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 AND DANIEL CLAYTON AND BILCON OF DELAWARE INC.

Claimants

AND:

GOVERNMENT OF CANADA

Respondent

EXPERT REPORT OF T. MURRAY RANKIN, Q.C.

I. PURPOSE OF THIS REPORT

1. I was asked to undertake an independent analysis of the environmental assessment ("EA") process that was followed with respect to an application by Bilcon of Delaware, Inc. ("Bilcon") for project approval of a quarry and basalt loading facility to be established at Whites Point, located in Digby County, Nova Scotia. I was asked to consider the decision-making followed prior to, during and after the Joint Review Panel ("JRP") process established by the Governments of Canada and Nova Scotia.

2. The specific question posed was whether the EA process that was followed, either considered in whole or in part, would be substantively unreasonable and/or procedurally unfair, as viewed through the lens of Canadian public law principles. In doing so, I compared the treatment afforded projects that might objectively be considered substantially similar to the Bilcon project, recognizing, of course, that no two projects are ever identical. It is a hallmark of the "rule of law" principle, which has been held to undergird Canadian constitutional law[1], that as much as possible "like cases should be treated alike". Prevailing notions of justice have long featured adherence to this fundamental principle.[2]

3. When broadly considered, the issue is whether those projects received better treatment in the application of the two Governments' EA process when compared to the White Points Quarry ("WPQ") project, and whether jurisdictional deficiencies arose during the process, including any lack of natural justice and procedural fairness, which would offend principles of Canadian public law.

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[1] *Re Secession of Québec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 (***Investor's Schedule of Documents at Tab C 816***).

[2] The Free Online Dictionary provides this alternative definition of "justice":

2. (Philosophy) *Ethics*

a. the principle of fairness that like cases should be treated alike

b. a particular distribution of benefits and burdens fairly in accordance with a particular conception of what are to count as like cases. (emphasis added)

4. In preparing this Report, I reviewed the JRP Report; the Bilcon Memorial; the Counter-Memorial submitted by the Government of Canada; the various expert reports submitted by the parties, including those of David Estrin, Robert G. Connelly, and Lawrence Smith, Q.C.[3]; the witness statements of Hugh Fraser and Paul Buxton[4]; as well as the exhibits, portions of the transcripts of the JRP hearing and certain internal government correspondence that were provided to me. I was asked to provide my opinion on both the environmental law and public law aspects of what occurred. I was asked to draw on my academic and practice experience in administrative law and environmental law to inform my perspective.

[3] In preparing this Report, I was only provided copies of the initial expert reports of Mr. Estrin and Mr. Lawrence E, Smith, QC. I understand that subsequent reports may have been filed but these were not provided to me before this report was submitted. I have never spoken to either Mr. Estrin or Mr. Smith in advance of preparing this report.

[4] In the case of Buxton, I have reviewed both his initial witness statement from July 20, 2011, and his supplementary witness statement.

II. PROFESSIONAL BACKGROUND

5. I first studied environmental law at the Harvard Law School and then taught the subject as a Professor of Law at the University of Victoria for over a decade before joining Heenan Blaikie LLP, where I was a partner and a mediator/arbitrator in the environmental law field. I remain an Adjunct Professor at the University of Victoria, where I am Co-Chair of the Environmental Law Centre, which operates a clinic in public interest environmental law. I am a founding member of the Canadian Centre for Environmental Arbitration and Mediation, Co-Chair of the National Environmental Law Forum, and regularly advise governments, corporations, and law firms on environmental matters.

6. I advised the British Columbia Ministry of Environment on reform of environmental protection legislation, and represented the Province on the Commission on Resources and Environment in the development of strategic land use plans. I am a former Chair of the BC Public Interest Advocacy Centre, the Land Conservancy of BC, and the West Coast Environmental Law Association. I served as Commission Counsel to a Federal/Provincial Environmental Assessment Panel, and have been jointly retained by the Governments of Canada and British Columbia as an expert in Canadian environmental law in litigation before District Court of the United States.

7. I was appointed Queen's Counsel in 1999, and have appeared at all levels of Court on environmental matters. I have been ranked as a leading practitioner in Environmental Law in the LEXPERT Directory, as an expert in Environmental Law by Chambers & Partners Global, in its UK-based legal directory, and as an expert in Natural Resources Law in Best Lawyers International. I currently head a firm specializing in public and environmental law. I also serve as a director of Hummingbird Urban Biomass Ltd., a waste-to-energy corporation with offices in Canada and the United States.

8. I am a Regional Editor of the *Canadian Journal of Administrative Law and Practice*, and among my publications is a translation of the leading three-volume administrative law text by René Dussault and Louis Borgeat, *Administrative Law: A Treatise*.

III. EXECUTIVE SUMMARY

9. This Report arrives at six conclusions:

a) The Joint Review Panel (JRP) did not fulfill its mandate.
b) The JRP exceeded the jurisdiction conferred on it by the enabling legislation and its stipulated Terms of Reference.
c) The JRP did not accord natural justice and procedural fairness to Bilcon.
d) The JRP made erroneous findings of fact, provided opinions that were not based on the evidence provided to it, and took into account irrelevant considerations.
e) As a result of the JRP process, the decisions made by the federal and provincial ministers were in consequence also deficient in law.
f) This process was fundamentally flawed.

A. Mandate Omissions

10. The recommendations made by the JRP are circumscribed by the specific requirements of the Panel's statutory jurisdiction, the sources of which are the *Canadian Environmental Assessment Act*[5], the Nova Scotia *Environment Act*[6] and the JRP's Terms of Reference.[7] The Panel could not lawfully do anything contrary to the legislation under which it was constituted or the specific Terms of Reference under which the review was to take place. Examples of the JRP acting contrary to the legislation and its Terms of Reference include the following:

a) it did not provide the Ministers with any recommendations concerning "the environmental effects of malfunctions or accidents that may occur in

[5] *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (***Investor's Schedule of Documents at Tab C 255***).
[6] *Nova Scotia Environment Act*, 1994-95, c. 1, as amended by S.N.S. 1998, c. 18, s. 557 (***Investor's Schedule of Documents at Tab C 258***).
[7] Terms of Reference for the Joint Review Panel, Appendix to the *Agreement concerning the Establishment of a Joint Review Panel*, dated November 3, 2004 (***Investor's Schedule of Documents at Tab C 363***).

connection with the Project", contrary to the mandatory terms of the "Scope of the Environmental Assessment and Factors to be considered in the Review", contained in Part III of the Terms of Reference;

b) it did not limit its analysis of cumulative environmental effects to those that are "likely to result from the Project in combination with other projects or activities that have been or will be carried out"; and

c) it did not make recommendations concerning "measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project".

B. Excess of Jurisdiction

11. The JRP's conclusion that the project would negatively impact "community core values" was *ultra vires.* In light of the definition of "environmental effects" contained in the Terms of Reference, "community core values" is not an "environmental effect" as that term is defined. Any conclusion based on a notion of "community core values", therefore exceeded the JRP's jurisdiction.

12. Similarly, the JRP's decision to adopt sustainable development and the precautionary principle as part of its "five guiding principles" also constituted jurisdictional errors. They are considerations outside the JRP's jurisdiction as codified in the Terms of Reference, as was the JRP's evaluation of "benefits and burdens", and what it considered to be in the public interest.

13. In introducing its first Recommendation, the JRP stated:

> The Panel's mandate was to determine whether the Project presented by Bilcon would result in significant adverse or beneficial physical, biological or socioeconomic environmental effects and would be in the public interest. Based on its comprehensive synthesis and analysis of all the information provided, the

> Panel found that the Project would have a significant adverse effect on a Valued Environmental Component represented by the "core values" of the affected communities. The Panel's review of core values advocated by the communities along Digby Neck and Islands, as well as community and government policy expectations, led the Panel to the conviction that community has an exceptionally strong and well-defined vision of its future.[8]

Even if the "affected communities…advocated" certain things – and the evidence shows clearly that Digby Neck was a classically divided community – this could not change the legal mandate of the JRP. It simply had no jurisdiction to make determinations about "the public interest" or "benefits and burdens".

C. Lack of Natural Justice and Procedural Fairness

14. In the conduct of its hearing the JRP did not meet Bilcon's expectations. It did not provide Bilcon with adequate notice of "the case it had to meet", demonstrated bias in its antagonistic questioning of Bilcon's representatives, and revealed a pre-determination of the questions it was to decide by refusing or neglecting to hear from Bilcon's expert witnesses.

15. Bilcon's presentations were made available to the JRP 10 days in advance of the JRP hearing. It was Bilcon's understanding that the Federal/Provincial regulatory authorities would submit their presentations, or at least the outlines of their of presentations, 10 days in advance, or sufficiently in advance, so as to allow Bilcon a reasonable opportunity to review, consider and effectively respond to the presentations. But this was not the case. As a result Bilcon's preparation was confounded by the fact that Bilcon was not provided with a number of presentations causing Bilcon to guess at times as to what was going to be said that might require an immediate Bilcon answer. In particular a number of government presentations were provided to Bilcon just a few days before or on the eve of the hearings. More troubling still was the presentation by DNR at

[8] Joint Review Panel Report, dated October 23, 2007, at p. 4 (***Investor's Schedule of Documents at Tab C 34***).

the hearing that turned out to be substantially different from the presentation it submitted prior to the hearing.[9]

16. Former journalist Hugh Fraser noted an "adversarial approach" taken by the Chair of the JRP toward Bilcon.[10] Although Bilcon had submitted a 17-volume comprehensive Environmental Impact Statement, which was compiled over three and a half years, and included 48 experts' reports and 35 studies commissioned for the proposed project, Mr. Fraser observed that the tone of the questioning by the Panel was belligerent and sarcastic, to the point that the Chair of the JRP sneeringly asked during the public hearings if any member of the Bilcon team knew what "the scientific method" was.[11]

17. With respect to most of the issues assessed in the Environmental Impact Statement, Bilcon's experts were not called upon, and Bilcon was given no notice that "community core values" would be taken into account, let alone play a decisive role in the JRP's decision.

18. Similarly, the JRP took into account considerations such as "sacred landscape" and "Loyalist, Afro-Canadian and Acadian views of Traditional Knowledge", without proper notice and beyond the scope of its mandate. It seems self-evident that Bilcon would not have been able to fairly participate in an environmental review that required it to satisfy such as amorphous standard as the term "sacred landscape" connotes.

[9] Supplemental Witness Statement of Paul Buxton at para. 45.
[10] Witness Statement of Hugh Fraser, dated July 6, 2011, at para. 9.
[11] Witness Statement of Hugh Fraser, dated July 6, 2011, at para. 13; Environmental Impact Statement of the Whites Point Quarry and Marine Terminal Project, March 2006 (***Investor's Schedule of Documents at Tab C 1***).

D. Erroneous Findings

19. The JRP made several critical findings of fact that were erroneous and contrary to the evidence presented to it, and expressed personal opinions that were not based on the evidence presented to it. For example:

a) The JRP's findings concerning the Project's viability ignored evidence presented at the hearings, and made guesses without evidence in concluding that the project would not be economically viable;
b) The JRP concluded that since Bilcon had not been able to acquire the Whites Point Road, the project was not viable, despite the fact that Bilcon's agent expressly testified at the hearing that Bilcon had deliberately designed the Project without the use of that road;
c) The Panel referred to the environmental impacts of an artificial breakwater – something which had never even been proposed by Bilcon;
d) The Panel concluded that the approval of the WPQ project would likely lead to other American companies wanting to come to the Digby Neck area, despite the fact that this conclusion was contrary to the evidence provided to the Panel – namely, that there had been no inquiries from American corporations to the Government of Nova Scotia seeking information on quarrying in Nova Scotia;
e) In addressing the depth of water in the area of the proposed dock, Bilcon was accused of not speaking to local fishers, yet its Environmental Impact Statement used advanced scientific technology to provide unassailable scientific evidence on that very point; and
f) The Panel also concluded that adverse effects could result from the use of ammonium nitrate fuel oil ("ANFO"), despite evidence to the contrary presented by Bilcon's blasting specialist, as well as federal government officials. The JRP's conclusion that over 300 times more ANFO would be used than was actually the case, also constituted an enormous factual error.

E. Resulting Ministerial Decisions

20. In addition to relying on the flawed JRP Report, the resulting ministerial decisions also involved fundamental legal errors. For example:

a) The failure to accord Bilcon the opportunity to make any representations to the relevant decision-makers in the two governments was contrary to the principles of natural justice and procedural fairness, given the significant impact of the Ministers' decisions upon Bilcon's economic and legal interests. Since there is no indication that other material was taken into account in their decision-making, one must infer that the decisions were based only on these recommendations of the JRP and the factual errors included in them;

b) Since the Canadian environmental assessment process is statute-bound, fundamental rule of law principles dictate that ministerial decision-making must be consistent with constitutional and administrative law principles. Even though both relevant statutes empowered a joint review process, the Ministers' decision-making was still required to be within their respective constitutional powers. Accordingly, the Federal Minister was constitutionally required to decide on the basis of fisheries or other matters assigned to the Federal Government under section 91 of the *Constitution Act, 1867*;

c) The JRP misapprehended the planning role assigned to it, and was entirely too prescriptive in its recommendations, given the subsequent permitting process that would be required under both federal and provincial legislation; and

d) A key example is that the Government of Canada explicitly accepted the JRP's irrelevant consideration of "community core values".[12]

21. There were also critical government errors related to the conduct of the federal and provincial officials at the commencement of Bilcon's engagement with them. The differential and inconsistent treatment between the quarry and marine terminal at Whites Point, and other similar projects constituted an abuse of discretion by the federal and provincial governments from the outset.

F. Effect on Entire Process

22. Each phase of the EA process that was followed with respect to the Bilcon application included and compounded the legal errors of the previous phase. Thereby, in addition to the legal consequences of each specific error, the cumulative effect results in the entire process being fundamentally flawed in Canadian law.

[12] DFO News Release headed 'The Government of Canada's Response to the Environmental Assessment Report of the Joint Panel on the Whites Point Quarry and Marine Terminal Project', dated March 24, 2003 (***Investor's Schedule of Documents at Tab C 589***).

IV. APPLICABLE LEGAL FRAMEWORKS

Administrative Law in Canada

A. Review of Administrative Decisions

23. In Canada, any decision of an administrative nature, whether made by a specialized body, a tribunal, or a Minister, may be reviewed for compliance with administrative law. The decision of the Supreme Court of Canada in *Dunsmuir* is the leading jurisprudence in regard to the parameters that guide the review.[13] It affirmed that the core principle of review was to "ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes."[14]

B. Standards of Review

24. There are two standards of review of an administrative decision: correctness and reasonableness. Reasonableness is the more common standard:

> Reasonableness is a deferential standard… Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[15]

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[13] *Dunsmuir v. New Brunswick (Board of Management)* (2008) SCC 9, [2008] 1 S.C.R. 190 (***Investor's Schedule of Documents at Tab C 817***).
[14] *Dunsmuir v. New Brunswick (Board of Management)* (2008) SCC 9, [2008] 1 S.C.R. 190 at para. 28 (***Investor's Schedule of Documents at Tab C 817***).
[15] *Dunsmuir v. New Brunswick (Board of Management)* (2008) SCC 9, [2008] 1 S.C.R. 190 at para. 47 (***Investor's Schedule of Documents at Tab C 817***).

Thus, when an administrative decision is reviewed against the standard of reasonableness, the review is imbued with a large degree of deference to the decision-maker.

