

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 Response to Canada's
Post Hearing Brief on Transfers**

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Investor's Response to Canada's Post Hearing Brief

- 1) At the close of the jurisdictional hearing, the Tribunal invited the Respondent to address the issue of transfers of claims and successors in interest. This responsive brief specifically addresses comments Canada raised in its Post Hearing Submission on transfers of claims and successors in interest.
- 2) As noted in the Investor's Post Hearing brief, Canada filed its initial response on the transfer of a NAFTA claim contained in its Jurisdictional Rejoinder Memorial.¹ Canada expanded upon its views in its Post Hearing Brief.
- 3) This jurisdictional phase is based on Canada's artificial construct regarding the nature of the Investor's claim. Canada's challenge is meritless. The claims in this case were always focused on the discovery of evidence of the wrongfulness arising from the evidence that eventually became public in the *Mesa Power* NAFTA claim. It also was always a case involving the transfer of shares. These are not new developments. Indeed, Canada addressed the issue of transfers in its Memorial on Jurisdiction but pretends in its Post Hearing Brief that transfers are a new issue. Canada's position is refuted by the actual pleadings (including Canada's own pleadings in this jurisdictional phase).
- 4) This response addresses Canada's principal arguments regarding the issue of transfers and successors in interest raised in the Post Hearing Brief.
 - a) **PART ONE** addresses the binding NAFTA textual provisions on transfers.
 - b) **PART TWO** addresses conclusions arising from textual provisions on transfers.
 - c) **PART THREE** contains the Investor's Prayer for Relief.
- 5) Tennant Energy was the successor in interest to the shares held by John H. 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 John H. Tennant received the interest in the shares on April 19, 2009 until the days in which the

¹ Tennant Energy addressed the law on the successors in ¶¶104 – 106 of its Counter-Memorial and ¶¶ 16-21 of the Investor's Second Response on Article 1128 Submissions.

shares were transferred to Tennant Energy on January 15, 2015. Tennant Energy was an Investor with an investment in Canada before the breach of the NAFTA under either approach. Thus, as a result, there was an American investor with an investment in Canada before the breach occurred.

- 6) On the issue of transfers and successors in interest, this response demonstrates that:
 - a) Transfer of claims are permitted by the NAFTA.
 - b) There is no prohibition upon transfers of claims in the NAFTA; indeed, NAFTA cases have recognized transfers.
 - c) There are other provisions in the NAFTA which presume the operation of transfers.
 - d) Canada misconstrues the structure and objectives of the NAFTA relating to transfers.
 - e) Canada fails to adequately understand the relevant international law cases and principles.
 - f) That Canada's arguments on technical issues such as waiver simply make no sense because the breach occurred within three years of the bringing of the claim on June 1, 2017, the transfer occurred before the time of the NAFTA breach; and that Tennant Energy LLC was an American investor with an investment in Skyway 127 Wind Energy.

- 7) The NAFTA addresses transfers. As a result, the Investor has established jurisdiction for this claim to proceed.
 - a) Canada failed to address NAFTA provisions such as Article 1109 that expressly permit transfer of claims.
 - b) Canada ignored the one relevant case that specifically confirmed the transfer of a claim under NAFTA Article 1109.
 - c) Canada ignores other NAFTA provisions such as NAFTA Article 1137 that anticipated that transfers would generally occur.
 - d) Canada misunderstands the meaning of subrogation and its role regarding transfers
 - e) Canada is mistaken about the international law.
 - f) Canada has raised scurrilous technical arguments which do not create an obstacle to jurisdiction.

1. PART ONE - THE OPERATION OF INTERNATIONAL LAW

- 8) The Investor has demonstrated that the Treaty protects transfers. In comparison, Canada has not provided any relevant NAFTA provisions or jurisprudence challenging transfers of claims. Canada's arguments should be denied, and jurisdiction should be confirmed.

