IN THE MATTER OF AN ARBITRATION UNDER THE 1976 UNCITRAL ARBITRATION RULES AND THE NORTH AMERICAN FREE TRADE AGREEMENT

Tennant Energy LLC.

INVESTOR

v.

Canada

RESPONDENT

INVESTOR'S RESPONSE TO CANADA'S MOTION FOR "TARGETED DOCUMENT PRODUCTION"

April 20, 2020

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1. The Investor responds to the Respondent's April 3, 2020 Motion for Targeted Document Production, and the Tribunal's subsequent invitation to the Investor to:

> (i) comment on whether the Respondent's document requests should be entertained now or await the document production phase envisaged in Annex I to Procedural Order No. 1, and
>
> ii) provide any comments it may have on the Respondent's proposed schedule for targeted document production.

The Investor does not engage in a substantive response to the document request or the Motion itself.

2. As an initial matter, we extend our hopes for the personal health and safety for the members of the Tribunal, the Secretariat, counsel for the Respondent and their respective friends and families. Our hearts and thoughts go out to the people who have been affected by the unprecedented novel COVID-19 event, which was declared a pandemic by the World Health Organization.

3. It is thus in the middle of this worldwide pandemic – one in which the United States has suffered more than any country in the world – that the Investor was taken aback by Canada's unauthorized and highly inappropriate Motion for "Targeted Discovery," the name itself being completely misleading as the extensive discovery is anything but "targeted."

RESPONDENT'S MOTION IS HIGHLY INAPPROPRIATE

4. In the first instance, Canada's Motion seeks to re-argue issues already decided by the Tribunal when it rejected Respondent's Motion for Security for Costs, a motion that was fully briefed last year, that was heard over a two-day hearing, and which resulted in an extensive decision from the Tribunal. Absolutely nothing in that decision invited the Motion at issue but instead that decision clearly rejected it.

5. Indeed, the Tribunal explicitly noted the exceptional circumstances that would be necessary before it would entertain a Motion for Security for Costs, such as the failure of the Investor to pay its share of costs.

6. The Investor consistency and repeatedly has complied with every order and direction of this Tribunal, including all monetary orders. Indeed, the Investor has complied with the most recent advance fee deposit request made by this Tribunal.

7. Therefore, there is no need now to entertain discovery before the timetable set forth in the Procedural Orders for the exchange of document requests in Redfern Schedules - after the initial Memorials have been filed – especially in a purported effort to obtain relief already denied by this Tribunal, and where it is abundantly clear that the requisite factors for that relief are not existent.

8. Article 26(1) of the UNCITRAL Arbitration Rules provides that a tribunal may issue interim measures if it deems them to be "necessary in respect of the of the dispute." subject-matter. This issue was extensively pleaded before the Tribunal at the January 2020 hearing and need not be re-pleaded at this time.

9. While a detailed response to Canada's motion exceeds the limitations of this response, it is clear that Canada's new motion cannot meet all four of the principal requirements for the granting of an interim measure:

    a. A risk of serious or irreparable harm;
    b. Urgency;
    c. No prejudgment of the merits of a case; and
    d. A *prima facie* case on the merits.[1]

10. Cognizant that the Tribunal repeatedly has rejected Investor's own requests for early discovery on the basis of these same requirements, Canada goes through pains to explain why it should receive special treatment and be allowed such early extraordinary discovery based upon some non-existent "new evidence."

11. Simply put, if this Tribunal desired to allowed Canada to seek early discovery after receiving the limited disclosure of the Investor's funding arrangement, the Tribunal could have issued such relief as part of Procedural Order No 4. The Tribunal made no such direction within Procedural Order No. 4. Indeed, nothing in Procedural Order No. 4 remotely suggests that Canada would be permitted to take early discovery to bolster its failed Motion for Security for Costs.

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[1] *See* **CLA-44**, Excerpt from Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION (2014), 2468 (further stating that, "[c]onsidered more closely, … most arbitral tribunals also look to the nature of the provisional measures that are requested, and the relative injury to be suffered by each party, in deciding whether to grant such measures").

12. For the reasons set out below, Canada cannot show that there is irreparable harm at this time and urgency. In addition, Canada has the burden to show that the burden of its interim measure is not disproportionate during this time of pandemic and distress. On its face, Canada's motion is unreasonable and could never be proportionate.

