

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 in response to the Claimant's letter of December 23, 2020 requesting an extension of the deadline to file its submission on Jurisdiction, and a corresponding modification of the procedural calendar. Canada consents to the Claimant's request to file its submission on March 1, 2021 rather than January 11, 2021. However, Canada is unable to agree with the Claimant's proposed procedural calendar for two reasons.

First, the Claimant is not entitled to three submissions on Jurisdiction. Procedural Order No. 1 provided bifurcated and non-bifurcated procedural calendars for this arbitration.¹ Under both scenarios, each disputing party is permitted two written submissions (leaving aside any response to potential submissions by the United States and Mexico pursuant to Article 1128 of the NAFTA). While Procedural Order No. 4 slightly modified the procedural calendar in the arbitration, the number of submissions was not changed.

¹ Procedural Order No. 1, Annex I: Procedural Calendar, pp. 15-17.

On August 7, 2020, the Claimant filed its Memorial. This submission included pleadings with respect to jurisdiction, merits, and damages per the Tribunal’s instructions.² For instance, one section in the Memorial entitled “Jurisdiction” included over 100 paragraphs of argumentation on the Claimant’s alleged compliance with the limitation period under NAFTA Article 1116(2), and the Claimant’s alleged ownership and control of the investment at certain times.³ Canada responded, on September 21, 2020, with its Memorial on Jurisdiction. While labeled a memorial, this submission was in fact Canada’s counter-memorial for jurisdictional arguments, because the Claimant submitted its first round of jurisdictional arguments in its Memorial. Thus, the submission by the Claimant due on January 11, 2021 (or, with the Tribunal’s approval, March 1, 2021) is not a counter-memorial. This submission will be the Claimant’s Reply on Jurisdiction. After that submission, Canada will file its Rejoinder on Jurisdiction, thus completing the two submissions per disputing party on Jurisdiction. After those steps are complete, the only remaining submissions from either disputing party in the preliminary phase will be in response to any Article 1128 submissions from the other NAFTA Parties.

Second, the Claimant’s proposal does not account for the fact that the Tribunal will make a decision on the scope of the preliminary phase following the Claimant’s March 1, 2021 submission. The deadline for Canada to file its Rejoinder on Jurisdiction cannot occur until 45 days after the Tribunal’s decision (subject to any extension requests made by Canada to this deadline, as acknowledged by the Claimant in its letter of December 23, 2020), not 45 days after the Claimant’s March 1, 2021 submission. Canada needs to know the full scope of the jurisdictional issues in the preliminary phase to prepare its Rejoinder on Jurisdiction.

As a result, Canada proposes the following procedural calendar, which also reflects the timelines contemplated in Procedural Order No. 1 for the filing of submissions contemplated in Steps C, D, and E below:

<u>Event</u>	<u>Proposed New Date</u>
A. Investor’s Reply Memorial on Jurisdiction	March 1, 2021
B. Tribunal Decision on Scope of Preliminary Phase of Proceedings	[TBD]
C. Canada’s Rejoinder Memorial on Jurisdiction	B + 45 days ⁴

² Procedural Order No. 4 provided: “[t]he Claimant is to set out in full its detailed pleading on the issue of jurisdiction in its Memorial and specifically on the issue of time-bar which has been raised by the Respondent. In accordance with the procedural timetable set out in PO 1, this Memorial is due to be filed 90 days from the date of this Procedural Order (i.e. Wednesday, 27 May 2020)” (emphasis added). See Procedural Order No. 4, ¶ 93(a).

³ Claimant’s Memorial, ¶¶ 681-781. The Claimant devoted another 50 paragraphs to jurisdiction in a subsection in the “Overview” entitled “The Tribunal has jurisdiction to rule on these claims”: ¶¶ 100-150.

⁴ Procedural Order No. 1 contemplates 45 days for the submission of Reply and Rejoinder Memorials on Jurisdiction. See Annex I – Procedural Calendar.

D. Submissions of the United States and Mexico Pursuant to NAFTA Article 1128 (if any)	C + 30 days ⁵
E. Responses to 1128 Submission	D + 15 days ⁶

Finally, Canada does not object to the Claimant's request to designate as confidential the personal health information contained in the Claimant's letter of December 23, 2020. Canada invites the Claimant to provide a redacted version of the letter for Canada's comment in accordance with the procedures outlined in the Confidentiality Order of this arbitration.

Canada also takes this time to wish the Tribunal, the PCA, and opposing counsel a joyous holiday season and happy New Year.

Yours very truly,



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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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⁵ Procedural Order No. 1 contemplates 30 days for the submissions by the United States and Mexico pursuant to NAFTA Article 1128. *See* Annex I – Procedural Calendar.

⁶ Procedural Order No. 1 contemplates 15 days for Responses to 1128 Submissions. *See* Annex I – Procedural Calendar.