

September 11, 2020  
*By email*

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Dear Mr. President and Members of the Tribunal:

Re: Tennant Energy v. Canada - Response to Canada's Motion on Valuation Data

- 1) Canada yet again has exploited a minor procedural matter as part of its ongoing campaign of wanton spending in the hope of dissipating the Investor's limited legal and financial resources. This request from Canada is a charade – wasting the Tribunal's and the Investor's time for no benefit. The production of the Excel spreadsheets in question is unnecessary.
- 2) Canada unilaterally has demanded that a particular form of spreadsheet be produced within seven days. Consent and party autonomy are the foundations for arbitration. As addressed in this Rejoinder - there was no need for this spreadsheet to be produced (as the information was already available and disclosed) and there was no consent between the disputing parties for the production of something not required under the rules.
- 3) Again, Canada could have requested an amendment for the bilateral production of hardcoded spreadsheets before the memorial was filed and shown why it needed it (it does not). Despite Tennant Energy's invitation to engage in a discussion leading to a consent agreement on reciprocal production, Canada did not seek any rule modification for a

procedural order with reciprocal obligations, nor does Canada offer to produce its own excel spreadsheets in a similar fashion. Canada simply made unilateral demands which were unreasonable in the circumstances.

- 4) The Tribunal has focused on the issue of whether there was a meaningful need to produce Excel spreadsheets that were not specified for production in the Procedural Order. On August 30, 2020, the Tribunal asked the disputing parties to address the following questions:

the Tribunal .... invites the Respondent to explain more fully why the information that they seek is both (i) not in the schedules in Section 10 and the figures in Appendix B of the Deloitte Expert Report (CER-1); and (ii) cannot be deduced from the information the Claimant has provided in its submission of 7 August 2020, including the Memorial, the Deloitte Expert Report, and accompanying documents.

- 5) Canada says that it requires the production of the Excel spreadsheets with native formulas concerning the Deloitte LLP Valuation Report (**CER-1**) for two reasons:
- a) Because the valuation experts relied on an incorrect document reference in the footnotes. The reference to Exhibit **C-036** in footnotes to some tables in the Deloitte Report is obviously wrong as document **C-036** was not an operational budget forecast but a memo on regulatory topics.
  - b) Canada says that it cannot be in any position to assess the conclusions made in the expert report regarding capital cost structures (Schedule 4) or certain operating loss matters (Schedule 6) on the basis of the information provided in the Deloitte Report unless it receives the excel spreadsheet with native formulas.
- 6) Canada did not answer the Tribunal's questions in its September 4, 2020 Reply.
- a) Canada did not address Tribunal Question (i) regarding whether the information was in the schedules in Schedule 10 and the figures in Appendix B.

- b) Canada did not address Tribunal Question (ii) regarding whether the information sought could be obtained from the materials submitted on August 7, 2020, including the Deloitte Report, the Memorial, and the accompanying documents.
- 7) We assume that Canada did not address the Tribunal's questions in its September 4<sup>th</sup> Reply because the answers would result in the dismissal of Canada's ill-considered request. As set out in detail in this Rejoinder, the Deloitte Report provided all of the information necessary. Canada's failure to objectively respond to the Tribunal's actual questions has required Tennant Energy to engage its experts to carefully demonstrate the sufficiency of the Deloitte Report to answer these questions.
- 8) In this Rejoinder, Tennant Energy relies upon a September 10, 2020 letter from Larry Andrade and Richard Taylor (the "Deloitte Letter")<sup>1</sup> explicitly addressing the issues raised by Canada in its September 4<sup>th</sup> letter. This Deloitte Letter takes a step by step approach to demonstrate where Canada can find the information that it claims is non-existent. Each of Canada's complaints is addressed in the Deloitte Letter. There is no support for Canada's contentions. For that reason, Canada's motion should be dismissed.
- 9) The Deloitte Letter also addresses whether the Excel spreadsheets needed to be produced, and the circumstances in which spreadsheets are commonly produced. It also considered matters involving hardcoded vs. formula-based spreadsheets.
- 10) As set out in this Rejoinder submission, the information sought by Canada is expressly within the August 7, 2020, Deloitte Report. Canada does not need the information in Excel spreadsheets to respond to the Deloitte Report fairly. That information was always available to Canada. This Rejoinder submission focuses on exactly how this information was already available to Canada.

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<sup>1</sup> The September 10, 2020 letter from Larry Andrade and Richard Taylor from Deloitte LLP is set out as Exhibit C-261.

