

PUBLIC VERSION

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

PCA CASE NO 2018-54

BETWEEN

Tennant Energy LLC

INVESTOR

AND

Government of Canada

RESPONDENT

**Tennant Energy's Post-Hearing Comments on the Westmoreland
Coal Award**

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TABLE OF CONTENTS

	Page
I. Key Dates for the investment.....	1
II. The Westmoreland NAFTA dispute	4
III. The Timing of the Breach is affected by Canada’s deceptive acts	4
IV. Timing.....	6
A. Tolling of the limitation period.....	6
B. Tennant Energy’s alternative breach	7
V. The Principles in paragraph 195 of the Westmoreland award.....	8
VI. Does “beneficial ownership at all relevant times with a NAFTA investor” (award, paragraph 195) includes beneficial ownership of a minority shareholding in a NAFTA Chapter 11 claimant?	10
VII. THE <i>WESTMORELAND</i> AWARD’S ANALYSIS OF TREATY OBJECTIVES ARE INCOMPLETE AND UNRELIABLE	10
VIII. legal successor to a minority shareholding as an “investor”.....	12
IX. The Investment.....	13
A. The Trust.....	13
B. Successor in interest.....	15
1. Impact of California Law.....	16
X. The BURDEN OF PROOF	17
XI. Tribunal should not RELY UPON <i>Westmoreland</i>	18

Investor's Post-Hearing Comments on the Westmoreland Coal Award

On April 11, 2022, after the close of the jurisdictional hearing post-hearing briefs, Canada requested that the award in *Westmoreland Coal v Canada (Westmoreland)* be admitted as an authority. The Tribunal ordered the admission of the award (**RLA-207**) on April 20, 2022. The Tribunal, in that same decision, invited the disputing parties to address several points in a 20-page (maximum) pleading to be filed on May 4, 2022. This brief contains Tennant Energy's submissions on the Post-Hearing Comments on the *Westmoreland* Award.

Within these Comments, the Investor will address the following issues:

- A. That the timing of the breach is affected by Canada's deceptive acts. These actions resulted in a tolling of the time limit clock.
- B. That Tennant Energy was the successor in interest to the shares held by John Tennant either by way of transfer (assignment) of the claim or because of the operation of a valid trust due to the operation of California law which operated from the day he acquired the right to the shares in 2007 and/or received the shares on April 19, 2011 in trust for Tennant Energy until the days in which the shares were formally transferred to Tennant Energy on January 15, 2015. Tennant Energy was an Investor with an investment in Canada before the breach under either approach.
- C. That Tennant Energy is a successor in interest; the *Westmoreland* Award does not restrict acts of successor companies.
- D. Issues of burden of proof and whether the *Westmoreland* award should be reliably relied upon by this Tribunal if relevant.

In general, the *Westmoreland* Award does not add anything further to assist the deliberations of this Tribunal. As noted in paragraph 230 of the decision, the *Westmoreland* Award results from *sui generis* facts related to specific situations arising from U.S. bankruptcy law choices not present here.

Furthermore, a specific document (**C-268**) confirms that Tennant Energy is the successor in interest to John H. Tennant and Tennant Energy's ownership of share equity interests and control interests in Skyway 127 which makes the Tennant Energy case entirely different from the situation considered in the *Westmoreland* Award.

I. KEY DATES FOR THE INVESTMENT

1. On October 19, 2007, John Tennant loaned his brother Derek Tennant's holding company, I.Q. Properties, \$200,000 (**C-265**) for a term of three years (October 19, 2010). The loan was secured with 437,500 Skyway 127 shares — 11.3 percent of the shares owned by I.Q. Properties.¹ John Tennant granted a six-month extension, which extended the loan's due date to April 19, 2011.

2. It is uncontroverted between the disputing parties that John Tennant obtained shares in Skyway 127 in 2011. Those shares were obtained under the Promissory Note (**C-265**). On October

¹ While it is not essential to determine the issues in this claim of how far back John H. Tennant's investment, under NAFTA's Article 1139 definition of investment, the investment at issue in this case arose as early as John H. Tennant's intangible interest in the Skyway 127 shares on October 19, 2007 through a debt instrument.

PUBLIC VERSION

19, 2010, John Tennant exercised his call option under the Promissory Note signed by Derek Tennant (C-265) and demanded that the 437,500 shares of Skyway 127 be transferred to him if I.Q. Properties defaulted on the loan on April 19, 2011 (C-267),²

3. I.Q. Properties defaulted on the loan extension on April 19, 2011, giving effect to the already-exercised call option.

4. Skyway 127's share registry shows that the Skyway 127 shares were formally transferred to John Tennant's name in June 2011³, and then to Tennant Travel (n/k/a Tennant Energy) in January 2015.⁴ Although the share registry in June 2011 refers to "John Tennant," the uncontroverted testimony at the hearing showed that there was a 2-month delay in doing the administrative task of recording the transfer, but that the shares actually were obtained on April 19, 2011,⁵ and that these shares were held in trust for a company to be designated, which was in fact designated as Tennant Energy on April 26, 2011.⁶

5. On February 18, 2016, John Tennant issued a confirmatory memorandum to the Tennant Energy Management Board. (C-268) This memorandum was issued almost 18 months before the NAFTA claim was filed.⁷ The memorandum states:

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

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

6. John Tennant, an American, validly transferred his tangible and intangible rights to Tennant Energy by transferring the Skyway 127 shares. Tennant Energy is a successor-in-interest to any rights, including choses in action that John H. Tennant had at the time of the transfer/assignment. This evidence is undisputed.

7. Thus, the key dates regarding the interest of Tennant Energy are as follows:

(a) Oct 19, 2007 - John Tennant acquires a beneficial interest in Skyway 127.

(b) John Tennant obtained the right to shares on April 19, 2011, declaring a trust in favour of a company to be designated at that same time. John Tennant designates the company on April 26, 2011, as Tennant Travel (n/k/a Tennant Energy).

² John H. Tennant's had another protected form of investment directly in the shares of Skyway 127 under NAFTA's Article 1139 definition of investment in October 2010

³ Shareholder's Ledger Skyway 127, June 20, 2011 (C-117).

⁴ Shareholder's Ledger Skyway 127, January 15, 2015 (C-115).

⁵ Day 2 Transcript, 239:5-22.

⁶ Day 2 Transcript, 244:14-18.

⁷ Testimony of John H. Tennant, Transcript Day 3, at 375:11-15.

- (c) John Tennant assigned the shares in Skyway 127 to Tennant Energy including rights as successor in interest. Tennant Energy was “**the full successor in interest and all my rights whether they were considered in person, or in my capacity as trustee.**” This instrument confirmed that Tennant Energy was the successor in interest to John Tennant’s share rights, and, as successor in interest, it dates back to when John Tennant first obtained his interest in the shares (which was either on October 19, 2007 with the original collateral or on April 19, 2011 when rights of default commenced).
- (d) June 12, 2013 – The Ontario FIT Program terminates through a Direction from Minister of Energy Bob Chiarelli to Colin Anderson, OPA, 12 June 2013, (C-152).
- (e) On January 15, 2015, the interest in the Skyway 127 Wind Energy Shares held by John Tennant (as Trustee) were registered into the name of Tennant Energy LLC.

