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. 2 [Amended]

10 February 2009

ARBITRAL TRIBUNAL

Professor Juan Fernández-Armesto (President)
Professor Jean-Gabriel Castel
J. Christopher Thomas, Q.C.

CONSIDERING

1. The documentary requests filed by each party on 15 October 2008, numbered GAL 13 and CAN 11, and the objections to the counterparty's documentary requests of 12 January 2009, numbered GAL 15 and CAN 12.

2. That further to these communications, the parties submitted GAL 17 and CAN 16 as short rebuttals, and Canada presented CAN 17 dealing with the additional production of document pertaining to requests nos. 73, 77, 78, 60(n) and 80.

3. That, according to Procedural Order no. 1, the Arbitral Tribunal may, in its discretion, order one disputing party to communicate to the other documents or limited categories of documents. In the exercise of its discretion, the Arbitral Tribunal will have regard to the specificity of the request, the relevance of the requested documents, the fact that they are in the possession, power or control of the disputing party, any applicable privileges, and all surrounding circumstances.

The Arbitral Tribunal issues this

PROCEDURAL ORDER NO. 2

This Procedural Order rules on the documentary requests (I) clarifying preliminary issues raised by the parties and (II) deciding on each of the disputed documentary requests.

I. Preliminary Issues

1. Each party has claimed that (a) the documents so far produced by the other party are, to a large extent, unorganised; (b) privilege has been asserted over an unspecified number of documents; (c) some of the requested documents are not in its possession, but rather in the possession of third parties; and (d) there is a possibility of late production.

The Arbitral Tribunal will provide guidance on each of these claims and allegations.

(a) Unorganised document production

2. Basically, Claimant argues that Canada presented its documents in a disorganised manner, without separate tabs or table of contents whilst Canada alleges that it is Claimant who has produced numerous documents which are neither described nor organised in any particular manner.

3. The Tribunal considers that, to be useful to the parties, documents have to be appropriately organised. Depending on the circumstances, different systems of organisation may be appropriate. The Arbitral Tribunal requests both parties to cooperate in good faith and to jointly solve their respective difficulties and to jointly

report on the outcome. The Tribunal hopes that both parties will be able to resolve the issue without further guidance from the Tribunal.

(b) Privilege

4. The parties have claimed that an unspecified number of documents are client/attorney privileged and/or are of special political and institutional sensitivity. Regarding privileged documents, Claimant has offered to exchange comprehensive privilege logs and Canada is willing to produce an amended Redfern Schedule that identifies the privilege claimed where such information was omitted, provided that Claimant also identifies each privilege claimed and corrects the other deficiencies in its response to Canada's Redfern Schedule.

5. The Arbitral Tribunal takes note of the parties' positions and requests both parties to prepare a log for all documents in respect of which they claim client/attorney privilege and/or special political and institutional sensitivity. The Arbitral Tribunal asks both parties to confer before 23 February 2009 and to reach an agreement regarding the structure and preparation of such log.

6. Such log shall be prepared by each party and delivered to the other party no later than 4.00 pm 3 March 2009, and each party shall then have until no later than 4.00 pm 6 March 2009 to set out its observations in writing as to the other's claims which it contests. The party claiming privilege shall then be free to make a short observation in reply, to be filed no later than 4.00 pm 10 March 2009. At that point, the Tribunal shall decide on any claims of privilege which remain contested.

(c) Third parties

7. Each party has objected to the production of certain documents arguing that such documents are not in its possession, but in that of third parties and, thus, the party claims to be unable to compel such third parties to produce the requested documents. In particular, this objection has been raised by Canada as regards municipalities and certain individuals and by Claimant as regards 919841 Ontario Inc. and the Limited Partnership for the purposes of this arbitration.

8. The Arbitral Tribunal considers that, in this respect, in addition to entities which may be controlled by a party, there may be entities or persons with whom a party has a relationship which is relevant for the purposes of this arbitral processing. The duty of production extends to the entities controlled by each party. Furthermore, good faith also imposes a duty of best efforts to obtain documents that are in the possession of entities or persons with whom or with which the party the subject of the request has a relevant relationship.

9. The Tribunal will not decide at this point within which category each of the disputed third parties falls. The Tribunal simply takes note of Canada's offer to use its best efforts and write to certain municipalities to request that they voluntarily produce certain documents in this arbitration. The Arbitral Tribunal expects Claimant to carry out the same offer in relation to the documents in the possession

of 919841 Ontario Inc., the alleged successor of the limited partners, and the Limited Partnership.

