

**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**

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**EXPERT REPORT OF THE HON. THOMAS CROMWELL**

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**NOVEMBER 6, 2017**

**TO: Trade Law Bureau  
Government of Canada  
Lester B. Pearson Building  
125 Sussex Drive  
Ottawa, Ontario  
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## **PART I - SUMMARY OF QUALIFICATIONS AND RELEVANCE TO OPINION SOUGHT**

1. I am Senior Counsel with Borden Ladner Gervais LLP, a position that I have held since late February of 2017. I was admitted to the Nova Scotia Bar in 1984, served as a judge of the Nova Scotia Court of Appeal from 1997 to 2008 and then as a judge of the Supreme Court of Canada until my retirement from the judiciary on September 1, 2016. A fuller outline of my professional training and experience is attached as Schedule “A”.

## **PART II - INTRODUCTION AND OVERVIEW**

2. In these proceedings, Dean Lorne Sossin has opined that:

*Without legitimate grounds to deny approval to the project, and but for the inappropriate reliance on the JRP’s findings in relation to “community core values,” in my view, the Ministers were legally compelled to exercise their discretion to approve the project.*<sup>1</sup>

You have asked for my fair, objective and non-partisan opinion as to whether I agree with Dean Sossin’s conclusion in so far as the Nova Scotia legislation is concerned.

3. For the purposes of my opinion, I am to assume that the Joint Review Panel (the “JRP”) was incomplete in two respects. First, and as the Tribunal found, the JRP failed to conduct “the rigorous and comprehensive evaluation defined and prescribed by the laws of Canada”<sup>2</sup> and the result of this failure was to deny “the ultimate decision makers in government information which they should have been provided.”<sup>3</sup> Second, considering the JRP Report as if its “highly problematic” reliance on community core values has been excised from it,<sup>4</sup> the Report would also lack a recommendation, a mandatory component of the Report.<sup>5</sup>

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<sup>1</sup> Reply Expert Opinion of Lorne Sossin, August 3, 2017 at para. 9 in Investors’ Reply Damages Memorial & Expert Reports [Sossin Reply Opinion].

<sup>2</sup> Tribunal Majority Decision on Jurisdiction and Liability, March 17, 2015 [Tribunal Decision] at para. 598.

<sup>3</sup> Tribunal Decision at para. 535.

<sup>4</sup> Tribunal Decision at para. 534.

<sup>5</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 Environment and Labour, Nova Scotia [JRP Agreement], s. 6.3.

4. For several reasons, I do not agree with Dean Sossin’s opinion in relation to the discretionary powers of the Nova Scotia Minister of Environment and Labour (the “Minister” or the “Nova Scotia Minister”).

5. First, Dean Sossin’s opinion fails to give sufficient weight to the Nova Scotia Minister’s broad discretion under the Nova Scotia legislation – a discretion which is not expressly constrained – to approve or reject a project.

6. Second, given that the JRP Report was not complete, the Minister was not legally compelled to approve the Whites Point Quarry and Marine Terminal project (the “Project”) and a decision to do so would likely have been vulnerable to judicial review. Faced with a JRP Report that failed to carry out its mandate, the Nova Scotia Minister should have directed the JRP to fulfil that mandate.

7. Third, I do not accept the factual premise of Dean Sossin’s opinion that there were no “legitimate grounds to deny approval of the project.” Quite apart from its problematic community core values analysis, the JRP determined that the Project would result in adverse environmental effects and made other findings that would not have supported approval.

8. Finally, there is, in my respectful view, a significant inconsistency in Dean Sossin’s reasoning that undermines his conclusion that the Nova Scotia Minister was “legally compelled” to approve this Project. Dean Sossin opines, on one hand, that the Nova Scotia Minister was “legally compelled” to approve the Project. On the other hand, Dean Sossin’s opinion is that, had the Minister’s decision to reject the Project been judicially reviewed, the “likeliest result of such judicial review would have been to remit the approval process back to Federal and Nova Scotia Ministers, for a further discretionary process .....”<sup>6</sup> But if, in fact, the Minister had no legal option

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<sup>6</sup> Sossin Reply Opinion at para. 12.

but to approve, a court on judicial review would order the Minister to approve the undertaking, not remit it for further consideration under a discretionary process.

9. In sum, Dean Sossin's opinion that the Nova Scotia Minister was legally compelled to approve this undertaking amounts to saying that an incomplete JRP Report that expresses many concerns about an undertaking's adverse effects somehow becomes the proponent's ticket to a legally compelled approval. In my opinion, this view has no support in the statutory language and is deeply inconsistent with both the purposes of the legislation and the broad discretion that it confers on the Minister.

10. To explain my conclusions, I will first set out very briefly the general legal principles relating to ministerial discretion and then turn to elaborate each of the points set out above that leads me to disagree with Dean Sossin's opinion that the Nova Scotia Minister was legally compelled to approve this undertaking.

### **PART III - GENERAL LEGAL PRINCIPLES RELATING TO MINISTERIAL DISCRETION**

11. Dean Sossin's Expert Opinion dated December 10, 2016 briefly summarizes some of the main legal principles relating to the exercise of ministerial discretion in Canadian administrative law.<sup>7</sup> I agree with Dean Sossin that:

- (a) Ministerial discretion on judicial review is subject to the highest level of deference;<sup>8</sup>
- (b) The Nova Scotia *Environment Act* (*NSEA* or the *Act*) provides the authority for the exercise of ministerial discretion to deny (and I would add, to grant) approval;<sup>9</sup> and

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<sup>7</sup> Expert Opinion of Lorne Sossin, December 10, 2016, Investors' Damages Memorial and Expert Reports Lorne Sossin and David Estrin [Sossin Opinion].

<sup>8</sup> Sossin Opinion at para. 20.

<sup>9</sup> Sossin Opinion at para. 16.

