

PUBLIC DOCUMENT

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES**

TENNANT ENERGY, LLC

Investor

v.

GOVERNMENT OF CANADA

Respondent

INVESTOR'S STATEMENT OF COSTS

JULY 15, 2022

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I. INTRODUCTION

1. Following the Tribunal Secretary's communication of June 24, 2022, the Investor files this Statement of Costs. This submission is made under NAFTA Article 1135(1) and Articles 38 and 40 of the *UNCITRAL Arbitration Rules* concerning the costs that Tennant Energy reasonably incurred during this arbitration.
2. Part Two of this Statement of Costs submission outlines the total of the Investor's costs. The Investor's costs are divided into three categories:
 - a. The Investor's legal costs and disbursements.
 - b. Expert fees, witness fees, and related disbursements.
 - c. Institutional costs, including payments made to the Permanent Court of Arbitration acting as the secretariat of the arbitration and ICSID as the appointing authority.
3. Part Three of this Statement of Costs outlines the costs that should be awarded to the Investor, even if the Investor were not to prevail on any claim, as a result of Canada's conduct both that gave rise to the claim and during this proceeding which caused the Investor specific and additional costs.
4. The costs sought by the Investor are summarized in Part Four and the chart below.

a. SUMMARY OF INVESTOR'S TOTAL EXPENSES

1. Attorney Fees and Disbursements	US\$ 5,097,825.64
2. Expert Witnesses	US\$ 150,848.46
3. Other Disbursements	US\$ 31,245.47
4. Fees Paid for Tribunal and Institutions	US\$ 335,000
Total	US\$ 5,430,768.03

II. INVESTOR'S COSTS

a. THE INVESTOR'S LEGAL COSTS & LAWYERS' DISBURSEMENTS

5. The Investor was represented in the arbitration by counsel from various law firms.
6. The following lawyers and paralegals from Appleton & Associates International Lawyers LP provided legal assistance from 2018 throughout the arbitration to the Investor:
 - a. Barry Appleton
 - b. Sean Stephenson
 - c. Lillian De Pena
 - d. Nabeela Latif
 - e. Abby Cannon
 - f. Mel Schwing
 - g. Nicolle Lafosse
 - h. Aidan Seymour-Butler
 - i. Nathan McCray
 - j. Gabriel Marshall
 - k. Justin Giovannetti
7. Lawyers from the Miami office of Reed Smith LLP provided legal assistance to the Investor and appeared as co-counsel at the hearing. These lawyers include:
 - a. Edward Mullins
 - b. Cristina Cardenas
 - c. Sujey Herrera
 - d. Anabel Blanco
 - e. Maria A. Peñuela
 - f. Daniel Avila
 - g. Jose Astigarraga
 - h. David Cohen
 - i. Daniel Sox
 - j. Ben Love
8. Lawyers from Reed Smith were supported by Cynthia Benavides, Darlene Bayne, Sabrina Busgith, Erik Bolte, Kevin Hernandez, Sofia Bustillos, Laura Helmick, John Hendricks, Christian Leuthner, Rebecca Stanley, Thenya Taiyanides, Curtis Waldo, and Holly Nomura.

9. In total, lawyers and legal counsel support staff billed to the Investor a total amount of US \$5,097,825.64 not including general disbursements.
10. Other general disbursements such as photocopies, translation services, couriers, long-distance charges, faxes, and travel and accommodation expenses for hearings and meetings including travel and accommodation costs for witnesses and party representatives come to \$ 31,245.47.

b. EXPERT AND WITNESS FEES AND DISBURSEMENTS

11. The Investor retained experts to prepare expert witness statements for submission to the Tribunal and attended the hearing as expert witnesses. The Investor also incurred costs in preparing and obtaining the statements of certain fact witnesses. These external experts included:
 - a. Richard Taylor of Deloitte LLP \$ 111,423.46
 - b. Justice Margaret Grignon (Ret) \$ 39,425
12. The costs and disbursements concerning these experts and witnesses totaled US \$150,848.46.

c. INVESTOR'S PAYMENTS TO THE APPOINTING AUTHORITY AND TO THE PERMANENT COURT OF ARBITRATION

13. The Investor was required to pay US\$10,000 to the ICSID Secretary General, the NAFTA-designated Appointing Authority, in June 2018 to enable the appointment of the chair. This payment was due to Canada's failure to provide timely appointments to enable the constitution of the Tribunal.
14. The Investor made the following deposits of fees to the Tribunal:
 - a. Initial fee deposit of \$150,000 in January 2019.
 - b. Fee deposit of \$150,000 on March 31, 2020; and
 - c. Fee deposit of \$125,000 in February 2022.

