

**APPLETON & ASSOCIATES**

INTERNATIONAL LAWYERS

Washington DC

Toronto

*PRIVILEGED AND CONFIDENTIAL*

**UNDER THE UNCITRAL ARBITRATION RULES AND  
THE NORTH AMERICAN FREE TRADE AGREEMENT**

**INVESTOR'S SUMMARY ON DAMAGES**

BETWEEN:

**S.D. MYERS, INC.**

Claimant / Investor

- and -

**GOVERNMENT OF CANADA**

Respondent / Party

INVESTOR'S SUMMARY ON DAMAGES  
Re: S.D. Myers, Inc. and Canada  
PRIVILEGED AND CONFIDENTIAL

## INVESTOR'S SUMMARY ON DAMAGES

On November 13, 2000, this Tribunal rendered a Partial Award and a Separate Opinion concluding the initial phase of this NAFTA investor-state arbitration. Within the Partial Award, the Tribunal indicated that Canada had acted in violation of its international law obligations and as a result would have to pay compensation to the Investor<sup>1</sup>. The Tribunal found that the compensation awarded to the Investor at the conclusion of this quantification phase should undo the material harm inflicted by a breach of an international obligation<sup>2</sup>.

In the dispositive provisions of the Partial Award, the Tribunal found that:

325. CANADA shall pay to SDMI compensation for such economic harm as is established legally by SDMI to be directly as a result of CANADA's breach of its obligations under Articles 1102 or 1105 of the NAFTA.
326. Such compensation shall be quantified in accordance with the principles set out in this Partial Award, at the second stage of the arbitration as contemplated by paragraph 1 of Procedural Order No. 1.

The Tribunal did not make any determination on the precise methodology to be used to quantify the damages caused to the Investor other than to conclude that, in light of the unlawfulness of Canada's measures, that the fair market value standard would not be a "logical, appropriate or practicable measure of the compensation awarded" to this Investor<sup>3</sup>.

The Tribunal indicated within the Partial Award that the disputing parties would have the opportunity in this phase of the arbitration to make factual and legal submissions on the precise methodology to be used to quantify the compensation owed by Canada to the Investor<sup>4</sup>. The Investor submits this Summary to address the issues respecting the quantification of compensation owed by Canada as a result of the Tribunal's dispositive findings made in its Partial Award and Separate Opinion of November 13, 2000 and in light of the Tribunal's letter to the disputing Parties of January 3, 2001.

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<sup>1</sup> *Partial Award* at para. 308.

<sup>2</sup> *Partial Award* at para. 315.

<sup>3</sup> *Partial Award* at para. 309.

<sup>4</sup> *Partial Award* at para. 314.

The Investor makes the following submissions:

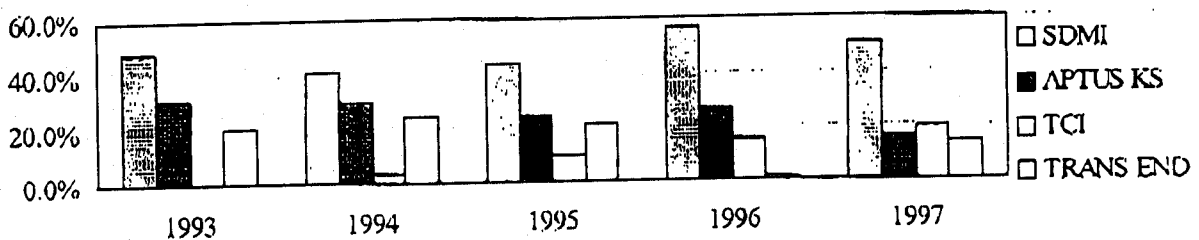
1. That Canada must pay compensation to the Investor to take into account the damage suffered by the Investor and its Investment. Damage should be calculated to quantify the economic benefits lost to the Investor and the Investment as a result of the unlawful measures.
2. Lost economic benefits are calculated as the difference between those benefits that would have been realized by the Investor and its Investment but for Canada's unlawful measures, and the economic benefits that actually had been realized by them.
3. The calculation of compensable losses in this claim requires an assessment of the income that would have been generated but for Canada's unlawful measures. Thus, in order to assess the damages, it will be necessary to assess:
  - a) The loss of cash flow that would have been available for distribution to the Investor and Investment from the time of the opening of the US border in 1995 until the closure of the US border in 1997;
  - b) The out of pocket costs incurred by the Investor and its Investment; and
  - c) Value for the lost opportunity occasioned by Canada's unlawful measures.

A detailed description and quantification of these losses will be set out within the Expert Valuation Report that will accompany the Investor's Memorial on Damages.

