PUBLIC VERSION
PUBLIC DOCUMENT

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL ARBITRATION RULES, 1976

-between-

TENNANT ENERGY, LLC

(the "Claimant")

-and-

GOVERNMENT OF CANADA

(the "Respondent", and together with the Claimant, the "Parties")

PROCEDURAL ORDER NO. 3

The Arbitral Tribunal

Mr Cavinder Bull SC (Presiding Arbitrator)

Mr Doak Bishop

Sir Daniel Bethlehem QC

Registry

Permanent Court of Arbitration

Tribunal Secretary

Ms Christel Y. Tham

10 January 2020

1. Procedural History

1.1 On 9 October 2019, pursuant to paragraph 16 of the Confidentiality Order dated 24 June 2019 (the "**CO**"), the Respondent submitted preliminary confidential versions of its Response to the Claimant's Request for Interim Measures, its cumulative index of supporting documentation, and exhibits R-021 and R-022 (the "**Confidentiality Designations**").

1.2 By letter dated 29 October 2019, in accordance with paragraph 16 of the CO, the Claimant submitted its objections to the Respondent's Confidentiality Designations, arguing *inter alia* that the "proposed redactions do not meet the criteria for 'Confidential Information' under Section I(b) of the Confidentiality Order."

1.3 By letter dated 12 November 2019, in accordance with paragraph 17 of the CO, the Respondent submitted its replies to the Claimant's objections to its Confidentiality Designations.

1.4 By letter dated 14 November 2019, the Claimant contended that the Respondent raised for the first time in its 12 November 2019 letter specific grounds on which it based its Confidentiality Designations, including Section 19 of the Ontario Freedom of Information and Protection of Privacy Act (the "**FIPPA**"), and requested that it be given an opportunity to respond to the new information by 19 November 2019. The Claimant further proposed that the Respondent then be given until 22 November 2019 to reply, and that the Parties be given until 27 November 2019 to try to reach an agreement on the issue in accordance with paragraph 17 of the CO.

1.5 By e-mail dated 15 November 2019, the Tribunal noted that, in accordance with the procedure set forth in the CO, the Parties were to "attempt to reach an agreement on the objected designations", and if no such agreement is reached within 21 days of the Respondent's reply, *i.e.* 3 December 2019, to jointly submit a Disputed Designations Schedule to the Tribunal for resolution.

1.6 By e-mail dated 2 December 2019, the Claimant informed the Tribunal that the Parties had failed to reach an agreement on the Confidentiality Designations, and requested leave to submit comments on the new contentions raised in the Respondent's 12 November 2019 letter, and in particular to "advise the Tribunal that the Ontario FIPPA is not applicable in this situation, and that the cases relied upon by Canada are irrelevant and inapplicable."

1.7 By letter dated 3 December 2019, the Respondent *inter alia* objected to the Claimant's request, arguing that the Claimant has offered "no reasoned basis" to justify a further round of submissions, which will unnecessarily burden the arbitral process. The Respondent further submitted the Disputed Designations Schedule, which contained the Parties' relevant arguments to date, to the Tribunal for resolution.

1.8 By e-mail dated 5 December 2019, the Tribunal noted that after failing to reach an agreement, the Parties had submitted the Disputed Designations Schedule to the Tribunal for resolution. Thus, in accordance with the CO, the Tribunal considered itself seised of the issue and would render a decision in this respect in due course. In addition, the Tribunal expressed its view that the Respondent had raised in its 12 November 2019 letter arguments regarding Section 19 of the FIPPA that were not addressed in its initial submission of 9 October 2019, and that the Claimant

had not had the opportunity to address. As such, consistent with paragraph 17 of the CO which provides that it may "invite further submissions on proposed designations", the Tribunal directed the Claimant to submit its comments on the Respondent's arguments regarding Section 19 of the Ontario FIPPA by 12 December 2019, and the Respondent to provide its reply by 19 December 2019.

