ARBITRATION UNDER
CHAPTER ELEVEN OF THE NAFTA
AND THE UNCITRAL ARBITRATION RULES

BETWEEN

VITO G. GALLO

Claimant

AND

GOVERNMENT OF CANADA

Respondent

PROCEDURAL ORDER NO. 3

8 April 2009

ARBITRAL TRIBUNAL

Professor Juan Fernández-Armesto (President)
Professor Jean-Gabriel Castel, OC, Q.C.
J. Christopher Thomas, Q.C.

CONSIDERING

1. That Procedural Order no. 2 requested both parties to prepare a privilege log for all documents in respect of which they claimed client/attorney privilege and/or special political and institutional sensitivity. Procedural Order no. 2 granted each party the possibility to file observations regarding the counterparty's privilege log.

2. That the parties complied with Procedural Order no. 2, submitting communications numbered CAN 22, 24, 25, 26 and 27[1] and GAL 22, 23, 25 and 26[2], in which each party filed comments on the counterparty's privilege log and responded thereto.

3. That at this point, the Arbitral Tribunal has to decide on any claims of privilege which remain contested and to this effect issues this

PROCEDURAL ORDER NO. 3

1. The Arbitral Tribunal will first analyse Claimant's privilege log (I) and then Canada's privilege log (II). In reviewing the parties' submissions, the Tribunal will refer to what it regards to be the principal points and it will not attempt to summarise each and every point made by a party.

I CLAIMANT'S PRIVILEGE LOG

A. Canada's opposition to Claimant's privilege log (CAN 22)

2. Canada contends that the privilege log provided by Claimant is insufficient. For instance, it does not contain a single entry related to a privileged email and there are only eight entries between June 2002 (the date of the Enterprise's incorporation) and April 2004 (the date of the introduction of the Adams Mine Lake Act ["AMLA"] into the Legislative Assembly). Yet it is contended that during this time the site's value grew from $1,8 million paid for it by the Enterprise to the $335,1 million now claimed in this arbitration.

   Specifically, Canada points out that the privilege log does not contain any entries for documents on subjects in respect of which one would expect that Claimant and the Enterprise had sought legal advice, such as the due diligence performed before the Enterprise acquired the site (request no. 72), documents relating to legal advice provided to Mr. Gallo concerning the Enterprise (request no. 26) or internal valuations of the Enterprise (request no. 142).

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[1] Canada has, as of the date of this Procedural Order, also submitted communication CAN 28 which is a letter addressed to the counterparty to which Canada annexes an index of its document production. This communication has no relevance for the decisions made in this Procedural Order no. 3.

[2] Claimant has, as of the date of this Procedural Order, also submitted communication GAL 27 which is a letter addressed to the counterparty to which Claimant annexes an index of its document production. This communication has no relevance for the decisions made in this Procedural Order no. 3.

In request no. 152 Canada requested all documents concerning amendments to the AMLA. The privilege log produced by Claimant does not list a single document. However, Canada noted that it had in its possession letters sent in 2004 by Mr. Gordon Acton, counsel for the Enterprise, in which he requested that a number of amendments be made to the AMLA. Thus, Canada notes, although such documents must exist, none have been produced.

3. Canada requests that Claimant be ordered to confirm that it has completely searched all of its documents and to produce a revised privilege log that accurately lists all privileged documents, including emails, responsive to Canada's request.

B. Claimant's response to Canada's objections (GAL 23)

4. Claimant, first of all, asserts that Canada provided no adequate reason as to why it could not respond to Claimant's privilege log within the deadline foreseen in Procedural Order no. 2 and, thus, the Arbitral Tribunal should rule that Canada has abandoned its opportunity to challenge the 60 documents included in Claimant's privilege log.

5. Additionally, Claimant responds to Canada's complaint that the privilege log does not contain entries for certain categories of documents:

- As regards the due diligence undertaken, Claimant observes that entrepreneurial enterprises have a relatively flat business structure and watch their expenditures closely. Accordingly, there may be limited documentation and comparatively less extensive decision-making than in government. He reminds the Tribunal that the waste disposal site had its Certificate of Approval in place, already had been granted a Permit to Take Water (subject to renewal) and had negotiated the purchase of the Border Lands. Mr. McGuinty and Swanick & Associates were performing legal work in relation to the acquisition. The relevant documents have been either produced or listed in the privilege log.

- The absence of emails is due to the facts that email was either not used or, when used, not retained.

