

# **Digby Neck Quarry Bilcon Case, Tribunal Decision and Dissent**

## **By Janet M Eaton, PhD. \*\* May 11, 2015**

### **Introduction**

The announcement that a NAFTA Investor State Tribunal had overturned the decision of a Canadian Federal Provincial Environmental Joint Review Panel (JRP) decision to reject a US mega-quarry proposed by Bilcon of Delaware Inc. for Whites Point, Digby Neck, Nova Scotia, sent shock waves across the province. And it caused indignation amongst the many Nova Scotians who had been involved in the lengthy and hard fought struggle to preserve the small scale scenic, rural fishing community and economy on the ecologically sensitive and unique Bay of Fundy with its endangered right whales.

At the same time the Bilcon decision has been making waves internationally, sparking a new level of long standing debate about the failures of NAFTA Chapter 11 to safeguard laws put in place by democratic nations. In this regard it has been providing ammunition for the tireless crusade of activist lawyers, researchers and NGOs fighting to have this mechanism removed from the upcoming mega-trade agreements under negotiation: the Trans-Pacific Partnership Agreement (TPPA), the Transatlantic Trade and Investment Partnership (TTIP) and the Canada- EU Comprehensive Economic and Trade Agreement (CETA).

### **Panel implementation and actions**

The origin of the Bilcon case goes back to 2004 when a Joint Review Panel (JRP) was appointed by two levels of the Canadian government to review the Bilcon proposal to establish a mega-quarry in Whites Point Digby Neck. The Panel would determine the potential effects of this project on the environment and the community before recommending whether the government should approve the project. After three years of extensive community consultation, hearings, and review of documentation the Panel experts recommended against approval, which was followed by a similar decision by the Provincial and Federal governments.

The Joint Review Panel, admitting to a somewhat unconventional approach, evaluated the proponent's project proposal and potential environmental impacts employing an 'adequacy analysis' framework which depended heavily on i) five key sustainability principles including public involvement, traditional community knowledge, ecosystem approach, sustainable development, and the precautionary principle and ii) review of policy and planning documents including the local level *Multi-year Community Action Plan* as well as many pieces of federal and provincial legislation for further guidance regarding the values and principles that should inform decisions about development of the project.

One of many environmental issues of particular concern was the potential impact on the endangered North Atlantic Right Whale which the Panel ruled could be threatened from increased blasting from the quarry and the increased risk of ships striking the endangered

whales due to the larger volume of vessel traffic. The Panel based its final decision on the assessment of a range of adverse environmental impacts in particular “core values of the community” which in their view were regarded as a “valued environmental component.” This reasoning led to the following Panel conclusion:

*The implementation of the proposed White’s Point Quarry on Digby Neck and marine terminal complex would introduce a significant and dramatic change to Digby Neck and Islands, resulting in sufficiently important changes to the community’s core values that warrant the Panel describing them collectively as a significant adverse effect that cannot be mitigated.*

### **Bilcon’s Challenge under NAFTA Ch 11 [Investor protections and Investor State Dispute Settlement [ISDS]**

Bilcon’s lawyers, Appleton and Associates, argued that the quarry decision had breached international law by treating Bilcon in a discriminatory, arbitrary and unfair manner under NAFTA article 1105 (minimum standard of treatment) and that they had also been treated differently than local companies under Article 1102 (National Treatment). Bilcon presented a number of claims against the JRP process including that they had been encouraged by the Nova Scotia government to invest in the quarry only to be subjected to a lengthy process which became entangled in a local web of politics. They also argued that the Panel review had been a rare, costly and cumbersome obstacle that should never have been allowed to go ahead and among other things that the Panel was biased. However, Bilcon’s core complaint was that the Panel’s decision to reject the quarry had been made based on the concept of “Community Core Values” which they argued was not part of the relevant legal and regulatory framework and of which they had no advance notice. They further contested the legitimacy of the concept suggesting that the notion of community core values had no place in the Constitution of Canada, the administrative law framework, the environmental legislation or any other relevant law. Bilcon also argued that in considering the notion of community core values, the environmental review had relied upon arbitrary, biased, capricious, and irrelevant considerations that amounted to a violation of rules in NAFTA including the guarantee of a “minimum standard of treatment” for foreign investors.

