

**IN THE 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

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**INVESTOR'S COUNTER-MEMORIAL ON JURISDICTION**

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## I. OVERVIEW

1. This jurisdictional challenge is yet another wasteful use of the Tribunal's and the disputing parties' resources. Canada raises two jurisdictional concerns, but a review of the facts demonstrates that both lack substance.
2. Canada questions Tennant Energy's standing for claims arising in June 2013 when Skyway 127 was harmed by the cancellation of the FIT Program.
  - a) There can be no question that Canada owed an obligation under NAFTA Article 1105 to Tennant Travel Services LLC (now known as Tennant Energy LLC) as of April 26, 2011. In June 2013, Tennant Travel Services owned a property right through its beneficial ownership of shares in Skyway 127 Wind Energy Inc. This interest arose under the law of California where the Trust was resident, and where the Trustee was resident.
  - b) The NAFTA protects beneficial interests. This intangible property right was protected by the NAFTA in April 2011, more than two years before Ontario cancelled the FIT Program, taking Skyway 127 off the priority wait list for a FIT Contract.
  - c) The Investor has pled this property interest in its Notice of Arbitration<sup>1</sup> and addressed it in its Memorial.<sup>2</sup> Canada selectively ignores this information and re-raises this incorrect argument. Canada's argument is without any basis in the facts.
  - d) Tennant Energy is an investor as defined by the NAFTA holding an investment in Skyway 127 Wind Energy Inc.
3. Canada also makes a second jurisdictional argument about timing that also flies in the face of the facts.
  - a) Canada (and Ontario) took ongoing and pervasive steps to suppress public knowledge of the so-called "Breakfast Club" conspiracy of senior Ontario officials and the other associated activities that unjustly and abusively hurt those who fairly bid in the Ontario FIT Program in favor of influence peddling for those friends of the Ontario Government who received secret and unfair access, gaining riches for them at the expense of those who fairly participated in the process. Tennant Energy has a right to have its case heard. Tennant Energy's case deals with matters which were first known in 2015 with the disclosure of information arising from admissions Ontario government officials made in closed sessions at the October 2014 Mesa Power NAFTA hearing.
  - b) Canada cannot avoid accountability for its internationally wrongful acts simply because it thought that it got away with them years ago by hiding them from the public. Canada seeks to benefit in this arbitration because it successfully duped Skyway 127 and other FIT Proponents for years claiming that it fairly administered the FIT Program. Now

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<sup>1</sup> Notice of Arbitration at ¶¶ 10 -12.

<sup>2</sup> Investor's Memorial at ¶116.

Canada says that FIT Proponents should have known to doubt the government and presume malfeasances and bad faith.

- c) No one can profit from their misdeeds. The administration of international justice would fall into disrepute if Canada were able to dismiss this NAFTA claim based on Canada's ongoing measures to disguise and hide its wrongfulness from the public.
  - d) Canada says that Tennant Energy somehow should have known about the effects upon its rights caused by this secret Ontario government "Breakfast Club" conspiracy. This was a secret "off the books" conspiracy undertaken at the highest levels of the Ontario government.
  - e) Canada's assertions would be laughable had they not been dealing with such egregious and troubling conduct which run contrary to the rule of law, due process, and transparency. There can be no reasonable way in which the Investor could have known about the NAFTA breaches while this information was kept secret and suppressed by Canada and Ontario.
4. Supporting this Counter-Memorial are the following new materials:
  5. The Witness Statement of John H. Tennant, (**CWS-2**), a member of the Board of Management of Tennant Energy, LLC. regarding his holding of shares of Skyway 127 Wind Energy in Trust for Tennant Travel Services, LLC (late renamed Tennant Energy, LLC) from April 2011 until January 15, 2015.
    - a. The Witness Statement of Derek Tennant (**CWS-3**), the President of Skyway 127 Wind Energy and the brother of John H. Tennant.
    - b. The Expert Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon (**CER-2**) who considers the legal status of the Skyway 127 Shares held by John Tennant before his transfer on January 15, 2015 into the name of Tennant Travel Services (later renamed Tennant Energy, LLC).
  6. In paragraph 42 of *Procedural Order No. 8*, the Tribunal noted:

Thirdly, the Tribunal considers that the Respondent's First Objection can be examined without delving into the merits of the Claimant's claim. The Respondent's First Objection is discrete and focuses on: (i) when the alleged breach occurred; and (ii) when did the Claimant become an "investor of a Party" with an investment in Skyway 127. This is separate from the question of whether there is merit to the Claimant's allegations of breach. This is also separate from the question of whether the Claimant knew or should have known about the alleged breach, and/or the loss or damage arising from the breach.
  7. Part II of this Counter-Memorial on Jurisdiction sets out why there is no basis for Canada's objections on Standing.:

- a) Tennant Energy has standing to bring a claim regarding the period from April 26, 2011 to January 15, 2015 as Tennant Energy had beneficial interest in the Skyway 127 Wind Energy shares.
  - b) Retired California Court of Appeal Justice Margaret Grignon reviews the evidence before this Tribunal in her Expert Legal Opinion. Justice Grignon (Ret.) concludes that as a matter of California law, Tennant Travel Services LLC had the beneficial ownership of the Skyway 127 Wind Energy Shares.<sup>3</sup> As described in more detailed below, international law and the NAFTA both recognize the beneficial interest as the basis for standing and for the making of a claim. Simply put, there is no substance to Canada's arguments.
  - c) Canada does not object to the standing of Tennant Energy with respect to claims arising as of January 15, 2015 at the time that Tennant Energy alleges that it first knew, or ought to have known, of the NAFTA breaches.
8. Part II specifically answers the Tribunal's questions in Procedural Order 8 as follows:
- c. Tennant Energy became an investor of a Party with an investment in Skyway 127 Wind Energy on April 26, 2011.
  - d. The Investor's claims are set out in paragraph 13 of the Investor's Memorial. None of these measures were known, nor could have been known by the Investor, Tennant Energy, or the Investment, Skyway 127, before June 1, 2014.
  - e. Tennant Energy identifies in Part IV of this Counter-Memorial on Jurisdiction that the date of the breach was in August 2015 when Tennant Energy first could have been aware of information that would credibly form the basis for knowledge of a claim.
9. However, no matter what date for the breach is determined by this Tribunal, Tennant Energy's investment in Skyway 127 predates the August 15, 2015 date advanced by Tennant Energy, the June 12, 2013 date advanced by Canada (or even the inapplicable July 4, 2011 date alternatively offered by Canada). On every basis, there is standing for Tennant Energy.
10. Part IV of this Counter-Memorial addresses Canada's second objection on timing.
11. In *Procedural Order No. 4*, the Tribunal ordered Tennant Energy to clearly articulate the basis of its claim. Tennant Energy complied in Paragraph 13 of its Memorial. The Memorial states in paragraph 13 what the Tennant Energy Claim is about:

### 13. The Tennant NAFTA Claim is about:

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<sup>3</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶33. (CER-2)

- (a) Special business opportunities provided to a politically connected local favourite, IPC.
- (b) The “Breakfast Club” cabal of politicians and senior officials systemically abusing the process to reward friends at the expense of everyone else.
- (c) Ontario’s decision to not complete its FIT Program for the Bruce Region contrary to the legitimate expectation of FIT Proponents such as Skyway 127.
- (d) The delay of the award of contracts because of Korean Consortium’s failure to comply with its contractual obligations.
- (e) The conspiracy in the systemic violations of the NAFTA and the spoliation and wanton destruction of evidence by Ontario.<sup>4</sup>

12. John C. Pennie, the Client Representative of Tennant Energy filed a Witness Statement that was filed along with the Memorial. **(CWS-1)**. Paragraph 96 specifically reflected that same understanding:

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.
- e) The conspiracy in the systemic violations of the NAFTA and the destruction of evidence.<sup>5</sup>

13. These are the fundamental questions in this NAFTA Claim. The second jurisdictional question is when did these breaches of international law first arise. In paragraph 43 of Procedural Order No. 8, the Tribunal noted issues regarding Canada’s Second Objection. The Tribunal wrote:

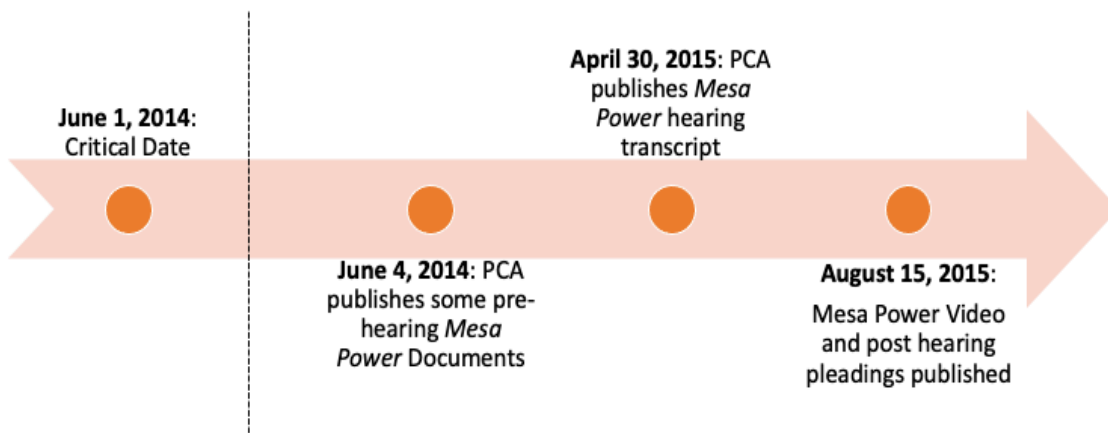
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<sup>4</sup> Investor’s Memorial at ¶13.

<sup>5</sup> John C. Pennie Witness Statement at ¶96. **(CWS-1)**

With regard to the Respondent’s Second Objection however, it is not yet clear to the Tribunal whether it would be able to determine this objection without delving into the merits of the Claimant’s claim. At the heart of this objection is the question of whether the Claimant knew or should have known about the alleged breaches, as well as the loss or damage arising out of those breaches, more than three years prior to the filing of its Notice of Arbitration. On one hand, this could well be a relatively straightforward issue for decision on a preliminary basis. The Respondent’s case is simply that the Claimant’s allegations should have been known to the Claimant based on information that was publicly available prior to 1 June 2014, including the numerous public documents used in the *Mesa Power* arbitration and the *Mesa Power* submissions. On the other hand, depending on the evidence which the Claimant intends to adduce, the Tribunal may be required to substantially engage in the facts of the dispute, and to establish certain facts and connections between these facts. This may also involve significant testimony from, and cross-examination of, witnesses. In that case, the inquiry would be best conducted together with the merits phase when the Tribunal has the benefit of the entire record.

14. Tennant Energy’s arguments regarding what is at issue in this claim should be capable of determination based on a review of the specific concerns it raised. All the claims articulated in paragraph 13 of the Investor’s Memorial deal with information that Canada suppressed from the public and which was not and **could not be known before June 1, 2014**.



15. Specifically, the dates upon which Investor became aware of the breaches is set out in the following table. Each part of Paragraph 13 of the Investor’s Memorial is identified with the date upon which knowledge of the breach was obtained. In each circumstance, the knowledge could



not have been known due to Canada’s actions so disguise and hide the information, which only became known because of cross-examinations of Canada’s witnesses at the Mesa Power Hearing in October 2014, and subsequently disclosed in 2015. Again, Canada’s argument fails. Every claim at issue arises AFTER June 1, 2014.

<b>Investor’s Memorial Claim Issue</b>	<b>Date of Knowledge</b>	<b>Description</b>
Breakfast Club – special opportunities to IPC Memorial Para 13(a)	August 15, 2015 <i>Source: Mesa Power</i> post-hearing written submissions	Secret Government conspiracy provides special business opportunities to a politically connected local favourite, International Power Canada.
Breakfast Club – conspiracy benefits Memorial Para 13(b)	August 15, 2015 <i>Source: Mesa Power</i> post-hearing written submissions	Secret Breakfast Club cabal of politicians and senior officials protects government friends at expense of ordinary FIT proponents.
Ontario no longer will follow FIT measures Memorial Para 13(c)	August 15, 2015 <i>Source: Mesa Power</i> post-hearing written submissions	Ontario’s no longer follows announced power transmission and other FIT Program measures and its effect upon Skyway 127.
Korean Consort given benefits but no GEIA Memorial Para 13(d)	August 15, 2015 <i>Source: Mesa Power</i> post-hearing written submissions	Non-disclosure that Korean Consortium is in breach of GEIA but still receives benefits outside of the operation of the GEIA
Conspiracy to hide and systemic spoliation Memorial Para 13(e)	April 30, 2015 <i>Source: Mesa Power</i> transcripts June 18, 2015 <i>Source: Trillium Wind CLA-278</i>	Conspiracy in the systemic violations of the NAFTA and the destruction of evidence.

16. John C. Pennie, Tennant Energy’s client representative provided some particulars of the information not known by Tennant Energy and Skyway 127, including that his conclusion about how 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:

*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 the [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.<sup>6</sup>

17. Further, John Tennant, a member of the Board of Management of Tennant Energy, and Derek Tennant, the president of Skyway 127 Wind Energy, both filed Witness Statements detailing the information that they did not know of the breaches of the NAFTA before 2015.<sup>7</sup>
18. The information that was publicly available prior to June 1, 2014, including the numerous public documents used in the Mesa Power arbitration and the Mesa Power submissions did not disclose the information that could allow any of the claims noted in Memorial paragraph 13 to arise.
19. Unconvincingly, Canada attempts to recast the claims made by Tennant Energy. Canada alleges that Tennant Energy repeats the exact same claims made by Mesa Power Group in its NAFTA claim. Tennant Energy LLC is not Mesa Power Group, and Tennant Energy nor this Tribunal is limited to the facts presented in the *Mesa Power* case or its outcome.
20. Canada does not challenge the Tennant Energy's claims that first arose in 2015 with the release of information from the *Mesa Power* NAFTA hearing. The evidence Canada raises avoids the arguments Tennant Energy raises about why this claim arose.
  - f. Canada has no answer to the issues raised by the International Power Canada claim and the "Breakfast Club."
  - g. 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

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<sup>6</sup> Witness Statement of John C. Pennie at ¶92. (CWS-1)

<sup>7</sup> Witness Statement of John Tennant at ¶¶ 37 - 43. (CWS-2) Witness Statement of Derek Tennant at ¶¶ 47 - 53. (CWS-3)

Investment Agreement, and Ontario's decision to continue to provide the benefits of the agreement without the payment of the costs.

- h. Canada ignores the relevant meeting between the [REDACTED] and the 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 Program.
  - i. 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.
21. Tennant Energy has demonstrated why its claims are within the jurisdiction of this Tribunal. It has raised claims that could only have been brought after the October 2014 hearing in the *Mesa Power* NAFTA claim as they relate specifically to admissions made in that October 2014 hearing that were not previously known. Canada has not provided any evidence that these specific issues were disclosed previously. These claims are within the temporal scope of NAFTA Article 1116(2) on their face and based on the uncontroverted facts.
  22. The claims in this arbitration arise from previously secret information that first came to light in 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.
  23. In response, Canada offers an affirmative defense. This defense requires Canada to prove that Tennant Energy's claims are based on the exact same factual assertions made in the *Mesa Power* case and known to the public prior to June 1, 2014. As this is an affirmative defence, Canada has the burden of proof under Article 24(1) of the UNCITRAL Arbitration Rules. Canada also admitted this burden in its Statement of Defense saying:

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.<sup>8</sup>

24. Tennant Energy is entitled to detrimentally rely upon the statements Canada made in its Statement of Defense.
25. Canada's jurisdictional case hinges on its 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 — which Canada simply cannot do.
26. A review of the evidence from Canada demonstrates that this Tribunal has jurisdiction.
27. There is no question that this claim is about the unfair and wrongful administration of Ontario's FIT Program.
  - j. Government officials admitted widespread governmental conspiracy that took place in 2011 to help friends of the government unfairly.
  - k. Ontario took steps to manipulate the amount of power transmission that would be available to assist its political allies, and in so doing, it denied Skyway 127 the FIT Contract that it fairly and properly was entitled to under the FIT Rules.
28. The evidence Canada raises avoids the arguments Tennant Energy raises about why this claim arose:
  - l. Canada has no answer to the issues raised by the International Power Canada claim and the "Breakfast Club" conspiracy.
  - m. 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.
  - n. 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.
  - o. Canada completely ignores 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

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<sup>8</sup> 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."

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.

29. Ontario took measures to prevent public knowledge of the wrongful action of its government officials and its controlled entity. At no time before 2015 was there public disclosure about these measures. Some further measures included criminal actions that resulted in the criminal destruction of relevant and material evidence.
30. 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. Canada asserts that Tennant Energy should have brought its claim earlier at a time before the admissions in the *Mesa Power* NAFTA Claim were ever made. This assertion completely ignores the facts of the claim Tennant Energy pled and recast Tennant Energy's claim with a flimsy and fictitious claim made of Canada's construction.
31. As set out below, Tennant Energy is entitled to argue its claim based on those measures that it finds material and relevant. Tennant Energy has articulated specific claims that largely rest on information arising from the public revelation of the October 2014 *Mesa Power* NAFTA Hearing. That is the basis of the claim that Tennant Energy asserts.
32. Astonishingly, in its Memorial on Jurisdiction, Canada never addresses the fundamental point of how Tennant Energy's claim arises from knowledge derived from materials that became public since 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 jurisdiction exists.

**A. Knowledge of the Breach by the Investor is Essential**

33. There cannot be a breach raised under NAFTA Article 1116 without the Investor having such actual or constructive knowledge.
34. 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.

35. 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.
36. Canada's Memorial on Jurisdiction is replete with misstatements and misrepresentations. At paragraph 2, Canada says "The Claimant is asking this Tribunal to award it damages because it failed to receive a Feed-in Tariff contract ("FIT Contract") in 2011."<sup>9</sup>
37. A review of the Tennant Energy's pleadings indicates that its claim relates to claims that first arose in 2015.
38. The pleadings also indicate that in 2011, Skyway 127 Wind Energy was on the FIT waiting list. It did not lose its contract until the termination of the FIT Program on June 12, 2013. Thus, no claim could arise in 2011. The earliest that a claim could arise for Skyway 127 would be June 13, 2013. However, a claim could not arise on that day because Skyway 127 did not know, nor could have known, about the breach because of the active concealment of information by Ontario and then Canada.
39. The Investor's claim is about the conduct that Tennant Energy discovered from the 2015 public discussion of testimony from the October 2014 *Mesa Power Group* NAFTA hearing. This discussion was first made public in 2015 (mostly in August 2015 but some in April 2015).
40. Canada attempts to convince this Tribunal that the Investor's claim is not about the discovery in 2015 about wrongful and impermissible conduct. This is the crux of Canada's jurisdictional case. However, Canada's arguments are untethered to the pleadings or the facts in this arbitration.
41. Tennant Energy's management indicated that the company did not know of the measures in dispute. Canada ignores these statements. These statements have been confirmed by the witness evidence of John Pennie<sup>10</sup>, client representative of Tennant Energy, John Tennant<sup>11</sup>, the trustee

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<sup>9</sup> Canada's Jurisdictional Memorial at ¶2.

