PUBLIC VERSION

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

Tennant Energy LLC.

INVESTOR

v.

Canada

RESPONDENT

Investor's Response to Canada's Third Bifurcation Request

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OVERVIEW

1) Time and time again, Canada sings the same song. Unconvincingly, Canada says Tennant Energy LLC is attempting to repeat the exact same claims made by Mesa Power Group in its NAFTA claim. Tennant Energy LLC is not Mesa Power Group, and Tennant nor this Tribunal is limited to the facts presented in that case or its outcome. This Tribunal should realize that Canada's song does not ring true.

2) Canada's Third Bifurcation Request and its ongoing jurisdictional challenges thus require Canada to prove that Tennant Energy's claims are based on the exact same factual assertions made by the *Mesa Power* case and known to the public prior to June 1, 2014. Canada's attempt for a separate jurisdictional phase hinges on Canada's ability to establish that there were no facts that became available to the public after June 1, 2014, that could support Tennant's legal claims. This assertion simply is untrue.

3) This Third Bifurcation Response reviews the evidence Canada relies upon to support its position that this Tribunal lacks jurisdiction. These arguments appear in Canada's Jurisdictional Memorial. Canada's position is all smoke and mirrors – but there is no content. The evidence Canada raises avoids the arguments Tennant Energy raises.

   a) Canada has no answer to the issues raised by the International Power Canada claim and the "Breakfast Club."

   b) Canada ignores the issues Tennant Energy raises by about the secrecy surrounding the failure of the Korean Consortium to meet their responsibilities under the Green Energy Investment Agreement, and Ontario's decision to continue to provide the benefits of the agreement without the payment of the costs.

   c) Canada ignores the relevant meeting between the [redacted] and Vice President of NextEra and the ensuing high-level actions taken to facilitate new contracts for NextEra projects that had failed in other transmissions zones earlier in the FIT Progress; and

   d) Canada completely has ignored the role of the above issues and how the understanding of these issues in 2015 from the *Mesa Power* NAFTA Claim of the involvement of high-level officials from the Premier's Office in the FIT Program makes the criminal and willful destruction of Ontario energy policy documents relevant to Tennant Energy.

4) Canada's Jurisdictional Memorial completely ignores the fact that Canada cannot establish a case, and it is precisely why Canada is desperately trying to avoid the merits of Tennant Energy's claim.

5) With the cloak of darkness on the *Mesa Power* Hearing admissions of wrongdoing now removed, Canada is aware of its precariously weak position on the merits of this claim. Thus, Canada attempts legal gymnastics by arguing that there was a tremendous amount of evidence known to the public before June 1, 2014, that Canada acted notoriously in profligate non-conformity with its NAFTA Chapter Eleven Section A obligations. Thus, Canada asserts that Tennant Energy should have brought its claim earlier. This assertion is absurd. It completely ignores the facts of the claim Tennant Energy pled, and substitutes Tennant Energy's claim with a flimsy and fictitious claim of Canada's construction.

6) Tennant Energy is entitled to argue its claim based on those measures that it finds material and relevant. As set out in detail in this Response, Tennant Energy has articulated specific claims that largely rest on information arising from the public revelation of the October 2014 *Mesa Powe*r NAFTA Hearing. That is the basic claim Tennant Energy asserts – and the one that Canada should have addressed in its Third Bifurcation Request.

7) Astonishingly, Canada never addresses the fundamental point of how Tennant Energy's claim arises from knowledge derived from materials that became public knowledge during the *Mesa Power* NAFTA hearing, as the basis for this arbitration. The failure to address this fundamental point, after reviewing Tennant Energy's Memorial, is telling. Of course, Canada has no answer because *prima facie* jurisdiction exists. As a result, Canada's Third Bifurcation Request adds nothing to its first failed request and constitutes nothing but an expensive and needless waste of time and resources.

8) The claims in this arbitration arise from previously secret information that first came to light in August 2015. The admissions involve the existence of improper actions to favor political friends and favorites of Ontario's government taken by senior Canadian government officials. These companies - owned by political cronies and supporters - were favored to the detriment of investments American investors owned who followed the general guidelines of the FIT

Program. The NAFTA prohibits such unfair practices, which disrupt commercial certainty and cross-border investment.

9) As discussed below, the NAFTA drafters - and the decisions from NAFTA and other international tribunals - had come to a common conclusion: it is impossible to consider the breach of an obligation without consideration of the measures and when it was known to be an internationally wrongful measure. Thus, the time of a breach must consider when an investor actually knew, or reasonably ought to have known, of the specific breach at issue.

10) Essential to evaluating the timing question is the pervasive secrecy in energy policy decision making in Ontario. Not only was the administration of Ontario's energy policy opaque from the public, but there was the added factor of the criminal destruction of tens of thousands of documents relating to Ontario Energy policies. Evidence before this Tribunal also confirms that secret bodies of the most senior Ontario government and political officials congregated to plan ways to circumvent the existing FIT Rules to assist local friends and supporters of the government. Those meetings did not come public until August 2015.

11) Tennant Energy did not have the knowledge, and could not have known, of these wrongful measures at the time that the internationally unlawful measures occurred. Tennant Energy's claims arise from information *unknown to the public* on Canada's artificial substitute dates of June 12, 2013 (or July 4, 2011). Similarly, Tennant Energy did not know or could not have known this information when *Mesa Power* raised its NAFTA claim in 2011.

12) Astonishingly, Canada persists in its failed attempts to conflate the claim here with the earlier *Mesa Power* claim. In bringing its Third Bifurcation Request, Canada wholly ignores the actual claim Tennant Energy articulates. Canada also ignores the requirement that the Investor has actual or constructive knowledge of the NAFTA breach for the "time clock" to start to run.

13) At no time does Canada establish that Tennant had actual or constructive knowledge of:

    a) the special treatment granted to International Power Canada, which resulted in the harm caused to Skyway 127.

    b) the existence of the "Breakfast Club" of senior political and government officials who have unfairly manipulated the FIT Program and other government rules in Ontario to the

detriment of the FIT proponents such as Skyway 127. Ontario blocked the public from having knowledge of these extraordinary practices.

14) There cannot be a breach raised under NAFTA Article 1116 without the Investor having such actual or constructive knowledge.

15) Article 1116 (2) is very clear:

> 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.

16) The three-year period is initiated when all the following elements have been met:

a) there is actual or constructive knowledge of both;
b) knowledge of a breach; and
c) knowledge of loss or damage that has been incurred as a result.

17) Until all those elements are met, the three-year period has not begun. The knowledge requirement applies both to the breach and to the suffering of damage. Knowledge of one, without the other, is insufficient to trigger the commencement of the three years.

18) The three-year provision is not designed for the Tribunal to determine before the merits hearing whether a claim existed at a particular point in time or the scope of that claim. These are issues for the Tribunal to consider on the merits. To determine whether "sufficient" events arose three years before filing the Notice of Arbitration, the Tribunal must begin from the Investor's good-faith understanding of its claim; it must consider the internationally wrongful conduct the Investor alleges as the basis of the claim; and, it must ask, based upon the Investor's theory of law, are there "sufficient" acts and omissions three years before filing the Notice of Arbitration that, if proven, would establish internationally wrongful conduct that would allow the Investor to succeed with the claim as filed?

19) NAFTA Article 1116 is about good faith conduct concerning the host state. It must not be used as an indirect avenue for challenging the Investor's claim as the Investor defines or understands it, or the Investor's view of the law and the facts. It does not matter that, on a different theory of the law or different facts than those the Investor alleges, there might have been "sufficient" acts

and omissions three years before filing its claim for some other case not brought. The relevant perspective is the Investor's good faith understanding of the law and facts as they appeared when it filed its Notice of Arbitration and concerning the claim actually as stated.

20) Absent evidence of bad faith, a Tribunal should defer to the Investor's judgment about when its claim arose when assessing whether it complied with such a requirement. As long as the Investor has acted in good faith and reasonably in coming to the conclusion that it had a claim at a particular point in time, and waited six months from that point (as required by NAFTA Article 1120), then the three-year period should not be a bar for the Investor to prove its claim on the merits as it has pled.

21) It is abundantly clear that, in this arbitration, the Investor has acted in good faith and has been reasonable in arriving at the conclusion that it filed its claim within three years of learning of the facts and acts of Canada's wrongful conduct before bringing its Notice of Arbitration. Canada has not shown otherwise. The Notice of Arbitration conforms to the requirements of the NAFTA, as it was filed well within three years from the date of when the Investor became aware of Canada's breach through the release of documents commenting on testimony at the October 2014 *Mesa Power* NAFTA claim.

THE TIME ISSUE

22) Canada asks the Tribunal to wear blinders and ignore the evidence upon which Tennant Energy relies, first made public after June 1, 2014. NAFTA Article 1115 binds this Tribunal. It says:

> Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

23) Article 15 of the UNCTIRAL Arbitration Rules states:

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with

> equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case. [1]

24) Fundamentally, NAFTA Article 1115 and Article 15 of the (1976) UNCITRAL Arbitration Rules guarantee that Tennent Energy is entitled to due process and to be given a full opportunity of presenting its case. These guarantees will be invalidated if Canada is entitled to unilaterally modify the Investor's claim as it proposes to do.

25) This Tribunal needs to consider the facts the Investor pled in determining the case. This is especially important when the Investor raises a claim of fair and equitable treatment. As the *Windstream NAFTA* Tribunal noted,

> "a judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of a particular case… just as the proof of the pudding is in the eating (and not in its description), the ultimate test of correctness of an interpretation is not in its description in other words, *but in its application on the facts*."[2]

26) Canada may not substitute the facts and claims the Investor actually raises and replace them with facts the Respondent selects. Tennant Energy, as the claimant in this arbitration, is entitled to define its claim. This right cannot be lightly modified.

27) It is not surprising that there is some commonality among the factual underpinnings between the issues arising in this Claim, the *Mesa Power* Claim, and the *Windstream Energy* Claim. While all three NAFTA Claims arose from the misadministration of Ontario's FIT Program, each of them addresses different treatment, with additional facts arising out of the earlier proceedings giving rise to Tennant Energy's Claim.

28) For example, the public (and thus Tennant Energy) only first became aware of certain internationally wrongful acts from measures after reviewing the public versions of submissions discussing the evidence at the *Mesa Power* NAFTA hearing and the unredacted, yet publicly-

[1] Article 15 of the 1976 UNICTRAL Arbitration Rules. **CLA-249**.
[2] *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Award, 27 September 2016, ¶362, **RLA-088**, (quoting *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, ¶118).

available, video recordings of the *Mesa Power* NAFTA hearings on the PCA website, publicly available well after June 1, 2014.[3]

29) Indeed, the core facts and core allegations set out in Tennant Energy's Memorial, and other pleadings were unknown to it before June 1, 2014. There is no possible way that these admissions could have been known at that time as they were not even made until the October 2014 *Mesa Power* NAFTA hearing took place and were not made public until sometime in 2015. Canada hid the internationally wrongful conduct upon which the testimony was based.[4] This information first started to become available to Tennant Energy and the public, in *drips and drabs*, when the flow of information slowly released from the *Mesa Power* NAFTA hearing in 2015.

30) Canada highlights that Tennant Energy must meet the procedures set out in NAFTA Chapter Eleven. While Tennant Energy disputes that the procedural issues Canada raises in its Jurisdictional Memorial are truly jurisdictional, the principle of judicial economy mandates that this Tribunal need not rule on that jurisprudential issue, as it abundantly clear that the information underpinning knowledge of the breach and the damages arising from that breach, in this case, has never been known before the June 1, 2014 date (three years before the June 1, 2017 date of the Notice of Arbitration filing).

31) Canada's motion to renew its earlier failed bifurcation request requires this Tribunal to limit its determinations only to those facts publicly known and mostly presented by *Mesa Power* in its claim prior to June 1, 2014; conjunctively, by focusing this Tribunal on those facts alone, Canada ignores and tries to conceal facts/admissions that became public knowledge after June 1, 2014.

[3] The public version of the transcript and video was posted to the PCA website in 2015. Investor's Notice of Arbitration at ¶126. The date of posting was April 15, 2015.

[4] Not only did Canada continue to enable and support Ontario's policy not to make public the wrongful conduct of its Officials, but Canada maintained the confidentiality of the information that had been released to the public from the Mesa Power NAFTA hearing – even after it had been released for over five years. Canada unilaterally wrote to the Permanent Court of Justice and had the video evidence removed after being public on the internet for five years. In addition, Canada unsuccessfully sought to suppress this evidence from the consideration of the Tennant Energy NAFTA Tribunal and has successfully taken steps to prevent the public form continuing its knowledge of what took place. Due to the inadvertent public disclosures of the unredacted *Mesa Power* Hearing videos, Tennant Energy was able to become aware of key admissions of wrongful conduct that Canada attempted to conceal. **CWS-1,** Witness Statement of John C. Pennie at ¶¶99, 102, (**CWS-1**); The videos of the Mesa Power NAFTA Hearing that were available to the public on the Permanent Court of Arbitration's Mesa Power Group v Canada website have been submitted into the current hearing record as the following exhibits : **C-107, C-201, C-204, C-205, C-206, C-208** and **C-224 to C-243** inclusive.

Canada's motion to renew its earlier bifurcation request thus would necessitate this Tribunal improperly to limit its determinations **only** to those facts publicly known and mostly presented by a different claimant, Mesa Power Group.

32) The issues before this Tribunal are now a well-worn path. This is Canada's third attempt to delay the hearing of this arbitration through a bifurcation request.

33) In October 2019, Tennant Energy had to respond to Canada's second attempt to seek bifurcation. In Tennant Energy's response, it said:

> 19. In addition to the fact that it is clear from the face of the Investor's pleadings that Canada's jurisdictional objection is frivolous, bifurcating this arbitration to allow that objection to be adjudicated separately would not materially reduce the time and cost of these proceedings. Instead, it only would multiply them.
>
> 20. As the previous section makes clear, at least some, if not all (as the Investor asserts), of the Investor's claims are based upon facts that would not be known by anyone in the Investor's position before June 4, 2014—less than three years before the Notice of Arbitration, in this case, was submitted. Thus, notwithstanding Canada's brazen and unsupported assertion that "each and every one of the measures is beyond the Tribunal's jurisdiction," there will be a merits hearing of some scope in this case.[5]

34) The very same situation is applicable with respect to Canada's now third bifurcation request.

35) At the same time, by focusing this Tribunal on those facts alone, Canada asks the Tribunal to entirely ignore the most relevant facts from highly relevant and material admissions from the government officials administering the FIT Program that became first known to Tennant Energy and the public after June 1, 2014. In this manner, Canada's wishes the Tribunal to wear blinders and ignore the core of the evidence produced and upon which Tennant Energy relies.

36) Canada does this because it knows that the facts occurring later in time are the facts at the heart of Tennant Energy's NAFTA claims. These critical facts were first made public after June 1, 2014. They establish direct and unfair losses to Tennant Energy, evidence Canada's core wrongful conduct, and form the fundamental basis of this Investor's claim. The Investor is not

[5] Tennant Energy Response to Canada's Second Request for Bifurcation at ¶¶19 – 20.

limited to the claims of similarly situated investors – it is entitled to articulate its own claim and to have that claim fully heard.

37) First, Canada's motion to renew its earlier bifurcation request requires this Tribunal to limit its determinations to only those facts publicly known and mostly presented by *Mesa Power,* before June 1, 2014; conjunctively, by focusing this Tribunal on those facts alone, Canada ignores and tries to conceal admissions and facts that became public knowledge after June 1, 2014. Canada does this because it knows that the facts known later confirm Canada's international wrongful conduct and result in loss and damage arising from those breaches first known after June 1, 2014.

38) The evidence already before this Tribunal includes direct admissions, made after June 1, 2014, of international wrongful conduct by government officials administrating the FIT Program — including senior staff within the Ministry of Energy. Tennant Energy says that it first obtained knowledge of the international wrongful conduct at issue on August 15, 2015. John C. Pennie, the client representative of Tennant Energy, set out at paragraph 70 of his Witness Statement (**CWS-1**) that he first became aware of the NAFTA breaches after reviewing submissions first released on August 15, 2015. These submissions were arising from the discussion of evidence arising from the October 2014 Mesa Power NAFTA hearing. He testified as follows:

> Shortly after August 15, 2015, we first became aware of the actions taken by Ontario to harm Skyway 127, and other FIT Proponents in the Bruce transmission zone who relied upon the FIT Rules. I learned of information of a government systemic process to favor certain protected friends of the Government. In this Program, the Government ensured that unfair benefits were granted to their friends and supporters – at the cost of those, like Skyway 127, who invested and followed the FIT Program Rules. I could not have known about these measures without reading the public version of the documents published on August 15, 2015.[6]

39) Mr. Pennie provided additional evidence about when Tennant Energy first became aware in paragraph 94 of his Witness Statement. He attested:

> 94. The first time Skyway 127 and I learned of the real reason that Skyway 127 was denied a FIT Contract was when I was able to see information from the Mesa Power NAFTA post hearing submissions. This occurred shortly

[6] Witness Statement of John C. Pennie at ¶70, (**CWS-1**).

> after August 15, 2015 when these materials were posted to the public by the Permanent Court of Arbitration. I was not present at the live hearings for the *Windstream* NAFTA case or the *Mesa Power* NAFTA claim. I later looked at the decision in the Windstream NAFTA arbitration as well. Both the *Mesa Power* arbitration and the *Windstream* arbitration were eyeopeners to the fact that there was little fairness or transparency in the FIT Program. [7]

40) Mr. Pennie provided some particulars of the information not known by Tennant Energy and Skyway 127, including that his conclusion about the breach in August 2015 was built upon a foundation of knowledge of issues arising from an initial call with an attorney on June 16, 2015:

> 92. As of the time of my initial call with Mr. Appleton on or about June 16, 2015:
>
> a) I was not aware of the details of the exclusive and unfair access to FIT Contracts given to International Power Canada. That information was not released to the public.
>
> b) I was not aware of the details of the unfair access and the special meetings that senior corporate officials from NextEra had with the most senior Ontario energy officials and [redacted]
>
> c) I was not aware that Ontario Energy Ministry officials had decided that they were not going to follow the terms of the FIT Program to save money and that the OPA would not allocate all of the available transmission access in the Bruce Transmission Region to the FIT proponents still awaiting Launch Round FIT Contracts like Skyway 127.
>
> d) I was not aware that International Power Canada was given an allocation of new transmission access while wind power projects in the Bruce Region were being arbitrarily cut back because the Ontario Power Authority wanted to reduce the cost of the FIT Program. [8]

41) Mr. Pennie identified the key role of the public *Mesa Power* NAFTA hearing submissions discussing the evidence arising from that hearing. Mr. Pennie concludes that "the key information that leads to the bringing of this claim" came from his understanding of this evidence from the October 2014 *Mesa Power* NAFTA hearing. This was the information that Tennant Energy learned that made it possible for it to determine that there was a NAFTA breach that related to Skyway 127's investment. He testified:

[7] Witness Statement of John C. Pennie at ¶94, (**CWS-1**).
[8] Witness Statement of John C. Pennie at ¶92, (**CWS-1**).

> 101. I have read the public versions of post-hearing briefs and submissions presented in that arbitration, as well as the decision of the NAFTA Tribunal. A great deal of this information arose from the release by the Permanent Court of Arbitration of the Mesa Power Investor's Post Hearing Brief on January 19, 2015 but the key information that resulted in bringing this claim arose after we were able to see the Post-Hearing submissions from the Mesa Power NAFTA hearings. These were released on August 15, 2015. I also read the public transcript of the examination of witnesses at the Mesa Power hearing. [9]

42) Mr. Pennie also identified that he became aware of additional information due to reviewing the *Mesa Power* Hearing Videos at paragraph 71. The unredacted, yet publicly available, video recordings of the *Mesa Power* NAFTA hearings on the Permanent Court of Arbitration public website were available to the public from April 30, 2015, until mid-August 2020, when they were removed at Canada's demand. On this point, Mr. Pennie testified:

> 99… From looking at the public transcript and watching the public video, I could hear the redacted portions of the transcripts and see documents (for example emails) that had been presented on a video projector at the hearing as well. I was also able to view content that had been removed from the public versions of the various post-hearing submissions. I could never have been aware of this previously secret information before the June 1, 2014 date, which I understand is relevant for jurisdiction in this arbitration. I was dismayed and shocked by the ongoing unfair and manipulative acts taken by Ontario that I learned from watching the uncensored hearing videos. From this testimony, I finally was able to learn of additional unfair practices taken by Ontario that had been concealed from the public due to the redactions in the public hearing transcripts.
>
> 100. Before the dates listed above, there was no way in which we would have learned of this information as it was the first time such information became public knowledge. [10]

43) Canada admits that information in the testimony arising from the *Mesa Power* NAFTA hearing is relevant and material to the issues in this arbitration. The Tribunal noted this fact in a finding in paragraph 48 of *Procedural Order No. 7*, saying:

> the Respondent does not dispute that the Mesa Power Videos contain information which is relevant and material to the issues in this arbitration.

[9] Witness Statement of John C. Pennie at ¶101, (**CWS-1**).
[10] Witness Statement of John C. Pennie at ¶¶99 -100, (**CWS-1**).

> …. The Claimant simply wishes to refer to evidence which is already in its possession and which was obtained through public sources.[11]

44) Canada directed the public on Canada's own website to these public video recordings for over five years. In August 2020, at Canada's written request, the Permanent Court of Arbitration removed all continued public access from these videos that had been available in the public domain for over five years.[12] Canada has continued to prevent the public from having access to this information in this arbitration over Tennant Energy's objection, who believes the information to be properly within the public domain and necessary if the principle of transparency is to have meaning.

45) This Tribunal rejected Canada's request to suppress this evidence from the Tribunal's consideration in *Procedural Order No. 7*. The Tribunal also noted at paragraph 47 of *Procedural Order No. 7* that:

> Even if the information in the Mesa Power Videos was subject to a confidentiality order issued by the Mesa Power tribunal, the Mesa Power Videos were publicly available for a period of over 5 years. This Tribunal cannot "roll back the clock" and pretend that that was not the case. [13]

46) Canada knows the additional information made public after June 1, 2014, creates the basis for the Tennant Energy's claim in June 2017. To avoid allowing Tennant Energy the opportunity to be heard, Canada raises an alternative argument. In a reversal of Canada's legal position in the *Mesa Power* NAFTA case, Canada now argues that facts made public before June 1, 2014, clearly demonstrate that Canada breached its NAFTA obligations.[14] Canada makes this *volte-face* to justify its conclusion that Tennant Energy should have known about Ontario's wrongfulness earlier and thus brought its NAFTA claim earlier. This absurd flip-flop is bizarre and improper — Canada *cannot have its cake and eat it too.*

47) Canada's attempt to switch its analysis of the facts/issues presented in the *Mesa Power* NAFTA arbitration provides an implied admission that Canada either knowingly misrepresented the

[11] Tennant Energy Procedural Order No. 7 at ¶48. (footnotes omitted).
[12] Email from Government of Canada to Permanent Court of Arbitration, 10 August 2020, **R-027.**
[13] Tennant Energy Procedural Order No. 7 at ¶47. (footnotes omitted).
[14] Canada's Jurisdictional Memorial at ¶137.

earlier matters to the *Mesa Power* Tribunal or that it is now misrepresenting matter in this current claim.

48) Furthermore, Canada's approach usurps Tennant Energy's right to present its claim fully. Tennant Energy must be allowed to determine the facts it contends underpins its claims that Canada has engaged in international wrongful behavior. Tennant Energy is the author of its claim, and it alone is entitled to establish the case that it brings and explain when it, and not some other investor, has sufficient knowledge to bring its own claim.[15]

49) In January 2020, Canada made a motion for bifurcation that was rejected. Canada's current "renewed motion" is simply a reworking of the same argument Canada presented and that the Tribunal rejected in the January 2020 Procedural Hearing. This Tribunal ordered Tennant Energy to pay attention to the articulation of its claim in regard to Jurisdiction in its Memorial. It did so in the Memorial and in the supporting witness statement of John C. Pennie, the client representative who provides firsthand evidence of the knowledge of both Tennant Energy and the Skyway 127 wind project.

