

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

MERRILL & RING FORESTRY L. P.

CLAIMANT

AND

THE GOVERNMENT OF CANADA

RESPONDENT

(ICSID Administered Case)

**DECISION OF THE TRIBUNAL ON PRODUCTION OF
DOCUMENTS**

Background

1. On January 21, 2008, the Tribunal issued an Order Concerning Requests for Documents and Certain Evidentiary Matters, which was reissued, with amendments, on June 24, 2008 (the Document Production Order).
2. The Document Production Order provided that each disputing party shall submit to the Tribunal and the other disputing party, together with its written submissions, 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 disputing party (para. 1). A disputing party has the right to request documents from the other disputing party (para. 2). If the disputing party to whom the document request is addressed has objections to some or all of the documents requested, it shall state them in writing to the Tribunal in the form of a Redfern Schedule (para. 5). A party may object on the basis of any of the reasons set forth in para. 6 of the Document Production Order. The Tribunal shall determine the admissibility, relevance, materiality and weight of evidence, and may exclude from evidence or production any document, statement, oral testimony for any of the following reasons (para. 6):
 - (a) lack of sufficient relevance or materiality;
 - (b) legal impediment or privilege under the legal or ethical rules determined by the Tribunal to be applicable;
 - (c) unreasonable burden to produce the requested evidence;
 - (d) loss or destruction of the document that has been reasonably shown to have occurred;
 - (e) grounds of commercial or technical confidentiality that the Tribunal

- determines to be compelling;
- (f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Tribunal determines to be compelling;
- (g) consideration of fairness or equality of the disputing parties that the Tribunal determines to be compelling; or
- (h) failure to comply with the requirements for making a proper document request as set forth in the Document Production Order.¹
3. The Document Production Order stated that the Tribunal may provide further specific procedural directions to resolve disputes between the disputing parties about document production (para. 11).
4. The Document Production Order established a timeline for document production in the proceedings as follows (para. 7): Simultaneous Requests for Document Production (SDRP) were to be made by the disputing parties 7 days after Canada submitted its Counter-Memorial; counsel for the disputing parties were to meet to assess objections to document production 7 days after the SDRP; both disputing parties were to submit objections to refusal to produce in the form of a Redfern Schedule to the Tribunal 21 days after the SRDP. Pursuant to the parties' requests of May 16, 2008, this timeline was changed by letter of the Secretary of the Tribunal of May 19, 2008, as follows: each party was to make a request to the other party of any requests for documents it may have by June 4, 2008; counsel for the parties were to meet to discuss the respective document

¹ These requirements are the following:

- i) failure to describe a document or information sufficient to identify it (para. 3(a)(i));
- ii) failure to provide a narrow and specific requested category of documents (para. 3(a)(ii));
- iii) a document has already been produced or the document is already in possession of the requesting party (paras. 3(c) and 1);
- iv) a document is not in the possession, custody or control of the requesting disputing party (paras. 3(c) and 4).

requests, if any, by June 11, 2008; the parties were to respond to each other in writing on the requests by June 25, 2008; the parties were to inform the Tribunal of the status of the document requests and, if necessary, ask the Tribunal to decide on any requests not mutually agreed-upon by July 2, 2008.

5. On June 4, 2008, the Investor provided its Document Request to Canada, and Canada provided its Document Request to the Investor.
6. On June 20, 2008, Canada replied to the Investor, providing it with a listing of refusals to the Investor's document requests. On the same date, the Investor provided to Canada its list of refusals to Canada's document requests.
7. On June 26, 2008, in a letter to the President of the Tribunal, the Investor objected to Canada's refusals based on Cabinet Privilege.
8. On July 2, 2008, Canada submitted to the Tribunal a letter explaining its refusals to produce documents on the grounds of relevance and of special political or institutional sensitivity. Canada also submitted, attached to this letter, Refusals to Produce Documents in the form of a Redfern Schedule and Objections to the Investor's Refusals to Produce Documents. On the same date, the Investor submitted, with a cover letter, its Objections to Canada's Refusals to Produce Documents in the form of a Redfern Schedule.
9. On July 8, 2008, the Investor submitted a letter objecting, *inter alia*, to the fact that Canada had introduced additional grounds for refusals to produce documents in its submission of July 2, 2008, as compared to the list of refusals it had provided to the Investor prior to that date. The Investor also requested the Tribunal to set a date by which Canada should account fully to each of its objections based on Cabinet Privilege.

10. On July 10, 2008, Canada replied to the Investor's letter of July 8, 2008, and requested the Tribunal to proceed with resolving each party's objections to produce.

