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Subject: RE: PCA Case No. 2018-54 - Tennant Energy LLC v Canada -Canada's request of March 8, 2022
Date: 10 March 2022 23:31:25

The Investor writes concerning the March 8, 2022 communication from the Government of Canada. Canada makes two requests:

1. Canada has asked this tribunal to recall the release of the Jurisdictional Hearing transcripts which have already been released on the internet to the public. (Canada's "Preliminary Request.")
2. Canada has asserted concerns resulting in the delay in publishing the audio recordings, Investor's Jurisdictional Post-Hearing Brief, and the Jurisdictional Hearing video. (the "Secondary Request".)

Canada justifies its Preliminary Request on the basis that it has changed its mind. Canada no longer wishes to be bound by the terms of the Jurisdiction Hearing Transcript Publication Consent Agreement (referred to herein as "the Hearing Transcript Publication Consent Agreement" or "the Consent Order"). This is what Canada innocuously refers to in the March 8th communication as "a very limited number of additional confidentiality designations to the Hearing transcripts."

In correspondence to the Investor not shared with the Tribunal sent by Canada around 8 pm on Friday, March 4, 2022, Canada identified eight further confidentiality designations that it seeks to make to the Transcripts and at least three additional redactions to the hearing videos (for 11 hearing video redactions).

The terms of the Hearing Transcript Publication Consent Agreement were communicated to the Tribunal by Canada by email on February 4, 2022.

Canada expressly agreed to the terms of the Hearing Transcript Publication Consent Agreement. Based on the express agreement of the disputing parties, the tribunal concurred. The Tribunal subsequently gave effect to the Hearing Transcript Publication Consent Agreement terms and posted the Transcripts in the manner proposed by Canada's communication.

Now, one month later, Canada says that this Hearing Transcript Publication Consent Agreement should no longer apply.

As the tribunal is aware, Canada has an inordinate number of lawyers, paralegals, and advisors working on this file. Indeed, Canada has demanded payment of security for costs for this plethora of legal advisors. Yet even with such considerable resources committed to this project, Canada says that it "inadvertently missed" information within the transcripts made public.

Other than admitting that Canada did not thoroughly review its work, Canada provides no potentially legally relevant arguments to justify its abrupt change of position (such as Canada's legal incapacity, duress, fraud, or changed circumstances). Of course, there are none present.

Yet Canada seeks to have this tribunal to give effect to Canada's most recent opinion in the place of the carefully negotiated terms of the Hearing Transcript Publication Consent Agreement.

The Investor opposes Canada's Request for the following reasons discussed in this communication:

- a. Canada's Preliminary Request ignores the parties' express agreement and thus the foundational principle of party autonomy.
- b. Canada's agreement to publish the Transcript as conveyed on February 4, 2022 constituted an express waiver of confidentiality over everything else in the Hearing Transcript. The instructions were formally made by Canada in his arbitration to the Tribunal. The Tribunal must apply the binding effect of Canada's waiver.
- c. The Jurisdiction Hearing transcript has been made public, and that information is already well-distributed in the public domain. Thus, Canada's requests are inconsistent with the scope of the "Confidentiality Order" and its definition of "confidential information." Simply put, Canada now asks

for the Tribunal to do the impossible.

To be clear, for the reasons set out below in Section III of Part One, the Investor objects to the Respondent's suggestion that the PCA remove the public versions of the hearing transcripts from its website

PART ONE – Publication of the Hearing Transcript

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I. The facts leading to the Hearing Transcript Publication Consent Agreement

Canada wrote to the tribunal on the morning of February 4, 2022, to confirm the terms of the Hearing Transcript Publication Consent Agreement negotiated between the disputing parties on the confidentiality designations to the hearing transcripts. That Hearing Transcript Publication Consent Agreement resulted from a significant and ongoing set of discussions between the disputing parties. As agreed by the disputing parties, Canada presented the Hearing Transcript Publication Consent Agreement to the tribunal in its February 4, 2022 communication.

