INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
1818 H STREET, NW | WASHINGTON, DC 20433 | USA
TELEPHONE (202) 458 1534 | FACSIMILE (202) 522 2615
WWW.WORLDBANK.ORG/ICSID

NIKO RESOURCES (BANGLADESH) LTD.
V.
BANGLADESH PETROLEUM EXPLORATION &PRODUCTION COMPANY LIMITED ("BAPEX")
AND BANGLADESH OIL &GAS MINERAL CORPORATION ("PETROBANGLA")
(ICISD CASE NOS. ARB/10/11 AND ARB/10/18)

Procedural Order No 22
(Privilege Asserted Against the Production of the Deloitte Documents)

I. The Requests and the Related Procedure

1. At the April 2017 evidentiary hearing on the Corruption Claim [redacted] made reference to an investigation (also referred to as "audit") conducted at the instruction of a subcommittee of the Board of Directors of Niko Resources Ltd (Niko Canada) by Deloitte & Touche Forensic & Investigative Services Inc., Calgary ("Deloitte") in connection with the corruption allegations by the Bangladesh Anti-Corruption Commission (ACC) and the Royal Canadian Mounted Police (RCMP). Specifically, [redacted] mentioned a PowerPoint presentation concerning the results of the investigation. The Respondents requested production of this presentation and any related documents. The Claimant observed that there might be valid grounds for the assertion of privilege.

2. The procedural steps that followed this exchange at the hearing were recorded in the Tribunals' Procedural Order No 21 of 4 June 2017 which also decided some of the procedural issues that had arisen in the context of the Respondents' request for production and the Claimant's assertion of privilege. The remaining issues which the Tribunals address in the present Order and the related procedure may be summarised as follows:

3. By letter of 11 May 2017, the Respondents requested that the Tribunals order the Claimant to immediately produce the PowerPoint, the full Deloitte report, and a list of all the documents related to the Deloitte audit.

4. By Procedural Order No. 20, issued on 17 May 2017, the Tribunals ordered the Claimant to:

> *1.1 produce to the Tribunals and the Respondents a list of*
>
> *(a) all documents which were produced by Deloitte as part of the audit of the corruption issue, to which* [redacted] *referred in his oral testimony (the Deloitte Audit List) and*

(b) documents derived from these documents, such as the PowerPoint presentation mentioned by [redacted] *and the minutes of Board Meetings at which the Deloitte report was discussed;*

1.2 identify on the Deloitte Audit List those documents for which Niko claims privilege, and state the reasons for the privilege claim (submission on privilege); and

1.3 produce to the Tribunal and the Respondents those documents for which no privilege is claimed.

5. On 22 May 2017 the Claimant responded to this order. In its letter of that date, the Claimant presented its position concerning the Deloitte investigation and the documents produced, claiming privilege for these documents (the **Claimant's submission on privilege**). The Claimant explained that Deloitte had been engaged by Gowling Lafleur Henderson LLP, Calgary (**Gowlings**), in support of the legal advice they were providing to Niko Canada and added:

> *The documents generated by or with Deloitte as part of its work for Gowlings is privileged, as well as documents derived from those documents, reflecting the conclusions drawn from the investigation or summarising the details of the work conducted.*[1]

The submission was accompanied by Exhibit C-238, the letter by which Deloitte was engaged by Gowlings, the solicitors of Niko Canada (the **Deloitte Engagement Letter**, referred to by the Claimant as the Deloitte Retainer Agreement) and the **Deloitte Audit List**, as defined in item 1.1 (b) of P.O. No 20; the submission was also accompanied by legal authorities, numbered CLA-214 to CLA-218.[2] Exhibits C-239 to C-251, also mentioned in the Deloitte Audit List, were produced on 24 May 2017. These exhibits were identified as "Niko Canada Board Meeting Minutes" and as "Audit Committee Meeting Minutes".

6. On 26 May 2017 the Claimant provided an updated Deloitte Audit List. In its updated version, the list mentions the following documents:

- Records of interviews: 25 summaries of interviews of 22 interviewees, at various dates between 9 April and 27 July 2009 (items 2 to 13 and 15 to 27); there are two interviews with interviewee 6 and 7 and hand written notes of an undated interview with the latter.

[1] Claimant's submission on privilege, p. 4.
[2] The submission erroneously includes Exhibit C-237 in the list of accompanying documents; that document had been produced already at the April 2017 hearing (see Summary Minutes, paragraph 14).

- A "Memorandum containing summary of findings from public source searches regarding background details of an individual and related entities (undated)" (item 14);
- The "PowerPoint Slides" described as "entitled Niko Resources Ltd., DRAFT Audit Committee Report, Privileged and Confidential, June 11, 2009";
- Minutes of Niko Canada Board Meetings: minutes of 6 meetings, at various dates, between 7 January and 11 December 2009 (items 30 to 33, 35 and 45); the Claimant produced all these meetings heavily redacted, identifying those passage where privilege is asserted;
- Minutes of the Audit Committee: minutes of 10 meetings 18 April and 11 December 2009, some of which also were redactions.

7. The letter of 26 May 2017 by which the Claimant transmitted the revised Deloitte Audit List, provides the following information:

> *The additional Deloitte generated material comprises further interview notes/summaries as well as a general description of what we understand to be voluminous internal working papers generated by Deloitte pursuant to their engagement by Gowlings under the Retainer Agreement dated 27 February 2009. It is our understanding that such Deloitte internal working papers reside in different locations within Deloitte's record keeping systems and comprise working notes, annotations and similar items generated by Deloitte team members for the purpose of performing its mandate pursuant to its engagement by Gowlings. As with the other Deloitte generated materials, solicitor-client privilege and litigation privilege is asserted in all such work product as outlined in Niko's submission of 22 May 2017.*

8. The Respondents objected that the redactions made in the documents produced by the Claimant did not identify which of the redactions were made on the basis of an assertion of privilege. The Claimants produced on 29 May 2017 new versions of these documents in which they had marked the passages for which they claim privilege.

9. On 6 June 2017 the Claimant responded to certain points in P.O. 21, explaining inter alia that Dentons, the Claimant's present counsel, "acts as counsel both for Niko Resources Ltd. ('Niko Canada') and for Niko". It added:

> *With particular regard to the specific inquiry of the Respondents noted in paragraph 10.4 of Procedural Order No 21, we advise that following the issuance of Procedural Order No 13 in these arbitrations, in June 2016 Niko Canada authorised Dentons to retain Deloitte in order to allow Dentons (who replaced Gowlings as counsel in these arbitrations) adequately to defend Niko in the Corruption Phase of these arbitration. Pursuant to this retainer some materials and information concerning the investigation that Gowlings had conducted years before with the assistance of Deloitte's forensic services were made available to Dentons. Following the issuance of Procedural Order No 20, in May 2017 Niko Canada*

> *provided Board and Audit Committee meeting minutes to Dentons that were responsive to the Tribunals' request and consented to Niko disclosing the redacted minutes in compliance with that order as reported in our correspondence with the Tribunals.*

10. The Respondents replied on 9 June 2017 to the Claimant's submission on privilege (**Response on Privilege**), disputing that the Deloitte documents are covered by solicitor-client privilege or litigation privilege, seeking the production of

> *any and all documents related to Deloitte's investigation and report*

and

> *deny*[ing] *Claimant's assertion of privilege*

over these documents.[3] The Respondents also argued that any privilege that may have attached to the Deloitte documents was waived by [redacted] testimony at the April 2017 hearing.

11. On 11 June 2017, the Claimant requested an opportunity to respond to the "assertion, made for the first time in the Respondents' letter of 9 June 2017, that Niko waived applicable privilege through [redacted] testimony at the hearing in April". The request was granted and the Claimant responded to the said assertion on 16 June 2017.

12. Also on 16 June 2017, the Respondents requested an opportunity to respond to the Claimant's submission on waiver. They argued that one round of written submissions on the privilege issue had been programmed and that, by being allowed to comment on the waiver issue, the Claimant had been granted a second submission; therefore the Respondents also should be granted the opportunity for a second submission.

13. Further to directions from the Tribunals, the Secretariat wrote to the Parties on 20 June 2017 as follows:

> *The Respondents requested the production of the documents related to the Deloitte investigation. The Claimant objected by raising privilege and the Respondents replied. In their Reply the Respondents invoked waiver and the Claimant replied. The Tribunals are of the view that the Parties had an adequate possibility to express their position on these issues. The Tribunals also consider that they are sufficiently briefed at this time and therefore decline the request for a further submission.*

14. The Tribunals have deliberated on the Respondents' request for production and Claimant's assertion of privilege. In the course of these deliberations the Tribunals considered the question whether their decision required an inspection of the documents

[3] Respondents' Response on Privilege of 9 June 2017, p. 14.

for which privilege was asserted. Since they wished to avoid having to examine documents which, at the end of their examination, may have to be declared as privileged and thus should not be brought to their attention, they examined the possibility of appointing an expert familiar with Canadian law of privilege to inspect the documents for which the Claimant asserts privilege and to advise on the question whether these documents are indeed covered by privilege. The decided to refrain from doing so since the Parties had argued in depth the relevant rules and principles of Canadian law and the Tribunals concluded that, on the basis of the principles, as they were argued by the Parties, the Respondents' request and the Claimants' privilege assertion could be decided without the Tribunals having to inspect the documents concerned. In these circumstances, the Tribunals concluded that the additional delay which would inevitably have been caused by such an expert consultation was not justified.

