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

REPLY EXPERT OPINION OF

LORNE SOSSIN

August 3, 2017

Purpose of this Report

1. I was asked to provide a reply analysis responding to the Expert Reports included as part of the Counter-Memorial on Damages of the Government of Canada. I further rely for this analysis on my earlier Expert Report, dated December 10, 2016, including the description of my qualifications and expertise set out in the introduction to that Report.

2. The Government of Canada's Expert Reports, my Expert Report and this Reply Expert Report relate to the damages which flow from the decisions of the Nova Scotia and federal Ministers to deny approval to the Investors' Whites Point Quarry and Marine Terminal Project ("Whites Point Quarry").

3. As I elaborated in my Expert Report, the findings of the Arbitral Tribunal 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.

4. I concluded in my Expert Report that the Ministers' exercise of discretion in relation to the Whites Point Quarry project would be found unreasonable under Canadian administrative law. The Ministers relied on the recommendation and findings of the Joint Review Panel ("JRP") which found the project to be inconsistent with "community core values." The Arbitral Tribunal held that this factor was not a relevant factor under the governing federal and Nova Scotian legislation, or the terms of reference of the JRP.

5. For purposes of my analysis, I rely on the findings of the Arbitral Tribunal in its Award:

> The Report expressly identifies only one effect of the project as both significant and adverse, namely "inconsistency with community core values". With respect to other impacts of the project, the Panel allowed

> that "with the effective application of appropriate mitigation measures, competent project management and appropriate regulatory oversight, most project effects should not be judged 'significant'".
>
> (at para. 509)

6. I also rely on the Reply Expert Report of David Estrin, who observes that the CEAA process was completed by the JRP and, but for its erroneous conclusion with respect to "community core values," the Panel did not identify significant adverse environmental effects ("SAEE") which would likely result from the Whites Point Quarry Project.

7. John Evans, in his Expert Report states that "community core values" was characterized as a "primary" basis on which the JRP rejected the Project, but may not have been the "only" basis (at para. 97). He noted a number of other potential adverse effects identified by the JRP, and that "uncertainties" remained as to the project effects in some areas (at paras. 99,103). The nature and scope of these alleged uncertainties remains unclear. That said, it was open to the Ministers to direct the JRP to clarify these uncertainties, if they existed, or to explore other potential adverse effects before reaching a decision. The Ministers chose not to do so. In light of the Arbitral Tribunal's findings and the record in this matter, the Ministers did not appear to have a basis in the record for a finding of significant adverse environmental effects which could not be mitigated, within the meaning of the terms of reference of the JRP, and in light of the governing legislation.

8. As I elaborate below, absent any evidence in the record of significant adverse environmental effects that could not be mitigated, the Ministers could not reasonably have denied approval to the Whites Point Quarry project, in light of their legislative mandate under the *Canadian Environmental Assessment Act, 1992* ("CEAA") and the *Nova Scotia Environment Act* ("NSEA"). While each of the statutory schemes employs slightly different language, the effect of the statutory framework for the decision on the project is to authorize the Ministers to exercise their discretion only on the basis of the evidentiary record before them (as set out in the findings of the JRP).

9. Without legitimate grounds to deny approval to the project, and but for the inappropriate reliance on the JRP's findings in relation to "community core values," in my view, the Ministers were legally compelled to exercise their discretion to approve the project.

10. The Government of Canada in its Counter-Memorial asserts that the Investors could have mitigated their losses had they pursued remedies within Canada's domestic courts and legal frameworks. While the decision of the Ministers could have been challenged in Canadian Courts through judicial review or by way of civil action, the process and remedies available through these domestic judicial recourses differ substantially from the NAFTA process and remedies. I am aware of no duty of exhaustion in the NAFTA context that would have compelled the Investors to pursue remedies domestically prior to seeking a remedy through the NAFTA process, especially where those domestic processes involve different standards, procedural hurdles and remedies.

