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

BETWEEN:

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

Claimants/Investors

AND:

GOVERNMENT OF CANADA

Respondent

EXPERT OPINION OF

LORNE SOSSIN

December 10, 2016

Purpose of this Report

1. I was asked to undertake an independent analysis into whether the Nova Scotia and federal Ministers exercise of discretion in denying approval to the Investors' Whites Point Quarry and Marine Terminal Project ("Whites Point Quarry") was consistent with their obligations under Canadian law, and if not, whether such breaches of Canadian law would give rise to monetary remedies.

2. As I elaborate below, my conclusion is that the decision of the Federal Minister of the Environment (on December 17, 2007) and the Nova Scotia Minister of the Environment & Labour (on November 20, 2007) to adopt the recommendation of the JRP to deny the Investors' Whites Point Quarry proposal constituted an unreasonable exercise of discretion within the meaning of that term under Canadian administrative law. The findings of the Arbitral Panel on Jurisdiction and Liability clearly amount to breaches of Canadian administrative law standards and standards of civil liability for which monetary remedies would be available under Canadian law.

Professional Background

3. I am currently Professor and Dean, Osgoode Hall Law School, York University. Prior to this appointment, I was a Professor at the Faculty of Law at the University of Toronto (2002-2010), where I also served as Associate Dean of the Faculty (2004-2007). I have also held appointments as an Assistant Professor in

the Department of Political Science at the University of Toronto (1995-96) and York University (1997-1999).I hold doctorates both in Law (J.S.D., Columbia University, School of Law, 1999) and Political Science (Ph.D., University of Toronto, Political Science, 1993). I received my LL.B. from Osgoode Hall Law School, York University in 1992 and was called to the Ontario Bar in 1996.

4. I have published approximately 100 journal articles and have authored, co-authored or co-edited eight books, primarily in the area of public administration, public policy, legal process, constitutional law and administrative law. Attached to this Affidavit as Exhibit "A" is a true copy of my curriculum vitae.

5. Books and articles I have authored or co-authored have been cited at all levels of Court, and by the Supreme Court of Canada in *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77, at para. 97, per Lebel J.; *Bruker v. Marcovitz*, [2007] 3 S.C.R. 607 at para. 41; *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 44; *Canada (Minister of Immigration and Citizenship) v. Khosa* 2009 SCC 12, at para. 94; *Doré v Barreau du Québec*, 2012 SCC 12; and *Loyola High School v. Quebec (Attorney General)* 2015 SCC 12, among others.

6. I have specific expertise as a political scientist and legal scholar relating to issues of the rule of law principle and the development of constitutional values in Canada. I am the author of *Boundaries of Judicial Review: The Law of*

Justiciability in Canada 2nd ed. (Toronto: Carswell, 2012), and co-editor of *Parliament in Crisis* (Toronto: University of Toronto Press, 2009) (with Peter Russell), among other books. Most recently, I published "The Complexity of Coherence: Justice Lebel's Administrative Law" (2015) 70 S.C.L.R. (2d) 145-164 and co-authored, "International Civil Service Ethics, Professionalism and the Rule of Law" in Vesselin Popovski, ed., *International Rule of Law and Professional Ethics* (New York: Ashgate, 2014) (with Vasuda Sinha) pp.149-70; and "*Charter* Values and Administrative Justice" (2014) 67 Supreme Court Law Review (2d) 391 (with Mark Friedman). Relevant to this Report, I also have authored papers specifically on ministerial discretion and the Rule of Law including, "The Unfinished Project of *Roncarelli v. Duplessis*: Justiciability, Discretion and the Limits of the Rule of Law" (2010) 55 McGill Law Review 661;"Introduction of the Puzzle of Discretion" (2009) 24 Can JL & Soc 301 (with Anna Pratt); and "Discretion and the Culture of Justice" (2006) Singapore Journal of Legal Studies 356-384; and "The Rule of Law and the Justiciability of Prerogative Powers: A Comment on *Black v. Chrétien*" (2002) 47 McGill L.J. 435-56.

7. I also have specific expertise on the issue of the accountability for ministerial discretion through civil actions, including "Revisiting Class Actions Against the Crown: Balancing Public and Private Legal Accountability for Government Action" in J. Kalajdzic (ed.), *Accessing Justice* (Toronto: LexisNexis, 2011), pp.31-48; "Class Actions Against the Crown: Or Administrative Law By Other Means?" (2006) 43 Canadian Business Law Journal 380-97; an updated and

modified version of this paper published as "Class Actions Against the Crown: A Substitution for Judicial Review on Administrative Law Grounds (2007) 57 UNBLJ 9-26; "Redress for Unjust State Action: An Equitable Approach to the Public/Private Distinction" in D. Dyzenhaus & M. Moran (eds.), *Calling Power to Account* (Toronto: University of Toronto Press, 2005); and "Public Fiduciary Obligations, Political Trusts and the Evolving Duty of Reasonableness in Administrative Law" (2003) 66 Saskatchewan Law Review 129-82.