Finally Bilcon argued that because it had been unjustly “forced into a most expansive, expensive and time-consuming environmental assessment, it would sue Canada for \$188 million as compensation.

### **The Tribunal’s Decision:**

The majority tribunal of Bruno Simma, chair, and Bryan Schwartz, investor's nominee, held Canada in breach of Chapter 11 of the North American Free Trade Agreement (NAFTA) finding Canada liable for unfair regulatory treatment and in breach of the minimum standard of treatment (article 1105), as well as national treatment (article 1102), to the U.S. claimants. The proponent’s lawyers, Appleton and Associates, stated in a summary of the detailed 229 page Arbitration that the Tribunal reviewed the facts and found the Joint Review Panel process fundamentally flawed under international law

because the review panel failed to follow the stated rules and criteria, instead substituting unannounced criteria to reject the quarry. According to Appleton the Tribunal ruling also took into account the fact that the JRP failed to allow Bilcon to take any steps to address any adverse environmental effects through the adoption of mitigation measures.

The Majority Tribunal determined that the environmental impact assessment violated Canada's NAFTA obligation to afford Bilcon a "minimum standard of treatment" on the basis that this approach was "arbitrary", as per the interpretation of standards in the Waste Management II case, and that this arbitrary action had frustrated Bilcon's expectations about how the approval decision would be made.

The majority Tribunal also sided with the claimants in what they perceived as encouragement by enthusiastic local officials to pursue their investment only to find themselves in a regulatory review process that was expensive and "in retrospect unwinnable from the outset".

The Tribunal decision also ruled the JRP had violated Article 1102, National Treatment by not treating Bilcon as well as other Canadian proponents who were in similar circumstances.

The third lawyer on the Tribunal, Professor Donald McRae from the University of Ottawa, who was the Canadian government's nominee, delivered a strong dissent contending that the majority had turned what was nothing more than a possible breach of domestic law into an international wrong which should have been resolved in a Canadian federal court.

### **Dissent: McRae's and other criticism of the Tribunal's findings.**

#### **Tribunalist Donald McRae's Dissent**

In his formal 20 page Dissenting Opinion Donald McRae said the Panel was entitled to make its assessment on the basis of 'community core values' and that it was clearly within their mandate to do so. In this respect he stated that the term 'community core values' used by the JRP was merely a restatement encapsulating the various human environmental effects the project can have, which is something confirmed by Professor Meinhard Doelle referred to below. McRae also disagreed with the Majority Tribunal argument that the JRPs actions met the Waste Management II (referring to an earlier NAFTA tribunal case) standard of 'arbitrary', and found their reasoning somewhat circular and leading to a possible interpretation that any breach of Canadian law could be defined as arbitrary. He also noted that beyond the assertion of 'arbitrary', the Majority Tribunal made no attempt to show how the actions of the JRP were arbitrary. McRae believed the Panel thought what it was doing was justifiable and in regard to the charge of failure to mitigate he felt the Panel took the view that the project's problems as such could not be mitigated and hence the Panel did not need to provide a list of mitigations. McRae concluded that the most the Majority had shown was that there was a possibility that the JRP's analysis did not conform to requirements of Canadian Law and that this could have been clarified if the case had first been taken through a judicial review by a

Canadian federal court which, unfortunately no Party determined to initiate. As such he felt that the NAFTA Tribunal decision did not meet the threshold in the Waste Management II case and that action of the JRP was not 'arbitrary' nor had the Majority shown any other standards of the Waste Management II case relevant, (i.e. that the conduct was grossly unfair, unjust, idiosyncratic, discriminatory or exposing the claimant to sectional or racial prejudice or involving a lack of due process leading to an outcome which offends judicial propriety.) McRae makes another insightful criticism based on failure to litigate this issue in a Canadian court- which is that Canadian law does not provide a damages claim whereas NAFTA does. He also concludes that NAFTA was not intended to litigate domestic law and therefore you can't get a remedy under NAFTA Ch 11 for a breach of Canadian law. You can only get a remedy for a breach of NAFTA.

