

**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. 6

August 26, 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 a refusal notice with regard to other document requests.

WHEREAS the Investors, in a letter dated August 17, 2009, requested the Respondent to “provide a timely and sorted production of the documents, or an index”.

WHEREAS the Investors, in a letter dated August 20, 2009, requested the Tribunal to order that “the deadline of the filing of Redfern schedules be pushed back by 14-days from the date of receipt of Canada’s index”. According to the Investors, the Respondent’s failure to provide an index “can only be attributed to its desire to prejudice the ability of the Investors to produce Refusals to [the Respondent’s] Request in the 14-day period available for the [D]isputing [P]arties to make refusal motions to the Tribunal”.

WHEREAS the Respondent, in a letter dated August 21, 2009, opposed the Investors’ request “for an extension of the timeline applicable to the next steps in the document production phase of this arbitration”, submitting that the Investors “have provided no explanation as to how such an index bears any relevance to the next step in document production”. In particular, the Respondent emphasizes that the next step in the document production phase is for the Disputing Parties “to exchange replies to refusal notices”, which “have nothing to do with what has been produced, but instead relate to what the [D]isputing [P]arties are refusing to produce”.

WHEREAS the Investors, in a letter dated August 24, 2009, repeated their request that the Respondent “be ordered to produce a proper production index with document list, and that the date for the filing of document refusals be extended until 14 days after receipt of a proper index”. The Investors submit that the lack of an index has put them “in the unfair position of not knowing what has been produced”; consequently, the Investors allege that it has been “impossible to determine how to respond to the Respondent’s objections, as set out in Section 3.5.2 of Procedural Order No. 3”.

WHEREAS the Respondent, in a letter dated August 25, 2009, repeated its opposition to the Investors’ request, re-emphasizing that “[t]he documents produced by [the Respondent], and the detailed index that it voluntarily prepared to assist the [the Investors], bear absolutely no relevance to the documents that [the Respondent] objected to producing”; consequently, the Respondent finds “no explanation” as to why the Investors are unable to respond to the Respondent’s refusals by the original deadline.

THE TRIBUNAL ISSUES THE FOLLOWING PROCEDURAL ORDER:

1. The Tribunal considers that the matter of the timing of the Investors’ replies to the Respondent’s refusal notice pursuant to Section 3.5.2 of Procedural Order No. 3 is distinct from that of alleged insufficiencies in the modalities of the Respondent’s document production, since the Investors’ replies are expected to solely address the objections stated in the Respondent’s refusal notice.

2. The Tribunal clarifies that the Disputing Parties' replies pursuant to Section 3.5.2 of Procedural Order No. 3 are without prejudice to a Disputing Party's right to bring to the Tribunal's attention any insufficiencies in the other Disputing Party's document production that it may identify at a later stage, following the review of the documents produced by the other Disputing Party.
3. The request for an extension of the deadline for replies to the requested Disputing Party's objections pursuant to Section 3.5.2 of Procedural Order No. 3 is rejected; the original deadline of August 28, 2009 stands.

Dated: August 26, 2009



Judge Bruno Simma
President of the Tribunal

On behalf of the Tribunal