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. 4

21 December 2009

ARBITRAL TRIBUNAL

Professor Juan Fernández-Armesto (President)
Professor Jean-Gabriel Castel, O.C., Q.C.
Dr. Laurent Lévy

CONSIDERING

1. That both parties have filed motions requesting the Arbitral Tribunal to adopt certain decisions regarding document production.

2. That the Arbitral Tribunal has granted each party the possibility to respond to the counterparty's motions and to file a rebuttal.

3. That the Tribunal, after analysing the submissions made by both parties in accordance with the original briefing schedule, finds that it has been sufficiently briefed and that it does not require the presentation of additional submissions from any party.

The Arbitral Tribunal issues this

PROCEDURAL ORDER NO. 4

1. The Arbitral Tribunal will first analyse the Claimant's motion on draft and final Cabinet Decision documents (I), then the Claimant's motion for the presentation of certain documents related to para. 112 of the Statement of Defence (II) and Canada's motion on the production of documents by Mr. Cortellucci and the scope of document request no. 25 (III). Once a decision is taken with regard to the three motions, the Arbitral Tribunal will comment on the request for costs (IV) and, finally, reinstate the Procedural Calendar (V).

2. 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 DOCUMENT NO. 663

A. **The Claimant's request** (GAL 28)

3. On 30 January 2009 Canada disclosed to the Claimant a document containing the Final Cabinet Decision ("Final Cabinet Decision") in unredacted form. Thereafter, Procedural Order no. 3 ordered the production of the Draft Cabinet Decision ("Draft Cabinet Decision" or "Document no. 663"). Canada voluntarily complied with the order by producing an unredacted version of said document.

4. Canada later informed the Claimant, first orally and then in writing, that the unredacted version had been produced inadvertently, demanded its return and raised questions as to the Claimant's counsel's compliance with his professional obligations.

5. The Claimant's counsel has sealed and lodged with an independent counsel Document no. 663, until the dispute has been solved. He has not destroyed nor returned it, because he believes that the document was produced intentionally in compliance with Procedural Order no. 3.

6. As regards the Final Cabinet Decision, the Claimant believes that Canada has waived any solicitor client privilege by producing that document in an unredacted version as well.

7. Hence, the Claimant requests that Canada be ordered to produce unredacted versions both of the Draft and of the Final Cabinet Decision.

B. Canada's reply (CAN 36)

8. Canada submits that it has produced unredacted versions of the Draft Cabinet Decision and of the Final Cabinet Decision as a result of a technical error. This inadvertent disclosure does not result in a waiver of solicitor-client privilege.

9. According to Canada, it decided to voluntarily produce the Final Cabinet Decision, but with redactions for solicitor-client privileged material. In fact, consistent with its advising the Claimant and the Tribunal that it would produce the Final Cabinet Decision with redactions being made to protect solicitor-client privilege, Canada's legal counsel carefully redacted the materials relating to the legal advice that was being recorded in the document. However, an error in the operation of Canada's litigation document management software occurred and the redactions made by counsel did not in fact show in the electronic and hard copies that were then produced to the Claimant and so unredacted versions were sent to the Claimant.

10. Canada submits that Document no. 663 is protected both by solicitor-client privilege and Cabinet privilege, and Canada's privilege log stated so. Canada claimed special institutional sensitivity for the document as a whole and, for particular parts of it, solicitor-client privilege. Canada always intended to produce a redacted version, but the same technical error occurred, and unredacted versions were again inadvertently sent to the Claimant.

11. The two inadvertent disclosures, however, do not waive solicitor-client privilege. Solicitor-client privilege can only be waived with the client's consent. Numerous cases support these conclusions.

12. Canada holds that counsel for the Claimant should have appreciated that they had received documents containing legal advice protected by solicitor-client privilege and have notified Canada immediately of the inadvertent disclosure and returned or destroyed the privileged materials.

13. The relief sought by Canada is that counsel for the Claimant return to Canada the unredacted copy of the Draft Cabinet Decision (the Final Decision was already returned) and that counsel for the Claimant, the Claimant himself as well as his witnesses and experts, be prohibited from disclosing to the Tribunal, or any third-

party, solicitor-client privileged information inadvertently provided to the Claimant or from utilising solicitor-client privileged information contained in these documents.

C. The Claimant's rebuttal (GAL 35)

14. The Claimant submitted in his rebuttal that there can be no question that Canada waived privilege with respect to the Final Cabinet Decision.

15. As regards the Draft Cabinet Decision, any reasonable solicitor who had received the document after reading Procedural Order no. 3 would have had little doubt that it was not subject to solicitor-client privilege.

