

PUBLIC DOCUMENT

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE 1976 UNCITRAL ARBITRATION RULES**

BETWEEN:

TENNANT ENERGY, LLC

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

(PCA Case No. 2018-54)

GOVERNMENT OF CANADA

SUBMISSION ON COSTS

July 15, 2022

Trade Law Bureau
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CANADA

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I. INTRODUCTION

1. Tennant Energy, LLC (the "Claimant" or "Tennant Energy") should never have brought this claim. Canada has not consented to arbitrate it under NAFTA Chapter Eleven, as Canada has shown throughout these proceedings. From the outset, the Claimant's arguments on jurisdiction have been untenable and unsupported by case law or evidence. Moreover, Tennant Energy's conduct throughout the proceedings has been inexcusable and needlessly costly. The Claimant evidenced a disdain for the procedural decisions of the Tribunal by seeking to re-litigate them; it unnecessarily forced the Tribunal to decide minor procedural matters by persistently failing to agree with Canada on simple requests; and it undermined the integrity of the arbitration process at significant cost by asserting this Tribunal has jurisdiction yet failing to provide any reliable evidence in support of this assertion.
2. Canada respectfully requests that, if the Tribunal determines it has no jurisdiction over this claim by finding for Canada on one or both of its jurisdictional objections, the Tribunal order the Claimant to bear all of the costs of this arbitration and Canada's legal costs in the proceedings pursuant to NAFTA Article 1135(1) and Article 40 of the 1976 UNCITRAL Arbitration Rules (the "UNCITRAL Rules"). In this brief submission, Canada explains that the Tribunal has strong reasons to apportion all costs in Canada's favour and further demonstrates that Canada's costs are reasonable.
3. Further, if the Tribunal finds jurisdiction over this claim (which Canada maintains it should not), the Tribunal should refrain from allocating costs for the jurisdictional phase of the proceedings and instead apportion costs with its final award on merits and damages. Only at that time will the Tribunal have a full appreciation of the relevant cost considerations arising over the course of the entire proceeding.

II. THE TRIBUNAL SHOULD APPORTION ALL COSTS IN CANADA'S FAVOUR IF CANADA PREVAILS WITH ONE OF ITS JURISDICTIONAL OBJECTIONS

A. The Tribunal Has the Authority to Order Costs in Canada's Favour

4. The Tribunal has the authority under NAFTA Article 1135(1) to award Canada its costs in accordance with the applicable provisions of the UNCITRAL Rules.¹ Pursuant to Article 38 of those Rules, Canada's costs, summarized in the table below, include the fees and expenses of the Tribunal, as well as the reasonable costs for Canada's legal representation and assistance.

SUMMARY OF COSTS	
Arbitration Costs	CAN \$932,262.88
Legal Representation and Assistance	CAN \$2,594,148.14
TOTAL²	CAN \$3,526,411.02

5. Article 40(1) of the UNCITRAL Rules provides that in principle, the unsuccessful party shall bear the arbitration costs. Article 40(2) provides that the Tribunal has discretion to apportion the disputing parties' legal representation and assistance costs (referenced in Article 38(e)) as it considers reasonable. NAFTA tribunals have consistently recognized that these Rules, and the principles they embody, apply to disputes under Chapter Eleven.³

6. In apportioning costs under Article 40, the Tribunal should have regard "both to the outcome of the proceedings and to other relevant factors"⁴ in order to serve "the dual function of reparation and

¹ NAFTA Article 1135(1) (Final Award): "Where a Tribunal makes a final award against a Party, the Tribunal may award [...] A tribunal may also award costs in accordance with the applicable arbitration rules."

² Annexes I and II contain further detail on Canada's costs in the proceedings.

³ **RLA-208**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Final Award (concerning the apportionment of costs between the Disputing Parties), 30 December 2002 ("*S.D. Myers – Final Award*"), ¶¶ 8-10, 12, 15; **CLA-136**, *International Thunderbird Gaming Corporation v. Mexico* (UNCITRAL) Award, 26 January 2006 ("*Thunderbird – Award*"), ¶¶ 212-215; **CLA-158**, *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 ("*Methanex – Final Award*"), Part V, ¶¶ 1-12; **CLA-125**, *Chemtura Corporation v. Canada* (UNCITRAL) Award, 3 August 2010, ¶ 272; **CLA-126**, *Waste Management Inc. v. Mexico* (ICSID No. ARB(AF)00/3) Award, 30 April 2004 ("*Waste Management II – Award*"), ¶ 183.

