

Global Affairs Canada
Department of Justice



Affaires mondiales Canada
Ministère de la Justice

CANADA

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March 26, 2021

VIA EMAIL

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Sir Daniel Bethlehem
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Dear Members of the Tribunal:

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

Canada writes in accordance with paragraph 17 of the Confidentiality Order (“CO”), seeking the Tribunal’s final determination with respect to the outstanding disputed confidentiality designations to several exhibits filed with the Claimant’s Memorial on Jurisdiction, Merits and Damages (“Claimant’s Memorial” or “Memorial”) on August 7, 2020.

Specifically, Canada seeks the Tribunal’s determination on disputed confidentiality designations to exhibits C-107, C-108, C-201, C-204, C-205, C-206, C-208, and C-224 through C-243. With the exception of exhibit C-108, these exhibits are the *Mesa Power* hearing videos. Canada proposed a path forward with respect to the information in the videos to the Claimant over four months ago, but a resolution has not been found. While Canada has patiently waited for Mr. Appleton to return to the file to pursue this matter further, it has become clear to Canada that no agreement will be reached on these matters. Therefore, Canada respectfully requests that, pursuant to paragraph 17 of the CO, the Tribunal make a determination with respect to the two outstanding confidentiality

issues: (1) the disputed designations to exhibit C-108 in the Annex at Appendix C, and (2) the *Mesa Power* hearing videos.

Procedural History

Below, Canada sets out the sequence of events and correspondence relevant to the confidentiality issues set out in this letter. Since the confidentiality issues related to the *Mesa Power* hearing videos represent a unique situation, all of the disputing parties' discussions and proposals for dealing with such confidentiality issues are set out in the various pieces of correspondence detailed below, rather than in Annex A of the CO (the "Disputed Designations Schedule"). As such, the below explanations and attached Appendices are necessary to fully inform the Tribunal of the circumstances surrounding these confidentiality issues.¹ However, with respect to exhibit C-108, the Disputed Designations Schedule found at Appendix C to this letter fully sets out the parties' submissions with respect to that exhibit.

On October 30, 2020, Canada provided the Claimant with its proposed confidentiality designations to exhibit C-108, as well as a proposal for the designation of the *Mesa Power* videos, in accordance with paragraph 16 of the CO. Canada proposed that the *Mesa Power* videos be designated as Confidential, and that the publicly available redacted *Mesa Power* hearing transcripts stand as the Public Version of these exhibits in the *Tennant* proceedings. Canada proposed this way forward to ensure that public information from the *Mesa Power* hearing could remain available while also aiming to create efficiencies in the confidentiality review process and save resources.

Following the PCA's removal of the *Mesa Power* hearing videos from its website on August 11, 2020, Canada reviewed the videos to determine the extent of confidential information that had not been redacted. From Canada's review, it appeared that there was a substantial amount of confidential information that remained unredacted and did not properly reflect the final confidentiality designations that had been made to the hearing transcripts and videos pursuant to the *Mesa Power* Confidentiality Order. As such, Canada was of the view that it would take considerable resources to prepare the properly redacted videos and that submitting the public versions of the *Mesa Power* hearing transcripts would be the most efficient way of proceeding. Given that the public versions of the *Mesa Power* hearing transcripts provide the exact same audible information that would be in a public version of the *Mesa Power* hearing videos, Canada is of the view that there would be no

¹ Some of the Appendices attached to this letter contain attachments themselves. However, Canada has only retained those attachments that are directly relevant to the confidentiality issues addressed in this letter. Canada will provide the complete set of attachments, should the Tribunal so request. The Claimant's email of March 23, 2021 sets out the same dates as Canada sets out below on which correspondence was exchanged between the disputing parties.

prejudice to either side if the transcripts stand in place of the videos, as the confidential versions of the videos would still be available for use by the Tribunal and the disputing parties in this arbitration. Canada's email of October 30 is attached for the Tribunal's reference as Appendix A.

On November 20, 2020, the Claimant responded to Canada's proposed confidentiality designations and to Canada's proposal regarding the *Mesa Power* hearing videos. The Claimant's email of November 20 is attached for the Tribunal's reference as Appendix B.

On December 3, 2020, Canada responded to the Claimant's email of November 20 and attached an Annex with its Replies to the Claimant's Objections to designations in exhibit C-108 and the Claimant's Memorial of August 7, 2020. The disputed designations to the Claimant's Memorial were subsequently resolved between the parties, with only the disputed designations to exhibit C-108 left outstanding. In its response, Canada reiterated its proposal and position on the *Mesa Power* hearing videos. A copy of Canada's December 3 communication setting out its position on the *Mesa Power* videos, as well as the Annex with the outstanding disputed designations to exhibit C-108, are attached for the Tribunal's reference as Appendix C.

On January 15, 2021, having not received a response to its email of December 3, Canada wrote to the Claimant to follow up on the issues raised in that email. The Claimant wrote back to Canada on that same day, indicating that in light of Mr. Appleton's personal circumstances, it preferred to wait until his return to full time practice to address the matters raised in Canada's communication. A copy of the January 15 exchange is attached for the Tribunal's reference as Appendix D.

Canada responded to the Claimant's email of January 15 on January 18 and indicated that in light of Mr. Appleton's personal circumstances, it would delay seeking the Tribunal's assistance in these matters for an additional two weeks. Canada also requested that the Claimant submit the final Public and Confidential versions of its Memorial and Witness Statements of John Pennie and Justin Giovannetti as the designations to these materials had been resolved since December 3, 2020. A copy of Canada's January 18, 2021 communication is attached for the Tribunal's reference as Appendix E.

