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Date: 20020128

Docket: A-252-01

Neutral citation: 2002 FCA 39

CORAM: STRAYER J.A.

ROTHSTEIN J.A.

SEXTON J.A.

IN THE MATTER OF SECTIONS 5 AND 6 OF THE *COMMERCIAL*

*ARBITRATION ACT*, R.S.C. 1985, c. 17 (2<sup>nd</sup> SUPP.)

IN THE MATTER OF ARTICLES 1, 6, AND 34 OF THE *COMMERCIAL*

*ARBITRATION CODESET 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 COUNCIL OF CANADIANS, THE SIERRA CLUB OF CANADA

and GREENPEACE

Appellants

(Moving Parties)

and

THE ATTORNEY GENERAL OF CANADA

Respondent

(Applicant)

and

S.D. MYERS INC.

**Respondent**

**(Respondent)**

Heard a Toronto, Ontario on Thursday, January 17, 2002t

JUDGMENT delivered at Ottawa, Ontario on Monday, January 28, 2002

REASONS FOR JUDGMENT BY: STRAYER J.A.

CONCURRED IN BY: ROTHSTEIN J.A.

SEXTON J.A.

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**THE ATTORNEY GENERAL OF CANADA**

**Respondent**  
**(Applicant)**

and  
**S.D. MYERS INC.**

**Respondent**  
**(Respondent)**

**REASONS FOR JUDGMENT**

STRAYER J.A.

[1] This is an appeal from an interlocutory order of Rouleau J. of the Trial Division. In that order he refused leave for the appellants herein to intervene in a judicial review in which the respondent Attorney General of Canada is the applicant and the other respondents herein are respondents there.

[2] The judicial review is in respect of a Partial Award by an Arbitral Tribunal made under the *North American Free Trade Agreement ("NAFTA")*.

[3] The role the appellants by their notice of motion each sought as interveners would be essentially that of parties to a judicial review: to receive all documents and evidence; to introduce evidence; to conduct cross-examination; to make oral and written submissions; and to have the right to appeal, presumably even if none of the parties wished to appeal. In their notice of motion the appellants further indicated their intention to participate in the debate of issues already included in the judicial review as well as to raise other issues not raised by the parties.

[4] In his reasons for dismissing the application to intervene in this form the learned motions judge stated:

. I am not satisfied that the moving parties can bring to the Court a point of view with respect to these issues which will, in any material way, be different from that of the parties. The essence of the judicial review application is the correct interpretation of the NAFTA. The proposed intervenors do not have any particular or unique expertise in interpreting international treaty obligations that would assist the Court beyond that which is offered by counsel for Canada, the United States, Mexico, the respondent and the members of the Arbitral Tribunal itself. The social policy concerns of the moving parties, including Canada's trade policy, would not assist in the determination of the legal issues which arise under the Government's application for judicial review.

[5] The motions judge committed no error in principle in considering these factors to be determinative for the purpose of the exercise of his discretion in respect of the motion before him. It is apparent that the issues on which the appellants sought leave to intervene were essentially "jurisprudential". This Court has held that such interests alone are not sufficient to justify leave to intervene (*CUPE v. Canadian Airlines International* [2000] F.C.J. 220).

[6] Nor did the motions judge err in the exercise of his discretion as to costs by orderings costs of \$2,000 against the appellants in favour of S.D. Myers Inc. It should first be observed that it is normal for costs of a motion to be awarded against losing parties. The motions judge took into account the additional legitimate consideration that a similar type of intervention in judicial review of a NAFTA arbitral award had already been rejected by a British Columbia court. I would therefore not disturb the award of costs below.

[7] The appeal should therefore be dismissed with costs in this Court to S.D. Myers Inc., and the decision of the motions judge should be affirmed.

(s) "B.L. Strayer"

J.A.

I agree

Marshall Rothstein J.A.

I agree

J. Edgar Sexton J.A.

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** A-252-01

**STYLE OF CAUSE:** THE COUNCIL OF CANADIANS ET AL v. AGC  
AND S.D. MYERS INC.

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** January 17, 2002

**REASONS FOR JUDGMENT:** Strayer J.A.

**CONCURRED IN BY:** Rothstein, Sexton JJ.A.

**DATED:** January 22, 2002

**APPEARANCES:**

Mr. Steven Barrett and Mr. Steven Shrybman FOR THE APPELLANTS

Mr. Keith Mitchell and Mr. Ian Laird FOR THE RESPONDENT

(S.D. MYERS INC.)

Mr. Patrick Bendin FOR THE RESPONDENT

(A.G.C.)

**SOLICITORS OF RECORD:**

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FOR THE APPELLANTS

Davis & Company of Vancouver, B.C.  
MYERS INC.)

FOR THE RESPONDENT (S.D.

Morris Rosenberg,

FOR THE RESPONDENT

Deputy Attorney General of Canada (A.G.C.)