Foreign Affairs and
International Trade Canada

Department of Justice

CANADA

Affaires étrangères et
Commerce international Canada

Ministère de la Justice

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By Email and Courier

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Re: Gallo v. Canada

Dear Professor Fernández-Armesto and Members of the Tribunal,

This letter responds to the Tribunal's request for a post-hearing brief on certain issues and your correspondence A4 dated March 10, 2008. Canada replies in the order suggested by the Tribunal.

(a) The Adams Mine Lake Act, 2004

Canada understands that the Claimant is responding to question (a).

(b) Place of Arbitration

Canada does not agree to naming London, England as the place of arbitration. For the reasons explained in its submission, Canada considers that the factors set out in the *UNCITRAL Notes* for the determination of the place of arbitration clearly favour Toronto and that Toronto should be named the place of arbitration pursuant to NAFTA Article 1130.

During the Procedural Hearing the Claimant expressed its concern that section 5 of the *Adams Mine Lake Act, 2004* ("*AMLA*") might be used to oppose a request made by the Claimant for the assistance of an Ontario court with document production or witness attendance in this NAFTA Chapter 11 arbitral proceeding. Canada remains of the view that section 5 of the *AMLA* is not applicable to such a situation and could not be used to oppose such a request for assistance. In the interests of advancing this matter, Canada agrees not to invoke section 5 of the *AMLA* to oppose a request for the assistance of an Ontario court with document production or attendance of a witness in this NAFTA Chapter 11 arbitration. Canada trusts that this fully addresses the concerns of the Claimant set out at page 11 of its written submission.

Obviously, Canada reserves the right to refer to all relevant provisions of the *AMLA* on an application under NAFTA Article 1136 to set aside an award, should such an application ever be made by either disputing party.

(c) Place of Arbitration for Previous NAFTA Chapter 11 Arbitrations

Canada has attached a chart to this letter that lists the place of arbitration for NAFTA Chapter 11 arbitrations to date. This chart is based on publicly available materials as of March 18, 2008. Canada has made the chart as comprehensive as possible to assist the Tribunal. This chart shows that the place of arbitration in four of the six NAFTA Chapter 11 proceedings brought against Canada has been within its territory.

(d) Court Decisions Concerning Applications to Set Aside NAFTA Chapter 11 Awards

Canada has attached a chart that lists the applications to set aside NAFTA Chapter 11 awards to date. This chart is based on publicly available materials as of March 18, 2008. Canada has made the chart as comprehensive as possible to assist the

Tribunal. Internet links to the set aside decisions have been included for ease of reference.

This chart shows that Canada has initiated only one set aside proceeding, in *S.D. Myers*. It follows that Canada has no "practice" of pleading before local courts that NAFTA awards should be set aside as the Claimant alleges at page 7 of its written submission. Moreover, the decisions of the Canadian courts reviewing the NAFTA Chapter 11 awards have all found that these awards are entitled to a high level of deference.

(e) Retention of Confidential Information

The Government of Canada and the Government of Ontario are each obligated to retain a complete copy of the record, including confidential information, to comply with their domestic statutory obligations. Respondent agrees to return or destroy any duplicate documents which contain the Claimant's confidential information following the conclusion of any set aside proceeding or after the time to request a set aside proceeding under NAFTA Article 1136 has expired.

(f) Revised Schedule

Canada and the Claimant have reached agreement on a revised schedule, which is attached to this letter. With respect to the Claim and Defence, both disputing parties agree that the production of key documents is without prejudice to either disputing party later producing and relying upon relevant and material documents in the production phase or with its Memorials, and that neither disputing party will object to production of a document solely on the basis that it was not annexed to the Claim or Defence.

(g) Tribunal Fees

Canada agrees to pay the Tribunal US $550 per hour. Canada understands the Claimant will reply to this point on its own behalf.

(h) Other Issues

The Tribunal raised two further drafting issues concerning the Confidentiality Order during the procedural hearing which Canada would like to address.

First, the Tribunal requested that Canada provide a list of the statutes and regulations that should be referred to in paragraph 10 of the Confidentiality Order. Canada can confirm that paragraph 10 should read:

> Notwithstanding any other provision of this Order, a request to the Government of Canada or the Government of Ontario for documents pursuant to the *Access to Information Act*, the *Privacy Act*, the *Freedom of Information and Protection of Privacy Act*, and federal or provincial regulations thereto, including documents produced to Canada in these proceedings, shall be wholly governed by the relevant legislation.

In response to the Tribunal's comments on paragraph 14 of the Confidentiality Order, Canada would like to propose the following revisions:

> Either disputing party may disclose documents to the public which do not contain confidential information or from which all confidential information has been redacted. Documents that are the subject of an objection under paragraph 8 of this Order may not be disclosed until the Tribunal has decided on the objection. For the purpose of this paragraph, documents include submissions, together with appendices and exhibits, correspondence, transcripts of hearings, any orders, rulings or awards, and other materials generated in this arbitration.

We trust this is satisfactory.

Sincerely yours,

Meg Kinnear
Senior General Counsel and
Director General
Trade Law Bureau

cc. Chuck Gastle
Murdoch Martyn
Rizza Andrade