

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE  
NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE UNCITRAL ARBITRATION RULES**

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**BETWEEN:**

**WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON,  
DOUGLAS CLAYTON, DANIEL CLAYTON, AND BILCON OF  
DELAWARE INC.**

**Claimants**

**AND:**

**GOVERNMENT OF CANADA**

**Respondent**

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**Expert Report of  
Robert G. Connelly**

**Connelly Environmental Assessment Consulting, Inc.**

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**June 9, 2017**

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1. My name is Robert Connelly and I am currently the President of Connelly Environmental Assessment Consulting Inc. I have been engaged by the Government of Canada to prepare this Report on the decision-making process of the Canadian federal government<sup>1</sup> following receipt of a Joint Review Panel (“JRP”) Report under the *Canadian Environmental Assessment Act* (the “Act”), as it applied at the time relevant to the present dispute.<sup>2</sup> In addition, recognizing the Tribunal’s conclusion of a breach of the North American Free Trade Agreement (“NAFTA”) by Canada, I was asked to provide my opinion as to the probable government decision regarding the Whites Point project, absent that breach.

2. In providing the present opinion, I rely on my experience detailed below, and I have also taken cognizance of the findings of Ms. Lesley Griffiths, Dr. Anthony Blouin, and the Honourable John M. Evans retained by Canada as experts in this arbitration, as well as of the Report of Mr. Peter Geddes. In sum, I am of the view that the government could have reasonably not granted approval to the Whites Point project, even absent the NAFTA breach, for the reasons set out below. I disagree with the Claimants’ assumption that there was no reasonable basis to deny environmental assessment approval of the Whites Point project. On the contrary, many factors were concurring to make this approval highly uncertain. In the unlikely event that it would have been granted, the process would likely have been fraught with considerable delays.

3. In section I of this Report, I provide information on my background and qualifications. In section II, I offer an overview of how the many actors that are involved in the lead up to the announcement of a government response to a JRP Report interact, what processes they follow, and what factors they may consider in determining the government response to a JRP Report. In doing so, I describe the process of preparing a Memorandum to Cabinet (“MC”) and the matters typically contained in a MC and its supporting documents. In section III, I set out the possible responses to a JRP Report once it is received by the government. In section IV, I describe the process of communicating and implementing the government response. In section V, I review the government decision with respect to the Whites Point project. In section VI, I provide my

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<sup>1</sup> As I only address the federal decision-making process, unless indicated otherwise, all mentions of the “government” refer to the Canadian federal government.

<sup>2</sup> **R-1**, *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, June 23, 1992 (“The Act”). The Act was replaced in 2012.

opinion as to how the federal decision-making might have unfolded had the JRP not acted in the way which the Tribunal concluded was a breach of Canadian law and consequently a breach of NAFTA, in assessing the Whites Point project and submitting its Report.<sup>3</sup> My overall conclusions are provided in section VII.

## **I. BACKGROUND AND QUALIFICATIONS**

4. I have broad experience in environmental issues, primarily in the area of environmental assessment and with the associated process leading to the decision-making of government authorities. I received a B.A.Sc. in civil engineering from the University of Waterloo in 1970, where my studies focused on environmental engineering. Both as a student, and initially after my graduation, I worked for a consulting engineering company involved in the design and construction of infrastructure projects. I left this consulting firm and joined the federal government in late 1970.

5. I was transferred to the newly created Department of Environment in Winnipeg in 1971. I first became involved in environmental assessment in 1974 when I provided advice to Transport Canada on the potential environmental effects of Manitoba Hydro's plans for the construction of hydro-electric dams on the Churchill and Nelson rivers in northern Manitoba.

6. In 1975, I joined the United Nations Economic Commission for Europe ("UNECE") secretariat in Geneva as an Environmental Affairs Officer. Here, I drafted background documents for international meetings on a variety of environmental issues, including environmental assessment.

7. In 1978, I re-joined the federal government, this time with the Federal Environmental Assessment Review Office in Ottawa. In this position, I served as the panel manager of three, and the chair of six, environmental assessment review panels from 1978 to 1993. I also organized and conducted Canada-wide consultations in 1987 on improving federal environmental assessment, a process that ultimately led to the enactment of the Act in 1995.

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<sup>3</sup> R-212, Environmental Assessment of the Whites Point Quarry and Marine Terminal Project, Joint Review Panel Report, October 2007 ("JRP Report").

8. In December 1993, prior to the enactment of the Act, I was appointed Vice President, Policy with the soon to be created Canadian Environmental Assessment Agency (the “Agency”). As Vice President, Policy I was responsible for the introduction of the first amendments to the Act before its proclamation in 1995.<sup>4</sup> I was also responsible for the preparation of key regulations required to make the Act operational before it could enter into force.

9. During my tenure as Vice President, Policy, at the Agency, I served as the federal lead in the development of the Sub-Agreement on Environmental Assessment signed by federal, provincial, and territorial governments in 1998. Since 1998, this Sub-Agreement has provided the framework for federal-provincial cooperation on environmental assessment. I also led the preparation of a number of federal-provincial bilateral agreements that resulted in various JRPs throughout the country.

10. I was also the lead official on consultations regarding the mandatory review of the Act after its first five years and I developed proposed amendments to the Act in 2003. As part of the amendment process, I appeared before the House of Commons Standing Committee on Environment and Sustainable Development, and the Standing Senate Committee on Energy, the Environment and Natural Resources, to explain and respond to questions about the proposed amendments.

11. In November of 2003, I was appointed Acting President of the Agency. I was confirmed in this position by the Governor General in Council in March 2004. I served in that role for 17 months until shortly before my retirement from the federal government in July 2005.

12. In addition to my work in Canada on environmental assessment, I have chaired the United Nations Working Group that developed the Convention on Environmental Impact Assessment in a Transboundary Context, completed in 1991. I also represented Canada at international meetings dealing with environmental assessment at the UNECE, the Organization for Economic Cooperation and Development, and the North American Commission for Environmental Cooperation.

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<sup>4</sup> The Act was given Royal Assent in June 1992 under the tenure of a Progressive Conservative government. During the election campaign of 1993, the Liberal party platform included proposed changes to the Act. Subsequently, with the election of a Liberal government, amendments to the Act were introduced in Parliament and given Royal Assent in December 1994.

13. In 2005, after 35 years of public service, I retired from the Government of Canada. In 2006, I established Connelly Environmental Assessment Consulting, Inc. I have worked as a consultant in the area of environmental assessment ever since. My clients have included various federal departments, Ontario Power Generation, the Forum of Federations (an international non-governmental organization), and the Environmental Impact Review Board of the Inuvialuit Settlement Region.

14. I have also served as the chair of two review panels established under the Act: a joint review of a natural gas development (Encana Shallow Gas Infill Development Project, Canadian Forces Base Suffield National Wildlife Area, Alberta) and a federal review of a mine development (Prosperity Gold-Copper Mine Project, Taseko Mines Ltd, British Columbia), completed in 2009 and 2010, respectively.

15. Over the course of my career, I have delivered presentations on a wide range of environmental assessment topics at conferences, seminars, and meetings in Canada and abroad. In 2006, the International Association for Impact Assessment presented me with the Rose-Hulman Award in recognition of my contribution to and leadership in environmental assessment within Canada and internationally.

16. I have been involved in drafting a number of MCs related to environmental assessment legislation and regulations, and in reviewing Governor in Council (“GIC”)<sup>5</sup> responses to environmental assessment panel reports. For example, as Vice President, Policy, at the Agency, I was responsible for drafting MCs with proposed amendments to the Act in 1994, proposed regulations required to allow promulgation of the Act in 1995, and amendments to the Act following the completion of its legislated five year review in 2003.<sup>6</sup> I was also responsible for MCs that revised the Cabinet Directive on the Environmental Assessment of Policy, Plans and Program Proposals in 1999 and 2004. I chaired various interdepartmental meetings to receive input from other departments, interacted with the Minister of the Environment and the Minister’s

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<sup>5</sup> **R-617**, Privy Council Office, *Glossary – Orders in Council* (“Glossary”). “The “Governor (General) in Council” is the Governor General of Canada acting by and with the advice and consent of the Queen’s Privy Council for Canada (i.e. Cabinet).

<sup>6</sup> **R-17**, An Act to Amend the Canadian Environmental Assessment Act, 2003, c. 9.

political staff, appeared before House of Commons and Senate committees, and briefed other members of Parliament on legislative changes.

17. As for the various Cabinet Directives on Environmental Assessment of Policy, Plans and Program Proposals, I reviewed many MCs prepared by other departments in fulfilment of the role given to the Agency of promoting the application of strategic environmental assessment to policy, plan, and program proposals.

18. My curriculum vitae is attached as Annex I to this Report. The opinions expressed here are my own.

## **II. THE TYPICAL GOVERNMENT PROCESS FOR RESPONDING TO A JOINT REVIEW PANEL REPORT**

19. In this section, I describe the process typically followed pursuant to the Act from the receipt by the government of a JRP Report to the announcement of the government response. I outline the roles of the Responsible Authority,<sup>7</sup> of the Cabinet,<sup>8</sup> and of the GIC pursuant to the Act, as well as the roles of the Agency and of the Privy Council Office (“PCO”), and the process they follow. I also indicate what factors may be considered by the decision-makers in their decisions under the Act and their response to the JRP report, and explain how such factors are brought to the decision-makers’ attention.

### **A. The Role of the Responsible Authority, the GIC, the Agency, and PCO**

20. Once a JRP finishes its work, it submits its report to the Minister of the Environment who, under s. 36 of the Act, must make the report available to the public and advise the public that the report is available. Section 37(1.1)(a)<sup>9</sup> of the Act requires the Responsible Authority to then respond to the report, with the approval of the GIC and then take one of the authorized courses of actions outlined in s. 37 of the Act. Annexed to the present Report is Figure 1, illustrating summarily the decision-making process. A Responsible Authority is a Federal

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<sup>7</sup> **R-1**, The Act, s.2 (1) defines “Responsible Authority” as “in relation to a project, means a federal authority that is required pursuant to subsection 11(1) to ensure that an environmental assessment of the project is conducted.” See also **R-1**, The Act, s. 11(1) addressing responsibilities.

<sup>8</sup> **R-617**, Glossary. The “Cabinet” is the executive arm of government. Cabinet Ministers are chosen by the Prime Minister.

<sup>9</sup> See ¶ 28 below for the full text of s. 37 of the Act.

Authority<sup>10</sup> with responsibilities for ensuring that an environmental assessment is conducted before it can exercise any of the powers or perform any of the functions or duties included in s. 5(1) of the Act. In the present matter, the Responsible Authority was the Department of Fisheries and Oceans (“DFO”).<sup>11</sup> The decision of the GIC takes the shape of an Order in Council (“OIC”).<sup>12</sup> As further explained below, in determining the appropriate response to a JRP Report, including as to whether the likely significant adverse environmental effects of a project are justified in the circumstances, the Responsible Authority and the GIC enjoy considerable discretion given the object and purpose of the Act and the factors that Ministers consider in matters before Cabinet.

21. In the process of obtaining a decision from Cabinet, a MC is prepared. A MC is a comprehensive document that contains information Ministers will consider to make a decision. The Responsible Authority takes the lead under the Act to prepare an MC for Cabinet. The Agency ensures that the MC accurately describes the findings of the JRP and the requirements under the Act.

22. The PCO provides support to the Prime Minister and Cabinet and its decision-making structures. This includes providing guidance to departments on the preparation of MCs. It includes information on the MC content, format, and process to be followed. In the next subsections, I describe briefly the process involved in preparing a MC and matters that would be considered in responding to a JRP Report.

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<sup>10</sup> **R-1**, The Act, s. 2(1).

<sup>11</sup> As noted in my previous Report of December 2, 2011, ¶ 40, “while the Department of Fisheries and Oceans administered the *Navigable Waters Protection Act* at the time the Whites Point environmental assessment was commenced, the administration of this Act has since been transferred to the Department of Transport.” Since DFO had the responsibility at that time to consider issuing an authorization and a permit under the *Fisheries Act* and the *Navigable Waters Protection Act* respectively for the Whites Point project, it became the responsible authority in accordance with s. 5(1) (d) of the Act.