25. Correctness is a more stringent standard, which permits a judge to substitute his/her own assessment for the decision-maker's:

> A reviewing court will not show deference to the decision-maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision-maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.[16]

C. The Applicable Standard

26. The applicable standard of review the decisions made by the Ministers with respect to the Bilcon EA process is reasonableness. In *Dunsmuir*, the Supreme Court of Canada affirmed, "Questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness….".[17] This matter is largely associated with questions of fact, discretion and policy. While the jurisdictional questions involved are more legal in nature, when legal and factual questions are intermixed, they fall under the reasonableness standard of review.[18]

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[16] *Dunsmuir v. New Brunswick (Board of Management)* (2008) SCC 9, [2008] 1 S.C.R. 190 at para. 50 (***Investor's Schedule of Documents at Tab C 817***).
[17] *Dunsmuir v. New Brunswick (Board of Management)* (2008) SCC 9, [2008] 1 S.C.R. 190 at para. 51 (***Investor's Schedule of Documents at Tab C 817***).
[18] *Dunsmuir v. New Brunswick (Board of Management)* (2008) SCC 9, [2008] 1 S.C.R. 190 at para. 53 (***Investor's Schedule of Documents at Tab C 817***).

D. Rule of Law

27. Administrative law is itself the natural outcome of the rule of law and the transcendent idea it encompasses: those exercising public authority must act within the scope of the authority granted to them by legislation. As expressed by the Supreme Court of Canada:

> The theoretical basis of this idea is therefore unimpeachable (…): any grant of jurisdiction will necessarily include limits to the jurisdiction granted, and any grant of a power remains subject to conditions.[19]

Sir William Wade, a leading English authority on administrative law, notes that all public authority is "subject to legal limitations; there is no such thing as absolute or unfettered administrative power."[20]

E. Jurisdiction (*Vires*)

28. A leading Canadian text on administrative law[21] expresses the concept of jurisdiction succinctly:

> When an agency has been given authority it may use that authority only for the purposes for which the authority was given to it. An agency does not have the jurisdiction to use its powers for improper purposes. To do so constitutes acting without jurisdiction. [22]

> (…) [W]hat is the status of decisions made without jurisdiction? Simply put, a decision made without jurisdiction is invalid or even void.[23]

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[19] *UES, Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at para. 118 (***Investor's Schedule of Documents at Tab C 818***).
[20] W.C. Wade, *Administrative Law*, 6th Edition (United Kingdom: Clarendon Press, 1988), p. 4-5 (***Investor's Schedule of Documents at Tab C 853***).
[21] R. Macaulay and James Sprague, *Practice and Procedure before Administrative Tribunals* (Canada: Carswell, 2004) (***Investor's Schedule of Documents at Tab C 863***).
[22] R. Macaulay and James Sprague, *Practice and Procedure before Administrative Tribunals* (Canada: Carswell, 2004), p. 5-17 (***Investor's Schedule of Documents at Tab C 863***).
[23] R. Macaulay and James Sprague, *Practice and Procedure before Administrative Tribunals* (Canada: Carswell, 2004), p. 5-18 (***Investor's Schedule of Documents at Tab C 863***).

> Having discretion does not mean one can do whatever one wishes when and however one wishes to do. Discretion is not a licence to act arbitrarily.[24]

29. In support of this fundamental principle, the Supreme Court has held:

> … in a country founded on the rule of law and in a society governed by principles of legality, discretion cannot be equated with arbitrariness. While this discretion does of course exist, it must be exercised within a specific legal framework… The statute and regulations define the scope of the discretion and the principles governing the exercise of the discretion, and they make it possible to determine whether it has in fact been exercised reasonably.[25]

30. A famous British decision, *Anisminic Limited v. Foreign Compensation Commission*[26], explains how a decision-maker may exceed jurisdiction:

> …there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provision setting it up, it had no right to take into account. I do not intend this list to be exhaustive.[27]

31. The jurisdiction of the JRP was contained in certain specific legal instruments: the *Environmental Assessment Act* of Canada; the *Environment Act* of Nova Scotia, the Intergovernmental Agreement ("the Agreement")[28] establishing the JRP, and the Terms of Reference appended to the Agreement. Unlike the superior courts in Canada which

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[24] R. Macaulay and James Sprague, *Practice and Procedure before Administrative Tribunals* (Canada: Carswell, 2004), 5B.3 (Investor's ***Schedule of Documents at Tab C 863***).

[25] *Montreal (City) v. Montreal Port Authority* (2010) SCC 14, [2010] 1 S.C.R. 427 at para. 33 (Emphasis added) (***Investor's Schedule of Documents at Tab C 819***).

[26] *Anisminic Limited v. Foreign Compensation Commission*, [1969] 2 AC 147, [1968] UKHL 6 (***Investor's Schedule of Documents at Tab C 840***).

[27] *Anisminic Limited v. Foreign Compensation Commission*, [1969] 2 AC 147, [1968] UKHL 6 at p. 3-4 (***Investor's Schedule of Documents at Tab C 840***).

[28] 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 , dated November 3, 2004 (***Investor's Schedule of Documents at Tab C 363***).

have inherent jurisdiction, the JRP was a statutory tribunal, which had only the limited authority expressly conferred on it by those legal instruments.

32. The Federal Court of Canada has also confirmed that the Terms of Reference of an environmental review panel "defin[e] the jurisdiction of the Panel".[29]

F. Discretion

33. The decision-makers in this matter, the federal and Nova Scotia Ministers of the Environment, were subject to these rule of law principles, which required that their discretion had to be exercised in accordance with their statutory authority.

34. In a rule of law system, discretion has clear limits and cannot be abused:

> When Parliament grants power to public authorities, it inevitably also gives them discretion. Each authority has to decide for itself whether to act or not to act and how it wishes to act. (…) Even if the authority has undoubted power to do something, there may be duties as to how it is to be done. (…)
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> If merely because an Act says that a Minister may "make such orders as he thinks fit" or may do some "if he is satisfied" as to some fact, the court were to allow him as he liked, a wide door would be opened to abuse of power and the rule of law would cease to operate.
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> It is a cardinal axiom accordingly that every power has legal limits, however wide the language of the empowering Act. If the court finds that the power has been exercised oppressively or unreasonably, or if there has been some procedural failing, such as not allowing a person affected to put forward his case, the Act may be condemned as unlawful. Although lawyers appearing for Government departments often argue that some act confers unfettered discretion, they are guilty of constitutional blasphemy. Unfettered discretion cannot exist where the rule of law reigns.[30]

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[29] *The Industrial Cape Breton Community Alliance Group on the Sable Gas Project v. Sable Offshore Energy Project et al*. (2000) 195 F.T.R. 189 at para. 20 (***Investor's Schedule of Documents at Tab C 820***).
[30] W.C. Wade, *Administrative Law*, 6th Edition (United Kingdom: Clarendon Press, 1988), p. 38-39 (***Investor's Schedule of Documents at Tab C 853***).

35. Abuse of discretion is frequently the subject of judicial review in Canadian administrative law. For example, in *Keeping v. Canada (Attorney General)*[31] a government agent improperly measured a fisherman's boat as being smaller than it actually was. Had the boat been properly measured, the policy of the department would have been to issue the appropriate fishing license. Due to the error, however, the Minister refused to license the boat. When the error was discovered, officials of the government raised the defence that since the grant of licenses lay within the Minister's absolute discretion under the statute, the Minister was absolved from any liability. The Newfoundland and Labrador Court of Appeal disagreed and concluded:

> (…) In the present case [if the boats] had been properly measured there would have been no valid reason for the Minister not to have issued William Keeping a supplementary crab license. To not have done so, given that Mr. Keeping would have then met all the required criteria, would have been completely arbitrary and in bad faith.[32]

It is also fundamental to discretion that "discretion cannot be exercised in a discriminatory manner"[33], and that discretion must also be exercised in accordance with the basic rules of natural justice.[34]

36. A typical review of a Minister's discretionary power is illustrated by the recent decision of the Supreme Court of Canada in *Halifax (Regional Municipality) v. Canada (Public Works and Government Services).*[35] The case involved a review of a decision by a federal minister under the *Payments in Lieu of Taxes Act*. The evaluation of a historic site had been the subject of disagreement and the matter was referred to an advisory panel – a mechanism with advisory powers similar to those of the JRP in the present case. The

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[31] *Keeping v. Canada (Attorney General)* (2003) 226 D.L.R. (4th) 285 (NLCA) (***Investor's Schedule of Documents at Tab C 837***).
[32] *Keeping v. Canada (Attorney General)* (2003) 226 D.L.R. (4th) 285 (NLCA) at para. 36 (***Investor's Schedule of Documents at Tab C 837***).
[33] R. Macaulay and James Sprague, *Practice and Procedure before Administrative Tribunals* (Canada: Carswell, 2004), p. 5B-29 (***Investor's Schedule of Documents at Tab C 863***).
[34] *Council of Civil Service Unions v. Minister for the Civil Service* [1984] 3 All E.R. 935 (HL) (***Investor's Schedule of Documents at Tab C 858***).
[35] *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29 (***Investor's Schedule of Documents at Tab C 821***).

Panel advised the Minister that 42 acres of urban land should be valued at a nominal $10. The Minister accepted the Panel's advice and acted in accordance with it. The Supreme Court held that the evaluation was unreasonable and the matter was remitted to the Minister for redetermination.[36]

37. Even though the *Act* conferred broad discretion on the Minister to determine payments, his decision was held to be unreasonable. The Minister's approach had the effect of frustrating the legislative scheme under which his authority was conferred, and his decision was at odds with the policy of the *Act*, which was to treat municipalities fairly. The Court held that it could not be fair or equitable to conclude that 42 acres in the middle of a major city had virtually no value for assessment purposes. Although the legislation granted the Minister an ostensibly unbounded, permissive grant of authority, the Supreme Court held that the Minister's discretion was not unfettered:

> Discretion conferred by statute must be exercised consistently with the purposes and policies underlying its grant.[37]
>
> …
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> What will constitute a reasonable approach on the part of the Minister depends on the evidence placed before him in the particular case, viewed through the lens of his statutory duties under the Act and in light of the reasons which he gives for the particular exercise of his statutory discretion.[38]

G. Natural Justice and Procedural Fairness

38. One way in which a statutory decision-maker can lose jurisdiction is by not meeting the requirements of natural justice, which Canadian courts now also characterize as "procedural fairness" and the "duty to act fairly". The two components of procedural

[36] *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29 at para. 59 (***Investor's Schedule of Documents at Tab C 821***).
[37] *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29 at para. 55 per Cromwell, J. (*per curiam*) (***Investor's Schedule of Documents at Tab C 821***).
[38] *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29 at para. 58 per Cromwell, J. (*per curiam*) (***Investor's Schedule of Documents at Tab C 821***).

fairness are contained in these Latin maxims: *audi alteram partem* (hear the other side) and *nemo judex in sua causa* (the decision-maker cannot be biased by having an interest in the result or by predetermining the result).

39. In its *Guide for Chairpersons and Panel Members*, the Canadian Environmental Assessment Agency acknowledges that Review Panels are subject to the rules of "natural justice".[39] In the Whites Point Quarry context, both the JRP and the Ministers were subject to the requirements of natural justice. The Proponent had "the right to be heard" before decisions affecting its interests were made. Those making and directly influencing the decisions were required by law to be free from any disqualifying bias. In the context of the JRP, this first required, in accordance with Section 33 of the CEAA, that panel members be unbiased and without any direct or indirect conflict of interest in respect of the project:

> The duty not to do anything which is procedurally unfair also means that every person must be given an adequate opportunity to be heard before a decision affecting his or her interests is made. (…).
>
> All individuals must be given an equal and fair opportunity to respond to anything which may be contrary to their interests.[40]

40. *Alberta Wilderness Association v. Cardinal River Coals Limited*[41] is an example of a JRP decision that was reviewed on the basis or procedural fairness. In that case, the Federal Court concluded that "as a result of a breach of due process based on legitimate

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[39] Canadian Environmental Assessment Agency, *Your Role in an Assessment by a Review Panel: A Guide for Chairpersons and Members*, July 2001, Annex B: "There are legal requirements governing proceedings such as those of a review panel. The violation of these legal requirements by a review panel (or by one of the panel members) may be a basis for the court to set aside the decisions that will be made by the responsible authorities in consideration of the panel report. In such a case, the review panel may have to reconvene in order to then fully comply with the applicable legal requirements." (***Canada's Counter-Memorial Exhibit R-32***) (***Investor's Schedule of Documents at Tab C 829***).

[40] Canadian Environmental Assessment Agency, *Your Role in an Assessment by a Review Panel: A Guide for Chairpersons and Members*, July 2001, Annex B (***Canada's Counter-Memorial Exhibit R-32***) (***Investor's Schedule of Documents at Tab C 829***).

[41] *Alberta Wilderness Association v. Cardinal River Coals Limited* [1999] 3 FC 425 (***Investor's Schedule of Documents at Tab C 453***).

expectations, the Joint Review Panel has committed a reviewable error in that it did not consider information it accepted for consideration."[42]

41. In the *Dunsmuir* case, the Supreme Court of Canada also restated the role of the courts in ensuring fairness by decision-makers:

> …a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision-maker and the type of decision under review. (…) The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process.[43]

42. In addition to the duty of *audi alteram partem*, a decision-maker must be free from any disqualifying bias. The leading formulation of the relevant test in Canadian law is that of the Supreme Court of Canada in *Committee for Justice and Liberty v. National Energy Board*[44]:

> The apprehension of bias must be a reasonable one, held by reasonable and right-minded people, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.[45]

Bias also includes attitudinal bias:[46]

> Attitudinal bias arises where a decision-maker has pre-judged an issue and has not brought an open mind to the decision-making process. The rule against bias disqualifies decision-makers with attitudinal biases.[47]

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[42] *Alberta Wilderness Association v. Cardinal River Coals Limited* [1999] 3 FC 425 at para. 86 (***Investor's Schedule of Documents at Tab C 453***).
[43] *Dunsmuir v. New Brunswick (Board of Management)* (2008) SCC 9, [2008] 1 S.C.R. 190 at para. 129 (***Investor's Schedule of Documents at Tab C 817***).
[44] *Committee for Justice and Liberty v. National Energy Board* [1978] 1 S.C.R. 369 (***Investor's Schedule of Documents at Tab C 822***).
[45] *Committee for Justice and Liberty v. National Energy Board* [1978] 1 S.C.R. 369 at para. 40 (***Investor's Schedule of Documents at Tab C 822***).
[46] *Metecheah v. British Columbia (Minister of Forests),* 1997 CanLII 2719 (BC SC) (***Investor's Schedule of Documents at Tab C 835***).

43. And it should be noted that in Canadian law the requirements of natural justice extended to panels or commissions that only make recommendations. For example, in *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, the Supreme Court of Canada noted that the roles of commissions of inquiry to investigate "should not be fulfilled at the expense of the denial of the rights of those being investigated. (…)[N]o matter how important the work of an inquiry may be, it cannot be achieved at the expense of the fundamental right of each citizen to be treated fairly".[48]

H. Constitutional Framework of Canadian Environmental Law

44. Under the Canadian *Constitution Act, 1867*[49] various subjects of legislative authority are allocated between the federal government and the provinces of Canada. While many subjects are specifically allocated – for example, "navigation and shipping" and "seacoast and inland fisheries" are allocated to the federal government; "property and civil rights in the province" and "the management and sale of public lands belonging to the province" are allocated to the provinces.[50] Noteworthy among provincial heads of authority is section 92A of the *Constitution Act, 1867* which confers on each provincial legislature exclusive authority to make laws in relation to:

> The development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production there from (…).[51]

45. The regulation of quarries and other mines in Nova Scotia derives from this power as well as from legislative power in relation to "property and civil rights" and "the

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[47] *Metecheah v. British Columbia (Minister of Forests)*, 1997 CanLII 2719 (BC SC) at para. 41 (***Investor's Schedule of Documents at Tab C 835***).
[48] *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)* [1997] 3 SCR 440 at para. 31 (Emphasis added) (***Investor's Schedule of Documents at Tab C 823***).
[49] *Constitution Act , 1867*, Section 91(2) (***Investor's Schedule of Documents at Tab C 257***).
[50] See sections 91 and 92 of the *Constitution Act, 1867* (***Investor's Schedule of Documents at Tab C 257***).
[51] *Constitution Act , 1867*, Section 92A(1) (***Investor's Schedule of Documents at Tab C 257***).

management and sale of public lands". In addition, Canadian Courts have recognized that provinces derive legislative authority from their ownership of natural resources, which is guaranteed in Section 109 of the *Constitution Act, 1867*.

