

**MATTER OF AN ARBITRATION UNDER THE UNCITRAL  
ARBITRATION RULES AND THE TREATY BETWEEN THE  
GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE  
GOVERNMENT OF CANADA UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT**

**Tennant Energy LLC.**

INVESTOR

v.

**Canada**

RESPONDENT

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**Investor's Rejoinder to Canada's Motion to Suppress Evidence from the  
Public and the Tribunal**

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**TABLE OF CONTENTS**

Overview ..... - 1 -

    The information in the exhibits is not confidential..... - 5 -

    Canada admits that Tennant lawfully obtained the evidence ..... - 7 -

Tennant had lawful access to the evidence..... - 8 -

    The *Mesa Power* Confidentiality Order does not apply to Public information..... - 11 -

    Canada’s Role in Publication is highly relevant..... - 15 -

    All the Hearing Video information is now public information ..... - 17 -

    The evidence is material and relevant..... - 18 -

Transparency & public interest..... - 19 -

    Public interest favors admitting the documents ..... - 21 -

    The *Mesa Power* Confidentiality Order does not apply..... - 22 -

International Tribunal Cases support Tennant and not Canada..... - 23 -

The Tribunal must reject Canada’s absurd approach to re-write Tennant’s case ..... - 25 -

Costs ..... - 27 -

Conclusion ..... - 28 -

OVERVIEW



- 1) Canada is bringing this Tribunal into the theatre of the absurd. The argument raised by Canada is reminiscent of the fictional discussion between Humpty Dumpty and Alice in Lewis Carroll's *Through the Looking Glass*. Humpty Dumpty says:

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less." "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all."

- 2) Canada asks this Tribunal to suspend all common sense and allow words to mean only what Canada chooses them to mean. Public domain information can never be confidential. Canada's request in its *Motion to Suppress Evidence from the Public and the Tribunal* is manifestly absurd and would result in a nonsensical of the procedures in this arbitration, and even in the procedural order of other tribunals. This Tribunal should not follow Canada blindly in this reckless way. Following Canada's suggestions in its *Motion to Suppress Evidence from the Public and the Tribunal* would make a mockery of the arbitration.

- 3) Canada's *Motion to Suppress Evidence from the Public and the Tribunal* is about information that was publicly available and that was lawfully accessed by Tennant.<sup>1</sup> Moreover, while the information revealed may be embarrassing and prove a liability against Canada, the information in the Investor's exhibits do not constitute anything that would be recognized as confidential under any ordinary meaning or usual or indeed any definition of that term.
- 4) Confidential Information cannot and does not include any information that is available in the public domain and especially information that was in the public domain for years.
- 5) Public domain information can be accessible to the public in many ways, including through publication in a book, a newspaper, or the Internet. The information at issue certainly does not meet the definition of Confidential Information as defined in the *Tennant Confidentiality Order*. No matter how many times Canada protests, the facts remain the same.
- 6) Tennant lawfully accessed information through Mr. Pennie that it placed into evidence in this arbitration. The information is highly material and relevant. As discussed in Mr. Pennie's witness statement (CWS-1), the Investor put the full *Mesa Power* Hearing video into the record of this arbitration in Exhibits C-107, C-201, C-204, C-205, C-206, C-208 and C-224 to C-243. That information had been on the Internet for more than five years. The information contained admissions by senior Canadian officials of internationally wrongful behavior resulting from cross-examinations under oath in the *Mesa Power* NAFTA hearing
- 7) In the first instance, there was nothing rightfully confidential about the admissions of wrongful conduct in the administration of the FIT Program made by Canadian officials but clearly it is not confidential now. Under oath, Ontario's officials gave admissions about systemic abuse under the Ontario FIT Program. The abuse of the FIT Program allowed the Ontario government to favor friends and political cronies at the expense of FIT Proponents like the Investor in this arbitration. Ontario and Canada did not tell the

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<sup>1</sup> Canada admits on page 4 of its August 26, 2020 Reply to Canada's *Motion to Suppress Evidence from the Public and the Tribunal* that "Canada does not contend that Tennant obtained the information illegally".

public about this wrongfulness. As discussed in the Memorial, most of the source of the evidence was criminally destroyed as well.

- 8) The information is embarrassing and damning to Ontario. It contains admissions of egregious conduct and gross unfairness. The evidence of the maladministration of the Ontario FIT Program is shocking, as was Canada and Ontario's attempts to hide this information from the public.
- 9) Further, Canada's own role in making this information public is part of a comedy of errors. Canada failed to diligently review evidence that was posted in another NAFTA case and ended up publishing the same information that it now claims is confidential to the world. Yet in this current motion, Canada fails to take responsibility for its own actions – preferring to blame the Permanent Court of Arbitration for the error, and the Investor for relying on evidence that was in the public domain through Canada's own actions.
- 10) In Canada's August 10, 2020 *Motion to Suppress Evidence from the Public and the Tribunal*, Canada asks this Tribunal not to admit this lawfully obtained evidence. Canada asks this Tribunal to:
  - a) Ignore the most relevant and pertinent evidence supporting its claim – namely Exhibits C-107, C-201, C-204, C-205, C-206, C-208, and C-224 to C-243 inclusive, which contain copies of the video of the *Mesa Power* hearing downloaded in July 2020 from the PCA's *Mesa Power* website;
  - b) Order that information arising from the *Mesa Power* hearing videos be suppressed from the public and the Tribunal.
  - c) Order that the Investor redacts this information from the Internet, from its Memorial, and file a new redacted pleading.
  - d) Order that the procedural clock should stop in this arbitration, to provide Canada more time to consider evidence arising from this earlier case concerning witnesses that Canada itself presented and who were within its control; and

- e) Award costs for the motion and associated costs of reviewing the Investor's Memorial pleadings.

11) In its August 19<sup>th</sup> Response to Canada's *Motion to Suppress Evidence from the Public and the Tribunal*, the Investor set out a detailed response:

- a) Setting out case after case where tribunals have admitted evidence that is material and relevant to the matters before them.
- b) Advising that the relief sought by Canada was an interim measure and that Canada could not meet the requirements for the success of such a measure.
- c) Rejecting Canada's demands that the evidence be excluded and that the Memorial be refiled without it.
- d) Rejecting the demands to stop the procedural deadlines on account of the introduction of this evidence; and
- e) Agreeing that costs should be awarded with respect to this Motion – but against Canada on a full indemnity basis.

12) In its August 26<sup>th</sup> Reply to the Investor's August 19<sup>th</sup> Response, Canada said that:

- a) This Tribunal should ignore the applicability of the awards issued by other tribunals filed by the Investor.
- b) The Tribunal should continue to suppress the information from the public.
- c) The release of the information should be blamed upon the actions of two counsel acting for the Investor, who previously acted for Mesa Power.
- d) The Investor's assertion that Canada was seeking an interim measure should be rejected, but in doing so, Canada failed to identify any alternative basis for the Tribunal to take the steps sought by Canada; and
- e) Canada reiterated its demand for costs.

