

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES OF 1976 (“UNCITRAL Rules”)**

-between-

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

(the “Investors”)

-and-

GOVERNMENT OF CANADA

(the “Respondent” and, together with the Investors, the “Disputing Parties”)

PROCEDURAL ORDER NO. 11

August 10, 2011

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 is at the stage of document production.

WHEREAS, on June 17, 2011, the Investors expressed their discontent about the redaction of certain new documents disclosed by the Respondent.

WHEREAS, on June 20, 2011, the Respondent explained that “any redactions appearing on the face of the documents serve to redact material that is either irrelevant to matters raised in the Claimants’ claim or subject to a privilege claim.”

WHEREAS, on June 21, 2011, the Investors requested “that the Tribunal order Canada to produce non-redacted copies of all documents that have been tampered with for any reason other than privilege.”

WHEREAS, on June 29, 2011, the Tribunal invited the Investors to submit a reasoned motion pursuant to Sections 30 and 31 of Procedural Order No. 1, should the Investors wish to proceed with their request.

WHEREAS, on July 13, 2011, the Investors brought a motion addressing the production of redacted documents.

WHEREAS, with their motion, the Investors requested that (1) the Respondent be ordered to explain within 10 days of the Order all redactions, including the identity of those who made the determination, when the determination was made, and the criteria used for making the determination; (2) the Respondent be ordered to produce non-redacted copies of all documents that have been redacted on any basis other than privilege within 10 days of the Order, together with a second copy containing a “black line” annotation beside the previously redacted text; and (3) the Investors and its experts be entitled to adduce any resulting evidence obtained within the successive rounds of pleadings.

WHEREAS, on July 18, 2011, the Respondent requested an extension of the time limit to reply to the Investors’ motion until July 20, 2011.

WHEREAS, on July 18, 2011, the Investors indicated their consent to the requested extension.

WHEREAS, on July 19, 2011, the Tribunal granted the request for an extension by the Respondent.

WHEREAS, on July 20, 2011, the Respondent submitted its reply to the Investors’ motion, arguing that, since it is only required to produce relevant and material information, it has complied with its document production obligations in this arbitration by redacting documents that were either partially irrelevant or privileged.

WHEREAS, in its reply, the Respondent requested the Investors’ motion to be rejected in its entirety, with an award of costs to be issued against the Investors.

WHEREAS, on July 21, 2011, the Investors noted that they would reply to the Respondent’s response to the Investors’ motion “sometime next week after the memorial is filed”.

WHEREAS, on July 21, 2011, the Respondent objected to the Investors’ “assertion that they will ‘reply sometime next week’” to the Respondent’s response and requested that a fixed date be set for the Investors’ reply, should the Tribunal grant the Investors a right to reply, and

that the commencement of the time period to file the Respondent's Counter-Memorial be suspended until the issues raised in the Investors' motion are resolved.

WHEREAS, on July 26, 2011, the Investors submitted their comments on the Respondent's response, stating that "[i]f a document is even partially relevant, it needs be produced in its entirety. Canada cannot self-censor or suppress partially relevant evidence through redaction."

WHEREAS, on July 26, 2011, the Tribunal indicated that it allowed an additional round of comments regarding the Investors' motion, inviting the Investors to provide comments until July 29, 2011, and the Respondent to submit a reply to such comments until August 3, 2011.

WHEREAS, on July 29, 2011, the Investors provided additional comments on the Respondent's response, requesting that the time period to file the Respondent's Counter-Memorial shall not be suspended.

WHEREAS, on August 3, 2011, the Respondent submitted further comments, stating that "[t]he Claimants have provided no compelling reason why Canada should be required to produce irrelevant and immaterial information that will have no probative value in this arbitration" and reiterating its earlier request.

WHEREAS, on August 3, 2011, the Investors replied to the Respondent's comments of the same day.

THE TRIBUNAL ISSUES THE FOLLOWING PROCEDURAL ORDER:

1. At the outset, the Tribunal notes that the question whether documents may be redacted due to perceived partial irrelevance was not specifically addressed in the Tribunal's prior procedural orders and does not seem to have formed the subject of prior decisions of arbitral tribunals established pursuant to NAFTA Chapter Eleven. In the Tribunal's view, both Disputing Parties have put forward, in good faith, differing interpretations of their obligations during the document production phase.
2. The Tribunal notes that, further to the clarifications in the Respondent's letter of July 20, 2011, five documents (Nos. 3, 5, 36, 37, 143) appear not to have been redacted or appear to have been produced in unredacted form in the meantime; hence, the Tribunal makes no disposition with regard to these documents.
3. Similarly, the Tribunal considers it unnecessary to make any ruling with regard to the seven documents (Nos. 2, 55, 124, 125, 127, 128, 151) that, as the Respondent has explained, already appeared in redacted form in its files.
4. As regards the 270 documents identified by the Respondent as containing redactions for reasons of privilege, the Tribunal considers that these redactions for reasons of privilege are most appropriately dealt with as part of Canada's general privilege log, pursuant to the procedure set out in Procedural Orders Nos. 3 and 7, rather than in the context of a separate (anticipated) submission on privilege. Accordingly, the Respondent is invited to include such documents in its privilege log, to be filed on October 31, 2011. To the extent that a document also contains redactions with regard to which the Respondent does not plan to make a privilege claim, such redactions are to be dealt with in accordance with paragraph 5 below.

5. As regards the 53 documents containing redactions (*inter alia*) based on perceived partial irrelevance, the Tribunal wishes to clarify that its prior procedural orders regarding document production refer to “documents” that are relevant and material, rather than “information”. Therefore, the terms of its prior orders are to be interpreted as requiring the production of the entirety of a document in the event that part of it is material and relevant, except to the extent that such a document contains sections that are subject to privilege claims. While the particular grounds for redaction – other files, personal matters, personal contact details, personal passwords – invoked by the Respondent do not appear unreasonable *per se*, the Tribunal considers that the presence of such circumstances does not justify the systematic partial redaction of documents to be produced. Accordingly, the Respondent is requested to produce these documents within 10 days of this Order, except for those sections of the documents that are subject to privilege claims.
6. Should the Respondent have reasons to believe that, even with the application of the provisions of Procedural Order No. 2 (concerning the confidential treatment of certain information that is produced by a Disputing Party), the disclosure of such irrelevant information would lead to serious prejudice to a third party, the Tribunal would be open to considering an application from the Respondent requesting that a particular redaction be exceptionally permitted.
7. The Respondent’s request that the commencement of the time period to file the Respondent’s Counter-Memorial be suspended until the issues raised in the Investors’ motion are resolved is rejected; the original deadline of October 24, 2011 stands.
8. The Tribunal, having duly noted the Respondent’s request for an award of costs in connection with the Investors’ motion, reserves the allocation of costs until a later stage of proceedings.



Judge Bruno Simma
President of the Tribunal

On behalf of the Tribunal

Dated: August 10, 2011