11. Speculating on what might have occurred had the Investors hypothetically sought judicial review of the Ministers' decision involves myriad contingencies that would make any view expressed by an expert a largely subjective exercise. That said, assuming the Investors did pursue remedies through Canada's domestic courts through a civil action, the monetary remedies or damages sought would have precluded concurrent proceedings under NAFTA. Given the unpredictability of timelines in the domestic Canadian courts and the complexity of any proposed domestic court challenge (involving, potentially, either or both Federal and Nova Scotia proceedings), it is not reasonable to conclude such proceedings could have been completed, including any possible appeals of interlocutory and/or final outcomes, in the three year period before the Investors' ability to engage the NAFTA process would become time-barred.

12. While the Investors hypothetically could have pursued non-monetary remedies through judicial review concurrently with NAFTA proceedings (that is, assuming they sought remedies other than monetary damages in such a judicial review), the likeliest

result of such judicial review would have been to remit the approval process back to Federal and Nova Scotia Ministers, for a further discretionary process, in which the Investors reasonably would have lacked confidence in light of their experience that culminated in the rejection of the project.

13. I turn now to the analysis underlying the conclusions set out above.

Analysis

14. This analysis is divided into two sections:

   a. The first section elaborates on the statutory discretion of the Ministers and considers how the JRP process, and the record before the Ministers following the JRP, constrained that discretion; and

   b. The second section explores the recourses open to the Investors in Canadian domestic courts, and how those recourses interact with the NAFTA process.

Part One: Ministerial Discretion

15. In my Expert Report, I concluded that the Ministers' exercise of discretion in denying approval to the Whites Point Quarry was unreasonable. This conclusion was based in part on the fact that the Ministers had accepted the finding and recommendation of the JRP, which was based on the "community core values" factor, which was subsequently rejected by the Arbitral Tribunal.

16. What I wish to elaborate upon in this Reply Expert Report is whether, had the JRP not based its findings on the "community core values" factor, the Ministers nonetheless could have refused approval for the project. This view is expressed by Expert Reports submitted by the Government of Canada, mainly those of Mr. Blouin (at para. 42), Mr. Connelly (at paras. 20, 51-59), and Mr. Geddes (at paras. 23-25).

17. In this sense, I take the significance of this question to be relevant for the Tribunal as it evaluates the loss to the Investors arising from Canada's breach of NAFTA. I understand that while the calculation of damages flowing from breaches of national law may be of interest in the calculation of damages flowing from a breach of NAFTA, the ultimate issue for the Tribunal is not the domestic legal implications of the Ministers' decision to deny approval for the Whites Point Quarry project, but rather whether the potential availability of domestic judicial remedies could have mitigated the damages relevant to the breach of NAFTA.

18. I am aware that reasonable mitigation can be relevant to the calculation of damages under NAFTA principles. I understand the premise of the Government of Canada's submission to be that if the JRP had not relied on "community core values," the Ministers nonetheless would have had the authority under the governing legislation to deny approval to the project, and, as a consequence, the Investors had no entitlement to approval of the project (paras. 59-62 of Counter-Memorial of the Government of Canada).

19. In order to address the question of whether the Ministers could have denied approval for the Investors' proposal on grounds <u>other than</u> "community core values," it is helpful to set out the statutory discretion which governed the federal Minister (through the CEAA) and the Nova Scotia Minister (through the NSEA), respectively. I will deal with the implications of the statutory language in each context in turn.

20. Section 37 of the *Canadian Environmental Assessment Act, 1992* provides that a "responsible authority" (in this case, the DFO) with the approval of the Governor in Council ("GIC") must take one of two courses of action following an environmental assessment:

> 1. If the project is not likely to cause significant adverse environmental effects (SAEE), or if such effects are likely but the GIC believes these negative environmental effects can nevertheless be justified, the Responsible Authority (RA) may exercise any power or perform any duty that would allow the project to proceed (s. 37(1)(a)).