That communication stated:

Pursuant to the Confidentiality Order and agreement between the disputing parties, please find attached Canada's Post-Hearing Submission as a public document, Hearing Transcripts Days 1, 3, 4, and 5 as public documents, and Hearing Transcript Day 3, final Public and Confidential versions, for publication on the PCA's webpage as appropriate.

In the Hearing Transcript Publication Consent Agreement, each disputing party waived all confidentiality designations over the Jurisdictional Hearing Transcripts for Days 1, 3, 4, and 5. The Jurisdictional Transcript for Day 2 (erroneously referred to in the email as the Day 3 Transcript) was redacted by agreement in one place – notably on page 126. The redaction was provided to the Tribunal on February 4, 2022. As a result of the negotiated consent order, only a few words on page 126 of the Day 2 Transcript were designated and thus made unavailable to the public.

This tribunal gave the Hearing Transcript Publication Consent Agreement immediate effect. The Transcript of the hearing was made public on the PCA website. The public has been aware of the Transcript's content as counsel for the Investor has received unsolicited correspondence regarding issues arising from the transcripts.

The disputing parties had copies of the Transcript since the end of the hearing on November 19, 2021.

II. Canada's Request to invalidate the Consent Agreement

Canada now comes before this tribunal, many months after receiving the Hearing Transcript (and a month after communicating the Consent Agreement), to say that the terms of the Hearing Transcript Publication Consent Agreement should be disregarded.

Canada's motion challenges foundational arbitration principles such as party autonomy and the recognition of express waiver.

Party autonomy is a foundational concept in international arbitration. It is one of the benefits of international arbitration. Party autonomy ensures the ability of the disputing parties to decide on all aspects of an international arbitration procedure, subject only to certain limitations of mandatory law arising from the place of arbitration.

Canada's motion challenges the *pacta sunt servanda* principle, which requires Canada to observe the agreements Canada has made in good faith. This good faith obligation extends to carrying out procedural agreements made within this NAFTA arbitration.

The Investor also notes that the UNCITRAL Model Law confirms this well-known arbitration principle. Article 19(1) provides:

Article 19. Determination of rules of procedure

1. Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
- 2.

The *Federal Arbitration Act* is the law of the place of arbitration, Washington, D.C. The principle of party autonomy to determine the procedure in arbitration is a part of US law. For example, this principle was reflected in the US Supreme Court's interpretation of the *Federal Arbitration Act* in *Hall St Associates v Mattel*.

There was an **express waiver of confidentiality**. That was the effect of Canada's instructions on February 4th. While Canada may have changed its mind, this occurred long after Canada waived confidentiality.

As noted above, Canada has a vast cadre of legal staff available and assigned to this arbitration. Canada does not explain how its staff could have missed so many potential confidentiality designations while still filing a confidentiality designation concerning page 126 of the Day Two Transcript.

Canada does not identify any impediment or obstacle that made it impossible for Canada to review the jurisdictional hearing transcript. Neither does Canada identify any existence of incapacity or any violation of the Hearing Transcript Publication Consent Agreement with the mandatory provisions of the law of the seat of this arbitration? Indeed, Canada was able to identify matters for designation in the Transcript. Further, Canada expressly waived all confidentiality designations concerning the hearing transcripts on Days 1,3,4,5 and everything on Day 2 other than the one matter on page 126.

In addition, Canada has resiled from the terms of the Hearing Transcript Publication Consent Agreement covering a matter within this arbitration claim. This was an agreement freely entered by Canada and upon which the Investor subsequently relied.

III. Publication is an essential factor

Canada comes to the tribunal to "turn the clock back" and order secrecy over information within the public domain. However, Canada's *volte-face* occurred after the Hearing Transcript was made public.

The Jurisdiction Transcript is already public information. Under Article 1(b) of the *Confidentiality Order*, the term "confidential information means information that is not publicly available." Thus, once that information has been released to the public, it is no longer capable of constituting "confidential business information" as that information is *ipso facto* no longer confidential.

Canada agreed to make all information other than the particular words on the Day 2 Transcript on page 126 available to the public.

