

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Global Telecom Holding S.A.E.

v.

Canada

(ICSID Case No. ARB/16/16)

PROCEDURAL ORDER NO. 9
DECISION ON GTH'S REQUEST OF 18 MARCH 2019

Members of the Tribunal

Prof. Georges Affaki, President of the Tribunal
Prof. Gary Born, Arbitrator
Prof. Vaughan Lowe, Arbitrator

Secretary of the Tribunal

Ms. Lindsay Gastrell

25 March 2019

I. BACKGROUND

1. On 1 June 2018, the Tribunal issued Procedural Order No. 3, which set forth the Tribunal's decision on each of the Parties' respective requests for document production.
2. Since the issuance of Procedural Order No. 3, the Tribunal has issued Procedural Order Nos. 4, 5, 6 and 8, addressing the Parties' disputes on issues of legal privilege.
3. On 18 March 2019, GTH wrote to the Tribunal, challenging the completeness of the Respondent's document production pursuant to Procedural Order No. 3. Together with its letter, GTH submitted Appendices A to M and exhibit C-257. GTH informed the Tribunal that, in July 2016, its Canadian counsel had submitted a request to the Ministry for Innovation, Science and Economic Development ("**ISED**")¹ pursuant to Canada's Access to Information Act. In November 2016, GTH's Canadian counsel challenged ISED's response with the Information Commissioner. According to GTH, the Commissioner found the complaint to be well founded, and "*noted that over 500,000 pages of documents have been identified as potentially relevant, but had not yet been reviewed.*"² Then, on 8 March 2019, GTH's Canadian counsel received 625 pages (55 documents) from ISED (the "**ATI Documents**"). GTH alleges that "*at least 15 of the newly received ATI documents had not been produced to GTH in the Arbitration despite their obvious relevance to several of the issues in dispute,*" and considers this "*clear evidence that Canada's productions were deficient.*"³
4. In light of this issue, GTH requests the following relief:

In the first instance, GTH respectfully requests that the Tribunal order Canada to confirm the following:

- i. That Canada's document collection efforts to comply with its obligations under PO 3, involved the collection and review of the

¹ ISED was formerly known as Industry Canada.

² GTH's Letter of 18 March 2019, p. 3 and **Appendix A**, Letter from Information Commissioner of Canada to Aird & Berlis, 14 December 2018, pp. 5-6.

³ GTH's Letter of 18 March 2019, p. 3.

500,000 pages identified by ISED as potentially responsive to Ms. Backman's ATI requests.

ii. That Canada undertook good faith efforts to ensure that all relevant documents responsive to PO 3 were collected and reviewed, and to detail the procedure used, including the steps undertaken to collect and review electronic records and to preserve the parent-attachment relationships in both electronic and hard copy records.

iii. That Canada has produced all draft documents responsive to PO 3, where the draft is not an exact duplicate of a document already produced.

In the event Canada is unable to confirm the above (or its confirmation is unsatisfactory), GTH respectfully further requests that the Tribunal order Canada to immediately remedy the deficiencies in its disclosure, undertake a review of any documents not yet reviewed that could be responsive to GTH's document requests, and produce such documents as soon as possible. If Canada fails to do so, the Tribunal should be willing to adopt the appropriate adverse inferences with respect to any such failures.

(...) in the interest of procedural fairness and propriety, as well as parity of arms, in the event that Canada produces additional documents as a result of its earlier failure to satisfy its disclosure obligations, GTH respectfully requests permission to submit additional factual exhibits on the record either as part of the post-hearing submission process (if any) or as standalone exhibits.⁴

5. Upon receipt of GTH's letter, the President of the Tribunal wrote to the Parties to encourage them to confer together with an aim to reaching a consensus on the matters outlined in GTH's letter. In the event the Parties were unable to agree, the President invited Canada to provide its response by open of business on 22 March 2019 (Washington, D.C. time).
6. By email of 22 March 2019, Canada informed the Tribunal that the Parties were still consulting in an attempt to resolve the matters addressed in GTH's letter, and requested a one-day extension to file its response. Canada noted that GTH had consented to the extension request. On the same day, the President of the Tribunal informed the Parties that the extension was granted.

⁴ GTH's Letter of 18 March 2019, p. 5.