8. Against these factual dates, the Investor notes that some hearing testimony was first made public on April 30, 2015.⁸ Testimony in a confidential session was not released. The *Mesa Power* Investor’s Post Hearing Briefs were released in 2015.⁹ As this Tribunal is aware, the *Mesa Power* Post-Hearing Briefs contained information that expanded on what was available to the public in the transcripts. This included information about the existence of International Power Canada. Other information, such as the direct role of [REDACTED] or the fact that Ontario had lied about making all electricity transmission available to FIT proponents became known to Tennant Energy in 2020 – in the manner set out in Mr. Pennie’s Witness Statement and other witness statements.¹⁰

9. Tennant Energy relied on the Ontario Minister of Energy in 2011, right after the FIT Contracts were issued. The Minister said nothing was wrong with the administration of the program; everything in the FIT Program was in order. Skyway 127 also received a letter that had it at the top of the FIT waitlist.¹¹ Skyway 127 knew that Ontario would make all transmission available to the FIT Program, so it simply thought that this was another delay for its project. Tennant Energy also relied on its own calls to officials at the OPA as a further due diligence step.¹² The OPA officials said that everything was in order. The consistent denials of unfairness and the promotion of alternative theories of causation exonerating Ontario of blame were prominent.

⁸ Email from PCA confirming publication of public version of Mesa Power transcripts – April 30, 2015(C-112)

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

¹⁰ The Discovery of more information arising from reviewing unredacted Mesa Power Hearing videos on the PCA website was detailed in the following witness statements: J.C. Pennie (CWS-1), Witness Statement of Justin Giovannetti (CWS-4) and Witness Statement of Parthenya Taiyanides (CWS-5)

¹¹ July 4, 2011 Letter from Joanne Butler, VP, Ontario Power Authority to J.C. Pennie (C- 149)

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

10. During his testimony, John C. Pennie confirmed that Skyway 127 relied on these statements.¹³ Thus, the time must be tolled during this earlier period – only to resume once the Investor knew of the breach.

II. THE *WESTMORELAND* NAFTA DISPUTE

11. The *Westmoreland* dispute arose out of an investment made by the US-based Westmoreland Coal Company in two Canadian mining entities, which directly and indirectly owned three mine-mouth coal mines in Alberta, Canada. Westmoreland Mining Holdings emerged as the successor to Westmoreland Coal Company after the company underwent a bankruptcy reorganization in March 2019.

12. Westmoreland commenced a claim in 2019 after Alberta Canada awarded roughly \$1.4 billion in compensation to Alberta coal companies for losses arising from phasing out coal by 2030 — while excluding Westmoreland, the only U.S. company to be impacted by the policy. Canada contended that these payments were meant to compensate only coal-fired generation units, and not coal suppliers.¹⁴

13. As a result of the bankruptcy reorganization, the *Westmoreland* Tribunal concluded that the reorganization did not result in having the investor being the legal successor of Westmoreland Coal Company, and thus not the proper claimant before NAFTA Tribunal.¹⁵ The *Westmoreland* Tribunal noted that its decision was heavily fact dependent stating in paragraph 230 that “In reaching this decision, the Tribunal emphasizes that its analysis is founded on the specific process by which Westmoreland came into being.”

III. THE TIMING OF THE BREACH IS AFFECTED BY CANADA’S DECEPTIVE ACTS

14. To understand whether *Westmoreland* is even relevant to this Tribunal’s deliberations, it is important to understand the measure at issue and **when** it could have been known by Tennant Energy.

15. One of the unique factual issues arising in this NAFTA Chapter Eleven claim is that this the Tennant Energy Claim is about covert and deceitful practices surrounding the Ontario FIT Program. Canada and Ontario accomplished this through deceptive and directly misleading statements to prevent potential claimants from understanding and appreciating their legal rights through a systemic disinformation campaign that disseminated false information to FIT Proponents and the general public.

16. This case concerns the application of practices from the Government of Canada and the Government of Ontario against Skyway 127 under the Ontario FIT Program.¹⁶ Canada engaged in an ongoing wrongful practice that was unknown to Tennant Energy. This lack of knowledge

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

¹⁴ *Westmoreland Coal v Canada (Westmoreland)* at ¶ 82. (RLA-207)

¹⁵ *Westmoreland Coal v Canada (Westmoreland)* at ¶ 230. (RLA-207)

¹⁶ Under the definitions in NAFTA Article 201, the term “measure” includes any law, regulation, procedure, requirement or practice”.

resulted from government deception and ongoing misinformation from the government to the public. This practice was to keep the public unaware of Canada's wrongful conduct.

17. As discussed during the jurisdictional hearing, the wrongful measures from Canada and Ontario's deceit could not be known before the summer of 2015, with the most significant knowledge becoming known to Tennant Energy in 2017. Canada's preferences for favored friends of the government in contravention of the terms of the FIT Program were non-transparent, contradictory to the terms of the Program, and unreasonably inconsistent with due process and the FIT Program. These practices also were inconsistent with Canada's NAFTA obligations in Section A of NAFTA Chapter Eleven. Once discovered, such measures affected Tennant Energy's basic expectations that the FIT Program was run fairly under its terms, as asserted by Canada and Ontario during the entirety of the program's operations and continuously after that. The measure, in this case, was in direct contravention of due process, which arose from impropriety and was integrally related to the impropriety of Canada's and Ontario's ongoing deceptive practices to suppress public knowledge of these earlier improper acts.

18. Canada conveniently failed to address this issue during the jurisdictional phase. Canada's entire jurisdictional challenge is willfully blind to the admissions of its own witnesses during cross-examination at the *Mesa Power* Hearing. It ignores the facts of what took place through artifice.

19. As noted by the Investor in its Post Hearing Brief, there is no way to conceive this as an instantaneous breach. Canada continued its disinformation campaign despite the truth finally becoming known (in private sessions of the *Mesa Power* NAFTA Hearings). The eventual discovery of the truth marks when the breach was completed; this was the only time FIT Proponents could be able to fairly appreciate their own legal position in relation to others and meaningfully consider bringing a NAFTA claim. The measure at issue was the continuing deceitful conduct of Canada in suppressing the truth about the treatment of proponents under the Ontario FIT Program. The extent of this deceit became known to the public in 2017 with the release of information from the *Mesa Power* hearing videos mislabeled on the internet.

20. It is a general principle of international law that no one may profit from their own wrongdoing.¹⁷ Canada's active and ongoing engagement in deception and misinformation regarding the breach is essential when considering the determination of the timing of the breach, and thus the relevance (or irrelevance) of the *Westmoreland* Award.

