

**IN A NAFTA ARBITRATION UNDER THE UNCITRAL ARBITRATION RULES**

**S.D. Myers, Inc.  
("SDMI")**

**(Claimant)**

**- and -**

**Government of Canada  
("CANADA")**

**(Respondent)**

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**FINAL AWARD**

**(concerning the apportionment of costs between the Disputing Parties)**

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## CHAPTER I

### PREFACE AND PROCEDURAL HISTORY

#### The Tribunal

- 1 An account of the events that gave rise to the dispute, the commencement of the arbitration and the initial constitution of the Tribunal were set out in the Preface to the Tribunal's Partial Award dated 13 November 2000 (the *First Partial Award* or *FPA*). For present purposes, it is sufficient to record that the Tribunal was duly constituted and became seized of the arbitration on 4 March 1999. The constitution of the Tribunal changed following the resignation of Mr Bob Rae on 3 June 1999 and the appointment of Mr Edward C Chiasson QC as his replacement on 24 June 1999.

#### The Third Stage procedure

- 2 The procedural history of the arbitration up to 27 December 2001 was set out in Chapter II of the Tribunal's First and Second Partial Awards and is not repeated in this award.<sup>1</sup>
- 3 Towards the end of the second stage hearing the Tribunal and the Disputing Parties held a discussion concerning the procedure that would lead to the eventual decision concerning the allocation of costs between the Disputing Parties<sup>2</sup>.
- 4 In Chapter VIII of the Tribunal's Second Partial Award (the *Second Partial Award* or *SPA*) dated 21 October 2002 the Tribunal stated as follows:

*308. It was agreed at the second stage hearing that the Tribunal would make a Second Partial Award on the quantification of the compensation to be awarded and that the Disputing Parties would be given an opportunity to submit their claims in respect of costs, together with any submissions they wish to make, after they have seen the Second Partial Award.*

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<sup>1</sup> The First and Second Partial Awards are both published on a number of websites, including [www.appletonlaw.com](http://www.appletonlaw.com), [www.dfait-maeci.gc.ca](http://www.dfait-maeci.gc.ca), and [www.naftalaw.com](http://www.naftalaw.com).

<sup>2</sup> See Transcript, 26 September 2001, page 1056 *et seq.*

309. Accordingly, all questions concerning costs under Articles 38 and 40 of the UNCITRAL Arbitration Rules are postponed to the Tribunal's Final Award.

- 5 The Disputing Parties duly exchanged their submissions on the allocation of costs on 4 November 2002. CANADA subsequently delivered further comments, to which SDMI objected. The Tribunal has not found it necessary to take account of CANADA's further comments in making its decision concerning costs and, accordingly, did not invite SDMI to make any further submissions in reply.
- 6 Thereafter the Tribunal deliberated by telephone conference before making this Final Award, which was ultimately made by a majority comprised of Mr Edward C Chiasson QC and Professor J Martin Hunter (the "Majority", as the context requires) pursuant to Article 31.1 of the UNCITRAL Rules.

#### Abbreviations

- 7 The following abbreviations are adopted in this award:

CANADA	The Government of CANADA
CAN\$, and \$	Canadian dollars
Disputing Parties	SDMI and CANADA
Majority	Mr Edward Chiasson QC and Prof J Martin Hunter
MEXICO	The United States of Mexico
NAFTA	The North American Free Trade Agreement
Parties	CANADA, MEXICO and the USA
SDMI	S. D. Myers, Inc
Transcript	Verbatim record of the hearing held in Toronto from 21 to 26 September 2001
Tribunal	Professor Bryan P Schwartz, Mr Edward C Chiasson QC and Professor J Martin Hunter
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Rules	UNCITRAL Arbitration Rules, 1976
U.S. or USA	The United States of America
US\$	United States dollars

## CHAPTER II

### THE APPLICABLE RULES

8 Article 38 of the UNCITRAL Rules provides as follows:

*The arbitral tribunal shall fix the costs of arbitration in its award. The term 'costs' includes only:*

