

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF THE
NORTH AMERICAN FREE TRADE AGREEMENT, CONCLUDED ON
DECEMBER 17, 1992 (“NAFTA”)**

-and-

**THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
RULES OF ARBITRATION (“UNCITRAL ARBITRATION RULES”)**

**ADMINISTERED BY THE PERMANENT COURT OF ARBITRATION (“PCA”)
PCA CASE NO. 2009-21**

-between-

**MELVIN J. HOWARD,
CENTURION HEALTH CORP. &
HOWARD FAMILY TRUST**

(“Claimants”)

-and-

THE GOVERNMENT OF CANADA

(“Respondent,” and together with the Claimants, the “Disputing Parties”)

**ORDER FOR THE TERMINATION OF THE PROCEEDINGS
AND AWARD ON COSTS**

August 2, 2010

**Arbitral Tribunal: H.E. Judge Peter Tomka (President)
Professor Marjorie Florestal
Mr. Henri Alvarez, Q.C.**

Secretary to the Tribunal: Mr. Dirk Pulkowski

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I. INTRODUCTION

1. The Claimants are Melvin J. Howard, the Centurion Health Corp., and the Howard Family Trust. The Claimants are represented by Mr. Melvin J. Howard, 2436 E. Darrel Rd, Phoenix, AZ 85042, United States of America. According to the Claimants, all entities are nationals of the United States.¹
2. The Respondent is the Government of Canada. The Respondent is represented by the Government of Canada's Trade Law Bureau, Department of Foreign Affairs and International Trade, 125 Sussex Drive, Ottawa K1A 0G2, Canada.
3. The dispute between the Disputing Parties arises from the planned construction by the Claimants of a private healthcare facility, which was intended to offer a wide range of surgical services, in Vancouver, British Columbia. The completion of the project was allegedly impeded by a range of legislative and administrative measures adopted by the local, provincial and federal governments, which the Claimants consider to be inconsistent with the Respondent's obligations under NAFTA. The Claimants have alleged breaches of the following NAFTA provisions:
 - Article 1102 (National Treatment);²
 - Article 1103 (Most-Favored Nations Treatment);³
 - Article 1105 (Minimum Standard of Treatment);⁴

¹ In Section II.c of the Notice of Intent to Submit a Claim to Arbitration dated July 11, 2008 ("Notice of Intent"), the Claimants indicated that the "disputing investors" had the nationality of the United States. In Section II.B of the Revised Amended Statement of Claim dated February 2, 2009, the Claimants noted that "Melvin J. Howard is an American citizen", while "Centurion Health Corporation and Regent Hills Health Centre Inc. each are investments of Melvin J. Howard, and The Howard Family Trust is the Trustee of the investor of the Party, of the United States of America, within the meaning of NAFTA Article 1139."

² Section VI of the Notice of Intent; Revised Amended Statement of Claim, p. 5.

³ *Id.*

⁴ Notice of Arbitration dated January 5, 2009, p. 2.

- Article 1110 (Expropriation and Compensation);⁵
- Article 1503, paragraph 2 (State Enterprises);⁶
- Article 1502, paragraph 3(a) (Monopolies and State Enterprises).⁷

4. Specifically, the Claimants argue that the Respondent breached its obligations under Article 1102 of NAFTA by failing to provide the investor “through clear guidance from the Government of Canada with the best treatment available to US competitors in the monopoly health care services market, and in particular, US surgical services”; that the Respondent acted inconsistently with Article 1103 of NAFTA “by failing to accord the Investor and its enterprises of Canada most favored nation treatment by providing treatment to Canadian Investors that is better than the treatment provided to the Claimant”; that the Respondent violated Article 1105 of NAFTA by failing to accord the Investor and its enterprises treatment in accordance with international law, including fair and equitable treatment and full protection and security; and that the Respondent acted inconsistently with Articles 1502, paragraph 3(a) and 1503, paragraph 2, of NAFTA by failing to ensure that the Provinces of British Columbia, Alberta, and their regional health authorities refrain from acting in a manner inconsistent with Canada's obligations under Section A of NAFTA Chapter 11.⁸
5. To substantiate their claims, the Claimants *inter alia* aver that there are “serious inconsistencies” between the Canada Health Act and Canadian provincial health care programs. The Claimants further allege that their planned construction of a healthcare facility “suffered numerous set-backs”, including through zoning requirements and legal hurdles imposed by municipalities and city officials. The Claimants also contend that they suffered “a major loss” because the Respondent’s actions caused

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Revised Amended Statement of Claim, p. 6.

their “medical technology” to be shipped back to the United States. Accordingly, the Claimants “seek to be compensated for damages for barriers to entry and expropriation.”⁹

6. The Claimants seek the following relief:

“1. A sum not less than U.S. \$160,000,000.00[,] One Hundred Sixty Million United States Dollars in compensation for the damages caused by Canada's failure to accord the Investor the minimum standard of treatment and in expropriating of its medical technology. ...;

2. Costs associated with these proceedings, including all professional fees and disbursements;

3. Pre-award and post-award interest at a rate to be fixed by the Tribunal; and

4. Such further relief that counsel may advise and that the Tribunal may deem appropriate.

5. Tax consequences of the award to maintain the integrity of the award.”¹⁰

7. According to the Claimants’ submissions, the claim for damages includes, in particular:

“1. Loss of value of its investments in Canada

2. Loss of business opportunities

3. Fees and expenses of \$ 4,700,000.00 Four Million Seven Hundred Thousand ...

4. Loss of Goodwill

5. Loss of Profits.”¹¹

II. PROCEDURAL HISTORY

8. In accordance with Article 1119 of NAFTA, the Claimants submitted a Notice of

⁹ Section VII of the Notice of Intent; Revised Amended Statement of Claim, p. 9.

