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Bill C-50, the Rule of Law and Executive Power

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Ten small paragraphs, budget bill C-50's immigration provisions, have been publicized by the government as a mechanism for clearing the current skilled worker processing backlog. However, the changes will not touch the current backlog. Moreover, the new law will get around many of the administrative rules imposed by the *Immigration and Refugee Protection Act* and regulations and the ability to seek remedies at the Federal Court in many types of applications.

The amendments allow the minister to issue instructions, and require immigration officers to determine applications in compliance with these ministerial instructions, rather than transparent, known and consistent legal requirements. It enables maximum government flexibility on which types of applications are included and what types of judicial remedies will no longer be allowed.

The new law could target overseas humanitarian and compassionate applications, skilled worker applications and any other type of application or 'request' through the use of ministerial instructions. The delegation of authority is farther reaching than the modest goals that the government suggests will result from these legislative changes. The ministerial instructions, however wide or narrowly they are drafted, will be law, unless ruled contrary to the Charter or the principles of natural and fundamental justice. The word 'request' has not been utilized in the present Act or Regulations. This raises the question about what these 'requests' entail and why they have not been defined. The provision, that 'an application or request is retained, returned or otherwise disposed of does not constitute a decision not to issue a visa or other document, or grant status or exemption, in relation to which the application or request is made" under subsection 87.3(5), would enable the government to destroy, discard, hold, delay, decide or refuse

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an application, and then not consider it a 'decision'. If a disposition is not a decision, mandamus, judicial review and other administrative and judicial remedies no longer apply.

The government has touted the benefits of these amendments: "Simply put, our government's immigration reforms will get skilled workers into the country earlier, help families get reunited sooner, provide the Canadian economy with the human capital it needs to maximize its enormous potential, and continue to enrich our great country with the cultural influences of newcomers from the four corners of the earth" said Prime Minister Harper. Yet these laudable goals could be attained through public processes and standards already in the law.

Current law empowers the government to address immediate business and labour market needs for Canadian employers. Unfortunately, the government has not employed their current powers for this purpose. Below are three examples of the government's failure to meet business needs in Canada: (1) In September 2007, the government introduced a Simplified Application Process to facilitate the filing of skilled worker applications, which resulted in an increase in the current processing backlog of almost one million applications, thus substantially impacting the resources which each visa office could expend on work permit applications. (2) Labour Market Opinion applications now take nine months to process (instead of three weeks) for urgent work permit requests in Canada's most labour challenged provinces. (3) Lengthy delays in approving "arranged employment" applications, notwithstanding that employers are desperately clamoring for these workers. The government has other options available for expediting applications, which would meet Canada's labour market needs, such as inland permanent residence categories for work permit holders, expansion of provincial nominee programs and facilitated work permit applications procedures at visa offices for labour market approvals.

Immigration changes are desirable and, indeed, necessary. The current legislation empowers the government to effect such changes. The new changes may achieve those results only by ignoring acceptable principles of fundamental justice and procedural fairness.

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"Time is on My Side, Yes it is (No it's Not)"[1]

Are Proceedings to Enforce a Foreign Arbitral Award Subject to a Limitation Period?

*Antonin I. Pribetic**

The *New York Convention*[2] and the *Model Law*[3] each offer a process for recognition and enforcement of foreign arbitral awards, which is generally more streamlined, less expensive and time-consuming than recommencing an action on the merits. However, the old cliché "timing is everything" is apt. There is still some degree of uncertainty under Canadian law as to whether a foreign arbitral award made under the *New York Convention* or *Model Law* is subject to a limitation period, and, if so, what that limitation period is.[4]

Under Ontario law, a foreign judgment is simply evidence of a contract debt and must be sued upon as an "action on the case". The old limitation period for a "specialty" (i.e., a domestic judgment) was twenty (20) years; however, the Ontario Court of Appeal held that a "foreign judgment" was not equivalent to a domestic judgment unless there was reciprocal enforcement legislation from the originating jurisdiction which granted judgment. Therefore, the old limitation period in Ontario was six (6) years, but was only triggered when the judgment debtor returned to Ontario.[5] This exception has limited application in circumstances where the debtor has no physical presence in Ontario, but simply has assets there. In any event, the new limitation period for most actions commenced after December 31, 2003 in Ontario is now two (2) years, a relatively short time to sue. By contrast, in the US, the *Federal Arbitration Act* lays down a time-limit of three years for the confirmation and enforcement of awards made under the New York Convention.[6]

This is further complicated by some drafting ambiguity in the *Limitations Act, 2002*[7] (the "Limitations Act, 2002") which omits reference to the *ICAA* (incorporating the *Model Law*). Furthermore, the *New York Convention* is silent on limitation periods, which is a substantive issue to be determined by either the *lex arbitri* or the *lex fori* (at least in Canada and the US). The following are relevant excerpts from the *Limitations Act, 2002* and the *Model Law* (as incorporated by the domestic enabling legislation):

> **Limitations Act, 2002, S.O. 2002, c. 24, Sched. B**
>
> **No limitation period**
> **16.** (1) There is no limitation period in respect of,
> (a) a proceeding for a declaration if no consequential relief is sought;
> (b) a proceeding to enforce an order of a court, or any other order that may be enforced in the same way as an order of a court;
> …
> (d) a proceeding to enforce an award in an arbitration to which the *Arbitration Act, 1991* applies;
>
> **International Commercial Arbitration Act, R.S.O. 1990, c. I.9**
>
> **10.** For the purposes of articles 35 and 36 of the Model Law, an arbitral award includes a commercial arbitral award made outside Canada, even if the arbitration to which it relates is not international as defined in article 1 (3) of the Model Law. R.S.O. 1990, c. I.9, s. 10.
>
> **Enforcement**
> **11.** (1) An arbitral award recognized by the court is enforceable in the same manner as a judgment or order of the court. R.S.O. 1990, c. I.9, s. 11 (1).
>
> **Idem**
> (2) An arbitral award recognized by the court binds the persons as between whom it was made and may be relied on by any of those persons in any legal proceeding. R.S.O. 1990, c. I.9, s. 11 (2).