- 13) Canada did not address in its August 26<sup>th</sup> Reply its request that the procedural timelines be frozen. It appears that Canada has abandoned that request.
- 14) This Rejoinder addresses issues arising from Canada's Reply to the Investor's Response to Canada's *Motion to Suppress Evidence from the Public and the Tribunal*.

THE INFORMATION IN THE EXHIBITS IS NOT CONFIDENTIAL

- 15) From the public *Mesa Power* Investor's Post Hearing Brief, the public first became aware on August 15, 2015 that at the *Mesa Power* Hearing, Energy Assistant Deputy Minister Sue Lo made an astonishing admission; she admitted that there was a secret group of the most senior Ontario Government public officials meeting with the most senior political officials in an unofficial clandestine meeting known as the "breakfast club." At the secret "breakfast club" meetings, the officials regularly took steps to provide preferential business opportunities to the government's cronies and political supporters. This included regulatory machinations of the FIT Program. Ms. Lo testified that the officials meeting at the "breakfast club" provided special protection for companies like International Power Canada, which was run by a member of the Liberal Party leadership and closely connected to the Ontario Liberal Government. Such actions were in direct contravention of the legitimate expectations of the Investor and its Investment and were in violation of the international law standard in NAFTA Article 1105. Notably, Canada has not, and cannot, contend that any of this information was confidential.
- 16) The *Mesa Power* Hearing videos contained more information about what already had been made public. The witness evidence at the hearing had admissions related to the following:
  - a) Greater information about how International Power Canada, a Canadian entity owned by a high-ranking Liberal party member, had high-powered assistance from government officials to obtain FIT Contracts by unfairly taking over transmission access that was properly allocated and available to Skyway 127.
  - b) NextEra Energy, another applicant in the Bruce to Milton Transmission Project of the FIT Program, had been given advanced access to information that would help

them to corruptly advance themselves in the Program compared to the other FIT proponents.

- c) The reasons why Pattern Energy (the joint venture partner of the Korean Consortium) was trying to lockup wind developments from developers such as Skyway 127 and Skyway 9 as part of a predatory practice where the Korean Consortium could use inside information and governmental assistance not available to others to manipulate the Feed-in Tariff process.
  - d) The decision by Ontario officials not to make electricity transmission available in the Bruce Transmission Region but to make more power available in the West of London region to give extraordinary business access to preferred friends of the Liberal Government.
- 17) The admission of the existence of a secret governing process could not meet the definition of confidential information under the terms of the *Mesa Power* Confidentiality Order. Still, this information had been concealed by Canada, and it did not become public until disclosure of this information was contained in a post-hearing brief published by the PCA on August 15, 2015.<sup>2</sup> Canada has not, and cannot, argue that the basic facts of the covert meeting of officials is confidential.
- 18) Indeed, the Investor briefed and argued the fact of this meeting and decision in its *Notice of Arbitration*, in its briefing in response to Canada's failed Motion to Bifurcate, and at the Second Procedural Hearing in January 2020.
- 19) All these admissions took place during cross-examinations "in open court" in testimony, during portions of the hearing that were closed to the public. These admissions would not deal with the release of any information that ordinarily would be considered as meeting the definition of confidential information. As a result, the non-confidential admissions were "caught" in portions of the transcript that were not released to the public. But, as it turned

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<sup>2</sup> August 10, 2015, Email from Ben Craddock, case manager, PCA to counsel to disputing parties, releasing post-hearing procedural documents after the end of day on August 14, 2015, **C-124**.



out, the videos of that cross-examination have been public for years. And, the basic facts, again, had been revealed in the public post-hearing brief and in this arbitration repeatedly.

CANADA ADMITS THAT TENNANT LAWFULLY OBTAINED THE EVIDENCE

- 20) There was a Confidentiality Order in place in the *Mesa Power* NAFTA arbitration.<sup>3</sup> Mesa Power, one of the disputing parties to the *Mesa Power* arbitration, wholly complied with the terms of that order. Canada has not argued otherwise.
- 21) The unredacted *Mesa Power* NAFTA hearing videos happened to be released to the public by the Permanent Court of Arbitration (PCA). The videos were posted by the PCA on the Internet. The videos were available for all to view without limitation in the public domain on the Internet for more than **five years** - since April 30, 2015. As described in the Investor's Response, Canada itself participated in the public dissemination of this information.<sup>4</sup> Concerning the release of the record, the parties, the *Mesa Power* Tribunal, and the counsel to Mesa Power are entirely blameless.
- 22) Canada admits on page 4 of its Reply that "Canada does not contend that Tennant obtained the information illegally."<sup>5</sup>
- 23) In its Reply, Canada continues to argue that Tennant Energy cannot submit the evidence to the Tribunal, which Canada admits Tennant lawfully accessed on the Internet. As noted in the Investor's Response, Tennant Energy comes to this arbitration with clean hands.
  - a) Tennant Energy is a separate and distinct party from Mesa Power. Tennant Energy disclosed its reliance on the disclosure of previously confidential information arising from the Post Hearing Brief in its Notice of Arbitration in June 2017.<sup>6</sup> Tennant's reliance on this information was notorious and fully disclosed.

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<sup>3</sup> *Mesa Power Group, LLC v. Government of Canada* (PCA Case No. 2012-17), Confidentiality Order, 21 November 2012, **C-250**

<sup>4</sup> Investor's August 18, 2020 Response at ¶¶ 50-58.

<sup>5</sup> Canada's August 26, 2020 Reply at p. 4.

<sup>6</sup> Notice of Arbitration at ¶81.

- b) Canada never objected earlier to Tennant's reliance upon the disclosure of the Sue Lo evidence in the Tennant Energy Notice of Arbitration even though it arose from the disclosure of information that was originally subject to the confidentiality provisions in the *Mesa Power* case. That information, originally classified as confidential, was subsequently disclosed to the public.<sup>7</sup>
- c) Canada has not raised any objections over the authenticity of the earlier evidence that Tennant Energy filed or to any question of legal privilege. Canada is estopped from any complaint about that evidence regarding the "Breakfast Club" and International Power Canada.

#### TENNANT HAD LAWFUL ACCESS TO THE EVIDENCE

- 24) The information the Investor filed with the Memorial in this *Tennant Energy* arbitration was in the public domain for more than five years.
- 25) Tennant had lawful access to the information that was submitted. The information was available to the entire world on a trusted public web site administered by the PCA. Canada apparently trusted the PCA sufficiently to use that institution to carry out Canada's self-professed transparency obligation and it re-published the information on its own website.
- 26) The Investor took no step at any time that was unlawful to obtain the information, as Canada admits.
  - a) The client representative, Mr. Pennie, filed a sworn statement in which he outlined how he accessed the information in question. (CWS-1) (See Witness Statement of John C. Pennie CWS-1 at ¶¶99 and ¶¶ 102 - 104).

