

**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 BILCON OF DELAWARE INC.**

(the “Investors”)

-and-

GOVERNMENT OF CANADA

(the “Respondent” and, together with the Investors, the “Disputing Parties”)

PROCEDURAL ORDER NO. 14

September 19, 2012

ARBITRAL TRIBUNAL:

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

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

I. Introduction

1. In this Order, the Tribunal clarifies the Disputing Parties' obligation to produce documents that are responsive to the opposing Party's requests where those documents post-date the Investors' Notice of Intent dated February 5, 2008.

II. Procedural History and Arguments of the Disputing Parties

2. At the Procedural Hearing on June 8, 2012, the Investors argued that the Respondent had identified documents responsive to the Investors' document production requests that it had refused to produce on the ground that they post-date the Notice of Intent.¹ According to the Investors, the Respondent has not produced any documents dated after February 5, 2008, the date the Investors filed their Notice of Intent in this arbitration.
3. The Respondent confirmed that it had not produced any documents post-dating February 5, 2008.² The Respondent argued at the June 8 hearing that it made the Investors aware as early as August 14, 2009, the date of its first production, as well as in several letters thereafter, of its position that "documents after [February 5, 2008] are irrelevant" and not responsive to a document request related to the Investors' claims.³ In the Respondent's view, the date of the Notice of Intent is the latest point in time at which an alleged breach of the NAFTA could have occurred.⁴
4. In response to a question from the Tribunal, the Respondent acknowledged that, hypothetically, a document made after February 5, 2008, could be responsive insofar as it recounts events occurring before that date; however, the Respondent could not recall identifying any such document.
5. In a letter dated August 10, 2012, the Investors claimed that the Respondent "previously confirmed that it had relevant documents dated after [February 5, 2008]" and requested that the Tribunal "order [the Respondent] to disclose all relevant documents that do not qualify under legal privilege."
6. In a letter dated August 15, 2012, the Respondent maintained that it had confirmed the contrary at the June 8 hearing.
7. On August 17, 2012, the Tribunal invited the Respondent "to clarify . . . whether there are – or may be – any documents that are responsive to the Investors' request and were created after February 5, 2008. [If so,] the Tribunal requests the Respondent to provide . . . a short submission in support of its position that it need not produce" such documents. The Tribunal invited the Investors to comment on the Respondent's clarification and/or submission.
8. In a letter dated August 24, 2012, counsel for the Respondent "confirm[ed] that, outside of the work done to prepare [the Respondent's] defence to the [Investors'] claims, it is not presently aware of any documents responsive to the Claimants' document requests which were created after the date on which the [Investors] filed their Notice of Intent." Counsel stated that, nevertheless, the Respondent could not rule out the possibility that documents created after February 5, 2008, but addressing allegations that pre-date that date, may exist, and that such documents may be responsive to the Investors' requests.

¹ June 8 Hearing Transcript, p. 22, lines 14-22; p. 51, lines 3-12; p. 227, lines 2-3; 6-9.

² June 8 Hearing Transcript, p. 234, lines 12-14.

³ June 8 Hearing Transcript, p. 54, lines 12-19; p. 235, lines 11-12.

⁴ June 8 Hearing Transcript, p. 235, lines 8-10.

According to the Respondent, the Investors implicitly accepted its choice of cut-off date by not raising the issue earlier in the proceedings. Finally, the Respondent argued that to carry out a search for such documents now would be overly time-consuming and burdensome.

9. In a letter dated August 31, 2012, the Investors rejected the Respondent's position, identifying eighteen occasions on which the Respondent made reference to non-privileged documents falling within the scope of the Investors' document requests that post-dated the Notice of Intent. The Investors asserted that the Respondent would have sufficient time to conduct a further review of documents during September and October 2012 and as well as producing all of the documents already identified that post-date February 5, 2008.