There are two potentially conflicting outcomes. First, the new Act refers only to the domestic arbitration statute, namely, the *Arbitration Act, 1991*,[8] but fails to refer to the international domestic statute, namely, the *ICAA*. However, one possible argument is that the interplay and combined effect of section 16(b) of the *Limitations Act, 2002* and section 11(1) of the *ICAA*, means that, in Ontario, no limitation period applies to the enforcement of a foreign arbitral award.

Second, there is no guarantee that an Ontario judge will necessarily accept this novel point of law. In *Compania Maritima Villa Nova S.A.* v. *Northern Sales Co.,*[9] the appellant company, which carried on business as a buyer, seller and supplier of grains, entered into a charter party agreement on January 17, 1978, with the respondent as owner of the vessel GRECIAN ISLES, for carriage of a cargo of grain from the port of Vancouver to the port of Bombay, India. The appeal concerned the Trial Division's directions for determination of certain points of law raised in the pleadings, including a constitutional question as to whether the *New York Convention*[10] was *ultra vires*, as well as whether the action to enforce the foreign arbitral award was statute-barred under *U.K. Limitation Act, 1980*. Stone, J. held Parliament did possess the power to adopt the Act as valid federal legislation for the recognition and enforcement in Canada of foreign arbitral awards having a federal character in a constitutional sense. With respect to the issue of limitation periods, Justice Stone agreed with the motions judge that limitations statutes are procedural in nature and the relevant provisions are those of the *lex fori,* concluding that Canadian law governs the matter of the limitation period applicable to an action in a Canadian court to enforce an award:

> … *The foreign arbitral award, as I have already stated, gave rise to a fresh cause of action which may be asserted in the Trial Division. Even if the U.K. statute applied, it provides a limitation for bringing an action to enforce an award. But no such award can exist until after it is made. It is only then that it may be enforced in the courts.*
>
> Counsel submits, in the alternative, that the matter of limitation is governed by the provisions of subsection 39(2) of the *Federal Court Act*, which reads:
>
> > ss. 39(2) A proceeding in the Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.
>
> In my view, the "cause of action arose" on the date of the award, May 24, 1985, at the earliest. *The action in the Trial Division was instituted well within the six years limitation period prescribed by the subsection.* [emphasis added][11]

Admittedly, the *Compania Maritima Villa Nova S.A.* v. *Northern Sales Co.* is a federal court decision and has limited applicability for cases within provincial superior court jurisdiction, particularly in light of section 23 of the *Limitations Act, 2002* which represents a sea change for the applicability of conflict of laws rules vis-à-vis Ontario limitations law, and reads:

> **23.** For the purpose of applying the rules regarding conflict of laws, the limitations law of Ontario or any other jurisdiction is *substantive law.* 2002, c. 24, Sched. B, s. 23.[12] [emphasis added]

Nevertheless, one should not blithely assume that just because Ontario limitations law is no longer procedural, therefore, no limitation period applies to the recognition and enforcement of a foreign arbitral award. In a recent Alberta case,[13] the applicant, Yugraneft Corp. applied for an order recognizing and enforcing an international arbitration award. The court rejected Yugraneft's contention that there was no applicable limitation period for foreign arbitration awards based upon the definition of a "remedial order" in s.1(i)(i) of the Alberta *Limitations Act*.[14] Chrumka, J. noted that since there were no comparable guidelines within the Model Law and the *ICAA* with respect to limitation periods, a foreign arbitral award, like a foreign judgment, was based upon a simple contract debt. As such, the action was statute-barred due to the expiry of

the two-year limitation period set out in the Alberta *Limitations Act.* Unlike s. 23 of the *Limitations Act, 2002*, the Alberta *Limitations Act* does not distinguish between substantive and procedural law and reads as follows:

> Conflict of laws
> 12**(1)** The limitations law of Alberta applies to any proceeding commenced or sought to be commenced in Alberta in which a claimant seeks a remedial order.
> **(2)** Notwithstanding subsection (1), where a proceeding referred to in subsection (1) would be determined in accordance with the law of another jurisdiction if it were to proceed, and the limitations law of that jurisdiction provides a shorter limitation period than the limitation period provided by the law of Alberta, the shorter limitation period applies.[15]

The alternative approach is to bring a common law action to enforce a foreign judgment which previously confirmed the final arbitral award. However, this strategy may also prove to be problematic, as it is unsettled whether a Canadian court is willing to simply "rubber stamp a second hand judgment", a practice which has been criticized by some as the "laundering of foreign judgments".[16]

In conclusion, while most foreign arbitral awards are recognized and enforced by Canadian courts, there still remain potential hurdles facing counsel retained to enforce a foreign arbitral award. Aside from logistical problems and typical delays for service *ex juris*,[17] limitation periods are not the exclusive bane of litigators. Unless and until there is federal and/or inter-provincial legislative reform to harmonize or unify the law of limitations for both foreign judgments and foreign arbitral awards,[18] a party seeking recognition and enforcement of a foreign arbitral award in an Ontario court is well advised to commence an application to enforce the final arbitral award within the new two (2) year limitation period.