- With respect to Mr. Gordon Acton, he represented Notre and Mr. McGuinty long before the Enterprise became involved (and neither are parties to this arbitration) and so there is a separate privilege. Notre and Mr. McGuinty have not waived any privilege they hold in relation to their documents.

- Claimant notes further that Mr. McGuinty's requests for changes to the AMLA were for the benefit of Notre and not for the Enterprise's and that the first time that the Enterprise or its counsel saw the correspondence between Mr. Acton and the Government of Ontario was when Canada produced it. Claimant states that there are no documents relating to any discussions

between Mr. Acton, Mr. McGuinty and the Enterprise or Claimant regarding these submissions.

C. **Canada's rebuttal** (CAN 25)

6. Canada submits that Mr. Gordon Acton acted not only as Notre's legal representative, but also as the Enterprise's legal representative (he was counsel to it in a civil action against the Government of Ontario) and that he proposed several amendments to the AMLA.

   According to Canada, Claimant has not provided a clear explanation for the failure to list Mr. Acton's documents concerning amendments to the AMLA. It appears to take the position that Mr. Acton acted without instructions from the Enterprise or that the Enterprise had no knowledge of the negotiation of the amendments to the AMLA. After reviewing documents that show that Mr. Acton was stated to represent the Enterprise, Canada noted that if he proposed amendments to the AMLA without the Enterprise's knowledge, such behaviour could constitute professional misconduct. In such circumstances, Canada would have no choice but to contact him concerning these allegations and he would be in a position to address them and defend his professional reputation.

   Canada then examines the potential role in which Mr. Acton could have acted (in relation to the Enterprise, Notre and Mr. McGuinty). He was plainly counsel of record in the Enterprise's action and if he acted as counsel both for Notre and for the Enterprise (or for the benefit of both) in the negotiations relating to the AMLA, Canada contends that neither client is entitled to claim solicitor-client privilege against the other. That is, Notre cannot assert privilege against the Enterprise with respect to a matter in which Mr. Acton represented both parties. Accordingly, the Enterprise must request from Mr. Acton the files concerning the negotiations related to the AMLA and list privileged documents in its privilege log. The same would apply to any valuation analyses related to the civil action in which Mr. Acton acted on the Enterprise's behalf. He cannot withhold them from his client and the Tribunal should accordingly direct the Enterprise to formally request the documents' return from its counsel.

7. Finally, Canada expresses its concern at Claimant's admission that he did not retain emails even as he was contemplating a NAFTA Chapter 11 claim.

8. Canada therefore requests that:

   - The Tribunal direct Claimant to provide a clear explanation of his failure to list privileged documents concerning the negotiations for amendments to the AMLA;

   - If the Enterprise indicates that it was aware of the negotiations concerning the AMLA, the Tribunal should direct the Enterprise to request these documents from Mr. Acton and list them in its privilege log;

- The Tribunal provide Canada with an opportunity to comment on any new entries in Claimant's privilege log concerning amendments to the AMLA;

- The Tribunal direct the Enterprise to formally request any valuations of Adams Mine that Mr. Acton relied on in preparing the Statement of Defence;

- And the Tribunal grant any other relief deemed appropriate.

D. Claimant's additional objections (GAL 26)

9. Claimant specifically objected to the request filed by Canada that the Enterprise advise whether it was aware of the negotiations concerning the AMLA. This is, in Claimant's opinion, a request for discovery in the nature of an interrogatory question pertaining to document production that was not contemplated in Procedural Orders nos. 1 and 2 and which, if they did occur, are in any event clearly solicitor-client privileged.

10. Claimant explained further the history of the production of documents to him by Mr. Acton and confirmed that none of his counsel (nor anyone in Mr. Gastle's employ) had seen the correspondence between Mr. Acton and the Government of Ontario until Canada produced it. As a gesture of good faith, Claimant will make a further inquiry of Mr. Acton asking him for his files, inclusive of any privileged documents. Should any new document appear, Claimant agrees that Canada should have the right to challenge any new documents not presently listed in the privilege log.

11. As concerns valuations relating to the Statement of Claim, specific requests were sent to both Mr. McGuinty and Mr. Acton after Procedural Order no. 2 was issued.