III. The Tribunal's Decision

10. At the outset, the Tribunal notes that the great majority of responsive documents in the present arbitration would have been created before the date of the Notice of Intent. What is central to the present arbitration are the facts surrounding the environmental assessment and approval process with regard to the Whitestone quarry project, leading up to negative decisions both at the provincial level and at the federal level. The Tribunal is therefore convinced that the number of documents of significant probative value that post-date these central events is likely to be very limited. The same seems to be accepted by both Disputing Parties.
11. However, it is also plain to the Tribunal that the concepts of "relevance" of documents or "responsiveness" to document requests are not *a priori* limited in time. In fact, the Respondent itself concedes that it is conceivable that documents post-dating the Notice but pertaining to earlier events exist which it may not have identified in its search. The Tribunal also notes that NAFTA Chapter Eleven tribunals have, under special circumstances, allowed parties to submit evidence post-dating the Notice of Intent considering that in Canadian and U.S. law, as in most jurisdictions, parties to a dispute are obligated to produce relevant and responsive documents at least up to the date of any evidentiary hearing.⁵ Hence, it is not appropriate, in the Tribunal's view, to exclude evidence pertaining to events pre-dating the Notice of Intent *ab initio*, merely on the basis that it was created after that date.
12. At the same time, the Tribunal is required to uphold an orderly and efficient arbitral process. In the evidentiary context, this principle is made clear by the IBA Rules on the Taking of Evidence in International Commercial Arbitration of 1999 ("IBA Rules"), by which the Tribunal is guided. Preamble to the IBA Rules states that the "[IBA Rules] are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations." Article 9 concerning Admissibility and Assessment of Evidence gives the Tribunal discretion to exclude from evidence or production any document, statement, oral testimony or inspection for "considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling."

⁵ *Methanex v. United States*, Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005) (where amended Regulations, adopted after the date of the Notice of Intent, were admitted as evidence in support of the Investor's case); *Merrill & Ring Forestry L.P. v. Canada*, Decision on Investor's New Damages Claim (Dec. 29, 2008) (where a new expert report on damages was permitted); *Chemtura v. Canada*, Award (Aug. 2, 2010) (where the tribunal took notice of public document post-dating the Amended Notice of Intent).

13. Having regard to the considerations set out in Article 9 of the IBA Rules, the Tribunal clarifies the Disputing Parties' duties in the document production process as follows:
- (a) To the extent that new information that is relevant and material to the arbitration and responsive to an opposing Party's document requests comes to the attention of a Disputing Party, the Disputing Party remains under a continuing duty to disclose such information.
 - (b) The Tribunal considers that it would not be productive for the Disputing Parties to conduct an additional search for documents post-dating February 5, 2008 that may be responsive to the opposing Party's document production requests. Such a search would not be in the interest of procedural economy, bearing in mind the 2013 hearing days tentatively agreed by the Disputing Parties. It would also be unlikely, in the Tribunal's view, to result in the production of new evidence of significant probative value. With regard to a potential further search for documents related to comparator projects in particular, it is the Tribunal's view that the burden on the Respondent would be disproportionate to any reasonable likelihood of uncovering further material information. The Tribunal therefore concludes that, as of the date of this Order, neither Disputing Party is under an obligation to conduct further searches for documents except where otherwise responding to a prior or subsequent order of the Tribunal.
 - (c) Without prejudice to this general direction, the Tribunal takes note of the Respondent's eighteen letters (appended to the Investors' letter of August 31, 2012), in which the Respondent makes reference to the existence of documents post-dating the Notice of Intent related to particular comparator projects. Considering that the Respondent has already identified these documents in its correspondence, and that their identification accordingly does not require a new search, the Tribunal invites the Respondent to produce these documents **within 30 days of the date of this Order** to avoid delaying the proceedings. Such production shall be without prejudice to the general question of the relevance of documents that refer to facts post-dating the Notice of Intent under NAFTA Chapter Eleven. The Tribunal will take the Disputing Parties' arguments in this regard under advisement and consider them if it is presented with evidence relating to facts post-dating the Notice of Intent.

Dated: September 19, 2012



Judge Bruno Simma
President of the Tribunal

On behalf of the Tribunal