

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*

Canada writes in response to the Tribunal's communication of August 30, 2020, noting that it requires further information in order to make a decision on Canada's request of August 24, 2020, which requested the Tribunal to 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. In response to the specific questions posed in the Tribunal's e-mail, Canada confirms its position that the information that it seeks 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 August 7, 2020, including the Memorial, the Deloitte Expert Report, and accompanying documents. Canada explains in more detail below.

First, the Claimant states that its damages model could be recreated by copying and pasting the figures provided in Schedules 1-8 into Excel.¹ This is incorrect. The underlying formulas used to create the

¹ Claimant's Response to Canada's Request, 28 August 2020, ¶ 9.

Schedules are not transparently explained in the Valuation Report. The figures produced by Deloitte in Schedules 1-8 obscure (if not completely hides) many of the detailed calculations used to arrive at the cash flow figures reflected in the Schedules. For instance, while Canada's experts could confirm simple calculations – such as whether price multiplied by production equals revenue – they 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.
- 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.

Deloitte's submission contains complex calculations with numerous interlinking relationships, and their presentation of PDF-only data is tantamount to providing hard-coded data only. This approach has been recognized as inappropriate in international arbitration. As the Global Arbitration Review's *Guide to Damages in International Arbitration* ("GAR Damages Guide") notes:

presenting hard-coded data (i.e., the numerical results of calculations that are themselves not disclosed) is generally disfavored in the absence of some justification, as it prevents the other side's expert from understanding the underlying inputs or calculations used to derive the hard-coded entries.²

The GAR Damages Guide further states that, "frequently, experts make assumptions that are not stated,"³ which "can often be difficult to identify, as they are not explained in the expert reports and can often only be ascertained upon close examination of the damages model."⁴

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.

² **RLA-116**, Global Arbitration Review, John A Trenor, *The Guide to Damages in International Arbitration* (London: Law Business Research Ltd., 2018) ("GAR Damages Guide"), p. 159.

³ **RLA-116**, GAR Damages Guide, p. 162.

⁴ **RLA-116**, GAR Damages Guide, p. 163.

Second, the Schedules contain data that cannot be traced to the exhibits provided by the Claimant. 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. Indeed, this apparent error in the Claimant’s expert’s submission is precisely why it is necessary to review the detailed calculation logic, formulas, and cross-referencing in the native Excel file.

Finally, we do not anticipate that the native Excel version of Schedules 1-8 would be burdensome for Deloitte to provide. The Claimant suggests that the effects of the COVID-19 pandemic on its firm and Deloitte have made Canada’s request unreasonable. The Claimant has once again provided no evidence that having its firm closed down due to the pandemic will cause any difficulty in providing an electronic copy of the Schedules – which would have already been created in the preparation of the Deloitte expert report and are easily shared over email. Based on our visual inspection of Schedules 1-8, and our damages experts’ experience in the creation of similar models, it appears that Deloitte has simply converted its native Excel model into a PDF format. Therefore, the native Excel file which Canada seeks is very likely already in Deloitte’s possession and could be provided with minimal additional effort.

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, to prevent any further delay in Canada’s review of the Claimant’s Memorial.

Yours very truly,



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