<sup>12</sup> **R-617**, Glossary. An “Order in Council” (“OIC”) is a legal instrument made by the Governor in Council pursuant to a statutory authority or, less frequently, the royal prerogative. All orders in council are made on the recommendation of the responsible Minister of the Crown and take legal effect only when signed by the Governor General.



## **B. The Process Leading to a Government Response**

23. Initially the Responsible Authority contacts PCO to describe the issue it wishes to bring forward to Cabinet and to determine the requirements and timelines for its submission. A tentative date would be established as a future Cabinet Committee agenda item. The nature of Cabinet Committees varies with each government. The present government has ten different Cabinet Committees<sup>13</sup> that review matters within their mandate. PCO determines which committee is appropriate to consider a matter that would require a decision by the government.

24. The Responsible Authority consults with any other Responsible Authorities, any expert departments that may have been involved in the JRP review, as well as any other potentially affected Federal Authority to receive their views on the JRP Report and its recommendations. As noted in my previous Report,<sup>14</sup> there is often more than one Responsible Authority. The Act outlines a procedure to determine the various responsibilities including which Federal Authority would become the lead Responsible Authority. The Minister of the lead Responsible Authority would bring the matter before Cabinet for a decision. Also, central agencies including Treasury Board and the Department of Finance may need to be consulted to ensure that the response is consistent with the government's overall agenda and to identify any policy, fiscal and implementation issues that need to be addressed.<sup>15</sup> These early consultations are important to identify any issues that cross different portfolios and to assist departments in preparing their Ministers for the future Cabinet discussion. Typically, the initial consultation involves an interdepartmental meeting to receive the views of all the departments and agencies whose mandate might be affected by the decision. A draft MC may be circulated in advance of the interdepartmental meeting to initiate the discussion.

25. Once the initial consultation is completed, the Responsible Authority completes a draft MC for wide distribution to all affected departments. An interdepartmental meeting is required at this stage and all departments including central agencies are invited to attend. The interdepartmental meeting provides a forum to address any concerns raised by departments and

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<sup>13</sup> **R-618**, Cabinet Committee Mandate and Membership, February 1, 2017.

<sup>14</sup> Expert Report of Robert G. Connelly, December 2, 2011, ¶ 41.

<sup>15</sup> For example, recommendation 7 of the JRP Report recommended that Transport Canada revise its Ballast Water regulations (**R-212**, JRP Report, p. 5).

agencies. Departments and agencies are expected to have consulted within their portfolios at a senior level and to come prepared to indicate to the Responsible Authority the position they are recommending their Minister take in the upcoming Cabinet meeting. Every effort is made to achieve a consensus amongst the various affected departments and agencies. If there is disagreement that is not resolved at the meeting, further consultation including additional interdepartmental meetings and new drafts of the MC may be required before the PCO is satisfied that the document is comprehensive, fully reflects the views of departments and agencies, and is suitable for consideration by Ministers.

26. When the MC is considered to be complete, the Minister of the Responsible Authority (the “Responsible Minister”) signs the document and it is submitted to PCO for scheduling on the agenda of the appropriate Cabinet Committee. Once the Committee discussions are complete, a Committee Recommendation is issued. The Committee Recommendation is based on the recommendation of the Responsible Minister but can be altered by the Committee. The Committee Recommendation is then submitted to the full Cabinet for its consideration. The Cabinet issues a Record of Decision which may endorse the Committee Recommendation or amend it. The Record of Decision results in a ministerial recommendation that is then submitted to the GIC to issue an OIC. Strictly speaking, the GIC cannot approve or permit a project. The GIC may prevent it from going forward by prohibiting the exercise of certain powers by Federal Authorities;<sup>16</sup> or it may approve a government response that is entirely or partially in line with the JRP’s recommendations, and that contains a decision as to the significance of environmental effects and their justification, allowing the project to proceed if no other impediments prevent it.

27. In the case of a response to a JRP Report, once the OIC is issued, the Responsible Authority must take a course of action in conformity with the OIC.<sup>17</sup> If the OIC agrees that the significant adverse environmental effects of the project are justified, the Responsible Authority “may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part and shall ensure that those mitigation measures are

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<sup>16</sup> For instance, the realization of a project may require regulatory approvals, or the disbursement of funds by the Treasury Board, which the GIC may forbid.

<sup>17</sup> **R-1**, The Act, s. 37(1.1)(c).

implemented.”<sup>18</sup> As is made clear by the use of the discretionary “may,” further regulatory approvals are often required before the project can proceed, and there is no guarantee these will be granted. In the present matter, had the GIC determined that the likely significant adverse environmental effects of the Whites Point project were justified in the circumstances, authorizations and a permit would still have been required under the *Fisheries Act* and the *Navigable Waters Protection Act*, respectively.

28. The different options available to the government once being provided with a JRP report are laid out in s. 37 of the Act:

### **Decision of responsible authority**

37. (1) Subject to subsection (1.1), the responsible authority shall take one of the following courses of action in respect of a project after taking into consideration the report submitted by a mediator or a review panel or, in the case of a project referred back to the responsible authority pursuant to subsection 23(a), the comprehensive study report:

- (a) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate,
  - (i) the project is not likely to cause significant adverse environmental effects, or
  - (ii) the project is likely to cause significant adverse environmental effects that can be justified in the circumstances,

the responsible authority may exercise any power or perform any duty or function that would permit the project to be carried out in whole or in part and shall ensure those mitigation measures are implemented; or

- (b) where, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, the project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances, the responsible authority shall not exercise any power or perform any duty or function conferred on it by or under any Act of Parliament that would permit the project to be carried out in whole or in part.

### **Approval of Governor in Council**

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<sup>18</sup> R-1, The Act, s. 37(1)(a).

- (1.1) Where a report is submitted by a mediator or review panel,
- (a) the responsible authority shall take into consideration the report and, with the approval of the Governor in Council, respond to the report;
  - (b) the Governor in Council may, for the purpose of giving the approval referred to in paragraph (a), require the mediator or review panel to clarify any of the recommendations set out in the report; and
  - (c) the responsible authority shall take a course of action under subsection (1) that is in conformity with the approval of the Governor in Council referred to in paragraph (a).<sup>19</sup>

29. In section III below, I describe the possible government responses that may be made under s. 37 once the government is provided with a JRP Report.

### **C. Matters Considered in the Government Decision and Preparation of a MC**

30. I begin this section by addressing the broad factors that can be considered by the Responsible Authority in responding to a JRP Report, and by the GIC in deciding its approval of the Responsible Authority's proposed course of action. I then describe the considerations typically included in a MC dealing with the response to a JRP Report, referring to the PCO Drafter's Guide applicable at the relevant time,<sup>20</sup> and to the Background/Analysis Note annexed to the Whites Point project MC.<sup>21</sup>

#### **1. The Act**

31. Several sections of the Act speak to the factors relevant to the environmental assessment and the subsequent decisions by the Responsible Authority and the GIC. I refer specifically to principles laid out in the preamble of the Act, to its purpose articulated in s. 4, and to the factors

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<sup>19</sup> **R-1**, The Act, s. 37.

<sup>20</sup> **R-619**, Guide - Memoranda to Cabinet, 2004. This document, which is periodically updated, provides guidelines as to how to draft a memorandum to cabinet and present matters for consideration to the Cabinet.

<sup>21</sup> **R-620**, Background/Analysis Note annexed to the Whites Point Memorandum to Cabinet, November 27, 2007. This document is of the type generally annexed to an MC and provided the background information for the Cabinet to make its decision on the Whites Point project. It has been produced at pages 814381-814388 of the Respondent's production. To be clear, I have no knowledge of the content of the MC itself, which is privileged and has not been produced in this arbitration.

to be considered in an environmental assessment as listed in s. 16, and to s. 37, the latter of which lays out the process leading to a final government decision. I address these in turn.

32. The fundamental principles upon which the Act is based are set out in its preamble, and in s. 4, its purpose provision:

Whereas the Government of Canada seeks to achieve sustainable development by conserving and enhancing environmental quality and by encouraging and promoting economic development that conserves and enhances environmental quality;

Whereas environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development;

Whereas the Government of Canada is committed to exercising leadership within Canada and internationally in anticipating and preventing the degradation of environmental quality and at the same time ensuring that economic development is compatible with the high value Canadians place on environmental quality;

And Whereas the Government of Canada is committed to facilitating public participation in the environmental assessment of projects to be carried out by or with the approval or assistance of the Government of Canada and providing access to the information on which those environmental assessments are based.<sup>22</sup>

[emphasis added]

4. The purposes of this Act are

- (a) to ensure that the environmental effects of projects receive careful consideration before responsible authorities take actions in connection with them;
- (b) to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy;
- (b.1) to ensure that responsible authorities carry out their responsibilities in a coordinated manner with a view to eliminating unnecessary duplication in the environmental assessment process;

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<sup>22</sup> R-1, The Act, Preamble.

- (c) to ensure that projects that are to be carried out in Canada or on federal lands do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out; and
- (d) to ensure that there be an opportunity for public participation in the environmental assessment process.<sup>23</sup>

[emphasis added]

33. In my experience, these principles enshrined in the Act mean that the process of environmental assessment is not limited to the consideration of the biophysical environment, but calls for a wider appreciation of a project's contribution to sustainable development. Indeed, the Act refers to "integrating environmental factors" into "decision-making," and not to limiting the decision-making process to environmental factors. My experience as an environmental assessment panel member and chair, and the exercise of my responsibilities regarding the amendments made to the Act, all lead me to conclude that the Act warrants the consideration of a wide variety of factors by the government, in furtherance of the objective to achieve "sustainable development" and a "healthy economy."

34. I find further support for my opinion in the writings of Prof. Meinhard Doelle.<sup>24</sup> As he observes:

In short, the preamble clearly suggests that the process is about more than a consideration of [the] biophysical environment, what is expected is that the EA process will result in integrated decision-making, considering environmental, social and economic consequences of projects.

The purposes of the Act are similarly broad. RAs [Responsible Authorities] are to be encouraged to take actions in line with sustainable development, again suggesting that the EA process is to prepare the federal decision-maker to make integrated decisions.<sup>25</sup>

[emphasis added]

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<sup>23</sup> **R-1**, The Act, s. 4. I have addressed these principles and purpose in my first Report: Expert Report of Robert G. Connelly, December 2, 2011, ¶ 33.

<sup>24</sup> Meinhard Doelle is Professor of Law and Associate Dean, Research at the Schulich School of Law, Marine and Environmental Law institute, Dalhousie University. He specializes in environmental and energy law, with a focus on climate change and environmental assessment processes. He has been involved in the practice of environmental law in Nova Scotia since 1990 and in that capacity served as drafter of the Nova Scotia *Environment Act* and as policy advisor on the *Canadian Environmental Assessment Act* (1992).

<sup>25</sup> **R-621**, M. Doelle, *The Federal Environmental Assessment Process, A Guide and Critique*, excerpt, April 2008, pp. 137-138 ("*Doelle*").

35. The environmental factors to be considered in an environmental assessment, set out in s. 16 of the Act, point to the same direction:

16 (1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

- (a) the environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;
- (b) the significance of the effects referred to in paragraph (a);
- (c) comments from the public that are received in accordance with this Act and the regulations;
- (d) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project; and
- (e) any other matter relevant to the screening, comprehensive study, mediation or assessment by a review panel, such as the need for the project and alternatives to the project, that the responsible authority or, except in the case of a screening, the Minister after consulting with the responsible authority, may require to be considered.

(2) In addition to the factors set out in subsection (1), every comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:

- (a) the purpose of the project;
- (b) alternative means of carrying out the project that are technically and economically feasible and the environmental effects of any such alternative means;
- (c) the need for, and the requirements of, any follow-up program in respect of the project; and
- (d) the capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.

