

**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. 7

Decision on Claimants' Motion to Compel Documents

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

6 March 2024

I. Procedural History

1. On 30 January 2024, Claimants filed a Motion to Compel Documents (“Motion to Compel”) and Request for an Extension of Time to file a Reply.
2. On 31 January 2024, Respondent opposed the Motion to Compel as untimely since it was filed 95 days after Claimants had received Respondent’s document production and privilege log and only 10 days before Claimants’ Reply was due. Respondent also noted that the Motion to Compel was incomplete as it was missing the referenced witness statement.
3. On 1 February 2024, Claimants supplemented their Motion to Compel Documents, which was accompanied by the following documents:
 - CWS-07 Witness Statement of Harold Paul Einarsson (31 January 2024);
 - Exhibits C-1 through C-15;
 - Legal Authorities CLA-1 through CLA-3;
 - 22 January 2024 Email from M. Lemmens to Respondent’s Counsel; and
 - Claimants’ Index of Materials Motion to Compel Document (“Index”).
4. On 6 February 2024, the Tribunal held a case management conference (“2024 CMC”) to discuss the future proceeding, including Claimants’ Motion to Compel and request for an extension to file the Reply. At the 2024 CMC, Respondent proposed a hearing on the Motion to Compel, which was agreed to by Claimants. The Tribunal and the Parties agreed to hold the Hearing on 1 March 2024, which appeared to be the only available date within a reasonable period for all participants.
5. On 11 February 2024, the Tribunal wrote to the Parties, advising “*that the hearing on the Motion to Compel will go forward as agreed on Friday 1 March 2024 at a time yet to be determined* [.]”
6. On 13 February 2024, the Tribunal notified the Parties that it would like to reserve three hours for the 1 March 2024 hearing on Claimants’ Motion to Compel, and the Tribunal requested that the Parties confirm their agreement with an earlier start time, to accommodate the different time zones.
7. Later that same day, 13 February 2024, Claimants advised the Tribunal that they were unable to comply with the 29 February 2024 Reply deadline set out in PO 5, given the 1 March 2024 hearing and the 29 February 2024 deadline to comply with PO 4, “*especially in light of the circumstances for the remaining Claimants attending to matters relating to Davey Einarsson’s death, and that counsel is in final argument for a lengthy four-month trial next week.*” Additionally, Claimants argued:

Further, if the answer to Procedural Order No. 4 is that the Claimant, Davey Einarsson, is not represented, then the Claimants’ counsel is certainly not able to comply simultaneously with

Procedural Order No. 5, nor proceed with the Motion scheduled on March 1, 2024. Despite the Tribunal's direction in Procedural Order No. 4 at paragraph 11 that these Arbitration proceedings proceed "unless and until the Tribunal decides otherwise", a positive confirmation that Davey Einarsson is not properly represented would result in counsel being bound to comply with the rules applicable from the governing law society for counsel such that they cannot file any materials. That is not a matter within the Tribunal's jurisdiction.

8. On 14 February 2024, Respondent agreed with the Tribunal's proposed hearing time.
9. On 16 February 2024, further to the Tribunal's directions, Respondent replied to Claimants' 13 February 2024 letter. Respondent submitted that "[i]f the Claimants are not prepared to comply with Procedural Order No. 5 and make themselves available for the March 1st date (which was agreed by the Disputing Parties and the Tribunal at the CMC and chosen based on Claimants' counsel limited availability), Canada requests that the Motion simply be denied with no further briefing or hearing. This would be justified in the circumstances, given that the Motion was untimely and appears to have been brought for the sole purpose of delaying the proceedings and buying the Claimants more time to file their Reply Memorial." If the Tribunal prefers a hearing, however, the Respondent noted that it is prepared to proceed on 1 March 2024.
10. Later that day, as directed by the Tribunal at the CMC and in the Tribunal's 13 February 2024 communication, Respondent filed "Canada's Reply to Claimants' Motion to Compel Documents," which was accompanied by the following documents:
 - Exhibits R-498 through R-513;
 - Legal Authority RLA-168; and
 - Index of Supporting Documentation.
11. On 26 February 2024, the Tribunal issued Procedural Order No. 6 in which the Tribunal "confirm[ed] that the 1 March 2024 hearing on the Motion to Compel will be held at a time and for a duration that will be set in consultation with the Parties."
12. On 27 February 2024, the Tribunal advised the Parties that it had changed some pre-existing commitments to start the hearing at a later time and proposed a hearing schedule. Respondent confirmed its agreement with the hearing schedule. Claimants also confirmed their agreement with the proposed schedule for the 1 March 2024 Hearing while "not[ing] that the confirmation of agreement is subject to the caveat respecting the passing away of Theodore David Einarsson and his interests in this proceeding, as raised in prior correspondence."
13. On 1 March 2024, the Tribunal held a Hearing on the Motion to Compel. At the beginning of the Hearing, Claimants confirmed that they were able to proceed with their Motion to Compel and the hearing. After the Parties' submissions on the Motion to Compel, the Tribunal informed the Parties that, in light of the pending 14 March 2024 deadline for

Claimants to file their Reply, the Tribunal would rule on Claimants' Motion to Compel Documents early the following week with reasons to follow.

II. The Tribunal's Decision

14. The Tribunal denies Claimants' Motion to Compel Documents with reasons to follow.

Dated: 6 March 2024

Place of Arbitration: Calgary, Alberta, Canada

[Signed]

Carita Wallgren-Lindholm
(Presiding Arbitrator)

[Signed]

Trey Gowdy

[Signed]

Toby Landau KC