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[1] From the popular song by The Rolling Stones "Time is on My Side" written by Jerry Ragovoy (under the pseudonym Norman Meade).
[2] UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, [the "New York Convention"] concluded at New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 art. V, s. 1.
[3] The UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (United Nations documents A/40/17, annex I and A/61/17, annex I) (As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) (available online at: http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-english_revised%2006.pdf) [the "Model Law"]. The Model Law is incorporated in Ontario by the International Commercial Arbitration Act, R.S.O. 1990, c. I.9 (as am.) [the "ICAA"].
[4] THE [UNAMENDED] CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS (New York, 1974), which has received accession from 18 countries, including the United States, generally imposes a four-year limitation period. Prof. Kazuaki Sono in his article, "The Limitation Convention: The Forerunner to Establish UNCITRAL Credibility" notes:

> At present, there are eighteen Contracting States to the Convention as amended by the Protocol (Argentina, Belarus, Cuba, Czech Republic, Egypt, Guinea, Hungary, Mexico, Paraguay, Poland, Republic of Moldova, Romania, Slovakia, Slovenia, Uganda, United States, Uruguay, and Zambia). On the other hand, the number of Contracting States to the original 1974 Limitation Convention is twenty-five, i.e., eighteen above plus seven. Out of the latter seven States, four (Dominican Republic, Ghana, Norway, and Yugoslavia) are those which ratified or acceded to the Limitation Convention before the Protocol was adopted (and have not yet ratified the Protocol); two States (Ukraine and Burundi) ratified only the original Convention in 1993 and 1998 respectively, and Bosnia and Herzegovina declared succession of the original Convention in 1994, on the theory that former Yugoslavia was a Contracting State to the 1974 Convention. [citations omitted] (available at http://www.cisg.law.pace.edu/cisg/biblio/sono3.html)

See also UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL) Status of Conventions and Model Laws, art. 8. available at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_status.html.

[5] *Lax* v. *Lax* (2004) 70 O.R. (3d) 520 (Ont. C.A.). Cf. the recently proclaimed Saskatchewan *Enforcement of Foreign Judgments Act*, 2005 c.E-9.121 (effective April 19, 2006) which contains a 10 year limitation also found in some provincial reciprocal enforcement legislation: *British Columbia Court Order Enforcement Act*, RSBC 1996 Chap. 78, § 29 (1)(a) and (b); Prince Edward Island *Reciprocal Enforcement of Judgments Act*, R.S.P.E.I. 1988, c. R-6, § 2(1)(a) and (b). For a more detailed analysis of limitation periods in this context, see Antonin I. Pribetic, "Thinking Globally, Acting Locally: Recent Trends in the Recognition and Enforcement of Foreign Judgments in Canada", in ANNUAL REVIEW OF CIVIL LITIGATION 2006, The Honourable Justices T. Archibald & R. Echlin, eds., (Toronto: Thomson-Carswell, 2007) 144-199 at 178-181 and 189.

[6] Alan Redfern and Martin Hunter (with Nigel Blackaby and Constantine Partasides), LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, (4th Ed.-Student Version) (London: Sweet & Maxwell, 2004), Chap. 9, at §9-46, p.508.

[7] *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B (as am.).

[8] *Arbitration Act*, 1991, S.O. 1991, c. 17 (as am.).

[9] *Compania Maritima Villa Nova S.A.* v. *Northern Sales Co.* 137 N.R. 20, [1992] 1 F.C. 550 (F.C.A.) per Stone, J. (Heald and Mahoney JJ. concurring).

[10] UNITED NATIONS FOREIGN ARBITRAL AWARDS ACT, S.C. 1986, c. 21, s. 3, Schedule.

[11] *Compania Maritima Villa Nova S.A.* v. *Northern Sales Co., supra.*

[12] *Limitations Act, 2002, supra* note 7, s.23. See also, Janet Walker, "Twenty Questions (About Section 23 of the *Limitations Act*, 2002)" in W. Gray, L Kerbel-Caplan & J Ziegel, eds. (Toronto, Ontario Bar Association, 2005) at pp. 117-121.

[13] *Yugraneft Corp.* v. *Rexx Management Corp.* [2007] A.J. No. 749 Alta. Q.B. per P. Chrumka J. (June 27, 2007).

[14] *Limitations Act*, R.S.A. 2000, c. L-12 (as am.) §1(i) "remedial order" means a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right, but excludes

(i) a declaration of rights and duties, legal relations or personal status,

(ii) the enforcement of a remedial order

…

[15] Id., RSA 2000 cL-12 s12.

[16] See, *Morgan Stanley & Co International Ltd* v. *Pilot Lead Investments Ltd* [2006] 4 HKC 93; [2006] HKCFI 430 (High Court of the Hong Kong Special Administrative Region); Clarke v. Fennoscandia Ltd [2004] SC 197 (Scottish Outer House), per Lord Kingarth at ¶ 31.

[17] CONVENTION OF 15 NOVEMBER 1965 ON THE SERVICE ABROAD OF JUDICIAL AND EXTRAJUDICIAL DOCUMENTS IN CIVIL OR COMMERCIAL MATTERS (available online at: http://www.hcch.net/index_en.php?act=conventions.text&cid=17) and Rule 17.05(1) of the Ontario Rules of Civil Procedure. See also, Ingeborg Schwenzer and Simon Manner, "'The Claim is Time-Barred': The Proper Limitation Regime for International Sales Contracts in International Commercial Arbitration, *Arbitration International*, Vol. 23 No. 2 (2007), pp. 293-307 at 303.

