

THE HON LORD DERVAIRD

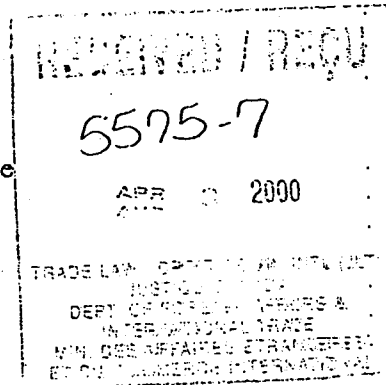
4 MORAY PLACE
EDINBURGH
EH3 6DS

TELEPHONE: +44 (0)131 225 1881
FACSIMILE: +44 (0)131 220 0644

Pope & Talbot, Inc
c/o Mr Barry Appleton
Appleton & Associates
1140 Bay Street, Suite 300
Toronto, Ontario, M5S 2B4
Fax: 00 1 416 966 8801

Government of Canada
c/o Maitre Eric Harvey
Counsel, Trade Law Division
Department of Foreign Affairs and International Trade
125 Sussex Drive
Ottawa, Ontario, K1A 0G2
Fax: 00 1 613 944 3213

2 April 2000



Dear Sirs

**NAFTA UNCITRAL Investor-State Claim
Pope & Talbot Inc and the Government of Canada**

The Tribunal refers to the faxes passing between the parties and the Tribunal in relation to the question whether Canada was or is entitled to make available to representatives of sub-national governments documents occurring in or generated by the present arbitration.

1. The parties are subject to a Confidentiality Order, Procedural Order No. 5 whereby Protected Documents and Third Party Protected Documents are subject to restriction.
2. Under paragraphs 9 and 10 of that Order disclosure of those documents is limited to particular classes of person as set out in each of those paragraphs.
3. Wide ranging arguments have been put forward by each party, relating on the one hand to the proper scope and meaning of the expression "Canada" in the NAFTA Agreement and on the other to the proper scope and range of confidentiality in relation to international commercial arbitration in general and NAFTA arbitration in particular.
4. In the view of the Tribunal those wide ranging arguments do not arise immediately. The Tribunal is conscious that Procedural Order on

Confidentiality No. 5 is a document based on materials put forward by the parties to this arbitration. In particular paragraphs 4, 5, 9 and 10 of Procedural Order No. 5 are in precisely the terms which Canada proposed that these paragraphs should have in their faxes to the Tribunal dated 17th and 18th November 1999. There was no difference between the parties as to the terms of paragraph 9, and as to paragraph 10 Canada desired, and the Tribunal agreed, and therefore included in its direction that the prohibition on disclosure should not apply only to a representative of the Claimant/Investor present at the hearings. In these circumstances the initial question which arises is the extent to which disclosure is permitted by the terms of the Order, whatever the general law may be in regard to the wider matters canvassed. Canada is a party to this arbitration. The sub-national governments of Canada as such are not parties to this arbitration. The only possible right that there might be under the present Order for representatives of sub-national governments to have access to these documents would be if they fell within category (2) of paragraph (9), namely officials or employees of the parties whose involvement in the preparation or conduct of these proceedings is reasonably necessary. Otherwise there could be no entitlement under any head. It appears to the Tribunal self-evident that representatives of sub-regional governments are not officials or employees of Canada. Accordingly there can be no question under the present Procedural Order of such persons being permitted access to Protected Documents. (No similar provision exists under paragraph 10 for Third Party Protected Documents).

