Confidential Information – Unauthorized Disclosure Prohibited

Global Affairs Canada | **Affaires mondiales Canada**

Department of Justice | **Ministère de la Justice**

CANADA

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October 8, 2020

VIA EMAIL

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Dear Members of the Tribunal:

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

Canada writes to seek clarification from the Tribunal on the operation of paragraph 16 of the Confidentiality Order ("CO"), and the timing for Canada's confidentiality designations to the following materials, which the Claimant did not label as confidential when they were filed:

- Claimant's Memorial, dated August 7, 2020;
- Witness statement of Mr. John Pennie, dated August 7, 2020;
- Claimant's Response to Canada's Motion of August 10, including the Witness Statement of Parthenya Taiyanides, dated August 18, 2020 (the Claimant's "Response"); and
- Claimant's Rejoinder Response to Canada's Motion of August 10, including the Witness Statement of Justin Giovanneti, dated September 2, 2020 (the Claimant's "Rejoinder Response").

Paragraph 15 of the CO requires each party to label the cover page of a submission "Confidential Information – Unauthorized Disclosure Prohibited" upon filing, if the filing party contends that the submission contains confidential information.

Paragraph 16 of the CO provides that, within 21 days from the date of filing of a written submission, the filing party must file a confidential version of the submission with confidential information identified. In turn, the receiving party has 21 days from the date of receiving the filing party's proposed designations to object to those designations and to provide its own further proposed confidentiality designations.

Since the submissions noted above were not labeled as confidential in accordance with paragraph 15 of the CO, it is not clear when Canada's proposed designations to these submissions should be filed in this scenario. Canada therefore asks the Tribunal to confirm whether Canada's 21 days under paragraph 16 of the CO begins to run on the date the submissions were first filed (August 7, 2020 for the Claimant's Memorial and Mr. Pennie's witness statement, August 18, 2020 for the Claimant's Response, and September 2, 2020 for the Claimant's Rejoinder Response), or whether the timelines in paragraph 16 of the CO are engaged for both parties if the filing party does not assert confidentiality pursuant to paragraph 15 of the CO by labelling its submission as containing confidential information.

Based on the stay for confidential designations issued by the Tribunal on September 15, 2020 ("Stay Order"), which was retroactive to August 10, 2020, and the language of paragraph 16 of the CO, if paragraph 16 is to be interpreted such that it is not engaged for both the Claimant and Canada in this scenario, Canada's proposed designations would be due 21 days after the submissions were first filed: on October 9, 2020 (for the Claimant's Memorial and Mr. Pennie's witness statement), and October 12, 2020 (for the Response and Rejoinder Response).

If paragraph 16 of the CO is engaged for both parties in this scenario, Canada's 21 days would not start to run until the expiry of a period of 21 days after the Claimant filed a submission. Based on the Stay Order and this interpretation of the language of paragraph 16 of the CO, Canada would thus have until October 30, 2020 (for the Claimant's Memorial and Mr. Pennie's witness statement) and November 2, 2020 (for the Response and Rejoinder Response), to provide the Claimant with any proposed designations (i.e. 21 days after the Claimant's time expires).

Canada understands the latter situation to apply, however, should the tribunal find that Canada's proposed designations to these materials are due on October 9, 2020 (for the Claimant's Memorial and Mr. Pennie's witness statement) and October 12, 2020 (for the Claimant's Response and Rejoinder Response), Canada respectively asks the Tribunal for an extension of its deadline to file its proposed designations to October 19, 2020. In accordance with paragraph 50 of Procedural Order No. 7, Canada intends on maintaining confidentiality over the information that was designated as confidential in the *Mesa Power* hearing videos in this arbitration. Canada's request for an extension should not in any way be construed as a waiver of confidentiality over these materials, or any other information Canada wishes to designate confidential.

We thank the Tribunal for their assistance on these matters.

Yours very truly,

Heather Squires
Deputy Director & Senior Counsel
Trade Law Bureau

cc: Barry Appleton, TennantClaimant@appletonlaw.com (Appleton & Associates)
Ed Mullins, Ben Love (Reed Smith LLP)
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