II. The Factual Background

15. The Claimant explained in its Submission on privilege of 22 May 2017 that in January 2009, Niko Canada received information that the RCMP were investigating allegations of improper payments in Bangladesh by Niko Canada or its subsidiary, the Claimant. Niko Canada engaged Gowlings as legal counsel, to direct an internal investigation under the direction of an Audit Sub-Committee of the Niko Canada Board of Directors that comprised Niko Canada's non-management directors [redacted], [redacted] and [redacted]. The purpose of these internal investigations, according to Ms Kristine Robidoux of Gowlings in her statement dated 6 September 2011, was "to provide advice to [Niko Canada] concerning and to defend against allegations arising from alleged corruption in civil, criminal or regulatory forums".

16. Gowlings engaged the services of Deloitte pursuant to the Engagement Letter of 27 February 2009. The Claimant explains that Niko Canada's Board and Audit Committee described the work as "Special Audit" but that the term "audit" does "not correspond to the context and the work that was in fact done".[4]

17. The Claimant also explained that the only "report" about the investigation by Deloitte of which Niko is aware is reflected in the PowerPoint presentation mentioned by [redacted] during the April 2017 Hearing. It asserted that "it is a recognised best practice in internal investigations to deliver investigation results either orally or in an oral presentation accompanied by PowerPoint slides, although sometimes full written reports are also prepared".[5]

18. In support of these explanations, the Claimant relies on the Engagement Letter,[6] the Board meetings of 7 January and 12 February 2009,[7] Ms Robidoux' witness statement

[4] The General Business Terms attached to the Engagement Letter specify in paragraph 2 (b) that the services provided according to the letter "will not constitute an audit conducted in accordance with generally accepted auditing standards…".
[5] Claimant's Submission on Privilege, p. 4.
[6] Produced as Confidential Exhibit C-238.
[7] Produced as partially redacted confidential exhibits C-239 and 240, respectively.

and an article on conducting internal investigations,[8] together with other legal authorities.

19. The Respondents argue that the Claimant, seeking to rely on privilege, "bears the burden of proving the existence of the privilege on a balance of probabilities". This is not denied. The Respondents argue that

> *Niko's evidentiary support of its claim is extraordinarily limited. It offers no sworn affidavits from Deloitte, Gowling Lafleur Henderson LLP ("Gowlings"), or Niko Canada regarding the nature of Deloitte's engagement, its conduct of the investigation, the circumstances in which reports of the investigation were delivered, or the identity of the recipients of such reports. Instead, Niko submits only attorney argument, bolstered by nothing beyond Deloitte's engagement letter and a privilege log that omits the most basic details concerning the withheld communications.*[9]

20. The Respondents do not, however, dispute that the Engagement Letter correctly records the engagement of Deloitte by Gowlings nor the authenticity of the documents produced.

21. On the basis of the evidence produced by the Claimant, the Tribunals conclude that around early 2009 Niko Canada became aware of an "investigation of allegations of improper payments made by Niko Resources Ltd. and/or its subsidiary in Bangladesh and other locations",[10] that it retained Gowlings who in turn engaged Deloitte to conduct the enquiry. The questions which the Tribunals must address, therefore, is whether the documents and information produced in Deloitte's investigation are covered by one or the other privilege invoked by the Claimant and, if they are, whether this privilege has been waived.

III. The Law Applicable to Privilege and Waiver in the Present Case

22. The documents of which the Respondents seek production were generated by an investigative service provider in Canada to a Canadian law firm retained by a Canadian company related to a Canadian investigation. The issue of privilege thus is clearly linked to Canada. The Tribunal noted in particular that the lawyer-client relationship on which the Claimant relies is between a Canadian law firm and its Canadian client. The question whether and to what extent this relationship is covered by legal privilege thus clearly is subject to Canadian law.

[8] Michael J. Missal, Stvroula E. Lambrakopoulos, Curtis S. Koawalk, Conducting Internal Investigations, K&L Gates, 2015. Produced as CLA-214.
[9] Respondents' Response on Privilege of 9 June 2017, p. 8.
[10] Engagement Letter p. 1.

23. The Parties, too, in their argument on the question of privilege rely on Canadian law. The Claimant asserts specifically that the issue is governed by Canadian law.[11] The assertion is not contested by the Respondents who rely on Canadian jurisprudence.[12]

24. The Tribunals therefore consider the issue under the law of Canada.

IV. The Distinction between Solicitor-Client Privilege and Litigation Privilege in Canadian Law

25. Solicitor-client privilege and litigation privilege are treated differently under Canadian law. Court cases have referred repeatedly to an article by R.J. Sharpe who, in the words of the Canadian Supreme Court, "has explained particularly well the difference" between these two legal institutions:[13]

> *It is crucially important to distinguish litigation privilege from solicitor-client privilege. There are, I suggest, at least three important differences between the two. First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.*
>
> *Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client*

[11] Claimant's Submission on Privilege of 22 May 2017, p. 4.
[12] Response on Privilege of 9 June 2017, p. 9 *et passim.*
[13] Blank v. Canada (Department of Justice), 2006 SCC 39,, paragraph 28, CLA-218 (**Blank**)

> *privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).* [14]

26. Bearing this distinction in mind, the Tribunals have examined the Claimant's assertion of privilege in its two forms.

V. Is the Work Product of Deloitte Covered by the Solicitor-Client Privilege?

A. The solicitor-client privilege protection in principle and its extension to the "protected continuum"

27. The Claimant states that, in Canada, as in most common law jurisdictions, the protection of solicitor-client communications from disclosure is fundamental. The Claimant relies *inter alia* on a recent decision of the Canadian Supreme Court, and specifically on the following passage:

> *The importance of solicitor-client privilege to our justice system cannot be overstated. It is a legal privilege concerned with the protection of a relationship that has a central importance to the legal system as a whole.*[15]

28. It is uncontested that, as a matter of principle, the solicitor-client privilege (occasionally referred to as the lawyer-client privilege) must be protected in this international arbitration as it is prescribed by Canadian law. The Parties differ, however, with respect to the question whether, in the circumstances of this case, the Deloitte documents are covered by this privilege.

29. With respect to the solicitor-client privilege, the difference between the Parties arises from the fact that the documents and the information with respect to which the Claimant asserts privilege do not record directly the advice provided to Niko Canada by their solicitors and the corresponding communications from Niko Canada to the solicitors. They concern documents and information gathered by a third party, Deloitte, engaged for this purpose by Niko's solicitors.

30. Addressing this question, the Claimant explains that the

> *Solicitor-client privilege is not narrowly limited to the specific communications between a solicitor and client that amount to the telling of the law but includes advice regarding what should be done in the relevant legal context. It is not necessary that the communications specifically request or offer advice as long as it can be placed 'within the continuum' of communication in which the solicitor tenders advice.*[16]

[14] R.J. Sharpe, "Claiming Privilege in the Discovery Process", in Law in Transition : Evidence [1984] Special Lect. L.S.U.C. 163, at pp. 164-165; quoted from Blank, paragraph 28. The passage is quoted also in other court decisions, e.g. General Accident Assurance Co. v Chrusz (1999), 45 OR (3d) 321 (Ont CA), 124 OAC 356 (**Chrusz**), CLA-217, paragraph 23.
[15] Alberta (Information and Privacy Commissioner) v University of Calgary 2016 SCC 53 at para 26 (CLA-216).
[16] Submission on privilege of 22 May 2017, p. 5.

