

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

BETWEEN:

S.D. MYERS, INC.

Claimant

-and-

GOVERNMENT OF CANADA

Respondent

**REJOINDER MEMORIAL OF THE GOVERNMENT OF CANADA
(DAMAGES PHASE)**

August 31, 2001

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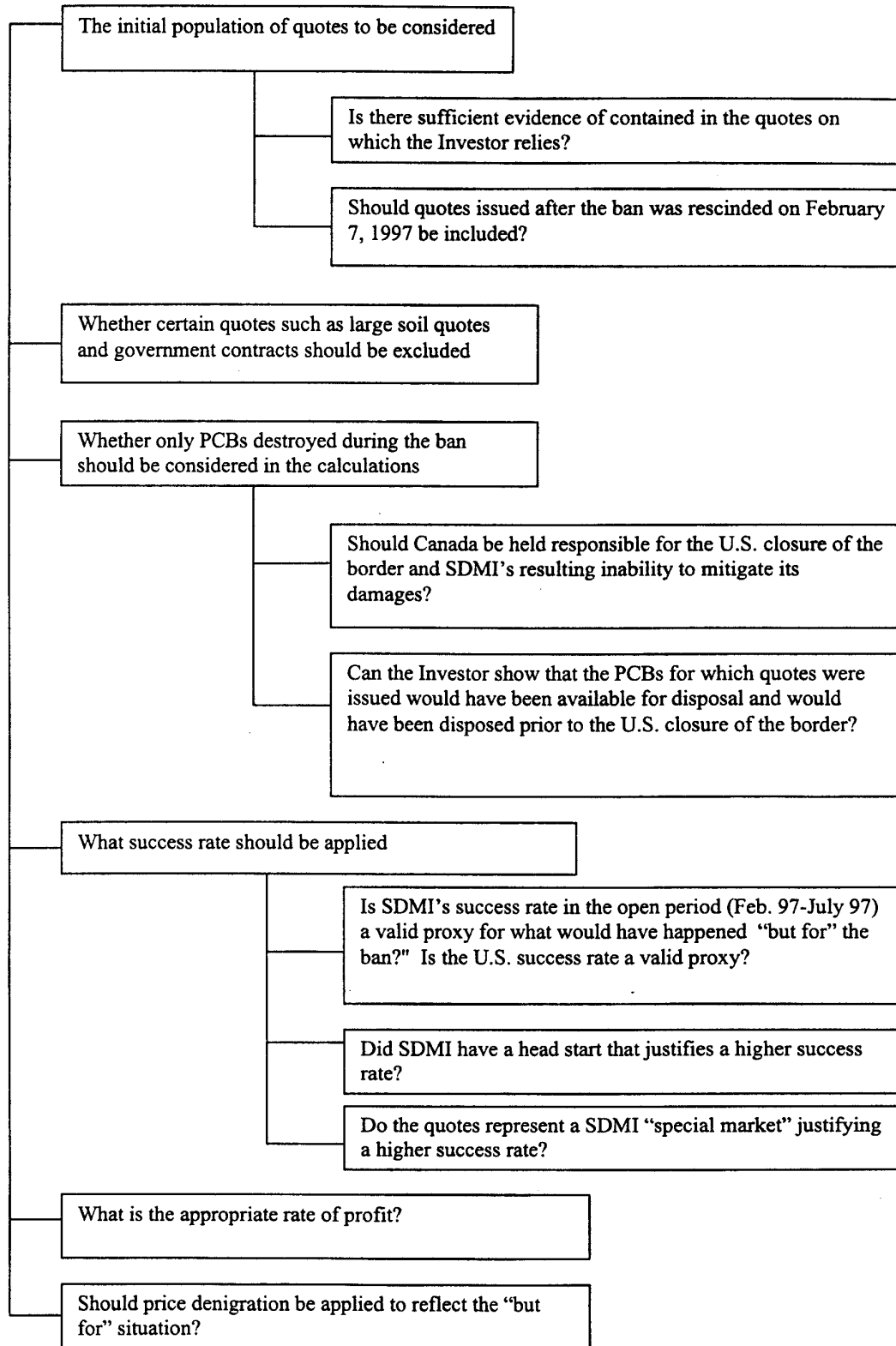
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PART A: The Investor's Case: A Moving Target

1. On August 10, 2001, the Investor responded to Canada's Counter-Memorial by reducing the amount of its claim and submitting additional material. The reduced claim attempts to respond to criticisms levelled by Canada and its experts in assertions made in the Investor's Memorial. Like its predecessor, the amended claim contains serious arithmetic errors, faulty or incomplete assumptions and methodological flaws. It also presents a new evidentiary foundation for the amount of the claim. That evidentiary foundation lacks credibility and, in any event, supports Canada's theory of damages. Finally, the amended claim misstates or misrepresents testimony offered by Canada's experts.
2. The Investor initially submitted a damage claim substantially greater than that which could be anticipated from its pleadings. While the evidence offered in support of the claim was woefully inadequate, its size compelled Canada to expend considerable time and money locating relevant information and developing its response. After considerable effort, including the intervention of the Tribunal to obtain access to information relevant to Canada's defence, Canada submitted its Counter-Memorial.
3. Canada's Counter-Memorial caused the Investor to reconsider its position regarding the relevance of evidence previously requested by Canada and led it to search for new information to refute Canada's arguments. This resulted in the introduction of considerable new evidence which now forms the foundation of the Investor's claim. The Investor's Reply includes more than two thousand pages of new "evidence" and three new expert reports, in addition to the Revised Rosen Report.
4. The Investor now submits a revised claim based on "new" evidence. It controlled all the "new" evidence upon which it now relies and it appears the information was available to the company earlier through due diligence. Canada had previously requested production of much of this information and received responses that the requested information did not exist or was not relevant to the proceedings.
5. The introduction of this new evidence at the eleventh hour, after repeated assurances by the Investor that the entire evidentiary record to be relied upon had been produced, undermines the process established by the Tribunal to establish the relevant facts, and narrow the factual and legal issues for determination. This process included specific procedures and timelines for discovery, and the exchange of expert reports and submissions based on information obtained through discovery.
6. Furthermore, the Investor has once again modified its numbers, the list bids and quotes on which it relies and the amount of its claim.

PART B: The Case Before The Tribunal

7. Canada maintains its position as fully set out in the Counter Memorial. There is no change to the legal theory of Canada's case. However, Canada must submit new reports from its experts to answer the new claim and purported evidence as well as the new numbers submitted by the Investor and its experts.
8. Moreover, Canada must address certain fundamental flaws in the Investor's legal analysis and evidence. The proper disposition of these issues will lead the Tribunal to the correct valuation of the Investor's claim.
9. First, the Tribunal must determine what is the investment and whether part of the Investor's Claim is beyond the scope of Chapter Eleven. This will lead to a determination of:
 - whether damages to Myers Canada only are compensable;
 - or whether damages to the U.S. operations should also be included.
10. Second, the Tribunal must decide what methodology is appropriate in the circumstances, given the nature of the breach. Three approaches have been suggested by the disputing parties.
 - (a) reimbursement of expenditures (Canada's Alternative 1)
 - (b) delay compensation (Canada's alternative 2)
 - (c) loss of cash flow/contribution margin approach (Canada's alternative 3 and Investor's approach)
11. If the Tribunal retains Canada's alternatives 1 or 2, there is no disagreement between the parties as to the amount of compensation. If the Tribunal retains the Investor's approach and Canada's alternative 3, then it must answer a number of questions outlined in the chart below.
12. Third, the Tribunal must decide what out-of-pocket or incremental expenses were incurred, as a result of Canada's breach.
13. Fourth, the Tribunal must determine the appropriate pre-judgement and post-judgement interest rates to be applied.



PART C: Evidentiary Issues

1. Telephone Logs

14. SDMI and Mr. Rosen rely on approximately two thousand pages of telephone logs introduced in the Reply Memorial and Revised Rosen Report. These telephone logs purport to be notes taken by SDMI sales staff of conversations with potential Canadian clients. This new material is the foundation upon which the Investor now seeks to support its inflated damages claim.
15. The Investor bears the burden of authenticating and proving the new material's admissibility and reliability. It failed to do so. Nevertheless the Investor now relies on the logs not only for the truth of the statements of the sales staff, but further submits them as scientific survey evidence¹ of client and market attitudes and suggests that they support the overstated market share claimed by the Investor.
16. After the Investor first disclosed the existence of this material to Canada and the Tribunal, Canada requested information to authenticate and determine the reliability and veracity of the telephone logs.² In response, the Investor noted that the material was recently "created", presumably from a database containing information covered by Canada's production requests. Canada received no response to its inquiries regarding when the logs were created, whether the notes were made contemporaneously with the telephone calls and contacts with customers, the date of first and last entry, the name of employees making the comments, how the comments were entered, and an explanation of the codes referenced in the notes.³
17. The telephone logs are unreliable for the following reasons:
- There is no evidence concerning who created these logs, when the notes were entered, if they accurately reflect the conversations recorded or whether the notes were prepared contemporaneously with the telephone calls;
 - The logs represent only some of the calls made⁴ to PCB owners and only reflect the perception of the SDMI sales staff;
 - There is no indication of whether the sales notes purport to record or comment on entire conversations or merely selective topics;
 - The logs provide no indication of how the notes were entered or taken. Nor is there evidence that any system was in place to ensure consistent and accurate note-taking by sales staff; and
 - There is no evidence that management used or relied upon these logs for any purpose. Indeed, at the hearing on June 21, 2001, Mr. Appleton noted that

¹ Investor's Reply Memorial, para. 93; Revised Rosen Report, Section 2 at p.3.

² Canada's Letter to Investor dated July 10, 2001.

³ Investor's letter to Canada dated July 11, 2001.

⁴ Counsel for SDMI states in his letter of August 15, 2001 that the telephone logs do not represent all the calls made by SDMI.

management did not know this information existed. If the Investor had relied upon or used these reports for management purposes, one would have expected that secondary evidence of their existence and utility (in the form of memoranda, e-mails between management or the like) would have been provided.

18. Canada has had no opportunity to test this evidence. The sales staff that recorded these notes will not be presented to testify about their completeness or accuracy. There is no means to determine why logs do not exist for at least 100 quotes relied on by the Investor. Were these prospective clients never contacted? Is it simply an indication of the selective nature of the information?
19. Moreover, these telephone logs are not customer comments or surveys, as portrayed by the Investor. Rather, they are notes from SDMI sales staff relating to telephone conversations with Canadian PCB owners who SDMI considered potential Canadian customers. Furthermore, contrary to the Investor's characterization, some entries suggest that the notes include comments from companies that were not necessarily potential customers of PCB disposal services.⁵
20. The Investor proffers selective notes by sales staff as a contemporaneous record of customer attitudes and concerns from 1995-1997 as if it were tantamount to a survey.⁶ These notes are not a market survey and cannot be used in that way. There is no evidence of any scientific methodology or any regularity in the data collection reflected in the telephone logs. In contrast, the White and Associates conducted its survey of Canadian PCB owners to which SDMI issued quotes following a consistent and objective methodology for the collection of data.⁷ The Tribunal must reject the Investor's characterization and the statistical use made of the logs by Rosen in his Revised Report.
21. The telephone logs have not been authenticated and contain the biases of the sales staff entering them. In addition, the Investor relies on the logs to support propositions such as, "the PCB owners were not concerned with U.S. liability"⁸ or that "there was no competition for SDMI besides Chem-Security." Any conclusion drawn or inference as to the prevailing market attitude could be seriously misleading.⁹ It is equally as plausible that all the notes prove is that the sales staff did not report all elements of the conversation, that the question was never asked, or that the customer had the concern but did not raise it.¹⁰ The notes cannot support the Investor's broad conclusions, but can only be used to reflect what some PCB owners said.