15. The Investor also paid a total of US\$ 325,000 to the Permanent Court of Arbitration which is acting as the secretariat of this arbitration. These fees represented Tennant Energy's share of the administrative arbitration costs.
16. The total amounts paid for the Arbitration Tribunal and international arbitration institutions are US\$ 335,000.

d. REASONS INVESTOR SHOULD BE AWARDED COSTS

17. NAFTA Article 1135(1) states that "A tribunal may also award costs in accordance with the applicable arbitration rules."
18. Articles 38 and 40 of the UNCITRAL Arbitration Rules ("the Rules") govern the awarding of costs in this proceeding. Article 38 of the Rules gives the Tribunal authority to fix the costs of arbitration, while Article 40 sets out the presumptions and tests to be applied by the Tribunal in awarding costs.
19. Articles 38 and 40 of the Rules distinguish between representation costs and arbitration costs. Representation costs include legal costs and associated expert fees, and management costs. Arbitration costs relate to the cost of the arbitration or institutional fees paid to the Tribunal, the secretariat, and the appointing authority.
20. UNCITRAL Article 40 sets out two separate tests for awarding costs. Paragraph 1 of Article 40 creates a rebuttable presumption that arbitration costs will be paid by the unsuccessful party. Specifically, Article 40(1) states that "the costs of arbitration shall in principle be borne by the unsuccessful party."
21. The primary circumstance to be considered is the degree of success a party has achieved in the arbitration. This will not be known by either party at the date of this cost submission. However, this should be taken into account by the Tribunal in awarding costs.

22. The second test is set out in paragraph 2 of Article 40 of the Rules and gives the Tribunal discretion to apportion representation costs “taking into account the circumstances of the case.”

1. Arbitration Costs

a. The Investor Should be Awarded All Arbitration Costs

23. If Tennant Energy is successful in any of its claims, then Canada should bear the arbitration costs of this arbitration.¹

2. Representation Costs

a. The Investor Should be Awarded Representation Costs

24. If Tennant Energy is successful in any of its claims, then the Tribunal also should order Canada to pay Tennant Energy's representation costs in full. In this case, costs should follow the cause. As outlined in Article 40(2), representation costs are left mainly to the Tribunal's discretion based on “the circumstances of the case.”
25. This case requires Canada to pay for Tennant Energy's representation costs. Given the claim's complexity and novelty, it is reasonable that the Tribunal order Canada to pay the Investor's representation costs.
26. Moreover, representation costs have been awarded by other NAFTA tribunals. For example, representation costs were awarded by the *SD. Myers* Tribunal.²
27. Tennant Energy's claim was made in good faith, and it was a reasonable action in light of the circumstances of Canada's unfair and non-transparent conduct.

¹ As stated in UNCITRAL Rule 40(1), this is the primary criteria that should be taken into account when awarding arbitration costs and should be followed if that is the case.

² *S.D. Myers v. Government of Canada*, Final Award (concerning the apportionment of the costs between the Disputing Parties), October 5, 1999, paras. 48-49 (CLA-336).

28. Article 40(2) of the UNCITRAL Arbitration Rules says that the Tribunal should exercise its discretion to apportion representation costs “taking into account the circumstances of the case.”
29. In this regard, the Tribunal must consider the impact that Canada and Ontario’s material misrepresentations had in this claim. We note that Canada and Ontario knowingly made statements that were demonstrated to be false. The witness testimony (under oath) from the *Mesa Power* NAFTA hearing conclusively confirmed that Canada and Ontario denied any misadministration in the FIT Program when Ontario and Canada knew that these public statements, targeted FIT Proponents, were false. Those statements were intended to mislead investors such as Tennant Energy. And as shown, Tennant Energy was one of the primary entities that directly suffered due to Canada and Ontario’s actions in reconfiguring its award of the valuable FIT contracts solely to benefit a politically connected and local competitor.
30. Canada then sought to rely on its own misconduct and the misconduct of Ontario.³ Claiming that the Investor was too late to commence its claim, despite Canada’s contribution to the delay through misinformation and deceitful practices.
31. Uncontroverted evidence confirmed that Ontario always was aware that the admissions made by officials at the *Mesa Power* NAFTA Hearing (which were suppressed from the public but known to Canada) admitted government measures that were inconsistent with Canada’s NAFTA Treaty obligations owed to FIT Program investors. Despite this knowledge, Canada and Ontario engaged in flagrant false and misleading statements, disregarding Canada’s international law obligations under the treaty.

