

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

**Investor's Second NAFTA Article 1128
Response**

26 JULY 2021

APPLETON & ASSOCIATES
INTERNATIONAL LAWYERS

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Investor's Second Article 1128 Response

1. On June 25, 2021, the governments of the United States and the United Mexican States filed submissions on the interpretation of the NAFTA. The Tribunal granted the disputing parties until July 26, 2021, for filing responsive observations on these submissions.
2. Tennant Energy LLC (“Tennant” or the “Investor”) submits its response to the NAFTA Article 1128 observations of the Government of the United Mexican States and the United States of America.
3. Unfortunately, the non-disputing Parties’ observations present an incomplete and unbalanced picture of the relevant law. The Investor uses this observation to address these mischaracterizations.
4. The Investor maintains its position that the Respondent’s Jurisdictional objections are without merit and should be dismissed. The recent observations by the non-disputing Parties do not alter this conclusion. In this jurisdictional challenge, Canada attempts to recast the claims made by Tennant Energy. Canada alleges that Tennant Energy repeats the exact same claims made by Mesa Power Group in its NAFTA claim.
5. At its heart, Tennant Energy LLC is not Mesa Power Group, and Tennant Energy nor this Tribunal is limited to the facts presented in the *Mesa Power* case or its outcome.
6. Tennant Energy underscores that Canada does not challenge the Tennant Energy’s claims that first arose in 2015 with the release of information from the *Mesa Power* NAFTA hearing. The evidence Canada raises avoids the arguments Tennant Energy raises about why this claim arose.
7. The arguments raised by the non-disputing NAFTA parties also ignore the legal effects that Tennant Energy’s claims that first arose in 2015 with the release of information from the *Mesa Power* NAFTA hearing.

I. SPECIFIC RESPONSES TO THE UNITED STATES AND MEXICO

8. The Investor, Tennant Energy, has the following comments on the Second Article 1128 Submission of the United States and the Second Article 1128 Submission of Mexico:
9. The Investor disagrees with ¶4 of Mexico’s Second Article 1128 submission. As noted in the Investor’s Reply Memorial on Jurisdiction, the issue of time matters is best

considered as an admissibility issue rather than as a jurisdictional one. Thus, the Investor respectfully disagrees with the conclusions of the United States at ¶ 3 of the Second Article 1128 Submission of the United States. As a matter of admissibility, the burden of proof rests on the party advancing the admissibility argument, which is Canada.

10. The position of Tenant Energy with respect to the matter of consent is clear. Canada has given its consent to this arbitration in NAFTA Article 1122(1); thus, the Investor disagrees with the United States and Mexico that the matter at hand is not properly one of consent. Mexico contends that the Investor has the burden of proving consent in ¶5 of Mexico's Second Article 1128 submission. However, Canada's admission of consent in NAFTA Article 1122(1) meets any such burden.
11. In ¶7 of the United States Second 1128 Submission, the United States comments that the period under NAFTA Article 1116(2) commences when the investor first acquired or should have first acquired knowledge of the alleged breach and knowledge of the loss.
12. Tennant Energy is entitled to argue its claim based on those measures that it finds material and relevant. Tennant Energy has articulated specific claims that largely rest on information arising from the public revelation of the October 2014 *Mesa Power* NAFTA Hearing. That is the basis of the claim that Tennant Energy asserts.
13. The test is set out in the wording of Article 1116(2) and does not require any gloss.¹ In this case, the situation is specific. As set out in ¶¶ 180 – 181 of the Investor's Counter Memorial on Jurisdiction, it would be inequitable to allow Canada to wrongfully hide the knowledge of its wrongfulness and at the same time suggest that the time clock was running. As the Investor noted:

180. Canada cannot have its proverbial cake and eat it too. Canada cannot suppress evidence to the public and yet, at the same time, claim that the clock is running. This is a binary choice. Canada chose suppression over disclosure. Because of this choice – the time clock could not run-on breaches unknown to Tennant Energy.

