



Court File No.

ONTARIO 07-CV-340139 PD2

SUPERIOR COURT OF JUSTICE

Irrigation District #11, Brownsville Irrigation District, Cameron County
Irrigation District #2, Cameron County Irrigation District #6, Delta Lake Irrigation
District, Donna Irrigation District Hidalgo County #1, Engelman Irrigation District,
Hidalgo County Irrigation District #1, Hidalgo County Irrigation District #2, Hidalgo
County Irrigation District #5, Hidalgo County Irrigation District #6, Hidalgo County
Irrigation District #16, Hidalgo & Cameron County Irrigation District #9, La Feria
Irrigation District Cameron County #3, Santa Maria Irrigation District Cameron
County #4, United Irrigation District, Valley Acres Irrigation District, Arthur E.
Beckwith, W. G. Bell Jr. Trust, Luther Bradford, Capote Farms, Ltd., Estate of E.F.
Davis, Jr., Richard Drawe, Electric Gin Company of San Benito, Odus D. Emery, Jr.,
Willard Fike, Fike Farms, Fuller Farms, Krenmueller Farms, Moore & Sons Farms
Inc., North Alamo Water Supply Corporation, Donald Phillipp, Francis Phillipp, Pine
Tree Conservation Society, Juan F. Ruiz, James D. Russell, Sam Sparks L.P., Gregory
Schreiber, Rita Schreiber, Charles Shofner, Theimer Trust, Julie G. Uhlhorn

Applicants

- and -

THE UNITED MEXICAN STATES

Respondent

APPLICATION UNDER the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9,
Articles 18 and 34 and Rule 14.05 of the *Rules of Civil Procedure*

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim
made by the applicants appears on the following page.

THIS APPLICATION will come on for a hearing on
393 University Avenue, Toronto, Ontario M5T 1E6.

Thursday the 17th day of Jan. 2008

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in
the application or to be served with any documents in the application, you or an Ontario
lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed
by the Rules of Civil Procedure, serve it on the applicants' lawyer or, where the applicants do

not have a lawyer, serve it on the applicants, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicants' lawyer or, where the applicants do not have a lawyer, serve it on the applicants, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than 2 days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date September 17, 2007

Issued by  M. Sagaria
Local registrar Registrar

Address of 393 University Avenue
court office Toronto, Ontario M5T 1E6

TO: Subdirectoria de Consultoria Juridica
Gobierno Federal de Mexico
Alfonso Reyes 30, 06140, Hipodromo Condesa,
Mexico, Piso 17
Colonia Condesa
Mexico, Distrito Federal, C.P 06140

Attention: Alejandra Galaxia Trevino Solis
Office: 011-52-555-729-9100 ex: 15209
Fax: 011-52-555-729-9310
Email: atrevino@economia.gob.mx

AND TO : Subsecretaria de Negociaciones
Comerciales Internacionales
Secretaria de Economia
Gobierno Federal de Mexico
Alfonso Reyes No. 30, Piso 17
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Mexico

Attention: Luis Alberto Gonzalez
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Attention: Florinda Pasquel Peart
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AND TO: Embassy of Mexico in Canada
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Tel: 613.233.8988
Fax: 613.235.9123

APPLICATION

1. The applicants make application for an order:
 - (a) setting aside the arbitral award made as at Toronto, Ontario on June 19, 2007 in ICSID Additional Facility Case No. ARB(AF)2005/1 (the “Award”) between Bayview Irrigation et al and the United Mexican States (“Mexico”) concerning an arbitration arising under Chapter Eleven of the *North American Free Trade Agreement* (the “NAFTA”), pursuant to Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”), attached to the *International Commercial Arbitration Act*, R.S.O. 1998, c. I.9 (the “Act”);
 - (b) granting the applicants their costs of this application on a full indemnity basis; and
 - (c) such further and other relief as counsel may advise and this Honourable Court permit.
2. The grounds for the application are as follows:

Applicants Bring Claim Alleging Breach of NAFTA by Mexico with Respect to Applicants’ Water Rights

- (a) the applicants -- 17 Texas irrigation districts, 24 individual water users, and a corporate investor -- own 1,291,521 acre-feet of water located in six rivers in Mexico;
- (b) from 1992 to 2002, Mexico captured and diverted all of this water upstream of the applicants’ point of diversion for use by Mexican farmers and municipalities, denying this water to the applicants and causing substantial damages to them;
- (c) on January 19, 2005, the applicants filed a Request for Arbitration pursuant to NAFTA Chapter 11, alleging that by diverting the water in this manner, Mexico had treated the applicants less favourably than Mexican nationals,

contrary to NAFTA Article 1102, had denied the applicants fair and equitable treatment, contrary to NAFTA Article 1105, and had expropriated the applicants' water rights without fair compensation, contrary to NAFTA Article 1110;

