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 THE INVESTORS OF DELAWARE INC.

(the "Investors" or "Bilcon")

-and-

GOVERNMENT OF CANADA

(the "Respondent" or "Canada" and, together with , the "Disputing Parties")

PROCEDURAL ORDER NO. 21

(Regarding document production in the damages phase)

ARBITRAL TRIBUNAL

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

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

I. INTRODUCTION

1. This Procedural Order addresses the Parties' requests for the production of documents in the damages phase.

II. PROCEDURAL HISTORY

2. By Procedural Order No. 3 dated June 3, 2009, the Tribunal ordered, *inter alia*, the bifurcation of the proceedings between the merits phase and, if liability was found to exist, the damages phase.

3. In its award of March 17, 2015 ("**Award**"), a majority of the Tribunal found Canada liable for breaches under Articles 1102 and 1105 of NAFTA in respect of some of its conduct, while rejecting liability in other respects.

4. By Procedural Order No. 20 dated January 5, 2016, the Tribunal ordered, *inter alia*, a procedural timetable for the quantum phase ("**Procedural Timetable**"). According to the Procedural Timetable, the Parties were to exchange their requests for document production by February 11, 2016 ("**Document Requests**"); their objections to the Document Requests by February 25, 2016 ("**Objections**"); their responses to objections by March 11, 2016 ("**Responses**"); and their replies to the Responses by March 21, 2016 ("**Replies**").

5. By letter dated March 16, 2016, Canada requested an extension until March 29, 2016 to file its Replies to the Investors' Response, indicating that the Investors had consented to the time extension. By e-mail of the same date, the Tribunal granted Canada's request for time extension.

6. By letter dated March 29, 2016, Canada informed the Tribunal that the Parties "[continued] to engage in discussions in an effort to resolve outstanding objections to document requests" and requested a time extension until April 11, 2016 to file the Replies. By e-mail of the same date, the Tribunal granted the time extension.

7. On April 11, 2016, Canada, on behalf of both Parties, submitted a Redfern Schedule "summarizing the status of the [Parties'] respective positions on the [Investors'] document requests to Canada in the quantum phase".

8. By letter of the same date, Canada indicated, *inter alia*, that the Parties had agreed on 50 out of 60 of the Investors' document requests, namely requests number 1-36, 38, 39, 41, 43-46, 48-50 and 55-58.

9. Also by letter of the same date, the Investors' indicated, *inter alia*, that they did not "agree to the narrowing of document requests [number] 41 and 43" and that these requests "remain as drafted in their February 10, 2016 Request for Documents from Canada". In the same letter, the Investors requested a clarification from Canada on "its position that 'it takes note' of the Investors' claims of privilege" with respect to Canada's document requests number 14(d), 14(h) and 26, in its letter of March 11, 2016.

10. By letter dated April 13, 2016, Canada maintained its initial objections to the Investors' requests number 41 and 43. Canada further explained that, by advising that it "takes note" in its letter of March 11, 2016, it was "simply acknowledging [the Investors'] privilege claims" with respect to Canada's requests [number] 14(d), 14(h) and 26. Finally, Canada noted that it expected that "the documents in issue will be produced with the privileged information redacted".

11. By letter dated April 15, 2016, the Investors proposed that "a date be scheduled for a Case Management Meeting to be held in Toronto during the week of June 27, 2016". The Investors

further indicated that "Canada has agreed to confirm to the Investors the stipulations it is able to make within 45 days". Finally, the Investors proposed that the Tribunal set "a time shortly thereafter…to resolve any document requests that may remain outstanding, with the Parties having time to exchange prior submissions that they will speak to at the Case Management Meeting".

12. By e-mail dated April 19, 2016, the Tribunal invited Canada to provide its comments on the Investors' letter of April 15, 2016 by April 22, 2016.

13. By letter dated April 22, 2016, Canada indicated that it considered a Case Management Meeting "to be unnecessary and [asked] that the Tribunal proceed with issuing its ruling on all outstanding disputed requests".

14. By letter dated April 26, 2016, the Investors requested a "full opportunity to provide briefs to the Tribunal with regard to the grounds and merits of Canada's objections, as well as the relevance, materiality, specificity, and reasonableness of the documents requested", before the Tribunal makes any decision with respect to the Investors' outstanding requests. To that end, the Investors proposed that the Parties be directed to exchange brief submissions, followed by a "Case Management Tele-Conference".

15. By letter dated April 28, 2016, the Tribunal invited the Investors to "submit their comments on Canada's objections (only) in respect of the requests on which no agreement has been reached [and to include each comment]…in a separate column of the Redfern schedule, next to the objection by Canada to which it refers", by May 11, 2016.

16. By letter dated April 29, 2016, Canada requested clarification from the Tribunal "as to whether the [Investors'] comments [were] to be limited to, Canada's objections to the document requests, which were filed on February 25, 2016 or whether the [Investors] may also comment on Canada's replies filed on April 11, 2016". If the Tribunal were of the view that the Investors might comment on Canada's replies, Canada further requested "that it be provided a fair opportunity to respond to the [Investors'] comments".

17. By e-mail dated May 3, 2016, the Tribunal invited "the Investors to comment on the entirety of Canada's statements contained in the objections/replies column of the Redfern Schedule". The Tribunal further indicated that "[s]hould it turn out that Canada wishes to make revisions to its replies in light of the Investors' comments, it may do so by 18 May 2016", and that the Tribunal expected to receive "a new version of the Redfern Schedule setting out both the Investors' and Canada's full positions by 18 May 2016".

