

**ARBITRATION UNDER
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES**

Between

DETROIT INTERNATIONAL BRIDGE COMPANY

(on its own behalf and on behalf of its enterprise The Canadian Transit Company)

Claimant

and

THE GOVERNMENT OF CANADA

Respondent

PROCEDURAL ORDER No. 3

March 27, 2013

Arbitral Tribunal

Mr. Yves Derains (Chairman)
The Hon. Michael Chertoff
Mr. Vaughan Lowe, Q.C.

Whereas the Arbitral Tribunal set out procedural rules governing this arbitration on December 20, 2012;

Whereas the Arbitral Tribunal hereby supplements its Procedural Orders No. 1 and No. 2;

Whereas these rules have been discussed between the disputing parties and the Arbitral Tribunal during a conference call held on December 13, 2012, and subsequently by written correspondence and at a hearing held in New York on March 20, 2013.

A) THE TRIBUNAL AND THE DISPUTING PARTIES

a) Constitution of the Arbitral Tribunal
(Article 1123 of the NAFTA)

1. The disputing parties agree and confirm that the Arbitral Tribunal has been duly constituted in accordance with Article 1123 of the NAFTA.
2. The disputing parties confirm that they waive any possible objection to the constitution of the Arbitral Tribunal and to the appointment of the Arbitrators on the grounds of conflict of interest and/or lack of independence or impartiality in respect of matters known to them at the date of signature of this Procedural Order.
3. Contact details of each Member of the Arbitral Tribunal are as follows:

Mr. Yves Derains
Derains & Gharavi
25, rue Balzac
75008 – Paris – France
Tel.: 00 33 (0) 1 40 555 972
E-mail: yderains@derainsgharavi.com

The Hon. Michael Chertoff
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
U.S.A.
Tel.: 00 1 202 662 5060
E-mail: mchertoff@cov.com

Mr. Vaughan Lowe, Q.C.
Essex Court Chambers
24 Lincoln's Inn Fields
London WC2A 3EG
United Kingdom
Tel.: 00 44 20 7813 8000
E-mail: vlowe@essexcourt.net

b) Representation of the Disputing Parties
(Article 5 of the UNCITRAL Arbitration Rules)

4. The Claimant is represented by:

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575 Lexington Avenue, 7th Floor
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William A. Isaacson
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5. The Respondent is represented by:

Sylvie Tabet
Mark A. Luz
Adam Douglas
Reuben East
Heather Squires
Marie-Claude Boisvert
Trade Law Bureau (JLT)
Foreign Affairs and International Trade Canada
Government of Canada
125 Sussex Drive
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Ontario K1A 0G2
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reuben.east@international.gc.ca
heather.squires@international.gc.ca

B) PLACE OF ARBITRATION AND LOCATION OF HEARINGS

(Article 1130 of NAFTA; Article 18 of the UNCITRAL Arbitration Rules)

6. The place of arbitration is Washington, D.C.
7. Meetings and hearings may be held at other locations if so decided by the Arbitral Tribunal, after consultations with the disputing parties.
8. The Arbitral Tribunal may deliberate at any convenient location, without consultation with the disputing parties.

C) PROCEDURAL LANGUAGE AND TRANSLATION

(Article 19 of the UNCITRAL Arbitration Rules)

9. All documentary evidence in a language other than English shall be translated to English by the disputing party submitting that evidence at its own cost, and shall be provided in its original language. Witness testimony in a language other than English shall be translated to English, the cost of which shall be borne by the disputing party calling that witness; in the event that such testimony is submitted in writing, it will also be provided in its original language.

D) CONFIDENTIALITY

(Articles 28(3) and 34(5) of the UNCITRAL Arbitration Rules)

10. A separate Confidentiality Order applicable to these proceedings shall be issued.
11. Section I (Access to Documents) of the Note of Interpretation of the NAFTA Free Trade Commission, issued July 31, 2001, applies to the treatment of documents in these arbitral proceedings.

E) ISSUES AFFECTING THE ARBITRAL TRIBUNAL

a) Quorum and Replacement of Arbitrators

(Articles 14 and 15 of the UNCITRAL Arbitration Rules)

12. The presence of all three members of the Arbitral Tribunal shall normally constitute a quorum and shall be required to conduct proceedings unless the disputing parties agree otherwise. In the event of the death or incapacity of a member of the Arbitral Tribunal, the truncated tribunal may proceed to decide procedural matters.
13. In cases of urgency, the presiding arbitrator may decide procedural matters alone, upon reasonable consultation with the remaining members of the Arbitral Tribunal.

