IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE *NORTH AMERICAN FREE TRADE AGREEMENT*

BETWEEN:

S.D. MYERS, INC.

Claimant/Investor

and

THE GOVERNMENT OF CANADA

Respondent/Party

GOVERNMENT OF CANADA

APPLICATION FOR A STAY OF THE ARBITRAL PROCEEDINGS PENDING THE OUTCOME OF THE FEDERAL COURT OF CANADA APPLICATION TO SET ASIDE

Introduction

1. This is an application under Article 15(1) of the UNCITRAL Arbitration Rules for a stay of the damages phase of this arbitration pending final disposition by the Federal Court of an application by the Attorney General of Canada for an order reviewing and setting aside the Partial Award released by the Tribunal on November 13, 2000 ("Award") in whole or in part.

2. In the Award, the Tribunal found that the Claimant was an "investor" under the *North American Free Trade Agreement* ("NAFTA") and that S.D. Myers (Canada) Inc., a company incorporated under the laws of Canada, was an "investment" of the Claimant. The Tribunal also found 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 Claimant.

   Award, paragraphs 320-322, page 80

3. The Tribunal also held that Canada should pay the Claimant compensation for such economic harm as is established legally by the Claimant to result directly from Canada's breach of its NAFTA obligations. The Tribunal further directed that, consistent with paragraph 1 of Procedural Order No. 1, compensation would be determined at the second stage of the arbitration.

   Award, paragraphs 325 and 326, page 80

4. On February 8, 2001, the Attorney General of Canada applied to the Federal Court – Trial Division for an order setting aside the Tribunal's Award in whole or in part. The application was made pursuant to the *Commercial Arbitration Act* and the *Commercial Arbitration Code* ("Code"). The Notice of Application is before the Tribunal.

   Letter from Joseph de Pencier to Martin Hunter dated February 8, 2001 and Notice of Application to the Federal Court Trial Division dated February 8, 2001

   Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.), sections 4(a), 5 and 6, and scheduled *Commercial Arbitration Code*, articles 1, 6, 34(2)a(iii) and 34(2)(b)(ii)

5. NAFTA Articles 1136(3) and (4) recognise the role of domestic courts in the review and enforcement of Chapter Eleven awards. The *Commercial Arbitration Act* governs commercial arbitration, including judicial review and enforcement of an arbitral award, where one of the disputing parties is the Crown in right of Canada. Article 5(4) of the *Commercial Arbitration Act* provides for greater certainty that the phrase

"commercial arbitration" in Article I of the Code includes claims under NAFTA Articles 1116 and 1117. The Code is based on the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law.

North American Free Trade Agreement Implementation Act, S.C. 1993. C. 44, s. 50

Commercial Arbitration Act, sections 5(4)

Hunter & Redfern, *Law and Practice of International Commercial Arbitration*, (3d), ¶1-111/112

6. Given that the place of arbitration for this arbitration is Toronto, and pursuant to Article 2 of the Code, the provisions of the Code regarding the setting aside of arbitral awards are applicable.

   Commercial Arbitration Code, Article 2

7. The application for a stay falls within the Tribunal's authority over conduct of the arbitral proceedings under Article 15(1) of the UNCITRAL Arbitration Rules.

8. Canada says the application ought to be granted for five reasons:

   a) A stay is logically consistent with the Tribunal's decision to divide the proceedings into two distinct phases, dealing with liability and quantification of damages separately.

   b) If the Tribunal proceeds without the benefit of a ruling by the Court, it may fix damages in a manner inconsistent with the findings of the Court. The application before the Federal Court of Canada raises serious issues going to the heart of the Award. If the application to set aside succeeds entirely, the damages phase of this proceeding becomes moot. If the application succeeds in part, the damages may be assessed differently from that contemplated by the current award.

   c) A stay protects the Tribunal and the disputing parties from incurring needless inconvenience and expense.

   d) The Tribunal's authority to award interest and costs indemnifies the Claimant from the temporal consequences of a stay if the application before the Federal Court of Canada fails.

   e) The Claimant's case on damages is not prejudiced by the period of any stay, particularly as it asserts that it has gathered all the evidence it requires to prosecute its claim for damages and has not yet disclosed that evidence to Canada.

The Jurisdiction of the Tribunal to Grant a Stay of Proceedings

9. Article 15(1) of the UNCITRAL Rules provides that a tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity to present its case.

