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

REJOINDER EXPERT REPORT FOR THE DAMAGES PHASE OF THE ARBITRATION

by

THE HONOURABLE JOHN M. EVANS

November 6, 2017

TABLE OF CONTENTS

I. INTRODUCTION

1. In my Expert Report for the Damages Phase of the Arbitration dated June 6, 2017 ["First Report"], I concluded that given the Tribunal's findings in the Jurisdiction and Liability Phase, an application for judicial review in the Canadian courts of the JRP Report would almost certainly have been successful, the Whites Point Joint Review Panel Report ["JRP Report" or "Report of the JRP"] and recommendations would have been set aside, and the matter would have been returned for a new environmental assessment and new decisions by the federal and Nova Scotia Governments on the issuance of the permits necessary for the Project to proceed.[1]

2. Neither the Claimants nor their experts have challenged my conclusion. In fact, Dean Lorne Sossin expressly agreed that: "if [Bilcon of Nova Scotia was] successful on a judicial review, the likeliest remedy, as John Evans notes, would be for the matter to be remitted back either to the Ministers for a new decision, or to the JRP for a new process".[2]

3. Instead, the Claimants seem to challenge my conclusions that "judicial review would have been an expeditious and relatively cost-effective remedy for the unlawful administrative action on which the Tribunal based its findings" and that "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."[3]

4. This Rejoinder Expert Report for the Damages Phase of the Arbitration ["Rejoinder Report"] responds to three arguments made by the Claimants in their Reply material.

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[1] **RE-6**, Expert Report for the Damages Phase of the Arbitration by the Honourable John M. Evans, June 9, 2017 ("Evans Report I"), ¶¶ 90-91.

[2] Reply Expert Opinion of Lorne Sossin, August 3, 2017 ("Sossin Reply Report"), ¶ 60.

[3] **RE-6**, Evans Report I, ¶ 91.

5. First, they criticize the efficacy of the judicial review process in what I understand to be an attempt to show that it was, in fact, reasonable for them not to pursue an application for judicial review in Canadian courts in order to mitigate their loss attributable to what the Tribunal found to be an unlawful environmental assessment.

6. Second, they assert that there is no duty in Canadian law for a plaintiff to seek to mitigate a loss caused by unlawful administrative action by bringing an application for judicial review of the impugned measure.

7. Third, they suggest that, if the Report of the JRP had not relied on "community core values" the Governor in Council ["GIC"] would have had virtually no discretion to refuse to approve the issuance of the permits necessary for the Project to proceed.

8. I disagree with each of these contentions.

II. JUDICIAL REVIEW IN CANADIAN COURTS WOULD HAVE PROVIDED AN EFFECTIVE, EFFICIENT AND COST-EFFECTIVE REMEDY THAT WOULD HAVE FULLY RESTORED THE RIGHT OF BILCON OF NOVA SCOTIA TO HAVE THE PROJECT CONSIDERED IN ACCORDANCE WITH CANADIAN LAW

1. Judicial review would have provided an effective remedy for any legal defects in the JRP Report, the subsequent Ministerial decisions, or both

9. The Claimants' expert, Dean Sossin, criticizes the fact that in my First Report, I focused on the availability of judicial review of the Report of the JRP, rather than the relevant Ministerial decisions.[4] As I explain below, his argument does not demonstrate that the Claimants could not have pursued an application for judicial review in Canadian courts to challenge the legality of the JRP Report alone.

10. My First Report explained how an application for judicial review of the JRP Report would probably have proceeded. This was because the Tribunal based its liability decision on what it regarded as a fundamental legal error in the JRP Report.[5]

[4] Sossin Reply Report, ¶¶ 52-55.

[5] **RE-6**, Evans Report I, ¶ 62.

However, even though the Tribunal did not pronounce on the legality of the subsequent Ministerial decisions, it would have been open to the Claimants to challenge them in judicial review proceedings, on the ground that they had adopted what the Tribunal found to be a legally flawed JRP Report. The two judicial review applications would likely either have been consolidated or heard together, as happened in *Alberta Wilderness Assn*. *v. Cardinal River Coals Ltd.*[6]

11. Further, the fact that the Claimants could also have sought judicial review of the Ministerial decisions does not affect my conclusion that they could have limited the application for judicial review to a determination of the legality of the JRP Report alone. Nor does it affect my assessment of the Claimants' standing, the applicable limitation periods, the duration of the judicial review process, and costs. Indeed, contrary to Dean Sossin's suggestion,[7] the Ministers' decisions not to issue the permits after considering the JRP Report did not preclude the Claimants from pursuing an application for judicial review of the JRP Report and recommendations.