8. I also have been commissioned to undertake studies for a range of Commissions of Inquiry. In 2004, I was commissioned by the Ipperwash Inquiry to conduct a study of the regulation and oversight of police conduct in Ontario.[1] In 2005, I was commissioned by the Gomery Sponsorship Inquiry to conduct a study of the constitutional status of the public service in Canada.[2] In 2007, I was commissioned by the Ontario Expert Commission on Pensions led by Professor Harry Arthurs to undertake a study on the effectiveness and efficiency of pension regulation in Ontario and in comparative perspective.[3] In 2008, I was

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[1] L. Sossin, "The Oversight of Executive Police Relations in Canada: The Constitution, the Courts, Administrative Processes and Democratic Governance" Paper commissioned by the Ipperwash Inquiry (June 2004) at http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/meetings/pdf/Sossin.pdf.

[2] "Defining Boundaries: The Constitutional Argument for Bureaucratic Independence and Its Implication for the Accountability of the Public Service" Paper commissioned by the Inquiry into the Sponsorship Affair (Gomery Inquiry) (February 2006) http://www.gomery.ca/en/phase2report/volume2/CISPAA_Vol2_2.pdf.

[3] L. Sossin, "The Effectiveness and Efficiency of Pension Regulation in Ontario and in Comparative Perspective" Expert Commission on Pensions (November 2007) at

commissioned by the Inquiry into Pediatric Forensic Pathology (the "Goudge Inquiry") to undertake a study of the regulation and accountability of pathologists and coroners in Ontario.[4]

9. I have provided expert affidavits in several matters, including *Rothmans Tobacco v. NB* 2009 NBQB 131.

10. In preparing this Expert Report, I have reviewed the decision of the Arbitral Panel issued March 17, 2015 and related materials before the Panel. Additionally, I have reviewed the relevant statutory and regulatory instruments governing the decision. I was asked to provide my opinion on whether under Canadian law, the findings of the Arbitral Panel would give rise to a conclusion that the decision of the federal and Nova Scotia Ministers breached Canadian administrative law standards and standards of Crown liability, and if so, what remedies such breaches could give rise to. I was asked to draw on my academic and practice experience in public and administrative law to inform my analysis.

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http://www.pensionreview.on.ca/english/summaries/8Sossin.html.

[4] L. Sossin,"Oversight and Accountability of Death Investigations in Ontario" Commission of Inquiry into Pediatric Forensic Pathology in Ontario (February 2008) at http://www.goudgeinquiry.ca/policy_research/pdf/Sossin_Accountability-and-Oversight.pdf.

Analysis

11. This analysis is divided into two sections.

    a. The first section explores the scope of ministerial discretion, and situates this topic within the specific statutory and regulatory context for the Investors' Whites Point Quarry project. I consider the constraints on ministerial discretion under Canadian administrative law and their application to the circumstances of the Ministers' decision, and specify the legal breaches which the Arbitral Panel found to have occurred.

    b. The second section considers the range of remedies available under Canadian law for the legal breaches identified by the Arbitral Panel.

12. As indicated above, the following Report takes as its point of departure the Arbitral Panel findings in relation to the exercise of ministerial discretion in denying approval to the Investors' application. While the Arbitral Panel was concerned with the standards of NAFTA and not specifically concerned with whether the decision of the federal and Nova Scotia environmental Ministers breached Canadian legal standards, their findings in relation to the consideration of irrelevant factors and their failure to consider relevant factors provide a basis for conclusions to be drawn on the application of domestic Canadian law in these circumstances.

1. Exercise of Ministerial Discretion under CEAA and NSEA

13. First, it is important to clarify the precise exercise of ministerial discretion to which this analysis applies. While the Ministers at issue exercised discretion at different stages of the decision-making process, including the discretionary decision to refer the proposal to a Joint Review Panel (JRP), the focus of this analysis will be on the decision of the Nova Scotia Minister of Environment and Labour dated November 20, 2007, and Federal Minister of the Environment dated December 17, 2007, by which they accepted the recommendation of the JRP and exercised their discretion to deny the Investors' proposal.

14. The Ministers' exercise of discretion was authorized under the *Canadian Environmental Assessment Act* (CEAA) and the *Nova Scotia Environment Act* (NSEA), respectively.

15. In this section of the Report, I explore the various legal constraints on ministerial discretion established under Canadian administrative law. It has become customary to begin any discussion of the constraints on ministerial discretion in Canada with a focus on the Minister's (or her or his delegate's) statutory or prerogative authority, as interpreted through the lens of the unwritten constitutional principle of the rule of law.

16. Under the rule of law constitutional principle, the Executive does not have inherent or unlimited legal authority to exercise public authority. Rather, all executive action must have a source in law – that source may be a statute or regulation or other statutory instrument, or may be part of a recognized Crown prerogative. In this case, the CEAA and NSEA provide the authority for the exercise of ministerial discretion to deny the Investors' application.

17. At least since the Supreme Court of Canada's landmark *Roncarelli v. Duplessis* judgment ([1959] 1 S.C.R. 121), all executive authority must be understood as bounded and limited by its statutory terms. *Roncarelli* involved the revocation of a liquor licence by the responsible Minister, as a result of direction from the Premier of Quebec. The licence holder was the owner of a Montreal tavern who was well known in the Jehovah Witness community, at a time when the Quebec Government was seeking to limit the activities of the Jehovah Witness community. The majority of the Supreme Court of Canada quashed the revocation of the licencse and awarded damages to the licence-holder. As part of the majority in that decision, Justice Rand's judgment has become an oft-quoted point of departure for discussions about the legal limits on ministerial discretion in Canada. As Justice Rand stated in *Roncarelli*:

> [legislation does not confer] an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. … 'Discretion' necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.(at p.140)

Roncarelli stands not only for the proposition that no public authority is unlimited, but also that the exercise of public authority, particularly through ministerial discretion, is subject to the rule of law as a principle of the Canadian Constitution (*Secession Reference* ((1998) 2 S.C.R. 217).

