Foreign Affairs and International Trade Canada

Department of Justice

CANADA

Affaires étrangères et Commerce international Canada

Ministère de la Justice

125 Sussex Drive
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April 29, 2010

VIA EMAIL AND COURIER

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Dear Members of the Tribunal,

Re: *Melvin J. Howard, Centurion Health Corp. & Howard Family Trust v. Government of Canada*

Canada writes pursuant to Articles 38, 40 and 41 of the *UNCITRAL Arbitration Rules* to request that the Tribunal terminate this arbitration and issue an award of costs in favour of Canada.

Pursuant to Article 41(4) of the *UNCITRAL Arbitration Rules*, this arbitration

should be terminated because the Claimants have failed to make the required deposit for more than thirty days after they were obligated to do so. Further, there is nothing to suggest that they intend to ever make that deposit, or to advance this arbitration in any way. The Claimants cannot be permitted to hold Canada hostage in an arbitration which they are either unwilling or unable to continue.

Pursuant to Article 40(3), Canada is entitled to an award requiring the Claimants to pay Canada's arbitration and legal costs. Since the filing of the Notice of Intent to Submit a Claim to Arbitration in July 2008, the Canadian government and several provincial governments have been required to expend significant resources in order to respond to the Claimants' frivolous and broad allegations. As is now apparent, all of these resources were wasted. The Claimants' abuse of the procedures established to allow for the good faith resolution of investor-state disputes should not be permitted to sour the taste of the international community for the arbitration process. Justice requires that Canada be reimbursed for its costs.

I. THE TRIBUNAL SHOULD TERMINATE THE ARBITRATION

The Claimants submitted a Notice of Intent on July 11, 2008, and then served a Notice of Arbitration ("NOA") on Canada on January 5, 2009. Pursuant to Article 3(4)(c) of the *UNCITRAL Arbitration Rules*, the Claimants elected to treat that NOA as their Statement of Claim. On January 22, Canada advised the Claimants that the NOA failed to meet the requirements of Article 18(2) and was, thus, defective as a Statement of Claim.[1] In response to Canada's letter, the Claimants attempted to remedy the defects in their Statement of Claim by filing, on February 2, 2009, a "Revised Amended Statement of Claim."

On July 3, 2009, Claimants appointed Professor Marjorie Florestal to the Tribunal. On August 12, 2009, Canada appointed Mr. Henri C. Alvarez, Q.C.. The Tribunal was finally constituted on November 11, 2009, when Judge Peter Tomka accepted the parties' joint nomination as presiding arbitrator.

A First Procedural Meeting was scheduled to occur in The Hague on March 19, 2010. However, on March 5, 2010, the Tribunal suspended the proceedings *sine die* because the Claimants had failed to pay their deposit, and because it believed that the Claimants intended to pursue a challenge to Mr. Henri C. Alvarez. Over six weeks have passed, and the Claimants have neither paid their deposit, nor pursued their purported

[1] Letter to Melvin Howard from Sylvie Tabet dated January 22, 2009 [**RE-1**].

challenge. Accordingly, it is now time for the Tribunal to move these proceedings from suspension to termination.[2]

A. The Claimants Have Failed to Make Their Deposit

Article 41(4) of the *UNCITRAL Arbitration Rules* provides:

> If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

In a December 4, 2009, joint letter to the Tribunal, the disputing parties agreed to each make a deposit of US $100,000 on March 1, 2010, as an advance for the Tribunal's fees. On December 14, the Tribunal noted this agreement, and pursuant to Article 41 of the *UNCITRAL Arbitration Rules* ordered that such deposits be made on the agreed date. The Tribunal has reiterated this Order no less than four times.[3]

Canada paid its share of the deposit on February 24. However, the Claimants have taken the position that it is in their discretion to decide at what point they will comply with the Order of the Tribunal. On March 5 the Claimants represented to the Tribunal that "further arrangements are being made to wire transfer the Claimants [sic] portion share of advanced costs while the challenge is in progress."[4] Claimants reiterated this representation in their letter of March 8 and added that their legal costs were "being underwritten by insurance for the Claimants."[5] It has been nearly two months since the Claimants made these representations, and yet they have still failed to make the deposit required. In fact, there is absolutely no reason to believe that they will ever do so.