10. This provision bestows wide latitude on the tribunal to conduct the proceeding as it sees fit, bearing in mind the need for fairness and equity as between the disputing parties. The breadth of authority created by Article 15(1) was recognised by the Chapter Eleven Tribunal in *Methanex Corporation v. United States of America* in granting a petition by non-parties to file *amicus* briefs:

> "26. ... This provision constitutes one of the essential "hallmarks" of an international arbitration under the UNCITRAL Arbitration Rules, according to the *travaux préparatoires*. Article 15 has been described as the "heart" of the UNCITRAL Arbitration Rules; and its terms have since been adopted in Articles 18 and 19(2) of the UNCITRAL Model Law on International Commercial Arbitration, where these provisions were considered as the procedural *"Magna Carta"* of international commercial arbitration. Article 15(1) is plainly a very important provision.
>
> "27. Article 15(1) is intended to provide the broadest procedural flexibility within fundamental safeguards, to be applied by the arbitration panel to fit the particular needs of the particular arbitration."

Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amici Curiae", January 15, 2001

11. Staying the arbitral proceedings at this stage without proceeding to assessment of damages would maintain the equality of treatment of the parties and not impede the ability of the parties to present their case on damages fully at a later stage, if the tribunal is found to have jurisdiction.

A stay is logically consistent with the Tribunal's decision to divide the proceedings into two distinct phases, dealing with liability and quantification of damages separately.

12. Procedural Order No. 1 determined that this would be a bifurcated proceeding. Paragraph 1 of the Order provides that at the first stage of the proceedings the tribunal would determine liability issues and principles on which damages should be awarded. The Partial Award is a final award on liability, subject to the possibility of challenge in the courts.

Hunter & Redfern, *Law and Practice of International Commercial Arbitration*, (3d), ¶ 8-32

13. The order to bifurcate was made at the request of the Investor and contrary to the position of Canada. Canada accepted the Tribunal's determination.

14. If a Chapter Eleven proceeding can be and is bifurcated, leading to an award that is final on a key element of the challenge – such as liability, that bifurcation must extend to the provisions for finality and review set out in Article 1136(3). In other words, if a disputing party is subject to bifurcation over its objections, then it should be treated consistently. It should not be subject to a subsequent phase of the proceeding while it exercises its Chapter Eleven rights with respect to the first phase, especially where to do so could subject it to considerable costs and time thrown-away.

15. One of the reasons for bifurcating the arbitral proceeding was to avoid needless cost and expense. Consistent with that objective and to maintain the equality of treatment mandated by 15(1) of the UNCITRAL Rules, the Tribunal should stay the proceedings until the Federal Court application is decided.

If the Tribunal proceeds without the benefit of a ruling by the Court, it may fix damages in a manner inconsistent with the findings of the Court. The application before the Federal Court of Canada raises serious issues going to the heart of the Award. If the application to set aside succeeds entirely, the damages phase of this proceeding becomes moot. If the application succeeds in part, the damages may be assessed differently from that contemplated by the current award.

16. The Notice of Application before the Federal Court for Canada sets out ten grounds for setting aside, including that:

> "The Award deals with a dispute not contemplated by or not falling within the terms of Chapter Eleven of the NAFTA or is in conflict with the public policy of Canada in finding that the Respondent was an "investor of a Party" for the purposes of NAFTA Chapter Eleven, and in finding that S.D. Myers (Canada) Inc. was an "investment" of the Respondent for the purposes of NAFTA Chapter Eleven."
>
> [Paragraph 5 of the Notice of Application]
>
> "The Award deals with a dispute not contemplated by or not falling within the terms of Chapter Eleven of the NAFTA or is in conflict with the public policy of Canada by comparing, for the purposes of NAFTA Article 1102 "in like circumstances," the Respondent and its PCB waste disposal operations in the United States, with Canadian-owned and controlled companies and their PCB waste disposal operations in Canada. Rather, the Respondent was a provider of cross-border services subject to NAFTA Chapter 12."
>
> [Paragraph 7 of the Notice of Application]
>
> "The Award deals with a dispute not contemplated by or not falling within the terms of Chapter Eleven of the NAFTA or is in conflict with the public policy of Canada in finding that a breach of NAFTA Article 1102 essentially establishes a breach of NAFTA Article 1105."

[Paragraph 9 of the Notice of Application]

"The Award deals with a dispute not contemplated by or not falling within the terms of Chapter Eleven of the NAFTA in finding that a breach of NAFTA Article 1105 occurs when it is shown that an "investor" has received treatment not in accordance with international law, including fair and equitable treatment and full protection and security. Article 1105 applies to "investments" of investors of another Party, and not to investors themselves."

[Paragraph 10 of the Notice of Application]

17. If Canada succeeds on the first of these four grounds, the Award as a whole would have to be set aside. This would render the quantification of damages moot, whether ongoing or stayed.

18. If Canada succeeds on any of the next three grounds, the Award would, at least, have to be set aside in part. According to NAFTA Articles 1116 and 1117, the damages claimed must result from a specific NAFTA breach. Paragraph 316 of the Award requires compensation to be payable only with respect to harm "proved to have a sufficient casual link with the specific NAFTA provision that has been breached". As a result, it is clear that a partial setting aside relating to any particular NAFTA obligation has an impact on the quantification of damages phase.

