YCAP

LEX ARBITRI

The E-Newsletter of
Young Canadian Arbitration Practitioners
Jeunes praticiens canadiens de l'arbitrage

2014
Volume 10 Number 1

In This Issue:

Message from the President

Dear YCAP Members,

The past few months have been very busy for YCAP and the second part of 2014 promises to be just as eventful.

On May 8, YCAP brought its Spring Symposium series back to the West coast. "Trans-Pacific Crossings: Current Trends and Practical Tips for International Arbitration between Asia and Canada" was a great success and featured lawyers with extensive experience with international arbitration in Asia: Chiann Bao (Secretary General of the Hong Kong International Arbitration Centre), Kevin Nash (Singapore International Arbitration Centre), Huen Wong (Fried Frank, Hong Kong) and Gerhard Wegen (Gleiss Lutz, Stuttgart). Former YCAP Board Member Angus Gunn Q.C. (Borden Ladner Gervais) moderated the proceedings, which enjoyed the generous support of Fasken Martineau, BLG and Herbert Smith. You can watch the entire event online at the YCAP website – just click on "Multimedia."

LEX ARBITRI
Spring/Summer 2013
Volume 9, Number 1

On another continent the very next day at the Canadian High Commission in London, YCAP added its support to a lunch event organized by the Chartered Institute of Arbitrators (CIArb) and YCAP Board Member Lisa Tomas (Arnold & Porter) promoting Canada as a seat of arbitration. Canadian luminaries Yves Fortier and Ian Binnie were among the guests invited by the Canadian High Commissioner to raise awareness of Canada as an ideal place for international arbitrations.

Two weeks later, YCAP organized an event with the International Bar Association in Toronto on May 29, 2014. Following a unique format of a "firm-wide partner-associate brainstorming session," Tina Cicchetti (Fasken Martineau), Lisa Tomas (Arnold & Porter) and Patrick Pearsall (U.S. State Department) put on an entertaining and educational event with Peter Rees Q.C. (Thirty Nine Essex Street, London) and Luca Radicati (Radicati di Brozolo Sabatini, Milan) as senior commentators. The materials distributed to the participants – including the Power Point presentation and the fictitious memorandum regarding the infamous but indispensable firm client "Mozart Industries" – are available on the YCAP website at http://www.ycap.ca/ycap-events/.

SAVE TWO DATES

The autumn will be another busy time for YCAP and there are two dates to mark into your calendar. First, YCAP will be organizing a seminar and networking event in Calgary on **October 15, 2014** in conjunction with the American Arbitration Association and the Association of International Petroleum Negotiators. Second, as has become our tradition, the YCAP 2014 Fall Symposium will be held in conjunction with the ICC Canada Annual General Meeting and Conference in Montreal **November 6-7, 2014**. We hope to see you at one, if not both, of these great events. Details will follow soon.

LEX ARBITRI
2014
Volume 10, Number 1

CONTACT

YCAP
c/o Tina Cicchetti
Fasken Martineau DuMoulin LLP
Suite 2900
550 Burrard St.
Vancouver, BC V6C 0A3
Canada

Email: YCAP@ycap.ca

Website: www.ycap.ca

CONTRIBUTIONS

News or event contributions are greatly welcomed. Please contact one of the members of the Newsletter Committee, or email us at: newsletter@ycap.ca.

MEMBERSHIP

If you are interested in becoming a member of YCAP, please contact: YCAP@ycap.ca

NEW CORPORATE SPONSORS

ARBITRATION PLACE
An all-encompassing approach

FTI CONSULTING™

YCAP is pleased to announce that Arbitration Place and FTI Consulting have become corporate sponsors of YCAP. Both have been very supportive of YCAP in the past – Arbitration Place has been a gracious host to past YCAP symposia and cocktail events and FTI has been a big part of our pub night history – so we are lucky to have both join YCAP in an official capacity along with the ten indispensable law firms who sponsor YCAP every year. You can learn more about Arbitration Place, FTI Consulting and our supporting law firms on the YCAP website.