⁵ See Customer Comments List A-N, p.107 where telephone log indicates that solicitor-client privilege material from the Investor's attorney, Appleton & Associates were removed. Clearly, Appleton & Associates were not potential customers of PCB disposal services.

⁶ Investor's Reply Memorial at para. 93.

⁷ Doug White Report, Section 3.0; White Supplemental Statement, Part E (6).

⁸ Investor's Reply Memorial at para. 65.

⁹ White Supplemental Statement, Section 4.

¹⁰ White Supplemental Statement, Section 4.

22. Mr. Rosen's extensive reliance on these notes in his Revised Report leads to flawed conclusions regarding the PCB waste disposal market in Canada and to an overstated success rate of what SDMI might have achieved but for the event.
23. Given the Investor's failure to authenticate the telephone logs and considering their unreliability, the Tribunal should give them very little weight, if any. In any event, the telephone logs do not stand for the propositions proffered by the Investor, but in fact this material supports Canada's theory of damages.

2. Unsubstantiated Quotes

24. The Investor's Reply Memorial adds about \$30M of new alleged quotes to its calculations of damages. Included in these are two alleged quotes to Public Works Canada¹¹ (Quebec project) totalling \$21M. The supporting documentation justifies the inclusion of only \$1.165M of these quotes.¹² As there is no evidence to support the balance of the \$21M, the remainder should be excluded from the claim.
25. The Investor also includes undocumented quotes worth about \$7.2 million¹³ based on SDMI's "Investor/Investment client list"¹⁴ in its damage calculation. According to Mr. Appleton, his client prepared this list on September 13, 1998¹⁵ and it details the names of companies contacted and amounts quoted during 1995-1996¹⁶ for which the Investor could not locate supporting documentation.¹⁷ This list is not valid evidence in support of the existence of quotes in these amounts. It is questionable whether someone, without access to supporting documentation, can remember years after the fact the specific dates and companies contacted and the amount of each quote down to the last dollar. Furthermore, the creator(s) of the list submitted no statement supporting it. These factors raises suspicions regarding the accuracy, veracity and reliability of this "evidence". Hence, it should receive no weight and the unsupported quotes should be excluded from the calculation of damages.

3. U.S. Quotes Data

26. The Investor's Reply and the Revised Rosen Report also introduce, for the first time, almost 200 pages of data on U.S. PCB orders and quotes to support the claimed 66% success rate.¹⁸

¹¹ Additional reasons to exclude the Public Works Canada quotes will be canvassed in Section C(c)(i), *infra*.

¹² KPMG Reply Report, Section 5.3, p. 25.

¹³ KPMG Reply Report, Section 5.3 para. 2 pp. 26-27. KPMG has included some of these quotes not produced on the basis of references found in the telephone logs. As a result, KPMG's calculations only exclude \$2.4 million of quotes for which absolutely no evidence exists. Because of Canada's concerns about the veracity and creation of the telephone logs. Canada takes the position that the complete amount of \$7.2 million for which no hard copy documentation of the quote exist should be excluded.

¹⁴ Revised Rosen Report, at pages 17-18.

¹⁵ Letter from Mr. Appleton dated August 21, 2001.

¹⁶ In numerous cases no date is provided.

¹⁷ Revised Rosen Report.

¹⁸ Moreover, this evidence does not support the 66% success rate advanced by Mr. Rosen. The U.S. bids and order

27. Canada questions the veracity and reliability of this evidence as well as the relevance and validity of the calculation based on this data.¹⁹ The value of the orders recorded in the U.S. data appears to be considerably less than the sales recorded by SDMI for PCB related business. This suggests the evidence provided is incomplete and any reliance on it to assess market share may be misleading. Also, it is suspect that the value of the successful quotes is equal to the revenue generated from these quotes, given that quotes are based on estimated amounts of PCBs which are adjusted after the Investor determines the actual quantity.²⁰ Hence, little or no weight should be given to this evidence.

PART D: The Investor's Own Evidence Supports Canada's Theory Of Damages

28. Leaving aside Canada's earlier comments and caution regarding the reliability of the telephone logs, this material, in fact, supports Canada's theory of damages. Moreover, this new evidence contradicts numerous assertions by the Investor regarding, among others things, the absence of competition, its potential market share and its alleged head start over the competition.

1. SDMI's Quote Prices Were Not Always Lower than the Competition

29. Contrary to S.D. Myers' assertions in the liability phase,²¹ SDMI's quoted prices were not consistently less than its competitors. The logs indicate that the market was very price sensitive and that in several instances SDMI lost quotations because they were too high, not because of the border closure. With the announced entry of U.S. competition in the Canadian market, Canadian PCB disposal companies reacted rapidly and lowered their prices to become competitive.²² Chem-Security lowered its prices considerably in response to increased competition.²³ The Investor itself acknowledges this and claims the entry of the U.S. competition into the Canadian market caused a price decrease.²⁴
30. By November 1995, when SDMI would first have been authorized by the EPA to import Canadian PCBs to the U.S., it would no longer have had a significant price

show a success rate of 46.9% for 1990-1997. For the years 1990-1994, the success rate ranges from 19.3% to 52.6% and averages of 38.5% for the years 1990-1994. See Section 5.7 of KPMG's Rebuttal Report for a discussion of the validity of this data and anomalies noted.

¹⁹ KPMG Reply Report, Section 5.7, p. 35; KPMG writes: the raw data from which Mr. Rosen's table was prepared shows that in every single case, the value of the successful quotes was equal to the value of the revenue generated from those quotes. The coincidence is impossible. Generally, SDMI issues quotes based on estimated quantities – for example, drums of material are generally quoted by SDMI as though full. Once the material arrives in Tallmadge and is verified, the customer is charged for the actual amount of material. There will be a difference between the quoted amount and the actual revenue.

²⁰ Many proposal letters from Myers representatives state that invoicing will be based on actual gross weight received at S.D. Myers, Inc. See, for example, Investor's Contractual Documents, Vol. 1, Tabs 57 and 98; Vol. 7, Tabs 661 and 662; Vol. 10, Tabs 776 and 793; Vol. 14, Tabs 924 and 937.

²¹ Investor's Memorial, Part 1: The Facts; Who Destroys PCBs in Canada, p.6..

²² Stillman Report, at 10; White Report, Section 8, Stillman Report at paras 10-11.

²³ White Report, Section 9.4

²⁴ Rosen Report at p.19.

advantage over the competition. By January 1996, when the U.S. competition would have entered the Canadian market but for the Event, SDMI would have lost its price advantage. The telephone logs indicates that SDMI may have underestimated the ability of the Canadian PCB disposal companies to compete and that, as a result, it lost many quotes because of the earlier higher price estimates.²⁵

31. The telephone logs relied upon by SDMI and Mr. Rosen indicate about fifty (50) instances where S.D. Myers lost a PCB disposal contract because it was more expensive than its competitors.²⁶ A few samples of the relevant logs appear below.

81-Brookfield Development [quote/order issued 6 October 1995 for \$81,408]: 12/11/95 CAN 77 – **Leo told me we were at 81K and the job went for about 27 K to a ballast reduction company.**²⁷

763-Stanfields Ltd. [quote/order issued 20 Nov 1995 for \$8,326]: 12/04/95 10:13 A CAN 77 **Called Andy, said he found a lower price. He will not help us. QUOTE DEAD.**²⁸

251-Gaspesia Paper [quote/order issued 19 August 1996 for \$58,302]: 10/04/96 9:32 A CAN 79 M. rioux (sic) **told me that they are negotiating w/ PCB Disposal our price was 58,302 and their (sic) is somewhat 15% to 20% cheaper, theris (sic) still a chance PCB Disposal may not agreed (sic) on some service agreement topics required by the customer. If I don't hear from them in two weeks it would mean that finally signed w/ them.**²⁹

510-Mobil Chemical Canada Ltd. [quote/order issued 5 January 1996 for \$3,973]: 5/28/96 4:07 P CAN 81A DISP - called Eric and asked for the REAL reason they cancelled disp. order. **He said they weren't comfortable shipping across border, the border isn't open, and the #1 reason, Chem. Sec. gave it to them for ½ our cost. He said that because the border is going to open soon, prices are coming down. Said thanks for the info.**³⁰

(emphasis added)

See Appendix A for other examples

32. The telephone logs confirm the price sensitivity of the market. Mr. Wallace, SDMI's own PCB expert, also acknowledges this:

In my experience, the PCB disposal market in Canada in 1995-1997, and up to the present time was and is purely price-driven.³¹ (Emphasis in original)

²⁵ Customer Comments List A-N, p. 111: 42-Armstrong [quote/order issued 1 March 1996 for \$24,551]: 2/25/97 (pg. 117) Can 79A – Finally reached him followed on up on news release but **says he got a better price than what we gave him a year ago so he gave them the contract without even calling us to see if we could do any better.**

²⁶ There may of course be more as PCB owners did not always indicate why they chose another PCB disposal company over SDMI.

²⁷ Customer Comments List A-N, p. 239.

²⁸ Customer Comments List O-Y, p. 374.

²⁹ Customer Comments List A-N, p. 663.

³⁰ Customer Comments List A-N, p. 1142.

³¹ Statement of Peter Wallace, paragraph 16.

33. Myers sales staff themselves appeared frustrated by the fact that prices drove most customers purchasing decisions.

628-Praxair [quote/order issued 11 April 1996 for \$45,638]: 4/12/96 10:46 A CAN 80A Hassan called back. Now he tells me that he doesn't necessarily make the decisions, that is left up to each plant, because they have to pay for it. Asked why, then, did we quote the work grouping 6 plants together? Then he says that the \$\$ will come from a corp. budget. Tried to fact-find & 3+ (sic) the decision-making process, all I ended up doing was getting him PO'd at me. Said he'd never been asked these ?s (sic) before, and the other co.'s that have quoted the job did it w/o ever calling him. **Told him all I was attempting to do was find out the criteria used to make a decision in the \$50k region, and told him that if he was looking only for lowball, I'm not it. He changed his mind on the low bid criteria AT LEAST three times in the conversation. Told me to "send my best price" and they will consider it. Told him again, if lowball is all that matters, then I'm wasting his time to quote the job. I used every Sandler method I knew, but know no more than when I started. Will fax quote to him to make him happy. Quote \$45,638. Snowballs in H— have a better chance than I do.**³²

(emphasis added)

2. U.S. Liability is a Factor

34. While the Investor argues that there was no basis for customer fears of U.S. liability, many customers simply refused to send their waste to the U.S. because of liability concerns. A number of potential customers said as much to SDMI sales staff.

684-Rockwell International Corp. [quote/order issued 24 May 1996 for \$36,266]: 10/28/96 1:42 P CAN 65 BOB SEZ **ALL PCB'S WILL GO TO SWAN HILL CAUSE THAT IS WHERE THE CORP. LAWYERS WANT IT TO GO. THEY SAY LESS LIABILITY THERE THAN IN THE STATES. SEZ THIS WILL TAKE CARE OF ALL THERE DISPOSAL NEEDS.**³³

279-Goodyear, Quebec [quote/order issued 13 February 1997 for \$10,702]: 3/04/97 9:29 A CAN 65 SPOKE WITH DAVE, HE SAYS A DECISION WAS MADE AT CORP. TO KEEP ALL THE MATERIAL IN, **THEY HAVE SELECTED SWAN HILLS FOR DISPOSAL, SAYS SUPERFUND LIABILITY WAS THE MAIN REASON, TRIED TO EXPLAIN SOME THINGS TO HIM THAT IT WAS A BIG SNOW JOB ON FEAR BUT HE SAID IT WAS MADE WELL ABOVE HIM BY ATTORNEYS, HE SAYS THEY WOULD HAVE NO LIABILITY FROM SWAN HILLS IF THEY WENT OUT OF BUSINESS AND THEIR MATERIAL WAS LEFT UNPROCESSED.**³⁴

88-Cadillac Fairview [quote/order issued on 11 February 1997 for \$55,557]: 7/10/97 CAN 79A – Finally got a hold of Mme Malo. She says David Handly V-P Env decided not to send his PCB's to the U.S. for destruction, **wants them destroyed in Canada even if its more expensive.**³⁵

(emphasis added)

³² Customer Comments List O-Y, p. 138.