21. The admission that the government did not actually follow the terms of the FIT Program, and favored friends of the Government, occurred during witness examination in the *Mesa Power* NAFTA hearing held in the fall of 2014. This testimony was in a confidential session, and its content was disclosed in part only beginning in the summer of 2015. Thus, information arising from these admissions did not become known until much later, and at a time when Tennant Energy had registered ownership of the shares of Skyway 127 Wind Energy. In any event, Tennant Energy had been controlling Skyway 127 since late 2011. Thus, *Westmoreland* is irrelevant because

¹⁷ The general international law principle that no one may profit from their own wrongdoing (the *Nullus Commodum* Principle) was set out in Investor's Opening Slide 44 referring to Bin Cheng, *General Principles of International Law* (CLA-108) Day 1 Transcript at page 156, lines 18 – 24.

Tennant Energy already owned the shares outright when Canada's wrongful conduct could become known.

22. Thus, in every way, Tennant Energy meets the requirements of NAFTA Article 1116. Tennant Energy was an investor of a NAFTA Party with a claim that another NAFTA Party breached obligations under Section A of NAFTA Chapter Eleven with respect to that Investor's investment and that investor incurred loss or damage arising out of that breach.

23. Tennant Energy had a beneficial interest in these shares since April 2011, through the trust created by John Tennant. As outlined in the Post Hearing Brief, this fact was uncontroverted from the testimony at the hearing.

24. Finally, as discussed in detail below, Tennant Energy is the successor in interest to the position of John Tennant. The NAFTA-protected investments of John Tennant in Skyway 127 Wind Energy go back to 2007.

25. The loss or damage to Tennant Energy's investment in Skyway 127 Wind Energy arose from Canada's breach. Thus, even if the general principles in *Westmoreland* could apply, they are simply inapplicable based on the different facts present in this case as opposed to those in *Westmoreland*.

IV. TIMING

26. During the jurisdictional hearing, Tennant Energy noted that the measure in issue was based on the false and deceptive "plausible explanations" Ontario and Canada raised about the FIT Program results in the Bruce Region.

A. TOLLING OF THE LIMITATION PERIOD

27. Canada engaged in misinformation about the administration of the FIT Program by producing false alternative plausible explanations. If Canada and Ontario had told the truth, the time limit clock would have run normally. However, there must be consequences arising from Canada's deception; otherwise, States would be free to engage in wrongful conduct and prevent investors from asserting their legal rights by deceiving them for years.

28. For the purposes of this jurisdictional inquiry, the impact of Canada's deception is that the time limit clock could not run because of the plausible false alternative explanations Ontario and Canada prominently disseminated.

29. Applying this approach means that the Tribunal would take into account the FIT Contract awards of July 4, 2011 (a time when Skyway 127 had not yet suffered the loss of the FIT Contract) and the day upon which Skyway 127's place on the priority waitlist expired with the cancellation of the FIT Program on June 12, 2013.¹⁸ On account of Ontario and Canada's plausible but false statements, the Investor could not have formed the requisite knowledge of breach until the Investor or its investment discovered the actual truth.

¹⁸ Direction from Minister of Energy Bob Chiarelli to Colin Anderson, OPA, 12 June 2013, (C-152).

30. The only relevant date is the date of actual knowledge – which arises on the actual date when Tennant Energy became aware that Ontario was not telling the truth about the FIT Program. According to John C. Pennie, that date was the discovery of the evidence of Energy Assistant Deputy Minister Susan Lo, which he saw for the first time on August 15, 2015.¹⁹

31. There was no way that Skyway 127 could ever have known this information before the witness evidence confirming the truth to Ontario’s lie occurred. This admission occurred in a confidential session on October 28, 2014 (so that is within the 3-year Art 1116(2)-time limit), and its discovery occurred the following August 2015 by Mr. Pennie (also within the time limit).

32. The Post Hearing Brief noted that Canada and Ontario prominently and ongoingly denied partiality and wrongdoing in the administration of the FIT Program. Canada repeated these positions consistently in the October 2014 *Mesa Power* hearing and its public comments.²⁰

33. During witness testimony at the *Mesa Power* hearing, the prior sworn witness testimony put forward by Canada’s witnesses was significantly impeached. As in most impeachments, Canada’s witnesses asserted statements that appeared factual but contained an untruth. Then the cross-examining lawyer skillfully tested the credibility of the statement – and the witnesses admitted under oath to matters that contradicted the earlier untruthful statements. In addition to untruthful statements exposed at the *Mesa Power* Hearing, new information that was previously unknown to FIT Applicants was discovered at the *Mesa Power* Hearing. This previously undiscovered information related to the “Breakfast Club” conspiracy; the confirmation that Ontario officials knew that some FIT Applicants were being treated better than others; and the fact that there had been meetings with [REDACTED] and other senior government officials around the time that Ontario decided to modify its FIT Program and permit a significant rule change on the eve of making Contract awards.

34. Thus, the *Westmoreland* award is inapplicable to the situation here – at the time of knowledge of the deceptive practices, Tennant Energy already had ownership of the Skyway 127 shares and control of the Canadian investment.

B. TENNANT ENERGY’S ALTERNATIVE BREACH

35. Tennant Energy explained that the measure at issue in this claim was the breach of NAFTA Article 1105 arising from the false statements the Government made by with the actual knowledge of such breaches constituting the date of the breach. The Investor noted the impact of discovery in the closing and in the closing slides. The impugned act is not a single instantaneous act but a continuous act. Canada’s practice thus constitutes at the same time a continuous act, a composite act, and a complex act. It is not an instantaneous act. The acts themselves have continued in time. The primary obligations alleged to be breached are the obligations in NAFTA Articles 1105, 1102, and 1103. The violations have been pleaded in the Tennant Energy Notice of Arbitration. The effects of the lack of knowledge were to mislead the FIT Proponents such as Tennant Energy and Mesa Power (and others) who followed the FIT Rules, delay these proponents in bringing claims

¹⁹ Witness Statement of John C. Pennie at ¶¶ 70 and 94. (CWS-1)

²⁰ See Investor’s 17 December 2021 Post Hearing Brief at ¶¶ 23-26. Also J.C. Pennie Testimony, Day 2 Transcript at page 282, lines 8 - page 284, line 3.

and seeking redress, and result in ongoing harm due to Canada's continued non-cessation of these measures.

36. These all arose directly from the effects of Canada's untruths. Tennant Energy contends that the breach first arose in the late spring and early summer of 2015 upon the actual discovery of falsehoods – which would give rise to the requisite knowledge required by Article 1116(2) and would establish the breach of the NAFTA for Article 1116(1).

