>25 This multi-jurisdictional EA</p>	<p>1 included the cultural context of community 2 planning, social impact assessment and site 3 planning for sustainable development, was relevant 4 to the potential social-economic effects of the 5 project which, as we have seen, would be an 6 important component of this environmental 7 assessment..</p> <p>8 Now, these three individuals had 9 the requisite experience to serve, and in stark 10 contrast to what the claimants now plead, just 11 three weeks after their appointment, Mr. Buxton, 12 Bilcon's project manager, is recorded to have 13 stated in a public meeting that if "they", that is 14 Bilcon, had the option to choose, they may well 15 have chosen these professionals.</p> <p>16 Now, moving on, once the JRP was 17 constituted, it then took the required steps to 18 engage the public and gather information from 19 Bilcon on the potential environmental effects of 20 the Whites Point project.</p> <p>21 I want to highlight some of the 22 key steps in the JRP's process, but I pause here 23 briefly to note that Bilcon chose not to retain a 24 leading environmental consulting firm that would 25 typically be called upon to represent a proponent</p>

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<p>1 by this point in the process.</p> <p>2 It, rather, chose to conduct the</p> <p>3 EA through its project manager, Mr. Buxton, who,</p> <p>4 with respect, doesn't appear to have had past</p> <p>5 experience in preparing an EA for a proponent whose</p> <p>6 project was to be assessed by a Joint Review Panel.</p> <p>7 Canada's expert, Lawrence Smith,</p> <p>8 is an EA practitioner who has represented multiple</p> <p>9 proponents in JRP proceedings, and he has described</p> <p>10 the apparent shortcomings in Bilcon's approach in</p> <p>11 his first expert report and how these impacted the</p> <p>12 Whites Point EA.</p> <p>13 Now, turning to the process</p> <p>14 itself, at each and every point of this process,</p> <p>15 Bilcon was afforded adequate notice and due process</p> <p>16 and it was treated fairly.</p> <p>17 Within one week of being</p> <p>18 announced, the JRP released draft environmental</p> <p>19 impact statement guidelines for Bilcon's review and</p> <p>20 for public comment. Now, EIS guidelines are</p> <p>21 detailed instructions on the information regarding</p> <p>22 the environmental effects of a proposed project</p> <p>23 that a proponent is to provide in its environmental</p> <p>24 impact statement or EIS.</p> <p>25 The EIS is the cornerstone</p>	<p>1 impact statement, and this was followed by a period</p> <p>2 during which members of the public and government</p> <p>3 officials commented on Bilcon's EIS and during</p> <p>4 which the JRP issued information requests on issues</p> <p>5 not adequately addressed in the EIS.</p> <p>6 Bilcon was given full opportunity</p> <p>7 to respond to the public comments and to the JRP's</p> <p>8 information requests, many of which it simply</p> <p>9 ignored.</p> <p>10 It was also during this period</p> <p>11 that Bilcon, recognizing that it required some</p> <p>12 assistance in the process, retained AMEC, which was</p> <p>13 an international environmental consulting firm, to</p> <p>14 assist Mr. Buxton with the process.</p> <p>15 Finally, from June 16th to 30th,</p> <p>16 2007, the JRP held public hearings in Digby, Nova</p> <p>17 Scotia, hearings at which Bilcon and its</p> <p>18 representatives were again able to make the</p> <p>19 presentations they deemed necessary and to ask</p> <p>20 questions of every other presenter.</p> <p>21 Now, consistent with their take on</p> <p>22 every decision made in the Whites Point EA, the</p> <p>23 claimants are extremely critical of the Joint</p> <p>24 Review Panel, alleging that it imposed capricious</p> <p>25 and arbitrary demands on Bilcon.</p>
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<p>1 document used in the JRP process. EIS guidelines</p> <p>2 are naturally tailored to the issues engaged by the</p> <p>3 project and environment in issue, in addition to</p> <p>4 the informational requirements of the involved</p> <p>5 jurisdictions.</p> <p>6 From January 6th to 9th 2005, the</p> <p>7 JRP held scoping meetings at four locations in</p> <p>8 southwest Nova Scotia to facilitate public comments</p> <p>9 on the draft EIS guidelines. Now, Bilcon was</p> <p>10 welcome to participate in these meetings.</p> <p>11 Three months later the JRP issued</p> <p>12 the final EIS guidelines, giving Bilcon notice of</p> <p>13 the issues its EIS would have to address. The</p> <p>14 final EIS guidelines provided Bilcon was to address</p> <p>15 both the biological impacts of the project, but</p> <p>16 also its human impacts, including its impact on</p> <p>17 factors such as community profile, the economy,</p> <p>18 human health and community wellness, and social and</p> <p>19 cultural patterns.</p> <p>20 Now, these latter requirements,</p> <p>21 again, aren't surprising given that the NSEA and</p> <p>22 CEAA require an EA to consider effects of the</p> <p>23 project on socioeconomic conditions.</p> <p>24 Now, in April 26th, 2006, after</p> <p>25 almost 13 months, Bilcon filed its environmental</p>	<p>1 Now, the requirements Bilcon was</p> <p>2 asked to fulfil were neither arbitrary nor</p> <p>3 capricious, but were no doubt perceived as such by</p> <p>4 a proponent that does not appear to have</p> <p>5 appreciated the nature of the process in which it</p> <p>6 was engaged. The record reveals a proponent that</p> <p>7 assumed it was in a mere permitting process, that</p> <p>8 it was entitled to a permit, when at the end of the</p> <p>9 day and on the basis of information gathered during</p> <p>10 the EA, a decision had to be made as to whether or</p> <p>11 not the project should be allowed to proceed.</p> <p>12 And their flawed understanding of</p> <p>13 the process is well documented. For example, just</p> <p>14 a few weeks after the JRP was appointed, the</p> <p>15 minutes of a public meeting provide that Mr. Buxton</p> <p>16 explained the following. Mr. Buxton noted this</p> <p>17 project is a legal project and there is nothing in</p> <p>18 law to prevent this project from going ahead.</p> <p>19 He noted there are hoops to jump</p> <p>20 through and satisfy to obtain permits, but there is</p> <p>21 nothing to say that the quarry can't proceed at</p> <p>22 Whites Cove.</p> <p>23 And then in a later presentation</p> <p>24 to four ministers of the government of Nova Scotia,</p> <p>25 Bilcon explained its view that the federal and</p>

<p style="text-align: right;">Page 160</p> <p>1 provincial environmental assessment acts are 2 clearly in place to determine the specific terms 3 and conditions which must be adhered to by a 4 proponent for the project to receive permitting. 5 Now, these assertions are simply 6 not correct. An EA conducted under the federal or 7 provincial EA regimes is not just a mere permitting 8 process. It is, rather, used to gather information 9 about the expected future consequences of a project 10 to allow for government decision-makers to make an 11 informed decision as to whether they should take 12 action that would allow the project, as its been 13 proposed, to proceed. 14 But if these are the types of 15 assumptions that the claimants took into the EA 16 process, if in their minds the EA was nothing more 17 than hoops to jump through to get a permit or that 18 a proponent just needed to cobble something 19 together to satisfy the system, well, it is not 20 surprising that they take issue with what was 21 required of them, but this doesn't mean that their 22 complaints or characterizations of the process are 23 either accurate or justified. 24 Now, after the JRP completed its 25 information-gathering, they prepared a report</p>	<p style="text-align: right;">Page 162</p> <p>1 Project." 2 Now the JRP issued its report on 3 October 22nd, 2007. And, as we know, it 4 recommended that the Whites Point project should 5 not be approved. 6 Its recommendation was based on 7 the following conclusions: That the project would 8 have an adverse effect on the people, communities 9 and economy of Digby Neck and Islands, whose core 10 values support the principles of sustainable 11 development based on the quality of the local 12 environment; that the project would undermine 13 community-driven economic development planning and 14 threaten an area recognized and celebrated as a 15 model of sustainability by local, regional, 16 national and international authorities; and that 17 the imposition of a major long-term industrial site 18 would introduce a significant and irreversible 19 change to Digby Neck and Islands, resulting in 20 sufficiently important changes to the community's 21 core's values to warrant the Panel assessing them 22 as a Significant Adverse Environmental Effect that 23 cannot be mitigated. 24 The claimants and their experts 25 make much of the three words "community's core</p>
<p style="text-align: right;">Page 161</p> <p>1 detailing its recommendations to government 2 decision-makers. 3 I pause here to highlight that the 4 record shows the JRP to have been hindered in its 5 efforts by the quality of the information that had 6 been provided by Bilcon. In its report, the JRP 7 noted that: 8 "In many ways the information 9 provided by the Proponent was 10 inadequate for the 11 requirements of an 12 environmental assessment, 13 that the Proponent declined 14 to provide some of the 15 information requested by the 16 Panel... and that a more 17 adequate EIS document and 18 responses to information 19 requests would have 20 facilitated the review 21 process." 22 And that: 23 "The accumulation of concerns 24 about adequacy leads the 25 Panel to question the</p>	<p style="text-align: right;">Page 163</p> <p>1 values" into these pleadings. They have 2 characterized them as a fabrication over which 3 Bilcon was given no notice. But even the 4 claimants' expert, Mr. Estrin, agrees that effects 5 on a community's core values are socioeconomic 6 effects, and the passages I just cited from the 7 report make it clear that the JRP concluded the 8 Whites Point project would undermine the very 9 socioeconomic conditions existing on the Digby Neck 10 that I described earlier, and that given the 11 fundamental inconsistency between the project and 12 the local environment, there was nothing that could 13 be done to mitigate this significant adverse 14 environmental effect. 15 This was a factor that the JRP was 16 entitled and, indeed, required to consider under 17 both the NSEA and the CEAA, and its recommendation 18 to reject the project on this ground was made well 19 within its mandate. 20 Now, as I have explained, in every 21 EA a decision has to be made on the basis of the 22 information that's been gathered as to whether 23 permits should be issued or approvals granted that 24 would allow the project or activity in question to 25 proceed.</p>

<p style="text-align: right;">Page 164</p> <p>1 In the case of the Whites Point 2 EA, as two governments were carrying out the EAs, 3 two decisions had to be made. 4 These decisions were independent 5 of one another, in that each government had its own 6 decision to make in accordance with its own 7 legislation. 8 However, the ability of the Whites 9 Point project to proceed was dependent on both 10 governments deciding that it should be approved. 11 Nova Scotia made its decision 12 first. On November 20th, 2007, Mark Parent, the 13 Minister of NSDEL, notified Mr. Buxton in a 14 personal phone call and in writing that he would be 15 accepting the JRP's recommendation. 16 Now, this decision rendered the 17 federal decision that had to be made moot as the 18 project could not proceed at this point under Nova 19 Scotia law. 20 But as the federal government was 21 still required to respond to the report under the 22 CEAA, it did so a month later, confirming that 23 Canada had accepted the recommendations of the 24 Joint Review Panel. 25 Now, as they have with the rest of</p>	<p style="text-align: right;">Page 166</p> <p>1 on a whole host of matters that need not be 2 debated, as they are irrelevant to the outcome of 3 the EA process that I just described. 4 I want to briefly touch on four 5 here. First, we anticipate that there will be much 6 focus on decisions made regarding a 3.9 hectare 7 quarry for which Nova Stone, Bilcon's Canadian 8 partner, was a proponent at the outset of plans for 9 the Whites Point project. 10 Now, it is important to note that 11 Mr. Nash's comments today regarding blasting 12 setbacks and Mr. Buxton's interactions with DFO in 13 2002 and 2003 were in relation to this 3.9 hectare 14 quarry. In many instances, he confused and 15 conflated decisions and comments made in respect of 16 the 3.9 hectare quarry with decisions and comments 17 made in respect of the Whites Point project, in 18 particular, in slides 58 to 60 of his presentation. 19 Now, Nova Stone applied for the 20 3.9 hectare quarry separately from the larger 21 Whites Point project. As this map shows, the 3.9 22 hectare quarry was contained within the property 23 that had been leased for the Whites Point project 24 site. 25 The claimants expend so much time</p>
<p style="text-align: right;">Page 165</p> <p>1 their story, the claimants allege these decisions 2 were the final act in a scheme to bring about the 3 predetermined outcome that the Whites Point project 4 was to fail, but if such a scheme existed, it was 5 both multi-jurisdictional and incredibly 6 bipartisan. By this point, the process had spanned 7 five years and several provincial, and federal 8 governments led by different ministers from 9 different political parties. 10 And as implausible as such a 11 scheme is, the claimants' complaints about this 12 phase of the EA don't detract from the fact that 13 the decisions fell squarely within each 14 government's mandate and were reasonable in light 15 of the panel's recommendation. 16 Now, what I have provided to you 17 thus far is an overview of the salient facts of the 18 Whites Point EA, and it is on the basis of these 19 facts that you are going to need to decide the 20 claimants' claims. 21 Before turning to these claims, 22 though, I want to revert to my comments at the 23 outset regarding those overarching considerations 24 that we would like you to keep in mind, in 25 particular, my comment that the claimants focussed</p>	<p style="text-align: right;">Page 167</p> <p>1 and effort complaining about decisions made 2 regarding the 3.9 hectare quarry that one might 3 think this was the project they had proposed. It 4 was not. 5 What it was was a small operation 6 for which Nova Stone obtained an industrial 7 approval from NSDEL on April 30th, 2002, well 8 before the draft project description was filed for 9 the larger project. 10 They did so because quarries under 11 four hectares are not undertakings under the NSEA 12 that require a EA. They only require an industrial 13 approval. 14 Now, essentially the claimants 15 wanted to get a head start through Nova Stone's 3.9 16 hectare quarry in developing the Whites Point 17 project. 18 In fact, the final project 19 description for the Whites Point project showed 20 Nova Stone's 3.9 hectare quarry to be entirely 21 contained within the larger Whites Point project, 22 and the site of infrastructure for the larger 23 project including a sedimentation retention pond 24 and quarry buildings. 25 The claimants advance a number of</p>

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<p>1 merittless allegations over this 3.9 hectare quarry. 2 They challenge DFO's involvement in the review of 3 blasting on the 3.9 hectare quarry, notwithstanding 4 the potential impact of this activity on fisheries 5 issues.</p> <p>6 They complain that Nova Stone 7 wasn't allowed to operate the 3.9 hectare quarry, 8 notwithstanding it was on the very land and 9 entailed the very activities to be assessed by the 10 JRP in the EA of the Whites Point project.</p> <p>11 They claim their inability to 12 conduct a test blast on the 3.9 hectare quarry 13 denied them data needed for the JRP process, 14 notwithstanding that they didn't need an 15 operational quarry to conduct a simple test blast.</p> <p>16 So while these allegations are all 17 groundless, they are also irrelevant to what you 18 have to decide, because the claimants didn't come 19 to Nova Scotia to operate a 3.9 hectare quarry. 20 They came to operate the Whites Point project.</p> <p>21 Now, the lack of importance of the 22 3.9 hectare quarry to the realization of their plan 23 is no better illustrated by the fact that they 24 chose to abandon the 3.9 hectare quarry on May 1st, 25 2004, three years before the JRP hearings, as part</p>	<p>1 decision on the misguided notion that DFO had no 2 authority over the quarry element of the Whites 3 Point project, and, hence, no jurisdiction to 4 include it in the scope of project for the purposes 5 of the EA.</p> <p>6 The claimants characterize DFO's 7 scope of project determination as unusual and 8 unlawful. They are wrong. DFO's scope of project 9 decision was both rational and legally correct, but 10 the most apt characterization for the decision in 11 this case is, in our view, irrelevant.</p> <p>12 Why? Because no matter what, the 13 Whites Point project required EAs under both the 14 NSEA and the CEAA. Given the harmonized approach 15 that was to be taken, the scope of project for the 16 EA had to be broad enough to meet the informational 17 needs of both jurisdictions.</p> <p>18 Further and finally, in the end, 19 the scope of project was not decided by DFO. It 20 was decided by the Nova Scotia Minister of NSDEL 21 and the federal Minister of the Environment in the 22 agreement establishing the JRP.</p> <p>23 Now, the claimants and their 24 experts also challenge how the Joint Review Panel 25 conducted the EA process, for example, that it</p>
<p>1 of the corporate reorganization that I have alluded 2 to earlier.</p> <p>3 Now, in the end, also, the JRP's 4 recommendation that the project should not be 5 approved, it wasn't related to data that could be 6 derived from conducting a test blast on the 3.9 7 hectare quarry site. It was based on the JRP's 8 findings regarding the project's significant 9 adverse environmental effects, including its 10 inconsistency with socioeconomic development on the 11 Digby Neck.</p> <p>12 So in the coming days, please ask 13 yourselves: Does the issue of the 3.9 hectare 14 quarry matter in the end? We say that the answer 15 is "no" and that much paper and hearing time could 16 have been saved had the claimants not fixated so 17 much on this issue.</p> <p>18 Now, another debate we anticipate 19 in the coming days, and Mr. Nash has confirmed it 20 for us this morning, will relate to DFO's 21 preliminary decision in April of 2003 that the 22 scope of the Whites Point project for the purposes 23 of the EA would include the marine terminal and the 24 quarry.</p> <p>25 The claimants challenge this</p>	<p>1 misapplied EA concepts like the precautionary 2 principle, adaptive management and cumulative 3 environmental effects. Now, again, we disagree 4 with all of these claims.</p> <p>5 Canada's expert, Lawrence Smith, 6 when he testifies, can explain for you while 7 they're all unfounded, but they are also simply not 8 debates on which we need to spend hearing time, 9 because no matter how they might be resolved, the 10 claimants provide no explanation that but for these 11 issues, the outcome of the Whites Point EA would 12 have been different.</p> <p>13 Finally, the claimants challenge 14 the constitutionality of the federal government's 15 decision to accept the Joint Review Panel's 16 recommendation.</p> <p>17 While we are of the view these 18 arguments have no basis, they are again irrelevant, 19 as Nova Scotia's prior rejection of the Whites 20 Point project meant that, no matter what, the 21 project could not proceed.</p> <p>22 Now, let's turn to the legal 23 issues that the Tribunal will have to decide in 24 this arbitration. They fall under three general 25 headings: First, the jurisdictional bars to the</p>