12. In relation to emails, Claimant assures the Tribunal that no relevant documents were purposely destroyed prior the introduction of the AMLA and that Claimant simply acknowledges that it is possible that emails could have been exchanged prior to 2004 for which there is no longer any record. Finally, he mentions that Mr. McGuinty has advised him that some of Notre's documents were either lost or destroyed after its operations shut down. Further, these documents were in the possession of a third party at the time and they remain in the possession of a third party today. Mr McGuinty had a search of his files conducted and all relevant documents provided by him have been produced or listed in the privilege log and any additional relevant documents that are obtained from him will likewise be produced or listed.

E. Canada's comments (CAN 26)

13. Canada stated its appreciation of Claimant's offer to request that Mr. Acton produce documents concerning the amendments to the AMLA he negotiated. However, the Arbitral Tribunal should order the Enterprise to obtain the documents from Mr. Acton, not request them as if he were a third party. Documents held by Mr. Acton, as former counsel to the Enterprise, are documents in the legal

possession, custody or control of the Enterprise. The Enterprise cannot discharge its obligation to produce these documents by simply asking Mr. Acton for voluntary production.

F. The Arbitral Tribunal's view

14. The Arbitral Tribunal notes that Canada's submissions were presented in accordance with the Tribunal's directions set out in its communication A 14. The Tribunal granted both parties an extension of the time for the submission of allegations regarding the privilege log. The Arbitral Tribunal, thus, dismisses Claimant's allegations that Canada has abandoned its opportunity to challenge the documents included in Claimant's privilege log.

15. In relation to documents in Mr. Acton's possession, the Arbitral Tribunal considers that there is sufficient evidence on the record to indicate that he acted for the Enterprise and therefore documents in his possession relating to his retainer are, as a matter of law, in the legal possession, custody or control of the Enterprise. The Enterprise shall obtain such documents and either produce them to Canada or, where subject to a claim of privilege, list them in its log.

16. In relation to any documents that may be produced to Claimant by Mr. McGuinty, Claimant shall likewise either produce them or list them in its log.

17. Canada will have the right to challenge any such documents listed in Claimant's privilege log.

18. As regards Canada's allegations concerning the lack of entries in Claimant's privilege log generally, the Arbitral Tribunal takes note of Claimant's representation that counsel has carried out a search of the requested documents, and has either produced all available requested documents or listed them in the privilege log. If Canada disagrees with Claimant's representation, it is entitled to use its Counter-Memorial to request the Tribunal to draw appropriate inferences against Claimant.

II CANADA'S PRIVILEGE LOG

A. Claimant's opposition to Canada's privilege log (GAL 22)

19. According to Claimant, Canada's privilege log is inadequate, because Canada has claimed:

- "Cabinet confidence" for almost every internal document from the moment the new government came into power and there is no weighing of the need for confidentiality and for disclosure.

  Claimant makes extensive submissions on the relationship between a claim to Cabinet confidence and an international law proceeding such as the instant

one. It points to a procedural order rendered by the *Biwater Gauff* Tribunal, a WTO panel report in *Canada – Measures Affecting the Export of Civilian Aircraft* and to the *UPS* Tribunal's ruling on the extent of Cabinet confidence in support of its contentions that international law does not extend privilege to documents that are peripheral to cabinet decisions and that merely asserting privilege does not make a document privileged. There must be a weighing process undertaken by Respondent (i.e. the need for continued secrecy versus the need for disclosure to the requesting party) and there has been no apparent weighing of these competing interests in the instant case.

It is submitted further that for an international tribunal faced with the claim of Cabinet confidence, the only considerations as to whether relevant documents should be withheld are (i) where to do so would threaten vital national security interests of the State; and (ii) to permit a full and frank exchange of ideas at the Cabinet table.

Thus, in Claimant's submission, Canada should be required to review each of the claims for Cabinet confidence listed in column A of Appendix A to GAL 22, and undertake the weighing process incumbent upon it. Canada should also better describe the documents for which it maintains a claim for this privilege to permit a better evaluation.

- "Solicitor-client" and "Cabinet confidence" with respect to documents identified as policy documents, even though solicitor-client privilege does not attach to the work of a lawyer working in a policy position.

- "Solicitor-client" privilege when the subject matter of the document is identified as legislative, which is policy-oriented and for which there is no "solicitor-client" privilege.

In respect of the two foregoing classes of documents, Claimant submits that Canada should be ordered to produce the documents listed in columns A and B because they are related to policy or in the nature of policy documents and thus, they cannot be withheld on grounds of solicitor-client privilege.

