

**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. 2

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

29 July 2019

1. Procedural History

- 1.1 On 24 June 2019, the Tribunal issued Procedural Order No. 1, paragraph 12.1 of which stated that “[a]ll filings to the Tribunal, hearing transcripts, and directions, orders and awards of the Tribunal generated during the course of this arbitration shall be made available to the public, subject to redaction of confidential information.”
- 1.2 On 27 June 2019, pursuant to paragraph 12.1 of Procedural Order No. 1, the Permanent Court of Arbitration (“PCA”) circulated a draft item for publication on its website, and invited the Parties to provide their comments by 8 July 2019.
- 1.3 On the same day, the Respondent confirmed that it had no comments on the draft item for publication, and “that there are no redactions of Canada’s confidential information required in Procedural Order No. 1 or the Confidentiality Order before publication.”
- 1.4 On 11 July 2019, the Claimant submitted its comments to the draft item for publication, and argued, *inter alia*, that other documents, in addition to the Notice of Arbitration dated 31 May 2017, Procedural Order No. 1, and the Confidentiality Order dated 24 June 2019, should be published on the PCA’s website. These documents include the Terms of Appointment dated 10 January 2019, the Parties’ submissions on draft Procedural Order No. 1, the place of arbitration, the attendance of non-disputing Parties, confidentiality, and the European Union’s General Data Privacy Regulation (“EU GDPR”), as well as the Tribunal’s communications dated 17 and 24 June 2019.
- 1.5 On the same day, the PCA invited the Respondent to provide its comments to the Claimant’s 11 July 2019 correspondence by 22 July 2019.
- 1.6 On 22 July 2019, the Respondent maintained that the PCA should only publish the Terms of Appointment and the Statement of Defence, in addition to Procedural Order No. 1 and the Confidentiality Order, on its website. The Respondent argued that this approach not only provides for meaningful transparency, but is also consistent with the PCA’s usual practice.
- 1.7 On 23 July 2019, the Claimant objected to the Respondent’s position, which it considered to be inconsistent with paragraph 12.1 of Procedural Order No. 1.

2. The Tribunal’s Analysis and Decision

- 2.1 The Tribunal recalls that paragraph 12.1 of Procedural Order No. 1 provides that “[a]ll filings to the Tribunal, hearing transcripts, and directions, orders and awards of the Tribunal generated during the course of this arbitration shall be made available to the public, subject to redaction of confidential information.”
- 2.2 The Tribunal further recalls that paragraph 5 of the Confidentiality Order provides that the “Tribunal may, either *proprio motu* or on an application of a Party, after affording the Parties an opportunity to be heard, designate Confidential or Restricted Access Information contained in any document produced to or designated by it”. Paragraph 6 further provides that “[n]o document, communication or information submitted in or arising in the course of these

proceedings may be made public by the Tribunal (and their assistants, if any), the Registry, or the Parties other than by direction of the Tribunal.”

- 2.3 The Tribunal notes that the Claimant takes the position that various documents, which it considers to fall within the scope of paragraph 12.1 of Procedural Order No. 1, should be published on the PCA website. With the exception of the Terms of Appointment, the Respondent objects to the publication of these documents.
- 2.4 Having regard to the above considerations, the Tribunal has considered the content each document carefully, and reached its decisions on each as follows.

Terms of Appointment

- 2.5 The Tribunal does not consider the Terms of Appointment to constitute a “direction[], order[] [or] award[] of the Tribunal generated during the course of this arbitration” within the meaning of paragraph 12.1 of Procedural Order No. 1. Accordingly, the Terms of Appointment shall not be made available to the public, whether on the PCA’s website or otherwise.

The Tribunal’s Communications of 17 and 24 June 2019

- 2.6 The Claimant submits that the Tribunal’s communications of 17 and 24 June 2019 constitute “directions ... of the Tribunal generated during the course of this arbitration”, and therefore, should be made available to the public. The Respondent objects to the Claimant’s position.
- 2.7 The Tribunal considers that its communication of 17 June 2019, which simply confirms the scope of the Respondent’s Statement of Defence as a follow-up to a question that was raised during the first procedural hearing, does not need to be published.
- 2.8 The Tribunal does agree, however, that the following extracts of the Tribunal’s communication of 24 June 2019, should properly be published as directions from the Tribunal, namely:

“On the potential application of the General Data Protection Regulation 2016/679 (“GDPR”) to this arbitration, having carefully considered Parties’ submissions on this issue, the Tribunal finds that an arbitration under NAFTA Chapter 11, a treaty to which neither the European Union nor its Member States are party, does not, presumptively, come within the material scope of the GDPR. Accordingly, the Confidentiality Order makes no reference to the GDPR. This is without prejudice to the importance of ensuring a high level of data protection, and language to this effect has been added into the Confidentiality Order.”