[emphasis added]

36. Among these, I take particular note of the “purpose of the project,” of the “alternative means of carrying out the project,” and of the “capacity of renewable resources that are likely to be significantly affected by the project to meet the needs of the present and those of the future.” These factors call for the examination of the project’s benefits to society and for the assessment of alternatives so as to determine how to best minimize adverse environmental effects. The reference to the capacity of renewable resources underlines the central concept of sustainable development. Similarly, the mention of “any other matter relevant to ... the assessment by a review panel, such as the need for the project, and alternatives to the project” contributes to widening the potential scope of the assessment and decision-making. These broad considerations require the assessment to examine matters that go beyond just the examination of environmental effects. Prof. Doelle reaches a similar conclusion:

The references to the purpose, need for and alternatives to a project all point to the need for the EA under CEAA to look beyond environmental effects as defined in the Act.<sup>26</sup>

37. In this regard, a number of JRPs in the era of the Whites Point project interpreted their mandate broadly, building on the preamble and purposes of the Act, and the underlying legislative intention to achieve sustainable development. In so doing, they provided decision-makers with information beyond just the consideration of significant adverse environmental effects. The broader approach to sustainability taken by those JRPs was further enabled by the fact they were operating under both the Act and provincial legislation, such as the Nova Scotia *Environment Act* in the case of the Whites Point project, where socio-economic, health, and cultural matters are to be considered.<sup>27</sup>

38. Prof. Robert Gibson has written extensively on the subject of sustainability and how various environmental assessments have addressed this subject. A sustainability approach to environmental assessment builds on the concept of sustainable development in that it strives to ensure that projects proceed with minimum environmental effects and meet the needs of the

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<sup>26</sup> **R-621**, Doelle, p. 138.

<sup>27</sup> **R-5**, Nova Scotia *Environment Act*, 1994-95, c. 1 (amended 1998): the definition of environmental effect includes in s. 3(v)(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.”



present and those of the future. Prof. Gibson’s publication in 2013 on sustainability assessment in Canada<sup>28</sup> reviews seven environmental assessments including the Whites Point project, the Voisey’s Bay Mine and Mill Project in Newfoundland and Labrador (1997-2000), the Kemess North Copper-Gold Mine in British Columbia (2005-2007), and the Mackenzie Gas Project in the North West Territories (2004-2009). All of these reviews developed criteria against which they measured the project’s sustainability. Prof. Gibson notes that these “cases provide the nearest Canadian approximation of an emerging line of practice. All are major project assessments (one is effectively strategic as well) where an explicit sustainability test was applied by independent review panels with public hearings, and all of them rest on provisions of the *Canadian Environmental Assessment Act* combined with the requirements of at least one other jurisdiction.”<sup>29</sup>

39. Ms. Lesley Griffiths has also observed in her Expert Report<sup>30</sup> that the JRP applied the principles of sustainable development in its assessment of the Whites Point project. The JRP had a broad mandate and considered many issues that went beyond the identification of significant adverse environmental effects, similar to her experience on the Lower Churchill Generation Project.<sup>31</sup> This approach by the JRP is consistent with its terms of reference which required it to “recommend either the approval, including mitigation measures, or rejection of the project”<sup>32</sup> pursuant to the Nova Scotia *Environment Act* – since such a recommendation would require it to consider the project from a holistic sustainability perspective. Accordingly, it was reasonable for the JRP to examine the project’s sustainability and thereby provide the Responsible Authority and the GIC with considerable information to assist in decision-making.

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<sup>28</sup> **R-622**, R. Gibson, *Sustainability Assessment in Canada* in *Sustainability Assessment: Pluralism, practice and progress* (Routledge London and New York: 2013) (“Gibson”).

<sup>29</sup> **R-622**, Gibson, p. 170.

<sup>30</sup> **RE-1**, Expert Report of Lesley Griffiths, June 9, 2017, ¶¶ 154-156.

<sup>31</sup> **R-414**, *Report of Joint Review Panel*, Lower Churchill Hydroelectric Generation Project, Nalcor Energy, Newfoundland and Labrador [excerpt], p. 270: “The [Lower Churchill Hydroelectric Generation Project] Panel’s Terms of Reference mandate it to consider a broad range of social, cultural, economic and biophysical adverse effects and benefits of the Project, and to consider the need and purpose of the Project and potential alternatives. These are all issues that go beyond the identification of significant adverse environmental effects” (emphasis added).

<sup>32</sup> **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, November 3, 2001, ¶ 6.3 (“Joint Panel Agreement”).

40. Similarly, a JRP review conducted under the more recent version of the Act, the Site C Clean Energy Project in British Columbia (2011-2014), had a broad mandate to review the environmental, economic, social, health, and heritage effects of the project. While it did not conduct a sustainability assessment *per se* along the lines of the projects mentioned above, its mandate required it “to weigh both sides, and to present a balance sheet, accounting for its associated recommendations, to allow elected provincial and federal governments to determine if the benefits justify the costs.”<sup>33</sup> In addition, it was required to provide information on justifiability if it reached a conclusion that the project would likely have significant adverse environmental effects.<sup>34</sup> The JRP concluded that there were a number of likely significant adverse environmental effects that could not be mitigated if the project proceeded, thus requiring the GIC to determine whether the project was justified in the circumstances.

41. The government is entitled to draw on this broad range of information gathered by JRPs so that in the event they identify a likely significant adverse environmental effect, the JRP Report will assist in making a determination as to whether a project may be justified in the circumstances. Even in the event that no likely significant adverse environmental effects are found, such information can still be of assistance to the decision-making of Ministers.

42. Further, in making the decision, it is also clear from s. 37 of the Act that the Responsible Authority, and ultimately the GIC, may consider factors that go beyond what is addressed in the JRP Report to which it must respond. Section 37(1)(a)(ii) of the Act enables the GIC to determine that, even where a project is found likely to have significant adverse environmental effects, that project may still be justified in the circumstances and be allowed to proceed. To reach such a conclusion, the Responsible Authority and the GIC would examine the JRP Report and also a broad range of social and environmental considerations beyond the mere significance of the adverse environmental effects. This would include information such as overall economic benefits to the local region and perhaps the nation. The relevance of the project

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<sup>33</sup> **R-623**, *Report of the Joint Review Panel, Site C Clean Energy Project*, B.C. Hydro and Power Authority, British Columbia, May 1, 2014, p. iv.

<sup>34</sup> **R-623**, *Report of the Joint Review Panel, Site C Clean Energy Project*, B.C. Hydro and Power Authority, British Columbia, May 1, 2014, p. 340: “The Joint Review Panel must ensure that where it has concluded that the Project is likely to cause significant adverse environmental, economic, health, heritage or social effects, taking into account the implementation of any mitigation measures, information with respect to the justifiability of any significant adverse effects is included in its Joint Review Panel Report, where the information has been received by the Panel.”

to national priorities or policies may also factor in. Similarly, the GIC can reach the conclusion that a project that is likely to have significant adverse environmental effects should not proceed, contrary to a recommendation to proceed by the JRP based on available mitigation measures. I refer to such a scenario in section III D of my Report.

43. In the Site C Clean Energy environmental assessment, the GIC decided that the likely significant adverse environmental effects were justified in the circumstances. This was challenged by First Nations in the Federal Court. In the first instance, the Federal Court denied First Nations their application for judicial review of the GIC decision under s. 52(4) of the then applicable version of the *CEAA*.<sup>35</sup> In doing so, the court had been called upon to address the scope of the decision-making authority of the GIC when it must be determined whether likely significant adverse environmental effects from a project are “justified in the circumstances.” The Federal Court of Appeal dismissed the appeal and confirmed that:

[30] The reality is that decisions rendered by the GIC are the result of a highly discretionary, policy-based and fact driven process. As such, the Judge properly found that decisions of the GIC, an elected body familiar with its legislation, are ‘polycentric’.<sup>36</sup>

[emphasis added]

44. In conclusion, the Act allows for the consideration of a broad range of factors and is not limited to the examination of the significance of effects on the environment. Various JRPs, including that of the Whites Point project, have conducted such reviews and provided decision-makers with the broad range of information they need to make well informed decisions. Furthermore, as noted in the recent judicial decision on the Site C Project, the Canadian courts have adopted a similar view in insisting on the wide variety of factors that the GIC can take into consideration once an environmental assessment has been conducted and a decision regarding the justification of the likely significant adverse environmental effects of a project must be made. My experience with JRP reviews, the broad preamble, purpose, and factors to be considered

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<sup>35</sup> **C-903**, *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 (“*CEAA 2012*”). *CEAA 2012*, s. 52 corresponds to **R-1**, the Act, s. 37 and does not differ from it in a way that affects this argument.

<sup>36</sup> **R-624**, *Prophet River First Nation and West Moberly First Nations v. Canada (A.G.)*, 2017 FCA 15, January 23, 2017, ¶ 30. The court also insists on how the GIC exercises its discretion focusing on a variety of considerations and seeking to balance individual and public interests: **R-624**, *Prophet River First Nation and West Moberly First Nations v. Canada (A.G.)*, 2017 FCA 15, January 23, 2017, ¶ 71.

under the Act, the recent Site C judicial decision, and the writings of experts all run counter to Mr. Estrin's and Prof. Sossin's opinions regarding the GIC discretion as being very narrowly defined by the Act. In brief, I concur with Mr. Sossin that the GIC decision "must have a source in law - that source may be a statute or regulation or other statutory instrument, or may be part of a recognized Crown prerogative,"<sup>37</sup> but I disagree with Mr. Estrin's implication that a Responsible Authority must base its decision, pursuant to s. 37 of the Act, strictly on the findings of a "Panel Review on significant adverse "environmental effects" within the meaning of CEAA."<sup>38</sup> The scope of the decision-makers' discretion regarding the justification is broader.

45. On the matter of significance I wish to briefly note that in the process of a panel review, it is for the JRP to come to conclusions of likely significant adverse environmental effects, and not for the government officials participating in the environmental assessment. No inference on environmental effects can be drawn from the fact that no department identified significant adverse environmental effects during the JRP review.<sup>39</sup> The fact that no government officials had taken the position, before the JRP, that the Whites Point project should not be approved is irrelevant. It is not the practice of Federal Authorities to take a position on the significance of environmental effects before a JRP - in fact, their taking such a position could even be invoked as a sign of bias. It is only for the JRP to reach the conclusion on the significance of environmental effects. As I noted in my previous Report:

In my experience, government participants generally describe their mandate and policies relevant to the project and whether the project is consistent with their policies and requirements, offer their advice on the accuracy or reliability of information presented by the proponent, present views on the appropriateness of measures to mitigate impacts and express their views on the methodologies used to predict effects of the project in their area of expertise. Federal government departments typically do not provide views on whether predicted effects are likely to be significant and adverse or as to whether or not the project should be approved or rejected.<sup>40</sup>

[emphasis added]

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<sup>37</sup> Expert Report of Lorne Sossin, December 10, 2016, ¶ 16.

<sup>38</sup> Expert Report of David Estrin, March 8, 2017, ¶ 121.

<sup>39</sup> Contrary to Mr. Estrin's implications: Expert Report of David Estrin, March 8, 2017, ¶¶ 3 and 10.

<sup>40</sup> Expert Report of Robert G. Connelly, December 2, 2011, ¶ 120.

46. Nova Scotia officials also follow the same practice. Mr. Geddes states in his Report:

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.<sup>41</sup>

## **2. Presentation of the Matters to Cabinet: the MC**

47. I now describe how these broad considerations that are brought before Cabinet are presented in a MC dealing with a JRP Report, and in so doing I highlight the types of considerations that were made in the Whites Point project MC through reference to the Background/Analysis Note annexed to the Whites Point project MC.<sup>42</sup>

48. MCs are prepared according to a certain format to ensure consistency and are designed to be comprehensive and concise. The format changes periodically. For the purpose of this Report, I will refer to the format and content specified in the PCO Drafter's Guide that was applicable at the time of the government's decision relative to the Whites Point project to illustrate matters that are typically considered by Cabinet in approving the response to a JRP Report. References to the Background/Analysis Note and to the PCO Drafter's Guide support my conclusion that the GIC considers a wide variety of interlocking and interacting factors and interests in deciding whether to approve of a Responsible Authority response to a JRP Report, a decision-making process that the Federal Court of Appeal characterized as "polycentric."

49. In the present matter, the response proposed by DFO, the Responsible Authority to the Whites Point project JRP Report, would have been submitted to the Operations Committee of Cabinet. This Committee was established to "[e]nsure effective management of the government's day-to-day agenda."<sup>43</sup> All matters brought to the Operations Committee required the preparation

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<sup>41</sup> RE-4, Report of Peter Geddes, June 9, 2017, ¶ 11.

<sup>42</sup> R-620, Background/Analysis Note annexed to the Whites Point Memorandum to Cabinet, November 27, 2007.

