

FEDERAL COURT - TRIAL DIVISION

**IN THE MATTER OF SECTIONS 5 AND 6 OF THE *COMMERCIAL
ARBITRATION ACT*, R.S.C. 1985, C. 17(2nd SUPP.)**

**IN THE MATTER OF ARTICLES 1, 6 AND 34 OF THE *COMMERCIAL
ARBITRATION CODE* SET OUT IN THE SCHEDULE TO THE *COMMERCIAL
ARBITRATION ACT***

**AND IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF THE
NORTH AMERICAN FREE TRADE AGREEMENT ("NAFTA") BETWEEN
S.D. MYERS, INC. AND THE GOVERNMENT OF CANADA**

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

- and -

S.D. MYERS, INC.

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the applicant on behalf of Her Majesty the Queen in right of Canada. 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 Ottawa, 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 Court Rules, 1998*, 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 Court Rules, 1998*, 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.

January 20, 2003

Issued by: Natalie Theriault
(Registry Officer)

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APPLICATION

This is an application to set aside a Partial Award dated October 21, 2002 (the “Damages Award”) and a Final Award dated December 30, 2002 (the “Costs Award”) made by an Arbitral Tribunal comprised of Messrs. Martin Hunter, Bryan Schwartz and Edward Chiasson (the “Arbitral Tribunal”) established pursuant to articles 1120, 1122 and 1123 of the *North American Free Trade Agreement* (“NAFTA”). The Awards are final with respect to damages and costs.

A previous Award issued by the Arbitral Tribunal (the “Liability Award”) on November 13, 2000 underpins both the Damages and Costs Awards. In the Liability Award, the Arbitral Tribunal found that the Respondent was an “investor” under the NAFTA and that S.D. Myers (Canada) Inc., a company incorporated under the laws of Canada, was an “investment” of the Respondent. The Arbitral Tribunal also held that by issuing an interim order in 1995 banning the export of polychlorinated biphenyl wastes (“PCB wastes”) to the United States of America (the “Interim Order”), Canada breached obligations under NAFTA Articles 1102 (national treatment) and 1105 (minimum standard of treatment) thereby causing damage to S.D. Myers (Canada) Inc. and to the Respondent.

The Damages Award found that as a consequence of the breaches found in the Liability Award, the Respondent suffered damage and is entitled to recover damages in the amount of \$6,050,000 together with interest (compounded annually) for the period starting at the date of the notice of arbitration until the date of payment of the award calculated at the Canadian prime rate plus 1%.

The Costs Award found that as a consequence of the Respondent’s success in the arbitration, it was entitled to recover a portion of the costs of the arbitration and of its

legal fees and expenses together with interest on that sum at the Canadian prime rate plus one per cent, compounded annually, from the date of the Costs Award until the date on which payment is made.

The applicant makes application for an order:

1. Setting aside the Damages and Costs Awards in whole or in part;
2. The costs of the application; and
3. Such other relief as counsel may advise and this Honourable Court may grant.

The grounds for the application are:

1. Sections 5 and 6 of the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.);
2. Articles 1, 6, 34(2)(a)(iii) and 34(2)(b)(ii) of the *Commercial Arbitration Code* set out in the Schedule to the *Commercial Arbitration Act*;
3. Rules 300(b) and 324 of the *Federal Court Rules, 1998*;
4. Chapter Eleven of the NAFTA, as implemented by the *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44;
5. The Arbitral Tribunal based its assessment of damages on the facts found, and legal conclusions reached, in the Liability Award.

6. The Liability Award dealt with a dispute not contemplated by or not falling within the terms of Chapter Eleven of the NAFTA in several respects and conflicted with the public policy of Canada. Consequently, the Liability Award is susceptible to challenge, and has been challenged in this Honourable Court by the Applicant, under Articles 34(2)(a)(iii) and 34(2)(b)(ii) of the *Commercial Arbitration Code* set out in the Schedule to the *Commercial Arbitration Act*. That challenge by the Applicant bears court file number T-225-01 and has yet to be heard by this Honourable Court.