- 11) Tennant Energy suggested in its August 28<sup>th</sup> motion response that counsel should meet to resolve matters in the hope of finding a mutually acceptable agreement on the joint production of Excel spreadsheets. Canada never availed itself of this proposal. Canada demanded unilateral production of something not mandated by the Procedural Order, the *IBA Rules on the Taking of Evidence*, or any professional governing rules. Canada unilaterally demanded this information through a mandatory Tribunal order rather than following the tried and true route of first reaching out to opposing counsel to seek a consent amendment to the arbitration procedure.
- 12) Canada then discovered an obvious error in the record regarding the reference in a footnote to some tables to a document that had been discussed in the Deloitte Report and its appendices. As set out below, the error and the answer were both obvious to Canada. That simple typographic error does not necessitate the production of Excel spreadsheets. However, Canada used that simple typographic error to be one of its principal bases to justify why the Excel spreadsheets with native formulas need to be produced. Canada is wrong.
- 13) Canada's behavior cannot be viewed in isolation. Still, it must be considered in the context of Canada's ongoing campaign for the concealment of public domain information from the public and the Tribunal.
- 14) Tennant Energy has suggested that Canada should approach this case as a responsible and reasonable disputing party. Yet time and time again, Canada attempts to use its unfettered legal resources and unlimited budget as a weapon to bludgeon the Investor. As Tennant Energy has consistently noted, Canada's latest motion is part of an overall campaign to inundate the Investor with multiple unnecessary motions and excessive spending on legal fees. One needs to look no further than the January 2020 procedural hearing, where Canada was represented at the procedural hearing by more than 20 representatives, while two lawyers represented Tennant Energy. Besides, as discussed below, the impacts of COVID-19 result in greater inequality between the disputing parties.

- 15) In this Rejoinder, Tennant Energy will address the specifics raised by Canada in its September 4<sup>th</sup> reply submission. It will demonstrate there is no substance to Canada's demands. Tennant Energy will demonstrate that this is nothing more than posturing and a vexatious motion.
- 16) In short, Canada demands something that was not contemplated by the Procedural Order. Canada is no doubt aware that *Procedural Order No. 1* does not require the production of the Excel spreadsheets which Canada seeks.
- 17) The Deloitte Report contained a dedicated Scope of Review section (Appendix A) that detailed more than 90 documents upon which the experts relied on in the preparation of the Deloitte Report. Every single document referenced by Deloitte in the Deloitte Report was produced with the Deloitte Report. This five-page Appendix A is contained in **CER-1**, and the Appendix A alone was filed as Exhibit **C-259**.<sup>2</sup>
- 18) It is manifestly absurd to suggest that Canada's valuation experts cannot do their work because of the absence of excel versions of the tables. Deloitte produced a series of tables set out on pages 50 – 59 of the Deloitte Report confirming the basis for their conclusions. The tables are supporting evidence for the experts' conclusions.<sup>3</sup> There is no need to produce alternative copies of those tables.
- 19) Further, as discussed below, the information sought by Canada in the Excel spreadsheets was available to Canada the whole time. The Deloitte Letter walks the reader through the identification of the information that Canada says that it needs to address its specific questions. As a result, Canada does not require the Excel spreadsheets sought in its motion.

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<sup>2</sup> Deloitte Valuation Report Appendix A itemizing and producing 91 different documents relied upon by the Valuation Team -in their Scope of Review Documents -Extract from the Deloitte Valuation Report - CER-1 – **Exhibit C-259**.

<sup>3</sup> Scope of Review Documents -Extract from the Deloitte Valuation Report - CER-1 – **Exhibit C-260**.

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THE EXCEL INFORMATION IS UNNECESSARY

- 20) The issue is simple. Deloitte LLP produced a detailed valuation report addressing the calculation of economic losses arising from the NAFTA Claim. This Deloitte Report was heavily supported by materials. Appendix A - The Scope of Review section contained five pages with more than 90 items that were listed and produced by the Expert Valuation Team.<sup>4</sup> The detailed tables in the Deloitte Report fully document the basis for the experts' conclusions that were rendered in the Deloitte Report.<sup>5</sup>
- 21) The tables were entirely produced in the Deloitte Report. The basis for reviewing the calculations can be seen transparently from the Deloitte Report and those tables. No other information is necessary to address the conclusions of the experts, which is contained and discussed in the Deloitte Report.
- 22) The Expert Valuation Team is experienced in the production of damages reports:
- a) Mr. Taylor is a chartered business valuator and a chartered professional accountant with more than thirty years of damages experience.
  - b) Mr. Andrade is a chartered business valuator, MBA, and chartered professional accountant with almost 20 years of experience as a damages expert.
- 23) Deloitte is a global professional services firm. Before any report is issued by Deloitte, it undergoes an independent and separate review by an internal Deloitte team who reviews the report for accuracy and compliance with professional standards before the Deloitte name can be applied to that report. The report produced to this Tribunal underwent that review and scrutiny before it was filed.

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<sup>4</sup> They have been extracted from CER-1 and the detail produced as Exhibit C-259.

<sup>5</sup> They have been extracted from CER-1 and produced as Exhibit C-260.