On January 27, 2021 the Claimant responded to Canada's email of January 18 and addressed the outstanding confidentiality issues, again indicating its preference to delay resolution of these matters until Mr. Appleton's return. Canada was prepared to delay, in good faith, its outreach to the Tribunal on these issues until after Mr. Appleton had returned to regular practice. Canada responded to the Claimant on January 28, indicating that it would continue to wait for Mr. Appleton's return, while also offering its assistance in preparing the final versions of the Memorial and Witness

Statement of John Pennie.² Canada provided the Claimant with a version of the Memorial and Witness Statement of John Pennie on January 28, which reflected the final, agreed upon designations. A copy of the communications exchanged on January 27 and 28 is attached for the Tribunal's reference as Appendix F.

Canada emailed the Claimant again on February 24, 2021 offering its assistance in preparing the final versions of the Memorial and Witness Statement of John Pennie. The Claimant responded on the same day, indicating that it wished to defer discussing the procedural matters until Mr. Appleton's return. A copy of the February 24 exchange is attached for the Tribunal's reference as Appendix G.

While Canada was awaiting Mr. Appleton's return to practice in order to discuss these outstanding procedural issues, the Claimant filed its Reply Memorial on Jurisdiction.³ The Reply Memorial was signed by Mr. Appleton. In its submission, the Claimant made further (incorrect) allegations about Canada's conduct regarding these outstanding issues,⁴ alleging that Canada has "continued to prevent the public from having access to this information in this arbitration over Tennant Energy's objection [.....]". This is incorrect and misleading. As the attached email correspondence demonstrates, Canada has proposed a process to make the non-confidential aspects of the *Mesa Power* hearing video information public but the Claimant has failed to engage on this point.

Order Requested

In light of the Tribunal's direction in paragraph 50 of Procedural Order No. 7,⁵ and in accordance with paragraph 17 of the CO, Canada hereby requests that the Tribunal order that all

² The disputing parties were in agreement with respect to the designations in the Witness Statement of Justin Giovannetti.

³ In its March 23, 2021 correspondence, the Tribunal determined that as the Claimant had, as of March 23, already filed two submissions on jurisdiction, it would not be necessary for the Claimant to file another submission after Canada files its second submission on jurisdiction. Canada therefore treats the Claimant's Counter-Memorial as a Reply Memorial. In its January 10, 2021 correspondence on this same issue, the Tribunal also refers to the Claimant's pleading as the "Reply Memorial". See also PO 9, ¶¶ 22, 31, and 32.

⁴ See for example, ¶ 334 and fn. 218.

⁵ "[t]he Tribunal notes that the *Mesa Power* Videos have since been removed from the case registry's website and they are no longer in the public domain. It may be that the Respondent will wish to protect the confidentiality of the information in the *Mesa Power* Videos, in accordance with the *Mesa Power* confidentiality order. If the Respondent so requests, the Tribunal would be prepared to order that any confidential information contained in the *Mesa Power* Videos be redacted from the publicly available versions of the Parties' pleadings and any decision or award. In this regard, the Tribunal notes that the Confidentiality Order in this arbitration defines "Confidential Information" to include information "that is not

information that was designated as confidential pursuant to the *Mesa Power* Confidentiality Order in the *Mesa Power* hearing videos⁶ be designated as confidential in this arbitration. Further, as Canada noted in its email of October 30, 2020 (attached as Appendix A), in order to save resources and create efficiencies, Canada also requests that the publicly available redacted *Mesa Power* hearing transcripts stand as the Public Versions of these exhibits in the *Tennant* proceedings.

Canada also requests that the Tribunal reject the Claimant's proposed designation to exhibit C-108 for the reasons set out in the Disputed Designations Schedule attached at Appendix C.

Finally, Canada reserves its right to seek costs as a result of the Claimant's actions related to these matters.

Yours very truly,



Heather Squires
Deputy Director & Senior
Counsel
Trade Law Bureau

cc: Barry Appleton, TennantClaimant@appletonlaw.com (Appleton & Associates)
Ed Mullins, Ben Love (Reed Smith LLP)
Christel Tham, Diana Pyrikova (Permanent Court of Arbitration)
Annie Ouellet, Alexandra Dosman, Mark Klaver, Maria Cristina Harris (Trade Law Bureau)

publicly available and is designated by a Party as confidential on the grounds that it is...information subject to a confidentiality order issued by a court or tribunal in proceedings unrelated to the present proceedings". (footnotes omitted)

⁶ Namely C-107, C-201, C-204, C-205, C-206, C-208, and C-224 through C-243.

Tait, Benjamin -JLTB

From: Tait, Benjamin -JLTB
Sent: October 30, 2020 4:32 PM
To: 'Barry Appleton'; Ed Mullins; Ben Love; Cristina Cardenas (MIA); Nabeela Latif; Tennant Claimant
Cc: Squires, Heather -JLTB; Ouellet, Annie -JLTB; Harris, Maria Cristina -JLTB; Klaver, Mark -JLTB; Bakelaar, Darian -JLTB; Girvan, Krystal -JLTB; Dosman, Alexandra -JLTB
Subject: Tennant Energy LLC v. Canada - Canada's Proposed Designations to Claimant's Memorial and Supporting Documents (Email 1 of 2)