12. Dean Sossin says that at paras. 36-38 of my First Report I relied on the Federal Court decision in *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*[8] as authority for the proposition that the Claimants could have sought judicial review of the JRP's Report alone. This was an error, he says, because in that case, unlike the present case, no Ministerial decision had been made.[9] Dean Sossin is incorrect on both counts.

13. First, my discussion at paras. 36-38 does <u>not</u> rely on the Federal Court decision as one where a JRP report was challenged alone. Second, a Ministerial order had been made in that case, and the applications to review the JRP report and the Minister's decision were heard together.[10] The Federal Court set aside the Ministerial

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[6] **RE-6**, Evans Report I, ¶ 36, citing to **R-625**, *Alberta Wilderness Association v. Cardinal River Coals Ltd.,* [1999] 3 F.C.R. 425 (FC) [*Alberta Wilderness Association*].

[7] Sossin Reply Report, ¶¶ 54-57.

[8] **R-625**, *Alberta Wilderness Association*.

[9] Sossin Reply Report, ¶¶ 52-54.

[10] **R-625**, *Alberta Wilderness Association,* p. 2.

authorization which indicated that licences would be issued, but granted no relief with respect to the application for judicial review of the JRP report.[11]

14. The case I relied on in my First Report to demonstrate that the Claimants could have sought judicial review of the JRP Report alone was the earlier decision by the Federal Court of Appeal in *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and* Oceans).[12] This was an appeal from a separate decision of the Federal Court Trial Division dismissing an application for judicial review of a JRP report on the preliminary ground that the Minister had already issued a decision indicating that the authorizations would be issued, a decision that the appellants had not challenged in their application for judicial review.[13]

15. Allowing the appeal, the Federal Court of Appeal held (at paras. 18-22) that the Applications Judge had erred in concluding that the Minister's response had superseded the JRP's report. Writing for the Federal Court of Appeal, Sexton J.A. said:

> 18. The requirements of CEAA are legislated directions that are explicit in mandating the necessity of an environmental assessment as a prerequisite to ministerial action. It is clear that the Minister has no jurisdiction to issue authorizations in the absence of an environmental assessment. It is equally clear that any assessment must be conducted in accordance with the Act, including for example, the requirement imposed under section 16 of CEAA. The fact that a federal response has been issued and remains unchallenged does not change these requirements. Thus, the appellants are entitled to argue the merits of their case.
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> 19. The appellants are entitled to seek prohibition against the Minister on the basis that the panel report is materially deficient. The fact that the federal response was not challenged is irrelevant to the appellants' claim. In my view, the federal response does not supersede the panel report, nor can it, as the respondents suggest, potentially cure any deficiencies in the panel report. The two are separate statutory steps with distinct purposes and functions.
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> 20. Section 37 of CEAA dictates that the Minister must consider the panel report before embarking on a course of action. Subparagraph 34(c)(i) establishes that

[11] **R-625**, *Alberta Wilderness Association*.

[12] **R-676**, *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans),* [1999] 1 F.C.R. 483 (FCA). *See* **RE-6**, Evans Report I, ¶ 64.

[13] **R-676**, *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans),* [1999] 1 F.C.R. 483 (FCA), ¶¶ 2-3.

> this report must set out the "rationale, conclusions and recommendations of the panel relating to the environmental assessment of the project". Paragraph 34(d) makes it clear that it is this report that contains the results of the environmental assessment that must be submitted to the Minister. Finally, subsection 2(1) defines "environmental assessment" as "an assessment of the environmental effects of the project that is conducted in accordance with this Act". Thus the report that must be submitted to the Minister pursuant to paragraph 34(d) must contain, pursuant to subparagraph 34(c)(i) and subsection 2(1), the results of an environmental assessment conducted in compliance with the requirements of CEAA.[14]

16. Accordingly, the appellants were entitled to argue the merits of their judicial review of the panel report and, when the matter was heard on its merits in the Trial Division, they could ask for an order prohibiting the Minister from issuing authorizations before the completion of a valid environmental assessment as required by the *Canadian Environmental Assessment Act* ["*CEAA*"], ss. 5 and 13.