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<sup>7</sup> In fact, on June 1, 2017, when the Tennant Energy claim was filed, the admission by Assistant Deputy Minister Sue Lo was freely available to the entire world through the video on the PCA website although at that time, Tennant was only aware of it through the Mesa Power Investor's post hearing brief references because Mr. Pennie reviewed the redacted transcript of the hearing rather than the publicly-available video at that time. CWS-1-Witness Statement of John C. Pennie at ¶ 99.

- b) A paralegal in the New York office of Reed Smith, Parthenya Taiyanides, filed a sworn statement in which she outlined what she could access and how the information in question was accessed on the website of the PCA. **(CWS-2)**
  - c) Reed Smith LP was not a party to the Confidentiality Order as that law firm did not represent Mesa Power in the *Mesa Power* arbitration. Neither Tennant Energy nor Mr. Pennie nor Ms. Taiyanides were parties to the *Mesa Power v Canada* Confidentiality Order or subject to it.
- 27) The *Mesa Power* Confidentiality Order is an arbitral order. As such, its force and scope apply only to those before the *Mesa Power* Tribunal. An arbitration tribunal order cannot apply to third parties who have not consented to the jurisdiction of the Tribunal.<sup>8</sup> This limitation of scope is a fundamental difference between an order arising from an arbitration tribunal and an order of a court (although even a court order typically does not apply to non-parties and those not in privity with parties). There are no governing court orders regarding confidentiality over the *Mesa Power* NAFTA hearing video.
- 28) Gary Born notes that "any confidentiality provisions in the parties' arbitration agreement are binding only on the parties themselves, and not on third parties (including witnesses)."<sup>9</sup> There was no general court order affecting non-parties to the Confidentiality Agreement. Canada never sought a general court order to assist in the enforcement of the *Mesa Power* Confidentiality Order in Washington, D.C. (the place of the arbitration in the *Mesa Power* case), or before the courts of Canada.
- 29) Canada hangs its entire argument on dispersions it asserts personally against Mr. Appleton and Mr. Mullins. But while derogatory, these arguments are manifestly absurd.
- 30) Canada raises a new argument in its Reply at Footnote 4. Canada now claims that counsel from the *Mesa Power* case used their unique access to bring evidence into the *Tennant* claim.

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<sup>8</sup> Gary Born writes "First, any confidentiality provisions in the parties' arbitration agreement are binding only on the parties themselves, and not on third parties (including witnesses)". Gary Born *International Commercial Arbitration* 2nd ed, Kluwer Law International, 2014 at page 2789, **CLA-244**.

<sup>9</sup> Gary Born writes "First, any confidentiality provisions in the parties' arbitration agreement are binding only on the parties themselves, and not on third parties (including witnesses)". Gary Born *International Commercial Arbitration* 2nd ed, Kluwer Law International, 2014 at page 2789, **CLA-244**.

This argument is entirely unsupported, inflammatory, and derogatory. As discussed below, it is also wholly and utterly false, and without a shred of truth. Indeed, the only disputing party in the *Mesa Power* Arbitration even arguably to violate the terms of the Confidentiality Order, if there was a violation, was Canada who published the information on its own website to the world, takes no responsibility, but now blames everyone else.

- 31) But Canada is not saying it violated the confidentiality order by republishing what was on the PCA website. If Canada has not violated the confidentiality order then clearly Tennant, a non-party to the *Mesa Power* arbitration, did not violate an order rendered in that arbitration.
- 32) Mr. Appleton is the only lawyer at Appleton & Associates International Lawyers LP covered by the Confidentiality Order. All the other lawyers and staff working on the *Tennant* Arbitration at Appleton & Associates were not covered by the *Mesa Power* Confidentiality Order.
- 33) Mr. Mullins and Ms. Cardenas are the only lawyers at Reed Smith LLP who were working on the *Mesa Power* arbitration at the Astigarraga Davis law firm and are currently working on the *Tennant* Arbitration. None of the other lawyers at Reed Smith were ever covered by the *Mesa Power* Confidentiality Order.
- 34) Mr. Appleton, Mr. Mullins and Ms. Cardenas never released information that was confidential from the *Mesa Power* arbitration. It was for that very reason that the client representative of Tennant personally viewed the admissions from the government officials from the public information on the public websites.
- 35) Canada complains that non-confidential transmission letters from the PCA to the *Mesa Power* Arbitration parties have been produced. There is nothing special or confidential about such letters. There is no reason why they would not be available.
- 36) The Investor advised the Tribunal during the January 2020 procedural hearing that Mesa Power Group LLC made non-confidential information from the *Mesa Power* NAFTA case available to Tennant Energy LLC.

- 37) Eight months after the January 2020 hearing, Canada also now raises scurrilous issues at Footnote 5 of the Reply that T. Boone Pickens, the chief executive officer of Mesa Power Group, did not give his permission to share non-confidential information with other potential claimants against Canada who were claiming that the Ontario FIT Program was unfairly administered. Canada does not explain why Mr. Pickens – a well-known public defender of public markets and free trade would support hiding the unfair practices of Canada. Mesa Power was a strong proponent of transparency in the *Mesa Power* NAFTA hearing and sought for all the information surrounding the NAFTA hearing to be public. Canada's assertions are self-serving but make no sense.
- 38) The only circumvention of the *Mesa Power* Confidentiality Order by a party was by Canada who failed to check the posting done by the PCA and also published this same material to the world on its website for over five years – and now blames the counsel for Mesa Power for Canada's failings.
- 39) While this evidence is embarrassing and damning to Canada, it is not inadmissible in any way. Canada's real problem with this non-confidential correspondence being added to the record is that it demonstrates Canada's contributory fault in the publication of *Mesa Power* Hearing video in 2015.

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THE MESA POWER CONFIDENTIALITY ORDER DOES NOT APPLY TO PUBLIC INFORMATION

- 40) Canada argues in its Reply that Tennant's counsel - who were also counsel in *Mesa Power* - *should* have taken steps to prevent Tennant from relying on the evidence published by Canada and the PCA on the Internet. This suggestion is ridiculous. Tennant lawfully obtained the evidence of Canada's wrongful conduct from the public domain. Not only did Tennant directly access the evidence, but other lawyers and paralegals for Tennant, who were not subject to the restrictions in the confidentiality order in *Mesa Power*, also accessed the evidence at issue. Canada's arguments are simply designed to continue Canada's campaign of evidence suppression. This Tribunal should give Canada's arguments no weight.

