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

**BETWEEN:**

**TENNANT ENERGY, LLC**

**Claimant**

**AND**

**GOVERNMENT OF CANADA**

**Respondent**

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# GOVERNMENT OF CANADA

# MEMORIAL ON JURISDICTION

**September 21, 2020**

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Trade Law Bureau
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## I. INTRODUCTION

1. Tennant Energy, LLC ("Tennant" or the "Claimant") is seeking to arbitrate a claim against the Government of Canada under NAFTA Chapter Eleven for an alleged breach of Article 1105. However, in doing so, the Claimant has completely disregarded the conditions precedent to Canada's consent to arbitration. The NAFTA Parties only offered their consent to arbitrate certain investment disputes. Their consent is neither universal nor unconditional. The NAFTA Parties conditioned their consent on a claimant following certain procedures and meeting the specific requirements set out in Articles 1116 to 1121 when submitting a claim to arbitration. These conditions precedent to each Party's consent are a fundamental part of the agreement reached by the NAFTA Parties, and they cannot be ignored or simply set aside because they prove inconvenient to a potential claimant.

2. The Claimant has spent almost 250 pages laying out its claim, yet its claim is quite simple. The Claimant is asking this Tribunal to award it damages because it failed to receive a Feed-in Tariff contract ("FIT Contract") in 2011. It bases its claim on three groups of measures that together result in an alleged breach of NAFTA Article 1105. First, measures arising out of the Green Energy Investment Agreement ("GEIA") signed between the Government of Ontario (the "Government" or "Ontario"), and Samsung C&T ("Samsung") and Korea Electric Power Corporation (together the "Korean Consortium"), in 2010. Second, measures taken by Ontario and the Ontario Power Authority (the "OPA"), in the context of the Feed-in Tariff Program (the "FIT Program") and the award of FIT Contracts in 2011. Third, and finally, measures taken by Ontario with respect to the handling of documents from 2011 to 2013.

3. None of the measures, either on their own or in combination, breach Canada's obligations under NAFTA Chapter Eleven. The Claimant's arguments are rife with inaccuracies, errors, and speculation. The Claimant's attempt to convince this Tribunal that Canada has breached Article 1105 of the NAFTA by misquoting previous testimony from another NAFTA proceeding and by misleading the Tribunal with baseless accusations must be rejected. However, the Tribunal need not even burden itself with sorting through the Claimant's mischaracterizations on the merits of this claim, because this case must be dismissed for lack of jurisdiction.

4. Fundamentally, Canada's objections to the Tribunal's jurisdiction set out in this submission are about timing. First, the Claimant was not a protected investor under NAFTA Chapter Eleven when

the alleged breach of Article 1105 occurred. The Claimant did not acquire an ownership interest in the alleged investment, Skyway 127 Wind Energy Inc. ("Skyway 127"), until **January 15, 2015**. Prior to this date, Canada did not owe the Claimant any of the substantive obligations afforded under Article 1105. Since the alleged breach occurred long before this date, the Tribunal has no jurisdiction to consider Tennant's claim. To submit a valid claim under Article 1116(1), the Claimant must demonstrate with reliable, contemporaneous documentary evidence that it owned or controlled Skyway 127 at the time of the alleged breach. The Claimant has failed to do so. Instead, it relies on a limited number of corporate documents that provide no evidence to establish the Claimant's ownership or control of the investment at the relevant time, and on a Memorial and witness statement riddled with uncorroborated assertions that fail to meet the Claimant's burden in this regard. This Tribunal cannot assume jurisdiction over a dispute valued at over $200 million without even basic documents demonstrating that the Claimant owned or controlled the investment at the relevant time.

5. Second, even if the Tribunal were to conclude that the Claimant owned or controlled the investment at the relevant time, the Claimant's claim is nonetheless jurisdictionally barred. The Claimant failed to submit its claim in accordance with NAFTA Article 1116(2) which requires that claims be filed within three years of first acquiring actual or constructive knowledge of the alleged breach and loss or damage arising out of that breach. If the Tribunal finds that the Claimant was a protected investor under the NAFTA at the time of the alleged breach, the Claimant should have had knowledge of the alleged breach, and alleged loss or damage arising out of that breach, more than three years before it filed its Notice of Arbitration ("NOA") on June 1, 2017. Every measure complained of by the Claimant was documented in media reports and other public documents prior to the critical date of **June 1, 2014**. Indeed, in 2011 another disgruntled FIT Program applicant filed a NAFTA Chapter Eleven claim alleging virtually an identical breach. The Claimant cannot now turn back the clock and remedy the defects in its claim with an assortment of unsatisfactory excuses, almost complete reliance on exhibits and submissions from another NAFTA proceeding, and assertions which are entirely contradicted by the public record. The fact that the Claimant did not take timely action to file a claim based on the abundance of public information available to it bars this Tribunal from assuming jurisdiction over the claim.

6. Canada's Memorial on Jurisdiction is organized as follows: Part II provides a general overview of the facts relevant for the jurisdictional phase of this arbitration. Parts III and IV discuss the burden

of proof the Claimant must meet when alleging this Tribunal has jurisdiction over its claim. Part V explains that this Tribunal has no jurisdiction under Article 1116(1) of the NAFTA, as the Claimant was not an "investor of a Party" when the alleged breach occurred. Part VI explains that, even if the Claimant was an "investor of a Party" at the relevant time, this Tribunal is still without jurisdiction because the Claimant failed to submit its claim to arbitration within the three-year limitation period stipulated in Article 1116(2) of the NAFTA. Finally, Part VII contains Canada's conclusion and request for relief.

## II. FACTUAL BACKGROUND

7. Canada's Memorial on Jurisdiction addresses the Claimant's failure to establish that this Tribunal has jurisdiction *ratione temporis* over this arbitration under NAFTA Articles 1116(1) and 1116(2).[1] This brief factual background concerns the dates of relevant events underpinning the Claimant's claim, the date when the Claimant first acquired an ownership interest in the alleged investment, and the date when the Claimant should have first acquired knowledge of the alleged breach and loss or damage arising out of that breach. Consistent with the approach to challenging jurisdiction, Canada generally assumes the Claimant's allegations of facts to be correct where it is appropriate to do so.[2] However, should the claim proceed to a merits and damages phase, Canada will provide further evidence to address the Claimant's claim, demonstrate that it is entirely without merit, and explain why the Claimant is not entitled to any of the damages it seeks.

[1] As Canada notes in its Renewed Request for Bifurcation, dated September 21, 2020, at ¶ 4, Canada reserves its right in these proceedings to challenge the Claimant's standing to bring a claim under Article 1116 for loss or damage incurred by the alleged investment rather than the alleged investor (*see also*, Canada's Statement of Defence, 2 July 2019 ("Canada's SOD"), ¶¶ 43-44), as well as Canada's objection that certain measures do not "relate to" an investor of another Party or its investments, as required by Article 1101(1) of the NAFTA (*see also* Canada's SOD, ¶¶ 40-41).

[2] *See e.g.*, **RLA-123**, *Burlington Resources Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5) Decision on Jurisdiction, 2 June 2010, ¶ 110. *See also* **RLA-002**, *Methanex Corporation v. United States* (UNCITRAL) Partial Award, 7 August 2002 ("*Methanex – Partial Award*"), ¶ 112; and **RLA-124**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 22 November 2002, ¶¶ 33-37.

## A. Ontario's Feed-in-Tariff Program

### 1. The Green Energy and Green Economy Act, 2009

8. On May 14, 2009, the *Green Energy and Green Economy Act, 2009* (the "GEGEA") was enacted in the province of Ontario (the "Province").[3] The GEGEA amended Section 25.35 of the *Electricity Act, 1998* to authorise the Minister of Energy (the "Minister")[4] to direct the OPA[5] to develop the FIT Program.[6] At the time, the OPA was an independent, not-for-profit non-share capital corporation responsible for procuring electricity supply and capacity for the Province.[7]

### 2. FIT Program Rules and Procedures

9. On September 24, 2009, pursuant to the GEGEA, the Minister issued a Direction to the OPA to establish the FIT Program for the procurement of electricity generated from renewable energy sources through long-term fixed rate contracts.[8] The OPA launched the FIT Program on October 1, 2009.[9]

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[3] **R-031**, *Green Energy and Green Economy Act, 2009*, S.O. 2009, c. 12 ("GEGEA"). Canada is a federation composed of a central federal government, ten provincial governments, and three territorial governments. The Canadian Constitution and convention assign different powers to each order of government.

[4] The Minister's title at the time of the relevant measures was "Minister of Energy" or "Minister of Energy and Infrastructure". It later changed to "Minister of Energy, Northern Development and Mines". However, this submission uses the term "Minister of Energy" because it was the title at the time of the relevant measures.

[5] Effective January 1, 2015, the former OPA and the Independent Electricity System Operator ("IESO") were amalgamated and continued as one entity under the name IESO. The IESO administers the electricity market and directs the flow of electricity from generators to consumers through the transmission system. The Minister appoints its Board of Directors. However, this submission uses the term "OPA" because it was the name of the entity at the time of the relevant measures.

[6] **R-031**, GEGEA, Schedule B, s. 25.35; **R-032**, *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A (historical version for the period 14 May 2009 to 8 September 2009), s. 25.35.

[7] On January 1, 2015, amendments to the *Electricity Act, 1998* came into force to provide for the amalgamation of the OPA and the Independent Electricity System Operator ("IESO"). The new entity was continued under the IESO name. **R-033**, *Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A (historical version for the period 1 January 2015 to 3 June 2015), ss. 5, 25.8(1).

[8] **C-174**, Direction from George Smitherman, Minister of Energy and Infrastructure to Colin Anderson, Ontario Power Authority, 24 September 2009 ("September 24, 2009 Direction"). All directions issued by the Minister are publicly available when issued.

[9] **R-034**, Ontario Power Authority, Backgrounder, 8 April 2010; **C-174**, September 24, 2009 Direction.

### (a) Province-Wide Ranking for FIT Applications

10. On September 30, 2009, the OPA issued documents on the standard terms and contracting conditions of the FIT Program, including the FIT Program Overview, the FIT Rules, and the FIT Contract.[10] To be eligible for the FIT Program, a project had to meet certain basic requirements.[11] Once the OPA deemed a project eligible, the OPA would rank applications for FIT Contracts using a process with two phases: a special procedure for applications received during the first 60 days of the FIT Program, from October 1, 2009 to November 30, 2009 (the "launch period"); and a standard procedure for all subsequently-received applications.[12] The OPA ranked only applications for large-scale projects (larger than 500 kW or 0.5 MW).[13]

11. Once rankings for both the launch and post-launch periods were complete, the OPA consolidated the rankings into a single province-wide ranking for all FIT applications. The province-wide ranking determined the order in which the OPA would consider projects for a FIT Contract. Projects also received a secondary "area ranking" based on their selected connection point on the grid. The area ranking was relevant solely for assessing available transmission capacity in the chosen transmission area, and communicating relevant information to FIT applicants. The OPA did not use the area ranking for any other purpose.

### (b) Connection Availability

12. As a technical matter, the amount of new generation that can connect to the electricity system, both overall and at any one specific point, is limited. The OPA could not enter into a FIT Contract with an applicant when no connection capacity was available for its project. Thus, after ranking FIT

[10] **R-035**, Ontario Power Authority, Feed-in Tariff Program, Program Overview, v. 1.1, 30 September 2009 ("FIT Program Overview, v. 1.1"); **C-162**, Ontario Power Authority, Feed-in Tariff Program, FIT Rules, Version 1.1, 30 September 2009 ("FIT Rules, v. 1.1"); **R-036**, Ontario Power Authority, FIT Program Contract, v. 1.1, 30 September 2009 ("FIT Contract, v. 1.1"). The FIT Program Rules and Contract were updated on November 19, 2009, prior to Skyway 127's FIT application being submitted: *see*, **R-026**, Ontario Power Authority, Feed-in Tariff Program, FIT Rules, Version 1.2, 19 November 2009 ("FIT Rules, v. 1.2"); **R-037**, Ontario Power Authority, FIT Program Contract, v. 1.2, 19 November 2009. As version 1.2 of the FIT Rules and Contract apply to the Skyway 127 Project, Canada relies on those versions going forward in this submission. The OPA retained discretion to change the FIT Program. Under section 12.2(g) of the FIT Rules, "The OPA may at any time make changes to these FIT Rules, the form of FIT Contract, the Price Schedule or the FIT Program (including substantial changes or a suspension or termination of the FIT Program)."

[11] **R-026**, FIT Rules, v. 1.2, s. 2.1(a).

[12] **R-026**, FIT Rules, v. 1.2, ss. 4.1, 13.2, and 13.5.

[13] **R-026**, FIT Rules, v. 1.2, s. 13.

applications, the OPA would conduct a connection availability assessment to determine whether the transmission and distribution infrastructure could accommodate the electricity generated by a proposed FIT project.[14] If that assessment indicated there would likely be capacity, the project could receive a FIT Contract offer.[15] If not, the OPA would proceed to consider the next project in the ranking to determine if there was sufficient capacity for it – and so on until all the available capacity was used.

13. The OPA issued the first round of FIT Contract offers to launch period projects in April 2010.[16] On December 21, 2010, the OPA posted on its website the priority rankings of launch period applications that did not receive a FIT Contract in this initial round.[17] These FIT applications would remain in a queue according to their time stamp.[18]

### (c) Transmission Limitations and FIT Contract Allocation in the Bruce Region

14. FIT applicants were widely aware that technical transmission constraints in the Province's Bruce Peninsula (referred to as the "Bruce region" for transmission planning purposes) meant there was no available capacity when FIT applicants applied to the FIT Program in 2009. FIT applicants also knew that unless these constraints were resolved, no FIT contracts would be awarded in the Bruce region.

15. FIT applicants were also widely aware that in 2007, Hydro One, Inc.[19] ("Hydro One") had proposed the construction of a new high-voltage transmission line to resolve the transmission constraints in the Bruce region (the "Bruce to Milton Line"). The Bruce to Milton Line did not receive its final significant regulatory approval until May 2011. By then, conditions for renewable generation

[14] **R-035**, FIT Program Overview, v. 1.1, s. 5. There were potentially two parts to the connection availability assessment: (1) the Transmission Availability Test ("TAT"), and (2) the Distribution Availability Test ("DAT").

[15] **R-026**, FIT Rules, v. 1.2, s. 6.1(a).

[16] **R-034**, Ontario Power Authority, Backgrounder, 8 April 2010, p. 2.

[17] **C-128**, Ontario Power Authority, Feed-in Tariff Program, Program Update: Priority ranking for first-round FIT Contracts posted, 21 December 2010.

[18] **R-035**, FIT Program Overview, v. 1.1, s. 5.5(b); **R-001**, Ontario Power Authority Presentation, "The Economic Connection Test Process" 23 March 2010, slide 9.

[19] Hydro One is an electricity transmission and distribution service provider in Ontario. It is the primary distributor for rural customers in the Province. **R-038**, Hydro One, 2012 Annual Report (2013), p. 14.

in Ontario had evolved. First, the FIT Program had already resulted in the procurement of much of the renewable generation that the Government had determined was desirable. Second, due to the contemporary economic crisis and the success of conservation promotion efforts, the Province's electricity demand outlook was for only medium growth.[20] The Government had identified these conditions in its Long-Term Energy Plan, publicly released on November 23, 2010.[21]

16. The Long-Term Energy Plan set a target of generating 10,700 MW of electricity from non-hydroelectric renewable sources by 2018. On February 17, 2011, the Minister directed the OPA to plan to achieve this outcome.[22] The Ministry of Energy (the "Ministry") collaborated with the OPA to develop a process for allocating transmission capacity on the Bruce to Milton Line to FIT applicants in a manner that would meet both the Government's policy objectives and FIT applicants' expectations.

17. The Minister outlined this process in a Direction to the OPA on June 3, 2011.[23] The June 3, 2011 Direction instructed the OPA to offer FIT Contracts for up to 750 MW in the Bruce region and up to 300 MW in the West of London transmission area ("West of London region").[24] The Minister also instructed the OPA to allow FIT applicants to change connection points in order to access the new capacity created by the Bruce to Milton Line.[25] Indeed, since 2010, the OPA had publicly discussed providing FIT applicants an opportunity to change their connection points[26] in order to allow "projects with a higher priority time stamp first access to newly available existing transmission

[20] **R-039**, Government of Ontario, "Ontario's Long-Term Energy Plan", 23 November 2010 ("2010 LTEP"), pp. 8 and 12-15.

[21] **R-039**, 2010 LTEP, pp. 12-15.

[22] **C-222**, Direction from Brad Duguid, Minister of Energy to Colin Andersen, Ontario Power Authority, 17 February 2011, p. 3.

[23] **C-176**, Direction from Brad Duguid, Minister of Energy to Colin Anderson, Ontario Power Authority, 3 June 2011 ("June 3, 2011 Direction").

[24] **C-176**, June 3, 2011 Direction, p. 2.

[25] **C-176**, June 3, 2011 Direction, p. 2. The FIT Rules had allowed FIT applicants to change a project's proposed connection point without impacting their province-wide ranking. *See* **R-026**, FIT Rules, v. 1.2, ss. 5.3(d), 5.5, and 5.6. This would permit projects to adjust their plans (at their own expense) in order to connect to different parts of the grid where capacity was available.

[26] **R-040**, Independent Electricity System Operator, Wind Power Standing Committee, Minutes of Meeting, 23 September 2010, Action Item #52, p. 3.

capacity."[27] In line with these statements and FIT applicants' expectations, the Minister directed the OPA to allow a five-day change window during which any FIT applicant in the Bruce and West of London regions could change its connection point prior to the allocation of the Bruce to Milton Line capacity.[28] That window was open from June 6 to June 10, 2011.[29]

18. During this window, a number of FIT projects with high province-wide rankings changed their connection points into the Bruce region so that they could compete for access to the new transmission capacity created by the Bruce to Milton Line. On July 4, 2011, the OPA awarded FIT Contracts totalling 749.5 MW for the available capacity on the Bruce to Milton Line to 14 FIT applicants, including five applicants that had changed their connection points during the June 6 to 10 window.[30]

### 3. 2011 Auditor General's Report

19. On December 5, 2011, the Office of the Auditor General of Ontario publicly tabled its *2011 Annual Report* (the "2011 Auditor General's Report") in the Legislative Assembly of Ontario (the "Legislative Assembly").[31] The 2011 Auditor General's Report assessed whether the Ministry and the OPA had adequate procedures to achieve two main objectives: first, ensure new renewable energy projects are developed in a cost-effective manner within the context of applicable legislation and government policy; and second, implement a balanced and responsible plan for renewable energy to provide Ontarians with a clean, reliable, affordable, and sustainable electricity system.[32] The 2011 Auditor General's Report noted that in July 2010, under a year after the FIT Program began, the OPA had received over 16,000 FIT applications (for projects of varying sizes).[33] The 2011 Auditor General's Report explained that the OPA could not offer FIT Contracts to such an overwhelming number of FIT applications.[34]

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[27] **R-001**, Ontario Power Authority Presentation, "The Economic Connection Test Process", 23 March 2010, slide 22.

[28] **C-176**, June 3, 2011 Direction, p. 2.

[29] **C-129**, Ontario Power Authority, Feed-In Tariff Program, FIT Rules, Version 1.5, 3 June 2011 ("FIT Rules, v. 1.5"), s. 5.4.1(b).

[30] **C-025**, Ontario Power Authority, "FIT Contract Offers for the Bruce-Milton Capacity Allocation Process", 4 July 2011.

[31] **R-002**, Office of the Auditor General of Ontario, 2011 Annual Report [Excerpt] ("2011 Auditor General's Report").

[32] **R-002**, 2011 Auditor General's Report, p. 88.

[33] **R-002**, 2011 Auditor General's Report, pp. 105, 108, 115-116.

[34] **R-002**, 2011 Auditor General's Report, p. 115.

#### 4. June 12, 2013 Ministerial Direction

20. In October 2011, the Ministry began a two-year review of the FIT Program.[35] On June 12, 2013, the Minister issued a Direction to the OPA to no longer procure any additional MW under the FIT Program for large FIT projects.[36] All FIT applications for such projects that had not received a FIT Contract by that time were cancelled and the deposits refunded in whole.[37]

21. All of the information detailed in this section with respect to the FIT Program – whether it relates to ranking of FIT Projects, FIT Contract allocation in the Bruce Region, the June 3, 2011 Direction, or the decision to no longer procure renewable energy for large FIT projects – was publicly available prior to June 1, 2014.

### B. The Green Energy Investment Agreement

22. While Ontario was developing the *GEGEA* in 2008, the Korean Consortium approached the Ministry regarding a proposal for a major investment in Ontario's renewable energy sector.[38] This led to discussions between the Ministry and the Korean Consortium and the signing of a memorandum of understanding in December 2008.[39]

23. Negotiations with the Korean Consortium continued after the passage of the GEGEA in May 2009. On September 30, 2009, the Minister announced that the Province had entered into a province-wide framework agreement to enable the development of Ontario's green energy economy.[40] The Minister further directed the OPA to "hold in reserve" 500 MW of transmission capacity in certain regions of the Province "for renewable energy generating facilities whose proponents have signed a province-wide framework agreement".[41]

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[35] **C-048**, Government of Ontario, "Ontario's Feed-in Tariff Program: Two-Year Review Report", 19 March 2012.

[36] **C-152**, Direction from Bob Chiarelli, Minister of Energy to Colin Andersen, Ontario Power Authority, 12 June 2013 ("June 12, 2013 Direction"), p. 3.

[37] **C-152**, June 12, 2013 Direction, p. 3.

[38] **R-002**, 2011 Auditor General's Report, p. 108.

[39] **R-002**, 2011 Auditor General's Report, p. 108.

[40] **C-186**, September 30, 2009 Direction.

[41] **C-186**, September 30, 2009 Direction.

24. On January 21, 2010, the Government and the Korean Consortium entered into the $7 billion GEIA.[42] That same day, the Premier of Ontario publicly announced the agreement at the Toronto Stock Exchange.[43] The Government issued a news release stating that it had "negotiated an agreement with a consortium, comprised of Samsung C&T Corporation and the Korea Power Electric Corporation, which will triple Ontario's renewable wind and solar energy generation and lead to manufacturing facilities being constructed in Ontario."[44] In exchange, the Korean Consortium was guaranteed priority access to 2,500 MW of transmission capacity in Ontario, carried out in five phases over five years with each phase targeting approximately 500 MW of capacity.[45]

25. In a Direction issued to the OPA on April 1, 2010, the Minister clarified that the capacity held in reserve pursuant to the September 30, 2009 Direction was for the GEIA, and that there were four remaining phases to the agreement.[46] As such, the Minister directed the OPA "to negotiate one or more power purchase agreements as appropriate with respect to each Phase with the Korean Consortium or appropriate Project companies."[47] The Minister also directed that "the OPA shall, consistent with section 5.2 of the FIT Program Rules, give priority to projects within the scope of this direction when assessing transmission availability with respect to the FIT Program".[48]

26. The Minister issued a further Direction on September 17, 2010, which directed the OPA "in carrying out Transmission Availability Tests and Economic Connection Tests under the FIT Program Rules, to hold in reserve 500 MW of transmission capacity to be made available in the Bruce area in anticipation of the completion of the Bruce-Milton Transmission Reinforcement, for Phase 2 projects of the Korean Consortium or its Project Companies."[49] Further details regarding the negotiation of

[42] **R-041**, Government of Ontario, Ministry of Energy, Archived Backgrounder, "Ontario Delivers $7 Billion Green Investment", 21 January 2010.

[43] **R-042**, The Canadian Press, "Korean Deal Approved: Wind, Solar Farms Coming to Ontario", 21 January 2010.

[44] **R-041**, Government of Ontario, Ministry of Energy, Archived Backgrounder, "Ontario Delivers $7 Billion Green Investment", 21 January 2010.

[45] **R-002**, 2011 Auditor General's Report, p. 108.

[46] **C-139**, Direction from Brad Duguid, Minister of Energy, to Colin Andersen, Ontario Power Authority, 1 April 2010 ("April 1, 2010 Direction").

[47] **C-139**, April 1, 2010 Direction.

[48] **C-139**, April 1, 2010 Direction.

[49] **R-043**, Direction from Brad Duguid, Minister of Energy, to Colin Andersen, Ontario Power Authority, 17 September 2010 ("September 17, 2010 Direction").

the GEIA and its relationship to the FIT Program were published in the 2011 Auditor General's Report, which was made public on December 5, 2011.[50]

27. The 2011 Auditor General's Report also clearly articulated the priority of the Korean Consortium over FIT applicants when it came to "accessing the availability of already-limited transmission capacity."[51] It further stated in plain terms that the commitment to the consortium "affected the FIT contract allocation process and the timely connection of renewable energy from other generators."[52]

28. All of the information detailed in this section – whether it relates to the events that unfolded in the negotiation and signing of the GEIA, the set aside of transmission capacity for the Korean Consortium, or the impact the GEIA had on the FIT Program – was publicly available prior to June 1, 2014.