50) The Witness Statement of John C. Pennie summarized out the principal concerns of Tennant Energy in this arbitration claim as follows

> 96. The Tennant NAFTA Claim is about:
>
> a) Special business opportunities provided to a politically connected local favourite, International Power Canada.
>
> b) The Breakfast Club cabal of politicians and senior officials seeking to reward friends at the expense of everyone else.
>
> c) Ontario's decision to not complete its FIT Program for the Bruce Region and its effect upon Skyway 127.
>
> d) The delay of the award of contracts because of Korean Consortium's failure to comply with its contractual obligations.

[15] John C. Pennie, the client representative of Tennant Energy set out at ¶70 and ¶¶ 90-94 of his Witness Statement (**CWS-1**) that he first became aware of the NAFTA breaches after reviewing submissions arising from the Mesa Power NAFTA hearing on August 15, 2015. Mr. Pennie also identified that he became aware of more information because of reviewing the Mesa Power Hearing Video's (see ¶71). At ¶99 and ¶102, Mr. Pennie confirmed that he had not been aware of the information redacted from the public transcript of the Mesa Power NAFTA hearing that was otherwise available on the public Mesa Power Hearing Video before July 2020.

e) The conspiracy in the systemic violations of the NAFTA and the destruction of evidence. [16]

51) Not surprisingly, Tennant Energy's arbitration claim addresses these principal areas. However, Canada's Third Bifurcation Motion does not address any of these core issues.

52) Canada wants this Tribunal to forget the sworn admissions of wrongful conduct from senior government officials during witness examination at the *Mesa Power* NAFTA arbitration.

a) This included information in the public version of *Mesa Power* Investor's Post Hearing brief arising from the Mesa Power NAFTA hearing from Ontario Assistant Deputy Energy Minister Susan Lo.[17] At the *Mesa Power* Hearing, Ontario Assistant Deputy Energy Minister Susan Lo made an astonishing admission that there was a secret group of the most senior Ontario Government public and political officials in an unofficial clandestine meeting known as the "Breakfast Club."[18] At the secret "Breakfast Club" meetings, the officials regularly took steps to provide preferential business opportunities to the government's cronies and political supporters. This included regulatory machinations of the FIT Program.

b) Ontario Assistant Deputy Energy Minister Susan Lo testified that the officials meeting at the "Breakfast Club" provided special protection for companies like International Power Canada, which was run by a member of the Liberal Party leadership and closely connected to the Ontario Liberal Government.[19] Such actions were in direct contravention of the legitimate expectations of the FIT Proponents such as the Investor and its Investment and were in violation of the international law standard in NAFTA Article 1105.

53) Canada concealed the existence of this secret governing process. This secret order of government did not become public until the release of submissions commenting on the

[16] Witness Statement of John C. Pennie at ¶92, (**CWS-1**).
[17] *Notice of Arbitration* at ¶81; Investor's Memorial at ¶728.
[18] See: *Mesa Power Group LLC v. Government of Canada* (PCA Case 2012-17)**,** Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, Discussed from 1:39:25 - 1:48:28, **C-204***; Mesa Power Group LLC v. Government of Canada* (PCA Case 2012-17)**,** Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, Screenshot at 1:39:25, **C-179***; Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, pp.182-185, lns.8-3, **C-121.**
[19] Investor's Memorial, at ¶750.

testimony at the *Mesa Power* NAFTA hearing published on the PCA website on August 15, 2015, which commented on this astonishing admission.[20]

54) Tribunals must make determinations in the context of the facts of a particular case.[21] Here, what is essential is when Tennant Energy became aware or could have been aware of the international wrongful conduct that caused Tennant Energy not to obtain a FIT Contract. That knowledge was not co-extensive at the time as Ontario covertly engaged in the wrongful behavior because Ontario did not disclose that wrong. Knowledge of the international wrongful measure is essential when establishing the time of the breach and the time when the harm arising from that breach occurred could first occur. That time could not have first occurred before the time that Tennant Energy first became aware, or should have been aware, of the international wrongful actions, which was impossible as it was kept secret.

55) Canada admits in its Jurisdictional Memorial that "fundamentally, Canada's objections to the Tribunal's jurisdiction set out in this submission are about timing."[22] However, nowhere does Canada demonstrate that Tennant Energy was aware of the wrongs at the heart of this dispute in 2013 or 2011 or could have known about them earlier. While Canada claims in its Jurisdictional Memorial that "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**."[23] However. Canada fails to provide support for this statement, and as discussed in detail below, in this response, these statements are inconsistent with the evidence and completely untrue.

56) For Canada to prevail on its objection, it must conclusively establish that Tennant Energy was aware or should have been aware before June 1, 2014 of Ontario's unlawful acts, which arose from the testimony of Canada's own experts at the October 2014 *Mesa Power* NAFTA hearing and that the damages arose from those same breaches. Canada has not established such a fact, and unless Canada can travel back in time, it cannot do so now.

[20] August 10, 2015, Email from Ben Craddock, case manager, PCA to counsel to disputing parties, releasing post-hearing procedural documents after the end of day on August 14, 2015, **C-124.**
[21] *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Award, 27 September 2016, ¶362, **RLA-088**, (quoting *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, ¶118).
[22] Canada's Jurisdictional Memorial at ¶4.
[23] Canada's Jurisdictional Memorial at ¶5.

57) While Canada claims in its Jurisdictional Memorial that "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," [24] yet this is not what Canada actually has done.

58) The information about Ontario's egregiously unfair actions was not disclosed until the public release of testimony from the *Mesa Power* Hearing. As this Tribunal is aware of from other procedural applications in this arbitration, while the *Mesa Power* NAFTA hearing took place in October 2014, much of the testimony of Ontario's officials was conducted in private, shielded from public view. Tennant Energy was not aware, and could not have been aware, of the coordinated wrongful actions of Ontario officials until August 15, 2015. However, the difference in information available from the public website was not widely known, and the actual information relied on by Tennant Energy, in assessing its damages, was not available until August 2015, at the earliest, according to the testimony of Tennant Energy's client representative, John C. Pennie.[25]

59) In its Jurisdictional Memorial, Canada focuses on the amount of knowledge that Tennant Energy would need to have of the loss or damage. Canada discusses the established case law with respect to there not being a need to know of all the loss for there to be a breach.[26]

60) However, what Canada scrupulously avoids is the requirement in Article 1116(2) that there be knowledge of the loss or damage **arising from the breach**. NAFTA Article 1116 requires that the Investor have knowledge of the breach and knowledge that the loss arises from that particular breach. The reason for this timing requirement is to ensure that an Investor can bring a claim on a timely basis once it has actual or constructive knowledge of the international wrongful action. Knowledge of damage requires there to be knowledge as well of the damages arising from the breach identified by the Investor. In a case in which the Respondent has hidden its conduct, such as in this case, the subterfuge of the Respondent must not be used to cause harm to the Investor. Thus, the three years must not be interpreted to shield the wrongdoer from responsibility for its internationally wrongful conduct.

[24] Canada's Jurisdictional Memorial at ¶7.
[25] Witness Statement of John C. Pennie at ¶70, (**CWS-1**).
[26] Canada's Jurisdictional Memorial at ¶¶112-113.

61) Tennant Energy knew that it would not have a FIT Contract, despite being on the priority waitlist when the FIT Program was ended in 2013. Tennant Energy was unaware of the operative reason for why it did not obtain its 100 MW FIT Contract. In June 2013, Tennant Energy was unaware that the operative reason for it not being awarded a FIT Contract was that Ontario ignored the FIT Program Rules and reduced the amount of transmission for contracts. But Tennant Energy did not know and could not have known that Ontario officials had taken steps to protect International Power Canada. These steps also assisted others located in the West of London Transmission zone to the detriment of Skyway 127. On June 1, 2014, Tennant was unaware that the reason for these decisions was to enable political supporters of the government, cronies such as International Power Canada and other friends, to unfairly obtain FIT Contracts at the expense of proper applications awaiting contracts in the Bruce Transmission zone like Skyway 127. That knowledge of the wrongful measure was essential for Tennant Energy to know that it had suffered a loss arising from Canada's breach of the NAFTA.

MESA POWER HEARING ADMISSIONS ARE ESSENTIAL TO DETERMINING CANADA'S NAFTA BREACH

62) Canada behaves like Tennant Energy's reference to the Testimony of Assistant Ontario Deputy Energy Minister Susan Lo was not an integral or essential part of Tennant Energy's original claim. Nothing could be further from the truth.

63) A review of the Tennant Energy Pleadings demonstrates that the admissions arising from the *Mesa Power* NAFTA Hearing are central to its claim. These admissions arise from the *Mesa Power* Hearing transcript, the *Mesa Power* Investor submissions made after the October 2014 *Mesa Power* NAFTA Hearing, and the *Mesa Power* Hearing Videos.

THE NOTICE OF INTENT

64) The March 2017 Tennant Energy Notice of Intent demonstrates that the admissions arising from the *Mesa Power* NAFTA Hearing are central to Tennant Energy's claim. In Paragraph 29, Tennant Energy stated:

Ontario's Non-Transparent Actions left the Public and FIT Proponents in the Dark

27.Ontario's administration of the FIT Program was non-transparent and opaque. The FIT Program was operated in a manner that was inconsistent with fairness, due process, and the rule of law. ….

29. This treatment was not publicly disclosed until many years later. Ordinary FIT Proponents could not have known about the full extent of the actions of Ontario until the public disclosure of the following:

a. The claims made in the NAFTA Chapter Eleven proceeding in the *Mesa Power v. Canada* proceeding, which was released to the public by the Permanent Court of Arbitration on June 4, 2014.

b. The complete terms of the Green Energy Investment Agreement which were not made public on the signing of the agreement in 2010 and were not finally released to the public until after the public disclosure of information arising from the NAFTA Chapter Eleven arbitration in *Mesa Power Group v. Canada*;

c. **The public release of the transcript of the NAFTA hearing in *Mesa* on April 28th, 2015**; and

d. The public disclosure of the NAFTA Tribunal decision in *Windstream Energy v Canada* on December 6, 2016. [27]

65) Subsequent to the filing of the Notice of Intent, a review of the parties' correspondence relating to the release of *Mesa Power* documents narrowed the exact dates of release of the relevant information to be August 15th for information arising from submissions discussing testimony arising at the *Mesa Power* NAFTA hearing and April 30 regarding the *Mesa Power* NAFTA hearing transcript and hearing videos.

66) Tennant Energy has briefed and argued the fact of the results of the meeting and decision in its Notice of Arbitration,[28] in its briefing in response to Canada's failed motion to bifurcate[29], and at the second procedural hearing in January 2020.[30]

67) Tennant Energy disclosed its reliance on the disclosure of this previously confidential information arising from submissions discussing the evidence at the *Mesa Power* NAFTA hearing,

[27] Tennant Energy *Notice of Intent*, March 1, 2017 at ¶29.
[28] Tennant Energy *Notice of Arbitration* at ¶¶74-81; 99-101; 106; 107.
[29] Tennant Energy's Response to Canada's first bifurcation request at ¶13.
[30] Transcript, *Tennant Energy v Canada* Procedural Hearing on Bifurcation and Preliminary Motions, Transcript Day 1 (Public Version), 14 January 2010, at p.168, lines 9-25; at p.169, lines 1-16.

such as the Investor's Post Hearing Brief in its Notice of Arbitration in June 2017.[31] Tennant's reliance on this information was notorious and fully disclosed. That information, classified initially as confidential, was subsequently disclosed to the public.[32]

NOTICE OF ARBITRATION

68) Tennant Energy made extensive reference to previously confidential information arising from the discussion of the *Mesa Power* NAFTA hearing in its Notice of Intention. This included information that had been released in the *Mesa Power* Investor's Post Hearing Brief. This information addressed the principal issues in the claim.

DISCLOSURE OF PREVIOUSLY UNKNOWN INFORMATION ABOUT THE KOREAN CONSORTIUM

69) Tennant Energy relied upon the new evidence from the *Mesa Power* NAFTA hearing extensively in its Notice of Arbitration regarding the Korean Consortium as follows:

a) Concerning actions regarding the Korean Consortium, Tennant Energy identified that it became aware upon public release of the *Mesa Power* material that Ontario provided beneficial treatment far-beyond what was required by the terms of the GEIA and after the Korean Consortium failed to fulfill its obligations under the terms of the GEIA.[33]

b) Tennant Energy also identified that by knowing this information, there was more available transmission capacity in the Bruce Transmission region than that announced by Ontario's government when the FIT Contracts were awarded. This information was not available to

[31] Tennant Energy *Notice of Arbitration* at ¶81.

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

[33] Tennant Energy *Notice of Arbitration* at ¶40- 42 referencing Assistant Ontario Deputy Energy Minister Susan Lo's testimony at the *Mesa Power* Hearing. Testimony of Ontario Assistant Deputy Energy Minister Susan Lo, Hearing Transcript, Day 3, at pp.94-95, lns.23-2.

the public until the April 2015 release of the Mesa Power NAFTA hearing testimony transcripts. [34]

c) Ontario gave all sorts of undisclosed benefits and unique accommodations to the Korean Consortium that went outside of what was disclosed to the public. [35] Tennant Energy' Notice of Arbitration stated:

> evidence from the *Mesa* hearing revealed that the Korean Consortium, and its joint venture partner Pattern Energy, had delayed its connection point 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. [36]

d) At the *Mesa Power* NAFTA Hearing, Ontario's former FIT Program Manager, Jim MacDougall, disclosed that Ontario was aware that the Korean Consortium were using the special governmental access available under the GEIA in a predatory anti-competitive manner and that Ontario took no oversight or other action to address this wrongful behavior. [37] Footnote 33 to the Notice of Arbitration also notes that Assistant Ontario Deputy Energy Minister Susan Lo also testified on this same previously undisclosed action.

70) At paragraph 81 of the Notice of Arbitration, Tennant Energy states:

> 81. During the *Mesa* hearing, the closing statements confirm that evidence from the hearing was presented that Sue Lo testified that there was not an "even playing field" between the Korean Consortium and FIT proponents. When asked about an email she had written, she had confirmed that two projects owned by a Canadian project, International Power Canada ("IPC"), would be given special treatment to protect it

[34] Investor's Notice of Arbitration at ¶43.
[35] Investor's Notice of Arbitration at ¶¶44 – 48 references aspects of the relationship with the Korean Consortium and the administration of the Green Energy Investment Agreement first disclosed to the public as a result of the testimony at the *Mesa Power* NAFTA hearing.
[36] Investor's Notice of Arbitration at ¶49.
[37] Investor's Notice of Arbitration at ¶50. The Notice of Arbitration at Footnote 33 says - *Mesa v. Canada*, Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp.200-01, lns.19-19. Ontario Assistant Deputy Energy Minister Susan Lo also discussed this strategy: "[i]t would make sense" that the Korean Consortium was purchasing "low-ranked projects that really had no realistic opportunity to become part of the FIT program in order to satisfy their obligations under the GEIA" but she was "not aware or unaware:" *Mesa v. Canada*, Hearing Transcript, Day 3, at p.87, lns.13-24.

against the effects of the Korean Consortium's transmission set-aside. The President of IPC was the past president of the governing Ontario Liberal Party.[38] As a result of protection afforded to IPC, IPC projects received FIT contracts. Without similar protection from Ontario, Skyway 127 lost its position and thus the fair opportunity for contracts.[39]

DISCLOSURE OF SECRET MEETINGS BETWEEN NEXTERA AND [redacted]

71) In paragraph 77 of the Notice of Arbitration, Tennant Energy states new evidence arising from the *Mesa Power* Post-Hearing Brief regarding undisclosed meetings between Al Wiley, the Vice President of NextEra, and high-level officials. Shortly after those meetings, Assistant Ontario Deputy Energy Minister Susan Lo testified at the *Mesa Power* NAFTA Hearing that a list of NextEra FIT Projects was sent to the Ministry of Energy.

> 77. NextEra accomplished this through ties with the Ontario government. After a concerted lobbying campaign, NextEra was given preferential access to government officials. NextEra's Vice President, Al Wiley, personally met with high level officials.[40] On May 11, 2011, Mr. Wiley met with Andrew Mitchell, Senior Policy Advisor in the Minister of Energy's Office, to discuss whether a connection point change window would be opened prior to the next round of FIT contract awards, which was a "a very significant issue for NextEra."[41]
>
> 78. NextEra's efforts worked. On May 12, the Premier met with the Ministry of Energy, and the decision was made to allow a connection point window change.[42] On May 13, the morning after this decision was made, Ms. Lo, then Assistant Deputy Minister at the Ontario Ministry of Energy, met with NextEra, and in response to this call, Mr. Wiley sent

[38] The Notice of Arbitration references "*Mesa v. Canada*, Closing Statements, Hearing Transcript, Day 6: p.54, lns.19-23 and p.284, lns.11-16," **(C-126)** – see Notice of Arbitration at ¶81.
[39] Notice of Arbitration at ¶81.
[40] The Notice of Arbitration set out the following footnote "The Investor's Post Hearing Brief in *Mesa Power* refers to this issue at ¶156 and references an Email from Al Wiley (NextEra), dated May 10, 2011 [CONFIDENTIAL]."
[41] The Notice of Arbitration set out the following footnote "The Investor's Post Hearing Brief in *Mesa Power* refers to this issue at ¶156 and references an Email from Ontario Assistant Deputy Energy Minister Susan Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), May 12, 2011."
[42] The Notice of Arbitration set out the following footnote "*Mesa v. Canada*, Rejoinder Statement of Shawn Cronkwright, at ¶21," **(C-151).**

> Ms. Lo the names of the six NextEra projects "remaining in the FIT queue."[43]

EVENTUAL DISCLOSURE ABOUT THE ACTIONS OF THE "B"CLUB TO BENEFIT INTERNATIONAL POWER CANADA

72) The Notice of Arbitration referenced the admissions from Assistant Ontario Deputy Energy Minister Susan Lo at the *Mesa Power* NAFTA Hearing that Ontario protected International Power Canada and other preferred local companies at the Breakfast Club – a secret unofficial meeting of Ontario political leaders and Ontario's supposedly apolitical senior officials.

73) At paragraph 111 of the Notice of Arbitration, Tennant Energy states:

> 145. As part of this email, when considering setting aside capacity in the West of London for GEIA projects, Ms. Lo admitted that Ontario's "b'club" wanted to protect ["redacted confidential The ["redacted confidential"] that Ontario wanted to protect from the Korean Consortium set aside were owned by International Power Canada ("IPC"), a Canadian company whose president was the past president of the governing Ontario Provincial Liberal Party, who then became the president of the federal Liberal Party of Canada.[44]
>
> 146. Ms. Lo, upon being questioned on the political connections of IPC's President and CEO, contended that the Ministry "didn't pay attention to the politics,"[45] but then admitted that the short time frame for changing connection points was driven by political considerations, specifically wanting "good news" and the ruling government being able to "talk about its millions and millions of dollars in investment that it would attract" for re-

[43] The Notice of Arbitration set out the following footnote "The Investor's Post Hearing Brief in *Mesa Power* at ¶156 refers to this issue and references an Email from Ontario Assistant Deputy Energy Minister Susan Lo (MOE) to Al Wiley (NextEra), dated May 13, 2011."

[44] The Notice of Arbitration set out the following footnote "This is referenced in the Investor's Post Hearing Brief in *Mesa Power* as follows: This information has not been made public but a reference to the existence of this information was released in the *Mesa Power* Post Hearing Brief (released to the public on January 9, 2015) Testimony of Ontario Assistant Deputy Energy Minister Susan Lo, Hearing Transcript, Day 3, at pp.182-185, lns.8-3."

[45] The Notice of Arbitration set out the following footnote "This is referenced in the Investor's Post Hearing Brief in *Mesa Power* as follows: This information has not been made public but a reference to the existence of this information was released in the *Mesa Power* Post Hearing Brief (released to the public on January 9, 2015) Testimony of Ontario Assistant Deputy Energy Minister Susan Lo, Hearing Transcript, Day 3, at p.184, lns.16-17."

> election purposes.[46] These political considerations were also apparent as the timing coincided with the August 2, 2011 direction from the Minister of Energy, to eliminate the FIT contract termination provisions so that any PPA awarded could not be terminated under the existing four-month termination provisions in the FIT Program.[47]

74) In addition, the Notice of Arbitration also referenced the admissions from Assistant Ontario Deputy Energy Minister Susan Lo at the *Mesa Power* NAFTA Hearing that, while the Government of Ontario knew that it had to award all available transmission capacity in FIT Contracts, it desired to reduce the amount it would have to spend on renewable energy. As a result, Ontario did not award FIT Contracts for all the available transmission capacity in Ontario as it did not want to pay for more power despite the expectations of the FIT Proponents and representations made to them.[48]

CONCLUSIONS ABOUT NAFTA HEARING EVIDENCE IN THE NOTICE OF ARBITRATION

75) The Notice of Arbitration summarizes the role of the information arising from the October 2014 *Mesa Power* NAFTA Hearing as follows:

> 83. Ontario arbitrarily modified the FIT Program Rules in a manner that disadvantaged the Investment to the benefit of other proponents. The Investor's Post-Hearing Brief in *Mesa Power* demonstrates the following evidence on these points from that NAFTA hearing on the FIT Program:
>
> a. That the Ministry of Energy interposed itself in the operation of the selection process of a multi-million-dollar award of lucrative FIT contracts. Despite even at the *Mesa Power* hearing, Ontario's energy officials were contending that it would be improper for the Ministry of Energy to prefer one applicant over another, the evidence shows that this is exactly what happened. The Ministry had access to confidential

[46] The Notice of Arbitration set out the following footnote "This is referenced in the Investor's Post Hearing Brief in *Mesa Power* as follows: Testimony of Susan Lo, Hearing Transcript, Day 3, at p.179, lns.5-8."
[47] The Notice of Arbitration set out the following footnote "This is referenced in the Investor's Post Hearing Brief in *Mesa Power* as follows: Letter from the Honourable Brad Duguid, Minister of Energy to Colin Andersen, Ontario Power Authority, August 2, 2011."
[48] Notice of Arbitration, ¶101.

> rankings of FIT applicants to see how contracts would be given and how changes would affect applicants.
>
> b. With Ontario knowing this information, one applicant, NextEra Energy, 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. Blatant protection was afforded to International Power Canada, a Canadian company whose exclusive leadership at the time was a well-known political backer of the Ontario Liberal government.[49]
>
> c. The result was a capriciously misapplied process contaminated by selective and improper investor protection, a lack of minimal due process, and a complete lack of transparency and candor. This culminated in a significant rule change that was decided without any consultation with stakeholders and literally was given a weekend's advance notice. *Mesa* has also shown that the culmination of all these facts were in complete disregard of the international principles of fair and equitable treatment. [50]

76) Canada has not addressed the clear and numerous reliance upon the evidence arising from the *Mesa Power* Hearing in its detailed Memorial on Jurisdiction or in its Request for Bifurcation.

THE INVESTOR'S MEMORIAL

77) Canada habitually recognizes that much background information presented by both Mesa Power and Tennant Energy was available to the public prior to June 1, 2014 - this has never been in dispute. However, the Investor's Memorial makes extensive use to establish its claims of the evidence first made public **after June 1, 2014**, arising from *inter alia* the *Mesa Power* Hearing Videos and the submissions commenting on the evidence at the *Mesa Power* hearing, including the *Mesa Power* Investor's Post Hearing Briefs. Indeed, it was only when the critical information known by Tennant Energy after June 1, 2014, was understood in the factual matrix of information known before June 1, 2014, that Skyway 127 and Tennant Energy had sufficient

[49] The original footnote in the Notice of Arbitration references the Hearing Transcript, Day 6, at p. 284, lns.11-16.
[50] The original footnote in the Notice of Arbitration references the Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp.234-235, lns.1-20.

knowledge to bring a claim against Canada for breaching its obligations under NAFTA Chapter Eleven.

78) But for the last-minute changes made to the FIT Program, Skyway 127 would have received a 20-year FIT contract.[51] Not until evidence from the *Mesa Power* Post Hearing was made available in briefs arising after the hearing, and through public access to unexpurgated video recordings of the hearings, did the Investor have any knowledge, actual or constructive, that Ontario's actions were done not for a legitimate public interest, but instead to privately protect and benefit International Power Canada and other competing FIT Program proponents.

