APPLETON & ASSOCIATES
INTERNATIONAL LAWYERS

ReedSmith

April 20, 2021

By email

Cavinder Bull, SC
Drew & Napier LLC
10 Collyer Quay 10th Floor, Ocean Financial Centre
Singapore 049315

Doak Bishop
King & Spalding LLP
1100 Louisiana Street, Suite 4000
Houston, Texas 77002

Sir Daniel Bethlehem QC
20 Essex Street
London, WC2R 3AL

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 April 13, 2021 reply to Tennant Energy's April 5th letter on 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" prepared for Leader Resources Services Corp. (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 Permission for Canada to substitute an out-of-date and currently inaccurate hearing transcript in the place of the actual video evidence (submitted as Exhibits **C-107, C-201, C-204, C-205, C-206, C-208, and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*).***

This current arbitration focuses heavily on Canada's repeated attempts to hide evidence from public, scrutiny to prevent its knowledge of unhelpful and compromising admissions from senior public officials. Canada's motion is emblematic of Canada's overall tactics in this arbitration before this Tribunal. Canada must not be allowed to bury public information away from public scrutiny by claiming the *Mesa Power* Confidentiality orders cover this arbitration even though the information sought to be kept secret otherwise has been made available to the public and/or obtained from third-parties outside of the *Mesa Power* proceedings.

Tennant Energy is gratified to learn that Canada does not seek an exclusion order and that it reasonably concedes that Exhibit **C-108** is admissible before this Tribunal. However, in its April 13th response, Canada fails to substantively address the significant procedural irregularities of its application which fall outside of the terms of the Procedural Order.

Canada continues to unreasonably seek an unprecedented order to have this Tribunal replace exhibits **C-107, C-201, C-204, C-205, C-206, C-208, and C-224 through C-243** with the redacted transcripts from the *Mesa Power* hearing — to suppress publication of the evidence in its entirety, making the video evidence unavailable to the public.

Again, Tennant Energy notes that this relief sought by Canada, to replace exhibits with redacted transcripts from the *Mesa Power* hearing, is not contemplated in the procedures set out in paragraphs 15 – 18 of the *Confidentiality Order*. This request does not fit within the ordinary scope for confidentiality designation.

In summary:

1. Exhibit C-108, the Arran Wind Project Energy Assessment (the "Arran Wind Assessment Report"), is not a confidential document. There is no basis for any confidentiality designation upon it. It was provided to Tennant Energy by Leader Resources Services Corp.

2. Canada tries to substitute the *Tennant Energy* claim with the *Mesa Power* claim. This Tribunal already has concluded that the *Mesa Power* Confidentiality Order does not apply to Tennant Energy. Yet time and time again, Canada attempts to bind Tennant Energy to the orders of another arbitration tribunal that simply do not apply to Tennant Energy.

3. Canada improperly challenges the confidentiality designation of the *Mesa Power* video evidence. Canada seeks to bury evidence to prevent public scrutiny of the admissions of wrongful activity contained in the video evidence. 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. Report C-108 – Arran Wind Resources

Canada says that Leader Resources Services Corp., the actual party who commissioned the Arran Wind Assessment Report (**C-108),** cannot share its own information with Tennant Energy. Canada provides no legal support for such a statement. Canada advances irrelevant and formulistic arguments that a third party to this arbitration, Mesa Power Group, must authorize the release of Leader Resources Services Corp's information. Leader Resources Services Corp is a distinct legal entity, and it is not owned and controlled by Mesa Power. Remarkably, Canada expects this

Tribunal to accept its legal conclusion at face value, but Canada offers absolutely no support for this contention.

A. The Exhibit C-108 Report is addressed to Leader Resources Services Corp.

Mesa Power Group obtained the Arran Wind Assessment Report from Leader Resources Services Corp. This company always had the possession and ownership over this Wind Energy Assessment Report that it commissioned. Leader Resources Services Corp. did not assert any confidentiality over the Wind Assessment Report when it provided it to Tennant Energy. Understandably, for Leader Resources Services Corp., this old Arran Wind Assessment Report was no longer business confidential as the Ontario FIT Program was over.

This issue has nothing to do with any permission granted by Mesa Power Group over non-confidential documents (discussed below) because this document did not arise from Mesa Power Group.

