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CASE COMMENT: CANADA (A-G) V. S.D. MEYERS, INC., [2004] 3 F.C.J. NO. 29.

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I. INTRODUCTION

Chapter 11 of NAFTA grants substantive and procedural rights to investors of a NAFTA country who invest in another NAFTA jurisdiction. It allows citizens of Canada, the US and Mexico, who invest in another NAFTA country, the right to obtain damages for government measures in violation of the provisions of Chapter 11.¹ The provisions of Chapter 11 have been the subject of both criticism and acclaim. Chapter 11 has been hailed as the hero of commercial investment efficiency, and as a villain seeking to maximize private business interests at the expense of national public interest.

Chapter 11 is aimed at providing stability and reducing uncertainty with respect to decisions on whether to invest in the countries of NAFTA.² Because there is no appellate tribunal designated within Chapter 11, arbitral decisions are subject to judicial review by domestic courts only in limited circumstances. However, the standard of review which the domestic courts of Canada, the United States and Mexico must apply to Chapter 11 arbitration cases is uncertain.³ The recent decision of the Federal Court in *Canada (A.G.) v. S.D. Meyers, Inc.*⁴ is an important case because it indicates the standard of review which Canadian courts will apply to the decisions of Chapter 11 arbitral tribunals. In addition, the case is the first time that a Chapter 11 arbitration award was heard before the losing party's own judiciary.

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¹ Patricia Isela Hansen, "Judicialization and Globalization in the North American Free Trade Agreement" (2003) 38 Tex. Int'l L.J. 489 at 497 [Hansen].

² Joseph A. McKinney, *Created From NAFTA* (Armonk, New York: M.E. Sharpe, Inc., 2000) at 224 [McInney].

³ *Supra* note 1 at 498.

⁴ *Canada (A-G) v. S.D. Meyers, Inc.*, [2004] 3 F.C.J. No. 29 [Meyers].

II. FACTS OF THE CASE

Canada made an application to seek judicial review of arbitration awards issued against it pursuant to Chapter 11 of NAFTA.⁵ The application, made by Canada pursuant to Article 34 of the Commercial Arbitration Code, sought to have the Federal Court set aside decisions made by the Arbitral Tribunal with regard to awards of liability, damages and costs to S.D. Myers, Inc (“SDMI”).⁶

S.D. Meyers Inc. is a privately-owned Ohio-based toxic waste treatment company which became interested in expanding its operations into Canada in the 1990s, as the market for its services began declining in the United States. To this end, S.D. Meyers (Canada) Inc. was incorporated in 1993; the company intended to transport materials which were contaminated with polychlorinated biphenyls (PCBs) from Canada to the company’s Ohio site, and dispose of them there.⁷

In 1995, the United States Environmental Protection (EPA) issued an “enforcement discretion” permitting SDMI to import PCBs subject to certain conditions. Canada immediately responded by issuing a temporary ban on PCB waste exports to the United States; this ban remained in effect for fourteen months. During this period SDMI was unable to import the toxic waste to its Ohio facility.⁸

When the border was re-opened, SDMI submitted an arbitration claim under Chapter 11 of NAFTA, asserting that the ban violated NAFTA, specifically with respect to national treatment, a minimum standard of treatment, the prohibition on performance requirements, and compensation for expropriation. Pursuant to Article 1116, SDMI asserted that it had sustained damages because its investment in Canada had suffered harm as a result of the measure taken by Canada.⁹ The Arbitral Tribunal found that Canada had violated its obligations in terms of national treatment and the minimum standard of treatment.¹⁰

The Federal Court found that, according to Article 34 of the *Commercial Arbitration Code*, judicial review is not provided for, despite

⁵ *S.D. Meyers, Inc. v. Government of Canada, Partial Award* [Meyers, Partial Award].

⁶ *S.D. Meyers*, supra note 4 at para. 3.

⁷ *Ibid.* at para. 3.

⁸ *Ibid.* at paras. 8-9.

⁹ *Ibid.* at para. 9.

