

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ruby River Capital LLC

v.

Canada

(ICSID Case No. ARB/23/5)

PROCEDURAL ORDER NO. 9

Decision on Requests for Production of Documents Identified as Privileged

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

24 January 2025

I. PROCEDURAL BACKGROUND

1. On 30 November 2024, the Tribunal issued Procedural Order No. 4, addressing the Claimant's document production requests and ordering the Respondent, *inter alia*, (i) to produce, by 10 December 2024 at the latest, a privilege log and redacted versions of documents.
2. On 5 December 2024, the Respondent indicated that it would only be able to produce, on 10 December 2024, a partial log of around 350 withheld documents for which it invokes privilege, and that some of the documents would not be produced within the prescribed deadline. The Respondent also explained that it was impossible to produce on that same date, even in a limited number, documents redacted on the basis of privilege.
3. On 9 December 2024, the Claimant objected to the Respondent's production of its privilege log without the corresponding partially redacted documents, and to the production of redacted documents without providing the basis for such redactions.
4. On 11 December 2024, the Tribunal informed the Parties that it would hear them during a procedural session held by videoconference on 18 December 2024. The Tribunal also invited the Parties to confer and agree on proposed adjustments to the procedural calendar, or, should they be unable to agree, to submit their respective proposals by 17 December 2024.
5. On 17 December 2024, the Parties transmitted their respective proposed amendments to the procedural calendar.
6. On 18 December 2024, the Tribunal held a procedural session with the Parties by videoconference. After the videoconference, at the request of the Tribunal, the Claimant transmitted to the Tribunal (i) the partial privilege log it had received from the Respondent on 10 December 2024 and (ii) "*a list of the 44 documents containing redactions for which the Respondent provided no justification, nor identified as redacted in the index provided with the documents.*"

7. On the same day, the Tribunal informed the Parties that it had reviewed the privilege log transmitted by the Claimant and wished to receive and review the Claimant's request for production of documents withheld on the basis of privilege, scheduled to be filed on 19 December 2024 (per paragraph 39 of Procedural Order No. 4 and step 14 of the Procedural Calendar), before providing further directions to the Parties.
8. On 19 December 2024, the Claimant filed its "Request for the Production of Documents withheld by the Respondent, listed in the Respondent's Privilege Log dated 10 December 2024, and its annexes."
9. On 20 December 2024, the Tribunal issued Procedural Order No. 5 addressing the Respondent's document production requests to the Claimant.
10. On 21 December 2024, following the Respondent's request for clarification of 20 December 2024, the Tribunal informed the Parties that the deadline prescribed in Procedural Order No. 4 for the filing by the Respondent of any opposition to the Claimant's request filed on 19 December 2024 was maintained.
11. On 26 December 2024, the Respondent filed its opposition to the Claimant's requests for production of the documents not produced, together with the witness statements of Ms. Josée De Bellefeuille and Mr Donald Booth.
12. On 30 December 2024, the Claimant informed the Tribunal that it maintained its request for an Order per paragraph 39 of Procedural Order No. 4 but that it withdrew certain prior requests which had become moot, thus narrowing down the issues for the Tribunal.
13. On 3 January 2025, the Tribunal issued Procedural Order No. 8, which contained in its Annex A, a revised procedural calendar, and provided to the Parties explanations and guidelines applicable to the privilege logs to be submitted by the Parties on 14 February 2025. The Tribunal explained that these explanations and guidelines might be supplemented by the present procedural order addressing the Respondent's privilege log dated 10 December 2024 (as updated on 20 December 2024). The Tribunal also invited the Respondent to incorporate in its final privilege log an updated version of the privilege log submitted on 10 December 2024.

14. On 6 January 2025, the Claimant requested clarifications from the Tribunal regarding the revised procedural calendar transmitted on 3 January 2025.
15. On 7 January 2025, the Tribunal provided the requested clarifications to the Parties.
16. On 9 January 2025, in light of the clarifications provided by the Tribunal, the Parties jointly submitted to the Tribunal a number of proposed corrections to the revised procedural calendar transmitted on 3 January 2025 as Annex A to Procedural Order No. 8. The Tribunal approved the proposed corrections on 10 January 2025, and a revised procedural calendar was transmitted to the Parties on 16 January 2025.

