IN THE MATTER OF AN ARBITRATION UNDER
CHAPTER 11 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

AND:

GOVERNMENT OF CANADA

Respondent

EXPERT REPORT FOR THE DAMAGES PHASE OF THE ARBITRATION

by

THE HONOURABLE JOHN M. EVANS

June 9, 2017

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I. QUALIFICATIONS

1. I received my B.A. from Oxford University (First Class, Honour School of Jurisprudence) in 1964 and my B.C.L. from Oxford University in 1965. I moved to Canada in 1975 on my appointment as a Professor of Law at Osgoode Hall Law School of York University. I was admitted to the Ontario bar in 1979 as a Barrister and Solicitor. I continued to teach at Osgoode Hall Law School until 1998 when I was appointed to the Bench. I was a Judge first of the Federal Court until 1999, and then of the Federal Court of Appeal until my retirement in 2013. I have been Public Law Counsel at Goldblatt Partners LLP since 2015.

2. I am the author, co-author or editor of 8 books, and author of 40 refereed law journal articles and 7 book chapters. Most of my scholarly work concerns the judicial review of administrative action. With my co-author Donald J. M. Brown, Q.C., I won the David W. Mundell Medal for Legal Writing for the treatise, *Judicial Review of Administrative Action in Canada*, in 1998. In 2011, I was awarded the Council of Canadian Administrative Tribunals Medal for contributions to administrative justice in Canada. My scholarly works are regularly cited by Canadian courts at all levels, and I have been described by the Supreme Court of Canada as "a leading scholar in the field of administrative law."[1]

3. I have substantial experience with the judicial review of administrative action by the Government of Canada and its agencies. As a consultant, both before and after my years as a Judge, I have given legal advice on a wide range of administrative law matters. As a teacher, invited conference speaker and writer, I have specialized in the law relating to the judicial review of administrative action. Finally, judicial review of administrative action is the largest component of the Federal Courts' jurisdiction and as a Judge of the Federal Courts for more than 15 years, I heard hundreds of applications for judicial review and appeals from decisions of federal administrative decision makers, and wrote many opinions. The Federal Courts' judicial review jurisdiction covers all

[1] **R-632**, *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at para. 41 [*Alberta Teachers' Association*].

federal administrative decision makers, including those acting under the *Canadian Environmental Assessment Act,* 1992 S.C. c. 37 (*CEAA*). While few *CEAA* cases reached the Federal Court of Appeal during my tenure, I wrote reasons as a Trial Division Judge in *Sierra Club of* Canada *v. Canada (Minister of Finance)* [1999] 2 F.C. 211, and was a member of panels of the Federal Court of Appeal that heard other *CEAA* cases.

4. A comprehensive curriculum *vitae* is attached as Appendix "A*"* to this report.

II. PURPOSE AND SCOPE OF REPORT

5. This report is submitted at the request of the Government of Canada in connection with the damages phase of the NAFTA arbitration between Bilcon of Delaware, Inc., members of the Clayton family (the Claimants) and the Government of Canada. The dispute relates to the Claimants' proposal to develop and operate a stone quarry and marine terminal at Whites Point, Nova Scotia (the Project). In the Jurisdiction and Liability Phase of the Arbitration, the Tribunal held by a 2-1 majority that Canada was in breach of NAFTA Articles 1102 and 1105.

6. My understanding is that the Tribunal based its conclusion on a finding that the recommendation of the Joint Review Panel (JRP) that the Project not be permitted to proceed on the basis of its "inconsistency with community core values" was a "fundamental departure from the methodology required by Canadian and Nova Scotia law,"[2] and that despite its legal obligation under s. 16 of *CEAA* to report on mitigation measures,[3] the JRP did "not explain why no mitigation measures at all were possible in respect of the 'community core values', even if in the view of the JRP they would not have been entirely sufficient."[4] As a result, the Tribunal found that the Claimants were denied "a fair opportunity to know the case … [they] had to meet and to address it."[5]

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[2] Award on Jurisdiction and Liability, ¶ 600.

[3] Award on Jurisdiction and Liability, ¶ 546.

[4] Award on Jurisdiction and Liability, ¶ 547.

[5] Award on Jurisdiction and Liability, at ¶ 543.

7. In the damages phase of the arbitration, the Claimants seek to recover the future profits that they claim they would have earned over the estimated 50-year life of the quarry.

8. I have been asked by the Government of Canada to consider, in light of the majority's conclusions, the domestic administrative law remedies that were available to the Claimants under Canadian law, and how, if at all, resort to these remedies could have mitigated the damage caused to the Claimants by the acts of the JRP that the Tribunal found to be in breach of NAFTA. In my opinion, the Claimants could have applied for judicial review in the Canadian courts in order to mitigate any damage caused by these acts and would, as a result, have had an opportunity to have the Project considered in accordance with Canadian law.

9. Part III of this Report describes in general terms the Canadian law and procedure of judicial review of administrative action, both at the federal level and in the province of Nova Scotia. I specifically consider the jurisdiction of the Canadian courts to review administrative action, the grounds on which a court may find the actions of an administrative tribunal to be unlawful, the standard of review, the available remedies, and the likely duration and cost of the proceedings.

10. Part IV considers how applications for judicial review would likely have unfolded in the present case. As noted above, I understand that the breach identified by the Tribunal is the recommendation of the JRP, rather than the decisions made by Canada and Nova Scotia to refuse the permits that the Claimants required to undertake the Project.[6] As a result, I focus my opinion on the judicial review available with respect to the JRP recommendation itself, although I note that much of what I describe here would also apply to the government decisions. In this Part, I describe the courts in which the Claimants could have instituted proceedings to challenge the recommendations of the

[6] The Tribunal appears to have made no definitive ruling on the legal validity of the Government decisions to refuse the permits. It did, however, reject the Claimants' arguments that the decisions were invalid because the Ministers (i) had not considered their submissions that the Project should be approved despite the JRP's recommendation to the contrary, (ii) had not made an independent decision, and (iii) had failed to give adequate reasons: Award on Jurisdiction and Liability, ¶¶ 585-587.

JRP, the likely outcome of those proceedings (accepting for the purposes of this Report that the NAFTA Tribunal correctly identified breaches of Canadian law), the remedies that could have been granted, and an estimate of the duration and cost of the judicial review process.

11. In Part V, I consider the hypothetical situation which I understand has been posited by the Claimants in the arbitration. That is, in the absence of the JRP's errors found by the majority, the Project would have been given a positive recommendation by the JRP and would have been approved by government decision-makers. The question that I consider here is whether objectors to the proposed project, who participated in the JRP hearings, could have successfully applied for judicial review to challenge this outcome.

III. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN CANADA: AN OVERVIEW

1. Function of Judicial Review

12. In liberal democracies the availability to individuals of effective redress against unlawful governmental action is regarded as an essential element of the rule of law, both to protect individuals from harm and to vindicate the public interest in ensuring that governmental action is lawful.

13. Redress for the abuse of power by public officials or bodies in the common law world includes judicial review of administrative action by courts whose independence of the Executive is constitutionally guaranteed. In judicial review proceedings the courts determine the legality, rationality and procedural fairness of administrative action impugned by the applicants, and will normally provide a remedy when the action under review does not meet these standards.[7]

2. The Jurisdiction of the Various Canadian Courts to Review Administrative Action

[7] For a recent authoritative restatement of the function of judicial review, see **R-633**, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 27-33 [*Dunsmuir*].

14. An application for judicial review may be made with respect to a wide range of administrative action taken pursuant to delegated statutory authority.[8] Before 1970, the superior courts of the Provinces exercised judicial review jurisdiction over administrative action taken pursuant to powers delegated by either the federal Parliament or provincial legislatures.

15. In 1970, Parliament enacted the *Federal Court Act*,[9] which conferred on the newly created Federal Court of Canada exclusive jurisdiction over applications for judicial review of all administrative action taken by those operating under federal legislation.[10] As a result, the Federal Court has no jurisdiction to review administrative action taken under provincial legislation, and provincial superior courts have no jurisdiction over applications for judicial review of federal administrative action, unless it is challenged on constitutional grounds.

16. The *Federal Courts Act*, s. 18.1(3) codifies the common law and provides that an application for judicial review may be made in respect of "a decision, order, act, or proceeding" of a federal statutory body. The most common types of acts reviewed are administrative decisions, orders, and subordinate legislation. Reports or recommendations made under statutory authority as an integral element in a decision-making process may also be the subject of an application for judicial review.[11]

17. The provisions of the *Nova Scotia Civil Procedure Rules* relating to applications for judicial review apply to "decisions", a term that is defined broadly to include "action

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[8] **R-634**, Brown and Evans, *Judicial Review of Administrative Action in Canada*, loose leaf (Toronto: Thomson Reuters Canada: 1998), chap. 2:1000-3400 (last updated October 2016) [*Brown and Evans*].

[9] Now *Federal Courts Act,* R.S.C. 1985, c. F-7 [**C-266**, *Federal Courts Act*].

[10] See **C-266**, *Federal Courts Act*, s. 2, where the federal boards, commissions and other tribunals reviewable in the Federal Courts are defined as those "having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament." This definition extends well beyond bodies normally regarded as boards, commissions and tribunals and includes Ministers exercising federal statutory powers: see **R-635**, *Canada (Attorney General) v. Telezone Inc*., 2010 SCC 62, [2010] 3 S.C.R. 585 at para 50.

[11] See, for example, **R-636**, *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 (reference of human rights complaint to adjudication), and **R-637**, *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System),* [1977] 3 S.C.R. 440 (report of public inquiry causing reputational damage).

taken, or purportedly taken, under legislation."[12] A report and recommendations made pursuant to Nova Scotia statutory authority can thus be the subject of an application for judicial review in the Supreme Court of Nova Scotia.

