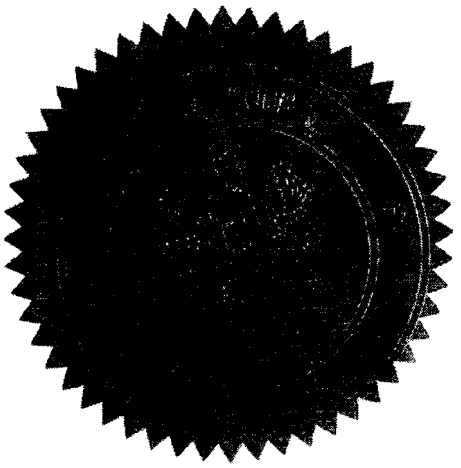


Court File No. T-668-12

FEDERAL COURT

ST. MARYS VCNA, LLC

Applicant

and

MINISTER OF INTERNATIONAL TRADE and the ATTORNEY GENERAL OF CANADA

Respondents

APPLICATION UNDER SECTION 18.1 OF THE *FEDERAL COURTS ACT*

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant. The relief claimed by the applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at Toronto, Ontario.

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 a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the Federal Courts Rules and serve it on the applicant's solicitor, or where the applicant is self-represented, on the applicant, **WITHIN 10 DAYS** after being served with this notice of application.

Copies of the Federal Courts Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: March 30, 2012

Issued by: _____
(Registry Officer)

Address of local office: 180 Queen Street West
Suite 200
Toronto, ON M5V 3L6

TO: **Minister of International Trade**
Foreign Affairs and International Trade Canada
125 Sussex Drive
Ottawa, ON K1A 0G2

AND TO: **Attorney General of Canada**
284 Wellington St.
Ottawa, ON K1A 0H8

APPLICATION

This is an application for judicial review in respect of:

1. The denial of benefits under Chapter 11 of the North American Free Trade Agreement ("**NAFTA**") to the Applicant by the Trade Law Bureau, on behalf of the Department of Foreign Affairs and Trade Canada ("**DFAIT**"), purportedly pursuant to Article 1113(2) of the NAFTA, which denial of benefits was communicated to the Applicant by letter dated March 1, 2012 (the "**Decision**").

The applicant makes application for:

1. A declaration that the Decision is unlawful and invalid;

2. An order quashing the Decision with an order not to remit the matter back to DFAIT;

3. Alternatively, an order quashing the Decision with an order to remit the matter back to DFAIT, subject to directions of this Honourable Court;

4. Costs of the proceedings; and

5. Such further and other relief as may be sought and this Honourable Court may permit.

The grounds for the application are:

1. The Applicant, St. Marys VCNA, LLC ("**St. Marys**"), is incorporated pursuant to the laws of Delaware, one of the United States of America, and is registered as an out-of-state corporation in Nevada, one of the United States of America, where its head office is located.

2. St. Marys owns and controls St. Marys Cement Inc. (Canada) ("**SMC**").

3. As is set out below, SMC has been attempting to obtain approval of a quarry on a certain site located on the outskirts of the City of Hamilton, Ontario. On April 20, 2011, the Minister of Municipal Affairs and Housing of the Province of Ontario ("**Ontario Minister**") issued a Declaration of Provincial Interest ("**DPI**") that prevents SMC from obtaining that approval without the consent of the Lieutenant Governor in Council.

4. St. Marys submitted a Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement ("**NOI**") on May 13, 2011, and a Notice of Arbitration Under the Arbitration Rules of the United Nations Commission on International Trade Law and the North American Free Trade Agreement ("**NOA**") on September 14, 2011. The NOA included the submission of St. Marys' consent to arbitration. Canada's existing consent was set out in NAFTA Article 1122. The submission of the claim to arbitration through the NOA initiated an Investor-State arbitration pursuant to Section B of NAFTA Chapter 11.

The Decision Under Review

5. On March 1, 2012, the Trade Law Bureau, acting on behalf of DFAIT (collectively, with the Minister as defined below, "**Canada**"), advised, by letter addressed to St. Marys' NAFTA counsel, of Canada's decision to rely on NAFTA Article 1113(2) to deny the benefits of NAFTA Chapter 11 to St. Marys and its "alleged investment", SMC. Canada advised that this denial of benefits applied to all disputes, measures and facts alleged in the NOI and NOA.

6. A denial of benefits under Article 1113(2) means that the NAFTA Party (in this case, Canada) has denied the foreign investor (St. Marys) the benefits—and protections—of Chapter 11 of the NAFTA.

7. Thus, Canada, one of two disputing parties to the NAFTA arbitration, acted to unilaterally terminate the arbitration process and to deny St. Marys recourse to the NAFTA.

