



INTERNATIONAL LAWYERS



April 5, 2021

*By email*

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Sir Daniel Bethlehem QC  
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Dear Mr. President and Members of the Tribunal:

**Re: Confidentiality and Procedural Matters regarding Exhibit Numbers C-107, C-108, C-201, C-204, C-205, C-206, C-208, and C-224 through C-243**

Tennant Energy writes in response to Canada’s application of March 26, 2021, regarding the determination of two procedural matters:

1. Confidentiality designations in a document entitled the “Assessment of the Energy Production of the Proposed Arran Wind Energy Project” (Exhibit **C-108**); and
2. Permission for Canada to substitute an out-of-date and currently inaccurate hearing transcript in the place of the actual video evidence (submitted as Exhibits **C-107, C-201, C-204, C-205, C-206, C-208, and C-224 through C-243**).

While Canada says that it seeks confidentiality rulings, a closer inspection of Canada’s motion demonstrates that it seeks different remedies – which fall outside of what is contemplated in Paragraph 17 of the *Confidentiality Order*. Canada requests the following effective relief:

1. An exclusion order to prevent the Investor’s experts from relying upon Exhibit C-108; and
2. An order to suppress publication of the video evidence in its entirety, making all the video evidence unavailable to the public.

None of this relief is addressed in the procedures set out in paragraphs 15 – 18 of the *Confidentiality Order*. Canada has improperly attempted to “shoe-horn” these motions into a confidentiality designation dispute. These matters do not fit within the ordinary scope for confidentiality designation.

The Investor has addressed each matter in this letter. In summary:

1. Exhibit C-108, the Arran Wind Project Energy Assessment (the “Report”), is not a confidential document. There is no basis for any confidentiality designation upon it.
2. Canada’s attempt to exclude the admission of Exhibit C-108 is entirely improper and objectionable. Canada may not interfere with the Investor’s ability to fully have its case heard based on evidence lawfully in its possession. As discussed below, Canada has attempted to exclude all non-confidential evidence that arose from the *Mesa Power* NAFTA claim. Canada may not enjoy that the *Mesa Power* NAFTA record provides significant admissions of Canada’s internationally wrongful acts. Canada’s multiple attempts to exclude this evidence are telling and transparent to all.
3. Canada does not challenge the confidentiality designation of the *Mesa Power* video evidence. Instead, Canada seeks to bury the evidence to prevent any public scrutiny of the videos. Canada already had the PCA remove access to these *Mesa Power* hearing videos. As discussed below, there currently is no public access to any of the videos, which denies information to other victims of Canada’s wrongful conduct during the limited period for which the NAFTA remains in force. Canada’s application falls outside of the scope of Section 17 of the *Confidentiality Order* and the commitments of the NAFTA Free Trade Commission.

For the reasons set out in this submission, Canada’s procedural requests should be dismissed.

## I. Exhibit C-108 is not a Confidential Document.

Exhibit C-108 is a report used in the Investor’s Valuation Report regarding the Arran Wind Project wind economics. The Arran Wind Energy Project sits astride the Skyway 127 Wind Power Project. Some of the Arran Wind Energy Project wind lease plots are situated within the exterior boundaries of the Skyway 127 Wind project. Because of this close interconnection of the wind lease sites, a wind study of the Arran Wind Energy Project would provide reliable evidence of Tennant Energy’s Skyway 127 Wind Project’s wind conditions and economics.

Arran Wind was acquired by Mesa Power Group. The Arran Wind Project wind economics Assessment Report (Exhibit C-108) was an exhibit to Tennant Energy’s Valuation Report, which referenced it. The Valuation Team relied upon the information in the Report to determine the economic losses suffered by Skyway 127 Wind Energy.

Exhibit C-108 does not contain confidential information. Tennant Energy did not ever assert that the information in the Report that it filed was confidential. It is a report prepared to a third party to this arbitration.