31. In particular, the Claimant states that the privilege "extends to third party communications that are in furtherance of a function which is essential to the existence or operation of the relationship between the solicitor and the client".[17]

32. The Respondents do not dispute that communications between solicitors and third parties may be privileged, but assert that this is the case rarely "and only in narrow circumstances".[18]

33. In support of its position that in the present case privilege must include the Deloitte documents, the Claimant relies in particular on the decision in *Chrusz*, where the Ontario Court of Appeal stated:

> *The privilege also extends to communications and circumstances where the third party employs an expertise in assembling information provided by the client and in explaining that information to the solicitor. In doing so, the third party makes the information relevant to the legal issues on which the solicitor's advice is sought.*
>
> *…the applicability of client-solicitor privilege to third party communications where the third party cannot be described as a channel of communication between the solicitor and client should depend on the true nature of the function that the third party was retained to perform for the client. If the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship, then the privilege should cover any communications which are in furtherance of the function and which meet the criteria for client-solicitor privilege.*[19]

34. In another decision on which the Claimant relies, the Court refers to the "protected continuum" and states:

> *Put another way, does the disclosure of the communication have the potential to undercut the purpose behind the privilege – namely, the need for solicitors and their clients to freely and candidly exchange information and advice so that clients can know their true rights and obligations and act upon them?*[20]

35. The issue before the Tribunals thus has two aspects: it must first be determined whether the communications between Niko Canada and Gowlings are covered by the solicitor-client privilege and, if that is the case, whether the investigations by Deloitte form part of the protected continuum of Niko Canada's communications with its solicitors.

[17] Submission on privilege of 22 May 2017, p. 5, relying on Chrusz, paragraph 120.
[18] Response on Privilege of 9 June 2017, p. 9.
[19] Chrusz CLA-217.
[20] Quoted in the Claimant's Submission on Privilege of 22 May 2017, p. 6, referring to Canada (Information Commissioner) v. Canada (Minister of Public Safety and Emergency Preparedness), 2013 FCA 104, 360 D.L.R. (4t) 176 (F.C.A.), quoted at p. 5 of the letter.

B. Niko Canada's Gowlings communications with Niko Canada, its officers and personnel and those of Niko, its subsidiary

36. The record shows that Niko Canada sought legal advice from Gowlings in relation to the corruption allegations. Ms Robidoux describes the assignment from Niko as follows:

> *When corruption allegations were raised in Bangladesh, Gowlings conducted an internal investigation with Niko Resources Ltd. for the purpose of obtaining information for Niko Resources Ltd.'s legal counsel in order to provide advice to Niko Resources Ltd. concerning and to defend against allegations arising from alleged corruption in civil, criminal or regulatory forums. Although the criminal charges in Canada against Niko Resources Ltd. appear to have been resolved with the guilty plea on June 24, 2011, other regulatory investigations appear to remain outstanding. Further, two Canadian law firms widely known for class action law suits announced in late June 2011 that they were investigating Niko's disclosures, stock option practices and foreign business practices. The privilege associated with Gowlings' files and the investigation results remains necessary to protect Niko Resources Ltd's interests in defending against potential future allegations or claims.*[21]

37. Concerning the time when "corruption allegations were raised in Bangladesh", the minutes of the Board meeting on 7 January 2009 indicate that these allegations came to the attention of Niko Canada before that meeting, presumably in late 2008.[22] Indeed, Ms Robidoux explains that among the documents received by Gowlings there were "written enquiries from the Bangladesh Anti-Corruption Commission in 2008". [23]

38. The Tribunals conclude that the communications between Niko Resources Ltd. and Gowlings concerning the corruption allegations related to the legal advice which Gowlings was engaged to provide. Such communications are clearly covered by solicitor-client privilege.

39. The communications between Gowlings and its client take place not by the company as a legal entity but by the persons who are engaged in the substance matter to which the legal advice relates. These persons, officers of the company and employees, communicate with the solicitor on behalf of the company, providing the information on the basis of which the solicitors provide their advice. It is these communications by the officers and personnel of the client company that must be protected by the privilege so that they may "confide in [the] solicitor knowing that what is said will not be revealed".

40. The Respondents seem to hold the view that the extension of the investigation "to sources outside Niko Canada, namely its subsidiaries", could not be covered by the solicitor-client privilege: They seem to justify this conclusion on the assumption that

[21] Witness Statement of Ms Robidoux, dated 6 September 2011, paragraph 9, Exhibit C-222. [22] Exhibit C-239.
[23] Exhibit c-222, paragraph 6 (c).

the interviews in question were conducted "with individuals in Canada and in Bangladesh and these were not all individuals internal to Niko Canada, the client".[24]

41. The internal investigation mentioned by Ms Robidoux in her witness statement mentions only advice to Niko Canada and the Deloitte Engagement Letter defines the "Client" as "Niko Resources Ltd. Board of Directors". The Engagement Letter, however, clearly states that the review to be performed concerns activities not only of Niko Canada but also "its subsidiaries' operations in Bangladesh". The subsidiaries, and in particular the Bangladesh subsidiary, were just as concerned by the corruption allegations as the parent company and it was just as important that a subsidiary's officers and personnel communicated with the same degree of confidence with the solicitor as those of the parent company. In any event, since the allegations concerned the activities in Bangladesh, an internal investigation by the solicitors necessarily must have extended to any officers and personnel of Niko, the Bangladesh subsidiary.

42. The Tribunals conclude that the communications covered by the solicitor-client privilege include the officers and personnel of both Niko Canada and Niko, the Claimant, to the extent they were invited to provide confidential information to the internal investigation under the direction of Gowlings.

C. Extension of the solicitor-client privilege to communications with Deloitte

43. The documents requested by the Respondents and for which the Claimant asserts solicitor-client privilege, as far as it can be seen from the evidence and information provided by the Claimant, do not concern communications between officers and personnel of Niko Canada or Niko and Gowlings, but the formers' communications with Deloitte. The question therefore is whether the solicitor-client privilege extends to such communications with Deloitte.

44. Deloitte were not engaged as solicitors by Niko or Niko Canada, but provided assistance to Gowlings. The internal investigation seems to have been conducted to a large extent if not entirely, by Deloitte. The Engagement Letter states that Gowlings acted "on behalf of Niko Resources Ltd. Board of Directors ("Client") to provide the forensic and investigative services described herein". The letter starts with a section on "Background to the engagement", containing the following passages:

> *We understand that you have requested our services in connection with the investigation of allegations of improper payments made by Niko Resources Ltd. and/or its subsidiary in Bangladesh and other locations, as directed by Counsel, and any other related matters.*
>
> *We understand that it is Counsel's intention and the position of Counsel that our work for it will be covered by the solicitor work-product privilege and other applicable privileges, and that the information, records, data, advice or*

[24] Respondents' Response on Privilege of 9 June 2017.

> *recommendations contained in any reports, materials, opinions, presentations or other communications written or otherwise, in draft or final form, provided by Deloitte to Counsel are intended solely for the information and use of Counsel and Niko.*

45. The Deloitte Engagement Letter continues under the heading of "Scope of Services" with the following clarification:

> *You have requested our assistance in conducting an internal investigation stemming from the allegations described above.*

46. It thus results clearly from the evidence before the Tribunals that Deloitte's services were linked to the advice for which Gowlings were engaged and that Deloitte fulfilled a task that formed part of the assignment given by Niko Canada as the Client to its Counsel. In compliance with this task, the privileges of Gowlings were extended to Deloitte. It seems uncontested that the solicitor-client privilege extends to such auxiliary services in the course of an investigation directed by a solicitor. The Respondents acknowledge that:

> *For instance, documents produced in internal investigations done for the purpose of putting facts or circumstances before a lawyer to obtain legal advice may be covered by Solicitor-Client privilege.*[25]

47. The Engagement Letter expressly envisaged that Deloitte, in the course of their work, gather information by interviews and thus engage in communications with persons relying on the confidentiality of communications in an investigation under the direction of a solicitor. When describing in some detail the work which Deloitte was expected to perform, the Engagement Letter expressly mentions "a total of five to 10 interviews to be conducted in Canada and via telephone in Bangladesh".

48. The Tribunals conclude that, to the extent Deloitte performed auxiliary services in the investigation by Gowlings and made this clear to the persons interviewed, these persons could rely that their communications benefitted from the solicitor-client privilege of Gowlings.

D. <u>Which of the Deloitte documents are covered by the solicitor-client privilege?</u>

49. When accepting, in the statement just quoted, that internal investigations may be covered by solicitor-client privilege, the Respondents add, however,

> *… where the investigation involves the <u>gathering and possible interpretation of evidence from outside sources</u>, for the purposes of assisting counsel to provide legal advice; this will not be covered by Solicitor Client privilege.*[26]

[25] Response on Privilege of 9 June 2017, p. 10, emphasis in the original; the quoted passage relies on Talisman Energy (RLA-378).
[26] Response on Privilege of 9 June 2017, p. 10, emphasis in the original.

50. The case on which the Respondents rely in support of the quoted statement does indeed concern a case where the court found that a third party was retained by in-house counsel "to gather – and possibly, interpret – information from outside sources for the purposes of assisting counsel to provide legal advice". The court did not accept that solicitor-client privilege attached to this relationship.[27]

51. The Tribunals agree with the Respondents' conclusion. Two situations must be distinguished: the first situation concerns gathering of material without involving confidential communications. There, the fundamental premise of the solicitor-client privilege is not met. In the words of Sharpe, there is no "confidential communication between the client and his solicitor". The second situation concerns the case where there are confidential communications but they are with persons outside the organisation of the client.