17. The point is, as the Court stated, JRPs and Ministers exercise independent statutory powers, each of which is subject to judicial review. In my opinion, the *Alberta Wilderness Assn.* decision by the Federal Court of Appeal is clear authority for the proposition that under Canadian law the Claimants could have made an application for judicial review of the JRP Report alone, even though a federal response had already been issued. Dean Sossin produced no legal authority for the proposition that the Claimants could not have applied for judicial review of the JRP Report alone if they had so chosen.

2. Judicial review would have restored Bilcon of Nova Scotia's right to a fair opportunity to have an environmental assessment of the Project in accordance with Canadian law

18. The Claimants suggest that judicial review would have merely returned Bilcon of Nova Scotia to another tainted and untrustworthy administrative process, and that

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[14] **R-676**, *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans),* [1999] 1 F.C.R. 483 (FCA), 1999, ¶¶ 18-20 (emphasis added).

Canadian courts are ill-equipped to provide an effective remedy for this.[15] This is not the case.

19. An application for judicial review responds precisely to the Claimants' complaint, and the Tribunal's determination, that Bilcon of Nova Scotia was unlawfully denied an opportunity for a fair and lawful environmental process. As I have already noted, Dean Sossin agrees that the outcome of an application for judicial review would probably have been to provide Bilcon of Nova Scotia with a new hearing before a differently constituted JRP.[16] In light of the Tribunal's finding, predicting the outcome of an application for judicial review was thus far from a "largely subjective exercise."[17] Nor would an application for judicial review in this case have been particularly complex.

20. There is no basis for the Claimants to believe that, following a successful judicial review, a new JRP process would have been conducted unfairly or otherwise unlawfully. If the Claimants had expressed to the reviewing court concerns about the fairness of a re-determination, the Court would likely have ordered that the matter be referred to a differently constituted panel, with a direction that inconsistency with "community core values" is not legally relevant to the environmental assessment, and any other directions that it thought appropriate.[18]

21. As is evident from the cases cited in my First Report,[19] it is quite common for individuals to apply for judicial review to challenge the legality of environmental assessments and Ministerial decisions on projects, and to request reconsideration. Applicants in those (and other) cases would not have pursued judicial review if a court order setting aside the impugned determination and remitting the matter was an ineffective remedy.

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[15] *See, for example*, Claimants' Reply Memorial, ¶ 246; Sossin Reply Report, ¶ 60.

[16] See ¶ 2, above.

[17] Sossin Reply Report, ¶ 11.

[18] **RE-6**, Evans Report I, ¶ 78.

[19] *See, for example*, **RE-6**, Evans Report I, ¶¶ 31-36.

22. Of course, it would have been open to the Claimants to return to court if they believed that the second assessment was not lawful because, for example, the panel's conduct gave rise to a reasonable apprehension of bias. However, in my experience as a Judge of the Federal Court of Appeal, a second judicial review is rarely needed to correct legal errors in a fresh administrative process conducted following a successful challenge to a first decision. Nor am I aware that the administrative law literature has questioned the practical utility of court-ordered re-determinations. The Claimants provide no evidence to support their assertion that a second environmental assessment in this case would have been legally flawed.

23. In short, there is no basis for the Claimants' assertion that an application for judicial review would not have provided an effective remedy, because a different JRP would neither have conducted the process according to law, nor fairly assessed the environmental effects of the Project on the basis of the evidence adduced and submissions made to it.

24. Of course, a successful application for judicial review would not guarantee that a second JRP process would provide a positive assessment and recommendations, followed by the issuance of permits. The Claimants have no legal right to be issued the permits necessary for this Project, no matter how much they had invested in it. Permits are issued in the exercise of Ministerial discretion.

25. Like other applicants, the Claimants only have a right to a lawful application process. They were initially denied this, but would have obtained it as a result of an application for judicial review.

3. Judicial review in Canadian courts would have provided an expeditious and cost-effective remedy

26. The Claimants appear to argue that it would not have been reasonable to require them to have mitigated the loss attributable to the legal errors in the JRP Report by seeking judicial review of it. They note the time that judicial review proceedings would have taken, and the time and expense of a new JRP process.

27. With respect to the issue of timing, Mr. Buxton's assertion that a new JRP process would not have begun until late 2013[20] is, in my opinion, unduly pessimistic. Applications for judicial review of the JRP Report would have turned on a question of law: are community core values legally relevant to an environmental assessment under the *CEAA* or Nova Scotia *Environment Act*? The proceedings would thus have been less complex than, for example, cases where a JRP's findings of fact are challenged, and would have required the compilation of a relatively limited evidential record.