Canada did not object to Tennant Energy's lack of confidentiality designation over this Report on a timely basis when this document was filed with the Deloitte Valuation Expert Report. Canada made no indication of confidentiality over Exhibit C-108 in the Deloitte Valuation Report. Instead, Canada comes before this Tribunal, long after the deadline to object, erroneously seeking to do two inconsistent acts, neither of which it may do. First Canada seeks to make certain references in the document confidential. Second, Canada appears to seek to exclude Exhibit C-108 altogether as a supposed confidential document arising from the *Mesa Power* Arbitration. That is not a proper request for *Confidentiality Designation*. It is an entirely different type of application – an improper request to exclude.

This Tribunal already has received lengthy substantive pleadings on the Tribunal's broad powers to receive evidence. No reason exists to repeat that here. The Tribunal has expansive powers to receive evidence. However, in this circumstance, Canada is abusively making an application under the confidentiality designation process for purposes far outside its intended scope and purpose. Canada's objections are not about designation, but exclusion and thus are *ultra vires*.

A. There is no substantive basis to Canada's request for any confidentiality on Exhibit C-108.

While Canada may not make this application on Exhibit C-108 due to its procedural irregularities, there also is no substantive basis for Canada's application. The information in the Assessment of the Energy Production of the Proposed Arran Wind Energy Project contains no information confidential to Canada. It contains information that might have been confidential once to the party who commissioned the Report – which was Leader Resources Services Corp. However, that party did not assert any confidentiality over the document. Thus, Canada's application fails on this basis as well.

Mesa Power was the purchaser of the Arran Wind Project. That project was interconnected to the Skyway 127 Wind Power Project owned and controlled by Tennant Energy. Thus, the Wind Power Analysis is fundamental to the development of the valuation of damages.

Canada wrongly presumes that Exhibit C-108 is confidential. This presumption of the source of Exhibit C-108 was not apparent until Canada made its final comments in the Redfern Schedule. Leader Resources Services Corp, the party who commissioned the Arran Wind Assessment Report and to whom the Report was addressed, provided the document to Tennant Energy. When the document was provided, Leader Resources Services Corp. did not assert any confidentiality over the Report's information as it was years after the FIT Program was over. It did not consider that information to continue to be business confidential to it now.

An earlier letter from the Chief Corporate officer of Leader Wind Resources was referenced in the Notice of Arbitration.<sup>1</sup> Tennant Energy sought confidentiality over the reference to that letter while it sought confirmation from Leader Resources Services Corp. that the information was not business confidential. The Tribunal acknowledged that the letter from the third party (referenced in footnote 10 of the Notice of Arbitration) was not considered confidential in its email of July 23, 2019.<sup>2</sup>

There is no evidence before this Tribunal that the Investor's counsel, in breach of their obligations under the *Mesa Power* Confidentiality Order, disclosed confidential information which they received from a disputing party in the *Mesa Power* proceedings. In fact, the document was obtained completely outside of the *Mesa Power* proceedings. But even if Exhibit C-108 had arisen from the *Mesa Power* proceedings, it would still be admissible. The Tribunal already concluded in paragraph 22 of *Procedural Order No. 7*, "The fact is that the Claimant is not bound by the *Mesa Power* confidentiality order and the Respondent acknowledges this." The Investor is entitled to be able to fully argue its case under NAFTA Article 1115 and Article 15 of the 1976 UNCITRAL Arbitration Rules. Thus, there is no circumstance in which Exhibit C-108 could be excluded and not be available to the Tribunal in this arbitration.

#### B. Exhibit C-108 came from a different source.

Canada wrongly presumed that Exhibit C-108 came from the *Mesa Power* arbitration. This assumption was entirely incorrect. The fact that Exhibit C-108 was filed by Mesa Power as *Mesa Power* Exhibit C-374 in the *Mesa Power* arbitration is irrelevant to its status in the *Tennant Energy* Arbitration as Exhibit C-108 came from Leader Resources Services Corp. and thus had no confidentiality associated with it.