³³ Customer Comments List O-Y, p. 234.

³⁴ Customer Comments List A-N, p. 706.

³⁵ Customer Comments List A-N, p. 257.

See Appendix B for further examples

35. Even where SDMI's quoted prices were lower than Canadian competitors, some PCB holders were not prepared to ship to the U.S. because of concerns about U.S. liability, additional administrative burdens related to border crossing or existing relationships with Chem Security or other PCB disposal companies.

721-Scarborough Town Centre [quote/order issued on 24 March 1997 for \$8145]: 7/29/97 11:17 A CAN 80 Marcel called. Two months ago he used Eric Smith and had him reduce the ballasts to 2 and a half drums and sent to SH. Supposedly they tested the pitch and it came back <50ppm. Yeah, right. Marcel said the cost was the same, but he has heard nasty things about shipping to the U.S. and he did not want to be hassled with shipping trans-border. Told him I have been trying to keep in touch with him and that I wish I would have had an opportunity to discuss the "rumors" before he made his decision. They may have more in the future. Will keep in touch.³⁶

258-General Mills Canada Inc. [quote/order issued 6 Oct 1995 for \$8,357]: 10/16/95 4:22 P CAN ED R&R, GREG MOLLOY ANSWERED MY CALL. **GREG IS NAVINS (sic) BOSS. HE SAID THEY WILL PROBABLY USE CHEM SINCE THEY ARE CANADIAN AND ARE VERY CLOSE TO OUR PRICE. TOLD HIM OUR PRICE WAS BUDGETARY AND IT WOULD GO LOWER WHEN WE ACTUALLY PRICED. HE SAID SEND ANOTHER QUOTE THEN. I ASKED HIM IF HE WAS JUST TRYING TO KEEP OUR QUOTERS BUSY OR IF HE REALLY WANTED ANOTHER QUOTE WHICH I THINK SURPRISED HIM. I SAID I DONT WORK REAL HARD FOR \$6K ORDERS. I THEN TOLD HIM HE WOULD PROBABLY USE THEM ANYWAY AND HE SAID YES PROBABLY EVEN IF THEY WERE HIGHER. MAY BE WORTH A SHOT WHEN BORDER IS OPEN JUST TO HAMMER HIM BUT NOT TILL THEN.**³⁷

(emphasis added)

36. Some companies even had policies not to ship to the U.S. In fact, some of the companies most vehemently opposed to shipping to the U.S. for disposal were Canadian branches of U.S. parent companies.³⁸

3. No Motivation to Dispose of PCBs

37. The Investor's theory assumes that all PCB owners to whom it issued quotes were actually in the market for PCB disposal services and it was just a matter of determining who would get the business. The telephone logs paint a different picture. Several companies said they would keep their PCBs in storage rather than dispose of them. For the most part, companies with sufficient storage space were not interested in disposing of their PCBs at the time. Storage was simpler and cheaper.

325-Grey County Board of Education [quote/order issued 28 September 1995 for \$118,846] 9/30/96 8:32 A CAN 65 ARCHIE RETURNED MY CALL. **TOLD HIM BORDER WAS TO OPEN AND HE SEZ DON'T HOLD YOUR BREATH. SEZ HAS 10 YEARS LEFT ON HIS STORAGE AND IN NO HURRY TO DISP.**³⁹

³⁶ Customer Comments List O-Y, p. 288.

³⁷ Customer Comments List A-N, p. 673.

³⁸ Doug White Report, Section 4.

³⁹ Customer Comments List A-N, p.734.

619-Plastomer Inc. [quote/order issued 20 October 1995 for \$7,908]: 11/14/95 9:30 A CAN C2 A1 was shocked and astounded to view our budgetary price. He pointed out that it was much cheaper to keep storing his capacitors than dispose of them. I pointed out it was a very fair price and asked him what he thought would be a proper price. He said \$1000. When I regained consciousness, I pointed out his potential liability was much more than that, that the market was ripe for good pricing, and that did he understand this was not just landfilling, but a honest-to-goodness destruction process? He said he would call in 3 months to see if our prices go down. I told him, no, we'll call YOU in 3 months to see if you have any money to spend. Poorly qualified customer.⁴⁰

49-Atlas Alloys: [quote/order issued 8 November 1995 for \$3,514]: 10/04/96 CAN 80A – Called Brian, they have no intention of sending the PCBs anywhere. He said that since they spent all that money on their storage bldg. and it only takes their maint. guy 5 min. per month to inspect, it's not hurting anyone where it is. Told him I'd touch base from time to time to see if that changes. He said that was fine.⁴¹

32- Amoco Canada Petroleum [quote/order issued 17 November 1995 for \$5,951]: 12/14/95 CAN 65 A - Tom has heard about Fifth Estate and Sheila Copps and C.S. in Alberta. Our price looks favorable compared to what he has seen, but he talked to management and not interested in disposing cuz they just build (sic) their storage facility. (...)

6/12/97 CAN 81 DISP – talked to Tom, disposal isn't a concern at all at this time. Still adding ballasts to inventory of three drums and they have plenty of storage space. We are on list of bidders when they decide to dispose but won't be this year.⁴²

719-Sask Power [quote/order issued 30 May 1996 for \$4,259,018]: 11/01/95 11:00 A CAN 77 Called for Brian, said they have been getting additional material, **but they have so much storage they they can accumulate pcb's for the next 10 years**, no pain to dispose.⁴³

(emphasis added)

38. Furthermore some companies to which SDMI issued quotes indicated that they would not dispose of their PCBs unless required by law to do so. Unlike the United States, no Canadian regulation compelled PCB owners to dispose of their PCBs within a particular period of time.⁴⁴ As a result, even when disposal prices became more affordable, storage remained the cheaper option. For budgetary reasons, some PCB owners lacked the motivation to incur the additional expense related to PCB disposal.⁴⁵

193-Dominion Bridge: [quote/order issued 13 November 1995 for \$205,775] 2/05/96 3:01P CAN 79 **decision is to wait couple years.**

10/08/96 8:47 A CAN 79 **They will wait until regs will forced (sic) them to dispose.**

⁴⁰ Customer Comments List A-N, p.389.

⁴¹ Customer Comments List A-N, p. 125.

⁴² Customer Comments List A-N, p. 98.

⁴³ Customer Comments List O-Y, p.276.

⁴⁴ The Investor therefore cannot claim the same success rate for turning quotes into orders as it did in the U.S.

⁴⁵ The Investor was competing against the "status quo" of maintaining PCBs in storage as opposed to the more costly disposal option. Also see: Counter Memorial (Damages Phase) at para 132.

12/18/96 11:12 A CAN 81 DISP - Gordon Koch N.L.W.Co.. Talked to Ted Bridge I think his name is. He confirmed last comment. However, they do own some trannies and those are the ones w/pcbs in them. **He isn't planning on doing anything about them until he has to.** Asked how good of shape the units are in and he said he brings people in to take care of them. Said I would touch base every now and then. Great.⁴⁶

451-Lakehead University [quote/order issued 16 November 1995 for \$2,793]: 5/06/96 8:30 A CAN 81A DISP - Walt. **says no shipping until mandatory. Said because of the massive cuts in funding, doesn't have the money anyway. Wait til law demands they get rid of pcb.**⁴⁷

190-Doctors Hospital: [quote/order issued 22 November 1995 for \$7,402]: 12/12/96 12:36 N CAN 80A David called, said that **they are sitting on their PCBs until federally/provincially mandated to dispose of. Said to kill the quote.** Will do.⁴⁸

76-Boonstra and Reiding Ltd. [quote/order issued 4 January 1996 for \$2,320]: 12/05/96 CAN 80A – Called Kevin, he said that **even after I sharpened the quote from \$2300 to \$1700, they will not spend the \$\$ unless MOEE tells them to.** No interest in spending ANY \$\$ on this. Killed quote.⁴⁹

912-Esco [quote/order issued 19 January 1996 for \$26,560]: 10/30/96 10:10 A CAN 80A Called Allan, he has his inventory but has no intentions of getting rid of it. When I pushed, he said that **they will not spend any money when they are not governmentally mandated to do so.** He asked not to be called again. I said no problem.⁵⁰

233-Fibres and Fils [quote/order issued 21 October 1996 for \$3,685]: 11/04/96 2:15 P CAN 79A CUSTOMER IS HAPPY WITH PRICE QUOTED BUT SAYS THAT HIS BOSS DOESN'T HAVE ANY BUDGET FOR NOW. **THEY WILL WAIT TILL A LEGISLATION IS PAST (sic) FORCING THEM TO GET RID OF THEIR PCB'S.**⁵¹

(emphasis added)

4. Even if Canada had not Imposed the Ban, SDMI Would Have Been Unable to Dispose of Many PCBs in the November 1995 to February 1997 Period

39. The Investor's damages theory incorrectly assumes that between November 1995 to February 1997, it would have been able to process all the PCBs on which it issued a quote, but for the ban. This is unrealistic.
40. Only a few PCB owners were anxious to dispose of their PCB waste. For the vast majority, PCB waste disposal was not a priority as storage was available and relatively risk-free. Moreover, no money had been budgeted by many PCB owners for disposal of wastes, which often led to 1-3 year delays. Some companies also had to go through formal tendering processes, which could take several months to

⁴⁶ Customer Comments List A-N, p. 496.

⁴⁷ Customer Comments List A-N, p. 995.

⁴⁸ Customer Comments List A-N, p. 493.

⁴⁹ Customer Comments List A-N, p. 221.

⁵⁰ Customer Comments List A-N, p. 589.

⁵¹ Customer Comments List A-N, p. 627.

complete. More generally, PCB owners wanted to wait to see how low prices would go before awarding the contract.⁵²

41. The Investor's own logs provide no support for Mr. Wallace's assertion that owners rushed to dispose of PCBs as soon as the Alberta and U.S. borders opened.⁵³
42. Because of the relative ease of storage, numerous PCB owners told S.D. Myers sales staff they were in no hurry to dispose of the wastes and they preferred waiting for the border to open.

460-461-London Transit Commission: [quotes/orders issued 9 September 1995 for \$47,447 and 14 November 1996 for \$26,296]: 2/10/97 1:55 P CAN 65 SPOKE WITH STEVE, THEY ARE INTERESTED IN OUR BID BUT HAVE NO MONEY FOR THIS YEAR TO GET RID OF IT, NO WAY AT ALL OF FINDING JUST A LITTLE, **STORAGE FACILITY IS EXCELLENT AND FEEL NO URGENCY.**⁵⁴

38-Apollo Forest Products [quote/order issued 8 Nov 1995 for \$18,913]: 4/30/96 CAN 77 – **Still holding out till the border opens.**

10/03/96 (pg. 112) CAN KT – Talked to Marcel he wanted to know if our price was the same I asked him if the inventory had changed he said no. He was going to talk to his boss about it there is no urgency to dispose.⁵⁵

401-Inter-Action Industries [quote/order issued 16 November 1995 for \$23,332]:

4/16/96 1:10 P CAN 77 talked to Bob, the Stephens Foundry that is closed is the site that **has the stored PCBS items, no rush to dipose (sic) of the waste**, Bob is not the decision maker, he said Pat could probably do it, Pat is out.