### C. Skyway 127

#### 1. Skyway 127's FIT Application

29. On November 24, 2009, Skyway 127 submitted a FIT application in the launch period for a 100 MW on-shore wind project (i.e. a large-scale FIT project[53]) near the town of Port Elgin, with a connection point in the Bruce region (the "Skyway 127 Project" or the "Project").[54] Following the initial ranking process, Skyway 127's application was ranked 64th in the province-wide ranking.[55]

[50] **R-002**, 2011 Auditor General's Report, p. 107.

[51] **R-002**, 2011 Auditor General's Report, p. 116.

[52] **R-002**, 2011 Auditor General's Report, p. 116. *See also,* p. 116: ("[T]he OPA's forecasts of the likely locations of the consortium projects indicated that 1,323 MW of the existing transmission capacity and about 1,177 MW of the future transmission capacity from the Bruce–Milton line and the other three priority projects will be made available to the consortium.")

[53] As noted above, large-scale FIT projects were above 500 kW or 0.5 MW. The Skyway 127 Project was a 100,000 kW project.

[54] **R-025**, Skyway 127 FIT Application, 27 November 2009, p. 26; Claimant's Notice of Arbitration, 1 June 2017 ("Claimant's NOA"), ¶ 28.

[55] **C-104**, Ontario Power Authority, Priority Ranking for First-Round FIT Contracts, 21 December 2010, p. 1.

30. Due to the Bruce region's transmission constraints, Skyway 127 did not receive a launch period FIT Contract for the Project in April 2010. Like other applicants that did not receive a FIT Contract, it entered a queue for future consideration.

31. The lower province-wide ranking of the Project also meant Skyway 127 did not receive a FIT Contract when the OPA awarded FIT Contracts for the available capacity on the Bruce to Milton Line on July 4, 2011. Following the issuance of the Ministerial Direction on June 12, 2013, Skyway 127's FIT application was cancelled in accordance with the FIT Rules, and its deposit returned in full.

### 2. Skyway 127's Ownership

32. According to the evidence filed by the Claimant, Derek Tennant and John C. Pennie incorporated Skyway 127 in Ontario on October 18, 2007.[56] Different firms and individuals held equity interests in Skyway 127 at various times, as indicated below:

- General Electric Energy LLC ("GE Energy"), a U.S. corporation incorporated in Delaware, acquired a 15% equity interest in Skyway 127 on November 25, 2009.[57] GE Energy acquired a further 35% equity interest on June 9, 2011.[58] GE Energy held its shares in Skyway 127 until June 30, 2016.[59]
- According to the Claimant, John Tennant first acquired an 11.3% equity interest in Skyway 127 on June 20, 2011.[60] He received a further 11.3% equity interest on December 30, 2011.[61] John Tennant held his 22.6% shareholding in Skyway 127 until January 15, 2015.

[56] **C-113**, Skyway Wind Energy Inc. incorporation documents, 18 October 2007, pp. 1, 2, and 9. Derek Tennant was the President of Skyway 127, while John C. Pennie was the Director.

[57] Claimant's Memorial, 7 August 2020 ("Claimant's Memorial"), ¶ 122(a). Claimant's NOA, ¶ 10.a, ¶ 13.a; **C-118**, Shareholder's Ledger, Skyway 127, 25 November 2009.

[58] Claimant's Memorial, ¶ 122(b); Claimant's NOA, ¶ 13.b; **C-116**, Shareholder's Ledger, Skyway 127, 9 June 2011.

[59] **CWS-1**, Witness Statement of John C. Pennie, 7 August 2020 ("Pennie Statement"), ¶ 67; Claimant's NOA, ¶ 11.

[60] Claimant's Memorial, ¶ 124; **C-117**, Shareholder's Ledger, Skyway 127, 20 June 2011.

[61] Claimant's Memorial, ¶ 128; Claimant's NOA, ¶ 14b; **C-114**, Shareholder's Ledger, Skyway 127, 30 December 2011.

- On January 15, 2015, Tennant Travel Services, LLC (later renamed "Tennant Energy, LLC") received 45.2% of the shares of Skyway 127.[62] On June 30, 2016, Tennant Energy, LLC acquired GE Energy's shares of Skyway 127.[63]

### D. Domestic Reviews and Investigations Regarding Ontario's Handling of Government Records

33. In support of its contentions with respect to Ontario's handling of documents, the Claimant refers to a series of events that relate to three different issues: (i) Ontario's decision to cancel two gas-fired powers plants; (ii) Ontario's deferral on the development of off-shore wind projects; and (iii) the disclosure of the terms of the GEIA.[64] Canada addresses the Claimant's factual assertions with respect to issues (i) and (ii) in the following paragraphs and discusses issue (iii) in Part VI.B.1(a)(iii).

#### 1. Documents and Evidence Relating to Ontario's Decision to Cancel Two Gas Plants

34. In the mid and late 2000s, TransCanada Energy Ltd. and Eastern Power Ltd. were developing plans for gas-fired power plants to be built in Oakville and Mississauga in accordance with contracts both companies had with the OPA.[65] In October 2010 and September 2011, the Government announced the cancellation of the Oakville plant and of the Mississauga plant, respectively.[66] The two companies were offered contracts to build their gas plants at different locations.[67] Following the cancellation of the gas plants, issues concerning the Government's handling of records were made public in various domestic reviews and investigations.

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[62] **C-115**, Skyway 127 Energy Inc. Shareholder's Ledger, 15 January 2015; **CWS-1**, Pennie Statement, ¶ 50; Claimant's NOA, ¶ 11.

[63] **CWS-1**, Pennie Statement, ¶ 67; Claimant's NOA, ¶ 11.

[64] *See* Claimant's Memorial, ¶¶ 263-268.

[65] **R-044**, Office of the Auditor General of Ontario, *Special Report: Oakville Power Plant Cancellation Costs* (2013) ("AG Report – Oakville Cancellation Costs"), p. 5; **R-045**, Office of the Auditor General of Ontario, *Special Report: Mississauga Power Plant Cancellation Costs* (2013) ("AG Report – Mississauga Cancellation Costs"), pp. 5-6.

[66] **R-044**, AG Report – Oakville Cancellation Costs, p. 5; **R-045**, AG Report – Mississauga Cancellation Costs, p. 6.

[67] **R-044**, AG Report – Oakville Cancellation Costs, p. 5; **R-045**, AG Report – Mississauga Cancellation Costs, p. 14.

35. To start, the Standing Committee on Estimates ("Estimates Committee") of the Legislative Assembly undertook a review of the costs involved in the cancellation.[68] As part of this review, on May 16, 2012, the Estimates Committee adopted a motion directing the Ministry, the former Minister of Energy, and the OPA to produce records relating to the 2010 and 2011 decisions to cancel the gas plants.[69]

36. The former Minister initially declined to disclose the records, citing "the confidential, privileged and highly commercially sensitive nature of the issues."[70] Subsequently, 500 pages of records were released to the Estimates Committee.[71] On August 27, 2012, members of the opposition asked the Speaker of the Legislative Assembly to determine whether the Minister's failure to produce the documents ordered by the Estimates Committee breached the Legislature's right to order production of documents and amounted to contempt of the Legislature.[72] On September 13, 2012, the Speaker issued his ruling that a *prima facie* case of privilege had been established and that the Minister had an obligation to comply with the motion of the Estimates Committee.[73] In response to the Speaker's ruling, the Ministry and the OPA produced 56,000 pages of records to the Estimates Committee. The former Minister's office produced no records.[74]

37. On October 15, 2012, the Premier announced his resignation and prorogued the Legislature.[75] The governing Liberal party chose a new leader, who became Premier, and the Legislature reconvened on February 19, 2013.

38. On March 5, 2013, all parties in the Legislative Assembly agreed to a motion authorizing the Standing Committee on Justice Policy ("Justice Policy Committee") to consider the tendering,

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[68] **R-003**, Information and Privacy Commissioner of Ontario, *Deleting Accountability: Records Management Practices of Political Staff* (2013) ("IPC Report"), p. 3.

[69] **R-003**, IPC Report, pp. 3-4.

[70] **R-003**, IPC Report, p. 5.

[71] **R-003**, IPC Report, p. 5.

[72] **R-046**, Ontario, Official Report of Debates (Hansard), 40th Parl., 1st Sess., No. 69, 27 August 2012, pp. 3098-3106.

[73] **R-047**, Ontario, Official Report of Debates (Hansard), 40th Parl., 1st Sess., No. 79, 13 September 2012, p. 3607. The Speaker noted that the "right to order production of documents is but one category [of parliamentary privilege]." (p. 3607). *See also*, **R-003**, IPC Report, p. 5.

[74] **R-003**, IPC Report, p. 5.

[75] **R-003**, IPC Report, p. 5.

planning, commissioning, cancellation, and relocation of the Mississauga and Oakville gas plants, and to report its observations and recommendations on these issues.[76] The Justice Policy Committee began its review of the matter on March 7, 2013.[77] It heard testimony from a number of witnesses, including from Craig MacLennan, Chief of Staff to the former Minister from January 2010 to August 2012.[78] In his testimony on April 9, 2013, Mr. MacLennan stated that he had a practice of deleting all of his emails.[79] This resulted in a Member of the Legislative Assembly filing a complaint with the Information and Privacy Commissioner of Ontario ("IPC"), whose office immediately launched an investigation.[80]

39. On June 5, 2013, the IPC issued a special investigation report entitled *Deleting Accountability: Records Management Practices of Political Staff* ("IPC Report").[81] The IPC Report detailed the records management practices of the office of the Minister. It confirmed that Mr. MacLennan "had a longstanding practice of deleting all emails"[82] and that his records management practices were in violation of his obligations under the applicable records retention policies.[83]

40. The IPC Report also considered the potential inappropriate deletion of emails by the former Premier's office during the transition to the new Premier.[84] During an interview with Mr. David Livingston, the Chief of Staff of the former Premier, the Commissioner learned that "his information

[76] **R-048**, Ontario, Official Report of Debates (Hansard), 40th Parl., 2nd Sess., No. 9, 5 March 2013, p. 370.

[77] *See* **R-049**, Ontario, Official Report of Debates (Hansard), Standing Committee on Justice Policy, 40th Parl., 2nd Sess., No. JP-3, 7 March 2013.

[78] **R-050**, Ontario, Official Report of Debates (Hansard), Standing Committee on Justice Policy, 40th Parl., 2nd Sess., No. JP-10, 9 April 2013. *See also*, **R-003**, IPC Report, p. 13.

[79] **R-050**, Ontario, Official Report of Debates (Hansard), Standing Committee on Justice Policy, 40th Parl., 2nd Sess., No. JP-10, 9 April 2013, p. JP-181, JP-194: ("By the sheer volume of documents that I get, I tend not to save emails, based on the capacity of my email account, but I know that the ministry legal counsel and the OPA does save them. I myself don't, and regularly delete emails.")

[80] **R-003**, IPC Report, p. 1.

[81] The Commissioner later reopened the investigation due to new information that her office had received regarding the Ontario Public Service Enterprise Email System, which should have been provided during the original investigation, and she released an addendum to the IPC Report. *See* **R-004**, Information & Privacy Commissioner of Ontario, *ADDENDUM to Deleting Accountability: Records Management Practices of Political Staff*, 20 August 2013 ("IPC Report Addendum"), p. 3.

[82] **R-003**, IPC Report, p. 13 (emphasis omitted).

[83] **R-003**, IPC Report, p. 15.

[84] **R-003**, IPC Report, p. 1.

management practices were very similar to those of [Chris] MacLennan. In particular, he generally did not retain paper records" and he "deleted his emails daily".[85] Based on the evidence gathered by her office, the Commissioner concluded: "[w]hile I cannot state with certainty that there was an inappropriate deletion of emails by the former Premier's staff as part of the transition to the new Premier, it is difficult to escape that conclusion."[86]

41. On June 7, 2013, two days after the IPC Report was released, the Ontario Provincial Police ("OPP") launched a criminal investigation into the destruction of e-mails relating to the relocation and cancellation of the gas plants.[87]

42. All of the information detailed in this section – whether it relates to the events that unfolded in the two Legislative Assembly committees or to the IPC Report and the launch of a police investigation – was publicly available prior to June 1, 2014. The Official Report of Debates in the Ontario Legislature (Hansard) is made public in a matter of hours or days after the adjournment of a sitting or a committee meeting. For instance, on September 15, 2020, the debates held on September 14, 2020 were available online.[88] The IPC Report was released on June 5, 2013, and the IPC Report Addendum was released on August 20, 2013.[89]

### 2. Documents and Evidence Relating to Ontario's Deferral on the Development of Off-Shore Wind Projects

43. In 2013, Windstream Energy, LLC ("Windstream") filed a NAFTA Chapter Eleven claim against Canada related to Windstream's investment in an off-shore wind project.[90] In that claim, Windstream made allegations in relation to the deletion of documents. As detailed in Part II.E below,

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[85] **R-003**, IPC Report, p. 27.

[86] **R-003**, IPC Report, p. 26.

[87] **R-004**, IPC Report Addendum, p. 3; **R-051**, National Post, "Mass deletion of Ontario gas plant emails by senior Liberal staff now a police investigation", 7 June 2013; **R-052**, The Star, "Power plant cancellations: OPP to investigate deleted emails", 7 June 2013.

[88] **R-053**, Legislative Assembly of Ontario webpage excerpt, Official Report of Debates (Hansard), 42nd Parl., 1st Sess., 14 September 2020, available at: https://www.ola.org/en/legislative-business/house-documents/parliament-42/session-1/2020-09-14/hansard [Accessed on September 15, 2020].

[89] **R-003**, IPC Report, cover page; **R-004**, IPC Report Addendum, cover page and p. 1.

[90] **R-054**, *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Amended Notice of Arbitration, 5 November 2013 ("*Windstream – Amended NOA*").

Windstream argued that documents that it should have received through document production were missing, and asked the tribunal in that case to draw an adverse inference that documents supporting Windstream's position had been deleted.[91] In this regard, Windstream concluded that "[g]iven the temporal and subject-matter overlap between the gas plant scandal and the events at issue in this arbitration, the only reasonable conclusion is that emails relevant to offshore wind and Windstream likely were deleted along with emails concerning the gas plants cancellation."[92]

44. Although Windstream filed its Memorial in August 2014, in making its arguments it relied predominantly on the Official Report of Debates that took place in the two committees of the Legislative Assembly mentioned above, the IPC Report, and press articles relating to the OPP investigation.[93] As Canada has already noted, the Official Report of Debates and the IPC Report were publicly available prior to June 1, 2014. In addition, most of the press articles on which Windstream relied were published before that date.[94]

### E. Other International Proceedings

#### 1. *Mesa Power Group, LLC v. Canada*

45. On July 6, 2011, just two days after the July 4, 2011 award of FIT Contracts to applicants for the available capacity on the Bruce to Milton Line, Mesa Power Group, LLC ("Mesa") filed a Notice of Intent ("*Mesa* NOI") to submit a claim to arbitration against Canada under Chapter Eleven of the NAFTA.[95] The first paragraph summarized Mesa's claim:

> [t]his case is about unfairness, the abuse of power and process and undue political interference in the regulation of renewable energy in Ontario through the

[91] *See* **R-055**, *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Memorial of the Claimant, 19 August 2014 ("*Windstream – Claimant's Memorial*"), ¶¶ 366-381. As explained in Section I.E.2, the *Windstream* tribunal did not consider it necessary to rule on the claimant's request for an adverse inference.

[92] **R-055**, *Windstream – Claimant's Memorial,* ¶ 377.

[93] *See* **R-055**, *Windstream – Claimant's Memorial,* ¶¶ 367-373.

[94] *See* **R-055**, *Windstream – Claimant's Memorial*, footnote 596, *citing to:* **R-056**, Postmedia News, "Ontario police pursuing a criminal charge against McGuinty's chief of staff over gas plant scandal", 27 March 2014; **R-057**, The Globe and Mail, "IT Expert linked to Ontario gas-plant scandal to testify by videoconference" 14 April 2014.

[95] **R-058**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Notice of Intent to Arbitrate, 6 July 2011 ("*Mesa – Notice of Intent*"). Mesa was represented by the same legal counsel as the Claimant in this case.

> unannounced last-minute imposition of arbitrary measures and through opaque and secret administration and "buy local" contract requirements.[96]

46. Mesa's Notice of Arbitration ("*Mesa* NOA") followed on October 4, 2011.[97] The *Mesa* NOI and the *Mesa* NOA were made public on the Government of Canada's website no later than May 8, 2013.[98] Mesa's claim was also reported in various press reports.[99]

47. Mesa's claims related to its investments in Canadian companies that had applied for FIT Contracts to develop on-shore wind projects in the Bruce region and that were unsuccessful in receiving FIT Contracts.[100] Specifically, Mesa described its claim as one arising "out of the arbitrary and unfair application of various government measures related to the regulation and production of renewable energy in Ontario. Canada, through its sub-national organs imposed sudden and discriminatory changes to the established scheme for renewable energy, namely the Feed-In-Tariff Program (the "FIT Program")."[101]

48. Mesa alleged in its NOA that the unfair, discriminatory, and arbitrary treatment of its FIT applications by the Government and the OPA breached Canada's obligations under NAFTA Article 1105.[102] Like the Claimant here, the measures Mesa alleged to be in breach of the NAFTA included the impact of the GEIA on the FIT Program, changes to the FIT Rules, and the alleged inappropriate

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[96] **R-058**, *Mesa – Notice of Intent*, ¶ 1.

[97] **R-005**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Notice of Arbitration, 4 October 2011 ("*Mesa – Notice of Arbitration*").

[98] **RWS-1**, Witness Statement of Lucas McCall, 21 September 2020 ("McCall Statement"), ¶ 3.

[99] *See* **R-059**, The Globe and Mail, "Oil tycoon takes on Ontario Green Energy Act over wind farm", 14 July 2011; **R-060**, Appleton & Associates website excerpt, "Mesa Power Group Files Legal Action Against Government for NAFTA Infractions", 14 July 2011; **R-061**, Recharge News, "Pickens issues NAFTA challenge to Canada over wind rules", 18 July 2011; **R-062**, Columbia Law School, Climate Law Blog, "Texas Renewable Energy Developer Initiates NAFTA Claim Against Canada", 22 July 2011; **R-063**, The Star, "Texas firm to challenge to Ontario's wind power regulations", 14 July 2011; **R-064**, PR Wire, "Mesa Power Group Files Legal Action Against Canadian Government for NAFTA Infractions", 14 July 2011; **R-065**, Reuters, "Boone Pickens challenges Canada on green power law", 14 July 2011; **R-066**, IISD, Investment Treaty News, "Trends in Investor Claims Over Feed-in Tariffs for Renewable Energy", 19 July 2012 (referring to *Mesa* arbitration); **R-067**, Ontario Wind Resistance, "McGuinty Liberals charged with abuse of power, undue 'political interference' in awarding wind contracts", 17 July 2011 (referring to *Mesa* arbitration).

[100] **R-005**, *Mesa – Notice of Arbitration*, ¶¶ 8, 48.

[101] **R-005**, *Mesa – Notice of Arbitration*, ¶ 6.

[102] **R-005**, *Mesa – Notice of Arbitration*, ¶ 62. Mesa also submitted claims for alleged breaches of Articles 1102 (National Treatment), 1103 (Most-Favoured-Nation treatment) and 1106 (Performance Requirements). It was unsuccessful on each of these alleged breaches. *See* **R-005**, *Mesa – Notice of Arbitration*, ¶¶ 51, 70; **RLA-001**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016 ("*Mesa – Award*"), ¶¶ 335, 465.

awarding of FIT Contracts as a result.[103] Like Tennant, Mesa claimed that the changes to the FIT Program in June 2011, and the improper awarding of FIT Contracts in the following month, were "the culmination of unfair and discriminatory preferences given to other competitors who had private and secret meetings with the governmental authority in January 2011"[104] and that certain FIT applicants, like NextEra Energy Resources ("NextEra"), had "privileged access" to information regarding transmission availability in Ontario, a "close relationship with the OPA", and that they had influenced the changes to the FIT Rules.[105]

49. While its NAFTA arbitration was proceeding, Mesa took steps in the United States through the use of Section 1782 of Title 28 of the United States Code ("Section 1782") to obtain further evidence with respect to its claim.[106] Mesa's Section 1782 applications and the U.S. District Court decisions

[103] *See* **R-005**, *Mesa – Notice of Arbitration*, ¶¶ 22, 28-31, 37, 48-49; and **RLA-125**, *Mesa Power Group, LLC v. Canada* (UNCITRAL) Procedural Order No. 1, 21 November 2012 ("*Mesa – Procedural Order No. 1*"), ¶¶ 4.9-4.16. Mesa's position and its allegations regarding the arbitrary and unfair application of government measures related to the regulation and production of renewable energy in Ontario were summarized by the *Mesa* tribunal in Procedural Order No. 1 which was issued on November 21, 2012 and made public no later than May 8, 2013 (**RWS-1**, McCall Statement, ¶ 3).

[104] **R-013**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Investor's Answer on Canada's Preliminary Objections on Jurisdiction, 19 February 2013 ("*Mesa – Investor's Answer on Jurisdictional Objections*"), ¶ 13, which was made public on the Government of Canada's website no later than September 11, 2013 (**RWS-1**, McCall Statement, ¶ 5).

[105] *See e.g.*, **R-058**, *Mesa – Notice of Intent*, ¶¶ 16-18, 20-21, 24; **R-005**, *Mesa – Notice of Arbitration*, ¶¶ 29-35, 47, 49-50; **R-013**, *Mesa – Investor's Answer on Jurisdictional Objections*, ¶¶ 74-82, 85; and **C-133**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Memorial of the Investor, 20 November 2013, ¶¶ 638-675; **C-182**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Reply Memorial of the Investor, 30 April 2014, ¶¶ 426-433.

[106] Under Section 1782, a petitioner is allowed to obtain evidence through a federal district court "for use in a proceeding in a foreign or international tribunal." An application for an order under Section 1782 ("1782 application"), is available to any "interested person", including a U.S. person or corporation with ongoing foreign proceedings. *See* **R-068**, 28 U.S. Code § 1782. Mesa filed four 1782 applications. The first was filed on November 14, 2011, in the U.S. District Court of the Northern District of California for an order for document production and testimony from Pattern Energy Group LP ("Pattern") related to the negotiation, execution or operation of the GEIA, proposals submitted by Pattern to the OPA in relation to the FIT Program, as well as any communications between Pattern and the Government of Ontario (**R-069**, *In re Application for Judicial Assistance in Obtaining Evidence from Pattern Energy et al.*, Case No. CV 11-5510 (JCS), Application, 14 November 2011). On May 9, 2012, Pattern was ordered to produce documents and provide the deposition testimony under terms and conditions agreed to by the parties (**R-070**, *In re Application for Judicial Assistance in Obtaining Evidence from Pattern Energy et al.*, Case 3:11-cv-05510-JCS, Stipulation Resolving Subpoenas and Order, 9 May 2012). The second and third 1782 applications were filed on November 15, 2011, in the U.S. District Court of New Jersey seeking documentation and testimony from Samsung and Korea Electric Power Corporation (KEPCO) related to the NAFTA arbitration and the benefits both companies had allegedly obtained from the Government of Ontario to the detriment of Mesa (**R-071**, *In re Application for Judicial Assistance in Obtaining Evidence from Korea Electric Power Corporation*, Case 2:11-mc-00270-ES, Application, 15 November 2011; **R-072**, *In re Application for Judicial Assistance in Obtaining Evidence from Samsung C&T America, Inc. et al*, Case 2:11-mc-00280-ES, Application, 15 November 2011). On November 20, 2012, Mesa's Samsung 1782 application was granted, in part (**R-073**, *In re Application for Judicial Assistance in Obtaining Evidence from Samsung C&T America, Inc. et al.*, Case 2:11-mc-00280-ES, Opinion and Order, 20 November 2012). On April 19, 2013, Mesa's KEPCO 1782 application was also granted, in part (**R-074**,

on Mesa's requests are publicly available.[107] Mesa's Section 1782 applications were discussed in *Mesa* Procedural Order No. 3 ("PO 3"), which was issued on March 28, 2013 and made public on the Government of Canada's website no later than May 8, 2013.[108]

50. Mesa's claim was dismissed in its entirety, with the Claimant bearing all arbitration costs, on March 24, 2016.[109]

### 2. *Windstream Energy, LLC v. Canada*

51. Windstream filed its NOA on January 28, 2013 (the "*Windstream* NOA").[110] Windstream's claims related to its investment in a proposed 300 MW off-shore wind project in Lake Ontario.[111] In particular, Windstream alleged that a decision made by Ontario in February 2011 to defer the approval of off-shore wind wrongfully frustrated its ability to obtain the benefits of a FIT Contract it had signed with the OPA in 2010 in breach of Canada's obligations under NAFTA Chapter Eleven.[112]

52. As noted above, Windstream requested that the tribunal draw an adverse inference against Canada based on allegations with respect to the deletion of government records in relation to the

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*In re Application for Judicial Assistance in Obtaining Evidence from Korea Electric Power Corporation*, Case 2:11-mc-00270-ES, Opinion and Order, 19 April 2013). The fourth 1782 application was filed on December 1, 2011 in the U.S. District Court of Florida against NextEra seeking discovery and document production relating to Ontario's FIT Program, including communications with the Government of Ontario, lobbyist groups and other third parties involved in its FIT Contract bidding process, and also seeking to depose NextEra corporate representatives (**R-075**, *In re Application for Judicial Assistance in Obtaining Evidence from NextEra Energy Resources, LLC et al.*, Case 1:11-mc-24335-UU, Application, 1 December 2011). Mesa's 1782 application was initially granted on December 6, 2011 and production of NextEra's communications with the Government of Ontario and the discovery of those communications was finally ordered on July 13, 2012. (**R-076**, *In re Application for Judicial Assistance in Obtaining Evidence from NextEra Energy Resources, LLC et al.*, Case 1:11-mc-24335-UU, Order 6 December 2011; and **R-077**, *In re Application for Judicial Assistance in Obtaining Evidence from NextEra Energy Resources, LLC et al.*, Case 1:11-mc-24335-UU, Order Denying Motion to Quash, 13 July 2012).