- (a) The fees of the arbitral tribunal to be stated separately in the award 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 that 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.*

9 Article 40 of the UNCITRAL Rules provides:

- 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.*
- 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.*

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10 Although both paragraphs of Article 40 of the UNCITRAL Rules confer wide discretion on an arbitral tribunal in respect of its award on costs, it can be seen that an arbitral tribunal is

required to adopt a subtle difference of approach between the “arbitration costs” (the items contained in Articles 38(a),(b),(c),(d) & (f)) and the costs of “legal representation and assistance” (the item referred to in Article 38(e)). Under Article 40.1 the former are to be borne “in principle” by the “unsuccessful party”; under Article 40.2 the latter are to be apportioned by an arbitral tribunal after “taking into account the circumstances of the case”. There is no reference to the “successful” or “unsuccessful” party in Article 40.2.

- 11 SDMI contends that it should recover from CANADA all of the sums it paid in respect of the arbitration costs and the full amount it incurred in respect of the costs of legal representation and assistance. CANADA contends that the arbitration costs should be borne equally by the Disputing Parties, and that the Disputing Parties should bear their own costs of legal representation and assistance.
  
- 12 In the two Chapters that follow, the Majority presents its analysis of SDMI’s claims in respect of (a) the arbitration costs, and (b) the costs of legal representation and assistance. The Majority also makes its determinations in respect of the apportionment of costs in accordance with Articles 40.1 and 2 of the UNCITRAL Rules.

## CHAPTER 111

### THE COSTS OF THE ARBITRATION

- 13 SDMI submits that it prevailed in the overall result of the arbitration, while acknowledging that it was awarded less than claimed. SDMI also contends that CANADA added to the cost of the proceedings by failing to comply with procedural orders, and that SDMI prevailed on most of the major contested procedural issues. It also points to CANADA's conduct that resulted in the liability finding as a factor that should influence the Tribunal's award in respect of costs.
- 14 CANADA submissions are based primarily on: the novelty of the issues; the shifting quantum of SDMI's claim; the limited amount awarded to SDMI; SDMI's conduct during the proceedings; and the practices of other NAFTA Chapter 11 arbitral tribunals.
- 15 The Majority has considered all of these factors. As stated above, Article 40.1 of the UNCITRAL Rules places emphasis on "success" as a significant element in an arbitral tribunal's consideration of the apportionment of the arbitration costs. The logical basis for this policy appears to be that a "successful" claimant has in effect been forced to go through the process in order to achieve success, and should not be penalised by having to pay for the process itself. The same logic holds good for a successful respondent, faced with an unmeritorious claim.
- 16 "Success" is rarely an absolute commodity. In the first ("liability") stage of the arbitration SDMI established CANADA's liability as a result of the Tribunal's findings of breach of certain provisions of the NAFTA, but in fact lost on a number of other issues (for example, its claim in respect of alleged expropriation under Article 1110) that occupied a good deal of the Tribunal's time and effort, as well as that of CANADA's legal team. In summary, SDMI "succeeded" on liability, but not as to the full extent of its pleaded case.