3. Standing

18. Those adversely affected by administrative action have standing to make an application for judicial review to challenge it.[13] In addition, courts have discretion to confer public interest standing on applicants who have not themselves been adversely affected, but who represent some aspect of the public interest in challenging the impugned administrative action. When deciding whether to grant public interest standing, courts consider whether: (i) there is a justiciable issue to be decided; (ii) the applicant has a stake or genuine interest in the matter; and (iii) the proceeding is a reasonable and effective way of raising the issue.[14] Public interest groups that have a demonstrated record of involvement with an issue, especially if they have participated in administrative hearings on a matter, are regularly granted standing to apply for judicial review of the resulting decision.[15]

19. A court may also grant intervener status to individuals who wish to participate in an application for judicial review in order to offer arguments in support of or in opposition to the administrative action under review.[16] In exercising this discretion, courts typically consider whether the proposed intervener will bring to the proceeding a perspective different from that of the parties, and their ability to assist the court to reach

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[12] **R-638**, *Nova Scotia Civil Procedure Rules*, Consolidated [Excerpts], R. 7.01(i).

[13] **C-266**, The *Federal Courts Act*, s. 18.1(1) provides that an application for judicial review may be made by "… anyone directly affected by the matter in respect of which the relief is sought." While an apparently narrower test for standing than the "adversely affected" common law test, the Federal Courts grant standing on much the same basis as courts applying the common law. See **R-634**, *Brown and Evans*, chap. 4:3412.

[14] See **R-639**, *Finlay v. Canada (Minister of Finance),* [1986] 2 S.C.R. 607, at paras 13, 38; **R-640**, *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society,* 2012 SCC 45, [2012] 2 S.C.R. 524 at p. 525. Although this latter case involved a constitutional challenge to the validity of legislation, its more flexible approach to the grant of public interest standing is almost certainly applicable to challenges to the legality of administrative action on non-constitutional grounds.

[15] **R-634**, *Brown and Evans*, chap. 4:3532 (last updated May 2016).

[16] See, for example, **R-641**, *Federal Courts Rules,* SOR/98-106 [Excerpts], R. 109.

an informed decision. These factors are balanced against courts' concern that parties are not prejudiced and the litigation is not unduly complicated.[17]

4. Limitation Periods

20. The common law does not specify limitation periods within which an applicant must seek judicial review. However, because a legal challenge to administrative action may prejudice the public interest in the proper working of government, or the rights of third parties, a court has discretion to dismiss a proceeding if the applicant has unduly delayed commencing it.[18]

21. Statutory limitation periods now govern applications for judicial review in some jurisdictions, though reviewing courts normally have discretion to extend these periods.[19] For example, the *Federal Courts Act*, s. 18.1(2) provides that applicants may apply for judicial review in respect of a decision or order of a federal board, commission or other tribunal within 30 days from when the decision or order was communicated to them. However, these statutory limits apply only to decisions or orders. Other kinds of reviewable administrative action, such as non-binding recommendations or reports, like the report and recommendations prepared by the JRP in this case, are subject to the common law requirement that relief must be sought without undue delay.

22. In Nova Scotia, an application for judicial review may be made within 25 days of the communication of a decision to the applicant or six months from the date of the decision, whichever is the earlier.[20] The definition of "decision" in R. 7.01 is broad

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[17] For the factors governing the exercise of discretion in applications for leave to intervene in proceedings in the Federal Courts, see **R-642**, *Rothmans Benson & Hedges Inc. v. Canada (Attorney General),* [1990] 1 F.C. 90 (CA); **R-643**, *Sport Maska Inc. v. Bauer Hockey Corp*., 2016 FCA 44 at paras 37-43; and **R-644**, *Canada (Attorney General) v. Shakov*, 2016 FCA 208 at paras 6-7.

[18] **R-634**, *Brown and Evans*, chap. 3:5100, 5300-5330 (last updated October 2016).

[19] See, for example, **C-266**, *Federal Courts Act*, s. 18.1(2); **R-638**, *Nova Scotia Civil Procedure Rules*, Consolidated [Excerpts], R. 2.03(1).

[20] **R-638**, *Nova Scotia Civil Procedure Rules*, Consolidated [Excerpts], R. 7.05(1).

enough to include a wide range of administrative action, including reports and recommendations made pursuant to a grant of statutory authority.[21]

5. Grounds and Standards of Review

23. The grounds on which an applicant for judicial review may rely to impugn administrative action are broadly similar in all jurisdictions in Canada. They are:

- error of law;
- erroneous finding of fact;
- abuse of discretion;
- jurisdictional error or *ultra vires*; and
- breach of the duty of procedural fairness.

24. *Dunsmuir v. New Brunswick*[22] established the basic legal framework that would have been used by Canadian courts, including the Federal Courts,[23] for selecting the applicable standard of review at the time when the Claimants could have made applications for judicial review of the JRP's report.[24] In general, there are two standards of review in Canadian law – reasonableness and correctness. The standard of review that applies depends largely on the nature of the question decided by the administrative decision maker that is in dispute in the proceedings.

(i) Reasonableness

25. In determining the reasonableness of an administrative decision, a reviewing court considers both the "existence of justification, transparency and intelligibility within the decision-making process", and the reasonableness of the outcome of the administrative process. That is, a court considers the decision maker's reasons, and

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[21] See para. 17, *supra.*

[22] Note 7, *supra*.

[23] **R-645**, *Canada (Immigration and Citizenship) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paras. 28, 36 and 40 [*Khosa*].

[24] The *Dunsmuir* analytical framework is not limited to decisions by tribunals operating at arm's length from the Executive, but is also applicable to decisions by Ministers: **R-646**, *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 50.

whether "the decision falls within the range of possible acceptable outcomes which are defensible on the facts and the law."[25] The reasons and the decision must be read together as "an organic exercise."[26]

26. However, reviewing courts seem to give more weight to the defensibility of the outcome than to the cogency of decision makers' reasons. For example, a reviewing court is not limited to the reasons given by the administrative body, but may also support the decision on the basis of reasons that the decision maker could have given.[27] Indeed, the Court has reviewed, and upheld, the reasonableness of a decision maker's interpretation of its enabling statute in the absence of any reasons at all.[28] An administrative decision may not be set aside simply because the decision maker's reasons are inadequate.[29]

27. While reasonableness connotes a single standard of review, it takes its colour from the context in which it is being applied: the range of choices available to decision-makers in any given case that are reasonably defensible on the law and the facts can be either broad or narrow. For example, it will be easier for an applicant to establish that discretion has been exercised unreasonably when the statute imposes objective restrictions on it, than when it is conferred in subjective terms or has a high policy content. Similarly, ambiguous or broadly worded statutory provisions leave considerable interpretative discretion to a decision-maker, while others admit of only one reasonable meaning.[30]

28. The following questions decided by an administrative body or official are reviewed on the reasonableness standard:

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[25] **R-633**, *Dunsmuir*, at para 47.

[26] **R-647**, *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para. 14 [*Newfoundland Nurses' Union*].

[27] **R-633**, *Dunsmuir* at para. 48.

[28] **R-648**, *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd*., 2016 SCC 47, at paras 36-40.

[29] **R-647**, *Newfoundland Nurses' Union* (note 26, *supra*).

[30] **R-649**, *Wilson v. Atomic Energy of Canada*, 2016 SCC 29, [2016] 1 S.C.R. 770 at paras. 33-36.

(a) **Questions of law** involving the interpretation of an administrative decision-maker's enabling statute, a statute closely connected with its function, or a rule of common law that it regularly applies in the context of the statutory scheme are usually reviewable for reasonableness.[31] In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*,[32] the Supreme Court went further and held that these questions of law were presumptively reviewable on the reasonableness standard. The presumption is only rebuttable in limited circumstances.[33]

(b) **Findings of** fact must have reasonable support in the evidence before the decision maker. Reasonableness review does not permit a reviewing court to reweigh the evidence or to make its own findings of fact.[34]

(c) **Discretion** must be exercised reasonably in light of the facts and the law, although some legal defects in the exercise of discretion may render it *ultra vires* and reviewable for correctness.

(ii) Correctness

29. In determining the correctness of an administrative decision, a court substitutes its view on the question in dispute for that of the administrative decision maker. For

[31] **R-633**, *Dunsmuir* at para. 54. The Court also directed reviewing courts to take other contextual factors into account when previous authority had not already satisfactorily settled the question. They include the presence of a statutory preclusive clause or a right of appeal, and the relative expertise of the tribunal and the court on the question in dispute: see paras. 55 and 64.

[32] **R-632**, *Alberta Teachers' Association* at paras. 33-40. In cases that came before the courts in the years between 2008 (*Dunsmuir*) and 2011 (*Alberta Teachers' Association*) it could be difficult to predict whether the court would review the interpretative issue in dispute on the correctness or the reasonableness standard. In **R-650**, *MiningWatch Canada v. Canada (Fisheries and Oceans),* 2010 SCC 2, [2010] 1 S.C.R. 6 at paras. 43-52 [*MiningWatch*], a case decided before *Alberta Teachers' Association*, the Court reviewed the correctness of a Ministerial interpretation of s. 21 of the *CEAA* without mentioning standard of review.

[33] See, for example, **R-651**, *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283 at paras. 13-18 (concurrent jurisdiction between court and tribunal on the interpretation of statutory provision); **R-652**, *Tervita Corp. v. Canada (Commissioner of Competition),* 2015 SCC 3, [2015] 1 S.C.R. 161 at paras. 34-39 (existence of an unusually worded right of appeal).

[34] The *Federal Courts Act* formulates the standard for the review of a federal decision maker as an erroneous finding of fact "made in a perverse or capricious manner or without regard for the material before it" (**C-266**, *Federal Courts Act*, s. 18.1(4)(*d*)). However, this is not a different standard, but simply a more precise statement of the common law standard of reasonableness as applied to findings of fact: **R-645**, *Khosa* at para. 46.

example, if the question concerns the interpretation of a provision in the decision maker's enabling statute to which the reasonableness standard does not apply,[35] the court will determine for itself, without any deference to the decision maker, the meaning of the provision on the basis of the principles of statutory interpretation, which require consideration of the statutory text, context and objectives. The following legal questions are reviewable for correctness.

(a) **"True questions of jurisdiction or *vires*"** will normally be reviewed on the correctness standard. However, few, if any, questions involving an adjudicative decision maker's interpretation of its enabling statute are nowadays characterized as raising a jurisdictional question.[36] The term *ultra vires* is usually applied to an exercise of power by a non-adjudicative body that is beyond the scope of its grant of statutory authority. For example, a decision-maker may not exercise its discretion in a manner that is inconsistent with the enabling statute, in bad faith or for an extraneous purpose.

