

**In the Matter of an Arbitration
Under Chapter Eleven of the North American Free Trade Agreement**

between:

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

Claimants

and:

Government of Canada

Respondents

**Report of
Peter Geddes
Nova Scotia Provincial Government**

Contents

1. Background and Qualifications	1
2. The Provincial Government Decision-Making Process under the <i>NSEA</i>	3
a. Decision-Making Power of the Minister under the <i>NSEA</i>	3
b. Decision-Making Process by the Minister Following the Receipt of a Panel Report	5
c. Criteria Considered in the Minister's Decision-Making Process	6

1. My name is Peter Geddes. Until April 1, 2017, I was Director of Policy, Planning and Environmental Assessment at the Nova Scotia Department of Environment.¹ I was employed by the Department of Environment from 2001 to 2017 (further details below). On April 1, 2017, I became the Executive Director of Policy, Planning, and Support Services at the Nova Scotia Department of Natural Resources. I prepared this report at the request of the Government of Canada to explain the role of the Minister of Environment and Labour (the Minister) in Nova Scotia's environmental assessment process.

2. My report is based on my past experience and involvement in Nova Scotia's environmental assessment process. After describing my background and qualifications, my report will address the role of the Minister within the environmental assessment process under the Nova Scotia *Environment Act* (*NSEA*),² and more specifically the Minister's responsibility to make a decision following the receipt of a report and recommendations by a joint review panel (JRP). I discuss how this decision-making process is carried out and what factors are considered, and I describe the possible decisions available to the Minister with respect to a project like the Whites Point project.

1. Background and Qualifications

3. I have twenty years of experience in environmental education and environmental assessment under the *NSEA*. Following my bachelor degree in Design in Environmental Planning from the Nova Scotia College of Art and Design in 1994, I worked for five years in environmental education for Clean Nova Scotia, a prominent environmental non-governmental organization (NGO) in Nova-Scotia.

4. I joined the Nova Scotia Department of Environment (then the Nova Scotia Department of Environment and Labour) in 2001 and have been directly involved in the administration of Nova Scotia's environmental assessment process since 2003. From 2003 to 2010, I was an Environmental Assessment Officer. In that capacity, I led the review of numerous environmental

¹ The Department is currently known as the Department of the Environment; however at the time of the Whites Point project environmental assessment, it was the Department of Environment and Labour.

² My report does not detail the complete environmental assessment process as I understand that information is included in the two affidavits of Christopher Daly submitted by the Government of Canada in the jurisdiction and liability phase of this arbitration.

assessments, including the assessment of large quarry and mining projects such as the Moose River Gold Mine, the East Uniacke Quarry, the Sovereign Resources project and the Point Aconi Surface Coal Mine.

5. As an Environmental Assessment Officer, I was involved in environmental assessments of both Class I (smaller developments) and Class II (larger developments) projects under Part IV of the *NSEA* and the *Environmental Assessment Regulations*.³ For Class I projects, my main tasks were to administer the steps in the review process, which included pre-registration of the project, scoping and planning meetings with the proponents of the project, formal registration of the project, management of the review of the environmental assessment documents by the public and the relevant government agencies, assembling all comments into a report and preparing departmental analysis and the recommendation for the Minister. Following the Minister's decision, my role was to release the decision to the public and the project proponents, review the terms and conditions of the approved projects with the proponents and front-line enforcement officers, and annually track whether the proponents were meeting the terms and conditions of the projects.

6. Class II projects are referred to a provincial environmental assessment review panel (formerly known as the Environmental Assessment Board). The purpose of a panel is to provide a recommendation to the Minister on whether to approve or reject a project (referred to as an "undertaking" in the *NSEA*). This recommendation is communicated in the form of a panel report. My role as an environmental assessment officer was to administer the preliminary steps in the process up to the point the project was referred to the panel for its review and recommendation to the Minister. The preliminary steps included registering the project, drafting terms of reference, and reviewing the proponent's environmental assessment report to ensure adherence to the terms of reference. At that point, the Minister would then refer the matter to the panel.

7. In 2010, I became Manager of Environmental Assessment at the Nova Scotia Department of Environment. In 2012, I became Director of Policy, Planning and Environmental Assessment. In each of these capacities, I oversaw the review of every provincial environmental assessment,

³ **R-5**, Nova Scotia *Environment Act*, 1994-95, c. 1 (amended 1998) ("*NSEA*"); **R-6**, Nova Scotia *Environmental Assessment Regulations*, O.I.C. 95-220, N.S. Reg. 26/95.

including large mining and quarry projects. I also served as the Environmental Assessment Administrator, who was responsible to present the Department's analysis and recommendations on the acceptability of the projects to the Minister.

