

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Ruby River Capital LLC

v.

Canada

(ICSID Case No. ARB/23/5)

PROCEDURAL ORDER NO. 8

Decision on Revised Procedural Calendar

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

3 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 a privilege log and redacted versions of documents on 10 December 2024 at the latest, and (ii) to produce documents not withheld from production on a rolling basis from 13 to 20 December 2024.
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 a privilege based on the existence of ethical rules and political/institutional sensitivity, 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 the existence of a privilege. The Respondent further indicated that it would be able to produce, between 13 and 20 December 2024, all documents, redacted or not, responsive to Claimant's requests 5, 9, 10, 13, 14, 16, 17, 18, 19, 20, 21, 22, 24, 25, 27, 30, 36, 37, 38 and 39, and would update at the same time its privilege log of withheld documents. Regarding documents responsive to Claimants' requests 1, 2, 3, 4, 6, 7, 8, 12, 23, 25, 26, 28, 29, 31, 32, 33, 34 and 35, the Respondent indicated that it would be producing them on a rolling basis (also updating its privilege log on the same rolling basis) and would be able to complete production by 28 February 2025. The Respondent requested the Tribunal's leniency for the delays in carrying out its production of documents.
3. On 9 December 2024, the Claimant objected to the Respondent's request for leniency and denounced the Respondent's "*total disregard of the procedural calendar that would have major ramifications and would flout fundamental principles of due process.*" The Claimant noted that the Respondent's failure to produce all responsive documents within the prescribed deadline would jeopardize its ability to submit such documents as evidence with its Reply, and the manner in which the Respondent proposed to produce the documents would be highly disruptive of the work of the Claimant's legal team. The Claimant also objected to the approach proposed by the Respondent with respect to the 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. To that end, the Tribunal invited the Parties to confer and agree on proposed adjustments to the procedural calendar, to be submitted by Tuesday, 17 December 2024 at the latest. The Tribunal further invited the Parties, should they be unable to agree, to submit their respective proposals by the same deadline. The Tribunal insisted that whether joint or separate, the Parties' proposed adjustments should not affect the hearing dates, set for 2 to 12 December 2025.
5. On 17 December 2024, each Party submitted its proposed adjustments 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 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.
10. On 21 December 2024, upon request from the Respondent on 20 December 2024, the Tribunal informed the Parties that the deadline prescribed in PO4 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 declarations of Ms. Josée De Bellefeuille and Mr Donald Booth.
12. On 30 December 2024, the Claimant filed a reply relating to the Respondent's opposition dated 26 December 2024, and to the documents produced by the Respondent between 13 and 20 December 2024, explaining the decisions it was seeking from the Tribunal. The Claimant also stated that it was no longer requesting the production of the following documents: PRIV000336 to PRIV000341, PRIV000347 to PRIV000356, PRIV000361 to PRIV000367, and that it reserved its right to request production of the following documents, for which the Respondent had indicated on 26 December 2024 that it finally agreed to produce them, but with redactions: PRIV000325, PRIV000326, PRIV000327, PRIV000328, PRIV000329, PRIV000330, PRIV000331, PRIV000332, PRIV000333, PRIV000334, PRIV000335, PRIV000342, PRIV000343, PRIV000344, PRIV000345, PRIV000346, PRIV000357, PRIV000358, PRIV000359 and PRIV000360. Lastly, the Claimant indicated that it reserved its right, after having completed its review of the 3,467 documents produced by the Respondent on 20 December 2024 and after having discussed with the Respondent the reasons for the redactions, to seek an order from the Tribunal on this matter.
13. Having reviewed the Parties' positions, expressed through correspondence and at the 18 December 2024 procedural session, the Tribunal has established, in Annex A to the present Order, a revised procedural calendar, and provides to the Parties the following explanations and guidelines applicable to all privilege logs to be submitted by the Parties on 14 February 2024. These explanations and guidelines may be supplemented by the procedural order that the Tribunal will issue no later than 23 January 2025¹ with respect to the Respondent's privilege log dated 10 December 2024. In addition, the Respondent

¹ 23 January 2025 is a deadline and the Tribunal will make its best efforts to issue its decision before that date.

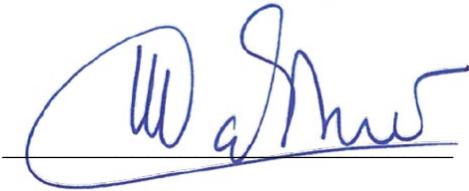
is invited to incorporate in its final privilege log an updated version of the privilege log submitted on 20 December 2024.

II. EXPLANATIONS AND GUIDELINES

14. The Parties will note that the Tribunal has decided to proceed with a single exchange of arguments with respect to the upcoming privilege logs (Step 11 – production of the privilege log, and Step 12 – requests for production of documents identified in the privilege log). The Parties are therefore invited to:
- a) Avoid duplicative entries in their privilege logs or, if duplicative entries cannot be avoided or are necessary, to identify them clearly.
 - b) Include in their privilege logs redacted documents.
 - c) Provide clear and complete reasons in their privilege logs for the withholding or redaction of documents, to enable the other Party to fully respond without having to subsequently provide further arguments. This entails to provide:
 - i. Precise dates, names of authors and recipients with their title or function.
 - ii. A summary of the type and content of the documents.
 - iii. The legal basis for the withholding or redaction.
 - iv. In case of a withholding or redaction based on political or institutional sensitivity:
 1. The compelling reasons justifying confidentiality and how such reasons should prevail over the other Party’s interest in accessing the withheld or redacted information.
 2. Whether Article 283 of the Quebec Code of Civil Procedure is relevant/applicable.
 - v. In case of a withholding or redaction based on the “legal advice” nature of a document, the ground on which that document can be qualified as “legal advice”,

including with respect to the title or function of the drafter and/or sender of the document.

On behalf of the Tribunal,



Ms. Carole Malinvaud

President of the Tribunal

Date: 3 January 2025