

**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

PROCEDURAL ORDER NO. 7

November 20, 2009

ARBITRAL TRIBUNAL:

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

Permanent Court of Arbitration (PCA) Case No. 2009-04

WHEREAS the present arbitration finds itself at the stage of document production.

WHEREAS, on August 14, 2009, each of the Disputing Parties transmitted by courier some of the documents requested of it and, by e-mail of the same date, submitted refusal notices with regard to other document requests.

WHEREAS, on September 11, 2009, each of the Disputing Parties submitted to the Tribunal an application for the production of documents in the form of a Redfern schedule detailing requests for documents, the objections of the opposing Party, and the requesting Party's replies thereto.

WHEREAS, on September 24, 2009, the Disputing Parties submitted a revised Redfern schedule containing the Respondent's requests for the production of documents, the Investors' objections, and the Respondent's replies to the Investors' objections.

WHEREAS, on October 13, 2009, the Disputing Parties each made an additional submission regarding the legal principles that should govern the Tribunal's consideration of claims of cabinet privilege, political sensitivity, and legal privilege, as well as the process and schedule for the Tribunal's consideration of objections on the grounds of privilege and sensitivity.

WHEREAS, on October 16, 2009, the Tribunal held a Case Management Meeting with the Disputing Parties in Toronto, Canada to address issues relating to the production of documents.

WHEREAS, on November 4, 2009, the Disputing Parties submitted revised requests for the production of documents and revised objections in the form of a joint Redfern schedule.

WHEREAS, in a letter to the Tribunal dated November 19, 2009, the Respondent requested an extension of the original time period for the production of certain documents to December 18, 2009, and the Investors consented to such extension in a letter to the Tribunal dated November 20, 2009.

WHEREAS the Tribunal is presently considering the Disputing Parties' revised requests for the production of documents.

THE TRIBUNAL ISSUES THE FOLLOWING PROCEDURAL ORDER:

1. The Tribunal notes that, during the October 16, 2009 Case Management Meeting, the Disputing Parties were in agreement on a default period of 30 days for the production of documents that are no longer subject to objections following the exchange of revised requests. Accordingly:
 - a. The production of documents that are not subject to objections shall in principle occur by **Monday, November 23, 2009** (30 days from the Disputing Parties' filing of revised document production requests).
 - b. As agreed between the Disputing Parties, the Disputing Parties shall produce any documents that they are unable to make available by this date no later than by **Friday, December 18, 2009**.

2. Documents shall be produced in such a form that the documents and the requests to which they are responsive are readily identifiable. Accordingly, in the further course of document production, the Disputing Parties shall comply with the following provisions regarding the production of all documents:
 - a. Documents shall be identified individually and assigned an individual identification number, which shall be marked on each page of the document.
 - b. Documents shall be produced in order and shall be produced in such a manner that the beginning and end of each document can be readily determined, including—if appropriate—through the use of dividers or tabs.
 - c. Documents shall be accompanied by an index, which shall set forth the following information:
 - i. the identifying number of the document;
 - ii. the title or description of the document;
 - iii. the document request(s) to which the document is responsive; and
 - iv. the number of pages contained in the document.


With regard to documents produced on Monday, November 23, 2009, the corresponding index shall follow by **Monday, November 30, 2009**.

3. Following the Tribunal's decision on the requests for the production of documents contained in the revised joint Redfern schedule, the further production of documents and consideration of claims of cabinet privilege, political sensitivity, or legal privilege shall proceed as follows:
 - a. **Within 7 days** from the Tribunal's decision, the Disputing Parties shall confer and seek agreement as to whether the quantity of documents ordered to be produced necessitates an extension of time provided for production. The Disputing Parties' agreement, or—in the absence of agreement—an application from the Party seeking additional time shall be communicated to the Tribunal. An application for additional time shall comply with the Motions Procedure set forth in paragraphs 30 and 31 of Procedural Order No. 1.
 - b. In the absence of either an application for additional time or an agreement between the Disputing Parties to modify the time provided for production, documents responsive to the requests for production granted by the Tribunal shall be produced **within 30 days** from the Tribunal's decision—except where a claim of cabinet privilege, political sensitivity, or legal privilege is asserted regarding individual documents.
 - c. **Within 7 days** from the close of the time period provided for the production of documents (30 days from the Tribunal's decision or an alternate period agreed upon by the Disputing Parties or ordered by the Tribunal), the Disputing Parties shall exchange privilege logs detailing any claims of cabinet privilege, political sensitivity, or legal privilege asserted regarding individual documents.