13. In any event, the documents sought would not be appropriate whenever they are requested. At its core, Canada's unauthorized early Redfern Schedule seeks highly intrusive documents. By way of example, it seeks,

    a. "Deeds or other records of any real property owned by the Claimant, including information on whether such property is encumbered or unencumbered"; and

    b. "Documents evidencing any other assets (tangible or intangible), or income, held by the Claimant that would be available to satisfy a debt…."

14. Such requests can be categorized only as requests seeking asset recovery information before any award is entered and improperly assumes Canada will prevail – a determination that would improperly delve into the merits. There is simply no justification for that here, no matter when these documents are sought.

15. The Investor objects on several additional grounds, as outlined below.

CANADA'S MOTION HAS BEEN FILED IN THE MIDST OF A GLOBAL PANDEMIC THAT INFRINGES ON THE INVESTOR'S ABILITY TO ADEQUATELY RESPOND TO AN EARLY REQUEST FOR DOCUMENTS

16. As the Tribunal is fully aware, the World Health Organization has declared the rapidly spreading novel coronavirus outbreak a global pandemic.[2] At the time of this writing, the United States, where the Investor's counsel currently are located under mandatory

[2]The World Health Organization (WHO) Emergency Committee under the International Health Regulations issued a Public Health Emergency of International Concern (PHEIC) about the novel coronavirus on January 30, 2020. A declaration of a pandemic by the Director General was on March 11, 2020. *See* https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020

lockdown orders, has over 750,000 confirmed COVID-19 cases and a tragic number of over 40,000 deaths.

17. To combat the spread of the COVID-19 virus, public authorities in the United States and Canada have imposed escalating isolation and social disengagement measures. By way of example,

    a. On March 1, 2020, the Governor of Florida issued a mandatory stay-at-home order applicable to the entire state of Florida. This affects Ed Mullins and others working with him from the Miami office of Reed Smith.

    b. Further, another senior member of the Investor's counsel team, Barry Appleton, is currently located in another US state where he is subject to a mandatory stay-in-place lockdown. At this time, severe transportation restrictions are affecting Mr. Appleton's eventual return to Canada, where his offices are located, as direct flights to Canada are no longer available for him. Assuming that he remains without infection, at this time, it appears that Mr. Appleton subsequently will be subjected to a Canadian federally-ordered fourteen-day quarantine after his return to Canada to continue working in his offices.

    c. Mr. Appleton is the co-director of the New York Law School Center for International Law, where he also teaches as a senior fellow. The New York Law School has been under lockdown (initially by the NY City Public Health Department) since early March due to investigations over COVID-19 infections and exposure at the law school (Unfortunately, an asymptomatic student with COVID-19 was in classes before a diagnosis was confirmed).

    d. On March 17, 2020, a state of emergency was declared in the province of Ontario about the COVID-19 pandemic.

    e. The Canada – US border is closed to non-essential travel, which also detrimentally may affect the Investor's ability to respond to a document request process and will also affect the ability of counsel to travel to review, sort, and scan documents *in situ*. Canada recently announced that this closure would

continue until May 19th at the earliest, and it may well extend for a further period.

18. Counsel for the Investor have not been in their offices since March, with no end to this situation currently in sight. Reed Smith, for example, has closed its 31 offices as a result of the virus. This includes the New York office where Ben Love is located. All Reed Smith lawyers have been working online as of Friday, March 13th. The Appleton Office in Toronto is currently under shutdown and has been closed since the third week of March.

19. At this time, we are mindful of complying with disease-control restrictions implemented by relevant governmental or health authorities. As a result, counsel acting for the Investor has had to alter their practice habits dramatically.

20. While reports may indicate some beaches have opened in Florida, we note that this order does not apply to South Florida (where the Reed Smith team is based) and where well over half of the infections and deaths resulting from the coronavirus are centered for Florida.

21. The imposition of these emergency health and public safety measures have significantly impacted the ability of legal counsel, and those supporting them, to mobilize resources.

