DECISION AND ORDER BY THE ARBITRAL TRIBUNAL

In

NAFTA UNCITRAL INVESTOR-STATE CLAIM

Pope & Talbot, Inc. and Government of Canada

1. On February 22, 2002, the Investor advised the Tribunal that, on February 6, 2002, Canada gave notice of its intention to disclose various documents that had been previously submitted to the Tribunal. Canada gave notice pursuant to Procedural Order on Confidentiality No. 5, thereby acknowledging that the documents in question were subject to that Order. Canada said it was acting in response to a request under its Access to Information Act ("ATIA"),[1] which it contended required disclosure unless the documents fall within an exemption to the Act, which Canada denies. Canada further stated that it intended to release the documents 30 days after its notification (March 8, 2002), presumably in compliance with paragraph 5 of Order No. 5. (Canada forwarded copies of the documents in question to the Investor, and the Investor forwarded those documents to the Tribunal with the hard copy of its faxed letter of February 22.)

2. By way of relief, the Investor requested the Tribunal to "make a declaration clarifying, if necessary," Order No. 5, and to "urge...Canada not to release protected documents." The Investor stated that, with the March 8, 2002 deadline, time was of the essence.

3. Canada waited until February 28, 2002 to answer the Investor's request. That answer recounts the requirements of Order No. 5 and asserts that it permits disclosure under domestic Canadian law. Further, Canada asserts that neither the Order nor the UNCITRAL Rules (under which this arbitration is being conducted) "could purport to

---

[1] R.S.C. 1985, c. A-1, as amended.

affect or modify statutorily mandated disclosure requirements." Canada relies expressly on paragraph 5 of Order No. 5 and on Notes of Interpretation issued by the NAFTA Free Trade Commission, as well as three rulings by other Chapter 11 tribunals. Finally, Canada contests the Investor's suggestion that any exemption under the ATIA would apply to the documents in question.

4. Canada's submission does not dispute that the Investor has provided the Tribunal with copies of the documents in question. The Tribunal therefore proceeds on the basis that those documents represent the universe it had been asked to consider. The Tribunal notes that, in one important respect, Canada's description (in its February 6, 2002 notification) of the documents as "certain documents submitted to the Pope & Talbot Tribunal," is not fully accurate. In fact, the documents include transcripts of hearings, which are not submissions at all.

DISCUSSION AND RULING

5. Article 105 of NAFTA requires Canada to ensure that all necessary measures are taken to give effect to the provisions of the Agreement. Article 1120 provides that a disputing investor may submit its claim to arbitration under, *inter alia*, the UNCITRAL Rules, and, further, provides that "The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section." There has been no suggestion that the cited Section has modified the UNCITRAL Rules in any way material to this discussion.

6. The UNCITRAL Rules provide in Article 15(1) that the tribunal may conduct the arbitration in such manner as it considers appropriate, provided the parties are treated with equality. Article 25(4) of the Rules provides, *inter alia*: "Hearings shall be held *in camera* unless the parties agree otherwise." The parties here have not agreed otherwise.

7. Following these precepts and, importantly, at the request of both parties, the Tribunal made Procedural Order No. 5 on December 17, 1999. The parties had been unable to reach complete agreement on a confidentiality order and each party submitted variants to a common draft. In these respects, it was left to the Tribunal to resolve those differences.

8. Procedural Order No. 5 includes the following paragraphs:

> 1. In accordance with UNCITRAL Arbitration Rules Article 25(4), hearings shall be held *in camera* unless the parties agree otherwise.
>
> 2. Transcripts of hearings and submissions by the disputing parties, such as memorials, counter-memorials, pre-hearing memoranda, witness statements and expert reports, including appendices and exhibits to such submissions, and any applications or motions to the Tribunal, shall be kept confidential and may only be disclosed according to the conditions established below for "Protected Documents" or "Third Party Protected Documents," as the case may be.
>
> 3. The following documents may be released into the public domain, subject to redaction of confidential business information as agreed by the parties:
>
> Notice of Intent
> Notice of Arbitration
> Statement of Claim
> Statement of Defense
>
> 4. Subject to NAFTA Articles 1127 and 1129 [which relate to providing documents to other NAFTA Parties, not to the public], no document
>
> (i) for which business confidentiality has been claimed in these proceedings * * * (hereinafter referred to as "Protected Documents"), or information recorded in those documents, or
>
> (ii) for which business confidentiality with respect to third parties has been claimed in these proceedings * * * (hereinafter referred to as "Third Party Protected Documents"), or information recorded in those documents, shall be disclosed except in accordance with the terms of this Order or with prior written consent of the person that claimed business confidentiality over the document and the person to whom the business confidential information relates.

