

Global Affairs Canada
Department of Justice



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VIA EMAIL

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Dear Members of the Tribunal:

Re: *Tennant Energy LLC v. Government of Canada*

Canada writes in response to the Tribunal's invitation dated August 19, 2020 to reply to Tennant Energy LLC's (the "Claimant" or "Tennant") submission dated August 18, 2020 (the "Response") regarding Canada's letter to the Tribunal dated August 10, 2020 (the "Letter"). In its Response, the Claimant spends over 50 pages drawing the Tribunal to many irrelevant topics at excessive length. However, the question facing the Tribunal is simple: whether to admit into the record confidential information from the *Mesa Power Group v. Government of Canada* ("Mesa") arbitration that the Permanent Court of Arbitration ("PCA") disclosed inadvertently. Below, Canada: (I) disposes of the main contentions in the Response and explains why the information from the *Mesa* hearing videos remains confidential under the *Mesa* Confidentiality Order (the "*Mesa* CO"); and (II) demonstrates that the proper way for Tennant to enter the information upon which it wishes to rely into the record is by following the procedures set out by this Tribunal in Procedural Order No. 1 ("PO 1").

I. THE INFORMATION REMAINS CONFIDENTIAL UNDER THE *MESA* CO

A. The Continued Misuse of Confidential Information by the Claimant and Its Counsel

At the outset, Canada notes that in the Letter it asked the Tribunal to refrain from taking cognizance of the content of the hearing videos from the *Mesa* arbitration that remains confidential under the

Mesa CO until the issue of its inadvertent disclosure by the PCA is resolved.¹ Yet the Claimant's Response repeatedly brings this content to the Tribunal's attention.² As explained below, this conduct continues to be in direct violation of the *Mesa* CO and must cease.³

Moreover, while the Claimant insists that its claims differ from the claims made in the *Mesa* arbitration, the Claimant's counsel continue to take advantage of their former role as Mesa Power's counsel to advance Tennant's case, by using information they could have only obtained through those proceedings.⁴ The Claimant's counsels' use of such information to advance their client's position in this arbitration is highly improper.⁵

¹ Canada's Letter to the Tribunal dated August 10, 2020 ("Letter"), p. 3.

² Claimant's Response to Canada's Letter dated August 18, 2020 ("Response"), ¶¶ 60, 143.

³ As noted in Canada's Letter, pp. 2-3, paragraph 8 of the *Mesa* CO states: "Except with the prior written consent of the disputing party that claimed confidentiality with respect to the information and, in the case of materials from third parties, the owner of such confidential information, confidential information may be used only in these proceedings and may be disclosed only for such purposes to and among [certain participants in the arbitration hearings...]" (emphasis added). Paragraph 20 of the *Mesa* CO states: "The obligations created by this Order shall survive the termination of these proceedings." (RLA-093, *Mesa Power Group v. Government of Canada* (UNCITRAL) Confidentiality Order, 21 November 2012 ("*Mesa – Confidentiality Order*"), ¶ 20). See also, RLA-115, International Bar Association and the Secretariat of the Organisation for Economic Co-operation and Development, *Report of the Task Force on the Role of Lawyers and International Commercial Structures* (May 2019), ¶ 4.3: ("A lawyer will be liable for intentional or inadvertent breach of confidentiality and may face disciplinary sanctions.")

⁴ For instance, the Response cites correspondence between counsel for Canada and the PCA in *Mesa* that is not in the public record and that neither disputing party in that arbitration had an opportunity to label as confidential. Documents exchanged in the course of the arbitration (including correspondence exchanged between the parties, the PCA, and the tribunal) were only reviewed for confidentiality if they were attached to a submission as an exhibit. All other documents exchanged between the parties in the course of the arbitration were presumed to be confidential unless otherwise confirmed. (C-248, Letter from Shane Spelliscy, Legal Counsel, Canada, to the Tribunal containing Canada's response to Investor's Motion for the Public Release of the Hearing Transcripts and Videos, 22 December 2014; C-255, Letter from the Tribunal advising on receipt of the public versions of the disputing parties' post-hearing submissions and the future posting on the PCA website, 9 January 2015; C-255, Letter from H. Wehland, Legal Counsel, PCA, to counsel for disputing parties, regarding the agreed modifications to the hearing transcripts and video recordings, 9 April 2015; C-251, Letter from Shane Spelliscy, Legal Counsel, Canada to Hanno Wehland, Legal Counsel, PCA, commenting on the amended hearing transcripts and videos, 13 April 2015; C-256, Email from Hanno Wehland, Legal Counsel, PCA, to disputing parties regarding the hearing videos and transcripts and inviting Parties to provide comments, 29 April 2015; C-252, Email from Shane Spelliscy, Canada, to Benjamin Craddock, Case Manager, PCA, confirming Canada's agreement on the hearing transcripts and video, 29 April 2015).

