

**IN THE MATTER OF AN ARBITRATION UNDER
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL RULES OF 1976 (“UNCITRAL RULES”)**

- between -

**WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS
CLAYTON, DANIEL CLAYTON AND BILCON OF DELAWARE INC.**

- and -

GOVERNMENT OF CANADA

Dissenting Opinion of Professor Donald McRae

1. I regret that I am unable to join my colleagues in their ultimate disposition of this case. I agree with many of the majority’s conclusions in the Award, but on the key question of whether there has been a violation of Article 1105, I cannot agree.

2. In large part, my disagreement is with the majority’s assessment of the facts, whether the report of the Joint Review Panel (JRP or “the Panel”) through endorsing the concept of “community core values” and its treatment of the requirement of a “significant effects analysis”, “departed in fundamental ways from the standard of evaluation required by the laws of Canada”.¹ At the same time, my disagreement is with the effect of the majority’s decision on the threshold for the application of the standard under Article 1105. The majority accepts the well-known statement in *Waste Management*² as encapsulating the standard to be applied under Article 1105 and acknowledges that it is a “high threshold”.³ But it applies the standard in a way that it is met simply by an allegation of a breach of Canadian law.

¹ Award, para. 594.

² *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, paras. 98 and 99.

³ Award, para. 444.

The Basis of the Majority's Approach

3. The key component of the majority's conclusion that there has been a violation of Article 1105 is that the JRP relied upon the concept of "community core values".⁴ Less central, but also an important part of the majority's conclusion, is that the JRP did not provide in its report an assessment of the mitigation measures that might have been taken to avoid the significant environmental effects of the project.⁵ Both of these, in the majority's view, take the JRP's conclusions outside the scope of what is required by Canadian law. But, even if there had been a potential breach of Canadian law, this would not of itself constitute a breach of NAFTA Article 1005.⁶ I will return to these matters shortly.

4. The majority includes in its analysis factors other than the actions of the JRP, intended to support its conclusion that there has been a breach of Article 1105. In particular, it concludes that the Claimant had "legitimate" or "reasonable" expectations based on encouragement by the government of Nova Scotia to invest in mining in the province, and at the White's Point site, in particular.⁷ The expectation of the Claimant, the majority asserts, was that "it would only obtain environmental permission if the project satisfied the requirements of the laws of federal Canada and Nova Scotia."⁸ This

⁴ Award, para. 452: "The 'community core values' approach of the Joint Review Panel was the decisive and overriding consideration."

⁵ *Ibid.* "The Joint Review Panel did not carry out its mandate to conduct a 'likely significant effects after mitigation' analysis to the whole range of potential project effects, as required by the *CEAA*."

⁶ *Gami Investments, Inc. v. United Mexican States*, UNCITRAL Award, 15 November 2004, para. 95: "A failure to satisfy requirements of national law does not necessarily violate international law."

⁷ Award, para. 448, "The Investors reasonably relied on specific encouragements, at the political and technical level, to pursue the project not only in Nova Scotia but in the specific site they chose."

⁸ Award, para. 447.

also encouraged the Claimant to spend substantial sums of money developing the project.⁹

5. With respect, the actions of Nova Scotia officials in encouraging investment in mining and any consequent “legitimate expectations” are simply irrelevant to whether the JRP has met the standards of Article 1105. Any investor would have the expectation that if the requirements of Canadian law (federal and provincial) regarding environmental assessment were met its investment could go ahead. Assurances or encouragement by provincial officials have nothing to do with the expectation that an investor will have Canadian law applied properly to it. That is an expectation that an investor would have independently of any assurances or encouragement. Thus, the long excursus by the majority into the actions of provincial officials,¹⁰ apart from creating an aura of mistreatment of the Claimant, simply has no bearing on the alleged violation of Article 1105.

6. The majority also adds to this aura of mistreatment by reference to what happened at the hearing and other conclusions and recommendations set out in the Panel report, even though it does not conclude that anything in the JRP process constitutes a violation of Article 1105. It refers to a failure to call Bilcon’s expert witnesses, the recommendations about a moratorium on future coastal projects, and the demeanour of the President in the hearing. Yet, in doing so, the majority has relied on what the Claimant’s experts and witnesses claimed, rather than what actually was said in the hearing itself.