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<p>1 claimants' claims; second, the claim that Canada 2 violated its minimum standard of treatment 3 obligation under Article 1105; and, third, the 4 claim that Canada violated its national treatment 5 and MFN obligations under Articles 1102 and 1103.</p> <p>6 Now, the first key legal issue 7 that the Tribunal will have to address is whether 8 it has jurisdiction over a number of claims in 9 light of certain threshold provisions in the NAFTA, 10 in particular, claims relating to Nova Stone's 3.9 11 hectare quarry, claims that are time barred, claims 12 regarding the JRP's administration of the EA, and 13 claims pertaining to measures that didn't cause the 14 claimants' damage.</p> <p>15 We will review each of these. 16 Let's first consider measures relating to Nova 17 Stone's 3.9 hectare quarry.</p> <p>18 Now, I have already explained why 19 the claimants' complaints here are really 20 irrelevant to what you have to decide, but they 21 also face jurisdictional bars.</p> <p>22 First, under NAFTA Article 1101, 23 paragraph 1, a tribunal only has jurisdiction to 24 consider measures relating to investors of another 25 party or investments of investors of another party.</p>	<p>1 the claimants challenge is NAFTA Article 1116, 2 paragraph 2, which provides for a time bar to 3 certain claims in this case.</p> <p>4 Article 1116, paragraph 2, 5 specifically provides that a claimant may not make 6 a claim if more than three years has elapsed from 7 the date on which it first had knowledge of the 8 alleged breach and resulting damage.</p> <p>9 Let me recap some key dates here 10 that are relevant to the three-year time bar under 11 Article 1116, paragraph 2.</p> <p>12 First, the disputing parties have 13 agreed that the commencement date of this 14 arbitration was June 17th, 2008. As such, the 15 Tribunal doesn't have jurisdiction to entertain 16 claims relating to measures for which the claimants 17 had knowledge of the alleged breach and resultant 18 loss more than three years prior to this date, 19 i.e., prior to June 17th, 2005.</p> <p>20 And there are several such 21 measures. First, the evidence is overwhelming that 22 for any and all measures relating to Nova Stone's 23 3.9 hectare quarry, the claimants first knew of any 24 alleged breach and loss incurred well in advance of 25 June 17th, 2005.</p>
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<p>1 Measures that don't relate to the 2 claimants or their investments cannot be considered 3 by a NAFTA tribunal.</p> <p>4 Now, the claimants take great 5 liberties with the facts here. They are fond of 6 asserting that the industrial approval issued for 7 the 3.9 hectare quarry was Bilcon's. It was not.</p> <p>8 As we can see, it was Nova 9 Stone's. Nova Stone applied for and was issued the 10 industrial approval for the 3.9 hectare quarry, and 11 under Nova Scotia law, it couldn't be transferred 12 without Ministerial consent.</p> <p>13 So any measures relating to the 14 industrial approval related to Nova Stone. The 15 fact that Bilcon entered into a business 16 relationship with Nova Stone after issuance of the 17 approval doesn't mean that measures taken with 18 regards to the 3.9 hectare quarry related to 19 Bilcon.</p> <p>20 As measures relating to Nova 21 Stone's industrial approval did not relate to the 22 claimants, they are beyond the Tribunal's 23 jurisdiction.</p> <p>24 A second jurisdictional bar to the 25 Tribunal's consideration of certain measures that</p>	<p>1 In fact, as I noted, the 3.9 2 hectare quarry was voluntarily abandoned as of May 3 1st, 2004, 13 months prior to the June 17, 2005 4 cutoff date.</p> <p>5 No measures could have been taken 6 with respect to the 3.9 hectare quarry after May 7 1st, 2004, let alone after June 17, 2005, and no 8 measures that had been taken with respect to the 9 3.9 hectare quarry could have possibly continued 10 into the three-year time period, because this 11 project was a dead issue by May 1st, 2004.</p> <p>12 Several other claims are similarly 13 time barred, including the claimants' claim 14 pertaining to Minister Thibault's June 26, 2003 15 referral of the Whites Point project to a review 16 panel, a measure that pre-dated the time bar cutoff 17 by 24 months.</p> <p>18 The claimants' claims pertaining 19 to DFO's April 14th, 2003 determinations that the 20 Whites Point project would require, at the very 21 least, a comprehensive study and that the quarry 22 element of the project should be included in the 23 scope of project for the purposes of the EA are 24 similarly time barred. They are measures that 25 pre-dated the time bar cutoff by 26 months.</p>

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<p>1 Now, none of these measures 2 warrant a finding of a NAFTA breach in the first 3 place, but putting this issue aside, each was known 4 to the claimants prior to June 17, 2005, and to the 5 extent that they resulted in the claimants 6 incurring additional cost or expense, well, the 7 claimants knew this as well before June 17, 2005.</p> <p>8 These claims are accordingly 9 time-barred.</p> <p>10 Now, as I have noted, the 11 claimants also challenge how the Whites Point JRP 12 conducted the EA, but the acts of the Joint Review 13 Panel, a non-governmental body composed of private 14 citizens, are not measures adopted or maintained by 15 a party, as required by NAFTA Article 1101, 16 paragraph 1, and, hence, are not attributable to 17 Canada in international law.</p> <p>18 Now, the claimants' response to 19 this jurisdictional bar has been, to say the least, 20 confused. They have alleged that the JRP is an 21 organ of Canada, that it exercised delegated 22 governmental authority, and that it acted under 23 Canada's instructions.</p> <p>24 Now, each allegation ignores the 25 fundamental nature of a JRP and the facts of this</p>	<p>1 loss or damaged could possibly flow from the 2 federal decision as required by Article 1116, 3 paragraph 1.</p> <p>4 Let's turn briefly now to the 5 substantive failings of the claimants' claims. 6 First, the claimants allege that governmental 7 measures taken in the Whites Point EA and the acts 8 of the JRP violated Canada's minimum standard of 9 treatment obligation under NAFTA Article 1105.</p> <p>10 This article provides that: 11 "Each party shall accord to 12 investments of investors of 13 another party treatment in 14 accordance with international 15 law, including fair and 16 equitable treatment and full 17 protection and security." 18 With respect to the claimants' 19 Article 1105 claim, for now we simply wish to make 20 three points clear. First, the FTC note, the Free 21 Trade Commission's note of interpretation of 22 Article 1105, defines the substantive content of 23 the obligation by providing that the obligation 24 prescribes the customary international law minimum 25 standard of treatment of aliens as the minimum</p>
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<p>1 case. The JRP is and was not an organ of Canada. 2 The JRP was not exercising delegated governmental 3 authority with respect to the acts that the 4 claimants allege are NAFTA breaches, nor did the 5 JRP act under Canada's control or instructions at 6 any time.</p> <p>7 Its acts are accordingly not 8 attributable to Canada for the purposes of this 9 case.</p> <p>10 Finally, the claimants challenge 11 governmental acts that, by virtue of acts preceding 12 them, were incapable of causing them any alleged 13 damage. As NAFTA Article 1116, paragraph 1 14 provides that a claim may be submitted only where a 15 claimant has incurred loss or damage by reason of, 16 or arising out of, an alleged breach, measures not 17 capable of causing loss or damage are beyond the 18 Tribunal's jurisdiction.</p> <p>19 Now, here we are referring to the 20 federal government's December 17th, 2007 acceptance 21 of the JRP's recommendation. As I noted earlier, 22 Nova Stone's decision to reject the Whites Point 23 project one month earlier rendered the federal 24 decision moot.</p> <p>25 But it also meant that no alleged</p>	<p>1 treatment of treatment to be afforded to 2 investments of investors of another party.</p> <p>3 Now, the claimants have advanced a 4 number of novel theories as to why this Tribunal 5 should be the first to ignore the content of the 6 FTC note and to accept their interpretation of 7 NAFTA Article 1105.</p> <p>8 My colleagues will address the 9 intricacies of the claimants' theories in argument, 10 but for now I will simply say the note provides, 11 pursuant to NAFTA Article 1131, paragraph 2, the 12 interpretation of Article 1105 that this Tribunal 13 must follow.</p> <p>14 Second, the threshold for a 15 violation of the minimum standard of treatment is 16 extremely high. It is not one that converts a 17 proponent's disappointment into an international 18 wrong.</p> <p>19 It also isn't one that calls for 20 second guessing of government decision-making, 21 especially the type of decisions that have to be 22 made in the EA process, which are heavily-dependent 23 upon scientific analysis and expertise.</p> <p>24 Finally, consider the actual 25 measures in issue. Once you get beyond the</p>

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<p>1 universally negative gloss that the claimants have 2 cast upon them, it is clear that they are nothing 3 more than the decisions made in EA processes every 4 day.</p> <p>5 They were neither shocking nor 6 were they egregious in light of the facts of this 7 case, which I have just described. They are the 8 type of decisions that, if a proponent really takes 9 issue with them, are typically addressed at the 10 time they are made with officials administering the 11 EA process or in Canada's domestic courts.</p> <p>12 They don't belong in this forum, 13 and they simply don't, not on their own or 14 collectively, breach the minimum standard 15 established by Article 1105.</p> <p>16 Let's now turn to the claimants' 17 other claim that Canada breached its national 18 treatment and MFN obligations of Articles 1102 and 19 1103.</p> <p>20 Now, these provisions require that 21 treatment accorded to investors or investments of a 22 NAFTA party must be no less favourable than that 23 accorded, in like circumstances, to Canadian 24 investors or investments or to the investors or 25 investments of another NAFTA party or non-NAFTA</p>	<p>1 with respect to treatment, the claimants draw 2 haphazard comparisons between treatment accorded by 3 the federal government and Nova Scotia government 4 and the Whites Point EA, and that accorded by 5 governments to relevant proponents of other EAs, 6 often in other provinces, upending what must be 7 inherent in the notion of discrimination, that it 8 must be the same government actor or actors 9 according the allegedly discriminatory treatment.</p> <p>10 Second, the claimants must 11 discharge the burden of proving that the treatment 12 was less favourable. This is the claimants' 13 burden, not Canada's. Now, the claimants do 14 identify differences in individual instances of 15 treatment accorded to EA proponents, but different 16 does not automatically equate to less favourable.</p> <p>17 All that it really confirms is 18 that given the factors influencing each EA, no two 19 EAs will ever proceed in exactly the same way.</p> <p>20 Finally, the treatment in issue 21 must have been accorded in "like circumstances", 22 the requirement that brings us to the claimants' 23 theory that all EA proponents are automatically in 24 like circumstances.</p> <p>25 Now, the implication of this</p>
<p>1 party.</p> <p>2 Article 1102 and 1103 are intended 3 to protect against nationality-based 4 discrimination, and there is not a shred of 5 evidence in this case that the claimants suffered 6 this in the Whites Point EA.</p> <p>7 Now, the claimants seem to think 8 that Canada breached its obligations under these 9 provisions because, after gaining access to tens of 10 thousands of documents from over 70 EAs conducted 11 across Canada, they have been able to identify some 12 differences in the treatment accorded to other EA 13 proponents under very different circumstances.</p> <p>14 But merely identifying differences 15 in the conduct or the outcome of EA processes, 16 which are inherently context-dependent, simply does 17 not cut it.</p> <p>18 The claimants bear the burden of 19 making out a national treatment claim and MFN 20 claim, and this is to demonstrate that they were 21 accorded treatment less favourable than that 22 accorded to other EA proponents in like 23 circumstances.</p> <p>24 They failed to discharge their 25 burden, and let me briefly explain why. First,</p>	<p>1 theory is that it would be impossible for 2 government officials to conduct an effective EA 3 process, as any differences with treatment accorded 4 in other EAs across the country could violate the 5 NAFTA.</p> <p>6 More is required than blithely 7 stating that like circumstances exist because two 8 proponents are subject to the EA process.</p> <p>9 Now, as I have already noted, EAs 10 are highly context-dependent. Consideration must 11 be given to the factors influencing why the 12 treatment in issue was accorded, for example, 13 differences in the nature of the projects in issue 14 or the environments in which two projects are to be 15 located, or in the level of public concern that has 16 been engaged, or in the quality of the information 17 that has been provided by two EA proponents.</p> <p>18 These differences can result in 19 differences in treatment and explain why like 20 circumstances don't exist. We aren't saying 21 circumstances have to be identical, just "like", 22 and to demonstrate like circumstances you must look 23 at why certain treatment was accorded.</p> <p>24 Now, this is why it is 25 inappropriate for claimants to claim a NAFTA</p>
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<p>1 violation merely on the basis of differences in the 2 treatment accorded in the Whites Point EA to that 3 accorded in EAs of diamond mines in the tundra of 4 the Northwest Territories, or a port facility in 5 Vancouver or liquid natural gas terminals in heavy 6 industrial zones.</p> <p>7 It also explains why the claimants 8 are wrong to claim a NAFTA breach arising from the 9 treatment accorded in the government reviews of 10 several smaller, shorter-term and unlike projects 11 carried out in Tiverton, which is a small fishing 12 village down the Digby Neck from the Whites Point 13 project site that we heard about earlier this 14 morning.</p> <p>15 Now, these government reviews 16 were, first, NSDEL's review of an application by a 17 Nova Scotia company to operate a small 1.8 hectare 18 quarry at Tiverton. They were also DFO's two 19 screening level EAs on repairs made to the public 20 infrastructure at Tiverton, specifically repairs to 21 the Tiverton wharf and dredging and improvements 22 made to the Tiverton Harbour.</p> <p>23 Now, the claimants make much of 24 the Tiverton project in their pleadings, and they 25 did earlier today, so I want to make a few points</p>	<p>1 public support. This is to be contrasted with the 2 outright opposition engaged by the Whites Point 3 project.</p> <p>4 Now, the claimants also seem to 5 want to compare the Tiverton quarry with Nova 6 Stone's 3.9 hectare quarry proposal, but this, too, 7 is inappropriate, as the Tiverton quarry wasn't the 8 first step in the construction and the operation of 9 a 50-year quarrying for export project, the likes 10 of which the Digby Neck had never seen.</p> <p>11 It entailed a few months of 12 blasting for wharf and for harbour repairs, and 13 then it would be done.</p> <p>14 And with respect to repairs to the 15 Tiverton wharf and the dredging and improvements to 16 the Tiverton harbour, these two small projects 17 simply didn't engage the wide array of 18 environmental and socioeconomic effects and 19 concerns that had been engaged by the Whites Point 20 project.</p> <p>21 It is true that the dredging of 22 the Tiverton harbour required limited blasting in 23 the water, but this activity was subjected to 24 workable and effective mitigation measures that 25 were determined through the EA process.</p>
<p>1 about them clear now.</p> <p>2 First, the Tiverton quarry. Yes, 3 it was a quarry and, yes, it was located down the 4 Digby Neck from Whites Point, but that is where the 5 similarity between the two projects ends.</p> <p>6 Now, as I have noted, the Tiverton 7 quarry footprint was all of 1.8 hectares. The 8 footprint of the proposed Whites Point quarry at 9 152 hectares was over 80 times larger.</p> <p>10 Blasting on the Tiverton quarry 11 was to be limited to a few blasts to generate rock, 12 the Tiverton wharf and harbour projects, as opposed 13 to what was proposed for the Whites Point project, 14 blasting and processing of aggregate, the 15 construction and the use of a massive marine 16 terminal, and weekly visits from huge super tankers 17 all over a 50-year period.</p> <p>18 Now, blasting on the Tiverton 19 quarry was also to be conducted significantly away 20 from the marine environment than what was proposed 21 for initial blasting at Whites Point.</p> <p>22 Further, blasting on the Tiverton 23 quarry, as it was in furtherance of improvements to 24 essential pieces of the public infrastructure of a 25 fishing village, a wharf and a harbour, received</p>	<p>1 Moreover, the Tiverton wharf and 2 harbour projects were integral to the local 3 economy, unlike the Whites Point project proposal, 4 and the repairs that had to be carried out to them 5 simply didn't give rise to any public opposition.</p> <p>6 So while the claimants might 7 identify differences in the reviews conducted of 8 the Whites Point and Tiverton projects, the fact is 9 that given the nature of these projects, the 10 treatment in issue was accorded under different 11 circumstances and did not breach Canada's 12 obligation under NAFTA Article 1102.</p> <p>13 Well, this brings Canada's opening 14 statement to a close. I want to thank all of you 15 for your attention this morning -- or this 16 afternoon, and subject to any questions that the 17 Tribunal might have, we look forward to expanding 18 on the points that I have just highlighted and we 19 look forward to a productive and efficient hearing.</p> <p>20 Thank you.</p> <p>21 MR. LITTLE: I should add we will 22 be handing up binders of the PowerPoint 23 presentation that I just made.</p> <p>24 PRESIDING ARBITRATOR: Thank you 25 very much, Mr. Little.</p>

