

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

Tennant Energy LLC.

INVESTOR

v.

Canada

RESPONDENT

WITNESS STATEMENT OF JUSTIN GIOVANNETTI

September 2, 2020

First Witness Statement of Justin Giovannetti

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I. INTRODUCTION

1. My name is Justin Giovannetti. I am a third-year law student at the Osgoode Hall Law School in Toronto, Canada.
2. In this witness statement, I discuss my discovery that the website of the Permanent Court of Arbitration contained videos of the Mesa Power NAFTA Hearing that were broader than the information contained in the redacted public hearing transcript. I also confirmed that Canada's Mesa Power information website was publishing this same video information to the world.
3. This witness statement discusses the circumstances of my discovery.

A. Background

4. I am currently enrolled as a law student at the Osgoode Hall Law School at York University in Toronto. I previously completed a business degree (B.Com) at Queen's University in Kingston, Ontario. I hope to practice law in the future.
5. [REDACTED]
6. During the summers of 2019 and 2020, I worked as a summer intern at Appleton & Associates International Lawyers LP. As a summer intern, I have worked on the Tennant Energy NAFTA

arbitration on behalf of Tennant Energy, LLC. I have enjoyed my work at Appleton & Associates International Lawyers.

7. I expressly consent to the use and processing of my personal data, in or related to this witness statement, being used by the arbitration participants for this dispute, including its subsequent consideration and enforcement.
8. I wrote this witness statement in the English language and would testify in English if called before the Tribunal. I believe that the contents of this statement are correct. The information set out in this statement arises from my own personal knowledge and experience as a summer intern and as a member of the public lawfully accessing information on the Internet. If I rely upon another source for my information in this statement, I have specified the basis for that knowledge or belief in this statement.
9. Because of COVID-19, the Appleton & Associates Office in Toronto has been closed. I have worked remotely. I had only had the opportunity to see Mr. Appleton in person twice this entire summer – once when I received a loaner laptop computer in June 2020 at the Appleton office and a second time in the last full week of August 2020, when Mr. Appleton hosted a socially-distanced outdoor farewell lunch for one of my professional colleagues and me.
10. My last day working full time at Appleton & Associates International Lawyers was on August 28, 2020. Law school recommenced on Monday, August 31, 2020. My priority is to complete my legal studies. If my legal studies permit, I may do some limited part-time research work for Appleton & Associates International Lawyers during the fall semester to help me defray some of my school expenses.
11. I have had no contact with the members of the Tribunal or the Secretariat at the Permanent Court of Arbitration. I had no prior relationship with counsel for the Respondent.
12. I am currently a student volunteer on a public interest research project with the International Arbitration Committee of the American Bar Association's Section of International Law. We are preparing a possible policy statement on investor-state arbitrator conflict of interest reform being considered by the ICSID and UNCITRAL Working Group III. Mr. Appleton serves a co-chair of the ABA Section of International Law's International Arbitration Committee. He is also the chair of the

multi-national ABA taskforce considering these proposals for the International Arbitration Committee. All students at the Osgoode Hall Law School participate in a public interest law project as part of our requirements for graduation. This public interest research project is expected to be completed this semester.

B. Discovery that the Hearing Video was different from the Transcript

13. I understand that my work for Tennant Energy LLC is covered by attorney work product privilege because I am working on that case. As a result, I am mindful to avoid the disclosure of privileged information in this Witness Statement.
14. On July 17, 2020, I was reviewing evidence from the public Transcript in the *Mesa Power Group v Canada* NAFTA arbitration related to projects that had been approved in other transmission zones.
15. As part of our review of the items relevant to the upcoming Tenant Energy Memorial, I watched the *Mesa Power* NAFTA hearing witness video on the PCA website. Before this time, I had been looking at the redacted public Transcript rather than review the video because it was faster to read the Transcript than to watch the video. There were six days of video evidence posted on the PCA website.
16. The witness evidence of Energy Assistant Deputy Minister Sue Lo was crucial to the Investor's case, so I decided that should review her testimony in the hearing.
17. To my surprise, on Monday, July 20, 2020, I discovered that the evidence available from the public *Mesa Power* Hearing videos contained more information than in the Transcript. On July 20, 2020, I reviewed the *Mesa* Hearing Day 2, Part 4, and 5 testimony of Rick Jennings, *Mesa* Hearing, Day 3 Part 4 testimony of Bob Chow, and *Mesa* Hearing Day 3 Part 1 testimony of Susan Lo.
18. I reviewed all the remaining *Mesa Power* hearing videos posted on the PCA website. I discovered that all the *Mesa Power* NAFTA hearing videos of witness testimony contained no redaction the next day. To be sure, I viewed the entirety of the six days of video evidence posted on the PCA website. There were no restrictions on these videos. They were freely available to anyone on the Internet.