Privilege logs shall identify individually each document as to which a claim of cabinet privilege, political sensitivity, or legal privilege has been asserted. They

shall also state the circumstances giving rise to the assertion of privilege/sensitivity for each document in sufficient detail to permit the requesting Disputing Party to make an initial evaluation as to whether the assertion of privilege/sensitivity is justified.

- d. **Within 7 days** from the receipt of the opposing Disputing Party's privilege log, the Disputing Parties shall notify each other regarding any objections to the exclusion of individual documents from production on the grounds of cabinet privilege, political sensitivity, or legal privilege.
 - e. **Within 30 days** from the receipt of objections to the exclusion of individual documents, the Disputing Party asserting the claim of cabinet privilege, political sensitivity, or legal privilege shall provide further submissions and/or evidence to substantiate its claim.
 - f. **Within 15 days** from the receipt of further submissions and/or evidence in support of the claim of cabinet privilege, political sensitivity, or legal privilege, the Party objecting to the asserted claim shall reply, indicating whether it continues to object to the claim of cabinet privilege, political sensitivity, or legal privilege.
 - g. **Within 7 days** from the receipt of all replies, the Disputing Parties shall submit any claims of cabinet privilege, political sensitivity, or legal privilege regarding individual documents that remain contested to the Tribunal for determination. The Disputing Parties shall submit all contested claims jointly in the form of a schedule pursuant to the model attached to this Procedural Order as Annex B. At the request of the Disputing Parties, the PCA will be available to assist the Parties in making a joint submission. The Tribunal will thereafter decide any claims of cabinet privilege, political sensitivity, or legal privilege submitted to it.
 - h. Following the Tribunal's decision on claims of cabinet privilege, political sensitivity, or legal privilege, the Disputing Parties shall produce any documents ordered by the Tribunal **within 30 days** of the Tribunal's decision.
4. For the benefit of the Disputing Parties, the schedule set forth in this Procedural Order is provided in tabular form and attached as Annex A.



Dated: November 20, 2009

Judge Bruno Simma
President of the Tribunal

On behalf of the Tribunal

ANNEX A: INDICATIVE TIMETABLE

Event	Party	Date
<i>Document production:</i> - Production of documents to the production of which the requested Party no longer objects	Disp. Parties	November 23, 2009 and December 18, 2009
<i>Tribunal decision on revised requests for the production of documents</i>	Tribunal	To be set by Tribunal (= Day A)
<i>Document production:</i> - Agreement regarding whether additional time for production is required by the quantity of documents ordered, or application for additional time - Production of documents as ordered by the Tribunal in the absence of an agreement or application for additional time - Exchange of privilege logs - Notification of objections to claims of privilege/sensitivity - Production of submissions and evidence to substantiate claims of privilege/sensitivity - [Reply to submissions and evidence regarding claims of privilege/sensitivity] - Submission of contested claims of privilege to the Tribunal	Disp. Parties Disp. Parties Disp. Parties Disp. Parties Disp. Parties Disp. Parties	A + 7 days A + 30 days = B B + 7 days = C C + 7 days = D D + 30 days = E E + 15 days = F F + 7 days
<i>Tribunal decision on claims of cabinet privilege, political sensitivity, or legal privilege</i>	Tribunal	To be set by Tribunal (= Day X)
<i>Document production:</i> - Production of documents as ordered by the Tribunal	Disp. Parties	X + 30 days

ANNEX B: MODEL SCHEDULE FOR CLAIMS OF CABINET PRIVILEGE, POLITICAL SENSITIVITY, OR LEGAL PRIVILEGE

No.	Document requested (<u>Party claiming privilege</u>)	Claim of Privilege/Sensitivity (<u>Party claiming privilege</u>)		Submission in Support of Privilege/Sensitivity (including reference to any evidence submitted) (<u>Party claiming privilege</u>)	Reply to Submissions and Evidence in Support of Privilege/Sensitivity (<u>Party challenging privilege</u>)	Decision (<u>Tribunal</u>)
		Privilege Claimed	Initial Circumstances for Claim of Privilege (from privilege log)			