7. This is well illustrated by the majority’s reference to the witness statement of Bilcon’s consultant, Mr. Hugh Fraser who said that the JRP paid “little respect to Bilcon and its experts.”¹¹ He uses as an example of a lack of respect a question of the President

⁹ *Ibid*, para. 470. It should be noted that provincial officials made no assurances about the particular treatment that the Claimant would receive in the environmental process, nor did the Claimant ever assert that they did.

¹⁰ Award, paras. 455-470.

¹¹ Hugh Fraser Witness Statement, p. 5, para. 13.

of the JRP, Dr. Fournier, asking if any of Bilcon's team knew what the scientific method was, and this, Mr. Fraser said, was a to a team composed of "experienced and qualified engineers and scientists". But reference to the actual transcript of the hearing shows that Mr. Fraser omitted the fact that Dr. Fournier had already put the question to two of Bilcon's experts and they had been unable to answer it.¹² This of course places the question put by Dr. Fournier in a totally different light.

8. For the majority, the central failing of the JRP was to rely on the concept of "community core values" which it says became the essential basis of its reasoning to recommend rejection of the Project. It was, in the words of the majority, the "decisive and overriding consideration".¹³ The term, the majority says, was "fundamentally novel",¹⁴ essentially unknown to environmental assessment.¹⁵ It had not been used in the environmental assessment guidelines for the JRP, the majority says, and the Claimant was never made aware that its Project was to be assessed against it.¹⁶

9. The majority argues that the meaning of "community core values" is difficult to ascertain and "open to a variety of possible interpretations". It then divines four possible interpretations of "community core values" intended by the JRP and proceeds to explain why these are all legally and factually unsustainable.¹⁷

10. The first of these possible interpretations is that the concept of community core values is shorthand for majority public opinion. In supporting this potential linkage, the majority refers to nothing in the JRP report but to a question put by the Chair of the JRP to a witness during the public hearing, asking, "in some small way this is a kind of

¹² JRP Hearing Transcript, June 18, 2007, pp. 261-263.

¹³ Award, para. 452.

¹⁴ *Ibid*, para. 573.

¹⁵ This is a rather odd claim, as the majority also says that the Claimant's expert Mr. Estrin stated that in the Sable Gas case "community core values" was addressed in a particular way. *Ibid*, para. 493.

¹⁶ *Ibid*, para. 451.

¹⁷ It should be noted that none of these meanings of "community core values" was proposed by either party in its written or oral pleadings before the Tribunal, or identified as the meaning of community core values by the JRP.

referendum, isn't it?"¹⁸ The question was never answered and the idea of a referendum appears nowhere else in the transcript of the hearing or in the JRP Report. In short, the majority here is simply erecting a "straw man".

11. The second potential meaning of community core values, identified by the majority, are values enshrined in certain key documents including "Vision 2000". This is a plausible description of what the JRP took into account in considering the importance of core values in the community.¹⁹ But as a sole description of the meaning of community core values, it is partial and does not, as I shall point out shortly, do justice to what the JRP actually said.

12. The third potential meaning of community core values, according to the majority, is local self-determination in planning matters. Once again the majority has taken a part of what the JRP said and criticized it, as if it were the whole. Local self-determination is mentioned by the JRP in elaborating what "community core values" can encompass,²⁰ but there is no basis for concluding that this alone is what the JRP meant by the concept of community core values.

13. The fourth meaning of community core values identified by the majority is "community DNA". The majority derives this meaning from what the JRP described as a "biological analogy" drawn by the JRP to provide "a perspective on the potential impact on the proposed quarry and marine terminal on the communities of Digby Neck and Islands". The analogy is described by the JRP itself as "not perfect",²¹ and at a certain point, the Panel admits that the analogy breaks down.²² The analogy may perhaps have been more meaningful to the scientists on the panel than to lawyers and it was offered purely on the basis that readers might find it helpful. There is nothing, however, in the report itself to suggest that the JRP saw "community DNA" as the primary way to view

¹⁸ Hearing Transcript, Volume 11, p. 2669.