41) A review of the Confidentiality Order demonstrates that Section 12 of the *Mesa Power* Confidentiality Order expressly identifies the extent of the obligation of the Confidentiality Order. Section 12 states:

All persons receiving confidential information shall be bound by this Confidentiality Order. Each disputing party shall have the obligation of notifying all persons receiving confidential information of the obligations under this Confidentiality Order.<sup>10</sup>

42) Thus, the obligation the *Mesa Power* Confidentiality Order applies only to those who received confidential information under the terms of the *Mesa Power* Confidentiality Order. Section 8(b) of the *Mesa Power* Confidentiality Order identifies those who can obtain access under the *Mesa Power* Confidentiality Order. Section 8(b) applies only to counsel “whose involvement in the preparation or conduct of these proceedings is reasonably considered by the disputing party to be necessary.”

43) Thus, only someone who received a determination from Canada or Mesa Power could be bound under the Confidentiality Order – and then only to the extent that the information was accessed for the permitted purpose – which was the preparation or conduct of the *Mesa Power* Proceedings.<sup>11</sup>

44) The circumstances of the discovery are set forth in the Witness Statement of Justin Giovannetti, a law student doing an internship at Appleton & Associates International Lawyers LP in the summer of 2020. (**CWS-3**).

45) Mr. Giovannetti was not counsel in the *Mesa Power v Canada* NAFTA case and discovered the public information on his own while conducting a review of evidence on the PCA website. Mr. Giovannetti watched the entirety of the six days of the *Mesa Power* Hearing on the PCA Website against the redacted transcript. He also confirmed that Canada published this same uncensored *Mesa Power* hearing information w through a weblink from

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<sup>10</sup> *Mesa Power* Confidentiality Order at § 12, **C-250**

<sup>11</sup> *Mesa Power* Confidentiality Order at § 12 and 8(b), **C-250**

Canada's public NAFTA website to the PCA Website. Mr. Giovannetti prepared the video exhibits which were submitted to the Tennant Energy Tribunal. (CWS-3).

- 46) Neither Justin Giovannetti nor Parthenya Taiyanides is covered within the scope of Sections 12 and 8(b) of the *Mesa Power* Confidentiality Order. Neither worked on that proceeding. Moreover, Tennant Energy was never covered by the *Mesa Power* Confidentiality Order.
- 47) Both Canada and Tennant Energy engaged legal counsel in this case that were involved in the *Mesa Power* arbitration. Yet, Canada suggests that somehow Tennant could not avail itself of public evidence because Tennant had some counsel that were covered by the terms of the *Mesa Power* Confidentiality Order.
- 48) In this regard:
  - a) The *Mesa Power* Confidentiality Order could not apply since the confidential information was – after 5 years of open publication on the Internet, no longer confidential.
  - b) There could have been no expectation of confidentiality attaching to information available to the public and that the Tennant Client representative accessed directly from public websites available on the Internet
  - c) Both disputing parties in the *Tennant* Arbitration are entitled to engage counsel of their choosing to represent them in this case. Indeed, if any other counsel represented Tennant Energy there would be no dispute that Tennant Energy had the right to use otherwise public information. Canada has *admitted* that Tennant Energy has done *nothing* wrong in accessing the public information (Reply, p. 4) that Canada itself published. Tennant Energy cannot be punished for having the counsel of its choosing and to force Tennant Energy to choose to use valuable, public evidence or use the counsel of its choice is untenable.

- 49) Furthermore, persons who were not covered by the terms of the *Mesa Power* Confidentiality Order (and never could be) accessed the information from the public domain.
- a) John C. Pennie provided a witness statement that detailed how Tennant Energy became aware of the information. It lawfully accessed the information in the public domain. **(CWS-1)**. Mr. Pennie was not subject to the terms of the *Mesa Power* Confidentiality Order.
  - b) Parthenya Taiyanides in her witness statement **(CWS-2)** detailed how she lawfully accessed the information from the public domain. Ms. Taiyanides was not subject to the terms of the *Mesa Power* Confidentiality Order, and she was able to obtain this information.
  - c) Justin Giovannetti in his witness statement **(CWS-3)** detailed how he lawfully accessed the information of the *Mesa Power* witness hearing from the PCA website and a link from Canada. This information was all in the public domain. Mr. Giovannetti was not subject to the terms of the *Mesa Power* Confidentiality Order, and he was able to obtain this information lawfully from the Internet.
- 50) Finally, on page 5 of its Reply, Canada suggests the existence of a duty imposed upon Tennant’s counsel who were involved in the *Mesa Power* hearing to patrol the Internet to ensure that no information from the *Mesa Power* case could ever be seen by the public.<sup>12</sup> Yet, Canada claims that it does not seek the suppression of the evidence from the *Mesa Power* Hearing – but on page 5 of its Reply Canada demands this extraordinary result. Specifically, Canada demands that information that has been made public be suppressed by the former *Mesa Power* counsel notwithstanding the undisputed fact that the evidence has been widely available to the world on the Internet for years. Canada does not impose this same duty on Canada’s own counsel. In essence, Canada suggests that this sub-group of

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<sup>12</sup> Canada says “The Claimant’s counsel have a clear and lasting obligation that extends beyond the conclusion of the *Mesa* proceedings not to disclose confidential information they received from Canada in the *Mesa* proceedings. They have an obligation to prevent other clients, including those who happen to be future clients such as Tennant, from using this information as well.”



Tennant's counsel act in their personal capacities like "the Lone Ranger" – with the perpetual mission of preventing everyone who ever had access to the Internet and the public domain from using that information from the *Mesa Power* Hearing that was on the Public Domain. Apparently, Canada's own counsel had no such duty and their client even could re-publish the information with impunity.

- 51) According to Canada, this duty extends to having these "lone rangers" prevent the *Tennant* Tribunal from being able to see this relevant and material evidence of internationally wrongful measures that Tennant lawfully obtained. Canada says that those lawyers for Tennant who were also counsel to Mesa Power must intercede and remove the lawfully obtained evidence from Tennant's client representative and others who have accessed this information lawfully. In this respect, Canada's counsel is graced with a vivid imagination. This suggestion is so foolish as to need no other comment from Tennant. For the record, the Investor cannot agree with this proposal.

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#### CANADA'S ROLE IN PUBLICATION IS HIGHLY RELEVANT

- 52) Under Art 8 of the *Mesa Power* Confidentiality Order, no party or participant in the *Mesa Power* arbitration may publish, disclose, or communicate any confidential or restricted-access information relating to the *Mesa Power* arbitration.<sup>13</sup> That obligation extends only to the disputing parties to the *Mesa Power* arbitration and the arbitral tribunal.
- 53) If anything, under its own logic that this information remained confidential despite the fact that the PCA made it public, Canada was actively publishing the unexpurgated *Mesa Power* hearing video to the public as part of Canada's transparency policy. Canada posted the full uncensored *Mesa Power* videos on a link from Canada's own NAFTA website.
- 54) On Canada's *Mesa Power* website, Canada says that "Legal documents related to this case can be viewed at the website of the Permanent Court of Arbitration."<sup>14</sup> Canada then links

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<sup>13</sup> *Mesa Power* Confidentiality Order, **C-250**.