- 24) Deloitte produced a report where it independently concluded and supported its conclusions. Further, Deloitte undertook representations to the Tribunal about its professional and independent duties as experts. The Deloitte Letter says:

...it is clear that all of the information sought by Canada was fully contained and available within the information produced within the Deloitte Report. All the information was fully accessible. There was no need to repeat it within an Excel Spreadsheet.<sup>6</sup>

- 25) Thus, in Deloitte's opinion, there was no need to produce the excel spreadsheets considering the detailed information presented in the Deloitte Report.<sup>7</sup>
- 26) On August 12, 2020, Canada wrote to the Investor, demanding the production of the Excel spreadsheets. The production of the Excel spreadsheets was not a requirement under the Procedural Orders.

THE EXHIBIT C-036 ISSUE IS A RUSE

- 27) Canada says that it needs production of the Excel spreadsheets to trace information referenced in a footnote to the tables of the Deloitte Report. A careful review of this matter will demonstrate that Canada has attempted to use the Tribunal's question to unduly exert its demands for unilateral production of materials. This question is not related in any way to the production of the Excel spreadsheets.
- 28) Precisely, Canada says that the tables listed in the schedules in the Deloitte Report are not supported by Exhibit C-036.<sup>8</sup>

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<sup>6</sup> Deloitte Letter at page 4, C-261.

<sup>7</sup> Deloitte Letter at page 4, C-261.

<sup>8</sup> An extract of the schedule in the Deloitte Report was filed as Exhibit C-260 along with Tennant's August 28th Response.

- 29) General Electric Energy (GE Energy) was an original partner in the Skyway 127 wind project. GE Energy prepared a detailed operating business forecast with the Skyway 127 management about the profitability of the Skyway 127 wind project. The detailed operating plan set out operational costs and the profitability for the Skyway 127 project. Because this detailed GE Energy-produced business plan demonstrated the ongoing profitability of the Skyway 127 project, it was relied upon by the valuation team in preparing the Deloitte Report. Deloitte referenced the GE Energy spreadsheet in the Deloitte Report as **C-035**. It also referenced it by name in the Scope of Review (Appendix A). The only issue was a typo in the footnotes of specific tables set out in the schedules at pages 52, 53, 54, and 56. Only on those tables, was the document misidentified as **C-036** rather than as **C-035**.
- 30) The Investor relied on schedules set out on pages 52, 53, 54, and 56, relying on the operating business forecast. The forecast was noted identically in each schedule as Exhibit **C-036**. This exhibit was described in the Deloitte Report as “an operating model provided by management” to support various specific financial matters such as operating expenses, land lease payment, and development.
- 31) Tennant Energy erroneously identified this document as Exhibit **C-036**. The most cursory review of the document identified as Exhibit **C-036** shows that this document was not an operational business forecast. The document at exhibit **C-036** is a memorandum to John Pennie about environmental assessment regulatory matters.
- 32) Canada does not come with clean hands before this Tribunal on this matter. Instead, it attempts to distract the Tribunal from the real issues. Canada admits at page 3 of its September 4<sup>th</sup> filing that Canada knew full well that the document identified as Exhibit **C-036** was not “an operating model provided by management” to support financial assumptions:

Deloitte makes numerous references to C-036, which is allegedly “an operating model provided by management,” to support its assumptions in respect of: total operating expenses, land lease payments, development costs, Wind Turbine Generator (“WTG”) costs, Balance of Plants (“BoP”)

costs, contingency costs, and the debt amortization period. Exhibit C-036 does not contain any of this information. Rather, Exhibit C-036 appears to be a memorandum from John Nicholson to John Pennie dated 12 November 2009 regarding the Project's Renewable Energy Approval ("REA") Certificate.<sup>9</sup>

- 33) Upon review, it appears that Deloitte made a typographical error concerning this exhibit. Exhibit **C-036** was not the correct document for the reference in the Deloitte Report.
- 34) The Deloitte Letter shows that Deloitte, relied on the document identified as Exhibit **C-035**, in the report rather than Exhibit **C-036**. Exhibit **C-035** is the confidential operating forecast for Skyway 127. Document **C-035** was produced to Canada.
- 35) The GE Energy operating forecast document was also correctly referenced as Document **C-035** in Appendix A- Scope of Review at paragraph 1.1.11 on page 61 with the accurate and full description as follows:
- 1.1.11      **C-035** (000163) - GEE Budget Live Model - 70% to 100% Equity, dated April 26, 2012
- 36) The only error about this document was a typographic error in reference to this document in the table footnotes on pages 52, 53, 54, and 56.in a few tables. The references to the source of information were correct in the substance of the Deloitte Report and Appendix A – Scope of Review. The typo could not have been the source of significant confusion.
- 37) The Deloitte Letter confirms that Messrs. Taylor and Andrade reviewed Exhibit **C-035** when making the Deloitte Report (**CER-1**).<sup>10</sup> At that time, it was known by working tab number (000163), and this was noted in Appendix A on item 11.1.11. The document did not obtain a C exhibit number until shortly before the submission of the Memorial and the Deloitte Report. The typographic error occurred at that time.

