

**IN THE MATTER OF AN ARBITRATION UNDER THE  
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW  
AND THE NORTH AMERICAN FREE TRADE AGREEMENT**

**BETWEEN:**

**TENNANT ENERGY, LLC**

**Claimant**

**AND**

**GOVERNMENT OF CANADA**

**Respondent**

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**GOVERNMENT OF CANADA**

**RENEWED REQUEST FOR BIFURCATION**

**September 21, 2020**

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## I. INTRODUCTION

1. In accordance with the Tribunal's ruling in Procedural Order No. 4<sup>1</sup> ("PO 4"), Canada respectfully requests that the Tribunal bifurcate these proceedings and hear the jurisdictional objections set out in Canada's Memorial on Jurisdiction in a preliminary phase.<sup>2</sup> With the benefit of Tennant Energy, LLC's ("Tennant" or the "Claimant") Memorial of August 7, 2020 before it, Canada is certain that its jurisdictional objections with respect to NAFTA Articles 1116(1) and 1116(2) can be decided without entering the merits of the dispute and would be most efficiently dealt with as a preliminary matter.

2. The presumption established by the *1976 UNCITRAL Arbitration Rules* (the "1976 UNCITRAL Rules") that questions of jurisdiction should be heard in a preliminary phase is aimed at ensuring efficiency in arbitration proceedings.<sup>3</sup> It is procedurally unfair and inefficient to require Canada to spend potentially millions of dollars and thousands of hours of lawyer, expert, and witness time litigating claims that Canada does not consent to arbitrate and over which the Tribunal has no jurisdiction. The Claimant's Memorial confirms that there are serious jurisdictional bars to this claim proceeding and that the most efficient way to resolve these is through a bifurcated process.

3. For this Tribunal to have jurisdiction over Tennant's claim, the Claimant must show that it meets the requirements of NAFTA Chapter Eleven. For example, Article 1116(1) requires the Claimant to demonstrate that it was an "investor of a Party" protected by NAFTA Chapter Eleven when the alleged breach occurred, while under Article 1116(2), the Claimant must show that it did not submit its claim more than three years from the date on which it first acquired, or should have first acquired, knowledge of the alleged breach and resulting loss or damage. These are fundamental conditions to Canada's consent to arbitration that must be addressed before an

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<sup>1</sup> Procedural Order No. 4, 27 February 2020 ("PO 4"), ¶ 93(b).

<sup>2</sup> Canada's Memorial on Jurisdiction, 21 September 2020 ("Canada's Memorial on Jurisdiction"), Parts V and VI. *See also* Canada's Statement of Defence, 2 July 2019 ("Canada's Statement of Defence"), ¶¶ 28-39 and 45-46.

<sup>3</sup> UNCITRAL Arbitration Rules (1976), Article 21.4: ("In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.")

arbitration is to proceed.<sup>4</sup> The information in the Claimant's Memorial supports Canada's position that the Claimant has not met either of these requirements.<sup>5</sup> As such, Canada remains of the view that its objection with respect to the limitation period under Article 1116(2) would be most efficiently dealt with as a preliminary matter.<sup>6</sup> Further, as a result of new information provided in the Claimant's Memorial, Canada is also of the view that its objection under Article 1116(1) would be most efficiently dealt with in the same manner.<sup>7</sup> As fully explained below, both of these objections are not frivolous; would, if successful, materially reduce the time and costs of the proceeding; and concern issues that are not intertwined with the merits of the arbitration. The Tribunal should hear both of these objections to its jurisdiction *ratione temporis* as a preliminary matter prior to engaging in a potentially unnecessary and expensive merits and damages phase.<sup>8</sup>

4. As it would not increase the efficiency of these proceedings, Canada does not propose to include the two other jurisdictional objections raised in its Statement of Defence dated July 2, 2019 in a preliminary phase.<sup>9</sup> Those objections, although not frivolous, may be more closely intertwined with the merits of this dispute. Accordingly, this Renewed Request for Bifurcation only addresses Canada's objections to the jurisdiction *ratione temporis* of the Tribunal, and is without prejudice to other jurisdictional objections to be made in future pleadings, if such pleadings are necessary.