- "Solicitor-client" privilege in respect of legal advice regarding consultations with aboriginal groups and the disposition of Crown Land (the so-called Border Lands). This privilege is said to have been waived as a result of Canada's pleading in its Statement of Defence the advice that was received.

Since in Claimant's view, the privilege has been waived, Canada should be required to produce documents listed in columns C and D.

- Additionally, Claimant asserts that Canada has made no attempt to provide documents that are redacted only as to the legal advice contained in them and, thus, Canada should be ordered to provide redacted versions of documents and, specifically, of those listed in column E.

20. As regards documents listed in the log as being withheld on the basis of litigation privilege, Claimant will not further pursue the production thereof.

B. Canada's response to Claimant's objections (CAN 24 and CAN 27)

21. With respect to Claimant's request for an order that documents claimed to be protected by solicitor-client privilege be produced, Canada observes that according to the IBA Rules on the Taking of Evidence in International Commercial Arbitration ["IBA Rules"], the Tribunal is to exclude from evidence or production any document that, *inter alia*, is to be excluded by virtue of any legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable. It asserts further that the applicable law must be Canadian law, noting in this regard that the only claim of solicitor-client privilege in this case concerns legal advice being provided by Canadian counsel, to Canadian clients, in Canada (as evidenced by both disputing parties' claiming the privilege).

22. Canada submits that international law does not vary from Canadian law in terms of the importance attached to the need to ensure the confidentiality of communications between lawyers and their clients for the purposes of seeking and giving of legal advice. It refers to the case of *First Eagle SoGen Funds Inc. v. Bank for International Settlements*, which observed that the attorney-client privilege has been recognised in public international law and international commercial arbitration rules and awards for the same reasons as it has been maintained in Canadian law.

23. Canada has stated that it reviewed the privileged documents listed in column A and determined that such documents were prepared or received by government counsel that were engaged in the process of providing legal advice to policy clients. Such government counsel are employed by the Legal Services Division of the Ministry of the Attorney General and act as solicitors to the Ministry and also provide legal advice to other ministries. None of these responsibilities includes the provision of policy advice to the Ministry.

24. Additionally, Canada pleads that some of the documents listed in column A are of special political or institutional sensitivity and thus, are protected by Cabinet confidence. Canada seeks to withhold these documents on grounds of "special political or institutional sensitivity", as contemplated in Art. 9.2(f) of the IBA Rules[3]. According to Canada, Claimant has justified his request on the ground that it seeks to ascertain the intent behind the AMLA, but the actual decision making documents are already in its possession, since all of the final Cabinet submissions

[3] Article 9 IBA Rules Admissibility and Assessment of Evidence
(2) "*The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any document, statement, oral testimony or inspection for any of the following reasons:*
[...]
(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable;
[...]
(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government of a public international institution) that the Arbitral Tribunal determines to be compelling.

have been disclosed to Claimant. The documents for which privilege is claimed either do not explain the measure's intent, or discuss prior drafts of the Act, express opinions that were not adopted, or do not discuss the AMLA at all.

25. As regards the class of documents dealing with legal advice on policy issues given to policy officials, production of which is also sought by Claimant, Canada expressly represents that in all documents listed in column B, government counsel is (i) providing legal advice to his/her governmental clients; (ii) being requested to provide legal advice to clients; (iii) communicating with individuals in order to gather information necessary to provide legal advice; and (iv) being kept informed of developments in order to facilitate the provision of legal advice to a policy client.

26. As regards draft legislation, production of which is also sought by Claimant, when it is prepared by government counsel, this too is the work of attorneys performed at the request of their clients. Moreover, preparing draft legislation is not a policy role, but a legal process to be protected from disclosure.

27. Turning to the documents pertaining to the legal obligation to consult with First Nations and whether solicitor-client privilege has been waived by Canada, it is agreed that Canadian courts have found an implicit waiver of privilege when legal advice related directly to issues in the pleadings was pleaded as a defence and in such circumstances they have required the advice, which would otherwise be protected from disclosure, to be disclosed. This notwithstanding, Canada is of the opinion that not only did it not explicitly waive the privilege (since the Statement of Defence does not refer to "legal advice"), it also cannot be said to have implicitly waived it either when it pleaded the need to consult aboriginal groups. Thus, the documents listed in column C are protected.