- b) **Decisions of the Arbitral Tribunal**
(Article 33 of the UNCITRAL Arbitration Rules)
14. Subject to paragraph 11, the Arbitral Tribunal shall make any award or other decision by a majority of its members.
15. All awards and decisions shall be deemed to be made at the place of arbitration, regardless of place of signature.
- c) **Time Limits**
(Article 25 of the UNCITRAL Arbitration Rules)
16. The Arbitral Tribunal shall, in consultation with the disputing parties, fix the time limits in respect of all documents to be filed. In case of urgency, the presiding arbitrator may fix a time limit or amend an existing limit.

F) PROCEDURAL ISSUES

- a) **Service of Documents and Copies of Instruments**
(Article 17 (4) of the UNCITRAL Arbitration Rules)
17. The Arbitral Tribunal and the disputing parties shall send all correspondence and submissions, including pleadings, memorials, witness statements, expert reports, and an index of exhibits and legal authorities, by email (and, to the extent feasible, in a searchable format) simultaneously to opposing counsel, to the Members of the Arbitral Tribunal, to the PCA, and to the Administrative Assistant, on the date the submission in question is due via the following email addresses.

Mr. Yves Derains
yderains@derainsgharavi.com

The Hon. Michael Chertoff
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Mr. Vaughan Lowe, Q.C.
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Mr. Jonathan D. Schiller
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Ms. Ana Paula Montans
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Ms. Evgeniya Goriatcheva
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18. In addition to the electronic service of documents described in paragraph 16 above, the disputing parties agree to send hard copies of exhibits and documents that are 25 pages or longer by overnight delivery service or Federal Express international priority, post-marked within two business days of the relevant due date. Such mailings will be sent to William Isaacson for the Claimant, Mark A. Luz for the Respondent, the PCA, each member of the Arbitral Tribunal, and to the Administrative Assistant (one copy each), at the addresses noted above. Legal authorities may be sent in electronic form only on CD-rom. Each disputing party shall also provide digital copies (searchable PDF files if possible) of the submissions including witness statements, expert reports, documentary exhibits and legal authorities.
 19. The disputing parties shall identify each exhibit submitted to the Tribunal with a distinct number as follows. Each exhibit submitted by the Claimant shall commence with the letter “C” followed by the applicable consecutive number (i.e., C-1, C-2). Each exhibit submitted by the Respondent shall commence with the letter “R” followed by the applicable consecutive number (i.e., R-1, R-2).
 20. The disputing parties shall identify each legal authority submitted to the Tribunal with a distinct number as follows. Each legal authority submitted by the Claimant shall commence with the letters “CLA” followed by the applicable consecutive number (i.e., CLA-1, CLA-2). Each legal authority submitted by the Respondent shall commence with the letters “RLA” followed by the applicable consecutive number (i.e., RLA-1, RLA-2).
- b) **Organization of Hearings**
(Article 28 of the UNCITRAL Arbitration Rules)

21. After consultation with parties, the Arbitral Tribunal shall issue, for each hearing, a Procedural Order convening the meeting, establishing its place, time, agenda and all other technical and ancillary aspects.
22. Hearings shall be transcribed.
23. The technical characteristics of the transcription will be determined by the Arbitral Tribunal in the Procedural Order organizing the hearing, after consultation with the parties.
24. The Arbitral Tribunal shall establish, as necessary, procedures and schedules for the correction of transcripts. If the disputing parties disagree as to the corrections of transcripts, the Arbitral Tribunal shall determine which corrections are to be adopted.
25. For procedural meetings which are not transcribed, the Secretary of the Tribunal shall keep minutes in summary form and circulate those minutes to the disputing parties.

c) Pleadings

(Articles 20-21 of the UNCITRAL Arbitration Rules)

26. Each disputing party will produce key documents in their possession with their Statement of Claim and Statement of Defence, respectively. Such production is without prejudice to either disputing party producing relevant and material documents not later than together with the Memorial or Counter-Memorial. Neither disputing party will object to production of a document solely on the basis that it was not produced with the Statement of Claim or Statement of Defence.

d) Amendments to Claims or Defences

(Article 22 UNCITRAL Arbitration Rules)

27. Any amendments to claims shall be governed by the NAFTA and Article 22 of the UNCITRAL Arbitration Rules.

e) Non-Disputing Party Participation

28. Applications for leave to file *amicus curiae* briefs must be presented by third parties within the time frame, if any, fixed by the Tribunal in the schedule of proceedings, in accordance with the procedure set forth in recommendations of the North American Free Trade Commission on non-disputing party participation, issued on October 7, 2003. The Arbitral Tribunal will decide on any application, taking into consideration the recommendations of such Commission.

