

**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

**REJOINDER EXPERT REPORT OF
LAWRENCE E. SMITH, Q.C.**

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1. My name is Lawrence Edward Smith and I reside at 1216 Beverley Blvd. SW, Calgary, Alberta. I prepared the "Expert Report of Lawrence E. Smith, Q.C." ("Smith First Report") filed previously in these proceedings. In connection with my preparation of this Rejoinder Expert Report ("Rejoinder Report"), I have reviewed the Claimants' Reply Memorial, the Supplemental Witness Statement of Paul Buxton, the Reply Expert Report of David Estrin ("Estrin Reply") and the Expert Report of T. Murray Rankin, Q.C. ("Rankin Report").

A. PURPOSE OF THIS REPORT

2. As explained in my First Report, I was asked by the Government of Canada for my opinion as to the reasonableness of the treatment afforded Bilcon in the environmental assessment ("EA") of the proposed Whites Point Project based on my experience as an EA practitioner in Canada; and as to whether it was discriminatory or appeared to lack fairness as compared to the EAs of other developments in Canada and, in particular, in Nova Scotia. In this regard, I have considered the Claimants' materials identified in paragraph 1 above, and I provide my response to these materials in this Rejoinder Report.

B. EXECUTIVE SUMMARY

3. I have organized my Rejoinder Report to comment on each of the five parts of the Estrin Reply, and where appropriate, to provide comments on the opinions offered by Mr. Rankin as well.

4. In Part I, I address the decisions made by government officials up to and including the decision to refer the Whites Point Project to a Joint Review Panel ("JRP"). Based on my experience in and familiarity with EAs in Canada, and on my understanding of the particular circumstances surrounding the Whites Point Project, I believe that Bilcon was treated fairly and reasonably in accordance with applicable Canadian and Nova Scotian legislation. I must also note that much of what Messrs. Estrin and Rankin take exception to in this period of the process is simply irrelevant. In particular, they ignore both the integrated nature of the Whites Point Project (a combined quarry and marine terminal) and the "joint" federal and provincial nature of the review, which meant that the entire project – whether or not any one particular component engaged Nova Scotia's jurisdiction or Canada's – had to be

considered in order to satisfy the regulatory requirements of both jurisdictions. In this respect, it seems pointless to protract a theoretical debate about what parts of the Whites Point Project would have been appropriate to include in a federal-only review.

5. In Part II, I address Messrs. Estrin's and Rankin's comments on the JRP hearing process and report. My conclusion here, also based on my experience in and familiarity with EAs in Canada and on my understanding of the particular circumstances surrounding the Whites Point Project, is that Bilcon was treated fairly and reasonably, and in accordance with the law. In particular, while Messrs. Estrin and Rankin engage in debate over the Panel's application of concepts such as the precautionary principle and cumulative effects, and its consideration of mitigation and monitoring measures, it was the project's inconsistency with community core values which ultimately led to its rejection. In this regard, there can be no doubt that, at a minimum, the Nova Scotia legislation required consideration of all the components of the review which the Panel described as constituting "community core values". Further, the fact that the phrase did not appear in the Panel's Terms of Reference or in the Final EIS Guidelines is irrelevant. Bilcon was on notice from the outset that the concerns the Panel had regarding the project's inconsistency with every aspect of "community core values" were tied to factors identified in the Terms of Reference and outlined in detail in the Final EIS Guidelines, both of which were provided to guide Bilcon in the preparation of its evidence. In this regard, Bilcon cannot claim to be a victim of any procedural unfairness.

6. Part III of this Rejoinder Report deals with the responses of the federal and Nova Scotia governments to the JRP's report. My conclusion, based on my experience in and familiarity with EAs in Canada, and on my understanding of the particular circumstances surrounding the Whites Point Project, is that Bilcon was treated fairly and reasonably, in accordance with the law. In particular, the government of Nova Scotia, at a minimum, had the right to reject the Project on the grounds of its inconsistency with community core values. This decision also meant the project was dead before the federal government took steps to itself reject the Project almost a month later. Once again, it seems senseless to protract the debate about what the federal government might have done under other circumstances. Indeed, as I will discuss, Mr. Estrin's suggestion that the federal Minister

should have lobbied his provincial counterpart to reverse Nova Scotia's rejection invites the very jurisdictional error (intruding upon provincial jurisdiction) of which Mr. Estrin now complains.

7. In Part IV, I briefly touch upon the failure of Bilcon to complain at the time of its EA about the issues now being raised in the Estrin Reply and the Rankin Report. As the many judicial decisions cited in the record demonstrate, issues of alleged jurisdictional error, bias and procedural fairness can be brought before the courts in order to determine whether they have merit and, where appropriate, to re-engage the EA in whatever manner necessary to correct any proven errors. For the Whites Point Project, there is no evidence whatsoever of any court concluding that Bilcon was treated unfairly, unreasonably or in contravention of the law at any point throughout the EA process or subsequent to the rejection of the project by Nova Scotia and later by Canada. In that regard, Bilcon's failure to engage the corrective mechanisms available throughout the process is problematic in light of the positions now advanced by Messrs. Estrin and Rankin.

8. Part V of this Rejoinder Report deals with Mr. Estrin's strained suggestion that recent legislative amendments to the *CEAA* – six years after the release of the Whites Point JRP Report – were a tacit admission by the Canadian government that that review process was unfair. Not surprisingly, nothing in the background materials released in conjunction with that new legislation makes any reference to Bilcon or the Whites Point Project.

9. In Part VI, I provide my closing remarks.

1. Overarching Facts

10. One problem with responding *seriatim* to each of Mr. Estrin's submissions, and now the related submissions of Mr. Rankin, is that they tend to confuse rather than to clarify the EA of the Whites Point Project. Standing back for a moment to reflect on the arguments advanced by Bilcon and its experts, I believe it is important to keep in view several important facts. Once those facts are fully appreciated, the logic of the review process selected by Canada and Nova Scotia becomes apparent.

(a) The Process was a Joint Federal-Provincial Review – not a Federal or CEAA-Only Review

11. First, as explained above, the Whites Point Project engaged federal and provincial jurisdiction. While much time and effort has been expended in debating exactly what the limits of federal jurisdiction might have been, that issue is largely irrelevant. Rather, Bilcon had to satisfy the requirements of both the federal and the Nova Scotia regulatory regimes. As noted in my First Report, Mr. Estrin has consistently understated the significance of the Nova Scotia legislative and regulatory requirements upon the process and the government decisions made at the end of the process. Bilcon was never going to be able to side-step regulatory scrutiny of both the quarry and the marine terminal. Indeed, Bilcon itself (sensibly in my view) showed an interest at the outset as to "... whether or not the Fed and Prov EA can be done as a joint effort".¹

12. In these circumstances, a one-stop shopping "joint" review was a logical and reasonable approach. The process, and the decisions made pursuant to that process, must not be judged, therefore, on the basis of something entirely different such as a federal-only review panel, or some other type of assessment of only the individual components of the Whites Point Project. Instead, they must be judged in recognition of the fact that this was a "joint" federal and provincial EA.

(b) Bilcon Always Referred to the Project as an Integrated Quarry and Marine Terminal Project

13. Second, the Proponents consistently referred to the project as the "Whites Point Quarry and Marine Terminal". Contrary to Mr. Estrin's suggestion, the Proponents always represented to both the federal and the provincial officials that their Project was an integrated quarry and marine terminal. As GQP explained to the DFO, "... quite frankly, if they cannot put in a wharf they are not interested in the quarry".² They also made clear that even the purpose of the blasting activities on the 3.9 ha site and the intended use of the blasted rock was as an initial step in the construction of various aspects of the overall Whites

¹ Government of Canada Counter Memorial, December 9, 2011 ("Counter Memorial"), para. 93.

² Counter Memorial, paras. 92, 93.

Point Project – that is, the construction of environmental controls and a new access road.³ Further, the Proponents consistently made it known from July 2002 through to the hearing⁴ that the export of all the blasted rock would only take place by means of the marine terminal, not by road. Hence, the integrated nature of both components of the Project was at all times manifest.⁵ The integrated nature of the project components also explains the "joint" approach taken by Nova Scotia and Canada that I have described above.

14. In these circumstances, it is logical and sensible that the provincial and the federal authorities would scope the project as the Proponents themselves defined it, to include all components – quarry and marine terminal. With respect, Mr. Estrin appears to now disagree with how the Proponents described their own project.

(c) The Whites Point Project was Controversial

15. Third, the Whites Point Project was controversial. There is no question that the project was strongly opposed by large numbers of people in the communities surrounding the proposed project site. This is one point on which Mr. Estrin and I appear to agree as he acknowledges in his Reply Report "that there was significant opposition to the WPQ project" and that "[t]he project was very controversial."⁶ Under these circumstances, it is hardly surprising that government officials chose the only type of assessment at the time – a panel review – that provided funding to ensure meaningful public participation in the EA process. Specifically, section 58 (1.1) of the *CEAA* only made funding available to facilitate public participation in mediations and assessments by review panels. Such funding for public participation was not available with respect to screenings or comprehensive studies at the relevant time.⁷

³ Counter Memorial, paras. 130, 131.

⁴ Smith First Report, para. 175.

⁵ Smith First Report, para. 115; Rankin Report, paras. 19 b) and 113. Mr. Rankin emphasizes that "Bilcon had specifically designed the project in such a way that the road would not be needed."

⁶ Estrin Reply, para. 194.

⁷ Mr. Rankin confirms the Bilcon project was "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'; Rankin Report, para. 57.

PART I: THE TREATMENT OF THE WHITES POINT ENVIRONMENTAL ASSESSMENT PROPONENTS PRIOR TO THE JOINT PANEL REVIEW WAS LAWFUL, FAIR AND REASONABLE

16. As I have explained, the Whites Point Project was presented to government officials as an integrated quarry and marine terminal that would operate on a 152 ha parcel of land at Whites Point for fifty years. In these circumstances, it is logical and sensible that the provincial and the federal authorities would scope the project as the Proponents themselves defined it, to include all components – quarry and marine terminal. With respect, Mr. Estrin (supported by Mr. Rankin it appears) appears to now disagree with how the Proponents described their own project. In fact, Mr. Estrin's analysis verges on implying that the real project under consideration was a 3.9 ha quarry that was proposed by Nova Stone Exporters Inc. ("Nova Stone") on the site of the Whites Point Project; that the Project itself was no different than much smaller scale, short term, uncontroversial projects such as quarries needed only for wharf repairs or quarries located in much more remote areas;⁸ that the only jurisdiction that was relevant to the EA process was federal;⁹ and that the significant public concerns expressed about the Project did not need to be recognized in the selection of the type of assessment.

17. As discussed in greater detail below, the Whites Point Project was none of these things. Mr. Estrin's submissions, and Mr. Rankin's concurring comments, therefore, are irrelevant and, to the extent they seek to impugn the *bona fides* of the government officials involved, they are also regrettable.

18. First, with respect, the controversy Messrs. Estrin and Rankin seek to generate regarding how Nova Stone's 3.9 ha quarry was addressed, and the role of DFO in the permitting process regarding blasting, appears strained. For example, the permit for the 3.9 ha quarry granted to Nova Stone lapsed once the project's ownership was restructured after lengthy delays¹⁰ so it seems pointless to belabour issues which had no bearing on the final outcome of the EA process.

⁸ Estrin Reply, para. 12.

⁹ Estrin Reply, paras. 28-128.

¹⁰ Counter Memorial, paras. 159-160.

19. Second, the extensive debate in which Mr. Estrin continues to engage regarding precisely where the federal government's jurisdiction began or ended¹¹ ignores the basic reality that the project was to be assessed in one single process that had to satisfy all federal and provincial requirements. This is particularly true with regard to DFO's scope of project determination. With respect, the federal focus of Mr. Estrin's analysis is not relevant to a joint federal-provincial review which, of necessity, must consider the entire project and all of its potential environmental effects in order to fully satisfy all federal and provincial regulatory requirements.

20. Third, a JRP was the appropriate type of assessment to satisfy both federal and provincial regulatory requirements in one single review process ("one-stop shopping"). Referral to a JRP was the only avenue available to provide the public with participant funding in order to ensure a meaningful opportunity for them to participate.¹² Moreover, any experienced practitioner alive to the controversy surrounding the proposed industrialization of the picturesque setting of the Digby Neck within a UNESCO Biosphere Reserve,¹³ and aware of past failed attempts to establish large-scale quarries in the area,¹⁴ would have placed a high probability on the Project being referred to a panel review. Indeed, even if the project was to undergo duplicative separate federal and provincial reviews, an experienced practitioner would recognize that each of them could have entailed separate public hearings.

21. I address each of these points below.

1. DFO Involvement in the Permitting Process for Nova Stone's 3.9 ha Quarry

22. Paragraphs 4-9 of the Mr. Estrin's Reply reiterate allegations made in his First Report of improper DFO involvement in Nova Stone's 3.9 ha quarry permitting process, including the suggestion that DFO thwarted Bilcon's ability to conduct test blasts on the site.

¹¹ For example, whether blasting would or would not affect matters under federal or provincial jurisdiction; whether scoping should be limited to "triggers"; and how other different quarry developments might have been treated by either the federal or provincial authorities at other times.

¹² Smith Rejoinder Report, para. 15.

¹³ Counter Memorial, para. 30.

¹⁴ Counter Memorial, para. 31.

Mr. Rankin apparently holds a similar view.¹⁵ Mr. Estrin advances this point to corroborate a "pattern by officials of making life difficult for the proponent", leading to a process during this early period which "was beyond what a proponent would reasonably have expected".¹⁶

23. I am surprised the issue of the 3.9 ha permit continues to garner so much attention. The permit expired May 1, 2004¹⁷ as a result of the Proponent's corporate restructuring so the issue was moot over three years before the JRP held its hearings. Nevertheless, it appears to me that DFO's involvement was lawful and appropriate. For the reasons I explain below, contrary to what Mr. Estrin says, an experienced practitioner would have expected some DFO involvement in a project of this kind.

24. At this point, however, it is important to clear up one misconception which Mr. Estrin has in his Reply.¹⁸ He repeatedly refers to "Bilcon" as the proponent of the 3.9 ha quarry and as the party which dealt with DFO throughout that period.¹⁹ The fact of the matter is, however, Bilcon did not own the 3.9 ha quarry and never held the permit for its development. At all times Nova Stone was the permit holder for the 3.9 ha quarry, right up to the point at which the permit was invalidated.

(a) DFO Involvement in Nova Stone's 3.9 ha Quarry Proposal was Lawful and Appropriate

25. As I stated above, any experienced practitioner would have expected DFO to play some role in the review of Nova Stone's application to operate the 3.9 ha quarry. That it is common for DFO to get involved in such proposals becomes obvious upon a simple review of the Nova Scotia's *Guide to Preparing an EA Registration Document for Pit and Quarry*

¹⁵ Rankin Report, paras. 94-97.

¹⁶ Estrin Reply, paras. 1 and 2.

¹⁷ Letter from Paul Buxton to Jean Crépault dated August 17, 2004, **Exhibit R-94**; Lease Agreement between Bilcon of Nova Scotia and the Linebergers and Johnsons, **Exhibit R-95**; Affidavit of Bob Petrie sworn December 1, 2011 ("First Petrie Affidavit"), paras. 15-17.

¹⁸ Mr. Estrin repeatedly asserts it was "Bilcon" that was "thwarted"; that it was "Bilcon's blasting plan" that was not approved; and that it was "Bilcon" that was unable to proceed. Estrin Reply, paras. 4, 5 and 6.

¹⁹ Estrin Reply, para. 1.

Developments in Nova Scotia ("Pit and Quarry Guidelines") which reference DFO directly.²⁰

26. At a minimum, once it was notified of the proposed activity, I would have expected that DFO would be interested in acquiring sufficient information to determine the nature and extent of its regulatory role, if any, and then to determine what was required to responsibly discharge that role. Sometimes that initial inquiry might disclose no regulatory role, but such an outcome would not invalidate DFO's initial interest.

27. Against this backdrop, Mr. Estrin's specific criticisms include that DFO "inserted itself" in a provincial process, "imposed blasting conditions in Bilcon's provincial quarry permit," kept "expanding its concerns," and ultimately "refused to authorize Bilcon's blasting plan."²¹ In my opinion these criticisms appear strained, and lack factual support.

28. First, DFO did not "insert" itself into a provincial process.²² It is dangerous for a practitioner to simply assume an industrial development would only engage a "provincial process", especially a development that proposes blasting just 35 metres from the Bay of Fundy. Depending on the project, both federal and provincial jurisdiction often are engaged; a fact underscored by the reference to DFO in Nova Scotia's *Pit and Quarry Guidelines* themselves. In this case, Nova Scotia was of the view that DFO's jurisdiction could be engaged by the proposed blasting activities, and it reached out to DFO to obtain its input on the project. DFO responded to Nova Scotia's request and it did so consistent with its statutory mandate, as I explained in my First Report.²³ Moreover, the facts simply do not support Mr. Estrin's assertion that DFO "imposed blasting conditions in Bilcon's provincial

²⁰ Under heading 6.1.6 of the *Pit and Quarry Guidelines*, **Exhibit R-81**, p. 12, it states:

"Fisheries and Oceans Canada (DFO) will be reviewing the registration document to determine if the pit or quarry development will likely result in the harmful alteration, disruption, or destruction of fish habitat. A qualified professional should be hired by the proponent to determine whether any fish or fish habitat exists in any indented watercourse within the pit and quarry site or any other receiving watercourse that may be impacted by the development. The appropriate survey(s) should be conducted in a manner that is acceptable to DFO (Appendix A and B)." [emphasis supplied].

²¹ Estrin Reply, paras. 1-9.

²² Estrin Reply, para. 9.

²³ Smith First Report, para. 148; DFO, *Policy for the Management of Fish Habitat*, 1986-2001, p. 13, **Exhibit R-405**; *Fisheries Act*, R.S.C., 1985, c. F-14, ss. 37(1), **Exhibit R-82**. See also, Smith First Report, paras. 138-150; First Petrie Affidavit, paras. 10-12 and related exhibits – Engineering Report on the Nova Stone Exporters, Inc. Quarry, by Robert Balcom, March 21, 2002 (**Exhibit R-79**), Letter from Paul Buxton to Robert Petrie, November 20, 2002 (**Exhibit R-80**) and *Pit and Quarry Guidelines*, (**Exhibit R-81**).

quarry permit"; Nova Scotia did that, after consulting with DFO, and it did so on its own and for good and valid reasons.²⁴

29. Nor did DFO keep "expanding the scope of its concerns"²⁵ in taking steps to review the blasting plan that Nova Stone was to prepare for DFO review in accordance with the blasting conditions. Rather, Nova Stone failed to provide sufficient information for officials to satisfy their regulatory responsibilities. After having to request further information from Nova Stone on several occasions, DFO ultimately concluded that the proposed blasting activity required a section 32 *Fisheries Act* ("FA") authorization, given the potential effects the blasting could have on an endangered species – the inner Bay of Fundy Atlantic salmon.²⁶ The evidence also shows DFO still had concerns over impacts of the blasting on whales.²⁷ That decision was the product of internal consultation amongst DFO scientists. In my view, there does not appear to be anything objectionable about the process that unfolded here.

30. Moreover, DFO did not "refuse" to authorize Bilcon's blasting plan as Mr. Estrin alleges.²⁸ Contrary to Mr. Estrin's suggestion that DFO was "making life difficult for the proponent",²⁹ DFO made it clear that it was receptive to Nova Stone redesigning its blasting plan so as to mitigate risk to endangered species and not to engage section 32 of the FA.³⁰ DFO's behaviour hardly appears hostile, obstructionist or "beyond what a proponent would reasonably have expected."³¹

31. I must also note that Mr. Estrin appears to characterize Nova Stone's 3.9 ha quarry as a "test quarry" that was needed to provide evidence (in the EA process) on the use of explosives.³² On the basis of my review of the record, what is clear is that approval was being sought for the 3.9 ha quarry so that quarrying operations and site preparations for the

²⁴ First Petrie Affidavit, para. 11.

²⁵ Estrin Reply, para. 5.

²⁶ Affidavit of Mark McLean signed December 1, 2011 ("First McLean Affidavit"), paras. 39-42; Letter from Phil Zamora to Paul Buxton dated May 29, 2003, **Exhibit R-55**.

²⁷ Letter from Phil Zamora to Paul Buxton dated May 29, 2003, **Exhibit R-55**.

²⁸ Estrin Reply, para. 1.

²⁹ Estrin Reply, para. 1.

³⁰ Letter from Phil Zamora to Paul Buxton dated May 29, 2003, **Exhibit R-55**.

³¹ Estrin Reply, para. 2; *See also*, Affidavit of Stephen Chapman sworn March 19, 2013 ("Second Chapman Affidavit"), para. 4; and Affidavit of Mark McLean sworn March 13, 2013 ("Second McLean Affidavit"), para. 8.

³² Estrin Reply, para. 6.

Whites Point Project could commence immediately. In this regard, I note that Mr. Buxton, who at the time was representing both Nova Stone and Global Quarry Products (the then proponent of the Whites Point Project), advised officials that the "intentions for the 3.9 Ha quarry are to open it in accordance with the Approval and crush rock". As I mentioned above, he also noted that the rock would be used for "environmental controls ... and to construct a new access road to the 3.9 Ha quarry."³³ Given that the activities described by Mr. Buxton were about to be assessed by the review panel that was in the process of being convened, I am not surprised that both DFO and the Agency took the cautious approach that they did in deciding not to discuss potential mitigation measures that could allow for blasting to be conducted on the 3.9 ha quarry. I am surprised, however, at the suggestion that a small-scale quarrying operation should have been permitted on the 3.9 ha quarry when these very same activities were to be reviewed in the pending EA process. An experienced practitioner would have been sensitive to the obvious problems presented by section 5(1)(d) of *CEAA*.³⁴

(b) Other Projects Cited by Mr. Estrin Are Not Appropriate Comparators

32. Mr. Estrin attempts to bolster the arguments he advances in connection with Nova Stone's 3.9 ha quarry proposal by suggesting that there are no other examples of blasting conditions such as those included in Nova Stone's permit. He also argues that no such conditions were included in the Tiverton quarry permit and that mitigation measures taken at the Tiverton Harbour project, where blasting was conducted in the water, were not as stringent as those required for Nova Stone's 3.9 ha quarry.³⁵

33. I have not conducted an exhaustive search of other NSDEL approvals of projects involving blasting to determine whether conditions similar to those appearing in Nova Stone's permit have been included. However, in my view it is not unusual for there to be differences amongst various industrial approvals, depending on the circumstances in which they are issued. The conditions that get prescribed will depend on a multitude of factors,

³³ Letter from Paul Buxton to Derek McDonald dated April 20, 2003, **Exhibit R-151**.

³⁴ Section 5(1)(d) of the *CEAA* prohibited any RA from granting approvals, permits or licences to enable the project to be carried out in whole or in part without the EA of the project first being completed.

³⁵ Estrin Reply, paras. 7, 9 and 23-27.

including the approach of the individual regulators on the file, the issues involved, the expertise required, the extent of public concern and the specific impacts of the project on the surrounding environment.

