

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Ruby River Capital LLC**

**v.**

**Canada**

**(ICSID Case No. ARB/23/5)**

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**PROCEDURAL ORDER NO. 2  
On Transparency and Confidentiality**

***Members of the Tribunal***

Ms. Carole Malinvaud, President of the Tribunal  
Mr. Barton Legum, Arbitrator  
Prof. Zachary Douglas KC, Arbitrator

***Secretary of the Tribunal***

Mr. Benjamin Garel

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October 17, 2023

## **I. PROCEDURAL BACKGROUND**

1. On July 14, 2023, the Tribunal circulated a draft of this order (“**Draft PO2**”) for discussion by the parties.
2. On July 27, 2023, the parties commented on Draft PO2.
3. On August 2, 2023, the first session was held. During the first session, the parties and the Tribunal discussed the parties’ comments on Draft PO2 and the draft Procedural Order No. 1.
4. This Procedural Order No. 2 contains the parties’ agreements and the Tribunal’s decisions concerning the transparency regime governing this case.

## **II. LEGAL FRAMEWORK**

5. The legal framework applicable to these proceedings is determined by the North American Free Trade Agreement (NAFTA), the United States-Mexico-Canada Agreement (USMCA), the ICSID Convention, and the 2022 ICSID Arbitration Rules.
6. NAFTA Articles 1129 and 1137.4 and Annex 1137.4 and the FTC Note of Interpretation of 31 July 2001, Section A: Access to Documents contain provisions regarding transparency and confidentiality of proceedings, documents and information.
7. ICSID Arbitration Rules 62-66 contain provisions concerning the publication of the award, orders and decisions, other documents filed in the proceedings, transcripts and recordings of hearings, open hearings and the definition of confidential or protected information.
8. In accordance with ICSID Arbitration Rule 1(2), the parties may agree on other rules governing transparency and confidentiality of this proceeding.
9. In accordance with ICSID Arbitration Rule 66 confidential or protected information is information which is protected from public disclosure:
  - (a) by the instrument of consent to arbitration;
  - (b) by the applicable law or applicable rules;
  - (c) in the case of information of a State party to the dispute, by the law of that State, including but without being limited to, the Access to Information Act, the Canada Evidence Act, the Personal Information Protection and Electronic Documents Act, the Quebec Act respecting Access to documents held by public bodies and the Protection of personal information (RLRQ, Chapter A-2.1), the Quebec Act respecting the protection of personal information in the private sector (RLRQ, Chapter P-39.1), the Quebec Civil Code (Seventh Book) and the Quebec Code of Civil Procedure, as well as their amended version;
  - (d) in accordance with the orders and decisions of the Tribunal;
  - (e) by agreement of the parties;
  - (f) because it constitutes confidential business information of a disputing party or of a provincial, territorial or municipal government, or confidential business information relating to a third party or protected personal information;

- (g) because it constitutes information that is deemed to be financial, commercial, scientific or technical information supplied by third parties that has been treated in a confidential manner by those third parties
- (h) because public disclosure would impede law enforcement;
- (i) because a State party to the dispute considers that public disclosure would be contrary to its essential security interests;
- (j) because public disclosure would aggravate the dispute between the parties; or
- (k) because public disclosure would undermine the integrity of the arbitral process.

10. “Confidential Business Information” is understood to include:

- (a) trade secrets;
- (b) financial, commercial, scientific or technical information that is treated consistently in a confidential manner by the disputing party, provincial, territorial or municipal government or third 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;
- (c) information the disclosure of which could result in material financial loss or gain to the disputing party, provincial, territorial or municipal government or third party to which it relates;
- (d) information the disclosure of which could interfere with contractual or other negotiations of the disputing party, provincial, territorial or municipal government or third party to which it relates; or
- (e) other communications treated as confidential in furtherance of settlement between the disputing parties.

### **III. TRANSPARENCY RULES**

11. The Tribunal adopts the following transparency and confidentiality rules governing the Centre’s publication as concern this proceeding.

**A. AWARD (ICSID ARBITRATION RULE 62)**

12. For the purposes of Article 48(5) of the ICSID Convention and ICSID Arbitration Rule 62, the parties consent to publication of the award by ICSID on its website, with any redactions agreed by the parties, in accordance with Section G below.<sup>1</sup> The parties shall provide ICSID with their jointly redacted text within 60 days after the dispatch of the award.

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<sup>1</sup> Pursuant to ICSID Arbitration Rule 72(2) this procedural order shall continue to apply to an interpretation, revision or annulment proceeding with necessary modifications, unless the parties agree or the Tribunal or Committee orders otherwise.