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<sup>9</sup> Canada's September 4<sup>th</sup> letter at page 3.

<sup>10</sup> Deloitte Letter at page 4, **C-261**.

- 38) It was clear from a review of the underlying document that Exhibit **C-036** could not offer support for the specific contentions in the schedules on pages 52, 53, 54, and 56. Typically, experts viewing such an apparent anomaly would contact instructing counsel, and the instructing counsel would reach out to their corresponding counsel for the other disputing party to see if an error took place. Alternatively, counsel might cross-examine on such an issue at the witness hearing. The responsive valuation experts retained by Canada might also raise this matter as an issue in their ensuing responsive damage report. Canada did none of those things. There is no doubt that Canada has and has always had the necessary document as Exhibit **C-035**.
- 39) The filing of a memorial is a complicated matter. Clerical and typographic errors can occur on occasion. Staff changes due to the impacts of COVID-19 do not assist matters. In this case, an exhibit identifier was referenced with a typographic error in a reference in footnotes to certain tables. However, as set forth more fully below, the reliance on Exhibit **C-036** would not give rise to any need for the Excel spreadsheets. Any information in the spreadsheets could not ever address matters arising from misplaced reliance on an exhibit in this fashion.
- 40) As a result of becoming aware of this issue, Deloitte issued an *errata notice* concerning its reference to **C-036 with its September 10, 2020 letter**.<sup>11</sup>
- 41) Moreover, to ensure that no other similar document reference issues exist, Deloitte has undertaken a full review of every document referenced in its Deloitte Report against the exhibits filed with the Tribunal to ensure that there were no other inadvertent referencing errors. Those minor rectifications are covered in the *errata* contained in the Deloitte September 10, 2020 letter.<sup>12</sup>

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<sup>11</sup> Deloitte Letter at pages 4-5, **C-261**.

<sup>12</sup> Deloitte Letter at pages 4-5, **C-261**.

- 42) Whatever matter arises from the typographical error in listing Exhibit **C-035** erroneously as Exhibit **C-036** – this has nothing to do with any proper or reasonable need to produce the Excel spreadsheets.

THERE IS NO NEED FOR THE EXCEL SPREADSHEETS

- 43) Canada has made powerful statements in its response to the Tribunal’s question. Again, a careful review of the Deloitte Report demonstrates that there is no need to produce the Excel spreadsheets.
- 44) Canada contends on page 1 of its September 4th letter that “the Tribunal cannot consider the accuracy or reasonableness of the [Valuation] report in the absence of the formulas.” On page 2 of its September 4th letter Canada adds that:

Without review of Deloitte’s native Excel model, it is impossible to confirm the accuracy and reasonableness of assumptions used by Deloitte, particularly those which may only have been made implicitly and may be buried deep within the Excel spreadsheet without any corresponding explanation in the report.<sup>13</sup>

- 45) Canada continues that it:

cannot assess the accuracy or reasonableness of the more complex calculations without access to the detailed logic/formula for each cell in the model, such as in the following examples:

- In CER-1, Schedule 4, Deloitte presents the project financing schedule. However, Schedule 4 shows no source for the capital cost schedule. Without knowing the underlying formulas, Canada cannot assess calculations related to: monthly capital costs schedule, monthly equity and debt injections, financing fees, and capitalized interest during construction.

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<sup>13</sup> Canada’s September 4<sup>th</sup> letter at page 2.

- In CER-1, Schedule 6, without underlying formulas, it is unclear how Deloitte quantifies operating loss carry account movement, CRCE account movement, and Class 43.2 account movement.<sup>14</sup>

- 46) However, a careful review of the Deloitte Report demonstrates that Canada's concerns are unfounded, untethered to reality, fictitious, and unreasonable. The Deloitte Letter carefully walks through Canada's expressed reasons attempting to justify why it requires more information in Excel spreadsheets. Unfortunately for Canada, the Deloitte Letter demonstrates that every item of Canada's concern was comprehensively documented in the Deloitte Report and that all the information was available all the time for every criterion raised by Canada. There could be no reasonable need for more information.
- 47) Canada's motion is premised on fiction, not fact. Canada has merely been seeking another opportunity to add cost and delay to Tennant Energy's claim. There is no reasonable basis for Canada's request. It should be dismissed as the information was always available and present.