34. Moreover, in my opinion, the imposition of blasting conditions similar to those being complained of here represents a means by which provincial and federal officials working together would attempt to resolve each other's concerns so as to permit the project to proceed. I view that as a constructive arrangement. It always remains Nova Scotia's choice whether to permit a quarry. However, both Nova Scotia and DFO would recognize that any activity which might contravene a federal law would mean the quarrying activity should not be permitted to proceed. It is reasonable, therefore, for Nova Scotia to consider imposing conditions that would prevent that from occurring. That Nova Scotia might consult or coordinate with DFO respecting the substance of those conditions also is logical and reasonable – again, it is the antithesis of obstructionism.

35. In fact, the *Pit and Quarry Guidelines* make it obvious that Nova Scotia regularly engages in such coordination with DFO. For example, I note that in the Troy Quarry EA, which is described in the First Affidavit of Mark McLean,³⁶ the proponent was – just like Nova Stone – asked to prepare a detailed blasting plan in accordance with DFO's Blasting Guidelines, given DFO's concerns over whether section 32 or section 35(2) FA authorizations were required. Likewise, in NSDEL's Elmsdale Quarry EA (also cited in the First Affidavit of Mark McLean) I note that DFO requested that the proponent be required to prepare a blasting plan in accordance with its Blasting Guidelines. In Elmsdale, DFO also stated that "[t]he results of this analysis should be reviewed by DFO prior to implementation."³⁷

36. In both Troy and Elmsdale, while it is true that blasting conditions were not written into the EA approvals issued by NSDEL, it is a bit of a distinction without a difference. The point here is that differences in approach to issues arising in the EA process, which are inevitable, can still lead to similar outcomes. For example, if, after reviewing the blasting

³⁶ First McLean Affidavit, para. 18; Letter from Guy Robichaud to Cheryl Benjamin, undated, **Exhibit R-114**.

³⁷ First McLean Affidavit, para. 18; Letter from Joe Crocker to Vanessa Margueratt, April 22, 2007, p. 3, **Exhibit R-110**.

plan prepared by either one of the Troy or Elmsdale proponents, DFO determined that FA authorizations were needed, or that the blasting plan was simply deficient, it would be reasonable to expect that Nova Scotia regulators might not allow the project to proceed under its legislation until the fisheries concerns were adequately addressed.

37. It is also not surprising to me that the conditions in the approval issued for Nova Stone's 3.9 ha quarry and for the blasting conducted at the Tiverton Quarry were not identical.³⁸ As I explained in my first report, the Tiverton Quarry involved short term blasting over an area less than half the size (1.8 ha) of the initial Nova Stone 3.9 ha quarry. The duration of that blasting activity would be simply that which was necessary to complete repair work on the Tiverton Wharf and Tiverton Harbour. In fact, I understand the permit issued for the blasting at Tiverton Quarry was in force for just two years.³⁹ By contrast, when Nova Stone's application was reviewed, officials were well aware that it was the first step in a large scale quarrying and marine terminal operation that would consume far more than 3.9 ha and that was projected to involve weekly blasting for fifty years. Nova Stone's project was also considerably closer to the Bay of Fundy and was generating considerable public concern at the time it was under review.⁴⁰ While Mr. Estrin is of the view that Nova Stone's 3.9 ha quarry "was of a similar scale to ... the Tiverton Quarry",⁴¹ I do not think the facts bear that out. Apart from anything else, continuous almost weekly blasting over 50 years at Whites Point bears little resemblance to the limited blasting at Tiverton which was to be used for a wharf and harbour repair projects.

38. Mr. Rankin, on the other hand, incorrectly equates the Tiverton and Whites Point Project as follows:

[t]hese two quarry and marine terminals were considered at approximately the same time.⁴² [emphasis supplied]

39. Obviously, Tiverton had no "marine terminal" whereas Whites Point did. Its marine terminal jutted out 170 metres into the Bay of Fundy and the associated weekly marine

³⁸ Estrin Reply, paras. 15-21.

³⁹ First Petrie Affidavit, para. 24; Letter from Bob Petrie to Michael Lowe, March 24, 2003, **Exhibit R-105**.

⁴⁰ First Petrie Affidavit, paras. 19-21.

⁴¹ Estrin Reply, para. 12.

⁴² Rankin Report, para. 85.

loading activity over a fifty year period into post-Panamax ships is another feature which illustrates the major difference between the Whites Point and Tiverton projects.

40. With respect to the Tiverton Harbour project, Mr. Estrin complains that mitigation measures employed at the Tiverton Harbour were not used or suggested for Nova Stone's 3.9 ha quarry.⁴³ However, it is the proponent's responsibility to suggest potential mitigation measures and the record does not demonstrate Nova Stone suggested the type of measures suggested by Mr. Estrin in his Report. More importantly, Mr. Estrin ignores that the mitigation measures implemented at Tiverton were actually the product of the EA that was carried out on the Harbour project. A similar EA process might have been conducted for Nova Stone's project, and may well have led to the implementation of similar mitigation measures, had the project not been contained in the larger Whites Point Project. However, once a joint federal-provincial review panel was to be convened to consider the Whites Point Project, it appears that government officials made the prudent decision that any such mitigation measures would have to be assessed by the Panel. I see nothing untoward about that decision. It is a simple fact of life in project development that I would expect any experienced practitioner would appreciate.

2. The Whites Point Scope of Project Decision was Lawful and Reasonable

41. Mr. Estrin spends twenty-four pages ostensibly rebutting my conclusion that the decision to scope in the quarry was lawful and reasonable. In that regard, he focuses on the following four points:

- (a) DFO knew there was no valid trigger for the quarry component;⁴⁴
- (b) DFO's decision to scope in the quarry was unusual;⁴⁵
- (c) DFO's decision to include the quarry was not "academic";⁴⁶
- (d) the decision to scope in the quarry was based on irrelevant considerations.⁴⁷

⁴³ Estrin Reply, paras. 23-27.

⁴⁴ Estrin Reply, p. 13.

⁴⁵ Estrin Reply, p. 20.

⁴⁶ Estrin Reply, p. 33.

⁴⁷ Estrin Reply, p. 36.

42. As I explained at the outset, Mr. Estrin's analysis continues to suffer from one fundamental flaw – his criticisms focus solely upon what might or might not have been done under a federal-only review. In other words, he fails entirely to deal with the fact that Nova Scotia's jurisdiction over the quarry meant that the joint EA process here had to fulfil the regulatory requirements of two jurisdictions. He also continues to ignore the fact that, as I explained in my First Report, the referral of this Project to a Joint Review Panel meant that DFO's initial determination as to scope was irrelevant since it was the federal Minister of the Environment and the Nova Scotia Minister of Environment and Labour who determined the scope of the Project.⁴⁸ An extended discussion of what DFO might have done under the very different circumstances of a federal-only review does not alter the basic fact that this was a multi-jurisdictional federal-provincial joint review panel.

43. Accordingly, Mr. Estrin's comments are largely irrelevant since Nova Scotia, as well as Canada, had the legal right to include the quarry within the project scope of a combined environmental review.

44. Below, I explain the federal-provincial nature of the project scoping determination in the Whites Point EA. I then explain how, regardless of whether a federal-provincial review was conducted, DFO could still include the quarry and marine terminal in the scope of the project. After that, I put to rest Mr. Estrin's continued confusion about whether or not DFO had a "trigger" for the quarry which required an EA. Finally, Mr. Estrin has commented on decisions made in the screenings DFO conducted on the Tiverton Harbour and Tiverton Wharf projects, in order to call into question DFO's scope of project decision in the Whites Point EA. While these two screenings are not, in my view, appropriate comparators to the Whites Point EA, DFO appeared to apply the same methodology to scoping for these projects that it did with respect to the Whites Point Project. The fact that DFO came to different conclusions because of the different facts involved is unsurprising and unremarkable. In my opinion, a review of the approach to the scoping decisions in the Tiverton projects simply confirms that there was nothing untoward about DFO's approach to scoping in the case of Whites Point.

⁴⁸ Smith First Report, paras. 126-133.

(a) The Federal and Provincial Governments Established the Scope of the Project to be Reviewed by the JRP

45. Essentially Mr. Estrin⁴⁹ and Mr. Rankin⁵⁰ have lost the forest for the trees. Both overlook the fact that in the JRP review, the scope of the project was determined by the federal Minister of the Environment and the Nova Scotia Minister of Environment and Labour, and had to be broad enough to satisfy Nova Scotia's legislative and regulatory mandate. Any experienced practitioner would have expected the project as scoped by Nova Scotia and Canada to include all components of the Project of concern to both jurisdictions.

46. In this respect, it is critical to recognize the utter irrelevance of DFO's scoping decision with respect to whether the entire Project, or only some components of it, should have been subject to its own regulatory review. Nova Scotia decided a Panel review was the appropriate type of assessment for the quarry. Accordingly, it needed the Panel to review the quarry, regardless of what DFO might have considered to be within its purview. This is the essence of an EA conducted by a JRP. While at the end of the day each of the participating authorities only issue the approvals or permits within their own specific area of jurisdiction, the "joint" panel review is comprehensive and the project scope inclusive of all components of the project, whether or not any one authority has jurisdiction over only a single or several of those components. In a JRP, it would be nonsensical to attempt to segment and exclude a particular component, or all components, within one jurisdiction. This would defeat the very purpose of a "joint" review.

47. For example, the Sable Offshore Energy/Maritimes and Northeast Pipeline Joint Panel Review, on which I acted as the proponent's lead counsel, included the following project components all in one single project scope: (i) the offshore drilling and field development; (ii) gathering lines; (iii) offshore processing facilities; (iv) a subsea raw phase transmission pipeline; (v) the onshore gas processing plant; (vi) an onshore gas liquids pipeline extending from the Goldboro gas plant to a fractionator located on Cape Breton Island; (vii) the fractionation; and (viii) an onshore gas transmission pipeline extending from Goldboro, Nova Scotia to the international border at St. Stephen, New Brunswick. This

⁴⁹ Estrin Reply, paras. 105-106.

⁵⁰ Rankin Report, paras. 44-56.

broad scope of project was established despite the fact that none of the participating jurisdictions⁵¹ had jurisdictional authority over every component of the "project" under review.

48. The approach taken in the Sable Gas EA, and the Whites Point EA for that matter, is standard in multi-jurisdictional joint panel reviews. A panel review solely dealing with federal jurisdiction, however, is different since federal jurisdiction would first have to be established in respect of the project.

49. This distinction appears to explain Mr. Estrin's and Mr. Rankin's confusion and demonstrates why their concerns and objections are misplaced. For example, they both cite the *Red Hill Creek*⁵² case (or "*Hamilton-Wentworth*" as the court case is formally known) in support of their argument that there was something improper about the scope of project determination in the Whites Point EA. However, they neglect to acknowledge that this case dealt with only a federal review panel; not a multi-jurisdictional joint panel review like the one that considered the Whites Point Project.⁵³ In the end, their arguments on DFO's scope of project determinations are misleading and ultimately irrelevant.

50. I also conclude that their arguments are simply wrong, a point I discuss in the sections which follow.

51. Before doing so I wish to address one further point being made regarding DFO's scope of project determination. Mr. Estrin asserts that "DFO's internal decision to scope in the quarry ... was essential to DFO and Nova Scotia being able to achieve a joint review panel".⁵⁴ He premises that assertion on the assumption that neither significant adverse environmental effects nor public concerns existed *vis-à-vis* the marine terminal.⁵⁵ Mr. Rankin appears to hold a similar view.⁵⁶ However, the evidence demonstrates that the marine terminal itself was identified as a source of both public concern and of potential

⁵¹ The constituting jurisdictions in that case were the National Energy Board, Nova Scotia and the Canada-Nova Scotia Offshore Petroleum Board.

⁵² *Hamilton-Wentworth (Regional Municipality) v. Canada (Minister of the Environment)* 2001 FTC 281, Investors' Schedule of Documents at Tab **C-764**.

⁵³ Estrin Reply, paras. 115-128; Rankin Report, paras. 54-56.

⁵⁴ Estrin Reply, para. 107.

⁵⁵ Estrin Reply, paras. 105 and 106.

⁵⁶ Rankin Report, paras. 44-56.

significant adverse environmental effects.⁵⁷ Thus, even if DFO did not include the quarry in the scope of the project, there was no legal barrier preventing the EA of the marine terminal from being referred to a JRP. With respect, Messrs. Estrin's and Rankin's arguments as to how the Minister of DFO *might* have exercised his statutory discretion if things had been the other way is pure speculation that ignores the relevant facts.

(b) Regardless of Whether a Federal-Provincial Review Panel was Established, DFO Could Have Included the Quarry and Marine Terminal in the Project Scope

52. Mr. Estrin also contends that it was contrary to DFO practice and was therefore "unusual" to include both the quarry and marine terminal components of the Whites Point Project in the EA.⁵⁸ He specifically asserts that DFO's scoping practice at the time of the Whites Point EA was always to "scope to the trigger". Interestingly, Mr. Estrin does not appear to argue that DFO's determination that it could include the quarry in the scope of the project was unlawful, implicitly agreeing with at least that part of my First Report.⁵⁹

53. As noted above, the issue of whether or not, as a matter of practice, DFO scoped to its trigger at the time of the Whites Point EA is ultimately irrelevant given that the project was assessed by a JRP. But even if this was a federal-only review, as I explained in my first Report, section 15 of the *CEAA* provided DFO with clear jurisdiction to scope in the quarry, regardless of whether or not triggers existed, because of the interdependence of the quarry and the marine terminal as integral aspects of the same project.⁶⁰ In my opinion there is nothing "unusual" at all about a regulator acting within the scope of its jurisdiction and it appears from the record that there were regulators in this case that were of the view DFO could make the scope of project determination that it did.⁶¹

54. Mr. Estrin appears to take issue with my application of the "principal project/ accessory test" under which the scope of a project is to include other physical works or

⁵⁷ Affidavit of Neil Bellefontaine sworn November 22, 2011 ("Bellefontaine Affidavit"), paras. 23-28 and 36-37. *See also* Expressions of Public Concern at the WP JRP Hearing Over the Proposed Whites Point Marine Terminal, **Exhibit R-535**.

⁵⁸ Estrin Reply, para. 53.

⁵⁹ Smith First Report, paras. 96-99 and 111-125.

⁶⁰ Smith First Report, paras. 110-111.

⁶¹ Bellefontaine Affidavit, paras. 29-31, and the Exhibits cited therein. *See also* Affidavit of Stephen Chapman sworn December 2, 2011 ("First Chapman Affidavit"), paras. 15-18 and the Exhibits cited therein.

physical activities that are "accessory" to the principal project.⁶² In his view this test does not demonstrate DFO's determination was correct because "the dock was accessory to the quarry, not the other way around." He further asserts that "Bilcon came to Nova Scotia to extract rock, not to build a dock."⁶³

55. This argument is as remarkable as it is wrong. The interdependence of the quarry and the marine terminal was reflected in the various iterations of the Bilcon's Project Description. As noted earlier, the proponent had made it clear that all crushed rock from the entire quarry would only be exported by means of the marine terminal – not a road. In fact, the proponent expressed to regulators at the outset that "if they cannot put in a wharf structure they are not interested in the quarry."⁶⁴ The Proponent obviously considered both elements of the project to be of equal importance – neither could be viewed, as Mr. Estrin now suggests, as primary and secondary.⁶⁵ In this respect, DFO can hardly be blamed for taking the Proponent at its word or for making the scope of project determination that it did.

56. I would add that as a practitioner, my concern with Mr. Estrin's attempts to segment the project as he proposes would have been an increased risk of legal challenge by opponents of the Whites Point Project and a resultant delay in the process. In this regard, it is important to note that there was continued controversy and risk associated with project scoping practices over the entire period in which the EA of the Whites Point Project was being conducted. The fluid nature of the scope of project issue is made clear in this case by the debate taking place amongst government officials within DFO and the Agency regarding how the Whites Point Project should be scoped.⁶⁶ I would also note that the Supreme Court of Canada's *Miningwatch* decision, which I described in my First Report⁶⁷ and which concluded in 2010 that the approach ultimately taken to determining the scope of project by

⁶² Smith First Report, paras. 114-115.

⁶³ Estrin Reply, para. 56.

⁶⁴ Counter Memorial, paras. 92 and 93; Thomas Wheaton's notes of meeting between DFO and GQP, July 25, 2002, p. 2, **Exhibit R-127**; See also First McLean Affidavit, para. 25.

⁶⁵ First McLean Affidavit, para. 25; Wheaton's notes of meeting between DFO and GQP, July 25, 2002, p. 2, **Exhibit R-127**.

⁶⁶ Bellefontaine Affidavit, paras. 29-34.

⁶⁷ Smith First Report, paras. 124-125.

DFO in the Whites Point EA was the correct one,⁶⁸ actually arose from the Red Chris mine proposal which commenced in October 2003.⁶⁹

57. Mr. Estrin's reference to the 1999 *Tolko*, the 1998 *Sunpine* and the 2004 *Prairie Acid Rain* (or "True North") decisions further illustrate the existence of that controversy and related appeal risk.⁷⁰ Clearly from 1998 through to 2010, there was active litigation respecting project scope, which is why DFO officials mentioned that potential appeal risk in their June 25, 2003 Briefing Note to their Minister.⁷¹ While I agree that these three cases did confirm that regulators had the discretion to determine the scope of project narrowly – i.e., they could scope to their trigger – it cannot be said that the issue was thereby settled – much to the consternation of most practitioners. In fact, despite the *Tolko*, *Sunpine* and *Prairie Acid Rain* decisions, challenges, reviews and appeals continued to rage throughout the period of the Whites Point EA. I would also note that, interestingly, the scope of project controversy in the cases cited by Mr. Estrin related to federal-only panel reviews.⁷² As I have explained above, the controversy did not arise for joint federal-provincial reviews which is another benefit of that type of assessment.

(c) DFO did Determine that it had Regulatory Triggers for the Whites Point Quarry

58. Mr. Estrin asserts that "... it appears from the record that DFO never conclusively determined that it had a regulatory trigger for applying *CEAA* to the quarry component of the WPQ proposal".⁷³ He also advances a conspiracy theory that the entire decision was based on political considerations and "irrelevant considerations".⁷⁴ Messrs. Estrin's and Rankin's contentions regarding DFO's scope of project determination are also both irrelevant and wrong because DFO did determine that it had a regulatory trigger on the Whites Point quarry.

⁶⁸ In *MiningWatch* the Supreme Court of Canada held the minimum scope for the purposes of an EA under the *CEAA* is the project as proposed by the proponent. Bilcon consistently described its project as the "Whites Point Quarry and Marine Terminal". See *MiningWatch*, para. 34, **Exhibit R-15**.

⁶⁹ *MiningWatch*, para. 4, **Exhibit R-15**.

⁷⁰ Estrin Reply, paras. 60-64.

⁷¹ Memorandum for the Minister, Referral of Proposed Whites Point Quarry and Shipping Terminal to the Minister of the Environment for a Panel Review, p. 3, **Exhibit R-72**.

⁷² Estrin Reply, para. 61.

⁷³ Estrin Reply, para. 41.

⁷⁴ Estrin Reply, s. 1.4(e) "The decision to scope in the quarry was based on irrelevant considerations", paras. 108-128.

59. The record makes it clear that DFO believed it had relevant regulatory triggers on the quarry.⁷⁵ All of the evidence of which I am aware suggests that DFO made this determination based on objective, scientific investigation which, in my opinion, is the antithesis of political considerations or other "irrelevant considerations." The fact that this determination was made with respect to Nova Stone's proposed 3.9 ha quarry rather than the larger Whites Point quarry is irrelevant – the small quarry was entirely situated within the bigger quarry, so conclusions on the former applied equally to the latter. As DFO's Phil Zamora explained in a letter to the Agency's Stephen Chapman "DFO has determined that the blasting plan for the 3.9 hectare test quarry, which was submitted to DFO for review, is likely to have a *Fisheries Act* Section 32 trigger" and "The environmental effects of the operation of the 3.9 hectare test quarry are expected to be the same as the environmental effects of the proposed 120 hectare quarry."⁷⁶

60. It also appears that even the proponent was under the impression that the proposed quarrying operation would engage federal fisheries concerns. In particular, I note that Mr. Buxton applied on May 14, 2003 for a section 35(2) Harmful Alteration, Disruption or Destruction ("HADD") authorization regarding the potential damage or destruction of fish and fish habitat due to the use of explosives for blasting "... on the quarry component of the project".⁷⁷ Clearly, at the time the proponent believed DFO had a trigger.

61. I note that Mr. Estrin also quotes various exchanges amongst officials early in the process which reflected the internal debate over what regulatory role DFO had with respect to the Project.⁷⁸ It is important to bear in mind, however, the fact that these discussions reflected *preliminary* commentary which, as Mr. Bellefontaine explained in his Affidavit,⁷⁹ required further verification. It is such further verification, and ultimately the EA process

⁷⁵ Letter from Thomas Wheaton to Phil Zamora, April 7, 2003, **Exhibit R-147**; Email from Peter Amiro to Phil Zamora, May 27, 2003, **Exhibit R-150**; Letter from Phil Zamora to Paul Buxton, April 14, 2003, **Exhibit R-54**; Letter from Phil Zamora to Paul Buxton, May 29, 2003, **Exhibit R-55**; Smith First Report, para. 107.

⁷⁶ Letter from Phil Zamora to Steve Chapman dated September 17, 2003, Investors' Schedule of Documents at **Tab C-490**. Mr. Estrin cites an internal August 13, 2003 email of Derek McDonald, stating that DFO determined "that it does not have a s. 32 trigger", in support of his contention that DFO had "determined that there was, after all, no *Fisheries Act* trigger for the quarry" (Estrin Reply, para. 47). I note however that Mr. McDonald was an employee of the Agency, not DFO. His assertion seems to also be incorrect, given Mr. Zamora's letter to Stephen Chapman over a month later, which stated that it "is likely to have a *Fisheries Act* Section 32 trigger" on the 3.9 ha quarry.

⁷⁷ Estrin Reply, para. 40.

⁷⁸ Estrin Reply, paras. 30-52 and 108-128.

⁷⁹ Bellefontaine Affidavit, para. 34.

itself, which generate the type of information that can be used to make determinations on whether regulatory authority has been engaged, or whether an effect is likely to be significant or adverse. As such, it is not wrong for an official to arrive at a tentative conclusion as to regulatory involvement based upon preliminary information.

62. It is also unreasonable to impugn the validity of the initial decision because it was later discovered to be based on an assumption that proved incorrect. In this respect, methodologically, Mr. Estrin insists that the cart should be placed before the horse. It appears somewhat absurd to expect, as Mr. Estrin does, that any official could have been able to state categorically that "fish would be destroyed by the quarrying operations at the WPQ"⁸⁰ before the EA was conducted. Mr. Estrin also criticizes DFO's determination that a section 32 authorization would be required in light of the fact that Paul Brodie, a consultant retained by Nova Stone, never actually "concluded" there would be any destruction of whales or marine life.⁸¹ This argument is also flawed. Mr. Brodie's advice to Nova Stone appears to have been provided after one field visit and without knowledge of the specifics of Nova Stone's proposed blasting activity. Moreover, no respectable expert would have provided a conclusion about the destruction of whales or marine life prior to being provided with the type of information that an EA might generate.

