

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

PCA CASE NO 2018-54

BETWEEN

Tennant Energy LLC

INVESTOR

AND

Government of Canada

RESPONDENT

Tennant Energy's Post-Hearing Brief

17 DECEMBER 2021

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Investor's Jurisdictional Post-Hearing Brief

- 1) At the close of the jurisdictional hearing, the Tribunal invited the disputing parties to comment on issues raised in the Jurisdictional Phase. This brief contains the post-hearing submission of Tennant Energy.
- 2) This NAFTA Claim is about the unfair and wrongful administration of the FIT Program. This unfair and wrongful administration was hidden from the public. Canada did this through deceptive and misleading statements that Ontario and Canada made to prevent potential claimants from understanding their legal rights. These governments engaged in a systemic disinformation campaign that disseminated false information to FIT Proponents and the general public. Ontario and Canada knowingly shared false information about the administration of the Ontario FIT Program at a time when it knew, or ought to have known, that their statements were false.
- 3) Canada conveniently failed to address this issue. Canada's entire jurisdictional challenge is wilfully blind to the admissions of its own witnesses during cross-examination at the *Mesa Power* Hearing. It ignores the facts of what took place through artifice. From the very outset of this Claim, the Investor identified Canada's failure to disclose the truth of what occurred as a central event giving rise to this NAFTA arbitration.
- 4) There is no way to conceive of this as an instantaneous breach. Canada continued its disinformation campaign despite the truth finally becoming known from the private sessions of the *Mesa Power* NAFTA Hearings. The eventual discovery of the truth marks the time when the breach was completed; this was the only time FIT Proponents could be in a position to be able to appreciate their own legal position in relation to other Applicants fairly and meaningfully so as to allow them to consider bringing a NAFTA claim.
- 5) The absence of good faith on the part of the government erodes public trust in governments and institutions. A government's disinformation hinders investors from meaningfully exercising their investment treaty rights.
- 6) Canada is wilfully blind to the admissions of its own witnesses during cross-examination at the *Mesa Power* Hearing. Despite the truth finally becoming known (in private hearing sessions),

Canada continued its disinformation campaign.

- 7) In this jurisdictional phase, Canada attempts to profit from its own wrongfulness. Canada and Ontario caused injustice to FIT Proponents like Skyway 127 through disinformation and repeated deception. Canada continues with this wrongful conduct yet wishes to rely upon its own underlying wrongfulness to "start the time limitation clock" while Canada and Ontario took steps to actively prevent Skyway 127 and other FIT proponents from knowing about the true nature of the wrongfulness. But, it is a general principle of international law that no one may profit from their own wrongdoing.¹
- 8) Because of the nature of the specific circumstances in this Claim, there is no way to conceive of the harm underlying this NAFTA Claim as an instantaneous breach. Canada's active and ongoing engagement in deception and misinformation regarding the breach is both a continuous and a composite act.²
- 9) Within this Post-Hearing Brief, the Investor will address the following issues:
 - A. That the timing of the breach is affected by Canada's deceptive acts. These actions resulted in a tolling of the time limit clock;
 - B. The breach of the NAFTA affecting Skyway 127 first arose in 2015; and
 - C. That Tennant Energy LLC was an investor with an investment in Skway 127 Wind Energy. Tennant Energy was the successor in interest to the shares held by John H. Tennant either by way of transfer (assignment) of the Claim or because of the operation of a valid trust due to the operation of California law which operated from the day he received the shares on April 19, 2009 until the days in which the shares were transferred to Tennant Energy on January 15, 2015. Tennant Energy was an Investor with an investment in Canada before the breach under either approach,
- 10) Finally, the Investor deals briefly with two responsive issues: namely, the issue of transparency and the Interpretative consideration that this Tribunal should pay to suggestions of Subsequent Practice by the NAFTA Parties.

¹ The general international law principle that no one may profit from their own wrongdoing (the *Nullus Commodum* Principle) was set out in Investor's Opening Slide 44 referring to Bin Cheng, *General Principles of International Law (CLA-108)* Day 1 Transcript at page 156, lines 18 – 24.

² As noted in the closing, Canada's reliance on its deceptive misinformation practices also constitutes a complex breach. Transcript at Day 5 at page 874, lines 19-20.

1. TIMING

- 11) During the hearing, Tennant Energy noted that the measure in issue was based on the false and deceptive "plausible explanations" Ontario and Canada raised about the FIT Program results in the Bruce Region.
- 12) In this manner, there are two approaches that the Tribunal could take to consider the measure

A. TOLLING OF THE LIMITATION PERIOD

- 13) Canada engaged in misinformation about the administration of the FIT Program by producing false alternative plausible explanations. If Canada and Ontario had told the truth, the time limit clock would run normally. However, there are consequences arising from Canada's deception.
- 14) For the purposes of this jurisdictional inquiry, the impact of Canada's deception is that the time limit clock could no longer run because of the plausible false alternative explanations Ontario and Canada prominently disseminated.
- 15) Applying this approach means that the Tribunal still would take into account the FIT Contract awards of July 4, 2011 (a time when Skyway 127 had not yet suffered the loss of the FIT Contract) and the day upon which Skyway 127's place on the priority waitlist expired with the cancellation of the FIT Program on June 12, 2013.³ On account of Ontario and Canada's plausible but false statements, the Investor could not have formed the requisite knowledge of breach until the Investor or its investment discovered the actual truth. In this circumstance, we need not consider the issue of constructive knowledge as the Investor never could know because the information was embargoed – and never was available to the public until after the NAFTA hearing in *Mesa Power* – years later.
- 16) The plausible but false justifications were prominently available to the public. There is no need to seek out additional sources for constructive knowledge in such circumstances when the regulator (the Ontario Energy Minister) and the federal government of Canada have spoken authoritatively on the subject.
- 17) The only relevant date is the date of actual knowledge – which arises on the actual date when Tennant Energy became aware that Ontario was not telling the truth about the FIT Program.

³ Direction from Minister of Energy Bob Chiarelli to Colin Anderson, OPA, 12 June 2013, (C-152).

According to John C. Pennie, that date was the discovery of the evidence of Energy Assistant Deputy Minister Susan Lo, which he saw for the first time on August 15, 2015.⁴

- 18) There was no way that Skyway 127 ever could have known this information before Ontario disclosed the truth, ending Canada and Ontario's lies. The first of such admissions occurred in a confidential session on October 28, 2014 (so that is within the 3-year Art 1116(2)-time limit), and its discovery occurred in August 2015 by John C. Pennie (also within the 3-year time limit)
- 19) There are press reports in the arbitration record confirming that Mesa Power made allegations in a Notice of Intent. Skyway 127 would not know of the technical legal document at that time (the Mesa Notice of Intent), but there were prominent media reports – around July 14, 2011, in the *Globe & Mail* newspaper (**R-059**). John C. Pennie testified that he was aware of that story.⁵ That story reported on Mesa Power's complaints of not being treated fairly. It also contained an unequivocal denial from Ontario's Energy Minister denying Mesa Power's allegation and saying that all FIT Applicants were treated fairly. Ontario never has varied from that categorical denial to this day.
- 20) Canada issued an "observations" statement in the *Mesa Power* NAFTA arbitration that was posted on the internet around May 8, 2013 (**R-081**), claiming that Canada did not violate any NAFTA obligation and suggesting that the motivation behind Mesa Power's NAFTA claim was simply disappointment – and that disappointment is not sufficient to ground a NAFTA claim. This document confirmed the Ontario's earlier statement. While it was not prominently reported, the statement reconfirmed the same denials and publicly undermined the credibility of Mesa Power's claims.
- 21) At this hearing, John C. Pennie testified that he made repeated contacts to obtain information from Ontario Power Authority officials after the *Mesa Power* allegations became public. Those officials confirmed that the FIT Program rules were fairly and consistently followed.⁶ These statements were untrue.
- 22) On July 4, 2014, essential materials from the *Mesa Power* arbitration, such as the Mesa Power Investor Memorial and Canada's Counter-Memorial, became available to the public. This date was

⁴ Witness Statement of John C. Pennie at ¶¶ 70 and 94. (**CWS-1**)

⁵ J.C. Pennie Testimony Day 2 Transcript at page 275, lines 12 – 15 and page 310 at line 14.

⁶ J.C. Pennie Testimony, Day 2 Transcript at page 282, lines 8 - page 284, line 3.

confirmed in a letter from the PCA's Mr. Llamazon and filed as Exhibit **C-130**.⁷ This information was not widely reported in the media. But if the Tribunal was to give any weight to this event, Canada's *Mesa Power* Counter Memorial (**C-177**) continued to maintain the earlier position – that there was no differential treatment between any FIT Applicant denied all of Mesa Power's claims.

- 23) The legal significance of the July 4, 2014 publication is that it is the first (of many) of Canada's categorical denials of Mesa Power's allegations that were made within the 3-year time limit set out by NAFTA Article 1116(2). Canada's pleading reconfirmed the same denials of Mesa Power's allegations and publicly undermined the credibility of Mesa Power's claims. Again, Canada never has varied from that categorical denial to this day.
- 24) Witnesses Canada put forward at the *Mesa Power* NAFTA hearing included senior officials at the Ministry of Energy and officials operating the FIT Program. All officials confirmed Canada's position regarding categorical denials of unfair or differential treatment between FIT applicants in their written testimony.
- 25) The *Mesa Power* NAFTA Hearing took place October 25 – 30, 2014 (within the 3-year Article 1116-time limit). There was no real-time web access to view the *Mesa Power* NAFTA hearing. Large parts of the hearing were public to persons who appeared in person, who were pre-registered and could attend in a separate viewing room. As in the current NAFTA hearing, testimony occurring in the confidential session was not available to the public.
- 26) During that witness testimony, the prior sworn witness testimony put forward by Canada's witnesses was significantly impeached. As in most impeachments, Canada's witnesses asserted statements that appeared factual but contained an untruth. Then, the cross-examining lawyer skilfully tested the credibility of the statement – and the witnesses admitted under oath to matters that contradicted the earlier untruthful statements.
- 27) In addition to untruthful statements exposed at the *Mesa Power* Hearing, new information that was previously unknown to FIT Applicants was discovered at the *Mesa Power* Hearing. This previously

⁷ June 4, 2014 Email from Aloysius Llamzon, Legal Counsel, PCA to Jennifer Montfort, Appleton & Associates regarding publication of Investor's Memorial (Public Version), Expert Valuation Report and Witness Statement of Cole Robertson by the PCA (**C-130**). This letter was addressed in the Investor's opening and the Closing Statement. Also see Investor's Closing Appleton Presentation Slide 31.

undiscovered information related to the "Breakfast Club" conspiracy; the confirmation that Ontario officials knew that some FIT Applicants were being treated better than others; and the fact that NextEra had meetings with [REDACTED], and other senior government officials around the time that Ontario decided to modify its FIT Program and permit a significant rule change on the eve of making Contract awards.