[107] Mesa's 1782 applications and related District Court decisions are available on Public Access to Court Electronic Records (PACER) at https://www.pacer.gov/.

[108] *See* **RWS-1**, McCall Statement, ¶ 3.

[109] **RLA-001**, *Mesa – Award*, ¶ 706.

[110] **R-054**, *Windstream – Amended NOA*, cover page (noting original filing date of January 28, 2013).

[111] *See* **R-054**, *Windstream – Amended NOA*, ¶¶ 15, 17.

[112] The claimant in *Windstream* alleged that Canada had breached Articles 1102 (National Treatment), 1103 (Most-Favoured-Nation treatment), 1105 (Minimum Standard of Treatment) and 1110 (Expropriation and Compensation). *See* **R-054**, *Windstream – Amended NOA*, ¶¶ 22, 36.

deferral of off-shore wind projects by the Office of the Premier of Ontario and the Ministry.[113] The allegations with respect to deleted documents stemmed from the 2012 and 2013 investigations into the Government's handling of records relating to the cancellation of the gas-fired power plants in 2010 and 2011, described above. In light of its other findings, the Windstream tribunal did not rule on this issue.[114]

### F. The Claimant's Submission of its Claim to Arbitration

53. On March 2, 2017, the Claimant served Canada with a NOI under Section B of Chapter Eleven of the NAFTA. On June 1, 2017, the Claimant served Canada with its NOA. The NOA describes the "general nature" of Tennant's claim as one arising "out of the arbitrary and unfair application of Ontario government measures related to the regulation and administration of a renewable energy transmission and production program in Ontario known as the Feed-in Tariff Program (the "FIT Program")".[115] In its Memorial, the Claimant characterizes its claim as one that:

> [i]nvolves the blatant disregard of fairness in the allocation of multi-million-dollar renewable energy contracts. It involves the protection of companies owned by political cronies to the detriment of investments owned by American investors.[116]

[113] **R-055**, *Windstream – Claimant's Memorial*, ¶¶ 366-381; **R-078**, *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Reply Memorial of the Claimant, 22 June 2015, ¶ 52. Specifically, Windstream believed that because Canada had not produced documents from email accounts of the Premier's Office staff involved in the energy portfolio, and only produced three relevant emails from the Minister of Energy's Chief of Staff, relevant documents from the Premier's Office and the Minister's Chief of Staff had been deleted. It thus requested that the tribunal "draw an adverse inference that such emails would have contained information detrimental to Canada's case". *See* **R-055**, *Windstream – Claimant's Memorial*, ¶ 366.

[114] **RLA-088**, *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Award, 27 September 2016, ¶ 380 and footnote 773: ("In view of its findings, the Tribunal also need not consider whether an adverse inference should be drawn, as requested by the Claimant, in light of the evidence that some of the emails relating to the Project may have been intentionally deleted by officials of the Premier's Office.")

[115] Claimant's NOA, ¶ 7.

[116] Claimant's Memorial, ¶ 1.

54. The Claimant alleges that Canada violated NAFTA Article 1105.[117] It claims that the difference in treatment given to Skyway 127 was "politically motivated, arbitrary, discriminatory, and contrary to the rule of law."[118] The Claimant seeks no less than CAD 219 million in damages. [119]

## III. CANADA'S CONSENT TO ARBITRATION IS A QUESTION OF JURISDICTION, NOT ADMISSIBILITY

55. The Claimant argues that this "Tribunal has jurisdiction to decide on all the issues in the Investor's claim" and that Canada has consented to this arbitration.[120] It then states that the issue of consent is not a question of jurisdiction, but rather one of admissibility.[121] This is incorrect. NAFTA tribunals have held that a disputing parties' consent to arbitration under NAFTA Chapter Eleven is a question of jurisdiction.[122] Article 1122(1) affirms that Canada has conditioned its consent on claims being submitted "in accordance with the procedures set out in this Agreement."[123] The fulfillment of Article 1116's requirements is one of the pre-conditions that must be met to establish a NAFTA Party's consent to arbitration, and in turn a tribunal's jurisdiction. Until these requirements are met, Canada has not provided its consent to arbitration. As the *Methanex v. United States* tribunal stated:

> In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a

[117] Claimant's Memorial, ¶¶ 44, 489, 904.

[118] Claimant's Memorial, ¶ 44.

[119] The Claimant seeks CAD 184 million in economic loss and CAD 35 million in moral damages. *See* Claimant's Memorial, ¶¶ 851, 869, 889.

[120] Claimant's Memorial, ¶¶ 102-103.

[121] Claimant's Memorial, ¶ 103. *See also* Claimant's NOA, ¶ 125, where the Claimant argues that questions of compliance with the requirements of Article 1116(2) are an issue of admissibility, not jurisdiction.

[122] **RLA-069**, *Ethyl Corporation v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 24 June 1998, ¶ 59; **RLA-003**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015 ("*Bilcon – Award on Jurisdiction and Liability*"), ¶ 229 "General international law also provides that a state is not automatically subject to the jurisdiction of international adjudicatory bodies to decide in a legally binding way on complaints concerning its treatment of a foreign investor, but must give its consent to that means of dispute resolution. The heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent").

[123] NAFTA Article 1122(1) (Consent to Arbitration) states: "Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement."

> claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.[124]

56. NAFTA tribunals agree that if a claimant cannot meet the preconditions to submit a claim under Article 1116(1) a NAFTA tribunal will lack jurisdiction.[125] Equally, NAFTA tribunals,[126] and all three NAFTA Parties,[127] agree that if a claim is submitted outside of Article 1116(2)'s three-year limitation period, a tribunal will be without jurisdiction.

57. Even though the Claimant has, in passing, cited to the Award in *Pope & Talbot v. Canada* in support of its assertion that compliance with Article 1116(2) is a question of admissibility,[128] that case is inapposite and unhelpful to its cause. In *Pope & Talbot*, and contrary to what the Claimant suggests, the tribunal did not assert that the limitation period was a question of admissibility. The tribunal's statement that Canada's motion was "in the nature of an affirmative defense" was not a general legal conclusion on jurisdiction versus admissibility (in fact, the question was never raised).[129] Further, subsequent NAFTA tribunals have since rejected this singular finding and instead,

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[124] **RLA-002**, *Methanex – Partial Award*, ¶ 120.

[125] *See e.g.*, **RLA-001**, *Mesa – Award*, ¶¶ 325-327; **RLA-004**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011 ("*Gallo – Award*"), ¶¶ 324-326; **RLA-121**, *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Partial Award, 19 July 2019 ("*B-Mex – Partial Award*"), ¶ 145.

[126] *See* **RLA-080**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award on Jurisdiction and Admissibility, 14 June 2013 ("*Apotex – Award on Jurisdiction*"), ¶¶ 318, 335; **RLA-079**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Decision on Jurisdiction and Admissibility, 30 January 2018 ("*Resolute – Decision on Jurisdiction and Admissibility*"), ¶ 83. *See also*, **CLA-084**, *Merrill & Ring Forestry, L.P. v. Government of Canada* (UNCITRAL) Opinion with respect to the Effect of NAFTA Article 1116(2) On Merrill & Ring's Claim, 22 April 2008 ("*Merrill & Ring – Opinion of W. Michael Reisman*"), ¶ 16: ("In this opinion, I consider the three-year limitation period under NAFTA Article 1116(2), that is, jurisdiction *ratione temporis*.").

[127] *See e.g.*, **RLA-126**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Objection to Jurisdiction of Respondent United States of America, 5 December 2005 ("*Grand River – Objection to Jurisdiction of Respondent*"), p. 2; **RLA-127**, *Eli Lilly and Company v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant to NAFTA Article 1128, 18 March 2016, ¶ 5; **RLA-128**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant to NAFTA Article 1128, 25 July 2014, ¶ 4; **RLA-129**, *ADF Group Inc., v. United States of America* (ICSID Case No. ARB(AF)/00/1) Second Article 1128 Submission of the United Mexican States, 22 July 2002, p. 4; **RLA-080**, *Apotex – Award on Jurisdiction*, ¶ 314, citing to Transcript, Day 2, pp. 313-315

[128] Claimant's NOA, ¶ 125, and footnote 86 in particular, *citing* **RLA-036**, *Pope & Talbot Inc. v. The Government of Canada* (UNCITRAL) Award on Harmac Motion, 24 February 2000 ("*Pope & Talbot – Award on Harmac Motion*").

[129] **RLA-036**, *Pope & Talbot – Award on Harmac Motion*, ¶ 11. The investor had filed a timely claim but omitted to file a waiver with respect to its investment Harmac Pacific, Inc. pursuant to Article 1121(1) until after its Notice of Arbitration. Canada argued that this meant the limitation period had expired with respect to Harmac, but the tribunal decided that there was no evidence to presume that there had been actual or constructive knowledge of loss or damage at the time Canada suggested. The scenario there bears no resemblance to this or other NAFTA cases in the past 20 years.

held that questions related to the limitation period go to the jurisdiction of a tribunal.[130] Regardless of whether Canada's limitation period objection is characterized as an issue of jurisdiction or admissibility, as held by the tribunal in *Mobil v. Canada*, the practical consequences are the same: if a claimant has failed to comply with the limitation period set out in Article 1116(2), then the case cannot proceed.[131]

## IV. THE CLAIMANT BEARS THE BURDEN OF ESTABLISHING THAT THIS TRIBUNAL HAS JURISDICTION

58. An investor bringing a claim under NAFTA Chapter Eleven bears the burden of proving that it has satisfied the conditions precedent to commence arbitration and that the tribunal has jurisdiction over the dispute. This fundamental principle was confirmed in *Mesa v. Canada* where the tribunal held that "[i]t is for the Claimant to establish the factual elements necessary to sustain the Tribunal's jurisdiction over the challenged measures."[132] In so holding, the *Mesa* tribunal followed earlier NAFTA tribunals, including those in *Apotex v. United States*, *Methanex v. United States*, *Bayview v. Mexico, Grand River v. United States* and *Gallo v. Canada*, which have consistently affirmed that it is for the claimant to establish that its claims fall within the scope and coverage of NAFTA Chapter Eleven and within the tribunal's jurisdiction.[133]

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[130] **RLA-079**, *Resolute – Decision on Jurisdiction and Admissibility*, ¶ 85: ("The Tribunal does not agree with the *Pope & Talbot* dictum that time bar objections under NAFTA Articles 1116(2) and 1117(2) constitute an 'affirmative defence'. The language of NAFTA treats the 3-year time limit as one among a number of requirements that a claimant under Chapter Eleven has to meet to attract jurisdiction over a claim. The Tribunal agrees with later tribunals, and with the United States and Mexico in their Article 1128 submissions, that the claimant has to establish its case on this and other points.") *See also*, **RLA-002**, *Methanex – Partial Award*, ¶ 120; **RLA-130**, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Procedural Order No. 2 (Revised), 31 May 2005, ¶ 18; **RLA-070**, *Grand River Enterprises Six Nations, Ltd., et al v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006 ("*Grand River – Decision on Jurisdiction*"), ¶ 3.

[131] *See* **RLA-131**, *Mobil Investments Canada Inc. v. Government of Canada* (ICSID Case No. ARB/15/6) Decision on Jurisdiction and Admissibility, 13 July 2018 ("*Mobil – Decision on Jurisdiction and Admissibility*"), ¶ 136.

[132] **RLA-001**, *Mesa – Award*, ¶ 236.

[133] **RLA-080**, *Apotex – Award on Jurisdiction*, ¶ 150, *citing* **RLA-005**, *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, 15 April 2009 ("*Phoenix Action – Award*"), ¶¶ 58-64 (summarizing previous decisions, and concluding that "if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established prima facie] at the jurisdictional phase."); **RLA-065**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB(AF)/0501) Award, 19 June 2007, ¶¶ 63, 122 (finding that "Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven" and rejecting claimant's submission that "Respondent bears the burden of demonstrating that the Tribunal should not hear the claim"); **RLA-132**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶ 122 (holding that "Claimants must […] establish an investment that falls within one or more of the categories established by that Article [1139]"); **RLA-004**, *Gallo – Award*, ¶ 328 (stating that "[i]nvestment arbitration tribunals have unanimously found that

59. The tribunal in *Resolute v. Canada*, in remarking that a tribunal will lack jurisdiction if a claim is not submitted in accordance with Article 1122, also discussed the burden of proof in the context of the 1976 UNCITRAL Rules:

> Article 24(1) of the UNCITRAL Rules, which are applicable here by virtue of Article 1120(1) of NAFTA, imposes on the relevant party 'the burden of proving the facts relied on to support [its] claim or defence'. The Tribunal does not see any reason to limit Article 24(1) to matters of substance, and the facts necessary to establish that a claim has been brought in accordance with Section B of Chapter Eleven are, in its view, facts relied on in support of the claim.[134]

60. The principle that a claimant bears the burden of proving all facts necessary to establish a tribunal's jurisdiction is also well established in international investment arbitration more generally.[135] The tribunal in *Spence International Investments v. Costa Rica* observed:

> [I]t is for a party advancing a proposition to adduce evidence in support of its case. This applies to questions of jurisdiction as it applies to the merits of a claim, notably insofar as it applies to the factual basis of an assertion of jurisdiction that must be proved as part-and-parcel of a claimant's case. The burden is therefore on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction.[136]

61. As explained below, the Claimant has failed to meet its burden of proving that the Tribunal has jurisdiction.

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they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted.")

[133] NAFTA, Article 1122(1).

[134] **RLA-079**, *Resolute – Decision on Jurisdiction and Admissibility*, ¶ 84.

[135] *See e.g.*, **RLA-133**, *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28) Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶ 48: ("As a party bears the burden of proving the facts it asserts, it is for the Claimant to satisfy the burden of proof required at the jurisdictional phase."); **RLA-134**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Decision on Jurisdiction, 14 November 2005, ¶ 192: ("[Claimant] has the burden of demonstrating that its claims fall within the Tribunal's jurisdiction."); **RLA-135**, *ICS Inspection and Control Services Limited (U.K.) v. The Argentine Republic* (UNCITRAL) Award on Jurisdiction, 10 February 2012, ¶ 280: ("[A] State's consent to arbitration shall not be presumed in the face of ambiguity. Consent to the jurisdiction of a judicial or quasi-judicial body under international law is either proven or not according to the general rules of international law governing the interpretation of treaties. The burden of proof for the issue of consent falls squarely on a given claimant who invokes it against a given respondent. Where a claimant fails to prove consent with sufficient certainty, jurisdiction will be declined.")

[136] **RLA-136**, *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica* (UNCITRAL) Corrected Interim Award, 30 May 2017 ("*Spence – Corrected Interim Award*"), ¶ 239 (emphasis added).

## V. THE TRIBUNAL HAS NO JURISDICTION *RATIONE TEMPORIS* UNDER ARTICLE 1116(1) BECAUSE THE CLAIMANT WAS NOT AN "INVESTOR OF A PARTY" WHEN THE ALLEGED NAFTA BREACH OCCURRED

62. In its Memorial, the Claimant alleges that, "[t]here can be no question that Skyway 127 Energy Inc. was an enterprise of a Party."[137] It states that when it submitted its claim, Tennant was "an investor as defined by paragraph (b) of the definition of 'Investment' in NAFTA Article 1139."[138] The Claimant also asserts that, "Tennant Energy acquired its shares [in Skyway 127] from John Tennant, an American citizen, in June 2011."[139] As a result, the Claimant says, "there can be no issue that there has been continuous American nationality of the ownership of the shares from before the time that the claim arose to the current date."[140] However, the Claimant fails to establish the Tribunal's jurisdiction under Article 1116(1) to consider the measures that it claims breached Article 1105.

63. Consistent with the non-retroactive application of the substantive obligations in NAFTA Chapter Eleven, and international treaties in general, a claimant cannot submit a claim under Article 1116(1) to allege a breach that occurred before it became an "investor of a Party". In this case, all of the measures alleged by the Claimant to breach Article 1105 occurred prior to January 15, 2015, when the Claimant first acquired an ownership interest in Skyway 127. Consequently, the Tribunal has no jurisdiction *ratione temporis* under Article 1116(1) to consider any of the measures alleged to breach Article 1105. Tennant's entire claim must be dismissed on this basis alone.

### A. NAFTA's Dispute Settlement Provisions Limit the Tribunal's Temporal Jurisdiction to Claims from a Claimant Who Qualified as an "Investor of a Party" When the Alleged Breach Occurred

#### 1. Article 1116(1) Requires a Claimant to be an "Investor of a Party" When the Alleged Breach Occurred

64. Article 1116(1) sets out the circumstances under which an investor of a Party may bring a claim on its own behalf, as follows:

[137] Claimant's Memorial, ¶ 769.

[138] Claimant's Memorial, ¶ 773.

[139] Claimant's Memorial, ¶ 775.

[140] Claimant's Memorial, ¶ 775.

> 1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,
>
> and that the investor has incurred loss or damage by reason of, or arising out of, that breach. […][141]

65. To submit a claim under Article 1116(1), a claimant must therefore satisfy the requirements of Article 1101(1) (Scope and Coverage). This provision is located in Section A, and establishes the scope and coverage of the substantive protections accorded to investors and investments as well as the scope of the rights to submit disputes to arbitration, as follows:[142]

> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) investors of another Party;
>
> (b) investments of investors of another Party in the territory of the Party; and
>
> (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party. […]"

66. Article 1101(1) therefore provides that NAFTA Chapter Eleven applies to measures adopted or maintained by a Party that relate to "investors of another Party" and "investments of investors of another Party". Article 1139 (Definitions) defines these terms as follows:

> **investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;
>
> **investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of such Party;

[141] Similarly, Article 1117(1) (Claim by an Investor of a Party on Behalf of an Enterprise) sets out the circumstances under which an investor of a Party may bring a claim on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, alleging that another Party breached an obligation under Section A of NAFTA Chapter Eleven and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach. In this arbitration, the Claimant did not submit a claim under Article 1117(1), but only under Article 1116(1).

[142] **RLA-001**, *Mesa – Award*, ¶ 252.

67. The proper interpretation of the term "investor of a Party" as it operates within Article 1116(1) is that a tribunal's jurisdiction *ratione temporis* is limited to claims submitted by a claimant who qualified as an "investor of a Party" when the alleged breach occurred. Articles 1116(1) and 1101(1) set a temporal limitation on a tribunal's jurisdiction over claims concerning the substantive obligations in Section A of Chapter Eleven. A measure that occurred before the date when a claimant became an "investor of a Party" cannot breach the substantive obligations in Section A in relation to that claimant, because a NAFTA Party did not owe those obligations to that claimant before it became an "investor of a Party". Thus, for the substantive obligations of Chapter Eleven to apply to a measure relating to an investor or its investment, and for a claimant to bring a claim under Article 1116(1), the claimant must have owned or controlled the investment when the alleged breach occurred.

### 2. International Investment Jurisprudence Confirms that a Claimant Must Be an "Investor of a Party" When the Alleged Breach Occurred

68. International investment tribunals, including those established under NAFTA Chapter Eleven, as well as international investment arbitration scholars, have consistently held that if a claimant cannot establish it was a protected investor with a protected investment when an alleged breach occurred, a tribunal lacks temporal jurisdiction.[143] For example, in *Phoenix Action v. Czech Republic*, the tribunal held:

> The Tribunal is limited *ratione temporis* to judging only those acts and omissions occurring after the date of the investor's purported investment. The proposition that bilateral investment treaty claims cannot be based on acts and omissions occurring prior to the claimant's investment results from the nature of the host State's obligations under a bilateral investment treaty. All such obligations relate to the host State's conduct regarding the investments of nationals of the other contracting

[143] Zachary Douglas states: "the timing of the investor's acquisition of its investment determines the commencement of the substantive protection afforded by the investment treaty and hence the temporal scope for the tribunal's adjudicative power over claims based upon an investment treaty obligation." **RLA-117**, Zachary Douglas, *The International Law of Investment Claims* (New York: Cambridge University Press, 2009), ¶ 303; ¶ 631; and Rule 32. *See also*, **RLA-137**, Hanno Wehland, "The Transfer of Investments and Rights of Investors under International Investment Agreements — Some Unresolved Issues", in *Arbitration International*, Volume 30, Issue 3, 1 September 2014, p. 568: ("Investors can only claim protection with regard to breaches taking place after they become protected […]"); and **RLA-138**, Nelson Goh, "The Assignment of Investment Treaty Claims: Mapping the Principles", in Thomas Schultz (ed), *Journal of International Dispute Settlement*, 2019, Volume 10, Issue 1, p. 35.

> party. Therefore, such obligations cannot be breached by the host State until there is such an investment of a national of the other State.[144]

69. Similarly, the tribunal in *Cementownia v. Turkey* stated, "[i]t is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, *i.e.*, at the moment when the events on which its claim is based occurred."[145] The tribunal in *Levy v. Peru* also maintained:

> [I]t is clear to the Tribunal that, where the claim is founded upon an alleged breach of the Treaty's substantive standards, a tribunal's jurisdiction is limited to a dispute between the host state and a national or company which has acquired its protected investment before the alleged breach occurred. […] a claimant bringing a claim based on a Treaty obligation must have owned or controlled the investment when that obligation was allegedly breached.[146]

70. Under the NAFTA, the *Mesa* tribunal held that it lacked jurisdiction *ratione temporis* over certain measures that occurred before Mesa's enterprises were incorporated in Canada, and thus, before Mesa became a protected investor with respect to those investments.[147] The tribunal stated unequivocally:

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[144] **RLA-005**, *Phoenix Action – Award*, ¶ 68 (emphasis added).

[145] **RLA-139**, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/2) Award, 17 September 2009, ¶ 112.

[146] **RLA-140**, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru* (ICSID Case No. ARB/11/17) Award, 9 January 2015, ¶¶ 146-147 (emphasis added). *See also*, **RLA-141**, *Philip Morris Asia Limited v. Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 529: ("whenever the cause of action is based on a treaty breach, the test for a *ratione temporis* objection is whether a claimant made a protected investment before the moment when the alleged breach occurred."); **RLA-142**, *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia* (UNCITRAL) Award, 29 March 2019, ¶ 107; **RLA-143**, *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8) Award, 2 September 2011, ¶¶ 121-128: ("In order to establish jurisdiction, the Claimant must prove that it owned ÇEAŞ and Kepez shares during the time at which it claims the acts constituting a violation of the ECT were committed by the Respondent"); **RLA-144**, *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A.v. The Dominican Republic* (UNCITRAL) Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶¶ 106-107: ("the Tribunal lacks jurisdiction over acts and events that took place before the Claimant acquired the investment"); **RLA-145**, *ST-AD GmbH v. Republic of Bulgaria* (UNCITRAL) Award on Jurisdiction, 18 July 2013, ¶ 300: ("a tribunal has no jurisdiction *ratione temporis* to consider claims arising prior to the date of the alleged investment, since a BIT cannot be applied to acts committed by a State before the claimant invested in the host country. […] According to the well-known principle of non-retroactivity of treaties in international law, a BIT cannot apply to the protection of an investor before the latter indeed became an investor under said BIT").

