

Global Affairs Canada
Department of Justice



Affaires mondiales Canada
Ministère de la Justice

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VIA EMAIL

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Dear Members of the Tribunal:

Re: *Tennant Energy LLC v. Government of Canada (PCA Case No. 2018-54)*

Canada writes in response to the Tribunal's April 2, 2019 e-mail, which directed the disputing parties to submit a joint marked-up draft Confidentiality Order ("CO") for the Tribunal's consideration, with comments on areas of disagreement provided by way of a side-letter.

Canada provided the Claimant with a draft CO for its consideration on February 7, 2019.¹ While the Claimant acknowledges that the disputing parties agree that a CO is necessary in these proceedings, it has refused to engage with Canada, or to provide an alternative draft CO for Canada's consideration. Therefore, Canada proposes, on its own behalf, the attached draft CO to govern the treatment of confidential information in these proceedings.

In Canada's view, these proceedings will require protection of two discrete categories of information, including (i) Confidential Information; and (ii) Restricted Access Information.

¹ Claimant's Letter to the Tribunal dated March 14, 2019, p. 8.

Both categories of information are defined in paragraph 1 of the draft CO. This type of CO with two levels of redactions is commonly used in NAFTA Chapter Eleven arbitrations, including the previous cases in which the Feed-In Tariff (“FIT”) Program in Ontario was a measure at issue.²

Generally speaking, Confidential Information is a category that protects business confidential information (“BCI”) of a party, a government or a third party, or confidential information otherwise protected from disclosure under Canadian law. This information will be protected from public disclosure.

Restricted Access Information is another category that protects highly sensitive BCI or other information the disclosure of which would result in serious material gain or loss that could potentially prejudice the competitive position of the party, a government or a third party to whom that information relates. This second category of information would be disclosed only to a limited group of individuals, including the members of the Tribunal, counsel to a party or to a provincial government and independent experts or consultants. Restricted Access Information may need to be redacted in these proceedings, including to highly sensitive BCI from third party applicants that the Government of Ontario may have received in the context of the FIT Program.

The CO proposed by Canada also sets out a robust process with set timelines for making and challenging confidentiality designations, including submitting any disputed designations to the Tribunal for resolution. In Canada’s experience, a process for resolving confidentiality designations disputes between the disputing parties avoids delays in the arbitral process.

While the Claimant insists that a “different approach” is required to address its concerns, it has done nothing to work with Canada to provide a joint marked-up version of a CO, nor has it provided specific proposals for Canada’s consideration. The Claimant had every opportunity to raise its concerns with Canada in the last three weeks and it should not be permitted to ignore the Tribunal’s direction to the disputing parties and to argue that a meeting in person is necessary to resolve confidentiality issues in these proceedings without clearly articulating the issues that need to be addressed. Such an approach is inefficient and could result in unnecessary multiple Procedural Meetings. If the Claimant has concrete proposals to address its concerns, it should be required to submit its proposals to the Tribunal, in writing, prior to the Procedural Meeting to ensure that Canada has a fair opportunity to review and comment on such proposals.

² *Mesa Power Group, LLC v. Canada (UNCITRAL) Confidentiality Order*, 21 November 2012, available at: <https://www.italaw.com/sites/default/files/case-documents/italaw1201.pdf> ; *Windstream Energy LLC v. Canada (UNCITRAL) Confidentiality Order*, 2 October 2014, available at: <https://www.italaw.com/sites/default/files/case-documents/italaw1587.pdf>.

Based on the foregoing, Canada submits the attached CO for the Tribunal's consideration and reserves its right to provide additional comments should the Claimant submit its own proposals. Canada further confirms that it is also currently reviewing the Claimant's email to the Tribunal dated April 16, 2019, regarding its comments on the EU General Data Privacy Regulation and will provide a response on April 30, 2019 in accordance with the Tribunal's direction.

Yours very truly,

A handwritten signature in black ink, appearing to read "Lori Di Pierdomenico". The signature is fluid and cursive, with a long horizontal stroke at the end.

Lori Di Pierdomenico
Senior Counsel
Trade Law Bureau

cc: Barry Appleton, TennantClaimant@appletonlaw.com (Appleton & Associates)
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