63. Over and above the factual refutation of Mr. Estrin's "irrelevant considerations" theory which I have provided above, the record in this case also provides specific denials of his political conspiracy theory. There is no evidence that DFO made its decision to include the quarry in the scope of the project on grounds of Ministerial involvement or input. The Minister himself and the senior DFO official in the Maritimes Regional Office have both sworn affidavits which contradict Mr. Estrin's thesis.⁸² On the basis of the record, therefore, I cannot agree with Mr. Estrin's assertion that "[t]he decision to scope in the quarry was based on irrelevant considerations."⁸³

⁸⁰ Estrin Reply, para. 38.

⁸¹ Estrin Reply, para. 46.

⁸² Affidavit of Robert Thibault sworn November 26, 2011 ("Thibault Affidavit"), paras. 14-16; Bellefontaine Affidavit, paras. 42-43.

⁸³ Estrin Reply, p. 36.

(d) DFO's Approach to Scope of Project in the Tiverton Harbour and Tiverton Wharf Projects was Consistent with its Approach in the EA of the Whites Point Quarry and Marine Terminal

64. I wish to respond briefly to comments Mr. Estrin has made with respect to decisions made in the *CEAA* screenings that DFO conducted on the Tiverton Harbour and Tiverton Wharf projects.

65. As I explained above, Mr. Estrin provides these comments as part of his critique of DFO's decision regarding the scope of project in the Whites Point EA. The debate in which Mr. Estrin engages here is again, in my view, purely theoretical since the Whites Point Project engaged both federal and provincial jurisdiction, required an EA process that had to satisfy federal and provincial law, and ultimately necessitated a scope of project reflective of both jurisdictions. The same cannot be said of either the Tiverton Harbour or Wharf screenings. That fact alone should end the debate.

66. Nevertheless, for the sake of completeness, I provide the following brief response to Mr. Estrin's comments. It is my opinion that the facts show that DFO's approach to screening with respect to the Tiverton Harbour and the Tiverton Wharf projects was consistent with its approach to scoping in the case of the Whites Point Project.

i) The Tiverton Harbour Screening

67. Mr. Estrin takes issue with the fact that DFO's screening of the Tiverton Harbour, which I addressed in Appendix 4 of my First Report, did not "scope in" the Tiverton Quarry.⁸⁴ He also challenges my statement that as the rock for the Harbour "could have been obtained from any number of sources, it is reasonable that the Tiverton Quarry was not included in the Tiverton Harbour project scope."⁸⁵ As I understand Mr. Estrin, his point is that if DFO had followed the same approach to scoping at Tiverton that it followed at Whites Point, it would have scoped the Tiverton Quarry into the screening report for the Tiverton Harbour. The fact that it did not do so, he seems to allege, is evidence of the inappropriateness of its scope of project decision with respect to the Whites Point Project. I

⁸⁴ Estrin Reply, paras. 71-80.

⁸⁵ Smith First Report, Appendix 4, para. 4.

disagree, and, in fact, arrive at a contrary conclusion. It appears to me that DFO's approach to scoping was the same in both cases. In particular, in both cases DFO considered whether or not the two projects were interdependent. In answering the question, however, the conclusions were different.

68. Mr. Estrin claims that NSDEL had approved the Tiverton Quarry on the basis that it would provide rock to construct the breakwater for the Tiverton Harbour.⁸⁶ He uses this fact to claim that "Tiverton Harbour could not proceed without the Tiverton Quarry"⁸⁷ and suggests that the reference to an "approved quarry" in the Tiverton Harbour Screening Report⁸⁸ was a *de facto* reference to the Tiverton Quarry, which, he says, "had been specifically approved [by NSDEL] as the exclusive source of rock for the Harbour project ... about one year earlier."⁸⁹

69. With respect, this is a clear misrepresentation of the meaning of the NSDEL approval and the facts of this case. From my perspective, NSDEL had nothing to say about where the rock for the Tiverton Harbour Project would come from since it did not control that project. The NSDEL industrial approval sets conditions on the operation and uses of the Tiverton Quarry – not conditions on the construction of the Harbour. The latter conditions were determined during the federal EA of the Tiverton Harbour project. There is nothing in that screening report that required the use of rock from the Tiverton Quarry in the construction of the Harbour; and there is certainly nothing in that screening report that establishes the Tiverton Quarry as the "exclusive source" for the needed rock. In fact, according to the Screening report, the contractor for the Tiverton Harbour, who had not been determined when DFO was carrying out the screening of the project, could have sourced the rock required for the project from any "approved quarry".⁹⁰

70. In the end, the Tiverton Quarry ended up as the source of rock for the Tiverton Harbour project. However, contrary to what Mr. Estrin seems to claim, this outcome was not inevitable. The industrial approval for the Tiverton Quarry may have made that project

⁸⁶ Estrin Reply, para. 74.

⁸⁷ Estrin Reply, para. 80.

⁸⁸ Tiverton Harbour Screening Report, p. 5, **Exhibit R-342**.

⁸⁹ Estrin Reply, para. 75.

⁹⁰ Tiverton Harbour Screening, p. 5, **Exhibit R-342**.

dependant on the construction of the Tiverton Harbour but the inverse is not true. The industrial approval of the Quarry did not, and could not, mean that the "Tiverton Harbour could not proceed without the Tiverton Quarry". Unlike the Whites Point Quarry and Marine Terminal, the Tiverton Quarry and Harbour were not interdependent. They were separate projects, with separate proponents, and the Harbour could have proceeded without the Quarry.

ii) The Tiverton Wharf Screening

71. As he does with the Tiverton Harbour, Mr. Estrin asserts that if DFO had applied the same approach to scoping that it did at Whites Point, the Tiverton Quarry would have been included in the scope of project for the purposes of DFO's screening of repairs to the Tiverton Wharf.⁹¹ Again, I disagree and believe that the same approach was, in fact, employed, just with different conclusions being reached. This result is unsurprising because much like the Harbour and the Quarry, the Tiverton Wharf and Quarry were separate projects. The Wharf repairs could have proceeded without the Quarry, and as such, I draw the same conclusion here as I do above – DFO's approach to the scope of project appeared both appropriate and consistent with its approach to scoping the Whites Point Project.

72. In considering Mr. Estrin's contentions, it is important to keep in mind that the Tiverton Quarry had neither been proposed nor approved at the time that DFO conducted the screening of the Tiverton Wharf project. DFO completed the screening on January 27, 2003,⁹² over a month before Parker Mountain Aggregates (the Tiverton Quarry proponent) applied to NSDEL to open the Quarry,⁹³ and almost two months before the Quarry was approved.⁹⁴ Accordingly, there was no mention of the Tiverton Quarry in the Screening Report; it only stated that rock for the project should be "obtained from existing approved

⁹¹ Estrin Reply, paras. 81-96.

⁹² Tiverton Wharf Screening Report, **Exhibit R-561**.

⁹³ Letter from Michael Lowe to Jacqueline Cook, February 27, 2003, attaching application for the Approval of a Rock Quarry at Tiverton, **Exhibit R-96**.

⁹⁴ Letter from Bob Petrie to Michael Lowe, March 24, 2003, attaching Approval to Parker Mountain Aggregates Ltd., March 24, 2003, **Exhibit R-105**.

quarries."⁹⁵ This fact alone demonstrates to me that the Tiverton Wharf Project was separate from and in no way dependent upon the Tiverton Quarry.

73. As it turns out, after the Screening Report was completed, the contractor for the Tiverton Wharf chose to source the rock that it needed for the Wharf repairs from the Tiverton Quarry. As the Screening Report had required the rock to be "obtained from existing approved quarries" (which, at the time, the Tiverton Quarry was not), some DFO officials reasonably questioned whether the Screening should be re-opened and the Tiverton Quarry included in the scope of project.

74. It appears to me from the documents cited by Mr. Estrin, that DFO officials considered both questions and ultimately determined that the answer was "no". They based their answers on their understanding that the Quarry would be supplying aggregate to other projects, and that DFO had reviewed the Quarry proposal and determined there were no concerns regarding fisheries resources. DFO also appears to have concluded that the Tiverton Wharf and Quarry were unlike the components of the Whites Point Project where the "marine terminal and the quarry operation are inextricably linked; the marine terminal is being constructed to transport aggregate materials solely from the White Cove quarry. In other words, the quarry couldn't operate without the marine terminal and vice versa."⁹⁶

75. Mr. Estrin takes issue with this decision because he says that "DFO knew the Tiverton Parker Mountain quarry was supplying rock only to DFO's Tiverton projects."⁹⁷ Certainly the DFO Briefing Note that Mr. Estrin cites does not suggest that this was the case. But even if it was, it does not change my opinion that rock for the Tiverton Wharf project could have been sourced from any existing approved quarry, not just the Tiverton Quarry. As with the Harbour, the Wharf repairs were not dependent on the existence of the Tiverton Quarry, and as such, the two projects cannot be considered interdependent.

76. Mr. Estrin is also critical of the DFO Briefing Note that he cites in his Reply Report because, in his view, it shows DFO "was scoping in the quarry [at Whites Point] because it

⁹⁵ Tiverton Wharf Screening Report, p. 8, **Exhibit R-561**.

⁹⁶ Briefing Note for the Minister, Wharf Repairs at Tiverton, Digby County, Nova Scotia, p. 3, **Exhibit R-548**.

⁹⁷ Estrin Reply, para. 95.

could not determine if the quarry would cause impacts sufficient to trigger the *Fisheries Act*".⁹⁸ I consider this a serious mischaracterization of DFO's statement in the Briefing Note. DFO actually noted the fact that the "effects of the quarry and associated blasting activities on local fisheries resources have not yet been determined [at Whites Point]" not as justification for "scoping in the Whites Point quarry" as Mr. Estrin contends, but rather as one of the reasons why the Whites Point Project was significantly different from the Tiverton Wharf project (where DFO had concluded the blasting activity would not affect fisheries resources).⁹⁹

77. Putting all of Mr. Estrin's contentions aside, I question the utility of re-opening a completed Screening and including this small 1.8 ha quarry in the scope of project, merely because it did not "exist" at the time of the Wharf EA. NSDEL had "approved" the Tiverton Quarry, and as part of the approval process DFO determined there were no concerns with respect to fisheries resources.¹⁰⁰ The same could not be said for the 152 ha Whites Point quarry, which at this point in time was raising significant public concern and a host of questions in the minds of DFO officials as to its potential impacts on fisheries resources.¹⁰¹ In the end, I do not consider Mr. Estrin's comments on either of the Tiverton projects to be either helpful or relevant.

3. The Referral of the Whites Point Project to a Joint Review Panel was Lawful and Reasonable

(a) The Whites Point Project Satisfied Statutory Criteria for Referral to a Joint Review Panel

78. Mr. Estrin maintains his position that "... the decision to refer the WPQ to a panel was unusual".¹⁰² On the other hand, Mr. Rankin asserts that projects have to be "... large and controversial ..." to be referred to a review panel. Indeed, Mr. Rankin stresses the point that

⁹⁸ Estrin Reply, para. 96.

⁹⁹ Briefing Note for the Minister, Wharf Repairs at Tiverton, Digby County, Nova Scotia, p. 3, **Exhibit R-548**.

¹⁰⁰ Briefing Note for the Minister, Wharf Repairs at Tiverton, Digby County, Nova Scotia, p. 2, **Exhibit R-548**.

¹⁰¹ Letter from Thomas Wheaton to Phil Zamora, April 7, 2003, **Exhibit R-147**, wherein Mr. Wheaton notes that blasting on the Whites Point quarry could require a section 32 FA authorization. See email from Phil Zamora to Cheryl Benjamin, April 22, 2003, **Exhibit R-308**, wherein Mr. Zamora notes that a section 32 FA authorization could be required if fish are likely to be killed by blasting but that "We will need more information to determine this."

¹⁰² Estrin Reply, para. 129.

they must be both "large and contentious" though he offers no statutory support for his proposition.¹⁰³

79. While there is no dispute that there are more screenings and comprehensive studies than review panels, in my opinion both Messrs. Estrin and Rankin ignore the fact that the Whites Point Project satisfied the statutory criteria for referral to a review panel – specifically, they ignore that the project engaged the prospect of significant adverse environmental effects and considerable public concern.¹⁰⁴ Messrs. Estrin and Rankin also systematically underestimate the stand-alone significance of "public concerns" in warranting reference to a review panel.¹⁰⁵

80. In this regard, the statutory criteria under *CEAA* provide that the presence of only public concern could be sufficient to warrant reference to a review panel. The legislation does not also require a finding of significant adverse environmental effects.¹⁰⁶ For example, section 25(b), which deals with the referral of a comprehensive study to a review panel, uses disjunctive language and, shows Mr. Rankin's statement to be incorrect – public concerns, on their own, can bump up a comprehensive study to a review panel:

25. Subject to paragraphs 20(1)(b) and (c), where at any time a responsible authority is of the opinion that

- (a) a project, taking into account the implementation of any mitigation measures that the responsible authority considers appropriate, may cause significant adverse environmental effects, or
- (b) public concerns warrant a reference to a mediator or a review panel,

¹⁰³ Rankin Report, para. 78: "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."

¹⁰⁴ I note that in fact the Whites Point Project was referred to a review panel pursuant to s. 21(b) of the *CEAA*, which does not expressly list these two reasons for referral. However, I agree with Robert Connelly that, in practice, a referral under s. 21(b) would be based on these criteria. Expert Report of Robert G. Connelly, signed December 2, 2011 ("Connelly Report"), footnote 54.

¹⁰⁵ Smith First Report, paras. 64-72.

¹⁰⁶ In this regard, I should correct a minor error in my First Report. At the end of the first sentence of paragraph 54, I stated that "the Act allowed the responsible authority to refer the project to a panel review after receiving a screening (*per* ss. 20(1)(c)) or a comprehensive study report (*per* ss. 23(b)) if it is apparent that "public concerns" or the risk of significant adverse environmental effects warranted a public review." While the statement is accurate, I should clarify that it is the Minister of the Environment, not the responsible authority, that exercises the power to elevate – or "bump up" – the comprehensive study to a panel or joint panel review under section 28, however, the Minister can also bump up an assessment at any time.

the responsible authority may request the Minister to refer the project to a mediator or a review panel in accordance with section 29.¹⁰⁷

81. There appears to be no disagreement that the Whites Point Project was very controversial. I describe the substantial evidence of public concern in my First Report.¹⁰⁸ DFO officials made reference to the elevated levels of public concern and media attention in several briefing memos in January, March and June of 2003.¹⁰⁹ Mr. Estrin also provides his clear acknowledgement that "there was significant opposition" to the Whites Point Project and that the "project was very controversial".¹¹⁰

82. But despite these apparently obvious facts Mr. Estrin suggests that public concerns did not exist for the purposes of the referral because the letter from the Minister of DFO to the Minister of the Environment referring the project for a referral to a review panel did not mention public concern.¹¹¹ Mr. Rankin also appears to endorse this line of argument.¹¹² In my opinion, the wording of the referral cannot carry the results pleaded by Messrs. Estrin and Rankin. The DFO Briefing Note to the Minister that actually recommended referral of the project to a review panel addressed the issue of public concern.¹¹³ Indeed, the Briefing Note expressly linked the public concerns to, amongst other things, a number of potential significant adverse environmental effects that were tied to the health of the local economy. It provided:

This proposal has generated extensive public and media attention related to its potential environmental and social impacts. Concerns include impacts on lobster, herring and endangered Bay of Fundy stock of Atlantic salmon, fisheries, marine mammals including the endangered right whale, release of

¹⁰⁷ *CEAA*, s. 25, **Exhibit R-1**.

¹⁰⁸ Smith First Report, paras. 73-75.

¹⁰⁹ Memorandum for the Minister, Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, January 14, 2003, **Exhibit R-65**; Memorandum for the Minister, Proposed Rock Quarry and Shipping Terminal, Whites Cove, Digby County, Nova Scotia, March 13, 2003, **Exhibit R-66**; Memorandum for the Minister, Referral of Proposed Whites Point Quarry and Shipping Terminal to the Minister of the Environment for a Panel Review, June 25, 2003, **Exhibit R-72**.

¹¹⁰ Estrin Reply, para. 194.

¹¹¹ Estrin Reply, paras. 132-136.

¹¹² Rankin Report, paras. 169-170.

¹¹³ Counter Memorial, paras. 143-145; First McLean Affidavit, paras. 46-49; Letters of Concern from April 2002 to August 2003, **Exhibit R-170**.

ballast water and introduction of exotic species, loss of tourism and disruption of the local community.¹¹⁴

83. It is clear, therefore, that the significant public concern surrounding the Whites Point Project was present in the mind of the Minister prior to and at the date of the referral, regardless of the fact that the referral letter did not recite the fact that public concerns were a reason for referral.¹¹⁵ I would also note that the Minister hardly needed to be reminded of the public concerns over the Whites Point Project – by this point in the process he had received hundreds of letters from concerned members of the community requesting, among other things, that the project be subject to a panel review.¹¹⁶

84. In light of the foregoing, it is somewhat surprising that Mr. Estrin takes issue with the fact that the Whites Point Project was referred to a review panel. It is also surprising when one considers what Mr. Estrin himself sees as the purpose of a review panel. As Mr. Estrin notes:

In my view, the main purpose of hearings under CEAA and provincial EA legislation is to ensure that the public's concerns about a proposal can be heard and considered by the proponent and the government decision-makers. A secondary, related purpose is to legitimize government decisions about proposals. Opponents of a project that gets approved – and supporters of a project that gets rejected – are more likely to accept the outcome if they have been given a chance to have their say.¹¹⁷

85. I agree with this description of the purposes underlying a hearing by way of review panel. In light of Mr. Estrin's acceptance of the significant controversy and public concern which existed over the Whites Point Project, I am puzzled as to why he thinks it was inappropriate to allow these purposes to be fulfilled here and instead chooses to imply some form of political conspiracy or other "irrelevant considerations".¹¹⁸

¹¹⁴ Memorandum for the Minister, Referral of Proposed Whites Point Quarry and Shipping Terminal to the Minister of the Environment for a Panel Review, June 25, 2003, p. 2, **Exhibit R-72**.

¹¹⁵ Estrin Reply, paras. 132-136; Rankin Report, paras. 169-170.

¹¹⁶ Letters of Concern from April 2002 to August 2003, **Exhibit R-170**.

¹¹⁷ Estrin Reply, para. 193.

¹¹⁸ Estrin Reply, paras. 108-128.

(b) Comparison with EAs of other Projects

86. Mr. Estrin asserts that "[t]here was nothing about the size and location of the WPQ that warranted a panel review".¹¹⁹ Further, as I have noted, Mr. Rankin emphasizes that panel reviews are intended to be reserved for "large and controversial projects," stressing the "conjunctive" – that is, the fact they had to be both large and controversial.¹²⁰

87. As stated above, the criteria for referral to a panel review does not turn on the size of the Project nor its location *per se*. Rather, the statutory criteria focus upon the potential for significant adverse environmental effects "or" the fact that public concerns warrant referral.¹²¹ This explains the primary basis on which I differentiated the Whites Point Project from the three projects to which Mr. Estrin referred in his First Report – Aguathuna, Belleoram and Tiverton Harbour.¹²² One common characteristic of these proposals was the absence of public concern.¹²³ Mr. Estrin agreed,¹²⁴ but he appears to contend that public concern does not exist unless it is referenced in the formal letter referring a project to a review panel. That is an untenable proposition in light of the well-established facts in this case, and Mr. Estrin's concession that the Whites Point Project was a "very controversial" project.¹²⁵

88. I would add that the "joint" aspect of this review process, as noted above, meant that another jurisdiction – in this case Nova Scotia – had to satisfy its own regulatory requirements. In the context of a controversial project like Whites Point, it is understandable that Nova Scotia would want to afford members of the public an opportunity to meaningfully participate.¹²⁶ That fact alone – regardless of the size or location of the Project – warranted referral to a joint review panel.

¹¹⁹ Estrin Reply, p. 45.

¹²⁰ Rankin Report, para. 78.

¹²¹ This is why, in my paragraph 62 of my First Report, I provided examples of the same kinds of projects (e.g., LNG plants and pipelines) being subject to each potential type of assessment under the *CEAA* (screenings, comprehensive studies and panel reviews). It is common that the same types of project are subjected to different types of review under the *CEAA*.

¹²² Smith First Report, Appendices 2, 3 and 4.

¹²³ Smith First Report, para. 63.

¹²⁴ Estrin Reply, para. 130.

¹²⁵ Estrin Reply, para. 194.

¹²⁶ *CEAA*, s. 40, **Exhibit R-1**; Smith First Report, para. 83; *Environment Act*, 1994-95, c. 1, s. 44, **Exhibit R-5**.

89. In support of his argument that there was nothing about the size and location of the Whites Point Project that warranted a panel review, Mr. Estrin provides a listing of projects with much bigger footprints that did not end up being assessed by a review panel.¹²⁷ But the footprint of a proposed project alone does not tell the complete story. I explain in Appendix 1 of this Rejoinder Report why each of the projects cited by Mr. Estrin did not share the attributes of the Whites Point Project that contributed to its referral to a review panel.

90. Mr. Estrin also cites a number of Nova Scotia pit and quarry projects that were not made to undergo a panel review, implying that there was something untoward about how the EA of the Whites Point Project unfolded. Again, aside from the fact that some of these projects were quarries in Nova Scotia, they were simply not fair comparators to the Whites Point Project. I have summarized the fundamental differences between these projects and the Whites Point Project in Appendix 2 of this Rejoinder Report. Moreover, in my First Report I provided a number of examples to demonstrate that it is common that the same types of projects are subjected to different types of review under *CEAA*. For example, I listed LNG projects and six pipeline projects which respectively underwent all the different types of assessments – screenings, comprehensive studies, as well as panel reviews.¹²⁸ It is simply not reasonable, therefore, to suggest that even if the Whites Point Project was only a quarry (which it was not) it would necessarily have only been the subject of a screening or a comprehensive study.

91. I must also take issue with Mr. Estrin's views on the Kelly's Mountain Quarry and Marine Terminal project, which I understand was described in the Affidavit of Neil Bellefontaine as an illustration of the basic fact that, depending on their location and the public concern they engage, quarrying projects can be subjected to different levels of EA. Mr. Estrin appears to have missed this point, and simply argues that this project is "of little comparative value" because it was governed by an earlier EA regime than the *CEAA*.¹²⁹

92. I disagree. It is true that the Kelly's Mountain project was referred to a joint Nova Scotia-federal review panel under the *Environmental Assessment and Review Process*

¹²⁷ Estrin Reply, paras. 138-139.

¹²⁸ Smith First Report, para. 62.

¹²⁹ Estrin Reply, para. 147.