Issues Concerning Documents Containing Cabinet Confidences or Crown Privileges

11. In its letter of June 26, 2008, the Investor explained to the Tribunal that Canada was considering a number of refusals to produce the documents requested by the Investor on the ground of Cabinet Privilege, even though such privilege had not been specifically claimed in respect of individual documents, nor had it been justified.
12. In this light the Investor petitioned the Tribunal to order Canada to set out the identity of any document over which it claims refusal on the ground of privilege, the date of its creation, the identity of its creator and recipient, its length and the general nature of its contents, as well as the reasons justifying why such privilege applies to the specific document refusal. At the same time, the Investor requested that its own objections to such refusals be deferred so that the parties are able to consider possible agreement on any refusals.
13. The Investor invoked in support of its views on the matter the finding of the *Pope & Talbot* Tribunal confirming that international tribunals may not rely on a respondent's mere assertion of cabinet privilege and can only take a decision in respect of documents sufficiently identified and justified [*Pope & Talbot Inc. v. Government of Canada*, Decision on Cabinet Confidence, September 6, 2000, para 1.4]. The Investor also relied on the ruling of the *Canada-Aircraft* WTO panel decision requiring justification of such a claim [*Canada – Measures Affecting the Export of Civil Aircraft*, WT/DS70/R, April 14, 1999, at footnote 633].

14. In its submission of July 2, 2008, Canada explained that it was not actually asserting at this time such a privilege but only indicating that if in the search for documents the production of which is ordered by the Tribunal documents subject to privilege are found then it might need to refuse production on such basis.
15. Canada has also invoked in support of its views the meaning of the *Canada Evidence Act*, governing confidence of the Cabinet or Privy Council of Canada. The Act does not allow for discretion in the release of Cabinet Confidences [*Canada Evidence Act*, R.S. 1985, c.C-5, Section 39 (1)]. As Canada explained, the Crown Privileges in British Columbia are preserved by the *Crown Proceeding Act* [*Crown Proceeding Act*, RSBC 1996, c.89, Section 9 (3)], which allows such discretion but to be exercised by the Provincial Government. Canada has also invoked the *UPS* and *Glamis* NAFTA decisions to the effect of protecting deliberative and policy-making decisions at high levels of government [*United Parcel Services of America Inc. (UPS) v. Canada* (UNCITRAL), Decision of the Tribunal relating to Canada's Claim of Cabinet Privilege, October 8, 2004, para. 11; *Glamis Gold Ltd. v. US* (UNCITRAL), Decision on Parties' Request for Production of Documents Withheld on Grounds of Privilege, April 21, 2006, para. 36].
16. The Tribunal notes in this respect that the parties have also discussed in their submissions whether paragraph 6 (f) of the Document Production Order covers cabinet privileges or similar protections established under the federal or provincial legislation relevant to this matter. Paragraph 6 (f) allows for refusals on "grounds of special political or institutional sensitivity (including evidence

that has been classified as secret by a government or a public international institution) that the Tribunal determines to be compelling”.

17. While the Investor believes that domestic legislation, federal or provincial, cannot apply to proceedings conducted under international law, Canada has explained that it is not asserting that its domestic laws apply directly in these proceedings but only assist in demonstrating that the document in question falls within the category covered by executive or deliberative privilege at international law.
18. The Tribunal believes that paragraph 6 (f) of the Document Production Order, like the equivalent provision of paragraph 9 (2) (f) of the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, includes within the concept of “special political or institutional sensitivity” the kind of privileged information to which the Canadian legislation refers. Even if such information is not formally classified as “secret”, the purpose of the privilege is quite evidently to prevent disclosure of documents containing information which is sensitive by its nature. There is thus no conflict in this case between international law and a domestic law that might be inconsistent with its provisions.
19. The Tribunal is also persuaded, however, that the privilege, as held in *Pope & Talbot* and the *Canada-Aircraft* decisions invoked by the Investor, can only be asserted in respect of sufficiently identified documents together with a clear explanation about the reasons for claiming such privilege. The parties would need such information in order to assess whether they agree or disagree about a refusal on these grounds, just as the Tribunal needs it to decide in case of disagreement between the parties.

