

**AN ARBITRATION UNDER CHAPTER 11 OF THE NAFTA
AND THE UNCITRAL ARBITRATION RULES, 1976**

between

MESA POWER GROUP, LLC

Claimant

and

GOVERNMENT OF CANADA

Respondent

PROCEDURAL ORDER NO. 11

ARBITRAL TRIBUNAL

Professor Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

The Honorable Charles N. Brower

Toby Landau, QC

Secretary of the Tribunal

Rahul Donde

I. PROCEDURAL BACKGROUND

1. In its communication of 30 May 2014, the Claimant challenged the additional confidentiality designations proposed by the Respondent in the Reply Memorial and its supporting documents in the table provided in Procedural Order No. 6. Upon the invitation of the Tribunal, the Respondent responded to these challenges on 11 June 2014. For several challenges, it observed that the information in question was barred from disclosure by virtue of Ontario's Freedom of Information and Protection of Privacy Act ("FIPPA"). The Claimant contended that this was a "new argument", as a result of which the Tribunal gave the Claimant an opportunity to comment, which the latter did on 16 June 2014. The Respondent submitted its views on those comments on 23 June 2014.
2. In its submissions, the Claimant challenges several designations on three grounds: (a) paragraph 1(b)(iii) of the Confidentiality Order does not permit the Respondent to designate information as confidential pursuant to the Respondent's domestic access to information legislation (II.A. below); (b) the Respondent cannot designate information as confidential on the instructions of third parties to this arbitration (II.B. below); and (c) the Respondent failed to designate information as confidential during the document production process (II.C. below).

II. THE SUBMISSIONS

A. Scope of paragraph 1(b)(iii) of the Confidentiality Order

i. The Claimant's Position

3. The Claimant submits that "Section 1(b)(iii) of the Confidentiality Order does not permit Canada to apply its municipal Access to Information legislation [i.e. the FIPPA] to prevent the public disclosure of information regarding the activities of government officials [...] this is exactly the type of information that must be made public in a NAFTA arbitration." It further submits that the FIPPA does not apply "to orders made by international tribunals". The FIPPA cannot govern confidentiality in these proceedings because it would "obviate the governing role of international law that the parties have agreed to. It also places Canada at a distinct advantage compared to the United States and Mexico when it comes to public disclosure of documents in Chapter 11 arbitrations [...]. It is for these very same reasons of equality [...] that Canada's attempt to shield the

evidence of its unfair and improper behaviour from the public should be dismissed.” The Claimant relies on *Pope & Talbot* in support of its submissions.

ii. The Respondent’s Position

4. The Respondent contends that the Claimant’s argument is contrary to the plain language of paragraph 1(b)(iii) of the Confidentiality Order, which does not contain any limitation with respect to which domestic law protects information from disclosure. It submits that paragraph 1(b)(iii) was the subject of considerable discussion among the Parties and the Tribunal at the first session, and that the Claimant’s later proposal for limitations was not accepted by the Tribunal. The Respondent also stresses that the Claimant has not contested that the information in question would be protected from disclosure under the FIPPA. Finally, it submits that the Claimant has misunderstood paragraph 1(b)(iii) of the Confidentiality Order, confusing issues of confidentiality with issues of privilege or situations where a party refuses to disclose information on the basis of domestic law.

iii. Analysis

5. The Tribunal believes that the Claimant’s submissions are somewhat misguided. The question before the Tribunal is not whether the Respondent can refuse to produce documents to the Claimant on the basis of its domestic law (as in the *Pope & Talbot* decision relied on by the Claimant). Rather, the question is whether documents already produced should be made available to the public or not. The Claimant’s submissions often fail to distinguish between these two situations.
6. The Tribunal recalls that paragraph 1(b)(iii) of the Confidentiality Order defines confidential information as information “otherwise protected from disclosure under the applicable domestic law of the disputing State party.” Thus, in order to prevent public disclosure of information, a Party must show that the information in question is protected under the applicable domestic law of Canada. Here, the Respondent alleges that the FIPPA protects the information from disclosure. The Claimant does not appear to dispute that the information at issue is protected under the FIPPA. It submits that the FIPPA is not applicable in the present arbitration, an issue which – in the Tribunal’s view – is pre-empted by the clear language of the Confidentiality Order.

7. Further, to the extent relevant, the Claimant does not appear to convincingly argue that it will be prejudiced if the information in question is not made available to the public. The information has already been provided to the Claimant and the Tribunal finds it difficult to understand – especially in the absence of any cogent explanation by the Claimant to this effect – how the latter could be harmed by the fact that it is not disclosed to the general public. By contrast, if the Tribunal were to deny the Respondent’s request, it would have to consider the latter’s request to withdraw the information in question, which may likely affect the Claimant’s interests.
8. For these reasons, the Tribunal denies the Claimant’s submissions.

