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GAL 8

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Dear Sirs,

Re: Vito G. Gallo v. Government of Canada

The Claimant apologizes for having to make this further, unsolicited, submission but we were under the impression that the parties would only respond to the directions contained within the Tribunal's correspondence of March 10th, 2008. Leave is hereby requested for the Tribunal to consider this later submission, in response to the limited undertaking and additional proposals contained within the Respondent's last submission (CAN 6), in order to satisfy the principle of equality required under Article 15 of the UNCITRAL Arbitration Rules. They were not provided to us in advance of the March 18th deadline for the submission and we saw them for the first time when we received the CAN 6 correspondence.

With respect to the limited undertaking, we note that on page 2 of its submissions, the Respondent has stated that it will not rely on the *Adams Mine Lake Act* "to oppose a request for the assistance of an Ontario court with document production or attendance of a witness" and suggests that "this fully addresses the concerns of the Claimant...."

This comes as a surprise to the Claimant and he therefore feels compelled to state that the limited undertaking does not address his concerns. The Respondent has specifically

reserved the right to refer to the *Adams Mine Lake Act*, 2004 in any proceeding in a court to set aside an award that the Arbitral Tribunal may make. The action for which the Respondent reserves the right is indeed the Claimant's primary concern and it is his submission that this means that Ontario cannot possibly serve as the legal seat of the arbitration. The Respondent has refused to agree with London, UK as the seat, as suggested by the Tribunal. As a result, Washington D.C. is the only remaining proposed seat of the arbitration. Washington D.C. has been chosen as the seat of arbitration already in two cases where Canada was the respondent, and in both cases by the tribunal rather than on consent: the *UPS v. Canada* and *Merrill & Ring Forestry L.P. v Government of Canada* NAFTA Chapter 11 cases. In the latter decision, the Tribunal held that:

> 31. In addition to the above considerations, the Tribunal also notes that Washington D.C. is the seat of ICSID, the administering institution of this case, that it has been accepted on various occasions as the place of arbitration and that it has developed the reputation of being an independent venue for many international organizations (See *UPS* (para 18), *ADF* (para 21); *Methanex* (para 39)...
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> 33. The Tribunal appreciates, of course, that the claimant is a national of, and distinct from, the United States, and that this factor is sufficient guarantee that the impartiality of the courts will not be in any way affected as the United States Federal judiciary is also fully independent.

Further, the Claimant notes that the Respondent has proposed new paragraphs 10 and 14 at page 4 of its submissions. With respect to paragraph 10, the Claimant relies on his submissions made at the hearing and, in any event, notes that the language now proposed by the Respondent could allow the *Access to Information Act*, the *Privacy Act*, and the *Freedom of Information* and *Protection of Privacy Act*, to all be unilaterally used by the Respondent to govern requests for production by the Claimant in this proceeding. This risk is underscored by the phrase "documents produced to Canada in these proceedings." Although the Claimant remains strongly opposed to inclusion of the paragraph in its entirety, counsel for the Claimant had understood that the words "a *third party* request..." (Emphasis added) would at least be added should the Tribunal elect to include such a paragraph within its order.

With its freshly proposed paragraph 14 of the Confidentiality Order, the Respondent indicates just how sweeping it intends this disclosure to be. It includes "submissions, together with appendices and exhibits, correspondence, transcripts of hearings, any orders, rulings or awards, and other materials generated in this arbitration." This means absolutely everything, including any correspondence or documents exchanged between the parties even though they might never be placed into evidence or submitted to the Tribunal. The Respondent relied on the *Notes of Interpretation* issued on July 31st, 2001 in its original submission but, as we state at page 18 of our submissions, the *Pope and Talbot* NAFTA Tribunal held that the *Notes of Interpretation* **did not** modify UNCITRAL Rule 25(4) and that the transcripts should not be published. More specifically, the Panel made the following observation:

> The Tribunal observes that the *[Notes of Interpretation, July 31st, 2001]* applies only to documents "submitted to, or issued by, a Chapter Eleven tribunal." Certain of the material that Canada proposes to make public are not either, but are transcripts of the hearings. To the same point, the Interpretation recognizes that the arbitral rules referred to in Article 1120(2) may set forth specific exceptions that may preclude disclosure. As noted, the UNCITRAL rules do contain a specific provision requiring *in camera* hearings, unless the parties agree otherwise. That exception would surely cover transcripts of those hearings.

The Respondent's proposal goes beyond even the Notes of Interpretation, by proposing all documents be produced including those that are not "submitted to, or issued by, a Chapter Eleven tribunal." It is notable that the Respondent's new proposal is even broader than its original draft which included the words "... correspondence to or from the Tribunal ..." Of course, this is separate and apart from the fact that the Respondent's proposal will entirely destroy the claimant's right to an "*in camera*" hearing, as mandated under the UNCITRAL Arbitration Rules. Again, the Claimant relies on his submissions at the hearing in this regard.

Once again, we apologize for making this unsolicited submission and ask for leave that it be considered by the Tribunal.

All of which is respectfully submitted,

Yours very truly,
BENNETT GASTLE Professional Corporation

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CMG/ra

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