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Dear Members of the Tribunal:

Re: ***Tennant Energy LLC v. Government of Canada***
Response to the Claimant's Submission on the European Union General Data Protection Regulation

Canada writes in response to the Tribunal's direction on May 28, 2019, instructing the Claimant and the Respondent (the "Parties") to address two issues: on the applicability of the European Union's ("EU") General Data Protection Regulation ("GDPR") to these proceedings (the "Arbitration"); and on certain immunities that may be accorded to the Permanent Court of Arbitration ("PCA") and the Arbitrators in relation to the GDPR.[1] In this submission, Canada maintains that the GDPR does not govern this Arbitration generally, because the rules that govern the Arbitration fall outside the material scope of the GDPR. Thus, it is the responsibility of each Party, Arbitrator, and the PCA to determine, individually, whether the GDPR applies to its or their own activities in the Arbitration.

Canada's activities in this Arbitration would almost certainly fall outside the territorial and material scope of the GDPR. Canada also notes that the Claimant, in its submission of June 4,

[1] E-mail from the Tribunal to the Parties, dated May 28, 2019.

2019, failed to establish that the Arbitrators would not receive immunity from the GDPR. Moreover, this is each Arbitrator's determination to make.

The Tribunal indicated that Arbitrator Bethlehem affirms that "the arrangements in place in respect of Arbitrator Bethlehem's professional activities, including in respect of arbitration proceedings, are considered to be GDPR compliant."[2] Canada accepts Arbitrator Bethlehem's determination in this regard.

Since the GDPR does not govern this Arbitration generally, and because the GDPR almost certainly does not apply to Canada in the Arbitration, it is inappropriate to create generally-applicable rules on the GDPR in the Confidentiality Order ("CO"). Nor is it necessary for the Parties, Arbitrators, and the PCA to enter a data protection protocol specific to the GDPR. Instead, Canada has put forward a draft CO that is sufficient to protect confidentiality in this Arbitration.

I. THE GDPR DOES NOT APPLY TO THIS ARBITRATION, AND IT ALMOST CERTAINLY WILL NOT APPLY TO CANADA IN THIS ARBITRATION

The Claimant assumes that the GDPR applies generally to this Arbitration, principally on the basis that Arbitrator Bethlehem is established in the EU.[3] While Arbitrator Bethlehem's Privacy Notice[4] acknowledges that the GDPR may apply to his activities at 20 Essex Street, this does not establish that the GDPR applies generally to Canada, the PCA, or the other Arbitrators in this Arbitration.

A. The Arbitration Rules Do Not Fall Within the Material Scope of the GDPR

Article 2.2(a) of the GDPR states:

> *"[t]his Regulation does not apply to the processing of personal data: (a) in the course of an activity which falls outside the scope of Union law […]".*

Paragraph 2 (Applicable Arbitration Rules) in draft Procedural Order No. 1 of this Arbitration states:

> *"[t]he procedure in this arbitration shall be governed by the 1976 UNCITRAL Arbitration Rules except as modified by the provisions of Section B of Chapter Eleven of the North American Free Trade Agreement ("NAFTA") (per Article 1120(2) of the NAFTA)."*

[2] E-mail from the Tribunal to the Parties, dated May 28, 2019.

[3] See for instance: Claimant's Letter to the Tribunal, dated June 4, 2019, ¶¶ 23 and 44.

[4] Privacy Notice for Sir Daniel Bethlehem QC, *attached to* E-mail from the Tribunal to the Parties, dated May 28, 2019.

The 1976 UNCITRAL Arbitration Rules and NAFTA Chapter Eleven govern this Arbitration. The former are international rules that do not constitute a law or regulation of the EU or EU Member State; rather, they were adopted by the United Nations Commission on International Trade Law.[5] As the Tribunal noted, NAFTA is a treaty to which neither the EU nor its Member States are a party. Accordingly, this Arbitration is governed by rules that do not constitute EU law; it therefore falls outside the material scope of the GDPR. Whether each of the Parties, Arbitrators, or the PCA are subject to the GDPR in the course of their activities in this Arbitration is a separate issue that they each bear the responsibility to determine independently.

B. The GDPR Almost Certainly Does Not Apply to Canada in this Arbitration

Canada's activities in this Arbitration would almost certainly fall outside the territorial and material scope of the GDPR.

