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August 28, 2020
By email

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Sir Daniel Bethlehem QC
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Dear Mr. President and Members of the Tribunal:

Re: Tennant Energy v Canada - Response to Canada's Motion on Valuation Data

The Investor writes in response to Canada's August 24, 2020 request for a production order regarding excel spreadsheets.

1) This motion is unnecessary for the following reasons:
   a. All the necessary information required by Canada's experts was produced by the Investor;
   b. The information requested is unnecessary;
   c. The information requested was not required by the Tribunal's Procedural Order.

2) Canada made its request while the Investor was addressing the unnecessary complexities raised by Canada's motion to exclude videos of the *Mesa Power* NAFTA hearing that have been available to the public for more than five years.

3) Canada's latest motion is part of itsoverall campaign to inundate the Investor with multiple unnecessary motions after motion. Last week, it was Canada's motion to suppress

information from the public. This week, it is Canada's motion to deal with the production of unnecessary electronic spreadsheets because the information has been produced in tables by the Investor's evaluation experts.

4) We note that Canada apparently has virtually unlimited legal and paralegal resources available to defend in this case, which it has been prepared to squander inefficiently in this arbitration. Canada's lavish spending is conspicuous. One needs to look no further than the January 2020 procedural hearing, where Canada was represented at the procedural hearing by more than 20 representatives, while the Investor was represented by two lawyers.

5) At every turn, Canada brings motion after motion to dissipate the Investor's resources. Now it attempts to inundate the Investor with scurrilous motions – one to exclude publicly available evidence that comes as no surprise to Canada (given that Canada itself linked the information on its own website) and the other to obtain unnecessary extra evidence. It appears that Canada will stop at nothing to silence this claim.

THE REQUIRED INFORMATION WAS PRODUCED.

6) Canada is keenly aware that *Procedural Order No. 1* does not require the production of the spreadsheet materials Canada seeks. Indeed, Canada's motion is poorly taken as it ignores the extensive and unparalleled efforts taken by the valuation team to provide detailed disclosure to Canada.

7) Canada demands something that was not contemplated by the Procedural Order.

8) The Investor's August 2020 Valuation Report (CER-1) contained a dedicated section (Appendix A) that detailed more than 90 documents upon which the Investor's experts relied on the preparation of their Valuation Report. Every single document the experts referenced

was produced with the Valuation Report. This five-page long appendix is attached to this submission as Exhibit C-259.[1]

9) It is manifestly absurd to suggest that Canada's valuation experts cannot do their work because of the failure to provide the excel version of the tables. The Investor's valuation team produced a series of tables set out on pages 50 – 59 of the Valuation Report confirming the basis for their conclusions in the report. The tables are supporting evidence for the conclusions. Those tables were produced and are attached to this submission.[2] There is no need to produce alternative copies of those tables. They are available in searchable pdf and can be copied into excel by Canada at any time without any delay.

THE INFORMATION IS UNNECESSARY

10) These detailed tables in the Valuation Report fully document the basis for the Valuation Experts' conclusions that have been rendered in the Expert Report.

11) The conclusions of the Valuation Experts are in the valuation report. The support for those conclusions comes from evidence that has been produced or from the tables, which sets out the information in a detailed manner.

12) The tables were fully produced, and the basis for reviewing the calculations can be seen transparently in those tables. No other information is necessary to address the conclusions of the Valuation Experts, which is contained and discussed in the Valuation Report.

[1] Valuation Report schedule itemizing and producing 91 different documents relied upon by the Valuation Team -in their Scope of Review Documents -Extract from the Deloitte Valuation Report - CER-1 – **Exhibit C-259.**

[2] Schedule itemizing and producing 91 different Scope of Review Documents -Extract from the Deloitte Valuation Report - CER-1 – **Exhibit C-260.**

THE INFORMATION WAS NOT REQUIRED BY THE PROCEDURAL ORDER

13) Procedural orders routinely itemize the extent of the material to be produced. The terms of Procedural Order No. 1 were widely discussed by the parties at the first procedural hearing. Canada had no hesitation in making its points during that hearing – yet Canada did not raise any issue about production of the underlying excel charts to the underlying printed tables which supported the conclusions of the experts.

14) On August 12, 2020, Canada wrote the following short email to counsel for the Investor:

> We are writing to request the native Excel spreadsheets of the various schedules and models relied on and attached to the Deloitte expert report accompanying the Claimant's Memorial of August 7, 2020. The native versions of these schedules are necessary for Canada's experts to review the calculations made by Mr. Andrade and Mr. Taylor and should be exchanged by the parties as a matter of course.
>
> *Please provide Canada with the above-mentioned documents by August 19, in order to prevent any further delay to Canada's review of the Claimant's Memorial.*[3]

15) Canada knows that it was not entitled to this material. Indeed, had Canada been entitled to this information, Canada certainly would have referenced any relevant mandatory provisions in this email along with its demand. Canada cited no basis for its demand.

16) Indeed, the relevant Procedural Order says something else. Paragraph 10.2 of Procedural Order No. 1 states:

> Expert reports shall be accompanied by any documents or information upon which they rely, unless such documents or information have already been submitted with the Parties' written submissions, in which case the reference to the number of the exhibit will be enough.

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[3] This email from Darian Bakelaar, Senior Paralegal, Canada to Barry Appleton, Appleton & Associates International Lawyers LP is set out as **R-028.**

17) Article 5(2) of the *IBA Rules on the Taking of Evidence* provides that an expert report must contain:

> (d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;
>
> (e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;

18) The Investor does not agree with Canada's characterizations in its August 12 email. The information Canada seeks was not material that "should be exchanged by the parties as a matter of course."