Follow Up Flag: Follow up
Flag Status: Completed

Dear Mr. Appleton,

In accordance with paragraph 16 of the CO, and the Tribunal's letter of October 16, 2020, providing Canada until today's date to provide its proposed designations, we attach for your review Canada's proposed designations to the Claimant's Memorial, Witness Statement of John Pennie, and Exhibits C-108, C-179, C-214, C-215, C-216, and C-218. Due to the size of these files, we will be sending these documents in two separate emails, with this being the first. With regard to the *Mesa Power* Hearing videos that were exhibited with the Claimant's Memorial on August 7, 2020, Canada proposes that these exhibits be designated as Confidential in accordance with the confidentiality review process that was done in the *Mesa Power* arbitration. The *Mesa Power* hearing videos are on record in this arbitration as C-107, C-201, C-204, C-205, C-206, C-208, and C-224 through C-243; in light of the file sizes, they have not been attached to this email. Canada proposes that the public versions of the *Mesa Power* Hearing transcripts take the place of the public versions of the *Mesa Power* Hearing videos. Normal practice would be to propose that the public versions of the *Mesa Power* Hearing videos be submitted in this arbitration. However, we have reviewed the Amended *Mesa Power* Hearing videos that the PCA had uploaded to the private, file sharing site for that arbitration, and it appears that the hearing videos have still not been edited properly to redact all confidential information. It would take considerable resources in time, cost, and manpower for either disputing party to prepare the properly redacted videos. Submitting the public versions of the transcripts would be the most efficient way to proceed, and given that the public transcripts provide the exact same information that would be in the public videos, if the videos existed, there is no prejudice to either side, as the confidential videos would still be available for use in this arbitration, and public access will be upheld in the same manner. Designating the *Mesa Power* videos as Confidential in their entirety conforms to the Tribunal's decision in paragraph 50 of Procedural Order No. 7.

Additionally, we write to confirm that we have no proposed designations in the materials exchanged relating to the *Mesa Power* Hearing videos. This includes:

- Canada's Motion of August 10, 2020;
- Tribunals Email of August 11, 2020
- Claimant's Response of August 18, 2020
- Tribunal's Email of August 19, 2020
- Canada's Reply of August 26, 2020
- Claimant's Rejoinder of September 2, 2020

We look forward to hearing from you in accordance with the timelines under the CO.

Best regards,

Benjamin Tait

Paralegal
Trade Law Bureau (JLTB)
Global Affairs Canada
Tel: (343) 203-6868



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Canada

Affaires mondiales
Canada

Tait, Benjamin -JLTB

From: Barry Appleton <bappleton@appletonlaw.com>
Sent: November 20, 2020 4:52 PM
To: Squires, Heather -JLTB; Tait, Benjamin -JLTB; Klaver, Mark -JLTB; Ouellet, Annie -JLTB; Dosman, Alexandra -JLTB; Girvan, Krystal -JLTB; Bakelaar, Darian -JLTB; Harris, Maria Cristina -JLTB
Cc: Cristina Cardenas (MIA); Ben Love; Ed Mullins; Nabeela Latif; Tennant Claimant
Subject: Tennant v. Canada - Investors confidentiality designation - Nov 20 2020
Attachments: CWS-3 -Justin Giovannetti Witness Statement - September 2 2020.pdf; CWS-1 - Pennie (7Aug2020) - Canada's Proposed Designations with Investor's Additions.pdf; 2020-11-20 - Investor's objections to Respondent's Proposed Designations.docx; 2020-08-07 - Tennant - Claimant Memorial - Canada's Proposed Designations with Investor's Additions.pdf

Follow Up Flag: Follow up
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Dear Heather,

We are writing to address a number of procedural matters.

- In accordance with Paragraph 16 of the *Confidentiality Order* the Investor has enclosed a Redfern Schedule setting out Objections to the Respondent's preliminary confidentiality designations in connection with the publication of the Investor's Memorial.
- In accordance with Canada's November 18th email, the Investor has set out preliminary confidentiality designations with respect to the Investor's Memorial and the Witness Statement of John Pennie (CWS-1). These designations are based on our earlier agreement.
- We also have enclosed the Witness Statement of Justin Giovannetti in accordance with the Investor's November 13th email and the Tribunal's November 16th email. We have made preliminary confidentiality designations on only his home address and birth date for personal data privacy reasons. We have enclosed these documents with this email.
- Finally, we are responding to Mr. Tait's email of October 30, 2020 where Canada's proposes that the *Mesa Power* Hearing videos (C-107, C-201, C-204, C-205, C-206, C-208, and C-224 through C-243) be designated as confidential in accordance with the confidentiality review process that was done in the *Mesa Power* arbitration.

Unfortunately, we are not in a position to concur with Canada's proposal to hide the video exhibits behind a confidentiality shield. The approach proposed by Canada would needlessly restrict portions of the *Mesa Power* Hearing video that should now be considered public. The reason is that information that was confidential at the time that the video was made has subsequently become public. As a result, portions of the original confidential hearing video can no longer be confidential.

Public interest demands public access wherever reasonably possible. If Canada's proposal were to be followed, there would be unnecessary obstacles to transparency and barriers to public scrutiny of conduct of government officials. These non-confidential portions of the exhibits must be made public. They cannot meet the requirements of confidentiality under the Tennant Energy *Confidentiality Order*.

Information that has been made public cannot no longer be restricted in the transcript or the videos. Such actions would be inconsistent with the Tribunal's decision in paragraph 50 of Procedural Order No. 7.

Canada is aware of those areas which have been made public subsequently to the Mesa Power Hearing, and thus can propose appropriate redactions to the video exhibits and the transcripts. The public video and the public transcripts are currently overly restrictive and thus are not a reliable or accurate substitute for the evidence.

To facilitate this process, we are prepared to have Canada make the proposals initially on the transcript and then, after agreement has been established, move to the video.

There is a serious public interest in open access and open justice in this arbitration. This is especially important when questions of misconduct from government officials arise. We believe that the public in each of the three NAFTA states have a right to see this information. There would be significant prejudice to the administration of international justice and due process arising from Canada's disrespect to the principles of transparency. This should not be lightly countenanced.

We note that these videos were available to the public on the internet for nearly five years. This would be a basis for these videos to be fully public now. We simply cannot see why Canada would not support the principle of transparency for information that was part of the public domain.

The Investor sees little benefit for Canada to continue in its charade that this evidence is still private given the extensive and unlimited public exposure on the internet arising from Canada's own NAFTA website. However, if Canada still wishes to persist in this needless and wasteful pursuit, then Canada will need to devote the resources to properly redact the transcript and the videos.

