

**MATTER OF AN ARBITRATION UNDER THE UNCITRAL
ARBITRATION RULES AND THE TREATY BETWEEN THE
GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE
GOVERNMENT OF CANADA UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT**

Tennant Energy LLC.

INVESTOR

v.

Canada

RESPONDENT

**Investor's Response to Canada's Motion to Suppress Evidence from the
Public and the Tribunal**

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OVERVIEW

- 1) Time and time again, Canada sings the very same song. Unconvincingly, Canada says Tennant Energy LLC is actually Mesa Power Group or is attempting to repeat the exact same claims made by Mesa Power. As pointed out in the January 2020 Procedural Hearing, and in the Investor's Memorial, Tennant Energy LLC is not Mesa Power Group, and Tennant Energy's claims asserted are not the same claims asserted in the Mesa Power claim.
- 2) This arbitration involves the blatant disregard of fairness in the allocation of multi-million-dollar renewable energy contracts. It involves the protection by senior government officials of companies owned by political cronies and supporters to the detriment of investments owned by American investors following the public guidelines of the FIT Program. The NAFTA prohibits such unfair practices, which disrupt commercial certainty and cross-border investment.
- 3) Tennant Energy's claims arise from information unknown to the public when earlier NAFTA claims arose. Canada's motion to exclude relevant evidence attempts to conceal the very admissions at the heart of the NAFTA claim from being heard through Canada's attempts for exclusion and suppression of public information.
- 4) However, an interesting and unexpected eventuality arose in the current claim – which is the subject of this motion. Evidence including direct admissions by government officials administrating the FIT Program of wrongful conduct was made public.
- 5) The admissions of the wrongful conduct occurred during the sworn testimony of senior government officials during witness examination at the *Mesa Power* NAFTA Arbitration.
- 6) The admissions of wrongful conduct themselves do not meet the definition of confidential information under the Confidentiality Orders in the *Mesa Power* NAFTA arbitration. Moreover, these admissions took place during cross-examination "in open court" in testimony, during portions of the hearing that were closed to the public. As a result, the non-confidential admissions were "caught" in portions of the transcript that were not released to

- the public. But, as it turned out, the videos of that cross-examination have been public for years.
- 7) There was a Confidentiality Order in place in the *Mesa Power* NAFTA arbitration.¹ Mesa Party, one of the disputing parties to the *Mesa Power* arbitration, completely complied with the terms of that order.
 - 8) The unredacted *Mesa Power* NAFTA hearing videos happened to be released to the public by the Permanent Court of Arbitration (PCA). The videos were posted by the PCA on the Internet. The videos were available for all to view without limitation in the public domain on the Internet for more than **five years** - since April 30, 2015.
 - 9) Someone other than the disputing parties to the *Mesa Power* arbitration took steps that resulted in the wholesale dissemination of the admissions of wrongdoing by the Ontario Officials. With respect to the release of the record, the parties, the *Mesa Power* Tribunal, and the counsel to the parties are entirely blameless.
 - 10) None of this evidence comes as a surprise for Canada. Canada has been aware of the full extent of the admissions throughout the pendency of the Tennent Energy arbitration as it was a party to the *Mesa Power* case and the admissions all came from its own senior government officials.²
 - 11) The disputing parties in the *Mesa Power* arbitration were involved in the video posting process but not in the actual posting itself. The videos were posted due to a December 2014 motion Mesa Power brought to make the videos public. Canada and Mesa Power were engaged in a review of the video and the hearing transcripts. The PCA notified the disputing

¹ *Mesa Power Group, LLC v. Government of Canada* (PCA Case No. 2012-17), Confidentiality Order, 21 November 2012 **C-250**

² Some members of Canada's current counsel team were counsel in the *Mesa Power* claim. Tennent Energy was not a party to the *Mesa Power* NAFTA Claim. Some of Tennant Energy's counsel were counsel at the Mesa Power claim. The Appleton & Associates Law firm was counsel to both Mesa Power Group and Tennant Energy at NAFTA hearings. Reed Smith LLP was not counsel to Mesa Power Group in the NAFTA arbitration. Edward Mullins and Cristina Cardenas both were counsel to Mesa Power Group when they were at a predecessor firm. One expert witness, Richard Taylor, from Deloitte, was a witness at the *Mesa Power* hearing and filed an expert statement in the current Tennant Energy arbitration. Other principal legal counsel and staff involved in this claim from Reed Smith LLP and from Appleton & Associates were not counsel in the Mesa Power NAFTA arbitration.

parties on April 30, 2015, that the videos were posted on the PCA website. At that time of posting in 2015, it was open to either disputing party to inspect the video postings and to notify the *Mesa Power* Tribunal in the event of any inadvertent disclosure of information. Neither disputing party made any such notification of any disclosure despite being on notice of the posting through a communication from the PCA on April 30, 2015.

- 12) The PCA posted the post-hearing submissions and a host of other submissions on August 15, 2015,³ after the posting of the hearing videos as the Investor has noted in its Notice of Arbitration and in its Memorial. This included information in the Post Hearing brief that was made public by Energy Assistant Deputy Minister Sue Lo.⁴
- 13) But what is most incredible is that Canada in its motion did not tell the Tribunal that Canada itself published the very same videos on its own website as part of its transparency initiative to make all information public. Canada published a link to the PCA website that include this uncensored material.
- 14) Canada made public on its own what the PCA did. Yet Canada now complains that a non-party is using public domain material that Canada itself posted that material by way of a share link, and thus aided in that very dissemination. Canada's motion is specious.
- 15) At the *Mesa Power* Hearing, Energy Assistant Deputy Minister Sue Lo made an astonishing admission. She admitted that there was a secret group of the most senior Ontario Government public officials meeting with the most senior political officials in an unofficial clandestine meeting known as the "breakfast club." At the secret "breakfast club" meetings, the officials regularly took steps to provide preferential business opportunities to the government's cronies and political supporters. This included regulatory machinations of the FIT Program. Ms. Lo testified that the officials meeting at the "breakfast club" "provided special protection for companies like International Power Canada, which was run by a member of the Liberal Party leadership and closely connected to the Ontario Liberal Government. Such actions were in direct contravention of the legitimate expectations of the

³ August 10, 2015, Email from Ben Craddock, case manager, PCA to counsel to disputing parties, releasing post-hearing procedural documents after the end of day on August 14, 2015, **C-124**.

⁴ Notice of Arbitration at ¶81. Memorial at ¶728.

Investor and its Investment and were in violation of the international law standard in NAFTA Article 1105.

- 16) The admission of the existence of a secret governing process could not meet the definition of confidential information under the terms of the *Mesa Power* Confidentiality Order, but this information had been concealed by Canada and it did not become public until disclosure of this information was contained in a post-hearing brief published by the PCA's on August 15, 2015.⁵ The Investor has briefed and argued the fact of this meeting and decision in its Notice of Arbitration, in its briefing in response to Canada's failed motion to bifurcate, and at the second procedural hearing in January 2020.
- 17) The *Mesa Power* Tribunal had a process under its Confidentiality Order where the disputing parties would review and dispute confidential designations before materials were made available to the public.⁶ Canada had an opportunity to review and revise confidentiality designations. The *Mesa Power* record is strewn with Canada's applications challenging Mesa Power's designations. While Canada had this opportunity in relation to the various post-hearing submissions, Canada did not redact the information about the admission made by Assistant Deputy Minister Sue Lo in the *Mesa Power* Investor's Post Hearing Brief – or other disclosures in other documents released at the same time.⁷
- 18) In short, Canada had the opportunity to further redact the *Mesa Power* Post Hearing Brief, but Canada apparently did not do so. Canada failed to take timely action in relation to the review of the Post Hearing Brief or the videotape of the NAFTA hearing. Only Canada is responsible for those decisions.

⁵ August 10, 2015, Email from Ben Craddock, case manager, PCA to counsel to disputing parties, releasing post-hearing procedural documents after the end of day on August 14, 2015, **C-124**.

⁶ *Mesa Power Group, LLC v. Government of Canada* (PCA Case No. 2012-17), Confidentiality Order, 21 November 2012, **C-250**.

⁷ Mesa Power filed its post hearing brief on December 14, 2014. Under Article 4 of the *Mesa Power* Confidentiality Order, Canada had 10 days to file objections over the designation or non-designation of confidentiality in that document. Canada did not file any claims and the PCA confirmed on January 9, 2015 that the post hearing briefs were ready for public disclosure, **C-250**. In fact, the post hearing briefs were not made public until August 14, 2015. See the August 10, 2015, Email from Ben Craddock, case manager, PCA to counsel to disputing parties, releasing post-hearing procedural documents after the end of day on August 14, 2015, **C-124**.

- 19) Canada has not evidenced any reticence in making objections in a NAFTA arbitration. The decision to not object, like the decision to object, in these circumstances constitutes an express choice by Canada and thus operates as a waiver. Because of that waiver, Canada is estopped from raising objections in relation to the materials in the public domain because Canada had no impediment to making that objection and should have reviewed the material posted for consistency at the time of posting. But in any event, those objections are not relevant to the Tennant Energy case – but to the Mesa Power case – a matter over which this current Tribunal has no jurisdiction and where all the parties are not present.
- 20) The Investor here, Tennant Energy, comes to this arbitration with clean hands. Tennant Energy is a separate and distinct party from Mesa Power. Tennant Energy disclosed its reliance on the disclosure of previously confidential information arising from the Post Hearing Brief in its Notice of Arbitration in June 2017.⁸ Tennant's reliance on this information was notorious and fully disclosed. Canada never objected earlier to Tennant's reliance upon the disclosure of the Sue Lo evidence in the Tennant Energy Notice of Arbitration even though it arose from the disclosure of information that was originally subject to the confidentiality provisions in the Mesa Power case. That information, originally classified as confidential, was subsequently disclosed to the public.⁹ Further Canada has not raised any objections over the authenticity of the earlier evidence that Tennant Energy filed or to any question of legal privilege.
- 21) Tennant Energy filed a detailed Memorial on August 7, 2020. That document set out many admissions of internationally wrongful conduct senior Ontario government officials made by regarding the administration of the Ontario FIT Program. These actions form the basis of the Investor's claim.
- 22) Ontario had an ongoing policy to conceal and suppress compromising information about how it manipulated the Ontario FIT Program to reward friends and supporters at the cost of

⁸ Notice of Arbitration at ¶81.

⁹ In fact, on June 1, 2017, when the Tennant Energy claim was filed, the admission by Assistant Deputy Minister Sue Lo was feely available to the entire world through the video on the PCA website although at that time, Tennant was only aware of it through the Mesa Power Investor's post hearing brief references because Mr. Pennie reviewed the redacted transcript of the hearing rather than the publicly-available video at that time. CWS-1-Witness Statement of John C. Pennie at ¶ 99.

law-abiding FIT Proponents who followed the public terms of the renewable energy program. Ontario rewarded its friends, who otherwise had failed under the terms of the program, at the cost of would-be successful applicants like the Skyway 127 wind project owned and controlled by Tennant Energy.

- 23) While trying to conceal its wrongdoing, Canada attacked Tennant Energy's claim by claiming that Tennant Energy must have known about the NAFTA breach by June 1, 2014 – more than three years before Tennant Energy brought its NAFTA Claim (on June 1, 2017).
- 24) At the January 2020 Procedural Hearing, Tennant Energy addressed these issues and explained that Tennant Energy could not have known about the breaches before June 1, 2014, because of Canada's policy of concealment and suppression of information. Counsel for Tennant Energy explained that the information first became available through the review of information about actions that the most high-ranking Ontario civil servants and political leaders took in the secret "breakfast club" meeting. There was nothing properly confidential about this egregious conduct, but Canada ensured that that this devastating and embarrassing testimony was redacted in the *Mesa Power* hearing transcripts posted on the public website of the PCA.¹⁰
- 25) However, while reviewing for the preparation of his Witness Statement, John C. Pennie, the Investor's representative, discovered that he was able to see *all* of the witness testimony of Energy Assistant Deputy Minister Sue Lo and the remainder of Canada's witnesses and Canada's counsel on the PCA website. (See Witness Statement of John C. Pennie CWS-1 at ¶¶99 and ¶¶ 102 - 104).
- 26) As detailed in Mr. Pennie's witness statement, (CWS-1) the Investor put the full *Mesa Power* Hearing video into the record of this arbitration in Exhibits C-107, C-201, C-204, C-205, C-206, C-208 and C-224 to C-243. The information in that video is discussed in Mr. Pennie's Witness Statement as it is relevant to the determination of merits and jurisdictional questions

¹⁰ The correspondence between Canada and the PCA leading up to the release of the hearing transcripts and the hearing video is discussed below.

before this Tribunal. The information is also discussed in the Witness Statement of Parthenya Taiyanides (CWS-2).