28. I estimated that it would have taken a total of three years for an application for judicial review by the Claimants to be decided by the Federal Court and the Federal Court of Appeal.[21] This time frame was sufficiently generous to enable motions (normally decided in writing) to be dealt with. Thus, the judicial review proceedings would probably have been concluded at the intermediate appellate level by late 2010.[22]

29. As I explained in my first report, there would have been no appeal as of right to the Supreme Court of Canada, which grants applications for leave to appeal in only a small percentage (20%) of cases.[23] Therefore, it cannot be considered probable that the Supreme Court would have given leave to appeal.

30. Thus, even on Mr. Buxton's assumptions about the length of time it would take for a new JRP process to get underway (which may or may not be sound), the new JRP process would probably have started by late 2011, not December 2013.

31. With respect to the expense of the new JRP process, Mr. Buxton provides no support for his estimate that only 10-20% of the information in the first JRP process would have been useful in the second process.[24] I was surprised that he put the figure of re-usable material this low, but I am not qualified to provide an expert opinion on whether that is a plausible figure. However, if the JRP process had started in 2011,

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[20] Reply Witness Statement of Paul Buxton, August 18, 2017 ("Buxton Reply Statement"), ¶ 45.

[21] **RE-6**, Evans Report I, ¶¶ 82-83.

[22] **RE-6**, Evans Report I, ¶ 83.

[23] **RE-6**, Evans Report I, ¶ 48.

[24] Buxton Reply Statement, ¶ 47.

rather than 2013 as Mr. Buxton assumed, more of the material used in the first JRP process might have remained relevant for the second one.

32. A co-operative attitude by participants can also go a long way to expediting the environmental assessment process and avoiding at least some of the complications of the previous time around, and thus to saving time and money. Guidance from the reviewing court on the permitted parameters of the JRP's inquiry would also assist in focusing the process, as occurred in *Alberta Wilderness Assn*.**,** where the Judge specified in some detail what the panel had to do in order to make good the deficiencies in its initial report.[25]

33. In my view, it is reasonable to think that the identification of the principal issues and areas of concern in the first JRP process could not but help to expedite the second and reduce the expense. In short, even if the second JRP process took the same amount of time as the first following its constitution (three years) – and for reasons suggested above it could have been less – it would have been completed in 2014, not late 2017 as Mr. Buxton suggests.[26]

4. There are no "juristic disadvantages" to pursuing judicial review that made it reasonable for the Claimants not to have pursued it in this case

34. Of the disadvantages of judicial review noted by Dean Sossin,[27] the absence of discovery in judicial review proceedings would not have been particularly relevant to the Claimants' application for judicial review.

35. A judicial review is a summary proceeding conducted on the basis of the material before the decision maker. An applicant in the Federal Court may ask the administrative decision maker under review to deliver up all the material in its possession relevant to the application that the applicant does not already have. In exceptional circumstances, an applicant may add to the judicial review record evidence that was not before the

[25] **R-625**, *Alberta Wilderness Association v. Cardinal River Coals Ltd.,* [1999] 3 F.C.R. 425 (FC), p. 26.

[26] Buxton Reply Statement, ¶ 49.

[27] Sossin Reply Report, ¶ 58.

decision maker. This may include: material providing useful background information; evidence of a breach of the duty of fairness not apparent from the decision maker's evidential record; and proof that there was no evidence before the decision maker to support one of its material findings of fact.[28]

36. However, since the issue in this case is one of pure law - the legal relevance of "community core values" to environmental assessments under federal and Nova Scotia law – evidential matters are of little relevance. Further, as the application for judicial review is not aimed at the Ministers' exercise of discretion, the concept of curial deference to discretionary decisions is also irrelevant. Nor would there seem to be any basis on which the Court would exercise its discretion to dismiss an application for judicial review made by the Claimants.

III. THE DUTY TO MITIGATE LOSS CAN INCLUDE THE INITIATION OF LEGAL PROCEEDINGS

37. The governing law in this dispute is international law, and thus Canadian law is not directly relevant to whether a duty to mitigate exists here. However, the Claimants submitted an Expert Report by Professor John McCamus on the Canadian law of mitigation and also requested Dean Sossin to address this issue. I disagree with their narrow interpretation of the duty to mitigate under Canadian law.