Wishing you and your team the very best of health, on behalf of Counsel for the Investor, Tennant Energy



Barry Appleton

Managing Partner

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Tait, Benjamin -JLTB

From: Tait, Benjamin -JLTB
Sent: December 3, 2020 8:16 AM
To: 'Barry Appleton'; Squires, Heather -JLTB; Klaver, Mark -JLTB; Ouellet, Annie -JLTB; Dosman, Alexandra -JLTB; Girvan, Krystal -JLTB; Bakelaar, Darian -JLTB; Harris, Maria Cristina -JLTB
Cc: Cristina Cardenas (MIA); Ben Love; Ed Mullins; Nabeela Latif; Tennant Claimant
Subject: RE: Tennant v. Canada - Investors confidentiality designation - Nov 20 2020
Attachments: 2020-12-03 - Canada's Replies to Investor's Objections to Respondent's Proposed Designations.docx

Follow Up Flag: Follow up
Flag Status: Completed

Dear Mr. Appleton,

Thank you for your comments in your email below. We have considered your comments, and can respond accordingly.

In accordance with paragraph 17 of the Confidentiality Order, please find attached Canada's Replies to the Claimant's Objections to the proposed designations in the Memorial and supporting documents.

Canada has no objections or additional designations to proposed in the Witness Statement of Mr. Giovannetti. Additionally, Canada has no objections to the additional proposed designations to the Claimant's Memorial or Witness Statement of John Pennie.

Respectfully, Canada cannot agree to the Claimant's position, set out below, with respect to the *Mesa Power* videos. The Tribunal's position in paragraph 50 of Procedural Order No. 7 (PO 7) is clear in that the Tribunal is prepared to order that any confidential information contained in the *Mesa Power* videos be designated as Confidential in this arbitration, if Canada so requests. This was subsequently confirmed by the Tribunal in its communication of October 16, 2020 where it stated:

"In the event that the Claimant disagrees with the Respondent's confidentiality designations regarding any information contained in the *Mesa Power* Videos which is subject to the confidentiality order issued by the *Mesa Power* tribunal, and the issue comes before the Tribunal for determination, the Tribunal will be prepared to order that any such confidential information be redacted from the publicly available versions of the Parties' submissions, and any directions, orders or award, in accordance with paragraph 50 of PO7."

Canada's initial proposal on the Confidential designations to be made to the *Mesa Power* video exhibits was set out in our email to you of October 30, 2020 which proposed that the *Mesa Power* video exhibits be designated as Confidential in accordance with the confidentiality review process that was completed in the *Mesa Power* arbitration. Canada maintains its position that there is no basis to suggest that the subject information should somehow now be public in light of the inadvertent disclosure. In paragraph 38 of PO 7, the Tribunal specifically accepted and upheld Canada's contention that no waiver of confidentiality over the information contained in the *Mesa Power* videos had taken place, and that Canada had a reasonable expectation that confidentiality instructions would be followed, and that any disclosure was purely inadvertent. To suggest otherwise would be a departure from the Tribunal's findings.

Should the Claimant maintain its position with respect to the *Mesa Power* video exhibits, we ask the Claimant to set out its objections to Canada's confidentiality designation proposal regarding the *Mesa Power* videos in a separate Annex, identifying the specific information in the videos that the Claimant believes to be not confidential, as provided for in

paragraph 16 of the Confidentiality Order. Canada will subsequently provide its Replies to any Objections and if no agreement can be achieved, the disputing parties can seek the Tribunal's direction on the matter, in accordance with paragraph 17 of the Confidentiality Order and the Tribunal's clarification of October 16, 2020, noted above.

Finally, with respect to the manner in which the public information in the *Mesa Power* videos are to be made public (i.e. redacted transcripts or redacted videos), we believe it would be prudent to return to this issue once the issue of confidentiality has been resolved.

Best regards,

Benjamin Tait
Paralegal
Trade Law Bureau (JLTB)
Global Affairs Canada
Tel: (343) 203-6868



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Canada

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Canada

Annex A: Investor’s Disputed Designations Schedule

No.	Ref. to Designation	Objections to Designation			Reply to Objections	Tribunal’s Decision
		Proposed Redaction	Reasons	Designation Requested		
CHALLENGES TO RESPONDENT’S PROPOSED CONFIDENTIALITY DESIGNATIONS IN CLAIMANT’S MEMORIAL AND SUPPORTING DOCUMENTS						
1.	Investor’s Memorial	<p>Sentence in paragraph 166: <i>“Skyway 127 had placed into the group of successful candidates during the “dry run,” but it did not award the FIT Contract.”</i></p>	<p>The Investor objects to Canada’s designation of Memorial paragraph 166 as confidential. In particular, Canada seeks to designate the following: <i>“Skyway 127 had placed into the group of successful candidates during the “dry run,” but it did not award the FIT Contract.”</i></p> <p>However, all this information is publicly available. . Thus, it does meet the definition of Confidential Information under the <i>Confidentiality Order</i>.</p> <p>For example, this information is in the public January 2020 Procedural Hearing Transcript. For example, see page 285, lines 17 – 25 of the Day 2 Transcript (January 15, 2020).</p> <p><i>“But the fact of the matter is that the issues about the use for International Power Canada, a favored company because of its political connections, they took the spot of Skyway 127, the investment owned by Tennant Energy. It had what was called the “dry run.” It had a vested position in the queue, and they bounced them from that vested position. They ran the test, they found out that their friends didn’t get it, and then they modified it over a weekend.”</i></p>	<p>This information is not confidential. The Investor objects to any confidentiality designation.</p>	<p>Canada agrees to withdraw this designation.</p>	