(c) Ministerial discretion must not be exercised on the basis of irrelevant considerations.<sup>10</sup>

12. I would add:

(a) “The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries ...”<sup>11</sup>

(b) “...[I]t is the intention of a Legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law ... in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* ...”<sup>12</sup>

(c) Powers that have been granted to a Minister are likely to be construed more generously than powers conferred on other non-elected bodies or delegates,<sup>13</sup> and

(d) Where, as here, the statute setting out the Minister’s decision-making power does not place any specific limitations on the scope of the decision or the relevant factors to be considered,

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<sup>10</sup> Sossin Opinion at para. 22.

<sup>11</sup> **R-394**, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1992] 2 S.C.R. 817 [*Baker*] at para. 52.

<sup>12</sup> **R-394**, *Baker* at para. 53.

<sup>13</sup> **R-811**, Donald J. Brown and Hon. John Evans, *Judicial Review of Administrative Action in Canada*, at 15:1212.

the Minister has considerable latitude concerning the basis for a particular decision and the factors that can be taken into account in reaching it. Generally no single decision is legally the right one.<sup>14</sup>

#### **PART IV – ANALYSIS**

**A. Dean Sossin’s opinion fails to give sufficient weight to the broad and not expressly constrained discretion conferred on the Nova Scotia Minister to approve or reject a project.**

13. In my opinion, the Nova Scotia Minister has broad statutory discretion which is to be exercised in light of the purposes of the *NSEA*.<sup>15</sup> It is not consistent with either the breadth of this discretion or the purposes of the *Act* to conclude that the Minister was legally compelled to approve this undertaking when faced with a JRP Report that failed to conduct the rigorous and comprehensive evaluation defined and prescribed by the laws of Canada.

14. I will review the statutory scheme under the *NSEA* and the Minister’s role in it in detail. I will do so because, in my opinion, this sort of detailed consideration of the Nova Scotia legislation and jurisprudence is essential in order to accurately understand the nature and scope of the Nova Scotia Minister’s discretion. Dean Sossin’s opinion and his Reply opinion contain virtually no analysis of the Nova Scotia legislation and do not refer to any Nova Scotia judicial decisions relating to ministerial discretion.

15. In my opinion, a careful review of the statutory scheme, the Minister’s role in it and the relevant jurisprudence shows that approval of this undertaking was not legally compelled under Nova Scotia law.

#### **1) The Statutory Purpose and the Minister’s Role**

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<sup>14</sup> **R-816**, Paul Muldoon, Alastair Lucas, Robert B. Gibson, Peter Pickfield and Julie Williams, *An Introduction to Environmental Law and Policy in Canada* (2d, 2015) [Muldoon] at p. 48.

<sup>15</sup> **R-5**, *Environment Act*, SNS 1994-95, c. 1 [*NSEA*]. I note that the *NSEA* was amended in 2006 by SNS 2006 C30, but all references to the *NSEA* (unless otherwise stated) refer to Exhibit R-005, which is the version of the *NSEA* that applied when Bilcon’s environmental assessment began.

16. The Minister is given significant authority throughout Part IV of the *NSEA* regarding the approval of undertakings such as the Whites Point Quarry and Marine Terminal Project. As my detailed statutory review will show, the Minister determines the process of environmental assessment to which an undertaking will be subject, is to obtain such information as in his view is required, and may reject a proposal without further assessment processes on the basis that it is likely to cause unacceptable adverse effects.

17. The Minister has the statutory authority, with no express constraints, to approve, approve with conditions or reject a proposed undertaking. This final decision-making power cannot be delegated and his decision is exempted from the statutory appeal mechanism provided for in the *NSEA*.<sup>16</sup>

18. The purpose of the *Act* is to support and promote the protection, enhancement and prudent use of the environment while recognizing a number of stated goals, such as, for example, maintaining environmental protection as essential to the integrity of ecosystems, human health and the socio-economic well-being of society and the principles of sustainable development.<sup>17</sup> The Minister is responsible for the general supervision and management of the *NSEA* and, for the purposes of the administration and enforcement of the *Act* is among other things, required to “promote sustainable development, including pollution prevention.”<sup>18</sup> All of the Minister’s powers must be understood as being conferred to carry out the broad purposes of the *Act*.

19. The legislation is marked by two critical elements which reflect the guiding principles of Canadian environmental law. The first is a broad and open-ended approach to the definition of the sorts of environmental concerns to which it is directed. This element reflects the fact that, as noted by the Supreme Court of Canada, “... the nature of the environment (its complexity, and the wide

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<sup>16</sup> R-5, *NSEA*, s. 38-40.

<sup>17</sup> R-5, *NSEA*, s. 2.

<sup>18</sup> R-5, *NSEA*, s. 8(1)-8(2)(a).



range of activities which might cause harm to it) is not conducive to precise codification.”<sup>19</sup> The second is a highly discretionary regulatory approach which confers wide powers on the responsible minister (and his or her delegates) to give effect to the wide-ranging objectives of the legislation. This is consistent with the reality that “... the potential consequences for a community’s livelihood, health and other social matters from environmental change are integral to decision-making on matters affecting environmental quality...”<sup>20</sup> Both of these critical elements are fundamental to the scheme of the *NSEA*.

20. Central to the *NSEA* is the concept of an “environmental assessment”, defined in the *Act* to mean “a process by which the environmental effects of an undertaking are predicted and evaluated and a subsequent decision is made on the acceptability of the undertaking.”<sup>21</sup> The process is, therefore, imbued with prediction, evaluation and judgment about what is acceptable, none of which is capable of being narrowly confined or precisely defined.