37. Because of the active steps Canada took to create misinformation to distract FIT Applicants from knowing about the breach, the timing of the breach could not occur until AFTER Skyway 127 and Tennant Energy actually could know about the true reasons for Skyway's failure. Thus, even though wrongful acts occurred, the breach could not occur until disclosure of the true reason for the measures. That information did not occur until after the release of information arising from the *Mesa Power* NAFTA hearing in the Spring and Autumn of 2015.

V. THE PRINCIPLES IN PARAGRAPH 195 OF THE *WESTMORELAND* AWARD

38. In paragraph 195, the *Westmoreland* Tribunal set out three principles. The Tribunal wrote:

195. Having reviewed the cases cited by the Parties, certain principles can be drawn: (i) a sham transaction will be fatal to jurisdiction, (ii) just because a transaction is bona fide does not of itself guarantee jurisdiction; and (iii) there must be beneficial ownership at all relevant times with a NAFTA investor. However, none of the cases cited by the Parties is directly on point in respect of the issue in dispute in this case, in particular, whether the Investor at the time the challenged measures are adopted or maintained must be the same entity as the Investor at the time the arbitration is commenced.

39. Principle (i) is not an issue in this jurisdictional challenge. Principle (ii) is the question in general before this Tribunal.²¹ The controversial matter arising from the *Westmoreland* award arises from Principle (iii) regarding whether the Investor at the time the challenged measures are adopted or maintained must be the same entity as the Investor at the time the arbitration is commenced.

40. On Principle (iii), this Tribunal should not follow the approach advanced by the *Westmoreland* Tribunal. The proposition advanced by the *Westmoreland* Tribunal is contradictory to general principle of international law and by the *jurisprudence constante* as discussed below.

41. However, suppose this Tribunal were to follow Principle (iii) advanced in the *Westmoreland* award, (which the Investor avers that it should not). In that case, the terms of the particular assignment operate to ensure that Tennant Energy stands as successor. In place of John Tennant, an investor who had an investment in Skyway 127 in 2007 (through the debt instrument or 2011 through the debt default) before the breach took place, is Tennant Energy. Unlike the situation in the *Westmoreland* claim, only one party can bring a claim as a NAFTA investor in

²¹ Regarding principle (i), there has been no allegation by Canada that the underlying transaction was fraudulent and the parties to the transaction gave evidence on it and were examined before the Tribunal. On Principle (ii), the issue of jurisdiction is the fundamental question before this Tribunal.

this arbitration – that is Tennant Energy, as it holds the stake in Skyway 127 Wind Energy (the FIT Proponent), and Tennant Energy is the successor in interest to any personal interest (or trust interest) that John Tennant previously held. Even without being a successor-in-interest, the hearing testimony showed that Tennant Energy was the beneficial owner of the shares at issue since April 2011. There simply is no basis for applying *Westmoreland* here.

42. The assignment addresses the key temporal issue advanced in paragraph 194 of the *Westmoreland* Award. This also meets the third critical element of the test set out in *Westmoreland* paragraph 195: “there must be beneficial ownership at all relevant times with a NAFTA investor.”

43. John Tennant had a beneficial interest in the shares of Skyway 127 as a creditor since April 2007 when he took a debt interest of three years duration over the shares as collateral for a loan. The definition of an investor in NAFTA Article 1139 includes a creditor. That loan was called on October 19, 2010 with a grace period of 6 months extended until the shares were called by John Tennant in April 2011. All of these acts predated the measure.

44. Further, in this particular case, an actual assignment document expressly names the Claimant (Tennant Travel then renamed Tennant Energy) as the successor in interest to all the rights in the Skyway 127 shares previously held by John H. Tennant. This addresses the issues raised in paragraph 201 and also, particularly in paragraph 220 of the *Westmoreland* award. The risks of the investment John Tennant assumed by went to the successor in interest, Tennant Energy.

45. And all of these transfers occurred before the measure was known to have occurred. There can be no question that the challenged measures applied to the Skyway 127 Wind Power project. Thus, the shares held in that project by John Tennant must be capable of giving rise to a claim.

46. The *Westmoreland* Tribunal does not consider the impact of when that impact should be assessed. On account of NAFTA Article 1116, the time to assess the impact, in this case, was in the summer of 2015, taking into account Canada’s active misrepresentations and disinformation, must be when the breach was known to occur. This also is in line with the *Westmoreland* Tribunal’s consideration of risk born by the investor – when Tennant Energy formally acquired its shares in Skyway 127, it bore the risk of the investment – it did not at the time know that Canada had engaged in a systematic pattern of deceptive and misleading media campaigns to lull investors into a false sense of security. This is not a case where a third-party company acquired shares with the knowledge that a NAFTA breach occurred.

47. Further, the Investor does not agree with the correctness of the position advanced by the *Westmoreland* Tribunal. Instead, the position of the *Loewen* Tribunal is correct.²²

48. The *Westmoreland* Award references the legal opinions filed by Jan Paulsson. Mr. Paulsson referenced the jurisdictional decision of the *Perenco v Ecuador* Tribunal (**RLA-182**), and that Tribunal’s reliance on the writings of Prof. Bederman. Mr. Paulsson noted that in the article referenced by the *Perenco* Tribunal at footnote 827 to ¶ 522, Prof. Bederman noted that

22 See Investor’s Post Hearing Brief at ¶¶ 93 – 94 for discussion on the *Loewen Group v Canada* NAFTA award’s acceptance of transfers between parties of a NAFTA claim and the important role played by NAFTA Article 1109 in the protection of transfers under the NAFTA. See also ¶¶ 13-20 in the Tennant Energy Response to Canada’s Post Hearing Brief on Transfers (22 December 2021).

“the notion that the beneficial (and not the nominal) owner of property is the real arty-in-interest before an international court.” Indeed, this is a general principle of international law. The *Westmoreland* Award must not be applied in a manner contrary to international law.

VI. “BENEFICIAL OWNERSHIP AT ALL RELEVANT TIMES WITH A NAFTA INVESTOR” (*WESTMORELAND* AWARD, PARAGRAPH 195) INCLUDES BENEFICIAL OWNERSHIP OF A MINORITY SHAREHOLDING IN A NAFTA CHAPTER 11 CLAIMANT

49. Suppose this Tribunal were to follow Principle (iii) advanced in the *Westmoreland* award (which the Investor avows that it should not). In that case, the definition of investment set out in the NAFTA must determine the investment at issue.

50. NAFTA Article 1139 defines an investment. The Treaty provides an illustrative list of items that are included in this definition, including an enterprise (paragraph a), an equity interest in an enterprise (paragraph b), debt security of at least three years duration, and real estate or other property, tangible and intangible (paragraph g)

51. This definition includes all owners, whether they own a minority or majority interest in the investment. Thus, a minority interest qualifies as an investment if owned by an investor of American national such as Tennant Energy LLC (and John Tennant). Further, this definition includes all owners who may control – both *de jure* and *de facto*. In this case, Tennant Energy controlled the investment before it became aware of the breach. Tennant Energy also owned a property interest in the Skyway 127 Wind Power investment.

