

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE
UNCITRAL ARBITRATION RULES**

BETWEEN:

MERRILL & RING, L.P. (“Merrill & Ring”)

Investor

AND

GOVERNMENT OF CANADA (“Canada”)

Party

**INVESTOR’S SUBMISSION ON
DOCUMENT PRODUCTION AND INFORMATION REQUESTS**

Appleton & Associates International Lawyers
77 Bloor St. West, Suite 1800
Toronto, ON M5S 1M2
Tel: (416) 966-8800
Fax: (416) 966-8801

I. OVERVIEW

1. Investor state tribunals have found guidance in reliance upon Article 9 of the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*.¹ While designed for use in the field of commercial arbitrations, these rules can provide assistance to a Tribunal in establishing rules governing the production of documents.
2. The Investor submits that it is inappropriate to adopt Article 9 of the *IBA Rules* in its entirety as it does not adequately allow exclusive sovereign privileges. To assist the Tribunal, the Investor has proposed an Information Request Order based on NAFTA precedent and the *IBA Rules*.
3. Article 9(2)(b) of the *IBA Rules* provides that the tribunal may rely on “legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable” to exclude documents from production. While privilege like attorney-client privilege applies equally to both disputing parties, certain sovereign privileges followed by Canada do not. Applying this rule to an investor-state arbitration involving Canada cannot result in equal treatment of the disputing parties.
4. In other cases, Canada has relied explicitly or implicitly on its extensive non-reviewable domestic evidence suppression powers to block access to evidence. Canada argues that Section 39 of its *Evidence Act* provides a non-reviewable privilege.
5. Section 39 of the *Canada Evidence Act* provides:
 - (1) Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen’s Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.
 - (2) For the purposes of subsection (1), “a confidence of the Queen’s Privy Council for Canada” includes, without restricting the generality thereof, information contained in
 - (a) a memorandum the purpose of which is to present proposals or recommendations to Council;
 - (b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;
 - (c) an agenda of Council or a record recording deliberations of decisions of Council;
 - (d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

¹ *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, Tab 18.

- (e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and
- (f) draft legislation.²

Section 39 of the *Canada Evidence Act*, therefore, allows Canada to refuse to disclose a broad range of government deliberations by simply certifying that the information is “a confidence of the Queen’s Privy Council for Canada.”

- 6. Canada cannot rely on Section 39 to refuse to disclose information in this arbitration. On its face, Section 39 does not apply to arbitration tribunals. Even if it did, neither the NAFTA nor international law protects mere government deliberations from disclosure. The NAFTA and international law certainly do not protect information on the mere assertion of the party that it is privileged. Instead, a party relying on a privilege must prove the application of their privilege to a specific information source if that privilege is challenged.

II. PROCEDURAL HISTORY

- 7. On March 8, 2007, counsel for Merrill & Ring sent Canada a draft confidentiality agreement containing the following provision:

If the Government of Canada objects to the disclosure of any information on the basis of a privilege, ground for exemption or non disclosure or public interest immunity arising at common law or by Act of the Parliament of Canada, the Tribunal will decide on the basis of submissions by the disputing parties on the action to be taken.³

- 8. Canada responded with a revised draft of the confidentiality agreement on March 22, 2007, replacing this provision with the following:

Nothing in this Agreement shall be construed to abrogate any claim or entitlement to refuse to disclose any information on the basis of a privilege, ground for exemption or non-disclosure or public interest immunity arising at common law or by Act of the Parliament of Canada.⁴

- 9. In a letter of September 10, 2007, Canada reiterated its support for a rule that it “may refuse to produce evidence, disclosure of which would be contrary to Canada’s laws

² *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 39, Tab 29.

³ Investor’s Draft Confidentiality Agreement, attached to letter of March 8, 2007, from Barry Appleton to Meg Kinnear, Article 8, Tab 1.

⁴ Canada’s Draft Confidentiality Agreement, attached to letter of March 22, 2007, from Meg Kinnear to Barry Appleton, Article 14, Tab 2.

protecting the deliberative and policy-making process of the executive branch of government at the cabinet level.”⁵

III. SECTION 39 DOES NOT APPLY TO TRIBUNALS OPERATING UNDER THE UNCITRAL RULES

10. Section 39(1) of the *Canada Evidence Act* allows the Clerk of the Privy Council to object to the disclosure of information “before a court, person or body with jurisdiction to compel the production of information.” A NAFTA Tribunal has the power to request information or to take an adverse inference from the failure to produce. It has no power to compel production. Thus Section 39(1) of the *Canada Evidence Act* is inapplicable to a NAFTA Tribunal.
11. The *Pope & Talbot* and *UPS* Tribunals confirmed this conclusion.⁶ In both cases, Canada also sought to rely on a Section 39 certificate to avoid producing documents. Both tribunals rejected Canada’s claim. The *Pope & Talbot* Tribunal concluded:

...the Tribunal does not in any event consider that s.39 of the Canada Evidence Act is applicable. The Tribunal is not “a court, person or body with jurisdiction to compel the production of information.” It is operating under the UNCITRAL Rules. While Article 24(3) of those rules empowers [it] to “require the parties to produce documents, exhibits or other evidence,” there is no power to compel that production. Indeed, Article 28(3) characterizes this requirement to produce as an invitation:

If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.⁷

12. The *UPS* Tribunal reached the same conclusion.⁸ The Tribunal went on to emphasize that “Canada may not have the advantage of its own law if it is more generous than the law governing the Tribunal.” The *UPS* Tribunal admonished Canada for relying on Canada’s

⁵ Letter of September 10, 2007 from Sylvie Tabet, Trade Law Bureau, International Trade Canada, to Barry Appleton, Tab 3.

⁶ *Pope & Talbot Inc. v. Canada*, Decision on Cabinet Confidence, September 6, 2000, Tab 7; *United Parcel Service of America v. Government of Canada*, Decision Relating to Canada’s Claim of Cabinet Privilege, 2004 WL 3314912 (October 8, 2004), Tab 28.

⁷ *Pope & Talbot Inc. v. Canada*, Decision on Cabinet Confidence, September 6, 2000, Tab 7 at para. 1.3.

⁸ *United Parcel Service of America v. Government of Canada*, Decision Relating to Canada’s Claim of Cabinet Privilege, 2004 WL 3314912 (October 8, 2004), Tab 28 at para. 7: “... s. 39(1) in its own terms does not apply to this proceeding since the Tribunal does not have ‘jurisdiction to compel the production of information’.”

mere assertion of privilege before acknowledging its ability to draw adverse inferences from Canada's failure to produce the requested documents.⁹

13. Following the decisions in *Pope & Talbot* and *UPS*, Canada should not be permitted to rely on Section 39 of the *Canada Evidence Act* or to follow analogous procedure to refuse production *en bloc*. The principle of equality requires that Canada must justify its reliance on privilege in the same manner as the Investor.

IV. SUBJECTING CANADA'S OBLIGATIONS OF DISCLOSURE TO THE EVIDENCE ACT IS INCONSISTENT WITH THE NAFTA

14. NAFTA Chapter 21 demonstrates that Canada cannot rely on a Section 39 certificate to refuse to disclose information in a NAFTA arbitration subject to the UNCITRAL Rules. NAFTA Chapter 21 provides exceptions to the obligations in the other NAFTA chapters, including Chapter 11. Chapter 21 provides that the disclosure of certain information is excepted from the scope of the other NAFTA chapters. Specifically, NAFTA Article 2102 provides:

... nothing in this Agreement shall be construed to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests.

15. Similarly, NAFTA Article 2105 provides:

Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting personal privacy or the financial affairs and accounts of individual customers of financial institutions.

NAFTA Articles 2102 and 2105, therefore, allow Canada to refuse to disclose information "contrary to its essential security interests" and inconsistent with domestic laws "protecting personal privacy" and protecting "the financial affairs and accounts of individual customers of financial institutions."

16. By specifically exempting disclosure of this information from the scope of the Agreement, the NAFTA drafters confirmed that disclosure of all other information is subject to the Agreement, including NAFTA Article 1131(1).

⁹ *United Parcel Service of America Inc. v. Canada*, Decision of the Tribunal Relating to Canada's Claim of Cabinet Privilege, October 8, 2004, Tab 28 at paras. 7 and 15.

V. SUBJECTING CANADA'S OBLIGATIONS OF DISCLOSURE TO THE EVIDENCE ACT IS INCONSISTENT WITH INTERNATIONAL LAW

17. International law prevents Canada from relying on Section 39 of the *Canada Evidence Act* to refuse to disclose information. NAFTA Article 1131(1) provides that international law governs the issues in dispute in this arbitration:

A Tribunal established under this section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

Canada's disclosure of information is "in dispute" in this arbitration and, therefore, is governed by general international law, to the extent it is not governed by the *lex specialis* rules of the NAFTA.