> 2. If the project is likely to cause significant adverse environmental effects that cannot be justified, the RA may not exercise any power or perform any duty that would allow the project to proceed (s. 37(1)(b)).

21. The implication of this section of CEAA is that even if there is evidence of significant adverse environmental effects, the GIC can nevertheless approve a project where there are overriding public interest benefits. This "political override" is found in section 37 for projects that may be environmentally harmful but which may nonetheless be "justified in the circumstances" because the project is considered necessary for political, policy or economic reasons.

22. By the same token, however, where there is no evidence of such significant adverse environmental effects, a Minister does <u>not</u> retain discretion to nevertheless deny approval to a project. There is no corresponding phrase in section 37(1)(b) of CEAA that says something along the following lines: "if a project will not have significant adverse environmental effects, a refusal can nonetheless be justified in the circumstances…". If the project does not give rise to significant adverse environmental effects, in other words, there is no provision in CEAA that would allow the Responsible Authority ("RA") (or GIC) to turn it down for reasons of political expediency, policy preference, economic reasons, or in response to public opposition.

23. The fact that there is no such discretion to be found in the legislation is hardly surprising. The statutory ability for decision-makers to override a finding that there are no significant adverse environmental effects in a particular project for political, policy or economic reasons would have been a feature of the legislative scheme that every proponent like Bilcon would have had to be aware of from the start of the process. If such a provision had indeed existed, why would proponents like Bilcon invest millions of dollars on experts, in preparing an environmental impact statement and in participating before the joint review panel? It is unreasonable to expect that proponents like Bilcon would nevertheless participate if they thought that final political decision-makers could nevertheless act for any reason, even if no SAEE were found to exist. It is hard to imagine that proponents would make these expenditures and take the time to participate fully in such circumstances.

24. Section 37 of CEAA, 1992 provided that a responsible authority with the approval of the Governor in Council (GIC) must take one of two courses of action. If the project is not likely to cause significant adverse environmental effects, or if such effects are likely but can be justified, the RA may exercise any power or perform any duty that would allow the project to proceed (s. 37(1)(a)). If the project was likely to cause significant adverse environmental effects that cannot be justified, the RA may not exercise any power or perform any duty that would allow the project to proceed (s. 37(1)(b)).

25. This distinction in the Act between ministerial discretion where significant adverse environmental effects are found on the record before the decision-maker, and where SAEE are not found on the record, is reinforced by the amendments that were made to the CEAA in 2012. (Indeed, an entirely new statute, CEAA, 2012 repealed and replaced the CEAA that applies in the present proceedings). It is well accepted that subsequent legislation can provide guidance on the interpretation of prior versions of the legislation. As Pierre-Andre Côté writes in *The Interpretation of Legislation in Canada, 3rd Edition* (Scarborough: Thomson Canada Limited, 2000):

> Subsequent legislative history is relevant because the legislature presumably intends to introduce some change in the law by modifying it. The repeal of a statute creates the presumption that it was indeed in force at the time of repeal. Similarly, the addition of an element to a statute justifies the presumption that it was previously absent. Any other conclusion implies that the new legislation served no purpose.
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> (at pp. 529-30)

26. Under the CEAA, 2012, the language found in the sections authorizing ministerial discretion in relation to projects, authorizes the GIC to deny approval where significant adverse environmental effects cannot be justified in the circumstances. For example, for projects assessed initially by the NEB, s. 31(1)(a)(iii) of the CEAA, 2012 provides:

> Governor in Council's decision

> 31 (1) After the responsible authority with respect to a designated project has submitted its report with respect to the environmental assessment or its reconsideration report under section 29 or 30, the Governor in Council may, by order made under subsection 54(1) of the *National Energy Board Act*
>
> (a) decide, taking into account the implementation of any mitigation measures specified in the report with respect to the environmental assessment or in the reconsideration report, if there is one, that the designated project
>
> (i) is not likely to cause significant adverse environmental effects,
>
> (ii) is likely to cause significant adverse environmental effects that can be justified in the circumstances, or
>
> (iii) is likely to cause significant adverse environmental effects that cannot be justified in the circumstances; and
>
> **(b)** direct the responsible authority to issue a decision statement to the proponent of the designated project that
>
> **(i)** informs the proponent of the decision made under paragraph (a) with respect to the designated project and,
>
> **(ii)** if the decision is referred to in subparagraph (a)(i) or (ii), sets out conditions
>
> ...
>
> [Emphasis added]

27. This interpretation of CEAA, 2012, and its implications for interpreting the previous version of the Act, is further supported by the structure of the Minister's role as clarified in the CEAA, 2012. Section 27 and section 36 of the CEAA, 2012 both provide that the RA or where the Agency is the RA, the Minister, must make decisions in accordance with section 52. Section 47 provides that the Minister, after taking into account the review of a panel's report, must make decisions in accordance with section 52. Section 51 provides that the Minister, after taking into account the Agency's report, must make decisions in accordance with section 52.

28. Section 52, in turn, provides that the RA or Minister must determine if the project is, or is not, likely to cause SAEE as set out in sections 5(1) or 5(2), as applicable, taking

into account mitigation measures that the decision maker considers appropriate. The project is only referred to Cabinet if a project is likely to cause SAEE. After such a referral, Cabinet then decides whether or not the SAEE are justified in the circumstances. For projects without any findings of SAEE, however, there is no referral to Cabinet. Instead, the decision maker must establish conditions with which the proponent must comply. These conditions become binding once federal power is exercised to permit the project to proceed (s. 53(2) and (3)). In essence, following the finding that there are no significant adverse environmental effects of a project, the Minister retains no discretion to deny approval for the project.

29. The same is true of Cabinet's decision under section 53 – if Cabinet finds that the project will not cause SAEE, it must establish the conditions to be complied with if power is exercised.

30. As David Estrin elaborates in his Expert Report, in the present circumstances, had the JRP not fallen into error with its conclusion with respect to community core values, it would not have found significant adverse environmental effects to exist. As a result, there was no basis in the evidentiary record before the Ministers to deny approval for the Whites Point Quarry.

31. If the Ministers wished to rely on additional evidence or information not contained in the record of the JRP, they could have requested that the JRP undertake additional actions before determining that they were in a position to address the request. Mr. Connelly in his Expert Report alludes to this authority as well (at para. 69), and acknowledges that prior to issuing a decision the Ministers must determine that the JRP Report is complete and meets all the requirements under the Act (at para. 72).

32. Given this conclusion, I disagree with the assertion in the Reply Expert Opinion of Mr. Connelly (specifically at paras. 20, 48, 51-59) that the Ministers retained some residual discretion to deny approval even if the factor of "community core values" were removed from consideration in the JRP.

33. Turning to the NSEA, a similar analysis follows, though the specific statutory language differs in some relevant respects.

34. Under the NSEA, panels are authorized to evaluate the likelihood that a project will cause "adverse effects" and "significant environmental effects," defined under the Act in the following terms:

   a. "Adverse Effect" means an effect that impairs or damages the environment or changes the environment in a manner that negatively affects aspects of human health.

   b. "Environmental Effect" means, in respect of an undertaking, (i) any change, whether negative or positive, that the undertaking may cause in the environment, including any effect on socio-economic conditions, on environmental health, physical and cultural heritage or on any structure, site or thing including those of historical, archaeological, paleontological or architectural significance; and (ii) any change to the undertaking that may be caused by the environment, whether the change occurs inside or outside the Province.

   c. "Significant" means, with respect to an environmental effect, an adverse effect that occurs or would occur as a result of any of the following: (i) The magnitude of the effect; (ii) The geographic extent of the effect; (iii) The duration of the effect; (iv) The frequency of the effect; (v) The degree of reversibility of the effect; and (vi) The possibility of occurrence of the effect.