21. The term “environmental effect”, a key part of this concept, is defined in broad terms. It means “any change, whether negative or positive, that the undertaking may cause in the environment, including any effect on socio-economic conditions, on environmental health, physical and cultural heritage or on any structure, site or thing including those of historical, archaeological, paleontological or architectural significance, and any change to the undertaking that may be caused by the environment, whether the change occurs insider or outside the Province.”<sup>22</sup> Of note is the fact that this definition does not limit environmental effects to effects on the biophysical environment, but includes such things as the effect on socio-economic conditions and physical and cultural heritage.

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<sup>19</sup> **R-817**, *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 at para. 43.

<sup>20</sup> **R-3**, *Friends of the Oldman River v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 [*Friends of the Oldman River*] at p. 42.

<sup>21</sup> **R-5**, *NSEA*, s. 3(s).

<sup>22</sup> **R-5**, *NSEA*, s. 3(v).

22. Another key term is “adverse effect” which is defined to mean “an effect that impairs or damages the environment, including an adverse effect respecting the health of humans or the reasonable enjoyment of life or property.”<sup>23</sup> The term “environment” is used in a broad sense, underlined by the fact that the statute defines it to include not only air, land, water, the atmosphere and so forth, but also to include for the purposes of the approvals process set out in Part IV of the *Act*, “the socio-economic, environmental health, cultural and other items referred to in the definition of environmental effect.”<sup>24</sup> This further underlines the breadth of the considerations that are relevant to the exercise of the Minister’s discretion, particularly in relation to the approval scheme set up by Part IV of the *NSEA*, the Part which governs the approval process in issue in these proceedings.

23. In summary, the *Act* establishes a scheme that calls for a broad understanding of environmental effects as well as for the exercise of judgment with respect to what effects may be predicted, how they should be evaluated and whether the predicted effects are acceptable. A process that does not respond to these broad objectives is not consistent with the basic elements of the statutory scheme.

24. Not surprisingly, the *NSEA* gives the Minister a large suite of discretionary powers to permit him or her to carry out his or her supervisory and management duties. For example, the Minister is to promote sustainable development, establish and administer approval processes pertaining to the protection and stewardship of the environment, and control the handling of substances that may have an adverse effect.<sup>25</sup> The Minister has the discretion to establish advisory and ad hoc committees and retain experts to report to the Minister with respect to the content and

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<sup>23</sup> R-5, *NSEA*, s. 3(c).

<sup>24</sup> R-5, *NSEA*, s. 3(r) and (v).

<sup>25</sup> R-5, *NSEA*, s. 8(2)(a), (b), and (e).

administration of the *NSEA*.<sup>26</sup> The Minister is also responsible for hearing appeals of decisions made under the legislation by a delegate of the Minister.<sup>27</sup>

25. In my opinion, it is inconsistent with the breadth of these powers and the purposes for which they are given to conclude that the Nova Scotia Minister is legally compelled to approve a project following submission of a JRP Report where the JRP has failed to conduct the rigorous and comprehensive evaluation defined and prescribed by the laws of Canada.

## 2) The Assessment Process and the Minister's Role

26. Part IV of the *NSEA* contains the statutory provisions that apply to the environmental assessment process and is the Part of the *Act* governing the Project. Throughout this process, the Minister (and where I refer to the Minister, I include his or her statutory delegate where the authority may be delegated) has wide discretionary powers. Indeed, Part IV applies with respect to an “undertaking” *as determined by the Minister* or as prescribed in the regulations. The Project was an undertaking under this Part.<sup>28</sup>

27. Once the proponent of an undertaking registers it as required by section 33, it is up to the Minister's discretion as to how the process will unfold from there. The options open to the Minister range from simply permitting the undertaking to proceed, to rejecting the undertaking because of the likelihood that it will cause adverse effects or environmental effects that cannot be mitigated.<sup>29</sup>

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<sup>26</sup> **R-5**, *NSEA*, s. 9(a). I note that the amendments to the *NSEA* made by SNS 2006 C30 altered the language to this subsection slightly but that the Minister's discretion did not change in substance.

<sup>27</sup> **R-5**, *NSEA*, s. 137.

<sup>28</sup> **R-5**, *NSEA*, s. 31 [emphasis added]; s. 3(az) “undertaking” is defined as being an “enterprise, activity, project, structure, work or proposal and may include, in the opinion of the Minister, a policy, plan or program that has an adverse effect or an environmental effect and may include, in the opinion of the Minister, a modification, extension, abandonment, demolition or rehabilitation, as the case may be, of an undertaking.” The definition of “undertaking” changed slightly with the 2006 amendments to be defined as “an enterprise, activity, project, structure, work or proposal that, in the opinion of the Minister, causes or may cause an adverse effect or an environmental effect, and may include, in the opinion of the Minister, a policy, plan or program or a modification, extension, abandonment, demolition or rehabilitation, as the case may be, of an undertaking” (SNS 2006 C30). The change in the definition of undertaking has no impact on my opinion.

<sup>29</sup> **R-5**, *NSEA*, s. 34(1).

The Minister is to notify the proponent of the decision as to how matters will proceed and the reasons for it.<sup>30</sup>

28. It is worth underlining the point that the statute provides explicit authority to the Minister to reject the proposal following examination of the registration material without engaging further assessment processes. In my opinion, the fact that the Minister is expressly authorized to reject a project at this early stage supports the view that the Minister's powers should be understood as being conferred in very broad terms.