1.9 On 12 December 2019, the Claimant submitted its comments on the Respondent's arguments on Section 19 of the Ontario FIPPA, along with exhibit C-020, legal authorities CLA-075 to CLA-080, and updated indices of exhibits and legal authorities. In its submission, the Claimant argued *inter alia* that the Ontario FIPPA is inapplicable to the case at hand because the Claimant did not request exhibits R-021 and R-022 via a FIPPA request. Moreover, even if Section 19 of the FIPPA did apply to the two exhibits, they would still not be shielded from disclosure because the Respondent has waived any right to privilege with respect to them by "ma[king] a strategic choice to … bring them into this action." The Claimant also argued that "[i]t would deny fundamental principles of fairness and equality for Canada to be able to use documents during this supposedly open arbitration and then claim they should still be shielded from the public." For these reasons, in addition to those previously submitted, the Claimant requested the Tribunal to reject the Respondent's Confidentiality Designations.

1.10 On 19 December 2019, the Respondent submitted its reply to the Claimant's 12 December 2019 submission, along with exhibit R-024, legal authorities RLA-093 to RLA-097, and an updated index of supporting documentation. In its submission, the Respondent disputed the Claimant's contentions regarding Section 19 of the FIPPA, and maintained *inter alia* that (i) the definition of "Confidential Information" in the CO expressly includes information otherwise protected from disclosure under the FIPPA, regardless of whether the two exhibits were requested via a FIPPA request or whether the Respondent "voluntarily disclosed" them in the arbitration; and (ii) the information covered by the Confidentiality Designations is protected under Section 19 of the FIPPA, which is a legislated exemption that is broader than common law privilege and may not be subject to the principle of waiver at common law. The Respondent further noted that if the Tribunal were to require the Respondent to publicly disclose documents that are otherwise protected from disclosure under domestic law, it "may have no choice but to withdraw these documents from the record."

1.11 By e-mail dated 20 December 2019, the Respondent sought a postponement of the deadlines for the filing of its proposed designations on documents related to the Confidentiality Designations until after the Tribunal made its ruling thereon.

2. The Tribunal's Decision

2.1 Having carefully considered the Parties' respective arguments, including those regarding Section 19 of the Ontario FIPPA, the Tribunal finds that the Respondent's Confidentiality Designations are justified under the CO, and sets out its decision in the Disputed Designations Schedule enclosed as **Annex 1** to this Order.

2.2 In accordance with paragraph 19 of the CO, the Respondent shall by **Monday, 10 February 2020** file final Confidential and Public Versions of its Response to the Claimant's Request for Interim Measures, its cumulative index of supporting documentation, and exhibits R-021 and R-022.

2.3 The Parties are further directed to submit by **Monday, 20 January 2020** any proposed Confidential Information designations on documents related to the above-mentioned Confidentiality Designations, in accordance with procedure set forth in paragraph 16 of the CO.

Dated: **10 January 2020**

Place of Arbitration: Washington, D.C.

Cavinder Bull SC
(Presiding Arbitrator)