The *Tennant Energy* Tribunal determined what *Mesa Power* information would be confidential. *Procedural Order No. 7*, says:

"...the Tribunal notes that the Confidentiality Order in this arbitration defines "Confidential Information" to include information "that is not 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".<sup>3</sup>

As a result of the disclosure of Exhibit C-108 at this time, the *Mesa Power* Exhibit C-374 is no longer confidential either. Exhibit C-108 was provided to Tennant Energy independently from a party other than the disputing parties to the *Mesa Power* NAFTA hearing, *Mesa Power* Exhibit C-374 is now publicly available. Thus, *Mesa Power* Exhibit C-374 is no longer a confidential document and, if so desired, could also be used in the *Tennant Energy* arbitration. Of course, this is not necessary as Exhibit C-108 is in the *Tennant Energy* record and it has the same information. The difference is that it came from another source that properly had the document. There is no basis to content that Exhibit C-108 is the confidential document from the *Mesa Power* NAFTA hearing.

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<sup>1</sup> Footnote 10 of the Notice of Arbitration referenced an April 8, 2010 letter from JoAnne Butler, from the Ontario Power Authority to Charles Edey, Leader Resources.

<sup>2</sup> Email of July 23, 2019 from Christal Tham on behalf of the PCA to parties (acknowledging Canada's confirmation that there is no confidential information in the April 8, 2010 letter cited at footnote 10 of the Claimant's Notice of Arbitration).

<sup>3</sup> *Procedural Order No. 7*, September 21, 2020, at ¶150.

Canada's unfounded confidentiality designation application on Exhibit C-108 must be dismissed. No confidential business information is at issue.

### C. Canada's Application on C-108 is Untimely

Canada's objection regarding Exhibit C-108 is untimely. Exhibit C-108 was relied upon in the Deloitte Valuation Report filed to support the Merits Memorial. The deadline for filing confidentiality objections over this exhibit was extended until after the Tribunal issued *Procedural Order No. 7*.<sup>4</sup>

The Tribunal clarified the deadline for the filing of confidentiality designation concerns regarding the Investor's Memorial, the Witness Statement of John C. Pennie, and the "remaining four documents set out in Respondent's October 8, 2020 letter" in an October 16, 2021 letter to the disputing parties.<sup>5</sup> This letter set out the following instructions:

Accordingly, the Respondent's proposed confidentiality designations to the Claimant's submissions listed above would be due 21 days after the expiry of a period of 21 days after the Claimant filed those submissions in accordance with the CO. Having regard to the Tribunal's previous order, by consent, that all confidentiality order filing deadlines under the CO be stayed from 10 August 2020 until the issuance of PO7, and unless otherwise agreed between the Parties, the Respondent is to provide the Claimant with its proposed designations by 30 October 2020 (for the Claimant's Memorial and Mr. Pennie's witness statement) and 2 November 2020 (for the remaining four documents set out in the Respondent's 8 October 2020 letter).

These instructions did not provide any changes regarding the Valuation Report or other documents filed with the Memorial, other than the specific ones identified above. The Arran Wind Assessment Report was filed to support the Deloitte Valuation Report. Exhibit C-108 was not referenced in the Memorial. Its sole purpose was to support the Valuation Report filed at the same time. Canada filed no confidentiality objections over its use in the Deloitte Valuation Report despite having the opportunity to do so.

Canada's waived its confidentiality objections regarding Exhibit C-108 after it made its application on October 30, 2020 when the Deloitte Valuation Report was made public, with Canada's consent on November 17, 2020.

The fact was made abundantly clear by the Tribunal Secretary. On November 11, 2020, the Tribunal Secretary wrote to the disputing parties advising that the PCA had received no objections over confidentiality designations to many documents, including the Deloitte Valuation Report.<sup>6</sup> The Tribunal Secretary was exceedingly thorough and clear, stating:

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<sup>4</sup> Email from C. Tham to disputing parties, October 16, 2020.

<sup>5</sup> Letter from C. Tham to disputing parties, October 16, 2021.

<sup>6</sup> Letter from C. Tham to disputing parties, November 11, 2020.