16. The Claimant adds that Canada's demands come just two months before he was expected to submit his Memorial. The Claimant has operated for four months on the understanding that the documents were intentionally produced in unredacted form. Depriving the Claimant of these unredacted materials would put him in an unfair position.

D. The Arbitral Tribunal's view

17. In essence, the Arbitral Tribunal has to decide whether the Draft and the Final Cabinet Decisions, which Canada delivered to the Claimant's counsel in unredacted form, are protected by solicitor-client privilege (the issue of Cabinet privilege being moot since this privilege has been waived by Canada with regard to the Final Cabinet Decision and rejected by the Tribunal with regard to the Draft Cabinet Decision). If the Tribunal were to find in Canada's favour, the Respondent would have the right to withdraw the unredacted documents and to substitute them with redacted versions.

18. A redacted version of the Draft Cabinet Decision, also known as Document no. 663, has already been produced by Canada, and the Claimant has submitted it to the Tribunal. The Tribunal will assume – as represented by Canada – that the Final Cabinet Decision is substantially similar to the Draft Cabinet Decision[1], and that the redactions in both documents are analogous.

a. Background

Final Cabinet Decision

19. Under section G. "Passage of the Adams Mine Lake Act", the Claimant requested two particular categories of documents[2]:

- Request no. 73 relating to every document at Cabinet, including without limiting the generality of the foregoing, cabinet minutes, discussing the

[1] CAN 24, p. 28.
[2] The Claimant's Documentary Request (GAL 13), p. 23 and 24.

Adams Mine Project or the Adams Mine Lake Act (hereinafter "AMLA") from 1 October 2003 to 1 July 2004.

- Request no. 77 relating to every document drafted or circulated within the Government of Ontario, including but not limited to Memoranda and draft Memoranda to Cabinet, concerning the drafting and adoption of the AMLA, from its inception as a policy proposal to its tabling in the legislature including every document concerning economic costs or liabilities that could be incurred arising out of the adoption of the policy proposal that would become the AMLA.

20. Canada answered by agreeing to produce certain Cabinet materials that resulted in the introduction of the AMLA, with redactions for information subject to solicitor-client privilege[3]. These materials included the Final Cabinet Decision, plus ancillary items like briefing notes, minutes, questions and answers, the Minister's speaking notes and Powerpoint presentations.

21. Notwithstanding the above, when on January 30, 2009 Canada forwarded the Cabinet materials it had agreed to produce to the Claimant, it did so without any redactions.

Draft Cabinet Decision

22. In CAN 16, Canada stated that the Draft Cabinet Decision enjoyed Cabinet privilege, as cabinet materials of special political and institutional sensitivity, and, "*for some documents*", it also invoked solicitor-client privilege[4]. The same point reappeared in CAN 36[5], in which Canada reiterated that it was claiming Cabinet confidence for nine documents, "*which are either not protected or only partially protected by solicitor-client privilege*". One of these documents was Document no. 663, and Canada did not specify whether this document, for which Cabinet privilege was being claimed, additionally belonged to the category of "not protected" (i.e. Canada was not additionally claiming solicitor-client privilege) or "only partially protected" (i.e. Canada was claiming solicitor-client privilege for some parts of the text, which consequently would be redacted)[6].

23. On 8 April 2009, the Arbitral Tribunal rejected the Claimant's request for production of eight of the nine documents it sought, and in doing so accepted Canada's allegation of their politically and institutionally sensitive character. The Arbitral Tribunal ordered the production of only one document, namely Document no. 663, because it concerned the AMLA directly[7]. Additionally, in para. 52 of Procedural Order no. 3, the Tribunal stated as follows[8]:

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[3] CAN 16, p. 5.
[4] CAN 16, p. 5 and CAN 36, p. 4.
[5] P. 26.
[6] In its lengthy privilege log, however, Canada did list Document no. 663 claiming solicitor-client privilege and special political and institutional sensitivity.
[7] Procedural Order no. 3, p. 14.
[8] Para. 52.

> *"Documents no. [...] and 663 are, according to Canada, not protected by solicitor-client privilege, but by their character as documents of special political or institutional sensitivity".*

24. It is now apparent that the statement made by the Tribunal in para. 52 of Procedural Order no. 3 in fact is not accurate, because in its latest submissions, Canada has clarified by referring to certain statements made in its previous correspondence, that Document no. 663 was one of the documents for which Canada was claiming not only Cabinet privilege, but also solicitor-client privilege (i.e. it belonged to the category of "partially protected" documents). The Tribunal regrets that in Procedural Order no. 3, it incorrectly characterized Canada's position. The misunderstanding might have been ameliorated had Canada brought the mischaracterisation of its position to the Tribunal's attention immediately after receiving Procedural Order no. 3.

