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 CONFIDENTIALITY

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PART ONE: OVERVIEW

1. The disputing parties have been unable to agree upon the terms of a Confidentiality Order governing this arbitration. Canada has insisted that any Confidentiality Order governing the arbitration contain a provision permitting Canada to disclose information protected by the Order to applicants under Canada's *Access to Information Act* ("*ATIA")*. Counsel for Merrill & Ring has objected that making an Order subject to the express provisions of Canada's *ATIA* effectively ensures Canada has no obligations of confidentiality while imposing strict obligations of confidentiality on Merrill & Ring. Such inequality of treatment is inconsistent with the NAFTA and could never guarantee the equality of the parties enshrined by Article 15 of the UNCITRAL Arbitration Rules.

PART TWO: THE FACTS

Procedural history

2. The disputing parties have been unable to agree on the terms of a confidentiality agreement to govern this agreement:

   a) on September 29, 2006, Canada wrote to counsel for Merrill & Ring warning that Canada may be required to release documents it receives during the course of the arbitration under its domestic law;[1]

   b) on October 4, 2006, the Investor wrote to Canada seeking a Confidentiality Agreement to govern this arbitration;[2]

   c) on March 8, 2007, the Investor sent Canada a draft confidentiality agreement;[3]

   d) Canada responded with a revised draft of the confidentiality agreement on March 22, 2007, adding a provision specifying that any documents produced during this arbitration be subject to disclosure under Canada's *ATIA*;[4]

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[1] Letter of September 29, 2006, from Paul Robertson, Department of Foreign Affairs and International Trade, International Trade Canada, to Appleton & Associates, Tab 4.

[2] Letter of October 4, 2006, from Barry Appleton to Paul Robertson, Department of Foreign Affairs and International Trade, Tab 5.

[3] Letter of March 8, 2007, from Barry Appleton to Meg Kinnear, Trade Law Bureau, International Trade Canada, Tab 1.

[4] Letter of March 22, 2007 from Meg Kinnear, Trade Law Bureau, International Trade Canada, to Barry Appleton, Tab 2.

e) Counsel for Merrill & Ring rejected the provision on August 24, 2007;[5] and

f) Canada insisted again on the provision on September 10, 2007.[6]

The *ATIA*

3. The *ATIA* gives anyone in Canada the right to request "any record" under the control of the Canadian government.[7]

4. The recent *Appleton v. Privy Council Office* decision demonstrates that, in response to such a request, Canada can disclose whatever it likes.[8] The *Appleton* case arose from a request under the *ATIA* for "records from January 1, 1994 to present containing any mention of Appleton & Associates or Barry Appleton and ... the North American Free Trade Agreement (NAFTA) Chapter 11." In response to this request, Canada released documents both marked as confidential and protected as confidential by a Confidentiality Order made by the *UPS v. Canada* NAFTA Tribunal. The Investor was forced to make a

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[5] Letter of August 24, 2007, from Barry Appleton to Meg Kinnear, Trade Law Bureau, International Trade Canada, Tab 6.

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

[7] *Access to Information Act*, Tab 26. Section 4 of the ATIA provides:

(1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is:
(a) a Canadian citizen, or
(b) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*,
has a right to and shall, on request, be given access to any record under the control of a government institution.

(2) The Governor in Council may, by order, extend the right to be given access to records under subsection (1) to include persons not referred to in that subsection and may set such conditions as the Governor in Council deems appropriate.

The Governor in Council has invoked section 4(2) by enacting an Order in Council, namely Extension Order, No. 1 to the Access to Information Act, SOR/89-207, which extends the eligibility of those who can access government documents under the ATIA:

> The right to be given access under subsection 4(1) of the Access to Information Act to records under the control of a government institution is hereby extended to include all individuals who are present in Canada but who are not Canadian citizens or permanent residents within the meaning of the Immigration Act and all corporations that are present in Canada.

[8] *Appleton & Associates and Barry Appleton v. The Clerk of the Privy Council Office,* June 19, 2007, [2007] FC 640, Tab 17.

federal court application to attempt to prevent release of the documents. Following the court proceeding (which prevented release of some but not all of the documents), not only did Canada release documents sought by the Access to Information Requests, but Canada broadly used its statutory discretion to release documents that were not even requested. In response to the request for "records from January 1, 1994 to present containing any mention of Appleton & Associates or Barry Appleton and ... the North American Free Trade Agreement (NAFTA) Chapter 11," Canada released documents that neither referred to NAFTA nor Chapter 11.