The PCA notes that neither Party has designated any Restricted Access or Confidential Information in the following documents pursuant to the procedure provided for under paragraphs 11, 16 and 23 of the Confidentiality Order dated 24 June 2019, and taking account of (i) the stay of deadlines between 10 August and 21 September 2020, as agreed between the Parties; (ii) the Parties' agreed extension of deadlines as set forth in the Respondent's e-mail of 8 October 2020; and (iii) the Tribunal's direction in its letter of 16 October 2020:

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6. Claimant's Memorial, dated 7 August 2020.
7. Deloitte Valuation Report, dated 7 August 2020.

....

As such, in accordance with paragraph 12.1 of *Procedural Order* No. 1 dated 24 June 2019, the PCA shall publish the above documents in full on its website by Tuesday, 17 November 2020, unless otherwise indicated by the Parties by Monday, 16 November 2020.<sup>7</sup>

Canada did not object to the content of the November 11, 2020 letter from the Tribunal Secretary about the November 16 deadline regarding the Deloitte valuation report, which explicitly made reference to the lack of confidentiality over Exhibit C-108. The subsequent extension of time affected other documents, such as the Memorial but not Exhibit C-108.

Yet despite Canada's express waiver of the confidentiality of materials relied upon by the Deloitte Valuation Report on November 17, 2020, Canada renewed its objection after its waiver regarding Exhibit C-108 as being confidential in its references in the Deloitte Valuation Report. The Investor, and the Tribunal Secretary, relied on Canada's waiver when allowing the Deloitte Valuation Report to be published on the PCA website. Canada is thus estopped from this application.

Canada's confidentiality designation objection was made after the PCA made the Deloitte Valuation Report public on November 17, 2020. Thus, Canada has already waived its objections over Exhibit C-108 by not maintaining confidentiality over its use of Exhibit C-108 in the Deloitte Valuation Report. The Investor noted this issue when C-108 was considered for its confidentiality designation within the Redfern Schedule.

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. 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.<sup>8</sup>

Canada is aware of the Investor's objection on the impropriety of Canada's application regarding Exhibit C-108 as it was noted in the Investor's comments in the Redfern Schedule:

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<sup>7</sup> C. Tham to disputing parties, November 11, 2020.

<sup>8</sup> The Redfern Schedule was set out as Appendix C to Canada's March 26, 2021 Application.

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.<sup>9</sup>

Exhibit C-108 has nothing to do with the discussions during the *Mesa Power* NAFTA hearing or in the video evidence. This is a factual document about wind potential and economics relied upon in the Deloitte Valuation Report.

Canada took active steps to treat Exhibit C-108 as non-confidential when it accepted the publication of the Deloitte Valuation Report on the PCA website. Thus, its application now is untimely. Canada failed to make a timely objection when it was permitted to do so. Canada now asks for a second opportunity to deny the Public and its Parliamentary Oversight Committee an opportunity to access information. Allowing Canada to go outside of the *Confidentiality Order* process would not be treating the disputing parties equally or fairly. It would also raise serious due process and fairness issues. This Tribunal should simply dismiss Canada’s application.

## II. Canada’s collateral attack on Tennant Energy’s Counsel

However, Canada not only has raised an untimely and unmerited confidentiality objection. Canada has raised the second request in its confidentiality designation motion, resulting in significant delay and concern. Canada says that it would “reconsider” its objections and would treat Exhibit C-108 as not confidential only if the Investor provides evidence that it has permission to use Exhibit C-108 in these proceedings.

As noted above, Canada’s objections to admissibility are not an abuse of the confidentiality designation process.

Counsel for the Investor provided testimony about the authorization to use Mesa Power’s non-confidential evidence in this arbitration during the 2020 Tennant Energy Procedural Hearing. There are two references from that hearing. The first on Day 1 – at page 82.

19 The second part is an order that Canada produce  
20 non-confidential documents on the record in the Windstream  
21 Energy arbitration. Originally, we had sought to have both  
22 the Mesa Power and the Windstream arbitration materials,  
23 but, in fact, before Mr. Pickens passed away, he gave his  
24 permission that non-confidential information that could be  
25 passed along--from that case could be passed along. So, we  
1 no longer needed to have permission with respect to the  
2 Mesa Power case. We only needed to have information with  
3 respect to the Windstream Case, cases that both involved  
4 Canada. Canada has documents in their possession that are

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<sup>9</sup> Redfern Schedule. Appendix C, Canada’s March 26, 2021 Application.