(b) **Compliance with the duty of procedural fairness** is reviewed on the correctness standard.[37] The question is whether the decision maker satisfied the minimum legal procedural standard by affording to the applicant an opportunity to be heard that was fair in all the circumstances.[38]

6. Remedies

30. A reviewing court has a wide array of remedies that it may grant to a successful applicant for judicial review, including relief corresponding to that available under the

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[35] See, for example, note 33, *supra*.

[36] **R-632**, *Alberta Teachers' Association* at paras. 33-40.

[37] **R-645**, *Khosa* at para. 42; **R-653**, *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at para. 92.

[38] The common law duty of procedural fairness requires those exercising administrative powers to provide a fair hearing to those who may be adversely affected by a decision. Its procedural content is variable and context specific. For the principal contextual factors relevant to determining the degree of procedural protection, see **R-654**, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 21-34. Legislation may also impose additional procedural requirements or exempt the exercise of a particular power from the duty of fairness. The duty of procedural fairness also requires decision makers to be and to appear to be impartial.

common law prerogative writs,[39] declarations and injunctions.[40] The *Federal Courts Act*, s. 18.1(3)(*a*) and (*b*) codify the common law by providing that on an application for judicial review the Court may order a federal tribunal to do an act that it had unlawfully failed to do or had unreasonably delayed in doing, declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain a decision, order, act or proceeding. Damages, however, are not available on an application for judicial review, and must still be claimed by way of an action.

31. The grant of relief is in the discretion of the reviewing court, including the discretion to grant no relief at all.[41] The discretionary bars to the grant of relief include a failure to exhaust alternative remedies (in courts or elsewhere).[42] However, in order to reinforce the rule of law, the relief normally given when an administrative decision is held to be unlawful is an order setting it aside and remitting the matter for redetermination in accordance with the law or the reasons of the court.[43] Notably, once

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[39] These included: the writs of *certiorari*, which quashed or set aside a decision of a judicial or *quasi*-judicial nature if made in breach of the rules of natural justice or the duty of procedural fairness or in excess of the decision maker's jurisdiction, or an error of law was apparent on the face of the tribunal's record; prohibition, which restrained the taking of administrative action that was outside a body's jurisdiction; and *mandamus,* which compelled the performance of a statutory duty that a public body or official had unlawfully refused to perform.

[40] When employed as public law remedies, a declaration might, for example, declare ministerial regulations or municipal by-laws to be invalid, while an injunction might enjoin a public official from some unlawful action.

[41] Some statutory provisions creating an application for judicial review expressly retain the courts' common law discretion to refuse relief sought through a prerogative writ. See, for example, **R-655**, Ontario's *Judicial Review Procedure Act*, R.S.O. 1990, chap. J-1, s. 2(5)). As equitable remedies in origin, declarations and injunctions are also discretionary. Other statutory provisions are less explicit, such as **C-266**, *Federal Courts Act*, s. 18.1(3) and **R-638**, *Nova Scotia Civil Procedure Rules*, Consolidated [Excerpts], R. 7.11. However, a general provision that on an application for judicial review a court may grant the relief sought suffices to indicate that relief remains discretionary. See **R-645**, *Khosa* at paras. 36 and 40; **R-656**, *Strickland v. Canada (Attorney General),* 2015 SCC 37, [2015] 2 S.C.R. 713 at paras. 37-39.

[42] Others are prematurity, delay and mootness; see generally, **R-634**, *Brown and Evans*, chap. 3 (last updated October 2016).

[43] See, for example, **R-657**, *Friends of the West Country Association v. Canada (Minister of Fisheries*), [1998] 4 F.C.R. 340 (FC) (approvals set aside and remitted for reconsideration in accordance with the *CEAA*, including a screening environmental assessment. See generally, **R-634**, *Brown and Evans,* chap. 5:2200-2251 (last updated October 2016). However, in one case, the court declined to set a decision aside on the ground of procedural unfairness because it would serve no useful purpose. **R-658**, *Bowen v.*

work on a project has been completed, the court may not grant a prohibition ordering the Minister not to approve it, even though the authorization had been based on a misinterpretation of the *CEAA*.[44]

32. A court granting an application for judicial review may normally not set aside the administrative decision or recommendation under review and substitute its own preferred decision or recommendation.[45] The legislature has entrusted decision-making responsibility to the administrative body, not the court.[46] However, in very unusual situations a reviewing court may direct the tribunal to dismiss the administrative proceeding, or direct that the matter not be remitted to the tribunal for redetermination.[47] A directed verdict will never be appropriate when the issue in dispute is factual in nature.

Canada (Attorney General), [1998] 2 F.C. 395 (TD) at para 86. See also **R-659**, *Robbins v. Canada (Attorney General)*, 2017 FCA 24 at paras. 17-18 [*Robbins*], where the Court declined to send the matter back because the decision maker "could not reasonably reach a different decision;" see also **R-660**, *Gehl v. Canada (Attorney General)*, 2017 ONCA 319 at para. 54. In the *MiningWatch* case, the Court declined to set aside an environmental assessment, even though it should have been conducted on the basis of the project as proposed by the proponent (**R-650**, *MiningWatch* at paras. 43-52). The Court noted that the public interest applicants did not challenge the substantive scoping decision, but were principally concerned to obtain a legal ruling on the interpretation of the federal authorities' obligations under s. 21 of *CEAA*. In these circumstances, the Court held, a declaration of the correct interpretation of the provision was a sufficient remedy. It was not justifiable to impose on the proponents the additional costs that they would have incurred if the assessment had been set aside and a new one conducted. And for an environmental case in which the court granted a declaration that a Ministerial determination was erroneous in law and invalid, see **R-661**, *David Suzuki Foundation v. Canada (Fisheries and Oceans),* 2010 FC 1233; reversed in part on appeal: **R-662**, *Canada (Fisheries and Oceans) v. David Suzuki Foundation,* 2012 FCA 40. However, these cases are very much the exception. In *MiningWatch*, the Court acknowledged that courts' power not to set aside an unlawful decision and require that the decision-making process be done afresh should be exercised sparingly in order not to "make inroads upon the rule of law" (**R-650**, *MiningWatch* at para. 52).

[44] **R-663**, *Environmental Resource Centre v Canada (Minister of Environment),* 2001 FCT 1423 at paras. 160-164.

[45] However, on an appeal from a lower court's disposition of an application for judicial review, an appellate court may set aside the decision of the court appealed from, and give the judgment that it should have given: **R-662**, *Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40.

[46] In **R-664**, *Canada v. Kabul Farms Ltd.,* 2016 FCA 143 at paras. 52-54, the Court removed a direction by the Federal Court as part of its order, on the ground that it might be regarded as suggesting how the decision maker should exercise a discretion when the matter was remitted. It was enough, the Federal Court of Appeal held, to order that the decision be set aside and redetermined with proper reasons.

[47] See, for example, **R-665**, *Wihksne v. Canada (Pensions Appeal Board),* 2002 FCA 356; **R-666**, *Freeman v. Canada (Minister of Citizenship and Immigration),* 2013 FC 1065.

33. When a matter is remitted for redetermination, the members of the body who made the first decision may also make the second one.[48] However, in order to remove any apprehension that the decision maker will not approach the matter with an open mind, the court often directs, where this is possible, that different individuals conduct the redetermination. This could necessitate starting the process from scratch.

34. A court order setting aside a tribunal decision nullifies it. In principle, therefore, a redetermination will be based on the material adduced at the rehearing. However, measures may be taken to save time and expense. For example, the reviewing court may direct, the decision maker may decide or, with the consent of the decision maker when necessary or appropriate, the parties may agree that the redetermination should be made on the basis of the existing administrative record, supplemented by any additional material that either party wishes to include, or that the issues in dispute can be narrowed.[49]

35. A complete redetermination of a matter following its remittal by a reviewing court may be costly for the parties and further delay the final resolution of the underlying dispute, especially if new decision makers are involved or new evidence is adduced. Nonetheless, it is, as I have already noted, the usual remedy.[50] For example, in *Union of Nova Scotia Indians v. Canada (Attorney General)*[51] the Court remitted for redetermination a Ministerial decision to issue permits that had been made without considering all the environmental effects of a project as required by s. 16(1)(*a*) of the *CEAA.*

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[48] In **R-626**, *Pembina Institute for Appropriate Development v. Canada (Attorney General),* 2008 FC 302 at paras 79-80, the Court expressly remitted the matter to the same JRP to provide a rationale for its conclusion that the adverse effects of a project could be mitigated so that they ceased to be significant.

[49] In **R-667**, *Bergey v. Canada (Attorney General)*, 2017 FCA 30 at para. 84, the Court left it to the board to assess whether it could fairly redetermine some at least of the issues on the basis of the record and the existing findings of fact. The Court was concerned that, in the circumstances, it would be helpful if a decision was made as quickly as possible. However, the Court said, "that is a matter for the Board and not this Court to determine."

[50] At para. 31, *supra*.

[51] **R-668**, *Union of Nova Scotia Indians v. Canada (Attorney General)* (1996), 122 F.T.R. 81 (TD). The permits had been issued following an environmental screening report.

36. However, this is not to say that courts are oblivious to the need to achieve efficiencies. In *Alberta Wilderness Assn. v. Cardinal River Coals Ltd*.[52] the Federal Court fashioned a creative remedy designed to reduce the expense and delay that would otherwise have resulted from an order setting a decision aside and remitting the matter for a full redetermination. The applicants, a coalition of NGOs concerned about the likely environmental impacts of a proposed mine, had brought two applications for judicial review. One was to set aside a JRP's report and recommendation that the Minister authorize the construction of an open-pit mine near a national park. The other application was to set aside the Ministerial authorizations granted on the basis of the JRP's report. The Court held that the JRP had failed to conduct an environmental assessment in accordance with the *CEAA*, and that the authorizations were therefore also unlawful.

37. First, the JRP had failed to discharge its statutory duty to obtain all available information required for the conduct of the review by not requiring the production of information that it knew existed.[53] Second, it had failed to conduct a comparative analysis of a potential alternative to the proposed open-pit mine, namely, an underground mine. Third, it had breached the duty of fairness by not considering information submitted by an NGO, which had a legitimate expectation that the information would be put before the JRP.