35. Mr. Blouin's Expert Report asserts that based on his experience with environmental assessment panels in Nova Scotia, a broad approach is taken to the scope of socio-economic factors (at paras. 22-26). Additionally, Mr. Blouin indicates "mitigation" has a different meaning in the NSEA context. Since the language of the CEAA and NSEA differ, it is important to consider the terms of reference of the JRP itself, which reflects the blended mandates of both Ministers under each governing Act. The terms

of reference of the JRP authorize the panel to evaluate the "socio-economic effects of the project." (at Terms of Reference, Joint-Review Panel, Part III (i))

36. While Mr. Connelly's Expert Report asserts that the JRP reached its conclusion to recommend against approving the project on grounds other than "community core values" (at paras. 82-87), and while Mr. Blouin's Expert Report includes certain speculative conclusions on what might have been found by the JRP had the NAFTA breach not occurred (at para. 49), my understanding is that this stage of the Arbitral Tribunal's proceeding is dedicated to determining the loss caused by the breach which was found to have occurred.

37. As the Arbitral Tribunal concluded that the "community core values" at the heart of the breach was the only significant finding which justified recommending against approval, I have taken the question of the record before the Ministers, and on which they based their decisions, as settled. At this juncture, I am also guided by the following passage in the Arbitral Tribunal's Award:

> While it is not strictly necessary to decide the point in order to resolve this case, the Tribunal's respectful view is that the "community core values" approach actually went beyond being just problematic and that on any of its plausible interpretations it does not by itself warrant a finding of "likely significant adverse effects after mitigation". In any event, it appears certain to the Tribunal that the JRP was, regardless of its "community core values" approach, still required to conduct a proper "likely significant effects after mitigation" analysis on the rest of the project effects. By not doing so, the JRP, to the prejudice of the Investors, denied the ultimate decision makers in government information which they should have been provided.
>
> (at para. 535)

38. In my view, the CEAA does not permit a residual discretion for a federal Minister to reject a proposal where no significant adverse environmental effects have been found simply on the basis of the Minister's preference or political motivations.

39. Mr. Connelly in his Expert Report suggests such "political override" discretion does exist under the CEAA and was exercised in the context of the Northern Gateway

Pipeline. I am not persuaded the analogy holds to the circumstances of the Investors' claim. In the context of the Northern Gateway JRP, a successful challenge to the Federal Court of Appeal invalidated the original analysis and recommendation on grounds of insufficient consultations with Indigenous communities. Additionally, the Government's ultimate decision not to proceed with the Northern Gateway project was justified on evidentiary grounds relating to environmental effects (OIC 2016-1047, which specifically links the Government's decision to the evidence on the record in the JRP), and not on the basis of any residual political discretion to adopt a position not rooted in the evidentiary record generated by the JRP. Finally, in the Northern Gateway case, the GIC prevented the pipeline project from proceeding by resorting to its authority contained in s. 54 of the *National Energy Board Act* combined with s. 31 of CEAA, 2012 -- a provision, of course, that did not exist at the time that the WPQ Project was being considered. Section 31 specifically provides that the GIC may by order made under s. 54(1) of the *Act*, "decide …that the designated project (iii) is likely to cause SAEE that cannot be justified in the circumstances". Therefore, the Northern Gateway decision undermines any suggestion made by Mr. Connelly that the GIC had the requisite statutory authority under CEAA, 1992 to deny the WPQ Project from proceeding where there is no SAEE; that authority only came into existence subsequently when CEAA, 2012 was enacted.

40. Just as the CEAA does not permit a residual discretion for a federal Minister to reject a proposal where no significant adverse environmental effects have been found simply on the basis of the Minister's preference or political motivations, I am aware of no discretion of this kind which could be justified under the NSEA.

