

- 382) An investor is not required to make a claim under NAFTA Article 1116 until such time as an Investor knows or ought to know of the breach of the NAFTA. The record is clear that the first date of the public release of the admissions of Assistant Ontario Deputy Energy Minister Susan Lo regarding unlawful preferential treatment to International Power Canada first occurred on August 15, 2015.
- 383) It is patently obvious that Canada's allegations about the date of the NAFTA breach are fictions. The date of the NAFTA breach was not earlier than August 15, 2015.
- 384) By August 15, 2015 – Canada admits that Tennant Energy owned shares in Skyway 127, and thus there could be no possible issue raised concerning its investment.²²² A claim arising on August 15, 2015, would also not cause any issue for Tennant Energy's June 1, 2017, NAFTA filing under the three-year time limitation imposed by NAFTA Article 1116(2).
- 385) As a result of these facts alleged in the claim and supported by evidence of the date of release of the admissions of Assistant Deputy Energy Minister Susan Lo in August 2015, any bifurcation based on the date of breach would be entirely frivolous.
- 386) Canada itself has acknowledged that the consideration of two of Canada's jurisdictional defenses would, in any event, require a hearing. In this context, bifurcation would not promote or provide significant cost savings. It would be the exact opposite.
- 387) There can be no question in these circumstances that this motion should never have been brought by Canada as there is a slim prospect for success. It is a clear example where costs should be awarded against Canada to bring this vexatious motion designed as part of an overall campaign to draw down on the Investor's limited financial capabilities.
- 388) For all the foregoing reasons, Canada's motion should be denied in its entirety, and costs should be assessed against it on a full indemnity basis for the costs of this vexatious and needless motion.

²²²The Investor's Memorial describes how Tennant Energy made its first investment in Skyway 127 in 2011 and the investment was formally registered in the name of Tennant Energy by January 15, 2015— see Canada's Jurisdictional Memorial at ¶32.