    Even if an implicit waiver were to be conceded, the documents required to be produced would be limited to the subject-matter of that advice. A court would order disclosure of the legal advice claimed to have been relied upon in order to prove that the party's representations were accurate. The privilege would not be lost for the whole of the document, unless partial disclosure would mislead the other party. Accordingly, if a waiver occurred, which is denied, it concerns only those documents that provided formal legal advice.

28. In summary, Canada submits that the Tribunal should dismiss Claimant's challenges to Canada's claims of solicitor-client privilege, Claimant's assertion that Canada has waived solicitor-client privilege concerning Aboriginal consultations and Claimant's challenges to documents that contain provincial Cabinet confidences, which are of special and political sensitivity to the Government of Ontario.

C. **Claimant's rebuttal** (GAL 25)

29. Canada has argued that solicitor-client privilege exists simply by alleging that the documents were prepared or received by government counsel who were engaged in the process of providing legal advice to policy clients. However no international

law authority is cited to explain the circumstances in which a government lawyer's activity should imbue the documents with solicitor-client privilege.

30. Claimant's intent in seeking the production of policy documents is to prove that the Government of Ontario tried to prevent any use of the Adams Mine site as a waste landfill in any manner possible. Canada has argued that there were technical and environmental impediments to employing the property as a waste landfill even though it enacted the Act. The question arises whether the alleged impediments were considered and rejected as a barrier to development and whether the only option left was the passage of the Act. Thus, at the very least, any document predating the final cabinet submission already produced by Canada, that dealt with and discarded any of the alleged impediments, should be disclosed.

31. Canada should be required to review each of the claims for Cabinet confidence on the basis that solicitor-client privilege does not automatically extend to every document that a lawyer touches. It should produce documents where lawyers acted in a policy or some other role to which solicitor-client privilege does not attach. In the alternative, Claimant submits that a more detailed description should be required of Canada that is equivalent to the descriptions it has provided in pages 26-28 of CAN 24.

32. With respect to the documents for which special political or institutional sensitivity has been claimed, and no solicitor-client privilege applies, Claimant requests the Arbitral Tribunal to order the production of all nine documents but one, namely, document no. 421.

33. Turning the question of waiver of solicitor-client privilege, in Claimant's view, Canada specifically refers to the fact that legal advice was provided to the Ministry of Natural Resources in para. 112 of the Statement of Defence, and confirms that the Ministry acted on this legal advice. Canada has, thus, waived any privilege and Claimant should be entitled to the disclosure of the legal advice which had been communicated to the native affairs officer which was then relayed to the Ministry of Natural Resources and to the disclosure of the legal advice provided throughout the consultation process in part to test whether the Ministry of the Environment was indeed fulfilling its duty to consult or whether it was being used as a way to attempt to block the transfer of the Border Lands to the Enterprise.

34. Finally, Canada should be ordered to produce redacted versions of documents where privileged information is redacted and the balance of the documents is produced. These are to include the documents listed in GAL 22 and specifically in column E of Appendix A.

D. Canada's comments (CAN 26)

35. Canada asserts that Claimant originally requested the production of certain Cabinet documents which would be relevant to reveal the purpose of the AMLA and the motives for its adoption. He has now, in Canada's submission, advanced a new justification for seeking disclosure of the documents, namely, that they might

discuss whether technical and environmental impediments were considered and rejected as a barrier to the development of the Adams Mine site. Canada objects to this attempt to revise Claimant's Redfern Schedule and the stated relevance of these document requests. According to Claimant, the same cabinet documents should be produced because they might address whether Ontario government officials were considering the Adams Mine waste disposal site as part of the waste management strategy. This, in Canada's view, is another attempt to revise the Redfern Schedule. Canada confirms that documents no. 253, 356 and 495-497 do not discuss the Adams Mine as part of the provincial waste management strategy. As for one document, while it discusses the provincial waste management strategy and the Adams Mine, it analyses the two issues separately. In any event, Claimant has not provided an adequate explanation as to why its interests in the production of these documents outweighs Canada's concern that they are of special political and institutional sensitivity.

E. The Arbitral Tribunal's view

36. The Arbitral Tribunal will first decide on the law applicable to privilege and, then, decide on the existence of privilege with regard to each of the columns in which Claimant has divided its objections to Canada's privilege log.