<sup>10</sup> Witness Statement of John Pennie at ¶¶94-113. (CWS-1)

<sup>11</sup> Witness Statement of John Tennant at ¶¶36-40. (CWS-2)

of the Skyway 127 Shares and a member of the board of management of Tennant Energy, and the witness statement of Derek Tennant, the President of Skyway 127 Wind Energy Inc.<sup>12</sup>

42. Canada cannot show that Tennant Energy knew or ought to have known of these claims.
  - p. Canada became aware of Ontario's wrongful measures certainly during the *Mesa Power* NAFTA claim process, but Canada also took measures to prevent public knowledge of these wrongful actions.
  - q. There is no dispute that these measures took place before June 1, 2014. However, the wrongful administration of the program addressed in the claim was not known to the public when it occurred.
43. Ontario actively hid knowledge of these measures from the public. Senior officials in the Premier's office destroyed documents. It was only the production of confidential evidence under domestic court order from US Courts under Section 1782 that Mesa Power was able to know about, and cross examine government officials, about these issues. Tennant Energy was not aware of these admissions, which were addressed in confidential session of the hearing, until information was disclosed in the public discussion of the *Mesa Power* NAFTA testimony. That disclosure of the damning admissions from Ontario government officials from the October 2014 *Mesa Power Group* NAFTA hearing began to be known to the public through the public distribution of certain submissions discussing the evidence at the NAFTA hearing in August 2015.
44. As discussed below, the NAFTA drafters — and 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.
45. 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

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<sup>12</sup> Witness Statement of Derek Tennant at ¶2. (CWS-3)

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.

46. Tennant Energy did not have the knowledge, and could not have had the knowledge, 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.
47. Astonishingly, Canada persists in its failed attempts to conflate the claim here with the earlier *Mesa Power* claim. Canada wholly ignores the actual claim that 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.
48. At no time does Canada establish that Tennant had actual or constructive knowledge of the following:
  - r. the special treatment granted to International Power Canada, which resulted in the harm caused to Skyway 127.
  - s. 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.
49. There cannot be a breach raised under NAFTA Article 1116 without the Investor having such actual or constructive knowledge. Tennant Energy had to know its result in the FIT Process was caused by a breach of a NAFTA obligation under NAFTA before the "clock" could start to run.
50. 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.*
51. The three-year period is initiated when all the following elements have been met:
  - t. there is actual or constructive knowledge of both;
  - u. the breach; and
  - v. the loss or damage that has been incurred as a result of that breach.



52. The knowledge requirement applies both to the breach and to the loss arising therefrom. Until both of those elements are met, the three-year period does not begin. Knowledge of one, without the other, is insufficient to trigger the commencement of the three years.
53. The three-year-limitation provision is not designed for the Tribunal to determine before a merits-hearing which will enable the tribunal to determine whether a claim existed at a particular point in time or the scope of that claim. To determine whether "sufficient" events arose three years before filing the Notice of Arbitration, the Tribunal must begin with Tennant Energy's good-faith understanding of its own claim; it must consider the internationally wrongful conduct the Investor alleges as the basis of the claim; and, it must ask, based upon the Tennant Energy's understanding of the law, were 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?
54. 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 Tennant Energy's claim as it 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 Tennant Energy 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 Tennant Energy's good faith understanding of the law and facts as they appeared when it filed its Notice of Arbitration and concerning the claim as stated.
55. 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. If the Investor has acted in good faith and reasonably in concluding 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.
56. In this arbitration, Tennant Energy 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 meets 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.

## II. THE STANDING ISSUE

57. The issue of standing is one of the two issues raised in Canada's jurisdictional attack. As set out below, Canada has misconstrued the facts. The facts before the Tribunal clearly confirm Tennant Energy's standing and this Tribunal's jurisdiction to rule.

### A. The Facts

58. Skyway 127 Wind Energy Inc. was incorporated on October 18, 2007.<sup>13</sup> Its purpose was to develop a wind power project in the Bruce Region for the Ontario FIT Program.

59. Derek Tennant was the president of Skyway 127. He was issued [REDACTED] common shares.

60. In 2007, Derek Tennant needed money to fund additional investments. He asked for a loan from his brother, John Tennant, who lived in California. John Tennant agreed to provide \$200,000 in finance to Derek Tennant. John Tennant advanced the funds in September 2007.<sup>14</sup>

61. As security for the loan, Derek Tennant had a formal promissory note drawn up. The loan was for three years and repayable on October 19, 2010.<sup>15</sup> The loan carried interest at 10% per year. Derek Tennant also acted as a personal guarantor of the loan.<sup>16</sup>

62. As collateral [REDACTED] pledged [REDACTED] of its Skyway 127 shares.<sup>17</sup> The promissory note had a provision that allowed for a six-month extension to the loan. The promissory note stated:

The Lender has a Call Option ON DEMAND at any time after the due date or any extension thereof to convert its Promissory Note into the SW127 shares (or its successor company) such settlement shall be offset against the interest and principal of the Note.

The Lender may grant a six-month extension of time or other indulgences provided that the interest earned as of the due date is paid in full, and the Lender may grant releases and discharges and otherwise deal with the Undersigned borrower as the Lender may see fit without prejudice to the rights of the Lender.

63. The loan also was acknowledged by Skyway 127.<sup>18</sup> The acknowledgment stated:

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<sup>13</sup> Skyway Wind Energy Inc. incorporation documents, 18 October 2007, C-113.

<sup>14</sup> John Tennant Bank Statements with copies of cashed checks to Derek Tennant, September 2007, C-264; Witness Statement of John Tennant at ¶¶10-14. (CWS-2)

<sup>15</sup> Promissory Note, 19 October 2007, C-265. Witness Statement of John Tennant at ¶11. (CWS-2)

<sup>16</sup> Witness Statement of John Tennant at ¶11. (CWS-2)

<sup>17</sup> Promissory Note, 19 October 2007, C-265.

<sup>18</sup> Acknowledgement of Promissory Note, 20 October 2007, C-266.

WHEREAS Skyway 127 Wind Energy Inc., (the "Corporation") hereby acknowledges the attached Promissory Note between the Parties for \$200,000 Canadian funds, dated October 19th, 2007.

The Corporation acknowledges and consents that the attached Promissory Note between the Parties is secured by a pledge of [REDACTED] common shares issued to [REDACTED] by way of the Corporation's Certificate #COM-14, including but not limited to any anti-dilution, or other common share transfer rights from any other shareholder or shareholders by way of agreement, consent, or otherwise; and may not be transferred to any other party without the express written consent and Direction to the Corporation by both of the Parties.

64. In 2010, Derek Tennant was still in arrears on the loan. John Tennant notified Derek Tennant several times about repayment. By October 19, 2010, he still had not been repaid by [REDACTED] [REDACTED] under the October 2007 loan agreement.<sup>19</sup>

65. John Tennant issued a formal note to [REDACTED] on October 19, 2010, to request repayment within six months, by April 19, 2011, which stated:

The Lender hereby DEMANDS, in the event of failure to pay on or before April 19, 2011, that the security pledged of [REDACTED] common shares of Skyway 127 Wind Energy Inc., (Certificate #COM-14, including but not limited to any anti-dilution, or other common share transfer rights from any other shareholder or shareholders by way of agreement, consent, or otherwise) issued to [REDACTED] be transferred to the Undersigned Lender.<sup>20</sup>

66. The loan defaulted on October 19, 2010, and John Tennant allowed the six-month extension on the repayment to April 19, 2011 as contemplated under the terms of the promissory note.<sup>21</sup> John Tennant then exercised the call of the Skyway 127 shares collateral from [REDACTED] under the promissory note.<sup>22</sup>

67. On April 19, 2011, Derek Tennant was forced under the call option to turn over his shares in the Skyway 127 wind project to his brother John Tennant. Derek Tennant informed John Pennie about the share transfer in April.<sup>23</sup>

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<sup>19</sup> Witness Statement of John Tennant at ¶15. (CWS-2)

<sup>20</sup> Demand Notice on Promissory Note, 19 October 2011, C-267. Witness Statement of John Tennant at ¶16. (CWS-2)

<sup>21</sup> Witness Statement of John Tennant at ¶¶15-17. (CWS-2)

<sup>22</sup> Witness Statement of John Tennant at ¶¶17-18. (CWS-2)

<sup>23</sup> Witness Statement of John Tennant at ¶17. (CWS-2)

68. John Tennant received the shares of Skyway 127 as a trustee for a US company to be designated later.<sup>24</sup>
69. Around April 19, 2011, John Tennant informed John Pennie and Derek Tennant that he would hold the Skyway 127 shares as a trustee for a controlled US holding company that John Tennant had yet to designate.<sup>25</sup>
70. Despite the April 19, 2011, equitable transfer date, the shares were not recorded on the share register until June 20, 2011.<sup>26</sup> At that time, the [REDACTED] common shares in Skyway 127, previously held by [REDACTED] were formally transferred to John Tennant.<sup>27</sup>
71. The corporate books of Skyway 127 indicated that the shares were held by John Tennant. In fact, the shares in Skyway 127 were held by John Tennant in his capacity as a trustee. John Tennant held the shares in trust until they were formally transferred to Tennant Travel Services LLC (which was subsequently renamed Tennant Energy LLC). Tennant Energy served as the holding company for the shares.<sup>28</sup>
72. This Tribunal has before it the direct evidence of the persons involved in the transaction:
- w. There is the evidence of Derek Tennant regarding the alienation of his shares. Derek Tennant was the President of Skyway 127 and he also testified about his knowledge that John Tennant was holding the Skyway 127 shares in trust for a US company to be designated.<sup>29</sup>
  - x. There is the evidence of John Tennant, the Trustee. John Tennant was the acquiror of the shares. He wished to have the shares held by a holding company. He held the shares in trust pending the registration in the holding company. John Tennant transferred all his intangible rights to Tennant Energy that might be related to the NAFTA Claim. This was confirmed in a written memorandum sent to the Tennant Energy Members Management Board and to Skyway 127.<sup>30</sup>
  - y. John Tennant also sent a document to Tennant Energy in February 2016 about NAFTA rights that also incidentally referenced the existence of his holding of the shares as trustee.

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<sup>24</sup> Witness Statement of John Tennant at ¶18. (CWS-2)

<sup>25</sup> Witness Statement of John Tennant at ¶19. (CWS-2)

<sup>26</sup> Shareholder's Ledger Skyway 127, 20 June 2011, C-117.

<sup>27</sup> Witness Statement of John Tennant at ¶18. (CWS-2)

<sup>28</sup> See discussion in below on California law. Also see Skyway 127 Wind Energy corporate documents C-114, C-115, C-117.

<sup>29</sup> Witness Statement of Derek Tennant at ¶¶24-26. (CWS-3)

<sup>30</sup> John Tennant memo to Tennant Energy, C-268; Witness Statement of John Tennant at ¶34. (CWS-2)

- z. There is also evidence from John Pennie. Mr. Pennie was the CEO of Tennant Energy and the management representative for this arbitration. Mr. Pennie had acknowledged on behalf of Skyway 127 the original promissory note in October 2007 from Derek Tennant. Mr. Pennie confirmed his direct knowledge that John Tennant was holding the Skyway 127 shares in trust in his first witness statement.<sup>31</sup>
73. Canada objects to evidence from the corporate representative and the corporate officers in its Jurisdictional Memorial, relying on arbitrations from civil law states where often such evidence is inadmissible.<sup>32</sup> Canada's objections run contrary to the express provisions of the rules for evidence in this arbitration. For example, Paragraph 8 of Procedural Order No. 1 provides that the 2010 *IBA Rules on the Taking of Evidence* can be applied in addition to the UNCITRAL Arbitration Rules on evidence rules. The *IBA Rules on the Taking of Evidence* make clear that there is no prohibition on the Tribunal receiving evidence from persons who are corporate officers, as Article 4(2) provides:
- Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.*<sup>33</sup>
74. Indeed, Canada incorrectly describes the direct evidence of John Pennie, the Corporate Secretary of Skyway 127, and the client representative of Tennant Energy as "hearsay."<sup>34</sup> Hearsay evidence is that based upon a what a third party has said. Mr. Pennie has testified as to his direct knowledge of what occurred. Mr. Pennie's direct testimony of conversations in which he was a communicating party constitutes direct testimony, due to his direct knowledge.
75. In any event, hearsay or not, it is admissible evidence in an international arbitration. Article 25(6) of the (1976) UNCITRAL Arbitration Rules provides that "The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered." All this evidence, and the supporting documents, from the corporate officers and the persons directly involved is the best evidence. It must be admitted and given serious weight given its materiality and relevance.

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<sup>31</sup> Witness Statement of John C. Pennie at ¶¶48,66. (CWS-1)

<sup>32</sup> Canada's Jurisdictional Memorial at ¶¶ 77 and 78 rely on cases in Romania and in Egypt.

<sup>33</sup> Article 4(2) of the 2010 IBA Rules on the Taking of Evidence, **CLA-391**; The Tribunal is already relying on these rules. ¶8 of Procedural Order No. 1 says "In addition to the relevant articles of the UNCITRAL Rules and the provisions on document production above, the Tribunal may use, as an additional guideline, the IBA Evidence Rules, when considering matters of evidence. The Tribunal also relies on them for document production issues as set out in ¶7.4.6 and ¶7.6 of Procedural Order No.

<sup>34</sup> Canada's Jurisdictional Memorial at ¶89.

76. The evidence is overwhelming. John Tennant never owned the shares in Skyway 127 for his personal benefit. These shares always were held for the benefit of a holding company to be named. That holding company is currently known as Tennant Energy, LLC.<sup>35</sup> Canada lacks any evidence to the contrary.

### 1. California law issues

77. Retired California Court of Appeal Justice Margaret Grignon filed an expert legal opinion on California law and legal ramifications of the actions of John Tennant over the shares of Skyway 127. She is a licensed California attorney and has over thirty-years of experience with California Law, including six-years as Trial Judge, and fourteen years as a Justice for the California Court of Appeal (Second District, Division Five).<sup>36</sup> Justice Grignon works as a partner at the Long Beach office of the Grignon Law Firm LLP.<sup>37</sup> Her work has produced multiple precedential opinions from state and federal courts.<sup>38</sup>
78. Ms. Grignon has been named one of the Top Women Lawyers in California for 2010, 2013, and 2015; rated in Band 1 by Chambers for Appellate Litigation in California from 2009 through 2018; and listed in Best Lawyers in America, Appellate Practice from 2016 through 2020. Additionally, she is a former President of the California Academy of Appellate Lawyers, a Board Member of the American Academy of Appellate Lawyers, a member of the California Women Lawyers Association and the National Association of Women Judges, and a member and former Board Member of the Association of Business Trial Lawyers.<sup>39</sup>
79. Retired Court of Appeal Justice Grignon finds that John Tennant's declaration in respect of the shares of Skyway 127 Wind Energy in April 2011 created a valid trust pursuant to California law.<sup>40</sup>
80. Justice Grignon (Ret.) summarized the key facts as follows in her legal opinion.

15. John lent \$200,000 to [REDACTED] on October 19, 2007. (CWS-3, ¶ 10; CWS-2, ¶ 9; C-265.) The term of the note was for three years, with a six-month extension, and carried 10% interest. (CWS-3, ¶¶ 10-12; CWS-2, ¶ 10; C-265.)

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<sup>35</sup> John Tennant memo to Tennant Energy, **C-268**; Witness Statement of John Tennant at ¶35. (**CWS-2**)

<sup>36</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶3. (**CER-2**)

<sup>37</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶4. (**CER-2**)

<sup>38</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶4. (**CER-2**)

<sup>39</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶5. (**CER-2**)

<sup>40</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶33. (**CER-2**)

Derek was a personal guarantor of the note. (CWS-3, ¶ 11; CWS-2, ¶ 10; C-265.) [REDACTED] pledged [REDACTED] Skyway 127 shares as collateral. (CWS-3, ¶ 11; CWS-2, ¶ 12; C-265.) After the due date of the note, John had a call option, allowing him to convert the note into the Skyway 127 shares pledged as collateral. (CWS-3, ¶ 12; C-265.) The note was acknowledged by Skyway 127. (CWS-3, ¶ 13; CWS-2, ¶ 13; C-266.)

16. With a six-month extension, the note was due on April 19, 2011, but [REDACTED] [REDACTED] could not repay it. (CWS-3, ¶ 15- 16; CWS-2, ¶ 15; C-267.) John exercised his call option and John and Derek agreed that the shares constituted payment of the note in full. (CWS-3, ¶¶ 16-19; CWS-2, ¶ 15.) On April 19, 2011, to prevent dilution of voting control, John agreed to hold the Skyway 127 shares in a U.S. holding company that he would designate. (CWS-2, ¶¶ 17-18; CWS-3, ¶¶ 19-20.) On April 26, 2011, John designated Tennant Travel Services LLC (“Tennant Travel”) to hold the Skyway 127 shares. (CWS-3, ¶¶ 19-21; CWS-2, ¶¶ 17-19.) Tennant Travel is a California limited liability company. (CWS 3, ¶ 20; C-269.) On April 26, 2011, John told Derek and John Pennie that he was holding the shares as trustee in trust for Tennant Travel. (CWS-3, ¶ 24; CWS-2, ¶ 20.) John assumed Skyway 127’s corporate records reflected his shareholder interest as trustee for Tennant Travel, but Skyway 127’s Shareholders & Transfers Register named John as the shareholder without a trustee designation. (CWS-2, ¶ 28; C-117, C-114.) John acted consistently with his belief that he held the shares as trustee for the benefit of Tennant Travel. (CWS-2, ¶ 28.)<sup>41</sup>

81. Subsequent corporate actions took place. Justice Grignon (Ret.) summarizes them as follows:

17. In December 2011, John received additional Skyway 127 shares when a major investor exited Skyway 127, which John also held as trustee for Tennant Travel. (CWS-3, ¶ 34; CWS-2, ¶ 25; C-114.)

18. On January 15, 2015, John as trustee in trust for Tennant Travel received additional Skyway 127 shares when another major investor exited Skyway 127. (CWS-3, ¶¶ 39-42; CWS-2, ¶ 29; C-115.) On that same date, John’s Skyway 127 shares were formally transferred to Tennant Travel, which was later renamed Tennant Energy. (CWS-3, ¶ 36; CWS-2, ¶ 29, 31; C-269.)

19. John also transferred any personal intangible rights that he or the trust possessed in the Skyway 127 shares to Tennant Travel. (CWS-3, ¶¶ 44-45; CWS-2, ¶¶ 30, 32; C-268.) In his 2016 memorandum, John described these intangible

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<sup>41</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶¶15-16. (CER-2)



rights as “all interests and rights under the North American Free Trade Agreement that I might have as trustee or personally, related to the holding of shares in Skyway 127.” (C-268).<sup>42</sup>

82. Retired California Court of Appeals Justice Margaret Grignon reviewed the relevant California law regarding the legal relationships arising from John Tennant’s treatment of the shares. Justice Grignon (Ret.) wrote:

21. In California, a trust may be created by a “declaration by the owner of property that the owner holds the property as trustee” (Cal. Prob. Code § 15200(a))<sup>43</sup> where the “settlor properly manifests an intention to create a trust” (Cal. Prob. Code § 15201),<sup>44</sup> “there is trust property” (Cal. Prob. Code § 15202),<sup>45</sup> and there is a “beneficiary” (Cal. Prob. Code § 15205(a)).<sup>46</sup> “A trust may be created for any purpose that is not illegal or against public policy” (Cal. Prob. Code § 15203),<sup>47</sup> including for an indefinite or general purpose (Cal. Prob. Code § 15204).<sup>48</sup>

22. A trust of personal property may be oral. Cal. Prob. Code § 15207.<sup>49</sup> *Higgins v. Higgins*, 11 Cal. App. 5th 648, 661(2017).<sup>50</sup> “Consideration is not required to create a trust.” Cal. Prob. Code §15208.<sup>51</sup>

83. After setting out the relevant law in California, Retired Court of Appeal Justice Grignon finds that a legal trust was created. She opines:

28. In my opinion, the witness statements and supporting documents provide clear and convincing evidence that John created an oral trust on April 19, 2011, and as of April 26, 2011, he held the Skyway 127 shares as trustee in trust for Tennant Travel, subsequently renamed Tennant Energy. The residency of the trust is California, where John resides. Cal. Prob. Code §§ 17005,<sup>52</sup>17300.<sup>53</sup> The residency of Tennant Services/Energy is also California. Cal. Corp.

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<sup>42</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶¶ 18-19. (CER-2)

<sup>43</sup> Cal. Prob. Code, CLA-292.