- 17 In the second (“quantum”) stage of the proceedings it might fairly be considered that SDMI was the unsuccessful party. At the start of the second stage, SDMI quantified its claim at US\$70,921,421.00 to US\$80,002,421.00<sup>3</sup>. By August 2001, about a month before the second stage hearing, SDMI had reduced its claim to “not less than US\$53,000,000.00<sup>4</sup>. The ultimate award was a little over CAN\$6,000,000.00,<sup>5</sup> which is only a small percentage of the amount claimed, particularly bearing in mind that SDMI presented its claims in US\$, not CAN\$.
- 18 The Tribunal became aware that the Disputing Parties entered into settlement negotiations during the second stage of the arbitration, but was not aware of the offers or counter-offers that may have been made by either Disputing Party. In making its determinations as to the apportionment of costs, the Majority considers that it is unable to take account, either way, of the reasonableness or otherwise of the negotiating positions taken by the Disputing Parties by reference to the eventual result. The only benchmarks, in terms of “success”, are (a) the results on the various liability issues and (b) the difference between the amounts claimed by SDMI and the amount ultimately awarded.
- 19 The Majority considers that neither party has achieved absolute “success” in the sense used in Article 40.1 of the UNCITRAL Rules, and that there must be some apportionment as mandated by that Rule. Overall, taking into account “the circumstances of the case” as provided for in Article 40.1 of the UNCITRAL Rules, the Majority considers that SDMI is entitled to recover a significant portion of its arbitration costs, but not all of them. It was not successful on all of the positions it advanced in the liability phase of the arbitration, but it did establish liability. The amount of compensation awarded was very substantially less than the amount claimed, but some compensation was awarded.

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<sup>3</sup> SDMI’s Summary on Damages, page 8, para. 28.

<sup>4</sup> SDMI’s Reply Memorial, page 53.

<sup>5</sup> The figures in this paragraph exclude interest, claimed or awarded.



- 20 The arbitration was hard fought. The Disputing Parties both requested the assistance of the Tribunal in dealing with a number of pre-hearing issues.<sup>6</sup> The conduct of the Disputing Parties during the course of the proceedings is certainly a matter to be taken into account in assessing the apportionment to be made in respect of costs. Contrary to SDMI's assertion, the Majority does not consider it appropriate to take into account of the conduct of CANADA that gave rise to the determination of liability for the purpose of the Tribunal's consideration of the apportionment of costs. This topic is discussed in more detail below.
- 21 Assessing the amount to be paid to SDMI by CANADA in respect of the costs of legal representation and assistance requires the Tribunal to exercise a broad judgement on the "big issues", but it also requires some attention to a number of other issues that are relatively small in monetary terms. The most important of these relatively minor issues are considered in the paragraphs that follow.
- 22 SDMI includes in its claim in respect of arbitration costs the expenses incurred for its share of engaging reporters to supply transcripts of the hearings (CAN\$21,748.29); the costs of the joint visit of party-appointed experts to Tallmadge (CAN\$12,490.26); and hotel cancellation charges for the postponed hearing in early September 2001 (CAN\$36,749.00).
- 23 SDMI's claim in respect of the provision of a transcript appear to relate to the second stage hearing, because earlier transcript charges were included in the disbursements of SDMI's lead counsel. This claim includes the cost of transcripts supplied to SDMI. These are not "arbitration costs". Only the daily attendance fee of the reporters and the cost of the transcripts and discs supplied to members of the Tribunal should be categorised as "arbitration costs".
- 24 The Tallmadge visit was proposed by the Tribunal, and adopted by agreement between the Disputing Parties. It was an orderly and efficient way of undertaking an evidence-gathering exercise that had to be carried out speedily at a late stage of the proceedings, as a

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<sup>6</sup> A total of 21 procedural orders were made by the Tribunal, not including a number of procedural rulings made during the course of the witness hearings.

result of SDMI's late production of a large volume of computer print-outs relating to its sales activities in Canada. These costs are not "arbitration costs"; they fall within the Disputing Parties' costs of legal representation and assistance.

