

Federal Court of Canada
Trial Division



Section de première instance de
la Cour fédérale du Canada

Date: 20010411

Docket: T-225-01

Neutral Citation: 2001 FCT 317

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

AND:

S.D. MYERS, INC.

Respondent

AND:

**THE COUNCIL OF CANADIANS,
THE SIERRA CLUB OF CANADA
and GREENPEACE**

Moving Parties

REASONS FOR ORDER

ROULEAU, J.

[1] The moving parties, The Council of Canadians, The Sierra Club of Canada and Greenpeace, appeared before this Court on March 22, 2001 seeking leave to intervene in these proceedings. Their motion reads as follows:

1. An order granting the Council of Canadians, the Sierra Club and Greenpeace Canada leave to intervene for the purposes of: being served with or otherwise being provided access to all document and evidence relevant to these proceedings; introducing evidence; conducting cross examination; making oral and written submissions; having a right to appeal from the decision of this court; and, on such terms and conditions as this court considers just;

2. An order adjourning the hearing of the Motion of the Attorney General of Canada, scheduled to be heard March 22, 2001, regarding, *inter alia*, confidentiality of the record for the purposes of permitting the Intervener sufficient time to make submissions with regard to the confidentiality issue;

[2] This matter came before the Court as a result of an application filed by the government of Canada in which it is seeking judicial review of a NAFTA arbitration award rendered under the Uncitral Arbitration Rules. It was determined that Canada was in breach of certain articles of the NAFTA and that Canada should pay to S.D. Myers Inc. (SDMI) compensation for economic harm. Request for relief under Chapter 11 of the North America Free Trade Agreement (NAFTA) was initiated by SDMI. It alleged that Canada had violated Article 1102 of the NAFTA; that in light of its investment it was entitled to be treated by Canada in like circumstances to the investments of Canadian investors equally and without discrimination. SDMI alleged that it was deprived of a rightful contract to dispose of PCBs originating in Ontario or Quebec which could have been treated in their Ohio plant; by reason of an Order in Council issued by the government of Canada the PCBs were ordered to be transported and destroyed in Canada at a facility located in Swan Hills, Alberta, several thousand kilometers further than SDMI's facility in Ohio.

[3] A brief history and background to this matter is required to understand this application.

[4] The Respondent, S.D. Myers Inc. (SDMI) is a privately held corporation existing in the State of Ohio in the U.S.A. Part of its core business was transformer oil testing, oil reclaiming, rebuilding and manufacturing transformers. It was also involved in PCB remediation and was equipped to analyse and assess oil level contamination and transportation of contaminated oil. It had an equipped facility for the extraction of PCBs located some 50 kilometers south of Cleveland. It could be said that they had developed an expertise in the treatment and disposition of hazardous waste. Though they did not operate a treatment facility in Canada, a Canadian subsidiary was incorporated in 1993 for the purposes of contracting with Canadian customers for the treatment of contaminated waste in the U.S.A. S.D. Myers (Canada) Inc. (Myers Canada) was to receive a commission as remuneration resulting from contracts obtained through marketing, customer contact, testing and assessment of oil; SDMI personnel from the U.S. participated in these activities. The greatest inventories of PCBs in Canada are located in Ontario and Quebec.

[5] In the U.S.A., PC's are regulated by a federal regulatory body established under the *Toxic Control Substances Act*. The Act imposes restrictions on

manufacture, sale, use, import, export and disposal of PCBs and PCB contaminated waste.

[6] In 1986, Canada and the U.S.A. entered into the Transboundary Agreement which contemplated the possibility of cross-border activity. The recitals contain the following passage:

Recognizing that the close trading relationship and the long common border between the United States and CANADA engender opportunities for a generator of hazardous waste to benefit from using the nearest appropriate disposal facility, which may involve the transboundary shipment of hazardous waste.

[7] Regardless of the Transboundary Agreement, there remained in the U.S.A. restrictions with respect to the importation of PCBs and PCB contaminated waste.

[8] In March, 1989, a number of countries including Canada signed the Basel Convention which dealt with the international traffic of PCBs and other hazardous waste. Though the U.S.A. signed the Basel Convention, it had not been ratified at the time of these events. The Basel Convention, among other things, prohibited the export-import of hazardous waste from and to states that were not party to the convention (Article 4(5)), unless such movement is subject

to bilateral, multilateral or regional agreements or arrangements whose provisions are not less stringent than those of the Basel Convention.

[9] The Convention also required that appropriate measures be taken within a signatory country to ensure availability of adequate disposal facilities for the environmentally sound management of hazardous waste that were located within its boundaries. It also required that the transboundary movement of hazardous waste be reduced to a minimum, consistent with the environmentally sound and efficient management of such waste and be conducted in a manner that would protect human health and the environment.

[10] For a few years prior to the fall of 1995, SDMI and Myers Canada contacted a number of Canadian PCB holders with the objective of having their PCBs remediated by SDMI using its Ohio facilities. Marketing initiatives were initiated and assessments made of PCB contaminated equipment; some was drained and transportation organized.