II. SCOPE OF THE ORDER

17. In this Order, the Tribunal rules on the Claimant's requests for the production of documents identified as privileged in the Respondent's privilege log transmitted on 10 December 2024 and updated on 20 December 2024.

III. PARTIES' POSITIONS

18. The Tribunal provides here a brief overview of the Parties' arguments, referring to their submissions filed on 19 December 2024 (Claimant) and 26 December 2024 (Respondent).

Claimant

19. Preliminarily, the Claimant submits that the Respondent's privilege log fails to establish the privileges claimed, for the following four reasons.¹
20. First, the Claimant contends that the issue at stake is whether the Respondent has proved that the documents in the log are protected from disclosure, not whether certain redactions should be allowed or not. The Claimant notes that the Respondent has not clarified whether it will comply with a Tribunal order to produce them, and indicates that

¹ Claimant's Letter dated 19 December 2024, paras. 6 to 13.

if the Respondent maintains its refusal, the Claimant will request that the Tribunal draw adverse inferences.²

21. Second, the Claimant submits that the Respondent has failed to take into account the Tribunal's guidance on political sensitivity, and that the Respondent's grounds for confidentiality are based on generalities and lack specificity. The Claimant further contends that the Respondent has not provided necessary detail about the individuals from whom or to whom the documents are addressed, such as their titles, positions, and roles, making it difficult to assess the political sensitivity of the documents. For the Claimant, the Respondent has therefore failed to meet its burden of proof under Article 9.2(b) IBA Rules.³
22. Third, the Claimant argues that the Respondent has had multiple opportunities to justify its grounds for withholding documents but has not done so adequately. The Claimant recalls that paragraph 15.8 of Procedural Order No. 1 does not provide for multiple opportunities to justify withholding or redacting documents. For the Claimant, allowing the Respondent another chance to provide explanations would be unfair and unnecessary. The Claimant reserves the right to respond if the Respondent is given another opportunity.⁴
23. Fourth, the Claimant informs the Tribunal that the log contains numerous duplicates, making its review unduly burdensome. The Claimant suggests that this issue should be considered in a cost order against the Respondent.⁵
24. The Claimant submits that the Respondent has failed to establish that the documents withheld are privileged or otherwise confidential.⁶
25. With respect to the political sensitivity argument raised by the Respondent under Article 9.2(f) of the IBA Rules, the Claimant contends that the Respondent has failed to show

² Claimant's Letter dated 19 December 2024, paras. 6 and 7.

³ Claimant's Letter dated 19 December 2024, paras. 8-10.

⁴ Claimant's Letter dated 19 December 2024, paras. 11-12.

⁵ Claimant's Letter dated 19 December 2024, para. 13.

⁶ Claimant's Letter dated 19 December 2024, paras. 14 to 40.

(i) that the grounds invoked are compelling and justify the withholding of documents and
(ii) that a redaction of the confidential or protected information would not suffice to protect the Respondent's interests in a document not being disclosed to the public.⁷

26. In particular, the Claimant submits that the Respondent's invoking the fact that a document withheld was prepared for purposes of and to inform Governmental deliberations or decision-making does not suffice to justify the non-production of said documents and that tribunals, including NAFTA tribunals, have ordered document production in similar circumstances.⁸
27. The Claimant raises a similar argument regarding documents allegedly reflecting deliberative process and/or decision-making.⁹
28. Further, the Claimant submits, with respect to the Respondent's reliance on Article 283 of the Québec Code of Civil Procedure, that it is "*well established that a State cannot rely on its own domestic law – and a fortiori provincial domestic law – to avoid the production of documents in an international investment arbitration.*"¹⁰
29. With respect to the legal privilege argument raised by the Respondent under Article 9.2(b) of the IBA Rules, the Claimant submits that the Tribunal has not indicated specifically which legal or ethical rules apply to the proceeding and that, in any event, (i) the Claimant does not seek any document protected by legal privilege, and (ii) the Respondent bears the burden of proving that the documents withheld are protected by legal privilege.¹¹

⁷ Claimant's Letter dated 19 December 2024, paras. 15 to 23.