B. Canada irrationally requires non-parties to authorize information in the possession of disputing parties.

Canada then advances a second dubious proposition. Canada demands that the Arran Wind Assessment Report (addressed to Leader Resources Services Corp.) may be freely admissible as evidence only if a third party, Mesa Power Group, gives its consent to the use of Leader Resources Services Corp's business information. This suggestion is nonsensical. Again, this document did not arise from Mesa Power. Mesa Power has no authority over this document. Neither Leader Resources Services Corp nor Mesa Power Group is a party to this arbitration.

This Tribunal has full authority to admit this report as evidence, and apparently, Canada has not raised any objection to the Arran Wind Assessment Report being admitted into evidence.

In any event, this Tribunal has made clear that Tennant Energy is not bound by the *Mesa Power* Group Confidentiality Order. Canada's entire argument has no foundation in law or logic.

The definition of business confidential information in the current arbitration is contained in the *Tennant Energy* Confidentiality Order. Information may not be designated as business confidential if the information is not confidential under that definition.

While the information in Exhibit **C-108** may well once have been confidential to its parties, it is no longer confidential. The Arran Wind Project competed for a FIT Contract with the adjacent (and interconnected Skyway 127 Wind Project). Thus, the very fact that Leader Resources Services Corp. provided the Arran Wind Project Energy Assessment document over to its neighbor and former competitor, Skyway 127, is a testament to the fact that that the document is not confidential. As the document is not confidential, it may not be designated as confidential business information under the order.

Mesa Power is a holder in due course, but its possession of the Arran Wind Report did not vanquish the rights of Leader Resources Services Corp. over the Arran Wind Assessment Report. Thus, Leader Resources Services Corp. had full rights to use or share the information in the Arran Wind

Assessment Report as it wished. Canada has demonstrated no basis for any restriction. There simply were none.

C. Timeliness and Waiver

Canada also failed to address the timeliness of its objections. 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. 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.

D. Canada's arguments ignore the facts.

Finally, Canada selectively reviewed the Investor's submission. Tennant Energy identified in its earlier submission that Canada first raised Canada's allegation that Exhibit **C-108** arose from confidential *Mesa Power* documents in the final commentary to the Redfern Schedule. Tennant Energy would not have commented on the origin of the document as a matter of course and only did so to address Canada's mistaken assumption of the document's origin.

However, rather than accept the explanation, Canada's response is perplexing. Canada demands that a non-party to this arbitration, Mesa Power, now be ordered to give evidence about a document that did not come from Mesa Power. Canada demands that Tennant Energy be held ransom to this demand for testimony and evidence from a non-party to this arbitration.

While Canada now admits that it does not seek to strike this document from the record, its continued demands make absolutely no sense. Exhibit **C-108** is not confidential. Thus, there is no way to assert business confidentiality over any of its provisions.

II. The Mesa Power Videos

Canada's argument about the Mesa Power videos is also hard to understand. Canada has had no objection to force Tennant Energy to have to declassify information. Still, when Canada finds itself with an enormous declassification task, Canada seeks to have the rules changed to exempt Canada from having to do the task.

Canada has demanded that all exhibits be declassified. Canada said that this was necessary to address its transparency requirements, but then Canada has failed to make any of this declassified evidence available to the public.

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."

Canada contends that every confidential document in the *Mesa Power* case must be confidential in the Tenant Energy case. But that is not correct. 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".[1]

Tennant Energy reminds the Tribunal that the extensive case law on the admission of evidence in the public domain already has been canvassed in the consideration of the *Mesa Power* videos. In those submissions, Tennant Energy referenced the decision in the *Conoco Phillips* arbitration, noting the following at paragraph 80:

> 80) The only issue is that the information that was once confidential is no longer confidential. Canada says that this tribunal should "roll back the clock" and pretend that the public never saw the information posted to the world for five years. Giving effect to Canada's request would be a "travesty of justice." Prof. George Abi-Saab wrote about the absurd effects of such a decision in his separate award in the ConnocoPhillips case. He wrote: This Tribunal had an obligation to evaluate the best available evidence to determine the facts in the dispute before it. To ignore the "existence of relevance of such glaring evidence" would be to send the Tribunal over into an "epistemological" abyss and close itself off to: 'a subjective make believe world of its creation; a virtual reality in order to fend off probable objective reality; a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration but of the very idea of adjudication."[2]

Information from the *Mesa Power* NAFTA hearing that currently is publicly available never could be designated by a disputing party as confidential under *Procedural Order No. 7*.