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[2] At least five cases administered under the ICSID rules have been discontinued for non-payment of advances: (*International Trust Company of Liberia v. Republic of Liberia* (ICSID Case No. ARB/98/3) **[RA-26]**; *Philippe Gruslin v. Malaysia* (ICSID Case No. ARB/99/3) **[RA-29]**; *GRAD Associates, P.A. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/00/3) **[RA-22]**; *Russell Resources International Limited and others v. Democratic Republic of the Congo* (ICSID Case No. ARB/04/11) **[RA-32]**; *Branimir Mensik v. Slovak Republic* (ICSID Case No. ARB/06/9) **[RA-19]**. Three more are currently stayed for non-payment: *Ahmonseto, Inc. and others v. Arab Republic of Egypt* (ICSID Case No. ARB/02/15) **[RA-16]**; *S&T Oil Equipment & Machinery Ltd. v. Romania* (ICSID Case No. ARB/07/13) **[RA-33]**; *Quadrant Pacific Growth Fund L.P. and Canasco Holdings Inc. v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/08/1) **[RA-31]**.

[3] Letter to the disputing parties from the Tribunal dated February 24, 2010 **[RE-5]**; Letter to the disputing parties from the Tribunal dated March 1, 2010 **[RE-7]**; Letter to the disputing parties from the Tribunal dated March 2, 2010 **[RE-8]**; Letter to the disputing parties from the Tribunal dated March 5, 2010 **[RE-10]**.

[4] Letter to the Tribunal from Melvin J. Howard dated March 5, 2010 **[RE-9]**.

[5] Letter to the Tribunal from Melvin J. Howard dated March 8, 2010 **[RE-11]**.

B. The Claimants Have Failed to Pursue a Challenge to Mr. Alvarez Despite Suggesting on Several Occasions that they Would Do So

On January 7, 2010, the Claimants informed Canada that they believed Mr. Alvarez should be disqualified because of an appearance of bias.[6] The Claimants based their allegation on the fact that Mr. Alvarez's firm was allegedly representing other unrelated private health care clinics in British Columbia in litigation allegedly on a subject related to this arbitration. Canada responded on January 12, stating that it did not believe there was a conflict and that, in any event, Mr. Alvarez's firm had ceased representing those other private health care clinics prior to the constitution of the Tribunal. Canada also informed the Claimants that, as they had opted to proceed under the *UNCITRAL Arbitration Rules*, the procedure for challenges was governed by Article 11 of the *Rules*.[7] Despite Canada's reference, the Claimants flaunted the requirements of the *Rules*, waiting until February 1, 2010 to make the notifications required. On February 9, 2010, Mr. Alvarez explained that his firm had withdrawn as counsel in the action identified by the Claimants prior to his appointment to the Tribunal, that any documents related to that action were not kept by his firm, that he had never had access to those documents, and that he did not believe the issues in the litigation and arbitration were the same.[8]

The Claimants delayed writing to ICSID regarding their purported challenge until March 5, 2010, a mere two weeks before the scheduled First Procedural Meeting and the date on which procedural submissions from the parties were due to be filed.[9] The Deputy Secretary General of ICSID confirmed receipt of that correspondence on March 19, 2010.[10] In that letter, ICSID noted that the Claimants had not paid the US $10,000 fee required by ICSID, despite requests from ICSID that they do so and despite the Claimants' assurances that arrangements for payment had been made. More than six weeks have passed since ICSID's letter. At Canada's request, ICSID confirmed again on April 13, 2010, that the Claimants have still not paid the fee required by ICSID.[11]

Instead, the Claimants challenged the authority of Deputy Secretary-General Nassib Ziadé to decide their challenge. The Claimants appear to have argued that "another appointing authority" had to be designated because Mr. Ziadé, as the Deputy Secretary General, was not capable of deciding a challenge to an arbitrator brought pursuant to

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[6] Letter to Sylvie Tabet from Melvin J. Howard dated January 7, 2010 [**RE- 2**].
[7] Letter to Melvin J. Howard from Shane Spelliscy dated January 12, 2010 [**RE-3**].
[8] Letter to the PCA from Mr. Henri C. Alvarez dated February 9, 2010 [**RE-4**].
[9] Letter to the disputing parties from the Tribunal dated February 24, 2010 [#2] [**RE-6**].
[10] Letter to the disputing parties from Nassib G. Ziadé, March 19, 2010 [**RE-12**].
[11] Email correspondence to Sylvie Tabet from Nassib G. Ziadé dated April 13, 2010 [**RE-13**].

