

**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)**

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**PROCEDURAL ORDER NO. 9**

**On Alleged Breach of the Confidentiality Order**

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**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. Background

1. On 16 February 2024, Respondent, in its Reply to Claimants' Motion to Compel Documents (the "**Motion Reply**"), alleged that Claimants used a confidential document produced by Canada in document production in these proceedings for collateral purposes in violation of the Confidentiality Order.<sup>1</sup> Canada highlights that, on 28 December 2023, "Harold Einarsson" sent the CNLOPB an access to information request labelled "*Equinor and OMV access to GSI data and secondary submissions*,"<sup>2</sup> and that it "*is not aware of any other means by which Mr. Einarsson, who had been delegated the task of reviewing Canada's document production by Claimants' counsel, would have been able to be so specific in his request to the CNLOPB – identifying Mr. Joe Runcer, OMV and Equinor by name – without using the knowledge obtained by reviewing the still-confidential document produced by Canada in this arbitration only two months before.*"<sup>3</sup> Respondent defers to the Tribunal to determine the appropriate censure for the Confidentiality Order violation while underscoring that "*Mr. Einarsson's actions demonstrate the serious risks of disclosing third-party confidential information to the Claimants in this arbitration. The Claimants have initiated and are continuing dozens of lawsuits against third parties regarding GSI's seismic data and there is no way for the Tribunal or Canada to effectively monitor whether information obtained in this arbitration will be used for collateral purposes in the future, especially once the arbitration is over.*"<sup>4</sup>
2. On 21 March 2024, Respondent noted that as a consequence of Claimants' CNLOPB request "in violation of the Confidentiality Order, absent direction from the Tribunal, the CNLOPB will soon be required under domestic law to release the documents in question to the Claimants."<sup>5</sup>
3. In Claimants' letter of 25 March 2024, Claimants objected that Respondent's 21 March 2024 correspondence regarding the CNLOPB issue was unclear with respect to whether a request was being made to the Tribunal.
4. On 18 April 2024, the Tribunal invited Respondent to clarify whether it was seeking an order from the Tribunal with respect to this matter.

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<sup>1</sup> Canada's Reply to Motion to Compel Documents ("Motion Reply"), p. 28.

<sup>2</sup> Motion Reply, p. 29.

<sup>3</sup> Motion Reply, p. 29.

<sup>4</sup> Motion Reply, p. 30.

<sup>5</sup> Respondent's Letter of 21 March 2024, p.1. On 22 April 2024, Respondent informed the Tribunal that the CNLOPB had recently produced the requested documents. Respondent's Letter of 22 April 2024, p. 2.

5. On 22 April 2024, Respondent requested that the Tribunal “censure the Claimants for the violation of the Confidentiality Order and note[d] the seriousness of such violations to deter future use of confidential information obtained by the Claimants through this arbitration”, including “an appropriate order of costs to emphasize the unacceptability of Confidentiality Order violations.”<sup>6</sup> Respondent also noted that “Claimants have not denied the fact that Mr. Einarsson used confidential information provided in this arbitration to make his ATIA request to produce documents to the CNLOPB.”<sup>7</sup>
6. On 3 May 2024, Claimants argued that Canada had not brought the sanctions issue related to the alleged breach of the Confidentiality Order before the Tribunal as a motion, which would have been accompanied by evidence, written submissions and a potential cross-examination, so it could not be considered now.<sup>8</sup> In any event, Claimants specified that “*Mr. Paul Einarsson, through GSI, did not so violate the Confidentiality Order[]*” as the “*Confidentiality Order protects information that is not otherwise publicly available.*”<sup>9</sup> According to Claimants, “[a] request was made through domestic access to information legislation and was responded to by Canada with publicly available information. Canada itself designated such information as publicly available. Accordingly, even if the information was produced by Canada in the course of this Arbitration, the same information is publicly available and is not a violation of the Confidentiality Order.”<sup>10</sup> Consequently, Claimants submit that “*Canada is estopped from seeking a declaration that any of the Claimants violated the Confidentiality for information that Canada itself made publicly available through its own domestic laws.*”<sup>11</sup> Claimants submitted that the Tribunal should dismiss Canada’s request for relief set out in its 22 April 2024 correspondence.<sup>12</sup>

## II. The Tribunal’s Analysis

7. The Tribunal notes that based upon the materials available it is not in a position to determine whether or not the Confidentiality Order has been breached. Making such determination would require detailed briefing by the Parties, including the filing of submissions and evidence, and possibly the holding of a hearing on the matter.

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<sup>6</sup> Respondent’s Letter of 22 April 2024, p. 2.

<sup>7</sup> Respondent’s Letter of 22 April 2024, p. 2.

<sup>8</sup> Claimants’ Letter of 3 May 2024, p. 1.

<sup>9</sup> Claimants’ Letter of 3 May 2024, p. 1.

<sup>10</sup> Claimants’ Letter of 3 May 2024, p. 1.

<sup>11</sup> Claimants’ Letter of 3 May 2024, p. 1.

<sup>12</sup> Claimants’ Letter of 3 May 2024, p. 2.

8. To this end the Tribunal invites Respondent to confirm whether it seeks to maintain its censure request for the alleged breach of the Confidentiality Order. If so, the Tribunal will establish a briefing schedule for this matter.
9. In any event, the Tribunal emphasizes that going forward the Tribunal will not look favorably on any circumvention of the Confidentiality Order.

### III. The Tribunal's Decision

10. Respondent is invited to confirm, within 7 days, whether it maintains its censure request for Claimants' alleged breach of the Confidentiality Order.
11. All issues concerning costs are reserved.
12. All other requests and claims are dismissed.

**Dated:** 21 June 2024

**Place of Arbitration:** Calgary, Alberta, Canada

[Signed]

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Carita Wallgren-Lindholm  
(Presiding Arbitrator)

[Signed]

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Trey Gowdy

[Signed]

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Toby Landau KC