Law and Business Review of the Americas

Volume 21 | Number 3 Article 5

2015

Bilcon of Delaware v. Canada: NAFTA's Impact on Environmental Assessments

Elise LeGros

BILCON OF DELAWARE V. CANADA: NAFTA'S IMPACT ON ENVIRONMENTAL ASSESSMENTS

*Elise LeGros**

I. INTRODUCTION

THE Permanent Court of Arbitration (Tribunal) ruled on March 17, 2015, that the manner in which Canada conducted an environmental assessment of an application to build a marine quarry in Nova Scotia violated the North American Free Trade Agreement (NAFTA) Articles 1105 (International Law Standards of Treatment) and 1102 (National Treatment).[1] This report focuses on the Tribunal's analysis and ruling concerning Article 1105.

In his dissent, Professor Donald McRae argued that the Tribunal's finding of an Article 1105 breach was "a remarkable step backwards in environmental protection" and would impose a "chill" on environmental review panels.[2] According to Professor McRae, review panels will now sacrifice consideration of local concerns out of fear that a claim will result in NAFTA Chapter Eleven damages.[3] But this does not have to be the case. Rather, following the ruling, review panels may consider factors they deem appropriate for an environmental review, including local considerations, as long as all factors are disclosed to investors prior to the review.[4] If there is complete transparency in a panel's decision-making process, then there should be no harm to environmental protection.[5]

II. THE FACTS

The Clayton Group and Bilcon of Delaware (Bilcon) (collectively, Investors) sought to invest in a quarry and marine terminal (Project).[6]

---

* J.D. Candidate, SMU Dedman School of Law, 2016; B.A. in Global Studies, St. Edward's University, 2010. The author would like to thank her wonderful family for their endless love and support.

1. Bilcon of Del., Inc. v. Gov't of Can., Case No. 2009-04, ¶ 732 (Perm. Ct. Arb. 2015), http://www.pca-cpa.org/Award%20on%20Jurisdiction%20and%20Liability a161.pdf?fil_id=2904.
2. Bilcon of Del., Inc. v. Gov't of Can., Case No. 2009-04, ¶ 51 (Perm. Ct. Arb. 2015) (McRae, dissenting), http://www.pca-cpa.org/Dissenting%20Opinion%20of%20 Professor%20Donald%20McRae956b.pdf?fil_id=2905 [hereinafter *Dissent*].
3. *Id.*
4. *See Bilcon*, Case No. 2009-04, ¶ 740.
5. *See id.* ¶ 357.
6. *Id.* ¶ 5. A quarry is a location from which stone and other minerals are extracted.

From 2002 to 2007, the Project underwent a lengthy environmental assessment by the Canadian government.[7] The Canadian Environmental Assessment Act (CEAA) contains the federal framework on environmental assessments.[8] Assessments must be conducted on projects that present a risk to the environment.[9] The CEAA provides that Canada "may enter into agreements with authorities in other jurisdictions," including other provinces such as Nova Scotia, and establish a joint review panel (JRP) to conduct an environmental assessment of a proposed project.[10] JRPs are not the ultimate decision-makers of whether a project will go through.[11] Instead, a JRP must ensure that there is enough information for the ultimate decision-makers—in this case, the Canadian Minister of the Environment and Nova Scotian Minister of Environment and Labour—to make an informed decision.[12]

Both federal and local laws contribute to the guidelines and framework of a JRP's assessment.[13] In the case at hand, the agreement was between Federal Canada and the provincial government of Nova Scotia (Canada-Nova Scotia Agreement), where the Project would take place.[14] Under the CEAA, a JRP must consider "likely significant adverse effects after mitigation."[15] Nova Scotia environmental law additionally requires the panel to assess "any effect on socio-economic conditions, on environmental health, [and] physical and cultural heritage . . . ."[16] Thus, while the two statutes have different mandates, the governments mutually agreed the requirements could be harmonized and fulfilled.[17]

Pursuant to the Canada-Nova Scotia Agreement, the Canadian Environmental Assessment Agency (CEA Agency) would prepare guidelines for the scope of the JRP's review.[18] The JRP would then objectively assess any potentially significant adverse effects the Project may have on the environment, as well as possible mitigation measures.[19] The JRP would also consider public comment and balance public sentiment with the Project's risks and mitigation measures.[20] In this case, the JRP supplemented the CEA Agency's guidelines with their own, which were more expansive in scope and considered, among other things, "social and cultural patterns."[21] That analysis included an assessment of "effects on