³ Canada has full responsibility under international law rules and Article 105 of the NAFTA for the acts taken by the Government of Ontario and for its measures.

32. Canada had an obligation to carry out its NAFTA treaty obligations in good faith under Article 15 of the *Vienna Convention of the Law of Treaties*. Ontario did not carry out these obligations in good faith as it knowingly violated the NAFTA. Canada did not establish that it had taken any actions to address Ontario's lack of compliance with the NAFTA, despite, for example, Canada's evident knowledge of the existence and repetition of Ontario's false and misleading statements to shield Canada from NAFTA disputes.
33. The amounts in dispute are based on the terms of a twenty-year fixed rate energy contract. The amounts in dispute are not inflated and are based on the application of the contract. Thus, the amount of the Investor's costs are proportional to the amounts in dispute. As noted, assuming the breach is proven, causation of damages was a certainty.
34. And, if the Investor is not successful in any of its arbitration claims for whatever reason, the Investor still should be awarded certain specific and identifiable costs incurred due to Canada's vexatious arguments, repetitive and convoluted pleadings, and conduct throughout these proceedings. The Tribunal should grant the Investor costs in any event for those specific instances in which Canada's conduct and argumentation caused the Investor to incur unnecessary additional costs. These claims are made under Article 40(2) of the UNCITRAL Arbitration Rules.
35. Canada's conduct consistently has prolonged the proceedings and has required additional legal work. Such actions caused additional representation costs for the Investor, all of which were borne directly from this arbitration.
36. Canada repeatedly challenged the Tribunal's findings on confidentiality – preposterously arguing, again and again, that information that had been made publicly available by Canada on its website for more than five years was confidential and thus should be suppressed from the public knowledge by this Tribunal—the very secretive behavior that caused the Treaty violation in the first instance. Canada took no responsibility for its own

conduct and brought endless repetitive motions causing needless cost escalations to Tennant Energy.

37. The Investor notes that Canada engaged in vexatious motions calculated to cause financial hardship to the Investor. As a G-7-member government, Canada has a virtually unlimited budget and has engaged in wasteful spending, including excessive foreign travel and accommodations for Canada's exceedingly large delegation. For example, at the in-person procedural hearings, Canada had excessive numbers of participants who did not speak as counsel or appear as a party representative. The Investor has had small counsel teams to keep this arbitration efficient and economical.
38. Canada also brought needless, untimely, and repeated motions for security for costs, which were repeatedly dismissed. These repetitive and convoluted pleadings regarding security for costs or claims over confidentiality for information in the public domain needlessly greatly but needlessly added to Tennant Energy's representation costs. Canada even continued such efforts even after the Tribunal denied the request after a live two-day hearing.
39. This Tribunal must consider Canada's design to delay the arbitration process and make access to relevant and necessary evidence more difficult. Canada refused to take steps to make the arbitration process more efficient. Instead, Canada engaged in conduct that only exasperated the proceedings.
40. In sum, the Investor requests that the Tribunal order Canada to pay all reasonable representation costs following the principle that "costs follow the award." This includes ordering Canada to bear the full costs arising from the costs involved in addressing and responding to the large number of confidentiality designations Canada raised.

Throughout the Investor's pleadings and at the arbitration hearing, it has become clear that but for Ontario's internationally wrongful actions under NAFTA, the Investor would have received FIT contracts, and no legal action against Canada would have been taken.

Therefore, Canada should be ordered to pay the Investor's legal costs if the Investor is successful in its claim.

e. SUMMARY OF INVESTOR'S TOTAL EXPENSES

1. Attorney Fees and Disbursements	US\$ 5,097,825.64
2. Expert Witnesses	US\$ 150,848.46
3. Other Disbursements	US\$ 31,245.47
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Total	US\$ 5,430,768.03

III. THE INVESTOR SHOULD NOT BE RESPONSIBLE FOR CANADA'S COSTS

41. If the Investor is not successful in this arbitration for whatever reason, the Investor should not bear Canada's arbitration or representation costs for the reasons set forth below.

a. The Investor Should Not be Responsible for Canada's Arbitration Costs

42. In the *Azinian v. Mexico* NAFTA arbitration, the Investor's claim was dismissed for lack of merit. However, the Tribunal ordered that each party pay its arbitration and representation costs. In doing so, the Tribunal focused on three factors:

- i. The novelty of the case,
- ii. The Investor's professional conduct throughout the proceedings, and
- iii. That the Respondent's conduct concerning misleading and deceitful public statements intended to reduce its exposure to proceedings.