46. Although environmental protection is not a specifically enumerated constitutional power, in *R. v. Hydro Quebec*[52] the Supreme Court of Canada determined that the protection of the environment as a public purpose would support federal law under the federal government's criminal law power. As a result, the *Canadian Environmental Protection Act* was upheld as being within the legislative authority of the federal government. In another decision, the Supreme Court of Canada held:

> The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government(…).
>
> It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.[53]

In the result, as a matter of legislative authority environmental law is "a matter of shared jurisdiction."[54]

47. Professor Benidickson begins his analysis of the *Canadian Environmental Assessment Act* ("CEAA") by emphasizing "the importance of first linking the exercise of legislative power in a relation to the environment to the appropriate head of constitutional power."[55]

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[52] *R. v. Hydro Quebec* [1997] 3 S.C.R. 213 (***Investor's Schedule of Documents at Tab C 824***).
[53] *Friends of the Oldman River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3 at p. 71-72 (***Investor's Schedule of Documents at Tab C 825***).
[54] *R. v. Hydro Quebec* [1997] 3 S.C.R. 213 at para. 59 (***Investor's Schedule of Documents at Tab C 825***).
[55] J. Benidickson, *Environmental* Law, 3rd Edition (Toronto: Irwin Law, 2009), p. 253 (Emphasis added) (***Investor's Schedule of Documents at Tab C 852***).

48. Similarly, Professor Alistair Lucas, another well-known environmental lawyer, has written:

> The federal government has jurisdiction to assess the environmental effects of aspects of the project related to a federal head of power, but cannot use an environmental assessment process as a colourable device to assess subjects within provincial jurisdiction.[56]

49. So as a matter of law, even in the context of a joint federal-provincial review, the federal government can only address matters over which it has constitutional jurisdiction, and only in accordance with its statutory mandate, as set out in the *CEAA*. Referring to constitutional issues, Ms. Beverly Hobby, the author of a leading text on the *CEAA* and a senior lawyer with the Federal Department of Justice, has written:

> The "environment" is not an enumerated head of power in the Constitution. The Act must be read and interpreted in the context of the jurisdiction over environmental assessment shared by the provinces and the federal government. (…) At what point, however, will the (Department of Fisheries and Ocean's) environmental assessment exceed federal jurisdiction and be said to be unduly intruding into an area of provincial jurisdiction? The response to this question stems to a large extent from the power, duty or function, the federal authority proposes to exercise or perform with respect to a project. [57]

50. In that context, Ms. Hobby points out that Section 5 of the CEAA identifies the powers, duties and functions that a federal authority may exercise or perform with respect to a project. She states that if a federal authority is the proponent, or is granting some sort of financial assistance or disposing of some interest in federal land to enable a project to proceed, "the federal authority can consider all adverse environmental effects likely to result from the project, regardless of the division of powers. In addition, the

[56] R. Cotton and Alistair Lucas, *Canadian Environmental Law*, 2nd Edition (Canada: Lexus Nexis, 1991) at COMM 3.3, citing *Friends of Oldman River* at p. 80 (Emphasis added) (***Investor's Schedule of Documents at Tab C 862***).
[57] Beverley Hobby et al, *Canadian Environmental Assessment Act* (Aurora: Canada Law Book, 1997), p. I-3 – I-4 (***Investor's Schedule of Documents at Tab C 851***).

federal authority may impose any mitigation measures it considers necessary in the circumstances."[58]

51. Another way in which the federal government may engage with the environment occurs when it must issue a permit, licence or other authorization under some other federal legislation that is expressly included in the *Law List Regulations* enacted under the *CEAA*. That was the stated basis for federal involvement in the WPQ project: federal legislation was said to constitute the "trigger" to invoke the CEAA. When that is the basis for federal involvement, Ms. Hobby writes:

> Determining the level of significance of adverse environmental effects and the conditions a federal authority may attach to the issuance of a regulatory approval will be limited. The limits will include the head of federal jurisdiction the legislation relates to (which may vary depending on the type of action or approval the legislation authorizes) as well as other areas of federal jurisdiction and including areas of provincial jurisdiction that will likely affect the area of federal jurisdiction to be protected. [59]

52. She gives an example of the Department of Fisheries and Oceans (DFO) issuing an authorization in a national park. Effects on wildlife outside the national park "would not normally be within its authority": any conditions could only extend to the national park, and not the adjacent territory. Conversely, the DFO could only consider impacts in areas of provincial jurisdiction that would in turn affect an area of federal jurisdiction. For instance, the impact of a project on soil erosion in adjacent territory (that is within provincial jurisdiction) could be considered if the erosion would have a negative impact on fish habitat.[60]

She concludes:

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[58] Beverley Hobby et al, *Canadian Environmental Assessment Act* (Aurora: Canada Law Book, 1997), p. I-4 (***Investor's Schedule of Documents at Tab C 851***).
[59] Beverley Hobby et al, *Canadian Environmental Assessment Act* (Aurora: Canada Law Book, 1997), p. I-4 (***Investor's Schedule of Documents at Tab C 851***).
[60] Beverley Hobby et al, *Canadian Environmental Assessment Act* (Aurora: Canada Law Book, 1997), p. I-4.1 (***Investor's Schedule of Documents at Tab C 851***).

> The net effect of the constitutional limits imposed on the exercise of a power or the performance of a duty or function identified in the *Law List Regulations* is to reduce the scope of the legislation in a manner that is not apparent from the wording of the Act. For instance, the relatively broad definition of "environmental effect" in section 2 of the Act may lead to incorrect assumptions. Before a responsible authority issues a permit, licence or authorization, it will be required to assess, mitigate and determine the level of significance on the basis of all adverse "environmental effects" the project is likely to cause – but **not** irrespective of whether such effects are in areas of federal or provincial jurisdictions. On the contrary, the choice of appropriate mitigation measures and corresponding level of significance of environmental effects may be a function of careful consideration of the division of powers, as well as the regulatory power that is to be applied.[61]

53. Therefore, despite the seemingly wide ambit of discretion in the EA process, it does not enable one level of government to impose terms on a project proponent or to make a decision relating to a proposed project that is not within its own constitutional jurisdiction, but is rather in the jurisdiction of the other level of government. As Ms. Hobby observes, "environmental effects" call for "careful consideration of the division of powers".[62]

54. The legal importance of the separation of federal and provincial powers, as it relates to the environmental assessment was considered in the leading case, *Hamilton Wentworth (Regional Municipality Of) v. Canada (Minister of the Environment).*[63] In that case, the Federal Court of Canada considered a referral to a review panel by a federal Minister. The Fisheries Minister had set out the basis on which he was making a request to the Minister of the Environment that a certain expressway project be referred to a review panel. He had rejected the proposal made to him that the expressway be referred

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[61] Beverley Hobby et al, *Canadian Environmental Assessment Act* (Aurora: Canada Law Book, 1997), p. I-5 (Emphasis added) (***Investor's Schedule of Documents at Tab C 851***).

[62] Beverley Hobby et al, *Canadian Environmental Assessment Act* (Aurora: Canada Law Book, 1997), p. I-5 (Emphasis added) (***Investor's Schedule of Documents at Tab C 851***).

[63] *Hamilton Wentworth (Regional Municipality Of) v. Canada (Minister of the Environment)*, 2001 FCT 381 per Dawson, J (***Investor's Schedule of Documents at Tab C 764***). Upheld for different reasons by a unanimous Federal Court of Appeal in *Canada (Minister of Environment) v. Hamilton Wentworth (Municipality)*, 2001 FCA 347 (***Investor's Schedule of Documents at Tab C 865***). See also the analysis in *City of Hamilton v. Attorney General et al*, 2011 ONSC 7128 at paras. 21-29 (***Investor's Schedule of Documents at Tab C 826***).

to a review panel because of an application that the Municipality had made under the *Fisheries Act*.

55. After examining the reasons for which the Minister was making a request that he had given in his letter to the Minister of the Environment, who in turn referred the expressway proposal to a review panel because of "the potential for significant adverse environmental effects" and "public concern surrounding the issue", the Federal Court of Canada said:

> It is therefore necessary to determine whether the purported exercise of federal authority to refer the matter to panel review under the CEAA was linked to the Minister's jurisdiction with respect to migratory birds, or was otherwise properly grounded because of the level of public concern.[64]

56. Although the federal government had jurisdiction over "migratory birds", the Court noted that there was no scientific basis to conclude that the loss of bird habitat in the Redhill Creek Valley would have an adverse effect on migratory birds, and therefore it concluded that the federal government did not have jurisdiction over the habitat of birds, which was a provincial matter. The focus of the state of public concern related to the need for the project in relation to highways, which were in the exclusive jurisdiction of the Province:

> In the result, I conclude that the Environment Minister's decision to refer this project to panel review was not supported by a valid head of federal power and was thus *ultra vires.*[65]

[64] *Hamilton Wentworth (Regional Municipality Of) v. Canada (Minister of the Environment)*, 2001 FCT 381 at para. 160 (***Investor's Schedule of Documents at Tab C 764***).
[65] *Hamilton Wentworth (Regional Municipality Of) v. Canada (Minister of the Environment)*, 2001 FCT 381 at para. 181 (***Investor's Schedule of Documents at Tab C 764***).

I. The Environmental Assessment (EA) Process

57. The *Canadian Environmental Assessment Act*[66] (*CEAA*) was proclaimed in January, 1995, and substantially amended in 2003.[67] The Bilcon project came to be assessed under the pre-2003 statute, as the amended *Act* expressly provided that environmental assessments of projects commenced before October 2003 "shall be continued and completed as if the amendments to the Act had not been enacted".[68] The decision that the WPQ project would require federal approval under section 5(1) of the *Navigable Waters Protection Act*, which constitutes a "trigger" under section 5 of the *CEAA*[69], was made on February 3, 2003. According to the transitional provisions contained in the 2003 amendments to the Act, the project was therefore governed by the *Act* as it was before the amendments came into effect.

58. The EA process is a statutory decision-making process that is completely subject to administrative law and rule of law principles, including the jurisdictional boundaries of the Canadian Constitution. In *Alberta Wilderness Association v. Canada (Minister of Fisheries and Oceans)*[70], for example, the Canadian Federal Court of Appeal held:

> [T]he requirements of CEAA are legislated directions that are explicit in mandating the necessity of an environmental assessment as a prerequisite to ministerial action. It is clear that the Minister has no jurisdiction to issue authorizations in the absence of an environmental assessment. It is equally clear that any assessment must be conducted in accordance with the Act (…).[71]

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[66] S.C. 1992, c. 37 (***Investor's Schedule of Documents at Tab C 255***).
[67] *An Act to Amend the Canadian Environmental Assessment Act*, S.C. 2003, c.9 at 20 (***Investor's Schedule of Documents at Tab C 259***).
[68] *An Act to Amend the Canadian Environmental Assessment Act*, S.C. 2003, c.9 at 20, cl. 33 (***Investor's Schedule of Documents at Tab C 259***).
[69] Eventually section 35(2) of the *Fisheries Act* was also considered a trigger.
[70] *Alberta Wilderness Association v. Canada (Minister of Fisheries and Oceans)* (1998), 238 N.R. 88 (F.C.A.) (***Investor's Schedule of Documents at Tab C 261***).
[71] *Alberta Wilderness Association v. Canada (Minister of Fisheries and Oceans* (1998), 238 N.R. 88 (F.C.A.) at p. 7 (***Investor's Schedule of Documents at Tab C 261***).

In one context, EA is a preliminary planning tool. Through concurrent permitting during the EA process, which occurs under some provincial EA statutes[72], the specific requirements that government agencies impose on projects are contained in the licenses, permits, approvals and other specific instruments that follow after the EA process has been completed.

i. CEAA

59. The Canadian Environmental Assessment Agency itself recognizes the planning aspect of an EA, and admonishes panel members to keep in mind that EA is a planning tool:

> 2.1.1 Purposes of the Act
>
> The purpose of the Act is to establish a balanced process that brings a degree of certainty to the environmental assessment process and helps federal departments and agencies determine the environmental effects of projects early in their planning stage.[73]

60. In *Friends of the Oldman River Society*, the Supreme Court of Canada echoed that the EA process is a planning tool:

> Environmental impact assessment, in its simplest form, is a planning tool that is now generally regarded as an integral component of sound decision-making (…). As a planning tool, it has both an information gathering and decision making component which provides the decision-maker with an objective basis for granting or denying approval for a proposed development.[74]

[72] See, for example, s. 23 of the BC *Environmental Assessment Act*, SBC, 2002, c. 43, which permits the minister to authorize an environmental assessment process which is concurrent with the process for reviewing the specific licenses and approvals that are normally required subsequently once a project is granted an environmental assessment certificate and permitted to proceed (***Investor's Schedule of Documents at Tab C 827***).

[73] *Your Role in an Assessment by a Review Panel: A Guide for Chairpersons and Members (May 2001)* at p. 5 (Emphasis added) (***Investor's Schedule of Documents at Tab C 829***).

[74] *Friends of the Oldman River Society v. Canada (Minister of Transport*) [1992] 1 S.C.R. 3 at p. 79 (***Investor's Schedule of Documents at Tab C 825***).

61. The jurisprudence is also clear that the EA process is not the same as the licensing process. As noted, the licensing process normally takes place only after EA approval is granted. The scheme of the *Act*, therefore, is that a recommendation is to be made to the Minister (or in the context of a joint review, the Ministers, and ultimately the Cabinet) containing the review panel's overall assessment as to the environmental effects of the project, leaving to them the final decision on whether the project can proceed, subject to whatever conditions are ultimately imposed, often based upon recommendations from the Panel,

> While the Panel accepts that a conceptual level of detail in a project description may suffice for some elements of an EIS, it concludes that to conduct a full assessment of particular environmental effects it requires clarity regarding the nature of project activities and any alterations proposed to the environment.[75]

Overstepping this mandate, by going beyond information required for the assessment of environmental effects, is one way that a panel would exceed its statutory role.

62. The general scheme of the *Act* is that if a "project", as defined in the statute and which is not on an "exclusion list" is proposed, an EA is required before a federal authority can make a decision under Section 5 of the *Act*. The requirements of that section stipulate the federal decisions that will trigger an EA.[76] If it is triggered, there are four ways in which the EA can be conducted: screening; a comprehensive study; a panel review; or mediation (which has rarely if ever been used).

63. If the "scoping" determination concludes that a Review Panel is appropriate, the Panel undertakes the process in accordance with the Terms of Reference issued to it by

[75] Joint Review Panel Report, dated October 23, 2007, at p. 25-26 (***Investor's Schedule of Documents at Tab C 34***).
[76] Sections 46-48 allow the Minister to initiate an environmental assessment even if there is no section 5 decision involved, if the project is expected to have environmental effects across provincial or international boundaries or on federal lands. *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 (***Investor's Schedule of Documents at Tab C 255***).

the Minister. It establishes procedures, holds hearings, considers oral and written submissions, and prepares a report of recommendations.