25. The Tribunal considers that, since the Cabinet documents are purported to be subject to two distinct claims to privilege, each must be addressed on its own merits. The claim to Cabinet privilege for the Final Cabinet Decision has been waived by Canada and the claim to Cabinet privilege for Document no. 663 has been rejected in Procedural Order no. 3. However, both documents are said to be subject to solicitor-client privilege and the Arbitral Tribunal must address those claims on their own merits separately.

26. The Tribunal also notes that under Canadian law (about which it shall have more to say below) solicitor-client privilege is a substantive legal rule, not just a rule of evidence. It is not an absolute rule because it is subject to exceptions, and in some cases, to balancing determinations, but it is seen to be fundamental to the operation of the Canadian legal system and deserving of protection.

b) <u>Inadvertent disclosure of privileged information</u>

No implied waiver

27. The Tribunal agrees with Canada that, according to Canadian law (which is taken into consideration to the extent that it conforms to international practice) and also international law on the subject, where information covered by solicitor-client privilege is disclosed inadvertently, as a general rule there is no waiver of privilege.

28. The Tribunal has reviewed the evidence submitted by Canada and, specifically, the affidavits presented by Messrs. Leboeuf, Forget and Turchin, and accepts Canada's explanation that almost 60 documents – including the Draft and the Final Cabinet Decisions – were inadvertently delivered in unredacted form, and that Canada only discovered the mistake four months after delivery.

29. Consequently, the Tribunal decides that Canada has not implicitly waived its right to claim solicitor-client privilege with regard to the Draft and Final Cabinet Decisions, due to its inadvertent disclosure to the counterparty.

Behaviour of the Claimant's counsel

30. In its correspondence, Canada raised questions about the conduct of the Claimant's counsel. The Tribunal is of the opinion that the Claimant's counsel has conducted himself above any criticism.

31. This conclusion is supported by the following factors: Canada's claims regarding solicitor-client privilege were voluminous and, to some extent, unclear; in Procedural Order no. 3, the Tribunal made the statement with regard to Document no. 663 just discussed, which now seems to be inaccurate, but which Canada never asked to correct; the Claimant's counsel was entitled to rely upon the Tribunal's characterisation of Canada's position; when the Claimant's lawyer received the unredacted version of the Draft Cabinet Decision, it was reasonable to assume that Canada was agreeing with the Tribunal's interpretation as stated in Procedural Order no. 3, and not that by mistake Canada was delivering full copies of what should have been redacted documents; and finally, the Claimant has returned 58 documents, as requested by Canada, and has deposited the single document under dispute with an independent third party.

c) Requirements for claiming solicitor-client privilege

32. In Procedural Order no. 3 the Arbitral Tribunal defined four requirements that have to be met for a document to be protected by solicitor-client privilege[9]:

- 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.

33. The Arbitral Tribunal has examined the redacted version of Document no. 663 provided by the Claimant[10]. It consists of two parts:

- The first part is a 29 page long document, to be signed by the Ministers and Deputy Ministers of the Environment and Natural Resources, and to be submitted to the Cabinet, with a recommendation that the Ministry of the Environment be directed to draft legislation with regard to the Adams Mine Site; this document is partially redacted, but it is possible to follow its reasoning and it includes the main body of the proposal;
- The second part is a 10 page document, which is completely redacted, so that it is impossible to know what its purpose is.

[9] Procedural Order no. 3 para. 47.
[10] Annexed to GAL 28.

34. Given the Respondent's counsel's affirmation pursuant to paragraph 66 of Procedural Order no. 3 that all documents for which the Respondent pleaded solicitor-client privilege meet all requirements set forth in paragraph 47 of that order, the Arbitral Tribunal accepts that Document no. 663 contains discussions of legal matters covered by solicitor-client privilege.

35. The Tribunal considers that a *prima facie* claim to solicitor-client privilege is clearly made out by the Respondent. At the time of the making of both the Draft and Final Cabinet Decisions, the government of Ontario and the project proponent were involved in contentious legal proceedings: (i) as Document no. 663 itself records, the Provincial Government was already being sued by the project proponent for failing to transfer the Crown lands adjoining the Adams Lake Mine site; and (ii) the draft legislation which was the subject of the Cabinet documents contemplates extinguishing the proposed use of the site, revoking all approvals, voiding the PTTW applications and prohibiting a cause of action against the Crown.