CANADA'S MOTION

- 27) Canada's August 10, 2020 motion is yet another one its attempts to conceal its shameful and wrongful acts by government officials who systematically have worked to harm the Skyway 127, the investment in this arbitration. Canada asks this Tribunal to:
- a) Ignore the most relevant and pertinent evidence supporting its claim – namely Exhibits C-107, C-201, C-204, C-205, C-206, C-208, and C-224 to C-243 inclusive, which contain copies of video of the *Mesa Power* hearing downloaded in July 2020 from the PCA's *Mesa Power* website.
 - b) Order that information arising from the *Mesa Power* hearing videos be suppressed from the public and the Tribunal.
 - c) Order that the Investor redact this information from the internet from its Memorial and file a new redacted pleading.
 - d) Order that the procedural clock should stop in this arbitration, to provide Canada given more time to consider evidence arising from this earlier case with respect to witnesses that Canada itself presented and who were within its control.
 - e) Award costs for the motion and associated costs of reviewing the Investor's Memorial pleadings.
- 28) The information the Investor filed with the Memorial in this Tennant Energy arbitration was all in the public domain.
- 29) At no time does Canada raise any objections over the authenticity of the *Mesa Power* NAFTA hearing video evidence that Tennant Energy filed arising from the PCA's public website or raise any question of legal privilege, nor could it.

THE POSTING OF THE MESA POWER VIDEOS BY THE PCA

CANADA TOOK NO ACTION FOR OVER FIVE YEARS

STEPS BEFORE POSTING OF THE VIDEO

- 30) On **December 18, 2014**, Mesa Power brought a detailed motion to the Tribunal regarding the posting of hearing videos.¹¹ At that time, there was an uncertain time frame for posting videos, and according to the motion, Canada had not been cooperating with the release of the video.¹² Canada responded on **December 22, 2014**, agreeing for the posting of videos and claiming that it was always in favor of publication of the hearing video.¹³ The Tribunal notified the disputing parties on **January 9, 2015** that it had received the public versions of the Parties' post-hearing submissions and would request the PCA to publish them on its website.¹⁴
- 31) On **April 9, 2015** Hanno Wehland, Legal Counsel, PCA provided the disputing parties with copies of the hearing video for their review and the hearing transcripts.¹⁵ After this email, the disputing parties reviewed the video and the transcripts. There were communications between them with respect to what was covered by the confidentiality agreement. The PCA, at each step, provided notification to the parties and asked them to confirm what was to be posted.
- 32) On **April 10, 2015**, the counsel for Mesa Power wrote to Mr. Wehland with detailed comments about sections of the transcript that were marked as confidential – which was

¹¹ Mesa Power Investor's Motion for the Public Release of the Hearing Transcripts and Videos, 18 December 2014, **C-247**.

¹² Mesa Power Investor's Motion for the Public Release of the Hearing Transcripts and Videos, 18 December 2014, ¶6, **C-247**.

¹³ Letter from Shane Spelliscy, Legal Counsel, Canada, to the Tribunal containing Canada's response to Investor's Motion for the Public Release of the Hearing Transcripts and Videos, 22 December 2014, **C-248**.

¹⁴ Letter from the Tribunal advising on receipt of the public versions of the disputing parties' post-hearing submissions and the future posting on the PCA website, 9 January 2015, **C-255**.

¹⁵ Letter from H. Wehland, Legal Counsel, PCA, to counsel for disputing parties, regarding the agreed modifications to the hearing transcripts and video recordings, 9 April 2015, **C-249**.

inconsistent with the public testimony on the video. Mesa Power “signed off” on the video in that letter.¹⁶

- 33) On **April 13, 2015**, Canada noted that it had reviewed the video and expressed comments on the transcript.¹⁷ On **April 29, 2015**, Canada confirmed its agreement with the video.¹⁸
- 34) On **April 30, 2015**, Mr. Wehland, sent a letter to counsel for the disputing parties in the *Mesa Power* NAFTA arbitration. The letter addressed the publication of video recordings and transcripts on the PCA website. That letter confirmed that the information and video recordings were uploaded to the PCA’s website and could be accessible to the public.¹⁹
- 35) Despite all the communications regarding the video, there was no email from either disputing party indicating any concerns raised with what was released to the public by the PCA on April 30, 2015.
- 36) Counsel for Canada in her August 10th letter confirms the process followed by Canada. Ms. Squires states:

As background, following the Mesa hearing, the disputing parties submitted the final redacted transcripts to the PCA. The disputing parties agreed that before publishing the videos, the full hearing videos would be edited by the PCA in accordance with the final redacted transcripts to remove all confidential and restricted access information from the videos. In fact, the disputing parties specifically provided the PCA with instructions on which sections of the videos to black out and

¹⁶ Letter from Barry Appleton, Legal Counsel, Mesa Power, to Hanno Wehland, Legal Counsel, PCA, regarding amendments to public transcript and video, 10 April 2015, **C-246**.

¹⁷ Letter from Shane Spelliscy, Legal Counsel, Canada to Hanno Wehland, Legal Counsel, PCA, commenting on the amended hearing transcripts and videos, 13 April 2015, **C-251**.

¹⁸ Email from Hanno Wehland, Legal Counsel, PCA, to disputing parties regarding the hearing videos and transcripts and inviting Parties to provide comments, 29 April 2015, **C-256**; Email from Shane Spelliscy, Canada, to Benjamin Craddock, Case Manager, PCA, confirming Canada’s agreement on the hearing transcripts and video, 29 April 2015, **C-252**.

¹⁹ The Investor filed the April 30, 2015 PCA notification letter on the posting of the video and hearing transcripts as Exhibit **C-135**.

*which could remain in the designated public versions. To Canada's knowledge, the PCA followed these instructions in posting the videos.*²⁰

- 37) The PCA gave notice to Canada once it posted the videos of the *Mesa Power* NAFTA hearing. It is important to note that each disputing party (Canada and Mesa Power) had an opportunity to have the video evidence changed after the posting. Neither party made any objection to the Tribunal before the tribunal lost its authority and became *functus officio*.
- 38) The August 10, 2020 letter from Ms. Squires fails to note any process taken by Canada to confirm that Canada's requested changes were made to the material posted on the PCA website. Indeed, it appears that Canada's changes were not made – but Canada took no action for over five years to check.
- 39) This is not to put the blame on the PCA. These things happen. But the point is the information in the video is now public record and has been in the public domain for over five years. Canada cannot put the “genie back in the bottle” after the information is already been public, especially for this length of time.
- 40) Yet, Canada blames everyone else for the public release of information. Canada assumes none of the responsibility for its failure to diligently check while it had the opportunity to do so. If this information – which as noted, the basic contents of which Canada did not even claim was confidential when it appeared in the *Mesa Power* post-hearing brief—was so confidential, Canada had just as much responsibility as the PCA to make sure the parties' agreement was met. Canada will argue that it had assumed the PCA would comply but Canada's own failure to ensure that means it has not come to this Tribunal completely blameless. It is transparent that Canada seeks to hide the relevant and material evidence that would not be available had Canada taken the most basic diligence on its posting in April 2015.

²⁰ August 10, 2020 letter from Heather Squires to the Tennant Tribunal demanding that the evidence in the public domain be suppressed from the public and ignored by the Tribunal, **C-253**; along with an email from Darian Bakelaar, Senior Paralegal, Canada, to the PCA demanding that the public no longer have access to the video from the Mesa Power NAFTA case, **R-027**.

- 41) But, again, it does not matter whose fault it was the fact is that the material was public for five years – available to anyone with a computer and access to the Internet for free and without even requesting it. Under no conceivable definition can such information ever be considered “confidential.”
- 42) Canada nevertheless raised its first objection to the material posted in April 2015 on August 10, 2020, in an email sent by a Canadian paralegal to the PCA – *more than five years after the material was posted on April 15, 2015.* ²¹
- 43) The Investor notes that pursuant to Canada’s request to the PCA of August 10, 2020 set out in Exhibit R-027 – the PCA took down the video site– affecting the source of the evidence before this Tribunal, and has now deprived the public of the continued access to video from the *Mesa Power* NAFTA hearing that the public had for over five years. Taking the website down in these circumstances only does more damage to the objectives and values of transparency which Canada hypocritically claims publicly to espouse – but which it actively opposes through its actions.
- 44) As noted, Canada had more than five years to review the postings on the PCA website. The website hosted the testimony of the witnesses before the Tribunal (for both disputing parties) in the *Mesa Power* arbitration, certain documents and slides presented at the hearing, and the opening and closing comments. All of this unredacted material has been available to the public, to the press, to other investors, and to the world for the last five years.
- 45) For its part, Canada does not, and cannot, allege any illegality in how the Investor obtained the video evidence. Nor does it dispute that that the information has been public for five years, nor does it explain its own lack of diligence to remove the material earlier.
- 46) The PCA gave Canada notice that the *Mesa Power* hearing video was being posted in April 2015. The disputing parties there, including Canada, had the opportunity to review the video at that time of its posting to check to determine if it had an objection to the release of confidential information. For whatever reason, Canada failed to do so, and one wonders if it

²¹ August 10, 2020 email from Darian Bakelaar, Senior Paralegal, Canada, to the PCA demanding that the public no longer have access to the video from the Mesa Power NAFTA case, **R-027**.

was so vital that this information is not revealed to the public, why Canada did nothing to notify the PCA of any issue. No matter what the reason, the truth remains that Canada did not object to the release of this video at the time, despite having had the specific opportunity to do so.

- 47) For its part, Tennant Energy was an outsider to the *Mesa Power* NAFTA arbitration. No one from Tennant Energy was present at the hearing. Tennant Energy was under no confidentiality obligation under the terms of the Mesa Power Confidentiality Order regarding the information freely available to all on the Internet. That Tennant Energy shares the same counsel as Mesa Power is irrelevant. Tennant Energy should not be prejudiced from utilizing critical, public evidence to prosecute its case simply because its counsel was part of a confidentiality order that they are not themselves accused of violating. Tennant Energy must be treated the same as any other member of the public who, indisputably, has had the ability and the right to examine this evidence for the last five years.
- 48) The evidence on the video is highly relevant and material to issues in this current arbitration, again, a fact that Canada does not dispute. The evidence addresses admissions of previously concealed actions by Ontario officials that directly harmed the Investor in an internationally wrongful manner. It contradicts arguments Canada raised in the Mesa Power arbitration and discloses highly relevant information going to matters at issue in the current arbitration. It forms an integral and essential part of the Claimant's evidence. There is no reason to prevent this evidence from being admitted.
- 49) Canada has not made any suggestion that the unknown person at the PCA who released the information to the public at the PCA was related to Tennant, the party seeking to rely upon it. Again, this information was available on the Internet for five years. There can be no way that this relevant and material information could be confidential at the time that the Investor filed it in this arbitration.

CANADA IS RESPONSIBLE FOR THE PUBLICATION OF THE MESA POWER VIDEO

- 50) Canada has not disguised its umbrage at the events resulting in the publication of the damning admissions of its officials at the *Mesa Power* NAFTA hearing. However, what

Canada has failed to disclose to the Tribunal was that Canada itself was actively engaged in the public dissemination of the uncensored Mesa Power hearing videos.

- 51) Indeed, there are two sources for release of the full *Mesa Power* hearing videos. The first source was the PCA website, as referenced by the witness statements of Mr. Pennie filed with the Memorial (CWS-1) and the subsequent witness statement of Ms. Taiyanides, filed with this submission. (CWS-2).
- 52) However, while Canada has blamed everyone else for the disclosure of the videos, Canada was actively publishing the unexpurgated *Mesa Power* hearing video to the public as part of Canada's transparency policy. Canada posted the full uncensored *Mesa Power* videos on a link from Canada's own NAFTA website.
- 53) On Canada's *Mesa Power* website, Canada says that "Legal documents related to this case can be viewed at the website of the Permanent Court of Arbitration."²² Canada then links its Government of Canada website directly to the pages of the PCA. The hyperlink in Canada's website goes directly to the PCA's *Mesa Power* posting page at <https://pca-cpa.org/en/cases/51/>.²³ This is the exact same location where the PCA previously posted the links to the *Mesa Power* Hearing video.
- 54) Canada notes on its NAFTA Chapter 11 landing page that the information that it provides to the public on its website is "**provided for transparency purposes**". Canada states:

The information on this website is provided for transparency purposes only and is without prejudice to Canada's legal position on these cases.²⁴

²² Government of Canada NAFTA Website, Mesa Power page accessed on August 18, 2020 at <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/mesa.aspx?lang=eng>. A copy of Canada's landing page is set out at C-258. The link to the PCA is on page 2.

