Foreign Affairs and
International Trade Canada

Department of Justice

CANADA

Affaires étrangères et
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Ministère de la Justice

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January 29, 2008

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Dear Sirs:

Canada has reviewed the Confidentiality Order ("CO") dated January 21, 2008. Canada asks this Tribunal to reconsider its determination at paragraph 31 of the CO, which provides:

> At the conclusion of these proceedings, all material produced hereunder, or otherwise submitted to the Tribunal and any copy of those materials and any materials containing any confidential information, are to be returned to the disputing party who supplied the materials, together with certification that no duplicate has been retained. Returning material from the files of the Tribunal or the administering institution shall require the prior approval of the Tribunal.

Tribunal's Authority to Reconsider

The Tribunal has authority to reconsider this paragraph of the CO pursuant to its general mandate to conduct the arbitration under Article 15(1) of the UNCITRAL Rules. Article 15(1) of the UNCITRAL Rules provides:

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided the parties are treated with equality and that any stage of the proceedings each party is given a full opportunity of presenting his case.

Proceedings to Date

Paragraph 31 of the CO was first proposed by Claimant in its written submission on Confidentiality, dated November 9, 2007. As a result, Canada could not address this in its written submission which was simultaneously exchanged on November 9, 2007. Canada's only opportunity to respond to Claimant's proposal was at the First Procedural Meeting, held on November 15, 2007. At that meeting, Canada clearly informed the Tribunal of its inability to agree to a provision that requires the return of documents at the end of a hearing, due to domestic law. Canada stated:

> Just one point on the destruction or return of information at the end of the proceeding, which is in Mr. Appleton's draft. Unfortunately, Canada is now in a difficult position and cannot – we have been given advice that we cannot agree to this kind of language, and it would be contrary to our Librarian Archives Act (sic) and our Access to Information Act, and so we would ask that this language be removed, and we cannot consent to this language in the Confidentiality Order. [1]

[1] *Merrill & Ring, L.P. v Government of Canada*, Transcript of the First Procedural Meeting, 15 November 2007 (Tab A) at page 168, ln 12-20, ("Transcript").

Counsel for the investor agreed that the return of documents was not required. Counsel stated:

> If, at the end of the day, the Tribunal has an order that is binding, which I think we can do now, **then I have no problem not worrying about destruction**, but I do need an order that is going to be binding equally on both sides, and I think that we have now provided a mechanism that doesn't have to set up a conflict between Canada's domestic law and the international law.[2]

As there is now a binding CO in this case, paragraph 31 is not required.

Canada's Domestic Legal Regime Concerning the Destruction of Documents

Canada cannot agree to a blanket commitment to return or destroy documents. To do so would put it in conflict with mandatory domestic legislation.

At least three principle federal instruments individually and collectively prevent Canada from returning documents to the Claimant:

- the *ATIA*;
- the *Library and Archives of Canada Act* ('*LACA*'); and
- the *Privacy Act* ('*PA*').

Under the *ATIA*, Canada cannot:

> (a) destroy, mutilate or alter a record;
>
> (b) falsify a record or make false a record;
>
> (c) conceal a record; or
>
> (d) direct, propose, counsel or cause any person to do anything mentioned in paragraphs (a) to (c).[3]

A record is defined under the *ATIA* as "any documentary material, regardless of medium or form".[4] Any person who disposes of documents in contravention of the

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2 Transcript, at page 178, ln 2-9.

3 *ATIA*, s. 67.1 (**Tab B**).

ATIA may be found criminally liable.[5] Material obtained in the course of these proceedings will fall within the definition of a "record" under the *ATIA*. For the purposes of the *ATIA*, to "destroy" a record may include cases where Canada releases that record without retaining a copy. Canada therefore cannot guarantee that it will be able to return Claimant's records while remaining within the requirements of the *ATIA*.

For its part, the *LACA* provides at s. 12(1):

> No government or ministerial record, whether or not it is surplus property of a government institution, shall be disposed of, including by being destroyed, *without the written consent of the Librarian and Archivist [of Canada]* or of a person to whom the Librarian and Archivist has, in writing, delegated power to give such consents.[6] (*Emphasis* added)

The *LACA* defines a "government record" as a record that is under the control of a government institution.[7] "Record" is broadly defined under the *LACA* as "any documentary material other than a publication, regardless of medium or form".[8] Canada cannot guarantee in advance that it will obtain the written consent of the Librarian and Archivist of Canada to dispose of all documents that it will receive from Claimant in this arbitration.