29. *Amicus curiae* have no standing in the arbitration, and will have no special access to documents filed in the arbitration, different from any other member of the public. Their briefs must be limited to argument, and may not introduce new evidence.

f) Article 1128 - NAFTA Party Participation

30. NAFTA Article 1128 submissions by the other NAFTA Parties must be presented within the time frame fixed by the Tribunal in the schedule of proceedings. Each disputing party shall be entitled to comment on any such Article 1128 submission within a time frame to be fixed by the Tribunal.

31. Non-disputing NAFTA Parties shall be entitled to receive a copy of the evidence and submissions referred to in Articles 1127 and 1129 of the NAFTA.

g) Conservation of the record

32. After termination of this procedure, the Government of Canada and the Claimant may each retain a complete copy of the record, including confidential information retained in accordance with the Confidentiality Order. All other confidential information relating to this procedure must be returned to the respective party or otherwise destroyed, following the conclusion of any set aside proceedings or after the time to request a set aside proceeding under Article 1136 NAFTA has expired.

G) ISSUES REGARDING EVIDENCE

a) Guidelines

(Articles 27 of the UNCITRAL Arbitration Rules)

33. The disputing parties agree that provisions of the *International Bar Association's Rules on the Taking of Evidence* ("IBA Rules") shall be followed as guidelines on:

- the exchange of documents (Article 3 of the IBA Rules, excepting Article 3.12, concerning confidentiality);
- the presentation of evidence by fact and expert witnesses (Articles 4 and 5 of the IBA Rules);
- on-site inspection (Article 7 of the IBA Rules);
- the conduct of the evidentiary hearing (Article 8 of the IBA Rules); and
- the admissibility and assessment of evidence (Article 9 of the IBA Rules).

b) Document production

34. The disputing parties may request documents from each other. Any request shall identify a specific document or a narrow and specific category of documents, and establish the relevance and materiality of each document or category of documents. The parties may refer any dispute to the Arbitral Tribunal. These requests, which may be made only after the disputing parties have exchanged their Statements of Claim and Defence, or as otherwise fixed in the schedule of proceedings shall be presented in the form of a table ("Redfern Schedule") comprising four columns:

First column: identification of the document(s) or the category or categories of document(s) that have been requested;

Second column: short presentation of the reasons of each request;

Third column: a summary of the objections by the other disputing party to the production of the requested document(s);

Fourth column: left blank for the decision of the Arbitral Tribunal.

35. The third column shall be completed at the time of the filing of the objections to production. The second column may be supplemented at the time of the responses to objections.
36. The Arbitral Tribunal may then, at its discretion, order one disputing party to communicate to the other disputing party documents or limited categories of documents. In the exercise of its discretion, the Arbitral Tribunal will consider the specificity of the request, the relevance and materiality of the requested documents, the extent to which they are in the possession, power or control of the disputing party from whom they are requested, the public availability and accessibility of the requested documents, the legitimate interests of the opposing disputing party (including the burden of communicating the documents and any applicable privileges), and all surrounding circumstances.
37. Documents communicated in response to such requests shall be sent to the requesting disputing party in electronic format (and, to the extent feasible, in a searchable format) by the date set by the Tribunal, by electronic mail, courier, or overnight mail. All documents communicated shall be clearly labeled with a unique identifying number. The disputing parties are not required to send hard copies.
38. Documents so communicated shall not be considered on record unless and until a disputing party subsequently produces them.
39. The Arbitral Tribunal may of its own motion order a disputing party to produce documents at any time.
40. Where a disputing party receives a document or documents from the other disputing party which it reasonably believes may be protected by privilege or similar immunity from discovery, it shall promptly inform the disclosing party of the disclosure of the document(s) and seek confirmation that such disclosure was intentional. If the disclosing party declares that the disclosure was not intentional, the receiving party shall promptly: (a) return the document(s) to the disclosing party; (b) destroy the document(s) and confirm that destruction in writing to the disclosing party; or (c) sequester the document(s) and confirm that sequestration in writing to the disclosing party. The receiving party's return, destruction, or sequestration of such document(s) is without prejudice to the right of the receiving party to claim that a document is not privileged or immune from discovery, or that its disclosure resulted in a waiver of the applicable protection on the grounds that the conditions of paragraph 40 below have not been met.
41. Where documents are protected by privilege or similar immunity from discovery, their disclosure does not operate as a waiver if: (a) the disclosure is inadvertent; (b) the disclosing party took reasonable steps to prevent disclosure; and (c) the disclosing party took reasonable steps to rectify the error after it discovered or should have discovered the inadvertent disclosure.