22. Similar restrictions apply to the Investor itself:

    a. John Pennie is in isolation is in a rural location in the Province of Ontario. He is in an area under mandatory lockdown. Mr. Pennie's condition puts him at extreme risk of infection.

    b. Others at Tennant Energy LLC that counsel would need to consult concerning Canada's unnecessary Motion are located in areas that are under mandatory lockdown. One in the province of Ontario, Canada, and another in California –a state which also has been in lockdown. Both persons are of advanced age, and both recently suffered medical conditions that place them at high risk for COVID-19. The increased risk to the effects of the COVID-19 virus and the mandatory

shelter in place orders severely limit if not outright eliminates their ability to leave their home for any reason.

c. Also, access to storage archives, other non-essential facilities and offices are not available at this time due to the impact of the pandemic – including mandatory orders issued by Canada and the Province of Ontario (and rules in the State of California). At this point, it is impossible to advise when access could be restored.

23. These facts are relevant to the general consideration of urgency and to the consideration of the general international law principle of proportionality. Document production should not place the management of the Investor at severe risk to life or liberty. Accordingly, the Investor objects to the Respondent's untimely extraordinary Motion based on the disproportionate impact and burden caused by the global pandemic. This not only includes the situation with the Investor's lawyers (in lockdown in various locations) but also our client (with both California and Ontario in lockdown as well as with the knowledge of the need to consult with clients whose age and medical conditions put them at increased risk). Given the current global pandemic, the Investor– who does not have full access to files, copies, archives, etc. as a result of the pandemic - will be disproportionately harmed to the extent it is required to respond to a document production request at this time.

NO "NEW EVIDENCE" OF EXCEPTIONAL CIRCUMSTANCES EXISTS REQUIRING A DEVIATION FROM THE CURRENT PROCEDURAL CALENDAR

24. Pandemic aside, Canada's Motion is as meritless as it is merciless. Canada's request for early document production is premised solely on the notion that "new evidence" exists that warrants its ability to seek discovery regarding the assets of the Investor. Canada is wrong on all accounts.

25. According to Procedural Order No. 1, the disputing parties are required to file document requests within thirty days of the filing of Respondent's Counter-Memorial. Currently, that deadline falls on September 24, 2020 (if no bifurcation is requested by Respondent).

26. There is no reason to deviate from that schedule. In fact, in Procedural Order No. 4, the Tribunal rejected the Investor's previous request to deviate from the timetable for disclosures. Canada seeks better treatment than that afforded to the Investor.

27. In its Motion, the Respondent contends that its "targeted" discovery request nonetheless is merited because, according to Respondent, there is "new" evidence allegedly indicative of Investor's inability to comply with an adverse costs order. The Investor contends that, in denying its Motion for Security for Costs, the Tribunal noted that its decision did not preclude Canada from reviving its motion "if there is a change in circumstances or if there is new evidence which suggests the Investor may not, or may not be able to, comply with an adverse costs order."

28. Respondent takes that sentence in the Tribunal's order out of context.

29. In its Procedural Order No. 4, the Tribunal denied Respondent's Motion for Security for Costs because "exceptional circumstances" were not met. In doing so, the Tribunal noted in paragraph 174 that the standard to be applied as to whether security for costs was appropriate was the following:

> "*The Tribunal agrees with the tribunal in Orlandini v Bolivia that such exceptional circumstances would include, for instance (i) a claimant's track record of non-payment of costs awards in prior proceedings; (ii) a claimant's improper behaviour in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings; (iii) evidence of a claimant moving or hiding assets to avoid any potential exposure to a costs award; or (iv) other evidence of a claimant's bad faith or improper behaviour.*" Procedural Order 4, §174.

30. None of those factors exists here. Indeed, the opposite is true – the Investor has complied with all of its financial obligations timely. Indeed, the Investor has timely met with each of the two-tribunal advance cost requests, as well as all other orders and procedural directions in this arbitration. By way of example, as recently as April 2020, the Investor complied with the latest request for an advance deposit issued by the Tribunal. The Investor is current on all of its financial obligations, and Canada has not provided any "new evidence" of "improper behavior," "hiding assets," or "bad faith."

31. The decisions upon which the Tribunal relied and quoted in Procedural Order No. 4 support that same conclusion. For example, in paragraph 175 of Procedural Order No. 4, the Tribunal cites the decision in *RSM v. Saint Lucia,* noting that the:

> "*decisive factor for the tribunal to grant the requested security for costs was the fact that the claimant had a proven history of not complying with costs awards rendered against it*."

Again, that is not the case here.

32. The Tribunal also relied in paragraph 176 of Procedural Order No. 4, upon *EuroGas v. the Slovak Republic*, noting that the tribunal in that case appropriately had "refused to make an order for security for costs as the respondent had failed to establish that the Claimants had defaulted on their payment obligations in the proceedings or in other arbitration proceedings."