8. The Minister of International Trade ("**Minister**") is the responsible Minister under the *North American Free Trade Agreement Implementation Act*. The Minister is the instructing client of the Trade Law Bureau, and is ultimately responsible for any action taken by the Trade Law Bureau and any other actor of DFAIT in relation to the NAFTA.

9. In accordance with ss. 18.1(4)(a), (b), (c) and (d) of the *Federal Courts Act*, the Decision is reviewable on the following grounds:

(a) Canada acted without jurisdiction in purporting to deny benefits under Article 1113(2) of the NAFTA, by erroneously finding as a jurisdictional fact that St. Marys did not have substantial business activities at the relevant time;

(b) Canada acted without jurisdiction by purporting to deny benefits under Article 1113(2) prior to the constitution of the NAFTA Tribunal, which deprived St. Marys of the normal and ordinary review of Canada's action by the trier of fact;

(c) Canada failed to observe a principle of procedural fairness by failing to enter into a reasonable confidentiality agreement with St. Marys, with the result that St. Marys could not provide Canada with all the evidence relevant to Canada's request;

(d) Canada erred in law in making the Decision, by failing to properly interpret and apply the legal test in Article 1113(2) of the NAFTA; and

(e) Canada based the Decision on an erroneous finding of fact regarding whether St. Marys carried on "substantial business activities" at the relevant time, and this finding was made without regard to the evidence.

Background to Quarry Application

10. In 2006, SMC took over an aggregate quarry permit application from Lowndes Holdings Corp., when the two companies merged. Lowndes Holdings Corp. had already commenced studies and testing for the application. The application was for lands located at the 11th Concession Road East at Millburough Line in the City of Hamilton, Ontario

("**Quarry Site**"). The Quarry Site contains dolostone rock of the Amabel formation, one of the highest quality resources for crushed stone in Ontario.

11. The local Official Plan for the Quarry Site identified the area as containing significant mineral resources, and a number of aggregate quarries operate in the vicinity of the Quarry Site. However, the zoning of the Quarry Site was agriculture and conservation, which does not permit the operation of a quarry.

12. To operate a quarry in Ontario, the use has to be permitted by the Official Plan and zoning by-laws of the municipality. A license under the Ontario *Aggregate Resources Act* ("**ARA**") is also required. A license under the ARA is only granted if the zoning by-laws permit a quarry. An application was made by Lowndes Holdings Corp., prior to its merger with SMC, for an Official Plan amendment ("**OPA**") and for an amendment to the zoning by-laws. St. Marys filed supplementary applications for an OPA and amendment to the zoning by-laws in October, 2008. An application for a license under the ARA was made in January, 2009.

13. On April 12, 2010, while SMC's application to amend the Official Plan and by-laws was still outstanding, the Ontario Minsiter issued a Minister's Zoning Order ("**MZO**"). The MZO affected only the Quarry Site, and had the effect of freezing the agricultural zoning of the Quarry Site by prohibiting any use of that land except those uses permitted on the date of the MZO.

14. By way of applications filed pursuant to the Ontario *Planning Act* in May and June 2010, SMC requested that the Ontario Minister revoke or substantially amend the MZO. SMC's application also asked the Ontario Minister to request that the OMB hold a hearing regarding SMC's request to revoke or amend the MZO. The Ontario Minister did so by letter dated October 28, 2010. On April 1, 2011, the OMB held a pre-hearing conference in respect of that matter.

15. On April 20, 2011, the Ontario Minister issued the DPI pursuant to s. 47(13.1) of the Ontario *Planning Act*. The DPI stated that it was the Ontario Minister's view that a matter of provincial interest, as defined in the Ontario *Planning Act*, is or is likely to be adversely affected by the request to amend or revoke the MZO. As a result of the DPI, a

decision of the OMB to amend or revoke the MZO is not final or binding, and the Lieutenant Governor in Council may confirm, vary or rescind the decision of the OMB. SMC moved to judicially review the MZO and DPI in the Ontario courts. The OMB hearing referred to in the paragraph above was adjourned.

16. The Ontario Minister, by issuance of the DPI, effectively prevented SMC from obtaining an amendment to the zoning of the Quarry Site, because the Lieutenant Governor in Council, of which the Ontario Minister is a member, can rescind the decision of the OMB.

Background to Decision

17. As stated above, St. Marys submitted its NOI under the NAFTA on May 13, 2011. It submitted its NOA on September 14, 2011.

18. By letter dated December 22, 2011 ("**December 22 Letter**"), Canada wrote to St. Marys' NAFTA counsel and requested evidence of St. Marys' ownership structure, assets, holdings, and business activities in the United States during the period relevant to the matters raised in the NOI and NOA. The letter advised that Canada had grounds to believe that NAFTA Article 1113(2) of the NAFTA was applicable.