4. In addition, in light of the Investor's success in the merits phase and taking into account the nature of the unlawful measures, the Investor is entitled to receive from Canada costs and disbursements for its professional and expert advisors and the costs of this arbitration and an amount representing the opportunity cost for these costs and disbursements.
5. Damage caused to S.D. Myers, Inc. and to Myers Canada was directly related to Canada's actions and was foreseeable. The following factors may assist the Tribunal in establishing the directness and foreseeability of the Investor and Investment's damages:
  - a) Canada knew of the nature of the business operations of S.D. Myers, Inc. and Myers Canada;
  - b) Canada had knowledge about the market development activities of S.D. Myers, Inc. and Myers Canada taking place in Canada;
  - c) Canada's unlawful acts were intended to divert Canadian market share from S.D. Myers, Inc. and Myers Canada to Canadian-based competitors in order to protect this economic activity from competition from US-based competitors;

- d) Canadian officials knew that the unlawful measures would harm S.D. Myers, Inc. and Myers Canada, and that their unlawful measures were likely NAFTA violations.
6. The Investor was very successful in the US market in the remediation of waste contaminated with PCBs. Since 1989 the Investor processed more PCB contaminated materials than all of its competitors combined. The Investor maintained its position as an industry leader within the competitive US market for PCB contaminated equipment remediation, maintaining an average 48% share of the US market for PCB waste remediation, as can be seen from the following chart:

US PCB Transformer Market Share



7. In 1993, Myers Canada was incorporated. Myers Canada was intended to work with the American company in order to obtain business in Canada that could be developed jointly with the American company. In some cases, S.D. Myers, Inc. would bid for work in Canada with the expectation that the Canadian based operations would be undertaken by Myers Canada and in other cases, Myers Canada would bid for work always with the understanding that the final PCB waste remediation would be done by S.D. Myers, Inc. in Tallmadge, Ohio.
8. In the Partial Award, the Tribunal recognized that the business operation of the Investor and the Investment were seamlessly connected and interdependent. The Tribunal has already made findings in relation to the business operations between the Investor and the Investment. In its Partial Award, the Tribunal found:

Although SDMI did give consideration to developing a treatment facility in Canada, the focus of the Canadian project was to obtain PCB waste for treatment by SDMI in its U.S. facility. It was envisaged that Canadian entities would contract for the treatment of their waste in the USA and that Myers Canada would receive a percentage of the contact as its remuneration. The business was done by marketing, customer contact, testing and assessment of oil and other like services. SDMI personnel from the USA participated in these activities<sup>5</sup>.

<sup>5</sup> Partial Award at para. 93.

Together the Investor and the Investment engaged in activity that would result in the remediation of PCB wastes at S.D. Myers, Inc.'s US facilities.

9. When operating in Canada, the officers of S.D. Myers, Inc. expected that its American market leadership and competitive advantage would reasonably translate into a similar leadership position for its Canadian operations (including the operations of Myers Canada).
10. The Investor recognized that the proximity of the Tallmadge facility would provide it with a substantial competitive advantage over other competitors, such as the Swan Hills facility, due to the costs associated with the transportation of the materials from the client to the processing facility. The proximity of S.D. Myers, Inc.'s Tallmadge facility to the vast majority of PCB inventories in Canada also resulted in its expectation that it would maintain its leadership position within the Canadian PCB remediation market. S.D. Myers, Inc. concluded that the operation of the Investment would result in an effective Canadian located presence which would enhance the ability of SD Myers, Inc. and Myers Canada to maintain its competitive position against future Canadian or American-based competitors.
11. In the two-year period prior to the opening of the US border in 1995, the Investor and the Investment undertook a comprehensive marketing campaign by contacting every known holder of PCB wastes in Canada identified in Canada's PCB Waste Inventory. This comprehensive contact was maintained through follow-up calls every one to two months. S.D. Myers, Inc. and Myers Canada also launched an ad campaign in Canadian trade publications. No other service provider had undertaken a marketing campaign of this magnitude within the Canadian market and the Investor and the Investment's marketing campaign obviously caused consternation to their Canadian counterparts as evidenced in their concerns raised with Minster Cops and through Mr. Smith to her officials.
12. As a result of these marketing efforts, the Investor and the Investment had significant success in developing a "pipeline of potential purchase orders". Subsequent to Canada's improper closing of the border to exports to the US, Canadian customers became hesitant to commit to S.D. Myers, Inc. or its Investment, given that its ability to fulfil the contract (at any time in the future) was in doubt due to Canada's improper acts.
13. At the time of the making of Canada's *PCB Waste Export Ban*, the domestic Canadian PCB waste remediation market was in a growth phase. This growing market appeared to react very favourably to the marketing efforts made by S.D. Myers, Inc. and Myers Canada as a result of the following factors:
  - a) the proximity of the Tallmadge Ohio remediation facility to the bulk of the Canadian PCB waste inventories;
  - b) the exceedingly competitive price quotations offered by the Investor and Investment;