18. By letter dated May 11, 2016 enclosing the revised Redfern schedule, the Investors' indicated, *inter alia*, that requests number 36, 37, 40, 41, 42, 43, 47,[1] 51, 52, 53, 54, 59, and 60 remained contentious; and proposed "a telephone conference with the Tribunal in regard to any of the determinations it will be making with regard to document production where further representations from the Parties may be of assistance".

19. By letter dated May 18, 2016 enclosing a new version of the Redfern Schedule, Canada indicated that the Parties required the Tribunal's rulings on twelve requests, namely requests number 36, 37, 40, 41, 42, 43, 51, 52, 53, 54, 59, and 60.

20. By letter dated May 23, 2016, the Investors submitted two further comments with respect to two of their requests, rejecting Canada's proposed stipulation in response to document request

[1] The Tribunal notes that the Investors' have withdrawn request number 47.

number 37 and making a clerical correction to their comment of May 11, 2016 with respect to document request number 53.

III. THE TRIBUNAL'S DECISION

21. At the outset, the Tribunal recalls that the purpose of document production is to provide the Investors with a reasonable opportunity to obtain relevant and material documents beyond those on the public record. Conversely, Canada must have the opportunity to obtain relevant and material documents in the possession of the Investors that it requires for an effective response to the Investors' damages claim. Since the Investors have not objected to Canada's document requests (save for the assertion of legal privilege), the present Order deals only with the Investors' requests to which Canada continues to object.

22. The legal standard applicable to questions of document production in NAFTA Chapter Eleven proceedings was the subject of extensive briefing by the Parties at an earlier phase of the present arbitration, regarding jurisdiction and liability. The Tribunal observes that there was little disagreement between the Parties in respect of the applicable law. To the extent that the Tribunal felt that further clarification was apposite, the Tribunal set out direction in its previous procedural orders, which the Parties are invited to take into account, *mutatis mutandis*, in the present document production phase, regarding damages.

23. In particular, the Tribunal takes note of the Parties' reliance on Articles 3 and 9 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999) ("**IBA Rules**"). According to paragraph 3.5.4 of Procedural Order No. 3, the IBA Rules are not binding in these proceedings. However, the Tribunal may refer to the IBA Rules for guidance to the extent it considers appropriate. The Tribunal has done so in the context of the present decision while remaining mindful of the particularities of this arbitration.

24. Several requests of the Investors for the production of documents have been opposed by Canada on the grounds that they are insufficiently relevant and material, and that their production would constitute an undue burden. As observed in Procedural Order No. 8, in determining whether a document request is unduly burdensome, the Tribunal must take into account both the time and effort required to locate and produce the requested documents and the prospect that these documents will have probative value. In this regard, the Tribunal notes that procedural fairness and efficiency require that a balance be struck between the burden of production and the documents' likely probative value. While the search for, and production of, responsive documents must not result in an undue burden, what is "undue" is in turn informed by the documents' likely probative value. Conversely, the greater, and more clearly established, the likely probative value is, the less likely it is that the production of documents will be considered "unduly burdensome".

25. The Tribunal understands that the Parties agree that privilege claims are to be resolved by means of redaction, wherever possible. In this regard, the Tribunal recalls, as observed in Procedural Order No. 11, that, in principle, the entirety of a document must be produced in the event that part of it is material and relevant, and sections that are subject to privilege claims may be redacted. To the extent that a document cannot be produced at all, not even in redacted form, the document shall be identified in a privilege log, which is to be provided to the opposing side on the date fixed for the production of responsive documents. The Tribunal recalls its view in Procedural Order No. 12 that:

> a privilege log is not intended to enable the opposing party to take cognizance of the content of listed documents, such as the precise subject matter on which legal advice was sought or provided. Rather, the requirement to keep a log of

> all documents over which privilege is asserted is to ensure that relevant documents are withheld only through a controlled and transparent process. As such, the party asserting a legal privilege is required to represent that it has reviewed all the substantive conditions for the privilege and to provide some further detail to substantiate its representation.

As regards the form of such privilege logs, the Tribunal directed the Parties, in Procedural Order No. 7, as follows:

> 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.

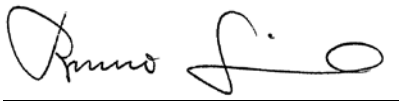
26. In light of these considerations, the Tribunal has reviewed, and deliberated upon, the Investors' requests for the production of documents to which Canada maintains objections. The Tribunal's decision in relation to these documents is **set out in the schedule attached to this Procedural Order**.

27. The date of the present Order shall constitute Date "B" of the Procedural Timetable. The quantum phase shall accordingly proceed in accordance with the following procedural timetable,[2] which is based on the schedule that has been agreed between the Parties.[3]

Date "B"	Date of the Tribunal's Ruling on Document Requests
Production of Documents Pursuant to Document Requests	+ 60 days
The Investors' Memorial and Supporting Materials	+ 90 days
Canada's Counter-Memorial and Supporting Materials	+ 90 days
The Investors' Reply and Supporting Materials	+ 60 days
Canada's Rejoinder and Supporting Materials	+ 60 days
1128 Submissions	+ 45
Responses to 1128 Submissions	+ 15 days
Hearing	+ 90 days

[2] The dates in the schedule may require adjustment in accordance with Article 2(2) of the UNCITRAL Rules.
[3] *See* Letter from the Parties to the Tribunal dated September 4, 2015.

Date: June 6, 2016



For the Tribunal

Judge Bruno Simma
(Presiding Arbitrator)