29. The exercise of this broad discretion is structured somewhat by the *Regulations*.<sup>31</sup>

30. Undertakings are either Class I or Class II undertakings as outlined in Schedule "A" of the *Regulations*. With respect to Class I undertakings (into which Class the Bilcon Project fell) the *Regulations* provide that the environmental assessment process: shall include registration, may include a focus report, terms of reference, and an environmental assessment report, may include alternative dispute resolution, and may include a referral to the Board when an environmental assessment report is required.<sup>32</sup>

31. The *Regulations* require the Minister to consider certain factors in reaching a decision as to how the process will unfold. These factors include, for example: the location of the proposed undertaking and the nature and sensitivity of the surrounding area, the size and scope of the proposed undertaking, and concerns expressed by the public about the adverse effects or the

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<sup>30</sup> **R-5**, *NSEA*, s. 34(2). Part IV of the *NSEA* applied to the Project. Bilcon registered the project pursuant to section 33 of the *NSEA* in the manner proscribed by the regulations. The applicable regulation titled *Environmental Assessment Regulations* NS Reg 26/95 as amended up to NS Reg. 44/2003 [**R-6**, *EAR*] provides the procedure for registering an undertaking.

<sup>31</sup> **R-6**, *EAR*.

<sup>32</sup> **R-6**, *EAR*, s. 11(1).

environmental effects of the proposed undertaking.<sup>33</sup> The Minister is also empowered to consider such other information as the Minister may require.<sup>34</sup>

32. The *Regulations* also set out some specific options for the Minister's discretionary decision as to how to proceed. These range from requiring more information to deciding to reject the proposal where the Minister's review of the information (i.e., the information considered by virtue of section. 12 of the Regulation) indicates that there may be adverse effects or significant environmental effects which are unacceptable.<sup>35</sup>

33. Three points are worthy of particular note. First and as noted, the Minister may reject a proposal at the registration stage without further assessment. Second, the Minister is not limited to considering the registration material provided by the proponent, but rather is required by the *Regulations* to consider such other information, including concerns expressed by the public about the adverse effects or the environmental effects of the proposed undertaking, as the Minister thinks is required. Finally, the Minister is explicitly authorized to reject an undertaking on the basis of a likelihood of adverse effects or significant adverse effects which are unacceptable. These broad discretionary powers are unaccompanied by any legislative limitation.

34. In my opinion, these aspects of the legislative scheme undermine Dean Sossin's conclusion that, following receipt of an incomplete JRP Report, the Minister is somehow locked-in by the statute to grant approval. At every step that I have just reviewed, the Minister has broad discretion as to what process will be followed, as to what information he or she requires and as to the decision to approve or reject the proposed undertaking.

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<sup>33</sup> R-6, EAR, s. 12 (a)(b), (c).

<sup>34</sup> R-6, EAR, s. 12 (i).

<sup>35</sup> R-6, EAR s. 13(a) and (e).

35. Where the Minister decides that an environmental assessment report is required, the Minister has a range of options open at his discretion both respect to the content of the report and what will happen following its receipt. Under section 36 of *NSEA*, the Minister causes the terms of reference for the assessment to be prepared and revises them as he considers appropriate following consultation with the proponent and the public.<sup>36</sup> When the report is received, the Minister may require further work or further information when the report is deficient in any respect.<sup>37</sup> Once the report is acceptable, the Minister must release it to interested persons and the public generally. The Minister may then decide to approve the undertaking, reject it or approve it with conditions.<sup>38</sup> However, other options are available to the Minister to invoke a more extensive review process.

36. Section 38 of the *NSEA* provides that upon receipt of an environmental assessment report the Minister “may refer the environmental-assessment report to the Board (Nova Scotia Environmental Assessment Board established by Part IV) on Class I undertakings as defined in the regulations.”<sup>39</sup>

37. Where the Minister decides against referring the proposal to the Board, the *Regulations* require the Administrator under the *Act* to submit to the Minister a summary of comments provided by provincial, federal and municipal departments and agencies and the public<sup>40</sup> and the Minister has the discretion to approve or reject the proposed undertaking, a discretion unconstrained by any express statutory limits. Where, on the other hand, the Minister decides to refer the undertaking to the Board, the Minister then may give directions regarding the scope of its review.<sup>41</sup> Referral to the

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<sup>36</sup> R-5, *NSEA*, s. 36.

<sup>37</sup> R-5, *NSEA*, s. 37.

<sup>38</sup> R-5, *NSEA*, s. 40.

<sup>39</sup> R-5, *NSEA*, s. 38(c). Referral to the Board is mandatory for Class II undertakings.

<sup>40</sup> R-6, *EAR*, s. 25(1).

<sup>41</sup> R-5, *NSEA*, s. 38.

Board triggers specific public consultation requirements under the Regulations.<sup>42</sup> Whether referred to the Board or not, there is a mandatory public input component to the process.

38. The duties of the Board are outlined in section 43 of the *NSEA* and include a review of the environmental assessment report and public consultation. Of particular note is the statutory obligation of the Board to make a recommendation to the Minister for the approval or rejection of an undertaking, or conditions that ought to be imposed upon an undertaking if it proceeds.<sup>43</sup>

39. Section 40 of the *NSEA* provides, in relevant part, that “Upon receiving ... a recommendation from the Board under Section 39 ... the Minister may (a) approve the undertaking; (b) approve the undertaking, subject to any conditions the Minister deems appropriate; or (c) reject the undertaking.”<sup>44</sup>

40. The Minister therefore makes the ultimate decision<sup>45</sup> and there is no express legislative constraint on the exercise of this discretion. Underlining the breadth of the Minister’s discretion, this ultimate decision under section 40 is exempted from the statutory appeal provisions in the *Act*.<sup>46</sup>

### **3) The Joint Review Process**

41. The *Act* empowers the Minister to enter into agreements with other governmental authorities, including the federal government, to create a joint review and single hearing process under sections 47 and 48 of the *NSEA*.<sup>47</sup> This is what occurred with respect to the Project.

42. The JRP’s mandate is outlined in the Agreement between the federal and Nova Scotia Ministers as well as the Terms of Reference (the “JRP Agreement”).<sup>48</sup> The JRP was required to

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<sup>42</sup> R-6, *EAR*, s. 23(2); R-599, *Environmental Assessment Board Regulations*, N.S. Reg. 27/95.