¹⁰ *Meyers, Partial Award*, supra note 7 at para. 322.

the fact that the arbitral decision may be based on an error of law or an erroneous finding of fact.¹¹ In its decision the Federal Court held that because Canada had failed to raise the issue of jurisdiction at the outset of the arbitration process, it could not do so after the fact, as this “would undermine the clear and express procedures incorporated in NAFTA for the resolution of disputes.”¹²

However, in the event that it was mistaken in this regard, the Court went on to consider the standard of review applicable to the arbitral decision. The Federal Court concluded that the application for judicial review should be dismissed, holding that the decision of the Tribunal was proper in finding that the Canadian subsidiary of SDMI was an investment of SDMI, that SDMI could be protected by Articles 11 and 12 concurrently, and that SDMI and Canadian providers of toxic waste disposal services were in “like circumstances”.¹³ Finally, the Court held that the Tribunal’s awards were not in violation of Canadian public policy.¹⁴

III. OPPORTUNITY FOR JUDICIAL REVIEW

Article 1136(3)(b) allows for national courts to revise, set aside or annul awards of arbitral tribunals. However, in *Meyers*, the Federal Court recognized that Article 34 of the *Commercial Arbitration Code* limits the Court’s scope for judicial review of a NAFTA Chapter 11 arbitration decision. Referring to the two other Canadian cases addressing the issue—*The United States v. Metalclad Corp.*¹⁵ and *The United Mexican States v. Marvin Roy Feldman Karpa*¹⁶—the Federal Court held that in the case at bar the arbitral awards may only be set aside if the Attorney General of Canada could prove that: (a) the awards deal with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or (b) the awards contain decisions on matters beyond the scope of the submission to arbitration.¹⁷

¹¹ *S.D. Myers*, *supra* note 4 at 42.

¹² *Ibid.* at para. 53.

¹³ *Ibid.* at para. 74.

¹⁴ *Ibid.* at para. 56.

¹⁵ (2001), 89 B.C.L.R. (3d) 359 [*Metalclad*].

¹⁶ [2003] O.J. No. 5070 [*Feldman*].

¹⁷ *S.D. Meyers*, *supra* note 4 at para. 44.

The Court held that because Canada had not raised the issue as to the jurisdiction of the Tribunal at the outset of the arbitration, it could not do so now, as this would undermine the clear and express procedures incorporated in NAFTA for the resolution of disputes.¹⁸ Thus, the Federal Court concluded that, according to Article 21(3) of the *UNCITRAL Arbitration Rules*, it lacked a basis on which to judicially review the Tribunal's decision. If the Court were to hold differently, the likelihood of parties "shopping around" for different outcomes to arbitration decisions which were counter to their interests would increase significantly. Of course, this would negatively impact the effectiveness of Chapter 11 arbitral decisions.

In *Myers*, Canada attempted to argue that an error of law in the application of Articles 1102 and 1105 brought the matter within the scope of judicial review. This argument is similar to one made in *Metalclad*, where Mexico submitted that "a patently unreasonable error can amount to an excess of jurisdiction."¹⁹ The Court in that case appears to have left the issue open, not deciding on the issue as it did not believe there to be such an error. The Court did take note, however, that *Quinette Coal*²⁰ indicated that the domestic test of patently unreasonable error did not apply to the *International Commercial Arbitration Act*.²¹ Here, the Court rejected the argument on the basis that Article 34 of the *Commercial Arbitration Code* does not allow errors of law or fact to be grounds for judicial review if the decision is within the jurisdiction of the Tribunal.²² Nonetheless, the Court went on to consider the appropriate standard of review to be applied to the Tribunal's decision in the event the Court was not correct in its finding in respect of the jurisdiction matter.

IV. THE FEDERAL COURT'S APPLICATION OF JUDICIAL REVIEW

In *Myers*, the Court considered *Metalclad*, *Feldman* and *Quinette Coal* and concluded that contrary to Canada's arguments, the "pragmatic and

¹⁸ *Ibid.* at 53.

¹⁹ *Metalclad*, *supra* note 15 at para. 92.

²⁰ *Quinette Coal Ltd. v. Nippon Steel Corp.*, [1990] B.C.J. No. 2241 (BCCA). This case involved international arbitration between two private parties.

²¹ *Metalclad*, *supra* note 15 at para 97.

²² *S.D. Myers*, *supra* note 4 at para. 42.

functional” approach to judicial review of domestic administrative tribunals does not apply to international arbitration tribunals.²³ A pragmatic and functional approach cannot be used to create a standard of review not provided for in the *International Commercial Arbitration Act*.²⁴ Further, the Court noted that the Supreme Court of Canada has stated that review of the correctness of arbitration decisions “ignores the fact that the legislature has voluntarily placed limits on such review, to preserve the autonomy of the arbitration system.”²⁵ However, later in the *Myers* judgment, the Court refers to *Dynamex Canada, Inc. v. Momona*²⁶ and states:

in applying the “pragmatic and functional approach” the Federal Court held that on questions of law normally considered by the Courts, and not on questions that engage the special expertise of the tribunal or require the application of the facts to the law, the standard is correctness. However, the manner in which the correct legal principles are applied to the facts is a question of mixed law and fact, and should be reviewed on the standard of reasonableness.²⁷ [emphasis added]

Thus, the Court concluded that, with regard to the issues that go to the “scope of the submission to arbitration”, the standard of review it would apply on questions of law is correctness, and the standard on a question of mixed law and fact is reasonableness.²⁸ Once the Court considers the issues in the event it is mistaken in its assessment of the jurisdictional question, the Federal Court appears to apply the pragmatic and functional approach after all.

