

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT AND THE
UNCITRAL ARBITRATION RULES (1976)**

-between-

**THEODORE DAVID EINARSSON, HAROLD PAUL EINARSSON, RUSSELL JOHN
EINARSSON, AND GEOPHYSICAL SERVICE INCORPORATED
("Claimants")**

-and-

**GOVERNMENT OF CANADA
("Respondent", and together with Claimants, the "Disputing Parties")
(ICSID CASE NO. UNCT/20/6)**

PROCEDURAL ORDER NO. 2

(Document Production)

The Arbitral Tribunal

Ms. Carita Wallgren-Lindholm (Presiding Arbitrator)

Mr. Trey Gowdy

Mr. Toby Landau KC

Administrative Authority

ICSID

Tribunal Secretary

Ms. Geraldine R. Fischer

29 July 2023

I. Procedural Background

1. This Procedural Order contains the Tribunal's decisions on the document production requests made by Theodore David Einarsson, Harold Paul Einarsson, Russell John Einarsson, and Geophysical Incorporated (together, "**Claimants**"), on the one side, and by the Government of Canada ("**Respondent**" or "**Canada**"), on the other. Claimants and Respondent are collectively referred to as the "**Parties.**"
2. In accordance with Section 14 of Procedural Order No. 1 ("**PO 1**") and the timetable in Annex II of PO 1, on 2 May 2023 the Parties exchanged document production requests, objections to those requests and responses to those objections in Claimants' Redfern Schedule "A" and Respondent's Redfern Schedule "B". Claimants also submitted a Redfern Schedule "B" that included the previously mentioned exchanges and Claimants' reply to Respondent's objections - an unscheduled reply to which Respondent did not raise an objection.
3. As provided in Section 14 of PO 1, the Tribunal has been guided by Articles 3 and 9 of the 2020 IBA Rules on the Taking of Evidence in International Arbitration for document production ("**The IBA Rules**").

II. Tribunal Considerations

4. Claimants' production request is extensive and Canada, as it sets out itself, has refused to produce most of the requested documents. Claimants have agreed to produce some of Respondent's requests, with many requests remaining in dispute. The Parties appear to agree on the procedural framework governing production and have mostly invoked the IBA Rules in support of their requests and objections, respectively. Arguments invoked in support of objections to produce have been mainly lack of relevance to the case or of materiality to its outcome; documents being publicly available; or the request being of a nature to cause an unreasonable burden on the producing party. Confidentiality as a ground for objection is addressed below.
5. In reviewing the requests, the Tribunal has found that the requesting Parties were mostly able to demonstrate that they sought sufficiently relevant documents to prove disputed facts that could be material to the outcome of the case, and that it would be appropriate to order their production. In a number of instances, however, the Tribunal agreed with the objections raised by the producing Party and so has wholly or partly denied the request for production. In particular, where documents are publicly available, albeit only after some effort of search, the Tribunal has found that the onus lies primarily on the requesting Party(ies) to locate them, even if it is possible that the search could be performed with less effort by the other Party(ies). Such consideration has in some instances resulted in the Tribunal denying some of Claimants' requests, wholly or partly, regarding correspondence to or from Canadian governmental entities or documents issued by such entities that are currently available for search by the public. However, where it appears that it may not be possible to identify materials since they are listed under other names than

GSI (*e.g.* Secondary Submissions), Claimants' request for production has been granted.

6. Both Claimants and Respondent have in some instances invoked issues of confidentiality and privilege to object to production. Claimants have also argued that much of the information requested by Canada constitutes business and trade secrets. The Tribunal has taken account of confidentiality and privilege arguments throughout its decisions on production, albeit when it comes to much of Claimants' financial information, the Tribunal has not been persuaded of its allegedly confidential nature. On the other hand, the Tribunal has upheld Canada's privilege argument regarding legal opinions obtained by it, considering that a mere reference to the existence of a legal opinion in materials on record is not sufficient for the Tribunal to find that Canada has waived legal privilege as to the contents of the same.

III. Order

7. After carefully considering each Party's arguments set out in the respective schedules, the Tribunal's decisions on the document production requests have been incorporated in Claimants' Schedule (Annex A) and Respondent's Schedule (Annex B).
8. Claimant's Schedule (Annex A) and Respondent's Schedule (Annex B) are attached hereto and form an integral part of the present Procedural Order.
9. Production shall be effected as set out in Section 14 of PO 1.
10. Where Claimants are no longer in possession of documents due to Claimants' own 7-year document retention policy, they may not request the said documents from the Respondent. Within 10 days of the date of this Order, the Claimants shall confirm which documents, or categories of documents, forming the subject of their production requests, are likely to have been destroyed as a result of such policy and are thereby to be excluded. The same confirmation deadline shall apply to Claimants' Request No. 20.
11. No Party is required to create any documents, collations of information or summaries in order to comply with this Order.
12. Should any Party when complying with this Order withhold a document or produce a document with redactions invoking confidentiality or privilege, the Tribunal expects any such withholding or redaction to be reasoned and informative as to the number of withheld documents and the extent of redacted text, in accordance with paragraphs 14.7-14.9 of PO 1 and the applicable provisions of the Confidentiality Order issued on 13 June 2022.
13. This Procedural Order is without prejudice to the Tribunal's right to entertain further requests for production of documents by the Parties in application of PO 1 and in particular paragraphs 7.2 and 10.5 and Sections 14 and 21 thereof.

14. Pursuant to Annex II of Procedural Order No. 1, documents are to be produced by 27 September 2023.

Dated: 27 July 2023

Place of Arbitration: Calgary, Alberta, Canada

[Signed]

Carita Wallgren-Lindholm
(Presiding Arbitrator)

[Signed]

Trey Gowdy

[Signed]

Toby Landau KC

Enclosures: Annex A
Annex B