A. THE NAFTA TEXT EXPRESSLY PERMITS TRANSFERS

- 9) The NAFTA expressly permits transfers. NAFTA Article 1109 expressly covers "all transfers relating to an investment of an investor of another Party." 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.
- 10) NAFTA Article 1109 makes clear that transfers of property are permitted. The definition of types of property covered as investments is located in paragraph (g) of NAFTA Article 1139. This definition includes the protection of intangible and tangible property.
- 11) The assignment of rights to a claim is an intangible right. Transfers of intangible property are protected under the NAFTA like all other forms of intangible property. There is no question that assignments of rights are a form of investment covered by the obligations in NAFTA Article 1109.
- 12) Accordingly, the NAFTA Parties expressly addressed this issue of transfers expressly in the text of the NAFTA. That should be the end of this discussion. The transfer in question was evidenced in a memorandum (**C-236**) in February 2016, almost 18 months before the NAFTA claim was issued in June 2017. This memorandum and the underlying transaction reflected therein needs to be given its full legal effect.

B. NAFTA CASES ADDRESSING ASSIGNMENT UNDER NAFTA ARTICLE 1109

- 13) Astonishingly, in its Post Hearing Submission, Canada failed to address the interplay of NAFTA Article 1109 upon transfers of claims.
- 14) This *Loewen Group v United States* claim (**CLA-285**) was addressed by the Investor at paragraphs 93 to 94 of the Investor's Post Hearing Brief.
- 15) The *Loewen* Tribunal noted at paragraph 23 of its award that the problem with the assignment in that claim was the change of nationality during the course of the claim from a Canadian claimant into an American one:

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.²

- 16) The *Loewen* Tribunal did not challenge the transfer of the Loewen Group's NAFTA claim. The Tribunal accepted it and focused on the problematic change of nationality. As noted by the Investor in its Post Hearing Brief, there was no change in nationality in the transfer from John H. Tennant to Tennant Energy. Both were and continue to be American nationals.³
- 17) There is no dispute between the disputing parties over the nationality of John H. Tennant or Tennant Energy LLC. John H. Tennant is a US citizen and Tennant Energy LLC is a California corporation.⁴ Both are US nationals and thus covered by the scope of the NAFTA.
- 18) *Loewen Group v United States* is the only NAFTA claim to expressly rule on transfers under NAFTA Article 1109.
- 19) Canada's only response on this seminal case is that the *Loewen Group* Tribunal concluded that there was no jurisdiction for the claim from the Loewen Group because its claim was transferred from a Canadian entity to an American bankruptcy trustee, thus breaking a continuous nationality rule.⁵ What Canada fails to note is that, however, to reach this point, the *Loewen Group* Tribunal made conclusions about the legitimacy of transfers of claims and the applicability of NAFTA Article 1109 to transfers of claims.
- 20) As set out in the Investor's Post Hearing Brief, the *Loewen Group* NAFTA Tribunal had to expressly consider this question. It confirmed that NAFTA Article 1109 applied to transfers of claims.⁶ Such transfers include the transfer of claims.

² *Loewen Group v USA*, Final Award (CLA-285) at ¶23

³ Investor's Post Hearing Brief at ¶51 and at ¶80.

⁴ Justice Margaret Grignon, Transcript Day 4, at 562 :21-22.

⁵ Canada's Post Hearing Brief at ¶24.

⁶ Investor's Post Hearing Brief at ¶93-94. *Loewen Group v United States*, Final Award (CLA-285) at ¶23.

C. CANADA IGNORES NAFTA ARTICLE 1137

- 21) NAFTA Article 1137 addresses "general" points regarding investor-state arbitration such as the process of service, when a claim is considered submitted, and the issue of subrogation. Article 1137(3) states:

Receipts under Insurance or Guarantee Contracts

3. In an arbitration under this Section, a Party shall not assert, as a defense, counterclaim, right of set-off or otherwise, that the disputing Investor has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

- 22) The inclusion of this clause is significant. The NAFTA Parties clearly anticipated that there would be assignments of rights. The NAFTA created a specific rule to prohibit the filing of a defence or right of set-off in a NAFTA Chapter Eleven arbitration regarding the fact that an investor received or might receive, compensation for or indemnification for all or part of these damages. This clause does not operate as a limit against transfers of claims.
- 23) There is no prohibition against transfers of assignments in the NAFTA. NAFTA Article 1137(3) supports the ability to assign or transfer claims. It does not restrict them. Similarly, NAFTA Article 1109 expressly permits transfers. Article 1137(2) assumes the existence of transfers in the context of subrogation.