The first ground Canada relied on to set aside the Tribunal’s award was that the arbitrators had decided issues outside the scope of their authority. The Court held that the definition of “investment of an investor of a Party” was broad enough to conclude that the Tribunal’s interpreta-

²³ *S.D. Myers*, *supra* note 4 at paras. 38-39. The Court noted that such an approach is not provided for in Article 34 of the *Commercial Arbitration Code*.

²⁴ However, in *Feldman* the Ontario Superior Court seems to suggest it is applying the pragmatic and functional approach when it applies the factors from *Pushpanathan* (*Feldman*, *supra* note 16 at para. 82) .

²⁵ *S.D. Myers*, *supra* note 4 at para. 40.

²⁶ 2003 F.C.A. 248.

²⁷ *S.D. Myers*, *supra* note 4 at para. 59.

²⁸ *Ibid.* at 58.

tion was “correct” and the application of the correct legal definition to the facts was “reasonable”.²⁹ The Court rejected Canada’s position that SDMI had no “investment” because control of Meyers Canada was not based on the legal ownership of shares. It considered that a strict application of Canadian domestic law (the *Canada Business Corporations Act*) was too narrow and legalistic as well as contrary to the purposive interpretation mandated by Article 2.01 of NAFTA and Article 31 of the Vienna Convention.³⁰ The Court then found that, though SDMI’s investment activities could also be characterized as cross-border trade in services regulated under Chapter 12, the Tribunal was correct in not precluding Chapter 11 from applying to SDMI’s rights and obligations.³¹ As the issue involving national treatment in “like circumstances” was a question of mixed fact and law, the Court agreed that the Tribunal’s decision was reasonable.³²

The second ground which Canada relied upon was that the award violates public policy. The Federal Court defines public policy in this case as relating to “fundamental notions and principles of justice.”³³ The Federal Court held that the Tribunal decision did not in fact violate Canadian public policy as it could not be said to be “patently unreasonable”, “totally irrational”, “totally lacking in reality” or a “flagrant denial of justice”.³⁴ The facts which the Tribunal found, and the Court accepted, did not make for a particularly strong public policy argument in this case, and it will be interesting to see how Canadian courts approach this argument under other circumstances.

As evidenced in this decision, there is little room for judicial review of international arbitral awards under Chapter 11. This narrow approach is “in keeping with the expectations of the parties, who in the commercial context, have expressly chosen to remove their dispute from the jurisdiction of national courts.”³⁵ To this end the Federal Court stated:

²⁹ *Ibid.* at para. 66.

³⁰ *Ibid.* at para. 71.

³¹ *Ibid.* at para. 74.

³² *Ibid.* at para. 55

³³ *Ibid.* at para 56.

³⁴ Noah Rubins, “Judicial Review of Investment Arbitration Awards” (2004) in Todd Weiler, ed., *NAFTA: Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects*, (Ardsey, New York: Transnational Publishers, Inc., 2004) 375 [Rubins].

³⁵ *S.D. Myers*, *supra* note 4 at para. 39.

Courts restrain themselves from exercising judicial review with respect to international arbitration tribunals so as to be sensitive to the need of a system for predictability in the resolution of disputes and to preserve the autonomy of the arbitration forum selected by the parties.³⁶

In this case, the Federal Court appears to firmly limit the power of domestic courts to oversee arbitral tribunal decisions. The Ontario Superior Court took a similar position in *Feldman*. Otherwise, the effect would be to transfer to the courts the jurisdiction that is intended, by NAFTA, to be vested in the arbitrators.³⁷ Canadian courts seem to agree that deference to arbitral tribunals is necessary to ensure the predictability of the enforcement of dispute resolution provisions, and to facilitate freer trade on an international scale.³⁸

IV. CONSISTENCY OF JUDICIAL REVIEW

The applicable standard of judicial review can still vary depending on the circumstances of the case. The standard of review for arbitral decisions is determined by domestic legislation, without any treaty restriction: “[D]ifferent arbitration statutes will cover—or fail to cover—Chapter 11 awards. And different statutes will limit differently the scope of review.”³⁹ The United States and Mexico may apply their own domestic legislation in determining their domestic courts’ scope of review. Canadian federal law applies if the arbitration takes place in Canada and the award is issued by an arbitral tribunal against Canada. If, however, as in *Metalclad*, the arbitration occurs in Canada, but the award is issued against another country, then the law of the particular province is applied.⁴⁰

³⁶ Rubins, *supra* note 35 at 387.