⁴ **CLA-126**, *Waste Management II – Award*, ¶ 183.

dissuasion.”⁵ Investment tribunals have broadly accepted that as a matter of principle, the costs of proceedings should generally be borne by the unsuccessful party.⁶ The tribunal in *S.D. Myers* noted that the “logical basis” for awarding costs to a successful respondent is that the respondent “has in effect been forced to go through the process in order to achieve success, and should not be penalised by having to pay for the process itself.”⁷ Tribunals under NAFTA and other investment treaties have frequently ordered claimants to pay a respondent’s legal and arbitration costs upon declining jurisdiction.⁸

⁵ **CLA-137**, *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* (ICSID No. ARB (AF)/97/2) Award, 1 November 1999 (“*Azinian – Award*”), ¶ 125.

⁶ **RLA-209**, *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9) Award, 16 September 2003, ¶ 24.1; **RLA-210**, *Canfor Corporation et al., v. United States* (UNCITRAL), Joint Order on Costs and Termination, 19 July 2007, ¶¶ 139,149 (finding that the principle of “costs follow the event” is “expressly contemplate[d]” by Article 40(1) of the UNCITRAL Rules and is the “guiding principle for the application of Article 40(2)”; and **RLA-211**, *Telenor Mobile Communications A.S. v. The Republic of Hungary* (ICSID Case No. ARB/04/15) Award, 13 September 2006, ¶ 107. See also **RLA-212**, John Y. Gotanda, “Consistently Inconsistent: The Need for Predictability in Awarding Costs and Fees in Investment Treaty Arbitrations” (ICSID Review, Vol. 28, No. 2, 2013), p. 428; **RLA-213**, Thomas H. Webster, “Efficiency in Investment Arbitration: Recent Decisions on Preliminary and Costs Issues” (Arbitration International, Vol. 25, 2009), p. 473.

⁷ **RLA-208**, *S.D. Myers – Final Award*, ¶ 15.

⁸ **RLA-214**, *Itisaluna Iraq LLC et al. v. Republic of Iraq* (ICSID Case No. ARB/17/10) Award, 3 April 2020 (“*Itisaluna – Award*”), ¶¶ 261-264. See ¶ 255: “The costs associated with resorting to arbitration are not insignificant and it is fair and reasonable that a party that is found not to have a meritorious case has the burden of covering the costs not simply of its own legal fees and expenses but also those of the opposing side, as well as the costs of the tribunal. The Tribunal sees no reason to distinguish the application of this principle in the case of proceedings which are concluded by an award on jurisdiction as opposed to those that are concluded by an award on the merits” (emphasis added; upholding the respondent’s jurisdictional objection and ordering the claimants to pay US\$ 724,662.94 and US\$ 172,720.47 for the respondent’s legal and arbitration costs, respectively); **RLA-142**, *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia* (UNCITRAL) Award, 29 March 2019, ¶ 341 (upholding the respondent’s temporal jurisdictional objection and ordering the claimant to pay US\$ 2,975,017 and £361,247.23 for the respondent’s legal and arbitration costs, respectively); **RLA-215**, *Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait* (ICSID Case No. ARB/18/2) Award on the Respondent’s Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019, ¶¶ 48, 69 (upholding the respondent’s jurisdictional objection and ordering the claimant to pay US\$ 612,986.39 and US\$ 200,000 for the respondent’s legal and arbitration costs, respectively); **RLA-216**, *Astrida Benita Carrizosa v. Republic of Colombia* (ICSID Case No. ARB/18/5) Award, 19 April 2021, ¶ 242 (upholding the respondent’s jurisdictional objection, including on the limitation period, and ordering the claimant to pay US\$ 760,458 and US\$ 294,448.06 for the respondent’s legal and arbitration costs, respectively); **RLA-217**, *Cascade Investments NV v. Republic of Turkey* (ICSID Case No. ARB/18/4) Award, 20 September 2021, ¶ 462 (upholding the respondent’s jurisdictional objection and ordering the claimant to pay the arbitration costs and a portion of the respondent’s legal fees); **RLA-218**, *Philip Morris Asia Limited v. Commonwealth of Australia* (UNCITRAL) Final Award Regarding Costs, 8 March 2017, ¶¶ 7, 105 (upholding the respondent’s jurisdictional/admissibility objection and ordering the claimant to bear part of the respondent’s legal costs and arbitration costs); **RLA-219**, *Agility Public Warehousing Company K.S.C. v. Republic of Iraq* (ICSID Case No. ARB/17/7) Award, 22 February 2021, ¶ 259; **CLA-158**, *Methanex – Final Award*, Part V, Page 4, ¶ 13 (finding no jurisdiction and ordering the claimant to pay US\$ 2,989,423.76 and US\$ 1,071,539.21 for the United States’ legal and arbitration costs, respectively); **RLA-069**, *Ethyl Corporation v. Canada* (UNCITRAL) Award on Jurisdiction, 24 June 1998, ¶ 92 (finding that the claimant would pay Canada’s costs with respect to certain jurisdictional issues as set forth in the Final Award); **RLA-220**, *Italba Corporation v. Oriental Republic of Uruguay* (ICSID Case No. ARB/16/9) Award, 22 March 2019, ¶¶ 296-297.