<sup>44</sup> Cal. Prob. Code, CLA-292.

<sup>45</sup> Cal. Prob. Code, CLA-292.

<sup>46</sup> Cal. Prob. Code, CLA-292.

<sup>47</sup> Cal. Prob. Code, CLA-292.

<sup>48</sup> Cal. Prob. Code, CLA-292.

<sup>49</sup> Cal. Prob. Code, CLA-292.

<sup>50</sup> *Higgins v. Higgins*, 11 Cal. App. 5th 648, 661(2017), CLA-295.

<sup>51</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶¶ 21 – 22, (CER-2); Justice Grignon (Ret.) relied upon Cal. Prob. Code, CLA-292.

<sup>52</sup> Cal. Prob. Code, CLA-305.

<sup>53</sup> Cal. Prob. Code, CLA-306.

Code § 17701.02(g).<sup>54</sup>

29. John and Derek both testify they agreed that John would hold the shares in a holding company to prevent dilution of voting control. (CWS-3, ¶¶ 19-21; CWS-2, ¶¶ 17-19.) John testifies that from the time of the transfer of the shares to him on April 19, 2011, he held the Skyway 127 shares in trust, and those shares in trust were identified as being for the benefit of Tennant Travel/Energy on April 26, 2011. (CWS-2, ¶¶ 20, 28.) John and Derek both testify that on April 26, 2011, John told Derek and John Pennie that he held the Skyway 127 shares in trust for Tennant Travel/Energy. (CWS-3, ¶ 24; CWS-2, ¶ 20.) John testifies that he assumed the Skyway 127 Shareholders & Transfers Register would reflect his ownership as trustee and when he learned that it did not, he formally transferred the shares to Tennant Travel/Energy in January 2015. (CWS-2, ¶ 28.) John's 2016 written memorandum confirms his testimony. (C-268.)

30. Although the Skyway 127 Shareholders & Transfers Register reflected John Tennant as the owner of the shares and did not expressly include trustee language (C-114, C-115, C-117), trustee language is not necessary to create an oral trust in personal property.<sup>55</sup>

84. Thus, on April 19, 2011, a trust was created when John Tennant expressed the intention to hold the property as trustee.<sup>56</sup> Tennant Travel Services LLC obtained the equitable interest in the shares in Skyway 127 one week later when John Tennant nominated Tennant Energy as the beneficiary to hold the shares on April 26, 2011.<sup>57</sup> This equitable interest was for the benefit of Tennant Energy. Justice Grignon (Ret.) states:

33. In my opinion, and for the reasons stated above, John created an equitable property interest in Tennant Travel/Energy by orally declaring on April 26, 2011, that he held the Skyway 127 shares in trust for Tennant Travel. John created an oral trust and held the Skyway 127 shares as trustee in trust from the time he acquired them on April 19, 2011. John identified Tennant Travel as the beneficial owner of those shares one week later, on April 26, 2011, when Tennant Travel's equitable interest arose. John also acquired the additional Skyway 127 shares in December 2011 and January 2015 as trustee in trust for Tennant Travel/Energy.

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<sup>54</sup> *Cal. Corp. Code*, **CLA-304**.

<sup>55</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶¶28-30. (**CER-2**)

<sup>56</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶33. (**CER-2**)

<sup>57</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶33. (**CER-2**)

John, as trustee, was the legal owner of the Skyway 127 shares and Tennant Travel/Energy, as beneficiary, was the equitable owner.<sup>58</sup>

85. Justice Grignon (Ret.) also expressly identifies the dates of the creation of the legal and equitable ownership rights for Tennant Travel Services LLC. She concludes that Tennant Travel Services LLC had an intangible property interest in the Skyway 127 shares as an equitable interest as of April 26, 2011. She states:

35. In my opinion, as the legal and equitable owner of the Skyway 127 shares and the transferee of any personal intangible rights John possessed either as trustee or individually, Tennant Travel had an intangible property interest in these Skyway 127 shares as an equitable interest as of April 26, 2011, and as a legal interest with the formal transfer of the shares as of January 15, 2015.<sup>59</sup>

86. John Tennant is a resident of California and was a resident throughout the 2007 to 2015 period of holding the shares as sole trustee. Retired California Court of Appeal Justice Grignon confirms that John Tennant's California residency makes the trust residency also in California.<sup>60</sup> As a result of the trustee being a resident of California, the trust is a California resident trust under the law of California.<sup>61</sup>
87. In coming to her legal conclusions, Retired California Court of Appeal Justice Grignon reviewed the February 8, 2016 memorandum from John Tennant to Tennant Energy, LLC assigning rights held by the trustee for the trust.<sup>62</sup> She concluded as a matter of California law that John Tennant as the Trustee had the right to transfer intangible rights from the trust to Tennant Energy LLC.<sup>63</sup>
88. As a result, Tennant Energy (through Tennant Travel Services LLC) was an American investor with an investment in Skyway 127 Wind Energy Inc. in Ontario on April 26, 2011.

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<sup>58</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶33. (CER-2)

<sup>59</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶35. (CER-2)

<sup>60</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶28. (CER-2)

<sup>61</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶28. (CER-2)

<sup>62</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶¶19 and 29. (CER-2)

<sup>63</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶¶36 and 37. (CER-2)

## B. Treaty provisions

89. The general definitions of the NAFTA are in NAFTA Chapter Two – Article 201. The definition of a person is a natural person or an enterprise.
90. The definition of an enterprise for NAFTA Chapter Eleven is defined as:
- “enterprise means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.”<sup>64</sup>
91. An investor of a party is defined in NAFTA Article 1139 as “investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.”<sup>65</sup>
92. An Enterprise of a Party is defined in Article 1139 as:
- “enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.”<sup>66</sup>
93. An Enterprise of such Party would include an American trust (which is explicitly covered by the definition in NAFTA Articles 1139 and 201).
94. As set out in the Expert Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon, the residency of the Trust is determined by the California Residency of John H. Tennant.<sup>67</sup>
95. Article 1116 allows an investor of a party to bring a claim as follows:
- Article 1116: Claim by an Investor of a Party on Its Own Behalf
1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
- (a) Section A or Article 1503(2) (State Enterprises), or

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<sup>64</sup> NAFTA Chapter Eleven, January 1, 1994, Article 1139, **CLA-042**.

<sup>65</sup> NAFTA Chapter Eleven, January 1, 1994, Article 1139, **CLA-042**.

<sup>66</sup> NAFTA Chapter Eleven, January 1, 1994, Article 1139, **CLA-042**.

<sup>67</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶28. (**CER-2**)

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. 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.<sup>68</sup>

96. An arbitration claim brought by a US trust always would have been permitted. In this situation, the claim was brought by a US enterprise that had an investment, namely intangible property (the beneficial interest in shares held by a US Trust for the US company).

### 1. Rights of Trustees

97. The holder of a beneficial interest in an investment has standing to bring a claim for losses arising out of damages to such investment. While there is some debate, in a case of split ownership, as to whether the legal owner can bring a claim without the beneficial owner, there is no debate that the beneficial owner has standing to bring a claim in international law.
98. In its Decision on Respondent's Preliminary Objections in *Mason Capital v. Korea*,<sup>69</sup> the Tribunal noted that the right of the holder of a beneficial interest to bring a claim in international law was well settled. The Tribunal stated:

167. The first school considers that there is a general principle of international investment law that a claimant only qualifies as an investor to the extent that it can prove a beneficial interest in the investment. According to this view, legal title alone is insufficient to establish ownership. Representative of this school of thought is Professor Stern's dissenting opinion in *Occidental v. Ecuador* which states: As far as the position of international law towards beneficial owners, in cases where the legal title and the beneficial ownership are split, is concerned, it is

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<sup>68</sup> NAFTA Chapter Eleven, January 1, 1994, Article 1116, **CLA-042**.

<sup>69</sup> *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, Decision on Respondent's Preliminary Objections, 22 December 2019, **CLA-311**.

quite uncontroversial, after a thorough review of the existing doctrine and case-law, that international law grants relief to the owner of the economic interest.<sup>70</sup>

168. This was affirmed by the annulment committee in the same matter in the following terms:

In cases where legal title is split between a nominee and a beneficial owner international law is uncontroversial: as Arbitrator Stern has stated in her Dissent the dominant position in international law grants standing and relief to the owner of the beneficial interest – not to the nominee.<sup>71</sup>

169. The second school of thought does not accept that, under general international investment law, only the beneficial owner fulfils the characteristics of an investor. For example, the tribunal in *Saba Fakes v. Turkey* made the following observations on the division of legal title and beneficial ownership:

[T]he division of property rights amongst several persons or the separation of legal and beneficial ownership is commonly accepted in a number of legal systems, be it through a trust, a fiducie or any other similar structure. Such structures are in no way indicative of a sham or a fraudulent conveyance, and no such presumption should be entertained without convincing evidence to the contrary. The separation of legal title and beneficial ownership rights does not deprive such ownership of the characteristics of an investment within the meaning of the ICSID Convention or the Netherlands-Turkey BIT. Neither the ICSID Convention, nor the BIT make any distinction which could be interpreted as an exclusion of a bare legal title from the scope of the ICSID Convention or from the protection of the BIT.<sup>72</sup>

170. Along the same lines, the tribunal in *Von Pezold v. Zimbabwe* considered prima facie evidence of legal ownership sufficient to establish jurisdiction.<sup>73</sup>

99. The *Mason Capital* Tribunal also noted the *Flemingo v. Poland* award, stating:

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<sup>70</sup> *Mason Capital*, Decision on Respondent's Preliminary Objections, at ¶167, **CLA-311** references *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador II*, ICSID Case No. ARB/06/11, Dissenting Opinion of Professor Stern, 20 September 2012, at ¶148, **CLA-313**.

<sup>71</sup> *Mason Capital*, Decision on Respondent's Preliminary Objections, at ¶168, **CLA-311** referring to *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015, at ¶259, **CLA-312**.

<sup>72</sup> *Mason Capital*, Decision on Respondent's Preliminary Objections, at ¶169, **CLA-311** citing *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, at ¶134, **CLA-314**.

<sup>73</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, Decision on Annulment of the Award, 2 November 2015, at ¶170, **CLA-312**; *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, at ¶314, **CLA-307**.

In similar vein, the tribunal in *Flemingo v. Poland* ¶ 331 stated: "With regard to Respondent's alternative submission that only 'the ultimate beneficiary of the investment' would be entitled to the Treaty's protection, the Tribunal observes that, as between Claimant and the ultimate beneficiary of the investment, there are indeed three layers of companies ... However, the Tribunal notes again that the Treaty did not expressly provide for the limitation of treaty protection to the ultimate beneficiary of the investment and, therefore, such a restriction cannot be read into it."<sup>74</sup>

100. The Ad Hoc Annulment Committee in *Occidental v. Ecuador* (II) noted Prof. Stern's dissent as being the established law, saying:

259. In cases where legal title is split between a nominee and a beneficial owner international law is uncontroversial: as Arbitrator Stern has stated in her Dissent, the dominant position in international law grants standing and relief to the owner of the beneficial interest - not to the nominee.<sup>75</sup>

101. The *Occidental II* Ad Hoc Annulment committee commented on Prof. Stern's dissent saying:

The position as regards beneficial ownership is a reflection of a more general principle of international investment law: claimants are only permitted to submit their own claims, held for their own benefit, not those held (be it as nominees, agents or otherwise) on behalf of third parties not protected by the relevant treaty.<sup>76</sup>

102. In *Blue Bank v. Venezuela*, the Tribunal concluded that the beneficial owners of the investment had the standing to bring the case rather than the trustee who had only legal interest, rather than the beneficial interest. The Tribunal stated:

172. In conclusion, Blue Bank, as a trustee holding the assets of the Qatar Trust for the ultimate benefit of third party interests, does not own the assets of the Qatar Trust, did not invest these assets for its own account and cannot, therefore, ground jurisdiction on any investment made by it as required by Articles 1(a) and 8(1) of the BIT.<sup>77</sup>

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<sup>74</sup> *Mason Capital*, Decision on Respondent's Preliminary Objections, at FN 205, **CLA-311** citing *Flemingo Duty free Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, 12 August 2016, at ¶331, **CLA-310**.

<sup>75</sup> *Occidental Petroleum v. Ecuador* (II), *Decision on Annulment of Award*, at ¶259, **CLA-312**.

<sup>76</sup> *Occidental Petroleum v. Ecuador* (II), *Decision on Annulment of Award*, at ¶¶262-264, **CLA-312**.

<sup>77</sup> *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/20, Award, 26 April 2017, at ¶172, **CLA-308**.

103. In the present case, Tennant Travel Services had the beneficial interest and rights in the Skyway 127 shares as of April 26, 2011.<sup>78</sup> Even accepting *in arguendo* the earliest date (and clearly incorrect) breach date argued by Canada of July 4, 2011, Tennant Energy's acquisition of its beneficial interest in Skyway 127 — arising on April 26, 2011 — predates any of the possible breach dates proposed.

## 2. Rights of Assignees

104. While Canada's challenge does not address the issue of assignment of claims *per se*, international law also clearly permits the assignment of claims if the continuous nationality of a treaty party is maintained.
105. The Tribunal in *Daimler v Argentina*<sup>79</sup> that assignment of an interest does not impair the right to bring an investment treaty claim if the continuous nationality of a protected investor under the treaty is contained. The *Daimler* Tribunal held:

141. Turning then to the requirements for the effective assignment of an ICSID claim under international law, the parties have focused much attention on the so-called "continuous ownership criterion." Both the Claimant and the Respondent cite to investor-State cases in which a claimant had sold its investment to a third party after initiating the arbitration. These cases have uniformly held that the subsequent sale of an investment does not deprive an investor-State tribunal of its jurisdiction to hear the claim. Some of the decisions have suggested that this is so because the "critical date" under international law is the date upon which the arbitration is commenced. The Respondent argues that this implies that where an investment is sold before the commencement of the arbitration, the tribunal will necessarily lack jurisdiction. However, as pointed out by the Claimant, none of the tribunals cited by Argentina actually addressed that question, and certain obiter dicta in the decisions suggest that at least some tribunals would have been prepared to accept jurisdiction even if the sale had occurred prior to the arbitration's commencement.<sup>80</sup>

106. The *Daimler* Tribunal found no issue because the original holder and the assignee both had the same German nationality.<sup>81</sup>

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<sup>78</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶33. (CER-2)

<sup>79</sup> *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, CLA-309.

<sup>80</sup> *Daimler Financial Services AG v. Argentine Republic*, Award, at ¶141, CLA-309.

<sup>81</sup> *Daimler Financial Services AG v. Argentine Republic*, Award, at ¶144, CLA-309.



### 3. Compliance with the treaty

107. John Tennant as trustee held the Skyway 127 shares in a valid California trust since on April 19, 2011.
108. Tennant Energy LLC is a limited liability company operating under California law. It is a US national as defined by the NAFTA.
109. A US trust which is an US enterprise under the definition of enterprise of a party in the NAFTA Article 1139 and Article 201. The shares held by the trust are investments held by a US investor.
110. Thus, the equity investment in Skyway 127 was an investment owned by Tennant Energy LLC.
111. 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. This is simply incorrect.
112. 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 its 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.<sup>82</sup>

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

48. John Tennant is an American citizen residing in California. John Tennant first acquired the rights to Derek Tennant's [REDACTED] interest in Skyway 127 on April 19,

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<sup>82</sup> Investor's Memorial at ¶¶772-773.

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 [REDACTED] interest in Skyway 127 on December 30, 2011, for a total of [REDACTED]. 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 [REDACTED] 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 up by his brother Jim Tennant to acquire and maintain John's investment in Skyway 127. Skyway 127 registered the transfer as directed by John Tennant.<sup>83</sup>

114. 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 [REDACTED] 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.<sup>84</sup>

115. As set out in the following parts of this Counter-Memorial, Tennant Energy does not agree that the date of the breach occurred in 2011 or 2013, but even if the Tribunal concluded that the date of the breach occurred on these two inapplicable dates proposed by Canada, Tennant Energy still would be an investor with an investment at the relevant times.

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<sup>83</sup> Witness Statement of John C. Pennie at ¶¶48,66. (CWS-1)

<sup>84</sup> Investor's Memorial at ¶¶779-780.

116. The definition of investment and investor in NAFTA Article 1139 is extraordinarily broad. 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.
117. Intangible property interests acquired in the expectation of economic benefit is also a protected interest under NAFTA Chapter Eleven. Beneficial rights held by a trust constitute intangible property as well as an intangible property interests acquired in the expectation of economic benefit. Thus, the shares beneficially owned by Tennant Travel Services through John Tennant as a bare trustee in 2011 meet the definition of a covered investment.
118. The definition of investor is broad. Investor covers someone “who makes, is making, or has made an investment.”<sup>85</sup>
119. Tennant Travel made an investment once it had the beneficial interest of the Skyway 127 shares in trust on April 26, 2011. Clearly, Tennant Energy has standing for this intangible property interest.
120. 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.<sup>86</sup>
121. 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.<sup>87</sup>
122. 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. The only limits on the

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<sup>85</sup> NAFTA Chapter Eleven, January 1, 1994, **CLA-042**.

<sup>86</sup> *Pope & Talbot Inc. v. The Government of Canada*, Award on the Merits of Phase 2, 10 April 2001, **CLA-121**.

<sup>87</sup> NAFTA Chapter Eleven, January 1, 1994, Article 1139(g), **CLA-042**.

definition of “investment” are those expressly set out in 1139(i), which excludes claims to money.<sup>88</sup> Only intangible interests, which are only express claims to money, are excluded.

123. The *Merrill & Ring* Tribunal came to the following conclusion:

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.<sup>89</sup>

124. 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.<sup>90</sup> 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.<sup>91</sup>

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<sup>88</sup> NAFTA Chapter Eleven, January 1, 1994, Article 1139(h), **CLA-042**.

<sup>89</sup> *Merrill & Ring Forestry L.P. v. Government of Canada*, Award, 31 March 2010, ¶¶143-144, **CLA-167**.

<sup>90</sup> *Merrill & Ring*, ¶262, **CLA-167**.

<sup>91</sup> *Merrill & Ring*, ¶123, **CLA-167**.

125. 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 for Tennant Energy fits within the definition of NAFTA Article 1139.

### C. Canada's specific standing challenges are unfounded

126. In paragraph 88 of the Memorial on Jurisdiction, Canada raises unfounded and scurrilous concerns about Tennant Energy's investment in Skyway 127. Canada's statements are misleading and incorrect. They require specific review and refutation.

#### 1. Tennant Energy has filed the best evidence before the Tribunal

127. The Investor offered firsthand evidence with its Merits Memorial from the chief executive of Tennant Energy about Tennant Energy's ownership of the Skyway 127 shares. As a member of the limited liability corporation's Board of Management and the corporate representative, Mr. Pennie can offer the best evidence about the treatment of the shares by Tennant Energy LLC and gave firsthand evidence about the shares.
128. In his First Witness Statement (**CWS-1**), Mr. Pennie confirmed that Tennant Energy received the shares in Trust from John Tennant, who held the shares as a bare trustee.<sup>92</sup> Canada admits in paragraphs 87 and 88 that Mr. Pennie gave evidence about the ownership of the shares.<sup>93</sup>
129. John Tennant is a US citizen and a resident of the state of California.<sup>94</sup> The expert legal opinion of retired California Court of Appeal Justice Margaret Grignon (**CER-2**) confirms that a trust is created under the law of California upon the intent and declaration of the intention to create a Trust.<sup>95</sup> The Expert Legal opinion confirms that John Tennant created a legally effective trust once he expressed that he was holding property as a trustee and once at the time he received his beneficial interest in the Skyway 127 shares upon the exercise of a call option on April 19, 2011.<sup>96</sup>

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<sup>92</sup> Witness Statement of John Pennie at ¶¶48,66. (**CWS-1**)

<sup>93</sup> Canada's Memorial on Jurisdiction at ¶87.

