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

BETWEEN:

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

Claimants

AND:

GOVERNMENT OF CANADA

Respondent

Rejoinder Expert Report of Robert G. Connelly

Connelly Environmental Assessment Consulting, Inc.

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I. INTRODUCTION

1. In my Expert Report for Canada's Counter-Memorial, I analyzed how government decision-makers would address the Whites Point project but for the breach of the North American Free Trade Agreement ("NAFTA") identified by the Tribunal. Nothing in the Claimants' Reply Memorial or Expert Reports changes my analysis. As I stated in my Counter-Memorial Report, in the hypothetical situation where the Joint Review Panel ("JRP") adopted a NAFTA-compliant approach, government decision-makers could still have reasonably denied approval to the Whites Point Quarry project.[1]

2. In this Reply Report, I explain why the main arguments submitted by the Claimants and their experts against my analysis are incorrect. Specifically, this Report demonstrates (1) the incomplete nature of the JRP Report absent the JRP's findings on community core values ("CCV"); (2) the implications of an incomplete JRP Report; (3) the role of government officials in the Environmental Assessment ("EA") process; and (4) the Responsible Authority's ("RA") and Governor in Council's ("GIC") authority to find a significant adverse environmental effect ("SAEE") under the *Canadian Environmental Assessment Act* ("the Act") and to reject a project.

II. ABSENT CCV FINDINGS, THE JRP REPORT IS INCOMPLETE

A. Mr. Estrin Fails to Explain Why the JRP Report is Complete in the But For Scenario

3. In his Reply Expert Report, Mr. Estrin states that it is reasonable to conclude that the RA and the GIC chose to regard the JRP Report as complete and in compliance with the Act.[2] I agree. Presumably, the RAs and GIC determined that the Report satisfied the Act's requirements. The RAs and GIC likely considered the finding of SAEE on CCVs as a SAEE on socio-economic conditions that was caused by a change to the physical environment and that could not be mitigated. This is the most reasonable understanding that can be drawn for why government decision-makers considered the JRP Report complete. If the federal and Nova Scotia Environment Ministers considered the Report incomplete, they could have instructed the JRP to reconvene in order to complete the Report. Moreover, I presume that having reached the

[1] **RE-3**, Expert Report of Robert G. Connelly, June 9, 2017 ("Connelly Report I"), ¶ 88.

[2] Reply Expert Report of David Estrin, August 20, 2017 ("Estrin Reply Report"), ¶ 22.

conclusion that the JRP Report was complete and that the Whites Point project should not receive approval, the GIC considered it pointless to seek clarification of the Report in accordance with the GIC's authority under s. 37(1.1)(b) of the Act.

4. Yet this does not address the but for scenario. Remove the SAEE finding, and the JRP Report would contain serious deficiencies, as I describe below. In my opinion, Mr. Estrin fails to articulate why government decision-makers would still consider the Report complete in the but for world contemplated by the Tribunal's finding in its Award on Jurisdiction and Liability.

B. Absent the JRP's CCV Findings, the JRP Report Contained Serious Deficiencies

5. A panel report would be considered complete if it reached a conclusion on the matter of significance – that is, no SAEE or SAEE – for s. 16 factors in the Act.[3] Where a panel reached conclusions that there would be no SAEEs, it would need to specify mitigation measures for those factors to ensure the effects remained insignificant. Thus, if a panel reaches no conclusion on whether certain environmental effects are significant, and also provides no specific recommendations on how to mitigate effects to ensure no SAEEs in the future, the report would be incomplete. The panel would have not fulfilled its mandate to determine the significance of environmental effects as required by the Act.

6. In the case of the Whites Point project, absent the SAEE finding based on CCV, the JRP Report would be incomplete, for at least two reasons: (1) it would make no significance finding

[3] **R-1**, *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, June 23, 1992 ("The Act"), s. 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" [Emphasis added].

one way or the other for the project's effects on critical valued ecosystem components ("VECs") over which the JRP expressed concern; and (2) the Report raised numerous concerns about the environmental effects of the project, but made no recommendations on how any of those effects could be mitigated if the project received approval. Thus the GIC would not have the information necessary to make a proper decision on whether to approve the project, or what terms and conditions to require.

1. The JRP Did Not Complete its SAEE Analysis on Critical Valued Ecosystem Components

7. Mr. Estrin states that no relevant SAEE had been found likely by the JRP.[4] He relied on the JRP's conclusion that, "with effective application of appropriate mitigation measures, competent project management and appropriate regulatory oversight, most project effects should not be judged 'significant'".[5] [emphasis added] Yet Mr. Estrin disregarded the key word – "most". The JRP did not say "all" project effects should not be judged significant. Moreover, Mr. Estrin quoted selectively and did not acknowledge the full sentence in the JRP Report. The sentence continues as follows, after 'significant': "the accumulation of concerns about adequacy leads the Panel to question the Project."[6]

8. Ms. Griffiths notes in her Counter-Memorial Expert Report that the JRP had concerns about a number of other environmental effects of the project.[7] The evidentiary record and JRP Report show the unsettled issues raised concerns about the project. In particular, the JRP was concerned about the project's impacts on VECs including the endangered North Atlantic right whale and the American lobster.[8] Although the JRP did not expressly conclude that those other effects were likely SAEEs under the Act, it did not declare these effects not to be significant. As Ms. Griffiths explains, it appears that the JRP simply did not complete its analysis.[9]

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[4] Estrin Reply Report, ¶ 33.

[5] **R-212**, JRP Report, pp. 83-84.

[6] **R-212**, JRP Report, p. 84.

[7] **RE-1**, Expert Report of Lesley Griffiths, June 9, 2017 ("Griffiths Report I"), ¶ 61.

[8] **RE-1**, Griffiths Report I, ¶ 62(e).

[9] **RE-1**, Griffiths Report I, ¶ 60.

9. Proponents bear the onus to demonstrate to a panel that a project will likely cause no SAEEs after mitigation. This is the essence of the environmental impact statement. The *Greenpeace* case suggests a panel must give "some consideration" to the various environmental effects of a project.[10] The Federal Court of Appeal held that although the JRP was unable to consider the environmental effects of HSE [hazardous substance emissions] to the same extent as other environmental effects, the JRP nevertheless was able to recommend a number of measures to mitigate these effects. This suggests that a panel must complete its analysis of the significance of project effects after mitigation. If a panel report fails to reach a conclusion on significance after mitigation, one cannot presume that the panel found the effects insignificant, as Mr. Estrin does. Instead, if a report fails to reach a conclusion on significance, only one conclusion is possible: the report is incomplete. Thus, with the finding of CCV removed from the JRP Report, I believe the RAs and the Minister of the Environment would have no option but to find the Report incomplete because it reached no conclusions on significance after mitigation for project effects on critical VECs.