- 25 The second stage hearing, scheduled for early September 2001, was postponed at the request of CANADA. The hotel in which it was to take place, and in which a number of the participants had reserved rooms, levied a cancellation fee of CAN\$24,792.45. In addition, it appears that SDMI will be charged for others room booked in connection with that hearing. SDMI says that CANADA has failed to pay its half-share of the cancellation charges.<sup>7</sup> CANADA says that it has paid its share of the cancellation charges, and that it has also paid an additional CAN\$20,562.00 for other rooms booked in connection with that hearing.<sup>8</sup>
- 26 The postponement of the hearing scheduled for early September 2001 was the direct result of the late delivery by SDMI of a significant quantity of evidentiary material. This material should have been produced by SDMI at a much earlier stage, pursuant to the Tribunal's procedural orders. The material in question was apparently omitted because SDMI considered that information stored in a computerised database did not fall within the definition of a "document" for the purposes of the Tribunal's procedural orders. After the material was produced, the Tribunal reluctantly concluded that fairness to CANADA required a postponement of the hearing, and expressly deferred making an order on the consequences in terms of costs. CANADA has not advanced a claim in respect of these costs, but submits that SDMI's portion should not be paid by CANADA. The Majority agrees.
- 27 ICSID, the appointing authority in this case, performed its functions concerning SDMI's challenge to Mr Bob Rae in the early stages. This event was described in the First Partial Award. The Tribunal has received confirmation from ICSID that no fees have been or will be charged in respect of its services.<sup>9</sup> (See UNCITRAL Rules, Article 38(f)).

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<sup>7</sup> SDMI's Submission on Costs, para. 24.

<sup>8</sup> CANADA's Memorial on Costs, para. 55.

<sup>9</sup> ICSID has subsequently introduced a system of charges for these services

- 28 The Disputing Parties paid the initial Article 41 deposits and the supplementary deposits in equal shares. SDMI claims that it has paid a total of CAN\$647,666.60 by way of deposits to the account held by the Tribunal.<sup>10</sup> Some interest has been earned on the deposit, for the benefit of the Disputing Parties, and this will be taken into account later when the Tribunal's final account is presented to the Disputing Parties.
- 29 As stated above, determination of the apportionment of the arbitration costs between the Disputing Parties can only be a matter of broad judgement, applying the guidance given in the relevant provisions of the UNCITRAL Rules. The Majority orders that CANADA shall pay to SDMI the sum of CAN\$350,000 in respect of its claim for the costs of the arbitration. So far as concerns the deposits made by the Disputing Parties to the account held by the Tribunal, the result is that CANADA will have paid CAN\$1,105,347.50 and SDMI will have paid CAN\$405,347.50.<sup>11</sup> Put another way, after implementation of this award, CANADA will have contributed nearly three times as much as SDMI to the total amount deposited with the Tribunal. The Majority considers this result to be a fair reflection of the relative "success" of the Disputing Parties, in the context of the other circumstances of the case.
- 30 In addition to the payments noted above, each Disputing Party has each given an undertaking to the Tribunal to pay its half share of the balance of the amounts due to the Tribunal, the Tribunal having notified them that the amount remaining on deposit will not be sufficient to cover its unbilled fees and expenses. The amounts involved do not affect the Majority's determination as set out in the preceding paragraph. A schedule of the amounts invoiced and paid to each member of the Tribunal will be provided to the Disputing Parties as soon as practicable. Having regard to the provisions of Article 38(a), this schedule shall be deemed to form part of this Final Award.

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<sup>10</sup> The Majority has found it hard to reconcile this figure. This is partly because of currency fluctuations (the deposits were made, in instalments over time, in US\$), and partly because SDMI may have made an arithmetical error in calculating the sum of its total US\$ deposits. The Majority's calculation is that SDMI's total deposits amounted to around CAN\$755,347.50 at the rate of exchange prevailing at the time of preparation of this award. But the discrepancy makes no difference to the Majority's overall conclusion