38. The Court stated that in designing a remedy it would aim for "the least intrusive approach to reaching compliance."[54] Accordingly, it set aside the Ministerial authorizations required before the project could go ahead, because the environmental assessment had not been conducted in accordance with the *CEAA*. However, the Court granted no relief with respect to the JRP's report, despite its legal defects. Instead, it accepted the suggestion of counsel for the Minister of Fisheries and Oceans that, pursuant to s. 24(2) of the *CEAA* the Minister would order the JRP to make any

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[52] **R-625**, *Alberta Wilderness Association v. Cardinal River Coals Ltd.,* [1999] 3 F.C.R. 425 (FC) [*Alberta Wilderness Association*].

[53] **C-255**, *Canadian Environmental Assessment Act,* S.C. 1992, c.37, s. 34(*a*).

[54] **R-625**, *Alberta Wilderness Association* at s. VII (B).

adjustments to its report necessary to take into account new information relating to the environmental effects of the project. The Court then specified the directions by the Minister that were required to bring the report into compliance with the *CEAA*.

39. The *Federal Courts Act*, s. 18.1(3)(*b*) only permits the Courts to give such directions when setting aside administrative action and referring it back for redetermination in accordance with the court's reasons. The powers of a reviewing court at common law are probably the same: it can only give directions if it sets aside and remits the impugned decision.

40. When setting aside a decision, a court usually remits the matter to the decision-maker with a direction that it be redetermined in accordance with the court's reasons. How much actual latitude such an order leaves to the decision-maker may depend on the ground on which the original decision was set aside. For example, when a decision has been set aside on procedural grounds, the court's reasons may constrain the decision-maker's procedural choices for the new hearing, but not the substantive outcome. However, when a reviewing court sets aside a decision on a non-procedural ground, such as a finding that the decision was based on an unreasonable interpretation of the relevant statutory provision, or on the exercise of discretion in a manner inconsistent with the enabling statute, the decision-maker may be practically compelled to reach a different decision second time around. Nonetheless, this is not inevitable: new evidence and legal arguments may lead to the same decision as that originally made.

7. The Duration of a Judicial Review

41. Rules of procedure prescribe the timelines within which the pre-hearing steps in applications for judicial review must be completed, subject to any extension of time granted by the court in the exercise of its discretion. However, other timelines are not set, and hence estimating the duration of any particular judicial review is difficult. It is also important to bear in mind here that applications for judicial review are summary in nature and are therefore decided more expeditiously and at less cost than proceedings

commenced by way of an action with pre-trial discovery and all the procedural incidents of a trial.[55]

(i) Federal Courts

42. If parties take the maximum time permitted by the Rules, and no extensions of time are granted, an application for judicial review can be ready for hearing by the Federal Court within six months from the date of the impugned administrative action.[56] Once an application has been perfected, the Federal Court can normally schedule a hearing within six months for a case that needs no more than two days of court time. Judges are normally expected to render their decision within six months of a hearing. Most decisions are made well within this period, although complex cases can take longer. In short, it is reasonable to estimate that the Federal Court will decide an application for judicial review of somewhat more than average complexity within approximately eighteen months from the date of the administrative action under review.

43. A right of appeal lies from a decision of the Federal Court to the Federal Court of Appeal.[57] A notice of appeal may be filed within 30 days of the pronouncement of the final judgment under appeal.[58] Absent any extensions of time, pre-hearing steps of an appeal are normally completed within six months from the judgment under appeal.[59] An appeal in the Federal Court of Appeal requiring one day of hearing time can usually be heard within six months from the filing of the requisition for a hearing. Judgments are normally rendered within six months of the hearing of the appeal. Thus, the Federal Court of Appeal can normally be expected to render judgment within eighteen months of the Federal Court judgment under appeal.

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[55] See further paras. 50-52, *infra.*

[56] The timelines prescribed by the *Federal Courts Rules* for the completion of the pre-hearing steps in an application for judicial review are set out in Appendix “B” to this report.

[57] **C-266**, *Federal Courts Act*, s. 27(1).

[58] *Ibid*, s. 27(2)(*b*).

[59] The timelines prescribed by the *Federal Courts Rules* for the completion of the pre-hearing steps in an appeal from the Federal Court are set out in Appendix *“*C*”* to this report.

44. In sum, when a decision is appealed from the Federal Court to the Court of Appeal the total time taken by proceedings in the Federal Courts from the date of the impugned administrative action to a decision by the Court of Appeal is typically about three years.

(ii) Nova Scotia Supreme Court and Court of Appeal

45. The *Nova Scotia Civil Procedure Rules* do not set out similarly detailed timelines, but leave much to be determined by a judge in the individual case on the basis of a motion for directions.[60] Nonetheless, in view of the similarity of the prescribed timelines to those in the Federal Court, it is reasonable to assume that the total length of time taken to complete all the pre-hearing steps of an application for judicial review in the Supreme Court of Nova Scotia, and for the Court to render judgment, is probably not significantly different from an application in the Federal Court: that is, about eighteen months from the date of the impugned administrative action.

46. A decision of the Supreme Court of Nova Scotia may be appealed to the Nova Scotia Court of Appeal. Again, the Rules prescribe only some of the timelines for the completion of the pre-hearing steps of an appeal, but leave others to be fixed by a judge on a motion for directions.[61] However, it is reasonable to assume no significant departure from the time taken by the Federal Court of Appeal to dispose of an appeal: that is, about eighteen months.

47. In sum, when a decision is appealed from the Supreme Court to the Court of Appeal it is also reasonable to assume that the total time taken by proceedings in the Nova Scotia Courts from the date of the impugned administrative action is typically about three years. Proceedings in the Nova Scotia courts could run concurrently with those in Federal Court if necessary.

(iii) Supreme Court of Canada

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[60] The timelines prescribed by the *Nova Scotia Civil Procedure Rules* for the completion of the pre-hearing steps in an application for judicial review are set out in Appendix “D” to this report.

[61] The timelines prescribed by the *Nova Scotia Civil Procedure Rules* for the completion of the pre-hearing steps in an appeal to the Nova Scotia Court of Appeal are set out in Appendix “E” to this report.

48. While there is no appeal as of right to the Supreme Court of Canada, a losing party in an intermediate appellate court, such as the Federal and Nova Scotia Courts of Appeal, may apply to the Supreme Court of Canada for leave to appeal. The completion of an application for leave to the Supreme Court takes less than four months from the date of the decision under appeal. Leave applications are normally decided without an oral hearing.[62] Average time lapses for the years 2006-2016 are contained in the Supreme Court Statistics.[63] In these years, the average time from the perfection of a leave application until it was decided was a little less than four months.[64] If leave was granted (as it was in less than 20% of cases), it took around eight months for the appeal to be heard and less than another five months for a decision to be rendered. Thus, an average of about twenty-one months elapsed between an intermediate appeal court's decision and, when leave was granted, the disposition of an appeal by the Supreme Court of Canada.

(iv) Summary

49. The total time between an impugned administrative action and the completion of the judicial review application and its ultimate disposition by the Supreme Court of Canada could thus be as much as five years. However, few cases proceed this far.

8. Costs of Judicial Review

50. An application for judicial review is a relatively cost-effective proceeding because it is summary in nature.[65] It is commenced by a notice of application, and is generally conducted solely on the basis of a paper record.

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[62] The timelines prescribed for the completion of an application for leave to appeal to the Supreme Court of Canada are set out in Appendix "F" to this report.

[63] **R-669**, Supreme Court of Canada website excerpt, "Category 5: Average Time Lapses" (2006-2016), available at: www.scc-csc.ca/case-dossier/stat/index-eng.aspx.

[64] **R-669**, Supreme Court of Canada website excerpt, "Category 5: Average Time Lapses" (2006-2016), p. 1.

[65] The procedures governing applications for judicial review may vary in their detail from jurisdiction to jurisdiction. At the federal level much of the law governing applications for judicial review is codified in the *Federal Courts Act* (**C-266**) and supplemented by the *Federal Courts Rules,* SOR/98-106 (**R-641**). In Nova Scotia, applications are governed by the common law and the *Nova Scotia Civil Procedure Rules,* R. 7 (**R-638**).

51. The judicial review record typically includes supporting affidavits, documentary evidence, the record compiled by the administrative body in question, the reasons of the administrative body under review, and the memoranda of fact and law submitted by the parties and any interveners. Parties may require the body under review to produce material in its possession relevant to the application for judicial review that is not already in their possession.[66] However, the record does not normally include material covered by deliberative privilege, such as any notes taken by the body's members or draft reasons for decision.[67] An administrative body cannot usually be ordered to produce material of this nature.[68] Evidence that was not before the body under review is also generally inadmissible before the reviewing court.[69] Finally, the cross-examination of affiants in applications for judicial review is permissible,[70] but unusual.

52. An application for judicial review is thus not only an effective proceeding for vindicating rights in Canada and providing redress, but is also quicker, more efficient, and cheaper than other forms of judicial relief.[71]

53. In addition, a successful applicant's out-of-pocket litigation expenses may be reduced by an award of costs that provides at least a partial reimbursement. The general principles governing the award of costs in the Federal Courts are contained in the *Federal Courts Rules*, Rule 400, which applies to almost all proceedings in the Federal Courts.[72] The Judge who heard a matter has full discretion over the award of

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[66] See, for example, **R-641**, *Federal Courts Rules,* SOR/98-106 [Excerpts], R. 317.

[67] **R-670**, *Society Promoting Environmental Preservation v. Canada* (2000), 187 F.T.R. 149.

[68] **R-671**, *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval,* 2016 SCC 8, [2016] 1 S.C.R. 29 at paras 56-58.

[69] However, affidavit evidence may be admitted to provide the court with useful background information, and to prove a procedural defect that is not apparent from the tribunal's record or the absence of evidence to support a finding of fact.

[70] See, for example, **R-641**, *Federal Courts Rules,* SOR/98-106 [Excerpts], R. 83.

[71] See, for example. **R-672**, *Ernst v. Alberta Energy Regulator,* 2017 SCC 1, pp. 6, 11 where an application for judicial review is compared to a more time-consuming and expensive action for damages for breach of a right guaranteed by the *Canadian Charter of Rights and Freedoms*.