5 available and that should be available to the Tribunal and  
6 to the Investor in this case.<sup>10</sup>

Shortly after that, Arbitrator Bethlehem addressed the matter of Mr. Appleton obtaining permission from Mesa Power Group's T. Boone Pickens to use non-confidential Mesa Power NAFTA documents for others before he passed away. On Day 1, page 93, Sir Daniel asks:

22 ARBITRATOR BETHLEHEM: You said in your  
23 submissions, Mr. Appleton, that before T. Boone Pickens  
24 died, that he gave permission for the Mesa documents to be  
25 used. I don't quite know what that means. Perhaps you can  
1 elaborate. But I'd like to know whether this means, in  
2 effect, that you have got an archive of Mesa documents  
3 which are now available to Tennant and, if so, whether that  
4 is an archive of documents that corresponds to the archive  
5 of documents that Canada would have, and, if not, whether  
6 you are implicitly making an offer to disclose all of those  
7 documents to Canada as part of the--as it were, the  
8 reciprocal disclosure of Windstream and Mesa documents.  
9 MR. APPLETON: So, Mr. Tennant [*sic*] said that all the  
10 public documents that were available in Mesa could be made  
11 available to anybody that contacted us with respect to the  
12 issues under the Ontario FIT Program.<sup>11</sup>

It is undisputed that Appleton & Associates International Lawyers acted as Counsel to Mesa Power in the NAFTA proceedings (and Canada's Trade Department acted for Canada). Further, Mr. Appleton's stipulation in the January 2020 hearing was clear. Mesa Power's T. Boone Pickens gave permission to share non-confidential information arising in the Mesa Power Group NAFTA claim to persons who sought that information.

Canada appears to suggest that this express stipulation from the former counsel to Mesa Power does not constitute evidence. Canada's approach appears to be troubling.

This issue is separate from the baseless objections to confidentiality over Exhibit C-108, which have been addressed above (as C-108 was obtained from someone other than a disputing party to the *Mesa Power* NAFTA hearing, there could be no legitimate basis for Canada's confidentiality objections).

However, Canada maintains its unreasonable requirement that Mr. Appleton prove to Canada that his statement to the Tribunal in the January 2020 Hearing was accurate and truthful. Canada has called this representation into question; this is precisely why any additional consideration of this matter requires the involvement of Mr. Appleton.

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<sup>10</sup> Hearing on Bifurcation and Preliminary Motions Day 1 Public Transcript, 14 January 2020, Page 82, Lines 19-25 to Page 83 at line 6.

<sup>11</sup> The reference to Mr. Tennant on page 94 - line 1 is an obvious error in the transcript – the reference should be to Mr. Pickens. Hearing on Bifurcation and Preliminary Motions Day 1 Public Transcript, 14 January 2020, Page 94, Lines 1-12 .



Yet, at the same time, Canada appears to suggest that it is unnecessary to await Mr. Appleton's return to the office because his electronic signature was applied to the Jurisdictional Counter-Memorial filing.<sup>12</sup> However, this Tribunal and Canada both are aware from numerous ongoing communications that Mr. Appleton has not returned to work at his office and that the catastrophic family health matter continues. If there was any doubt, Canada could have simply emailed Mr. Mullins or Ms. Latif. Virtually every communication to Canada and the Tribunal has a notation on this matter. Canada's answer appears to be a mere pretense. Such conduct comes under question in making such a statement. It is as if Canada has been attempting to ambush Mr. Appleton during this horrible family health crisis – both with the unsubstantiated issues regarding the instructions from *Mesa Power* and then with the conclusions to be drawn from the electronic signature of Mr. Appleton on the Jurisdictional Counter-Memorial.

To be clear, regrettably, Mr. Appleton is still dealing with a most unfortunate set of family health matters which have delayed his return to the office. One should hope that Canada is not taking advantage of the Appleton family's tragic personal circumstances. If this were to be the case, it would be deeply troubling.