#### THE INFORMATION CAN BE READILY DETERMINED FROM THE REPORT

- 48) The details questioned by Canada arising from schedules 4 and 6 to the Deloitte Report can be determined from the information referenced within the Deloitte Report. Canada and Canada's Experts should have been able to determine those numbers based on the information provided.
- 49) Canada makes an allegation that Schedule 4 in the Deloitte Report fails to show the "source for the capital cost schedule." Canada then states that this is the reason why it needs Excel spreadsheets. Canada says:

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<sup>14</sup> Canada's September 4<sup>th</sup> letter at page 2.

Without knowing the underlying formulas, Canada cannot assess calculations related to: monthly capital costs schedule, monthly equity and debt injections, financing fees, and capitalized interest during construction.<sup>15</sup>

- 50) The Deloitte Letter identifies the details of how each capital cost schedule criteria raised by Canada can be determined based on the information provided in the Deloitte Report.<sup>16</sup> Every issue raised by Canada was addressed with detailed information arising from the materials filed in the Deloitte Report.
- 51) Similarly, Canada makes the allegation for Schedule 6 that “without underlying formulas, it is unclear how Deloitte quantifies operating loss carry account movement, CRCE account movement, and Class 43.2 account movement.”<sup>17</sup>
- 52) The Deloitte Letter identifies the details of how the operating loss carry account movement, CRCE account movement, and Class 43.2 account movement accounts were determined. The Deloitte Letter answers the questions posed on August 30, 2020 by the Tribunal and demonstrates where this information can be found right from the pages of the Deloitte Report.<sup>18</sup> Every issue raised by Canada regarding Schedules 4 and 6 was addressed with detailed information arising from the materials filed in the Deloitte Report.<sup>19</sup>
- 53) For the reasons set out in detail in the Deloitte Letter and summarized in this Rejoinder, there is no factual need for the Excel spreadsheets. All the information required was produced when the Deloitte Report was filed on August 7<sup>th</sup>. Canada has simply sent this Tribunal on a wild goose chase.

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<sup>15</sup> Canada’s September 4<sup>th</sup> letter at page 2.

<sup>16</sup> Deloitte Letter at page 3, **C-261**.

<sup>17</sup> Canada’s September 4<sup>th</sup> letter at page 2.

<sup>18</sup> Deloitte Letter at pages 3-4, **C-261**.

<sup>19</sup> Deloitte Letter at pages 3-4, **C-261**.

## ABSENCE OF AGREEMENT BETWEEN THE SIDES

- 54) There is no basis to Canada's position about the need for underlying formulas in the Excel spreadsheets.
- 55) Canada did not express any need for underlying Excel spreadsheets to be produced when *Procedural Order No 1* was negotiated.
- 56) The correspondence between the disputing parties in advance of the First Procedural Hearing details many points where the disputing parties engaged in comments on the Tribunal's draft procedural order. At no time did Canada request the production of the underlying Excel spreadsheets for expert reports.
- 57) Had Canada required such information, it could have easily raised this as an issue when *Procedural Order No. 1* was being discussed. Clearly, from the *Mesa Power* order produced by Canada, this was not a new issue for Canada. However, Canada did not seek this information. There were no changes proposed by the disputing parties to the formulation in Article 10.2 of *Procedural Order No. 1*. Tennant did not consider any further requirements necessary as the procedural order only required the filing of documents relied upon by the experts – and the formulas in a spreadsheet did not fit into that category.
- 58) Both Canada and Tennant could have sought the production of Excel spreadsheets supporting expert reports. Both disputing parties did not consider an express requirement for such spreadsheets. Both disputing parties had counsel present that was aware of the procedural orders in *Bilcon* and *Mesa Power*. In this respect, the autonomy of the parties should be respected. The disputing parties knew how to specify for the production of the excel spreadsheets underpinning expert reports, and neither sought that in *Procedural Order No. 1*. The terms of *Procedural Order No. 1* reflected the positions of the disputing parties and did not require the production of underlying Excel spreadsheets.

- 59) The Deloitte Letter advises that there is no need for the underlying formulas to be produced. Indeed, Deloitte advises that in the circumstances where there is not a pre-existing agreement between disputing parties requiring the production of a spreadsheet with underlying formulas:

In terms of standard practice, it is our experience in international arbitrations that where valuation models are exchanged, it is typically hardcoded Excel spreadsheets that are exchanged by the financial experts. In addition, it is standard practice among valuation firms in Canada when reviewing other firms' analysis, that if valuation models are exchanged, it is typically hardcoded models rather than live Excel models that are exchanged. That being said, parties can always agree to exchange additional information including hard-coded or native Excel models. It is our understanding that there was no agreement reached between the parties to exchange valuation models in this case.<sup>20</sup>

- 60) Accordingly, the demands made by Canada in this arbitration are unusual – even from the perspective of valuation experts operating in Canada, such as the Toronto, Canada-based valuation team from Deloitte LLP.
- 61) Even more critical, the requests made by Canada are unnecessary. The information was clearly available in the Deloitte Report. As a result, Canada did not require the production of Excel spreadsheets with this information along with the Deloitte Reports.
- 62) Finally, Canada provides no support for Canada's demand for the underlying formulas in the professional valuation literature, or any professional standards. Canada's only support for this as a requirement arises from a GAR Article written by an arbitration practitioner, who is neither an accountant nor a business valuator.