[147] **RLA-001**, *Mesa – Award*, ¶ 333: ("TTD and Arran were incorporated on 17 November 2009. North Bruce and Summerhill were incorporated on 6 April 2010. Hence, for the reasons set forth above, the Tribunal concludes that its jurisdiction is limited to claims based on measures which occurred after 17 November 2009 for TTD and Arran and after 6 April 2010 for North Bruce and Summerhill.")

> [I]nvestment arbitration tribunals have repeatedly found that they do not have jurisdiction *ratione temporis* unless the claimant can establish that it had an investment at the time the challenged measure was adopted. […] Accordingly, this Tribunal's jurisdiction *ratione temporis* is limited to measures that occurred after the Claimant became an "investor" holding an "investment".[148]

71. Moreover, in describing Article 1101(1), the *Mesa* tribunal held that:

> The scope of application so defined limits the Tribunal's jurisdiction for the obvious reason that the latter derives from the dispute settlement provisions embodied in Chapter 11. Consequently, there is no jurisdiction if disputed measures are not "relating to investors" or to "investments of an investor." In addition to these express provisions of Chapter 11, the same conclusion arises as a general matter from the principle of nonretroactivity of treaties. State conduct cannot be governed by rules that are not applicable when the conduct occurs.[149]

72. As the *Mesa* tribunal noted, provisions such as Article 1116(1) and Article 1101(1) are consistent with the general rule under international law on the non-retroactive application of international treaties.[150] The tribunal in *GAMI v. Mexico* reached a similar result, stating, "NAFTA arbitrators have no mandate to evaluate laws and regulations that predate the decision of a foreigner to invest."[151] Moreover, the tribunal in *B-Mex v. Mexico* agreed with the disputing parties in that case that, "Claimants must establish that they owned or controlled the [relevant investment] at the time of the treaty breaches".[152]

73. The authorities above apply the general rule on the non-retroactive application of international treaties in various circumstances – including where an alleged investment was incorporated after the alleged breach, or where a previous owner of an investment lacked the requisite nationality to be a

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[148] **RLA-001**, *Mesa – Award*, ¶¶ 325-327 (emphasis added).

[149] **RLA-001**, *Mesa – Award*, ¶ 325 (emphasis added).

[150] Under international law, treaties do not apply retroactively unless stated otherwise. The ILC Articles on State Responsibility, Article 13 states: "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs." (**CLA-185**, International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, Article 13). Similarly, the Vienna Convention on the Law of Treaties, Article 28 states: "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party. (**RLA-031**, *Vienna Convention on the Law of Treaties,* 1155 U.N.T.S. 331, 23 May 1969, Article 28).

[151] **CLA-135**, *GAMI Investments, Inc. v. The Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004, ¶ 93.

[152] **RLA-121**, *B-Mex – Partial Award*, ¶ 145.

protected investor. Nevertheless, as explained below, the Claimant appears to maintain that there was continuous American nationality over the investment – meaning one allegedly protected investor transferred Skyway 127 to another allegedly protected investor.[153] Similar circumstances arose in *GEA Group v. Ukraine*.[154] The claimant in that case invested in the investment (a conversion contract) by acquiring the shares of an enterprise (KCH) from another potentially protected investor (SF Beteiligungs-GmbH).[155] Ukraine argued that to the extent any alleged breaches occurred before the acquisition of KCH, the tribunal lacked jurisdiction.[156] The tribunal affirmed that it had no jurisdiction over alleged breaches that occurred before the claimant became an investor, as follows: "for [a] tribunal to hear the Claimant's claim, the Claimant must have held an interest in the alleged investment before the alleged treaty violations were committed".[157] The tribunal observed that investment arbitration tribunals have consistently applied this principle.[158]

74. Accordingly, this Tribunal has no jurisdiction to consider an alleged breach that occurred before the Claimant became an "investor of a Party" in Canada. Nothing in the text of Article 1116(1) expresses an intention from the NAFTA Parties to derogate from the general rule on the non-retroactive application of international treaties.[159]

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[153] Claimant's Memorial, ¶ 775.

[154] **RLA-146**, *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16) Award, 31 March 2011 ("*GEA Group – Award*").

[155] **RLA-146**, *GEA Group – Award*, ¶¶ 36-40, 150, 172.

[156] **RLA-146**, *GEA Group – Award*", ¶ 166.

[157] **RLA-146**, *GEA Group – Award*", ¶¶ 168-170 (emphasis added). In applying the governing principle quoted, the *GEA Group* tribunal found that it had jurisdiction over certain alleged breaches because they occurred after the claimant had made its investment in Ukraine. (*See e.g.*, ¶¶ 192 to 193, 198). However, as explained in Part V.B below, such grounds to find jurisdiction do not exist in this case, because all of the measures that Tennant Energy, LLC alleges to have breached NAFTA occurred before the Claimant allegedly invested in Canada.

[158] **RLA-146**, *GEA Group – Award*, ¶ 170, *citing*: **RLA-147**, *Limited Liability Company Amto v. Ukraine* (SCC Arbitration No. 080/2005) Final Award, 26 March 2008, ¶ 48(c); **CLA-115**, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 244; **RLA-005**, *Phoenix Action – Award*, ¶ 67.

[159] It is well recognized that "[a]n important principle of customary international law should [not] be held to have been tacitly dispensed with [by international agreement], in the absence of words making clear an intention to do so." (**RLA-148**, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, I.C.J. Reports 1989, Judgment, 20 July 1989, p. 42); **CLA-138**, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003, ¶ 162: ("It would be strange indeed if sub silentio the international rule were to be swept away.")

### 3. The Claimant Must Submit Adequate Evidence to Discharge Its Burden to Prove that It Was an "Investor of a Party" When the Alleged Breach Occurred

75. As explained above, the Claimant bears the burden to prove the factual elements required to establish the Tribunal's jurisdiction. In this regard, the *Gallo* tribunal provided key insights into the evidence necessary for a claimant to discharge its burden to prove it owned or controlled an enterprise at the relevant time.[160] The claimant in that case, Mr. Gallo, contended that he owned an equity share in the investment enterprise before the alleged breach occurred. On the burden of proof, the tribunal affirmed that:

> [I]t is for the Claimant to marshal convincing evidence showing the date when he acquired ownership of the Enterprise's share capital, in accordance with applicable law.[161]

76. The tribunal found that the only evidence marshalled by the claimant to prove the transfer of shares to him took place before the alleged breach occurred was the testimony of one witness.[162] As elaborated in Part V.B.2 below, the Claimant also only offers the testimony of a single witness, providing hearsay evidence, to support assertions that are central to determining whether the Claimant was an "investor of a Party" when the alleged breach occurred. Yet, in *Gallo*, the single witness' evidence did not carry sufficient weight for the tribunal, from a subjective or objective point of view.[163] Subjectively, the tribunal found that it could not rely solely on the witness's statement because it was "not made by an independent and unbiased witness", but by the enterprise's secretary, "who has a personal interest in the matter".[164] Objectively, the tribunal stated that it would expect some circumstantial evidence to corroborate the witness's testimony, but it instead found:

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[160] **RLA-004**, *Gallo – Award*, ¶¶ 284-297.

[161] **RLA-004**, *Gallo – Award*, ¶ 284. The tribunal clarified that a shareholders' register could be used to establish a rebuttable presumption showing that the registration took place at a specified date (¶ 284). Yet this presumption must give way if undisputable proof is marshalled showing that the transaction took place at a different date. On the facts, the tribunal found that Mr. Gallo did not acquire the share capital of the enterprise on the date shown in the Shareholders' Registry (¶ 287).

[162] **RLA-004**, *Gallo – Award*, ¶ 288.

[163] **RLA-004**, *Gallo – Award*, ¶ 289.

[164] **RLA-004**, *Gallo – Award*, ¶ 289, *citing*: **RLA-149**, *Hussein Nuaman Soufraki v. The United Arab Emirates* (ICSID Case No. ARB/02/7) Award, 7 July 2004, ¶ 78: ("The Tribunal does not find that the affidavit of Messrs. Casini and

> There is none. In an age where almost every human action leaves a written record, it is simply unconceivable that the Claimant, after extensive discovery, has not been able to produce one single shred of documentary evidence, confirming the date when Mr. Gallo acquired ownership: no agreement, no contract, no confirmation slip, no instruction letter, no memorandum, no invoice, no email, no file note, no tax declaration, no submission to any authority – absolutely nothing.[165]

77. The claimant in *Gallo* failed to prove he acquired ownership and control of the enterprise investment before the alleged breach occurred.[166] The tribunal therefore held that it lacked jurisdiction *ratione temporis* over the claim, affirming that NAFTA Chapter Eleven "cannot be applied to acts committed by a State before the claimant invested in the host country."[167]

78. Other tribunals have given no weight to self-serving witness statements that offer accounts of hearsay without reliable corroborating evidence. In *Helnan v. Egypt*, the claimant alleged that Egypt adopted a plan to terminate the contract at issue based on what a witness said a government official told the witness.[168] The tribunal found that the claimant failed to discharge its burden to prove this

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Nicotra constitutes disinterested and convincing evidence. It should be noted that Mr. Casini is an auditor whom Mr. Soufraki has engaged over the years, and that Mr. Nicotra is a receptionist at Mr. Soufraki's hotel in Viareggio.").

[165] **RLA-004**, *Gallo – Award*, ¶ 289 (emphasis added). The tribunal emphasised that two elements of persuasion weighed highly in its assessment: the inexistence of contemporaneous corporate resolutions, and the absence of contemporaneous tax filings (¶ 291). *See also*, ¶ 294: ("Both Mr. Gallo and the Enterprise should have presented tax declarations for the fiscal years 2002 and 2003 to the US and to the Canadian tax authorities, Mr. Gallo disclosing that he was the owner of the Enterprise and the Adams Mine, and the Enterprise identifying Mr. Gallo as its only shareholder. Both Mr. Gallo and the Enterprise were under a legal obligation to do so, and both failed to comply.")

[166] **RLA-004**, *Gallo – Award*, ¶¶ 290, 297, 312.

[167] **RLA-004**, *Gallo – Award*, ¶¶ 325-326: ("for Chapter 11 of the NAFTA to apply to a measure relating to an investment, that investment must be owned or controlled by an investor of another party, and ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained. In a claim under Art. 1117 the investor must prove that he owned or controlled directly or indirectly the 'juridical person' holding the investment, at the critical time. […] As the Tribunal in *Phoenix* declared, it does not need extended explanation to assert that a tribunal has no jurisdiction *ratione temporis* to consider claims arising prior to the date of the alleged investment, because the treaty cannot be applied to acts committed by a State before the claimant invested in the host country. In the present case, the Claimant must have owned or controlled the Enterprise at the time when the AMLA was enacted. And since the Tribunal has already found that the Claimant has failed to marshal the evidence necessary to prove such ownership and control at the relevant time, the necessary consequence is that his claim must fail for lack of jurisdiction *ratione temporis*." (emphasis added)).

[168] **RLA-150**, *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19) Award, 3 July 2008 ("*Helnan – Award*"), ¶ 158.

allegation, as it relied on hearsay contained in a single witness statement with no corroborating evidence.[169]

79. Similarly, the tribunal in *EDF v. Romania* found that the claimant failed to discharge its burden to prove its allegations that government officials solicited bribes, as the claimant relied on hearsay evidence from a witness statement without corroborating evidence.[170] The tribunal held that confirmatory evidence is normally required to admit hearsay evidence from a witness statement in international arbitration.[171]

### B. The Tribunal Has No Jurisdiction *Ratione Temporis* Because the Claimant Was Not an "Investor of a Party" When the Alleged Breach Occurred

80. The Claimant filed this NAFTA claim on its own behalf under Article 1116(1).[172] For the claim to proceed, the Claimant must demonstrate that Tennant Energy, LLC (not John Tennant) was an "investor of a Party" when the alleged breach occurred. The Claimant cannot establish the Tribunal's jurisdiction under Article 1116(1) by simply claiming that Skyway 127 was a protected investment at the relevant time. It is not determinative of the Tribunal's jurisdiction whether a previous investor may have owned or controlled an investment at the time of the alleged breach; rather, the Claimant itself must have been an investor in that investment when the alleged breach occurred. Thus, only two dates are relevant to Canada's jurisdictional objection under Article 1116(1): (i) the date when the alleged breach occurred; and (ii) the date when the Claimant became an "investor of a Party".

#### 1. All of the Challenged Measures, and therefore the Alleged Breach, Occurred Between 2008 to 2013

81. Every document relied upon by the Claimant in its Memorial confirms that all the measures it challenges occurred no later than 2013. Indeed, there is no dispute between the Parties that each of the measures the Claimant alleges resulted in a breach of Article 1105 occurred from 2008 to 2013.

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[169] **RLA-150**, *Helnan – Award*, ¶ 157: ("The only evidence of intervention of the administration to obtain, directly or indirectly, the termination of the Contract is based on hearsay, with no further corroborating evidence.")

[170] **RLA-151**, *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13) Award, 8 October 2009 ("*EDF – Award*"), ¶¶ 224-232.

[171] **RLA-151**, *EDF – Award*, ¶ 224.

[172] Claimant's NOA, p. 1 and ¶ 5; *see also* Claimant's Memorial, ¶¶ 108, 117.

82. The Claimant alleges that three groups of measures resulted in a breach of Article 1105. The first group of challenged measures concerns the Korean Consortium. This includes the negotiation of the GEIA from 2008[173] to the GEIA's signing on January 21, 2010[174]; the reservation of capacity for the Korean Consortium, set out in Ministerial Directions from September 30, 2009 to September 17, 2010[175]; Ontario's grant of an extension to the Korean Consortium to choose its connection points in the Bruce region, on August 3, 2011;[176] and the Korean Consortium's purchase of lower-ranked FIT projects beginning in 2010, up to September 13, 2011.[177] These events occurred from December 2008 to September 13, 2011.

83. The second group of challenged measures concerns the administration of the FIT Program. This includes the Minister's Direction to the OPA on June 3, 2011 on allocating capacity from the Bruce to Milton Line, including the interconnection point amendment and the reduction of transmission capacity;[178] the treatment of NextEra and IPC in 2011; the awarding of FIT Contracts on July 4, 2011 when the OPA told Skyway 127 it would not receive a FIT Contract[179]; and the Minister's Direction to the OPA on June 12, 2013 to no longer procure any additional MW under the FIT Program for large FIT projects.[180] These events occurred from November 27, 2009 at the earliest (when Skyway 127 applied to the FIT Program) to June 12, 2013.

84. The third group of challenged measures concerns the handling of documents by Ontario. This includes the alleged destruction of emails and documents by staff of the former Minister of Energy

[173] **R-002**, 2011 Auditor General's Report, p. 108.

[174] *See* **R-041**, Government of Ontario, Ministry of Energy, Archived Backgrounder, "Ontario Delivers $7 Billion Green Investment", 21 January 2010; **C-132**, Samsung C&T press release, "Samsung C&T, Korea Electric Power Company to Build World's Largest Wind, Solar Panel Cluster in Ontario", 21 January 2010.

[175] **C-139**, April 1, 2010 Direction; **R-043**, September 17, 2010 Direction.

[176] **R-002**, 2011 Auditor General's Report, p. 108.

[177] *See* **R-079**, Renewables Now, "Pattern Energy, Samsung Renewable buy 180-MW Canadian wind project", 13 September 2011.

[178] **C-176**, June 3, 2011 Direction; **C-129**, FIT Rules, v. 1.5.

[179] **C-025**, Ontario Power Authority, "FIT Contract Offers for the Bruce-Milton Capacity Allocation Process", 4 July 2011.

[180] **C-152**, June 12, 2013 Direction, p. 3.

and Premier of Ontario concerning the two cancelled gas plants,[181] and the alleged destruction of documents concerning Ontario's deferral on the development of off-shore wind projects. These events occurred from August 2011 to February 2013. Hence, none of the challenged measures post-dates June 12, 2013.

85. The following table summarizes each group of measures, as alleged by the Claimant:

[181] **R-050**, Ontario, Official Report of Debates (Hansard), Standing Committee on Justice Policy, 40th Parl., 2nd Sess., No. JP-10, 9 April 2013, p. 22; **R-003**, IPC Report, pp. 4, 13, 23, and 25.

| **Challenged Measures Alleged by the Claimant** | **Date(s)** |
|---|---|
| **Challenged Measures Related to the GEIA** | |
| Ontario negotiated the GEIA in "secret".[182] | December 12, 2008[183] to January 21, 2010[184] |
| Ontario did not make the terms of the GEIA public upon conclusion.[185] | January 21, 2010 |
| Ontario reserved transmission capacity for the Korean Consortium, and provided its projects priority access to transmission capacity.[186] | September 30, 2009[187] to April 1, 2010[188] |
| Ontario reserved 500 MW of transmission capacity in the Bruce region for the Korean Consortium.[189] | September 17, 2010[190] |
| Ontario granted the Korean Consortium an extension to select connection points in the Bruce region, instead of cancelling the GEIA.[191] | August 3, 2011[192] |
| Ontario allowed the Korean Consortium and its partner Pattern Energy to acquire lower-ranked FIT application projects.[193] | 2010 to September 13, 2011[194] |
| **Challenged Measures Related to the FIT Program** | |
| Ontario revised the rules of the FIT Program (including the allocation of transmission capacity in the Bruce and West of London regions, and the Connection Point Amendment Window).[195] | June 3, 2011[196] |
| Ontario provided NextEra preferential access to government officials and advanced information on FIT Rule changes.[197] | 2011 |
| Ontario favoured NextEra and IPC in awarding FIT Contracts.[198] | July 4, 2011[199] |
| The Minister issued a Direction to the OPA to no longer procure any additional MW under the FIT Program for large FIT projects. | June 12, 2013[200] |
| **Challenged Measure Related to the Management of Information** | |
| Staff of the former Minister of Energy and Premier of Ontario allegedly destroyed documents relating to the two cancelled gas plants and to Ontario's deferral on the development of off-shore wind projects.[201] | August 2011 to February 2013[202] |

[182] Claimant's Memorial, *e.g.* ¶¶ 511-515.

[183] **R-002**, 2011 Auditor General's Report, p. 108.

### 2. The Claimant Was Not an "Investor of a Party" When the Alleged Breach Occurred

#### (a) The Claimant Did Not Own an Equity Interest in Skyway 127 When the Alleged Breach Occurred

86. The Claimant offers conflicting and unsubstantiated assertions regarding the precise dates when Tennant Energy, LLC (or its predecessor in name, Tennant Travel Services, LLC) acquired an equity interest in Skyway 127. Yet, none of the evidence offered by the Claimant supports a finding that the Claimant owned equity in Skyway 127 between 2008 and 2013, when the alleged breach occurred.

87. The most relevant facts on the Claimant and its ownership in Skyway 127 are as follows:

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[184] *See* **R-041**, Government of Ontario, Ministry of Energy, Archived Backgrounder, "Ontario Delivers $7 Billion Green Investment", 21 January 20; **C-132**, Samsung C&T press release, "Samsung C&T, Korea Electric Power Company to Build World's Largest Wind, Solar Panel Cluster in Ontario", 21 January 2010.

[185] Claimant's Memorial, *e.g.* ¶ 526.

[186] Claimant's Memorial, *e.g.* ¶ 202.

[187] **C-174**, September 24, 2009 Direction.

[188] **C-139**, April 1, 2010 Direction. The letter is stamped as received on May 6, 2010. **R-043**, September 17, 2010 Direction.

[189] Claimant's Memorial, *e.g.* ¶ 227.

[190] **R-043**, September 17, 2010 Direction.

[191] Claimant's Memorial, *e.g.* ¶¶ 206-208.

[192] **R-002**, 2011 Auditor General's Report, p. 108.

[193] Claimant's Memorial, *e.g.* ¶ 221.

[194] *See* **R-079**, Renewables Now article, "Pattern Energy, Samsung Renewable buy 180-MW Canadian wind project", 13 September 2011.

[195] Claimant's Memorial, *e.g.* ¶ 502.

[196] **C-176**, June 3, 2011 Direction; **C-129**, FIT Rules, v. 1.5.

[197] Claimant's Memorial, *e.g.* ¶ 537.

[198] Claimant's Memorial, *e.g.* ¶ 490.

[199] **C-176**, June 3, 2011 Direction; **C-025**, Ontario Power Authority, "FIT Contract Offers for the Bruce-Milton Capacity Allocation Process", 4 July 2011.

[200] **C-152**, June 12, 2013 Direction, p. 3.

[201] Claimant's Memorial, *e.g.* ¶¶ 264-268.

[202] **R-050**, Ontario, Official Report of Debates (Hansard), Standing Committee on Justice Policy, 40th Parl., 2nd Sess., No. JP-10, 9 April 2013, p. 22; **R-003**, IPC Report, pp. 4, 13, 23, and 25.

- While the Claimant was incorporated on September 10, 2001,[203] James Tennant filed Restated Articles of Organization on March 5, 2002[204] and on November 27, 2002. On the latter date, he renamed the entity, "Tennant Travel Services, LLC".[205] On April 20, 2015 – after the entity first received shares in Skyway 127 – James Tennant again renamed the entity, "Tennant Energy, LLC".[206]
- John Tennant held shares in Skyway 127 from June 20, 2011 to January 15, 2015.[207]
- On January 15, 2015, Tennant Travel Services, LLC[208] received 45.2% of the shares in Skyway 127.[209] In its NOA, the Claimant states, "Tennant Energy continued the investment of these American entities [GE Energy and John Tennant] in Skyway 127 through a corporate reorganization on January 15, 2015."[210]

88. Despite this statement in the NOA, the Claimant submits a new assertion on the ownership of Skyway 127 in its Memorial: that John Tennant held his shares in Skyway 127 as a "bare trustee".[211] This assertion fails to establish that *the Claimant* owned an equity interest in Skyway 127 when the challenged measures occurred. The Claimant provides no contemporaneous documentary evidence to prove that John Tennant held his shares in Skyway 127 in trust for Tennant Travel Services, LLC. The Claimant offers no corporate record books, emails, or internal documents of Tennant Travel Services, LLC or Skyway 127 indicating that the Claimant was a beneficial owner of shares in Skyway 127 before January 15, 2015. The Claimant offers no tax documents of Tennant Travel Services, LLC or John Tennant indicating that Tennant Travel Services, LLC was a beneficial owner

[203] As Canada noted in its Motion for Security for Costs and Disclosure of Third Party Funding, dated August 16, 2019, fn. 50, the Claimant was incorporated in California in 2001 under the name, "Tennant Consulting, LLC" (200125610024). **R-008**, Tennant Consulting, LLC, Limited Liability Company Articles of Organization, 10 September 2001.

[204] **R-009**, Wine Destinations, LLC, Limited Liability Company Restated Articles of Organization, 5 March 2002.

[205] **R-010**, Tennant Travel Services, LLC, Limited Liability Company Restated Articles of Organization, 27 November 2002.

[206] **R-011**, Tennant Energy, LLC, Amendment to Articles of Organization of a Limited Liability Company, 20 April 2015.

[207] **C-117**, Shareholder's Ledger, Skyway 127, 20 June 2011; **C-115**, Shareholder's Ledger Skyway 127, 15 January 2015.

[208] For accuracy, this analysis uses the contemporaneous name of the Claimant during the relevant dates.

[209] **C-115**, Shareholder's Ledger Skyway 127, 15 January 2015. Specifically, it received 22.3% of the equity from John Tennant, 11.3% from Mr. Pennie, and 11.3% from Marilyn Field (Mr. Pennie's wife).

[210] Claimant's NOA, ¶ 11; **CWS-1**, Pennie Statement, ¶ 67. The Claimant does not explain how it "continued the investment" of GE Energy on this date. While it does not appear the Claimant received any of GE Energy's equity in Skyway 127 in 2015, Tennant Energy, LLC acquired GE Energy's 50% shareholding in Skyway 127 on June 30, 2016. It is unclear whether Tennant Travel Services, LLC paid any money for any of the equity interest it obtained in Skyway 127, including for the transfer of GE Energy's 50% shareholding.

[211] Claimant's Memorial, ¶ 126.

of John Tennant's equity interest in Skyway 127. It is highly irregular for the Claimant not to provide a single piece of contemporaneous evidence demonstrating that it was the beneficial owner of shares in Skyway 127 when the alleged breach occurred.