2. The JRP Did Not Recommend any Mitigation Measures

10. The JRP Report provides no information on how effects, some of them adverse, could be mitigated. Despite stating, "the accumulation of concerns about adequacy leads the Panel to question the Project",[11] the JRP recommended rejection of the project without suggesting potential mitigation in case government decision-makers decided to approve the project with conditions.

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[10] **R-784**, *Ontario Power Generation v Greenpeace Canada*, 2015 FCA 186 (application for leave to appeal to the Supreme Court of Canada dismissed) ("*Ontario Power Generation v. Greenpeace*"), ¶ 153: "This led to the absence of a bounding scenario analysis for some of the HSE environmental effects. As a result, the Panel was unable to quantitatively assess all of those environmental effects until reactor selection had occurred. Out of necessity, the Panel was left to undertake a qualitative assessment of such effects, including the existence of applicable present and future regulatory practices and mitigative measures. Clearly, the consideration by the Panel of the environmental effects of HSE was not undertaken to the same depth or extent as were other environmental effects. However, it is our view that this lesser degree of consideration nonetheless constitutes "some consideration" of the environmental effects of HSE by the Panel. Indeed, the Panel was able to make a number of recommendations with respect to the HSE environmental effects" [Emphasis added].

[11] **R-212**, JRP Report, p. 84.

11. The JRP in the *Greenpeace* case ("the Darlington JRP"[12]) did a much more thorough review than the Whites Point JRP of all factors in the assessment, including mitigation measures. In fact, Justice Russell of the Federal Court found the Darlington EA Report to be "highly competent work."[13] The Darlington JRP concluded:

> The Panel concludes that the Project is not likely to cause significant adverse environmental effects, provided the mitigation measures proposed and commitments made by OPG [Ontario Power Generation] during the review and the Panel's recommendations are implemented.[14]

12. The Darlington JRP Report[15] made 67 recommendations, many of which deal with mitigation measures. On the core matter under dispute – hazardous substance emissions – the Darlington JRP recommended mitigation measures. Thus the Federal Court of Appeal ruled that the JRP had complied with s. 16 of the Act by giving "some consideration" to the matter. In contrast, the Whites Point JRP offered no mitigation measures on any environmental effect.

13. I take note of the fact that the Tribunal appears to have appreciated the seriousness of the JRP's failure to propose mitigation measures on any factor. The Tribunal stated that by not conducting a proper SAEE analysis "on the rest of the project effects" besides CCV, the JRP "denied the ultimate decision makers in government information which they should have been provided".[16] This is a fundamental point. The Tribunal found that the JRP did not provide government decision-makers with information on mitigation that they should have received. For instance, the JRP provided no recommendations on how to mitigate the project's impacts on the endangered North Atlantic right whale, despite raising many concerns about how the project would affect right whales. The same is true for the American lobster. These errors denied government decision-makers with important information.

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[12] The Darlington New Nuclear Power Plant Project, a joint CEAA and Canadian Nuclear Safety Commission panel.

[13] **R-785**, *Greenpeace Canada v. Canada (Attorney General)*, 2014 FC 463 [Excerpt], ¶ 394; see also **R-784**, *Ontario Power Generation v. Greenpeace*, ¶ 23: "The respondents argued before the Federal Court Judge […] that there were 25 deficiencies in the EA Report. The Judge rejected the majority of the respondents' arguments and in general found the EA Report to be 'highly competent work' (Federal Court Decision at para 394)".

[14] **R-786**, Joint Review Panel Environmental Assessment Report, Darlington New Nuclear Power Plant Project, August 2011, Report Summary, p. i.

[15] **R-786**, Joint Review Panel Environmental Assessment Report, Darlington New Nuclear Power Plant Project, August 2011 Report Summary, pp. i-x.

[16] Award, ¶ 535.

14. In the but for scenario where the RAs and GIC received a JRP Report, (a) with no recommendation on whether certain project effects would in fact be likely significant adverse environmental effects, (b) citing an "accumulation of concerns" that led the JRP to question the Project, and (c) containing no mitigation measures, the JRP Report would contain serious deficiencies. With CCV removed and no mitigation measures identified for any other project effects – including on critical VECs – the Environment Ministers would likely consider the Report incomplete as the JRP would have failed to meet its terms of reference for the review.

III. IMPLICATIONS OF AN INCOMPLETE JRP REPORT

A. Environment Ministers Would Likely Seek Further Information from the JRP

15. In the relevant but for scenario, the Environment Ministers would have received a JRP Report with no conclusion on SAEE and no advice on how to mitigate adverse environmental effects that the JRP identified. RAs rely on panels to provide such advice to the decision-makers. In the absence of such information, it is likely that the Environment Ministers would have instructed the JRP to reconvene to provide the missing information and advice. This would have included information and recommendations on potential adverse effects and potential mitigation measures related to whales, lobsters, noise, air and water pollution, and socio-economic effects caused by a change in the environment (e.g. the fishery, whale watching).

B. RAs and GIC Could Have Reasonably Denied the Project

16. Upon gaining further information from the JRP, the RAs and GIC could have reached a conclusion that there were SAEEs on VECs such as whales and lobsters, in two ways. First, the Expert Reports of Ms. Griffiths demonstrate that in the absence of the NAFTA breach, a panel reviewing the environmental record in the Whites Point project could reasonably find a SAEE that could not be mitigated. Second, as I explain below, RAs and the GIC also have authority to find SAEEs, independent from the conclusions of the JRP Report. If a SAEE is identified, the RAs and GIC could have reasonably denied the project by finding the SAEE not 'justified in the circumstances.'

C. RAs and GIC Could Have Required Terms and Conditions That Would Affect Project Viability

17. Alternatively, in order to mitigate the effects of the project, the RAs and GIC could have imposed mitigation measures through terms and conditions. In the case of the Whites Point project, as Ms. Griffiths explains in her Counter-Memorial Report,[17] there would be limited options to mitigate the effects of blasting on whales and lobsters. The RAs could have imposed stringent blasting conditions to blast less frequently. These conditions could have rendered the project unprofitable or even unfeasible. As Mark McLean notes in his Witness Statement,[18] conditions concerning a *Fisheries Act* Authorization or a *Species at Risk Act* Permit could have rendered the Whites Point project unprofitable in other ways as well. The RAs could reasonably impose conditions restricting vessel speeds, or restricting entry to the port only to times when visibility was good, in order to reduce the risk of vessel strikes on the North Atlantic right whale. These conditions could have reduced the number of ships coming in and out of the Whites Point marine terminal. In that case, the conditions could have significantly undermined the profitability of the Whites Point project, or rendered the project economically unviable. In fact, the JRP found that "in some cases the costs associated with mitigation could become prohibitively expensive (thereby undermining the viability of the Project)".[19] Moreover, as a result of information gathered from indigenous peoples, the RAs could have required onerous conditions that would have affected the economics of the project. Accordingly, it is wrong for Mr. Estrin to assume that government decision-makers would simply grant full approval to the project without imposing rigorous terms and conditions that could affect the viability of the project. Based on the record, government decision-makers could have reasonably required terms and conditions that would have rendered the project economically unviable.