B. Reliance on designations made by non-Parties to the arbitration

i. The Claimant’s Position

9. The Claimant submits that certain designations proposed by the Respondent are inappropriate because they were made at the behest of third parties. According to the Claimant, “Canada’s insistence on relying on designations made by the OPA is not only against the Tribunal’s previous rulings and the position Canada itself has argued, it also violates the equal treatment of parties protected in NAFTA Article 1115 and Article 15 of the UNCITRAL Arbitration Rules.”

ii. The Respondent’s Position

10. In its reply, the Respondent submits that the Claimant has raised this argument before and that it was rejected. As the Tribunal had observed earlier, the relevant question is whether the designation is consistent with the Confidentiality Order and not who made it. According to the Respondent, the information in question satisfies the requirements of the Confidentiality Order.

iii. Analysis

11. The Tribunal notes that for several designations the Respondent has indicated that the information was designated as confidential “upon the instruction of the OPA”. However, the Tribunal also notes that the Respondent has explained why the information falls within the ambit of the Confidentiality Order (see, for instance, items 1-7). Thus, it does not appear to the Tribunal that the Respondent has exclusively relied on the third

party's designation in making its own designation. Indeed, as indicated in Annex A hereto, the information in question satisfies the requirements of Article 1(b) of the Confidentiality Order. In the circumstances, and relying on its earlier decisions,¹ the Tribunal denies the Claimant's submissions.

C. Designation of information as confidential during document production

i. The Claimant's Position

12. For several designations, the Claimant submits that "Canada failed to designate this information confidential during the document production process, Canada did not take the position that this information is confidential."

ii. The Respondent's Position

13. The Respondent replies that, under the terms of the Confidentiality Order, it was not required to designate information as confidential during the document production process. In its letters of 13 September 2013 and 16 January 2014, it had specifically reserved its right to designate information as confidential in accordance with the Confidentiality Order. The Claimant did not object at that time. Contrary to the Claimant's submissions, the Respondent's designations were, therefore, timely.

iii. Analysis

14. The Tribunal recalls that paragraph 4 of the Confidentiality Order provides:

"If upon receipt of a written submission, the receiving disputing party contends that it contains additional confidential or restricted access information that has not been appropriately identified and redacted by the submitting disputing party, it shall so inform the submitting disputing party and the Tribunal within ten (10) days, and within twenty (20) days shall provide an electronic copy of the written submission with the additional information which it contends is confidential or restricted access information appropriately identified and redacted. The twenty day period may be extended by the Tribunal if necessary."

15. Thus, a Party receiving a written submission has ten days from receipt to inform the submitting Party and the Tribunal that the submission contains confidential/restricted access information. Within 20 days, the receiving Party must then provide an electronic version of the written submission identifying and redacting the protected information.

¹ See, for instance, Procedural Order No. 6.

Paragraph 4 does not mention that designations would need to be made during the document production process. Neither do other provisions of the Confidentiality Order. The Tribunal thus cannot agree with the Claimant's submission that the Respondent should have made its designations during the document production phase.

16. In respect of the Claimant's submission that the designations should have been made earlier, the Tribunal recalls that the Claimant submitted its Reply Memorial on 1 May 2014. On 13 May 2014, the Respondent notified the Claimant and the Tribunal that it would designate certain additional information as confidential in the Claimant's Reply Memorial. The Respondent submitted its additional designations on 22 May 2014, within the 20-day time-limit prescribed by the Confidentiality Order. The Tribunal thus cannot agree that the Respondent's designations were untimely.
17. Therefore, the Tribunal denies the objections raised by the Claimant. The Tribunal's determination in respect of each of the Claimant's challenges is contained in Annex A hereto, which forms an integral part of the present Procedural Order.

III. DECISION

18. The Tribunal:

- i. decides the Claimant's challenges to the additional confidentiality designations proposed by the Respondent in the Reply Memorial and its supporting documents as stated in Annex A, which forms an integral part of this Order;
- ii. directs the Claimant to produce a re-designated Reply Memorial and supporting documents by 11 July 2014. A public version of these documents should be produced by 18 July 2014; and,
- iii. reserves costs for subsequent determination.

Seat of arbitration: Miami, Florida, U.S.A

Date: 4 July 2014

For the Arbitral Tribunal:

Prof. Gabrielle Kaufmann-Kohler
President of the Arbitral Tribunal