

Notice of Application

Court File No.: T-1000-15

Federal court

In the matter of sections 5 and 6 of the *Commercial Arbitration Act*, R.S.C. 1985, C. 17(2nd SUPP.)

In the matter of Articles 1, 6 and 34 of the *Commercial Arbitration Code* set out in schedule to the *Commercial Arbitration Act*

and in the matter of an arbitration under Chapter 11 of the *North American Free Trade Agreement* (“NAFTA”)

Between:

Attorney General of Canada
Applicant

and

William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, inc.
Respondents

Notice of application

To the respondents:

A proceeding has been commenced by the applicant. The relief claimed by the applicant appears on the following page.

This application will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Toronto, Ontario, Canada.

If you wish to oppose this application, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Court Rules, 1998* and serve it on the applicant’s solicitor, or where the applicant is self-represented, on the applicant, **within 10 days** after being served with this notice of application.

Copies of the *Federal Court Rules, 1998*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

If you fail to oppose this application, judgment may be given in your absence and without further notice to you.

June 16, 2015

Issued by:
(Registry Officer)

Address of local office:
180 Queen Street West
2nd Floor, Toronto, Ontario
M5V 3L6

To:

William Ralph Clayton

And to:

William Richard Clayton

And to:

Douglas Clayton

And to:

Daniel Clayton
PO Box 3015
Lakewood, NJ 08701
United States of America

c/o
Gregory J. Nash
Nash & Company
Barristers
595 Burrard Street, Suite 3013
PO Box 49043 - Three Bentall Centre
Vancouver, British Columbia
V7X 1C4

And to:

Bilcon of Delaware, inc.
1355 Campus Parkway
Monmouth Shores Corporate Park
Neptune, New Jersey, 07753
United States of America

c/o
Gregory J. Nash
Nash & Company
Barristers
595 Burrard Street, Suite 3013
PO Box 49043 - Three Bentall Centre
Vancouver, British Columbia
V7X 1C4

This is an application to set aside the Award on Jurisdiction and Liability dated 17 March 2015 (the “Award”) made by an Arbitral Tribunal constituted under Chapter 11 of the *North American Free Trade Agreement* (“NAFTA”), concerning an arbitration arising between William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton (the “Claytons”) and Bilcon of Delaware, Inc. (“Bilcon”) and the Government of Canada (“Canada”) in Permanent Court of Arbitration Case No. 2009-04. The Award is a final award with respect to liability and jurisdiction. The damages phase of the arbitral proceeding is pending.

The applicant, the Attorney General of Canada, makes application for:

- 1. An Order setting aside the Award;
- 2. An Order granting the applicant its costs of this application; and
- 3. Such further and other relief as counsel may advise and as to this Honourable Court may seem just.

The grounds for the application are:

- 4. Bilcon is a corporation incorporated in the United States of America and the Claytons are American citizens. Bilcon and certain of the Claytons own or control Bilcon of Nova Scotia.
- 5. Bilcon of Nova Scotia is a limited liability company incorporated on April 24, 2002 for the purpose of developing a 152 hectare basalt quarry and marine terminal at Whites Point, a community located on the Digby Neck in south-west Nova Scotia (the “Whites Point project”).
- 6. On August 7, 2003 the Whites Point project was submitted for review by a Joint Review Panel (“JRP”), a body constituted under the *Canadian Environmental Assessment Act* (S.C. 1992, c. 37) (“CEAA”) and the *Nova Scotia Environment Act* (S.N.S. 1994-95, c. 1) (“NSEA”) to gather information on the environmental effects of the project, and to make recommendations to government decision-makers with respect to the project.
- 7. On October 22, 2007, the JRP submitted a report to decision-makers in the Governments of Nova Scotia and Canada setting out its recommendation that the Whites Point project should not be approved. The Nova Scotia Minister of Environment and Labour and the Government of Canada accepted the JRP’s recommendation, respectively on November 20, 2007 and December 18, 2007.
- 8. On June 17, 2008, Bilcon and the Claytons commenced a claim under Chapter 11 of the NAFTA, alleging that a number of measures taken over the course of the environmental assessment of the Whites Point project violated Canada’s obligations under NAFTA Articles 1105 (Minimum Standard of Treatment), 1102 (National Treatment) and 1103 (Most-Favoured Nation Treatment).