3/11/97 10:23 A CAN 79 **not decided yet on disposal time this year or next, told him that price are lower, may called (sic) if ready otherwise to be call next November.**⁵⁶

50-Ault Foods Ltd. [quote/order issued 24 January 1997 for \$1,100]: 1/05/96 CAN 80A – Talked to Bernie who I've talked to before -see comments under Ault Foods Ltd. He has never heard of Paul before or that they even have a plant in Windsor. He basically told me the same thing, **he would rather wait for the borders to open and that he won't do anything until they have a secure 2nd option.**⁵⁷

22-Albright and Wilson [quote/order issued 7 April 1997 for \$51,913]: 3/07/96 CAN 77 – This plant is being torn down. No production here, has a storage area, **no pain to dispose in 96.** OK to keep in touch, call back when the boarder (sic) opens.⁵⁸

⁵² White Supplemental Statement, Section 3.0; KPMG Rebuttal Report, Section 7, discuss many factors that would have delayed SDMI's conduct of the work beyond the U.S. L.C. Closure of the border or even the award of a disposal contract in the relevant period.

⁵³ Peter Wallace, para. 6.

⁵⁴ Customer Comments List A-N, p.1033.

⁵⁵ Customer Comments List A-N, p. 106.

⁵⁶ Customer Comments List A-N, p. 886.

⁵⁷ Customer Comments List A-N, p. 130.

⁵⁸ Customer Comments List A-N, p. 70.

5/24/96 CAN 77 – left message, **they still have their storage of PCBs.**⁵⁹

(emphasis added)

43. Even after receiving a quote, the decision to dispose of the PCBs was often far from being taken. Many of the quotes sent by SDMI were on undefined amounts or approximations of inventories which indicate that the decision making process was still in its early stages. Companies often requested quotes for budgeting purposes in future years. Disposing of PCBs was rarely a priority. Internal decision-making processes regarding disposal of PCBs often took several years.

565-Nova Scotia Power Corporation [quote/order issued 14 November 1995 for \$340,927]: 12/12/95 CAN 77 Jim Priddy has not done his homework and will not issue a PO#. Said he does not know who we are, asked him to check with Brenda McD. I was told she is not a decision maker. **They are 6 mo. away from making any decisions that will result in a order.** He will have to involve his environment people. I told him they should come down for a visit before they decide on anything. Visit S-H first then come see us on their way back.⁶⁰

161-Crown, Cork & Seal [quote/order issued 16 October 1996 for \$31,090]: 5/01/96 1:05 P CAN 80A S/C- met w/Jim. He wants the disposal of the caps quoted separately from the askarel. Also has, on the roof of the plant, (2) drained askarel xfmrs. Was quoted \$150K by local co. to rig and dispose of. **All decisions must be approved by corporate in Philadelphia. According to Jim, that process takes several months.** Has been quoted to use SH, but still feels that the \$\$ will go down once the border opens. Finally convinced him that the cost is staying where it's at.

12/05/96 1:34 P CAN 80A Called Jim, he is still waiting to hear from corporate in Philly. Said that he **wants to move the PCBs in the 1st half of 97.** If I don't hear from him by 1-15-97, give him a call.

2/10/97 8:43 A CAN 80A Called Jim, he said that he **has been flooded w/calls. What a surprise. He is still waiting on money from Philly, and asked me to call in 2 wks. Will do.**⁶¹

(emphasis added)

See Appendix C for other examples

44. Few companies had funds allocated to destroying PCBs. The necessity of budgeting such funds precluded fast disposal. Often, companies indicated to SDMI's sales staff that they would budget for a subsequent year and see if the funds for disposing would be approved. This resulted in 1 or 2 year delays (sometimes even longer) before the PCB owner could dispose of the PCBs. In many instances, the ban benefited SDMI in that it provided an opportunity for them to continue to cultivate potential business further and give PCB owners time to access funds to be ready to dispose of wastes once the border re-opened.

⁵⁹ Customer Comments List A-N, p. 69.

⁶⁰ Customer Comments List A-N, p. 1262.

⁶¹ Customer Comments List A-N, pp. 460-461.

121-Central Machinery and Metals [quote/order issued 20 September 1995 for \$954,851]: 6/13/96 2:37 P CAN 80 MARTHA JAMES (FAMILY MEMBER) TALKED TO ME AND SHE SAID THAT THE COMPANY IS VERY SMALL AND THAT THEY HAVE NO INTENTIONS OF DISPOSING OF THIS MATERIAL EVEN AT HALF THE COST. THEY DON'T HAVE THE MONEY. I WILL C.B. IN JAN. TO SEE IF EITHER THE REG. HAVE CHANGED OR THEY FIND THE MONEY.⁶²

474-Manitoulin Board of Education [quote/order issued 25 September 1995 for \$4,179]: 4/26/96 1:16 P CAN 81A DISP - Govern. cut budget big time. Wants me to call him back in Sept. We will both have a better handle on things at that time.⁶³

47-Atikokan Board of Education [quote/order issued 26 February 1996 for \$2,965]: 3/26/96 (pg. 128) CAN 77 – Called Murry (sic), gave me 3 leads for Hospital, Muni & hydro. Murry (sic) told me they have had the capital budget reduced and that forced the elimination of the PCB disposal project. Ok to keep in touch.⁶⁴

(emphasis added)

See Appendix D for more examples.

45. In some limited instances companies wished to dispose of their PCBs and could not wait until the border opened. More often, Canadian companies waited for the border to open to assess their options. Mr. White's reports indicate that many companies believed prices would drop further once the border opened and other competitors entered the market. The telephone logs relied upon by the Investor confirm this. PCB owners told SDMI to call back once the border re-opened because they thought they would get better prices.

566-567-Nutrite Inc. [quotes/orders issued 5 October 1995 for \$4,179 and 21 December 1995 for \$35,817]: 10/28/96 10:12 A CAN 81 SC - met w/Joshua, **very concerned if he ships to the U.S. he will end up in a super fund hassle.** Whats (sic) to know when we become the owners of the waste; who owns the ash; wants audit package sent. Wants something in writing that will convince him he won't get stuffed by shipping here. **Is in no hurry to ship to because he feels the price will drop greatly when the border does open.**⁶⁵

139-Coats Patons [quote/order issued 18 October 1995 for \$12,154]: 9/05/96 9:14 A CAN KT THEY STILL HAVE THERE (SIC) PCB INVENTORY AND HAVE NO PAIN JUST LIKE CRAIG SAID IN PREVIOUS NOTE, **HE SAID STILL TOO EXPENSIVE TO DISPOSE OF HE WOULD LIKE TO COMPARE PRICES WHEN THE BORDER OPENS. GT WOOD DOES THERE TESTING AND HAS DONE IT FOR 20 TO 30 YRS THEY DO YEARLY TESTING. TONY IS ALSO THE PERSON TO TALK TO CONCERNING TESTING.**⁶⁶

33-Amoco Fabrics and Fibres [quote/order issued 20 September 1995 for \$67,081]: 10/02/95 (pg. 105) CAN ED R&R – Jean is a good guy to talk to. **He said he is going to wait for a couple years to get rid of his PCBs because he believes the price will go down due to**

⁶² Customer Comments List A-N, p. 349.

⁶³ Customer Comments List A-N, p. 1070.

⁶⁴ Customer Comments List A-N, p. 121.

⁶⁵ Customer Comments List A-N, p. 1267.

⁶⁶ Customer Comments List A-N, p. 395.

competition. He has 36 drums of soil, 8 drums containing 16 caps. All low risk for storage he says. He wants us to stay in touch and send lit which I am doing now. Chem Sec gave him a price of \$75,000 for all the material. He said even is (sic) we were 40% less he would still wait.⁶⁷

563-Norton Canada Inc. [quote/order issued 16 November 1995 for \$9,453]: 12/05/96 9:39 A CAN 80A Called Ken, he feels our price is way too high. Asked what he was comparing it to, he said he feels the price will plummet once "all the competition gets going."

Asked him again what he was basing his decision on, he said that he doesn't have that kind of money in the budget. Tried to find out how much he had budgeted, wouldn't share. Asked if I should kill the quote then, he said yes. Killed quote for \$7193.⁶⁸

(emphasis added)

46. This suggests that regardless of the ban, SDMI's vaunted two-month advantage over its U.S. competitors was not worth much because few companies were ready or willing to proceed immediately.

5. A Significant Portion of PCBs Quoted Were Not Destroyed During Ban

47. The logs show that SDMI lost much of its potential business because of the U.S. closure of the border in July 1997, not because of Canada's closure of the border. Based on the analysis of the quotes, phone interviews conducted by Mr. Doug White, and telephone logs from S.D. Myers sales staff, KPMG estimates⁶⁹ that of the PCBs quoted during the delay period a significant portion were not destroyed during the delay period.

48. In fact, in the second half of 1997 and in 1998, SDMI continued pursuing Canadian PCB owners regarding quotes it issued in 1995 and 1996.

6. No "Special Market"

49. The value of quotes issued is not accurate representation of customer interest in SDMI. Many companies simply were not convinced that they should ship to SDMI. The logs show that SDMI sales staff persistently called and offered quotes in an attempt to increase business even where there was little interest from the Canadian PCB holder.⁷⁰ This contradicts the Investor's claim of a high success rate on these quotes.

⁶⁷ Customer Comments List A-N, p. 99.

⁶⁸ Customer Comments List A-N, p. 1252

⁶⁹ KPMG Reply Report, Section 1.4, at p.9-10. KPMG estimates that of the PCBs quoted during the delay period 41.5% were still available after the delay period.

⁷⁰ See for example: 344-Halton Roman Catholic Separate School Board; Customer Comments List A-N, p. 759; and Customer Comments List (O-Y, p. 393); White Report, Section 9.1, Sub-section i) at p.56.

50. Furthermore, the logs indicate that SDMI was in most cases only one of the competitors bidding on the PCBs for disposal.⁷¹
51. All PCB disposal firms worked from the national registry as their potential market.⁷² Most jobs contained different kinds of PCB contaminated material. Myers does not indicate how they chose which companies to contact.
52. It appears from SDMI's telephone logs that many other Canadian and U.S. competitors were contacting the same PCB owners and bidding against SDMI for the same available PCBs.

(a) Many Of The "Quotes" Are Budgetary Letters

53. Many customers requested quotes to budget for future PCB disposal. They did not reflect an interest in doing business with SDMI but instead viewed this as an opportunity to take advantage of what Myers itself described as a free service they offered. The companies would then use this information when considering future interest in disposing of PCBs when funds became available.⁷³

792-T. Harris Environment Management [quote/order issued 5 August 1996 for \$140,000]: 10/15/96 2:26 P CAN KT RANDY CALLED AND WANTED TO KNOW THE STATUS ON THE BORDERS. TOLD HIM ABOUT 60 DAY WAIT, HE SAID SOMEONE IN HIS OFFICE TOLD HIM THAT A COMPANY IN KANSAS WAS ALREADY SHIPPING, TOLD HIM I WAS UNSURE OF HOW THAT COULD BE, HE IS STILL INTERESTED IN THE QUOTE HE RECEIVED, **HE WANTED TO KNOW IF THE PRICE WAS THE SAME I WILL HAVE QUOTING LOOK AT IT, ALTHOUGH IT WAS JUST QUOTED IN AUG., I TOLD HIM IT WOULD PROBABLY BE PRETTY CLOSE TO THE SAME.**

11/05/96 7:43 A CAN 80 Left message with Randy's answering service to call me about the \$ 140,000.00 R&R quote.

11/05/96 10:44 A CAN 80 This was a badly qualified quote, **this guy is just searching for a budgetary.** I will call him back in a month to see if his client is moving on this material yet.⁷⁴

728-Sears: [quote/order issued 28 October 1996 for \$20,947]: 10/16/96 2:35 P CAN 80A Tom called, good conversation. He currently has 30 drums of ballasts in Kitchener, and 10-12 drums of ballasts in Victoria, BC. They will be retrofitting 20 stores in Ontario in 1997 and will consolidate that material in Kitchener as well. **NO MONEY for 1996, possibly none in 1997. He wants a budgetary \$\$ so he can plan this as a capital expense.** Will do, and will touch base from time to time.⁷⁵

693-694-Royal York Hotel [quotes/orders issued 13 November 1996 for \$5,470 and 25 September 1995 for \$11,579]: 10/02/96 3:04 P CAN 80A **Called Graham, he needs new numbers as he's added to the inventory. Dan to refigure & send budgetary. This work will not get done until 1997 at the earliest.** Recall 2 wks.⁷⁶

⁷¹ See Appendix E and Appendix F.