64. Where review panels are convened, their reports are used by the responsible authority, with the approval of the "Governor in Council" (effectively, the federal Cabinet) to determine whether to exercise its powers to allow the project to proceed. The report usually identifies whether the project is likely to cause significant adverse environmental effects. The determination that the project can proceed can be made either on the basis that the project is not likely to cause significant adverse environmental effects, that the effects are justified in the circumstances, or that the effects can be mitigated. It is the federal Cabinet which must decide whether the project can proceed: in this way, political accountability is insured.

65. In its *Guide for Chairpersons and Panel Members*, the Canadian Environmental Assessment Agency itself notes:

> Another important legal requirement governing the proceedings of a review panel is that in fulfilling its mandate, the panel must stay within, and not exceed, its jurisdiction. The source of a review panel's jurisdiction is the Act and the panel's Terms of Reference. Generally speaking, a review panel cannot do anything that would be directly contrary to the Act or to the Terms of Reference. If the Act and the Terms of Reference are silent on a specific issue, the panel may however do whatever is necessary for fulfilling its mandate, provided that it is not otherwise prohibited by any other law, that it is consistent with the objects of the Act and of the Terms of Reference, and that it is not unreasonable. Administrative law gives tribunals, boards or panels such as a review panel broad discretionary powers, but does draw boundaries around conduct which violates norms. For example, the panel is permitted to consider a very broad range of evidence, but not something that would be clearly irrelevant for the purpose of fulfilling its mandate.[77]

[77] *Your Role in an Assessment by a Review Panel: A Guide for Chairpersons and Members (May 2001*) at p. 33. (Emphasis added) (***Investor's Schedule of Documents at Tab C 829***).

ii. The Nova Scotia Environment Act

66. Part IV of the *Nova Scotia Environment Act*[78] establishes the EA regime for that Province. It is noteworthy that under the Nova Scotia legislation, not all quarries are subject to EA. A "quarry" is defined as a "Class I Undertaking" and generally subject to assessment. However, if a quarry is less than 4 hectares in area, it is not subject to EA, and, under section 4(2) of a regulation, if it is "established solely to provide fill or aggregate for road building or maintenance contracts with the [provincial Ministry]", it is likewise exempt.[79] Examined in this context, at first blush it must be considered peculiar that a quarry like the WPQ would be made subject to a full "joint review panel" process.

[78] *Nova Scotia Environment Act*, 1994-95, c. 1, as amended by S.N.S. 1998, c. 18, s. 557 (***Investor's Schedule of Documents at Tab C 258***); 2001, c. 6, s. 103 and Environmental Assessment Regulations made under section 49 of the *Environment Act* S.N.S. 1994-95, c. 1, O.I.C. 95-220 (March 21, 1995), N.S. Reg. 26/95 (***Investor's Schedule of Documents at Tab C 859***).
[79] N.S. Reg. 26/95 (***Investor's Schedule of Documents at Tab C 859***).

V. APPARENT BREACHES OF ADMINISTRATIVE LAW

Prior to the JRP Hearings

A. With Respect to the Rule of Law and Discretion

i. WPQ Compared with other Projects Not Subjected to a JRP

67. In *Domtar Inc. v. Quebec (CALP)*[80], the Supreme Court of Canada held:

> [T]he requirement of consistency is also an important objective. As our legal system abhors whatever is arbitrary, it must be based on a degree of consistency, equality and predictability in the application of the law.[81]

68. To the same effect, the Supreme Court cited Professor Wade MacLauchlan as follows:

> Consistency is a desirable feature in administrative decision making. It enables regulated parties to plan their affairs in an atmosphere of stability and predictability. It impresses upon officials the importance of objectivity and acts to prevent arbitrary or irrational decisions. It fosters public confidence in the integrity of the regulatory process. It exemplifies "common sense in good administration".[82]

69. In *HTV Ltd. v. Price Commission*[83], the United Kingdom Court of Appeal considered a complaint that the Price Commission had changed its method of dealing with a particular item for computation purposes under the UK Price Code. It was alleged that this was offensive because it resulted in an inconsistency of treatment in the consideration of HTV's claim for a price increase. The Court concluded that if a public authority regularly interprets or applies a provision in a particular way, there should be no

[80] *Domtar Inc. v. Quebec (CALP)* [1993] 2 S.C.R. 756 (***Investor's Schedule of Documents at Tab C 828***).
[81] *Domtar Inc. v. Quebec (CALP)* [1993] 2 S.C.R. 756 at para. 59 (***Investor's Schedule of Documents at Tab C 828***).
[82] *Domtar Inc. v. Quebec (CALP)* [1993] 2 S.C.R. 756 at para. 59 (***Investor's Schedule of Documents at Tab C 828***): H. Wade MacLauchlan, "Some Problems with Judicial Review of Administrative Inconsistency" (1984) 8 Dalhousie LJ 435, at p. 446 (***Investor's Schedule of Documents at Tab C 850***).
[83] *HTV Ltd. v. Price Commission* [1976] I.C.R. 170 (U.K.CA) (***Investor's Schedule of Documents at Tab C 844***).

change "unless there is good cause for departing from it".[84] To do otherwise is to "act unfairly and unjustly towards a private citizen when there is no overriding public interest to warrant it".[85]

70. United States courts have used the "equal protection" clause in the United States Constitution to avoid inconsistency in the application of governmental policies and processes. They have also noted that mere unevenness of treatment is insufficient to justify intervention: there must be "excessive variance" as opposed to mere unevenness, a line that is admittedly sometimes difficult to draw.[86]

71. This legal context compels the conclusion that the inconsistency of the government treatment of the WPQ project, as compared to the governmental treatment of similarly situated projects, constituted an abuse of discretion.

72. I have reviewed Appendices C and D of the Expert Report of David Estrin. It documents the complete list of review panels convened under the *CEAA*, and all completed *CEAA* review panels and joint review panels between 1995 and 2010. The latter Appendix indicates the type of project, the approximate scale of the project, whether the review panel recommended that the project proceed and, if so, whether additional terms or conditions were recommended.

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[84] *HTV Ltd. v. Price Commission* [1976] I.C.R. 170 (U.K.CA) at p. 13 (***Investor's Schedule of Documents at Tab C 844***).
[85] *HTV Ltd. v. Price Commission* [1976] I.C.R. 170 (U.K.CA) at p. 13 (***Investor's Schedule of Documents at Tab C 844***).
[86] See for example *Butz v. Glover Lifestock Commission* (4th 11 US 182) (1973) (***Investor's Schedule of Documents at Tab C 831***). Also consider the Canadian jurisprudence: *Roncarelli v. Duplessis* [1959] S.C.R. 122 (***Investor's Schedule of Documents at Tab C 861***); *Oakwood Developments Ltd. v. Rural Municipality of St. Francois Xavier* [1985] 2 S.C.R. 164 (***Investor's Schedule of Documents at Tab C 830***). In the latter judgment, a municipal decision was held by the Supreme Court of Canada to be *ultra vires* because it had failed to consider evidence that was highly material to the applicant's legitimate concerns. As expressed in a leading text, "Although not mentioned in the judgment, the Municipality's error presumably could also have been described as a breach of the duty of procedural fairness, because it denied the developer an opportunity to tender evidence in support of its claim", something that is highly relevant in the WPQ context as well: see JM Evans, HM Janisch, DJ Mullan and RCB Risk, *Administrative Law: Cases, Texts and Materials*, 4th edition (Toronto: Emond Montgomery, 1995), p. 1048 (***Investor's Schedule of Documents at Tab C 857***).

73. One is immediately struck by the comparatively small scale of the WPQ Project as compared to those for which joint review panels or *CEAA* review panels have been convened. It is also striking that the WPQ Project was the only project turned down by a review panel with no recommendations or mitigation measures provided. Of all of the review panels convened, only the Kemess North Mine, the Lachine Canal Decontamination Project, the Prosperity Gold-Copper Mine and the WPQ Project, involved panels recommending that a project not proceed. Moreover, it is only the WPQ Project where no terms and conditions for mitigation were even offered by the Panel.

74. Although no two projects are ever identical, where projects were as obviously similar in scope and location as the Tiverton and WPQ projects were, and were acknowledged as such by key officials, the law requires a provable and demonstrably appropriate justification for treating them differently. If not, it must be inferred that an abuse of discretion has occurred.

75. If projects appear to be sufficiently similar, environmental law counsel rely on the similarity to provide advice and guidance to their clients. It is therefore most unlikely that any environmental lawyer would expect that a project like the WPQ would have to undergo the delay and expense of a joint review process. Lawrence Smith, Q.C., who submitted a report in these proceedings for the Government of Canada which is referenced in its Counter-Memorial, notes that the principle of "*stare decisis* does not apply to environmental assessments".[87] However, that does not justify arbitrariness, which is itself a fundamental breach of administrative law. Arbitrariness is an abuse of discretion; and therefore an abuse of authority. And the very definition of arbitrariness is the treatment of similar circumstances in different ways.

[87] Expert Report of Lawrence E. Smith at para. 13.

76. In this regard the cases of *HTV Ltd. v. Price Commission*, and *Mount Sinai Hospital Centre v. Quebec (Minister of Health and Social Services)*[88], as well as the analysis of Canadian administrative law scholar Professor David Mullan are instructive. A highly respected Emeritus Professor of Law at Queen's University, Professor Mullan has advanced the position that inconsistent treatment should be recognized as a general category of abuse of discretion. He states as follows:

> It can be argued quite convincingly that review for inconsistency, if accepted as a basis for judicial review, would provide another example of abuse of discretion. (…)
>
> The justifications for a review of inconsistency…transcend national legal systems and have a universality of the kind claimed by natural law theory, namely that the justice of any system depends upon like cases being treated alike and different cases differently.[89]

77. The governmental treatment of Bilcon in its efforts to establish a quarry and a supporting marine shipping facility is patently inconsistent with the governmental treatment of other similar projects in analogous situations, all of which were treated much less rigorously than the WPQ Project.

78. It needs be emphasized how unusual it is that a project of this scope and kind would be subject to a full joint review process. I repeat the observations of Professors Doelle and Tollefson, two well known Canadian environmental lawyers, who comment on what they perceive to be the normal approach in the following terms:

> Assuming that screenings are intended for small and routine projects, comprehensive studies for medium sized projects and <u>panel reviews for large and controversial projects</u>, how can each process be improved to achieve greater efficiency, greater effectiveness, or both?[90]

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[88] *Mount Sinai Hospital Centre v. Quebec (Minister of Health and Social Services)* [2001] 2 S.C.R. 281 (***Investor's Schedule of Documents at Tab C 833***).

[89] D. Mullan, "Natural Justice and Fairness: Substantive as well as Procedural Standards for the Review of Administrative Decision-Making" (1982) 27 McGill L. J. 250, at p. 280-81 (***Investor's Schedule of Documents at Tab C 860***).

[90] M. Doelle and C. Tollefson, *Environmental Law: Cases and Materials* (Toronto: Carswell, 2009), p. 324. (Emphasis added) (***Investor's Schedule of Documents at Tab C 856***).

In other words, the authors appear to assume that panel reviews must be intended to be reserved for "large and controversial projects". One notes the use of the conjunctive: merely because a project is controversial, does not appear to them to be a proper threshold for a panel review. So to subject a project of this scope and kind to a full joint review process is, to say the least, extraordinary.

79. While Mr. Smith also comments that other comparable projects "were publicly contentious",[91] it is noteworthy that, neither the federal nor provincial Minister purported to use public concern as the basis for escalating the EA to a joint panel review.

B. The Belleoram Project

80. Appendix E of the Estrin Report compares the WPQ Project with the Continental Stone Limited Quarry and Marine Terminal Project in Belleoram, Newfoundland ("Belleoram"). In the Belleoram case, only a comprehensive study report was required; while in the WPQ case, a Review Panel was convened. Both involved quarries and marine terminals to be situated in Atlantic Canada for the export of crushed rock. Both were to be located close to a community and in potentially sensitive coastal environments with private sector components. Belleoram enjoyed federal agency financial support and was a Canadian-controlled company. It was over six times as large as the WPQ proposal, and contemplated over three times as much annual production. It involved the same responsible authorities as in the WPQ case, and yet a much less onerous EA was imposed. The quarry was scoped out of the comprehensive study. With regard to the marine terminal at Belleoram, mitigation measures were identified to deal with any adverse environmental effects under the *Federal Ballast Water Control and Management Regulations*, whereas for the WPQ, the JRP did not consider the regulations to be adequate. In Belloram, blasting was not considered to be a major issue, and only a

[91] Expert Report of Lawrence E. Smith at para. 13.

"screening" was required, with the DFO concluding there was "no regulatory trigger for the quarry".[92]

81. It seems that the primary difference between these two projects was the lack of public opposition in the Belleoram context, while there was a clear split in the community in the vicinity of the WPQ project.

82. Appendix 2 of Mr. Smith's report addresses the Belleoram Quarry. The project, which was funded by the Atlantic Canada Opportunities Agency (ACOA), "included a rock crusher, a conveyor system, administrative buildings and a marine terminal designed to handle vessels larger than 25,000 Dead Weight Tonnes" (…)[93]; "the original project proposal was for a nine hundred hectare quarry; however, the first phase (20 – 25 years) was reduced to 80 ha."[94] Although it was also located in a commercial fishing area, with developing aquaculture operations, no species at risk or habitat effects were considered significant according to the Comprehensive Study Report. Like in the case of the WPQ project, section 5 of the *Navigable Waters Protection Act* was triggered as a result of the marine terminal and another federal trigger was section 35(2) of the *Fisheries Act* for the harmful alteration of fish habitat during the construction of the terminal.

C. The Tiverton Harbor and Quarry Project

83. The Tiverton quarry, approved at approximately the same time, is located only 10km south of the WPQ project on the Bay of Fundy. Appendix G of the Estrin Report compares the Tiverton Harbour proposal with WPQ. Tiverton underwent a CEAA screening between 2003 and 2004, while the WPQ project was subjected to a full joint review panel process. The Tiverton project was in a marine environment that is very similar to the WPQ environment. Disruption and destruction of fish habitat was caused

[92] Expert Report of David Estrin, dated July 8, 2011, at Appendix E, p. 6.
[93] Expert Report of Lawrence E. Smith at Appendix 2, para. 1.
[94] Expert Report of Lawrence E. Smith at Appendix 2, para. 2.

by underwater blasting and a large volume of rock was deposited on the harbour floor. Despite the use of explosives in the water, no concern about the North Atlantic Right Whale and IBoF (Inner Bay of Fundy) salmon were brought forward by the DFO.

84. Although changes to "valued ecosystem components ("VECs'") were acknowledged to cause potentially significant impacts, Tiverton was allowed to proceed with mitigation measures. With respect to the WPQ project, the JRP did not consider mitigation measures, so the Ministers had no advice about whether mitigation measures were available. The Tiverton project was also approved without the onerous blasting conditions imposed on the WPQ project, even though blasting at Tiverton Harbour occurred under water, compared to blasting at the WPQ, which was to occur at least 100 metres from the ocean.