¹⁹ See, JRP Report, p. 99, Exhibit C-34.

²⁰ JRP Report, p. 99.

²¹ *Ibid*, p. 100.

²² *Ibid*.

“community core values”. The whole analogy was placed in a square box, as an aside, implying it was there for those who found it useful, but was not the basis on which the analysis of the JRP rested.

14. The majority has selected individual elements from the hearing or from the JRP report and suggested that they are potential interpretations of the concept of “community core values”. In short, it has simply speculated on what the JRP might have meant by the term “community core values”. What the majority has failed to do is to look at the JRP report itself and see how the concepts of “core values” and “community core values” arose and what were their referents. If this had been done it would have been seen that “core values” and “community core values” were simply names given to an important component of what the JRP in accordance with its terms of reference had to consider.

Community Core Values in the JRP Report

15. The Panel saw its mandate in the following terms: “to identify, evaluate and report on the potential environmental effects of the Project on the physical, biological and human environments.”²³ It also stated that its report “should include recommendations about either the approval, including mitigation measures, or the rejection of the Project.”²⁴ In undertaking its “Environmental Effects Assessment” the Panel covered “terrestrial effects”, “marine effects”, “human environment effects” and “cumulative effects”.²⁵ In each case the Panel reviewed the nature of the potential effects and how the Claimant had dealt with them in its Environmental Impact Statement (EIS), and considered the adequacy of any mitigation measures proposed by the Claimant.

²³ JRP Report, p. 15.

²⁴ *Ibid.* The detailed terms of reference are set out in the Agreement of the Canadian Minister of the Environment and the Nova Scotia Minister of Environment and Labour on “The Establishment of a Joint Review Panel for the Whites Point Quarry and Marine Terminal”, Exhibit R-27.

²⁵ JRP Report, pp. 66-84.

16. In making its assessment of the human environment effects, the Panel stated that the communities of Digby Neck and Islands have developed “core values that reflect their sense of place, their desire for self-reliance, and the need to respect and sustain their surrounding environment.”²⁶ This appears to be the first reference to “core values” in the JRP report. Throughout its analysis of the human environment effects, the Panel points out that the Proponent²⁷ had failed to provide an adequate analysis of such matters as Aboriginal peoples resource use,²⁸ community history and heritage resources,²⁹ community character and attitudes,³⁰ and community health and wellness.³¹

17. The inability of the Proponent to provide an adequate assessment of the human environment effects of the Project was perceived by the Panel in large part as a result of the failure of the Proponent to engage effectively in consultations with Aboriginal peoples, with fishers and with others in the community. The Proponent had established a Community Liaison Committee (CLC) chaired by a person from the community, but over time, only supporters of the Project attended.³² Some concluded that the Committee was

²⁶ *Ibid*, p. 66.

²⁷ Since the JRP refers to the Claimant as the Proponent in its Report, the two terms will be used here interchangeably.

²⁸ *Ibid*, p. 67. The Panel noted that the Proponent’s attempts to consult with Aboriginal communities was unsuccessful and as a result traditional Aboriginal knowledge was left out of its assessment.

²⁹ *Ibid*, pp. 68-69. The Panel found the Proponent’s archeological assessment inadequate, in part because it was undertaken after quarrying operations had taken place and disturbed the area, and lacked reference to traditional community knowledge.

³⁰ *Ibid*, pp. 69-72. The Panel considered that the EIS had failed to appreciate the strong commitment of the community through its organizations and community groups to sustainable development and may have exacerbated a “them and us” attitude. The Proponent had been unsuccessful in engaging in meaningful consultation with the community and was perceived by some in the community as having a dismissive or hostile response to their concerns.

³¹ *Ibid*, pp. 72-79. In the Panel’s view the EIS provided “little socio-cultural information, such as patterns of family or community life”. Equally it provided little information on air quality, or noise, vibration, light and traffic, or inadequate information on the effect of the project on water wells and mitigation measure.