19. Moreover, the Federal Court application may provide guidance on liability and the NAFTA obligations at issue that will assist the Tribunal in the damages phase of the arbitration. If the Tribunal does not stay the proceedings it risks rendering an award on damages inconsistent with the Federal Court findings, which may as a result require additional proceedings.

A stay protects the Tribunal and the disputing parties from incurring needless inconvenience and expense.

20. If the application before the Federal Court of Canada succeeds in whole or in part, the parties will have needlessly incurred expense by proceeding simultaneously with the quantification of damages phase.

21. Arbitral procedures should provide a fair means of resolving the matters to be determined by suiting the circumstances of the particular case and avoiding unnecessary delay or expense.

    Hunter & Redfern, *Law and Practice of International Commercial Arbitration*, (3d), ¶1-126

22. Saving expense is cited as a fundamental advantage of bifurcating arbitral proceedings.

Hunter & Redfern, *Law and Practice of International Commercial Arbitration*, (3d), ¶6-38/40, 8-34 and 37

23. The disputing parties have not yet expended significant sums on presenting their cases on damages – at least Canada has not because it does not yet know the case on quantum of damages it has to meet.

24. The Tribunal has not received any evidence on damages or devoted much time to the matter. However, obviously the Tribunal will incur significant expenses in the assessment f damages. Further, the Tribunal recently raised the prospect of additional expenditures in the form of a Tribunal-appointed expert or expert's fees.

25. The damages phase of the arbitral proceeding is in its early stages. The Claimant recently summarized its case in a manner analogous to a statement of claim. Canada says that statement of claim is deficient even by the standards for pleadings. Canada has provided a preliminary response to the Claimant's summary. The procedure for the damages phase has not been determined. Clearly there will be considerable expense involved in this phase and considerable time required of the disputing parties, their counsel and witnesses and the members of the Tribunal.

26. Proceeding with the damages phase in the circumstances risks throwing away this time and expense.

27. The period of stay is likely to be less than half of the length of time taken by the proceedings to date (recalling that the Notice of Arbitration is dated October 30, 1998). The application before the Federal Court of Canada is governed by Part Five of *Federal Court Rules, 1998*. It provides 130 days from issuance of application to requisition for hearing (i.e., parties ready for judge). The requisition itself requires the parties to indicate their availability in next 90 days: (Rule 314(2)(d)). Moreover, the parties can apply to the Court for case management leading to an expedited proceeding.

    Federal Court Rules, 1998, SOR/98-106, Part V and Rules 383-385

The Tribunal's authority to award interest and to award costs indemnifies S.D. Myers, Inc. from the temporal consequences of a stay if the application to set aside fails.

28. The Tribunal can redress any prejudice the Claimant suffers from the consequences of a stay. The Tribunal has the authority to award interest and costs: Article 1135(1). There is no *irreparable* harm to the Claimant in granting a stay.

29. Otherwise, there is no injustice to the Claimant in granting a stay. In circumstances where there are concurrent court and arbitral proceedings, a stay of the arbitration may be granted where a stay would not cause injustice to the claimant in the arbitration.

    Wilson v, Larchwood Construction Ltd, [1994] ADRLJ 67 at 70 (County Court); citing *Compagnie Nouvelle France Navigation, S.A. v. Compagnie Navale Afrique du Nord (The Tunisia and the Oranie)*, (1966) 1 Lloyd's Law Reports 477 (C.A.)

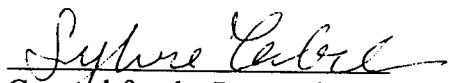
30. This is such a case. The measure in dispute and giving rise to the claim, the temporary PCB ban, is no longer in place. There is therefore no on-going breach and the Claimant will not suffer any new damages as a result of any delay.

S.D. Myers, Inc.'s case on damages is not prejudiced by the period of any stay, particularly as it has yet to disclose its case on damages to Canada.

31. It is approximately two months since the Claimant advised Canada and the Tribunal that it was ready to provide its full case on damages (by its Memorial, evidence and experts reports). The Claimant has since confirmed that it is ready to proceed. But aside from an inadequate "summary" of its case, the Claimant has not disclosed, nor has it been required to disclose, its full case.

32. Therefore, the Claimant is not prejudiced by a stay. Canada will not receive an untoward "advantage" through full disclosure of the Claimant's case and a "windfall" period of time to prepare its response. Indeed, by waiting for the last week of the three year prescription (provided by NAFTA Article 1116(2)) to commence its case, and having the benefit of two and a half years of proceedings since then, the Claimant has had far more time to prepare and polish its case on damages than Canada will ever receive to prepare its response.

All of which is respectfully submitted this 15th day of February 2001



Counsel for the Respondent