²³ On Canada's Mesa Power website, it states Legal documents related to this case can be viewed at the website of the [Permanent Court of Arbitration](#). The hyperlink in Canada's website goes directly to the PCA's Mesa Power posting page at <https://pca-cpa.org/en/cases/51/>.

²⁴ Canada NAFTA Chapter 11 Cases filed against the Government of Canada - Government of Canada NAFTA Website accessed on August 18, 2020 at <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng>. A copy of Canada's landing page setting out its policy of transparency is set out at C-257.

- 55) Thus, Canada has taken actions to publicize and widely disseminate the uncensored video from the *Mesa Power* NAFTA hearing. It would be natural to go to Canada's NAFTA website to research matters related to the *Mesa Power v Canada* NAFTA claim. On Canada's *Mesa Power* website, Canada actively promoted the link to the PCA website. In giving this link "for transparency purposes", Canada was publishing the uncensored *Mesa Power* hearing videos on Canada's own website.
- 56) Yet Canada castigates Tennant Energy's reliance on the public domain information before this Tribunal, and questions the role of some of Tennant Energy's lawyers in receiving this public information from public websites, while not admitting its own significant role in disseminating that very same information to the public.
- 57) Canada has been actively disseminating the full NAFTA hearing information from the Mesa Power NAFTA case through its incorporation of the PCA link into Canada's own website. That is and of itself is grounds for a denial of Canada's unfounded motion.
- 58) There can be no greater confirmation that this information from the *Mesa Power* hearing has entered the public domain or that Canada has brought a costly and needless motion to this Tribunal.

THE EVIDENCE IS PUBLIC - THE CAT IS OUT OF THE BAG

- 59) The Tribunal should reject Canada's motion in its entirety for no other reason that the information from the hearing video at issue is in the public domain. The numerous admissions by Ontario's officials of wrongdoing can no longer be concealed from the Tribunal or the public. The "cat is out of the bag."
- 60) Notably, the admissions related to the following:
 - a) International Power Canada, a Canadian entity owned by a high-ranking Liberal party member, had high-powered assistance from government officials to obtain FIT Contracts by unfairly taking over transmission access that was properly allocated and available to Skyway 127.

- b) NextEra Energy, another applicant in the Bruce to Milton Transmission Project of the FIT Program, had been given advanced access to information that would help them to corruptly advance themselves in the Program compared to the other FIT Proponents.
 - c) The reasons why Pattern Energy (the joint venture partner of the Korean Consortium) was trying to lockup wind developments from the Windrush Energy, such as Skyway 127 and Skyway 9 as part of a predatory practice where the Korean Consortium could use inside information and governmental assistance not available to others to manipulate the Feed-in Tariff process;
 - d) The decision by Ontario officials not to make transmission available in the Bruce Region but to make more power available in the West of London region to give extraordinary business access to preferred friends of the Liberal Government.
- 61) The Tribunal should reject Canada's motion because it fails to meet the requirement for an interim measure.
- 62) In addition, there are other reasons why this Tribunal should reject Canada's motion:
- a) The evidence is relevant and material to the most essential issues in this arbitration.
 - b) The admissions under oath by senior Canadian officials in charge of the government measure at issue in this arbitration provide the best evidence about the internationally wrongful government conduct at issue in this arbitration.
 - c) Not only is the evidence completely lawful for submission given that it comes from the public domain, but the Investor, Tennant Energy, did not engage in any wrongful actions to obtain this information. The Investor, Tennant Energy, is under no obligation under the terms of the Mesa Power Confidentiality Order. Neither is the Tennant Energy NAFTA claim Tribunal.
- 63) The admissions of wrongdoing are shocking – but nothing in them is privileged. All the statements came from admissions from government officials who explained systemic impropriety, favoritism, and the abusive manipulation of the FIT Rules. Canada never asserted privilege over these statements as they were admissions made in the course of cross-

examination. Further the statements could not be confidential given their public release, including with the involvement of Canada in their public release. The evidence is relevant and material. Canada can no longer shield the light of public scrutiny from these admissions of shameful action from the review of this Tribunal.

- 64) The seat of this arbitration (and thus the *lex arbitrii*) is Washington, DC. As discussed below, the *lex arbitrii* has no mandatory or other provision that would restrict the admission or the consideration of this evidence. The evidence from the internet is perfectly admissible under the law of the place of arbitration.
- 65) The evidence is also fully admissible under the government UNCITRAL Arbitration Rules. Given its materiality, the evidence should be admitted, notwithstanding Canada's objections. In considering materiality, if there is little other evidence going to a particular point, the evidence is more likely to be admitted.²⁵ The documents in question are admissions under oath relating to the administration of the Ontario FIT Program at the time when the harm occurring to the Skyway 127 took place. It is the best evidence. The evidence are admissions from senior officials in charge of the FIT program, and currently, these admissions are the only evidence considering the widespread despoliation of evidence in which Ontario has engaged.
- 66) To preclude the consideration of this evidence would be to prevent Tennent Energy from fully presenting its case and to risk an unreasonable conclusion – not based on the best evidence. The need to preserve the integrity of the proceedings should outweigh confidentiality concerns.
- 67) There is otherwise no implied duty of confidentiality on which Canada may rely. The information came to Tennant Energy lawfully and without confidentiality.

²⁵ Cherie Blair and Ema V. Gojkovic 'WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence' *ICSID Review – Foreign Investment Law Journal*, vol. 33, issue 1, 2018 pp.235-259 **CLA-248**; *Methanex Corporation v United States, Final Award on Jurisdiction and Merits*, NAFTA Tribunal, 3 August 2005 at Part II Chapter I, ¶ 54, **CLA-158**.

- 68) The Tribunal should admit the exhibits because the confidentiality provisions in the Tennant Confidentiality Order do not render them inadmissible.

THE MESA POWER CONFIDENTIALITY ORDER DOES NOT APPLY

- 69) Under Art 8 of the *Mesa Power Confidentiality Order*, no party or participant in the *Mesa Power* arbitration may publish, disclose, or communicate any confidential or restricted-access information relating to the *Mesa Power* arbitration.²⁶ That obligation extends to the disputing parties to the *Mesa Power* arbitration and the arbitral tribunal. By contract, this applies to the secretary of the arbitral tribunal, and any experts and witnesses involved in the proceedings. The order does not restrict a party or a participant from publishing material that is not confidential or that has been made part of the public record.
- 70) Based on the relief that Canada seeks, it appears that Canada misunderstands the limits upon arbitration orders. The *Mesa Power Confidentiality Order* is an arbitral order. As such, its force and scope only apply to those before the *Mesa Power* Tribunal. An arbitration tribunal order cannot apply to third parties who have not consented to the jurisdiction of the Tribunal.²⁷ This limitation of scope is a fundamental difference between an order arising from an arbitration tribunal and an order of a court. There are no governing court orders regarding confidentiality over the *Mesa Power* NAFTA hearing video.
- 71) The *Mesa Power Confidentiality Order* cannot bind the *Tennant Energy* Tribunal. The *Mesa Power Confidentiality Order* does not preclude the *Tennant Energy* Tribunal from admitting the evidence because Tennant Energy LLC was not a party to the *Mesa Power* arbitration.²⁸ Tennant Energy was free to discuss any evidence obtained from the public domain with its

²⁶ *Mesa Power Group, LLC v. Government of Canada* (PCA Case No. 2012-17), Confidentiality Order, 21 November 2012, **C-250**.

²⁷ Gary Born writes “First, any confidentiality provisions in the parties’ arbitration agreement are binding only on the parties themselves, and not on third parties (including witnesses)”. Gary Born *International Commercial Arbitration* 2nd ed, Kluwer Law International, 2014 at page 2789, **CLA-244**.

²⁸ Gary Born *International Commercial Arbitration* 2nd ed, Kluwer Law International, 2014, ¶ 2789, **CLA-244**; Ileana M. Smeureanu ‘Chapter 4: Actors Bound by the Duty to Maintain Confidentiality’ in Ileana M. Smeureanu and Julian D. M. Lew *Confidentiality in International Commercial Arbitration*, International Arbitration Law Library, 2011, ¶¶134, 135, **CLA-252**.

legal counsel and the Tribunal. Nothing in the Mesa Power Confidentiality Order had authority to restrict Tennant Energy's ability to review this lawful evidence.

- 72) However, the fact that the evidence was obtained from the public domain and through proper conduct on the part of Tennant Energy identifies that the focus on admissibility is a question under the procedural rules governing the *Tennant Energy* arbitration and not the *Mesa Power* arbitration.
- 73) Tennant could not have any duty of confidentiality. The information arises from the public domain. The release of the information did not arise from illegality on the part of Tennant Energy.
- 74) In the absence of a Tribunal finding of a breach of any express duty of confidentiality on the part of Tennant Energy LLC, there can be no automatically applicable doctrine of privilege or confidentiality in international arbitration, which would exclude the admission of the documents identified as Exhibits C-107, C-201, C-204, C-205, C-206, C-208 and C-224 to C-243 inclusive.

THE IBA GUIDELINES ALLOW FOR ADMISSION OF THE EVIDENCE

- 75) NAFTA Article 1120(2) provides that the Tribunal oversees the procedure of this arbitration subject to the arbitration rules selected for the claim as modified by the NAFTA. In this arbitration, the 1976 *UNCITRAL Arbitration Rules* apply. The 1976 *UNCITRAL Arbitration Rules* provide no guidance on evidence other than in Article 25(6), which provides that "The arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence offered."
- 76) In *Procedural Order No. 1*, the Tribunal determined that it would apply the 2010 *IBA Rules on the Taking of Evidence (IBA Rules)* as a guide to evidence issues.²⁹

²⁹ The Tribunal designated the 2010 edition of the *IBA Rules on the Taking of Evidence* as a guideline for dealing with matters of evidence in Article 8.1 of Procedural Order No. 1. It also references Article 7.4.6 of Procedural Order No. 1 on document production and as a reference for claims of privilege in 7.6 of the same procedural order.

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- 77) Article 9.1 of the *IBA Rules* says that "The Arbitral Tribunal shall determine the admissibility, relevance, materiality, and weight of evidence." (In this respect Article 9.1 is similar to the powers conveyed to this Tribunal under Article 25(6) of the UNCITRAL Arbitration Rules).
- 78) Art 9.2 of the *IBA Rules* sets out the limited grounds upon which the Tribunal may exclude evidence.

The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:

(a) lack of sufficient relevance to the case or materiality to its outcome.

(b) legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.

(c) unreasonable burden to produce the requested evidence.

(d) loss or destruction of the Document that has been shown with reasonable likelihood to have occurred.

(e) grounds of commercial or technical confidentiality that the Arbitral Tribunal determines to be compelling.

(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling; or

(g) considerations of procedural economy, proportionality, fairness, or equality of the Parties that the Arbitral Tribunal determines to be compelling.

- 79) None of the grounds contained in Article 9.2 of the *IBA Rules* are applicable.
- a) The evidence at issue is highly relevant and material.
- b) There is no legal impediment or privilege that applies to the information submitted by Tennent Energy.

- c) There is no burden associated with the production as it was entirely on the PCA website (and indirectly on Canada's website) and it has been submitted from the PCA website as exhibits in this arbitration.
 - d) The evidence was available and now has been removed at the request of Canada – meaning that the non-admission of the evidence at this point would remove it as a source of evidence.
 - e) There is no business or technical confidential information at issue given that it has been public for five years and made available by Canada on its website.
 - f) The evidence does not have political or institutional sensitivity and in any event, it has been made public already.
 - g) The ground of procedural economy would favor the admission of this evidence. Further the impact upon the fairness to the Investor and the due process of this arbitration would be greatly diminished by the failure to admit this relevant and material evidence.
- 80) The only issue is that the information that was once confidential is no longer confidential. Canada says that this tribunal should “roll back the clock” and pretend that the public never saw the information posted to the world for five years. Giving effect to Canada's request would be a “travesty of justice.” Prof. George Abi-Saab wrote about the absurd effects of such a decision in his separate award in the *ConnocoPhillips* case. He wrote:

This Tribunal had an obligation to evaluate the best available evidence to determine the facts in the dispute before it. To ignore the “existence of relevance of such glaring evidence” would be to send the Tribunal over into an “epistemological” abyss and close itself off to: *‘a subjective make believe world of its creation; a virtual reality in order to fend off probable objective reality; a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration but of the very idea of adjudication.’*³⁰

³⁰ *ConnocoPhillips*, Dissenting Opinion of Georges Abi-Saab, at ¶¶66-67, **CLA-254** (emphasis added).