³² *Ibid*, pp. 69-72. The Panel considered that the EIS had failed to appreciate the strong commitment of the community through its organizations and community groups to sustainable development and may have exacerbated a “them and us” attitude. The Proponent had been unsuccessful in engaging in meaningful consultation with the

just a vehicle for the Proponent to promote its Project and the Panel concluded that the Committee had “mixed success” in encouraging “open exchanges on the issues in an unthreatening environment.”³³

18. An illustration of the difficulty community members found with the Community Liaison Committee is illustrated by an assertion made by the Proponent in a meeting on November 24, 2003 that the JRP could only recommend modifications to the Project; it could not prevent the Project from going ahead.³⁴ In other words, the Proponent was saying, the project was going to go ahead regardless and attempts to prevent that were futile. This was hardly a basis on which an effective community consultation could be conducted. The JRP also considered that a defamation suit brought by the Proponent at an early stage against a local newspaper that had made negative comments about Bilcon “undermined the willingness of local residents to enter into meaningful discussions with the Proponent and hardened local attitudes against the project.”³⁵

19. The Panel’s assessment of the effects of the human environment is an assessment in part of the so-called “core values” that ultimately became the basis for the Panel’s recommendation that the project be rejected. The Panel said that the five elected officials, who had appeared before it, “argued that approval would be inconsistent with community values and local initiatives”.³⁶ This is a clear indication that the Panel understood community core values to be the substance of what was being said in submissions and at the hearing about the human environment. So, if there were any uncertainty about what the Panel meant by community values, core values or community core values, one can simply have reference to what those five elected officials were saying in the hearing.

community and was perceived by some in the community as having a dismissive or hostile response to their concerns.

³³ *Ibid*, p. 71.

³⁴ CLC Minutes, 24 November 2003, p. 234, Exhibit R-299. “Mr. Buxton noted that this project is a legal project and there is nothing in law to prevent this project from going ahead. He noted that there are hoops to jump through....”

³⁵ JRP Report, p. 71.

³⁶ *Ibid*, p. 71.

20. The officials did not use the terms community values, or core values; they spoke of fishing, of tourism, of air and water quality and generally about the quality of life in the Digby Neck and Islands area. They were concerned with the socio-economic effects of the project on their communities.³⁷ Thus, when the Panel said that these witnesses were talking about community values, in the eyes of the Panel the concept of community values was an encapsulation of the matters discussed by it in the human environment effects assessment.

21. The Panel noted that the Proponent did not “acknowledge community core values as defining features of these communities”.³⁸ The Proponent’s view appeared to be that this was a community in decline and that the economic opportunities provided by the project would help arrest that decline. However, the Panel saw several instances where the communities had discussed and set out in documents their vision of the community that encourages economic development, but provides a balanced approach combining economic, social and cultural issues. In the words of the Panel, “they simultaneously advocate core values, quality of life and a sustainable environmental outcome”.³⁹ A Proponent putting together an EIS for the project that provided a human environment effects assessment, would have undoubtedly been aware of these documents and the fact that some of them refer to the notions of “local values” and “community values”.⁴⁰

22. This failure of the Proponent to consider the way in which the relevant communities have given consideration to community planning activities and policy outcomes, such as commonly identified priorities, core values, vision statements or future goals was regarded as a serious deficiency in the EIS. Indeed, in the Panel’s view, such core values were to be regarded as a “Valued Environmental Component as important to

³⁷ JRP Hearing Transcript Vol. 8.

³⁸ JRP Report, p. 93.

³⁹ *Ibid*, p. 94.

⁴⁰ *Ibid*.

the broad ecosystem as any other part of the ecosystem”. This led to the Panel’s key conclusion:⁴¹

the implementation of the proposed White’s Point Quarry and Maine Terminal complex would introduce a significant and dramatic change to Digby Neck and Islands, resulting in sufficiently important changes to that community’s core values that warrant the Panel describing them collectively as a Significant Adverse Environment Effect that cannot be mitigated.