8. My responsibilities as former Manager and then as Director included ensuring that environmental assessment processes were carried out by a team of Environmental Assessment Officers in accordance with the legislation and within the regulated timelines. When a provincial panel review was triggered, my responsibilities also included administering the panel recruitment process and ensuring that the panel had all the resources it needed to conduct the review. Finally, I was responsible for reviewing the panel report with the Minister and providing additional advice and analysis necessary for the Minister to make his or her decision.

2. The Provincial Government Decision-Making Process under the NSEA

a. Decision-Making Power of the Minister under the NSEA

9. The assessment of a project can take different forms, pursuant to the Minister's powers in *NSEA* section 34 to request additional information, to determine that a focus report is necessary, or to require an environmental assessment report. Regardless of the form of the assessment, the decision to reject, approve, or approve a project with conditions ultimately rests with the Minister, who must consider all relevant factors.

10. When a project requires both a provincial and a federal environmental assessment (as was the case with the Whites Point project), sections 47 and 48 of the *NSEA* allow the Minister to enter into an agreement with the Federal Government to harmonize the environmental assessment process.⁴ The joint assessment agreement outlines the procedural steps that will be undertaken by both governments in the review process. When the Federal Government has made a determination that a panel review is required, a JRP can be constituted. Although the Nova Scotia and Federal Governments have frequently entered into joint assessment agreements, JRPs in Nova Scotia are rare, having occurred only two times in my fifteen years at NSE. Those two JRPs proceeded by way of joint assessment agreements, which ensured that the requirements of the *NSEA* were fulfilled.

⁴ R-5, *NSEA*, ss. 47-48.

11. The tools that a review panel uses to assess an application include submissions by the proponent, interested members of the public, NGOs, the federal government and the Nova Scotia government. The government's submissions can include comments on potential effects and the adequacy of assessment data. Government reviewers typically identify issues or potential issues and suggest means of mitigation, or suggest there is inadequate information to determine that there might be an effect. However, in my experience, government reviewers do not make findings on whether effects constitute an "environmental effect" as defined under the *NSEA*, nor do they provide a determination of whether the project application should be recommended for rejection or approval.

12. Based on my experience and involvement with the environmental assessment process, even where a joint review panel is established, responsibility for approving or rejecting an undertaking for the Province rests with the Minister. The JRP makes a recommendation to the Nova Scotia Minister of Environment based on the *NSEA* and a recommendation to the Federal Minister based on the federal statute.

13. Pursuant to his or her authority under sections 32 and 40 of the *NSEA*, the Minister can approve, approve with conditions, or reject an undertaking. As stipulated in section 40(1) of the *NSEA*:

40 (1) Upon receiving information under Section 34, a focus report under Section 35, an environmental-assessment report under Section 38, a recommendation from a review panel under Section 39 or from a referral to alternate dispute resolution, the Minister may

- (a) approve the undertaking;
- (b) approve the undertaking, subject to any conditions the Minister deems appropriate; or
- (c) reject the undertaking.⁵

14. Importantly, in the context of a joint review, the Nova Scotia Minister exercises his or her authority to approve or reject the undertaking independently from the Federal Government's exercise of its authority. In my experience, federal agencies are respectful of the Province's decision-making authority; I am not aware of any instance in which the federal agencies tried to persuade the Nova Scotia Minister to make a particular decision regarding an undertaking.

⁵ **R-5**, *Nova Scotia Environment Act*, s. 40(1).

b. Decision-Making Process by the Minister Following the Receipt of a Panel Report

15. When the Minister receives a panel report, he or she is required to issue a decision on the project under sections 32 and 40 of the *NSEA* and pursuant to the joint panel agreement. To that end, in my role as Environmental Assessment Administrator, I arranged for a briefing with the Minister to review the process, the issues raised during the assessment, the panel recommendations and the Minister's options for a decision.

16. In making a decision, the Minister may request further advice from the department on matters raised in the report and consider that additional advice in rendering a decision. The Minister may determine that there is inadequate or unclear information in the report and ask staff to provide further analysis.

17. A panel report's conclusions and recommendations are not binding on the Minister, although the Minister takes into account the panel's findings in coming to a decision.

18. The Minister can either make his or her decision known immediately following the briefing, or take time to consider the options and provide a decision at a later date. Additional briefings could be requested by the Minister before making the decision. In the case of a JRP or another harmonized process, Nova Scotia liaises with the Canadian Environmental Assessment Agency on the timing of the release of the Minister's decision.

19. While the review process is standardized among projects insofar as the process set out by the *NSEA*, regulations, and operational practices, there is no policy of standardized outcomes for projects. Environmental assessment under the *NSEA* is contextual in that it is intended to respond to the facts-on-the-ground of each project. An assessment needs to account for the physical parameters of the project and its surroundings (topography, geology, hydrogeology), the social and economic parameters (population density, nearby land use, local industries), and biological parameters (habitat, wildlife, migration and mating patterns). All of this can vary widely depending on location within the Province and which must be reflected in the assessments, and eventually in an approval or rejection. To provide context for the Whites Point project, as may be seen from the public record, it is only one of three of actual or proposed coastal quarries in the Province involving a marine terminal, and the only such project proposed for the Digby Neck or

along the Nova Scotia side of the Bay of Fundy. The other two are Black Point Quarry near Canso (having been approved on April 26, 2016), and the Martin Marietta quarry at Porcupine Mountain on the Strait of Canso (which predates environmental assessment, except for an expansion of the operation which was given EA approval on August 11, 2000).