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<sup>4</sup> See e.g., **RLA-117**, Zachary Douglas, *The International Law of Investment Claims* (Cambridge: CUP, 2009), p. 151: ("Consent of the respondent host state to investor/state arbitration in the investment treaty is the most important condition for the vesting of adjudicative power in the tribunal.")

<sup>5</sup> See Canada's Memorial on Jurisdiction, Parts V and VI.

<sup>6</sup> See Canada's Request for Bifurcation, 23 September 2019 ("Initial Bifurcation Request"), ¶¶ 10-28.

<sup>7</sup> See Initial Bifurcation Request, ¶ 5, where Canada noted that, at that time, it was not requesting bifurcation of its additional jurisdictional objections raised in its Statement of Defence due to the limited information before it and the potential of those objections being more closely intertwined with the merits. With the additional information set out in the Claimant's Memorial, Canada now raises its jurisdictional objection with respect to Article 1116(1) for preliminary determination since it is clear that this objection can be decided discretely from the merits.

<sup>8</sup> With respect to an objection under Article 1116(1) going to a tribunal's jurisdiction *ratione temporis*, the tribunal in *Mesa v. Canada* stated: "[t]his Tribunal's jurisdiction *ratione temporis* is limited to measures that occurred after the Claimant became an 'investor' holding an 'investment.'" (**RLA-001**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016 ("*Mesa – Award*"), ¶ 327).

<sup>9</sup> See Canada's Statement of Defence, ¶¶ 40-44, where Canada sets out jurisdictional objections with regard to (a) NAFTA Article 1101(1) and the alleged destruction of evidence not "relating to" the Claimant or its alleged investment; and (b) the Claimant's failure to explain how it has standing under Article 1116 to bring a claim on its own behalf on the grounds that it "has incurred loss or damage" as a result of an alleged breach of NAFTA.

## II. JURISDICTIONAL OBJECTIONS SHOULD BE CONSIDERED AS A PRELIMINARY MATTER WHEN DOING SO WILL INCREASE THE FAIRNESS AND EFFICIENCY OF THE PROCEEDINGS

5. Article 21(4) of the 1976 UNCITRAL Rules creates a presumption in favour of bifurcating jurisdictional questions,<sup>10</sup> which is intended to increase the fairness and efficiency of arbitration proceedings.<sup>11</sup> In exercising their discretion to bifurcate proceedings into a separate jurisdictional phase, tribunals have been guided by these two principles.<sup>12</sup> In fact, the Claimant has acknowledged arbitral efficiency and economy as being considerations for determining whether bifurcation is warranted.<sup>13</sup>

6. Holding a preliminary phase to hear Canada's jurisdictional objections will ensure that the Tribunal only hears and decides a dispute when the conditions of consent to arbitrate have been

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<sup>10</sup> Unlike Article 23(3) of the 2010 *UNCITRAL Arbitration Rules*, which provides that the Tribunal "may" bifurcate, the preceding 1976 UNCITRAL Rules provide that the tribunal "should" rule on a plea concerning its jurisdiction as a preliminary question. The use of "should" rather than "may" provides narrower discretion to a tribunal under the 1976 UNCITRAL Rules and creates a presumption in favour of bifurcation. See **RLA-060**, *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL) Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014 ("*Philip Morris – Procedural Order No. 8*"), ¶ 101. See also, Initial Bifurcation Request, ¶ 6 and footnote 7.