36. The Draft Cabinet Decision explicitly refers to the existing litigation and the likelihood of additional litigation. See, for example, pages 3, third full paragraph, and 8, where under the heading "Stakeholders and Issues Management" the document notes that the Adams Lake proponent "will be vehemently opposed; likely to launch legal action." Plainly, a contentious situation existed at the time.

37. It is also evident to the Arbitral Tribunal that the Cabinet documents were prepared with the expectation not only of confidentiality, but of outright secrecy. Given the protection afforded to Cabinet documents by the *Ontario Evidence Act*, the oath of office sworn by incoming members of the Executive Council, Cabinet confidentiality in Canadian Parliamentary practice which is recognized and generally respected by the Canadian courts, and the collegial and collective nature of Cabinet decision-making for which each member of Cabinet shares responsibility, there is no doubt that in preparing a document for Cabinet discussion which set out the various options available to the provincial government, evidently together with a discussion of the legal risks attendant thereto, there was an expectation of confidentiality at the time.[11]

38. Moreover, the law of Canada has recognized the indivisibility of the executive branch, whereby legal advice given to one department of the executive branch is still protected by solicitor-client privilege even though that advice passes to another department. The indivisibility principle means perforce that when legal advice provided within a department goes, not to another department, but rather into a document which is to be the basis for a confidential Cabinet discussion, there is no waiver of privilege when legal advice is disclosed by a government department to

[11] *Ontario Evidence Act*, R.S.O. 1990, c. E. 23, s. 30. The features of Cabinet decision-making are discussed in a series of cases, including *Carey v. Ontario*, (1986), 30 C.C.C. (3d) 498, [1986] 2 S.C.R. 637 and *Babcock v. Canada (Attorney General)*, (2002), 214 D.L.R. (4th) 193 (S.C.C.),

other parts of the Executive Branch because it is the Executive Branch as a whole that is being advised. The department is a part of the whole.[12]

d) Other considerations

39. This, however, in the Arbitral Tribunal's view, is not the end of the matter. The Tribunal is influenced by the way in which the erroneous production of the unredacted Cabinet documents has unfolded in the instant case.

40. The Arbitral Tribunal is loath to criticize anyone for their role in what can only be described as a most unusual and regrettable train of events, which led to the production of documents for which solicitor-client privilege was being claimed, not once, but on four separate occasions, and with respect to the Cabinet documents at issue in this Order, not once, but twice, and over a period of some four months.

41. The Tribunal has no difficulty in concluding that counsel for the Respondent plainly intended to claim privilege and in fact did so (the redacted version of the Cabinet document containing the automatic date stamp and redacting counsel's name clearly demonstrates this was being done prior to the document's production). The Respondent has also shown that under Canadian law, the courts have generally ordered the return of documents protected by solicitor-client privilege.[13]

42. As noted in Procedural Order no. 3, the Tribunal takes into consideration Canadian law to the extent that it conforms to international practice.[14] While of substantial relevance to the resolution of these issues, Canadian law does not govern the matter in the sense of an exclusive governing law (which, as noted in Procedural Order no. 3, is the NAFTA and applicable rules of international law). The Tribunal regards it as important that the parties conducted themselves in their relations with counsel and in the conduct of the instant proceeding in the expectation that solicitor-client privilege would apply, and for that reason it had little difficulty in earlier confirming both the existence of solicitor-client privilege and its application to a Chapter Eleven arbitration.[15]

43. However, the Tribunal considers the truly extraordinary circumstances which it now confronts and that such circumstances arose during a NAFTA dispute between a U.S. citizen and Canada. Thus, it should have regard not just to Canadian legal authorities but also to those of other common law jurisdictions such as Australia, England, and the United States. Some jurisdictions appear to be quicker than others

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[12] *Halifax Shipyard ltd. v. Canada (Minister of Public Works and Government Services)*, (1996) 113 F.T.R. 222, 63 A.C.W.S. (3d) 594 (T.D.). citing Reed J. in *Canada (Attorney General) v. General Cartage Co*, (1987), 10 F.T.R. 225, 4 A.W.C.S. (3d) 359, (T.D.), affirmed 35 F.T.R. 160*n*, 109 N.R. 373 (C.A.), leave to appeal to S.C.C. refused 74 D.L.R. (4th) viii, 126 N.R. 336*n sub nom. Canada (Minister of Industry, Trade and Commerce) v. Central Cartage Co. (No. 2)*.