28) The Investor also reminds the Tribunal that Canada raised during the current jurisdiction hearing the witness statement report filed in the *Mesa Power* claim from investigative reporter Peter Wolchak (C-203). The investigative journalist reviewed all the available public information and thoroughly reviewed all public media sources for his witness statement. He states in his witness report that its purpose was "To summarize and contextualize media reporting on the politics of Ontario's energy policy in relation to renewable and clean energy." Mr. Wolchak, a highly experienced investigative reporter, did not locate any evidence of the existence of the "Breakfast Club" conspiracy, the "Breakfast Club" conspiracy's role regarding the treatment of International Power Canada, or the existence of the meeting between the [REDACTED] and other high-level Ontario Energy officials with a senior corporate officer of NextEra just before a significant last-minute change in the FIT Program resulting in a very significant reallocation in the award of FIT Contracts in his report. As noted by the Investor in the closing, if a professional investigative journalist could not discover the evidence of Ontario's covert actions, how could an ordinary business rely on the fair and proper administration of a public set of rules governing awarding of regulatory transmission and public electricity contracts?⁸

29) Some hearing testimony was first made public on April 30, 2015 with the publication of the hearing transcript.⁹ But, testimony in the confidential sessions was not released. The Mesa Power Investor's Post Hearing Briefs were released in 2015.¹⁰

⁸ Transcript Day 5 page 862 lines 3 – 12 noting Mr. Wolchak was a professional investigative journalist. Now, in this context, in the materials that he filed, an extensive report of what was available in the media, this professional investigative journalist could not find any evidence of the Government conspiracy known as the "Breakfast Club" or the effect of the "Breakfast Club" for International Power of Canada. That is the mother's milk that an investigative journalists live for. If a professional could not find this, searching and scouring on the public record, how could the general public?

⁹ Email from PCA confirming publication of public version of Mesa Power transcripts – April 30, 2015 (C-112)

¹⁰ Canada presented a January 9, 2015 letter (C-255) from Gabrielle Kaufmann-Kohler informing the PCA that it should post the Post Hearing Briefs but there is no confirmation letter from the PCA about the date of public upload. We do know from the testimony of John C. Pennie that he first saw the footnotes and other content of the Mesa Power Post Hearing Brief that contained the necessary admissions on August 15, 2015. (J.C. Pennie Witness Statement (CWS-1) at ¶¶ 70 and 94. (CWS-1).

- 30) As this Tribunal is aware, the *Mesa Power* Post-Hearing Briefs contained information that expanded on what was available to the public in the transcripts. This included information about the existence of International Power Canada. Other information, such as the identity of the senior official who met with NextEra ██████████ or the fact that Ontario had lied about making all electricity transmission available to FIT proponents, became known to Tennant Energy in 2020 – in the manner set out in Mr. Pennie's Witness Statement and the witness statements submitted by Justin Giovannetti and Parthenya Taiyanides.¹¹
- 31) Tennant Energy relied on the Ontario Minister of Energy in 2011, right after the FIT Contracts were issued. The Minister said nothing was wrong with the administration of the program; everything in the FIT Program was in order. Skyway 127 also received a letter that had Skywat 127 listed at the top of the FIT waitlist.¹² Skyway 127 knew that Ontario would make all transmission available to the FIT Program, so it simply thought that this was another delay for its project.
- 32) Tennant Energy also relied on its own calls to officials at the OPA as a further due diligence step.¹³ The OPA officials said that everything was in order.
- 33) The consistent denials of unfairness and the promotion of alternative theories of causation exonerating Ontario of blame were prominent. During his testimony, John C. Pennie confirmed that Skyway 127 relied on these statements.¹⁴
- 34) Canada may not rely on a time limitation in these circumstances where active and ongoing deception from the government is intended to deter the pursuit of legal remedies. The Investor had no actual knowledge of the breach considering Ontario's (and Canada's) false but plausible explanations. Due to Ontario and Canada's widespread and continuous deceptive practices, there could not be constructive notice.
- 35) Thus, the time must be tolled during this earlier period – only to resume once the Investor knew of the breach.

¹¹ The discovery of more information arising from reviewing unredacted *Mesa Power* Hearing videos on the PCA website was detailed in the following witness statements: J.C. Pennie (CWS-1), Witness Statement of Justin Giovannetti (CWS-4) and Witness Statement of Parthenya Taiyanides (CWS-5)

¹² July 4, 2011 Letter from Joanne Butler, VP, Ontario Power Authority to J.C. Pennie (C- 149)

¹³ Testimony of J.C. Pennie - Transcript – Day 2 at page 275 lines 12 – 25 and page 290, lines 1-7.

¹⁴ Testimony of J.C. Pennie - Transcript – Day 2 at page 275 lines 12 – 25 and page 290, lines 1-7.

B. TENNANT ENERGY'S ALTERNATIVE BREACH

- 36) Tennant Energy explained that the measure at issue in this Claim was the breach of NAFTA Article 1105 arising from the false statements made by the government with the actual knowledge of such breaches constituting the date of the breach. The Investor noted the impact of discovery in the closing and is discussed by the International Law Commission in its own commentary. It was raised in the closing and in the closing slides. According to Tennant Energy, in the closing, the Tribunal should consider the breach a non-instantaneous breach. Because of the facts, it makes no difference if this is considered a continuous breach, a composite breach, or even an obscure complex breach.
- 37) The impugned act is not a single instantaneous act but a continuous act.
- 38) Prof. Crawford's writings assist in understanding the time when a continuous or composite act ends. In **CLA-199** at p 60(5), Prof. Crawford states:
- (5) Moreover, the distinction between completed and continuing acts is a relative one. A continuing wrongful act itself can cease: thus a hostage can be released, or the body of a disappeared person returned to the next of kin.
- 39) As the Investor noted on Closing Slide – Deck B - Slide 23:
- In essence, a continuing wrongful act is one which has been commenced but has not been completed at the relevant time. Where a continuing wrongful act has ceased, for example by the release of hostages or the withdrawal of forces from territory unlawfully occupied, the act is considered for the future as no longer having a continuing character, even though certain effects of the act may continue. In this respect, it is covered by paragraph 1 of article 14.¹⁵
- 40) Just like the situation of a "disappeared person," the time of the breach occurs upon discovery of the truth, and not upon the killing (which constitutes on its own a separate internationally wrongful act).
- 41) Canada's conduct thus constitutes at the same time a continuous act, a composite act, and a complex act. It is not an instantaneous act.
- 42) The acts themselves have continued in time. The primary obligations alleged to be breached are the obligations in NAFTA Article 1105, 1102, and 1103. They have been pled as being violated in the

¹⁵ James Crawford, *The International Law Commission's Articles on State Responsibility*, (Cambridge University Press, 2002), (**CLA-199**) at page 60(5).

Tennant Energy Notice of Arbitration.¹⁶

- 43) In this way, the Tribunal should follow the approach identified by the International Law Commission in cases such as *Lovelace v Canada*, *Loizidou v Turkey*, *de Becker*, and *Papamichaelopoulos v Greece*.¹⁷
- 44) The European Court of Human Rights found in *Loizidou v Turkey* and *Papamichaelopoulos v Greece*¹⁸ that continuous acts could constitute a breach.
- a) In the *Loizidou* case, the European Court of Human Rights had to consider the temporal impact of a denial of access to title of a property in Northern Cyprus that arose in 1974, sixteen years before Turkey accepted the Court's jurisdiction. The ILC Commentary notes that "the conduct of the Turkish Republic and Turkish troops in denying the applicant access to her property continued after Turkey accepted the European Court of Human Rights' jurisdiction, and constituted a breach of article 1 of the Protocol to the European Convention on Human Rights after that time."¹⁹
- b) In *Papamichaelopoulos v Greece*,²⁰ the ECHR held a seizure of property not involving formal expropriation occurred eight years before Greece recognized the Court's competence was a continuing breach of the right to peaceful enjoyment of property under article 1 of the Protocol to the European Convention on Human Rights, which continued after the Protocol had come into force; it accordingly upheld its jurisdiction over the Claim.

¹⁶ The references to these cases referenced by James Crawford, *The International Law Commission's Articles on State Responsibility*, (Cambridge University Press, 2002), Closing Slides – Deck B - Slide 23;

¹⁷ These cases are all discussed by the International Law Commission Commentary on the Articles of State Responsibility for Internationally Wrongful Acts, (CLA-185) between pages 250 to 261 – These cases were noted in the Investor's Closing Slide Deck B- at slide 24. The ILC Commentary (CLA-185) notes in footnote 236 that "The issue has often been raised before the organs of the European Convention on Human Rights. See, e. g., the decision of the European Commission of Human Rights in the *De Becker v. Belgium* case, application No. 214/56, Yearbook of the European Convention on Human Rights, 1958–1959, p. 214, at pp. 234 and 244; and the Court's judgments in *Ireland v. the United Kingdom*, Eur. Court H.R., Series A, No. 25, p. 64 (1978); *Papamichalopoulos and Others v. Greece*, *ibid.*, No. 260–B, para. 40 (1993); and *Agrotexim and Others v. Greece*, *ibid.*, No. 330–A, p. 22, para. 58 (1995). See also E. Wyler, "Quelques réflexions sur la réalisation dans le temps

¹⁸ *Papamichalopoulos and Others v. Greece (article 50)*, Eur. Court H.R., Series A No. 330–B, para. 36 (1995); discussed by the International Law Commission Commentary, (CLA-185) at pages 60(9).