5. Appleton & Associates and Barry Appleton challenged Canada's release of the documents. The Canadian Federal Court upheld Canada's decision to release documents that were confidential and which were not even requested by the applicant. The Court said:

> ... the issue appears to be well-settled - 'a third party cannot object that the government institution is prepared to give more than was asked for.' ... In my view, the applicants cannot argue that the Coordinator made any error in deciding to disclose more than was asked for.[9]

6. The Federal Court upheld Canada's decision to disclose the documents because it held that the UPS Cconfidentiality Order specifically endorsed the application of the *ATIA* to issues of disclosure.[10] The *UPS* confidentiality order said:

> Any request to the Government of Canada for documents under the *Access to Information Act*, including documents produced to Canada in these proceedings, will be governed by the provisions of that Act ...[11]

7. The decision in *Appleton v. Privy Council Office* demonstrates that subjecting Canada's confidentiality obligations to the *ATIA* gives Canada a unilateral discretion to broadly disclose the information that has been designated as confidential and provided under the form of a NAFTA Order.

8. Canada has no such discretion if Canada's confidentiality obligations are not subject to the *ATIA*. The *Pope & Talbot* Tribunal, for example, found Canada had no discretion to unilaterally disclose otherwise confidential information because the Confidentiality Order was not subject to that Act. The Tribunal rejected Canada's attempt to include a provision

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[9] *Appleton & Associates and Barry Appleton v. The Clerk of the Privy Council Office,* June 19, 2007, [2007] FC 640, Tab 17 at para. 11.

[10] *Appleton & Associates and Barry Appleton v. The Clerk of the Privy Council Office,* June 19, 2007, [2007] FC 640, Tab 17 at para. 15.

[11] *UPS v Canada*, Confidentiality Order, April 4, 2003, Tab 19 at para. 11.

in the Confidentiality Order subjecting it to the *ATIA*.[12] Instead, the Tribunal included the following provision:

> If any person in possession of a Protected Document or Third Party Protected Document receives a request pursuant to law to disclose a Protected Document or Third Party Document or information contained therein, that person shall give prompt written notice to the party that claimed confidentiality over the document and to the person to whom the confidential information relates so that such party may seek a protective Order or other appropriate remedy.[13]

9. In rejecting Canada's subsequent reliance on this provision to attempt to disclose information under the *ATIA*, the Tribunal said:

> ... the Order plainly contemplates that disputes over release of documents will be determined by the Tribunal, not that a party may release documents absent approval.[14]

The *Pope & Talbot* Tribunal, therefore, confirmed that Canada cannot rely on its *ATIA* to disclose otherwise confidential information if the Confidentiality Order is not subject to that Act.

Subjecting confidentiality to the *ATIA* undermines the equality of the parties

10. The parties' confidentiality obligations are subject to the overriding requirement of equality expressed in both Article 15 of the UNCITRAL Arbitration Rules and NAFTA Article 1115. Since the claimant must respect its confidentiality obligations, enabling Canada to rely on the *ATIA* to escape its confidentiality obligations destroys the parties' equality in breach of Article 15 of the UNCITRAL Arbitration Rules and NAFTA Article 1115. The *Pope & Talbot* Tribunal noted Article 15 and the principle of equality in rejecting Canada's request to rely on the *ATIA* to disclose confidential information.[15]

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[12] *Pope & Talbot v Canada*, Decision regarding the *ATIA*, March 11, 2002, Tab 20 at para. 12: "In the court of negotiating the terms of Order No. 5, Canada did propose an express provision that would have made it 'without prejudice to the rights, duties and obligations of Canada under its laws ... including the Access to Information Act'. The Tribunal rejected that proposal."

[13] *Pope & Talbot v Canada*, Amended Procedural Order on Confidentiality, September 17, 2002, Tab 21 at para. 5.

[14] *Pope & Talbot v Canada*, Decision Regarding the *ATIA*, March 11, 2002, Tab 20 at para. 13.

[15] *Pope & Talbot v Canada*, Decision Regarding the *ATIA*, March 11, 2002, Tab 20 at para. 6.