<sup>43</sup> R-5, *NSEA*, s. 39(1) and s. 43.

<sup>44</sup> R-5, *NSEA*, s. 40(1).

<sup>45</sup> R-5, *NSEA*, s. 39.

<sup>46</sup> R-5, *NSEA*, s. 138(2).

<sup>47</sup> R-5, *NSEA*, s. 47 and 48.

consider all factors pursuant to Part IV of the *NSEA* as well as section 16 of the *Canadian Environmental Assessment Act* (“*CEAA*”). The scope of the assessment and factors to be considered in the review are outlined in the Terms of Reference and include: the purpose and need for the project; alternatives to the project; the location of the undertaking and the nature and sensitivity of the surrounding area; planned and existing land and other undertakings in the area; the environmental effects of the project (including as a result of malfunctions and accidents); any cumulative effects; socio-economic effects; steps taken by the proponent to address environmental concerns expressed by the public; technically and economically feasible measures that could mitigate any significant adverse environmental effects; follow-up and monitoring programs; the capacity of renewable resources that are likely to be significantly affected by the project; and residual adverse effects and their significance.<sup>49</sup>

43. The JRP Agreement also required the JRP to recommend either the approval including mitigation measures, or rejection of the undertaking pursuant to Part IV of the *Act* and required the Nova Scotia Minister to consider the recommendations of the JRP, and either approve (with or without conditions) or reject the project.<sup>50</sup>

44. Of note is that under the JRP process, the Nova Scotia Minister’s powers under section 40 of the *Act*, as discussed above, remain exactly as they are under the purely Nova Scotia process: the Minister is the ultimate decision-maker as to whether Nova Scotia approval should be granted and that discretionary power is not constrained by any express statutory or other requirements or limitations.

45. In my opinion, this statutory scheme is inconsistent with Dean Sossin’s view that ministerial approval is legally compelled following submission of an incomplete JRP Report.

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<sup>48</sup> C-363, JRP Agreement, Terms of Reference for the Joint Review Panel [Terms of Reference].

<sup>49</sup> C-363, Terms of Reference, Part III.

<sup>50</sup> C-363, JRP Agreement, clause 6.3 and 6.7.



#### 4) Other Ministerial Discretionary Powers

46. The breadth of ministerial discretion present in Part IV of the *Act* is mirrored in Part V, which deals with proposed “activities”<sup>51</sup> as distinguished from “undertakings” that are addressed in Part IV which I have just reviewed.<sup>52</sup>

47. In particular, subsection 52(1) of the *NSEA* provides a broad discretion to the Minister to decide that no approval will be issued in respect of a proposed activity so long as notice is given to the proponent with reasons. This notice and this decision can be made at any time. When exercising this discretion, the Minister is required to consider “whether the proposed activity contravenes a policy of the Government or the Department, whether the location of the proposed activity is unacceptable or whether adverse effects from the proposed activity are unacceptable.”<sup>53</sup> Similarly, section 56 confers a broad discretion to approve or reject proposed activities and to impose terms and conditions on approvals that the Minister considers necessary.

#### 5) Contrast with the Federal Legislation

48. Dean Sossin recognizes that the language of the *NSEA* and the *CEAA* differ but he does not consider the nature of these differences as they relate to the Minister’s discretion under the Nova Scotia legislation.<sup>54</sup>

49. In contrast to the federal legislation, the Nova Scotia legislation does not provide express criteria that the Nova Scotia Minister must consider when exercising his discretion, and most significantly, does not make the presence or absence of “significant adverse environmental effects” an explicit or key consideration. The role of the Minister under *NSEA* has more in common with the role of the Governor General in Council (GIC) under the federal statute than it does with the

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<sup>51</sup> **R-5**, *NSEA*, s. 3(a) defines “activity” to mean “an activity or part of an activity prescribed by the regulations.

<sup>52</sup> The Project was subject to Part IV of the *NSEA* and I refer to Part V only to show that it too contains broad discretionary powers for the Minister similar to those that exist in Part IV.

<sup>53</sup> **R-5**, *NSEA*, s. 52(2).

<sup>54</sup> Sossin Reply Opinion at p. 10.

role of the responsible authority under that scheme. Subsection 37(1.1) of the *CEAA* deals with the role of the GIC in the federal assessment process. The decision under section 37(1) by the responsible authority must be approved by the GIC. Like section 40 of the *NSEA*, section 37(1.1) of the federal statute says nothing about the grounds on which the GIC is to decide whether or not to approve the decision of the responsible authority.

#### **6) Conclusion with Respect to the Statutory Review**

50. In summary, the legislative scheme confers broad discretion on the Minister and his delegates at every step of the process and provides little express legislative constraint on the exercise of that discretion. And this broad discretion must be understood in the context of the fundamental objects of the process which are to predict and evaluate the environmental effects of an undertaking and to decide whether they are acceptable.

51. There is no language in the *NSEA* or the regulations made under it to support the view that the Minister is legally compelled to approve an undertaking when faced with a JRP Report that, as the Tribunal found, “denied the ultimate decision makers in government information which they should have been provided,”<sup>55</sup> let alone a JRP Report that fails to provide the mandatory recommendation. Moreover, the view that the Minister is legally compelled to approve an undertaking in those circumstances is deeply inconsistent with the central objects of the *Act*, which are to predict, evaluate and judge the acceptability of an undertaking’s environmental effects. This view is also, in my opinion, inconsistent with the Nova Scotia Minister’s responsibility for the general supervision and management of the *Act*.

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<sup>55</sup> Tribunal Decision at para. 535.