10. If the above instructions fail to resolve any current disagreements, either party may apply to the Arbitral Tribunal for further direction.

(d) Late production

11. Canada has referred to the possibility of needing an extension of time to provide certain documents in the possession of third parties, which might, in any case, be privileged.

12. The Arbitral Tribunal understands that given the complexity of some of the requests, some flexibility may be necessary. Both parties are requested to cooperate in good faith in order to adapt the schedule of the arbitration and to jointly report on the outcome. The Tribunal hopes that both parties will be able to solve the issue without further guidance from the Tribunal.

II. Requested documents

13. The Arbitral Tribunal will (a) first analyse the 21 document categories requested by Claimant to which Canada has objected; and (b) then analyse the 18 document categories requested by Canada to which Claimant has objected.

(a) Claimant's requests[1]

- *No. 20: Rail Cycle North's response to the request for proposal in 1999/2000*

  Further to I.(c) above, Canada is required to contact the City of Toronto in order to obtain the requested documents.

- *No. 22: Pricing Agreement relating to disposition at Arbor Hills, including addendums and modifications*

  The Arbitral Tribunal is of the opinion that only the final pricing agreements and subsequent addenda and modifications are relevant.

  Canada is required to contact the City of Toronto in order to obtain the requested relevant documents. See I.(c) above.

- *No. 27: Documents constituting waste management plan*

  The Arbitral Tribunal is of the opinion that the requested documents are only relevant if related to municipalities referred to by Claimant as the "GTA municipalities".

[1] The requests have been summarised; each decision covers the full original request

- *No. 30: Specific documents relating to the purchase of the Green Lane Landfill site in 2007*

  (i) The Arbitral Tribunal understands that only the final agreement of purchase and sale is relevant. Canada is ordered to produce this final agreement, if it is in its possession or to contact the appropriate alleged third parties in order to obtain it, as provided for in I.(c) above.

  (ii) The Arbitral Tribunal takes note that, according to Canada, all responsive documents concerning the valuation of the site by the City of Toronto have been produced.

  (iii) (1) The Arbitral Tribunal takes note that, according to Canada, no negotiations took place with the Ministry of Environment leading to the expansion of the airspace; (2) The Arbitral Tribunal takes note that, according to Canada, any Ministry of Environment analysis or evaluation of the expansion of Green Lane in its possession has been produced.

- *No. 32: Contingency plans in response to border closures, created as a result of the 26 May 2003 order*

  Canada is required to contact the City of Toronto and the Regions of York, Peel and Durham in order to obtain the requested documents. See I.(c) above.

- *No. 39: Documents relating to the methods of leachate containment used in four landfills that use a hydraulic containment system*

  The Arbitral Tribunal takes note that, according to Canada, no more documents exist, apart from those already produced.

- *No. 40: Documents concerning the use of hydraulic containment method for landfills located in low permeability bedrock*

  The Arbitral Tribunal takes note that, according to Canada, there are no such documents in its possession.

- *No. 46: Documents from 1 January 1996 to September 2002 relating to the acquisition of the Borderlands by the Enterprise or its predecessor in title*

  The Arbitral Tribunal is of the opinion that this request lacks relevance for the adjudication of the case.

- *No. 52: Documents in which advice was provided to the District Office of the Ministry of Natural Resources regarding the legal obligation to consult with aboriginal people*

  The Arbitral Tribunal takes note that Canada invokes solicitor-client privilege. In accordance with I.(b) above, Canada shall itemise these documents in its privilege log.

- *Nos. 54 and 55: Documents relating to the preparation of a plan to consult local aboriginal communities and documents referring to the estimation of the duration of such consultations*

  The Arbitral Tribunal takes note that, according to Canada, it has produced all non-privileged documents. In accordance with I.(b) above, Canada shall itemise these documents in its privilege log .

- *No. 60: Documents concerning the Project and/or the Permit to Take Water*

  c), g), l), m) and o): The Arbitral Tribunal does not think that documents from Mr. Rabbior, Mr. Dhalla, the Ministry, Mr. Campbell or Mr. Reitzel are relevant.
  d), e), f), i) and k): The Arbitral Tribunal takes note that, according to Canada, all non-privileged documents have been produced. In accordance with I.(b) above, Canada shall itemise these documents in its privilege log.