33. In support of its arguments, Canada again relies on *Herzig v. Turkmenistan* (Motion at ¶¶10-11). That case is unavailing – as more fully explained by the Investor in its February 24, 2020 Response to Canada's Submission on *Herzig v. Turkmenistan*. By way of summary:

- The *Herzig* claim was decided under different legal regime that is not applicable to this arbitration;[3]

- The Herzig Tribunal affirmed the need for a finding of "exceptional circumstances."[4]

- And while the *Herzig* majority relied on the "certainty" that the claimant, in that case, could not pay an adverse costs award, that finding is inconsistent with the majority view that impecuniousness alone does not suffice to award security for costs.

[3] Investor's February 24, 2020 Response to Canada's Submission ¶¶3-4.
[4] *Herzig*, **RLA-112** ¶¶ 57-58.

- Moreover, the *Herzig* majority took care to assure itself that the Investor could post security at low cost without impeding its access to justice.[5] Canada has not shown such a circumstance exists here.

34. In paragraph 174 of Procedural Order No. 4, this Tribunal has already adopted that majority view. Otherwise, the Tribunal would have required the Investor to answer questions on the details of its funding agreement and reserved the right to rule on security for costs based upon the answers provided by the Investor. The Tribunal did not do that.

35. Canada also tries to bolster its argument that, to date, the Investor has not provided evidence of its financial acumen (see paragraph 12 of Canada's Motion). It is not the burden of the Investor to provide open access to its assets any more than a Respondent to any claim or counter-claim must do so. It is not Investor's responsibility to refute the suppositions of Canada or to provide information on its assets pre-judgment.

36. Respondent's Motion is nothing more than an effort to re-argue arguments it already has lost in the context of its Motion for Security for Costs. It should be denied summarily.

CANADA SEEKS BETTER TREATMENT IN EARLY DISCOVERY

37. Another independent reason exists to deny the Motion. Even Canada recognizes in paragraph 17 of its Motion that it successfully blocked Investor's own efforts to obtain early discovery. Canada notes that the "*Tribunal refused the Claimant's request for a departure from the calendar in PO1 and consequently refused the Claimant's request for an early production of the Windstream Documents.*"

38. In paragraph 59 of Procedural Order No. 4, the Tribunal made clear that it would not depart from its procedural schedule concerning document production, noting that it was "not persuaded that it is necessary for the Tribunal to order an early production of these

[5] *Herzig*, **RLA-112**, ¶¶ 64-65.

documents, which would require the Tribunal to depart from the timelines and procedures for document production set out in PO 1."

39. Canada does not even mention this finding by the Tribunal. It provides no basis for the Tribunal to revise its decision, which presumably would require both sides to have early discovery for purposes of equality. *See infra.*

40. To distinguish its successful efforts to block the Investor's own attempts at early discovery, Canada nonetheless claims that is own early discovery request is "completely distinguishable." (Canada's Motion at ¶ 30).

41. Yet, Canada's explained reasons are inexplicable. Canada claims that the documents sought are unrelated to the claims, but then subsequently notes that the *Windstream* documents the Investor sought were not relevant. The fact that the documents Canada seek are divorced from the merits, and relate only to the Investor's post-award assets – and again Canada surely would not provide such information about its own pre-award assets – is a reason not to provide early discovery of them. If anything, it is a reason *not* to permit discovery.

42. The Investor further notes that Canada argues the following in paragraph 20 of its Motion.

> "*should Canada pursue bifurcation of the proceedings (as provided for in PO4) and be successful on its jurisdictional claims, this arbitration would be decided without any document production phase altogether, leaving Canada in a position where it does not obtain information on the Claimant's financial condition, never has an opportunity to revive a motion for security for costs, and is potentially left with a costs award in its favour that it cannot collect. In such a scenario, the timelines and procedures for document production set out in PO1 would never arise.*"

43. Such arguments are simply irrelevant. Canada already sought a premature Motion to Bifurcate and lost that Motion in Procedural Order No. 4. Should Canada file a motion to bifurcate, and in the unlikely event that Motion is granted by the Tribunal, there will be little harm to Canada. It will have succeeded in having its incessant need for an early adjudication of what the Investor contends are meritless arguments on timeliness. Either Canada will prevail and thus will have not expended as much resources, or it will

lose, thus making it much less likely it ever will be able to prove exceptional circumstances as required for exceptional remedy of having the Investor post security for costs.