42. If a receiving party sequesters any document(s) pursuant to paragraph 39(c) above, then, following the conclusion of the Tribunal's decision on the receiving party's claim that a document is not privileged or immune from discovery, or that its disclosure resulted in a waiver of the applicable protection, the receiving party shall (a) return the document(s) to the disclosing party or (b) destroy the document(s) and confirm that destruction in writing to the disclosing party.

c) **Fact Witnesses**

43. Any person may present evidence as a witness, including a disputing party or its officials, officers, employees or other representatives.

44. For each witness, the disputing party offering the witness shall submit a sworn or affirmed witness statement to the Arbitral Tribunal in accordance with the schedule set by the Tribunal, unless such a statement cannot be obtained from a witness for a legitimate reason which offering disputing party shall explain to the Arbitral Tribunal. Each witness statement shall state the witness's name, birth date, present address and involvement in, or relation to, the case. The Arbitral Tribunal shall have the discretion to decide whether to permit the testimony of witnesses who have not submitted timely sworn or affirmed witness statements.

45. Each party shall be responsible for calling its own witnesses to an oral hearing, except when the other disputing party has waived cross-examination of a witness or expert and the Arbitral Tribunal does not direct his or her appearance.

46. Each party shall advance the costs of appearance of its own witnesses. The Arbitral Tribunal will decide upon the appropriate allocation of such costs in its final award.

47. At the request of a disputing party or on its own initiative, the Arbitral Tribunal may call a witness to appear.

48. If a witness fails to appear when first called to an evidentiary hearing, the Arbitral Tribunal may call the witness to appear a second time if it is satisfied that there was a valid reason for the first failure to appear and that the testimony of the witness is relevant and material to the outcome of the case.

49. The Arbitral Tribunal may consider the witness statement of a witness who provides a valid reason for failing to appear, when called to an evidentiary hearing or whose cross examination has been waived, having regard to all the surrounding circumstances.

50. At oral hearings, the examination of each witness shall proceed as follows:

(i) the disputing party summoning the witness may briefly examine the witness;

(ii) the adverse disputing party may then cross-examine the witness;

- (iii) the disputing party summoning the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination, with re-cross examination to be conducted only with leave from the Arbitral Tribunal; and
 - (iv) the Arbitral Tribunal may examine the witness at any time, either before, during or after examination by one of the disputing parties.
51. A fact witness shall not be present in the hearing room during the hearing of any other witness's oral testimony, discuss the testimony of any other witness who has already testified with that witness prior to giving his/her testimony, or read any transcript of any other witness's oral testimony, prior to his or her examination, except with the express permission of the Arbitral Tribunal upon request from a party. This condition does not apply to expert witnesses or representatives of a disputing party. For good cause, the Arbitral Tribunal may change this rule.
52. The Arbitral Tribunal shall, at all times, have complete control over the procedure for hearing a witness. The Arbitral Tribunal may in its discretion:
- (i) refuse to hear a witness if it considers that the facts with respect to which the witness will testify are either proven by other evidence or are irrelevant;
 - (ii) limit or refuse the right of a disputing party to examine a witness when it appears that a question has been addressed by other evidence or is irrelevant; or
 - (iii) direct that a witness be recalled for further examination at any time.
53. It shall not be improper for counsel to meet witnesses and potential witnesses to establish the facts, prepare the witness statements, and prepare the examinations.

d) Expert Witnesses

54. Each party may retain and submit the evidence of one or more experts to the Arbitral Tribunal. The procedural rules set out above shall apply to the testimony of experts.
55. Subject to NAFTA Article 1133, the Arbitral Tribunal may, at the request of a disputing party, or, unless the disputing parties disapprove, on its own initiative, appoint one or more experts to address one or more of the matters listed in that Article. The Arbitral Tribunal shall consult with the disputing parties on the selection, terms of reference (including expert fees) and conclusions of any such expert. The Arbitral Tribunal may, on its own initiative or at the request of any disputing party, take oral evidence of any such expert(s). The procedural rules set out above shall apply to any such expert(s) by analogy.

Upon consultation with the parties and for good cause, the Arbitral Tribunal may at any time amend this Procedural Order.

Place of the Arbitration: Washington D.C, U.S.A.

Date: March 27, 2013



Yves Derains
Chairman of the Arbitral Tribunal