1. Territorial Scope

On territorial scope, the GDPR may apply to non-EU controllers[6] or processors[7] that process[8] personal data based on one of two criteria: the "establishment" criterion in Article 3.1; or the "targeting" criterion in Article 3.2.[9]

a. Article 3.1 – Establishment in the EU

Article 3.1 states:

> *"[t]his Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not."*

The GDPR does not define the term "establishment", but Recital 22 of the GDPR clarifies that an "*[e]stablishment implies the effective and real exercise of activity through stable arrangements.*"

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[5] The 1976 UNCITRAL Rules, Preamble states: "*[n]oting that the Arbitration Rules were adopted by the United Nations Commission on International Trade Law at its ninth session 1/ after due deliberation*".

[6] **CLA-34**, GDPR, Article 4(7) states: "'*controller' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law*".

[7] **CLA-34**, GDPR, Article 4(8) states: "'*processor' means a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller*".

[8] **CLA-34**, GDPR, Article 4(2) states: "*processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction*".

[9] **CLA-36**, European Data Protection Board, Guidelines 3/2018 on the Territorial Scope of the GDPR (Article 3), 16 November 2018 ("Draft Territorial Guidance"), p. 3.

Article 3.1 only applies to processing by a controller or processor carried out in the context of the activities of an establishment of that controller or processor in the EU.[10] In its guidance on the territorial scope of the GDPR, the European Data Protection Board ("EDPB") states that, in determining the applicability of GDPR obligations, it is important to consider the processing by each entity separately.[11] The EDPB offers the following guidance for this analysis:

> *"[t]he first question is whether the controller itself has an establishment in the Union, and is processing in the context of the activities of that establishment. Assuming the controller is not considered to be processing in the context of its own establishment in the Union, that controller will not be subject to GDPR controller obligations by virtue of Article 3(1)."*[12]

b. Article 3.2 – Targeting Subjects in the EU

Article 3.2 states:

> *"[t]his Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:*
>
> *(a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or*
>
> *(b) the monitoring of their behaviour as far as their behaviour takes place within the Union.*" (Emphasis added.)

To qualify under Article 3.2(a), it is not enough to process the data of subjects in the EU: the processing must target or relate to offering goods or services to those data subjects.[13] The EDPB states that this requires "*a connection between the processing activity and the offering of good or*

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[10] **CLA-36**, Draft Territorial Guidance, p. 4; and at p. 9: "*[a]s far as processing activities falling under the scope of Article 3(1) are concerned, the EDPB considers that such provisions apply to controllers and processors whose processing activities are carried out in the context of the activities of their establishment in the EU*." (Emphasis added.)

[11] **CLA-36**, Draft Territorial Guidance, p. 9. At p. 10: "*[t]he EDPB emphasises that it is important to consider the establishment of the controller and processor separately*."

[12] **CLA-36**, Draft Territorial Guidance, p. 10 (emphasis added).

[13] **CLA-36**, Draft Territorial Guidelines, p. 14: "*[t]he EDPB also wishes to underline that the fact of processing personal data of an individual in the Union alone is not sufficient to trigger the application of the GDPR to processing activities of a controller or processor not established in the Union. The element of "targeting" individuals in the EU, either by offering goods or services to them or by monitoring their behaviour (as further clarified below), must always be present in addition*." (Emphasis added.) Recital 23 provides that, in determining whether an entity is offering goods or services to data subjects in the EU, it should be ascertained whether it is "*apparent that the controller or processor envisages offering services to data subjects in one or more member States in the Union*."

service".[14] Recital 23 identifies factors in determining if Article 3.2(a) has been met, including use of a currency used in a Member State "*with the possibility of ordering goods and services*", as well as the "*mentioning of customers or users who are in the Union*".

The word "monitoring" in Article 3.2(b) implies that the controller has a specific purpose in mind for the collection and subsequent reuse of data about an individual's behaviour in the EU.[15]

2. Canada Almost Certainly Falls Outside the GDPR's Territorial Scope in this Arbitration

Canada almost certainly would not qualify under the territorial scope provisions in Articles 3.1 or 3.2 when potentially processing any personal data through this Arbitration.