Subjecting confidentiality to the *ATIA* is inconsistent with the NAFTA

11. Subjecting Canada's confidentiality obligations to the *ATIA* not only undermines the equality of the parties, it is also inconsistent with international law. 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.

12. The parties' confidentiality obligations are "in dispute" in this arbitration and, therefore, are governed by international law. Canada has been unable to identify any principle of international law that allows it to subject its confidentiality obligations to the *ATIA*. Indeed, the *IBA Rules on the Taking of Evidence in International Commercial Arbitration* ("*IBA Rules*") provide that parties' obligation of confidentiality is absolute and is not subject to domestic law requirements. Article 3.12 states clearly:

> All documents produced by a Party pursuant to the IBA Rules of Evidence ... shall be kept confidential by the Arbitral Tribunal and by the other Parties, and they shall be used only in connection with the arbitration.[16]

13. Parties to investment treaty disputes, including those involving the NAFTA, have regularly adopted Article 3.12 to govern their arbitration.[17] Investment treaty tribunals have also regularly supported the application of the Article to the dispute before them.[18]

14. The NAFTA does not support Canada's attempt to circumvent the intent of the Confidentiality Order. Canada had the option to include its *ATIA* obligations in the exceptions chapter of the NAFTA. Indeed, in Article 2105, headed "Disclosure of

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[16] *IBA Rules on Taking of Evidence in International Tribunals*, Tab 18.

[17] See, for example, *Lauder v. Czech Republic*, UNCITRAL, Final Award, 2001 *WL* 34786000 (September 3, 2001), Tab 22 at para. 16: "The Arbitral Tribunal ... took note of the agreement of the Parties that in general the IBA Rules on the Taking of Evidence in International Commercial Arbitration would be used;" *Methanex Corporation v. the United States of America*, Final Award on Jurisdiction and Merits, 2005 *WL* 1950817 (August 3, 2005), Tab 23 at Part II, Chapter B, para. 10: "By virtue of an express, written agreement between the Disputing Parties ... Articles 3, 4 and 5 of the IBA Rules ... governed the exchange of documents ...."

[18] See, for example, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11; 2005 WL 3067740 (October 12, 2005), Tab 24 at para. 20, quoting the Tribunal's Procedural Order: "The IBA Rules ... can be considered (particularly in Articles 3 and 9) as giving indications of what may be relevant criteria for what documents may be requested and ordered to be produced, in ICSID procedures between investors and host States;" *Helnan v Egypt*, Decision on Jurisdiction, October 17, 2006, Tab 25 at para. 22, quoting the Tribunal's Procedural Order: "... the IBA Rules ... (and particularly Articles 3 and 9) ... can be considered as a guidance as to what documents may be requested and produced."

Information," Canada agreed that domestic laws protecting personal privacy and financial information would have priority over Canada's objection to disclose information under international law. NAFTA Article 2105 states:

> Article 2105: Disclosure of Information
>
> 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.

This NAFTA Article protects information that may otherwise need to be disclosed under international law. It does not permit Canada to release confidential information. If the NAFTA was intended to operate to permit such unlimited disclosure, the terms of NAFTA Article 2105 could easily have accommodated such concerns. In addition, Canada could have included the priority of the *ATIA* in the NAFTA or in a reservation or exception.

15. Indeed, Canada has not seen any need to make information received by it subject to other NAFTA disputes subject to the *ATIA*. For example, information collected in NAFTA Chapter 20 disputes must be kept confidential and is not subject to the *ATIA*.

16. The *Pope & Talbot* decision confirms that allowing Canada to disclose confidential information under the *ATIA* is inconsistent with principles of international law and the NAFTA. In rejecting Canada's request to disclose information under the *ATIA*, the *Pope & Talbot* Tribunal said:

> At bottom, Canada argues that, under the ATIA, any citizen or permanent resident of Canada, simply by filing a written request, must be given access to information otherwise protected by Order No. 5 [protecting confidentiality]. If that interpretation of the Act is correct, the Tribunal finds it difficult to understand how Canada could have accepted in good faith the undertakings in paragraphs 1 and 2 of Order No. 5 ... and, indeed, of NAFTA itself.[19]

17. The *Canada - Aircraft* WTO panel decision also confirms that allowing Canada to disclose confidential information under the *ATIA* is inconsistent with principles of international law. The panel adopted a confidentiality order that was not subject to the *ATIA.* The Order neither mentioned the Act, nor disclosure under domestic law, and stated clearly:

> Where Business Confidential information has been submitted pursuant to these procedures, no

[19] *Pope & Talbot v. Canada*, Decision Regarding the *ATIA*, March 11, 2002, Tab 20 at para. 18.