18. Under the rule of law, certain exercises of statutory discretion will fall within the jurisdiction of a decision-maker while other activity lies outside the decision-maker's jurisdiction. In particular, arbitrary state action is inconsistent with the rule of law, as the Supreme Court elaborated in the *Secession Reference* (at para. 70):

> The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in Roncarelli v. Duplessis, [1959] S.C.R. 121, at p. 142, is "a fundamental postulate of our constitutional structure". As we noted in the Patriation Reference, supra, at pp. 805-6, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.

19. Another dimension of the rule of law doctrine in Canada is that an aggrieved party always must have recourse to a court to review an exercise of ministerial discretion alleged to breach the rule of law. While some kinds of decisions involving pure policy determinations have been held by Canadian Courts to be

non-justiciable (for example, decisions to send troops abroad), ministerial action under environmental legislation has been found to be justiciable and subject to judicial review (e.g., *David Suzuki Foundation v. Canada (Minister of Fisheries and Oceans)* 2012 FCA 40).

20. Ministerial discretion on judicial review under Canadian administrative law is subject to the highest level of deference. However, as the Supreme Court reiterated in *CUPE v. Ontario (Minister of Labour)* 2003 SCC 29 (the "*Retired Judges Case*"), the view that statutory grants of discretion are to be viewed as providing *carte blanche* for the responsible Minister is not consistent with Canadian administrative law principles.

21. In the *Retired Judges Case*, the Supreme Court held that a broad grant of discretion to the Ontario Minister of Labour to appoint anyone the Minister considers to be "qualified" to chair labour arbitration panels could not include retired judges. Even though the Minister had plausible reasons to believe retired judges were qualified to act as labour arbitration chairs, the Supreme Court held that all legislation must be interpreted in its context, and the ministerial discretion to appoint labour arbitrators had to be understood within the context of the broader goals of labour legislation, which had always included the appointment of labour arbitrators who were part of a mutually agreed upon roster.

22. Similarly, in this case, the grant of statutory authority to the federal and Nova Scotia Ministers to decide on the Investors' application was circumscribed. Under Canadian administrative law, certain relevant factors must be considered in the exercise of this discretion, and it is not open to the Ministers to consider other irrelevant factors. For example, consider the scenario of a proposed municipal greenbelt plan, where a provincial Minister believed that potential harm to a small number of property owners, who were acquaintances of and large donors to the Minister's political party, outweighed the empirically sound evidence of broader environmental and economic benefits of the greenbelt. If the Minister denied approval for the greenbelt where there is evidence the decision was influenced by such ulterior considerations, a reviewing Court would find the Minister's decision invalid and not within the purview of the Minister's legitimate statutory. Purported exercises of discretion on these bases were once referred to as *ultra vires* under Canadian administrative law, and now have been folded into the various grounds on which an exercise of discretion will be quashed on the basis that it was unreasonable. As discussed below, exercises of discretion outside the purview of legitimate statutory authority may also give rise to civil liability and monetary remedies.

23. Applying this framework, and in light of the findings of the Arbitral Panel discussed below, I conclude that the Ministers' decision denying the Investors' Whites Point Quarry proposal would be considered unreasonable within the meaning of this term under Canadian administrative law.

24. The Arbitral Panel observes that socioeconomic, human health and cultural and physical effects of a proposal can be considered as part of an environmental assessment under the CEAA. The NESA criteria are slightly different from those set out in the federal CEAA, and additionally include statutory authority for including "socioeconomic factors" in the exercise of discretion under the Act. Under the provincial Environmental Assessment process, socioeconomic effects of a project are considered environmental effects. For purposes of this Report, I rely on the description of the similarities and differences in the federal and Nova Scotia environmental assessment legislation as set out by the Arbitral Panel (at para. 487), and the conclusions of David Estrin in his Expert Report dated July 8, 2011 (filed in the merits phase of this arbitration).

25. Neither the CEAA nor the NSEA refers to "core community values" in its defined criteria on which the minister may base a rejection of a proposal. On this question, the Arbitral Panel found:

> To the extent that the notion of "community core values" is construed as representing the level of local support for a project, the Tribunal concludes that there is no mandate in federal Canada's environmental assessment system or the Nova Scotia regime for a review panel to make recommendations on such a basis. The function of a review panel is to gather and evaluate scientific information and input from the community and to assess a project in accordance with the standards prescribed by law, not to conduct a plebiscite. (para. 508)

26. Subsequently, the Tribunal reached the following finding on the JRP's reliance on the factor of "core community values":