⁸ Claimant's Letter dated 19 December 2024, paras. 25 to 27.

⁹ Claimant's Letter dated 19 December 2024, paras. 28 to 30.

¹⁰ Claimant's Letter dated 19 December 2024, paras. 31 to 36.

¹¹ Claimant's Letter dated 19 December 2024, paras. 37 to 40.

Respondent

30. The Respondent submits that its invocation of privilege to justify the withholding of privileged documents was made in a timely manner and in compliance with the provisions of Procedural Order No. 1.¹²
31. The Respondent submits that for each document identified in the Respondent's consolidated Privilege Log dated 20 December 2024, lawyers from the Government of Canada or the Government of Quebec familiar with the Claimant's allegations and the issues in dispute examined the document and weighed the following factors: (i) the importance of the particular institutional or political sensitivity involved, as reflected by the constitutional and statutory protection afforded in Canadian and Quebec law; (ii) the Claimant's interest in obtaining disclosure of the document in light of its theory of the case as described in its pleadings, including its Memorial on Jurisdiction and the Merits; (iii) the disclosure or availability of non-privileged evidence with related content; (iv) the provisions of the Tribunal's confidentiality order, in particular those concerning the protection of confidential information, and the possibility of accommodating the government's institutional and political sensitivities by other means while still permitting production of the document; and (v) the time elapsed since the document was created or the communication transmitted.¹³
32. The Respondent further contends that the documents withheld fall within the categories of documents described in Articles 9.2(f) and 9.2(b) of the IBA Rules.¹⁴
33. In particular, the Respondent submits that the confidential information relating to the Quebec and federal Cabinets, which are among the documents referred to in Article 9.2(f) of the IBA Rules,¹⁵ are not subject to document production because of their political sensitivity.¹⁶ To justify the political sensitivity, the Respondent submits, in particular, two witness statements which explain that the secrecy of the deliberations of the Council

¹² Respondent's Letter dated 26 December 2024, paras. 5 to 6.

¹³ Respondent's Letter dated 26 December 2024, para. 11.

¹⁴ Respondent's Letter dated 26 December 2024, paras. 7 to 8.

¹⁵ Respondent's Letter dated 26 December 2024, paras. 9 to 13.

¹⁶ Respondent's Letter dated 26 December 2024, paras. 14 to 19, and 34 to 36.

of Ministers/the Cabinet derives from the constitutional principles of the collective responsibility and solidarity of the members of the Council of Ministers/the Cabinet.¹⁷

34. The Respondent also submits that the documents at stake are of limited importance to the Claimant's case.¹⁸ Further, the Respondent asserts that it is impossible to accommodate the political sensitivity through other means in order to allow the production of the requested documents.¹⁹ Lastly, the Respondent notes that the withheld documents have all been created or transmitted less than four years ago (Quebec documents) or three years ago (federal government documents), which are short periods compared to the 25 year period of exemption from disclosure prescribed in the *Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels* and the 20 year period of exemption from disclosure prescribed under federal law.²⁰
35. The Respondent also contends that confidential information protected by legal or ethical rules applicable to lawyers are protected under in article 9.2(b) of the IBA Rules, and notes that the Parties seem to agree on that point, since the Claimant stated in its request for production of withheld documents that "*the Claimant does not seek documents that are protected by legal privilege.*"²¹
36. Lastly, with respect to the 44 documents produced with redactions but without reasons for such redactions, the Respondent explains that the redactions concern personal data and were made a few years ago, contemporaneously with communications exchanged between the MELCC and the Impact Assessment Agency. The Respondent submits that producing a non-redacted version of these documents, as the Claimant requested in its 17 December 2024 communication, would entail altering the evidence. The Respondent therefore requests the Tribunal to reject the Claimant's request.²²

¹⁷ Respondent's Letter dated 26 December 2024, paras. 15 and 36.

¹⁸ Respondent's Letter dated 26 December 2024, paras. 20 to 29, and 37 to 44.

¹⁹ Respondent's Letter dated 26 December 2024, paras. 30 to 31 and 45.

