Court file No.: T-225-01

FEDERAL COURT - TRIAL DIVISION

IN THE MATTER OF SECTIONS 5 AND 6 OF THE *COMMERCIAL ARBITRATION ACT*, R.S.C. 1985, C. 17 (2nd SUPP.)

IN THE MATTER OF ARTICLES 1, 6 AND 34 OF THE *COMMERCIAL ARBITRATION CODE* SET OUT IN THE SCHEDULE TO THE *COMMERCIAL ARBITRATION ACT*

AND IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF THE *NORTH AMERICAN FREE TRADE AGREEMENT* ("NAFTA") BETWEEN S.D. MYERS, INC. AND THE GOVERNMENT OF CANADA

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

S.D. MYERS, INC.

Respondent

MEMORANDUM OF ARGUMENT

Introduction

1. The Council of Canadians, Greenpeace Canada and the Sierra Club of Canada (the "Proposed Interveners") apply together for leave to participate in this review with status analogous to that of a party. They do so on the basis that they are interested in the application of the *North American Free Trade Agreement* ("NAFTA") and its relationship with environmental regulation and wish to present arguments and evidence in addition to those raised by the Applicant in its Notice of Application.

2. The Proposed Interveners also seek an order adjourning the Applicant's motion for directions returnable March 22, 2001.

3. The Applicant supports third party intervention if the criteria established under Rule 109 are satisfied and therefore it asks the Court to decide this motion in accordance with those criteria.. The Applicant says that if the Court is inclined to grant any or all of the Proposed Interveners' application for leave to intervene, the directions issued pursuant to Rule 109(3) should confine their participation in the application for review to delivering written and oral argument addressing the issues identified in the Notice of Application and that no right of appeal should be granted. As to costs, the Proposed Interveners should not be entitled to costs of the motion for leave to intervene or of participating in the application for review.

The Facts

4. On November 13, 2000, an Arbitral Tribunal established pursuant to Articles 1120, 1122 and 1123 of the NAFTA (the Tribunal") issued a Partial Award ("Award"). In that Award, the Tribunal found that, for the purposes of the NAFTA, the Respondent was an "investor" and that S.D. Myers (Canada) Inc., a company incorporated under the laws of Canada, was an "investment" of the Respondent. The Tribunal also held that by issuing an interim order in 1995 banning the export of polychlorinated biphenyls ("PCB's") to the United States of America (the "Interim Order"), Canada breached obligations under NAFTA Articles 1102 (national treatment) and 1105 (minimum standard of treatment) thereby causing damage to S.D. Myers (Canada) Inc. and to the Respondent.

> Affidavit of John Myslicki sworn March 7, 2001in support of the Application for Review, Exhibit "A", Motion Record in Motion for Directions, pp. 40-123

5. On February 8, 2001 the Applicant applied for review of the Award under the *Commercial Arbitration Code*. In addition to public policy grounds, the Applicant contends, among other grounds, that the Tribunal purported to resolve disputes not properly before it, exceeded the jurisdiction of a NAFTA arbitral tribunal and misinterpreted NAFTA to such a degree that it extended the benefits of Chapter Eleven to a company (the Respondent) that was not an investor in the claimed investment (namely S.D. Myers (Canada) Inc.). The Applicant also contends that, on the face of the Award, the Tribunal misapplied NAFTA Article 1102 and 1105.

> Notice of Application, Motion Record in Motion for Directions, Tab 3, pp.11-16

6. On March 7, 2001 the Applicant filed an affidavit in support of the application. That affidavit briefly described the facts underlying the dispute. It also included copies of the pleadings and the Award. However, the affidavit did not append documents and testimony in the record before the arbitrators because the parties to the arbitration do not agree whether evidence received *in camera* forms part of the public record or must be sealed under Rules 151 and 152. The Applicant has filed a motion for directions returnable March 22, 2001, concerning the confidentiality of the record.

> Affidavit of John Myslicki sworn March 7, 2001in support of the Application for Review, Motion Record in Motion for Directions, pp. 29-276

7. On March 19, 2001 the Proposed Interveners moved for an order granting them leave to intervene in this application. The Interveners seek access to all the documents relied on by the parties, to be served with all documents, leave to file affidavit evidence and to cross-examine on affidavits submitted by the parties, permission to make oral submissions at the hearing following the submissions of the Respondent, and a right of appeal. They also seek an order relieving them and the parties of any requirement to pay costs associated with the motion for leave to intervene.