41. In his Expert Report, Mr. Geddes asserts the Minister could have relied on a broad definition of "socio-economic effects" under the NSEA to deny a project even if the JRP identified no significant adverse environmental effects based on the record (at para. 23). Further, Mr. Geddes indicates that the JRP constituted simply one source of information which informed the Nova Scotia Minister's decision, but that the Minister could similarly rely upon staff reports and public comments about a proposed project, even if these did not form part of the record of the JRP (at para. 24). The implication

of Mr. Geddes' characterization of the Minister's discretion under the NSEA, is that it is, in effect, unlimited. It may be based on evidence in the record, whether or not disclosed to proponents of a project, or may be based on no evidence at all, but rather the sentiments and desires of members of the public. I disagree with these assertions of Mr. Geddes.

42. The Nova Scotia Minister's discretion is set out in s. 40 of the NSEA. The very purpose of establishing a JRP is to ensure a transparent and fair process for generating the evidentiary record that will inform the Minister's exercise of that discretion. As indicated above in relation to the federal framework, there would be little rationale for proponents to invest significant resources in the JRP process if the Minister possesses a residual political discretion simply to disregard the record arising from the JRP, or to rely on other factors and information, not disclosed to proponents and with no opportunity for proponents or intervenors to contribute to or respond to the Minister's understanding of such factors and information.

43. If there were ambiguity on the proper interpretation of the CEAA and NSEA in relation to a residual political discretion, the language of the JRP's terms of reference and the decision letters of the Ministers reinforce the conclusion that denying the Whites Point Quarry project could only be lawful if rooted in the record and evidence before the JRP.

44. Given this conclusion, I disagree with the Reply Expert Opinions of Mr. Blouin, Mr. Connelly and Mr. Geddes, to the extent they suggest a residual discretion could have been exercised by the Ministers to deny approval for the project. In my view, given the Arbitral Tribunal's finding that the JRP recommendation was based on the "community core values" in breach of NAFTA, it follows that the Ministers, acting reasonably and within their statutory authority, would have approved the Whites Point Quarry project based on the record and evidence before them.

45. As the Expert Reports filed by the Government of Canada assert that the Investors could have sought redress for the decision not to approve the Whites Point Quarry

project through Canada's domestic courts, I turn to address these assertions in Part Two of this Report.

Part Two: Hypothetical Recourse to Domestic Courts

46. In examining the recourses open to the Investors' in addition to NAFTA, it is important to reiterate the conclusions I set out in my Expert Report. The key conclusion of that analysis was that the responsible Federal and Nova Scotia Ministers acted unreasonably in denying the Investors' application for approval for the Whites Point Quarry project. The Ministers relied on the flawed JRP Report, and failed to consider the record. That record, as David Estrin concludes in his Expert Report, revealed no significant adverse environmental effects arising from the project which could not be mitigated.

47. In other words, as indicated in Part One of this report, not only did the Ministers act unreasonably in denying approval to the Whites Point Quarry project, but in light of the record generated by the JRP, and the constraints on the Ministers' discretion outlined above, the Ministers, acting reasonably, would have granted approval to the project. This conclusion is bolstered by the fact that the Ministers granted approval to previous and subsequent projects in analogous locations and of comparable size and scope (or larger) approval, as elaborated in David Estrin's Expert Report, on which I rely. In this vein, the Arbitral Tribunal concluded in its Award:

> In the present case the evidence shows that some of the individual factual elements were highly unusual in their own right. The unprecedented nature of the JRP's approach is confirmed by remarks of the Chair of the Panel. Extensive and detailed expert testimony confirmed that the approach was not only at variance with the existing legal framework, but also with the actual treatment provided in comparable cases. The comparators included situations involving coastal mining and marine terminals as well as situations where a local community was politically divided over the project.

(at para. 739)

48. The Government of Canada, in its Counter-Memorial, asserts that the Investors could have and should have sought recourse to domestic courts to address flaws in the JRP (at paras. 87-98). I am aware of no doctrine that requires parties to exhaust domestic remedies before seeking redress for unfair treatment under Chapter 11 of NAFTA.