On behalf of the Tribunal

Annex 1: Disputed Designations Schedule

No	Ref. to Designation	Objections to Designation		Reply to Objections	Tribunal's Decision
		Reasons	Designation Requested		
CHALLENGES TO RESPONDENTS' CONFIDENTIALITY DESIGNATIONS IN RESPONSE TO CLAIMANT'S REQUEST FOR INTERIM MEASURES					
1.	R-021	The proposed redactions do not meet the criteria for "Confidential Information" under Section I(b) of the Confidentiality Order. A reference to the existence of a [redacted] does not fall within the definition of "Business Confidential Information" or "Confidential Information" provided in the Confidentiality Order. At most, the actual substance of a [redacted] could potentially qualify for redaction pursuant to the solicitor-client privilege (attorney client privilege) or litigation privilege (work product privilege), under Section 9.2 of the IBA Rules on the Taking of Evidence, (information may be excluded as a result of "legal impediment or privilege"). Section 1(b) of the Confidentiality Order provides that "Confidential Information" includes "information otherwise protected from disclosure under the applicable domestic law of the disputing State Party including… Ontario's *Freedom of Information and Protection of Privacy Act*." While the Act does not refer to the litigation privilege, Article 19 of the Act provides that disclosure may be precluded if the information is protected by solicitor- client privilege. However, assuming the solicitor-client privilege or litigation privilege applied, [redacted]		Canada maintains its proposed designations. The information contained in this document has been designated as confidential in accordance with paragraph 1(b)(iii) of the Confidentiality Order on the grounds that it is "otherwise protected from disclosure under the applicable domestic law of the disputing State party including […] Ontario's *Freedom of Information and Protection of Privacy Act*." Ontario's *Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F.31, ("*FIPPA*"), sections 19 (a) and (b) provide that: "19. A head may refuse to disclose a record, (a) that is subject to solicitor-client privilege; (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;" Section 19 of the *FIPPA* is a legislated exemption and while it may capture common law solicitor-client privilege and litigation privilege, it is broader than either solicitor-client privilege or litigation privilege at common law. The information designated in exhibit R-021 and in Canada's Response to the Claimant's Request for	The Tribunal has no objections to the Respondent's proposed designations. The Tribunal hereby sets out its reasons below. The Claimant submits that the *Freedom of Information and Protection of Privacy Act* ("***FIPPA***") is inapplicable to the case at hand as it is invoked only when a member of the public requests a document from the government. The Claimant further submits that even if solicitor-client privilege or litigation privilege applied, [redacted] have already been filed in an un-redacted manner as part of the record and that accordingly, any such privileges have been waived by the Respondent. In response, the Respondent submits that the information designated in exhibit R-021 and in the Respondent's Response to the Claimant's Request for Interim Measures dated 23 September 2019 falls within the scope of section 19(a) of the *FIPPA* [redacted]

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		have already been filed (in an un-redacted manner) as part of the record, as Exhibits R-021 and R-022. Accordingly, even assuming either the solicitor-client privilege or litigation privilege applied, such privileges have been waived by Canada. *See, e.g.* Agility Pub. Warehousing Co. K.S.C. v. Dep't of Def., 110 F. Supp. 3d 215, 225 (D.D.C. 2015) (disclosure of otherwise privileged information waives the attorney client privilege); Mannina v. D.C., No. 115CV931KBJRMM, 2019 WL 1993780, at *8 (D.D.C. May 6, 2019) (voluntary disclosure of documents waived the deliberative process privilege at issue). Even as a matter of Ontario law, the exchange of this information to the Tribunal and the Investor constitutes a clear waiver of any possible privilege allocated with the documents. In Sopinka, Lederman and Bryant's, The Law of Evidence in Canada, Third Edition, the general principle concerning waiver of privilege is stated: *It was once thought that certain requirements should be established in order for waiver of the privilege to be established; for example, the holder of the privilege must possess knowledge of the existence of the privilege which he or she is forgoing, have a clear intention of waiving the exercise of his or her right of privilege, and a complete awareness of the result. But, as will*		Interim Measures ("Canada's Response") falls within the scope of section 19(a) of the *FIPPA* and is exempt from disclosure. [redacted] [redacted] exhibit R-021 [redacted] The information designated in exhibit R-021 and in Canada's Response fall within the scope of section 19(b) of the *FIPPA* and is exempt from disclosure. [redacted] This information is precisely what the plain language of section 19(b) is meant to protect.	[redacted] The Respondent further submits that section 19(b) of the *FIPPA* is a legislated exemption that is broader than the common law privilege, and that it may not be subject to the principle of waiver at common law. The question before the Tribunal is whether documents already produced by the Respondent should be made available to the public or not. The question is not whether the Respondent can refuse to produce documents to the Claimant on the basis of its domestic law. Paragraph 1(b)(iii) of the Confidentiality Order provides that "Confidential Information" means information that is not publicly available and is designated by a Party as confidential on the grounds that it is "information otherwise protected from disclosure under the applicable domestic law of the disputing State party including, but not limited to, and as amended…Ontario's *Freedom of Information and Protection of Privacy Act*" ("***FIPPA***").