Donald McRae concludes his Dissent with three pages of implications of the Majority Tribunal's decision relating to the future ability of a nation state to apply their own environmental laws and conduct proper environmental assessment reviews. After ascertaining that the Majority's case was not appropriate to be reviewed under NAFTA he cited potential negative consequences of the NAFTA Tribunal decision as follows i) that this decision is a "significant intrusion into domestic jurisdiction" ii) that if the majority view in this case is to be accepted, then the proper application of Canadian law by an environmental review panel will be in the hands of a NAFTA Chapter 11 tribunal, importing a damages remedy that is not available under Canadian law. iii) that of even greater concern, would be the inability of states to apply their environmental laws, because the majority decision effectively subjugates 'human environment' concerns to the scientific and technical feasibility of a project. iv) that a chill would be imposed on environmental review panels which would then be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages. Finally, given all these considerations, he concludes that the decision of the majority will be seen as "a remarkable step backwards in environmental protection."

As Sierra Club US says in regard to the implications of the Bilcon Case decision:

*In other words, the tribunal's ruling suggests not only that governments can run afoul of trade rules if they take community rights and values into account in environmental impact assessments, but also that foreign corporations should have the right to bypass domestic courts and sue governments for millions or even billions of dollars before extrajudicial tribunals if they don't agree with how governments are interpreting their own laws.*

### **McRae substantiated by other legal experts vis a vis use of 'community core values'**

Other experts have also defended the Panel's decision vis a vis the use of 'Community core values.

Dalhousie University Professor and Director of Dalhousie University's Marine & Environmental Law Institute, Meinhard Doelle, shortly after the Tribunal's decision was announced, provided an in-depth interpretation of federal and Nova Scotia's environmental assessment law exposing where the Tribunal went wrong.

As he explained, the Whites Point Panel focussed its reasons for rejecting the project on its conclusion that the proposed project was inconsistent with “core community values” and once it had concluded that the project would result in significant adverse environmental effects that could not be justified, it did not suggest measures to mitigate. Doelle states:

*On both issues, the majority reached its conclusion in large part based on “expert legal advice” filed on behalf of the proponent, advice which seems to have offered a one-sided interpretation of the federal EA process, and no meaningful legal interpretation of the provincial EA process. Perhaps more importantly, it seems clear that the “expert legal advice” was completely misunderstood and misapplied by the majority of the NAFTA tribunal.*

In short Doelle says, the Whites Point Panel did exactly what it was asked to do and because of the broad definition of environmental effect (that includes all socio-economic effects), and the broad discretion left to the provincial Minister to decide whether to approve a project, there is no question that the provincial Minister acted within his legal authority when he followed the recommendation of the Whites Point Panel to reject the project. Where there was question was in regard to the authority of the federal officials to reject. He says the proponent had every opportunity to challenge the federal decision through a judicial review application before the Federal Court but didn't, unfortunately, because it would have been an opportunity to clarify a number of issues that practicing lawyers and legal academics have been debating for 20 years. Also he notes that none of this rich literature, much of it peer reviewed and supporting what the Whites Point Panel and the federal Minister did in this case, was referenced in the NAFTA ruling. Doelle concludes that the failure of the proponent to pursue any of the legal remedies available to it in Canada should have resulted in the dismissal of this case, as it leaves too much legal uncertainty for the NAFTA tribunal to deal with. In this case it appears that the failure to explore readily available domestic remedies put the NAFTA tribunal in an impossible situation.

Another Dalhousie Environmental Law Professor, David VanderZwaag, also explained how Nova Scotia law would allow the panel to interpret community core values as part of Environmental impact:

*The Nova Scotia Environmental Assessment Regulations have defined an ‘environmental effect’ as including, ‘any effect on socio-economic conditions, on environmental health, physical and cultural heritage or on any structure, site or thing including those of historical, archaeological, paleontological or architectural significance’. This wording provides a firm basis in law to justify the inclusion of social, economic, and community-based concerns within the assessment of the Whites Point Quarry proposal.*