*Guidelines Order*¹³⁰ ("*EARPGO*") which preceded the *CEAA*. However, like the *CEAA* this order allowed for the referral of a project to a review panel if it presented either the potential for "adverse environmental effects" or "if public concern about the proposal is such that a public review is desirable."¹³¹

93. Given that the *EARPGO* provides for almost the exact same statutory criteria as existed under the *CEAA*, and given that the Kelly's Mountain project was quite similar to the Whites Point Project, and engaged both Nova Scotia and federal jurisdiction, it seems extraordinary for Mr. Estrin to argue that this project is "of little comparative value." It seems to me that a contentious, large scale quarrying and marine terminal operation, engaging almost the same statutory criteria as were applicable to the Whites Point Project, would be a far more appropriate comparator than the wide range of operations identified by Mr. Estrin in his Reply Report and addressed in Appendices 1 and 2 of this Rejoinder Report. In my view, the Kelly's Rock example reinforces that fact that it was entirely reasonable for the Whites Point Project to have been referred to a review panel.

(c) My Response to Mr. Estrin's Comments Regarding the Benefits of a Joint Review Panel

94. Mr. Estrin takes issue with my views¹³² on the procedural benefits offered to a proponent where a JRP is used.¹³³ I stand by my position that, faced with the circumstances that were manifested at Whites Point, an experienced practitioner would seriously consider a joint panel review rather than running the risk of a project segmentation appeal or of the project being bumped up to a panel review from a different type of EA process.¹³⁴

95. The GSX Pipeline Project, which I described in my first Report, stands as a testament to the serious risks which exist where contentious projects can be bumped to a review panel part way through the EA process. As I explained in my first Report, I was also involved in several projects where we concluded a panel review was a better option in terms

¹³⁰ Environmental Assessment and Review Process Guidelines Order, June 22, 1984, **Exhibit R-8**.

¹³¹ Environmental Assessment and Review Process Guidelines Order, ss. 12, 13 and 20, **Exhibit R-8**.

¹³² Smith First Report, paras. 76-95.

¹³³ Estrin Reply, paras. 157-170.

¹³⁴ Smith First Report, paras. 76-95.

of timing and in some instances, appeal risk.¹³⁵ Federal officials were clearly alive to this potential risk for the Whites Point Project and tried to avoid it.¹³⁶

96. As a potential alternative to the JRP that assessed the Whites Point Project, Mr. Estrin refers to the ongoing comprehensive study of the Labrador-Island Transmission Link project as a different harmonization format which could have been employed for the Whites Point Project which would not involve a panel review.¹³⁷ Mr. Estrin is wrong about this Labrador-Island Transmission Link EA representing a potential process substitute for a joint panel review of the Whites Point Project. The *CEAA* has significantly changed since the issuance of the Whites Point JRP's Report. The 2003 *CEAA* amendments provide funding for members of the public to participate in the same meaningful way for projects tracked as comprehensive studies as had previously only been available for panel reviews. As explained by Robert Connelly, the extensive public participation opportunities in the process and, in particular, the Participant Funding Program described in Mr. Estrin's Reply¹³⁸ were only available for panel reviews at the time of the Whites Point Project (and not for comprehensive studies).¹³⁹ Mr. Rankin confirms that the 2003 *CEAA* amendments did not apply to the Whites Point Project review.¹⁴⁰

97. In my view, Mr. Estrin's alternative represents his tacit admission that, in the circumstances, meaningful, funded public participation was required in the Whites Point EA. That fact, in my view, represents further affirmation of the prudence of the provincial and federal governments' adoption of the JRP process format. That same admission also answers fully the "better question" he says I put aside which is, "why any hearing should have been held at all for the WPQ".¹⁴¹

¹³⁵ Smith First Report, paras. 93 and 94.

¹³⁶ Mr. McLean's notes at an inter-agency meeting on March 31, 2003 establish the concerns of regulators over starting the EA as a comprehensive study and having to later bump it up to a panel review as a result of public concerns. Again, Canada's officials were attentive to trying to avoid the disruption, cost and delay associated with bumping. Notes of Mark McLean, March 31, 2003, p. 2, **Exhibit R-144**.

¹³⁷ Estrin Reply, paras. 159-163.

¹³⁸ Estrin Reply, para. 162.

¹³⁹ Connelly Report, para. 69.

¹⁴⁰ Rankin Report, para. 57.

¹⁴¹ Estrin Reply, para. 167.

98. Moreover, Mr. Estrin appears to agree there can be procedural benefits of the joint review panel.¹⁴² For example, he states:

From a proponent's point of view, where governments from two jurisdictions have legitimately determined that each would hold a public hearing, I can agree with Mr. Smith that at that point a joint hearing would likely be preferable for the proponent rather than two separate hearings.¹⁴³

99. Given Mr. Estrin's misconception of the process options and participant funding available at the time of the Whites Point EA, it is not surprising that he would assert that "I would never advise a client facing federal and provincial EAs to ask for a joint review panel ...".¹⁴⁴ I stand by the procedural benefits of the JRP process which are outlined in my First Report – elimination of duplication; avoidance of uncoordinated and potentially conflicting review results (as experienced in the Prosperity Gold-Copper Mine EA¹⁴⁵); elimination of the "bumping" risk associated with public concerns (as occurred in the GSX Pipeline Project); and avoidance of litigation risk for project splitting or project segmentation (i.e. project scope) which dogged the Red Chris Mine development (*Miningwatch*) from 2003-2010 when, after several reversals, the Supreme Court of Canada upheld the propriety of a broad scoping approach.¹⁴⁶

100. In the end, I reiterate my conclusions that "[l]aw, logic and convenience strongly recommended a one-stop shopping approach facilitated by a joint panel review".¹⁴⁷ The facts about the process options available at the time simply do not support Mr. Estrin's allegation that the referral was "the product of political expediency"¹⁴⁸ which was "primarily motivated

¹⁴² Smith First Report, paras. 76-95.

¹⁴³ Estrin Reply, para. 166.

¹⁴⁴ Estrin Reply, para. 167.

¹⁴⁵ Smith First Report, para. 87, Prosperity Gold-Copper Mine Project, Taseko Mines Ltd. British Columbia, Report of the Federal Review Panel, excerpt, s. 4.5, p. 30, **Exhibit R-429**.

¹⁴⁶ Smith First Report, paras. 93-95. These are not theoretical considerations conjured up solely by an expert witness years removed from the event. Rather, DFO itself cautioned against that very same appeal risk in its briefing note: "It is likely, due to public opposition of the proposal that there will be a court challenge if the scope of project for the CEEA assessment does not include both the quarry and terminal." Memorandum for the Minister, Referral of Proposed Whites Point Quarry and Shipping Terminal to the Minister of the Environment for a Panel Review, June 25, 2003, p. 3, **Exhibit R-72**.

¹⁴⁷ Smith First Report, para. 95.

¹⁴⁸ Estrin Report, para. 93.

by subjective political criteria, rather than by requirements of sound environmental decision-making"¹⁴⁹ or that Canada was acting out an agenda "to hinder or stop the WPQ Project".¹⁵⁰

¹⁴⁹ Estrin Report, p. 1, para. 5; p. 11, para. 5; Smith First Report, para. 95.

¹⁵⁰ Estrin Report, p. 2, para. 4.

PART II: THE JOINT REVIEW PANEL PROCESS AND REPORT WERE FAIR, REASONABLE AND LAWFUL

101. In Part II of his report, Mr. Estrin takes issue with the conclusion in my First Report that the JRP process and report were, from the perspective of EA in Canada, fair, reasonable and lawful. Mr. Estrin focussed on four basic issues:

- (1) the JRP's reliance upon inconsistency with community core values to reject the Whites Point Project;
- (2) the JRP's application of the precautionary principle;
- (3) the JRP's application of the concept of cumulative effects; and
- (4) the JRP's approach to mitigation measures.

102. While I will respond to each of Mr. Estrin's points in turn, as well as Mr. Rankin's related comments, I will give primary emphasis to what they both refer to as the "community core values" issue given that it was the determinative factor which led to the JRP's recommendation that the Whites Point Project should be rejected.

1. Community Core Values was a Valid Ground for the JRP to Consider and to Rely Upon in Rendering its Recommendations on the Whites Point Project

103. In paragraphs 175 to 215 of his Reply, Mr. Estrin opines that "community core values" was "... a concept apparently invented by the Panel and in my view inappropriately used to reject the WPQ".¹⁵¹ He attempts to equate community core values to a "community veto",¹⁵² a notion that I had rejected;¹⁵³ and claims that Dr. Fournier's prior involvement with the Sable Gas Project supports his assertion.¹⁵⁴ Finally, Mr. Estrin, asserts again that Bilcon did not have notice that community core values were at issue and, thus, had no opportunity to respond.¹⁵⁵

¹⁵¹ Estrin Reply, para. 172.

¹⁵² Estrin Reply, paras. 184-195.

¹⁵³ Smith First Report, paras. 292-294.

¹⁵⁴ Estrin Reply, paras. 208-210.

¹⁵⁵ Estrin Reply, paras. 211-215.

104. Mr. Rankin echoes Mr. Estrin's opinion on most of these points, concluding that community core values was not a proper factor for consideration by the JRP under federal or provincial law, and that Bilcon was denied procedural fairness because components of the community core values issue were "imposed" as several new criteria in the final EIS guidelines. He argues that "the Panel did not provide adequate notice of these concerns so that the Proponent knew the case it had to meet".¹⁵⁶

105. I am unable to agree with Messrs. Rankin's and Estrin's conclusions. As I explain in greater detail below, it was appropriate for the JRP to consider the various components of what it described collectively as community core values and to rely upon the Project's inconsistency with those community core values in formulating its conclusions and recommendations. Those factors fell squarely within the Panel's legislative and regulatory mandate. Further, Bilcon was provided ample notice of the need to fully discuss these factors in the Panel's Terms of Reference and in the final EIS Guidelines, both of which directed Bilcon to present evidence to address those very matters.

(a) The Panel's Rationale for Recommending Against the Project was Legitimate under Provincial and Federal Legislation and its Terms of Reference

106. In his first Report, Mr. Estrin was of the opinion that the notion of community core values has no place under *CEAA* "as any impact on community core values is not an 'environmental effect' within the meaning of *CEAA*".¹⁵⁷ In response, I pointed out that Mr. Estrin had fundamentally misconstrued the nature of a "joint" federal/provincial review. In particular, I pointed out that he failed to recognize the provincial requirement to consider community core values, as such values fall within the definition of "socio-economic conditions" under the Nova Scotia *Environment Act* ("*NSEA*").¹⁵⁸ I also disagreed with Mr. Estrin's conclusions concerning whether the Panel properly understood the legal requirements of *CEAA*. I explained that, in my view, the record clearly shows the JRP identified adverse socio-economic impacts that were likely to arise from environmental effects caused by the Project (as required by the *CEAA*).

¹⁵⁶ Rankin Report, para. 99; *See also* paras. 123-135.

¹⁵⁷ Estrin Reply, para. 196.

¹⁵⁸ Smith First Report, paras. 220-246 and 282-291.

107. In his Reply Report, Mr. Estrin agrees that the Panel's process was governed by both the *CEAA* and the *NSEA*. He also agrees that the *NSEA* "... provides for a consideration of socio-economic effects". Mr. Estrin does not agree, however, "... that community core values as used by the WPQ Panel are a legitimate factor to consider under the Nova Scotia *Environment Act*" (emphases supplied).¹⁵⁹ In some places he goes so far as to assert that the *NSEA* does not encompass the notion of community core values.¹⁶⁰ With little supporting analysis, Mr. Estrin also persists in his view that the JRP's recommendation was not proper under *CEAA*.

108. I disagree with the conclusions that Mr. Estrin has reached in his Reply. As I explain below, in my view, the JRP's recommendation was proper under both the *NSEA* and the *CEAA* and was consistent with its mandate. In this context, I offer my views as to the comparative value of the Kemess and Sable Gas project. Where appropriate, in my comments below I have also addressed Mr. Rankin's criticisms of the Whites Point JRP's recommendations, which largely echo those made by Mr. Estrin.

i) The JRP's Consideration of Socio-Economic Effects Was Consistent with Nova Scotia Law

109. In my opinion, the JRP's treatment of community core values fell well within the definition of socio-economic effects under the *NSEA*. The JRP's finding in this regard was consistent with Nova Scotia law and its regulatory mandate and provided a sound basis for its rejection of the Project.

110. In his Reply Mr. Estrin appears to disagree, but his approach to community core values over the course of his two reports is revealing. His First Report focussed solely on the *CEAA* definition of "environmental effect" (which is narrower) in order to conclude that reliance upon community core values to reject the Whites Point Project "... was a fundamental legal error".¹⁶¹ In support of that claim, he contrasted the narrower *CEAA*

¹⁵⁹ Estrin Reply, para. 197.

¹⁶⁰ Estrin Reply, para. 199.

¹⁶¹ Estrin Report, para. 237; at para. 231, Mr. Estrin states "CEAA only recognizes socio-economic impacts as "environmental effects" where they are the result of a change that the project causes in the natural environment. For example, if fisheries habitat is destroyed by a project and that causes a loss of fishing income, then that may be considered as an environmental effect." [emphasis supplied]

definition of socio-economic effects (which can only arise as a result of an environmental effect) with the broader notion of "pure" socio-economic effects. He concluded, therefore, that inconsistency with community core values was a "pure socio-economic effect".¹⁶² This is an important point since, as noted above, Mr. Estrin agrees that the *NSEA* requires the consideration of socio-economic effects. As such, it logically follows that the "socio-economic effects of the Project" were a mandatory factor in the EA of the Whites Point Project because of the *NSEA*. Under the interpretation Mr Estrin appeared to offer in his First Report, therefore, the Whites Point Project's inconsistency with community core values was a legitimate basis upon which Nova Scotia could reject it.

111. However, in his Reply, Mr. Estrin now appears to say that while the project's inconsistency with community core values was a "pure socio-economic" effect, it did not constitute a socio-economic effect under the *NSEA*.¹⁶³ In my opinion, this position is contradictory and untenable. Consideration of community core values was certainly legitimate under provincial law. In fact, even the *Guide to Preparing an EA Registration Document for Pit and Quarry Developments in Nova Scotia*,¹⁶⁴ cited by Mr. Estrin, supports this conclusion.¹⁶⁵ While Mr. Estrin may be correct that there is no reference to the phrase "community core values" in the part of the *Guide* he cites,¹⁶⁶ the JRP was clearly using the phrase community core values to encompass concerns about the impact of the project on the "(1) Economy", "(2) Land Use and Value" and "(3) Recreation and Tourism"¹⁶⁷ – all of

¹⁶² Estrin Report: (a) "230. However, inconsistency with community core values is not an *environmental* effect, as defined by CEAA, it is a pure socio-economic effect ..." [emphasis supplied];

(b) "243. In fact, the Panel identified only one potential impact of the WPQ project as both 'adverse' and 'significant'. This impact was socio-economic in nature, and will be described, for the purpose of my report, as 'inconsistency with community core values.'" [emphasis supplied];

(c) "261. A 'pure' socio-economic impact, one that is not tied to a change in the natural environment caused by the project, is not considered an 'environmental effect' pursuant to CEAA." [emphasis supplied];

(d) "262. The impact identified by the Panel, inconsistency with community core values, is a pure socio-economic impact, one that has no necessary connection to environmental impact." [emphasis supplied]

¹⁶³ Estrin Reply, paras. 197-199.

¹⁶⁴ *Guide to Preparing an EA Registration Document for Pit and Quarry Developments in Nova Scotia ("Pit and Quarry Guide")*, **Exhibit R-81**.

¹⁶⁵ Estrin Reply, para. 201.

¹⁶⁶ Estrin Reply, para. 201.

¹⁶⁷ *Pit and Quarry Guide*, pp. 12-13, **Exhibit R-81**.

which, pursuant to the *Guide*, are socio-economic conditions that are to be addressed in an EA.

112. Perhaps recognizing his contradiction, Mr. Estrin also argues that even if Nova Scotia's legislation mandates a review of pure socio-economic effects, it does not endorse what he calls "the community veto approach adopted by the WPQ panel". He adds that "the intent is not to turn an EA into a referendum or to replace local planning legislation"¹⁶⁸ and that "[w]hile it is quite proper for a Nova Scotia EA to consider socio-economic impacts on a community such as the creation or loss of jobs, property devaluation, increased traffic, or impacts on recreational uses like hunting and fishing ... it is another matter to consider whether a majority of the community may be opposed to the project".¹⁶⁹

113. As explained in my First Report,¹⁷⁰ I disagree with Mr. Estrin's characterization of the JRP's recommendation as a mere referendum-style approach based on the will of the majority of community members appearing at the hearing.¹⁷¹ The JRP was mandated to permit public participation in the process and to register the comments it received as a part of that process.¹⁷² It cannot be faulted for this. It did not recommend rejection of the project, however, on a "majority rules" basis. Rather, its recommendations were based upon its conclusion that the Whites Point Project would have unmitigable adverse effects on the community's development.

114. This conclusion and the basis for it are demonstrated in the JRP's report. For example, the Report analyses the information assembled by the Proponent at the Panel's request (in response to the EIS Guidelines) and its interplay with the policies, strategies, guidelines and legislation regarding impacts on existing and future land use, other

¹⁶⁸ Estrin Reply, para. 199.

¹⁶⁹ Estrin Reply, para. 203.

¹⁷⁰ Smith First Report, paras. 292-294.

¹⁷¹ Estrin Reply, paras. 184-195. In particular, I must take issue with Mr. Estrin's selective quotation of Dr. Fournier to suggest the Chairperson himself considered the hearing to be "... a kind of a referendum ..." on "industrialization" (Estrin Reply, para. 190). In fact, when the balance of the transcript is considered, it is clear that rather than making an assertion, the Chairperson was asking the witness whether he agreed and, if so, "... how does the community survive and sustain itself under those circumstances?" (Whites Point JRP Hearing Transcript, Vol. 11, June 28, 2007 at p. 2669, lines 19-24, Investors' Schedule of Documents at **Tab C-163**). Clearly, Dr. Fournier acted in a balanced and inquiring manner, challenging rather than affirming the concept of a "referendum".

¹⁷² Smith First Report, paras. 292-294.

businesses and activities, tourism, fisheries and the like.¹⁷³ The analysis of these interactions was discussed over the course of Chapter 3 of the JRP Report detailing what the Panel meant by the Project's inconsistency with community core values. The Panel's rigorous and deliberate review and analysis of a broadly based government and municipal planning framework, in my view, is the antithesis of a simple referendum-style tally of the Project's opponents and supporters at a hearing.

115. For example, the Panel described the local communities' "efforts to create a sustainable economy based on good management of fisheries and eco-tourism activities" and noted the considerable international recognition they had received (UNESCO Biosphere; UN Bio-Habitat, Smart Communities).¹⁷⁴ In that regard, the Panel observed that the Proponent's description of short term operational impacts and employment only "rarely" addressed "the broader implications ... on long-term sustainable development of communities".¹⁷⁵

116. The Panel also discussed the consistency of the Project with planning, policies, strategies, guidelines and legislation which included business development, natural resources, environment and tourism, heritage and culture.¹⁷⁶ In this discussion, it drew particular attention to the community plan "*Building Tomorrow – Vision 2000: Multi-year Community Action Plan for Annapolis and Digby Counties*" ("*Vision 2000*").¹⁷⁷ The *Vision 2000* policy development process involved the public, seven municipal governments and two senior levels of government. The Panel noted that this overarching planning document excluded the general model of industrial resource utilization which the Whites Point Project represented.¹⁷⁸ It also contrasted the Whites Point Project with the *Nova Scotia Strategy for Sustainable Coastal Tourism Development*, the *Nova Scotia Community Development Policy* and the 2007 *Environmental Goals and Sustainable Prosperity Act*.

¹⁷³ WPQ, Joint Review Panel Report, Chapter 3 **Exhibit R-212**.

¹⁷⁴ WPQ, Joint Review Panel Report, Section 3.2.4 "Sustainable Development" at p. 91, **Exhibit R-212**.

¹⁷⁵ WPQ, Joint Review Panel Report, Section 3.2.4 "Sustainable Development" at p. 91, **Exhibit R-212**.

¹⁷⁶ WPQ, Joint Review Panel Report, Section 3.3, pp. 93-100, **Exhibit R-212**.

¹⁷⁷ WPQ, Joint Review Panel Report, Section 3.3, p. 93, **Exhibit R-212**.

¹⁷⁸ WPQ, Joint Review Panel Report, Section 3.3, p. 94, **Exhibit R-212**.

117. Further, the Panel contrasted the branding for coastal tourism developed by the *Nova Scotia Strategy for Sustainable Coastal Tourism Development* ("... spectacular scenery, living tradition, maritime culture and lifestyle with a feeling of deep-down spiritual satisfaction"¹⁷⁹) with the risks an industrial development like the Project posed for environmental quality and community character. It concluded the burdens fell disproportionately on the Digby Neck and Islands and the associated marine environment (including risks to the tourism industry and the lobster industry which are clear *CEAA* socio-economic effects) with few of the projected benefits.¹⁸⁰

118. In its concluding section, Section 3.5 "Core Values", the Panel summarized the factors it reviewed as community core values including the community focus, its economic and social development, and its cultural experience. The Panel also stressed the importance of traditional community knowledge noting that it "includes information on traditional lifestyles and quality of life. To a degree, it represents core values held by those communities".¹⁸¹ Overall, the Panel demonstrated that its use of the term "community core values" was based upon a rigorous, well documented, social and economic development framework formulated by governmental authorities. The Panel concluded that:

These policy goals of local and provincial agencies are a direct outgrowth of the community's core values. Core values expressed at the local, regional and national levels address the interplay of economic development, ecosystems and socio-cultural issues that communities have chosen to use to guide decision-making about development.¹⁸² [emphasis supplied]

119. In my view, the Panel did exactly what it was supposed to do under its Terms of Reference. It considered a wide range of environmental and socio-economic impacts, considered potential mitigation and offsets identified by the Proponent, and then balanced the related burdens and benefits to the communities affected.

120. The fact that the majority of community leaders at the hearing arrived at the same conclusion is neither surprising nor does it constitute a referendum-like veto. Rather those

¹⁷⁹ WPQ, Joint Review Panel Report, Section 3.3.2 "Policies, Strategies, Guidelines and Legislation", p. 94, **Exhibit R-212**.

¹⁸⁰ WPQ, Joint Review Panel Report, Section 3.4.1 "Balancing Benefits and Burdens", p. 96, **Exhibit R-212**.

¹⁸¹ WPQ, Joint Review Panel Report, Section 3.2.2 "Traditional Community Knowledge" at p. 88, **Exhibit R-212**.

¹⁸² WPQ, Joint Review Panel Report, Section 3.5 "Core Values", p. 100, **Exhibit R-212**.

community leaders and the Panel were simply reflecting the inconsistency of the Project with broadly based policies, strategies, guidelines and legislation formulated by multiple levels of government following extensive community consultation.¹⁸³ A fair review of the JRP Report, in my opinion, discloses a careful, detailed and structured analysis of the legislative and policy framework which governed community development and found the Project to be inconsistent with it.¹⁸⁴ As noted above, that is the antithesis of a simple hearing room head count or referendum.

121. At its core, the impact of the Whites Point Project upon this social and economic development framework in the Digby Neck and Islands area was a socio-economic effect. It was a necessary and appropriate issue for the JRP to consider and upon which to base its conclusions and recommendations. With respect, it is a disservice to the Panel to attempt to diminish the force of its detailed analysis by characterizing the effort as a mere referendum.¹⁸⁵ Based on the foregoing, I simply cannot agree with Mr. Estrin that the JRP's consideration of community core values was inappropriate.