On Article 3.1, Canada almost certainly would not process personal data in an "establishment" of Canada in the EU. While Canada might provide data to Arbitrator Bethlehem during this Arbitration, this alone does not bring Canada within the territorial scope outlined in Article 3.1. The GDPR would treat separately any processing by Arbitrator Bethlehem at his EU establishment, and Canada's handling of personal data in Canada or other jurisdictions with no link to a Canadian establishment in the EU.[16]

On Article 3.2(a), Canada almost certainly would not process the personal data of subjects in the EU in relation to offering those data subjects goods or services in connection with this Arbitration. In transferring any data to Arbitrator Bethlehem, Canada would not be seeking to offer goods or services to the data subjects whose personal data it may transfer.

On Article 3.2(b), Canada almost certainly would not monitor the behaviour of data subjects in the EU through this Arbitration, including for the collection or reuse of their data.

3. Canada Falls Outside the GDPR's Material Scope in this Arbitration

On material scope, in addition to the fact that the GDPR does not apply to this Arbitration, Canada's activities relating to processing, protecting, and accessing personal data during this Arbitration would be governed by Canadian law. Canada's own privacy legislation applies to the personal data of EU subjects in the context of Canada's activities in this Arbitration.[17] Canadian law does not fall within the material scope of EU law or the GDPR.

In sum, given that Canada's activities in this Arbitration would almost certainly fall outside the territorial and material scope of the GDPR, Canada would not incur obligations under the GDPR in this Arbitration. Thus, it is unnecessary and inappropriate to include generally-applicable

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[14] **CLA-36**, Draft Territorial Guidelines, p. 14.

[15] **CLA-36**, Draft Territorial Guidelines, p. 18.

[16] For the avoidance of doubt, Canada and Arbitrator Bethlehem would almost certainly not qualify as "joint controllers", as they would not '*jointly determine the purposes and means of processing*': **CLA-34**, GDPR, Article 26.

[17] *Personal Information Protection and Electronic Documents Act* (S.C. 2000, c. 5); *Privacy Act*, (R.S.C. 1985 c. P-21).

provisions concerning the GDPR in the CO, or for the Parties to enter a data protection protocol relating to the GDPR.

II. THE PCA AND THE ARBITRATORS MAY HAVE IMMUNITY FROM THE GDPR

In its May 28, 2019 direction, the Tribunal asked the Parties to comment on certain immunities granted in the Netherlands-PCA Headquarters Agreement ("HQA"). While Canada appreciates the opportunity to provide the following observations, it reiterates that it is for each of the Parties, Arbitrators, and the PCA to determine whether and how the GDPR applies to itself or themselves – and what immunities they might enjoy – apart from the applicable rules in this Arbitration.

A. The HQA Likely Accords Certain Immunities to the Arbitrators

HQA Article 9.1 states: "*PCA Adjudicators shall, in the exercise of their duties, enjoy such immunities as are accorded to diplomatic agents pursuant to the Vienna Convention.*" This Arbitration likely qualifies as a "PCA Proceeding"[18] because it is a dispute resolution administered by or under the auspices of the PCA. The Arbitrators likely qualify as "PCA Adjudicators"[19] under the HQA because they are arbitrators taking part in a hearing, meeting, or other activity in relation to the PCA Proceeding. Thus, the Claimant's statement that "*[t]he PCA Headquarters Agreement is not at all applicable to the Tribunal, as they are not PCA Adjudicators*" is incorrect.[20] The Arbitrators likely enjoy the immunities identified in Article 9.1 of the HQA.

The *Vienna Convention on Diplomatic Relations of 18 April 1961* ("VCDR") accords extensive immunities to diplomatic agents. Among them, VCDR Article 30.2 provides that the papers, correspondence, and certain property of a diplomatic agent shall enjoy inviolability. VCDR Article 31.1 states that a diplomatic agent "*shall also enjoy immunity from [a State's] civil and administrative jurisdiction*" absent limited exceptions.

B. The PCA and Arbitrators May Be Immune from the GDPR in EU Courts

The Tribunal indicated that, as it reads these provisions from the HQA and the VCDR:

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[18] **CLA-40**, Permanent Court of Arbitration, Headquarters Agreement, March 30, 1999 ("HQA"), Article 1 (Definitions) states: "*7. 'PCA Proceedings' shall mean dispute resolution administered by or under the auspices of the PCA, whether or not pursuant to the 1899 Convention, the 1907 Convention, or any of the PCA's optional rules of procedure, in which at least one party is a State, a State-controlled entity, or an intergovernmental organization;*". See also: Draft Procedural Order No. 1, Article 4.1.