⁵ At the procedural hearing in January 2020, Mr. Appleton accepted that much of the information from *Mesa* remains confidential. Hearing on Bifurcation and Preliminary Motions Transcript, Day 1, 14 January 2020, p. 63:9-15: ("A large amount of the information in this case was restricted or confidential, subject to orders – not only of a Tribunal, but four different orders relevant from different courts of the United States with respect to the production of information. That information is known to Mesa. That information is not known to Tennant.") Irrespective of whether Mesa Power's party representative, T. Boone Pickens, consented to disclose Mesa Power's confidential information – evidence of which Mr. Appleton has not provided in this arbitration – that cannot remove the confidential status of content from the *Mesa* arbitration that has not properly entered the public domain. Mesa Power is not authorized to rescind Canada's confidentiality designations over materials in the *Mesa* arbitration.

B. Tennant’s Position that the *Mesa* Information is Not Confidential is Incorrect

The Claimant’s arguments that the information which Canada designated confidential in the *Mesa* hearing videos is not confidential have no merit, for four reasons. First, the Claimant argues that Canada waived confidentiality of the *Mesa* information because “Canada published a link to the PCA website that included this uncensored material”⁶ and that “Canada made public on its own what the PCA did.”⁷ This reasoning is misguided. The Claimant itself notes in its Response that the disputing parties in the *Mesa* arbitration went through an extensive process to have confidential designations made to their submissions and the hearing videos.⁸ Canada and Mesa Power provided the PCA with agreed upon confidentiality instructions, whereby the PCA was to create public versions of the hearing videos. In fact, the PCA still has those public versions on file.⁹ In these circumstances, Canada had a reasonable expectation that the PCA would adhere to its instructions. Canada did not anticipate that the PCA would inadvertently disclose the confidential versions of the videos. Nor should Canada have been expected to re-visit the videos once the PCA posted them on its website.¹⁰ Canada trusted, in good faith, that the PCA would do its intended job as instructed by the parties to the *Mesa* dispute. Canada cannot be held at fault for the inadvertent disclosure of its confidential information by a third party when Canada took prudent steps to protect it.

Second, the Claimant argues that Canada waived confidentiality by not designating parts of the *Mesa* post-hearing briefs as confidential.¹¹ Yet the information designated as confidential in the hearing videos is different from the public information contained in those briefs, and Tennant cannot re-write history in this regard. The *Mesa* tribunal – the proper tribunal with jurisdiction to interpret and apply the *Mesa* CO – already determined what information was confidential to the extent the disputing parties could not agree. It is not open for Tennant to argue now, in this arbitration, that the *Mesa* information was not confidential in those proceedings. Moreover, since the *Mesa* tribunal is *functus*, no tribunal is in place to overrule Canada’s confidentiality designations over the *Mesa* hearing videos. Nor has Canada consented in writing to the use of that information.¹² The information therefore remains confidential under the *Mesa* CO, and Tennant has no right to use it in its Memorial or accompanying documents.

Third, the length of time that the PCA inadvertently disclosed the information is irrelevant to its confidential status under the *Mesa* CO.¹³ Upon learning of the inadvertent disclosure, Canada

⁶ Response, ¶ 13.

⁷ Response, ¶ 14.

⁸ Response, ¶¶ 11, 30-39.

⁹ **R-029**, E-mail from Túlio Di Giacomo Toledo, PCA to Darian Bakelaar, Trade Law Bureau, 11 August 2020.

¹⁰ Response, ¶¶ 11, 35, 37-38.

¹¹ Response, ¶¶ 17-19, 40.

¹² **RLA-093**, *Mesa – Confidentiality Order*, ¶ 8; Letter, p. 2.