<sup>94</sup> Witness Statement of John Tennant at ¶¶1-2. (**CWS-2**)

<sup>95</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶21. (**CER-2**)

<sup>96</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶33. (**CER-2**)

130. John Pennie confirmed that the shares were received by John Tennant as trustee for a US company to be designated. That expression created a trust.<sup>97</sup> The shares were registered in the Skyway 127 corporate books.
131. The Witness Statement of Derek Tennant, the President of Skyway 127, confirms that he was aware that the shares obtained by John Tennant were held by him as a trustee for a US company to be designated in future in Trust.<sup>98</sup>
132. The expert legal opinion of Justice Margaret Grignon (Ret.) confirms that John Tennant's 2016 memorandum to Tennant Energy is legally valid instrument to confer the intangible rights to Tennant Energy, LLC.<sup>99</sup>
133. The Witness Statement of John H. Tennant relies upon a document related to the assignment of all intangible rights held by John Tennant as Trustee, and any residual rights held by him personally, over the Skyway 127 shares. The document was executed on February 8, 2016, more than one year before the March 2017 filing of the NAFTA Notice of Intent.<sup>100</sup> That document made specific reference by John Tennant to the Skyway 127 shares as being held in trust *ab initio* and for the sole and exclusive purpose of a US holding company which was Tennant Energy, LLC.
134. Because the beneficial interests of John Tennant were transferred to Tennant Energy in 2011 before the NAFTA claim was issued, Tennant Energy had full and unfettered legal standing as a beneficial holder to bring its claim with respect to the interests obtained by John Tennant as of April 26, 2011.<sup>101</sup>
135. As a result, this Tribunal has the following evidence before it:
- a) From the Trustee about the expression of a trust on April 19, 2011 for the benefit of a company to be designated.<sup>102</sup>

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<sup>97</sup> Witness Statement of John Pennie at ¶¶48,66. (CWS-1)

<sup>98</sup> Witness Statement of Derek Tennant at ¶¶24-26. (CWS-3)

<sup>99</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶19. (CER-2)

<sup>100</sup> John Tennant memo to Tennant Energy, C-268.

<sup>101</sup> Canada does not raise any issues regarding a change of nationality on the part of the Investor. There has never been a change in the US nationality of the investment from the time of the breach to the time of the issuance of the claim. The trustee was an American Citizen and the successor in interest is a US corporation.

<sup>102</sup> Witness Statement of John Tennant at ¶¶19, 28, 30-31. (CWS-2)

- aa. From the Trustee about the designation of Tennant Travel and the beneficial transfer of those shares to Tennant Travel on April 26, 2011.<sup>103</sup>
- bb. From the Skyway 127 corporate officers who had knowledge about the existence of a trust.<sup>104</sup>
- cc. From Retired California Court of Appeal Justice Margaret Grignon confirming that there was a trust in existence under California's law on April 19, 2011 and that the intangible rights through equitable property rights were vested in Tennant Travel Services LLC as of April 26, 2011.<sup>105</sup> Justice Grignon also confirmed that that because of John Tennant's California residency, the trust is a resident of California under California law.<sup>106</sup>
- dd. An external document from February 8, 2016, predating the June 1, 2017 NAFTA Notice of Arbitration by more than one year, referencing the existence of the Trust and the fact that John Tennant held the Skyway 127 shares in Trust for Tennant Energy LLC.<sup>107</sup>

## 2. Tennant Energy is a NAFTA Investor with an Investment in 2011

- 136. The definition of enterprise under the NAFTA includes a Trust.<sup>108</sup> A California trust would meet the definition of enterprise contained in NAFTA Article 1139 as it would be an enterprise of another NAFTA Party.
- 137. Tennant Energy held the shares in Skyway 127 through the Trust more than two years before Ontario canceled the FIT Program on June 12, 2013. While the Investor does not believe that July 4, 2011, is a relevant date because Ontario notified it that Skyway 127 was on the FIT Priority waitlist, the April 19, 2011 date precedes the July 4, 2011, Bruce Region FIT Contract announcements as well.
- 138. In any event, Canada does not challenge Tennant Energy's assertions as an investor arising after January 15, 2015. As noted elsewhere in this jurisdictional Counter-Memorial, the claims in this arbitration arose from knowledge first known (and not otherwise knowable by the Investor) after January 15, 2015.

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<sup>103</sup> Witness Statement of John Tennant at ¶¶16-20. (CWS-2)

<sup>104</sup> Witness Statement of John C. Pennie at ¶¶48,66. (CWS-1). Witness Statement of Derek Tennant at ¶¶ 19-21 and ¶24. (CWS-3)

<sup>105</sup> Expert Witness Legal Opinion of Retired California Court of Appeals Justice Margaret Grignon at ¶33. (CER-2)

<sup>106</sup> Expert Witness Legal Opinion of Retired California Court of Appeals Justice Margaret Grignon at ¶28. (CER-2)

<sup>107</sup> John Tennant memo to Tennant Energy, C-268.

<sup>108</sup> NAFTA Article 201 – **enterprise**.

139. The Investor has always said that there was no basis to Canada's jurisdictional objections. The clear evidence before this Tribunal confirms that there simply is no credence in Canada's wishful arguments. This Tribunal has full jurisdiction to hear this arbitration. Claim.
140. Accordingly, there can be no basis at all for Canada's jurisdictional challenge. It is nothing more than a figment of Canada's imagination.

#### **D. Control**

141. Claims may be brought under NAFTA Article 1116 for an investment owned or controlled by an investor of another NAFTA Party. The NAFTA does not require ownership AND control. It requires ownership or control.
142. Should the Tribunal come to the determination that Tennant Energy had a beneficial interest in the Skyway 127 shares on April 26, 2011, it need not determine the control issue in the jurisdictional phase.
143. Tennant Energy identified above why it owned an investment and thus qualified as an investor as defined in Article 1139. In addition to ownership, Tennant Energy qualifies as an investor given its control of Skyway 127 Energy Inc. Although both is not required — one or the other is sufficient — Tennant Energy is able to demonstrate both.
144. The Notice of Arbitration says that:

10. Tennant Energy is the successor in interest to two US nationals, which transferred their equity in the Investment to Tennant Energy. These US nationals are General Electric Energy LLC. (“General Electric” or “GE”) and John Tennant, a US national. Mr. Tennant is a US citizen and GE Energy is a limited liability corporation incorporated in the state of Delaware.

a. GE Energy acquired its initial equity investment in Skyway 127 as of November 24, 2009.

b. John Tennant acquired his initial equity investment in Skyway 127 on April 19, 2011.

11. Tennant Energy continued the investment of these American entities in Skyway 127 through a corporate reorganization on January 15, 2015. Tennant Energy acquired GE Energy's investment in Skyway 127, along with its intangible rights associated with this investment, as of June 30, 2016.



12. Tennant Energy owns and controls the investment. At all material times in respect to this claim, Tennant Energy, GE Energy and John Tennant have been American nationals. Collectively, GE Energy and John Tennant have owned and controlled the investment, and Tennant Energy has continued as successor in interest to own and controls the Investment.

145. Canada is simply mistaken when it says that Tennant Energy provided no evidence on control in its Memorial. John Pennie referenced the fact that John Tennant as Trustee controlled Skyway 127 in his witness statement.<sup>109</sup>
146. As a result of Canada's misleading statement, John Tennant provides more detail about this matter of control in his witness statement.<sup>110</sup>
147. On April 26, 2011, John Tennant informed Derek Tennant and John Pennie that the Skyway 127 shares he recently acquired in trust should be for the benefit of Tennant Travel LLC.<sup>111</sup>
148. John Tennant notified John Pennie that he would vote the Skyway 127 shares in his trust along with John and Derek to control day to day decisions in Skyway 127.<sup>112</sup>
149. Because the shares were held by John Tennant as trustee, he reached an agreement with other shareholders that he would get the last word in the voting bloc.<sup>113</sup>
150. This issue of control was reviewed by Retired California Court of Appeal Justice Margaret Grignon in her Expert Legal Opinion. She reviewed the evidence and the Witness Statements of John H. Tennant and Derek Tennant. She held in her opinion that:

29. John and Derek both testify they agreed that John would hold the shares in a holding company to prevent dilution of voting control. (CWS-3, ¶¶ 19-21; CWS-2, ¶¶ 17-19.) John testifies that from the time of the transfer of the shares to him on April 19, 2011, he held the Skyway 127 shares in trust, and those shares in trust were identified as being for the benefit of Tennant Travel/Energy on April 26, 2011. (CWS-2, ¶¶ 20, 28.) John and Derek both testify that on April 26, 2011, John told Derek and John Pennie that he held the Skyway 127 shares in trust for Tennant Travel/Energy. (CWS-3, ¶ 24; CWS-2, ¶ 20.) John testifies that he assumed the Skyway 127 Shareholders & Transfers Register would reflect his ownership as trustee and when he learned that it did not, he formally transferred the shares to

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<sup>109</sup> Witness Statement of John C. Pennie at ¶48. (CWS-1)

<sup>110</sup> Witness Statement of John Tennant at ¶19. (CWS-2)

<sup>111</sup> Witness Statement of John Tennant at ¶32. (CWS-2)

<sup>112</sup> Witness Statement of John Tennant at ¶25. (CWS-2)

<sup>113</sup> Witness Statement of John Tennant at ¶25. (CWS-2)

Tennant Travel/Energy in January 2015. (CWS-2, ¶ 28.) John's 2016 written memorandum confirms his testimony. (C-268.)

30. Although the Skyway 127 Shareholders & Transfers Register reflected John Tennant as the owner of the shares and did not expressly include trustee language (C-114, C-115, C-117), trustee language is not necessary to create an oral trust in personal property.<sup>114</sup>

151. On July 4, 2011, Skyway 127 was put on the FIT priority waitlist. Skyway 127 did not get a FIT Contract as expected but remained in the FIT priority waitlist queue.
152. While GE held shares in Skyway 127, it was a silent investor, and it never voted its shares. GE seemed to be most interested in selling wind turbines and servicing the wind farm once operational.<sup>115</sup>
153. On December 31, 2011, there was an internal re-organization of Skyway 127 due to [REDACTED] leaving the project. As a result of the cancellation of [REDACTED] shares, John Tennant's Trust shareholding increased from [REDACTED] to [REDACTED].<sup>116</sup>
154. John Tennant informed John Pennie and Derek Tennant that these new shares should be held the same way as the old shares and that the trust would continue to vote the shares with Derek and John Pennie to control the company.<sup>117</sup> Because of this arrangement, Tennant Travel (later Tennent Energy) had effective voting control of Skyway 127 since December 31, 2011.
155. No contract was announced after July 4, 2011 for the Skyway 127 wind project. Skyway 127 was told that it was on the priority waitlist for a FIT Contract. It remained on this list for nearly two years without a contract. The Ontario government canceled the FIT Program on June 12, 2013. John Tennant still had the shares in Skyway 127 for the Trust.
156. The witness statements of John H. Tennant and Derek Tennant were reviewed by retired California Court of Appeal Justice Margaret Grignon. She concluded that in her legal opinion, John Tennant's express statement on April 19, 2011 created a trust. John Tennant's designation of Tennant Travel Services on April 26, 2011 vested equitable rights to the shares in Tennant

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<sup>114</sup> Expert Witness Legal Opinion of Retired California Court of Appeal Justice Margaret Grignon at ¶¶ 28-30. (CER-2)

<sup>115</sup> Witness Statement of John Tennant at ¶24. (CWS-2)

<sup>116</sup> Shareholder's Ledger Skyway 127, 30 December 2011, C-114.

<sup>117</sup> Witness Statement of John Tennant at ¶26. (CWS-2)

- Travel Services. These rights are a protected investment under the NAFTA definition of investment in Article 1139 as intangible property rights.
157. On January 15, 2015, the Trust shares were formally moved to Tennant Travel. The same day, Tennant Travel received additional Skyway 127 shares bringing Tennant Travel's legal ownership stake to [REDACTED].<sup>118</sup>
158. These additional shares made no difference to control because the Trust's current shareholding was controlling the company's day-to-day activities and had been since 2011.<sup>119</sup> The transfer of the shares was registered on January 15, 2015.<sup>120</sup>
159. At the time that the Skyway 127 shares were finally transferred to Tennant Travel Services LLC, John Tennant agreed to transfer all intangible rights over to Tennant Travel Services LLC along with the shares.<sup>121</sup> Retired California Court of Appeal Justice Margaret Grignon confirmed that John Tennant as trustee had the authority to transfer rights associated with the shares to Tennant Travel.
160. In April 2015, Tennant Travel Services LLC was renamed as Tennant Energy, LLC. The change was registered by the California Secretary of State on April 20, 2015.<sup>122</sup>
161. When John Tennant turned over the beneficial interest in the Skyway 127 shares to Tennant Travel on April 26, 2011, the FIT Program in Ontario was underway. Many contracts had already been announced and the FIT Contract announcement for the Bruce area where Skyway 127 had its wind project were yet to be announced. Skyway 127 was highly ranked in the FIT priority queue.<sup>123</sup>
162. Tennant Travel Services LLC was the beneficial holder and then the successor in interest to the rights that held by the trust and any rights held by John Tennant personally as the trustee of the shares in Skyway 127.<sup>124</sup>

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<sup>118</sup> Skyway 127 Energy Inc Shareholder's Ledger, 15 January 2015, **C-115**.

<sup>119</sup> Witness Statement of John Tennant at ¶29. (**CWS-2**)

<sup>120</sup> Skyway 127 Energy Inc Shareholder's Ledger, 15 January 2015, **C-115**.

<sup>121</sup> John Tennant memo to Tennant Energy, **C-268**; Witness Statement of John Tennant at ¶¶32-35. (**CWS-2**)

<sup>122</sup> California Secretary of State registration of amendment, April 20, 2015. **C-269**

<sup>123</sup> OPA, Priority ranking for First Round FIT Contracts, 21 December 2010, **C-131**, Bruce Transmission Project Rankings, 21 December 2010, **C-104**.

<sup>124</sup> Witness Statement of John Tennant at ¶32. (**CWS-2**)

163. John Tennant confirmed the transfer of these intangible rights at the time to Derek Tennent, the president of Skyway 127, and to John Pennie, who was the operating officer of Tennant Energy.<sup>125</sup>
164. John Tennant confirmed this transfer in a written instrument sent to Tennant Energy in February 2016. This notification was issued well before Tennant Energy filed its initial notice of intent to Canada about this NAFTA dispute on March 2, 2017.<sup>126</sup>
165. The notification letter referred again to:
- a) The existence of the trust.<sup>127</sup>
  - b) That John Tennant had communicated about this trust to Derek Tennant at Skyway 127 and John Pennie at Skyway and Tennant Energy.<sup>128</sup>
  - c) That Tennant Travel Services, LLC (and Tennant Energy LLC) were the irrevocable successors in interest to any rights or benefits received by John Tennant while acting as trustee over the Skyway 127 shares.<sup>129</sup>
  - d) That Tennant Energy LLC (and its predecessor Tennant Travel Services LLC) was the successor in interest to any personal rights or benefits that John Tennant received while acting as trustee over the Skyway 127 shares.<sup>130</sup>
166. Canada suggests at paragraph 95 of the Memorial on Jurisdiction that John Tennant could not control Skyway 127. This statement fails to cogently understand the exercise of control. Control is assessed by the Investor's ability to control the enterprise. GE did not vote its shares in Skyway 127. GE's interest was originally [REDACTED] but it increased to [REDACTED] in 2011. Because GE never voted its shares, the control went to those who wished to vote, and to those who showed up to vote. This control came through the exercise of common share voting rights which were buttressed by a standing agreement of other shareholders to vote their shares along with John Tennant.
167. Tennant Travel effectively controlled the Skyway 127 wind project with the start of the voting bloc on December 31, 2011.<sup>131</sup> This was more than eighteen months before the earliest potential date of breach asserted by Canada.

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<sup>125</sup> John Tennant memo to Tennant Energy, **C-268**; Witness Statement of John Tennant at ¶32. (CWS-2)

<sup>126</sup> John Tennant memo to Tennant Energy, **C-268**.

<sup>127</sup> John Tennant letter, **C-268**; Witness Statement of John Tennant at ¶34. (CWS-2)

<sup>128</sup> John Tennant letter, **C-268**; Witness Statement of John Tennant at ¶34. (CWS-2)

<sup>129</sup> John Tennant letter, **C-268**; Witness Statement of John Tennant at ¶34. (CWS-2)

<sup>130</sup> John Tennant letter, **C-268**; Witness Statement of John Tennant at ¶34. (CWS-2)

<sup>131</sup> Witness Statement of John Tennant at ¶26. (CWS-2)

168. GE absented itself. John Tennent on behalf of Tennant Travel exercised *de facto* control over Skyway 127 when he was the trustee for the benefit of Tennant Travel. John Tennent held the shares in his capacity as trustee. That power merged over to Tennant Energy once the shares were formally transferred to Tennant Energy and with the intangible rights assignment executed by John Tennant.<sup>132</sup>
169. After John Tennant transferred the legal title of the shares to Tennant Energy in 2015, John Tennant became a member of the Management Board of Tennant Energy and continues to have a significant role in the decisions of the company. However, once the legal interest in the shares of Skyway 127 is transferred to Tennant Energy, there is no longer any need to review the role and activities of John Tennant, and the entire focus shifts to Tennant Energy LLC.

#### E. Time and standing

170. 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.
171. As discussed below, Canada places its focus on a legally irrelevant time. The legally relevant time is when Tennant Energy became aware or could have been aware of the internationally wrongful act. That was August 15, 2015. At that time, Tennant Energy owned ██████████ of the shares of Skyway 127 and had been exerting *de facto* control over the project for years.
172. 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.<sup>133</sup>

In April 2011, John Tennant had ██████████ of the shares. In December 2011, John Tennant acquired an additional ██████████ - for a total of ██████████<sup>134</sup>

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<sup>132</sup> John Tennant memo to Tennant Energy, C-268.

<sup>133</sup> Witness Statement of John C. Pennie at ¶48. (CWS-1)

<sup>134</sup> Witness Statement of John C. Pennie at ¶48. (CWS-1)

The shares were formally transferred to the holding company, now known as Tennant Energy, in January 2015. At this time, the company held ██████ of Skyway 127 and was controlling the company.<sup>135</sup>

173. 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.
174. Canada and Ontario kept the information about the wrongful actions of the government strictly secret. Even when it was admitted in sworn evidence at the *Mesa Power* NAFTA Hearing, the information did not become known to the public – but only to those in the closed session of the hearing.
175. 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.
176. 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.<sup>136</sup> Tennant Energy used those shares to control Skyway 127.
177. Simply put, the time clock could not be running on breaches of the NAFTA not discoverable by Tennant Energy.
178. Furthermore, additional support for the fair and equitable treatment claims Tennant Energy raises also has been supported by additional information made available in the *Mesa Power* hearing video.
179. The knowledge arising from these claims also has the effect of resetting limitation periods for certain claims in this case.

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<sup>135</sup> Witness Statement of John C. Pennie at ¶50. (CWS-1)

<sup>136</sup> Skyway 127 Energy Inc Shareholders' Ledger, 15 January 2015, C-115.

180. 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 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.
181. 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).
182. The entirety of the time limitation argument fails if the Tribunal concludes that Tennant Energy's claim arose on August 15, 2015, when the most relevant details essential to Tennant Energy's claims became available to the public.