[13] *Chan v. Dynasty Executive Suites, Ltd.*, 30 C.P.C. (6th) 270.

[14] Procedural Order no. 3, para 41.

[15] *Id.*, para 50.

to hold that inadvertent disclosure is not easily remedied to the benefit of the erring party.[16]

44. The Arbitral Tribunal is satisfied, having reviewed all of the authorities, that ultimately a decision must be taken in light of all of the circumstances and considerations of fairness. As Clarke LJJ (as he then was) noted in the *Al Fayed* case, the relief will depend upon the particular circumstances.[17] Here the Tribunal is struck by the repeated instances of inadvertence, the length of time that the documents were in the possession of the Claimant and the Claimant's actions taken to prepare his case in light of the information disclosed by the Final Cabinet Decision. The Arbitral Tribunal believes that the "bell cannot be un-rung" in the present circumstances.

45. Accordingly, the Arbitral Tribunal decides that the two Cabinet decisions are not protected by solicitor-client privilege.

46. It may be that Canada will wish to have the documents made subject to a protective order. If Canada so requests, the Tribunal would be prepared to order that any information contained in the Decisions should be kept confidential among the disputing parties, and that any references to such information be redacted from the publicly available versions of the parties' Memorials and any decision or award.

II DOCUMENTS RELATED TO PARA. 112 OF THE STATEMENT OF DEFENCE

A. **The Claimant's request** (GAL 29)

47. The Claimant complains that the documents presented by Canada in compliance with the Arbitral Tribunal's order regarding the legal advice mentioned in para. 112 of Canada's Statement of Defence have been redacted so heavily that the understanding of how the advice was actually applied and construed remains obscure.

48. In the Claimant's opinion, the texts hidden by the redactions would confirm that the Province of Ontario received advice that it had entered into a binding agreement of purchase and sale, and that it would either have to transfer the Borderlands to the Enterprise or, alternatively, pay damages resulting from the Province of Ontario's preventing the Enterprise from operating a licensed waste disposal facility at the site.

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[16] For example, the Court of Appeal of England and Wales has held that a solicitor considering documents made available by the other party to litigation owes no duty of care to that party and where a party allows the other party to inspect privileged documents by mistake, it will in general be too late for him to claim privilege in order to correct the mistake: *Al Fayed and others v. Commissioner of Police of the Metropolis and others*, [2001] EWCA Civ 780, at pp. 3-4 in the copy of the Court's reasons for judgment submitted by the Claimant as supporting documents for Gallo 28, 29 and 35, at Tab 4

[17] *Id.*, p. 4.

49. The Claimant further suggests that the document production is incomplete: the memo of 13 May 2003 refers to another memo of 7 May 2003, which has not been produced, and none of the documents produced makes any reference to the case law cited in footnotes 168 and 169 of para. 112.

B. Canada's response (CAN 37)

50. The Claimant requests that Canada produce all solicitor-client privileged information concerning the transfer of the Crown lands, regardless of whether that privileged information concerns the duty to consult with aboriginal communities. In Canada's opinion this request far exceeds the scope of the implied waiver of privilege identified in Procedural Order no. 3.

51. On 29 April 2009 Canada produced four memoranda drafted by counsel for the Government of Ontario that provided legal advice to the Ministry of Natural Resources concerning the duty to consult aboriginal communities prior to transferring the Crown lands to the Enterprise. Since these memoranda also contained legal advice on the transfer of the Crown lands that was unrelated to the duty to consult aboriginal communities, Canada redacted those sections to remove this solicitor-client privileged legal advice.

52. Although the Claimant may desire to know if there was legal advice provided as to whether there was a binding sale agreement, this legal advice was never put at issue by paragraph 112 of the Statement of Defence. The Claimant does not require access to this unrelated legal advice in order to understand the legal advice given concerning the duty to consult aboriginal communities, or the effect of that advice on the decision of the Government of Ontario.

53. Canada has produced all of the legal advice concerning the duty to consult aboriginal communities. Although the memoranda produced do not specifically cite the decisions referred to in para. 112 of the Statement of Defence, they do refer to the decisions generally. Canada can further confirm that while some of the memoranda state that they were done on a preliminary basis, no further written legal advice was provided concerning the duty to consult aboriginal communities concerning the transfer of the Crown lands to the Enterprise.

C. The Claimant's rebuttal (GAL 37)

54. The Claimant submits that when one relies on "advice of counsel" as part of one's defence, all advice received concerning the subject of such advice has been waived and all evidence of advice received must accordingly be produced. Canada is thus under the obligation to produce evidence about whether the duty to consult existed and also with respect to its alleged impact upon the Crown's obligations under a binding agreement of purchase and sale for the Borderlands, including the remedies that parties could obtain from the court in the circumstances.

