

**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

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**PROCEDURAL ORDER NO. 5**

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**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. On 2 August 2013, the Respondent informed the Tribunal that it was unable to meet the time limit of 9 August 2013 for production of documents ordered to be produced in Procedural Order No. 4 (“PO 4”) and requested an extension (the “Respondent’s Request”). Specifically, the Respondent requested the Tribunal to extend the dates for production as follows:
  - Documents from Government Entities<sup>1</sup>: 13 September 2013
  - Documents from the Independent Electricity System Operator (“IESO”): 16 October 2013
  - Documents from Hydro One: 16 December 2013; and,
  - Documents from the Ontario Power Authority (“OPA”): 16 January 2014.
2. On the same day, the Tribunal invited the Claimant’s comments, which were submitted on 6 August 2013. While the Claimant objected to the Respondent’s Request, it agreed to a 30-day extension for the Respondent’s production. Additionally, the Claimant submitted two requests of its own asking the Tribunal to order (a) that the Respondent disclose “all of its correspondence with the [OPA], Hydro One, and the IESO, relating to document disclosure and production, and correspondence with Ontario on the same issue”, and (b) that the Tribunal “draw an adverse inference against [the Respondent] from any non-production of relevant documents” (collectively the “Claimant’s Requests”).
3. On 7 August 2013, the Tribunal informed the Parties that it would soon issue a ruling and suspended the document production time limit until then.

## **II. THE PARTIES’ POSITIONS**

### **A. The Respondent’s Position**

4. In its letter of 2 August 2013, the Respondent requested an extension of the dates for document disclosure in respect of the Government Entities, the IESO, Hydro One and the OPA.
5. In respect of production from the Government Entities, the Respondent stated that it had prepared a database of documents and was presently reviewing them “to ensure their responsiveness and to ensure that no privileged documents are inadvertently disclosed.” The Respondent added that approximately 26,550 documents were being reviewed, after which some time would be required for the production. The Respondent was reviewing approximately 1000 documents a day and anticipated that it would be in a position to produce the documents by 13 September 2013.

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<sup>1</sup> A term defined in the Claimant’s Request of 17 April 2013 and later modified by the Claimant in its Reply to Objections of 11 June 2013.

6. The Respondent noted that it was unable to expedite the process by outsourcing this task as doing so “could jeopardize sensitive, privileged and confidential government information.” Further, as the same document was likely to be responsive to several requests, “rolling production”, would lead to inefficiency and waste time and resources. Indeed, the same document would have to be reviewed and produced numerous times as the different requests were completed, which would be more cumbersome than reviewing the document once in the context of multiple requests. Further, rolling production would also make it difficult to produce an index of the documents in response to particular requests, as this would require references to previous productions.
7. In respect of the production from the IESO, Hydro One and the OPA, the Respondent informed the Tribunal that each of these entities was willing to produce documents. However, they all had indicated that they would need more time for production, especially because they would have to determine whether the documents to be produced contained confidential third party information. If so, they would need to seek the consent of the relevant third parties before disclosing the documents.
8. The Respondent noted that IESO and Hydro One would complete their collection and review of relevant material in 30 and 90 additional days respectively. The OPA, which was to produce the largest number of documents, would require at least 120 additional days. If any document production required third party consent, the latter would have to be approached, approximately 30 days would then be needed for the response, after which a brief period would be required for the documents to be produced.
9. For all of these reasons, the Respondent requested the Tribunal to extend the dates for document disclosure from the IESO, Hydro One and the OPA to 16 October 2013, 16 December 2013 and 16 January 2014 respectively.

#### B. The Claimant's Position

10. In its response of 6 August 2013, the Claimant objected to the Respondent's request.
11. It first submitted that “no element of due process” justified the Respondent's belated request and pointed out that it had given written notice to the Respondent more than two years ago that all the documents related to the Feed In Tariff Program (“FIT Program”) would be required to be produced. This notice was later confirmed at the Procedural Hearing on 12 October 2012 (the “Procedural Hearing”), and also when the Tribunal ordered the Respondent to produce the documents on 9 August 2013. There was therefore no credible reason for the Respondent to inform the Tribunal only a week before that it would be unable to meet the time limit.
12. Next, according to the Claimant, the Respondent's Request was a dilatory tactic which the Tribunal “ought not to condone or facilitate”. In support, the Claimant referred to the Respondent's conduct in *Bilcon et al. v. Canada*, where despite being ordered to produce its documents within 45 days of resolution of the Redfern

Schedule, the Respondent sought a six month extension. Just as it has argued in the present case, the Respondent in that case submitted that it was unable to complete the document production within the time ordered, and that it needed further time to obtain documents, which it would then have to review. As a result, the tribunal in *Bilcon* was forced to resolve the issue through two procedural conferences, and the Respondent only completed its production 35 months after it was initially ordered by the tribunal.