52. As to the first of these situations, the Respondents rightly point out that the assignment of Deloitte was not limited to an internal investigation. There is no indication that, apart from the interviews, the Deloitte documents contain any confidential communications. The description of Deloitte's Scope of Services in the Engagement Letter states:

> *While the internal investigation stems from the aforementioned allegations, our work is intended to be broader in scope to include Niko's activities in Bangladesh, and other jurisdictions as necessary. […] Initially, we will review the documentary evidence, take steps to safeguard and gather additional evidence, and interview such persons as Deloitte and Counsel agree are necessary.*

53. The description of the "Approach to the engagement", starts by the following statement:

> *Our approach is to perform a holistic review of the disbursements and activities related to Niko Resources Ltd ("Niko Canada") and its subsidiaries' operations in Bangladesh ("Niko Bangladesh").*

54. The detailed description of Deloitte's activity in several phases as set out in the Engagement Letter shows that this activity went far beyond confidential communications with the Client's personnel. It included the collection and analysis of documents and information from other sources. During phase I, for instance, Deloitte's investigation included, in addition to interviews with individuals in Canada and in Bangladesh, such tasks as to "execute forensic electronic data acquisition and analysis procedures in Canada", to "perform preliminary analysis of records located in Canada" and to obtain background information on [redacted] on [redacted]"; phase II included similar activities in Bangladesh and other activities collecting and analysing data and in phase III an expert report on Deloitte's findings and conclusions was foreseen which was to include "any related files, schedules or analysis".

[27] *Wilfred Robert Pearson and Inco Limited*, Superior Court of Justice, Ontario, 16 September 2008, Pearson (RLA-369), paragraph 8.

55. Some of the documents included in the updated Deloitte Audit List correspond to those mentioned in the Engagement Letter. The application of solicitor-client privilege to them is at the least doubtful. For instance the "Memorandum containing summary findings from public source searches regarding background details of an individual and related activities" (item 14 of the list) obviously cannot attract solicitor-client privilege: findings from public sources, by their nature, are not based on communications relying on the confidence in this relationship.

56. The internal working papers (item 28 of the List) and the PowerPoint Slides (item 29 of the List) may well contain information communicated by Niko officers and personnel in reliance on the solicitor-client privilege; but they will most likely also contain other information. They would have to be produced and the protected information would have to be redacted. The same can be expected to apply to the Board Meeting Minutes (items 30 – 33, 35 and 45 of the List) and the Audit Committee Meeting Minutes (items 34, 36-44 of the List), most of which were produced in a redacted form. When determining the production by reference to the solicitor-client privilege, the redactions would have to be verified in order to ensure that they are limited to information provided in the course of communications covered by this privilege.

57. The Tribunals conclude that some and possibly many of the documents for which the Claimant asserts privilege do indeed attract solicitor-client privilege or at least may require redactions. The decision about their production requires further information from the Claimant and an examination of the documents themselves possibly by an independent expert. Before initiating a procedure to this effect and engaging time and resources in it, however, the Tribunals have examined the other basis on which the Claimant asserts privilege.

58. The second situation concerns the interviews conducted by Deloitte. To the extent the persons interviewed form part of Niko Canada's and Niko's organisation and they conveyed confidential information in reliance on solicitor-client privilege, the summaries are covered by that privilege, as explained above. It is, however, not certain that the interviewees are limited to these persons.

59. The protection of the confidentiality of communications with a solicitor has as its purpose to ensure the effectiveness of the advice and defence which the client is entitled to receive from its solicitor. This purpose must cover the communications by the client and members of its organisation. It is difficult to see how communications by "outside sources", i.e., persons not part of the organisation which seeks legal advice, should benefit from the protection which is afforded to individuals who, as explained by Sharpe, "confide in a solicitor knowing that what is said will not be revealed". Records of interviews with persons which are not part of the Niko organisation, thus, cannot be considered as concerning protected communications and are not covered by the solicitor-client privilege. In order to decide whether the interview summaries are protected by this privilege, the Tribunals thus must know who the interviewees are.

60. Ms Robidoux described the investigation of Gowlings as "internal". This may be understood to mean that only persons internal to Niko Canada and to Niko would be concerned. That may well have been the principal purpose and nature of the Deloitte investigation. Indeed, an investigation initiated by Niko Canada about alleged corruption committed by the company most likely would start with and focus on the activity of the organisation itself and its members.

61. It is, however, not certain that the investigations stopped there and that no outside persons were among the interviewee. The Tribunals note that the investigation concerning [redacted] and [redacted] are to be conducted, "unless otherwise agreed upon, without direct contact with the individual";[28] it would thus be unlikely that [redacted] (who by that time held no longer a function in Niko and thus had become an outsider) was interviewed.

62. Other outsiders may, however, have been interviewed: Since an important part of the Deloitte investigations related to payments made by the company, it seems possible or even likely that persons involved in implementing, recording or auditing of payments (inside the company and in the banks or other institutions carrying out the payments), would also be questioned in such an investigation.

63. Neither the witness statement of Ms Robidoux nor the Engagement Letter identify the persons interviewed in the course of the investigation. The latter document simply states that, as part of its activity in Phase I, Deloitte will "conduct interviews with individuals in Canada, individuals in Bangladesh, via telephone as necessary".[29] The Claimant itself stated

> *Niko Canada (and Niko) considers the identity of the persons interviewed as part of the investigation to reflect the thought processes of counsel and encompassed by the solicitor-client and litigation privileges. It has therefore omitted this information under claim of privilege.*[30]

In these circumstances, the Tribunals cannot know which of these interviews are covered by the solicitor-client privilege as part of the "internal investigation" and which were conducted with outside persons with respect to whom no solicitor-client privilege can be admitted. For the reasons explained above in paragraph 57, the Tribunals have decided, before seeking clarification on this point, e.g. by having the summaries examined by a third person appointed by them, to examine the other privilege which the Claimant asserts. Depending on the conclusion reached with respect to this other privilege, such further examinations may not be necessary.

[28] Exhibit C-238, p. 3.
[29] Exhibit C-238, p. 3.
[30] Submission on Privilege of 22 May 2017, p. 8.

VI. Litigation Privilege

64. In addition to the solicitor-client privilege, the Claimant also asserts litigation privilege under Canadian law, arguing that "the Deloitte work product undertaken pursuant to the Retainer Agreement is also protected by litigation privilege".[31]

65. As explained by Sharpe,

> *Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate.*[32]

66. In the *Pearson* case, the court considered the situation where a third party was retained "to gather – and, possibly, interpret – information from outside sources for the purposes of assisting counsel to provide legal advice". In that case, the court denied solicitor-client privilege to such material from "outsides sources", as did the Tribunals in this decision. The court pointed out that such a situation had to be considered from the perspective of litigation privilege and "emphasised the need to preserve the boundaries of solicitor-client privilege and litigation privilege in cases of third party communications".[33]

67. The Respondents deny that litigation privilege applies to the Deloitte documents. They deny that the dominant purpose of the Deloitte investigation was threatened litigation and they argue that, any litigation privilege that may have existed has terminated. The Tribunals will examine these two lines of argument separately.

A. Dominant purpose

68. The Claimant describes litigation privilege under Canadian law as applying

> *to communications and documents where the dominant purpose for their creation was for use in connection with contemplated litigation.*[34]

69. The Respondents do not contest this definition. They emphasise that the

> *… principal issue in determining whether litigation privilege applies to a particular document is whether the dominant purpose of the communication or document was for litigation.*[35]

70. The Respondents rely on a passage from a decision of the Alberta Court of Queens Bench in which that court quoted the Alberta Court of Appeal in *Mosely vs. Spray Lakes Sawmills* (2008):

[31] Submission on Privilege of 22 May 2017, p. 7.
[32] As quoted above from CLA-217, paragraph 23.
[33] Pearson (RLA-396), paragraph 8.
[34] Submission on Privilege of 22 May 2017, p. 7.
[35] Response on Privilege of 9 June 2017, p. 12.