³⁷ *S.D. Meyers*, *supra* note 4 at para. 42.

³⁸ Jeffery Atik, “Repenser NAFTA Chapter 11: A Catalogue of Legitimacy Critiques” (2003) 3 *Asper Rev. Int’l Bus. & Trade L.* 215 at 225.

³⁹ Jeffery Atik, “Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process” in Todd Weiler, ed., *NAFTA: Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects*, (Ardsley, New York: Transnational Publishers, Inc., 2004) 143.

⁴⁰ Rubins, *supra* note 35 at 376.

In the case of *Metalclad*, the issue of judicial review was raised in the context of which domestic legislation applied. The *British Columbia Commercial Arbitration Act* would allow the courts to re-examine the merits of the dispute and set aside an award on the basis of an error of law. On the other hand, the *British Columbia International Commercial Arbitration Act* limited the Court to setting aside the award only in cases of serious procedural defects.⁴¹ In applying the latter legislation, the Court upheld part of the Tribunal's decision because there was no error in arbitral procedure.⁴² However, the Court found that the Tribunal had gone beyond the scope of the submission to arbitration and therefore set aside a portion of the Tribunal award.⁴³ Critics of the judgment suggested that the Court's approach intruded into the merits of the case and that the decision could lead more states to seek judicial review of arbitration decisions.⁴⁴

The perception that domestic courts cannot be trusted to deal with foreign commercial investment claims in an unbiased manner is reflected in much of the academic commentary. In response to criticism directed at Chapter 11, one article states:

[T]he fundamental reason that the great majority of modern investment protection treaties have opted for international adjudication is that domestic courts are often in fact, and, just as important, usually perceived to be, biased against alien investors, especially when those courts must evaluate and pronounce upon acts of their own governments.⁴⁵

The Federal Court's decision in *Meyers*, however, should allay the concerns raised by *Metalclad*. The Court reviewed Canadian jurisprudence and made it clear that extensive judicial deference should be granted to Chapter 11 arbitral tribunals. In its judgment, the Court emphasized that judicial review of arbitration awards negatively affects both the speed and the finality of the arbitration process.⁴⁶

⁴¹ *Metalclad*, supra note 15 at para. 91.

⁴² *Ibid.* at para 78.

⁴³ Rubins, supra note 35 at 380.

⁴⁴ Charles N. Brower and Lee A. Steven, "Who Then Should Judge?: Developing the International Rule of Law under NAFTA Chapter 11" (2001) 2 Chi. J. Int'l L. 193 at 196 [Brower and Steven].

⁴⁵ *S.D. Meyers*, supra note 4 at para. 42.

⁴⁶ Brower and Steven, supra note 45 at 200.

In addition to their possible bias, domestic courts are regarded as less able to understand the complexities of international commercial investment law, as compared to the experts chosen to constitute an arbitral panel.⁴⁷ Canadian courts, however, appear cognizant of, and responsive to, this concern. Canadian courts, in reviewing decisions from both domestic administrative tribunals and Chapter 11 arbitration tribunals, have recognized that the expertise of arbitration panels requires courts to accord deference to their decisions.

V. CONCLUSION

The *Meyers* decision is significant in that the Federal Court acknowledged that it cannot interfere in the decisions of arbitration tribunals to import a standard of judicial review which is not contemplated by relevant legislation, which in *Meyers* was the *Commercial Arbitration Code*. The Court appeared to recognize that if it were to do so, the result would be to diminish the efficiency and finality intended to be imbued in the Chapter 11 arbitration tribunal process. If Canadian courts follow the reasoning of the Federal Court, the result should be that “if the Tribunal has jurisdiction, the correct procedures are followed and the correct formalities are observed, the award—good, bad or indifferent—is final and binding on the parties.”⁴⁸ However, the Court’s perspective as to the “pragmatic and practical” approach to the judicial standard of review is not as clear as it could be. It will be interesting to see how Canadian courts define and apply the standard of review to Chapter 11 tribunals in future cases.

⁴⁷ *S.D. Meyers*, *supra* note 4 at para. 42.