### III. THE TEST FOR JURISDICTION

183. Tennant Energy submits that the questions raised by Canada are fundamentally ones of admissibility rather than questions of jurisdiction. This is a contentious issue. However, practically, the Tribunal need not be overly concerned with this distinction as it might in other cases due to the sufficiency of evidence produced by Tennant Energy with respect to standing, and due to the absence of responsive evidence adduced by Canada on the issue of its affirmative defence on timing.
184. As already noted in Part II, Tennant Energy (known at that time as Tennant Travel) was an Investor with an Investment in Skyway 127 Wind Energy as of April 26, 2011.
185. In its Memorial on Jurisdiction, Canada takes no issue with the fact that Tennant Energy was an Investor as of January 15, 2015. Tennant Energy contends that that Tennant Energy's investment in Skyway 127 in January 2015 alone is sufficient for the purposes of the jurisdiction.
186. However, Tennant Energy has provided direct testimony, documents, and expert evidence to support its conclusion that it had a protected investment under the NAFTA on April 26, 2011. This investment occurred years before the breach in this arbitration claim arose.
187. Considering the sufficiency of evidence from Tennant Energy, and the total insufficiency from Canada on the relevant questions on the date of the breach, little is to be gained in an esoteric dispute over the correct taxonomy for Canada's flailing application.
188. The evidence clearly and overwhelmingly demonstrates that there is an Investment at any of Canada's claimed breach dates and certainly before the date of breach claimed by the Investor.
189. The remaining question is to determine the date of the breach based on the Investor's claims in this arbitration.

#### A. The claims are timely under articles 1116(2)

190. The facts show that Tennant Energy submitted its Notice of Arbitration within three years of having knowledge of Canada's breaches. Canada's time limitation objections depend on (a) the incorrect presumption that Tennant Energy should have known it incurred damages before it actually incurred any damages, and (b) an incorrect assumption that the breaches of NAFTA Article 1105 are evaluated in the same way as NAFTA Article 1116.



191. Canada bears the burden of proving facts sufficient to justify its affirmative defenses. Article 24(1) of the (1976) UNCITRAL Arbitration Rules provides that “[e]ach party shall have the burden of proving the facts relied on to support its claim or defence.”
192. NAFTA arbitration tribunals, such as in *Pope & Talbot*, have thus required Respondent States to bear “the burden of proof of showing [a] factual predicate” to “an affirmative defense.
193. The situation in the *Pope & Talbot v. Canada* NAFTA arbitration is relevant to the timing issue in the Tennant Energy arbitration. Pope & Talbot claimed that a regulatory regime applying to carry out the Canada -US Softwood Lumber Agreement eventually required the investor to purchase wood at an increasingly expensive rate.<sup>137</sup> Canada contended that the investor knew or should have known a loss occurred in 1996 upon enactment of the Softwood Lumber Agreement, nearly four years before the investor perfected its right to submit its claim to arbitration and in violation of Article 1116(2).<sup>138</sup> The *Pope & Talbot* Tribunal, ruled against Canada, explaining that:

“[i]t is not clear to the Tribunal at what stage this loss of production resulted in a necessity to purchase expensive wood chips, except that it can only have arisen at some stage after implementation of the Export Control Regime.” Whether loss and damage would even be incurred was thus based upon future events not known at the time the challenged measures were put into place.<sup>139</sup>

194. NAFTA’s three-year limitation period in Article 1116(2) is initiated when all the following elements have been met: (a) there is knowledge (actual or constructive) of both (b) a breach and of (c) loss or damage that has been incurred as a result. When any of those elements has not been 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 commencement of the three-year period.
195. Even a reasonable belief that damages are probable or likely would be insufficient to trigger the commencement of the three-year period because the damages would not yet have been “incurred” or suffered. This requirement of knowledge of damages “incurred” is coextensive

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<sup>137</sup> Pope & Talbot – The Harmac Motion at ¶¶1, 12, **RLA-036**.

<sup>138</sup> Pope & Talbot – The Harmac Motion at ¶9, **RLA-036**. Canada contended that the investor’s claim was not perfected until January 2000, when the investor waived its right to initiate other proceedings pursuant to NAFTA Article 1121(1)(b). Pope & Talbot – The Harmac Motion at ¶5, **RLA-036**.

<sup>139</sup> Pope & Talbot – The Harmac Motion at ¶12, **RLA-036**.

with the requirement in Articles 1116(1) that a claim may be submitted for arbitration when the host government “has breached an obligation” under Chapter 11 and the investor (or enterprise) “has incurred loss or damage by reason of, or arising out of, the breach.” Government measures may constitute a breach, but the three-year period does not run, nor could any claim be made, until the investor has knowledge of damages actually incurred.

196. As the tribunal in *Pope & Talbot v. Canada* held, “[t]he critical requirement is that the loss has occurred and was known or should have been known by the Investor, not that it was or should have been known that loss could or would occur.”<sup>140</sup>

197. 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.

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

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)<sup>141</sup>

199. 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:

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<sup>140</sup> Pope & Talbot – The Harmac Motion ¶12, **RLA-036**.

<sup>141</sup> *AMCO Asia Corporation and Others v. Republic of Indonesia*, 1 ICSID Rep. 389, Decision on Jurisdiction, (25 September 1983) at 405, ¶38, **CLA-283**.

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.*<sup>142</sup>

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)<sup>143</sup>

200. This same approach was adopted by the NAFTA 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<sup>144</sup>

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<sup>142</sup> *Ethyl Corporation and Canada*, Award on Jurisdiction, (June 24, 1998) at ¶61, **RLA-069**.

<sup>143</sup> *Ethyl Corporation and Canada*, Award on Jurisdiction, (June 24, 1998) at ¶61, **RLA-069**.

<sup>144</sup> *Pope & Talbot, Inc., and Canada*, Measures Relating to Investment Motion, January 26, 2000, at ¶25, **CLA-284**.

201. It is also the approach that was adopted by the Tribunal in the NAFTA Chapter 11 claim advanced by the Loewen Group, Inc. There, the Tribunal deferred to the merits phase those matters that required an assessment of the factual context to be properly determined, and 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.<sup>145</sup>
202. 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.

That paragraph gave the Court jurisdiction over any dispute between the Parties about "the interpretation or application" of the Treaty.<sup>146</sup>

203. 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 alleged 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 alleged 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.<sup>147</sup>

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<sup>145</sup> *Loewen Group, Inc.* at ¶¶74-76, **CLA-285**.

<sup>146</sup> *United Parcel Service of America Inc. v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 22 November 2002, at ¶35, **CLA-286**.

<sup>147</sup> *United Parcel Service of America Inc. v. Government of Canada*, Award on Jurisdiction, 22 November 2002, at ¶¶36-37, **CLA-286**.

204. 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. 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.
205. The only question is whether Tennant Energy alleged such a case, and was this information known by Tennant Energy before June 1, 2014. On this point, John Pennie, John Tennant, and Derek Tennant have all offered evidence in the negative and Canada offers no evidence to the contrary despite Canada's burden to refute the evidence of Mr. Pennie that was in the record.

#### **B. The meaning of temporal restrictions in the NAFTA Article 1116**

206. 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.

207. 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.
208. 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.
209. 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.<sup>148</sup>

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<sup>148</sup> ILC *Articles on State Responsibility* at Art. 12, **CLA-276**.

210. 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.
211. 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.
212. 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 states:

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 1503(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.<sup>149</sup> (emphasis added)

213. 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 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.

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<sup>149</sup> Canadian Statement of Implementation – NAFTA Article 1116

214. 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*.<sup>150</sup> 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.
215. 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.<sup>151</sup> The nature of these concerns was expressed in the 1903 *Gentini* (Italy) award by the Venezuelan Mixed Claims Commission,<sup>152</sup> 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, 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 unjust.<sup>153</sup>
216. 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.
217. 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.
218. Both the *Feldman* and *UPS* NAFTA Tribunals refused to apply Article 1116(2) to bar claims challenging acts that were continuing. The Tribunals refused to bar the claims because

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<sup>150</sup> *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**.

<sup>151</sup> Mew, G., *The Law of Limitations*, 2nd ed. (Markham: Butterworths, 2004), at p. 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**.

<sup>152</sup> Mew, G., *The Law of Limitations*, 2nd ed. (Markham: Butterworths, 2004), at p. 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**.

<sup>153</sup> *Gentini (Italy v. Venezuela)*, Reports of International Arbitral Awards, 1903, Volume X, p.551, **CLA-277**.

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.<sup>154</sup>

219. 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.<sup>155</sup>
220. The *UPS* Tribunal confirmed that a continuous course of action means that the limitation is extended for each day that the continuous acts continue.<sup>156</sup> Hence, the UPS NAFTA Tribunal said:

...continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitation period accordingly<sup>157</sup>.

221. 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 confirming the conduct or allowing more precise computation of loss. The Feldman tribunal's conclusion on this score buttresses our own<sup>158</sup>

222. The *Feldman* NAFTA Tribunal reached the same conclusion.<sup>159</sup> 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

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<sup>154</sup> 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.

<sup>155</sup> *United Parcel Service of America v. Government of Canada*, Award on the Merits, (24 May 2007), **CLA-282**.

<sup>156</sup> *United Parcel Service of America v. Government of Canada*, Award on the Merits, (24 May 2007) at ¶28, **CLA- 282**.

<sup>157</sup> *UPS*, Award, at ¶28, **CLA-282**

<sup>158</sup> *UPS*, Award, at ¶28, **CLA-282**

<sup>159</sup> *Feldman*, Award, 16 December 2002, ¶203, **RLA-081**



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.<sup>160</sup> 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.

223. 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.
224. 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:

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*

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<sup>160</sup> 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**.

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<sup>161</sup>

225. 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 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.<sup>162</sup>

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<sup>161</sup> *Mondev International Ltd. v. United States* ARB(AF)/99/2, Award, 11 October 2002, ¶87, **RLA-083**.

<sup>162</sup> *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, Decision on Objections to Jurisdiction, 20 July 2006, ¶186, **RLA-070**.

226. 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, if 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.
227. 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.
228. 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.
229. 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.
230. 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.<sup>163</sup> 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.<sup>164</sup>

231. 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 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.<sup>165</sup>

232. 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

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<sup>163</sup> *Bilcon et al. v. Canada*, Award on jurisdiction and liability at ¶267, **CLA-208**.

<sup>164</sup> *Bilcon* at ¶¶268-269, **CLA-208**.

<sup>165</sup> *Bilcon* at ¶¶271 and 281, **CLA-208**.

concluded that the Investors also knew that they would suffer some sort of loss arising from these breaches – thus meeting both requirements to perfect the time limitation in the NAFTA. So, for those breaches, the NAFTA time limitation arose to block a remedy.<sup>166</sup> 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.

233. 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.<sup>222</sup> There may thus be a difference between the date of different breaches arising from a given course of governmental conduct.<sup>167</sup>

234. 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 which only occurred, or they only became aware of, later.<sup>168</sup> 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."<sup>169</sup>

235. 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

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<sup>166</sup> *Bilcon* at ¶¶272 - 281, **CLA-208**.

<sup>167</sup> *Resolute Forest Products v Canada*, Decision on Jurisdiction and Admissibility, January 30, 2018 at ¶ 154, **RLA-079**.

<sup>168</sup> *Ansung Housing Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/14/25) Award, 9 March 2017, at ¶110, **RLA-161**.

<sup>169</sup> *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.

wrongful actions of Ontario government officials, which is at the heart of Tennant Energy's claim.

- ee. These facts are highly relevant to the determination of the loss and the breach.
  - ff. They involve a consideration of the spoliation of evidence issue (which, as described more fully below, requires the production of further evidence).
  - gg. 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 pre-judgement of the merits.
  - hh. 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.
236. 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.
237. 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.
238. Canada provides an unbalanced view of the law of jurisdiction in its Memorial on Jurisdiction.<sup>170</sup> However, even in this unbalanced approach, Canada summarizes its position on the meaning of construction knowledge in paragraph 111 of its Memorial on Jurisdiction 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."<sup>171</sup> 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.<sup>172</sup>

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<sup>170</sup> Tennant Energy notes Canada's position but does not agree with it.

<sup>171</sup> *Grand River Enterprises Six Nations, Ltd., et al v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006, **RLA-070**.

<sup>172</sup> Canada's Jurisdictional Memorial at ¶111.

239. 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.

**1. Canada is not allowed to take advantage of its own wrongfulness**

240. Canada approach is simple and deeply troubling. Canada cannot avoid accountability for its internationally wrongful acts simply because it thought that it got away with them years ago. Canada seeks to benefit in this NAFTA arbitration because it successfully duped Skyway 127 and other FIT proponents for many years. No one can profit from their misdeeds. The administration of international justice would fall into disrepute if Canada were able to dismiss this claim based on Canada's disguised and hidden wrongfulness. Canada has hidden its internationally wrongful actions from the public, but at the same time, it wants this Tribunal to believe that the public was aware of the hidden facts and to use them to start the three year clock in Article 1116(2).

241. International law will not permit Canada to do this. No one can be allowed to take advantage of its own wrong is a general principle of international law. It is known in Latin as *Nullus commodum capere potest de sua iniuria*. Bin Cheng notes:

"No one can be allowed to take advantage of his own wrong," declared the Umpire in *The Montijo Case (1875)*. "A State may not invoke its own illegal act to diminish its own liability. Commissioner Pinkney, in *The Betsy Case (1797)*, called it "the most exceptionable of all principles, that he who does wrong shall be at liberty to -plead his own illegal conduct on other occasions as a partial excuse."<sup>173</sup>

242. Prof. Bin Cheng<sup>174</sup> refers to the Permanent Court of International Justice's decision in the *Chorzow Factory* case, where the Permanent Court stated:

It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to

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<sup>173</sup> Bin Cheng, "General Principles of Law as Applied by International Courts and Tribunals", Cambridge University Press, 1953, at 149, **CLA-108**.

<sup>174</sup> Bin Cheng, *General Principles* at 149, **CLA-108** (Prof. Cheng references the *Montijo Case (1875)* 2 Moore's Int. Arb. 1421 at 1437), **CLA-317**.

some means of redress, if the former party had, by some illegal act, prevented the later from fulfilling the obligation in question....<sup>175</sup>

243. In the *Frances Irene Roberts* case, the US-Venezuela Mixed Claims commission rejected Venezuela's prescriptive limitation defense on a thirty-year-old non-payment claim as follows:

The contention that this claim is barred by the lapse of time would, if admitted, allow the Venezuelan Government to reap advantage from its own wrong in failing to make just reparation to Mr. Quirk at the time the claim arose.<sup>176</sup>

244. Investors have a right to expect that states will act in conformity with their domestic constitution, legislation, regulations, and practices.<sup>177</sup> The protection of due process and the rule of law requires Canada to comply with its own local laws and procedures such as the FIT Rules.<sup>178</sup> This due process is protected by the fair and equitable treatment protection and as a matter of customary international law.

## 2. It is necessary to examine the Investor's submissions

245. The Notice of Arbitration provided detailed information about what this claim was regarding in a section described as "knowledge of the breach." It states:

126. ... The Investor did not obtain knowledge of Ontario's covert actions until sometime after March 16, 2015 when Skyway 127's representatives first met with legal counsel about the applicability of the evidence adduced from the *Mesa Power* NAFTA claim.

The Investor did not have knowledge of the breach caused by the unfair preferential dissemination of FIT Program information until sometime after March 16, 2015 when Skyway 127's representative first met with legal counsel about the applicability of the evidence from the *Mesa Power* NAFTA claim. On this breach, this information first was disclosed confidentially on October 28, 2014 in the testimony of Susan Lo, an Assistant Deputy Minister from the Government of Ontario at pages 172. However, while the hearing transcript of this testimony was apparently declassified by Canada, it was not disclosed to the public and thus not reproduced in the transcript that was released by the PCA on April 30, 2015.<sup>179</sup>

<sup>175</sup> *Factory at Chorzow* (Germ. v. Po), PCIJ Series A, No. 9, 1927, at 31, **CLA-318**.

<sup>176</sup> Reports of International Awards, *Frances Irene Roberts* case, Vol. IX, 1903 – 1904 at 207, **CLA-319**.

<sup>177</sup> See *CMS Gas Transmission Company v. The Argentine Republic*, Decision of the Tribunal on Objections to Jurisdiction, Case No. ARB/01/8, July 17, 2003, at ¶¶26-27, **CLA-320**.

<sup>178</sup> *Teco Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID, Award, December 19, 2013, **CLA-181**.

<sup>179</sup> The Notice of Arbitration sets out the following at footnote 87: The PCA wrote to the *Mesa Power* parties to say that the transcript and video was posted to the PCA website on April 30, 2015.



The first disclosure of information about this measure (but without any disclosure of the actual testimony) arose in the Mesa Power Investor Post-Hearing Brief (Released on January 9, 2015), however the Investor was not aware of this information until sometime after March 16, 2015.

The Investor did not have knowledge of the breach caused by Ontario's unfair administration and arbitrary awarding of FIT Contracts until it reviewed the *Mesa Power Investor's Post-Hearing Brief*. **This occurred sometime after March 16, 2015.** The Investor's Post-Hearing Brief made reference to actual testimony (not reproduced and subject to confidentiality).<sup>180</sup> **This testimony confirmed that IPC received better treatment than other FIT Proponents.**

The Investor did not have knowledge of the breach caused by the spoliation of documents until after April 30, 2015. Because of the serious and pervasive nature of this wrongful behavior, **the extent of the breach cannot be identified until interrogatories or the Tribunal in this claim can order other investigation.**

246. Mr. Pennie provided some particulars of the information not known by Tennant Energy and Skyway 127, including the fact 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:

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 the [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.

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<sup>180</sup> The Notice of Arbitration sets out the following at footnote 88: 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).

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.<sup>181</sup>

247. In essence there are four particular facts raised in the three witness statements of John Pennie, John Tennant, and Derek Tennant which helps to clarify the key issues raised in paragraph 126 of the Notice of Arbitration:

- a) Delay in awarding FIT Contracts because of the Korean Consortium receiving benefits outside of the operation of the GEIA because the Korean Consortium was in breach of the GEIA, but the public was not aware of that breach;<sup>182</sup>
- b) Unfair program information regarding Ontario's secret decision not to award all available transmission to FIT Proponents in the Bruce Region and abusive modifications arising because of a secret meeting between the [REDACTED] and senior corporate officers of NextEra which had not been disclosed to the public, while Ontario took steps to assure the public that only ordinary course low level official meetings were taking place;<sup>183</sup>
- c) Unfair administration of the FIT Program by the secret "Breakfast Club" Conspirators who were actively assisting competitors of Skyway 127 to the detriment of Skyway 127;<sup>184</sup>
- d) Spoliation of documents.<sup>185</sup>

248. Each of these facts identifies problems with the administration of the FIT Program. However, these improprieties are not the actual measures which form the base of the Tennant Energy Claim. They are simply factual antecedents to the Claim.