7. *Id.*
8. *Id.* ¶ 475.
9. *Id.* ¶ 476.
10. *Id.* ¶ 313.
11. *Id.* ¶ 480.
12. *Id.*
13. *Id.* ¶¶ 483, 485.
14. *Id.*
15. *Id.* ¶ 487.
16. *Id.*
17. *Id.* ¶ 483.
18. *Id.* ¶ 497.
19. *Id.* ¶ 481
20. *Id.*
21. *Id.* ¶ 497.

traditional lifestyles, values[,] and culture."[22]

The JRP completed its assessment and released a report (Report) of its findings. While the Investors knew of the factors the JRP would consider under to the Canada-Nova Scotia Agreement and the JRP's supplemental guidelines, the Report introduced the "community core values" factor for the first time.[23] No panel had ever considered this factor before—here, however, it was the JRP's primary consideration.[24] The Report also did not propose any mitigation measures, as required by the CEAA.[25]

Based on the JRP's recommendations and consideration of community core values, the Nova Scotian and Canadian governments rejected the Project.[26] Following the rejection, the Investors argued that, rather than evaluating their project according to the current legal framework found in the CEAA and Nova Scotian statutes, the Project was evaluated by an unprecedented factor: community core values.[27] The Investors were given neither notice the JRP would consider this novel factor, nor an opportunity to adequately address it before the assessment was completed. For that reason, its introduction violated Article 1105.[28]

III. NAFTA ARTICLE 1105

Article 1105 provides that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."[29] On July 31, 2001, the Free Trade Commission issued Notes of Interpretation on this provision.[30] These included:

> (1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment of another Party. (2) The Concepts of "fair and equitable treatment" and "full protection and security" do not require treatment to or beyond that which is required by the customary international law minimum standard of treatment. (3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).[31]

Whether there has been a denial of "fair and equitable treatment" and "full protection and security" by a host state toward foreign investors depends on what the international minimum standard, which is based on customary international law, requires.[32] In the past, NAFTA tribunals

22. *Id.*
23. *Id.* ¶ 503.
24. *Id.* ¶¶ 505, 601.
25. *Id.* ¶ 504.
26. *Id.* ¶ 5.
27. *Id.* ¶ 23.
28. *Id.* ¶ 601.
29. North American Free Trade Agreement art. 1105(1), Dec. 8, 1993.
30. *Bilcon*, Case No. 2009-04, ¶ 429.
31. *Id.*
32. *Id.* ¶¶ 428–29.

have sought to identify a high "threshold of seriousness" that an alleged breach must reach before constituting a breach of the international minimum standard.[33] *Waste Management, Inc. v. Mexico* articulated the high standard for a violation of Article 1105.[34] In pertinent part, the *Waste Management* Tribunal stated:

> [T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[35]

As the Tribunal in the present case noted, every authority agrees "that the mere breach of domestic law or any kind of unfairness does not violate the international minimum standard."[36] Yet the action need not be "shocking or outrageous," either.[37] The international minimum standard has become increasingly more protective of foreign investors over the years to encourage investment.[38]

That said, the Tribunal elaborated that "[t]he imprudent exercise of discretion or even outright mistakes do not, as a rule, lead to a breach."[39] Rather, there must be "[s]ome special circumstances."[40] For instance, adjustments to "a legal or policy framework that have a retroactive effect, are not proceeded by reasonable notice, are aimed or applied in a discriminatory basis or are contrary to earlier specific assurances by state authorities that the regulatory framework would not be altered to the detriment of the investor" could breach the internal minimum standard[41]

Following this decision, a breach of the international minimum standard may also occur when a host government strays from the confines of its own statutes and promulgates environmental assessment factors when reviewing a foreign investor's project.

IV. APPLICATION OF THE WASTE MANAGEMENT STANDARD AND "COMMUNITY CORE VALUES"

When the JRP released its Report recommending that the Project be

33. *Id.* ¶ 440.
34. Waste Mgmt., Inc. v. Mex., ICSID Case No. ARB(AF)00/3, Award, ¶ 98 (Apr. 30, 2004), 43 I.L.M. 967 (2004).
35. *Id.*
36. *Bilcon*, Case No. 2009-04, ¶ 436.
37. *Id.* ¶ 444.
38. *Id.* ¶ 438.
39. *Id.* ¶ 437.
40. *Id.* ¶ 572.
41. *Id.*

rejected, it did not mention any statutory or regulatory guidelines.[42] The dominant focus was instead "community core values" and how the Project would adversely affect those values.[43] This was after the Investors spent over three years compiling environmental assessment information, including forty-eight expert reports and thirty-five commissioned studies, addressing environmental concerns such as impacts on biological organisms.[44]

