

**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. 6**

**Decision on Outstanding Procedural Issues**

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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*

**26 February 2024**

[CORRECTED]

## I. Background

1. On 27 September 2023, the Tribunal adopted the Parties' mutually agreed timetable modifications:
  - 27 October 2023: Production of Documents
  - 25 January 2024: Claimants' Reply Memorial
  - 24 April 2024: Respondent's Rejoinder Memorial.
2. On 6 October 2023, with a view to setting hearing dates, the Tribunal invited the Parties to confer and agree on the number of hearing days required and a broad period in which the hearing should take place. The Tribunal would then consult their schedules and propose hearing dates to the Parties.
3. On 11 October 2023, further to the Tribunal's instructions, the Parties reverted to the Tribunal noting that up to nine hearing days were required and proposed hearing dates between 14 October and 15 November 2024.
4. On 17 October 2023, the Tribunal relayed to the Parties that, despite their best efforts to make the Parties' proposed hearing time window work, the first period the Tribunal would be available for nine consecutive days was 3 March-16 April 2025. The Tribunal then asked the Parties to confirm their availability for a hearing within that time window.
5. On 24 October 2023, the Parties both expressed concern over the delay caused by a 2025 hearing, and Claimants noted that they were not amenable to splitting the hearing as suggested by Respondent as this would increase costs, although Claimants were amenable to a one-day final argument occurring later, potentially virtually, albeit the time zone difference could make this difficult to coordinate.
6. On 30 October 2023, after undertaking another review of its hearing availability and consulting with the Parties on two more occasions in order to find hearing dates in 2024, the Tribunal rescheduled some of its commitments to offer the Parties hearing dates of 16-24 September 2024 (with a carve-out of a few hours on 17 September) inclusive of the weekend. The Parties confirmed their availability for these hearing dates on 1 November 2023 and, on 3 November 2023, the Tribunal confirmed that the Hearing would be held from 16-24 September 2024 (with a carve-out of a few hours on 17 September) inclusive of the weekend.
7. On 22 November 2023, Claimants wrote to the Tribunal that “[t]he Parties have agreed to a two-week extension to both the Reply and Rejoinder Memorials and accompanying materials[, with t]he Claimants' Reply [...] due on February 8, 2024 and the Respondent's Rejoinder [...] due on May 22, 202[4].”

8. On 12 December 2023, the Tribunal wrote to the Parties requesting a clarification of the Rejoinder dates as “*there is a four-week extension for Respondent’s Rejoinder as the letter indicates it is now due on 22 May 2024 (and it was previously due on 24 April 2024).*”
9. On 22 December 2023, the Tribunal relayed to the Parties that it had discussed the Parties’ proposed modified procedural calendar and expressed concern that the proposed submission dates would be too close to the 16-24 September 2024 scheduled hearing dates. In its message, the Tribunal proposed to modify the time frames for the NAFTA 1128 and Amicus submissions, and the Tribunal invited the Parties to revert on certain hearing-related matters by 4 January 2024.
10. On 2 January 2024, Claimants advised that Theodore David Einarsson (“Davey Einarsson”) had passed away that day. The following day, the Tribunal extended its sympathy to Davey Einarsson’s family and noted that it understood that Claimants would need time to instruct counsel on behalf of Davey Einarsson’s estate, so the Tribunal would await further information, including any extension requests. The Tribunal noted that it would consider, in consultation with the Parties, if other adjustments to the calendar were needed because of any extensions that might be requested.
11. Later, on 3 January 2024, Respondent wrote expressing its condolences to Davey Einarsson’s family and stating that it would stand by for further information from Claimants regarding Mr. Einarsson’s estate and “*any implications on the claim once they are ready to provide it.*” Respondent also requested confirmation that the Tribunal’s deadline for the Parties to confer on hearing matters by 4 January 2024 was also temporarily postponed, which the Tribunal so confirmed.
12. On 13 January 2024, the Presiding Arbitrator inquired from the Parties as to when the Tribunal might hear back from Claimants to finalize the schedule for the procedural timetable.
13. In the absence of a response, on 22 January 2024, the Tribunal wrote to the Parties noting that it looked forward to hearing from Claimants, or the Parties jointly, by the end of the week, and the Tribunal explained that at this stage, and in these circumstances, the Tribunal wished to hold a further Case Management Conference (“2024 CMC” or “CMC”) to discuss the further procedure for this proceeding, including the timetable and Hearing logistics.
14. On 23 January 2024, Claimants wrote to notify the Tribunal that “[i]t has now been determined that Paul Einarsson is the executor of the estate of Theodore David Einarsson, and also the beneficiary of Theodore David Einarsson’s interests in GSI.” Claimants also noted that Davey Einarsson’s passing resulted in a delay in Claimants’ availability to prepare the Reply and advised that, while it would try to meet the filing deadline, additional time might be required. Furthermore, Claimants informed the Tribunal that the Parties were communicating regarding potential deficiencies in Respondent’s document production, which might require a motion to compel, which would necessitate a delay in the schedule

