

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 writes to request that the Tribunal order the Claimant to produce the live (or native) Excel spreadsheets used in the preparation of various schedules and figures included in the damages expert report accompanying the Claimant's Memorial of August 7, 2020.¹ More specifically, Canada seeks to obtain the live (or native) Excel spreadsheets used in the preparation of: (i) the schedules found in Section 10 of the Deloitte Report and (ii) the figures included in Appendix B (Industry and Economic Outlook) of the same report.

The authors of the Deloitte Report base their conclusions on certain quantitative analyses they have conducted. While they have produced the schedules and figures in PDF format within their report,² they have not provided the live (or native) Excel spreadsheets that were used to conduct their

¹ CER-1, Expert Valuation Report of Deloitte (Andrade and Taylor), 7 August 2020 ("Deloitte Report").

² CER-1, Deloitte Report, pp. 50-59 and 66-70.

calculations, and as such, have not disclosed the details of the formulae they employed or the methodology that resulted in specific figures.

On August 12, 2020, Canada wrote to the Claimant and requested that it provide the native Excel spreadsheets used by the authors of the Deloitte Report by August 19, 2020, so that Canada and its experts could review them without further delay.³ The Claimant has not responded to Canada's request or even acknowledged its receipt. We note that the exchange of such documents between disputing parties is standard practice in international arbitration and is, in most cases, a non-contentious matter.

As held by the tribunal in *Bilcon v. Canada*, the obligation to produce documents and information upon which an expert relies also extends to the models used by expert witnesses to perform their calculations.⁴ The tribunal in *Mesa v. Canada* also ordered the claimant to produce the Excel model used by its experts, based on a series of factors, including the model's relevance and/or materiality and the fact that if Canada did not receive the model from the Claimant, it may have to recreate it and incur considerable expenses.⁵

The same circumstances exist in this case. There are no reasonable grounds for the Claimant to refuse to provide the requested documents. The live (or native) Excel versions of the schedules and figures were expressly relied upon by the Claimant's experts in coming to the conclusions they reached.⁶ Obtaining those documents will allow Canada's experts to understand and verify the calculations relied on by the Claimant's experts in support of their valuation of damages. The Claimant's refusal to provide those documents prejudices Canada and its experts in their ability to respond to the information the Claimant has submitted. Finally, sharing the model will also minimize the time and the costs that would otherwise be spent by Canada's experts to recreate the Claimant's damages model.

For all of these reasons, we respectfully request that the Tribunal order the Claimant to produce the live (or native) Excel spreadsheets used in the preparation of: (i) the schedules found in Section 10 of the Deloitte Report and (ii) the figures included in Appendix B (Industry and Economic Outlook) of that report as soon as possible, and by no later than Friday August 28, to prevent any further delay in Canada's review of the Claimant's Memorial.

³ **R-028**, Canada's E-mail to the Claimant dated August 12, 2020.

⁴ **RLA-113**, *Bilcon of Delaware et al. v. Government of Canada* (UNCITRAL) Procedural Order No. 22, 14 February 2017, ¶¶ 32-34.

⁵ **RLA-114**, *Mesa Power Group LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 6, 5 March 2014, ¶ 27.

⁶ **CER-1**, Deloitte Report, ¶ 7.1.1.

Yours very truly,



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