19) Furthermore, Canada and its experts will suffer no prejudice by not having the spreadsheets as all the data relied upon is supplied as tables with the Valuation Report. As can be seen in the attached extract with the Valuation Report tables, Canada has full access to the conclusions and the data supporting those conclusions. The Valuation Report was fully consistent with Art 5(2) of the IBA Rules, as it set out the facts upon which it was based, and it included a detailed description of the methods, evidence, and information used in arriving at conclusions. In coming to those conclusions, the Valuation Experts relied upon tables. Those tables were produced in their entirety in the Schedule (Exhibit **C-260**).

20) The Investor and its counsel were not provided with these excel models when the Valuation Report was filed.

21) Indeed, all the documents and information the Valuation Team relied upon were carefully itemized and produced. The Investor met or exceeded all the requirements to produce supporting material set out in *Procedural Order No. 1* and Article 5(2) of the IBA Rules.

22) In this manner, there can be no prejudice because of the provision in the Valuation Report of highly detailed tabulated information and the extensive and transparent production of supporting materials.

23) Canada is aware that the effects of the COVID-19 pandemic has had a terrible effect on counsel and the Investor. For example, the Miami office of Reed Smith and the Toronto office of Appleton law firm remain closed due to the pandemic. Both law firms have suffered reductions in availability of staff. We also had to deal with weather emergencies, including hurricanes. Similarly, the Deloitte Valuation Experts have had to deal with significant dislocation because of the pandemic.

24) Yet Canada has made unreasonable demands with very short timeframes that require coordination. These factors also go to the issue of unreasonableness of Canada's demands.

25) Canada relies in general on decisions from the *Mesa Power* case and the *Bilcon* case. The Investor notes that the *Bilcon* decision turns on a complete failure of the valuation expert to provide any of the materials underpinning his report. That decision also relies upon an interpretation of specific language that was *sui generis* in another procedural order within the *Bilcon* particular arbitration.[4] The *Bilcon* decision simply does not apply to the issues in this case where so many documents have been produced as well as all of the underlying tables.

26) The decision by the tribunal in *Mesa Power* is simply a discretionary decision taken by that tribunal in the context of its evaluation of the particular circumstances of that case.[5]

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[4] In particular, this is raised within the requirements of *Bilcon Procedural Order No. 3,* **CLA-266** – *this matter is descripted in detail in ¶¶ 15 - 18 of the Bilcon decision filed by Canada. Bilcon of Delaware et al. v. Government of Canada* (UNCITRAL) Procedural Order No. 22, 14 February 2017, **RLA-113.**

[5] *Mesa Power Group LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 6, 5 March 2014, **RLA-114**.

27) What is clear is that if Canada reasonably anticipated the need for this extent of supporting material, surely it should have raised these concerns when the procedural orders were being drafted. Instead, Canada has sat on its hands to spring an ambush attack on the Investor.

28) We also note that in the *Merrill & Ring* case, Canada produced millions of computations under its Export Management System (EMS) to the Investor that were not in machine-readable form. This information was produced as part of document production and for the purpose of enabling the valuation report. When the Investor sought production of the EMS data in a machine-readable form to allow for analysis, Canada refused. Canada offered to demonstrate the computer model for the Investor and its experts. The *Merrill & Ring* case supported the non-production of the data.[6]

PRACTICAL MATTERS

29) As a matter of principle, the Investor cannot condone Canada's practice of involving the Tribunal with every procedural spat. It is poor form and reflects poorly on Canada.

30) The Investor would have greatly preferred for Canada to deal with this matter in a more courteous and professional manner. Certainly, it would have been better for Canada to reach out and consult further with the Investor before making this motion. The Investor believes that matters such as this should not, in first instance, be matters for the Tribunal.

31) The Investor fully complied with the letter and spirit of the Tribunal's Procedural Order. Canada has a tremendous amount of material supporting the conclusions of the valuation experts. The detailed tables set out the calculations that were used by the Valuation Team to make its determination.

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[6] *Merrill and Ring Forestry LP v. Canada*, ICSID Case No. UNCT-07-1, Order on Document Production, 22 September 2008, **CLA-265.**

32) We also note that Canada, in its current motion, has not asked the Tribunal to vary the requirements upon experts going forward in the production of supporting materials for expert reports.

33) Neither has Canada offered to produce similar evidence with its own reports in the future. Instead, Canada demands immediate production of materials, to which it knew it was not entitled and to which Canada apparently is not prepared to provide.

34) If Canada sought to have a conversation about such matters, it might be possible to agree upon a consent amendment to the terms of the Procedural Order. But such a matter would need to arise because of negotiation, and not by way of a *dictat* unilaterally imposed by one party upon the other. Canada's petulance and complaints do not assist the resolution of this matter.

35) For example, as noted above, there is no need for the Investor to produce alternative copies of those tables. They are available in searchable pdf and can be copied into excel by Canada at any time. They require no supplementation.

36) Matters in arbitration work best when counsel consult and confer in a professionally reasonable manner. Indeed, the Investor is prepared to engage in a respectful and professional conversation – but it is not obliged to produce whatever Canada demands whenever Canada demands it.

37) We encourage Canada to engage in a productive conversation to see if this matter could be resolved amicably, without the unnecessary intervention of the Tribunal. At this time, for the reasons set out above, the Investor must remain opposed to Canada's unreasonable demands.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Appleton & Associates International Lawyers LP

Reed Smith LLP

Date: August 28, 2020

Encl:
cc:

Doak Bishop
Sir Daniel Bethlehem
Christel Tham
Cristina Cardenas
Heather Squires (And Canada's Legal team)