Gretchen Fitzgerald, Executive Director of Sierra Club Canada Atlantic, also stated in an op-ed submitted to the Chronicle Herald that:

*The company was told clearly and in many ways that the environmental assessment would include an evaluation of how the project would impact local communities. This should come as no surprise: as every Grade 8 student learns, sustainability is the*

*confluence of environmental, economic, and social factors. Our laws are written to reflect the fact that we are part of the fabric of life; environmental damage damages our communities in big and small ways.*

Legal expert on investment agreements and head of the Green Party of Canada, Elizabeth May, also defended the Panel's conclusions noting that language used in the Tribunal's decision confirms that the international trade lawyers involved in the decision did not have even the most rudimentary understanding of the environmental assessment process.

Professor Doelle echoed Ms. May:

*I have found a NAFTA Tribunal that lacked, with the exception of the dissenting member, even a basic understanding of the legal context within which the decisions it was asked to rule on were made. It also lacked any real appreciation for the factual context within which the decisions being challenged were made..*

Professor Nigel Bankes, Law Professor, University of Alberta commenting on the case in a recent University of Calgary Faculty of Law Blog on Developments in Alberta (ABlawg) referred to Donald McRae's strong dissent, adding that he had nothing to add to Mr. McRae's excellent critique while also referring his readers to Meinhard Doelle's post on the decision.

As noted in the introductory statements above, the Bilcon case has become a lightning rod for those law professors, lawyers, NGOs, researchers and activists who are producing statements, press releases, and news articles with the aim of trying to stop the inclusion of Investor State Dispute Settlement [ISDS] in the mega- trade agreements. In these writings they are pointing to the risks as spelled out in the Bilcon dissent should governments ratify TPP, TTIP, and CETA with ISDS still intact. US activists are also citing Bilcon in their attempts to stop a Fast Track vote in Congress. As recently noted in a paper published on the University of Oslo PluriCourts Blog on the Legitimacy of the International Judiciary:

*For those opposing the inclusion of ISDS provisions in these agreements, the Bilcon decision is ammunition for the argument that investment treaty arbitration improperly bypasses potential domestic remedies, and that it interferes with a sovereign's ability to regulate in the public interest, protect the environment, or protect human health.*

Among these recent writings referencing Bilcon, another pertinent critique comes from Lisa Sachs and Lise Johnson, director of the Columbia Center on Sustainable Investment, and Head of Investment Law and Policy at the Columbia Center respectively, who after describing the Majority Tribunal's reasoning for overturning the Panel's decision to reject Bilcon's proposal stated:

*In fact, the arbitrators got the international law standard wrong. The parties to the NAFTA—the United States, Canada and Mexico—have all repeatedly clarified that ISDS is not meant to be a court of appeals sitting in judgment of domestic administrative or*

*judicial decisions. Yet in Bilcon, the majority of the arbitrators gave only lip service to the NAFTA states' positions.*

In other words the Majority Tribunal lawyer's ignored the clear intent of NAFTA's provisions and provided a judgement dismissive of domestic law.

And unfortunately for Canada it cannot even appeal this major misinterpretation under ISDS, because there is no avenue to appeal. Governments cannot even overturn arbitral decisions for getting the law or facts wrong and Governments and their taxpayers remain responsible for paying out wrongfully decided ISDS awards.

### **Implications:**

Shortly after the release of the Tribunal's decision, Lawrence Herman, international trade lawyer, reported in *Canada Loses Another Investment Dispute Under NAFTA*, that the Tribunal results were likely to stir up considerable controversy, because of Donald McRae's strong dissent, and statement that the NAFTA Tribunal went far beyond its jurisdiction under the treaty in questioning the reasoning of the federal-provincial environmental panel. As can be inferred from the degree of dissent articulated above, Herman's predictions were insightful and prophetic.

The implications of the Bilcon case include not only the threats to environmental law and assessment as outlined by Professor McRae. The Bilcon case when dissected also exposes many inherent flaws of NAFTA Ch 11, designed as it was from a business perspective to ensure protection for foreign investors with far less regard for the public welfare role of government. These insights are particularly relevant given the high level of debate in the EU Parliament around ISDS in TTIP and subsequently CETA as well as concerns that abound in regard to TPPA and ISDS.