Finally, the *PA* requires at section 6(3) that:

> A government institution shall dispose of personal information under the control of the institution in accordance with the regulations and in accordance with any directives or guidelines issued by the designated minister in relation to the disposal of that information. [9]

"Personal Information" is defined under the *PA* as, "information about an identifiable individual that is recorded in any form [...]".[10]

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4 *ATIA, id.*, s. 3 (**Tab B**).

5 *ATIA, id.*, s. 67.1(2): "Every person who contravenes [s. 67.1] is guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding two years or to a fine not exceeding $10,000, or to both; or (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding six months or to a fine not exceeding $5,000, or to both" (**Tab A**).

6 *LACA*, R.S.C. 2004, c-11 ("*LACA*") (**Tab C**).

7 *LACA, id.*, s. 2 (**Tab C**).

8 *LACA, id.*, s. 2 (**Tab C**).

9 R.S., 1985, c. P-2, s.6 (3) (**Tab D**).

10 *PA, id.*, s. 3 (**Tab D**).

The *Privacy Regulations* further provide at s. 4(1) that:

> Personal information concerning an individual that has been used by a government institution for an administrative purpose shall be retained by the institution for at least two years following the last time it was used unless the individual consents to its disposal. [11]

If Canada receives documents that fall within the definition of "personal information" under the *PA*, it cannot simply return these documents to Claimant. Rather, it must first review all documents for the existence of personal information and request that affected persons consent in writing to the documents' destruction. Canada cannot know in advance whether such consent will be granted.

These three legislative regimes both individually and collectively make it impossible for Canada to make any commitment to document return, as requested by Claimant.

If paragraph 31 remains as currently drafted, Canada will be placed in the impossible position of having to comply with irreconcilable binding domestic obligations and the Confidentiality Order.

Paragraph 31 is Not Necessary

Canada would add that the above considerations are not counterbalanced by any competing imperatives. The confidentiality of Claimant's documents is already assured by the non-disclosure provisions accepted by Canada in the draft Confidentiality Order. This was recognized by Claimant during the first Procedural Meeting. As there is now a binding CO between the disputing parties, Claimant's own submission demonstrates that paragraph 31 of the CO is no longer required.

Further, any materials in Canada's possession that were subject to an *ATIA* request would be protected by the specific exemptions in that Act.

Note on Past Practice

In early NAFTA Chapter 11 cases [*Pope & Talbot v. Canada* ("*Pope*") and *S.D. Myers Inc. v. Canada* ("*Myers*")] the obligation to return documents was expressly subject to the *National Archives Act*, the predecessor to the *LACA*.[12] [13] Unfortunately,

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[11] SOR/83-508 **(Tab E)**.

[12] *Pope & Talbot, Inc. v. Government of Canada*, Amended Procedural Order on Confidentiality No. 5, 17 September 2002, at ¶ 14 **(Tab F)**.

the *UPS v. Canada* case required return of documents and did not make this subject to the *NACA* or *LACA*.[14] As explained by counsel for Canada at the November 15 hearing, Canada has been given advice that it cannot agree to such language. In all subsequent procedural hearings in NAFTA Chapter 11 cases, Canada has consistently advised of this concern as explained above.

Conclusion

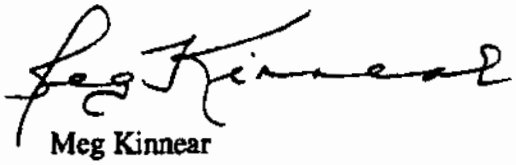
In light of the above considerations, Canada respectfully requests that paragraph 31 of the CO be deleted.

Alternatively, Canada would suggest the following substitute for paragraph 31:

> At the conclusion of this arbitration, Canada undertakes to ask the Librarian and Archivist of Canada for written consent to destroy or return the records generated in this arbitration to the Claimant.

In light of the systemic importance of this issue, Canada is willing to address the matter further by telephone conference call or otherwise, as directed by the Tribunal.

Sincerely,



Meg Kinnear
Senior General Counsel &
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Trade Law Bureau (JLT)

cc. Barry Appleton
cc. Eloise Obadia
cc. Howard Dean

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[13] *S.D. Myers Inc. v. Government of Canada*, Procedural Order No. 11, 11 November 1999 at ¶ 13 **(Tab G)**.

[14] *United Parcel Services of America v. Government of Canada*, Procedural Directions and Order of the Tribunal, 4 April 2003 at ¶ 24 **(Tab H)**.