No.	Ref. to Designation	Objections to Designation			Reply to Objections	Tribunal's Decision
		Proposed Redaction	Reasons	Designation Requested		
			<p>This information was also publicly disclosed in Day 2 on page 301 lines 1-10 :</p> <p><i>“So, Tennant had shares in the Skyway Project. GE had shares in the Skyway Project. GE was very interested. They thought this would be an excellent Project. Being in sixth place gave them basically what they thought was guaranteed access because they did what is called the "dry run." In the dry run, they had access. Six projects for sure. Could have been actually more at the time, I think, but for sure they were in the gold zone. They were in the green. They were getting a contract and then all of a sudden they didn't.”</i></p> <p>Further, paragraph 780 of the Public Version of the Investor’s Reply Memorial in <i>Mesa Power</i> discusses the dry run:</p> <p><i>“Once it was determined that the ECT would not be used to award FIT contracts, the OPA and the Ministry of Energy began to develop a process to award contracts in regions enabled by the new Bruce to Milton transmission line. As of April 2011, the OPA was proposing a “special TAT” process that did not include either connection point changes or generator-paid upgrades. In mid-April 2011, the OPA conducted a “dry run” of the Bruce to Milton Allocation process that determined which projects would receive contracts using the OPA’s preferred approach. The OPA shared this information with the Ministry of Energy, despite its reluctance to do so.”</i></p>			

No.	Ref. to Designation	Objections to Designation			Reply to Objections	Tribunal's Decision
		Proposed Redaction	Reasons	Designation Requested		
			<p>Paragraphs 781-785 of the Public Version of the Investor's Reply Memorial in <i>Mesa Power</i> indicate that companies on the priority que were harmed by the changes made after the dry run was conducted.</p> <p>Both the January 15, 2020 Day 2 Procedural Hearing Transcript and the Public Version of the Investor's Reply Memorial from <i>Mesa Power</i> are disclosed as public information.</p> <p>Canada's request must fail as the information does not meet the definition of Confidential Information.</p>			
2.	Investor's Memorial	<p>Sentence in paragraph 513: <i>"These consultations showed that the interest in the FIT program exceeded the available capacity in the transmission system."</i></p>	<p>The Investor objects to the confidentiality designation of <i>"These consultations showed that the interest in the FIT program exceeded the available capacity in the transmission system."</i> in paragraph 513 of the Investor's Memorial.</p> <p>This information is already available to the public on the internet. Thus, it cannot meet the definition of Confidential Information under the Confidentiality Order.</p> <p>The information contained in this sentence Canada seeks to designate is derived from the Public Version of the Investor's Post-Hearing Brief in the <i>Mesa Power</i> case. Specifically, this information is found in paragraph 293 of the Public Version of the Investor's Post Hearing Brief. This Investor's Post Hearing Brief is public and available on the internet. Thus, this information cannot meet the definition of Confidential Information under the Confidentiality Order.</p>	<p>This information is not confidential. The Investor objects to any confidentiality designation.</p>	<p>Canada agrees to withdraw this designation.</p>	

No.	Ref. to Designation	Objections to Designation			Reply to Objections	Tribunal's Decision
		Proposed Redaction	Reasons	Designation Requested		
3.	C-108	All proposed designations in this exhibit.	<p>The Investor objects to all proposed confidentiality designations in Exhibit C-108 as this information is already available to the public on the internet. Thus, it cannot meet the definition of Confidential Information under the Confidentiality Order.</p> <p>This was an exhibit to the Investor's Valuation Report, filed with the Investor's Memorial. Information from C-108 was reviewed by the Valuation Team in the process of drafting their Report. The exhibit was referenced in the Valuation Report. Canada did not assert any confidentiality over the disclosure of this information in the Valuation Report, and this information in Exhibit C-108 is public through the publication of the Valuation Report on the PCA website.</p>	This information is not confidential. The Investor objects to any confidentiality designation in this exhibit.	<p>Canada maintains its designations to Exhibit C-108. This exhibit was C-374 in the <i>Mesa Power</i> arbitration, and was designated Confidential in that arbitration. The information from C-108 that is found in the Deloitte Valuation Report is very limited, with the overwhelming majority of the information not found in the Valuation Report or anywhere else on record in the Tennant arbitration, and remaining confidential as C-374 from the <i>Mesa Power</i> arbitration. Unless the Claimant can demonstrate (with actual evidence) that it has permission to use Mesa Power's confidential information in these proceedings, the document should remain confidential in the Tennant arbitration as well.</p> <p>If the Claimant can provide actual evidence that it has permission to use Mesa Power's confidential information in these proceedings, Canada will reconsider its position on this matter.</p>	

Tait, Benjamin -JLTB

From: Nabeela Latif <nlatif@appletonlaw.com>
Sent: January 15, 2021 11:28 AM
To: Tait, Benjamin -JLTB; Tennant Claimant
Cc: Barry Appleton; Tennant Claimant; Ed Mullins; Cristina Cardenas (MIA); Ben Love; Squires, Heather -JLTB; Ouellet, Annie -JLTB; Harris, Maria Cristina -JLTB; Klaver, Mark -JLTB; Bakelaar, Darian -JLTB; Girvan, Krystal -JLTB; Dosman, Alexandra -JLTB
Subject: Re: Tennant v. Canada - Investors confidentiality designation - Nov 20 2020

Confidential

Dear Mr. Tait,

Your email today had enquired about some procedural matters. As I understand your email, there is one outstanding issue given that Canada agreed to withdraw two of the three outstanding matters. That outstanding matter relates to Document C-108.

Because this email addresses personal privacy health information about a minor, we ask that this correspondence be treated as confidential in its entirety and that the government take appropriate personal data protective measures.

I am afraid that these procedural matters would best await Mr. Appleton's return to the office. You can imagine how difficult it must be to balance family, hospital, and law practice. No one expects catastrophic illness, which is especially difficult during a massive pandemic and a mandatory lockdown.

Currently, there is no risk of disclosure regarding Document C-108 as that document remains restricted from public view. It is merely a procedural item to be resolved.

This has been an extremely challenging time. It is now 33 days since young Mr. Appleton had a successful heart transplant. He suffered a major cardiac event on the day of your December 3rd email. He continued to have severe complications until he received a full heart transplant some ten days later. Young Mr. Appleton remains in the pediatric cardiac intensive care unit with severe postoperative complications. This is an extraordinary situation that reflects the severity of the situation. There continue to be serious health matters to address on an ongoing basis. The timing of the resolution of this health matter is simply out of Mr. Appleton's control.