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<p>1 Okay, I think you were speaking 2 for just quite precisely 90 minutes, and you say 3 you are now followed by -- this is followed by 4 presentations. For how much time, approximately? 5 MR. APPLETON: He is distributing 6 them. 7 PRESIDING ARBITRATOR: Sorry. 8 MR. APPLETON: His presentation is 9 finished. 10 MR. LITTLE: That comprises 11 Canada's opening statement, Judge Simma, so we can 12 move on with the examinations. 13 PRESIDING ARBITRATOR: You used 14 the term that your colleagues would proceed or 15 continue. 16 MR. LITTLE: These are them. It 17 is the PowerPoint presentation I just presented. 18 They are hard copies of them. 19 PRESIDING ARBITRATOR: Thank you. 20 That was my misunderstanding. So I suggest that we 21 have a break. So I think there the time has come 22 for a break of 15 minutes which will take us 23 precisely to 3 o'clock. Thank you. 24 --- Recess at 2:46 p.m. 25 PRESIDING ARBITRATOR: So</p>		<p>1 a few questions about your witness statement today, 2 and I just want to go over a few things at the 3 beginning. 4 If you don't understand a question 5 I ask, just ask me to rephrase it. I want to make 6 sure I understand. Similarly, if I have 7 misunderstood something you said, just let me know. 8 I want to make sure we're all on the same page. 9 I don't expect to be going all 10 that long today, but if you do need a break at any 11 point, let me know and we will try to find a good 12 time for that, and also at this time I would like 13 to hand to you a smaller bundle of documents so we 14 don't have to take you through the eight or nine 15 exhibits. If I could ask Cheryl to come up and do 16 that, I think we have one for the complainant, as 17 well, and for the Tribunal members I think you have 18 yours already behind you. 19 Now, Mr. Clayton, the first 20 document in this bundle is the witness statement 21 attached to the claimants' memorial. If you take a 22 look at this witness statement, this is the witness 23 statement you filed in this arbitration. 24 A. Yes. 25 Q. If you could turn just for a</p>	
<p>1 Mr. Clayton, I welcome you in the witness stand so 2 to say. 3 MR. CLAYTON: Thank you. 4 PRESIDING ARBITRATOR: Could you 5 read the declaration that you have, should have in 6 front of you. 7 MR. CLAYTON: I solemnly declare 8 upon my honour and conscience that I will speak the 9 truth, the whole truly and nothing but the truth. 10 AFFIRMED: WILLIAM RICHARD CLAYTON, JR. 11 PRESIDING ARBITRATOR: Thank you. 12 I think the examination can go underway, a short 13 introduction. 14 MR. NASH: We have no questions 15 for direct. So Mr. Clayton can go directly into 16 cross-examination. 17 PRESIDING ARBITRATOR: So, yes. 18 MR. SPELLISCY: I am not going to 19 block the screen. Everybody can see the screen for 20 the Tribunal? 21 PRESIDING ARBITRATOR: Yes. 22 CROSS-EXAMINATION MR. SPELLISCY: 23 Q. Good afternoon, Mr. Clayton. 24 My name is Shane Spelliscy. I am counsel for the 25 Government of Canada. I am going to be asking you</p>	Page 189	<p>1 second, I want to just confirm something for the 2 record. If you could turn to the last page of this 3 witness statement, you will see -- it is on page 5. 4 You will see a line for -- a signature line for 5 yourself. You haven't signed this witness 6 statement; is that correct? 7 A. Apparently I haven't signed 8 this yet. 9 Q. So I take it, then, that you 10 drafted this witness statement? 11 A. No. This is my witness 12 statement. 13 Q. But just to confirm, and 14 maybe there is a signed copy on the record. I want 15 to confirm for the record that looking at this, 16 this is your testimony and there is not going to be 17 any difficulty in the witness statements later? 18 MR. NASH: Mr. President, there is 19 a signed copy of the witness statement. It is not 20 the one in the record, but it there is a signed 21 copy. 22 BY MR. SPELLISCY: 23 Q. That's great. If you could 24 take a look at it now, since this is the one in 25 your book, and this is the one that came with the</p>	Page 191

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<p>1 claimants' memorial, and confirm this is the 2 witness statement? 3 A. Yes, it looks like it. 4 Q. All right, thank you. Now, 5 let's turn, then, we've got that aside, to the 6 testimony that you have offered in this matter. I 7 want to start at the beginning and understand a 8 little bit about the investment that your family 9 made. 10 So did I understand Bilcon of 11 Delaware, this is one of the corporations that is 12 owned by members of your family; correct? 13 A. Yes, it is. 14 Q. In fact, it is owned by 15 yourself and your two brothers; correct? 16 A. Yes. 17 Q. Your father has no ownership 18 in Bilcon of Delaware? 19 A. No. 20 Q. And Bilcon of Delaware, that 21 is the sole shareholder of Bilcon of Nova Scotia; 22 correct? 23 A. Yes, it is. 24 Q. And, again, you and your two 25 brothers, you are the directors of Bilcon of</p>	<p>1 A. Yes. 2 Q. So in 2001, I think we have 3 heard earlier that you were approached by a company 4 about the possibility of investing in an aggregate 5 quarry and marine terminal in Nova Scotia; is that 6 right? 7 A. Yes. 8 Q. And at the time, your 9 companies were actually engaged in buying aggregate 10 from a quarry in New Brunswick; right? 11 A. One of our companies, yes. 12 Q. Now, you were buying from 13 this quarry, but you actually never invested into 14 Canada before; right? 15 A. No. We were buying from a 16 quarry and bringing it to New York. 17 Q. But you hadn't actually made 18 an investment into Canada before this? 19 A. No. 20 Q. In fact, your family had 21 never invested outside of the United States before; 22 correct? 23 A. No. 24 Q. So prior to this project, you 25 had no experience with actually trying to develop a</p>
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<p>1 Delaware; correct? 2 A. Yes. 3 Q. Your father is not a director 4 of Bilcon of Delaware? 5 A. Right. 6 Q. And the directors of Bilcon 7 of Nova Scotia, that is you and your brothers, as 8 well? 9 A. Yes, it is. 10 Q. And the officers of Bilcon of 11 Nova Scotia, that is solely you and your brothers, 12 as well? 13 A. Yes. 14 Q. So your father, then, didn't 15 actually exercise control over Bilcon of Nova 16 Scotia. This was a project that he left to you and 17 your brothers to run; correct? 18 A. For as much as he leaves it 19 to run, yes. 20 Q. But as a legal matter, your 21 brothers and -- your brothers and you are the 22 directors and the officers of the corporation; 23 right? 24 A. Yes. 25 Q. At all times; right?</p>	<p>1 major project in Canada; correct? 2 A. No. 3 Q. Now, the individual who 4 approached your family, that was Mr. Mark Lowe; 5 correct? 6 A. That's correct. 7 Q. You didn't know Mr. Lowe 8 prior to this contact, did you? 9 A. No. 10 Q. And now Mr. Lowe's company 11 that was called Nova Stone Exporters; right? 12 A. Yes, I believe so. 13 Q. And you didn't know of Nova 14 Stone Exporters prior to being contacted by 15 Mr. Lowe? 16 A. No. 17 Q. I think at this point, with 18 apologies to those on the Internet, they may see a 19 grey screen, but we are going to look at some 20 documents at this point in some of your witness 21 statements, so if you could change the feed over so 22 we can look at some documents. 23 I would like to look particularly 24 at your witness statement at paragraph 6 for now. 25 So this paragraph follows in your witness statement</p>

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<p>1 after you mentioned the 2001 contact by Nova Stone, 2 and you say, "after researching the investment 3 climate in Nova Scotia"; do you see that? 4 A. Yes, I do. 5 Q. And this was after you 6 were -- this research you did was after you were 7 contacted by Mr. Lowe, but before you actually 8 committed to make an investment in this company; 9 correct? 10 A. Yes. 11 Q. And what you cite here at the 12 end of that sentence, you will see where you talk 13 about what your research -- at the end of the 14 paragraph, you say -- your reference to the Nova 15 Scotia Department of Natural Resources, "Minerals: 16 A Policy for Nova Scotia"; correct? 17 A. In number 6? 18 Q. In footnote number 2, which 19 is at the end of paragraph 6 there. 20 A. Okay. Yes. 21 Q. That's the document that you 22 referred to when you say you were researching the 23 investment climate; correct? 24 A. I don't recall it directly. 25 Q. You don't recall reviewing</p>	<p>1 A. Well, there was a lot of 2 things I don't remember ten years ago. 3 Q. But I take it you remember 4 reviewing this document at the time the witness 5 statement was filed since it is referred to? 6 A. Not directly. 7 Q. All right. Well, let's just 8 take a quick look and let me ask you a general 9 question, as well. If you look at section 5 of 10 this document, which is on the next page and, in 11 particular, if you look at section 5.2, you will 12 see that this refers to an environmental assessment 13 process; correct? 14 A. Yes. 15 Q. So you were -- now, were you 16 aware, then, when you were doing your initial 17 research into the investment climate, that in fact 18 there would have to be an environmental assessment 19 of the project that you were looking at developing 20 in Nova Scotia? 21 A. Yes. We heard that. 22 Q. Now, I just want to flip back 23 to your witness statement again here in paragraph 24 6, and see if I can understand again. So you 25 didn't remember reviewing this document. When you</p>
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<p>1 that document and researching the investment 2 climate? 3 A. No. I don't recall that 4 document exactly. 5 Q. All right. If you look at 6 footnote 2 there, you reference a particular 7 section of that document. I am wondering if you 8 could turn to this policy right now where you have 9 it attached to the witness statement. 10 It is in Clayton Exhibit No. 2. 11 MR. NASH: Perhaps counsel could 12 direct the witness to where that is in the 13 materials, what tab it is under in the binder. 14 BY MR. SPELLISCY: 15 Q. Clayton Exhibit 2, as I said, 16 and it starts at page -- well, we're going to turn 17 to section 4, section 4.5. And if you turn to the 18 page marked on the bottom right as 744703, you will 19 see you cited this section 4.5, but there is no 4.5 20 in this document; correct? It ends at 4.4; right? 21 A. I assume so. 22 Q. And to be clear, though, then 23 you don't actually recall reviewing this document 24 prior to investing or making a decision to invest 25 in Nova Scotia?</p>	<p>1 say you were researching the investment climate in 2 Nova Scotia, do you remember any document you 3 reviewed in researching that investment climate? 4 A. Not directly, no. 5 Q. Did you review the Nova 6 Scotia Environment Act when researching the 7 investment climate? 8 A. Not that I recall. 9 Q. Would you have reviewed the 10 Canadian Environmental Assessment Act? 11 A. Not that I recall. 12 Q. Would you have reviewed any 13 documents, that you recall, discussing what those 14 Acts were? 15 A. No. 16 Q. I think at this point I am 17 going to start to discuss some of the information 18 that has been designated as confidential in this 19 arbitration, so I would ask the live feed be cut, 20 and then we can have the -- now, the live feed is 21 cut, do we actually have the ability to put the 22 documents on the screen still? Yes, we do, good. 23 --- Upon commencing confidential session under 24 separate cover at 3:25 p.m. 25 --- Upon resuming public session at 3:46 p.m.</p>

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<p>1 PRESIDING ARBITRATOR: Are we 2 on? Okay, we're on. 3 BY MR. SPELLISCY: 4 Q. Now, Mr. Paul Buxton 5 represented the partnership and Bilcon in its 6 attempts to develop this quarry in Nova Scotia; 7 correct? 8 A. Yes. 9 Q. And, now, he had actually 10 been working with Nova Stone and Mr. Lowe before? 11 A. Originally, yes. 12 Q. And before you became 13 partners with Nova Stone, you had never met 14 Mr. Buxton before? 15 A. No. 16 Q. You had no experience with 17 any of his operations or of any of his companies; 18 correct? 19 A. No. We did not know Paul. 20 Q. Now, if you turn to paragraph 21 12 of your witness statement-- and I will ask the 22 document to come up on the screen again -- you 23 describe Mr. Buxton as a professional engineer in 24 Nova Scotia and note that he headed the approvals 25 process for the Whites Point quarry; correct?</p>	<p>1 Q. You have to say "no" for the 2 record. 3 A. I'm sorry, no. 4 Q. At this time, then, you said 5 you were confident in him, but you didn't retain an 6 environmental consulting firm, then, to deal with 7 what the required environmental assessments were 8 going to be at this time in -- 9 A. No, we did not. 10 Q. -- 2002. Now, in your 11 witness statement, you describe how -- and it is in 12 paragraph 13 -- how Mr. Buxton met with Mr. Balser, 13 a Nova Scotia minister who was the representative 14 for Digby, many times in 2002; correct? 15 A. Yes. 16 Q. But in your witness statement 17 in the next paragraph, paragraph 17, you confirmed 18 that you didn't meet with Minister Balser until 19 June 24th, 2002; correct? 20 A. Yes. 21 Q. So then to be clear, by this 22 time that you had met with Minister Balser in June, 23 in fact, you had already entered into the letter of 24 intent with Nova Stone and you had actually already 25 registered the partnership Global Quarry Products;</p>
<p>1 A. Yes. 2 Q. Now, at the time that you 3 placed your trust and reliance in Nova Stone to do 4 this, and you said you weren't familiar with 5 Mr. Buxton, so then you weren't aware of whether or 6 not he ever headed an approvals process for a 7 project like this before; correct? 8 A. No. We met him through Nova 9 Stone. 10 Q. And when you met him through 11 Nova Stone, did you inquire with him as to whether 12 or not he ever headed an approvals process for a 13 project of this size before? 14 A. We felt that he was very good 15 candidate and we felt that he was -- you know, from 16 having dealt with him a little bit, that he was 17 good to go. 18 Q. But you knew that he had 19 never worked on a federal environmental assessment 20 before; correct? 21 A. Not really. 22 Q. You didn't ask whether or not 23 he worked on a federal environmental assessment for 24 your project? 25 A. (No answer.)</p>	<p>1 correct? 2 A. I don't recall the dates. 3 Q. Okay. We can go back and 4 look. We had just looked at them for a second. 5 You will recall, when we were looking at Exhibit 6 R-289, the date of that was March 28th, 2002, and 7 that is when it was signed and that was the first 8 letter of intent; correct? 9 A. Okay. 10 Q. And you will recall when we 11 looked at your Exhibit 3 to your witness statement, 12 that that was a letter of intent that was actually 13 signed on May of 2002; correct? 14 A. Okay. 15 Q. And then you recall we looked 16 very briefly at the formation of the partnership, 17 and that was at R-292, and that was the formation 18 of the partnership. The registration of the 19 partnership was on April 25th, 2002. Do you recall 20 that? 21 A. Okay. 22 Q. And so by the time that you 23 had met with Mr. Balser, all of these things had 24 occurred already. Bilcon had already signed a 25 letter of intent with Nova Stone to invest in this</p>
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<p>1 project; correct?</p> <p>2 A. Evidently.</p> <p>3 Q. Now, Mr. Balsler, he was the</p> <p>4 Minister of economic development in Nova Scotia.</p> <p>5 He was not the Minister of environment and labour</p> <p>6 at the time; right?</p> <p>7 A. I'm not sure.</p> <p>8 Q. Well, you say that Minister</p> <p>9 Balsler was supportive of the project; correct?</p> <p>10 A. Yes. He was very nice.</p> <p>11 Q. But you don't say, and</p> <p>12 nowhere in your testimony do you say, that he</p> <p>13 promised there would be no environmental assessment</p> <p>14 of the project?</p> <p>15 A. No, he did not.</p> <p>16 Q. He did not promise that,</p> <p>17 right. Nowhere in your testimony do you say he</p> <p>18 promised a specific outcome with respect to the</p> <p>19 project; correct?</p> <p>20 A. No, I don't think he would do</p> <p>21 that.</p> <p>22 Q. He didn't make any such</p> <p>23 representations to you at any time; right?</p> <p>24 A. No. He was very encouraging.</p> <p>25 He had just received these, as part of his mission</p>	<p>1 Q. So that is a year after, in</p> <p>2 fact, your meeting with Minister Balsler; correct?</p> <p>3 A. Yes.</p> <p>4 Q. That trip down to take this</p> <p>5 helicopter tour by Mr. Lizak didn't have anything</p> <p>6 to do with your meeting with Minister Balsler, other</p> <p>7 than the general sense he was encouraging of the</p> <p>8 project?</p> <p>9 A. I don't think the helicopter</p> <p>10 ride had anything to do with Balsler. It was</p> <p>11 natural resources.</p> <p>12 Q. Okay. Now, in your witness</p> <p>13 statement, you state at paragraph 20 at the very</p> <p>14 last -- before you get to the A, B and C, that:</p> <p>15 "Mr. Lizak provided to me</p> <p>16 documents referencing the</p> <p>17 following government</p> <p>18 policies."</p> <p>19 See that, A, B and C?</p> <p>20 A. Yes.</p> <p>21 Q. Did you review those</p> <p>22 documents when he gave them to you?</p> <p>23 A. Yeah. They were like, you</p> <p>24 know, pamphlets and policies that were being put</p> <p>25 forth to encourage investment.</p>
<p>1 from his new job, to do whatever he needed to do to</p> <p>2 bring jobs into his district, and that is what --</p> <p>3 it was kind of very soon to when we showed up that</p> <p>4 he was on a mission to bring in jobs.</p> <p>5 Q. But you understood that his</p> <p>6 mission to bring in jobs was still subject to</p> <p>7 environmental assessments in Nova Scotia?</p> <p>8 A. Yes. He didn't make any</p> <p>9 promises.</p> <p>10 Q. Right. Now, I want to get</p> <p>11 some timing, as well, down here, too, because in</p> <p>12 the opening I thought I heard that your counsel,</p> <p>13 Mr. Nash, had said that after you met with Minister</p> <p>14 Balsler and based on the encouragement he gave you,</p> <p>15 you sent Mr. Lizak down to Nova Scotia and took a</p> <p>16 helicopter tour.</p> <p>17 You talk about that helicopter</p> <p>18 tour in paragraph 19 and 20 of your witness</p> <p>19 statement. Perhaps we can turn there now.</p> <p>20 A. Yes.</p> <p>21 Q. And so if you look halfway</p> <p>22 down or three-quarters of the way down the</p> <p>23 paragraph, you will see that that helicopter tour</p> <p>24 was on June 4th of 2003; correct?</p> <p>25 A. Yes.</p>	<p>1 Q. I would like to -- at</p> <p>2 subparagraph (c) or subparagraph(c) of paragraph</p> <p>3 20, you mention the official policy of the</p> <p>4 Government of Nova Scotia to have efficient one</p> <p>5 window environmental assessments. Do you see that?</p> <p>6 A. Yes. They were talking about</p> <p>7 making the process more efficient.</p> <p>8 Q. And if you look down to the</p> <p>9 footnote, that is in Clayton Exhibit 8. So if we</p> <p>10 could just turn to Clayton Exhibit 8, which has the</p> <p>11 number 8 on it in your book. Is this the document</p> <p>12 that you remember Mr. Lizak giving to you?</p> <p>13 A. I don't recall it exactly.</p> <p>14 Q. Well, if you could just turn</p> <p>15 now to the table of contents, it is on the page</p> <p>16 little Roman numeral iii is where it begins.</p> <p>17 A. Mm-hm.</p> <p>18 Q. You will see this lays out</p> <p>19 the table of contents, and you will see there is a</p> <p>20 section called "Section 7. Environmental</p> <p>21 Assessment Process." Do you see that?</p> <p>22 A. Yes.</p> <p>23 Q. Okay. It says it begins on</p> <p>24 page 15. Can you turn to the last page of your</p> <p>25 exhibit here? You will see that you ended on page</p>