Notice of Motion, Applicant's Motion Record, pp. 2-7

Memorandum of Argument, para. 59, Applicant's Motion Record, p. 123

8. The affidavits of Steven Staples, Angela Rickman and Kevin Gamble support the motion. The Proposed Interveners claim an interest in trade and environmental issues -- primarily as non-governmental organizations concerned with public policy and trade agreements including NAFTA. The Proposed Interveners do not claim a direct involvement in the fact situation at issue in this case. Notice of Motion, Applicant's Motion Record, pp. 2-7

Affidavit of Steven Staples sworn March 19, 2001, paras. 4 – 11 and 15, Applicant's Motion Record, pp. 10-13

Affidavit of Angela Rickman sworn March 19, 2001, paras. 3, 7 and 11, Applicant's Motion Record, pp. 54, 55 and 56

Affidavit of Kevin Gamble sworn March 19, 2001, paras. 6, and 11 - 13, Applicant's Motion Record, pp. 72-73 and 74-75

9. For the purposes of this motion, the Applicant does not dispute the facts set out in the affidavits of Steven Staples, Angela Rickman and Kevin Gamble but does not accept their conclusions.

Points to be Argued

10. In deciding this motion, the court must consider the circumstances of each of the Proposed Interveners separately and determine which of them should receive intervener status, in light of the criteria established under Rule 109(1).

11. The circumstances of each of the Proposed Interveners must be considered individually based on the evidence relevant to that particular Proposed Intervener. Interveners cannot be granted the right to intervene based on a "collective" interest.

12. If the court grants intervener status to one or more of the Proposed Interveners, the directions issued under Rule 109(3) should confine the role of the intervener to submitting written and oral arguments based on the record before the arbitral tribunal which should address only those matters raised in the Notice of Application. The Proposed Interveners receiving leave to intervene should not have a right of appeal and should bear the costs of their participation in the application for review.

Argument

Should the court grant status to one or more of the Proposed Interveners?

13. Rule 109(1) of the *Federal Court Rules* bestows discretion on the court to allow a third party to participate in proceedings on terms provided "that participation will assist the determination of a factual or legal issue related to the proceedings".

Federal Court Rules, Rule 109(2)(b)

14. The principles governing the exercise of this discretion are well established. In *CUPE v. Canadian Airlines Limited*, [2000] FCJ 220 (C.A.). Mr. Justice Noël summarized the relevant rules as follows:

> …in order to grant the intervention the motions Judge would have considered the following factors which were advanced by both the appellants and PSAC as being relevant to her decision:
>
> 1) Is the proposed intervener directly affected by the outcome?
>
> 2) Does there exist a justiciable issue and a veritable public interest?
>
> 3) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
>
> 4) Is the position of the proposed intervener adequately defended by one of the parties to the case?

5) Are the interests of justice better served by the intervention of the proposed third party?

6) Can the Court hear and decide the cause on its merits without the proposed intervener?

Other cases supplement this list of criteria by requiring that the moving party must make a useful contribution without causing injustice to the immediate parties.

CUPE v. Canadian Airlines Limited, [2000] FCJ 220 (C.A.)

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (No.1) (1989), [1990] 1 F.C. 74 (T.D.) at 79-83

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (No.2) (1989), [1990] 1 F.C. 84 (T.D.) at 88

Rothmans, Benson & Hedges Inc. v. Canada (Attorney General) (No.3) (1989), [1990] 1 F.C. 90 (C.A.)

Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada (1990), 74 O.R. (2d) 164 (C.A.)

15. Interveners must demonstrate an interest that is not solely "jurisprudential" in nature. An interest in the development of the jurisprudence alone does not justify an intervention. Similarly, a proposed intervener will not be granted intervener status on the basis that it seeks to argue a different interpretation of the relevant jurisprudence.

CUPE v. Canadian Airlines Limited, [2000] FCJ 220 (C.A.)

Canada (Min. of Citizenship & Immigration) v. Katriuk (1998), 150 F.T.R. 137

R v. Bolton, [1976] 1 F.C. 252 (C.A.) (per Jackett C.J.)

Tioxide Canada Inc. v. Ministre du Revenu national, [1994] 174 N.R. 212 (per Hugessen J.A.) (C.A.)

16. Whether a Proposed Intervener has a sufficient interest must be measured by comparing the grounds pleaded in the Notice of Application at issue with the material filed by the Proposed Interveners.

17. The Court must determine as a matter of fact whether each of the Proposed Interveners meet the criteria established under Rule 109.