⁷² White Report, Section 9.1 ii) at p.56.

⁷³ White Supplemental Statement at p.4.

⁷⁴ Customer Comments List O-Y, p.424.

⁷⁵ Customer Comments List O-Y, pp. 295-296.

⁷⁶ Customer Comments List O-Y, p. 252.

851-852-Walkertown Public Utilities [quotes/orders issued 6 May 1997 for \$3,813 and 19 January 1996 for \$6,226]: 1/17/96 3:43 P CAN 65 STAN TOLD ME WHAT HE HAS INVENTORY WISE. HE ISN'T PLANNING ON GETTING RID OF IT ANYTIME SOON. GE REWOUND HIS XFMR WHICH HAD 346PPM AND GAVE HIM BACK THE WOOD, PAPER, AND METALS (JUST DAMAGED) IN DRUMS. HE HAS 9 DRUMS WITH WOOD AND PAPER AND ONE 3X3X3 CONTAINER WITH DAMAGED COPPER AND CORE STEEL. SAID HE NEEDS QUOTE FOR BUDGET AND THEN WILL GO TO THE COMMISSION.⁷⁷

(emphasis added)

(b) SDMI Quoted on Jobs It knew It Would Not Get

54. The logs also indicate that SDMI bid on PCB disposal business for which it knew it would not be competitive given the nature of the PCB contaminated material. There is therefore little evidence supporting SDMI's claim that it "targeted" its potential customers.

125-CH2M Gore @ Storrie [quote/order issued 8 November 1995 for \$435,650 and \$1,235,048: 10/10/96 9:00 A CAN 65 NO ONE SEEMS TO KNOW ANYTHING ABOUT THIS. THE DISP. IS ALL DIRT, WHICH WILL BE DIFFICULT FOR US. QUOTE DEAD. WE MAY HEAR FROM NETTA WHEN SHE COMES BACK NEXT YEAR.

4/08/97 1:41 P CAN 77 Called Glenn, got the big blow-off. Told me to call another day. On recall.⁷⁸

903-Woodington Systems [quote/order issued 23 February 1996 for \$256,216]: 12/12/96 4:16 P CAN 80 TALKED TO TIM VICARS AND HE SAID THAT THEIR INVENTORY IS CONTAMINATED SOLVENTS, PAINTS, OILS (ALL KINDS) AND SOILS. I WILL GIVE A BUDGETARY QUOTE ON THIS, BUT I DON'T THINK WE CAN WIN AGAINST GOING DIRECT TO THE INCINERATOR.⁷⁹

PART E: Errors In The Investor's Theory And Calculation Of Damages

1. Damages To SDMI's U.S. Operations Are Beyond The Scope Of Chapter 11

55. The Investor's claim for damages incorrectly includes damages for the Investor's U.S. operations in addition to those of its investment, Myers Canada. Under the NAFTA's Investment Chapter and Article 1116 of the NAFTA, the Tribunal can only award to an investor compensatory damages relating to its investment. In this case, the Investor's claim should be limited to the damages relating to Myers Canada.
56. Canada addresses the Investor's errors concerning the definition of investment and the scope of Chapter 11. The definition of "Investment" in Article 1139 of the NAFTA cannot be stretched to include SDMI's own activities to enable the Investor to claim damages beyond those relating to its investment. This is also supported by

⁷⁷ Customer Comments List O-Y, p. 581.

⁷⁸ Customer Comments List A-N, p. 373.

⁷⁹ Customer Comments List O-Y, p. 672.

the fact that SDMI's activities are those of a cross-border service provider and cannot be compensated under the Investment Chapter.

2. Speculative Nature Of The Investor's Damages Calculation

57. The Investor calculates its damages based on a loss of cash flow that would have accrued to the Investor and its Investment but for the Event. Canada noted in its Counter-Memorial that this approach contains an unacceptably high degree of speculation given the absence of a market with similar competitive conditions as would have existed but for the Event and the lack of historical basis for SDMI sales in Canada prior to the Event.⁸⁰ Canada has submitted three alternatives for calculating damages. The first is a return of SDMI's investment in Myers Canada. The second, is a rate of return on the investment during the delay period of the ban. The third is a loss of contribution margin to Myers Canada similar to the approach proposed by the Investor and Mr. Rosen. Canada's first two alternatives have the advantage of being considerably less speculative⁸¹ and compensate the investor directly for losses suffered to its investment in the manner intended by NAFTA.⁸²

3. PCB Business Still Available After The Ban Should Not Be Included In The Damages

58. The Investor's damages theory incorrectly assumes that but for the ban, it would have been able to process all the PCBs on which it issued a quote. Canada has already showed that this would not be the case: only a few PCB owners were in a hurry to dispose of their PCBs. PCB waste disposal was not a priority as storage was available. Absence of budget prevented fast disposal. Formal tendering processes, which could take several months to complete. Internal decision-making processes could take time. More generally PCB owners wanted to wait to see how low prices would go before awarding the contract.
59. Canada's approach of considering only PCBs destroyed takes into account these concerns and the impossibility of ascertaining which of the quotes for PCBs not destroyed during the ban could have in fact been turned into orders and disposed of prior to the U.S. closure of the border.
60. The Investor's theory largely ignores the Investor's obligation to mitigate its damages as it does not take into account the fact that a significant portion of PCBs were not destroyed during the period of the ban. This is based on the Investor's view that Canada should be held responsible for the closure of the U.S. border by the U.S. EPA and SDMI's resulting inability to mitigate its damages flowing from the Event by pursuing the PCB disposal opportunities still available to it.

⁸⁰ The proceedings then underway in the U.S. courts also contributed an element of speculation as it remained open to the applicants in that case to seek and obtain an injunction prohibiting imports until the court resolved the issue. Had the ban not been in place, the U.S. plaintiffs in the Sierra Club challenge may have been more action.

⁸¹ KPMG Report, Section 5.1, p. 12-13

⁸² KPMG Report, Section 5.2, p. 14-17

61. Canada's view, which is reflected in KPMG's calculations, is that it should not be held liable for damages caused by the subsequent closure of the border by the U.S.⁸³ After the border re-opened some of the potential business was still available to SDMI and therefore was not lost "by reason of, or arising out of" the Event. The evidence shows that, on its own, Canada's closure of the border for 14 months caused minimal loss to S.D. Myers. While the Investor claims it lost its "head start", the evidence shows that any head start was essentially worthless. Apart from some few potential customers anxious to destroy their PCBs, Canada's actions merely delayed the realization of S.D. Myers' revenue. Yet, the Investor's theory would have Canada bear the burden of the losses resulting from the U.S. closure of the border.
62. Another reason to favour Canada's approach is that the Investor issued a significant number of quotes in late 1996 because Canada would re-open the border in early 1997. The Investor issued 302 quotes in the period between the announcement of the border opening in October, 1996 and when the U.S. side closed in July, 1997. The impossibility of realizing these quotes is clearly due to the U.S. closure of the border.

4. Initial Population Of Quotes

63. In his first report, Mr. Rosen estimated the population of quotes to be \$107 million. When Mr. Appleton filed the Investor's Memorial (after revision), 4 days after Mr. Rosen's first report, his listing of quotes totalled \$77.9 million. On April 18, 2001, Mr. Appleton clarified the confusion about the population by stating that the Investor relied on the "Revised Memorial Listing" totalling \$77.9 million. Mr. Appleton confirmed again that the Claimant relied on this new population of quotes by way of letter dated May 9, 2001.⁸⁴ On August 9, 2001, Mr. Rosen filed a report responding to KPMG's two reports. In it, he used a population of quotes of \$104.2 million.⁸⁵
64. After reviewing of the quote documentation in the Reply and Revised Rosen Report, KPMG calculates the total initial quote population to be \$78.2 million.⁸⁶ Significant duplications and unsubstantiated quotes and other errors in the quote population used by Mr. Rosen account for the \$23 million difference between Mr. Rosen and KPMG.⁸⁷

⁸³ KPMG Reply Report, Section 5.2, p.23 and 5.5, p.32.

⁸⁴ In this letter Mr. Appleton stated that the difference of approximately \$29 million between the figures used in the Rosen Report and the Investors Memorial (on which he previously stated the Investor relied) was due to additional quotes and bids for which no supporting documentation exists that have instead been included in the population of quotes by Mr. Rosen on the basis of "circumstantial files".

⁸⁵ KPMG state in their Reply Report that they were surprised that Mr. Rosen Revised Report established yet another population of quotes, \$104.3 million, and a non-detailed analysis of how he got his new quote value. KPMG Rejoinder Report, Section 5.3, p.26.

⁸⁶ KPMG Reply Report, Section 1.2, pp. 5-6.

⁸⁷ KPMG Reply Report, Section 1.2, pp. 5-6.

5. Quotes Issued After The Ban Was Rescinded Should Not Be Included In The Damages

65. The Investor inappropriately includes in its claim the loss of revenue from quotes issued after Canada rescinded the ban. S.D. Myers loss of revenue related to quotes issued after the Event was not “by reason of, or arising out of” Canada’s breach and cannot be compensated. Any inability to complete these quotes prior to July 1997 is not a direct consequence of, nor is it attributable to, Canada’s breach.
66. Furthermore, the Investor fails to explain why quotes issued after Canada announced its intention to open its border to PCB waste exports, should be included in the calculation of damages. Throughout the duration of the ban the Investor continued to issue quotes. New material became available during the ban as it was taken out of service and some PCB owners became interested in disposing of their PCBs whereas this was not the case in 1995-1996. If SDMI quoted on these PCBs after Canada rescinded the ban and could not turn these quotes into orders because of the U.S. closure of the border, Canada should not be held responsible.
67. Canada therefore submits that the Investor inappropriately included \$9.2 million worth of quotes and uncompleted orders issued after February 7, 1997.⁸⁸

6. Government Owned PCBs

68. SDMI incorrectly includes potential contracts worth \$21 million respecting the remediation of government-owned PCBs.⁸⁹ This amount should not be included in the Investor’s population of quotes for the following reasons.
69. First, the Investor’s evidence only supports the existence of a single bid of \$1.165 million by SDMI to dispose of certain federal government-owned PCBs.⁹⁰ There is no supporting documentation for the remaining \$835,000 claim down or \$19 million claim⁹¹ or \$19 million claims. As such, it is unclear whether such PCBs were available for disposal, whether the government tendered for these PCBs in the period of the ban, or whether SDMI submitted a bid in relation to these PCBs. Rather, the unsupported balance appears to be SDMI’s estimate of what they would have bid, based on the volume they believed to be within the federal government inventory. The Rosen Revised Report confirms this.⁹²

⁸⁸ KPMG Reply Report, Schedules 8, p.2.

⁸⁹ Revised Bids and Quotes, Tab 989 and 990.

⁹⁰ Revised Bids and Quotes, Tab 990.

⁹¹ Tab 990 lists a quote for \$2 million, but underlying documentation shows that the Investor bid \$1,165,301.

⁹² Revised Rosen Report, Section Appendix II: “We have also valued the incremental revenues from quotes that the Investor would have received from the Canadian Federal Government, calculated as the outstanding Federal PCB inventory (In-use and In-Service – excluding soils) multiplied by the Investor’s average price per pound on U.S. PCBs from 1995 through 1997 and included in revenue at the same success rates applied to the other Canadian quotes”. KPMG Rejoinder Report, Section 5.3, para. 1.