7. The conduct of the parties during the arbitral proceedings is also pertinent in apportioning costs.⁹ For example in *Mesa Power*, the tribunal ordered the claimant to pay approximately CAN \$3 million of Canada's costs because the claimant had lost the arbitration and created many procedural difficulties. These difficulties included requests that "unnecessarily burdened the arbitral process and were decided against the Claimant."¹⁰

B. Canada Should Be Awarded All of Its Costs in the Arbitration

8. Consistent with the rules and principles outlined above, the Tribunal should order Tennant Energy to bear all of Canada's arbitration costs and costs of legal representation and assistance for this claim. As Canada has demonstrated throughout the proceedings, the Claimant failed to establish jurisdiction under each of NAFTA Articles 1116(1) and 1116(2). Its legal arguments were convoluted, incorrect, and unsupported by jurisprudence; its factual assertions continuously shifted, yet consistently lacked evidentiary support. The Tribunal ought to grant Canada all of its costs to provide reparation and dissuade similarly spurious claims.

9. The procedural difficulties created by Tennant Energy throughout this arbitration further justify a costs award in Canada's favour. First, the Claimant tried to re-litigate decisions already made by the Tribunal. For example, the Claimant failed to respect the Tribunal's decision to bifurcate the proceedings under the highly inappropriate charge that its due process rights would be violated if the Tribunal did not permit document production and require Canada to file its Counter-Memorial on merits and damages.¹¹ The Tribunal rejected this attempt to overturn its bifurcation decision, observing that "[t]o the extent that the Claimant seeks documents relating to the merits [...] such a request is, in the

⁹ **RLA-214**, *Itisaluna – Award*, ¶ 256; **CLA-137**, *Azinian – Award*, ¶ 126; **CLA-136**, *Thunderbird – Award*, ¶ 218; **RLA-067**, *Canfor Corporation. and Terminal Forest Products Ltd. v. United States of America* (UNCITRAL) Decision on Preliminary Question, 6 June 2006, ¶ 351; **RLA-221**, *Pope & Talbot Inc. v. Canada* (UNCITRAL) Award in Respect of Costs, 26 November 2002, ¶¶ 7-17; **RLA-002**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award (Preliminary Award on Jurisdiction and Admissibility), 7 August 2002 ("*Methanex – Partial Award*"), ¶ 170; **RLA-222**, *Global Telecom Holding S.A.E. v. Canada* (ICSID Case No. ARB/16/16) Procedural Order No. 5 (Decision on Outstanding Issues of Legal Privilege), 13 December 2018, Annex A(i), p. 28.

¹⁰ **RLA-001**, *Mesa Power Group, LLC v. Canada* (UNCITRAL) Award, 24 March 2016 ("*Mesa – Award*"), ¶¶ 703, 706 (finding no jurisdiction over certain claims and ordering the claimant to pay CAN\$ 1,832,701 and CAN\$ 1,116,000 for Canada's legal and arbitration costs, respectively).

¹¹ Claimant's Letter to the Tribunal, 30 November 2020; Canada's Letter to the Tribunal, 15 December 2020.