13. The Claimant also contended that on account of the “political sensitivity” of the FIT Program, it had a “reasonable apprehension” that the Respondent’s failure to comply with the Tribunal’s orders and to produce documents was caused by factors other than those stated in its letter of 2 August 2013. The Claimant stressed that the correspondence between the Respondent and the OPA was important, because the Ontario Government had been investigated for destruction of documents in the past.
14. In respect of the production from the OPA, the Claimant relied on provisions of Ontario law, Article 105 of the NAFTA as well Article 8 of the Articles on Responsibility of States for Internationally Wrongful Acts, to contend that the Respondent not only had the *power* to direct the OPA to produce the documents, but also had the *obligation* to do so. The OPA was legally obligated to *immediately* produce the documents requested by the Respondent. The Claimant submitted that as the Ontario Electricity Act required the OPA to comply with Ministerial Directives, and as the FIT Program was conducted under such Directives, international law made Canada responsible for the actions of the OPA. Thus, the OPA was not a third party to these proceedings. The Respondent also pointed out that most of the responsive documents issued by the OPA to comply with Ministerial Directives should already be in the possession of the Respondent. In sum, the Claimant submitted that instead of using its best efforts to obtain documents from the OPA, the Respondent “had simply chosen to disregard its legal obligations and to flaunt the authority of the tribunal.”
15. Finally, the Claimant denied that the Respondent could not complete its production in time as it “ha[d] unlimited human and technological resources to enable compliance.”
16. For all these reasons, the Claimant requested the Tribunal to deny the Respondent’s request and:
  - “1. Order an extension of time for document production of no more than 30 days;
  2. Order that Canada immediately disclose all of its correspondence with the Ontario Power Authority, Hydro One and the IESO, relating to document disclosure and production, and correspondence with Ontario on the same issue; and
  3. Order that the Tribunal will draw an adverse inference against Canada from any non-production of relevant documents.”

17. In respect of request (2) just quoted, the Claimant denied that the Respondent had made any efforts to obtain the relevant documents. If it had made any such efforts, those efforts would have been disclosed rather than simply making reference to “unspecified recent correspondence asking for some unspecified documents.” The Claimant also contended that the Respondent had waived any privilege in respect of correspondence exchanged with the IESO, Hydro One and the OPA.

### III. Analysis

#### A. The Respondent’s Requests

##### i. Production from Government Entities

18. The Tribunal notes that the Claimant has agreed to a 30-day extension for the entire production from the Respondent. In its submission, the Respondent has indicated that production from the Government Entities can take place on 13 September 2013. Thus, in respect of the production from the Government Entities, there no longer remains a dispute between the Parties (except for the time between 9 and 13 September which the Tribunal finds inconsequential).
19. Accordingly, the Tribunal directs the Respondent to produce all documents from the Government Entities which are responsive to the document production requests granted by the Tribunal (in Annex A of PO 4) by **13 September 2013**. The same time limit shall also apply to the Claimant’s production (Annex B of PO 4).

##### ii. Production from IESO, Hydro One and the OPA

20. For the IESO, Hydro One and the OPA, the Respondent proposes staggered production, the last of which is to take place on 16 January 2014. The Claimant objects to such staggered production. For the following reasons, the Tribunal is unable to follow the Claimant’s position.
21. The Tribunal first recalls that the Respondent has consistently maintained that because of the number of entities involved, it was possible that it would require more time for production. For instance, at the Procedural Hearing the Respondent observed: “keep in mind ... that we are dealing with two levels of government here. And that can impose added procedural complications in terms of obtaining the documents, reviewing the documents, producing the documents. Not that that will be prohibitive, but there may be additional time required because of that added complication.”<sup>2</sup> The potential need for additional time was repeated in subsequent correspondence. Thus, it does not appear to the Tribunal that the Respondent is engaging in dilatory tactics.

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<sup>2</sup> Tr. 207:7-14.

22. This observation is confirmed if one reviews the explanations given to substantiate the need for further time, which are perfectly plausible. The IESO, Hydro One and the OPA may have to review a large number of documents, determine for each one whether it is responsive and whether it contains third party confidential information, in which case they would have to seek that third party's consent and, if obtained, then produce the document. To the Tribunal, the periods suggested by the Respondent seem reasonable. The Tribunal does not see how the process can significantly be shortened under the circumstances.
23. In its assessment, the Tribunal also takes into account that the IESO, Hydro One and the OPA are not within its direct reach. This is the reason why in PO 4 the Tribunal did not require production directly from these entities, but instead requested the Respondent to use its best efforts to ensure production. In the circumstances, the Tribunal finds itself unable to impose document production obligations, especially when the Respondent has advanced plausible reasons why these entities are unable to produce the documents within the time limits initially set. In mentioning this aspect from a mere procedural and practical point of view, the Tribunal expresses no opinion on the Claimant's argument that "as a body that is subject to the control of [...] Ontario, the OPA is not an independent third party in these proceedings" and that the OPA's acts are attributable to Canada.
24. In any event, the Claimant's principal concern is one of delay, i.e. that the calendar for the arbitration should not be affected by the delays in production. Provided the time limits set in this order are kept, the Respondent's Request will not affect the calendar:
- documents from the Government Entities will be produced on 13 September 2013. From that date, the Claimant will have more than two months to review and incorporate their content if appropriate into its Memorial on the Merits due on 20 November 2013. This is obviously acceptable to the Claimant which has accepted this extension;
  - documents from the IESO will be produced on 16 October 2013. From that date, the Claimant will still have more than a month before its Memorial on the Merits. It may thus still have sufficient time to take account of the new documents. If it considers this time to be too short, it will then be able to account for these documents in its Reply due on 22 April 2014;
  - documents from Hydro One will be produced on 16 December 2013. From that date, the Claimant would have more than four months before its Reply on Merits;
  - documents from the OPA will be produced on 16 January 2014. From that date, the Claimant would have more than three months before its Reply is due.