> The Tribunal agrees with Mr. Estrin's analysis that incompatibility with "community core values" absent some ecological impact is not within the scope of what is assessable under the terms of the *CEAA*...
> Mr. Estrin and Mr. Rankin both testified, however, that "community core values" as used by the JRP were not within the scope of environmental assessment contemplated by the Nova Scotia as well as federal Canada statute. They were matters of philosophical belief, not effects that could be assessed and mitigated. Although the point about the Nova Scotia statute is not decisive in the present case, the Tribunal agrees. The statutes are concerned with effects on actual biophysical and socioeconomic conditions rather than with matters of political or philosophical belief, such as that a local community should have a veto over a project even if the law does not so provide. Mr. Smith himself appeared to be referring to not only the federal Canada statute, but rather Nova Scotia's as well, when he confirmed his agreement that there was no "community veto" under the law. (Emphasis added) (para. 525, 528)

In light of the findings of the Arbitral Panel, the exercise of discretion by the federal and Nova Scotian Ministers, denying the Investors' proposal of the Whites Point Quarry, relied on an irrelevant factor -- namely, "core community values" -- and as such breached a key standard of Canadian administrative law.

27. Additionally, a relevant factor under the relevant Acts is the issue of mitigation as part of the environmental assessment analysis, and the extent to which any potentially damaging environmental impacts can be minimized through specific actions. These actions may be conditions of any approval of an application. As the Arbitral Panel concluded,

> In summarizing its overall conclusion the Report states that the project would have significant adverse effects, but does not mention the test of "after mitigation", which is an integral part of the mandate of a Panel under s. 16 of the *CEAA*. (para. 504)

The failure of the Ministers to consider the relevant factor of mitigation in their exercise of their statutory discretion appears to represent another breach of Canadian administrative law.

28. Further, the federal and Nova Scotia Ministers' reliance on the JRP, to the exclusion of other factors or their own assessment of the relevant factors, may have constituted what courts term a "fettering" of their discretion. The Supreme Court addressed this issue in *Kanthasamy v. Canada (Citizenship and Immigration)* (2015 SCC 61). In *Kanthasamy*, the Court held a discretionary decision-maker reached an unreasonable decision where a guideline with an incorrect standard was relied on by ministerial delegate to the exclusion of other relevant factors. In this case, one way to view the findings of the Arbitral Panel would be to see the Ministers as having fettered their discretion by relying on the JRP's findings in relation to "core community values" rather than considering the totality of the evidence before them. Neither the reasons offered by the federal nor Nova Scotia Minister disclose a consideration of factors beyond the recommendation of the JRP in exercising their discretion to deny the Investors' proposals.

29. In addition to the conclusion that the Ministers acted unreasonably, a parallel ground for challenging the Ministers decisions under Canadian administrative law flows from breaches of procedural fairness. The Arbitral Panel found the JRP process to have breached standards of fairness, and it follows that the Minister's decisions, adopting the findings of the JRP, also failed to adhere to the duty of fairness. The Arbitral Panel relied on the Expert Report of Murray Rankin, QC, which was filed in the merits phase of the arbitration. Mr. Rankin concludes that the Ministers additionally failed to observe the applicable standard of procedural fairness by ignoring efforts on the part of the Investors to meet after the issuance of the JRP Report and prior to the Ministers issuing their decisions. Mr. Rankin also refers to the failure to provide reasons for their decisions as a further procedural breach. Based on the findings of the Arbitral Panel and the record before it, the Ministers' failure to discharge the duty of fairness constitutes an additional ground for concluding Canadian administrative law standards were breached by the Ministers' decisions.

30. To conclude, the Arbitral Panel found that the Ministers considered irrelevant factors, failed to consider relevant factors, and arguably fettered their discretion, in deciding to deny the application of the Investors in relation to the Whites Point Quarry. Additionally, the Arbitral Panel found that the Investors were denied the degree of procedural fairness owed in the circumstances. Any of these findings, or a combination of these findings, would be sufficient for a reviewing Court, applying Canadian administrative law principles, to find the Ministers' decision to

be invalid. Below, I explore the implications of these findings and the range of remedies to which they may give rise.

2. Remedies for Ministerial Accountability

31. As discussed above, the findings of the Arbitral Panel in this case, in my view, would be sufficient to provide a basis for a successful judicial review under Canadian administrative law on reasonableness and fairness grounds. These findings may give rise to several different avenues of legal accountability under Canadian law. Where *Charter* rights are engaged, for example, an aggrieved party may apply for a *Charter* remedy which can include either remedies affecting the statutory grant of authority under s.52(1) of the *Constitution Act of 1982*, or remedies relating to the decision itself, including quashing the decision at issue, substituting a different decision, and *Charter* damages, among other available remedies, which under s.24 of the *Charter*, are considered to be "just and appropriate." The circumstances of this case, given that they involve the denial of an economic opportunity, do not in my view give rise to a potential *Charter* claim.

32. Ministerial discretion can also give rise to remedies under various applicable treaties, whether between the Canadian Crown and Indigenous communities or

under international treaties such as NAFTA. Apart from NAFTA, I am aware of no other treaties apply to the exercise of discretion in this case.

33. In this Report, I focus on constraints on ministerial discretion arising from Canadian administrative law, including an analysis of the applicable statutory constraints and common law constraints on the exercise of discretion, particularly the requirement that such action be considered by a reviewing court to be fair and reasonable.

a) Public Law Remedies

34. Canadian administrative law imposes constraints on the exercise of ministerial discretion in relation to the process of ministerial decision-making and the substance of ministerial decision-making.

