

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
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Dear Members of the Tribunal:

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

Canada objects to the Claimant's latest demand to the Tribunal, in its correspondence of today's date. The Confidentiality Order ("CO") establishes a straightforward process to resolve disputes over the Parties' confidentiality designations. The Claimant offers no reason to depart from the established rules to resolve such disputes. The Tribunal should reject the Claimant's attempt to rewrite the procedural rules so that it can make another round of submissions for two reasons.

First, Paragraphs 16 and 17 of the CO and Schedule 1 to the CO allow the Parties to make only one round of submissions to the Tribunal on confidentiality designations in the Disputed Designations Schedule. Paragraph 16 of the CO allows the receiving Party to object to the filing Party's proposed confidentiality designations. Paragraph 17 allows the filing Party to respond to those objections. The CO does not contemplate a second round of submissions from the Parties in the Disputed Designations Schedule or following the filing of the Disputed Designations Schedule, unless the Tribunal invites further submissions.

The Claimant filed its objections to the challenged confidentiality designations with the Tribunal on October 29, 2019. Canada submitted its responses to the Claimant's challenges in the Disputed Designations Schedule on November 12, 2019. The Tribunal has not invited a second round of submissions on these designations. Thus, the Claimant's uninvited demand that it "must be given" another opportunity to make submissions on confidentiality is inappropriate and falls outside the procedural rules. The fact that the Claimant did not know all of the details of Canada's response to its confidentiality objections when it originally filed its objections does not justify another round of submissions. The CO always contemplated this procedure. The Claimant has offered no basis to depart from it. The Claimant should not gain a new opportunity for continuous rounds of submissions over confidentiality designations. This would undermine the procedural rules in this arbitration.

Second, the Claimant failed to follow the CO's procedural requirement to attempt to reach an agreement with Canada over the disputed confidentiality designations before submitting its objections to the Tribunal. As Paragraph 17 states, after the Parties exchange objections and responses regarding the proposed confidentiality designations among themselves: "[t]he Parties shall then attempt to reach an agreement on the objected designations. If no such agreement is made, the Parties shall submit the Disputed Designations Schedule to the Tribunal for resolution." (Emphasis added.) Without first seeking to negotiate with Canada, the Claimant addressed its confidentiality objections directly to the Tribunal in its letter of October 29, 2019.

Quite belatedly, in its letter of today, the Claimant now suggests that the Parties should be granted until the end of November to find a compromise. The Claimant had an opportunity to negotiate a resolution to its confidentiality objections with Canada. It declined to take that opportunity before submitting its objections to the Tribunal for resolution. The Claimant must not be permitted to reorder the procedural rules by crafting a new stage of negotiations in order to rationalise another round of submissions on confidentiality.

For these reasons, Canada respectfully requests that the Tribunal reject the Claimant's attempt to revise the procedural rules set out in the CO and its Schedule 1 by allowing the Parties to make further written submissions on confidentiality designations at this time.

Once again, Canada respectfully requests the Tribunal to take the Claimant's actions into account when awarding costs at the appropriate stage of these proceedings.

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)
Ed Mullins, Ben Love (Reed Smith LLP)
Christel Tham, Diana Pyrikova (Permanent Court of Arbitration)
Annie Ouellet, Susanna Kam, Mark Klaver, Maria Cristina Harris, Johannie Dallaire (Trade Law Bureau)