**B. ORDERS AND DECISIONS (ICSID ARBITRATION RULE 63)**

13. ICSID shall publish the orders and decisions of the Tribunal, with any redactions agreed by the parties or decided by the Tribunal, in accordance with Section G below. The parties shall provide ICSID with their jointly redacted text within 60 days after the dispatch of the order or decision.

**C. WRITTEN SUBMISSIONS (ICSID ARBITRATION RULE 64)**

14. ICSID shall publish the parties' main written submissions (request for arbitration, memorial, counter-memorial, reply and rejoinder), with any redactions agreed by the parties or decided by the Tribunal, in accordance with Section G below.
15. The parties agree that ICSID will publish other written submission not falling within paragraph 14 above with any redactions agreed by the parties or decided by the Tribunal in accordance with Section G below.

**D. SUPPORTING DOCUMENTS (ICSID ARBITRATION RULE 64)**

16. ICSID Arbitration Rule 64 permits publication by ICSID of supporting documents only with the consent of both parties. As all parties did not agree, supporting documents, including exhibits, legal authorities, witness statements and expert reports (including annexes, appendices or exhibits thereto) shall not be published by ICSID.

**E. OPEN HEARINGS (ICSID ARBITRATION RULE 65(1)-(2))**

17. ICSID Arbitration Rule 65 permits ICSID hearings to be open to the public only with the consent of both parties. As all parties did not agree, hearings shall not be open to the public.

**F. TRANSCRIPTS AND RECORDINGS OF HEARINGS (ICSID ARBITRATION RULE 65(3))**

18. ICSID Arbitration Rule 65 permits publication by ICSID of transcripts and recordings of hearings only with the consent of both parties. As all parties did not agree, transcripts and recordings of hearings shall not be published by ICSID.

**G. PROCEDURE FOR REDACTIONS - NON-PUBLICATION OF CONFIDENTIAL OR PROTECTED INFORMATION (ICSID ARBITRATION RULE 66)**

19. With respect to publication pursuant to Sections A, B and C above, any confidential or protected information as defined in ICSID Arbitration Rule 66 and in this Order that is submitted to the Tribunal shall be protected from disclosure and publication in accordance with the procedure set forth below:
20. To designate as confidential information contained in pleadings, witness statements, exhibits or other documents, a disputing party must clearly indicate on each page of the document allegedly containing confidential information, the following mention: "Confidential information – Unauthorized disclosure is prohibited" or a similar mention. Each information designated as confidential must be placed within square brackets ("[ ]") and highlighted in yellow.
21. Unless disclosure is ordered by law or a tribunal, confidential information can be disclosed only in accordance with the prescriptions of this Procedural Order or with the prior written consent of the disputing party asserting confidentiality and, with respect to documents from third parties, of the owner of this confidential information.

### **Designation of confidential information**

22. Within 20 calendar days from the date of filing of a written submission, a party shall give written notice to the other party that it requests the non-disclosure of certain information it considers confidential or protected. If no such notification is given within 20 calendar days or if the parties notify the Tribunal within the same period of their agreement to the publication of a written submission without redactions, the Tribunal shall authorize ICSID to publish the document without redactions from the parties, unless the Tribunal determines on its own initiative that certain information is not to be made public in accordance with the applicable framework.
23. Within 20 calendar days of receipt of the notice referred to in paragraph 22, the other party may raise objections to the proposed redactions.
24. If no objections are raised within the deadline established in paragraph 23, the Tribunal will authorize ICSID to publish the written submission at issue with the requested redactions.
25. If objections are raised within the deadline established in paragraph 23, the parties shall confer and seek to agree on redactions within 20 calendar days of receipt of the objections to the proposed redactions. If the parties reach an agreement, the Tribunal shall authorize ICSID to publish the written submission at issue with the agreed redactions.
26. If objections remain unresolved, the disputed redaction requests and the objections thereto shall be submitted for determination to the Tribunal in the form of the Transparency Schedule set out in Annex A to this Order.
27. If information is to be redacted from a written submission in accordance with paragraphs 24, 25 or 26, the parties shall provide a redacted version of the document. Upon receipt of the redacted document, the Tribunal will ask ICSID to publish the document.