- 81) Canada's argument is not supported by the decisions of other international tribunals. If granted, Canada's motion would result in a grave injustice to the ability of Tennant Energy to have its case heard. In any event, the considerations of procedural economy, proportionality fairness, and equality of the parties all favor the consideration of the evidence rather than its exclusion.

ARBITRATION JURISPRUDENCE SUPPORTS ADMISSION OF THE EVIDENCE

- 82) There is no generally recognized doctrine of "arbitration privilege" in international commercial arbitration, and regardless, privilege is typically treated as distinct from confidentiality. There are cases where international bodies have had to consider admissibility disputes.
- 83) In *Caratube v Kazakhstan*, Caratube sought to produce documents that had been made publicly available on the Internet because of a specific hacking of Kazakhstan's Government I.T. systems. The hackers uploaded around 60,000 documents onto a website known as 'KazakhLeaks'.³¹ Caratube was not involved in the hack. Caratube introduced eleven documents from KazakhLeaks, including at least four documents that Kazakhstan alleged were covered by legal privilege. Kazakhstan objected to the submission of all the leaked documents, which they referred to as 'stolen documents'. The Respondent requested that the Tribunal declare all the 'stolen documents' inadmissible in the arbitration.³²
- 84) The *Caratube* tribunal allowed the admission of all non-privileged leaked documents that had been released online by hackers. These approaches to confidentiality and privilege

³¹ *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. The Republic of Kazakhstan* (ICSID Case No. ARB/13/13), Award, 27 September 2017, at ¶150, **CLA-245**. While the Decision itself is not public, it was contemporaneously reported in detail in *Global Arbitration Review* and later summarized by the tribunal in the Award. *Caratube International Oil Company LLP v The Republic of Kazakhstan, Award*, ICSID Case No. ARB/08/12, 5 June 2012. Decision on the Claimants Request for the Production of Leaked Documents (27 July 2015) – unpublished – discussed in Alison Ross “Tribunal Rules on Admissibility of Hacked Kazakh Emails” *Global Arbitration Review* (GAR) (22 September 2015) <http://globalarbitrationreview.com/news/article/34166/tribunal-rules-admissibility-hacked-kazakh-emails/>, **CLA-255**.

³² *Caratube International Oil Company LLP and Mr. Devincci Salah Hourani v. The Republic of Kazakhstan* (ICSID Case No. ARB/13/13), Award, 27 September 2017, at ¶152, **CLA-245**. Also see Cherie Blair and Ema V. Gojkovic ‘WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence’ *ICSID Review – Foreign Investment Law Journal*, vol. 33, issue 1, 2018, p. 255, **CLA-248**.

recognized the parties' autonomy in arbitration to determine the existence and scope of their obligations.³³

85) The *Caratube* Tribunal noted that the plaintiffs alleged the documents were material and relevant to the dispute; and that the documents were now in the public domain.³⁴ Thus, the balance tipped in favor of admitting the documents.³⁵

86) Deciding in favor of admission of the non-privileged documents, the *Caratube* Tribunal concluded that the risk of an award that would be “artificial and factually wrong when considered in light of the publicly available information” outbalanced the need to protect against cybercrime and the potential unfairness that might arise from the admission of the evidence.

87) The *Caratube* Tribunal noted that the public knowledge of the evidence was important as to not admit the document would have the effect that the tribunal would be “placed in a sterile environment or a bubble detached from the real world and to ignore these documents or pretend they don't exist.”³⁶

88) The Tribunal noted that claimants' alleged involvement in the leak was not established or even alleged, and that the authenticity of the leaked documents could be challenged after they had been admitted.

89) On the other hand, the universal “sanctity” of the lawyer-client privilege, the fact that it had not been not waived as a result of the hacking, and the need to afford “utmost protection” to privileged documents, militated against admissibility of legally privileged leaked documents even though this created a “regrettable but inescapable and acceptable” risk of an ultimate decision “inconsistent with the privileged leaked documents in the public domain.” The tribunal further noted that disregarding legal privilege would require “rather extreme circumstances.”

³³ Alison Ross “Tribunal Rules on Admissibility of Hacked Kazakh Emails” GAR, 22 September 2015, **CLA-255**.

³⁴ Alison Ross “Tribunal Rules on Admissibility of Hacked Kazakh Emails” GAR, (22 September 2015), **CLA-255**.

³⁵ Alison Ross “Tribunal Rules on Admissibility of Hacked Kazakh Emails” GAR, (22 September 2015), **CLA-255**.

³⁶ Alison Ross “Tribunal Rules on Admissibility of Hacked Kazakh Emails” GAR, (22 September 2015), p.3, **CLA-255**.

- 90) The *Caratube* Tribunal placed special emphasis on the fact that once released, these documents were "lawfully available to the public."³⁷ In the view of the *Caratube* tribunal, this fact that the documents were public precluded them from being considered privileged information. In this vein, the tribunal held that it should not issue an award which would be factually wrong based on documents that were "widely, freely and lawfully available online."³⁸
- 91) Tribunals have taken restrictive approaches where there was evidence of the involvement of illegality on the party seeking to rely upon the evidence. In *Libananco v. Turkey*, Turkey's security services intercepted privileged communications between Libananco and its lawyers as part of a financial fraud investigation. Libananco objected to the production because it was involved the surreptitious collection of privileged information by Turkey – the party to the dispute. During the ICSID proceedings, Turkey obtained access to the claimant's materials as part of an alleged larger money-laundering investigation targeting many companies. According to the claimant, Turkey intercepted up to 2,000 privileged and confidential communications with its counsel, contacts, and potential witnesses, used in the preparation and development of the claimant's case. In light of the prejudice arising from the use of privileged communications about the arbitration between the attorney and its client, the Libananco sought to exclude the admission of the documents.³⁹ The Tribunal did not allow Turkey to admit this privileged attorney-client communication information that its security services improperly intercepted from a disputing party.⁴⁰ In *Methanex*, the NAFTA Tribunal excluded the admission of evidence obtained by private investigators in California that was obtained illegally.⁴¹
- 92) Methanex introduced into evidence multiple documents illegally copied by a third party upon Methanex's instructions, from private files in the garbage of one of the witnesses for the

³⁷ Alison Ross "Tribunal Rules on Admissibility of Hacked Kazakh Emails" GAR (22 September 2015), p.5, **CLA-255**.

³⁸ Alison Ross "Tribunal Rules on Admissibility of Hacked Kazakh Emails" GAR (22 September 2015), p. 5, **CLA-255**.

³⁹ *Libananco Holdings v. Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 23 June 2008, ¶¶ 73-74, **RLA-015**.

⁴⁰ *Libananco Holdings v. Turkey*, Decision on Preliminary Issues, 23 June 2008, at ¶74, **RLA-015**.

⁴¹ *Methanex Corporation v. United States, Final Award on Jurisdiction and Merits*, NAFTA Tribunal, 3 August 2005 at Part II Chapter I, ¶ 54, **CLA-158**.

United States. These documents included personal notes, private correspondence, materials expressly subject to legal professional privilege and a private address-book.⁴²

- 93) To obtain the evidence, a private investigator hired by Methanex committed “successive and multiple acts of trespass” into the private property where the offices of the witness were located to sift through dumpsters. Documents of interest were then forwarded in over a hundred shipments to Methanex.⁴³ The *Methanex* tribunal, referring to the general legal duty of good faith conduct, the respect of the equality of arms, the principles of ‘equal treatment’ and procedural fairness, ruled that introducing evidentiary materials obtained unlawfully by one party would be “wrong.”⁴⁴
- 94) The *Methanex* tribunal was deeply disturbed by the active participation of Methanex in the unlawful obtaining of the evidence brought before the tribunal. The *Methanex* Tribunal characterized Methanex’s actions to be unlawful, amounting to “acts of trespass” and there was “reckless indifference”⁴⁵ to obtain an “unfair advantage” in the arbitration proceedings.⁴⁶
- 95) To the *Methanex* Tribunal, the admission of the specific evidence procured by a party unlawfully would violate the “general duty of good faith” imposed not only under the UNCITRAL Arbitration Rules, but also as a general principle, without which international arbitration “cannot operate.”⁴⁷ Methanex’s conduct was furthermore described by the Tribunal as offending “basic principles of justice and fairness required of all parties in every international arbitration.”⁴⁸ In coming to this conclusion, the Tribunal also noted that the evidence was not material and that this determination also factored into its conclusion.⁴⁹

⁴² *Methanex* - Part II – Chapter I, ¶14, **CLA-158**.

⁴³ *Methanex* - Part II – Chapter I, ¶¶140, 59, **CLA-158**.

⁴⁴ *Methanex* - Part II – Chapter I, ¶154, **CLA-158**.

⁴⁵ *Methanex* - Part II – Chapter I, ¶155, **CLA-158**.

⁴⁶ *Methanex* - Part II – Chapter I, ¶159, **CLA-158**.

⁴⁷ *Methanex* - Part II – Chapter I, at Part II- Chapter I, ¶158, **CLA-158**.

⁴⁸ *Methanex* - Part II – Chapter I, ¶143, **CLA-158**.

⁴⁹ *Methanex* - Part II – Chapter I, ¶ 56, **CLA-158**.

- 96) In both *Libananco v Turkey* and *Methanex v USA*, the determining factor for non-admission was the indisputable involvement on the party seeking to rely upon the evidence in the illegal obtaining of that evidence.
- 97) In *Yukos*,⁵⁰ the Energy Charter Tribunal relied extensively on evidence arising from US State Department confidential diplomatic cables published by WikiLeaks. These documents contained various communications between the US Embassy and PricewaterhouseCoopers (PwC), an auditor to Yukos. At the arbitration, Yukos depended on WikiLeaks cables to prove that the Russian Federation put improper pressure on PwC to the detriment of Yukos. PwC pulled its audition opinion, and Yukos claimed that this was based on improper measures from the Russian Federation.⁵¹
- 98) The *Yukos* Tribunal allowed the admission of the WikiLeaks evidence and relied upon it significantly in coming to its determinations.⁵² Cherie Blair examined the use of illegal evidence in the Yukos case. She noted:

*While the Yukos awards do not offer an explicit analysis of admissibility, the Tribunal's conclusion in Hulley Enterprises implied that unlawfully obtained evidence is admissible before and may be relied on by investment tribunals.*⁵³

⁵⁰ Yukos majority shareholders brought claims before the Permanent Court of Arbitration (PCA) under the Energy Charter Treaty (ECT) through a variety of different claims. See *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* (PCA Case No. AA 226), Final Award, 18 July 2014 (*Hulley Enterprises*), **CLA-257**, *Yukos Universal Limited (Isle of Man) v. The Russian Federation* (PCA Case No AA 227), Final Award, 18 July 2014 and *Veteran Petroleum Limited (Cyprus) v. The Russian Federation* (PCA Case No AA 228), Final Award, 18 July 2014. The minority shareholders also filed two arbitrations before the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) under bilateral investment treaties: *RosInvestCo UK Ltd. v. The Russian Federation* (SCC Case No. 079-2005), Russian Federation-United Kingdom BIT, Final Award, 12 September 2010, **CLA-247**, and *Quasar de Valores SICAV SA, Orgor de Valores SICAV SA, GBI 9000 SICAV SA v. The Russian Federation* (SCC No 24/2007), Final Award 20 July 2012. Only those cases relevant to the current motion have been added as exhibits to the record.

⁵¹ *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No AA 226, Final Award (18 July 2014) (*Hulley Enterprises*), at ¶1218, **CLA-257**.

⁵² *Hulley Enterprises* at ¶¶1218 to 1223, **CLA-257**.

⁵³ Cherie Blair and Ema V. Gojkovic 'WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence' *ICSID Review – Foreign Investment Law Journal*, vol. 33, issue 1, 2018 pp.235-259, p. 248, **CLA-248**.

