

**UNDER THE UNCITRAL ARBITRATION RULES AND  
THE NORTH AMERICAN FREE TRADE AGREEMENT**

BETWEEN:

**MERRILL & RING FORESTRY L.P.**

Claimant / Investor

**-AND-**

**GOVERNMENT OF CANADA**

Respondent / Party

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**INVESTOR'S MOTION TO ADD A NEW PARTY**

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## OVERVIEW

1. Pursuant to Article 20 of the UNCITRAL Arbitration Rules, the Claimant seeks to amend its Statement of Claim to add Georgia Basin Holdings L.P. (“Georgia Basin”) as an additional Investor claiming in this arbitration.
2. Georgia Basin is a Limited Partnership validly constituted under the laws of the State of Washington that owns certain timberlands located near Squamish and Menzies Bay in the Province of British Columbia granted before March 12, 1906.
3. Georgia Basin seeks to be named as a party to this claim with respect to damage suffered to it as a result of the measures raised in this NAFTA claim. During the relevant period of this claim, <sup>C-1(b)(ii) and C-1(b)(iv)</sup> ~~C-1(b)(ii) and C-1(b)(iv)~~ <sup>C-1(b)(ii) and C-1(b)(iv)</sup> ~~C-1(b)(ii) and C-1(b)(iv)~~ <sup>C-1(b)(ii) and C-1(b)(iv)</sup> ~~C-1(b)(ii) and C-1(b)(iv)~~ in future.
4. Georgia Basin has no impediment to asserting a separate NAFTA claim arising entirely on the same measures and facts relied on by Merrill & Ring in this claim. The addition of Georgia Basin as a party to this claim would not result in any prejudice to Canada, nor would this addition otherwise affect the existing jurisdictional objections already asserted by Canada in this claim in any material way.
5. The most efficient and practical result would be for the Tribunal to exercise its discretion to permit the amendment of this claim. Permitting this amendment would prevent the needless constitution of a new NAFTA arbitration Tribunal and the filing of a motion for consolidation under NAFTA Article 1126 (that would result in the appointment of a new NAFTA Tribunal to hear the claims if consolidation were to be ordered).

## GROUND FOR AMENDMENT

6. The Investor, Merrill & Ring, relies on Article 20 of the UNCITRAL Arbitration Rules which provides:

### *Amendments to the claim or defence*

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

## THE AMENDMENT SATISFIES THE UNCITRAL RULES' CRITERIA

7. UNCITRAL Article 20 gives the Tribunal the discretion to accept an amendment to the Statement of Claim at any time "during the course of the arbitral proceedings" so long as the amended claim falls within the scope of the arbitration agreement. Merrill & Ring has filed a Draft Amended Statement of Claim with this motion as Exhibit A, noting the addition of Georgia Basin as a party (All changes have been underlined to assist the Tribunal).
8. In exercising its discretion, UNCITRAL Article 20 provides that the Tribunal is to have regard to:
  - a. the delay in the application;
  - b. prejudice to Canada; and
  - c. any other circumstances.
9. The Tribunal should permit the addition of Georgia Basin as a party as:
  - a. the proposed amendment falls entirely within the scope of Section B of NAFTA Chapter 11 (subject to Canada's overall jurisdictional objections);
  - b. there is no delay in the application - the Claimant submits this motion shortly after discovering the reasons requiring the amendment; and
  - c. Canada is not prejudiced by the amendment.

**A. The Amendment Falls Within the Scope of Section B of NAFTA Chapter 11**
10. Georgia Basin satisfies the requirements in NAFTA Chapter 11 to bring a claim:
  - a. Georgia Basin is an "investor of a Party". NAFTA Article 1139 says that "investor of a Party means an enterprise, that seeks to make, is making or has made an investment." Georgia Basin is an "enterprise of a Party". Georgia Basin attaches to this motion as Exhibit F documents demonstrating its existence as a Washington State Limited Partnership.

NAFTA Article 1139 says that investment includes "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes." Georgia Basin's land in British Columbia and timber on that land, both constitute investments in Canada.
  - b. Georgia Basin brings a claim that Canada has breached an obligation under Section A of Chapter 11, as required by NAFTA Article 1116(1). Georgia Basin claims that Canada has breached the same Section A obligations that Merrill & Ring Forestry LP claims Canada has breached.
  - c. Georgia Basin brings its claim within three years of first acquiring knowledge of the breach and knowledge of loss or damage, as required by NAFTA Article

1116(2). Georgia Basin claims that Canada has breached its NAFTA Chapter 11 Section A obligations through its treatment of timber owned by Georgia Basin that was harvested within the last year. Georgia Basin's claim raises no issues under Article 1116(2) beyond those the Tribunal decided to join to the merits at the November 15, 2007 procedural hearing.

- d. Six months have elapsed since the events giving rise to the claim, as required by NAFTA Article 1120.
- e. Georgia Basin consents to this arbitration, as required by NAFTA Article 1121(1)(a). Georgia Basin attaches to this motion as Exhibit B a consent and waiver of its right to pursue domestic remedies, as required by NAFTA Article 1121(1)(b).

