



The logo for ReedSmith, consisting of the word "Reed" in black and "Smith" in red, both in a sans-serif font.

March 2, 2020

*By email*

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Dear Mr. President and Members of the Tribunal

**Re: Assertion of Confidentiality over publicly disclosed [REDACTED]**

While the disputing parties were able to agree on the text of rectifications to the procedural hearing transcript, they differ on the treatment of proposed confidentiality designations relating to the existence of [REDACTED] by the Government of Ontario and its controlled instrumentality.

The Investor filed an Annex A with observations to Canada on such disputed matters on February 10, 2020. Canada filed responsive observations on February 26<sup>th</sup>. Twenty-one days have now elapsed since the raising of the objection. Accordingly, the Investor writes pursuant to the terms of the *Confidentiality Order*.

The disputing parties are not in agreement on the fundamental issue about how to treat the existence of [REDACTED]. While Canada agreed to reduce some of its excessive demands to suppress information, Canada still contends that any reference to [REDACTED], in any way, is confidential, and must be redacted.

The definition of confidential information in the **Confidentiality Order** requires that Canada prove that the information at issue that it seeks to suppress actually is confidential. This is a necessary pre-condition for designation of information.

Information released to the public cannot qualify as confidential information under the terms of Article 1(b) of the *Confidentiality Order*.

“*Confidential Information*” means information that is not publicly available...”

The Investor sent a letter to Canada containing its views. The Investor underscored that the Tribunal President put Canada on notice that it had an obligation to make timely objections if information discussed in the public hearing sessions concerned matters that Canada considered to be confidential. This letter, contained references to the hearing transcript, is attached along with the completed Annex A, containing the Investor’s objections and Canada’s response thereto.

The facts of this matter are simple. **Canada failed to make timely objections during the procedural hearing.** Canada again failed to make a timely objection with respect to the publication of the hearing video. **The information at issue has been disseminated widely to the public.** The public knows that there was [REDACTED] Reasonably this should not be confidential in any sense.

It would be absurd to suggest that this public information about the existence of [REDACTED] is confidential. The public at the hearing know about [REDACTED] The public watching the video on the internet knows that there was [REDACTED] simply is no longer a confidential matter. It is a matter of public record.

As the knowledge of [REDACTED] is public, Canada cannot assert confidentiality over it. Canada may not force the Tribunal to take steps to mask this information from the public. Such actions would not only be improper but would bring the administration of the investor-state arbitration into disrepute with civil society. Such actions should be avoided.

This situation is made worse due to Canada’s ongoing practice of not following the Tribunal’s orders in a timely manner, and then attempting to obtain untimely relief from the Tribunal that would be most objectionable to the public commitment to transparency announced by the Trade Ministers of the United States and Canada. Canada can only blame itself for its failure to make timely objections at the NAFTA hearing, and again to fail to make timely objections before the video was made public.

Canada’s motion cannot succeed under the terms of the *Confidentiality Order*. The Investor advised Canada to withdraw this unnecessary motion, to avoid wasteful costs. As a result, the Investor seeks that the Tribunal dismiss Canada’s motion and award costs forthwith to the Investor with respect to this flagrantly wasteful exercise.

On behalf of counsel for the Investor,

Yours truly,



Barry Appleton

Encl:

cc: Heather Squires

Edward Mullins