- 99) The Russian Federation disagreed with the purported reasons behind the auditor's withdrawal,⁵⁴ but the Hulley award does not evidence that the Russian Federation disputed the admissibility of the leaked U.S. diplomatic cables in the arbitration. Neither did the tribunal make any inquiry into the question of admissibility of these documents. The Tribunal referring to the leaked diplomatic cables at least 20 times throughout the Final Awards.⁵⁵
- 100) In *ConocoPhillips v Venezuela*,⁵⁶ the former holders of oil development rights successfully brought an expropriation claim against Venezuela. In its finding of expropriation, the Tribunal concluded that Venezuela had breached its obligation to negotiate in good faith. Venezuela brought a motion for the Tribunal to reconsider the determination about the absence of good faith based on evidence of Venezuelan efforts arising from the illegal release of U.S. State Department diplomatic cables through WikiLeaks.⁵⁷ The Tribunal admitted the WikiLeaks information, but it did not reconsider the issue based on the new information.
- 101) As noted, in a strongly worded dissenting opinion, Arbitrator Prof Georges Abi-Saab expressed the need for the Tribunal to admit and consider the unlawfully obtained evidence.⁵⁸ Prof. Abi-Saab was particularly concerned with the need for the Tribunal to consider material and relevant evidence on issues that the Tribunal had to rule upon. He wrote:

"In these circumstances, I don't think that any self-respecting Tribunal that takes seriously its overriding legal and moral task of seeking the truth and dispensing justice according to law on that

⁵⁴ *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* (PCA Case No. AA 226), Final Award, 18 July 2014, ¶1187, **CLA-257**.

⁵⁵ *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* (PCA Case No. AA 226), Final Award, 18 July 2014, ¶1223, **CLA-257**.

⁵⁶ *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v. Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/30), Decision on Jurisdiction and the Merits, 3 September 2013, **CLA-258**.

⁵⁷ *ConocoPhillips Petrozuata BV, ConocoPhillips Hamaca BV and ConocoPhillips Gulf of Paria BV v. Bolivarian Republic of Venezuela* (ICSID Case No ARB/07/30), Decision on Respondent's Request for Reconsideration, 10 March 2014, ¶14, **CLA-259**.

⁵⁸ *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Dissenting Opinion of Georges Abi-Saab, March 10, 2014, **CLA-254**.

basis, can pass over such evidence, close its blinkers and proceed to build on its now severely contestable findings, ignoring the existence and the relevance of such glaring evidence. It would be shutting itself off by an epistemic closure into a subjective make believe world of its creation; a virtual reality in order to fend off probable objective reality; a legal comedy of errors on the theatre of the absurd, not to say travesty of justice, that makes mockery not only of ICSID arbitration but of the very idea of adjudication.”⁵⁹

102) Two appeals from arbitrations in connection with the FIFA (the international football federation) have expressly allowed unlawfully collected evidence to be considered before the Court for Arbitration for Sport (CAS).

- a) In *Amos Adamu v FIFA*,⁶⁰ Mr. Adamu was a former FIFA Executive Committee member from Nigeria who had been banned for three years from football activity.
- b) In *Ahongalu Fusimalohi v FIFA* also had to consider similar evidence.⁶¹ Mr. Fusimalohi, the former General Secretary of the Tonga Football Association, was appealing his two-year ban.

103) Both cases were based on the publication of covert recordings published in the *Sunday Times* newspaper of meetings between undercover journalists and these senior FIFA officials. According to the CAS, it was agreed that the recordings were illegal. FIFA used illegal recordings as evidence for the activity bans.

104) The CAS concluded that illegally obtained information was admissible, finding

Given the general duties of good faith and respect for the arbitral process, the CAS could exclude evidence where one party had "cheat[ed]" the other party and illegally obtained the evidence.⁶²

105) But the CAS distinguished its approach from the more restrictive approach in *Libananco v Turkey* and *Methanex v USA* fundamentally because the wrongful conduct regarding the

⁵⁹ *ConocoPhillips*, Dissenting Opinion of Georges Abi-Saab, at ¶¶66-67, **CLA-254**.

⁶⁰ *Amos Adamu v. FIFA* (CAS 2011/A2426), Arbitral Award, 24 February 2012, ¶169, **CLA-260**.

⁶¹ *Ahongalu Fusimalohi v. FIFA* (CAS 2011/A/2425), Arbitral Award, 8 March 2012, ¶ 82, **CLA-261**.

⁶² *Ahongalu Fusimalohi v. FIFA* (CAS 2011/A/2425), Arbitral Award, 8 March 2012, ¶ 73, **CLA-261**. *Amos Adamu v. FIFA* (CAS 2011/A2426), Arbitral Award, 24 February 2012, ¶79, **CLA-260**.

obtaining of the evidence was not done by the party relying on it. In this regard, FIFA itself did not act illegally and neither FIFA nor anyone close to FIFA prompted or supported the unlawful media investigation. Because FIFA followed a process that transparency solicited the recordings from the Sunday Times after the publication of the news article disclosed important parts of the contact, FIFA did not violate the "duty of good faith and respect for the arbitral process incumbent on all who participate in international arbitration."⁶³ The CAS concluded that FIFA was simply confronted with evidence derived from a fait accompli.⁶⁴

- 106) In relation to the current Tennant claim, Canada is also simply confronted with evidence derived from a fait accompli. There can be no question of good faith on the part of the Tennant Energy. Tennant Energy took no role in making the evidence public. It simply found the highly relevant and material evidence on a public website. This was evidence always known to Canada since the initiation of the Tennant arbitration. There can be no question that the actions were taken in good faith by Tennant or that Canada is unfairly prejudiced by the release of this information.

INTERNATIONAL COURT OF JUSTICE CONSIDERATIONS

- 107) The decisions of the International Court of Justice (ICJ) provide assistance.
- 108) In the *Corfu Channel* Case, the ICJ did not exclude evidence obtained by the United Kingdom through an act that the Court itself had characterized as a violation of international law.⁶⁵ Following a 1946 naval mine incident affecting two Royal Navy ships in Albanian territorial waters, the United Kingdom conducted a mine-sweeping operation in the Corfu Channel over the protests of Albania. The United Kingdom presented reports on the mine-sweeping operation, and photographs of the collected mines as evidence of Albania's violations of international law, claiming compensation. While the ICJ deemed the United Kingdom's

⁶³ *Ahongalu Fusimalohi v. FIFA* (CAS 2011/A/2425), Arbitral Award, 8 March 2012, ¶74, **CLA-261**. *Amos Adamu v. FIFA* (CAS 2011/A2426), Arbitral Award, 24 February 2012, ¶70, **CLA-260**.

⁶⁴ *Ahongalu Fusimalohi v. FIFA* (CAS 2011/A/2425), Arbitral Award, 8 March 2012, ¶ 86, **CLA-261**. *Amos Adamu v. FIFA* (CAS 2011/A2426), Arbitral Award, 24 February 2012, ¶82, **CLA-260**.

⁶⁵ *Corfu Channel Case (United Kingdom v. Albania)*, On the Merits, International Court of Justice, 9 April 1949, ¶4, **CLA-262**.

breach of Albanian sovereignty during the mine-sweeping as a violation of international law, the ICJ did not expressly rule on the admissibility of the collected mines (which were submitted as evidence to the court) despite the well-settled principle that no one is allowed to take advantage of his own wrongdoing. (*ex turpi causa non oritur actio*).

- 109) The *Corfu Channel* Case has been widely regarded as confirmation that evidence unlawfully obtained by a party tendering the evidence may be admissible and moreover may be relied upon before the ICJ.⁶⁶
- 110) In the *Questions Relating to the Seizure and Detention of Certain Documents and Data* case⁶⁷ (Timor-Leste v Australia), an issue arose from a dispute between Timor-Leste and Australia arising out of negotiations over the Timor Sea Treaty.
- 111) Australian government intelligence services illegally planted listening devices in the cabinet office of Timor-Leste to gain an advantage in the treaty negotiations. Timor-Leste became aware of this surveillance operation thanks to a whistleblower, and initiated arbitration proceedings before the PCA to terminate the treaty, just months after acceding to it.
- 112) During the arbitration, Australian authorities organized a raid and the seizure of documents held in the Australian offices of Timor-Leste's counsel, purportedly on national security interests. Among the documents seized were privileged exchanges between Timor-Leste's officials and legal counsel on the strategy in the arbitration proceedings.
- 113) Timor-Leste promptly initiated proceedings against Australia at the ICJ, requesting a variety of relief, including return of the seized documents and, a provisional measure, that illegally taken documents be sealed and placed in custody with the ICJ.⁶⁸
- 114) The ICJ ordered that the unlawful documents be sealed until further ICJ decision as they contained sensitive and confidential information relating to the pending PCA arbitration proceedings, and the disclosure of the documents might be disadvantageous to Timor-

⁶⁶ Rüdiger Wolfrum & Mirka Möldner, "International Courts and Tribunals, Evidence", in *Max Planck Encyclopedia of Public International Law*, 2013, ¶160, **CLA-263**.

⁶⁷ Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Order, International Court of Justice, March 3, 2014 ("Timor-Leste Order"), **CLA-264**.

⁶⁸ Timor-Leste Order at ¶¶4-5, **CLA-264**.

Leste.⁶⁹ Furthermore, Australia was ordered not to further interfere in whatever way in Timor-Leste's communications with its legal advisors.⁷⁰

THERE IS NO CONFIDENTIALITY OBLIGATION OWED BY TENNANT

- 115) Gary Born notes that "any confidentiality provisions in the parties' arbitration agreement are binding only on the parties themselves, and not on third parties (including witnesses)." ⁷¹ Tennant was not a party to the *Mesa Power* Arbitration claim, and thus Tennant was not a party to the Confidentiality Agreement in the *Mesa Power* case. Some, but not all, of the law firms representing Tennant were counsel for Mesa Power in that arbitration. One of the experts representing Tennant Energy was an expert on the *Mesa Power* arbitration and attended that hearing.
- 116) The question of confidentiality arising from persons involved in an arbitration whose parties were not was considered by one tribunal. In *Enron Creditors Recovery Corp. v. Argentine Republic*, the admission of a witness's testimony for the claimant was challenged by Argentina as violating his confidentiality obligations owed towards Respondent's agency, as well as the expert's ethical duties of non-disclosure.
- 117) Years before the current dispute arose, Patricio Perkins, the witness, was the executive director of the Gas del Estado SAA Argentine Privatization Committee involved in an ICSID arbitration. After the dispute arose, the witness gave a written statement in favor of the licensee in the privatization process regarding the intention of the Privatization Committee. Mr. Perkins testified on the same subject matter in two other cases. Argentina opposed the admission of the witness statement in the Enron arbitration as being contrary to his duties under the Code of Professional Ethics in Surveying, Architecture, and

⁶⁹ Timor-Leste Order, at ¶51, **CLA-264**.

⁷⁰ Timor-Leste Order, at ¶52, **CLA-264**.

⁷¹ Gary Born writes "First, any confidentiality provisions in the parties' arbitration agreement are binding only on the parties themselves, and not on third parties (including witnesses)". Gary Born *International Commercial Arbitration* 2nd ed, Kluwer Law International, 2014 at page 2789, **CLA-244**.

Engineering and infringed a confidentiality clause between the witness' s company and a government-owned company.⁷²

118) Enron argued that Argentina was not the proper actor to seek enforcement of the confidentiality undertaking between the two companies. The confidentiality and professional duties were owed to the specific entity subject to privatization – not to the parties in that current arbitration.⁷³

119) The ICSID tribunal supported the claimant's position and refused to make an order. The communication from the tribunal suggesting that the ICSID tribunal lacked jurisdiction over the contract between the witness (or his company) and the government-owned company.

*"[T]he question concerning Mr. Perkins' eventual obligations [of confidentiality] with the Republic of Argentina is a matter that can only be dealt within the context of the contract between Mr. Perkins and the Argentine Republic or its agencies and not before this Tribunal."*⁷⁴

120) Consequently, the witness statement of Mr. Perkins was admitted into evidence.

121) At the annulment stage, the ICSID ad hoc Committee reviewed this issue and confirmed that the Tribunal had no jurisdiction to determine whether the witness breached any confidentiality obligation under an agreement with a nonparty to the arbitration.⁷⁵

122) Here, the point is largely moot because to the extent that Canada believes that the material in question is actually confidential then Canada itself violated the *Mesa Power* Confidentiality

⁷² *Enron Creditors Recovery Corp. (formerly Enron Corporation) & Ponderosa Assets LP v. The Argentine Republic* (ICSID Case No. ARB/01/3) (Annulment Proceeding), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, ¶156, **CLA-246**.