IV. ROLE OF FEDERAL DEPARTMENTS IN THE EA PROCESS

A. Panels Do Not Expect Federal Departments to Reach a Conclusion on SAEE

18. Mr. Estrin misinterprets the role of government officials in the EA process. He devotes a considerable portion of his Report to support his theory that a "key factor" in considering the

[17] **RE-1**, Griffiths Report I, ¶¶ 91-93 and 118-119.

[18] **RW-1**, Witness Statement of Mark McLean, November 6, 2017, ¶ 23.

[19] **R-212**, JRP Report, p. 96.

approvability of the Whites Point project is whether government officials told the JRP that any component of the project would likely cause a SAEE.[20]

19. This is an important issue to clarify. It is not the usual practice of federal departments to state that there are SAEEs in their area of expertise. I will expand on this point by explaining how a SAEE is determined under the Act, and then examining some of the panel reviews referenced by Mr. Estrin. In my Expert Report of December 9, 2011, I explained how significance is determined,[21] and I note that Ms. Griffiths refers in her Report[22] to the same Reference Guide prepared to support the implementation of the Act that I used. In particular, I noted that:

> The Reference Guide sets out the following five criteria for determining if an adverse effect is significant after the application of mitigation measures (which I discuss below): magnitude (severity of the effect); geographic extent (localized or regional effect?); duration and frequency (long term or temporary?); reversibility (is the effect reversible?); and, ecological context (is the location a pristine environment and ecologically fragile?). For example, using fish habitat as an environmental factor, if the effect would result in the permanent elimination of an important fish spawning ground, the effect would be severe, long term, and irreversible, and consequently it would be reasonable to conclude that the effect would be significant.[23]

20. The Prosperity Gold-Copper Mine Project panel review offers an example of a panel applying the Reference Guide. The panel found a SAEE for fish and fish habitat using the Reference Guide criteria in a manner almost identical to the quote from my Expert Report above. The panel report stated:

> In the Panel's view, the Project's effects on fish and fish habitat would be high magnitude, long-term and irreversible and would include the loss of an area that was stated to be of value as both a First Nation food fishery and recreational fishery.

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[20] Estrin Reply Report, ¶¶ 54-161.

[21] Expert Report of Robert G. Connelly, December 2, 2011, ¶ 77.

[22] **RE-1**, Griffiths Report I, ¶ 34, citing to **R-20**, *Reference Guide: Determining Whether a Project is Likely to Cause Significant Adverse Environmental Effects*, Canadian Environmental Assessment Agency (Nov. 1994).

[23] Expert Report of Robert G. Connelly, December 2, 2011, pp. 30-31.

> The Panel concludes that the Project would result in a significant adverse effect on fish and fish habitat in the Teztan Yeqox (Fish Creek) watershed.[24]

21. The Reference Guide does not advise panelists, government decision-makers, or federal departments that one factor in determining if an adverse effect is significant is whether government officials told the panel that the project would cause a SAEE. Mr. Estrin's assertion that this is a "key factor" is unsupported in the applicable law. Instead of advising federal authorities to reach conclusions on SAEE, s. 12(3) of the Act states that federal authorities are to provide "expert information or knowledge" on a project when requested by a panel.[25] During the panel review stage, it is the panel that retains the responsibility to reach a conclusion on SAEEs. The RA and other federal authorities are to assist the panel in making that significance determination by providing information and facts.

22. Panels regularly request information from federal departments to assist them in making a determination on SAEEs, as Mr. Estrin points out.[26] In response to such requests, departments will often advise panels that certain effects will be insignificant if specific mitigation measures are required. Or they may speak to uncertainty about such effects. But federal departments typically do not provide conclusions that an effect will be significant. That is not their normal practice. In fact, federal departments have generally been careful in panel reviews not to reach a conclusion that a SAEE is likely. Their approach is to assist the panel in arriving at its own conclusion as to whether mitigation measures are feasible, and whether, with appropriate mitigation, an effect will be insignificant.

23. It would be unusual for a federal department to advise a panel on how it should apply the law. Federal departments provide expert advice in an EA. It is the panel which is authorized to reach SAEE conclusions at this stage of the EA process. Even if a federal department states a SAEE would or would not occur, that does not bind a panel. Nor do the statements of a federal department in the review stage bind the RA and GIC's discretion over whether to approve a

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[24] **C-576**, Report of the Federal Review Panel, Prosperity Gold-Copper Mine Project, Taseko Mines Ltd, British Columbia, July 2, 2010, p. 98.

[25] **R-1**, The Act, s. 12(3). Subsection 12(3) of the Act states: "Every federal authority that is in possession of specialist or expert information or knowledge with respect to a project shall, on request, make available that information or knowledge to the responsible authority or to a mediator or a review panel."

[26] Estrin Reply Report, ¶¶ 50-161.

project. The panel reviews cited by Mr. Estrin demonstrate how departments broadly understand that their role is not to reach a conclusion on SAEEs, as I outline below.

1. Lower Churchill Hydroelectric Generation Project

24. The Department of Fisheries and Oceans ("DFO") acknowledged their role in the public hearings held by the Lower Churchill Hydroelectric Generation Project JRP. Responding to a question from the chair, Ms. Griffiths, Mr. Beiger of DFO stated:

> From the very start, we interact with the Proponent to provide advice on how to avoid harmful impacts to fish habitat, how to manage them and mitigate them, so -- but we never -- the decision to actually issue an authorization and to pronounce on whether an authorization is appropriate and what conditions would be attached to it is never made until after a review is completed and, in this case, the Panel is finished.[27]
>
> [emphasis added]

25. Mr. Bieger further stated in his presentation at the hearing:

> In relation to significance, we continue to evaluate the mitigations that the Proponent is proposing to implement to avoid or address possible negative effects on fish and fish habitat including those that are proposed during the construction period, during the impoundment, the fish habitat compensation strategy and so on. We are continuing to assess those and we will determine, ultimately, the significance of any residual impacts that the project has on the aquatic environment after the conclusion of the panel hearings. And we'll consider panel recommendations, of course, and other information that is received throughout the hearing process; it's not over yet. So we will make a determination of significance when -- at the right time.[28]
>
> [emphasis added]

26. In response to a question from Sierra Club Atlantic, Dr. Hanson with Environment Canada stated:

> As the panel has indicated this morning, it is their job and their duty to administer the term "significant" to these impacts. What we tried to convey

[27] **R-787**, Lower Churchill Hydroelectric Generation Project, Joint Review Panel Hearing Transcript, Volume 4, March 5, 2011 [Excerpt], p. 76:20 – p. 77:3.