as Claimants would then have to review any compelled documents prior to finalizing their Reply.

15. On 24 January 2024, to ensure that there would be no prejudice to Canada, Respondent requested “*that the Claimants produce documents evidencing the following: (1) Paul Einarsson’s legal authority to act as executor of Theodore David Einarsson’s estate; (2) power of attorney confirming authority of Stikeman Elliot to represent the estate of Theodore David Einarsson in these proceedings; (3) Theodore David Einarsson’s last will and testament and any related estate-plans with respect to GSI; (4) corporate documentation establishing that Paul Einarsson is the beneficiary of Theodore David Einarsson’s interests in GSI; (5) any court filings, including creditor claims, by, on behalf of, or against the estate of Theodore David Einarsson; and (6) any published notice regarding the timeline to file claims against the estate of Theodore David Einarsson.*” Respondent submitted that these documents were relevant and material to Claimants’ ability to continue their claim against Canada on behalf of Theodore David Einarsson and/or GSI, as well as relevant and material to the calculation of damages. Respondent also noted that should Claimants make a motion to compel, it would respond, but Respondent would oppose an extension for Claimants’ Reply because of alleged document production issues as Claimants had been in possession of Respondent’s document production and privilege log since 27 October 2023.
16. On 30 January 2024, Claimants filed a Motion to Compel Documents and Request for an Extension of Time to file a Reply, which Claimants supplemented on 1 February 2024.
17. On 31 January 2024, Respondent opposed the Motion to Compel as untimely since it was filed 95 days after Claimants had received Respondent’s document production and privilege log and only 10 days before Claimants’ Reply was due. Respondent also noted that the motion was incomplete as it was missing the referenced witness statement. Moreover, Respondent stated that Claimants’ request for an extension to file their Reply also jeopardizes the hearing dates. Respondent requested that the timetable for the response and resolution of the motion be discussed at the Case Management Conference.
18. On 31 January 2024, in a letter dated 26 January, Claimants reiterated that Paul Einarsson was the executor of Davey Einarsson’s estate and beneficiary of his interests in GSI. In a second message of the same date, Claimants provided a redacted copy of Davey Einarsson’s will as evidence that Paul Einarsson was the executor of Davey Einarsson’s estate and beneficiary of his interests in GSI. Claimants asserted that Paul Einarsson had had the POA for Theodore David Einarsson for the duration of the proceeding and had confirmed via a separate letter that Stikeman Elliott LLP was his chosen representative throughout this arbitration. In this letter, Claimants also wrote in support of their Motion to Compel Documents and the need for an extension for the Reply.
19. On 6 February 2024, the Tribunal held the 2024 CMC to discuss the future proceeding, including issues related to the passing of Theodore David Einarsson on 2 January 2024 and Claimants’ Motion to Compel and request for an extension to file the Reply. During the CMC, Claimants accepted a possible filing date by end February 2024, albeit noting that

this would pose a strain. The Tribunal agreed, without objection from Respondent, that the 8 February 2024 Reply filing date would be lifted without setting a new date for the submission. The Parties also agreed that the Hearing needed to be postponed and they noted that the earliest available date previously indicated by the Tribunal after September 2024 had been in March 2025. The Parties then asked for a renewed assessment of the Tribunal's availability in the hope of scheduling the Hearing before the end of the year.