23. Thus, the “core values” of the Digby Neck and Islands communities or the “community core values” revolved around the matters discussed in the human environment effects assessment made by the Panel. That assessment concerned the historical use of the area by Aboriginal peoples, fishing, eco-tourism, quality of life, air and water quality, a sense of community history and heritage, a belief in a certain community character and common attitudes, and were reflected, too, in views about the health of the community. And these views, the JRP considered, were reflected and developed through the various documents that were identified by the Panel.

24. None of these documents reflected formal community planning, nor did they constitute the views of the whole community. In the view of the Panel, the documents demonstrated an attempt to define what was important to the community and the same views emerged in many of the statements made by members of the public and NGOs at the hearing. The Panel obviously gave great credence to these manifestations of community values and the effect that the Project would have on the people in the community, their economy and values.

25. The Claimant asserted that the concept of community core values was completely new. The Claimant alleged that it had not been made aware that that it was a matter to be addressed before the JRP, let alone that the JRP’s decision would be based on this concept. But when the JRP referred to “community core values”, it was referring to precisely the matters relating to the human environment that according to the Panel had

⁴¹ *Ibid*, p. 100.

been dealt with so inadequately by the Proponent in its EIS. The Claimant knew that the EIS had to cover what the Panel saw as encompassed within community core values – aboriginal resource use, community history and heritage, community character and attitudes etc – and it heard what community members had to say at the hearing. But the Proponent failed to make connections with Aboriginal peoples, with fishers, and with other community members that might have allowed it to provide what was requested of it. And it did not attempt to respond in the hearing to the many views expressed on the effect of the project on the community of Digby Neck and Islands.

26. Rather than being unaware of what was required of a human environment effects analysis, what the Panel was to call “community core values”, the Claimant simply did not or was unable to satisfy the Panel that the project could operate consistently with those core values. The Panel was entitled to make that assessment; it was clearly within its mandate to do so.

27. The majority treats the decision of the JRP as if it were in effect a “zoning decision”.⁴² But, the JRP simply made its recommendation about the specific project before it. If the Proponent had been successful both in community consultations and in its EIS in assuaging the concerns of the community and the JRP about the socio-economic impact of the Project on the community, perhaps in modifying its proposal, perhaps in providing greater economic benefits, the recommendation might have been different. It is true that the JRP did make a recommendation in its report that Nova Scotia develop a coastal zone management policy and place a moratorium on future development until that had occurred. But this was a reflection of what it considered to be appropriate after going through the review process and can hardly be referred to as a surreptitious zoning decision by the JRP in its primary recommendation that the Project be rejected. In seeing the recommendation of the JRP as a “kind of zoning decision”, the majority is relying on speculation about motives rather than looking at what the JRP actually said.

⁴² Award, para. 454.

The Identification of Mitigation Measures

28. Once the Panel made the determination that it should recommend the rejection of the project because it was inconsistent with human environment concerns and the attitudes of the community to those concerns, the question was whether it was required to identify mitigation measures to deal with those community concerns. The Panel took the view that it was not required to do so. In making its criticism of this conclusion, the majority refers to the words of the Panel that, it "accepts that with the effective application of appropriate mitigation measures, competent project management and appropriate regulatory oversight, most project effects should not be regarded as 'significant'," suggesting that the Panel's concerns could have easily been dealt with through mitigation measures. However, the words immediately following the above quotation state that the "accumulation of concerns about adequacy leads the Panel to question the Project".⁴³

29. In short, the Panel took the view that while individual objections in isolation might be met by appropriate mitigation measures, the Panel was concerned with the effects of the project on the human environment as a whole – what it encapsulated in the term "community core values". Focusing on individual concerns within that panoply of human environment issues and questions did not, in the Panel's view, get to the central issue about the effect of the project as a whole. In the Panel's view, pointing out possible individual mitigation measures served no value when its concerns were much larger. This "accumulation of concerns" ultimately led the Panel to recommend the rejection of the project.