38. The common law imposes a duty on plaintiffs to take reasonable steps to mitigate loss that they have sustained as a result of another's wrongful act. It is based on considerations of fairness: a defendant should not be required to compensate a plaintiff for loss that would have been avoided if the plaintiff had taken steps that it was reasonable to take. Mitigation normally arises in disputes between private parties, but there is no reason in principle why it should not also apply in litigation against a governmental body. The scarcity of authorities on this point may in part be because errors in the discharge of public duties by regulatory and adjudicative bodies, as alleged

[28] For a recent restatement of the applicable principles, see **R-810**, *Tseil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128, ¶ 32.

in this case, rarely also give rise in Canadian law to a private law duty to compensate those injured thereby.[29]

39. Further, as a matter of principle, there is no reason why a plaintiff could never be obliged to mitigate a loss by commencing litigation, if the defendant could establish that reasonableness so required. Professor McCamus reports that he has been unable to identify any Canadian case where the duty to mitigate has included a duty to commence proceedings against the wrongdoer, even if that would have reduced or eliminated projected loss.[30]

40. However, it is equally pertinent to point out that Professor McCamus found no Canadian authority for the proposition that, as a matter of law, the duty to mitigate can never include the commencement of litigation that would reduce or eliminate a loss. He does, though, cite English authority for the proposition that in some circumstances the duty to mitigate a loss may include the initiation of legal proceedings.[31]

41. If a duty to mitigate exists in respect of claims for compensation for breach of NAFTA, there is no reason in principle why, in appropriate circumstances, it could not include the initiation of other legal proceedings against the Party in breach. It would thus be a question of mixed fact and law whether it was reasonable to require the Claimants to have mitigated Bilcon of Nova Scotia's loss by commencing judicial review proceedings on the facts of this case. The answer to this question may depend on factors that include: the likelihood that the Claimants would have their lost opportunity of a fair and just process restored; the time and costs involved; and the prejudice to Canada if the Claimants did not pursue an application for judicial review.

42. In support of his argument that it is not reasonable to require the Claimants to seek judicial review of the JRP Report in order to mitigate the loss caused by the unlawful environmental assessment, Dean Sossin relies on *Canada (Attorney General)*

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[29] See **R-0672**, *Ernst v. Albert Energy Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3, ¶¶ 44-48, 50-51.

[30] Expert Report of Professor John D. McCamus, F.R.S.C, August 14, 2017 ("McCamus Report"), ¶ 170.

[31] McCamus Report, ¶ 176.

v. Telezone Inc.[32] The Supreme Court of Canada held in that case that the plaintiff had a right to bring an action for damages for loss allegedly caused by federal administrative action without first bringing an application for judicial review in the Federal Court to determine the validity of the administrative decision in question.

43. In my view, *Telezone* does not establish that in Canadian law plaintiffs can never be required to commence judicial review proceedings in order to mitigate loss caused by a legally erroneous administrative decision. *Telezone* is not about mitigation, but jurisdiction.

44. The issue in *Telezone* was whether a provincial superior court had jurisdiction over an action for damages against the federal Crown for wrongfully failing to issue a licence to the plaintiff in accordance with the terms of a Policy Statement.[33] The Crown moved to dismiss the action. It argued that, since the Federal Court has exclusive jurisdiction over applications for judicial review of federal administrative action, *Telezone* could not bring an action to seek damages in a provincial superior court until the Federal Court had determined the lawfulness of the Minister's decision that caused the plaintiff's loss.[34]

45. Rejecting this argument, the Supreme Court of Canada held that there was nothing in the *Federal Courts Act* limiting the concurrent jurisdiction of provincial superior courts over actions for damages against the federal Crown in the manner suggested. They have jurisdiction to determine any question of fact or law necessary to dispose of such an action, including, in most cases, the legality of any federal administrative action relevant to the claim.[35]

46. Dean Sossin also relies on *Paradis Honey* as authority for the proposition that an injured person is not precluded from seeking damages because the lawfulness of the administrative action that allegedly caused the loss could have been determined in an

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[32] Sossin Reply Report, ¶ 50.

[33] **R-0635**, *Canada (Attorney General) v. Telezone Inc*., 2010 SCC 62, [2010] 3 S.C.R. 585 at 585-586.

[34] **R-0635**, *Canada (Attorney General) v. Telezone Inc*., 2010 SCC 62, [2010] 3 S.C.R. 585 at ¶ 2.

[35] **R-0635**, *Canada (Attorney General) v. Telezone Inc*., 2010 SCC 62, [2010] 3 S.C.R. 585 at ¶ 6.

application for judicial review.[36] He argues that this is analogous to the present case and that *Paradis Honey* supports the view that the Claimants were entitled to claim compensation under NAFTA from the Arbitral Tribunal without first applying for judicial review in Canadian courts.