<sup>11</sup> See e.g., **RLA-056**, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India* (UNCITRAL) Procedural Order No. 4 - Decision on the Respondent Application for Bifurcation, 19 April 2017, ¶ 78: ("These considerations – fairness and procedural efficiency – are the determining factors that should guide the Tribunal's discretion. As noted above, these were the principles that guided the negotiations for the 1976 Rules."); **RLA-054**, *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL) Procedural Order No. 2 (Revised), 31 May 2005 ("*Glamis Gold – Procedural Order No. 2 (Revised)*"), ¶ 11: ("In examining the drafting history of Article 21(4) of the UNCITRAL Rules, the Tribunal finds that the primary motive for the creation of a presumption in favor of the preliminary consideration of a jurisdictional objection was to ensure efficiency in the proceedings.") See also **RLA-074**, David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2<sup>nd</sup> Edition (Oxford University Press, 2012), p. 458: ("The above discussion points to efficiency as the prime factor in determining whether a tribunal should rule on objections concerning jurisdiction as a preliminary matter").

<sup>12</sup> See e.g., **RLA-071**, *Accession Mezzanine Capital L.P. and Danubius Kereskedohaz Vagyonkezele v. Hungary* (ICSID Case No. ARB/12/3) Decision on Respondent's Notice of Jurisdictional Objections and Request for Bifurcation, 8 August 2013, ¶ 38: ("[t]he Tribunal shall consider as an overarching question whether fairness and procedural efficiency would be preserved or improved.") See also, **RLA-072**, *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41) Procedural Order No. 2 – Decision on Bifurcation, 28 June 2018, ¶ 50; **RLA-061**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28) Decision on Request for Bifurcation under Article 41(2) of the ICSID Convention, 2 November 2012, ¶¶ 55-56; **RLA-073**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Procedural Order Deciding Bifurcation and Non-Bifurcation, 25 January 2013, ¶ 11. See also, Initial Bifurcation Request, ¶ 8.

<sup>13</sup> See e.g., Claimant's Response to Canada's Motion for Bifurcation, 23 October 2019 ("Claimant's Bifurcation Response") ¶¶ 2 and 35; Hearing on Bifurcation and Preliminary Motions, Hearing Transcript Day 1 [Corrected], 14 January 2020, p. 201:14-25.

met.<sup>14</sup> The Tribunal and the disputing parties should seek to avoid finding themselves in a situation where, “[w]ith the wisdom of hindsight, the majority of the costs and expenses of each party and of the dispute, both in duration and expense, would have been avoided”<sup>15</sup> had the proceedings been bifurcated and the respondent’s jurisdictional objections been heard in a preliminary phase.<sup>16</sup> As explained below, if Canada is successful on either of its jurisdictional objections, Tennant’s claim will be dismissed in its entirety and these proceedings will be over. The complete dismissal of Tennant’s claims during a jurisdictional phase would achieve considerable efficiency in the NAFTA Chapter Eleven arbitral process.<sup>17</sup>

7. In its Request for Bifurcation dated September 23, 2019 (“Initial Bifurcation Request”), Canada relied on the three criteria identified by the *Philip Morris v. Australia* tribunal and applied by the NAFTA Chapter Eleven tribunal in *Resolute v. Canada* to determine if bifurcation is appropriate.<sup>18</sup> While Canada’s position in this Renewed Request for Bifurcation remains consistent with the position taken in its previous submission, in what follows Canada specifically addresses the considerations set out by the Tribunal in PO 4. They are:

- (i) whether the jurisdictional objection is frivolous;

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<sup>14</sup> See e.g., **RLA-058**, Gary Born, *International Commercial Arbitration*, 2<sup>nd</sup> edition (Kluwer Law International, 2014), pp. 1245-1246: (“Although no absolute rules can be prescribed, the more appropriate course for the arbitral tribunal is generally to conduct at least some preliminary, independent inquiry into jurisdictional objections. If it appears that a credible, good faith jurisdictional challenge has been raised, it is ordinarily appropriate to provide the parties with an opportunity to submit legal argument and evidence on the challenge [...]. This course permits the parties to fully address (and the tribunal to fully consider) jurisdictional objections and, if jurisdiction is lacking, avoids the expense of presenting the case on the merits. It also avoids forcing a party, who may not be subject to a tribunal’s jurisdiction, to litigate the merits of its claims in what may be an illegitimate forum.”)