¹⁰ Revised Amended Statement of Claim, p. 11.

¹¹ *Id.*, at p. 12.

Intent under NAFTA Chapter 11 dated July 11, 2008, which the Respondent received on July 16, 2008. On January 5, 2009, the Claimants submitted a Notice of Arbitration and, thus, initiated arbitration proceedings against the Respondent pursuant to Articles 1116 and 1120 of NAFTA and Article 3 of the UNCITRAL Arbitration Rules concerning alleged breaches by the Respondent of its obligations under NAFTA.

9. In their Notice of Arbitration, the Claimants, pursuant to Article 1121 of NAFTA, consented to arbitration and also waived their right to initiate or continue before any administrative tribunal or court, or other dispute settlement procedures, any proceedings with respect to the measures that they allege to be breaches of the Respondent's obligations under NAFTA. The Claimants stated that this waiver applied except with respect to proceedings for injunctive, declaratory or other extraordinary relief not involving the payment of damages before an administrative tribunal or court under the Respondent's laws. In accordance with Article 3, paragraph 4(c), of the UNCITRAL Arbitration Rules, the Claimants included their Statement of Claim with the Notice of Arbitration. On February 2, 2009, the Claimants submitted a Revised Amended Statement of Claim to the Respondent.
10. In a letter dated November 2, 2009 to Judge Peter Tomka, Vice-President of the International Court of Justice, the Disputing Parties informed Judge Tomka that the Claimants had appointed Professor Marjorie Florestal and the Respondent had appointed Mr. Henri C. Alvarez, Q.C. as members of the Tribunal for the arbitral proceedings between them and invited Judge Tomka to act as the Presiding Arbitrator of the Tribunal. On November 11, 2009, Judge Tomka notified the Disputing Parties of his agreement to act as the President. On November 23, 2009, the Tribunal suggested to the Disputing Parties several dates during which the Tribunal was available to hold the First Procedural Meeting and provided the Disputing Parties with a Draft Agenda for that Meeting. Further, the Tribunal invited the Disputing Parties to consider that the Permanent Court of Arbitration administer the arbitral

proceedings.

11. The Disputing Parties agreed on December 4, 2009 that the PCA administer the arbitral proceedings and that the First Meeting of the Tribunal be held at the Peace Palace, The Hague, on March 19, 2010. The Disputing Parties also agreed to pay a deposit of US\$ 100,000 each by March 1, 2010. Finally, the Disputing Parties jointly proposed to remunerate the arbitrators as follows:

“a fee of US \$3,000.00 per day, or such other fee as may be set forth from time to time in the ICSID Schedule of Fees, for each day of participation in meetings of the Tribunal or 8 hours of work performed in connection with the proceeding, or [*pro rata*]; and (b) subsistence allowances and reimbursement of travel (in business class) and other expenses with[in] the limits set forth in Regulation 14 of the *ICSID Administrative and Financial Regulations and the Memorandum on the Fees and Expenses of ICSID Arbitrators*.”

12. In a letter to the Disputing Parties dated December 11, 2009, the President confirmed that the First Procedural Meeting with the Tribunal would be held on March 19, 2010.
13. On December 14, 2009, the Tribunal requested the Disputing Parties to pay an initial deposit of US\$ 100,000 each by March 1, 2010 pursuant to their procedural agreement dated December 4, 2009 and in accordance with Article 41, paragraph 1, of the UNCITRAL Arbitration Rules. The Tribunal also provided the Disputing Parties with details regarding case administration, hearing and meeting facilities, and the First Procedural Meeting.
14. The Tribunal sent the Disputing Parties draft Terms of Appointment on January 27, 2010. At the same time, it also circulated to the Disputing Parties a signed Statement of Impartiality and Independence and a current *curriculum vitae*/résumé from each member of the Tribunal.
15. In a letter to the Respondent on February 1, 2010, which was copied to the Tribunal, the Claimants stated that they were formally challenging Mr. Alvarez’s appointment