A. INTERNATIONAL LAW DOES NOT PROTECT GOVERNMENT DELIBERATIONS

18. General international law does not recognize broad rights to claim privilege that may exist under domestic law. In his treatise, *Evidence Before International Tribunals*, Professor Sandifer recognized that:

[a] general rule is to be deprecated that would permit parties to defeat the production of essential documents by refusing to give their consent on the ground of their confidential character.¹⁰

19. Consistent with its reluctance to accept broad claims of privilege, international law does not protect mere government deliberations. Professor Sandifer confirms that international law only protect documents that actually contain state secrets. He states that:

[t]here are two general rules of privilege in municipal procedure having apparent potential importance in international proceedings, namely, the exemption of certain professional persons from revealing information confided to them in their professional capacity *and the privilege for facts constituting secrets of state.*¹¹

International law only protects documents *containing* state secrets, rather than any process that may have eventually led to the creation of such secrets.

¹⁰ Derward Sandifer, *Evidence Before International Tribunals* (1975), Tab 31 at 381.

¹¹ Sandifer, Tab 31 at 376 (emphasis added).

**B. INTERNATIONAL LAW TRIBUNALS DO NOT RELY ON A STATE'S
MERE ASSERTION OF PRIVILEGE**

20. Even if international law protected state deliberations, rather than the secrets themselves, the *Pope & Talbot* Tribunal confirmed that international law tribunals do not rely on a state's mere *assertion* of that privilege. The Tribunal held:

It is not in dispute that a ground that may justify refusal of a party to produce documents to an international arbitral tribunal may be the protection of state secrets. But any reasonable evaluation of the quality of that justification must depend in large part on having some idea of what those documents are. A determination by a Tribunal that documents sufficiently identified deserve protection is a very different matter from acquiescence to a simple assertion, without identification, that they deserve protection.¹²

21. The *Pope & Talbot* Tribunal, therefore, confirmed that the tribunal itself will determine if each document is privileged, based on the party's detailed description of that document and why it is privileged. The *Canada - Aircraft* WTO panel decision supports this conclusion. In admonishing Canada for refusing to release documents based on an assertion of cabinet privilege, the panel said:

With regard to cabinet privilege, we note that in certain circumstances, such as national security, a Member may consider itself justified in withholding certain information from a panel. However, in such circumstances, we would expect that Member to explain clearly the basis for the need to protect that information. In the present case, Canada has invoked cabinet privilege for the purpose of protecting documents concerning the approval of contributions under the TPC. Canada has failed to explain why such information needs to be protected. In the absence of any such explanation, we are not at all convinced of the merits of Canada's reliance on cabinet privilege in the present case.¹³

The WTO panel, therefore, confirmed that Canada could not refuse to disclose documents based on a mere assertion of cabinet privilege.

¹² *Pope & Talbot v. Canada*, Decision on Cabinet Confidence, September 6, 2000, Tab 7 at para. 1.4.

¹³ *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, 14 April 1999, Tab 27 at footnote 633.

VI. SUBJECTING CANADA'S OBLIGATIONS OF DISCLOSURE TO THE EVIDENCE ACT DESTROYS THE EQUALITY OF THE PARTIES

22. Subjecting Canada's obligations of disclosure to the *Evidence Act* is not only inconsistent with the Act, the NAFTA and international law, but it destroys the equality of the parties. The Investor has no right to unilaterally refuse to disclose documents without explanation and without review. Granting Canada this right, therefore, destroys the parties' equality in breach of Article 15 of the UNCITRAL Arbitration Rules.
23. Granting Canada this right also undermines the equality of the NAFTA Parties. The *Pope & Talbot* Tribunal observed that:

[i]n the specific context of a NAFTA arbitration where the parties have agreed to operate by UNCITRAL Rules, it is an overriding principle (Article 15) that the parties be treated with equality. The other NAFTA Parties do not, so far as the Tribunal has been made aware, have domestic law that would permit or require them to withhold documents from Chapter 11 tribunals without any justification beyond a simple certification that they are some kind of state secret. In these circumstances, Canada, if it could simply rely on s.39, might be in an unfairly advantaged position under Chapter 11 by comparison with the United States and Mexico.¹⁴

The *Pope & Talbot* Tribunal, therefore, confirmed that enabling Canada to rely on Section 39 of the *Canada Evidence Act* is not only inconsistent with the Act, the NAFTA and international law, but undermines the equality of the disputing parties in breach of Article 15 of the UNCITRAL Rules.

