

**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 THE CLAIMANT'S APPLICATIONS
DATED 31 MARCH 2017 AND 27 APRIL 2017**

4 May 2017

ARBITRAL TRIBUNAL:

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

A: Introduction

1. The Tribunal refers to the letter from the Claimant dated 31 March 2017, the letter dated 10 April 2017 from the Respondent, the letter dated 27 April 2017 from the Claimant and the letter dated 2 May 2017 from the Respondent (with their respective attachments), following the Tribunal's Procedural Order of 24 February and 1 March 2017 on certain documentation to be produced by the Respondent by 17 March 2017 ("the Procedural Order").
2. The Tribunal has also been sent copies of the Parties' inter-party correspondence, namely the letter dated 13 April 2017 from the Claimant, the letter dated 21 April 2017 from the Respondent, and the second letter dated 2 May 2017 from the Respondent.
3. The Parties' correspondence raises distinct procedural disputes between the Parties over outstanding document production and the procedural timetable. It is convenient to consider each in turn.

B: Document Production

4. The Tribunal understands that the Respondent produced to the Claimant, on 17 March 2017, 14 of the 23 documents at issue under the Procedural Order, of which 3 were produced in a form partly redacted by the Respondent. The Claimant's principal application concerns only these 9 disputed documents, as listed in Annex A to the Respondent's letter dated 10 April 2017 as Nos 112, 114, 147, 162, 163, 168, 177, 183 and 199.
5. As to these 9 documents that have not been produced by the Respondent (either in whole or in part) on grounds of special political or institutional sensitivity under Article 9(2)(f) of the IBA Rules, the Tribunal understands that 2 are drafts containing general information for presentation to the Québec Council of Ministers; 2 are "plans de communications"; 2 are drafts of legislative text; 2 contain "simplement" a decision by the Council of Ministers; and the last is a note "présentant les actions ayant menés au Projet de la loi no. 18 et le contenu de ce projet de loi" (see page 5 of the Respondent's letter dated 10 April 2017).
6. As to the documents produced in a partly redacted form by the Respondent under Article 9(2)(f) of the IBA Rules, the Tribunal understands that these redactions comprised only: "la recommandation au Conseil des Ministres" (see also page 5 of the Respondent's letter dated 10 April 2017).
7. The Tribunal notes from the Claimant's letter dated 27 April 2017 and the Respondent's letter dated 2 May 2017 to the Claimant that the numbers of documents withheld by the Respondent, in whole or in redacted part, may be different from the numbers listed above. For present purposes, the Tribunal does not consider these differences to be material.

8. There is a related subsidiary issue between the Parties regarding 2 documents (numbered 162 and 163) where, by its letter dated 17 March 2017 to the Claimant, the Respondent claimed the further right to withhold the same on the separate ground of legal privilege under Article 9(2)(b) of the IBA Rules, in addition to its existing objection based on special political or institutional sensitivity under Article 9(2)(f) of the IBA Rules. The Tribunal understands that these two documents are draft legislative texts prepared by a lawyer in the Québec Government, acting in that capacity (see the Respondent's letter dated 10 April 2017, page 12).
9. By its letter dated 31 March 2017, the Claimant disputed this claim to legal privilege (having been earlier notified of such claim by the Respondent's letter dated 17 March 2017 to the Claimant). By its letter dated 31 March 2017, the Claimant requested an order from the Tribunal that these 2 documents be submitted to the Tribunal to decide for itself the Respondent's claim of legal privilege (Part II).
10. As to the 26 "new" documents listed in Annex C of the Respondent's letter dated 10 April 2017 (see also pages 12ff of the letter), the Tribunal understands that 10 have been produced by the Respondent to the Claimant. 8 of these 10 produced documents were partly redacted by the Respondent and the remaining 16 of the 26 documents were withheld in full from production by the Respondent, on grounds of legal privilege and special political or institutional sensitivity under Articles 9(2)(b) and 9(2)(f) of the IBA Rules.
11. The Tribunal understands that, given the timing of the Respondent's case on these "new" documents, the Claimant may not have been in a position, as regards the Tribunal, to respond to the Respondent's case on 24 of these 26 "new" documents.
12. *The Parties' Cases:* In brief, the Claimant, by its letter dated 31 March 2017 seeks a peremptory order from the Tribunal, at this stage of these arbitration proceedings, declaring the Respondent in deliberate and serious breach of the Procedural Order (Part I, paragraph 1) and drawing certain adverse inferences against the Respondent's case on the merits in this arbitration under Article 9(5) of the IBA Rules (Part 1, paragraph 2). The Claimant also seeks an order striking out parts of the Respondent's counter-memorial and precluding certain submissions (Part 1, paragraph 3); and it claims an interim (partial) award on costs against the Respondent in the amount of US\$ 50,000 (Part I, paragraph 4). The Claimant's full claimed relief is set out in Part IV of its letter dated 31 March 2017 (pages 11 and 12).
13. In brief, the Respondent rejects in full the relief claimed by the Claimant. The Tribunal has noted the several reasons listed by the Respondent for not producing the documents (whether at all or in unredacted form), as set out in its letter dated 10 April 2017.
14. *The Tribunal's Decisions:* As to the Claimant's principal application, given the terms of this Procedural Order and also the timing of the Parties' procedural dispute before the Hearing, the Tribunal thinks it inappropriate to address here, in full, the Parties' respective written submissions set out in their respective letters dated 31

March and 10 April 2017. The Tribunal has considered and deliberated upon the Parties' respective submissions, together with the Parties' inter-party correspondence listed above; but this is a time when it seems wiser to say less, rather than more.