²⁰ Respondent's Letter dated 26 December 2024, paras. 32 and 46.

²¹ Respondent's Letter dated 26 December 2024, paras. 47 to 53.

²² Respondent's Letter dated 26 December 2024, paras. 54 to 56.

IV. TRIBUNAL'S DETERMINATIONS AND APPROACH

37. The Tribunal's determinations are in the table in Annex A to this Order. The Tribunal has applied the following approach to make these determinations.
38. Preliminarily, the Tribunal notes that no determination is required regarding the 23 documents for which the Respondent has invoked a legal privilege under Article 9.2(b) of the IBA Rules, and the production of which is no longer requested by the Claimant.²³ No determination is required either regarding the 20 documents produced by the Respondent with redactions under Article 9.2(b) of the IBA Rules, since the Claimant has raised no objection to these redactions.²⁴
39. The Respondent invokes political sensitivity under Article 9.2(f) of the IBA Rules in respect of 324 documents requested by the Claimant.
40. The Tribunal notes that while the privilege log filed by the Respondent includes documents responsive to Claimant's requests no. 4, 5, 8 to 10, 12 and 28, the majority of the documents actually relate to requests no. 4 and 5 on the one hand and no. 8 to 10 on the other. Only three documents respond to requests no. 12 and 28. The Tribunal further notes that the Parties have each had an opportunity to fully express their positions to the Tribunal and considers that the Respondent's developments in its privilege log aimed at explaining for each document the reasons why it invokes Article 9.2(f), as well as the two witness statements attached, are admissible.
41. The Tribunal also notes that the Parties agree that Article 283 of the Quebec Code of Civil Procedure is not *stricto sensu* applicable in this case. The Tribunal considers in any event that it is not bound by it, but may nevertheless draw inspiration from it.
42. Like other tribunals, the Tribunal acknowledges that there is a legitimate and important public interest in refusing disclosure of documents relating to cabinet decisions taken at

²³ Claimant's Letter dated 30 December 2024, para. 7.

²⁴ Claimant's Letter dated 30 December 2024, paras. 8 and 9.

the federal and provincial levels. The Tribunal takes note, in that regard, of the witness statements of Ms. Josée De Bellefeuille and Mr. Donald Booth filed by the Respondent.

43. The Tribunal considers however that this legitimate interest must be weighed against the Claimant's interest in obtaining production of the requested documents. The Party invoking Article 9.2(f) to withhold a document ordered by the Tribunal to be produced has the burden of proving that withholding the document is justified. In that respect, the Tribunal had noted in paragraph 26 of Procedural Order No. 4, regarding exhibits C-280 and C-281, that:

[...] on the assumption that a general principle protecting the confidentiality of Cabinet deliberations applies to these documents, the Parties agree that a balancing exercise is to be carried out between the investor's interest in having the document on the record, and the government's interest in not producing the requested documents.

44. In paragraph 35 of Procedural Order No. 4, the Tribunal had also noted that:

A Party making such an assertion must not only articulate the points stated in items (a) through (d) above but state compelling grounds to justify the political or institutional sensitivity.

45. Thus, if the withholding or redaction of information is based on political or institutional sensitivity, the Party must indicate the compelling reasons justifying the alleged confidentiality and why these reasons should prevail over the other Party's interest in accessing the withheld or redacted information.
46. The Tribunal considers that the transparency and confidentiality regime established by Procedural Order No. 2 constitutes an effective protection and safeguard against disclosure to persons not participating in this arbitration, as, before publication, the Parties have the ability to redact sensitive information from all pleadings or evidence,²⁵

²⁵ As a matter of fact, the Parties have agreed before publication, to remove any reference to the content of Exhibits C-280 and C-281, which according to Respondent relate to cabinet decision.

even if, the Tribunal acknowledges, it does not fully address the concerns expressed in the witness statements filed by the Respondent.²⁶