122. With respect to Mr. Rankin, he appears to simply echo Mr. Estrin's opinion to the effect that the JRP exceeded its jurisdiction when it relied upon community core values to reject the project.¹⁸⁶ Mr. Rankin states that "consideration of socio-economic effects is a long way from the 'community core values' on which the Panel's conclusions turn".¹⁸⁷ While Mr. Rankin provides no analysis or support for his conclusory statement, he appears to contradict Mr. Estrin's clear acknowledgement that "inconsistency with community core values ... is a pure socio-economic effect".¹⁸⁸ In the end, his unsubstantiated and conclusory statement has not convinced me that the JRP's consideration of the inconsistency of the Whites Point Project with community core values was anything but sound and proper under the *NSEA*.

¹⁸³ WPQ, Joint Review Panel Report, Section 3.3 "Interplay of Planning, Policies, Strategies, Guidelines & Legislation" pp. 93-95, **Exhibit R-212**.

¹⁸⁴ WPQ, Joint Review Panel Report, Section 3.3.2 "Policies, Strategies, Guidelines and Legislation", pp. 94-95, **Exhibit R-212**; *See also* WPQ, Joint Review Panel Report, Appendix 4 for those documents germane to the review.

¹⁸⁵ Estrin Reply, paras. 188-193.

¹⁸⁶ Rankin Report, para. 123-135.

¹⁸⁷ Rankin Report, para. 129.

¹⁸⁸ Estrin Report, para. 230.

ii) The JRP's Consideration of Socio-Economic Effects Resulting from Changes to the Environment Caused by the Project was Consistent with Federal Law

123. I also stand by the conclusion in my first report that the JRP's recommendation regarding the project's effect on community core values was equally legitimate under the *CEAA*.¹⁸⁹ To parse Mr. Estrin's example, if fisheries habitat is destroyed by a project and this causes a loss of fishing income, that qualifies as an adverse environmental effect under *CEAA*.¹⁹⁰ A host of these types of potential effects did emerge in the course of the JRP review.

124. In my First Report, I concluded that "... when one reads the Panel's determination regarding the Project, at s. 4.1 of the JRP Report, it is apparent that the impacts to 'the people, communities and economy of Digby Neck and Islands that concerned the Panel were grounded in potential changes to the surrounding environment ...'".¹⁹¹ For example, pile driving, blasting and shipping activities could have disruptive effects upon commercial and recreational fisheries and ecotourism activities such as whale watching. Surface run-off into the nearshore, whether due to accidents or malfunctions of environmental controls as had already happened on the site, could have similar effects.¹⁹² Accordingly, I concluded that "the Panel's determination was in fact based on a significant adverse environmental effect within the meaning of the *CEAA*".¹⁹³

125. I stand by this conclusion. Indeed, neither Mr. Estrin nor Mr. Rankin appear to question my analysis on this point in my first Report.¹⁹⁴ I note that Mr. Estrin has only reiterated his position, without any further analysis that "there was no basis under *CEAA* for

¹⁸⁹ Smith First Report, paras. 282-291.

¹⁹⁰ Estrin Report, para. 231.

¹⁹¹ Smith First Report, para. 289.

¹⁹² In May 2003, Digby Neck residents complained about a large plume of heavily sedimented water and debris that flowed directly into the Bay of Fundy due to the inadequacy of Nova Stone's sedimentation controls. This incident followed closely on the heels of another Nova Stone environmental offence (for which it was later convicted) when, in late 2002, Nova Stone dumped infill next to the LaHave River causing another uncontrolled flow of sediment into sensitive fish habitat. Counter Memorial, paras. 145, 52; Smith First Report, paras. 282-291; NSDEL, Whites Point Hearing Undertaking #40 – Siltation Complaints, **Exhibit R-490**.

¹⁹³ Smith First Report, para. 290; In that regard, Mr. Rankin's concurrence is as follows: "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." (Rankin Report, para. 52).

¹⁹⁴ Smith First Report, paras. 282-291.

the federal government to reject the project".¹⁹⁵ For his part, Mr. Rankin echoes Mr. Estrin's opinion, offering only a summary rebuttal that the JRP's conclusions were "*ultra vires*".¹⁹⁶ But beyond this conclusory statement, like Mr. Estrin, he provides no supporting analysis that would lead me to reconsider my opinion.

iii) The JRPs Consideration of Socio-Economic Effects was Consistent with its Terms of Reference

126. For reasons that I do not understand, Mr. Rankin oddly asserts that "[e]ven 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".¹⁹⁷ This argument appears to be based on, at best, a misreading and, at worst, a misrepresentation of the Panel's "Terms of Reference". Tellingly, Mr. Rankin's reproduction of the relevant mandatory factors governing the Panel's review¹⁹⁸ is incomplete.

127. In particular, he lists from the Terms of Reference only seven of the sixteen enumerated factors. Moreover, he inexplicably omits the most relevant factor as to whether or not the project was consistent with community core values – "(i) the socio-economic effects of the Project".¹⁹⁹ He also omits other factors that were directly relevant to the issue of community core values, including: "(e) the location of the proposed undertaking and the nature and sensitivity of the surrounding area", "(f) planned or existing land use in the area of the undertaking", and "(k) comments from the public that are received during the review".²⁰⁰

128. It is difficult to comprehend why Mr. Rankin would list just seven of the sixteen factors and fail to even acknowledge the key factors which actually had a direct bearing upon "community core values". Failure to even acknowledge the existence of these key

¹⁹⁵ Estrin Reply, para. 207.

¹⁹⁶ Rankin Report, para. 11.

¹⁹⁷ Rankin Report, para. 125.

¹⁹⁸ Part III of the 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**.

¹⁹⁹ Rankin Report, para. 170; *See also*, 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**.

²⁰⁰ 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**.

factors which the Panel was directed to include in its review, in my opinion, completely undermines Mr. Rankin's assertion that the JRP acted in excess of its jurisdiction.²⁰¹

iv) The Comparative Value of the Recommendations Made in the EAs of Other Projects Referenced by Mr. Estrin

129. Mr. Estrin disagrees with my reference to the Kemess North Mine EA ("Kemess") project as a fair comparator in considering the Whites Point JRP's reliance on community core values.²⁰² He also suggests that Dr. Fournier's actions on the Sable Gas Project rejecting adverse community impacts as an obstacle to project approval contradicts the position the JRP took in the Whites Point review.²⁰³ I respond to Mr. Estrin on both counts below.

(1) Kemess North Mine

130. Mr. Estrin suggests that my reference to the Kemess EA is inappropriate because the community values considered there were aboriginal values which have their own constitutional protection.²⁰⁴ More specifically, he asserts that the Kemess Panel's rejection of that project "turned mainly on the project's impacts on constitutionally recognized Aboriginal rights and values".²⁰⁵

131. I disagree with Mr. Estrin's characterization of the Kemess report. The Kemess JRP was another federal/provincial joint review panel which conducted its review almost contemporaneously with the Whites Point JRP. It also recommended the rejection of that proposed mining development based on socio-economic and socio-cultural effects.²⁰⁶ In that case, the federal and provincial governments also rejected that mining project.²⁰⁷

132. Contrary to Mr. Estrin's assertion, the Kemess JRP stressed the importance of "public" values; they were not limited to Aboriginal values alone.²⁰⁸

²⁰¹ Rankin Report, paras. 123-135.

²⁰² Estrin Reply, paras. 175-183.

²⁰³ Estrin Reply, paras. 208-210.

²⁰⁴ Estrin Reply, paras. 175-183.

²⁰⁵ Estrin Reply, para. 182.

²⁰⁶ Smith First Report, para. 276.

²⁰⁷ Smith First Report, para. 279; Letter from Barry Penner, BC Minister of Environment, to K. Stowe, Northgate Minerals, March 7, 2008, **Exhibit R-465**; *The Government of Canada's Response to the Environmental Assessment Report of the Joint Review Panel on the Kemess North Copper-Gold Mine Project*, March 7, 2008, **Exhibit R-466**.

²⁰⁸ Smith First Report, paras. 277-281.

... the economic and social benefits provided by the Project, on balance, are outweighed by the risks of significant adverse environmental, social and cultural effects, some of which may not emerge until many years after mining operations cease.

...

One of the most important components of a panel review is to integrate public values, as well as government policy expectations, into the review process. In order to weigh the Project development pros and cons in the context of public values and policy expectations, the Panel chose to adopt what it considered to be an appropriate sustainability assessment framework.²⁰⁹ [emphasis supplied]

133. In the Kemess EA, the methodology and the basis for the recommended rejection of that mining project was "... in the context of public values and policy expectations ...". That is exactly the same approach the Whites Point Joint Review Panel employed in Chapter 3 of its Report.²¹⁰ Consideration of "community core values" and of "public values and policy expectations" as described by the two federal/provincial review panels (within one month of each other in 2007), appear to me to be very similar. Whether or not the "values" of any of the individual communities involved were also constitutionally protected is not the point. The point is that the proposed project was determined to significantly and adversely affect those community values. That was the conclusion in both cases; and that was the basis for both the Kemess JRP and the Whites Point JRP almost contemporaneously recommending the rejection of those two projects.

(2) *Sable Gas*

134. Mr. Estrin also argues that because Dr. Fournier (as one member of a five-member joint review panel) did not consider the Sable Gas projects as being inconsistent with community concerns, he acted inconsistently in finding that the Whites Point Project was.²¹¹ Mr. Estrin's point is difficult to follow. To me, both panels appear to approach the issue of community impacts utilizing the same methodology. They come to different conclusions,

²⁰⁹ *Kemess North Copper-Gold Mine Project, Joint Review Panel Report*, excerpt, p. xi, **Exhibit R-411**; Smith First Report, para. 278.

²¹⁰ WPQ, Joint Review Panel Report, s. 2.2.1 "Public Involvement"; s. 3.2.2 "Traditional Community Knowledge"; s. 3.2.4 "Sustainable Development"; s. 3.3 "Interplay of Planning, Policies, Strategies, Guidelines and Legislation"; s. 3.4.1 "Balancing Benefits and Burdens"; s. 3.5 "Core Values", **Exhibit R-212**.

²¹¹ Estrin Reply, paras. 208-210.

but that is not surprising since they were two fundamentally different projects with different impacts on those communities.

135. The five-person Sable JRP (not just Dr. Fournier) applied a similar methodology to the Whites Point JRP by analysing the benefits and burdens of the Sable Offshore Energy Project ("SOEP") and the Maritimes and Northeast Pipeline Project ("M&NP") and whether those projects, therefore, were generally in the public interest.²¹²

136. A review of the "Rural Quality of Life" section of the Sable Gas JRP Report²¹³ referenced by Mr. Estrin discloses the fact that the Panel carefully considered the Project's adverse effects and reasoned why they could be fully mitigated. In that case, the benefits/burdens analysis favoured SOEP/M&NP whereas for Whites Point it did not.

137. The different conclusions are hardly surprising. It is obvious that the practical burdens on public land use, planning, tourism and fisheries would be quite different between these two very different projects. For example, post-construction, there is a significant difference in the physical effects of a buried, underground pipeline the surface right-of-way for which, immediately after installation, "could be replanted with bushes, and small, shallow rooted trees ... [which] would provide for both visual screening and support wildlife",²¹⁴ and a large scale, above ground quarrying operation with daily rock crushing, bi-weekly blasting, marine loading, and almost weekly shipments of post-Panamax-size freighters in and out of the Bay of Fundy continuously for a period of 50 years. The physical impacts and the impacts on a "rural quality of life" of the operational phase of the two projects upon the local communities and their value systems are simply not comparable. Obviously, the impacts of the two projects upon a "rural quality of life" are very different.

(b) Bilcon was Afforded Ample Notice and an Opportunity to Respond to All Factors which Comprised Community Core Values

138. Both Mr. Estrin and Mr. Rankin contend that because the phrase community core values was never discussed until the JRP's Report, Bilcon had no opportunity to know the

²¹² WPQ, Joint Review Panel Report, pp. 7-9, 55-60, 83-85, **Exhibit R-212**.

²¹³ Sable Gas Projects, JPRP Report, p. 91, **Exhibit R-553**.

²¹⁴ Sable Gas Projects, JPRP Report, p. 91, **Exhibit R-553**.

case it had to meet.²¹⁵ I cannot agree. Their position is based on semantics and ignores completely the fact that every component of what the JRP discussed as community core values was identified and detailed in the "Final EIS Guidelines" which, as the title suggests, was supposed to guide Bilcon in the preparation of its evidence.

139. Mr. Estrin contends that the Panel was guilty of procedural unfairness due to its "... reliance on the novel concept of community core values ..." which "... blindsided" Bilcon.²¹⁶ Mr. Estrin suggests I did not refute his "essential point, which is that the Guidelines did not speak of 'community core values' *per se*, and did not 'give any hint, except perhaps in hindsight, that the Panel considered community core values to be, in and of themselves, a 'valued environmental component' that must be protected'".²¹⁷ Finally, Mr. Estrin disagrees with my conclusion that Bilcon had "clear and detailed instructions from the Panel about what would be required to fulfil the requirements of the Final EIS Guidelines".²¹⁸

140. For the reasons explained below, I stand by my conclusion that the Final EIS Guidelines were clear, detailed and indeed extensive in alerting Bilcon well in advance about what information and analysis would be required for an assessment of all the factors which the Joint Review Panel collectively described as community core values. That is the point – all aspects of what were discussed under the aegis of the phrase "community core values" were outlined as the factors the Terms of Reference directed the Panel to consider in its review and were reflected in considerable detail in the final EIS Guidelines. I would refer to my earlier discussion of those matters rather than repeat them here.²¹⁹

141. I would also invite the Tribunal to simply peruse the Terms of Reference and the Final EIS Guidelines and compare them with the JRP Report's Chapter 3 "Analysis". There the Panel simply summarized its assessment of the interplay of the various factors the Terms

²¹⁵ Estrin Reply, paras. 211-215; Rankin Report, paras. 98-99.

²¹⁶ Estrin Reply, paras. 211-215.

²¹⁷ Estrin Reply, para. 212.

²¹⁸ Estrin Reply, para. 212.

²¹⁹ Smith First Report, paras. 230-246 (Legislation and Terms of Reference); 247-275 (Draft and Final EIS Guidelines); For example, reading the requirement for baseline "Socio-Cultural Patterns" in section 9.3.8 in conjunction with the actual analysis directed for assessing the impact on the human environment for the same "Socio-Cultural Patterns" in section 10.3.8 put it beyond doubt that impacts on community core values and perspectives were central to the review.

of Reference directed it to consider. Having done so, the Panel provided the basis for its conclusion that the Project's effects would be inconsistent with community core values.

142. From even a cursory review of the draft and final Terms of Reference as well as the draft and final EIS Guidelines, Bilcon could not have found itself "blindsided" by the factors that were to be assessed as part of the Panel's review.

143. For example, Mr. Estrin is simply wrong when he contends the Panel never considered community core values as a "valued environmental component" ("VEC") that must be protected.²²⁰ To the contrary, the Terms of Reference made clear the necessity of satisfying Nova Scotia legislative and regulatory requirements. In that regard, the NSDEL provided guidance in their "A Proponent's Guide to Environmental Assessment" ("Guide") which defined as a VEC and directed Bilcon to include in their discussion the following:

A discussion of the effects to the socio-economic conditions of the area should be detailed in the document. Examples of these could include employment, transportation, recreation and tourism.

...

Addressing adverse effects will entail evaluating any effects that impairs or damages the environment, including an adverse effect respecting the health of humans or the reasonable enjoyment of life or property.²²¹ [emphasis supplied]

144. For his part, Mr. Rankin asserts that even if the Final EIS Guidelines were clear enough "the draft EIS Guidelines were very different from the Final Guidelines".²²² Mr. Rankin then improbably asserts that "the Panel did not provide adequate notice of these concerns so that the Proponent knew the case it had to meet".²²³

145. I must disagree. First, with respect, Mr. Rankin does not appear to understand how the process actually worked here. Bilcon had the Final EIS Guidelines on March 31, 2005.

²²⁰ Estrin Report, paras. 247-249.

²²¹ Smith First Report, para. 220; *A Proponent's Guide to Environmental Assessment*, Nova Scotia Environment and Labour, February 2011, p. 12, **Exhibit R-163**.

²²² Rankin Report, para. 98.

²²³ Rankin Report, para. 99.

It did not file its EIS until over a year later on April 26, 2006.²²⁴ It clearly knew the case it had to meet and took over a year to respond. It could have taken longer had it wished. The very existence of the Final EIS Guidelines contradicts Mr. Rankin's assertions about an alleged failure to provide adequate notice since that is the express function of the EIS Guidelines in the first place.

146. Second, it bears noting that Bilcon had several opportunities to comment on the draft Guidelines as well as on the matters raised by other parties at the scoping meetings, some of which were later reflected in the Final EIS Guidelines.²²⁵ When Bilcon finally responded to Dr. Fournier's personal invitation to comment, it did not take issue with any of the draft Guidelines or the scoping meeting comments from the public relating to impacts on socio-cultural matters, existing and future land use matters, tourism impacts, lobster fishery matters, traditional community knowledge and the like which were the components of what the Panel described collectively as community core values.²²⁶ In addition, once provided with the Final EIS Guidelines, Bilcon had every opportunity to ask questions about their content, if it felt the need to do so, which evidently, it did not.

147. In fact, despite being afforded every opportunity to comment on whether the Panel should be required to consider and assess the socio-economic effects of the Project or the potential scope of that factor as part of its review, and to ask questions on these criteria, neither Mr. Buxton nor the Proponent offered any comment much less a question or an objection.

148. In summary, in my opinion there can be no doubt that Bilcon was on notice and was provided an ample opportunity to address every component of what the Panel considered to represent community core values.

²²⁴ Counter Memorial, paras. 176, 180.

²²⁵ Smith First Report, paras. 244-245.

²²⁶ Counter Memorial, paras. 171-176.

2. The JRP's Approach to the Precautionary Principle and Adaptive Management Was Appropriate in Light of the Lack of Information Available

149. Mr. Estrin asserts that the Panel misapplied the precautionary principle and in so doing maligned Bilcon for its inability to predict the effects of the project with complete certainty – in particular by rejecting Bilcon's correct reliance on and application of adaptive management.²²⁷ He also states that I agreed with the Panel that the precautionary principle mandates that no actions can be undertaken until scientific uncertainty of environmental harm is eliminated.²²⁸ Likewise, Mr. Rankin comments that the Panel dismissed the "critical component" of adaptive management with "patently dismissive arrogance".

150. At the outset, I note that the Panel's decision to recommend the rejection of the Project does not appear to hinge on any alleged errors with respect to its application of the precautionary principle. Rather, as is discussed above, the Panel recommended rejection of the Project based on its conclusion that the Project is likely to "have a significant adverse environmental effect on the people and communities that comprise Digby Neck and Islands, which are without doubt integral, essential and valued components of that environment" – that is, on the community's core values.²²⁹

151. Nevertheless, the allegations that Messrs. Estrin and Rankin make are demonstrably wrong. First, neither I nor the JRP ever concluded that the precautionary principle requires complete certainty, and nor was the concept of adaptive management simply dismissed. In order to draw this conclusion, Mr. Estrin selectively quotes one sentence²³⁰ of my report. However, that sentence specifically dealt with a situation where basic information is missing from a proponent's assessment.²³¹ With respect to the precautionary principle in general, what I explained in my report was that:

²²⁷ Estrin Reply, paras. 217, 218(1), 231, 236.

²²⁸ Estrin Reply, paras. 243, 245.

²²⁹ WPQ, Joint Review Panel Report, pp. 100 and 103, **Exhibit R-212**.

²³⁰ Estrin Reply, para. 242 quotes the following sentence only from my First Report: "In light of the precautionary principle, a Panel cannot recommend approval of a project where there is an absence of basic information that the Panel needs to assess the likelihood of the project's effects, the significance of those effects, and the effectiveness of the proposed mitigation measures."

²³¹ Estrin Reply, para. 242.

334. The lack of perfect certainty in environmental assessment means that where the risks and the adverse effects are significant though uncertain, as a precaution, measures should be adopted to deal with them. As a precaution, where there is a lack of confidence in the efficacy of proposed mitigative measures or in the ability or willingness of the proponent to employ them, then a project may not receive a favourable recommendation.

335. If a Panel and the public encounter a proponent that consistently refuses or consistently fails to provide the requested information, there is a distinct possibility, if not a likelihood that a Panel will not recommend approval. In light of the precautionary principle, a Panel cannot recommend approval of a project where there is an absence of basic information that the Panel needs to assess the likelihood of the project's effects, the significance of those effects, and the effectiveness of the proposed mitigation measures. Discharging a practical burden of persuasion with sufficient evidence to satisfy a Panel is a normal component of the process faced by all proponents. [emphasis supplied]

152. As is clear from these passages, my view is that the precautionary principle does not require certainty, but it does require sufficient information upon which conclusions regarding the likelihood of effects or the significance of those effects and the appropriateness of mitigation measures can be based.²³²

153. Where such information exists, I do not disagree that the concept of adaptive management can be properly applied in a way that is compatible with the application of the precautionary principle. I also do not take issue with Mr. Estrin's reliance on *Pembina Institute for Appropriate Development v. Canada (Attorney General)* to advance the proposition that adaptive management counters the potentially paralyzing effects of the precautionary principle by allowing projects with uncertain yet potentially adverse environmental impacts to proceed based on adaptive management strategies.²³³ However, once again, the key caveat, made clear in the passage cited by Mr. Estrin, is that such strategies can be employed "where sufficient information regarding those impacts and potential mitigation measures already exist".²³⁴

²³² Smith First Report, para. 334-339, 340-344.

²³³ Estrin Reply, para. 235 and 248, citing *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, [2008] F.C.J. No. 324 at para. 32 ("*Pembina*"), Investors' Schedule of Documents at Tab **C-260**.

²³⁴ *Pembina*, para. 32, Investors' Schedule of Documents at Tab **C-260**.

154. As I explained in my First Report,²³⁵ the concern that the Panel appears to have identified is that Bilcon was invoking the concept of adaptive management in situations where sufficient information regarding potentially adverse impacts and potential mitigation measures did not already exist. For example, in my First Report, I referenced an exchange between Bilcon's representatives and the Panel on impacts to rare plants. Contrary to Mr. Estrin's implication, I did not ignore Bilcon's proposal to establish an environmental conservation zone. The simple point I was making in discussing the Panel's exchange with Mr. Kern²³⁶ was that the Panel seemed concerned with the insufficiency of information regarding potential adverse impacts to and potential mitigation measures regarding the plants in the proposed conservation zone combined with the bald invocation of adaptive management in these circumstances. Specifically, Panel Member Muecke seemed concerned that simple isolation of areas (i.e., the creation of the environmental conservation zone) did not necessarily take into account adverse impacts from other pathways, such as effects due to changes in hydrology.²³⁷

155. While Mr. Estrin takes exception to what he characterizes as my selective quotation of Mr. Kern's response, nothing turns on the "full" response that Mr. Estrin reproduces in his report.²³⁸ Nor does it address the point I raised in my first Report, and the key point with which the Panel was concerned – merely offering to monitor and to then implement adaptive management measures does not adequately address uncertainty or insufficient information regarding the environmental effects of a project, the significance of those effects and appropriate mitigation measures required to eliminate, reduce, or control those effects.²³⁹

156. The same concern is further illustrated by an exchange on Day 2 of the oral hearing, during which Panel Member Grant further questioned Bilcon on "the perceived risks to the

²³⁵ Smith First Report, paras. 356-368.

