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By Email

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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 the Tribunal's December 5, 2019 directions, the Investor offers the following comments in relation to the arguments on Section 19 of the Ontario *Freedom of Information and Protection of Privacy Act* ("*FIPPA*"), which were raised by Canada for the first time in its November 12, 2019 submission.

The *FIPPA* is inapplicable to the case at hand.

In Paragraph 12 of its September 23, 2019 Response to Claimant's Request for Interim Measures, Canada voluntarily disclosed that [redacted] R-021 and R-022 to the Tribunal as proof of that fact.

On October 9, 2019, in accordance with Paragraph 16 of the Tribunal's June 24, 2019

[1] Response to Claimant's Request for Interim Measures, 23 September 2019, ¶12.

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Confidentiality Order, Canada designated R-021 and R-022 as "confidential" documents.[2] On October 29, 2019, the Investor objected to those documents being designated as confidential, arguing that any privilege that could have been asserted in relation to those documents had been waived.[3] Thereupon, Canada, in its November 12, 2019 reply, argued for the first time that the documents were shielded from disclosure to the public by Section 19 of the *FIPPA*.[4]

However, the *FIPPA* is inapplicable to the case at hand. As made clear by the court in *Ontario (Attorney General) v. Holly Big Canoe* ("*Big Canoe*")—a decision which was cited by Canada in its November 12 submission—the *FIPPA* is a legislative "scheme", whose first purpose is "to provide a right to access to information under the control of the government of Ontario, or an agency thereof, upon the principles that information should be available to the public, subject to exemptions that are necessary, limited, specific and independently reviewed."[5] Like freedom of information statutes in other countries, *e.g.*, the U.S. Freedom of Information Act [6] and the UK Freedom of Information Act[7] the *FIPPA* is only invoked when a member of the public requests a document from the government.

Specifically, to invoke the *FIPPA*, an individual, pursuant to Section 24 of the statute, must take the following steps:

> *a) make a request in writing to the institution that the person believes has custody or control of the record, and specify that the request is being made under this Act;*
> *b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and*
> *c) at the time of making the request, pay the fee prescribed by the regulations for that purpose.*[8]

Then, the head of the institution that holds the record in question will "give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given."[9] The presumption is that the person has a right of access to the record,[10] and access can only be withheld if the record falls within certain statutory "exemptions" or the institutional head determines that the request is "frivolous or vexatious".[11]

The two cases cited by Canada as alleged support for its argument that R-021 and R-022 are shielded from disclosure both follow this necessary fact pattern. In *Big Canoe*, a man convicted of assaulting his wife submitted a *FIPPA* request for the Crown brief which had been disclosed

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[2] Email from Canada to Tribunal with the Disputed Designations Schedule and attachments, October 9, 2019 ***(C-020).***
[3] Annex A – Investor, 29 October 2019.
[4] Annex A – Replies to Claimant's Objections to Designations in Response to Request for Interim Measures, 12 November 2019.
[5] *Ontario (Attorney General) v. Holly Big Canoe*, Ontario Superior Court of Justice, 8 May 2006, *("Big Canoe")*, ***(RLA-092)***.
[6] *The Freedom of Information Act*, 5 U.S.C. §552, 2016, ***(CLA-075)***
[7] *Freedom of Information Act*, UK Public General Acts 2000 c. 36, ***(CLA-076)***
[8] Section 24, *Ontario's Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F.31, ***(R-018)***.
[9] Section 26, *Ontario's Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F.31, ***(R-018)***.
[10] Section 10, *Ontario's Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F.31, ***(R-018)***.
[11] Section 10, *Ontario's Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F.31, ***(R-018)***.

to his defense counsel before trial, and the Ministry of the Attorney General refused to disclose some aspects of that brief to him on the basis of Section 19 of the *FIPPA*.[12] Likewise, in *Liquor Control Board of Ontario v. Magnotta Winery Corporation* 2010 ONCA 681 (CanLII) ("*Magnotta Winery*"), an unidentified person submitted a request under FIPPA to the Liquor Control Board of Ontario ("LCBO") for a complete record of a mediated settlement to which the LCBO was a party, but the LCBO denied access to some of those records under Section 19 of the *FIPPA*.[13]

The situation here is completely inapposite. The Investor did not request documents R-021 and R-022 via a *FIPPA* request. Instead, as Canada itself admits, Canada voluntarily disclosed those documents "[redacted]."[14] Accordingly, not only does the *FIPPA* not apply, but also its statutory exemptions (including the exemption in Section 19 of the *FIPPA* for records subject to solicitor-client privilege) do not apply.[15]

Canada's tact is analogous to a failed one it put forth in *Pope & Talbot Inc. v. Canada*. In that NAFTA arbitration, Canada tried to argue that it did not have to produce certain documents on account of what at the time was contained in Section 39(1) of the Canada Evidence Act,[16] which provides:

> *Where a minister of the Crown or the Clerk of the Privy Council objects to the disclosure of information before a court, person or body with jurisdiction to compel the production of information by certifying in writing that the information constitutes a confidence of the Queen's Privy Council for Canada, disclosure of the information shall be refused without examination or hearing of the information by the court, person or body.*[17]

However, the *Pope & Talbot* tribunal rejected that argument on the basis that it was not "a court, person or body with jurisdiction to compel the production of information;" instead, it was simply an arbitral tribunal operating under the UNCITRAL Rules that could only make an adverse ruling if a party refused to produce a document that had been requested.[18] Thus, the statutory subsection Canada had asserted for protection from disclosure could not be applicable.