47. However, like *Telezone*, *Paradis Honey* is not a mitigation case. *Paradis Honey* only decided that the matter should proceed to trial because it was not plain and obvious that the plaintiff's action for damages should be struck out as disclosing no probable cause of action on the ground that the allegedly unlawful administrative action on which the plaintiff's action for damages rested could have been the subject of an application for judicial review. Like *Telezone*, the question was the right to bring a claim for damages, not whether damages should be reduced because of the plaintiff's failure to mitigate.

48. In my view, the recent Supreme Court case of *Ernst v. Albert Energy Regulator*[37] provides a more useful analogy. The issue in *Ernst* was whether an award of damages under s. 24 of the *Canadian Charter of Rights and Freedoms* would be "appropriate and just in the circumstances" to remedy harm caused to the plaintiff by an allegedly unlawful administrative directive from the Alberta Energy Regulator. Writing on this issue for four of the nine members of the Court, Justice Cromwell struck Ms. Ernst's action and held that the award of *Charter* damages would not be "appropriate and just", in part because Ms. Ernst could have made an application for judicial review to set aside the allegedly unauthorized administrative action on which her claim for damages rested.

49. Justice Cromwell said that an order from a reviewing court would serve most of the purposes of an award of *Charter* damages. It would have vindicated her rights, put an end to the administrative action to which she objected more speedily than an action

[36] Sossin Reply Report, ¶ 51.

[37] **R-0672**, *Ernst v. Albert Energy Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3.

for damages, prevented further damage from occurring as a result of the breach, clarified the law, and prevented a repetition of the unlawful conduct.[38]

50. While not directly on point, *Ernst* sets out the advantages of an application for judicial review over an action for damages, including its ability to mitigate loss flowing from unlawful administrative action. The summary nature of applications for judicial review also means that they are normally adjudicated much more quickly than actions. *Ernst* thus provides some support for the argument that it would have been reasonable for the Claimants to institute an application for judicial review in order to mitigate the losses allegedly attributable to the JRP's legally flawed process.

IV. THE SCOPE OF THE GIC'S POWER OF APPROVAL CONFERRED BY *CEAA*, S. 37(1.1) IS BROADER THAN THE CLAIMANTS SUGGEST

51. It is nowadays uncontroversial that the grant of discretion is indispensable to the effective delivery of regulatory and benefit-conferring programs created by legislatures. However, opponents of the emergence of the welfare state in Britain in the first half of the 20th century, including A.V. Dicey, Friedrich Hayek and Lord Chief Justice Hewart, had argued that the delegation of discretion to those responsible for administering statutory programs was inimical to the rule of law. They said that the rule of law required that individuals' legal rights and duties should be governed by laws of general application, whether derived from judge-made common law or statutes, and should not be at the whim of public officials.

52. However, this extreme concept of the rule of law has yielded to the need of modern public administration for flexibility to deal with the unforeseen and changing circumstances that often arise in the course of administering regulatory and benefit-conferring programs. To require the enactment of legislation to remedy unanticipated problems or new developments would effectively bring administration to a halt, strangle it in an ever-growing mass of legislation, and impose a virtually impossible burden on Parliament's legislative capacity.

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[38] **R-0672**, *Ernst v. Albert Energy Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3, ¶¶ 36-37 (*per* Cromwell J.).

53. Nonetheless, essential rule of law values are preserved by the legal restraints imposed by courts on the exercise of statutory discretion that are designed to prevent the abuse of power, to hold decision makers accountable for their actions, and to protect basic individual rights and democratic values.

54. Thus, courts regard all discretion that may affect individual interests as legally limited, no matter how broad the statutory language conferring it.[39] Further, discretion must be exercised subject to any limits expressly imposed by the legislation conferring it, for a purpose consistent with the objectives of the enabling statute, and on the basis of legally relevant factors. More generally, a reviewing court may review the exercise of discretion to determine if it was reasonable in light of the facts and the law.[40] Individuals who are potentially adversely affected by the exercise of administrative discretion often have a right to be heard before a decision is made.[41]

55. In addition, the interpretation of statutory grants of discretion is subject to certain common law presumptions of legislative intent. For example, in the absence of a clear expression of legislative intent to the contrary, a statutory power authorizing an official to demand the production of documents was held not to include those covered by solicitor-client privilege,[42] and a discretion to set court fees has been presumed not to authorize fees that effectively deny individuals reasonable access to the courts.[43]

56. The "responsible authorities" have discretion under *CEAA*, s. 37(1)(a) to exercise any power to enable a project to be carried out when the project is not likely to cause significant adverse environmental effects or, when such effects are likely, they can be

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[39] **C-0861**, *Roncarelli v. Duplessis*, [1959] S.C.R. 121, p. 140 (*per* Rand J.).