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<p>1 13. So this exhibit here is actually incomplete, 2 then. It doesn't include the environmental 3 assessment -- 4 A. Okay. 5 Q. -- regime there. Do you 6 remember if you reviewed the discussion of the 7 environmental assessment? 8 A. I don't recall that, no. 9 Q. Let's go back to paragraph 21 10 of your witness statement. You start paragraph 21 11 of your witness statement by saying: 12 "Based on all of these 13 actions, statements, 14 publications and documents, I 15 felt confident that investing 16 in Nova Scotia would be a 17 safe and predictable 18 venture." 19 Correct? 20 A. Yes. 21 Q. But, again, the documents 22 that you just referred to here, you only received 23 those in June of 2003; right? 24 A. I don't know. I assume so. 25 Q. Well, in the paragraph</p>		<p>1 actually been filed with the relevant Nova Scotia 2 and federal officials; correct? 3 A. I assume. 4 Q. You're not aware of exactly 5 when the project description was filed? 6 A. No. 7 Q. In fact, I think we saw the 8 slide. I think we had some discussion of it 9 earlier in one of the slides in Canada's opening, 10 but if I said to you the project description was 11 filed in March of 2003, would that sound right? 12 A. I'm not sure. 13 Q. Now, in fact, given all of 14 this that had already happened, the helicopter tour 15 that Mr. Lizak took, it wasn't really about the 16 Whites Point project, was it? 17 A. They covered a lot of 18 projects. I'm not sure if it was over Whites Point 19 or they were showing him alternatives to invest in. 20 Q. Mm-hm. 21 A. They were interested in 22 investing in more than one. 23 Q. When you say "they" were, you 24 say the Nova Scotia -- 25 A. Natural Resources.</p>	
<p>1 before, you testified or two paragraphs before you 2 testified that the helicopter tour was on June 4th, 3 2003. Is that your testimony? 4 A. Yes. 5 Q. And in paragraph 20, you said 6 that you discussed what Mr. Lizak received and said 7 he told me he received documents from government 8 staff and he provided to you these documents. So 9 that would be presumably after of course he met 10 with the staff; correct? 11 A. Yes. 12 Q. So you then received these 13 documents and publications in June of 2003, at the 14 earliest; correct? 15 A. I assume. 16 Q. So by this time, again, not 17 only had -- we have been through this. The 18 partnership had been formed; correct? 19 A. Yes. 20 Q. And in fact Bilcon had 21 already invested money into that partnership; 22 right? 23 A. Yes. 24 Q. And in fact by June of 2003, 25 the final project description for the project had</p>	<p>Page 209</p>	<p>1 Q. Natural Resources? 2 A. Yes. 3 Q. So you're not even sure that 4 this helicopter tour at all related to the Whites 5 Point project at all? 6 A. You will have to ask John. 7 Q. But your understanding from 8 him, and he reported to you, was in fact it 9 involved potentially other investments -- 10 A. Yes. 11 Q. -- in Nova Scotia that Bilcon 12 or the Clayton Group might make? Okay. 13 Now I want to come back to, then, 14 what you recall about the environmental assessment 15 process and with respect to your earlier 16 confirmation that you felt comfortable relying on 17 people like Mr. Lowe and Mr. Buxton. 18 At some point, you actually do -- 19 Bilcon actually does hire actual EA consultants; 20 correct? 21 A. Yes. 22 Q. And if we turn to the 23 document at tab R-317 in your book, this is an 24 email from a Ms. Josephine Lowry. Do you know who 25 she was?</p>	<p>Page 211</p>

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<p>1 A. I remember the name, but I 2 don't remember her, no.</p> <p>3 Q. But she was somebody who 4 worked for you at Bilcon Nova Scotia?</p> <p>5 A. I was really not involved day 6 to day. You know, that would be something Paul was 7 doing. I remember the name.</p> <p>8 Q. But in terms -- if we look at 9 the email, in the second email in that chain, which 10 she sends to Uwe Wittkugel on August 31st, you see 11 right above her signature she talks, "Paul and I", 12 which is Paul Buxton:</p> <p>13 "... feel a great deal more 14 comfortable with the entire 15 process now that AMEC is on 16 boards for guidance." 17 Do you see that?</p> <p>18 A. Yes.</p> <p>19 Q. So AMEC had been retained, so 20 you presumably could have been consulted on their 21 retention; correct?</p> <p>22 A. Yes.</p> <p>23 Q. So by August 2006, I take it 24 then that Mr. Buxton or Ms. Lowry, somebody at your 25 operations, had indicated to you that in fact they</p>	<p>1 those meetings of that liaison committee, did you?</p> <p>2 A. We went up there a few times 3 and had meetings with the locals, but I don't 4 remember if it was in that setting.</p> <p>5 Q. Now, at the hearing of the -- 6 you will recall there were several hearings held by 7 the Joint Review Panel, the hearing on scoping, and 8 there was the actual hearing. You didn't attend 9 any of those hearings?</p> <p>10 A. I don't think so.</p> <p>11 Q. Thank you. I don't have any 12 further questions for you.</p> <p>13 PRESIDING ARBITRATOR: Thank you, 14 Mr. Spelliscy.</p> <p>15 MR. NASH: I am going to ask 16 Mr. Clayton some questions on confidential matters, 17 so I would ask that the Internet be turned off.</p> <p>18 PRESIDING ARBITRATOR: Confidential 19 matters.</p> <p>20 --- Upon resuming confidential session under 21 separate cover at 4:01 p.m.</p> <p>22 --- Upon resuming public session at 4:15 p.m.</p> <p>23 PRESIDING ARBITRATOR: If I am 24 right, this concludes the witness examination of 25 you, Mr. Clayton. So let me just raise one</p>
<p>1 were no longer comfortable with the entire process 2 as it was; is that right?</p> <p>3 A. Paul was driving that. I 4 don't recall exactly.</p> <p>5 Q. Just to be clear here, if we 6 can get your recollection of these dates, this 7 retention, you will see this email is sent in 8 August of 2006; correct?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. Now, that was long 11 after the environmental assessment of the project 12 had started; right?</p> <p>13 A. Yes.</p> <p>14 Q. And in fact Bilcon had 15 already done its environmental impact assessment by 16 the time it had actually retained these 17 environmental consultants; correct?</p> <p>18 A. I assume.</p> <p>19 Q. Just a few more questions 20 here, one or two. You are aware that there was a 21 community liaison committee set up to engage with 22 the local population on the 3.9 hectare quarry; 23 correct?</p> <p>24 A. Yes.</p> <p>25 Q. You never attended any of</p>	<p>1 question; namely, the confidentiality with regard 2 to the written, to the transcript, because we are 3 going to have transcripts.</p> <p>4 Now, of course the transcripts are 5 not available to the general public. You will have 6 them, so the parties will have them.</p> <p>7 So would it be sufficient or would 8 the parties regard it as sufficient with regard to 9 keeping the pages of the transcript that were 10 excluded from the video, that if both sides confirm 11 that they will treat the confidential parts of the 12 transcript as "confidential information" within the 13 meaning of P.O. No. 2? Then we could just have you 14 agree on the record, and that would be fine.</p> <p>15 But you would have to consider 16 that as sufficient to secure the confidentiality. 17 So do you want to just think about that for a 18 moment, or...</p> <p>19 I think my point was clear; right?</p> <p>20 MR. APPLETON: Yes.</p> <p>21 Mr. President, this has been a way that has been 22 done in other tribunals already. We think that is 23 a very easy way to proceed and also very effective 24 to be able to deal with the objective, which is to 25 protect this information, but otherwise have the</p>

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<p>1 rest of the transcript public.</p> <p>2 I noticed from the transcript that</p> <p>3 the quite excellent court reporter has been</p> <p>4 identifying which sections have been confidential</p> <p>5 and which are not, and so I think that would make</p> <p>6 it easy to be able to deal with. So we would be</p> <p>7 very much in favour of this.</p> <p>8 PRESIDING ARBITRATOR: I saw you</p> <p>9 taking notes on the side. You put it in the</p> <p>10 transcript.</p> <p>11 MR. APPLETON: I did understand,</p> <p>12 though, there may be a lag time to permit this to</p> <p>13 be vetted by the parties. So my colleague,</p> <p>14 Mr. Dickson-Smith, has pointed that out to me. I</p> <p>15 am not sure what that lag time is, but it would be</p> <p>16 useful to identify that.</p> <p>17 So, in other words, for the</p> <p>18 confidential transcripts could be made available in</p> <p>19 the normal course, and the non-confidential</p> <p>20 transcripts would take whatever the lag time would</p> <p>21 be to make sure that we ensured that that material</p> <p>22 was not in the transcript. That's all.</p> <p>23 PRESIDING ARBITRATOR: I'm not</p> <p>24 sure I understood what you mean.</p> <p>25 In another case in which I was</p>	<p>1 suggests a 20-day period. I think that would</p> <p>2 probably be more than sufficient. It was exactly</p> <p>3 to make sure that -- we don't want to slow down the</p> <p>4 ability to do this arbitration, but at the same</p> <p>5 time we need to be able to protect that information</p> <p>6 for what would be made available on transcripts to</p> <p>7 the public. They would reflect exactly what is</p> <p>8 being live streamed now, and it is very important</p> <p>9 that the public has that access to the process.</p> <p>10 We just want to make sure that we</p> <p>11 deal with it in a responsible and fair manner.</p> <p>12 PRESIDING ARBITRATOR: So you</p> <p>13 would agree to the way that Mr. Spelliscy spelled</p> <p>14 out? So I think we can regard this problem as</p> <p>15 being solved, if you don't hear differently</p> <p>16 tomorrow. Okay.</p> <p>17 So let's have -- thank you,</p> <p>18 Mr. Clayton, once again.</p> <p>19 THE WITNESS: Thank you.</p> <p>20 PRESIDING ARBITRATOR: We will</p> <p>21 have a short break, I think, just five minutes. So</p> <p>22 we have a break until, what is it, 4:25, and then</p> <p>23 continue with the examination of Mr. Lizak.</p> <p>24 --- Recess at 4:20 p.m.</p> <p>25 --- Upon resuming at 4:28 p.m.</p>
<p>1 president, the problem was solved by issuing</p> <p>2 separate pages so that there is a separate</p> <p>3 manuscript, if you want, of the confidential</p> <p>4 conversation so that the official transcript did</p> <p>5 not contain -- it probably said -- I don't</p> <p>6 remember, but from now on confidential, and then</p> <p>7 you got the pages -- the parties got the page</p> <p>8 separate. So that would be the alternative.</p> <p>9 MR. SPELLISCY: I think from our</p> <p>10 perspective if the transcripts that come this</p> <p>11 evening and tomorrow morning we would treat as</p> <p>12 confidential, and then we would have a period of</p> <p>13 time afterwards, I think is what my client is</p> <p>14 talking about, to actually redact those</p> <p>15 transcripts, give our redactions to the court</p> <p>16 reporter, and then a confidential version of the</p> <p>17 transcript could be produced, but the ones we get</p> <p>18 tonight, surely, yes, the parties will treat them</p> <p>19 as the confidential versions.</p> <p>20 That is the way we have done it in</p> <p>21 other NAFTA arbitrations.</p> <p>22 PRESIDING ARBITRATOR: Would that</p> <p>23 be fine with you, Mr. Appleton?</p> <p>24 MR. APPLETON: That is what I was</p> <p>25 suggesting. In fact, the procedural orders</p>	<p>1 PRESIDING ARBITRATOR: Mr.</p> <p>2 Spelliscy, are you continuing?</p> <p>3 Well, it looks like we are</p> <p>4 complete again. Of course it is an experience I</p> <p>5 make as a public international lawyer, more or less</p> <p>6 frequently, that compliance is a relative thing.</p> <p>7 --- Laughter</p> <p>8 PRESIDING ARBITRATOR: Of course,</p> <p>9 I learn we won't have breaks for shorter times than</p> <p>10 ten minutes. That's probably more practical.</p> <p>11 Thanks for being back. And I welcome Mr. Lizak.</p> <p>12 Mr. Lizak, you should have in</p> <p>13 front of you a statement, a declaration for a</p> <p>14 witness. Would you be so kind and read it out.</p> <p>15 MR. LIZAK: I would.</p> <p>16 PRESIDING ARBITRATOR: Yes. The</p> <p>17 microphone is supposed to be green.</p> <p>18 MR. LIZAK: I solemnly declare</p> <p>19 upon my honour and conscience I will speak the</p> <p>20 truth, the whole truth, and nothing but the truth.</p> <p>21 AFFIRMED: JOHN LIZAK</p> <p>22 PRESIDING ARBITRATOR: Mr. Lizak,</p> <p>23 may I also remind you you have signed the</p> <p>24 statement, the assurance with regard to your not</p> <p>25 having heard other witness statements. That would</p>

