

**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. 8

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

21 June 2024

I. Procedural History

1. On 30 January 2024, Claimants filed a Motion to Compel Documents (“Motion to Compel” or “Application”) 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 by filing the following additional 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 preferred a hearing, however, Respondent noted that it was 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.

14. On 6 March 2024, the Tribunal issued Procedural Order No. 7, denying Claimants' Motion to Compel Documents with reasons to follow.

II. The Parties' Positions

A. Claimants' Position

15. Claimants brought an Application for the “*production of documents which should have formed part of the October 27, 2023 disclosure, but were illegible, missing pages, included unjustified redactions, not produced by Canada or some combination thereof (the ‘Impugned Documents’)*.”¹ According to Claimants, the over 30,000 pages produced by Canada had many redactions and appeared to be missing pages or portions of pages, making the “haphazard” production difficult to review.² With respect to documents produced for Request No. 29, Claimants noted that the colors from the map legend were indiscernible and they could not eliminate the overlap.³
16. The Parties exchanged correspondence between December 2023 and January 2024 regarding document production issues. On 19 January 2024, Canada advised that it would produce an itemized list of 70 documents responsive to Redfern Request No. 5 over which it maintained privilege, but did not agree to provide a list of all other documents over which it asserted privilege. Canada further indicated that Claimants could make an appointment at the Frontier Information Office (“FIO”) to view documents responsive to Request No. 3.⁴ When Claimants attended the FIO appointment, no specific documents had been identified at the FIO as responsive to Request No. 3, but they rather found the whole contents of the FIO.⁵ Canada’s response therefore remains deficient in Claimants’ view.
17. Claimants cite to the importance of a full documentary production as providing “*the basis of well-informed decision making by the parties and the finder of fact.*”⁶ Claimants assert that the governing law is not Canadian legislation, so documents can be produced even if they fall under one of the domestic law exemptions. Claimants, moreover, take issue with Respondent’s approach to document production, including claiming privilege over certain categories of documents that are responsive to Request No. 5 without producing an itemized list of those privileged documents.⁷
18. Similarly, although Respondent has said that it produced all documents responsive to Request No. 3, after reviewing the documents produced by Canada, Claimants submit that Respondent has withheld or redacted much of the documentation on the basis of privilege and relevance, including blatantly not producing many of the records, asserting access to information exemptions under domestic legislation to avoid the disclosure of third parties’

¹ Claimants’ Motion to Compel Documents (“Application”), para. 1.

² Application, para. 5.

³ Application, para. 6.

⁴ Application, para. 11.

⁵ Application, para. 12. *See also* Tr. (1 March 2024) 24:4 *et seq.*

⁶ Application, para. 24.

⁷ Application, para. 26.

identities, the amounts paid in work expenditure credits for the Secondary Submissions and the identity of those to whom Canada disclosed Seismic Works, which is highly relevant to Claimants' damages position and ordered by the Tribunal.⁸

19. Claimants submit that Respondent's privilege logs are deficient,⁹ and Respondent is required to submit "[a]n *itemized privilege log... containing relevant details in order to assess the assertion of privilege and determine whether it is appropriate.*"¹⁰ Claimants argue that the use of vague categories prevent the Tribunal from "*determining the admissibility, relevance, materiality and weight of the withheld evidence in the Impugned Documents, in contravention of Article 9(1) of the IBA Rules.*"¹¹

B. Respondent's Position

20. In Respondent's 16 February 2024 Reply to Claimants' Motion to Compel Documents, Respondent emphasizes that it has conducted a reasonable and good faith search for and production of those documents ordered by the Tribunal.¹² Moreover, Respondent points out that Claimants were silent for months before raising any substantive complaint about Respondent's production and then Claimants made unreasonable and unjustified "*new complaints and demands with patently unachievable and arbitrary deadlines.*"¹³