Tribunal's view, effectively an attempt to re-litigate the issues decided in PO1 and PO8 and should not be countenanced."¹²

10. Further, the Claimant not only once, but twice attempted to gain for itself a third round of jurisdictional submissions. This required the Tribunal to issue two decisions rejecting the Claimant's continued attempts to modify the already established procedural schedule.¹³ Additionally, the Claimant's interim measure request for the production of *Windstream* documents was a pointless and costly attempt to circumvent the rules, procedures, and timelines established in Procedural Order No. 1 ("PO 1"), as the Tribunal itself noted.¹⁴

11. Each of the Claimant's actions described above constitutes precisely the type of inefficient and costly conduct where the Tribunal has indicated an adverse cost award is appropriate:

Any order made by the Tribunal (including this Procedural Order No. 1 and the Procedural Calendar) may, at the request of a Party or upon the Tribunal's own initiative, be varied where the circumstances so require in the Tribunal's discretion, after consultation with the Parties. **However, the Tribunal reminds the Parties that repeated or multiple requests for reconsideration that are found by the Tribunal to be without proper grounds may entail adverse costs consequences as well as being treated as an abuse of process.**¹⁵

12. Second, the Claimant filed other needless procedural motions in the arbitration and otherwise failed to follow the procedures set by the Tribunal.¹⁶ For example, the Claimant's attempt to incorporate

¹² Tribunal's Letter to the Disputing Parties, 23 December 2020, p. 2 (emphasis added).

¹³ Tribunal's Letter to the Disputing Parties, 10 January 2021, p. 2; and Tribunal's Letter to the Disputing Parties, 23 March 2021, p. 2: "The Tribunal sees no reason to depart from its decision of 10 January 2021, and accordingly rejects the Claimant's proposed schedule and corresponding request to file an additional submission on jurisdiction after the Respondent's second submission on jurisdiction."

¹⁴ Procedural Order No. 4, ¶ 59: "[T]he Tribunal is not persuaded that it is necessary for the Tribunal to order an early production of these documents, which would require the Tribunal to depart from the timelines and procedures for document production set out in PO 1" (emphasis added). Canada's request for targeted document production from the Claimant, of April 3, 2020, was completely distinguishable from the Claimant's request for production of *Windstream* documents. See e.g., Canada's Motion for Targeted Document Production, ¶¶ 18-21.

¹⁵ PO 1, ¶ 16.4 (emphasis added).

¹⁶ For example, the Claimant objected to the NAFTA Parties' right to make submissions on NAFTA interpretation issues, including at the procedural hearing on January 14-15, 2020, and to attend the procedural hearing. See Claimant's Letters to the Parties, dated November 2 and 5, 2019. The Tribunal rejected the Claimant's objections and permitted written and oral submissions from the non-disputing NAFTA Parties, as well as their attendance at the procedural hearing. See Tribunal's Email to the Parties, 11 November 2019. In addition, the Claimant argued the *Ontario Freedom of Information and Protection of Privacy Act* was inapplicable to the proceedings. See Claimant's Letter to the Parties, 12 December 2019. The Tribunal rejected the Claimant's position and found that Canada's confidentiality designations at issue were justified under the

the European Union's *General Data Protection Regulation* into the confidentiality rules for this NAFTA arbitration wasted significant resources, including time at the first procedural hearing; required numerous rounds of submissions; and in the end, was rejected by the Tribunal.¹⁷

13. Third, the Claimant persistently objected to reasonable requests from Canada. For example, the Claimant had no reasonable basis to oppose Canada's requests to enter new and relevant investment decisions into the record.¹⁸ The Claimant's consistent practice in doing so consumed time and money of the disputing parties and the Tribunal, which ultimately permitted the authorities into the record.¹⁹

14. The Claimant also failed to produce to Canada an electronic version of its damages model following the submission of its expert report – something that has been agreed to by the parties in the majority of arbitrations under NAFTA Chapter Eleven to which Canada has been a party.²⁰ When such information is exchanged, the receiving party does not have to spend significant resources attempting to re-create a model that already exists. Yet the Claimant in this arbitration refused to produce such a model, leading to numerous submissions by both disputing parties, expenses incurred in discussions with damages experts, unnecessary work by Canada's damages expert prior to the Tribunal's bifurcation

