

From: [Jose Luis Aragon Cardiel](mailto:Jose.Luis.Aragon.Cardiel@international.gc.ca)
To: ["Benjamin.Tait@international.gc.ca"](mailto:Benjamin.Tait@international.gc.ca); bappleton@appletonlaw.com; Cavinder.Bull@drewnapier.com; dbishop@kslaw.com; dbethlehem@twentysessex.com; [Diana.Pyrikova](mailto:Diana.Pyrikova@international.gc.ca)
Cc: Heather.Squires@international.gc.ca; EMullins@reedsmitth.com; Mark.Klaver@international.gc.ca; Stefan.Kuuskne@international.gc.ca; Alexandra.Dosman@international.gc.ca; tenantclaimant@appletonlaw.com; Krystal.Girvan@international.gc.ca
Subject: RE: PCA Case No. 2018-54 - Tennant Energy LLC v Canada -Canada"s request of March 8, 2022
Date: 11 April 2022 11:44:44

Dear Mesdames, dear Sirs,

The Tribunal has carefully considered the Respondent's communications of 8 March 2022 and 15 March 2022, as well as the Claimant's communication of 10 March 2022.

The Tribunal hereby rejects the Respondent's request for leave to submit additional confidentiality designations to the Hearing Transcripts. The Tribunal notes that the disputing parties had negotiated and agreed on the confidentiality designations to the Hearing Transcripts on 4 February 2022. The agreed Hearing Transcripts were thereafter published on the PCA website pursuant to the parties' agreement and were publicly accessible for a month before the Respondent's request was made. Having regard to these circumstances, absent a strong and compelling reason, the Tribunal can see no reason for the Respondent to now submit additional confidentiality designations.

In the Respondent's communication of 15 March 2022, the Respondent explained that it had inadvertently disclosed certain confidential information within the Hearing transcript, that the mistake had not been unreasonable, and that inadvertent disclosure of information does not constitute a waiver of confidentiality. This, though, in the Tribunal's view, is not a strong or compelling reason for the Tribunal to permit additional confidentiality designations, having regard to the parties' agreement of 4 February 2022 and, significantly, to the publication of the agreed Hearing Transcripts on the basis of that agreement. In reaching this conclusion, the Tribunal notes as well the presumption in favour of publication evident in paragraph 1 of the Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, 31 July 2001).

Now that the Tribunal has decided on the Respondent's request for leave to submit additional confidentiality designations to the Hearing Transcripts, the Tribunal hereby directs the parties to try to reach an agreement on the confidentiality designations to the Claimant's Post-Hearing Brief as soon as possible.

As for the format in which the Respondent should provide the Claimant with its proposed designations to the Hearing videos, the Tribunal agrees with the Respondent that the Claimant's request for an instruction from the Tribunal in this regard is premature. The Tribunal further notes that the Respondent has indicated that it will provide the Claimant with copies of the Hearing transcripts with highlighting on the specific information it seeks to designate for the Hearing videos. Likewise, the parties are encouraged to try to reach an agreement on the confidentiality designations to the Hearing videos.

Yours sincerely,

José Luis Aragón Cardiel
Legal Counsel • Conseiller juridique
Permanent Court of Arbitration • Cour permanente d'arbitrage
Peace Palace • Palais de la Paix
Carnegieplein 2
2517 KJ The Hague • La Haye
The Netherlands • Pays-Bas
Tel: +31 70 302-4155 (direct • directe)
Fax: +31 70 302-4167
URL: <http://www.pca-cpa.org>

This email and any attachments may be confidential. Please notify us immediately if you have received this email or any attachment in error.

Ce courriel, ainsi que toute pièce jointe, peut être confidentiel. Si vous avez reçu ce message ou toute pièce jointe par erreur, veuillez nous en aviser immédiatement.