20. Canada has asserted in its letter of July 10, 2008, that claims on privileges have already been made in its submissions on refusals and there is thus no need to further elaborate on this question. But even if that were the case such claims are not specific in respect of identification and justification. Canada has also explained that at this stage it is only advising the Investor that the case may arise in its search for documents.
21. In the absence of this specific information the Investor is unable to agree or disagree with such refusal just as the Tribunal is unable to decide on a privilege which at present has no connection to specific documents or even less so justified or explained. The principle of equality in the treatment of the parties laid down by Article 15 of the UNCITRAL Arbitration Rules governing these proceedings also requires that such privileges be clearly explained so as to allow the Investor the opportunity to provide informed comments on the matter.
22. The Tribunal accordingly directs Canada that if it believes that a document will need to be protected under paragraph 6 (f) of the Document Production Order, it shall need to identify such document specifically, its date and description of its general contents. At the same time, Canada is required to provide the appropriate explanations about why it considers that the privilege must be asserted.
23. This process cannot be open-ended as it could potentially disrupt the procedural timetable of the proceedings. The Tribunal notes the Investor's expression of concern in this respect in its letter of July 8, 2008, and accepts that specific dates must be established to this effect.
24. The Tribunal accordingly directs Canada to submit any claim for privilege as a ground for refusing the production of a document ordered by the Tribunal further below within a period of fifteen days following the date of this Order.

The Investor shall have fifteen additional days to either accept or object to such a claim. In case of an objection, the matter shall be submitted to the Tribunal upon termination of the latter period in a Redfern Schedule format which shall include the pertinent reference to the document at issue and the reasons for Canada to refuse its production and the Investor's objections thereto.

Issues concerning measures adopted by the British Columbia Government

25. The parties have also disagreed about whether it is justified for Canada to refuse the production of documents because of immateriality or relevance on the ground that some of these documents concern measures adopted by the Government of British Columbia. While Canada believes that no claim in this arbitration concerns provincial measures but only federal measures and hence it is immaterial or irrelevant to produce documents relating to provincial measures, the Investor is of the view that since the outset it has made claims in respect of both kinds of measures.
26. The Investor has identified a number of documents in this category and has petitioned the Tribunal to rule on the production of six of these documents "at this time", in advance of its decision concerning other refusals and objections.
27. The Tribunal notes that the parties do not disagree that lack of sufficient relevance of a document or the fact that a document is immaterial to the resolution of the dispute, are grounds for refusal included in paragraph 6 (f) of the Document Production Order. They only disagree about whether the fact that the documents requested relate to provincial measures is a ground for such immateriality or relevance in the context of this arbitration.
28. Whether in addition to federal measures provincial measures are also properly complained of in this arbitration is not a jurisdictional question, as the Investor

believes Canada is raising at this time. It is a matter to be examined at the merits. In fact the parties have not raised any jurisdictional issues in this connection in the memorials they have submitted thus far.

29. Without prejudice to that examination, if the Investor considers that provincial measures are also the subject of its claim and believes that certain documents are relevant to this effect there is no reason to object to the production of such documents because of their connection with the British Columbia Government. The issue of immateriality or relevance might be pertinent in respect of these documents on other grounds but not because of the source in which they originate.
30. The Tribunal finds no reason why these documents should be produced in advance of the deadline for document production established in the Document Production Order. This deadline is 45 days after the Tribunal's ruling on refusals to produce.

Issues concerning confidential commercial information

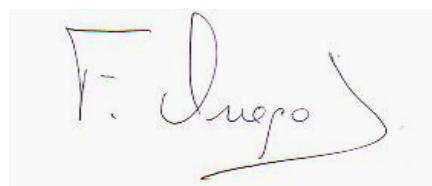
31. The parties have refused the production of a number of documents on the ground of them containing confidential commercial information. To the extent that some such refusals are based on the nature of the transaction or information contained in the pertinent document, particularly if it relates to intra-company information or business transactions involving third parties, a refusal might be well justified on these grounds. There are, however, other documents that appear to relate to more general information where the justification will be less evident.
32. In this last situation, even if the document contains confidential information it can be protected on the public record by the filing of appropriately redacted documents to the extent feasible. The Tribunal accordingly will order the

production of such documents but requests the parties to introduce the appropriate redaction in case this is judged, in good faith, to be essential for the protection sought.

Decision

33. In application of the criteria set out above, the Tribunal hereby orders the production of documents, or, as applicable, upholds a refusal to produce, following the same identification numbers as used by the Investor and the Respondent in the respective Redfern schedules, as indicated in Annex A attached hereto.

July 18, 2008

A handwritten signature in black ink, appearing to read "F. Orrego", with a long, sweeping flourish extending to the right.