We are always seeking input and assistance from YCAP Members, so please do not hesitate to contact us at ycap@ycap.ca if you have suggestions for events YCAP can get involved with or if you would like to volunteer for one of the YCAP committees.

On behalf of the YCAP Executive,

Mark A. Luz
President

YCAP 2014 Spring Symposium jointly hosted with HK45 and YIAG, May 8, 2014

YCAP co-hosted a breakfast symposium on "Trans-Pacific Crossings: Current Trends and Practical Tips for International Arbitration between Asia and Canada" on 8 May 2014 in Vancouver, British Columbia, Canada. YCAP joined forces with the Young International Arbitration Group (YIAG) of the London Court of International Arbitration (LCIA) and HK45 (the young arbitration group of the Hong Kong International Arbitration Centre) to host this event, which was held in conjunction with the Inter-Pacific Bar Association's Annual General Meetings.

Angus Gunn QC, of the Canadian law firm Borden Ladner Gervais, moderated a panel of four speakers who addressed the pathway from drafting the arbitration clause through to enforcement in a hypothetical Asia/Canada contract dispute. The speakers were Chiann Bao, Secretary-General, Hong Kong International Arbitration Centre (HKIAC); Kevin Nash, Counsel, Singapore International Arbitration Centre; Gerhard Wegen, Gleiss Lutz; and Huen Wong JP, Fried Frank LLP.

The event was sponsored by Borden Ladner Gervais, Fasken Martineau, and Herbert Smith Freehills. The organizing committee included members of YIAG, YCAP and HK 45, including Sarah McEachern (YIAG co-representative for North America).

The event was well attended in person and also included about 40 attendees via webcast.

Ontario Lawyer and Former YCAP Steering Committee Member, Dr. Todd Weiler, launches new book on the Interpretation of International Investment Law in Washington DC

On February 27, 2014 Dr. Todd Weiler launched his new book, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context*,[1] at the International Centre for the Settlement of Investment Disputes (ICSID).

[1] Todd Weiler, *A History of International Investment Law: Equality & Discrimination in Fresh Perspective* (Martinus Nijhoff: The Hague, 2013).

The book launch was hosted by Young-ICSID, an organization which encourages professional development among international investor-State dispute resolution practitioners under the age of 45. The room was packed.

Dr. Weiler, a London, Ontario-based lawyer, delivered a synopsis of his inductive, historical-functional approach for interpreting investment treaties. Dr. Weiler contends that this approach can improve the coherency of international investment law by accounting for the historical context in which treaties and their provisions were written and therefore reduce the indeterminacy so often attached to their interpretation and application.[2] His position gains traction primarily through the principle of contemporaneity, found in Article 31(3)(c) of the Vienna Convention of the Law of Treaties.[3]

Dr. Weiler further identified and set out to dispel four myths of international investment law, specifically:

(1) The "Protection and Security" (P&S) and "Fair and Equitable Treatment" (FET) standards are not synonymous with the "Customary International Law Minimum Standard of Treatment of Aliens" (CILMSTA);

(2) CILMSTA has been established without demonstrating binding international custom (i.e. State practice and *opinio juris*);

(3) FET is not an outgrowth of a customary international law prohibition against denials of justice, which are more akin to claims of failed P&S, and;

(4) "National Treatment" and "Most-Favoured Nation Treatment" can be encapsulated in one standard: "Treatment-No-Less-Favourable" (TNLF), which is not limited to protect against only nationality-based discrimination.[4]

Frédéric Sourgens, author of a recent review of another of Dr. Weiler's book, *Truth in Method*,[5] published in a 2014 issue of ICSID

[2] See specifically *ibid* at 40-49.
[3] See *ibid* at 43.
[4] *Ibid* at 17.
[5] Frédéric Sourgens, "Truth in Method: Book Review of The Interpretation of International Investment Law: Equality Discrimination and Minimum Standards of Treatment in Historical Context," 29(1) ICISD Review 247-261 (2014)

Review, expertly moderated the event adding comedic relief, witty banter and interesting insights into Dr. Weiler's work; suggesting, for example, an extension of Dr. Weiler's TNLF principle could include costs of a premature jurisdictional claim.