These implications will be assessed in a forthcoming paper to follow on the heels of this one entitled: *Digby Neck Bilcon Tribunal Decision Sparks International Debate over Flaws and Failures of ISDS*

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### **Janet M Eaton, Bio**

\*\* Janet M Eaton, PhD [Marine Biology] Dalhousie University, is an independent researcher, and part-time academic who has taught courses in *Critical perspectives on Globalization, Community Political Power and Environment and Sustainable Society*. She has been a volunteer with Sierra Club Canada for over a decade, was one of four SCC researchers who contributed to the Terms of Reference for the proponent's Environmental Impact Statement [EIS] and to Sierra Club Canada's lengthy response to Bilcon's EIS. She also testified twice before the Joint Review Panel. Since then Janet has been an international trade representative for SCC on the national Trade Justice Network, was a SCC International Representative for Corporate Accountability, and maintained a blog site on international trade for SCC. In latter years she has followed closely the

emergence of the international debate to reject or radically reform ISDS in free trade and investment agreements. See:

*Australia's Rejection of Investor-State, from AUSFTA to the Gillard Government's Trade Policy and the implications for Canada.* By Janet M Eaton, PhD. December 31<sup>st</sup>, 2013. [http://www.commonfrontiers.ca/Single\\_Page\\_Docs/PDF\\_Docs/Jan08\\_14-AUSFTA-paper.pdf](http://www.commonfrontiers.ca/Single_Page_Docs/PDF_Docs/Jan08_14-AUSFTA-paper.pdf)

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### Bilcon case:

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<http://appletonlaw.com/files/2008/Bilcon%20NAFTA%20Notice%20of%20Intent.pdf>

Corporate Rights in Trade Agreements: Attacking the Environment and Community Values.

[http://action.sierraclub.org/site/DocServer/0999\\_Trade\\_Bilcon\\_Factsheet\\_04\\_low.pdf?docID=17481](http://action.sierraclub.org/site/DocServer/0999_Trade_Bilcon_Factsheet_04_low.pdf?docID=17481)

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Merits Award Arbitration under NAFTA Ch 11 between Bilcon and Government of Canada: <http://www.appletonlaw.com/News/Bilcon%20Merits%20Award%20-%20March%202015.pdf>

Permanent Court of Arbitration. **Bilcon of Delaware et al v. Government of Canada.**

The PCA is providing administrative support in this arbitration, which is being conducted under Chapter Eleven of the North American Free Trade Agreement (NAFTA).

[http://www.pca-cpa.org/showpage.asp?pag\\_id=1341](http://www.pca-cpa.org/showpage.asp?pag_id=1341)

Appleton & Associates: Two page backgrounder on NAFTA Award: Bilcon v. Canada

<http://www.appletonlaw.com/News/Bilcon%20-%20Award%20Backgrounder%20-%20March%202015.pdf>

BILCON WINS NAFTA CLAIM AGAINST CANADA FOR UNFAIR TREATMENT  
DAMAGES TO BE HEARD IN SECOND HEARING

<http://www.appletonlaw.com/News/Bilcon%20News%20Release%20-%20Wins%20NAFTA%20Claim%20Against%20Canada%20-%20March%202015.pdf>

Dissenting Opinion of Professor Donald McRae

<http://www.appletonlaw.com/News/Bilcon%20Merits%20Dissenting%20Opinion%20-%20March%202015.pdf>

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### **Dissent from other legal experts**

*Clayton Whites Point NAFTA Challenge Troubling* by [Meinhard Doelle](#), March 25, 2015

<https://blogs.dal.ca/melaw/2015/03/25/clayton-whites-point-nafta-challenge-troubling/>

*Quarrels over a Proposed Quarry in Nova Scotia: Successful Application of Sustainability Principles in Environmental Impact Assessment but Not a Perfect Ending* by [David L. VanderZwaag](#)<sup>351</sup>, [Jason May](#)

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*Green Party calls for re-negotiation of all investor-state agreements in light of outrageous Digby Neck loss.* Sunday, March 22nd, 2015 in [Press Releases](#)

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