89. Instead, the Claimant relies on Mr. Pennie's Witness Statement to support this assertion.[212] In his statement, Mr. Pennie states, "John Tennant told me that he was holding the Skyway 127 shares as a bare trustee for a corporation to be named."[213] Mr. Pennie reiterates that John Tennant held the shares in trust for a "still undesignated holding company".[214] Mr. Pennie's statement that John Tennant "told me" he was a bare trustee is merely hearsay. The Tribunal should give it no weight. It is unreliable given the lack of contemporaneous evidence on the record to corroborate it.[215] Subjectively, Mr. Pennie is a senior executive for Tennant Energy, LLC.[216] This Tribunal should refrain, as other international investment tribunals have done, from finding that the Claimant has discharged its burden of proof by relying solely on hearsay evidence offered by a single, self-interested witness without corroborating evidence.[217]

90. In fact, substantial evidence on the record indicates that the Claimant did *not* own shares in Skyway 127 prior to January 15, 2015. The Claimant submitted with its Memorial three Shareholder & Transfer Ledgers for Skyway 127 from 2011 (June 9, 2011, June 20, 2011, and December 30, 2011).[218] None of the ledgers refer to Tennant Travel Services, LLC – the Claimant is completely absent from them. They do not state that John Tennant held his shares in Skyway 127 in trust for

[212] Claimant's Memorial, ¶ 126; **CWS-1**, Pennie Statement, ¶¶ 48-49.

[213] **CWS-1**, Pennie Statement, ¶ 48 (emphasis added).

[214] **CWS-1**, Pennie Statement, ¶ 48.

[215] Even relying on Mr. Pennie's testimony, there is nothing to support the allegation that John Tennant held his shares in Skyway 127 in trust specifically for Tennant Travel Services, LLC instead of another enterprise when he acquired those shares in 2011.

[216] **CWS-1**, Pennie Statement, ¶ 68 ("I have been the senior executive of Tennant since it took over control of the Skyway 127 project.")

[217] **RLA-004**, *Gallo – Award*, ¶ 326; **RLA-150**, *Helnan – Award*, ¶¶ 157-160; **RLA-151**, *EDF – Award*, ¶¶ 224-232.

[218] **C-116**, Shareholder's Ledger Skyway 127, 9 June 2011; **C-117**, Shareholder's Ledger Skyway 127, 20 June 2011; **C-114**, Shareholder's Ledger Skyway 127, 30 December 2011, respectively.

Tennant Travel Services, LLC. The earliest Shareholder Ledger identifying Tennant Travel Services, LLC as owning an interest in Skyway 127 is dated January 15, 2015.[219]

91. Rather than John Tennant holding the Skyway 127 shares in trust for the benefit of a company from June 20, 2011 to January 15, 2015, it appears that during this period John Tennant held the shares for his own benefit and then, after January 15, 2015, used a holding company to maintain the shares for his own benefit. The Memorial states that Tennant Travel Services, LLC acted as "the holding company" when it obtained the 45.2% interest in Skyway 127 in 2015.[220] The Memorial explains that John Tennant "used the existing California limited liability corporation to hold the investment in Skyway 127."[221] To the extent the Tribunal wishes to rely on Mr. Pennie's Witness Statement in this regard, Mr. Pennie says that John Tennant held the shares until he designated a holding company; and, "[e]ventually, John Tennant used the existing California limited liability corporation set up by his brother Jim Tennant [*i.e.* Tennant Travel Services, LLC] to acquire and maintain John's investment in Skyway 127."[222]

92. The only reliable evidence on the record demonstrates that Tennant Travel Services, LLC acquired its equity interest in Skyway 127 on January 15, 2015, and not a day earlier. The Claimant has failed to discharge its burden to prove that it owned Skyway 127 when the alleged breach occurred, between 2008 to 2013.[223]

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[219] **C-115**, Shareholder's Ledger Skyway 127, 15 January 2015.

[220] Claimant's Memorial, ¶ 127: ("After that, the shares were registered into the holding company, then known as Tennant Travel Services, LLC."), *citing*: **C-117**, Shareholder's Ledger, Skyway 127, 20 June 2011.

[221] Claimant's Memorial, ¶ 126 (emphasis added).

[222] **CWS-1**, Pennie Statement, ¶ 48 (emphasis added).

[223] Canada notes that even if the Claimant marshals reliable, contemporaneous evidence proving that it owned an equity interest in Skyway 127 when John Tennant acquired his shares on June 20, 2011, the Tribunal's jurisdiction would nonetheless be limited to an alleged breach that occurred on June 20, 2011 and thereafter. The Tribunal would have no jurisdiction over the claims regarding measures that preceded June 20, 2011 – including many of the GEIA-related measures and the June 3, 2011 Direction. While Mr. Pennie says in his Witness Statement that John Tennant obtained his shares in Skyway 127 from Derek Tennant on April 19, 2011, no contemporaneous documentary evidence on the record corroborates this statement. In fact, the Shareholder Ledger from June 9, 2011, does not refer to John Tennant. Thus the Tribunal should accord no weight to this statement from Mr. Pennie. *See* **CWS-1**, Pennie Statement, ¶ 27: ("Derek Tennant transferred his interest in Skyway 127 (held through IQ Properties) to his brother, John Tennant, on April 19, 2011. At the time, we were very busy at Skyway 127 with the FIT Applications, and John's shares were not registered in the Skyway 127 corporate books until June 20, 2011."); **C-116**, Shareholder's Ledger Skyway 127, 9 June 2011.

### (b) The Claimant Did Not Control Skyway 127 When the Alleged Breach Occurred

93. The Claimant has also failed to establish that it controlled Skyway 127, directly or indirectly, when the alleged breach occurred.[224] The following chart summarizes the key facts on the owners, directors, and management of Tennant Travel Services, LLC and Skyway 127 as of June 20, 2011 (the date when John Tennant first acquired shares in Skyway 127), unless stated otherwise.

| **Enterprise** | **Tennant Travel Services, LLC** | **Skyway 127** |
|---|---|---|
| **Shareholders** | • Jim Tennant: 100% | • GE Energy: 50.0%<br>• Premier Renewable Energy: 25.0% (0% in December 2011)<br>• John Tennant: 11.3% (22.6% in December 2011)<br>• John C. Pennie: 5.6% (11.6% in December 2011)<br>• Marilyn Field: 5.6% (11.6% in December 2011)<br>• Others: smaller shareholdings |
| **Board of Directors** | • John C. Pennie*<br>• Jim Tennant*<br>• John Tennant*<br>*Dates uncertain. | • Derek Tennant<br>• John C. Pennie |

[224] NAFTA Chapter Eleven contains no definition of the term "control". The Federal Court of Canada in *S.D. Myers v. Canada* observed that the ordinary meaning of "control" as: "[t]he power of directing, command (under the control of)". (**R-080**, *Canada (Attorney General) v. S.D. Myers Inc.*, 2004 FC 38, [2004] 3 FCR 368, ¶ 63). In *S.D. Myers*, the tribunal found that the claimant (SDMI) controlled the investment (Myers Canada), even though SDMI did not own shares in Myers Canada (**CLA-111**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 12 November 2000 ("*S.D. Myers –Partial Award*"), ¶¶ 229 to 231). The Federal Court concurred (**R-080**, *Canada (Attorney General) v. S.D. Myers Inc.*, 2004 FC 38, [2004] 3 FCR 368, ¶ 70). At least four facts in *S.D. Myers* distinguish it from this case. First, the "Myers family" wholly-owned SDMI and Myers Canada. SDMI was owned by Dana Myers (51%) and his three brothers. Myers Canada was owned by the four Myers brothers in equal shareholdings. Second, Dana Myers was the authoritative voice over SDMI, as its CEO and majority owner (**CLA-111**, *S.D. Myers –Partial Award*, ¶ 227). Third, Dana Myers was the authoritative voice over Myers Canada (¶ 227). The Federal Court found: "Mr. Dana Myers controlled every decision, every investment, every move by Myers Canada, and Mr. Myers did so as chief executive officer of SDMI." (**R-080**, *Canada (Attorney General) v. S.D. Myers Inc.*, 2004 FC 38, [2004] 3 FCR 368, ¶ 67) Fourth, SDMI advanced the money necessary for the operation of Myers Canada; provided personnel and technical support for Myers Canada; and expected to share in the profits from Myers Canada (**R-080**, *Canada (Attorney General) v S.D. Myers Inc.*, [2004] 3 FCR 368, ¶ 64; **CLA-111**, *S.D. Myers –Partial Award*, ¶ 226).

| | | |
|---|---|---|
| **Management Officers** | • Jim Tennant | • Derek Tennant (President)<br>• John C. Pennie (Chief Operating Officer) |

94. The facts demonstrate that the Claimant did not control Skyway 127 from 2008 to 2013. First, during that time, GE Energy was the largest shareholder, owning half the shares.[225] Of the other shareholders, no shareholder held more than a 22.6% interest in Skyway 127 by the end of 2011;[226] and Tennant Travel Services, LLC was not one of these shareholders. The Claimant did not hold any stake, let alone a controlling one, in Skyway 127 from 2008 to 2013.

95. Mr. Pennie makes the unsubstantiated assertion that John Tennant controlled the day-to-day decisions of Skyway 127.[227] This assertion does not reconcile with the fact that John Tennant never held a role granting him the power to direct Skyway 127. He did not hold a position on the Board of Directors or Management of Skyway 127. Instead, Derek Tennant was the President of Skyway 127, while Mr. Pennie held roles on both the Board and Management. However, even accepting this assertion *prima facie*, it does not establish that the Claimant controlled Skyway 127 when the alleged breach occurred. John Tennant is not the Claimant in this case; Tennant Energy, LLC (and its predecessors) retains separate legal personality from its owners.[228] Thus, it is impermissible to conflate the identity of the Claimant with that of John Tennant. This is particularly so here, where John Tennant's involvement with Tennant Energy, LLC (or its predecessors) does not demonstrate that he controlled the Claimant. His involvement with Tennant Travel Services, LLC appears limited to serving on its Board, with others.[229] John Tennant does not appear to have held an ownership stake in Tennant Travel Services, LLC (let alone a majority ownership) or a management position with it

[225] **C-117**, Shareholder's Ledger Skyway 127, 20 June 2011.

[226] **C-117**, Shareholder's Ledger Skyway 127, 20 June 2011.

[227] **CWS-1**, Pennie Statement, ¶ 51.

[228] In **RLA-152**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* I.C.J. Reports 1970, Second Phase, Judgment, 5 February 1970, p. 34, ¶¶ 38-45, the International Court of Justice acknowledged the corporation's separate legal personality as established by municipal law.

[229] **CWS-1**, Pennie Statement, ¶ 50.

when the alleged breach occurred.[230] Moreover, as noted above, it is James Tennant who renamed the enterprise throughout its corporate history, not John Tennant.

96. Furthermore, the Claimant filed none of the evidence considered relevant by the tribunal or reviewing Federal Court in *SD Myers v. Canada* to showing a claimant's control over an investment enterprise.[231] For instance, the Claimant provided no evidence that Tennant Travel Services, LLC advanced the money necessary for the operation of Skyway 127 when the alleged breach occurred, or that Tennant Travel Services, LLC provided Skyway 127 with loans, technical assistance, personnel, or other forms of support through which the Claimant might have controlled Skyway 127. No reliable, contemporaneous evidence on the record shows that the Claimant controlled Skyway 127 when the alleged breach occurred. Consequently, the Tribunal has no jurisdiction *ratione temporis* over the claim, because the Claimant has failed to prove that it was an "investor of a Party" when the alleged breach occurred, as required under Article 1116(1).

## VI. THE TRIBUNAL HAS NO JURISDICTION *RATIONE TEMPORIS* UNDER ARTICLE 1116(2) BECAUSE THE NOTICE OF ARBITRATION WAS NOT SUBMITTED WITHIN THE THREE-YEAR LIMITATION PERIOD

97. Even if the Tribunal were to conclude that the Claimant was an "investor of a Party" at the relevant time, the Tribunal still does not have jurisdiction to hear this claim. This is because the Claimant failed to submit its claim within the three-year limitation period prescribed by Article 1116(2).

### A. Canada's Consent to Arbitration is Conditional on the Claimant Satisfying the Strict Requirement in Article 1116(2)

#### 1. Article 1116(2) Imposes a Strict Three-Year Limitation Period for a Claimant to Submit a Claim to Arbitration

98. Conformity with NAFTA Article 1116(2) is one of the pre-conditions to Canada's consent that must be complied with in order to establish this Tribunal's jurisdiction. Article 1116(2) of the

[230] Mr. Pennie states that John Tennant was an original business partner in the wine-tourism company, without stating that John Tennant held any shares or a management position in it. Mr. Pennie also states that Jim Tennant – not John Tennant – set up the California limited liability corporation. **CWS-1**, Pennie Statement, ¶ 49.

[231] **R-080**, *Canada (Attorney General) v S.D. Myers Inc.*, 2004 FC 38, [2004] 3 FCR 368, ¶ 64; **CLA-111**, *S.D. Myers – Partial Award*, ¶ 226.

NAFTA establishes a three-year limitation period for an investor to bring a claim under Chapter Eleven:

> An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.[232]

99. The standard articulated in Article 1116(2) is a strict limitation period that forms one of the fundamental bases of Canada's consent to arbitration disputes under NAFTA Chapter Eleven.[233] This is consistent with the very purpose of limitation period provisions, which provide legal predictability and certainty by ensuring that States are not forced to defend stale claims for which evidence may no longer be readily available or which require witnesses to recollect events long past.[234] The limitation period provision ensures that any allegation of a breach of a NAFTA obligation will be addressed promptly rather than allowed to linger. This, in turn, creates certainty and stability for both NAFTA Parties and their investors.[235] As the *Spence International* tribunal noted in discussing the Dominican Republic-Central America Free Trade Agreement's (CAFTA-DR) equivalent limitation period provision:

> While, from a given claimant's perspective, a limitation clause may be perceived as an arbitrary cut off point for the prosecution of a claim, such clauses are a

[232] NAFTA Article 1116(2).

[233] **RLA-081**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002 ("*Feldman – Award*"), ¶ 63: ("[T]he Arbitral Tribunal stresses that, like many other legal systems, NAFTA Articles 1117(2) and 1116(2) introduce a clear and rigid limitation defense, which, as such, is not subject to any suspension […], prolongation or other qualification. Thus the NAFTA legal system limits the availability of arbitration within the clear-cut period of three years…"). *See also*, **RLA-079**, *Resolute – Decision on Jurisdiction*, ¶ 153 (the *Resolute* tribunal stating when referring to Article 1116(2), "this time limit is strict, not flexible. There is no provision for the Tribunal to extend the limitation period…"); **RLA-070**, *Grand River – Decision on Jurisdiction*, ¶ 29; **RLA-080**, *Apotex – Award on Jurisdiction*, ¶ 327.

[234] This is consistent with one of the NAFTA's objectives: to create effective procedures for the resolution of disputes. *See* NAFTA, Article 102(1)(e).

[235] **RLA-131**, *Mobil – Decision on Jurisdiction and Admissibility*, ¶ 146. *See also*, **RLA-153**, *The Renco Group, Inc. v. Republic of Peru* (UNCITRAL) Decision on Expedited Preliminary Objections, 30 June 2020, ¶ 226 (where the tribunal, in discussing the equivalent limitation period provision in the United States-Peru Trade Promotion Agreement, remarked: "The Parties seem to agree, as does this Tribunal, that one of the objectives of the Treaty is to provide a predictable legal framework, and that Article 10.18.1 in particular aims at providing legal predictability by protecting State respondents against late claims, not least to ensure that claims will be resolved when evidence is reasonably available and fresh.")

> legitimate legal mechanism to limit the proliferation of historic claims, with all the attendant legal and policy challenges and uncertainties that they bring.[236]

100. Tribunals constituted under the CAFTA-DR have also recognized the strict character of the three-year limitation period.[237] For example, in *Corona Materials v. Dominican Republic*, the tribunal determined it had no jurisdiction over the claims because the claimant had not satisfied the conditions set out in the CAFTA-DR's limitation period clause.[238]

101. The NAFTA Parties do not consent to arbitrate claims submitted to arbitration after the expiry of the three-year limitation period, and a NAFTA Chapter Eleven tribunal has no jurisdiction *ratione temporis* over such untimely claims.[239] Indeed, failure to comply with the three-year limitation period has resulted in the dismissal of several NAFTA Chapter Eleven claims.[240]

### 2. The Limitation Period in Article 1116(2) Begins On the Date the Claimant First Acquires or Should Have First Acquired Knowledge of the Alleged Breach and That It Has Incurred Loss or Damage

102. The limitation period in Article 1116(2) begins running from the date on which the claimant "first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that [it] has incurred loss or damage."[241] A claimant cannot merely assert when it "first acquires"

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[236] **RLA-136**, *Spence – Corrected Interim Award*, ¶ 208.

[237] *See e.g.*, **RLA-082**, *Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3) Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the CAFTA-DR, 31 May 2016 ("*Corona Materials – Award on Preliminary Objections*"), ¶¶ 192, 199, *citing* **RLA-081**, *Feldman – Award* with approval in interpreting the equivalent three-year limitation period in the CAFTA-DR noting "[t]he limitation period clause is written in plain terms and does not contemplate the suspension or 'tolling' of the three-year period.") *See also*, **RLA-136**, *Spence – Corrected Interim Award*, ¶¶ 297-298 (where the tribunal rejected the idea that missing a limitation period deadline by a *de minimis* period of three months should be overlooked. That tribunal noted: "while international law may eschew undue formalism, giving effect to a limitation clause is not undue formalism; it is what is required by way of the proper interpretation and application of the treaty. The Tribunal agrees with the Respondent that the three-year limitation period 'is not an estimate'".)

[238] *See* **RLA-082**, *Corona Materials – Award on Preliminary Objections*, ¶¶ 234, 236-237, 280.

[239] *See* **RLA-079**, *Resolute – Decision on Jurisdiction*, ¶ 83: ("Although the time limit specified in Articles 1116(2) and 1117(2) is not itself a procedure, compliance with it is required for the bringing of a claim, which is certainly a procedure. This is enough to justify the conclusion that compliance with the time limit goes to jurisdiction.")

[240] *See*, for example: **RLA-070**, *Grand River – Decision on Jurisdiction*, ¶¶ 103-104. The only claim the tribunal reserved for consideration on the merits was one based on separate and distinct legislation adopted by individual States after March 12, 2001 (i.e., within the applicable three-year limitation period); **RLA-080**, *Apotex – Award on Jurisdiction*, ¶¶ 314-335; **RLA-003**, *Bilcon – Award on Jurisdiction and Liability*, ¶¶ 258-282.

[241] Article 1116(2) (emphasis added).

knowledge. The acquisition of knowledge is a question of fact, and sufficient evidence must be provided. [242]

103. The use of the term "first" means "earliest in occurrence, existence."[243] This is consistent with the ordinary meaning of Article 1116(2), which has been described by Professor Michael Reisman as follows:

> It takes great effort to misunderstand Article 1116(2). It establishes that the challenge of the compatibility of the measure must be made within three years of *first* acquiring (i) knowledge of the measure and (ii) that the measure carries economic cost for those subject to it. If the challenge is not made within those three years, it is time-barred.[244]

104. The inclusion of "first" to modify the phrase "acquired knowledge" was a deliberate drafting choice, intended to mark the beginning of the time when knowledge of breach and loss arises, or should have arisen, and not the middle or end of a continuous event or period. As noted by the *Mobil II* tribunal, "[t]he fact that the limitation period begins to run when a would-be claimant *first* acquires (or should first have acquired) the requisite knowledge is significant; as Canada points out, an investor cannot *first* acquire knowledge of the same matter on more than one occasion."[245] The task

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[242] In this case, the Claimant must prove with evidence that it "first acquired" knowledge of the alleged breach and of incurred loss on a specific date on or after June 1, 2014, and the task of this Tribunal is to determine based on the evidence provided whether the Claimant has met its burden. If the evidence shows that the Claimant "first acquired" or "should have first acquired" knowledge of breach and loss before June 1, 2014, the Tribunal must conclude that the Claimant's NOA was submitted after the expiration of the limitation period and that it has no jurisdiction to hear the claim. The **RLA 070**, *Grand River – Decision on Jurisdiction*, ¶ 54: ("This is foremost a question of fact."). With the exception of constructive knowledge, which is imputed; **RLA-136**, *Spence – Corrected Interim Award*, ¶ 163: ("If the Claimants cannot establish, to an objective standard, that they first acquired knowledge of the breaches and losses that they allege in the period after 10 June 2010, they fall at the first hurdle. To surmount this obstacle, each claimant must show, in respect of each property claim, that they have a cause of action, a distinct and legally significant event that is capable of founding a claim in its own right, of which they first became aware in the period after 10 June 2010.") *See also* ¶ 166, 239: *See* also **CLA-226**, *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12) Decision on Respondent's Jurisdictional Objections, 1 June 2012 ¶ 2.9.

[243] **RLA-154**, *Shorter Oxford English Dictionary*, 5th ed., (New York: Oxford University Press, 2002), at p. 965.

[244] **CLA-084**, *Merrill & Ring – Opinion of W. Michael Reisman*, ¶ 28 (emphasis in original).

[245] **RLA-131**, *Mobil – Decision on Jurisdiction and Admissibility*, ¶ 147 (emphasis in original). *See also* **RLA-155**, *Nissan Motor Co., Ltd. v. Republic of India* (UNCITRAL) Decision on Jurisdiction, 29 April 2019 ("*Nissan – Decision on Jurisdiction*"), ¶ 325: ("Bearing these provisions in mind, the Tribunal agrees with India on a threshold proposition: that once an investor has knowledge that it has been harmed by a particular State act alleged to breach a CEPA obligation, additional conduct relating to the same underlying harm "cannot without more renew the limitation period" for the filing [sic] a claim seeking redress. If the three years have elapsed from first knowledge, then that particular investment dispute cannot be revived.")

of a NAFTA tribunal is thus straightforward: it must determine the specific date that a claimant first acquired, or should have first acquired, knowledge of the alleged breach and knowledge of incurred loss or damage arising out of that breach.

105. This interpretation has been consistently upheld by NAFTA tribunals[246] and affirmed by all three NAFTA Parties.[247] It has similarly been upheld by tribunals interpreting the equivalent provision in the CAFTA-DR.[248]

106. For example, in *Spence International*, the claimants alleged that they had first learned of a 2008-2009 suspension of expropriation proceedings by a Costa Rican government body, SETENA, when it was disclosed in the respondent's Counter-Memorial on July 15, 2014.[249] Given that the discovery of the indefinite delay in the expropriation process occurred after the critical date of June 10, 2010, the claimants argued that their minimum standard of treatment claim was within the CAFTA-DR's limitation period.[250] In response to this argument, the tribunal remarked:

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[246] **RLA-003**, *Bilcon – Award on Jurisdiction and Liability*, ¶ 281 (establishing that the three-year cut-off date is June 17, 2005); **RLA-080**, *Apotex – Award on Jurisdiction*, ¶ 315 (establishing that the three-year cut-off date is June 5, 2006); **RLA 070**, *Grand River – Decision on Jurisdiction*, ¶ 53 (establishing that the three-year cut-off date is March 12, 2001).

[247] **RLA-156**, *Merrill & Ring Forestry, L.P. v. Government of Canada* (UNCITRAL) Submission of the United States of America, 14 July 2008, ¶ 5: ("An investor *first* acquires knowledge of an alleged breach and loss at a particular moment in time: under Article 1116(2), that knowledge is acquired on a particular 'date.' Such knowledge cannot *first* be acquired on multiple dates, nor can such knowledge *first* be acquired on a recurring basis." (emphasis in original)); **RLA-157**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant Article 1128 of NAFTA, 14 February 2014, ¶ 22: ("As Canada has demonstrated, all three NAFTA Parties have agreed that the term 'first acquired' means that the time limitation starts when an investor first acquires knowledge of an alleged breach and loss at a particular moment in time."); **RLA-158**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Reply of the Government of Canada to the NAFTA Article 1128 Submissions, 3 March 2014 ¶ 33: ("The NAFTA three-year time limitation provision exists to ensure claims are brought within a finite period of time from the moment an investor first acquired knowledge of the breach and loss.")

[248] **RLA-136**, *Spence – Corrected Interim Award*, ¶ 208 (emphasis in original). The interpretation and approach was also affirmed by the CAFTA tribunal in *Corona Materials v. Dominican Republic*. *See* **RLA-082**, *Corona Materials – Award on Preliminary Objections*, ¶ 200: ("Article 10.18.1 requires the Tribunal to determine the date on which the Claimant '*first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b) has incurred loss or damage.*' A comparison of that date with the 'critical date' will then enable the Tribunal to decide whether it is competent to hear the claims in this proceeding: Should the date on which the Claimant acquired actual or constructive knowledge of the alleged breach and of the corresponding damage be earlier than the critical date, the Tribunal would have to conclude that the Claimant's Request for Arbitration was submitted after the expiration of the limitation date and, as a consequence, the Tribunal would have no jurisdiction to hear the Claimant's claims.")

[249] **RLA-136**, *Spence – Corrected Interim Award*, ¶¶ 79, 152 (viii)-(xii).

