

Ottawa knew it was likely violating NAFTA with PCB ban, documents show

S.D. Myers seeking \$20-million in compensation

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The federal government knew it was likely violating the North American free-trade agreement when it banned in 1995 the export of PCBs for treatment, government documents show.

"A NAFTA challenge to the border closure is very likely as there is no strong environmental argument to justify closure," says an internal memorandum to then-environment minister Sheila Copps, who is now Heritage Minister.

The ban, which lasted from November, 1995, to February, 1997, is now the subject of a challenge under NAFTA's investment chap-

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ter. Ohio-based S.D. Myers Inc., which treats polychlorinated biphenyls, is suing Ottawa for wrecking its Canadian business through the ban.

"Closing the border would likely be found inconsistent with NAFTA," say more government documents, obtained by trade lawyer Barry Appleton, who is acting on behalf of Ohio-based S.D. Myers. "S.D. Myers may try to hold the federal government liable for business losses if [Canadian environmental] regulations close the border."

Indeed, S.D. Myers is taking the next step in its case against the government today, seeking at least \$20-million (U.S.) in compensation.

The Ohio company told the federal government in July that it intended to file a claim for damages under NAFTA's investment chapter. The rules require the two sides to consult for 90 days before the challenge can go ahead.

But the company and Ottawa have not consulted, and now that

the 90 days is up, the Ohio company has decided to pursue its case, Mr. Appleton said. The dispute will now go before a binding arbitration panel, but it will take months to play out.

He argues that during the 15-month ban, Ottawa discriminated against foreign companies, especially S.D. Myers.

Trade Minister Sergio Marchi's office has suggested that the Myers case is frivolous, but Mr. Appleton points to internal government documents showing that the government was well aware of the NAFTA transgressions when it passed the ban.

"If you decide to act to close the Canadian border to PCB exports, expect strong opposition from PCO [Privy Council Office], DFAIT [Department of Foreign Affairs and International Trade] and Industry Canada who, at a meeting with DOE [Department of Environment] staff, viewed PCB export as a trade issue," says the internal memo to Ms. Copps.

Other documents say a government legal opinion indicated that closing the border to PCB exports would be considered a restriction on trade under NAFTA.

But weighing against all the legal opinions was a public commitment that Ms. Copps had made promising that Canadian PCBs would be destroyed in Canada, the documents say.

They also say that Ms. Copps had told Chem Security, an Alberta treatment facility, that she would close the border if the United States removed its own ban on importing PCBs (the United States lifted the ban on Oct. 26, 1995, just three weeks before the federal government put in place its own ban).

The S.D. Myers case is the second NAFTA investment challenge to the federal government's environmental legislation. Virginia-based Ethyl Corp. tried to sue Ottawa for a ban on MMT, a gasoline additive produced by Ethyl. In July, Ethyl and the government settled before the NAFTA panel ruled, with Ottawa agreeing to strike down the ban and pay Ethyl \$13-million.

The NAFTA panel process is shrouded in secrecy, but Mr. Appleton plans to publicly release the government documents today.