5. If any person in possession of a Protected Document or Third Party Protected Document receives a request pursuant to law to disclose a Protected Document or Third Party Protected Document or information contained therein, that person shall give prompt written notice to the party that claimed confidentiality over the document and to the person to whom the confidential information relates so that such party may seek a protective Order or other appropriate remedy. Such notice shall be provided not less than sixty (60) days before disclosure unless the law requires disclosure in a shorter period of time.[2]

* * *

16. This Order shall be subject to further direction of the Tribunal.

9. Procedural Order No. 5 was first modified on April 2, 2000 in relation to its paragraphs 10 and 11 so that Canada might make certain confidential information available to certain persons. That modification was made upon the condition that the information would remain confidential within that additional class of persons and was to be used for a limited purpose. Specifically, those additional persons would be required to execute a confidentiality agreement in the terms specified in the Order.

10. On July 31, 2001, the NAFTA Free Trade Commission issued an interpretation of Chapter 11 which included the following language:

A. **Access to documents**

1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter 11 arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.

2. In the application of the foregoing:

(a) In accordance with article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the

[2] On March 8, 2002 the Tribunal amended the Order to provide a sixty day period, previously, it had been thirty days.

> Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.
>
> (a) Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:
>
> (i) ***
>
> (ii) ***
>
> (iii) Information which the Party must withhold pursuant to the relevant arbitral rules, as applied.

11. Based upon its submissions, Canada accepts that the documents in question are to be treated pursuant to paragraph 5 of Order No. 5. That is the plain intention of the Order, since those documents largely fall under paragraph 2 of the Order, which expressly requires such treatment. The question raised by Canada's actions in this matter is whether the ATIA makes the remainder of Order No. 5 inapplicable, once the 30 day (now 60 day) notice procedures have been followed.[3]

12. Canada summarized its views in its letter to the Investor dated February 18, 2002 in the following terms:

> Disclosure pursuant to domestic law is consistent with Canada's international obligations and Procedural Order on Confidentiality No. 5. Procedural Order on Confidentiality No. 6 expressly recognizes that information or documents filed with the Tribunal may be subject to disclosure under domestic law.

The Tribunal is not clear upon what part of the Order Canada relies as *express* recognition of its assertion that documents are subject to disclosure under domestic

---

[3] For example, paragraphs 9 and 10 of the Order set out categories of persons to whom disclosure may be made; Canada does not suggest that the persons seeking the documents fall within those categories. Paragraph 11 requires that persons receiving covered documents "be governed by this Order," and paragraph 13 requires that they execute a Confidentiality Agreement prescribed by the Order. Canada has not suggested that it intends to take any steps under those paragraphs.

law. In the course of negotiating the terms of Order No. 5, Canada did propose an express provision that would have made it "without prejudice to the rights, duties and obligations of Canada under its laws * * * including the Access to Information Act."[4] The Tribunal rejected that proposal. For this reason, the Tribunal rejects Canada's contention that the Order expressly recognizes disclosure under the ATIA.

13. To the extent that Canada claims that Order No. 5 implicitly recognizes disclosure pursuant to domestic law, the Tribunal points out that the Order plainly contemplates that disputes over release of documents will be determined by the Tribunal, not that a party may release documents absent approval. Canada has not sought such approval.

14. Canada makes reference to the Interpretation of the NAFTA Free Trade Commission set out above, arguing that nothing in Chapter 11 imposes a general duty of confidentiality. This is true, but the remainder of the Interpretation shows that the NAFTA Parties fully recognized that there may well be *specific* requirements of confidentiality that inure in the Chapter 11 process. Of course, Order No. 5 is such a specific requirement. It was not a product of a general requirement of confidentiality but of an agreement between the parties, adopted by the Tribunal, regarding appropriate treatment of submissions and other documents.[5]

---

[4] Canada's fax to the Tribunal, Nov. 18, 1999.

[5] While Canada would have preferred that pre-hearing memoranda and applications or motions to the Tribunal not be included in the Order, the reason it gave for that preference was that the decision of their treatment was "premature and turns on the contents of the document." *See* Canada's letter to the Tribunal dated Nov. 19, 1999. In other words, Canada's position implicitly recognized that those documents could, in circumstances it chose not to enumerate, properly be considered as confidential. The Tribunal's decision to issue a comprehensive order that would avoid document-by-document rulings did no violence to Canada's views in this respect.