pursuant to Article 11 of the UNCITRAL Arbitration Rules.¹²

16. On February 2, 2010, the Respondent informed the Claimants and the Tribunal that it disagreed with the Claimants' challenge to Mr. Alvarez's appointment and requested the Claimants to withdraw their challenge. Further, the Respondent argued that the Claimants had failed to comply with the requirement in Article 11, paragraph 1, and (2) of the UNCITRAL Arbitration Rules that a challenge be filed within fifteen days after the circumstances giving rise to the challenge are known.
17. On February 3, 2010, the President of the Tribunal invited the Respondent to submit by February 5, 2010 additional comments on the Claimants' letter dated February 1, 2010. The President of the Tribunal also invited Mr. Alvarez to submit by February 10, 2010 any comments or provide additional information that he wished to bring to the Disputing Parties' attention. The Tribunal then requested the Claimants to indicate by February 17, 2010 whether they would withdraw their challenge or request a decision on the challenge in light of the Respondent's and Mr. Alvarez's comments. Finally, the Tribunal referred the Claimants to Article 12, paragraph 1, of the UNCITRAL Arbitration Rules, which provides that a decision on such a challenge is made by the appointing authority. The Tribunal also noted that, pursuant to Article 1124, paragraph 1, of NAFTA, the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID") serves as appointing authority for any arbitration under Section B of NAFTA Chapter 11.
18. In a letter to the Tribunal and the Claimants dated February 5, 2010, the Respondent

¹² The Tribunal was informed in the course of the following days of correspondence between the Claimants and the Respondent that had taken place earlier in January 2010. On January 7, 2010, the Claimants informed the Respondent that, in their view, there was "an important issue of conflict" between Mr. Alvarez's duties as an arbitrator and certain other client matters dealt with by the law firm, Fasken Martineau DuMoulin LLP at which Mr. Alvarez is a partner. The Claimants then asked that Mr. Alvarez resign as an arbitrator from the Tribunal. On January 12, 2010, the Respondent informed the Claimants that none of the circumstances raised by the Claimants in their letter dated January 7, 2010 required Mr. Alvarez to resign as an arbitrator. The Respondent also advised the Claimants that, if they wished to challenge Mr. Alvarez's appointment, the appropriate procedure was stipulated in Article 11 of the UNCITRAL Arbitration Rules. The relevant correspondence on this matter had not been copied to the Tribunal at the time that it had been exchanged.

argued that the Claimants' challenge should not be allowed to proceed because it had not been filed within the time limit stipulated under the UNCITRAL Arbitration Rules. The Respondent also argued that no reasonable person would conclude that the circumstances which the Claimants had cited gave rise to justifiable doubts as to Mr. Alvarez's independence and impartiality as an arbitrator and that therefore, the Claimants should withdraw their challenge.

19. Writing to Mr. Alvarez on February 9, 2010, the President noted that it was for the ICSID Secretary-General to decide on the challenge in accordance with the provisions of Article 1124 of NAFTA. In a letter to the Tribunal, dated February 9, 2010, which was copied to the Disputing Parties, Mr. Alvarez addressed the issues raised by the Claimants regarding his impartiality and independence as an arbitrator in the current proceedings.
20. In their letter to the Tribunal on February 15, 2010, which was copied to the Respondent, the Claimants reaffirmed their challenge to Mr. Alvarez's appointment.
21. On February 17, 2010, the Tribunal reminded the Claimants that, if they wished to request a decision on their challenge, the appropriate course of action under Article 12, paragraph 1(b), of the UNCITRAL Arbitration Rules and Article 1124, paragraph 1, of NAFTA would be for them to submit a request to the ICSID Secretary-General. The Tribunal also reminded the Claimants that, pursuant to the ICSID Schedule of Fees, "[a] fee of US\$ 10,000.00 is payable to the Centre by the party requesting the Secretary-General to appoint, or to decide on the challenge of, an arbitrator for any arbitration not conducted under the Convention or Additional Facility Rules." The Tribunal requested the Claimants to inform the Tribunal by February 26, 2010 if they had filed a request for a decision with the ICSID Secretary-General.
22. Addressing the Disputing Parties in a letter dated February 24, 2010, the Tribunal acknowledged receipt of the Respondent's share of the initial deposit for the current proceedings in the amount of US\$ 100,000. The Tribunal also clarified that the

Disputing Parties' obligation to pay their share of the deposit was independent of the Claimants' challenge to Mr. Alvarez's appointment because, in any event, the current arbitral proceedings continued. To that end, the Tribunal requested the Claimants to pay their share of the deposit to the PCA by March 1, 2010 regardless of whether or not they intended to seek from the ICSID Secretary-General a decision on their challenge.

23. On February 26, 2010, the Claimants requested the Tribunal to postpone the First Procedural Meeting because they had made preparations to file on March 1, 2010 a request to the ICSID Secretary-General that she decide on their challenge to Mr. Alvarez's appointment. The Claimants also provided the Tribunal with a copy of their correspondence that they had previously exchanged with ICSID, and in which they had raised a possible conflict between Secretary-General Meg Kinnear's previous position as the Senior General Counsel and Director General of the Trade Law Bureau of Canada and her current role as the appointing authority under Article 1124 of NAFTA. In response to that concern, ICSID Deputy-Secretary General Nassib G. Ziadé assured the Claimants that he was prepared to act as the appointing authority and that he would "take all necessary measures to avoid [potential] conflicts of interest." The Claimants also informed the Tribunal that they disagreed with the Tribunal's conclusion that their obligation to pay the deposit was independent of their decision to file a challenge with the Secretary-General. According to the Claimants, the procedural agreement dated December 4, 2010 was silent on that matter and the agreement was "predicated on other issues being met."
24. On March 1, 2010, the Tribunal informed the Disputing Parties that it intended to suspend the arbitral proceedings once it had received confirmation that a challenge had been filed with the Secretary-General and until the appointing authority had rendered a decision on the challenge. The Tribunal also noted that, pursuant to Article 41, paragraph 1, of the UNCITRAL Arbitration Rules, it was competent to request the Disputing Parties to deposit an equal amount as an advance for costs once the

Tribunal was established, that is, upon the President's acceptance of his appointment. In light of that, the Tribunal again requested the Claimants to pay their share of the deposit. Finally, the Tribunal invited the Respondent to submit by March 5, 2010 its comments regarding the matters that the Claimants raised in their letter dated February 26, 2010.