NAFTA.[12] The Deputy Secretary-General definitively rejected this challenge to his authority,[13] much as he did when a similar challenge was made to his authority in the NAFTA arbitration *Vito Gallo v. Canada.*[14] On April 14, 2010, the Claimants appear to have confirmed that they will not pursue their challenge to Mr. Alvarez at ICSID, writing to the Deputy-Secretary General that they "disagree" with his decision and "will seek to address this issue by other means."[15]

In the nearly two weeks since this correspondence, the Claimants have done nothing. This is not surprising, both in light of the Claimants' general course of conduct in this arbitration, and because the Claimants, in reality, have no "other means" to pursue a challenge to Mr. Alvarez. Article 12(1)(b) of the *UNCITRAL Arbitration Rules* provides that any challenge to an arbitrator is to be decided by the "appointing authority." Pursuant to NAFTA Article 1124, the appointing authority in this case is the ICSID Secretary General (which means, as explained by Mr. Ziadé, the Deputy Secretary-General for the purposes of this challenge).[16] The Claimants' statement is further evidence they never intended to pursue their challenge. In light of the failure of the Claimants to make the deposit required by ICSID, this effectively abandoned challenge to Mr. Alvarez should not impede the termination of these proceedings.

II. CANADA SHOULD BE AWARDED ITS COSTS

Where a Tribunal issues a termination order, Article 40(3) of the *UNCITRAL Arbitration Rules* requires it to "fix the costs of arbitration referred to in Article 38 and Article 39, paragraph 1, in the text of that order or award." The costs covered by Article 38 include both the cost of the arbitral proceeding and the costs to the parties of legal representation and assistance.[17]

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[12] Email correspondence to Melvin J. Howard from Nassib G. Ziadé dated April 14, 2010 **[RE-14]**. Canada is left to speculate as to the exact basis for the challenge to Mr. Ziadé's authority because the Claimants failed to copy Canada on their April 7 correspondence to ICSID.

[13] *Id.*; *see also* Letter to the disputing parties from Nassib G. Ziadé, March 19, 2010 **[RE-12]**.

[14] *Vito Gallo v. Canada* (UNCITRAL), Decision on the Challenge to Mr. J. Christopher Thomas, Q.C., 14 October 2009, ¶¶ 2-3 **[RA-37]**.

[15] Email to Nassib G. Ziadé from Melvin J. Howard dated April 14, 2010 **[RE-15]**.

[16] *Gallo*, ¶¶ 2-3 **[RA-37]**.

[17] Article 38 defines costs to include exclusively "(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39; (b) The travel and other expenses incurred by the arbitrators; (c) The costs of expert advice and of other assistance required by the arbitral tribunal; (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal; (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague."

Costs serve the "dual function of reparation and dissuasion,"[18] especially in the case of frivolous or vexatious claims.[19] Frivolous investor claims have been a concern in the international community. Indeed, recent amendments to the ICSID Convention and the 2004 Model U.S. bilateral investment treaty permit expedited hearings on claims that are apparently without merit.[20]

No NAFTA tribunal has been faced with the task of making a decision on costs in the context of a termination order being issued as a result of the Claimants' failure to make any effort to progress the arbitration or pay the required deposits to the Tribunal. In each of the NAFTA arbitrations where the Tribunal has had to decide the issue of costs, the claim was pursued in good faith, even if unsuccessfully, by the Claimants until the natural end of the arbitration. Even in such cases, the NAFTA tribunals that have considered the issue have endorsed the "loser pays" principle both with respect to arbitration costs, under Article 40(1), and the costs of legal representation and assistance, under Article 40(2) of the *UNCITRAL Arbitration Rules*.[21]

Where a termination order is issued because a Claimant failed to advance even the first deposit required by the Tribunal, costs should always be awarded to the Respondent. In fact, to the extent either Article 40(1) or (2) is relevant, the only circumstance[22] that may

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[18] *Azinian, Davitian, & Baca v. Mexico* (ICSID No. ARB (AF)/97/2) Award, 1 November 1999, ¶ 125 [**RA-17**].