¹⁹ *Loizidou* at pp. 2230–2232 and 2237–2238, paras. 41–47 and 63–64. (CLA-185) at pages 60(10).

²⁰ *Papamichalopoulos and Others v. Greece*, Eur. Court H.R., Series A, No. 260–B, para. 40 (1993).

- c) In *Lovelace v Canada*,²¹ the ILC commentary noted that the UN Human Rights Committee followed this same approach as the European Court of Human Rights:

(11) The Human Rights Committee has likewise endorsed the idea of continuing wrongful acts. For example, in *Lovelace*, it held it had jurisdiction to examine the continuing effects for the applicant of the loss of her status as a registered member of an Indian group, although the loss had occurred at the time of her marriage in 1970 and Canada only accepted the Committee's jurisdiction in 1976.

It found that the continuing impact of Canadian legislation, in preventing *Lovelace* from exercising her rights as a member of a minority, was sufficient to constitute a breach of article 27 of the International Covenant on Civil and Political Rights after that date. Here the notion of a continuing breach was relevant not only to the Committee's jurisdiction but also to the application of article 27 as the most directly relevant provision of the Covenant to the facts in hand.

(12) Thus, conduct which has commenced some time in the past, and which constituted (or, if the relevant primary rule had been in force for the State at the time, would have constituted) a breach at that time, can continue and give rise to a continuing wrongful act in the present. Moreover, this continuing character can have legal significance for various purposes, including State

- d) The ILC Commentary noted the Inter-American Court of Human Rights in the *Blake* award:

For example, the Inter-American Court of Human Rights has interpreted forced or involuntary disappearance as a continuing wrongful act, one which continues for as long as the person concerned is unaccounted for.²²

45) As the acts have been committed against different entities (as many FIT proponents were individually affected as victims beyond Tennant Energy), including the effects of the lack of knowledge was to:

- Mislead the FIT Proponents who followed the FIT Rules, such as Tennant Energy and Mesa Power (and others);
- Delay these proponents in bringing claims and seeking redress;

²¹ *Lovelace v. Canada*, *Official Records of the General Assembly, Thirty-Sixth Session, Supplement No. 40 (A/36/40)*, annex XVIII, communication No. R.6/24, p. 172, paras. 10–11 (1981) discussed by the International Law Commission Commentary, (CLA-185) at pages 61 (11).

²² *Blake*, Inter-American Court of Human Rights, Series C, No. 36, para. 67 (1998). *The International Law Commission Commentary* (CLA-185) at p. 60.

- Result in ongoing harm due to Canada's continued non-cessation of these measures.

46) These all arose directly from the effects of Canada's untruths.

47) Tennant Energy contends that the breach first arose in 2015 upon the actual discovery of falsehoods – which would give rise to the requisite knowledge required by Article 1116(2) and would establish the breach of the NAFTA for Article 1116(1).

C. TIMING OF THE BREACH

48) Because of the active steps, Canada took to create misinformation to distract FIT Applicants from knowing about the breach, The timing of the breach could not occur until AFTER Skyway 127 and Tennant Energy could actually know about the true reasons for Skyway's failure.

49) As set out above, the Tribunal should consider that the breach in this Claim to be akin to the "disappeared." Thus, even though wrongful acts occurred, the breach could not occur until disclosure of the true reason for the measures. That information did not occur until after the release of information arising from the *Mesa Power* NAFTA hearing in the Spring and Autumn of 2015.

2. THE INVESTMENT

50) Canada's other argument to defeat Tennant Energy's claims is that it claims that Tennant Energy is not a protected investor. This is not supported by the record or the law.

51) As set forth below, Tennant Energy, an American company, beneficially owned the shares since 2011 under an oral trust created by Mr. John Tennant, another American. Moreover, Mr. John Tennant, as trustee, then formally assigned the shares in Skyway 127 to Tennant Energy in 2015.

A. OVERVIEW OF THE ISSUE

52) There are three issues for the Tribunal to resolve to determine whether Tennant Energy was a protected investor:

- Determine when the NAFTA breach occurred (set forth in Section I(c) above of this submission);

- Determine whether an oral trust was created under California law, and Tennant Energy was a beneficial owner of the Skyway 127 shares at the time of the NAFTA breach; and
- Determine whether the tangible and intangible rights in the Skyway 127 shares were validly transferred under California law

53) As the Tribunal will appreciate, even if it determines that there was no oral trust created, the result is no different — Mr. John Tennant, an American, validly transferred his tangible and intangible rights to Tennant Energy, and it is a successor-in-interest to any rights, including choses in action that Mr. John Tennant had at the time of the assignment. This evidence is undisputed.

B. THE TRUST

54) On October 19, 2007, Mr. John Tennant loaned his brother Derek Tennant's holding company, I.Q. Properties, \$200,000 (C-265) for a term of three years (October 19, 2010).²³ At the time, I. Q. Properties owned fifty percent of Skyway 127 shares.²⁴ The loan was secured with 437,500 Skyway 127 shares — 11.3 percent of the shares owned by I.Q. Properties.²⁵ Mr. John Tennant granted a six-month extension, which extended the loan's due date to April 19, 2011.²⁶

55) It is uncontroverted between the disputing parties that Mr. John Tennant obtained shares in Skyway 127 in 2011. Those shares were obtained under the Promissory Note (C-265). As can be seen below, on October 19, 2010, Mr. John Tennant exercised his call option under the Promissory Note signed by Derek Tennant (C-265) and demanded that the 437,500 shares of Skyway 127 be transferred to him if I.Q. Properties defaulted on the loan (C-267):²⁷

The Lender hereby DEMANDS, in the event of failure to pay on or before April 19, 2011, that the security pledged of 437,500 common shares of Skyway 127 Wind Energy Inc., (Certificate #COM-14, including but not limited to any anti-dilution, or other common share transfer rights from any other shareholder or shareholders by way of agreement, consent or otherwise) issued to I.Q. Properties Inc., be transferred to the Undersigned Lender.

²³ Testimony of John H. Tennant, Transcript Day 3, at 342:18–343:14.

²⁴ Testimony of Derek Tennant, Transcript Day 3, at 436:6–8.

²⁵ Testimony of John H. Tennant, Transcript Day 3, at 343:18–22.

²⁶ Testimony of John H. Tennant, Transcript Day 3, at 350:17–351 :6.

²⁷ Testimony of John H. Tennant, Transcript Day 3, at 351:19–352:15.

56) I.Q. Properties, in fact defaulted on the loan on April 19, 2011, giving effect to the already exercised call option.²⁸

57) It is undisputed by the parties and their experts that oral trusts can be created under California law.²⁹

Three witnesses testified before the Tribunal about John H. Tennant's creation of an oral trust to hold the Skyway 127 shares that he obtained from Derek Tennant.³⁰ Not a single fact witness disputed the trust's creation. The arguments of Canada's lawyers about their own doubt about the evidence is not credible — Canada has a vested interest in challenging what occurred; it wants to avoid an investment arbitration. But, Canada did not present any witness to show the oral trust was not created but instead challenged the lack of contemporaneous writing about the oral trust. This argument is circular — if there were a contemporaneous writing, then the trust would not be oral, it would be written. Thus, although Ms. Lodise opined in her expert report (**RER-2**) and before the Tribunal that a trust was not created because there was no contemporaneous writing related to the oral trust,³¹ she also admitted that under California law "there does not have to be contemporaneous writing to prove an oral trust."³² Thus, the lack of a contemporaneous writing memorializing the oral trust lacks weight because no such requirement exists under § 15207 (**CLA-292**).

58) In California, a trust may be created by a property owner's "declaration" that the "owner holds the property as trustee."³³ Justice Grignon testified that a trust was established by Mr. John Tennant when he expressed that he wanted to acquire the shares for a holding company that he did not have at that time.³⁴ That occurred on April 19, 2011.³⁵ Mr. John Tennant identified the property, the purpose, and the class (beneficiary). As a matter of California law, that created a trust at that time

²⁸ Testimony of John H. Tennant, Transcript Day 3, at 351:19–352 :15.

²⁹ Justice Margaret Grignon, Transcript Day 4, at 501:7–14; Margaret Lodise, Transcript Day 4, at 571:20–25.

³⁰ Testimony of J.C. Pennie, Transcript Day 2, at 244:14–19; Testimony of John H. Tennant, Transcript Day 3, at 358:16–24; Testimony of Derek Tennant, Transcript Day 3, at 443:24–444:2.

³¹ Margaret Lodise, Transcript Day 4, at 579:19–21.

³² Margaret Lodise, Transcript Day 4, at 641:20–21 (emphasis added). Canada also improperly discussed the lack of a contemporaneous writing as evidence that a trust was not created despite their own expert's admission that one is not needed under California law. Klaver Closing, Transcript. Day 5, at 729:10–19

³³ California Probate Code § 15200 (CLA-292).

³⁴ Justice Margaret Grignon, Transcript Day 4, at 500:13–18; 505:12–16. The use of holding companies was a common family practice as evidenced by both Derek Tennant and John C. Pennie owning holding companies as part of their business practice. Testimony of Derek Tennant, Transcript Day 3, at 468:25–469:5. In fact, the Skyway 127 shares that Derek Tennant used as collateral for the \$200,000 loan were held in his holding company, I.Q. Properties. Testimony of John H. Tennant, Transcript Day 3, at 342:12–17.

