

Global Affairs Canada
Department of Justice



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Ministère de la Justice

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VIA EMAIL

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Dear Members of the Tribunal:

Re: *Tennant Energy LLC v. Government of Canada*

In accordance with the Tribunal's direction of December 5, 2019, Canada writes in response to the Claimant's additional comments on section 19 of the Ontario *Freedom of Information and Protection of Privacy Act* ("FIPPA").

As explained below, the Claimant's arguments that the FIPPA is inapplicable and that section 19 of the FIPPA does not protect against the disclosure of information in this case are meritless. Paragraph 1(b)(iii) of the Confidentiality Order ("CO") that governs this arbitration clearly defines the term "confidential information" as including 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*."

Furthermore, there is no question that section 19 of the FIPPA applies to exhibits R-021 and R-022, and that those exhibits are therefore exempt from disclosure pursuant to Ontario law. The Claimant's erroneous assertion that Canada has somehow waived the application of the FIPPA misstates the conditions under which the Tribunal must evaluate those documents in these proceedings.

A. The Definition of “Confidential Information” in the CO Expressly Includes Information Otherwise Protected From Disclosure Under the FIPPA

The Claimant’s argument that the FIPPA is inapplicable is directly contrary to the language of paragraph 1(b)(iii) of the CO, which states:

1. For this Confidentiality Order:

[...]

- b) “Confidential Information” means information that is not publicly available and is designated by a Party as confidential on the grounds that it is:

[...]

- iii) information otherwise protected from disclosure under the applicable domestic law of the disputing State party including, but not limited to, and as amended, Canada’s *Access to Information Act*, the *Canada Evidence Act*, Canada’s *Privacy Act*, and Ontario’s *Freedom of Information and Protection of Privacy Act*.

In accordance with provisions virtually identical to paragraph 1(b)(iii), past NAFTA tribunals have routinely recognized information otherwise protected under the domestic law of the disputing State party as “confidential information.”¹

Similar arguments advanced by the Claimant’s counsel in *Mesa v. Canada*, that certain designations made by Canada were inappropriate because paragraph 1(b)(iii) of the Confidentiality Order in that case did not allow a party to designate information as confidential on the basis of applicable domestic access to information laws, were rejected by the tribunal. As stated by the *Mesa* tribunal:

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.²

Contrary to the Claimant’s argument,³ there is no requirement in paragraph 1(b)(iii) of the CO for a member of the public to request a document from an institution under the FIPPA in order for Canada

¹ For example, **RLA-093**, *Mesa Power Group v. Government of Canada* (UNCITRAL) Confidentiality Order, 21 November 2012, ¶ 1(b)(iii); **RLA-094**, *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Confidentiality Order, 16 September 2013, ¶ 1(b)(iii); **RLA-095**, *Bilcon of Delaware et al. v. Government of Canada* (UNCITRAL) Procedural Order No. 2 (Confidentiality Order), 4 May 2009, ¶ 1(b)(iii).

² **RLA-096**, *Mesa Power Group v. Government of Canada* (UNCITRAL) Procedural Order No. 11, 4 July 2014 (“*Mesa – PO 11*”), ¶ 6.

³ Claimant’s Letter to the Tribunal, 12 December 2019, p. 1.

to have the right to invoke the FIPPA to designate information as confidential. The requirement set out by the Claimant would be nonsensical as it would permit a disputing party to designate information as “confidential” only after a member of the public requests the document in question in accordance with the procedures in the FIPPA. Such an application of the CO would negate its express terms and purpose.

Furthermore, the Claimant’s argument that the FIPPA does not apply because it did not “request” the documents and Canada “voluntarily disclosed” them in the arbitration is baseless. Attempts by the Claimant’s counsel to raise similar arguments in *Mesa* were also rejected. As explained by the *Mesa* tribunal:

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.⁴

Likewise, the issue in this case does not concern document production, but rather, whether exhibits R-021 and R022 should be made available to the public. Thus, the Claimant’s reference to the *Pope & Talbot* tribunal’s statements on document production are irrelevant.

The fact that Canada “voluntarily disclosed” such documents in these proceedings does not obviate any of the grounds on which it can designate “confidential information” in accordance with the CO. In this case, Canada did not need to disclose [REDACTED]. However, it determined it was critical to do so to provide the Tribunal with the information it needs to resolve the Claimant’s Motion for Interim Measures, in which the Claimant made serious and inaccurate representations of Canada’s conduct in this arbitration. In effect, the Claimant’s suggestion that information in this arbitration should automatically be made public simply because it is “voluntarily” disclosed would mean that Canada would need to waive the protections under the CO in order to present its case in response to the Claimant’s motion. Such an approach is not only incorrect, but violates Article 15 of the UNCITRAL Rules, which requires the parties to be treated with equality and, at any stage of the proceedings, be given a full opportunity to present their case.

B. Canada’s Designated Information is Protected Under Section 19 of the FIPPA

As set out above, [REDACTED] filed as exhibits R-021 and R-022 were disclosed by the Government of Ontario and the IESO (respectively) in support of Canada’s Response to the Claimant’s Request for Interim Measures, [REDACTED]

[REDACTED]

⁴ RLA-096, *Mesa – PO 11*, ¶ 5.