25. On March 2, 2010, the Respondent informed the Tribunal that it had confirmed with ICSID that the Claimants had not filed a challenge to Mr. Alvarez as of that date, notwithstanding the Claimants' assertion that they had made preparations to file the challenge on March 1, 2010. Because the Respondent was concerned as to whether the Claimants had the intention or the ability to proceed with the arbitral proceedings, it requested the Tribunal to postpone the First Procedural Meeting unless the Claimants paid their share of the deposit by March 3, 2010.
26. In a letter dated March 2, 2010, the Tribunal informed the Disputing Parties that the Claimants had still not paid the required deposit and that the Tribunal would postpone the First Procedural Meeting *sine die* unless the Claimants presented a bank confirmation by March 5, 2010 evidencing their payment of the deposit to the PCA.
27. On March 5, 2010, the Claimants requested the ICSID Secretary-General to decide on their challenge to Mr. Alvarez's appointment. On the same day, the Secretary-General recused herself from deciding on the challenge and informed the Disputing Parties and the Tribunal that the ICSID Deputy Secretary-General would resolve the challenge. The Respondent also requested the Secretary-General to confirm receipt of the Claimants' challenge and the required fee before establishing a schedule to receive submissions on what the Respondent considered to be a frivolous challenge.
28. On the day that the Claimants filed their challenge with the ICSID Secretary-General, the Claimants sent the Tribunal a copy of that challenge and also informed the Tribunal that "further arrangements [were] being made to wire transfer the [Claimants'] share of [costs] while the challenge [was] in progress."

29. Addressing the Disputing Parties in a communication dated March 5, 2010, the Tribunal acknowledged receipt of a copy of the Claimants' challenge. In light of that, the Tribunal cancelled the First Procedural Meeting and suspended the proceedings until the Deputy Secretary-General had decided on the challenge. The Tribunal then reminded the Claimants of their duty to pay the required deposit and also clarified that, once the ICSID Deputy Secretary-General had decided on their challenge, the Tribunal would be unable to fix a new date for the First Procedural Meeting unless they had paid the required deposit.
30. On March 8, 2010, the Claimants informed the Tribunal that, although they had informed the Tribunal that they had made arrangements to pay the required deposit while the challenge was being resolved, the Claimants' insurer advised them to "halt all activity so that these issues of conflict can be reassessed if need be to other authorities [*sic*]." In response, the Tribunal informed the Disputing Parties on March 9, 2010 that it would wait for the Deputy Secretary-General to decide on the Claimants' challenge.
31. In a letter to the ICSID Deputy Secretary-General on March 16, 2010, the Claimants asserted that the Respondent's communication to the ICSID Secretary-General on March 5, 2010, "less than 24 hours after the Claimants submitted [their] challenge," had in their view "cast doubt on the fairness and transparency [of the challenge proceedings]."
32. On March 19, 2010, the ICSID Deputy Secretary-General informed the Disputing Parties that ICSID had not, as of that day, received any hard copy and annexes of the Claimants' challenge despite their assurances that these were forthcoming. In addition, according to the Deputy Secretary-General, the Claimants had not yet paid the required fee "to institute the challenge." In light of that, the Deputy Secretary-General encouraged the Claimants to send this required fee as soon as possible "so that the procedure for deciding the challenge can start without further delay." Finally, the Deputy Secretary-General stated that when the Secretary-General is unable to act

within the meaning of Article 10, paragraph 3, of the ICSID Convention, the Deputy Secretary-General shall act as the Secretary-General and perform his or her functions, including those of an appointing authority.

33. In the Claimants' letter to the ICSID Deputy Secretary-General on April 7, 2010, the Claimants suggested that the President of the World Bank should designate an appointing authority, who should then decide on their challenge to Mr. Alvarez's appointment. The Claimants recognized that, under Article 10, paragraph 3, of the ICSID Convention, the Deputy Secretary-General was to act as the Secretary-General if he or she was unable to act. However, the Claimants averred that the Respondent had cast doubt on the fairness and transparency of the challenge proceedings.
34. On April 12, 2010, the Respondent wrote to the ICSID Deputy Secretary-General, asking him to confirm whether or not the Claimants had taken any steps to pursue "this arbitration, including with respect to their challenge to Mr. Alvarez." In reply to that inquiry, the Deputy Secretary-General informed the Respondent on April 13, 2010 that the Claimants had not yet deposited the fee "required to institute the challenge" as of that date.
35. On April 14, 2010, the ICSID Deputy Secretary-General explained to the Claimants, in an e-mail copied to the Respondent, that he was required to act as the appointing authority in the Claimants' challenge to Mr. Alvarez, because the ICSID Secretary-General was unable to act within the meaning of Article 10, paragraph 3, of the ICSID Convention. To that end, the Deputy Secretary-General informed the Claimants that he was "acting with full authority and complete independence" and as such, the Claimants had no basis to request that the President of the World Bank designate another appointing authority. Replying on the same day, the Claimants stated that they disagreed with the points raised by the Deputy Secretary-General and that they "will seek to address this issue by other means."
36. On April 29, 2010, the Respondent submitted a Written Submission on Termination

and Costs (“Submission”), in which it requested the Tribunal to terminate the current arbitral proceedings and to issue an award on costs in its favor. Specifically, the Respondent requested that:

“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.”