30. There is, of course, a question under Canadian law whether it was proper for the JRP to take such an approach to mitigation measures. And, there may well be a question whether using a term such as "community core values" to encapsulate the variety of human environment effects that the Proponent had failed to address adequately and that ultimately led to the recommendation to reject the Project, accords with the requirements

⁴³ JRP Report, pp. 83-84.

of Canadian law. The majority quotes extensively from the expert opinions of Mr. David Estrin and Professor Murray Rankin, two highly respected Canadian environmental lawyers. Both took the view that Canadian environmental law had not been complied with by the JRP and that its decision would have been overturned if it had been taken to a Canadian federal court on judicial review.

31. However, neither Mr. Estrin, nor Professor Rankin, is an expert on NAFTA, nor did either seek to give an opinion on whether the actions of the JRP constituted a violation of Article 1105. But that is the issue that this Tribunal had to decide. And whether Canadian law has been complied with is a relevant consideration in deciding whether there has been a violation of NAFTA Article 1105, it is not of itself sufficient to establish such a violation.⁴⁴

The Applicable Standard under NAFTA Article 1105

32. I am in agreement with the majority⁴⁵ that the appropriate standard to apply in the application of Article 1105 is that set out in *Waste Management*. There it was said:

the 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.⁴⁶

I am in agreement with the majority, too, that this is a high standard, but one that is not to be applied rigidly. There is some flexibility in its application and it must be applied in light of the facts in each particular case.

⁴⁴ *GAMI*, *supra*, footnote 6.

⁴⁵ Award, paras. 427 and 443.

⁴⁶ *Waste Management*, *supra*, footnote 2.

33. The majority's assessment of whether the *Waste Management* standard has been met relies first on frustration of the "legitimate expectations" of the Claimant created by the actions of officials of the governments of Nova Scotia that Canadian law would be properly applied. As pointed out earlier, the actions of Nova Scotia officials are irrelevant here because the expectation that Canadian law would be properly applied to it is an expectation that any investor would legitimately have, even in the absence of any assurances or encouragement. Thus, the "legitimate expectations" that the majority identifies are simply of no assistance in deciding whether there has been a violation of Article 1105.

34. The majority then argues that the actions of the JRP meet the *Waste Management* standard because they were arbitrary in that the JRP had created and applied a "new standard of assessment, rather than fully carrying out the mandate defined by the applicable law".⁴⁷ This, then, is an allegation that the JRP did not comply with Canadian law. In this regard, the majority accepts the view of the Claimant's experts that Canadian law had not been complied with and rejects the view of the Respondent's expert that the JRP's approach was consistent with Canadian law. At the very least then, the matter was arguable and the Tribunal did not have the benefit of a determination by a Canadian federal court on the matter. At most, then, the majority is saying that there has been a violation of Article 1105 because of a potential violation of Canadian law by the JRP, and that adopting an approach that led to that potential violation was action that was arbitrary.

35. The majority, however, argues that this potential violation of Canadian law nonetheless meets the high threshold of the *Waste Management* standard. Again the majority reverts to the expectations of the Claimant, the lack of reasonable notice of the new approach and a reiteration of the language that the JRP "had departed in fundamental ways from the standard of evaluation provided by the laws of Canada."⁴⁸

⁴⁷ Award, para. 591.

⁴⁸ *Ibid*, para. 594.

36. With respect, none of this demonstrates anything more than that potentially the JRP approach would have been found by a federal court not to be in conformity with Canadian law. As I have pointed out, the Claimant's only legitimate expectation could have been that Canadian law would be properly applied and the majority takes the view that Canadian law had not been properly applied. But, a potential breach of Canadian law does not meet the high threshold of the *Waste Management* standard.

37. Thus, the only basis for meeting the high threshold of Article 1005 is the assertion that the JRP's conduct was arbitrary. But here, with respect, I find the majority's reasoning somewhat circular. The majority concludes that the Panel actions were arbitrary. But the manifest arbitrariness seems to be that instead of applying Canadian law, the Panel "effectively created, without legal authority or notice to Bilcon, a new standard of assessment".⁴⁹ In short, by deviating from Canadian law, the Panel acted arbitrarily. This reasoning suggests that any departure from Canadian law is arbitrary and thus any departure from Canadian law meets the threshold of arbitrariness under the *Waste Management* standard. Breach of NAFTA Article 1105, then is equated with a breach of Canadian law.