[28] **R-788**, Lower Churchill Hydroelectric Generation Project, Joint Review Panel Hearing Transcript, Volume 23, March 31, 2011 [Excerpt], p. 99:13 – p. 100:3.

> through Environment Canada and our analysis is the relative magnitude of these proposed changes.[29]
>
> [emphasis added]

27. Mr. Estrin offers the Lower Churchill Hydroelectric Generation Project review as an example of a federal department offering its view that the project would have no SAEEs on environmental matters, with well-executed mitigation activities.[30] Environment Canada stated that it "expects there will not be any significant adverse effects on environmental matters with the Department's mandate."[31] Environment Canada also noted in its presentation to the JRP:

> Our recommendations pertaining to wetlands are that the Proponent is encouraged to implement the federal policy on wetland conservation goal of no net loss of wetland function, first, by creating a comparable amount of riparian wetland habitat, by implementing a follow-up program to determine the effectiveness of habitat creation and, lastly, by committing to an adaptive management mechanism if the proposed mitigation fails to perform. The creation of riparian wetland habitat should furthermore replace the lost habitat function for wetland sparrows.[32]

28. Despite Environment Canada's opinion, the JRP concluded that there was a SAEE on riparian habitat:

> The Panel concludes that the residual adverse effect of the Project on wetlands and riparian habitats, even with appropriate mitigation, is significant.[33]

In this instance, the panel did not accept the advice from Environment Canada regarding SAEEs. It had every right to decide not to do so. The JRP presumably also considered advice it received from other participants in reaching this conclusion.

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[29] **R-789**, Lower Churchill Hydroelectric Generation Project, Joint Review Panel Hearing Transcript, Volume 13, March 17, 2011 [Excerpt], p. 162:20 – p. 163:1.

[30] Estrin Reply Report, ¶¶ 89-91.

[31] **C-1405**, Letter from Environment Canada to Lower Churchill Hydroelectric Generation Project Joint Review Panel, attaching Submission of Environment Canada, February 21, 2011, p. 6 of Submission.

[32] **R-789**, Lower Churchill Hydroelectric Generation Project, Joint Review Panel Hearing Transcript, Volume 13, March 17, 2011 [Excerpt], p. 110:4-16.

[33] **C-681**, Report of the Joint Review Panel, Lower Churchill Hydroelectric Generation Project, Nalcor Energy, Newfoundland and Labrador, August 2011, p. 100.

29. It is not unusual for a federal department to state that no SAEEs are likely with appropriate mitigation, or that there is uncertainty about an environmental effect based on the information available at the time of the hearing. Yet this is distinct from concluding that a SAEE is likely at the hearing. Federal departments may conclude that a SAEE is likely at a later stage in the EA process, after receiving a panel report. But federal departments understand that during the panel's review process, it is only the panel that makes the determination that SAEEs are likely. Federal departments widely respect that their role during the panel review is to provide information to assist the panel with this determination. The panel has a mandate to gather input from a wide audience beyond federal departments, which may include the general public, indigenous people and organizations, provinces, environmental groups, business organizations, and various experts engaged by the panel or by participants. Federal departments reserve their judgement that a SAEE is likely until after they have received the advice of a panel.

2. Prosperity Gold-Copper Mine

30. In the Prosperity Gold-Copper Mine panel review, an exchange between myself, as the chair, and Mr. Silverstein of DFO demonstrates that DFO was reluctant to suggest that there may be SAEEs related to compensation plans for fish and fish habitat:

> MR. SILVERSTEIN: So DFO, as I mentioned, and the Crown, is required to consult with First Nations, and we would attempt to include First Nations in Compensation Planning to ensure that whatever Compensation Plan is developed would also include their objectives. In the existing situation, detailed discussions with the local First Nations around their objectives have not yet occurred and therefore I couldn't comment directly on how they have been incorporated in this situation. I will note, however, though, that Compensation Planning is the responsibility of the Proponent. DFO is there to provide advice and guidance and ultimately approval. And so we view that as a shared responsibility with the Proponent to include First Nations objectives and views on the Compensation Plan.
>
> THE CHAIRMAN: Well, just to pursue that further, what if they are very clear that this is unacceptable from their perspective, how would you deal with that?
>
> MR. SILVERSTEIN: I think that speaks, Mr. Chairman, to the type of Review Process that we have here, which is as public and as the role of the Review Process that is possible, with as high a decision level on the proposed Project as is possible. And in part, when DFO made a recommendation to the Minister of

> Environment that the Project be reviewed by Review Panel, those considerations came into play.[34]

31. This exchange reveals that even when faced with the potential strong opposition to a project from indigenous groups, the RA was reluctant to perform the panel's role of reaching conclusions on SAEE.

3. New Prosperity Gold-Copper Mine Project

32. In the New Prosperity Gold-Copper Mine Project, Ms. Rotinsky of DFO stated:

> We didn't present a determination on the significance of the facts. That is the purpose of this panel, the panel hearings, and of course up to the panel to determine.[35]
>
> [emphasis added]

B. The Statement of Transport Canada in the Prosperity Case is a Deviation From Normal Practice

33. Mr. Estrin places importance on the statement by Transport Canada in the Prosperity Gold-Copper Mine Project review. Transport Canada stated that the project would likely cause significant adverse effects on navigation. The panel reached this conclusion as well.[36] I chaired that panel, and found this conclusion by Transport Canada unusual. In fact, even Transport Canada noted that this case was unusual. In response to a question from Mr. Bell-Irving on behalf of Taseko mines, Mr. Mackie from Transport Canada stated:

> In delivery of the ***Navigable Waters Protection Act***, the provisions of the Act, it is normal for staff, for myself, to look at the interferences to navigation at the site of the proposed work. Normally, in most cases, what we're looking at is an interference, not a complete extinguishment. This proposal is unusual. We are looking at the extinguishment of a couple of waterways where the public right of navigation exists. And we've had to think outside the box. Now, the examples of mitigation through signage, public notification, those are examples of mitigation for a work where the interference might be associated with the construction

[34] **R-790**, Prosperity Gold-Copper Mine Project, Federal Review Panel Hearing Transcript, Volume 31, April 28, 2010 [Excerpt], pp. 6233-6234.

