

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

**SUPPLEMENTARY AFFIDAVIT OF JOHN MYSLICKI  
SWORN FEBRUARY 19, 2003  
VOLUME II of II**

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S.D. MYERS, INC.

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SUPPLEMENTARY AFFIDAVIT

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

1. I am Chief of the Transboundary Movement Division at the Department of the Environment and have held that position since 1984. In that capacity, I appeared as a witness and observer at several hearings before an Arbitral Tribunal (the "Arbitral Tribunal") established to hear an arbitration commenced by S.D. Myers, Inc. ("SDMI") under Chapter Eleven of the *North American Free Trade Agreement* ("NAFTA"). I also read the pleadings and filings before the Arbitral Tribunal and all its awards concerning liability, damages and costs.

2. I have also read the Order dated February 12, 2003 consolidating these proceedings with earlier proceedings in Court File Number T-225-01 (the "Consolidation Order"). That order permits the parties to rely on the Application Records already filed in Court file number T-225-01 for the purposes of this proceeding and directs them not to duplicate that material in this application. It also contemplates that the parties will file additional evidence received by the Arbitral Tribunal after the Applicant filed the Notice of Application in Court File T-225-01.

3. Based on the foregoing, I have knowledge of the matters hereinafter deposed.

4. This affidavit supplements my earlier affidavit in this matter dated January 20, 2003.

5. Attached hereto and marked as Exhibit "A" is the index to the Joint Books of Documents submitted by the parties to the Arbitral Tribunal during the damages phase of the arbitration. The documents, statements and expert reports listed in this index, together with the 211 documents comprising the Joint Books of Documents filed with the Arbitral Tribunal during the liability phase of the arbitration, the transcripts of all proceedings, a computer model provided to the Tribunal subsequent to the assessment of damages hearing and the memoranda of argument presented by the parties and the other State Parties comprised the record for the purposes of the assessment of damages.

6. In paragraph 9(d) of my earlier affidavit, I deposed that S.D. Myers (Canada) Inc. conducted marketing, customer contact, testing and assessments of PCB contaminated equipment in Canada. S.D. Myers (Canada) Inc. did not dispose of PCBs or PCB wastes in its own facilities in Canada.

7. The evidence before the Arbitral Tribunal disclosed that S.D. (Myers) Canada Inc. lacked the capacity to perform much of the work it contracted to perform. In those cases, SDMI staff based in Tallmadge performed these tasks and S.D. Myers (Canada) Inc. paid SDMI for their services and expenses. So far as disposing of PCBs or PCBs wastes was concerned, Mr. Dana Myers planned for S.D. Myers (Canada) Inc. to funnel PCBs and PCB wastes through SDMI's facilities in Tallmadge, Ohio and to compensate SDMI for that work.

8. Before 1997, several companies in Canada solicited contracts for the disposal of PCB wastes in Canada. Some of these companies disposed of PCB wastes at their own facilities while

others disposed of them at facilities in Canada owned or operated by other companies. No company in Canada disposed of PCBs or PCB wastes in the United States.

9. Evidence on the activities of S.D. Myers (Canada) Inc. and other companies disposing of PCBs and PCB wastes in Canada before 1997 appears in the Application Record for Court File No. T-225-01. For that reason, I will not reproduce that evidence here.

10. During the assessment of damages hearings, the Arbitral Tribunal received additional evidence on the matters mention in paragraphs 6 through 9, inclusive, of this affidavit. I attach the following affidavits, statements and cross-examinations that discuss these and other points:

- (a) Exhibits "B", "C" and "D" are copies of the Affidavit of Dana Myers sworn February 28, 2001, a Supplemental Witness Statement of Dana Myers dated August 3, 2001, and the transcript of his testimony before the Arbitral Tribunal;
- (b) Exhibits "E" and "F" are copies of the Witness Statement of Bob Rasor dated August 6, 2001 and an extract from the transcript of his testimony before the Arbitral Tribunal;
- (c) Exhibits "G" and "H" are copies of the Report of Peter Wallace dated August 3, 2001 and the transcript of his testimony before the Arbitral Tribunal; and
- (d) Exhibits "I", "J" and "K" are copies of the Report of Douglas White sworn May 24, 2001, the Supplemental Statement of Douglas White dated August 29, 2001 and the transcript of his testimony before the Arbitral Tribunal.

11. At paragraph 248 of the Damages Award, the Arbitral Tribunal calculated the value of all quotations that should be taken into account as the point of departure in the assessment of the income stream lost in the period of the closure as being CDN \$50,294,735. To arrive at this figure, the Arbitral Tribunal took SDMI's claimed value of CDN\$101,774,735 for the 833 bids and quotes mentioned in paragraph 230 of the Damages Award and applied a series of deductions discussed at paragraphs 231 through 247 of the Damages Award.

12. The bids and quotations upon which SDMI based its claim appeared in several volumes of the Joint Books of Documents.

13. While the Damages Award acknowledges the efforts of SDMI to develop the Canadian market, it does not distinguish between bids or quotations SDMI submitted to Canadian PCB waste holders and bids or quotations submitted to Canadian PCB waste holders by S.D. Myers (Canada) Inc. At paragraph 86 of the Damages Award, the Arbitral Tribunal observed:

In pursuit of this strategy [to acquire PCB-contaminated materials from owners in Canada; to transport the material to Tallmadge for processing and recycling; and to dispose of the residue for incineration by specialist contractors], in 1993 SDMI developed a plan . . . to build a leading market position in Canada, so that SDMI would be in a position to gain a significant share of the market if and when the border opened. To this end SDMI and MYERS Canada embarked on a comprehensive marketing campaign to establish the MYERS brand as the leading name for the disposal of PCB's. SDMI spent in excess of \$1 million (MYERS Canada had no resources of its own to commit to the project) for this purpose. . . . . By the end of 1995 nearly 3,000 storage sites in Canada had been identified and either SDMI or MYERS Canada had contacted almost all of them, with routine follow-up calls after one or two months. (portion in square brackets taken from paragraph 85 of the Damages Award)

Furthermore, at paragraphs 245 and 246 of the Damages Award, the Arbitral Tribunal found that an electronic record of contacts between SDMI personnel and Canadian PCB holders "corroborated the marketing effort of the company" and that SDMI placed many "cold calls" to Canadian PCB waste holders to solicit business.

14. As stated in paragraphs 15 and 16 of my earlier affidavit, S.D. Myers (Canada) Inc. submitted some bids or quotations to destroy PCB wastes. However, the vast majority of bids or quotations submitted by SDMI in support of its claim for damages emanated from SDMI itself. Furthermore, these quotes made no mention of S.D. Myers (Canada) Inc. as a sub-contractor or other participant in the performance of the proposed contract.

15. 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 arbitral awards made under NAFTA Chapter Eleven, and for no improper purpose.

**SWORN BEFORE ME** at the        )  
City of Ottawa,                    )  
on the    day of February, 2003    )

\_\_\_\_\_  
A Commissioner, etc.

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