37. On May 10, 2010, the Tribunal invited the Claimants to submit by May 21, 2010 any comments that they might have regarding the Respondent’s request that the Tribunal terminate the current proceedings and issue an award on costs in the Respondent’s favor. The Tribunal further reminded the Claimants of their obligation to pay the deposit pursuant to Article 41, paragraph 1, of the UNCITRAL Arbitration Rules.
38. On May 10, 2010, the Tribunal requested the ICSID Deputy Secretary-General to provide official confirmation as to whether the Claimants had properly instituted their challenge to Mr. Alvarez’s appointment. In a letter dated May 11, 2010, the ICSID Deputy Secretary-General confirmed to the Tribunal that the Claimants “[had] still not deposited the fee required to properly institute their challenge to the appointment of Mr. Alvarez as [an] arbitrator.”
39. On May 18, 2010, the Claimants submitted their comments on the Respondent’s request that the proceedings be terminated and an award on costs be rendered in its favor. The Claimants did not present any claims for costs.
40. On July 5, 2010, the Tribunal informed the Parties of its intention to issue an order for the termination of the proceedings in accordance with Articles 41, paragraph 4, and 34, paragraph 2, of the UNCITRAL Arbitration Rules, unless the Claimants paid the requested deposit of costs by July 19, 2010.

41. On July 19, 2010, Mr. Howard informed the Tribunal that he would “be appointing counsel to [proceed] on our behalf with this matter” and that his “first meeting with proposed counsel was only on July 12, 2010.” Mr. Howard requested a continuation of the proceedings.
42. The Tribunal notes that no deposit was made by the Claimants within the extended time period provided to them by the Tribunal in its letter dated July 5, 2010, and that the Claimants have indicated no intention to make the required deposit.

III. ARGUMENTS OF THE DISPUTING PARTIES

A. Respondent’s Arguments

43. In its Submission, the Respondent requests the Tribunal to issue a termination order pursuant to Article 41, paragraph 4, of the UNCITRAL Arbitration Rules and an award on costs in its favor.
44. The Respondent argues that, pursuant to Article 41, paragraph 4, of the UNCITRAL Arbitration Rules, the Tribunal should terminate the proceedings because the Claimants have failed to pay the required deposit more than thirty days after they were obligated to do so. The Respondent notes that the Claimants have neither paid the required deposit to the PCA nor pursued their challenge to Mr. Alvarez’s appointment. According to the Respondent, the Tribunal should not let the – apparently abandoned – challenge to Mr. Alvarez’s appointment impede the termination of these proceedings.
45. In the Respondent’s view, it is entitled to an award requiring the Claimants to shoulder the costs of arbitration and the Respondent’s legal costs. The Respondent notes that it has expended significant resources in order to respond to the Claimants’ purportedly frivolous and broad allegations. The Respondent cites Article 40, paragraph 3, of the UNCITRAL Arbitration Rules which requires a tribunal 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 Respondent notes that the costs covered by Article 38 include the costs of the arbitral proceedings and the costs that the Disputing Parties incur for legal representation and assistance.

46. The Respondent contends further that costs serve the “dual function of reparation and dissuasion,”¹³ especially in the case of frivolous or vexatious claims.¹⁴ The Respondent observes that no NAFTA tribunal has decided on costs in relation to a termination order issued as a result of a claimant’s failure to make progress on the arbitration or to pay the deposit. However, the Respondent notes that NAFTA tribunals that have considered the issue of costs have endorsed the “loser pays” principle. Accordingly, the Respondent argues that the Tribunal should award costs to the Respondent because the Claimants have failed to advance even the first deposit required by the Tribunal. The Respondent points out that the Claimants initiated this arbitration, which has resulted in great expense, and “[let it] grind to a halt because of their unwillingness or inability to proceed.”
47. The Respondent states that the costs that it has incurred as a result of the current proceedings include: arbitral fees to be determined by the Tribunal, CAN\$ 227,651.69 in legal fees, and CAN\$ 4,667.99 in disbursements for consultant fees, travel, court and document costs.

B. Claimants’ Arguments

48. The Claimants oppose the Respondent’s request to terminate the arbitral proceedings stating that they take these proceedings “seriously.”
49. The Claimants note that, in a letter to the ICSID Deputy Secretary-General on

¹³ Submission, p. 6 (quoting *Azinian, Davitian & Baca v. Mexico*, ICSID Case No. ARB(AF)/97/2, Award, November 1, 1999, ¶ 125).