79) A key political supporter of the Ontario governing Liberal Party ran International Power Canada. International Power Canada already had lost its launch period bid for a FIT Contract in the West of London Transmission Region.[52] It was only after the release of this information arising from the Mesa Power NAFTA Hearing that Tennant Energy became aware or could have been aware of the unlawful nature of Ontario's measures that resulted in a loss to its investment Skyway 127.

80) When taken together, it is overwhelmingly clear that Tennant Energy's claim relies on knowledge first available only after June 1, 2014. Referencing information and items that arose prior to that time are relevant for context, but they do not form the basis of the Tennant Energy claim. Canada should not be allowed to use knowledge of important contextual facts which were known prior to June 1, 2014, to defeat a claim which satisfies the elements of NAFTA breaches on evidence known after June 1, 2014.

81) The *Mesa Power* NAFTA Tribunal held that preferential treatment alone, such as that which was known to take place in compliance with the terms of the GEIA, did not constitute a breach of the fair and equitable treatment standard or other provisions of NAFTA.[53] Whether or not another tribunal would rule otherwise, Tennant Energy could not have brought its claim prior to the additional information that was only made available after June 1, 2014.

[51] Investor's Memorial, at ¶¶10-12.
[52] Project Rankings, 21 December 2010, **(C-104).**
[53] *Mesa Power Group, LLC v. Government of Canada* (PCA Case No. 2012-17), Award, 24 March 2016, at ¶574, **CLA-232.**

82) A breach of fair and equitable treatment obligation can result from the aggregation of government acts and omissions. This could include the receipt of unfair preferential treatment compounded with subterfuge and non-disclosed collusion to result in the disadvantage of Skyway 127 to advantage another. Article 15(2) of the ILC Articles on State responsibility provides that a composite breach occurs at the first point in time when all the conditions for the breach occur.

83) Accordingly, a composite breach can occur only when a series of actions or omissions, when grouped together, amount to a breach of an obligation – and not at an earlier point in time. Thus, to establish such a breach requires all the necessary facts to establish a systematic policy or practice, a series of actions or omissions, that only when aggregated together can be defined as wrongful under a treaty and international law.

84) For example, in *Rompetrol v. Romania*, a combination of acts could be considered a composite act, as there must be 'some link of underlying pattern or purpose between them' in contrast to a 'scattered collection of disjointed harms.'[54]

85) Only part of the terms of the GEIA was made available to the public prior to June 1, 2014. But even if the public was aware of preferential treatment to the Korean Consortium (including the transmission capacity set aside for the Korean Consortium, under the terms of the GEIA), Tennant Energy was not aware that:

a) While the GEIA may show a deal to provide preferential treatment to the Korean Consortium, the agreement requires this treatment in exchange for duties provided by the Korean Consortium. However, the evidence from the *Mesa Power* NAFTA hearing established that Canada was providing preferential treatment to the Korean Consortium that exceeded the terms of the GEIA; and

b) Canada protected other FIT investors (involved in the "Breakfast Club") from this set-aside.

[54] *The Rompetrol Group N.V. v. Romania* (ICSID Case No. ARB/06/3), Award, 6 May 2013, at ¶271, **CLA-216.**

c) Senior Political officials in the Premier's Office who were privy to the Breakfast Club (or members of the Breakfast Club) also took steps to frustrate document production and engaged in the spoliation of evidence.

86) It is clear that the Tribunal will need to consider the effect of the combination of these various activities in order to determine issues raised in Canada's jurisdictional arguments. This will also require document production as a necessary step before these issues can be determined.

DISCLOSURE OF PREFERENTIAL TREATMENT GIVEN TO INTERNATIONAL POWER CANADA

87) As the Investor noted in its Memorial, Tennant Energy only gained knowledge of the unfair preferential treatment that Ontario gave International Power Canada through the *Mesa Power* Investor's Post Hearing Brief, which was first published onto the PCA website on August 15, 2015.[55] Only after the Investor's Post Hearing Brief was the public first able to find out that the government of Ontario had unfairly protected IPC's projects from the Korean Consortium set aside. This demonstrated the preferential treatment that IPC received[56] while negatively affecting investors such as Tennant Energy, who had been following the rules and had demonstrated that they were capable of receiving a FIT Contract.

88) The Investor's Memorial notes in paragraph 750 that Assistant Ontario Deputy Energy Minister Susan Lo's first gave testimony at the *Mesa* Hearing admitting that Ontario had "Breakfast Club" meetings in which Ontario officials took non-disclosed steps to protect the business prospects of International Power Canada.[57] She stated how the President of International Power Canada was the former senior political official of both the federal and the provincial Liberal Party and had become the president of the federal Liberal Party of Canada.[58] This favoritism was

[55] Investor's Memorial, at ¶742.
[56] Investor's Memorial at ¶178; Mesa Power Investor's Post Hearing Brief at ¶158.
[57] Investor's Memorial, at ¶750.
[58] Investor's Memorial at ¶750; Investor's Memorial sets out the following at footnote 666: *Mesa Power Group LLC v. Government of Canada* (PCA Case 2012-17)**,** Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, Discussed from 1:39:25 - 1:48:28, **C-204***; Mesa Power Group LLC v. Government of Canada* (PCA Case 2012-17)**,** Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, Screenshot at 1:39:25, **C-179***; Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Susan Lo, 28 October 2014, pp.182-185, lns.8-3, **C-121.**

information that became public knowledge through the NAFTA Hearing testimony of Assistant Deputy Energy Minister Lo. This testimony was not available to the public in the published hearing transcript. These hearing transcripts were published onto the PCA website for the first time on April 30, 2015.[59] The information first became available through the publication of submissions discussing the hearing evidence, which were first released to the public on August 15, 2015.

DISCLOSURE OF MEETINGS BETWEEN VICE PRESIDENT OF NEXTERA AND ONTARIO GOVERNMENT

89) The Investor's Memorial demonstrates that the *Mesa Power* NAFTA hearing and the submissions describing the evidence from the *Mesa Power* NAFTA hearing were the first instances in which extensive information about the high-level ties that occurred between NextEra and the government of Ontario were known to the public.[60] As noted in paragraph 255 of the Investor's Memorial, the *Mesa Power* NAFTA hearing videos revealed the fact that Al Wiley, the Vice President of NextEra, was having meetings with high-level officials on the Ontario Government.[61] These meetings were with officials such as [redacted].[62] The *Mesa Power* Hearing videos also notified the public that Mr. Al Wiley was having meetings with the Senior Policy Advisor in the Minister of Energy's office, Mr. Andrew Mitchell, to discuss connection point changes.[63]

[59] April 30, 2015 Letter from Hanno Wehland, Legal Counsel, PCA to counsel for disputing parties, regarding publication of public video recordings and public transcripts have now been uploaded to the PCA's website and can be accessed at the following web address. The letter also references the issuance of a news release by the PCA, but that news release is no longer available on the PCA website, **C-135.**

[60] Investor's Memorial, at ¶746.

[61] Investor's Memorial at ¶255; Investor's Memorial sets out the following at footnote 148: Email from Al Wiley (NextEra), 10 May 2011 ***[CONFIDENTIAL]***, referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014), Discussed at 1:25:35, **C-204.**

[62] Investor's Memorial at ¶255; Investor's Memorial sets out the following at footnote 148: Email from Al Wiley (NextEra), 10 May 2011 ***[CONFIDENTIAL]***, referenced in: *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014), Discussed at 1:25:35, **C-204**

[63] Investor's Memorial at ¶255; Investor's Memorial sets out the following at footnote 149: Email from Susan Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), 12 May 2011, referenced in: *Mesa Power Group LLC v.* Government of Canada, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, **C-204*;*** *Mesa Power Group LLC v. Government of Canada*, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, Screenshot at 1:27:21**, C-213.**

90) Furthermore, during the *Mesa* hearing, Jim MacDougall, the former FIT Program manager at the OPA, also testified that NextEra lobbied for connection point changes, which would allow NextEra to enter the Bruce transmission area.[64] Mr. MacDougall testified that it was because of this lobbying that there were rule changes[65] that eventually negatively affected projects such as Skyway 127, which were following the rules to gain a FIT Contract and who had a higher chance of doing so.

91) Shawn Cronkwright, an Ontario Power Authority official, also testified in his witness statement at the *Mesa Power* hearing that there was a high-level meeting on May 12, 2011, which approved a connection point window change.[66] The testimony in the *Mesa Power* NAFTA hearing videos confirmed that the attendees at that meeting were Al Wiley, Vice-President of NextEra, and [redacted][67] One day after the meeting that [redacted] had with the Ministry of Energy, NextEra's Al Wiley sent Assistant Ontario Deputy Energy Minister Susan Lo the names of the six previously unsuccessful NextEra FIT Projects.[68] After the June 3, 2011, FIT Program Rule changes, all six of these projects were transformed from failures to successful FIT Projects.[69]

92) Moreover, because of the ties that NextEra created with the Ontario government, this company was able to[70] bundle six projects into sharing a common connection.[71] This allowed NextEra to

[64] Investor's Memorial at ¶254; Investor's Memorial sets out the following at footnote 146: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17*)*, Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, p. 225, lns.5-9, **C-121.**
[65] Investor's Memorial at ¶254; Investor's Memorial sets out the following at footnote 146 *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17*)*, Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, p. 225, lns.5-9, **C-121.**
[66] Investor's Memorial at ¶256; Investor's Memorial sets out the following at footnote 150: *Mesa Power Group LLC v. Government of Canada,* Rejoinder Witness Statement of Shawn Cronkwright, 2 July 2014, ¶21, **C-151.**
[67] Mesa Power Group LLC v. Government of Canada, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014), Discussed at 1:25:35, **C-204.**
[68] Investor's Memorial at ¶257; Investor's Memorial sets out the following at footnote 151: Email from Ontario Assistant Deputy Energy Minister Susan Lo (MOE) to Al Wiley (NextEra), dated May 13, 2011, referenced in: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Investor's Post-Hearing Brief (Public Version), 18 December 2014, Footnote 326 to ¶156, **C-017.**
[69] Investor's Memorial at ¶258.
[70] Investor's Memorial at ¶254.
[71] Investor's Memorial at ¶254; Investor's Memorial sets out the following at footnote 147: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17*)*, Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, p.228 lns.1-7, **C-121.**

make a connection that would be economically non-viable.[72] All of this new and specific information arising from the *Mesa Power* NAFTA hearing discloses breaches of the NAFTA that were otherwise unknown to Skyway 127 or Tennant Energy until after this information became known after the release of information from the *Mesa Power* NAFTA hearing and the submissions discussing the *Mesa Power* Hearing on August 15, 2015.

DISCLOSURE OF INFORMATION ON KOREAN CONSORTIUM

93) The *Mesa Power* hearing revealed to the public information about the Korean Consortium that previously was unknown. This information demonstrates how the Korean Consortium continued to get preferential treatment throughout the time of the FIT Program, even when other projects might have already met the criteria to receive FIT contracts.

94) During the *Mesa Power* NAFTA hearing, Assistant Ontario Deputy Energy Minister Susan Lo testified that the Korean Consortium was having trouble meeting the deadlines for Phase 1 and Phase 2.[73] Canada states in Paragraph 130 of their Jurisdictional Memorial [74] that the delay in meeting the deadlines was information that the public would have known about prior to June 1, 2014, because of the 2011 Auditor General's Report. However, in reviewing the citation that Canada makes[75] to this supposed earlier knowledge, one sees that this is not true. The 2011 Auditor General's Report discusses that the Korean Consortium was getting a set aside of MW,

[72] Investor's Memorial at ¶254; Investor's Memorial sets out the following at footnote 147: *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Jim MacDougall, 28 October 2014, p.228 lns.1-7, **C-121.**

[73] Investor's Memorial ¶752; Testimony of Ontario Assistant Deputy Energy Minister Susan Lo, Hearing Transcript, Day 3, at pp.97-98, lns.19-2.

[74] Relevant Portion of ¶130 of Canada's Memorial on Jurisdiction: "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."

[75] Footnote 319 as set out in in the first sentence of ¶130 on p. 64 of Canada's Memorial on Jurisdiction: **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.

however, on page 116 (as cited to by Canada) there is no discussion of a delay in meeting the deadlines for Phases 1 & 2.

DISCLOSURE OF SPOILATION OF EVIDENCE

95) In its Memorial, the Investor drew attention to Ontario's conspiracy to destroy critical evidence, which further demonstrated Ontario's extensive NAFTA violations.[76]

96) In 2015, the Ontario Court of Appeal decided to consider claims based on misfeasance in public office through a case brought by *Trillium Wind*.[77] Through the discovery process, in that case, it became apparent that Ontario intentionally destroyed evidence relevant to the litigation and purged emails, records, and documents from its files.[78] The Political Staff were imbued with a spirit of lawlessness. For example, the *Trillium Wind* Amended as Fresh Pleading discloses that the officials avoided using project or company names to frustrate access to information searches and orders for document production. For example, as discussed below, *Trillium Wind* was only referenced as "Project Vapour." [79] This was part of an organized strategy to frustrated lawful document production requests.

97) While this case is still pending, the substantive spoliation aspects of the *Trillium Wind* case were upheld by the Ontario Court of Appeal on June 18, 2015.[80] The documents that were not disclosed by Ontario in the *Trillium Wind* case are also the basis for the Investor's spoliation claim within its motion. *Trillium Wind* asserted that Police investigators and the Information and Privacy Commissioner disclosed the deletion of emails. They also confirmed acts of wiping

[76] Investor's Memorial at ¶262.
[77] *Trillium Power Wind Corp v. Ontario (Natural Resources)*, (Ontario Court of Appeal) 2013 ONCA 683, 22 March 2013, ¶2, **CLA-099.**
[78]Order of Master Hawkins, Ontario Supreme Court, June 18, 2015 permitting the filing of a Fresh as Amended Statement of Claim in *Trillium Power Wind Corp v Her Majesty the Queen* ¶44, **CLA-278.**
[79] Fresh as Amended Statement of Claim in *Trillium Power Wind Corp v. Her Majesty the Queen* 2020 ¶46 - 47, **CLA-278.**
[80] Order of Master Hawkins, Ontario Supreme Court, June 18, 2015 permitting the filing of a Fresh as Amended Statement of Claim in *Trillium Power Wind Corp v. Her Majesty the Queen* **CLA-278.**

computer hard drives clean within the Office of the Premier of Ontario to avoid leaving a written record regarding the contemporaneous decisions regarding energy.[81]

98) As it relates to the Investor's claim, in January 2018, the former Chief of Staff to the Ontario Premier was criminally convicted for the deliberate destruction of the evidence relating to Ontario's energy policy.[82]

99) Canada's assertion that "information on the document destruction and spoliation of evidence by senior officials of the Government of Ontario was highly publicized between 2011 and 2013 and well before the critical date of June 1, 2014"[83] improperly infers that general knowledge of the spoliation and criminal acts by the government should have resulted in Tennant Energy's specific knowledge of what was contained in the destroyed evidence that was discovered as a result of the *Trillium Wind* motion in 2015.

100) The NAFTA was designed to provide protection to investors in case of such a breach. Indeed, the preamble resolves the parties to "Ensure a predictable commercial framework for business planning and investment."[84] Additionally, Article 1105(1) of the NAFTA provides, "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment."[85]

101) Such criminal conduct on the part of senior government officials erodes a predictable commercial framework for business planning and investment. Fair and equitable treatment can thus not be afforded to investors if governments are permitted to destroy evidence resulting in breaches of this agreement. This result would destroy investor confidence and leave the investor with virtually no remedy.

102) Furthermore, when a government knowingly and purposefully covers up their wrongdoing by destroying evidence, such conduct frustrates the object and purpose of the treaty – "to promote

[81] Order of Master Hawkins, Ontario Supreme Court, June 18, 2015 permitting the filing of a Fresh as Amended Statement of Claim in *Trillium Power Wind Corp v Her Majesty the Queen* 2020 ¶48(d), **CLA-278.**
[82] Rob Ferguson, *Toronto Star*, "Former McGuinty chief of staff found guilty of deleting documents in wake of power plants cancellation," 19 January 2018, **C-009**.
[83] Canada's Request for Bifurcation, ¶ 20, September 23, 2019.
[84] NAFTA, Preamble (Sixth Recital).
[85] NAFTA Art. 1105(1),

conditions of fair competition in the free trade area and ... create effective procedures for the implementation and application of th[e] Agreement; for its joint administration and for the resolution of disputes."[86]

103) The *Trillium Wind* case before Ontario's Supreme Court has discovered evidence that officials in the Premier's Office used code names to disguise discussions of energy projects to make subsequent document production and freedom of information searches impossible. The Fresh as Amended Statement of Claim says:

> 46. Moreover, the Plaintiff states that the Defendant assigned a "code name" to its internal communications regarding "offshore wind" and did so with the express purpose of hiding its misfeasance specifically targeted to injure the Plaintiff, consistent with and concurrently with the Defendant's use of the code name "Project Vapour" to hide its communications regarding the concurrent cancellation of gas fired electricity generating plants in Ontario. The Defendant has not disclosed the "code name" it assigned to "offshore."
>
> 47. The Plaintiff states further that this spoliation of evidence by the Defendant was intended to defeat or disrupt the Plaintiff's case, and that there exists a direct causal relationship between the act of spoliation and the potential of the Plaintiff's inability to prove its case by reason of the destruction or deliberate concealment of the evidence of misfeasance in public office. [87]

104) The Investor has emphasized in its Memorial the role of the principle of good faith and *pacta sunt servanda*. Article 26 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*)," entitled "*Pacta sunt servanda*," provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[88] Spoliation of evidence of internationally wrongful acts such as a breach of a treaty obligation is a direct frustration of the object and purpose of NAFTA. It is entirely incompatible with Canada's NAFTA obligations in good faith.

105) Canada was obligated under the NAFTA to provide Tennant and its investors with fair and equitable treatment and to carry out all of its treaty obligations in good faith. NAFTA Article 105 requires that this obligation covers all levels of government in Canada.

[86] NAFTA Art. 102(a, e) Objectives
[87] Fresh as Amended Statement of Claim in *Trillium Power Wind Corp v Her Majesty the Queen* 2020 ¶46 - 47, **CLA-278.**
[88] Article 26 of the Vienna Convention on the Law of Treaties (1969), **RLA-031**

106) Canada failed to demonstrate good faith and did not follow the rule of law when it purposefully destroyed key evidence.

107) The rule of law in Canada can be characterized by three interrelated features:

a) a jurisprudential principle of legality;

b) institutional practices of imposing effective legal restraints on the exercise of public power within the three branches of government; and

c) a distinctive political morality shared by all in the Canadian political community.[89]

108) While Tennant recognizes that there may be extraordinary situations where a reasonable investor would expect that novel threats to public health, the environment, fundamental economic crises, or national security emergencies might temporarily require governments to depart from the existing legal framework of a government program for a short period of time, fair and equitable treatment requires that such departures be justified under the rule of law and not result in a disproportionate result for the investor. In any event, the spoliation of evidence would never be justified under the rule of law or due process.

THE INVESTOR'S MOTION ON INTERIM MEASURES

109) On August 16, 2019, the Investor made a Request for Interim Measures. In paragraph 2 of the Request, Tennant Energy requested the Tribunal to:

[89] Mary Liston, "*Governments in Miniature: The Rule of Law in the Administrative State*" in Lorne Sossin & Colleen Flood eds, Administrative Law in Context (Toronto: Emond Montgomery 2013), p.78, **CLA-289.**

a) order Canada and the Investor to preserve and protect documentation (Documents)[90] in their possession, custody, or control that is relevant to the dispute (the Protected Documents);[91] and

(b) order Canada to produce[92] non-confidential Documents on record in *Windstream Energy LLC v. Government of Canada* (PCA Case No. 2013-22) (the Windstream Documents).[93]

110) The Investor had requested these Interim Measures based on Canada's history of concealing and destroying evidence.

111) However, in Canada's Response to the Investor's first request in their Motion for Interim Measures, Canada stated that:

> "it is not necessary to "preserve, index, protect, and scan documents" in order to rule on the issue of time bar. In the absence of any supporting evidence and considering Canada's jurisdictional objections, the Claimant has failed to establish, prima facie, that it has a reasonable possibility of prevailing in this case."[94]

[90] Footnote 2 as set out in Investor's Request for Interim Measures Motion: For the purposes of this Motion, the term "Document" shall mean any writing, email, recording or photograph including, but not limited to, electronic documents, which are in your actual or constructive possession, custody, care or control, which pertain directly or indirectly, in whole or in part, either to any of the subjects listed below or to any other matter relevant to the issues in this arbitration, or which are themselves listed below as specific documents, including but not limited to: correspondence, e-mails, memoranda, agendas, facsimiles, drafts, notes, messages, diaries, minutes, books, reports, work papers, charts, ledgers, invoices, computer printouts, microfilms, videotapes or tape recordings, or any record in any electronic format or other medium.

[91] Footnote 3 as set out in Investor's Request for Interim Measures Motion: The "Protected Documents" sought in this Motion include, but are not limited to documents in the possession, custody, care, or control of the Respondent relating to the dispute, in particular documents relevant to the Investor, the Investment, and the award of electrical power transmission access or contracts under the Ontario Feed-In Tariff (FIT) Program and/or any related policies or measures.

[92] Footnote 4 as set out in Investor's Request for Interim Measures Motion: All documents produced by the Respondent should be exchanged in electronic format, along with an index, with the producing party retaining copies of the original document, which will be produced if required for inspection at the request of the party requesting the document.

[93] Footnote 5 as set out in Investor's Request for Interim Measures Motion: The "Windstream Documents" include all non-confidential documents (or non-confidential versions of documents) in the possession, custody or control of the disputing parties in the Windstream Energy LLC v. Canada NAFTA Arbitration, (PCA Case 2013-22) including, but not limited to, pleadings, exhibits, legal authorities, correspondence, indexes, hearing materials, presentations, and demonstrative aids.

[94] Canada's Response to Investor's Request for Interim Measures at ¶6.

112) In the January 2020 Procedural hearing, the issue of the same request for Interim Measures as mentioned above, was discussed. During that hearing, although Canada stated that it assumed that both disputing parties are preserving their evidence as it is an obligation to act in good faith in arbitrations,[95] Canada made a string of other arguments that demonstrate its lack of desire to share the evidence it has despite their history of destroying and concealing evidence. Canada stated that generally, under domestic law, the government of Ontario and the IESO would have to preserve documents. Yet, the Minister's office previously had been found to have record management practices of deleting emails, which the Minister had confirmed.[96] Furthermore, as Canada pointed out themselves, there was also the possibility that the former Premier's office had deleted emails before the new Premier came to office.[97] Therefore, the assertions that Canada makes that the Investor should trust that in good faith, it will not be deleting evidence is hard to believe.

113) Moreover, at the January 2020 hearing, Canada stated that the Tribunal should not grant the Investor's request for Interim Measures because there is no urgency for such a request. Canada stated that the Investor was "relying on unsupported allegations that documents relevant to its claim were destroyed."[98] However, it has been made clear publicly through the *Trillium Wind* case and through Canada's recent Memorial on Jurisdiction itself that Canada has a history of destroying and concealing emails and documents and thus, there is no way of knowing what exactly got deleted in the past that could have been evidence possibly available to the public.

THE TEST FOR BIFURCATION

114) Bifurcation is not an ordinary course event. Tribunals routinely decide that there would be procedural economy and efficiency from considering certain issues out of their ordinary sequence. Tribunals make such decisions based on a determination of the facts and issues in the case before them. Tribunals do not order bifurcation if a hearing on the merits needs to take

[95] January 2020 Hearing on Bifurcation and Preliminary Motions, Transcript Day 1, at p. 97 lines 15-19, 14 January 2020.
[96] Canada's Memorial on Jurisdiction, at ¶39.
[97] Canada's Memorial on Jurisdiction, at ¶40.
[98] January 2020 Hearing on Bifurcation and Preliminary Motions, Transcript Day 1, at p. 99 lines 8-10, 14 January 2020.

place in any event, or if a jurisdictional hearing would result in the need to substantively consider issues that would have to be heard in the merits.