Counsel for Tennant Energy maintains that Exhibit C-108 is not confidential. It came from a non-party to the *Mesa Power* dispute, separate and independent from the evidence filed in the *Mesa Power* hearing.

Challenging the *bona fides* of the express representations made to the Tribunal by the former legal counsel for Mesa Power Group (and the current counsel to Tennant Energy) is without any basis. In a local Canadian court, such baseless assertions during a dispute may well form the basis for special damages against the party who asserted them. The Tribunal should note such conduct by Canada in assessing damages and the consideration of conduct in this arbitration.

Tennant Energy objects to Canada's approach, which raises complicated issues of privilege and disclosure beyond the statement expressed to the Tribunal at the January 2020 Procedural Hearing. In any event, to go deeper, it will be necessary to have Mr. Appleton's involvement, which is simply not practical at this time for the unfortunate reasons already well-known to this Tribunal and Counsel for Canada.

As outlined above from the January 2020 Procedural Hearing Transcript, Counsel for Tennant Energy has provided a basis for providing additional evidence. Any further discussion into the conversations with the late Mr. Pickens or the attainment cannot be resolved without Mr. Appleton. There is no reason why that discussion must take place now in the absence of Mr. Appleton.

To be clear, this issue raised by Canada is completely ill-taken. It does not conform to the process in the *Confidentiality Order*. It is without basis. It is generally outrageous.

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<sup>12</sup> See page 4 of Canada's Application where Canada states "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. The Reply Memorial was signed by Mr. Appleton."

### III. The Mesa Power Video Evidence

The *Mesa Power* Hearing videos will be an essential issue for the *Tennant Energy* arbitration because those videos give direct admissions by government officials of internationally wrongful behavior that had been otherwise unknown to the public.

The second matter before this Tribunal purports to consider confidentiality over the *Mesa Power* hearing videos. The NAFTA transparency obligations require that this Tribunal strongly favor information release unless there is confidential information.

Canada seeks to have the videos entirely unavailable for the public and not provide a public version of the videos. Canada instead wants to deprive the public of the information in the videos and substitute this evidence with something else.

In Paragraph 50 of *Procedural Order No. 7*, the Tribunal ordered:

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 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.

The critical issue is the definition of confidentiality, which the Tribunal noted in the last line of paragraph 50.

In this regard, the Tribunal notes that the *Confidentiality Order* in this arbitration defines "Confidential Information" to include information "**that is not 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." (*emphasis added*)

#### A. Canada may not suppress evidence.

The *Confidentiality Order* created a procedure to allow evidence to be available to the public without disclosing confidential information. The disputing parties have put considerable time, cost, and effort are spent by the parties in producing to enable the public to be aware in a meaningful way of the nature of the issues in the NAFTA Chapter Eleven proceedings.

Canada has had no hesitation in imposing these costly burdens on the Investor but not shirks its duty when it must comply with the same obligations. Canada seeks to rely on Paragraph 16 of the *Confidentiality Order* to exempt Canada from redacting confidential information. Canada seeks to go outside of the four corners of the order. Canada seeks to suppress the actual evidence from public scrutiny and then replace the evidence with something else that is entirely different. Hiding and

switching the evidence from the public is not permitted under the *Confidentiality Order*. In general, Canada's suggestion is offensive to the rule of law and opposed to the foundational principle of Transparency, which is one of the three mandatory rules and principles of NAFTA confirmed by NAFTA Article 102.

The *Mesa Power* NAFTA videos contain essential information that is not on the transcript. They contain references to PowerPoint slides with evidence that is also properly in the public domain but would not be but to produce the videos.

Canada also inaccurately contends on page 2 of its application that the public transcript provides the same "audible information" that would be in public *Mesa Power* hearing videos. This is factually incorrect. The *Mesa Power* hearing transcript does not reflect those parts of the record that have subsequently been made public. Canada may redact only confidential information. The information that has been subsequently made available to the public must be reflected in the transcript AND the *Mesa Power* hearing videos. Canada's proposals simply avoid its obligations. The public deserves the right to have this information.