19. Article 1113(2) states:

> Subject to prior notification and consultation in accordance with Articles 1803 (Notification and Provision of Information) and 2006 (Consultations), a Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control the enterprise and **the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized. [emphasis added]**

20. As noted by Canada in its December 22 letter, to avail itself of Article 1113(2), two criteria must be met: (1) investors of a non-Party control the enterprise, and (2) the enterprise has no substantial business activities in the territory of the Party under whose laws it is constituted or organized. Canada asserted that it had performed "[e]xtensive due diligence" and "failed to confirm any business activities by [St. Marys] in the United States".

21. Correspondence was exchanged between Canada and NAFTA counsel for St. Marys about whether St. Marys met the second criterion—that is, whether it had "no substantial business activities" in the territory of the United States. NAFTA counsel for St. Marys supplied Canada with considerable documentary evidence of the business activities of St. Marys in the United States, which were sufficient to meet the definition of "substantial business activities".

22. From the time the NOA was submitted and throughout the correspondence relating to Article 1113(2), Canada refused to enter into a reasonable confidentiality agreement with St. Marys. As St. Marys repeatedly advised Canada, without such an agreement in place, it would be unable to provide full documentary disclosure to Canada about its business activities due to serious risk of damage arising from any leak to competitors of proprietary and confidential business information.

23. Even with the restriction caused by Canada's refusal to enter into a reasonable confidentiality agreement, St. Marys provided Canada with sufficient evidence to meet the test. Among the evidence provided to Canada was:

(a) evidence of a $325 million term loan with the Bank of America and a further revolving credit facility of $125 million, which was supported by a Uniform Commercial Code filing made by Bank of America in October 2010;

(b) a bank account held by St. Marys with Comerica Bank; and

(c) copies of offer letters evidencing business negotiations between St. Marys and supply companies and consultants.

24. Canada took the position that St. Marys' response was deficient in three ways:

(a) St. Marys failed to provide evidence of its ownership structure, assets, holdings, and business activities during the period relevant to the matters raised in its NOI and NOA;

(b) St. Marys failed to provide documents relating to certain categories of information Canada requested in its letter of December 22, 2011; and

(c) Canada viewed the documents provided by St. Marys as being inconsistent with its alleged business activities.

25. NAFTA counsel to St. Marys responded by letter directly addressing the concerns raised by Canada and enclosing further documentary evidence respecting St. Marys' business activities. Further, NAFTA counsel pointed out that the relevant time period was the time of the consideration of the denial of benefits (i.e., December 22, 2011), not the time of the matters raised in the claim. However, St. Marys again advised Canada that it could not provide full documentary disclosure unless Canada entered into a confidentiality agreement with St. Marys.

26. Notwithstanding the evidence provided by St. Marys to Canada, on March 1, 2012, Canada wrote to NAFTA counsel to St. Marys to advise that Canada was relying on NAFTA Article 1113(2) to deny the benefits of Chapter 11 to St. Marys and its "alleged investment", SMC.

Canada Acted Without Jurisdiction

27. Canada did not have jurisdiction to deny benefits to St. Marys pursuant to NAFTA Article 1113(2) because that provision can only be exercised against an enterprise that is controlled by investors of a non-Party, and only if the entity has no substantial business activities in the territory of the NAFTA Party under whose laws it is constituted or organized. Canada made an erroneous finding of jurisdictional fact that St. Marys did not have substantial business activities in the United States. The denial of benefits was therefore made without jurisdiction.

28. Further, Canada acted without jurisdiction by purporting to deny benefits pursuant to NAFTA Article 1113(2) prior to the constitution of the Tribunal to hear the arbitration. By taking this step before the independent adjudicator was in place, Canada deprived St. Marys of its due process right to have the evidence, and any decision made on the evidence pursuant to Article 1113(2), considered by an independent arbiter. Instead, the evidence was

considered and a decision to deny St. Marys access to the arbitration process was made unilaterally by the very party against which St. Marys sought to arbitrate. Such a measure, if properly taken at all, which is not admitted but denied, should not have been taken until after the NAFTA Tribunal was constituted.

Canada Failed to Observe Procedural Fairness

29. St. Marys was precluded from providing all the evidence to Canada that it requested due to Canada's failure to enter into a reasonable confidentiality agreement, as discussed above. To the extent that Canada cites failure to provide certain documents as evidence that there were no "substantial business activities", it was Canada's own failure to act with procedural fairness that prevented full disclosure.

The Decision is Based on the Application of an Incorrect Test

30. In assessing the evidence provided by St. Marys, Canada demanded that St. Marys provide evidence of its ownership structure, assets, holdings, and business activities during the period relevant to the matters raised in its NOI and NOA. However, the test in Article 1113(2) is clearly worded in the present tense: whether the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized. The relevant timeframe for the purposes of Article 1113(2) is the time the denial of benefits was proposed.