Praise for Dr. Weiler's work from the upper echelons of the international investment law world is also not hard to find. The well-known American jurist Judge Charles Brower, in his Foreword, describes Dr. Weiler's book as "an intellectual Venus flytrap – well calculated to capture the attention of international investment arbitration arbitrazhniks."[6] Meg Kinnear, ICSID's Secretary General, seemed similarly impressed by Dr. Weiler's book, asking how ICSID Tribunals could incorporate his method.

Overall, the book launch was an excellent way to expose young minds to a "new-old" way of critical thinking by asking the attendees to consider the historical context of an investment treaty when they are faced with an interpretation question.

Experts Corner

Concurrent Evidence – What Works? What Does not Work? What is Missing? What is Next?

Introduction

Over the past five years there has been renewed interest in the presentation of expert evidence through concurrent evidence (often referred colloquially as "hot tubbing" or "witness conferencing"). While the use of concurrent evidence has been used since the 1970s in Australia, other countries have recently been exploring its use, most notably in the United Kingdom and Canada.

Concurrent evidence has been described as a process whereby experts sit side-by-side, often in a panel format, where the lawyers, experts and the trier(s) of facts engage in a discussion to identify the issues and differences in their respective reports and whether any differences can be reconciled. When a resolution is not possible, the experts' opinions are then presented to the court or tribunal individually.

[6] *Supra* note 1, at xxxv.

While the use of concurrent evidence has proliferated in recent years, many detractors still remain. Although many agree that it does have imperfections, alternative models exist. The remainder of this article briefly explores the advantages and disadvantages of concurrent evidence and highlights a recently advanced alternative model seen in international arbitration and in Australia.

What Works? What Does Not?

Concurrent evidence was borne out of the desire to enable experts to better serve the court or tribunal in contrast to the traditional adversarial "battle of the experts". The process allows for increased independence of the experts and removes the client advocacy position that some experts may employ or that counsel may attempt to take advantage of during expert shopping. Additionally, the process is viewed as more efficient, thereby allowing for a higher degree of clarity and understanding for the judges or arbitrators. This is accomplished by allowing the trier(s) of fact the opportunity to pose questions directly to the experts as opposed to each individual expert only offering their opinion through an examination-in-chief and cross-examination by the respective parties' counsel.

This gives rise to the common criticism, often by counsel, that the parties lose control over the process and that the "story of the case" is ultimately told through the judge's or arbitrator's questions, rather than that of counsels'. In some cases, this might be beneficial as issues of importance are narrowed down. However, some experts and counsel have argued that this may tend to result in an over-simplification of the issues.

Another common criticism is that the process favours experts who are more verbose or aggressive, which can be further amplified by the reduced "safety-net" of counsel in typical proceedings. However, the converse may also be true for those experts who are reluctant to maintain or take extreme or combative positions in front of other experienced and respected experts.

Overall, judges and arbitrators largely see concurrent evidence as advantageous over the traditional model. For example, Justice Binnie of the Supreme Court of Canada (as he was then) stated that: "a court should be able to require opposing experts to testify on the same panel and to be subject to questioning in the presence of each

other, with the right to question each other in the presence of the trier of fact".[7]

In *Eli Lilly & Co. v. Apotex,* Justice Gauthier wrote that "the use of hot tubbing would have been particularly useful",[8] whereas, the Australian Court has found "that experts themselves approve of the procedures and they welcome it as a better way of informing the Court".[9]

What is Missing?

While there are strong arguments for the continued use of concurrent evidence, its use is only moderately supported. There still exists a need for the continued study regarding the use of concurrent evidence given the arguments against its use, most notably, from the experts themselves. To date, there exists only anecdotal evidence. In fact, most of the evidence comes indirectly from triers of fact themselves.

What is Next?

While concurrent evidence offers many worthwhile advantages, an alternative model has been used based on the *IBA Rules on the Taking of Evidence in International Arbitrations*[10] and in Australia. Under this model, sometimes referred to as *Expert Teaming*, the IBA Rules allow for both party *and/or* tribunal appointed experts to present expert evidence.