<sup>15</sup> **RLA-062**, *Caratube International Oil Company v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Award, 5 June 2012, ¶ 487.

<sup>16</sup> See also, **RLA-057**, Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th edition (London: Sweet & Maxwell, 2004), p. 258 (noting that dealing with a challenge to a tribunal’s jurisdiction in a preliminary phase “enables the parties to know where they stand at an early stage; and it will save them spending time and money on arbitral proceedings that prove to be invalid.”); **RLA-058**, Gary Born, *International Commercial Arbitration*, 2<sup>nd</sup> edition (Kluwer Law International, 2014), p. 1247: (“[...] it is important also to give effect to the less quantifiable, but real, ‘costs’ of requiring a party who disputes the tribunal’s jurisdiction to litigate a case on the merits before having its jurisdictional objections resolved by any decision-maker.”)

<sup>17</sup> NAFTA Chapter Eleven tribunals have frequently decided questions of jurisdiction as a preliminary matter prior to hearing the case on the merits. See Initial Bifurcation Request, ¶ 7, footnote 10.

<sup>18</sup> See Initial Bifurcation Request, ¶ 9.

- (ii) whether the objection, if successful, would materially reduce the time and costs of the proceeding; and
- (iii) whether the objection concerns issues intertwined with the merits of the arbitration.<sup>19</sup>

8. As noted above, Canada now submits two objections to the Tribunal's jurisdiction *ratione temporis*: first, the Claimant has failed to establish that Tennant Energy, LLC was a protected "investor of a Party" when the alleged breach occurred, and therefore the Claimant has not met the requirements of Article 1116(1); and second, the claim was not filed prior to the expiry of the limitation period articulated in Article 1116(2). Both of Canada's objections satisfy each of the considerations listed above, and as a result, it is fair and efficient to have both issues heard in a preliminary phase.

9. Consistent with the approach taken by other tribunals, even if the Tribunal determines that only one of Canada's jurisdictional objections satisfies the criteria for bifurcation, these proceedings should still proceed on a bifurcated basis.<sup>20</sup> Briefing and resolution of each objection can be accomplished expeditiously without any need for document production or expert reports. Thus, hearing one or both objections during a bifurcated jurisdictional phase will achieve considerable efficiency because, as explained below, each objection, if successful, would dispose of all of Tennant's claim and would bring these proceedings to an end.<sup>21</sup>

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<sup>19</sup> PO 4, ¶ 87. The three criteria Canada set out in its Initial Bifurcation Request are substantively the same as the considerations relied on by the Tribunal in PO 4. The three criteria set out in the Initial Bifurcation Request were: (i) whether the objection is *prima facie* serious and substantial; (ii) whether the objection can be examined without prejudging or entering the merits; and (iii) whether the objection, if successful, could dispose of all or an essential part of the claims raised. *See* Initial Bifurcation Request, ¶ 9.

<sup>20</sup> *See e.g., RLA-118, Gran Colombia Gold Corp. v. Republic of Colombia* (ICSID Case No. ARB/18/23) Procedural Order No. 3 - Decision on the Respondent Request for Bifurcation, 17 January 2020, ¶¶ 31-33 and 36(b), where the tribunal bifurcated the proceedings to hear only one jurisdictional objection as a preliminary matter and proposed doing so on the basis of an accelerated timetable to ensure resolution of the objection could be achieved "as expeditiously as reasonably possible". The *Gran Colombia* tribunal examined similar criteria for bifurcation to that set out by this Tribunal in PO 4 and held that Colombia's denial of benefits objection met all three criteria for bifurcation, and unlike Colombia's other jurisdictional objections, could potentially (if successful) dispose of the entire case. Although the *Gran Colombia* tribunal decided not to bifurcate Colombia's time limitation period objection, it did so on the basis that, if successful, it would have only disposed of certain alleged breaches pre-dating the critical date but not all of them and thus, procedural economy would not have been served.