47. In particular, the Respondent submits, and the Tribunal accepts, that disclosure of information or documents relating to cabinet decisions, even in a manner that would preserve or maintain confidentiality as to everyone but the participants in this arbitration, could have an effect of stymying the full and frank discussion essential to effective collective decision-making at the level of government cabinets. The Tribunal accepts that this is a legitimate, compelling policy concern that justifies protection of cabinet deliberations.
48. The Tribunal also accepts the legitimacy and compelling nature of the concern articulated by the Claimant, i.e., that the Claimant should have access to documents shedding key light on the government decisions at issue and thus highly relevant to its assertions that the decisions were arbitrary or discriminatory and the Respondent's assertions that they were not.
49. The Tribunal considers that the documents requested under Claimant's requests no. 4, 5, 8 to 10, 12 and 28 are at the core of the Claimant's case, namely its contentions that the real reasons underlying the Respondent's decisions are different from the apparent or stated reasons and/or that they were applied to the GNLQ Project in a discriminatory manner.
50. In that respect, the main question that emerges from the document production requests concerns the criteria for approval of the GNLQ Project, in particular the three criteria set out by the Quebec Minister of the Environment, Mr. Charette, at the press conference on March 24, 2021 (social acceptability, fostering the energy transition and contributing to global greenhouse gas (GHG) reductions) (C-31, p. 2).
51. Three sub-questions underlie these requests:
 - The alleged novelty of the three criteria (only for request no. 4).

²⁶ Witness Statement of Donald Booth, para. 14; Witness Statement of Josée De Bellefeuille, paras. 18 to 22.

- The alleged ‘fallacious’ nature of these three criteria (which the Claimant asserts to be a pretext concealing the real reasons for rejecting the Project, which are allegedly based on political calculations rather than scientific or technical reasons) (all requests, but specifically requests no. 4, 5, 8, 9 and 10).
- The allegedly discriminatory nature of these three criteria and of the other criteria for approving the Project (i.e. the risk to belugas due to the increase in maritime traffic), as well as of their application (only for requests no. 12 and 28).

52. These three sub-questions are highly relevant to the Claimant’s assertions of violations of Article 1105 of NAFTA due to the ‘illegal and arbitrary’ refusal of the Project (all requests) and of Articles 1102 and 1103 of NAFTA due to the ‘discriminatory and arbitrary’ refusal (requests no. 12 and 28).

53. To establish that the real reasons underlying the Respondent’s decision are different from the apparent or stated reasons, the Claimant must, it appears to the Tribunal at this stage of the proceeding, show:

- a) Either that the essential reasons for the rejection of the Project are not those stated in the collective decision and detailed in the BAPE report²⁷ or the MELCC report.²⁸

In that case, and beyond the fact that the Claimant contests the circumstances in which these reports were established, the mere analysis of such reports, may not, contrary to what the Respondent suggests, be sufficient to support that claim.

- b) Or that the stated reasons are not applied consistently to other comparable projects.

In that case, an analysis of the public register of the MELCC containing the environmental assessments of similar projects may be useful.

²⁷ Exhibit C-250.

²⁸ Exhibit C-269.

54. In balancing the interests at stake, the Tribunal:
- a) Acknowledges the robust process implemented by the Respondent to carry out its own balancing exercise, which involved high level officials with knowledge of the case in close contact with the Respondent's legal team. Such process reflects the Respondent's willingness to proceed rationally and in good faith. The Tribunal, however, is not bound by the conclusions proposed by the Respondent and retains discretion in balancing the interests at stake.
 - b) Notes that despite stating that his statement does not contradict the Respondent's invocation of political and institutional sensitivity, the Prime Minister's chief of staff, Mr. Martin Koskinen, has provided insights into the relationship with, and the positions taken by, the other ministers during the decision-making process.²⁹
 - c) Notes the scarcity of details in the privilege log regarding the content and context of the documents. The reasons for this paucity – preserving the confidentiality of the information – are understandable, but the balancing exercise is necessarily more difficult.
55. To carry out the balancing exercise, the Tribunal relies on three criteria.
56. First, the Tribunal assesses the political or institutional sensitivity of the documents. In doing so, the Tribunal deems necessary to distinguish not only between authors and recipients of the documents, but also between documents prepared to inform cabinet deliberations and documents reflecting the content of such deliberations. The latter documents may indeed carry or involve a higher degree of political or institutional sensitivity, to allow full and frank discussions within government cabinets (see paragraphs 46 and 47 above).
57. In that respect, the Tribunal notes that the tribunal in *Merrill Ring Forestry v. Canada* drew a similar distinction:

The Tribunal is convinced that this distinction is appropriate in this case. Documents brought to the attention of the Cabinet in

²⁹ Witness Statement of Mr. Martin Koskinen, paras. 39 to 44.