- c) the dominant market position of S.D. Myers, Inc. within the US domestic market;
  - d) the solid EPA record maintained by S.D. Myers, Inc.'s Tallmadge Ohio remediation facility; and
  - e) S.D. Myers, Inc's commitment to customer satisfaction and service.
14. On November 20, 1995, the Government of Canada issued an emergency order prohibiting the export of PCB waste from Canada to the US. The effect of this order, and the subsequent permanent order, was to prevent the ongoing operation of the business operations of the Investor and the Investment in Canada as well as to destroy the dominant Canadian leadership position enjoyed by the Investor and the Investment. In the course of their sales efforts in Canada prior to the border closing in July 1997, S.D. Myers, Inc. and Myers Canada quoted on over 1,000 projects for a total exceeding CDN\$109 million dollars as reflected in the summary provided in Table 1<sup>6</sup>.

<b>Table 1</b>		
<b>Summary of Quotes and Orders lost through Canada's unlawful acts</b>		
	<b>Contract</b>	
	<b>Number</b>	<b>Amount (CDN\$)</b>
Quotes	970	\$107,661,639
Orders	111	2,298,007
<b>Total</b>	<b>1081</b>	<b>\$109,959,646</b>
Based on documents provided by the Investor to Canada during documentary discovery requests in 1999 and by information supplied by the Investor.		

The Investor and the Investment were only able to complete seven contracts for PCB waste remediation, after the *PCB Waste Export Ban* was finally removed, for which they received revenues of CDN\$ 182,256.

15. Canada's unlawful acts adversely affected the business dealings of S.D. Myers, Inc. and Myers Canada, *inter alia*, by:

<sup>6</sup> The summary in Table 1 does not include the inventories of PCB contaminated wastes held by the Government of Canada other than those upon which it bid. For example, the Investor made a bid to the Canadian Department of Defence in 1995. Documents provided to the Investor through Canada's Access to Information procedure confirmed that this contract was not awarded to the Investor solely on the basis that the Investor was non-Canadian in violation of Canada's obligations to provide national treatment to S.D. Myers, Inc. as an American investor operating in Canada.

- a) Preventing the operation of contracts and purchase orders from Canadian customers;
  - b) Interfering in the bidding process for these customers; and
  - c) Harming the ongoing business relationships created by S.D. Myers, Inc. and Myers Canada.
16. S.D. Myers, Inc. and Myers Canada would have found success in the general PCB waste remediation market in Canada but for Canada's unlawful acts. In the US market, S.D. Myers, Inc. held a 48% average share of the entire US market for PCB transformer remediation and the company had a general success rate of 45% upon all market bids. In Canada, it would appear that S.D. Myers, Inc. and Myers Canada would have received a success rate on bids no less than its US experience of 45%. Indeed, the Investor submits that on account of the following factors, S.D. Myers, Inc. and Myers Canada should reasonably be expected to have a Canadian success rate far in excess of 45%.
- a) There were far fewer competitors operating in the Canadian market than in the American market;
  - b) S.D. Myers, Inc. and Myers Canada provided PCB waste remediation quotes that were significantly lower than the listed prices of their principal Canadian competitors;
  - c) In most cases, there were shorter transportation distances for customers remediating wastes at the S.D. Myers, Inc. Tallmadge facility in comparison with its main Canadian competitor. However, the marketing abilities of S.D. Myers, Inc. and Myers Canada were so strong that waste holders located in Northern Alberta (close to Chem-Security) decided to do business with S.D. Myers, Inc. rather than Canadian competitors; and
  - d) S. D. Myers, Inc. and Myers Canada maintained ongoing customer contracts and post-contract support.
17. The losses suffered by S. D. Myers, Inc. and Myers Canada as a result of Canada's unlawful measures are not speculative, as the Investor engaged in similar waste remediation services in the US and was successful at it. The Canadian operations merely represented a new market for the Investor's already established and successful business operations.
18. S.D. Myers, Inc. had a very high success rate in the highly competitive US market which had a number of other competitors engaged in marketing to customers at similar or lower prices. In the Canadian market, where there were far fewer competitors with significantly higher waste remediation quotes, one would expect S.D. Myers, Inc. and Myers Canada to perform significantly better. As a result of these factors, especially in light of the value

of S.D. Myers, Inc. and Myers Canada actions as first mover in the Canadian market, the Investor submits that its success rate in Canada would likely have been between 66% to 75%.