38. The majority makes no attempt, beyond an assertion of arbitrariness, to show how the actions of the JRP were, in fact, arbitrary. There is no suggestion that the Panel had deliberately or willfully disregarded the law to be applied. Indeed, the Panel thought that what it was doing was justified and within the law. The majority refers to a subsequent interview with the Chair of the JRP, who admitted that not listing mitigation measures was novel. But the Chair then went on to reiterate the justification given in the JRP's report for doing so.⁵⁰ The Panel had taken the view that the problems with the project were such that mitigation measures could not save it. This was a principled position, and even if it turned out not to be supportable under Canadian law, the position can hardly be regarded as arbitrary within the meaning of the *Waste Management* standard.

⁴⁹ *Ibid.*

⁵⁰ Exhibit C-180.

39. The majority also claims that the actions of the Nova Scotia officials were unjust in encouraging investment by Bilcon,⁵¹ implying, it appears, that this was an alternative basis for finding that the *Waste Management* principle had been complied with. But, as pointed out, the expectations resulting from the actions of Nova Scotia officials could do no more than create an expectation the Bilcon would be treated in accordance with Canadian law. And, as pointed out already failure to treat someone in accordance with Canadian law does not of itself constitute a breach of Article 1105.

40. In short, the most the majority has shown is that there is a possibility that the JRP's analysis did not conform to the requirements of Canadian law and would have been overturned had it been subjected to judicial review by a Canadian federal court. I cannot agree that this meets the threshold set out in the *Waste Management* case. The actions of the JRP have not been shown to be arbitrary, nor has the majority shown that other *Waste Management* standards are met. The conduct of the JRP cannot be viewed as "grossly unfair, unjust or idiosyncratic," or that it "involves a lack of due process leading to an outcome which offends judicial propriety." It has simply been alleged the JRP applied a standard that is not in conformity with Canadian law. Thus, I do not believe that the JRP's actions constitute a violation of NAFTA Article 1105.

41. The Claimant was no doubt upset and disappointed with the result of the review process in which it has invested considerable human and financial resources. But there was never any guarantee that it would pass the review process and disappointment is not a basis for finding a violation of Article 1105. As the tribunal in *Robert Azinian et al v. The United Mexican States* famously said:⁵²

It is a fact of life everywhere that individuals may be disappointed in their dealings with public authorities, and disappointed yet again when national courts reject their complaints...NAFTA was not intended to provide foreign investors with blanket protection from this kind of disappointment, and nothing in its terms so provides.

⁵¹ Award, para. 592.

⁵² *Robert Azinian et al v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, 1 November 1999, para. 83.

42. The Claimants did, of course, have an available recourse to deal with their disappointment with the report of the JRP. They could have taken the matter to the Federal Court of Canada, which could have reviewed the decision and perhaps overturned it. But, they chose not to do so and ultimately filed this NAFTA claim. Of course, they were entitled to choose a remedy through NAFTA rather than pursuing a domestic remedy under Canadian law.⁵³ But the NAFTA standard is not the domestic law standard and a NAFTA claim must meet the NAFTA standard. Showing that domestic law could have been violated does not mean that there has been a violation of Article 1105.

43. By treating this potential violation of Canadian law as itself a violation of NAFTA Article 1105 the majority has in effect introduced the potential for getting damages for what it is breach of Canadian law, where Canadian law does not provide a damages claim for such a breach. That is not what NAFTA was intended to do. You cannot get a remedy under NAFTA Chapter 11 for breach of Canadian law; you can only get a NAFTA remedy for a breach of NAFTA.

Implications of the Decision

44. The majority takes great pains to deny that its decision interferes with Canada's ability to legislate on environmental issues.⁵⁴ And, the case of course does not challenge Canada's laws; rather, it challenges the way they have been implemented. But there are two consequences of the majority's decision that have significant implications for the application of environmental laws by NAFTA Parties.

