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Sent: 03 December 2019 1:16 AM
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Subject: Request for Directions - PCA Case No. 2018-54: Tennant Energy, LLC (U.S.A.) v. Government of Canada

Dear Mr. President and Members of the Tribunal:

The Investor writes seeking directions concerning the process regarding Canada's request to redact certain documents evidencing [redacted] filed around the interim measures motion.

The issue is straight-forward. Canada filed document R21- and R-22 with its response on Interim Measures. R-21 [redacted]. R-22 [redacted], the IESO (which is the successor to the Ontario Power Authority).

Canada fully disclosed the contents of these [redacted] to the Tribunal and the Investor in this case as they are materially relevant to the issue before the Tribunal. Canada voluntarily waived privilege upon the filing of both documents in the arbitration.

The Investor objected to Canada's attempt to designate these two documents as confidential since the legal privilege was waived. The Investor notified Canada of this concern in the Disputed Designation Schedule (known as Annex A) on October 29, 2019. At the time of filing the Annex A on October 29, 2019, the Investor did not know the specific basis for the claim of confidentiality. Canada provided no basis to justify its assertion of confidentiality when it requested redaction.

Canada filed a response to Investor's concerns on November 12, 2019. In its response, Canada claimed a separate authority under Ontario provincial legislation. According to Canada, the fact that the attorney-client privilege had been waived was irrelevant to the special power Ontario had under section 19 of the Ontario Freedom of Information and Protection of Privacy Act "FIPPA"). The reliance on the Ontario Act and the subsequent reliance on a claim of Protection of Privacy privilege were unknown completely to the Investor before Canada filed its response.

The disputing parties subsequently have consulted to see if there could be agreement on the treatment of this evidence. Unfortunately, there appears to be no agreement. The issue for the Tribunal is how to handle the subsequent process.

Canada wrote the Investor and confirmed that it wished to maintain its position regarding this special privilege. The Investor advised Canada that it sought to respond to Canada's arguments first raised in Canada's response. This is where the parties are at odds:

- Canada says that the Investor is not permitted any response to any of the new information first raised by Canada in its response.
- The Investor submits that it must have an opportunity to advise the Tribunal that the Ontario FIPPA is not applicable in this situation, and that the cases relied upon by Canada are irrelevant and inapplicable. Again, the Investor had no opportunity to do so before.

The Tribunal issued a direction on November 15th that the parties should respond by December 3, 2019. Late in the day on December 2nd, Canada advised that it would not consent to the filing of any responsive observations on the materials first filed on November 12th. Canada demanded that the Investor's comments of October 29th remain non-augmented in any way.

Accordingly, the Investor seeks directions from the Tribunal.

The Investor must be given the opportunity to be able to have its case heard pursuant to the mandatory terms of NAFTA Article 1115 and Article 15 of the 1976 UNCITRAL Arbitration Rules.

In this regard, the Investor has been given no opportunity to address any of Canada's new contentions and could never have adequately responded on October 29th to arguments first raised on November 12th.

The Investor could not obtain the required equal treatment and due process in the absence of having a limited the opportunity to confront the incorrect legal assertions made by Canada for the first time in Canada's November 12th submission.

Accordingly, the Investor seeks leave to file its comments in a new column added to the Annex A and that Canada be given an opportunity to file rejoinder comments strictly limited to new matters raised for the first time by the Investor.

The Investor will not file any material pending the determination of this request by the Tribunal.
On behalf of counsel for the Investor,

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