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<p>1 only be of course Mr. Clayton before.</p> <p>2 THE WITNESS: I have signed that,</p> <p>3 sir, yes.</p> <p>4 PRESIDING ARBITRATOR: Thank you.</p> <p>5 EXAMINATION IN-CHIEF MR. NASH:</p> <p>6 Q. Thank you, Mr. President.</p> <p>7 Mr. Lizak, could you speak a bit about your</p> <p>8 occupational background.</p> <p>9 A. Yes. I am a professional</p> <p>10 geologist and mineral appraiser. I was a</p> <p>11 consultant for Bilcon on this particular project.</p> <p>12 I have been asked to come here</p> <p>13 today to provide some background information on the</p> <p>14 Whites Point project and to provide some assistance</p> <p>15 to the Tribunal, if need be.</p> <p>16 I have a bachelor's degree in</p> <p>17 fundamental science from Lehigh University with a</p> <p>18 specialty in geology and geotechnical engineering;</p> <p>19 a master's degree in geology from Purdue</p> <p>20 University.</p> <p>21 I also have postgraduate training</p> <p>22 in mineral economics, hydrogeology, and mining</p> <p>23 engineering. I am a licensed professional</p> <p>24 geologist in four states.</p> <p>25 I have roughly 35 years of</p>	<p>1 testimony in some litigation related to Hurricane</p> <p>2 Katrina in the Federal Court in New Orleans.</p> <p>3 I also represent quite a few</p> <p>4 international environmental groups. I work for the</p> <p>5 Nature Conservancy and the Trust for Public Land.</p> <p>6 I have been certified as an expert in numerous</p> <p>7 federal and state courts. I have also been</p> <p>8 appointed a court master to arbitrate mining</p> <p>9 litigation.</p> <p>10 I have numerous publications.</p> <p>11 Probably the one most relevant to this particular</p> <p>12 hearing is the publication titled "Aquifer</p> <p>13 Protection Within And Near Aggregate Operations".</p> <p>14 Q. I would like to go</p> <p>15 confidential, if we could, please.</p> <p>16 PRESIDING ARBITRATOR:</p> <p>17 Confidential.</p> <p>18 --- Upon resuming confidential session under</p> <p>19 separate cover at 4:20 p.m.</p> <p>20 --- Upon resuming public session at 4:24 p.m.</p> <p>21 PRESIDING ARBITRATOR: We are</p> <p>22 public again. Who are you?</p> <p>23 MR. EAST: I will introduce</p> <p>24 myself.</p> <p>25 --- Laughter.</p>
<p>Page 221</p> <p>1 experience in a whole host of projects, hundreds of</p> <p>2 projects in literally dozens of countries, numerous</p> <p>3 commodities.</p> <p>4 During that 35 years, I worked</p> <p>5 with Exxon Coal & Minerals, Inc. as a senior</p> <p>6 geologist. I also worked with British Petroleum in</p> <p>7 its mineral acquisition group.</p> <p>8 I was also the manager of</p> <p>9 regulatory affairs and chief geologist for the</p> <p>10 Millington Group of Companies. I also had quite a</p> <p>11 few projects in Canada ranging from tar sands in</p> <p>12 Alberta to gold projects in Timmins, construction</p> <p>13 materials projects in Ontario, and also industrial</p> <p>14 mineral projects in Maritimes, and also some coal</p> <p>15 projects in Cape Breton, for example.</p> <p>16 I have a rather diverse client</p> <p>17 base. Unlike a lot of my peers and my competitors,</p> <p>18 I don't work exclusively for the industry. My</p> <p>19 client base is fairly mixed. I do have a large</p> <p>20 number of Fortune 50 and smaller companies,</p> <p>21 privately-held companies, but I also work for</p> <p>22 state, local and federal governments.</p> <p>23 One of my major clients is the US</p> <p>24 Department of Justice, their environmental and</p> <p>25 resources group. I recently provided expert</p>	<p>Page 223</p> <p>1 MR. LIZAK: Somebody without a</p> <p>2 name.</p> <p>3 CROSS-EXAMINATION BY MR. EAST:</p> <p>4 Q. Yes. Good afternoon. My</p> <p>5 name is Reuben East. I am counsel at the</p> <p>6 Government of Canada. And, Mr. Lizak, I will be</p> <p>7 asking you a few questions this afternoon.</p> <p>8 But before I do, I just want to</p> <p>9 check that everyone has a copy of the core bundle</p> <p>10 that we provided to you. This is a set of</p> <p>11 documents that I will be asking you about today.</p> <p>12 I want to make sure that you, sir,</p> <p>13 have a copy of that. I want to make sure the</p> <p>14 claimants have a copy, and of course Members of the</p> <p>15 Tribunal, before we begin.</p> <p>16 A. Is that my witness statement?</p> <p>17 Q. It includes your witness</p> <p>18 statement, sir.</p> <p>19 A. Okay.</p> <p>20 Q. And exhibits. I will take a</p> <p>21 moment to ensure everyone has it before I begin.</p> <p>22 Well, I don't think -- I was going</p> <p>23 to ask a few questions about your professional</p> <p>24 background, but we had that introduction. So I</p> <p>25 will go straight into the matter.</p>

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<p>1 Mr. Lizak, other than evaluating 2 the viability of investing in a quarry site in Nova 3 Scotia, has the Clayton Group of Companies asked 4 you to evaluate the liability of a quarry site 5 elsewhere in Canada.</p> <p>6 A. They have.</p> <p>7 Q. Can you tell me where?</p> <p>8 A. I could. As I said, I 9 started, and my initial role was, to investigate or 10 to determine the quality and quantity, essentially 11 the suitability, of the Whites Point quarry project 12 for export to the United States.</p> <p>13 But as part of the process, we 14 wanted to get a very clear understanding of how 15 that operation, you know, fit into essentially the 16 competitive overview, and essentially was this the 17 best property? And as part of that undertaking, I 18 visited numerous sites within not only Nova Scotia 19 but also in British Columbia -- I'm sorry, also in 20 New Brunswick. And, if memory serves, I think we 21 even looked at a few possible joint venture 22 opportunities in New Brunswick, and possibly even 23 Labrador.</p> <p>24 I will give you an example. I 25 mean, not only did I look at a lot of sites -- and</p>		<p>1 2002.</p> <p>2 Q. And Mr. Lizak, in the course 3 of your work in the field or in developing a 4 report, do you typically carry and use a notebook? 5 6 A. Sometimes. I mean, well, 7 typically what I do, for example, if you look at 8 the attachments on my exhibit.</p> <p>9 Q. Yes.</p> <p>10 A. There is a core sheet, and 11 that is where the lion's share of the data goes, 12 but, yes, I make some field notes, sure.</p> <p>13 Q. So you usually take notes? 14 15 A. Yes.</p> <p>16 Q. And when you undertake an 17 assessment for a client, do you usually provide 18 periodic updates on your progress? 19 20 A. Definitely.</p> <p>21 Q. And do you typically update 22 by email or other written communications or... 23 24 A. I would say this particular 25 project, most of the update was probably face-to-face meetings at the client's headquarters.</p> <p>Q. Most, but do you recall if you would have also updated by email or letter or anything like that?</p>	
<p>1 I want to emphasize, you know, one of the most 2 extensive trips that I had was a trip that was 3 essentially established by the Nova Scotia 4 Department of Environment Resources -- I'm sorry, 5 Nova Scotia Department of Natural Resources, 6 Mr. Phil Finck set up a helicopter tour as part of 7 that we visited.</p> <p>8 Q. Sir, we will come to that. I 9 will ask questions about that. It was just again 10 to ask if you --</p> <p>11 A. Dozens, literally dozens of 12 operating greenfield and competitor sites.</p> <p>13 Q. And when you typically 14 complete an assignment for a client such as the 15 Clayton Group, do you typically produce a report 16 with your recommendations? 17 18 A. I do, sir, and I did in this 19 particular assignment.</p> <p>20 Q. And in respect of this 21 particular project, sir, that report was completed 22 in December 2002; correct? 23 24 A. Are you referring to Exhibit 25 1?</p> <p>Q. You could refer to Exhibit 1.</p> <p>A. Yes, yes, exactly, December</p>	Page 225	<p>1 A. Probably not a lot of email, 2 but, you know -- and probably not a lot of letters, 3 but maybe an occasional phone call, but, again, 4 pretty comprehensive face-to-face meetings in New 5 Jersey.</p> <p>6 Q. Mr. Lizak, your statement 7 indicates that your involvement in the Whites Point 8 project began in 2002; is that correct? 9 10 A. Yes.</p> <p>11 Q. According to your statement, 12 the purpose of your involvement was to evaluate for 13 the Clayton Group of companies the potential for 14 investment in the Province of Nova Scotia; correct? 15 16 A. That is correct.</p> <p>17 Q. Now, you have indicated in 18 your statement your involvement began in March of 19 2002, but on what date were you actually engaged by 20 the Clayton Group? I think we heard in an answer 21 just now that you indicated April 2002. I just 22 want to clear something up here. 23 24 A. It was somewhere around my 25 birthday, which was April 26th.</p> <p>Q. Okay.</p> <p>A. It would depend upon what the actual execution date on the contract was.</p>	Page 227

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<p>1 Q. So you would have signed a 2 contract then with the Clayton Group? 3 A. A consulting services 4 contract, yes, sir. 5 Q. Okay. And just to confirm 6 not necessarily the exact date, but would you say 7 that was in April of 2002; is that accurate? 8 A. I think so. Like I said, I 9 think it was around my birthday. 10 Q. Okay. Which you indicated 11 was April 26th? 12 A. 26th. 13 Q. Okay. Now, your first 14 meetings with Nova Scotia officials, in your 15 statement, you indicated were on April 29th and 16 April 30th of 2002; correct? 17 A. That sounds about right. 18 Again, not to -- because I know it was around my 19 birthday. 20 Q. Sure. That's not a problem. 21 We can confirm that. But if you look at paragraph 22 9 of your statement, sir, if you can turn to that 23 briefly, it is the first item in the bundle we 24 provided to you. It should be, in any event. 25 So again paragraph 9, sir, if you</p>	<p>1 had 13 meetings with the Nova Scotia's Department 2 of Natural Resources to discuss potential aggregate 3 investments; correct? 4 A. Correct. 5 Q. And your statement indicates 6 the precise dates in which these 13 meetings took 7 place; correct? 8 A. Yes, it does. 9 Q. And we've confirmed or you 10 confirmed that the earliest of those meetings was 11 April 29th, 2002? 12 A. Yes, it was. 13 Q. Okay. 14 A. I might have had a phone call 15 or two before that. As a matter of fact, I'm sure 16 I did to set up the logistics of the meetings. 17 Q. I see. But the meetings 18 themselves listed, the first one is April 29th. 19 Your statement was signed on July 8th of 2011; 20 correct? 21 A. Yes, it was. 22 Q. So that meeting would have 23 been almost nine years after you signed that 24 agreement or signed your statement, I should say; 25 correct?</p>
<p>1 could take a look at that, you will see there is a 2 footnote to that paragraph. If you look at the 3 footnote, you will see a list of dates for 4 meetings. Do you see that? 5 A. The one that is the paragraph 6 that starts "From 2002 to 2005". 7 Q. Correct. 8 A. Okay. 9 Q. And the first -- 10 A. Footnote number 2? 11 Q. I will just double check. I 12 think it is 3. 13 A. Okay. 14 Q. You would agree with me that 15 the first meetings are April 29th, April 30th, 16 2002? 17 A. Yes, I would. 18 Q. So, in effect, just to be 19 clear on this, your actual involvement began in 20 April of 2002, not March 2002; is that true? 21 A. I think there were some 22 preliminary discussions in March of 2002, just kind 23 of a general overview of a possible project in Nova 24 Scotia. 25 Q. And you state, sir, that you</p>	<p>1 A. Correct. 2 Q. Now, Mr. Lizak -- or 3 Mr. Lizak, pardon me, these are precise dates you 4 have indicated in your statement. Did you rely on 5 a calendar, notebook, anything written, electronic 6 to arrive at these dates? 7 A. I derived them from several 8 sources. I would say probably the most dependable 9 one is I went back and reviewed my billable 10 invoices. For tax purposes, I keep all of my 11 invoices and they're very detailed. So I would 12 have looked at that. 13 I also keep, you know, a simple 14 12-month calendar where I make a note on what I 15 did, when I had meetings, et cetera. There were 16 probably some notes in there, also. 17 Q. Just to confirm, then, 18 billable invoices, you mentioned a calendar, and in 19 addition there were probably some notes; is that 20 your evidence? 21 A. Correct. 22 Q. And in addition to the 23 meetings with members of the Nova Scotia's 24 Department Of Natural Resources, you also note in 25 your statement that you had further discussions</p>

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<p>1 with department officials by teleconference; 2 correct?</p> <p>3 A. Yes.</p> <p>4 Q. And you have also indicated 5 precise dates for those teleconferences, as well?</p> <p>6 A. I did, sir.</p> <p>7 Q. Does your statement attach 8 any documents in relation to either of the 13 9 meetings that you note in your statement, or the 10 teleconferences that you also mentioned in your 11 statement?</p> <p>12 A. Sorry, would you...</p> <p>13 Q. Sure. Did you attach any 14 documents to your statement in relation to the 15 meetings that you note took place with department 16 officials? That's with respect to paragraph 9 of 17 your statement. And then further on, we 18 established that your statement also indicates that 19 you had teleconferences with these same officials.</p> <p>20 And in respect of those 21 teleconferences, did you attach any documents, your 22 notes, the calendar and so on?</p> <p>23 A. No. What is attached are 24 essentially documents that were provided by the 25 Nova Scotia Department of Natural Resources, I</p>	<p>1 --- Upon resuming confidential session under 2 separate cover at 4:47 p.m.</p> <p>3 --- Upon resuming public session at 4:53 p.m.</p> <p>4 PRESIDING ARBITRATOR: We are back 5 in public.</p> <p>6 BY MR. EAST: 7 Q. Okay, very good. Mr. Lizak, 8 I would now like to turn back to your statement. 9 Sir, your evidence is that you 10 were told by Nova Scotia's Department of Natural 11 Resources that the province was encouraging of 12 investments of land-based quarries; correct.</p> <p>13 A. Correct.</p> <p>14 Q. And which specifically 15 included the Whites Point quarry site?</p> <p>16 A. Well, I didn't specifically 17 say that it included the Whites Point quarry site.</p> <p>18 Q. Okay?</p> <p>19 A. Just generally they were 20 encouraging tidewater development.</p> <p>21 Q. So they were generally 22 encouraging of investments in land-based quarries?</p> <p>23 A. Yes.</p> <p>24 Q. All right. You also state, 25 sir, that you relayed the Government of Nova</p>
<p>1 think a couple of letters, and that's it.</p> <p>2 Q. We will come to those.</p> <p>3 A. Okay.</p> <p>4 Q. I just wanted to confirm 5 there are no notes and so on attached in relation 6 to those meetings or those teleconferences?</p> <p>7 A. Correct.</p> <p>8 Q. Any reason why you didn't 9 attach those notes, calendars and so on, 10 information?</p> <p>11 A. No. I wasn't asked to. I 12 was simply asked to provide documents that were 13 submitted to me by the Department of Natural 14 Resources.</p> <p>15 Q. Thank you. Mr. Lizak, I 16 would now just like to turn to the Tribunal, 17 because I am about to ask some questions relating 18 to documents that are marked "confidential".</p> <p>19 PRESIDING ARBITRATOR: Okay. So 20 we will go off.</p> <p>21 MR. EAST: I grouped those in 22 together in convenience, and I think it is 23 appropriate we go off camera.</p> <p>24 PRESIDING ARBITRATOR: Just give 25 it a second.</p>	<p>1 Scotia's words of encouragement to the Clayton 2 Group; is that correct?</p> <p>3 A. That is correct.</p> <p>4 Q. Mr. Lizak, did any Nova 5 Scotia government official represent to you that 6 the project would not be subject to an 7 environmental assessment?</p> <p>8 A. I don't recall that they said 9 it would not. That was not my role in the project, 10 sir. My role was to look at the quarry, to rank it 11 in context of other quarries, and, like I said, to 12 participate in the environmental impact statement.</p> <p>13 Q. Sure. So I understand you're 14 describing your role, but do you recall whether any 15 official would have represented to you that the 16 project would not be subject to an environmental 17 assessment?</p> <p>18 A. No, I don't recall that.</p> <p>19 Q. Okay. Now, does your 20 statement attach any documents from officials of 21 the Nova Scotia's Department of Natural Resources 22 that solicit or ask for the investment of the 23 Clayton Group of Companies in the development of a 24 quarry and marine terminal at Whites Point?</p> <p>25 A. Are you asking me, sir, if</p>