⁷³ *Enron Creditors Recovery Corp. (formerly Enron Corporation) & Ponderosa Assets LP v. The Argentine Republic* (ICSID Case No. ARB/01/3) (Annulment Proceeding), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, ¶160, **CLA-246**.

⁷⁴ *Enron Creditors Recovery Corp. (formerly Enron Corporation) & Ponderosa Assets LP v. The Argentine Republic* (ICSID Case No. ARB/01/3) (Annulment Proceeding), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, **CLA-246**. Paragraph 166 also refers to the Tribunal decision and a procedural order on this topic.

⁷⁵ *Enron Creditors Recovery Corp. (formerly Enron Corporation) & Ponderosa Assets LP v. The Argentine Republic* (ICSID Case No. ARB/01/3) (Annulment Proceeding), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, ¶¶169 – 179, **CLA-246**.

Order by linking its own website to the PCA website and thereby disseminating the uncensored *Mesa Power* NAFTA hearing videos in question.

- 123) Of course, Canada will say that all Canada was doing was making public what the PCA had published. Yet, that is all that Tennant, a non-party to the *Mesa Power* arbitration is doing. Canada's position here is completely untenable and its failure to inform the Tribunal that Canada made the videos public is troubling, to say the least.

STRONG REASONS TO ADMIT THE EVIDENCE?

- 124) If the Tribunal has concerns about the confidential nature of the documents, despite that Canada itself made the documents public, the Tribunal still should admit the documents in its discretion.
- 125) First, the Tribunal must consider the party's right to present its case.⁷⁶ This is a fundamental requirement under the UNCITRAL Arbitration Rules, NAFTA Article 1115, and the UNCITRAL *Model Law on International Commercial Arbitration*.⁷⁷ While considering this point, the Tribunal should bear in mind that any defects in evidence can be accounted for in consideration of credibility, materiality, and weight.⁷⁸ The admission of this evidence does not restrict Canada from having the opportunity to comment on and clarify the evidence when the Tribunal considers its weight, relevance, and materiality.
- 126) A second principle is evenhandedness. Parties should refrain from relying on documents not available to both sides. In this case, the documents were available on a public website available to both disputing parties (and in fact republished by a party) and based on evidence

⁷⁶ Article 15 of the (1976) UNCITRAL Arbitration Rules, **CLA-249**.

⁷⁷ Article 18 of the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law") states "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case," **CLA-251**.

⁷⁸ Gary Born notes that there is a great deal of discretion available to Tribunals which is generally exercised towards the admission of all forms of evidence. Gary Born *International Commercial Arbitration* 2nd ed, Kluwer Law International, 2014, Chapter 15, at pages 2311 - 2312, **CLA-256**.

that had been available to the Respondent for five full years before the Investor became aware of it.⁷⁹

- 127) Transparency enhances the consistency and legitimacy of arbitral awards, promotes fairness, equity, and due process, and facilitates the overall development of international commercial arbitration law.

II. TENNANT SHOULD BE ENTITLED TO SUBMIT THE EVIDENCE DESPITE OBJECTIONS

- 128) The Tribunal has a wide discretion to admit evidence, even evidence obtained illegally (this evidence clearly is not) is not automatically inadmissible.⁸⁰ In the absence of any supporting evidence from Canada as to any purported illegality, the Tribunal should admit the evidence because there is no evidence of any illegality on the part of Tennant, and public interest favors that outcome.

THE LAW OF THE PLACE OF ARBITRATION ALLOWS THE EVIDENCE

- 129) The place of arbitration is Washington D.C. The courts in the U.S., where this arbitration is seated, have addressed this issue many times- when a party belatedly comes to the governing tribunal to complain that some information, long public, should be confidential. Those courts, with rare exceptions, hold that once the information is made available to the public, that information is no longer confidential.

⁷⁹ See the discussion of “equality of arms” in *Methanex* at Part II Chapter I, ¶ 54, **CLA-158**. Equality of arms would apply where one party has special investigative powers to obtain evidence that the other party lacks – such as police powers used in the *Libananco* case.

⁸⁰ Cherie Blair and Ema V. Gojkovic ‘WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence’ *ICSID Review – Foreign Investment Law Journal*, vol. 33, issue 1, 2018 pp.235-259, **CLA-248**.

- 130) In the words of the Court in *Re Document Techs*, “[T]he proverbial cat is out of the bag, and plaintiffs’ request for redaction is thus moot.”⁸¹
- 131) Here, as noted, Canada had notice from the PCA of the posting of the *Mesa Power* transcripts and videos.⁸² Thus, Canada had the opportunity to review the materials once posted and the obligation to take timely steps in the event of an error. Instead, Canada not only did object it reposted the PCA information on its own website.
- 132) In *Nycomed U.S., Inc. v. Glenmark Generics, Inc.*, the court concluded that “any information that is already public or is independently made public, cannot be deemed to be confidential.”⁸³
- 133) In *Fischman v Mitsubishi Chemical*, the U.S. District court had to deal with the impact of the failure of a party to take immediate steps to seal materials. The court identified several cases all coming to the same conclusion:

More fundamentally, the two cases cited by Defendants notwithstanding, there is ample authority for the proposition that where, as here, a party fails to take immediate steps to request that publicly filed materials be sealed, its request to redact or seal may be denied for that reason. *See, e.g. Next Caller Inc. v. Martire*, 368 F. Supp. 3d 663, 666-67 (S.D.N.Y. 2019) (denying a motion to seal as “untimely” in part because it was filed “nearly a year” after the unsealing order, even though the documents had not yet been unsealed); *In Re Document Techs. Litig.*, 282 F. Supp. 3d 743, 750 (S.D.N.Y. 2017) (“[T]he proverbial cat is out of the bag, and plaintiffs’ request for redaction is thus moot.” (internal quotation marks omitted)); *SOHC, Inc. v. Zentis Sweet Ovations Holdings LLC*, No. 14-CV-2270 (JMF), 2014 WL 5643683, at *6 (S.D.N.Y. Nov. 4, 2014) (denying a request to redact as moot because “the proverbial cat [was] out of the bag”); *ING Glob. v. United Parcel Serv. Oasis Supply*

⁸¹ *In re Document Techs. Litig.*, 282 F. Supp. 3d 743, 750 (S.D.N.Y. 2017), **CLA-242**; *Bailey v. City of NY*, No. 14-CV-2091 (JBW) (VMS), (E.D.N.Y. July 27, 2015), **CLA-243** (denying a request for a confidentiality order where the party failed to take “timely action to correct any inadvertent disclosure” of the materials at issue); *Smithkline Beecham Corp v. Pentech Pharmaceuticals*, 261 F. Supp. 2d 1002, 1008 (N.D. Ill. 2003), **CLA-238** (Posner, J., sitting by designation) (noting, with respect to **confidential** information referenced in an opinion, “the cat is out of the bag”).

⁸² See Exhibit **C-135**.

⁸³ *Nycomed US, Inc. v. Glenmark Generics, Inc.*, 8 March 2010, 2010 WL 889799, **CLA-239**; see also *Liqwd, Inc. and Olaplex LLC v. L’Oréal USA, Inc., L’Oréal USA Products, Inc., L’Oréal USA S/D, Inc., and Redkens 5th Avenue, NYC, L.L.C.*, 2 May 2019, 2019 WL 19773, **CLA-240**.

Corp., No. 11-CV-5697 (JSR), 2012 WL 4840805, at *6 (S.D.N.Y. Sept. 25, 2012) (“If UPS was concerned about the disclosure of confidential information, it should have immediately moved the court to seal the documents.... By UPS’s own admission, at this point, the ‘cat was out of the bag,’ and ING’s failure to seal the documents was irrelevant.”); *King Pharm., Inc. v. Eon Labs, Inc.*, No. 04-CV-5540 (DGT), 2010 WL 3924689, at *10 (E.D.N.Y. Sept. 18, 2010) (denying redaction request for information that was “already public”); *see also, e.g., Bailey v. City of N.Y.*, No. 14-CV-2091 (JBW) (VMS), 2015 WL 4523196, at *9 (E.D.N.Y. July 27, 2015) (denying a request for a confidentiality order where the party failed to take “timely action to correct any inadvertent disclosure” of the materials at issue); *SmithKline Beecham Corp. v. Pentech Pharm., Inc.*, 261 F. Supp. 2d 1002, 1008 (N.D. Ill. 2003) (Posner, J., sitting by designation) (noting, with respect to confidential information referenced in an opinion, “the cat is out of the bag”).⁸⁴

- 134) Tennant Energy was entitled to rely on information that was already public (and had been public for the last 5 years and that Canada itself made public). The cat is out of the proverbial bag and there is no going back.

TENNANT WAS NOT A PARTY TO ANY ILLEGALITY

- 135) A party should not be entitled to "profit from its own misconduct" and thus must come before the Tribunal with clean hands in this circumstance.⁸⁵ Under this "clean hands" approach, a Tribunal may consider the issue of a party's involvement in the obtainment of the evidence if the party seeking to adduce the evidence was involved in unlawful obtainment.

⁸⁴*Jennifer S. Fischman v. Mitsubishi Chemical Holdings America Inc.*, United States District Court, S.D. New York, July 11, 2019 Slip Copy, 2019 WL 3034866, **CLA-241**.

⁸⁵Cherie Blair and Ema V. Gojkovic ‘WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence’ *ICSID Review – Foreign Investment Law Journal*, vol. 33, issue 1, 2018 pp.235-259, **CLA-248**; Nikki O’Sullivan ‘Lagging behind: is there a clear set of rules for the treatment of illegally obtained evidence in international arbitrations?’ Practical Law Arbitration Blog, 31 August 2017, **CLA-250**. *Methanex at Part II Chapter I*, ¶¶ 53 – 57, **CLA-158**. *Libananco Holdings v Turkey* (ICSID Case No. ARB/06/8), Decision on Preliminary Issues, 23 June 2008, at ¶¶78-81, **RLA-015**.

- 136) The introduction of such evidence may well be relevant under mandatory public policy concerns at the place of arbitration.⁸⁶ Also, the enforcement of a subsequent award could be problematic under the UNCITRAL Model Law if the receipt of evidence was unlawful and, thus, a breach of public policy. Fortunately, as discussed in this submission, there is no impediment under the applicable *lex arbitrii* to the admission of this evidence, and thus there are no mandatory arbitration law public policy concerns to consider.
- 137) In cases in which a party has sought to rely on supposed illegally obtained evidence but did not participate in any illegal activity, tribunals have not considered this a sufficient reason to preclude the evidence from the proceedings. This appears to be the key distinction between the rejection of evidence in *Methanex* and the admission of evidence in *Caratube*, *Yukos*, *ConocoPhillips*, *Libananco*, and two FIFA cases before the CAS. Cherie Blair notes the role of the party seeking to admit the evidence in the release of the evidence is an important consideration inadmissibility of evidence. She states:

*The clean hands approach has been applied in many international cases and seems reasonable in light of deterring overzealous litigants from pursuing unlawful means to obtain a procedural advantage. Moreover, allowing a party to rely on evidence which that party has procured unlawfully would run counter to the principle of ex turpi causa non oritur actio (a right cannot stem from a wrong).*⁸⁷

- 138) The evidence that is before this Tribunal by the client representative of Tennant Energy was not obtained in breach of any because of illegal or wrongful acts on the part of the Investor. Mr. Pennie obtained the evidence on the Internet.⁸⁸ Reed Smith paralegal Parthenya Taiyanides detailed in her witness statement the extent and nature of the evidence from the *Mesa Power* hearing video available as part of the public domain on the Internet.⁸⁹

⁸⁶ *Amos Adamu v. FIFA*, at ¶ 49, **CLA-260**. Also see Nicholle Ng, *Illegally Obtained Evidence in International Arbitration – Protecting the Integrity of the Arbitral Process*, 10 July 2010, ¶ 47, **CLA-253**.

⁸⁷ Cherie Blair and Ema V. Gojkovic 'WikiLeaks and Beyond: Discerning an International Standard for the Admissibility of Illegally Obtained Evidence' *ICSID Review – Foreign Investment Law Journal*, vol. 33, issue 1, 2018, at p. 256, **CLA-248**.

⁸⁸ CWS -1 – Witness Statement of John C. Pennie.

⁸⁹ CWS-2 – Witness Statement of Parthenya Taiyanides.