- 9. On or about January 29, 2009, an Arbitral Tribunal (“Tribunal”) was constituted under Chapter 11 of NAFTA to determine the claims of Bilcon and the Claytons.
- 10. The place of arbitration is Toronto, Ontario, Canada.
- 11. The applicable rules governing the arbitration are the *United Nations Commission on International Trade Law Arbitration Rules* (“UNCITRAL Arbitration Rules”) of 1976, as modified by the provisions of NAFTA Chapter 11.
- 12. The governing law for the arbitration is NAFTA and applicable rules of international law.
- 13. On March 17, 2015, the Tribunal issued the Award in which it unanimously decided, among other determinations, that the acts of the JRP were attributable to Canada at international law.
- 14. By majority decision the Tribunal further decided that Canada had breached its NAFTA obligations on the following grounds:
 - a. The JRP did not assess the Whites Point project in a manner that complied with the requirements of the environmental assessment laws of Canada and Nova Scotia, and of Canadian public administrative law; and
 - b. The JRP’s non-compliance with the laws of Canada and Nova Scotia violated NAFTA Articles 1105 (Minimum Standard of Treatment) and 1102 (National Treatment).
- 15. The Award contains decisions on matters beyond the scope of the submission to arbitration, contrary to Article 34(2)(a)(iii) of the *Commercial Arbitration Code* as enacted and set out in the Schedule to the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.) (the “Code”). In particular:
 - a. The Tribunal erred in assuming jurisdiction over the complaints advanced by Bilcon and the Claytons insofar as the methodology used by the JRP to conduct the environmental assessment and the recommendations it made to government decision-makers are not attributable to Canada and therefore not measures adopted or maintained by Canada to which Chapter 11 applies;
 - b. The Award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration in that it determines the actions of the JRP violated Canada’s domestic laws;
 - c. The Award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration in finding breaches of NAFTA Articles 1105 and 1102 solely on the basis of the Tribunal’s determination that the actions of the JRP violated Canada’s domestic laws.
- 16. The Award is in conflict with the public policy of Canada, contrary to Article 34(2)(b)(ii) of the *Code* insofar as it usurps the judicial review function of Canadian courts. A determination of whether a JRP’s recommendations departed from the requirements of Canadian law is one that only Canada’s courts, not NAFTA tribunals, are authorized to make, and one for which the only prescribed remedies are those that can be obtained through judicial review, not an award of NAFTA damages.

Treaties, enactments and rules relied upon:

- 17. The Applicant relies upon:
 - a. The NAFTA, including without limitation Chapter 11, as implemented by the *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44;
 - b. The UNCITRAL Arbitration Rules of 1976;

- c. *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.), sections 5 and 6, and the *Commercial Arbitration Code*, set out as a Schedule thereto; and
- d. Rules 300(f) and 324 of the *Federal Court Rules, 1998*.

This application will be supported by the following materials:

- 18. The Award, pleadings, exhibits and proceedings in the arbitration record.
- 19. The written submissions in the *Mesa Power Group, LLC v. Government of Canada* NAFTA Chapter 11 arbitration made by Mesa Power Group and the Governments of Canada, the United States, and Mexico, on the Award on Jurisdiction and Liability in *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton v. Government of Canada*.
- 20. Such further and other materials as counsel may advise and this Honourable Court may permit.

June 16, 2015

William F. Pentney, Q.C.
Deputy Attorney General of Canada

Per:

Karen Lovell / Roger Flaim
Department of Justice
Ontario Regional Office
The Exchange Tower
130 King St. West
Suite 3400, Box 36
Toronto, Ontario
M5X 1K6

Tel:

(416) 952-9529/(416) 952-6889

Fax:

(416) 973-0809

File:

8023116

Solicitors for the Applicant