[35] **R-791**, New Prosperity Gold-Copper Mine Project, Federal Review Panel Hearing Transcript, Volume 8, July 30, 2013 [Excerpt], p. 247:6-10.

[36] Estrin Reply Report, ¶¶ 110-114, citing to **C-728**, Report of the Federal Review Panel, Prosperity Gold-Copper Mine Project, Taseko Mines Ltd., British Columbia, July 2, 2010, p. 158.

> activities of that work. Once it's in, it's not necessarily an interference any longer. And clearly those types of mitigation for the interference wouldn't apply in this case. Those are examples of a small logging road bridge over a relatively rural waterway.[37]
>
> [emphasis added]

34. In response to a question from a participant, Ms. Crook, Mr. Mackie later stated:

> Nationally the provision of the NWPA that we're considering, Section 23, the Governor in Council, or actually an exemption, has been used four other times, there's not a lot of experience with it. The normal delivery of the ***Navigable Waters Protection Act*** would see to mitigate the interference at the point of the work. That can't be done here.[38]
>
> [emphasis added]

35. Mr. Estrin also refers to statements made by Transport Canada in the New Prosperity Gold-Copper Mine review.[39] In this instance, while there were similarities with the Prosperity review in that a smaller, less accessible lake, Little Fish Lake, would no longer be navigable, Transport Canada was careful not to reach a conclusion that a significant adverse effect on navigation was likely. Transport Canada stated that "the impact of the TSF to navigation within the Project area is irreversible and appropriate mitigation measures for some effects may not exist."[40] However, I find no basis for Mr. Estrin's inference that:

> The Transport Canada statements quoted above certainly make clear Transport Canada found that a number of aspects of the New Prosperity project would have a significant adverse effect on navigation and in turn on Aboriginal Rights being exercised in respect of navigation on the affected lakes.[41]

36. Transport Canada did not state that a significant adverse effect on navigation was likely. Rather, it provided information to assist the panel in making this determination. The panel determined that no SAEE was likely on navigation. In its Report, the panel stated:

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[37] **R-792**, Prosperity Gold-Copper Mine Project, Federal Review Panel Hearing Transcript, Volume 33, April 30, 2010 [Excerpt], pp. 6966:20 – p. 6967:14.

[38] **R-792**, Prosperity Gold-Copper Mine Project, Federal Review Panel Hearing Transcript, Volume 33, April 30, 2010 [Excerpt], p. 6971:2-8.

[39] Estrin Reply Report, ¶¶ 116-127.

[40] Estrin Reply Report, ¶ 121.

[41] Estrin Reply Report, ¶ 123.

> The Panel notes Transport Canada's concerns about the Project, namely that the tailings storage facility would interfere with navigation and that suitable mitigation to compensate for these losses may not exist. The Panel agrees with Transport Canada's assertion that Little Fish (Y'anah Biny) is likely important for Aboriginal people in conducting traditional activities, of which are supported by navigation. The Panel accepts Transport Canada's view that the Project's effects on navigation on Little Fish Lake and portions of Fish Creek (Teztan Yeqox) would be irreversible but are small in magnitude with a limited geographic extent. As a result, the Panel determines that the Project would have an adverse but not significant effect on navigation.
>
> The Panel accepts the information provided during the community hearing sessions indicates that Little Fish Lake (Y'anah Biny) is likely important for Aboriginal people in conducting traditional activities, some of which are supported very modestly by navigation. The Panel also accepts that Aboriginal peoples will have less ability to navigate in the area around Little Fish Lake for traditional purposes.
>
> The Panel accepts that Transport Canada will ensure any effects on navigation posed by the Project are minimized through appropriate mitigation measures.[42]

The panel concluded that:

> The Panel concludes that the Project would not result in a significant adverse effect on navigation.[43] [Emphasis added]

37. This case demonstrates that the role of departments is to provide information to assist the panel in reaching a decision on the significance of an adverse effect. Transport Canada adhered to normal practice of not concluding that an adverse effect on navigation was likely. What it provided was information to assist the panel in its determination of significance.

C. Panels Have Found a SAEE Without Federal Departments Describing Effects as SAEEs

38. Mr. Estrin refers to panel reviews which actually support my point that panels make SAEE determinations without reliance on federal departments stating that SAEEs are likely. I refer to the three reviews mentioned above where the panels found a SAEE without a federal

[42] **R-793**, Report of the Federal Review Panel, New Prosperity Gold-Copper Mine Project, Taseko Mines Ltd., British Columbia, October 31, 2013 [Excerpt], p. 234.

[43] **R-793**, Report of the Federal Review Panel, New Prosperity Gold-Copper Mine Project, Taseko Mines Ltd., British Columbia, October 31, 2013 [Excerpt], p. 234.

department stating that a SAEE was likely. In each review, the departments providing input were Environment Canada, DFO, Health Canada, Natural Resources Canada, and Transport Canada.

39. First, the panel in the Lower Churchill Hydroelectric Generation Project found four SAEEs,[44] even though no federal department stated that SAEEs were likely on any VEC. Second, the panel in New Prosperity Gold-Copper Mine Project[45] found three SAEEs, although no federal department advised that SAEEs were likely. Third, the panel in Prosperity Gold-Copper Mine Project found five SAEEs;[46] as Mr. Estrin and I note, Transport Canada was of the view there would be just one likely SAEE, on navigation.

40. These instances, along with the statements made by various federal departments noted in paragraphs 26-33 above, show that the typical practice of federal departments is not to make conclusions that SAEEs are likely. As I stated in my Expert Report of December 2, 2011: "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."[47]

[44] **C-681**, Report of the Joint Review Panel, Lower Churchill Hydroelectric Generation Project, Nalcor Energy, Newfoundland and Labrador, August 2011, Executive Summary, p. xii: ("The Panel has determined that the Project would have several significant adverse environmental effects on the aquatic and terrestrial environments, culture and heritage and, should consumption advisories be required in Lake Melville, on land and resource uses.")

[45] **R-793**, Report of the Federal Review Panel, New Prosperity Gold-Copper Mine Project, Taseko Mines Ltd., British Columbia, October 31, 2013, Executive Summary, p. ix: ("The Panel concludes that the New Prosperity Project would result in several significant adverse environmental effects; the key ones being effects on water quality in Fish Lake (Teztan Biny), on fish and fish habitat in Fish Lake, on current use of lands and resources for traditional purposes by certain Aboriginal groups, and on their cultural heritage. The Panel also concludes there would be a significant adverse cumulative effect on the South Chilcotin grizzly bear population, unless necessary cumulative effects mitigation measures are effectively implemented.")