[REDACTED]. [REDACTED]
[REDACTED]
[REDACTED] This disclosure does not imply that the Government of Ontario and IESO may no longer rely on Ontario law to refuse to disclose documents pursuant to the FIPPA, nor does it permit the Tribunal to override those protections by forcing Canada to disclose to the public documents protected under the FIPPA.

The Claimant argues that section 19(b) of the FIPPA somehow does not apply because by disclosing [REDACTED] to the Tribunal and the Claimant, the Government of Ontario and IESO have waived any privilege that attached to these documents. As noted above, Canada maintains that the issue of waiver is irrelevant for the purposes of the application of the CO in these proceedings.

In any event, even if the concept of waiver under Ontario law is found to be relevant, then the Claimant has confused the concepts of common law privilege and a statutory exemption under the FIPPA. Ontario courts interpreting the statutory exemption under the FIPPA have indicated that the statutory exemption under section 19(b) is distinct and broader than the concept of common law privilege. For example, in *Ontario (Attorney General) v. Holly Big Canoe*⁶, the Ontario court held that the issue is not common law privilege when determining whether section 19(b) is applicable to a document, but whether the documents meet the statutory description provided for in section 19(b).⁷

The court further noted that section 19(b) was “not an importation of the common law privilege into FIPPA, but an enactment in its own right” and that “there is nothing in the language or the context [of FIPPA] to suggest that the FIPPA exemption [section 19(b)] is terminated by the loss of the common law litigation privilege.”⁸ If the legislature had intended section 19(b) to be limited to common law solicitor-client and litigation privilege, it would have been express in providing for this as it has in section 19(a) of FIPPA. This case supports the principles that common law privilege is distinct from the section 19(b) statutory exemption, and that waiver of a common law privilege does not necessarily constitute a waiver of the statutory exemption.

Other cases, including Orders issued by the Information and Privacy Commissioner of Ontario (“IPC”), have also re-iterated these principles and have drawn a clear distinction between the common law privilege (intended to be covered under section 19(a) of the FIPPA) and section 19(b), which has been found to be a separate “statutory” privilege.⁹

⁵ Canada’s Response to the Claimant’s Request for Interim Measures, 23 September 2019, fn 24.

⁶ **RLA-092**, *Ontario (Attorney General) v. Holly Big Canoe*, 2006 CanLII 14965 (ON SCDC), 8 May 2006 (“*Holly Big Canoe*”).

⁷ **RLA-092**, *Holly Big Canoe*, ¶ 45.

⁸ **RLA-092**, *Holly Big Canoe*, ¶¶ 28, 43.

⁹ See for example **RLA-091**, *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (CanLII), 20 October 2010 and **R-024**, Information and Privacy Commissioner of Ontario, Order PO-3627 (Jun. 30, 2016).

The principles set out in *Ontario (Attorney General) v. Holly Big Canoe*, and *Liquor Control Board of Ontario v. Magnotta Winery Corporation*¹⁰, indicate that disclosure of documents subject to section 19(b) to an opposing party or to a mediator did not constitute a waiver of the “statutory” privilege, and therefore that the protections established under section 19(b) continued to apply. Both of these cases reflect the principle that where disclosure to limited parties is required or supports the proper administration of justice, such disclosure does not constitute a waiver of the statutory privilege under section 19(b) of FIPPA.

While the Claimant attempts to distinguish these cases as somehow inapplicable to the issue of the scope of section 19(b), Canada disagrees. Canada’s disclosure, similar to the purpose of the disclosures in *Magnotta* and *Holly Big Canoe*, [REDACTED]

(particularly given that the Claimant has raised serious allegations of spoliation of documents against Ontario).

Further, in *Gowling v. Meredith*,¹¹ a case cited by the Claimant, the Ontario Superior Court of Justice re-iterated that “any conflict as to the interference with solicitor-client privilege ‘should be resolved in favour of protecting confidentiality’.”¹² Canada is of the view that the same principle should be applied here to the extent that the question of whether privilege has been waived is at issue.

C. Conclusion

In sum, the Claimant’s claims that (1) the FIPPA is inapplicable; and (2) section 19 of the FIPPA does not protect against the public disclosure of information in this case must be rejected.

Canada has consistently advocated for the greatest transparency in investor-State arbitration, subject to the protection of confidential information. Accordingly, Canada disclosed exhibits R-021 and R-022 in this arbitration in accordance with the terms of the CO and on the understanding that any waiver of privilege did not further constitute a waiver of confidentiality since such information is otherwise protected under domestic law. If the Tribunal were to require Canada to publicly disclose documents that are otherwise protected from disclosure under domestic law, Canada may have no choice but to withdraw these documents from the record.

Yours very truly,



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¹⁰ **RLA-091**, *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (CanLII), 20 October 2010.

¹¹ **CLA-079**, *Gowling v. Meredith*, 2011 ONSC 2686 (CanLII), ¶ 10.

¹² This principle was originally articulated by the Supreme Court of Canada in *Descoteaux v. Mierzwinski*. See **RLA-097**, *Descoteaux et al. v. Mierzwinski*, [1982] 1 SCR 860, ¶ 27(2).

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