

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

BETWEEN:

LONE PINE RESOURCES INC.

Claimant

AND

GOVERNMENT OF CANADA

Respondent

PROCEDURAL ORDER ON WITHELD AND REDACTED DOCUMENTATION

24 February 2017

ARBITRAL TRIBUNAL:

**Mr. V.V. Veeder (President)
Professor Brigitte Stern
Mr. David Haigh**

1. *Introduction:* The Tribunal refers to the Parties' respective written submissions of 2 February 2017, submitted pursuant to the Tribunal's Procedural Orders Nos 1, 2 and 3.
2. The Tribunal has considered each Party's objections to the production of documentation requested by the other Party, as recorded in their said submissions. Given the large number of such objections, the timetable required for the Tribunal's decisions and the effect of those decisions, this Procedural Order necessarily takes the form of a summary. The Tribunal has nonetheless considered the Parties' submissions in full.
3. The Tribunal recognises the time and effort expended by the Parties in seeking to resolve their many differences over their first-stated objections. The Parties have thereby reached agreement on a significant number of objections that no longer require decisions from the Tribunal. There remain, however, a very large number of differences between the Parties on the withholding of whole documents or to the redaction of documents produced in part only.
4. These remaining differences between the Parties turn essentially upon the application of Article 9(1), Article 9(2)(a), (b), (e), (f) and Article 9(3)(a), (c), (d) and (e) of the IBA Rules of Evidence, as a general guide to the Tribunal's powers conferred by Articles 17 and 27(3) of the UNCITRAL Arbitration Rules (2010).
5. As to legal privilege and professional secrecy under Article 9(2)(b) of the IBA Rules, the Parties also agree on the general test expressed by the decision in *Gallo v Canada*.¹ The Tribunal considers that the same general test applies to both in-house and out-house counsel, within the private and public sector, as illustrated by the decision in *Prichard v Ontario (Human Rights Commission)*.² As a general approach, the Tribunal places on a similar footing "commercial or technical confidentiality" and "special political or institutional sensitivity" under Articles 9(2)(e) and 9.2(f) of the IBA Rules.³ Article 9(3) here plays no additional separate part in the Tribunal's decisions, excepting Article 9(3)(d): see below.
6. The Tribunal does not consider that either Party has inadvertently waived any objection to documentary production or otherwise waived any claim to legal privilege within the meaning of Article 9(3)(d) of the IBA Rules or otherwise.
7. *The Claimant's Objections:* The Tribunal refers to the Claimant's schedule attached to its submissions of 2 February 2017 (in electronic form). Applying Article 9(2)(b) and (e) of the IBA Rules, the Tribunal has recorded its decisions in the 14th column against each of the items numbered 1 to 291, with "N" recording the Tribunal's rejection of the Respondent's documentary request (thereby upholding the Claimant's objection) and "O" recording that no decision is now required from the Tribunal. This completed schedule (in electronic form) is to be treated as part of this Procedural Order.

¹ *Gallo v Canada*, Procedural Order No 3, 8 April 2009.

² *Prichard v Ontario (Human Rights Commission)* [20004] 1 R.C.S. 809.

³ See *The IBA Commentary on the Revised Text of the 2010 IBA Rules*, p. 26.

8. *The Respondent's Objections:* The Tribunal regrets that it has found the Respondent's schedules, both in paper and electronic form, impractical for the purpose of this Procedural Order. These are not therefore attached to this Procedural Order. The Tribunal therefore prefers to use the "Annexe" to the Respondent's submission of 2 February 2017. This Annexe breaks down the Respondent's disputed objections into separate categories, which it is appropriate to address in turn.

9. As to the documentation in Categories P-1 to P-7, the Tribunal rejects the Claimant's documentary requests (thereby upholding the Respondent's objections) under Article 9(2)(f) of the IBA Rules.

10. As to the documentation in Categories I-1 to I-4, the Tribunal rejects the Claimant's documentary requests (thereby upholding the Respondent's objections, based also on an absence of relevance and materiality) under Articles 9(2)(a) and 9(2)(f) of the IBA Rules.

11. As to the documentation in Category I-5 relating to the Law of 13 June 2011, the Tribunal rejects in principle the Respondent's objections (thereby ordering the production of the same to the Claimant). However, if and to the extent that redactions are required to exclude irrelevant or immaterial passages from production (as suggested in the Respondent's said submissions, at page 10), the Respondent is hereby permitted to do so.

12. As to the documentation in Category E (comprising of "*ébauches ou projets de documents*"), the Tribunal rejects the Claimant's documentary requests (thereby upholding the Respondent's objections based also on an absence of relevance and materiality) under Articles 9(2)(a) and 9(2)(f) of the IBA Rules.

13. True copies of the documentation ordered to be produced, as above, shall be so produced by the requested Party to the requesting Party as soon as practicable; but not later than 15 days from the date of this Procedural Order.

[Signed]

V.V. Veeder
On behalf of the Tribunal
Date: 24 February 2017