¹⁴ Submission, p. 6 (citing *S.D. Myers v. Canada*, UNCITRAL Final Award, December 30, 2002, ¶ 44; *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB(AF)05/1, Award, June 19, 2007, ¶ 125; *Possible Improvements of the Framework for ICSID Arbitration*, ICSID Secretariat Discussion Paper, October 22, 2004, p. 7, ¶ 9).

April 7, 2010, they had requested that the President of the World Bank designate an appointing authority, which should then decide on their challenge to Mr. Alvarez's appointment. The Claimants argue that it would be improper for the Deputy Secretary-General himself to rule on the admissibility of their request to the World Bank President, considering that the Deputy Secretary-General would thus be in a position to determine whether he or another entity designated by the President of the World Bank should act as appointing authority. In the Claimants' view, the ICSID Deputy Secretary-General thus faced a situation of conflict of interest.

50. In their submission of May 18, 2010, the Claimants request the "International Court of Arbitration [*sic*] to request the President of the World Bank to take over the role of appointing authority of arbitrators and a new arbitrator be appointed to replace Mr. Alvarez."¹⁵
51. The Claimants argue that it would not be appropriate for the Tribunal to render an award on costs in the Respondent's favour because "no judgment has been made" and the Respondent has not provided a "fair and reasonable" explanation in support of its Submission.

IV. ANALYSIS OF THE ARBITRAL TRIBUNAL

A. Request for Termination of the Proceedings

52. The Tribunal starts with the observation that international arbitral proceedings under the UNCITRAL Arbitration Rules can effectively advance only if the claimant pursues its claims in a professional way and if the parties to the proceedings are willing to meet their obligations in relation to the costs of the arbitral proceedings by paying, in a timely fashion, the advances required by the tribunal.
53. Article 41, paragraph 1, of the UNCITRAL Arbitration Rules provides:

¹⁵ Letter from the Claimants dated May 18, 2010.

“The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in Article 38, paragraphs (a), (b) and (c).”

Article 38, paragraph (a), concerns the fees of the arbitrators, paragraph (b) relates to the travel and other expenses incurred by the arbitrators, and, finally, paragraph (c) is relevant for the costs of expert advice and of other assistance required by the arbitral tribunal.

54. On December 14, 2009, the Arbitral Tribunal requested the Disputing Parties to pay the initial deposit of US\$ 100,000 each by March 1, 2010. This date and the amount were agreed between the Claimants and the Respondent in their procedural agreement, dated December 4, 2009.
55. While the Respondent paid its share of the advance in full and on time (on February 24, 2010), the Claimants have not done so to this date, despite the repeated invitations from the Tribunal on February 24, 2010, March 1, 2010, March 2, 2010, March 5, 2010, May 10, 2010 and July 5, 2010.
56. The Tribunal notes that the Claimants have been in default on their payment obligation since March 1, 2010.
57. The Tribunal further observes that the Claimants who raised, in their communications to the Respondent and to the Tribunal, certain issues relating to the participation of one of the arbitrators in these proceedings, failed to properly institute the challenge with the appointing authority under Article 12, paragraph 1, of the UNCITRAL Arbitration Rules, despite having been informed by the Tribunal in its letters of February 3 and February 17, 2010 about the proper procedure. The Claimants limited themselves to e-mail communications with ICSID, having failed to submit a formal, duly signed challenge, and to pay the required fee of US\$ 10,000 to ICSID, again despite repeated requests and information from the Deputy Secretary-General of the ICSID.

58. The Tribunal cannot accept the complaints of the Claimants against the ICSID Deputy Secretary-General's exercise of the function of the appointing authority and to accede to their request that the Tribunal and the President of the World Bank "take over the role of appointing authority."
59. In accordance with Article 12, paragraph 1, of the UNCITRAL Arbitration Rules, which are applicable in the present proceedings, the decision on a challenge shall be made by the appointing authority. NAFTA Article 1124, paragraph 1, provides that the Secretary-General of ICSID shall serve as appointing authority under Section B of NAFTA Chapter 11.
60. Under Article 10, paragraph 3, of the ICSID Convention, during the Secretary-General's inability to act the Deputy Secretary-General shall act as Secretary-General. This would have been the case in the present proceedings had the Claimants properly instituted the challenge against the Arbitrator and had they paid the required fee under the ICSID schedule of fees. Neither NAFTA, nor the UNCITRAL Arbitration Rules provide for any role of the President of the World Bank to act as, or to designate, the appointing authority.
61. The ICSID Deputy Secretary-General confirmed to the Claimants his readiness to decide on the challenge in case it had been properly instituted and the payment requirement met by them. The Tribunal has no reason to doubt that he would have performed the role of the appointing authority in an impartial, independent, highly competent and professional manner, as he has done so in the past (see e.g. his Decision of October 14, 2009, on the challenge to Mr. J. Christopher Thomas, QC, in NAFTA Arbitration *Vito G. Gallo v. Government of Canada*).
62. Article 41, paragraph 4, of the UNCITRAL Arbitration Rules provides:

"If the required deposits [of costs] 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.”