52. Ownership of an investment under the definition of investment in NAFTA Article 1139 including beneficial ownership and direct ownership. It also covers minority and minority ownership.

53. The NAFTA Article 1139 definition of an “investor” strengthens this understanding as the Investor who may commence a claim includes a person who makes, is making, or seeks to make an investment.

54. The terms of the particular assignment memorandum confirm that Tennant Energy stands as successor and in the place of John Tennant, an investor who had an investment in Skyway 127 as early as 2007 before the breach took place.

VII. THE *WESTMORELAND* AWARD ANALYSIS OF TREATY OBJECTIVES IS INCOMPLETE AND UNRELIABLE

55. The Investor submits that the analysis in paragraph 201 is irrelevant. The analysis by the *Westmoreland* Tribunal about the objectives of the NAFTA failed to give appropriate weight to the objective of a predictable commercial framework and expansion of investment opportunities.

56. Paragraph 201 states:

201. Whilst *Westmoreland* seeks to impress on us that we should not be quick to infer a stipulation where none is express, this construction comports with the object

and purpose of the NAFTA which is, inter alia, to “increase substantially investment opportunities in the territories of the Parties”. In order to encourage and support this investment, the Parties further agree certain protections for investors as detailed in Chapter Eleven. It must be a necessary element of the NAFTA that the duty on a NAFTA Party to accept certain obligations of investment protection is predicated upon an investor taking the risk of making an investment or, to put it the other way, an investor must have taken a risk by making an investment in order to be assured of treaty protection. A purchaser or assignee of an investment prior to any alleged treaty breach evidently takes a risk that there may be a subsequent treaty breach. However, once an alleged treaty breach has taken place, it cannot be argued that a subsequent purchaser of the investment or assignee of a claim takes such a risk. After the occurrence of an alleged breach, a subsequent assignee or purchaser can assess the likely damage arising from such breach and factor the risk level into the terms of any purchase or assignment. Whilst the actual quantification of such loss may not be certain, the risk is not that the breach may occur, it has already occurred.

57. The express terms of the NAFTA required the *Westmoreland* Tribunal to interpret its terms in “light of its objectives set out in [Article 102(1)] and in accordance with the applicable rules of international law”. The NAFTA Preamble sets out that the Parties resolve to, among other things, “reduce distortions to trade,” to “establish clear and mutually advantageous rules governing their trade,” and to “ensure a predictable commercial framework for business planning and investment.” The objectives of the NAFTA Treaty, as set out in Article 102, also include increasing substantially investment opportunities in the territories of the Parties, and otherwise eliminating barriers to trade.

58. The balance that the Tribunal imposes in Paragraphs 201 and 212 regarding characteristics of investment is simply not present in the NAFTA. They are present in Article 25 from the jurisprudence of Article 25 of the ICSID. The NAFTA drafters were well aware of the ICSID as it is an option available to claimants to bring a claim. Had the NAFTA drafters desired to impose such a test upon investment, they would have done so in the two pages of detailed examples of investments in NAFTA Article 1139. The fact that the treaty drafters were aware of such an approach and decided against the inclusion of such a characteristic test weigh strongly against importing such a doctrine into the NAFTA. On this issue, the *Westmoreland* Tribunal has waded clearly into error.

59. But even if it were applied (it should not be), the test is met here because Tennant Energy did take an investment risk. It was a beneficial owner through the creation of the trust since April 2011, well before any measure. It also formally became an owner in January 2015, before it had any knowledge that a NAFTA breach occurred. Unlike the facts in *Westmoreland*, where the rights were acquired *after* there was knowledge of a breach, here, knowledge of the breach did not occur until much later and is thus a protected investor.

60. There can be no question that the measures at issue comply with the requirements of NAFTA Article 1101 that the measure relate to investors of another Party or investments of investors of another Party in the territory of that Party.

61. The practices of Canada were designed to frustrate the ability of FIT Proponents, such as Skyway 127 Wind Energy (and its investors) from having information necessary to commence a NAFTA claim. Canada and Ontario actively engaged in false representations to actively deceive proponents. Such actions related directly to the FIT Proponents and such active deception continued well into 2017 (if not even later).

62. Canada and Ontario's measures directly impacted on the legal rights of Tennant Energy as investor in Skyway 127 Wind Energy, and upon Skyway 127 Wind Energy. These measures directly related to these investments and the Investor (despite the fact that neither the Investment nor Investor was aware due to the governments' wrongdoing).

63. In this case, Tennant Energy was the successor in interest to John Tennant either individually or as trustee – and thus the measures either related to Tennant Energy directly or to Tennant Energy as successor to John H. Tennant.

VIII. LEGAL SUCCESSOR TO A MINORITY SHAREHOLDING AS AN “INVESTOR”

64. The Tribunal asked, ‘having regard to paragraph 220 of the Westmoreland award, the relevance (if at all) of the Westmoreland award to circumstances in which a NAFTA chapter 11 claimant may be the legal successor to a minority shareholding that may qualify as an ‘investor’ for purposes of NAFTA chapter 11.’

65. The issue addressed in the Tribunal's final question was already answered. Paragraph 220 states:

220. The Tribunal does not accept Westmoreland's test. Having determined that jurisdiction under Chapter Eleven requires that a claimant shows that the challenged measures applied to it and that it suffered loss as a result of the challenged measures, it follows that Westmoreland must show that it is the legal successor to WCC. It is common ground that this issue is one of fact. Westmoreland's expert did not address this issue and, whilst Canada adduced expert U.S. bankruptcy evidence, the Tribunal notes Canada's expert's evidence (which is not disputed by Westmoreland) that U.S. bankruptcy law is not relevant to this question.¹¹⁴ Accordingly, we approach determination of this question on the basis of the facts before us and against the background of U.S. domestic law as the law governing Westmoreland and WCC.

66. As noted above, Tennant Energy is the legal successor of John Tennant's investment in the Skyway 127. This was addressed directly by Justice Grignon in her testimony. She testified that this was a matter under the law of California that did not require a specific form of words in the assignment. However, she also confirmed that such wording was memorialized in a 2016 document that addressed the assignment, issued by John Tennant. (C- 268).

67. Further, the definition of “investor” in NAFTA Article 1139 is expansive. It includes a national of a NAFTA Party who seeks to make, has made, or is making an investment. Thus, in the case of Tennant Energy, it was the legal successor to shareholding that qualifies as an “investor” for purposes of NAFTA Chapter Eleven.

IX. THE INVESTMENT

68. Tennant Energy, an American company, beneficially owned the shares since 2011 under an oral trust created by John Tennant, another American. Moreover, John Tennant, as trustee, then formally assigned the shares in Skyway 127 to Tennant Energy and named Tennant Energy the successor in interest.