[72] Exceptionally, costs in immigration and refugee cases are governed by the *Federal Courts Immigration and Refugee Protection Rules* SOR/93-22, R. 22 (**R-673**). **R-638**, *Nova Scotia Civil Procedure Rules*, Consolidated [Excerpts], R. 77 deals with costs in terms similar to **R-641**, *Federal Courts Rules,* SOR/98-106 [Excerpts], R. 400.

costs.[73] The Federal Court of Appeal rarely interferes with the Federal Court's exercise of its discretion over costs.

54. The award of costs normally follows the event: that is, the unsuccessful party on an application for judicial review will be ordered to pay the costs of the successful party (party and party costs). In the absence of circumstances calling for an enhanced or reduced award, costs in the Federal Courts are awarded for counsel fees on the basis of the allowable units of lawyers' time set out in Column III of Tariff B. The unit value of lawyers' time was set in 1998 at $100 *per* hour.

55. Party and party costs are intended to provide only a partial indemnity for the legal costs incurred. How much of a winning party's actual legal expenses are covered by a costs award varies according to the type and complexity of the litigation, as well as its location. It is my understanding that when Tariff B was introduced in 1998 a costs award based on Column III was intended to cover up to about 40% of a winning party's actual legal expenses.

56. However, since 1998, the percentage of actual legal costs recoverable under a Tarff B assessment has dropped considerably as counsel fees have increased. For example, a winning party in a recent, complex patent trial estimated that even if costs were assessed under Column V, the high end of the Tariff, it would only have recovered 11% of its actual legal costs.[74]

57. Alternatively, the Court may award a lump sum for costs instead of or in addition to costs assessed under Tariff B.[75] Awards of lump sums have become more frequent, because they both save parties the extra expense of a disputed costs assessment, and enable the Court to award a higher percentage of the actual legal fees than would be recoverable under the Tariff.

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[73] **R-641**, *Federal Courts Rules,* SOR/98-106 [Excerpts], R. 400(1).

[74] **R-674**, *Nova Chemicals Corporation v. Dow Chemical Company,* 2017 FCA 25 at para. 3 [*Nova Chemicals*].

[75] **R-641**, *Federal Courts Rules,* SOR/98-106 [Excerpts], R. 400(4).

58. Thus, in *Nova Chemicals* the Federal Court of Appeal upheld the Trial Judge's lump sum costs award that was based on 30% of the successful party's actual costs.[76] This decision is no doubt intended to encourage the use of lump sum costs awards, especially where costs assessed under Tariff B would provide a totally inadequate amount of reimbursement.

59. One of the factors listed in R. 400 that Judges may take into consideration when exercising their discretion over costs is relevant more often in applications for judicial review than other proceedings. A court may take into account whether the public interest in having the proceeding litigated justifies a particular award of costs.[77] This may be especially relevant when a public interest group has brought an application. However, this is only one of the factors that a court may consider. Unsuccessful public interest litigants are not automatically awarded their costs, nor are they exempt from being required to pay the winning party's costs.

60. The Federal Courts' discretion over costs includes the power to award costs to and against interveners. However, such awards are not generally made. In granting leave to intervene under R. 109 of the *Federal Courts Rules*, the Court must give directions respecting, among other things, costs.[78] In my experience, the directions often specify that the intervener is neither entitled to nor liable for an award of costs.

61. A costs award also includes other expenses, or disbursements, that a litigant has reasonably incurred for the purpose of the litigation. They are recoverable in accordance with Tariff A.[79]

IV. APPLICATIONS FOR JUDICIAL REVIEW BY THE CLAIMANTS

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[76] **R-674**, *Nova Chemicals* at para. 2. After a complex 32-day trial, Dow Chemicals calculated its actual legal costs at $9.6 million. The legal costs of patent litigation are generally regarded as among the highest in Canada.

[77] **R-641**, *Federal Courts Rules,* SOR/98-106 [Excerpts], R. 400(3)(h). See, for example, **R-675**, *Lukács v. Canadian Transportation Agency*, 2016 FCA 314 at para. 12, where Dawson J.A. said: "In circumstances where there is a public interest in having the Agency's decision reviewed, I would not award costs against the appellant."

[78] **R-641**, *Federal Courts Rules,* SOR/98-106 [Excerpts], R. 109(3).

[79] **R-641**, *Federal Courts Rules,* SOR/98-106 [Excerpts], Tariff A.

62. This Part of the Report considers what probably would have happened if the Claimants had commenced judicial review proceedings in Canadian courts to challenge the legality of the JRP's recommendation. As explained at the outset, I have assumed for the purpose of this Part that, as the NAFTA Tribunal held, the JRP's report was "a fundamental departure from the methodology required by Canadian and Nova Scotia law."[80]

1. The Canadian Courts Available to Review the JRP Report and Recommendation

63. Because the Project engaged both federal and provincial interests, the federal Minister of the Environment established the JRP under s. 40(2)(*a*) of the *CEAA* with the agreement of the Nova Scotia Minister of the Environment and Labour pursuant to s. 48 of the Nova Scotia *Environment Act* (*NSEA*). The JRP issued its Report in October of 2007.

64. There is no question that the JRP's Report and recommendations were subject to review in Canadian courts. The Federal Court of Appeal held in *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)*[81] that reports of JRPs are reviewable in the Federal Court, even though they contain non-binding recommendations to the Government, and are legally independent of any subsequent Ministerial decision on the issuance of a permit. The *Nova Scotia Civil Procedure Rules*, Rule 7.01 defines "decisions" to which Rule 7 applies as including "action taken" and "an omission to take action required." This definition is broad enough to include the JRP Report and recommendations. Further, there is no reason to believe that an application for judicial review by the Claimants would have run into a discretionary bar in either the Federal Court or the Supreme Court of Nova Scotia.

65. As explained above, any judicial review proceeding to challenge the lawfulness of the JRP's report on the ground of non-compliance with the *CEAA* would have to have

[80] Award on Jurisdiction and Liability, ¶ 600.

[81] **R-676**, *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans),* [1999] 1 F.C.R. 483 (FCA).

been made in the Federal Court, and any proceeding to challenge the JRP's report for failure to comply with the *NSEA* would have to have been made in the Supreme Court of Nova Scotia.[82]

2. Standing

66. Since the Claimants would have claimed that the errors in the JRP Report and recommendations would cause them financial loss if accepted by the Governments of Canada and Nova Scotia, they would clearly have had standing to commence applications for judicial review in both the Federal Court and the Supreme Court of Nova Scotia.

67. Members of the public and public interest groups who had participated in the JRP's hearings could have applied for leave to intervene in the Claimants' applications for judicial review in support of the JRP's Report. On the basis of the factors considered by courts when deciding whether to grant leave to intervene, it is likely that at least some of the public interest participants at the JRP's hearings would have been given leave to intervene if they had applied.

68. The reviewing courts would probably have regarded the groups whose participation before the JRP was funded by the Canadian Environmental Assessment Agency as particularly appropriate interveners. They would have been able to demonstrate that they had an ongoing interest in the matter, were well informed about the issues and better positioned than Canada to represent the perspective of residents concerned by the impact of the Project on the local environment. Despite any concern of the Claimants about potential prejudice, courts would likely have concluded that the interests of justice would be better served by permitting at least some of the objectors to intervene.

3. Limitation periods

[82] **R-677**, *Lavigne v. Canada (Minister of Human Resources Development),* 2001 FCT 1365, [2002] 2 F.C. 164, affirmed 2004 FCA 203.

69. The JRP Report and recommendations lack the finality required to be a "decision or order" to which the limitation period prescribed in the *Federal Courts Act*, s. 18.1(2) applies. Thus, in Federal Court the common law rule that judicial review proceedings must be commenced without undue delay would have applied. The Claimants would have been well advised to file their notice of application promptly. Moreover, judicial review proceedings in the Nova Scotia Supreme Court would have to have been commenced no later than 25 days after the communication of the JRP Report and recommendation. Since the Report was communicated on October 22, 2007, any application for judicial review would have to be commenced by no later than November 17, 2007 (because the 25-day period expires on a Sunday, the deadline would move to the next business day). In order to achieve efficiencies in coordinating the processes, the Claimants would have been well advised to bring the judicial review application in Federal Court at the same time.

4. Grounds and standards of review

70. For the purpose of the Damages Phase of the Arbitration, the Tribunal's conclusion that the JRP Report did not comply with Canadian law is taken to be correct. In the domestic context, the legal errors identified by the Tribunal constituted grounds on which the Claimants could have commenced judicial review proceedings in both the Nova Scotia Supreme Court and the Federal Court.

71. The fundamental legal flaw that the Tribunal identified in the JRP Report was its conclusion that the Project would cause significant adverse effects because it was inconsistent with "community core values." The Tribunal found that this concept was unknown to environmental law in Canada. Domestic reviewing courts would have treated this issue of statutory interpretation as a question of law.

72. It is difficult to be definitive on the standard of review that the courts would have applied in the years 2008 to 2010 to determine the legality of the JRP's implicit conclusion that the *CEAA* and the *NSEA* permitted it to base its environmental

assessment in this case on inconsistency with community core values.[83] However, if the Claimants' applications for judicial review had reached the Supreme Court of Canada, the Court would probably not have decided the appeal until late 2012. On the basis of the *Alberta Teachers' Association* presumption, the Court would probably have applied the standard of reasonableness.

73. Despite this deferential approach, in my opinion, the courts would likely have found the JRP's interpretation of CEAA and the NSEA to be unreasonable, and thus erroneous in law. Courts often regard the range of choice open to decision makers on the interpretation of their enabling statute as quite narrow or, when the statutory provision in question has only one reasonable meaning, non-existent.

74. The Tribunal also held that the JRP was in breach of domestic environmental law when it failed to consider whether the Claimants could take steps to mitigate the adverse effects of the Project so as to render them less than "significant."[84] An administrative body's failure to consider a question that it was legally required to consider constitutes an error of law.

75. The Tribunal further found that the JRP had breached the duty of procedural fairness that it owed to the Claimants by failing to inform them that it was considering basing its decision on community core values, and to give them an opportunity to respond. This was a conclusion that the reviewing courts could have reached. However, if the JRP was not authorized to take community core values into account, its failure to inform the Claimants before it made its decision would not have been material, and therefore could not have constituted an additional ground of judicial review.