1. Canada's Privilege Claims Comply with the Tribunal's Order and the Applicable Arbitration Rules

21. Respondent submits that its treatment of information redacted or withheld pursuant to IBA Rules Article 9 is consistent with Procedural Order Numbers 1 and 2.¹⁴ Additionally, Respondent asserts that its production of redacted versions of documents clearly identifies grounds on which the information was withheld.¹⁵ Moreover, Respondent's redaction of personal information is justified. Furthermore, Respondent submits that it properly asserted Solicitor Client privilege and Litigation privilege as recognized under IBA Rules Article 9(2)(b).¹⁶ Similarly, Respondent withheld sensitive business confidential information or documents submitted in confidence by third parties to relevant authorities in reliance upon

⁸ Application, para. 28.

⁹ See, e.g. Tr. (1 March 2024) 15:16 *et seq.*

¹⁰ Application, para. 29. Claimants also cite to procedural orders issued in prior NAFTA arbitrations as support for the need to produce detailed privilege logs. See Application paras. 31 and 32 (citing CLA-1, *Global Telecom Holding S.A.E. v. Canada*, ICSID Case No. ARB/16/16, Procedural Order No. 6 (Decision on Common Interest Privilege, Limited Waiver of Privilege and Subject Matter Waiver of Privilege) at 20; and CLA-2, *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Procedural Order on Document Production Regarding the Parties' Respective Claims to Privilege and Privilege Logs).

¹¹ Application, para. 30. See, also Transcript (1 March 2024) 21:17 *et seq.*

¹² Canada's Reply to Motion to Compel Documents of 16 Feb. 2024 ("Canada's Reply"), pp. 1-4.

¹³ Canada's Reply, para. 17. See also Canada's Reply, pp. 4-9.

¹⁴ Canada's Reply, pp. 9-11. See, e.g. Tr. (1 March 2024) 57:2 *et seq.*

¹⁵ Canada's Reply, pp. 11-12.

¹⁶ Canada's Reply, pp. 13-16. See also Tr. (1 March 2024), 45:5 *et seq.*

and in compliance with its domestic laws, CPRA and the Accord Acts, and IBA Rules Article 9(2)(b) and 9(e).¹⁷

2. *Canada has complied with Procedural Order No. 2 and has no obligation to produce More Documents*

22. With respect to the small number of documents with allegedly missing or unreadable pages, Respondent asserts that as these documents are old (most between 10 and 48 years old), a search in offsite storage facilities will have to be conducted to confirm their existence. As Respondent has said that it will endeavor to locate and provide new copies, Respondent submits that no Tribunal ruling is needed for this aspect of the Motion.¹⁸
23. Regarding the other categories of documents identified by Claimants in their Motion, Canada argues that it has already complied with Procedural Order No. 2 and it has no further obligation to produce those documents to Claimants. Respondent submits the following specific responses:
- **Claimants' Document Requests # 1, 7, 8, 9, 10, 11, 12, 16, 21 and 26:** Claimants only complain about redactions, which has already been addressed. Respondent has already committed to endeavoring to diligently search and produce all documents that it can locate in its possession, custody and control. If there are no responsive documents, Respondent will inform Claimants.¹⁹
 - **Claimants' Document Request # 3:** Canada has already explained that the responsive documents located at CER's Frontier Information Office ("FIO") exist in older formats (*e.g.* mylar or large paper), which would be prohibitively costly, time consuming and overly burdensome to convert to electronic format, which is why Canada asserts IBA Rule 9(2)(c) as a basis for not producing them. Moreover, Respondent has already identified the documents at the FIO that are responsive in this arbitration, and Claimants are aware of these lists and were in a position to request to view specific documents had they so wished.²⁰
 - **Claimants' Document Request # 4:** Respondent has already explained that Exhibit C-111 is a document produced by Claimants, so Respondent cannot confirm whether it is complete or accurate, but Canada has in any event produced all records of disclosure responsive to this document request, totaling thousands of pages, which Canada notes have been in Claimants' possession for years. Moreover, the Tribunal should reject Claimants' new request for documents relating to the Premier Dunderdale speech in June 2013 as this is an untimely new request for documents for which there is no relevance or materiality to the claims

¹⁷ Canada's Reply, pp. 16-19. *See also* Tr. (1 March 2024), 45:14 *et seq.*

¹⁸ Canada's Reply, pp. 19-20.