The applicable law

37. The Arbitral Tribunal must, first of all, decide on the law applicable to privilege.

38. Canada points out that the UNCITRAL Arbitration Rules, which govern the proceedings, are silent on determinations of legal privilege, and that the IBA Rules, which are to provide guidance on the admissibility and assessment of evidence, leave it to the Arbitral Tribunal to determine the legal rules applicable to privilege. In this situation, Canada suggests that the applicable legal rules on privilege be Canadian law, since this arbitration concerns legal advice being provided by Canadian counsel to Canadian clients in Canada. And this is no different as regards the privilege log filed by Claimant. According to Canada, Canadian law solicitor-client privilege shields all documents that contain or describe confidential communications between a solicitor and client and that involve a client seeking legal advice.

39. Claimant responds by invoking Art. 1131(1) of the NAFTA[4] which provides that the issues in dispute shall be decided in accordance with the NAFTA and applicable rules of international law, not domestic law. Thus, Canadian law is inapplicable and Canada cannot avoid its international law obligations by relying on its own legal system.

40. Canada, as a subsidiary argument, contends that the protections afforded by international law appear to be no different from those under Canadian law.

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[4] Art. 1131 NAFTA: Governing Law
(1) "*A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law*".

41. The Arbitral Tribunal has reviewed the parties' allegations and, taking into consideration Art. 1131(1) NAFTA, decides that international law applies. But this is not the end of the matter for, as shall be seen, the Tribunal is of the view that domestic legal concepts of solicitor-client privilege are recognised and protected by international law. In addition, the Arbitral Tribunal will also consider Art. 9.2(b) and (f) of the IBA Rules (applicable by virtue of the parties' agreement reflected in para. 41 of Procedural Order no. 1) and it will take into consideration Canadian case law to the extent that it conforms to international practice.

42. When performing such task, the Arbitral Tribunal has reviewed the legal authorities presented by the parties and also carried out further research on its own. Of all the materials, the Arbitral Tribunal has found the article by F. von Schlabrendorff and Audley Sheppard "Conflict of Legal Privileges in International Arbitration: An Attempt to Find a Holistic Solution" to be most helpful and *Glamis Gold, Ltd. v. The United States of America*[5] are relevant for defining the solicitor-client privilege (albeit in the context of a dispute involving American conceptions of attorney-client privilege); *United Parcel Service of America Inc. v. The Government of Canada*[6] is instructive on the privilege attaching to Cabinet documents; and the judgment of the Supreme Court of Canada in *John Campbell and Salvatore Shirose v. Her Majesty the Queen*[7] is instructive for its discussion of waiver of solicitor-client privilege.

Documents listed in columns A and B

43. Column A comprises documents claimed to be protected by solicitor-client privilege and which constitute Cabinet confidences. Column B lists legislative documents.

44. The Arbitral Tribunal takes note of Canada's representation that (i) all documents listed in column A were prepared by counsel providing legal advice and that (ii) none are policy-oriented, and that the legislative documents listed in column B were prepared by lawyers providing legal advice to their clients; this being also applicable to draft legislation. Only nine documents are Cabinet documents, not protected by the solicitor-client, but imbued with special political sensitivity.

45. Thus, the Arbitral Tribunal will first decide on (a) the documents for which Canada has claimed solicitor-client privilege and then (b) decide on those Cabinet documents which are politically or institutionally sensitive.

(a) Solicitor-client privilege

46. Legal advice is recognised in most jurisdictions as having a privileged status and the right to invoke said privilege is considered to be a fundamental right. The rationale behind solicitor-client privilege is that lawyers are impaired from candidly offering their best advice to clients, and clients will not be able to speak freely with

[5] Tab 3 Book of Authorities to CAN 24.
[6] Tab 33 Book of Authorities to CAN 24.
[7] Tab 14 Book of Authorities to CAN 24.

their lawyers, if the confidentiality of the communications is not guaranteed. For this reason, privilege from disclosure can be claimed for documents relating to the giving or seeking of legal advice.

47. In general, a document needs to meet the following requirements in order to be granted special protection under solicitor-client privilege:

- The document has to be drafted by a lawyer acting in his or her capacity as lawyer;
- A solicitor-client relationship based on trust must exist as between the lawyer (in-house or external legal advisor) and the client;
- The document has to be elaborated for the purpose of obtaining or giving legal advice;
- The lawyer and the client, when giving and obtaining legal advice, must have acted with the expectation that the advice would be kept confidential in a contentious situation.

48. Once such requirements are met, the document attracts the privilege. However, this privilege which is protected, subject to narrow exceptions, applies only to solicitor-client documents, not to documents that might be protected by privileges of a different nature, such as those dealing with political or institutional sensitive issues.