[18] The less likely alternative would be for Canada (and each constituent province and territory) to sign, ratify and implement the U.N. *Limitations Convention*, supra note 4.

Attorney General of Canada v. *S.D. Myers, Inc.* - Observations

*Rajeev Sharma**

I. Introduction

On January 13, 2004, the Federal Court of Canada handed down its decision in *Canada (Attorney General)* v. *S.D. Myers Inc.*[1] This ruling was significant because it confirmed that the decisions of international arbitral tribunals are to be granted a high level of deference in judicial review. This proposition has developed significantly over time in Canadian jurisprudence, commencing with the 2001 decision of *Mexico* v. *Metalclad*[2] where the Supreme Court of British Columbia ("B.C. Supreme Court") commented that the intervention of courts in international arbitral awards should be minimized. Part I of this case comment will provide a brief introduction to Chapter 11 of the North American Free Trade Agreement ("NAFTA"), and to Canadian jurisprudence under Chapter 11 before *Myers* was decided. Part II will explain the 2003 Ontario Superior Court's decision of *Myers*. Part III will canvass the critical commentary written on the Court's decision of *Myers*.

A) NAFTA Chapter 11

NAFTA Chapter 11 confers on investors and their investments in the NAFTA zone a direct right of action against the signatory governments for alleged violations of the legal obligations contained in the Chapter. Arbitral tribunals are given the task of considering whether specific governmental action has harmed an investor or its investment[3] in contravention of the legal obligations in NAFTA Chapter 11. NAFTA investors are not permitted to sue their own governments. NAFTA Chapter 11 tribunals may either dismiss claims before them or award monetary damages for losses suffered; these tribunals cannot recommend that the government withdraw or change the impugned law, regulation or policy.

B) Judicial Review of NAFTA Chapter 11 Arbitration Awards in Canada before Myers

1) The 2001 *Metalclad* Decision

Though the focus of this article is on the 2004 decision of *Myers*, it also briefly canvasses the NAFTA Chapter 11 cases in Canada that came before it to provide some context for the *Myers* decision. *Metalclad* was the first NAFTA arbitral award to undergo judicial review in Canada. In this case, a U.S. corporation invested in Mexico for the purposes of operating a hazardous waste landfill. Mexico's government approved the project that induced the U.S. investor, but the local municipality later obtained a court order to prevent the development of the site and the local governor issued a decree designating the site as a nature preserve. The Tribunal found Mexico's actions to be in violation of Articles 1105 (minimum standard of treatment) and 1110 (expropriation), and awarded Metalclad approximately US $17 million in compensation. More specifically, the Tribunal ruled that Mexico had acted in a non-transparent and arbitrary manner towards the U.S. investor, thereby breaching the fair and equitable treatment requirement under Article 1105. It also concluded that these actions amounted to an expropriation of the investor's investment for which compensation was due under Article 1110.

Mexico sought judicial review of the Tribunal's decision before Justice Tysoe in the B.C. Supreme Court, the province's trial court. Justice Tysoe accepted Mexico's argument that the Tribunal had exceeded its jurisdiction by improperly creating a new basis for liability by reading in "transparency" requirements under NAFTA Article 1105. The B.C. Supreme Court ruled that the Tribunal's reliance on the principle of transparency

was not in accord with the phrase "fair and equitable treatment in accordance with international law" under Article 1105. Justice Tysoe thus set aside the portion of the award dealing with Mexico's transparency obligations, but he kept the US $17 million award largely in tact. Nevertheless, the effect of the *Metalclad* decision was to cast some doubt on the finality of international arbitration awards in Canada. Critics of the decision noted that Justice Tysoe's approach was unduly intrusive because he positioned himself in the place of the Tribunal in order to rule on the meaning and content of international law under NAFTA Article 1105.

2) The 2003 Mexico v. Feldman Karpa[4] Decision

Feldman involved a dispute between a U.S. investor, which exported cigarettes manufactured in Mexico through its Mexican investment Corporacion de Exportaciones Mexicanas S.A. de C.V. ("CEMSA"), and the Mexican government. Feldman, the U.S. investor, initiated the arbitration process under NAFTA Chapter 11, claiming that Mexico discriminatorily granted an excise tax rebate to a Mexican company, and not to CEMSA. The Tribunal ruled that Mexico had discriminated against Feldman in favour of a Mexican competitor, and that contrary to Article 1102, Mexico could not justify such differential treatment on the basis of any legitimate public policy rationale. The Tribunal ordered Mexico to pay damages equivalent to the tax rebates that the Mexican government had wrongfully withheld.

The parties chose Ontario as the legal seat of arbitration upon commencing the dispute. Mexico sought to have the Tribunal's decision set aside by the Ontario Superior Court of Justice on the grounds that the Tribunal had exceeded its jurisdiction, and that the award was contrary to public policy. Ultimately, the Ontario Superior Court of Justice rejected Mexico's application in its entirety. The judge strongly emphasized that expert NAFTA tribunals should be afforded a high level of deference in international arbitrations. Regarding the issue of public policy, the Ontario Superior Court of Justice held that the Tribunal's award did not breach the public policy of Ontario because Mexico had not established that the NAFTA award was "contrary to the essential morality of Ontario". Notably, the Ontario Court of Appeal[5] in 2005 upheld the Ontario Superior Court's *Feldman* decision.