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<sup>20</sup> Deloitte Letter at page 2, C-261.

CANADA'S POSITION IS NOT BASED ON A CREDIBLE FOUNDATION

63) The *GAR Guide to Damages in International Arbitration* (RLA-116) is not a scholarly treatise.<sup>21</sup> It is not even a peer-reviewed journal. Global Arbitration Review refers to the GAR Guide as follows:

*It is pitched at the entry level, keeping things simple and easy to follow.*

64) The *GAR* article is simply the opinion of John Trenor. Canada refers three times to Mr. Trenor's article entitled "Strategic Issues in Employing and Deploying Damages Experts."

65) John Trenor is not a chartered business valuator.<sup>22</sup> He is a lawyer practicing at Wilmer Hale in Washington, D.C. He is not an accountant, nor a practicing valuation expert. He has no specialized professional recognition in the damage valuation field. Mr. Trenor sets out his own observations from his legal practice. He makes practical suggestions for arbitrations such as the use of color-coded tab headings or joint reports from experts. In that context, of a broad set of general tips, Mr. Trenor recommends the exchange of formula based excel spreadsheets rather than hardcoded ones.

66) Mr. Trenor's views are his own. His position does not rely on valuation guidelines nor upon governing regulatory foundations. They are merely his views.

67) The Deloitte Letter reviewed Mr. Trenor's article. The Deloitte Letter stated:

*The Deloitte Report is a detailed report consistent with valuation standards containing detailed schedules. It is supported by copies of the source documents that we relied on in*

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<sup>21</sup> *Global Arbitration Review*, John A Trenor, *The Guide to Damages in International Arbitration* (London: Law Business Research Ltd., 2018) ("GAR Damages Guide"), **RLA-116**.

<sup>22</sup> Mr. Trenor lists an MPA and a JD on his Wilmer Hale website. He does not list any certifications or degrees in accounting or business valuation. <https://www.wilmerhale.com/en/people/john-trenor>, **C-262**.

our analysis, considerations, and conclusions. All assumptions are stated in the Deloitte Report. All numbers in the report and schedules can be determined based on information provided in the Deloitte Report and attached schedules. It is our view that our detailed report and schedules, as well as, the documents relied upon, should allow Canada's expert to understand the assumptions used, the calculation completed, and the conclusions reached in the Deloitte Report without any additional information.<sup>23</sup>

68) Mr. Trenor does not provide any support for the contention that there is any professional requirement to produce Excel spreadsheets. There is none.

69) The expert valuers have more than fifty years of professional valuation experience have specified that "It is our view that our detailed report and schedules, as well as, the documents relied upon, should allow Canada's expert to understand the assumptions used, the calculation completed, and the conclusions reached in the Deloitte Report without any additional information."

70) As well, the expert valuers noted that there was no requirement to exchange Excel spreadsheets at all. The Deloitte Letter says:

There is no professional requirement to exchange Excel spreadsheets along with the production of an expert report. Spreadsheets would only be provided if they were necessary to understand the report. If the report provided the information, then spreadsheets would not be necessary for review by other experts. The filing of Excel spreadsheets is a matter that may be required by the Tribunal in a procedural order. It may also be agreed to by the disputing parties or the experts.<sup>24</sup>

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<sup>23</sup> Deloitte Letter at page 1, **C-261**.

<sup>24</sup> Deloitte Letter at page 2, **C-261**.

- 71) Finally, the expert chartered business valuers at Deloitte LP commented on the need for hardcoded spreadsheets vs. formula loaded spreadsheets.

Canada's letter also raises the issue of what type of spreadsheet is produced. Canada has demanded the production of Excel spreadsheets that contain formulas, rather than spreadsheets that contain the results of the formulas (which are referred to as "hardcoded" spreadsheets).