Francisco Orrego Vicuña

President, on behalf of the Tribunal

Annex A

DOCUMENTS REQUESTED BY THE INVESTOR

1. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute.
2. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute.
3. Production ordered. [Cabinet privilege not specific or justified and may be resubmitted].
4. Production ordered. [Cabinet privilege not specific or justified and may be resubmitted].
5. Refusal to produce upheld on the ground of unreasonable burden and for lack of sufficient relevance or for being immaterial to the resolution of the dispute.
6. Production ordered. [Cabinet privilege not specific or justified and may be resubmitted].
7. Production ordered. [Cabinet privilege not specific or justified and may be resubmitted].
8. Refusal to produce upheld on the ground of lack of sufficient relevance or because of being immaterial to the resolution of the dispute.
9. Production ordered. [Cabinet privilege not specific or justified and may be resubmitted].
11. Production ordered. [Cabinet privilege not specific or justified and may be resubmitted].

13. Refusal to produce upheld on the ground of lack of sufficient relevance or because of being immaterial to the resolution of the dispute.

20. Production ordered with the requirement that it be redefined to facilitate more precise identification [Cabinet privilege not specific or justified and may be resubmitted].

21. Production ordered. [Cabinet privilege not specific or justified and may be resubmitted].

23. Production ordered. [Cabinet privilege not specific or justified and may be resubmitted].

24. Production ordered. [Cabinet privilege not specific or justified and may be resubmitted].

25. Production ordered. [Cabinet privilege not specific or justified and may be resubmitted].

26. Production ordered. [Cabinet privilege not specific or justified and may be resubmitted].

28. Production ordered. [Cabinet privilege not specific or justified and may be resubmitted].

32. Production ordered. [Cabinet privilege not specific or justified and may be resubmitted].

34. Refusal to produce upheld on the ground of unreasonable burden.

38. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute.

39. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute.

40. Production ordered. [Cabinet privilege not specific or justified and may be resubmitted].

44. Production ordered. [Cabinet privilege not specific or justified and may be resubmitted].

45. Production ordered. [Cabinet privilege not specific or justified and may be resubmitted].

47. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute.

53. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute.

54. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute.

55. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute and on the ground of unreasonable burden.

57. Production ordered as per discussion of British Columbia measures above.

58. Production ordered as per discussion of British Columbia measures above.

59. Production ordered as per discussion of British Columbia measures above.

60. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute and on the ground of unreasonable burden.

61. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute and on the ground of unreasonable burden.

62. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute and on the ground of unreasonable burden.

63. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute and on the ground of unreasonable burden.

64. Production ordered. [Cabinet privilege not specific or justified and may be resubmitted].

65. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute.

66. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute and on the ground of unreasonable burden.

68. Production ordered with the requirement that it be redefined to facilitate more precise identification.

69. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute.

70. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute.

73. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute.

74. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute.

75. Production ordered.

76. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute.

77. Production ordered as per discussion of British Columbia measures above.

78. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute.

87. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute.

88. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute.

89. Production ordered with the requirement that it be redefined to facilitate more precise identification. [Cabinet privilege not specific or justified and may be resubmitted].

90. Production ordered with the requirement that it be redefined to facilitate more precise identification. [Cabinet privilege not specific or justified and may be resubmitted]. [Commercial information eventually redacted].

91. Refusal to produce upheld on the ground of unreasonable burden.

92. Production ordered with the requirement that it be redefined to facilitate more precise identification. [Commercial information eventually redacted].

93. Refusal to produce upheld on the ground of unreasonable burden.

DOCUMENTS REQUESTED BY CANADA

4 (a-d). Production ordered. [Commercial information eventually redacted].

7 (a-c). Refusal to produce upheld on the ground of compelling confidential commercial information.

8. Refusal to produce upheld on the ground of compelling confidential commercial information.

22. Production ordered. [Commercial information eventually redacted].

23 (a). Production ordered. [Commercial information eventually redacted].

23 (b). Refusal to produce upheld on the ground of compelling confidential commercial information.

23 (c). Production ordered. [Commercial information eventually redacted].

32. Production ordered to the extent not already produced.

33. Production ordered to the extent not already produced.

40. [Refusal to produce withdrawn].

51. Production ordered to the extent not already produced.

52. Production ordered with the requirement that it be redefined to facilitate more precise identification.

56 (1, 2, 3 and 5). Production ordered.

56 (4). Refusal to produce upheld on the ground of compelling confidential commercial information.

60 (a-b). Refusal to produce upheld on the ground of unreasonable burden.

67 (1-2). Production ordered with the requirement that it be redefined to facilitate more precise identification.

70. Refusal to produce upheld on the ground of unreasonable burden.

71. Refusal to produce upheld on the ground of lack of sufficient relevance or for being immaterial to the resolution of the dispute and on the ground of unreasonable burden.