<sup>21</sup> Canada notes that some tribunals that have ruled against bifurcating jurisdictional objections (even when some of the objections met the criteria for bifurcation) have remarked that the outcome of such objections can be taken into account when awarding costs in the arbitration. In this case, however, awarding costs would not be an appropriate remedy. Canada has raised serious concerns with respect to the Claimant's ability to satisfy an adverse costs award

### III. BIFURCATION WILL INCREASE THE FAIRNESS AND EFFICIENCY OF THE PROCEEDINGS

#### A. Canada's Objection that the Claimant Was Not a Protected Investor When the Alleged Breach Occurred

10. In its Statement of Defence, Canada noted that “[t]o the extent that the Claimant fails to offer sufficient evidence that it was an investor holding an investment at the time the challenged measures were adopted, Canada has not consented to this arbitration and the Tribunal lacks jurisdiction to hear the claim.”<sup>22</sup> At the time of that submission, Canada had limited information concerning the date when the Claimant invested in Canada. However, following the submission of the Claimant’s Memorial, it has become clear that the Claimant, Tennant Energy, LLC, was not a protected “investor of a Party”, as defined by Article 1139, when the alleged breach occurred.<sup>23</sup> Most importantly for this submission, it is now evident that Canada’s Article 1116(1) objection should be dealt with as a preliminary matter.

11. Specifically, the Claimant has failed to establish that Tennant Energy, LLC was an “investor of a Party” between 2008 and 2013, when the alleged breach occurred.<sup>24</sup> Rather, the exhibits accompanying the Claimant’s Memorial show that the Claimant first obtained an equity interest in

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and recently, the Claimant has acknowledged that it has “limited financial resources” (*See* Claimant’s Response to Canada’s correspondence of August 10, 2020, dated 18 August 2020, ¶ 181). The Claimant’s limited financial capacity provides an even greater reason to bifurcate these proceedings in order to deal with them in the most cost efficient manner. *See e.g., RLA-119, Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia* (UNCITRAL) Procedural Order No. 2 (Decision on Bifurcation), 31 January 2018, ¶ 56 (where, despite finding that one jurisdictional objection justified bifurcation (because it met all three criteria and if successful, would dispose of the entire case) the tribunal chose not to bifurcate into a jurisdictional phase but remarked that during a merits phase “the ultimate outcome of the objections will be a factor that the Tribunal may take into account when awarding costs in this arbitration.”); **RLA-120, Rand Investments Ltd. and others v. Republic of Serbia** (ICSID Case No. ARB/18/8) Procedural Order No. 3, 24 June 2019 (“*Rand Investments – PO 3*”), ¶ 18(d): (“It is true that the costs of litigating the merits may be expended for no purpose if in a non-bifurcated proceedings [sic] jurisdiction were eventually denied. That consequence could, however, be remedied when allocating the burden of the costs of the proceedings.”)

<sup>22</sup> Canada’s Statement of Defence, ¶ 46.

<sup>23</sup> Canada’s Memorial on Jurisdiction, Part V., and ¶¶ 80-96. *See also* Canada’s Statement of Defence, ¶¶ 45-46.

<sup>24</sup> Claimant’s Memorial, 7 August 2020 (“Claimant’s Memorial”), ¶ 771-774; Canada’s Memorial on Jurisdiction, Part V., and ¶¶ 80-96.



the alleged investment, Skyway 127 Wind Energy Inc. (“Skyway 127”), on January 15, 2015.<sup>25</sup> Accordingly, the Claimant cannot submit its claim to arbitration under Article 1116(1).

