

FEDERAL COURT - TRIAL DIVISION

IN THE MATTER OF SECTIONS 5 AND 6 OF THE *COMMERCIAL ARBITRATION ACT*, R.S.C. 1985, C. 17 (2<sup>nd</sup> 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

AFFIDAVIT

I, JOHN MYSLICKI, of the City of Ottawa in the province of Ontario, public servant, make oath and say as follows:

**General**

1. I am Chief of the Transboundary Movement Division (the "Division") at the Department of the Environment ("DOE") and have held that position since 1984.
2. The Division monitors and controls interprovincial and international movements of hazardous wastes to ensure they comply with federal law, federal-provincial policies and Canada's international obligations. These hazardous wastes include a wide range of equipment, liquids, solids

16. Messrs. Rosen and Rostant prepared and submitted several expert reports before the hearings and the parties referred to those reports extensively during the hearing. Those reports analysed a substantial number of quotations for the disposal of PCBs and PCB wastes submitted by SDMI or S.D. Myers (Canada) Inc. to companies and others in Canada between 1995 and mid-1997. None of the quotations submitted by SDMI described the role, if any, that S.D. Myers (Canada) Inc. would play if the company or person receiving the quotation accepted it.
17. Subsequently, Messrs. Rosen and Rostant submitted a spreadsheet to assist the members of the Arbitral Tribunal in their deliberations.
18. On October 21, 2002 the Arbitral Tribunal issued a Partial Award (the "Damages Award") awarding SDMI damages for the breaches found in the Liability Award. I attach a copy of the Damages Award as Exhibit "B".
19. As the Damages Award indicates, the Tribunal assessed damages on the basis that SDMI had an investment in Canada, namely S.D. Myers (Canada) Inc., and that SDMI was therefore entitled to recover damages representing the net income stream it would have received had Canada not adopted the Interim Order.
20. As the Damages Award further indicates, the period included in the assessment of damages extended from November 1995 (when Canada imposed the Interim Order) to July 1997 (five months after Canada reopened its borders to PCB waste exports to the United States).
21. The Damages Award also invited the parties to submit representations on the matter of costs within two weeks of the date of that award or such extended period as they might agree.

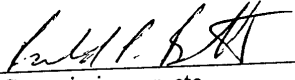
#### **The Costs Award**

22. On December 30, 2002, the Arbitral Tribunal issued a Final Award (the "Costs Award") ordering the government of Canada to pay to SDMI part of the costs of the arbitration and some of its legal costs. I attach a copy of the Costs Award as Exhibit "C".
23. As the Costs Award indicates, SDMI recovered costs because it achieved partial success on liability and damages. SDMI recovered no costs by reason of the conduct of the Applicant during the arbitration.

24. I am advised by Counsel and do verily believe that the Liability, Damages and Costs Awards are final with respect to the issues addressed in those awards.

25. This affidavit is made in support of an application under sections 5 and 6 of the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2<sup>nd</sup> supp.) to set aside two arbitral awards made under NAFTA Chapter Eleven, and for no improper purpose.

SWORN BEFORE ME at the )  
City of Ottawa, )  
on the 20<sup>th</sup> day of January, 2003 )

  
\_\_\_\_\_  
A Commissioner, etc.  
Ronald P. Burnett

  
\_\_\_\_\_  
John Myslicki