35. The Arbitral Panel found the JRP process contained numerous flaws. While a range of procedural issues are discussed by the Arbitral Panel, its key finding is that the Investors were deprived of "fair notice" of the case they were expected to meet in relation to "core community values." This key flaw rendered the decision, in the Arbitral Panel's view, inconsistent with the evaluative standards of the CEAA and the applicable standards of Canadian administrative law.

36. In this matter, the concerns and findings of the Arbitral Panel extend beyond procedural concerns to the substance of the Ministers' denial of the Investors' Whites Point Quarry proposal based on the recommendation of the JRP. Substantive concerns are treated differently under Canadian administrative law. First, the question a reviewing Court must consider in relation to an exercise of ministerial discretion is the standard of review. The standard of review addresses what degree of deference a public decision-maker should be accorded.

37. Exercises of discretion virtually always will attract the more deferential standard of "reasonableness" and only in rare instances might include constitutional implications or deal with matters of jurisdiction or matters central to the legal system and be reviewed on the less deferential standard of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9) In this case, I am aware of no argument that could justify a standard of correctness, and so will assume the standard which the Ministers' exercise of discretion must meet in these circumstances would be reasonableness.

38. The Federal Court of Appeal has recognized the importance of deference in Cabinet decisions under the CEAA. As the Court held in *Innu of Ekuanitshit v. Canada (Attorney General)* (2014 FCA 189) "Therefore, in my view, the judge correctly found that deference was owed to the decisions made pursuant to [the CEAA], but that a reviewing court must ensure that the exercise of power

delegated by Parliament remains within the bounds established by the statutory scheme (at para. 44).

39. Where, as here, the exercise of discretion is determined to be unreasonable, the decision may be invalidated if challenged (often referred to by its formal title of *certiorari*, or simply as "quashing") on judicial review. Typically, where a decision is quashed on substantive grounds of unreasonableness, it is remitted to the decision-maker to reconsider in light of the analysis provided by the Court. For example, in *Loyola High School v. Quebec (Attorney General)* (2015 SCC 12), a Minister was found to have denied an exemption to a private, Catholic college in relation to the instruction of a course on world religions unreasonably. After finding the denial of the exemption to Loyola unreasonable, the Supreme Court ordered the matter remitted back to the Minister to balance *Charter* values with the statutory objectives of the grant of discretion in ways that the Supreme Court determined had not occurred (at para. 81).

40. In other settings, in the circumstances of an unreasonable exercise of discretion, the Court can make an order in *mandamus* which would compel the discretionary decision-maker to grant a licence or permit. For example, in *Trinity Western University v. College of Teachers*, 2001 SCC 31, the Supreme Court concluded on the record that the Minister of Education would have granted a private Christian University accreditation to offer a professional program but for a particular concern which the Court concluded should not have led the Minister to deny the

application. The Court found the appropriate remedy was simply to grant the licence (at paras. 43-44).

41. Another option on judicial review would be for the Court to permit a project to move forward by quashing a process impeding or delaying the project. For example, in *Hamilton Wentworth (Regional Municipality Of) v. Canada (Minister of The Environment)* (2001 FCT 381), the Federal Court held that a referral to a joint review panel under the CEAA was not justified under the Act, and ordered that the proposed project could proceed.

42. Further, monetary remedies are also available for unreasonable exercises of discretion. In *Roncarelli*, for example, the misuse of ministerial discretion gave rise to an award of damages in addition to the quashing of the revocation of Mr. Roncarelli's liquor licence mentioned above. The awarding of monetary remedies for unreasonable exercises of discretion has been reviewed and confirmed more recently by the Federal Court of Appeal in *Paradis Honey*, discussed in more detail below, and may also give rise to the tort of misfeasance of a public office, discussed below as well.

a. Civil law remedies

43. The exercise of ministerial discretion is not exempt from civil liability. As the Supreme Court of Canada observed in *R. v. Imperial Tobacco* (2011 SCC 42), "[i]t is important for public authorities to be liable in general for their negligent conduct in light of the pervasive role that they play in all aspects of society. Exempting all government actions from liability would result in intolerable outcomes."(at para. 76). The evolution of the common law position relating to the liability of the Crown is detailed in Peter Hogg, Patrick Monahan and Wade Wright's study, *Liability of the Crown* 4th ed. (Toronto: Carswell, 2011), in which the authors state that at least since 1874, the Crown has enjoyed no general immunity from the remedy of damages (at p.32).

44. While ministerial discretion may give rise to civil liability, there is no independent cause of action tied to breach of statute or regulation by a Minister or delegate (*The Queen in Right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205 and *Holland v. Saskatchewan* 2008 SCC 42); rather, the actions of Ministers or of Government more generally may give rise to liability where those acts breach private or public standards, and where such liability is not statute-barred. For example, in *Authorson v. Canada* ((2002) 58 O.R. (3d) 417 (C.A) (rev'd on other grounds 2003 SCC 39)), the Court accepted that where a Minister had discretion over funds held in trust for disabled veterans, and failed to invest

those funds in interest-bearing accounts, this constituted a breach of the Minister's equitable obligations, which could ground a cause of action to recover the interest that those funds could have generated.

45. Actions of public authorities may give rise to civil liability in a variety of ways (for example, through breaches of contracts). In light of the circumstances of this case, I will focus on potential tortious liability that could flow from the denial of approval for a project based on an environmental assessment.