Tribunal Holds Jurisdictional Hearing

- (d) following the constitution of the Tribunal in December 2005, Mexico challenged the jurisdiction of the Tribunal to decide these issues, alleging, among other things, that the applicants did not have an investment within the territory of Mexico, that NAFTA Chapter 11 was not the appropriate remedy for enforcing the applicants' alleged water rights, and that the claim had not been filed on a timely basis;
- (e) the Tribunal decided that it would deal with Mexico's jurisdictional objection as a preliminary issue, separate from the merits stage of the proceeding;

Tribunal in Deciding Jurisdiction Must Assume Facts Alleged by Applicants Are True

- (f) in their oral and written submissions on jurisdiction, the applicants made clear to the Tribunal their position that, in accordance with well-established jurisprudence concerning the appropriate standard of review and procedure for the determination of jurisdiction in international investment law and NAFTA Chapter 11 arbitrations:
 - (i) the Tribunal -- for the purposes of deciding jurisdiction -- must assume that the facts as alleged by the applicants are true; and
 - (ii) the applicants would not be required to provide additional evidence substantiating those factual assertions until the merits stage of the proceeding;
- (g) in particular, the applicants emphasized that the factual record respecting the nature and extent of the applicants' rights to water in Mexico was incomplete and was a factual issue to be determined at the merits stage of the arbitration;

- (h) Mexico did not disagree with the applicants' position, and in fact stated expressly that for the purposes of its motion on jurisdiction, it did not challenge the applicants' factual assertions, but took issue instead only with the legal assertions made by the applicants on the basis of those facts;

Tribunal Made Improper Factual Findings on Incomplete Evidentiary Record

- (i) the Tribunal in its decision on jurisdiction made numerous factual findings that are contrary to the facts alleged by the applicants, including a finding that the applicants did not own any water located in Mexico. The Tribunal made those factual findings despite the agreed-upon standard of review and procedure that, for purposes of determining its jurisdiction, the Tribunal must assume that the facts alleged by the applicants, including the fact that the applicants owned water located in Mexico, are true;
- (j) neither at the hearing nor at any time prior to releasing the Award did the Tribunal advise the applicants that it intended to make factual findings or provide the applicants with an opportunity to present evidence on any disputed facts;
- (k) accordingly, neither party presented any evidence at all from any fact or expert witness at the hearing on jurisdiction, since the agreed-upon standard of review and procedure was that the facts alleged by the applicants would be assumed to be true for purposes of the jurisdictional determination and that evidence from witnesses respecting contested facts would be heard only at the merits stage;
- (l) the Tribunal's Award determining that the applicants' claim was not within its jurisdiction was predicated on the Tribunal's improper and premature findings of disputed facts, including in particular its finding that, contrary to the applicants' allegations, the applicants do not own water located in Mexico;

Grounds for Setting Aside the Award

- (m) the Award should be set aside because:
 - (i) contrary to Article 34(2)(a)(ii) of the Model Law, the applicants were unable to present their case on crucial factual issues, including presenting evidence that they own water located in Mexico;
 - (ii) contrary to Article 34(2)(a)(iii) of the Model Law, the Award deals with a dispute not falling within the terms of the submission to arbitration and contains decisions on matters beyond the scope of the submission to arbitration, because it purports to decide factual issues at the jurisdictional stage prior to submission of evidence, rather than assuming the truth of the applicants' factual assertions and deciding disputed factual issues only at the merits stage upon a full hearing of the evidence; and
 - (iii) contrary to Article 34(2)(b)(ii) of the Model Law, the Award is in conflict with the public policy of Canada, including the requirements of fundamental justice and due process, because the Tribunal determined factual issues adversely to the applicants without providing the applicants with an opportunity to adduce evidence or make submissions in support of their factual assertions;

Other Grounds

- (n) the Award was made as at, and the place of the arbitration is, Toronto, Ontario;
- (o) sections 1 and 2 of the Act, and Articles 1, 6, 18 and 34 of the Model Law which, among other things, grant jurisdiction to the courts of Ontario to set aside an arbitral award where the place of arbitration is in Ontario;
- (p) rules 14.05, 17.02(f), 17.02(n), 38, 39 and 57 of the *Rules of Civil Procedure*; and

- (q) such other grounds as counsel may advise and this Honourable Court allow.
3. The following documentary evidence will be used at the hearing of the application:
- (a) the Award, pleadings, exhibits and proceedings in the arbitration record;
 - (b) the affidavit of Roger J. Marzulla; and
 - (c) such other material as counsel may advise and this Court may permit.

September 17, 2007

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Solicitors for the Applicants

Bayview et. al
Applicants

The United Mexican States
Respondent

Court File No:

07-CU-340139 PD2

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto, Ontario

NOTICE OF APPLICATION

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