<sup>43</sup> R-619, Guide - Memoranda to Cabinet, 2004, p. 1.

of a two-page Issue Brief.<sup>44</sup> Given the sensitivity and complexity of matters considered by JRPs, a MC was also required. The MC has three main sections: a five-page maximum Ministerial Recommendations section, an Annex with a one-page maximum Communications Plan, and a six-page maximum Background/Analysis section. The level of detail expected increases according to the page limits for each section. In the case of a response to a JRP Report, an additional Annex to the Ministerial Recommendations section would generally contain the proposed decision-makers' response to each recommendation for future public release.

50. A MC addressing the response to a JRP Report would focus on the recommendations found in the report. However, there are many other broad considerations that are also examined. These are noted in the PCO Drafter's Guide and, consistent with my experience, require the gathering of information that may extend beyond the content of the JRP Report. The order in which the range of factors considered is presented hereinafter does not relate to their importance. For each project, Cabinet will come to a view as to the set of factors that is determining.

51. In deciding whether to accept or reject the JRP's overall findings or to follow or reject specific recommendations, Ministers will consider the likely public reaction to their decision. Ministers, more than scientists or public servants, are acutely aware of the effects of their judgments on society, as their livelihood depends on the views of the electorate. Views expressed by the public, the proponent, and any other stakeholder are generally received by Ministers in correspondence after the JRP Report is made public and prior to consideration of the report by Cabinet. This would be augmented by members of the caucus or other parliamentarians, in particular those from the local area, political staff and government officials. These views are helpful to Ministers in understanding the implications of their decisions and would be reflected in the Risk and Strategies<sup>45</sup> section of the Ministerial Recommendations and in the Communications plan which would provide Ministers with the state of public opinion regarding the project. For example, the Communications Plan<sup>46</sup> includes "an assessment of public opinion and expected media reaction to identify risks and/or opportunities," in addition to "highlight[ing]

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<sup>44</sup> R-619, Guide - Memoranda to Cabinet, 2004, p. 2.

<sup>45</sup> R-619, Guide - Memoranda to Cabinet, 2004, Tab C, p. 10.

<sup>46</sup> R-619, Guide - Memoranda to Cabinet, 2004, Tab D, p. 12.

any regional or provincial sensitivities related to the initiative and indicat[ing] how they will be addressed.”

52. Key issues that may be “legal, social, economic, environmental, regional, international...as well as implications/reactions for provinces, territories and other key stakeholders,”<sup>47</sup> are addressed under strategic considerations in the Issue Brief and in the Ministerial Recommendations section of the MC. Regional and international implications, as well as those with respect to provinces and stakeholders, would require additional information beyond that which is found in the JRP Report. In the case of a joint federal-provincial review, the provincial views would also be considered in the government response.

53. Sustainable development implications of accepting or rejecting the JRP Report are also an important consideration for the decision on justification. The Considerations section of the Ministerial Recommendations and the Background/Analysis<sup>48</sup> sections may address aspects of sustainable development. Also, as I have explained above, the Act itself highlights the importance of sustainable development. The first clause of the preamble,<sup>49</sup> the statement of purposes,<sup>50</sup> and s. 16 of the Act<sup>51</sup> all refer to sustainable development.

54. I agree with Mr. Sossin’s opinion that it would be inappropriate for the Responsible Authority or the GIC to not consider factors beyond the JRP recommendation related to community core values in its Report.<sup>52</sup> In that respect, decision-makers are to consider a broad range of factors, as required under the Act. For example, the Whites Point JRP examined how the project would address the long-term sustainability of communities in the area. It noted:

Despite the Panel’s guidance, the EIS [Environmental Impact Statement] rarely addressed the broader implications of the proposed Project on the long-term

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<sup>47</sup> **R-619**, Guide - Memoranda to Cabinet, 2004, Tab B, p. 6.

<sup>48</sup> **R-619**, Guide - Memoranda to Cabinet, 2004, Tab C, pp. 9-10 and Tab E, p. 14.

<sup>49</sup> **R-1**, The Act, Preamble: “WHEREAS the Government of Canada seeks to achieve sustainable development by conserving and enhancing environmental quality and by encouraging and promoting economic development that conserves and enhances environmental quality.”

<sup>50</sup> **R-1**, The Act, s. 4(b): “to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy.”

<sup>51</sup> **R-1**, The Act, s. 16. See ¶ 35 above.

<sup>52</sup> Expert Report of Lorne Sossin, December 10, 2016, ¶ 28.

sustainable development of communities. The need to describe effects on valued environmental components does not obviate the need to consider the Project's contribution to sustainability...Rather than using the proposed Project to build on and extend existing community strengths, the general tenor of the Proponent's EIS and various information responses appeared negative and dismissive with little support for community lifestyle, history and previous attempts at community introspection, visioning and self-determination.<sup>53</sup>

Also, it concluded:

the Proponent's approach to sustainable development does not adequately account for the region's identified strategies for sustainability.<sup>54</sup>

55. Given the JRP's finding of inadequate consideration of sustainable development by Bilcon of Nova Scotia in its EIS, and the JRP's finding that the Whites Point project would make little or no contribution to sustainability,<sup>55</sup> it would be appropriate for the Responsible Authority to take this important conclusion into account in order to respond to one of the key purposes of the Act, which is to consider sustainable development in the decision-making process. The PCO Drafter's Guide also points to the relevance of such a consideration and would dictate how it is presented to Cabinet.<sup>56</sup>

56. The Cabinet would also entertain legal considerations, such as the potential for judicial review of its decision by stakeholders or the proponent. In that regard, the MC would likely address the extent to which a JRP Report responds to matters raised in the letter of referral from the Responsible Minister to the Minister of the Environment<sup>57</sup> and in the terms of reference for the JRP.<sup>58</sup> The Cabinet would also turn its attention to whether a JRP met the requirements of the Act and more specifically whether the factors set out in s. 16 of the Act, as referenced in the terms of reference,<sup>59</sup> were examined in a satisfactory manner.

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<sup>53</sup> **R-212**, JRP Report, p. 91.

<sup>54</sup> **R-212**, JRP Report, p. 91.

<sup>55</sup> **R-212**, JRP Report, p. 4.

<sup>56</sup> **R-619**, Guide - Memoranda to Cabinet, 2004, Tab C, p. 10; Tab E, p. 14.

<sup>57</sup> **R-73**, Letter from Robert Thibault, Minister of DFO to David Anderson, Minister of Environment, June 26, 2003.

<sup>58</sup> **C-363**, Joint Panel Agreement, Terms of Reference for the Joint Panel Review, Part II.

<sup>59</sup> **C-363**, Joint Panel Agreement, Terms of Reference for the Joint Panel Review, Part II, s. 6.3: "The report shall include recommendations on all factors set out in section 16 of the *Canadian Environmental Assessment Act* and



57. With respect to social, economic, and environmental issues, Cabinet would certainly consider what was addressed in a report, as summarized in the MC, informing Ministers as to the implications of accepting or rejecting the JRP's recommendations. Taking for granted that a JRP Report satisfies the requirements of the Act, it would be appropriate for the Responsible Authority to bring relevant information to the attention of Ministers that the JRP was not strictly required to address under the Act.

58. In this regard, the Whites Point JRP noted that the proponent had failed to provide information in a number of areas that prevented it from reaching a conclusion. There are some eighteen concerns about the project listed in the Executive Summary of the JRP Report. I have reproduced these in Annex III. Appropriately, it appears from the Background/Analysis Note annexed to the Whites Point project MC that these concerns were brought to the attention of Ministers, summarized as follows:

The Joint Panel report provides a summary of the Panel's concerns about the evidence submitted by the proponent during the environmental assessment process. The Panel found that the Proponent failed: to provide consistent or complete information on the character of the Project; to provide adequate data to demonstrate that it appropriately characterized the environment in its own analysis of potential effects; to demonstrate that it can implement technically or economically feasible mitigation measures; and to demonstrate that it can meet regulatory standards. The Panel report also states that in some cases the Proponent assumed that the likelihood of accidents was low and therefore did not fully consider environmental effects.<sup>60</sup>

59. Provincial views, especially in a joint federal-provincial review, are also an important consideration and in fact figured as a primary concern in the Whites Point Background/Analysis Note. With respect to the "Cons" associated with allowing the project to move forward (i.e. rejecting the proposed government response which was to follow the JRP recommendation), the Background/Analysis Note provides that this option:

- Would be perceived as interfering in the environmental assessment processes of Canada and Nova Scotia.

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pursuant to Part IV of the Nova Scotia *Environment Act*, recommend either the approval, including mitigation measures, or rejection of the project."

<sup>60</sup> R-620, Background/Analysis Note annexed to the Whites Point Memorandum to Cabinet, ¶ 29.

- Would have a contrary outcome to the Joint Panel report which could deter future cooperation with regard to environmental assessment in Nova Scotia.
- Would be seen as the federal government not supporting Nova Scotia's decision making power over the development of their natural resources and as a result the federal government would find it necessary to rebuild relationships in the area of joint resource management with the Government of Nova Scotia.
- Would negatively impact relations with Nova Scotia and federal-provincial environmental assessment harmonization.<sup>61</sup>

60. In summary, the Act and a MC both contemplate a broad consideration of factors in decision-making with respect to the justification of the significant adverse environmental effects of a project after a JRP has delivered its report. Public views and their likely reaction to a decision are important considerations for Ministers, and in the case of the Whites Point project MC, the difficulty the JRP had with the information provided by Bilcon of Nova Scotia was clearly pointed out to Ministers. Federal-provincial relations and the provincial responsibilities for a project are also important considerations.

### **III. POSSIBLE RESPONSES TO A JOINT REVIEW PANEL REPORT**

61. In my view, s. 37 of the Act dictates that the government response to a JRP Report could take the form of four possible scenarios:

1. The GIC, pursuant to s. 37(1.1)(b) of the Act, requires the JRP to clarify any of the recommendations set out in its report;
2. The report is considered not to meet the Act's requirements;
3. Additional information is requested by the Responsible Authority; or
4. The Responsible Authority, with the approval of the GIC, accepts the report and issues a decision accepting or rejecting the project in accordance with s. 37(1)(a).

62. I elaborate below on each of these scenarios and the process that would be followed in relation to the Whites Point project.

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<sup>61</sup> R-620, Background/Analysis Note annexed to the Whites Point Memorandum to Cabinet, ¶ 30.

### **A. GIC Requires Clarification of the JRP Report's Recommendations**

63. Where the GIC concludes that a JRP Report requires clarification, it may, under s. 37(1.1)(b), require the JRP to clarify any of the recommendations set out in its report. The JRP may respond to such a request on the basis of information already on its public record, or it may need to gather additional information, likely from the proponent of the project. Once the JRP is satisfied it has received the required information, it would give all parties in the review an opportunity to respond. This could be accomplished by written comment or there may be a need to hold another public hearing. For example, a further public hearing would be likely if a JRP found that it was difficult to obtain information from the proponent and had to rely on others to provide such information. In the case of the Whites Point project, the JRP Report makes clear that the panel was left with many questions regarding the adequacy and sufficiency of the information that was provided by Bilcon,<sup>62</sup> though it concluded that it did have sufficient information to fulfill its mandate.

64. Once the JRP is satisfied that it has received sufficient information to respond to the request for clarification by the GIC, it would likely submit a revised report or addendum to its initial report to the Minister of the Environment. The process of submitting the clarification to the GIC would follow the same process described in section II B of this Report.

### **B. The Report Does Not Meet the Act's Requirements**

65. A JRP Report can be considered not to meet the Act's requirements. This determination could be made by the Responsible Authority or the GIC, in which case the JRP would be required to revise its report and resubmit it to the Minister of the Environment. This scenario could occur, for example, if a JRP failed to address all the factors set out in s. 16 of the Act or failed to reach conclusions on the significance of certain adverse environmental effects. In such a case, the JRP may need to hold another public hearing to hear new evidence brought before it. Following the hearing, the JRP would likely submit a revised report or an addendum to its original report to the Minister and the process would proceed as in section II B above.

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<sup>62</sup> **R-212**, JRP Report, p. 84: "The Proponent declined to provide some of the information requested by the Panel, forcing the Panel to obtain required information from government officials, interveners and holders of traditional knowledge, during public hearings."