46. Where potential misconduct is involved, the tort of misfeasance in a public office may arise. Erika Chamberlain describes the tort as "available only against public officers and is often grounded in decisions relating to licensing, zoning, and other discretionary decision-making. (Erika Chamberlain "When Unlawfulness Becomes Tortious: Misfeasance in a Public Office and Administrative Law" 44 Advoc. Q. 489 (2015)) *Roncarelli v. Duplessis*, which gave rise to the modern rule of law doctrine in Canada is also cited as a key foundation for the tort of misfeasance in a public office: See Erika Chamberlain, "What is the Role of Misfeasance in a Public Office in Modern Canadian Tort Law?" (2009) 88 Canadian Bar Review 579 at 583-4.

47. In Canada, this tort was explored by the Supreme Court in *Odhavji Estate v. Woodhouse* (2003 SCC 69). Typically, this tort involves the deliberate attempt by

a public official to harm a party through the exercise of their public authority. The tort may arise where there is malice against a party or where a public official acts outside their lawful scope of authority, and where the decision-maker knows, as a result, the party will be harmed. There is a close conceptual link between this tort and the administrative law protection, flowing from the rule of law principle discussed above, that public authority may only properly be exercised for public purposes, and not for ulterior motives such as personal or partisan political advantage.

48. In *Odhavji Estate*, the issue before the Supreme Court was whether an abuse of power was necessary to demonstrate in order to give rise to liability, or whether the breach of a statutory duty could suffice. The alleged misfeasance in *Odhavji Estate* involved the failure of police officers to cooperate with the Special Investigations Unit (SIU) as required by the applicable statute governing police conduct. Justice Iacobucci, writing for a majority of the Court, concluded misfeasance in a public office was a broad concept, covering unlawful conduct in the exercise of public powers. It is not necessary, the Court held, to demonstrate malice or intentional abuse of power in the context of the tort of misfeasance in a public office, though it is necessary to prove that the public official knew of the harm to which the decision or action could give rise.

49. In *Granite Power Corp v. Ontario* ((2004) 72 O.R. (3d) 194 (C.A.)), the Ontario Court of Appeal allowed a claim for misfeasance in a public office to proceed where the Government of Ontario altered the scheme for purchasing energy in the Province to enhance competition, and delayed a decision on granting a private energy firm an exemption from this new scheme in ways which harmed the firm, and which the Government could foresee would harm the firm.

50. In a variety of settings, Courts have awarded damages for exercises of ministerial discretion based on negligence as applied against public authorities.

51. With respect to the tort of negligence in the context of public authorities, the test for determining the existence of a private duty of care owed by a public authority is known as the "Anns/Cooper" test (*Cooper v. Hobart*, 2001 SCC 79). The test requires a court to address the analysis by considering the following series of questions:

    1) Has a previous decision already established the existence of a duty of care (or the absence of one) in these circumstances;

    If not;

    2) Was the harm suffered by the plaintiff reasonably foreseeable;

    If yes;

    3) Was there a relationship of sufficient proximity between the plaintiff and the defendant such that it would be just to impose a duty of care in these circumstances;

    If yes, a *prima facie* duty arises;

    4) Are there any policy reasons for negating the *prima facie* duty of care established

    If not, then a novel duty of care is found to exist.

52. Under the *Anns/Cooper* test, the onus is on the plaintiff to show a *prima facie* duty of care (through answering questions 1–3, above); and the onus is on the defendant to establish any policy reasons for negating the *prima facie* duty of care. Generally, where a decision relates to operational matters rather than policy matters, the common law as interpreted in Canada does not bar civil liability for negligence or other torts committed by public officials or public bodies. The *Anns/Cooper* test is intended to limit liability only for "true policy" decisions. These decisions involve Government or public authorities striking a balance between various social, political and economic factors, while operational decisions concern the implementation of policy – typically based on expert or professional opinion, technical standards or general standards of reasonableness (*Brown v. British Columbia (Minister of Transportation and Highways*, [1994] 1 S.C.R. 420). The ministerial decisions in the present case reflect these operational concerns.

53. In *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)* (2015 BCCA 163), the B.C. Court of Appeal recently applied this test in the context of Ministerial discretion in an environmental assessment context. That case involved an applicant party seeking Ministerial approval under the *Fisheries Act*, CEAA and related Regulations. The B.C. Court of Appeal found sufficient proximity between the Government and the applicant to conclude the claim for negligence should not be struck on a preliminary motion. The Court observed,

> There are several features of this legislative scheme that are consistent with a private duty of care toward proponents. For example, the direct interactions between the Minister and a proponent are a result of the legislative scheme, which is directed at individual applications for an exemption and individual consideration on the part of the Minister or delegated officials.
>
> As well, the inclusion in the Regulations of a series of specific timelines for the various stages of the CEAA screening process could be indicative of a legislative intention to protect the proponent's economic interests. After all, it is only the proponent who has an interest in his approval process being moved along the chain expeditiously.
>
> On the other hand the Minister is charged with protecting the fishery and the environment, responsibilities that are to be carried out in the public interest. (paras. 100-102)