70. Second, the success rate applicable to the general population of quotes issued by SDMI to Canadian PCB owners cannot be applied to a government procurement, which requires a formal tender process and involves therefore increased competition.
71. Third, the Investor does not establish that SDMI would have obtained any PCB disposal contracts from the federal government given the existing 1989 federal government policy to destroy PCBs in Canada.⁹³

7. Large Soil Quotes

72. The Investor included large soil quotes totalling \$19.8M⁹⁴ in the population of quotes without even adjusting the applicable success rate.
73. Canada's position is that large soil quotes should be removed from the calculations on the basis that S.D. Myers is principally in the business of remediating and recycling PCB transformers, capacitors, and ballasts. While they do treat soil, it is an auxiliary service to their main lines of business. In arriving at this position, KPMG Canada's experts relied upon SDMI's history of dealing with soil in their U.S. operations. Amounts relating to smaller volumes of soil incidental to other PCB waste included.⁹⁵

8. Price Adjustments

74. The Rosen Report makes no attempt to address the impact of the increased competition on the quotes issued by SDMI. Mr. Rosen assumes that the quotes issued would be accepted as submitted. As reflected in the KPMG and Stillman reports, the emergence of new competition when SDMI and its U.S. competitors received their Enforcement Discretion from the U.S. EPA, must be considered in determining what prices would have prevailed but for the Event. Had Canada not imposed the ban, prices would have started dropping much sooner in anticipation of the entry of U.S. competitors in the Canadian market; market entry that was only two months away. The analysis performed by Mr. Stillman concludes that a downward adjustment of 42% to the value of quotes issued by SDMI before October 1, 1996 42% is appropriate to reflect the effect competition would have had on "but for" prices.⁹⁶

9. Overstated Market Share

75. The Investor bases its claim on a success rate for turning quotes into sales of 66%. The justification for this success rate is:

⁹³ Canada' Counter Memorial (Liability Phase) paras 94, 114, 126, 160, 166, 169, 324, 334; Partial Award, at paras 162-171.

⁹⁴ KPMG Reply Report, Section 5.4, p.30, Section 5.7., p.35.

⁹⁵ KPMG Reply Report, Section 5.4, pp. 30-31.

⁹⁶ Stillman Report, para. 42, p.17; Revised Rosen Report, Section 5, (IV) .

- SDMI's market share in the U.S.;
- The fact that the population of quotes represents a special market; and
- SDMI's head start over the competition.

76. These assumptions are incorrect and do not, in any event, justify a 66% market share. What actually occurred after Canada rescinded the ban is the best proxy for what would have occurred between November 1995 and February 1997 but for the ban. Based on the analysis of the market share in the open period (February to July 1997) Canada estimates that SDMI's market share but for the ban would have been about 25%.⁹⁷

(a) U.S. Market Share Is Not a Proxy For Potential Market Share In Canada

77. Mr. Rosen takes says that SDMI's success rate on quotes issued to potential U.S. customers is a proxy for what would have happened in Canada but for the Event. Canada rejects this proposition and questions Mr. Rosen's latest assertions of SDMI's success rate in the U.S.
78. Mr. Rosen's August 9, 2001 Report introduced new U.S. PCB quotes and order data comprising over 200 pages.⁹⁸ Mr. Rosen relies on this data to claim a 67.1% success rate by SDMI on quotes issued to potential U.S. customers.⁹⁹ This contradicts Mr. Rosen's previous assertions of a 45% success rate in the U.S.¹⁰⁰ Moreover, as KPMG observes the data used by Mr. Rosen to support his new position is suspect and should be given little if any weight.¹⁰¹
79. The U.S. EPA statistics contradict Mr. Rosen's assertions. They indicate that SDMI had a 38.8% market share of the PCB contaminated transformer market.¹⁰² The Investor's data and the U.S. EPA statistics also show that when SDMI entered into the PCB disposal market in the U.S. their market share was less than half that amount in the first three years. The Investor does not explain why it would have instantly obtained a higher market share in Canada. With respect to other segments of the PCB market, EPA statistics also show that SDMI's market share was considerably lower.¹⁰³
80. In any event, to suggest, as Mr. Rosen has done, that SDMI's experience in the U.S. would translate into a similar success rate in Canada is misplaced for several reasons. First, Canadian owners concerns about U.S. liability is not a factor that is reflected in

⁹⁷ Stillman Report, para. 35, p.15.

⁹⁸ Canada requested information of this type in our previous requests to SDMI in the spring of 2001 but this information was not forthcoming.

⁹⁹ Revised Rosen Report, page 21 claiming a success rate of 67.1% for the years 1995-1997. For the years 1990-1997 the data show only a success rate of 46.9%. For the period 1990-1994, which were the high volume years for treating U.S. PCBs, the success rate was 38.1%.

¹⁰⁰ Rosen Report, page 6.

¹⁰¹ KPMG Reply Report, Section 1.6, p.12.

¹⁰² Farkas Berkowitz Report, page 3. Canada's Counter-Memorial, paras. 31-32.

¹⁰³ Farkas Berkowitz Report, Appendix C.

the U.S. data relied upon by Mr. Rosen.¹⁰⁴ Second, SDMI targeted a much broader market in Canada than it had in the U.S. In Canada, while SDMI preferred PCB contaminated transformers, it also pursued all types of PCB contaminated material to provide turnkey solutions.¹⁰⁵ The quotes and customer comments show that it was bidding also on, *inter alia*, large soil quotes, askarel, ballasts and other wastes for which it was not price competitive and sometimes only acting as an intermediary. When comparing SDMI's share of the U.S. market to its potential share of the Canadian market, it is important to look at the same market. This suggests that SDMI's success rate would have been lower in Canada.

81. Other differences between the Canadian and U.S. market, including the different regulatory regimes, explain why market share in one would not automatically translate into a similar market share in the other.

(b) No Special Market

82. The quotes on which the Investor relies to support its claim do not represent a "special market" that would justify an increased market share.
83. Mr. Rosen asserts that the population of quotes is not representative of the general market, but of some "special," yet undefined, market. On this basis, Mr. Rosen applies a higher success rate than he would if SDMI were competing in the open market. This assumption lacks any support,¹⁰⁶ and contradicts the evidence, including that:
- S.D. Myers bid for business it admitted having no chance of winning.
 - All the PCB disposal companies approached the same potential customers and bid on the same business. S.D. Myers was merely another bidder. As discussed above, the logs themselves indicate the presence of other competitors for the same business as SDMI was going after.
 - Many of the larger quotes involved a tender. By definition, not a special market, only open to SDMI.
84. Many Canadian PCB owners appear to have used quotes from SDMI to negotiate lower prices from Canadian PCB disposal companies.¹⁰⁷
85. At best, the quotes issued can be said generally to reflect the potential market of PCB owners that may eventually become interested in disposing of their PCBs with SDMI or one of its competitors.

¹⁰⁴ KPMG Reply Report, Section 5.1, at p.23.

¹⁰⁵ Dana Myer Statement at para 4 (i) and Statement of Peter Wallace at paras. 12 and 32.

¹⁰⁶ KPMG Reply Report, Section 5.7, pp. 34-39.

¹⁰⁷ White Supplementary Statement, Section 4.0 [last paragraph]. For example see: 413-Joseph Brant Memorial Hospital: [quote/order issued 8 Nov 1995 for \$33,310]: 12/05/95 1:06 P CAN 80A Duncan is still shopping for prices. Pointed out to him that if he does go w/somebody else (aside from SDMI), that his pcb's are going to the same place...Alberta. **I also mentioned that if the borders don't up (sic), Alberta would be his only option...** don't forget your coupon. He did say that he will not do anything 'till Jan'96. Customer Comments List A-N, p. 932.

(c) SDMI Did Not Have A Head Start

86. The Investor justifies its claim to an increased market share and higher prices on the existence of a head start over the competition. According to SDMI's own assertions in its Memorial and Reply Memorial¹⁰⁸ and that of its expert,¹⁰⁹ the market was purely price driven. Therefore, even if S.D. Myers was the first to contact a particular company, this did not translate into any advantage.¹¹⁰ Simply put, potential customers wanted the lowest price available. This is inconsistent with the motion of a head start.
87. Evidence summarised earlier¹¹¹ also suggests that regardless of the ban, S.D. Myers' 2-month advantage over its U.S. competitors was not as valuable as the Claimant portrays to be worth.¹¹² In fact, the evidence shows that companies were in no hurry to dispose of their PCBs and wanted to wait and wanted to take advantage of the competition and lower prices that they anticipated (correctly) was imminent.
88. Furthermore, most companies did not proceed on the basis of a quote from a single company. Most larger companies had formal tender processes and even smaller companies had informal bid processes that would require asking for bids from several PCB disposal companies to award a PCB disposal contract.¹¹³
89. Furthermore, contrary to the Investor's assertions,¹¹⁴ the telephone logs of SDMI sales staff indicate that many PCB owners were not interested in disposal, not interested in shipping to the U.S., did not have money or were simply obtaining quotes for budgetary purposes.
90. At the time many PCB owners preferred storage or would not destroy unless mandated to do so. Others simply had not yet made a decision about disposing, had PCBs still in-service or had other priorities.
91. As a result, the initial population of quotes that some or any other service provider could have turned into orders should be reduced or a lower market success rate should be applied. Neither of these adjustments have been made by the Investor.

10. Rate Of Gross Profit

92. The Investor's claim for damages is inflated due to the use of inappropriately low cost margins.

¹⁰⁸ Investor's Memorial (Damages) at paras. 3(c) and 26; Investor's Reply Memorial at para. 74.

¹⁰⁹ Statement of Peter Wallace at para. 16.

¹¹⁰ Berkowitz Supplemental Letter at p. 5 [last paragraph rebuts the "head start" argument by indicating that other U.S. competitors were ready to go and that Cdn PCB holders were waiting to have competitive bids in their hands]

¹¹¹ Canada's Rejoinder Memorial at para. 80; Stillman Rebuttal Report at para. 8.

¹¹² Berkowitz Supplemental Letter at pp. 1-3, Readiness of U.S. Firms to Pursue the Canadian Market.

¹¹³ KPMG Reply Report, Section 5.3, pp. 27-28.

¹¹⁴ Investor's Reply, para 54.

93. Mr. Rosen used the cost from one department, the "Resource Recovery" department, as the appropriate surrogate for costs for all PCBs on which quotes were issued. Mr. Rosen's rationale is that the cost of goods sold margin from Resource Recovery (47%)¹¹⁵ is less than SDMI's overall cost of goods sold margin (54%).
94. KPMG rejects this approach. It considered seven different departments, after analyzing into which departments S.D. Myers would record the potential revenue and therefore where the costs would follow. KPMG then allocated the revenue from quotes based on a thorough analysis of the type of material available from Canada. KPMG's cost estimates flow from this analysis and represent a more realistic estimation of what would have occurred "but for" the ban.¹¹⁶

11. Out-Of-Pocket Expenses

95. In his original report, Mr. Rosen determined that out-of-pocket expenses caused by the Event amounted to \$2.4¹¹⁷ million. In his subsequent report, he reduced this claim to \$208,120.¹¹⁸ This amount remains inaccurate as it includes fixed management costs that would have been incurred regardless of the ban.
96. KPMG's report assesses the out-of-pocket expenses at approximately \$10,000.¹¹⁹

¹¹⁵ Rosen Report, Section 5, p.25.

¹¹⁶ KPMG Reply Report, Section 5.8, p.40.

¹¹⁷ Rosen Report, Appendix V, p.50.

¹¹⁸ Rosen Supplemental Report, Section 2, p.5.

¹¹⁹ KPMG Report, Section 1.8, p.14.