66. The courts could also come to the same conclusion in the context of judicial review. For example, in the case of the Cardinal River Coal mine project,<sup>63</sup> the Federal Court concluded following the release of the Report that the JRP had not examined adequately the factors set out in s. 16 of the Act dealing with cumulative effects and alternatives to the project. The JRP was consequently reconvened and held hearings in line with detailed directions from the Federal Court as to the effects that should be considered. Similarly, in regard of the Kearl Oil Sands project,<sup>64</sup> the Federal Court concluded that the JRP had failed to justify its recommendation regarding greenhouse gases. As a result, the JRP issued an addendum to its Report, based on the existing record.

67. In both the case of the Cardinal River coal mine and the Kearl Oil Sands, the judicial review occurred after the GIC had rendered a decision and resulted in considerable delay to both projects.<sup>65</sup> The JRPs both had to expend considerable efforts, either in holding another hearing to receive more evidence on the direction received from the Court or in preparing an addendum to the original Report. The resulting Reports were then re-submitted to the GIC for a decision.

68. Since the existence of a JRP Report that satisfies the requirements of the Act, and its consideration by the Responsible Authority and the GIC, is a precondition for the validity of the government decision, no project can be allowed to move forward until the defects in the report have been remedied and duly submitted and considered by the Responsible Authority and GIC.

### **C. The Report Satisfies the Requirements of the Act, but Additional Information Sought Prior to Reaching a Decision**

69. The GIC or a Responsible Authority could conclude that while a JRP has completed its report in a satisfactory manner, more information is needed to assist the Responsible Authority or the GIC in reaching a decision. This may occur where a JRP recommends that further studies be undertaken or the government itself determines that information not included in the JRP Report is needed before taking a decision, for instance regarding the local or national socio-economic effects of the project. As noted in section II C 2, a MC typically includes more

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<sup>63</sup> **R-625**, *Alberta Wilderness Assn. v. Cardinal River Coals Ltd.*, [1999] 3 FCR 425 (FC), p. 25.

<sup>64</sup> **R-626**, *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302, ¶ 79.

<sup>65</sup> The Cardinal River Coal project received its first OIC approval in October 1997 and it is only after a Federal Court decision in August 2005 that the last related judicial review proceedings came to an end.

information than that contained in a JRP Report. In such a case, prior to bringing the matter forward to the GIC, government would likely commission or undertake the gathering of this information. The Responsible Authority and GIC would then have the JRP Report as well as the additional information to assist them in making a decision.

70. A case in point is the JRP review of the Lower Churchill Hydroelectric Generation Project in Newfoundland and Labrador. The JRP reached conclusions that significant adverse environmental effects were likely should the project proceed. In addition, the JRP recommended that further analysis be undertaken in the areas of long-term financial returns, energy alternatives to serve domestic needs, and reducing uncertainty about downstream environmental effects.<sup>66</sup> Prior to reaching a decision the federal government conducted an economic analysis and reviewed an independent supply report commissioned by the proponent. This information together with the JRP Report was considered by the Responsible Authority and the GIC in the decision that the likely significant adverse environmental effects could be justified in the circumstances.

71. In a more recent example under *CEAA* 2012<sup>67</sup> – The Deep Geologic Repository for Low-and Intermediate-Level Radioactive Waste Project – the Minister requested additional information from the proponent before a decision was taken, even where the JRP Report was found to satisfy the requirements of the Act.<sup>68</sup> The request included a study on the environmental effects of feasible alternative locations for the project, information on cumulative effects and on mitigation of adverse effects.<sup>69</sup>

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<sup>66</sup> **C-792**, Government of Canada Response to the Report of the Joint Federal-Provincial Review Panel for Nalcor’s Lower Churchill Generation Project in Newfoundland and Labrador, March 15, 2012, pp. 4-5.

<sup>67</sup> **C-903**, *CEAA* 2012.

<sup>68</sup> **R-627**, Letter from the Honourable Catherine McKenna, Minister of the Environment and Climate Change to Laurie Swami, Ontario Power Generation, February 18, 2016. Under **C-903**, *CEAA* 2012, s. 15(c), the Minister of the Environment and Climate Change is a Responsible Authority and under s. 47(2): “The Minister may, before making decisions referred to in subsection 52(1), require the proponent of the designated project to collect any information or undertake any studies that, in the opinion of the Minister, are necessary for the Minister to make decisions. Under s. 52(2) of that Act: “If the decision maker decides that the designated project is likely to cause significant adverse environmental effects referred to in subsection 5(1) or (2), the decision maker must refer to the Governor in Council the matter of whether those effects are justified in the circumstances.” This is similar to s. 37 of *CEAA* 1992 (**R-1**, The Act, s. 37).

<sup>69</sup> **R-627**, Letter from the Honourable Catherine McKenna, Minister of the Environment and Climate Change to Laurie Swami, Ontario Power Generation, February 18, 2016.

#### **D. Decision-Makers Accept the Report and Decide Whether to Grant Approval to Proceed**

72. In this scenario, the Responsible Authority and the GIC would accept that the JRP Report is complete, that it meets the requirements under the Act and that it requires no further studies, such that it can render a decision on the project. As explained, the GIC would then have before it the JRP Report and broad discretion to consider other factors in making its decision regarding the justification of the significant adverse environmental effects.

73. As noted earlier in section II C, other factors enter into the decision-making process besides simply the content of the JRP Report. In the event of a JRP finding of likely significant adverse environmental effects, the decision-makers are not obliged to reject a project. They may determine that the significant adverse environmental effects of a project are justified under the circumstances.<sup>70</sup> For example, in the Lower Churchill Generation Project, the JRP found a number of likely significant adverse environmental effects.<sup>71</sup> Nevertheless, the decision-makers found that the significant adverse environmental effects of the project were justified under the circumstances after considering provincial, regional, and national benefits including the replacement of non-renewable generation plants that produce significant greenhouse gases, as well as extensive direct and indirect economic benefits for the entire region, including facilitating greater linking of the regional electricity grid, enhanced inter-provincial cooperation, and economic integration.<sup>72</sup> These are examples of the types of broad issues that are not necessarily addressed in a JRP Report but are important for the GIC to consider in making a sound and comprehensive decision.

74. On the other hand, the GIC can equally reject the recommendations of a JRP Report that a project be authorized to proceed on the grounds that, for example, the overall environmental effects of a project are greater than determined by the JRP. Such cases are rare but can occur. In 2016, the recommendation from a JRP on the Northern Gateway Project was not accepted.<sup>73</sup> The

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<sup>70</sup> **R-1**, The Act, s. 37(1)(a)(ii).

<sup>71</sup> **C-792**, Government of Canada Response to the Report of the Joint Federal-Provincial Review Panel for Nalcor's Lower Churchill Generation Project in Newfoundland and Labrador, March 15, 2012, p. 4.

<sup>72</sup> **C-792**, Government of Canada Response to the Report of the Joint Federal-Provincial Review Panel for Nalcor's Lower Churchill Generation Project in Newfoundland and Labrador, March 15, 2012, pp. 5-6.

<sup>73</sup> **R-628**, Privy Council Office announcement, PC Number 2016-1047, November 25, 2016.

JRP concluded that the project was likely to have significant adverse environmental effects on woodland caribou and grizzly bears,<sup>74</sup> but recommended that the GIC find the project to be justified under the circumstances. On June 17, 2014, the GIC accepted the JRP's recommendation to justify the significant adverse environmental effects and authorized the project to proceed.<sup>75</sup> However, the Federal Court of Appeal quashed the OIC and remitted the matter to the GIC for redetermination,<sup>76</sup> ruling that there had been insufficient consultation with indigenous people in the affected area. On November 25, 2016, after the election of a new government, the GIC reviewed the JRP determination again and decided not to accept the JRP findings and recommendation to justify the significant adverse environmental effects.<sup>77</sup> This decision was issued by the Prime Minister at a press conference where he also announced the GIC decision to proceed with two other pipeline projects in western Canada. The PCO announcement and the speech given by the Prime Minister on that occasion show that the decision to reject the Northern Gateway Pipeline Project was based on the GIC's own determination that the project would have greater environmental effects than assessed by the JRP. In fact, it indicates that factors beyond those addressed by the JRP were important considerations by the GIC in reaching the decision that the significant adverse environmental effects were not justified. Whereas the JRP's finding of likely significant adverse environmental effects concerned grizzly bears and caribou, the GIC focused on the impact of oil tanker traffic on the Douglas Channel:

Whereas the Governor in Council is of the view that the waters of the Douglas Channel are part of a sensitive ecosystem that must be protected from spills of crude oil from tankers;

Whereas the Report disclosed that the Project would result in 220 tankers annually transiting the waters of the Douglas Channel carrying crude oil, diluents, or condensate, or any combination of them.<sup>78</sup>

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<sup>74</sup> **R-628**, Privy Council Office announcement, PC Number 2016-1047, November 25, 2016, s. 2.

<sup>75</sup> **R-628**, Privy Council Office announcement, PC Number 2016-1047, November 25, 2016, s. 2.

<sup>76</sup> **R-629**, *Gitxaala Nation v. Canada*, [2016] FCA 187, ¶ 8. The Federal Court of Appeal concluded that "Canada has not fulfilled its duty to consult."

<sup>77</sup> **R-628**, Privy Council Office announcement, PC Number 2016-1047, November 25, 2016, ss. 3-4.

<sup>78</sup> **R-628**, Privy Council Office announcement, PC Number 2016-1047, November 25, 2016, s. 3.

75. The Prime Minister’s speech completes the picture and illustrates how consideration of sustainable development ultimately overrode the JRP’s recommendations:

Even before we formed government, we were clear about our intentions to protect the Great Bear Rainforest and Sea. This unique and beautiful ecosystem thrives with diverse wildlife, and supplies an abundant and sustainable economy to the tens of thousands of people who depend on its health. It is a jewel of Canada’s west coast.<sup>79</sup>

76. The GIC’s decision relative to the Northern Gateway Project shows the broad discretion it has in making decisions whether or not to approve a project that has been positively recommended by a JRP.

#### **IV. COMMUNICATING THE GIC APPROVAL AND THE ISSUANCE OF PERMITS BY RESPONSIBLE AUTHORITIES**

77. Once a decision is reached by the GIC, it is typically announced by means of a press release in accordance with the MC Communication Plan. The Act states that the Responsible Authority shall take a course of action under s. 37(1) of the Act in conformity with the OIC (s. 37(1.1)(c)). If the GIC denies approval, i.e. the significant adverse environmental effects are not justified in the circumstances, no further action can be taken by the Responsible Authority to allow the project to move forward (s.37(1)(b)). If the GIC approves the decision that the significant adverse environmental effects of the project are justified in the circumstances, the Responsible Authority may exercise any power or perform any duty or function that would permit the project to proceed (s.37(1)(a)). The use of the discretionary term “may” confirms that further information and details at this stage could still prevent the project from proceeding.

78. If the Responsible Authority takes a course of action that permits the project to proceed, it must ensure that mitigation measures approved by the GIC are implemented (s. 37(2)).

#### **V. THE GOVERNMENT DECISION ON WHITES POINT**

79. Before considering how the government decision might have unfolded absent the NAFTA breach identified by the Tribunal as a result of the “community core values” approach taken by the JRP, I review the government decision that was actually rendered. I am of the view

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<sup>79</sup> R-630, Prime Minister Justin Trudeau’s Pipeline Announcement, November 30, 2016, p. 5.



that this decision was based on a variety of factors that remain relevant, even in the hypothetical situation where no NAFTA breach had occurred. In this section I refer to the government decision on the Whites Point project<sup>80</sup> issued on December 17, 2007 as well as the Background/Analysis Note annexed to the MC on the Whites Point decision. It is my opinion that the government did not rely solely on the JRP findings related to “community core values.”