## CHAPTER IV

### THE COSTS OF LEGAL REPRESENTATION AND ASSISTANCE

- 31 SDMI claims a total of CAN\$3,549,863 in respect of its costs of legal representation and assistance under Article 38(e) of the UNCITRAL Rules<sup>12</sup>. CANADA submits that each party should bear its own costs.
- 32 Unlike the position in some national court systems, in arbitrations - particularly in international arbitrations - there are no rigid rules<sup>13</sup>. An arbitral tribunal generally has a wide discretion in determining the amount, if any, that one party should pay to the other for representation costs.
- 33 The practices of international arbitral tribunals in the exercise of their discretion vary widely, as may be seen from the English language literature on the recovery of the costs of legal representation. Some arbitral tribunals are reluctant to order the losing party to pay the winner's representation costs, unless the winner has prevailed over a manifestly spurious or unmeritorious position taken by the loser. Other arbitral tribunals evidently feel that the winning party should not normally be left out of pocket in respect of the expenses incurred in enforcing its legal rights. Some adopt a median position, based perhaps on the idea that further proceedings to quantify the winner's costs claims would be an expensive exercise, or because neither party can be said to have been wholly successful. In any event, it is clear that the costs claimed must be demonstrably "reasonable" in order to be awarded.

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<sup>11</sup> For this purpose, the Majority has used (in SDMI's favour) its own CAN\$755,347.70 figure, rather than the CAN\$647,666.60 figure used by SDMI in its Submissions on Costs.

<sup>12</sup> This figure is arrived at by deducting SDMI's claim in respect of "arbitration costs" (CAN\$718,654.00) from its total costs claim (CAN\$4,268,516.00)

<sup>13</sup> For example, some national systems base recovery on a tariff; some do not allow, or discourage, recovery; and others provide for recovery that approaches full indemnification.

34 As described above, the two separate paragraphs of Article 40 of the UNCITRAL Rules draw a subtle distinction between the criteria to be applied in awarding (a) the “arbitration costs”, and (b) the parties’ costs of legal representation and assistance. Article 40.1 places the emphasis on “success”, leaving the arbitral tribunal a residual duty to take account of other circumstances. Article 40.2 does not mention “success” (although clearly it is to be included), and places the emphasis on the arbitral tribunal’s freedom to determine the apportionment of the costs between the parties after taking into account .... *the circumstances of the case.*

35 SDMI submits that the ...*primary ‘circumstance’ to be taken into account by the Tribunal...* in considering the award of costs *is the degree of success* that it achieved. The second important factor is said to be the conduct of the parties. SDMI refers to the test articulated by Judge Howard M Holtzmann in an Iran-US Claims Tribunal case, *Sylvania Technical Systems, Inc. -v- Iran*<sup>14</sup>:

1. *Were costs claimed in the arbitration?*
2. *Was it necessary to employ lawyers in the case in question?*
3. *Is the amount of costs reasonable?*
4. *Who should bear the costs? Are there circumstances in this case that make it reasonable to apportion costs?*

36 The third and fourth items of Judge Holtzmann’s test require particular consideration in this case.

37 The costs of representation and assistance claimed by SDMI are as follows:

- \* lead counsel fees - CAN\$2,068,250.00
- \* lead counsel disbursements - CAN\$421,582.00
- \* legal consultant for strategic policy initiatives - CAN\$49,797.00

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<sup>14</sup> (1985) 8 Iran-US C.T.R 298, 322-324.

- \* consultant law firm (including counsel at the damages hearing) - CAN\$217,530.00
- \* other legal assistance - CAN\$33,442.00
- \* damages consultants - CAN\$937,914.00
- \* other secretarial and negotiation - CAN\$12,446.00