A. THE TRUST

69. It is undisputed by the parties and their experts that oral trusts can be created under California law.²³ Three witnesses testified before the Tribunal about John Tennant's creation of an oral trust to hold the Skyway 127 shares he obtained from Derek Tennant.²⁴ Not a single fact witness disputed the trust's creation. Thus, although Ms. Lodise opined in her expert report (**RER-2**) and before the Tribunal that a trust was not created because there was no contemporaneous writing related to the oral trust,²⁵ she also admitted that under California law "there does not have to be contemporaneous writing to prove an oral trust."²⁶ Thus, the lack of a contemporaneous writing memorializing the oral trust has no weight because there is no requirement under § 15207 (**CLA-292**).

70. In California, a trust may be created by a property owner's "declaration" that the "owner holds the property as trustee."²⁷ Justice Grignon testified that a trust was established by Mr. John Tennant when he expressed that he wanted to acquire the shares for a holding company that he did not have at that time.²⁸ That occurred on April 19, 2011.²⁹ John Tennant identified the property, the purpose, and the class (beneficiary). As a matter of the law of California, that created a trust at that time, and nothing further was required.³⁰

71. While under California law, a property owner's declaration is not sufficient to prove a trust, § 15207 (**CLA-292**), the experts agreed that a declaration is the actual declaration of the trust owner, it is not oral testimony from the testator.³¹ Here, the undisputed evidence from three witnesses is that an oral trust was created by John Tennant.

²³ Justice Margaret Grignon, Transcript Day 4, at 501:7–14; Margaret Lodise, Transcript Day 4, at 571:20–25.

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

²⁵ Margaret Lodise, Transcript Day 4, at 579:19–21.

²⁶ Margaret Lodise, Transcript Day 4, at 641:20–21 (emphasis added). Canada also improperly discussed the lack of a contemporaneous writing as evidence that a trust was not created despite their own expert's admission that one is not needed under California law. Klaver Closing, Transcript. Day 5, at 729:10–19

²⁷ California Probate Code § 15200 (CLA-292).

²⁸ Justice Margaret Grignon, Transcript Day 4, at 500:13–18; 505:12–16. The use of holding companies was a common family practice as evidenced by both Derek Tennant and John C. Pennie owning holding companies as part of their business practice. Testimony of Derek Tennant, Transcript Day 3, at 468:25–469:5. In fact, the Skyway 127 shares that Derek Tennant used as collateral for the \$200,000 loan were held in his holding company, I.Q. Properties. Testimony of John H. Tennant, Transcript Day 3, at 342:12–17.

²⁹ Justice Margaret Grignon, Transcript Day 4, at 500:13–18.

³⁰ Justice Margaret Grignon, Transcript Day 4, at 501:15–502:9.

³¹ Justice Margaret Grignon, Transcript Day 4, at 503:25–504:12; Margaret Lodise, Transcript Day 4, at 624:8–19.

PUBLIC VERSION

72. Therefore, under California law, an oral trust was created when John Tennant declared on April 19, 2011 that he would be holding the Skyway 127 shares in trust for a holding company.³² On April 26, 2011, John Tennant confirmed the holding company and beneficiary of the trust as Tennant Travel (later renamed Tennant Energy LLC).³³ John Tennant satisfied the requirements for an oral trust under California by identifying the *res* (property) of the trust as the Skyway 127 shares, the trustee as himself, and the beneficiary as Tennant Travel.

73. Further, the fact that the shares themselves were not shown as transferred until later is irrelevant. It is further undisputed by the parties that company shares or the right to those shares can constitute trust property in California.³⁴ The testimony further showed that it was not relevant whether the share certificates were in the possession of John Tennant, because his future right to receive the shares was sufficient.³⁵ Ms. Lodise did not disagree.³⁶

74. The parties also agree that a holding company, such as Tennant Travel, can constitute a beneficiary.³⁷ Moreover, even if Tennant Travel had not been named immediately, both Justice Grignon and Ms. Lodise agreed that an identifiable class of beneficiaries is sufficient; it is not necessary to name a specific beneficiary.³⁸ They both also agreed that when the settlor gives the trustee discretion to choose the beneficiary, that is also sufficient.³⁹ Here, John Tennant, the settlor, gave himself, as trustee, discretion to choose a beneficiary from an identifiable class of beneficiaries — a company he would designate in the future.⁴⁰

75. The experts further agreed that a trust could be created for a lawful, general or indefinite purpose.⁴¹ They testified that holding shares for the benefit of a company to prevent dilution of voting control is an adequate trust purpose.⁴² In fact, pursuant to President Bull's question, Ms. Lodise admitted that this would be an acceptable purpose for the trust John Tennant created.⁴³ Summarily, the requirements for the creation of an oral trust under California law are met in the instant case, and there was no conflict between the experts on the elements. This eviscerates any relevance of *Westmoreland* as Tennant Energy had a beneficial interest in Skyway 127 since April 2011 and is thus a proper claimant.

76. Finally, the testimony related to the creation of the trust was confirmed by a memorandum from John Tennant to the Tennant Energy Management Board issued almost 18 months before the NAFTA claim was filed (C-268).⁴⁴ That confirmatory letter was consistent with all the evidence

³² Testimony of J.C. Pennie, Transcript Day 2, at 244:12–19, 245:15–17; Testimony of Derek Tennant, Transcript Day 3, at 474:19–475:4.

³³ Testimony of John H. Tennant, Transcript Day 3, at 372:12–15.

³⁴ Margaret Lodise, Transcript Day 4, at 644:17–20.

³⁵ Testimony of J.C. Pennie, Transcript Day 2, at 239:14–23.

³⁶ Margaret Lodise, Transcript Day 4, at 644:12–20.

³⁷ Justice Margaret Grignon, Transcript Day 4, at 501:20–502:4; Margaret Lodise, Transcript Day 4, at 633:6–9.

³⁸ Justice Margaret Grignon, Transcript Day 4, at 501:20–502:4, 563:6–15; Margaret Lodise, Transcript Day 4, at 629:17–630:2, 632:11–20.

³⁹ Justice Margaret Grignon, Transcript Day 4, at 537:11–18; Margaret Lodise, Transcript Day 4, at 632:11–20.

⁴⁰ Testimony of John H. Tennant, Transcript Day 3, at 366:23–367:9.

⁴¹ Justice Margaret Grignon, Transcript Day 4, at 502:5–9; Margaret Lodise, Transcript Day 4, at 570:25–571:3.

⁴² Justice Margaret Grignon, Transcript Day 4, at 502:5–9.

⁴³ Margaret Lodise, Transcript Day 4, at 585:21–585:4.