7. By letter of 23 March 2019, Canada informed the Tribunal that the Parties had been unable to resolve their disagreement and set out its response to GTH's letter of 18 March 2019. Together with its letter, Canada submitted Appendices A and B. Appendix A contained a Schedule of both Parties' positions on each of the 15 ATI Documents that GTH had identified as being wrongly withheld from Canada's document production (separated into ten categories). That Schedule is contained as Annex A to the Order, together with the Tribunal's determinations in respect of each document.
8. In its letter, Canada acknowledged that two of the ATI documents should have been produced, but denied that this could be considered evidence that Canada had carried out a flawed approach to its document production. Canada stated that "[i]f *anything*, the Claimant received more documents than what it was entitled to, not less."⁵
9. In addition, Canada responded as follows to GTH's request that Canada confirm it has reviewed the 500,000 pages referenced by the Information Commissioner:

Contrary to what GTH implies in its letter to the Tribunal, ISED has not yet collected half a million pages of documents. That number is merely an estimate of the number of pages that may have to be collected and reviewed by ISED in response to GTH's access to information request. As such, Canada is unable to confirm, as GTH requests, that it has collected or reviewed the documents that ISED has collected to respond to GTH's access to information request. Moreover, GTH's access to information requests are broader than its document production requests in this arbitration.⁶

II. ANALYSIS

10. As a preliminary matter, the Tribunal notes that GTH's request is admissible. Whilst Canada's alleged deficiencies in complying with Procedural Order No. 3 go back at least to 26 November 2018 when Canada asserted that it conducted the necessary search for responsive documents, it is only when GTH received the ATI Documents on 8 March 2019

⁵ Canada's letter of 23 March 2019, p. 3.

⁶ Canada's letter of 23 March 2019, p. 5.

that it was able to determine that the production was incomplete.⁷ In its letter of 23 March 2019, Canada admits that two wrongly withheld documents should have been produced as being responsive to the document production order issued in Procedural Order No. 3.⁸

11. Regarding GTH's request for relief in Section B of its letter of 18 March 2019, the Tribunal does not consider it appropriate to require Canada to provide the confirmation requested by GTH in Section B(i) when Canada underscores that the universe of 500,000 potentially responsive documents is yet to be collected, and therefore to exist. Said differently, the benchmark against which the Tribunal is asked to decide on Canada's compliance, or lack thereof, is yet inexistent. In light of this fact, the Tribunal notes with satisfaction Canada's unqualified statement of compliance with all of its document production obligations stated in its letter of 15 March 2019 and finds no compelling reason further to require an additional statement of Canada that mirrors the terms of the relief set out by GTH in Section B(i).⁹
12. Likewise, the Tribunal determines that Canada's unqualified statement of compliance with all of its document production obligations as set out in its letter of 15 March 2019 satisfies GTH's request for relief in Section B(ii). The Tribunal does not consider it necessary to require a different, more formal, statement absent evidence of a delinquent withholding of responsive documents or of a flawed search process for responsive documents. The onus on evidencing that Canada's unqualified statement its letter of 15 March 2019 is incorrect or utterly misleading falls on GTH.
13. Concerning GTH's request for relief in Section B(iii), the Tribunal has been presented with no evidence that the Parties agreed that drafts of responsive documents shall not be produced where the final responsive document is produced. Canada could have sought confirmation of its purported understanding of the Parties' agreement as narrated in footnote 9 of its letter of 23 March 2019. Absent an evidence of a consensus between the

⁷ GTH's Letter of 18 March 2019, **Appendix C**, Letter of 13 March 2019 from Mr. Rahim Moloo to Ms. Sylvie Tabet.

⁸ Canada's letter of 23 March 2019, p. 3.

⁹ GTH's Letter of 18 March 2019, **Appendix G**, Letter of 15 March 2019 from Mr. Jean-François Hébert to Mr. Rahim Moloo ("we reiterate that we have fully complied with all of our document production obligations in this arbitration.").

Parties on that issue, the Tribunal notes that its document production order in Procedural order No. 3 does not differentiate between drafts and final documents. Any responsive document must be produced, whether it is in a draft or a final version. Canada cannot arrogate the right to determine which drafts do not *substantially* differ from the final version that has been produced, and therefore be legitimately withheld. Accordingly, Canada is ordered to produce forthwith on a rolling basis all responsive documents that are available in a draft version regardless of the materiality of the difference between the draft and the produced final version.

14. GTH's request for leave to produce additional evidence after the hearing is dismissed absent a sufficiently particularized application that would warrant such an extraordinary measure happening after the end of the unique evidentiary hearing scheduled in this arbitration.
15. Finally, as noted above, the Tribunal's observations with regard to each of the 15 ATI Documents alleged by GTH to have been wrongly withheld are contained in the Schedule at Annex A to this Order and constitute an inseparable part thereof.