Canada again attempts to hide behind the *Mesa Power* Hearing orders to keep information that was made available to the public since the October 2014 hearing away from public scrutiny. Such an approach runs contrary to the principle and obligations of transparency and public disclosure.

A. Canada attempts to suppress evidence.

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

[1] *Procedural Order No. 7*, September 21, 2020, at ¶50.
[2] Tennant Energy - Investor's Response to Canada's Motion to Suppress Evidence from the Public and the Tribunal, August 18, 2020 at ¶ 80 referencing ConocoPhillips, Dissenting Opinion of Georges Abi-Saab, at ¶¶66-67, CLA-254.

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.

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. Canada has not done so because it knows it cannot: these videos were available to the public already.

Despite all 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.

B. The Video contains other important evidence necessary for 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.

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

Canada identifies Tennant Energy has agreed to Canada's confidentiality claims over PowerPoint presentation screenshots in Exhibits **C-179, C-214, C-215, C-216 and C-218**. Tennant Energy agreed to confidentiality over these exhibits because these screenshots contain information that is not a part of the public domain through PowerPoints which reference other evidence which remains confidential. While the testimony in these limited instances is public, the screenshots require redaction. This only affects Exhibits **C-179, C-214, C-215, C-216 and C-218**.

There are simple ways to edit the video to address this situation. In these very limited situations, the video might be edited to simply redact the PowerPoint screen but to leave the rest of the image and testimony in place.

Canada is a G8 member economy. It regularly attends hearings with more than 20 representatives in comparison to the two representatives representing Tennant Energy. Canada has the resources and capabilities to redact the video evidence. It simply does not want to follow the same obligations as it willingly imposes on the Investor. This conduct is simply unacceptable.

III. Mr. Appleton's presence is required only on one matter.

Canada maintains its unreasonable requirement that Tennant Energy prove to Canada's satisfaction that the statements of its counsel to the Tribunal in the January 2020 Hearing were accurate and truthful through written evidence of *Mesa Power's* instructions to release the documents.

Canada has called this representation into question; this is precisely why any additional consideration of this matter requires the actual involvement of Mr. Appleton.

Originally, Canada's position was that it was unnecessary to await Mr. Appleton's return to the office because his electronic signature was applied to the Jurisdictional Counter-Memorial filing.[3] However, this Tribunal and Canada both are aware from numerous ongoing communications that Mr. Appleton has not returned full-time to work at his office and that the catastrophic family health matter continues.

Canada has written to Tennant Energy and requested that it spare the details of the horrific health issues on a young child to avoid causing anxiety and distress to Canada's legal team. Then Canada claims that it was uncertain about the situation and thus decided to bring this motion as it assumed the situation was better. Canada later relies on Mr. Appleton's virtual presence on a virtual panel with four other international arbitration experts.

However, the immensity of the family health crisis is relevant and needs to be understood. The issues before the Appleton family address catastrophic and lethal conditions. The fact that a young patient remains in intensive care for more than four months after a full heart transplant is severe and indicative of the catastrophic scale of the situation. Mr. Appleton is grateful that matters have stabilized recently but they continue to be of the most serious nature. Mr. Appleton would be delighted for a swift and full recovery of his nephew and for a return to normal. These are all matters beyond his control.

As outlined in the April 5th response from Tennant Energy, the January 2020 *Tennant Energy* Procedural Hearing Transcript 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. Yet Canada continues to suggest that this discussion must take place in the absence of Mr. Appleton. Doing so would seriously prejudice Tennant Energy's opportunity to have its case heard.

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

[3] See page 4 of Canada's Letter Re Confidentiality of C-108 and Mesa Power Videos, Dated 13 April 2021, where Canada states "While Canada was awaiting Mr. Appleton's return to practice to discuss these outstanding procedural issues, the Claimant filed its Reply Memorial on Jurisdiction. The Reply Memorial was signed by Mr. Appleton."

A. Prof. Appleton's Parliamentary Panel participation

Canada takes a new approach suggesting that its March 26, 2021 motion is justified because. Prof. Appleton made a brief appearance as part of a panel of eminent arbitrators and Canadian law professors to discuss investor-state arbitration on March 26, 2021. Canada seeks to justify its attempt to ambush Tennant Energy with because of Prof. Appleton's virtual presence on a zoom panel before a Canadian Parliamentary International Trade oversight Standing Committee — suggesting it is proof that he has returned to full time work.