19. Government activity had a devastating effect on unconfirmed business orders and access to the rest of the Canadian PCB remediation market was destroyed by Canada's unlawful measures. The total amount of general PCB market revenue lost by S.D. Myers, Inc. and Myers Canada due to Canada's unlawful acts can be calculated on the following range:

<u>% Market Share</u>	<u>Revenue loss<sup>7</sup></u>
50%	43,933,688
66%	57,482,506
75%	65,103,733

20. In addition, the Investor and Investment suffered out-of-pocket damages of US\$2,446,421, not including professional costs or the costs of this arbitration.
21. As a result of these lost revenues, the Investor and Investment have suffered a loss of profit as follows:

<u>% Market Share</u>	<u>Lost Profits<sup>8</sup></u>
50%	28,923,421
66%	36,861,421
75%	41,581,421

22. As a result of Canada's unlawful actions, the Investor has lost significant business opportunities and has also been forced to incur significant costs that it would otherwise not have incurred but for these actions. These losses include lost corporate opportunities.
23. According to the financial statements of S.D. Myers, Inc. and Myers Canada, the companies avoided the use of debt in their business, preferring to engage in self-financing. If Canada had not acted illegally in closing the Canadian border in November 1995, the Investor and the Investment would have been able to earn significant profits from their activities. Accordingly, it is likely that the Investor and the Investment would

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<sup>7</sup> Losses in US dollars includes lost orders and lost markets. This calculation takes into account a higher success rate for orders issued to the companies that had been prevented by Canada's unlawful measures than for those quotes issued by the companies but not accepted by the potential customer.

<sup>8</sup> Losses in US dollars include lost cash flow from business and out-of-pocket costs.



have re-invested the free revenue generated from its Canadian operations back into company operations, or in another business enterprise that would provide a rate of return equal to, or greater than, their own internal rate of return within their own companies.

24. International case law supports the proposition that the amount of compensation should reflect the lost opportunity cost of the cash flow that would have been generated by the enterprise but for the illegal act given the circumstances of each case. Therefore, in these circumstances, the Investor and its Investment would have been able to generate an equity rate of return upon the profits from its Canadian operations. The re-deployment of this cash flow would have begun immediately in November 1995 and would have extended well after the time it submitted the Notice of Intent to Submit a Claim to Arbitration in July 1998.
25. In addition, the Investor submits that this rate of return, applicable for the pre-judgment period in this claim, should be set on the basis of the internal rate of return of the Investor and Investment.
26. The award for compensating the Investor and the Investment for the lost opportunity of access to this cash flow would reflect the damages incurred directly arising from Canada's unlawful *PCB Waste Export Ban* in November, 1995. Therefore, the Investor is entitled to receive compensation for the lost opportunities it had to use the revenues from its Canadian operations to further its business. This direct consequential loss must be based upon the opportunity lost by the Investor by not re-deploying its cash flow from its Canadian-based business operation.

27. As a result of these lost opportunities, the Investor and Investment have suffered the following aggregate losses, not including costs and disbursements:

<u>% Market Share</u>	<u>Further Losses<sup>9</sup></u>	<u>Total Loss<sup>10</sup></u>
50%	26,725,000	55,648,421
66%	34,060,000	70,921,421
75%	38,421,000	80,002,421

The Investor submits that this Tribunal should award damages to the Investor in this case based on a Canadian market share set at not less than 66% of the Canadian market.

28. In light of the foregoing, the Investor seeks the following amounts of damages to be payable immediately from Canada:
- no less than US\$70,921,421 and up to US\$80,002,421 for income loss to the Investment and Investor; and
  - An amount to be fixed for the costs and disbursements for professional and experts advisors and the costs of this arbitration.

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<sup>9</sup> Losses are in US dollars and reflect investment income on lost profits and have been rounded to the nearest thousand dollars.

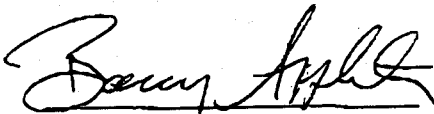
<sup>10</sup> Losses in US dollars have been rounded to nearest thousand dollars. Total losses include lost opportunity costs on the lost profits to the expected date of judgment in 2001.

**SUBMISSIONS**

In view of the facts and arguments set out in this Summary, the Investor requests the following relief:

- a) Canada be hereby ordered to pay compensation to the order of the Investor in the amount of not less than US SEVENTY MILLION, NINE HUNDRED AND TWENTY ONE THOUSAND dollars.
- b) Canada be hereby ordered to pay all the costs of this arbitration, including but not limited to:
  - i) the full costs of this arbitration Tribunal;
  - ii) the professional fees and disbursements of professionals used by the Investor to prepare, negotiate and prosecute this claim;
  - iii) appropriate post-judgement interest on these amounts at a commercial rate of interest.

Submitted this 16<sup>th</sup> day of January, 2001



Barry Appleton  
for APPLETON & ASSOCIATES INTERNATIONAL LAWYERS

816 Connecticut Ave NW, Suite 1200  
Washington, DC

Counsel for the Investor, S.D. Myers, Inc.