15. The Tribunal observes that the Interpretation applies only to documents "submitted to, or issued by, a Chapter Eleven tribunal." Certain of the material that Canada proposes to make public are not either, but are transcripts of the hearings. To the same point, the Interpretation recognizes that the arbitral rules referred to in Article 1120(2) may set forth specific exceptions that may preclude disclosure. As noted, the UNCITRAL Rules do contain a specific provision requiring *in camera* hearings, unless the parties agree otherwise. That exception would surely cover transcripts of those hearings.

16. The Interpretation also requires redaction "of information the [NAFTA] Party must withhold pursuant to the relevant arbitral rules, as applied." Article 15 of the UNCITRAL Rules gives a tribunal authority to "conduct the arbitration in such manner as it considers appropriate," making Order No. 5 a plain application of those Rules and thus within the language of the Interpretation.[6] Finally, the Interpretation was issued some seven months ago, and Canada has never suggested that it requires amendment of or, indeed, has any bearing on Order No. 5.[7]

17. For these reasons, the Tribunal rejects Canada's suggestion that the Interpretation requires disclosure under the ATIA. Indeed, the Tribunal views as the better argument that the Interpretation recognizes the validity of Order No. 5 as binding on Canada.

18. At bottom, Canada argues that, under the ATIA, any citizen or permanent resident of Canada, simply by filing a written request, must be given access to information

---

[6] Article 15 of the UNCITRAL Rules also requires that the parties be "treated with equality," thereby raising questions about an interpretation that would remove only the NAFTA disputing party but not the investor from confidentiality restraints. In view of its other determinations on these matters, the Tribunal need not resolve this question at this time.

[7] During that period, Canada has made a number of representations to the Tribunal on other aspects of the Interpretation.

otherwise protected by Order No. 5.[8] If that interpretation of the Act is correct, the Tribunal finds it difficult to understand how Canada could have accepted in good faith the undertakings in paragraphs 1 and 2 of Order No. 5 (much of which was contained in Canada's own proposed order) and, indeed, of NAFTA itself. As a Party to NAFTA, Canada pledged to follow the UNCITRAL Rules where, as here, they have been properly invoked in a Chapter 11 arbitration. As noted, those rules require *in camera* hearings. Yet Canada now seems to be saying that that undertaking may be disregarded in the face of a request for hearing transcripts under the ATIA and that that step may be taken without even making a submission to the Tribunal. This Tribunal has no expertise to interpret the ATIA, but it can state that making these documents public will not only violate Order No. 5 but NAFTA itself.

19. Canada has drawn the Tribunal's attention to three decisions of other Chapter 11 tribunals that, it claims support its views. The first ruling, in *Mondev International, Ltd. and United States*, concerned release under the U.S. Freedom of Information Act[9] of submissions by the United States to the tribunal and certain letters it wrote to the claimant's counsel and the tribunal. The *Mondev* tribunal makes no reference to a confidentiality order in that case, so the Tribunal assumes there was none. Thus, the question for decision was whether the ICSID (Additional Facility) Rules, under which that arbitration proceeded, required non disclosure. The tribunal found no such provision in those rules, which only call for what amounts to *in camera* hearings – no publication of hearing minutes and/or outside party attendance without agreement of

---

[8] While the ATIA contains certain exceptions, Canada argues that none are applicable here to documents admittedly covered by Order No. 5.

[9] 5 U.S.C. § 552.

the disputing parties. Thus, the tribunal in *Mondev* had no occasion to address the issues presented here.

20. The Tribunal is not sure why Canada would rely on the tribunal's rulings in *Loewen and United States*. Those decisions involve release of minutes and audio recordings of a hearing. The tribunal ruled that the ICSID (AF) Rules regarding non disclosure of hearing minutes applied to parties, not just the tribunal, and that those rules prohibited publication of hearing minutes, a full record of the hearing and any order made by the tribunal. It was only after reaching that determination that the tribunal observed, as *dicta*, that its decision could not alter statutory imposed obligations regarding disclosure. To the Tribunal, the *Loewen* decisions are perfectly consistent with the decisions reached here.

21. Finally, the decision in *Metalclad and Mexico* considered a request by Mexico for an order declaring that the proceedings would be confidential. Mexico was concerned that the investor's CEO had described various aspects of the case to shareholders and investment analysts. Mexico contended that oral comments of the president of the tribunal during a previous hearing amounted to a declaration of a "general principle of confidentiality." The tribunal concluded that nothing was intended in those remarks beyond a restatement of the ICSID (AF) rule against publication of the hearing minutes. The tribunal did find that disclosure by the claimant of specific time limits apparently discussed in the hearing was a technical violation of the ICSID (AF) Rules, but not serious enough to warrant a protective order. Thus, *Metalclad*, like *Mondev*, simply does not raise the issues presented here.