³⁵ Justice Margaret Grignon, Transcript Day 4, at 500:13–18.

and nothing further was required.³⁶

- 59) Thus, while under California law a property owner's declaration is not sufficient to prove a trust, § 15207 (**CLA-292**), the experts agreed that a declaration of an oral trust is the actual statement of intent of the trust owner creating the oral trust; it is not later oral testimony from the testator such as was presented here.³⁷ Here, the undisputed evidence from three witnesses is that an oral trust was created by John Tennant.
- 60) Therefore, under California law, an oral trust was created when Mr. John Tennant declared on April 19, 2011, that he would be holding the Skyway 127 shares in trust for a holding company.³⁸ On April 26, 2011, Mr. John Tennant confirmed the holding company and beneficiary of the trust as Tennant Travel (later renamed Tennant Energy LLC).³⁹ Mr. John Tennant satisfied the requirements for an oral trust under California by identifying the res (property) of the trust as the Skyway 127 shares, the trustee as himself, and the beneficiary as Tennant Travel.
- 61) Further, the fact that the shares themselves were not shown as transferred on the corporate records until later is irrelevant. It is further undisputed by the parties that either company shares or simply the right to those shares can constitute trust property in California.⁴⁰ Thus, it was not relevant whether the share certificates were in the possession of Mr. John Tennant, because his future right to receive the shares was enough.⁴¹ Ms. Lodise did not disagree.⁴²
- 62) The parties also agree that a holding company, such as Tennant Travel, can constitute the beneficiary.⁴³ Moreover, even if Tennant Travel had not been named immediately, both Justice Grignon and Ms. Lodise agreed that an identifiable class of beneficiaries is sufficient under California trust law; it is not necessary to name a specific beneficiary.⁴⁴ They also both agreed that

³⁶ Justice Margaret Grignon, Transcript Day 4, at 501:15–502:9.

³⁷ Justice Margaret Grignon, Transcript Day 4, at 503:25–504:12; Margaret Lodise, Transcript Day 4, at 624:8–19.

³⁸ Testimony of J.C. Pennie, Transcript Day 2, at 244:12–19, 245:15–17; Testimony of Derek Tennant, Transcript Day 3, at 474:19–475:4.

³⁹ Testimony of John H. Tennant, Transcript Day 3, at 372:12–15.

⁴⁰ Margaret Lodise, Transcript Day 4, at 644:17–20.

⁴¹ Testimony of J.C. Pennie, Transcript Day 2, at 239:14–23.

⁴² Margaret Lodise, Transcript Day 4, at 644:12–20.

⁴³ Justice Margaret Grignon, Transcript Day 4, at 501:20–502:4; Margaret Lodise, Transcript Day 4, at 633:6–9.

⁴⁴ Justice Margaret Grignon, Transcript Day 4, at 501:20–502:4, 563:6–15; Margaret Lodise, Transcript Day 4, at 629:17–630:2, 632:11–20.

when the settlor gives the trustee discretion to choose the beneficiary, that is sufficient.⁴⁵ Here, Mr. John Tennant, the settlor, gave himself, as trustee, discretion to choose a beneficiary from an identifiable class of beneficiaries — a holding company that he would designate in the future.⁴⁶

63) The experts further agreed that a trust can be created for a lawful, general or indefinite purpose.⁴⁷

They testified that holding shares for the benefit of a company to prevent dilution of voting control is an adequate trust purpose.⁴⁸ In fact, pursuant to President Bull's question, Ms. Lodise herself admitted that this would be an acceptable purpose for the trust John H. Tennant created.⁴⁹

64) Summarily, the requirements for the creation of an oral trust under California law are met in the instant case and there was no conflict between the experts on the elements.

65) Further, this was not a situation in which there was a deceased settlor or trustee who was unable to confirm the creation of the trust.⁵⁰ The Tribunal heard testimony from Mr. Tennant, the actual declarant, in person at the hearing. They also heard from the counter-party to the transaction, Derek Tennant. John C. Pennie also testified about the creation of the trust before the Tribunal.⁵¹ The witness testimony at the hearing was consistent with the testimony in the witness statements. Here, there was testimony beyond the declaration of the settlor to corroborate the creation of the trust, thereby satisfying § 15207(b) (CLA-292).⁵² Ms. Lodise conceded that Derek Tennant and John C. Pennie's testimony could be considered corroboration of the existence of the trust under California law.⁵³ Additionally, there was no conflicting testimony actually denying the declaration of trust.

66) On January 15 2015, the oral trust created by Mr. John Tennant on April 19, 2011 was terminated by his formal transfer of the Skyway 127 shares (and assignment of rights) to Tennant Travel (n/k/a

⁴⁵ Justice Margaret Grignon, Transcript Day 4, at 537:11–18; Margaret Lodise, Transcript Day 4, at 632:11–20.

⁴⁶ Testimony of John H. Tennant, Transcript Day 3, at 366:23–367:9.

⁴⁷ Justice Margaret Grignon, Transcript Day 4, at 502:5–9 ; Margaret Lodise, Transcript Day 4, at 570:25–571:3.

⁴⁸ Justice Margaret Grignon, Transcript Day 4, at 502:5–9.

⁴⁹ Margaret Lodise, Transcript Day 4, at 585:21–585:4.

⁵⁰ Justice Margaret Grignon, Transcript Day 4, at 504:13–24, 520:2–17, 522:8–14.

⁵¹ Testimony of J.C. Pennie, Transcript Day 2, at 243:17–244:19, 303:17–24.

⁵² “The oral declaration of the settlor, standing alone, is not sufficient evidence of the creation of a trust of personal property.” (CLA-292). In response to Arbitrator Bishop’s question, Justice Margaret Grignon explained that § 15207(b) is satisfied because “you don’t simply have the oral declaration, which is what he said in 2011. Instead, you have his testimony, which is different than someone else testifying about what [John Tennant] said.” Justice Margaret Grignon, Transcript Day 4, at 522:8–523:7.

⁵³ Margaret Lodise, Transcript Day 4, at 657:13–18.

Travel Energy) (C-115).⁵⁴ Similar to his brother Derek Tennant's business practice of keeping Skyway 127 shares in I.Q. Properties, a holding company, John Tennant transferred his shares to Tennant Travel (n/k/a Travel Energy).⁵⁵ That same day, John C. Pennie and his wife Marilyn Field also transferred their Skyway 127 shares to Tennant Travel consistent with the family's intention to have continuity, manage the company as a family, and prevent dilution of the voting bloc.⁵⁶ Within months, in April 2015, the shareholders changed the name of the company to Tennant Energy.⁵⁷

67) Finally, the testimony related to the creation of the trust was confirmed by a memorandum from John Tennant to the Tennant Energy Management Board issued almost 18 months before the NAFTA claim was filed (C-268).⁵⁸ That confirmatory letter was consistent with all the evidence from John Tennant and Derek Tennant. Canada has questioned this memorandum, but what is incontrovertible is that Skyway 127's share registry shows that the shares were transferred to John Tennant's name in June 2011⁵⁹, and then to Tennant Travel (n/k/a Tennant Energy) in January 2015.⁶⁰ Thus, the memorandum does in fact memorialize events that actually happened. It states:

(2) For greater certainty, I transferred all share property interests in Skyway 127, both tangible and intangible, including all shares in Skyway 127 to Tennant Travel Services, LLC (which is now known as Tennant Energy, LLC).

(3) I further confirm that Tennant Energy, LLC. is the full successor in interest and all my rights whether they were considered in person, or in my capacity as trustee.

68) Despite filing law on the international law of transfer and assignment in its jurisdictional pleadings, Canada presented no evidence on California law on the validity of the assignment.

69) In contrast, Justice Grignon testified that, as a matter of California law, John Tennant held legal title of the Skyway 127 shares once he received them in April 19, 2011, and the beneficial interest was

⁵⁴ Testimony of John H. Tennant, Transcript Day 3, at 385:18–21.

⁵⁵ Testimony of John H. Tennant, Transcript Day 3, at 363:7–9 (“I always intended to put my shares in a trust — or in a holding company, I should say.”); Testimony of J.C. Pennie, Transcript Day 2, at 258:10–23.

⁵⁶ Testimony of John H. Tennant, Transcript Day 3, at 363:2–9; Testimony of Derek Tennant, Transcript Day 3, at 445:4–12 ; Testimony of J.C. Pennie, Transcript Day 2, at 315:23–316:1.

⁵⁷ Testimony of John H. Tennant, Transcript Day 3, at 422:5–14.

⁵⁸ Testimony of John H. Tennant, Transcript Day 3, at 375:11–15.

⁵⁹ Shareholder's Ledger Skyway 127, June 20, 2011 (C-117).

⁶⁰ Shareholder's Ledger Skyway 127, January 15, 2015 (C-115).

vested in Tennant Travel at that time as a matter of the operation of the law of California.⁶¹ Once John H. Tennant transferred the Skyway 127 shares he held as trustee to Tennant Travel in January 2015, the holding company obtained legal title in addition to the beneficial interest it already held.⁶²

- 70) Canada's expert, Margaret Lodise, largely agreed with this testimony under cross-examination testifying that "legal title is in the Trustee, [and] then the Trustee can act with the property[.]" while the beneficial interest is held by the beneficiary.⁶³
- 71) The evidence and testimony presented by the Investor proves that John H. Tennant held Skyway 127 shares for the benefit of Tennant Travel from April 19, 2011 to January 15, 2015 under California's clear and convincing standard. California's clear and convincing standard requires only high probability as established by the state's jury instructions, CACI 201 (C-270). High probability remains the standard and has not been augmented to a higher standard as Canada argues. For instance, in *Nevarrez* (CLA-334) the court "decline[d] to hold that CACI No. 201 (C-270) should be augmented to require that 'the evidence must be so clear as to leave no substantial doubt' and 'sufficiently strong as to command the unhesitating assent of every reasonable mind'" because such language is "dangerously similar to that describing the burden of proof in criminal cases" — beyond a reasonable doubt.⁶⁴
- 72) Canada misleads the tribunal by relying on *Butte Fire Cases* (CLA-335)⁶⁵ and claiming that California's clear and convincing standard requires evidence with a higher burden of proof. *Butte Fire Cases* is not a case related to determining whether an oral trust was created, but instead a case that went on appeal on the issue of summary judgment, in which the Court decides whether certain claims can go to trial before a jury.⁶⁶ The clear and convincing standard, as established by the California jury instructions (C-270) and the state's highest Court, requires the party to "persuade you that it is highly probable that the fact is true."⁶⁷ This is the language given to the jury — the trier

⁶¹ Justice Margaret Grignon, Transcript Day 4, at 626:9–24.