D. THE TRIBUNAL MUST GIVE INTERPRETATIVE WEIGHT TO THE OBJECTIVES OF THE NAFTA

- 24) A NAFTA Tribunal should broadly interpret the NAFTA along with the Treaty's objectives when considering the context of an investment. Respect for these interpretative principles must be respected when considering assignment and successors in interest.
- 25) NAFTA Article 102 sets out the objectives of NAFTA. The article states:

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:

- a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties.
- b) promote conditions of fair competition in the free trade area.
- c) increase substantially investment opportunities in the territories of the Parties.
- d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory.
- e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
- f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

- 26) NAFTA Article 102 includes two objectives that are relevant to the issue of transfer of NAFTA claims. These objectives are to "increase substantially investment opportunities in the territories of the Parties" in paragraph (c) and the obligation to "provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory" in paragraph (d). Both objectives are applicable to Tennent Energy.
- 27) The objective in paragraph (d) of Article 102 to provide efficient protection and enforcement of intellectual property is relevant specifically because the transfer rights are intangible property rights in the same genus as intellectual property.
- 28) As noted in the Investor's Post Hearing Brief, the *S.D. Myers* Tribunal in paragraphs 119 and 120 of its *Second Partial Award* (CLA-193), focused on the mandatory purposive requirements in interpreting the NAFTA under NAFTA Article 102(c).

119. Article 102(c) of the NAFTA states that one of the objectives of the Agreement is to:

...increase substantially investment opportunities in the territories of the Parties

120. Article 102(2) provides that the Parties:

...shall interpret and apply the provisions of this Agreement in light of the objectives set out in paragraph 1 and in accordance with applicable rules of

international law.⁷

- 29) Thus, the purposive interpretation of the NAFTA, required by NAFTA Article 102, requires that this Tribunal give effect to the NAFTA provisions that expressly protect the right to make transfers. Not only is this set out in the NAFTA text, but it is consistent with the objectives of the Treaty. Canada's suggestions to prohibit transfers conflicts with the mandatory interpretative rules mandated by the NAFTA and runs contrary to the canons of interpretation set out in Article 31 and 32 of the *Vienna Convention on the Law of Treaties*.
- 30) As noted in the Investor's Post Hearing Brief, Canada's Federal Court followed the same interpretative approach by examining the objectives of the NAFTA in its judicial review, which upheld the Tribunal award over Canada's objections.⁸
- 31) Canada has misstated the findings and facts from this case in its pleadings and the Post Hearing Brief. In so doing, Canada fundamentally challenges the decisions of Canada's own Federal Court and the decision of the *S.D. Myers* Tribunal. It appears that even twenty years later, Canada remains disappointed that a NAFTA Tribunal, and Canada's own Federal Court, concluded that Canadian federal measures violated Section A of NAFTA Chapter Eleven. However, Canada has fundamentally misrepresented the findings and the decisions of Canada's own reviewing court and the *S.D. Myers* Tribunal.
- 32) The approach on the interpretation of the NAFTA by the *S.D. Myers* Tribunal was based on the mandatory interpretative rules set out in NAFTA Article 102. This Tribunal should equally apply Article 102 and the persuasive and helpful approach taken by the *S.D. Myers* Tribunal, which was separately reviewed and upheld by Canada's Federal Court.

E. CANADA MISUNDERSTANDS USMCA & NAFTA

- 33) Canada provides no support to its general statement that there is a prohibition on assignment of claims in international law. Indeed, as noted above, the NAFTA expressly

⁷ *S.D. Myers Second Partial Award* at ¶¶ 119 – 120. (CLA-193).

⁸ Investor's Post Hearing Brief at ¶125 and ¶135 in reference to the *S.D. Myers* Federal Court Decision (R-80).

permits transfers in Article 1109.

- 34) Canada absurdly suggests that the subrogation provisions in treaties that might limit aspects of transfers in treaties other than NAFTA should somehow be given effect in the NAFTA. (In essence Canada argues for the imposition of a least favoured nation treatment principle here). Such an argument makes no sense in law or logic and runs afoul of NAFTA Article 1103 and the NAFTA Article 102 interpretative principle of most favoured nation treatment.
- 35) Surprisingly, Canada fails to note the subrogation provision in NAFTA Chapter Eleven.
- 36) In footnote 45 of its Post Hearing Brief, Canada refers to USMCA Article 14.15 (**CLA-294**). Article 14.15 in the new US-Mexico-Canada Treaty expressly prohibits subsequent claims arising from a subrogation. This new limit is entirely different from the obligation in NAFTA Article 1137(2).
- 37) To be precise, USMCA Article 14.15 states:

If a Party, or an agency of a Party, makes a payment to an investor of the Party under a guarantee, a contract of insurance, or other form of indemnity that it has entered into with respect to a covered investment, the other Party in whose territory the covered investment was made shall recognize the subrogation or transfer of any right the Investor would have possessed with respect to the covered investment but for the subrogation, and the Investor shall be precluded from pursuing that right to the extent of the subrogation, unless a Party or an agency of a Party authorizes the Investor to act on its behalf.

- 38) This limit needs to be considered in light of the transfers obligation in USMCA Article 14.9.⁹ The first sentence of the USMCA Article 14.9 transfers obligation is identical to the general obligation in the first line of NAFTA Article 1109 on transfers. However, there are slight differences in the USMCA transfer provision. One difference is that USMCA Article 14.15 "precludes certain additional rights" if there is a subrogation. While Canada attempts to conflate the two provisions, the USMCA subrogation prohibition is different from what is in the NAFTA.

⁹ USMCA Article 14.9 begins with identical language to NAFTA Article 1109(1) stating: " Each Party shall permit all transfers relating to a covered Investments to be made freely and without delay into and out of its territory. "

- 39) The limitation on the subrogation is a specific exception to the broad and general obligations in the transfer clause in USMCA Article 14.9.
- 40) All transfers other than subrogated transfers are protected in the USMCA. Rather than establishing the contrary, Canada's example shows that transfers of claims are permitted under the USMCA exist other than for additional claims where there has been a subrogation. And this limit is only because of the express treaty language creating the USMCA limitation.
- 41) It is important to recognize that when the NAFTA Parties sought to create an exception to the NAFTA, they did so explicitly and clearly.
 - a) For example, NAFTA Article 1138 contains clear exclusions regarding national security.
 - b) NAFTA Article 1108 contained detailed exceptions and reservations against the obligations in Articles 1102, 1103, 1106, and 1107.
 - c) Article 1110(7) provided a clear indication that compulsory licenses of intellectual property that would otherwise offend NAFTA's expropriation provisions in Article 1110, were permitted.
- 42) Canada does not point to any prohibition in the NAFTA against assignment of claims, nor to any exception that would render NAFTA Article 1109 transfers inoperative. No exception prohibiting transfers of claims was taken against NAFTA Article 1109.
- 43) This is further confirmed as NAFTA Article 1137(2) assumes unlimited subrogation rights, and the NAFTA takes no steps to limit them unlike the new USMCA treaty. Thus, transfers are expressly permitted in the NAFTA and there is no prohibition

F. CANADA FAILS TO UNDERSTAND THE SUBROGATION PROVISIONS

- 44) In paragraph 21 of Canada's Post Hearing Submission, Canada makes the baseless statement that subrogation "provides an exception to the general rule that a claim cannot be assigned". This demonstrates Canada's complete misunderstanding of subrogation, and of the NAFTA.
- 45) Apparently, Canada misunderstand how subrogation is referenced. In footnote 45 to Canada's Post Hearing Brief, Canada states:

Subrogation is a special case of assignment that arises where the Investor has received an indemnity under an insurance claim. Under its terms, the insured Investor's claim against the host State is assigned to the insurer upon payment of the claim arising from the insurance. The insurer succeeds to all the rights of the beneficiary who has received compensation under the insurance contract. In the context of investment law, the host State agrees to the subrogation, typically through an investment treaty between the host State and the Investor's State of nationality. Many investment treaties contain subrogation clauses of this kind.

- 46) As is clear from the text of Article 1137(3), Canada explanation about subrogation is completely wrong. Subrogation is an actual assignment of a claim to a third party. It arises when an insurer steps into the place of an investor.
- 47) The prohibition against claiming a defence against subrogation does not provide any prohibition on assignment. It is a mechanism to address one type of assignment that the NAFTA Drafters assumed would take place. Nowhere is there any support to Canada's contention that assignment is prohibited or that subrogation is a general exception to the NAFTA or international law.
- 48) Subrogation is not a general exception to a general prohibition on transfers. This suggestion is entirely untethered to the NAFTA or the truth.
- 49) The provisions on subrogation address a common issue as to whether the fact of subrogation might be raised by a party. It is not a special exception to a general prohibition of subrogation. This clause permits an insurer, without regard to its nationality, to bring or continue a subrogated claim on behalf of a claimant who otherwise meets the nationality requirements of Section B of NAFTA Chapter Eleven.