181. Canada's argument on timing applies only if the Tribunal ignores the dates when the claim first arose and Canada's substituted dates (of July 4, 2011, or June 12, 2013, are applied).

14. The Investor also relies at ¶270 of its Counter-Memorial on Jurisdiction on the *Resolute Forestry* decision.

¹ The Investor cannot agree with ¶7 of the US Second Article 1128 Submission that the wording of the clear terms of Article 1116(1) should be restricted by the *Grand River* test or the *Berkowitz* Test (which simply adopted Grand River in the CAFTA context). These approaches are narrow and not in keeping with the objectives and context of the NAFTA.

270. The Resolute Forest NAFTA Tribunal test looks to knowing that a breach actually occurred and not that it is likely to occur. The Resolute Forest Tribunal said:

As to the requirement of breach, one cannot know of a breach until the facts alleged to constitute the breach have actually occurred. It is not enough that a breach is likely to occur; paragraph (2) deals with allegations, no doubt, but not with contingencies. There may thus be a difference between the date of different breaches arising from a given course of governmental conduct.²

271. This was not a situation where there was a physical taking that was known. This case involves subterfuge and the concealment of the wrongful act. A breach under the NAFTA does not occur until there is breach and knowledge of that breach. In essence, in the circumstances of this arbitration claim, the concealment by the government forms an essential part of the composite breach. While the first part of the wrongful act occurred, the victim was unaware that the wrongful act had taken place. The second part of the composite act occurs when the victim discovered the wrong. Before that time, the investment attributed the wait and then the inability to obtain a contract to the fair operation of the FIT Program. Later, Skyway 127 discovered a different situation that was inconsistent with the NAFTA.

15. An investor must have knowledge before a claim can be initiated. Canada's practices to ensure that no information was available to the public could not allow the time clock to run.

The Investor may include a successor in interest

16. The Second Article 1128 Submission of the United States also considers the definition of Investor. The United States contends that an investor must be the same party as the party suffering the breach. Mexico comes to a similar position in ¶6 of its Second Article 1128 Submission. The Investor respectfully cannot agree with the position of the United States or Mexico. The natural conclusion of the argument of the United States is that access to justice could be blocked by states who murdered potential claimants, leaving meritorious successors in interest to victims without access to impartial and fair dispute settlement. Such a highly restrictive approach should be strongly avoided by the Tribunal.
17. The concept of the successor in interest is well known in international law. There is well established caselaw that demonstrates that there are cases brought by successors in

² The Investor had the following footnote in its Counter-Memorial on Jurisdiction "*Resolute Forest Products v Canada*, Decision on Jurisdiction and Admissibility, 30 January 2018, at ¶154, **RLA-079**."

interest. For example, cases under the US – Iran Claims Tribunal³ or the US -Mexican Claims Tribunal⁴ have arisen from legal successors in interest. Furthermore, treaty claims have been brought by bankruptcy trustees and other successors in interest, including the *Loewen* claim against the United States brought by the bankruptcy trustee and a shareholder or the Enron Creditors.⁵ There is nothing unusual about this common arrangement. It is also applied in the case of state succession, amalgamation or independence under the *1978 Vienna Convention on Succession of States in respect of Treaties*. The position of the non-disputing parties is simply aggrandized and overstated.

18. A review of the NAFTA cases assists. The definition of an enterprise in NAFTA Article 201 includes all types of organizations, whether for profit or not, and includes corporations, trusts, partnerships, sole proprietorships, joint ventures and other associations.
19. Similarly, the definition of an “investment of an investor of a Party” in Article 1139 is broad. It applies to an investment owned or controlled directly or indirectly by an investor of a Party.” Like the broad definition of investment in this same article, the context for these definitions is contextual to the entire treaty (and not just the specific NAFTA chapter).⁶ This broad context is relevant when considering the associated requirements for an investor and an investment such as the element of control. There is no dispute that Tennant Energy had actual control of Skyway 127 in the period before the January 15, 2015, formal registration of shares. This is highly relevant under the NAFTA test and the cases on control have been important to understanding the context of investor and investment.⁷

³ For example, Bank Mellat was a successor in interest to the International Bank of Iran in Iran-US Claims Tribunal, *Isaiah v. Bank Mellat*, 2 IRAN-U.S. C.T.R., 30 March 1983, pp. 232, 249-252, (CLA-321).