15. The Tribunal concludes that the Claimant's principal application regarding the 9 documents, whilst timeously made, is not yet ripe for final decision by the Tribunal; and, further, that any premature decision on the Claimant's application or the Respondent's response, at this stage of the arbitration, could jeopardise the fairness of the Hearing and the status of any Award. Hence, for these reasons, the Tribunal makes no order for the time being on the Claimant's principal application, save to reserve it in full for further submissions by the Parties at or soon after the Hearing, if and to the extent then relevant as decided by the Tribunal.
16. As to Documents 162 and 163, the Tribunal is satisfied that the Respondent has made out a sufficient case for its objection based on legal privilege under Article 9(2)(b) of the IBA Rules. Accordingly, for this and other reasons, the Tribunal dismisses the Claimant's application that the Tribunal review these two documents *ex parte*, so as to check the Respondent's claim to legal privilege.
17. As to any of the 26 "new" documents, the Tribunal grants permission to the Claimant to respond in writing to the Respondent's letter dated 10 April 2017, as soon as practicable but not later than 8 May 2017. Otherwise, the Tribunal makes no further order here in regard to these "new" documents.

C: Procedural Timetable

18. The Claimant seeks a postponement of the deadline for its reply memorial to 26 May 2017, with a corresponding curtailment of 3 weeks for the Respondent's rejoinder memorial to be submitted by 14 July 2017 (see Part III of the Claimant's letter dated 31 March 2017). The Respondent objects to the Claimant's application (see the Respondent's letter dated 10 April 2017, page 15). The Tribunal also notes the Respondent's own suggestions for amending the procedural timetable (as set out in its letter dated 10 April 2017, at page 16 and column 6 of the attached Annex C and its letter dated 2 May 2017, at page 1 and column 4 of the attached revised Annex C). The Tribunal further notes the Claimant's revised counter-suggestions (as set out in its letter dated 27 April 2017). Accordingly, under the Parties' revised suggestions, the Claimant is to submit its reply memorial on 9 May 2017 (per the Respondent) or 5 June 2017 (per the Claimant) and the Respondent its rejoinder memorial by 18 July 2017 (per the Respondent).
19. *The Tribunal's Decision:* The Tribunal regrets that the procedure for document production has taken much longer and with many more difficulties than had been originally anticipated at the time of Procedural Order No 2. Nevertheless, the bulk of document production by the Respondent to the Claimant, to the Tribunal's understanding, was completed by early December 2016. The Parties' subsequent disputes over document production, whilst possibly important, addressed a significantly lesser amount of documentation. The Tribunal is not currently in a position, however, to assess such importance for the Claimant's next pleading.

20. In the circumstances, the Tribunal dismisses the Claimant's application for its proposed changes to the current procedural timetable. However, as a matter of fairness, the Tribunal thinks it necessary to accommodate the Claimant to a lesser extent in regard to its reply memorial, without causing unnecessary procedural harm to the Respondent in regard to its rejoinder memorial. The Tribunal has taken note that its accommodation exceeds the time-limits suggested by the Respondent in its Revised Annex C.
21. Accordingly, balancing the interests of both Parties, the Tribunal decides that the Claimant shall submit its reply memorial by 19 May 2017; the Respondent shall submit its rejoinder memorial by 1 August 2017; and the Hearing shall commence, as already fixed, in Toronto on 2 October 2017. All other intermediate dates between May and October 2017 (namely Steps 16 to 19 in Procedural Order No 2) shall be delayed as indicated by separate procedural order to be issued shortly, as also the organisational meeting by telephone conference-call (Step 20) to be held at a date and time still to be fixed by the Tribunal in early to mid-September 2017.
22. Finally, the Tribunal draws the Parties' attention to the essential importance of maintaining the October 2017 dates for the Hearing, if at all possible. The procedural timetable leading to the Hearing is now tight; but in the Tribunal's view, this timetable remains possible for the Parties, any Non-Disputing Parties and the Tribunal. Accordingly, the Parties are requested to do everything in their own power to meet all dates necessary for the Hearing in October.
23. This Procedural Order is issued at the Place of Arbitration.

[Signed]

V.V. Veeder
On behalf of the Tribunal
Date: 4 May 2017