G. CANADA IS MISTAKEN ON THE INTERNATIONAL LAW

- 50) The most relevant international law cases are those under the NAFTA because of the specific provisions of the NAFTA specifically protecting transfers. Unfortunately, Canada paid no attention to the relevant NAFTA Cases however the Investor has addressed them.
- 51) No NAFTA case ever has denied jurisdiction regarding a transfer. As noted, the *Loewen* Tribunal confirmed that transfers could take place as long as the continuous nationality

rule was followed.

- 52) The express confirmation under NAFTA Article 1109 means that this Tribunal need not have recourse to general principles which are reflected in cases such as *Daimler*. Even without the powerful guidance of NAFTA Article 1109, international investment treaty cases also support transfers of claims provided that there is no change in the nationality of the underlying Investor. 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.¹⁰ (CLA-309). In paragraph 24 of the Post Hearing Submission, Canada attempts to suggest that there are additional requirements to the *Daimler* test, but this is simply incorrect. It is also irrelevant. As noted below, as an operational matter, the breach in this claim occurred after the Investor had its investment.
- 53) Other cases are much less relevant because of the specific terms of the NAFTA. However, it is important to note that Canada has applied a lack of care to its analysis of these other authorities.
- 54) For example, in footnote 60 of its Post Hearing Brief, Canada says that the *Caire* case did not involve a successor in interest. The *Caire* case (CLA-322) is well-known due to its importance in the law of state responsibility. In his monograph, *The International Law Commission's Articles on State Responsibility*, Prof. James Crawford confirms that the *Caire* Case was about the harassment, torture, and murder of a French Citizen by Mexican officials.¹¹ As Mr. Caire was murdered by the Mexican officials, clearly, he was not the claimant in that case. The case involved a successor in interest to the murdered Mr. Caire. This successor in interest was a person over whom France could espouse an international claim. However, with the most superficial research on the *Caire* case, Canada would have known that the victim, Mr. Caire, was murdered, and that France brought the claim on behalf of Mr. Caire's widow. That did not prevent Canada from espousing a view on this seminal case that was completely untethered to

¹⁰ 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.

¹¹ James Crawford, *The International Law Commission's Articles on State Responsibility*, (Cambridge University Press, 2002), (CLA-199) at page 107(5).

the truth.

- 55) 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. Canada attempts to distinguish these cases in paragraph 25 of the Post Hearing Brief based on a diplomatic espousal of claims theory. Fundamentally Canada is incorrect. Practically, however, in light of the express textual provisions in the NAFTA which permit transfers, reliance on all the non-NAFTA case law is irrelevant.

H. TECHNICAL OBJECTIONS INCLUDING WAIVERS

- 56) Canada raises a number of poorly considered technical issues regarding transfer of claims such as the relevance of local law and the issue of waivers. The Investor briefly addresses them in this response.

I. ROLE OF LOCAL LAW FOR TRANSFERS

- 57) Canada argues inconsistently in its Post Hearing Brief about the role of local law. At the same time, Canada argues that local law is irrelevant yet a few pages later in its pleading, Canada demands strict observance of the definition of de jure control under the *Ontario Business Corporations Act*. Canada's position is contrary and confused.
- 58) In paragraph 27 of its Post Hearing Brief, Canada objects to the application of California law to address the establishment of a trust or whether there was an assignment of property rights to or from the trustee. Canada suggests that the term "trust" in the NAFTA requires an international definition and that the national law of the place of the enterprise is irrelevant.
- 59) However, Canada is inconsistent. Canada expresses exactly the opposite argument in paragraph 48 and demands that Ontario law must apply to the Treaty's definition of de jure "control". Indeed, as noted by the Investor in its Post Hearing Brief, Canada made a similar argument before the Federal Court of Canada in the *S.D. Myers* case. Canada's own Federal Court dismissed Canada's argument.¹²

¹² Investor's Post Hearing Brief at ¶¶ 135 – 136 referencing ¶ 68 of the Federal Court decision (**R-80**).