<sup>14</sup> Government of Canada NAFTA Website, Mesa Power page accessed on August 18, 2020 at <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/mesa.aspx?lang=eng>. A copy of Canada's landing page is set out at **C-258**. The link to the PCA is on page 2.

its Government of Canada website directly to the pages of the PCA. The hyperlink in Canada's website goes directly to the PCA's *Mesa Power* posting page at <https://pca-cpa.org/en/cases/51/>.<sup>15</sup> This is the exact same location where the PCA previously posted the links to the *Mesa Power* Hearing video.

- 55) Canada notes on its NAFTA Chapter 11 landing page that the information that it provides to the public on its website is “**provided for transparency purposes**”. Canada states:

The information on this website is provided for transparency purposes only and is without prejudice to Canada's legal position on these cases.<sup>16</sup>

- 56) Thus, Canada has taken actions to publicize and widely disseminate the uncensored video from the *Mesa Power* NAFTA hearing. It would be natural to go to Canada's NAFTA website to research matters related to the *Mesa Power v Canada* NAFTA claim. On Canada's *Mesa Power* website, Canada actively promoted the link to the PCA website. In giving this link “for transparency purposes,” Canada was publishing the uncensored *Mesa Power* hearing videos on Canada's own website.

- 57) Canada argues at page 3 of its Reply that Canada's role in publishing and disseminating the record should not be considered as Canada's fault because Canada had a legitimate expectation that the videos were redacted. Canada is looking to move the blame, but this statement does not absolve Canada of its obligation to diligently review the postings after Canada had notice of the video posting, and the opportunity to check. Canada seemed to not care to check but now it wants to shift the responsibility to others for its own failures.

- 58) Canada cannot come back five years later and say that the disclosure of information caused by Canada's own publication of the information on Canada's own website does not count as public dissemination. As noted in the Response, the “Cat is out of the Bag” – this information is part of the public domain. Canada cannot take steps now to consider this

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<sup>15</sup> On Canada's *Mesa Power* website, it states Legal documents related to this case can be viewed at the website of the [Permanent Court of Arbitration](https://pca-cpa.org/en/cases/51/). The hyperlink in Canada's website goes directly to the PCA's *Mesa Power* posting page at <https://pca-cpa.org/en/cases/51/>.

<sup>16</sup> Canada NAFTA Chapter 11 Cases filed against the Government of Canada - Government of Canada NAFTA Website accessed on August 18, 2020 at <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng>. A copy of Canada's landing page setting out its policy of transparency is set out at **C-257**.

public information to be secret or confidential, to hide it in future from the public and others who have been harmed by Ontario's wrongful actions.

- 59) The information about the *Mesa Power* NAFTA hearing could always be lawfully accessed from Canada's own *Mesa Power v Canada* website, which published this information through direct links to the PCA website. To the extent that any party to the *Mesa Power* Confidentiality Order expressly violated the terms of that order – it was the Government of Canada.
- 60) The *Mesa Power* Tribunal long ago became *functus officio*. However, that is a question that only the *Mesa Power* Tribunal could properly consider.

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ALL THE HEARING VIDEO INFORMATION IS NOW PUBLIC INFORMATION

- 61) Tennant lawfully accessed the information in question in a manner that was fully compliant under the laws of the United States and Canada. The elements confirming the lawfulness of the information include the following:
- a) The information that was lawfully accessed and placed before this Tribunal did not violate any criminal acts.
  - b) Canada admits on page 4 of its Reply that “Canada does not contend that Tennant obtained the information illegally.”
  - c) Tennant did not engage third parties to engage in any unlawful access.
  - d) Tennant did not take steps to improperly intercept this information, or engage in any eavesdropping, wiretapping, or improper solicitation. Tennant comes before this Tribunal with clean hands.
  - e) No national security or cabinet privilege is involved with this information.
- 62) The admission of this evidence before the Tennant Tribunal is entirely lawful. For the reasons already identified in the submissions before the Tribunal, the video evidence which

contains admissions of internationally wrongful conduct and systemic abuse of the Ontario FIT Program is highly relevant and material to the matters before this Tribunal.

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THE EVIDENCE IS MATERIAL AND RELEVANT

- 63) This information is highly relevant to any potential questions regarding jurisdiction that may come before this Tribunal from Canada in a bifurcation motion. The information in that video is discussed in Mr. Pennie's Witness Statement as it is relevant to the determination of merits and jurisdictional questions before this Tribunal. This is the best evidence detailing admissions under oath of wrongful conduct by the relevant Ontario officials.
- 64) The risk of excluding the evidence is made even worse by the clear indication that Canada has engaged in criminal acts of spoliation of evidence and willful non-compliance with lawful subpoenas to produce evidence about its renewable energy programs.<sup>17</sup> Considering its availability in these circumstances, the exclusion of the evidence would be nothing less than a travesty of justice.
- 65) Canada may properly make arguments about the materiality, weight, and admissibility of this evidence in due course. Due process and fairness considerations do not allow Canada to exclude this evidence now.
- 66) This advocacy right does not grant Canada the right for an urgent interim measure now to address its evidentiary concerns. While Canada may wish to raise its issues in the ordinary course, Canada has not demonstrated how there is an issue that requires a Tribunal determination now, or that can justify Canada's demand that the Tribunal not review the evidence that is put before it. There can be no urgency over evidence available to the public for the last five years by the PCA – a trusted public institution – and which Canada itself has published to the world through links to the PCA website.

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<sup>17</sup> Investor's Memorial, at ¶ 95 and ¶¶ 265-268.

## TRANSPARENCY &amp; PUBLIC INTEREST

- 67) Canada has told this Tribunal that there is a significant public interest in transparency and disclosure. Yet, at every turn, Canada has attempted to avoid this obligation.
- 68) Time and time again, Canada says, **do what I say and not what I do.**
- 69) Canada has attempted to suppress lawfully obtained public information obtained from witness examination under oath from senior Ontario officials administering the FIT Program. This information was not available to the public until disclosed lawfully by a publication link on Canada's website to the Permanent Court of Arbitration.
- 70) The only issue is that the information that was once confidential is no longer confidential. Canada says that this Tribunal should "roll back the clock" and pretend that the public never saw the information posted to the world for five years. Giving effect to Canada's request would be a "travesty of justice." Prof. George Abi-Saab wrote about the absurd effects of such a decision in his separate award in the *ConnocoPhillips* case. He wrote:

This Tribunal had an obligation to evaluate the best available evidence to determine the facts in the dispute before it. To ignore the "existence of relevance of such glaring evidence" would be to send the Tribunal over into an "epistemological" abyss and close itself off to: *'a subjective make believe world of its creation; a virtual reality to fend off probable objective reality; a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration but of the very idea of adjudication.'*<sup>18</sup>

- 71) The Tribunal is being asked to consider whether the public interest in disclosure outweighs the public interest in non-disclosure. But this is not the question. There has been a

<sup>18</sup> *ConnocoPhillips*, Dissenting Opinion of Georges Abi-Saab, at ¶¶66-67, **CLA-254** (emphasis added).

fundamental change in circumstances. The information, through no fault of Tennant, has become public.