Expert Teaming differs from concurrent evidence, in that the Court or Tribunal has an active role from the outset in identifying those issues requiring expert evidence and the types of experts required. Once established, the retained experts are briefed with an identical set of agreed upon facts and competing assumptions.

The experts are then separated from their respective parties to allow them to work co-operatively to produce a joint-expert report. This joint report identifies points in agreement and in contention.

[7] The Honourable Justice Ian Binnie, "The Changing Role of the Expert Witness", 2010, 49 Supreme Court Law Review (2d) 179.
[8] Eli Lilly and Co. v. Apotex, 2009, Federal Court of Canada, FC 991, paragraph 234.
[9] The Honourable Justice Garry Downes, "Concurrent Expert Evidence in the Administrative Appeals Tribunal: The New South Wales Experience", February 27, 2004
[10] IBA Rules on the Taking of Evidence in International Arbitrations, May 29, 2010.

Thereafter, any unresolved issues are addressed by individual expert reports and concurrent evidence.

While the Expert Teaming approach is a fusion of pre-trial mediation and concurrent evidence, it is hoped that it will facilitate the narrowing of issues along with reducing adversarial bias thus realizing additional efficiencies.

It remains to be seen which model, concurrent evidence or Expert Teaming, will be more commonly used in the future. Both have their advantages, though it seems clear that triers of fact prefer a move away from the traditional model of the "battle of the experts".

Co-written by:

Yoram Beck, MA(Econ), CBV, CFA, Vice President and Vimal Kotecha, MBA, CPA, CA, CBV, Partner are senior team members at Richter Advisory Group Inc. in the Valuation, Litigation and Transaction Advisory Practice in Toronto, *Canada. Both Yoram and Vimal have worked on numerous complex valuation and damages disputes across numerous industries, both domestically and* ***internationally.***

***OMA* v *Willis Canada Inc*, 2013 ONCA 745: Another Win For Arbitration In Ontario**

Cenobar Parker, In-House Counsel/Resident Tribunal Secretary, Arbitration Place

The Ontario Court of Appeal rendered an important decision in December in *Ontario Medical Association v Willis Canada Inc*, 2013 ONCA 745, which confirms that the competence-competence principle is alive and well in arbitrations conducted pursuant to Ontario's *Arbitration Act*, SO 1991, c 17. The competence-competence principle, which is well-recognized in international arbitration, provides that the arbitrator, and not the court, should be the first to address jurisdictional challenges. This is contrary to the courts' traditional approach, which favoured intervention, posing serious challenges to the arbitration process.

Though both the Ontario Court of Appeal and the Supreme Court of Canada had already weighed in on the application of the competence-competence principle in international arbitrations, the Ontario

Medical Association (OMA) in this case argued that those precedents did not apply under the domestic act.

The respondents Aviva Canada Inc., an insurance company, and Willis Canada Inc., an insurance broker, entered into a Broker/Agent Agreement pursuant to which Aviva provided insurance coverage to Ontario Medical Association (OMA) members, and Willis acted as Broker. The Agreement, to which the OMA was not a signatory, contained an arbitration clause. The OMA did sign an Addendum to the Broker/Agent Agreement, which did not refer to, nor contain, any arbitration clause, but which included in its preamble a reference to the Broker/Agent Agreement. Pursuant to a schedule to the Broker/Agent Agreement, Aviva was to pay to the OMA an "Over-Ride (Sponsor)" fee. After an alleged default of payment, the OMA commenced an action in the Superior Court. Aviva moved to stay that action pursuant to section 7 of the *Arbitration Act*, arguing that the Agreement and the Addendum were to be read as a whole, meaning that the OMA was governed by the arbitration clause.

Section 7 of the *Arbitration Act* requires, subject to narrow exceptions, that a court stay any proceedings commenced where the matter is the subject of an arbitration agreement. Citing the competence-competence principle affirmed in *Dalimpax Ltd v Janicki* (2003),64 OR (3d) 737 (ONCA) and *Dancap Productions Inc v Key Brand Entertainment Inc*, 2009 ONCA 135, the Motion Judge deferred the question of jurisdiction to the arbitrator on the basis that it was arguable that the OMA was governed by the arbitration clause.