[19] **CLA-40**, HQA, Article 1 (Definitions) states: "*8. 'PCA Adjudicator' shall mean an arbitrator, mediator, conciliator, or member of a commission of inquiry taking part in a hearing, meeting or other activity in relation to PCA Proceedings*".

[20] Claimant's Letter to the Tribunal, dated June 4, 2019, ¶¶ 34 and 50.

> *"their effect would be to preclude suit before the Dutch courts against a tribunal or an individual arbitrator seeking to obtain papers relating to the arbitration, including going not only to deliberations but also any other case papers, and including those relating to data subjects. While the question remains as to the weight that would be accorded to the HQA in the case of proceedings before the courts of other States, such courts may be expected to have careful regard to the HQA in the case of any such proceedings."*[21]

Canada concurs with the Tribunal's reading of these provisions. As PCA Adjudicators under the HQA, the Arbitrators likely enjoy immunities accorded to diplomatic agents pursuant to the VCDR. Under HQA Article 9.1 and VCDR Article 31.1, the Arbitrators would likely be immune from a claim for sanctions in Dutch courts concerning the GDPR. Yet this immunity is not necessarily limited to the Netherlands. VCDR Article 31 notes that a diplomatic agent shall enjoy immunity from the civil and administrative jurisdiction of the receiving State; and VCDR Articles 30 and 31 apply to all State parties to the VCDR. Furthermore, HQA Article 9.1 does not confine its applicability to the Netherlands. Thus, courts of other EU Member States may be expected to have careful regard to the HQA and the immunities that it offers the Arbitrators. Due to the HQA and VCDR, the Arbitrators may enjoy immunity from these courts' jurisdiction over the GDPR.

In its letter of June 4, 2019, the Claimant posits that the presence of PCA Host Country Agreements with three EU countries, "*suggest[s] that the inviolability of the PCA only applies to acts within the territory of the Kingdom of the Netherlands and those EU countries with which the PCA has host country agreements, i.e., Portugal and Ireland*."[22] The Claimant's inference in this regard is unsupported, and demonstrates a misinterpretation of the Host Country Agreements. Their purpose is to make the PCA's dispute resolution services more widely accessible, and to allow for PCA-administered proceedings to be conducted under conditions similar to those guaranteed by the HQA.[23] Given the purposes of PCA Host Country Agreements, their conclusion with certain States does not invite or justify an inference that the

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[21] E-mail from the Tribunal to the Parties, dated May 28, 2019 (emphasis added).

[22] Claimant's Letter to the Tribunal, dated June 4, 2019, ¶ 31 (emphasis added).

[23] The PCA explains that: "*[s]ince the 1990s, the PCA has adopted a policy of concluding Host Country Agreements with its Contracting Parties with the goal of making its dispute resolution services more widely accessible throughout the world, not just at its headquarters at the Peace Palace in The Hague. Through such agreements, the host country and the PCA establish a legal framework within which PCA-administered proceedings (including arbitration, conciliation, mediation, and fact-finding commissions of inquiry) can be conducted in the territory of the host country on an ad hoc basis under conditions similar to those guaranteed by the PCA's Headquarters Agreement with the Kingdom of the Netherlands*." See: Press Release for Ireland-PCA Host Country Agreement, March 8, 2019, p. 1, available at: https://pca-cpa.org/wp-content/uploads/sites/6/2019/03/Press-release-8-March-2019.pdf. Under the Host Country Agreements, the PCA and the host country may also establish a PCA facility in the territory of the host country. See: PCA webpage on "Host Country Agreements": https://pca-cpa.org/en/relations/host-country-agreements/.

immunities granted to PCA Arbitrators under the HQA may not apply in other EU Member States.

In sum, since the GDPR does not apply to this Arbitration, and the GDPR almost certainly does not apply to Canada in this Arbitration, there are insufficient grounds to proceed with adopting generally-applicable rules on the GDPR in the CO or a data protection protocol. The draft CO that Canada has put forward is sufficient to address confidentiality in this Arbitration.

Yours very truly,

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