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		be pointed out, other considerations unique to the adversarial system, such as fairness to the opposite party and consistency of positions, have overtaken these factors. *An obvious scenario of waiver is if the holder of the privilege makes a voluntary disclosure or consents to disclosure of any material part of a communication…[I]f a client testifies on his or her own behalf and gives evidence of a professional, confidential communication, he or she will have waived the privilege shielding all of the communications relating to the particular subject matter.* *Moreover, if the privilege is waived, then production of all documents relating to the acts contained in the communication will be ordered.* Accordingly, the Claimant objects to Canada's proposed confidentiality designations and redactions.		Moreover, section 19(b) of the *FIPPA* is a legislated exemption that is broader than the common law privilege. The courts (Ontario) have indicated that records subject to section 19(b) (a record "in contemplation of or for use in litigation" or referred to as "branch 2" of s. 19(b) in the attached case law) may not be subject to the principle of waiver at common law. For example, see **RLA-091**, *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (CanLII) ("*Magnotta Winery*") in which the Ontario Court of Appeal held there was no waiver of privilege/confidentiality by providing alternative dispute resolution materials to opposing counsel or to a mediator to assist with mediation and settlement discussions as part of the litigation process. (see also: **RLA-092**, *Ontario (Attorney General) v. Holly Big Canoe*, 2006 CanLII 14965 (ON SCDC)) ("*Holly Big Canoe*"). To remove the designations on exhibit R-021 and in Canada's Response would reveal information otherwise protected from disclosure under the law of Ontario. The Claimant's objection should therefore be denied, and the designation maintained.	In this regard, sections 19(a) and (b) of the *FIPPA* further provide that: "19. A head may refuse to disclose a record, (a) that is subject to solicitor-client privilege; (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;" The Claimant appears to accept that the [redacted] are subject to solicitor-client privilege, or litigation privilege. Instead, the Claimant submits that *FIPPA* is not applicable in the present arbitration. Like the tribunal in *Mesa Power LLC v Government of Canada* (PO No. 11), this Tribunal agrees that this is an issue which is pre-empted by the clear language of the Confidentiality Order, which expressly provides that the *FIPPA* is applicable insofar as Confidentiality Information designations are concerned. Further, the Claimant has not explained in its submissions how it will be prejudiced if the information in question is not made available to the public. That information has already been provided to the

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					Claimant. In this regard, the Claimant's submission that the tribunal in *Pope & Talbot Inc v Canada* rejected Canada's argument that it did not have to produce certain documents on account of what was at that time contained in the Canada Evidence Act because the Canada Evidence Act was not applicable to a NAFTA tribunal is beside the point. As highlighted above, the question here is not whether the Respondent can refuse to produce documents to the Claimant on the basis of its domestic law, but whether documents already produced by the Respondent should be made available to the public or not. The Tribunal is further unable to agree with the Claimant that the Respondent has waived any applicable legal privilege [redacted]

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					Respondent's Response to the Claimant's Interim Measures Request at [redacted] (emphasis added). For these reasons, the Tribunal rejects the Claimant's objections to the Respondent's proposed Confidentiality Information designations in Exhibit R-021. For these same reasons, the Tribunal similarly has no objections to the Respondent's proposed redactions to the text of its Response to the Claimant's Request for Interim Measures containing references [redacted]
2.	R-022	The proposed redactions do not meet the criteria for "Confidential Information" under Section I(b) of the Confidentiality Order. A reference to the existence of [redacted] does not fall within the definition of		Canada maintains its proposed designations. The information contained in this document has been designated as confidential in accordance with paragraph 1(b)(iii) of the Confidentiality Order on the grounds	The Tribunal has no objections to the Respondent's proposed designations in exhibit R-022 for the same reasons as set out above.