⁶² Justice Margaret Grignon, Transcript Day 4, at 535:19–25.

⁶³ Margaret Lodise, Transcript Day 4, at 626:13–15, 626:22–24.

⁶⁴ *Nevarrez v. San Marino Skilled Nursing & Wellness Ctr., LLC*, (CLA-334) at 882. The court in *Nevarrez* also cited to *In re Angelia P.*, a 1981 case cited in the jury instructions only as to its holding that "[c]lear and convincing' evidence requires a finding of high probability." CACI No. 201 (sources and authority) (C-270).

⁶⁵ *Butte Fire Cases*, 24 Cal. App. 5th 1150, 235 Cal. Rptr. 3d 228 (2018) (CLA-334).

⁶⁶ Justice Margaret Grignon, Transcript Day 4, at 668:18–669:8; *Butte Fire Cases*, 24 Cal. App. 5th at 1158 (CLA-334).

⁶⁷ CACI No. 201 (C-270).

of fact — and nothing further.⁶⁸ As understood by this Tribunal, “high probability” falls between “a preponderance of the evidence” and the standard used in criminal trials — “beyond a reasonable doubt.”⁶⁹

73) An example of the application of the clear and convincing standard can be found in *Fahrney* (C-301), in which one of California’s intermediary courts applied the clear and convincing standard to an oral trust case. There, the deceased’s wife disputed the creation of an oral trust (life insurance proceeds) for the benefit of her husband’s creditors.⁷⁰ Despite the wife’s conflicting testimony, the Court held that an oral trust was created based on testimony regarding the deceased’s statements.⁷¹ The Court in *Fahrney* determined that to prove that an oral trust was created, the “required proof may be indirect, consisting of acts, conduct, and circumstances []; no particular terminology is needed, and the words, ‘trust’ or ‘trustee’ need not be used.”⁷² In sum, the word “trust,” just like a contemporaneous writing about the trust, is not a requirement when creating an oral trust under California law. Moreover, there was conflicting evidence in *Fahrney*. Completely consistent evidence thus is not required for the clear and convincing standard to be met.

74) The Investor anticipates that Canada may argue that Mr. Pennie’s testimony that in December of 2011, Mr. John Tennant still had not designated the beneficiary holding company constitutes inconsistent testimony, but this argument would be erroneous. Mr. Pennie, in fact, stated that he actually could not remember when Mr. John Tennant designated Tennant Travel/Energy as the beneficiary of the Skyway 127 shares.⁷³ Mr. Pennie also stated that, although he could not remember the date the beneficiary company was designated, he was informed when Mr. John Tennant spoke to his brother Jim Tennant about using his holding company (Tennant Travel).⁷⁴ Both Mr. John Tennant and Derek Tennant testified that Mr. Pennie was informed on April 26, 2011.⁷⁵

⁶⁸ Justice Margaret Grignon, Transcript Day 4, at 671:21–672:2.

⁶⁹ Justice Margaret Grignon, Transcript Day 4, at 674:9–675:9.

⁷⁰ *Fahrney v. Wilson*, 180 Cal. App. 2d 694, 695 (1960) (C-301).

⁷¹ *Id.* at 698 (C-301).

⁷² *Id.* at 697–98 (C-301) (internal citations omitted).

⁷³ Testimony of J.C. Pennie, Transcript Day 2, at 247:16–248 :3 (“I don’t remember, but I think that was the case.”) (*emphasis added*), 293:11–21 (“I don’t think it was designated at that point, but I can’t remember.”) (*emphasis added*).

⁷⁴ Testimony of J.C. Pennie, Transcript Day 2, at 293:22–294:6.

⁷⁵ Testimony of John H. Tennant, Transcript Day 3, at 377:6–13, 412:12–17 ; Testimony of Derek Tennant, Transcript Day 3, at 449:11–17.

75) Similar to the facts in *Fahrney*, there is no written evidence that states that Mr. John Tennant created an oral trust, but there is more than sufficient evidence from witness testimony and surrounding circumstances to satisfy the clear and convincing standard as applied in California. Ms. Lodise also agreed that conflicting evidence is not fatal to finding an oral trust in California.⁷⁶ Yet here, other than Canada's retained expert who for the most part agreed with Justice Grignon on the legal points, there is no seriously conflicting testimony or any evidence proving the lack of Mr. John Tennant's intent to create an oral trust.

C. SUCCESSOR IN INTEREST

76) Alternatively, should the Tribunal conclude that no oral trust was created, Tennant Energy still would be a protected investor because it is a successor in interest and the assignment of John H. Tennant's tangible and intangible rights to a successor company — Tennant Travel/Energy — permits the successor company to bring any existing claims, including those claims under NAFTA. This occurred in January 2015 when Mr. Tennant transferred his shares to Tennant Travel.⁷⁷ This was confirmed in the February 18, 2016 memorandum (C-268) of John H. Tennant, which also confirmed that the shares were for the purposes of Tennant Energy LLC.⁷⁸

77) Justice Grignon addressed the transfer of shares in her live expert testimony and in paragraphs 19, and 34 to 37 of her Expert Report (CER-2).

78) For its part, Canada brought forth no contrasting expert testimony. While Canada had the opportunity to comment on Justice Grignon's opinions regarding transfers, it failed to do so. As noted, Canada's expert, Ms. Lodise explicitly refused to comment on the assignment when asked during cross-examination.⁷⁹ Ms. Lodise confirmed that she was not providing any expert opinion on the issue of assignment.⁸⁰ Canada's failure to provide expert testimony regarding assignment is inexplicable given that Justice Grignon testified to the assignment and the effect of same in her expert opinion.⁸¹

⁷⁶ Margaret Lodise, Transcript Day 4, at 646:14–17.

⁷⁷ Shareholder's Ledger Skyway 127, January 15, 2015 (C-115) ; Justice Margaret Grignon, Transcript Day 4, at 565:4–12.

⁷⁸ Justice Margaret Grignon, Transcript Day 4, at 534:14–22.

⁷⁹ Margaret Lodise, Transcript Day 4, at 611:22–25 (“I’m not going to render any opinion on an Assignment.”).

⁸⁰ Margaret Lodise, Transcript Day 4, at 611:22–25 (“I’m not going to render any opinion on an Assignment.”).

⁸¹ Justice Margaret Grignon, Transcript Day 4, at 533:23–534:8.

- 79) When John H. Tennant formally transferred his Skyway 127 shares to Tennant Travel on January 15, 2015 (C-115), all his rights to a claim under NAFTA also were transferred to the company.⁸² Whether John H. Tennant held the Skyway 127 shares personally or as trustee for Tennant Travel prior to the January 15, 2015 transfer, Tennant Travel obtained absolute legal title to those shares on that date.⁸³ By this transfer of shares, John H. Tennant also transferred all rights he had related to the Skyway 127 shares to Tennant Travel/Energy, thereby becoming a successor in interest to any claims John H. Tennant may have had.⁸⁴
- 80) There is no dispute between the disputing parties over the nationality of John H. Tennant or Tennant Energy LLC. John H. Tennant is a US citizen and Tennant Energy LLC is a California corporation.⁸⁵ Both are US nationals and thus covered by the scope of the NAFTA. While General Electric Energy, another holder of Skyway 127 shares and a joint venturer in the wind power project is also a US national, its investment is not essential for determining jurisdiction. It thus is not substantively considered in this phase.
- 81) The shares of Tennant Energy are intangible rights.⁸⁶ The February 2016 memorandum (C-268) confirmed the assignment of the Skyway 127 shares acquired by John H. Tennant, as well as all the rights associated with the Skyway 127 shares to Tennant Travel. This included the right to bring any existing claims, including those that existed under the NAFTA.⁸⁷
- 82) As the transfer of legal title to the shares in Skyway 127 was registered on January 15, 2015, that would be the latest date for the assignment to take place. That was more than two years before the June 1, 2017 date of the making of the NAFTA Claim and earlier than the date of the discovery in August 2015 of the true cause of the NAFTA violation by John C. Pennie.
- 83) Justice Grignon noted at the hearing that, as a matter of California law, there was no need to separately assign any “choses in action” such as NAFTA rights along with the shares because all such rights automatically were conveyed with the shares.⁸⁸ Choses in action here means that “if the

82 Justice Margaret Grignon, Transcript Day 4, at 505:17–506:1, 562:11–22.

83 Justice Margaret Grignon, Transcript Day 4, at 564:7–565:12.

84 Justice Margaret Grignon, Transcript Day 4, at 534:4–536:12.

85 Justice Margaret Grignon, Transcript Day 4, at 562:21–22.

86 Justice Margaret Grignon, Transcript Day 4, at 505:17–506:1.

87 Justice Margaret Grignon, Transcript Day 4, at 505:17–506 :1

88 Justice Margaret Grignon, Transcript Day 4, at 505:17–506:1.

Shares had a right to bring an action, then when [John H. Tennant] transferred those Shares, that right to bring an action was transferred with the Shares to Tennant Travel/Energy[.].”⁸⁹

84) The testimony and evidence on the assignment of rights by the transfer of Skyway 127 shares wholly has been undisputed by Canada.

