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Subject: RE: PCA Case No 2018-54 Tennant Energy - Canada's untimely request for directions
Date: 09 October 2020 05:53:51

Dear Mr. President and members of the Tribunal

The Investor has had the opportunity to read the communication sent by the Government of Canada earlier today on October 8, 2020. Canada's request is untimely and based on a flawed understanding of paragraph 50 of the Tribunal's Procedural Order No. 7. The Investor needs to identify information missing in Canada's submission to permit the Tribunal to properly evaluate Canada's untimely request.

Canada's October 8, 2020 letter reaches the Tribunal after a course of intense recent consultations between the disputing parties, which resulted in a limited agreement to reschedule specific deadlines to October 14th that would otherwise have fallen on October 12th (which is a statutory holiday in Canada) or on Friday, October 9th. From the correspondence between the parties, Canada is aware that the Investor will be filing preliminary confidentiality designations with Canada on October 14 regarding the eleven documents filed with the Investor's August 7th Memorial. The Investor claimed confidentiality under the terms of Article 15 of the

Confidentiality Order.

In its letter today, Canada sought clarification of the operation of Article 16 of the Tribunal's *Confidentiality Order*. In this respect, Canada seeks direction regarding the following documents:

Claimant's Memorial, dated August 7, 2020;

The Witness statement of Mr. John Pennie, dated August 7, 2020;

The Claimant's Response to Canada's Motion of August 10, including the Witness Statement of Parthenya Taiyanides, dated August 18, 2020 (the Claimant's "Response"); and

The Claimant's Rejoinder Response to Canada's Motion of August 10, including the Witness Statement of Justin Giovannetti, dated September 2, 2020 (the Claimant's "Rejoinder Response").

Canada states, "it is not clear when Canada's proposed designations to these submissions should be filed in this scenario.". In this regard, Canada is mistaken. There is no process for the designation of these submissions because Canada expresses an incomplete understanding of *Procedural Order No. 7*.

Paragraph 50 of September 21, 2020's *Procedural Order No. 7* provides:

50. It may be that the Respondent will wish to protect the confidentiality of the information in the *Mesa Power Videos*, in accordance with the *Mesa Power Confidentiality Order*. If the Respondent so requests, the Tribunal would be prepared to order that any confidential information contained in the *Mesa Power Videos* be redacted from the publicly available versions of the Parties' pleadings and any decision or award.

Yet, in its October 8, 2020 letter, Canada says:

In accordance with paragraph 50 of *Procedural Order No. 7*, Canada intends on maintaining

confidentiality over the information that was designated as confidential in the *Mesa Power* hearing videos in this arbitration.

This assertion is not a request as required by the Paragraph 50 process. This strongly worded statement appears to be an order from Canada. However, in this NAFTA arbitration, Canada must request directions and orders from the Tribunal. This should be a reasoned application to create clarity and efficiency in any subsequent redaction process. The mention of a general desire for confidentiality at the tail end of Canada's October 8th letter is not sufficiently detailed for this purpose.

The answer to Canada's Request for directions is straightforward. The first step is for Canada to follow the terms of the Paragraph 50 process. If Canada wishes to designate information as confidential, it must request it from the Tribunal.

The Investor will also be required to be heard in this respect to this application.

If the Tribunal agrees with the application process and provides an order under Paragraph 50, then subsequent requirements to deal with the effects of such an order should follow the procedures currently in the *Confidentiality Order*.

Motion Materials

Canada seeks direction regarding the Investor's Response and Rejoinder to Canada's Motion. In correspondence sent to the Investor, Canada demands the right to redact certain documents exchanged before the Tribunal made *Procedural Order No. 7* on September 21, 2020. Canada presumes a right to file redacted copies of these documents. This demand is inconsistent with the express provisions and the spirit of the *Confidentiality Order*.

Currently, Canada has not made any application to the Tribunal envisioned in paragraph 50 of *Procedural Order No. 7*. *Procedural Order No 7* was clear. Canada's letter presumes a result from the Tribunal without any application.

Canada failed to comply with the existing requirements in the *Confidentiality Order* to claim confidentiality for its August 10, 2020 motion and the subsequent submissions.

Article 15 of the *Confidentiality Order* clarifies that a disputing party may only assert confidentiality if the filing party identifies the existence of confidential information at the time of filing. If Canada truly believed that its materials seeking an order of confidentiality contained confidential information, it would have been able to meet the requirements of Article 15 at the time of filing its Motion. Thus, even if the Tribunal makes a ruling permitted by Paragraph 50 of *Procedural Order No. 7*, Canada should not be entitled to file confidential versions of information contained in its motions because Canada had the opportunity and the knowledge to claim confidentiality with its motions – but it expressly failed to make a timely claim.

There is a public interest in the motions and the Tribunal's *Procedural Order No. 7*. The Motion addressed issues that could be of significant assistance to other NAFTA Tribunals and other international tribunals considering the admission of evidence.

There must be a meaning to the actions of parties to a dispute. Canada decided not to designate its Motion or Reply Motion as confidential. This Investor relied upon this decision in filing its Motion Response and Rejoinder. Canada knew full well about the nature of the evidence and items in dispute, yet Canada did not claim confidentiality in the manner set out in the *Confidentiality Order*.

This is a question of party autonomy. Canada's decision not to claim confidentiality at the time of filing must be given meaning. Further, the NAFTA Parties' commitment to public transparency should be given effect. This was especially the case when Canada had the option to claim confidentiality on a timely basis and decided not to claim it.

The provisions in the *Confidentiality Order* were proposed mainly by Canada. Canada now must be compliant with those terms.

As the motion materials were not marked as confidential by either disputing party, The Article 16 of the *Confidentiality Order* procedure is inapplicable. No party is entitled to redact those materials under the express terms of the *Confidentiality Order*. It would be a breach of due process and equality of the disputing parties to permit Canada to make a filing concerning the Motion in these circumstances.

The Investor's Memorial

If the Tribunal grants a hypothetical application from Canada, it would be necessary to address the Investor's Memorial and its supporting documents. In such a circumstance, there would need to be a twenty-one-day period to prepare preliminary confidentiality designations for the Memorial and its supporting materials.

As there was no knowledge of the potential for confidentiality claims at this time, the restrictions of Article 15 of the *Confidentiality Order* should not be applied. The standard process under Article 16 should be followed based on the date that the Tribunal issued an order on any Procedural Order No. 7 paragraph 50 application made by Canada.

As a practical matter, the Investor proposes the following approach:

1. If Canada is so inclined, it should be free to make a detailed application under paragraph 50 to the Tribunal.
2. Suppose the Tribunal grants Canada's application after hearing the arguments of the other disputing party. In that case, the process set out in paragraph 16 of the *Confidentiality Order* should be followed concerning preliminary confidentiality designations.

We thank the Tribunal for its consideration of this matter and wish the Tribunal, secretariat and counsel for Canada the very best of health.

On behalf of counsel for the Investor, Tennant Energy

Barry Appleton



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Sent: Thursday, October 8, 2020 6:27 PM

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Subject: PCA Case No 2018-54 Tennant Energy LLC v. Government of Canada

Dear Members of the Tribunal,

Please see attached Canada's letter of today's date.

Kind regards,

Benjamin Tait
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