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		"Business Confidential Information" or "Confidential Information" provided in the Confidentiality Order. [redacted] could potentially qualify for redaction pursuant to the solicitor-client privilege (attorney client privilege) or litigation privilege (work product privilege), under Section 9.2 of the IBA Rules on the Taking of Evidence, (information may be excluded as a result of "legal impediment or privilege"). Section 1(b) of the Confidentiality Order provides that "Confidential Information" includes "information otherwise protected from disclosure under the applicable domestic law of the disputing State Party including… Ontario's *Freedom of Information and Protection of Privacy Act*." While the Act does not refer to the litigation privilege, Article 19 of the Act provides that disclosure may be precluded if the information is protected by solicitor- client privilege. However, assuming the solicitor-client privilege or litigation privilege applied[redacted] have already been filed (in an un-redacted manner) as part of the record, as Exhibits R-021 and R-022. Accordingly, even assuming either the solicitor-client privilege or litigation privilege applied, such privileges have been waived by Canada. *See, e.g.* Agility Pub. Warehousing Co. K.S.C. v. Dep't of Def., 110 F. Supp. 3d 215, 225		that it is "otherwise protected from disclosure under the applicable domestic law of the disputing State party including […] Ontario's *Freedom of Information and Protection of Privacy Act*." Ontario's *Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F.31, ("*FIPPA*"), sections 19 (a) and (b) provide that: 19. A head may refuse to disclose a record, (a) that is subject to solicitor-client privilege; (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; Section 19 is a legislated exemption and while it may capture common law solicitor-client privilege and litigation privilege, it is broader than either solicitor-client privilege or litigation privilege at common law. The Independent Electricity Systems Operator ("IESO") is designated as an institution under Ontario's *FIPPA*, in accordance with Ontario Regulation 460. See R.R.O. 1990, Regulation 460, s. 1(1). The information designated in R-022 and in Canada's Response [redacted] As such, it falls within the scope of	

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		(D.D.C. 2015) (disclosure of otherwise privileged information waives the attorney client privilege); Mannina v. D.C., No. 115CV931KBJRMM, 2019 WL 1993780, at *8 (D.D.C. May 6, 2019) (voluntary disclosure of documents waived the deliberative process privilege at issue). Even as a matter of Ontario law, the exchange of this information to the Tribunal and the Investor constitutes a clear waiver of any possible privilege allocated with the documents. In Sopinka, Lederman and Bryant's, The Law of Evidence in Canada, Third Edition, the general principle concerning waiver of privilege is stated: *It was once thought that certain requirements should be established in order for waiver of the privilege to be established; for example, the holder of the privilege must possess knowledge of the existence of the privilege which he or she is forgoing, have a clear intention of waiving the exercise of his or her right of privilege, and a complete awareness of the result. But, as will be pointed out, other considerations unique to the adversarial system, such as fairness to the opposite party and consistency of positions, have overtaken these factors.* *An obvious scenario of waiver is if the holder*		section 19(a) of the *FIPPA* and is exempt from disclosure. [redacted] exhibit R-022 [redacted]. The information designated in exhibit R-022 and in Canada's Response fall within the scope of section 19(b) of the *FIPPA* and is exempt from disclosure. [redacted] This information is precisely what the plain language of section 19(b) was meant to protect. Moreover, section 19(b) of the *FIPPA* is a legislated exemption that is broader than the common law privilege. The courts (Ontario) have indicated that section 19 (b) (a record "in contemplation of or for use in litigation" or referred to as "branch 2" of s. 19(b) in the case law) may not be subject to the principle of	

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		of the privilege makes a voluntary disclosure or consents to disclosure of any material part of a communication…[I]f a client testifies on his or her own behalf and gives evidence of a professional, confidential communication, he or she will have waived the privilege shielding all of the communications relating to the particular subject matter. Moreover, if the privilege is waived, then production of all documents relating to the acts contained in the communication will be ordered. Accordingly, the Claimant objects to Canada's proposed confidentiality designations and redactions.		waiver at common law. For example, see **RLA-091**, *Magnotta Winery*, in which the Ontario Court of Appeal held there was no waiver of privilege/confidentiality by providing alternative dispute resolution materials to opposing counsel or to a mediator to assist with mediation and settlement discussions as part of the litigation process. See also **RLA-092**, *Holly Big Canoe*. To remove the designations on exhibit R-022 and in Canada's Response would reveal information otherwise protected from disclosure under the law of Ontario. The Claimant's objection should therefore be denied, and the designation maintained.	