Confidentiality Order. *See* Procedural Order No. 3, ¶ 2.1. Furthermore, the Claimant filed inappropriate and unauthorized submissions outside the explicit process set out in the Confidentiality Order regarding Canada's confidentiality designations. *See* Claimant's Email to Tribunal, *with attachments*, 2 March 2020. The Claimant also belaboured the dispute over Canada's confidentiality designations to the *Mesa Power* Hearing Videos, even though the Tribunal had expressly permitted Canada to propose confidentiality designations without first submitting a formal request. *See* Procedural Order No. 7, ¶ 50; Tribunal's Letter to the Parties, 16 October 2020; Canada's Letter to the Parties, *with attachments*, 26 March 2021. The Tribunal ultimately permitted Canada to designate as confidential the same information over the *Mesa Power* Hearing Videos that Canada designated as confidential in *Mesa Power*. *See* Procedural Order No. 13, ¶ 12 and Annex. This demonstrates the significant resources needlessly wasted through the Claimant's intransigence.

¹⁷ Tribunal's Email to the Disputing Parties, 24 June 2019: "the Tribunal finds that an arbitration under NAFTA Chapter 11, a treaty to which neither the European Union nor its Member States are party, does not, presumptively, come within the material scope of the GDPR. Accordingly, the Confidentiality Order makes no reference to the GDPR."

¹⁸ These authorities included: **RLA-112**, *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan* (ICSID Case No. ARB/18/35) Decision on the Respondent's Request for Security for Costs and the Claimant's Request for Security for Claim, 27 January 2020; **RLA-205**, *MAKAE Europe SARL v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/17/42) Award, 30 August 2021; **RLA-206** *Eco Oro Minerals Corp. v. The Republic of Columbia* (ICID Case No. ARB/16/41) Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021; **RLA-164**, *Westmoreland Mining Holdings LLC v. Government of Canada* (ICSID Case No. UNCT/20/3) Procedural Order No. 3, Decision on Bifurcation, 20 October 2020; and **RLA-207**, *Westmoreland Mining Holdings LLC v. Government of Canada* (UNCITRAL) Final Award, 31 January 2022.

¹⁹ Tribunal's Emails and Letters of 10 February 2020; 10 November 2020; 9 November 2021; 20 April 2022; Jurisdictional Hearing Transcript, Day 5, 19 November 2021, p. 703:6-10.

²⁰ *See* Canada's Letter to the Parties, 24 August 2020; Claimant's Letter to the Parties, 28 August 2020; Canada's Letter to the Parties, 2 September 2020; Claimant's Letter to the Parties, 11 September 2020.

decision, and the ultimate withdrawal of Canada's request due to the continued inflexibility of the Claimant. Canada maintains the position it stated at the time:

For now, Canada simply notes that each disputing party has control over its litigation strategy and that it is the Claimant that decided to file lengthy submissions on an issue that, in most cases, is easily and amicably resolved between opposing counsel. Canada should not be required to pay the costs of the Claimant's litigation strategy.²¹

15. Finally, the Claimant's conduct has undermined the integrity of the arbitral proceedings in general. As Canada has shown in its submissions, Tennant Energy's claim that John Tennant created an oral trust to transfer the investment to the Claimant on April 26, 2011 is a *post hoc* rationale developed solely in a failed attempt to establish the Tribunal's jurisdiction.²² In addition, Tennant Energy appears to have acquired the investment after the alleged breach occurred not to make a *bona fide* transaction, but to bring its claim while protecting its owner(s) from an adverse costs order rendered against them personally.²³ This conduct weighs heavily in favour of a costs decision against the Claimant.

16. In sum, given the many difficulties caused by the Claimant over basic procedural matters throughout the arbitration – including matters that the Tribunal had already finally decided – and the numerous decisions rendered against the Claimant, it is reasonable for the Tribunal to order Tennant Energy to cover all of Canada's costs.

C. The Tribunal Should Apportion Costs in the Final Award If It Finds Jurisdiction

17. Notwithstanding the above, if the Tribunal decides that it has jurisdiction, Canada respectfully submits that the Tribunal should reserve its decision on costs until the final award.²⁴ The Tribunal could then assess the relevant factors for apportioning costs in light of the entire arbitration.

²¹ Canada's Letter to the Tribunal, 6 October 2020.

