

Global Affairs Canada
Department of Justice



Affaires mondiales Canada
Ministère de la Justice

CANADA

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VIA EMAIL

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Sir Daniel Bethlehem QC
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Dear Members of the Tribunal:

Re: *Tennant Energy LLC v. Government of Canada*

Canada writes to request permission from the Tribunal to submit the following new legal authority into the record prior to the Tribunal's decision on bifurcation:

Westmoreland Mining Holdings LLC v. Government of Canada (ICSID Case No. UNCT/20/3) Procedural Order No. 3, Decision on Bifurcation, dated 20 October 2020 [the "Decision"].

Should the Tribunal so permit, Canada similarly requests permission from the Tribunal for both disputing parties to make brief, concise written submissions on the relevance of the Decision to Canada's Renewed Request for Bifurcation.

The *Westmoreland* tribunal issued the Decision on October 20, 2020. It was therefore not available to Canada at the time Canada submitted its Renewed Request for Bifurcation on September 21, 2020. As the Decision was only publicly released within the past week, this is the earliest opportunity for Canada to introduce the Decision into the record. This new legal authority contains a decision by a NAFTA Chapter Eleven tribunal on Canada's Request for Bifurcation in *Westmoreland*. The *Westmoreland* tribunal's reasoning and conclusion on this matter are, in certain regards, directly relevant to Canada's Renewed Request for Bifurcation in this arbitration.

Canada notes that Article 8.4 of Procedural Order No. 1 provides that “the Tribunal shall not consider any evidence that has not been introduced as part of the written submissions of the Parties, unless the Tribunal grants leave on the basis of exceptional circumstances.” However, as Article 8.4 does not apply to requests to introduce new legal authorities, the Parties are not required to show “exceptional circumstances” to submit the Decision into the record.

If the Tribunal admits the Decision into the record, Canada proposes the following briefing schedule. On the date of the Tribunal’s decision to admit the Decision as a new legal authority, Canada will send the Decision to the Tribunal, the Claimant, and the Permanent Court of Arbitration (with label RLA-164) and provide an updated cumulative index. Within five days of the Tribunal’s decision to admit the Decision as a new legal authority, Canada and the Claimant (if it so desires) will each provide a written submission to the Tribunal on the Decision. In order to uphold the efficiency of this arbitration, Canada requests that each party’s submission not exceed two pages in length.

Out of an abundance of caution, Canada has not annexed the Decision to this request, and will await the Tribunal’s permission to have it admitted into the record.

Yours very truly,



Senior Counsel/Deputy
Director
Trade Law Bureau

cc: Barry Appleton, TennantClaimant@appletonlaw.com (Appleton & Associates)
Ed Mullins, Ben Love (Reed Smith LLP)
Christel Tham, Diana Pyrikova (Permanent Court of Arbitration)
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