> *The key is, and has been since this Court adopted the dominant purpose test in Nova, that statements and documents will only fall within the protection of the litigation privilege where the dominant purpose for their creation was, at the time they were made, for use in contemplated or pending litigation. While a lawsuit need not have been initiated, and while a lawyer need not have been retained at the time the statement or document was made, the party claiming privilege must establish that at the time of creation the dominant purpose was use in litigation... The test is a strict one. As has often been stated, it is not enough that contemplated litigation is one of the purposes.*[36]

71. The Respondents underline the last sentence of this quotation and argue that, in the present case,

> *Niko Canada's initial motivation to undertake an investigation was, at least in part, the rumoured existence of an ongoing criminal investigation by Canadian authorities into allegations of corruption by Niko in Bangladesh, but Deloitte was ultimately engaged to undertake a far broader scope of work.*[37]

72. In support of this affirmation about a change from an "initial motivation" to a far broader scope for which Deloitte was "ultimately engaged", the Respondents rely on the following sentence in the Engagement Letter:

> *While the internal investigation stems from the aforementioned allegations, our work is intended to be broader in scope to include Niko's activities in Bangladesh, and other jurisdictions as necessary.*

73. This sentence leads the Respondents to a further conclusion:

> *This strongly suggests that while one purpose of the investigation was responding to the rumoured investigation, the dominant purpose was a more general search for irregularities unrelated to then pending or anticipated litigation. Niko points to no evidence to the contrary. Because preparing for criminal proceedings was not the dominant or primary reason for the investigation, these documents are not covered by litigation privilege.*

74. In dealing with these arguments, the Tribunals will have to examine (i) the initial purpose of the internal investigation and (ii) whether the initial purpose changed during the course of the investigation.

(i) Initial purpose

75. As to the **initial purpose**, the Respondents expressly recognise that Niko Canada's motivation at the outset related to a "criminal investigation by Canadian authorities" about corruption in Bangladesh. Investigations by the Canadian authorities were indeed

[36] Turnbull v. Alberta (Securities Commission), 2009 ABQB 257, 2009 CarswellAlta, 663, RLA 373, paragraph 28.
[37] Response on Privilege of 9 June 2017, p. 12.

at the origin of the internal investigation for which Niko engaged Gowlings. The first trace can be found in the minutes of the meeting of the Niko Canada Board of Directors on 7 January 2009:

> *Management informed the Board that several separate individuals have informed Niko that the Canadian Government through a branch of RCMP are conducting an investigation of the business conduct of Niko's operations in Bangladesh. One rumour indicates that the investigation could be focused on the manner in which Niko acquired its interests in the original Bangladesh properties at Feni and Chattak. These properties where acquired in the late 1990's. Niko's law firm, Gowlings, has been contacted and* [redacted] *is preparing for a meeting with Niko management immediately. It was agreed that Niko needs to immediately verify the facts concerning this potential investigation and prepare an immediate and vigorous response. A meeting will be held with Gowlings on the morning of January 8th to discuss this matter. Management will report back to the Board following the meeting.*[38]

76. The next Board meeting for which minutes have been produced was held on 12 February 2009. The minutes contain the following passage under the hearing of "Update on Bangladesh Investigation":

> *Management updated the Board on the current status of the investigation.*
>
> *The Audit Committee has recommended an independent audit be completed and has recently interviewed three companies as possible auditors (E&Y, Deloitte and MMP) – the purpose of the audit would be to audit all of the available books and records, interview all of the people involved and to make a copy of all of the data (books, e-mails, etc).*
>
> *[…]*
>
> *MOTION:* [redacted]*, as a representative of the Audit Committee, moved that the Company proceed with an independent audit of the Bangladesh operations. The audit would be directed by the Company's independent council [sic], Gowlings, and the audit committee recommended retaining the services of MMP to conduct the audit. The Audit Committee would review and approve the terms of the contract with MMP.* [redacted] *seconded the motion. All were in favour.*[39]

77. The testimony of Ms Robidoux points in the same direction. She wrote in her witness statement that the purpose of the internal investigation was to obtain information for counsel to provide advice

> *concerning and to defend against allegations arising from alleged corruption in civil, criminal or regulatory forums.*[40]

[38] Exhibit C-239, p. 1.
[39] Exhbit C-254, pp. 3 – 4.
[40] Witness statement paragraph 9.

78. Ms Robidoux indicated no other purpose for the investigation and there is no explanation by the Respondent why the "initial motivation" of the investigation should have been only "in part" the Canadian criminal investigations. While Niko may have had in mind further ramifications of the criminal investigations, extending to the "civil, criminal or regulatory forums" mentioned by Ms Robidoux, there is no indication that the internal investigation decided by Niko had any purpose other than defending against the corruption allegations in "civil, criminal or regulatory forums".

79. The defence against corruption allegations is also the stated purpose of the engagement of Deloitte. The Engagement Letter of 27 February 2009 states at the outset under the heading of "Background to the engagement":

> *We understand that you have requested our services in connection with the investigation of allegations of improper payments made by Niko Resources Ltd. and/or its subsidiary in Bangladesh and other locations, as directed by Counsel, and any other related matters.*

80. There is no other purpose of the investigation mentioned in the Engagement Letter.

81. The Tribunals conclude that the defence against these corruption allegations and anticipated litigation in various fora was the dominant initial purpose of the internal investigation and, as far as can be seen from the evidence produced, the only purpose of this investigation.

(ii) Did this initial purpose change?

82. **Did this initial purpose change** during the course of the investigation, as the Respondents seem to argue? The Respondents assert that the purpose of the investigation turned into "a more general search for irregularities unrelated to then pending or anticipated litigation".

83. The passage on which the Respondents rely in support of the alleged change in the dominant purpose of the internal investigation is contained in the section entitled "Scope of the services" and states that Deloitte's work "is intended to be broader in scope". This sentence is, however, preceded by another sentence which recalls the purpose of the investigation:

> *You have requested our assistance in conducting an internal investigation stemming from the allegations described above.*

84. This sentence clearly shows that the purpose of the investigation remains unchanged: the corruption allegations which were the subject of the Government investigations that were brought to Niko's attention. The following sentence, on which the Respondents rely, does not change this purpose nor does it introduce a different purpose. Instead, it refers to the scope of the investigation and states that it is "broader in scope"; it does not state that it is in any way different in purpose.

85. This is confirmed in the following section, entitled "Approach to the engagement" which starts with the following sentence:

> *Our approach is to perform a holistic review of the disbursements and activities related to Niko Resources Ltd ("Niko Canada") and its subsidiaries' operations in Bangladesh ("Niko Bangladesh").*

86. Ms Robidoux has not identified in her witness statement how specific the corruption allegations were which triggered the internal investigation. The minutes of the 7 January 2009 Board Meeting, however, mention that one of the rumours which triggered the investigating indicated "that the investigation could be focused on the manner in which Niko acquired its interests in the original Bangladesh properties Feni and Chattak". Other sources seem to have been more general in the description of the Government investigation against which Niko wished to protect itself, speaking of "the business conduct of Niko's operations in Bangladesh".

87. Even if the allegations on which the Government investigations were based had been limited to some very specific purported acts, it would have been imprudent if not irresponsible for counsel to limit the internal investigation to them. A broader scope of the internal investigation was called for. The present proceedings on the Corruption Claim have revealed the very broad scope of the investigation, as it was conducted by the RCMP, the ACC and the FBI. It is thus perfectly reasonable and justified for Gowlings and Deloitte to adopt for their internal investigation a broader approach and a "holistic review" in anticipation of the investigation with which Niko risked being confronted. It cannot be taken as an indication of a change in the purpose of the investigation.

88. The Tribunals conclude that the internal investigation, as it was initiated by Niko's engagement of Gowlings and then continued by the engagement of Deloitte, had as the dominant if not sole purpose to prepare Niko's defence against court or other proceedings relating to the allegations of corruption in Bangladesh. To that extent, the investigations by Deloitte and the documents and information produced by them are covered by the litigation privilege as protected by Canadian law.

B. Termination of litigation privilege

89. Apart from the objection concerning the dominant purpose of the internal investigation, the Respondents raise a second objection: they argue that any litigation privilege that may have existed has come to an end and can no longer be invoked. They state:

> *In the alternative, even if the dominant purpose of the Deloitte investigation is found to have been preparation for a potential criminal prosecution in Canada, the litigation privilege would no longer apply because that prosecution concluded with*

> *Niko Canada's guilty plea in 2011. As discussed in Chrusz, litigation privilege terminates upon the conclusion of the litigation.*[41]

90. The Claimant accepts that, as a matter of principle, litigation privilege is limited in time. It explains its view on Canadian law as follows:

> *While litigation privilege attaching to work product generally terminates when the contemplated litigation ceases to exist, or ceases to be a prospect, it will survive so long as closely related litigation remains pending or may reasonably be apprehended. Put differently, if new proceedings raise issues in common with the initially expected or actual proceedings, the litigation privilege will continue.* [42]

91. The Respondents do not contest that, in principle, litigation privilege may extend to the use of documents in a litigation closely related to that for which they were prepared. They argue, however, that no such extension is warranted in the present case. The difference between the Parties thus concerns the question whether the litigation for which the Deloitte documents were prepared is so closely related to the present arbitration that the original litigation privilege also applies here.

