



Canadian Case and the Loss of Sovereignty Under NAFTA

President Donald Trump has often spoken about taking the United States out of the North American Free Trade Agreement (NAFTA), or at least renegotiating the agreement to make it more fair to the United States.

The decision of the Canadian Federal Court demonstrates the dangers to not only Canada's national sovereignty, but also to the continued independence of the United States. While conservative free-market Americans may hail the decision in one respect, the precedent the decision sets should be of grave concern to American national sovereignty.



The facts of the case explain this ambivalence for those Americans who both hold concerns about the threat to free enterprise by radical environmentalism and to American national sovereignty by trade agreements such as NAFTA that create bodies that supersede the right of each country in the agreement — in this case, the U.S., Canada, and Mexico — to govern themselves.

Bilcon, an American Delaware-based firm run by the Clayton family of New Jersey, planned to develop a basalt quarry 16 years ago on the Bay of Fundy at Whites Point in Nova Scotia. A basalt quarry is a processing facility and marine terminal. The company intended to send 40,000 tons of stone to the United States each week over 50 years.

But the company ran afoul of some environmental opposition in Canada. The Sierra Club was among the environmental activists who ultimately opposed the plan. They persuaded the government of Nova Scotia (a province of Canada) and the federal government of Canada to end the project in 2007. An environmental assessment panel said the plan should be stopped, concluding that it would have a "significant adverse effect" on the environment, especially in the surrounding communities.

By this time, Bilcon had invested both time and money in the project, and opted to file a NAFTA challenge under the agreement's "Chapter 11." In the filing, Bilcon alleged that Canada had applied its environmental laws in an arbitrary, unfair, and discriminatory manner (they argued that, as an American company, they were held to a higher standard than a Canadian company would have been held).

The Permanent Court of Arbitration agreed that Canada was liable for damages to Bilcon, leading the government to appeal to its own Federal Court of Canada. In short, the Canadian court held that it had "no jurisdiction" to reverse a ruling by NAFTA in the Digby quarry case.

Federal Court Justice Anne Mactavish turned away arguments made by the federal government that NAFTA was deciding questions of Canadian law by disputing the environmental review panel process. "I find that the tribunal made a factual finding of arbitrary conduct and applied customary international law in determining whether Canada violated the minimum standard of treatment for the purposes of



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Article 1105 of NAFTA,” Mactavish said.

“Canada has thus not established that the decision of the majority deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration,” Mactavish explained.



While Mactavish ultimately ruled in favor of the NAFTA panel, she also acknowledged that the panel’s finding that Canada was liable for damages to the American company “raises significant policy concerns.”

She noted that the NAFTA ruling inhibited “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’s decision.”

Thus, despite legitimate concerns by Americans that the environmental movement is often calling for increased government controls over the economy, stifling free enterprise and the ability of individuals to use their own private property, this decision powerfully illustrates the dangers of international trade agreements. In this case, the decision upsets the environmentalists and pleases those who favor less governmental control over economic activity, but such rulings set the dangerous precedent of increasing regional governments at the expense of national sovereignty. This time it is Canada’s national sovereignty — next time it may very well be an infringement of U.S. national sovereignty in a case that advances some radical objective of environmentalists. It may be a decision in an area other than environmentalism. But in the end it will mean less national sovereignty for the United States.

Just remember: Fact often follows fiction. In the popular *Star Wars* movie series, it was a trade deal that began the process for the republic to be transformed into an empire.



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