

Backgrounder: NAFTA Award: Bilcon v. Canada

A NAFTA Tribunal has ruled that Canada violated its NAFTA obligations in a federal-provincial assessment of a proposed quarry expansion in Nova Scotia.

Bilcon, a U.S. based construction materials company, brought a NAFTA claim in 2008 challenging gross irregularities in the process by which its request to expand an existing gravel quarry in Whites Point, Nova Scotia was handled by a joint review panel and then by the federal and Nova Scotia governments.

The Tribunal's NAFTA Award concluded that Canada was responsible for actions taken by its government ministers in approving a flawed recommendation from a joint review panel to block the quarry expansion. This NAFTA award does not deal with the issue of damages, although Bilcon claims costs in excess of \$300 million. This matter is expected to be the basis of a further damage hearing expected to take place next year.

A three person international law tribunal constituted under the NAFTA made the decision. Judge Bruno Simma, a retired judge of the International Court of Justice (and currently a Judge of the US- Iran Claims Tribunal), is the president of the tribunal. The other members are University of Ottawa law professor Donald McRae and University of Manitoba law professor Bryan Schwartz.

The Original Proposal and Local Benefits

- Bilcon sought to expand a pre-existing gravel quarry located on the Digby Neck in Nova Scotia.
- Bilcon was welcomed to invest in Nova Scotia by Cabinet level officials with a goal to create permanent jobs through long term investment in this economically depressed region of Canada.
 - The Whites Point quarry, if approved, would create 225 construction jobs and 34 full time jobs.
- The Bilcon quarry had a fifty year projected lifetime.
- Bilcon complied with all local environmental and regulatory processes.

The Facts of the Dispute

- The proposal was sent to a special federal-provincial Joint Review Panel (JRP) for assessment in 2007.
 - The JRP process is generally used for complex large scale projects that may have serious environmental risks and had never been used to assess a small project such as the expansion of an existing gravel quarry.
- The joint review process took into consideration federal level and provincial level environmental assessments, which together ended up taking more than three and half years.
 - Bilcon submitted a 17 volume Environmental Impact Statement, including 48 expert reports and 35 site specific studies.

- The JRP rejected the quarry expansion without providing any advanced notification or opportunity for the proponent to address any environmental impacts; all on the basis of rules not contained in Canadian law.

The NAFTA Merits Award

- The NAFTA Tribunal ruled against Canada in a detailed 220-page decision that carefully reviewed the facts.
 - The NAFTA Tribunal stressed sustainable development is a key goal of the NAFTA and that the JRP process was fundamentally flawed under international law because the review panel failed to follow the stated rules and criteria and instead substituted unannounced criteria to reject the quarry.
- The Tribunal emphasized that its decision in this case was based on Canada's improper action, and that the Tribunal was not substituting its own decision in place of Canadian regulators.
- A majority of the three person Tribunal ruled that the members of the JRP failed to meet international due process and fairness standards.
 - All members of the Tribunal agreed on the assessment of the facts in this claim. A dissenting opinion was filed by one tribunal member with respect to the application of the international law to the facts.
- The Tribunal noted that the JRP failed to allow Bilcon to take any steps to address any adverse environmental effects through the adoption of mitigation measures.
 - The JRP's decision to close its mind to possible measures to protect the environment contributed to Tribunal's finding that the JRP acted in an arbitrary manner.
- The Tribunal underscored that governments are required to meet high environmental standards under the NAFTA and that governments are required to live up to the promises they make to foreign investors.
- Additionally, the NAFTA Tribunal concluded that the JRP also violated Canada's NAFTA obligations by not treating Bilcon as well as other Canadian proponents who were in similar circumstances.
- The decision of the NAFTA Tribunal cannot be appealed under Canadian law.
 - Domestic court review of the merits award can be made only on narrow grounds such as allegations of fraud, bias or corruption against the members of the three-person arbitration Tribunal.

A copy of the award and other case related materials are available at www.appletonlaw.com.