

IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF  
THE UNITED NATIONS COMMISSION ON INTERNATIONAL  
TRADE LAW

**PCA CASE NO 2018-54**

BETWEEN

**Tennant Energy LLC**

INVESTOR

AND

**Government of Canada**

RESPONDENT

**Investor's Response on Admissibility of  
Additional Authority**

**NOVEMBER 8, 2021**

**APPLETON & ASSOCIATES**  
INTERNATIONAL LAWYERS

**ReedSmith**

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### **Investor's Response on Admissibility of Additional Authority**

1. The Tribunal has invited the Investor, Tennant Energy LLC, to comment on Canada's request to admit a document that purports to be an award in *MAKAE Europe v Kingdom of Saudi Arabia*.
2. The Investor made its position clear at the Pre-Hearing Conference of October 19, 2021 regarding the need to establish the legitimacy and authenticity of the award that Canada seeks to admit. In this regard, the Tribunal issued instructions to Canada to address such matters. Unfortunately, Canada remains in non-conformity with the Tribunal's directions arising from the Pre-Hearing Conference of October 19, 2021 and this results in the Investor not being able to resolve its serious questions about this untimely authority.
3. However, since the Pre-Hearing Conference, the situation has become more complicated. As this matter now also addresses the matter of Canada's disregard of the Tribunal's orders, we ask for the Tribunal's indulgence as we conduct a brief review of the correspondence and the audio recording of the October 19, 2021 Pre-Hearing Conference. To assist the Tribunal, we have had a "rough transcription" made of the audio of the hearing. A copy of that transcript is attached. As this was not transcribed officially, the Tribunal may always wish to review the audio.
4. On September 25, 2021, counsel for the Investor wrote to the Tribunal and Canada regarding the admission of this untimely authority stating:

This jurisdictional decision does not appear on the ICSID website. We are not aware whether the Kingdom of Saudi Arabia authorized the public release of this decision. To our knowledge, no decisions in this ICSID arbitration have been released to the public by the ICSID. **We seek clarification of the jurisdictional decision's status** before being able to address whether this decision should be accepted into the record.
5. Canada did not clarify whether the *MAKAE Europe* award came from an authorized release before the Pre-Hearing Conference.
6. At the October 19, 2021 pre-hearing conference, the matter of the additional authority was raised. Mr. Appleton identified the Investor's position about the additional authority at the session. The unofficial transcript shows the following at timestamp minute 31:11. {emphasis in bold added}.

31:11 **Barry Appleton**

31:12 Mr. President, I do not have a copy of this decision from Canada,  
31:13 and I do not subscribe to the international arbitration reporter.  
31:14 I basically have a concern about things that might be come as a  
31:15 result of hacking or inappropriate behaviour being used in a  
31:16 case. We asked Canada to tell us if it was authorized. So, we  
31:17 would understand whether it was an authorized release, ....

31:21 ...., **we wanted to understand the nature of whether or**  
31:22 **not this was a legitimate copy we cannot authenticate the**  
31:23 **document, and make sure that it would be there. Canada did not**  
31:24 **answer that. If Canada will answer that, Canada could answer**  
31:25 that, I'm sure.

32:2 Generally ...., **in general, we do not oppose new authorities, because**  
32:3 **we're sure they're going to be all types of authorities that are**  
32:4 **going to need to come in and the tribunals, should I accept them**  
32:5 **and as lawyers, we'll deal with them.** So, our problem isn't, but  
32:6 there. But I don't even know what's in this decision, because it's  
32:7 behind some paywall that I don't subscribe to, in **a source that**  
32:8 **may be totally illegitimate. And I think that there's a public**  
32:9 **policy or a conscionability question here, as to whether we**  
32:10 **should be supporting what could be hacked documents, or other**  
32:11 **unauthorized ones. Canada raised all of those issues before, when**  
32:12 **it came to the question as to the Mesa Power videos themselves.**  
32:13 **And so it seems to be that the shoe is on the other foot, and**  
32:14 that we see the other thing.

32:20 ...But at the  
32:21 end of the day, we don't oppose cases. We don't oppose  
32:22 authorities. We think the Tribunal should know the law, *novit*  
32:23 *curia jura*, the maxim that the Tribunal should know what's  
32:24 there. So, we don't oppose that.

**Mr. Appleton** continued

32:25 **What we do is we want to make sure that it's proper, and its**  
33:1 **authentic. And we've asked Canada for that information.** And we  
33:2 still don't have an answer on that maybe, maybe Ms Squires could  
33:3 answer that. **Maybe she's had communications with the Government**  
33:4 **of the Kingdom of Saudi Arabia, and could tell us about their**  
33:5 **position about that,** or would like the PCA to write to the  
33:6 Kingdom of Saudi Arabia and ask them about that, .....