[250] **RLA-136**, *Spence – Corrected Interim Award*, ¶¶ 79, 152 (viii)-(xii).

> This contention does not alter the Tribunal's assessment and conclusion, *inter alia*, for the reason that affording to the Claimants' recently derived knowledge the weight that they propose would again turn the limitation clause on its head. The relevant question is the date on which the Claimants first acquired or are deemed to have first acquired knowledge of the breach and loss that they allege. While the Claimants may have first acquired knowledge of the SETENA suspensions in July 2014, the Tribunal has concluded, and underlines that conclusion, that the Claimants must be deemed to have first acquired knowledge of the breaches that form the essence of their claims a good deal earlier, before both the 10 June 2010 critical date and the 1 January 2009 CAFTA entry into force date. As with the MINAET instructions just addressed, knowledge of the SETENA 2008–2009 suspensions does not generate a new independently actionable breach separable from the conduct that preceded it of which the Claimants were aware.[251]

107. Finally, it is necessary to address the Claimant's attempt to obscure what is required by Article 1116(2). In its Memorial, the Claimant devotes several pages to the law on composite breach and the Commentary on Article 15 of the International Law Commission's *Articles on State Responsibility* but fails to demonstrate how this impacts the determination as to whether or not its claim was brought within the limitation period. As a result, the Claimant's comments on this point are unhelpful to establishing the Tribunal's jurisdiction.[252]

### 3. Either Actual or Constructive Knowledge is Sufficient to Start the Limitation Period in Article 1116(2)

108. Article 1116(2) provides that the limitation period may commence from two possible points in time: (1) when an investor "first acquired" knowledge of the alleged breach and loss or damage; or (2) when an investor "should have first acquired" knowledge of the alleged breach and loss or

[251] **RLA-136**, *Spence – Corrected Interim Award*, ¶ 299 (emphasis added).

[252] Even if a series of events is alleged to amount to a composite breach, in determining whether a claim is within the limitation period, the approach taken by the tribunals in *Rusoro Mining* and *Bilcon* should be followed. As stated by the *Rusoro Mining* tribunal: "the better approach for applying the time bar consists in breaking down each alleged composite claim into individual breaches, each referring to a certain governmental measure, and to apply the time bar to each of such breaches separately. This approach is the one adopted by other investment tribunals and respects the wording of Art. XII.3 (d), which defines the starting date for the time bar period as the date when the investor acquired knowledge that a breach had occurred and a loss had been suffered." The *Rusoro Mining* tribunal cited to *Bilcon v. Canada*: "the Tribunal finds it possible and appropriate, as did the tribunals in *Feldman*, *Mondev* and *Grand River*, to separate a series of events into distinct components, some time-barred, some still eligible for consideration on the merits". As discussed in Section VI.B below, each element of the Claimant's claim is outside the limitation period. *See* **RLA-159**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5) Award, 22 August 2016 ("*Rusoro – Award*"), ¶ 231; and **RLA-003**, *Bilcon – Award on Jurisdiction and Liability*, ¶ 266.

damage. The limitation period thus begins to run once a claimant has acquired either actual or constructive knowledge of both the alleged breach and the loss or damage.[253]

109. The notion of actual knowledge accounts for what an investor subjectively knew.[254] In contrast, the notion of constructive knowledge accounts for what an investor objectively ought to have known. The *Spence International* tribunal described the "should have first acquired knowledge test" as an "objective standard", namely to "what a prudent claimant should have known or must reasonably be deemed to have known".[255]

110. As explained by the tribunal in *Grand River*, "'[c]onstructive knowledge' of a fact is imputed to [a] person if by exercise of reasonable care or diligence, the person would have known of that fact."[256] That notion has also been linked to the one of "constructive notice", which "entails notice that is imputed to a person, either from knowing something that ought to have put the person to further inquiry, or from willfully abstaining from inquiry in order to avoid actual knowledge."[257]

111. The notion of constructive knowledge requires investors to exercise a measure of "reasonable care" and "diligence" under the standard of "a reasonably prudent investor".[258] Consequently, the three-year limitation period cannot be extended, for example, through wilful blindness on the part of an investor, a failure on the part of the investor to acknowledge that a measure is causing it loss or

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[253] **RLA-070**, *Grand River – Decision on Jurisdiction*, ¶¶ 53, 58; **RLA-003**, *Bilcon – Award on Jurisdiction and Liability*, ¶ 273. *See also* **RLA-082**, *Corona Materials – Award on Preliminary Objections*, ¶¶ 193, 217; **RLA-136**, *Spence – Corrected Interim Award*, ¶ 170.

[254] *See for e.g.*, **RLA-082**, *Corona Materials – Award on Preliminary Objections*, ¶ 217: ("As already noted above, DR-CAFTA Article 10.18.1 contemplates two forms of knowledge of breach and loss or damage: actual knowledge – what the Claimant did in fact know at a given time – and constructive knowledge – what the Claimant should have known at a given time.") The tribunal in *Grand River* qualified the existence of actual knowledge as a question of fact (**RLA-070**, *Grand River – Decision on Jurisdiction*, ¶ 54).

[255] **RLA-136**, *Spence – Corrected Interim Award*, ¶ 209, discussing the limitation period provision of the CAFTA-DR (Article 10.18.1). The *Spence* tribunal also noted in ¶ 209: ("As the actual knowledge of a claimant will often be difficult to determine, tribunals are frequently called upon to consider what a claimant must be deemed to have known."). *See also* **RLA-082**, *Corona Materials – Award on Preliminary Objections*, ¶¶ 195 and 217.

[256] **RLA-070**, *Grand River – Decision on Jurisdiction*, ¶ 59.

[257] **RLA-070**, *Grand River – Decision on Jurisdiction*, ¶ 59. This interpretation was affirmed by the tribunal in *Spence*. *See* **RLA-136**, *Spence – Corrected Interim Award*, ¶ 209: ("In this regard, the Tribunal agrees with the analysis by the tribunal in *Grand River* on this issue, viz: ''Constructive knowledge' of a fact is imputed to a person if by exercise of reasonable care or diligence, the person would have known of that fact. Closely associated is the concept of 'constructive notice.'' This entails notice that is imputed to a person, either from knowing something that ought to have put the person to further enquiry, or from wilfully abstaining from inquiry in order to avoid actual knowledge.")

[258] **RLA-070**, *Grand River – Decision on Jurisdiction*, ¶¶ 59 and 66.

damage, or a lack of carefulness on the part of the investor to discover any loss or damage that it may have incurred.

### 4. Full or Precise Knowledge of the Loss or Damage Incurred is Not Required to Start the Limitation Period in Article 1116(2)

112. With respect to an investor's knowledge of loss or damage, tribunals have consistently held that Article 1116(2) or equivalent provisions in other investment treaties do not require "full or precise knowledge" of the amount of loss or damage. As such, simple knowledge that loss or damage has been caused, even if its extent or quantification is still unclear, is sufficient to trigger the limitation period.[259]

113. As explained by the *Mondev v. United States* tribunal, "[a] claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear."[260] This finding is supported by all three NAFTA Parties,[261] and has been confirmed by subsequent NAFTA tribunals.[262] For example, as held by the *Grand River* tribunal:

> A party is said to incur losses, debts, expenses or obligations, all of which may significantly damage the party's interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time.[263]

114. International tribunals interpreting similar provisions found in other treaties have reached similar conclusions. For example, in its interpretation of the three-year limitation period in the Canada-Venezuela bilateral investment treaty, the tribunal in *Rusoro Mining Limited v. Venezuela* held that "what is required [to start the limitation period] is simple knowledge that loss or damage

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[259] **RLA-083**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002 ("*Mondev – Award*"), ¶ 87; **RLA-070**, *Grand River – Decision on Jurisdiction*, ¶¶ 77-78; **RLA-080**, *Apotex – Award on Jurisdiction*, ¶ 303; **RLA-003**, *Bilcon – Award on Jurisdiction and Liability*, ¶ 275.

[260] **RLA-083**, *Mondev – Award*, ¶ 87.

[261] *See e.g.*, **RLA-160**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant NAFTA Article 1128, 14 June 2017, ¶ 6, and **RLA-126**, *Grand River – Objection to Jurisdiction of Respondent*, p. 36.

[262] *See e.g.*, **RLA-070**, *Grand River – Decision on Jurisdiction*, ¶ 77; **RLA-003**, *Bilcon – Award on Jurisdiction and Liability*, ¶ 275: ("[t]he plain language of Article 1116(2) does not require full or precise knowledge of loss or damage.")

[263] **RLA-070**, *Grand River – Decision on Jurisdiction*, ¶ 77.

has been caused, even if the extent and quantification are still unclear."[264] More recently in *Nissan v. India*, the tribunal similarly held that "the triggering event for the running of the limitations period is knowledge that the investor has been harmed (*i.e.*, qualitatively has incurred "loss or damage"), not knowledge of the precise calculation of that harm."[265]

### B. The Tribunal Has No Jurisdiction *Ratione Temporis* Because the Notice of Arbitration Was Not Submitted Within the Limitation Period

115. The Claimant alleges that its claim "arise[s] out of information that was only made public after the critical date of June 1, 2014."[266] It asserts that it "could not have brought its claim prior to June 4, 2017 at the absolute earliest because it had no way of knowing about certain wrongful conduct Ontario committed" until it was "revealed […] during the *Mesa* arbitration and only public months later."[267] The Claimant also asserts that it was not aware of any alleged breach until "sometime after March 16, 2015 when Skyway 127's representatives first met with legal counsel […]."[268]

116. However, the fact that the Claimant alleges it incurred actual knowledge of breach for the first time in 2015 is irrelevant. The limitation period starts to run not only when a claimant first acquires knowledge of an alleged breach and loss or damage arising out of that breach, but also when it *should* have first acquired such knowledge. Numerous public documents, including those used in the *Mesa* arbitration and the *Mesa* submissions themselves, demonstrate that the Claimant should have first acquired knowledge of the alleged breach well before the critical date. The Claimant's allegations relating to the GEIA, the FIT Program, and the handling of documents should have been known to

[264] **RLA-159**, *Rusoro – Award*, ¶ 217. *See also*, **RLA-136**, *Spence – Corrected Interim Award*, ¶ 213: ("On the issue of whether loss or damage must be crystallised, and whether the claimant must have a concrete appreciation of the quantum of that loss or damage, the Tribunal agrees with the approach adopted in *Mondev*, *Grand River*, *Clayton* and *Corona Materials* that the limitation clause does not require full or precise knowledge of the loss or damage. Indeed, in the Tribunal's view, the Article 10.18.1 requirement, *inter alia*, to point to the date on which the claimant *first* acquired actual or constructive knowledge of the loss or damage incurred in consequence of the breach implies that such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result. It is the first appreciation of loss or damage in consequence of a breach that starts the limitation clock ticking."); **RLA-082**, *Corona Materials – Award on Preliminary Objections*, ¶ 194; **RLA-161**, *Ansung Housing Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/14/25) Award, 9 March 2017, ¶¶ 110-111.

[265] **RLA-155**, *Nissan – Decision on Jurisdiction*, ¶ 325.

[266] Claimant's Memorial, ¶ 741.

[267] Claimant's Memorial, ¶ 740.

[268] Claimant's NOA, ¶ 126; Claimant's Memorial, ¶ 720.

the Claimant, based on information that was publicly available, prior to June 1, 2014. As such, this Tribunal has no jurisdiction *ratione temporis* to consider any of the measures alleged to breach Article 1105 and Tennant's claim must be dismissed.

### 1. The Claimant Knew or Should Have Known of the Alleged Breach Prior to June 1, 2014

117. The Claimant maintains that, while it "was aware that it was not awarded a FIT Contract before June 1, 2014, it did not know why it was unsuccessful until after June 1, 2014 (when information and documents from the *Mesa* arbitration first became available to the public)."[269] The Claimant goes on to argue that pleadings from the *Mesa* arbitration were posted on the Permanent Court of Arbitration ("PCA") website, but that the "PCA Mesa Power NAFTA website did not get information posted until after June 4, 2014."[270] The Claimant then uses this to argue that it did not know about a breach of Article 1105 until the full claims made by Mesa "were published by the [PCA] onto its website on or after June 4, 2014".[271]

118. However, the Claimant fails to account for the fact that many pleadings from the *Mesa* arbitration were available on the Global Affairs Canada ("GAC") website prior to the critical date, and that those pleadings, along with many other public documents discussed below, demonstrate what information was publicly available to FIT applicants with respect to the GEIA, the FIT Program, and the treatment of documents by Ontario, prior to the critical date of June 1, 2014. More specifically, the following *Mesa* arbitration pleadings and orders were available to the public on the GAC website as of May 8, 2013:[272]

- Notice of Intent to Submit a Claim to Arbitration [273]
- Notice of Arbitration[274]

[269] Claimant's Memorial, ¶ 719.

[270] Claimant's Memorial, ¶ 724.

[271] Claimant's Memorial, ¶ 727(a).

[272] **RWS-1**, McCall Statement, ¶ 3; **R-030**, Global Affairs Canada, *Mesa Group LLC v. Government of Canada*, Webpage Screenshot, as of 8 May 2013 and 11 September 2013, p. 1.

[273] **R-058**, *Mesa – Notice of Intent*.

[274] **R-005,** *Mesa – Notice of Arbitration*.

- Government of Canada Outline of Potential Issues[275]
- Government of Canada Objection to Jurisdiction[276]
- Government of Canada Request for Bifurcation[277]
- Investor's Response on Bifurcation [278]
- Procedural Order No. 1[279]
- Confidentiality Order[280]
- Procedural Order No. 2[281]
- Procedural Order No. 3[282]

119. In addition, the following *Mesa* arbitration pleadings and orders were available to the public on the GAC website as of September 11, 2013:[283]

- Investor's Answer on Canada's Preliminary Objections on Jurisdiction[284]
- Procedural Order No. 4[285]
- Procedural Order No. 5[286]

120. These documents remained on the GAC website until January 2016, when they were removed and replaced with a link to the *Mesa* arbitration page maintained by the PCA.[287] Canada further details

[275] **R-081**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Canada's Outline of Potential Issues, 31 July 2012.

[276] **R-012**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Canada's Objection to Jurisdiction, 3 December 2012.

[277] **R-082**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Canada's Request for Bifurcation, 3 December 2012.

[278] **R-083**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Claimant's Response to Request for Bifurcation, 24 December 2012 ("*Mesa – Claimant's Response to Request for Bifurcation*").

[279] **RLA-125**, *Mesa – Procedural Order No. 1*.

[280] **RLA-093**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Confidentiality Order, 21 November 2012.

[281] **RLA-053**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 2, 18 January 2013.

[282] **CLA-001**, *Mesa – Procedural Order No. 3*.

[283] **RWS-1**, McCall Statement, ¶ 5; **R-030**, Global Affairs Canada, *Mesa Group LLC v. Government of Canada*, Webpage Screenshot, as of 8 May 2013 and 11 September 2013, p. 2.

[284] **R-013**, *Mesa – Investor's Answer on Jurisdictional Objections*.

[285] **RLA-162**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 4, 12 July 2013.

[286] **RLA-163**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 5, 23 August 2013.

[287] **RWS-1**, McCall Statement, ¶ 7.

the information contained in these documents, as well as in other public documents, in the sections that follow.

### (a) The Alleged "Specific Information That Became Public After June 1, 2014" Reveals How Little Information Was "New"

121. The Claimant argues that, "[s]ince Tennant Energy could have gained knowledge about Ontario's wrongful conduct only on June 4, 2014 at the absolute earliest, its filing of its Notice of Arbitration on June 1, 2017 (three years after June 1, 2014) was done in a timely manner […]."[288] The Claimant further argues that it could not have brought its claim earlier "because it had no way of knowing about certain wrongful conduct Ontario committed which was revealed only during the *Mesa* arbitration and only public months later."[289] It argues that August 15, 2015 "was the first date where the two specific necessary conditions under NAFTA Article 1116 were met."[290] The Claimant goes on to list four "claims"[291] that allegedly "arise out of information that was only made public

[288] Claimant's Memorial, ¶ 739.

[289] Claimant's Memorial, ¶ 740.

[290] Claimant's Memorial, ¶ 715.

[291] Claimant's Memorial, ¶ 741. The Claimant also describes these "claims" as "categories of wrongful actions": "(a) Ontario unfairly and for improper reasons manipulated the awarding of Contracts under the FIT Program; (b) Ontario unfairly and for improper reasons manipulated the award of access to the electricity transmission grid, resulting in unfair treated [*sic*] to the Investment; (c) Ontario unfairly and for improper reasons manipulated the dissemination of program information under the FIT Program; and (d) Senior officials improperly destroyed necessary and material evidence of their internationally unlawful actions to avoid liability for their wrongfulness." *See* Claimant's Memorial, ¶ 310.

The Claimant also describes these "claims" as "measures": "In summary, and as explained in this Memorial, there are four key measures that give rise to this claim: (a) Ontario unfairly manipulated the award of access to the electricity transmission grid, resulting in unfair treatment to the Investment; (b) Ontario unfairly manipulated the program information under the FIT Program to the specific detriment of Skyway 127; (c) Ontario unfairly manipulated the awarding of Contracts under the FIT Program to Skyway 127's detriment; (d) Senior officials improperly destroyed necessary and material evidence of their internationally unlawful actions in an attempt to avoid liability for their misconduct.") *See* Claimant's Memorial, ¶ 89.

*See also* Claimant's Memorial, ¶ 741, where the claimant characterizes its four "claims" as follows: "[E]ach of Tennant Energy's four claims in the current arbitration (that Ontario unfairly manipulated the award of access to the electricity transmission grid, resulting in unfair treatment to the Investment, that Ontario unfairly manipulated the dissemination of program information under the FIT Program; that Ontario unfairly manipulated the awarding of Contracts under the FIT Program; and that Senior officials improperly destroyed necessary and material evidence of their internationally unlawful actions in an attempt to avoid liability for their wrongfulness) arise out of information that was only made public after the critical date of June 1, 2014."

after the critical date of June 1, 2014"[292] and argues that, since this information was only made public after June 1, 2014, it has met the requirements of Article 1116(2).

122. Tennant describes its "claims" and the "specific information that became public after June 1, 2014" as follows:

| **Claimant's "Claim"** | **Alleged New Information That Became Public in the Claimant's Post-Hearing Submission in the *Mesa* Arbitration upon which Tennant Relies to Argue Its Claim is Timely** |
|---|---|
| "Ontario unfairly manipulated the award of access to the electricity transmission grid in favour of IPC, resulting in unfair treatment to the Investment."[293] | "Ontario granted special transmission privileges to the members of the Korean Consortium despite the fact that the Korean Consortium was non-compliant with the binding terms of the GEIA … between Canada and the Korean Consortium in 2011."[294]<br>"Ontario provided blatant protection to IPC, a Canadian company whose executive leadership at the time was a well-known political backer of the Ontario Liberal Government."[295]<br>NextEra "was given access to high-level government officials and succeeded in lobbying for a FIT rule change while at the same time receiving prior knowledge of the change."[296] |
| "Ontario unfairly manipulated the dissemination of program information under the FIT Program […]."[297] | "Ontario provided selective advance access to information and program decision makers to the Canadian subsidiary of NextEra and subsequently arbitrarily modified the FIT Program rules in a manner that disadvantaged the Investment."[298] |
| "Ontario unfairly manipulated the awarding of | "Ontario provided certain better treatment to IPC and the Korean Consortium."[300] |

[292] Claimant's Memorial, ¶ 741.

[293] Claimant's Memorial, ¶ 743.

[294] Claimant's Memorial, ¶ 744.

[295] Claimant's Memorial, ¶ 742.

[296] Claimant's Memorial, ¶ 746.

[297] Claimant's Memorial, ¶ 749.

[298] Claimant's Memorial, ¶ 748.

[300] Claimant's Memorial, ¶¶ 750-752.

| | |
|---|---|
| Contracts under the FIT Program […]."[299] | |
| "[S]enior officials improperly destroyed necessary and material evidence of their internationally unlawful actions in an attempt to avoid liability for their wrongfulness […]."[301] | The Claimant does not refer to any new information that became public after June 1, 2014, and on which it relies to argue that its claim is timely. |

123. Despite characterizing its arguments as four "claims", the Claimant is ultimately basing its arguments on the three groups of measures that Canada describes above in Part V.B.1. The first group of measures arises out of the GEIA signed between Ontario and the Korean Consortium in 2010. The second group of measures arises out of the administration of the FIT Program from 2011 to 2013. The Claimant alleges that the combined actions of Ontario with respect to the GEIA and FIT Program caused it to suffer loss or damage when it did not receive a FIT Contract on July 4, 2011. Third, and finally, the Claimant challenges measures taken by Ontario with respect to the handling of documents from 2011 to 2013.

124. In what follows, Canada demonstrates that the Claimant should have first acquired knowledge of the alleged breach arising out of these groups of measures (or "claims" or "categories of wrongful doing" as the Claimant describes them) well before the critical date of June 1, 2014. In doing so, Canada demonstrates that all the alleged "new information" relied upon by the Claimant to argue it submitted its claim to arbitration within the limitation period was either already public prior to the critical date or fails to toll the limitation period, such that the entirety of the claim falls outside the Tribunal's jurisdiction.

[299] Claimant's Memorial, ¶ 753.

[301] Claimant's Memorial, ¶ 755.

### (i) Public Documents Demonstrate that the Claimant Knew or Should Have Known of the Alleged Breach Concerning the GEIA Prior to June 1, 2014

125. The Claimant does not dispute when each of the alleged measures with respect to the GEIA took place. Rather, the Claimant disputes when it became aware of certain measures undertaken by Ontario with respect to that agreement, which it alleges contributed to Skyway 127's failure to receive a FIT Contract in July 2011. Specifically, the Claimant argues that it was not aware that "Ontario granted special transmission privileges to the members of the Korean Consortium despite the fact that the Korean Consortium was non-compliant with the binding terms of the GEIA … between Ontario and the Korean Consortium in 2011"[302] and that "Ontario provided certain better treatment to […] the Korean Consortium"[303] until Mesa's post-hearing submission was made public on August 15, 2015. The Claimant further alleges that the Korean Consortium had "undisclosed priority under the GEIA"[304] and that "Ontario intentionally withheld and misrepresented critical information about a so-called Green Energy Investment Agreement ("GEIA") between Ontario and certain Korean companies, and its ill effects on the FIT Program"[305] and maintains that it did not know about this until August 15, 2015.[306]

126. Contrary to the Claimant's allegation that Ontario "cloaked the GEIA in secrecy",[307] all relevant aspects of that agreement for the purposes of its claim were publicly known prior to the critical date of June 1, 2014. Ontario entered into the GEIA with the Korean Consortium on January

[302] Claimant's Memorial, ¶ 744.

[303] Claimant's Memorial, ¶ 750.

[304] Claimant's Memorial, ¶ 71.

[305] Claimant's Memorial, ¶ 65.

[306] Claimant's Memorial, ¶ 96.

[307] Claimant's Memorial, ¶ 228 (heading).

21, 2010.[308] The announcement of the GEIA, as well as the negotiations leading up to that announcement, were widely reported in the press in 2009 and 2010.[309]

127. From the outset, industry observers were concerned about the impact of the GEIA on the renewables sector in Ontario. For example, a press article from 2010 reported that "[m]any developers and manufacturers with plans to expand in Ontario expressed shock and surprise that Samsung is receiving hundreds of millions of dollars in extra incentives they can't get."[310] The same article quoted interviewees as saying that the agreement "gives an unfair advantage to Samsung" and that "Ontario is giving the Samsung group priority access to the electrical transmission grid in the province".[311]

128. The GEIA and its terms were described in detail in the 2011 Auditor General's Report.[312] The Auditor General also discussed the "challenges" associated with the Korean Consortium's projects, as well as the renegotiation of the GEIA in 2011, as follows: "[s]ubsequent to our audit fieldwork, the Ministry renegotiated the GEIA with the consortium, which had requested a one-year commercial operation date extension for phases one and two of its projects because of challenges in completing its regulatory and environmental studies. In July 2011, as a result of the date extension and other changes, the Ministry amended the GEIA to reduce the additional $437 million payment to $110

[308] *See* **R-041**, Government of Ontario, Ministry of Energy, Archived Backgrounder, "Ontario Delivers $7 Billion Green Investment", 21 January 2010; **C-132**, Samsung C&T press release, "Samsung C&T, Korea Electric Power Company to Build World's Largest Wind, Solar Panel Cluster in Ontario", 21 January 2010.

[309] **C-171**, The Star, "Ontario eyes green job bonanza" 26 September 2009; **R-084**, The Globe and Mail, "Samsung looking to build Lake Erie wind farm" 27 September 2009; **R-085**, Renewable Energy World, "Samsung Invests $7B in Ontario Wind & Solar" 22 January 2010.

