

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF  
THE NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE UNCITRAL ARBITRATION RULES**

BETWEEN:

**WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS  
CLAYTON, DANIEL CLAYTON AND BILCON OF DELAWARE INC.**

INVESTORS

AND

**GOVERNMENT OF CANADA**

RESPONDENT

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**PROCEDURAL ORDER NO. 9**

**July 16, 2010**

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**ARBITRAL TRIBUNAL:**

Judge Bruno Simma (President)  
Professor Donald McRae  
Professor Bryan Schwartz

**WHEREAS** on February 25, 2010, April 12, 2010, and June 14, 2010, the Disputing Parties submitted Interim Reports on the status of their document production.

**WHEREAS** on June 28, 2010, the Tribunal held a case management meeting with the Disputing Parties in Toronto, Canada (the “Case Management Meeting”), with the purpose of exploring whether the number of documents that remained to be reviewed and produced could be significantly reduced.

**WHEREAS** the Tribunal invited the Disputing Parties, on June 21, 2010, to consider a series of specific questions designed to facilitate the discussion during the Case Management Meeting.

**WHEREAS** as a result of the discussion during the Case Management Meeting, the Disputing Parties were invited to provide written submissions setting out their views as to how the process of document production could be rendered more efficient.

**WHEREAS** on July 5, 2010, the Respondent filed a written submission including its proposal regarding documents already produced; its proposals regarding individual and project-specific requests; its position on the timing of producing indices; its position on the early filing of privilege logs; and information regarding the guidance and direction that the Respondent had provided to individuals and government entities from whom documents were requested.

**WHEREAS** on July 5, 2010, the Investors filed a written submission, addressing the appropriate completion date for document production; its position regarding the disclosure of letters to individuals and government entities from whom documents were requested; its position regarding the filing of privilege logs for completed document requests; its request for the submission of a draft electronic index simultaneously with each future document production.

**WHEREAS** on July 9, 2010, both Disputing Parties submitted replies to the opposing Party’s written submission dated July 5, 2010.

**THE TRIBUNAL ISSUES THE FOLLOWING PROCEDURAL ORDER:**

**1. “Documents Already Produced”**

The Disputing Parties’ agreement regarding “documents already produced”, as set out in the Respondent’s submission dated July 5, 2010 and clarified in the Investors’ submission dated July 9, 2010, is confirmed:

- 1.1 In all future productions of documents responsive to outstanding individual specific requests 16, 23 and 24, the Respondent will not produce “documents already produced” in previous productions.
- 1.2 “Documents already produced” shall include documents that contain exactly the same information, yet may appear in a different form, that have been previously produced by the Respondent. The definition of “documents already produced” does not apply to documents containing margin notes, annotations, additional communication or information different from the originally-produced document.

- 1.3 Without prejudice to the Disputing Parties' positions on the timing of indices, the Respondent will continue to provide the Investors with an index for each and every future individual-specific request. The index will set out all information for the documents that are produced pursuant to the request, as required by paragraph 2(c) of Procedural Order No. 7. The Respondent will also provide an accompanying index that will provide a cross-reference to the production(s) and bates page number(s) of any documents that were not produced in respect of the individual by reason of the fact that they were "documents already produced" in previous productions.
- 1.4 For all future productions, "documents already produced" need not be identified in accordance with paragraph 2(a) of Procedural Order No. 7.

## **2. Sequence of Production of Outstanding Documents**

The production of all outstanding documents shall be completed in the following sequence:

- 2.1 The production of documents falling within Category A of Annex I shall be handled as a matter of priority and be completed by DATE A (with the exception of those documents for which claims of cabinet privilege, political sensitivity, or legal privilege are asserted). DATE A will be fixed by the Tribunal after considering the Disputing Parties' July 16, 2010 motion and July 27, 2010 reply regarding the question of documents in the possession of persons or organizations who are not a party to the arbitration.
- 2.2 The production of documents falling within Category B of Annex I shall be completed by DATE B (with the exception of those documents for which claims of cabinet privilege, political sensitivity, or legal privilege are asserted). DATE B shall coincide with the due date for the Respondent's Counter-Memorial.
- 2.3 DATE B shall also constitute the "close of the time period provided for the production of documents" within the meaning of Section 3(c) of Procedural Order No. 7. Thus, privilege logs shall be exchanged within 7 days after DATE B, followed by the steps set out in Section 3(d)-(h) of Procedural Order No. 7.