54. With respect to the CEAA itself, the B.C. Court of Appeal in *Carhoun* concluded,

> [T]he CEAA provides for the balancing of public and private interests... This legislative scheme suggests Canada is to conduct environmental assessments having regard to multiple interests, including both the public interest in maintaining healthy fisheries and the private interest in efficiently processing an application. The CEAA states within the preamble that the Minister is to "promote economic development that conserves and enhances environmental quality". The promotion of economic development may entail a consideration of the interests of the proponent. The legislation, therefore, cannot be interpreted as expressly prohibiting consideration of the proponent's interests. Instead, it operates from the presumption that these two interests are not irreconcilable...(at paras. 103-4)

The B.C. Court of Appeal further concluded that there were no residual policy reasons for negating this *prima facie* duty of care under the *Anns/Cooper* analysis. The Court's analysis provides a broad template for understanding the mix of ministerial considerations that guide exercises of discretion – at both the federal and provincial level - in relation to environmental assessment.

55. While it would remain for the plaintiff to establish the elements of negligence in this context, it is clear that both the federal and Nova Scotia Crown could be found liable for damages arising from the breach of their duty of care to the Investors in relation to the Whites Point Quarry application.

56. Beyond negligence, ministerial discretion may also give rise to other civil actions. For example, the Investors' arguments relating to entreaties by the Nova Scotia Government encouraging their investment in the Whites Point Quarry project could form the basis of an action based on promissory estoppel.

57. Promissory estoppel against the Crown requires clear proof of a clear promise made to a person or group by a public authority in order to induce the person or group to perform certain acts, and the person or group must show reliance on that promise (*Immeubles Jacques Robitaille inc. c. Québec (Ville)*, 2014 SCC 34 at para. 19; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)* 2001 SCC 41at paras. 93-102). Promissory estoppel cannot be invoked so as to prevent application of an express legislative provision. While this doctrine has been interpreted narrowly in Canada, it could well have application in this context given the findings of the Arbitral Panel, which accepted that the Investors "reasonably relied on specific encouragements" and that "these encouragements contributed to the Investors' decision" to proceed with the Whites Point Quarry proposal (at paras. 448-49), even though the application turned out to be "unwinnable from the outset" (at para. 453).

58. Further, the Arbitral Panel found a range of specific encouragements and reasonably reliance resulting from Government officials' communication with the Investors, and concluded it was "unjust" to have entreated the Investors to proceed while a different set of Government decision-makers had determined the Whites Point Quarry was a "no go" zone (at para. 592). This type of specific relationship and clear promises are precisely the foundation Canadian courts have referred to as a basis for promissory estoppel.

59. Under Canadian law, it is not necessary for a party to choose just one route to establishing the liability of the Crown. The Federal Court of Appeal confirmed in *Paradis Honey* (2015 FCA 89) that a Court may consider both administrative law <u>and</u> civil remedies in the face of the improper exercise of ministerial discretion in the context of denying permits and licences.

60. *Paradis Honey* involved a regulation regarding the importation of honey bees that had expired and not been replaced, but which the responsible Minister continued to rely on as a basis for denying applications by Canadian honeybee producers to import bee colonies from the United States. A class action of honeybee producers sued the Crown for denying permits without lawful basis. For the majority of the Federal Court of Appeal, Stratas J.A. concluded that it was not plain and obvious that the statement of claim, which is assumed to be proven, could not give rise to liability in negligence against the Crown.

61. Stratas J.A., in *obiter* in *Paradis Honey* also found that the statement of claim could give rise to administrative law remedies, including monetary relief. Stratas J.A. concluded that "monetary relief based on public law principles" , qualifies as a claim that should not be struck on a motion to strike (at para. 118) Stratas J.A. notes that private law standards are not always well suited to remedying public law breaches and cited a range of cases involving monetary relief involving breaches of public law standards where no breach of private law standards had been found (at para. 145). Stratas J.A. elaborates on the discretion to award monetary remedies in public law contexts:

> I wish to add more about the discretion to grant monetary relief in public law.
>
> In public law, monetary relief has never been automatic upon a finding that governmental action is invalid or, using modern, post-Dunsmuir administrative law language, outside the range of acceptability or defensibility: Welbridge Holdings Ltd. v. Greater Winnipeg, 1970 CanLII 1 (SCC), [1971] S.C.R. 957, 22 D.L.R. (3d) 470; The Queen (Can.) v. Saskatchewan Wheat Pool, 1983 CanLII 21 (SCC), [1983] 1 S.C.R. 205, 143 D.L.R. (3d) 9; Holland v. Saskatchewan, 2008 SCC 42 (CanLII), [2008] 2 S.C.R. 551 at paragraph 9. "Invalidity is not the test of fault and it should not be the test of liability": K.C. Davis, Administrative Law Treatise (1958), vol. 3 (St. Paul, MN: West Publishing, 1958) at page 487. There must be additional circumstances to support an exercise of discretion in favour of monetary relief.
>
> The compensatory objective of monetary relief must be kept front of mind. So, in some cases, the quashing of a decision or the enjoining or prohibition of conduct will suffice and monetary relief will neither be necessary nor appropriate. In other cases, quashing, prohibiting or