[310] **R-086**, The Globe and Mail, "'Unfair' advantage cited in Samsung deal" 25 January 2010, p. 2.

[311] **R-086**, The Globe and Mail, "'Unfair' advantage cited in Samsung deal" 25 January 2010, p. 3.

[312] With respect to the negotiation and conclusion of the GEIA, the Auditor General reported that: "[t]he consortium, led by two large Korean companies, approached the Ministry in June 2008 and proposed to make a major investment in Ontario's renewable energy sector. This led to ongoing talks between the Ministry and the consortium and the signing of a memorandum of understanding in December 2008. In June 2009, the Minister travelled to Korea for more discussions; six months later, the Minister, on behalf of the government, signed the $7-billion Green Energy Investment Agreement (GEIA) with the consortium. The consortium committed to build 2,000 MW of wind projects and 500 MW of solar projects in Ontario in five phases by 2016, with the equipment to be manufactured in this province." (**R-002**, 2011 Auditor General's Report, p. 108).

million."[313] The GEIA and its core terms were also debated in the Legislative Assembly in 2012,[314] and the GEIA was canvassed as part of Ontario's updated Long-Term Energy Plan, which was made public in November 2013.[315]

129. Likewise, the priority of the Korean Consortium's projects over FIT Program applicants was public information. On April 1, 2010, the Minister issued a Direction to the OPA setting out the terms of the GEIA.[316] The Minister first described the GEIA ("[u]nder the terms of this Agreement, the Korean Consortium has agreed to develop 2,500 megawatts (MW) of wind and solar renewable generation projects in Ontario in five Phases") before directing the OPA to negotiate power purchase agreements with the Korean Consortium with respect to each phase.[317] The fact that the Korean Consortium's projects would be given priority over FIT Program applicants was clear and publicly known.[318]

130. The 2011 Auditor General's Report also noted the impact of the GEIA on the FIT Program, including the delays occasioned by the Korean Consortium's failure to finalize its connection points.[319] This is consistent with the findings of the majority of the *Mesa* tribunal, which held that, as

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[313] **R-002**, 2011 Auditor General's Report, p. 108. The 2011 Auditor General's Report also contained details regarding the GEIA including pricing terms: "Standard FIT prices apply to phase 1 and phase 2 projects, plus additional payment called Economic Development Adder (EDA) as stated in the original Green Energy Investment Agreement (GEIA). Subsequent to our audit fieldwork, the GEIA was amended in July 2011, and the EDA was reduced to 1.43¢/ kWh for solar power and 0.27¢/kWh for wind power." (**R-002**, 2011 Auditor General's Report, p. 103, figure 8, footnote 3).

[314] **R-087**, Ontario, Official Report of Debates (Hansard), 40th Parl., 1st Sess., No. 47, 3 May 2012, p. 2052.

[315] **R-088**, Government of Ontario, "Achieving Balance: Ontario's Long Term Energy Plan", December 2013, p. 15.

[316] **C-139**, April 1, 2010 Direction.

[317] **C-139**, April 1, 2010 Direction.

[318] **C-139**, April 1, 2010 Direction, p. 2: ("I therefore further direct, pursuant to the authority provided to me under subsection 25.35 of the *Electricity Act, 1998*, that the OPA shall, consistent with section 5.2 of the FIT Program Rules, give priority to projects within the scope of this direction when assessing transmission availability with respect to the FIT Program"); *see also* **R-043**, September 17, 2010 Direction, p. 1: (OPA directed to "hold in reserve 500 MW of transmission capacity to be made available in the Bruce area in anticipation of the completion of the Bruce-Milton Transmission Reinforcement, for Phase 2 projects of the Korean Consortium or its Project Companies"); **R-002**, 2011 Auditor General's Report, p. 98, figure 6 (showing 2,500 MW of capacity reserved for the Korean Consortium).

[319] **R-002**, 2011 Auditor General's Report, p. 116; *see also* p. 108: (The Korean Consortium had "priority access to Ontario's transmission system, whose capacity to connect renewable energy projects is already limited"). The Auditor General also noted that: [w]hen the OPA evaluated the FIT applications and the availability of transmission capacity, it had to consider the locations and sizes of the consortium projects and their transmission requirements. According to the OPA, the required Economic Connection Test was delayed because the OPA could not start to assess the transmission availability until the consortium finalized the connection points for phases two and three of its projects.") *See also* Claimant's Memorial, ¶ 208.

far back as 2009, it was public knowledge that "the OPA had been instructed to hold in reserve transmission capacity for 'generating facilities whose proponents have signed a province-wide framework agreement'" and that "the agreement with the Korean Consortium would give them priority access to Ontario['s] grid space".[320] The majority of that tribunal similarly confirmed that it "[could not] agree that the reservation of capacity for the Korean Consortium was done in "secret."[321]

131. Further, the Claimant states that the Korean Consortium and its partner, Pattern Energy, engaged in a "predatory scheme" to acquire low-ranking FIT Program applicants[322] and that the Claimant did not have knowledge of this until after the critical date. Specifically, it states that "[e]vidence from the Mesa Power NAFTA hearing revealed that the Korean Consortium, and its joint venture partner Pattern Energy, had delayed notifying connection points and used the delay, to pick "low hanging fruit" – projects ranked too low to obtain a FIT Contract – in the FIT process to then convert into GEIA projects"[323]. Yet, the Claimant's concedes that it knew by December 2010 that the Korean Consortium was buying lower-ranking FIT projects in 2010 – the Skyway 127 Project was one of them:

> The Skyway 127 wind project was very desirable. Other competitors for FIT Contracts were interested in obtaining this wind project. Samsung and KEPCO (the Korean Consortium) were interested in obtaining it. A land swap agreement was entered into with the Korean Consortium's local wind partner (Pattern Renewable Holdings Canada ULC) on December 10, 2010 to acquire the Skyway 127 Project. This deal was subsequently terminated by Pattern.[324]

[320] After an extensive review of the evidence put forward by Canada and the claimant in that arbitration, the *Mesa* tribunal found that by November 2009, "the following information was publicly available to all FIT applicants: (i) the negotiations with the Korean Consortium were at an "advanced stage"; (ii) pursuant to those negotiations, the Korean Consortium would get an "economic adder" or [Economic Development Adder] in addition to the regular rate "if [it] commit[ted] to manufacturing its equipment in Ontario"; (iii) the OPA had been instructed to hold in reserve transmission capacity for "generating facilities whose proponents have signed a province-wide framework agreement"; and (iv) the agreement with the Korean Consortium "would give them priority access to Ontario['s] grid space"." *See* **RLA-001**, *Mesa – Award*, ¶ 607; cited in Claimant's Memorial, ¶ 228.

[321] **RLA-001**, *Mesa – Award*, ¶ 582 (emphasis added).

[322] Claimant's Memorial, ¶¶ 71-73.

[323] Claimant's Memorial, ¶ 222.

[324] Claimant's Memorial, ¶ 130, *citing* **CWS-1**, Pennie Statement, ¶ 59.

132. Indeed, the Claimant admits that individuals involved in the Skyway 127 Project were well aware of the GEIA and actions of the Korean Consortium prior to the critical date. [325]

133. The *Mesa* pleadings that were publicly available prior to the critical date further support the conclusion that Tennant should have first acquired knowledge of the alleged breach prior to the critical date. Mesa made the same allegations with respect to the GEIA and the similarities are evident when the pleadings in both arbitrations are compared:

| **Allegation** | **Excerpts from Mesa pleadings public prior to June 1, 2014** | **Excerpts from Tennant pleadings** |
|---|---|---|
| **Alleged secrecy of the GEIA** | On January 21, 2010, two Korean-controlled companies, Samsung C&T Corporation and Korea Electric Power Corporation, signed a $7 billion green energy investment agreement with Ontario's Premier and with Ontario's Minister of Energy (The Agreement is known as the *Green Energy Investment Agreement*). The existence of the agreement was public, but its terms and conditions were kept secret. The hidden agreement granted Samsung C&T and Korea Electric Power Corporation significantly better access to renewable energy transmission and generation than to other energy providers in the province of Ontario | On January 21, 2010, two Korean-controlled companies, Samsung C&T Corporation and Korea Electric Power Corporation, signed a $7 billion green energy investment agreement with Ontario's Premier and with Ontario's Minister of Energy (The Agreement is known as the Green Energy Investment Agreement) […]. The existence of the agreement was public, but its terms and conditions were kept secret. The secret agreement granted Samsung C&T and Korea Electric Power Corporation significantly better access to renewable energy transmission and generation than to other energy providers in the province of Ontario including other companies participating in the FIT Program.[327] |

[325] *See* **CWS-1**, Pennie Statement, ¶ 19: ("The 100 MW Skyway 9 Wind project was a large project for which we assembled 4,400 acres of land leases. We entered into a letter of agreement to sell this site to the Samsung Consortium (Pattern Renewable Holdings Canada ULC) on July 26, 2010. They paid an initial deposit to purchase the project but did not go through with it when they decided to develop an adjoining project due to transmission constraints in the Orangeville area. As a result, the Skyway 9 project did not proceed.")

[327] Claimant's Memorial, ¶ 202.

| Allegation | Excerpts from Mesa pleadings public prior to June 1, 2014 | Excerpts from Tennant pleadings |
|---|---|---|
| | including other companies participating in the FIT Program.[326] | |
| **Alleged impact of the GEIA on transmission availability and FIT Contract awards** | To satisfy Phase I of the *Green Energy Investment Agreement*, the Ontario Ministry of Energy directed the OPA on September 30, 2009 to hold in reserve 240 MW of transmission capacity in Haldimand County, Ontario and a total 260 MW of transmission capacity in Essex County and the Municipality of Chatham-Kent jointly for renewable energy generating facilities with respect to proponents that signed province-wide framework agreements. As a result of the *Green Energy Investment Agreement*, the Korean Consortium received a guaranteed right of first refusal on transmission access in these transmission zones in the Province of Ontario.[328] | To satisfy Phase I of the *Green Energy Investment Agreement*, the Ontario Ministry of Energy directed the OPA on September 30, 2009 to hold in reserve 240 MW of transmission capacity in Haldimand County, Ontario and a total 260 MW of transmission capacity in Essex County and the Municipality of Chatham-Kent jointly for renewable energy generating facilities with respect to proponents that signed province-wide framework agreements. Because of the *Green Energy Investment Agreement*, the Korean Consortium received a guaranteed right of the first refusal on transmission access in these transmission zones in the Province of Ontario.[329] |
| | However, the actual transmission capacity that was made available to FIT applicants was 750 MW because the Korean Consortium was guaranteed access to 450 MW in the Bruce region and was able to select their desired connection points. Despite the problems with the rankings and the connection point amendment window, Mesa was within the top 1200 | Correspondingly, had the Korean Consortium not been given a 500 MW reservation, and taking into consideration the combined kW of the projects ranked ahead of Skyway 127 at the time of the December 2010 ranking (280 MW), it was highly likely that Skyway 127 would have received a FIT contract based upon the MW available in that region and |

[326] **R-005,** *Mesa – Notice of Arbitration*, ¶ 22. *See also* **RLA-125**, *Mesa – Procedural Order No. 1*, section titled "The Claimant's Position", ¶ 4.9: ("On 21 January 2010, a Korea-based company, Samsung C&T ('Samsung') signed a $7 billion green energy investment agreement with Ontario's Premier and Ontario's Minister of Energy. While the existence of an agreement was public, the terms of the agreement were secret. This secret agreement granted Samsung significantly better access to supply renewable energy to the provincial energy grid than to other energy providers in the province. Samsung received a guaranteed right of first refusal on transmission access in certain transmission zones in the Province of Ontario.")

[328] **R-005,** *Mesa – Notice of Arbitration*, ¶ 24.

[329] Claimant's Memorial, ¶ 211.

| Allegation | Excerpts from Mesa pleadings public prior to June 1, 2014 | Excerpts from Tennant pleadings |
|---|---|---|
| | MW of transmission capacity and thus would have received a contract had it not been for the special and guaranteed access to transmission that the GEIA parties received.[330] | Skyway's rank in priority list for receiving contracts.[331] |
| | On August 3, 2011, the Ontario Ministry of Energy announced changes to the generous terms granted to Samsung C&T and its Consortium Partners. The Minister gave a one-year extension to the Consortium.[332] | On August 3, 2011, the Ontario Ministry of Energy announced changes to the generous terms granted to Samsung C&T and its Consortium Partners. The Minister gave a one-year extension to the Consortium.[333] |
| | On July 4, 2011 the Investor consequently lost their priority ranking and were not offered FIT Program contracts, because of the 750 MW limit on awards in the Bruce Region, even though there was still available transmission capacity at each of their respective interconnects.[334] | On July 4, 2011 Skyway consequently was not offered a FIT Program Contract, because of the 750 MW limit on awards in the Bruce Region, even though there was still available transmission capacity at each of their respective interconnects.[335] |
| **Alleged "predatory" behaviour of the Korean Consortium** | The Korean Consortium was granted preferential access to connection points with guaranteed access to transmission capacity. This preferential treatment permitted the Korean Consortium to identify lower ranked applicants for PPAs, purchase | In short, the Ontario hijacked and manipulated the FIT Program's bidding and ranking processes, along with its supposedly "standardized" criteria and "fair" and "open" administration, to expose and devalue low-ranking projects for the Korean Consortium to acquire and |

[330] **R-013**, *Mesa – Investor's Answer on Jurisdictional Objections*, ¶ 86; *see also* **R-073**, *In re Application for Judicial Assistance in Obtaining Evidence from Samsung C&T America, Inc. et al.*, Case 2:11-mc-00280-ES, Opinion and Order, 20 November 2012, p. 3: ("Mesa Power asserts that on January 21, 2010, Ontario entered into an undisclosed agreement with Samsung, known as the Green Energy Investment Agreement ('GEIA'). Per the direction of the Ministry of Energy, the OPA allocated 2.5GW of power transmission capacity in Ontario to Samsung. On August 3, 2011, the OPA entered into a twenty year PPA with Samsung. Mesa Power asserts that as a result of GEIA, the OPA denied its PPA applications because of transmission capacity limits in the area.")

[331] Claimant's Memorial, ¶ 227.

[332] **R-005,** *Mesa – Notice of Arbitration*, ¶ 37.

[333] Claimant's Memorial, ¶ 246.

[334] **R-005,** *Mesa – Notice of Arbitration*, ¶ 33.

[335] Claimant's NOA, ¶ 70.

| Allegation | Excerpts from Mesa pleadings public prior to June 1, 2014 | Excerpts from Tennant pleadings |
|---|---|---|
| | those projects and secure a PPA for those projects by integrating their operation into the Korean Consortium. This scheme granted other investors and their Canadian subsidiaries preferential treatment to the Investor.[336] | advance past projects like Skyway 127, which had earned its ranking and right to a FIT Contract under the program's rules.[337] |
| | Projects owned by Pattern Inc, a competitor of the Investor and a partner of Samsung, were transferred from the FIT program to obtain the better terms available through the Korean Consortium's agreement.[338]<br><br>Projects owned by other investors were transferred from lower-ranked positions through the Consortium Agreement to privileged status such that they received PPAs.[339] | The OPA's public release of the December 2010 rankings allowed the Korean Consortium to determine which projects would receive FIT contracts. With guaranteed transmission access and a lack of shovel-ready projects to fulfill their obligations under the GEIA, this knowledge proved critical for Pattern Energy and the Korean Consortium who then could approach promising developments that were not in a position to obtain FIT contracts with offers well below the market pricing.[340] |

134. The Claimant has not offered any valid reason as to why it had to wait until 2017 to bring a claim with respect to the same group of measures that were challenged by Mesa in 2011.[341] The fact that the Claimant relies almost exclusively on information from the *Mesa* proceedings in support of

[336] **R-013**, *Mesa – Investor's Answer on Jurisdictional Objections*, ¶ 71.

[337] Claimant's Memorial, ¶ 72.

[338] **R-013**, *Mesa – Investor's Answer on Jurisdictional Objections*, ¶ 72(c).

[339] **R-013**, *Mesa – Investor's Answer on Jurisdictional Objections*, ¶ 72(d).

[340] Claimant's Memorial, ¶ 221. Skyway 127 was one such development. *See* Claimant's Memorial, ¶ 130.

[341] In addition to alleging a violation of NAFTA Article 1105, the *Mesa* claimant also alleged violations of Article 1102, Article 1103, and Article 1106. Here, the Claimant alleges a violation of Article 1105. Contrary to the Claimant's assertion that "this Tennant Energy arbitration is different from the Mesa Power arbitration", the allegations underlying each case are the same. *See* Claimant's Memorial, ¶ 16. The Claimant's decision not to assert violations of other obligations under NAFTA Chapter Eleven does nothing to reduce the complete overlap of allegations concerning Article 1105 between the two cases.

its claim further reinforces this point.[342] It is simply not credible for the Claimant to argue that its claim differs from the one brought almost ten years ago by Mesa. The overlap of both claims is obvious. If there was enough public information about the alleged breach in 2011 for Mesa to file its claim, then there was certainly enough for the Claimant to do the same.

135. Moreover, the *Mesa* arbitration was discussed in both general interest and industry media.[343] Indeed, the Claimant admits it was well aware that the *Mesa* arbitration was ongoing.[344] There is no basis on which the Claimant can reasonably maintain that it could not have known about the terms of the GEIA, or its impact on transmission availability for FIT Program applicants, until the Investor's Post-Hearing Submission in *Mesa* was made public. At the very least, a reasonably prudent investor would have conducted some inquiries into the allegations at the time. For Tennant, such inquiries should have taken place well before it met with counsel in 2015, and certainly before the critical date. Its failure to do so should not prevent the Tribunal from finding that the Claimant should have first acquired knowledge of the alleged breach well before the critical date. To quote the *Spence International* tribunal, the Claimant was "on notice" of a potential breach well before the critical date.[345]

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[342] The Claimant's Memorial enters 221 documents into the record. Of those, 126 are on the record in the *Mesa* arbitration. The remaining 95 are principally Skyway 127's corporate documents and documents specific to damages quantification, which the Claimant does not use to support its arguments on the alleged breach.

[343] *See* **R-059**, The Globe and Mail, "Oil tycoon takes on Ontario Green Energy Act over wind farm", 14 July 2011; **R-060**, Appleton & Associates website excerpt, "Mesa Power Group Files Legal Action Against Government for NAFTA Infractions", 14 July 2011; **R-061**, Recharge News, "Pickens issues NAFTA challenge to Canada over wind rules", 18 July 2011; **R-062**, Columbia Law School, Climate Law Blog, "Texas Renewable Energy Developer Initiates NAFTA Claim Against Canada", 22 July 2011; **R-063**, The Star, "Texas firm to challenge to Ontario's wind power regulations", 14 July 2011; **R-064**, PR Wire, "Mesa Power Group Files Legal Action Against Canadian Government for NAFTA Infractions", 14 July 2011; **R-065**, Reuters, "Boone Pickens challenges Canada on green power law", 14 July 2011; **R-066**, IISD, Investment Treaty News, "Trends in Investor Claims Over Feed-in Tariffs for Renewable Energy", 19 July 2012 (referring to *Mesa* arbitration); **R-067**, Ontario Wind Resistance, "McGuinty Liberals charged with abuse of power, undue 'political interference' in awarding wind contracts", 17 July 2011 (referring to *Mesa* arbitration).

[344] Mr. Pennie states that he "knew that Mesa Power had raised a NAFTA challenge" (**CWS-1**, Pennie Statement, ¶ 90).

[345] **RLA-136**, *Spence – Corrected Interim Award*, ¶ 179. The Spence tribunal was charged with determining if the claimants had constructive knowledge of facts underlying their claims that their properties had been unlawfully expropriated. The tribunal found that the publication of a government resolution declaring a neighbouring piece of land subject to expropriation was sufficient to put the claimants "on notice" that in the government's view, the claimants' properties were also subject to expropriation ("The Tribunal also draws attention to the 5 November 2003 publication of the 22 July 2003 MINAE Resolution declaring the acquisition of Marion Unglaube's property to be in the public interest, subsequently described as the formal start of the expropriation process of properties within the Park. Notwithstanding any issue surrounding the contested status of this Resolution, the Tribunal considers that the fact of this Resolution, and its publication, must be taken to have put potential, and sitting, property investors on notice that the MINAE considered

### (ii) Public Documents Demonstrate that the Claimant Knew or Should Have Known of the Alleged Breach Concerning the FIT Program Prior to June 1, 2014

136. All measures taken with respect to the administration of the FIT Program were carried out before the Ministerial Direction to the OPA to no longer procure any additional MW under the FIT Program for large FIT projects on June 12, 2013.[346] This is undisputed between the parties. Rather, the Claimant disputes when it became aware of certain actions undertaken by the Government and the OPA in awarding FIT Contracts following the June 3, 2011 Direction.

137. Specifically, the Claimant alleges that it was "not aware that Ontario unfairly manipulated the award of access to the electricity grid, resulting in unfair treatment to the Investment" until August 15, 2015 when Mesa's post-hearing submission became public. In support of this statement, the Claimant argues that Mesa's submission first revealed that "NextEra 'was given access to high-level government officials and succeeded in lobbying for a FIT rule change while at the same time receiving prior knowledge of the change'"[347] and that "Ontario provided selective advance access to information and program decision makers to the Canadian subsidiary of NextEra and subsequently arbitrarily modified the FIT Program rules in a manner that disadvantaged the Investment."[348] However, all of the information with respect to the FIT Program underpinning the Claimant's arguments on the alleged breach, including any alleged political interference, should have been known to the Claimant prior to June 1, 2014.

138. All of the changes mandated by the June 3, 2011 Direction were public. In addition to the Minister's Direction itself,[349] the OPA issued updated FIT Rules along with explanatory

properties within a 125-metre landward zone to lie within the boundaries of the Park and thus to be subject to a legislative requirement on the State to expropriate in the public interest.")

[346] See above, ¶ 83, and the table that follows in ¶ 85, showing the dates of the groups of measures challenged by the Claimant.

[347] Claimant's Memorial, ¶ 746.

[348] Claimant's Memorial, ¶ 748.

[349] The June 3, 2011 Direction provided, among other things, that: (i) in determining FIT Contract offers in each of the Bruce and West of London transmission areas, "the OPA shall include in its assessment those projects whose connections require upgrades to connection assets paid for by their proponents"; (ii) before determining the FIT Contract offers, "the OPA shall provide a five (5) business day window for proponents to change their connection points" in the Bruce and West of London transmission areas; (iii) FIT Contracts for up to 750 MW were to be offered in the Bruce transmission area "based on priority project rankings in the area and available connection resources"; and (iv) FIT Contracts for up to

documents.[350] The Claimant cannot now complain of changes that were announced on June 3, 2011, including: the five-day connection point change window and the ability to change connection points between regions;[351] the consideration of projects that required paid upgrades to connection points;[352] the award of FIT Contracts in the Bruce transmission area for up to 750 MW (and not more);[353] the award of FIT Contracts in the West of London transmission area for up to 300 MW;[354] and the method of determining priority for those FIT Contract awards.[355]

139. With respect to allegations of unfairness and improper political considerations in the administration of the FIT Program from 2011 to 2013, it cannot reasonably be said that the Claimant was not aware of such alleged measures. In its NOA (which was filed in 2011), Mesa contended that the FIT Program was administered in an "arbitrary and non-transparent" manner and that Ontario government officials "used extraordinary unilateral Ministerial directives" and "powers" to benefit other companies "in the context of an Ontario provincial general election".[356] Mesa also alleged that Ontario exerted "[u]ndue political interference and discriminatory treatment to the Investment and blatant favoritism to other investments" and imposed "irrelevant political considerations when assessing [Mesa's] Investment".[357] Mesa also alleged in its *Answer on Canada's Preliminary*

300 MW were to be offered in the West of London transmission area "based on priority project rankings in the area and available connection resources." (**C-176**, June 3, 2011 Direction).

[350] **C-143**, Ontario Power Authority, "Allocating Capacity and Offering FIT Contracts for Bruce to Milton Enabled Projects", 3 June 2011.

[351] *See* Claimant's Memorial, ¶¶ 5, 86, 87, 233(b), 501, 503, 505, 595, 596, 620-623.

[352] *See* Claimant's Memorial, ¶¶ 578, 636, 642, 652-654.

[353] *See* Claimant's Memorial, ¶¶ 233(a), 235, 244, 593, 607, 660, 677(g).

[354] *See* Claimant's Memorial, ¶¶ 233(a), 239, 251, 252, 495, 563, 565, 593, 609, 677(g).

[355] *See* Claimant's Memorial, ¶¶ 553, 559, 592, 594, 603.

[356] **R-005**, *Mesa – Notice of Arbitration*, ¶ 50. As set out in ¶ 46 above, the *Mesa* NOA was published on the Global Affairs Canada website no later than May 8, 2013.