49. The Arbitral Tribunal is of the view that solicitor-client privilege and analogous concepts of confidentiality of legal advice are widely observed in one form or another in different States. Thus it cannot be dispensed with in a proceeding governed by international law on the ground that domestic law is not the governing law. The Arbitral Tribunal agrees in this respect with the procedural order of the tribunal in *First Eagle SoGen Funds, Inc. v. Bank for international Settlements*, where it was found that the "*attorney-client privilege, which is widely applied in domestic legal systems, has been recognized in public international and international commercial arbitration rules and arbitral awards*" and that "[a]*t the core of the attorney-client privilege in both domestic and international law is the appreciation that those who must make decisions on their own or others' behalf are entitled to seek and receive legal advice and that the provision of a full canvass of legal options and the exploration and evaluation of their legal implications would be chilled, were counsel and their clients not assured in advance that the advice proferred, along with communications related to it, would remain confidential and immune to discovery*"[8].

50. Moreover, the Tribunal is struck by the fact that both disputing parties before it have claimed solicitor-client privilege and have referred to Canadian legal authorities such as the Supreme Court of Canada's reasons for judgment in *R. v. Campbell*. Where both parties have conducted themselves in their relations with counsel in the matters which have become the subject of a dispute and indeed in the very conduct of the instant proceeding on the expectation that privilege would

[8] Tab 8, Book of Authorities to CAN 24, *First Eagle SoGen Funds, Inc. v. Bank forInternational Settlements*, Arbitration Tribunal Established Pursuant to Article XV of the Agreement Signed at the Hague on 20 January 1930, Procedural Order No. 6, p. 10.

attach, it would be unreasonable for an international tribunal to dispense with such a fundamental privilege even where, as in the instant case, one party has claimed privilege for a larger number of documents than those sought to be protected from disclosure by the other party.

51. However, the Arbitral Tribunal also considers that claims to solicitor-client privilege must be properly grounded and taken with care. Consequently, Canada is ordered to submit a formal representation by 15 April 2009 that all documents for which it asserts solicitor-client privilege meet all requirements set forth in para. 47 or to indicate which of the documents listed in its privilege log do not meet such requirements and to what extent.

(b) Politically or institutionally sensitive documents

52. Documents no. 199, 253, 298, 356, 421, 495, 496, 497 and 663 are, according to Canada, not protected by solicitor-client privilege, but by their character as documents of special political or institutional sensitivity.

53. The Arbitral Tribunal finds that, unlike cases in which solicitor-client privilege is pleaded, it must take into account Claimant's interests in the production of said documents in order to determine whether Canada's interests in withholding the documents are outweighed.

54. The Arbitral Tribunal is inclined to support the protection of information exchanged during deliberative and policy making processes except when the competing public interest in disclosure for the purposes of the arbitration outweighs such protection.

55. The Arbitral Tribunal will analyse in detail the eight such documents (since Claimant seems to no longer seek the production of document no. 421):

(i) Document no. 199: is a presentation prepared by the Assistant Deputy Minister of the Operations Division of the Ministry of the Environment for the Minister of the Environment which sets out several policy options for dealing with the Adams Mine but, it is said, does not however propose enacting draft legislation similar to the AMLA.

Claimant believes that this document outlines the status of the Adams Mine site and ways in which it might be blocked from a technical standpoint together with their chances of success.

(ii) Documents no. 253 and 298: are a draft cabinet memorandum prepared by the Strategic Policy Branch of the Ministry of the Environment and a draft presentation prepared by senior officials at the Ministry of the Environment, both for Ontario's Cabinet, and which concern the potential development of a provincial waste management strategy and sensitive policy options concerning the Environmental Assessment Act, but the documents do not, it is said, concern the AMLA.

(iii) Document no. 356: is a draft presentation prepared by senior officials at the Ministry of the Environment for Cabinet which, it is said, does not concern the AMLA, and only sets out policy options concerning the Adams Mine, which were never adopted and thus, only reflect the advice of a few officials.

(iv) Document no. 495: is a draft Cabinet memorandum concerning the Adams Mine, prepared by the Strategic Policy Branch of the Ministry of the Environment for Cabinet which, it is said, does not concern the AMLA, but only sets out policy options for Adams Mine that were never adopted by Ontario's Cabinet and, as such, reflects only the views of a few policy officials.