## **3. Timing of Memorial, Counter-Memorial, Reply and Rejoinder**

- 3.1 The Investors shall submit their Memorial within 90 days after DATE A. The Respondent shall submit its Counter-Memorial within 90 days after the receipt of the Investors' Memorial.
- 3.2 Section 1.4 of Procedural Order No. 3 is amended to the effect that the Investors' Reply shall be due within 60 days after the production of documents ordered by

the Tribunal pursuant to Section 3(h) of Procedural No. 7.<sup>1</sup> The Respondent shall submit its Rejoinder within 60 days after the Investors' Reply.

- 3.3 Section 38 of Procedural Order No. 1 is amended to the effect that the Disputing Parties shall not be precluded from filing documentary evidence with their Reply or Rejoinder.

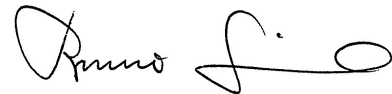
#### **4. Date Parameters and Search Terms**

The Respondent shall not be entitled to reduce the scope of documents for review for relevance and materiality through the use of date parameters or search terms.

#### **5. Timing of Indices**

With regard to the production of indices, the Respondent may continue to provide the Investors with an index within 7 days after a particular set of documents has been produced, in accordance with Section 2(c) of Procedural Order No. 7.

Dated: July 16, 2010



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Judge Bruno Simma  
President of the Tribunal

On behalf of the Tribunal

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<sup>1</sup> In the event that the Disputing Parties do not require the Tribunal's assistance in resolving disagreement regarding their respective privilege claims, the Investors' Reply shall be due within 60 days after the Disputing Parties have notified the Tribunal that their disagreement has been resolved. In the event that the Tribunal decides not to order the production of any documents for which a Party has claimed cabinet privilege, political sensitivity, or legal privilege, the Investors' Reply shall be due within 60 days after that decision of the Tribunal.

## **ANNEX I: CATEGORIES OF DOCUMENTS**

### **1. Category A documents include the following:**

- a. With regard to requests 3, 4 and *4bis*, documents in the possession of the Department of Fisheries and Oceans, the Canadian Environmental Assessment Agency and Transport Canada.
- b. With regard to request 4 and *4bis* sub-paragraph (b), by which the Investors seek internal documents of any provincial authority, documents in the possession of the provincial authorities of Nova Scotia.
- c. With regard to request 4, all documents in relation to projects not listed under Category B below.
- d. All other documents not falling within Category B below.

### **2. Category B documents include the following:**

- a. With regard to requests 3, 4 and *4bis*, documents in the possession of the following:
  1. National Energy Board
  2. Canadian Transport Agency
  3. Department of Northern Affairs
  4. Canadian Nuclear Safety Commission
  5. Industry Canada
  6. Canada-Nova Scotia Offshore Petroleum Board
  7. Environment Canada
  8. Natural Resources Canada
  9. All other federal agencies excluding the Department of Fisheries and Oceans, the Canadian Environmental Assessment Agency and Transport Canada
- b. With regard to request 4 and *4bis* sub-paragraph (b), by which the Investors seek internal documents of any provincial authority, documents in the possession of all provincial authorities other than those of Nova Scotia.
- c. With regard to request 3, documents in relation to the following remaining projects for which the Respondent has yet to complete production:
  1. Joslyn North Mine Project, CEAR Reference No. 08-03-37519
  2. Prosperity Gold-Copper Mine Project, CEAR Reference No. 09-05-44811
  3. Muskeg River Mine Expansion-Albion Oil Sands Project, CEAR Reference No. 05-07-16529
  4. Cheviot Coal Mine Project (2000)

