

Todd Weiler

From: Todd Weiler [tweiler@naftalaw.org]
Sent: Thursday, January 15, 2004 11:02 AM
To: twweiler@naftalaw.org
Subject: RE: NAFTA News Flash - Judgment in S.D. Myers

Dear NAFTA News subscribers:

Last month, a judge of the Federal Court of Canada heard an application from Canada to set aside an award made by a NAFTA Tribunal in: S.D. Myers, Inc. v. Canada.

The claim involved an investment made by an Ohio- based PCB waste treatment company in providing its services to Canadian governments and businesses holding PCB wastes. Unlike the USA, Canada did not have a mandatory PCB waste destruction rule, meaning that PCB waste holders could hold on to those wastes as long as they saw fit. At the time of Myers' investment, most waste holders were indeed holding on to their wastes because they did not have an affordable destruction option available to them. The only effective option that many had was to ship their wastes over 2000 kilometres across Canada (from the industrial heartland of Ontario and Quebec) to the country's only waste disposal facility (an incinerator located north of Edmonton, Alberta). Rather than pay both the monopoly fees demanded by the Alberta company, or the transportation and insurance costs that would follow, most held on to their wastes - resulting in something worse than land-filling (i.e. long term, above-ground "storage").

Myers attempted to make its move into Canada because Canadian regulations permitted the export of PCB wastes so long as prior approval had been obtained from the US Environmental Protection Agency. After enduring two years of regulatory proceedings in the USA, Myers obtained its approval and announced the good news to its new Canadian customers. Very shortly thereafter, the Canadian Minister of the Environment ignored the advice of her officials and signed an emergency order that effectively amended Canada's PCB export regulations, completely foreclosing on Myers' business plan. Myers had established a subsidiary in Canada in order to offer clients the service of cleaning up their sites and disposing of the wastes (through a chemical de-chlorination process that would take place back in Ohio). The new "border ban" made these plans unworkable. At the time of her decision, the Minister proudly declared that she had seen to it that PCB wastes would only be destroyed "in Canada by Canadians." As key documents would later reveal, the Minister had been heavily lobbied by Myers' Canadian competitors, who chose a man who had worked on the Minister's own personal staff only a few months earlier, and who wrote instructions to bureaucrats on how the border should be closed as if he still worked for the Minister.

The NAFTA Tribunal unanimously concluded that the treatment provided to Myers constituted a breach of Canada's obligation to provide national treatment under NAFTA Article 1105. The majority also concluded that the same facts supporting this conclusion could be used to found a breach of NAFTA Article 1105, the "fair and equitable treatment" obligation. Canada sought to have this award annulled on what it characterized as jurisdictional grounds, claiming that the tribunal had no authority under the NAFTA to make these findings. The tribunal lacked such authority, Canada argued, because it misconstrued the appropriate comparison to be made under Article 1102 (i.e. because Myers planned to physically destroy the wastes outside of Canada, it could not be compared with the Alberta competitor that had lobbied so heavily against Myers). Canada also argued that the standard of treatment required under Article 1105 required much less of it than the majority's view (effectively followed the consistent view of both Canada and Mexico that the Article 1105 "minimum standard of treatment" is largely satisfied with the establishment of a properly functioning court system, regardless of how a particular investor might have been treated by a particular government official). It further argued that the Tribunal lost jurisdiction by awarding damages to Myers for harm suffered outside of Canada (i.e. consequential harm suffered by an investor due to the treatment it and its investment received from Canada). The tribunal had concluded that the NAFTA does not place any sort of narrow territorial limitation on what damages can be claimed; rather, it concluded that all damages flowing from a treaty breach were recoverable, so long as proximate cause existed between the breach and the damages claimed. Canada even argued that the Tribunal had

improperly construed and applied the definitions of investor and investment!

In other words, with its review application Canada basically sought a *de facto* appeal of the tribunal's final award. In fact, Canada essentially argued before the Court that awards resulting from mixed claims (i.e. arbitrations involving claims against a state by an investor) should be shown no deference whatsoever upon review. It did so despite the fact that Canada was one of the first countries to ratify and implement the UNCITRAL Model Law into its domestic law. It did so despite the specific wording of its review statute, which sets out that the award of a NAFTA tribunal is to be considered and international commercial arbitral award. With the support of a Mexican Government intervention, Canada instead that the Federal Court judge should review all NAFTA awards a standard of "correctness" (meaning that if the reviewing court disagrees with any findings of law made by the tribunal, the tribunal would essentially be construed as having lost jurisdiction to render its award. In making these arguments in front of a Canadian court for the third time (the other cases were the infamous *Metalclad v. Mexico* case and the recent *Feldman v. Mexico* case), these two NAFTA amigos have provided considerable evidence as to why future NAFTA tribunals should never choose Canadian or Mexican cities as a suitable place to hold an arbitration involving a Canadian or Mexican government measure.

Despite Canada's best efforts, however, the Federal Court judge who heard this case took far less than a month (considering the intervening holiday period) to dismiss the application in its entirety.

Judge Kelen started his judgment by noting the very high level of expertise possessed by the arbitrators whose decision he was asked to review. He would later note how Canada had even attempted to rely on a leading arbitration book in its review arguments that was co-authored by the tribunal chair. The judge quoted at length from numerous decisions of all levels of Canadian courts, demonstrating that arbitral awards, as a general rule, are to be owed considerable deference. He did so even though the dispositive portion of his ruling required one paragraph. The judge correctly noted how Article 21(3) of the UNCITRAL Rules requires pleas as to the lack of jurisdiction of a tribunal to be made no later than the filing of the statement of defence. Myers was one of the rare cases where the responding government failed to raise any jurisdictional arguments. Accordingly, Kelen concluded that Canada was barred from raising jurisdictional arguments upon review of the final award.

Judge Kelen went on to note that even the definition of investor and investment are not jurisdictional questions (which under Canada's theory would require the right determination for a tribunal to avoid losing jurisdiction). This was a welcome step, as such dicta will come in handy for future cases where overzealous "jurisdictional" arguments are put forward by a losing party (whether it be a NAFTA Party or a claimant).

Having dismissed the application on the ground that any jurisdictional argument was barred to Canada, the only remaining question was whether upholding this award would violate the "public policy" of Canada. Given the potentially amorphous language of "public policy," one could puzzle as to how a reviewing court would react. Judge Kelen reacted like an arbitration veteran, stating that the term did not refer to a political decision or policy choice; rather it refers to "fundamental notions and principles of justice." The judge accepted that an utterly absurd tribunal finding would need to be annulled as a matter of public policy, but he clearly was not faced with such a case. He chose his words carefully, adding to "patently unreasonable" descriptions such as "clearly irrational" "totally lacking in reality" and "flagrant denial of justice" to indicate the kind of arbitral result that could be voided on the grounds of public policy. The added description was necessary because the expression "patently unreasonable" has sometimes led lesser judicial minds in Canada to embark on post facto reviews of decisions based upon their own subjective sense of what is "reasonable." The other descriptions ensure that "patently unreasonable" will retain its full import in the arbitral review context.

Finally, proving himself to be a diligent and thoughtful trial judge, Mr. Justice Kelen added a complete section on the merits of the award - just in case his judgment is appealed. In this regard, he found no reason to disturb any of the findings of the Myers Tribunal. He was right to stress that his second-look at the tribunal's work was only undertaken in the alternative, providing Myers with an added degree of certainty without failing to show appropriate deference to the work of the international law experts who heard the case in the first instance.

In short, judicial review decisions do not get much better than this one. It is definitely "a keeper."

Kindest regards,

TJW

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