85. These two quarry and marine terminals were considered at approximately the same time. The federal officials involved in the WPQ project even expressly recognized the similarity between the projects, stating that "many of the environmental issues will be similar."[95] Yet, the same federal officials followed a different process.[96]

86. It also appears that the different treatment of Tiverton and the WPQ project may have been politically motivated. Mr. Bruce Hood recorded in his journals that the difference in treatment was caused by the political interest of the Government of Nova Scotia.[97] He expressly noted his concern about the DFO lacking of authority for an EA of

[95] See Diary of Bruce Hood, Doc Request 022 – DFO Headquarters 270-0006, Page-801603 and 801604, CP48638 (***Canada's Counter-Memorial Exhibit R-260***).
[96] See E-mail from Barry Jeffrey (CEAA) to Stephen Zwicker (Environmental Protection), dated May 5, 2006, Canada document 11-492, Page-025381, CP07751 (***Investor's Schedule of Documents at Tab C 855***).
[97] Journal note by Bruce Hood (DFO), Fall 2007 (***Canada's Counter-Memorial Exhibit R-260***) (***Investor's Schedule of Documents at Tab C 369***), making note of the interest of the province of Nova Scotia to harmonize the environment assessment of the Whites Point Quarry with the federal government at 801595.

the quarry[98], and about the DFO overstepping its mandate.[99] He also clearly expressed exasperation about political interference, writing "get our Minister off this file".[100]

87. At paragraph 2 of Appendix 4, which deals with the Tiverton Harbour EA, Mr. Smith seems to suggest that the Tiverton project was supported and that only a screening was required because of the benefits from the proposed harbour development. The reason for not scoping in the quarry component appears to be that "the quarry and marine terminal were interdependent at WPQ but not at Tiverton".[101] This seems to be because the rock for the breakwater could have been obtained from other sources, which does not seem to me to be a valid environmental reason for the distinction. Mr. Smith also opines "that blasting in the water at the Tiverton Harbour was not related to any quarrying but was required in order to dredge the harbour area".[102] That, however, is of no environmental consequence. Regardless of the purpose for the blasting, environmental assessment depends on the effect it may have on marine life and the marine environment.

88. Mr. Smith likewise points out that proposed mitigation measures to avoid blasting at certain periods critical to the Inner Bay of Fundy Atlantic Salmon and the North Atlantic Right Whales were undertaken. However, these kinds of conditions could well have been considered by the WPQ panel as well.[103] Mr. Smith also points to the limited number of blasts and the comparatively short duration of the blasting, but he fails to emphasize that the blasting actually took place in the marine environment itself, whereas in the WPQ context, the blasting was to take place at least 100 metres away from the marine environment.

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[98] Journal note by Bruce Hood (DFO), April 25, 2003, at 801602-801603 (***Canada's Counter-Memorial Exhibit R-260***) (***Investors' Schedule of Documents at Tab C 284***).
[99] Journal note by Bruce Hood (DFO), April 25, 2003, at 801609 (***Canada's Counter-Memorial Exhibit R-260***) (***Investors' Schedule of Documents at Tab C 284***).
[100] Journal note by Bruce Hood (DFO), April 23, 2003, at 801610-801611 (***Canada's Counter-Memorial Exhibit R-260***) (***Investors' Schedule of Documents at Tab C 284***).
[101] Expert Report of Lawrence E. Smith at Appendix 4, para. 4.
[102] Expert Report of Lawrence E. Smith at Appendix 4, para. 5.
[103] Expert Report of Lawrence E. Smith at Appendix 4, para. 5.

D. The Aguathuna Quarry and Marine Terminal Project and Others

89. Appendix F of the Estrin Report compares the Aguathuna Quarry and Marine Terminal project ("Aguathuna") in Newfoundland with the WPQ project. That project involved the reopening of a limestone quarry and shipping facility which involved a crushing and screening plant being constructed, a marine terminal, and loading conveyors.[104] After the first year, up to 500 tonnes of crushed stone was to be produced annually over the 20 years of the quarry's operation.

90. The marine terminal required dumping rock fill in the ocean 40 metres into a bay "which supports a moderate lobster fishery and has some potential for aquaculture".[105] There were also herring spawning grounds within the bay area as well, yet there was no concern expressed by the DFO or Transport Canada about the effect of shipping on these fisheries. As in the Belleoram project, mitigation measures and government regulatory regimes were considered sufficient to make the project acceptable. This did not happen with the WPQ. In the Aguathuna Quarry, Canadian-based companies were involved, and both federal and provincial government financial support was provided.

91. No approvals under the *Navigable Waters Protection Act* nor authorizations under the *Fisheries Act* were required. ACOA, which was involved in the funding of the project, was the only responsible federal authority. No concerns over blasting impacts on the marine environment were found,[106] and no provincial EA was required.

92. Appendix H of the Estrin Report examines some 28 EAs for quarries, mines and sand pits completed between 2000 and 2011 in Nova Scotia. He observes that out of the

[104] See Expert Report of Lawrence E. Smith at Appendix 3, para. 3.
[105] Expert Report of David Estrin, dated July 8, 2011, at Appendix F, p. 3.
[106] See Expert Report of Lawrence E. Smith Expert Report at Appendix 3, para. 7.

28 applications that were made, only the WPQ was subjected to a public review hearing, and only the WPQ project failed to be approved.[107]

93. Appendix I of the Estrin Report similarly reviews Nova Scotia environmental projects completed between 2000 and 2011. In that regard, he observes that all of them involved much larger projects than the WPQ, but again, only the WPQ was rejected.[108]

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[107] Expert Report of David Estrin, dated July 8, 2011, at para. 75.
[108] Expert Report of David Estrin, dated July 8, 2011, at para. 88.

VI. NATURAL JUSTICE AND PROCEDURAL FAIRNESS

A. Providing Requisite Information

94. Paul Buxton, Bilcon's representative in Nova Scotia, was first shown a standard rock quarry permit by officials in the Nova Scotia Department of Environment and Labour in 2002.[109] Later that year, Bilcon's predecessor received approval for the construction and operation of the quarry. However, the approval was conditional upon the DFO granting approval of any blasting required. Bilcon applied for approval, but the DFO repeatedly denied its applications, without providing any reasons for the denial.[110] Bilcon required a blasting permit for the initial 3.9 ha quarry to gather the data necessary for the EA of the 152 ha quarry. No permit was ever provided. In the end, however, the JRP criticized Bilcon for not providing the data that the federal officials prevented it from obtaining.[111]

95. Bilcon was also faced throughout the process with constantly changing requirements called for by DFO officials. For example, Mr. Buxton recounts the changing setback requirements: the DFO at one point required a 500 metre set-back distance from the shoreline for blasting[112], while at nearby Tiverton Harbour, blasting was permitted in the water itself[113], and the setback for blasting was only 150 metres from the shoreline.[114] Some blasting at Tiverton was also permitted for road construction, within 10 to 15 metres of the shoreline.[115] Yet Transport Canada

[109] See Witness Statement of Paul Buxton, dated July 20, 2011, at para. 38.
[110] See Witness Statement of Paul Buxton, dated July 20, 201, at paras. 42-48.
[111] Joint Review Panel Report, dated October 23, 2007, at p. 25-26.
[112] Witness Statement of Paul Buxton, dated July 20, 2011, at para. 46.
[113] Witness Statement of Paul Buxton, dated July 20, 2011, at para. 46.
[114] E-mail from Phil Zamora (DFO) to Bruce Hood (DFO), et al., dated December 16, 2003 (**Investor's Schedule of Documents at Tab C 475**).
[115] *Environmental Screening for Harbour Development at Tiverton, Digby County, Nova Scotia* (Tiverton Harbour Screening Report), dated May 2004, at p. 16-17 (***Canada's Counter-Memorial Exhibit R-342***).

determined that there was no trigger requiring a hearing of any kind with respect to the Tiverton quarry.[116]

96. At another point, DFO officials advised Bilcon that they had carried out a modeling exercise to calculate the set-back of 500 metres, but refused to give Bilcon the model that they had used.[117] Bilcon's own blasting specialist modeled the blasting effects and demonstrated that its proposed blast design was well within the parameters set out in the DFO's *Guidelines for Blasting in or near Canadian Waters*.[118] When this analysis was sent to the DFO, it changed the set-back distance, without any explanation, to only 106.8 metres.[119] The calculations used by DFO were never provided to Bilcon.[120]

97. The DFO's handling of the blasting issue is the kind of arbitrary governmental conduct that was quashed in *Keeping v. Canada (Attorney General)*.[121]

B. Notice of Case to be Met

98. Basic procedural fairness required that Bilcon receive adequate notice in order to prepare the case to meet. It is my view that this did not happen. For example, the terms of the draft EIS Guidelines were very different from the Final Guidelines that the JRP approved. In this regard, Mr. Buxton has testified:

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[116] *Environmental Screening for Harbour Development at Tiverton, Digby County, Nova Scotia* (Tiverton Harbour Screening Report), dated May 2004, at p. 35 (***Canada's Counter-Memorial Exhibit R-342***).
[117] Witness Statement of Paul Buxton, dated July 20, 2011, at para. 46.
[118] Witness Statement of Paul Buxton, dated July 20, 2011, at para. 47.
[119] Witness Statement of Paul Buxton, dated July 20, 2011, at para. 47. The setback requirement for WPQ was ultimately set at 106.8 metres: see E-mail from Phil Zamora (DFO) to Bruce Hood (DFO) et al, dated December 16, 2003 (***Investor's Schedule of Documents at Tab C 807***). The setback is initially listed as 35.6, but Zamora writes that "Dennis Wright (our explosive expert)" suggested tripling that minimum setback distance to 106.8. For Tiverton Quarry, the setback was 150 metres. On the question of blast distance from Tiverton Quarry, Canada cited a "Statement of Frances MacKinnon" (***Canada's Counter Memorial Authority R-100***) which claims the Western blast point is 399.27 m from the Bay of Fundy. By contrast, NSDEL engineer Robert Balcom stated that "the nearest surface water is the ocean at a distance of 160 meters" (***Canada's Counter Memorial Authority R-101***).
[120] Witness Statement of Paul Buxton, dated July 20, 2011, para. 47.
[121] *Keeping v. Canada (Attorney General)* (2003) 226 D.L.R. (4th) 285 (NLCA) (***Investor's Schedule of Documents at Tab C 837***).

> In November 2004 I received the Draft Guidelines for the Preparation of the Environmental Impact Statement for the Whites Point Quarry Project. (…)
>
> I was also concerned to find that the scope of Final EIS Guidelines had become much more onerous, difficult to follow and departed significantly from the Terms of Reference. I began to notice the tactics of delay and confusion being adopted to drag the process out by local opposition. As a result, I wrote to the JRP requesting a clear and concise framework for the Final EIS Guidelines.
>
> (…)
>
> The EIS Guidelines were to set out the subjects that would need to be discussed throughout the entire process, and especially during the Joint Review Panel hearings. I found the EIS Guidelines were not easy to follow, which is why Bilcon restructured its EIS as it did. The subjects were raised and re-raised in various elements of the EIS Guidelines, and I found it difficult to have an EIS for Bilcon that was easy to follow and comprehend. I made best efforts to follow the outline of the Joint Review Panel's Guidelines as they were set out, but I can repeat that I had some difficulty in doing that.
>
> (…)
>
> The Joint Review Panel imposed several new criterion (sic) in the final EIS Guidelines, such as the inclusion of Loyalist, Afro-Canadian and Acadian views in its Traditional Knowledge analysis, which is normally only reserved for traditional knowledge from local aboriginal persons.[122] The Joint Review Panel also imposed a reverse onus on Bilcon which it claimed was part of the precautionary principle. The precautionary principle was not mentioned in the Terms of Reference nor in the Draft EIS Guidelines.[123]

99. Additionally, the JRP imposed several new criteria in the final EIS Guidelines, such as the inclusion of Loyalist, Afro-Canadian and Acadian views in its Traditional Knowledge analysis. Thus the Panel did not provide adequate notice of these concerns so that the Proponent knew the case it had to meet. Most egregiously, Bilcon was not given

[122] Section 3.0 of the Draft EIS Guidlines required Bilcon to consider "Traditional Knowledge", which was not included in the applicable CEAA (***Investor's Schedule of Documents at Tab C 169***). In addition to aboriginal people, the JRP's Final EIS Guidelines required Bilcon to consider the traditional knowledge of other groups, including Acadians, African-Canadians peoples, and United Empire Loyalists (s.3.1, at 8) (***Investor's Schedule of Documents at Tab C 168***).

[123] Witness Statement of Paul Buxton, dated July 20, 2011, at paras. 58, 59, 61 and 63.

any notice of the key factor that the JRP was going to base its Report upon: namely "community core values".

VII. BREACHES DURING THE JRP HEARINGS

A. Natural Justice and Procedural Fairness

i. Reasonable Apprehension of Bias

100. Conduct and comments made by panel members during a hearing can lead to the conclusion that there has been prejudgment and a disqualifying bias. Disqualifying bias can occur in a variety of ways. For example, antagonism by a panel member during a hearing can be sufficient to nullify the proceedings. A common manifestation of disqualifying bias is a panel member's unreasonably aggressive questioning, or inappropriate comments about testimony.

101. In the WPQ context, the Chair of the JRP, Dr. Fournier, displayed the kind of antagonism that has been found to constitute disqualifying bias. In his witness statement, former journalist Hugh Fraser provides illustrations of the "kind of adversarial approach the Chair employed with Bilcon".[124] He also provided his opinion that "throughout the Panel was taking sides, and showed little respect to Bilcon and its experts. The demeanor and conduct of Dr. Fournier, in particular, surprised me".[125]

102. Despite the fact that Bilcon submitted a 17-volume Environmental Impact Statement comprising over 3,000 pages, which took three and a half years to complete and involved 48 different experts, with 35 commissioned studies, Mr. Fraser notes that "over the 90 hours of hearings, Bilcon's experts testified for only 19 minutes or so."[126]

103. Mr. Fraser states that "throughout the hearings, while the Panel tolerated emotional outbursts and unrelated presentations from opponents to the project, Dr.

[124] Witness Statement of Hugh Fraser, dated July 6, 2011, at paras. 9 and 10.
[125] Witness Statement of Hugh Fraser, dated July 6, 2011, at para. 13.
[126] Witness Statement of Hugh Fraser, dated July 6, 2011, at para. 14.

Fournier chastised Bilcon frequently."[127] Mr. Fraser also documents "a pervasive tone of anti-Americanism" and an "anti-NAFTA tone" in the hearing. Mr. Fraser observed the tone of the questioning appeared belligerent and sarcastic, to the point that Dr Fournier sneeringly asked during the public hearing if any member of Bilcon's team knew what "the scientific method" was.[128] On one occasion, after an illustration was provided by Mr. Wittkugel, a witness for Bilcon, Mr. Fournier belittled the witness for not understanding "adaptive management" along the lines that Mr. Fournier thought appropriate.

ii. Refusal to Hear Bilcon's Experts

104. During the hearing process there were also inappropriate and repeated undertakings required, with attendant delays. And throughout the hearing, the level and scope of the requirements of the undertakings kept changing.[129]

105. Although Bilcon presented many experts to testify to the Panel, they were not called upon. One of the experts, Carlos Johansen, wrote to the Federal and Nova Scotia Ministers of Environment expressing his frustration that the JRP had asked him only one question, even though he had flown across Canada to be available to the Panel.[130]

Mr. Buxton also has testified:

> At the JRP hearings, Bilcon's experts were virtually ignored by the Joint Review Panel, who seemed to have already made up their mind about the project. I also found it troubling that the JRP demanded the full qualifications of Bilcon's experts whereas the JRP did not look for the qualifications of many of the individuals providing scientific views on behalf of groups opposed to the Whites Point Quarry.[131]

[127] Witness Statement of Hugh Fraser, dated July 6, 2011, at para. 16.
[128] Witness Statement of Hugh Fraser, dated July 6, 2011, at para. 13.
[129] Witness Statement of Paul Buxton, dated July 20, 2011, at para. 66.
[130] Letter from Carlos Johansen, Seabulk Systems Inc., to the Hon. John Baird and the Hon. Mark Parent, October 29, 2007 (***Investors' Schedule of Documents at Tab C 153***).
[131] Witness Statement of Paul Buxton, dated July 20, 2011, at para. 72.