115) Bifurcation can add considerably to the duration of the arbitration and its costs. Canada's Third Bifurcation Motion requires the Tribunal to evaluate the benefit that would be obtained from a bifurcation versus its significant impact on time, cost, and efficiency of the case.

116) In its Third Bifurcation Motion, Canada relies on Gary Born in his treatise, *International Commercial Arbitration.*[99] However, Canada omits the following warning in that treatise:

> Bifurcation inevitably imposes delays, which are often significant, in the resolution of some issues, which can only be justified on the basis that expense would be wasted in litigating those issues, which might become moot or irrelevant following decisions on other issues.[100]

117) Jeffrey Commission and Rahim Moloo, in their treatise *Procedural Issues in International Investment Arbitration,* state that:

> Bifurcation may result in the narrowing or even dismissal of claims but can significantly add to the costs and duration of an arbitration. This has not gone unnoticed by users of the ICSID and other systems of dispute settlement. In an OECD public consultation on investor-dispute settlement, the cost/time issue was raised as a concern in the context of bifurcations, given that they can add anywhere from twelve to eighteen months (per phase, on average) to an arbitration that typically lasts three to four years. [101]

118) Tribunals will not order a jurisdictional hearing if no meaningful need exists to consider jurisdiction as a separate issue. In such a circumstance, the order of bifurcation would be frivolous and unnecessary.

[99] Canada's Renewed Bifurcation Motion at ¶6 and footnote 14.
[100] Gary Born, International Commercial Arbitration 2nd ed, Kluwer Law International, 2014, Chapter 15, p.2243, **CLA-256**.
[101] Jeffrey Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration*, Oxford International Arbitration Series, 22 May 2018, at ¶ 5.01, **CLA-267**. The authors rely on OECD Investor-State Dispute Settlement Public Consultation Comments, 30 August 2012, p. 23, **CLA-268**; International Centre for Dispute Settlement (ICSID) Annual Report 2014, p. 30 ('The majority of arbitration proceedings concluded in FY2014 lasted on average just over three and a half years from the date of the tribunal's constitution.'), **CLA-269.**

WHY THE TRIBUNAL HAS JURISDICTION TO RULE ON THESE CLAIMS

119) The Tribunal has full jurisdiction to hear all the Investor's claims. The knowledge of the measures that give rise to Tennant Energy's claim arose well after June 1, 2014, which was three years before the Notice of Arbitration filing.

120) In an earlier proceeding before this Tribunal, Canada admitted that it had the burden of proof for jurisdictional objections such as time bars. Canada made this admission in paragraph 6 of its Response to Claimant's Request for Interim Measures, September 23, 2019.[102] In this pleading, Canada opposed Tennant Energy's request to have evidence regarding Ontario's energy policy scanned and indexed to ensure that no further spoliation of evidence occurred. Canada successfully opposed that request for an interim preservatory measure. In its response, Canada admitted that it had the burden of proof to establish jurisdictional objections on time bars:

> Canada bears the burden of proving its jurisdictional objection on time bar, not the Claimant. Pursuant to NAFTA Article 1116(2), Canada must prove that the Claimant 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 as a result of that breach. [103]

121) This Tribunal has jurisdiction to decide on all the issues raised in the Investor's claim. Canada has not been able to meet its admitted burden to establish a defense that there is a defect to the Tribunal's jurisdiction:

a) Tennant Energy, LLC, is an American investor with indirectly owned investments in the territory of Canada.

[102] Canada's Response to Claimant's Request for Interim Measures, September 23, 2019

[103] Canada supported this statement with footnote 9 which read "NAFTA Article 1116(2) provides that "[a]n 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." See Canada's Statement of Defense, ¶¶ 29-30."

b) The Investor has pleaded that the government measures at issue relate to the Investor and its investments and that these measures are inconsistent with obligations contained in Section A of NAFTA Chapter Eleven; and

c) The claim was brought promptly as the knowledge of the breach, and thus the knowledge that the damage arose from that breach, arose not earlier than August 15, 2020.

122) Finally, Canada raises issues in the context of its Third Bifurcation Motion and its Jurisdictional Memorial that are not questions of jurisdiction.

123) Canada has given its consent to this arbitration, and this consent is set out in the NAFTA. The question of consent is not a question of jurisdiction but is a question of admissibility. The Tribunal should dismiss Canada's consent complaints, be they on jurisdiction or admissibility, as in either case, consent to this arbitration is present.

124) There are no procedural irregularities present in the Investor's submission of its arbitration claim, and even if there was a procedural irregularity, this does not deprive the Tribunal of jurisdiction to hear the claim.

125) Canada conflates the burden and standard of proof for admissibility with that for jurisdiction. Canada incorrectly suggests that they are the same.[104] There are very significant differences between admissibility and jurisdiction, including questions of whom bears the burden of proof. Canada fails to note that addressing these complex legal issues will also add to the cost, duration, and complexity of any jurisdictional phase if any bifurcation takes place.

THE DETERMINATION OF THE DATE OF BREACH MUST BE CONSIDERED IN THE MERITS

126) Canada concocts an admissibility challenge through its artificial substitution of an earlier date for the true date upon which Tennant Energy's claims arose. The true date could not have been earlier than August 15, 2015.

[104] Canada's Memorial on Jurisdiction, at Parts III and IV, Canada's *Renewed Bifurcation Motion* at ¶16-17.

127) Without reference to the facts and pleadings set out by Tennant Energy in its Memorial, Canada substitutes an artificial substituted date of the breach – June 12, 2013, or even earlier to July 4, 2011.

128) Tennant Energy has pled that the date of the breach was August 15, 2015. This was known from the admission was revealed to the public of Assistant Ontario Deputy Energy Minister Susan Lo about a secret governmental group that provided special business opportunities for FIT Contracts for friends and supporters of the government over the interests of Skyway 127 in the FIT Program and from other admissions made during that NAFTA hearing which first became known with the publication to the public of the post-hearing submissions filed in the *Mesa Power* NAFTA claim.

129) For either of Canada's artificially-substituted dates to be applicable, Canada would need to prove that the actual date used by Tennant Energy could not have been the first date upon which Tennant Energy knew or ought to have known of that particular NAFTA breach regarding the "Breakfast Club" and how it favored companies like International Power Canada over Skyway 127.

130) Canada argues that somehow knowledge of other factors relating to Canada's wrongful administration of the FIT Program should have enabled Tennant Energy to realize that a secret government cabal had been put in place to manipulate government policy and the administration of the FIT Program rules.

131) Ontario never disclosed the existence of a decision-making body such as the "Breakfast Club" in any public FIT Program document or in any government press release or FIT Proponent webinar. Yet, Canada argues that Tennant Energy should have known this fact many years before Assistant Ontario Deputy Energy Minister Susan Lo testified about the existence of the "Breakfast Club" under oath at the *Mesa Power* NAFTA hearing in October 2014.

132) To understand this essential issue Canada raises, the Tribunal would be required to review the merits of this case in a detailed manner. This alone demonstrates conclusively that Canada's jurisdictional concerns related to the date of the breach must be joined to the merits.

133) In its arguments supporting bifurcation, Canada has not offered anyway in which a bifurcation could address this essential topic without having to address all of the substantive issues that would be necessary for the consideration of the merits of this claim.

134) The only genuinely jurisdictional matter raised by Canada is whether Tennant Energy falls within the NAFTA definition of an Investor or Investment. On this point, the Investor has established conclusive evidence that it is an American juridical national, and Canada has not challenged that fact.

135) Further, Tennant Energy had produced unchallenged evidence demonstrating that it owned the investments in Canada at the August 15, 2015 date when this claim arose. Canada makes no challenge to Tennant Energy's undisputed ownership of more than 45% of the shares of Skyway 127 by August 15, 2015.[105]

CANADA'S ARTIFICIAL DATES ARE IRRELEVANT

136) Canada has stated that the date of breach should be set at one of two artificial substitute dates. Those dates are June 12, 2013, or possibly an earlier date of July 4, 2011. (Canada relied on the June 12, 2013, date in its earlier objections, and a factual review suggests that July 4, 2011, never could be an appropriate date).

137) July 4, 2011, was not the date of the NAFTA breach Tennant Energy pled. Skyway 127 was placed on a FIT priority waiting list on July 4, 2011. It was not awarded a FIT Contract on that date. The Notice of Arbitration states in paragraph 73 that "Skyway 127 was told it remained in the running for a contract. JoAnne Butler, VP at the OPA, wrote to Skyway 127 stating: 'At this time your project will remain in the Priority Ranking and proceed to the Economic Connection Test.]"[106] At most, this date might be relevant to establishing the date of loss. As a result, the applicability of Canada's first artificial breach date of July 4, 2011, must be completely rejected.

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

[106] Notice of Arbitration, ¶73.

138) Canada's second artificial breach date of June 12, 2013, reflects the date that the FIT Program was terminated. Skyway 127 was still on the Priority FIT waitlist for a FIT Contract up until this date. The June 12, 2013, occurs before the time when Tennant Energy had actual or constructive knowledge of the internationally wrongful actions taken by Ontario. As a result, June 12, 2013 cannot be the relevant date of the breach in this arbitration.

139) The rejection of the artificial substituted dates also impacts Canada's contention that Tennant Energy did not own the shares by the artificial dates that Canada claims constitute the date of the breach – June 12, 2013, or July 4, 2011. The Investor has pleaded and provided evidence to demonstrate that Tennant Energy had property interests covered by the definition of investment in NAFTA Chapter Eleven at each of these legally irrelevant times. Again, Tennant Energy notes that Canada does not challenge the fact that Tennant Energy met the requirements for an Investor on August 15, 2015.

140) On this question, Canada acknowledges that there is evidence – it simply says that this Tribunal should reject it. However, the well-established test for jurisdiction, and for the decision to hold a separate bifurcation hearing, is not to go down the time consuming and expensive process of bifurcation where there is evidence that the tribunal has jurisdiction to rule. Canada is free to challenge the evidence in the merits hearing.

CASELAW ON THE TEST FOR JURISDICTION

141) In *Procedural Order No. 4*, the Tribunal set out three guiding criteria regarding whether a bifurcation should take place:

a) whether the jurisdictional objection is frivolous,

b) whether the objection, if successful, would materially reduce the time and costs of the proceeding, and

c) whether the objection concerns issues intertwined with the merits of the arbitration.[107]

[107] *Procedural Order No. 4* at ¶87. Canada accepts these three criteria in its Renewed Motion for Bifurcation at ¶7.

142) To succeed, Canada must successfully meet each of these three criteria. Unfortunately, Canada's Third Request for Bifurcation fails to meet any of the three necessary criteria. Therefore, it should be dismissed.

143) Canada has relied on articulating the bifurcation test that comes primarily from the *Glamis Gold* Bifurcation Decision.[108] Jeffrey Commission and Rahim Maloo comment on the basis for determining bifurcation as follows:

> 5.30 In practice, tribunals tend to analyse issues presented for bifurcation in light of a number of factors.[109] These include whether: (a) the objection is substantial rather than frivolous; (b) resolving the objection as a preliminary matter will result in a material reduction of proceedings at the next phase; and (c) the facts and issues to be addressed are distinct[110] from the merits phase.[111]

144) Jeffrey Commission and Rahim Maloo continue in paragraph 5.30 by reviewing the cases on bifurcation. The authors note:

> These factors first enumerated in Glamis Gold have been repeated, with certain variations, and applied by numerous tribunals, including those in *Mesa Power Group v. Canada*, [112] *Tulip Real Estate v. Turkey*, [113] *Philip Morris v. Australia*, [114] *Standard Chartered v. Tanzania*, [115] *Resolute Forest v. Canada*, [116] *Cairn*

[108] *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)*"), **RLA-054**. See Canada's Renewed Motion for Bifurcation at ¶11 and Canada's Jurisdictional Memorial at ¶57.
[109] Glamis Gold, Procedural Order No. 2 (Revised), **RLA-054**.
[110] Glamis Gold, Procedural Order No. 2 (Revised) at ¶12(c), **RLA-054**.
[111] Jeffrey Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration* at ¶5.30. All original footnotes were maintained in this draft and authorities were identified with CLA or RLA numbers, **CLA-267.**
[112] *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012–17, Procedural Order No. 2, 18 January 2013, ¶17 (citing Glamis Gold), **RLA-053**.
[113] *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-061**.
[114] *Philip Morris Asia Limited v. Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012–12, Procedural Order No. 8 regarding Bifurcation of the Procedure, 14 April 2014, **RLA-060**.
[115] *Standard Chartered Bank (Hong Kong) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/15/41, Procedural Order No. 3 on Bifurcation, 11 October 2016, ¶56. ('Investor-state tribunals have identified several factors that are relevant in deciding whether to bifurcate arbitration proceedings …'.), **CLA- 270.**
[116] *Resolute Forest Products Inc. v. the Government of Canada*, PCA Case No. 2016–13, Procedural Order No. 4—Decision on Bifurcation, 18 November 2016, ¶4.3. ('The Disputing Parties also agree that for a Tribunal to determine whether bifurcation is appropriate in a given case, it is helpful to apply the three-part test applied in

> *Energy v. India*, [117] and *Ballantine v. Dominican Republic*.[118] Simply put, in the words of the *Mesa Power Group v. Canada* tribunal, 'the decision in Glamis helpfully illustrates the factors to be borne in mind while determining an application for bifurcation.'[119] Consistent with this, ICSID itself explains that '[i]n deciding whether to bifurcate, the Tribunal balances the rights of the parties' and that '[t]he Tribunal may consider factors such as: the merit of the objection; whether bifurcation would materially reduce time and costs; and whether jurisdiction and merits are so intertwined as to make bifurcation impractical'.[120] In terms of the relationship among the Glamis Gold criteria, tribunals have been careful to note that they do not constitute a 'stand-alone test'[121] and are non-exhaustive elements 'in the quest for procedural efficiency'.[122]

145) Other criteria are also relevant. Again, Jeffrey Commission and Rahim Maloo note this at paragraph 5.31 as follows:

> 5.31 In addition to the Glamis Gold factors, other criteria have been considered by tribunals in decisions on bifurcation. For instance, the *Philip Morris v. Australia* tribunal held that a further general consideration relevant for the issue of bifurcation was that 'a long period of time ha[d] passed from the beginning of the present procedure.'[123] To take another example, an ICSID tribunal (in an unpublished 2012 decision) held that a respondent's refusal to pay its contribution to the costs of the arbitration, in breach of the ICSID Convention, 'is a factor which the Tribunal has taken into consideration' in reaching its decision not to grant that party's request for

Philip Morris v. Australia, which posed the following questions: (1) Is the objection prima facie serious and substantial?; (2) Can the objection can be examined without prejudging or entering the merits?; and (3) Could the objection, if successful, dispose of all or part or an essential part of the claims raised?'), **RLA-079**.

[117] *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, PCA Case No. 2016–7, Procedural Order No. 4—Decision on the Respondent's Application for Bifurcation, 19 April 2017, **RLA- 056**.

[118] *Michael Ballantine and Lisa Ballantine v. The Dominican Republic*, PCA Case No. 2016–17, Procedural Order No. 2, 21 April 2017, ¶18. ('In addition, the Tribunal draws guidance from the standard set out in Glamis Gold, cited by both Parties …'.), **CLA- 271.**

[119] *Mesa Power Group LLC v. Government of Canada*, UNCITRAL, PCA Case No. 2012–17, Procedural Order No. 2, 18 January 2013, ¶17, **RLA-053**.

[120] Jeffrey Commission references a document at <https://icsid.worldbank.org/en/Pages/process/Bifurcation.aspx> for this point in his book. Jeffrey Commission and Rahim Moloo *Procedural Issues in International Investment Arbitration* at ¶5.30; <https://icsid.worldbank.org/en/Pages/process/Bifurcation.aspx>, **CLA-267.**

[121] *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Government of India*, PCA Case No. 2016–7, Procedural Order No. 4—Decision on the Respondent's Application for Bifurcation, 19 April 2017, ¶77–8, **RLA-056**.

[122] Jeffrey Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration,* at ¶ 5.30. All original footnotes were maintained in this draft and authorities were identified with CLA or RLA numbers, **CLA-267.**

[123] *Philip Morris Asia Limited v. Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012–12, Procedural Order No. 8 regarding Bifurcation of the Procedure, 14 April 2014, ¶104, **RLA-060**.

> bifurcation. Still yet other tribunals have considered: issues of 'practical administration,' [124]'[p]arties' expectations towards time-efficient and cost-effective proceedings, on the one hand, and their due process rights, on the other';[125] the 'risk of inconsistent submissions by the Parties or prejudicial decisions by the Tribunal' [126] and that 'the parties' procedural and strategic choices' should not constrain the tribunal. [127]

146) Practical administration is a useful consideration in the current arbitration. A long period of time has elapsed in this case. Tennant Energy consistently has advised the Tribunal that it supported practical and efficient approaches to arbitration. As set out herein, Tennant Energy's case on the effects of spoliation of evidence is not an issue that Canada seeks to bifurcate. Thus, the Tribunal will need to proceed to address this matter in any event.

147) While Tennant Energy believes that there is no merit to Canada's jurisdictional objections, it is also clear that those objections will require an in-depth consideration of the merits of this dispute. For the reasons detailed in this response, the most practical and time-efficient action would be to hear the merits of this claim with any objections that Canada has to jurisdiction.

OTHER DUE PROCESS CONSIDERATIONS AGAINST BIFURCATION

148) In addition to the *Glamis Gold* bifurcation test, there are other case-dependent considerations that the Tribunal should consider in evaluating whether a bifurcation should occur.

149) In this case, it has become abundantly clear from the motions already heard before this Tribunal that there are sources of relevant evidence regarding Tennant Energy's claims over systemic violations of good faith and due process in the administration of Ontario's energy transmission system and the FIT Program. Canada has not produced highly relevant and material information concerning these matters and awaits the document production phase.

[124] *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Procedural Directions and Order of the Tribunal, 4 April 2003, ¶¶ 17, 20, **RLA-124**.
[125] *Churchill Mining Public Limited Company v. Indonesia*, ICSID Case No. ARB/12/14, Procedural Order No. 8, 22 April 2014, ¶17, **CLA-273.**
[126] 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, **RLA-073**.
[127] Jeffrey Commission and Rahim Moloo, *Procedural Issues in International Investment Arbitration* at ¶ 5.31, **CLA-267.**

150) Tennant Energy's entire claim for the harm caused to it arising from the spoliation of evidence relates to the information that will be produced from this document production phase. This arbitration will continue to the merits phase for the determination of this claim.

151) The highly regarded former president of the Netherlands Arbitration Institute, Albert Jan van den Berg, warns that one of the risks in making decisions on bifurcation is that "evidence that came up during the second phase would have had a material impact on (part of) the decisions made in the first phase." [128]

152) In their article "The Use of Bifurcation and Direct Testimony Witness Statements in International Commercial Arbitration Proceedings," Thomas J. Tallerico and J. Adam Behrendt identify the critical role of evidence. They state that the Tribunal should consider the amount and type of evidence necessary for each phase, the degree of overlap in evidence between the phases, and whether the evidence required for a later phase was sensitive or strategic in some manner.[129]

THE DATE OF BREACH ISSUE

153) Tennant Energy alleged in its Memorial that the date that this claim arose was August 15, 2015.[130] This was the date upon which Tennant Energy first became aware of evidence from Ontario officials of a breach of the NAFTA respecting their investment, Skyway 127.

154) The issue of discoverability is a key concept with respect to the requirements of NAFTA Article 1116. A claim does not arise until an Investor is aware of a breach and that the Investor is aware of loss arising from that particular breach.

[128] Albert Jan van den Berg, Organizing an International Arbitration: Practice Pointers, in *The Leading Arbitrators' Guide to International Arbitration* 150–2 (Lawrence W. Newman and Richard D. Hill (eds), 2nd ed, 2008), **CLA-274.**
[129] Thomas J. Tallerico and J. Adam Behrendt, 'The Use of Bifurcation and Direct Testimony Witness Statements in International Commercial Arbitration Proceedings', 20 Journal of International Arbitration (2003), pp. 295, 297, **CLA-275.**
[130] Tennant Memorial at ¶715. Canada's Jurisdictional Memorial at ¶121.

155) As set out below, none of the dates Canada suggests meets this test. Further, Canada does not establish credible reasons that the date Tenant Energy relies upon August 15, 2015, does not meet this jurisdictional test.

SETTING THE DATE IS ESSENTIAL

156) Tennant Energy became aware of the NAFTA breach upon learning of the wrongful conduct described by Assistant Ontario Deputy Energy Minister Susan Lo. That discovery started the clock.

157) Under Canada's theory of breach – the clock would start ticking whenever a breach occurred even if the harmed party did not know or could not have known of the breach. Thus, under Canada's theory, Canada would have no responsibility for an internationally wrongful act that violated Section A of Chapter Eleven of the NAFTA if Canada could keep the knowledge of the wrongful action hidden.

158) Canada has engaged in the ongoing suppression of evidence in this arbitration claim. International law does not condone the suppression of evidence. Quite to the contrary, international law supports transparency.

159) Canada's temporal allegations completely ignore the August 15, 2015, date pled by Tennant and the facts upon which Tennant relies. Instead, Canada artificially substitutes a series of earlier dates in place of the breach's actual August 2015 date.

160) Canada arbitrarily claims that the date of the breach in this claim is the date that the FIT contracts for the Bruce Transmission region on July 4, 2011.[131] In the alternative, Canada says that the dates were when the FIT Program was canceled on June 12, 2013, as the date of the breach.

[131] Canada's Jurisdictional Memorial at ¶156.

161) But these are not the dates of the breach pleaded by Tennant Energy. The date pleaded, and the facts relied upon by Tennant Energy, focus on the information emanating from the evidence obtained at the *Mesa Power* NAFTA Hearing.

162) Canada relies on charts in its Jurisdictional Memorial, which only confuses the issue.

163) The problems with Ontario's unfair actions in the FIT Program resulted in the *Windstream* Tribunal finding a breach of fair and equitable treatment. Similarly, Arbitrator Charles Brower concluded that there was a breach of fairness in administering the FIT Program in *Mesa Power*. However, the common basis of poor public policy administration does not define the measures at issue in the Tennant Energy claim.

164) Tennant Energy clearly articulates the critical role of its knowledge of Ontario's wrongful actions regarding International Power Canada. It also articulated concerns about "gaming" of the Ontario Transmission system to favor International Power Canada while hurting FIT Proponents such as Skyway 127. Those are the essential factual elements underpinning this arbitration.

165) Ontario did not tell the public that there was a secret "Breakfast Club" of senior political and government officials who circumvented government rules to help the government's friends. This information arose from the publication of information in submissions that commented on testimony at the October 2014 *Mesa Power* NAFTA Hearing. That testimony was not available to the public beforehand.

166) There was no way that Tennant Energy could have known this information until August 15, 2015, when the submissions commenting on the *Mesa Power* Hearing evidence were released to the public.

167) Canada takes great pains in its Jurisdictional Memorial to outline all the reasons why Tennant Energy should have known about allegations made by *Mesa Power* from postings on the Government of Canada website.[132] Indeed, Canada would be correct if the claims raised by Tennant Energy were the very same claims as those made in *Mesa Power* – but Tennant Energy's

[132] Canada's Jurisdictional Memorial at ¶¶118 – 120.

claims are different. Nowhere in those charts in paragraphs 118 – 120 of Canada's Jurisdictional Memorial does Canada have information disclosing the Ontario Senior officials conspiring to help International Power Canada to the detriment of Skyway 127 at the "Breakfast Club."

168) Canada then incorrectly states that information available from the *Mesa Power* NAFTA hearing is not relevant.[133] Yet, as shown above, the Tribunal already held it was relevant when the Tribunal addressed Canada's unsuccessful attempt to exclude the uncensored *Mesa Power* NAFTA Hearing Videos from being admitted to this Tribunal. As the Tribunal knows, Canada desperately does not want the incriminating evidence of admissions of wrongful conduct from its officials to be seen. The reason is not that this evidence is immaterial and irrelevant – but exactly because this information is highly relevant and detrimental to Canada's defense.