¹³ Response, ¶ 41. The Claimant offers no basis for its belief in this regard.

immediately asked the PCA to remove the videos from its website.¹⁴ The PCA promptly complied.¹⁵ This is the proper course of action when an inadvertent disclosure arises. It is the time from learning of the disclosure to requesting that it be taken down that is relevant – not how long the information was inadvertently in the public domain.¹⁶

Finally, the Claimant argues that the Tribunal should admit the unredacted videos into the record based on a number of cases, rules, and laws that do not apply to or resolve the current situation. First, Tennant cites cases where tribunals admitted illegally obtained or privileged information, and argues: “the Tribunal should admit the evidence because there is no evidence of any illegality on the part of Tennant.”¹⁷ Canada does not contend that Tennant obtained the information illegally; privilege is not at issue; and none of the cases cited by Tennant addresses the issue of inadvertently disclosed information that remains confidential under the terms of a confidentiality order issued in a previous arbitration. Second, Tennant cites the *IBA Rules on the Taking of Evidence in International Arbitration 2010* (the “*IBA Evidence Rules*”). The *IBA Evidence Rules* offer little guidance to resolve a situation where confidential materials were inadvertently disclosed in one arbitration and a third party tries to use them.¹⁸ Instead, Article 9.2 addresses situations when a party withholds its own documents from production or use based on the enumerated grounds, and is thus of no assistance to the Claimant. Third, the law of the seat does not govern this scenario, when the Claimant seeks to enter inadvertently disclosed confidential information into the record. Rather, the Tribunal has discretion under Articles 15(1) and 25(6) of the 1976 UNCITRAL Rules to determine whether to admit the evidence now or through the procedures established under PO 1.¹⁹

¹⁴ Letter, p. 2; **R-027**, E-mail from Government of Canada to Permanent Court of Arbitration, 10 August 2020.

¹⁵ **R-029**, E-mail from Túlio Di Giacomo Toledo, PCA to Darian Bakelaar, Trade Law Bureau, 11 August 2020, p. 2.

¹⁶ Within one business day of becoming aware of the inadvertent disclosure, Canada notified the PCA and requested that the videos be removed from the PCA website. Canada became aware of the inadvertent disclosure of the *Mesa* confidential information on Saturday August 8, 2020 after receiving the Claimant’s Memorial, informed the PCA on August 10, 2020, and the PCA removed the links to the videos on August 11, 2020. (**R-029**, E-mail from Túlio Di Giacomo Toledo, PCA to Darian Bakelaar, Trade Law Bureau, 11 August 2020).

¹⁷ Response, ¶ 128.

¹⁸ Article 9(1) of the *IBA Evidence Rules* affirms that a tribunal shall determine the admissibility of evidence (**RLA-087**, International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration*, 29 May 2010, Article 9.1). Further, a tribunal may “conduct the taking of evidence as it deems appropriate” when the *IBA Evidence Rules* are silent on any matter concerning the taking of evidence (**RLA-087**, Article 1(5)).

¹⁹ Procedural Order No. 1, ¶ 8.1 states that when considering matters of evidence, the Tribunal may use the 1976 UNCITRAL Rules and the *IBA Evidence Rules*. Article 15(1) of the 1976 UNCITRAL Rules grants the Tribunal discretion to conduct the arbitration as it considers appropriate. Article 25(6) of the 1976 UNCITRAL Rules confers discretion on the tribunal with respect to all forms of evidence: “[t]he arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.” This aligns with Article 9.1 of the *IBA Evidence Rules*. Thus, the 1976 UNCITRAL Rules authorize the Tribunal to determine the admissibility of inadvertently disclosed confidential information; and the Tribunal does not need to apply the law of the seat. Further, Canada’s request does not constitute a request for an interim measure under Article 26(1) of the 1976 UNCITRAL Rules, as it merely seeks to uphold the document production rules in this arbitration for inadvertently disclosed confidential information. Instead, Articles 15(1) and 25(6) apply in this situation.

