



The logo for ReedSmith, with "Reed" in black and "Smith" in red, both in a sans-serif font.

October 29, 2019

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Sir Daniel Bethlehem QC
 20 Essex Street
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Dear Mr. President and Members of the Tribunal,

Re: *Tennant Energy LLC v. Government of Canada (PCA Case No. 2018-54)*

Pursuant to Paragraph 16 of the Confidentiality Order, we have enclosed the Investor's Objections to Canada's Confidentiality Designations made on October 9, 2019.

In Procedural Order Number 1, the Tribunal set the place of arbitration at Washington DC. This, the *lex arbitri*, is the law of the District of Columbia. This law governs confidentiality privilege.

In its October 9, 2019 Response to the Investor's Request for Interim Measures (the "Response"), Canada has claimed an unspecified confidentiality privilege [REDACTED]

Canada has redacted a large amount of information (at pages 5 – 7) referring to the existence of [REDACTED], as well to references to [REDACTED] (R-21 and R-22). Canada has not provided the basis for these redactions.

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 "Business Confidential Information" or "Confidential Information" provided in the Confidentiality Order.

At most, the actual substance of [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] [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 (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 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 Investor objects to Canada’s proposed confidentiality designations and redactions.

Pursuant to section 16 of the Confidentiality Order, the Investor has enclosed its specific observations in Appendix A.

On behalf of counsel for the Investor,

Yours truly,

A handwritten signature in blue ink that reads "Barry Appleton". The signature is written in a cursive, flowing style.

Barry Appleton

Encl:

cc: Lori Di Pierdomenico
Edward Mullins
Christel Tham