5. Kemess North Gold-Copper Mine, CEAR Reference No. 04-07-3394
6. NWT Diamonds Project (1996)
7. Uranium Mining Developments in Northern Saskatchewan (1997)
8. Sable Gas Projects

d. With regard to request 4, documents in relation to the following projects:

1. LNG Terminal in Saguenay: Grand Anse Project, CEAR 06-03-16553
2. Kerr-Sulphurets-Mitchell Copper-Gold Mine, CEAR 07-03-36352
3. Kutcho Creek Copper Zinc Silver Mine, Dease Lake, B.C., CEAR 09-03-49262
4. Lodgepole Coal Mine, B.C., CEAR 07-03-36059
5. Millennium Mine Project, CEAR 09-03-49928
6. Mining and Milling the Midwest Project, CEAR 06-03-17519
7. Morrison Copper-Gold Project, CEAR 09-03-48445
8. Mount Milligan, Gold Copper Mine, CEAR 08-03-39778
9. Galore Creek Gold-Silver-Copper Mine, CEAR 05-038858
10. Keltic Petrochemical and Liquefied Natural Gas Terminal, CEAR 05-03-10471
11. Kitimat LNG Inc.-Liquefied Natural Gas Terminal, CEAR 05-03-10430
12. Liquefied Natural Gas (LNG) Transshipment and Storage Terminal, CEAR 07-03-26546
13. Newfoundland Transshipment Terminal (1996)
14. Pamour Gold Mine Expansion Project (2005)
15. Victor Diamond Project (2005)
16. Encana Corporation- Deep Panuke Offshore Gas Development Project, CEAR 06-03-21748
17. Aquarius Gold Mine (2000)
18. Diavik Diamond Mine (1999)
19. Huckleberry Copper Mine (1996)
20. Kemess South Gold-Copper Mining Project (1996)
21. Liquefied Natural Gas Marine Terminal and Multi-Purpose Pier (2004)

e. Draft versions of media communications and communications surrounding those media communications.

**ANNEX II: INDICATIVE TIMETABLE**

| <b>Event</b>  | <b>Party</b>   | <b>Date</b>  |
|---|--|--|
| <i>Date for the commencement of the time period for the filing of the Memorial</i><br>and<br><i>Production of documents in Category A (DATE A)</i>  | Tribunal<br><br>Respondent   | To be set by Tribunal  |
| <i>Memorial on jurisdiction and merits</i>  | Investors  | + 90 days  |
| <i>Counter-memorial on jurisdiction and merits</i><br>and<br><i>Production of documents in Category B (DATE B)</i>  | Respondent   | + 90 days  |
| <i>Privilege logs</i><br><br><ul style="list-style-type: none"> <li>- Exchange between the Disputing Parties</li> <li>- Notification of objections to claims of privilege/sensitivity</li> <li>- Production of submissions and evidence to substantiate claims of privilege/sensitivity</li> <li>- Reply to submissions and evidence regarding claims of privilege/sensitivity</li> <li>- Submission of contested claims of privilege to the Tribunal</li> <li>- Tribunal decision on claims of cabinet privilege, political sensitivity, or legal privilege</li> <li>- Production of documents as ordered by the Tribunal</li> </ul> | Disputing Parties<br><br><br><br><br><br><br>Tribunal<br><br>Disputing Parties | + 7 days<br><br>+ 7 days<br><br>+ 30 days<br><br>+ 15 days<br><br>+ 7 days<br><br>To be set by Tribunal<br><br>+ 30 days |
| <i>Reply on jurisdiction and merits</i>   | Investors  | + 60 days  |
| <i>Rejoinder on jurisdiction and merits</i>   | Respondent   | + 60 days  |
| <i>Submissions pursuant to Article 1128 of NAFTA</i>  | Non-disputing parties  | + 15 days  |
| <i>Observations on Article 1128 Submissions</i>   | Disputing Parties  | + 30 days  |