31. Alternatively, St. Marys submits the relevant timeframe commenced, at the earliest, at the submission of St. Marys' NOI pursuant to the NAFTA.

The Decision is Contrary to the Evidence

32. The Decision is contrary to the evidence provided to Canada. St. Marys provided Canada with clear evidence of substantial business activities at the relevant times. That evidence was overlooked in the Decision. Further, Canada relied on irrelevant criteria—such as an absence of bankruptcy filings or private aircraft registrations—in reaching its conclusion.

33. To the extent that Canada asserts that St. Marys failed to provide certain evidence, and relies on that failure in the Decision, this was predominantly due to the failure of Canada to enter into a reasonable confidentiality agreement, as outlined above.

This application will be supported by the following material:

1. The affidavit of Richard Olsen, to be sworn, and the exhibits thereto;

2. Such further and other material as counsel may advise and this Honourable Court may permit.

The Applicant requests the Respondents to send a certified copy of the following material that is not in the possession of the applicant but is in the possession of the Trade Law Bureau and/or DFAIT to the applicant and to the Registry:

1. All documents (for this and all items below, see the definition of "documents" in Rule 222(1) of the Federal Court Rules) relating to the Decision and the discussions or deliberations of Canada leading thereto;

2. All documents relating to Canada's suspicions that St. Marys had no substantial business activities in the United States;

3. All documents evidencing actions taken by Canada, or any person or persons acting on its behalf, to address suspicions that St. Marys had no substantial business activities in the United States;

4. All documents relating to Items 2 and 3 above, in which instructions are provided to persons employed with DFAIT or to any other third party;

5. All instructions or searches made by Canada, or any third party, in relation to the substantial business activities of St. Marys;

6. All invoices with respect to searches, whether done by Canada or any third party, or expense reports submitted thereto;

7. All documents relating to any inspections, site visits to any office of St. Marys or any of its affiliates or subsidiaries, in the United States or Canada, since May 13, 2011, and all documents evidencing communication in relation thereto;

8. All correspondence or other documents relating to discussions with representatives of the Government of the United States of America, or any government employee or agent at any other level in relation to the searches made or other due diligence of the Government of Canada in connection to a determination made under NAFTA Article 1113 with respect to St. Marys;

9. All correspondence or other documents sent to the Government of the United States by the Government of Canada, and all correspondence or other document received by the Government of Canada from the Government of the United States, pursuant to NAFTA Chapters 11, 18 and 20 with respect to St. Marys;

10. All documents made in relation to the decision by Canada to deny benefits under NAFTA Article 1113 to St. Marys on March 1, 2012;

11. All documents evidencing previous or subsequent considerations and the decisions by Canada to use NAFTA Article 1113;

12. All documents relating to any considered denial of benefits to St. Marys under NAFTA Article 1113 from persons who are identified in the Government of Canada's directory as being part of the JLT Group (Trade Law Division), or other parts of DFAIT, including but not limited to:

    a. de Bondy, Christophe: Deputy Director;

    b. Cheetham, Hugh: Acting General Counsel;

    c. Di Pierdomenico, Lori A.: Legal Counsel;

d. East, Reuben E.: Counsel;

e. Gallus, Nick: Counsel;

f. Kronby, Matthew: Director General;

g. Kurelek, Stephen: Counsel;

h. Little, Scott: Deputy Director;

i. Spelliscy, Shane: Counsel;

j. Squires, Heather: Counsel;

k. Tabet, Sylvie: Director;

l. Watchmaker, Rahool: Counsel;

13. All documents relating to a considered denial of benefits to St. Marys under NAFTA Article 1113 from other persons who have been identified as being privy to correspondence to or from the Government of Canada with regards to a potential or actual decision to deny benefits to St. Marys, including but not limited to correspondence with:

a. O'Neill, John: Director, Investment Trade Policy Division, DFAIT;

b. Seebach, Dennis: NAFTA Secretariat;

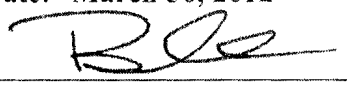
c. Souliere, Leesa: Paralegal, DFAIT;

d. Stubbs, Alina: Administrative Assistant, DFAIT;

e. Borrego, Carlos Vejar: Government of the United Mexican States;

14. All documents relating to the denial of benefits to St. Marys under NAFTA Article 1113 with other officials in DFAIT, Members of Parliament or their staff, Ministers of the federal or any provincial Government or their staff, or officials from the Government of Ontario.

Date: March 30, 2012



(Signature of Solicitor)

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ST. MARYS VCNA, LLC and **MINISTER OF INTERNATIONAL TRADE et al.**

Applicant Respondents

Court File No.

FEDERAL COURT

Proceeding commenced at Toronto

Application under Section 18.1 of the *Federal Courts Act*

NOTICE OF APPLICATION FOR JUDICIAL REVIEW

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