- 139) There is no suggestion, nor any evidence, that the Investor participated in any way in the release of the documents. Therefore, the Investor is approaching these proceedings with clean hands and with evidence that is public.
- 140) In summary, Tennant notes the following:
- a) The release of the unexpurgated Mesa Power NAFTA hearing video published on the PCA website was not a breach of any confidentiality obligation by Tennant Energy. Because of its public source, the information does not, and could not, meet the definition of confidential information under the Tennant Energy Confidentiality Order. It is relevant and material information. Canada's objections should be dismissed. The Tennant Confidentiality Order does not preclude the Tribunal from admitting the documents because the Investor is not a party to the other arbitration. The fact that the documents were obtained lawfully, while irrelevant, also should support the Tribunal's conclusion that the evidence is admissible.
 - b) The obligations regarding confidentiality of the original *Mesa Power* documents do not apply to Tennant, as it was not a party to the obligation. Once the PCA made the evidence public, there was a change in circumstances that made the *Mesa Power* Confidentiality Order inapplicable to the posted videos because they no longer were confidential. There is no suggestion that the Investor was involved in the release of the Mesa Power information to the public. Of course, Canada itself made the information public.
- 141) Although the former parties to the *Mesa Power* NAFTA arbitration might be bound by the terms of the *Mesa Power* Confidentiality Order, the obligation of confidentiality in that order is immaterial because the Investor is not a party to that earlier arbitration, and the information at issue was obtained from the public domain in any event.

WHAT WAS ON THE PUBLIC MESA POWER NAFTA HEARING WEBSITE?

- 142) The Investor encloses a statement from Parthenya Taiyanides, a paralegal in the New York Office of Reed Smith.⁹⁰ Ms. Taiyanides confirms in her statement the extent to which certain information previously marked as “confidential” was available on the PCA website. Ms. Taiyanides was not involved in any way with the *Mesa Power* NAFTA hearing, and had never seen this information before. Reed Smith was not counsel to Mesa Power at the NAFTA hearing. The statement confirms that information redacted from the public versions of the *Mesa Power* NAFTA hearing transcripts was widely available on the Internet to the public. There can be no question regarding the source of this information or the basic fact that the information was available lawfully, freely and to all.
- 143) John Pennie in his Witness Statement (CWS-1) summarizes some of the most important discoveries from watching the videos in paragraph 102 of his Witness Statement as follows:

As set out above, when preparing for this witness statement in July 2020, I first accessed the video website of the Permanent Court of Arbitration (PCA). To my surprise, I discovered that the video of the Mesa Power hearing on the PCA website contained more information than in the public transcripts. As a result, finally, I was able to hear the witness evidence of Ontario's officials admitting unfair and inappropriate measures that had been redacted from the Mesa Power hearing transcripts released to the public. For example, it was only from the public information arising from the Mesa Power case that we learned of the fact that:

- a) International Power Canada, a Canadian entity owned by a high-ranking Liberal party member, had high-powered assistance from government officials to obtain FIT Contracts by unfairly taking over transmission access that was properly allocated and available to Skyway 127.*
- b) NextEra Energy, another applicant in the Bruce to Milton Transmission Project of the FIT Program, had been given advanced access to information that would help them to corruptly advance themselves in the Program compared to the rest of us.*

⁹⁰ CWS-2 - Statement of Parthenya Taiyanides, August 10, 2020,

c) *I also was first able to understand why Pattern Energy (the joint venture partner of the Korean Consortium) was trying to lockup wind developments from the Windrush Energy, such as Skyway 127 and Skyway 9. I now understand that this was all part of a predatory practice where the Korean Consortium could use inside information and governmental assistance not available to others to manipulate the Feed in Tariff process.*

d) All available transmission power was supposed to be made available to FIT Applicants in the Bruce Region. Still, Ontario officials arbitrarily decided not to make it available in the Bruce Region but made more power available in the West of London region to give extraordinary business access to preferred friends of the Liberal Government in power at the time.⁹¹

144) Tennant Energy was not a party to the *Mesa Power* Confidentiality Agreement. It relies on the best evidence available – namely admissions of wrongful conduct taken Canada’s own senior government officials – made under oath at a NAFTA hearing. This best evidence demonstrates Canada’s systemic breach of the NAFTA Ontario was concealed. The release of some information of the admissions arising from the *Mesa Power* hearing in August 2015 (through the release of some information in post hearing briefs) and then through its subsequent entire release on the Internet by both the PCA and Canada, makes the admissions at the *Mesa Power* NAFTA hearing the best evidence of wrongdoing. It is relevant and material to the direct issues in this arbitration. It also explains how the *Tennant Energy* arbitration is very different from the *Mesa Power* Arbitration - which is relevant to other procedural matters potentially at issue in this claim.

THE EVIDENCE IS NOT CONFIDENTIAL

145) Canada has not established that any of the evidence relied upon by the Investor comes from a source that is not fully accessible to the public currently today. Indeed, for the last five years the information in the video of the hearings in the *Mesa Power* case has been available to the public on the Internet by both the PCA and Canada until this week when the PCA removed this material at Canada’s request. It may well be that the admissions by Canada’s

⁹¹ CWS-1 - Witness Statement of John C. Pennie, at ¶102.

official are unpleasant to Canada. Mr. Pennie in his witness statement voiced his shock and disgust at learning about what transpired that resulted in his project getting shut out. However, the blatant admissions of wrongful conduct in violation of the NAFTA are all contained in information that has been available to the public for many years. This information was not leaked in an improper way by Tennant Energy, nor does Canada so contend. It was freely available to the public for years. This cannot be considered private or confidential under the specific definitions in the Confidentiality Agreement or as the term “confidential information” is ordinarily understood. This information is public. There is no going back given the extent of the release of this information.

- 146) In this motion, Canada must demonstrate urgency, irreparable harm and that there is no prima facie case on the merits. How can there be urgency to stop information that has been public for five years? Again, how could there be irreparable harm in continuing public access to information that is no longer secret?
- 147) Mr. Pennie in his witness statement voiced his dismay and shock at learning about the unfair contortions and manipulations of the FIT process to protect friends and cronies at the expense of Skyway 127.⁹² However, these violations are all contained in information available to the public for years. There is no going back given the extent of the release of this information.
- 148) Canada acknowledges the public interest in international investment treaty cases. Civil society would never accept Canada’s efforts to continue its campaign of information suppression and concealment (that it did in Ontario) at the international level. In any event, the information at issue never could meet the definition of confidential information understood by international law, the Tribunal confidentiality orders in or here. This information with Canada’s admissions of wrongdoing and conspiracy already have been widely disseminated to the public.

⁹² CWS-1 – Witness Statement of John C. Pennie at ¶ 99.

- 149) There is no extraordinary issue governing the admissibility of this evidence such as overt acts by a party or counsel to steal this information. The information at issue was made available to the public by the PCA.
- 150) Canada always had the opportunity to review what was posted on the PCA website and thus on its own website while the *Mesa Power* Tribunal still had authority to govern that information. Canada did not review the posting and, after sitting on its hands, it now cannot take steps that would prevent Tennant Energy from having its case heard with public evidence. The information at issue is not controlled by Canada at this point. It has been freely available to the public, including to the Investor, for a lengthy time to the world as a part of the global commons. Information that has come into the public fold cannot be listed by Canada as confidential. The information at issue is not subject to Canada's control.
- 151) When one considers the source and the length of time, there is no reasonable way that this information could be confidential. The world has seen this information. This Tribunal cannot restrict its review of this non-confidential evidence.
- 152) Further, Canada asks the Tribunal to break its obligation to review the evidence and pleadings before it. The Investor is entitled to have its case heard under the UNCITRAL Arbitration Rules and the failure to have the case heard would do serious harm to the arbitration as it is contrary to the Article 1115 of the NAFTA, Article 15 of the UNCITRAL Arbitration Rules, and procedural provisions of the mandatory arbitration law at the place of arbitration, the Federal Arbitration Act.. Simply put, the Tribunal cannot be willfully blind and must carry out its duty to review the evidence put before it.

PUBLIC INTEREST FAVORS ADMITTING THE DOCUMENTS

- 153) It is in the public interest that the integrity of arbitrations is maintained. The evidence was arising from a previous arbitration with admissions of misconduct by those witnesses administering the same Ontario Program at the same time as the allegations at issue in this arbitration. Not only is the admission of the material and relevant evidence essential to permit the Investor to make its case, but it is also necessary for the arbitration process.

- 154) Given the public interest in the proper administration of public programs, and the massive waste of Ontario electricity ratepayer dollars into the pockets of political cronies and supporters of the former Ontario government over those who properly followed the FIT Program rules, there is a serious public interest favoring continued public access to this information. Following Canada's absurd proposal to forcibly suppress this public evidence of government wrongdoing seriously would jeopardize the integrity of investor-state arbitration and call into question the integrity of this NAFTA process. This is in addition to the issues that would give rise to a set aside of the arbitration due to the impairment of the Investor's ability to fully present its case. For all these reasons, the Tribunal must avoid supporting Canada's proposals that would do violence to the legitimate rights of the public.
- 155) By admitting this evidence, the benefit to that public interest and the development of international investment treaty arbitration outweighs any other concerns related to the current applicability of a confidentiality order from completed arbitration with a *functus officio* tribunal. The lack of evidence of party misconduct and the fact that the information is in the public domain, makes the evidence in the Tennant claim fully admissible and not subject to the terms of the confidentiality agreement. Concealment of the evidence at this time would raise considerable public criticism about the legitimacy of the investor-state process. The principle of transparency is a core interpretative principle, enshrined in NAFTA Article 102. The Investor long and unequivocally has supported transparency in this arbitration against the earlier opposition of Canada and maintains it against Canada's renewed attempts to suppress evidence from the public (and the Tribunal).
- 156) Admitting these documents would not constitute unequal treatment of the Parties, nor would it undermine Canada's opportunity to fully present its case.⁹³ The mere fact that it may be disadvantageous to Canada does not equate to Canada being treated unequally, especially absent any indication that the Investor took steps to improperly source the documents.

⁹³ The requirement to be able to fully present one's case is set out in Article, 18 *UNCITRAL* Model Law, **CLA-251**; Article 15 of the (1976) *UNCITRAL* Arbitration Rules, **CLA-249**.

CANADA IS NOT ENTITLED TO STOP THE CLOCK IN THESE CIRCUMSTANCES

- 157) Canada has requested that these proceedings stop to permit it an opportunity to review this Investor's case and its Memorial. Indeed, this is exactly what Canada is supposed to do upon receipt of the Memorial. It would be unfair to make such an order.
- 158) There is no reason to stop this arbitration for the following reasons:
- a) The confidentiality provisions in the Tennant Confidentiality Order do not render this evidence from the Mesa Power video to be inadmissible.
 - b) Canada not only had access to this information for five years, but Canada also posted links to disseminate this very material on its own website:
 - c) There is otherwise no implied duty of confidentiality on which Canada may rely; and
 - d) the need to preserve the integrity of the proceedings should outweigh concerns regarding confidentiality.
- 159) The disputing parties regularly must deal with confidentiality matters while a memorial process is underway. The Investor had to address confidentiality matters several times while it was preparing its Memorial. It would not seem to be treating the parties fairly or equally to permit such a delay in this circumstance. Such action would violate the principle of equality of treatment required by NAFTA Article 1115 and Article 15 of the (1976) UNICITRAL Arbitration Rules.
- 160) Canada was aware that the Investor was relying upon evidence arising from the *Mesa Power* NAFTA case for over a year. In fact, Canada's whole argument in support of its failed request to bifurcate the proceedings was that the claims here paralleled those in *Mesa Power*.⁹⁴ It also cannot be a surprise to Canada that Tennant Energy was relying on information made

⁹⁴ In fact, the actual claims in the Tennant Energy arbitration differ from those in Mesa Power Group as they deal with information that was not available to Mesa Power Group (or to Skyway 127) when Mesa Power commenced its claims in 2011 and this same information was not available to Tennant Energy until disclosures from the NAFTA hearing commenced in 2015 and thereafter.

public in the *Mesa Power* hearing. Tennant Energy made that clear in its notice of arbitration and at the hearing procedural hearing in January of this year. Tennant Energy specifically referenced, for example, the role of International Power Corporation in this matter. How, then, could Canada be caught by surprise in that it needed to review the *Mesa Power* NAFTA case to address the questions about the operation of the Ontario FIT Program? The Investor has put Canada on notice of this fact for a considerable period. Thus, the consideration of additional admissions of wrongfulness arising from the same source cannot reasonably form the basis to stop the clock in this arbitration.