**B. There is No Delay in the Application**

- 11. The Investor's counsel discovered that Georgia Basin owned a small portion of the overall timber harvest that is the subject of this claim. The Investor submits this motion shortly after discovering this information so as to minimize any potential for delay in the making of this application.
- 12. If accepted, this amendment would occur before any memorials, expert reports, document production and interrogatories have been exchanged by the disputing parties. The discovery occurred during the Investor's Memorial preparation time and does not detrimentally affect the timelines set by this Tribunal. Indeed, granting such a timely amendment minimizes any possible prejudice to the disputing parties.

**C. Canada is Not Prejudiced by the Amendment**

- 13. Canada cannot be prejudiced by the amendment of this claim as it raises no new issues in dispute. Georgia Basin challenges the same policies challenged by Merrill & Ring, and their application to the export of its own timber.
- 14. This amendment helps in the efficient resolution of this dispute. If Georgia Basin is not added as a co-investor then it will be forced to initiate a separate NAFTA claim in its own right. Given that Georgia Basin's claim challenges identical measures to those challenged by Merrill & Ring, the two NAFTA Tribunals that would be created would likely be consolidated pursuant to the provisions in NAFTA Article 1126(2) which provides:

Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

- a) assume jurisdiction over, and hear and determine together, all or part of the claims; or

- b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

Consolidation could result in replacing the current NAFTA Tribunal with a new Consolidation Tribunal. Consolidating the claims will involve in this claim considerable delay due to the need to constitute a new Tribunal and then re-argue the same procedural and jurisdictional issues that were argued before the current Tribunal. The interests of judicial economy, efficiency and coherence would be best served for a single Tribunal to hear the claims for both Investors.<sup>1</sup>

15. The *Ethyl v. Canada* NAFTA Tribunal accepted that Canada was not prejudiced for the purposes of an UNCITRAL Article 20 amendment that occurred within the Statement of Claim.<sup>2</sup> Indeed, the *Ethyl* Tribunal accepted that, for the sake of efficiency, the Investor could correct technical mistakes in the claim and did not need to file a new claim. The Tribunal, therefore, accepted the claim even though:
- the investor had not technically complied with the requirements of NAFTA Article 1101,<sup>3</sup>
  - the investor failed to wait six months after the “events giving rise to the claim,” as required by Article 1120;<sup>4</sup> and
  - the investor failed to submit its waiver as required by Article 1121.<sup>5</sup>

In accepting the claim, the *Ethyl* Tribunal said:

It is not doubted that today the Claimant could resubmit the very claim advanced here ... Clearly a dismissal of the claim at this juncture would disserve, rather than serve, the object and purpose of NAFTA.<sup>6</sup>

16. The *Mondev v. US* NAFTA Tribunal endorsed the *Ethyl* Tribunal’s decision, stating:

... non-compliance with a condition precedent would seem to invalidate the submission, whereas a minor or technical failure to comply with some other condition set out in Chapter 11 might not have that effect, provided at any rate that the failure was promptly remedied. *Chapter 11 should not be construed in an excessively technical way, so as to require the commencement of multiple proceedings in order to reach a dispute which is in substance within its scope.*<sup>7</sup>

<sup>1</sup> *Grand River Enterprises Six Nations Ltd. v. United States*, Jurisdiction, 2006 WL 4491476 (July 20, 2006), Exhibit G at para. 100.

<sup>2</sup> *Ethyl Corp. v. The Government of Canada*, Award on Jurisdiction, 1998 WL 34334636 (June 24, 1998), Exhibit C at para. 95: “An amendment of Ethyl’s claim, if one there has been, made as early as in the Statement of Claim can hardly be regarded as involving any ‘delay’. No prejudice or any other circumstances are cited by Canada which would tend to rebut Article 20’s presumption of amendability and the Tribunal apprehends none.”

<sup>3</sup> *Ethyl Corporation v Canada* Exhibit C at para. 69.

<sup>4</sup> *Ethyl Corporation v Canada* Exhibit C at para. 85.

<sup>5</sup> *Ethyl Corporation v Canada* Exhibit C at para. 91.

<sup>6</sup> *Ethyl Corporation v Canada* Exhibit C at para. 85.

<sup>7</sup> *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 2002 WL 32841359 (October 11, 2002) Exhibit D at para. 44.

The principle of avoiding multiple proceedings through technical rulings should be followed by this Tribunal in this case of Georgia Basin's request.

17. Other investment treaty tribunals have accepted that respondent states are not prejudiced by amending the statement of claim to add a new party. The *SPP v. Egypt* ICSID Tribunal, for example, accepted the parties' agreement to add the initial claimant's parent company even though the ICSID tribunal had already completed pleadings and hearings in its initial jurisdictional phase and was about to issue its decision on jurisdiction.<sup>8</sup>

**RELIEF REQUESTED**

18. The Claimant seeks the Tribunal's order to add Georgia Basin as an investor in this arbitration and to permit the filing of an Amended Statement of Claim as set out in Exhibit A.

All of which is respectfully submitted.

Submitted this 12th day of December, 2007

  
Barry Appleton

for APPLETON & ASSOCIATES INTERNATIONAL LAWYERS

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<sup>8</sup> *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, 1992 WL 12550382 (May 20, 1992) Exhibit E.