92. Both sides rely on the 2006 decision of the Supreme Court of Canada in *Blank v. Canada (Department of Justice)*. In that case, the Canadian federal government had pursued Mr Blank for the violation of environmental regulations; that procedure was stayed. Mr Blank then claimed damages from the government for the manner in which it had conducted these proceedings. The Supreme Court distinguished the two proceedings in the following terms:

> *In this case, the respondent claims damages from the federal government for fraud, conspiracy, perjury and abuse of prosecutorial powers. Pursuant to the Access Act, he demands the disclosure to him of all documents relating to the Crown's conduct of its proceedings against him. The source of those proceedings is the alleged pollution and breach of reporting requirements by the respondent and his company.*
>
> *The Minister's claim of privilege thus concerns documents that were prepared for the dominant purpose of a criminal prosecution relating to environmental matters and reporting requirements. The respondent's action, on the other hand, seeks civil redress for the manner in which the government conducted that prosecution. It springs from a different juridical source and is in that sense unrelated to the litigation of which the privilege claimed was born.*[43]

93. Before reaching this conclusion, the Supreme Court set out in some detail the principles applying to an extension of litigation principle:

> *As a matter of principle, the boundaries of this extended meaning of "litigation" are limited by the purpose for which litigation privilege is granted, namely, as*

[41] Response on Privilege of 9 June 2017, p. 12.
[42] Submission on Privilege of 22 May 2017, p. 7, references omitted.
[43] Blank (CLA-218) paragraphs 42 and 43.

> *mentioned, "the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate" (Sharpe, p. 165). This purpose, in the context of s. 23 of the Access Act must take into account the nature of much government litigation. In the 1980s, for example, the federal government confronted litigation across Canada arising out of its urea formaldehyde insulation program. The parties were different and the specifics of each claim were different but the underlying liability issues were common across the country.*
>
> *In such a situation, the advocate's "protected area" would extend to work related to those underlying liability issues even after some but not all of the individual claims had been disposed of. There were common issues and the causes of action, in terms of the advocate's work product, were closely related. When the claims belonging to that particular group of causes of action had all been dealt with, however, litigation privilege would have been exhausted, even if subsequent disclosure of the files would reveal aspects of government operations or general litigation strategies that the government would prefer to keep from its former adversaries or other requesters under the Access Act. Similar issues may arise in the private sector, for example in the case of a manufacturer dealing with related product liability claims. In each case, the duration and extent of the litigation privilege are circumscribed by its underlying purpose, namely the protection essential to the proper operation of the adversarial process.*

94. On the basis of these principles and the distinction made by the Supreme Court in the *Blank* case, the Respondents argue as follows:

> *These arbitration proceedings do not stem from the same juridical source as the criminal investigation. The criminal proceedings involved Niko Canada and the Crown in Right of Canada. This arbitration involves completely different parties, namely Niko Bangladesh and BAPEX and Petrobangla. Additionally, the legal issues arising in the criminal case prosecuted in Canada are distinct from those arising in this arbitration, in which Niko seeks monetary compensation for non-payment under a contract and a declaration that it is not liable for the blowouts at the Chattak field in 2005. Accordingly, although there are some common issues of fact, these arbitration proceedings cannot be considered to fall within the scope of the the [sic] Canadian criminal proceedings—the only potential litigation referred to in the Deloitte engagement letter.*[44]

95. When examining whether the litigation privilege attached to the Gowlings-Deloitte internal investigation applies in this arbitration the Tribunals bear in mind the words of the Supreme Court in the above quotation according to which "the duration and extent of the litigation privilege are circumscribed by its underlying purpose, namely the protection essential to the proper operation of the adversarial process" and "the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate". While in the present arbitration the Claimant seeks payment under the GPSA and determinations concerning its liability for the blow-outs, it is the

[44] Response on Privilege, p. 11.

Respondents' Corruption Claim which is raised against these claims and which the Tribunals now have to decide. It is with respect to this Corruption Claim by the Respondents that litigation privilege is asserted. The Respondents therefore are wrong when they compare the issues in the Gowlings-Deloitte internal investigation to Claimant's claims for relief in the arbitration and disregard their own claim for avoidance of the GPSA and the JVA.

96. When comparing the issues raised by the Respondents' Corruption Claim with those addressed by the Gowlings-Deloitte investigation, the close relationship becomes obvious: the Gowlings-Deloitte investigation concerned the defence against allegations of corruption committed by Niko in Bangladesh. When consulting Gowlings, the Niko Board of Directors had in mind that one of the "rumours" about the Government investigation "could be focused on the manner in which Niko acquired its interests in the original Bangladesh properties at Feni and Chattak".[45] This is exactly the issue raised by the Corruption Claim in the present arbitration. While the government investigation at the origin of the Gowlings-Deloitte investigation presumably focused on criminal charges and the Corruption Claim in the present arbitration seeks civil consequences of the alleged corruption, both actions have the same basis, namely the illegality of the alleged acts of corruption; they are two sides of the same coin. As the Claimant rightly points out, Ms Robidoux stated in her witness statement that Niko sought advice "concerning and to defend against allegations arising from alleged corruption in civil, criminal or regulatory forums".[46]

97. The Tribunals are aware that, as the Respondents point out, the parties in the present proceedings are not identical with those concerned by the Gowlings-Deloitte investigation. They note, however, that the Supreme Court in the *Blank* decision accepted that the "protected area" of litigation privilege may apply even if "the parties were different and the specifics of each claim were different". The common ground between the present arbitration and the investigation for which the Deloitte documents were produced is evidenced in a striking manner by the fact that the Respondents themselves rely in support of their Corruption Claim almost exclusively on the RCMP, ACC and FBI investigation which formed the basis for the litigation against which Niko Canada sought advice and defence from its solicitors.

98. The Tribunals conclude that the Claimant's defence against the Respondents' Corruption Claim is so closely related to the Gowlings-Deloitte investigation that the "protected area" of the litigation privilege of the latter extends to the former. The Tribunals accept that the Claimant may assert litigation privilege against the Respondents' request for production of the Deloitte documents.

[45] Minutes of the 7 January 2009 Board meeting (Exhbit C-239).
[46] Submission on Privilege of 22 May 2017, p. 7, referring to Exhibit C-222, pararaph 9.

VII. Has the Privilege been Waived?

99. The Respondents' principal defence against the Claimant's asserted privilege consists in arguing that:

> *Any privilege that might have applied to the Deloitte documents was waived by* [redacted] *decision to disclose some of Deloitte's findings and recommendations in his testimony to the Tribunal.*[47]

100. The Respondents point out that, prior to this disclosure, [redacted] "had been repeatedly warned that he was not required to reveal privileged information, and that revealing such information could result in waiver of privilege". The Respondents added:

> *Nevertheless,* [redacted] *chose to reveal not only the fact that Deloitte had conducted an investigation and produced a written PowerPoint presentation, but also testified about the substance of Deloitte's findings and recommendations, including Deloitte's purported conclusion that "there was nothing of particular concern regarding … the acquisition of these contracts". Niko's counsel, who are experienced practitioners in Canadian law and international arbitration, did not object to any of the questions that elicited this testimony, nor did they assert any claim of privilege at that time.*[48]

101. The Respondents also characterise [redacted] statement at the hearing as

> *Niko Canada's prior voluntary disclosure of the allegedly privileged information to third parties (such as the Tribunal through* [redacted] *testimony).*[49]

102. They conclude their argument about the waiver of privilege by the following statement:

> *Due to* [redacted] *disclosure of privileged information, reference to the PowerPoint, and partial disclosure of Deloitte's alleged conclusions and recommendation, any alleged privilege was waived as to the Deloitte report and all related communications, and they should be ordered produced forthwith.*[50]

103. The Claimant denies that privilege has been waived. It argues that the privilege belongs to Niko Canada; neither Niko Canada nor Niko nor [redacted] have expressly waived privilege. They have not done so implicitly by relying on protected information; answers to questions in cross-examination, so the Claimant's argument, cannot be taken as waiver unless the intention to waive is "abundantly clear".[51]

104. The Tribunals have considered that both solicitor-client privilege and litigation privilege can be waived. This is uncontested.

[47] Submission of 9 June 2017, p. 3.
[48] Response on privilege of 9 June 2017, p. 2, footnotes omitted.
[49] Ibid.
[50] Response on privilege of 9 June 2017, p. 8.
[51] Response on Waiver of 16 June 2017.