We would ask for your ongoing indulgence in these exceptional conditions. Your open procedural matter is complicated. It directly involves Mr. Appleton and third parties to this arbitration. There is simply no practical way to resolve this procedural matter without Mr. Appleton's active engagement. Mr. Appleton's absence would also delay any resolution before the Tribunal as we would also need him to address the matter before the Tribunal.

We thank counsel for Canada for its earlier support from Mr. Appleton's family during this miserable situation involving the emergency medical treatment for an extremely ill young man. You can rest assured that these outstanding procedural matters will be addressed once the emergency health matter resolves to a more stable situation.

The most practical approach would be to await his return.

On behalf of the Investor,
Nabeela Latif



Nabeela Latif

International Law Associate

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From: Benjamin.Tait@international.gc.ca

Sent: Friday, January 15, 2021 9:45:57 AM

To: Nabeela Latif

Cc: Barry Appleton ; Tennant Claimant ; Ed Mullins ; Cristina Cardenas (MIA) ; Ben Love ;

Heather.Squires@international.gc.ca ; Annie.Ouellet@international.gc.ca ; MariaCristina.Harris@international.gc.ca ;

Mark.Klaver@international.gc.ca ; Darian.Bakelaar@international.gc.ca ; Krystal.Girvan@international.gc.ca ;

Alexandra.Dosman@international.gc.ca

Subject: FW: Tennant v. Canada - Investors confidentiality designation - Nov 20 2020

Dear Ms. Latif,

We hope this email finds you and your team in good health, and we continue to send our best wishes for Mr. Appleton and his family in these difficult circumstances.

We are writing in follow up to our email of December 3rd, 2020 to inquire if the Claimant could provide its responses to Canada's proposals on the outstanding matters set out in the email. We remain open to continuing our discussions on these matters with a view to resolving them without Tribunal intervention, but should we be unable to come to an agreement, the disputing parties could submit these matters for resolution by the Tribunal in accordance with the Confidentiality Order.

Could you also confirm if the Claimant has provided the Tribunal with the final Public and Confidential versions of its Memorial, and Witness Statements of John Pennie and Justin Giovannetti? We don't seem to have a record of them being submitted, and the PCA's website does not list them as materials filed in this matter. Based on Canada's email of December 3rd, 2020 we believe the parties have reached agreement on the final designations to these items.

Finally, in response to your email of December 31, 2020, we confirm that we are in agreement with the Claimant's preliminary confidentiality designations to the December 15, 2020 and December 23, 2020 communications to the Tribunal and have no further designations to make.

We look forward to hearing from you regarding these matters.

Yours very truly,

Benjamin Tait

Paralegal

Trade Law Bureau (JLTB)

Global Affairs Canada

Tel: (343) 203-6868



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Canada

Tait, Benjamin -JLTB

From: Tait, Benjamin -JLTB
Sent: January 18, 2021 3:31 PM
To: 'nlatif@appletonlaw.com'
Cc: Squires, Heather -JLTB; Ouellet, Annie -JLTB; Dosman, Alexandra -JLTB; Klaver, Mark -JLTB; Harris, Maria Cristina -JLTB; 'bappleton@appletonlaw.com'; 'tenantclaimant@appletonlaw.com'; 'EMullins@reedsmith.com'; 'blove@reedsmith.com'; Cristina Cardenas (MIA)
Subject: Tennant v. Canada - Confidentiality Designations
Attachments: 2020-12-03 - Canada's Replies to Investor's Objections to Respondent's Proposed Designations.docx

Dear Ms. Latif,

We thank you for your prompt response on January 15, 2021 with respect to outstanding matters related to the confidentiality designation process. In light of our email exchanges, we believe there are in fact three matters which remain outstanding:

1. The disputed confidentiality designations to C-108.
2. The submission of final Public and Confidential versions of the Claimant Memorial of August 7, 2020, and Witness Statements of John Pennie and Justin Giovannetti.
3. The disputed confidentiality designations to the Mesa hearing video exhibits.

With respect to the first matter, as the parties have exchanged Objections and Replies to Objections, we remain open to discussing the disputed designations as contemplated in para. 17 of the Confidentiality Order (CO). Canada maintains its position with respect to exhibit C-108 as set out in the Annex Canada provided to the Claimant on December 3, 2020. For ease of reference, we have attached the Annex to this email.

Regarding the second matter, Canada is of the understanding that the final disputed designations have now been resolved per the attached Annex (originally provided by Canada on December 3, 2020). We see no impediment to these documents being filed with the Tribunal, and posted to the PCA's website without delay.

Finally, regarding the third matter, should the Claimant still maintain its position on the *Mesa* hearing video exhibits, we would ask that the objections be set out in an Annex, after which Canada will insert its Replies to the Objections. The disputing parties can then engage in further discussion pursuant to para. 17 of the CO, and should those discussions not result in agreement, the Annex can be submitted to the Tribunal for final decision.

While these matters have been outstanding for over six weeks now, we remain sympathetic to Mr. Appleton's circumstances. However, we do believe that a timely resolution of these matters is in the interest of both parties, as both parties view them with high importance. We would kindly ask for a response on the three outstanding matters by February 1, 2021. Otherwise, in the interest of transparency, Canada will request resolution of these matters by the Tribunal. With the benefit of Mr. Mullins' involvement in both *Mesa* and *Tennant* and because some of the disputed designations relate to *Mesa* material, we are of the view that these issues can be dealt with within the proposed timeframe.

Thank you for your attention to these matters. We look forward to hearing from you and continuing our discussions.