- a) There is no question that there has been a disclosure of information that has been in the public domain for more than five years.
  - b) Canada takes the absurd position that the lawfully obtained information should not be considered, and somehow, be suppressed by a ruling that the information is confidential again.
  - c) No Tribunal ever has suppressed public information from the public or designated public information as confidential.
  - d) The rights to Tennant to have a fair hearing and to fully be able to present its case would be severely affected by a decision not to admit this information.
- 72) The legitimacy of the NAFTA investor-state process would be besmirched by attempts to suppress relevant and material information that was lawfully obtained and in the public domain.
- 73) Canada summed up its position on the essential need for transparency as follows:

*Now, starting with transparency, this an integral principle in international arbitration. Transparency upholds the legitimacy of investment proceedings.<sup>19</sup>*

- 74) The closest situation to this is the more severe situation, where a Tribunal has had to consider the admission of secret information that has been subsequently disclosed through hacking.

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<sup>19</sup> Mark Klaver, Counsel for Canada. *Tennant Energy Second Procedural Hearing Transcript*, 14 January 2020: at pp.21- II:20 –22.

## PUBLIC INTEREST FAVORS ADMITTING THE DOCUMENTS

- 75) Evidence has been admitted in every situation where the information has been lawfully obtained, and the party submitting it has come with clean hands.
- 76) It is in the public interest that the integrity of arbitrations is maintained. The evidence at issue arose from a previous arbitration with admissions of misconduct by those witnesses administering the same Ontario Program at the same time as the allegations at issue in this arbitration. Not only is the admission of the material and relevant evidence essential to permit the Investor to make its case, but it is also necessary for the arbitration process.
- 77) Given the public interest in the proper administration of public programs, and the massive waste of Ontario electricity ratepayer dollars into the pockets of political cronies and supporters of the former Ontario government over those who properly followed the FIT Program rules, there is a serious public interest favoring continued public access to this information. Following Canada's absurd proposal to forcibly suppress this public evidence of government wrongdoing would jeopardize the integrity of investor-state arbitration and call into question the integrity of this NAFTA process. This is in addition to the issues that would give rise to a set aside of the arbitration due to the impairment of the Investor's ability to present its case fully. For all these reasons, the Tribunal must avoid supporting Canada's proposals, which would do violence to the legitimate rights of the public.
- 78) By admitting this evidence, the benefit to that public interest and the development of international investment treaty arbitration outweighs any other concerns related to the current applicability of a confidentiality order from completed arbitration with a *functus officio* tribunal. The lack of evidence of party misconduct and the fact that the information is in the public domain makes the evidence in the Tennant claim fully admissible and not subject to the terms of the confidentiality agreement. Concealment of the evidence at this time would raise considerable public criticism about the legitimacy of the investor-state process. The principle of transparency is a core interpretative principle, enshrined in NAFTA Article 102. The Investor long and unequivocally has supported transparency in

this arbitration against the earlier opposition of Canada and maintains it against Canada's renewed attempts to suppress evidence from the public (and the Tribunal).

- 79) Admitting these documents would not constitute unequal treatment of the Parties, nor would it undermine Canada's opportunity to present its case fully.<sup>20</sup> The mere fact that it may be disadvantageous to Canada does not equate to Canada being treated unequally, chiefly absent any indication that the Investor took steps to improperly source the documents.

THE MESA POWER CONFIDENTIALITY ORDER DOES NOT APPLY

- 80) The *Mesa Power* Confidentiality Order cannot bind the *Tennant Energy* Tribunal.
- a) The *Mesa Power* Confidentiality Order does not preclude the *Tennant Energy* Tribunal from admitting the evidence because Tennant Energy LLC was not a party to the *Mesa Power* arbitration.<sup>21</sup>
  - b) Tennant Energy was free to discuss any evidence lawfully obtained from the public domain with its legal counsel and the Tribunal.
  - c) Anyone with access to the Internet had access to the information that was promoted by Canada and on the PCA website.
  - d) Canada does not have a property right to the evidence at the *Mesa Power* NAFTA hearing. The *Mesa Power* Confidentiality Order prevented Canada from releasing any information designated confidential to the public. Whether intentionally or by lack of diligence, Canada did not meet its obligations and it made the information public by making it available through a link on Canada's website to anyone with access to

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<sup>20</sup> The requirement to be able to fully present one's case is set out in Article, 18 *UNCITRAL* Model Law, **CLA-251**; Article 15 of the (1976) *UNCITRAL* Arbitration Rules, **CLA-249**.

<sup>21</sup> Gary Born *International Commercial Arbitration* 2nd ed, Kluwer Law International, 2014, ¶ 2789, **CLA-244**; Ileana M. Smeureanu 'Chapter 4: Actors Bound by the Duty to Maintain Confidentiality' in Ileana M. Smeureanu and Julian D. M. Lew *Confidentiality in International Commercial Arbitration*, International Arbitration Law Library, 2011, ¶¶134, 135, **CLA-252**.



the Internet. After that time, based on Canada's release, the information could never be considered public.

- e) Nothing in the *Mesa Power* Confidentiality Order provides the authority necessary to restrict Tennant Energy's ability to review this lawful evidence.
  
- 81) Tennant could not have any duty of confidentiality under the *Mesa Power* Confidentiality Order or any other binding obligation for information made available by Canada on the PCA website. The information in the exhibits arises from lawful access and from the public domain. The release of the information did not arise from any illegality or impropriety on the part of Tennant Energy.
  
- 82) Canada admits that no privilege applies to the evidence at issue on page 4 of its Reply.
  
- 83) Canada only claims that confidentiality applies in the *Tennant* arbitration. Canada has the burden of establishing that confidentiality applies in this arbitration, but again, Canada supplies no legally relevant support for this contention.
  
- 84) In the absence of a Tribunal finding of a breach of any express duty of confidentiality on the part of Tennant Energy LLC, there is no applicable doctrine of privilege or confidentiality in international arbitration, which would exclude the admission of the documents identified as Exhibits C-107, C-201, C-204, C-205, C-206, C-208 and C-224 to C-243 inclusive.