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[83] See para. 28(a), *supra*. However, in my opinion, whichever standard of review was applied, a JRP report based on a factor not legally permissible in an assessment under the *CEAA* and *NSEA* would have been set aside on judicial review as erroneous in law.

[84] The Terms of Reference of the JRP required it to consider "m) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project" **C-363**, *Agreement concerning the establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal Project between the Minister of the Environment, Canada and the Minister of the Environment and Labour, Nova Scotia*, Terms of Reference for the Joint Panel Review, Part II, p. 9.

76. It is thus clear, in my opinion, that if the Claimants had made applications for judicial review of the JRP Report, the legal errors that the Tribunal identified in the JRP Report and recommendations would have warranted the grant of relief.

5. Remedies

77. In my opinion, in view of the errors of domestic law identified by the Tribunal, there is no plausible basis on which the reviewing courts could have declined to set aside the JRP Report. They would therefore have remitted the matter for redetermination in accordance with the Court's reasons. It cannot be said in this case that remitting the matter would have served no useful purpose or that a directed verdict would have been appropriate. Given the opportunities that the Claimants and other stakeholders would have had to adduce new evidence on a redetermination, it is impossible to predict what findings would have emerged from a new JRP hearing if the concept of community core values had been excluded from an assessment of the environmental effects of the Project.

78. In order to avoid an appearance of bias as a result of a pre-judgment of the dispute, the reviewing courts would also have been likely to accede to a request from the Claimants that the JRP should be differently constituted for the redetermination, despite the additional costs and delays inherent in a remittal to new panel members.

79. Reviewing courts would nonetheless have been mindful of the costs of ordering a fresh environmental assessment of the Project. However, as the Court emphasized in *MiningWatch*,[85] courts' power to deny successful applicants their right to a lawful administrative decision should only be exercised in very unusual circumstances in order not to undermine the rule of law. Further, it would have been open to the parties to save expense and time by submitting to the second JRP the same experts' reports and other documentary evidence, supplemented by additional material as appropriate. However, those who had given oral evidence would probably have to be heard again, together with any others who wished to testify.

[85] **R-650**, *MiningWatch* at para 52. In **R-659**, *Robbins* at para 17, the Court stated that any doubt as to whether it would serve any useful purpose to remit a matter should be resolved in favour of the applicant.

80. In short, it is my opinion that the most likely result of judicial review proceedings would have been a new environmental assessment by a differently constituted JRP, with an outcome that cannot be predicted.

6. Duration of the Review

81. It is difficult to assess the length of time that likely would have elapsed between the filing of notices of application and the issuance of judgments. In particular, as I noted above, precision is impossible in estimating the time between perfection and the hearing, and between the hearing and the release of a court's judgment. The parties' willingness to have the proceedings in the Federal Courts heard at the earliest available date, regardless of location, adds another layer of uncertainty. Nor can it be known if Nova Scotia and Canada would have pursued appeals to the intermediate appellate courts and from there to the Supreme Court of Canada.[86]

82. For these reasons, it is not possible to provide more than a rough estimate of the time that judicial review proceedings could have taken. However, on the basis of the calculations made earlier in this Report,[87] and that a matter of moderate complexity focusing on legal issues, not findings of fact, would require two days to be heard, a decision at first instance on the Claimants' applications for judicial review could probably have been expected about eighteen months after the JRP Report: that is, June or July, 2009.[88]

83. The Federal Court of Appeal could have been expected to render judgment in a case requiring a one-day hearing within eighteen months of the judgment under appeal: that is by December 2010. An appeal to the Supreme Court of Canada would have taken about another two years, so that all possible stages of the applications for judicial

[86] The timeline statistics published by the Supreme Court of Canada give a clearer picture of the average length of time taken from an application for leave to appeal and the ultimate disposition of the appeal if leave is granted. See note 63, *supra*.

[87] At paras. 41-49, *supra*.

[88] I have assumed that the time likely to be required by the Nova Scotia courts for the disposition of the application for judicial review and an appeal would not have been materially different from that taken by judicial review proceedings in the Federal Courts.

review would have been completed by late 2012, or five years after the JRP issued its Report.

7. Costs

84. The conduct of judicial review proceedings in two courts, together with any appeals, would have been an expense attributable to the tainted administrative process for which the Claimants could ask to be compensated. It is important to emphasize that applications for judicial review are summary proceedings in which there is no discovery, which is often the costliest stage of litigation.

85. Since it is assumed for the purpose of the Damages Phase that the JRP's Report did not comply with domestic law, it can also be assumed that the Claimants would have been successful at each stage of the judicial review proceedings, and would have been awarded party and party costs.

86. In order to provide at least a "ballpark" figure of the actual costs that the Claimants would have incurred in judicial review proceedings, I consulted lawyers at the Toronto firm with which I am associated, Goldblatt Partners, who are familiar with the legal costs of applications for judicial review and appeals. I explained that I wanted an estimate of the costs that might be incurred in a two-day judicial review of somewhat more than moderate complexity with two counsel, and subsequent appeals.

87. I was advised that costs are very variable and depend on the particular case. The firm's principal area of practice is union-side labour law and the preparation of application records is normally quite straightforward. The figures for costs and disbursements given below should be considered with these *caveats* in mind.

(a) **applications for judicial review**

A labour law judicial review would be billed in the neighbourhood of $32,000-$42,000. However, a recent judicial review against the Privacy Commissioner was billed out at approximately $50,000.

On the basis of these figures, a reasonable estimate of the costs and disbursements in applications for judicial review of the JRP Report would be in the neighbourhood of $50,000-$60,000. The need to make applications for judicial review in two courts would be an additional cost, increasing the range to $70,000-$80,000.

(b) **appeal of the judicial review decisions to intermediate appellate courts**

The cost of a one-day appeal of a judicial review decision would likely be less than the judicial review itself as the issues are more distilled and the hearing is shorter. I am advised that a figure in the $35,000-$40,000 range is a reasonable estimate, especially since the Claimants would have been respondents.

Again, appeals to two courts would increase the costs somewhat: perhaps by another $10,000, thereby increasing the range to $45,000-$50,000.

(c) **appeal to the Supreme Court of Canada**

The costs of responding to a motion for leave to appeal to the Supreme Court of Canada that is decided without an oral hearing are estimated as being in the range of $7,000-$10,000. The need to respond to motions for leave to appeal from two courts would increase the costs by perhaps another $5,000, bringing the total to the $12,000-$15,000 range.

The costs of the appeals themselves would likely be in the same range as the appeals to the intermediate appellate courts, that is, $45,000-$50,000.

88. This makes a “ballpark” grand total of between $172,000-$195,000 for costs and reasonable disbursements of a judicial review in both the Federal Courts and the Nova Scotia courts, assuming that an appeal was pursued all the way to the Supreme Court of Canada.

89. An award of party and party costs to the Claimants at each level of the proceedings would enable them to recover a percentage of their actual costs. It is

difficult to estimate how much this would be. However, courts may be more predisposed to award a lump sum in order to ensure that a party recovers an appropriate amount: in *Nova Chemicals* that was set at 30%.[89] This would reduce the Claimants' total out-of-pocket litigation expenses to a range of between $120,000 and $136,000.

8. Summary

90. For the reasons given above, it is my opinion that if the Claimants had made applications for judicial review, they could have obtained the lawful environmental assessment of the Project by the JRP that they alleged before the Tribunal that they had been denied. On the assumption that the Tribunal was correct in finding that the JRP had erred in Canadian law by basing its Report and recommendations on the Project's inconsistency with community core values, the reviewing courts would likely have set aside the JRP's report, and remitted the matter for redetermination on the basis of criteria relevant under the *CEAA* and *NSEA*.

91. Judicial review would have been an expeditious and relatively cost-effective remedy for the unlawful administrative action on which the Tribunal based its finding of Canada's liability for the breaches of NAFTA. Whether or not a redetermination would have resulted in an ultimately positive environmental assessment and the subsequent issuance of the permits cannot, of course, be known. However, a redetermination by a JRP would have effectively remedied any breach of the Claimants' right to have their project assessed in accordance with Canadian law, and mitigated any loss caused by the legal flaws that the Tribunal identified in the original recommendations of the JRP.

V. APPLICATIONS FOR JUDICIAL REVIEW BY PROJECT OPPONENTS

92. I understand that the Claimants are arguing that if the JRP had not relied on community core values, it would have given a positive environmental assessment of the Project because, the Claimants allege, the JRP found no other significant adverse

[89] See note 76 and paragraph 58, *supra*. It is possible that a reviewing court might set a much higher figure: see **R-678**, *Apotex Inc. v. Astrazeneca Canada Inc.,* 2017 FCA 9 at para. 137, where the Court awarded an appellant in a pharmaceutical patent case who had been "largely successful" in its appeal 90% of its costs of the appeal.

environmental effects from the Project. I understand that they also argue that the Project would, in those circumstances, have received approval from both Canada and Nova Scotia, and that permits for the construction and operation of the quarry and marine terminal would have been issued.

93. In this Part of my Report, I have been asked to assume that the Claimants' arguments are correct and to consider the question of whether or not Project opponents could have pursued a judicial review of the hypothetical JRP report and the subsequent government decisions. The comments that I made above with respect to the jurisdiction of the Canadian courts to hear the challenge, the limitations periods, the timelines and costs, all apply equally with respect to a judicial review brought by the Project opponents as opposed to the Claimants. As such, I will focus my remarks in this Part on three issues where there are differences: standing, grounds and standards of review, and remedies.

1. Standing of Project Opponents

94. It would have been open to Project opponents who participated at the hearings held by the JRP to make an application for judicial review and ask the courts to set aside the JRP's hypothetical report and recommendation that permits be issued. There can be little doubt that the courts would confer public interest standing on NGOs or individuals who had opposed approval of the Project.[90]

95. They would have been appropriate applicants for judicial review because: (i) they had a right to be heard by the JRP; (ii) they have demonstrated an interest in and are knowledgeable about the issues; (iii) the dispute over the outcome of the assessment and the environmental viability of the Project is ongoing; (iv) the legality of the hypothetical positive assessment raises justiciable issues; and (v) there are no other

[90] For the general principles governing the grant of public interest standing, see paras. 18-19, *supra* and their application to objectors at the JRP hearings, paras. 67-68, *supra*.

potential litigants, or proceedings, more appropriate for bringing the matter before a court on an application for judicial review.[91]

2. Grounds and Standard of Review

96. On the basis of the Claimants' assumption that a JRP Report not based on a community core values approach would have recommended approval, and that approval by Governments would have followed,[92] in my opinion it is by no means obvious that an application for judicial review by Project opponents would have been dismissed. In other words, the objectors would have had an arguable case that a positive report recommendation should be set aside.