On appeal, the OMA argued that under section 7 of the *Arbitration Act*, the court was required to determine whether the dispute was governed by an arbitration agreement before deciding whether to grant a stay. Subject to a narrow exception in cases where the challenge to jurisdiction was based solely on a question of law, the Court of Appeal rejected the argument on the basis that the competence-competence principle, which applied under the domestic act by virtue of sections 7 and 17, required the court to defer jurisdictional challenges to the arbitrator. Though the OMA attempted to distinguish domestic and international arbitrations, the Court disagreed, finding that when it came to the stay of court proceedings and the arbitrators' power to determine their own jurisdiction, the language of the *Arbitration Act* and the *International Commercial Arbitration Act*, RSO 1990, c I-9, were substantially the same.

The Court did not end there. In dismissing the appeal, the Court determined that the OMA's appeal was barred by section 7(6) which provides that "[t]here is no appeal from the court's decision" under section 7. The existing case law had only interpreted this bar to appeal in situations where (a) the court clearly found that there was an arbitration agreement, in which case there was no appeal from the court's decision, and (b) where the court found that there was no applicable arbitration agreement, in which case the *Arbitration Act* did not apply and a party could appeal the court's decision. The Court of Appeal found that when a judge relies on the competence-competence principle to defer the question of jurisdiction to the arbitrator, it is more akin to the former category of cases, since a stay is granted pursuant to section 7(1) despite the fact that no determination is made with respect to the merits of the jurisdictional dispute. Since such a decision does not remove the dispute from the scope of the *Arbitration Act*, the bar to appeal must apply. This, the Court determined, was consistent with the legislature's clearly stated intention to bar appeals from the court's decision to grant a stay under section 7. The Court stated that the bar to appeals reflected an important policy consideration—namely the promotion of an expeditious determination of where the parties' dispute is to be heard—and that no injustice would result from its decision since once the arbitrator made a determination with respect to his or her jurisdiction under section 17(1) of the Arbitration Act, a party had the ability to seek judicial review under section 17(8).

As a clear indication that the courts will not lightly intervene in arbitration proceedings, the Court of Appeal in this case sent a message in support of party autonomy and the decision to determine disputes by private arbitration. This decision also affirms that Ontario continues to be an arbitration friendly jurisdiction.

***St Marys VCNA, LLC* v *Canada*: The 'Improper Purpose' Exception to Privilege and a Lack of Standing Lead to a Consent Award**

Ivana Nenadic, J.D., LL.L.

The NAFTA tribunal in *St. Marys VCNA, LLC v. Canada* issued a Consent Award on March 29, 2013, thereby accepting the settlement agreement between the parties. St. Marys VCNA, LLC ("St. Marys" or "Claimant"), a Delaware corporation, had initiated proceedings against Canada for damages under Chapter 11 of NAFTA, in relation to the Government of Ontario's decision to issue a Municipal Zoning Order and a Declaration of Provincial Interest that included the

Claimant's quarry site. In the settlement agreement, the Votorantim Group, the ultimate owner of St. Marys, released and discharged the Government of Canada from its claim and acknowledged that it had always lacked standing to bring a case under NAFTA.[11]

Procedural History

The Claimant filed a Notice of Intent to Submit a Claim to Arbitration on May 13, 2011 ("Notice"). In the Notice, it stated that it had purchased land in the City of Hamilton in 2006 to develop a quarry. The Claimant also made clear that an investor from a non-Party to the NAFTA, the Votorantim Group of Brazil, ultimately owned it. The conflict arose when, on April 12, 2010, the Government of Ontario issued a Minister's Zoning Order ("MZO") that effectively froze the agricultural zoning of the quarry's site.[12] The Claimant alleged that the provincial government exercised its power in order to gain political support.[13] Although a briefing note issued on April 10, 2010 stated that the MZO controlled the use of the land but did not control the activities carried out on the land and did not stop the regulatory approval process, the Claimant argued that the local and provincial governments refused to carry on with the permit application process.[14]