80. The JRP included a sustainability test in its guidelines for the preparation of the environmental impact statement, consistent with the principle of sustainable development.<sup>81</sup> As noted in section II C above, it is common for JRPs to examine a project’s contribution to sustainable development. The JRP concluded the Whites Point project was inconsistent with the principle of sustainable development enshrined in the Act.<sup>82</sup> It appears that the Government of Canada accepted this conclusion, as its response to the JRP Report noted that:

Based on an analysis of the benefits and burdens of the project, the Panel has concluded that the burdens outweigh the benefits and that it would not be in the public interest to proceed with the Whites Point Quarry and Marine Terminal development.<sup>83</sup>

81. The statement being referenced by the government is found in the Executive Summary of the JRP Report, and is supported by the analysis of the project benefits and burdens where the JRP concluded that:

the potential impact on many species, from both terrestrial and marine environments, could be incommensurate with available benefits. The local community would experience social, cultural and economic concerns that would not be compensated by the projected gains.<sup>84</sup>

82. In this respect, in contrast with the opinion of Mr. Sossin that federal Ministers “relied on an irrelevant factor – namely, “core community values” or failed “to consider the relevant

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<sup>80</sup> **R-383**, The Government of Canada’s Response to the EA Report of the JRP on the Whites Point Quarry and Marine Terminal Project (the Project), December 17, 2007.

<sup>81</sup> **R-210**, Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal Project, March 2005.

<sup>82</sup> **R-212**, JRP Report, p. 91.

<sup>83</sup> **R-383**, The Government of Canada’s Response to the EA Report of the JRP on the Whites Point Quarry and Marine Terminal Project (the Project), December 17, 2007, page 2.

<sup>84</sup> **R-212**, JRP Report, p. 96.

factor of mitigation in their exercise of their statutory discretion,”<sup>85</sup> I am of the view that “community core values” was not the only factor considered in the GIC decision. Bilcon’s failure to demonstrate that the project would contribute to the long term sustainable development of the surrounding communities was an important consideration that was also likely taken into account by the GIC.<sup>86</sup>

83. The Background/Analysis Note annexed to the MC addressing the JRP findings provides further insight on the GIC decision. Notably, it makes no mention of community core values. While the Background/Analysis Note mentions that “the JRP concluded in accordance with the requirements of CEAA that the Project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances” it also refers to other matters that I believe are equally important. For example, it observes, as did the government response, the finding that the project was not in the public interest.<sup>87</sup> It also noted that:

The Proponent failed: to provide consistent or complete information on the character of the Project; to provide adequate data to demonstrate that it appropriately characterized the environment in its own analysis of potential effect; to demonstrate that it can implement technically or economically feasible mitigation measures; and to demonstrate that it can meet regulatory standards. The Panel report also states that in some cases the Proponent assumed that the likelihood of accidents was low and therefore did not fully consider environmental effects.<sup>88</sup>

84. S.16 (1)(c) of the Act requires that the assessment include considerations of “comments from the public.” It is noteworthy that the JRP reported that five elected officials from the three levels of government appeared before it and were unanimously opposed to the project. They argued that “approval would be inconsistent with community values and local initiatives.”<sup>89</sup> Elected officials are typically well versed on the views of their constituents. The unanimity of their views in this case would have been seen by the government as confirming the significant

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<sup>85</sup> Expert Report of Lorne Sossin, December 10, 2016, ¶¶ 26, 27.

<sup>86</sup> **R-212**, JRP Report, p. 91.

<sup>87</sup> **R-620**, Background/Analysis Note annexed to the Whites Point Memorandum to Cabinet, ¶ 27; **R-383**, The Government of Canada’s Response to the EA Report of the JRP on the Whites Point Quarry and Marine Terminal Project (the Project), December 17, 2007, p. 2.

<sup>88</sup> **R-620**, Background/Analysis Note annexed to the Whites Point Memorandum to Cabinet, ¶ 29.

<sup>89</sup> **R-212**, JRP Report, p. 71.

public concern about the project. The overall public reaction to the proposal was summarized in the Background/Analysis Note: “at the Panel hearings a majority of local stakeholders were opposed to the proposed project.”<sup>90</sup>

85. The views of regional stakeholders and Aboriginal groups and their likely reaction to the decision to be taken by the GIC were important considerations for Ministers. On the matter of Aboriginal groups, the Background/Analysis Note referenced the JRP Report’s statement that “the Proponent’s efforts to consult with Aboriginal communities were not successful, as a result leaving traditional knowledge out of the proponent’s EIS,”<sup>91</sup> and that the Bear River First Nation is opposed to the project.<sup>92</sup> The government would see this opposition as important, considering its duty to consult and accommodate First Nations’ interests, as determined by the Supreme Court of Canada decision in the *Haida Nation v. British Columbia* case in 2004.<sup>93</sup>

86. It is also apparent from the Background/Analysis Note that the Responsible Authorities and the Province of Nova Scotia were moving to fulfill their duty to consult with First Nations, or at the very least were gathering information to assist them and the GIC decision-makers – information that would be supplemental to any conclusions reached by the JRP. The Note states that a meeting was held on October 4, 2007 with the Mi’kmaq of Nova Scotia before the JRP Report was submitted to governments (made public on October 23rd).<sup>94</sup> The information gathered may have determined a need to accommodate the Mi’kmaq if the project were to proceed. If so, this may have had implications for the financial viability of the project and would at a minimum have required the government to examine the validity of First Nation claims.

87. I believe this illustrates that Ministers considered supplementary information beyond that provided solely by the JRP Report to assist them in approving the proposed response to the JRP Report. Accordingly, I disagree with Mr. Sossin’s statement regarding “the federal and Nova Scotia Ministers’ reliance on the JRP, to the exclusion of other factors.”<sup>95</sup> The government

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<sup>90</sup> R-620, Background/Analysis Note annexed to the Whites Point Memorandum to Cabinet, ¶ 21.

<sup>91</sup> R-620, Background/Analysis Note annexed to the Whites Point Memorandum to Cabinet, ¶ 24.

<sup>92</sup> R-620, Background/Analysis Note annexed to the Whites Point Memorandum to Cabinet, ¶ 26.

<sup>93</sup> R-631, *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, 2004 SCC 73.

<sup>94</sup> R-620, Background/Analysis Note annexed to the Whites Point Memorandum to Cabinet, ¶ 26.

<sup>95</sup> Expert Report of Lorne Sossin, December 10, 2016, ¶ 28.

fulfilled its duty to consider the appropriate range of broad factors in the exercise of its discretion. The above were all important matters, within the authority of the government to consider, and which Ministers would have considered. As noted earlier, it is incorrect to assume that the Act requires consideration of only a finding of significant adverse effects as a basis to make a decision.

## **VI. HOW THE GOVERNMENT DECISION-MAKING MIGHT HAVE UNFOLDED HAD THE JRP NOT COMMITTED THE IDENTIFIED NAFTA BREACH**

88. In this section I provide my opinion as to the hypothetical government response to the JRP Report had the JRP not proceeded in the way that the Tribunal found to be a breach of NAFTA. As I explain below, in my view, in the hypothetical situation where the JRP adopted a NAFTA-compliant approach, the government could still have reasonably denied approval to the Whites Point project.

89. As an initial matter, the Claimants' approach to answering the hypothetical question here (what would the government have done if the breach had not occurred) is, in my opinion, inappropriate. Mr. Estrin concludes that there would be no legitimate basis for either the Responsible Authority or the GIC to refuse approval of the Whites Point project pursuant to s. 37 of the Act based on the fact that the JRP did not expressly conclude in its Report that there were likely significant adverse environmental effects after mitigation other than the effect on community core values.<sup>96</sup> In my view, it is clear that with the references to community core values struck out, the JRP Report on the Whites Point project would not be judged sufficient to satisfy the requirements of the Act because it would include no conclusion on the likely significance of the environmental effects it was mandated to assess. Such a report would have been sent back for clarification, or would have led to a request for additional information, as explained in sections III A and III B above. To otherwise approve the project based on the same JRP Report but with the references to community core values excised, as the Claimants suggest, in the absence of any recommendations on how to mitigate effects, with a conclusion that the project is not sustainable, and with clear information about extensive public concern, would very likely have led to judicial review. Similarly a judicial review may also have arisen if the GIC had denied the approval of the project on the basis of a flawed report. This would have led to

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<sup>96</sup> Expert Report of David Estrin, March 8, 2017, ¶ 121.

considerable delay in reaching a decision and with no certainty as to the outcome. The Honourable John M. Evans has stated in his Expert Report that it is reasonable to estimate that judicial review could take five years if the matter progressed to the Supreme Court of Canada.<sup>97</sup> In section III B of this Report I noted that in the case of the Cardinal River Coal Project, it took eight years from the initial GIC decision to completion of the final judicial review.

90. Further, based on the JRP Report, it seems evident to me that if the JRP had not adopted the approach it did, it would have reached conclusions on the likely significance of other environmental effects. The Expert Reports of Ms. Griffiths and Dr. Blouin demonstrate that there was sufficient information on the record to allow for a reasonable determination of likely significant adverse environmental effects. I agree with Ms. Griffiths and Dr. Blouin that the record from the JRP shows that community core values were not the only substantial concern of the JRP. I take note that, in Ms. Griffith's professional opinion, it is reasonable to think that a JRP, asked to issue a report based on the same record but without breaching the NAFTA, could reasonably make a determination of likely significant adverse environmental effects with respect to the North Atlantic right whale and the American lobster.<sup>98</sup> I also take note of Dr. Blouin's determination that the JRP could reasonably have reached a similar conclusion under the Nova Scotia *Environment Act*.<sup>99</sup> Once likely significant adverse environmental effects have been identified by a JRP and accepted by a Responsible Authority, it falls to the government decision-makers to consider whether or not such effects are justified in the circumstances such that a project should be permitted to proceed.

91. As I explained above in section II C, an analysis of whether a significant adverse environmental effect is justified in the circumstances involves a broad-based and polycentric discretionary analysis of many relevant factors, all considered together in light of the principles and purposes that guide environmental assessment in Canada. As noted in my previous Report, "environmental impact assessment is inherently an anthropocentric concept. It is centered on the

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<sup>97</sup> **RE-6**, Expert Report of the Honourable John M. Evans, June 9, 2017 states that it is reasonable to estimate that a Federal Court decision would take eighteen months (¶ 42); if appealed to the Federal Court of Appeal, a further eighteen months (¶ 43); and if leave to the Supreme Court of Canada was granted, a further twenty-one months (¶ 48) for decisions to be rendered.

<sup>98</sup> **RE-1**, Expert Report of Lesley Griffiths, June 9, 2017, ¶ 62(e).

<sup>99</sup> **RE-2**, Expert Report of Tony Blouin, June 9, 2017, ¶ 120.

effects of human activities and ultimately involves a value judgment by society on the significance or importance of those effects.”<sup>100</sup>

92. For example, in the Northern Gateway Project discussed above, while the JRP found significant adverse environmental effects on grizzly bear and woodland caribou and recommended the project be justified in the circumstance, this was ultimately not accepted by the GIC. In reaching that decision, it is apparent that the GIC considered a broad range of concerns and issues, not only about the particular significant adverse impacts found by the JRP, but about the impact of oil tanker traffic on the Douglas Channel and the overall desire to protect the Great Bear Rainforest and Sea, which the government viewed as a “unique and beautiful ecosystem,” driving “an abundant and sustainable economy.”<sup>101</sup>

93. As noted, Ms. Griffiths identified likely significant adverse environmental effects on the Northern Atlantic right whale and the American lobster that could reasonably have been found by the JRP. Having reviewed in depth the Background/Analysis Note annexed to the Whites Point project MC, I do not see reference to factors that would have supported a conclusion that these effects would have been considered justified in the circumstances in this case. In fact, the record suggests that the government decision-makers would have reached the opposite conclusion. If Ms. Griffiths is correct and a JRP could reasonably make a determination of likely significant adverse environmental effects, then in my view, based on the existing record and for the following reasons, it is unlikely that the government would have found those likely significant adverse environmental effects to be justified in the circumstances. Thus the government could have reasonably decided not to grant approval to the project.

94. First, in the context of a “justified in the circumstances” analysis, the government decision-makers would have considered the socio-economic benefits and drawbacks of the project. I believe a full examination of the socio-economic concerns of the community, which centered at least in part on the effects on the whale watching industry and the lobster fishery,

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<sup>100</sup> Expert Report of Robert G. Connelly, December 2, 2011, ¶ 77, citing to **R-21**, Beanlands, Gordon and Duinker, Peter, *An Ecological Framework For Environmental Impact Assessment in Canada*, published by the Institute of Resource and Environmental Studies, Dalhousie University and the Federal Environmental Assessment Review Office, 1983, p. 44.