#### INTERNATIONAL TRIBUNAL CASES SUPPORT TENNANT AND NOT CANADA

- 85) The decisions of international tribunals strongly support Tennant's position that lawfully obtained information can be produced to the Tribunal.
  
- 86) Canada erroneously claims in its Reply that the cases address only situations of unlawfully obtained evidence. This answer suggests that Canada has failed to consider the nature of the cases.

- 87) The *Enron* Tribunal admitted evidence where the issue was whether the admission would be contrary to an obligation owed by an expert (Mr. Perkins) in another arbitration. The tribunal said that this issue was not one that should be, or could be, addressed by that tribunal. The Enron issue did not involve any consideration of illegality. The tribunal admitted that evidence.<sup>22</sup>
- 88) The *Caratube* tribunal noted that the public knowledge of the evidence was important to its consideration. The tribunal said that to not admit the document would have the effect that the tribunal would be “placed in a sterile environment or a bubble detached from the real world and to ignore these documents or pretend they don’t exist.”<sup>23</sup>
- 89) If information that was obtained in questionable situations is admitted by tribunals, then indeed information that is **lawfully obtained** should be admitted.
- a) The *Caratube* tribunal allowed the admission of all non-privileged leaked documents that had been released online by hackers. These approaches to confidentiality and privilege recognized the parties’ autonomy in arbitration to determine the existence and scope of their obligations.<sup>24</sup>
  - b) The Court for Arbitration for Sport admitted all information that came from public information, and from sources obtained from reporters, was admissible.<sup>25</sup>
- 90) The considerations of procedural economy, proportionality, fairness, and equality of the parties all favor the consideration of the evidence rather than its exclusion.

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<sup>22</sup> *Enron Creditors Recovery Corp. (formerly Enron Corporation) & Ponderosa Assets LP v. The Argentine Republic* (ICSID Case No. ARB/01/3) (Annulment Proceeding), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, ¶160, **CLA-246**.

<sup>23</sup> Alison Ross “Tribunal Rules on Admissibility of Hacked Kazakh Emails” GAR, (22 September 2015), p.3, **CLA-255**.

<sup>24</sup> Alison Ross “Tribunal Rules on Admissibility of Hacked Kazakh Emails” GAR, 22 September 2015, **CLA-255**.

<sup>25</sup> *Ahongalu Fusimalohi v. FIFA* (CAS 2011/A/2425), Arbitral Award, 8 March 2012, ¶ 73, **CLA-261**. *Amos Adamu v. FIFA* (CAS 2011/A2426), Arbitral Award, 24 February 2012, ¶79, **CLA-260**.

THE TRIBUNAL MUST REJECT CANADA'S ABSURD APPROACH TO RE-WRITE TENNANT'S CASE

- 91) Canada demands in its August 26<sup>th</sup> Reply that the Tribunal makes an order to limit the use of the video exhibits as supporting evidence. Canada's bizarre approach takes Canada's demands to an entirely new level of farce
- 92) Confidential information can be designated confidential only if it conforms to the terms of the Confidentiality Order.
- 93) In that order, a condition precedent for information to be designated as confidential is that the information is maintained as confidential. It would be an abuse of process to apply confidentiality to information that was available to the public. Yet, that is precisely the process that Canada prescribes in its Reply.
- 94) Article 6.2 of the *Tennant Energy Procedural Order No 1* provides that
- All Memorials shall specify in full detail the facts and contentions of law and relief claimed, and be accompanied by all evidence, including exhibits, witness statements, expert reports, and legal authorities upon which each party relies in support of the relevant Memorial.**
- 95) There is nothing in *Procedural Order No. 1* that allows Canada to regulate the evidence that the Investor is entitled to reply. Article 6.2 requires that the Memorials specify "in full detail" and be accompanied by "all evidence, including exhibits ... upon which each party relies." The Investor is required to provide evidence supporting its case with its Memorial.
- 96) Canada's suggestions destroy the objective of procedural economy and efficiency. While these objectives may not be significant to Canada given its wasteful and lavish spending in this NAFTA claim, it is very important to Tennant.
- 97) Canada now demands that the Tribunal completely ignore due process and the relevant provisions of *Procedural Order No 1*. Canada wants the embarrassing and damning admissions of guilt removed from the Investor's Memorial – and then demands that Tennant request production of this public information from Canada under the terms of

Article 7 of *Procedural Order No. 1* in a document request. This request for this very same evidence would then be obtained from Canada months later.

- 98) Of course, Section 6 of the *Procedural Order No. 1* applies to evidence supplied with Memorials. Section 7 applies to document requests for information. Under the *IBA Rules on the Taking of Evidence*, no request can be made under section 3.3 for any evidence that is already in possession of a requesting party. Thus, the evidence could never be sought – and perversely, Canada would succeed in suppressing this public domain evidence from the Public and the Tribunal.
- 99) The Investor assumes that the reason for this bizarre approach would be to attempt to exclude this highly relevant evidence from the consideration of Canada’s motion for Bifurcation. Certainly, the existence of this evidence of wrongful conduct, which was not known, and could not be known, on June 1, 2014 would harm Canada’s upcoming ill-considered Motion to Bifurcate the Proceedings.
- 100) In Canada’s contrived model, Canada would then be able to engage in a costly and lengthy production battle over information that was available to the entire world on the Internet for five years at the other end of Canada’s website.
- 101) Canada never has suggested that the exhibits contain evidence that is untrue or that are immaterial or irrelevant to the fundamental issues in this arbitration.
- 102) Canada has attempted to delay access to essential evidence of its wrongful behaviour again and again.
- 103) The Investor unsuccessfully sought production of evidence from the *Windstream* and the *Mesa Power* arbitrations from Canada in interim measures motions. Canada’s latest Reply to Canada’s *Motion to Suppress Evidence from the Public, and the Tribunal* is just more of the same.
- 104) The Tribunal should have the best available evidence before it. The evidence in question has been available to the entire world via the Internet for more than five years.

The evidence was in the public domain and thus within common knowledge for an extensive period.

- 105) Tennant has no restriction on the filing of the public evidence in this arbitration, notwithstanding Canada's contention to the contrary. For the reasons set out in this Rejoinder, Canada is simply wrong when it claims that there are any restrictions upon the evidence filed by Tennant from the *Mesa Power* claim.
- 106) Canada's attempt to apply this process is needless and wasteful. It would bring the administration of justice through investor-state arbitration into disrepute. It would make a mockery of these proceedings.