## 7) The Relevant Jurisprudence

52. While there is no Nova Scotia case law directly on point, a highly deferential stance on judicial review of the exercise of ministerial discretion is evident in several relatively recent decisions of the Nova Scotia Courts.<sup>56</sup>

53. The *Elderkin* decision is instructive, even though it is not concerned with the *NSEA*.<sup>57</sup> It concerned the Minister's refusal to approve certain planning documents which had been approved by a municipal council under subsection 208(6) of the *Municipal Government Act*. At issue was a requested rezoning to permit non-agricultural uses of certain land. The proposal was controversial and attracted great interest and public engagement. There were extensive planning studies. Under the relevant legislation, the Minister was to approve the documents, approve them with amendments or refuse to approve them.<sup>58</sup> In upholding the Minister's decision to refuse approval, the Court of Appeal wrote:

[36] The Minister's role as set out in s. 208(6) of the Act is important. That provision simply requires him to approve all or part of the planning documents, approve the documents with amendments, or refuse to approve the documents. Nothing ... obliges him to defer to Council's decision or any part of it. ... His task is to examine the planning documents anew, having regard to the [Statements of Provincial Interest]. His review necessarily involves considerations of complex policy issues and an overall weighing of policy considerations, which may include matters in addition to or different from those a municipality considers and weighs.<sup>59</sup>

54. While of course the parallel with this case is not exact, the nature of the Minister's powers under the *Municipal Government Act* are expressed in terms very similar to what we find in section 40 of the *NSEA*. Moreover, land use decisions, like environmental assessment decisions, give rise to questions of a public policy nature. *Elderkin* in my opinion suggests that the Nova Scotia courts

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<sup>56</sup> **R-818**, *Elderkin v. Nova Scotia (Minister of Service & Municipal Relations)*, 2013 NSCA 79 [*Elderkin*]; **R-819**, *Bay of Fundy Inshore Fisherman's Assn. v. Nova Scotia (Minister of Environment)*, 2017 NSSC 96, at paras. 28-31 citing with approval **R-820**, *Malcolm v. Canada (Minister of Fisheries and Oceans)*, 2014 FCA 130, at para. 58 and **R-821**, *Specter v. Nova Scotia (Minister of Fisheries and Aquaculture)*, 2012 NSSC 40, at para. 77.

<sup>57</sup> **R-818**, *Elderkin*.

<sup>58</sup> **R-822**, *Municipal Government Act*, S.N.S. 1998 c. 18, s. 208(6).

<sup>59</sup> **R-818**, *Elderkin*, at para. 36.

have a deferential stance towards the exercise of ministerial discretion and recognize that the Minister may take into account policy considerations and matters in addition to or different from other reviewers.

55. To similar effect, we see this statement in a 2004 Nova Scotia Supreme Court decision,

... ministerial decisions ‘are based on a public mandate relating to the administration of their department to determine matters of public interest and to balance competing public rights. By virtue of their status they are, in effect, experts on public policy.’<sup>60</sup>

56. There is Nova Scotia jurisprudence in relation to discretion in relation to the approval or rejection of proposed activities under Part V of the *NSEA*. In *Parker Mountain* the Court determined that the Minister had considerable discretion under section 52 of the *Act* in relation to approval.<sup>61</sup> A similar decision was reached in *Margaree Environmental Association*.<sup>62</sup> The Court in that case recognized that the Minister has a discretion to prevent a proposed activity from proceeding when he determines that it is not in the public interest having regard to the purposes of the *Act*. I note that under Part V of the *Act*, the discretion of the Minister to approve, approve with terms and conditions or refuse approval is expressed in language similar to that used in the comparable provisions in Part IV. In neither part is there an explicit “public interest” mandate. But the discretion for the Minister to act in the public interest having regard to the purposes of the *Act* must be inferred from the statutory scheme. These words of MacAdam J. bear repetition:

[80] The *Environment Act* directs the Minister, not the court, to determine whether, and under what terms and conditions, approval for oil well drilling will be given to an applicant. In determining whether to grant approval, the Minister is required by s.52 to consider “such matters as whether the proposed activity contravenes a policy of the Government or the Department, whether the location of the proposed activity is unacceptable or whether adverse effects from the proposed activity are unacceptable.” The Minister has a discretion to prevent the proposed

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<sup>60</sup> **R-823**, *DRL Environmental Services, Demolition Resources Ltd. v. Nova Scotia (Attorney General)*, 2004 NSSC 245, at para. 29.

<sup>61</sup> **R-824**, *Parker Mountain Aggregates Ltd. v. Nova Scotia (Minister of Environment)*, 2011 NSSC 134, at paras. 62-64.

<sup>62</sup> **R-825**, *Margaree Environmental Assn v. Nova Scotia (Minister of Environment)*, 2012 NSSC 296, at paras. 80-82.

activity from preceding when he determines it is not in the public interest having regard to the purpose of the Act.

[81] ... The purpose of the Act is primarily one of balancing interests, “of protecting the environment by balancing ecosystem integrity, human health and socio-economic well-being.” Section 52, however, permits the Minister to decide, in the final analysis, whether the granting of approval is in the public interest. The Minister is entitled to deference in determining whether, having regard to the purpose of the Act, it is in the public interest to approve an oil well drilling permit. (emphasis added)

57. A similar statutory scheme to the *NSEA* was considered by the British Columbia Court of Appeal in *Peace Valley*.<sup>63</sup> In that case, a JRP was appointed to consider the environmental impact of a project that required both federal and provincial approval. The panel was required to provide a report, and specifically empowered to make recommendations which had to be supported by reasons.<sup>64</sup> The British Columbia Court of Appeal described the ministerial role in the process after receipt of the JRP recommendations as follows:

[29] The role of the ministers in the statutory scheme is decidedly different from the role of the hearing panel. The ministers are, ultimately, the decision-makers. Their decisions are to be informed by the hearing panel’s report and recommendations, and the ministers must give consideration to them. In the final analysis, however, the discretion given to the ministers is very broad. They are entitled to consider a wide array of factors favouring or militating against the granting of a certificate.