169) Canada simply cannot be believed when it suggests that this evidence is not relevant to Tennant Energy's NAFTA Claim. On the contrary, it is essential to it.

170) None of that information was known to Mesa Power when it filed its arbitration claim as well. That information first became known to the public after the *Mesa Power* hearing took place and Mesa Power itself during the hearing.

171) Canada's substituted date of breach timing ignores the facts of Tennant Energy's claim. To support this unorthodox approach, Canada attempts to minimize the relevance of the foundational basis of the critical admissions of wrongfulness by Canada's officials about special business protection provided to a local company controlled by the government's political cronies.

172) Yet, Canada says that Tennant Energy and the entire public should have been aware that the government acted without due process and good faith. Yet, none of the Mesa Power claim allegations had specificity regarding the direct harm and its effect on Skyway 127, nor could they have addressed these secret meetings. Canada says that Tennant Energy should have inferred the harm caused by the special benefits Ontario secretly granted to International Power Canada arising from clandestine unofficial meetings of the most powerful political and government

[133] Canada's Jurisdictional Memorial at ¶¶122 – 120.

officials.[134] However, Tennant Energy cannot be expected to have inferred secret government meetings that were first disclosed in the non-public testimony of Ontario Energy Assistant Deputy Minister Susan Lo at the *Mesa Power* NAFTA Hearing.

173) Canada engaged in an ongoing campaign to suppress that information. Canada absurdly asks this Tribunal to impute knowledge to Tennant Energy, of which no ordinary FIT Proponent possibly could have been aware. Canada's allegations are completely untethered from reality or the facts in this case.

174) Canada's temporal objections are predicated upon the date of breach not occurring on the date claimed by Tennant Energy.

TIME AND STANDING

175) For the issue of Standing, Tennant Energy directly controlled Skyway 127 before August 15, 2015. While Tennant Energy held a beneficial interest in Skyway 127 since June 2011, the company had a fully registered interest in the shares of Skyway 127 before August 15, 2015.

176) As discussed below, Canada places its focus on a legally irrelevant time. The legally relevant time is when Tennant Energy because aware or could have been aware of the internationally wrongful act. That was August 15, 2015. At that time, Tennant Energy owned 45.6% of the shares of Skyway 127 and had been exerting actual control over the project for years.

177) John Pennie is the client representative of Tennant Energy and is a member of its Board of Management. He was the CEO of the Skyway 127 Wind Project. He testified in his witness statement about the share ownership of Tennant Energy in his witness statement (**CWS-1**). He states:

> John Tennant told me that he was holding the Skyway 127 shares as a bare trustee for a corporation to be named.[135]

[134] Canada's Jurisdictional Memorial at ¶144.
[135] Witness Statement of John C. Pennie at ¶48, **CWS-1**.

> In April 2011, John Tennant had 11.3% of the shares. In December 2011, John Tennant acquired an additional 11.3% - for a total of 22.6%. [136]

> The shares were formally transferred to the holding company, now known as Tennant Energy, in January 2015. At this time, the company held 45.2% of Skyway 127 and was controlling the company. [137]

178) What is critical is the uncontroverted fact that, in January 2015, Tennant Energy was not aware and could not have been aware of the wrongful actions of Ontario that benefited International Power Canada at the expense of Tennant Energy's place in the FIT Queue.

179) Canada and Ontario kept the information about the wrongful actions of the government strictly secret. Even when it was disclosed in sworn evidence at the *Mesa Power* NAFTA Hearing, the information did not become widely known.

180) The information about the secret "Breakfast Club" and its special actions to create business opportunities for International Power Canada (not available to others) was not publicly known until August 15, 2015.

181) At the time that the information became known on August 15, 2015, Tennant Energy formally had registration in the Skyway 127 corporate share registry, and Tennant Energy had beneficial entitlement to the Skyway 127 shares since June 2011. Without dispute, these shares were registered in the Tennant Energy Shareholder Register on January 15, 2015, notwithstanding the fact that they had been beneficially held for the holding company since June 2011.[138] Tennant Energy used those shares to control Skyway 127.

182) Simply put, the time clock could not be running on breaches of the NAFTA not discoverable by Tennant Energy.

183) Furthermore, additional support for the fair and equitable treatment claims Tennant raises also has been supported by additional information made available in the *Mesa Power* hearing video.

[136] Witness Statement of John C. Pennie at ¶48, **CWS-1**.
[137] Witness Statement of John C. Pennie at ¶50, **CWS-1**.
[138] Skyway 127 Energy Inc. Shareholder's Ledger, 15 January 2015,**C-115**.

184) The knowledge arising from these claims also has the effect of resetting limitation periods for certain claims in this case.

185) Canada cannot have its proverbial cake and eat it too. Canada cannot suppress evidence to the public and yet, at the same time, claim that the limitations clock is running. This is a binary choice. Canada chose suppression over disclosure. Because of this choice – the time clock could not run on breaches unknown to Tennant Energy.

186) Canada's argument on timing applies only if the Tribunal ignores the dates when the claim first arose and Canada's substituted dates (of July 4, 2011, or June 12, 2013, are applied).

187) The entirety of the time limitation argument fails if the Tribunal concludes that Tennant Energy's claim arose on August 15, 2015, when all of this information became public.

188) The Tribunal's determination of the date of breach thus will be determinative of the jurisdictional questions.

HOW CAN THE TRIBUNAL DETERMINE WHEN THE CLAIM AROSE?

189) This Tribunal will be aware of the dates upon which information from the *Mesa Power* NAFTA hearing was made available to the public from Tennant Energy's pleadings in Canada's Motion to suppress the *Mesa Power* Hearing Video posted to the internet.

190) The key dates are:

a) April 30, 2015 – the date that the *Mesa Power* NAFTA Hearing Video was made available to the public.

b) August 15, 2015 – the date that several submissions commenting on the NAFTA hearing, including the post-hearing briefs, the comments on the NAFTA Article 1128 submissions, and other post-hearing matters were made available to the public.

191) Canada simply ignores the Investor's claim and the uncontroverted evidence of the dates on which this information became available to Tennant Energy. Instead, Canada claims that all the

issues in this claim occurred before the date of the breach asserted by Tennant Energy. On this point, Canada claims:

> "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."[139]

192) Canada has consistently taken steps to prevent the public from having access to information about the international wrongful conduct of Ontario officials administering the FIT Program. Canada has continued these measures in this arbitration in attempting to restrict public access to information previously available on the internet to the public for five years. At the very same time, Canada claims that it is in favor of transparency – doing violence to this important concept in the process.

CANADA'S REQUEST IS FRIVOLOUS

193) Canada's request for bifurcation is frivolous. It has contorted the facts and applicable law to shoehorn a bad idea into an even worse motion.

194) NAFTA Article 1116(1) provides that certain requirements for bringing a claim. There must be the following:

a) A breach of Section A of NAFTA Chapter Eleven.

b) And a claim that the "investor has incurred loss or damage by reason of arising out of that breach.

195) It is technically impossible to commence a claim under NAFTA Article 1116 until there has been a breach and loss arising from that loss.

196) Article 1116 (2) considers the issue of discoverability of claims and imposes a time limit on that discoverability. Paragraph (2) requires that 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

[139] Canada's Jurisdictional Memorial at ¶63.

damage. Canada attempts to give meaning to paragraph (1) of Article 1116 that ignores the context of paragraph (2). Article 1116(1) needs to be read in the context of Article 1116(2).

197) The NAFTA cannot impose a limit on the time for bringing a claim (based on the discovery of the knowledge of the claim) without imputing a requirement that an investor bringing a claim must have knowledge of the breach, or objectively "should have first acquired" knowledge of the claim.

THE MEANING OF TEMPORAL RESTRICTIONS IN THE NAFTA ARTICLE 1116

198) In addition to the general rules applied by international law, specific treaties also can impose time limitations that need to be considered. The North American Free Trade Agreement (NAFTA) is frequently a source of tribunal consideration of time limits because of its specific time limitations. NAFTA Article 1116(2) places a limitation period on claims brought forth under NAFTA's Investment Chapter obligations set out in NAFTA Chapter Eleven. It states:

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

199) Understanding the meaning of a "breach" for purposes of applying the time limitation period in NAFTA Article 1116(2) requires the identification of the "measure" or "measures" that are alleged by the investor to breach the NAFTA.

200) The NAFTA definition of "measure" includes a "law, regulation, requirement or practice," which clearly allows for the possibility that a law or regulation might as such violate the NAFTA, and therefore be the "measure" that is the subject of a complaint. Nothing in this definition, however, excludes the possibility that continuous application, or indeed individual instances of the application of a statutory scheme, also could constitute "measures" that are violations of NAFTA and, therefore, internationally wrongful acts.

201) ILC Article 12 states that:

> There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.[140]

202) The continuous application of a statutory or regulatory scheme that violates treaty obligations is clearly conduct that falls within the meaning of ILC Article 12, regardless of whether the enactment of the scheme itself might be considered *per se* internationally wrongful.

203) There are two prerequisite conditions for the timing to commence on the three-year limitation period in NAFTA Article 1116(2) and 1117(2). First, the investor must have acquired actual or constructive knowledge of the breach at issue. Second, the investor must have acquired knowledge that it has incurred loss or damage because of that breach. It is only the point in time when the investor has acquired knowledge in both respects that the limitation period begins to run.

204) Canada itself, in its NAFTA *Statement of Implementation* (filed on the implementation of the NAFTA on its coming into force on January 1, 1994), comes to the same conclusion. In discussing the meaning of NAFTA Article 1116, the *Statement of Implementation* clearly identifies the subjective requirement upon an investor claimant to believe that there has been a breach of the NAFTA. The Canadian interpretative statement stays:

> Under article 1116, a claim may be submitted to arbitration under this section if an **investor believes that another party** (i.e., other than the Party of whom the investor is a national or an entity controlled by a national of that Party) **has breached an obligation** under section A or article l503(2) (state enterprises), or 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 investor has incurred a loss or damage as a result of the alleged breach of an obligation in question. 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 of a loss or damage.[141] (emphasis added)

205) In addition, the NAFTA contains a set of time limits which impose a requirement that a Claimant waits six months since the events giving rise to a claim before initiating a claim and

[140] ILC *Articles on State Responsibility* at Art 12, **CLA-276.**
[141] *Canadian Statement of Implementation* – NAFTA Article 1116

that a claim is commenced within three years of the date when the claim first arose and when the claimant knew of loss arising from the claim.

206) As a general note, these time limitations are an issue of admissibility. This was the approach correctly taken by the NAFTA Tribunal in *Pope & Talbot* and by the Tribunal in *TECMED*.[142] Accordingly, Tennant Energy disagrees with the arguments Canada raises that suggest that these limitations are jurisdictional issues. They are important issues – but ones that do not go to the jurisdictional competence of this Tribunal.

207) Tribunals and commentators generally recognize that time limits, such as NAFTA Article 1116(2), have two main purposes: to enable the respondent to collect evidence in its defense, addressing the normally negative effects of the passage of time on the quality and availability of evidence, and, secondly, to provide certainty and stability.[143] The nature of these concerns was expressed in the 1903 *Gentini (Italy)* award by the Venezuelan Mixed Claims Commission,[144] which found that prescription was a general principle of the law of civilized nations. At the same time, tribunals have recognized that, for complex political reasons, the challenge of addressing past injustices may, for complex political reasons, still remain after decades or more, and a different view of the passage of time is evident when the international community grapples with matters of transitional justice; normal prescription may well be viewed as *un*just.[145]

208) More generally, there are good reasons for allowing claims that challenge continuing wrongful acts. The continuing action continually generates new evidence, and the state's continuing breach of its treaty obligations undermines certainty and stability.

[142] Pope & Talbot, *Award re Preliminary Motion to Strike paragraphs 34 and 103 of the Statement of Claim,* 24 February 2000, at ¶11, **RLA-036**; Técnicas Medioambientales, TECMED S.A. v. The United Mexican States (Case No. ARB (AF)/00/2), Award, 29 May 2003 at ¶73, **CLA-113**. See also *Feldman* which came to the determination that time limitations issues are not jurisdictional issues, discussed *infra*: Marvin Roy Feldman Karpa v. United Mexican States (ICSID Case No. ARB(AF)/99/1), Award, 16 December 2002, (*Feldman, Award,* 16 December 2002), **RLA-081.**

[143] Mew, G., *The Law of Limitations*, 2nd ed. (Markham: Butterworths, 2004), at 12, **CLA-279**; *Peter Blaine v. Jamaica,* Inter-American Court of Human Rights Case 11, 827 (1998) at ¶52, **CLA-280**; *Wena Hotels Limited v. Arab Republic of Egypt* (Case No. ARB/98/4), Award, at ¶¶102-105, **CLA-281.**

[144] Gentini (Italy v Venezuela), Reports of International Arbitral Awards, 1903, Volume X, p.551, **CLA-277.**

209) These NAFTA time limits have been the source of a considerable amount of consideration of the temporal aspects of international law because these time limits need to interact with the operation of continuing acts.

210) Both the *Feldman* and *UPS* NAFTA Tribunals refused to apply Article 1116(2) to bar claims challenging acts that were still continuing. The Tribunals refused to bar the claims because international law accepts that in continuing an action inconsistent with international law, a state is taken to repeat that action every day and, therefore, commits a separate breach of international law every day. The Investor becomes aware of this separate breach every day and, therefore, cannot be time-barred while the state continues to breach its obligation.[146]

211) In the *UPS* claim, the core issue was the maintenance of certain special privileges and powers established by statute for the Canada Post letter mail monopoly, which were being applied to other business lines, such as courier and parcel delivery. The statutory basis for these powers had been in place for a period that exceeded the three-year period before the filing of the claim. [147]

212) The *UPS* Tribunal confirmed that a continuous course of action means that the limitation is extended for each day that the continuous acts continue. [148] Hence, the *UPS* NAFTA Tribunal said:

> ...continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly.[149]

213) The *UPS* Tribunal went on to say:

> This is true generally in the law, and Canada has provided no special reason to adopt a different rule here. The use of the term 'first acquired' is not to the contrary, as that logically would mean that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period, even if the investor later acquired further information

[146] The UPS and the Feldman cases addressed situations where the continuing breach was known to exist at the time of the wrongdoing. A different situation would arise if the Party compounded its international wrongfulness by hiding the public knowledge of its measure. This situation is relevant to the current arbitration and is discussed with the *dies ad quo* issue below.

[147] *United Parcel Service of America v. Government of Canada,* Award on the Merits, (24 May 2007), **CLA-282.**

[148] *United Parcel Service of America v. Government of Canada,* Award on the Merits, (24 May 2007), at ¶28, **CLA-282.**

[149] *UPS,* Award, at ¶28, **CLA-282.**

> confirming the conduct or allowing more precise computation of loss. The Feldman tribunal's conclusion on this score buttresses our own.[150]

214) The *Feldman* NAFTA Tribunal reached the same conclusion.[151] In that case, the Tribunal considered a claim that Mexico had breached its NAFTA obligations by failing to rebate tax expenses to the investor. The facts included a complicated series of legislative acts, administrative decisions, and court challenges that unfolded over a number of years, many of them before the three-year period began. Mexico first refused to rebate the taxes in 1990 but continued to refuse to rebate until the investor brought a claim in 1999. Even though the Investor claimed more than three years after the measure began, the Tribunal rejected Mexico's argument that the claim was time-barred and went on to find that Mexico's continuing act breached the NAFTA.[152] The tribunal considered and upheld on the merits, claims concerning the denial of a set of specific requests for tax rebates, each request having been filed within the three years.

215) Temporal issues with respect to the coming into force of the treaty arose in the *Mondev* claim. Here, the issue was whether state responsibility was barred because the measures occurred prior to the entering into force of NAFTA in 1994. The *Mondev* Tribunal excluded from eligibility various actions that had taken place prior to NAFTA's entering into force and considered on the merits a court decision that had been rendered after that date. With respect to the pre-1994 actions, the tribunal stated that, as they did not trigger NAFTA liability in the first place, they could not be the subject of ongoing duties to remedy NAFTA breaches that arose after NAFTA had entered into force.

216) The *Mondev* Tribunal, however did have something important to say about the NAFTA requirement that a claimant be not only aware of a breach of the NAFTA but also be aware of loss arising from that breach. The *Mondev* Tribunal stated:

[150] *UPS,* Award, at ¶28, **CLA-282.**

[151] *Feldman, Award,* 16 December 2002, ¶203, **RLA-081.**

[152] The *Feldman* Tribunal said: "The inescapable fact is that the Claimant has been effectively denied IEPS rebates for the April 1996 through November 1997 period, while domestic export trading companies have been given rebates not only for much of that period but through at least May 2000 ..." The Tribunal went on to say, "...the factual pattern in this case ... demonstrates a pattern of official action (or inaction) over a number of years, as well as de facto discrimination that is actionable under Article 1102"; *Feldman,* Award, at ¶¶187-188, **RLA-081.**

> Since the claims within the Tribunal's jurisdiction are limited to those under Article 1105 which challenge the decisions of the United States courts, no question arises as to the time bar. The present proceedings were commenced within three years from the final court decisions. If it had mattered, however, the Tribunal would not have accepted Mondev's argument that it could not have had 'knowledge of…loss or damage' arising from the actions of the City and BRA prior to the United States court decisions. *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. It must have been known to Mondev, at the latest by 1 January 1994, that not all its losses would be met by the proceedings LPA had commenced in Massachusetts.* In any event, the words 'loss or damage' refer to the loss or damage suffered by the investor as a result of the breach. Courts award compensation because loss or damage has been suffered, and this is the normal sense of the term 'loss or damage' in Articles 1116 and 1117. Thus, if Mondev's claims concerning the conduct of the City and BRA had been continuing NAFTA claims as at 1 January 1994, they would now be time barred. This is a further reason for limiting the Tribunal's consideration of the substantive claims to those concerning the decisions of the United States' courts.[153]

217) In the *Grand River* case, authorities within the United States had enacted a series of tobacco penalty laws in connection with a Master Settlement Agreement reached between a group of U.S. states and a group of tobacco manufacturers. The tribunal held that claims in respect of enactments at the federal and state level, including requirements for producers to make payments based on a percentage of their sales into escrow funds, were barred by the three-year rule. The *Grand River Tribunal* allowed claims to be considered on the merits, however, in respect of later enactments to strengthen the scheme established by the Master Settlement Agreement and to pressure other manufacturers into joining that agreement. The *Grand River* Tribunal held:

> In the circumstances here, the Tribunal has difficulty seeing how NAFTA Articles 1116(2) and 1117(2) can be interpreted to bar consideration of the merits of 37 properly presented claims challenging important statutory provisions that were enacted within three years of the filing of the claim and that allegedly caused significant injury, even if those provisions are related to earlier events. As the Permanent Court observed, while "a dispute may presuppose the existence of some prior situation or fact…it does not follow that the dispute arises in regard to the situation or fact." The *Mondev* and *Feldman* tribunals both considered the merits of claims regarding events occurring during the three-year limitations period, even though they were linked to, and required consideration of, events prior to the limitations period or to NAFTA's

[153] *Mondev International Ltd. v. United States* ARB(AF)/99/2, Award, 11 October 2002, ¶87, **RLA-083.**

> entry into force. In *Mondev*, the Tribunal considered (and rejected) the Claimant's claim that it had suffered a denial of justice in connection with state court proceedings occurring after NAFTA entered into force, although the dispute underlying the litigation arose years before. In *Feldman*, the Tribunal awarded damages in respect of discrimination occurring during the three-year limitations period, but its analysis of this and other claims again required consideration of earlier events.[154]

218) The *Grand River* Tribunal rejected the Investor's argument that it could challenge the scheme and claim for all the harm from it at any time, as long as the scheme was being still applied. The Tribunal understood such an argument as essentially rendering the limitation period inapplicable to challenges to statutory schemes as such where those remain in force. The *Grand River* Tribunal's decision rests squarely on its characterization of the Investor's claim as pleaded in terms of the breach being the statutory scheme itself.

219) It is not clear that the disputing parties intended the limitation period to operate in the face of the conflicting rules of state responsibility, which implies that the continuing applications of a statute in breach of a treaty are wrongful acts. But on the other hand, under the "default" customary rules of state responsibility, the Investor would need to allege and prove the specific acts of continuous application and harm therefrom, which they did not seem to do in *Grand River*. So, the *Grand River* Tribunal's approach can be understood as a way of dealing with the fashion in which the Investor had pleaded that case. However, the Tribunal in *Grand River* failed to consider the possibility that, with respect to the continued application of existing non-complying statutory schemes, the NAFTA Parties choose a more specific and targeted vehicle for limiting state responsibility than Article 1116(2), such as the possibility of reserving such schemes in exceptions or reservations to the NAFTA.

220) The *Grand River* Tribunal never needed to deal with the kind of situation in which the treatment of the Investor that is in breach of the NAFTA flows partly from the existence of the scheme as such, partly from many individual acts and omissions of a discretionary nature not predictable based on the bare scheme itself, and partly from the cumulative effect of a scheme that is inherently discriminatory and open to abuse and those specific abuses.

[154] *Grand River Enterprises Six Nations, Ltd., et al, v. United States of America*, Decision on Objections to Jurisdiction, 20 July 2006, ¶86, **RLA-070.**

221) Most recently, the issue of the effects of a continuous breach was considered at length in *Bilcon v. Canada*. In this NAFTA claim, the American claimants challenged discretionary regulatory and administrative measures applied to its applications to expand an existing gravel quarry. Some of these measures were first applied five years before the NAFTA claim was filed, while others arose only ten months before the claim was filed.

222) In *Bilcon*, the NAFTA Tribunal heavily relied on detailed findings of fact. The *Bilcon* Tribunal concluded, based on its review of its own careful factual determinations, that measures that arose more than three years before the initiation of the NAFTA claim were not the types of continuous actions that would extend the operation of the three-year limitation period. As a result, these measures themselves fell outside of the NAFTA time limitation, and the Tribunal held it did not have jurisdiction to consider them as the Tribunal considered that these particular key measures were complete acts with ongoing effects.[155] The *Bilcon* Tribunal held:

> 268. The Tribunal's position that an act can be complete even if it has continuing ongoing effects, is in line with the view of the tribunal in *Mondev*, and further consistent with Article 14(1) of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, according to which:
>
> > The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.
>
> 269. The Investors refer in their submissions to the ongoing effect of imposing blasting conditions, the ongoing effect of requiring (initially) a comprehensive study of the investment and the ongoing impact of the referral of the project to the JRP. These ongoing impacts, however, do not establish that there were ongoing acts.[156]

223) The *Bilcon* Tribunal continued to consider the requirement in the NAFTA that a claimant knows about the breach and about the loss arising from that breach. The Tribunal stated:

> 271. Even if a distinct act has been completed, however, the three-year period does not begin to run until that investor "first acquired, or should have first acquired, knowledge of the alleged

[155] *Bilcon et al. v. Canada*, Award on jurisdiction and liability at ¶267, **CLA-208.**
[156] *Bilcon* at ¶¶268-269, **CLA-208.**

> breach and knowledge that the investor has incurred loss or damage." …
>
> 281. The Tribunal takes the view, therefore, that as regards the breaches identified by the Investors that arose prior to the beginning of the three-year period starting on 17 June 2005, the corresponding claims must be considered time-barred. They were distinct and completed events, specifically brought about by executive officials in relation to the project rather than of general application, and the Investors had actual or constructive knowledge that these breaches would cause significant loss or damage, even if the full extent of their ongoing adverse effects was not known.[157]

224) The *Bilcon* Tribunal made factual determinations that the **Investors knew** about the existence of certain NAFTA breaches before the three-years in advance of making its claim. The Tribunal concluded that the Investors also knew that they would suffer some sort of loss arising from these breaches – thus meeting both of the requirements to perfect the time limitation in the NAFTA. So, for those breaches, the NAFTA time limitation arose to block a remedy. [158] At the same time, the *Bilcon* Tribunal concluded that other measures, which first arose within three years of the filing of the claim, were not excluded from its consideration.