249. The witness statement of John C. Pennie provides additional testimony with respect to these matters. Mr. Pennie confirms that the date of the first inquiry to legal counsel to discuss the NAFTA matter was June 5, 2015 and the first meeting with legal counsel was on or about June 16, 2015.<sup>186</sup>

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<sup>181</sup> Witness Statement of John C. Pennie at ¶92. (CWS-1)

<sup>182</sup> Witness Statement of John Tennant at ¶¶ 38-40. (CWS-2); Witness Statement of Derek Tennant at ¶¶ 47-53. (CWS-3); Witness Statement of John C. Pennie at ¶¶ 70, 90-103. (CWS-1)

<sup>183</sup> Witness Statement of John Tennant at ¶¶38-40. (CWS-2); Witness Statement of Derek Tennant at ¶¶47-53. (CWS-3); Witness Statement of John C. Pennie at ¶¶70, 90-103. (CWS-1)

<sup>184</sup> Witness Statement of John Tennant at ¶¶38-40, (CWS-2); Witness Statement of Derek Tennant at ¶¶47-53, (CWS-3); Witness Statement of John C. Pennie at ¶¶70, 90-103 (CWS-1)

<sup>185</sup> Witness Statement of John Tennant at ¶¶38-40. (CWS-2); Witness Statement of Derek Tennant at ¶¶47-53, (CWS-3); Witness Statement of John C. Pennie at ¶¶70, 90-103. (CWS-1)

<sup>186</sup> Witness Statement of John C. Pennie at ¶¶5, 90 and 91. (CWS-1)

250. Mr. Pennie identifies the first date that he became aware of the information in the *Mesa Power* post hearing writings including the post hearing submissions as after they became public on August 15, 2015.<sup>187</sup> He also confirms that he became aware of additional information, including the admissions of Ontario Assistant Deputy Energy Minister Susan Lo through the *Mesa Power* Hearing videos.<sup>188</sup> That information would include the testimony that the existence of the “Breakfast club” conspiracy and that International Power Canada received better treatment than other FIT Proponents on account of the “Breakfast club” conspiracy.
251. Mr. Pennie, 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.<sup>189</sup>

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

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 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*

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<sup>187</sup> Witness Statement of John C. Pennie at ¶94. (**CWS-1**)

<sup>188</sup> Witness Statement of John C. Pennie at ¶95. (**CWS-1**)

<sup>189</sup> Witness Statement of John C. Pennie at ¶70. (**CWS-1**)

arbitration were eyeopeners to the fact that there was little fairness or transparency in the FIT Program.<sup>190</sup>

253. 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:

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.<sup>191</sup>

254. 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:

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

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<sup>190</sup> Witness Statement of John C. Pennie at ¶94. (CWS-1)

<sup>191</sup> Witness Statement of John C. Pennie at ¶101. (CWS-1)

additional unfair practices taken by Ontario that had been concealed from the public due to the redactions in the public hearing transcripts.

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.<sup>192</sup>

255. Finally, as this Tribunal has not ordered document production to proceed in this matter, there still is not a sufficient knowledge of the extent of the destruction of relevant and material evidence to permit a proper understanding of the extent of the breach regarding the spoliation of evidence. What Tennant Energy knows is that the Premier's office was deeply involved in Energy Policy matters and that documents relating to the breaches that came to Tennant Energy's attention in 2015 are reasonably presumed to be within those documents criminally destroyed by the senior-most staff of the office of the Premier of Ontario.

### **C. Why the tribunal has jurisdiction to rule on these claims**

256. Canada asks the Tribunal to wear blinders and ignore the evidence upon which Tennant Energy relies, which was 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.

257. 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.<sup>193</sup>

258. 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.

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<sup>192</sup> Witness Statement of John C. Pennie at ¶¶99-100. (CWS-1)

<sup>193</sup> Article 15 of the 1976 UNICTRAL Arbitration Rules, CLA-249.

259. 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.<sup>194</sup> 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.<sup>195</sup>

260. 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:

- ii. Tennant Energy, LLC, is an American investor with indirectly owned investments in the territory of Canada.
  - jj. 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
  - kk. 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.
  - ll. Finally, Canada raises issues in the context of its Jurisdictional Memorial that are not questions of jurisdiction.
261. 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

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<sup>194</sup> Canada's Response to Tennant Energy's Request for Interim Measures, September 23, 2019

<sup>195</sup> 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."

Tribunal should dismiss Canada's consent complaints, be they on jurisdiction or admissibility, as in either case, consent to this arbitration is present.

262. 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.
263. Canada conflates the burden and standard of proof for admissibility with that for jurisdiction. Canada incorrectly suggests that they are the same.<sup>196</sup> There are very significant differences between admissibility and jurisdiction, including questions of whom bears the burden of proof.

#### **D. Determining the date of breach should be joined to merits**

264. Canada concocts an admissibility challenge through its substitution of an artificial date as the true date upon which Tennant Energy's claims arose. Without reference to the facts and pleadings set out by Tennant Energy in its Memorial, Canada recasts Tennant Energy's claim and substitutes an artificial substituted date of the breach – June 12, 2013, or even earlier to July 4, 2011.
265. 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" conspiracy and how it favored companies like International Power Canada over Skyway 127.
266. 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.'<sup>197</sup> 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.
267. 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

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<sup>196</sup> Canada's Memorial on Jurisdiction, at Parts III and IV, Canada's Renewed Bifurcation Motion at ¶16-17.

<sup>197</sup> Notice of Arbitration, ¶73.

date. The June 12, 2013, occurs well 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.

268. The true date could not have been earlier than August 15, 2015. Tennant Energy has pled that the date of the breach was August 15, 2015. With respect to the spoliation of documents, the earliest date would be April 30, 2015 when the Mesa Power public transcript was made public, but the essential information of the “Breakfast Club” conspiracy was not known until August 15, 2015.
269. 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.
270. The *Resolute Forest* NAFTA Tribunal test looks to knowing that a breach actually occurred and not that it is likely to occur. 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. There may thus be a difference between the date of different breaches arising from a given course of governmental conduct.<sup>198</sup>

271. This was not a situation where there was a physical taking that was known. This case involves subterfuge and the concealment of the wrongful act. A breach under the NAFTA does not occur until there is breach and knowledge of that breach. In essence, in the circumstances of this arbitration claim, the concealment by the government forms an essential part of the composite breach. While the first part of the wrongful act occurred, the victim was unaware that the wrongful act had taken place. The second part of the composite act occurs when the victim discovered the wrong. Before that time, the investment attributed the wait and then the inability to obtain a contract to the fair operation of the FIT Program. Later, Skyway 127 discovered a different situation that was inconsistent with the NAFTA.

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<sup>198</sup> Resolute Forest Products v Canada, Decision on Jurisdiction and Admissibility, January 30, 2018 at ¶154, **RLA-079**.



272. Skyway 127 and Tennant Energy believed Ontario conducted the FIT Program under its rules in a fair manner until it actually discovered that another situation existed. Derek Tennant, the President of Skyway 127 stated in his witness statement:

I assumed that Ontario would follow the law and followed the FIT Rules fairly. I assumed that Skyway 127 was not awarded a FIT contract through the fair and proper operation of the FIT Program Rules. I never attended any NAFTA hearings, including those for Mesa Power or Windstream. When those cases were underway, I was not aware that I would have any reason to go to those hearings.<sup>199</sup>

273. 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, and which only became public knowledge on August 15, 2015.

274. 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.

275. 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.

276. 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.

277. 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

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<sup>199</sup> Witness Statement of Derek Tennant at ¶47. (CWS-3) Similar statements were made by John H. Tennant in his Witness Statement at ¶37. (CWS-2); and John C. Pennie in his Witness Statement at ¶113. (CWS-1)

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.”<sup>200</sup>

278. 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.
279. 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 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).
280. 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.

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<sup>200</sup> Canada’s Jurisdictional Memorial at ¶63.

#### IV. THE TIME ISSUE

281. NAFTA Article 1116 requires for a claim that an investor have a NAFTA Breach that must be brought within three years of the time that the Investor knew or should have known of the breach. The Tennant Energy claim seeks damages for a breach of NAFTA Article 1105. It is not possible to commence a claim for a breach of fair and equitable treatment before the time that the Investor knew, or should have known, of the breach.
282. 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.
283. Under Canada's theory of breach – the clock would start ticking whenever a breach actually 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.
284. Canada has engaged in the ongoing suppression of evidence in this arbitration claim. Canada's practice of disguised and hidden wrongful actions is incompatible with its claim that the temporal clock was ticking on its breaches. International law does not condone the suppression of evidence. Quite to the contrary, international law supports transparency.
285. Before the "clock" started to tick, Tennant Energy had to know why its failure to obtain a contract in the FIT Process resulted from a breach of a NAFTA obligation.
286. Canada's temporal allegations completely ignore the August 15, 2015 date Tennant Energy pled and the facts upon which Tennant Energy relies. Instead, Canada artificially substitutes a series of earlier dates in place of the breach's actual August 2015 date.
287. Canada arbitrarily claims that the date of the breach in this claim is the date that the FIT contracts were announced for the Bruce Transmission region on July 4, 2011.<sup>201</sup> In the alternative, Canada says that the date of breach was when the FIT Program was canceled on June 12, 2013.

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<sup>201</sup> Canada's Jurisdictional Memorial at ¶156.

288. But these are not the dates of the breach as Tennant Energy has pled. That date focuses on the information emanating from the evidence obtained at the *Mesa Power* NAFTA Hearing.
289. Canada relies on charts in its Memorial on Jurisdiction, which only confuse the issue.
290. 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*.<sup>202</sup> However, the common basis of poor public policy administration does not define the measures at issue in the Tennant Energy claim.
291. 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.
292. 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 commenting on testimony at the October 2014 *Mesa Power* NAFTA Hearing. That testimony was not available to the public beforehand.
293. Tennant Energy could not have known this information until August 15, 2015, when the submissions commenting on the Mesa Power Hearing evidence were released to the public.
294. Canada takes great pains in its Memorial on Jurisdiction 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.<sup>203</sup> 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 claims are different. Nowhere in its charts in paragraphs 118 – 120 of Canada's Memorial on Jurisdiction 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."

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<sup>202</sup> *Mesa Power Group v. Canada* (PCA Case No. 2012-17), Dissenting Opinion of Judge Charlie N. Brower at ¶4, **CLA-055**.

<sup>203</sup> Canada's Jurisdictional Memorial at ¶¶118 – 120.

295. Canada then incorrectly states that information available from the *Mesa Power* NAFTA hearing is not relevant.<sup>204</sup> 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.
296. 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.
297. 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 to Mesa Power itself during the hearing.
298. 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 its own officials about special business protection provided to a local company controlled by the government's political cronies.
299. 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 officials.<sup>205</sup> 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.
300. Canada's temporal objections are predicated upon the date of breach not occurring on the date claimed by Tennant Energy.

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<sup>204</sup> Canada's Jurisdictional Memorial at ¶¶122 – 120.

<sup>205</sup> Canada's Jurisdictional Memorial at ¶¶83-85.

**A. The Investor identified the claim in this arbitration.**

301. Tennant Energy has raised a claim under its Notice of Arbitration of a Claim of a breach of the international law standard of treatment. NAFTA Article 1105(1) provides that:

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

302. In *Procedural Order No. 4*, the Tribunal ordered Tennant Energy to clearly articulate the basis of its claim. Tennant Energy complied.

303. The Memorial states in paragraph 13 what the Tennant Energy Claim is about:

13. The Tennant NAFTA Claim is about:

(a) Special business opportunities provided to a politically connected local favourite, IPC.

(b) The “Breakfast Club” cabal of politicians and senior officials systemically abusing the process to reward friends at the expense of everyone else.

(c) Ontario’s decision to not complete its FIT Program for the Bruce Region contrary to the legitimate expectation of FIT Proponents such as Skyway 127.

(d) The delay of the award of contracts because of Korean Consortium’s failure to comply with its contractual obligations.

(e) The conspiracy in the systemic violations of the NAFTA and the spoliation and wanton destruction of evidence by Ontario.<sup>206</sup>

304. John C. Pennie, the Client Representative of Tennant Energy filed a Witness Statement with the Memorial. (CWS-1). Mr. Pennie added the following comment at paragraph 97 of his Witness Statement:

97. Not one of these issues was known to the public before the release of information from the Mesa Power hearing in 2015, nor could it be known in the absence of evidence available to the public.<sup>207</sup>

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<sup>206</sup> Investor’s Memorial at ¶13.

<sup>207</sup> Witness Statement of John C. Pennie at ¶¶96 – 97. (CWS-1)

305. These are the fundamental questions in this NAFTA Claim. The jurisdictional question is when did these breaches of international law first arise.
306. Tennant Energy has argued that the breach arose in 2015 when Tennant Energy first became aware of the breach.
307. Canada takes the position that what has been articulated by the Investor should be disregarded. For Canada to be correct, then the breach must be considered to arise BEFORE the Investor knew about the internationally wrongful act (because Canada had concealed it). Canada has no support for this position, but it consistently asserts positions that require the Tribunal to accept this position for Canada to succeed.
308. Tennant Energy is the claimant in this arbitration. Due process and the opportunity of having its case heard gives it the right to articulate its claim. As such, Tennant Energy's claim needs to be considered as it has set it out.
309. Canada contends that the Investor's claim is not actually what it has addressed (namely the "Breakfast club" conspiracy and associated wrongful events), but that a recast and different claim of Canada's choosing should be substituted for Tennant Energy's claim. This recast claim, concocted by Canada, would mirror the *Mesa Power* Claim and thus this claim would fail according to Canada because it could have been brought earlier than June 1, 2014.
310. However, Canada provides no support for its novel approach of substituting the claim articulated by the Investor bringing the claim for something else. What Canada has done is taken the general expression of the claim and then applied facts that **could not** give rise to a claim.
311. For example, Canada cannot demonstrate that there was any public knowledge or reference to the fact that the Korean Consortium was not in compliance with the terms of the GEIA yet receiving special benefits which exceeded those specified in the GEIA.
312. Canada cannot therefore demonstrate any public disclosure of knowledge of the existence of the "Breakfast Club" conspirators of the most senior public officials and political staffers with the purpose of assisting the government's friends and supporters with regulatory obstacles.
313. Canada cannot demonstrate any public disclosure that International Power Canada was receiving special protection against regulatory issues (and other competitors in the FIT Process) from the most senior officials of the Ontario Government.

314. While Ontario can disclose that spoliation of evidence was an issue (although vigorously denied by the participants at that time), there is no indication of the effect of that spoliation of evidence upon the material and relevant documents to this case due to Canada’s ongoing refusal to identify what documents remain and which documents were destroyed.

## B. Canada may not recast the facts

315. The *Glamis Gold* NAFTA Tribunal held that “the basis of the claim is to be determined with reference to the submissions of [the] [c]laimant.”<sup>208</sup>

316. The *Eli Lilly* Tribunal held that:

However, as Claimant is the Party asserting the Tribunal’s jurisdiction to decide its substantive claim, the “alleged breach” must, in the first instance, be identified by reference to Claimant’s submissions.<sup>209</sup>

317. The Tribunal went on to carefully examine the pleadings issued by the Investor in that NAFTA claim. The Tribunal stated:

The Tribunal has carefully examined Claimant’s written and oral submissions to evaluate whether Claimant’s characterization of its claim for the purpose of jurisdiction is supported by its position on the merits.”<sup>210</sup>

318. Upon reviewing the merits, the *Eli Lilly* Tribunal rejected Canada’s attempt to “re-characterize” the Investor’s argument.<sup>211</sup> The Tribunal then had to consider the timing of the breach based on its determination of the Investor’s claim. The *Eli Lilly* Tribunal concluded:

With respect to jurisdiction, the critical question is obviously: when did Claimant first acquire knowledge, or constructive knowledge, of the alleged breach and the ensuing loss? Given the Tribunal’s finding on the identity of the alleged breach, the Tribunal sees no way in which Claimant could have acquired the requisite knowledge before the court invalidated the Zyprexa and Strattera Patents. An investor cannot be obliged or deemed to know of a breach before it occurs.<sup>212</sup>

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<sup>208</sup> *Glamis Gold, Ltd. v. United States*, UNCITRAL, Award, 8 June 2009 at ¶ 349, **CLA-315**.

<sup>209</sup> *Eli Lilly and Company v. The Government of Canada*, Final Award, UNCITRAL Arbitral Tribunal, Case No. UNCT/14/2, 16 March 2017 at ¶163, **CLA-316**.

<sup>210</sup> *Eli Lilly v. Canada*, Award at ¶164, **CLA-316**.

<sup>211</sup> *Eli Lilly v. Canada*, Award at ¶165, **CLA-316**.

<sup>212</sup> *Eli Lilly v. Canada*, Award at ¶167, **CLA-316**.



319. The Investor’s case is defined by its own submissions. Tennant Energy consistently has argued that the measures at issue arise from previously secret information first disclosed because of certain publications of written documents arising in 2015 after the *Mesa Power* NAFTA hearing.

320. Further, as noted in paragraph 167 of the *Eli Lilly* Award, “An investor cannot be obliged or deemed to know of a breach before it occurs.”<sup>213</sup>

321. That is not to say that the earlier issues are not of interest but that the absence of knowledge of the breach cannot be imputed.

322. In *Bilcon v. Canada*, the NAFTA tribunal stated:

While Article 1116(2) bars breaches in respect of events that took place more than three years before the claim was made, events prior to the three-year bar, however, are by no means irrelevant. They can provide necessary background or context for determining whether breaches occurred during the time-eligible period.<sup>214</sup>

323. The specific allegations Tennant Energy has made have been clear and consistent. They relate to information that was not known, and could not have been known, to Tennant Energy before June 1, 2014. As a result, Tennant Energy submits that it filed its June 1, 2017 Notice of Arbitration squarely within the three-year limitation period set forth in NAFTA Article 1116(2).

324. Fundamentally, NAFTA Article 1115 and Article 15 of the (1976) UNCITRAL Arbitration Rules guarantee that Tennant 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 Tennant Energy’s claim as it proposes to do.

325. This Tribunal needs to consider the facts Tennant Energy 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...”<sup>215</sup>

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<sup>213</sup> *Eli Lilly v. Canada*, Award at ¶167, **CLA-316**.

<sup>214</sup> *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 (“*Bilcon v. Canada*”), at ¶282, **RLA-003**.

<sup>215</sup> *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Award, 27 September 2016, ¶360, **RLA-088**, (quoting *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2), Award of 11 October 2002, ¶118) (emphasis added).

“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.*”<sup>216</sup>

326. Canada may not substitute the facts and recast the actual claim Tennant Energy raises with a different formulation that the Respondent selects. Tennant Energy, the Investor in this arbitration, is entitled to define its claim. This right cannot be lightly modified.
327. 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.
328. For example, the public (and thus Tennant Energy) could have become aware of certain internationally wrongful acts from measures only after reviewing the public versions of submissions discussing the evidence at the *Mesa Power* NAFTA hearing and the unredacted, yet publicly available, video recordings of the *Mesa Power* NAFTA hearings on the PCA website, publicly available well after June 1, 2014.<sup>217</sup>
329. 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 public 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.<sup>218</sup>

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<sup>216</sup> *Windstream Energy LLC v. Government of Canada* (UNCITRAL) Award, 27 September 2016, ¶362, **RLA-088**.

<sup>217</sup> 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.

<sup>218</sup> 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 from 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. 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.

330. 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 Memorial on Jurisdiction are truly jurisdictional, the principle of judicial economy mandates that this Tribunal need not rule on that jurisprudential issue, as it is 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).
331. Canada's Memorial on Jurisdiction 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.
332. The evidence already before this Tribunal includes direct admissions, made after June 1, 2014, of international wrongful conduct by government officials administering the FIT Program — including senior staff within the Ministry of Energy.
333. 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.
- .... The Claimant simply wishes to refer to evidence which is already in its possession and which was obtained through public sources.<sup>219</sup>
334. 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.<sup>220</sup> Canada has continued to prevent the public from having access to this information in this arbitration over Tennant Energy's objection, who believes the

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<sup>219</sup> Tennant Energy Procedural Order No. 7 at ¶48. (footnotes omitted).

<sup>220</sup> Email from Government of Canada to Permanent Court of Arbitration, 10 August 2020, **R-027**.

information to be properly within the public domain and necessary if the principle of transparency is to have meaning.

335. 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.<sup>221</sup>

336. 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 its legal position in the *Mesa Power* NAFTA case, Canada now argues that facts made public before June 1, 2014, clearly demonstrate that Canada in fact breached its NAFTA obligations.<sup>222</sup> 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.
337. Canada took, and continues to take, active steps to prevent the public (including other FIT Proponents) from knowing about the admissions of wrongful conduct provided by Ontario officials during the *Mesa Power* hearing in October 2014. Those admissions at issue arose in closed testimony that was not available to the public. A redacted transcript from that hearing was made available to the public in mid-2015. The full unrestricted hearing video was made available to the public from 2015 until 2020 when the PCA removed it from its website at the written request of the Government of Canada. That public video was viewed in 2020 by the client representative of Tennant Energy and it has been admitted as a confidential exhibit before this Tribunal.
338. In subsequent written submissions, information about the government official admissions became public through post-hearing written arguments that were made available to the public in 2015. Those documents became the foundations of Tennant Energy's arbitration claim.