[46] **C-576**, Report of the Federal Review Panel, Prosperity Gold-Copper Mine Project, Taseko Mines Ltd, British Columbia, July 2, 2010, Executive Summary, p. ii: ("The Panel concludes that the Project would result in significant adverse environmental effects on fish and fish habitat, on navigation, on the current use of lands and resources for traditional purposes by First Nations and on cultural heritage, and on certain potential or established Aboriginal rights or title. The Panel also concludes that the Project, in combination with past, present and reasonably foreseeable future projects would result in a significant adverse cumulative effect on grizzly bears in the South Chilcotin region and on fish and fish habitat.")

[47] Expert Report of Robert G. Connelly, December 2, 2011, ¶ 120.

V. AFTER A PANEL ISSUES ITS REPORT, THE RESPONSIBLE AUTHORITIES AND GOVERNOR IN COUNCIL HAVE AUTHORITY TO FIND A SAEE AND REJECT A PROJECT

A. RAs and GIC Are Not Bound by the Panel's Findings or Recommendations

41. In his Reply Report, Mr. Sossin states that the Ministers were required by law to approve the project because the JRP did not conclude that the project had likely SAEEs besides CCV.[48] Similarly, Mr. Estrin states that, "[t]he GIC would not have a 'decision-making' role unless the review panel had found there was likely to be (legitimate) SAEE, which is not what the JRP found."[49] I found no provision in the applicable legislation to support these statements. In fact, they seem to ignore s. 37(1.1) of the Act, which provides that the RA must submit a response to a panel report to the GIC for approval, regardless of a panel's finding of SAEE. Further, I note the Rejoinder Expert Report of Justice Evans, who states that s. 37(1.1) says nothing about the circumstances in which the GIC may approve a panel report.[50] Moreover, Mr. Estrin and Mr. Sossin appear to misunderstand a key aspect of the Canadian environmental review process: the RA and GIC have independent authority to find a SAEE.

B. RAs and GIC Can Find a SAEE Even if the Panel Did Not Find One

42. The RAs and GIC have independent authority to find a SAEE, even if the panel does not find one. A panel report is recommendatory. Section 37 (1) states that the RA shall take into consideration the report of a panel, and s. 37(1.1) indicates that the RA shall respond to the report with the approval of the GIC.[51] An RA is not required to accept the findings of a panel –

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[48] Reply Expert Opinion of Lorne Sossin, August 3, 2017 ("Sossin Reply Report"), ¶¶ 8-9.

[49] Estrin Reply ¶ 36.

[50] **RE-14**, Rejoinder Expert Report of John Evans, November 6, 2017 ("Evans Report II"), ¶ 59: ("s. 37(1.1) says nothing about the circumstances in which the GIC may approve the response of a responsibility authority to a review panel's report. In particular, s. 37(1.1) does not relate the GIC's approval to the review panel's report and recommendations, unlike the provisions of s. 37(1) governing the responsible authority's powers following the receipt of a report. Unlike s. 37(1), s. 37(1.1) imposes no restrictions on the GIC's exercise of its power of approval. What is clear, however, is that any response by a responsible authority must be approved by the GIC, and any action taken by that authority under s. 37(1) must be in conformity with the approval.")

[51] **R-1**, The Act, s. 37(1). Subsection 37(1) of the *Act* states: "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(1), the comprehensive study report […]" [Emphasis added]; **R-1**, The Act, s. 37(1.1). Subsection 37(1.1) of the *Act* states: "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."

only to consider them. Typically, RAs rely on the finding of panels, which reach conclusions on significance. Yet it is entirely permissible for a RA, having seen the evidentiary record from the environmental review process, to reach a different conclusion on significance than a panel. This could include finding, with the approval of the GIC, that a SAEE is likely even if a panel did not reach this conclusion. If so, the RA would also need the approval of the GIC on whether the project is justified in the circumstances.

43. After considering the evidence before it from myself and others on the EA process in Canada, the Tribunal acknowledged that a government could have arrived at the same conclusion as a recommendatory body (such as a panel), but might have done so by pursuing investigations on its own that might not be viewed as acknowledging and adopting the conduct of the recommendatory body.[52] Although the Tribunal found this did not happen in the case, the Tribunal made no such conclusion regarding the but for scenario. Nor did the Tribunal conclude that a government, in conducting its own investigation, could not have arrived at a different conclusion than that of a recommendatory body. With CCV removed from the JRP Report, the RAs and GIC could have found a SAEE and rejected the project independently from the JRP's findings and recommendations. As noted earlier, Ms. Griffiths stated in her Counter-Memorial Report that it would be reasonable to conclude that the project would likely have SAEEs on the North Atlantic Right whale and on American lobsters.[53]

1. Northern Gateway Case

44. I explained in my Counter-Memorial Report that the Northern Gateway case presents an example of the RA and the GIC concluding that the project would have greater environmental effects than determined by the JRP.[54] The GIC concluded that the waters of the Douglas Channel are part of a sensitive ecosystem that must be protected from spills of crude oil from the anticipated 220 tankers that would annually travel the Douglas Channel.[55] The GIC did not accept the findings of the JRP that although SAEEs were likely (on two valued ecosystem

[52] Award, ¶ 322.

[53] **RE-1**, Griffiths Report I, ¶¶ 60-61.

[54] **RE-3**, Connelly Report I, ¶ 74.

[55] **R-628**, Privy Council Office announcement, PC Number 2016-1047, November 25, 2016, s. 3.

components not related to the waters of the Douglas Channel – grizzly bears and woodland caribou), the project should be considered justified in the circumstances.

45. Mr. Sossin says that the Government's decision in Northern Gateway was based on evidentiary grounds.[56] This may be correct. In my last Report, I quoted the Prime Minister stating at the time of the announcement that, "[e]ven before we formed government, we were clear about our intentions to protect the Great Bear Rainforest and Sea."[57] It appears that the GIC gave more weight to the environmental effects on the Douglas Channel and the Great Bear Rainforest than the JRP and determined that the project was not justified in the circumstances. Moreover, as I explain below, the government has a duty to consult with aboriginal people in some circumstances, which may require considering matters beyond the evidentiary record that was before the panel.

46. In the Whites Point project the evidentiary record itself revealed numerous serious impacts on VECs that the RAs and GIC would likely have taken into consideration in a but for scenario. In my Counter-Memorial Report, I listed 18 concerns identified by the JRP. Irrespective of the JRP's conclusions, these concerns could serve as a basis for the RAs and GIC to find a SAEE themselves in the but for scenario.