²² Canada's Submission on the *Westmoreland* Final Award, 4 May 2022, ¶ 28; Canada's Post-Hearing Submission, 17 December 2021, ¶¶ 31-32; Jurisdictional Hearing Transcript, Day 1, 15 November 2021, p. 46:19-24; Jurisdictional Hearing Transcript, Day 5, 19 November 2021, p. 709:2-19; Canada's Rejoinder Memorial on Jurisdiction, 26 May 2021, ¶¶ 27, 32; Canada's Counter-Memorial on Jurisdiction, 21 September 2020, ¶ 91.

²³ Canada's Submission on the *Westmoreland* Final Award, 4 May 2022, ¶ 29; Canada's Post-Hearing Submission, 17 December 2021, ¶ 22; Canada's Rejoinder on Jurisdiction, 26 May 2021, ¶ 41.

²⁴ Article 38 (Costs) of the 1976 UNCITRAL Rules states: "[t]he arbitral tribunal shall fix the costs of arbitration in its award." The term "award" here refers to the final award in the arbitration. For context, Article 31 (Decisions) refers to "any award or other decision of the arbitral tribunal". In contrast, Article 38 does not refer to fixing costs in or alongside "other decisions" of the tribunal – such as decisions on procedural motions – but in the "award" alone.

18. It is common for tribunals under NAFTA and other investment treaties to address the costs of the entire proceedings with the final award.²⁵ Only at that time will the Tribunal have a complete picture of the proceedings, including the conduct of the disputing parties and the relative success of their legal arguments. Such an approach would also be consistent with Section 9.10 of PO 1, which provides that “[e]ach Party shall advance the costs of appearance of its own witnesses. The Tribunal will decide upon the appropriate allocation of such costs in its final award.”²⁶

III. CANADA’S COSTS ARE REASONABLE

19. The costs that Canada incurred to defend itself against Tennant Energy’s claim are reasonable. Annex I (Cost of Legal Representation) sets out Canada’s costs of legal representation and assistance. Canada’s total billings for legal representation reflect hourly rates that are well below market rates. Canada’s costs include billings for lawyers and paralegals from the Trade Law Bureau of the Government of Canada.²⁷ These costs do not represent the full cost to the Governments of Canada and Ontario, respectively, to defend against this claim.²⁸ Nonetheless, Canada’s costs reflect the significant legal resources demanded by the many procedural difficulties created by the Claimant, as described above. In light of these circumstances, and the consistency of Canada’s total billings with what other tribunals have awarded respondents in a jurisdictional phase,²⁹ Canada’s legal costs are reasonable.

²⁵ See e.g., **RLA-079**, *Resolute Forest Products Inc. v. Canada* (UNCITRAL) Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 331; **RLA-070**, *Grand River Enterprises Six Nations, Ltd. v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006, ¶ 105; **CLA-208**, *Bilcon of Delaware et al v. Government of Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015, ¶¶ 83, 732, & 742(c); **RLA-223**, *Lion Mexico Consolidated L.P. v. United Mexican States* (ICSID Case No. ARB(AF)/15/2) Decision on Jurisdiction, 30 July 2018, ¶ 265; **RLA-002**, *Methanex – Partial Award*, ¶¶ 170-171. As Caron and Caplan explain, “[t]ypically, the arbitral tribunal fixes the costs in the final award”. See **RLA-224** David D. Caron & Lee M. Caplan, “The UNCITRAL Arbitration Rules: A Commentary”, 2nd Ed. (2013), at Part VI (The Award), Chapter 27, Section B.5 (Comparison to the 1976 UNCITRAL Rules), p. 841. Paulsson and Petrochilos state, “in the majority of cases it is sensible for the arbitral tribunal to fix the costs in its final award.” See **RLA-225** Jan Paulsson and George Petrochilos, *UNCITRAL Arbitration* (Kluwer 2017), p. 361.

²⁶ PO 1, ¶ 9.3 (emphasis added). See also ¶ 10.3: “The provisions set out in relation to witnesses shall apply, *mutatis mutandis*, to the evidence of experts[.]”

²⁷ NAFTA tribunals have ordered claimants to pay Canada’s costs. See e.g., **RLA-226**, *Mercer International Inc. v. Canada* (UNCITRAL) Award, 6 March 2018, ¶ 9.11; **RLA-001**, *Mesa – Award*, ¶ 705.

²⁸ Costs that will not be captured by an award of costs in this arbitration include federal-provincial dialogues, review of materials, and extensive briefings at federal and provincial levels of Government, all of which represent significant public resources that have been diverted and expended on the defence against this claim.