“To the extent that a Party wishes to initiate court proceedings for the gathering of evidence from third parties, the Party is required to fully inform the Tribunal and the other Party in good time in advance of the application, including as regards the detail of the information that it is intended to seek, the court before which the application will be made, and the timing of the application. The Tribunal also expects the Party to report to the Tribunal and the other Party on the status of such court proceedings on a regular basis.”

2.9 Accordingly, the Tribunal directs that while its communication of 17 June 2019 shall not be made available to the public, whether on the PCA's website or otherwise, the PCA shall publish on its website a redacted version of the Tribunal's communication of 24 June 2019, which will only include the relevant extracts above.

The Parties' Submissions

2.10 The Claimant submits that the Parties' submissions on draft Procedural Order No. 1, the place of arbitration, the attendance of non-disputing parties, confidentiality, and the EU GDPR constitute "filings to the Tribunal" within the meaning of paragraph 12.1 of Procedural Order No. 1, and that therefore, they should be made available to the public. The Respondent objects to the Claimant's position.

2.11 The Tribunal acknowledges that the language of paragraph 12.1 of Procedural Order No. 1 does suggest that all filings by the Parties to the Tribunal should be made public, subject to the redaction of confidential information, and that on a plain reading, it includes within its scope the filings that the Claimant identified in its e-mail of 11 July 2019. However, the Tribunal considers there to be a distinction between proper submissions in this proceeding, and submissions that pertain to working drafts of procedural documents in this arbitration. In the Tribunal's view, the latter category of documents does not properly fall within the scope of paragraph 12.1 of Procedural Order No. 1, and therefore should not be published.

2.12 Having regard to the considerations set out in paragraph 2.11, the Tribunal finds that the following documents are submissions that pertain to working drafts of procedural documents in this arbitration, and therefore directs that they shall not be made available to the public, whether on the PCA's website or otherwise:

- Claimant's Letter to the Tribunal regarding Procedural Issues, dated 14 March 2019
- Respondent's Letter to the Tribunal regarding Procedural Issues, dated 14 March 2019
- Claimant's E-mail to the Tribunal regarding the Attendance of Non-Disputing Parties, dated 29 May 2019
- Claimant's E-mail to the Tribunal regarding the Attendance of Non-Disputing Parties, dated 5 June 2019
- Claimant's Observations on the draft Confidentiality Order, dated 30 May 2019
- Respondent's Letter to the Tribunal regarding the Confidentiality Order, dated 13 June 2019

2.13 The Tribunal finds that the following documents are proper submissions to the Tribunal, which shall be published on the PCA website:

- Claimant's E-mail to the Tribunal regarding the Application of the EU GDPR, dated 16 April 2019 (excluding attachments, and earlier e-mails)
- Claimant's Submission on Place of Arbitration, dated 23 April 2019 (excluding the cover e-mail, legal authorities, and exhibits)
- Respondent's Letter to the Tribunal regarding the Place of Arbitration and Transparency, dated 23 April 2019 (excluding enclosures)

- Claimant's Submission on Confidentiality, dated 23 April 2019, 20:32 EST (excluding the cover e-mail)
- Claimant's Submission on Confidentiality, dated 23 April 2019, 20:38 EST (excluding the cover e-mail and exhibits)
- Respondent's Letter to the Tribunal regarding the Confidentiality Order, dated 23 April 2019 (excluding enclosures)
- Respondent's Letter to the Tribunal regarding the EU GDPR, dated 30 April 2019 (excluding the cover e-mail)
- Questions and Investor's Response to Tribunal GDPR Questions and Data Privacy Questions, dated 4 June 2019 (including Appendix A, but excluding exhibits and legal authorities).

2.14 In accordance with paragraph 12.1 of Procedural Order No. 1, the Tribunal's orders regarding the publication of the documents mentioned above are subject to the redaction of confidential information and other information, such as personal data, that should not be publicly disclosed. Accordingly, the Parties are directed to identify by 12 August 2019 any information in the documents to be published that they consider should be redacted for reasons of confidentiality. Thereafter, each Party is directed to provide by 26 August 2019 any comments it may have to the other Party's proposed redactions, including any to which it objects. The Tribunal will then decide on any disputed redactions by 9 September 2019. Following the Tribunal's decision, the Parties will jointly submit public versions of each of the documents, which shall then be published on the PCA website.

2.15 The Parties should be guided by the principles expressed in this Procedural Order when dealing with the identification of documents that should be published pursuant to paragraph 12.1 of Procedural Order No. 1.

Dated: 29 July 2019

Place of Arbitration: Washington, D.C.



Cavinder Bull SC
(Presiding Arbitrator)

On behalf of the Tribunal