VII. RELIEF SOUGHT

24. The Investor seeks that the Tribunal adopt the Investor's Information Request Order attached as Annex "A" to this submission.
25. The Investor asks the Tribunal to include in the confidentiality order the following provision contained in paragraph 10 of the Investor's proposed Confidentiality Order which is attached as Annex "A" to its submission on Confidentiality:

If the Government of Canada objects to the disclosure of any information on the basis of a privilege, ground for exemption or non disclosure or public interest immunity arising at common law or by Act of the Parliament of Canada, the Tribunal will decide on the basis of submissions by the disputing parties on the action to be taken.

¹⁴*Pope & Talbot v. Canada*, Decision on Cabinet Confidence, September 6, 2000, Tab 7 at para. 1.5.

All of which is respectfully submitted.

Submitted this 9th day of November, 2007.

A handwritten signature in cursive script, reading "Barry Appleton", written over a horizontal line.

Barry Appleton
for Appleton & Associates International Lawyers
Counsel for the Investor, Merrill & Ring, L.P.

INFORMATION REQUEST ORDER

1. Each disputing party shall submit to the Tribunal and the other disputing party all documents available to it on which it relies, including public documents and those in the public domain, except for any documents that have been submitted by the other party. Each disputing party shall be entitled to serve Information Requests that relate to any issues raised in the pleadings.
2. An Information Request shall contain:
 - a.
 - (i) a description of a requested document or information sufficient to identify it; or
 - (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
 - b. a description of how the information requested is relevant and material to the outcome of the case; and
 - c. a statement that such document is not in the possession, custody or control of the requesting party and of the reason why that party assumes the documents requested to be in the possession, custody or control of the other party.
3. An Information Request may be made by either disputing party within the time for the Information Production process ordered by the Tribunal. The Information Production Process shall begin on December 1st, 2007.
4. A party to which an Information Request is made may within seven (7) days refuse any part of the Information Request, stating the grounds for the refusal. If the requesting party wishes to dispute the refusal, it may make written submissions to the Tribunal within seven days.
5. The disputing parties shall begin to produce information immediately after receiving the Information Request or, where appropriate, immediately after the Tribunal rules on any refusals. If the disputing parties are unable to agree on a timetable for production the Tribunal will establish one. Production will generally be reasonably expected to occur within 30 days of the making of the Information Request.
6. If copies of documents are produced, they must conform fully to the originals. At the request of the Tribunal, the original of any document must be presented for inspection.

7. Within the time ordered by the Tribunal, the disputing parties may submit to the Tribunal and to the other disputing party any additional documents which they believe have become relevant and material as a consequence of the issues raised in the documents, witness statements or expert reports submitted or produced by another party or in other submissions of the parties.
8. Any expert opinions to be tendered will be filed with the disputing parties' written submissions. Expert opinions will annex copies of the documents upon which they rely with their opinions.
9. In this direction a document includes a writing of any kind, whether recorded on paper, by electronic means, by audio or visual recordings or other mechanical or electrical means of storing or recording information.
10. The Tribunal reserves the power to make specific procedural directions to resolve disputes between the parties about document production.

WITNESSES

11. Any witness statements to be tendered will be filed with the written submissions of the disputing parties.
12. Any person may present evidence as a witness, including a disputing party or a disputing party's officer, employee or other representative.
13. If witness statements are submitted, any disputing party may file subsequent witness statements with subsequent written submissions, so long as such subsequent statements only respond to matters contained in another disputing party's witness statement or expert report and such matters have not been previously presented in the arbitration.
14. Each witness who has submitted a witness statement shall appear for testimony at an evidentiary hearing, unless the parties agree otherwise.
15. If a witness who has submitted a witness statement does not appear without a valid reason for testimony at an evidentiary hearing, except by agreement of the parties, the Tribunal shall disregard that witness statement unless, in exceptional circumstances, the Tribunal determines otherwise.
16. If the disputing parties agree that a witness who has submitted a witness statement does not need to appear for testimony at an evidentiary hearing, such an agreement shall not be considered to reflect an agreement as to the correctness of the content of the witness statement.

INTERROGATORIES

17. At any time during the Information Production Process, a disputing party may deliver written interrogatories to the other party. The interrogatories shall, in addition to the questions posed, list the persons or class of persons (the “person”) to whom the questions(s) are targeted. The procedures relating to refusals to respond to document production shall apply with respect to interrogatories.
18. Upon receipt of an interrogatory, the responding party shall ensure that an answer be provided to the best of the person's knowledge. The person answering may consult the lawyers representing them in the arbitration for general advice. The person to whom the interrogatories are posed shall not consult other witnesses of the disputing party. In the event that an answer cannot be made without such consultations, the identity of all such consulted persons must be disclosed.
19. The Tribunal reserves the power to make specific procedural directions to resolve any disputes between the disputing parties about interrogatories.