63. All conditions for the application of this rule are met in the case at hand. The Claimants did not pay the deposit required by the Tribunal on December 14, 2009 by March 1, 2010, as was required and earlier agreed upon. The Claimants have been given ample opportunity to pay the requested deposit. The Parties were informed of the Claimant’s default. The Respondent requested that the arbitration proceeding be terminated because the Claimants have failed to make the required deposit of costs of the arbitration proceedings.
64. In light of the above, in particular in view of the persistent refusal of the Claimants to make the required deposit of costs, the Tribunal is convinced that the time has come for it to terminate these proceedings, and that this would be the proper course of action in view of the particular circumstances of the case at hand.

B. Request for Award of Costs

65. The Tribunal is entitled, pursuant to Article 1135, paragraph 1, of NAFTA to “award costs in accordance with the applicable arbitration rules.” The applicable rules in these proceedings are the UNCITRAL Arbitration Rules.
66. Article 40, paragraph 3, of the UNCITRAL Arbitration Rules provides:
- “When the arbitral tribunal issues an order for the termination of the arbitral proceedings or reaches an award on agreed terms, it shall fix the costs of arbitration referred to in Article 38 and Article 39, paragraph 1, in the text of that order or award.”
67. Article 39, paragraph 1, provides that

“(t)he fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.”

The Parties agreed, on December 4, 2009, that they would propose to the Arbitrators a fee of US\$ 3,000 per day or per 8 hours of work performed in connection with the

proceeding (or *pro rata*). This is the standard fee currently applicable under the ICSID Schedule of Fees and the Parties agreed to calculate the Tribunal's fees on this basis. The Tribunal notes that there are arbitral tribunals, including NAFTA tribunals, which apply higher fees. Accordingly, the Tribunal considers fees assessed on this basis to be reasonable.

68. Under Article 38 of the UNCITRAL Arbitration Rules, the costs of arbitration include only:

- “(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 in The Hague.”

69. In the present arbitration proceedings, there have been no costs occasioned under paragraphs (d) and (f) of Article 38. Therefore it remains for the Tribunal to decide on the costs under paragraphs (a), (b), (c) and (e).

70. Having regard to the agreement of the Parties on the remuneration of the arbitrators, the Tribunal fixes the fee at US\$ 3,000 per 8 hours of work (i.e. hourly fee of US\$ 375). The fees of individual arbitrators are as follows:

President Judge Tomka: US\$ 13,687.50 for 36.5 hours of work;

Arbitrator Professor Florestal: US\$ 6,000 for 16 hours of work;

Arbitrator Mr. Alvarez, Q.C.: US\$ 9,562.50 for 25.5 hours of work.

The total costs under Article 38, paragraph (a), thus amount to US\$ 29,250.

71. The costs under Article 38, paragraph (b), consist of office expenses incurred by the Members of the Tribunal in the amount of US\$ 275.32.

72. The costs under Article 38, paragraph (c), in the present proceedings consist of payment for assistance rendered to the Tribunal by the PCA. The Parties agreed that the administrative support and registry services to the Tribunal would be provided by the PCA. The PCA applies the fees set out in its Schedule of Fees. In the present proceedings, the costs for the services provided by the PCA amount to US\$ 8,076.25 in fees for 35.5 hours of work by the Secretary to the Tribunal, and US\$ 303.88 in expenses for express courier deliveries.

73. Article 40 of the UNCITRAL Arbitration Rules provides some guidance to the arbitral tribunal with respect to allocating the costs of the arbitration. Article 40, paragraphs 1 and 2, of the UNCITRAL Arbitration Rules provide:

“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.”

74. The Tribunal agrees with the view, recently expressed by another NAFTA tribunal, that “[i]n these [paragraphs], both a general principle and arbitral discretion can be found. Article 40(1) adopts the general principle that the unsuccessful party should bear arbitration-related costs, though, in light of the circumstances of the case, the tribunal has the discretion to otherwise apportion the costs. Complete discretion, however, is provided to the Tribunal to apportion the costs of legal representation and

assistance in light of case circumstances under Article 40(2).”¹⁶

75. No award on the merits has been issued in these arbitration proceedings, as a result of the Claimants’ failure to make the required deposit and otherwise advance their claims as provided in the Rules. Nevertheless, in light of the Claimants’ failure to meet their basic obligations and to orderly prosecute their claims, the Tribunal is of the view that the Claimants are to be perceived as the unsuccessful Party.
76. With respect to the apportionment of costs between the Parties, in view of the circumstances of this case described above, and in view of the conduct of the Claimants, the Tribunal does not consider it reasonable to apportion the costs of the arbitration (under Article 38, paragraphs (a) and (c)). These costs were incurred as a result of the Claimants’ decision to commence this arbitration and their subsequent refusal to pursue their claims in an efficient manner in accordance with the applicable arbitration rules. It would not be fair or reasonable, in the Tribunal’s view, if these costs were to be borne or partially shared by the Respondent, the Government of Canada.
77. Accordingly, the Tribunal decides that the fees and expenses of the Tribunal and the costs of assistance required by the Tribunal, as specified above, in the amount of US\$ 37,905.45, shall be borne by the Claimants. The Tribunal orders the Claimant to reimburse the Government of Canada for these costs within 30 days from the receipt of this Order.
78. In addition, the Respondent claims in this arbitration the costs of its legal representation in accordance with Article 38, paragraph (e). These claimed costs consist of CAN\$ 227,651.69 in legal fees and CAN\$ 4,667.99 in disbursements for consultant fees, travel and court and document costs. The legal fees have been calculated by the Respondent on the basis that four lawyers working for the Government of Canada, either in the Department of Foreign Affairs or the

¹⁶ *Glamis Gold, Ltd. v. United States of America*, Award, June 8, 2009, para. 832.