CANADA SAYS TRANSPARENCY IS IMPORTANT

- 161) In the past, Canada has expressed strong positions that there was a public right to access to information in NAFTA Chapter Eleven arbitrations. Canada asserts that this is essential to the legitimacy of the investor state arbitration process and is part of its obligation of transparency – which Canada notes is an interpretative principle of the NAFTA. The Investor agrees with these principles but also believes they should apply here.
- 162) Canada in fact posted a link to the PCA posting of the *Mesa Power* information on its own website in support of transparency.
- 163) For example, on Day 1 of the Tennant Energy Second Procedural Hearing on January 14, 2020, Canada summed up its position on the essential need for transparency as follows:
- Now, starting with transparency, this an integral principle in international arbitration. Transparency upholds the legitimacy of investment proceedings.*⁹⁵
- 164) Canada also sets out a strong position on transparency in the first Tennant Energy Procedural hearing on June 17, 2019. Susanna Kam, counsel for Canada on the issue of transparency, set out Canada’s position, noting that the NAFTA Parties made a commitment

⁹⁵ Mark Klaver, Counsel for Canada. *Tennant Energy Second Procedural Hearing Transcript*, 14 January 2020: at pp.21- II:20 –22.

to transparency as an objective of the NAFTA.⁹⁶ She also noted that there were significant public policy interests in supporting the objective of transparency. She stated:

*I would note that the lack of transparency in ISDS has been a major criticism affecting public perception of this system. As such, Canada has consistently advocated for increasing transparency in investor-state arbitration and striving to ensure that documents submitted to or by a tribunal have been made -- will be made publicly available and that confidential information is adequately protected. This not only promotes transparency, but it contributes to the legitimacy of this arbitration.*⁹⁷

- 165) As a result, Canada vehemently supported the position that all material before this Tribunal needed to be made available to the public. When the Investor questioned whether confidential documents submitted to the Tribunal had to have a public version filed, on behalf of Canada, Ms. Kam noted Canada's commitment to transparency by arguing that the Investor's proposed procedure

*would be burdensome and inefficient [and that] to make supporting documents publicly available does not outweigh the benefit of making public access to this arbitration.*⁹⁸

CANADA'S INTERIM MEASURE MOTION TO SUPPRESS EVIDENCE FAILS

- 166) Incredibly, despite Canada's polemics in support of transparency as a lynchpin to the legitimacy of investor- state arbitration, Canada now comes before this Tribunal seeking to suppress information of its wrongdoing that has been disseminated to the public on the Internet for more than five years, and which Canada itself disseminated to the public.

⁹⁶ Susanna Kam, Counsel for Canada. "I would note that in NAFTA Article 102(1), the NAFTA parties had made a commitment to transparency as an objective of this agreement.", *Tennant Energy First Procedural Hearing Transcript*, 17 June 2019: at p.85: ll:17 – 20.

⁹⁷ Susanna Kam, Counsel for Canada. *Tennant Energy First Procedural Hearing Transcript*, 17 June 2019: at pp.86- ll:16 – p. 87 ll:5.

⁹⁸ Susanna Kam, Counsel for Canada. *Tennant Energy First Procedural Hearing Transcript*, 17 June 2019: at pp.867- ll:14 – p. 85 ll:1.

- 167) In its August 10th letter to the Tribunal, Canada makes the astonishing claim that this Tribunal should assist Canada in its campaign to suppress this public information. To this end Canada demands that the Tribunal:
- a) Ignore the most relevant and pertinent evidence supporting its claim – namely Exhibits C-107, C-201, C-204, C-205, C-206, C-208 and C-224 to C-243 inclusive which contain copies of video of the *Mesa Power* NAFTA hearing downloaded in July 2020 from the PCA’s *Mesa Power* website.
 - b) That the Tribunal order declare the information arising from the Mesa Power videos be suppressed from the public and the tribunal.
 - c) That the Investor redact this information from the Internet from its Memorial and file a new redacted pleading.
 - d) That the procedural clock should stop in this arbitration, to provide Canada given more time to consider evidence arising from this earlier case with respect to witnesses that Canada presented and who were within its control.
 - e) Order costs for the motion and associated costs of reviewing the Investor’s Memorial pleadings.
- 168) However, Canada’s request does not meet the requirements for a successful interim measure under Article 26 of the UNCITRAL Arbitration Rules or NAFTA Article 1134. As Canada itself asserted in prior interim measure applications, there are four necessary requirements for granting interim measures:
- (i) *prima facie*, there is a reasonable possibility that the disputing party advancing the motion would prevail in the case.
 - (ii) the disputing party would likely suffer harm not adequately reparable by an award of damages without the order.

(iii) the disputing party's potential harm without the order substantially outweighs the harm that the other disputing party would likely incur from the order; and

(iv) the condition of urgency is met.⁹⁹

- 169) As more fully discussed in this submission, Canada's request for interim measures must fail.
- 170) Canada does not make any effort to show any reasonable possibility that it would succeed in overall case. Further it is apparent that Canada has little possibility of succeeding in designating the information as Confidential as Canada did not demonstrate that the information meets the requirements under the terms of the Confidentiality Order.
- 171) Canada does not show how there could be any harm caused by the continuation of access to public information in this arbitration. The information has been public for 5 years including on Canada's own website. The evidence in question are admissions under oath of wrongful conduct. These admissions must be considered the best evidence for the Tribunal to consider. Canada not only seeks to suppress this evidence from the Tribunal, but to have the Tribunal exclude this evidence from its consideration. Granting Canada's request would cause irreparable harm to Investor in this arbitration. Further, if public information of admissions of wrongdoing by public officials were to be hidden from the public as requested by Canada, this would raise legitimacy questions about the investor-state arbitration process.
- 172) Canada does not demonstrate why it should be entitled to any extra-time to deal with the effects of the submission of evidence already known to Canada, arising from Canadian government officials that is relevant and material to the issues in dispute. The fact that Canada actually contributed to the public dissemination of this information is also relevant as to why it should not be entitled to any additional time on account of this issue.
- 173) Further Canada has not established how the public domain evidence submitted by the Investor requires redaction by the Investor pursuant to the terms of the Tennant

⁹⁹ Canada's Response on Interim Measures, 23 September 2019, at ¶12, C-254.

Confidentiality Order. There is no provision in that order that requires such action on the part of the Investor in this circumstance.

- 174) Canada also has not demonstrated that its potential harm without the order substantially outweighs the harm likely caused to Tennant if the order were made. The effects of such an order go beyond the public policy and legitimacy issues – but they could result in grounds for set aside and non-enforcement as the order to have the Tribunal ignore relevant and material evidence and the scheduling changes could result in a violation of the Tribunal’s obligations in NAFTA Article 1115 and Article 15 of the 1976 UNCITRAL Arbitration Rules.¹⁰⁰ The refusal to consider relevant and material evidence also may be violative of the *Federal Arbitration Act* Art. 10(a)(3), which provides that an award rendered in the United States may be vacated if the tribunal has “refus[ed] to hear evidence pertinent and material to the controversy.”
- 175) Disputing parties are free to raise matters at the hearing about the authenticity and weight to be given to evidence. This advocacy right does not grant Canada the right for an urgent interim measure motion to address its evidentiary concerns. While Canada may wish to raise its issues in the ordinary course, Canada has not demonstrated how there is any issue that requires determination by the Tribunal now or that can justify Canada’s demand that the Tribunal not review the evidence that is put before it. There can be no urgency over evidence available to the public for the last five years by the PCA – a trusted public institution – and which Canada itself has published through links to the PCA website.

COSTS

- 176) Canada’s August 10th letter raises Canada’s demand for the costs of this motion. The issue of costs requires a review of the conduct and the result arising from the application. The

¹⁰⁰ Article 15 of the UNCITRAL Arbitration Rules provides that “Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case”, **CLA-249**.

Investor agrees that this motion is appropriate for an award of costs – just not in favor of Canada.

- 177) Canada's conduct in bringing a motion to exclude relevant and material evidence in the public domain from the Tribunal – that it itself disseminated to the public - is egregious and scandalous.
- 178) Canada's motion raises points designed to besmirch the reputation of counsel involved in this matter.
- 179) In Canada's attempt to avoid accountability for the wrongful conduct of its government officials, Canada has advocated for a wholesale destruction of the principle of transparency. Canada also seeks relief that if granted would cause a serious loss of confidence about the legitimacy of investor-state arbitration.
- 180) Had Canada done a modicum of legal research before filing its motion, it would have observed that there is no support for its position in international law. Reasonable and responsible counsel would be aware that the relief sought by Canada is widely excessive, and with no reasonable likelihood of success. Further, there is no support for its position under the law of the seat of this arbitration or under the applicable arbitration rules and procedures, such as the *IBA Rules*.
- 181) Canada has unlimited resources to spend to defend this arbitration. Canada is aware that the Investor has limited financial resources. Canada continues to take advantage of the disparity in financial capacity in this arbitration with a relentless campaign to dissipate the limited financial resources of the Investor.
- 182) The resulting effort to respond to Canada's motion has been significant because of the needlessly broad scope of Canada's demands, the lack of support for Canada's position as a matter of international arbitration law and practice, and the extremely prejudicial effect that Canada's demands would have upon the Investor in this case.

- 183) In these circumstances, the Investor agrees that this Tribunal should make an order of costs. In that regard, the Investor seeks full indemnity costs against Canada for the significant costs incurred in responding to the needless and ill-considered motion.

CONCLUSION

- 184) The Tribunal should exercise its discretion to admit the documents despite Canada's unfounded and unsubstantiated attempts to exclude them. The documents are material, and they constitute the best evidence on matters and ensure that the Tribunal had the fullest evidence before it is necessary to make an accurate decision in this arbitration.
- 185) The risk of excluding the evidence is made even worse by the clear indication that Canada has engaged in criminal acts of spoliation of evidence and the willful non-compliance with lawful subpoenas to produce evidence about its renewable energy programs. *See, e.g.*, Investor's Memorial, paras. 95, 265-268. Considering its availability in these circumstances, the exclusion of the evidence would be nothing less than a travesty of justice.
- 186) The cases decided by international courts and tribunals about the admission of evidence arising from leaks clearly favors admission of the evidence. In a circumstance, such as the present one, where the party seeking to admit the evidence has not had any role in its disclosure, there is no basis to exclude the evidence.
- 187) Further, Canada's role in the public dissemination of this information is relevant to why the information is part of the public domain and should be admissible before this Tribunal.
- 188) Similarly, this Tribunal has no basis to treat this information as confidential. The information came from a public source and is public. It does not meet the definition of confidential information under the terms of the definitions in the Confidentiality Order.

- 189) Further, there would be serious public policy concerns arising from the exclusion of the evidence and the denial of public access to that information. As Canada said to this Tribunal “*Transparency upholds the legitimacy of investment proceedings.*”¹⁰¹
- 190) There is no mandatory issue under the law of the place of arbitration that requires the exclusion of the evidence. To the contrary, the validity of an arbitration award would be at risk should the Investor not be entitled to fully present its case by excluding this relevant and material evidence as sought by Canada. *See, e.g.,* FAA, Art. 10(a)(3) (providing that an award may be vacated where the tribunal has refused “hear evidence pertinent and material to the controversy”).
- 191) Simply there is no basis supporting Canada’s motion and many reasons why it should be dismissed in its entirety, preventing to obstacle to the admission of this highly relevant and material evidence.
- 192) At its heart, the Tribunal is being asked by Canada to put a blindfold over its own eyes and to stop the public from continuing to see information that was before it. Basic principles of legitimacy, transparency and due process are deeply offended by these suggestions. These same principles are at the heart of the Investor’s claim. The Investor is entitled to have this case heard, including the damning evidence arising from Canada’s own senior officials.
- 193) Canada asks the Tribunal to hide information from the public, to close its own eyes and to put the genie back in the bottle. Not only is this request absurd, but it would affect the due process and propriety of this arbitration. For all the foregoing reasons, Canada’s motion should be denied.
- 194) Canada’s interim measure request must be dismissed. As set out above, Canada’s request simply does not comply with the requirements for a successful interim measure.
- 195) In these circumstances, there can be no question that this motion should never have been brought by Canada. Canada’s motion was not clearly thought out and there is a slim prospect

¹⁰¹ Mark Klaver, Counsel for Canada. *Tennant Energy Second Procedural Hearing Transcript*, 14 January 2020: at pp.21- II:20 –22.

for success. It is a clear example where costs should be awarded against Canada for bringing this vexatious motion designed to drawn down on the limited financial capabilities of the Investor. This is especially true given that the evidence sought to be excluded was posted on Canada's own website.

- 196) Canada's request should be dismissed in its entirety and costs should be assessed against it on a full indemnity basis for the costs of this vexatious and needless motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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