44. At paragraph 61 of Procedural Order No. 4, the Tribunal observed that the document request regarding the Windstream documents was not urgent and thus the Tribunal denied the document request. The Tribunal stated:

> It is unclear to the Tribunal how that [early production of documents] would result in serious or irreparable harm to the Claimant if the Windstream Documents, assuming they are relevant and material, are produced only at the discovery stage.

45. On its face, Canada's motion should not be considered now because it cannot ever meet this serious or irreparable harm test. In fact, Canada's entire urgent motion is designed to impose more serious and irreparable harm upon the Investor – rather than being designed to avoid it.

46. In reality, Canada's reasons for early discovery – which would require the Tribunal to alter the Procedural timetable that it refused to change for Investor- is that it should be granted simply because Canada is making the request, instead of the Investor.

47. This type of request of having at Tribunal provide more favorable treatment to one side in this dispute violates the principle of equality of treatment required by NAFTA Article 1115 and Article 15 of the 1976 UNICITRAL Arbitration Rules.

48. That Canada would make this request for early discovery – in the middle of a worldwide pandemic -- after successfully defeating the Investor's own request is an exemplar of unbridled hubris and poor judgment.

RESPONDENT'S PROPOSED SCHEDULE IS NOT WORKABLE

49. Finally, Respondent's Motion includes a proposed schedule for production of documents. As noted for the reasons stated above, the Investor vigorously objects to being required to produce any of the documents requested by Respondent at this time.

50. Many – if not all – of the documents requested are highly invasive in nature (for example, all assets of the company, deeds, and records, etc.).

51. Without limiting the generality of the objections raised by the Investor above, the Investor notes that the procedural calendar proposed by Respondent is highly prejudicial for the following reasons:

    a. Canada's Motion fails to provide enough time for collection and production of documents (proposing a mere 10 and 15 days respectively); and

    b. Canada's Motion is designed to ensure that the document production process will occur during the same time that the Investor has been ordered to produce its initial Memorial, including its briefing on the issues of jurisdiction and temporal limitations as required by Procedural Order No. 4 (due May 27, 2020).

52. For reasons outside of the Investor's control, and not caused by it, the Investor has encountered extraordinary difficulties in being able to meet the ordinary deadlines originally contained in this arbitration. While the Investor has not yet sought an extension of time for filing its Memorial, the situation described in this Motion is exactly the type of *force majeure* event that would justify an extension of time for the filing of the Memorial. Canada's attempt to add additional demands upon the Investor at this time is as audacious as it is ill-suited. The disproportionate harm that could arise to the Investor from having to comply with Canada's new extraordinary document production request would not maintain the equality of the disputing parties. These proportionality and fundamental fairness concerns are yet another, independent reason why Respondent's Motion should be denied.

CONCLUSION

53. The Respondent's document requests should not be entertained at this time.
    a. The existence of the global pandemic imposes unnecessary burdens to the Investor if it is ordered to comply with this unscheduled document process at this time.

b. In any event, the conditions of urgency do not exist that would justify such an extraordinary process being ordered at this time.

c. Canada has an opportunity to make document requests under a detailed document production phase envisaged in Annex I to Procedural Order No. 1. To the extent that Canada's requests are compliant with the requirements for document production, Canada's request should be taken at that later time.

54. If the Tribunal determines that a document request should be entertained in advance of the document production process envisaged in Annex 1 of Procedural Order No. 1, then the schedule set out by Canada is grossly inadequate. The circumstances of the COVID-19 pandemic involve many regional restrictions arising from the existence of surges in local and regional epidemic surges. Given the significant short term variations in the impact of the pandemic, the Investor cannot advance a specific schedule at this time.

55. Should production be ordered, then the Investor would need to work with the Tribunal on production schedules in light of the fluidity of the current circumstances. Other than identifying that Canada's proposed schedule is woefully inadequate and unworkable, the Investor cannot propose an alternative schedule at this time for reasons entirely outside of its control. Canada's Motion is unnecessary and untimely. In the context of the massive human suffering arising from the pandemic, Canada's burdensome Motion is out of order.

56. For the reasons set out in this response, Canada's Motion should be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Date: April 20, 2020