

Global Affairs Canada
Department of Justice



Affaires mondiales Canada
Ministère de la Justice

CANADA

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VIA EMAIL

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Sir Daniel Bethlehem QC
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Dear Members of the Tribunal:

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

Canada writes regarding Tennant Energy LLC's (the "Claimant" or "Tennant") inappropriate use of information that was designated as confidential in the *Mesa Power Group v. Government of Canada* ("*Mesa*") arbitration, in its Memorial on Jurisdiction, Merits, and Quantum, dated August 7, 2020 (the "Memorial"). In this letter, Canada: (i) provides details on the confidential information and Tennant's misuse of it; and (ii) requests the Tribunal to order the proper remedies for Tennant's misuse of the confidential information.

I. TENNANT INAPPROPRIATELY CITED CONFIDENTIAL INFORMATION FROM THE *MESA* ARBITRATION

In its Memorial, the Claimant relies on the content of certain hearing videos from the *Mesa* arbitration that are available on the website of the Permanent Court of Arbitration ("PCA"). For instance,

Tennant states that it “became first aware of this additional evidence in the summer of 2020”¹ and cites this information as follows:²

The videos of the Mesa Power NAFTA Hearing that were available to the public on the Permanent Court of Arbitration’s Mesa Power Group v Canada website have been submitted into the current hearing record as the following exhibits: **C-107, C-201, C-204, C-205, C-206, C-208 and C-224 to C-243** inclusive.

The videos relied upon by the Claimant contain confidential information that was designated confidential pursuant to the *Mesa* Confidentiality Order. It is not clear to Canada how this information was posted to the PCA’s website; however, upon learning of the publication through the Claimant’s submission, Canada has requested the PCA to immediately remove all *Mesa* hearing videos from its website to ensure that all confidential information is properly redacted before publishing the videos.³

As background, following the *Mesa* hearing, the disputing parties submitted the final redacted transcripts to the PCA. The disputing parties agreed that before publishing the videos, the full hearing videos would be edited by the PCA in accordance with the final redacted transcripts to remove all confidential and restricted access information from the videos. In fact, the disputing parties specifically provided the PCA with instructions on which sections of the videos to black out and which could remain in the designated public versions. To Canada’s knowledge, the PCA followed these instructions in posting the videos. However, upon receiving Tennant’s Memorial, Canada learned that the videos posted on the PCA website do not in fact contain the proper black outs for this confidential information, and instead, confidential testimony and exhibits have been inadvertently disclosed. Such information remains confidential despite this inadvertent disclosure.

Canada has not consented to the use of the information over which it claimed confidentiality in *Mesa* and the Claimant’s use of such information is entirely inappropriate. The *Mesa* confidentiality order makes clear that information designated as confidential in that proceeding is not to be used for any other purpose. Paragraph 8 of that order specifically 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

¹ Claimant’s Memorial, dated 7 August 2020, ¶ 19. John Pennie also cites this information in his witness statement. CWS-1, Witness Statement of John C. Pennie at ¶¶ 99, 102.

² Claimant’s Memorial, footnote 1.

³ **R-027**, E-mail from Government of Canada to Permanent Court of Arbitration, 10 August 2020.

for such purposes to and among [certain participants in the arbitration hearings...].⁴

Counsel for the Claimant in this proceeding (Mr. Appleton and Mr. Mullins) are the same counsel that represented Mesa Power Group in that proceeding, and they continue to be bound by the obligations in the *Mesa* confidentiality order.⁵ Counsel's use of the *Mesa* confidential information in this proceeding is in direct violation of the provisions of the *Mesa* confidentiality order. Counsel for the Claimant has a clear and binding obligation not to permit their client to use this information in the present proceeding. Upon learning that the PCA inadvertently published confidential information from the *Mesa* arbitration, the proper course of action from Mr. Appleton and Mr. Mullins would have been to advise Canada and the PCA immediately so that they could protect the confidential information as required by the *Mesa* confidentiality order, rather than using such information in this arbitration irrespective of their obligations stipulated in the *Mesa* confidentiality order. It is highly irregular and improper for the Claimant's counsel to fail to bring such inadvertent disclosure to Canada's attention, and especially to allow such information to be used against Canada by the Claimant in the current proceeding, in direct contravention of the *Mesa* confidentiality order.

II. THE PROPER REMEDIES FOR THE CLAIMANT'S MISUSE OF CONFIDENTIAL INFORMATION

This Tribunal has the authority to conduct the arbitration in such manner as it considers appropriate.⁶ Although the information contained in the videos in no way explains why the Claimant was prevented from complying with the jurisdictional requirements of the NAFTA, including the limitation period to file a claim, and nor does it support the Claimant's allegations that Canada has breached the NAFTA, Canada is nevertheless compelled to request that the Tribunal remedy the Claimant's misuse of confidential information in the following manner.

First and foremost, Canada requests that the Tribunal refrain from taking cognizance of the content of the videos containing confidential information until the issue of their inadvertent publication by the PCA is resolved.

Secondly, Canada requests that the Tribunal direct the Claimant to refile its Memorial and accompanying documents, with all references to the confidential information removed, by an appropriate date as determined by this Tribunal.

Finally, the procedural schedule must be modified to protect Canada's allocated time to respond to the Claimant's revised Memorial. Canada cannot prepare its responsive submissions to an incorrect

⁴ **RLA-093**, *Mesa Power Group v. Government of Canada* (UNCITRAL) Confidentiality Order, 21 November 2012, ¶ 8 (emphasis added).

⁵ Paragraph 20 of that order states "The obligations created by this Order shall survive the termination of these proceedings."

⁶ Article 15(1) of the UNCITRAL Rules provides as follows: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

and outdated version of the Memorial which contains numerous references to facts and arguments which are based on the inappropriate use of confidential information from the *Mesa* arbitration. Canada therefore requests that the deadline to file its Objection to Jurisdiction, and Request for Bifurcation (should it wish to do so) be extended by the amount of time required by the Claimant to file a corrected version of its Memorial and accompanying documents.

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

Yours very truly,



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cc: Barry Appleton, TennantClaimant@appletonlaw.com (Appleton & Associates)
Ed Mullins, Ben Love (Reed Smith LLP)
José Luis Aragón Cardiel, Christel Tham, Diana Pyrikova (Permanent Court of Arbitration)
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