Yours very truly,

Benjamin Tait
Paralegal

Trade Law Bureau (JLTB)
Global Affairs Canada
Tel: (343) 203-6868



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Tait, Benjamin -JLTB

From: Tait, Benjamin -JLTB
Sent: January 28, 2021 11:23 AM
To: 'Mullins, Edward M. (MIA)'; Squires, Heather -JLTB; nlatif@appletonlaw.com; tennantclaimant@appletonlaw.com
Cc: bappleton@appletonlaw.com; tennantclaimant@appletonlaw.com; Cárdenas, M. Cristina; Love, Ben; Ouellet, Annie -JLTB; Harris, Maria Cristina -JLTB; Klaver, Mark -JLTB; Dosman, Alexandra -JLTB
Subject: RE: Tennant v. Canada - Investors confidentiality designation - Nov 20 2020
Attachments: 2020-08-07 - Tennant - Claimant Memorial - Final Agreed Designations.pdf; CWS-1 - Pennie (7Aug2020) - Canada's Proposed Designations with Investor's Additions.pdf

Dear Mr. Mullins,

I am responding on behalf of Ms. Squires.

We write to address certain outstanding issues arising from your email correspondence below.

First, on the public and confidential versions of the Claimant's Memorial and John Pennie Witness Statement: we have attached a new version of the Memorial with the two designations removed that Canada agreed to withdraw in its December 3, 2020 Annex. We believe this version, along with the Pennie Witness Statement provided on November 20, 2020 (also attached) represents the final agreed upon designations between the disputing parties for these documents. In regards to the preparation of the final Public and Confidential versions for the Tribunal, we refer to the Confidentiality Order ("CO"), ¶ 19 which states:

Within thirty (30) calendar days from the date on which the final designations of Confidential and Restricted Access Information have been confirmed by the agreement of the Parties or by order of the Tribunal, the Party that originally filed the Written Submission shall file:

- a) a final Restricted Access Version of the Written Submission reflecting the final designations of Restricted Access and Confidential Information;
- b) a final Confidential Version of the Written Submission reflecting the final designations of Confidential Information but with all Restricted Access Information redacted; and
- c) a final Public Version of the Written Submission, with all Confidential and Restricted Access Information, redacted. (Emphasis added.)

While Canada believes that the Confidentiality Order is clear on the preparation and submission of final Confidential and Public versions, given Mr. Appleton's current situation we offer our assistance in sending both the attached documents to the Tribunal if you prefer.

Second, on the *Mesa Power* video exhibits: Canada maintains its original proposal, which is consistent with the procedures established in the Confidentiality Order. Once Mr. Appleton returns actively to the file, Canada will seek to resolve this matter in the interests of procedural efficiency by submitting it to the Tribunal for its direction, in accordance with Procedural Order No. 7 and the Tribunal's communication of October 16, 2020. The Claimant will then have an opportunity to present its understanding to the Tribunal on this matter.

Third, on document C-108: Canada is also willing to wait for Mr. Appleton's return so he can provide the requisite information. For reassurance, this is not a matter of Mr. Appleton's professional integrity; it is a matter of substantiating a significant assertion concerning a third party to this arbitration. As Canada has explained, unless the Claimant can demonstrate with evidence that it has permission to use Mesa Power's confidential information in these proceedings,

the document must remain confidential in the *Tennant* arbitration as well. If the Claimant can provide evidence that it has permission to use Mesa Power's confidential information in these proceedings, Canada will reconsider its position on this matter. If the disputing parties cannot reach agreement on this matter, then it must be submitted to the Tribunal for resolution.

Kind regards,

Benjamin Tait
Paralegal
Trade Law Bureau (JLTB)
Global Affairs Canada
Tel: (343) 203-6868



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From: Mullins, Edward M. (MIA)

Sent: January 27, 2021 3:36 PM

To: Squires, Heather -JLTB ; nlatif@appletonlaw.com; Tait, Benjamin -JLTB ; tennantclaimant@appletonlaw.com

Cc: bappleton@appletonlaw.com; tennantclaimant@appletonlaw.com; Cárdenas, M. Cristina ; Love, Ben ; Ouellet, Annie -JLTB ; Harris, Maria Cristina -JLTB ; Klaver, Mark -JLTB ; Bakelaar, Darian -JLTB ; Girvan, Krystal -JLTB ; Dosman, Alexandra -JLTB ; Mullins, Edward M. (MIA)

Subject: RE: Tennant v. Canada - Investors confidentiality designation - Nov 20 2020

Dear Ms. Squires

I am sure that Mr. Appleton and his family will appreciate the supportive words of counsel for Canada in your email of January 15, 2021.

Tennant Energy had an obligation to disclose this situation's seriousness as it impacts certain procedural matters in this arbitration. The comments made by Ms. Latif in her email to Canada were in summary form. The exact details of the calamity affecting the Appleton Family were unnecessary to divulge.

We have taken such steps because in the past Canada has taken the unusual steps of challenging the integrity of representations made by counsel in this arbitration. We would have expected counsel to rely on other counsel's professionalism unless there was some specific and demonstrable reason to raise doubt. We see no circumstances that raise such concerns here.

Canada requests that we "sugar coat" and fetter information made available to the Tribunal about specific health issues affecting the Investor's legal team's senior members. We cannot restrict the flow of necessary information to the Tribunal. It may very well be necessary to advise the Tribunal of this unfortunate medical situation if it impacts the Investor's ability to meet deadlines or otherwise have the Investor's case fully heard. Indeed, this health emergency continues to this day, and it will continue for at least the next few weeks.

You may also rest assured that we have no desire to cause unnecessary anxiety to any member of Canada's legal team. No family should ever have to endure the turmoil and anguish over a young child's health that Mr. Appleton and his family have been going through for the last two months. We all agree that such situations are tragic.

As it may be necessary to disclose details on this topic in the future, it would be best if Canada were to take its internal steps to minimize detrimental impacts. That Canada may need to take internal steps to protect its staff that cannot come at the cost of impairing the due process and procedural rights of the Investor.