- *No. 65: Documents referring to certain individuals in the possession of the Ministry of Environment, Ministry of Natural Resources, Cabinet Office and Office of the Premier*

  The Arbitral Tribunal takes note that, according to Canada, it has produced all non-privileged documents. In accordance with I.(b) above, Canada shall itemise these documents in its privilege log.

- *No. 66: Documents concerning the Ministry of Environment's decision to assemble a technical review committee and related documents and any document from a third party regarding the Water Permit from 7 July 2003 to 17 July 2004*

  The Arbitral Tribunal takes note that, according to Canada, it has produced all non-privileged documents. In accordance with I.(b) above, Canada shall itemise these documents in its privilege log.

- *No. 68: Documents received or sent to Notre/Enterprise/Gartner Lee/Golder Associates concerning the Project from October 2003 to 5 April 2004*

  The Arbitral Tribunal considers that the production of these documents would be extremely burdensome for Canada and that the documents, in any case, lack relevance.

- *No. 72: Documents referring to the Howard report, technical review committee or the status of the Permit made available to any involved in the drafting of the Act*

  The Arbitral Tribunal takes note that, according to Canada, it has produced all non-privileged documents. In accordance with I.(b) above, Canada shall itemise these documents in its privilege log.

- *Nos. 82 and 84: Documents prepared or received by Dalton McGuinty or Michael Bryant or any staff member of the Office of the Premier and the Cabinet Office that refer to the Project or to the AMLA, between 1 January 1999 and 30 June 2004*

  The Arbitral Tribunal takes note that, according to Canada, it has produced all non-privileged documents. In accordance with I.(b) above, Canada shall itemise these documents in its privilege log.

- *No. 87: Documents concerning operation of Inter Recycling Systems Inc. Landfill*

  The Arbitral Tribunal is of the opinion that these documents are relevant for the adjudication of the case. Since Canada has claimed to have produced all non-privileged responsive documents, in accordance with I.(b) above, Canada shall itemise these documents in its privilege log.

- *No. 88: Documents concerning the Act provided to Mr. Ramsay and Ms. Dombowsky or any government MPP prior to the 5 April 2004*

  The Arbitral Tribunal finds that this request puts a heavy burden on Canada, who would have to contact all government MPP, as well as on all third parties that would be involved. The request is denied.

- *No. 95: Documents concerning the Canadian Environmental Assessment Agency initiating consultations to determine whether the Minister had legal authority to refer the Adams Mine to a federal environmental assessment*

  The Arbitral Tribunal takes note that Canada claims to have produced all non-privileged documents and/or invokes solicitor-client privilege. In accordance with I.(b) above, Canada shall itemise these documents in its privilege log

(b) Canada's requests[2]

- *No. 18: Documents signed by the Claimant concerning the Enterprise, the Limited Partnership or 919841 Ontario Inc.*

  The Arbitral Tribunal orders that Claimant produce these documents, but the category of documents to which this order applies is narrowed down to all agreements or contracts signed.

[2] The requests have been summarised; each decision covers the full original request.

- *No. 19: Documents indicating the dates and amounts of capital Claimant invested in the Enterprise, the Limited Partnership or 919841 Ontario Inc. by way of loans or contributions of capital*

  The Arbitral Tribunal orders Claimant to produce all documents, if any, showing the dates and amounts of capital Mr Gallo invested in the Enterprise, the Limited Partnership or 919841 Ontario Inc. by way of loans or contributions of capital.

- *No. 20: Documents concerning expenses Claimant paid on behalf of the Enterprise, the Limited Partnership or 919841 Ontario Inc from 26 June 2002 to 17 June 2004*

  The Arbitral Tribunal orders Claimant to produce all documents, if any, showing whether Mr. Gallo paid any expenses on behalf of the Enterprise, the Limited Partnership or 919841 Ontario Inc. in the aforementioned time period.

- *No: 21: Documents indicating that Claimant made a non-financial contribution to the Enterprise, the Limited Partnership or 919841 Ontario Inc.*

  The Arbitral Tribunal orders Claimant to produce all documents, if any, showing whether Mr. Gallo made a non-financial contribution to the Enterprise, the Limited Partnership or 919841 Ontario Inc.

- *No. 22: Documents concerning payments to be received and retained by Claimant from the Enterprise, the Limited Partnership or 919841 Ontario Inc.*

  The Arbitral Tribunal orders Claimant to produce all documents, if any, concerning payments to be received and retained by Mr. Gallo from the Enterprise, the Limited Partnership or 919841 Ontario Inc.