49. The purpose of domestic judicial review differs substantially from that of NAFTA. As the Arbitral Tribunal observed in its Award:

> It may bear reiterating, therefore, the Tribunal's view that under NAFTA, lawmakers in Canada and the other NAFTA parties can set environmental standards as demanding and broad as they wish and can vest in various administrative bodies whatever mandates they wish. Errors, even substantial errors, in applying national laws do not generally, let alone automatically, rise to the level of international responsibility vis-à-vis foreign investors. The trigger for international responsibility in this particular case was the very specific set of facts that were presented, tested and established through an extensive litigation process.
>
> (at para. 739)

50. Under Canadian law, parties may elect to bring actions which best might address (and redress) the violations of domestic laws that they have experienced. For example, the Supreme Court of Canada considered whether a civil action was available to a party which had received a negative regulatory decision, notwithstanding that the party could have but chose not to judicially review that regulatory decision (*Canada (Attorney General)* v. *TeleZone Inc*, 2010 SCC 62). By analogy, it should be open to the Investors to seek a remedy under NAFTA without negative consequences or prejudice flowing from the fact they chose not to judicially review the decision of the Ministers to deny approval to the project under domestic legal frameworks.

51. Similarly, as elaborated in my Expert Report dated December 10, 2016, the exercise of discretion by the Ministers could have given rise both to non-monetary and monetary remedies. The Federal Court of Appeal affirmed in *Paradis Honey* 2015 FCA 89, that the availability of judicial review is not a bar to recovery in tort. Canadian public law has a long tradition of ensuring the accountability for public decisions can be pursued

through either or both judicial review and tort, and if successful, resulting in either or both non-monetary and monetary remedies. In a blog post analyzing the decision, Paul Daly took issue with the dissenting Justice Pelletier's reasons in *Paradis Honey*, which would have held the availability of judicial review to be a bar to the recovery of damages, observing *"On this logic, Frank Roncarelli would also have been unable to collect damages."* (Paul Daly, "Rethinking Public Authority Liability in Tort: *Paradis Honey Ltd.* v. *Canada*, 2015 FCA 89" (April 13, 2015).

http://www.administrativelawmatters.com/blog/2015/04/13/rethinking-public-authority-liability-in-tort-paradis-honey-ltd-v-canada-2015-fca-89/)

52. In his Expert Report, John Evans addresses the availability of judicial review. He assumes the legal accountability at issue in the context of the Whites Point Quarry project relates to a review of the recommendation of the JRP (at para. 10). Mr. Evans asserts that the JRP itself could have been judicially reviewed and relies for this conclusion on *Alberta Wildnerness Assn* v. *Cardinal River Coals Ltd*. [1999] 3 F.C.R. 425 (F.C.) discussed by Mr. Evans at paras. 36-38.

53. While a JRP which has not yet led to a final decision from the responsible Minister may well be subject to a judicial review, it is unclear how this would be relevant to this matter, where a final decision from the responsible Ministers based on the JRP already has been made. While the Arbitral Tribunal focused its reasons on flaws of the JRP, the relevance of these flaws in the JRP process was that the Ministers relied on the JRP in their decisions. Had the Federal and Nova Scotia Ministers approved the project notwithstanding the recommendation of the JRP, there would be no need either for judicial review or for the NAFTA proceeding. Instead, they adopted the JRP's findings and provided no basis in the record other than the JRP's findings for their decision not to approve the project (at paras. 321-324 of the Arbitral Tribunal's Award).

54. The *Alberta Wilderness Assn* case relied on by John Evans (at para. 36-38) involved a very different problem – parties seeking prohibition against the Federal Minister to prevent the Minister from reaching a decision based on a JRP they viewed as flawed.

The Federal Court of Appeal held that flaws in the JRP could indeed be a basis for a party to seek prohibition.