7. The following specific errors, each of which dealt with a dispute not contemplated by or not falling within the terms of Chapter Eleven of the NAFTA or that conflicted with the public policy of Canada, appear in the Liability Award:

- (a) The Arbitral Tribunal erred in finding that the Respondent was an “investor of a Party” for the purposes of NAFTA Chapter Eleven, and in finding that S.D. Myers (Canada) Inc. was an “investment” of the Respondent for the purposes of NAFTA Chapter Eleven;
- (b) The Arbitral Tribunal erred by finding that NAFTA Chapter Eleven permits the Respondent to advance a claim for damages sustained by persons not parties to the arbitration, including shareholders of the Respondent and of its alleged investment;
- (c) The Arbitral Tribunal erred by permitting a mere provider of cross-border services subject to NAFTA Chapter Twelve to advance a claim under NAFTA Chapter Eleven. NAFTA Article 1213(2) stipulates that any service not provided through an investment as defined in NAFTA Article 1139 falls within the purview of NAFTA Chapter Twelve and, therefore, is necessarily excluded from NAFTA Chapter Eleven;
- (d) The Arbitral Tribunal erred by comparing, for the purposes of NAFTA Article 1102 “in like circumstances,” the Respondent and its PCB waste disposal

operations in the United States, with Canadian-owned and controlled companies and their PCB waste disposal operations in Canada;

(e) The Arbitral Tribunal erred by finding that Canada should have allowed exports of PCB wastes to the United States of America while imports of PCB wastes were contrary to U.S. law, and in the face of a well-established Canadian policy requiring the disposal of PCB wastes in Canada consistent with Canada's international obligations under the *Basel Convention*;

(f) The Arbitral Tribunal erred in finding that a breach of NAFTA Article 1102 essentially establishes a breach of NAFTA Article 1105; and,

(g) The Arbitral Tribunal erred in finding that a breach of NAFTA Article 1105 occurs when it is shown that an "investor" has received treatment not in accordance with international law, including fair and equitable treatment and full protection and security. Article 1105 applies to "investments" of investors of another Party, and not to investors themselves.

8. For the same reasons the Arbitral Tribunal erred in making the Liability Award, the Damages Award and the Costs Award that flow from and repeat those errors cannot stand.

9. In the alternative, with regard to the Damages Award:

(a) The Tribunal erred by including in its calculation of the damages recoverable by the Respondent some or all of the PCB waste disposal work the Respondent proposed to do itself without any involvement by S.D. Myers (Canada) Inc. Such damage could not have been caused by reason of, or arising out of, the breaches found by the Tribunal because any such damage arose regardless of whether or not the Respondent was

an "investor of a Party" having an "investment" in Canada. The Respondent sustained such damage because, as a business situate in the United States (i.e. as a cross-border service provider), it was unable to perform that work so long as the border remained closed. In awarding damages for losses unrelated to the Respondent's status as an "investor of a Party" having an "investment" in Canada, the Tribunal dealt with a dispute not contemplated by or not falling within the terms of Chapter Eleven of the NAFTA or that conflicted with the public policy of Canada;

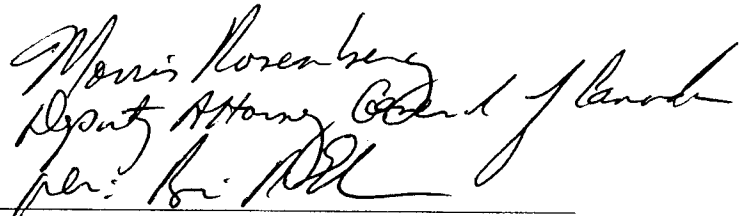
- (b) In the further alternative, the Tribunal erred by including in its calculation of the damages recoverable by the Respondent the value of quotations issued by the Respondent after Canada re-opened the border to allow exports of PCB wastes in February 1997. Such damage could not have been caused by reason of, or arising out of, the breaches found by the Tribunal. Consequently, the Tribunal dealt with a dispute not contemplated by or not falling within the terms of Chapter Eleven of the NAFTA or that conflicted with the public policy of Canada.

10. In the alternative, with regard to the Costs Award, the Tribunal based its conclusion on the Respondent's success in proceedings before it. Those proceedings resulted in Awards that dealt with disputes not contemplated by or falling outside the terms of Chapter Eleven of the NAFTA or that conflicted with the public policy of Canada. For those reasons, the Costs Award is insupportable and must be set aside.

The application will be supported by the following material:

1. The Affidavit of John Myslicki.
2. The pleadings and record of proceedings before the Arbitral Tribunal..
3. Such further and other material as counsel may advise and this Honourable Court permits.

January 20, 2003



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