III. DECISION

16. For the reasons stated above, the Tribunal decides as follows:
 - a. GTH's request for relief in Section B(i) of its letter of 18 March 2019 is dismissed.
 - b. GTH's request for relief in Section B(ii) of its letter of 18 March 2019 is dismissed.
 - c. In respect of GTH's request for relief in Section B(iii) of its letter of 18 March 2019, Canada is ordered to produce forthwith on a rolling basis all responsive documents that are available in a draft version regardless of the materiality of the difference between the draft and the produced final version.
 - d. GTH's request for leave to produce additional evidence after the hearing is dismissed absent a sufficiently particularized application.

On behalf of the Tribunal,

[signed]

Prof. Georges Affaki
President of the Tribunal
Date: 25 March 2019

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ATI Reference	Document Request	Canada's Comment (March 21, 2019)	GTH's Response (March 22, 2019)	Canada's Reply	Tribunal's Observations
[1] A-2016-00458 pp 211-226	Request 5	This document was determined to be a working draft of a document that was produced and which you filed as exhibit C-257.	There is no basis on which to conclude that this is a "working draft" of Exhibit C-257. The document is not labeled "draft," is dated four months prior to Exhibit C-257, and contains different content to Exhibit C-257. This document is responsive and should have been disclosed.	Upon further review this document should not have been identified as a working draft and should have been produced.	The Tribunal takes note that Canada admits improper withholding and that the document is now in GTH's possession.
[2] A-2016-00458 pp 246-248 A-2016-00458 pp 249-250 A-2016-00458 pp 660-676	Request 3	This document is not responsive to request no.3 or to any other document request. It relates to tower siting, which is a distinct matter from tower/site sharing.	Antenna siting was a factor taken into account by Industry Canada when it developed the tower/site sharing conditions in the 2008 AWS Auction. This document is responsive and should have been disclosed.	The documents do not relate to the adoption of mandated tower sharing and roaming provisions. Rather, they provide clarity to wireless telecommunications service providers concerning the procedures and approval process for the installation of towers.	GTH has not evidenced that its initial document production request as stated in Request 3 or in Request 5 can only be understood as also encompassing tower siting. Canada's not providing documents in relation to tower siting is therefore not a breach of Canada's production obligations pursuant to Procedural Order No. 3. The procedural rules in effect in this arbitration do not entitle GTH to present a new separate document production request. GTH's argument is dismissed

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<p>[3] A-2016-00458 pp 251-267</p>	<p>Request 3</p>	<p>Although a later version of this document was produced out of an abundance of caution at page CAN00036499 of Canada's production, the document is not responsive to request no.3 or to any other document request. It relates to tower siting, which is a distinct matter from tower/site sharing.</p>	<p>Canada produced a different version of this presentation because the presentation is responsive. Antenna siting was a factor taken into account by Industry Canada when it developed the tower/site sharing conditions in the 2008 AWS Auction. This document specifically references New Entrants' push for site sharing and need for "certainty" with respect to towers. (Slide 11). This document is responsive and should have been disclosed.</p>	<p>The reference to "certainty" found in slide 11 of this document is not "with respect to towers". Rather, this slide sets out the anticipated reactions of various stakeholders with respect to the updated antenna approval process. It notes that New Entrants will likely appreciate the timelines as it provides additional certainty concerning the siting approval process and implementation schedule. This document is not relevant to the development of mandated tower sharing and roaming conditions.</p>	<p>Same reasoning and decision as in [2] above.</p>
<p>[4] A-2016-00458 pp 593-609 A-2016-00458 pp 610-629</p>	<p>Request 3</p>	<p>This document is not responsive to request no.3 or to any other document request. It relates to tower siting, which is a distinct matter from tower/site sharing. Moreover, it is a working draft of the document produced at page</p>	<p>Canada produced yet another "working draft" of CAN00036499 at CAN00037385, illustrating the seemingly arbitrary manner in which Canada disclosed or withheld draft documents. These documents show Canada knew access to towers was a "key barrier to</p>	<p>The documents do not relate to the adoption of mandated tower sharing and roaming provisions. Rather, they provide clarity to wireless telecommunications service providers concerning the procedures and approval</p>	<p>Same reasoning and decision as in [2] above. GTH does not provide in support of its application sufficient evidential material and arguments to allow the Tribunal to decide with certainty whether Canada's previous production of a working draft that appears to be responsive to [4] precludes Canada from arguing now that the</p>