55. To permit Canada to parse out its disclosure obligation so narrowly as to reveal disjointed portions of the advice it received would be highly prejudicial to the Claimant.

56. The Claimant seeks that the Respondent be required to produce:

- the Memos of 13, 16 and 20 May and the Briefing Note with redactions removed which deal with any discussions of the remedies that might be available to a Court dealing with the issue of the transfer of the Borderlands to the Enterprise, this is to include any advice that the Ministry of Natural Resources had entered into a binding Agreement of purchase and sale and would be responsible for damages if it did not close the transaction;
- the Memo dated 7 May 2003 which is referred to in the memo of 13 May 2003, but in respect of which nothing has been produced even in the form of a redacted memo;
- the on-going advice to the Ministry of Natural Resources regarding its obligations to consult that refer to the case law that Canada cites the advice was based on, as well as any discussion of the remedies that might be available to a Court dealing with the issue of the transfer of the Borderlands to the Enterprise.

D. The Arbitral Tribunal's view

57. The parties' discussion focuses on para. 112 of Canada's Statement of Defence, which reads as follows:

> "*112. The MNR District Office was advised that recent court decisions had expanded the legal obligation on the Crown to consult with Aboriginal peoples* [footnote 168]. *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* [footnote 169]. *In light of this developing case law, MNR decided to delay the transfer of the tailings area to the Enterprise to ensure it had fulfilled its duty to consult with the relevant Aboriginal communities.*"
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> Footnote 168: "*Haida Nation v. British Columbia (Minister of Forests)*, 216 D.L.R. (4th) 1 (B.C.C.A.) (20 March 2003) **(CDA-117)**, aff'd *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 **(CDA-119)**; see also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 211 D.L.R. (4th) 89 (B.C.C.A.) (14 November 2002) **(CDA-118)**, aff'd *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 **(CDA-120)**."
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> Footnote 169: "See *e.g.*, *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1999), 178 D.L.R. (4th) 666 (B.C.C.A.) **(CDA-121)**. In *Halfway River First Nation* v. *British Colombia (Ministry of Forests)*, the court quashed a provincial government decision, in part, on the basis of a failure to consult; see also *Westbank v. B.C. (Minister of Forests) and Wenger* (2000), 191 D.L.R. (4th) 180 (B.C.S.C.) **(CDA-122)**. The court did not overturn the contract on the basis of a

failure of the duty to consult in this case. However, the judicial review delayed the contract, which was overturned by the court on other grounds."

58. The Arbitral Tribunal analysed para. 112 in Procedural Order no. 3 and decided that Canada had waived its right to any privilege with regard to the legal advice received in relation to the obligation on the Crown to consult with Aboriginal peoples[18]. Canada was explicitly entitled to redact parts of the documents that did not relate to such legal advice so long as the redactions did not mislead the reader[19].

59. The Arbitral Tribunal has construed Canada's waiver of privilege narrowly, linking it only to the legal advice received regarding the duty to consult.

60. The Arbitral Tribunal does not agree with the Claimant, that Canada must produce documents which refer to the remedies available to a Court dealing with the issue of the transfer of the Borderlands to the Enterprise. Canada does not refer to the discussion of said remedies in para. 112 of its Statement of Defence and, in the Arbitral Tribunal's view, this is an unrelated issue, not affected by Canada's waiver of privilege.

61. The same applies to the memorandum dated 7 May 2003. The fact that said memorandum was mentioned in the memoranda produced by Canada, does not necessarily imply that the 7 May 2003 memorandum deals with the legal advice received regarding the duty to consult.

62. The Arbitral Tribunal decided that Canada could redact parts of the documents, as long as the redactions did not mislead the reader. Thus, it meant that the reader should be able to understand the full legal advice given on the matter for which privilege was waived, i.e. the duty to consult First Nations. It does not result in a means of extending the waiver to all advice relating to the potential transfer of the Crown lands.

63. The Claimant further suggests that Canada has not presented all documents responsive to his request: footnotes 168 and 169 of the Statement of the Defence mention case law which formed part of the advice received, however none of the documents produced by Canada refers to said case law.