225) The *Resolute Forest* NAFTA Tribunal came to the same conclusion when considering this issue. The *Resolute Forest* Tribunal said:

> As to the requirement of breach, one cannot know of a breach until the facts alleged to constitute the breach have actually occurred. It is not enough that a breach is likely to occur; paragraph (2) deals with allegations, no doubt, but not with contingencies.222 There may thus be a difference between the date of different breaches arising from a given course of governmental conduct.[159]

226) While this issue need not be determined by the Tribunal as part of the bifurcation consideration, it is important to note that the determination of the temporal *dies a quo* issue of when damages first began to run will require a full determination of the merits of this case. For example, in the 2017 ICSID award, *Ansung Housing Co. Ltd. v. the People's Republic of China*, the ICSID Tribunal held that the limitation period ran from the date on which the investor was first aware of *any* damage from *any* breach of the treaty, even if the investor's claim includes damages

[157] *Bilcon* at ¶¶271 and 281, **CLA-208.**
[158] *Bilcon* at ¶¶272 - 281, **CLA-208.**
[159] Resolute Forest Products v Canada, Decision on Jurisdiction and Admissibility, January 30, 2018. (**RLA -079**)

which only occurred, or they only became aware of, later.[160] However, the *Ansung Housing* Tribunal noted the following:

> 112. The Tribunal acknowledges Claimant's legal argument that a continuing omission by a host State, such as alleged here, is recognized as a breach, for example in *Pac Rim v. El Salvador*, and that damages for such a continuing breach may be measured from different times after the first incident of that omission. As noted by the UPS tribunal, a "continuing course of conduct might generate losses of a different dimension at different times." [161]

227) The Tribunal will not be able to adjudicate this Article 1116(2) issue without a full understanding of the ongoing acts of Ontario and Canada to suppress public knowledge of the internationally wrongful actions of Ontario government officials is at the heart of Tennant Energy's claim.

a) These facts are highly relevant to the determination of the loss and the breach.

b) They involve a consideration of the spoliation of evidence issue (which, as described more fully below, requires the production of further evidence).

c) It appears to be a part of a composite act, also involved with the existence of the conspiracy and the "Breakfast Club." This matter cannot be determined without a prejudgement of the merits.

d) The Tribunal can see that Canada brazenly continues in this attempt of concealment even during the conduct of the current arbitration – including Canada's attempts to destroy transparency by seeking to have the Tribunal exclude the consideration of highly material evidence of internationally unlawful acts from its consideration.

228) Canada's continuing course of conduct needs to be considered – as no potential claimant would be able to commence a claim if government secrecy makes them unaware of the true cause of that loss. That was exactly the situation in the Tennant Energy claim.

[160] Ansung Housing Co., Ltd. v. People's Republic of China (ICSID Case No. ARB/14/25) Award, 9 March 2017, at ¶110, **RLA-161.**

[161] Ansung Housing Co., Ltd. v. People's Republic of China, at ¶112, **RLA-161.** The Ansung Housing Tribunal referenced ¶30 of the *UPS* NAFTA case for its reference to that Tribunal's decision

229) Thus, within the NAFTA context, and outside it, international tribunals broadly have approached time limits in a manner to ensure the effectiveness of international tribunals to address internationally wrongful behavior.

230) Canada provides an unbalanced view of the law of jurisdiction in its Jurisdictional Memorial.[162] However, even in this unbalanced approach, Canada summarizes its position on the meaning of construction knowledge in paragraph 111 of its Jurisdictional Memorial as follows:

> 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."[163] Consequently, the three-year limitation period cannot be extended, for example, through willful 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 damage, or a lack of carefulness on the part of the investor to discover any loss or damage that it may have incurred. [164]

231) Canada's own definition of constructive knowledge does not apply to information that could not have been known by Tennant Energy because the information was not known. Despite Canada's best attempts, Canada provides no evidence that Tennant Energy had any knowledge, actual or constructive, of these key events that are specifically identified in the Notice of Arbitration.

PLEADINGS ONLY NEED TO DISCLOSE A *PRIMA FACIE* CLAIM

232) Where a disputing party alleges that an arbitral tribunal does not have jurisdiction over the matter submitted to it, the tribunal is bound to examine only whether the claimant's pleading discloses an issue upon which the parties have consented to arbitrate. The task of the tribunal is not to examine whether the claimant's case will ultimately succeed or fail.

233) This is consistent with the approach that other Tribunals have taken. For instance, in *AMCO v. Indonesia*, the ICSID Tribunal put it this way:

[162] Tennant Energy notes Canada's position but does not agree with it. This bifurcation response is not the correct venue to address the substantive errors contained in Canada's Jurisdictional Memorial.
[163] Grand River Enterprises Six Nations, Ltd., et al v. United States of America (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006**, RLA-070.**
[164] Canada's Jurisdictional Memorial at ¶111.

> The Tribunal is of the view that in order for it to make a judgement at this time as to the substantial nature of the dispute before it, it must look firstly and only at the claim itself as presented to ICSID and the Tribunal in the Claimants' Request for Arbitration. If on its face (that is, if there is no dispute by the Claimants) the claim is one "arising directly out of an investment," then this Tribunal would have jurisdiction to hear such claims. *In other words, the Tribunal must not attempt at this stage to examine the claim itself in any detail, but the Tribunal must only be satisfied that prima facie the claim, as stated by the Claimants when initiating this arbitration, is within the jurisdictional mandate of ICSID arbitration, and consequently of this Tribunal.* (Emphasis added).[165]

234) This is the approach consistently taken by NAFTA Tribunals when addressing jurisdictional challenges in other Chapter 11 cases. For instance, in *Ethyl Corporation and Canada*, Canada raised jurisdictional objections like those raised here. In rejecting Canada's plea, the Tribunal articulated the proper approach as follows:

> On the face of the Notice of Arbitration and the Statement of Claim, Ethyl states claims for alleged breaches by Canada …… and alleges that it has "incurred loss or damage by reason of, or arising out of," such breaches, all as required by Article 1116(1). It likewise is beyond doubt that Claimant has acted within three years of the time when it "first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that [it] incurred loss or damage as stipulated in Article 1116(2). *Claimants Statement of Claim satisfies prima facie the requirements of Article 1116 to establish the jurisdiction of this Tribunal.*[166]

> As was stated in Administrative Decision No. II (1922), Decisions and Opinions, Mixed Claims Commission, United States and Germany (1925) 6- 7, quoted in K.S. Carlston, the Process of International Arbitration 77 (1946): "*When the allegations in a petition…bring a claim within the terms of the Treaty, the jurisdiction of the Commission attaches.*" See also Ambatielos Case (Greece v. United Kingdom), merits: obligation to arbitrate, 1953 I.C.J. Rep. 10,11-12 (Judgment of May 19) ("[T]]he words 'claims…based on the provision of the Treaty of 1886…" can only mean claims depending for support on the provisions of the Treaty of 1886…*The fact that a claim purporting to be based on the Treaty may eventually be found by the Commission of Arbitration to be unsupportable under the Treaty, does not of itself remove the claim from the category of claims which, for the purpose of arbitration, should be regarded as falling within the terms of the Declaration of 1926*…".(Emphasis added)[167]

[165] *AMCO Asia Corporation and Others v. Republic of Indonesia*, 1 ICSID Rep. 389, Decision on Jurisdiction, (25 September 1983) at 405, ¶38, **CLA-283.**
[166] *Ethyl Corporation and Canada,* Award on Jurisdiction, (June 24, 1998) at ¶61, **RLA-069.**
[167] *Ethyl Corporation and Canada,* Award on Jurisdiction, (June 24, 1998) at ¶61, **RLA-069.**

235) This same approach was adopted by the NAFTA Investor-State Tribunal in the *Pope & Talbot* Claim, where, the Tribunal said:

> In its Statement of Claim the Investor claims that the breaches described above relate to the Investor or the Investment, and that in each case it or the Investment has sustained loss or damage by reason of those breaches. For the purposes of the present Motion, the Tribunal must take those assertions of fact as true. Upon that basis it cannot be said that there is no investment dispute between the Investor and Canada. The Investor claims breaches of specified obligations by Canada which fall within the provisions of Section A of Chapter Eleven. In the view of the Tribunal, the Investor and Canada are disputing parties within the definition in Article 1139. Whether or not the claims of the Investor will turn out to be well founded in fact or law, at the present stage it cannot be stated that there are not investment disputes before the Tribunal [168]

236) It is also the approach that was adopted by the Tribunal in the NAFTA Chapter 11 claim advanced by the *Loewen Group, Inc.*[169] There, the Tribunal deferred to the merits phase those matters that required an assessment of the factual context to be properly determined, and also deferred consideration of those issues which might, but did not clearly, go to jurisdiction. The Tribunal determined the appropriate course would be to consider such arguments at the merits phase.[170]

237) The *UPS* Tribunal, in its jurisdictional award referred to the decision of the ICJ in *Oil Platforms* as follows:

> The International Court of Justice in the Case concerning Oil Platforms (Islamic Republic of Iran v United States of America) 19961CJ Reports 803, para 16 puts the test in this way: [The Court] must ascertain whether the violations of the Treaty . . . pleaded by Iran do Or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction ratione materiae to entertain, pursuant to Article XXI, paragraph 2.

[168] *Pope & Talbot, Inc. and Canada*, Measures Relating to Investment Motion, January 26, 2000, at ¶25, **CLA-284.**
[169] Loewen Group, Inc. and United States of America, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, (ICSID Case No. ARB (AF)/98/3), January 5, 2001, **CLA-285.**
[170] *Loewen Group, Inc.* at ¶¶74-76, **CLA-285.**

> That paragraph gave the Court jurisdiction over any dispute between the Parties about "the interpretation or application" of the Treaty.[171]

238) The UPS Tribunal concluded that it had the following task:

> 36. The reference to the facts alleged being "capable" of constituting a violation of the invoked obligations, as opposed to their "falling within" the provisions, may be of little or no ·consequence. The test is of course provisional in the sense that the facts aJ1eged have still to be established at the: merits stage. But any ruling about the legal meaning of the jurisdictional provision. for instance, about its outer limits. is binding on the parties.
>
> 37. Accordingly, the Tribunal's task is to discover the meaning and particularly the scope of the provision which UPS invokes as conferring jurisdiction. Do the facts al1eged by UPS fall within those provisions; are the facts capable, once proved, of constituting breaches of the obligations they state? It may be that those formulations would differ in their effect in some circumstances but in the present case that appears not to be so.[172]

239) Thus, this Tribunal's task is to consider whether a case meeting the terms of the Treaty has been pleaded. If so, that case continues.

240) In this case, there is no dispute that a claim that first arose from the release of information arising from the *Mesa Power* NAFTA hearing in October 2014 would, by necessity, first arise after June 1, 2014.

241) The only question is whether Tennant Energy alleged such a case, and was this information known by Tennant Energy before June 1, 2014.

THE FACTS ESTABLISH THE DATE OF BREACH WAS NOT EARLIER THAN AUGUST 15, 2015

242) Tennant Energy filed a detailed Memorial on August 7, 2020. That document set out many admissions of internationally wrongful conduct senior Ontario government officials made by

[171] *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 22 November 2002, at ¶35, **CLA-286.**

[172] *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 22 November 2002, at ¶¶36-37, **CLA-286.**

regarding the administration of the Ontario FIT Program. These actions form the basis of the Investor's claim.

243) Ontario had an ongoing policy to conceal and suppress compromising information about how it manipulated the Ontario FIT Program to reward friends and supporters at the cost of law-abiding FIT Proponents such as Skyway 127, who followed the public terms of the renewable energy program. Ontario rewarded its friends, who otherwise had failed under the program's terms, at the cost of would-be successful applicants like the Skyway 127 wind project owned and controlled by Tennant Energy.

244) Canada attacks Tennant Energy's claim by claiming that Tennant Energy must have known about the NAFTA breach by June 1, 2014 – more than three years before Tennant Energy brought its NAFTA Claim (on June 1, 2017).

245) In essence, Canada suggests that Tennant Energy should have known of the secret and wrongful conduct of Ontario officials before such conduct was admitted at the *Mesa Power* NAFTA hearing.

246) In this arbitration, Tennant Energy's Notice of Arbitration addressed measures that first arose within three years of the June 1, 2017 date of filing of the Notice of Arbitration. This information is clearly evidenced in the record. It is clear that none of this evidence could have been known before June 1, 2014 – as it was still secret and being suppressed by Ontario at that time.

Breakfast Club actions	Non-GEIA conforming measures to Korean Consortium	[redacted] Meets with President of NextEra
• August 15, 2015 - *Mesa Power* Investor's Post Hearing Brief.	• April 30, 2015 - *Mesa Power* Hearing Transcript and • August 15, 2015 - Mesa Power Investor's Post Hearing Brief.	• August 15, 2015 - *Mesa Power* Investor's Post Hearing Brief.

"THE BREAKFAST CLUB" AND IPC

247) The **Breakfast Club** addresses the evidence provided at the *Mesa Power* NAFTA Hearing by Assistant Ontario Deputy Energy Minister Susan Lo about the existence of a previously unknown body of the most senior public civil service official and political officials who "fixed" issues for the government to ensure that local friends and political cronies obtained favorable outcomes.

248) The result of these actions was to artificially reduce the amount of available transmission capacity to FIT Proponents in the Bruce Transmission zone to a level where Skyway 127 could not obtain a FIT Contract. These actions also enabled other FIT Proponents, who were otherwise unable to be considered for FIT Contracts at that time, to obtain FIT Contracts in preference to those waiting for launch period FIT Contracts in the Bruce Transmission Region.

GEIA NON-CONFORMING MEASURES

249) The **GEIA Non-conforming measures** address the evidence provided at the *Mesa Power* NAFTA Hearing by Assistant Ontario Deputy Energy Minister Susan Lo and former FIT Program Director Jim MacDougall about how the government engaged in unannounced policies that were not in conformity with the terms of the Green Energy Investment Agreement to

ensure that the members of the Korean Consortium (and their local joint venture partner) obtained favorable outcomes to which the Korean Consortium was not entitled under the GEIA. As a result of these programs, Ontario set another reduction in the amount of available transmission capacity available to FIT Proponents in the Bruce Transmission zone to a level where Skyway 127 was not able to obtain a FIT Contract.

[redacted] SECRET MEETING WITH NEXTERA

250) The [redacted] **with Al Wiley, Vice President of NextEra**, first disclosed in the evidence provided at the *Mesa Power* NAFTA Hearing by Assistant Deputy Energy Minister Susan Lo. This meeting with the most senior government officials resulted in a list being left with the government of six NextEra projects seeking assistance. None of the NextEra projects were located in the Bruce Transmission zone, but, after the meeting, senior officials modified the rules in a major fashion that resulted in NextEra obtaining favorable outcomes.[173] This disclosure's effect was not about some routine communication between a FIT Proponent and the FIT Program administrators. This was an unprecedented secret high-level meeting between a corporate CEO and [redacted].[174] Shortly thereafter, very significant FIT Program changes took place that benefited NextEra over Skyway 127.[175] This information of a meeting between the CEO and the [redacted] and the subsequent admission that lists of projects were provided to the government, first became public through a reference in the evidence provided at the *Mesa Power* NAFTA Hearing by Assistant Ontario Deputy Energy Minister Susan Lo.[176]

SPOLIATION OF DOCUMENTS

251) A final area Tennant Energy raises is the impact of the **spoliation of documents**. As the Tribunal is aware, there has been a criminal conviction about the destruction of critical Ontario

[173] Investor's Memorial at ¶¶253-259.
[174] Investor's Memorial at ¶255.
[175] Investor's Memorial at ¶258.
[176] Mesa Power Group LLC v. Government of Canada, (PCA Case 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014), Discussed at 1:25:35, **C-204.**

Energy Policy documents.[177] Because of the grave due process and rule of law matters raised in connection with this spoliation of evidence, and given Canada's ongoing campaign to refuse to produce documents, the extent of the relevance of this particular breach cannot be fully assessed until document production has been completed. Only after document production is finished will Tennant Energy be able to identify documents that should be available but for their destruction through spoliation. No matter what it makes no sense for jurisdiction to be bifurcated until that production happens.

252) The spoliation actions are of grave concern. They deal with a conspiracy against law and the rule of law. There is no way that Tennant Energy could be sufficiently aware of the impact of these missing documents on Tennant Energy's interests until after document production takes place as Ontario has done its best to keep this conspiracy secret from the public.

253) At the January 2020 Procedural Hearing, Tennant Energy addressed these issues and explained that Tennant Energy could not have known about the breaches before June 1, 2014, because of Canada's policy of concealment and suppression of information. Counsel for Tennant Energy explained that the information first became available by reviewing information about actions that the most high-ranking Ontario civil servants and political leaders took in secret "breakfast club" meetings. [178]

254) Canada is required to review the claim and facts as asserted on a *prima facie* basis. The test for this Tribunal is whether it has jurisdiction to consider a claim as that pleaded by the Investor, Tennant Energy.

255) Instead of following this approach, Canada has substituted different facts and acts instead of those the Investor has pled. Perhaps Canada could define the basis of the claim if Canada were the Claimant in this arbitration – but Canada is not the Investor in this arbitration. Canada is the Respondent. Thus, Canada must consider the facts and allegations of breach as submitted by Tennant Energy. It may well be that Canada does not like the results of how its policy of

[177] Rob Ferguson, *Toronto Star*, "Former McGuinty chief of staff found guilty of deleting documents in wake of power plants cancellation," 19 January 2018, **C-009.**
[178] Transcript, Tennant Energy v Canada Procedural Hearing on Bifurcation and Preliminary Motions, Transcript Day 1 (Public Version), 14 January 2010, at page 64, line 2.

evidence suppression has resulted in a delayed time of discovery of wrongfulness. Still, Canada is not allowed to change the dates of the breach simply to accommodate this motion.

256) Further, Canada's ongoing strategy to suppress information about these internationally wrongful acts creates a continuing course of conduct that also impacts the determination of the *dies a quo*. This composite act is complicated even more by the spoliation issue, which requires even more document production and also the need to consider the impact of the role of the "Breakfast Club." Together this heightens the need to consider this issue in the context of considering the merits of the claim.

257) Based on the submissions, for this Tribunal to bifurcate the proceedings, the Tribunal would need to reject the core allegations about the timing of the breach asserted by Tennant Energy. These allegations are:

a) That the Chapter Eleven NAFTA breach arose when Tennant Energy first became aware of the wrongful conduct, and not when the conduct occurred (but was unknown to the Investor).[179]

b) That Tennant Energy first obtained evidence of the admissions made by Ontario Assistant Deputy Energy Minister Susan Lo after June 1, 2014. [180]

c) That the special treatment provided to International Power Canada taken by the mysterious Breakfast Club was not disclosed as part of the public FIT Program criteria.[181]

d) That Tennant Energy owned and controlled Skyway 127 when it became aware of the internationally wrongful conduct. [182]

258) Canada's approach is predicated on the fundamental concept that Tennant Energy should have known that Ontario officials were engaged in unfair covert actions in violation of the terms of the FIT Program **BEFORE** the October 2014 date when Assistant Ontario Deputy Energy Minister Susan Lo first admitted this systemic practice at the *Mesa Power* NAFA hearing. Indeed, the entire Canadian jurisdictional approach is predicated on the Tribunal accepting the absurd

[179] Tennant Energy's Memorial at ¶97 and ¶719.
[180] Tennant Energy's Memorial at ¶¶750, 752.
[181] Tennant Energy's Memorial at ¶82.
[182] Tennant Energy's Memorial at ¶774.

suggestion that Tennant Energy must have known the testimony of Assistant Deputy Minister Susan Lo four months before she ever testified under oath.

259) This absurd factual premise makes Canada's motion frivolous. It also requires a detailed examination of the merits of the case to determine a needless jurisdictional point in advance of considering the merits.

260) By ignoring these core facts, Canada has created a phantom-claim which it can defeat. In this way, Canada's fiction makes its application both frivolous and vexatious. Canada is aware of the limited financial resources of the Investor. Canada has already brought many frivolous motions where it has been mostly unsuccessful. Canada has unlimited financial resources and can rely on the massive resources of Canada's Ministry of Justice in this case. By comparison, the Investor has finite resources limited because of Canada's internationally wrongful conduct. In these circumstances, the frivolous actions of Canada also are vexatious.

261) Finally, Tennant Energy notes that with the filing of Tennant Energy's Memorial and based on the abundance of evidence arising from the *Mesa Power* NAFTA hearing, it is clear that Tennant Energy comes before this Tribunal with a case supported with evidence, including admissions made by senior Ontario government officials such as the admissions of Assistant Deputy Energy Minister Susan Lo reported in the *Mesa Power* Investor's Post-Hearing Brief.

262) Despite the evidence, including admissions from government officials, Canada suggests that Tennant Energy has a weak case. It is obvious from Canada's aggressive technical defenses that Canada will do anything it can to delay the hearing of this case to deprive Tennant Energy of having its day in court.

CANADA'S ARGUMENT THAT TENNANT ENERGY IS NOT AN INVESTOR IS FRIVOLOUS AND FALSE

263) Canada states that this Tribunal does not have jurisdiction because Tennant Energy did not own or control Skyway 127 at the time of the breach.

264) The Tennant Memorial pleads that Tennant Energy owned and controlled Skyway 127 before the August 15, 2015 date of the breach. The Memorial states:

> 772. Tennant is an investor of a NAFTA party that "seeks to make, is making or has made an investment." Tennant Energy, an American national, owns and controls shares, a form of equity security, in Skyway 127.
>
> 773. This makes Tennant Energy an investor as defined by paragraph (b) of the definition of "Investment" in NAFTA Article 1139.
>
> a) At the time of making the NAFTA Claim, Tennant Energy controlled Skyway 127.
>
> b) Tennant also owned more than a majority of the shares when it made it claim.
>
> c) Tennant owned shares in Skyway 127 before the date that the claim arose on August 15, 2015.
>
> d) Tennant continued to own shares at the time that the claim was filed and holds shares today. [183]

265) The Witness Statement of John C. Pennie specifically addresses this issue as follows:

> 48. John Tennant is an American citizen residing in California.4 John Tennant first acquired the rights to Derek Tennant's 11.3% interest in Skyway 127 on April 19, 2011. As discussed above, the share transfer between John and his brother Derek was not registered in the Skyway 127 company records until June 20, 2011. This was done while we were awaiting the FIT Launch Period Contract announcement for the Bruce Transmission zone. John Tennant told me that he was holding the Skyway 127 shares as a bare trustee for a corporation to be named. Eventually all the shares were registered into a California LLC holding company, that would be later known as Tennant Energy LLC. John Tennant acquired another 11.3% interest in Skyway 127 on December 30, 2011, for a total of 22.6%. As I noted above, all these shares were initially held by John Tennant (as a bare trustee). In 2015, the intangible rights to Skyway 127 beneficially held by John Tennant on behalf of the company were registered over to a company -Tennant Travel LLC. John Tennant held the Skyway 127 shares from IQ Properties and the ones later issued to him from Skyway 127 in December 2011 in trust for the benefit of the still undesignated holding company. Eventually, John Tennant used the existing California limited liability corporation set

[183] Tennant Energy Memorial at ¶¶ 772-773.

> up by his brother Jim Tennant to acquire and maintain John's investment in Skyway 127. Skyway 127 registered the transfer as directed by the John Tennant. [184]

266) In addition to Tennant Energy's ownership of shares in Skyway 127, Tennant Energy also controlled Skyway 127. Tennant's Memorial pleads this point specifically saying:

> 779. From June 2011, onwards Tennant Energy's management effectively controlled the Investment, and this factual situation continued at the time that the NAFTA Claim arose in August 2015, notwithstanding that it only held 45% of the equity in the company, and at the time that the claim was issued in June 2017 when it held nearly all of the equity.
>
> 780. The 2016 transfer of GE Energy's shareholding to Tennant Energy continued the relationship between GE and Tennant in the Skyway 127 project. Tennant Energy continues to control the investment and to own the majority of its equity.[185]

267) While Tennant Energy does not agree that the date of the breach occurred in 2011 or 2013, Tennant Energy still would be an investor with an investment even if the Tribunal concluded that the date of the breach occurred on these two dates proposed by Canada.

