

**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

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

1. My name is Peter Geddes, and as indicated in my Report dated June 9, 2017 (“First Report”), I have twenty years of experience in environmental education and environmental assessment under the Nova Scotia *Environment Act* (*NSEA*). In my First Report, I addressed the role of government officials in managing the environmental assessment process and the responsibility of the Minister to reject, approve, or approve a project with conditions following the receipt of a report by a joint review panel (JRP).¹ I made clear that the Minister exercises this responsibility independently from the Federal Government’s exercise of its authority,² that the Minister is not bound by the conclusions or recommendations of the JRP,³ and that the Minister must consider all information relevant to the broad range of environmental effects, including staff assessments and public comments.⁴

2. Dean Sossin and Mr. Estrin do not appear to agree with some of the statements I made in my First Report regarding the Minister’s decision-making process following receipt of a JRP report.⁵ Their opinions misunderstand the role of the Nova Scotia Minister as well as the role of the officials advising the Minister, and they take the statements I made in my first report out of context.

3. As I explained in my First Report, the Minister’s powers are laid out in the *NSEA*. Dean Sossin and Mr. Estrin provide their legal interpretation of the Nova Scotia’s Minister’s legislative mandate, ultimately concluding that the Minister was legally compelled under the *NSEA* to approve the project.⁶ I am not a lawyer and therefore do not address this issue. That matter and others, like the breadth of discretion that the Minister has, are addressed by Justice Cromwell, who interprets the *NSEA* based on his experience, including as a judge on the Nova Scotia Court of Appeal and the Supreme Court of Canada.

¹ **RE-4**, Report of Peter Geddes, June 9, 2017 (“Geddes Report I”), ¶ 9.

² **RE-4**, Geddes Report I, ¶ 14.

³ **RE-4**, Geddes Report I, ¶ 17.

⁴ **RE-4**, Geddes Report I, ¶¶ 23-24.

⁵ Reply Expert Opinion of Lorne Sossin, August 2, 2017 (“Sossin Reply Report”), ¶¶ 40-41; Expert Reply Report of David Estrin, August 20, 2017 (“Estrin Reply Report”), ¶¶ 30-31.

⁶ Sossin Reply Report, ¶¶ 8-9; Estrin Reply Report, ¶ 129.

4. Dean Sossin argues that he “is aware of no discretion” under the *NSEA* that would allow the Minister “to reject a proposal where no significant adverse environmental effects have been found simply on the basis of the Minister’s preference or political motivations.”⁷ He disagrees with my assertions that the Minister could rely on concerns about socio-economic effects raised in staff reports and public comments to deny a project, and argues that the implication of my statement is that the Minister has unlimited discretion.⁸

5. Contrary to what Dean Sossin argues, I did not indicate or insinuate in my first report that the Minister has unlimited discretion to reject a project. As Justice Cromwell states,⁹ the Minister is not bound by the record before the JRP in exercising discretion to approve or reject an undertaking. Indeed, in my experience, the Minister considers all relevant information before making a decision. The record is not confined to the findings of the JRP, as Dean Sossin argues,¹⁰ but includes all relevant information including staff reviewer comments and public submissions. Ultimately, a JRP Report forms the principal source of information that the Minister will consider, but in my experience the Minister also considers other information, including government staff reviewer comments as well as public comments submitted to the JRP or directly to the Minister. The bottom line is that the Minister considers all relevant materials, and contrary to the assertion that Mr. Estrin appears to make,¹¹ the Minister is not constrained to consider only those factors found in the JRP Report.

6. The Minister considers any information on “adverse effects” or “environmental effects which cannot be mitigated”,¹² as opposed to “significant adverse environmental effects”, which are the terms found in the *Canadian Environmental Assessment Act*¹³ that Dean Sossin and Mr. Estrin appear to continue to focus on.¹⁴ It is important to interpret and apply the correct terms,

⁷ Sossin Reply Report, ¶ 40.

⁸ Sossin Reply Report, ¶ 41.

⁹ **RE-17**, Expert Report of the Honourable Thomas Cromwell, November 6, 2017, ¶¶ 16-25.

¹⁰ Sossin Reply Report, ¶¶ 8, 32.

¹¹ Estrin Reply Report, ¶ 30.

¹² **R-5**, Nova Scotia *Environment Act*, 1994-95, c. 1 (amended 1998) (“*NSEA*”), s. 34(1)(f).

¹³ **R-1**, *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, June 23, 1992, s. 37(1).

¹⁴ See for example, Sossin Reply Report, ¶ 41; Estrin Reply Report, ¶¶ 7-11.

which Justice Cromwell does in his Report. After all, as I pointed out in my First Report, 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. The two Ministers do not have "blended mandates", as Dean Sossin's Reply Expert Report suggests.¹⁵

7. Mr. Estrin and I agree that comments by government experts on potential adverse effects or environmental effects that cannot be mitigated form part of the relevant information that the Minister will consider, but we disagree on the purpose of those comments, and consequently on the role that government officials play. While government experts have a responsibility to identify what they believe, in their opinion, are potential effects of a project, and government EA reviewers provide advice to the Minister on these opinions, the Minister ultimately makes the determination of what constitutes an adverse effect or an environmental effect as defined in the Act and whether it can be mitigated.

