

**DOMINANT PURPOSE TEST IN SOLICITOR CLIENT PRIVILEGE HARDER TO MEET NOW**

By Stanley Berger

In March 2015 a NAFTA tribunal found that Canada violated NAFTA when federal and provincial governments refused to approve the White Point Quarry and Marine Terminal in Nova Scotia following an environmental assessment carried out by way of a joint panel review. see *Clayton, Bilcon of Delaware Inc v Canada* (17 March 2015), 2009-04, online: PCA <https://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf>.

The Tribunal had concluded that Canada had not satisfied its obligation to provide Investors with fair and equitable treatment under Article 1105 of NAFTA by providing discriminatory and unjustified treatment from that which would have been accorded similarly-situated Canadian investors. On May 2, 2018 the Federal Court of Canada upheld the tribunal decision see *2018 FC 436*. The Court acknowledged the Tribunal Award raised "significant policy concerns" about the effect on the ability of NAFTA parties to regulate environmental matters within their jurisdiction, the ability of NAFTA tribunals to properly assess whether foreign investors have been treated fairly under domestic environmental assessment processes and the potential chill in the environmental assessment process that could result from the majority decision. The Federal Court observed:

"Other commentators have raised concerns with respect to the ability of NAFTA Tribunals 'to properly assess whether a foreign investor has been treated fairly under a domestic environmental assessment process': *Meinhard Doelle, 'The Bilcon NAFTA Tribunal: A Clash of Investor protection and Sustainability-Based Environmental Assessments' in Stanley D. Berger ed., Key Developments in Environmental Law, 2017 Ed., (Thomson Reuters) 99 at 121*. Doelle suggests that amongst the challenges facing the Tribunal in this case was its lack of familiarity with relevant Canadian law, with environmental assessment practice at the federal and provincial levels, and with the process used to make findings of fact and domestic law: p.121"

Nevertheless, the Court dismissed Canada's application to set the Award aside since the NAFTA Tribunal's findings of fact and application of the law to the facts were within the four corners of the Submission to Arbitration.



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