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<sup>221</sup> Tennant Energy Procedural Order No. 7 at ¶47 (footnotes omitted).

<sup>222</sup> Canada's Jurisdictional Memorial at ¶137.

339. The matters at issue in the Tennant Energy claim are set out in paragraph 13 of the Tennant Energy Memorial. They are not addressed by Canada's argument in its Memorial on Jurisdiction. Those issues are:

13. The Tennant NAFTA Claim is about:

- (a) Special business opportunities provided to a politically connected local favourite, IPC.
- (b) The "Breakfast Club" cabal of politicians and senior officials systemically abusing the process to reward friends at the expense of everyone else.
- (c) Ontario's decision to not complete its FIT Program for the Bruce Region contrary to the legitimate expectation of FIT Proponents such as Skyway 127.
- (d) The delay of the award of contracts because of Korean Consortium's failure to comply with its contractual obligations.
- (e) The conspiracy in the systemic violations of the NAFTA and the spoliation and wanton destruction of evidence by Ontario.<sup>223</sup>

340. John C. Pennie wrote in paragraph 97 of his Witness Statement filed with the Tennant Energy Memorial:

97. Not one of these issues was known to the public before the release of information from the Mesa Power hearing in 2015, nor could it be known in the absence of evidence available to the public.<sup>224</sup>

341. Canada says that information was available by May 8, 2013 on Canada's public website with some pleadings in the claim. Canada even filed a Witness Statement from Lucas McCall, a government official, to this effect.<sup>225</sup>

- a. The documents that Canada raises in paragraphs 118 and 119 of the Memorial on Jurisdiction do not deal with the admissions of government officials about the existence and unfair operations of the "Breakfast Club" conspirators because that information was not made public until the confidential admission on cross-examination of Ontario

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<sup>223</sup> Investor's Memorial at ¶13.

<sup>224</sup> Witness Statement of John C. Pennie at ¶ 97. (CWS-1)

<sup>225</sup> Witness Statement of Lucas McCall. (RWS-1)

Assistant Energy Deputy Minister Susan Lo in October 2014 at the *Mesa Power* NAFTA hearing.

- b. Similarly, the information about the special protection granted to International Power Canada was not public at that time. It is not covered in any of the documents that Canada raises in paragraphs 118 and 119 of the Memorial on Jurisdiction.
  - c. Ontario's decision to not complete its FIT Program for the Bruce Region contrary to the legitimate expectation of FIT Proponents such as Skyway 127 was not disclosed either. An amount of transmission was announced but not the overall policy decision to no longer follow the terms of the FIT Program. That critical information was secret until admitted in the Mesa Power NAFTA hearing and not before.
  - d. The delay of the award of contracts because of Korean Consortium's failure to comply with its contractual obligations. was also not known to the public and not disclosed in any of the documents listed by Canada in paragraphs 118 and 119 of its Memorial on Jurisdiction. The Korean Consortium's continued benefits while being outside of the terms of its special deal, the GEIA, became known in the Mesa Power hearing and not before.
  - e. There was nothing disclosed in any of the documents listed by Canada in paragraphs 118 and 119 of its Memorial on Jurisdiction about the role of the Breakfast Club conspirators, or about the code names or any of the ways in which senior officials were suppressing and disguising the identity of key Ontario energy policy matters or anyone else involved in the despoliation and wanton destruction of evidence by Ontario.
342. In *Mesa Power*, Ontario and Canada asserted that it acted in good faith and in compliance with the FIT Rules. The fact that Mesa Power alleged that the President of the Ontario Liberals ended up with FIT Power Contract would certainly appear unusual. However, there is a difference between a generalized suspicion of politics<sup>226</sup> and a knowledge of unfairness based upon the admission of an Assistant Deputy Energy Minister of the existence of a specific conspiracy of the most senior officials in the government to secretly carry out protection for the government's friends and supporters.
343. Canada cannot demonstrate how its argument can be successful as it requires this Tribunal to ignore time. Canada cannot support its contention that Tennant Energy ought to have known about the existence of a high placed secret conspiracy of government officials or of their effects. Ontario and Canada's efforts to suppress public knowledge of these events speaks for itself.

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<sup>226</sup> As suggested in the table in paragraph 122 of Canada's Jurisdictional Memorial. All the items identified in the second column are mere supposition and not address the material and substantive issues raised by the Investor as the core issues in this claim.

Canada still attempts to limit public access to this information that it made available to the public for five years through links on Canada's own public website.

344. Based on Canada's theory, the floodgates of investor state litigation would rain down cases at every potentiality of unfairness simply because suffered some loss or defeat in a government process. This simply is not the rule and is not an acceptable result
345. NAFTA Article 1116 requires that a claimant know or ought to know. That is a much more material and higher standard that simply having a suspicion that something appears like favoritism.
346. For Canada to succeed, it must demonstrate that the Investor ought to have known about secret information years before the admissions at a confidential hearing were made and then partially released to the public another half year later.
347. Indeed, Canada does not even demonstrate that Mesa Power was aware of these matters with any publicly-available information before the *Mesa Power* hearing in October 2014.

### C. DISCLOSURE OF INFORMATION ON KOREAN CONSORTIUM

348. Canada contends in its Memorial on Jurisdiction 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:

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"<sup>227</sup>

349. The delay of the award of contracts because of Korean Consortium's failure to comply with its contractual obligations also not was known to the public and not disclosed in any of the documents listed by Canada in paragraphs 118 and 119 of its Memorial on Jurisdiction. This is the relevant issue. The Korean Consortium's continued benefits while being outside of the terms of its special deal, the GEIA, became known in the Mesa Power hearing and not before. Moreover, Ontario Assistant Deputy Energy Minister Susan Lo admitted that the Korean

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<sup>227</sup> Canada's Jurisdictional Memorial at ¶125

Consortium did not want certain terms of its agreement known to the public so that it could hold bargaining power over other investors.<sup>228</sup>

350. However, Canada attempts to recast the issue. The issue is not the existence of the sole-sourced GEIA, but the fact that the Korean Consortium was non-compliant with the GEIA and that Canada unfairly provided special benefits that went outside of the operation of the GEIA to the Korean Consortium and its joint venture partners and to the expense of FIT Proponents like Skyway 127.
351. 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 should have been known to Tennant Energy before this information became public. Canada kept this information secret. It was not 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 Memorial on Jurisdiction, but not one reference in the document addresses the specific allegation Tennant Energy raises.
352. 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, but that Canada still was 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.<sup>229</sup>
353. Canada addresses documents regarding the GEIA, but nowhere does Canada demonstrate where this knowledge that Ontario made public that it was unilaterally providing extra benefits

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<sup>228</sup> *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,” and when questioned she confirmed that this allowed the Korean Consortium to maintain “bargaining power” over other power investors in Ontario, **C- 121**.

<sup>229</sup> *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,” and when questioned she confirmed that this allowed the Korean Consortium to maintain “bargaining power” over other power investors in Ontario, **C- 121**.



outside of Ontario's contractual requirements in the GEIA. Canada cannot demonstrate this public knowledge because Canada and Ontario took measures to suppress this information from the public and keep this disclosure secret like all the other embarrassing matters associated with the operation of the FIT Program.

354. 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. 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.<sup>230</sup> Canada states in Paragraph 130 of their Memorial on Jurisdiction<sup>231</sup> 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<sup>232</sup> 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, however, on page 116 (as cited to by Canada) there is no discussion of a delay in meeting the deadlines for Phases 1 & 2, nor the supported (or at the very least known) predatory measures of the Korean Consortium to buy up FIT competitors' capacity ("low hanging fruit") in order to meet the terms of its exclusive deal.<sup>233</sup>
355. 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:

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

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<sup>230</sup> Investor's Memorial ¶752; Testimony of Ontario Assistant Deputy Energy Minister Susan Lo, Hearing Transcript, Day 3, at pp. 97-98, lns.19-2.

<sup>231</sup> 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."

<sup>232</sup> 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.

<sup>233</sup> *Mesa Power Group LLC v. Government of Canada*, (PCA Case No. 2012-17) Investor's Post-Hearing Brief (Public Version) 18 December 2014, ¶¶101-103, 134, 299-300, **C-017**; Released on the PCA Website on January 9, 2015.

GEIA and after the Korean Consortium failed to fulfill its obligations under the terms of the GEIA.<sup>234</sup>

356. Ontario gave all sorts of undisclosed benefits and unique accommodations to the Korean Consortium that went outside of what was disclosed to the public.<sup>235</sup> Tennant Energy's 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.<sup>236</sup>

#### **D. DISCLOSURE OF PREFERENTIAL TREATMENT GIVEN TO INTERNATIONAL POWER CANADA**

357. In Paragraph 13 of the Investor's Memorial, Tennant Energy identifies two issues:

13. The Tennant NAFTA Claim is about:

(a) Special business opportunities provided to a politically connected local favourite, IPC.

(b) The "Breakfast Club" cabal of politicians and senior officials systemically abusing the process to reward friends at the expense of everyone else.<sup>237</sup>

358. This particular information was not disclosed before June 1, 2014. Canada cannot avoid accountability for its internationally wrongful acts simply because it got away with these misdeeds years ago by hiding them — and denying them in its *Mesa/Windstream* Defenses — only to now substitute those general type claims in order to obscure the specific factual details presented by Tennant Energy LLC in light of the revelations from those prior proceedings. Canada seeks to benefit because it successfully duped Skyway 127 and other FIT proponents for years with suggestions that everything in the administration of the program was proper, but now

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<sup>234</sup> 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.

<sup>235</sup> 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 because of the testimony at the Mesa Power NAFTA hearing.

<sup>236</sup> Investor's *Notice of Arbitration* at ¶49; *Mesa Power Group LLC v. Government of Canada*, (PCA Case No. 2012-17) Investor's Post-Hearing Brief (Public Version) 18 December 2014, ¶¶101-103, 134, 299-300, **C-017**; Released on the PCA Website on January 9, 2015.

<sup>237</sup> Investor's Memorial at ¶13.

- Canada changes its tune saying that everything surrounding the FIT Program administration actually was *improper*, and that the foreign investors should have been able to *smell the rot* and commence international arbitration under the NAFTA. No one can profit from their misdeeds.
359. Canada seeks to rely on its disguised and hidden wrongfulness following its tried and true plan to muddle and confuse the issues.
- a. The documents that Canada raises in paragraphs 118 and 119 of the Memorial on Jurisdiction do not deal with the admissions of government officials about the existence and unfair operations of the “Breakfast Club” conspirators because that information was not made public until the confidential admission on cross-examination of Ontario Assistant Energy Deputy Minister Susan Lo in October 2014 at the *Mesa Power* NAFTA hearing.
  - b. Similarly, the information about the special protection granted to International Power Canada was not public at that time. It is not covered in any of the documents that Canada raises in paragraphs 118 and 119 of the Memorial on Jurisdiction.
360. It was only after the Investor’s Post Hearing Brief in the *Mesa Power* case when information of the preferential treatment Canada gave to International Power Canada became or could have first become public knowledge. Canada does not deny this in its Memorial on Jurisdiction. As the Investor noted in its Memorial, the Investor’s Post Hearing Brief was first published onto the PCA website on August 15, 2015.<sup>238</sup>
361. A key political supporter of the Ontario governing Liberal Party ran International Power Canada (“IPC”). IPC already had lost its launch period bid for a FIT Contract in the West of London Transmission Region.<sup>239</sup> However, as Susan Lo testified at the *Mesa Power* hearing, Ontario’s “Breakfast Club” gave preferential treatment to IPC to ensure that they were protected from the Korean Consortium set aside and allowed for connection changes so that IPC would still receive FIT Contracts. This demonstrated the preferential treatment that IPC received<sup>240</sup> while negatively affecting investors such as Tennant Energy, who had been following the rules and had demonstrated that they could receive a FIT Contract.
362. At paragraph 81 of the Notice of Arbitration, Tennant Energy states:

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<sup>238</sup> Investor’s Memorial, at ¶742.

<sup>239</sup> OPA, Priority ranking for First Round FIT Contracts, 21 December 2010, **C-131**.

<sup>240</sup> Investor’s Memorial at ¶178; *Mesa Power* Investor’s Post Hearing Brief at ¶158.

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 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.<sup>241</sup> 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.<sup>242</sup>

363. At paragraph 111 of the Notice of Arbitration, Tennant Energy identifies the following portion of the *Mesa Power* Investor’s Post-Hearing Brief:

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.<sup>243</sup>

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,”<sup>244</sup> 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-election purposes.<sup>245</sup> 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

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<sup>241</sup> 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-125** – see Notice of Arbitration at ¶81.

<sup>242</sup> *Notice of Arbitration* at ¶81.

<sup>243</sup> 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,” **C-121**.

<sup>244</sup> 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,” **C-121**.

<sup>245</sup> 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,” **C-121**.

provisions so that any PPA awarded could not be terminated under the existing four-month termination provisions in the FIT Program.<sup>246</sup>

364. 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.<sup>247</sup>
365. 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.<sup>248</sup> She stated how the President of IPC 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.<sup>249</sup> This favoritism was 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.<sup>250</sup> 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.

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<sup>246</sup> 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", **C-155**; Investor's Memorial, at ¶750.

<sup>247</sup> Notice of Arbitration, ¶101.

<sup>248</sup> Investor's Memorial, at ¶750.

<sup>249</sup> 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**.

<sup>250</sup> 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**.

## E. SECRET MEETINGS BETWEEN NEXTERA AND [REDACTED]

366. Canada in its Memorial on Jurisdiction states at paragraph 48 that Tennant Energy, like Mesa Power, has claimed that applicants such as NextEra Energy had “privileged access” to information regarding transmission availability in Ontario, a “close relationship with the OPA”, and that they had influenced the changes to the Fit Rules.”<sup>251</sup>
367. However, that privileged access and close relationship related to mid and low-level meetings regarding lobbyist representatives of NextEra, such as Bob Lopinski, with officials at the Ministry of Energy such as Pearl Ing. This low-level contact is not shocking, nor does it in itself give rise to Tennant’s claims. The egregious meeting of the [REDACTED] with the Vice President of NextEra, which lead to NextEra’s six projects receiving FIT Contracts over Skyway 127, provides concrete factual evidence as to why Skyway 127 was cut out of line. Without knowledge of this fact, Tennant Energy could not have had knowledge of a resulting loss.
368. The *Mesa Power* hearing videos provided the first instance in which information about secret meetings between Al Wiley, the Vice President of NextEra, and an [REDACTED], became publicly known (the Tennant Energy Memorial reiterates this fact at paragraphs 225 and 746).<sup>252</sup>
369. The *Mesa Power* NAFTA hearing videos revealed the fact that Al Wiley, the Vice President of NextEra, was having meetings with high-level officials in the Ontario Government.<sup>253</sup> These meetings were with officials including the [REDACTED] at the time, [REDACTED].<sup>254</sup>
370. During the *Mesa Power* 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.<sup>255</sup> Mr. MacDougall testified that it was because of this that

<sup>251</sup> Respondent’s Memorial on Jurisdiction, 21 September 2020, at ¶48.

<sup>252</sup> Investor’s Memorial at ¶¶255 and 746.

<sup>253</sup> 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.

<sup>254</sup> 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.

<sup>255</sup> 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.

there were rule changes<sup>256</sup> 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.

371. 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.<sup>257</sup> 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].<sup>258</sup>

372. **One day after the meeting that the [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.<sup>259</sup> After the June 3, 2011, FIT Program Rule changes, all six of these projects were transformed from failures to successful FIT Projects.<sup>260</sup>**

373. Moreover, because of the ties that NextEra created with the Ontario government,<sup>261</sup> this company was able to bundle six projects into sharing a common connection point.<sup>262</sup> This allowed NextEra to make a connection that would be economically non-viable for FIT competitors.<sup>263</sup>

374. The fact that the head of the Ontario Government met with the vice-president of a FIT competitor the day before that competitor was able to transform six failed FIT applications into

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<sup>256</sup> 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**.

<sup>257</sup> 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**.

<sup>258</sup> *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**.

<sup>259</sup> 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**.

<sup>260</sup> Investor's Memorial at ¶258.

<sup>261</sup> Investor's Memorial at ¶254.

<sup>262</sup> 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**.

<sup>263</sup> 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**.

successful projects is **evidence that Canada has completely ignored, and tried to obscure from this tribunal, in all of its submissions.**

375. 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 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.<sup>264</sup>

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.<sup>265</sup>

376. Canada argued before the *Mesa Power* Tribunal that there was nothing "unique nor unusual" in the meetings between Ontario officials and lobbyists. Canada said:

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<sup>264</sup> The original footnote in the Notice of Arbitration references the Hearing Transcript, Day 6, at p. 284, lns.11-16, **C-107**.

<sup>265</sup> 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, **C-121**.



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 [REDACTED] office” which expressed “its political preferences,” however, the email that the Claimant cites in support of its allegation simply notes the [REDACTED] 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.<sup>266</sup>

377. 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 — e.g., that there was nothing untoward or abnormal about the low-level informational meetings that were available to all FIT applicants.
378. In a monumental *voie face*, Canada now says that Tennant Energy should have known not to trust Canada’s word in its prior litigation matters, and Tennant Energy should have known of the types of egregious conduct — meetings between executive level officials in the public and private sector — which directly resulted in Tennant Energy’s loss of its FIT contract — even though that specific information was only revealed during the *Mesa* and *Windstream* arbitrations.
379. How can Canada now be credibly believed in this arbitration 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 should have known that Canada’s argument was wrong and instead brought a NAFTA claim based upon these same low-level contacts; no, Tennant has a right to bring its claim based on

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<sup>266</sup> *Mesa Power Group LLC v. Canada*, Canada’s Counter-Memorial, ¶¶422 – 424 (footnotes omitted). (Public Version), 28 February 2014, ¶¶422-424, C-177.

the new information, previously hidden evidence of meetings at the highest level of the Ontario government, that directly resulted in an unfair benefited to one FIT applicant at the expense of others — specifically Skyway127.

380. 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.
381. A simple review of Canada's contentions about prior allegations of meetings between government officials and FIT investors demonstrates why Canada's argument fails.
382. 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 Memorial on Jurisdiction, Canada relies on the following:
  - a. Mesa Power Investor's Answer on Canada's Preliminary Objections on Jurisdiction 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.
383. 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 specific breaches at issue in the Tennant Energy Claim.
384. 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.
385. The facts establish the date of breach was not earlier than 2015. As demonstrated below, Tennant Energy filed a detailed Memorial on August 7, 2020. That document set out many admissions of internationally wrongful conduct senior Ontario government officials made by regarding the administration of the Ontario FIT Program.
386. 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.

387. 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).
388. 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.
389. 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. 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. The meetings previously disclosed to the public did not rise to the level of the meetings and favoritism that was later discovered during the *Mesa* and *Windstream* arbitrations. Canada's highlight of the prior meetings obscures the more serious implications of the meetings at the highest level of the Ontario government — indeed disclosure of these prior meeting could not give rise to Tennant's claim.

### 1. The January 2011 Meeting

390. 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.<sup>267</sup>

391. This meeting was set by the Canadian Windpower Association. It was not a secret meeting with a high level official (let alone the [REDACTED]). It does not suggest to a FIT Proponent that nefarious or improper conduct was underway.

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<sup>267</sup> Mesa Power Investor's Answer on Canada's Preliminary Objections on Jurisdiction at ¶74, R-013.

## 2. THE FEBRUARY 25, 2011 OPA MEETING

392. 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:
393. Representatives of NextEra met with the Ministry of Energy on February 25, 2011, to obtain further information about how to change their projects connection point, including specific timing of a window to conduct those changes.<sup>268</sup>
394. 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.<sup>269</sup> Again, this was an informational exchange. It was not a secret meeting (let alone between a FIT competitor and Ontario's highest-executive). It alone would did not suggest to a FIT Proponent like Skyway 127 that nefarious or improper conduct was underway, nor would it impute knowledge to Skyway 127 that it had directly suffered a loss due to such a meeting.