20. If the Minister decides to approve the undertaking, he or she issues an environmental assessment approval. In keeping with section 40 of the *NSEA*, this approval is subject to any terms and conditions the Minister considers appropriate and may or may not include conditions to address mitigation measures recommended by a panel. The Minister has the authority to determine the required mitigation measures, including measures that are more onerous than the mitigation measures recommended by a panel. Mitigation measures are typically drafted in enforcement/regulatory language. Standard terms and conditions, which are not normally commented upon by panel reports, are also included.

21. If the Minister decides to reject the undertaking, the Minister issues a written decision to the proponent.⁶ The Minister's decision is final pursuant to section 138 of the *NSEA*.⁷ A proponent has recourse to have the Minister's decision judicially reviewed, but it may not be appealed.

c. Criteria Considered in the Minister's Decision-Making Process

22. The decision by the Minister to approve, with or without conditions, or reject a project is based on a consideration of potential environmental effects. *NSEA* section 3(v) defines environmental effects, in respect of an undertaking, as:

- i. any change, whether negative or positive, that the undertaking may cause in the environment, including any effect on socio-economic conditions, on environmental health, physical and cultural heritage or on any structure, site or thing including those of historical, archaeological, paleontological or architectural significance, and
- ii. any change to the undertaking that may be caused by the environment,

whether the change occurs inside or outside the Province[.]⁸

⁶ R-5, *NSEA*, s. 40(2).

⁷ R-5, *NSEA*, s. 138(2).

⁸ R-5, *NSEA*, s. 3(v).

23. As a result, when making a decision, the Minister is required to consider a broad range of environmental effects, as indicated by the list in this definition, and including socio-economic effects. The assessment of socio-economic effects is an important aspect of the Nova Scotia legislation and a process through which the Minister routinely balances off positive and negative effects of the undertaking. “Socio-economic effects” is generally considered by the department to have a very broad meaning. Ultimately, the Act gives the Minister the authority to consider a broad range of factors having a direct socio-economic effect. The specific factors considered depend on the context of the undertaking provided that they fall within the definition of environmental effect under the *NSEA*. Based on my past experience, factors examined to assess environmental effects (including socio-economic effects) have included:

- Air emissions, dust;
- GHG emissions;
- Noise and lighting;
- Habitat sensitivity and endangered species;
- Ground water impacts;
- Wetlands;
- Surface water and erosion / sedimentation control;
- Visual impacts;
- Impacts on aboriginal rights and title;
- Employment and business impacts (on variety of sectors such as tourism and fisheries);
- Traffic / road impacts;
- Potential impacts to reasonable enjoyment of surrounding property (tied to noise, dust, lighting, traffic);
- The location and the nature and sensitivity of the surrounding area;
- The size, scope and complexity of undertaking;
- Potential and known environmental effects of the proposed undertaking;
- Project schedules where applicable;
- Planned or existing land use in the area of the undertaking; and
- Other undertakings in the area.

24. A JRP report, as with other panel assessment reports, is considered by the Minister in his or her decision-making. It sets out the panel’s findings on a proposed undertaking and its

recommendations in light of these findings. In practice, the Minister's decision-making process is not limited to consideration of just the JRP report. The Minister considers the relevant information which is available to him or her, which ordinarily includes staff assessments and public comments arising over the history of a file. Should the Minister elect to approve an undertaking, the *NSEA* grants the Minister the authority to submit that undertaking to the same or different conditions than the ones proposed by a JRP. In reaching his or her decision, the Minister would consider the JRP report as an important source of information, and in practice all of the environmental aspects covered by the report (e.g. groundwater, habitat, erosion, socio-economic effects) would be factored into the Minister's decision-making. Based on my experience, the Minister may impose different and/or additional mitigation measures to those proposed by a panel. These mitigation measures can have important impacts on the economic viability of a project.

25. In the case of the Whites Point project, although I had only limited involvement and only at an early stage of the process, I had knowledge of the fact that the Minister was well aware of the concerns surrounding the socio-economic effects of the project because of the numerous letters and submissions received from citizens, municipalities and other stakeholders. These concerns are factors that he could have considered in his decision, whether or not they were addressed by the JRP. Even in the absence of the JRP's introduction of the concept of community core values, the Minister would have expected an assessment of effects from a socio-economic perspective as contemplated in the provincial definition of "environmental effects."

Dated: June 9, 2017



Peter Geddes
Halifax
Nova Scotia