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<p>1 these documents specifically mention the Whites 2 Point quarry?</p> <p>3 Q. Right. Not just the 4 documents, but also do you attach any documents 5 where officials are asking for that? Are there any 6 documents, whether they're publications or any 7 documents, period?</p> <p>8 A. Again, sir, what is the 9 context?</p> <p>10 Q. I will repeat that question. 11 A. Okay. 12 Q. Do any documents attached to 13 your statement from officials of the Nova Scotia's 14 Department of Natural Resources ask for or solicit 15 the investment of the Clayton Group of companies in 16 the development of a quarry and marine terminal at 17 Whites Point?</p> <p>18 A. No, not specifically the 19 Whites Point quarry.</p> <p>20 Q. Okay. Do any documents 21 attached to your statement ask for or solicit the 22 investment from, again, the Clayton Group in the 23 development of a quarry and marine terminal in the 24 Digby Neck?</p> <p>25 A. I want to be clear here. Are</p>	<p>1 quarry investment and specifically tidewater quarry 2 investment.</p> <p>3 Q. And most of the Government of 4 Nova Scotia publications you referred to are listed 5 in footnote 5 of your statement; is that right?</p> <p>6 A. Yes, I think that's fair, sir.</p> <p>7 Q. I would now like to take you 8 to some of those documents that you attach as 9 exhibits to your statement.</p> <p>10 A. Okay. 11 Q. Before we -- no, actually we 12 will go straight there. 13 Before I do, actually, pardon me, 14 just ask you if you are aware that several of these 15 publications that you have listed in this footnote 16 and attached to your statement predate the 17 enactment of the Nova Scotia Environmental 18 Assessment Act that was in place during the 19 assessment of the Whites Point quarry project.</p> <p>20 A. Again, sir, that wasn't my 21 role. I mean, I'm not an environmental expert, 22 and, you know,, my charge was not to concern myself 23 with the details of the environmental impact 24 statement.</p> <p>25 Q. Sir, just to confirm, I asked</p>
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<p>1 you asking me if any of these statements 2 specifically say or ask the Claytons specifically 3 to invest money in the Whites Point quarry, the 4 specific quarry?</p> <p>5 Q. Correct, or the Digby Neck. 6 A. You know, not specifically 7 Digby Neck, no. This was -- you know, generally 8 the encouragement was -- you know, obviously at 9 some point the province knew that we were working 10 on Whites Point.</p> <p>11 Q. Right. 12 A. But the encouragement was 13 broad based in terms of investment within the 14 province.</p> <p>15 Q. Okay. Now, you have alluded 16 to this and your statement indicates that Nova 17 Scotia's Department of Natural Resources did 18 provide you with some publications; is that 19 correct?</p> <p>20 A. Yes, sir. 21 Q. And your statement also 22 indicates that these publications, as I think you 23 said, but just to confirm, were encouraging of 24 investment generally in Nova Scotia?</p> <p>25 A. Generally, but specifically</p>	<p>1 you this question more generally before, but just 2 so I am clear, the exhibits that are attached to 3 this particular footnote, footnote 5, none of those 4 documents specifically solicit or ask for 5 investment of the Clayton Group, investment in 6 Whites Point or in the Digby Neck; is that correct?</p> <p>7 A. No. They don't specifically 8 ask Clayton for investment on that specific site.</p> <p>9 Q. If we could turn to Exhibit 3 10 in your bundle, it is dated November 1987; correct?</p> <p>11 A. Yes, it is. 12 Q. It its title is "Potential 13 Crushed Stone Deposits on Tidewater in Nova 14 Scotia"; correct?</p> <p>15 A. Correct. 16 Q. And you also referred to this 17 exhibit in your statement at paragraph 13 18 specifically, and indeed quote from it, don't you?</p> <p>19 A. Where do I do that, sir? 20 Q. I will give you an 21 opportunity to have a look at your statement. It 22 is at the beginning of the bundle?</p> <p>23 A. Okay. 24 Q. I referred to paragraph 13 of 25 your statement. There you quote from the document</p>

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<p>1 that we have just established as Exhibit 3. 2 A. Correct. 3 Q. If we could go back to 4 Exhibit 3, if you could turn to page 4 of that 5 document? 6 A. Okay. 7 Q. And, again, just so we're 8 clear on what these documents establish, if you 9 could look at the heading "Surface and Mineral 10 Rights", do you see that? 11 A. I do. 12 Q. And the second sentence 13 directly underneath that heading states, "It is 14 not", and the word "not" is underlined: 15 "... asking for or soliciting 16 proposals for the development 17 of the properties." 18 Is that correct? 19 A. That's correct. 20 Q. Now, you're generally 21 familiar with this document, sir? 22 A. Generally, yes. 23 Q. And this publication has been 24 prepared by the mineral development division of 25 Nova Scotia Department of Mines and Energy;</p>	<p>1 Q. In fact, just to be clear for 2 those reviewing that document, if you could turn to 3 page 8, that is where it is listed. Do you see 4 that? 5 A. I do. 6 Q. It indicates that White Point 7 is in fact located in Victoria County. Do you see 8 that? 9 A. Yes. 10 Q. Are you generally familiar 11 with the geography of Nova Scotia and where it 12 might be? 13 A. Somewhat. It is not Digby 14 County. 15 Q. No. It indicates further 16 down that it is near the Cabot Trail. Are you 17 aware that the Cabot Trail is in fact on Cape 18 Breton Island? 19 A. I think. I think I have 20 hiked on that trail, actually. 21 Q. I would like to take you to 22 another exhibit that you attach. It is an exhibit 23 to your statement, Exhibit No. 5, sir. 24 A. Okay. 25 Q. It is entitled "Minerals - A</p>
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<p>1 correct? 2 A. Yes, it has. 3 Q. And it identifies a series of 4 locations as suitable for development; is that 5 correct? 6 A. It does. 7 Q. Now, just to be clear, 8 Mr. Lizak, you're not suggesting that any of the 9 projects that are listed in -- or, sorry, any of 10 the sites, rather, that are listed in this document 11 referred to the location of the Whites Point quarry 12 site, are you? 13 A. No, I'm not suggesting that. 14 There are several sites. I note that we did visit 15 several sites listed in those publications, right. 16 Q. I just wanted to clarify. 17 The reason is, and I take that, sir, is I wouldn't 18 want anyone reviewing the document to be confused, 19 because one of the sites that are listed in this 20 document is a White Point. It sounds remarkably 21 similar, and I am not suggesting anything to it. I 22 just wanted to be clear that that is not the -- 23 that's not Whites Point in Digby County? 24 A. No. You're correct. It's a 25 totally different county.</p>	<p>1 Policy for Nova Scotia", 1996; correct? 2 A. Correct. 3 Q. You are familiar with this 4 document, sir? 5 A. I am, sir. 6 Q. If we could go to page 4, 7 please, of this document, near the bottom of the 8 page is a text box. Do you see that? 9 A. Under "present"? 10 Q. I am not sure. 11 A. Page 4 of this publication? 12 Q. You should be at Exhibit 5. 13 A. I'm sorry. I was on Exhibit 14 4. 15 Q. So just to make sure, you are 16 at the exhibit that is entitled "Minerals - A 17 Policy for Nova Scotia", 1996? 18 A. Yes. 19 Q. Okay. Now if you could turn 20 to page 4. 21 A. Okay. 22 Q. So at the bottom of that page 23 is a text box. Do you see that? 24 A. I do. 25 Q. And it includes the</p>

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<p>1 Department of Natural Resources' missions and 2 goals; correct?</p> <p>3 A. It does.</p> <p>4 Q. Can you confirm that these 5 goals include: To achieve sound natural resources 6 stewardship and sustainable development, and also 7 to maintain the diversity of the province's natural 8 environment? These are a couple of the goals, if 9 you will, that are listed?</p> <p>10 A. That is a fair quote.</p> <p>11 Q. Now, if you could turn to the 12 bottom of that page, page 4, and it continues on to 13 page 5. This is a list of conditions of the 14 mineral policy designed to ensure successful 15 mineral resource sector in Nova Scotia; is that 16 correct?</p> <p>17 A. Where are we, sir?</p> <p>18 Q. The bottom of page 4. There 19 is a number of conditions that start at the bottom 20 of page 4 and continues to page 5. Do you see 21 that?</p> <p>22 A. I do.</p> <p>23 Q. And condition number 5 in 24 that list it is entitled "The protection of the 25 environment"; correct?</p>	<p>1 mean, I also know that page 7, it says "to ensure 2 that the" -- "minimize the effort and cost required 3 to meet regulatory requirements".</p> <p>4 And on page 13, it says, you know, 5 basically support an effective and timely 6 environmental assessment process.</p> <p>7 I mean, so it does not 8 specifically reference Whites Point, but, you know, 9 this is the kind of information I passed along to 10 my client.</p> <p>11 You know, this is what was given 12 to me. All I know is, again, I'm not an 13 environmental expert. That was not part of my 14 charge, but this is what I read and this is also, 15 you know, what I was told by the gentleman I worked 16 with at the Department of Natural Resources.</p> <p>17 Q. Okay.</p> <p>18 A. So...</p> <p>19 Q. That's fine. Just to be 20 clear, this document doesn't say that -- you 21 mentioned environmental assessment at a couple of 22 the pages in this document. This document doesn't 23 say that it would abbreviate or in any way not 24 subject mineral development to environmental 25 assessment; correct?</p>
<p>1 A. Correct.</p> <p>2 Q. And, finally, page 12 of this 3 document, policy 5.0, do you see that?</p> <p>4 A. I do.</p> <p>5 Q. It is entitled "Ensure the 6 protection of the environment"; correct?</p> <p>7 A. Correct.</p> <p>8 Q. And this section mentions 9 environmental assessment of mineral projects, 10 doesn't it?</p> <p>11 A. It does.</p> <p>12 Q. So, again, just to be clear, 13 sir, this document doesn't talk about the Whites 14 Point or the Digby Neck, does it?</p> <p>15 A. No, not specifically, but it 16 is very generally encouraging of investment in Nova 17 Scotia.</p> <p>18 Q. Okay.</p> <p>19 A. And, you know, if I might 20 add, sir, on page 4 --</p> <p>21 Q. Mm-hm.</p> <p>22 A. -- Nova Scotia's colourful 23 history ... having the lifestyles, values, 24 location, the time zone many companies are seeking, 25 and from my perspective when I looked at this, I</p>	<p>1 A. No, but it does say it will 2 be done cost effectively in a timely manner.</p> <p>3 Q. Right. I just have a couple 4 more documents that are exhibits in this area that 5 I would like to take you to very briefly. If we 6 could look at Exhibit 6, this was attached to your 7 statement and it is called "A Look at Nova Scotia's 8 Mineral Industry"; correct?</p> <p>9 A. Correct.</p> <p>10 Q. It is dated July 1999?</p> <p>11 A. Yes, it is.</p> <p>12 Q. Your statement notes that -- 13 let me start first. If you could turn to page 2 of 14 this document, you will see there is a map there?</p> <p>15 A. I do, sir.</p> <p>16 Q. Your statement notes that 17 this map showcases over 42 current mining 18 operations in Nova Scotia; correct?</p> <p>19 A. Yes, it does.</p> <p>20 Q. So if we look at this map, 21 there are no marine terminals or quarries along the 22 coast of the Digby region, are there?</p> <p>23 A. No, there are not.</p> <p>24 Q. And, in fact, there are no 25 projects highlighted on the coast of the Digby Neck</p>

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<p>1 region, are there, along the coast?</p> <p>2 A. There are not.</p> <p>3 Q. If we could -- sorry. Your</p> <p>4 statement also specifically identifies one of the</p> <p>5 Nova Scotia government publications called "One</p> <p>6 Window Process For Mine Development Approvals";</p> <p>7 correct?</p> <p>8 A. Correct. That was one of the</p> <p>9 publications that was recommended to me.</p> <p>10 Q. That is attached at Exhibit 7</p> <p>11 to your statement; correct?</p> <p>12 A. Yes, it is. I think it is</p> <p>13 also referenced in one of the prior publications</p> <p>14 under the section that talks about expedited</p> <p>15 process and referring to the one window process.</p> <p>16 Q. Okay. Now, you referred to</p> <p>17 this publication as outlining a formalized and</p> <p>18 streamlined review process for the mining industry;</p> <p>19 correct?</p> <p>20 A. Correct. And that was what</p> <p>21 was emphasized by the gentleman that I worked with</p> <p>22 at DNR.</p> <p>23 Q. And does this document</p> <p>24 indicate that the Whites Point project would not</p> <p>25 have to undergo an environmental assessment or any</p>	<p>1 the general markets within Nova Scotia, provided</p> <p>2 the helicopter tour, you know, just contributed</p> <p>3 timeless amounts of money, effort and research. I</p> <p>4 mean, these guys were tremendously helpful.</p> <p>5 They didn't say, you know, We want</p> <p>6 you to invest specifically in Digby Neck, okay?</p> <p>7 Now, Dan Kontak did assist me in</p> <p>8 doing everything possible to help me with that</p> <p>9 analysis.</p> <p>10 Q. Mm-hm?</p> <p>11 A. But, generally, there was</p> <p>12 tremendous encouragement, tremendous support.</p> <p>13 These are some of the most competent couple of guys</p> <p>14 I ever worked with.</p> <p>15 Q. Is it accurate to say this</p> <p>16 was more general encouragement than specifically</p> <p>17 encouraging the Clayton Group to invest in Whites</p> <p>18 Point?</p> <p>19 A. I can't say that they said</p> <p>20 specifically Whites Point, although they did -- you</p> <p>21 know, when they became familiar with the project,</p> <p>22 you know, there was tremendous encouragement. They</p> <p>23 wanted this to go. It is part of their charge,</p> <p>24 sir. You know, it is what they do, and there are</p> <p>25 some publications referenced in here that</p>
<p>1 mining or project quarry development project?</p> <p>2 A. Well, again, sir, I believe</p> <p>3 not. I mean, I don't -- you know, I'm not trying</p> <p>4 to be flippant, but I don't think any of these</p> <p>5 publications, other than Minister contacts,</p> <p>6 specifically refer to Whites Point.</p> <p>7 Q. So would it be accurate to</p> <p>8 say, then, that the one window process, as you</p> <p>9 understand it, refers to the streamlining of the</p> <p>10 process a project would undergo, in general, rather</p> <p>11 than specifically in respect of the environmental</p> <p>12 assessment process?</p> <p>13 A. Yes. I mean, you know, I</p> <p>14 would like to provide a little context here. These</p> <p>15 documents were given to me by the Department of</p> <p>16 Natural Resources.</p> <p>17 Q. Right?</p> <p>18 A. And, you know, again, they</p> <p>19 weren't -- there was one couple of individuals</p> <p>20 within the Department of Natural Resources that did</p> <p>21 work extensively with me, encouraged me, supported</p> <p>22 me on developing the Whites Point quarry project,</p> <p>23 and that would be Dan Kontak.</p> <p>24 Mr. Phil Finck took more of a</p> <p>25 global view to essentially give us an overlay of</p>	<p>1 specifically talk about tidewater, you know,</p> <p>2 opportunities, things done by Dan Kontak, things</p> <p>3 done by the department, in general.</p> <p>4 Q. But outside these</p> <p>5 publications, there is no -- there are no documents</p> <p>6 that you attach to your statement that would</p> <p>7 specifically ask for, solicit, specifically</p> <p>8 encourage investment in the Whites Point region;</p> <p>9 correct?</p> <p>10 A. Well, again, sir, when</p> <p>11 they're providing countless hours -- you know, Dan</p> <p>12 Kontak, for example, who is one of the most</p> <p>13 competent guys I ever had an opportunity to work</p> <p>14 with. You know, he visited the site with me</p> <p>15 several times, overnights on the site, provided</p> <p>16 countless publications. He sampled our core. He</p> <p>17 analyzed our core.</p> <p>18 He also reviewed, you know,</p> <p>19 documents that we prepared for the Whites Point</p> <p>20 quarry. It was a very collaborative process. I</p> <p>21 mean, I didn't ask for this help. You know, had I</p> <p>22 essentially had to pay for this, it would have cost</p> <p>23 tens of thousands of dollars.</p> <p>24 Likewise, Phil Finck submitted all</p> <p>25 kinds of documents, you know, on properties within</p>