⁴⁴ Testimony of John H. Tennant, Transcript Day 3, at 375:11–15.

from John Tennant and Derek Tennant. Canada has questioned this memorandum, but what is incontrovertible is that Skyway 127's share registry shows that the shares were transferred to John Tennant's name in June 2011⁴⁵, and then to Tennant Travel (n/k/a Tennant Energy) in January 2015.⁴⁶ Thus, the memorandum does memorialize events that happened. It states:

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

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

77. Canada presented no evidence on California law on the validity of the assignment. In contrast, Justice Grignon testified that as a matter of California law, John Tennant held legal title of the Skyway 127 shares once he received them in April 19, 2011, and the beneficial interest was vested in Tennant Travel at that time as a matter of the operation of the law of California.⁴⁷ Once John H. Tennant transferred the Skyway 127 shares he held as trustee to Tennant Travel in January 2015, the holding company obtained legal title in addition to the beneficial interest it already had.⁴⁸

78. Canada's expert, Margaret Lodise, largely agreed with this testimony under cross-examination testifying that "legal title is in the Trustee, [and] then the Trustee can act with the property[.]" while the beneficial interest is held by the beneficiary.⁴⁹

79. The evidence and testimony presented by the Investor prove that John H. Tennant held Skyway 127 shares for the benefit of Tennant Travel from April 19, 2011 to January 15, 2015 under California's clear and convincing standard.

B. SUCCESSOR IN INTEREST

80. Tennant Energy is a successor in interest and the assignment of John H. Tennant's tangible and intangible rights to a successor company — Tennant Travel/Energy — permits the successor company to bring any existing claims, including those claims under NAFTA. This occurred in January 2015 when Mr. Tennant transferred his shares to Tennant Travel.⁵⁰ This was confirmed in the February 18, 2016 memorandum (**C-268**) of John H. Tennant which confirmed that the shares were for the purposes of Tennant Energy LLC.⁵¹ The effect of the succession went back to when John H. Tennant first obtained his intangible property interest in the shares.

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

⁴⁵ Shareholder's Ledger Skyway 127, June 20, 2011 (C-117).

⁴⁶ Shareholder's Ledger Skyway 127, January 15, 2015 (C-115).

⁴⁷ Justice Margaret Grignon, Transcript Day 4, at 626:9–24.

⁴⁸ Justice Margaret Grignon, Transcript Day 4, at 535:19–25.

⁴⁹ Margaret Lodise, Transcript Day 4, at 626:13–15, 626:22–24.

⁵⁰ Shareholder's Ledger Skyway 127, January 15, 2015 (C-115); Justice Margaret Grignon, Transcript Day 4, at 565:4–12.

⁵¹ Justice Margaret Grignon, Transcript Day 4, at 534:14–22.

82. For its part, Canada brought forth no contrasting expert testimony. Canada's expert, Ms. Lodise, explicitly refused to comment on the assignment when asked during cross-examination.⁵²

83. When John H. Tennant formally transferred his Skyway 127 shares to Tennant Travel on January 15, 2015 (C-115), all his rights to a NAFTA also were transferred to the company.⁵³ Whether John Tennant held the Skyway 127 shares personally or as trustee for Tennant Travel prior to the January 15, 2015 transfer, Tennant Travel obtained absolute legal title to those shares on that date.⁵⁴ By this transfer of shares, John Tennant also transferred all rights he had related to the Skyway 127 shares to Tennant Travel/Energy, and thereby, Tennant Energy became a successor in interest to any right (including claims) John Tennant may have had.⁵⁵

84. Again, *Westmoreland* does not apply here because the facts at issue there were very different. There, WCC went through a special bankruptcy proceeding and only specific claims were assigned to Westmoreland, without any corresponding liabilities. There was also testimony from Canada on the effect of the bankruptcy proceeding. This is not the case here – the only testimony on the effect of the assignment was provided by Justice Grignon and this was not an assignment of a claim through bankruptcy. What is at issue here was the direct transfer and assignment of Skyway 127 shares, including all rights and liabilities. Further, at the time this was done, there was not even any knowledge of the existence of any claim because Canada's deceptive acts had misled investors into believing that the FIT Program was operated fairly.

1. Impact of California Law

85. The shares of Tennant Energy are intangible rights.⁵⁶ The February 2016 memorandum (C-268) confirmed the assignment of the Skyway 127 shares acquired by John Tennant as well as all the rights associated with the Skyway 127 shares to Tennant Travel. This included the right to bring any existing claims, including any claims that existed under the NAFTA.⁵⁷

86. As the transfer of legal title to the shares in Skyway 127 was registered on January 15, 2015, that would be the latest date for the assignment to take place. That was more than two years before the June 1, 2017 date of the making of the NAFTA Claim and earlier than the date of the discovery in August 2015 of the true cause of the NAFTA violation by John C. Pennie.

87. Justice Grignon noted at the hearing that as a matter of California law there was no need to separately assign any "choses in action" such as NAFTA rights along with the shares as all such rights were automatically conveyed with the shares.⁵⁸ Choses in action here mean that "if the Shares had a right to bring an action, then when [John H. Tennant] transferred those Shares, that right to bring an action was transferred with the Shares to Tennant Travel/Energy[.]"⁵⁹ Such rights over choses in action are a form of intangible property that is protected by paragraph (g) of NAFTA Article 1139's definition of "investment" and also would be relevant to the successor in interest

⁵² Margaret Lodise, Transcript Day 4, at 611:22–25 ("I'm not going to render any opinion on an Assignment.").

⁵³ Justice Margaret Grignon, Transcript Day 4, at 505:17–506:1, 562:11–22.

⁵⁴ Justice Margaret Grignon, Transcript Day 4, at 564:7–565:12.

⁵⁵ Justice Margaret Grignon, Transcript Day 4, at 534:4–536:12.

⁵⁶ Justice Margaret Grignon, Transcript Day 4, at 505:17–506:1.

⁵⁷ Justice Margaret Grignon, Transcript Day 4, at 505:17–506 :1

⁵⁸ Justice Margaret Grignon, Transcript Day 4, at 505:17–506:1.

⁵⁹ Justice Margaret Grignon, Transcript Day 4, at 505:22–25.

issue (discussed below) had there not been an express confirmation that Tennant Energy was a successor in interest under Exhibit C-268.

X. THE BURDEN OF PROOF

88. The *Westmoreland* Award reconciles conflicting approaches on the burden of proof in jurisdictional phases. After reviewing the case law, the Tribunal concluded that there is no burden of proof with respect to legal issues. The Tribunal stated:

193. The question of burden of proof arises only with respect to matters of fact, where each party has the burden of establishing those facts that they assert. If the Claimant cannot establish, on the balance of probabilities, those facts which are critical to founding jurisdiction, there is no jurisdiction.⁶⁰

89. To the extent that there is a burden of proof, that burden is upon proving factual matters in dispute, not upon legal matters.⁶¹ Tennant Energy consistently has rejected Canada's assertions that the Claimant has the burden of proof to establish jurisdiction.