> approved person who views or hears such information shall disclose that information, or allow it to be disclosed, to any person other than another approved person, except in accordance with these procedures.[20]

Indeed, far from objecting that the order did not allow it to disclose information under the *ATIA*, Canada objected that the Order did not go far enough in protecting its confidential information.[21]

PART THREE: CONFIDENTIALITY AGREEMENT AND UNDERTAKING

18. The Investor has enclosed a draft Confidentiality Agreement and Undertaking (referred to together as the "Confidentiality Agreement"). As the disputing parties cannot agree upon the terms of the Confidentiality Agreement, the Investor seeks the Tribunal to make a Confidentiality Order that will require the disputing parties to enter into the Confidentiality Agreement.

19. The disputing parties have exchanged drafts of the Confidentiality Agreement. The Investor has been unable to consent to the draft proposed by Canada for a variety of reasons. The prime reason deals with Canada's insistence that the confidentiality in the NAFTA investor-state arbitration be subject to Canada's domestic legislation. This issue is fully canvassed in Part Two of this Submission.

20. In addition to the concerns raised in Part Two of this Submission, the Investor has the following concerns with Canada's draft:

    a. Canada removed the wording defining the identities of the disputing parties who are the parties to the Confidentiality Agreement.

    b. Canada added wording that would permit the Government of Canada to designate information as confidential based on its own domestic law which can be modified by Canada at an unspecified future date. Thus Canada would be able to unilaterally designate any information as having a form of privilege, such as cabinet privilege, without any oversight by the Tribunal. Canada would also be able to modify the coverage of its obligations through regulatory changes to its own legislation.

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[20] Article VII(1), Procedures Governing Business Confidential Information and Declaration of Non-Disclosure, attached as Annex 1 to *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, April 14, 1999, Tab 27 at page 232.

[21] *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, April 14, 1999, Tab 27 at para. 4.173: "After the Panel adopted the procedures, Canada sent a letter to the Panel indicating that it did not consider the procedures as adopted to confer sufficient protection for business confidential information."

c. Canada has deleted the applicability of the confidentiality provisions to consultations between the disputing parties pursuant to NAFTA Article 1118 consultations and to the broad area of settlement privilege arising between the disputing parties. This privilege, which is conducive to resolving this dispute, should be preserved.

d. Canada has added obligations to release information pursuant to NAFTA Articles 1127 and 1129 but failed to actually specify the requirements that the parties receiving such information provided must follow the terms imposed by this tribunal on that information.

21. As a result of these problems, the Investor has proposed a Confidentiality Agreement and Undertaking that is based upon the models adopted in the *UPS* NAFTA claim, but that takes into account the problems learned from subsequent Canadian domestic litigation on the meaning of the provisions of that agreement.

22. The Investor's draft has ensured that it makes reference to the *Privacy Act,* which was an issue in the *Appleton v. Privy Council Office* litigation.

23. In addition, the Investor's draft has language that ensures that without prejudice communications and communications made in furtherance of settlement between the disputing parties is covered by the Agreement.

24. This draft also includes language to address materials that may been exchanged prior to the execution of this Agreement.

25. Finally, the Investor's draft contains a clause that ensures that the Tribunal makes a transitional order to address disputes over confidentiality that may arise after the conclusion of this arbitration.

PART FOUR: CONCLUSION

26. NAFTA tribunals in cases involving Canada have used two different models for Confidentiality: the *Pope & Talbot* model and the *UPS* model. The main difference has been the inclusion of wording in the *UPS* Model that was not contained within the *Pope & Talbot* model that made the Confidentiality Order subject to Canada's *Access to Information Act.*

27. The obvious purpose of a Confidentiality Agreement is to permit the filing of information that otherwise could not be produced on account of confidentiality concerns.

28. Canada has used its discretion to respond to requests under the *ATIA* in a manner that is abusive to the objectives of the Order. Canada has abused its discretion by releasing confidential documents covered by the NAFTA Order that were not even requested by the unidentified Canadian applicant.

29. Canada's use of its discretion to release information otherwise covered by the NAFTA Tribunal Order has been upheld by Canada's courts.