The Transcripts have spread far beyond the PCA website. In addition to posting on the PCA website, the specific daily transcripts have been uploaded to various independent websites and services such as *Jus Mundi*, *Italaw*, and the *Investor-State Law Guide*. Those transcripts have likely been downloaded and reviewed extensively by the general public. Canada does not explain how it proposes to give effect to its Request in the face of such widespread dissemination of the information made public based on Canada's express instructions in the February 4, 2022 email.

The widespread dissemination of the hearing transcripts, at the express instruction of Canada, makes **Canada's request impossible to carry out**. It is simply an absurd request, as untethered in practicality as it is impossible to carry out.

Canada's Preliminary Request proposes that this tribunal deprive the public of information freely available on the internet. Canada is asking the tribunal to go back in time. Canada's desire to hide this information from the public after its release and dissemination on the internet is impossible to implement. This is simply nonsensical.

Thus, the Investor objects to the Respondent's suggestion that the PCA remove the public versions of the hearing transcripts from its website. Accordingly, the Investor cannot agree with Canada's Preliminary Request concerning the undoing of the Hearing Transcript Publication Consent Agreement.

PART TWO – Publication of the Hearing Video and other items

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In addition to the primary issue in the Preliminary Request of the further redaction of the already released Jurisdictional Hearing Transcript, there is Canada's Secondary Request regarding the release of the jurisdictional hearing video, the audio of the hearing, and the Investor's Post-Hearing Brief.

The Investor wrote to the Tribunal on March 1, 2022, setting out its position on the release of the hearing video, the audio of the hearing, and the Investor's Post-Hearing Brief. In this communication, the Investor favored the general release of information arising from the NAFTA jurisdictional hearing.

In Canada's March 8, 2022 communication to the Tribunal, Canada noted within its Secondary Request that Canada believed there to be a need for minor confidentiality redactions in the Investor's Post-Hearing Brief.

Canada's minor designations to the Investor's Post-Hearing Brief should await the tribunal's determination of the Primary Transcript issue in the Preliminary Request. The determination of the Secondary Request will mostly be addressed as a result of the determination of the Preliminary Request. Thus, the Investor proposes that it would be efficient and economical to await the determination of the Preliminary Request – before deciding the matters in the Secondary Request.

Within its two requests, Canada has not identified precisely what it seeks to redact as a practical matter other than the references in the Post Hearing Brief. For all other items, Canada has identified transcript pages and lines, but it has left it to the Investor to guess the precise words Canada seeks to redact. Similarly, the same problem arises with Canada's proposed redactions to the hearing video.

Canada must identify precisely and comprehensively the extent of its proposed confidentiality designations as the party seeking confidentiality designations. Instead, Canada has listed a page and a series of lines and leaves it to the Investor to guess what Canada wants. Canada sent these extensive changes on a Friday evening and brought this motion when it did not receive a response from the Investor on the following business day (the Monday).

It is for Canada to identify the precise terms that it seeks to redact and to identify the documents shown in the video record that require the most minimally invasive redaction. Canada should take such steps. However, Canada dumped a chart with references late on Friday evening upon the Investor. It then brought this motion while the Investor was seeking to understand the nature of Canada's concerns.

Again, most of these matters would be resolved once the tribunal determines the preliminary issue. Efficiency principles suggest that these matters follow the determination of the primary issue by the tribunal.

PART THREE – Conclusion

The Investor seeks the following:

1. The Tribunal reject Canada's proposal that the PCA remove the public versions of the hearing transcripts from its website in light of the existing confirmed public dissemination of the transcripts on the internet.
2. The Tribunal dismisses Canada's Preliminary Request to redact information in the public domain.
3. That in a manner consistent with the tribunal's determination of the Preliminary Request, Canada is ordered to specifically indicate any remaining confidentiality designations within the Investor's Post Hearing Brief and the hearing video and provide proposed preliminary confidentiality designations within seven days of the tribunal's determination of the preliminary issue.
4. That the tribunal releases the Jurisdiction Hearing audio files and posts them on the PCA website in a manner consistent with the tribunal's determination of the preliminary Request.
5. That the Parties write back to the Tribunal within three weeks of the determination of the Preliminary

Request with respect to the matters covered in the Secondary Request.

Filed this 10th day of March, 2022



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