85) Accordingly, the record evidence shows that Tennant Energy was a protected investor and Canada’s jurisdictional objection on this basis should be denied.

D. CONTINUED INVESTMENT IN CANADA PRIOR TO BREACH

86) After Tennant Energy invested in Skyway 127 and prior to Canada’s breach, Skyway 127 continued to invest in hopes of receiving a FIT contract by committing a quarter million dollars in additional land leases.⁹⁰

I. LAW ON SUCCESSORS

87) During the closing, counsel for Canada made unsubstantiated and incorrect comments arguing that NAFTA claims could not be assigned.⁹¹ Canada misspoke.

88) First Canada completely forgot that NAFTA Article 1109 expressly permits transfers of investments. Paragraph 1 of NAFTA Article 1109 in relevant part provides that “**Each Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay.**”

89) NAFTA Article 1109 makes clear that transfers of property are permitted. The definition of investment in paragraph (g) of NAFTA Article 1139 includes the protection of property intangible and tangible. Clearly, intangible property is the type of property covered by Article 1109. Canada has been very cavalier in its approach during the hearing. This is yet another example where Canada failed to bring relevant case law and NAFTA Treaty obligations to the Tribunal’s attention.

90) Even without the powerful guidance of NAFTA Article 1109, international investment treaty cases also support transfers of claims. For example, the Tribunal in *Daimler v Argentina* accepted the

⁸⁹ Justice Margaret Grignon, Transcript Day 4, at 505:22–25.

⁹⁰ Testimony of J.C. Pennie, Transcript Day 2, at 313:16–23.

⁹¹ Mark Klaver, Transcript, Day 5 at pages 704 line 22 - 705 line 05.

outright sale of the Claim on the basis that there was no change of the underlying nationality.⁹² (CLA-309). But the express confirmation under NAFTA Article 1109 means that this Tribunal need not have recourse to general principles which are reflected in cases such as *Daimler*.

- 91) There have been NAFTA claims that have been assigned. Indeed, even the authorities upon which Canada relied on successors in interest and assignment confirm that claims may be transferred. The Investor noted that the articles filed by Canada by Hanno Wehland (RLA-127) and Thomas Goh (RLA-138) both explicitly confirmed that assignment of claims was accepted if there is no change in the claimant's nationality.⁹³
- 92) Canada filed a limited response to the issue of transfer of a claim which it addressed in a lengthy footnote in its Jurisdictional Rejoinder Memorial. Thus, even before the jurisdictional hearing, Canada already filed its legal position on this issue.⁹⁴
- 93) In addition, Tennant Energy notes that the assignment of a NAFTA claim was a central issue in the *Loewen Group v USA* NAFTA claim (CLA-285). The Loewen Group had severe financial difficulty because of the Respondent's actions. The company made a transfer of its NAFTA claim. The transfer of the Claim was fully accepted by the NAFTA Tribunal however, as that assignment was made to an investor of a different nationality, it was ultimately unable to continue the Claim due to other reasons.⁹⁵ The *Loewen* Tribunal noted:

Article 1109 fully authorizes transfers of property by an investor. TLGI contends that such provision for free assignment somehow strengthens its position. The assignment from TLGI to Nafcanco is not being challenged, except as to what is being assigned. By the terms of the assignment, the only item being assigned was this NAFTA claim. All of the assets and business of TLGI have been reorganized under the mantle of an American corporation. All of the benefits of any award would clearly inure to the American corporation.⁹⁶

- 94) The *Loewen* Tribunal concluded that the change of nationality blocked the transfer of the Loewen

⁹² Mr. Appleton noted that Canada's authorities which contradict Canada's arguments, and which support the fact that transfers of claims. Transcript Day 5 at page 828 at lines 20-23.

⁹³ Hanno Wehland (RLA-127) and Thomas Goh (RLA-138)

⁹⁴ Tennant Energy addressed the law on the successors in ¶¶104 – 106 of its Counter-Memorial and ¶¶ 16-21 of the Investor's Second Response on Article 1128 Submissions.

⁹⁵ *Loewen Group v USA*, Final Award (CLA-285) at ¶237

⁹⁶ *Loewen Group v USA*, Final Award (CLA-285) at ¶23

Group's NAFTA claim. However, the Loewen Tribunal noted that NAFTA Article 1109 permissively recognized transfers of property which would include the NAFTA Claim.

- 95) To be clear, the Investor submitted over 100 years of consistent jurisprudence from various international law tribunals confirming that claims could be brought by persons who were not the original Investor such as successors in interest. These included the review of case law from the US – Venezuela Mixed Claims Commission, the US-Mexican Claims Commission, and the US- Iran Claims Commission – including *Caire* (CLA-322) *Chattin* (CLA-323), and *Roberts* (CLA-324) cases from the US-Mexico Claims Commission, and the *de Sabla* (CLA-325) case from the US-Venezuela Mixed Claims Commission cases.
- 96) Thus as a matter of international law, there is no impediment to the transfer of a claim between foreign nationals provided that those nationals continuously maintained the necessary nationality of a party capable of making a claim under the Treaty. Indeed, NAFTA Article 1109 expressly protects such rights.
- 97) The transfer of the Claim from John Tennant to Tennant Energy must be recognized by this Tribunal.

E. THE RELEVANCE OF THE *S.D. MYERS* CASE

- 98) At page 714 of the Day 5 Transcript, Sir Daniel requested Counsel for Canada to address the NAFTA case law about “piercing the corporate veil.” However, Counsel for Canada did not bring the highly relevant *S.D. Myers* NAFTA claim to the attention of the Tribunal until after being prodded to that specific case by the Tribunal.
- 99) The issue in *S.D. Myers* is important as it addressed how a NAFTA Tribunal should broadly interpret the NAFTA along with the treaty's objectives when considering the context of an investment by a family corporation.
- 100) *S.D. Myers Inc* (SDMI) was a US-based company run by the members of the Myers family. SDMI was the claimant in the NAFTA Claim regarding its investment in a Canadian subsidiary, *S.D. Myers Canada* (Myers Canada). However, as the evidence was reviewed, it came to light that SDMI was not the actual owner of Myers Canada. The actual owner of Myers Canada were the individual members of the Myers family, who were all American nationals. The Tribunal had to

determine if the Claim brought by SDMI could continue over the Canadian investment.

101) In the *First Partial Award*, (CLA-111) the *S.D. Myers* Tribunal concluded that SD. Myers Inc could be considered an investor over Myers Canada (the Canadian investment).⁹⁷

102) Sir Daniel asked the disputing parties to provide their views on paragraph 229 of the *S.D. Myers* First Partial Award. This paragraph states:

229. Considering the objective of the NAFTA, and the obligation of the Parties to interpret and apply its provisions in light of those objectives, the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a claimant in order to organize the way in which it conducts its business affairs. The Tribunal's view is reinforced by the use of the word "indirectly" in the second of the definitions quoted above [i.e.. Article 1139]...

103) It is essential to examine what the *SD. Myers* Tribunal did in this Claim. The *S.D Myers* Tribunal did not ignore the provisions of the NAFTA. A careful review of the *First Partial Award* and other decisions taken in this Claim demonstrates that the *S.D. Myers* Tribunal followed the NAFTA definitions in determining that S.D. Myers was an investor regarding its investment in Myers Canada.

104) It is instructive to look at what the *S.D. Myers* Tribunal actually did. The *S.D. Myers* Tribunal approached their task with care, and with a consideration of the relevant principles. The Tribunal determined in its *First Partial Award* that:

230. On the evidence and on the basis of its interpretation of the NAFTA, the Tribunal concludes that SDMI was an "investor" for the purposes of Chapter 11 of the NAFTA and that Myers Canada was an "investment".

231. The Tribunal recognizes that there are a number of other bases on which SDMI could contend that it has standing to maintain its Claim including that (a) SDMI and Myers Canada were in a joint venture, (b) Myers Canada was a branch of SDMI, (c) it had made a loan to Myers Canada, and (d) its market share in Canada constituted an investment. It is not necessary to address these matters in this context and the Tribunal does not do so, although they may be relevant to other issues in the case. Insofar as they are, they will be dealt with at the appropriate time. ⁹⁸

⁹⁷ *S.D. Myers First Partial Award* at ¶¶ 230 – 232. (CLA-113).

⁹⁸ *S.D. Myers Inc First Partial Award* at ¶¶ 229 – 232. (CLA-113).

105) Prof. Bryan Schwartz concurred with the *First Partial Award* on the issue of investment, but he also issued a separate opinion. (CLA-336). His *Separate Opinion* provided more understanding to the factors considered by the *SD. Myers* Tribunal on the investment questions. The evidence before the Tribunal referred to in the *Separate Opinion* of Professor Schwartz included:

- The directing mind of SDMI was interested in expanding into the Canadian market and believed that having an affiliate that was a Canadian company with a distinctly Canadian profile would make it easier to market and deliver services.
- Myers Canada was, while not technically a subsidiary of SD. Myers, an “affiliate” of SDMI;
- Employees of Myers Canada and SDMI acted in concert in many respects; and
- The basic *raison d’être* of Myers Canada was to promote and serve the interests of SDMI.⁹⁹

106) Indeed, as Professor Schwartz correctly noted at paragraph 39 of his separate opinion,

There is no way of escaping the fact that SD. Myers had an investment in Canada at least in this respect: it made a loan to an affiliate, Myers Canada. Article 1139, definition (d) of NAFTA, expressly includes as an investment a loan to an affiliate.¹⁰⁰

107) The *S.D. Myers* Tribunal provided significant more context to the decision in the *First Partial* award in paragraphs 108 to 121 of the *Second Partial Award* (CLA-193). These points focused primarily upon the family nature of the business.