<sup>101</sup> **R-628**, Privy Council Office announcement, PC Number 2016-1047, November 25, 2016, s. 2; **R-630**, Prime Minister Justin Trudeau’s Pipeline Announcement, November 30, 2016, p. 5.

could reasonably have led the government to the conclusion that the likely significant environmental effects on those exact species could not be justified by the limited economic benefits the project would bring. Similarly, I also note that Mr. Geddes states in his Report that the Nova Scotia Minister of Environment and Labour was well aware of public concerns surrounding socio-economic effects and could have considered such effects in his decision even if they were not addressed in the JRP Report.<sup>102</sup>

95. Second, I have noted in section V of this Report concerns raised by First Nations and the attention this was given in the Background/Analysis Note. It was important for the Responsible Authority and the GIC to examine carefully as part of their independent consideration the concerns of First Nations. It is apparent from the JRP Report that First Nations used the area for traditional purposes, and that they were opposed to the project. They continue to use the area of Digby Neck and the offshore waters for traditional purposes. Digby Neck was a hunting site and used for the harvesting of berries and other plants, and there is a possibility of burial remains on the site.<sup>103</sup> The opposition of First Nations to the project would have certainly been considered in concluding whether the identified likely significant adverse environmental effects could be justified in the circumstances.

96. Third, the government would also certainly have given consideration to the wishes and desires of the community in and around Digby Neck. From the outset of this project review, public concern was high.<sup>104</sup> Public concern was clearly an important part of the reason for the referral to a review panel, as noted by the Tribunal.<sup>105</sup> I do not see that through the JRP process, the proponent alleviated this concern sufficiently to convince the government to find the

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<sup>102</sup> **RE-4**, Report of Peter Geddes, June 9, 2017, ¶ 26: “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.”)

<sup>103</sup> **R-212**, JRP Report, p. 67.

<sup>104</sup> I disagree with Mr. Estrin’s claim that: “[...] the sole basis on which WPQ was referred by Canada to a JRP was potential environmental effects (i.e. fisheries), not public concern.” Expert Report of David Estrin, March 8, 2017, ¶ 11(iii).

<sup>105</sup> Award on Jurisdiction and Liability, March 17, 2015, ¶ 156. See Canada’s Counter Memorial, December 9, 2011, ¶¶ 406, 347-348 and 355.

significant adverse environmental effects to be justified such that it would have permitted the project to proceed. The community appeared to place great value on the tranquility of their rural life, their view of nature unmarred by development, and the ability to continue engaging in traditional economic or recreational activities.<sup>106</sup> In this regard, the Tribunal noted in paragraph 531 of its Award on Jurisdiction and Liability that:

To avoid any possible misunderstanding, the Tribunal has absolutely no doubt that the extent to which community members value various assessable components can be an entirely legitimate part of an environmental assessment. If some or all members of a community place a significant value on auditory quiet or a view of nature unmarred by development, or the ability to continue engaging in traditional economic or recreational activities, or community cohesion, these effects might be included in an assessment under the laws of Canada, and in fact in appropriate cases could lead to a finding of likely significant adverse effects after mitigation.<sup>107</sup>

97. As is evident from the Background/Analysis Note annexed to the Whites Point project MC, the government decision-makers were keenly aware of the public concern over the project. A determination that the significant adverse environmental effects of the project were not justified would have been consistent with the widespread opposition to the project.

98. Fourth, I have noted in section V of this Report that the JRP concluded that the project was not sustainable and would not contribute to sustainable development.<sup>108</sup> This is a conclusion that would have been important in the government's "justified in the circumstances" analysis. The benefits and burdens of the project are summarized clearly in Tables 3-1 and 3-2 of the JRP Report.<sup>109</sup> The absence of net benefit to the community is apparent in that "the accumulation of concerns about adequacy leads the panel to question the Project", even if "most project effects

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<sup>106</sup> **R-212**, JRP Report, p. 72: "Residents of Digby Neck and Islands enjoy a high quality of rural life. The basis of the region's ability to attract retirees and summer residents is its peace, natural beauty and environmental quality. Residents repeatedly expressed concerns that the proposed Project could undermine these qualities," p. 77: "Community representatives expressed concerns about a host of potential effects on tourism from the proposed Project, including impacts on whales, views of the coast from the Bay, migratory birds, and environmental activities in the planning stage (such as sea kayaking and bird watching)," p. 76: "Fishing is the mainstay of the economy in southwest Nova Scotia and is at the heart of the region's plans for a sustainable economy. Lobster Fishing Area 34, which includes the Bay of Fundy adjacent to the proposed site and nearby St. Mary's Bay, is the highest-value fishing area in Atlantic Canada."

<sup>107</sup> Award on Jurisdiction and Liability, 17 March, 2015, ¶ 531.

<sup>108</sup> **R-212**, JRP Report, pp. 4, 13, 91.

<sup>109</sup> **R-212**, JRP Report, Table 3-1 and Table 3-2, pp. 97-98.



should not be judged significant.”<sup>110</sup> These concerns were summarized in Table 2-1 of the JRP Report and are extensive: six major concerns were identified, affecting 31 valued environmental or project components.<sup>111</sup> Given the importance of sustainable development in environmental assessment in Canada, and the importance given to it by the government generally, it is reasonable to believe that the project’s inadequate contribution to sustainable development could have led the government to conclude that the identified likely significant adverse environmental effects could not be justified in the circumstances.

99. Compounding all of the above and working against a finding of justification of the significant adverse environmental effects would have been the concerns expressed by the JRP regarding obtaining the information it needed from Bilcon to conduct a proper assessment. For example, the JRP observes that “while the environmental impact statement provided considerable data, in many ways the information provided by the Proponent was inadequate for the requirements of an environmental assessment.”<sup>112</sup>

100. Finally, I understand from the Report of Mr. Geddes that the Province of Nova Scotia could reasonably have denied approval of the Whites Point project under Nova Scotia law, even in the absence of the NAFTA breach. As is shown by the Background/Analysis Note annexed to the Whites Point project MC, this also would have been a significant consideration for the government in its analysis of whether likely significant adverse environmental effects are justified in the circumstances. A provincial rejection of the development of a resource (the quarry) under its jurisdiction would be given weight, especially when federal interests (fisheries, navigation, and possibly effects on First Nations) would be fully protected by not proceeding. In light of these findings, I am of the view that, contrary to what Mr. Estrin says, the government reasonably could have refused to find the significant adverse environmental effects of the project to be justified in the hypothetical world where the JRP did not commit the NAFTA breach, thereby preventing it from proceeding.

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<sup>110</sup> R-212, JRP Report, pp. 83-84.

<sup>111</sup> R-212, JRP Report, Table 2-1, p. 85.


<sup>112</sup> R-212, JRP Report, p. 84.

## VII. CONCLUSIONS

101. The Claimants and their experts appear to take for granted that the Whites Point project would have been granted government approval, absent a JRP conclusion on community core values. I disagree and am of the view that such approval could reasonably have been denied, or at the very least, considerably delayed with no guarantee of success. The Expert Report prepared by Ms. Griffiths demonstrates that it would be reasonable to conclude that the project would likely have significant adverse environmental effects on the North Atlantic right whale and the American lobster.<sup>113</sup> Dr. Blouin's Report draws similar conclusions concerning the adverse effects of the project from the perspective of Nova Scotia.<sup>114</sup> In light of the noted socio-economic concerns, First Nations and public opposition, and the JRP's finding that the project was not sustainable, it would, in my opinion, be difficult for the GIC to determine that the potential likely significant adverse environmental effects on the North Atlantic right whale and the American lobster were justified in the circumstances.

Signed at Ottawa, Ontario

June 9, 2017



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Robert G. Connelly

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<sup>113</sup> RE-1, Expert Report of Lesley Griffiths, June 9, 2017, ¶ 62(e).

<sup>114</sup> RE-2, Expert Report of Tony Blouin, June 9, 2017, ¶ 120.

## ANNEX I – CURRICULUM VITAE OF ROBERT G. CONNELLY

### Robert (Bob) G. Connelly

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#### PROFILE

Mr. Connelly has thirty-eight years of experience in environmental assessment as a consultant, with the Canadian Environmental Assessment Agency and its predecessor the Federal Environmental Assessment Review Office. He also worked for the United Nations Economic Commission for Europe and an engineering company.

As an environmental assessment consultant his clients have included government organizations, industry and an international organization. He has been involved in many environmental assessment reviews throughout Canada. He chaired a number of environmental assessment panels involving projects in the transportation, petroleum, nuclear and mining sectors as well as in wildlife conservation. Mr. Connelly has broad experience with the development of environmental assessment policy, regulation and legislation. His work has enabled him to develop a good understanding of environmental processes and practices within Canada and internationally. He served in various roles while at Canadian Environmental Assessment Agency including as Acting President for 17 months before leaving in 2005.

He also chaired a working group that developed the United Nations Convention on Environmental Impact Assessment in a Transboundary Context. In 2006 he received the International Association for Impact Assessment's Rose Hulman award in recognition of his contribution and leadership in the field of environmental assessment.

#### PROFESSIONAL EXPERIENCE

##### **Connelly Environmental Assessment Consulting, Inc., August 2006 to present**

President

- Provided advice to the Expert Panel established by the Minister of the Environment to review federal environmental assessment processes
- Provided advice to the Chair of the Inuvialuit Environmental Impact Review Board (EIRB) on environmental assessment review procedures
- Served as an environmental assessment expert to the Department of Foreign Affairs and International Trade in arbitration under the North American Free Trade Agreement between Bilcon et al and Canada (the Whites Point project in Nova Scotia). Prepared a report for the arbitration on the operation and relevant provisions of the *Canadian Environmental Assessment Act* (the Act) in force at the time of the project review
- Chaired review panel for the Prosperity Gold-Copper Mine Project, Taseko Mines Ltd, British Columbia
- Chaired joint review panel for the Encana Shallow Gas Infill Development Project, Suffield Natural Wildlife Area, Alberta

- Provided strategic advice to Ontario Power Generation on its environmental assessment of the proposed expansion of the Darlington New Nuclear Power Plant, Ontario
- Assisted Ontario Power Generation in preparing for hearings before the joint review panel on the Darlington New Nuclear Power Plant Project
- Competed a report for the Forum of Federations on Environmental Impact Assessment in Federations and assisted the Forum of Federations in organizing and conducting an international conference on environmental assessment
- Completed a report on Environmental Assessment in Federations, Lessons for Canada, for the Major Projects Management Office, Natural Resources Canada

### **Canadian Environmental Assessment Agency, 1994 to 2005**

Acting President (appointed by Order in Council), November 2003 to March 2005

- Responsible for the overall administration of the Canadian Environmental Assessment Agency (the Agency) which manages the environmental assessment process for most major projects subject to the Act

Vice-President, Policy Development, December 1993 to December 2003

- Responsible for the five year review of the Act and resulting proposed amendments in 2003
- Responsible for proposed amendments to the Act made in 1994 before the Act's promulgation in 1995
- Appeared before Parliamentary Committees addressing amendments to the Act and on other matters associated with the Agency's administration
- Responsible for the development of regulations issued under the Act
- Chaired the Regulatory Advisory Committee, a multi-stakeholder committee that advised the Agency on the development of regulations and policies under the Act
- Served as federal lead in discussions on harmonization of federal/provincial environmental assessment leading to the development of the Sub-agreement on Environmental Assessment signed by federal and provincial Environment Ministers in 1998
- Led the development of various bi-lateral agreements with provinces that made provision for joint federal/provincial joint environmental assessment reviews
- Responsible for the development of the Cabinet Directive on Strategic Environmental Assessment which applies to federal policies, plans and programs
- Responsible for the development of guidance material on the implementation of the Act
- Responsible for research and development initiated by the Agency
- Responsible for intergovernmental affairs, liaison with Indigenous organizations and international programs
- Represented Canada in various international meetings on environmental assessment at the United Nations Economic Commission for Europe, the Organization for Economic Co-operation and Development (OECD) and the Council on Environmental Cooperation.