While the *Feldman* decision was viewed favourably by many international arbitration experts, concurring jurisprudence on the appropriate standard of review for international arbitral awards in Canada was still required. This concurring decision to reinforce *Feldman* was handed down by Justice Kelen in the 2004 Federal Court of Canada decision of *Myers*.

II. The 2004 *Myers* Decision

A) Facts, Issues and History of the Tribunal Proceeding in *Myers*

This case involved a dispute between a U.S.-based company, S.D. Myers Inc., that treats and disposes of toxic wastes contaminated with polychlorinated biphenyls ("PCBs"), and the Canadian government. S.D. Myers Inc. established a Canadian branch, S.D. Myers (Canada) Inc. ("Myers Canada"), to contract for the removal, testing, transportation and disposal of Canadian PCB waste in its U.S. facility. On or about November 15, 1995, the U.S. Environment Protection Agency ("EPA") issued an "enforcement discretion", permitting S.D. Myers Inc. to import PCBs from Canada under certain conditions.

Having anticipated this development, two Canadian operators of hazardous waste facilities approached the then Minister of the Environment, Sheila Copps, to advise her that this anticipated action would threaten the viability of their operations. Environment Canada and Foreign Affairs officials had advised the Minister that closing the border from the Canadian side could not be justified on health and environmental grounds and would raise concerns under NAFTA; however this advice was disregarded.

Consequently, on November 16, 1995, Canada banned the export of PCBs to the United States. Due to successful lobbying, the ban remained in force for 14 months. Notably, the ban was directed against S.D. Myers Inc. since it was the only company that the EPA granted permission to import PCBs to. At the time of the ban, S.D. Myers Inc. had been poised to perform millions of dollars worth of contracts that it had secured, and as a result of the ban, this potential went unmaterialized.

S.D. Myers Inc. challenged Canada's actions as violations of national treatment, fair and equitable treatment, performance requirements, and expropriation under NAFTA Chapter 11. In doing so, S.D. Myers Inc. asserted that Myers Canada constituted the U.S. company's "investment" in Canada. Canada argued that it had taken *bona fides* environmental measures to protect the health and safety of Canadians, and maintained that the export ban was not enacted to provide market protection to the Canadian company competing with S.D. Myers Inc.

The evidence before the Tribunal demonstrated that the ban was passed solely to protect the Canadian competitor of S.D. Myers Inc., and that the effect of the ban was that S.D. Myers Inc. and its investment, Myers Canada, were prevented from carrying out the Canadian business they had planned to undertake. The Tribunal thus found that Canada had violated Articles 1102 (national treatment) and 1105 (minimum standard of treatment), in breach of its NAFTA obligations. The Tribunal also found that there was no valid environmental or health basis for introducing the ban. As a result, S.D. Myers was awarded approximately U.S. $6 million in damages and almost U.S. $1 million in arbitration and legal costs.

B) The 2004 Federal Court of Canada Decision in *Myers*

1) Scope of Judicial Review

The Federal Court of Canada (the "Court") commented extensively on the scope of judicial review where a court is asked to review a Chapter 11 arbitral decision. NAFTA Article 1136(3)(b) gives national courts the ability to revise, set aside, or annul awards of an arbitral tribunal. The Court observed, however, that Article 34 of the *Commercial Arbitration Code*[6] (the "*Code*") limits the scope of judicial review for a court reviewing a NAFTA Chapter 11 decision.

Specifically, it stated that Article 34 of the *Code* "does not allow for judicial review if the decision is based on an error of law or an erroneous finding of fact if the decision is within the jurisdiction of the Tribunal".[7] It commented on the grounds which would establish a court's jurisdiction under Article 34, observing that a court can only set aside these kinds of arbitral awards if the applicant can prove that either the awards (a) deal with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or (b) contain decisions on matters beyond the scope of the submission to arbitration.[8] These grounds had been developed in Canadian jurisprudence – namely in *Metalclad* and *Feldman*. Proof that an arbitral decision that contravenes the applicant state's public policy is also a ground on which the court may establish its jurisdiction to set aside an award, which was discussed by the Court.

Since Canada had not raised the issue of the Tribunal's jurisdiction at the outset of the arbitration, the Court held that it was not able to rely on the issue at judicial review, as this would undermine the clear and express procedures in NAFTA for the resolution of disputes. Accordingly, the Court concluded that under Article 21(3) of the *UNCITRAL Arbitration Rules*,[9] it did not have a basis for judicial review of the Tribunal's decisions. However, the Court completed the analysis of the appropriate standard of review and the issues that Canada had raised, in the event that the Court's finding with respect to its lack of jurisdiction was incorrect.

2) Standard of Review

The Court commented that Canadian jurisprudence, namely *Metalclad, Feldman, and Quinette Coal Ltd.* v. *Nippon Steel Corp.*,[10] provides that courts have limited jurisdiction under Article 34 of the *Code* to review Chapter 11 arbitral awards. The reason for limiting the scope of judicial review of arbitral awards, according to the Court, was the recognition that "the legislature has voluntarily placed limits on such review, to preserve the autonomy of the arbitration system".[11] For similar reasons, and as noted in prior decisions, the Court found that the "pragmatic and functional approach" was applicable in Myers. The "pragmatic and functional approach" would not allow for the creation of a new standard of review outside those provided in Article 34 of the *Code*.