58. In my opinion, this is an accurate statement of the law in relation to the role of the Minister under *NSEA*.

## **8) Conclusion with respect to Statutory Review and Jurisprudence**

59. In my opinion, the statutory scheme of the *NSEA* and the relevant jurisprudence show that the Nova Minister is not legally compelled to approve an undertaking following receipt of an incomplete JRP Report and would not have been legally compelled to do so in this case. Nor is the Nova Scotia Minister limited in the range of considerations that he or she can take into account,

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<sup>63</sup> **R-826**, *Peace Valley Landowner Assn. v. British Columbia (Minister of Environment)*, 2016 BCCA 377 [*Peace Valley*].

<sup>64</sup> **R-826**, *Peace Valley* at para. 28.

provided of course that those considerations are relevant ones having regard to the purposes of the statute.

**B. Options open to the Minister**

60. Faced with a JRP Report that failed to carry out its mandate, it was open to the Nova Scotia Minister to direct the JRP to fulfil its mandate.

61. Dean Sossin is of the view that it was open to the Nova Scotia Minister to direct the JRP to clarify various uncertainties concerning project effects.<sup>65</sup> Given the incomplete state of the JRP Report, I am not sure that simply requiring uncertainties to be clarified would have been sufficient. But the key point, in my view, is that while there is no express authority in the legislation authorizing the Minister to require more information or analysis from the JRP, that authority is necessarily implied by the Minister's broad mandate and the purposes of the scheme.

62. I do not agree with Dean Sossin that the Nova Scotia Minister, when faced with a JRP Report that did not provide the information that it ought to have provided to him or the recommendation that it was legally obligated to make, was nonetheless legally compelled to approve the undertaking without that information and recommendation. Such a result is not consistent with the main purpose of the JRP process, which is to provide a thorough assessment of the undertaking to contribute to sound ministerial decision-making. More fundamentally, that position also undermines the overriding purpose of the *NSEA*, to “support and promote the protection, enhancement and prudent use of the environment” while recognizing certain stated goals.<sup>66</sup>

63. Moreover, there is jurisprudence under the federal legislation holding that an assessment conducted in accordance with the legislation is a statutory pre-requisite to the exercise of

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<sup>65</sup> Sossin Reply Opinion, at para. 7.

<sup>66</sup> **R-5**, *NSEA*, s. 2.

ministerial discretion.<sup>67</sup> While I am not aware of any Nova Scotia law on this point, the principle in my view is applicable to the Nova Scotia legislation: where, as here, the Minister decides that a JRP process should be completed, the Minister should not exercise his discretion to reject or approve the undertaking until that process has been completed in a manner that complies with the statutory requirements and the JRP's terms of reference. That did not occur in this case.

64. In summary on this point, given the assumption that the JRP Report was incomplete, I cannot agree with Dean Sossin that the Nova Scotia Minister was “legally compelled” to approve the Project. The Minister, faced with an incomplete JRP report, could and likely should have insisted on a JRP Report that complied with the requirements set out in the legislation and the Terms of Reference.

**C. I disagree with the factual premise of Dean Sossin's opinion that there were no legitimate grounds to deny approval of the Project.**

65. Dean Sossin states in his Reply Opinion that “Without legitimate grounds to deny approval to the project, and but for the inappropriate reliance on the JRP's findings in relation to ‘community core values’... the Ministers were legally compelled to exercise their discretion to approve the project.”<sup>68</sup>

66. I do not accept the factual premise of Dean Sossin's opinion that there were no “legitimate grounds to deny approval of the project.” The JRP determined that the Project would result in adverse environmental effects and made other findings that would not have supported approval, quite apart from the JRP's inappropriate reliance on community core values.

67. There were, therefore, findings and expressions of concern in the JRP Report that supported rejection of the Project. Moreover, under the Nova Scotia legislation, there is no particular

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<sup>67</sup> **R-676**, *Alberta Wilderness Assn v. Canada (Minister of Fisheries and Oceans)*, Federal Court of Appeal, December 4, 1998 Docket A – 430 – 98 at para. 17; **R-3**, *Friends of the Oldman River*.

<sup>68</sup> Sossin Reply Opinion at p. 3.

threshold of severity of adverse effects or environmental affects to justify refusal of approval. The JRP:

- accepted that docking a large ship on the unprotected shore would be potentially dangerous and would present a serious risk for accidents that could have adverse effects on the local fishery;<sup>69</sup>
- concluded that the Project was likely to have an adverse environmental effect on the socio economic health and viability of some of the fishing communities in the Digby Neck and Islands;<sup>70</sup>
- concluded that the project would have an adverse effect on property values;<sup>71</sup>
- believed that the undertaking risked direct physical harm and behavioral effects on whales and that mitigation measures were required well beyond that proposed by the proponent.<sup>72</sup>
- believed that the dust emissions from Project phases occurring near the coast may have an adverse environmental effect on periwinkles and dulse on a local scale;<sup>73</sup>
- believed that several components of the quarry activities would generate extremely fine particles that are likely to become windborne and that present a serious risk of creating adverse environmental effects on human receptors;<sup>74</sup>
- believed that the coastal fen would likely suffer adverse environmental effects;<sup>75</sup>
- believed that the possibility of high-volume, high flow rate emergency water releases during storm events casts considerable doubt over the long-term sustainability of proposed plant and animal communities in the constructed wetlands;<sup>76</sup>

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<sup>69</sup> **R-212**, *Environmental Assessment of the Whites Point Quarry and Marine Terminal Project*, Joint Review Panel Report [JRP] at p. 10.

<sup>70</sup> **R-212**, JRP at p. 77.

<sup>71</sup> **R-212**, JRP at p. 79.

<sup>72</sup> **R-212**, JRP at p.64.