8. Mr. Estrin and I also agree that there is a standard process to review projects, but as I pointed out in my First Report, there is no policy of standardized outcomes for projects.¹⁶ Mr. Estrin details some of the environmental assessment process in his Reply Report,¹⁷ with which I largely agree, but each project is assessed in its own context, taking into account its particular physical, social, economic and biological parameters. Accordingly, I do not agree with him that the Minister would approve a project as part of a "boiler plate" practice that exists in Nova Scotia, because, as he puts it, Nova Scotia never met a project it did not like.¹⁸

9. In fact, a number of other quarry or quarry-like undertakings in Nova Scotia have failed to receive Environmental Assessment approval. For example, after a public review process, the Environment Minister rejected the Blue Mountain Quarry in 1992, concluding that the project "poses the threat of unacceptable and significant adverse effects on the existing and future social, environmental and cultural conditions influencing the lives of individuals and families in the

¹⁵ Sossin Reply Report, ¶ 35.

¹⁶ **RE-4**, Geddes Report I, ¶ 19.

¹⁷ Estrin Reply Report, ¶¶ 266-323.

¹⁸ Estrin Reply Report, ¶¶ 267, 269, 427.

adjacent communities.”¹⁹ Likewise, the Riverland Developments upper Sackville rock quarry was rejected in 1998 due to concerns it would have an adverse effect by impacting the adjacent landfill liner.²⁰ The Greenhills open pit coal mine was rejected based on a number of socio-economic and environmental health considerations in addition to information deficiencies in the proponent’s registration documents.²¹ Other projects simply have not gone forward after requests for further information from the government. For example, the Minister has never issued an approval to the South Bishop Road Soil, Peat and Aggregate Operation following that applicant’s failure to provide more information which the Government requested in July 2004. Similarly, no approval was ever issued for the Point Aconi open pit surface coal mine, which also received a request for more information in January 2005.

10. Contrary to what Mr. Estrin argues,²² I am not asking the Tribunal to reopen its determination on CCV. Rather, I am pointing out that it is unreasonable to conclude, based on a standardized process, as Mr. Estrin does,²³ that there is a guaranteed result of approval. If it were that simple, then an EA review would not be necessary, as Nova Scotia could simply adopt standard mitigation requirements through general regulation for every undertaking. The Riverland Development Upper Sackville rock quarry that I referred to above demonstrates why it is never that simple. That proposal was rejected because of concerns over the blasting activity impacting the liner of the nearby Sackville landfill, allowing the escape of landfill leachate and the potential contamination of surface and ground water. It shows how a consideration of the effects of a project is fundamentally linked to the project location and that a standard mitigation approach cannot account for all risks.

11. In short, the Minister would not approve an undertaking without first considering all relevant information, including concerns raised around the socio-economic effects of a project,

¹⁹ **R-47**, Letter from Terence R.B. Donahoe, Nova Scotia Minister of Environment, to Blue Mountain Resources (Apr. 8, 1992).

²⁰ **R-796**, Letter from Donald R. Downe, Nova Scotia Minister of Environment, to Owen Davis, Riverland Developments Limited (Apr. 23, 1998).

²¹ **R-797**, Letter from Donald R. Downe, Nova Scotia Minister of Environment, to John King, Greenhills Development (Jun. 11, 1998).

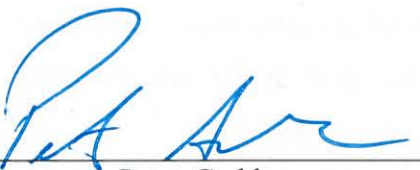
²² Estrin Reply Report, ¶ 30.

²³ Estrin Reply Report, ¶ 427.

particularly if the Minister had received public comments highlighting socio-economic concerns. If such information were not available in the recommendation of a JRP, the Minister may look for it in the JRP's summary of evidence and analysis, among other information. If the information were not in any of these places, the Minister may request that further analysis be undertaken with respect to the potential socio-economic effects of the undertaking. These effects could form the basis of the Minister's decision to reject an undertaking, or to impose additional mitigation measures not contemplated by a JRP.

12. As Justice Cromwell also makes clear, contrary to the opinion of Dean Sossin and Mr. Estrin,²⁴ the Minister is not bound to follow a recommendation of the JRP.²⁵ If the Minister believes a project has a likelihood to cause adverse effects or environmental effects that cannot be mitigated, the Minister would be entitled to reject that undertaking.

Dated: November 6, 2017



Peter Geddes
Halifax
Nova Scotia

²⁴ Sossin Reply Report, ¶¶ 8-9; Estrin Reply Report, ¶ 129.

²⁵ Cromwell, ¶ 25.