Thus, the Court recognized that a high level of deference should be accorded to arbitral awards. Recall that only after the Court began to consider the issues before it in the event that its conclusions on the question of jurisdiction were incorrect, did the Court take a position on the appropriate standards of judicial review of arbitral decisions. It noted, confirming *Dynamex Canada, Inc.* v. *Mamona*,[12] that the standard of review that the Court should apply to questions of law in reviewing arbitral awards was correctness, and the standard of review it should apply to questions of mixed law and fact was reasonableness.[13]

3) Issues

When Canada submitted an application for judicial review of the Tribunal's decision to the Court, the Court was asked to decide (1) whether the arbitral award exceeded the scope of the arbitration agreement in NAFTA Chapter 11 by dealing with a dispute not contemplated by this chapter; and (2) whether the award contravened the public policy of Canada.

The first issue raised four sub-issues:

(a) whether the Tribunal erred in concluding that S.D. Myers Inc. was an "investor" and Myers Canada was its "investment";

(b) whether the Tribunal misconstrued the national treatment obligation under NAFTA Article 1102 as permitting a comparison between the treatment accorded to S.D. Myers Inc. and Myers Canada with Canadian companies, and wrongly concluded that S.D. Myers Inc. and Myers Canada were in "like circumstances" with Canadian companies for the purposes of Article 1102;

(c) whether the Tribunal erred in concluding that under international law, a breach of an obligation related to investment protection supports a finding that Canada breached NAFTA Article 1105, and that in this case a breach of Article 1102 essentially establishes a breach of Article 1105; and

(d) whether the Tribunal exceeded the scope of the submission to arbitration by applying Chapter 11 obligations to "cross border trade in services", which are governed by Chapter 12, not Chapter 11.

4) Analysis

Issue #1: Did the arbitral awards exceed the scope of the arbitration agreement in NAFTA Chapter 11?

Recall that the Court had to consider the four sub-issues below to resolve this issue.

a) Did the Tribunal err in concluding that S.D. Myers Inc. was an "investor" and Myers Canada was its "investment"?

Whether S.D. Myers Inc. was an "investor" and Myers Canada was its "investment" was critical because the arbitration process only applies to disputes regarding Chapter 11 claims brought by "investors" with respect to "investments of investors". Canada argued that S.D. Myers Inc. and Myers Canada did not meet the criteria for these definitions, and therefore were not eligible to bring an arbitration. The Court relied on NAFTA Article 1139, which defines the relevant terms in order to assess whether the Tribunal erred in concluding that S.D. Myers Inc. was an "investor" and Myers Canada was its "investment". The Court began its analysis by finding that the arbitral award with respect to the legal meaning of the word "investor" and the phrase "investment of an investor" in the NAFTA was to be reviewed on the standard of correctness. It also found that in respect of the application of the facts to the definitions, the appropriate standard of review was reasonableness.

Under Article 1139, "investment of an investor of a Party" contemplates an investment owned or controlled directly or indirectly by an investor of such Party. "Investor of a Party" means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.

The Court noted that while there is a definition of "control" in NAFTA Chapter 16, this term is not defined in NAFTA Chapter 11. As such, the definition of "control" in NAFTA Chapter 11 is open to interpretation and should be given its ordinary meaning according to the *Vienna Convention on the Law of Treaties*.[14] The Court stated that the ordinary meaning of control, as defined in the *Canadian Oxford Dictionary*,[15] is the power of directing, command (under control of). It found that whether S.D. Myers Inc. controlled Myers Canada became a question of fact, followed by an evaluation of the evidence to that effect. In this regard, Mr. Dana Myers, the President of S.D. Myers Inc., testified that he exercised control over S.D. Myers Inc. in the United States, and over the company's operations in Australia, Saudi Arabia, Mexico and Canada as CEO of S.D. Myers Inc. Other witnesses confirmed that S.D. Myers Inc., through its President Dana Myers, had "the power of directing" Myers Canada.

The Court thus concluded that the Tribunal's findings that S.D. Myers Inc. was an "investor", and that Myers Canada was an "investment" for the purposes of Chapter 11 were well supported. The Court held that the Tribunal's interpretations of these definitions were correct, and that its application of the facts to the definitions was reasonable.

b) Did the Tribunal misconstrue the National Treatment obligation under NAFTA Article 1102?

The Court began by exploring Article 1102. It observed that Article 1102 requires Canada to treat investors and investments of a national of another party to NAFTA (i.e., the U.S. or Mexico) no less favourably than it would treat its own investors "in like circumstances" with respect to the "establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments".[16]

The Court noted that Canada, with the support of Mexico, submitted that "in like circumstances" means the Tribunal must compare U.S. investors and investments "in like circumstances" with Canadian investors and investments "in like circumstances". This was a question of mixed law and fact. The Court also observed that the authorities demonstrate that the comparison of "in like circumstances" is flexible; it can be expanded or contracted to suit the particular facts of each case. Here, the Tribunal used a broad comparison (i.e., Canadian operators such as Chem-Security and Cintex, who were S.D. Myers Inc.'s Canadian competitors), which was reasonably open to the Tribunal. As such, the Court refused to find that the Tribunal had misconstrued the national treatment obligation, and thus, did not set aside this part of the Tribunal's decision.

c) Did the Tribunal err in concluding that a breach of an obligation related to investment protection supports a finding that Canada breached NAFTA Article 1105, and that in this case, a breach of Article 1102 essentially establishes a breach of Article 1105?