20. On 9 February 2024, the Tribunal issued Procedural Order No. 4 (“**PO 4**”) ordering Claimants to submit, by 23 February 2024, “(a) a full and reasoned explanation (with all supporting materials) as to Mr. Harold Paul Einarsson’s authority and standing to make the claims for Mr. Theodor David Einarsson’s estate and bring claims on behalf of GSI, including as to the law applicable to these issues; (b) a full set of the Powers of Attorney/authorizations in this proceeding for Counsel for Claimants to act herein on behalf of all Claimants as now existing.”
21. Also on 9 February 2024, Claimants noted that they were unable to comply with the Tribunal’s PO 4 direction by 23 February 2024, as lead counsel was returning to her four-month trial in the week of 19-23 February 2024, and her instructing party had to attend to family matters related to the death of Davey Einarsson in the next week. Claimants therefore requested an extension until 1 March 2024 to comply with PO 4.
22. On 11 February 2024, the Tribunal wrote to the Parties, advising “that the hearing on the Motion to Compel will go forward as agreed on Friday 1 March 2024 at a time yet to be determined [, and] the extension requested by Claimants to comply with PO 4 is granted to Thursday 29 February 2024 at 2pm Calgary.”
23. On 12 February 2024, the Tribunal issued Procedural Order No. 5 (“**PO 5**”), setting out the deadline for Claimants’ Reply as 29 February 2024, and noting that “[n]ew Hearing dates shall be set as soon as possible, with the Tribunal revisiting this question after 1 March 2024.” Moreover, the Tribunal stated that “[a]ny other adjustments to the Procedural Calendar will be subsequently set by the Tribunal in consultation with the Parties.”
24. On 13 February 2024, the Tribunal wrote to the Parties, noting that it would like to reserve three hours for the 1 March 2024 hearing on Claimants’ Motion to Compel Documents, and the Tribunal requested that the Parties confirm their agreement with an earlier start time, to accommodate the different time zones.
25. Later that same day, 13 February 2024, Claimants wrote to advise the Tribunal that they were unable to comply with the 29 February 2024 Reply deadline set out in PO 5, given the 1 March 2024 hearing and the 29 February 2024 deadline to comply with PO 4, “especially in light of the circumstances for the remaining Claimants attending to matters relating to Davey Einarsson’s death, and that counsel is in final argument for a lengthy four-month trial next week.” Additionally, Claimants argued:

*Further, if the answer to Procedural Order No. 4 is that the Claimant, Davey Einarsson, is not represented, then the Claimants' counsel is certainly not able to comply simultaneously with Procedural Order No. 5, nor proceed with the Motion scheduled on March 1, 2024. Despite the Tribunal's direction in Procedural Order No. 4 at paragraph 11 that these Arbitration proceedings proceed "unless and until the Tribunal decides otherwise", a positive confirmation that Davey Einarsson is not properly represented would result in counsel being bound to comply with the rules applicable from the governing law society for counsel such that they cannot file any materials. That is not a matter within the Tribunal's jurisdiction.*

26. On 16 February 2024, further to the Tribunal's directions, Respondent replied to Claimants' 13 February 2024 letter. Respondent submitted that "[i]f the Claimants are not prepared to comply with Procedural Order No. 5 and make themselves available for the March 1st date (which was agreed by the Disputing Parties and the Tribunal at the CMC and chosen based on Claimants' counsel limited availability), Canada requests that the Motion simply be denied with no further briefing or hearing. This would be justified in the circumstances, given that the Motion was untimely and appears to have been brought for the sole purpose of delaying the proceedings and buying the Claimants more time to file their Reply Memorial." If the Tribunal prefers a hearing, however, the Respondent noted that it is prepared to proceed on 1 March 2024.
27. In this letter, Respondent also addressed Claimants' Reply Memorial 29 February 2024 deadline. The Respondent noted that Claimants appear unwilling to comply with this deadline despite the previously granted extension. Respondent noted that it will not oppose Claimants' proposed later filing date of 14 March 2024 (if the Respondent is not prejudiced by these additional extensions). Given the further doubt as to whether Claimants will file the additional information ordered by the Tribunal "regarding power to continue the litigation on behalf of the estate of Theodore Davey Einarsson and GSP" by 29 February 2024, "and given the serious doubts regarding the Claimants' standing and the Tribunal's jurisdiction", Respondent suggested that it may be prudent to suspend the remainder of the timetable until Claimants' standing is resolved. Respondent further asserted that "the deadline for the Canada's Rejoinder Memorial can only be determined once the issues concerning document production and the Claimants' standing to continue the claims are settled."
28. Later that day, as directed by the Tribunal at the CMC and in the Tribunal's 13 February 2024 communication, Respondent filed "Canada's Reply to Claimants' Motion to Compel Documents."