12. Applying the criteria laid out by the Tribunal in PO 4 with respect to bifurcation, the Tribunal should consider this objection as a preliminary matter. First, Canada's objection that the Claimant cannot submit its claim under Article 1116(1) because Tennant Energy, LLC was not an “investor of a Party” when the alleged breach occurred is not frivolous. In fact, it raises a fundamental question concerning the non-retroactive application of the substantive obligations in NAFTA Chapter Eleven. Under Article 1116(1), Canada has not consented to arbitrate claims of an alleged breach of the substantive obligations under Section A of Chapter Eleven that occurred before a claimant became an “investor of a Party”. This is consistent with the general rule under international law that international treaties do not apply retroactively, absent express provisions to the contrary.<sup>26</sup> Article 1116(1) does not depart from this rule. To submit a claim under Article 1116(1) that a NAFTA Party breached an obligation under Section A of Chapter Eleven, a claimant must establish that it was an “investor of a Party” when the alleged breach occurred. Otherwise, a NAFTA tribunal will lack jurisdiction *ratione temporis*.<sup>27</sup> An objection to a tribunal's jurisdiction in this regard is not frivolous. Rather, it goes to the fundamental principle of consent to arbitration.

13. Second, Canada's Article 1116(1) objection, if successful, would materially reduce the time and costs of the proceedings. In fact, a finding in Canada's favour would dispose of the totality of Tennant's claim. Moreover, such a decision can be made without the requirement for document production or expert reports. This objection can thus be dealt with in an efficient and expeditious manner.

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<sup>25</sup> **C-115**, Shareholder's Ledger Skyway 127, 15 January 2015. *See also*, **C-114**, Shareholder's Ledger Skyway 127, 30 December 2011, **C-116**, Shareholder's Ledger Skyway 127, 9 June 2011; **C-117**, Shareholder's Ledger Skyway 127, 20 June 2011.

<sup>26</sup> **CLA-199**, James Crawford, *The International Law Commission's Articles on State Responsibility*, (Cambridge University Press, 2002), p. 63, Article 13: (“An act of 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.”); and **RLA-031**, *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, 23 May 1969, Article 28: (“Unless 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.”)

<sup>27</sup> *See e.g.*, **RLA-001**, *Mesa – Award*, ¶¶ 325-327; **RLA-004**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011, ¶¶ 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, ¶ 145. *See also*, **RLA-122**, *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16) Award, 31 March 2011, ¶ 170.

14. Third, Canada's objection is not intertwined with the merits of this dispute. The objection involves a discrete issue: whether the Claimant was an "investor of a Party" under NAFTA Chapter Eleven when the alleged breach occurred. To address Canada's objection, the Tribunal need only ask itself two questions: (i) when did the alleged breach occur; and (ii) when did the Claimant become an "investor of a Party" with an investment in Skyway 127. If the answer to the second question post-dates the first, the Tribunal is without jurisdiction. These questions can be answered in their entirety without delving into the merits of Tennant's claim that the challenged measures breached the minimum standard of treatment under NAFTA Article 1105(1). Particularly, with respect to the first question, there does not appear to be any disagreement between the disputing parties on when the measures leading to the alleged breach occurred.<sup>28</sup>

**B. Canada's Objection that Tennant's Claim Was Not Submitted Within the Three-Year Limitation Period**

15. As Canada explains above, its first objection pertains to the Claimant's failure to meet the requirement under Article 1116(1) to be an "investor of a Party" when the alleged breach occurred. However, Canada's second objection proceeds on the basis that, even if this were not the case, the claim would nevertheless be outside of the Tribunal's jurisdiction because the Claimant failed to submit it within the three-year limitation period explicitly set out in Article 1116(2) of the NAFTA.

16. This Tribunal has no jurisdiction *ratione temporis* over Tennant's claim because it filed its Notice of Arbitration ("NOA") more than three years after it first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it incurred loss or damage arising out of that breach.<sup>29</sup> As such, the Claimant failed to meet the conditions precedent for submitting a claim to arbitration under Article 1116(2) and Canada has not consented to arbitrate this claim. The Claimant either knew or should have known about the alleged breach and loss or damage arising out of that breach well before the critical date of June 1, 2014.<sup>30</sup>

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<sup>28</sup> Canada's Memorial on Jurisdiction, ¶ 81.