[19] *S.D. Myers v. Canada* (UNCITRAL), Final Award, concerning the apportionment of costs between the Disputing Parties, 30 December, 2002, ¶ 44 [**RA-34**]; *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB(AF)/05/1), Award, 19 June 2007, ¶ 125 [**RA-18**]; *Possible Improvements of the Framework for ICSID Arbitration*, ICSID Secretariat Discussion Paper, October 22, 2004, p. 7, ¶ 9 [**RA-23**] ("As several cases have demonstrated, if the tribunal considers the claim to have been frivolous, it may also award costs to the respondent.").

[20] *See ICSID Arbitration Rules*, Article 41(5) [**RA-24**]; 2004 U.S. Model BIT, Article 28(4)-28(6) [**RA-36**]; Andrea K. Bjorklund, "The Emerging Civilization of Investment Arbitration" (2009) 113:4 Penn State Law Review 1269, 1274, n. 26 [**RA-35**].

[21] *Pope & Talbot, Inc. v. Canada* (UNCITRAL), Award on Costs, 26 November 2002, ¶ 17 [**RA-30**]; *Methanex Corporation v. United States of America* (UNCITRAL), Final Award, 03 Aug. 2005, Part V, pp. 2, 4, ¶¶ 5, 10 [**RA-27**]; *S.D. Myers*, ¶¶ 13, 49 [**RA-34**]; *Mondev International Ltd. v. United States* (ICSID No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 159 [**RA-28**]; *Azinian*, ¶ 125 [**RA-17**]; *Gami v. Mexico*, Final Award, 15 November 2004, ¶¶ 134-136 [**RA-21**]; *International Thunderbird Gaming Corp. v. Mexico* (UNCITRAL), Award, 26 Jan. 2006, ¶¶ 213-215 [**RA-25**].

[22] In cases which have proceeded to the natural end of the proceedings, Tribunals have considered various circumstances including 1) the novelty, importance, complexity of the claim or the novelty of the procedure; 2) the parties have presented their case in an efficient and professional manner; 3) whether the respondent's conduct invited litigation; 4) the financial position of the claimant; and 5) the relative success of each party in the case. While Canada believes that each of these factors is rendered irrelevant by the Claimants' failure to

require consideration is that the Claimants initiated this arbitration, resulting in great expense, and then did nothing to further it, letting it simply grind to a halt because of their unwillingness or inability to proceed. The Claimants' overall conduct suggests that their sole intent in initiating this arbitration was to create publicity for themselves through the publication of inflammatory commentary on the internet.[23]

III. COSTS INCURRED BY CANADA

The costs incurred by Canada pursuant to Article 38 of the UNCITRAL *Arbitration Rules* are set out specifically in Annex I and II. In short, they include the arbitral fees to be determined by the Tribunal, **$227,651.69** CAD in legal fees[24] and **$4667.99** CAD in disbursements for consultant fees, travel, and court and document costs.

In terms of its legal costs, by far the greatest expense, Canada was represented in this arbitration by lawyers employed by the Government of Canada. Over the life of this matter, these lawyers were:

- Sylvie Tabet, Director and General Counsel
- Shane Spelliscy, Counsel
- Christina Beharry, Counsel
- Pierre-Olivier Savoie, Counsel

The cost of counsel's time in this arbitration has been assessed by applying the "billable rate" used by the Department of Justice in its cost recovery process. Like its counterpart in private practice, the billable rate established by the Justice Department is intended to capture all of the costs associated with providing legal services, including the cost of office space and equipment and administrative support. This rate varies according to the position in question, and ranges from $172.40 CAD for junior counsel to $248.20 CAD for the senior-most lawyers on the file. In all cases, the rate is substantially below the going market rate for the services being provided.

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even make their initial deposit, to the extent the Tribunal wishes to consider them, they all favour Canada. Canada would be happy to provide the Tribunal with further briefing if it so requests.

[23] *See* Claimants' blog at <http://centurionhealthcorp.blogspot.com>, and, for example, "Seeking NAFTA Justice," April 25, 2009 **[RE-20]** (complaining that they have "experienced delays and out right lies [sic]" throughout the NAFTA arbitration process and describing NAFTA arbitrators as "a club or a mafia").

[24] Note that the cost of a full case for Canada can range anywhere from at least ten to twenty times more. By way of comparison, in *Methanex*, which was decided in 2005, the US claimed (and obtained) US $3.0 million in legal costs, while the investors had claimed US $11-12 million in legal costs. *Methanex*, Part V, p. 4, ¶ 12 **[RA-27]**.