- 38 These figures are taken from the SDMI's Submission on Costs (pages 3 and 4). The total is \$3,740,964, which together with the claimed arbitration costs of \$718,654.00 (page 7) amounts to \$4,459,618.00. This does not accord with the total costs claimed by SDMI of \$4,268,516.00 (page 1). Dana Myers stated that lead counsel's fees were \$2,053,250.00, which he said was less than the value of the "docketed time". Tab 18 of SDMI's schedule of invoices is a summary of the invoices of lead counsel's firm as of 1 October 2002. It shows total hours invoiced of 7511.13, with a value of \$1,763,034.00. SDMI says that this amount is in US\$, although it is not expressed as such in the summary. If the amounts were stated in US\$, the summary shows that lead counsel's hourly rate would be US\$425.00, which converts to approximately CAN\$680.00 at the rates prevailing at the time of preparation of this award<sup>15</sup>
- 39 It is not easy to reconcile the figures, but for the purpose of reviewing the "big picture" this is not essential. Parties are entitled to organise the preparation and presentation of their cases as they consider appropriate, and to spend as much money as they wish on lawyers, experts and so forth. In all litigation, attorneys and their clients decide how to present their cases; what positions are to be adopted; what arguments are to be advanced; what documentary and witness evidence will be presented; what experts are to be retained; what initiatives are to be undertaken; and what resources are to be engaged.
- 40 In the context of costs recovery from an "unsuccessful" party, the Majority does not wholly follow the approach of Judge Holtzmann. The Iran-US Claims Tribunal is a rather special situation. The Majority takes the view that, at least in this case, the test is not how much the "successful" party actually spent; and the fact that the client has initiated or approved

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<sup>15</sup> These comments are not made in criticism of SDMI or its attorneys. They illustrate the complexity that an arbitral tribunal may confront when examining a detailed claim for the costs of legal representation and assistance.

that expenditure is a matter only between the client and his attorney. The actual amount spent may have been “reasonable” in that sense. The test of reasonableness in the context of recovery from an “unsuccessful” party does not seek to second-guess these decisions, but looks to what amount it would be “reasonable” to require the unsuccessful party to pay ..... *taking into account the circumstances of the case.*

41 A number of subsidiary points were raised. SDMI contends that the differences in capacity to endure litigation between it and CANADA supports an award of costs in SDMI’s favour. Standing alone the Majority does not accept that this is a relevant factor. SDMI points to its success on liability and states that although the quantum recovered was less than it claimed, it still was substantial. CANADA asserts that the quantum claimed shifted significantly and that SDMI’s recovery was considerably less than the amount claimed. The Majority has reviewed this topic in the preceding Chapter. The same considerations apply in this Chapter.

42 Some of the costs claimed by SDMI relate to initiatives not directly involved in the conduct of the arbitration (for example, consultancy fees incurred for advice on negotiation strategy). CANADA states that the time spent by government counsel on the arbitration was 7220.6 hours, which is comparable to the time apparently spent by lawyers and others in SDMI’s lead counsel’s office. Both sides engaged a number of experts who provided lengthy and detailed reports.

43 As mentioned above, SDMI contends that the conduct of CANADA that gave rise to the liability finding supports an award of representation costs against CANADA. SDMI relies on the decision of the NAFTA Chapter 11 Tribunal in *Robert Azinian et al -v- Mexico*<sup>16</sup> and asserts:

*The Tribunal noted at para. 125 that it is common in international arbitral proceedings that a losing party bear the costs of the arbitration as well as*

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<sup>16</sup> Award dated 1 November, 1999.

*contribute to the prevailing party's costs of representation. The tribunal noted that this practice 'serves the dual function of reparation and dissuasion'.<sup>17</sup>*

- 44 This reference does not support the proposition that conduct which gave rise to liability is relevant to the award in respect of costs. The *Azinian* Tribunal's comments were not as broad as was asserted by SDMI. The Tribunal in that case stated that it was common for a *losing claimant* to bear a portion of the costs of the respondent. The *dissuasion* to which it referred was clearly the dissuasion of potential claimants from advancing frivolous claims. Neither of these elements was present in this case.
- 45 The Majority considers that conduct of an unsuccessful party which gives rise to liability is generally not relevant to the apportionment of costs. The purpose of an award of costs is not to punish a respondent for the conduct that made it liable to the claimant. If punishment or dissuasion for that conduct were appropriate, this would be dealt with by an award of damages, not an award in respect of the costs of the proceedings.
- 46 So far as conduct of the parties may properly be taken into account, the Majority considers that this must be conduct in the initiation of the proceedings, or while they are in progress. Both sides contend that the conduct of the other during the arbitration added to their costs.
- 47 SDMI cannot fairly be criticised for starting the arbitration, as there was no evidence of any meaningful offer of compensation by CANADA prior to its commencement. SDMI was obliged to initiate the arbitration to obtain redress. It may be that SDMI "over-litigated" the case; but CANADA responded in kind, and in any event it would not be fair for the Tribunal (or the Majority) to reach such a conclusion for the purposes of apportionment of costs without an extensive enquiry into the relevant facts. It is sufficient to recall that the arbitration was fought with exceptional ferocity by both sides. No quarter was given; almost nothing was agreed; the Tribunal was called upon to resolve many disputed procedural issues at case management meetings; and the Tribunal eventually issued 21 numbered Procedural Orders, and some other un-numbered orders contained in