64. The Arbitral Tribunal concurs with the Claimant that, when para. 112 of the Statement of Defence mentions that Canada was advised that Court decisions had expanded the consultation obligation and footnotes 168 and 169 quote certain case law, it must be referring to said court decisions. The Arbitral Tribunal would expect that Canada be in the possession of some memorandum in which the case law mentioned in footnotes 168 and 169 is explained, and invites Canada to carry out a new search through its documentation in order to find documents responsive to the Claimant's request in relation to the case law of footnotes 168 and 169, and to revise the redacted parts of the memoranda already presented, in case it had inadvertently redacted some parts which refer to said case law.

[18] Procedural Order no. 3 para. 62.
[19] Procedural Order no. 3 para. 62.

65. The Arbitral Tribunal has taken due note of the Claimant's allegations that the memoranda produced by Canada have been so heavily redacted that the understanding of the documents becomes burdensome. The Arbitral Tribunal is, however, not surprised that a great proportion of the documents has been redacted, since the waiver of privilege has been construed narrowly, covering only the advice received regarding the duty to consult. Canada is entitled to redact unrelated parts of the documents not dealing with such duty and, if such parts are preponderant, the documents will, necessarily, be heavily redacted.

III DOCUMENT REQUEST NO. 25

A. **Canada's request** (CAN 32)

66. Canada requests that the Tribunal order document production from Mr. Cortellucci, that is fully responsive to Canada's request for documents (i) and to direct the Claimant to produce documents in response to Document Request no. 25, including documents that affect or relate to the Claimant's ability to receive or retain profits, proceeds and royalties that are related to Adams Mine (ii).

(i) Document production from Mr. Cortellucci

67. Canada suggests that Mr. Cortellucci, the Cortellucci Group of Companies Inc., the Limited Partnership and the other limited partners were the real investors which owned and controlled the Enterprise and that Mr. Cortellucci was the principal investor.

68. Thus, in Canada's opinion it is not credible that Mr. Cortellucci has no documents in his possession related to the Adams Mine. However, the Claimant has failed to produce documents from Mr. Cortellucci, in response to Procedural Order no. 2, and the Claimant has refused to confirm whether Mr. Cortellucci has provided a response to the request.

69. Mr. Cortellucci should be ordered to produce documents in response to Canada's document requests or an explanation for the absence of responsive documents.

(ii) Scope of Document Request no. 25

70. According to Canada, its Document Request no. 25 included documents which affect profits or returns the Claimant would have received or retained as a result of the sale or development of the Adams Mine as a waste disposal site.

71. The ability of the Claimant to receive or retain profits or proceeds from the disposition of the Enterprise would be relevant to whether he is a real and *bona fide* owner of the Enterprise.

72. The Claimant should be ordered to produce all documents that concern the Claimant's entitlement to receive or retain profits, proceeds or royalties related to the Adams Mine, in response to Document Request no. 25.

B. The Claimant's reply (GAL 32)

(i) Document production from Mr. Cortellucci

73. The Claimant has made all the requests for documents from third parties that were directed by the Tribunal. All of the documents that Mr. Cortellucci had, were included in files already produced. There are no further documents to produce from Mr. Cortellucci.

(ii) Scope of Document Request no. 25

74. The Claimant has confirmed that, after exchanging letters with Canada discussing the scope of Document Request no. 25, counsel contacted the Limited Partnership, limited partners and the named individuals, including Mr. Cortellucci, asking them to produce documents that affected profits or returns the Claimant would have received or retained as a result of the sale or development of the Adams Mine as a waste disposal site, as requested by Canada.

75. The response received by the Claimant was that no further documents existed that satisfied the request.

C. Canada's rebuttal (CAN 38)

76. Canada submits that Mr. Cortellucci played an active role in the Enterprise, acting as an officer and agent of the Enterprise. Mr. Cortellucci should be ordered to comply with all of the document production obligations of the Enterprise, including the creation of a privilege log for documents that he may have withheld from voluntary production.

D. The Arbitral Tribunal's decision

77. The parties discuss the scope of Document Request no. 25 and Mr. Cortellucci's response to this request:

> *No. 25: Documents concerning the legal, business, contractual, economic, social or family relationship between Claimant and Gordon and Michael McGuinty, Mario, Nick and Roseanne Cortellucci, Tony Nalli, Gordon Acton, Murdoch Martyn, Brent Swanick, Simmy Shnier, or any corporation or other entities with which these individuals are associated*

78. In Procedural Order no. 2 the Arbitral Tribunal decided that Canada had not shown the involvement of Nick and Roseanne Cortellucci, Tony Nalli and Simmy Shnier in relation to matters raised in this arbitration, since none of the foregoing persons

had been mentioned in the Statement of Defence. The request with regard to these persons was accordingly rejected.