⁴ For example, claims were brought by heirs before the US- Mexico Claims Commission in the *Caire v. United Mexican States* case, 13 June 1929, (CLA-322); *Chattin v. United Mexican States*, 23 July 1927, US-Mexico Claims Commission, (CLA- 323); *Harry Roberts (U.S.A.) v. United Mexican States*, 2 November 1926, (CLA-324). Also see *Margaritte de Joly de Sabla v Venezuela* before the US – Venezuela Mixed Claims Commission where Mrs. De Sabla, a widow, was able to claim after the murder of her husband, (CLA-325); *Fannie P. Dujay, Executrix of the Estate of Gilbert F. Dujay (U.S.A.) v. United Mexican States Mexico*, Opinions, 8 April 1929, at p. 180, (CLA-330); *Charles S. Stephens and Bowman Stephens (U.S.A.) v United Mexican States*, Opinion, 15 July 1927, at p. 397, (CLA-331); *Greenstreet (U.S.A.) v. United Mexican States*, Award, 10 April 1929, at p. 199, (C-332).

⁵ In the *Loewen Group v. USA NAFTA* claim, (CLA-285) the claim was brought by the Bankruptcy trustee as well as by Mr. Loewen. Also see *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (Decision Jurisdiction), ICSID Case No. ARB/01/3, 14 January 2004, (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic) which was brought by the successor in interest to Enron. (CLA-333).

⁶ The United States has been overly narrow with its application of the context to NAFTA Article 1116 in paragraph 12 of its Second Article 1128 Submission. The definitions in Chapter Eleven are provided in Chapter Two and Eleven and the *Vienna Convention* context must be to the full NAFTA Treaty and not just one particular chapter.

⁷ Cases to assist in the understanding of the term investment in NAFTA Article 1139 requires an understanding of the term “owns or controls” in Article 1139. The following cases are particularly helpful in this regard: *Thunderbird v. Mexico*, ICSID, Arbitral Award, 26 January 2006, at ¶106, (CLA-136); *B-Mex, LLC and others v. Mexico*, ICSID, Partial Award, 19 July 2019, at ¶¶ 205, 212, 213, 216, 217, (CLA-326); *Tallinn v Estonia* Award, 21 June 2019, at ¶369, (CLA-327); *Eskosol v Italy*, Award 4, September 2020 at ¶ 230, (CLA -328) *Autopista Concessionada de Venezuela C.A. (“Aucoven”) v Bolivian Republic of Venezuela* (Decision on Jurisdiction), 27 September 2001, ¶ 97, (CLA - 329); *Ioannis*

20. While there clearly is evidence of a trust and Skyway 127 working on the basis of a trust, in fact, the real matter in dispute in the Tennant Energy case involves shares formally registered and owned by Tennant Energy in 2015. The date of the NAFTA breach was not earlier than August 15, 2015. By August 15, 2015 – Canada admits that Tennant Energy owned shares in Skyway 127, and thus there could be no possible issue raised concerning its investment.
21. Canada has in no way challenged the jurisdiction for actions that arose after Tennant Energy had its shares formally registered. As Tennant Energy could not have known of the wrongful actions of Canada due to Canada’s successful subterfuge in hiding this information from the public, the Investor submits that this post January 2015 period is the proper period to assess the breach – considering its discoverability.

II. PRAYER FOR RELIEF

22. For the preceding reasons, the Investor submits that this Tribunal has jurisdiction to hear this claim.
23. This Tribunal should:
 - a. Declare that this Tribunal has jurisdiction over Tennant Energy’s NAFTA Chapter Eleven claim, and
 - b. Dismiss Canada’s jurisdictional application in its entirety and order that this arbitration proceeds to the merits.
24. Respectfully submitted on behalf of the Investor, on July 26, 2021.



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