

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)*

In accordance with the Tribunal's direction on April 2, 2019, Canada provides the following response to the Claimant's submissions on the European Union's ("EU's") General Data Protection Regulation ("GDPR").¹

For months, the Claimant has emphasized the need for the Tribunal and the parties to engage in a comprehensive discussion on data privacy and security issues related to the GDPR.² In spite of being provided ample opportunity by Canada and the Tribunal, the Claimant has yet to clearly

¹ Claimant's Letter to the Tribunal regarding comments on Procedural Order No. 1 dated March 14, 2019; Claimant's E-mail to the Tribunal "Investor comments on the EU General Data Privacy Regulation" dated April 16, 2019; Claimant's E-mail to the Tribunal regarding Confidentiality and attached Submission dated April 23, 2019.

² The Claimant first suggested to Canada that "careful attention" should be paid to the policy of data minimization under the EU GDPR in the context of the parties' discussions on the draft Procedural Order, on February 27, 2019.

articulate its concerns, much less provide concrete proposals that could alleviate or address its concerns.

The Claimant takes issue with the fact that Canada did not respond to its invitation to modify its draft Confidentiality Order (“CO”).³ However, despite its allegation that the draft CO provided by Canada is “entirely inadequate” to address the Claimant’s GDPR concerns,⁴ it does not provide any explanation as to which aspect of the CO requires modification. For example, towards the end of its Submission on Confidentiality, the Claimant refers to the IBA-ICCA Task Force’s general suggestions for cybersecurity; however, the Claimant does not specify as to how it would propose to implement those ideas in the context of the CO.⁵ Since it is the Claimant that raised the issue of the GDPR, it has the responsibility to provide concrete proposals for Canada and the Tribunal’s consideration. The Claimant’s failure to do so since raising its GDPR concerns months ago makes clear that the issues it raises are nothing more than an attempt to delay the proceedings.

The issues raised by the Claimant are not unique to this arbitration. Since the GDPR came into force on May 25, 2018, other international arbitrations have commenced and proceeded with the involvement of EU participants, including EU-based arbitrators. The GDPR has not prevented such cases from proceeding in the manner that Canada proposes in its draft CO. Nevertheless, to the extent that the GDPR might be relevant in these proceedings and require further modification of Canada’s draft CO, Canada invites the Claimant, along with the PCA and the members of the Tribunal, to share any proposals they may have to address this issue.

Some of the issues raised by the Claimant concerning the GDPR also appear to be premature and hypothetical at this stage of the arbitration. For example, as acknowledged by the Claimant, there has not been any document production or engagement of EU counsel or experts in this dispute.⁶ Therefore it is unclear whether provisions setting out procedures for the transfer of personal data to such individuals are necessary. Should the Tribunal be required to address issues relating to the GDPR at a later stage, there is nothing preventing it from issuing a separate PO or an amendment to the CO at that stage of the proceeding.

In sum, Canada’s proposed CO fully addresses confidentiality issues in these proceedings. The potential application of the GDPR in this dispute should not prevent this arbitration from moving

³ Claimant’s Submission on Confidentiality dated April 23, 2019, ¶ 6.

⁴ Claimant’s Submission on Confidentiality dated April 23, 2019, ¶ 5.

⁵ Claimant’s Submission on Confidentiality dated April 23, 2019, ¶¶ 49-57.

⁶ Claimant’s Submission on Confidentiality dated April 23, 2019, ¶¶ 27, 58.

forward. The Claimant's insistence on the parties and the Tribunal discussing the GDPR does not explain its complete refusal to engage on any matter in the CO. Moreover, the Claimant's proposal to engage in vague, open-ended discussions about this issue and to defer the establishment of a CO is neither efficient nor cost-effective. With this in mind, Canada reserves its right to claim costs resulting from the Claimant's refusal to cooperate and attempts to delay 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 horizontal line extending from the end.

Lori Di Pierdomenico
Senior Counsel
Trade Law Bureau

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