The Court held that it did not have the power to review this part of the Tribunal's decision, and, accordingly, declined to express a view on the Tribunal's interpretation and application of Article 1105. However, the Court commented in *obiter dicta* that if it did have this power, it would not be necessary to review this aspect of the Tribunal's decision because the same damages flow from a breach of Article 1102. As such, a similar and subsequent review under Article 1105 would be redundant.

d) Did the Tribunal exceed the scope of arbitration by applying Chapter 11 obligations to Chapter 12 "cross border trade in services"?

Canada and the intervener, Mexico, argued that S.D. Myers Inc.'s activities in Canada are properly characterized as "cross border trade in services", and should therefore be governed by Chapter 12 of NAFTA, not Chapter 11.

The Court was of the view that the Chapters of NAFTA overlap, and that NAFTA rights are cumulative unless there is a direct conflict between them. Since S.D. Myers Inc. had an investment in Canada, it was entitled to protection of its investment granted by Chapter 11, as well as the rights and protection afforded to its trade in services by Chapter 12. Therefore, the rights and obligations under Chapter 11 were not mutually exclusive, nor were they in conflict with those in Chapter 12. As such, the Court ruled that the Tribunal had correctly applied Chapter 11 rights and obligations to S.D. Myers Inc.

Issue #2: Did the Tribunal's award contravene the public policy of Canada?

The Court found that pursuant to Article 34(2)(b)(ii) of the *Code,* it could judicially review and set aside an award where it "is in conflict with the public policy of Canada".[17] It remarked that public policy refers to "fundamental notions and principles of justice".[18] Public policy principle includes the notion that a tribunal cannot exceed its jurisdiction while it is carrying out an inquiry, and that this kind of "jurisdictional error" can be construed as a "patently unreasonable" decision. A complete disregard for the law will lead to a finding that "the decision constitutes an abuse of authority amounting to a flagrant injustice".[19] The Court concluded that, as the Tribunal's decisions were not "patently unreasonable", "clearly irrational," or "a flagrant denial of justice", there was no violation of the public policy of Canada. The Court did not explain its reasoning in reaching this conclusion in the judgment.

5) Concluding Summary of the Court's decision in *Myers*

The Court held that the Tribunal's findings on the questions of jurisdiction, and those with respect to Article 1102 were not "patently unreasonable". More specifically, the Court held that the Tribunal's findings that Myers Canada was an investment and S.D. Myers Inc. was an investor; that S.D. Myers Inc. could be protected by Articles 11 and 12 of NAFTA concurrently; and, that S.D. Myers Inc. and its Canadian competitors were "in like circumstances", were all appropriate. The Court also concluded that the Tribunal's award did not violate public policy in Canada. Ultimately, the application for judicial review was dismissed in its entirety.

III. Critical Commentary on *Myers*

A) Appropriateness of judicial review and whether the Court had jurisdiction

The Court in *Myers*, as discussed above, asserted that it did not have the jurisdiction to review the Tribunal's decision, however at least one critic has challenged this finding. Brower acknowledges that the proposition that parties must raise their jurisdictional arguments before the Tribunal is unremarkable, but he argues that Court in *Myers* extended this proposition.[20] This extension may have significant implications.

Specifically, Brower argues that Canada raised its jurisdictional objections in its statement of defence, which satisfied the proposition that parties must raise jurisdictional objections in their statement of defence to preserve them for judicial review. However, he notes that Canada did not classify its objections as jurisdictional issues.[21] Consequently, the Court held that because Canada did not label its objections as a challenge to the Tribunal's jurisdiction, it relinquished its right to raise these issues in the judicial review proceeding. The Court reasoned that "jurisdiction is a term of art and a legal objection must be clearly raised at the outset of the arbitration. Canada failed to do so in this case, and cannot now argue that the Tribunal did not have jurisdiction to."[22] Brower argues that this reasoning constituted excessive formalism, prohibiting judicial review.[23]

B) Inconsistency in Standards of Review

1) Inconsistency across arbitral awards in Canadian judicial review

Choudhury has argued that the degree of deference that different domestic courts accord to NAFTA Chapter 11 arbitral awards has been inconsistent in Canada.[24] Specifically, this author explores the problematic differences between the standards of review articulated in the 2001 Supreme Court of British Columbia decision in *Metalclad*, the 2003 Ontario Superior Court decision in *Feldman* affirmed by the Ontario Court of Appeal, and the 2004 Federal Court of Canada decision in *Myers*. Choudhury notes that the court in *Metalclad* took an intrusive approach in setting aside part of the Tribunal's award and substituting its own judgment.[25] The later judgments, *Feldman* and *Myers*, stand in contrast to *Metalclad* because the courts in these cases declined to set aside the arbitral awards, asserting that arbitral awards should be given a high degree of deference.

As such, Choudhury argues that the appropriate level of deference that Canadian courts should give to arbitral awards is a high one,[26] particularly since the Supreme Court of Canada has not ruled on the standard of review in NAFTA Chapter 11 arbitral and considering the practices of lower courts in Canada, European and American courts, and Canada's international commitments. He further observes that different issues such as questions of law and questions of mixed law and fact should have different standard of reviews. Tribunal decisions on special questions of law, which concern matters specific and familiar to a tribunal and that do not come before domestic courts for determination in other legal contexts, should be given a considerable degree of deference;[27] however, Choudhury does not specifically articulate what the applicable appropriate standard of review would be. He argues that less deference should be given to questions of general law, as domestic courts are experienced in this regard.[28] Lastly, Choudhury comments that matters relating to jurisdiction should be confined to whether the tribunal applied the designated law and whether there was an agreement to arbitrate; these questions should be reviewed on a standard of correctness.[29]