- Served as Canadian negotiator in the development of a transboundary agreement with the USA and Mexico under the auspices of the Council on Environmental Cooperation, formed as a result of the North American Free Trade Agreement

### **Federal Environmental Assessment and Review Office, 1978 to 1994**

#### Various positions

- Served as panel manager of review panels from 1978 to 1983 for federal reviews of:
  - the Eldorado Uranium Hexafluoride Refinery, Ontario
  - Eldorado Uranium Refinery, Saskatchewan
  - Arctic Pilot Project (Northern component) and
  - as co-manager of joint review panels with Quebec and Nova Scotia on the review of an LNG terminal for the Arctic Pilot Project
- Chaired federal review panels from 1983 to 1993 for reviews of:
  - CN Rail Twin Tracking Program, British Columbia
  - Fraser-Thompson Corridor Review, British Columbia
  - Northern Diseased Bison, Northwest Territories
  - Rafferty Alameda Dam, Saskatchewan
  - Runway expansion at Pearson International Airport, Ontario
- Co-chaired a joint federal/New Brunswick review panel of the Second Nuclear Reactor at Point Lepreau, New Brunswick in 1985
- Provided advice to staff on procedures for review panels
- Developed guidelines for the preparation of environmental impact statements and reviewed environmental impact statements
- Developed the participant funding program for review panels
- Involved in the establishment of terms of reference for review panels and the selection of members for review panels
- Delivered training programs on environmental assessment for federal employees
- Led Canada-wide consultations on improving the federal environmental assessment process in 1987
- Provided advice and input to the development of the Act
- Developed the Environmental Partnership Fund program (a funding program to initiate environmental enhancement projects on a cost shared basis with the federal government) for Environment Canada.
- Consultant to the World Health Organization on environmental assessment matters in India and Indonesia in 1979 and 1981 respectively
- Chaired a United Nations working group that developed the *Convention on Environmental Impact Assessment in a Transboundary Context* (the Espoo Convention), completed in 1991

### **United Nations Economic Commission for Europe, Geneva Switzerland, 1975 to 1978**

#### Environmental Affairs Officer

- Served as a member of the secretariat to international meetings on environmental issues
- Prepared various background reports for meetings on environmental impact assessment, environmental policies and strategies and on waste management

### **Environment Canada, Winnipeg, 1971 to 1975**

#### Senior Project Engineer

- Developed environmental monitoring programs
- Gathered data on best available technology from industrial sites to assist in the development of effluent regulations under the *Fisheries Act*
- Developed enforcement and compliance programs with industry for effluent discharges
- Provided advice to federal departments on the environmental effects of various industrial projects
- Investigated and recommended improvements to air emissions, effluent discharge and waste management practices at federal facilities in Manitoba, Saskatchewan and northwestern Ontario

### **National Health and Welfare, Public Health Engineering, 1970 to 1971**

#### Project Engineer

- Examined and reported on the adequacy of water supply and waste treatment systems at federal facilities and recommended improvements

### **The Proctor and Redfern Group, Consulting Engineers, 1966 to 1970**

#### As a student and a junior engineer

- Involved in the design and construction of municipal infrastructure and roads and highways

## **REVIEW PANEL REPORTS AND RECENT REPORTS AND PUBLICATIONS**

1. Federal Environmental Assessment Review Office, CN Rail Twin Tracking Program, British Columbia, Report of the Environmental Assessment Panel, 1985
2. Canada and the Province of New Brunswick, Second Nuclear Reactor Point Lepreau, New Brunswick, Report of the Environmental Assessment Panel, 1985
3. Federal Environmental Assessment Review Office, Fraser-Thompson Corridor Review, Report of the Environmental Assessment Panel, 1986
4. Federal Environmental Assessment Review Office, Northern Diseased Bison, Report of the Environmental Assessment Panel, 1990
5. Canadian Environmental Assessment Agency and the Alberta Energy Resources Conservation Board, Encana Shallow Gas Infill Development Project, Canadian Forces Base Suffield National Wildlife Area, Alberta, Report of the Joint Review Panel, 2009
6. Canadian Environmental Assessment Agency, Prosperity Gold-Copper Mine Project, Taseko Mines Ltd, British Columbia, Report of the Federal Review Panel, 2010

7. Connelly, Robert, Environmental Assessment in Federations, Lessons for Canada, prepared for the Major Projects Management Office, Natural Resources Canada, 2009
8. Connelly, Robert, Environmental Assessment in Federations, Prepared for the Forum of Federations, 2011
9. Connelly, Robert, Canadian and International EIA Frameworks as they apply to Cumulative Effects, Environmental Impact Assessment Review, 2011
10. Connelly, Robert, Expert Report in the Matter of an Arbitration Under Chapter Eleven of the North America Free Trade Agreement between Bilcon et al and Canada, 2011

## **EDUCATION AND PROFESSIONAL DEVELOPMENT**

### **Education:**

- BAsC (Civil Engineering) University of Waterloo, Waterloo, Ontario, Canada, 1970

### **Memberships and Associations:**

- Professional Engineers, Ontario

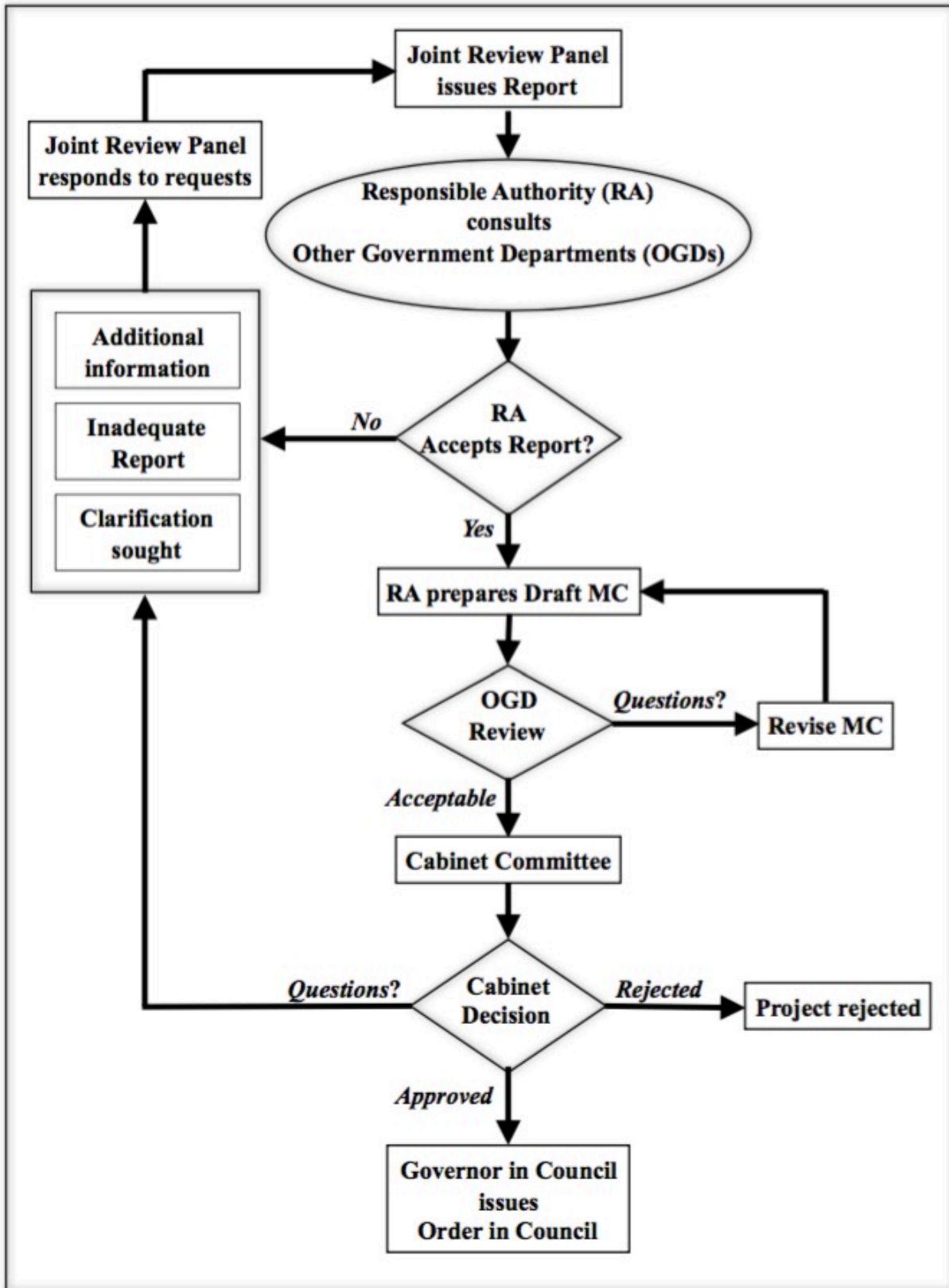
### **Languages:**

- English and French

### **Awards:**

- Received the Rose Hulman award, issued by the International Association for Impact Assessment in recognition of his contribution to and leadership in environmental assessment within Canada and internationally

ANNEX II – DECISION-MAKING PROCESS





### **ANNEX III – CONCERNS IDENTIFIED BY JRP, AS SUMMARIZED IN THE EXECUTIVE SUMMARY OF ITS REPORT**

1. Given that explosive weights used for operational blasting appear to fall well above those cited in the examples or the modelling, the Panel remained unconvinced that compliance would be feasible (page 5).
2. Because of the lack of specificity in the Project, many questions remain regarding specific impacts on nesting or migrating birds, mammals, lobster, herring, waterfowl etc. (pages 5-6).
3. Frequent exposure of the site to high wind speeds led the Panel to question the successful protection of valued plant communities on the site and nearby human receptors from occasional deposits of dust (page 6).
4. In the absence of a more reliable design and concrete management plan, the Panel was unable to conclude that the proposed structures would retain fine sediments and dissolved contaminants during extreme climatic events (page 7).
5. In the absence of extensive additional data from new and existing test wells, many of the uncertainties about groundwater remain very difficult to address, but the Panel believes that in the long term the quarry would negatively impact the yields of wells near the project site (page 7).
6. The Panel believes that the likelihood of high-volume, high flow rate emergency water releases during storm events sheds considerable doubt over the long-term sustainability of proposed plant and animal communities in the constructed wetland (page 7).
7. An expansion of the coastal buffer may not guarantee the health or survival of these plants, even if a physical barrier was provided between the more vulnerable and ecologically important portions of the buffer zone and the operating quarry (page 8).
8. However, the level of baseline information was often inadequate and insufficient to implement meaningful monitoring programs that would detect long-term changes and trigger mitigative action (page 8).
9. The Panel recognizes that limited data about salmon responses to acoustic disturbance, along with the inability to adequately predict blasting impacts, result in a high degree of uncertainty about possible behavioural effects on this endangered population (page 9).
10. Without the benefit of good baseline information on the species involved, extensive monitoring, and extensive ecosystem analysis, it becomes difficult to establish quantitative predictions (page 9).

11. The Panel believes that in the case of an accident that might bring in unwanted organisms, the highly dynamic character of this coastline would result in rapid dispersal of undesirable organisms that may negate any feasible preventive action (pages 9-10).
12. The potential effects of the Project on the tourism industry are difficult to predict with any certainty, given the many factors involved, but the Panel acknowledges that those involved in the tourism industry believe that the Project is not consistent with articulated provincial and local policy (page 11).
13. The Panel believes that in the EIS the Proponent's analysis of the cumulative effects of the Project, acting in concert with activities that should be considered as reasonably foreseeable, was not adequate (page 11).
14. The Panel believes that expansion of the present Project and the development of an additional quarry or quarries is reasonably foreseeable and that scenarios such as that should have been evaluated in the cumulative effects assessment (page 11).
15. The Panel concludes that the Proponent's public participation activities met the letter, but not the spirit, of the guidelines. The Panel believes that the lack of meaningful consultation is reflected in the failure of the EIS to include traditional community knowledge on key environmental and socio-economic issues (page 12).
16. The Panel concludes that a 100 m buffer would increase the probability that the buffer zones could fulfil the functions intended but would not guarantee the survival of the unique plant communities (page 12).
17. Government reviewers, many interveners and the Panel have little confidence in the effectiveness of this mitigation process [use of observers to spot marine mammals and water birds] under other than near perfect conditions (page 12).
18. The Panel predicts that given the Proponent's flawed understanding [of adaptive management], the eventual application of these tools could negate any positive intention to offset potential environmental impacts (pages 12-13).