7. Counsel for the Investor identified the serious public policy concerns arising from unauthorized admission of the authority at Audio minute 34:3 as follows

34:3 **Barry Appleton**  
34:4 **Well our question about whether it could come into the record, it**  
34:5 **would be based on whether or not it's authentic, whether it's**  
34:6 **legitimate, whether the questions of international public policy.**

34:7 Basically real questions of admissibility that should trouble  
34:8 this Tribunal, of which we don't know about. **If, this is the**  
**34:9 result of hacking or an illegal release, these would be**  
**34:10 questions, I think, akin to those of corruption, serious matters.**  
34:11 And I remind the Tribunal, that **corruption issues on the part of**  
**34:12 Canada before the Tribunal as well, and they should not be**  
**34:13 lightly thrown aside.** So, we need to consider them, too.  
34:14 **Otherwise, international arbitration could be in disrepute,** and I  
34:15 don't want that to be the case. But this is a case where from the  
34:16 perspective of the Investor, which is deeply about issues that  
34:17 are deeply troubling from an international public policy  
34:18 perspective, about governmental conduct, and about an admitted  
34:19 conspiracy from senior officials of the government before and  
34:20 International Tribunal as the root cause of what's before this  
34:21 Tribunal. And therefore, all of these issues we think we need to  
34:22 be taken seriously. ....

8. The Tribunal President addressed the Tribunal's conclusions as follows:

**President Bull:**

50:24 And then finally, in terms of the additional authority, I think  
50:25 as has already indicated, Government of Canada has to provide a  
51:1 copy to claimants as soon as possible. **And then some efforts will**  
**51:1 be made by Canada to check on authenticity.** And whether you have  
51:2 a clear answer or not. If you can revert to everyone, soon  
51:2 that will be good. And then, if necessary, we can hear from the  
51:3 claimants then the thought the thinking of the tribunals that  
51:3 once the claimants have a copy of the award, there is a little  
51:4 more breathing space in terms of time. So those were the  
51:4 decisions tribunals made following this this call? Is there  
51:5 anything that needs clarification from either counsel? Ms. Squires?

51:5 **Heather Squires**

51:6 No, nothing from Canada. **That's clear.**

9. The Permanent Court of Arbitration contacted the ICSID about this matter. On October 25, 2021, the ICSID Secretariat confirmed that the release of the *MAKAE Europe* decision was not authorized. The Secretariat would have been aware of the "authenticity logo" on the purported award and even in that circumstance, the ICSID Secretariat declined to confirm the authenticity of the document stating:

**The Parties in the above-referenced case have not consented to the publication of the Award to date.** Consequently, we are unable to address the authenticity or completeness of the version presented to the Tribunal in the case you act as tribunal secretary.

10. The ICSID Secretariat put the Tribunal and Canada on notice that the *MAKAE Europe* award was "bootleg," It might be incomplete and indeed might not be authentic.

11. At the hearing, Canada was asked to address authenticity. The President directed Canada as follows "**And then some efforts will be made by Canada to check on authenticity.**"
12. The only indication that the Tribunal has received on Canada's compliance regarding the "efforts to check on authenticity" was the following vague reference in Canada's email to the Tribunal of November 5, 2021 stating:

"As requested by the Tribunal, Canada has made inquiries as to the source of the Award that was made available on the IAREporter website. Unfortunately, we have not been able to secure any additional information."
13. Canada has not explained what steps it has taken. Canada did not confirm the authenticity of the document independently nor its completeness. Canada merely relied on a logo appearing on the document which has had no independent confirmation at all from the ICSID.
14. The procedural difficulties encountered by Canada are entirely of its own making. Canada has been aware of the Investor's concerns about authenticity and completeness for nearly six weeks (since the Investor's September 25, 2021 email). It has been nearly three weeks since the procedural hearing. Yet, Canada still refuses to demonstrate the specific steps it took to comply with the directions of the Tribunal President.
15. Further, had Canada written to the Kingdom of Saudi Arabia, we would have expected to see a letter similar to the letter sent by the PCA to ICSID. We must presume that Canada took no such steps. That Canada refused to take the most fundamental diplomatic efforts with the Kingdom of Saudi Arabia speaks volumes about Canada's tacit understanding that this authority is improper.

## Conclusions

16. The Investor's concerns on admissibility went to whether the document could be confirmed as authentic and complete, whether there was a question about legitimacy and whether there were questions of international public policy that would affect the admission of this authority under these unusual circumstances.
17. The President directed Canada to do two things:
  - a. Provide a copy of the decision directly to the Investor [which Canada did]; and
  - b. To take some efforts to check on authenticity, such as contacting the Kingdom of Saudi Arabia to enquire about the propriety of the release of the MAKAE award.

18. Canada has not provided any evidence that it complied with the second part of the Tribunal's direction. It appears that Canada has made meaningful efforts to comply and produced no correspondence with the Kingdom of Saudi Arabia. Yet, Canada now asks the Tribunal to disregard the clear obligation imposed three weeks ago without any explanation for its sheer defiance of the Tribunal's direction.
19. Canada acknowledged the President's instructions in the Pre-Hearing Conference and agreed to follow them. Canada has provided a copy of the "bootleg" award.
20. To date, **Canada has refused to present any evidence that it has taken any steps to address the status of the award with the Kingdom of Saudi Arabia.**
21. For greater certainty, the Investor does not oppose the introduction of new authorities as a general rule.
22. However, in these circumstances, and considering the lack of confirmation of authenticity, completeness, or propriety of its release of this particular decision, the *MAKAE Europe* award should be inadmissible before this Tribunal as Canada has refused to address the specific requirements for admission established by the Tribunal President on October 19, 2021.
23. The Investor agrees that matters such as willful non-conformity with a Tribunal's directions are relevant to costs. The Tribunal should consider Canada's conduct when assessing costs on this needless and seemingly dilatory demand on the eve of the jurisdictional hearing.

Respectfully submitted on behalf of the Investor, Tennant Energy on November 8, 2021.



Barry Appleton

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