97. In particular, the JRP's existing Report stated that the Project's impact on the communities and their core values was a "primary consideration influencing the Panel's decision to recommend rejection of the Project."[93] It did not say that it was the only consideration. Indeed, the JRP identified a number of respects in which it predicted that the Project could have adverse environmental effects upon the physical environment, even after mitigating measures proposed by the proponent had been taken into account.

98. These included adverse environmental effects on: the wetland from the disruption of its watershed;[94] groundwater management regime;[95] plant communities from airborne dust from the quarry;[96] migratory birds resulting from the location of the

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[91] In **R-629**, *Gitxaala First Nation v. Canada*, 2016 FCA 187 at paras. 84 and 86, participation before a JRP was regarded as almost a presumption of standing.

[92] I find this to be an inherently problematic assumption. Once decision makers have found a basis for a decision, they do not necessarily explore other issues with the same thoroughness that they otherwise would have done. If they understand that they need to make a different decision, one would expect their entire approach to be different.

[93] **R-212**, *Environmental Assessment of the Whites Point Quarry and Marine Terminal*: *Joint Review Panel Report* (Oct. 2007) at pp. 102-103.

[94] *Ibid.* at pp. 35-36.

[95] *Ibid*. at pp. 39 and 46.

[96] *Ibid.* at p. 41.

Project on an important flyway, collisions with lighted structures, and loss of habitat;[97] and marine mammals as a result of quarry blasting, and collisions with the bulk carriers going to and from the marine terminal.[98]

99. Commenting on these adverse environmental effects, the JRP concluded that "most project effects should not be judged 'significant.'"[99] However, it also noted that "uncertainties remain about several project effects,"[100] and that "the accumulation of concerns about adequacy leads the Panel to question the Project."[101] The JRP regarded the Project's inconsistency with community core values as "a primary consideration" influencing it to recommend rejection of the Project. But it also stated that "the Project should not proceed in a situation where endangered species and a local way of life would be at risk due to project effects."[102]

100. On the basis of the above, Project opponents could have argued that the JRP failed to discharge its statutory mandate to determine whether all the adverse environmental effects potentially resulting from the Project were likely to be significant. In particular, the JRP appears to have regarded the risks posed to endangered species as one reason for its rejection of the Project, even though incompatibility with community core values was the more important reason.

101. The Project opponents might also have argued that the report was legally deficient because the JRP had failed to discharge its obligation under s. 34(*a*) of the *CEAA* to ensure that it obtains the information that it needs to conduct the assessment,

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[97] *Ibid*. at p. 48.

[98] *Ibid.* at pp. 57-59 and 84.

[99] *Ibid.* at pp. 83-84 (emphasis added).

[100] *Ibid.* at p. 102.

[101] *Ibid.* at p. 84.

[102] *Ibid.* at p. 103 (emphasis added).

because, for example, it had failed to exercise its powers to require production of documentation relevant to its inquiry.[103]

102. However, I doubt whether this latter argument would have succeeded. While the JRP complained in its Report that the Claimants had not complied with requests for information,[104] it also stated that it was able to obtain the requested information from other sources, despite the Claimants' failure to be more forthcoming. On this basis, it was satisfied that it had "acquired adequate information to assess the likely environmental effects of the Project."[105] Accordingly, the opponents would have likely had difficulty in persuading a reviewing court that the JRP had failed to perform its legal duty under *CEAA*, s. 34(*a*).

103. In conclusion, if it is assumed that the JRP would have given a positive environmental assessment of the Project if it had not adopted the community core values approach, and that the Project would have received approval from both Canada and Nova Scotia, it is possible that objectors to the Project could have pursued a judicial review of the hypothetical JRP report and recommendations and government decisions. Given the concerns and uncertainties that the JRP expressed about the Project, and the inconclusive or incomplete nature of some of the actual Report`s findings, it is not obvious that a reviewing court would have dismissed an application for judicial review challenging the legality of a recommendation that the Project be approved.

3. Remedies

104. If the Project objectors were able to establish that the JRP's positive recommendation was legally flawed in any of the ways outlined above, the reviewing court would have granted some form of relief. To the extent that the report was found to be incomplete because the JRP had failed to determine the significance of some of the

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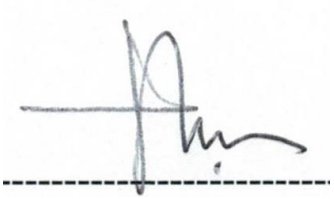
[103] **R-1**, *CEAA*, s. 35. The JRP's failure to exercise this power in order to properly inform itself of the facts was one of the grounds that attracted judicial intervention in **R-625**, *Alberta Wilderness Association* (note 52*, supra*).

[104] Note 93, *supra* at p. 84.

[105] *Ibid*.

Project's adverse environmental effects, the court might have remitted the matter to the same JRP to discharge its mandate by making the necessary findings.[106]

105. However, if the court had found that the JRP's recommendation was insupportable in light of the evidence before it, the report would likely have been set aside. In these circumstances, a remittal for redetermination would, as we have seen, be the normal form of relief. Subject to a successful appeal by the Claimants, the administrative process would start up again, with the associated delays and costs, but with no certainty of an eventual outcome favourable to the Claimants.



John M. Evans

June 9, 2017

[106] See note 48, *supra.*

APPENDIX "A"

CURRICULUM VITAE: THE HONOURABLE JOHN M. EVANS

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DEGREES AND PROFESSIONAL QUALIFICATION

1979	Barrister and Solicitor, Ontario
1965	B.C.L. Oxford University, U.K.
1964	B.A. Jurisprudence, Oxford University, U.K.

AWARDS

2011	Council of Canadian Administrative Tribunals Medal
1998	David W. Mundell Medal for Legal Writing

PRESENT POSITION

2015-date	Public Law Counsel, Goldblatt Partners LLP, Toronto

JUDICIAL OFFICE

1999-2013	Judge, Federal Court of Appeal.
1998-1999	Judge, Federal Court of Canada - Trial Division

ACADEMIC POSITIONS

1975-1998	Professor, Osgoode Hall Law School, York University
1992	Visiting Professor, Monash University, Australia
1987	Acting Dean, Osgoode Hall Law School, York University
1983	Robinson, Cox Visiting Fellow, University of Western Australia

1982-1985	Associate Dean, Osgoode Hall Law School, York University
1967-1975	Lecturer in Law, London School of Economics and Political Science
1974	Visiting Professor of Law, Osgoode Hall Law School, York University
1966-1967	Lecturer in Law, Worcester College, Oxford
1965-1966	Bigelow Teaching Fellow, Law School, University of Chicago

SELECTED PROFESSIONAL ACTIVITIES

Before judicial appointment:

- Prepared legal opinions and reports on administrative law issues to law firms, federal and provincial administrative tribunals, and to the Government of Canada.
- Prepared research papers on the law of trusts and the conflict of laws for the Ontario Law Reform Commission.
- Chair of university discipline tribunals.
- Co-chair of Toronto Stock Exchange Discipline Committee
- Member of committee established by the Minister of Citizenship and Immigration to determine claims for amnesty by illegal immigrants.
- Member of international group of experts invited to assist in drafting principles of administrative law for the new South Africa.

During judicial appointment:

- Invited speaker at many educational seminars.
- Invited speaker at Canadian and international legal conferences.
- Member of NAFTA Extraordinary Committee on softwood lumber dispute.

After leaving the Bench

- Consultant on administrative law, constitutional law, and intellectual property law matters.
- Legal author

- Advisor and seminar leader, Parkdale Community Legal Services.
- Guest speaker at Osgoode Hall Law School.
- Regularly invited conference speaker.

PUBLICATIONS

Books

Judicial Review of Administrative Action in Canada, 3 volumes, loose leaf (Toronto: Thomson Reuters Canada Ltd.; 1998, latest update December 2016) (with D. J. M. Brown).

Administrative Law: Cases, Text and Materials, 4th edn. (Toronto: Emond-Montgomery Publications Ltd., 1995) (with H. N. Janisch and D. J. Mullan).

Administrative Law: Cases, Text and Materials, 3d edn. (Toronto: Emond-Montgomery Publications Ltd., 1989) (with H. N. Janisch, D. J. Mullan and R. C. B. Risk).

Administrative Law: Cases, Text and Materials, 2d edn. (Toronto: Emond-Montgomery Publications Ltd., 1984) (with H. N. Janisch, D. J. Mullan and R. C. B. Risk).

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Monograph

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Book chapters

"Justice Gerald Le Dain: The Federal Court Years" in G.B. Baker (ed.), *Mélanges Gerald Eric Le Dain: Tracings of a Life*, (Montreal; McGill-Queen's University Press; 2017) (forthcoming).

"Adjudicative Independence: Canadian Perspectives", in Suzanne Comtois and Kars de Graaf (eds.), On Judicial and Quasi-Judicial Independence (The Hague: Eleven International Publishing; 2013) at 103-119.

"Interdiction by Treaty: The Canada-USA Safe Third Country Agreement" in Forced Migration and the Advancement of International Protection", (7th World Conference, November 6-9, 2006, International Association of Refugee Law Judges) at 122-31.

"Principle and Pragmatism: Administrative Agencies' Jurisdiction over Constitutional Issues" in Grant Huscroft and Michael Taggart (eds.), Inside and Outside Canadian Administrative Law: Essays in Honour of David Mullan (Toronto: University of Toronto Press; 2006) at 377-420.

"Cory on Administrative Law: a Contextual Study" (with Trevor Knight) in Patrick J. Monahan and Sandra A. Forbes (eds.) in Peter Cory at the Supreme Court of Canada (Winnipeg: Canadian Legal History Project; University of Manitoba; 2001) at 71-111.