105. The waiver of a right must be made by the holder of this right or a person validly acting for that holder. This seems obvious and must apply also with respect to privilege. Thus, the Supreme Court of British Columbia stated the principle in the following terms:

> *Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive that privilege.*[52]

106. It is also accepted that privilege can be waived implicitly by a beneficiary who relies on the protected information. In the quoted decision, the court continued by stating:

> *However, waiver may also occur in the absence of an intention to waive, where fairness and constancy so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost.*[53]

107. The Respondents refer to a Canadian decision where the court examined a number of decisions and reached the conclusion that in this respect

> *…the following principles appear to apply.*
>
> *When evidence will be relied on by a party, any privilege claimed over it will almost certainly be waived to comply with fairness and consistency. Further, if there is a danger that partial disclosure will mislead the Court or inaccurately present the content of certain facts, fairness will require disclosure. However, where there is no reliance on a document, waiver is less likely.* [54]

108. Some of the cases on which the Parties rely concern solicitor-client privilege, others litigation privilege. With respect to waiver, the Tribunals see no difference in the applicable principles. Indeed, the Alberta Court of Queen's Bench, the court was referred to the "important differences" between these two types of privilege and concluded:

> *However, I was not able to find any authority that suggests that litigation privilege is more easily waived or at a lower threshold than is solicitor-client privilege.*[55]

109. In the present case, the Deloitte investigation has been commissioned by Gowlings who identified Niko Resources Ltd as "the Client". As explained above, the investigation concerned directly the subsidiary in Bangladesh; the role of the client thus may have to be extended to this subsidiary, the Claimant. In any event, in the discussion of the privilege issue, Dentons have made representations also on behalf of Niko Canada and

[52] S&K Processors Ltd. v. Campbell Avenue Herring Producers Ltd., [1983] BCJ No 1499 (BCSC) (CLA-219), para 6.
[53] Ibid.
[54] O'Scolai v. Antrajenda [2008] A.J. No 241 ; 2008 ABQB 77; (RLA-368), paragraphs 29 & 30, references omitted.
[55] O'Scolai v. Antrajenda (RLA-368), paragraph 15.

that company consented to produce requested information and documents in the present arbitration, insisting that it did not waive privilege.[56]

110. In other words, the beneficiaries of privilege attaching to the Deloitte documents are Niko Canada and possibly Niko.

111. Neither Niko Canada nor Niko have waived that privilege. They have not done so expressly and they have not done so implicitly by relying on the investigation, the documents produced in the course of it or any of its results; they did not even mention them before the examination of [redacted] at the April 2017 hearing. Nor have they relied on protected information from the Deloitte documents. The Respondents do not allege the contrary.

112. The Respondents, indeed, do not rely on express or implied waiver by Niko Canada or the Claimant. The only basis for the alleged waiver on which the Respondents rely are the declarations of [redacted]. The Respondents do not explain how the statements of [redacted] constitute a waiver of privilege of Niko Canada or Niko.

113. The Tribunals have considered that, at the time of the April 2017 hearing, [redacted] was [redacted] of Niko Canada.[57] He was heard as a witness. As the Claimant points out, his "testimony was given in his individual capacity, rather than offered up as the testimony of Niko itself (much less Niko Canada to whom the privilege in fact belongs)".[58] During his testimony, he was not invited to make declarations on behalf of this company and he made no such declarations in relation to Niko Canada's privilege or the Deloitte documents.

114. The Tribunals conclude that the statements made by [redacted] were his personal testimony as a witness. These statements did not amount to declarations on behalf of Niko Canada or its subsidiary. They thus do not constitute a waiver by the holders of the privilege on which the Claimant relies in this arbitration.

115. Given the nature of [redacted] function, the Tribunals have nevertheless examined this testimony also under the perspective of fairness and consistency. As discussed above, such considerations normally intervene when the possessor of the privilege relies on only part of the protected information; fairness and consistency may then require that the protected information be disclosed in its entirety.

116. The Tribunals have examined the testimony of [redacted] in the light of the *O'Scolai* decision, as quoted above, and on which the Respondents rely in their argument on

[56] Submission on Privilege, pp. 1 – 2. The Claimant's counsel "confirm that none of the Deloitte materials and information that have been made available to Dentons has been shared with any third parties nor provided by Dentons to anyone at Niko Canada or Niko" (see the letter of Dentons, dated 6 June 2017.
[57] This is the position which he indicated in his Witness Statement of 10 January 2017. He confirmed this witness statement at the hearing and stated that no correction was required (T.27 April 2017, pp. 103, 104).
[58] Response on Waiver, p. 2.

fairness and consistency. They have borne in mind the position which the Respondents have taken with respect to this testimony:

> *Here, it would be unfair to allow* [redacted] *to make repeated assertions about the contents and conclusions of the Deloitte report, while refusing to allow Respondents to examine the contents of the report and related documents to verify, challenge, or contextualize this testimony.* [redacted] *elected to disclose Deloitte's ultimate conclusions and advice, which he asserts support Niko's positions on important issues in this case. Respondents have no capacity to evaluate or rebut this evidence without reviewing the referenced documents and underlying evidence. Yet Niko asserts privilege to preclude such examination, attempting to force Respondents to accept* [redacted] *self-serving description of the privileged matter at face value. The Tribunals should not allow Niko to wield privilege as both sword and shield. The Deloitte communications must now be disclosed.*[59]

117. The question which the Tribunals must decide is not the admissibility of any attempts by the Claimants "to force the Respondents to accept [redacted] self-serving description of the privileged matter at face value" or the consequences of such attempts. The Tribunals are not aware of any such attempt and they have not seen any statement in which the Claimant relies on [redacted] testimony concerning the Deloitte documents. The question which the Tribunals must examine is whether the testimony of [redacted] about these documents, in cross-examination and in response to questions from the Tribunals, requires that they be disclosed.

118. [redacted] did not rely on any of the Deloitte documents in his witness statement; he did not even mention the Gowlings-Deloitte investigation.

119. At the April hearing, [redacted] made no reference to this investigation or the documents generated by it until he was questioned by the Respondent's counsel:

> *MR SMITH: this morning,* [redacted] *in discussing this charge sheet indicated that there was an internal investigation or audit and he indicated that we should talk to* [redacted]*, you, about that investigation and that you would know about the internal investigation.*[60]

120. This question by the Respondents' counsel gave rise to a long discussion in which [redacted] responded to questions from counsel and from the Tribunals. In response to the question of Respondents' counsel, [redacted] referred to the investigation of the RCMP and then explained:

> *… so the board formed a subcommittee that* [redacted] *and I were not on because we were management directors and the subcommittee of the board engaged a*

[59] Response on Privilege, p. 7.
[60] Transcript, 27 April 2017, p. 195.

forensic – an accounting firm to conduct an investigation. But I actually never saw the results of them.

MR SMITH: This -- what was the name of this accounting firm?

[redacted]*: It was Deloitte.*[61]

121. The issue of Deloitte documents was not brought up by [redacted] but by the Respondents' counsel:

MR SMITH: Deloitte. Were records retained of that accounting firm's investigation?

[redacted]*: I have never seen them. I have never seen any results from them.*[62]

122. Shortly thereafter, Claimant's counsel intervened, stating:

There are obviously issues and concerns of solicitor-client privilege and we do not want to unwittingly have privilege matters disclosed when there is no waiver.[63]

123. The Respondents' counsel replied:

My questions are directed to finding out what the witness knew. I do not have an intention of asking him what counsel advised him; so I do not think I will get in that direction and it is certainly not my intention to bring out client-privileged information. If counsel for Claimant believes that that is the case, he can stop me and we can consider whether it is a valid objection or the Tribunal can consider whether it is a valid objection and I will give my input on that matter.[64]

124. During the questions that followed, [redacted] confirmed that the investigation was under the responsibility of a subcommittee formed by the Board, that Deloitte was engaged for the investigation, that to his knowledge Deloitte never prepared a report but only made a PowerPoint presentation to the subcommittee,[65] formed by the "independent board members" to the exclusion of [redacted] and [redacted] who were "management",[66] that he did not attend the meeting when the presentation was made[67] and that he "never saw the results" of the Deloitte investigation.[68] When the matter was discussed at the Board in 2016, he "was asked to step out of the room".[69]

125. [redacted] made it clear that he had no access to the Deloitte documents and did not attend the meeting where the results of the investigation were presented. Only the general conclusion was passed on to him orally:

[61] Ibid. p. 196.
[62] Ibid.
[63] Ibid. p. 198 – 199.
[64] Ibid. p. 199.
[65] Ibid. p. 215, 219.
[66] Ibid. p. 217.
[67] Ibid. p. 213.
[68] Ibid. p. 212.
[69] Ibid. p. 217.