²³⁶ Smith First Report, paras. 361 to 368.

²³⁷ Smith First Report, para. 363, citing Whites Point JRP Hearing Transcripts, June 16, 2007, 1T114:16 to 116:1, **Exhibit R-457**.

²³⁸ Estrin Reply, para. 238.

²³⁹ Smith First Report, para. 359; CEA Agency, "Operational Policy Statement: Adaptive Management Measures under the *Canadian Environmental Assessment Act*", March 2009, **Exhibit R-402**.

environmental preservation zone", particularly from surface water drainage patterns.²⁴⁰

Bilcon's response was:

Mr. DAVID KERN: We are in the process of coordinating the protection of the endangered plant species with the Nova Scotia Department of Natural Resources. They are suggesting, based especially where the Sandwort is located, that it is mostly on a coastal plain, that to define a watershed for that particular area would be an exercise that would be done as soon as possible, certainly before any quarry or any activity in that area would take place.

So during this time period, we would be identifying, through intensive site monitoring, thresholds that may exist for the Glaucous Rattlesnake route and the Sandwort populations that exist on the site.

At this point in time, we cannot say with certainty how much a disruption of a surrounding area would be on the particular plant populations.²⁴¹

157. Based on this exchange, it appears that there continued to be a lack of information regarding the hydrology and surface water drainage into the environmental preservation zone, and the potential effects of a disruption to the surrounding area was not known. As discussed above, relying upon adaptive management in such circumstances is not an appropriate application of the concept. This flaw in approach serves to demonstrate that the Panel's concerns regarding Bilcon's proposed implementation of adaptive management were not "gratuitous and unfounded" and are not "*indicia* of the Panel's dislike of both the project and the proponent".²⁴²

158. Further, I cannot agree with Bilcon's suggestion that the Panel had unreasonable expectations regarding baseline data with respect to issues of the sort referred to above. Bilcon has claimed that the baseline data sought by the Panel on these issues "does not even exist at the planning stage" and that "[b]aseline data of that nature for a quarry would only be gathered shortly before commencing operations".²⁴³ I do not agree. Where a proposed project has the potential to disrupt surface water drainage patterns (i.e., hydrology), it is a fairly basic requirement to gather baseline hydrologic information and model potential

²⁴⁰ Whites Point JRP Hearing Transcripts, June 18, 2007, 2T286, **Exhibit R-554**.

²⁴¹ Whites Point JRP Hearing Transcripts, June 18, 2007, 2T287-288, **Exhibit R-554**.

²⁴² Estrin Reply, para. 241.

²⁴³ Supplemental Witness Statement of Paul Buxton, ("Buxton Supplemental Statement"), December 20, 2012, para. 59.

project impacts to determine whether there will be an adverse impact and if so, what mitigation measures should be employed.²⁴⁴

159. In short, based on Bilcon's own evidence, it appears that the issue faced by the Panel was not a lack of perfect certainty. Rather, the issue was whether there was sufficient information upon which the Panel could reasonably base its conclusions. Indeed, contrary to Mr. Estrin's assertion,²⁴⁵ it is clear that the Panel did not expect or require perfect certainty. What the Panel required was better information from Bilcon about the potential effects of the project. As they explained:

While the Panel accepts that with effective application of appropriate mitigation measures, competent project management and appropriate regulatory oversight, most project effects should not be judged "significant", the accumulation of concerns about adequacy leads the panel to question the Project.²⁴⁶

160. Mr. Estrin takes the position in Section 2.3(d) of his Reply that the Panel's expectation that Bilcon provide sufficient information to assess project impacts was contrary to the *CEAA* regime.²⁴⁷ In particular, Mr. Estrin points to subsection 34(a) of *CEAA* to posit that the Panel's information gathering obligations are independent and the Panel cannot rely on the proponent to gather information.²⁴⁸

161. I disagree and am surprised by Mr. Estrin's position in light of the acknowledgement in his Reply that a "proponent has a duty to identify possible adverse effects and to propose

²⁴⁴ In this regard, I have difficulty with Mr. Buxton's reference (Buxton Supplemental Statement, para. 59, footnote 20) to the "Groundwater" discussion in the JRP Report (at page 7) and his suggestion that, in effect groundwater modelling and data would only be undertaken "shortly before commencing operations." In my experience, it is not unusual or uncommon to require comprehensive hydrogeological (i.e., groundwater) data gathering and modelling in EAs, where there is the potential for interaction between the proposed project and groundwater resources. As a further example, Mr. Buxton's Supplemental Statement also references page 79 of the JRP Report, which provides an adequacy analysis of property values information. On page 79 the Panel notes that "controversy around the Project makes it difficult to establish accurate baseline data on a 'pre-project' property values and to separate project effects from other trends in real estate. The revised EIS provided information on property sales in the region. The Proponents purchases of several properties in the area (at higher than normal market prices, according to several interveners) could be affecting current values." It is not clear to me why this would be information that "does not even exist at the planning stage". Regardless, I don't read the Panel Report as being particularly critical of the baseline information provided, but rather as acknowledging the difficulties associated with it. Further, it does not appear that the Panel's recommendation to reject the Project turned on this point in any event.

²⁴⁵ Estrin Reply, paras. 218, 242-256.

²⁴⁶ WPQ, Joint Review Panel Report, pp. 83-84, **Exhibit R-212**.

²⁴⁷ Estrin Reply, para. 264.

²⁴⁸ Estrin Reply, paras. 257-264.

ways to avoid or mitigate them".²⁴⁹ In my view, there is nothing unusual or unfair about requiring the proponent of a project to introduce sufficient information about the effects of that project so as to allow a reviewing body to make a decision or recommendation. Indeed, I maintain my view, based on my experience as proponents' counsel, that the proponent bears a practical burden or onus of demonstrating its project is not likely to result in significant adverse environmental effects.²⁵⁰

162. Subsection 34(a) of *CEAA* does not state otherwise. That section specifically provides that a review panel shall, "in accordance with its terms of reference", ensure that the information required for an assessment is obtained. The Whites Point JRP's Terms of Reference expressly instructed it to "... require the Proponent to prepare the [EIS] in accordance with the guidelines issued by the Panel" and further "[s]hould the Panel identify deficiencies after reviewing the [EIS] ... the Panel may require additional information from the Proponent"²⁵¹ [emphasis supplied].

163. In my view, these Terms of Reference corroborate my perspective on the existence of a "practical" (as opposed a "legal") onus or burden of proof. Further, and contrary to Mr. Estrin's assertion,²⁵² subsection 34(a) of *CEAA* by virtue of its express incorporation of a panel's Terms of Reference, allowed the Panel to delegate information gathering obligations to Bilcon. Bilcon thus was assigned the burden and bore the onus of preparing an EIS which, as a practical matter, had the objective of satisfying the Panel that its proposed project would not give rise to significant, adverse effects.

164. Even though the obligation was Bilcon's, contrary to what Mr. Estrin suggests the Panel did not sit as a passive observer or fail to take an active role.²⁵³ Although Mr. Estrin is critical of the Panel for doing so, the Panel asked Bilcon numerous rounds of information requests to elicit further information and clarification where it believed that the EIS was deficient.

²⁴⁹ Estrin Reply, para. 233.

²⁵⁰ Smith First Report, paras. 327-339.

²⁵¹ Final Whites Point JRP Agreement, November 3, 2004, p. 8, **Exhibit R-27**.

²⁵² Estrin Reply, para. 264.

²⁵³ Estrin Reply, paras. 268-270.

165. As detailed in my First Report, Bilcon did not always provide the information requested.²⁵⁴ Given the opportunities that were afforded to Bilcon to provide information that the Panel determined was necessary prior to the hearing through this information request process, in my view, it was not unreasonable for the Panel to have been critical of Bilcon, or to have expressed some frustration, when after repeated requests, such information was still lacking. An experienced practitioner would be concerned about situations in which the Panel considered the proponent to be unresponsive, and would want to ensure that the situation was remedied without delay.

166. In another instance, the Panel itself reasonably retained an expert to explain the implications of NAFTA. Although the EIS Guidelines required Bilcon to "[d]escribe the implications of international agreements (e.g., NAFTA, Kyoto protocol), ... that may influence the Project or its environmental effects",²⁵⁵ information gathering regarding the implications of NAFTA was not necessarily something that was uniquely within the knowledge or control of Bilcon.

167. Further, the Panel's information gathering did not end prior to the commencement of the hearing.²⁵⁶ Quite correctly in my opinion, the Panel did not treat the public hearing process as simply a rubber stamp of the information provided in the EIS, and in the information responses. Instead, the hearing process served as an opportunity for the Panel as well as the public to further probe the information presented in the EIS and to present additional information. As an EA practitioner, I certainly view this approach as appropriate, and in fact desirable. What I find unusual is that Bilcon was unable or unwilling to adequately respond to the need for further information in a way that satisfied the Panel. Where additional information provided by the public or Government officials at a hearing casts doubt on the information provided by the Proponent, in my view, a prudent Proponent ought to address that information and file further information, as necessary, to clarify any confusion or rebut any evidence with which it disagreed. To do otherwise runs the risk that

²⁵⁴ Smith First Report, paras. 306-311.

²⁵⁵ Final EIS Guidelines, p. 16, **Exhibit R-210**.

²⁵⁶ Estrin Reply, para. 263.

the Panel may prefer the evidence of the other parties over that of the Proponent and put Project approval at risk.

168. In the end, as is clear from its Report, the Panel appeared satisfied that it had sufficient information to start the hearing. Ultimately it was clearly dissatisfied with the quality of information that Bilcon provided, but that determination could only be made after the hearing concluded. It explained:

The Panel concludes that while the environmental impact statement provided considerable data, in many ways the information provided by the Proponent was inadequate for the requirements of an environmental assessment. The Proponent declined to provide some of the information requested by the Panel, forcing the Panel to obtain required information from government officials, interveners and holders of traditional knowledge, during public hearings. The Panel believes that while it acquired adequate information to assess the likely environmental effects of the Project, a more adequate EIS document and responses to information requests would have facilitated the review process.²⁵⁷

169. Again, I see no evidence that the Panel was looking for Bilcon to provide it with complete certainty. Rather, consistent with the precautionary principle, it appears that the Panel was simply looking for sufficient information to allow it to be confident that the proponent had adequately accounted for uncertainty and proposed appropriate measures in light of it. In the Whites Point EA, the JRP was not provided sufficient information to be confident. Contrary to what Mr. Estrin seems to maintain, the fact that other Panels in other EAs were given sufficient information to be confident is irrelevant here. In particular, the fact that the Voisey's Bay and Sable Gas²⁵⁸ panels were confident enough to recommend that their respective projects proceed with conditions is not, in my view, illustrative or

²⁵⁷ WPQ, Joint Review Panel Report, p. 84, **Exhibit R-212**.

²⁵⁸ While not directly relevant, I do wish to briefly comment on the conclusions Mr. Estrin draws from the Sable Gas JRP process that the panel in that case was prepared to accept "uncertainty" regarding the 208 kilometer offshore pipeline, in that specific final design, parameters, codes and specifications, as well as the final route had not been selected. In my view, the Sable Panel's approach to the pipeline final design and routing must be understood in light of the specific statutory regime engaged. Under the *National Energy Board Act* ("*NEB Act*"), pipeline route selection process is typically completed in two stages. In the first stage, which is when an EA under the *CEAA* must be completed, a proponent for a pipeline need only show the "general location" of the pipeline (*NEB Act*, ss. 32(1)). The *NEB Act* then requires the proponent, after the EA is completed, to select and apply for approval for the final, exact route of the pipeline. Accordingly, the Panel's recommendations in Sable Gas to deal with the "uncertainty" referenced by Mr. Estrin are in fact a product of the unique statutory regime applicable to pipelines in Canada. Estrin Reply, paras. 225-230.

dispositive of whether the Panel considering the Whites Point Project correctly applied the precautionary principle or required too great a level of certainty from Bilcon.

3. The JRP Properly Applied the Concept of Cumulative Effects

170. Both Mr. Estrin²⁵⁹ and Mr. Rankin²⁶⁰ maintain that the Panel misapplied the concept of cumulative effects. Again, the Panel's conclusions regarding cumulative effects were not the basis upon which the Panel recommended rejection of the Project, and therefore, the relevance of Mr. Estrin's and Mr. Rankin's comments is questionable. Nonetheless, I briefly address the points raised by Mr. Estrin and Mr. Rankin and explain why I disagree with their assertions.

171. Specifically, Mr. Estrin argues that the Panel misapplied the concept of cumulative effects because it considered hypothetical projects, such as the hypothetical future expansion of the Whites Point Quarry and Marine Terminal and induced nearby quarrying activities.²⁶¹ First, it bears noting that the Panel concluded that the establishment of an expanded or additional quarry or quarries was not hypothetical but rather "reasonably foreseeable" due to a number of factors, including the Canadian regulatory climate and the abundance of good quality rock in the area.²⁶²

172. Regardless, even if one considered that the developments were "hypothetical", the Panel did not err in considering them. In making his arguments Mr. Estrin ignores the CEA Agency's March 1999 *Operational Policy Statement: Addressing Cumulative Environmental Effects under the Canadian Environmental Assessment Act ("1999 Policy Statement")*,²⁶³ which clearly permits the consideration of hypothetical projects. As I explained in my First Report, the *1999 Policy Statement* provides: "The Act does not require consideration of hypothetical projects, but RAs may choose to do so at their discretion."²⁶⁴ The *1999 Policy Statement* adds the caveat that "Information concerning the cumulative effects of the project

²⁵⁹ Estrin Reply, paras. 272-281.

²⁶⁰ Rankin Report, paras. 151-154.

²⁶¹ Estrin Reply, para. 274.

²⁶² WPQ, Joint Review Panel Report, p. 83, **Exhibit R-212**.

²⁶³ *1999 Policy Statement*, **Exhibit R-482**.

²⁶⁴ Smith First Report, para. 375.

under assessment combined with hypothetical projects ... should not be the determining factor in the environmental assessment decision under the Act."²⁶⁵

173. While the Panel was critical of Bilcon for failing to address what it considered reasonably foreseeable induced developments, even if one considers that these are "hypothetical" projects, the Panel did not consider this as the "determining factor" in its recommendation and therefore, acted consistently with the *1999 Policy Statement*.²⁶⁶

Mr. Estrin provides no explanation or rationale for dismissing the authority given to the Panel to consider hypothetical projects by the *1999 Policy Statement* and nor does he challenge its relevance.

174. For his part, Mr. Rankin fails to even acknowledge the existence of the *1999 Policy Statement* in his Report. Mr. Rankin relies on the 1994 *Reference Guide on Cumulative Effects* in discussing the Panel's assessment of cumulative effects and states that the Panel "acted manifestly contrary to the *Reference Guide on Cumulative Effects*".²⁶⁷ As noted in my First Report, the *1999 Policy Statement* "updates the Agency's position on the assessment of cumulative environmental effects as described in the 1994 Reference Guide".²⁶⁸ Mr. Rankin, therefore, errs by relying exclusively on the out-of-date 1994 *Reference Guide on Cumulative Effects*.

175. Mr. Estrin also argues that the Panel erred in considering hypothetical projects because it only required Bilcon in the EIS Guidelines to consider projects where there was reasonable certainty that they would occur. Specifically, he criticizes my reliance on the *1999 Policy Guide* and accuses me of ignoring the portion of the EIS Guidelines that states:

A reasonable degree of certainty should exist that proposed projects and activities will actually proceed for them to be included. Projects that are conceptual in nature or limited as to available information may be insufficiently developed to contribute to this assessment in a meaningful manner. In either case, provide a rationale for the inclusion or exclusion.²⁶⁹

²⁶⁵ Smith First Report, para. 375.

²⁶⁶ *1999 Policy Statement*, at pp 1-2, **Exhibit R-482**.

²⁶⁷ Rankin Report, para. 154.

²⁶⁸ Smith First Report, para. 374, citing the *1999 Operational Policy Statement*, at pp 1-2, **Exhibit R-482**.

²⁶⁹ Estrin Reply, paras. 276-277.

176. Contrary to what Mr. Estrin says, I did not ignore this passage in my First Report. As I explained in my First Report, in addition to the above requirement, the EIS Guidelines also specifically required the Proponent to "[e]valuate the likelihood of development of other quarry or aggregate operations, by the Proponent or others, that may appear feasible because of the proximity of the Project's infrastructure."²⁷⁰ A reasonable interpretation of the EIS Guidelines that gives effect to both these provisions is that the Proponent was required to include in the cumulative effects assessment both other feasible quarry or aggregate operations as well as projects with a reasonable degree of certainty of proceeding. Certainly, based on my experience as an EA practitioner, this is how I would have advised my clients to proceed.

177. In my first Report, I provided several examples of other Panels that also considered hypothetical projects in their cumulative effects analyses, in particular, the Lower Churchill Hydroelectric Generation Joint Review Panel ("Lower Churchill") and the Mackenzie Gas Joint Review Panel.²⁷¹

178. Mr. Estrin states that my discussion of these panels was "misleading".²⁷² Regarding the Lower Churchill project, Mr. Estrin specifically suggests that the Panel only commented on the proponent's failure to consider "past projects", not hypothetical future projects.²⁷³ I do not agree. The Panel in that EA commented that the proponent (Nalcor) did not address the potential for cumulative effects resulting from induced development.²⁷⁴ It further noted that other participants expressed concerns regarding the exclusion from Nalcor's cumulative effects assessment of other induced development, including the exclusion of future projects.²⁷⁵ It is clear that when one reads the Lower Churchill Panel's conclusions on cumulative effects with this context in mind, the Panel was concerned about the lack of consideration of future development in the proponent's cumulative effects assessment:

²⁷⁰ Smith First Report, para. 376, quoting EIS Guidelines, p. 51, **Exhibit R-210**.

²⁷¹ Smith First Report, paras. 380-387.

²⁷² Estrin Reply, para. 278.

²⁷³ Estrin Reply, para. 280.

²⁷⁴ Lower Churchill JRP Report, p. 266, **Exhibit R-414**.

²⁷⁵ Lower Churchill JRP Report, pp. 266-267 **Exhibit R-414**.

16.3 PANEL CONCLUSIONS AND RECOMMENDATIONS

...

It is the view of the Panel that the cumulative effects assessment process for this Project is an example of the poor track record of project-based cumulative effects assessment. The Panel also recognizes that there are some inherent limitations to a project-based approach to cumulative effects assessment.

...

RECOMMENDATION 16.1 Regionally integrated cumulative effects assessment The Panel recommends that, if the Project is approved, the provincial Department of Environment and Conservation, in collaboration with the provincial Department of Labrador and Aboriginal Affairs and other relevant departments, identify regional mechanisms to assess and mitigate the cumulative effects of current and future development in Labrador.²⁷⁶ [emphasis supplied]

179. Mr. Estrin likewise takes issue with the example of the Mackenzie Valley Gas Project's EA as an EA that considered hypothetical or induced projects, on the basis that it was already designed with potential for expansion to 1.8 Bcf/d²⁷⁷ and therefore, "does not provide any insight as to the application of cumulative effects to a discrete, stand-alone project like the WPQ".²⁷⁸ However, Mr. Estrin ignores the fact that the Mackenzie Valley Gas Project Panel's cumulative effects assessment included two different future scenarios: the "Expansion Capacity Scenario", which included the project as expanded to a capacity of 1.8 Bcf/d as well as associated infrastructure and development;²⁷⁹ and an "Other Future Projects" scenario.²⁸⁰ The latter clearly represents induced effects.

180. The "Other Future Scenarios" were described in the Mackenzie Valley Gas Projects JRP Report as follows:

The Panel also considered the Project in combination with other additional hydrocarbon exploration, development, production and transportation undertakings, and other activities in the region (the Other Future Scenarios). In this case, the Panel considered the comments heard during its review process on hypothetical future scenarios and the cumulative impacts that

²⁷⁶ Lower Churchill JRP Report, pp. 267-268 **Exhibit R-414**.

²⁷⁷ The abbreviation Bcf/d means billion cubic feet per day, and is a measure of pipeline capacity.

²⁷⁸ Estrin Reply, para. 281.

²⁷⁹ Mackenzie Gas Project JRP Report, December 2009, Volume 1, chapter 3, p. 68-69, **Exhibit R-555**.

²⁸⁰ Mackenzie Gas Project JRP Report, December 2009, Volume 1, chapter 5, p. 98, **Exhibit R-555**.

might occur in combination with the Project and their contribution to sustainability.²⁸¹ [emphasis supplied]

181. Therefore, the consideration of these "Other Future Scenarios" was clearly independent of and in addition to the Expansion Capacity Scenario of the 1.8 Bcf/d and associated facilities. "Other Future Scenarios", for example, included other exploration, production, gathering and processing development that could be induced by the existence of the new pipeline in areas like the central Mackenzie Valley, which is hundreds of kilometres distant from the gas fields near the Arctic Ocean that were reviewed and approved as part of the actual Project under review.

182. The "Other Future Scenarios" assessed by the Mackenzie Valley Gas Projects Panel were not directly tied to the pipeline expansion *per se* and, therefore, are a clear example of a consideration of hypothetical or induced activities and development that were independent of the Mackenzie Gas Project expansion.

183. Accordingly, I see no reason to alter the position stated in my First Report that the cumulative effects approach taken by the Whites Point Project JRP was consistent with the approach taken by other joint review panels and in accord with the policies and guidance documents extant at the time of the assessment. In light of the foregoing, Mr. Estrin's and Mr. Rankin's arguments regarding cumulative effects, at best, represent inaccurate and potentially misleading discussion of the issue.

4. The JRP Properly Considered the Issue of Mitigation

184. In his Reply Expert Report, Mr. Estrin reiterates his view that the JRP failed to consider Bilcon's proposed mitigation measures and thus behaved improperly.²⁸² Mr. Rankin echoes that view, asserting the JRP "... did not consider mitigation measures at all".²⁸³ He alleges jurisdictional error, on the basis of an abuse of discretion due to a failure to take into

²⁸¹ Mackenzie Gas Project JRP Report, December 2009, Volume 1, chapter 3, p. 69, **Exhibit R-555**; *See also* pp. 63-67, under "3.4 Other Future Scenarios", where the scope of these additional developments and activities clearly expand beyond the scope of the contemplated 1.8 Bcf/d expansion of the Mackenzie Gas Pipeline.

²⁸² Estrin Reply, paras. 282-297.