90. In this jurisdictional phase, there is no factual dispute over the existence of a legally valid assignment and a legally valid successor in interest claim for Tennant Energy over any and all interests previously held by John Tennant. As noted above, while Tennant Energy offered expert and testimonial evidence on these matters, Canada did not offer evidence on these issues.

91. Canada also provided no evidence to contradict the testimonial evidence of John Tennant, Skyway 127 President Derek Tennant, and John C. Pennie that Tennant Energy controlled Skyway 127 Wind Energy from December 2011.

92. It is uncontroverted that John Tennant had an interest (whether personal or as a trustee) in Skyway 127 shares before the 2013 cancellation of the FIT Program, which took Skyway 127 off the priority waitlist. To the extent that it is relevant (which the Investor says that it is not), John Tennant also had that interest before Ontario made its announcement in the Bruce Region on July 4, 2011.

93. At the time of the cancellation of the FIT Program⁶² in 2013, Tennant Energy controlled Skyway 127 which makes it an investor under the NAFTA, and Tennant Energy also owned investment in the shares of Skyway 127. These interests confirm the Tribunal's jurisdiction

⁶⁰ *Westmoreland* Award at ¶¶ 193. (RLA-207)

⁶¹ *Westmoreland* Award at ¶146 sets out the Investor's position that "the Investor does not bear the burden of proof. *Westmoreland* Coal referred to *Grand River v. United States of America* ("**Grand River**") saying that the Tribunal in that case held that "Investment Tribunals have declined to adopt a method whereby one of the Parties carries the burden of proof in matters of jurisdiction." (RLA-207)

⁶² The FIT Program was terminated on June 12 2013. At that time, Skyway 127 Wind Energy was no longer on the priority FIT waiting list and thus could not obtain a contract. That would be the earliest day of a breach as advanced by Canada (as Skyway 127 still had the opportunity for a FIT Contract up to June 12, 2013. Direction from Minister of Energy Bob Chiarelli to Colin Anderson, OPA, 12 June 2013, (C-152).

XI. TRIBUNAL SHOULD NOT RELY UPON *WESTMORELAND*

94. The Tribunal should not rely upon the *Westmoreland* Award as it is not a complete and reliable treatment of this issue. Indeed, the *Westmoreland* Tribunal's award contained mistakes about foundational matters, including the omission of the NAFTA Article 1109 Transfers obligation. The *Westmoreland* Tribunal was also in error over whether its decision was a case of first impression as it was not.

95. NAFTA Article 1109 expressly permits transfers of investments. Paragraph 1 of NAFTA Article 1109 in relevant part provides that “**Each Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay**”. Canada never brought this NAFTA obligation to the Tribunal's attention during its arguments in this claim. Despite Article 1109 being raised by *Westmoreland*, the substantive issue of the effect of Article 1109 was not considered in the *Westmoreland* Award.

96. Even without the powerful guidance of NAFTA Article 1109, international investment treaty cases support transfers of claims. For example, the Tribunal in *Daimler v Argentina* accepted the outright sale of the claim on the basis that there was no change of the underlying nationality.⁶³ (CLA-309)

97. NAFTA claims have been assigned. Indeed, even the authorities upon which Canada relied on successors in interest and assignment confirm that claims may be transferred. The Investor noted that the articles Canada filed by Hanno Wehland (RLA-127) and Thomas Goh (RLA-138) explicitly confirmed that assignment of claims was accepted if there is no change in the claimant's nationality.⁶⁴

98. The assignment of a NAFTA claim was a central issue in the *Loewen Group v USA* NAFTA claim (CLA-285). The Loewen Group had serious financial difficulty because of the Respondent's actions. The company made a transfer of its NAFTA claim. The *Loewen* Tribunal fully accepted the transfer of the claim itself, but since that assignment was made to an investor of a different nationality, it was ultimately unable to continue the claim due to other reasons.⁶⁵ The *Loewen* Tribunal noted:

Article 1109 fully authorizes transfers of property by an investor. TLGI contends that such provision for free assignment somehow strengthens its position. The assignment from TLGI to Nafcanco is not being challenged, except as to what is being assigned. By the terms of the assignment, the only item being assigned was this NAFTA claim. All of the assets and business of TLGI have been reorganized under the mantle of an American corporation. All of the benefits of any award would clearly inure to the American corporation.⁶⁶

⁶³ Mr. Appleton noted that Canada's authorities which contradict Canada's arguments, and which support the fact that transfers of claims. Transcript Day 5 at page 828 at lines 20-23.

⁶⁴ Hanno Wehland (RLA-127) and Thomas Goh (RLA-138)

⁶⁵ *Loewen Group v USA, Final Award (CLA-285)* at ¶237

⁶⁶ *Loewen Group v USA, Final Award (CLA-285)* at ¶23

PUBLIC VERSION

99. The *Loewen* Tribunal concluded that the change of nationality blocked the transfer of the Loewen Group’s NAFTA claim. However, the *Loewen* Tribunal noted that NAFTA Article 1109 permissively recognized transfers of property which would include the NAFTA Claim.

100. To be clear, the Investor submitted over 100 years of consistent jurisprudence from various international law tribunals confirming that claims could be brought by persons who were not the original Investor such as successors in interest.⁶⁷ These included the review of case law from the U.S. – Venezuela Mixed Claims Commission, the US-Mexican Claims Commission, and the U.S.-Iran Claims Commission – including *Caire (CLA-322)*, *Chattin (CLA-323)*, and *Roberts (CLA-324)* cases from the US-Mexico Claims Commission, and the *de Sabla (CLA-325)* case from the US-Venezuela Mixed Claims Commission cases.

101. Thus, as a matter of international law, there is no impediment to the transfer of a claim between foreign nationals provided that those nationals continuously maintained the necessary nationality of a party capable of claiming the Treaty. Indeed, NAFTA Article 1109 expressly protects such rights. This Tribunal must recognize the transfer of the claim from John Tennant to Tennant Energy.

102. Further as noted above, the *Westmoreland* Tribunal gravely erred by incorporating a characteristic test for “investment” in the NAFTA, which was inconsistent with the careful and express terms of the definition of investment in Article 1139 of the NAFTA.

103. The Investor noted both of these issues in its Post Hearing Brief Submissions on assignment. The failure to consider a highly relevant textual obligation in the NAFTA on transfers makes the *Westmoreland* Award highly problematic. Further, as can be seen, the *Loewen v USA* NAFTA claim addressed this matter of assignment and did so in a manner consistent with international law. The answer for the Tribunal is found in the text of the NAFTA, and that text was the subject of argument before this Tribunal.

Respectfully submitted on behalf of the Investor, on May 4, 2022.



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⁶⁷ See Post Hearing Brief at ¶¶25 and ¶¶ 50 – 55, in the Tennant Energy Response to Canada’s Post Hearing Brief on Transfers (22 December 2021) and Mr. Appleton’s Jurisdictional Closing Argument at Transcript Day 5, 828 at lines 20 – 23.