### **H. TREATMENT OF CONFIDENTIAL INFORMATION**

28. Until the lapse of any period for a disputing party to provide the other disputing party with its proposed designations of confidential information, or such earlier time should the disputing parties communicate in writing that they have no proposed designations, a written submission, supporting document, procedural or administrative correspondence sent to and received from the Tribunal, decision, order, or award shall be deemed to be entirely designated as confidential information. Thereafter, until the final designations of confidential information have been agreed by the disputing parties, or determined by the Tribunal, each disputing party's proposed designations of confidential information shall be presumed valid.
29. Except pursuant to another provision of this Order to the contrary 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 provincial, territorial or municipal governments or third parties, the owner of such confidential information, confidential information may be used only in these proceedings and may be disclosed only for such purposes to and among:
  - (a) Members of the Tribunal (and their assistants, if any), ICSID officials, court reporters and other support staff to whom disclosure is reasonably considered by one or more Members of the Tribunal to be necessary;
  - (b) counsel to a disputing party (and their support staff) or counsel to the Québec Government (and their support staff);
  - (c) representatives or employees of the disputing parties or of the Québec Government;

- (d) experts or independent consultants (and their support staff) retained or consulted by a disputing party or by the Québec Government in connection with these proceedings;
  - (e) witnesses, who in good faith are reasonably expected by a disputing party to offer evidence in these proceedings; or
  - (f) anyone when required by law, after having notified the other disputing party.
30. No disputing party shall file any confidential material covered by the terms of this Order in any court or other tribunal unless required to do so by the court or other tribunal and before bringing this Order to the attention of the court or tribunal and securing directions from this court or other tribunal on how to produce this confidential material so as to protect its confidentiality. A disputing party shall notify the other disputing party and any affected parties prior to requesting such directions from the court or other tribunal.
  31. Inadvertent or improper disclosure of Confidential Information, as set forth in the present Order, does not constitute a waiver of the designation of the information as confidential.
  32. All persons receiving Confidential Information shall be bound by this Order. Each disputing party shall have the obligation of notifying all persons receiving Confidential Information of the obligations under this Order and to ensure that persons receiving Confidential Information pursuant to paragraphs 29(d), or (e) execute a Confidentiality Undertaking in the form attached as Appendix B before gaining access to any such information. Each disputing party shall maintain copies of Confidentiality Undertakings under Appendix B and shall make such copies available to the other disputing party upon order of the Tribunal or upon the termination of this arbitration.
  33. In light of the Note of Interpretation of the NAFTA Free Trade Commission issued July 31, 2001, a disputing party shall be free to disclose redacted versions of the Parties' written submissions or of the Tribunal decisions, orders or award.
  34. Non-disputing NAFTA Parties may attend hearings, obtain a copy of the unredacted hearing transcripts and have access to Tribunal decisions, orders and award and to the disputing parties' written submissions, including those that are designated as including Confidential Information under this Order. Non-disputing NAFTA Parties shall be made aware of this Confidentiality Order and pursuant to Article 1129 of the NAFTA, shall treat all information received from the Respondent as if they were a disputing party, notably in respect of protection of Confidential Information.
  35. The time periods set out in this Order may be amended by agreement of the disputing parties, or by order of the Tribunal after hearing the disputing parties and taking into account all relevant circumstances.
  36. This Order shall be effective upon its issuance to the parties by the Tribunal.
  37. The obligations created by this Order shall survive the termination of this proceeding.

On behalf of the Tribunal,

[SIGNATURE]

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President of the Tribunal

Date: October 17, 2023

**ANNEX A TO PROCEDURAL ORDER NO. 2**

**TRANSPARENCY SCHEDULE**

[insert party]	Request [1]
Information sought to be protected from disclosure	
Legal basis for protection	
Comments	
Reply by opposing party	
Decision	

**ANNEX B – CONFIDENTIALITY UNDERTAKING**

TO: Canada (and its legal counsel) and Ruby River Capital LLC (and its legal counsel).

FROM: \_\_\_\_\_

1. IN CONSIDERATION of being provided with materials in connection with the arbitration between Ruby River Capital LLC and Canada, over which claims for confidentiality have been advanced (“Confidential Information”), I hereby agree to maintain the confidentiality of such material. It shall not be copied or disclosed to any other person who has not signed a Confidentiality Undertaking nor shall the material so obtained be used by me for any purposes other than in connection with this proceeding.
2. I acknowledge that I am aware of Procedural Order No. 2 that has been agreed to by the disputing parties, a copy of which is attached to this Undertaking, and agree to be bound by it.
3. I will promptly return or otherwise destroy any Confidential Information received by me 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.
4. I acknowledge and agree that either of the disputing parties to this arbitration is entitled to relief to restrain breaches of Procedural Order No. 2, to 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:
  - a. For residents of Canada in the Province of Québec; or
  - b. For residents of the United States of America in the District of Columbia; or
  - c. For residents of another jurisdiction, at their choice [check one box]:
    - In the Province of Québec
    - In the District of Columbia

SIGNED, SEALED AND DELIVERED before a witness this \_\_ day of \_\_\_\_\_, 20\_\_.

(Print Name) (Print Witness Name)

(Signature) (Witness Signature)