[357] **R-005**, *Mesa – Notice of Arbitration*, ¶ 61(c), (e) (emphasis added); *see also* **R-058**, *Mesa – Notice of Intent*, ¶ 1: ("This case is about unfairness, the abuse of power and process and undue political interference in the regulation of renewable energy in Ontario through the unannounced last-minute imposition of arbitrary measures and through opaque and secret administration […]."); *see also* **R-077**, *In re Application for Judicial Assistance in Obtaining Evidence from NextEra Energy Resources, LLC et al.*, Case 1:11-mc-24335-UU, Order Denying Motion to Quash, 13 July 2012, p. 2: ("[A]s alleged by Mesa Power, on July 3, 2011 an unexpected change in the rules for awarding FIT Program contracts effectively prevented Mesa Power from obtaining any contracts with the OPA. Due to the ability to change interconnect points, NextEra and Boulevard were awarded FIT contracts while Mesa Power was allegedly shut out of the market. Mesa Power claims that the Government of Ontario unfairly usurped Mesa Power's ranking, essentially confirming a

*Objections on Jurisdiction* (filed February 9, 2013 and public by September 11, 2013) that a meeting between the OPA and NextEra in mid-January 2011 precipitated the announcement of the June 3, 2011 rule change; a subsequent meeting between the Ministry of Energy and NextEra on February 25, 2011 enabled NextEra representatives to obtain further information about how to change their project connections points, including specific timing of a window to conduct those changes; and a meeting with the IESO in April 2011 provided NextEra with information on transmission lines it would later choose during the window to change connection points.[358] Indeed, the Claimant's allegations with respect to the administration of the FIT Program, including the June 3, 2011 Direction and alleged political favouritism, are nearly a carbon copy of the allegations brought forward by Mesa, and all were made public prior to the critical date.[359]

140. As Canada notes above, allegations put forward by the claimant in the *Mesa* arbitration were covered by the media and made public on the GAC website through various submissions and orders, and the Claimant agrees it was aware of the *Mesa* arbitration when it was filed almost a decade ago. The Claimant thus should have been aware of the alleged measures of Ontario or the OPA that Mesa alleged breached the NAFTA prior to the critical date. At the very least, a reasonably prudent investor should have conducted some inquiries into the allegations at the time. For Tennant, such inquiries should have taken place well before it met with counsel in 2015, and certainly before the critical date. As with the GEIA allegations, the Claimant was "on notice" of a potential breach long before the critical date.[360]

141. A side-by-side comparison of the allegations made by Mesa and Tennant further demonstrates that the Claimant should have first acquired knowledge of the alleged breach before June 1, 2014:

course of conduct of arbitrariness, discrimination, and inequitable treatment as compared to other investors.") (emphasis added).

[358] **R-013**, *Mesa – Investor's Answer on Jurisdictional Objections*, ¶¶ 74-77.

[359] *See, for example*, **R-058**, *Mesa – Notice of Intent*, ¶¶ 1 and 24; **R-005**, *Mesa – Notice of Arbitration*, ¶¶ 28-35, 46-50 and 62-63 (both publicly available May 2013); **R-013**, *Mesa – Investor's Answer on Jurisdictional Objections*, ¶¶ 74-77.

[360] **RLA-136**, *Spence – Corrected Interim Award*, ¶ 179.

| Allegation | Excerpts from Mesa pleadings public prior to June 1, 2014[361] | Excerpts from Tennant pleadings |
|---|---|---|
| **Allegations with Respect to the June 3, 2011 Direction** | On Friday, June 3, 2011, the OPA issued, without any prior notice, a new set of rules for awarding FIT Program contracts based on a directive it received from the Ontario Minister of Energy.[362] | On Friday, June 3, 2011, the OPA, without any prior notice, and contrary to its established practice, issued a new set of rules for awarding FIT Program contracts based on a directive it received from the Ontario Ministry of Energy.[363] |
| | As a result of the new rules, several wind projects in the Bruce Region transmission zone lost available transmission capacity in their designated interconnects.[364] | Because of these last minute new rules, several existing wind projects in the FIT Program queue in the Bruce Region transmission zone no longer were able to receive transmission capacity at their specific designated locations (their transmission interconnect points).[365] |
| | Projects in the West of London region, that had a higher provincial-wide priority ranking, could now build long transmission lines to interconnect in | Projects in the West of London region, which had a higher provincial-wide priority ranking, could now build long transmission lines to interconnect in the Bruce Region and thereby jump |

[361] This is not an exhaustive list. Mesa Power made numerous allegations regarding the FIT Program in documents that were made public prior to the critical date. *See* **R-083**, *Mesa – Claimant's Response to Request for Bifurcation*, ¶ 6: ("The June and July events are composite acts that are directly linked to the operation of the Ontario FIT Program and prior events including the ranking methodology that was employed, failure to follow the process set out in the FIT rules, and efforts to facilitate connection point changes as early as January 2011"); **R-013**, *Mesa – Investor's Answer on Jurisdictional Objections*, ¶ 13(a): ("The interconnection point amendment was merely the culmination of discriminatory and unfair preferences given to other competitors who had private and secret meetings with the governmental authority in January 2011"); ¶ 81: ("The manner with which the OPA conducted the connection point window change was such as to be unreasonable, unforeseeable and unfair such that it constituted a breach of Article 1105"); ¶ 82: ("Furthermore, the decision to grant a competitor, NextEra Energy, preferential access to the Bruce region by allowing construction of a massive transmission line also constitutes unfair and unreasonable treatment that deprived the Investor of a PPA they would have otherwise been granted."); ¶ 85: ("The changes to the FIT rules on June 3, 2011, of which competitors like NextEra had advance notice, contributed to the fact that Mesa did not get a contract on July 4, 2011. Before other competitors were allowed to change from the West of London region, where only 350 MW of transmission was available, to the Bruce region where at least 750 MW of transmission capacity was available, Mesa would have received contracts for TTD and Arran because those projects were within the top 750 MW of transmission capacity in that region.)"

[362] **R-005**, *Mesa – Notice of Arbitration*, ¶ 28.

[363] Claimant's NOA, ¶ 508.

[364] **R-005**, *Mesa – Notice of Arbitration*, ¶ 29.

[365] Claimant's NOA, ¶ 59.

| Allegation | Excerpts from Mesa pleadings public prior to June 1, 2014[361] | Excerpts from Tennant pleadings |
|---|---|---|
| | the Bruce Region and thereby jump ahead in the priority ranking.<br><br>For example, a domestic competitor to the Claimants, Boulevard Associates Canada, Inc., was able to bring four of its West of London region projects, that were previously not eligible to receive contracts because of the 300 MW limit in that region, over to the Bruce Region. This allowed Boulevard Associates Canada, Inc. to jump to the front of the priority line, bumping ahead of the projects that had been in the Bruce Region since the beginning of the FIT Program. including the Investor's projects.[366]<br><br>Other Canadian competitors, such as Suncor, also benefited from the last-minute unfair rule changes.[367] | ahead in the priority ranking. But this result was only because of Ontario's manipulation of the process to protect politically connected proponents.<br><br>For example, a domestic competitor to the Claimant, Boulevard Associates Canada, Inc., was able to bring four of its West of London region projects, that were previously not eligible to receive contracts because of the 300 MW limit in that region, over to the Bruce Region. This allowed Boulevard Associates Canada, Inc. to jump to the front of the priority line, bumping ahead of the projects that had been in the Bruce Region since the beginning of the FIT Program, including the Skyway 127 project.[368] |
| | Rather than allow the FIT Program to be impartially assessed through the ordinary approval process, Ministers and other government officials used extraordinary unilateral Ministerial directives to interfere with the Investor's rights and the conduct and operations of its investments. These measures were taken without any consultation or notice to the four companies or their investments.[369] | Rather than allow the FIT Program to be impartially assessed through the ordinary approval process, Ministers and other government officials used extraordinary unilateral Ministerial directives to interfere with Tennant Energy's property rights and the conduct and operations of its investments. These measures were taken without any consultation or |

[366] **R-005**, *Mesa – Notice of Arbitration*, ¶¶ 30-31.

[367] **R-005**, *Mesa – Notice of Arbitration*, ¶ 32.

[368] Claimant's Memorial, ¶¶ 238-239.

[369] **R-005**, *Mesa – Notice of Arbitration*, ¶ 34. *See also* **R-077**, *In re Application for Judicial Assistance in Obtaining Evidence from NextEra Energy Resources, LLC et al.*, Case 1:11-mc-24335-UU, Order Denying Motion to Quash, 13 July 2012, p. 13: ("The communications between Canada and NextEra regarding the Power Purchase Agreements under the Feed In Tariff program go to the central issue in the underlying arbitration: the alleged difference in treatment between Mesa Power and NextEra, the reasons for NextEra being afforded better treatment, and the criteria that was applied by Canada to NextEra [D.E. 28, Opp. at 4].")

| Allegation | Excerpts from Mesa pleadings public prior to June 1, 2014[361] | Excerpts from Tennant pleadings |
|---|---|---|
| | | notice to the Investor or its investments.[370] |
| | On July 4, 2011 the Investor consequently lost their priority ranking and were not offered FIT Program contracts, because of the 750 MW limit on awards in the Bruce Region, even though there was still available transmission capacity at each of their respective interconnects.[371] | On July 4, 2011, Skyway 127 was not offered a FIT Program Contract, because of the 750 MW limit on awards in the Bruce Region, even though there was still available transmission capacity.[372] |
| **Allegations of Improper Political Influence** | [T]his case is about unfairness, the abuse of power and process and undue political interference in the regulation of renewable energy in Ontario through the unannounced last-minute imposition of arbitrary measures and through opaque and secret administration and "buy local" contract requirements.[373] | This arbitration involves the blatant disregard of fairness in the allocation of multimillion-dollar renewable energy contracts. It involves the protection of companies owned by political cronies to the detriment of investments owned by American investors.[374] |
| | The arbitrary and non-transparent use of these extraordinary powers resulted in a direct and immediate benefit to the better treated companies and were taken in the context of an Ontario provincial general election to be held on October 6, 2011.[375] | The arbitrary and non-transparent use of these extraordinary powers resulted in a direct and immediate benefit to the better-treated companies, and were taken in the context of an Ontario provincial general election to be held on October 6, 2011.[376] |
| | The rejection of the Investor's four wind power projects constituted a continuing course of arbitrariness, | On more than one occasion, Ontario gave preferential treatment to some companies over others for reasons that |

[370] Claimant's NOA, ¶ 61; Claimant's Memorial, ¶ 236.

[371] **R-005**, *Mesa – Notice of Arbitration*, ¶ 33.

[372] Claimant's Memorial, ¶ 235.

[373] **R-058**, *Mesa – Notice of Intent*, ¶ 1.

[374] Claimant's Memorial, ¶ 1.

[375] **R-005**, *Mesa – Notice of Arbitration*, ¶ 50.

[376] Claimant's NOA, ¶ 62.

| Allegation | Excerpts from Mesa pleadings public prior to June 1, 2014[361] | Excerpts from Tennant pleadings |
|---|---|---|
| | discrimination, procedural unfairness. […] These measures include, but are not necessarily limited to, the following: […] c. Undue political interference and discriminatory treatment to the Investment and blatant favoritism to other investments; d. Failure to provide transparent administration of the FIT Program.[377] | had nothing to do with the quality or strength of their respective bids. Ontario arbitrarily changed the FIT rules to ensure that certain projects succeeded, while others faltered. These blatant examples of favoritism represent clear violations of Canada's obligations under NAFTA Article 1105.[378] |
| | NextEra was able to submit an application to change its connection point because it had advance notice of the rule change.[379]<br><br>The improper awarding of contracts was the culmination of unfair and discriminatory preferences given to other competitors who had private and secret meetings with the governmental authority in January 2011 ….[380] | NextEra was given access to high-level government officials and succeeded in lobbying for a FIT rule change while at the same time receiving prior knowledge of the change […].[381]<br><br>Ontario provided selective advance access to information and program decision makers to the Canadian subsidiary of NextEra and subsequently arbitrarily modified the FIT Program rules in a manner that disadvantaged the Investment.[382] |

142. Yet again, the Claimant has not offered any valid reason as to why it waited until 2017 to challenge the same measures that Mesa was able to challenge in 2011, using the same documents and evidence that Mesa used to argue its claim almost a decade ago. [383] If there was enough public

[377] **R-005**, *Mesa – Notice of Arbitration*, ¶¶ 62(c),(d).

[378] Claimant's Memorial, ¶ 490.

[379] **R-013**, *Mesa – Investor's Answer on Jurisdictional Objections*, ¶ 85. Having heard the evidence, these allegations were dismissed by the *Mesa* tribunal: "While the Claimant has certainly proven that meetings were held between NextEra and the Ministry, it has not established that the content of these meetings differed in any relevant manner from the many meetings which the Ministry conducted in the normal course with investors in the FIT Program." (**RLA-001**, *Mesa – Award*, ¶ 678).

[380] **R-013**, *Mesa – Investor's Answer on Jurisdictional Objections*, ¶ 143(b).

[381] Claimant's Memorial, ¶ 746.

[382] Claimant's Memorial, ¶ 748.

[383] As previously noted, the Claimant's Memorial enters 221 documents into the record. Of those, 126 are on the record in the *Mesa* arbitration. The remaining 95 are principally Skyway 127's corporate documents and documents specific to damages quantification, which the Claimant does not use to support its arguments on the alleged breach.

information about the alleged breach with respect to the FIT Program in 2011 for Mesa to file its claim, then there was certainly enough for the Claimant to do the same. Nor is it credible for the Claimant to argue that its claim with respect to the FIT Program differs from the one brought almost ten years ago by Mesa. The overlap of both claims is incontestable.

143. Further, the Claimant's attempts to extend the three-year limitation period based on the identification of a particular competitor that was allegedly favoured by Ontario must be dismissed. The Claimant argues that it "became public for the first time" in Mesa's post-hearing submission (published on the PCA website on August 15, 2015) that "Ontario provided blatant protection to IPC, a Canadian company whose executive leadership at the time was a well-known political backer of the Ontario Liberal Government."[384] It argues that this is a key piece of new information that makes its claim timely.

144. However, as Canada demonstrated,[385] information with respect to alleged favouritism and politically-motivated decisions was known, or should have been known, by the Claimant long before the critical date. Documents that were publicly available prior to the critical date, including the submissions in the *Mesa* arbitration, make reference to the same allegations. The Claimant refers extensively to alleged political favouritism with respect to NextEra in its pleadings.[386] The fact that further alleged "political favourites" became known after the critical date does not re-set the limitation period.

145. As the *Spence International* tribunal noted, and as discussed above, limitation periods such as the one set out in Article 1116(2) start to run when the claimant first acquired or must be deemed to have first acquired "knowledge of the breaches <u>that form the essence of their claims</u>".[387] Here, the

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[384] Claimant's Memorial, ¶ 742.

[385] See above, ¶¶ 82-84, and the table that follows in ¶ 85, showing the dates of the groups of measures challenged by the Claimant.

[386] *See, for example,* Claimant's NOA, ¶¶ 74-79; Claimant's Memorial, ¶¶ 84-87, 254-258.

[387] *See* **RLA-136**, *Spence – Corrected Interim Award*, ¶ 299: ("… affording to the Claimants' recently derived knowledge the weight that they propose would again turn the limitation clause on its head. The relevant question is the date on which the Claimants *first* acquired or are deemed to have *first* acquired knowledge of the breach and loss that they allege. While the Claimants may have first acquired knowledge of the SETENA suspensions in July 2014, the Tribunal has concluded, and underlines that conclusion, that the <u>Claimants must be deemed to have first acquired knowledge of the breaches that form the essence of their claims a good deal earlier</u>, before both the 10 June 2010 critical date and the 1 January 2009 CAFTA entry into force date. As with the MINAET instructions just addressed, knowledge of the SETENA 2008–2009

essence of the Claimant's complaint is that Ontario favoured certain FIT Program applicants over others for improper political reasons. The essence of that complaint is not changed by the addition of a further "political favourite" to the claim. Indeed, the Claimant itself recognizes that the facts surrounding an alleged breach can evolve after a claim is submitted to arbitration and that a complete picture of the facts is not required for a claim to arise.[388]

### (iii) Public Documents Demonstrate that the Claimant Knew or Should Have Known of the Alleged Breach Concerning the Handling of Documents Prior to June 1, 2014

146. In its Memorial, the Claimant alleges that it was only "able to ascertain the full story of what occurred well after the termination of the FIT Program due to the non-transparent administration of the [program]"[389] and that "it did not have knowledge of the breach caused by the spoliation of documents until after April 30, 2015."[390]

147. Tennant also contends that the alleged spoliation of documents by government officials "is the only reason why [it] has gained knowledge supporting its preceding three claims only as a result of public disclosure of information from the *Mesa* and *Windstream* arbitrations."[391] This assertion is not credible. As Canada has demonstrated in the sections of this Memorial dealing with the GEIA and the FIT Program, there was sufficient publicly available information for Tennant to have acquired knowledge of the alleged breach prior to June 1, 2014.

148. As detailed in Part II.D, issues relating to the handling of government records in Ontario were made public long before the critical date in this arbitration. The Estimates Committee and the Justice Policy Committee of the Legislative Assembly conducted their work concerning the cancellation of the two gas plants in 2012 and 2013. The Official Report of the Debates held in those committees is made publicly available shortly after a meeting has taken place. In April 2013, the IPC received a

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suspensions does not generate a new independently actionable breach separable from the conduct that preceded it of which the Claimants were aware.") (emphasis added).

[388] *See* Claimant's Memorial, ¶ 720, and Claimant's NOA, ¶ 126 where the Claimant notes, with respect to the handling of documents, that "the extent of the breach cannot be identified until interrogatories or the Tribunal in this claim can order other investigation."

[389] Claimant's Memorial, ¶ 262; Claimant's NOA, ¶ 84.

[390] Claimant's Memorial, ¶ 720; Claimant's NOA, ¶ 126.

[391] Claimant's Memorial, ¶ 755.

complaint and it immediately launched an investigation, which resulted in the public release of the IPC Report on June 5, 2013.[392] Two days later, the OPP launched an investigation into the destruction of e-mails relating to the relocation and cancellation of the gas plants, a development that is mentioned in the Addendum to the IPC Report dated August 20, 2013.[393]

149. There was no need for the Claimant to wait until the public release of documents in the *Mesa* and *Windstream* arbitrations to submit its claim. In fact, the Claimant recognizes that a claimant can bring a case forward even if not all of the information supporting it is available when it states that "[b]ecause of the serious and pervasive nature of this wrongful behavior, the extent of the breach cannot be identified until interrogatories or the Tribunal in this claim can order other investigation."[394]

150. Further evidence of this is the fact that both Mesa and Windstream brought forward their respective claims before the critical date in this arbitration of June 1, 2014. Mesa filed its NOA on October 4, 2011.[395] While that document did not refer to the handling of documents, in its Memorial filed on November 20, 2013, Mesa referred to two news articles concerning Ontario's decision with respect to the cancellation of the two gas plants, and it filed them as exhibits.[396] These articles were published on June 5, 2013, and September 10, 2013. The first one specifically addressed the findings contained in the IPC Report and both articles referred to the September 2012 ruling of the Speaker of the Legislative Assembly.[397] These public documents were certainly available to the Claimant in 2013, the same way they were available to Mesa.

151. Windstream filed its NOA on January 28, 2013.[398] Canada has already explained that in that case, the claimant's request that the tribunal draw an adverse inference was based on documents that

[392] **R-003**, IPC Report, cover page.

[393] **R-004**, IPC Report Addendum, p. 3.

[394] Claimant's Memorial, ¶ 720; Claimant's NOA, ¶ 126.

[395] **R-005**, *Mesa – Notice of Arbitration*.

[396] **R-006**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Memorial of the Investor, 20 November 2013 [Excerpt], ¶ 11 and fns. 11-12.

[397] Canada also notes that paragraph 11 of Mesa's Memorial is almost identical to paragraph 95 of Tennant's Memorial, and that any differences are inconsequential. In fact, Tennant also filed the press articles dated June 5, 2013, and September 10, 2013, as Exhibits **C-183** and **C-184** in this arbitration.

[398] **R-054**, *Windstream – Amended NOA*, cover page (noting original filing date of January 28, 2013).

were publicly available before the critical date in this arbitration, namely the Official Report of Debates for the discussions that took place in the two committees of the Legislative Assembly, the IPC Report and press articles.[399]

152. Neither Mesa nor Windstream sat idle waiting for additional facts to arise out of other NAFTA Chapter Eleven arbitrations before bringing their claims forward. Beyond the dates on which relevant information became public, this is further evidence that a reasonably prudent investor would have had knowledge of the alleged breach before June 1, 2014. The fact that further details about Ontario's handling of government records came to light after that date does not change the moment when the Claimant should have first acquired knowledge of the alleged breach.

153. As for Tennant's allegations concerning the lack of transparency of the terms of the GEIA, Canada has already explained that the *Mesa* tribunal found that "sufficient information about the Ministry's dealings with the Korean Consortium was in the public domain" when the claimant in that arbitration made its investment in Ontario (i.e., November 2009).[400] In any event, the Claimant seems to be confusing concepts and it has not put forward any evidence of spoliation with respect to the GEIA.

154. To the extent the Claimant is purporting that the alleged spoliation of documents is a breach of Article 1105 of the NAFTA, its allegations in this regard were filed outside of the three-year limitation period set out in NAFTA Article 1116(2). Accordingly, Canada has not consented to arbitrate this claim and the Tribunal does not have jurisdiction over it.

### 2. The Claimant Knew or Should Have Known of the Alleged Loss or Damage Prior to June 1, 2014

155. As noted above, the limitation period in Article 1116(2) begins running from the date on which the claimant first acquires, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage arising out of that breach. While Canada has demonstrated above that the Claimant should have first acquired knowledge of the alleged breach

[399] *See* Section II.D.2.

[400] **RLA-001**, *Mesa – Award*, ¶ 595. *See also* ¶¶ 607-608.

prior to the critical date, the Claimant also knew, or should have known, of alleged loss or damage arising out of that alleged breach prior to the critical date.

156. The Claimant concedes that the reservation of transmission capacity in the Bruce transmission zone in September 2010 "immediately harmed" its investment.[401] It also knew that it did not obtain a FIT Contract on July 4, 2011 following the award of FIT Contracts in the Bruce Region, or that it could not obtain a FIT Contract after the OPA stopped procuring renewable energy from large FIT projects on June 12, 2013 at the very latest. Any and all loss or damage arising out of the alleged breach should have therefore been known to the Claimant well before the critical date of June 1, 2014.

157. Faced with this admission in relation to its knowledge of economic loss prior to the critical date, the Claimant is forced to allege that it was only able to "associate losses from the failure to obtain a contract under the FIT Program to the knowledge of a NAFTA breach" after August 2015.[402] This is essentially a repetition of its allegations regarding the NAFTA breach itself, where the Claimant argues that "Canada concealed the NAFTA breach which was the reason for Skyway 127's loss and this information was not discoverable until the release of information arising from the Mesa Power NAFTA hearing on August 15, 2015".[403]

158. Canada has already demonstrated that the Claimant acquired, or should have acquired, knowledge of the alleged breach prior to the critical date of June 1, 2014. The Claimant's attempt to extend the limitation period based on its alleged inability to "associate losses" it suffered in 2011 following the award of FIT Contracts in the Bruce Region to a breach must be rejected. The Claimant had actual knowledge of its failure to receive a FIT Contract, and of the alleged loss or damage arising out of the alleged breach, by July 4, 2011, and certainly no later than June 12, 2013 when the OPA stopped procuring renewable energy from large-scale FIT projects.

## VII. CONCLUSION AND REQUEST FOR RELIEF

159. For the foregoing reasons, Canada respectfully requests that this Tribunal:

[401] Claimant's NOA, ¶ 104.

[402] Claimant's Memorial, ¶ 715(b).

[403] Claimant's Memorial, ¶ 680.

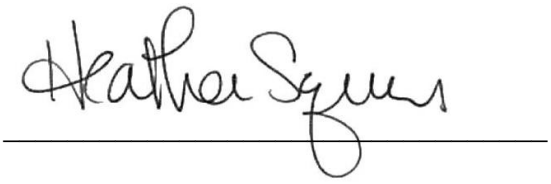
(a) Dismiss the Claimant's claim in its entirety and with prejudice on the grounds of lack of jurisdiction;

(b) Order the Claimant to bear the costs of this arbitration in full and to indemnify Canada for its legal fees and costs in this arbitration; and

(c) Grant any further relief it deems just and appropriate under the circumstances.

September 21, 2020

Respectfully submitted on behalf of the Government of Canada,



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