<sup>29</sup> The Claimant filed its Notice of Arbitration on June 1, 2017. Thus, the critical date for the purposes of the limitation period under Article 1116(2) is June 1, 2014.

<sup>30</sup> Canada's Memorial on Jurisdiction, Part VI.B.

17. Applying the criteria laid out by the Tribunal in PO 4 with respect to bifurcation, the Tribunal should consider this objection as a preliminary matter. First, Canada's objection that the Claimant has not made a timely claim is not frivolous.<sup>31</sup> Canada's objection goes to the very basis of the Tribunal's authority to hear this claim. Article 1116(2) is an integral aspect of the NAFTA Parties' consent to arbitration,<sup>32</sup> and constitutes a "clear and rigid limitation defense."<sup>33</sup> Indeed, as a matter of NAFTA practice, fundamental questions of consent such as those pertaining to the limitation period under Article 1116(2) of the NAFTA are normally decided as preliminary questions.<sup>34</sup> There is no reason for this Tribunal to diverge from that practice in this case.

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<sup>31</sup> See e.g., **RLA-120**, *Rand Investments – PO 3*, ¶ 17 (where the tribunal remarked that the respondent's time limitation period objection under the *Agreement Between Canada and the Republic of Serbia for the Promotion and Protection of Investments* was not frivolous and must be deemed serious: "Reviewing the Request from the perspective of procedural efficiency, the Tribunal first notes that the Respondent's objections do not appear frivolous. [...] Similarly, the *ratione temporis* objection under the Canada-Serbia BIT would involve an analysis of the relevant Treaty provisions, as well as a review of the record to determine when the three-year limitation period started running. Other objections also raise genuine questions of treaty interpretation among others. As a consequence, the Respondent's objections must be deemed serious, and success on a combination of several objections could result in the denial of jurisdiction over the entire case.") In *Rand*, the tribunal did not bifurcate the proceedings to hear Serbia's jurisdictional objections in a preliminary phase for several reasons, one of them being that because claims had been submitted under two separate treaties, even if the jurisdictional objections were successful under one treaty, the tribunal would still have to engage in a merits phase to examine facts underlying the claims brought under the other treaty (see **RLA-120**, *Rand Investments – PO 3*, ¶ 18). See also, Initial Bifurcation Request, ¶ 11.

<sup>32</sup> See e.g., **RLA-002**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002, ¶ 120 (holding that in order to establish consent to arbitration under NAFTA Chapter Eleven, a Claimant must show, among other things, that the "claim has been brought by a claimant investor in accordance with Articles 1116 or 1117"); **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 (holding that "[t]he 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, in Chapter Eleven, to an overall enhancement of their exposure to remedial actions by investors", and proceeding to analyze Canada's time bar objection as a question of jurisdiction.). See also Initial Bifurcation Request, ¶¶ 12-13.

<sup>33</sup> **RLA-081**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002, ¶ 63. Numerous NAFTA tribunals have applied the time limitation period provision strictly. As the Tribunal in *Resolute* stated, "this time limit is strict, not flexible. There is no provision for the Tribunal to extend the limitation period" (**RLA-079**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Decision on Jurisdiction and Admissibility, 30 January 2018, ¶ 153). See also **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*"), ¶¶ 29, 83, and 103; **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, ¶¶ 314-335; **RLA-003**, *Bilcon – Award on Jurisdiction and Liability*, ¶¶ 258-282. See also Initial Bifurcation Request, ¶ 13.