²⁹ See e.g., fn. 8. See also **RLA-227**, *Enrique Heemsen and Jorge Heemsen v. Bolivarian Republic of Venezuela* (UNCITRAL) Award on Jurisdiction, 29 October 2019 [Unofficial Translation], ¶ 455 (ordering the claimant to pay US\$ 2,518,886.59 for the respondent’s legal costs); **RLA-228**, *Clorox Spain S.L. v. Bolivarian Republic of Venezuela* (UNCITRAL) Award, 20 May 2019 [Unofficial Translation], ¶ 848 (ordering the claimant to pay US\$ 4,661,965.00 for the

20. Annex II (Disbursements) lists Canada's disbursements, which are also reasonable. Canada was required to hire Ms. Margaret Lodise due to the Claimant's unproven assertion that John Tennant orally created a trust under California law, and to respond to the Claimant's expert on this issue. Ms. Lodise's rates are commensurate with her extensive experience, and her hours in the arbitration were modest. Canada also incurred reasonable and necessary expenses on its damages experts, Berkeley Research Group ("BRG"). BRG's rates are in line with other damages experts; and all of its costs were incurred before the Tribunal's bifurcation decision, to prepare for a potential merits phase. BRG also assisted Canada in making necessary requests for the Claimant to share its expert's damages model, as described above.

IV. ORDER REQUESTED

21. Applying the relevant factors on the allocation of costs to the circumstances of this case, Canada respectfully requests that the Tribunal order Tennant Energy to pay:

- a. all of Canada's costs of legal representation and assistance and arbitration costs set out in Annexes I and II, respectively, which amount to CAN\$ 3,526,411.02; and
- b. post-award compound interest if payment is not received by Canada within 30 days of the issuance of the Award.

July 15, 2022

Respectfully submitted on behalf of the Government
of Canada,



Heather Squires
Mark Klaver
E. Alexandra Dosman
Stefan Kuuskne

respondent's costs); **RLA-229**, *Orascom TMT Investments S.à r.l. v. Democratic Republic of Algeria* (ICSID Case No. ARB/12/35) Award, 31 May 2017, ¶ 587 (ordering the claimant to pay US\$ 2,842,811.01 for the respondent's legal costs).

ANNEX I – COST OF LEGAL REPRESENTATION

TRADE LAW BUREAU - FISCAL YEARS 2016-2017 and 2017-2018 ¹			
Participant	Professional Fees		
	Rate (CAN \$) ²	Hours	Total Fees (CAN \$)
Heather Squires, Counsel ³	200.12	2	400.24
	238.55	27	6,440.85
Annie Ouellet, Counsel	238.55	149	35,543.95
Mark Klaver, Counsel	200.12	134	26,816.08
Jenna Wates, Counsel	200.12	161	32,219.32
Paralegals			
Darian Bakelaar	126.80	2	253.60
Sub-Total		475	\$101,674.04

TRADE LAW BUREAU - FISCAL YEAR 2018-2019			
Participant	Professional Fees		
	Rate (CAN \$)	Hours	Total Fees (CAN \$)
Lori Di Pierdomenico, Senior Counsel	241.19	68	16,400.92
Heather Squires, Counsel	241.19	38	9,165.22
Maria Cristina Harris, Counsel	202.24	153	30,942.72
Susanna Kam, Counsel	241.19	152	36,660.88
Mark Klaver, Counsel	202.24	81	16,381.44
Annie Ouellet, Counsel	241.19	16	3,859.04
	258.87	23	5,954.01
Paralegals			
Darian Bakelaar	145.57	59	8,588.63
Benjamin Tait	130.71	26	3,398.46
Sub-Total 2018/2019		616	\$131,351.32

¹ The fiscal year of the Canadian federal government is April 1 to March 31. Canada's claimed costs in this proceeding represent those incurred from March 2, 2017, the date of the Claimant's Notice of Intent to Submit a Claim to Arbitration, to the date of this submission. This total includes time spent meeting with clients within the Governments of Canada and Province of Ontario, assembling and reviewing documentary evidence, undertaking legal research and analysis, drafting and reviewing written pleadings, addressing procedural matters and appearing before the Tribunal. Counsel for Canada was also assisted by paralegals.