Applying the *Waste Management* standard, the Tribunal held that Canada violated Article 1105.[45] The Tribunal found that:

> [T]he Investors were encouraged to engage in a regulatory approval process costing millions of dollars and other corporate resources that was in retrospect unwinnable from the outset, even though the Investors were specifically encouraged by government officials and the laws of federal Canada to believe that they could succeed on the basis of the individual merits of their case.[46]

Encouragement from the government came, in part, from multiple Nova Scotian provincial publications that advertised the area was an ideal location for marine quarries and the Nova Scotian Minister for Natural Resources, who had at least fifteen meetings with the Investors and encouraged the Project.[47]

The Tribunal's main consideration was "community core values." While the JRP was allowed to "consider traditional lifestyles, values, and culture" of the community where the Project would take place, the JRP never disclosed it would consider "community core values."[48] The Tribunal found the meaning of community core values was ambiguous and, with that in mind, considered four possible interpretations.[49]

First, community core values might have referred to the local community's majority opinion of whether the project should be accepted or rejected.[50] The local community's collective opinion could be found in petitions, referendums, and surveys, or at the community hearings where locals came and voiced their opposition or support.[51] Second, the term could have meant those values espoused in local policy statements and documents, such as press releases announcing future plans for the community's development.[52] Third, community core values may have alluded to the community's right to determine for itself, rather than allowing the local and national government to make the ultimate decision, whether it

42. *Id.* ¶ 503.
43. *Id.* ¶ 505.
44. *Id.* ¶ 552.
45. *Id.* ¶ 604.
46. *Id.* ¶ 453.
47. *Id.* ¶¶ 459–60, 469.
48. *Id.* ¶ 497.
49. *Id.* ¶ 506.
50. *Id.* ¶ 507
51. *Id.* ¶ 509.
52. *Id.* ¶ 515.

would allow a marine quarry project in its vicinity.[53] The fourth and final interpretation referred to "community DNA"—a community's traditions and lifestyle that distinguish it from other communities.[54] Community core values could have referred to the belief that the community DNA had to be protected from random mutations, such as an influx of industrial projects that would alter the local community members' daily lives.[55]

All interpretive issues aside, however, community core values were not within the JRP's mandate. So it was unfair to the Investors to include them as a factor.[56] "[I]t was a serious breach of the law on procedural fairness that [the Investors were] denied reasonable notice of the 'community core values' approach as taken by the Tribunal, and the opportunity to seek clarification and respond to it."[57]

The Tribunal also considered the effect of community meetings on the JRP's assessment.[58] Community meetings were intended as a forum where the JRP panel members and the Investors could interact with the local community and address its concerns.[59] But instead of being an open dialogue, the meetings were a "very public venting of criticism."[60] A journalist who attended one of the meetings said that the JRP panelists clearly took sides and showed "little respect" towards the Investors and their experts.[61] The journalist stated that, rather than acting scholarly and professional, one panelist "appeared more like a professor committed to embarrassing an unpopular student, while showing the entire class who was in charge and who had the right answers to all of the questions he was asking."[62] The JRP barely questioned the experts the Investors had assembled—out of ninety hours of hearings, the experts testified for ninety minutes.[63]

One commentator claimed that the JRP thought from the outset that the Project was "not worthy of approval because it [would] benefit U.S. corporations and consumers rather than the local citizens."[64] The Tribunal rejected such an extreme view of the JRP's approach to the assessment, and noted that the JRP was supposed to consider the burdens on local communities.[65] But the JRP also had to "discharge its mandate of carefully investigating and evaluating specific project impacts in accordance with the prescribed methodology, including reporting on likely significant adverse effects after mitigation."[66] Community core values,

53. *Id.* ¶ 521.
54. *Id.* ¶ 529.
55. *Id.*
56. *Id.* ¶¶ 534–35.
57. *Id.* ¶ 534.
58. *See id.* ¶¶ 512–13, 515.
59. *Id.* ¶ 513.
60. *Id.* ¶ 514.
61. *Id.* ¶ 552.
62. *Id.*
63. *Id.* ¶ 554.
64. *Id.* ¶ 566.
65. *Id.*
66. *Id.*

rather than being within the scope of the environmental assessment, were "matters of political and philosophical belief" that a local community should have veto power over a project, even when the law does not provide that veto power to it.[67] That is why the JRP should not have considered them.