<sup>73</sup> **R-212**, JRP at p. 66.

<sup>74</sup> **R-212**, JRP at p. 73.

<sup>75</sup> **R-212**, JRP at p. 7.



- believed that the Project’s impact on native plant species would be an adverse environmental effect;<sup>77</sup>
- concluded that “given the limited economic and social benefits of the Project to the local communities, the province, and the country, the Panel found the Project should not proceed in a situation where endangered species and a local way of life would be at risk due to Project effects”;<sup>78</sup> and
- expressed concerns over risks of accidents and malfunctions.<sup>79</sup>

68. In the face of these concerns, and having regard to the statutory purposes of the *NSEA* and the Minister’s broad discretionary powers, I do not agree with Dean Sossin that the Nova Scotia Minister was legally compelled to approve this Project. In view of the many environmental concerns and the incomplete nature of the JRP Report, my view is that approval in those circumstances might well have made the Minister’s approval of the undertaking vulnerable to judicial review.<sup>80</sup> On the assumption that the Minister would eventually receive a complete JRP Report that contained these elements, they would provide the Minister with a reasonable basis to reject the undertaking.

**D. The inconsistency that undermines Dean Sossin’s opinion**

69. There is an inconsistency in Dean Sossin’s reasoning that undermines his conclusion that the Nova Scotia Minister was legally compelled to approve the Bilcon undertaking.

70. The inconsistency concerns the likely remedy if the Minister’s rejection had been the subject of judicial review. Dean Sossin notes, and I agree, that the most likely result of a successful

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<sup>76</sup> **R-212**, JRP at p. 36.

<sup>77</sup> **R-212**, JRP at p. 36.

<sup>78</sup> **R-212**, JRP at p. 103.

<sup>79</sup> **R-212**, JRP at p. 33-34.

<sup>80</sup> See **R-676**, *Alberta Wilderness Assn v. Canada (Minister of Fisheries and Oceans)*, Federal Court of Appeal, December 4, 1998 Docket A – 430 – 98 at para. 17; **R-3**, *Friends of the Oldman River*.

judicial review of the Minister's decision in this case would have been for the reviewing court to remit the matter to the Ministers for a further discretionary process.<sup>81</sup> However, this opinion is not consistent with the view that the Minister was legally compelled to approve the Project.

71. If, as Dean Sossin opines, the Minister had no alternative but to approve the Project, a judicial remedy in the nature of mandamus to require the performance of a non-discretionary duty would have been available.<sup>82</sup> The fact that such a remedy would not likely have been granted undermines the view that the Minister was legally compelled to approve the Project.

## **PART V: CONCLUSION**

72. In my opinion, faced with an incomplete JRP Report, the Nova Scotia Minister was not legally compelled to approve the undertaking. Given the state of the JRP Report, such approval would have been vulnerable to judicial review. On the assumption that the Minister would be provided with a complete JRP Report that found the adverse environmental effects and identified the various concerns that were noted in the JRP as filed, the Minister would have grounds to reasonably exercise his discretion to reject the Bilcon undertaking.



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Thomas Cromwell

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<sup>81</sup> Sossin Reply Opinion at para. 12.

<sup>82</sup> **R-3**, *Friends of the Oldman River*, at pp. 49 and 50.

## Schedule “A” – Summary of Education and Experience

### CURRICULUM VITAE

**The Honourable Thomas Albert Cromwell  
Senior Counsel, Borden Ladner Gervais LLP**

#### **CAREER OVERVIEW**

2017 –	Senior Counsel, Borden Ladner Gervais LLP
2008 - 2016	Justice, Supreme Court of Canada and Deputy of the Governor General
1997- 2008	Judge, Nova Scotia Court of Appeal
1995-1997	Professor of Law, Dalhousie Law School, Halifax Litigation Associate, Weir and Foulds (now WeirFoulds LL.P.)
1992-1995	Executive Legal Officer, Chambers of the Chief Justice, Supreme Court of Canada
1991-1992	Vice-Chair, Labour Relations Board (N.S.) and Construction Industry Panel
1982-1992	Associate Professor, then Professor of Law, Dalhousie Law School
1980-1982	Special Lecturer in Civil Procedure, Queen's University, Kingston, Ontario
1979-1982	Partner, O'Hara, Cromwell and Wilkin, Kingston, Ontario
1977-1978	Articles of Clerkship, Weir and Foulds, Toronto

#### **EDUCATION**

1977	Oxford University	Bachelor of Civil Law (Exeter College)(First Class)
1976	Queen's University (Kingston, Ontario)	Bachelor of Laws
1973	Royal Conservatory of Music	A.R.C.T.
1973	Queen's University	Bachelor of Music (First Class)

## **PROFESSIONAL QUALIFICATIONS**

2017                      Admitted to Bar of British Columbia  
1984                      Admitted to Nova Scotia Bar  
1979                      Admitted to Ontario Bar

## **RECOGNITION**

LL.D (Honoris Causa) – Queen’s University, Dalhousie University, Law Society of Upper Canada

D.H.C. – University of Moncton

Honorary Fellow - Exeter College Oxford, American College of Trial Lawyers, CREATE Justice, Faculty of Law, University of Saskatchewan

Honorary Director, Canadian Institute for the Administration of Justice

Honorary Member, Alternative Dispute Resolution Institute of Canada

Justice Medal, Canadian Institute for the Administration of Justice

Queen Elizabeth II Golden and Diamond Jubilee Medals (2002, 2012)

## **SERVICE TO PROFESSIONAL ORGANIZATIONS**

Served as President or Chair of:

Continuing Legal Education Society of Nova Scotia

Canadian Association of Law Teachers

Canadian Institute for the Administration of Justice

Canadian Forum for Civil Justice

Chief Justice’s Action Committee on Access to Justice in Civil and Family Matters