108) In paragraphs 119 to 121 the Tribunal focused on the mandatory purposive requirements in interpreting the NAFTA under NAFTA Article 102.

119. Article 102(c) of the NAFTA states that one of the objectives of the agreement is to:

...increase substantially investment opportunities in the territories of the Parties

120. Article 102(2) provides that the Parties:

...shall interpret and apply the provisions of this Agreement in light of the objectives set out in paragraph 1 and in accordance with applicable rules of

⁹⁹ *S.D. Myers Inc, Separate Opinion of Arbitrator Prof. Bryan Schwartz* at ¶ 38 (CLA- 336).

¹⁰⁰ *S.D. Myers Inc, Separate Opinion of Arbitrator Prof. Bryan Schwartz* at ¶ 39. (CLA-336).

international law.¹⁰¹

- 109) These points are largely consistent with the points raised in the Separate Opinion by Arbitrator Schwartz. They all address the situation when a Tribunal may take steps to preserve an otherwise meritorious claim affected by a problematic corporate structure.
- 110) The purpose of reference to the *Second Partial Award* and the *Separate Opinion* is to demonstrate that there are broad ways in which an Investor may have an investment under the NAFTA. The objectives of the NAFTA contemplated such broad investment activities and the NAFTA Parties drafted a treaty with the objective and intent to protect all forms of economic activity that resulted in the holding of investments.
- 111) When Sir Daniel raised his question, it is possible that he may not have been fully aware of the extent of the elaboration by the *S.D. Myers* Tribunal on the sufficiency of circumstances regarding the investment further in the *Second Partial Award (CLA- 193)*. This is what underpinned the Tribunal’s comments in paragraph 229 of the *First Partial Award*.
- 112) The Investor submits it is clear beyond peradventure that the Tribunal correctly concluded that SDMI was an Investor with an Investment in Canada. Similarly, this Tribunal should come to the same conclusion with respect of Tennant Energy.
- 113) In footnote 224 of the Jurisdictional Memorial, Canada argued that the facts in the *S.D. Myers* case were dissimilar to those in the Tennant Energy claim. However, a review of the facts demonstrates that there are great similarities.
- 114) At the outset, both the *S.D. Myers* claim and the Tennant Energy claim deal with claims brought by entities owned and controlled by family members.
- 115) Under the terms of the NAFTA, “control” is not dependent upon a 50.1% majority shareholding.
- 116) The term control is based on the circumstances. The ordinary meaning of “control” does not require 50.1% of shares. It requires the ability to get one’s own way. That is the definition of control.

¹⁰¹ *S.D. Myers Second Partial Award* at ¶¶ 119 – 120. (CLA-193).

- 117) The absence of control is not obtaining one's choices. John H. Tennant and Derek Tennant confirmed that that John H. Tennant had the last word over decisions.¹⁰² The fact that John H. Tennant was successful in having his way is in itself evidence of control.
- 118) In this current Claim, the members of the Tennant Family clearly worked in concert regarding the Skyway 127 wind project. John H. Tennant, John C. Pennie, and Marilyn Field were all shareholders in Skyway 127. Derek Tennant was the President of Skyway 127 and John C. Pennie was the Secretary Treasurer and the wind developer for the project.
- 119) Tennant Energy, Skyway 127, and John H. Tennant all worked in a concerted joint venture along with Derek Tennant, John C. Pennie and Marilyn Field. This "family business" is similar to the S.D. Myers family business and for the same purpose which was to benefit the local investment for the family.
- 120) In this manner, Tennant Energy and Skyway 127 were affiliated companies with common control, just as S.D. Myers Inc. was affiliated with Myers Canada.
- 121) And, the basic *raison d'être* of Skyway 127 was to promote and serve the interests of Tennant Energy.
- 122) Thus, the same broad and purposive approach taken by the *S.D. Myers* Tribunal in the understanding of the definitional terms of the NAFTA should be applied by this Tribunal to the interest held by John H. Tennant for Tennant Energy.

I. FEDERAL COURT OF CANADA DECISION

- 123) This same issue also was canvassed by the Federal Court of Canada in *Attorney General (Canada) v S.D. Myers Inc.* (**R-80**).¹⁰³ The Federal Court of Canada upheld the earlier jurisdictional decision made by the *S.D. Myers* NAFTA Tribunal.
- 124) In its Memorial on Jurisdiction, in footnote 224, Canada acknowledged this fact stating:

In *S.D. Myers*, the Tribunal found that the claimant (SDMI) controlled the investment (Myers Canada), even though SDMI did not own shares in Myers

¹⁰² See Day 5 at page 856 at lines 7-12 . John Tennant in his Witness Statement noted "I would get the last word on corporate decisions in the voting bloc. (CWS-2) Derek Tennant Witness Statement at ¶33 (CWS-3).

¹⁰³ *Canada (Attorney General) v. S.D. Myers Inc.*, 2004 FC 38, [2004] 3 FCR 368, (**R-080**).

Canada (CLA-111, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 12 November 2000 (“*S.D. Myers –Partial Award*”), ¶¶ 229 to 231). The Federal Court concurred (**R-080**, *Canada (Attorney General) v. S.D. Myers Inc.*, 2004 FC 38, [2004] 3 FCR 368, ¶ 70).

125) Canada’s own courts carefully reviewed the *S.D. Myers* Tribunal’s consistency with the NAFTA. Not only did the Canadian Court defer to the Tribunal’s decision, but the Court confirmed the correctness of the finding regarding the fact that S.D. Myers Inc. was an investor.¹⁰⁴

II. THE NON-APPLICATION OF THE ONTARIO BUSINESS CORPORATIONS ACT

126) Canada’s second argument is that an international arbitral tribunal ought to have looked to Canadian domestic corporate law to determine whether Tennant Energy had control of an Investment in Canada.

127) NAFTA Article 1131(1) requires the Tribunal to interpret the NAFTA in accordance with applicable rules of international law. The appropriate question for the Tribunal, therefore, was whether, under applicable rules of international law, as required by NAFTA Article 1131(1) with reference to international law principles, Tennant Energy was an Investor (i.e., an “enterprise of [the United States] that seeks to make, is making or has made an investment”), and second, whether Tennant Energy was seeking to make, was making, or had made, an investment in Canada. That question was to be answered against the backdrop of the expansive definition of Investment set out in Article 1139 of the NAFTA.

128) The *S.D. Myers* Tribunal concluded that SDMI had made such an investment.¹⁰⁵

129) The express terms of the NAFTA required the Tribunal to interpret its terms in “light of its objectives set out in [Article 102(1)] and in accordance with the applicable rules of international law”. Where the NAFTA intends that the domestic law of one of the parties is relevant, it says so expressly, as in, for instance, the definition of “enterprise” under Article 201, or various provisions of NAFTA Chapters 15 and 19.

130) The approach adopted by Canada must be rejected as contrary to the express objectives of the

¹⁰⁴ *Canada (Attorney General) v. S.D. Myers Inc.*, ¶ 68. (**R-080**),

¹⁰⁵ *S.D. Myers First Partial Award* at ¶¶ 230 – 232 (**C-113**) *S.D. Myers Second Partial Award* at ¶¶ 108 - 120. (**C-193**).

Treaty. The NAFTA Preamble sets out the Parties resolve to, among other things, “reduce distortions to trade,” to “establish clear and mutually advantageous rules governing their trade,” and to “ensure a predictable commercial framework for business planning and investment.” The objectives of the NAFTA Treaty, as set out in Article 102, also include increasing substantially investment opportunities in the territories of the Parties, and otherwise eliminating barriers to trade. These objectives are not served by assessing the meaning of the Treaty with reference only to domestic principles and without regard for the express intent of the Parties.

131) During the closing argument, Canada referred to a definition of control that is in the Ontario Business Corporation Act (OBCA).¹⁰⁶ However, Canada’s argument is both incorrect and misguided. Canada also failed to disclose that this same argument about the applicability of domestic Canadian definitions to the meaning of control in the NAFTA was rejected by the *S.D. Myers* Tribunal, and by Canada’s own Federal Court.

132) The definition of “Control” in the OBCA is not exhaustive as the definition of control over corporations. It is merely a definition of what constitutes control for certain reporting functions under that act. But, even more important, is that subnational legislation such as Ontario's domestic corporate legislation cannot control the ordinary meaning to be given to a term used in NAFTA across North America.

133) Assessing the meaning of "control" with reference to domestic law would permit the obligations owed by Canada, the United States, or Mexico under the NAFTA to vary depending upon the jurisdiction and domestic legislation. Thus, to the extent that the domestic legislation of the United States or Mexico (or any of their subnational governments) provided for a different definition of "control," then the rights of the investors of different states would correspondingly vary. That approach would allow governments to avoid liability for breaching the NAFTA by simply changing their own domestic legislation.

134) The OBCA is a statute dealing with the organization of Ontario corporations, but the NAFTA is

¹⁰⁶ Mark Klaver, Transcript, Day 5 at page 720 at lines 7-16 referring to the definition of control under the Ontario Business Corporations Act, (C-097). He stated: “The Ontario Business Corporations Act, Exhibit R 097, states that, "a corporation is controlled when one holds over 50 percent of the votes that may be cast to elect Directors of the Corporation, and the votes attached to those securities are sufficient, if exercised, to elect a majority of the Directors of the Corporation." Thus, for the Claimant to prove that it held legal control over Skyway 127, it would need to establish that Tennant Travel held over 50 percent of the votes that may elect Skyway 127's Directors.”

a wide-ranging trade and investment Treaty between three nations. To ascribe to the drafters of NAFTA an intention that the OBCA definition would apply in interpreting the Treaty is untenable.