268) The definition of investment and investor in NAFTA Article 1139 is exceedingly broad.

269) NAFTA Article 1139 defines the term "investment." This broad definition must be followed by this Tribunal. Paragraph (g) of NAFTA Article 1139's definition of investment covers "property, tangible or intangible acquired in the expectation or used for the purpose of economic benefit." This is a very broad term, and the NAFTA does not restrict the meaning of intangible property. The term intangible property is a broader term than the term "intellectual property rights." Intellectual property only forms a constituent part of intangible property.

270) Intangible property interests acquired in the expectation of economic benefit also protected interests under NAFTA Chapter Eleven. Beneficial rights held by a trust constitute intangible property as well as constituting intangible property interests acquired in the expectation of

[184] Witness Statement of John C. Pennie at ¶48, (**CWS-1**).
[185] Tennant Energy Memorial at ¶¶ 779-780.

economic benefit. Thus, the shares held by John Tennant as a bare trustee for Tennant Energy in 2011 meet the definition of a covered investment.

271) The definition of investor is broad. It covers someone "who makes, is making, or has made an investment." John Tennant had made an investment when he held the shares in trust for a holding corporation to be named later. In addition, the holding of the shares for the eventual benefit of the holding company, which would be known as Tennant Energy, makes Tennant Energy someone who is making an investment if the Tribunal does not conclude that the investment was already made. In either event, Tennant Energy has standing.

272) The *Pope & Talbot* Tribunal considered that access to export markets constituted such a protected interest and was thus protected by the terms of NAFTA Article 1110.[186]

273) The NAFTA protects intangible property used for the purpose of economic benefit. It is abundantly clear that the NAFTA specifically protects investors from the uncompensated taking of many different types of intangible property interests.

274) Paragraph (h) of Article 1139 is also clear and broad. The interests listed therein in connection to the commitment of capital or other resources in the territory for the purpose of economic benefit are mere examples in what is otherwise an open-ended list. Had the drafters intended to limit the types of interests covered by Paragraph (h) only to contracts and concessions, they could have easily done so with express wording to that effect. If one wanted to restrict the scope of "interests" referred to in Paragraph (h), it would be reasonable to suggest that they may be limited to commercial interests, since these clearly arise from the commitment of capital. The meaning is broad and must be supported by the overall wording of Paragraph (h), and not inconsistent with the objects and purposes of the NAFTA.

275) The only limits on the definition of investment are those expressly set out in 1139(i), which excludes claims to money. Only intangible interests, which are express claims to money, are excluded.

276) The *Merrill & Ring* Tribunal came to the following conclusion:

[186] Pope & Talbot Inc. v. The Government of Canada, *Interim Award,* 26 June 2000, at ¶¶96-98, **CLA-287.**

> 143. The Tribunal is in agreement with the view expressed in *Pope & Talbot* to the effect that the access to the United States' market was an important aspect of the business concerned in that case. So too, the Tribunal has no doubt that in this case, the right to access the international market is a fundamental aspect of the log export business of the Investor. Were this right impeded or prohibited it would certainly qualify for protection under NAFTA because it is the very objective of the investment made. However, there can be no doubt that the conditions and terms under which such a right may be exercised may be subject to appropriate regulation, provided this does not result in a form of substantial interference with the business.
>
> 144. In this regard, as was also concluded in *Pope & Talbot*, the business of the investor has to be considered as a whole and not necessarily with respect to an individual or separate aspect, particularly if this aspect does not have a standalone character. It could well happen that a certain aspect is so fundamental to the business concerned that interference with it might result in a kind of compensable expropriation. [187]

277) In *Merrill & Ring*, the Investor was seeking compensation for impediments placed on its ability to obtain "world price" for its product on the export market. Merrill & Ring was forced to first seek a "local price" for its products that were at a serious discount to world prices. The Tribunal found that the blockage on the right to obtain world prices for its export was not a protected interest because export prices were uncertain and thus too speculative – but the Tribunal did not determine that market access nor export access were not protected interests under the NAFTA. The *Merrill* Tribunal, like the earlier *Pope & Talbot* Tribunal, correctly determined that the nature of the intangible rights must be considered within the context of the investment's business.

278) This Tribunal in the present case also should take such an approach when considering whether the intangible property rights in the form of beneficial rights held by a bare trustee for Tennant Energy fits within the definition of NAFTA Article 1139.

CANADA'S JURISDICTIONAL MEMORIAL BLOWS SMOKE – BUT NO FIRE.

279) This motion on bifurcation is not the place to address all of Canada's jurisdictional arguments. However, a summary review of the arguments in Canada's Jurisdictional Memorial demonstrates

[187] *Merrill & Ring* at ¶¶ 143 and 144, **CLA-167.**

the weakness of its position. At its core, because Canada cannot answer the relevance of the evidence from the *Mesa Power* NAFTA hearing, Canada simply ignores Tennant Energy's submissions in its Bifurcation request and Jurisdictional Memorial.

280) A review of Canada's arguments demonstrates that little utility would be obtained through bifurcation. By comparison, if there were a bifurcation, little would be achieved, but there would be significant disruption, delay, and cost.

BEFORE THE MESA HEARING, THERE WAS NO PUBLIC INFORMATION ON THE HIGH-LEVEL MEETING BETWEEN [redacted] AND NEXTERA

281) Canada contends in its Jurisdictional Memorial that Tennant Energy should have been aware that there were improper contacts underway between NextEra and the government. At paragraph 139, Canada states:

> Mesa also alleged in its *Answer on Canada's Preliminary 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.[188]

282) However, a review of the facts demonstrates that there is no reasonable basis for this position. Before the *Mesa Power* NAFTA hearing, there was no information disclosed to the public on the high-level meetings between [redacted] and NextEra Vice-President Al Wiley.

283) Canada ignores the position that it strenuously advocated on this issue before the Tribunal in the *Mesa Power* arbitration. Canada now says that Tennant Energy should have known Canada's defense was meritless. In essence, Canada says that Tennant Energy should have known not to

[188] Canada's Jurisdictional Memorial at ¶139.

trust Canada and thus commenced an investor-state arbitration at that time without any further information. Canada argued before the Mesa Power Tribunal that there was nothing "unique nor unusual" in the meetings between Ontario officials and lobbyists. Canada said:

> 422. The Claimant's only evidence of the conspiracy it alleges is the fact that meetings took place between NextEra and government representatives. However, the mere fact that meetings occurred is not a reason for the Tribunal to assume some sort of conspiracy. In fact, both the Ministry of Energy and the OPA regularly had meetings with numerous FIT applicants throughout the relevant period. As stated by Sue Lo, "if someone requested a meeting, it was part of my job to meet with them." She explains that she met with hundreds of proponents. NextEra is neither unique nor unusual in this regard. And as Sue Lo confirms, FIT applicants were not provided with any special treatment during these meetings: "[a]ny information provided was publicly available."
>
> 423. The Claimant has presented no actual evidence in support of its allegations. Indeed, it has no real evidence that NextEra was given any sort of advance information that gave them an unfair advantage or that the Government of Ontario or OPA discussed ways in which their projects would most benefit. For example, as support for its allegation that "the Minister of Energy's Office took explicit steps to ensure the process was being executed to the benefit of NextEra," the Claimant cites a meeting note asking for the Minister to be prepared to contextualize next steps for the company. It also refers to a briefing note, which sets out how 'enabler requested' projects would be able to request a connection point. This is hardly evidence that demonstrates discriminatory intent or favoritism.
>
> 424. Similarly, the Claimant alleges that NextEra "gained assistance through the Ontario Premier's office" which expressed "its political preferences," however, the email that the Claimant cites in support of its allegation simply notes the Premier's preference to speed up the contract award process and for it to include a connection point amendment window. These so-called "political" preferences demonstrate that the Minister's office was simply interested in a fair and efficient outcome.[189]

284) Indeed, Canada previously argued that these contacts were not improper and did not indicate a NAFTA breach. How can Canada now be believed when it argued strenuously on the other side of this issue in the Mesa Power arbitration. Canada cannot credibly suggest that despite its arguments that these low-level meetings were proper in Mesa Power, that Tennant Energy

[189] *Mesa Power Group LLC v. Canada*, Canada's Counter-Memorial, ¶ 422 – 424 (footnotes omitted). (Public Version), 28 February 2014, ¶¶422-424. **C-177**.

should have known that Canada's argument was wrong and instead brought a NAFTA claim based upon these same low-level contacts.

285) Canada does not address the deeply troubling evidence of contacts at the highest level concerning the public bidding process, including the fact that the Minister of Energy's office provided confidential information and protection to certain domestic FIT investors.

286) A simple review of Canada's contentions about prior allegations of meetings between government officials and FIT investors demonstrates why Canada's argument fails.

287) Canada takes the position that Tennant Energy knew that internationally wrongful behavior described in its claim had taken place. At paragraphs 119 and 139 of its Jurisdictional Memorial, Canada relies on the following:

a) Mesa Power Investor's Answer on Canada's Preliminary Objections on Jurisdiction[190] which mentioned a January 2011 meeting between the OPA and NextEra;

b) A February 25, 2011 meeting between an official at the Ministry of Energy and NextEra about connection points;

c) an April 2011 IESO meeting.

288) A careful review of Canada's supporting documents evidence that any knowledge of these three events would not give rise to a knowledge of the breaches at issue in the Tennant Energy Claim.

[191] During the confidential session of the Mesa Power Hearing Video, there is a discussion about an email confirming that NextEra Vice President Al Wiley met with [redacted]. The reference is to Mesa Power Exhibit C-0681. It is described in the video, but the email is not shown. Mesa Power Video, Day 3, Part 2 at hour 1:25:30, **C-204.**

APRIL MEETING WITH NEXTERA AND THE IESO IN APRIL 2011

289) Canada contends that *Mesa Power* Investor's Answer on Canada's Preliminary Objections on Jurisdiction provides the critical information that Canada says would enable the claim made by Tennant Energy. However, a review of this document does not support Canada's contention.

290) Nowhere in the *Mesa Power* Answer on Canada's Preliminary Objections on Jurisdiction does Canada identify the particular type of information to support the claims made in Tennant Energy about International Power Canada, the high-level meetings with the [redacted] and NextEra, or the fact that the Korean Consortium was not being treated in a manner consistent with the GEIA. Canada ignores the relevant issues and attempts to confuse matters by scattering information that provides context but is not critical to the issues in dispute.

291) This is made even more confusing because Canada now argues that Tennant Energy should have been aware of NAFTA breaches for matters that Canada argued vociferously against being NAFTA breaches in the Mesa Power Claim.

292) To be specific, Canada does not address the previously secret information that there were private meetings at the highest level between Al Wiley, the Vice-President of NextEra, and the [redacted][191] This meeting resulted in NextEra providing the Ministry of Energy with a wish list of the "six-pack" -- six failed FIT Projects located in the West of London Transmission zone to the Ontario Ministry of Energy. An email in the Tennant Energy record, which confirms that the Ontario government disclosed confidential information about the results of FIT Competitors (the "dry run"), is set out as Exhibit C-213 (This same document was identified as Mesa Power exhibit C-0090).[192] This email discusses that this highly sensitive information was shared by Ontario with NextEra. This information was not shared with others.

[191] During the confidential session of the Mesa Power Hearing Video, there is a discussion about an email confirming that NextEra Vice President Al Wiley met with [redacted]. The reference is to Mesa Power Exhibit C-0681. It is described in the video, but the email is not shown. Mesa Power Video, Day 3, Part 2 at hour 1:25:30, **C-204.**

[192] Exhibit **C-213** (Mesa Power C-0090) is exhibited in the public Mesa Power video on Day 3- Part 2 video at hour 1:27:21**.** (This document is displayed in the public session, not in the confidential session).

293) Remarkably the FIT Rules were modified in such a way as to swiftly allow the six-pack to be able to obtain FIT Contracts in the Bruce Transmission zone. [193]

294) None of this information was known to the public prior to the release of the submissions discussing the *Mesa Power* NAFTA hearing.

295) A review of Canada's contentions shows that they are mere "smoke and mirrors." Examining the documents Canada relies upon demonstrates that Canada has taken every opportunity to systemically shield its wrongful administration of the FIT Program from the public.

THE JANUARY 2011 MEETING

296) The *Mesa Power* Investor's Answer on Canada's Preliminary Objections on Jurisdiction refers to a January 2011 meeting. Paragraph 74 of the Mesa Power Investor's Answer states the following:

> In mid-January 2011, shortly after the OPA announced that 1200MW of contracts would be offered in the Bruce region, a lobby organization, the Canadian District Energy Association, contacted the OPA to set up a meeting on behalf of a competitor, NextEra Energy Resources, to discuss the migration of their projects in the "West of London" region to the "Bruce" region.[194]

297) This meeting was set by the Canadian Windpower Association. It was not a secret meeting. It would not suggest to a FIT Proponent that nefarious or improper conduct was underway.

THE FEBRUARY 25, 2011 OPA MEETING

298) The *Mesa Power* Investor's Answer on Canada's Preliminary Objections on Jurisdiction refers to a February 25, 2011 OPA meeting. Paragraph 76 of the Answer states the following:

> Representatives of NextEra met with the Ministry of Energy on February 25, 2011, to obtain further information about how to change their projects

[193] Investor's Memorial at ¶254; Mesa Power Group LLC v. Government of Canada (PCA Case No, 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, Screenshot at 1:27:21, **C-213.**
[194] Mesa Power Investor's Answer on Canada's Preliminary Objections on Jurisdiction at ¶74, (**R-013)**

> connection point, including specific timing of a window to conduct those changes. [195]

299) This statement is supported by a reference to a February 25, 2011 email between Bob Lopinski, a lobbyist for NextEra, and an administrative official at the Ontario Ministry of Energy, Pearl Ing.[196]

300) Again, this was an informational exchange. It was not a secret meeting. It would not suggest to a FIT Proponent that nefarious or improper conduct was underway.

THE APRIL IESO MEETING

301) The *Mesa Power* Investor's Answer on Canada's Preliminary Objections on Jurisdiction refers to an April 2011 meeting with the IESO – the electrical transmission regulator. Paragraph 77 of the Investor's Answer states the following:

> 77. In early April 2011, the IESO scheduled a meeting with NextEra and its representatives regarding possibilities for connecting to 500kv transmission lines, the lines to which NextEra changed during the connection point amendment window process. [197]

302) This meeting between a FIT Proponent with the transmission regulator would appear ordinary course unless more information were disclosed. While something improper might have taken place, the existence of a meeting might not suggest to a FIT Proponent that nefarious or improper conduct was underway sufficient to raise a NAFTA Claim.

THE GEIA

303) Canada contends in its Jurisdictional Memorial that Tennant Energy could not be unaware that there were improper benefits between Ontario and the Korean Consortium. At paragraph 125, Canada references paragraph 744 of the Investor's Memorial and states:

[195] Mesa Power Investor's Answer on Canada's Preliminary Objections on Jurisdiction at ¶76, (**R-013)**
[196] Mesa Power Investor's Answer on Canada's Preliminary Objections on Jurisdiction at footnote 62 to ¶74, (**R-013)**
[197] Mesa Power Investor's Answer on Canada's Preliminary Objections on Jurisdiction at ¶77, **R-013**.

> 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 [198]

304) Once again, Canada can produce no support for its contentions that this information about the Korean Consortium being non-compliant with the terms of the Green Energy Investment Agreement yet receiving significant and unique benefits. This information was kept secret by Canada. It was known to FIT Proponents and the public before June 1, 2014. Canada reviews its position on the merits of the Green Energy Investment Agreement in paragraphs 126 – 132 of its Jurisdictional Memorial, but not one reference in the document addresses the specific allegation raised by Tennant Energy.

305) Tennant Energy's contention is that it discovered through the evidence from the *Mesa Power* NAFTA hearing that the Canadian government did not require the Korean Consortium to meet its obligations under the GEIA. Nonetheless, Canada was still providing wide-ranging preferential benefits to the Korean Consortium and its joint venture partners. Moreover, Ontario Assistant Deputy Energy Minister Susan Lo admitted that the Korean Consortium did not want the terms of its agreement known so that it could hold bargaining power over other investors.[199]

306) Canada addresses documents regarding the GEIA, but nowhere can Canada demonstrate where this knowledge that Ontario was providing benefits outside of the operation of the GEIA was available to the public. Canada cannot because it kept this disclosure secret like all the other embarrassing matters associated with the operation of the FIT Program.

[198] Canada's Jurisdictional Memorial at ¶125.

[199] *Mesa Power Group LLC v. Government of Canada* (PCA Case No. 2012-17), Hearing Transcript Day 3 (Public Version): Testimony of Sue Lo, 28 October 2014, pp.39: ll22 -40: ll23, **C-121.** - The reason provided by Ontario Assistant Deputy Energy Minister Susan Lo to hide the terms of the GEIA was that the Korean Consortium did not want information released about the GEIA because they did not want contract partners to know the contract terms due to "commercial sensitivity;" **C- 121.**

SPOLIATION

307) At the January 2020 Procedural Hearing, Tennant Energy addressed these issues and explained that Tennant Energy could not have known about the breaches before June 1, 2014, because of Canada's policy of concealment and suppression of information. Tennant Energy explained that the information first became available by reviewing information about actions that the most high-ranking Ontario civil servants and political leaders took in secret "breakfast club" meetings. [200]

308) Canada again misses the point when it addresses the spoliation argument in its Jurisdictional Memorial. The issue with the spoliation claim is that while Tennant Energy is aware that there were acts of spoliation, it needed to obtain information to understand how that spoliation affected its interest.

309) At the January 2020 Procedural Hearing, Tennant Energy addressed these issues and explained that Tennant Energy could not have known about the breaches before June 1, 2014, because of Canada's policy of concealment and suppression of information. Counsel for Tennant Energy explained that the information first became available by reviewing information about actions that the most high-ranking Ontario civil servants and political leaders took in secret "breakfast club" meetings. [201]

310) The Ontario Court of Appeal upheld *Trillium* Wind's rights to continue with its domestic Ontario court case about the spoliation of documents on June 18, 2015.[202] The documents not disclosed by Ontario in the *Trillium Wind* case are also relevant for this arbitration's spoliation claim. As with *Trillium Wind*, Police investigators and the Information and Privacy Commissioner disclosed the fact of the deletion of emails. They also confirmed acts of wiping computer hard drives clean within the Office of the Premier of Ontario to avoid leaving a

[200] Transcript, *Tennant Energy v Canada Procedural Hearing on Bifurcation and Preliminary Motions,* Transcript Day 1 (Public Version), 14 January 2010, at page 64, line 2.
[201] Transcript, *Tennant Energy v Canada Procedural Hearing on Bifurcation and Preliminary Motions*, Transcript Day 1 (Public Version), 14 January 2010, at page 64, line 2.
[202]Order of Master Hawkins, Ontario Supreme Court, June 18, 2015 permitting the filing of a Fresh as Amended Statement of Claim in *Trillium Power Wind Corp v Her Majesty the Queen*, **CLA-278**.

written record regarding the contemporaneous decisions regarding energy.[203] In January 2018, the former Chief of Staff to the Ontario Premier was criminally convicted for the deliberate destruction of the evidence relating to Ontario's energy policy.[204]

311) Canada's asserts that "information on the document destruction and spoliation of evidence by senior officials of the Government of Ontario was highly publicized between 2011 and 2013 and well before the critical date of June 1, 2014"[205] This statement ignores the relevant issue. General information that there may be spoliation is not sufficient alone. There needs to be a nexus between Tennant Energy and the Premier's Office on Ontario energy policy.

312) The admission about the existence of a conspiracy through the "Breakfast Club" makes the spoliation and criminal acts by the government relevant for Tennant Energy. This information could not have arisen until after Tennant Energy became aware of the existence and activities of the "Breakfast Club" from the *Mesa Power* NAFTA hearing testimony of Ontario Assistant Deputy Energy Minister Susan Lo. This is the foundational issue for Tennant Energy's spoliation claim because this disclosure made Tennant Energy first aware that the destruction of documents in the Premier's Office could be relevant to the negative treatment suffered by Skyway 127 during the FIT Process.

313) As addressed in this submission, the Ontario Court of Appeal in the *Trillium Wind* Case has ruled on the spoliation matter since June 1, 2014. As part of this ruling, the Court of Appeal permitted document discovery and filing a new Fresh as Amended Statement of Claim by *Trillium Power Wind Corporation*. As a result of this discovery, *Trillium Wind* disclosed the way documents were hidden by the Ontario Government using obscure project code names to make document requests and information requests more difficult.

314) Before Ontario's Supreme Court, the *Trillium Wind* case has discovered evidence that officials in the Premier's Office used code names to disguise discussions of energy projects to make

[203] Order of Master Hawkins, Ontario Supreme Court, June 18, 2015 permitting the filing of a Fresh as Amended Statement of Claim in *Trillium Power Wind Corp v Her Majesty the Queen* ¶48(d), **CLA-278.**
[204] Rob Ferguson, *Toronto Star*, "Former McGuinty chief of staff found guilty of deleting documents in wake of power plants cancellation," 19 January 2018, **C-009**.
[205] Canada's Request for Bifurcation, ¶ 20, September 23, 2019.

subsequent document production and freedom of information searches impossible. The Fresh as Amended Statement of Claim says:

> 46. Moreover, the Plaintiff states that the Defendant assigned a "code name" to its internal communications regarding "offshore wind" and did so with the express purpose of hiding its misfeasance specifically targeted to injure the Plaintiff, consistent with and concurrently with the Defendant's use of the code name "Project Vapour" to hide its communications regarding the concurrent cancellation of gas fired electricity generating plants in Ontario. The Defendant has not disclosed the "code name" ii assigned to "offshore".
>
> 47. The Plaintiff states further that this spoliation of evidence by the Defendant was intended to defeat or disrupt the Plaintiff's case, and that there exists a direct causal relationship between the act of spoliation and the potential of the Plaintiff's inability to prove its case by reason of the destruction or deliberate concealment of the evidence of misfeasance in public office. [206]

315) The spoliation issue is highly troubling because of the political staff's criminal conduct at the highest level, which may well be involved with the activities of the "Breakfast Club."

316) With the information about the "Breakfast Club" and the subsequent information from the Ontario Court of Appeal, Tennant Energy is better positioned to understand where corresponding documents may be found, or where applications to American Courts for judicial assistance may be necessary.

YOU CAN PUT LIPSTICK ON A PIG, BUT IT IS STILL A PIG

317) There is an old adage that *you can put lipstick on a pig, but it is still a pig*. There is nothing to support Canada's renewed argument that this Tribunal does not have jurisdiction. It is clear from the pleading and the additional evidence now available, and presented in the Investor's Memorial, provides this Tribunal has clear jurisdiction to rule, and it should use that authority.

318) Canada's repeated attempts in its Jurisdictional Memorial to raise baseless and scurrilous issues are simply an unwarranted attempt to obtain delay and impose more cost on Tennant Energy.

[206] Fresh as Amended Statement of Claim in Trillium Power Wind Corp v Her Majesty the Queen 2020 ¶46 - 47, **CLA-278.**

The most basic review of the facts underpinning Canada's argument demonstrates no support to its contentions.

a) Canada offers no argument that Tennant Energy could be aware of the existence of the "Breakfast Club" or the special treatment provided by it to International Power Canada and to others.

b) Canada offers no evidence that there was any public disclosure that the Korean Consortium was in material breach of their obligations under the GEIA, or that the benefits of the GEIA to the Korean Consortium continued to accrue to their benefit despite the fact that the companies were no longer compliant with their obligations.

c) The basis for Tennant Energy's claim arises from the secret high-level meeting between [redacted] and Al Wiley, the Vice President of NextEra. These meetings and subsequent steps are taken to provide benefits to NextEra in the FIT Program were carefully hidden by Canada. A mere mention of a meeting in the *Mesa Power* NAFTA case does not mean that nefarious action took place. Canada has the burden of proof in this motion, and it needs to demonstrate much more specific and actionable. Nowhere in Canada's Jurisdictional Memorial does it demonstrate how Tennant Energy would know this information before June 1, 2014.

d) Finally, Tennant Energy needed to have an understanding of the role of the "Breakfast Club" to appreciate that the criminal spoliation of Ontario energy policy documents in the Premier's Office could be material to the treatment of Tennant Energy and its investment, Skyway 127. Canada avoids this issue entirely in its Jurisdictional Memorial.