45. First, by concluding that a potential violation of Canadian law, caused by the use of novel language by a Panel, even though it did all that was required of it in providing an environmental assessment, or caused by a failure to list at the end of its report possible mitigation measures that it had referred to throughout its report, meets the *Waste*

⁵³ NAFTA Article 1121.

⁵⁴ Award, para. 598.

Management standard and thus constitutes a violation of NAFTA Article 1105, will change the character of environmental review under a joint review panel and perhaps other forms of environmental review as well.

46. A joint review panel is generally made up of scientists and environmental experts and not necessarily lawyers. It may use language that best expresses the views and conclusions it has reached, which may not be language familiar to lawyers and may not be the same as the language used by another joint review panel, expressing similar ideas. The real question is not what language has been used, but whether the Panel has done, in substance, what it has been asked to do.

47. There are two controls on an environmental review panel in the Canadian system. First, if the government does not consider that the Panel has done its job properly, it can reject the recommendation of the Panel. Second, a party that considers that the Panel has not acted in accordance with Canadian law can ask for the Federal Court of Canada to review the actions of the Panel. Neither event occurred in this case.

48. What the majority has done is add a further control over environmental review panels. Failure to comply with Canadian law by a review panel now becomes the basis for a NAFTA claim allowing a claimant to bypass the domestic remedy provided for such a departure from Canadian law. This is a significant intrusion into domestic jurisdiction and will create a chill on the operation of environmental review panels. In the past, if they made an error – exceeded their jurisdiction or failed to comply with the law – they would have had their recommendations ignored by the governments to which they were made or overturned on review by a federal court. 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.

49. Second, and more troubling for the ability of a state to apply its environmental law, is that the result of the majority decision is that a review panel that put great weight

on the effect of a project on the human environment and took account of the community's own expression of its interests and values results in the state being liable in damages to an investor. Thus, subjugation of human environment concerns to the scientific and technical feasibility of a project is not only an intrusion into the way an environmental review process is to be conducted, but also an intrusion into the environmental public policy of the state.

50. In effect, what occurred in this case was that an environmental review panel concluded that the socio-economic effects of a project were sufficiently negative that notwithstanding the existence of some positive benefits of the project, it should recommend against the project. In doing so, the Panel used terminology with which the Claimant argued it was not familiar to describe established and well-understood socio-economic and environmental effects. The Panel also decided not to recommend mitigation measures, because it believed that the overall effect of the project could not be mitigated. On that basis, the majority has concluded that Canada is liable in damages under NAFTA.

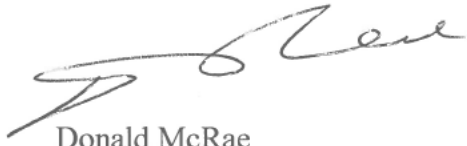
51. This result may be disturbing to many. In this day and age, the idea of an environmental review panel putting more weight on the human environment and on community values than on scientific and technical feasibility, and concluding that these community values were not outweighed by what the panel regarded as modest economic benefits over 50 years, does not appear at all unusual. Neither such a result nor the process by which it was reached in this case could ever be said to "offend judicial propriety".⁵⁵ Once again, a chill will be imposed on environmental review panels which will 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 under NAFTA Chapter 11. In this respect, the decision of the majority will be seen as a remarkable step backwards in environmental protection.

⁵⁵ *Waste Management, supra*, footnote 2, para. 95.

52. In conclusion, I disagree with my colleagues' disposition of the claim under Article 1105. I would have found that there was no breach of Article 1105.

53. I equally find that the actions of the JRP could not constitute a violation of Articles 1102 and 1103. In my view, the Claimants were treated in accordance with Canadian law, which all investors are entitled to expect, and thus there is no basis for a claim that there has been a violation of obligations of national treatment or of most-favoured-nation treatment.

54. In all other matters I agree with the results reached by my colleagues and thus have nothing further to add.



Donald McRae
Arbitrator

10 March 2015