135) Canada's own Federal Court came to the opposite conclusion raised by Canada in the *S.D. Myers* Judicial Review. The Federal Court considered the virtually same argument Canada raises (under the *Canada Corporations Act*) in the *S.D. Myers* case and ruled that the definition of control in Canadian law did not govern the definition of "control" under the treaty.¹⁰⁷ The Federal Court noted:

68. Therefore, the References to the *Canadian Business Corporations Act* relied upon by the Attorney General are not relevant for determining whether SDMI, as a matter of fact, controlled, indirectly or directly, Myers Canada in the ordinary meaning of the word « controlled ».

69. The position of the Attorney General is a narrow, legalistic, restrictive interpretation contrary to the objectives of the NAFTA, and contrary to the purposive interpretation which NAFTA Article 2.01 and Article 31 of the Vienna Convention stipulate.

136) Canada's own Court's rejected the argument that the definition of "control" in the NAFTA should be based on local Canadian law in the *S.D Myers* judicial review in 2000. This Tribunal should equally reject Canada's equally weak argument more than 20 years later.

F. THE DECEPTIVE USE OF CODE WORDS TO AVOID DISCLOSURE

137) President Bull requested that mention be made of the parts of the record addressing the use of Code Words by Ontario officials to evade document disclosure. These Code Words were part of the strategy used to avoid disclosing subpoenas issued by the Ontario Legislature investigating Ontario Energy Policy.

138) As the Tribunal is aware, the Chief of Staff to the Ontario Premier was identified as a member of the "Breakfast Club" by Susan Lo. The Chief of Staff was criminally convicted of destroying documents on Energy Policy held in the Premier's offices by having the computer storage devices "wiped" by a magnet by an I.T. Professional who had a personal relationship with the Deputy Chief of Staff to the Premier.¹⁰⁸

¹⁰⁷ *Attorney General (Canada) v S.D. Myers Inc (R-80)* at ¶¶ 68 - 69.

¹⁰⁸ Investor's Memorial at ¶ 268 and Rob Ferguson, Toronto Star, "Former McGuinty chief of staff found guilty of deleting documents in wake of power plants cancellation," 19 January 2018, (C-009).

139) In the opening statement, Tennant Energy took the Tribunal to materials before the Ontario's Courts and to an extract from Document **CLA-278** which appeared in Tennant Energy's Opening slide 36.¹⁰⁹ The extract from the document was from the *Trillium Wind* case before the Ontario Courts. The extract identified the types of extreme steps that Ontario officials took to hide and mischaracterize energy policy evidence to block its production.

140) Slide 36 from the Investor's Opening Statement contained an extract from document **C-278** filed in the Ontario Courts in 2020 explaining the nature of the criminal conspiracy to delay or block document production. The document identifies the disingenuous practices Ontario's most senior officials took to prevent document production by using "code words." This information arose from disclosure arising in the *Trillium Wind* case and was first disclosed in 2020. It noted:

Defendant assigned a "**code name**" to its internal communications regarding "offshore wind" and did so with **the express purpose of hiding** its misfeasance specifically targeted to injure the Plaintiff, consistent with and concurrently with the Defendant's use of the code name "**Project Vapour**" to hide its communications regarding the concurrent cancellation of **gas-fired electricity generating plants** in Ontario. The Defendant has not disclosed the "code name" it assigned to "offshore."

141) During the opening, Mr. Appleton also noted that "We also do not know the code name for the "onshore" projects, for the projects in the Bruce Region FIT Program or Skyway 127 either."¹¹⁰ What is evident is that senior government officials engaged in conduct designed to avoid disclosure of information about the misadministration of Ontario's Energy Policy. The person criminally convicted for the destruction of documents was identified by Susan Lo as one of the members of the "Breakfast Club" conspiracy in her testimony before the *Mesa Power* NAFTA Tribunal. This is a direct link between the "Breakfast Club" and the systemic and endemic efforts secretly taken by the Ontario government to hide the true reason for energy policy decisions in Ontario. The discovery of the code words provides better understanding of the extent of the conspiracy.

142) Such information has not been available to the Investor until the year 2020. The discovery of this information must be the constitutive factor to determine breach as, otherwise, the deception would allow the wrongdoing to evade redress simply by effectively continuing its wrongfulness.

¹⁰⁹ Investor's Opening Statement - Transcript – Day 1 at page 128, line 17 to page 129, line 19.

¹¹⁰ Investor's Opening Statement - Transcript – Day 1 at page 129, line 10-12.

Such an approach would permit Canada to profit from its wrongfulness and must not be permitted.

3. BRIEF RESPONSIVE ISSUES

A. TRANSPARENCY ISSUES

143) Tennant Energy notes that not all testimony that occurs in confidential sessions would meet the definitions of being confidential. The session is identified as confidential to facilitate the protection, but that does not conclusively mean that the testimony is consistent with any of the requirements for the continued suppression of that information from the public.

144) The NAFTA Free Trade Commission (FTC) has issued an interpretative statement under NAFTA Article 2103 on July 31, 2001. That document contained instructions on transparency.¹¹¹ The FTC statement in section 1(a) provides:

Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.

145) The FTC statement continues in section 1(a) (ii) to say

ii. Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:

a. confidential business information.

b. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and

c. information which the Party must withhold pursuant to the relevant arbitral rules, as applied.

146) In the hearing, Ms. Squires suggested that the relevant arbitral rules required Canada to keep the testimony of Ontario officials confidential. That is not correct. Canada chose to assert confidentiality over that testimony.

147) Further in this arbitration, Canada was invited to make that testimony public once it became

¹¹¹ FTC Notes of Interpretation, July 31, 2001 – Section I – Transparency.

known that the testimony was available to the public on the internet. After Mesa Power's representative to the hearing on May 14, 2021, confirmed his view that the information was not confidential. However, made a motion to keep that information confidential. It was consistently opposing every effort of Tennant Energy to make this information available to the public to allow this information to prominently put on public notice other FIT Proponents who were victims of Ontario and Canada's activities.

- 148) This understanding that "nothing in the NAFTA precludes the Parties from providing public access to documents "submitted to or issued by a Chapter Eleven tribunal" is essential. As the Tribunal is aware, Canada does not provide public access on its website to the documents submitted in NAFTA arbitrations. It opposed Tennant Energy's reliance on the non-confidential documents arising from the Mesa Power Arbitration until it saw the May 2021 communication from Mesa Power's client representative at the NAFTA Hearing confirming Mesa Power's agreement to share those documents. These documents appear to be the same documents that the NAFTA FTC obliged its Treaty Parties to make public.
- 149) Accordingly, Canada's policies and practices below Canada's public NAFTA obligations under the FTC Interpretative Statement are measures defined by NAFTA Article 201.
- 150) In addition, separately, Canada has undertaken transparency obligations in its international trade policy. In his testimony, Lucas McCall confirmed Canada's general international trade policy on transparency.¹¹² Canada's failure to diligently meet those obligations is also a practice (constituting a measure defined by NAFTA Article 201 under NAFTA).

B. SUBSEQUENT PRACTICE UNDER THE VIENNA CONVENTION

- 151) Canada adverted in the hearing to an alignment of litigation positions between the three NAFTA Parties as being sufficient to constitute subsequent practice under the 1969 Vienna Convention of the Law of Treaties (VCLT).
- 152) Tennant Energy repeats the following material from paragraphs 42 to 44 of Tennant Energy's First Article 1128 response:

¹¹² Transcript Day 2 at page 201, ll 20-2 (questioning from Ms. Herrera) Investor's Closing Appleton Presentation Slide 13.

42. Professor Martins Paporinskis considered subsequent state practice to see whether it was available to the NAFTA Parties as a means of modifying the interpretation of the Treaty at this time under the *Vienna Convention*. Professor Paporinskis identifies several serious obstacles to the position advanced by the non-disputing Parties in their Second Article 1128 Submissions. He concludes that written pleadings of states in investor-state disputes do not raise the threshold of constituting subsequent practice. Instead, the widespread and consistent practice needs to be demonstrated. Simply aligning various positions of non-disputing NAFTA Governments is not sufficient to establish concordant, common, and consistent subsequent practice supporting a new content of treaty law.¹¹³

43. Professor Paporinskis concludes his analysis by stating:

The procedural and empirical qualifications for identifying the argument with precision, the contradictions within the identifiable practice, and the consistent emphasis by States and Tribunals alike on the application of the *Vienna Convention* form the background to this debate. It does not seem possible to maintain that there exists sufficient practice to change either the content of custom or reinterpret the treaty rules of the *Vienna Convention on the Law of Treaties*.¹¹⁴

44. Thus, subsequent state practice concerning investor-state treaty practice is not a reliable or authoritative approach for supplemental interpretation of a treaty like the NAFTA.

153) The Investor opposes such a reading proposed by Canada and the non-disputing Parties. It would vastly expand the meaning of this essential interpretative principle in Article 31(1)(b) of the VCLT. The Investor's submissions opposing this approach were set out in its response to the First NAFTA Article 1128 submissions,¹¹⁵ and it maintains them consistently.

¹¹³ Martins Paporinskis, *The International Minimum Standard of Treatment and Equitable Treatment* (Oxford: Oxford University Press, 2013) ("Paporinskis (2013)"), pp.144-145 (*CLA-097*). The entirety of Prof. Paporinskis' observations were set out in full in paragraph 9 of the Investor's Response to the Original 1128 Submissions of the non-disputing Parties.

¹¹⁴ Paporinskis (2013), at p.146 (footnote omitted) (*CLA-097*).

¹¹⁵ Investor's First 1128 Response (Dec 27, 2019) at ¶¶ 34 – 47.

4. PRAYER FOR RELIEF

154) For the preceding reasons, the Investor continues in its views, set out in its earlier submission.

As explained above in detail, Tennant Energy respectfully requests that the Tribunal dismiss Canada's request to dismiss this Claim for want of jurisdiction.

155) Respectfully submitted on behalf of the Investor, on December 17, 2021.



Barry Appleton

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