47. Mr. Sossin refers to changes in the 2012 Act in suggesting that the GIC had less discretion under the 1992 Act.[58] I am of the view that his analysis of the Act is incorrect, for two reasons. First, amendments to the 2012 Act reveal that the GIC actually had <u>greater</u> discretion in the 1992 Act to find an SAEE that is not justified in the circumstances. As noted above, under s. 37(1.1) of the 1992 Act, the GIC had discretion to approve the RA's response to the panel's report, which could include finding an SAEE that is not justified in the circumstances. In contrast, the 2012 Act shifted discretion to the RA to find that the designated project is likely to cause SAEEs, for the purposes of sections 27, 36, 47, and 51 of the 2012 Act. The RA no longer needs approval from the GIC to determine that an SAEE is likely. Instead, once the RA makes this determination, the GIC then determines if those effects are justified in the circumstances –

[56] Sossin Reply Report, ¶ 39.

[57] **RE-3**, Connelly Report I, ¶ 75, citing to **R-630**, Prime Minister Justin Trudeau's Pipeline Announcement, November 30, 2016, p. 5.

[58] Sossin Reply Report, ¶ 39.

just as it could under the 1992 Act. But if the RA does not find that an SAEE is likely, under s. 53(1) and (2) of the 2012 Act the RA must establish conditions regarding the environmental effects that the proponent must comply with. By splitting authority between the RA to determine significance and the GIC to determine justification, the 2012 Act effectively reduced some of the GIC's discretion relative to that which could be exercised under the 1992 Act. In this regard, I would agree with Mr. Sossin's suggestion that the addition of this element to the 2012 Act meant that the authority of an RA to determine likely SAEEs on its own was previously absent from the 1992 Act. However, in my view this also means that the GIC had greater discretion under the 1992 Act to find both the existence of likely SAEEs and that they were not justified in the circumstances.

48. Second, the provision of the 2012 Act that Mr. Sossin relies on to draw inferences about the 1992 Act does not, in my view, support his argument with respect to the Whites Point project. Mr. Sossin notes that s. 31(1)(a)(iii) of the 2012 Act authorizes the GIC to find an SAEE that cannot be justified in the circumstances by order made under subsection 54(1) of the *National Energy Board Act* ("NEB Act"). Yet s. 31 of the 2012 Act only relates to the assessment of projects under the NEB Act. Since the Whites Point project did not involve the NEB Act, the addition of s. 31 to the 2012 Act is not relevant to interpreting the GIC's discretion under the 1992 Act with respect to non-NEB Reports.

49. As noted above, in determining whether the Northern Gateway project was justified in the circumstances, the GIC gave more weight to the possible environmental effects of the project on the Douglas Channel than the JRP did. In Whites Point, the RAs, with the approval of the GIC, could have determined that SAEEs on right whales and lobsters were likely, and determined that the project was not justified in the circumstances. In the end, I disagree with Mr. Sossin's opinion that, "the Northern Gateway decision undermines any suggestion […] that the GIC had the requisite statutory authority under CEAA, 1992 to deny the WPQ Project from proceeding where there is no SAEE" because, "that authority only came into existence subsequently when CEAA, 2012 was enacted."[59] First, as I have already noted, the "authority" that came into existence in the 2012 Act is relevant only to NEB projects. Second, the Northern

[59] Sossin Reply Report, ¶ 39.

Gateway decision is illustrative of the very authority that RAs and the GIC could exercise under the 1992 Act in respect of projects like the Whites Point project.

C. The RA Can Reject a Project Even if There is no SAEE

50. Mr. Sossin claims that if the project does not give rise to SAEEs, no provision in the Act would allow the RA or GIC to reject it.[60] Yet subsection 37(1)(a) of the 1992 Act provides that the RA "may" exercise any power to permit a project to be carried out if it has no SAEEs, or has SAEEs that may be justified in the circumstances.[61] The use of the word "may" rather than "shall", "will", or "must" recognizes that the RA, after gathering further detailed information, may still find reasons that would prevent it from issuing a permit or authorization under its governing statute. While I am not aware of any case where this has occurred, I still consider it possible. I would note also that the issue of whether the RA "may" act is, pursuant to s. 37(1.1) of the Act, entirely contingent on the approval of the GIC and the range of factors that it might take into account in issuing its approval, as outlined in my Counter-Memorial Expert Report.[62]

1. Limits to Ministerial Discretion

51. In this Report, I have outlined the broad discretion that the RA and GIC have in responding to a panel report. However, I do not consider this discretion unlimited. Mr. Sossin suggests that I stated that a Minister has a "political override" to reject a project on the basis of the Minister's preference or political motivations.[63] I made no statement in my Counter-Memorial Report to the effect that an RA or the GIC could turn down a project "for reasons of

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[60] Sossin Reply Report, ¶ 22.

[61] **R-1**, The Act, s. 37(1). Subsection 37 (1) of the *Act* states: "Subject to subsections (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" [Emphasis added].

[62] **RE-3**, Connelly Report I, ¶¶ 72-76.

[63] Sossin Reply Report, ¶¶ 39-40.

political expediency, policy preference, economic reasons, or in response to public opposition."[64] My Report noted that "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."[65] Nevertheless, in exercising the discretion I outline above, the government decision-makers' discretion to accept or reject projects under the Act must be sufficiently linked to the statute. The Rejoinder Report of Justice Evans supports this point.[66]

2. Broader Considerations of Ministers

52. Despite such limits, it is my opinion that government decision-makers can consider broader factors that could lead a RA and GIC to reach a different conclusion from a panel. In fact, as I explain below, sometimes they are obligated to consider broader factors. When determining whether to approve a project following a panel review, the GIC could consider the panel report, and the evidentiary record that was before the panel. The GIC may also consider information on factors that could supplement the evidentiary record that was before a panel. These factors could result in the GIC giving additional weight to certain elements of that evidentiary record.

53. Specifically, the GIC may consider at least four factors that would have some linkage to a panel report and the evidentiary record, but may be supplemented with additional information. First, in many environmental assessments, the government has a duty to consult with indigenous communities. This occurs before and after receipt of a panel report, and may involve considerations beyond the evidentiary record. Second, the GIC may consider factors relating to sustainable development, as espoused in the preamble to the Act.[67] In looking at the information before a panel through a sustainability lens, the GIC (and ultimately the RAs) could possibly arrive at conclusions that differ from those of a panel. Third, the GIC may take socio-economic

[64] Sossin Reply Report, ¶ 22.

[65] **RE-3**, Connelly Report I, ¶ 20.

[66] **RE-14**, Evans Report II, ¶ 71.