B. Jurisdiction and Discretion

i. Exceeding Jurisdiction

106. The JRP sought and heard evidence from federal officials about the North American Free Trade Agreement ("NAFTA") and then made conclusions that were both inaccurate and discriminatory of Bilcon.[132]

107. The JRP also chose to ignore the evidence it did not like. For example, Professor Gil Winham, an expert on the NAFTA, was asked by the JRP to explain the implications of the NAFTA on the Whites Point Quarry and future quarry development in Nova Scotia.[133] Professor Winham confirmed the NAFTA did not require automatic quarry approval of the Whites Point Quarry. "There is nothing in [the] NAFTA that would prevent an independent evaluation, either environmental or otherwise, of a major new commercial activity (…) The idea that [the] NAFTA requires successive commercial ventures to be approved is simply not valid."[134]

108. After receiving Professor Winham's report, the JRP informed him that he did not need to attend the hearings.[135] However, Mr. Gilles Gauthier of the Department of Foreign Affairs and International Trade was asked by the JRP to testify on compliance with the NAFTA obligations, although there is nothing in the Terms of Reference which would make the NAFTA a relevant consideration in the hearing.

[132] Joint Review Panel Report, dated October 23, 2007, at p. 83 (***Investor's Schedule of Documents at Tab C 34***).
[133] Memorial of the Investors, at para. 218.
[134] Memorial of the Investors, at para. 219.
[135] Memorial of the Investors, at para. 220.

109. A similar example of irrelevant considerations of this type, which were beyond the jurisdiction of the Panel[136], occurred when Bilcon was required to show the influence of the Kyoto Protocol on the WPQ.

[136] Final EIS Guidelines, s. 6.6. It reads as follows: "Describe the implications of international agreements (e.g., NAFTA, Kyoto protocol), designations (e.g., World Biosphere Reserve), or action plans (e.g., Gulf of Maine) that may influence the Project or its environmental effects." (***Investor's Schedule of Documents at Tab C 168***).

VIII. BREACHES IN THE JRP REPORT

A. Natural Justice and Procedural Fairness

i. Refusal to Accept Adaptive Management

110. The JRP's Report dismissed the critical component of "adaptive management":

> The EIS and related documents identify the central role and preferred usage of adaptive management in the proposed project by citing its anticipated implementation on no fewer than 140 occasions. Although the precautionary principle and adaptive management are neither identical nor synonymous, they do share important common ground: namely, they both address science-based risk management linked to scientific analysis and the scientific method. (…) The Panel found little evidence from the EIS, information requests or the hearings to indicate that the Proponent appreciates the difference between the precautionary principle and adaptive management, how each should be implemented or how fundamental the role of science is in the proper implementation of each. The Panel believes that given the Proponent's flawed understanding, the eventual application of these tools would potentially negate any positive intention to offset potential environmental impacts.[137]

111. In my view, this patently dismissive arrogance compels the legal conclusion that the JRP did not afford Bilcon an opportunity to have its case heard and considered honestly, reasonably, and fairly.

ii. Incorrect Conclusions

112. In some instances, there was little or no evidence to support the Panel's conclusions. In others, its findings of fact were clearly wrong.

113. For example, with regard to the project's viability, the JRP ignored the evidence provided by Bilcon at the hearing, and concluded without any evidence that the WPQ would not be economically viable. It simply concluded that was the case because Bilcon

[137] Joint Review Panel Report, dated October 23, 2007, at p. 92-93 (***Investor's Schedule of Documents at Tab C 34***).

had not been able to acquire the Whites Cove Road.[138] However, Mr. Buxton expressly testified at the hearing that Bilcon had specifically designed the project in such a way that the road would not be needed.[139]

114. In its Report, the Panel also referred to the environmental impacts of an artificial breakwater – something which had never been proposed by Bilcon.[140]

115. The Panel similarly concluded that the approval of the WPQ Project would cause quarries to multiply in the region, and would likely lead to other American companies wanting to come to the Digby Neck area, while the evidence was to the contrary.

116. Another factual error in the JRP's Report relates to its conclusion that adverse effects could result from the use of ammonium nitrate fuel oil (ANFO), despite contradictory evidence presented by Bilcon's blasting specialist and federal officials.[141] Instead, the Panel said that it preferred the evidence of a retired mining engineer who had acknowledged that he lacked experience in blasting.[142] The JRP also made a related factual error in concluding that over 300 times more ANFO would be used than was actually the case.[143]

117. In Canadian jurisprudence, a jurisdictional error occurs when unreasonable conclusions are reached by a tribunal.[144] Yet, all of these factual errors were then put

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[138] Joint Review Panel Report, dated October 23, 2007, at p. 24 (***Investor's Schedule of Documents at Tab C 34***).
[139] Witness Statement of Paul Buxton, dated July 20, 2011, at para. 79.
[140] Joint Review Panel Report, dated October 23, 2007, at p. 106 (***Investor's Schedule of Documents at Tab C 34***).
[141] Response to Undertaking #29 – 'To provide, following collaboration with Environment Canada, an assessment of the ecological risks associated the ammonia residuals resulting from blasting and episodic and controlled release from the project's settling ponds', dated June 29, 2007 (***Investor's Schedule of Documents at Tab C 437***).
[142] See Joint Review Panel Report, dated October 23, 2007, at p. 28 and 31 (***Investor's Schedule of Documents at Tab C 34***); Transcript Volume 10 - Joint Review Panel Public Hearing, Whites Point Quarry and Marine Terminal Project, dated June 27, 2007, at 2425 (***Investor's Schedule of Documents at Tab C 109***).
[143] The Panel concluded (at p. 28 of the Report) that "Total explosives utilized per blast would be 17.7 tonnes, or 412 kg placed in each blast hole. The annual consumption of ANFO would amount to 460 tonnes." (***Investor's Schedule of Documents at Tab C 34***).
[144] See, generally, *Dunsmuir v. New Brunswick (Board of Management)* (2008) SCC 9, [2008] 1 S.C.R. 190 (***Investor's Schedule of Documents at Tab C 817***).

before the Ministers when they made their decisions. Since there is no indication that other material was taken into account by the Ministers in reaching their decisions, one must infer that their decisions were based on these recommendations, and based upon these factual errors.

118. As noted above, Canadian courts have been clear that jurisdictional error can also occur when unreasonable conclusions are reached by a tribunal.[145] Even though "deference" would be normally afforded a tribunal, based in part on their supposed expertise vis-à-vis the courts, unreasonable decisions are routinely quashed.

119. Here, the Panel reached demonstrably naïve and unfair conclusions. For example, the Panel Report states: "The Panel concludes that the Proponent's public participation activities met the letter not the spirit of the Guidelines. The Proponent did not effectively work with project opponents to find mutually agreeable solutions to identified problems".[146]

120. At section 3.2.2 "traditional community knowledge" is addressed and again Bilcon is criticized for its "inadequate" efforts to include such knowledge in the process. However, the local fishers were simply ill-disposed to Bilcon and not interested in dialogue. Therefore, the "absence of meaningful consultation by the Proponent" seems unfair as a finding of fault in these circumstances.

121. The Panel complains in its report of "negative relations" between Bilcon and members of some of the communities which might be impacted by the Project.[147] Yet it seems self-evident from the transcript that an impasse resulted from an unwillingness of the opponents of the Project to cooperate, something that often occurs in deeply divided

[145] See, generally, *Dunsmuir v. New Brunswick (Board of Management)* (2008) SCC 9, [2008] 1 S.C.R. 190 (***Investor's Schedule of Documents at Tab C 817***).
[146] Joint Review Panel Report, dated October 23, 2007, at p. 88 (***Investor's Schedule of Documents at Tab C 34***).
[147] Joint Review Panel Report, dated October 23, 2007, at p. 87 (***Investor's Schedule of Documents at Tab C 34***).

communities. There were obviously people in the community who were unalterably opposed to the proposal, as is frequently the case with "NIMBY" situations. The Panel criticized Bilcon for the collapse of the Community Liaison Committee. However, it is not clear what any well-meaning and highly sophisticated proponent could do in the face of well-organized local resistance. To fault Bilcon, which made repeated good faith efforts to reach out to the community, where a part of the community was stalwartly opposed and would not engage in dialogue, cannot reasonably be considered a fault on the part of Bilcon.

122. The Panel also failed to take into account the petition in which 30% of the local population of adult voters voted in favor of the Project, and the attitude survey presented to the Panel, which showed 50% of the local population in favor of the Project.

B. Jurisdiction

i. Community Core Values

123. The recommendations of the JRP are circumscribed by the specific terms of its statutory jurisdiction, the sources of which are the *CEAA*, the *Nova Scotia Environment Act* and its Terms of Reference. Simply put, the Panel had no inherent authority. It only had the authority specifically delegated to it under its enabling legislation and its Terms of Reference. Doing anything else, or anything more, is to exceed its jurisdiction.

124. The Terms of Reference specifically define "environmental effect":

> "**Environmental Effect**" means, in respect of the Project,
> (a) any change that the Project may cause in the environment, including any change it may cause to a listed wildlife species, its critical habitat or the residence of individuals of that species, as those terms are defined in subsection 2(1) of the *Species at Risk Act*,
> (b) any effect of any change referred to in paragraph (a) on
> (i) health and socio-economic conditions
> (ii) physical and cultural heritage

(iii) the current use of lands and resources for traditional purposes by aboriginal persons

(iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, or

(c) any change to the Project that may be caused by the environment,

whether any such change or effect occurs within or outside Canada.[148]

125. This definition of "environmental effect" circumscribes the JRP's jurisdiction. It makes no reference to "community core values" as an environmental effect. The JRP was called upon to address only a particular kind of "environmental effect": one that is found to have a biophysical impact [as denoted in paragraph (a)] and that such change would affect (…) [of greatest relevance, such things as] "socio-economic conditions" or (…) "cultural heritage". Therefore, a stand-alone conclusion that the quarry would have an impact on "community core values" was not sufficient to constitute an "environmental effect", according to the JRP's Terms of Reference. It would only be the socio-economic effects resulting from the biophysical impact of the quarry on the landscape that properly would qualify as an "environmental effect", in the terms that the two Ministers must be taken to have intended by establishing the JRP in 2003. As I will elaborate upon below, any conclusion to that effect would exceed the jurisdiction of the JRP and therefore in law be of no force and effect. Even if the Nova Scotia Act itself were interpreted to permit "standalone" consideration of the socio-economic effects, those were not the Terms of Reference that were imposed on the JRP.

126. Regarding the "Scope of the Environmental Assessment and Factors to be considered in the Review", Part 3 of the Terms of Reference provides:

The Minister of Environment and Labour, Nova Scotia, and the Minister of the Environment, Canada, have determined that the Panel shall include in its review of the Project, consideration of the following factors (*inter alia*):

[148] Agreement concerning the Establishment of a Joint Review Panel, dated November 3, 2004, at Section 1 (***Investor's Schedule of Documents at Tab C 363***).

(c) alternative means of carrying out the Project that are technically and economically feasible and the environmental effects of any such alternative means;

…

(h) 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;

(l) steps taken by the Proponent to address environmental concerns expressed by the public;

(m) measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the Project;

(n) follow-up and monitoring programs including the need for such programs;

(o) the capacity of renewable resources that are likely to be significantly affected by the Project to meet the needs of the present and those of the future; and

(p) residual adverse effects and their significance.[149]

127. It simply is not open to one level of government to impose terms on a proponent or make a decision relating to a proponent that is within the jurisdiction of the other government. The federal government's reference to "community core values" in support of its decision is simply beyond the federal Minister's jurisdiction. Even if the Terms of Reference contemplate jurisdiction for the JRP to consider "socio-economic considerations", there is no equivalent constitutional jurisdiction for the Federal Government to consider "community core values" as the basis for its decision in this matter.

128. With respect to the Panel's recommendations concerning the "community core values" Mr. Smith contends that "consideration of socio-economic effects was within the Panel's mandate, which includes community core values".[150] He contends that because

[149] Terms of Reference for the Joint Review Panel, Appendix to the *Agreement concerning the Establishment of a Joint Review Panel*, dated November 3, 2004 (***Investor's Schedule of Documents at Tab C 363***).
[150] Expert Report of Lawrence E. Smith at para. 229.

the JRP reflects both federal and provincial legislative requirements that the effect of the agreement with Nova Scotia to establish the JRP enables the consideration of "additional procedures beyond those contemplated under the CEAA in order to accommodate the legislative requirements of both jurisdictions".[151]

129. Although the Panel could indeed consider socio-economic matters since that was a factor listed in the Terms of Reference, consideration of socio-economic effects is a long way from the "community core values" on which the Panel's conclusions turn. Mr. Smith makes a great deal of the fact that Bilcon had the ability to comment on the draft Environmental Impact Statement Guidelines.[152] But the fact that the "social, cultural and economic aspects were identified in the draft Guidelines[153] or the "cultural health of affected communities"[154] does not mean, as Mr. Smith asserts[155] that "Bilcon had ample advance notice of the importance of socio-economic considerations (…)which, in my view, certainly included matter such as "core community values".

130. This simply does not follow. Mr. Smith defends this conclusion by describing these as the "shared beliefs by individuals within groups, and constitute the defining features of communities (…) [including] the importance of a strong sense of place, a living connection with traditional lifestyles, harmony with the environment, combined with a strong sense of stewardship as a way of life". [156] In my view, this went well beyond what "fits within the concept of cultural health of affected communities". No Proponent could have reasonably been expected to anticipate that this would be the defining factor in the Panel's Report.

[151] Expert Report of Lawrence E. Smith at para. 232.
[152] Expert Report of Lawrence E. Smith at paras. 247-271.
[153] Expert Report of Lawrence E. Smith at para. 256.
[154] Expert Report of Lawrence E. Smith at para. 257.
[155] Expert Report of Lawrence E. Smith at para. 258.
[156] Expert Report of Lawrence E. Smith at para. 258, citing the JRP report at page 14.

131. Similarly, Mr. Smith states that the final EIS Guidelines "clearly identified the Panel's interest in community core values" such as section 3.1 "Use and Respect for Traditional and Community Environment Knowledge".[157] The fact that the Panel had an interest in these perspectives does not mean the identification of "core community values" as the key determinant of its assessment would result.

132. Mr. Smith then states that "any Proponent would be bound to prepare an EIS which satisfied the required balancing of benefits and burdens on community interest and values. Bilcon's onus of proof respecting community core values was clear and detailed."[158] However, the Panel's later conclusion concerning "sacred landscape" and "community core values" as it defines them, simply could not reasonably have been anticipated on reading the Guidelines.

133. When the Panel addresses the "significant adverse environmental effects" of the project and generates the label "Community Core Values", the Panel members reached a particularly startling conclusion:

> Communities articulate their defining core values most effectively in communal, introspective discussions by stakeholders: people from these communities who share common interests but have specific needs and goals.
>
> …
>
> People in Digby Neck and Islands believe strongly in self-determination and self-sufficiency. They referred often to the importance of a strong sense of place, a living connection with traditional lifestyles, harmony with the environment coupled with a strong sense of stewardship as a way of life. Community members informed the Panel at every juncture that Digby Neck and Islands is a unique environment – some might call it a "sacred landscape".[159]

[157] Expert Report of E. Lawrence Smith at para. 264.
[158] Expert Report of E. Lawrence Smith at para. 273.
[159] Joint Review Panel Report, dated October 23, 2007, at p. 99 (***Investor's Schedule of Documents at Tab C 34***).