Department of Justice, were assigned to the case. They spent, according to the submission by the Respondent, a total of 1,123.95 hours working on the case. The cost of their time spent on this arbitration has been assessed by applying the “billable” rate used by its Department of Justice.

79. Article 38, paragraph (e), concerns the costs for legal representation and assistance of the successful party, and only to the extent that the arbitral tribunal determines that the amount of such costs is *reasonable*. Further, the Tribunal notes that under Article 40, paragraph 2, of the UNCITRAL Arbitration Rules, the Tribunal is *free* to determine which party shall bear the costs of legal representation and assistance or may apportion such costs between the parties if it determines that apportionment is reasonable.
80. The Tribunal is of the view that it would not be reasonable to award the costs of legal representation to the Respondent. Although the Tribunal has concluded that the Claimants are to be perceived as the unsuccessful party in view of their failure to prosecute their claims, and the Respondent, accordingly, can be regarded as successful at least in respect of its request for the termination of the proceedings, the Tribunal must assess the reasonableness of those costs before they can be awarded.
81. As noted above, this arbitration never proceeded beyond the preliminary stages. The procedure did not even advance to the initial procedural meeting, although such a meeting was scheduled. Accordingly, participation in the arbitration proceedings required neither Disputing Parties to deploy any disproportionate resources: the principal matters to be attended to since the commencement of the proceedings were the negotiation of the Parties’ procedural agreement dated December 4, 2009; the review of draft documents circulated by the Tribunal in preparation for the initial procedural meeting; correspondence in the context of the Claimants’ stated intention to challenge one of the Members of the Tribunal; and the preparation of the Respondent’s Written Submission on Termination and Costs. Attendance to these matters during the preliminary procedural stages of the proceedings did not result in

any particular burden on the Disputing Parties. While a respondent is of course free to conduct a thorough review of the claims advanced by a claimant early on, before the constitution of the tribunal, and the figure of 1,123.95 hours of time spent collectively by four in-house lawyers suggests that the Government of Canada may have chosen to do so in the present case, the Tribunal does not consider it reasonable to order the reimbursement of the costs incurred by such a review at the preliminary stages of the present proceedings. Accordingly, the Tribunal, in the exercise of its discretion, declines to order the Claimants to reimburse the Government of Canada for the costs of its legal representation.

82. A different situation arises with respect to the disbursements for consultant fees, travel and court and document costs claimed by the Government of Canada in the amount of CAN\$ 4,667.99. These costs were clearly incurred as a result of the Claimants' institution of the arbitral proceedings and the Tribunal considers them to be reasonable. Therefore, the Tribunal awards these costs to the Respondent. The Tribunal orders the Claimants to pay to the Government of Canada CAN\$ 4,667.99 on account of the costs of legal and other assistance.

C. Place of Arbitration

83. Having regard to Article 1130 of NAFTA and Article 16, paragraph 1, of the UNCITRAL Arbitration Rules, and considering the Disputing Parties' agreement that the first procedural meeting be held at the premises of the PCA in The Hague, the Tribunal determines that the place of arbitration for the present arbitration shall be The Hague, the Netherlands.

V. DISPOSITIF

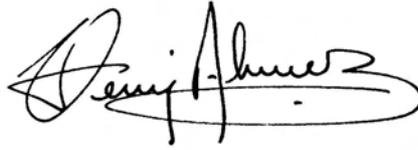
For these reasons the Tribunal DECIDES:

- 1. The Arbitral proceedings instituted by Melvin J. Howard, Centurion Health Corp. and Howard Family Trust against the Government of Canada are terminated in accordance with Article 41, paragraph 4, of the UNCITRAL Arbitration Rules on the day of the adoption of the present Order.**
- 2. The Claimants (Melvin J. Howard, Centurion Health Corp. and Howard Family Trust) are jointly and severally liable to reimburse the Respondent (the Government of Canada) the costs of the arbitration proceedings in the amount of US\$ 37,905.45 and disbursements in the amount of CAN\$ 4,667.99.**
- 3. Accordingly, the Claimants (Melvin J. Howard, Centurion Health Corp. and Howard Family Trust) shall pay to the Respondent (the Government of Canada) the sums of US\$ 37,905.45 and of CAN\$ 4,667.99 within 30 days of the adoption of this Award.**
- 4. The Respondent's other requests set out in its Submission dated April 29, 2010 – including for the reimbursement of costs of legal fees incurred by lawyers working for the Government of Canada – are dismissed.**

Done in The Hague on August 2, 2010:



Professor Marjorie Florestal



Mr. Henri Alvarez, Q.C.



**Judge Peter Tomka
President**