² The cost of counsels' and paralegals' time in this arbitration has been assessed by applying the "billable rate" used by Canada's Department of Justice in its cost recovery process. Like its counterpart in private practice, the billable rate established by the Department of Justice is intended to capture all of the costs associated with providing legal services, including the cost of office space and equipment and administrative support. This rate varies according to the position in question, and ranges from CAN \$126.80/hr for paralegals to CAN \$292.93/hr for the most senior lawyers. In all cases, the rate is well below the market rate.

³ Where a participant displays two different rates, the participant's classification level changed during the Fiscal Year, resulting in a change of applicable hourly rate.

TRADE LAW BUREAU - FISCAL YEAR 2019-2020			
Participant	Professional Fees		
	Rate (CAN \$)	Hours	Total Fees (CAN \$)
Scott Little, Senior Counsel	277.77	160	44,443.20
Lori Di Pierdomenico, Senior Counsel	241.19	105	25,324.95
	258.87	551	142,637.37
Heather Squires, Senior Counsel	241.19	122	29,425.18
Annie Ouellet, Senior Counsel	258.87	215	55,657.05
Alexandra Dosman, Counsel	241.19	48	11,577.12
Susanna Kam, Counsel	241.19	425	102,505.75
Mark Klaver, Counsel	202.24	158	31,953.92
	241.19	590	142,302.10
Johannie Dallaire, Counsel	202.24	100	20,224.00
	241.19	322	77,663.18
Maria Cristina Harris, Counsel	202.24	563	113,861.12
Paralegals			
Darian Bakelaar	145.57	417	60,702.69
Benjamin Tait	130.71	275	35,945.25
	136.44	347	47,344.68
Sub-Total 2019/2020		4,398	\$941,567.56

TRADE LAW BUREAU - FISCAL YEAR 2020-2021			
Participant	Professional Fees		
	Rate (CAN \$)	Hours	Total Fees (CAN \$)
Heather Squires, Senior Counsel	262.30	599	157,117.70
Annie Ouellet, Senior Counsel	262.30	195	51,148.50
Mark Klaver, Counsel	244.35	405	98,961.75
Johannie Dallaire, Counsel	244.35	78	19,059.30
Alexandra Dosman, Counsel	244.35	274	66,951.90
Maria Cristina Harris, Counsel	204.78	354	72,492.12
Paralegals			
Darian Bakelaar	153.18	306	46,873.08
Benjamin Tait	143.38	365	52,333.70
Sub-Total 2020/2021		2,576	\$564,938.05

TRADE LAW BUREAU - FISCAL YEAR 2021-2022			
Participant	Professional Fees		
	Rate (CAN \$)	Hours	Total Fees (CAN \$)
Heather Squires, Senior Counsel	264.51	779	206,053.29
Annie Ouellet, Senior Counsel	264.51	60	15,870.60
Mark Klaver, Counsel	246.38	885	218,046.30
Alexandra Dosman, Counsel	246.38	383	94,363.54
Maria Cristina Harris, Counsel	206.41	107	22,085.87
Stefan Kuuskne, Counsel	206.41	356	73,481.96
	246.38	41	10,101.58
Paralegals			
Benjamin Tait	144.52	170	24,568.40
	154.44	476	73,513.44
Krystal Girvan	138.29	396	54,762.84
Sub-Total 2021/2022		3,653	\$792,847.82

TRADE LAW BUREAU - FISCAL YEAR 2022-2023			
Participant	Professional Fees		
	Rate (CAN \$)	Hours	Total Fees (CAN \$)
Heather Squires, Senior Counsel	292.93	30	8,787.90
Mark Klaver, Counsel	272.47	125	34,058.75
Paralegals			
Benjamin Tait	167.45	55	9,209.75
Krystal Girvan	149.43	65	9,712.95
Sub-Total 2022/2023		275	\$61,769.35

TRADE LAW BUREAU TOTAL	CAN \$2,594,148.14
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ANNEX II – DISBURSEMENTS

Disbursement	Total (CAN \$)
Tribunal Advancements	572,552.79
Berkeley Research Group (Quantum Expert)	192,779.47
Ms. Margaret Lodise (California Trust Law Expert)	69,552.52
Core Legal (Trial Technology & Graphic Consultants)	41,101.60
Travel Costs	44,454.91
Boardroom Rental (Arbitration Place)	7,785.70
Courier Services	463.14
Translation Services	3,572.75
Total Disbursements	\$932,262.88