Then, on April 20, 2011, the provincial government issued a Declaration of Provincial Interest ("DPI"), which removed authority from the Ontario Municipal Board to review the MZO and rendered the Ontario Cabinet the sole authority to review the conduct of its members.[15] The Claimant argued that this manoeuvre by the provincial government meant Canada was breaching NAFTA provisions related to national treatment, most favoured nation treatment, international law standard of treatment and expropriation.[16] St. Marys sought, in the Notice of Arbitration,

[11] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Consent Award at para. 7).
[12] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Notice of Intent at para. 18).
[13] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Notice of Intent at paras. 9-10).
[14] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Notice of Intent at paras. 22-23).
[15] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Notice of Arbitration at para. 53).
[16] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Notice of Arbitration at para. 64).

damages of US $275 million in relation to these alleged breaches, as well as further costs and damages.[17]

On December 22, 2011, Canada notified the Claimant of its jurisdictional concerns under NAFTA 1113(2) and requested documents confirming the Claimant's ownership structure, assets, holdings and business activities in the United States.[18] Article 1113(2) allows a NAFTA Party to deny the benefits of the NAFTA to an Investor of another Party if 1) the denying Party proves that the Investment is owned or controlled by persons of a non-Party, and, 2) the denying Party proves that the investor has "no substantial business activities" in the territory of the Party where it is established.

Upon reviewing the information provided by the Claimant, on March 1, 2012, Canada informed the Claimant that it was formally invoking NAFTA Article 1113(2) to deny Chapter 11 benefits.[19]

In response, on March 23, 2012 the Claimant issued a Second Notice of Intent alleging that Canada's denial of benefits under NAFTA Article 1113(2) amounted to an additional breach of the NAFTA and listed St. Marys alleged business activities in the United States. The Claimant argued that the only time period relevant for the purpose of establishing whether it had "substantial business activities" in the US was "the time that the denial was proposed on December 22, 2011."[20] It put forth evidence of its substantial activities in the US by listing the assets of the subsidiary companies in the US and referring to the existence of banking, acquisition and consultant operations in various states.[21]

Canada's Jurisdictional and Substantive Defences

Canada filed a Brief Outline of Jurisdictional and Substantive Defences on August 31, 2012 ("Outline"). In the Outline, Canada stated that Votorantim, the ultimate owner of the Investment, incorporated St. Marys on October 18, 2010, in Delaware. It subsequently transferred

[17] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Notice of Arbitration at para. 79).
[18] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Canada's Brief Outline of Jurisdictional and Substantive Defences at para. 44).
[19] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Canada's Brief Outline of Jurisdictional and Substantive Defences at paras. 45-47).
[20] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Second Notice of Intent at para. 9).
[21] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Second Notice of Intent at para. 10).

to St. Marys ownership of St. Marys Cement ("SMC"), an Ontario corporation, in order to be able to file a claim under NAFTA. Canada explained that the Claimant relied almost entirely on events that occurred prior to October 18, 2010 in its claim.[22]

In response to the facts put forth by the Claimant, Canada stated that the authorities who issued the MZO and the DPI acted on the basis of statutory authority and that their discretionary power remained subject to review or alteration by Canadian courts. As of April 2010, the Claimant had not received the required approvals to develop and operate a quarry, and had not answered many pending questions since its initial application.[23] Moreover, Canada asserted that the SMC was informed that various approval processes were suspended *before* St Marys was incorporated. Nonetheless, the Claimant continued to corresponded with authorities after the incorporation to try to post-date the dispute. For instance, the Claimant presented, for the second time, a request to the Municipality of the Environment to perform water tests, which had been refused earlier.[24]

Canada made five main arguments. Firstly, Canada argued that St. Marys failed to establish jurisdiction under the NAFTA; in other words, it was not an Investor because it failed to establish ownership or control of its alleged investment in SMC at the time of the events referenced in its claim.[25]