Prof. Appleton is the co-director and Senior Fellow at the International Law Center at the New York Law School, where he is a professor of law teaching international arbitration and international business transactions. He is also the co-chair of the American Bar Association's Section of International Law International Arbitration Committee and the author of two treatises on the North American Free Trade Agreement. Prof. Appleton joined a hastily convened video panel along with the Hon. Yves Fortier, Prof. Armand de Mestral, Prof. Charles-Emmanuel Côté, and Prof. Patrick Leblond on March 26th before a Canadian Parliamentary Standing Committee studying investor-state dispute settlement. Mr. Appleton spoke in favor of investor-state arbitration for approximately 15 minutes and answer two questions from the Parliamentary Committee while attending the zoom meeting for approximately 90 minutes.

Canada contends that Mr. Appleton's virtual presence in a ninety-minute remote video attendance was "inappropriate."[4] This brief appearance is not inconsistent with the gravity of Mr. Appleton's family situation. Mr. Appleton's family is preoccupied with a grave matter involving a seriously ill young family member who remains in intensive care after four months. That makes planning exceedingly difficult due to the ongoing unpredictability of the situation. However, the tragic situation does not make a short video appearance impracticable, impossible, nor improper.

Prof. Appleton provided comments to Canada's Standing Committee on International Trade on ways that Canada's could address its dismal record of losses in investor-state cases. Prof. Appleton had been a former government official and advised on the defense of investor-state matters in the past as well as acting for investors. Canada filed Prof. Appleton's testimony. He outlined approaches for greater efficiency, better utilization of consultation and mediation approaches and he suggested that the government consider more thorough prioritization of cases. Prof. Appleton noted that the Parliamentary Committee could not review documents that were not made public by the disputing parties in NAFTA arbitrations, and that this lack of information might affect the Standing Committee's assessment of Canada's performance in the investor-state dispute settlement system. Mr. Appleton identified his personal support for the principle of transparency.

Tennant Energy has advocated for full disclosure and transparency from day one. In comparison, Canada has been advocating for the restriction on public access.

It is not surprising that Canada is unhappy with the nature of Prof. Appleton's critical comments to Canada's supervisory Parliamentary masters. Prof. Appleton remains supportive of transparency and public rights in investor-state arbitration. Before Canada's own supervisory Parliamentary Committee, Prof Appleton highlighted Canada's approach to restrict information from the public.

[4] Canada's Letter Re Confidentiality of C-108 and Mesa Power Videos, Dated 13 April 2021, at p. 5.

The question of legitimacy and transparency for the Canadian public is an important issue but it is a domestic matter and not a matter for this Tribunal to consider. Canada's record on transparency is a matter for the Canadian Parliamentary process. Consideration of such matters properly reside in other fora. It is hard to understand why Canada wished to raise these concerns with its policy choices here.

Canada was aware for two days that Prof. Appleton would be a witness to the Parliamentary Committee as it was on the International Trade Committee's public agenda. What is clear is that Canada seemingly ambushed Tennant Energy with this ill-considered confidentiality motion filed some twenty minutes after the completion of the Parliamentary Committee Hearings.

Nothing that Prof. Appleton said should come as a surprise to this Tribunal. Prof. Appleton has advocated his support for the Debevoise Protocol arbitration efficiency principles before this Tribunal. Virtually all of Prof. Appleton's comments on transparency and due process have been canvased before this Tribunal at earlier procedural meetings or correspondence.

Nothing in Prof. Appleton's short comments are inconsistent with the unfortunate family situation, not do they indicate that it has yet been resolved. As noted, numerous times, Mr. Appleton has not returned to the office during the period of his family emergency.

IV. Conclusions

Canada and Tennant Energy agree on one thing. This motion can be addressed now. The reason is simple.

1. Exhibit **C-108** does not contain confidential information from *Mesa Power*. The Arran Wind Assessment Report is a document from a party other than Mesa Power Group provided to Tennant Energy and relied upon by Tennant Energy's valuation report. There cannot be a designation for confidential business information if there is no confidentiality. Canada's motion must be dismissed.
2. Canada's proposal to substitute evidence in place of the hearing videos is procedurally improper. It also must be dismissed.
3. Tennant Energy is entitled to its full costs of this needless and vexatious procedure.

For the reasons set out above, Canada's procedural requests should be dismissed.

Respectfully submitted on behalf of counsel for Tennant Energy on the 20th day of April 2021.

Barry Appleton

APPLETON & ASSOCIATES
INTERNATIONAL LAWYERS

Edward M. Mullins

ReedSmith