## 3. THE APRIL IESO MEETING

395. 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.<sup>270</sup>

396. 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.
397. All the 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 public on August 15, 2015.

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<sup>268</sup> Mesa Power Investor's Answer on Canada's Preliminary Objections on Jurisdiction at ¶76, **R-013**.

<sup>269</sup> Mesa Power Investor's Answer on Canada's Preliminary Objections on Jurisdiction at footnote 62 to ¶74, **R-013**.

<sup>270</sup> Mesa Power Investor's Answer on Canada's Preliminary Objections on Jurisdiction at ¶77, **R-013**.

## F. DISCLOSURE OF SPOILATION OF EVIDENCE

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

- a) Order Canada and the Investor to preserve and protect documentation (Documents)<sup>271</sup> in their possession, custody, or control that is relevant to the dispute (the Protected Documents);<sup>272</sup> and
- b) order Canada to produce<sup>273</sup> non-confidential Documents on record in *Windstream Energy LLC v. Government of Canada* (PCA Case No. 2013-22) (the Windstream Documents).<sup>274</sup>

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

400. 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."<sup>275</sup>

401. 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

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<sup>271</sup> 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.

<sup>272</sup> 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.

<sup>273</sup> 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.

<sup>274</sup> 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.

<sup>275</sup> Canada's Response to Investor's Request for Interim Measures at ¶6.

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.<sup>276</sup>

402. Canada again misses the point when it addresses the spoliation argument in its Memorial on Jurisdiction. 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.
403. 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.<sup>277</sup>
404. 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.<sup>278</sup> 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 written record regarding the contemporaneous decisions regarding energy.<sup>279</sup> 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.<sup>280</sup>
405. Canada 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

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<sup>276</sup> 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.

<sup>277</sup> 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.

<sup>278</sup> 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**.

<sup>279</sup> 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**.

<sup>280</sup> 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**.

well before the critical date of June 1, 2014.”<sup>281</sup> This statement **ignores the relevant issue.**

General information that there may be spoliation is not sufficient alone to establish a loss to Skyway 127. There needs to be a nexus between the Premier’s Office on Ontario energy policy and the loss to Skyway 127. Without that nexus, Skyway 127 could not establish a claim.

406. 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, because it establishes that Skyway 127 was cut out of line as a result. 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.
407. 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.<sup>282</sup> Thus the June 15, 2015 date of the Trillium Order (**C-278**) is highly relevant in terms of information.
408. 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 subsequent document production and freedom of information searches impossible. The Fresh as Amended Statement of Claim says:

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

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<sup>281</sup> Canada’s Request for Bifurcation, ¶20, September 23, 2019

<sup>282</sup> 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* at ¶44, **CLA-278**.

of gas fired electricity generating plants in Ontario. The Defendant has not disclosed the "code name" ii assigned to "offshore".

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.<sup>283</sup>

409. 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." Further the use of code names to suppress and disguise the identity of energy policy matters is a further form of subterfuge which was designed to frustrate legitimate document production procedures by the those involved in the conspiracy.
410. 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.

#### **G. Tennant Energy and Skyway 127 had no knowledge before June 1, 2014**

411. NAFTA Article 1116(2) speaks of the actual knowledge of an Investor or whether that Investor ought to have known. As a result, it is necessary to consider the actual knowledge of the Investor and the Investment.
412. John Tennant, the trustee of the Skyway 127 shares up until January 15, 2015 who exercised *de facto* control over the enterprise confirmed an expectation that Ontario would act in good faith regarding Skyway 127's application in the FIT Program. He testified:

37. I assumed that Ontario would follow the law and followed the FIT Rules fairly. I assumed that Skyway 127 was not awarded a FIT contract through the fair and proper operation of the FIT Program Rules. I never attended any NAFTA hearings including those for Mesa Power or Windstream. When those cases were underway, I was not aware that I would have any reason to go to those hearings.<sup>284</sup>

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<sup>283</sup> Fresh as Amended Statement of Claim in *Trillium Power Wind Corp v. Her Majesty the Queen* 2020 ¶46 - 47, **CLA-278**.

<sup>284</sup> Witness Statement of John H. Tennant at ¶37. (**CWS-2**)



413. Derek Tennant, the President of the Investment, Skyway 127 Wind Energy confirmed a similar assumption as to how Skyway 127's wind power application would be handled in the FIT program in his Witness Statement.<sup>285</sup>
414. Derek Tennant identified the time in which Skyway 127 began to obtain information about NAFTA violations after the Mesa Power NAFTA hearing took place.

48. Before the summer of 2015, I did not know that Ontario had applied the FIT Rules unfairly and in a contrived manner that resulted in the loss of my investment in Tennant Energy and Skyway 127. We discovered information in the documents describing the admissions from government officials at the *Mesa Power* Hearing. That information was not public before 2015. We would have no other way of knowing about the Government's treatment, especially given that the Government took steps to keep the information secret and hidden from the public. This included actively not disclosing information to the public and the active criminal destruction of Ontario Energy Policy emails and documents by government officials

49. I did not know about how Ontario unfairly affected our company before the middle of June 2015. John Pennie and I had a meeting with Barry Appleton in his office in 2015. We also joined my brother John Tennant by phone from this meeting.

50. I was astonished when I later was told by John Pennie that he had found information on the internet coming from materials circulated after the *Mesa Power* NAFTA hearing about how Ontario treated our competitors in the FIT Program better than we had been treated because of political connections that were not related to the public terms of the FIT Program.

51. To be clear, I did not know about:

(a) The "Breakfast Club" conspiracy of government officials as was discussed in the submissions filed publicly after the Mesa Power NAFTA hearing, which became public in 2015.

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<sup>285</sup> Witness Statement of Derek Tennant at ¶47. (CWS-3) Derek Tennant stated "I assumed that Ontario would follow the law and followed the FIT Rules fairly. I assumed that Skyway 127 was not awarded a FIT contract through the fair and proper operation of the FIT Program Rules. I never attended any NAFTA hearings, including those for Mesa Power or Windstream. When those cases were underway, I was not aware that I would have any reason to go to those hearings."

(b) That International Power Canada was obtaining special preferential and unfair treatment in the FIT Program, as was discussed in the submissions filed publicly after the Mesa Power NAFTA hearing, which became public in 2015.

(c) Special meetings between senior Ontario government officials and senior wind power corporate officials as was discussed in the submissions filed publicly after the Mesa Power NAFTA hearing, which became public in 2015.

(d) The Ontario Ministry of Energy decided not to follow the Ontario FIT Program's terms, as discussed in the submissions filed publicly after the Mesa Power NAFTA hearing, which became public in 2015.

(e) The decision to not allocate all the available power transmission to successful FIT Program applicants as was discussed in the submissions filed publicly after the Mesa Power NAFTA hearing, which became public in 2015.<sup>286</sup>

415. John Tennant, the trustee of the Skyway 127 shares up until January 15, 2015 confirmed a similar lack of knowledge. John Tennant testified in his Witness Statement:

38. Before the summer of 2015, I did not know that Ontario had applied the FIT Rules unfairly and in a contrived manner that resulted in the loss of my investment in Tennant Energy and Skyway 127. The information that we discovered from the documents describing the events at the *Mesa Power* Hearing was not public before 2015. I would have no other way of knowing about the government's treatment, especially given that the government took steps to keep the information hidden from the public.

39. I did not know about how Ontario unfairly affected our company before the middle of June 2015. John Pennie and my brother Derek had a meeting with Barry Appleton in his office in 2015. I remember that there was a call which I joined by phone. I was astonished when I later was told by John Pennie that he had found information on the internet coming from materials circulated after the *Mesa Power* NAFTA hearing about how Ontario treated our competitors in the FIT Program better than we had been treated because of political connections that were not related to the public terms of the FIT Program.

40. To be clear, until summer 2015, I did not know about the following information:

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<sup>286</sup> Witness Statement of Derek Tennant at ¶¶ 48-51. (CWS-3)

(a) The Breakfast Club conspiracy of government officials as was discussed in the submissions filed publicly after the Mesa Power NAFTA hearing, which became public in 2015.

(b) That International Power Canada was obtaining special preferential and unfair treatment in the FIT Program, as was discussed in the submissions filed publicly after the *Mesa Power* NAFTA hearing, which became public in 2015.

(c) Special meetings between senior Ontario government officials and senior wind power corporate officials as was discussed in the submissions filed publicly after the Mesa Power NAFTA hearing, which became public in 2015.

(d) The Ontario Ministry of Energy decided not to follow the Ontario FIT program's terms, as was discussed in the submissions filed publicly after the Mesa Power NAFTA hearing, which became public in 2015.

(e) The decision to not allocate all the available power transmission to successful FIT Program applicants as was discussed in the submissions filed publicly after the Mesa Power NAFTA hearing, which became public in 2015.<sup>287</sup>

416. 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.<sup>288</sup>

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<sup>287</sup> Witness Statement of John H. Tennant at ¶¶38 - 40. (**CWS-2**)

<sup>288</sup> Witness Statement of John C. Pennie at ¶70. (**CWS-1**)

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

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 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.<sup>289</sup>

418. Mr. Pennie identified the claim and his knowledge in paragraphs 96 and 97 of his Witness Statement. He testified:

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.
- e) The conspiracy in the systemic violations of the NAFTA and the destruction of evidence.

97. Not one of these issues was known to the public before the release of information from the Mesa Power hearing in 2015, nor could it be known in the absence of evidence available to the public.<sup>290</sup>

419. John 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

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<sup>289</sup> Witness Statement of John C. Pennie at ¶94. (CWS-1)

<sup>290</sup> Witness Statement of John C. Pennie at ¶¶ 96 – 97. (CWS-1)

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:

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.<sup>291</sup>

420. 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:

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.

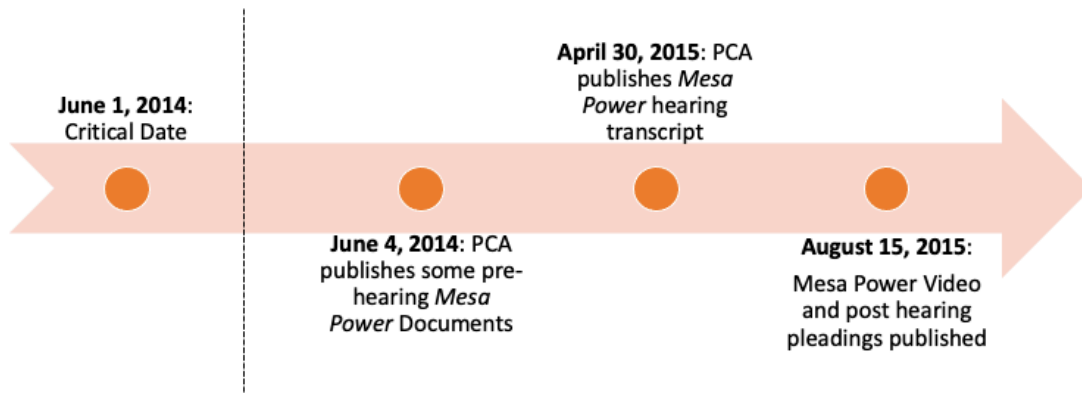
Before the dates listed above, there was no way in which we would have learned of this information as it was the first time such information became public knowledge.<sup>292</sup>

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<sup>291</sup> Witness Statement of John C. Pennie at ¶101. (CWS-1)

<sup>292</sup> Witness Statement of John C. Pennie at ¶¶99 -100. (CWS-1)

421. As this is an affirmative defence, Canada has the burden of proof to overcome the dates of breach asserted by Tennant Energy. Canada has filed no evidence to contradict these statements.
422. Finally, the international law principle that “no one can be allowed to take advantage of its own wrong” (*nullus commodum capere potest de sua iniuria*) discussed above means that Canada and Ontario’s actions to suppress information and to destroy information cannot be used to deprive the Investor of its due process and access to justice.
423. As discussed above, 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. If the Investor has acted in good faith and reasonably in concluding that it had a claim at a particular point in time, then the three-year period should not be a bar for the Investor to prove its claim on the merits as it has pled.
424. 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.
425. Accordingly, not only did the Investor and the Investment not know of Canada’s NAFTA breaches at issue in this arbitration, but there was no reasonable or objective reason for them to have known. Canada’s practice of disguised and hidden wrongful actions is simply incompatible with having the temporal clock ticking.
426. Canada’s attempt to recast the facts to impute knowledge to Tennant Energy (the Investor) or Skyway 127 (the Investment) before 2015 is nothing more than a charade. Canada’s argument fails completely. The timeline clearly displays how Canada’s argument fails. Every claim at issue arises AFTER June 1, 2014.



427. Specifically, the dates upon which Investor became aware of the breaches is set out in the following table. Each part of Paragraph 13 of the Investor’s Memorial is identified with the date upon which knowledge of the breach was obtained. In each circumstance, the knowledge could not have been known due to Canada’s actions so disguise and hide the information, which only became known because of cross-examinations of Canada’s witnesses at the *Mesa Power* Hearing in October 2014, and subsequently disclosed in 2015. Again, Canada’s argument fails. Every claim at issue arises AFTER June 1, 2014.

Investor’s Memorial Claim Issue	Date of Knowledge	Description
Breakfast Club – special opportunities to IPC Memorial Para 13(a)	August 15, 2015 <b>Source:</b> <i>Mesa Power</i> post-hearing written submissions	Secret Government conspiracy provides special business opportunities to a politically connected local favourite, International Power Canada.
Breakfast Club – conspiracy benefits Memorial Para 13(b)	August 15, 2015 <b>Source:</b> <i>Mesa Power</i> post-hearing written submissions	Secret Breakfast Club cabal of politicians and senior officials protects government friends at expense of ordinary FIT proponents.
Ontario no longer will follow FIT measures Memorial Para 13(c)	August 15, 2015 <b>Source:</b> <i>Mesa Power</i> post-hearing written submissions	Ontario’s no longer follows announced power transmission and other FIT Program measures and its effect upon Skyway 127.
Korean Consort given benefits but no GEIA Memorial Para 13(d)	August 15, 2015 <b>Source:</b> <i>Mesa Power</i> post-hearing written submissions	Non-disclosure that Korean Consortium is in breach of GEIA but still receives benefits outside of the operation of the GEIA
Conspiracy to hide and systemic spoliation Memorial Para 13(e)	April 30, 2015 <b>Source:</b> <i>Mesa Power</i> transcripts <i>June 18, 2015</i> <b>Source:</b> <i>Trillium Wind CLA-278</i>	Conspiracy in the systemic violations of the NAFTA and the destruction of evidence.

428. As is clear from this table and from the discussion above, all of Tennant Energy's claim first arose well after the "deadline" date of June 1, 2014.



## V. CONCLUSIONS

429. The evidence is clear: Tennant Energy is an Investor with an Investment in Skyway 127 Wind Energy Inc.

430. The Investor's claim is that articulated by the Investor and only the Investor. It is contained in paragraph 13 of the Investor's Memorial. This Tribunal has jurisdiction to hear the entirety of the claim set out in paragraph 13 of the Investor's Memorial.

### A. Tennant Energy has Standing

431. Canada does not challenge the standing of Tennant Energy to bring a claim for measures arising after January 15, 2015. Thus, the Tribunal has unchallenged jurisdictional capacity with respect to those claims.

432. The evidence abundantly demonstrates that Tennant Energy has standing with respect to all claims arising after the date upon which Tennant Energy first obtained the equitable interest in the Skyway 127 shares on April 26, 2011

433. The Witness Statements of John Tennant and of Derek Tennant both confirm the factual basis for this standing. The NAFTA provides express definitions which guide this Tribunal. Tennant Energy's investment fits within those definitions.

434. The Expert Legal opinion from retired California Court of Appeal Justice Margaret Grignon confirms that Tennant Travel (now Tennant Energy) had the beneficial ownership to the Skyway 127 shares as of April 26, 2011 through a trust that was created on April 19, 2011 by John Tennant. The existence of the trust is recognized under the law of California. The beneficial interest of Tennant Energy is sufficient to meet the definition of an investment held by an enterprise as defined by NAFTA Articles 201 and 1139.

435. Tennant Energy both owned and controlled Skyway 127 in 2011. Beneficial ownership arose on April 26, 2011 with *de facto* voting control on December 30, 2011. Both circumstances would enable Tennant Energy to have status as an Investor with an Investment.

436. While the actual date of the breaches arising from the Investor's claims as articulated in paragraph 13 of its Memorial is in 2015, Tennant Energy had standing to commence a NAFTA claim as early as April 26, 2011. This April 2011 date is earlier than all the dates proposed by Canada as constituting start dates (July 4, 2011 or June 12, 2013). As even under Canada's

Tennant Energy's investment predates these dates and the claims arose after these dates. Thus, this Tribunal will have jurisdictional to rule upon the merits of this claim.

**B. Tennant Energy made a timely claim.**

437. Tennant Energy's claims arose from information that could not have been known before the June 1, 2014 deadline date – because Canada took steps to suppress this information from the public. Canada's practice of disguised and hidden wrongful actions are incompatible with its claim that the temporal clock was ticking.

438. The Memorial states in paragraph 13 what the Tennant Energy Claim is about:

13. The Tennant NAFTA Claim is about:

(a) Special business opportunities provided to a politically connected local favourite, IPC.

(b) The "Breakfast Club" cabal of politicians and senior officials systemically abusing the process to reward friends at the expense of everyone else.

(c) Ontario's decision to not complete its FIT Program for the Bruce Region contrary to the legitimate expectation of FIT Proponents such as Skyway 127.

(d) The delay of the award of contracts because of Korean Consortium's failure to comply with its contractual obligations.

(e) The conspiracy in the systemic violations of the NAFTA and the spoliation and wanton destruction of evidence by Ontario.<sup>293</sup>

439. Tennant Energy did not know of the essential wrongful acts which support its claim until after June 1, 2014. Canada argues that the limitations clock should tick while Canada took steps to prevent the public of awareness of the very serious breaches of fairness, due process and the rule of law that were underway in the administration of the FIT Program.

440. 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

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<sup>293</sup> Investor's Memorial at ¶13.

hidden by Ontario and Canada are astonishing, and it goes to all areas of Tennant Energy's claims, including:

- 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.
441. This Tribunal must take the claim and facts argued by Tennant Energy. As set out above, other NAFTA Tribunals have overruled Canada's attempts to recast the facts pleaded by Investors. So, should this Tribunal. The Investor is entitled to have its claim considered. That claim arises from information that was first admitted confidentially in the *Mesa Power* NAFTA Hearing in October 2014 and first available to the public in limited form in the middle of 2015. None of this information could possibly have been known by Tennant Energy before June 1, 2014 as the admissions had not yet been made until October 2014.
442. 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.
443. 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.
444. It is patently obvious that Canada's allegations about the date of the NAFTA breach are wrong. The date of the NAFTA breach was not earlier than August 15, 2015. 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. 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).

445. As a result of these facts alleged in the claim and supported by evidence of the date of release of the admissions from the Mesa Power NAFTA hearing in August 2015.
446. There can be no question in these circumstances that this application 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 and wasteful procedure designed as part of an overall campaign to drawn down on the Investor's limited financial capabilities.
447. This Tribunal should:
- a. Declare that Tennant Energy is an Investor as defined by NAFTA Article 1139 as of April 26, 2011 over Tennant Energy's investment in Skyway 127 Wind Energy;
  - b. Declare that this Tribunal has jurisdiction over Tennant Energy's NAFTA Chapter Eleven claim;
  - c. Dismiss Canada's jurisdictional application in its entirety and order that this arbitration proceeds to the merits.
  - d. Award the costs, disbursements, and fees of the defense of this application on a full indemnity basis to the Investor, Tennant Energy.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Appleton & Associates International Lawyers LP



Reed Smith LLP

Date: March 1, 2021