5. In its submissions Canada refers to its long standing practices for the sharing of information with provinces and territories, and in particular so informing them in relation to Chapter 11 materials. However the fact is that Canada and the Claimant were agreed upon and the Tribunal in due course directed in relation to Protected Documents in paragraph 9 that such documents may be used only in these proceedings ... and may be disclosed only for such purposes, and in the case of paragraph 10 that neither Pope & Talbot Inc nor the Government of Canada may, directly or indirectly, use Third Party Protected Documents or information recorded in or derived from those Documents for any purpose other than this arbitration. The passages underlined indicate clearly that whatever other information Canada might properly share with provincial and territorial governments, it was restricted in the use it might make of any information within the protected classes to the purposes of this arbitration. Sharing that material with C-Trade representatives is not for the purposes of this arbitration but as Ms. Ayotte states at paragraph 18 of her affidavit "essential to avoid new measures that may generate future claims ...". If that be the purpose for which Canada seeks to use that protected information the Tribunal is in no doubt that it is not open to Canada to do so under the terms of the Procedural Order.
6. For the foregoing reasons it is unnecessary for the Tribunal to consider the wide issues raised by the parties in relation to Procedural Order No. 5. Canada has proposed and the Tribunal has accepted and contained in its Order restrictions on the use which may be made and the persons to whom disclosure may be made of the information produced in this arbitration, in particular, protected and third party protected information. In these circumstances it is

not open to Canada to disclose such information unless a variation order is made to Procedural Order No. 5.

7. In its submission Canada makes an alternative case that for the proper functioning and due observance of the NAFTA access to such documents should be permitted by variation of Procedural Order No. 5 to that effect. In the view of the Tribunal, Canada makes a convincing case that such a variation is desirable in order to enable Canada to ensure compliance with the NAFTA. Reference is made to NAFTA Article 105 and to the affidavit of Ms Ayotte.
8. The Tribunal has considered the amendments proposed by Canada. It is satisfied that with certain modifications those amendments will safeguard the confidentiality of protected documents as well as meeting Canada's requirements. However one issue arises. Under Article 10, both parties, that is to say Pope & Talbot Inc and the Government of Canada, are subject to the prohibition already mentioned in that neither may "directly or indirectly use Third Party Protected Documents or information recorded in or derived from these Documents for any purpose other than this arbitration." The amendment proposed by Canada permits disclosure to provincial and territorial trade representatives to the "C-Trade committee". It appears to the Tribunal that if that general prohibition in paragraph 10 is to be overcome it is necessary to include a reference to federal representatives as well in paragraph 10.1.
9. The Tribunal also considers that it is necessary to ensure that each person who may be comprised within the "C-Trade" committee provides Confidentiality Agreements before gaining access to any such Protected or Third Party Protected Documents. Accordingly any exercise of the power conferred under the proposed Article 10.1 will be subject inter alia to the provision of paragraph 13 of the existing Order.
10. The Tribunal accordingly orders that Procedural Order No. 5 be amended in the manner shown in the Annex hereto.

Yours faithfully



Lord Dervaird
Presiding Arbitrator

Copy:

Murray J Belman
Benjamin J Greenberg

ANNEX
NAFTA UNCITRAL INVESTOR - STATE CLAIM
POPE & TALBOT INC. AND THE GOVERNMENT OF CANADA

AMENDMENT TO PROCEDURAL ORDER NO. 5
(PROCEDURAL ORDER ON CONFIDENTIALITY)

The following amendments shall be made to Procedural Order No. 5 with immediate effect.

1. After Paragraph 10 there shall be a new paragraph 10.1 as follows:-
 - 10.1 Notwithstanding paragraphs 2, 3, 4, 9 and 10 of this Order, but subject always to paragraphs 11 and 13 of this Order, Canada may disclose to federal, provincial and territorial trade representatives of the "C-Trade", a federal-provincial/territorial committee which meets on matters relating to international trade policy, any confidential, Protected or Third Party Protected Documents, including pleadings, submissions, memorials, evidence tendered to the Tribunal and evidence and arguments heard by the Tribunal at hearings. All such documents shall be treated as confidential and used solely for purposes of "C-Trade" deliberations.
2. In paragraph 11 there shall be inserted immediately before the last sentence the following: "Canada shall have the obligation of notifying all "C-Trade" representatives provided with confidential Protected or Third Party Protected Documents of the obligations under this Order."
3. In all other respects Procedural Order No. 5 shall remain unchanged and of full force and effect.


Lord Dervaird
Presiding Arbitrator

2 April 2000