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<sup>17</sup> SDMI's Submission on Costs, para. 36.



correspondence and in the transcripts of the hearings. Success on contested procedural issues was divided, perhaps not equally, but at least not on a sufficiently one-sided basis to justify taking this factor into account in the award in respect of costs.

48 CANADA notes that other NAFTA Chapter 11 arbitral tribunals have not awarded representation costs<sup>18</sup>. Each arbitral tribunal has had its reasons for so proceeding, but their case-specific determinations do not override the obligation imposed on this Tribunal to make an apportionment of the costs in accordance with the UNCITRAL Rules, guided also by what the Tribunal (or the Majority) perceives to be international practice, rather than national practices in domestic courts or arbitrations in any particular jurisdiction.

49 Having considered the relevant provisions of the UNCITRAL Rules; the admissible submissions of the Disputing Parties; the nature, quantum and reasonableness of the costs of legal representation and assistance claimed by SDMI; the conduct of the parties during the proceedings; the Majority's perception of the relative "success", or "lack of success", of each of the Disputing Parties in the two principal stages of the arbitration; the published decisions of other NAFTA Chapter 11 arbitral tribunals; and the so-far-as-known practices of international tribunals generally, in the exercise of the discretion conferred on it by Article 40.2 of the UNCITRAL Rules, the Majority determines that CANADA shall pay to SDMI the sum of CAN\$500,000.00 in respect of SDMI's claim for its costs of legal representation and assistance. This sum takes account of the relatively minor sums transferred from SDMI's claim in respect of the arbitration costs that were not disallowed, but not considered under that head on the grounds that they were not "arbitration costs".

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<sup>18</sup> Some, but not all, of these cases were governed by the UNCITRAL Rules

## **CHAPTER V**

### **INTEREST**

- 50 In principle, there appears to be no good reason why the party that has been directed to pay an ascertained sum to the other in respect of costs should not pay interest on such sum for the period between the date on which the order was made and the date of payment. The Majority so orders.
- 51 The rate of interest to be applied shall be the same as the interest rate specified in the Second Partial Award, namely the Canadian prime rate plus one per cent, compounded annually.
- 52 The effect of this Chapter of the Final Award is that CANADA shall pay interest on the sum of CAN\$850,000 at the Canadian prime rate plus one per cent, compounded annually, from the date of this Final Award until the date on which payment is made.

**CHAPTER V1**

**DISPOSITIVE PROVISIONS OF THE AWARD**

- 53 CANADA shall pay to SDMI the sum of CAN\$350,000 in respect of the arbitration costs it incurred (UNCITRAL Rules, Article 38(a),(b),(c),(d) &(f)).
- 54 CANADA shall pay to SDMI the sum of CAN\$500,000 in respect of its costs of legal representation and assistance (UNCITRAL Rules, Article 38(e)).
- 55 CANADA shall pay to SDMI interest (compounded annually) for the period starting at the date of this Final Award until the date of payment of the sums awarded, calculated at the Canadian prime rate plus 1%.

MADE at the City of Toronto, Ontario, Canada.

**Signed:**

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Bryan P Schwartz

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Edward C Chiasson

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J Martin Hunter

Dated .....2002