<sup>34</sup> See **RLA-052**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Procedural Order No. 4 - Decision on Bifurcation, 18 November 2016, ¶ 4.6: ("As a matter of NAFTA practice, time bar issues are normally decided as preliminary questions"), citing **RLA-070**, *Grand River – Decision on Jurisdiction*, ¶ 29: ("Since Articles 1116(2) and 1117(2) introduced a clear and rigid limitation defence – not subject to any suspension, prolongation or

18. Moreover, NAFTA's limitation period under Article 1116(2) is meant to prevent stale claims for which evidence may be unavailable or which require witnesses to recollect events long past. The NAFTA Parties' clear intent to preclude historic claims is demonstrated in the language of Article 1116(2).<sup>35</sup> This is particularly true for claims, such as Tennant's, that involve measures that took place more than a decade ago. Canada's limitation period objection is therefore anything but frivolous.

19. Second, if Canada's time limitation period objection is successful, not only would it materially reduce the time and costs of the proceedings, it would dispose of Tennant's claim in its entirety. The Claimant knew or should have known about the alleged breach of Article 1105(1), as well as the loss or damage arising out of that breach, more than three years prior to the filing of its NOA.<sup>36</sup> Thus, if the Tribunal upholds Canada's objection with respect to the limitation period under Article 1116(2), these proceedings would come to an end. A decision in this respect can be made without the need for document production or expert reports. The result is a substantial savings in time and costs for both Canada and the Claimant, an outcome that the bifurcation of jurisdictional objections seeks to achieve.

20. Third, Canada's limitation period objection does not concern issues intertwined with the merits of the dispute. In deciding Canada's objection, the Tribunal will be required to undertake an analysis of the treaty standard and jurisprudence relating to Article 1116(2) of the NAFTA. It is a question of identifying the measures alleged to be in breach of NAFTA Chapter Eleven and the dates on when the Claimant *first* acquired – or should have first acquired – the requisite knowledge of the alleged breach and resulting loss or damage. No further inquiry is necessary, let alone any sort of inquiry that requires the Tribunal to prejudge or enter the merits of Tennant's Article 1105(1) claim.<sup>37</sup> Canada's objection can be decided without entering into any substantive

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other qualification - the Tribunal decided to bifurcate the time limitation issue for trial as a preliminary issue.”). *See also*, Initial Bifurcation Request, ¶ 7, footnotes 10 and 11.

<sup>35</sup> NAFTA Article 1116(2) states: “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.” (emphasis added)

<sup>36</sup> Canada's Memorial on Jurisdiction, Part VI.B.

<sup>37</sup> In the Claimant's Bifurcation Response, the Claimant argues that the Tribunal must take the claim as it is alleged by the Claimant (*see* ¶ 5, *citing to* **RLA-054**, *Glamis Gold – Procedural Order No. 2 (Revised)*, ¶ 12(a)). This,

analysis as to whether the measures are in conformity with Article 1105(1). Accordingly, it would be fair, efficient and consistent with the presumption in favour of bifurcation to hear this discrete objection alongside Canada's Article 1116(1) objection in a bifurcated jurisdictional phase.

#### **IV. CONCLUSION**

21. Canada's request to bifurcate the proceedings is based on fairness and efficiency. Canada's objections are not frivolous, they will dispose of the entirety of Tennant's claim if successful, and they are not intertwined with the merits of Tennant's claim under NAFTA Article 1105. Accordingly, they can be dealt with expeditiously in a preliminary phase. More fundamentally, because the Claimant has not submitted its claim "in accordance with the procedures set out in [the] Agreement"<sup>38</sup>, Canada should not have to defend a claim over which it has not granted its consent to arbitrate and over which the Tribunal has no jurisdiction.

22. For the foregoing reasons, Canada respectfully requests that the Tribunal bifurcate these proceedings and hear Canada's Article 1116(1) and Article 1116(2) jurisdictional objections in a preliminary phase.

September 21, 2020

Respectfully submitted on behalf of the  
Government of Canada,



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however, does not mean that Canada must concede legal arguments as to the Tribunal's jurisdiction. If a tribunal is deciding an objection to jurisdiction in a preliminary phase, a tribunal can accept the facts as set forth by a claimant to the extent that they are not patently false, without having to delve into the merits during that preliminary phase.

<sup>38</sup> NAFTA Article 1122(1).