²⁸³ Rankin Report, paras. 136-137 and 144.

account relevant considerations and the failure "to follow the parameters set out in the legislation".²⁸⁴

185. I am unable to agree with Messrs. Estrin and Rankin that the JRP failed to consider Bilcon's proposed mitigation. The JRP Report flatly contradicts their contentions. As I noted in my First Report, the Panel stated:

Where determining the nature and significance of environmental effects, the Panel analyzed and evaluated the information provided, along with the monitoring and mitigation proposed, in order to draw conclusions about the adequacy of the proposed measures and predicted effects on valued environmental components.²⁸⁵ [emphasis supplied]

186. It is clear, therefore, that the Panel's conclusions respecting the likelihood of significant adverse effects already incorporated their assessment of mitigation and monitoring proposed by the Proponent, as well as other theoretical "mitigation and monitoring" beyond that considered by Bilcon itself.²⁸⁶ Neither Mr. Estrin nor Mr. Rankin are able to cite any evidence to refute the JRP's own description of its approach to effects assessment under both the federal and provincial legislation.

187. If what Messrs. Estrin and Rankin mean to take issue with is the Panel's purported lack of consideration of further possible mitigation measures, I would point out that this is no fault of the JRP. In particular, the Panel expressly recognized the difficulty of assessing the likelihood of significant adverse effects arising, even after taking into account the Proponent's proposed mitigation and monitoring, given the problems created by the lack of clarity in the Project Description; the inadequacy of the Proponent's EIS due to the

²⁸⁴ Rankin Report, para. 137.

²⁸⁵ Smith First Report, para. 347; WPQ, Joint Review Panel Report, p. 20, **Exhibit R-212**.

²⁸⁶ For example, the Panel stated: "For the most part, the items presented in Table 3.2 have the potential for some form of future mitigation. ... The Panel believes, however, that in some cases the costs associated with mitigation could become prohibitively expensive (thereby undermining the viability of the Project) or engender other environmental effects (requiring additional assessment that may lead to conclusions that the Project would have adverse effects). For example the Panel notes that construction of an artificial breakwater to ensure ship safety on a risky coastline could reduce the risk of docking accidents but would involve significant costs; the presence of such a structure could seriously alter the local marine ecosystem, creating the potential for significant adverse environmental effects." [emphasis supplied] – WPQ, Joint Review Panel Report, p. 96 **Exhibit R-212**; See also p. 102 for the Panel's discussion of additional necessary mitigation which it felt would challenge the Project's economic feasibility. The latter excerpt also rebuts Mr. Estrin's assertion that the JRP "... did not identify potential mitigation measures and then reject each one for being unfeasible or ineffective" – Estrin Reply, para. 287; Mr. Rankin notes Bilcon never proposed a breakwater (Rankin Report, para. 19 c)). Accordingly, the Panel's identification of one as potentially necessary were the project to proceed was clearly an additional mitigation measure.

"ambiguity, a lack of transparency, incomplete or incorrect information, and a limited consideration of community sustainability";²⁸⁷ and the scant detail provided respecting potential effects arising from accidents and malfunctions.²⁸⁸ In these circumstances, as the Panel seems to have recognized, there was little point in speculating about detailed mitigation given the uncertainties about Project effects caused by the inadequacies of the Proponent's EIS.

188. In my opinion, the Panel met any requirements under section 16 of *CEAA* and Article 6.3 of its Terms of Reference. In particular, it considered whether there were "measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project".²⁸⁹ Having considered those matters, the Panel concluded, for the reasons given, that no additional mitigation or monitoring measures would be sufficient to permit the Project to proceed. While Bilcon and Messrs Estrin and Rankin might disagree with that conclusion, in my view, the Panel acted lawfully and within its mandate in so stating.

189. In this regard, I disagree with Mr. Estrin's suggestion that the EAs of the Kemess, Prosperity Mine and Lower Churchill projects reflect a requirement that even when a Panel finds a likelihood of significant adverse environmental effects, it nonetheless must outline potential mitigation measures in the event that governments decide the project is justified in the circumstances.²⁹⁰ In suggesting that such a standard approach exists, Mr. Estrin simply fails to take into account the different legislation and the different Terms of Reference that govern different panels and different project reviews.

190. For example, unlike the Whites Point JRP, the Prosperity Mine JRP did not have the mandate to recommend the approval or rejection of the Project that was conferred on the Whites Point JRP.²⁹¹ In fact, its terms of reference specifically directed it to "ensure that information with respect to the justifiability of any significant adverse environmental effects

²⁸⁷ WPQ, Joint Review Panel Report, p. 102, **Exhibit R-212**.

²⁸⁸ WPQ, Joint Review Panel Report, pp. 101-102, **Exhibit R-212**.

²⁸⁹ *CEAA*, section 16(d), **Exhibit R-1**.

²⁹⁰ Estrin Reply, paras. 291-297.

²⁹¹ *Agreement concerning the Establishment of a Joint Review Panel*, dated November 3, 2004, Article 6.3, **Exhibit R-27**.

is obtained".²⁹² Similarly, the Lower Churchill JRP's mandate specifically required that it "... set out the rationale, conclusions and recommendation of the Panel relating to the EA of the Project/Undertaking, including any mitigation measures and follow-up program".²⁹³ The Terms of Reference of the Kemess JRP are almost identical.²⁹⁴

191. The fact that the Whites Point JRP did not offer the same additional commentary, or that it may be the "only panel under CEAA or a joint review process to have recommended the outright rejection of a project, without providing recommendations regarding mitigation should the government decision makers decide to approve it",²⁹⁵ does not mean it acted unlawfully or improperly. Rather, the Whites Point JRP acted in accordance with the regulatory mandate assigned to it by its Terms of Reference.

192. Finally, I am unable to agree with Mr. Estrin that the JRP could, regardless of what it concluded on mitigation measures, tie the hands of the governments who were to decide whether or not to approve the project.²⁹⁶

193. First, the governments are not "tied" in any way to the Panel's recommendations. The governments are free to override the Panel's recommendations and, in the case of the federal government, even have the authority to approve a project which is likely to give rise to significant, adverse effects, as long as it is satisfied that the project is justified in the circumstances.

194. Second, even if a Panel does not recommend new mitigation and monitoring measures in its report, a government nevertheless could rely upon the measures identified by the proponent in its EIS. In its EIS, every proponent will propose many mitigation and monitoring measures that it considers technically and economically feasible to attenuate any significant, adverse effects of its Project. Thus, the fact that the Panel did not recommend any "additional" mitigation and monitoring measures meant that the governments' decision to approve or reject the Whites Point Project was based upon whether they believed Bilcon's

²⁹² Terms of Reference, Panel Review of the Proposed Prosperity Gold-Copper Mine Project, January 16, 2009, p. 1 "Mandate", **Exhibit R-556**.

²⁹³ Lower Churchill Hydroelectric Generation Project, Terms of Reference, January 8, 2009, s. 6.3, **Exhibit R-557**.

²⁹⁴ Kemess North Mines JRP Report, Appendix 5, s. 6.4, p. 272 **Exhibit R-558**.

²⁹⁵ Estrin Reply, para. 295.

²⁹⁶ Estrin Reply, para. 297.

own proposed mitigation and monitoring measures would adequately protect the human and physical environment.²⁹⁷ In that respect, it was Bilcon which tied the hands of the governments, not the JRP.

195. Mr. Estrin attempts to shift the blame for Bilcon's failure to propose such mitigation measures, on the grounds that it could not have proposed mitigation or monitoring measures regarding the likelihood of significant, adverse effects arising in connection with community core values because it did not have any notice such matters were at issue.²⁹⁸ For the reasons outlined in my First Report²⁹⁹ and above, I do not find this excuse justified or convincing.

²⁹⁷ In fact the Panel did consider other potential mitigation and monitoring measures but dismissed them on the basis that Bilcon had not demonstrated economic viability and technical feasibility. WPQ, Joint Review Panel Report, p. 102, **Exhibit R-212**.

²⁹⁸ Estrin Reply, para. 288.

²⁹⁹ Smith First Report, paras. 247-275.

PART III: THE PROVINCIAL AND FEDERAL GOVERNMENT DECISIONS WERE LAWFUL, REASONABLE AND PROPER

196. In my First Report, I concluded that from my perspective as an EA practitioner in Canada, the government responses to the Whites Point JRP Report and their respective decisions were neither improper nor contrary to law. In his Reply, Mr. Estrin continues to disagree and maintains that: (1) an effect on community core values is not an environmental effect under *CEAA* and thus, the federal government should not have refused to issue the requested authorizations on the basis of such an effect;³⁰⁰ and (2) the government responses failed to independently consider the proposal and instead merely "rubber stamp[ed] ... the panel report"³⁰¹—that is, the government responses failed to provide reasons for ultimately rejecting the Whites Point Project. Mr. Rankin disagrees with my conclusion that the provincial rejection of the Whites Point Project rendered the federal response "moot";³⁰² he also claims that Bilcon had a right to be heard by the governments prior to their issuing their responses rejecting the Project.³⁰³

197. I do not agree with Messrs. Estrin's and Rankin's positions.

198. First and foremost, they neglect to address the fact that Nova Scotia's rejection of the Project was unimpeachable.

199. Second, as a practical matter, Nova Scotia's rejection meant the end of the Whites Point Project since it could not proceed without provincial approval.

200. Third, federal decision-makers, in my view, also addressed matters fully within their jurisdiction, considered the relevant facts and acted reasonably in light of them.

201. Fourth, both the federal and provincial responses were reasonable and appropriate. Regarding Messrs. Estrin's and Rankin's complaints about the process followed by the respective governments in responding to the recommendations, with respect, they have invented legal obligations where none exist. The governments were required to "respond" to

³⁰⁰ Estrin Reply, paras. 299, 302-303.

³⁰¹ Estrin Reply, para. 300.

³⁰² Rankin Report, para. 164.

³⁰³ Rankin Report, para. 157-163.

the JRP's recommendations – nothing more – and it was entirely up to them as to how they chose to do so. Further, there is simply no "right to be heard" prior to a government's response to a JRP recommendation and the Claimants have not provided any authority to the contrary.

1. The Nova Scotia Decision to Reject the Whites Point Project on the Basis of Community Core Values is Unimpeachable

202. Once again, Mr. Estrin treats the JRP Report as if it was a federal-only review panel, ignoring the fact that the basic purpose of the review was to satisfy both Nova Scotia's and Canada's regulatory requirements. Mr. Estrin continues to assert errors in the federal actions relating to the review and the JRP Report, citing again the decisions of the Federal Court in *Hamilton-Wentworth* (2001) and *Prairie Acid Rain* (2004) as proof even though those cases were regarding federal-only reviews.³⁰⁴

203. However, Mr. Estrin still does not contest that Nova Scotia had the constitutional and statutory authority to reject the project based on its inconsistency with the core values of the community. In his First Report, Mr. Estrin acknowledged that "community core values" were a "pure" socio-economic effect.³⁰⁵ In his Reply, he similarly asserts that the question of "... whether the WPQ would offend the community's core values, are purely local matters falling under the exclusive jurisdiction of the provincial government".³⁰⁶

204. As noted in my First Report, the Nova Scotia Minister of Environment and Labour clearly founded his decision on the proposed project's inconsistency with the core values of the community. Specifically, in rejecting the project, the Nova Scotia Minister found:

... The definition of environmental effect in the *Environment Act* is broad in nature and includes any change that the project may have on the environment, including socio-economic conditions, environmental health, physical and cultural heritage.

I have arrived at my decision following careful consideration of the Panel's Report. I have determined that the proposed Project poses the threat of unacceptable and significant adverse effects to the existing and future

³⁰⁴ Estrin Reply, paras. 303-304, 318.

³⁰⁵ Estrin Report, para. 230.

³⁰⁶ Estrin Reply, para. 306.

environmental, social and cultural conditions influencing the lives of individuals and families in the adjacent communities.

Therefore, in accordance with the authority provided by Section 40 of the *Environment Act*, the proposed Whites Point Quarry and Marine Terminal is not approved.³⁰⁷ [emphasis supplied]

205. For the reasons discussed previously, I believe that Nova Scotia was entirely justified in relying on the JRP's analysis and recommendations respecting community core values.³⁰⁸ While Mr. Estrin may dispute the constitutionality of the federal actions taken in response to the JRP Report, his acceptance of the Province's jurisdiction to reject the Project means that he accepts that the development of the quarry was prohibited at law.

2. The Nova Scotia Decision to Reject the Whites Point Project was Determinative of the Project Being Unable to Proceed

206. Both Mr. Estrin and Mr. Rankin disagree with my Report wherein I observe that the Nova Scotia rejection of the Project "rendered the federal government's rejection moot in any event".³⁰⁹ Elsewhere I had suggested that the federal government's decision "... was something of an academic point".³¹⁰

207. There is nothing contained in either of their Reports that would persuade me to change my conclusion that Nova Scotia's rejection of the Project meant that it could not proceed, whatever the federal government might have decided in its own sphere of legislative authority. Much of their argument is speculative, and indeed, portions of it are simply wrong.

208. For example, Mr. Rankin cites the Prosperity EA in support of his argument that it "is clearly not the case" that "once one level of government has rejected a project that must be the end of the matter".³¹¹ Mr. Rankin notes that in Prosperity, the British Columbia government, after conducting its own EA, found that the project could proceed, while the federal government, after conducting its own EA, found that it could not. He also notes that

³⁰⁷ Letter of M. Parent, Minister of Environment and Labour to P. Buxton, Bilcon, November 20, 2007, **Exhibit R-331**; Smith First Report, para. 426.

³⁰⁸ Smith Rejoinder Report, paras. 109-122.

³⁰⁹ Smith First Report, para. 28; Estrin Reply, paras. 327-352; Rankin Report, para. 164.

³¹⁰ Smith First Report, para. 444.

³¹¹ Rankin Report, para. 164.

"the Proponent has recently resubmitted the project for federal approval based on a redesign".³¹²

209. If Mr. Rankin cites these facts in support of the assertion that despite the Nova Scotia rejection the Whites Point Project could nevertheless proceed, he is quite simply wrong.³¹³ Of course, a Proponent can file a new project reconfigured to cure the problems that were identified in the Report rejecting its initial project. However, this does not allow the old project, or the new project for that matter, to proceed. The old project is still rejected, and the new project must undergo an EA just like any new project.

210. On the other hand, if Mr. Rankin's point is that Bilcon had, and still has, the option to re-design its project to avoid the problems identified by the JRP, then I agree. Bilcon was and would be treated no differently than were the proponents in Prosperity who ultimately did re-design and submit their new project, known as the "New Prosperity Gold-Copper Mine Project", for a fresh EA.³¹⁴

211. Further, Mr. Estrin's assertion that a federal government decision to issue the requested authorizations and reject the Joint Review Panel's recommendations would have caused Nova Scotia to alter its own conclusions³¹⁵ is nothing more than rank speculation. The evidence discloses not the faintest hint of doubt, hesitation or equivocation on the part of Nova Scotia about its decision to reject the Project. As Mr. Daly's second Affidavit makes clear, there was no prospect of Nova Scotia changing its decision regardless of what the federal government might do.³¹⁶ Indeed, the province was unwilling even to delay its own announcement to coincide with the response of the federal government. Nova Scotia demonstrated a clear intention, in that respect, to "go it alone" and its decision amounted to a complete rejection of the Whites Point Project regardless of the federal decision-making process.

³¹² Rankin Report, para. 164.

³¹³ Rankin Report, para. 164.

³¹⁴ CEA Agency, News Release, "New Prosperity Gold-Copper Mine Project to be Assessed by a Federal Review Panel", Ottawa, November 7, 2011, **Exhibit R-559**.

³¹⁵ Estrin Reply, para. 352; Mr. Rankin goes even further arguing remarkably that the federal government owed Bilcon a duty of fairness to make representations to enable the federal Minister to lobby the Nova Scotia Minister to reconsider its own decision. Rankin Report, para. 163.

³¹⁶ Affidavit of Christopher Daly sworn March 4, 2013 ("Second Daly Affidavit"), para. 4.

3. The Federal Government's Decision was Lawful and Constitutionally Proper

212. Mr. Estrin now advances the argument that the federal government's reliance on "community core values" to reject the Project represented an unconstitutional intrusion into a provincial sphere of authority. Apart from the fact the constitutionality of the federal government's response made no difference whatsoever to the ability of the Whites Point Project to proceed due to its rejection by the Nova Scotia government, I also disagree that what the federal government did was unlawful.³¹⁷

213. As noted in my First Report,³¹⁸ a review of the federal Memorandum to Cabinet,³¹⁹ and the federal government's response to the JRP Report,³²⁰ discloses that the federal government carefully reflected upon what matters lay within federal jurisdiction and arrived at the conclusion that "the Project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances".³²¹

214. In my First Report, I also explained why I believe that there were *CEAA* based socio-economic effects.³²² I maintain that view – the socio-economic effects of the Project which arose from the environmental effects the JRP identified were a legitimate basis for federal authorities to base their decisions.³²³ Based on my experience in EAs conducted under the *CEAA*, I remain of the opinion that the federal government's rejection of the Project was reasonable and lawful, and now that Mr. Estrin has raised the issue, I believe the decision was within the federal government's constitutional competence.

215. The *Hamilton-Wentworth* and *Prairie Acid Rain* cases cited by Mr. Estrin in support of his constitutional attack on Canada's actions are inapplicable since both concerned

³¹⁷ Estrin Reply, paras. 301-318.

³¹⁸ Smith First Report, paras. 427-444.

³¹⁹ Memorandum to Cabinet, November 27, 2007, Investor's Schedule of Documents at **Tab C-871**.

³²⁰ *The Government of Canada's Response to the EA Report of the JRP on the Whites Point Quarry and Marine Terminal Project*, December 17, 2007, **Exhibit R-383**.

³²¹ Smith First Report 441; *See also, The Government of Canada's Response to the EA Report of the JRP on the Whites Point Quarry and Marine Terminal Project*, December 17, 2007, para. 8, **Exhibit R-383**.

³²² Smith First Report, paras. 262-291; for example, pile driving and blasting affecting the nearshore fishery or eco-tourism industry.

³²³ Smith First Report, paras. 282-291.

federal-only reviews.³²⁴ Again, the Whites Point JRP was making recommendations that had to satisfy both federal and provincial regulatory requirements. But even then, as I have explained above, in the Whites Point EA, the JRP's recommendation was adequately linked to an environmental effect under the *CEAA* – i.e., the effect of changes to the physical environment caused by the project on socio-economic conditions.³²⁵

4. The Federal and Provincial Governments' Responses to the JRP Report were Reasonable and Appropriate

216. Mr. Estrin takes the position that the federal response was wrongful because it did not offer a fresh, independent analysis of the criteria on which it based its decision to refuse the federal authorizations requested.³²⁶

217. I am unable to agree and see no reason to change my conclusion in my First Report that the brevity of the federal government's response has no relevance as to whether or not the response was appropriate.³²⁷ There is no legal requirement that a response to a panel review report be of a particular length, or that it include a particular amount of detail. Indeed, Mr. Estrin concedes that in other instances where projects were rejected (Prosperity and Kemess) the panel's recommendations were similarly endorsed with only brief written reasons.³²⁸

218. Mr. Estrin points to the government responses to the Mackenzie Gas and Lower Churchill panel reports as evidence for his assertion that the response to the Whites Point Panel Report was somehow deficient.³²⁹ What these responses demonstrate, however, is that the Terms of Reference governing any particular joint panel review can differ significantly depending upon the circumstances. Accordingly, the federal government may well offer additional detail in its response to a panel report if its Terms of Reference render it

³²⁴ Estrin Reply, paras. 303-304, 318.

³²⁵ In *Hamilton-Wentworth* there was no federal trigger; in Whites Point there was a federal trigger. This fully rebuts Mr. Estrin's reliance on *Prairie Acid Rain* as well where he quotes paragraph 243 of that judgment: "it could not have been Parliament's intent to authorize a Responsible Authority to environmentally assess aspects of a project unrelated to those heads of federal jurisdiction called into play by the project in question". Estrin Reply, para. 304.

³²⁶ Estrin Reply, paras. 319 and 326.

³²⁷ Smith First Report, paras. 424-444.

³²⁸ Estrin Reply, para. 325.

³²⁹ Estrin Reply, paras. 321-324.

appropriate or necessary to do so. They do not show that the federal government must do so in every case, as Mr. Estrin seems to imply.

219. With respect to the response to the Mackenzie Gas JRP report referenced by Mr. Estrin, the federal government rejected twenty recommendations from the Panel, reasoning that they were "outside the scope of that JRP's mandate as per the JRP Agreement and Terms of Reference."³³⁰ In contrast, the federal government did not require such a lengthy response to the Whites Point JRP Report because no issue arose as to whether that Panel exceeded its Terms of Reference in making its recommendation (as it was requested) concerning whether the Whites Point Project should be approved.³³¹

220. Mr. Estrin also cites the federal government's response to the Lower Churchill JRP report, pointing out that the panel in that EA determined there was a likelihood of significant adverse environmental effects and made a number of recommendations, some of which the respective governments accepted and rejected others. In some respects those recommendations identified further work to be done.³³² In contrast, no such gaps were identified in the Whites Point JRP Report, nor did either Nova Scotia or the federal government require any further information to conclude that the impacts were not justifiable.

221. Finally Mr. Rankin contends that the decisions of the federal government and Nova Scotia were wrongful because both governments refused to hear Bilcon's lobbying efforts

³³⁰ Estrin Reply, para. 322.

³³¹ In this regard, the Tribunal should be aware that the Mackenzie Valley JRP process, in which I appeared as counsel, was a unique, multi-jurisdictional federal-only process. By law, under the Mackenzie Valley Resource Management Act ("MVRMA") and the Western Arctic (Inuvialuit) Claims Settlement Act, and by its Terms of References several unique procedural steps were involved over and above those typically involved in a joint federal/provincial review panel process. One such unique feature was the "consult to modify" approach which required the governmental authorities to actually consult with the JRP before modifying any of its recommendations (at page 8). As the Governments' Response reflects: "The Response represents a unique approach as it is a blend of the MVRMA and the CEAA requirements. In previous less complex environmental assessments solely under the MVRMA, Governments have modified and reworded panel recommendations so they could be accepted". (page 4) "As part of the consult to modify process, Governments provided the Panel with new information that had been acquired since the hearings that had been considered in the preparation of the Interim Response, as required under the MVRMA." (page 8), Governments of Canada & of the Northwest Territories Final Response to the Joint Review Panel Report for the Proposed Mackenzie Gas Project, November 2010, Investors Schedule of Documents at **Tab C-777**, pp. 4 and 8.

³³² Estrin Reply, paras. 323-324.

regarding the Panel's recommendations, in violation of what Mr. Rankin calls their right to be heard by the Ministers prior to their making these decisions.³³³ I disagree.

222. First, having served as counsel in numerous panel review processes, I can confirm that such a right does not exist under the *CEAA*, the *NSEA* or any other relevant legislation and Mr. Rankin cites to no statutory authority or actual example to the contrary.