*preparation of eventual discussions or deliberations do not in fact inhibit at all such exercise. Some documents at hand originate in the work of governmental officials, including ministers, while some other are contributed by private entities unrelated to the government. None of them concern actual discussions or deliberations of the Cabinet, let alone a decision on such recommendations. In practice some documents may not even get to be considered by the Cabinet or may be discarded.*³⁰

58. In distinguishing between documents prepared to inform cabinet deliberations and documents reflecting such deliberations, the Tribunal takes some comfort in the fact that Canadian law also draws such a distinction. As the Respondent recognizes, the federal law on evidence excludes from the cabinet privilege discussion papers the purpose of which is to present background explanations, analyses of problems or policy options to the cabinet for its consideration in making decisions, where (as is the case here) those decisions are subsequently made public.³¹ As the Respondent also rightly observes, that law does not bind the Tribunal, but it does provide insight from a Canadian perspective into the responsible application of cabinet privilege in the context of judicial or quasi-judicial procedures.³²
59. In addition, the Tribunal makes a distinction with respect to the final version of exhibit C-281, as the Tribunal has already considered that the Claimant's interest in disclosure of exhibit C-281, which is a draft letter, outweighed the Respondent's public interest.
60. Second, as mentioned above (see para. 45), the Tribunal balances the Claimant's interest in obtaining the documents to support its claims or allegations against the Respondent's interest in not disclosing such documents.
61. Third, as indicated above (see para. 55), the Tribunal assesses whether the requested documents are the only evidence supporting the Claimant's claims or allegations or

³⁰ *Merrill and Ring Forestry L.P. v. Canada* (ICSID Case No. UNCT/07/1, Decision on Production of Documents in Respect of Which Cabinet Privilege Has Been Invoked, 3 September 2008 (Exhibit CLA-268))

³¹ *Opposition du défendeur aux demandes de productions de documents privilégiés*, para. 46 n. 47 ; see Exhibit R-106-ENG-FRA, Loi sur la preuve au Canada, LRC (1985) ch. C-5, art. 39(2)(b) & (4).

³² *Opposition du défendeur aux demandes de productions de documents privilégiés*, para. 35.

whether the Claimant could support or establish such claims or allegations through other, accessible means of evidence.

62. Lastly, the Tribunal addresses the issue of duplicates in the Respondent's privilege log of 10 December 2024 raised by the Claimant.³³ The Tribunal notes the absence of reaction of the Respondent on this issue in its subsequent letter.³⁴ In the absence of any information other than that provided in the privilege log, the Tribunal is unable to determine whether two documents bearing the same date, the same author, the same recipient and the same title are two different documents. Hence, the Tribunal considers that a document with the same date, the same author, the same recipient and the same title in the Respondent's privilege log of 10 December 2024 is a duplicate and has applied the same ruling to the duplicate as defined.
63. In that respect the Tribunal invites the Parties to agree on the definition of duplicate and avoid as much as possible the burden of duplicative work for the Parties and the Tribunal concerning the privilege logs to be produced next month.
64. Finally, the Tribunal notes that there are attachments to certain documents. Independently from the decision taken for the production of the "main document", it is necessary for the Parties to refer to the individual decision relating to each of the attached documents to determine whether or not the attached document must be produced.

V. ORDER

65. Applying the reasoning articulated above, the Tribunal issues for each document listed in the privilege log and for which application is made the order set out in the Annex to this order.

³³ Claimant's Letter dated 19 December 2024, para. 13.

³⁴ Respondent's Letter dated 26 December 2024.

66. The Tribunal orders the Respondent to produce to the Claimant, by 31 January 2025, the documents identified in Annex A.

On behalf of the Tribunal,

Signature

Ms. Carole Malinvaud

President of the Tribunal

Date: 24 January 2025