Based on the time records of the Trade Law Bureau, Canada calculates that the total time spent on this case by the above lawyers from July 2008 to April 2010, a period of approximately 2 years, was 1,123.95 hours. Counsel for Canada was also assisted by paralegals, students and technical support staff.

The number of hours spent on this dispute reflects both the nature of the dispute and the conduct of the Claimants. While this case is still in its initial stages, responding to a NAFTA claim requires significant time and involves a number of issues.[25] This is even more so when, as here, the claims are ill-formulated and the pleadings are broad and unclear, but the subject matter of the claim, health care, is one of the most socially important in all of Canada, and generates significant political and public interest. In order to adequately prepare for the case, Canada's legal team was required to:

- Review the case and provide a preliminary assessment to relevant federal, provincial and municipal government departments;
- Conduct research into the factual basis for the Claimants' allegations;
- Conduct research regarding the nomination of arbitrators;
- Prepare a draft Procedural Order, a draft Confidentiality Order, and a set of pleadings in view of the first procedural meeting that was planned for March 19, 2010;
- Begin preparations of a Statement of Defence;
- Respond to the purported challenge of Mr. Henri C. Alvarez;
- Prepare general correspondence to be sent to the Claimants and/or Tribunal; and
- Prepare this motion for termination and costs.

In terms of its other disbursements, Canada also retained the services of outside counsel to provide expertise and guidance. Given that Canada has kept its legal costs to a minimum by using Government of Canada lawyers, this represents a reasonable expense. Moreover, the cost of outside counsel over the life of this file has been extremely low at $3,200 CAD. Canada's other miscellaneous disbursements relate to travel necessary to speak with provincial officials and clients, as well as court fees and document retrieval costs.

IV. PRAYER FOR RELIEF

For all of the reasons set out in the present submission, Canada respectfully requests that:

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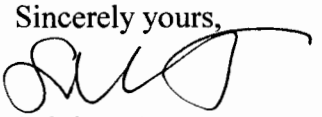
[25] Policy officials at various levels of federal, provincial, and municipal government also had to devote a significant amount of time to this matter.

1. The Tribunal issue a termination order pursuant to Article 41(4) of the *UNCITRAL Arbitration Rules*;

2. The Tribunal issue an award of costs in favour of Canada, requiring the Claimants to pay (a) all of the arbitration costs incurred by the arbitrators and the Permanent Court of Arbitration, to be determined by the Tribunal prior to the termination of the arbitration; (b) Canada's costs of legal representation and assistance, in the amount of $227,651.69 CAD; and (c) Canada's disbursements in the amount of $4,667.99 CAD.

Sincerely yours,



Sylvie Tabet
General Counsel and Director
Trade Law Bureau

cc: Melvin J. Howard
Dirk Pulkowski (dpulkowski@pca-cpa.org)

ANNEX 1 – COST OF LEGAL REPRESENTATION

		Lawyers Fees	
Description	**Hours**	**Rate**	**Fees**
Initial Pleadings (July 2008 – April 2010): receive and review Notices of Intent, Notice of Arbitration, and Revised Amended Statement of Claim, meet with clients; research on arbitrator selection; preparation for procedural meeting; preparation of defence to allegations; responding to challenge of Mr. Alvarez; General correspondence			
Shane Spelliscy (LA-2A)*	550.25	$208.80	$114,892.20
Pierre-Olivier Savoie (LA-01)*	290.20	$172.40	$50,030.48
Christina Beharry (LA-01)*	243.75	$172.40	$42,022.50
Sylvie Tabet (LA-3A)	39.75	$248.20	$9,865.95
Subtotal	1123.95		$216,811.13
GST @ 5%			$10,840.56
Total Fees			**$227,651.69**

* Note: Some lawyers are not employed by the Department of Justice but rather by the Department of Foreign Affairs. In those cases, marked by an asterisk (*) in this section, the classification of the individual has been converted to the equivalent position within the Department of Justice for the purpose of establishing the appropriate billable rate.

ANNEX II - DISBURSEMENTS		
	Disbursements	
Description	**US Funds**	**CDN Funds Paid Out**
DISBURSEMENTS:		
Legal readers – Jon Johnson		$3,200.00
B.C. Court Services		$52.00
Printing services		$81.50
Travel		$1334.49
Total Disbursements		**$4,667.99**