¹⁹ Canada's Reply, para. 60.

²⁰ Canada's Reply, paras. 61-62.

in this arbitration and these documents cannot, as argued by Claimants, be linked to their document Requests # 4 and 5.²¹

- **Claimants' Document Request # 5:** Canada submits that it has produced several thousand pages of responsive documents, much of which was already in Claimants' possession for years.²² These so-called "Secondary Submissions" included allowable expenditure applications from third parties, some of which were redacted for third-party business confidential information, and "Secondary Submission" seismic data was publicly released through the FIO and again in this arbitration. Like the information from the FIO, the CNLOPB and CNSOPB materials are available in microfiche, mylar or large paper format, many have been produced and some are in CNLOPB archives that have not been fully catalogued. Therefore, Canada relies on IBA Rule 9(c) not to produce more documents as it would be massively costly, time-consuming and impractical to locate, copy and produce these materials within the arbitration time frame.²³
- **Claimants' Document Request # 6:** On 27 October 2023 and 8 January 2024, after good faith effort, Canada produced no responsive documents as they did not exist. Now Claimants have changed their original document request, which Respondent objects to as a vexatious attempt to circumvent Claimants' own request and the Tribunal's Procedural Order No. 2. Moreover, even if the Tribunal were to order the new request, it covers over fifty years, including twenty years before GSI's existence, federal and provincial jurisdictions, which would make the request impossible to comply with. Furthermore, there are other elements of this new request that make any attempt of a response a Sisyphean task, for example trying to determine whether "unsummarized, aggregate and/or raw data" (which Canada says is an undefined and unclear term) is responsive.²⁴
- **Claimants' Document Request # 29:** Respondent reiterates that the information underlying the relevant annexes belongs to Claimants or is publicly available on the CNLOPB's website.²⁵
- **Claimants' Document Request # 30:** Respondent indicates that it has not been able to locate any responsive documents, and as emphasized in the Tribunal's Procedural Order No. 2, Respondent is not obliged to "create any documents, collations of information or summaries in order to comply with this Order."²⁶
- **Claimants' Document Request # 31:** Respondent undertook a diligent search and was unable to locate responsive documents. Claimants then sought to expand their

²¹ Canada's Reply, paras. 63-68.

²² *See, e.g.* Tr. (1 March 2024) 52:2 *et seq.*

²³ Canada's Reply, paras. 69-72.

²⁴ Canada's Reply, paras. 73-78.

²⁵ Canada's Reply, paras. 79-80.

²⁶ Canada's Reply, para. 81.

original request to include other documents. With respect to the 28 January 2001 GSC-TGSN contract that Claimants located in 2013 and that was attached as an exhibit to Mr. Einarsson's 13 July 2015 affidavit in a domestic proceeding, Canada acknowledges that it did not locate or produce the twenty-two-year-old document that is also not related to GSI's seismic works and submit that Claimants did not suffer any prejudice as a result. In addition, as it was brought to Canada's attention, Respondent undertook a search for records evidencing income from this contract and none was found.²⁷

3. Claimants' Have Used Confidential Documents Canada Produced for Collateral Purposes in Violation of the Confidentiality Order

24. Canada submits that Mr. Harold Einarsson used a confidential document produced in this arbitration, something that breached the Confidentiality Order. Mr. Einarsson, as advised by Claimants, was charged with reviewing Canada's document production in this arbitration, and he used a document responsive to Request #4 for the collateral purpose of making an ATIA request to the CNLOPB on 28 December 2023. With respect to this violation of the Confidentiality Order, "*Canada defers to the Tribunal as to the appropriate censure.*"²⁸ Respondent says that "*Mr. Einarsson's actions demonstrate the serious risks of disclosing third-party confidential information to the Claimants in this arbitration*"²⁹ as here is no way to effectively monitor whether information obtained in this arbitration will be used for collateral purposes in the future, especially once the arbitration is over, which emphasizes the importance of Canada's redactions and withholding such third-party information.³⁰