It is our view that Excel Spreadsheets are not required to understand and evaluate the assumptions, calculations, positions, and conclusions of the Deloitte Report. Canada has an expert, and that expert will be fully able to identify the necessary information from the Deloitte Report (this matter is addressed in detail below). As well, it is our view that Excel spreadsheets containing formulas would not be necessary at all.<sup>25</sup>

- 72) The Deloitte Letter confirms that there is no professional requirement to provide Excel spreadsheets, nor is there any convention to provide Excel spreadsheets with formulas. The expert Chartered Business Valuers from Deloitte dismiss the arguments made by Canada on the specifics of what was produced in the Deloitte Report. The Deloitte Letter states:

It is our view that all of the numbers in the Deloitte Report dated August 7, 2020 can be determined based on the information contained in the Deloitte Report and attached schedules. As a result, we believe that Canada's expert should be able to assess the reasonability of the assumptions made, the calculations completed, and the conclusions reached based on the information provided, and based on the Deloitte Report without any need for the Excel spreadsheets.<sup>26</sup>

- 73) There is no general or specific support for the position advanced by Canada. Further, a review of the actual terms of the Deloitte Report demonstrates that all the necessary information was produced in the Deloitte Report, obviating any need for the production of a spreadsheet of any kind.

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<sup>25</sup> Deloitte Letter at page 2, C-261.

<sup>26</sup> Deloitte Letter at page 2, C-261.

## APPENDIX B REQUEST IS IMPROPER

74) On August 12, 2020, Canada wrote the following short email to counsel for the Investor:

We are writing to request the native Excel spreadsheets of the various schedules and models relied on and attached to the Deloitte expert report accompanying the Claimant's Memorial of August 7, 2020. The native versions of these schedules are necessary for Canada's experts to review the calculations made by Mr. Andrade and Mr. Taylor and should be exchanged by the parties as a matter of course.

*Please provide Canada with the above-mentioned documents by August 19, in order to prevent any further delay to Canada's review of the Claimant's Memorial.<sup>27</sup>*

75) Canada has now expanded its demand for information to extend beyond the schedules. Canada now demands the production of information related to Appendix B. This was not contained in Canada's motion or referenced by the Tribunal in its question to the disputing parties.

76) Appendix B is the part of the Deloitte Report dealing with industry and economic data obtained from third parties. The source documents for each of the graphs and tables in Appendix B are referenced in the Deloitte Report. The referenced documents have been provided to Canada. The figures in Appendix B of the Deloitte Report were developed based solely on the referenced information. Canada's experts should be able to easily recreate the simple graphs and tables from the information provided. It is not clear what additional information is required by Canada's expert about the figures in Appendix B.

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<sup>27</sup> This email from Darian Bakelaar, Senior Paralegal, Canada to Barry Appleton, Appleton & Associates International Lawyers LP is set out as **R-028**.

- 77) Canada does not provide any explanation as to why it requires this information in the Excel spreadsheet format. It merely makes the same blanket assertion that it needs it, twice, for the first time in its September 4<sup>th</sup> letter.
- 78) The Deloitte Letter cannot identify why Canada would require any Excel spreadsheets in relation to this information.

## HARM AND BURDEN

- 79) Canada and its experts will suffer no prejudice by not having the spreadsheets as all the data relied upon are supplied as tables with the Deloitte Report. As can be seen in the extract with the Deloitte Report tables (Exhibit C-260), Canada has full access to the conclusions and the data supporting those conclusions.
- 80) The Deloitte Report was entirely consistent with Art 5(2) of the *IBA Rules*, as it set out the facts upon which it was based, and it included a detailed description of the methods, evidence, and information used in arriving at conclusions. In coming to those conclusions, the Valuation Experts relied upon tables. Those tables were produced in their entirety in the Schedule (Exhibit C-260).
- 81) All the documents and information that the Valuation Team relied upon were carefully itemized and produced. Tennant Energy met or exceeded all the requirements to produce supporting material set out in *Procedural Order No. 1* and Article 5(2) of the *IBA Rules*. In this manner, there can be no prejudice against Tennant Energy, as the provisions in the Deloitte Report have highly detailed tabulated information, and there was extensive and transparent production of supporting materials.
- 82) Canada ignores the repeated mentions by the Investor of the gross **asymmetry** of resources between Canada and Tennant Energy in terms of access to legal staff and financial resources. Canada seems to believe that the only relevant issue of harm is the impact of COVID-19.

- 83) Without question, the impact of COVID-19 placed another significant additional burden upon the Investor.
- 84) It is fair to say that few could have anticipated in March 2020 the effects of the COVID-19 virus would be as widespread and as pernicious as they have been. Indeed, the Reed Smith law firm recently announced that remote work would continue through at least January 2021 and, for example, trials have been recently continued in Miami Federal Court for the rest of the year. Toronto did not permit offices to open until very recently, and Appleton & Associates International Lawyers LP has not reopened its offices in Toronto. All the persons working on this arbitration deserve safe places to work. All these closures, and service reductions, resulting in impairment, inefficiency, and delays.
- 85) While not disclosing personal health data, some counsel and necessary client contacts working on the Tennant Energy case are at high risk for COVID-19. Others have family members who are at high risk or have been infected by COVID-19. Many have been required to modify their family-work balance to deal with the ravishes of the infection and the effects of school closures or the need to care for family members. Understandably, when family members are infected, the work on legal files stops. Infection rates in the United States and Canada have remained high. Surges have developed which have significantly impaired the efficiency of counsel. Canada entirely dismisses or diminishes these severe effects.
- 86) Obtaining client information has taken longer. Some offices and facilities are entirely closed. Others are on reduced hours. Deliveries take longer. Supplies are unavailable or severely delayed. Time and time again, nothing is as it was before.
- 87) Similarly, Tennant has experienced significant difficulty in communications with persons being consulted as experts, or potential experts, due to COVID-19 effects where they reside.