[40] **R-811**, Brown & Evans, *Judicial Review of Administrative Action in Canada*, loose leaf (Toronto; Thomson Reuters Canada), chap. 15:2431 (updated December 2016).

[41] See, for example, **R-0654**, *Baker v. Canada (Minister of Employment and Immigration),* [1999] 2 S.C.R. 817, ¶ 20 (duty of procedural fairness applies to the exercise of discretion to permit a non-national to remain in Canada on humanitarian and compassionate grounds).

[42] **R-812**, *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, ¶ 2 (*per* Côté J.).

[43] **R-813**, *Trial Lawyers of British Columbia v. British Columbia (Attorney General*), 2014 SCC 59, [2014] 2 S.C.R. 30, ¶¶ 71-74 *(per* Cromwell J.).

justified in the circumstances.[44] Section 37(1)(b) provides that when significant adverse environmental effects are likely and cannot be justified, the responsible authority shall not exercise any power enabling the project to be carried out.

57. In the present case, an exercise of discretion under s. 37(1)(a) to enable the Claimants' Project to proceed is subject to approval by the GIC under s. 37(1.1). The GIC approved the Minister's decision pursuant to s. 37(1)(b) to refuse to authorize the issuance of permits to Bilcon after considering the JRP's Report. If, hypothetically, the JRP had not relied on "community core values" and found that the Project was not likely to cause significant adverse environmental effects, could the GIC nonetheless have refused to approve a decision by the Minister under s. 37(1)(a) that the necessary permits should be issued to Bilcon?

58. Subsection 37(1.1) of the *CEAA* in force at the time relevant to these proceedings says three things about the powers of the GIC following receipt of a review panel's report:

- paragraph (a) provides that the responsible authority shall consider the report and, with the approval of the Governor in Council, shall respond to it;
- paragraph (b) provides that for the purpose of giving its approval under paragraph (a), the Governor in Council may require the review panel to clarify any of the recommendations in its report; and
- paragraph (c) provides that the responsible authority shall take a course of action under subsection (1) that is in conformity with the approval of the Governor in Council under paragraph (a).[45]

59. In contrast to s. 37(1), s. 37(1.1) says nothing about the circumstances in which the GIC may approve the response of a responsible authority to a review panel's report. In particular, s. 37(1.1) does not relate the GIC's approval to the review panel's report

[44] **R-1**, *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, June 23, 1992, s. 37(1)(a).

[45] **R-1**, *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, June 23, 1992, s. 37(1.1).

and recommendations, unlike the provisions of s. 37(1) governing the responsible authority's powers following the receipt of a report. Unlike s. 37(1), s. 37(1.1) imposes no restrictions on the GIC's exercise of its power of approval. What is clear, however, is that any response by a responsible authority must be approved by the GIC, and any action taken by that authority under s. 37(1) must be in conformity with the approval.

60. Dean Sossin considers whether the Ministers could have refused approval for the Project on grounds other than "community core values" if the JRP had not relied on them.[46] He agrees that if the Ministers had evidence suggesting that, contrary to the JRP Report, the Project was likely to cause significant adverse environmental effects, they could ask the JRP to "undertake additional actions".[47] He is also of the view that there is no "residual Ministerial discretion" to refuse approval if "community core values" were omitted from the JRP Report, and the report did not otherwise find that the Project would cause "significant adverse environmental effects."[48]

61. Curiously, Dean Sossin's analysis in his Reply Expert Report does not refer to s. 37(1.1), even though it is the only provision dealing with the GIC's approval, and the scope of the GIC's discretion to approve is in issue. On his analysis, it is difficult to discern any role for the GIC's discretion to approve the responsible authorities' decision under s. 37(1).

62. Neither the responsible authorities nor the GIC are legally bound by a review panel, whose role is to gather information, make it available to the public, and prepare a report setting out its "rationale, conclusions and recommendations."[49]

63. Further, Parliament required any decision of the responsible authorities to include a review panel's report after considering the report to be approved by the GIC. Since the GIC is "a body of diverse policy perspectives representing all constituencies within

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[46] Sossin Reply Report, ¶¶ 15-45.

