

**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. 16

November 15, 2012

ARBITRAL TRIBUNAL:

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

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

WHEREAS in their Supplemental Privilege Log of August 10, 2012, the Investors claimed “lawyer work product privilege” over the audio recording and transcript of a November 20, 2007 telephone conversation between a representative of the Investors, Mr. Paul G. Buxton, and then-Nova Scotia Minister of the Environment, Mark Parent (the “Recording”);

WHEREAS, by letter dated September 24, 2012, the Respondent objected to the Investors’ privilege claim over the Recording and asked the Investors to produce the same;

WHEREAS, by letter dated September 26, 2012, the Investors re-asserted their privilege claim over the Recording;

WHEREAS, by letter dated October 30, 2012, the Respondent requested that the Tribunal order the Investors to produce the Recording (the “Request”), arguing that it is not covered by privilege, as the recorded conversation took place between representatives of the Disputing Parties and was not made in preparation for litigation, but rather served the sole purpose of allowing Minister Parent to inform Mr. Buxton of Nova Scotia’s decision not to approve the Whites Point project;

WHEREAS, upon the Tribunal’s invitation, by letter dated November 5, 2012, the Investors submitted their views on the Respondent’s Request, arguing that a distinction must be made between the content of the recorded conversation, which is not protected by privilege, and the Recording itself, which is so protected, as it was created at the instruction of the Investors’ solicitor in contemplation of potential litigation;

THE TRIBUNAL ISSUES THE FOLLOWING PROCEDURAL ORDER:

1. Having considered the Disputing Parties’ views on the Respondent’s Request, the Tribunal finds that the Recording is not protected by privilege.
2. The purpose of work product or litigation privilege is to create a zone of privacy in which a party can investigate and consider the evidence and arguments it may ultimately wish to present in the course of litigation. On this basis, the Tribunal agrees with the Investors that there may be documents surrounding the creation of the Recording, such as instructions from the Investors’ solicitor or exchanges between Mr. Buxton and the solicitor concerning the content of the Recording, that are privileged. However, it appears to be common ground between the Disputing Parties that the Recording itself does not contain any analysis, but is an objective record of fact. The Recording is, as the Tribunal understands it, the record of one episode in a series of interactions between officials on each side that gave rise to the claims in this arbitration. It is not an edited, annotated, or paraphrased account of that episode of a nature that would tend to reveal the Investors’ internal deliberations or confidential lines of investigation as they prepared for litigation.
3. The work product or litigation privilege is not an absolute privilege, but a qualified one.¹ Where it is invoked, a tribunal may have to consider whether other factors outweigh its application to a particular document. As the Respondent has submitted that the conduct of Minister Parent is part of the challenged set of State actions in this case, the probative value of the Recording might be significant. Furthermore, as noted by the Respondent, the Investors themselves have referenced in their Memorial other communications between Mr. Buxton and Minister

¹ See the Tribunal’s remarks on the qualified nature of certain privileges in Procedural Order No. 13, at para. 22.

Parent and between Mr. Buxton and other provincial and federal ministers.² The Recording therefore appears to have the potential to clarify or put in context other evidence. The Tribunal need not, however, come to any definite conclusions on whether the work product or litigation privilege would prevail on a balance of consideration, as in its view the Investors have not made out a prima facie case for its applicability.

4. Accordingly, the Tribunal orders the Investors to produce the Recording to the Respondent by November 22, 2012.

Dated: November 15, 2012



Judge Bruno Simma
President of the Tribunal

On behalf of the Tribunal

² See letters cited in the Investors' Memorial at paras. 270, 276, 369.