[67] **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; WHEREAS environmental assessment provides an effective means of integrating environmental factors into planning and decision-making processes in a manner that promotes sustainable development; (…)" [Emphasis added].

conditions and considerations into account, which is a valid consideration under the Act. Similar to sustainable development considerations, socio-economic factors, while likely to be based on the evidentiary record, may be considered differently by decision makers than by a panel.[68] Fourth, the GIC may consider the implications of its decision-making on the federal-provincial dynamic, in light of the decision made, or to be made, by the province.[69]

3. Considerations in the Whites Point Project

54. As I explained in my Counter-Memorial Report, the RAs and GIC decision not to approve the Whites Point project was likely based partly on such broader considerations, that is, upon considering other matters than just the JRP's recommendations. As I stated in my first Report, CCV "was not the only factor considered in the GIC decision."[70] My Report outlined some of the factors that the GIC appears to have taken into account, as referenced from the Background/Analysis note annexed to the Whites Point Memorandum to Cabinet. In the absence of CCV, those other factors would clearly have still been important to the decision-makers. They included the socio-economic benefits and drawbacks of the project, public views and concerns, the provincial decision on whether the project would be approved or rejected, sustainable development implications, failure by the proponent to provide adequate evidence on environmental effects to the JRP, and concerns expressed by indigenous people.

55. Federal government officials consulted with officials from Nova Scotia to understand their views on the project. Moreover, 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 the RAs and GIC likely took into account.[71] The RAs recognized the necessity of conducting further consultations with indigenous people prior to learning the JRP's findings. This is consistent with Canada's duty to consult with and accommodate

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[68] **R-1**, The Act, s. 2(1): "'environmental effect' means, in respect of a project,

(b) any effect of any change referred to in paragraph (a) on

(i) health and socio-economic conditions" [Emphasis added].

[69] **R-620**, Background/Analysis Note annexed to the Whites Point Memorandum to Cabinet, November 27, 2007, p. 19.

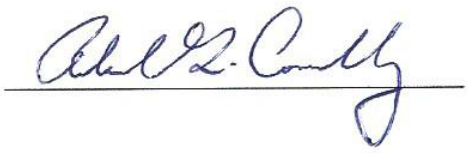
[70] **RE-3**, Connelly Report I, ¶ 82. Mr. Sossin states that in my last Report, I asserted that the JRP recommended against approval of the project on grounds other than CCV. Sossin Reply Report, ¶ 36.

[71] **R-212**, JRP Report, p. 91.

indigenous groups in accordance with the Supreme Court decision in *Haida*.[72] As I noted in my last Report, the views of indigenous groups and their likely reaction to the GIC's decision were important considerations for the GIC.[73]

56. Ultimately, given the broad discretion that government decision-makers have under the Act with respect to whether the project proceeds, the diverse factors that they consider in reaching this determination, and the fact that the JRP Report raised numerous serious concerns about the effects of the Whites Point project on critical VECs, if presented with a NAFTA-compliant JRP Report the government decision-makers would have had multiple bases under the law to reasonably deny approval to the Whites Point project.

Signed at Ottawa, Ontario



November 6, 2017 Robert G. Connelly

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

[73] **RE-3**, Connelly Report I, ¶ 85.

APPENDIX I

THE RESPONSIBLE AUTHORITY FOR THE WHITES POINT PROJECT

1. On the matter of which department or departments were RAs in the Whites Point project, Mr. Estrin states that I "was mistaken that Transport Canada (TC) was also an RA."[74] I wish to clarify this matter. In my Counter-Memorial Report I state:

> In the present matter, the Responsible Authority was the Department of Fisheries and Oceans ("DFO").[75]

2. In my Expert Report of 2011 I explained that at the commencement of the EA, DFO was responsible for the administration of the *Fisheries Act* as well as the *Navigable Waters Protection Act*, and consequently it was the sole RA for the project.[76] I also note in my Counter-Memorial Report that there were two RAs by the time the assessment was completed:

> 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.[77]

3. In 2004, the division that administered the Navigable *Waters Protection Act* was transferred back to Transport Canada.[78] Thus when the JRP submitted its Report to the Minister in 2007, and when the GIC was required to respond to the Report, both DFO and Transport were

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[74] Estrin Reply Report, ¶ 36.

[75] **RE-3**, Connelly Report I, ¶ 20.

[76] **RE-3**, Connelly Report I, fn 11: ("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.")

[77] **RE-3**, Connelly Report I, ¶ 27.

[78] **R-794**, *Order Transferring to the Department of Transport Certain Portions of the Public Service in the Department of Fisheries and Oceans and of the Powers, Duties and Functions of the Minister of Fisheries and Oceans under certain paragraphs of the Canada Shipping Act*, SI/2004-35, April 7, 2004, p. 4.

RAs under the Act. As correctly noted in the government response to the JRP Report,[79] both DFO and Transport Canada were RAs when the response was issued in 2007.

4. Mr. Estrin refers to a letter from Transport Canada to assert that I was mistaken in stating in my Counter-Memorial that both DFO and Transport Canada were RAs. He states:

> TC had determined very early in the process that a *Navigable Waters Protection Act* permit, which was a CEAA trigger, was required for the ship dock, but on January 10, 2006, well prior to the JRP process commencing, TC notified Bilcon that it had determined otherwise.[80]

5. However, he has misunderstood the contents of the letter from Transport Canada. The attachments to the letter clearly show that Transport Canada addressed an application for the fish habitat compensation component of the project under s. 5(2) of the *Navigable Waters Protection Act*, and not the marine terminal.[81] Furthermore, as Transport Canada has confirmed,[82] the issuance of a s. 5(2) determination is an exemption and does not remove Transport Canada from its responsibilities as a RA under s. 5(1) of the *Navigable Waters Protection Act*. Note also that s. 5(1) of the *Navigable Waters Protection Act* is a Law List Regulation trigger under the Act, but s. 5(2) is not. Section 5(1) of the *Navigable Waters Protection Act* was a trigger for the Whites Point project. Section 5(2), in contrast, allows for an exemption where it is determined that a project would not affect navigation and consequently does not trigger an EA under the Act.

[79] **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: ("In preparation of this Government of Canada Response, DFO and TC, as the RAs under CEAA, carefully considered the report submitted by the Joint Review Panel.")

[80] Estrin Reply Report, ¶ 36.

[81] **C-1027**, Letter from Jon Prentiss, Navigable Waters Protection Officer of Transport Canada, Re: NWPA: Navigable Waters Protection Application as per Enclosed Plans, January 10, 2006.

[82] **R-795**, E-mail from Carl Ripley, Manager, Navigation Protection Programs of Transport Canada, to Robert Connelly, October 10, 2017.