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<p>1 Nova Scotia, prepared a helicopter tour. We 2 visited, you know, six to ten sites. He set up 3 meetings with -- with owners. He talked about 4 funding mechanisms. He basically talked -- said, 5 If you have First Nations problems, my wife works 6 with First Nations.</p> <p>7 So, I mean, it was just -- you 8 know, again, to have a helicopter for two days, 9 have two staff members, I had died and gone to 10 heaven. This was kind of a dream project.</p> <p>11 Q. Let's come to that -- 12 A. Okay. 13 Q. -- helicopter tour, if we 14 could. Just before I come there, if you could just 15 tell me if you have ever personally visited the 16 Digby Neck? 17 A. The Digby Neck site? 18 Q. Yes, yes? 19 A. On numerous occasions, yes, 20 sir. 21 Q. Could you tell me what year, 22 the first time you visited it? 23 A. Well, on this project it was 24 2002, but I have been to Nova Scotia before, and, 25 quite frankly, I'm not certain if I visited Digby</p>	<p>1 Q. Just to ensure that we've got 2 the precise dates, sir, if we could look at -- if 3 you could just refer briefly to paragraph 19 of 4 your statement. Do you see that? 5 A. Yes. 6 Q. And in that paragraph, you 7 have stated that June 4th and 5th, 2003 is when 8 this helicopter tour took place? 9 A. Yes. Her birthday was June 10 6th, so... 11 Q. And the purpose of the 12 helicopter tour you stated was to review potential 13 quarry sites that could be suitable for your client 14 to invest in; correct? 15 A. Correct. 16 Q. Just to be clear, did this 17 tour include the Digby Neck? 18 A. No, it did not. There was 19 sort of a bifurcation of effort, in that Dan Kontak 20 being, you know, bar none, the resident expert on 21 the Digby Neck basalt. That was his niche, you 22 know. 23 Like I said, I met Dan on several 24 instances there. He was focussing on that core 25 area, essentially assisting me. Again,</p>
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<p>1 Neck, but I may have. I have had other projects. 2 I have been to trade meetings in Halifax and, you 3 know, things of that nature.</p> <p>4 Q. Okay. And just to confirm, 5 your statement doesn't indicate specifically that 6 you visited Digby Neck in 2002, does it? 7 A. My report does, and I think 8 my statement does indicate that I visited. I mean, 9 I did visit it around my birthday. I was on site 10 when we were doing the coring. 11 Q. So late April 2002? 12 A. I also visited the Department 13 of Natural Resources, you know, on the initial part 14 of that trip and the following part of that trip, 15 the end of that trip. 16 Q. Now, we have just been -- you 17 have just been referring to the helicopter tour 18 that the Department of Natural Resources organized 19 for you. This took place in June 4th, June 5th, 20 2003; correct? 21 A. Roughly around there, because 22 that was my fiancee's birthday, so it seems to me 23 it is all around birthdays. I was up for our 24 birthdays. 25 --- Laughter.</p>	<p>1 phenomenally impressive guy, and I am not easily 2 impressed. 3 Part of this is not only did we 4 want to know that Whites Point was a very viable 5 enterprise, but we needed to put it into context of 6 other opportunities with Nova Scotia to rank it, 7 okay? Essentially, how does this compare not only 8 to other operating quarries but, equally important, 9 competitive operations? 10 So we visited the Port Hawkesbury 11 Martin Marietta operation. This was to put this in 12 context. 13 Q. Okay. So just to confirm, 14 then, sir, the purpose of the visit, the helicopter 15 tour, then, was to generally tour other potential 16 quarry sites? 17 A. Right, because basically, you 18 know, I was taking care of what was going on at 19 Whites Point in collaboration with Dan Kontak, and 20 this was to give us an opportunity to rank this 21 site. And I want to emphasize, after doing this 22 exhaustive study, the Whites Point quarry was the 23 gem in the crown. When we looked at the criteria, 24 it was the best property, but we don't know that 25 until we look at the other sites.</p>

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<p>1 Q. Now, Mr. Lizak, just so I am 2 clear on this sort of time frame of events here, 3 looking at your statement, you would agree with me 4 that by this time -- and I took you to a number of 5 documents before -- that it is over a year since 6 Bilcon of Nova Scotia has been incorporated? 7 A. Since -- 8 Q. I am talking about the 9 helicopter tour in relation to this. 10 A. -- incorporation, it sounds 11 like about 13 months. 12 Q. Okay. And over a year since 13 the partnership Global Quarry Products was 14 incorporated? 15 A. It sounds about right. 16 Q. So those events I just 17 referred to just now all took place before the 18 helicopter tour in June 4th, 5th, 2003; correct? 19 A. Yes, they did. 20 Q. Now, in your statement, it 21 indicates that Dan Kontak, who you referred to, 22 informed you that the Whites Point joint review 23 panel would be consulting a Ms. Sandra Johnston to 24 provide analysis in respect of the environmental 25 impact statement guidelines; is that correct?</p>	<p>1 central division or the western division. 2 Q. So both regional geologists. 3 And you also state Mr. Kontak told you that he 4 believed that the Joint Review Panel's decision to 5 consult Ms. Johnston rather than himself was 6 political; correct? 7 A. Correct. 8 Q. And just to confirm, to the 9 best of your knowledge, Mr. Lizak, Mr. Kontak has 10 not entered a statement in these proceedings, has 11 he? 12 A. Not to my knowledge. 13 Q. So it is your understanding 14 on April 14th, 2005 Mr. Kontak was requested by the 15 Joint Review Panel not to provide advice on the EIS 16 guidelines? 17 A. I don't know if that was the 18 specific day. Here's what I know. 19 Q. Okay. 20 A. Dan was, as I said, bar none 21 the expert on the Whites Point basalt, the quarry 22 project. He worked tirelessly with me. We met on 23 site on numerous occasions. Like I said, he 24 sampled the core. He tested the core, read some of 25 our reports. He was -- he's the expert.</p>
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<p>1 A. Yes, he did. That's 2 somewhere in my statement. 3 Q. We can come to that. And it 4 is actually paragraph 25, if you would like to 5 review that. 6 A. Actually, I am looking at it, 7 sir. 8 Q. And that the Joint Review 9 Panel preferred Ms. Johnston to Mr. Kontak himself; 10 correct? That is what you referred to in that 11 paragraph? 12 A. Well, he said that he was 13 replaced by Sandra Johnston, correct. 14 Q. And you state that Mr. Kontak 15 informed you of this specifically on April 14th, 16 2005; correct? 17 A. Yes. 18 Q. Just to confirm, Mr. Lizak, 19 Mr. Kontak and Ms. Johnston at that time were 20 officials of the Nova Scotia Department of Natural 21 Resources; correct? 22 A. Correct. I believe they were 23 both regional geologists. Dan was a regional 24 geologist with the relevant office, and Sandra, I 25 believe, was regional geologist with I think the</p>	<p>1 And at some point, he indicated 2 that he was going to be an advisor to the Joint 3 Review Panel, and at some point when we're -- you 4 know, I'm submitting him documents, I'm soliciting 5 his input, he let me know that that was not the 6 case. 7 And my question was, Why 8 not? You're the guy. And it was a simple comment 9 it's political. 10 Q. We will come to that again, 11 sir, but just to be clear a bit on the time frame 12 of events here, Joint Review, would you agree with 13 me the Joint Review Panel issued the environmental 14 impact assessment guidelines on March 31st, 2005? 15 A. That I can't testify to, sir, 16 because again that was not part of my charge. 17 Q. No, no. The reason I ask you 18 that question, sir, is that in paragraph 25 you 19 make reference to Mr. Kontak telling you about a 20 specific request, and that request is in relation 21 to the environmental impact assessment guidelines. 22 So that is why I ask you that. 23 But in terms of confirming that 24 statement - that is, that the environmental impact 25 assessment guidelines were finalized on March 31st,</p>

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<p>1 2005 - if we could just turn to the documents in 2 the bundle, it is R-210. Do you see that? 3 A. I do, sir. 4 Q. And these are the final 5 environmental impact assessment guidelines; 6 correct? 7 A. I'm going to take your word 8 for that, sir. I haven't seen this document. 9 Q. You haven't seen this 10 document before. You see that the first page of 11 that document is date stamped 31st, March, 2005; 12 correct? 13 A. I do, sir. 14 Q. So just in terms of 15 understanding what you're saying in paragraph 25 of 16 your statement, not in this particular document, I 17 just want to be clear that your evidence, 18 Mr. Lizak, is that the Joint Review Panel 19 specifically requested that Mr. Kontak specifically 20 be excluded from providing analysis in respect of 21 the environmental impact assessment guidelines and, 22 instead, that the Joint Review Panel requested 23 Ms. Johnston's analysis. Is that your evidence, 24 sir? 25 A. I don't know if the panel,</p>	<p>1 A. Where are we, sir? 2 Q. The last page of your 3 statement? 4 Q. You will see actually there 5 are two paragraph 26s listed? 6 A. Oh, there are. 7 Q. If you look at the second 8 one, do you see that? 9 A. Yes, I do. 10 Q. Here you state that the 11 natural resources officials expressed surprise and 12 annoyance at the aggressive opposition from other 13 government officials and the Joint Review Panel. 14 Correct? 15 A. Correct. 16 Q. This is a strong statement, 17 sir. Has your statement named these officials? 18 A. I can name these officials. 19 Q. Okay. 20 A. You know, let me put this in 21 context. You know, throughout the process, from 22 the time I set foot in Nova Scotia, the officials 23 did everything they could to support and provide 24 encouragement. Again, they were the most helpful, 25 competent guys I ever had the opportunity to work</p>
<p>1 you know, specifically requested her, or what the 2 logistics were. I simply know what Dan told me. 3 Q. Is that a reflection of what 4 Mr. Kontak reported to you; is that your evidence? 5 A. Yes. Yes. And, again, this 6 was kind of bewildering to me. I mean, again I 7 don't know. My charge was not environmental law 8 and the specific Environmental Assessment 9 Regulations. 10 My charge was basically assess the 11 site in the context of all of the other sites. That 12 was not my not my assignment. 13 Q. Understood. Okay. And just 14 to be clear, Mr. Lizak, are there any documents 15 attached to your statement to support what you 16 stated in paragraph 25 of your statement? 17 A. No, just what I said. Just 18 what I reported. 19 Q. Okay? 20 A. Again, not to be flippant, 21 but that is my sister's birthday, okay. 22 Q. Okay, sure. If we could look 23 at the last page of your statement, and you will be 24 glad to know this is the last set of questions I 25 will ask you, sir.</p>	<p>1 with, you know, and I developed a trust with these 2 guys. These guys became, you know, close 3 collaborators in all aspects of the project. 4 They would visit me on site on 5 numerous occasions, spent countless provincial 6 dollars essentially supporting our project, and 7 always relayed to me that they thought the project 8 was a "go", you know. 9 And, again, let me provide some 10 context. When I took the helicopter tour with Phil 11 Finck, we looked at a lot of different properties, 12 and I remember one we looked at at Guysborough, and 13 I said, Phil, it is next to a provincial park. Is 14 that going to be a problem? He said, That's 15 manageable, okay. 16 But they were also following -- 17 you know, they were following the project on Whites 18 Point. 19 Q. But just to be clear, 20 Mr. Lizak, would any of these officials be able to 21 tell you -- 22 MR. NASH: Excuse me, 23 Mr. President. Could the witness be allowed to 24 answer the question? 25 PRESIDING ARBITRATOR: Sorry, I</p>

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<p>1 didn't hear you.</p> <p>2 MR. NASH: Could the witness be</p> <p>3 allowed to answer the question in full. He asked</p> <p>4 to put it in context, and he was continuing to do</p> <p>5 so before he was interrupted.</p> <p>6 PRESIDING ARBITRATOR: Okay. I</p> <p>7 think acoustically I had a problem, but you said</p> <p>8 would the witness be allowed to --</p> <p>9 MR. NASH: Could the witness be</p> <p>10 allowed to answer the question as he was trying to?</p> <p>11 PRESIDING ARBITRATOR: Yes, I</p> <p>12 think so. Yes, you are, of course.</p> <p>13 THE WITNESS: You know,</p> <p>14 specifically back to Dan Kontak, Dan Kontak and I</p> <p>15 remained in contact after the project was</p> <p>16 essentially denied, and, you know, we spoke a</p> <p>17 couple of months ago and he reiterated that the</p> <p>18 process was improper. I am quoting, and anyone</p> <p>19 feel free to call Dan up and ask him that.</p> <p>20 Similarly, I would go out with</p> <p>21 Phil, I would go out with Garth. We would go to</p> <p>22 the pubs. They were surprised, as I was surprised,</p> <p>23 I mean, just given the context of the size of the</p> <p>24 project. You know, that is what I can say.</p> <p>25 BY MR. EAST:</p>	<p>1 RE-EXAMINATION BY MR. NASH:</p> <p>2 Q. I have a few questions in</p> <p>3 follow-up to the questions of my friend.</p> <p>4 You went to Nova Scotia, you</p> <p>5 believe, in April of 2002?</p> <p>6 A. Correct.</p> <p>7 Q. You met with officials at the</p> <p>8 Nova Scotia Department of Natural Resources in</p> <p>9 April 29th and 30th, 2002?</p> <p>10 A. I did.</p> <p>11 Q. Who were they?</p> <p>12 A. They would have been Dan</p> <p>13 Kontak, Garth Prime and Phil Finck.</p> <p>14 Q. Was that your first</p> <p>15 introduction to them?</p> <p>16 A. First physical meeting. I</p> <p>17 had some conversations with some of them, like I</p> <p>18 say, prior to that, but that was my first physical</p> <p>19 meeting.</p> <p>20 Q. You have given evidence that</p> <p>21 you were given a number of documents by the</p> <p>22 officials from the Department of Natural Resources?</p> <p>23 A. I did.</p> <p>24 Q. Could you go to Exhibit 2,</p> <p>25 please, of your affidavit. You mentioned that Dan</p>
<p>1 Q. Okay. I just wanted to be</p> <p>2 clear, in particular, in respect of this paragraph,</p> <p>3 sir, and I wanted just to ask you some questions</p> <p>4 there. And we were talking about whether your</p> <p>5 statement named officials, and it is just -- is</p> <p>6 that true? Are officials named in that paragraph?</p> <p>7 A. No, sir, they're not.</p> <p>8 Q. And just to be clear, also,</p> <p>9 has your statement indicated the dates attached to</p> <p>10 what you describe in paragraph 26 of your</p> <p>11 statement?</p> <p>12 A. No, sir.</p> <p>13 Q. And also just to ask, have</p> <p>14 you attached any documents to substantiate what you</p> <p>15 have described in paragraph 26 of your statement?</p> <p>16 A. In terms of specific dates?</p> <p>17 Q. In terms of any documents</p> <p>18 attached to support that statement?</p> <p>19 A. No, sir, I have not.</p> <p>20 Q. Okay. Thank you, Mr. Lizak.</p> <p>21 Those are all of my questions.</p> <p>22 PRESIDING ARBITRATOR: Okay.</p> <p>23 Thank you very much.</p> <p>24 PRESIDING ARBITRATOR: Thank you,</p> <p>25 Mr. Nash?</p>	<p>1 Kontak you found to be a competent, knowledgeable</p> <p>2 person?</p> <p>3 A. Extremely competent, one of</p> <p>4 the most competent people I ever had the privilege</p> <p>5 to work with.</p> <p>6 Q. Is he a geologist?</p> <p>7 A. He's a Ph.D. geologist.</p> <p>8 Q. Did he offer to do studies of</p> <p>9 the Whites Point area with respect to the nature of</p> <p>10 the rock in that area?</p> <p>11 A. He not only offered; he did.</p> <p>12 He met me several times on site at Digby Neck, not</p> <p>13 only at the Whites Point quarry site, but we also</p> <p>14 visited the Tiverton quarry, Parker Mountain</p> <p>15 quarry, several other quarries. He was gracious</p> <p>16 enough to describe the core.</p> <p>17 One of the things we do in</p> <p>18 analysis like this, we drill the property. We</p> <p>19 literally get like a two-inch core. He described</p> <p>20 it. He sampled it. He did what we call a</p> <p>21 petrographic analysis. Not to bore you with the</p> <p>22 details, but essentially you thin-section the rock.</p> <p>23 You grind it down to the point where it is -- you</p> <p>24 know, visible light goes through it. And he</p> <p>25 analyzed it.</p>

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<p>1 I mean, that is the kind of thing 2 I normally do. My client normally does that. It 3 costs a tremendous amount of money. Again, he was 4 tremendously helpful and competent. 5 Q. Compared to other 6 jurisdictions you have worked in and other 7 governments you have worked in numerous 8 jurisdictions, how did the reception you received 9 in Nova Scotia compare to those? 10 A. It is not exaggeration to say 11 it was, bar none, the best. I mean, this was kind 12 of my dream team and dream project. I have had the 13 opportunity to work in dozens of countries, dozens 14 of provinces, dozens of states. Usually I'm the 15 one that has to do the courting. You know, usually 16 I've got to do the begging for assistance. 17 In this case, I had some of the 18 most competent people I ever had the opportunity to 19 work with. They were incredibly helpful, 20 incredibly resourceful. 21 I died and went to geologic 22 heaven, okay? It doesn't get any better than this. 23 When I was thinking about this, in hindsight, I 24 miss this project, okay? Just a tremendous 25 project.</p>	<p>1 evidence, but this is the specific hallmark of why 2 this is extremely good rock. 3 Q. Is that why it is the gem in 4 the crown? 5 A. It is one of the reason it is 6 the gem in the crown. There is a whole host of 7 criteria that one looks at, quality, quantity, 8 proximity to the States, you know, environmental 9 components, but that is one of the reasons that it 10 met, definitely met, the quality criteria. 11 These criteria are pretty 12 sophisticated. People tend to think that this 13 is -- you know, all rocks are created equal. They 14 are not. States have various tough specifications, 15 chemical, you know, specifications, physicochemical 16 specifications, and this rock met it. 17 As a matter of fact, it was so 18 hard I had a little bit of concern about crushing 19 costs. It was tremendous rock. 20 Q. If you look on the previous 21 page, page 70, there is a map which I take to be a 22 map of Digby Neck. What do all of those Bs on 23 Digby Neck mean? 24 A. Those are areas that I 25 believe that he sampled and described.</p>
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<p>1 Q. Can you describe for the 2 Tribunal what Exhibit 2 is. 3 A. Exhibit 2 is a study that Dan 4 did on essentially the North Mountain Basalt, which 5 is the rock we were mining on the Whites Point 6 quarry, a very in-depth analysis. Again, this is 7 the expert on the basalt rock. 8 Q. And in thumbnail sketch, what 9 was the conclusion of that study? 10 A. On a thumbnail sketch, if you 11 want, I can point to specific areas. 12 Q. Why don't you? 13 A. Okay. If you look at table 14 1. 15 Q. On which page? 16 A. I'm sorry, page 71. Top 17 flow, greenish black to grayish black columnar 18 jointed, you know, to those of you that are not 19 geologists, that is telling us that is as good at 20 it gets. As a matter of fact, when I would pull 21 the core out, literally I got a two-inch core and 22 we would break the core to put it into a core box. 23 I in many instances could not break the core with 24 my hammer. I have never seen that before. 25 So that is sort of the anecdotal</p>	<p>1 Q. Did the officials of the 2 Department of Natural Resources ever try to 3 dissuade you and the client from going to the 4 Whites Point quarry? 5 A. No. Contrarily. I would 6 argue that they encouraged us, as evidenced by all 7 of the work they did for me. You know, again, 8 usually I've got to bring competent people in on a 9 project like this, typically. In this case, I had 10 them. I mean, I had the best guys working for me. 11 Q. In the government? 12 A. At provincial expense. This 13 would have cost me hundreds of thousands of 14 dollars. You know, again you know, bar none, some 15 of the best guys on the planet. 16 Q. Have you ever been taken on a 17 helicopter tour by a government trying to attract 18 investors to their jurisdiction? 19 A. I had not. That would have 20 cost me tens of thousands of dollars, and I was a 21 little breathtaken when I saw that was set up. 22 But in addition to that, I had two 23 staff members from the Department of Natural 24 Resources, a two- to three-inch dossier, which 25 essentially categorized various, you know, mining</p>