134. The Panel then cites "academic literature" defining "sacred landscape". The question must be posed: how could any proponent effectively participate in an environmental review where the notion of operating in a "sacred landscape" is raised? As a matter of procedural fairness, absolutely no notice was provided that this was the "case to meet" for Bilcon. This standard is even more unattainable when one considers the fact that other quarries, such as the Tiverton Quarry – presumably likewise located in a closely neighboring "sacred landscape" – did not even require a panel review.

135. The comment of noted environmental lawyer Shawn Denstedt, Q.C. reflects the point:

> This finding was made despite the absence of a "core values" requirement in either the Panel's Terms of Reference or the CEAA. Rejection on this ground ignores the explicit legal test of whether the project is likely to cause significant adverse environmental effects after the application of mitigation measures.
>
> While a consideration of "core values" could potentially fit within a significance determination structure, by making sustainability a separate, stand-alone consideration, the Panel's analysis is inconsistent with the significant effects analysis upon which a panel must base its recommendations.[160]

ii. Mitigation Measures

136. Section 37 of the CEAA requires mitigation measures to be taken into account by the responsible authority. However, the JRP in regard to the WPQ did not consider mitigation measures at all. This omission violates the letter as well as the spirit of this statutory requirement. Since the scheme of the Act required that the decision-maker must take mitigation measures into account in determining whether a project would cause adverse environmental effects, the Report and recommendations of the Panel were fundamentally flawed.

[160] S. Denstedt et al, "Joint Review Panels Exceed Mandate with use of Sustainability Framework" (March 2008). http://www.mondaq.com/canada/article.asp?articleid=58438 (Emphasis added) (***Investor's Schedule of Documents at Tab C 834***).

137. The failure to take into account relevant mitigation measures not only constitutes an abuse of discretion, on the basis of the failure to take into account relevant considerations, but is also another jurisdictional error, as the JRP failed to follow the parameters set out in the legislation.

138. Robert Connelly, of Connelly Environmental Assessment Consulting, Inc., points out at paragraph 17 of his Report for Canada[161] that "[t]here are certain factors in section 16(1)(a)-(e) that must be considered in <u>every</u> type of environmental assessment" (Emphasis in original). One of these <u>mandatory factors</u> is "(d) measure that are technically an economically feasible and that would mitigate any adverse environmental effects of the projects".[162]

139. Here the WPQ Panel simply did not consider mitigation measures, contrary to the mandatory requirement to do so, as was acknowledged by Mr. Connelly.

140. In paragraph 83, Mr. Connelly cites Professor Hanna with respect to mitigation measures:

> The process of mitigation involves measures that can be taken to reduce or eliminate the impacts identified. It also provides the Proponent with the opportunity to make the project better, to respond to the concerns of those affected, and to improve the likelihood that the proposal will be favorably received by the EIA [environmental impact assessment] and other approval agencies. Effective mitigation measures can make a project more likely to be accepted and perhaps even ensure that it is more efficiently implemented.[163]

141. In my view, in the words of Professor Hanna, the failure to consider mitigation measures deprived Bilcon of "the opportunity to make the project better, to respond to the

[161] Expert Report of Robert Connelly.
[162] Expert Report of Robert Connelly at para. 72, Table 7.
[163] K. Hanna, "Environmental Impact Assessment: Process, setting and efficacy" in K. Hanna (ed), *Environmental Impact Assessment Practice and Participation*, 2nd edition (Oxford: Oxford University Press, 2009), ch. 1, p. 11 (***Investor's Schedule of Documents at Tab C 864***).

concerns of those affected and to improve the likelihood that the proposal [would] be favorably received by the EIA and other approval agencies".

142. Mr. Connelly also highlights the importance of considering mitigation measures, "… if mitigation measures reduce or eliminate this effect, then the overall magnitude of the effect could be negligible or insignificant".[164]

143. Mr. Connelly then refers to the decision of the Government at the conclusion of the EA as being of "a different quality" than earlier in the process precisely because "the information gathering aspect of the environmental assessment process is now complete".[165] However, if the information that is gathered is demonstrably erroneous in key areas, then the quality of the decision-making expected by the Ministers at the conclusion of the process must necessarily be very low.

144. Then Mr. Connelly offers this conclusion:

> If on the other hand the appropriate government decision-maker determines that the project is likely to cause significant adverse environmental effects (again, taking into account any appropriate mitigation measures) that cannot be justified in the circumstances, the responsible authority shall not take an action that would permit the project to be carried out in whole or in part.[166]

In other words, Mr. Connelly appears to confirm that mitigation measures must be considered in the calculus. However, mitigation measures were not considered by the JRP.

[164] Expert Report of Robert Connelly at para. 84.
[165] Expert Report of Robert Connelly at para. 87.
[166] Expert Report of Robert Connely at para. 88.

145. In the decision of the Federal Review Panel on the Prosperity Gold-Copper Mine Project in British Columbia (Taseko Mines Ltd.) (2010)[167], the Panel undertook a review of the mining proposal and concluded that the project would have a significant adverse effect on fish and fish habitat, on use of the land and resources by First Nations, on their cultural heritage, and on aboriginal rights and title. It therefore recommended rejection of the project. However, the Panel went on "in accordance with its mandate" to make recommendations relating to the appropriate procedures to mitigate the management of environmental effects, should the project proceed. The Panel also explained that, while it examined information on the employment and economic benefits, it made no conclusions in that regard because:

> The Panel's Terms of Reference limit it to addressing changes in socioeconomic conditions caused by a change the project may make in the environment. Economic issues for example, employment, income, government finances and economic and regional development, in the Panel's opinion, do not result from an environmental change caused by the project.[168]

146. It then went on to say that the Panel has no mandate to reach conclusions on justifiability of the Project, but only on the significant adverse environmental effects.[169] This is in sharp contrast with the WPQ Panel which imposed its views as to the benefits and burdens of the Project.

147. Similarly, even the joint review panel that prepared the much criticized Kemess North Mine Report[170] offered a suite of possible mitigation measures, for the ministers to

[167] Report of the Federal Review Panel, Prosperity Gold-Copper Mine Project, Taseko Mines Ltd., British Columbia, dated July 2, 2010 (***Investor's Schedule of Documents at Tab C 576***).
[168] Report of the Federal Review Panel, Prosperity Gold-Copper Mine Project, Taseko Mines Ltd., British Columbia, dated July 2, 2010, at p. v (***Investor's Schedule of Documents at Tab C 576***).
[169] Report of the Federal Review Panel, Prosperity Gold-Copper Mine Project, Taseko Mines Ltd., British Columbia, dated July 2, 2010, at p. v (***Investor's Schedule of Documents at Tab C 576***).
[170] Kemess North Mine Joint Review Panel Report, dated September 17, 2007 (***Investor's Schedule of Documents at Tab C 567***).

consider in the event they choose to approve the project, which that panel recommended be rejected.[171]

148. In a CBC interview with the JRP Chairperson on December 20, 2007, Dr. Fournier admitted this most serious deficiency in the following terms:

> We were so certain that this was a bad thing that it was inappropriate for that particular environment that we did not provide any of those mitigating recommendations at all. I think many people pointed to that and that was a very conscious effort on our part.
>
> …
>
> The one that absolutely couldn't be adjusted was this business of core values and the social component. It would have had such an effect on the environment that would have changed it forever and for us that was the determining factor.[172]

149. Mr. Smith contends that the Panel did consider mitigation measures.[173] He bases this assertion on comments made in its Report that simply state the Panel "analyzed and evaluated the information provided, along with monitoring and mitigation proposed…"[174] However, there is no reference whatsoever in the Report to any of these measures: this is merely a self-protective assertion since the Report contains no analysis of monitoring and mitigation measures. Mr. Smith then references other reports where mitigation measures were applied.[175] Yet as noted, in at least one of them, the Kemess North Project, the Panel recommended against the Project, but nevertheless included the mitigation measures, something which does not emerge from his analysis.

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[171] Kemess North Mine Joint Review Panel Report, dated September 17, 2007, at Appendix 1 (***Investor's Schedule of Documents at Tab C 567***).
[172] Transcript, by Appleton & Associates, of the CBC Interview of Robert Fournier, dated December 20, 2007 (***Investor's Schedule of Documents at Tab C 180***).
[173] Expert Report of Lawrence E. Smith at paras. 345-354.
[174] Joint Review Panel Report, dated October 23, 2007, at p. 20 (***Investor's Schedule of Documents at Tab C 34***).
[175] Expert Report of Lawrence E. Smith at para. 350.

150. Section 37 of the *CEAA* speaks to mitigation measures being taken into account by the responsible authority. It is my opinion, that the JRP's failure to consider mitigation measures at all, violates both the letter and spirit of section 37.

151. The JRP also required Bilcon to consider how other projects "have been or will be carried out", and imposed an unknown hypothetical standard of "induced" impacts.[176]

152. The "Adequacy Analysis" of Bilcon was then criticized by the JRP for not addressing "induced" developments, which some called "quarry creep".[177] The Panel stated that Bilcon's cumulative effects assessment was too narrowly focused and that it believes development of adjacent properties, likely by the Proponent, is a reasonably foreseeable activity that should have been considered. The Panel's "belief" is not supported by any evidence: it is simply a stated belief. Then the Panel concludes that it "expects that induced activities would add to the severity of predicted adverse social effects on the fishery and tourism in the region".[178] Again, this Panel "expectation" is not supported by any evidence. The JRP also said it "believes that the Proponent's analysis of the cumulative effects of the Project acting in concert with activities that should be considered as reasonably foreseeable was not adequate".[179]

153. According to the *Reference Guide on Cumulative Effects*[180], the only projects that could properly have been taken into account by the JRP were those that had already been

[176] Environmental Impact Statement Guidelines for the Review of the Whites Point Quarry and Marine Terminal, dated March 2005, at s. 11. (***Investors' Schedule of Documents at Tab C 168***). The following passage is apposite: "Analysis of the total cumulative effect on a VEC over the life of the Project requires knowledge of the incremental contribution of all projects and activities, in addition to that of the Project. Include different forms of impacts (e.g., synergistic, additive, induced, spatial or temporal). Identify impact pathways and trends" (Emphasis added).
[177] Joint Review Panel Report, dated October 23, 2007, at p. 81-83 (***Investor's Schedule of Documents at Tab C 34***).
[178] Joint Review Panel Report, dated October 23, 2007, at p. 83 (***Investor's Schedule of Documents at Tab C 34***).
[179] Joint Review Panel Report, dated October 23, 2007, at p. 82 (***Investor's Schedule of Documents at Tab C 34***).
[180] *Reference Guide for CEAA: Addressing Cumulative Environmental Effects*, November 1994, available at: http://www.ceaa.gc.ca/default.asp?lang=En&n=9742C481-1 (***Investor's Schedule of Documents at Tab C 880***). This guide advises that the assessment of cumulative environmental effects in relation to future projects should focus exclusively on imminent projects, that is, projects that have been approved but not yet implemented or proposals awaiting planning or other formal approval: see p. 153.

approved after an EA or for which approvals and authorizations were in the process of regulatory approval. Yet, the JRP Panel stated:

> The Proponent failed to address cumulative effects that could arise due to induced developments triggered by the Proponent's inability to overcome constraints in working the proposed site, the need to expand operations to meet demand, or economic imperatives. Ownership of adjacent properties provides the Proponent with the potential opportunity of expansion. The Panel believes that expansion of the present Project and the development of an additional quarry or quarries is reasonably foreseeable, and that scenarios such as that should have been evaluated in the cumulative effects assessment.[181]

154. There were no approvals issued for any other developments and none in the process of regulatory approval. It therefore seems clear that Panel did not apply the correct test for determining "cumulative effects", displayed a predisposed bias against Bilcon, and acted manifestly contrary to the *Reference Guide on Cumulative Effects* that speculative impacts of purely hypothetical projects had no place in the process.[182]

iii. Political Analysis

155. Chapter 3.4 of the JRP`s Report addresses the "benefits and burdens" of the Project. Any conclusion in this regard is quintessentially a political analysis. The famous definition of "politics" by Canadian political scientist, Dr. David Easton, Past President of the American Political Science Association, is "the authoritative allocation by the political system of values for society."[183] In all EA legislation, final decision-making is left to elected politicians –it is for them to allocate benefits and burdens and to be accountable for their decisions. In the absence of a clear mandate in the Terms of Reference, the benefits and burdens analysis is entirely beyond the JRP's jurisdiction.

[181] Joint Review Panel Report, dated October 23, 2007, at p. 21 (***Investor's Schedule of Documents at Tab C 34***).
[182] See also Expert Report of David Estrin, dated July 8, 2011, at paras. 422-442.
[183] David Easton, *A Framework for Political Analysis* (Englewood Cliffs: Prentice-Hall, 1965) (***Investor's Schedule of Documents at Tab C 854***).

156. It does not appear that there is any mandate in the Terms of Reference for the JRP to consider the benefits and burdens they might perceive to result from the proposed WPQ project - something that the Panel nevertheless went on to provide to the respective Ministers.[184]

[184] Joint Review Panel Report, dated October 23, 2007, at p. 95 (***Investor's Schedule of Documents at Tab C 34***).

IX. Breaches By the Ministers

A. Natural Justice and Procedural Fairness

i. Refusal to Hear from Bilcon

157. The scheme of both the Federal and Nova Scotia EA legislation is that elected Ministers make the final decision. Their refusal to hear from Bilcon and to rely on the Report and recommendation of the JRP is itself a denial of natural justice and therefore a fundamental jurisdictional error. Two famous British judicial decisions are apposite. First, in *Cooper v. The Board of Works for the Wandsworth District*[185], where the Court held: "Although there are no positive words in a statute requiring that the parties shall be heard, yet the justice of the common law will supply the omission of the Legislature".[186]

158. Second, *R. v. Sussex Justices, ex parte McCarthy*[187] is well known for the oft-quoted aphorism, "Justice should not only be done, but should manifestly and undoubtedly be seen to be done".[188]

159. The Federal and Nova Scotia Ministers were legally obligated to have an open mind when discharging their responsibilities after accepting the Report of the JRP. As Professor Wade indicates, "The relevant question is whether the Minister, when he comes to make his decision, genuinely addresses himself to the question with a mind which is open to persuasion".[189]

160. Instead, Mr. Buxton described what occurred:

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[185] *Cooper v. The Board of Works for the Wandsworth District* (1863) 143 E.R. 414 (***Investor's Schedule of Documents at Tab C 845***).
[186] *Cooper v. The Board of Works for the Wandsworth District* (1863) 143 E.R. 414 at p. 7 (***Investor's Schedule of Documents at Tab C 845***).
[187] *R. v. Sussex Justices, ex parte McCarthy* [1924] 1 K. B. 256, [1923] E.R. 233 per Lord Hewart, CJ (***Investor's Schedule of Documents at Tab C 846***).
[188] *R. v. Sussex Justices, ex parte McCarthy* [1924] 1 K. B. 256, [1923] E.R. 233 per Lord Hewart, CJ at p. 2 (***Investor's Schedule of Documents at Tab C 846***).
[189] W.C. Wade, *Administrative Law*, 6th Edition (United Kingdom: Clarendon Press, 1988), p. 492 (Emphasis added) (***Investor's Schedule of Documents at Tab C 853***).