The Investor contends that the Tribunal should consider these factors and when doing so, it should find that a cost award in Canada's favor is not merited.

43. In the present case, several aspects of the claim were novel and of the first instance, including:

- a. The issues related to applying data privacy regulations to non-institutional investment treaty arbitration.
 - b. The issues related to Third Party Funding Disclosure.
 - c. Issues related to the confidentiality and admissibility of evidence that had been disclosed to the public on the internet.
 - d. Complicated issues involving the application of oral trust in NAFTA claims and assignment law under California requiring expert testimony; and
 - e. The issues related to and the treaty implications of the discovery of Canada and Ontario's knowledge that the public statements provided to unsuccessful FIT Proponents were materially false and the subsequent reliance on a web of untruths intended to prevent unsuccessful FIT Proponents from exercising their legal rights against the government's wrongful administration of the FIT Program.
44. Moreover, there was no unreasonable or wasteful conduct on the Investor's behalf. All steps taken by the Investor were steps taken to resolve the present dispute efficiently and effectively.
45. The Tribunal also must consider the material misrepresentations knowingly made by Canada and Ontario denying any maladministration in the FIT Program when the record demonstrates that Ontario and Canada knew at the time that these public statements targeting FIT Proponents were false and intended to mislead. Canada then attempted to rely on its misconduct to claim that the Investor was too late to commence a claim, despite Canada's contribution to the delay through deceitful practices.
46. It is also relevant to consider that the Investor's acknowledged financial limitations arose directly because of Ontario and Canada's conduct at issue in this arbitration, including the false statements repeatedly made by Canada and Ontario. Tennant Energy and its investors were victims of such unfair conduct. The imposition of financial liability upon a

victim in such circumstances would not further the objectives of international justice. Such an action in these circumstances could be harsh and unconscionable.

47. Further, the Investor has outlined various instances of Canada's conduct undeserving of any award of costs in the representation costs section of Part 2 above.
48. Based on these factors and demonstrated instances of Canada's conduct throughout this arbitration, the Investor submits that it should not be responsible for Canada's arbitration costs.

*b. The Investor Should Not be Responsible for Canada's
Representation Costs*

49. Further, NAFTA jurisprudence is clear that while the Tribunal retains discretion in awarding costs, key considerations, including the complexity and novelty of a case and the parties' conduct throughout the case, may be determining factors in cost awards. These factors are to be considered alongside the overall success of a disputing party.
50. The factors stated in the *Azinian v. Mexico* case apply equally to representation costs.⁴ However, such factors are also supported by numerous NAFTA awards.
51. In *GAMI Investments v. Mexico*, the Tribunal made no award of costs and ordered the disputing parties to bear the fees and expenses of the Tribunal equally, although the claim was dismissed. Here, one of the critical facts the Tribunal considered was that GAMI's grievance was serious and raised questions about the Respondent's regulatory acts and omissions.⁵

⁴ *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States*, ICSID Case No. ARB (AF)/97/2, Award, November 1, 1999, at para 125-126 (CLA-135)

⁵ *GAMI Investments Inc v. Mexico* (UNCITRAL) at para 135 (Final Award) (Nov. 15, 2004) (CLA-137)

52. In *Loewen*, likewise, though the Investor's claim was dismissed, the Tribunal ordered each party to bear their costs and pay equally for tribunal costs. That Tribunal noted the problematic and novel questions "of far reaching importance for each party."⁶
53. Similarly, in *UPS v. Canada*, the Investor's claim was dismissed, and the Tribunal ordered that the parties bear their costs for the arbitration.⁷ This Tribunal gave no further reasoning for its decision.
54. The *Eiser Infrastructure v Spain* Tribunal ordered that the parties bear their own costs, stating:

The Tribunal is mindful that some ICSID tribunals have adopted the practice of awarding to the prevailing party some or all of its costs. However, in the circumstances of this case, the Tribunal determines that it is most appropriate for each Party to bear its own costs. The case involved a number of challenging procedural and legal issues, which both Parties addressed with professional and effective advocacy. While Claimants have in large measure prevailed on jurisdiction and have established a breach of the ECT's fair and equitable treatment standard, the Tribunal has not accepted all elements of their claims. Accordingly, the Tribunal concludes that it is fair overall for each Party to bear its own legal and other expenses and its respective equal share of the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre.⁸

55. There are other cases where Tribunals considering this question have arrived at the same conclusion. For example, *Accession Mezzanine Capital. v. Hungary*, where the Tribunal came to this conclusion stating, "there was no possibility for the Claimants to obtain justice in Hungary and it was natural for them to look to an international tribunal."⁹

⁶ *The Loewen Group Inc. v. United States*, ICSID (W. Bank) ARB(AF)/98/3 at para 240-241 (Award) (June 26, 2003) (CLA-138)

⁷ *UPS v. Canada*, (UNCITRAL) at para 88 (Award on the Merits) (May 24, 2007) (CLA-282).

⁸ *Eiser Infrastructure Ltd. & Energia Solar v. Spain*, (ICSID) Award (4 May 2017) at ¶¶ 484-485 (CLA-337)

⁹ *Accession Mezzanine Capital LP and Danubius Kereskedohaz Vagyonkezele Zrt. v. Hungary*, ICSID Case No. ARB/12/3, Award of 17 April 2015, at paras. 200-202 (CLA-339) Also *Gambrinius Corporation v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/31, Award of 15 June 2015, at paras. 284-285 (CLA-338).

Another Tribunal followed the same approach in *Postova Banka A.S. and Istrokapital S.E. v. The Hellenic Republic*.¹⁰ At paragraph 377, the Tribunal stated:

Although the Tribunal has concluded that it lacks jurisdiction *ratione materiae* and ruled in favor of Respondent, the jurisdictional issue was not clear-cut and involved a complex factual and legal background. Each side presented valid arguments in support of its respective case and acted fairly and professionally.¹¹

56. As outlined in the arbitration costs section, in the present case, the Investor presented a serious case, raising issues of first instance and in the face of Canada's failure to comply with the terms of the FIT Program with an absence of fairness and transparency. This evidence was suppressed from public knowledge by the Respondent. Indeed, the Respondent lied about the evidence to mislead potential litigants like the Investor. Later evidence also demonstrated that Canada knowingly acted in non-conformity with its NAFTA obligations when it designed the FIT Program. This was a course of conduct by the Respondent relevant to the assessment of costs. And, if Canada were to prevail, it would not have done so on the merits, and thus its actions would be far from vindicated.
57. Furthermore, the Investor's claim was conducted thoughtfully, seriously, efficiently, and professionally. All steps taken by the Investor were taken to resolve the present dispute efficiently and effectively. Consequently, the Tribunal should consider past NAFTA jurisprudence on this matter and order that Canada is responsible for its representation costs should the Tribunal find the Investor not successful on the merits of its claim.

¹⁰ *Postova Banka A.S. and Istrokapital S.E. v. The Hellenic Republic*, ICSID, (9 April 2015) at ¶¶ 377-378 (CLA-340).

¹¹ *Postova Banka A.S. and Istrokapital S.E. v. The Hellenic Republic* at ¶377(CLA-340).

IV. TOTAL COSTS SOUGHT BY THE INVESTOR

58. The Investor respectfully requests that the Tribunal grant an award under NAFTA Article 1135(1) and Articles 38 and 40 of the *UNCITRAL Arbitration Rules*, ordering that the Government of Canada bear the costs of this arbitration, as well as the Investor's costs for legal representation and assistance, for US\$ 5,430,768.03.
59. Further, the Investor submits that it should not be liable for any of Canada's arbitration or representative costs.
60. If the Investor is not successful on any of its claims in this arbitration, it requests an award for 50% of the costs (US\$ 2,781,000) based on Canada's vexatious argumentation and egregious conduct, which caused the Investor specific, identifiable, and unnecessary costs.
61. The Investor reserves the right to seek additional costs arising after filing this cost submission.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON BEHALF OF THE INVESTOR on July 15, 2022

Appleton & Associates International Lawyers LP
Reed Smith LLP

Counsel for the Investor, Tennant Energy LLC