[11] Also during the same period of time, this respondent and other companies in the same field were lobbying the U.S. Environmental Protection Agency (EPA) seeking to obtain a permit which would allow the cross-border movement of hazardous waste. An "enforcement discretion" was issued to SDMI valid from

November 15, 1995 to December 31, 1997 allowing the importation and treatment of PCBs and PCB waste.

[12] The government of Canada was aware of the lobbying and formal submissions to the U.S. EPA hearings seeking the issuance of "enforcement discretion" but nevertheless chose not to participate or submit any representations.

[13] Diplomatic notes which were exchanged between Canada and the U.S.A. revealed that the transportation of PCBs was covered by the Transboundary Agreement and the importation of PCBs would not be contrary to EPA restrictions.

[14] On the morning of November 20, 1995, aware of the issuance of an "enforcement discretion" to the respondent SDMI, the Canadian Minister of Environment nevertheless signed an interim order prohibiting PCB exportation to the U.S.A.

[15] On November 13, 2000, an Arbitral Tribunal established pursuant to Articles 1120, 1122 and 1123 of the NAFTA (the Tribunal) issued a Partial 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 law of Canada, was an "investment" of the respondent. The Tribunal also held that by issuing an interim order in 1995 banning the export of PCBs to the United States (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.

[16] On February 8, 2001, the Attorney General applied to this Court pursuant to the *Commercial Arbitration Code*, seeking judicial review of the Tribunal's decision. The applicant contends, *inter alia*, that the Tribunal purported to resolve disputes not properly before it thereby exceeding the jurisdiction of a NAFTA arbitral tribunal. The Tribunal is also alleged to have erred in law by misinterpreting 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.

[17] On March 19, 2001, the proposed intervenors moved for an order granting them leave to intervene in this application. The intervenors 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.

[18] A party seeking intervenor status must establish three things: it has an interest, that is a direct legal interest, in the outcome of the litigation; its rights will be seriously affected by the litigation; and, it will bring to the Court a point of view different from those of the parties. Its intervention must constitute an enhancement to the proceedings, not a distraction, and it is not permitted to redefine or expand upon the issues which have been legitimately brought before the Court by the parties to the action. In *Canadian Council of Professional Engineers v. Memorial University of Newfoundland* (1997), 75 C.P.R. (3d) 291 at 294, Rothstein, J. considered these criteria and concluded as follows:

The Court must be concerned with the expeditious and efficient progress of litigation, always having regard to fairness to the parties and indeed to the proposed intervenors. Expeditiousness and fairness considerations, I think, are at the root of the conditions that must be met by proposed intervenors. Where the rights of intervenors are not affected by the litigation and the intervenors are not shown to add anything new to the issues, the Court cannot allow itself to become bogged down with an expansion of participants in the litigation. While some authorities suggest that the rules of court may be used to avoid or reduce delay or expense, from a practical perspective, the addition of participants will almost inevitably complicate the proceedings and result in some additional time and expense.

[19] In the present case, the Attorney General's application for judicial review of the Arbitral Tribunal's decision arises within the specific legal framework of international law embodied in the NAFTA and in the UNCITRAL Rules and approved by Canada through the *NAFTA Implementation Act*. The issues raised in the Government's application are essentially:

(a) Was a reviewable error committed by the findings that the Respondent was an "investor of a Party" and S.D. Myers (Canada) Inc. was an "investment" under Chapter Eleven of NAFTA?

(b) Was the dispute not contemplated by or not falling within Chapter Eleven of NAFTA because the Respondent allegedly advanced a claim for damages sustained by persons not a party to the arbitration, namely, its shareholders?

(c) Was the dispute not contemplated by or not falling within the terms of Chapter Eleven of NAFTA because it considered an American company to be in "like circumstances" under Article 1102 with a Canadian company?

(d) Was the award in conflict with the public policy of Canada by finding that Canada should have permitted exports of PCBs to the United States, given the provisions of United States law and the granting by the EPA of an enforcement discretion?

(e) Does the award deal with a dispute not contemplated by NAFTA Chapter Eleven by virtue of its finding that a breach of Article 1102 may be a breach of Article 1105? and

(f) Does the award deal with a dispute not contemplated by NAFTA Chapter Eleven because it found a breach of international law in respect of an investor, rather than an investment?

[20] 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. Indeed, many of the issues raised by the proposed intervenors, such as whether the Basel Convention is paramount to the NAFTA and the matter of sustainable development, are not questions which have been raised in Canada's application and are therefore not before the Court.

[21] For these reasons I am exercising my discretion and refusing to grant intervenor status to the moving parties. The application is dismissed.

[22] The respondent has asked for costs and, under the circumstances, I agree that such an award is appropriate. Counsel for the moving parties had sought intervenor status on the basis of virtually identical argument in the British Columbia Supreme Court. That application was dismissed for primarily identical

reasons as those given above. They met with little success in British Columbia as well as before this Court. Accordingly, I am awarding costs of \$2,000.00 to the respondent S.D. Myers Inc.

"P. ROULEAU"

JUDGE

OTTAWA, Ontario
April 11, 2001