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THE TRIBUNAL SHOULD CONSIDER PRACTICAL MATTERS

88) As a matter of principle, the Investor cannot condone Canada's practice of involving the Tribunal with every procedural spat. It is poor form and reflects poorly on Canada. It also runs afoul of the most basic and shared benefits of arbitration – the respect for party autonomy on procedural matters.

89) In its August 28<sup>th</sup> response on this motion, Tennant Energy stated the following:

Matters in arbitration work best when counsel consult and confer in a professionally reasonable manner. Indeed, the Investor is prepared to engage in a respectful and professional conversation – but it is not obliged to produce whatever Canada demands whenever Canada demands it.<sup>28</sup>

We encourage Canada to engage in a productive conversation to see if this matter could be resolved amicably, without the unnecessary intervention of the Tribunal. At this time, for the reasons set out above, the Investor must remain opposed to Canada's unreasonable demands.<sup>29</sup>

90) Tennant Energy would have much preferred for Canada to deal with this matter more courteously and professionally. Indeed, it would have been better for Canada to reach out and consult further with the Investor before making this motion. Tennant Energy believes that matters such as this should not, in the first instance, be matters for the Tribunal.

91) Canada, in its current Reply, has not asked the Tribunal to vary the requirements upon experts going forward in the production of supporting materials for expert reports. Neither has Canada offered to produce similar evidence with its reports in the future. Instead, Canada demands immediate production of materials, to which it was not entitled and which Canada itself is not prepared to provide.

92) The Investor fully complied with the letter and spirit of the Tribunal's Procedural Order. Canada has a tremendous amount of material supporting the conclusions of the valuation

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<sup>28</sup> August 28, 2020 Reply to Motion on Excel Spreadsheet production at ¶36.

<sup>29</sup> August 28, 2020 Reply to Motion on Excel Spreadsheet production at ¶37.

experts. The detailed tables set out the calculations that were used by the Valuation Team to make its determination.

- 93) This entire matter should never have come before this Tribunal. Tennant Energy made a suggestion that counsel should consult and confer on the terms of a possible agreement on the mutual production of excel spreadsheets. Tennant Energy would have agreed to a reasonable consent order imposing reciprocal obligations for a hardcoded excel spreadsheet had Canada agreed to similar obligations. Canada never took up this offer, preferring to bludgeon the Investor before the Tribunal.
- 94) Canada never required the Excel spreadsheets to assess the Deloitte Report. It has merely pounced upon a typographical error to continue its campaign to distract the Tribunal from the core issues in this arbitration and to find ways to use its unlimited financial capacity and the enormity of its legal resources against a much smaller opponent.
- 95) The production of the Excel spreadsheets was entirely unrelated to Canada's demands about Exhibit C-036. This reference was a typographic error that could never be connected to the production of Excel spreadsheets. What is worse is that Canada must have known about this based on its description in its September 4<sup>th</sup> letter. Canada's position is absurd, and its conduct questionable.
- 96) The second issue is equally as simple. Canada does not need the information in the spreadsheets to be able to respond to the Deloitte Report. The Deloitte Letter identified that the necessary information could all be obtained from the materials that had been filed.<sup>30</sup> There was no real need for the information in the Excel Spreadsheets. All the information was available and accessible to Canada in the Deloitte Report.

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<sup>30</sup> Deloitte Letter at pages 4- 5, C-261.

- 97) An order to produce Excel spreadsheets is unnecessary. Canada's motion is wasteful and designed as part of a campaign to undermine the financial capacity of Tennant Energy. The Tribunal should decline to order production to encourage more efficient and courteous practices between counsel in this arbitration.
- 98) Finally, Canada did not ask to produce the underlying materials in Appendix B in its motion. It has not specified how it requires this information or even if there is an Excel spreadsheet reflecting this information. Canada should not be permitted to enlarge the scope of its motion at this late date.
- 99) For the reasons set out in this Rejoinder Submission, and in our earlier August 28<sup>th</sup> response, Tennant Energy maintains its request for relief and continues to oppose Canada's unreasonable demands.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Appleton & Associates International Lawyers LP



Reed Smith LLP

Date: September 11, 2020

cc:

Doak Bishop  
Sir Daniel Bethlehem  
Christel Tham  
Cristina Cardenas  
Heather Squires (And Canada's Legal team)