## II. The Tribunal's Analysis and Decision

### A. Hearing on the Motion to Compel Documents

29. Respondent in the CMC proposed a hearing on the Motion to Compel Documents, which was agreed to by Claimants. The Tribunal and the Parties agreed to hold the Hearing on 1 March 2024, which appeared to be the only available date within a reasonable period for all participants. The Tribunal continues to believe that a short hearing would be efficient and assist with its determination of the Motion.
30. Claimants have represented that “*Paul Einarsson is the executor of the estate of Theodore David Einarsson, and also the beneficiary of Theodore David Einarsson’s interests in GSI*”. Claimants have further submitted a redacted copy of the will of Davey Einarsson which supports this contention. By PO 4, and as already set out in the CMC, the Tribunal has given instructions regarding the materials to be submitted for now in support of Paul Einarsson’s standing to represent Davey Einarsson’s estate as well as GSI. In view of the documents submitted and representations already made by Claimants, and the procedure put in place by the Tribunal to corroborate these, the Tribunal considers that a suspension of the proceedings in relation to Davey Einarsson’s estate or GSI is not currently warranted and will proceed with the immediately upcoming scheduled procedural steps. This in particular since the Tribunal considers that the materials supporting Paul Einarsson’s standing which have been directed to be produced should be possible to secure without delay in the ordinary course of succession measures. The Tribunal also notes, in view of paragraph 15 above, that it has at this stage only ordered the submission of materials “*as to Mr. Harold Paul Einarsson’s authority and standing to make the claims for Mr. Theodore David Einarsson’s estate and bring claims on behalf of GSI (PO 4 para 10 (a))*”.
31. The Tribunal further notes, importantly, that there has been no suggestion that the standing of two other Claimants, Harold Paul Einarsson and Russel John Einarsson, has been affected *per se* by the passing of Davey Einarsson, nor has there been a challenge to the authority of Stikeman Elliott LLP to represent these two Claimants. This is further reason for the proceedings to move forward for now, pending any new developments that could warrant reconsideration by the Tribunal.
32. The Tribunal, therefore, confirms that the **1 March 2024** hearing on the Motion to Compel will be held for three (3) hours starting at **05:00 (Calgary)/07:00 (Washington, D.C./Ottawa)/ 14:00 (Helsinki)/20:00 (Singapore)**. If Claimants object to the proposal to set the commencement time one hour earlier than originally agreed, the Tribunal will hold a two (2) hour hearing only.

### B. Deadline to File the Materials Ordered in PO 4

33. The Tribunal granted Claimants an extension to file the materials ordered in PO 4 to 29 February 2024 (in lieu of 23 February). The Tribunal maintains this **29 February 2024** deadline, which is one (1) day in advance of the 1 March 2024 hearing on the Motion to Compel and only one (1) day shorter than requested by Claimants.

**C. Deadline for Claimants' Reply**

34. The Tribunal notes that Respondent does not oppose granting Claimants' requested extension to file their Reply by 14 March 2024 ("*as long as it is not prejudiced by these additional extensions*"). Given the agreement, the Tribunal grants the Claimants an additional extension until **14 March 2024** to file Claimants' Reply Memorial on Jurisdiction, Merits and Damages. The time for Respondent's Rejoinder will be set subsequently after consultation with the Parties, [also in view of the further procedural calendar as set out in PO 5 *in fine*].

**Dated:** 26 February 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