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		CAN00036499 of Canada's production.	competitive entry" and was considering the TPRP's recommendations regarding antenna tower sharing (pp. 602, 617). The documents are responsive and should have been disclosed.	process for the installation of towers.	documents do not relate to the adoption of mandated tower sharing and roaming provisions and, as such, are not responsive to Request 3.
[5] A-2016-00458 pp 630-659	Request 3	This document is not responsive to request no.3 or to any other document request. It relates to tower siting, which is a distinct matter from tower/site sharing. Moreover, it is a working draft of the document produced at page CAN00037385 of Canada's production which was produced out of an abundance of caution.	As this document demonstrates, Canada's decision making as to when something is, or is not, a "working draft" is arbitrary. The version Canada has produced (CAN00037385) is also a "working draft". Moreover, antenna siting was an important factor taken into account by Industry Canada when it developed the tower/site sharing conditions in the 2008 AWS Auction. This document is responsive and should have been disclosed.	The document does not relate to the adoption of mandated tower sharing and roaming provisions. Rather, it provides clarity to wireless telecommunications service providers concerning the procedures and approval process for the installation of towers. It is a working draft as evidenced by the fact that the date on the first page has been left blank.	Same reasoning and decision as in [4] above. For the avoidance of doubt, working drafts of responsive documents are required to be produced without delay as ordered in paragraph 16(c) above.
[6] A-2016-00458 pp 701-702	Request 7	The metadata associated with this document indicates that it is from March 2014. As such, the document is not responsive to document	This document is highly responsive (entitled "Spectrum Transfers Cheat Sheet") and is undated. Please provide the metadata	The metadata date fields associated to this document have been provided to GTH earlier today.	The Tribunal takes note that the document is now in GTH's possession.

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		request 7 which is limited to documents between January 1, 2013 and June 28, 2013.	for this document so GTH can assess its responsiveness.		
[7] A-2016-00458 pp 703-704 A-2016-00458 pp 705-707	Request 5	This document is not responsive to request no.5 or to any other document request. It relates mainly to tower siting, which is a distinct matter from tower/site sharing and contains a mere reference to the launch of the public consultations to amend the antenna tower and site sharing conditions.	That a document “relates mainly” to one topic which Canada apparently believes to be unresponsive is beside the point. Document responsiveness is not determined by the content a document “mainly” contains. If a document contains responsive information, the document is responsive. Indeed, the title of these documents, “Antenna Tower Siting Procedures and Mandated Tower Sharing,” underscores the close link between the concept of siting procedures and sharing procedures. These documents are responsive and should have been disclosed.	These documents do not relate to, set forth, discuss, consider or analyze Canada’s decision to amend the Conditions of License on roaming and tower/site sharing and are therefore not responsive to request 5.	Same reasoning and decision as in [2] above. For the avoidance of any doubt, the Tribunal determines that if a document is responsive to a document production order and also contains information relating to tower siting which had not been specifically requested by GTH, Canada must produce the document in its entirety, barring a legitimate reason pursuant to article 9.2 of the IBA Rules justifying withholding the document or redacting parts of it.
[8] A-2016-00458 pp 708-710	Request 7	The document summarizes publicly available information provided by	Based on our searches, this document is not publicly available. If it were publicly available, surely Canada	The information summarized in this document is available	The Tribunal takes note that the document is now in GTH’s possession.

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		third parties during a public consultation process.	would have indicated where it can be found. It is responsive and should have been disclosed.	at: https://www.ic.gc.ca/eic/site/smt-gst.nsf/eng/sf10615.html	
[9] A-2016-00458 pp 720-723	Request 7	The Minister's speech is publicly available.	Based on our searches, this document is not publicly available. If it were publicly available, surely Canada would have indicated where it can be found. It is responsive and should have been disclosed.	This document contains speaking points for a speech given by Minister Paradis on March 7, 2013. The final version of these speaking points are found at: https://www.canada.ca/en/news/archive/2013/03/new-measures-increase-competition-wireless-sector.html They have been produced as Exhibit C-156 .	The Tribunal takes note that the document is now in GTH's possession.

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<p>[10] A-2016-00458 pp 803-804</p>	<p>Request 7</p>	<p>The document is a near duplicate of a document which can be found at pages CAN00034381 and CAN00034382 of Canada's production.</p>	<p>The top communication in this email sends an updated, and different, attachment to that sent at CAN00034381, and therefore it is not a "near duplicate." The document, and its attachment, are responsive and should have been disclosed.</p>	<p>Although the attached briefing note has been produced and the top communication does not contain any substantive information, Canada agrees that this document should have been produced.</p>	<p>The Tribunal takes note that Canada admits improper withholding and that the document is now in GTH's possession.</p>
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