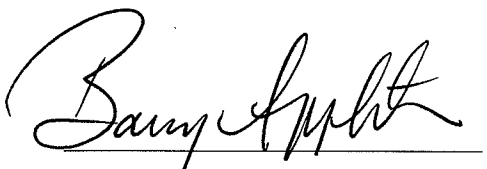
30. In light of Canada's intention to release confidential information and in light of the Canadian Court's findings in *Appleton v. Privy Council*, it is clear that the *UPS* model Confidentiality Order can no longer be adopted by NAFTA investor-state tribunals which are required to follow the terms of NAFTA Article 1115 and UNCITRAL Rule 15 to provide equality to the disputing parties.

31. The Investor, therefore, asks the Tribunal to reject Canada's demand to make the Tribunal's Confidentiality Order subject to Canada's *Access to Information Act*. The Investor requests that the Tribunal instead adopt the following provision contained in paragraph 11 of the Investor's Proposed Order, which is attached as Annex "A" to this submission:

> 11. The receipt of any requests pursuant to law to disclose confidential information shall be forwarded to the Tribunal for determination. The Tribunal's determination in such matters is final and binding upon the disputing parties.
>
> Each disputing party shall provide prompt written notice to the other party of any request to disclose confidential information. No information designated as confidential by Merrill & Ring shall be disclosed to any requestor unless and until the Tribunal has made a determination in the matter.

All of which is respectfully submitted.

Submitted this 9thth day of November, 2007.



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

Investor's Annex "A"

MERRILL & RING FORESTRY L.P.

Investor

v.

GOVERNMENT OF CANADA

Party

CONFIDENTIALITY AGREEMENT

The disputing parties stipulate and agree that:

1. For the purposes of this Agreement:

   (a) "disputing party" means, in the case of the Investor, Merrill & Ring Forestry L.P. and its affiliated companies ("Merrill & Ring"), and in the case of the Respondent, the Government of Canada;

   (b) "confidential information" means any information designated by a disputing party as confidential. A disputing party may designate as confidential, and protect from disclosure, any information that may otherwise be released under the terms of this Agreement on any of the following grounds:

      (I) business confidentiality;

      (ii) business confidentiality relating to a third party; and

      (iii) information otherwise protected from disclosure by legislation including Canada's *Access to Information Act, Privacy Act, Customs Act* and the *Competition Act.*

   (c) "business confidentiality" includes:

      (i) trade secrets;

(ii) financial, commercial, scientific or technical information that is confidential business information and is treated consistently in a confidential manner by the party to which it relates, including pricing and costing information, marketing and strategic planning documents, market share data or detailed accounting or financial records not otherwise disclosed in the public domain;

(iii) information the disclosure of which could result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, the disputing party to which it relates;

(iv) information the disclosure of which could interfere with contractual or other negotiations of the disputing party to which it relates; and

(v) without prejudice communications and communications made in furtherance of settlement between the disputing parties, including items described in Part II of this Agreement.

PART I

Protection and Disclosure of Confidential Information

Confidential Information

2. A disputing party may designate information as confidential. The disputing party shall clearly identify on each page of the document containing such information the notation "*Confidential*" or "*Confidential Information - Unauthorized Disclosure Prohibited*", and shall take equivalent measures with respect to information contained in other material produced in electronic and similar media.

3. Except as otherwise provided herein, when a disputing party files with the Tribunal material containing confidential information, it shall provide a copy of that material with the confidential information redacted within ten (10) business days of production. Material already exchanged by the disputing parties before the execution of this Agreement can be designated as Confidential by notifying the other disputing party of such designation within fifteen (15) business days of the execution of this Agreement.

4. Confidential information shall not be disclosed except in accordance with the terms of this Agreement or with the prior written consent of the disputing party that claimed confidentiality with respect to the information and, in the case of materials from third parties, the owner of such confidential information.

5. Except as otherwise provided in this Agreement, information and materials containing confidential information may be used only in these proceedings and may be disclosed only for such purposes to and among:

   (a) counsel to a disputing party (and their support staff) whose involvement in the preparation or conduct of these proceedings is reasonably considered by the disputing party to be necessary;

   (b) counsel or employees of the Government of Canada or Merrill & Ring to whom disclosure is reasonably considered by a disputing party to be necessary;

   (c) officials or employees of the disputing parties, to whom disclosure is reasonably considered by a disputing party to be necessary;

   (d) independent experts or consultants retained or consulted by the disputing parties in connection with these proceedings; or

   (e) witnesses who in good faith are reasonably expected by a disputing party to offer evidence in these proceedings but only to the extent material to their expected testimony.