25. The Tribunal appreciates that the Claimant would have preferred to have all the documents available prior to its Memorial on Merits. However, it wishes to stress that if the Claimant does not have the entirety of the documents ordered to be produced when filing its Memorial, for reasons that cannot be avoided, its due process rights are still protected by the possibility of addressing the documents filed close to or after the first Memorial in its Reply Memorial, in witness statements and expert reports, at the hearing, and in post-hearing briefs. Finally, the Tribunal insists that it expects the time limits now extended to be complied with in order to avoid that the calendar be further disturbed. The Tribunal has a duty to proceed efficiently and, subject to entirely unforeseeable and unavoidable circumstances, it will not consider further requests for extension of document production time limits favorably.
26. For all of these reasons and with this caveat, the Tribunal grants the Respondent's Request.

#### B. The Claimant's Requests

27. The Tribunal now turns to the Claimant's Requests, particularly that the Tribunal should (a) order disclosure of correspondence between the IESO, Hydro One and the OPA and the Respondent relating to document disclosure and production, and (b) state that it will draw an adverse inference against the Respondent in respect of any non-production of relevant documents.
28. Regarding item (a), the Tribunal recalls that paragraph 12.1 of Procedural Order No. requires that every request for production of documents "shall identify each document or category of documents sought with a sufficient degree of precision and establish its relevance and materiality to the dispute." The Claimant does not explain why it seeks this correspondence. In particular, it does not state whether it may be relevant and material to the dispute and its outcome or whether it is simply requested to show a lack of diligence on the part of Respondent in obtaining the documents ordered to be produced under PO 4. In this latter respect, the Tribunal notes that PO No. 4 was issued on 12 July 2013. By the time it wrote to the Tribunal on 7 August 2013, the Respondent had obtained the confirmation that all the Government Entities as well as the IESO, Hydro One and the OPA would cooperate in the document production exercise and had also received related time estimates. For these reasons and lacking further substantiation, the Tribunal does not consider it justified to order the production of the correspondence sought.
29. Regarding item (b), at the present stage when production is in process and briefs have not yet been filed, the Tribunal considers it premature to make any determination concerning adverse inferences. The Parties are obviously at liberty to request that adverse inferences be drawn in the further course of the proceedings with respect to specific documents which have not been produced although their production was ordered.

30. Finally, the Tribunal attaches an updated Annex A to PO 3, which takes into account the changes to the calendar made in the Tribunal's letter of 27 June 2013, in PO 4, and herein.

#### IV. ORDER

31. For the reasons set out above, the Tribunal makes the following decisions:

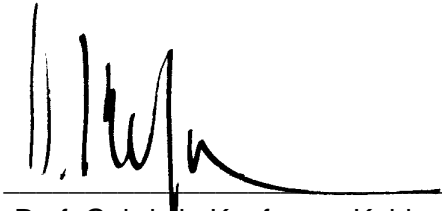
- i. **On 13 September 2013:**
  - a. The Respondent shall produce documents as required by Annex A to PO 4 which are in the possession, custody or control of the Government Entities;
  - b. The Claimant shall produce documents as required by Annex B to PO 4;
- ii. The documents originating from the IESO, Hydro One and the OPA shall be produced no later than:
  - a. **16 October 2013** – Documents from the IESO;
  - b. **16 December 2013** – Document from Hydro One; and
  - c. **16 January 2014** – Documents from the OPA
- iii. Confirms that in its Reply on Merits and Rejoinder on Jurisdiction of 22 April 2014, the Claimant may introduce into the record the new documents (if any) produced by Hydro One and the OPA and, if need be, the IESO. It may also make new fact allegations and new legal arguments arising out of such documents. The Respondent may respond to these new documents, allegations, and arguments in its Rejoinder on Merits of 24 June 2013. Paragraph 10.3 of PO 1 is accordingly amended;
- iv. Denies the Claimant's request for disclosure of correspondence between the Respondent and/or Ontario and the IESO, Hydro One and the OPA relating to document disclosure and production;
- v. Denies at this stage the Claimant's request for a declaration that the Tribunal will draw adverse inferences from the non-production of documents;
- vi. Adopts the revised calendar of the arbitration as set forth in Annex A; and
- vii. Reserves all questions of costs for subsequent determination.



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

23 August 2013

**For the Arbitral Tribunal:**

A handwritten signature in black ink, consisting of several vertical strokes followed by a horizontal line that curves to the right.

Prof. Gabrielle Kaufmann-Kohler  
President of the Arbitral Tribunal