Secondly, Canada invoked the denial of benefits provision in Article 1113(2) because St. Marys is ultimately owned and controlled by a non-Party to the NAFTA and is a shell company with no substantial business activities in the United States. In this regard, Canada conducted extensive due diligence and listed numerous items such as the fact that the Claimant was incorporated after all of the measures it raised in its Notice of Intent, except one, had occurred and the fact that the evidence the Claimant put forth to establish business activities in the United States post-dated the measures complained of.[26]

[22] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Canada's Brief Outline of Jurisdictional and Substantive Defences at para. 8).
[23] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Canada's Brief Outline of Jurisdictional and Substantive Defences at para. 14-17).
[24] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Canada's Brief Outline of Jurisdictional and Substantive Defences at para. 26-27).
[25] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Canada's Brief Outline of Jurisdictional and Substantive Defences at para. 37-38).
[26] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Canada's Brief Outline of Jurisdictional and Substantive Defences at para. 39-45).

Thirdly, Canada asserted that the claim should be dismissed for abuse of jurisdiction because the Claimant incorporated St. Marys in order to be able to make a claim under NAFTA.[27]

Fourthly, Canada argued that the tribunal lacked jurisdiction to rule on facts that predate the Investment, meaning the creation of St. Marys.[28]

Finally, Canada asserted that the Claimant did not abide by the timing for filing a claim under NAFTA Article 1120(1), which provides that a claim can be filed "provided that six months have elapsed since the events giving rise to the claim".[29]

Inadvertent Disclosure of Privileged Documents

On November 29, 2012, the Tribunal appointed Justice Spigelman, a retired Austrialian judge,[30] to address two questions regarding privileged documents that had arisen during the proceedings. The Claimant sought documents that it produced inadvertently to Canada to be declared privileged, while Canada argued that the documents were not entitled to privilege because they were used for an improper purpose. Having examined the context of the case and the exception of improper purpose, Justice Spigelman wrote in his report of December 27, 2012, that attorney client privilege was overcome because "Canada has a strong case that the Claimant is the vehicle for a scheme to obtain the right under NAFTA to institute and pursue proceedings".[31]

Justice Spigelman also addressed waiver, in spite of the non-privileged nature of the documents, because of the Claimant's jurisdictional challenge of his mandate. He analysed the circumstances in which the documents were produced and he sided

[27] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Canada's Brief Outline of Jurisdictional and Substantive Defences at para. 48-51).
[28] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Canada's Brief Outline of Jurisdictional and Substantive Defences at para. 53).
[29] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Canada's Brief Outline of Jurisdictional and Substantive Defences at paras. 55-58).
[30] Jarrod Hepburn, *"In a Newly-Released Report, Tribunal-Appointed Expert Urged Lifting of Attorney-Client Privilege on Documents at Centre of NAFTA Denial of Benefits Battle"* (2013) Investment Arbitration Reporter [online: http://www.iareporter.com/articles/20130416].
[31] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Report on Inadvertent Disclosure of Privileged Documents at page 12).

with the Claimant in this respect; out of 12,000 documents which the Claimant reviewed, it inadvertently produced 11 privileged documents along with 621 others due to a technical problem with the program that contained the Master Index.[32] However, he ruled that attorney client privilege was overcome by the overriding interests of justice which arise out of the attempt by the Claimant to manufacture standing under NAFTA.[33]

The report on privilege addressed the core of the parties' dispute and thus the Consent Award seemed to be a sensible ending to this dispute. This case stands for the proposition that a Claimant under NAFTA must be an investor of a Party to the NAFTA or must have "substantial business activities" in the territory of a Party where it is incorporated. It also demonstrates that corporate restructuring in investment treaty arbitration for the purpose of creating a claim under an investor-State treaty will be vehemently disputed by the State and will not end successfully for the Claimant . It is interesting to note that it was a mere ruling on privilege which ultimately led to settlement of the Tribunal's proceedings.

[32] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Report on Inadvertent Disclosure of Privileged Documents at page 14).
[33] *St. Marys VCNA, LLC v. Government of Canada*, [2011] NAFTA (Report on Inadvertent Disclosure of Privileged Documents at pages 16-17).