6. All persons receiving material in this proceeding containing confidential information shall be bound by this Agreement. Each disputing party shall have the obligation of notifying all persons receiving such material of the obligations under this Agreement. The obligations created by this Agreement shall survive the termination of these proceedings.

7. It shall be the responsibility of the disputing party wishing to disclose material containing confidential information to any person pursuant to paragraphs 5(d) or (e) to ensure that such person executes a Confidentiality Undertaking in the form attached before gaining access to any such material. Each disputing party shall maintain copies of such Confidentiality Undertakings and shall make such copies available to the other disputing party upon Order of the Tribunal or upon the termination of this arbitration.

   Where material containing confidential information is to be disclosed to a firm, organization, company or group, all employees and consultants of the firm, organization, company or group with access to the material must execute and agree to be bound by the terms of the attached Confidentiality Undertaking.

   Restricted Access Information

8. Where a disputing party wishes confidential information, as described in paragraph 1(b) to be kept confidential from the other disputing party, the disputing party shall clearly identify on each page of the material containing such information the notation - “Restricted Access - Dissemination Prohibited”.

9. (1) A person is entitled to receive access to information described in paragraph 8 of this Order only if that person:

a) is legal counsel employed or retained by Canada or Merrill & Ring Forestry, L.P. and their support staff; or
b) is an expertor consultant retained by a disputing party in connection with this proceedings; and, in either case
c) their access to the information is necessary for the preparation or the conduct of the case.

(2) Information provided under this section shall only be used for the purpose of these proceedings and shall only be given to persons referred to in subsection(1) if such persons:

a) execute a Confidentiality Agreement in the form attached as Appendix "A";
b) undertake not to disclose the information or permit to be disclosed the information in whole or in part, except for the purposes of use during the course of this proceeding; and
c) return the information and file a certificate to the effect that any notes or copies, in paper or electronic format, have been sealed or destroyed.

Disclosure of Material Pursuant to Law

10. 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.

11. The receipt of any requests pursuant to law to disclose confidential information shall be forwarded to the Tribunal for determination. The Tribunal's determination in such matters is final and binding upon the disputing parties.

Each disputing party shall provide prompt written notice to the other party of any request to disclose confidential information. No information designated as confidential by Merrill & Ring shall be disclosed to any requestor unless and until the Tribunal has made a determination of the matter.

12. Notice pursuant to this Agreement shall be provided to the Investor by sending notice by fax to the counsel of record for Merrill & Ring, while these proceedings are pending (or to the General Counsel for the Investor, after the completion of the proceedings) and to the Government of Canada by sending notice by fax to the General Counsel of the Trade Law Division of the Department of Foreign Affairs and International Trade (or his or her successor or designate). Notice to a third party to whom the confidential information relates shall be sent by fax and/or registered mail.

13. No party shall file any confidential material covered by the terms of this Agreement in any Court without first bringing this Agreement to the attention of the Court and seeking directions concerning the filing of such material in a manner that protects its confidentiality.

14. In the event that the Tribunal has concluded this arbitration, the Tribunal shall make a transitional order that will govern disputes arising under this Confidentiality Order and Agreement arising after the conclusions of this arbitration.

PART II

Conduct of Article 1118 Consultations

15. The Parties agree that this Agreement governs all aspects of this dispute, including any consultations or negotiations conducted pursuant to NAFTA Article 1118. This Agreement shall apply to the convening of the consultations, all correspondence related to the consultations and any post-consultations communications.

16. All statements made in connection with or during the consultations are confidential and privileged settlement discussions. All such statements are made without prejudice to either Party's legal position, and shall be inadmissible for any purpose in any legal proceeding. Any information disclosed by or on behalf of a Party shall be confidential and shall not constitute a waiver of any privilege. Any files or notes created or maintained by the Parties are solely for their own use and shall be destroyed following the termination of the consultations.