## COSTS

- 107) Canada's Reply again reiterates its demand in Canada's *Motion to Suppress Evidence from the Public and the Tribunal* for the costs of that Motion. Canada does not address the detailed submissions made by the Investor in its Response. Canada simply reiterates its original position that it is entitled for costs. It also continues in its campaign to besmirch the professional reputation of counsel for the Investor.
- 108) The Investor relies upon its earlier position detailed in the Response. Canada's Reply continues in a manifest lack of professionalism. This behaviour merits the sanction of an award of costs to dissuade the continuation of such unhelpful behaviour by Canada.
- 109) Fundamentally, had Canada done any legal research, it would not have commenced its Motion. The law and the equities are all in support of the Investor. Canada continues in its attempts to exert its formidable economic weight against Tennant Energy. Canada has unlimited resources to spend to defend this arbitration. Canada is aware that the Investor has limited financial resources. Canada continues to take advantage of the disparity in financial capacity in this arbitration with a relentless campaign to dissipate the limited financial resources of the Investor.

- 110) In these circumstances, the Investor agrees that this Tribunal should make an order of costs. In that regard, the Investor seeks full indemnity costs against Canada for the significant costs incurred in responding to the needless and ill-considered Motion.

## CONCLUSION

- 111) Canada behaves like it owns a property right in the confidential information. It does not. There was a right under the Confidentiality Order, but that order affects disputing parties in another case. Any rights in that agreement were rights to keep information secret. No matter whether it was intentional or negligent, Canada broke that obligation by its actions. In those circumstances, there could be no obligation applicable to any other counsel in that dispute with respect that the information published to the world by the Government of Canada and the PCA. Any dispute over rights arising in another arbitration cannot be considered by this tribunal, and this could not prevent the admission of this evidence within the Tennant arbitration.
- 112) Canada makes a mockery of this arbitration by excluding public evidence of admissions of Canada's wrongdoing. Information on the Internet is in the public domain. In Canada's *Motion to Suppress Evidence from the Public and the Tribunal*, Canada says that this information is so confidential that this Tribunal should not look at it and the public should never see it.
- 113) The rule of law and the fairness of this arbitration hang in the balance on the treatment of this relevant and material evidence.
- 114) The Tribunal should exercise its discretion to admit the documents despite Canada's unfounded and unsubstantiated attempts to exclude them. The documents are material, and they constitute the best evidence on matters and ensure that the Tribunal had the fullest evidence before it is necessary to make an accurate decision in this arbitration.
- 115) This Tribunal must be mindful of the warning from Arbitrator Abi-Saab in the *ConocoPhillips* arbitration. He warned that tribunals must not engage in a "legal comedy of

errors on the theatre of the absurd". His full warning merits repetition. He warned that Tribunals should not close themselves off to:

*a subjective make believe world of its creation; a virtual reality in order to fend off probable objective reality; a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration but of the very idea of adjudication.*<sup>26</sup>

- 116) The risk of excluding the evidence is made even worse due to Ontario's criminal acts of spoliation of evidence, and the history of non-compliance with lawful subpoenas to produce evidence about its renewable energy programs.<sup>27</sup> Considering its availability in these circumstances, the exclusion of the evidence would be nothing less than a travesty of justice.
- 117) In a circumstance, such as the present one, where the party seeking to admit the evidence has not had any role in its disclosure, there is no basis for excluding the evidence. As noted in the Investor's Response, the cases decided by international courts and tribunals about the admission of evidence arising from leaks clearly favors admission of the evidence.
- 118) Further, Canada's role in the public dissemination of this information is relevant to why the information is part of the public domain and should be admissible before this Tribunal.
- 119) Similarly, this Tribunal has no basis for treating this information as confidential. The information came from a public source and is public. The information does not meet the definition of confidential information under the terms of the definitions in the Confidentiality Order.
- 120) Moreover, there would be serious public policy concerns arising from the exclusion of the evidence and the denial of public access to that information. As Canada said to this

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<sup>26</sup> *ConocoPhillips*, Dissenting Opinion of Georges Abi-Saab, at ¶¶66-67, **CLA-254** (emphasis added).

<sup>27</sup> See. Investor's Memorial, ¶¶ 95, 265-268.

Tribunal, “*Transparency upholds the legitimacy of investment proceedings.*”<sup>28</sup> Canada has not responded to the Investor’s arguments about the law of the place of arbitration. There is no mandatory issue under the law of the place of arbitration that requires the exclusion of the evidence. To the contrary, the validity of an arbitration award would be at risk should the Investor not be entitled to fully present its case by excluding this relevant and material evidence.

121) As noted in the Investor’s Response, Canada’s *Motion to Suppress Evidence from the Public and the Tribunal* is an interim measures motion. It is not compliant with the requirements for an interim measure motion and should be dismissed in its entirety.

122) Canada asks the Tribunal to hide information from the public, to close its own eyes and to put the genie back in the bottle. In the words of the *Caratube* Tribunal, Canada wants

**a bubble detached from the real world and to ignore these documents or pretend they don’t exist.**<sup>29</sup>

123) Not only is Canada’s request impractical and absurd, but to give effect to Canada’s *Motion to Suppress Evidence from the Public and the Tribunal* demands would severely affect the Investor’s due process rights and the overall propriety of this arbitration. The Investor would not be able to have its case fully heard if its foundational evidence were not to be admitted by the Tribunal.

124) For all the foregoing reasons, Canada’s *Motion to Suppress Evidence from the Public and the Tribunal* should be denied. Basic principles of legitimacy, transparency, and due process are raised by Canada’s Motion. These same principles are at the heart of the Investor’s claim. The Investor is entitled to have its full case heard, including the damning evidence arising from the admissions from Canada’s own senior officials.

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<sup>28</sup> Mark Klaver, Counsel for Canada. *Tennant Energy Second Procedural Hearing Transcript*, 14 January 2020: at pp.21- II:20 –22.

<sup>29</sup> Alison Ross “Tribunal Rules on Admissibility of Hacked Kazakh Emails” GAR, (22 September 2015), p.3, **CLA-255**.



- 125) Canada's interim measure request must be dismissed. As set out above, Canada's request simply does not comply with the requirements for a successful interim measure.
- 126) Furthermore, Canada should not urge the Tribunal to needless subsequent motions to designate this lawfully accessed public information as confidential. The Confidentiality Order does not apply *ab initio* to information that is not confidential. Information that has been available on the Internet published to the world from Canada's own website – could never meet this initial threshold condition. This Tribunal should assist the parties by deciding to avoid needless subsequent applications by Canada on this same point.
- 127) Canada's *Motion to Suppress Evidence from the Public and the Tribunal* has a slim prospect for success based on the existing jurisprudence and the governing provisions in NAFTA Article 1115 and Article 15 of the (1976) UNCITRAL Arbitration Rules. Not only did the Investor obtain the evidence lawfully, but Canada contributed to the public release by posting links to this evidence on its own website – in breach of Canada's obligations under the *Mesa Power* Confidentiality Order. Canada's *Motion* should be dismissed in its entirety and full indemnity costs should be awarded against Canada for bringing this vexatious Motion designed to draw down on the limited financial capabilities of the Investor.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Appleton & Associates International Lawyers LP



Reed Smith LLP

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