II. TO ENTER THE INFORMATION INTO THE RECORD, THE CLAIMANT MUST FOLLOW THE PROPER PROCEDURES FOR DOCUMENT PRODUCTION IN PO 1 AND THE PROCEDURAL TIMELINE

A. The Fact that the Claimant is Not Bound by the *Mesa* CO is Irrelevant

The Claimant argues that the *Mesa* CO does not bind this Tribunal, and as such “Tennant Energy was free to discuss any evidence obtained from the public domain with its legal counsel and the Tribunal.”²⁰ It argues that “Tennant could not have any duty of confidentiality”²¹ and in the “absence of a Tribunal finding of a breach of any express duty of confidentiality on the part of Tennant Energy LLC, there can be no automatically applicable doctrine of privilege of confidentiality in international arbitration, which would exclude the admission of the documents” in question.²² Yet Canada never claimed that Tennant had such a duty, and the Claimant’s arguments in this regard are a red-herring. The duty is on the Claimant’s counsel, in their dual position as former counsel for Mesa Power whereby they remain bound by the *Mesa* CO, and as counsel for Tennant in the current proceedings. 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.²³ 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.

B. PO 1 and the Procedural Calendar Provide the Proper Procedure for the Claimant to Seek to Enter the Documents into the Record

Canada notes that the ongoing accusations from Tennant’s counsel that Canada seeks to “suppress evidence” are serious, inaccurate, and knowingly misleading.²⁴ Canada does not attempt to “suppress” information from use in the arbitration.²⁵ Tennant’s counsel failed to follow the proper procedure for handling inadvertently disclosed information – in direct violation of the *Mesa* CO to which they are bound – and instead sought to use it to their client’s advantage. Accordingly, it is appropriate for this Tribunal to order Tennant to refrain from using the information in its Memorial and accompanying submissions filed to date.

²⁰ Response, ¶ 71.

²¹ Response, ¶ 72.

²² Response, ¶ 74.

²³ **RLA-093**, *Mesa – Confidentiality Order*, ¶ 12: (“All persons receiving confidential information shall be bound by this Confidentiality Order.”), ¶ 20: (“The obligations created by this Order shall survive the termination of these proceedings.”)

²⁴ Response, footnote 20 and ¶ 3. In its response, the Claimant has inappropriately renamed Canada’s Letter to “Canada’s Motion to Suppress Evidence from the Public and the Tribunal.” The Claimant is not at liberty to rename Canada’s submissions in this manner.

²⁵ As noted in the Letter, none of the information designated confidential in the *Mesa* hearing videos supports Tennant’s case (Letter, p. 3). Further, the conduct complained of by the Claimant did not violate any obligations in the NAFTA.

Instead, should this arbitration proceed to the document production phase (the specific rules of which are laid out in section 7 of PO 1), the Claimant may request such confidential information from Canada, just as Mesa Power did, at the designated time set out in the Procedural Calendar.²⁶ If Canada produces it (with consent or upon the Tribunal's order), Tennant may then submit it into the record as exhibits to a written submission at the designated time set out in the Procedural Calendar.²⁷ This is the proper procedure to put the information in front of the Tribunal. While the Claimant bases its arguments for admitting the documents on the common tests of "relevance" and "materiality",²⁸ such arguments are only relevant at the stage of document production, not now. The Tribunal will recall that this is not the Claimant's first attempt to circumvent the proper procedures for document production in this arbitration.²⁹ In Procedural Order No. 4, the Tribunal denied Tennant's previous request to do so, as it "would require the Tribunal to depart from the timelines and procedures for document production set out in PO 1."³⁰ Canada again respectfully asks the Tribunal not to depart from the timelines and procedures for document production set out in PO 1, by ensuring the Claimant does not use inadvertently disclosed confidential information.

III. CANADA'S REQUEST FOR REMEDIES AND COSTS

Based on the foregoing, Canada requests that:

- the Claimant be ordered to refrain from using the *Mesa* confidential information in its Reply to this letter; and
- the remedies Canada requested from the Tribunal on pages 3 and 4 of its Letter be awarded.

At an appropriate stage of the arbitration, Canada will seek costs in relation to work undertaken as a result of the Claimant's counsel's inappropriate actions.

Yours very truly,



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²⁶ Document requests must follow the format as laid out in Article 7.2 of PO 1.

²⁷ Canada retains its right to designate such information as confidential pursuant to ¶ 16 of the Confidentiality Order in this arbitration.

²⁸ See Response, ¶¶ 65 and 125.

²⁹ Previously, Tennant sought an Interim Measure for Canada to produce documents on the record in the *Windstream v. Canada* case at a preliminary stage of the arbitration. Claimant's Request for Interim Measures, dated 16 August 2019.

³⁰ Procedural Order No. 4, 27 February 2020, ¶ 59.

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