17. Because the Parties are disclosing sensitive information in reliance on this Agreement, any breach of this Agreement could cause irreparable injury for which monetary damages would be inadequate. Consequently, either Party to this Agreement may obtain injunctive relief to prevent disclosure of any confidential information in violation of this Agreement.

PART III

Conduct of Proceedings and Public Disclosure of Documents

18. In accordance with UNCITRAL Arbitration Rule 25(4), the hearings in this arbitration shall be held *in camera*, unless the disputing parties agree otherwise.

19. Subject to the terms of this Agreement, and any further agreement between the disputing parties, the disputing parties agree that either disputing party shall be free to disclose to the public, including by posting on the internet, the following materials:

> Pleadings, and submissions of any disputing party or NAFTA Party, together with their appendices and attached exhibits, including the notice of intent, notice of arbitration, amended statement of claim, statement of defence, memorials,

affidavits, responses to tribunal questions, transcripts of public hearings, and any awards, including procedural orders, rulings, preliminary and final awards.

Any material disclosed to the public pursuant to this paragraph shall not contain any information designated by a party as confidential. In addition, each disputing party shall have fifteen (15) business days from the execution of this Agreement to provide redacted versions of the materials enumerated in paragraph 16 that have already been filed and over which confidentiality has been asserted.

20. Except as permitted by this Agreement, neither disputing party shall publicly disclose material produced by the other disputing party in the course of this dispute.

21. A disputing party has thirty (30) days from the date of notice by the other disputing party of its intent to publicly disclose material referred to in paragraph 19, to object to disclosure on the basis it contains confidential information. Such material may not be released prior to the end of this period unless both parties have confirmed that they do not object to such release or agree on the redaction of the material containing confidential information.

22. Where counsel for either disputing party reasonably expect that information, whether documentary or oral, designated by a disputing party as confidential information shall be referred to during the course of any hearing held by the Tribunal, then such portion of the hearing as is reasonably necessary to protect that confidential information shall be conducted *in camera* and may only be attended by those persons designated in paragraph 5.

23. The proceedings shall not be recorded in any way, except by a court reporter, and shall not be broadcast, unless the disputing parties jointly agree otherwise.

24. Transcripts of the proceedings containing any information designated by a disputing party as confidential information shall be redacted.

25. The obligations created by this Agreement shall survive the termination of these proceedings.

26. 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.

27. This Agreement shall be effective and binding upon a disputing party upon the signature of its counsel.

Dated: _____ _____

The Government of Canada
Office of the Deputy Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Dated: _____ _____

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APPENDIX "A"

NAFTA Arbitration Confidentiality Undertaking

TO: The Government of Canada (and its legal counsel) and Merrill & Ring Forestry LP ("Merrill & Ring") (and its legal counsel)

FROM: _____

1. IN CONSIDERATION of being provided with the materials ("Confidential Information" or "Restricted Access Material") in connection with a NAFTA arbitration between Merrill & Ring and the Government of Canada over which claims for confidentiality or restricted access have been advanced, I hereby agree to maintain the confidentiality of such material. It shall not be copied or disclosed to any other person nor shall the material obtained be used by me for any purposes other than in connection with this proceeding.

2. I acknowledge that I am aware of the Tribunal's Order based on the agreement of the disputing parties regarding Confidentiality and Restricted Access Information, a copy of which is attached as Schedule "A" to this Agreement, and agree to be bound by it.

3. I will promptly return any Confidential Information or Restricted Access Materials received to the disputing party that provided me with such materials, or the information recorded in those materials, at the conclusion of my involvement in these proceedings. All material containing information from Confidential Information or Restricted Access Material will be destroyed.

4. I acknowledge and agree that in the event that any of the provisions of this Confidentiality Agreement are not performed by me in accordance with the specific terms or are otherwise breached, that irreparable harm may be caused to either of the disputing parties to this arbitration. I acknowledge and agree that either of the disputing parties to this arbitration is entitled to seek injunctive relief restraining breaches of this Confidentiality Agreement and to specifically enforce the terms and provisions hereof in addition to any other remedy to which any disputing party to this arbitration may be entitled at law or in equity.

5. I agree to submit to the jurisdiction of the courts of the Province of Ontario (in the case of residents of Canada) or the District of Columbia (in the case of residents of the United States of America) to resolve any disputes arising under this Agreement.

SIGNED before a witness this _____day of _____, 200___.

_____
(*Print Witness Name*)

_____ _____

Witness Signature Signature