

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT AND THE
UNCITRAL ARBITRATION RULES, 1976**

-between-

**TENNANT ENERGY, LLC
(the “Claimant”)**

-and-

**GOVERNMENT OF CANADA
(the “Respondent”, and together with the Claimant, the “Parties”)**

PROCEDURAL ORDER NO. 5

The Arbitral Tribunal

Mr Cavinder Bull SC (Presiding Arbitrator)

Mr Doak Bishop

Sir Daniel Bethlehem QC

Registry

Permanent Court of Arbitration

Tribunal Secretary

Ms Christel Y. Tham

27 March 2020

1. Procedural History

- 1.1 On 2 March 2020, pursuant to the Confidentiality Order dated 24 June 2019 (the “CO”), the Claimant requested that the Tribunal decide on the Respondent’s confidentiality designations (the “**Confidentiality Designations**”) over: (i) the Claimant’s letter of 29 October 2019; (ii) the Respondent’s letter of 12 November 2019; (iii) an e-mail from the Claimant of 3 December 2019; (iv) the Claimant’s comments on Section 19 of the Ontario Freedom of Information and Protection of Privacy Act (the “**FIPPA**”), dated 12 December 2019; (v) the Respondent’s comments on Section 19 of the FIPPA, dated 19 December 2019; and (vi) Annex 1 to Procedural Order No. 3, dated 10 January 2020. As part of its request, the Claimant filed (i) a disputed designations schedule in the form prescribed by Annex A to the CO (the “**Disputed Designations Schedule**”), and (ii) an accompanying letter (the “**Claimant’s Letter**”).
- 1.2 By e-mail dated 2 March 2020, the Respondent requested that the Tribunal rule on the Confidentiality Designations as set out in the Disputed Designations Schedule only and reject the “inappropriate and unauthorized submissions” contained in the Claimant’s Letter.
- 1.3 By e-mail dated 3 March 2020, the Claimant provided a response to the Respondent’s e-mail of 2 March 2020, arguing, *inter alia*, that the Respondent was not allowed “to suppress the Investor’s due process rights to bring its objection before the Tribunal and to allow the Tribunal to see that Canada made the willful choice to continue the matter [i.e. the Confidentiality Designations] when there was no possible chance of success.”
- 1.4 By e-mail dated 4 March 2020, the Tribunal indicated that it considered the Confidentiality Designations to be ripe for decision and stated that it would render a decision in this respect in due course. The Tribunal also requested that the Claimant confirm whether it agreed with the Respondent’s proposal, set out in its communication of 5 February 2020, that the versions to Annex 1 to Procedural Order No. 3 enclosed with the Claimant’s letter of 29 October 2019 and the Respondent’s letter of 12 November 2019 not be published. Finally, the Tribunal confirmed that it would rule on the Respondent’s request that the Tribunal disregard the submissions made in the Claimants’ Letter at the time of ruling on the Confidentiality Designations.
- 1.5 By e-mail dated 6 March 2020, provided in response to the Tribunal’s e-mail of 4 March 2020, the Claimant reiterated the submissions made in the Claimant’s Letter and noted that, in the circumstances described in its e-mail, it could not provide assent to the Respondent’s 5 February 2020 proposal.

2. The Tribunal’s Decision

- 2.1 Having carefully considered the Parties’ respective arguments, the Tribunal sets out its decision on the Respondent’s Confidentiality Designations in the Disputed Designations Schedule enclosed as **Annex 1** to this Order.
- 2.2 In reaching its decision on the Respondent’s Confidentiality Designations, the Tribunal has found sufficient basis in the Parties’ arguments as set out in the Disputed Designations Schedule. In the circumstances, the Tribunal need not address the Respondent’s request that the contents of the Claimant’s Letter be disregarded.

- 2.3 In accordance with paragraph 19 of the CO, the Claimant shall by **Monday, 27 April 2020** file final Confidential and Public Versions of (i) its letter of 29 October 2019; (ii) its e-mail of 3 December 2019; and (iii) its comments on Section 19 of the FIPPA, dated 12 December 2019. By the same date, the Respondent shall file final Confidential and Public Versions of (i) its letter of 12 November 2019; and (ii) its comments on Section 19 of the FIPPA, dated 19 December 2019.
- 2.4 In accordance with paragraph 26 of the CO, and seeing that the Claimant has not proposed any confidentiality designations to Annex 1 to Procedural Order No. 3, the Tribunal orders the Respondent to file with the Tribunal, by **Friday, 17 April 2020**, final Confidential and Public Versions of Annex 1 to Procedural Order No. 3, dated 10 January 2020.

Dated: 27 March 2020

Place of Arbitration: Washington, D.C.



Cavinder Bull SC
(Presiding Arbitrator)

On behalf of the Tribunal