22. In its most recent submission of March 7, 2002, Canada, for the first time, gave the Tribunal the text of the request for disclosure it is addressing under the ATIA:

> Any reports, submissions, interpretations, memoranda, discussion papers, research papers, analyses, studies, opinions or any other information *prepared by* Canada, the United States and/or Mexico from October 1, 1996 to present concerning [various aspects of NAFTA Chapter 11]. [Emphasis added.]

The request was dated December 6, 2000, more than 15 months ago.

Insofar as the material intended to be disclosed by Canada includes parts of hearing transcripts (Items 8, 9, and 10 of Appendix One hereto and a separate copy of pages 536, 537, 539 and 541), they cannot reasonably be said to be "prepared by" Canada or the other NAFTA Parties. Since those documents were not requested under the ATIA, their disclosure could not be justified by the requirements of that statute. Canada's failure promptly to apprise the Tribunal of the request has thus unnecessarily placed it in peril of violating its obligations under Order No. 5.

23. The Tribunal also notes that, to the extent Canada has urged time limitations imposed by the ATIA as justification for its actions in this matter, the deadline fixed for disclosure under that act was November 19, 2001. After that date, Canada was accordingly deemed under the ATIA to have refused to comply with its disclosure obligations. Canada has also asserted that it had no discretion to extend the time limit. The Tribunal observes that, when it first notified the Investor on February 6, 2002 of its intent to disclose, Canada was already in breach of the time limit with purportedly no discretion after November 19, 2001 to delay further. Yet it relied on paragraph 6 of Procedural Order No. 5 nevertheless to extend that period. The Tribunal finds it difficult to see why Canada did not rely on the further request by the Tribunal to extend the period again.

24. For these reasons, the Tribunal declares as follows:

1. The documents referred to in Appendix One hereto are confidential documents falling within paragraphs 1 and 2 of the Procedural Order on Confidentiality No.

5 made by the Tribunal on December 17, 1999, as amended, and both parties are in terms of that Order obliged to treat them as confidential and not to disclose them to any person, other than in accordance with the terms of that Order.

2. The documents referred to in Appendix Two hereto are not confidential documents within the meaning of Procedural Order No. 5.

March 11, 2002

Lord Dervaird, Presiding Arbitrator

The Honourable Benjamin J. Greenberg, Q.C., Arbitrator

Murray J. Belman, Arbitrator

APPENDIX ONE

DOCUMENTS WHICH ARE CONFIDENTIAL
WITHIN THE TERMS OF PROCEDURAL ORDER
ON CONFIDENTIALITY NO. 5

1. Letter from Eric Harvey to Tribunal dated February 10, 2000.
2. Submission prepared by Eric Harvey dated 10 March 2000 (and affidavit of Daniele Ayotte).
3. Letter from Eric Harvey to Tribunal dated March 10, 2000.
4. Canada's undated Reply to Investor's Response to Canada's Application on Confidentiality signed by Fulvio Fracassi for Eric Harvey.
8. Part of Transcript of Hearing of January 7, 2000 (pp 536, 537, 539, 541).
9. Part of Transcript of Hearing of January 7, 2000 (pp 535 – 552).
10. Part of Transcript of Hearing of January 6, 2000 (pp 157 – 162).
11. Letter from Eric Harvey to Tribunal dated March 24, 2000.
12. Letter from Eric Harvey to Tribunal dated November 30, 1999.
13. Letter from Eric Harvey to Tribunal dated December 1, 1999.
14. Letter from Eric Harvey to Tribunal dated December 6, 1999.
15. Letter from Eric Harvey to Tribunal dated December 10, 1999.
19 & 20. Letter from Eric Harvey to Tribunal dated March 21, 2000.
21. Letter from Eric Harvey to Tribunal dated April 20, 2000.

In addition to those numbered items upon which Appleton & Co has commented there are included in the copy bundle sent to the Tribunal several other documents. Most of these are fax cover sheets to which no confidentiality attaches. However immediately following the letter numbered 25 in the Folio of Documents sent by Appleton & Co to each member of the Tribunal there is a further copy of pages 536, 537, 539 and 541 of the Transcript of the Hearing of January 7, 2000 (also sub-numbered 004081, 004082, 004083 and 004084) which are confidential documents.

To:

APPENDIX TWO

No confidentiality under Procedural Order No. 5 attaches to the other documents contained in the bundle sent to the Tribunal. For the avoidance of doubt this includes the following items identified by number in the letter from Appleton & Co dated February 13, 2002:- 5, 6, 7, 16, 17 and 18. Fax cover sheets are not in the view of the Tribunal confidential documents.

John Dervaird

Presiding Arbitrator on behalf of the Tribunal

14 March 2002.