> enjoining can prevent future harm and go some way to redress past harm, reducing or eliminating the need for monetary relief. In still others, such as cases like McGillivray and Roncarelli, both above, only monetary relief can accomplish the compensatory objective.
>
> As well, the quality of the public authority's conduct must be considered. This is because orders for monetary relief are mandatory orders against public authorities requiring them to compensate plaintiffs. And in public law, mandatory orders can be made against public authorities only to fulfil a clear duty, redress significant maladministration, or vindicate public law values: see, e.g., Canada (Public Safety and Emergency Preparedness) v. LeBon, 2013 FCA 55 (CanLII), 444 N.R. 93 at paragraph 14; D'Errico, above at paragraphs 15-21. (at paras. 141-144)

62. The Supreme Court's decision in *Imperial Tobacco* states that where a duty of care conflicts with the Crown's general public duty established by the statute, the court "may" conclude that no duty of care exists (at para. 45, 62). The Court defines policy decisions as those based on public policy considerations such as economic, social and political factors provided they are "neither irrational nor taken in bad faith." As Stratas J.A. observes in *Paradis Honey*, *Imperial Tobacco* reaffirms key principles of public liability but does not preclude such liability:

> I do not accept that *Imperial Tobacco* establishes any hard-and-fast rule that decisions made under a general public duty, government policy or core policy are protected from a negligence claim. (at para. 104)

63. Beyond the various torts to which the findings of the Arbitral Panel may give rise under Canadian administrative law, those findings also may meet the threshold

established by the Supreme Court for liability where public authorities act in "bad faith." In *Finney v. Barreau du Québec* 2004 SCC 36, the Court found a legal regulator in Quebec liable where its lack of diligence in delaying a prosecution of a lawyer for misconduct was held to constitute "bad faith" and monetary remedies to the affected party were found to be available. The Court held that "[e]xceptional though the case may have been, the conduct of the Barreau in this matter was not up to the standards imposed by its fundamental mandate, which is to protect the public. The virtually complete absence of the diligence called for in the situation amounted to a fault consisting of gross carelessness and serious negligence" (at para. 45).

64. The Arbitral Panel's finding in relation to the ministers' exercise of discretion and its reliance on the flawed JRP process could similarly be characterized as a "complete absence of the diligence called for in the situation." Again, liability against public officials and public regulators for bad faith flows not from malice but from an objectively determined absence of diligence or the presence of recklessness. As LeBel J. noted in *Finney* (at para. 39):

> Bad faith certainly includes intentional fault, a classic example of which is found in the conduct of the Attorney General of Quebec that was examined in *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121. Such conduct is an abuse of power for which the State, or sometimes a public servant, may be held liable. However, recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised . . . .

65. In *Enterprises Sibeca Inc. v. Frelighsburg (Municipality)* (2004 SCC 61) Deschamps, J., for the court, states:

> [T]he concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also to acts so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith. (at para. 26)

In light of this jurisprudential backdrop, the Ontario Court of Appeal summarized the "bad faith" test in relation to public authorities as, "inexplicable, apparently reckless, conduct may lead to the inference that the conduct was deliberate, intentional, and undertaken in bad faith." (*Bennett v. Bennett Environment Inc.* 2009 ONCA 198 at para. 30). For the purposes of this Report, I need not conclude that the findings of the Arbitral Panel actually meet this test. Rather, I conclude that if the JRP's recommendation, and the Ministers' reliance on that recommendation, constitute exercises of public authority that are "markedly inconsistent" with the applicable statutory authority, or otherwise can be characterized as "inexplicable" and "apparently reckless" and that harm to the Investors was foreseeable, liability on grounds of bad faith represent yet another potential basis for monetary remedies.

66. The discussion above is illustrative rather than exhaustive of the grounds for civil liability flowing from the ministerial discretion in denying the proposal of the Investors for the Whites Point Quarry. While this analysis has focused on the

findings of the Arbitral Panel, I am aware of subsequent developments which in my view bolster those conclusions – such as the recent approval of the Black Point Quarry project in Nova Scotia (April 2016), which includes precisely the reliance on appropriate factors and inclusion of mitigation issues that the Arbitral Panel found lacking in relation to the Whites Point Quarry decision.

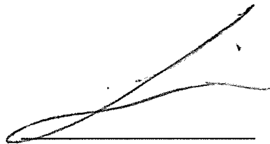
67. Finally, the Supreme Court has confirmed that it is possible for the same underlying public decision to give rise both to monetary and non-monetary remedies through both judicial review and civil actions. In *Canada (A.G.) v. Telezone* (2010 SCC 62), the Supreme Court confirmed that an aggrieved party may bring either or both an administrative law judicial review and a civil claim under Canadian law, and that it is not necessary to obtain a determination that an administrative law standard has been breached prior to launching a civil claim in relation to the same decision.

Conclusion

68. Notwithstanding the considerable deference which the exercise of ministerial discretion in the environmental field attracts, in light of the analysis above, I conclude that the decision of the Federal Minister of the Environment (on December 17, 2007) and the Nova Scotia Minister of the Environment & Labour (on November 20, 2007) to adopt the recommendation of the JRP to deny the Investors' proposal constitutes an unfair and an unreasonable exercise of discretion within the meaning of that term under Canadian administrative law.

69. Further, in light of the analysis above, I conclude that an exercise of discretion which breaches Administrative law standards and the standards of civil liability can give rise both to administrative law and civil law remedies, ranging from quashing the decision, to specific performance through mandamus, to monetary remedies and damages.

Date: December 10, 2016



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