Directions In The Event The Court Grants Leave To Intervene

18. If one or more of the Proposed Interveners receives intervener status in these proceedings, the directions of the court under Rule 109(3) should limit their participation to filing memoranda of argument and making oral submissions, which address only those matters raised in the Notice of Application. They should also allow counsel for any Proposed Intervener access to the record on the same basis as the Applicant and Respondent. The Court should refuse the Proposed Interveners leave to file evidence or cross-examine on affidavits and should not provide a right of appeal to any intervener. On the question of costs, the Proposed Interveners should not be entitled to costs of the motion for leave to intervene or of participating in the application for review.

19. Rule 109 is an all-purpose rule intended to replace several different rules, each of which applied to a different type of proceeding.

> Sgayias, Kinnear, Rennie, & Saunders, *Federal Court Practice 2001*, Carswell, Toronto, at p. 406

20. Consequently, the directions contemplated by Rule 109(3) cover all types of proceedings including trials and applications for judicial review. In this case, the application procedure is closely analogous to the procedure for an application for judicial review. Such applications are determined on a record established before the

Tribunal under review supplemented, where necessary, by affidavit evidence providing relevant information that does not appear on the face of the record (as might occur, for example, where a party alleges bias).

> *Gitsxan Treaty Society v. Hospital Employee's Union* [2000] 1 F.C. 135 (C.A.)
>
> *Farhadi v. Canada (Minister of Citizenship and Immigration)* [1998] 1 F.C. 315 (T.D.); reversed without comment on this issue (May 12, 2000), Doc. A-201-98 (C.A.)

21. Here, the Proposed Interveners seek leave to introduce new evidence. Paragraph 11 of the affidavit of Kevin Gamble provides one example of the type of evidence the Proposed Interveners seek to introduce. To the extent these materials might appear in the record, they need not be placed before the court again. To the extent these materials might not appear in the record, the information is not of the type the court would receive and consider on an application for review. Since the Proposed Interveners cannot supplement the record, leave to file new evidence or cross-examine should be refused

22. The Proposed Interveners also seek leave to argue issues that are not before the court on the application for review. Those issues are set out in subparagraphs 15(ii) [Sustainable Development and other Environmental Conditionality], (iii) [Confidentiality of Investor-State Procedures], (vii) [Trade in Goods vs. Investment], (viii) [Not Amenable to Arbitration] of the Notice of Motion. An intervener cannot raise new grounds in an application . Rather, it takes the record as it exists. While it may bring new viewpoints and special knowledge to a proceeding, the intervener may not litigate new issues.

> *Yale Indian Band v. Aitchelitz Indian Band* (1998), 151 F.T.R. 36 (T.D.)

Canada (Information Cmmr.) v. Canada (Min. of Public Works & Government Services), [1997] 1 F.C. 164 (T.D.)

23. To the extent the Proposed Interveners seek an order granting them the right to appeal, the request is ill-conceived. Rule 109 provides that the court may grant a right of appeal. The court should exercise sparingly the discretion granted by that rule and limit its application to cases where the intervener has a direct and substantial interest in the outcome of the proceedings. This is consistent with Rule 13.01 of the Ontario Rules of Civil Procedure which provides that a person may intervene as an added party with a right of appeal if he or she: has an interest in the subject matter of the proceeding; may be adversely affected by a judgment; or, there exists a question of law or fact in common between the person and one or more of the parties to the litigation. Such an interest clearly arises when the court grants someone leave to participate in a trial resulting in a judgment affecting its rights (as in the case of a person obliged to indemnify a party to litigation before the court). It does not arise where – as here –no relationship exists between the Proposed Interveners and the parties, an adverse judgment imposes no financial repercussions on the Proposed Interveners and, the decision at issue is of limited precedential value.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 13.01

NAFTA Article 1136(1)

Relief Requested

24. The Applicant requests, that if the court grants any or all Proposed Interveners leave to intervene, the motion be granted on the following terms:

    a. the intervener(s) shall have access to the record on the same basis as the Applicant and Respondent;

    b. the intervener(s) be denied leave to submit new evidence or cross-examine any witness;

c. the intervener(s) be granted leave to file a written argument on issues raised in the Notice of Application following delivery of the Memorandum of Argument of the Attorney General of Canada;

d. the interveners be granted leave to make oral submissions on those issues addressed in their written argument;

e. the interveners be denied any right of appeal; and,

f. the interveners shall not be entitled to costs of this motion or of participating in the application for review.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 21, 2001

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