19. The information that I discovered from the *Mesa Power* NAFTA hearing videos on the Internet had never been made available to me from the files at the Appleton law firm, or in any discussions with any lawyers at the Appleton law firm, including Barry Appleton. I understood from my time as a summer intern in 2019 and 2020 that information subject to the confidentiality restrictions in the *Mesa Power* NAFTA case was removed from the Appleton Offices before I started at the firm. I did not have access to this restricted material, nor did I ever view it in any form.
20. Before my first discovery on July 20, 2020 of these admissions and other information in the hearing video available on the Internet, I had not been able to see the admissions. From my online access, I was also able to see slides that projected during the hearing such as emails, letters, and other documents. These documents were referenced in public documents (released by the PCA on August 15, 2015). Still, I was unable to review the underlying emails referenced in the public post-hearing documents until I was able to view them projected to the Tribunal and witnesses during cross-examination and argument at the *Mesa Power* NAFTA hearing videos.
21. I contacted Mr. Appleton about this discovery on July 20, 2020. In my opinion, this was a significant discovery and a major source of public information about the operation and administration of this publicly administered energy program.
22. Mr. Appleton did not direct me to review the unredacted evidence on the public websites on July 20. I discovered this evidence on the Internet, and I subsequently informed Mr. Appleton and others of the extent of the evidence. Subsequently, I confirmed that Canada's Mesa Power website contained a link to *Mesa Power* hearing videos at the Permanent Court of Justice.
23. From my review of the non-confidential letters sent from the PCA about posting of the website, this material has been available to the public in this format since April 30, 2015.

C. My role as a member of the Public


24. I reviewed the Witness Statement of Parthenya Taiyanides (CWS-2). Ms. Taiyanides explanation of the contents of the website is in accordance with my direct experience. I did not see any point in repeating the contents of her witness statement again. I adopt her discussion of the contents of the Mesa Power videos into this statement.

25. I was not involved in the *Mesa Power Group v Canada* NAFTA arbitration. I did not have access to confidential materials arising from that case.
- a) I accessed the Mesa Power NAFTA hearing videos as a member of the public.
 - b) The information on the PCA website was part of the public domain.
 - c) I know that other members of the public without access to the confidential portions of the *Mesa Power* Hearing viewed the videos on the PCA website that was being published by Canada on its own NAFTA website. These other members of the public would include Parthenya Taiyanides at Reed Smith in New York and John C. Pennie at Tennent Energy. They were all able to lawfully access the public videos from the public domain.
26. As the information in the videos has been entirely available to the world on the Internet, I would have to conclude that my access in 2020 to the Permanent Court of Arbitration was ordinary, proper, in the public domain, and lawful.

D. Conclusion

27. For the reasons set out above, I believe that I lawfully accessed information in the public domain whenever I accessed the *Mesa Power* hearing video that was forwarded by Canada and hosted on the website of the Permanent Court of Arbitration.
28. I discovered that the website of the Permanent Court of Arbitration contained videos of the *Mesa Power* NAFTA Hearing that were broader than the information contained in the redacted public hearing transcript. I also confirmed that Canada's *Mesa Power* information website was publishing this same video information to the world.
29. I make this witness statement in support of the Investor's Memorial in this NAFTA Arbitration and for no other or improper purpose.

Signed in Toronto, Ontario on September 2, 2020

A handwritten signature in black ink, appearing to read "Justin", is written over a horizontal line.

Justin Giovannetti