(v) Documents nos. 496 and 497: are draft briefing notes prepared by the Cabinet Office and the Strategic Policy Branch of the Ministry of the Environment for Cabinet summarising document no. 495 and thus, are protected for the same reasons.

Claimant is of the opinion that, since Ontario was, in its view, under pressure by the threatened closure of the border with Michigan, the production of these documents could confirm that the Adams Mine waste site was identified as part of the solution to such problems and, thus, as part of the waste management strategy.

(vi) Document no. 663: is a draft Cabinet memorandum concerning the AMLA, which does not differ materially from the final memorandum concerning the AMLA, which has already been disclosed.

Claimant submits that, if Canada has produced the final copy of this document it has waived any claim for confidence over any of the previous drafts.

56. The Arbitral Tribunal accepts Canada's representation that the documents either address other matters or policy options concerning the Adam Mine which were never adopted and thus only reflect the view of some officers, not the government of Ontario's views. Those actual views are to be found in the Cabinet memoranda, presentations and briefing notes concerning the AMLA and such documents have already been produced to Claimant. Thus, documents nos. 199, 253, 298, 356, 495, 496 and 497 need not be produced.

57. However, document no. 663 is different. This document does concern the AMLA directly, and the Arbitral Tribunal is of the opinion that it may be relevant to compare the draft version of the memorandum with its final version, since variations could reflect changes in the government of Ontario's opinion. Thus, document no. 663 shall be produced.

Documents listed in columns C and D

58. Documents listed in columns C and D deal with consultations with First Nations in relation to the Adams Mine and the disposition of Crown Land.

59. Claimant alleges that Canada has waived any privilege relating to such documents as a result of Canada pleading in para. 112 of its Statement of Defence that the advice was received.

60. Canada has accepted that implicit waiver of privilege may occur when reference is made to the seeking of legal advice and reliance thereon is pleaded in relation to an issue raised in a subsequent legal proceeding.

61. Para. 112 of the Statement of Defence reads as follows:

> "*The MNR District Office was advised that recent court decisions had expanded the legal obligation on the Crown to consult with Aboriginal peoples. The Crown's failure to consult before taking an action affecting established or asserted Aboriginal rights had resulted in the courts delaying or striking down the action in various circumstances. In light of this developing case law, MNR decided to delay the transfer of the tailing area to the Enterprise to ensure it had fulfilled its duty to consult with the relevant Aboriginal communities.*"

After analysing the wording of such paragraph, the Arbitral Tribunal is of the opinion that Canada received advice and that it related to legal issues. It is true that Canada did not state that the Ministry of Natural Resources District Office was given "legal advice" as to the duty to consult First Nations, but the Arbitral Tribunal concludes that this advice is to be so regarded since it dealt with the "legal obligation" imposed upon the Crown and as a "duty to consult" and the implication of the pleading is that the Ministry of Natural Resources based its conduct thereon. The Tribunal considers that this amounts to an implicit waiver of privilege because Canada has made the existence of such advice part of its defence in this proceeding.

62. Consequently, the Arbitral Tribunal is of the view that Canada has waived its right to any privilege with regard to this legal advice and is to provide documents in which such advice was given, but only to the extent that the documents relate to the allegations made in para. 112 of its Statement of Defence. Canada is entitled to redact parts of the documents that do not relate to the legal advice so long as the redactions do not mislead the reader.

Documents listed in column E

63. Documents listed in column E are, according to Claimant, documents produced by a non-lawyer in respect of which solicitor-client privilege has been claimed.

64. The Arbitral Tribunal takes note of Canada's representation that it has conducted another review of the documents listed in column E in order to provide redacted versions and has produced five new documents.

65. In total, Canada has produced 43 redacted documents and represents that no more documents have been found that can be produced in a redacted version. If Claimant

disagrees with Canada's representation, it is entitled to make submissions in its Memorial requesting the Arbitral Tribunal to draw appropriate negative inferences.

66. Should Canada be claiming solicitor-client privilege for any of the documents listed in column E, it should make a formal representation by 15 April 2009 that all documents for which it pleads solicitor-client privilege meet all requirements set forth in para. 47 or to indicate which of the documents listed in its privilege log do not meet such requirements and to what extent.

[signed]

Juan Fernández-Armesto

[signed]

Jean-Gabriel Castel, OC, Q.C.

[signed]

John Christopher Thomas, Q.C.