III. The Tribunal's Analysis

25. As summarized above, Claimants' motion for better and further production of documents that were ordered by the Tribunal to be produced by 29 October 2023 is opposed by Respondent, who argues that it has in good faith and diligently complied with the Tribunal's production order (PO 2).
26. Claimants' application has been addressed extensively by the Parties and the Tribunal alike: the Parties have exchanged communications on the subject and the request for further documents has also been addressed at 2024 CMC on 6 February 2024 and in a hearing on 1 March 2024.
27. The Tribunal in analyzing the shortcomings that Claimants allege attach to Respondent's production does not find it to be haphazard or deficient so as to require intervention by the Tribunal for rectification or supplementation. The record rather shows a reasonable and

²⁷ Canada's Reply, paras. 82-85.

²⁸ Canada's Reply, para. 93.

²⁹ Canada's Reply, para. 93.

³⁰ Canada's Reply, pp. 29-30.

diligent effort to produce the ordered documents. Canada itself concedes that there may have been oversight in some minor respects which in the Tribunal's view can only be expected in an exercise involving tens of thousands of documents covering many decades.

28. One of Claimants' objections to Respondent's production is that documents are at times illegible, with pages missing, blurred etc. The Tribunal recalls that in PO 2 paragraph 11, the principle that materials are to be produced as they exist is articulated. It follows that documents are to be produced as is without a requirement that they be prepared or packaged a certain way (other than as may be agreed or ordered). Claimants' complaints in this regard, therefore, do not warrant any further order by the Tribunal. Likewise, it is the Tribunal's view that it was sufficient for Canada to facilitate Claimants' visit to the FIO, without a need to prepare files for them at that location.
29. When it comes to Claimants' objection that Respondent's privilege log is inadequate, the Tribunal, as Respondent, takes the view that while the privilege log may not in all respects follow the precise wording of the Tribunal's orders, the log adequately shows where and how Respondent has asserted privilege so as to give Claimants the tools to assess Respondent's privilege claims and to raise any issue with respect thereto.
30. It also appears that Claimants are likely to already be in possession of much of the documents requested, some since long, as a result of other litigation. Further, there is nothing preventing a subsequent request for a particular relevant and material document under paragraph 13 of PO 2 if the case so requires.
31. In evaluating the sufficiency of Canada's production efforts, in light of IBA Rules Article 9.2(c), the Tribunal has taken into consideration the extensive nature of Claimants' requests, as already mentioned in PO 2 paragraph 4.
32. The Tribunal also cannot disregard the passage of time between Canada's production and Claimants' first objection to the results which, in and of itself, could have justified the dismissal of the Application. In all events, such elapse of time indicates a lack of urgency and necessity on Claimants' part, in terms of their case preparation, and would have entailed an increased burden on the producing Party if further steps were now ordered.
33. Finally, the Tribunal considers that Production of Documents cannot be a continuous, parallel proceeding within the arbitration, but must come to a close. The Tribunal in this respect recalls paragraph 13 of PO 2, which allows for a renewed production exercise if the Tribunal finds that justified.

IV. The Tribunal's Decision

34. For the reasons set out above, on 6 March 2024 the Tribunal denied Claimants' Motion to Compel Documents.
35. All issues concerning costs are reserved.

36. Respondent's request for an appropriate censure for Mr. Harold Einarsson's alleged violation of the Confidentiality Order will be addressed separately.

Dated: 21 June 2024

Place of Arbitration: Calgary, Alberta, Canada

[Signed]

Carita Wallgren-Lindholm
(Presiding Arbitrator)

[Signed]

Trey Gowdy

[Signed]

Toby Landau KC