> After the JRP released its recommendation, I contacted Mark Parent, Nova Scotia's Minister of the Environment, to discuss whether he should accept the Joint Review Panel decision. I was eager to convey to Minister Parent our concerns about the unfair, flawed way the environmental assessment process had been conducted, and the many factual inaccuracies that were in the JRP's decision.
>
> I attempted to tell Minister Parent that he did not have all the information that he needed before making a decision. The environmental assessment was a long and complicated process that spanned more than five and a half years. I told the Minister that I felt that it was of critical importance to all Nova Scotians that the decision be made only after the Minister had been properly apprised of all the facts. I told the Minister that I felt the Panel was not fair, and that the Report contains many errors, including its recommendations, the fact that its panel ignored the regulators including the Minister's own department and our own experts.
>
> To my dismay, Minister Parent refused to discuss the Report. Minister Parent simply stated that he would be accepting it without any review or consideration. (…)
>
> Bilcon also wrote to the federal Minister of the Environment, John Baird, urging him to meet with us to hear our concerns. The Minister never responded, despite our repeated requests.[190]

161. As a matter of Canadian law, the Ministers are statutory decision-makers in the process. Their discretion is confined by the environmental assessment legislation and the legal jurisdictional obligations implicit in it which they are required to follow. Since the Ministers were the final decision-makers, it is a patent denial of natural justice to not provide Bilcon an opportunity to be heard. The JRP Report that the Ministers accepted and relied upon was tainted with fatal errors, both of a procedural and a substantive nature. Yet, Bilcon's efforts to bring the deficiencies to the attention of the decision-makers were, without reason, denied.

162. This is all the more significant since Canadian Jurisprudence makes it clear that a federal minister's response to a panel report cannot "cure any deficiencies in the panel report."[191] As stated by the Federal Court of Appeal:

[190] Witness Statement of Paul Buxton, dated July 20, 2011, at paras. 81-83 and 85.

> The requirements of CEAA are legislated directions that are explicit in mandating the necessity of an environmental assessment as a prerequisite to ministerial action. It is clear that the Minister has no jurisdiction to issue authorizations in the absence of an environmental assessment. It is equally clear that any assessment must be conducted in accordance with the Act, including for example, the requirement imposed under section 16 of CEAA. The fact that a federal response has been issued and remains unchallenged does not change these requirements.
> (…)
> Thus the report that must be submitted to the Minister pursuant to paragraph 34(d) must contain, pursuant to subparagraph 34(c)(i) and subsection 2(1), the results of an environmental assessment conducted in compliance with the requirements of CEAA.
>
> In sum, the combined effect of paragraphs 34(c), (d), subsection 2(1) and section 37 is that before taking a course of action, the Minister must consider an environmental assessment, that was conducted in accordance with the Act. (…).[192]

163. Mr. Smith's position is that once the Provincial Minister had decided that the WPQ Project would be denied, there was no reason for the Federal Government to hear from Bilcon. Essentially, he contends that the Federal Government's decision was "moot".[193] Yet this conclusion would deny Bilcon the opportunity to attempt to persuade the Federal Minister that his provincial counterpart ought to reconsider his decision. Moreover, the decision of the Nova Scotia Minister might have been judicially reviewed and changed, based on the procedural and substantive errors. If the courts found that the Nova Scotia Minister's decision was void, then the Federal Minister's decision might well have been a different one: but no such opportunity was provided. It was another procedural error for Bilcon to be denied the opportunity to make representations to the Federal Minister, the other statutory decision-maker in the matter.

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[191] *Alberta Wilderness Association v. Canada (Minister of Fisheries and Oceans)* (1998), 238 N.R. 88 (F.C.A.) at p. 7 (***Investor's Schedule of Documents at Tab C 261***).
[192] *Alberta Wilderness Association v. Canada (Minister of Fisheries and Oceans)* (1998), 238 N.R. 88 (F.C.A.) at p. 2, 7-8 (***Investor's Schedule of Documents at Tab C 261***).
[193] Expert Report of Lawrence E. Smith at para. 28.

164. Mr. Smith argues that "The Nova Scotia Government's rejection of the Project rendered the federal governments rejection moot in any event".[194] I do not agree. Under the scheme of the two statutes, each Minister has a separate decision to reach. It could well be the case that one level of government would be able under its constitutional jurisdiction to approve a project while the other would not. This is what occurred in the Taseko Mines situation involving Fish Lake.[195] The Province of British Columbia had conducted a separate EA of the project within the framework of its constitutional jurisdiction, and concluded that the project was acceptable under certain terms and conditions that the BC report recommended. The federal minister, noting that Fish Lake would be destroyed, was unable to accept the project. However, the Proponent has recently resubmitted the project for federal approval based on a redesign of the tailings impoundment.[196] Under Mr. Smith's analysis, once one level of government has rejected a project that must be the end of the matter. This is clearly not the case.

165. Based on lack of production of other materials, it is reasonable to assume that as statutory decision-makers under their respective EA statutes, the Ministers only had the flawed Report of the JRP on which to base their decisions. Their decisions were flawed due to the lack of procedural fairness and natural justice, as well demonstrable substantive errors contained in the Report. In the Government of Canada's response to the EA report of the JRP on the Whites Point Quarry and Marine Terminal Project, issued on December 17, 2007, it accepted the Panel's conclusions that "the Project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances".[197] Although no further reason was given for this conclusion, the release

[194] Expert Report of Lawrence E. Smith at para. 28.
[195] Report of the Federal Review Panel, Prosperity Gold-Copper Mine Project, Taseko Mines Ltd., British Columbia, dated July 2, 2010 (***Investor's Schedule of Documents at Tab C 576***). This is the panel report referred to at para. 87 of the Expert Report of Lawrence E. Smith.
[196] See CEAA Registry, http://www.ceaa.gc.ca/050/document-eng.cfm?document=54006 (***Investor's Schedule of Documents at Tab C 839***).
[197] DFO News Release headed 'The Government of Canada's Response to the Environmental Assessment Report of the Joint Panel on the Whites Point Quarry and Marine Terminal Project', dated March 24, 2003 (***Investor's Schedule of Documents at Tab C 589***).

noted the Panel's "belief" concerning "community core values", and that the "burdens outweighed the benefits and that it would not be in the public interest to proceed with the [development]".

166. Under the scheme of the two statutes, each of the Ministers involved had a separate decision to make. And each of them based their decision only on the flawed Report of the JRP.

167. The entire basis of the Ministerial decisions was therefore flawed. In the result, the Ministers accepted a Report that was the product of a faulty pre-hearing and hearing process, that contravened the basic requirements of natural justice and procedural fairness, that took into account irrelevant considerations, that exceeded its statutory jurisdictional mandate, and did not give Bilcon an opportunity to be heard on a decision that significantly affected its rights and interests.

B. Rule of Law

168. Under section 20(1)(c) of CEAA, where the responsible authority is uncertain if a particular project is likely to cause significant adverse environmental effects or whether public concerns warrant a review panel, the responsible authority must refer the project to the Minister of Environment for a referral to a review panel. The term "public concern" is not defined in the Act.

169. In this case, however, the explicitly stated reason for referral to a review panel was not public concern, but the question of possible adverse environmental effects. Therefore, a decision by the ministers predicated on "public concern" instead of adverse environmental effects would itself constitute a jurisdictional error. The Minister of Fisheries had a binary choice in making a referral to a review panel. He had to choose between the possibility of "significant adverse environmental effects" resulting from the

proposed project, or "public concern". While the Minister could certainly have predicated his decision on "public concern", that simply was not the basis for his determination. He made absolutely no reference to public concern, as the stated basis for his referral to a review panel.

170. Neither did the provincial Minister make public concern the basis for his decision to appoint a joint review panel. There is nothing to this effect in the June 26, 2003 letter from Minister Thibault to the Minister of Environment, David Anderson. Rather, reference is made to the need for authorizations under specified sections of federal legislation.[198] Similarly, in the letter from the Nova Scotia Minister of Environment and Labour, Mark Parent, announcing the Nova Scotia government's decision to accept the JRP Report (November 20, 2007), Minister Parent made no reference to "public concern".[199] Neither did the December 17, 2007 press release of the federal government announcing its decision to accept the Report without question.[200]

171. While there may have public controversy that arose between proponents and opponents of the quarry, it was never a stated rationale for the decision to refer the project to a review panel. As the Supreme Court of Canada affirmed in *Dunsmuir v. New Brunswick*, decisions will be upheld as reasonable if they meet the requirements of "justification, transparency and intelligibility" [201]: when the stated reasons for a decision are later replaced by other reasons, the result is arbitrariness, which contravenes Canadian domestic law principles.

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[198] Letter from Robert G. Thibault, Minister of Fisheries and Oceans, to The Honourable David Anderson, Minister of the Environment, dated June 26, 2003 (***Investor's Schedule of Documents at Tab C 466***).
[199] Letter from Minister Mark Parent to Paul Buxton, Bilcon of Nova Scotia, dated November 20, 2007 (***Investor's Schedule of Documents at Tab C 541***).
[200] DFO News Release headed 'The Government of Canada's Response to the Environmental Assessment Report of the Joint Panel on the Whites Point Quarry and Marine Terminal Project', dated March 24, 2003 (***Investor's Schedule of Documents at Tab C 589***).
[201] *Dunsmuir v. New Brunswick (Board of Management)* (2008) SCC 9, [2008] 1 S.C.R. 190 at p. 192 (***Investor's Schedule of Documents at Tab C 817***).

172. Mr. Smith properly acknowledges the two ways in which a review panel can be established: if there are "public concerns" or "significant adverse and environmental effect".[202] And yet the Ministers in the present case chose one route, not the other. Their basis was that the industrial activity in question might result in significant adverse environmental effects: they simply did not resort to the "public concern" justification.

173. By basing its Report on "community core values" and socioeconomic conditions, which are not a part of the *CEAA* or its Terms of Reference, the JRP exceeded its jurisdiction. By simply adopting the JRP's flawed conclusions without question, the federal Minister of the Environment exceeded his jurisdiction under the *CEAA*, and rendered his own decision *ultra vires.*

[202] Expert Report of Lawrence E. Smith at para. 51. See *CEEA*, s. 20(1)(c) and 23(b)(25) (***Investor's Schedule of Documents at Tab C 255***).

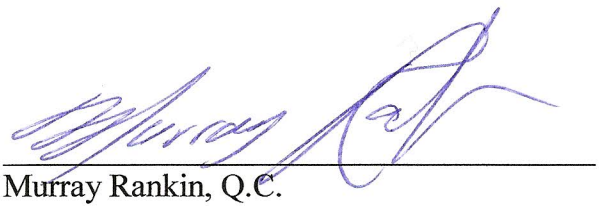
X. CONCLUSION

174. In my view, the entire environmental assessment process of the Whites Point Quarry was a violation of Canadian administrative law. The JRP's manifest disregard for its jurisdiction led it to a spiral of errors. By not confining itself to the parameters of its enabling legislation and Terms of Reference, the JRP abused its discretion. And the manner in which it conducted its hearing was a flagrant violation of Bilcon's rights of natural justice and procedural fairness. Bilcon was denied opportunity to know the case that it had to meet, and it faced blatant bias and hostility from the JRP. When Bilcon attempted to present its case with experts at the hearing, it was not permitted to do so.

175. When the Ministers then accepted the JRP Report without question and denied Bilcon the opportunity to make representations to them about it, their decision became flawed by the errors of the JRP, in addition to their own violation of the obligations of administrative law to be fair and reasonable. And overall, the rule of law was frustrated by the different treatment the Whites Point Quarry received compared to other similar projects in the same area.

176. When viewed through the lens of Canadian administrative law, this process was legally flawed from beginning to the end, and the Minister's decisions were thereby rendered *ultra vires.*

Signed December 21, 2012



Murray Rankin, Q.C.

APPENDIX A

Synopsis of Academic and Professional Qualifications

- Harvard Law School, LLM 1977 (*summa cum laude*) in environmental law;
- Professor of Law, University of Victoria, 1977-1992, teaching administrative and environmental law; and
- Partner of Arvay Finlay and Heenan Blaikie law firms, 1990-2012, specializing in administrative and environmental law.

Representative Professional Engagements

- Fellow of the Canadian Institute of Advanced Research, co-authored with Professor Richard Brown, an empirical study of the enforcement of the *Waste Management Act* in British Columbia;
- Research on enforcement methodologies of the US Environmental Protection Agency (Region 10) and State Environmental Protection agencies in Washington and Oregon;
- Commission Counsel to the joint federal-provincial environmental assessment panel reviewing a ferrochromium plant proposed for Port Hardy, British Columbia, and chaired by Bryan Williams, QC, subsequently appointed Chief Justice of the BC Supreme Court;
- Retained by the Governments of Canada and British Columbia as their expert in Canadian environmental law in litigation in the U.S. District Court for the District of Oregon relating to the Nestucca oil spill;
- Retained by the Environmental Protection Division of the BC Ministry of Environment to prepare legislative instructions for comprehensive reform of the environmental protection regime in the Province;

- Retained by BC Minister of Environment to report on the BC Hazardous Waste Management Corporation, which led to the winding down of the Crown corporation;
- Represented Environmental Protection Review Canada, a review agency appointed under the *Canadian Environmental Protection Act*;
- Negotiator and litigator in environmental law cases, including as counsel for the Forest Appeals Commission, in *Paul v. British Columbia (Forest Appeals Commission)* 2003 SCC 55 (Supreme Court of Canada);
- Advisor to private and public sector clients in relation to *Contaminated Sites Regulation* under the BC *Environmental Management Act*;
- Appointed by BC Minister of Environment to draft and lead implementation of the *Oil and Gas Commission Act* and the *Drinking Water Protection Act*;
- Legal advisor to the Climate Action Secretariat of the Province of British Columbia, and Counsel to the Greater Victoria Water Supply Commission;
- Founding member of the Canadian Centre for Environmental Arbitration and Mediation, comprised of Canada's leading environmental lawyers dedicated to the resolution of complex environmental disputes; and
- Co-Chair of the Environmental Law Forum, annual invitation-only assembly of Canada's leading environmental lawyers.

Selected Publications

"*Regulatory Reform in the British Columbia Petroleum Industry: The Oil and Gas Commission*" (with C. Jones et al) (2000) 38 Alberta L. Rev. 143

"*The Eyes Have It: Seeing Justice in the Law of Bias*" (with Matt Pollard), The Advocate, (September 1998)

"*Advising the Board: The Scope of Counsel's Role in Advising Administrative Tribunals*" (with Leah Greathead) (1993) 7 Canadian Journal of Administrative Law and Practice 29

"*Environmental Regulation and the Changing Landscape*", chapter in Environmental Law and Business in Canada, G. Thompson, M. McConnell, and L. Heustis, Canada Law Book, 1993

"*Alcan's Kemano Project: Options and Recommendations*", Report to Premier of British Columbia, (October 1992).

"*Information and the Environment: The Struggle for Access*", Environmental Rights in Canada, J.Z. Swaigen (ed), Butterworths, 1991

"*The Cabinets and the Courts: Political Tribunals and Judicial Tribunals*", (1990) 3 Canadian Journal of Administrative Law and Practice 301.

"*Persuasion, Penalties and Prosecution: Administrative vs. Criminal Sanctions*" (with R.M. Brown), chapter in Securing Compliance, M. Friedland (ed), (University of Toronto Press, 1990).

"The Enforcement of Environmental Law: Taking the Environment Seriously", (co-authored with P. Finkle) (1983) 17 University of British Columbia Law Review, 35

"*Dangerous Moves: The Law Responds to the Transportation of Dangerous Goods*" (1990), U.B.C. Law Review.

Translator of René Dussault, L. Borgeat, *Administrative Law: A Treatise* (three volumes) (Carswell Ltd. 1986, 1988 and 1989)

Regional Editor, *Canadian Journal of Administrative Law and Practice*, 1987 to present