The Tribunal found that the way in which the JRP conducted its review effectively made a zoning decision and imposed a moratorium on this type of project in the area—both of which were outside of its authority.[68] The Investors were given no notice that the JRP would adopt this novel approach and therefore had no chance to clarify or contest it.[69] The American Investors were "not treated in a manner consistent with Canada's" laws, and this formed the basis of a NAFTA breach.[70]

V. THE DISSENT

Professor McRae, on the other hand, argued that while the terminology "community core values" may have been new, the concept was not.[71] The JRP, he continued, used the phrase to refer to what relates to the human environment, and was mandated to consider the effects on the human environment.[72] The Investors' problem, then, lied not with discerning the meaning of community core values, but with satisfying the JRP that the Project would not adversely affect those values.[73]

Professor McRae also noted that there was no definitive breach of Canadian law—there was only a *potential* violation in whether the JRP failed to fulfill its statutorily mandated analysis.[74] He argued a potential violation of law should not meet the high *Waste Management* standard; instead Canadian courts should have adjudicated the issue to determine whether the JRP's analysis violated Canadian law.[75]

Most importantly, Professor McRae argued that the Tribunal's ruling would be "a remarkable step backwards in environmental protection."[76] He found the implications of the decision "interfere[d] with Canada's ability to legislate on environmental issues."[77] Now, according to Professor McRae, failure to comply with Canadian law can bypass the domestic remedy procedure and become a basis for a NAFTA claim, thus denying Canada the opportunity to address its own environmental concerns.[78] Professor McRae further found that, following the Tribunal's ruling, a JRP will be less willing to put "great weight on the effect of a project on

67. *Id.* ¶ 528.
68. *Id.* ¶ 454.
69. *Id.* ¶ 451.
70. *Id.* ¶ 602
71. *Dissent*, *supra* note 2, ¶ 25.
72. *Id.* ¶ 26
73. *Id.*
74. *Id.* ¶ 34.
75. *Id.* ¶¶ 35, 40.
76. *Id.* ¶ 51.
77. *Id.* ¶ 44.
78. *Id.* ¶ 48.

the human environment and [to take] account of the community's own expression of its interests and values" for fear of being liable to an investor.[79] Thus, according to Professor McRae, the Tribunal's ruling would have a profound effect on future environmental assessments and adversely affect environmental protection.[80]

VI. ANALYSIS

Contrary to Professor McRae's view, the Tribunal's ruling has no profound impact on environmental protection. The Tribunal did not find that a "potential breach of Canadian law" was the basis of a NAFTA violation.[81] Rather, the Tribunal found that introducing an unprecedented factor without notice to American investors after repeated government encouragement to invest violated NAFTA.[82] The American investors were treated unfairly when the JRP did not follow its own guidelines and mandates under the Canada-Nova Scotia Agreement.[83] This decision illustrates the increasingly investor-friendly international environment and minimum standard of treatment.[84] A breach of the international minimum standard does not require shocking or outrageous conduct.[85] The Tribunal's ruling reinforced that.[86]

Nor does this decision adversely affect environmental protection. Canada is not precluded from defining "community core values" and adding it to the list of factors that JRPs may consider in environmental assessments.[87] The factor just needs to be disclosed to future investors prior to the JRP's assessment so that the investors may adequately address the panel's concerns.[88] If this factor is disclosed, then JRPs should not be apprehensive to consider it in addition to the other factors the CEAA and other provincial statutes mandate.[89]

VII. CONCLUSION

"Community core values" was the overriding factor in the JRP's analysis.[90] Because the Investors were not aware of this unprecedented factor, the JRP's consideration of it violated NAFTA.[91] The dissent claimed the Tribunal's ruling would be a "remarkable step backwards in environmental protection."[92] But the Tribunal's ruling need not result in a backwards

79. *Id.* ¶ 49.
80. *See id.* ¶¶ 45, 48, 51.
81. *Cf. id.* ¶ 3.
82. *Bilcon*, Case No. 2009-04, ¶¶ 602, 604.
83. *See id.* ¶¶ 534–35.
84. *See id.* ¶¶ 428–29, 435, 442.
85. *Id.* ¶ 444.
86. *Id.*
87. *Id.* ¶¶ 582, 584, 590.
88. *Id.*
89. *Id.*
90. *Id.* 528–29.
91. *Id.* 602–604
92. *Dissent*, *supra* note 2, ¶ 51.

step. If Canada wishes to raise its level of environmental protection by having JRPs consider "community core values" as a factor in environmental assessments, then it may do so without violating NAFTA by fully disclosing its parameters to investors before the assessment.[93]

93. *Bilcon*, Case No. 2009-04, ¶ 598.