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

INVESTOR'S REPLY TO CANADA'S SUPPLEMENTAL MEMORIAL

BETWEEN:

S.D. MYERS, INC.

Claimant / Investor

- and -

GOVERNMENT OF CANADA

Respondent / Party

1140 Bay Street, Suite 300, Toronto, Ontario M5S 2B4 Tel. (416) 966-8800 Fax. (416) 966-8801 www.appletonlaw.com

816 Connecticut Avenue, NW, 12TH Floor, Washington DC 20006 Tel. (202) 293-0900 Fax. (202) 293-0988

INVESTOR'S REPLY TO CANADA'S SUPPLEMENTAL MEMORIAL

1. This is the Investor's Reply to certain statements and arguments made by Canada in its Supplemental Memorial of December 15, 1999 in this Claim. This Reply should be read in conjunction with the full arguments made by the Investor, S.D. Myers, Inc. ("Myers"), which are contained in the Investor's Memorial of July 20, 1999 and in the Supplemental Memorial of December 15, 1999.

The Investment Issue

2. Canada has attempted in its Supplemental Memorial to suggest that Myers did not have an investment in Canada. **There is no doubt that Myers is an American investor with an investment in Canada.** There is copious evidence to demonstrate that there was significant economic activity taking place in Canada. This investment takes three different forms:

   (a) Myers (Canada), an affiliate of Myers to which Myers made a loan;
   (b) The Myers - Myers (Canada) joint venture which operated in Canada during the relevant period; and
   (c) Myers itself, which operated in Canada on its own as a branch of the US company.

   Not only do these business entities meet the definitions of Investment as set out in NAFTA Article 1139, but it is reasonable to see that the activities of Myers and Myers (Canada) constitute an investment.

3. Canada has asserted at section 6 (paragraphs 63-71) of its Supplemental Memorial that Canada had no knowledge of Myers' Investment in Canada. The Investor cannot accept this position. There in uncontroverted evidence that Canada knew that Myers was operating in Canada to open the PCB waste remediation market. Indeed, Canadian officials discussed the fact that Myers was operating in Canada during the meetings which took place at the Privy Council Office in November 1995.[1] Canada knew that Myers was operating in Canada and it took steps to prevent its continued operation so that it could carry out its policy goal of "Canadianizing the PCB remediation market" by keeping foreign waste remediation companies out.[2]

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[1] For example, see answers 27 and 28 to the Response of Reg Plummer.

[2] This Canadian policy is set out at paragraphs 48 and 49 of the Affidavit of Victor Shantora.

National Treatment

4. Canada has argued that the Investor and the Investment were not in "like circumstances" with Canadian based investments. This argument misapplies the appropriate test of what is "in like circumstances". Canada unsuccessfully made a similar argument regarding its GATS obligations very recently before a WTO panel considering its implementation of the *Canada-US Autopact*. Under the Autopact Regime, Canada provided the best treatment in Canada to specific companies rather than to all companies who were in the same industry. The WTO Panel determined that "likeness" means considering the *de facto* effect on all foreign entities providing those services in the country.[3] Where a measure would result in only some companies within the same industry receiving an unfair advantage, there would be a *de facto* violation of the "like" standard.

5. The business at issue here is PCB waste remediation. All businesses that provided, or attempted to provide, PCB waste remediation fit among the class of those in "like circumstances".[4] Any other determination of the class of businesses to be compared under NAFTA Article 1102 would permit governments to engage in arbitrary discrimination to keep foreign investments away from domestic markets.

6. The "like circumstances" test is designed to ensure that Canada cannot develop policies which arbitrarily discriminate against one investment for the benefit another on the basis of the national origin of the investor and its investment. **Simply put, Canada may not maintain rules that harm foreign investors and their investments while assisting their domestic competitors.**

The Desona Case

7. Canada has provided a copy of the NAFTA Panel decision in the *Robert Azinian et al.* Claim (known as the *Desona* case). This decision speaks for itself. It is a case that is very different in fact and in law from the situation covered by this Claim. In that Claim, the Tribunal found that there were significant difficulties in the manner in which a foreign investor carried out its contractual relations with a subnational government in the United Mexican States and that as a result of these irregularities there was no basis for a *bona*

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[3] *Canada - Certain Measures Affecting the Automotive Industry* (WT/DS 139/R, WT/DS142/R) January 2000 at paragraph 10.262 (Tab 1).

[4] NAFTA Article 1139 provides that "investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, **that seeks to make**, is making or has made an investment" (emphasis added). It is disingenuous of Canada to close its border, thus preventing the Investor and its Investment from operating, and then claim that it has no duty to compensate because the Investor and its Investment were unsuccessful in operating their business in Canada (which, of course, was due to the imposition of Canada's measure).

fide NAFTA Investor-State Claim. Nonetheless, the Tribunal considered the case on its merits, rather than determining that the treatment complained of somehow did not "relate" to the investor or its investment.

8. This present Claim is very different from the *Desona* Claim. In this Claim, Myers has a strong *bona fide* claim. There is uncontroverted evidence that:

(a) Myers operated in Canada on its own, and with its affiliate as an Investment;

(b) Myers and Myers Canada engaged in economic activity in Canada related to the remediation of PCB wastes in Canada;

(c) Canada took measures that were designed to promote domestic companies and harm foreign ones operating in Canada;

(d) Departmental officials warned the government about the poor environmental basis for making this policy choice and about its likely inconsistency with Canada's international law obligations;

(e) Canada knew that Myers was operating in Canada. Canada specifically named Myers in its Regulatory Impact Analysis Statement which formed part of the measure that deprived the Investor and the Investment of its business in Canada; and

(f) There was ongoing communication between officials at the highest level and representatives from the leading domestic competitors of the Investor and Investment. From this communication arose commitments from Canada to protect the domestic industry by harming the Investor and its Investment, which were implemented through the PCB Waste Export Ban.

These are only some of the differences between these cases. **There is no doubt that the *Myers* Claim is a significantly different matter from the *Desona* case.**

The Metalclad Submission

9. Canada has relied upon the submission of the US government in another NAFTA claim, *Metalclad.* The Investor does not need to comment as its materials address all substantive issues raised by this interpretive document that belongs within the context of a completely different claim.

10. The Investor submits that arguments presented to a NAFTA Tribunal, including interpretive statements submitted by another Party, constitute part of the hearings of that Tribunal and are thus held in camera unless that Party, or disputing party, consents to its

release some of the material from a different NAFTA claim without the consent of the disputing parties. Since the disputing parties in *Metalclad* did not agree to the release of any information other than the Investor's Notice of Claim, Canada had no right to submit the US *Metalclad* submission to this Tribunal, in what constitutes a breach of its obligations to treat such matters as if it were a party to the *Metalclad* proceedings under Article 1129(2).

11. The Investor does not comprehend what type of document the *Metalclad* submission is. It is not a submission made by the US Government in this Claim and it is apparently not a document authored by Canada. Canada's submission of this document cannot be taken to reflect the views of the US government in this case because the US government did not submit any interpretative statement under NAFTA Article 1128. The Investor has already apprised the Tribunal of its views on the low weight that it believes that this document should receive by this Tribunal, to the extent that it is even relevant at all.

12. The Investor submits that it is unfair to permit Canada to utilize a document about which only it has specific knowledge without sharing that same knowledge with the Tribunal or the Investor. Otherwise, this Tribunal does not have the context to understand the US submission.

Submitted this 24th day of January, 2000

Barry Appleton

For Appleton & Associates International Lawyers
Counsel for the Investor, S.D. Myers, Inc.