The easiest way would be to believe counsel when they make statements instead of challenging their fundamental integrity. This would minimize the need to address medical matters – but it would not eliminate it.

Canada may also wish to reconsider its lengthy email distribution list. Perhaps your client might consider a narrower audience – one or two persons who would not be detrimentally affected by seeing medical descriptions and information. In this fashion, we might prevent the risk without impairing the Investor's due process and fairness rights.

I leave these as immediate and practical options for your consideration. Of course, our ultimate wish is for Mr. Appleton's family member to make a full and swift recovery so that this issue will resolve itself swiftly.

We also want to address some procedural housekeeping matters.

We will be filing a confidential and public version of the witness statement of Justin Giovannetti. We anticipate being able to send material to Canada by tomorrow.

The public and confidential versions of the Investor's Memorial and the Witness Statement of John Pennie are documents that need to come from Canada. Canada drafted the preliminary confidentiality designations on each of these documents. So we are waiting for your materials here.

Canada is aware of Tennant Energy's views on how the video recordings from the Mesa Power NAFTA hearings should be addressed. We addressed this matter in great detail in Mr. Appleton's email to Canada on November 20, 2020. (There is no reason to repeat that analysis here.)

If Canada wishes to assert confidentiality, it must follow the specific procedures established in the Confidentiality Order. Canada's process regarding the videos is inconsistent with those rules. The Investor acknowledges the public interest in accessing these NAFTA hearing videos, especially since Canada made them available to the public on the internet for many years but now actively take steps to suppress this information from the public that for so long was on the internet. The Mesa Power NAFTA hearing addresses government measures in Ontario. Any restrictions to public access regarding these materials should be as minimally invasive as possible. The public should have a right to know this information.

Finally, as you are aware, the issue concerning Document C-108 requires the active participation of Mr. Appleton. The matter addresses authorizations granted to Mr. Appleton by T. Boone Pickens, the Mesa Power Group's deceased CEO. Mr. Appleton adverted to this authorization during the January 2020 Procedural hearing. Canada now calls Mr. Appleton's professional integrity into question and requires him to prove the existence of these instructions from Mr. Pickens.

Mr. Appleton continues to be unavailable. It is currently day 45 in the pediatric intensive care dealing with ongoing and continuous post-operative complications. This is an unfortunate matter outside of Mr. Appleton's control. Because of the health issue, we are not in a position to appropriately proceed on this one matter right now, which challenges Mr. Appleton's integrity and the veracity of the statements he provided to the Tribunal. Again, given Canada's position, Canada must await Mr. Appleton's return.

There is no reason to raise this matter with the Tribunal until after seeing if Canada and the Investor can reach a consensus on this matter. In any event, the Tribunal cannot meaningfully address this matter without the active participation of Mr. Appleton. On all fronts, it merely seems sensible to await Mr. Appleton's return to regular office activity.

Yours very truly,

Edward (Ed) Mullins

Board Certified International Litigation and Arbitration

Pronouns: He/Him/His

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Tait, Benjamin -JLTB

From: Mullins, Edward M. (MIA) <EMullins@reedsmith.com>
Sent: February 24, 2021 11:28 AM
To: Tait, Benjamin -JLTB; Squires, Heather -JLTB; nlatif@appletonlaw.com; tennantclaimant@appletonlaw.com
Cc: bappleton@appletonlaw.com; tennantclaimant@appletonlaw.com; Cárdenas, M. Cristina; Love, Ben; Ouellet, Annie -JLTB; Harris, Maria Cristina -JLTB; Klaver, Mark -JLTB; Dosman, Alexandra -JLTB; Mullins, Edward M. (MIA)
Subject: RE: Tennant v. Canada - Investors confidentiality designation - Nov 20 2020

Dear Mr. Tait

Unfortunately, the situation with Mr. Appleton's family has not resolved itself yet. His nephew remains in the pediatric cardiac intensive care unit.

It has been more than nine weeks. This is unexpected and unfortunate. The good news is that Mr. Appleton reports that the doctors are optimistic for a full recovery. Mr. Appleton anticipates that he will return after a discharge from intensive care occurs.

I am sure that Mr. Appleton will provide an update if such events take place. In the meantime, I will be certain to pass your comments along to him and his family and he is copied here.

It would be best to continue to defer the procedural matters in these circumstances until Mr. Appleton can become fully engaged.

From: Benjamin.Tait@international.gc.ca <Benjamin.Tait@international.gc.ca>
Sent: Wednesday, February 24, 2021 10:25 AM
To: Mullins, Edward M. (MIA) <EMullins@reedsmith.com>; Heather.Squires@international.gc.ca; nlatif@appletonlaw.com; tennantclaimant@appletonlaw.com
Cc: bappleton@appletonlaw.com; tennantclaimant@appletonlaw.com; Cárdenas, M. Cristina <ccardenas@reedsmith.com>; Love, Ben <BLove@reedsmith.com>; Annie.Ouellet@international.gc.ca; MariaCristina.Harris@international.gc.ca; Mark.Klaver@international.gc.ca; Alexandra.Dosman@international.gc.ca
Subject: RE: Tennant v. Canada - Investors confidentiality designation - Nov 20 2020

EXTERNAL E-MAIL - From Benjamin.Tait@international.gc.ca

Dear Mr. Mullins,

We hope this finds you and your team in good health. We continue to keep Mr. Appleton and his family in our thoughts, and send our well wishes in these difficult times.

We are reaching out to again offer our assistance regarding the first point below, and remain open to submitting the materials on behalf of both disputing parties to the Tribunal.

With respect to the other two matters, Canada remains open to discussing the matters if Mr. Appleton has returned to practice. However, if Mr. Appleton has not returned to the office, we are prepared to delay any submission to the Tribunal until after his return.

Kind regards,

Benjamin Tait
Paralegal
Trade Law Bureau (JLTB)
Global Affairs Canada
Tel: (343) 203-6868



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