Likewise, in the instant case, Canada is trying to take advantage of a statutory exemption for producing documents under the *FIPPA*—even though the *FIPPA* is not applicable here. Accordingly, the Tribunal should disregard Canada's argument on its face.

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[12] *Big Canoe*, ¶¶ 2-3, ***(RLA-092)***.

[13] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, Ontario Court of Appeal, 20 October 2010, ("*Magnotta Winery*"), ¶¶ 9-10, ***(RLA-091).***

[14] Annex A: Disputed Designations Schedule, Canada's Reply to Objections, pp. 2, 4.

[15] Even if there were some action by the Investor or a member of the public that could be construed as a *FIPPA* request, Canada did not follow proper protocol under that legislation for confidentiality, such as having certain notifications issued from the heads of the relevant institutions. *See* Section 26, *Ontario's Freedom of Information and Protection of Privacy Act*, RSO 1990, c. F.31, ***(R-018)***.

[16] *Pope & Talbot Inc. v. The Government of Canada* (Decision by Tribunal), 6 September 2000, ¶ 1.1., (*"Pope & Talbot"*), ***(CLA-077).***

[17] Section 39(1): Confidences of the Queen's Privy Council for Canada, *Canada Evidence Act* (R.S.C., 1985, c. C-5), ***(CLA-078).***

[18] *Pope & Talbot*, ¶ 1.3., (***CLA-077).***

Even if Section 19 of the *FIPPA* somehow applied to R-021 and R-022, those documents would still not be shielded from disclosure.

Section 19 of the *FIPPA* provides the following:

> ***Solicitor-client privilege***
> ***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; or*
> *c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.*

Canada asserts that R-021 and R-022 are exempt from disclosure, because they "fall within the scope of section 19(b) of the *FIPPA*."[19] Moreover, it asserts that section 19(b) "may not be subject to the principle of waiver at common law" and cites *Magnotta Winery* and *Big Canoe* in support. However, *Magnotta Winery* and *Big Canoe* stood for no such thing.

In *Magnotta Winery*, the records in question were arguably covered by the common law doctrine of settlement privilege as well as by section 19(b) of the *FIPPA*—so waiver was never a question.[20] *Big Canoe* was even more clear. There, the court made clear it was only considering whether a prosecutor's mandatory disclosure to defense counsel waived its rights under section 19 of the *FIPPA*:

> *In this court, we are bound to follow the Big Canoe 1997 finding that waiver of the common law privilege by voluntary delivery of the records to a third party ends the s. 19 privilege, unless the later case of Big Canoe [in 2001] has impliedly over-ruled it. Since Big Canoe stresses the difference between the common law litigation privilege and the s. 19 exemption under FIPPA, the two cases may well not stand together, but, as I have concluded that there has been no voluntary waiver of the common law privilege, that question will have to await another day.*

In this case, even if the *FIPPA* applied (which it does not), it is clear that Canada waived any right it had to that statute's exemptions from disclosure. "Privilege is deemed waived when the communications between solicitor and client is legitimately brought into issue in an action."[21] Canada had no obligation to disclose R-021 and R-022 to the Tribunal. Rather, it made a strategic choice to mention those [redacted] and bring them into this action. Therefore, any privilege it could have claimed with respect to them is waived.

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[19] Annex A: Disputed Designations Schedule, Canada's Reply to Objections, pp. 2, 4.

[20] *Magnotta Winery*, ¶ 20, ***(RLA-091)*** (noting that the Divisional Court "concluded that the Disputed Records were exempt from disclosure under both the second branch of s. 19 of *FIPPA* and the common law doctrine of settlement privilege."), ¶¶ 48-50 (finding it unnecessary to determine whether settlement privilege at common law applied to the Disputed Records as they fell within the second branch of s. 19).

[21] *Gowling v. Meredith*, Ontario Superior Court of Justice, 19 May 2011, ¶ 10, ***(CLA-079).***

Furthermore, even if the common law rules of privilege waiver do not apply to Section 19 of the *FIPPA*, the principles of fairness and equality which underlie this arbitration dictate a similar result.[22] As the Canadian court in *S.C.L. v Ontario* explained,

> *It is not apparent in principle how one could make disclosure of a document and thereby have the use of the document in an action and assert at the same time that it is still privileged. The disclosure and use of the document are inconsistent with the position that is privileged and therefore not to be disclosed and used.*[23]

It 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.

Conclusions

As explained above, Canada has no viable argument on which it can claim confidentiality for documents R-021 and R-022. It has relied on a provision under the *FIPPA* to shield those documents from disclosure – but the *FIPPA* does not apply here. Moreover, even if the *FIPPA* did apply, Canada's actions would have constituted a waiver of any exemption it could have claimed under that statute.

Accordingly, Canada is not entitled under the Confidentiality Order to the confidentiality designations that it seeks to apply to documents R-021 and R-022. Canada's designations should be rejected.

On behalf of counsel for the Investor,

Yours truly,

Barry Appleton

Encl:

cc: Edward Mullins
Ben Love
Lori Di Pierdomenico
Christel Tham

[22] *See, e.g.*, 1976 UNCITRAL Arbitration Rules Art 15(1) ("Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."), ***(CLA-070)***.

[23] *S.C.L. v. Ontario*, Ontario Superior Court of Justice, 24 May 2004, ¶ 67, ***(CLA-080)***.