[47] Sossin Reply Report, ¶ 31.

[48] Sossin Reply Report, ¶¶ 38 and 40.

[49] **R-1**, *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, June 23, 1992, s. 34.

government",[50] courts tend to interpret broadly grants of discretion conferred upon it.[51] Accordingly, it is unlikely that the power delegated by the *CEAA* to the GIC with respect to projects that have been referred to a review panel (often because they have given rise to public concern) is as minimal as Dean Sossin appears to suggest.

64. At the very least, it must be open to the GIC to consider additional material indicating, contrary to the review panel's conclusions, that a project may cause significant adverse environmental effects that cannot be mitigated. In these circumstances the GIC's power under s. 37(1.1)(b) to "require" the panel to "clarify" its recommendations may be triggered.

65. However, the existence of this latter power (which may or may not apply in the circumstances posited) does not preclude the GIC from conducting an internal examination of material that was not before the review panel when it made its report and from concluding that in light of that material the panel's conclusions and recommendations were wrong.

66. It may also be open to the GIC to take a different view of the material that was before the panel and conclude that a project would have significant adverse environmental effects that cannot be adequately mitigated or justified in the circumstances.

67. Of course, the duty of fairness may require the GIC to give notice to those interested, including the proponent and others who participated in the panel's hearings, that it intends to consider extra-record material before deciding whether to approve the project. It should also disclose that material and afford those interested an effective opportunity to respond. Similar procedural duties might well also apply where the GIC was simply re-evaluating the material that was before the panel.

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[50] **R-814**, *Canada v. South Yukon Corporation*, 2012 FCA 165, ¶ 61.

[51] **R-815,** *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, p. 111 (while courts can strike down an order in council as *ultra vires* "it would take an egregious case to warrant such action.") (*per* Dickson J.).

68. It is not necessary for present purposes for me to speculate on whether there may be other circumstances in which, properly interpreted, s. 37(1.1) permits the GIC to withhold approval of a project that a JRP has not concluded is likely to cause significant adverse environmental effects. Of course, a decision by the GIC not to approve a project despite a positive recommendation by a review panel could be subject to judicial review by the proponent. A court's review of the lawfulness of the GIC's exercise of discretion would certainly include the objectives of the *CEAA* set out in s. 4 (nearly all of which concern the protection of the environment), the nature for the decision-making scheme, and the cogency of the material on which the GIC's decision was based.

69. In short, under the scheme created by the *CEAA*, review panels do not have the last word on whether a project will be receive environmental approval. The ultimate decision-making power rests with the Cabinet as the guardian of the public interest in Canada's environmental integrity. Parliament has not delegated this power to review panels.

70. I am aware of only one instance where the GIC has not given its approval of a project positively recommended by a review panel.[52] Nonetheless, it would have been legally possible for the Claimants to be denied approval of the Whites Point Quarry Project, despite a positive environmental assessment by the JRP, if the GIC's decision had a reasonable basis in fact and law.

V. CONCLUSIONS

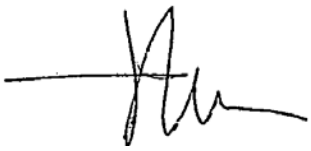
71. Based on my review of the materials and arguments submitted by the Claimants in response to my First Report, and for the reasons described in detail above, I have reached the following three conclusions:

- An application for judicial review would have provided the Claimants with an effective, efficient and cost-effective remedy for the wrong identified by the Tribunal: the denial of a fair and lawful opportunity to have the Project assessed in accordance with Canadian environmental law. A reviewing court would have

[52] **R-628**, Privy Council Office announcement, PC Number 2016-1047, November 25, 2016.

set aside the JRP Report and remitted the matter for a new determination. There is no basis for the Claimants to believe that the second assessment process would have been unfair or otherwise unlawful. Whatever the result of a second round of lawful decision-making, most of the Claimants' alleged losses could not be attributable to the unlawfulness of the JRP's initial report.

- The duty to mitigate damages under Canadian law can include the initiation of legal proceedings, such as steps taken to initiate an application for judicial review, in order to prevent further losses attributable to an administrative action.
- The GIC is not legally bound by the *CEAA* to approve a project which a review panel has concluded would not cause any significant adverse environmental effects that could not be satisfactorily mitigated. However, a decision by the GIC not to approve must have a reasonable basis in the material available to it and in the applicable law.



John M. Evans

November 6, 2017