2) Inconsistency in standards of review between NAFTA member states

Hansen and Cousins have expressed concern that the standard of review which domestic courts in Canada, Mexico and the United States must apply to Chapter 11 arbitral awards is uncertain and inconsistent.[30] Atik observes that "different arbitration statutes will cover – or fail to cover – Chapter 11 awards. And different statutes will limit differently the scope of review".[31] For instance, Cousins explains that the United States and Mexico are permitted to apply their domestic legislation when determining their domestic courts' scope of review.[32] She also notes that Canadian federal law applies if the arbitration takes place in Canada and the arbitral tribunal issues an award against Canada.[33] However, if the arbitration takes place in Canada, but the award is issued against another country, then the law of the particular province in Canada is applied.[34] Because domestic legislation determines the standard of review for arbitral decisions, the concern is that there is room for inconsistency in standards of review across NAFTA state parties. Until we have jurisprudence on point from U.S. and Mexican courts, this concern appears to be hypothetical at the moment.

IV. Forward: Conclusions on *Myers*

Myers is an important decision since it asserts that international arbitral awards should be given a high level of deference by courts faced with an application for judicial review. The high level of deference has also been confirmed by the Ontario Court of Appeal in Feldman, and taken together, both decisions are generally in line with jurisprudence in other jurisdictions such as the United States and other jurisdictions.

As the critics have intimated, the Myers decision underscores some inconsistency between the appropriate standards of review in court decisions both at home and abroad, but not enough to disrupt the general tendency of local courts globally to provide a high level of deference in the review of international arbitral awards. The Court's decision in Myers requires parties to formally object to the assertion or presumption[35] that a tribunal has acted within the scope of its jurisdiction, which may serve to change the manner in which parties communicate these objections to a tribunal in the future. On balance, however, the Canadian jurisprudence reviewing international arbitral awards confirms a high level of deference to be afforded to such decisions.

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[1] [2004] F.C. 38 (F.C. T.D) [*Myers*].
[2] (2001), 89 B.C.L.R. (3d) 359, 14 B.L.R. (3d) 285 (Supr. Ct.) [*Metalclad*], add'l reasons provided at (2001) 95 B.C.L.R. (3d) 169 (Supr. Ct.).
[3] The terms "investor" and "investment" are defined in Part II. B. 4. a. of this article.
[4] [2003] O.J. No. 5070 (S.C.J.) [*Feldman*]
[5] See *United Mexican States* v. *Karpa*, [2005] O.J. No. 16.
[6] Being Schedule to the *Commercial Arbitration Act*, R.S.C., 1985 (2nd Supp.), c. 17, art. 34.
[7] *Myers, supra* note 1 at para. 42.
[8] *Myers, supra* note 1 at para. 44.
[9] UN GAOR, December 15, 1976, Art. 21.
[10] 1990] B.C.J. No. 2241 (B.C.C.A) [*Quinette*].
[11] *Desputeaux* v. *Éditions Chouette* (1987) Inc., [2003] 1 S.C.R. 178 at paras. 68-9, qtd. in *Myers* at para. 40.
[12] (2002), 228 D.L.R. (4th) 463.
[13] *Myers, supra* note 1 at para. 58.
[14] May 23, 1969, [1980] Can. T.S. No. 37, Art. 31.
[15] Toronto: Oxford University Press, 2001.
[16] *Myers, supra* 1 note at 72.
[17] *Myers*, *supra* note 1 at 55.
[18] *Ibid.*
[19] *Ibid.*
[20] Charles H. Brower II, "S.D. Myers Inc. v. Canada, and Attorney General of Canada v. S.D. Myers, Inc., [2004] F.C. 38" (Apr. 2004) The American Journal of International Law, Vol. 98, No. 2, 339 at 346 [Brower].
[21] *Ibid.*
[22] *Myers*, s*upra* note 1 at 53.
[23] Brower, *supra* note 20 at 346.
[24] Barnali Choudhury, "Determining the Appropriate Level of Deference for Domestic Court Reviews of Investor-State Arbitral Awards" (2007), 32 Queen's L. J. 602 at para. 27. [Choudhury]
[25] *Ibid.* at para. 3.

[26] *Ibid.* at paras. 33-37.
[27] *Ibid.* at para. 61.
[28] *Ibid.* at para. 62.
[29] *Ibid.* at para. 65.
[30] See Angela Cousins, "Case Comment: Canada (A-G) v. S.D. Myers Inc., [2004] 3 F.C.J. No. 29", (2005) 14 Dal. J. Leg. Studies 191 at 191 [Cousins]; Patricia Isela Hansen, "Judicialization and Globalization in the North American Free Trade Agreement" (2003) 38 Tex. Int'l L.J. 489 at 498. [Hansen]
[31] 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.
[32] Cousins, *supra* note 30 191 at 197.
[33] *Ibid.*
[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* (Ardsley, New York: Transnational Publishers, Inc., 2004) 376.
[35] Brower asserts that there is a customary and "powerful" presumption that tribunals have acted within the scope of their jurisdiction. In Brower, supra note 20 at footnote 105, Brower cites the following in support of this proposition: *Quinette*; *Parsons & Whittemore Overseas co.* v. *Societe Generale de l'Industrie du Papier*, 508 F.2d 969, 976 (2d Cir. 1974); Gary B. Born, International Commercial Arbitration 708-9 (2d ed. 2001); Charles H. Brower II, "Beware of the Jabberwock; A Reply to Mr. Thomas", 43 Colum. J. Transnat'l L. 465, 476-7 (2002).

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