223. Second, Mr. Rankin also fails to mention the fact that Bilcon did make written submissions to the government prior to the responses being released.³³⁴ In fact, Bilcon wrote to the Nova Scotia Minister of the Environment and Labour, Mark Parent, on no fewer than three occasions after the release of the Whites Point JRP Report but prior to Minister Parent's decision on the matter. Specifically, Bilcon wrote to Minister Parent on October 29th, November 8th and November 16th of 2007 and outlined in some detail, particularly in the November 16th letter, Bilcon's perspective on the JRP Report.³³⁵ According to the Nova Scotia Minister of Environment and Labour himself, those written submissions were reviewed "very, very carefully".³³⁶ In addition, prior to when the federal Minister of the Environment, John Baird, rendered his decision, Bilcon wrote to him on November 21, 2007 and included all prior correspondence sent to the provincial Minister again effectively outlining Bilcon's perspective.³³⁷

224. Finally, Mr. Rankin claims that the failure to allow Bilcon "to be heard" by the federal Minister denied Bilcon "the opportunity to attempt to persuade the Federal Minister that his provincial counterpart ought to reconsider his decision".³³⁸ That argument is as remarkable as it is untenable. In essence, Mr. Rankin asserts Bilcon was treated unfairly because it should have had the right to brief the federal Minister so that he could persuade the provincial Minister to reconsider Nova Scotia's decision. That is, Mr. Rankin asserts the

³³³ Rankin Report, paras. 157-163.

³³⁴ Bilcon letter to The Honourable John Baird, November 21, 2007; Bilcon Letter to The Honourable Mark Parent, November 8, 2007; Bilcon Letter to The Honourable Mark Parent, November 16, 2007; Fax Cover Sheet and Transmission Verification Report November 28, 2007; Investors' Schedule of Documents at **Tab C-204**.

³³⁵ Bilcon Letter to The Honourable Mark Parent, November 16, 2007, Investors' Schedule of Documents at **Tab C-002**.

³³⁶ Transcript of telephone conversation between Paul Buxton and Mark Parent, November 20, 2007, **Exhibit R-560**.

³³⁷ Bilcon letter to The Honourable John Baird, November 21, 2007; Bilcon Letter to The Honourable Mark Parent, November 8, 2007; Bilcon Letter to The Honourable Mark Parent, November 16, 2007; Fax Cover Sheet and Transmission Verification Report November 28, 2007; Investors' Schedule of Documents at **Tab C-204**.

³³⁸ Rankin Report, para. 163.

federal Minister had a duty to intrude upon the exercise of a provincial Minister's decision-making authority. Apart from the truly extraordinary nature of Mr. Rankin's proposition, he appears to contradict what Mr. Estrin warns against above.

225. Moreover, Mr. Rankin insists some kind of "duty of fairness" existed whereby the federal Minister should have provided Bilcon an opportunity to brief him on how best to conduct this (inappropriate) extra-jurisdictional intrigue.³³⁹ In my experience, I have never heard anyone ever suggest that a "duty of fairness" to a proponent requires a provincial or federal decision-maker to lobby the other to change its position; that is, expressly requiring it to act beyond the scope of its own constitutional authority.

³³⁹ Rankin Report, para. 163.

PART IV: BILCON'S FAILURE TO COMPLAIN ABOUT ISSUES RAISED IN THE ESTRIN AND RANKIN REPORTS

226. In my First Report, I explained that when considering the fairness afforded to Bilcon in terms of both the process that governed the EA of the Whites Point Project and the reasonableness of the results that stemmed from it, it is important to remember the avenues and corrective mechanisms available to a proponent to address any concerns which might arise.

227. Mr. Estrin apparently disagrees and asserts in response that "EA is ... not a legalistic process".³⁴⁰ In this light, he argues that "a proponent should not be faulted for not obtaining legal advice in that process".³⁴¹ Nor should it be faulted, he asserts, for not resorting to judicial remedies, as these could result in unwanted delays³⁴² for the proponent who is "more concerned about the final result of the process ... than the process itself".³⁴³

228. Nothing Mr. Estrin has said causes me to alter my opinions expressed in my First Report. His general statement that EAs are not a legalistic process is difficult to reconcile with the facts. I agree with Mr. Estrin that the bulk of EAs (especially screenings) are not legalistic. That is not the case, however, for major projects or projects which are a matter of controversy within the affected communities. These types of projects are decidedly more legalistic.

229. As the Tribunal has seen, there are many court cases and precedents which demonstrate that the EA process does not necessarily end with the issuance of the JRP Report or the government response to it. Indeed, Mr. Estrin himself cites numerous appeals and judicial reviews which have collectively helped to define the procedural and substantive parameters of appropriate EA in Canada. The Canadian judicial system remains an important part of the EA process.

230. In this context it strains credibility to suggest that a proponent, especially one proposing a major and controversial project, "should not be faulted for not obtaining legal

³⁴⁰ Estrin Reply, paras. 356-358.

³⁴¹ Estrin Reply, paras. 356-358.

³⁴² Estrin Reply, para. 361.

³⁴³ Estrin Reply, para. 362.

advice in that process".³⁴⁴ I actually find it remarkable that Bilcon did not retain consultants at the outset, as DFO "strongly advised",³⁴⁵ or experienced counsel, especially for a controversial project like the Whites Point Project.

231. I was very active in project development in the Canadian Maritimes in the same timeframe as the Whites Point EA. There certainly were experienced counsel and consultants who could have assisted with the approach to the EA process; public consultation; commenting on the draft terms of reference and draft EIS Guidelines, the planning and the preparation of the EIS; the evaluation of appeal options or other potentially corrective measures as might appear appropriate; and the efficient conduct of the hearing. With respect to the latter point, for example, experienced counsel would ask the Panel to canvass all hearing participants prior to requesting all its experts to travel to and attend at the hearing. It is not unusual that, for some experts, neither the Panel nor intervenors have any questions as appeared to be the case for the nine experts Mr. Buxton discusses, who were never asked any questions at the hearing.³⁴⁶

232. Experienced counsel and consultants also would have been able to assist Bilcon in avoiding the deficiencies in its approach which became apparent after the filing of its EIS. In this light, it did not surprise me to learn that, during the Whites Point EA, Bilcon and Mr. Buxton appear to have been operating under a serious misapprehension as to the nature of the process. In particular, Mr. Buxton seems to have been under the (false) impression that the Whites Point Project was immune from rejection. In a statement made to the CLC on November 24, 2004, three weeks after the JRP Agreement and Terms of Reference were released, one of which expressly directed the JRP to recommend approval of the Project with conditions or its rejection, Mr. Buxton said exactly the opposite:

³⁴⁴ Estrin Reply, para. 357.

³⁴⁵ As early as April 14, 2003, due to the nature of anticipated EA, DFO "strongly advised" Mr. Buxton "engage a consultant with extensive experience in conducting environmental assessments under CEAA as early in the process as possible" [emphasis supplied] (Counter Memorial, para. 178; Letter from Phil Zamora to Paul Buxton, dated April 14, 2003, **Exhibit R-54**). Despite the fact that Mr. Buxton now advises that "... the owners of Bilcon ensured that there were no financial constraints on my ability to engage the best experts in every field" (Buxton Supplemental Statement, para. 10), it appears he did not take DFO's advice until over three years later, in August 2006, when he retained AMEC while struggling with the predictable onslaught of information requests: In retaining AMEC, Bilcon's Josephine Lowry noted, "Paul and I feel a great deal more comfortable with the entire process now that AMEC is on board" (Counter Memorial, para. 185; see also Wittkugel/Lowry email dated August 31, 2006 **Exhibit R-317**).

³⁴⁶ Buxton Supplemental Witness Statement, para. 48. See also, Rankin Report, paras. 102, 104-105.

[Y]ou can refer to the Canadian Environmental Assessment Act and the verbiage that goes with it. ... It essentially says that the Canadian Environmental Assessment Agency is to ensure that projects are carried out in an environmentally safe manner. He further noted it does not say that CEAA will determine whether or not a project will go ahead.

Mr. Buxton noted this project is a legal project and there is nothing in law to prevent this project from going ahead. He noted there are hoops to jump through and satisfy to obtain permits but there is nothing to say that the quarry can't proceed at Whites Cove.³⁴⁷ [emphasis supplied]

233. Mr. Buxton was clearly wrong about Nova Scotia and federal law and about the EA process itself. The JRP could recommend rejection of the Project and the government could deny it or allow it to go ahead. Retaining advice from experienced advisors at the outset could have disabused Mr. Buxton of these and other misconceptions about the Whites Point Project review.

234. Regarding the fact that Bilcon, like all proponents, may have been focused on project approval, in my opinion this only serves to condemn rather than excuse Bilcon's failure to seek counsel or to register its concerns while the process was ongoing.

235. Successful proponents regularly avail themselves of the opportunity to shape their own assessment process. It makes no sense to me to say that proponents principally concerned with securing the project's success should be unwilling to enhance the chances of that success by dealing with the procedural and substantive issues as they arise.³⁴⁸ If the concern is serious enough to potentially affect the successful outcome of the review, in my experience, it needs to be addressed promptly, notwithstanding any potential for delay. Simply put, if the primary goal is to successfully secure project approval then some amount of delay cannot be an obstacle to seeking a remedy to any serious issue which threatens the Project's success.

236. While Bilcon may have found certain things about the EA to be irritating, it obviously did not consider anything to be serious enough to warrant objection at the time, regardless of what Mr. Estrin and Mr. Rankin may now contend years later. Furthermore,

³⁴⁷ Counter Memorial, para. 206; CLC Minutes, November 24, 2004, p. 234, **Exhibit R-299**.

³⁴⁸ Estrin Reply, paras. 361-362

dealing with such concerns as they arise does not always result in undue delay to a project. In fact, direct submissions to the Panel itself often are sufficient to allay procedural concerns without having to resort to the courts. For example, the Prosperity Copper-Gold Joint Panel Review resolved judicial action respecting an allegation of bias against one of the panel members without any significant delay. After the assessment of the allegation and a report by the other two members, the proponent withdrew the court application and the Panel Review continued.³⁴⁹

237. In the end, the Canadian EA process includes corrective mechanisms that are always available to proponents throughout the entire EA process and even after the governments render their decisions. As an EA practitioner, it is puzzling that Bilcon chose not to make use of the corrective mechanisms available to it (and to any other proponent) if it had the issues Messrs. Estrin and Rankin now allege at virtually every step in the Whites Point EA.

238. Moreover, in my experience, a proponent seeking to overturn unfavourable decisions would readily countenance the delay associated with a judicial review rather than having to abandon their Project altogether.

³⁴⁹ Letter dated February 5, 2010 from counsel for Taseko to counsel for the Joint Review Panel, **Exhibit R-564**.

PART V: RECENT AMENDMENTS TO CEAA HAVE NOTHING TO DO WITH THE WHITES POINT EA

239. In paragraphs 363 to 367, Mr. Estrin makes reference to the recent repeal of the *CEAA* and its replacement with a new act, the *Canadian Environmental Assessment Act, 2012* ("*CEAA 2012*").

240. Although it is obvious that the timing of the enactment of the *CEAA 2012* means it could not apply to Bilcon in any way, Mr. Estrin attempts to link the reforms to alleged concerns with the review of Bilcon's Whites Point Project. However, he has no basis in fact to do so. Unsurprisingly, he has not been able to identify any reference to Bilcon or to the Whites Point Project in any of the extensive background materials released by the Government in the course of the enactment of the new legislation. Nor have I seen any reference to Bilcon or to the Whites Point Project in my review of those materials.

241. In my opinion, the new *CEAA 2012* has nothing to do with Bilcon or the Whites Point Project. In the absence of any factual linkage to support his assertion, Mr. Estrin's reference to *CEAA 2012*, at best, is unhelpful.

PART VI: CONCLUDING REMARKS

242. In conclusion, I reiterate the conclusions outlined at paragraphs 466-475 of my First Report, which, in sum, affirmed that in my experience as a practitioner in the area, the Whites Point environmental assessment process was conducted fairly and in accordance with applicable laws.

SIGNED at Calgary, Alberta
March 21, 2013



Lawrence E. Smith, Q.C.

APPENDIX 1

1. As explained briefly below, the ten projects that Mr. Estrin refers to on pages 45-46 of his Reply Report did not have the unique attributes of the Whites Point Project. Unlike the Whites Point Project, several were expansions of existing projects,¹ and many were in either already industrialized or remote locations. Many of them engaged little in the way of public concern or the risk of adverse environmental effects. Moreover, with the exception of Belleoram, Black Point and Orca Sand, none of these projects included the construction of a marine terminal, which was one of the main points of public concern in the Whites Point EA.

Sovereign Resources Quarry Expansion Project (Nova Scotia)

As the name implies, this project was a proposed expansion of an already existing 20-year-old, 19 ha quarry located just north of another quarry (Rocky Mountain Quarry), between the towns of Bedford and Waverley, just outside of Halifax.²

Mulgrave (Marietta) Quarry (Nova Scotia)

This project was also a proposed expansion of an existing 32-year-old, 123 ha quarry. The area to be expanded was simply to be used for storage of mining fines (tailings) and did not involve an increase in production or any drilling, blasting, crushing, or rock extraction. It was to be located just outside of the town of Mulgrave and adjacent to the heavily industrialized Strait of Canso. The project also faced virtually no public opposition.³

Hammerstone Quarry (Alberta)

This limestone quarry project was to be located in a remote area 60 kms north of Fort McMurray, Alberta. The quarry would be integrated with a recently approved, 255 ha quarry (Muskeg Valley Quarry) in a region that is already heavily quarried. In fact, all of the Hammerstone Quarry's associated facilities would be constructed within the existing footprint of the Muskeg Valley Quarry. Moreover, following the invitation for public input,

¹ Note that where a project listed below was an expansion, the ages of the existing quarries have been calculated from the approximate date of commencement of production until the date of the application for expansion.

² See <http://www.gov.ns.ca/nse/ea/sovereignquarry.asp> (**Exhibit C-881**); see also pp. 3-5 of the EA Registration document at http://www.gov.ns.ca/nse/ea/sovereignquarry/Sovereign_Main1.pdf (**Exhibit R-536**).

³ See <http://www.gov.ns.ca/nse/ea/martin.marietta.mulgrave.quarry.asp> (**Exhibit C-882**); see also sections 2.1, 2.2, 4.1, 4.2, and Figure 1 of the EA Registration document at <http://www.gov.ns.ca/nse/ea/martin.marietta.mulgrave.quarry/registration.report.pdf> (**Exhibit R-537**).

Alberta's Natural Resources Conservation Board received only two statements of concern.⁴

Fording River Coal Mine (B.C.)

The proponent proposed to develop a coal mine, near the remote community of Elkford, B.C., which would be an expansion of its existing 41-year-old, approximately 2,521 ha mine.⁵ The proposed mine would be located near other industrial activity such as oil and gas exploration, timber harvesting, and mining activity. The proposed project would primarily use existing infrastructure.⁶

Line Creek Coal Mine Phase 2 (B.C.)

The proponent here proposed two coal mining operating areas that would expand its existing 27-year-old, approximately 1300 ha coal mining operation which is located 22 kms east of Sparwood, in the remote southeast corner of B.C. The new coal mines would use the existing Line Creek infrastructure.⁷

Belleoram Quarry & Marine Terminal (Newfoundland)

As I explained in Appendix 2 of my First Expert Report, the Belleoram project was situated in a sparsely populated location, did not give rise to any public concerns, and engaged no risk of likely significant adverse environmental effects.

Ruby Creek Open-Pit Molybdenum Mine (B.C.)

This proposed mining operation was to be located northeast of the small town of Atlin, B.C., which is only 80 kms south of the B.C. – Yukon border.⁸ Also, the responsible authority determined that the project was not likely to cause any significant adverse environmental effects.⁹

⁴ See <http://www.ceaa.gc.ca/052/details-eng.cfm?pid=25921> (**Exhibit C-884**); <http://www.nrcb.gov.ab.ca/nrp/Decisions.aspx?id=3484> (**Exhibit C-883**), and pp. 1-4 of the NRCB Decision linked to that site (**Exhibit R-538**).

⁵ See <http://www.mining-technology.com/projects/fording/> (**Exhibit R-539**) for the start date of production. See p. 1 of the InfoMine description which lists the mine site footprint as comprising of 2,521 ha of coal lands <http://www.infomine.com/minesite/minesite.asp?site=fordingriver> (**Exhibit R-540**), which would be expanded by 1,200 ha as described in CEAA's project description at <http://www.ceaa.gc.ca/052/details-eng.cfm?pid=67115> (**Exhibit C-885**).

⁶ See <http://www.ceaa.gc.ca/052/details-eng.cfm?pid=67115> (**Exhibit C-885**).

⁷ See CEAA's project description at <http://www.ceaa.gc.ca/052/details-eng.cfm?pid=52126> (**Exhibit C-886**) and pp. 2, 6, 7 and Figures 1 & 2 of the Project Description attached to <http://www2.mpmo-bggp.gc.ca/MPTracker/project-projet-05.aspx?pid=136> (**Exhibit R-541**). The existing mine footprint is derived from comparing the proposed expansion footprint of 1,100 in Exhibit C-886 with the adjacent existing footprint that appears in the Figure 2 map in **Exhibit R-541**.

⁸ See <http://www.ceaa-acee.gc.ca/052/details-eng.cfm?pid=23875> (**Exhibit C-887**).

⁹ See p. 7 of the Ruby Creek Screening Report (**Exhibit R-542**).

Parsons Creek Limestone Quarry (Alberta)

This project was another quarry proposed for the already heavily industrialized area just north of Fort McMurray, Alberta.¹⁰

Black Point Quarry (Nova Scotia)

This proposed project was to be located in the remote, sparsely populated area of Black Point, near Fox Island, Nova Scotia.¹¹ The project was abandoned before a final decision was made as to whether it would be assessed by way of comprehensive study or panel review.

Orca Sand & Gravel Pit (B.C.)

This project is located west of Port McNeil on the sparsely populated north end of Vancouver Island. The project received broad general public and aboriginal support.¹² It was determined that mitigation measures would reduce and minimize potential adverse effects to an acceptable level, and the surrounding area was already well established as a mineral resource site with several small sand and gravel extraction operations active either within or beside the proposed pit area.¹³

¹⁰ See <http://www.ceaa.gc.ca/052/details-eng.cfm?pid=29050> (**Exhibit C-889**).

¹¹ See p. 7 and the Figure 1 map in the PDF Project Description linked to <http://www2.mpmo-bggp.gc.ca/MPTracker/project-projet-05.aspx?pid=204> (**Exhibit C-890**).

¹² See pp. 7 and 18 of the Orca Sand & Gravel Comprehensive Study Report at <http://www.ceaa-acee.gc.ca/050/documents/9320/9320E.pdf> (**Exhibit R-543**).

¹³ See pp. 7 and 14 of the Orca Sand & Gravel Track Report (**Exhibit R-544**).

APPENDIX 2

1. On pages 49 – 50 of his Reply report, Mr. Estrin provides a table that sets out 33 quarry, mining, and sand pit proposals (including Whites Point Quarry) that have been assessed under the *NSEA* since 2000.¹ The point of his table is to illustrate that the Whites Point Quarry and Marine Terminal was the only project to have been subjected to a public hearing, and the only one to have been rejected by Nova Scotia. If, by doing so, Mr. Estrin is implying that there was something improper about the Whites Point EA, then I must disagree. The 32 referenced projects did not share the unique attributes of the Whites Point project. Specifically,

Almost 70% of these projects were expansions or extensions of existing operations;

None of them involved the building of a marine terminal, let alone one designed to accommodate post-Panamax-sided vessels;

None of them were to be located on the Digby Neck or along the Bay of Fundy.

2. The table below lists the 32 projects provided by Mr. Estrin (as well as Whites Point) and, with reference to the factors above, summarizes how each of the 32 projects were different from the Whites Point project.

¹ The information in Mr. Estrin's table comes from Nova Scotia's environmental assessment website which was operational at the time I signed my Rejoinder Report:
<http://www.gov.ns.ca/nse/ea/projects.asp?display=complete>.
The project descriptions for each of the listed EAs are linked to that site.

Nova Scotia EAs for Quarries, Mines, and Sand Pits (2000 – 2012)

| Project Name | Expansion or Extension of An Existing Operation | Included the Construction of a Marine Terminal | Located on the Digby Neck or Bay of Fundy |
|---|---|--|---|
| Torbrook Gravel Pit Expansion | Yes | No | No |
| Northumberland Rock Quarry Extension | Yes | No | No |
| ScoZinc Operations Southwest Expansion | Yes | No | No |
| Hants County Aggregate Quarry Extension Project | Yes | No | No |
| Duncan Gillis Quarry Extension Project | Yes | No | No |
| Hardscratch Quarry Extension Project | Yes | No | No |
| Whycocomagh Quarry Extension Project | Yes | No | No |
| Miller's Creek Gypsum Mine Extension | Yes | No | No ² |
| Donkin Underground Exploration Project | No ³ | No | No |
| Panuke Road Quarry Expansion | Yes | No | No |
| Surface Gold Mine at Moose River Gold Mines | No | No | No |
| Whites Point Quarry | No | Yes | Yes |
| MacLeod's Settlement Pit Development | No | No | No |
| Lovett Road Aggregate Pit Expansion | Yes | No | No |
| Glenholme Gravel Pit Expansion | Yes | No | No |
| Elmsdale Quarry Expansion, Hants County | Yes | No | No |
| Marshall Road Sand Pit Expansion | Yes | No | No |
| Leitches Creek Quarry Expansion | Yes | No | No |
| Rhodena Rock Quarry Expansion | Yes | No | No |

² The Miller's Creek expansion project was to be located near the Avon River which is a tidal flat region of the Bay of Fundy. It therefore would not have engaged the marine mammal and iBoF salmon concerns raised by the Whites Point Project. (See the Figure 2.1 map attached to the Miller's Creek Project Description on the Nova Scotia website listed in footnote 1 above.)

³ As the name of this project implies, this was not a proposed quarry or mine but an exploration project whose object was to provide the proponent with enough geological data to determine the commercial viability of developing a long wall coal mine. (See the Donkin project summary of the Nova Scotia website listed in footnote 1 above.)

| Project Name | Expansion or Extension of An Existing Operation | Included the Construction of a Marine Terminal | Located on the Digby Neck or Bay of Fundy |
|--|--|---|--|
| Surface Coal (Prince) Mine and Reclamation Project | No | No | No |
| Nictaux Pit and Quarry | No | No | No |
| Sovereign Resources Quarry Expansion | Yes | No | No |
| Point Aconi Phase 3 Surface Coal Mine | No | No | No |
| Kempton Road Quarry Expansion Project | Yes | No | No |
| Bond Road Sand Pit Operations | No | No | No |
| East Uniacke Quarry Expansion | Yes | No | No |
| Stellarton Surface Coal Mine Extension | Yes | No | No |
| Cambridge Aggregate Pit Expansion | Yes | No | No |
| Troy Quarry Expansion (2003 Application) | Yes | No | No |
| White Rock Quartz Mine (Sept. 2002) | No | No | No |
| Kennedys Big Brook Red Marble Mine | No | No | No |
| White Rock Quartz, Kaolin & Mica Mine (Feb. 2002) ⁴ | No | No | No |
| Troy Quarry Expansion (2001 Application) ⁵ | Yes | No | No |

⁴ On February 18, 2002, the proponent withdrew their environmental assessment registration. A new proposal was submitted by the proponent on August 14, 2002, and approved on September 6, 2002 (see above).

⁵ On December 21, 2001, the Minister rejected the proposed project. A new environmental assessment registration was submitted on February 10, 2003, and approved on March 7, 2003 (see above).