- 60) The answer to this situation is offered by a close reading of the primary obligations. There are times where the primary obligation (such as an obligation under a treaty) requires a consideration of local law. For example, this can occur when considering if a particular entity constitutes a government organ. This reference to the internal law of the state is mandated by Article 4 of the ILC *Articles on State Responsibility*.
- 61) Similarly, local law is required to address the definition of enterprise under the NAFTA.
- 62) California law is relevant because of the express terms of the NAFTA which references local law as part of the definition of an enterprise of a Party and enterprise. Article 1139's definition of "enterprise of a Party" is "an enterprise constituted or organized under the law of a Party."
- 63) Article 1139 defines "enterprise" as being an enterprise as defined by Article 201 or a branch of an enterprise. Article 201 again refers to local law when defining an enterprise. Article 201's definition of enterprise is
- enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.
- 64) Thus, the NAFTA Article 1139 definition of "enterprise" of a Party and the NAFTA Article 201 definition of enterprise requires considering local law. The necessary reference to California law is a textual requirement in NAFTA Articles 1139 and NAFTA Article 201.
- 65) The NAFTA does not impose any local law requirements on other terms such as control or terms such as "investor" or "investment". These definitions are based on the terms of the NAFTA and international law as set out in the governing law provision in NAFTA Article 1131.

II. WAIVER

- 66) In Paragraph 22 of its Post Hearing Brief, Canada suggests that allowing the transfer of claims renders waivers under NAFTA Article 1121 meaningless. As a result, Canada

suggests that this Tribunal should not permit transfers to take place.

- 67) Canada's suggestions are nothing less than fanciful speculation. An analysis of Canada's contention demonstrates that the contention is not a *bona fide* concern.
- 68) NAFTA Article 1121 requires that an investor under NAFTA Article 1116 file a waiver to prevent specific local causes of actions being raised before local courts. The waiver needs to be filed on its own behalf and on behalf of any investment that it owns or controls. In this claim, Tennant Energy filed a waiver, as did Skyway 127 Wind Energy (the investment that it owns and controls).
- 69) However, even if a claim was to be brought, the remedy to any issue is simple. As a practical matter, the Tribunal could order that a waiver be filed by any additional claimant before it. However, this is simply irrelevant in the Tennant Energy claim. Further, the respondent could move to the local court and ask it to stay the local action under the local arbitration law in Mexico or Canada based on the UNCITRAL Model Law or under the *Federal Arbitration Act* in the United States. This is not a significant problem. Canada is making a mountain out of a molehill.
- 70) Tennant Energy, an American company, beneficially owned the shares since 2011 under an oral trust created by Mr. John Tennant, another American. Moreover, Mr. John Tennant, as trustee, then formally assigned the shares in Skyway 127 to Tennant Energy in 2015.
- 71) Tennant Energy was the successor in interest to the shares held by John H. 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 received the shares on April 19, 2009 until the days in which the shares were transferred to Tennant Energy on January 15, 2015. Tennant Energy was an Investor with an investment in Canada before the breach under either approach. Thus, as a result, there was an American investor with an investment in Canada before the breach occurred.
- 72) It is essential to have reference to the facts. John H. Tennant, an American, validly transferred his tangible and intangible rights to Tennant Energy, and it is a successor-in-

interest to any rights, including choses in action that Mr. John Tennant had at the time of the assignment. This evidence is undisputed.

- 73) Alternatively, should the Tribunal conclude that no oral trust was created, Tennant Energy still would be a protected investor because it is a successor in interest and the assignment of John H. Tennant's tangible and intangible rights to a successor company, Tennant 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.¹³ This was confirmed in the February 18, 2016 memorandum (**C-268**) of John H. Tennant, which also confirmed that the shares were for the purposes of Tennant Energy LLC.¹⁴
- 74) The evidence at the hearing was clear. John H Tennant held shares as a trustee. The trust was created as a matter of the automatic operation of the law of California. A trust has no independent legal capacity to bring a claim or to hold property. The property was held by John H. Tennant personally as trustee. According to Justice Grignon, John H. Tennant was automatically a trustee as a matter of law in California by April 19, 2011.
- 75) While Canada contends that the claim arose on July 4, 2011 (a date which the Investor consistently rejects), even under Canada's suggestion, Tennant Energy held the requisite property interest to meet the test of jurisdiction. Certainly, based on the Investor's approach, there is no question that Tennant Energy had an investment before the breach arose.
- 76) 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**). Justice Grignon testified to the assignment and the effect of same in her expert opinion.¹⁵ Canada filed no contrasting expert testimony. Canada's expert, Ms. Lodise explicitly refused to comment on the assignment when asked during cross-examination. Ms. Lodise confirmed that she was not providing any expert opinion on the issue of assignment despite the fact that the