"Controlling Administrative Discretion: a Role for Rules?" in Frank E. McArdle (ed.), The Cambridge Lectures 1991 (Cowansville: 1993; Les Editions Yvon Blais Inc.; 1993) at 209-24.

"Recent Developments in Remedies in Administrative Law" in Law Society of Upper Canada, Special Lecture Series 1981 (Toronto: Richard de Boo Ltd.; 1981) at 429-81.

Journal articles:

"Fair's Fair: Judging Administrative Procedures" (2015), 28 Canadian Journal of Administrative Law and Practice, 111-122.

"The Triumph of Reasonableness: But How Much Does it really Matter?" (2014), 27 Canadian Journal of Administrative Law and Practice 101-111.

"Standards of Review in Administrative Law" (2013), 26 Canadian Journal of Administrative Law & Practice 67-79.

"Current Constitutional Issues in Canada" (2013), 51 Duquesne Law Review 323-347.

"Administrative Justice Reforms in England and Wales: Some Canadian Reflections" (2011), 24 Canadian Journal of Administrative Law and Practice 11-21.

"The Role of Appellate Courts in Administrative Law" (2007), 20 Canadian Journal of Administrative Law & Practice 1-35.

“Questions of Law and the Standard of Review: A Crisis of Confidence?” (2005), 18 Canadian Journal of Administrative Law and Practice 297-313.
“Judicial Review of Administrative Discretion: plus ça change ...?” (2004), 6 Administrative Law Reports (4th) 61-72.
“Cultural and Social Diversity: Of Human Rights, Courts, Tradition and Social Change” (2003), 15 Journal of the Commonwealth Magistrates’ and Judges’ Association 8-19.
“Writing Effective Tribunal Decisions and Reasons” (2002), 16 Canadian Journal of Administrative Law and Practice 95-102.
“Collateral Challenges to the Validity of Administrative Action: a Pragmatic or Functional Analysis” (1999), 7 Reid’s Administrative Law 73-77.
“Administrative Tribunals and Charter Challenges: Jurisdiction, Discretion and Relief” (1997), 10 Canadian Journal of Administrative Law and Practice 355-368.
“Due Process and Fairness: the Democratic Deficit of the Savings and Restructuring Act, 1995" (1995), 4 Canada Watch 65-66.
"Administrative Appeal or Judicial Review: a Canadian Perspective" [1993] Acta Juridica 47-76.
“Current Developments in Canadian Administrative Law” (1992), Australian Institute of Administrative Law Newsletter 1-10.
"Jurisdictional Review in the Supreme Court of Canada: Romance, Reality and Recidivism" (1991), 48 Administrative Law Reports 255-273.
"The Principles of Fundamental Justice: the Constitution and the Common Law" (1991), 29 Osgoode Hall Law Journal 51-92.
"Developments in Administrative Law: l988-89 Term" (l990), l2 Supreme Court Law Review (2d) 1-79.
"Problems of Mass Adjudication: the Contribution of the Courts" (1990), 40 University of Toronto Law Journal 606-610.
"Charter Challenges before Administrative Tribunals: A Comment on Cuddy Chicks" (1990), 39 Administrative Law Reports 87-101.
"Federal Jurisdiction: Recent Developments" (l989), 67 Canadian Bar Review 817-842 (with B. Slattery).

"Developments in Administrative Law: l987-88 Term" (l989), 11 Supreme Court Law Review 1-39.
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"Developments in Administrative Law: 1986-87 Term" (1988) 10 Supreme Court Law. Review 1-59.
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"Developments in Administrative Law: 1984-85 Term" (1986), 8 Supreme Court Law Review 1-52.
"Unlawful Tax Expenditures: A Role for the Courts?" (1981), 3 Canadian Taxation 17-28.
"Federal Jurisdiction: A Lamentable Situation" (1981), 59 Canadian Bar Review 124-153.
"Public Interest Immunity and State Papers" (1980), 58 Canadian Bar Review 360-376.
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"The Trial Division of the Federal Court" (1977) 23 McGill Law Journal 132-143.
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"Police Powers and Road Traffic Offences" (1973), 36 Modern Law Review 260-269.
"Governmental Factors in Contracts of Public Authorities" (1972), 35 Modern Law Review 88-94.
"Judicial Review for Insufficiency of Evidence" (1971), 34 Modern Law Review 561-567.
"Delegation and Estoppel in Administrative Law" (1971), 34 Modern Law Review 335-340.
"Police Power to Stop Without Arrest" (1970), 33 Modern Law Review 438-441.
"Immigration Act, 1971" (1972), 35 Modern Law Review 508-524.
"Purpose Trusts" (l969), 32 Modern Law Review 96-99.

"More Convulsions in Family Property Law" (l968) 3l Modern Law Review 562-567 (with S. A. Roberts).

"Passing-Off and the Problem of Product Simulation" (1968) 31 Modern Law Review 642-655.

APPENDIX "B"

The timelines established by the *Federal Courts Rules* for the completion of the pre-hearing steps in an application for judicial review, absent any extensions of time granted by the Court, are as follows (*A* = Applicant; *R* = Respondent).

(a) 10 days from issuance of notice of application, *A* must serve it on *R*.[107]

(b) 10 days from being served with notice, *R* must file notice of appearance.[108]

(c) 30 days from issuance of notice of application, *A* must file and serve supporting affidavits and documentary exhibits.[109]

(d) 30 days from service of *A*'s affidavits, *R* must serve and file its supporting affidavits and documentary exhibits.[110]

(e) 20 days from filing of *R*'s affidavits, any cross-examination must be complete.[111]

(f) 20 days after date when cross-examination must be complete, *A* must file and serve its record.[112]

(g) 20 days from service of *A*'s record, *R* must file its record.[113]

(h) 10 days from service of *R*'s record, a requisition for hearing must be filed.[114]

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[107] **R-641**, *Federal Courts Rules,* SOR/98-106 [Excerpts], R. 304.

[108] *Ibid,* R. 305.

[109] *Ibid,* R. 306.

[110] *Ibid,* R. 307.

[111] *Ibid,* R. 308.

[112] *Ibid,* R. 309.

[113] *Ibid,* R. 310.

[114] *Ibid,* R. 314.

APPENDIX "C"

The timelines established by the *Federal Courts Rules* for the completion of the pre-hearing steps in an appeal from a decision of the Federal Court to the Federal Court of Appeal must be completed, subject to any extensions of time granted by the Court.

(a) *A* must serve notice of the appeal within 10 days of the issuance of the notice of appeal;[115]

(b) *R* must serve and file a notice of appearance within 10 days of service of the notice of appeal;[116]

(c) Parties must agree in writing the contents of the appeal book within 30 days of the filing of the notice of appeal.[117] If there is no agreement within this time, *A* must within 10 days serve and file notice of a motion requesting the court to determine the contents of the appeal book.[118]

(d) *A* must serve and file the appeal book within 30 days of filing an agreement of its contents or of a court order settling the contents.[119]

(e) *A* must serve and file a memorandum of fact and law within 30 days of filing an appeal book.[120]

(f) *R* must serve and file its memorandum of fact and law within 30 days of service of *A*'s memorandum.[121]

(g) *A* must serve and file a requisition for a date to be set for the hearing of the appeal within 20 days of service of *R*'s memorandum.[122]

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[115] *Ibid,* R. 339(1).

[116] *Ibid,* R. 341(1).

[117] *Ibid,* R. 343.

[118] *Ibid,* R. 343(3).

[119] *Ibid,* R. 345.

[120] *Ibid,* R. 346(1).

[121] *Ibid,* R. 346(2).

[122] *Ibid,* R. 347(1).

APPENDIX "D"

The timelines established by the *Nova Scotia Rules of Civil Procedure* for the completion of the pre-hearing steps in an application for judicial review, absent any extensions of time granted by the Court, are as follows.

(a) *A* must file with the application for judicial review a notice of a motion for directions to organize the judicial review to be heard within 25 days of the notice.[123]

(b) *A* must inform *R* of the notice within 10 days of its filing.[124]

(c) The *decision* maker must file the administrative record within 5 days of being notified of the judicial review.[125]

(d) *R* must file a notice of participation within 10 days of receiving notice of the application.[126]

(e) On the *hearing* of the motion for directions, a judge will set a timetable for the remaining pre-hearing steps and fix the date of the hearing.[127]

[123] **R-638**, *Nova Scotia Civil Procedure Rules*, Consolidated [Excerpts], R. 7.05(2).

[124] *Ibid,* R. 7.07.

[125] *Ibid,* R. 7.09(1).

[126] *Ibid,* R. 7.08(2).

[127] *Ibid,* R. 7.10(*i*) and (*k*).

APPENDIX “E”

The timelines established by the *Nova Scotia Rules of Civil Procedure* for the completion of the pre-hearing steps in an appeal from the Supreme Court of Nova Scotia to the Nov Scotia Court of Appeal, absent any extensions of time granted by the Court, are as follows.

(a) *A* may commence an appeal within 25 days of the decision under appeal.[128]

(b) *A* must serve notice of the appeal within 25 days of the commencement of the appeal.[129]

(c) *R* must serve a notice of contention within 10 days of the delivery of the notice of appeal.[130]

(d) *A* must file a notice for directions for the date of the hearing and conduct of the appeal within 80 days of filing the notice of appeal.[131]

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[128] *Ibid,* R. 90.13(3).

[129] *Ibid,* R. 90.14.

[130] *Ibid,* R. 90.22(2).

[131] *Ibid,* R. 90.25.

APPENDIX "F"

The timelines statutorily prescribed for the completion of the pre-hearing steps in an application for leave to appeal to the Supreme Court of Canada, absent any extensions of time granted by the Court, are as follows.

(a) *A* may file and serve notice of an application for leave to appeal within 60 days after the decision under appeal.[132]

(b) *R* may respond to an application for leave to appeal 30 days after *A* has served notice of the application.[133]

(c) *A* may file and serve a reply within 10 days of being served with *R*'s response.[134]

[132] **R-679**, *Supreme Court Act*, R.S.C. 1985, c. s-26, s. 58(1)(*a*).

[133] **R-680**, *Rules of the Supreme Court of Canada*, SOR/2002-156, R. 27.

[134] *Ibid*, R. 28.