> *So the subcommittee at the time received a presentation from Deloitte and the communication that came back to* [redacted] *and I was, you know, there was nothing, you know, nothing of particular concern was, I think the words that were …*[70]

126. The conclusion recounted to [redacted] was mentioned several times in his testimony with some variations. For instance in response to the question from the Tribunal whether he was there when the presentation was made:

> *No, it was just to the subcommittee and the comment I got was nothing of particular concern.*[71]

And:

> *The message I received was, you know, there was nothing of particular concern regarding, you know, the acquisition of these contracts.*[72]

And:

> *I did not communicate directly with Deloitte. My communication was through the members of the subcommittee.*
>
> *THE PRESIDENT: Members of the subcommittee told you …?*
>
> [redacted]*: you know, that the results were, you know, that, you know, the JVA and whatever were properly executed whatever and there was nothing …*[73]

127. The Parties disagree about whether disclosing privileged information during cross-examination constitutes waiver of privilege. The Respondents assert:

> *Canadian courts have consistently held that disclosing privileged information during question instead of objecting on grounds of privilege amounts to waiver.*[74]

128. The Claimant argues that the cases on which the Respondents rely were either superseded by a subsequent Supreme Court decision or else do not relate to disclosure or privileged information during a cross-examination. As to the true up-to-date position of Canadian law, the Claimant asserts:

> *…courts in Canada have held that when a party discloses privileged information on cross-examination, this does not amount to a voluntary waiver of privilege.*[75]

129. The Respondents rely on two cases which actually concern information provided during examination; the other decisions concern the effect of partial waiver. The first of the

[70] Ibid. p. 221.
[71] Ibid. p. 213.
[72] Ibid. p. 219.
[73] Ibid. p. 220.
[74] Response on Privilege, p. 4.
[75] Response on Waiver, p. 3.

decisions on which the Respondent relies concerned the examination for discovery in which the plaintiff was asked questions about his instructions to his lawyer and about her answers. In the decision of 1996, the British Columbia Supreme Court stated the following:

> *When Mr. Oliver [the Defendant's solicitor] questioned Mr. Hansen [the Plaintiff], he asked him numerous questions about what he had communicated to his then solicitor regarding that understanding. In a number of responses, Mr. Hansen described what he had told Ms. Chee [his solicitor] in instructing her with respect to the transaction. He could have declined to answer such questions on the ground that his communication with Ms. Chee was privileged, but he did not. Objection was taken at certain points by Mr. Cote to the extent of Mr. Oliver's questioning. However, I am satisfied that Mr. Hansen, by his replies, waived the solicitor/client privilege between himself and Ms. Chee with respect to the instructions that he gave her regarding the transaction*.[76]

130. The court also considered the question whether the waiver should extend to the answers given by his solicitor to Mr Hansen's instructions. The court treated this question as distinct from the instructions given to the solicitor. It found that "much less was said by Mr Hansen during discovery about what Ms Chee said to him" and denied waiver of privilege over the advice given by the solicitor.[77]

131. The other case invoked by the Respondents also concerns examinations for discovery and was decided by the Federal Court of Canada – Trial Division in 1998. In that case, the minutes of a meeting of the Senate of the defendant University stated that an outside legal opinion concluded that in case of a court case "the University may lose". During examination for discovery, the University's in-house counsel, Mr Thistle, was questioned and volunteered his own views about the legal opinion. His statement on the subject commenced as follows:

> *And you haven't asked me the question but, and I don't know whether I'm allowed to comment, the words "the University may loose", if you wish me to elaborate … you may ask the question afterward ... I feel like I would like to at some point. …*[78]

132. Mr Thistle then continued to elaborate in detail about the legal opinion and his views about it. The court concluded:

> *In these circumstances, I think Mr. Thistle's voluntary elaboration on the opinion constituted a voluntary waiver of privilege. In The Law of Evidence in Canada, Sopinka, Lederman and Bryant, (Toronto: Butterworths 1992), the learned authors state at page 665:*

[76] Hansen v. Stierle, 1996 Carswell BC 912 (RLA-356), paragraph 9.
[77] Ibid. paragraphs 10 – 16.
[78] Canadian Council of Professional Engineers v. Memorial University of Newfoundland, 1998 Carswell 2364 (RLA-359), paragraph 4.

> *Similarly, if 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.*
>
> *[…]*
>
> *If the communication is elicited in cross-examination of the client, it seems that unless it can be shown that the witness was misled or did not comprehend what was being asked of him or her, the assertion of the communication would amount to a waiver*.[79]

133. The court observed that Mr Thistle had chosen "to elaborate on the opinion in order to temper the adverse reference in the Senate minutes" and found that privilege had been waived.

134. The Claimant, in defending a position on Canadian law which differs fundamentally from that of the Respondents, rely on a decision of the Canadian Supreme Court. In the *R. v. Shirose* case, where in the course of direct and cross-examination a police officer revealed that he sought legal advice about the legality of "reverse-sting" operation.[80] That was not considered as a waiver of privilege; the waiver occurred subsequently when the Crown relied on the advice to argue that the police officer acted in good faith.

135. The *Shirose* decision was relied upon in subsequent decisions. The Manitoba Court of Appeal interpreted the *Shirose* decision of the Canadian Supreme Court:

> *The court held that at the point there was no waiver. Waiver must be voluntary. It cannot be forced on a party through questions raised by the opposing side on cross-examination. The officer was responding to questions upon cross-examination as he was required to do and this could not constitute a voluntary waiver*.[81]

136. Applying the rationale of the *Shirose* case to the case before it, the Manitoba Court of Appeal held:

> *The question becomes whether the defendant in this case has indeed placed its state of mind in issue voluntarily. The Supreme Court of Canada followed by the British Columbia Court of Appeal have held that responding to questions on cross-examination cannot constitute voluntary waiver. The same is true of questions asked on a cross-examination on an affidavit.*
>
> *In this case, the reference to good faith and reliance upon legal advice was made by the defendant in response to interrogatories sent to it by the plaintiff. This is similar*

[79] Ibid. paragraph 5.
[80] R. v. Shirose, 1998 Carswell.Ont 948 (CLA-220), paragraph 6.
[81] Gower v. Tolko Manitoba Inc., 2001 MBCA 11, 2001 CarswellMan 24 (CLA-222), paragraph 27.

to a response on cross-examination and does not represent the kind affirmative choice contemplated by the Supreme Court of Canada in R. v. Shirose.[82]

137. The Tribunals have considered the cases on which the Parties relied in their conflicting presentation of Canadian law on this issue. They considered that the cases relied upon by the Claimant are more recent. They also noted the circumstances in which the issue arose in the two cases relied upon by the Respondents: In the first case, Mr Hansen, in response to numerous questions set out in his own instructions to his solicitor and the court found that he had waived privilege with respect to these instructions; but not with respect to the advice by his solicitor with respect to which he had been much less forthcoming. In the present case, [redacted] described not the documents over which the Claimant asserts privilege but only what he was told about the conclusion reached by Deloitte; and the explanations about this conclusion were rather general. The difference is even more striking when the present case is compared with the case of the Canadian Council of Professional Engineers where the in-house counsel seized the opportunity of his examination in order to respond to a question he had not been asked and developed his own opinion on the legal opinion over which the University claimed privilege.

138. In view of these considerations, the Tribunals conclude that the Claimant's position is more convincing and more in line with their understanding of the Canadian law on privilege and waiver. In order to remove the privilege protection, the disclosure must be voluntary. In the present case, [redacted] responded to questions in cross-examination and to questions of the Tribunals. He could not reveal confidential information about the Deloitte documents since he had not seen them. All he did was to state what he had been told about in general terms. The substantive content of the document was withheld from him and he was excluded from the attending the oral report in the form of the PowerPoint presentation. Niko Canada thus demonstrated clearly its intention to preserve the privilege protection of the documents, just as it had avoided disclosures to outsiders.[83]

139. The Tribunals conclude that the answers provided by [redacted] to the questions of the Respondents' counsel and the Tribunal did not present direct evidence about the content of the Deloitte documents nor about the conclusions reached by Deloitte. They are not to be treated as a partial revelation of information protected by privilege and do not justify treating the privilege over the Deloitte documents as waived.

140. The Parties are free to comment in their post-hearing submissions on [redacted] testimony at the hearing on the Corruption Claim and the evidentiary value that the Tribunals should give to it.

[82] Ibid. paragraphs 52 and 53.
[83] See Claimant's letter of 29 May 2017, pp. 2 and 3.

141. The Tribunals conclude that litigation privilege asserted by the Claimant with respect to the Deloitte documents has not been waived. The Claimant is not required to produce these documents.

142. In view of this conclusion the question whether the Claimant also may invoke solicitor-client privilege does not need to be resolved.

VIII. Order

Having considered the Parties' allegations of fact and law, in view of the evidence produced and based on the considerations set out above, the Tribunals now decide:

(i) The Claimant is entitled to invoke litigation privilege against the production of the Deloitte Documents;
(ii) In view of the decision under (i) the assertion of solicitor-client privilege concerning these documents does not need to be resolved;
(iii) The Respondents' request for production of the Deloitte Documents is denied.

On behalf of the two Arbitral Tribunals

Michael E. Schneider

President

27 July 2017