¹³ Shareholder's Ledger Skyway 127, January 15, 2015 (C-115) ; Justice Margaret Grignon, Transcript Day 4, at 565 :4–12.

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

¹⁵ Justice Margaret Grignon, Transcript Day 4, at 533 :23–534 :8.

issue was raised in the Investor's Counter-Memorial on Jurisdiction and in the Grignon Expert Legal Opinion.¹⁶

- 77) When John H. Tennant formally transferred his Skyway 127 shares to Tennant Travel on January 15, 2015 (C-115), all his rights to a claim under NAFTA also were transferred to the company.¹⁷ Whether John H. 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.¹⁸
- 78) By this transfer of shares, John H. Tennant also transferred all rights he had related to the Skyway 127 shares to Tennant Travel/Energy, thereby becoming a successor in interest to any claims John H. Tennant may have had.¹⁹
- 79) The shares of Tennant Energy are intangible rights.²⁰ The February 2016 memorandum (C-268) confirmed the assignment of the Skyway 127 shares acquired by John H. 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 those that existed under the NAFTA.²¹
- 80) 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.
- 81) 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 because all such rights automatically were conveyed with the shares.²² Choses in

¹⁶ Margaret Lodise, Transcript Day 4, at 611 :22–25 (“I’m not going to render any opinion on an Assignment.”).

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

¹⁸ Justice Margaret Grignon, Transcript Day 4, at 564 :7–565 :12.

¹⁹ Justice Margaret Grignon, Transcript Day 4, at 534 :4–536 :12.

²⁰ Justice Margaret Grignon, Transcript Day 4, at 505 :17–506 :1.

²¹ Justice Margaret Grignon, Transcript Day 4, at 505 :17–506 :1

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

action here means 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[.]"²³ The testimony and evidence on the assignment of rights by the transfer of Skyway 127 shares wholly has been undisputed by Canada.

- 82) There could be no *bona fide* issue regarding the waiver as alleged by Canada in paragraph 21 of its Post Hearing Brief. The evidence shows that Tennant Energy was a protected investor at the time of the effective date of the assignment.

2. PART TWO - CONCLUSIONS

- 83) 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 making a claim under the Treaty. Indeed, NAFTA Article 1109 expressly protects such rights.
- 84) Tennant Energy was the successor in interest to the shares held by John H. 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 received the shares on April 19, 2009 until the days in which the shares were transferred to Tennant Energy on January 15, 2015.
- 85) There was an investment that went back to April 19, 2009 by operation of law. This occurred either through the trust or through the assignment and both due to the operation of law. Thus, Tennant Energy was an Investor with an investment in Canada before the breach under either approach.
- 86) Thus, because of the transfer of rights, there was an American investor with an investment in Canada before the breach occurred.
- 87) There is no prohibition upon transfers of claims in the NAFTA and NAFTA cases have recognized transfers.

²³ Justice Margaret Grignon, Transcript Day 4, at 505 :22–25.

- 88) Canada's arguments on technical issues such as waivers simply make no sense because the breach occurred within three years of the bringing of the claim on June 1, 2017, the transfer occurred before the time of the NAFTA breach; and that Tennant Energy LLC was an investor with an investment in Skway 127 Wind Energy.
- 89) As set out in this response, Tennant Energy requests that following conclusions:
- a) The recognition of the transfers which is expressly permitted and protected by the NAFTA.
 - b) The recognition of the transfer of the Claim from John H. Tennant to Tennant Energy.

3. PART THREE - PRAYER FOR RELIEF

- 90) For the preceding reasons, the Investor continues its requests for relief, set out in its earlier submission. As explained above in detail, Tennant Energy respectfully requests that the Tribunal dismiss Canada's request to dismiss this Claim for want of jurisdiction
- 91) Respectfully submitted on behalf of the Investor, on December 22, 2021.



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