- *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*

  The Arbitral Tribunal is of the opinion that Canada has not shown the involvement of Nick and Roseanne Cortelluci, Tony Nalli and Simmy Shnier in relation to matters raised in this arbitration. None of the foregoing persons has been mentioned in the Statement of Defence. The request with regard to these persons is accordingly rejected.

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

  The Arbitral Tribunal accepts the request as regards the rest of the listed persons, including any corporation or other entity with which each individual is associated.

As regards the scope of the production, the Arbitral Tribunal narrows down the documents to be produced to those which affect ore relate to Mr. Gallo's claimed ownership and control of the Enterprise.

The Arbitral Tribunal considers that for the purposes of this request, Claimant includes both Mr. Gallo and the Enterprise.

- *No. 30: Claimant's tax returns from 2002-2005, indicating his income received or expenses deducted in relation to the Enterprise, the Limited Partnership or 919841 Ontario Inc.*

  The Arbitral Tribunal accepts Claimant's offer to provide a redacted version of Mr. Gallo's tax returns.

- *No. 39: Documents that concern the legal, business, contractual, social, etc. relationship between any of the Limited Partners and the Enterprise, the Limited Partnership or 919841 Ontario Inc or the Claimant and documents signed by Claimant concerning the Enterprise, the Limited Partnership or 919841 Ontario Inc.*

  The Arbitral Tribunal orders that Claimant produce these documents, but narrowing the category to agreements or contracts signed. As regards documents not directly in possession of Claimant, the Arbitral Tribunal refers to I (c) above.

- *No. 50: Tax filings for the Enterprise, the Limited Partnership or 919841 Ontario Inc. from 26 June 2002 – 5 February 2008*

  The Arbitral Tribunal orders Claimant to produce these documents. As regards documents not directly in possession of Claimant, the Arbitral Tribunal refers to I (c) above

- *Nos. 112, 113 and 114 regarding the register and records of the limited partners and concerning the distribution and transfers of units within the Limited Partnership*

  The Arbitral Tribunal takes note that Claimant has produced Document 355 which, according to Claimant, is responsive to these requests.

- *No: 115: Options, buy-sell agreements, rights of first refusal concerning the Limited Partnership units*

  The Arbitral Tribunal is of the opinion that the requested documents are relevant. All documents in Claimant's possession should be produced. As regards documents not directly in possession of Claimant, the Arbitral Tribunal refers to I (c) above.

- *No. 116: Financial Statements for 919841 Ontario Inc. from 10 September 2002 to 5 February 2008*

  The Arbitral Tribunal does not see the relevance of these documents for the adjudication of the case.

- *No. 117: Documents concerning when the registered and beneficial shareholders of 919841 Inc. acquired their shares, transferred them and the amount invested in or loaned*

  The Arbitral Tribunal finds that the only relevant documents are those concerning the name of the ultimate shareholders of 919841 Ontario Inc. from 26 June 2002 – 5 February 2008. These should be produced. As regards documents not directly in possession of Claimant, the Arbitral Tribunal refers to I (c) above

- *No. 118: Documents concerning stock options, buy-sell agreements, etc. shares of 919841 Ontario Inc.*

  The Arbitral Tribunal finds that the only relevant documents are those dated from 26 June 2002 – 5 February 2008. These should be produced. As regards documents not directly in possession of Claimant, the Arbitral Tribunal refers to I (c) above

- *No: 119: Documents concerning shareholders, directors, shareholder agreements, unanimous shareholder agreements, unanimous shareholder declarations, voting trusts or other arrangements of 919841 Ontario Inc. from 26 June 2002 to 5 February 2008*

  The Respondent has not shown the relevance of these documents and the request is accordingly denied.

- *No. 142: Any internal valuation of the Adams Mine*

  The Arbitral Tribunal orders Claimant to present all internal valuations, if any, of the Adams Mine, made at any time prior to this arbitration, for the purposes of a purported sale of or investment in the Adams Mine.

14. As provided for in Procedural Order no. 1, the parties are to present the documents, the production of which has been ordered in this Procedural Order no. 2, no later than 27 February 2009.

[signed]

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Juan Fernández-Armesto

[signed]

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Jean-Gabriel Castel

[signed]

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John Christopher Thomas