319) Such evidence might include secret meetings of high-level officials and corporate officials, resulting in significant policy changes that favor one of the participants. There was nothing in the public version of the *Mesa Power* Investor's Answer on Canada's Preliminary Objections on Jurisdiction that disclosed this information. This first time that such disturbing information was known was a redacted reference in the *Mesa Power* Investor's Post-hearing submissions. This was

a matter that received further elaboration during the public session of the *Mesa Power* NAFTA hearing.[207] That information is now before this Tribunal.

320) Astonishingly, Canada never answers the fundamental point raised by Tennant Energy as to why a claim arising from the knowledge arising from materials disseminated disclosing otherwise hidden information from the *Mesa Power* NAFTA hearing is not capable of being the basis for this arbitration. The failure to address this question in Canada's moiton made after reviewing Tennant Energy's Memorial, is telling. Of course, Canada has no answer because there is *prima facie* jurisdiction.

321) Canada's argument was designed to confuse the issue and to obtain delay by imposing an unnecessary jurisdictional phase to give Canada more time to file its Counter memorial and to put pressure on the Investor.

BIFURCATION IS INEFFICIENT

322) Tennant Energy is interested in arbitral efficiency. The members of the Tennant Energy management are elderly, and all have suffered severe health impediments. They are desirous of having this arbitration to be resolved quickly and efficiently.

323) The approach proposed by Canada's is neither swift nor efficient.

324) Canada was unsuccessful in obtaining a bifurcation of this arbitration at the January 2020 Procedural Hearing.[208] Canada repeats the same arguments in the current bifurcation request that the Tribunal found unconvincing in January 2020. The primary reason for Canada's lack of success was that Canada's bifurcation request requires this Tribunal to ignore the claim filed by Tennant Energy.

325) Arbitration highly values efficiency. The primary, if not the only reason to hold a bifurcation is to obtain procedural efficiency. However, a review of the pleadings and the facts shows that

[207] Mesa Power Group LLC v. Government of Canada (PCA Case No, 2012-17), Day 3 Part 2 Hearing Video (Public Version), 28 October 2014, starting at 1:25:14, **C-204.**
[208] Tennant Energy *Procedural Order No. 4* at ¶¶87-91.

Canada is mistaken when it says in its Third Bifurcation Motion that holding a bifurcation at this time would achieve the goals of fairness and efficiency.[209]

326) There could be no procedural efficiency if the consideration of bifurcation required a substantial consideration of this arbitration's merits. In such circumstances, Tribunals follow procedural efficiency by joining the jurisdictional defenses to the merits.

327) Canada's jurisdictional approach requires this Tribunal to decide the merits of this arbitration to decide the jurisdictional issue. For that very reason, this Tribunal should decline to order a jurisdictional phase at this time.

328) Usually, the date upon which a claim arose is an uncontroversial matter. Often the disputing parties will agree to this date. However, in the Tennant Energy Claim, the date that the claim arises appears to be disputed. This includes the issue of *dies ad quo* for damages and the impact of continuing acts. This matter requires considering the impact of the spoliation of evidence as part of this continuing act. Thus, further document production is necessary to address this issue.

329) Tennant Energy further submits that to the extent NAFTA Article 1116 raises any question to be determined (whether fact or law), they are certainly not ones that can be determined in the abstract. A full examination of the entire factual matrix in which the claim arises would be required.

330) Tennant Energy concludes that none of Canada's reasons for bifurcation supports an actual decision to bifurcate. Canada suggests in paragraph 9 of its Third Bifurcation Motion that "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."

331) The Investor submits that bifurcation would not be practical or efficient even if the Tribunal concluded that only one of the issues merited bifurcation. The point frankly, is absurd.

[209] Canada's Renewed Motion for Bifurcation at ¶¶10-20.

332) The issue for the Tribunal to determine on Canada's renewed bifurcation request requires a consideration of the merits of the dispute to enable the Tribunal to conclude whether Tennant Energy knew, or ought to have known, of all the breaches.

333) The breaches at issue are part of a complicated regulatory regime and an even more complicated set of acts and facts on the part of Ontario officials affecting the FIT Program and Ontario energy policy. This issue is further complicated by Canada's information suppression strategy, which was also affected by criminal spoliation of evidence.

334) Document production will be necessary to determine the issues related to spoliation and also to determine the effects of the Breakfast Club conspiracy admitted to by Ontario's Assistant Deputy Minister Susan Lo at the *Mesa Power* NAFTA hearing, which was reported in public materials circulated in 2015 after the *Mesa Power* NAFTA hearing took place.

335) Indeed, the *Mesa Power* Tribunal found that it was not able to consider jurisdictional issues as a separate phase, especially considering the need to examine and weigh new evidence. In addressing this same regulatory program, the *Mesa Power* Tribunal reconsidered its earlier decision to bifurcate, made just a few months earlier, and ordered an end to the bifurcation (de-bifurcation) and rejoined the merits and jurisdiction phases in that arbitration.[210]

336) The determination of the jurisdictional issues requires pre-judgment of the significant issues raised in this arbitration.

a) The issue of Tennant Energy's knowledge of the breach needs to be considered against the legal and factual findings in this arbitration. It will be determinative of finding the breach date – the matter at the heart of one of Canada's two jurisdictional objections.

b) In turn, this issue of the date is highly relevant to consider the date upon which Tennant Energy would need to demonstrate its ownership - which is the heart of Canada's other objection.

[210] *Mesa Power* Procedural Order No. 3 at ¶73. This decision not to bifurcate the Mesa Power arbitration is discussed in detail in the following section.

337) If the Tribunal accepts the Investor's evidence, there is no need for bifurcation as the evidence demonstrates that the Tribunal has prima facie jurisdiction. Suppose the Tribunal wishes to consider jurisdiction further beyond a prima facie basis. In that case, neither of these issues could be determined without engaging in a wholesale review of the merits of this claim. The consideration of these issues requires document production and witness examination.

338) It is difficult to see how Canada's assurances of procedural efficiency and cost savings could be achieved in these circumstances. Bifurcation only would increase the time and cost in this arbitration without providing any efficiency gains. While Canada has unlimited financial and staff resources to dedicate to this case, the difference in the parties' size and scale needs to be consistent with the NAFTA's objectives and the central premise of arbitration.

339) The determination of the date of the breach of the NAFTA under NAFTA Article 1116 requires a full consideration of all the evidence, including witnesses and experts, to determine whether the events of August 15, 2015 (when the evidence of admissions noted in the *Mesa Power* post hearing submissions became public) or earlier dates constitute the date of breach of the NAFTA in this arbitration claim. Bifurcation would therefore require Tennant Energy to prove its case twice.

340) To decide Canada's issues, this Tribunal is required to decide the date upon which the claim arose. As discussed in the following section, this determination will require the Tribunal to hear and evaluate witnesses and consider issues integrally connected to the merits' determination.

THIS BIFURCATION REQUIRES CONSIDERING THE MERITS

341) Tennant Energy contends there are no *bona fide* jurisdictional issues which require a determination as a preliminary matter. If the Tribunal comes to a different view, then in the alternative, considering the issues raised in this claim requires a review of the entirety of the merits in this case. To determine when the date of the breach occurred requires a review of the following:

a) When Tennant Energy first obtained information about Ontario's internationally wrongful actions, such as the special government committee that secretly met, which removed obstacles to the successful award of a FIT Contract to International Power Canada.

b) The decision to limit transmission access in Ontario and award a significant portion of that limited transmission to International Power Canada rather than to applicants waiting for FIT Applications in the Bruce Transmission region.

c) Whether these internationally wrongful actions (and others arising from the *Mesa Power* NAFTA Hearing) could have been known to a non-favored FIT Proponent.

d) When these internationally wrongful actions (and others arising from the *Mesa Power* NAFTA Hearing) could have been known to a non-favored FIT Proponent; and

e) Whether the testimony of Tennant Energy's John C. Pennie should be considered regarding the bare trusteeship of Skyway 127 shares held by Tennant Energy.

f) John Pennie also worked closely with Skyway 127 and sat on its Board of Directors. Mr. Pennie provided testimony in his witness statement that Tennant Energy exercised control of Skyway 127.[211] The fact and the time of control would need to be considered.

g) The Tribunal would need to consider the *dies ad quo* about the damage. This requires an understanding of the impact of the composite acts of spoliation (after considering new evidence from document production) and the impact of the Breakfast Club conspiracy.

342) A consideration of all these issues is necessary to consider ruling upon Canada's jurisdictional objections.

343) This Tribunal also should consider the example of the *Mesa Power* Tribunal. In *Mesa Power*, Canada brought a motion for bifurcation on temporal reasons, claiming that there were straight forward issues to be determined. The Tribunal agreed and ordered Bifurcation.

[211] Witness Statement of John C. Pennie at ¶48, **CWS-1**.

344) A few months later, it became clear that the process of addressing temporal issues required the determination of complicated legal and factual matters. As a result, in *Mesa Power Procedural Order No. 3,* the *Mesa Power* Tribunal quickly debifurcated by undoing its recent bifurcation order.

345) The *Mesa Power* Tribunal based its decision to end bifurcation and re-unify the proceedings upon the following consideration:

> 73. Having now had the benefit of the Claimant's Answer on Jurisdiction, it appears to the Tribunal that it may not be possible to rule on the application of Article 1120(1) in the abstract, without substantially engaging in the facts of the dispute. The Tribunal will likely need to establish certain facts and the connections between these facts. Such an inquiry will best be conducted together with the merits phase, when the Tribunal will have the benefit of the entire record, including documents obtained through document production orders and witness evidence. It indeed anticipates at this stage that part of the facts, allegations, evidence, and arguments related to jurisdiction will overlap with the case on the merits.[212]

346) In addition to the concerns of procedural economy, the *Mesa Power* Tribunal also considered the need to obtain further evidence to address the temporal questions. On this point, the *Mesa Power* Tribunal stated:

> 76. Finally, the Tribunal has also considered the Respondent's submission that even if the facts as stated by the Respondent are assumed to be true, the Tribunal would still have to deny jurisdiction on the basis of Article 1120(1). It has asked itself whether it could indeed rule on jurisdiction on assumed facts. It is, however, unable to do so. Unlike other types of preliminary ruling (e.g. a "strike out"), it cannot base its decision on jurisdiction on mere assumptions. A ruling on jurisdiction would be final and binding on the Parties and carry *res judicata* effect. The facts forming the basis of the Tribunal's jurisdiction must be proven. If they are not, jurisdiction is not established. It would be needlessly problematic and unfortunate if facts assumed to be true for purposes of jurisdiction, were at a later stage found to be contrary to the record.[213]

347) Tennant Energy notes that it seeks and request additional evidence in this case; Canada's policy to suppress information surrounding the *Mesa Power* NAFTA claim and additional information,

[212] *Mesa Power* Procedural Order No. 3 at ¶73.
[213] *Mesa Power* Procedural Order No. 3 at ¶76.

now available to the public, surrounding the administration of the FIT Program, coupled with a pattern of destroying material evidence (recognized by its own court in the *Trillium* case), increases the need for a hearing on the merits and further discovery — Canada should be held to fully answer for its conduct.

OTHER ISSUES MUST BE JOINED TO THE MERITS

348) Tennant Energy has brought a claim regarding the spoliation of evidence. Tennant Energy's entire claim concerning the harm caused to it arising from the spoliation of evidence relates to the information that will be produced from this document production phase.

349) Canada admits that this claim cannot be determined separately from the merits. This arbitration will continue to the merits phase for the determination of this claim.

350) To deny Tennant Energy the right to continue through document production would deprive the Investor of important due process and procedural protections – which could involve matters such as determining when this claim first arose. Thus, this Tribunal should heed the advice of Albert Jan van den Berg to avoid bifurcation, in this case, to permit the production of "evidence that came up during the second phase [which] would have had a material impact on (part of) the decisions made in the first phase. [214]

351) Canada readily admits that it only has raised two of its four jurisdictional defenses in its Third Bifurcation Motion. Canada says:

> 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. Those objections, although not frivolous, may be more closely intertwined with the merits of this dispute. [215]

[214] Albert Jan van den Berg, Organizing an International Arbitration: Practice Pointers, in *The Leading Arbitrators' Guide to International Arbitration* 150–2 (Lawrence W. Newman and Richard D. Hill (eds), 2nd ed, 2008), **CLA-274.**
[215] Canada's Renewed Bifurcation Motion at ¶ 4. Canada notes "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".

352) Canada has admitted that the most efficient and proper course for this Tribunal is to join jurisdictional defenses to consider the merits where those matters are "more closely intertwined with the merits of this dispute."

353) As set out in this response, Canada's alleged two "hot" jurisdictional objections are not items that can be determined by the Tribunal without a thorough and substantive assessment of the merits of this claim.

354) In particular, the determination made by the Tribunal of what constitutes the breach will be necessary to determine the date of the breach, including the *dies ad quo* issue for damages. In turn, that date of the breach will be necessary to determine whether Tennant Energy owned and controlled the shares when the breach arose and whether the claim was filed within three years of the date upon which Tennant knew or ought to have known of the breach.

CANADA HAS CONSENTED TO THIS ARBITRATION

355) Canada argues in its Third Bifurcation Motion that it has not consented to this arbitration. Canada's statement stands in stark contrast to its explicit consent to arbitration contained in NAFTA Article 1122.

356) Canada's position is that it conditioned its consent to arbitration upon Canada's assessment of whether the arbitration procedures have been followed. However, the determination of conformity with arbitration procedure is not made by Canada, but by the Tribunal.

357) Canada thus concludes that its consent to arbitration in the NAFTA is meaningless if the Tribunal finds any procedural irregularity by any party to the claim or by any person before the Tribunal, including Non-Disputing Parties, the Secretariat or the Tribunal.

358) The matters invoked by Canada as jurisdictional objections are, in almost all cases, not relevant to the jurisdiction of this tribunal. In the one area where an objection could be jurisdictional, Canada has not challenged the American nationality of the Investor, Tennant Energy, LLC.

Canada admits that it is a limited liability company incorporated in the state of California in 2001.[216]

359) Consent to arbitration is not properly a jurisdictional question. It is properly a question of admissibility. As a result, Canada's assertion that there is a jurisdictional question because Canada has not provided its consent to the arbitration is simply absurd.

360) There is no question that Canada consented to this arbitration in NAFTA Article 1120. As a matter of treaty law, this is a settled matter. The consent of this state Party is contained in the NAFTA, and this consent cannot be withdrawn unilaterally without a modification to the NAFTA. Accordingly, Canada's admissibility argument that there is no consent to arbitration (and to whatever extent the Tribunal finds that this is a jurisdictional argument) should be dismissed in its entirety.

361) There is no separate issue of the state's consent where a treaty provides a comprehensive set of jurisdiction-determining provisions, as does the NAFTA. The Tribunal is bound to interpret those provisions in accordance with the customary international law of treaty interpretation, which is set out in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*. Whether a given provision of the NAFTA is a condition of jurisdiction or some other kind of norm is not a matter of applying a concept of "consent" but properly interpreting the treaty, above all the ordinary meaning of the words in light of the context, object, and purpose. Obviously, if this were an ICSID arbitration, then the Tribunal would need to address 'consent" under the *Washington Convention*. But it is not.

362) Treaties are to be interpreted in good faith. Canada has consented to arbitration in the text of the NAFTA in Article 1122. Article 1122 represents an ongoing, fully valid offer to arbitrate, which the investor has accepted in bringing the present claim. Canada now asserts conditions on its consent nowhere present in the NAFTA or any other international instrument with legal effect.

363) The notion that a party can place, unilaterally, and *ex post*, conditions on its consent to arbitrate, if accepted, would lead to absurd results. The three NAFTA Parties agreed to consent to

[216] Canada's Jurisdictional Memorial at footnote 203 to ¶87.

arbitration in the Treaty. The investors are required to file a separate consent as a condition precedent to arbitration. If there are any errors of form in the procedure, the Tribunal has the authority to address such matters, and previous NAFTA Tribunals have not hesitated to do so. However, such issues do not vitiate consent to arbitrate (and thus terminate the jurisdiction of the Tribunal). They are simply an inherent part of the Tribunal's jurisdiction that has been perfected by the pre-existing consent of the disputing parties to the arbitration.

364) "Kompetenz-kompetenz" is the foundational arbitration notion that a tribunal has the authority to determine its own jurisdiction. This is a cornerstone of all international arbitration, whether investor-state arbitration or commercial arbitration. Canada seeks to undermine this notion by creating a situation where one interested party, the Respondent, could merely assert a procedural fault in a claim, thereby blocking the possibility of an impartial, independent tribunal determining whether such a fault exists and what its consequences, if any, might be for jurisdiction.

365) If left unaddressed, Canada's suggestion would result in needless questions of consent being raised before International Tribunals with respect to each procedural and formalities point that might arise in future claims. Such important procedural questions do not go to the essential question of a disputing party's consent to arbitrate. They simply are matters which the Tribunal must consider in light of the existence of its authority due to the existing consent of the parties to arbitrate.

366) Tennant Energy notes that the US Government addressed this very issue in its NAFTA Statement of Administrative Action filed by the US Secretary of State to the US Congress in connection with the implementation of the NAFTA. The US NAFTA Statement of Administrative Action states:

> To ensure that a host country cannot frustrate an arbitration by withholding its own consent, Article 1122 itself constitutes advance consent by the three NAFTA governments to arbitration. [217]

[217] The North American Free Trade Agreement Implementation Act – *Statement of Administrative Action,* at 147, **CLA-288.**

367) Canada's position is erroneous, but this Tribunal would do a disservice to international arbitration if it did not categorically reject Canada's contentions about its consent to arbitration.

368) Tribunals such as those of *Lauder*[218] and *Biwater Gauff* each have held that the six-month waiting period is not a jurisdictional provision but was procedural and directory in nature.[219] Similarly, such an approach should also apply to the three-year rule as well.

369) The ordinary meaning of 'events giving rise to a claim' under Article 1120 connotes that events that relate to claim can occur not only prior to the claim but also continue after. The *Biwater Gauff* Tribunal stated:

> Non-compliance with the six-month period, therefore, does not preclude this Arbitral Tribunal from proceeding. If it did so, the provision would have curious effects, including:
>
> i. Preventing the prosecution of a claim and forcing the claimant to do nothing until six months have elapsed, even where further negotiations are obviously futile, or settlement obviously impossible for any reason.
>
> ii. Forcing the claimant to recommence an arbitration started too soon, even if the six-month period has elapsed by the time the Arbitral Tribunal considers the matter.[220]

370) Accordingly, any condition precedent should not be interpreted rigidly and in a manner that would defeat the purpose of the arbitration.

371) The NAFTA sets out the procedure for initiating an arbitration. The Investor has followed this procedure.

372) Tennant Energy provided Canada with a Notice of Intent and Notice of Arbitration in conformity with the requirements of the NAFTA.

[218] *Lauder v. Czech Republic*, Final Award, 2001 WL 34786000 (September 3, 2001) ("*Lauder* - Final Award"), at ¶¶190-191, **CLA-132.**

[219] See also *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Dissenting Opinion of Judge Charles N. Brower (August 15, 2012), at ¶¶13-14**, CLA-272.**

[220] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (ICSID Case No. ARB/05/22), Award, 24 July 2008, at ¶343, **CLA-127.**

373) Tennant Energy attempted to engage in consultations in accordance with Article 1118 to settle the dispute outside of arbitration. These efforts were not successful.

374) Canada's efforts to circumvent the process for commencing an arbitration cannot be interpreted to mean it has refused consent to arbitrate.[221] Canada's cooperation is what has not been forthcoming.

375) There is no latitude under the NAFTA for Canada to refuse to consent to arbitrate. Canada is bound by the jurisdictional clauses of the NAFTA, and if these clauses, properly read, confer jurisdiction, then there is no further issue about "consent."

CONCLUSIONS

376) The burden of this bifurcation request falls upon Canada as the moving party, as will the burden in a jurisdictional challenge. Canada must prove, through the law, the terms of the NAFTA and the applicable facts, that Tennant Energy failed to make a timely claim. All the issues relate back to that one matter.

377) To consider this request for bifurcation, and for the purposes of jurisdiction, this Tribunal must take the claim and facts argued by Tennant Energy. The Investor is entitled to have this case heard, including the damning evidence arising from Canada's own senior officials.

378) Canada has failed to carry its burden. The facts are that Tennant Energy did not know of the essential wrongful acts which support its claim until after June 1, 2014.

379) As noted herein, evidence from the *Mesa Power* NAFTA hearing unknown to the public addressed Canada's internationally wrongful actions and omissions. This was the information upon which Tennant Energy brings its NAFTA claim. The range and amount of information hidden by Ontario and Canada are astonishing, and it goes to all areas of Tennant Energy's claims, including:

[221] NAFTA Article 1118 Consultation Request Letter from Barry Appleton to Willian Pentney, Deputy Minister of Justice of Canada seeking NAFTA Article 1118 consultations and address other matters. March 2, 2017. Canada, **C-263**.

a) Special meetings held by the most senior corporate officials of NextEra with the [redacted]

b) The Korean Consortium and how the obligations under the Green Energy Investment were being manipulated.

c) The secret committee of political and senior government officials "fixing" issues in the FIT Program for local friends and favorites.

d) And the special business opportunities and contracts awarded to International Power Canada to address its previous failure in obtaining FIT Contracts in the West of London transmission region at the cost of the FIT Contract that should have been awarded to Skyway 127.

380) NAFTA's plain language makes these facts determinative. The three-year period in Article 1116(2) runs from the time an Investor knows or should have known that the breach occurred and that the loss or damage has been incurred arising from that breach.

381) NAFTA requires that the Investor knows of the breach. Canada's request simply does not comply with the requirements for a successful bifurcation as:

a) The request is frivolous. On its face, it demonstrates that it is inconsistent with the facts pleaded in the arbitration.

b) The request is inefficient. On its face, the delay and cost caused by the bifurcation would be significant. The benefits would be negligible as the jurisdictional challenge does not apply to all the matters raised in the claim. Further, the obvious defects in the claim demonstrate that it has a slim likelihood of success. On balance, the harm, cost, and delay caused by the bifurcation would greatly outweigh any benefit served by it.

c) The bifurcation request requires the Tribunal to take a deep dive into the merits. The issue of determining the date of the breach is not simple and requires the production of more evidence from Canada to address the continuing course of action of suppression of information and the spoliation of evidence.

382) An investor is not required to make a claim under NAFTA Article 1116 until such time as an Investor knows or ought to know of the breach of the NAFTA. The record is clear that the first date of the public release of the admissions of Assistant Ontario Deputy Energy Minister Susan Lo regarding unlawful preferential treatment to International Power Canada first occurred on August 15, 2015.

383) It is patently obvious that Canada's allegations about the date of the NAFTA breach are fictions. The date of the NAFTA breach was not earlier than August 15, 2015.

384) By August 15, 2015 – Canada admits that Tennant Energy owned shares in Skyway 127, and thus there could be no possible issue raised concerning its investment.[222] A claim arising on August 15, 2015, would also not cause any issue for Tennant Energy's June 1, 2017, NAFTA filing under the three-year time limitation imposed by NAFTA Article 1116(2).

385) As a result of these facts alleged in the claim and supported by evidence of the date of release of the admissions of Assistant Deputy Energy Minister Susan Lo in August 2015, any bifurcation based on the date of breach would be entirely frivolous.

386) Canada itself has acknowledged that the consideration of two of Canada's jurisdictional defenses would, in any event, require a hearing. In this context, bifurcation would not promote or provide significant cost savings. It would be the exact opposite.

387) There can be no question in these circumstances that this motion should never have been brought by Canada as there is a slim prospect for success. It is a clear example where costs should be awarded against Canada to bring this vexatious motion designed as part of an overall campaign to drawn down on the Investor's limited financial capabilities.

388) For all the foregoing reasons, Canada's motion should be denied in its entirety, and costs should be assessed against it on a full indemnity basis for the costs of this vexatious and needless motion.

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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