PART F: Response To Legal Issues Raised In The Investor's Reply

1. The Definition Of Investment

97. Article 1139 lists eight legal interests that are “an investment” for the purposes of NAFTA Chapter Eleven. This list is exhaustive, not illustrative. Only those legal interests listed in the definition of the word “investment” in Article 1139 are under Section A of NAFTA Chapter Eleven.
98. The Investor’s assertion to the contrary is simply wrong.¹²⁰ This is evident from the wording of Article 1139, which commences with the phrase “investment means...” followed by a finite list of covered assets and interests. If the NAFTA Parties intended this definition to be illustrative, they would have used the word “includes” as they did in other parts of NAFTA.¹²¹
99. The NAFTA Parties have expressly recognized that the definition of “investment” in NAFTA Article 1139 is exhaustive, not illustrative.¹²² This has also been recognized by at least one noted commentator, Mr. Antonio Parra, Deputy Secretary General of the International Centre for the Settlement of Investment Disputes (ICSID):
- In addition, in contrast to the all-inclusive definitions of covered investments found in most of the other treaties, the NAFTA’s definition provides an exhaustive (though admittedly very broad) enumeration, rather than an open-ended, illustrative list, of covered assets or investments that the NAFTA requires be related to an “enterprise,” to “business purposes” or to a “commitment of resources” to “economic activity” in the host State. In addition, the definition in the NAFTA specifically excludes from the scope of covered investments commercial contracts for the sale of goods or services. More than most of the other treaties, the NAFTA can in other words be seen as providing a definition of covered investments, and hence of covered investment disputes, that attempts clearly to distinguish them from trade and other non-investment assets and disputes.¹²³ (Emphasis added)
100. SDMI alleges that its direct marketing activities in Canada constitute an “enterprise” and are therefore an investment under NAFTA Chapter Eleven.¹²⁴ This baseless assertion ignores completely the definition of the term “enterprise” found in NAFTA Article 1139. This provision states that for purposes of Chapter Eleven, an “enterprise” means an “enterprise as defined in Article 201 (Definitions of General Application)”. Article 201 defines “enterprise” as follows:

¹²⁰ Investor Reply Memorial, paragraph 3.

¹²¹ For example, this was the case for the definition of “measures” in Article 201.

¹²² For example, in *Methanex Corporation v. United States of America*, the three NAFTA Parties agreed that NAFTA Article 1139 provides an exhaustive definition of “investment” for NAFTA Chapter 11.

¹²³ Antonio R. Parra, “Provisions on the Settlement of Investment Disputes in Modern Investment Laws, *Bilateral Investment Treaties and Multilateral Instruments on Investment*” (1997) 12 No. 2 ICSID Rev. 287, pp. 355-356.

¹²⁴ Investor’s Reply Memorial at para. 5(a).

...enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or government-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association;

101. SDMI's direct marketing activities in Canada amounted to nothing more than SDMI sales staff seeking to sell a service, the remediation of PCB waste at its site in Tallmadge, Ohio, to PCB owners in Canada.¹²⁵ Such sales activities do not constitute an "enterprise" as defined in NAFTA Article 201. More specifically, sales activities are not an "entity constituted or organized under applicable law".¹²⁶ Hence, SDMI's claim that its direct sales activities in Canada constitute an "enterprise" must be rejected.
102. SDMI also alleges that its activities in Canada themselves constitute an investment as it was a participant in a "joint enterprise" with Myers Canada.¹²⁷ There are both legal and factual difficulties with the allegation of a joint venture.
103. Legally, the arrangement lacked the degree of formality necessary to constitute a "joint venture" as contemplated by the relevant Article 1139 and 201 definitions. According to Articles 1139 and 201, an "investment" can be an "enterprise" including a "joint venture" where it is an "entity constituted or organized under applicable law". The question here is whether the relationship between SDMI and Myers Canada constitutes such an "entity". Canada says it is not.
104. Since the alleged "joint venture" is said to have operated in Canada, and the above definitions require that it be an "entity constituted or organized under applicable law", its status ought to be judged according to Canadian law.
105. The Courts have set out the elements that are deemed essential to the existence of a joint venture.¹²⁸ These are:
- (a) a contribution by the parties of money, property, effort, knowledge, skill or other assets to a common undertaking;
 - (b) a joint property interest in the matter of the venture;
 - (c) a right of mutual control or management of the enterprise;
 - (d) expectation of profit, or the presence of "adventure", as it is sometimes called;
 - (e) a right to participate in the profits; and

¹²⁵ Canada's Counter-Memorial at para. 86.

¹²⁶ In this case the "applicable law" is the law of Canada.

¹²⁷ Investor's Reply Memorial at para. 5(b).

¹²⁸ *Central Mortgage & Housing Corporation v. Graham et al.*, (1973) 43 D.L.R. (3d) 686 at pp. 709-710 (N.S.S.C. (T.D.)); K. Ward & C. Jenner, "Establishing a Business Enterprise in Canada" in H. Stikeman et al., ed. *Doing Business in Canada*, looseleaf (New York: Matthew Bender, 1999) at para. 14.04

- (f) most usually, limitation of the objective to a single undertaking or ad hoc enterprise.¹²⁹
106. The usual elements evidencing a joint venture, enumerated above, are absent in this case. The Claimant introduced no evidence establishing a joint venture between SDMI and Myers Canada and mere assertions to this effect by the Investor are without more, insufficient.
107. SDMI admits that no written contract or joint venture agreement exists between SDMI and Myers Canada.¹³⁰ Furthermore, the joint contribution by the co-venturers of money, property, effort, knowledge and skill is also lacking. The Claimant's own telephone logs demonstrate that the sales effort took place almost exclusively by SDMI sales staff from Tallmadge, Ohio. In fact, there is little evidence to support that Myers Canada played other than an insignificant role in the efforts of SDMI to market its cross-border PCB waste disposal services in Canada.
108. Moreover, the critical elements of joint control or management of the undertaking and the right to participate in the profits are also absent. The evidence demonstrates that Myers Canada acted on instructions from SDMI, bore none of the risks, as the money for its operations was advanced to it by SDMI, and was not profit sharing with SDMI *per se* but merely received a 10% commission.
109. The arrangement between SDMI and Myers Canada falls clearly outside the scope of what is generally understood to constitute a joint venture in Canadian law.
110. None of the listed assets and interests in the definition of "investment" under Article 1139 include goodwill as alleged by the Investor.¹³¹ The NAFTA Parties agree that goodwill in itself does not constitute an investment.¹³² SDMI's assertion that goodwill constitutes intangible property and therefore an investment is misplaced. The fundamental characteristics of property, be it tangible or intangible, include the ability to acquire, own and use that property to the exclusion of others. Goodwill is not, by itself, something that can be owned and used by an investor to the exclusion of others and therefore lacks the fundamental characteristics of property.
111. Examples of intangible property rights recognised at law include trademarks, copyrights, patents and contract rights. Intangible property is capable of being acquired and owned by a person. An owner of intangible property is able to exclude

¹²⁹ See also S. Williston, *A Treatise on the Law of Contracts*, 3rd ed., Jaeger, W.H.E. ed. Vol. 2. (Mt. Kisco: Baker, Voorhis & Co., 1959) at pp. 554-556: "... an association of two or more persons based on contract who combines their money, property, knowledge, skills, experience, time and other resources in the furtherance of a particular project of undertaking, usually agreeing to share the profits and losses and each having some degree of control over the venture."

¹³⁰ SDMI Response to Canada's Request for Documents, and letter from Appleton & Associates dated June 15, 1999.

¹³¹ Investor's Reply Memorial at para. 5(c).

¹³² For example, Mexico has taken this position in this case in its Article 1128 submission of February 16, 2000 and in its Article 1128 submission in *Methanex Corporation v. United States of America* dated May 15, 2001. The U.S. has taken this position in *Methanex Corporation v. United States of America* (see U.S. Memorial at pages 31-36 and Reply Memorial at pages 39-43).

others from its use.¹³³ Goodwill by itself does not meet these basic criteria and does not therefore constitute a property interest coming within the scope of the definition of investment under Article 1139 of the NAFTA.

112. For the above reasons, the SDMI investment in Canada should be limited to Myers Canada, as was found by the Tribunal in the liability phase of these proceedings. In turn, any damages awarded by this Tribunal can only relate to those suffered by SDMI as an investor in Myers Canada. All other claims to damages should be dismissed.

2. The Cross-Border Provision Of Services

113. The Investor misconstrues Canada's position with respect to the relationship between NAFTA Chapter Eleven and Twelve. Canada did not argue, as suggested by the Investor, that services offered by SDMI to Canadian PCB owners do not constitute an investment because SDMI offered Canadian PCB owners a service.¹³⁴ Canada's contends that SDMI did not provide its remediation services through its investment, Myers Canada, but from its facility in the U.S. As such, its remediation services are covered under Chapter Twelve and not Eleven.
114. The Investor's reliance on NAFTA Article 1213¹³⁵ to support its argument that cross-border service provisions of Chapter Twelve do not apply to the cross-border service provided by an investment (as defined in Article 1139) in the territory of another NAFTA Party fails for two principal reasons.
115. First, as noted above, the direct activities of SDMI in Canada do not constitute an investment.
116. Second, the mere fact that SDMI owned a marketing enterprise in Canada is irrelevant, as SDMI was not providing the PCB remediation services through its Investment in Canada. The Investor provided the remediation services in the U.S.¹³⁶
117. Myers Canada only had a few employees and its role was limited to sales activities targeted primarily in Quebec. It was also used for billing purposes and to "have a Canadian address". Had Myers Canada operated PCB remediation services in Canada then SDMI could have been said to operate PCB remediation services through its Investment and these activities would have fallen within the scope of Chapter 11.
118. For example, USPCI (a U.S. hazardous waste treatment and disposal company) provided PCB remediation services in Canada through their investment, PPM and

¹³³ Bruce Ziff, *Principles of Property Law*, (Ontario: Carswell, 1996), p. 72.

¹³⁴ Investor's Reply Memorial at para 10.

¹³⁵ Investor's Reply Memorial at para. 12

¹³⁶ That Myers Canada and SDMI did not provide any remediation services in Canada is clearly established by the evidence. Furthermore, the Investor does not dispute this fact.

therefore was covered under the provisions of NAFTA Chapter Eleven.¹³⁷ Only Myers Canada's activities in Canada and SDMI's relationship with Myers Canada are covered by Chapter Eleven.¹³⁸

119. SDMI cannot therefore receive compensation under Chapter 11 for damages to its cross-border services (i.e. its U.S. PCB remediation services). Any claim regarding a breach of national treatment with respect to SDMI's PCB remediation activities must be brought under the state-to-state dispute settlement provisions in NAFTA Chapter 20, which do not provide for financial compensation.

3. Scope Of Damages

(a) Only Direct Damages Are Compensable

120. The Investor attempts to circumvent the language of NAFTA Article 1116 by relying on other sources which it suggests stand for the proposition that indirect damages are recoverable at international law.¹³⁹ This effort must fail for two principle reasons.
121. First, NAFTA itself addresses the scope of damages for violations of a NAFTA Chapter Eleven obligation. More specifically, Article 1116 requires that any award must be in respect of "loss or damage by reason of, or arising out of, that breach". These words, when interpreted in accordance with their ordinary meaning in their context and in light of the object and purpose of the treaty,¹⁴⁰ require that the Investor establish a clear and direct nexus between the breach and the alleged loss. Hence, pursuant to Article 1116 only damages with a direct and causal relation to the breach found by the Tribunal are compensable.¹⁴¹
122. Second, as previously stated in Canada's Counter Memorial, under international law only direct damages caused by the breach can be taken into account in the calculation of compensation. Indirect, remote, or speculative damages are not allowed.¹⁴²

(b) Damages To Investor Must Relate To Investment

123. NAFTA Chapter Eleven also requires damages to be in relation to the investment. In this case, this means that compensation to SDMI must be in relation to its Investment, Myers Canada. Contrary to the Investor's characterization of Canada's argument¹⁴³, Canada is not claiming a geographical limitation *per se*. For example, if the Tribunal found that the Investor's loan was the investment that was discriminated against by Canada's actions, the loss would accrue in the U.S. to the Investor, S.D. Myers. Here because the Tribunal found that the Investment is Myers Canada, any

¹³⁷ Farkas Berkowitz Report, p.5; White Report, section 2.3.4.