79. Martyn Murdoch and Gordon Acton have acted as counsel and for this reason the request with regard to them was also rejected.

The Arbitral Tribunal accepted the request as regards the rest of the listed persons (Gordon and Michael McGuinty, Mario Cortellucci and Brent Swanick) including any corporation or other entity with which each individual is associated.

80. As regards the scope of the production, the Arbitral Tribunal narrowed down the documents to be produced to those which affected or related to Mr. Gallo's claimed ownership and control of the Enterprise.

81. The Arbitral Tribunal considered that for the purposes of this request, the Claimant includes both Mr. Gallo and the Enterprise[20].

82. The Claimant has repeatedly represented that he contacted the Limited Partnership, the limited partners and the named individuals, including Mr. Cortellucci, asking them to produce documents under request no. 25, including the extensive interpretation of its scope, as proposed by Canada[21]. The Claimant has represented that the response received was that all relevant documents had been delivered, and that no further documents existed that satisfied the request. Among those who replied was Mr. Cortellucci.

83. If a party specifically represents that it holds no further documents responsive to a production request, and the counterparty thinks otherwise, a remedy afforded in arbitration is that such party, in its memorial on the merits, should request the Tribunal to make the appropriate negative inferences.

84. The Tribunal notes, finally, that in CAN 32[22], the Respondent makes the following statement:

> *"Documents produced by the Claimant prior to PO no. 2 suggest that Mr. Cortellucci, the Cortellucci Group of Companies ... and the other limited partners, all of whom were Canadian, were the real investors which owned and controlled the Enterprise, and that Mr. Cortellucci was the real investor. Mr. Cortellucci and the limited partners appear to have been entitled to all of the proceeds from the sale of the Adams Mine ..."*

85. The Tribunal is aware that in GAL 32[23] the Claimant has made some brief comments in response to the Respondent's allegations.

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[20] Procedural Order no. 2, p. 8 and 9.
[21] See e.g. GAL 31, p. 5.
[22] p. 3
[23] p. 9

86. That said, the allegation that the Claimant is not the real investor is a material issue, which – if substantiated – could have implications regarding the jurisdiction of this Tribunal and/or the decisions on the merits. The Tribunal takes this opportunity to advise the Claimant that it sees the issue of the relationship between him and Mr. Cortellucci, the Cortellucci Group of Companies, and the Limited Partnership to be of potentially fundamental importance and it expects the Claimant to address the issue fully in his forthcoming Memorial and Witness Statements. This will permit the Respondent to then elaborate its position more fully in its Counter-Memorial.

IV COSTS

87. The Arbitral Tribunal has taken due note of the Claimant's request for reimbursement of his costs relating to the appointment of a special counsel.

88. The Arbitral Tribunal will take all decision on costs in the award.

V PROCEDURAL CALENDAR

89. On 29 May 2009 the Arbitral Tribunal decided to suspend the schedule of the proceedings until the Arbitral Tribunal had taken a decision on the three motions presented by the parties. Before the Tribunal could adopt this decision, the Claimant challenged one of the members of the Tribunal, and a new member was designated on 19 November 2009.

90. By the time the Arbitral Tribunal suspended the schedule, the Claimant still had two months to present his Memorial (the Memorial was due by 29 July 2009).

91. The Arbitral Tribunal decides that said Memorial shall be presented in a period of two months after the issuance of this Procedural Order, i.e. 21 February 2010.

92. The rest of the Procedural Calendar will be rescheduled as follows and para. 34 of Procedural Order no. 1 (as amended on 10 March 2009 in A 14) is amended accordingly:

21 June 2010	Canada – Counter-Memorial with Witness Statement(s) and Expert Report(s).
5 July 2010	Applications for Leave to File a Non-disputing party Submission.
19 July 2010	Claimant and Respondent – Submissions, if any, on Non-disputing party Submissions.
2 October 2010	Gallo – Reply with Reply to Witness Statement(s) & Expert Reply Report(s).
27 December 2010	Canada – Rejoinder with Reply to Witness

2 October 2010	Gallo – Reply with Reply to Witness Statement(s) & Expert Reply Report(s).
27 December 2010	Canada – Rejoinder with Reply to Witness Statement(s) & Expert Reply Report(s).
26 January 2011	NAFTA Article 1.128 Submissions.
TBD	Replies to Article 1.128 Submissions by Claimant and/or Respondent, if needed.
TBD	Oral Hearing.

Juan Fernández-Armesto

Jean-Gabriel Castel, O.C., Q.C.

Laurent Lévy