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<p>1 properties.</p> <p>2 I met owners on sites. I mean,</p> <p>3 logistically we need to think about this. We are</p> <p>4 flying around from site to site to site, and when</p> <p>5 we'd land, the owners would be there.</p> <p>6 There was guidance on financing.</p> <p>7 There was guidance on, you know, First Nations. I</p> <p>8 mean, just -- again, there was maps. I mean,</p> <p>9 phenomenal. It would have taken me hundreds of</p> <p>10 hours to work on this kind of stuff.</p> <p>11 Q. What did the officials say</p> <p>12 about the marine-based quarries?</p> <p>13 A. They were -- again, it is no</p> <p>14 secret that the province has been encouraging us</p> <p>15 for years. This was not my first trip to Nova</p> <p>16 Scotia on this thing. I mean, I have been to the</p> <p>17 province. I have been to Toronto, and generally</p> <p>18 they have a marketing budget. This is what these</p> <p>19 guys do.</p> <p>20 Prior to the helicopter tour with</p> <p>21 Phil, we took a trip to his family island. He grew</p> <p>22 up on an island, a one-man schoolhouse. There was</p> <p>23 the obligatory stop at a lobster shop. I said, Let</p> <p>24 me take care of this. He said, No, the province is</p> <p>25 doing this. This is part of the provincial</p>	<p>1 Scotia has a vibrant mining industry. I mean, all</p> <p>2 of the publications purport to that.</p> <p>3 It is apparent. It is part of</p> <p>4 what Nova Scotia does. And, I mean, they've looked</p> <p>5 in the province at numerous quarries. There's the</p> <p>6 Port Hawkesbury quarry. There is also -- there's a</p> <p>7 quarry in St Andrew that had been run by Balcan</p> <p>8 Materials in New Brunswick. That is New Brunswick.</p> <p>9 But this is what -- you know, this</p> <p>10 is it's not a surprise. I have been here before.</p> <p>11 I was here in '94 for the forum on industrial</p> <p>12 minerals, where presentations were made by the</p> <p>13 department promoting mineral development.</p> <p>14 I have been in Toronto, the</p> <p>15 industrial mineral forum. Again, the province</p> <p>16 travels. They have a budget.</p> <p>17 Q. Nova Scotia?</p> <p>18 A. Nova Scotia. One of the</p> <p>19 gentlemen I met was Michael McDonald. His title is</p> <p>20 exploration promotional manager. This is what</p> <p>21 these guys do. I don't think it is a secret.</p> <p>22 Q. Thank you. Those are my</p> <p>23 questions.</p> <p>24 PRESIDING ARBITRATOR: Thank you,</p> <p>25 Mr. Nash. Let me ask my colleagues if they have</p>
<p>1 promotional budget.</p> <p>2 Q. So they gave you a number of</p> <p>3 documents. One of them was at Exhibit 4, which is</p> <p>4 entitled "Industrial Minerals in Nova Scotia."</p> <p>5 A. Yes.</p> <p>6 Q. And if you turn to page, at</p> <p>7 the very bottom, 019518.</p> <p>8 A. Sorry, 019?</p> <p>9 Q. 019518. At the top, it says,</p> <p>10 "A thriving industry." You will see there it gives</p> <p>11 a historical perspective. Then down to the second</p> <p>12 column, halfway down the page, it says, "The</p> <p>13 present." And over to the next page, 519, in the</p> <p>14 third column, it says "A bright future."</p> <p>15 A. Correct.</p> <p>16 Q. Do you remember reading that,</p> <p>17 and what conclusions did you draw from that?</p> <p>18 A. What I remember reading,</p> <p>19 there is a couple of references in here, and I'd</p> <p>20 have to look for them, but where they specifically</p> <p>21 talk -- I know there is two references where they</p> <p>22 specifically mention tidewater quarries, and they</p> <p>23 specifically mention basalt.</p> <p>24 And that is -- you know, that is</p> <p>25 kind of what I honed in. It is no secret that Nova</p>	<p>1 questions.</p> <p>2 QUESTIONS BY THE TRIBUNAL:</p> <p>3 PROFESSOR SCHWARTZ: Just to</p> <p>4 clarify some terminology for us, you were asked</p> <p>5 several times about land-based quarries. You gave</p> <p>6 a number of answers and you referred to tidewater</p> <p>7 developments.</p> <p>8 Could you clarify how you</p> <p>9 understand land-based quarry and how you understand</p> <p>10 tidewater development?</p> <p>11 THE WITNESS: Sure. Tidewater</p> <p>12 development simply means -- you know, there's a</p> <p>13 whole list of salient criteria that you look at</p> <p>14 when you're evaluating a quarry.</p> <p>15 I mean, one of the key components,</p> <p>16 this is a very low-cost, high-weight product, so</p> <p>17 the transportation costs of the product is key.</p> <p>18 Now, this quarry is going to be</p> <p>19 shipped via ship, okay? So obviously proximity to</p> <p>20 tidewater is important. And you will see that</p> <p>21 referenced not only in my -- not only in my</p> <p>22 publications, but also in Nova Scotia publications,</p> <p>23 where they are essentially encouraging tidewater or</p> <p>24 essentially export, the exportation of stone.</p> <p>25 And, again, this is not a</p>

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<p>1 surprise. There is a large quarry in Port 2 Hawkesbury, which is, you know, near the Canso 3 locks, which is exporting stone that's owned by 4 Martin Marietta to the States, but essentially you 5 don't want to be quarrying far from the ocean if 6 you are going to be shipping it via the ocean. 7 One of the keys also is that the 8 cheapest way to move stone is via boat, you know. 9 Next cheapest is rail. Most expensive is via 10 truck. And, you know, that is an important 11 component of this, also. I mean, we're on 12 tidewater, but unlike a land-based quarry, you 13 can't see this operation. We're not going to have 14 a lot of trucks. You know, that is typically -- 15 you know, neighbours worry about trucks. This is 16 all going out via ocean-going vessel. 17 PROFESSOR SCHWARTZ: So land-based 18 quarry means a quarry where the transportation mode 19 is going to be by road rather than by sea? 20 THE WITNESS: It is essentially by 21 truck. 22 PROFESSOR SCHWARTZ: Just one more 23 question. You said somewhere there were several 24 references in Nova Scotia's materials to tidewater 25 development.</p>	<p>1 THE WITNESS: Yes. 2 PROFESSOR SCHWARTZ: There's a map 3 there. 4 THE WITNESS: Mm-hm. 5 PROFESSOR SCHWARTZ: We understand 6 the White Point at the right is not Whites Point. 7 THE WITNESS: Right. 8 PROFESSOR SCHWARTZ: We are on top 9 of that. There is coloured-in areas where there is 10 deposits. 11 Can you tell from this map what 12 counts as a tidewater development, or does it 13 depend on what is economic in context? 14 THE WITNESS: What this does is it 15 is locations of potential crushed stone deposits in 16 Nova Scotia. It doesn't specifically reference a 17 specific location. 18 For us geologists, if you look at 19 the legend, this kind of gives you an overview of 20 the regional geology, but you've got to get very 21 specific. But you do have some of the locations 22 that were studied marked on this map, White Point, 23 Kelly's Cove, Flagstaff Hill, Terence Bay, and I 24 want to point out that actually we looked at a site 25 in proximity to Terence Bay. We looked at a site</p>
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<p>1 THE WITNESS: Mm-hm. 2 PROFESSOR SCHWARTZ: I see that 3 Exhibit 3 talks about potential crushed stone 4 deposits of tidewater in Nova Scotia. 5 THE WITNESS: These are all -- 6 PROFESSOR SCHWARTZ: That's the 7 document. 8 THE WITNESS: These are all sites 9 that were investigated by the department that are 10 essentially on tidewater, which provide the 11 potential to export stone via boat. 12 But I want to emphasize, when you 13 compare these sites to the site that we looked at, 14 we had the gem in the crown for a whole host of 15 reasons. 16 If you have any interest, I will 17 go through the 12, 13 criteria, but, you know, safe 18 to say this was the gem in the crown. 19 PROFESSOR SCHWARTZ: Okay. Just 20 one more question. If you look at figure 2 in 21 Exhibit 3. 22 THE WITNESS: Sorry? 23 PROFESSOR SCHWARTZ: In Exhibit 3, 24 the potential crushed stone deposit tidewater in 25 Nova Scotia.</p>	<p>1 at Kelly's Cove. We looked at a site which I 2 called Cape Breton in the northeast corner, which 3 is close to White Point, to, again, put our site in 4 context to see how it ranked. 5 And it was, you know -- again, it 6 was, bar none, the gem in the Crown. And I think 7 it is fortuitous that, you know, one of the reasons 8 we may have been fortunate enough to get that site 9 was because nobody else had really looked at that 10 area prior to Dan Kontak, you know, getting on side 11 with his publication. 12 PROFESSOR SCHWARTZ: Thank you 13 very much. 14 THE WITNESS: Sure. 15 PRESIDING ARBITRATOR: Okay. I 16 have one-and-a-half questions. 17 --- Laughter 18 PRESIDING ARBITRATOR: Why a 19 tidewater? I understood that what it means is it 20 is right there at the beach so that ships can 21 transport the stuff away; right? 22 What does "tide" mean? I mean, I 23 know what a tide is, but why is it tidewater? 24 THE WITNESS: I don't know why 25 they call it that, but that is the euphemism we</p>

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<p>1 use, just you nailed it. It just means it's on the 2 water. And, again, it just can't be on the water. 3 There is a whole host of other things that have to 4 occur.</p> <p>5 You have to have adequate depth of 6 water. You know, there's a lot of things, but 7 ultimately it starts with the rock and the 8 proximity to the end destination, and it is not 9 just -- you know, there's two parts to this puzzle.</p> <p>10 The first part is the area where 11 you are mining the stone, but the other thing that 12 is crucial is that my client had the ability to 13 import stone, and that is unusual, you know, to 14 have. He had the dock down in Nova Scotia -- 15 or down in New Jersey. He had the adequate depth. 16 That is unusual, because most facilities, they 17 don't have the area. They don't have the water 18 depth.</p> <p>19 You need two components, the 20 quarry, and then the end use component. And, 21 again, this was, you know, the gem in the crown 22 with the project, with the site, and also 23 essentially, you know, tremendous, you know, 24 opportunity at the other end of the equation.</p> <p>25 PRESIDING ARBITRATOR: You gave me</p>	<p>1 The Whites Point site is kind of 2 in between. One of the advantages of the Whites 3 Point site is it had a quarry on site with a 4 permit. Then the other extreme, though, are sites 5 that are completely operating.</p> <p>6 And so we looked at the whole 7 range of sites. I would say, you know, there was 8 an even mix. We looked at -- my client also looked 9 at some joint venture opportunities with other 10 people. He not only looked at Nova Scotia, but 11 also looked at New Brunswick.</p> <p>12 And when we ranked everything, 13 this was the gem in the crown, and I would like to 14 sit here and tell you that -- you know, usually the 15 way you do a study like this is you investigate all 16 of these other options and you rank these sites and 17 you go after that.</p> <p>18 Fortuitously we landed on the 19 right spot. It happened to be, you know, the best 20 project, but I can't call it the best project till 21 I investigate the other alternatives. 22 Additionally, it was far superior to the existing 23 operations.</p> <p>24 So our stone quality was superior 25 to what occurred at the Martin Marietta site in</p>
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<p>1 one-and-a half answers.</p> <p>2 THE WITNESS: I'm sorry. You get 3 geologists talking about this, we can't stop.</p> <p>4 PRESIDING ARBITRATOR: The full 5 question refers to your helicopter tour. I mean, 6 you were very fortunate. I was taken for rides by 7 government, but never for a helicopter tour.</p> <p>8 THE WITNESS: You know, well, let 9 me -- I have one other story on that. On the way 10 back...</p> <p>11 PRESIDING ARBITRATOR: All right. 12 You said that you were taken on a helicopter tour. 13 You were taken to a number of sites, and what 14 wasn't quite clear to me, I think once you said to 15 sites that were operating, and then you said 16 "potential sites." You used to -- so did you visit 17 both types of sites, and some of them as an 18 alternative to the one that is in...</p> <p>19 THE WITNESS: Yes. No pun 20 intended. We left no stone unturned, okay?</p> <p>21 We look at what we called 22 greenfield sites, which are sites that have no 23 development at all, sites that would be -- you 24 know, essentially you would have to start from 25 scratch.</p>	<p>1 Port Hawkesbury. It was superior to what was 2 coming out of St. Andrew in New Brunswick. So we 3 had a competitive advantage.</p> <p>4 And we looked at those sites. I 5 looked at Tiverton. I looked at Parker Mountain. 6 I would be hard pressed -- maybe we missed 7 something, but, boy, we cast a wide net. And, 8 again, so much of this was because of the 9 assistance provided with the province.</p> <p>10 I mean, you know, I didn't know 11 about this stuff. It would have taken me years to 12 put this information together.</p> <p>13 PRESIDING ARBITRATOR: Thank you 14 very much.</p> <p>15 THE WITNESS: My pleasure.</p> <p>16 PROFESSOR SCHWARTZ: I have 17 another half question. 18 --- Laughter.</p> <p>19 THE WITNESS: I don't know what 20 that means. Can I give a half answer?</p> <p>21 PROFESSOR SCHWARTZ: I won't put 22 any analysis on "half". 23 You probably answered this. It is 24 probably in the materials. But the helicopter ride 25 when you died and went to heaven, was Digby Neck</p>

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1 any part of heaven that you went to on these
2 helicopter rides?

3 THE WITNESS: Well, what I meant
4 was this was just such an unusual effort, okay,
5 to -- again, I mean, I could not have put together
6 a better staff. It would have taken me hours to
7 put together this information. I've got a chopper
8 waiting for me that would have cost thousands of
9 dollars.

10 What I'm saying is that the
11 process was just so enlightening and wonderful.

12 PROFESSOR SCHWARTZ: But very
13 specifically, were you ever escorted by Nova Scotia
14 officials to anywhere on Digby Neck?

15 THE WITNESS: Not via helicopter,
16 but I met Dan Kontak on site on quite a few
17 occasions. We met him on site. He overnighted
18 there on several occasions. And, I mean, we spent
19 probably a good week or two on site, Dan and I, in,
20 you know, working on that specific project.

21 We also went to the core shed on
22 Paul Buxton's property where, you know, literally
23 he went through all of the core. I'm a very
24 competent guy. I'm the best at what I do, but I am
25 not going to ignore, you know, the advice and

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1 assistance of those who are, bar none, the experts.

2 I am going to solicit his input
3 every step of the way, and he graciously gave it to
4 me.

5 PROFESSOR SCHWARTZ: Okay, thank
6 you. No more questions, not even a fractional one.

7 PRESIDING ARBITRATOR: If I am
8 right, this concludes this first day's program,
9 Dirk? Okay. So thank you, Mr. Lizak.

10 Thank you. It was a pleasure
11 listening to somebody who has so much fun in his
12 job.

13 --- Laughter.

14 MR. LIZAK: We do. We do.

15 PRESIDING ARBITRATOR: And so it
16 was an interesting day. It was a long day. So we
17 are going to see each other again tomorrow at 9:30.

18 Thank you very much.

19 --- Whereupon the hearing adjourned at 5:50 p.m.,
20 to be resumed on Wednesday, October 23, 2013
21 at 9:30 a.m.

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