¹³⁸ Canada's Counter-Memorial (Damages Phase) at paras. 96-101.

¹³⁹ Investor's Reply at paras. 123-128.

¹⁴⁰ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 (in force January 27, 1980).

¹⁴¹ Canada's Counter-Memorial at para. 114.

¹⁴² Canada's Counter-Memorial at para. 111-113.

¹⁴³ Investor' Reply, Part 1.

damages to the Investor must be limited to that suffered in its capacity as an investor, therefore limited to losses to Myers Canada.

124. The fact that SDMI has brought its claim under Article 1116 does not entitle it to claim for damages suffered to its PCB activities in the U.S. The SDMI operations in the U.S. are not “investments” in the territory of another NAFTA Party. Therefore, no claim is possible with respect to those activities.

PART G: Interest And Costs

1. Interest

125. Canada has suggested that, given the lack of international jurisprudence on point, this Tribunal can consider domestic law in an award of interest.¹⁴⁴ The Investor argues that municipal law is irrelevant to this proceeding.¹⁴⁵ Arbitral Tribunals have relied on general principles of law found in analogies of municipal law in assessing damages and applying principles of interest.¹⁴⁶ Canada maintains the position that interest is a matter within the discretion of the Tribunal. In awarding interest consideration should be given to the practice of the courts in the place of arbitration¹⁴⁷ and the principle that interest is a form of compensation.¹⁴⁸

126. SDMI continues to claim over \$30 million in opportunity costs on damages at an equity rate.¹⁴⁹ Canada agrees¹⁵⁰ with the Investor’s valuation expert, Mr. Harder, where he states:¹⁵¹

The important question to ask is whether Myers Companies would have had an investment opportunity in the PCB remediation business in 1997 to invest US\$35.8 million and which would have returned 18%. The LRTS report does not provide any information which suggests that Myers Companies could have invested that amount of money in 1997 for that rate of return. Unless it can be shown that Myers Companies had an opportunity to invest the principal amount of damages awarded in a PCB remediation business opportunity, we would not accept 18% as the opportunity cost interest rate to use for calculating interest on the award in this case. (emphasis added)

127. The Claimant has failed to put forward any evidence of such a business opportunity. SDMI's claim for an equity rate on damages is unfounded, grossly speculative and must therefore be rejected.

¹⁴⁴ Canada’s Counter Memorial, para 199

¹⁴⁵ Reply Memorial para 166

¹⁴⁶ Brownlie, Principles of Public International Law, (5th ed) at p.17

¹⁴⁷ Canada’s Counter-Memorial at para. 200

¹⁴⁸ Canada’s Counter-Memorial at paras. 207-208

¹⁴⁹ Rosen Rebuttal Report, Section 5 (xviii); Investor’s Reply Memorial, para 166

¹⁵⁰ also see KPMG Reply to BDO Report, at page 7-8

¹⁵¹ Statement of Jeffery Harder, at page 20

2. Costs

128. Costs are also in the discretion of the Tribunal. Article 40 of the UNCITRAL Rules¹⁵² states that where deemed appropriate, costs may be apportioned between the parties. Canada submits that the apportionment submitted in its Counter Memorial¹⁵³ remains appropriate in the circumstances of this case, particularly in light of the Investor's additional changes to its position as set out in the Investor's Reply and its introduction of new evidence, so late into the arbitration.
129. The Investor claims that it has produced relevant and necessary documents for the use of Canada and the Tribunal.¹⁵⁴ The Investor further complains about Canada's document and interrogatory requests as being onerous and needless.¹⁵⁵ These assertions are not valid. The substantial new evidence filed with the Investor's Reply does not address "new legal issues" raised by Canada in the Counter Memorial, but introduces documents and information that ought to have been produced at the outset of this phase because of their relevance to the Investor's case and to Canada's defence.
130. The Investor commenced the damages phase with a significantly increased and inflated damages claim, with little evidence to support it. Because of the lack of substantiation, Canada and its experts had to build the initial case before being able to mount a defence. Only then did the Investor take the time to locate key documents in support of its claim.¹⁵⁶
131. However, months ago Canada submitted various requests for documents and information,¹⁵⁷ which the Investor claimed were irrelevant or did not exist. Now the Investor and its experts rely heavily upon such documents.¹⁵⁸ Repeatedly, the Investor claimed that Canada had all of the evidence that the Investor would rely upon to prove its damages.¹⁵⁹ Canada relied upon these representations and undertook significant additional work as a result. Much of this work had to be

¹⁵² Article 40 of the UNCITRAL Arbitration Rules provides:

1. Except as provided in paragraph 3, the costs of arbitration shall be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case. (emphasis added)

2. With respect to the costs of legal representation and assistance referred to in Article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear reasonable costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

¹⁵³ Counter Memorial (Damages Phase) at para 220: Canada proposed that each party bear their own costs for the Liability Phase and the Investor bear the costs of the Damages Phase.

¹⁵⁴ Reply Memorial para 168

¹⁵⁵ Reply Memorial para 171

¹⁵⁶ In its August 15, 2001 correspondence from Appleton and Associates: "this was information discovered by the Investor in response to specific matters put not issue by Canada in its Counter-Memorial.

¹⁵⁷ See Canada's various correspondence relating to its March 12, 2001 Motion for Production: April 19, May 4 and June 1, 2001

¹⁵⁸ For example, Vol 2- Revised Scope of Review(c) U.S. PCB orders-quotes 90-97, when the response to Canada's requests for documents relating to U.S. operations were consistently refused.

¹⁵⁹ Correspondence from the offices of Appleton and Associates dated Jan 24, March 27, April 18, and April 27, 2001 from Appleton's office.

132. duplicated because of the late introduction of new documents, to ensure that earlier analysis and calculations remained valid.

132. The Investor's deficient evidentiary production made it difficult for Canada to assemble a full defence. Given the size of the Investor's claim, Canada could not risk that the Tribunal may accept the uncontroverted, if insufficient, evidence. Instead, Canada had to direct its experts to recreate the calculations that were not apparent, absent or unexplained in the Rosen Report, so that faulty assumptions could be challenged, and that a proper assessment could be made.

133. To complicate matters further, the Investor's claim was a moving target:

- The number of quotes offered as a foundational base for its claim changed several times. The Investor has referenced 911,¹⁶⁰ 942,¹⁶¹ 970,¹⁶² 998,¹⁶³ 1012,¹⁶⁴ 1019,¹⁶⁵ and now, 940¹⁶⁶ with an additional 22¹⁶⁷ contractual documents as the "list setting out the identity, date and amount of contracts [...] that were affected by Canada's unlawful *PCB Waste Export Ban*."¹⁶⁸ Included in the *Revised Bids and Quotes* are not only some of the documents from the original and first revised listing, but also contains many (25) additions from the (58) documents which the Investor specifically instructed Canada to "remove and destroy" from the 14 Binders of Contractual Documents.¹⁶⁹
- Some of the documents being relied on as the foundation of the claim were not provided, were released at a late date, or do not exist.¹⁷⁰ Others tendered in support of the claim were included or excluded without explanation. With each change of the evidentiary foundation, the Investor made it necessary for Canada to have its Experts assess new evidence, sort out irrelevant information and recalculate damages. For example, KPMG reviewed the various quote populations¹⁷¹ offered throughout the damages phase. The quote population is the fundamental starting point for the Investor's assessment of damages, and not only has the Investor advanced several different figures based on several different populations, it seems unable to agree with its own expert.¹⁷² Each time

¹⁶⁰ The summary identified as Schedule 1 to the Investor's Memorial (Damages Phase), March 1, 2001

¹⁶¹ The summary submitted as "revised" on March 3, 2001 (replacement of Schedule 1)

¹⁶² The summary of contractual documents enclosed as Tab 1 of the 14 - 3" Contractual Document Binders, March 1, 2001

¹⁶³ The number of contractual documents contained in the Contractual Documents Binders, served March 1, 2001

¹⁶⁴ The number identified as quotes plus orders affected by the Ban – table 1 Investor's Memorial (Damages Phase)

¹⁶⁵ The relevant quotes and orders referenced by the Rosen Report, at Section 4 (vi)

¹⁶⁶ *Revised Bids & Quotes* listing, August 10, 2001

¹⁶⁷ Reply Scope of Review Additional Bids and Quotes – Tab E listing E-1 through E-23

¹⁶⁸ Investor's Memorial para 29

¹⁶⁹ Appleton correspondence, March 3, 2001; April 18, 2001

¹⁷⁰ Investor relies on "circumstantial" files; see Appleton & Associates correspondence of May 9, 2001 Canada's Counter Memorial (Damages Phase) Appendix II, tab 15; *Rosen Revised Report* Section 5 (i);

¹⁷¹ KPMG Reply Report, Section 1.9

¹⁷² The Investor's Memorial on Damages uses a base of \$77.9 Million and the Rosen Report uses a base of \$107

the Investor or Mr. Rosen present a new figure, KPMG must work to understand, rationalize and adjust their calculations.¹⁷³

134. Moreover, Canada had to ask on many occasions for documents on which the Investor and its expert relied and that were not produced with the reports, or alternatively that the Investor had on hand, but failed to produce. For example, while Canada requested a list of documents considered by Mr. Rosen in preparation of this report, the Investor responded that “all documents considered and relied upon” had been provided. What is troublesome with that answer is that when both parties’ experts met with the Investor’s bookkeeper at Tallmadge, Ohio, both Mr. Rosen and by Mr. Rostant viewed many newly produced documents. Mr. Rosen failed to list any of those documents in his scope of review. The Investor’s behaviour suggests that it may control other relevant documents that have not been produced.
135. The Investor offered little substantive assistance to the Tribunal in these proceedings. The Investor selectively produced its evidence, and denied Canada’s production requests causing serious delay, prejudice and cost to Canada. Denying production because a broad or general request for certain document production does not match the exact title of a document, or claiming a document “does not exist” because it only exists electronically and is inappropriate. The entire costs of the damages phase should be borne by the Investor.

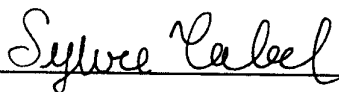
¹⁷³ KPMG Reply Report, Section 5.3

PART H: CONCLUSIONS

136. For the foregoing reasons, Canada respectfully reiterates its requests that this Tribunal render an award in favour of Canada dismissing SDMI's claim for damages in its entirety for failure to establish quantum of loss.
137. Alternatively, Canada says that this Tribunal fix damages in an amount of no more than CDN \$ 257,600 plus simple interest at 5% per annum from the date of the Statement of Claim for the delay caused to SDMI by the Interim Order in earning a return on its expenditures in support of Myers Canada pursuing Canadian PCB export business. Should the Tribunal adopt the contribution margin approach to damages advanced by the Investor and Canada's alternative 3, Canada says that based on the new evidence, this amount should be \$279,600 plus simple interest at 5% per annum.
138. Canada respectfully requests that this Tribunal determine that each party bear its own costs for the Liability Phase of this arbitration. For the Damages Phase, Canada asks that this Tribunal order SDMI to pay all costs, disbursements and expenses incurred by Canada in the defence of this claim including but not restricted to, legal, consulting, and witness fees and expenses, and travel and administrative expenses, as well as the costs of the Tribunal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED in the City of Ottawa, the Province of Ontario, this 31st day of August 2001.



OF COUNSEL FOR THE GOVERNMENT OF CANADA

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