55. As the scenario under which a challenge to the JRP itself would arise is one where an aggrieved party sought to close down the JRP <u>before</u> the Minister had reached a decision, it is difficult to see how this precedent applies to the situation of Bilcon. While the Investors did raise concerns about the JRP directly with the responsible Ministers, they were led to expect a further opportunity to address concerns prior to a final decision being made by the Ministers (letter of November 21, 2007, from Bilcon to Minister John Baird). Thus, the Investors acted reasonably in identifying the problems with the JRP but not seeking judicial review at that stage of the process, and the Arbitral Panel's decision in no way suggests the Investors were under any obligation to seek any redress from domestic courts at that stage of the process.

56. More importantly, the question in this NAFTA process is not simply the procedural fairness and fair treatment of the Investors in the JRP, or just the reasonableness of the Minister relying on the flawed JRP (as it would be under in a judicial review), but ultimately the fair treatment of the Investors pursuant to Chapter 11 of NAFTA.

57. The Investors certainly had recourses they could have pursued to address the Ministers' decision to deny approval to the Whites Point Quarry project. They could have pursued a judicial review of that decision in either or both of the Federal Court and the Nova Scotia Supreme Court. Additionally, the Investors could have pursued a civil action for various damages and monetary remedies (for misfeasance in public office or abuse of public authority, for example, or adopting the form of public liability outlined by the Federal Court of Appeal in *Paradis Honey* (2015), discussed above and in my original Expert Report). While such proceedings for damages through domestic courts were available, they would have precluded the Investors from pursuing concurrent NAFTA proceedings, and would almost certainly have taken more than 3 years to complete (inclusive of interlocutory and/or final appeals), thus rendering subsequent NAFTA proceedings time-barred.

58. The route of judicial review for non-monetary remedies could have been pursued concurrently with NAFTA proceedings. The nature of remedies available on judicial review in domestic courts in Canada differs substantially from the remedial framework available under NAFTA – such remedies include *certiorari* (resulting in remitting the matter back to the decision-maker), *mandamus* (directing a result) or prohibition (terminating a process before a final decision). Judicial review further would not provide any of the rights for examination for discovery which apply to an action, and would have led to other juristic disadvantages (such as deference to ministerial discretion on judicial review, etc).

59. John Evans concludes that the judicial review route, resulting in remedies <u>other than</u> damages, would take five years from commencement to conclusion. This timeline seems to assume no interlocutory disputes and that Federal and Nova Scotia proceedings would take place concurrently. It is unlikely I could comment on such a speculative and variable hypothetical scenario as that discussed in opinion of John Evans, except to say that in my experience, litigation involving the degree of complexity and contentiousness as existed in this matter would be likely to be at the upper end of any spectrum of time limits.

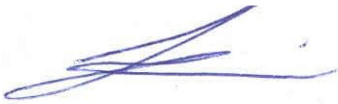
60. If successful on a judicial review, the likeliest remedy, as John Evans notes, would be for the matter to be remitted back either to the Ministers for a new decision, or to the JRP for a new process. Either way, the Investors would find themselves returned to a process that has already been found to have accorded them unfair and inequitable treatment. In these circumstances, it would be entirely unreasonable for the Investors to choose the uncertain path of judicial review instead of the recourse prescribed under the NAFTA.

61. Under Canadian administrative law principles, ministerial discretion, even if broadly worded, must be exercised based on the record and consistent with the authority provided under statute. While Bilcon could hypothetically have pursued remedies through domestic courts for the administrative law breaches apparent in the decision of the Ministers (and outlined in my original Expert Report), such a path would have

added years of uncertainty and remedies that would have been substantially different from those available in the NAFTA process.

62. To conclude, it is my opinion in all the circumstances that the Ministers acting reasonably, were legally compelled to approve the Whites Point Quarry project.

Date: August 3, 2017



Lorne Sossin