Canada's proposal would seriously disadvantage the public's knowledge and deny Members of Canada's Parliament the opportunity to scrutinize NAFTA Investor-State arbitrations. Canada's proposal to hide the evidence and replace it with something less harmful to Canada's reputation could never meet the requirements of the *Confidentiality Order*. Canada, like the Investor, must follow the terms of the *Confidentiality Order*.

We also note that the *Mesa Power* videos currently on the PCA website do not function. The videos launch page displays, but there has never been any operational video. Since the time Canada unilaterally demanded that the PCA remove the unredacted *Mesa Power* NAFTA hearing videos last year, none of the *Mesa Power* arbitration hearing video information has been available to the public.

Canada's duty was to propose redactions to the video evidence to address confidentiality under the *Confidentiality Order*. That is not what it did. Canada simply seeks to bury the evidence and rely upon another exhibit. That cannot be permitted.

## B. Canada cannot designate publicly available information as Confidential.

Since the time that the *Mesa Power* NAFTA Hearing videos were redacted by the *Mesa Power* disputing parties in 2015, additional hearing information has been made public through release in submissions that the parties agreed to make public. Thus, the record created in 2015 before this subsequent release could not accurately reflect the confidential information in properly redacted videos for this arbitration.

For example, the admissions from Ontario Energy Assistant Deputy Minister Sue Lo are redacted on the 2015 version of the public videos, but much of her testimony is no longer confidential. Other testimonies from other witnesses also have been disclosed. This needs to be considered in the public version. Canada's approach entirely ignores these developments.

Tennant Energy proposed a technical and rule-based process to address Canada's confidentiality concerns over the *Mesa Power* NAFTA Hearing videos. Canada could have already addressed this

issue. The duty is on Canada as the party seeking to have the videos kept confidential — not Tennant Energy LLC.

Canada is the moving party seeking to prevent the public from accessing these videos from the earlier NAFTA hearing based on information that Canada says is confidential. Canada must identify those parts of the videos that are currently confidential. This would form the basis for a version of the *Mesa Power* hearing videos compliant with the Tennant Energy *Confidentiality Order*. Canada must propose the redaction of that evidence.

Despite all of the time available to Canada, Canada simply has refused to meet its burden and identify confidential evidence as required under the *Confidentiality Order*. Instead, Canada wishes to suppress all the video and replace it with a transcript that cannot reflect those parts of the record which subsequently have been made public.

Because Canada's earlier video redactions overshoot the mark, it cannot be the final product either. Canada seeks to remove video testimony that was made available to the public through submissions that occurred after the *Mesa Power* hearing. Tennant Energy rejects the premise that the videos should be redacted as they existed in 2015 as ordered in the *Mesa Power* arbitration.

#### IV. Conclusions

This Tribunal should dismiss Canada's ill-considered application for the following reasons:

1. Exhibit C-108 is not a confidential document. There is no basis for any confidentiality designation upon it. Canada's attempt to exclude the admission of Exhibit C-108 is improper and objectionable.
2. Canada consented to its obligations in the Confidentiality Order. Canada cannot impose the *Confidentiality Order's* burdens upon Tennant Energy but then claim that the same burdens do not apply to Canada.
3. Canada attempts to suppress parts of the Mesa Power Hearing video with information released to the public. Canada seeks to hide this unflattering evidence to make public scrutiny difficult. Canada has had months to be able to reconcile the videos with the public record simply. It has simply refused.
4. Canada's application falls outside of the scope of Section 17 of the *Confidentiality Order*. It is inconsistent with the mandatory principles and rules of NAFTA Article 102 and the NAFTA Free Trade Commission commitments on Transparency.
5. Tennant Energy is entitled to its costs on this vexatious application. This entire application was needless, and Canada seeks relief outside the scope of the *Confidentiality Order*. For the reasons set out above, Canada's procedural requests should be dismissed.

Respectfully submitted on behalf of counsel for Tennant Energy on the 5<sup>th</sup> day of April 2021.



Barry Appleton

**APPLETON & ASSOCIATES**  
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Edward M. Mullins

**ReedSmith**