

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

BETWEEN:

TENNANT ENERGY, LLC

Claimant

AND

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

REJOINDER MEMORIAL ON JURISDICTION

May 26, 2021

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I. INTRODUCTION

1. To establish the Tribunal's jurisdiction, Tennant Energy, LLC (the "Claimant") must prove it has satisfied the requirements in NAFTA Articles 1116 to 1121. These requirements are fundamental to a NAFTA Party's consent to arbitration. A claimant cannot meet them by making unsupported allegations, or by ignoring the well-established legal principles of NAFTA Chapter Eleven.

2. The preliminary phase of this arbitration engages two issues of jurisdiction *ratione temporis*. Pursuant to Article 1116(1), the Claimant must establish it was an "investor of a Party" when the alleged breach occurred, by demonstrating that it owned or controlled the investment at that time. In accordance with Article 1116(2), the Claimant must also submit its claim within the three-year time limitation period.

3. The Claimant has failed on both accounts. In its Reply Memorial on Jurisdiction (the "Reply"),¹ the Claimant continues to ask this Tribunal to accept factual assertions without submitting adequate evidence, ignores facts that are inconvenient to its case, and makes legal conclusions that have no basis in the text of the NAFTA or arbitral awards. These attempts to fashion jurisdiction where there is none have run their course. The Claimant has failed to meet its burden to establish the Tribunal's temporal jurisdiction, and as such, its claim must fail.

4. In particular, the Claimant has not satisfied its evidentiary burden to prove it owned or controlled shares in Skyway 127 Wind Energy Inc. ("Skyway 127") from 2008 to 2013, when the challenged measures, and therefore, the underlying alleged breach occurred. The Claimant's entire case on Article 1116(1) rests on the narrative that it was the beneficiary of an alleged trust created orally in 2011. To support this story, the Claimant filed with its Reply: two witness statements from individuals with an interest in the outcome of the arbitration; a document created after the alleged breach occurred and in contemplation of arbitration; and a legal opinion that assumes the two witness statements to be true. This evidence is insufficient to establish ownership of an investment under the NAFTA. Conspicuously, the Claimant has not filed any contemporaneous documentary evidence to corroborate the formation of the alleged trust – not a single email, letter, fax, tax filing, corporate

¹ In referring to the parties' submissions on jurisdiction, Canada uses the nomenclature used by the Tribunal in Procedural Order No. 9.

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record, shareholder ledger, or financial statement. Consequently, the Claimant failed to meet the high evidentiary standard under California law to prove the existence of an oral trust. Instead, the contemporaneous documentary evidence before this Tribunal shows that the Claimant did not acquire an ownership interest in Skyway 127 until January 15, 2015 – long after the alleged breach occurred.

5. Moreover, the Claimant did not qualify as a protected investor on the basis that it controlled the investment when the alleged breach occurred. It has failed to articulate a case and provide reliable evidence as to how it controlled the investment, beyond its unsubstantiated claim that it beneficially owned Skyway 127 shares. Given the many missing evidentiary links behind its assertions, the Claimant has not discharged its burden to prove it was an “investor of a Party” at the requisite time. Thus, the Tribunal lacks jurisdiction under Article 1116(1), and the claim must fail on this basis alone.

6. Further, even if the Tribunal finds that the Claimant has met its burden under Article 1116(1), the claim still cannot proceed because it was submitted to arbitration well beyond the three-year limitation period set out in Article 1116(2). As Canada explained in its Counter-Memorial, ample information regarding the alleged breach was publicly available prior to the critical date of June 1, 2014 (the “Critical Date”). In response, the Claimant urges a nonsensical interpretation of Article 1116(2) by alleging that learning of additional factual details relating to an already time-barred claim can “reset” the limitation period. This interpretation would render the limitation period meaningless and has no support in arbitral awards. The three-year limitation period begins when a claimant *first* acquires (or should have *first* acquired) knowledge of the alleged breach (and thus the underlying measures) that forms the crux of its claim and alleged resulting loss.

7. Any reasonably prudent investor in the Ontario renewable energy market – as the Claimant holds itself out to be – would, or should, have been aware of the vast amount of information that was publicly available concerning the alleged breach. This information was accessible to the Claimant through the challenge of the Government of Ontario's (“Ontario”) management of the Green Energy Investment Agreement (“GEIA”) and the Feed-In-Tariff (“FIT”) Program by another failed proponent (Mesa Power Group, LLC (“Mesa”)), and through publicly available government documents and various media reports. The Claimant's willful blindness to this information does not toll the limitation period.

8. Nor can the Claimant circumvent the defects in its claim by labeling challenged measures that were constructively known to it prior to the Critical Date as “factual antecedents” to its claim. The Claimant’s entire Article 1116(2) case now rests on the Tribunal finding that two pieces of information that allegedly became known to it after the Critical Date – assertions that a particular FIT proponent (International Power Canada) was favoured for a FIT Contract and that decision-making in the context of the FIT Program was led by a group of government officials (referred to as the “Breakfast Club”) – give rise to separate and distinct causes of action that “reset” the limitation period. This is an untenable attempt by the Claimant to parse its claim in order to avoid the limitation period.

9. The Claimant’s claim is that the administration of the FIT Program and the GEIA by Ontario, as well as Ontario’s alleged handling of documents, breached Article 1105 of the NAFTA. The facts giving rise to this single alleged breach of Article 1105 were either known or should have been known to the Claimant prior to the Critical Date. The Claimant cannot escape the fact that there was ample information available to it prior to the Critical Date regarding the alleged breach of Article 1105, upon which it could have founded its claim. As a result, the Claimant’s claim must also fail for want of jurisdiction under Article 1116(2).

10. Canada’s Rejoinder Memorial on Jurisdiction (“Rejoinder”) is organized as follows.² Part II provides preliminary clarifications regarding the jurisdictional issues before the Tribunal, including that Canada’s objections go to the jurisdiction of this Tribunal and are not questions of admissibility; that the burden of proof at the jurisdictional phase rests squarely on the Claimant; and that facts relating to the jurisdiction of this Tribunal must be proven, not assumed. Part III demonstrates that the Claimant has failed to establish jurisdiction *ratione temporis* under Article 1116(1) because it did not meet its evidentiary burden to prove it owned or controlled the investment when the alleged breach occurred. Part IV explains that, even if the Claimant was an “investor of a Party” at the

² In its Counter-Memorial on Jurisdiction, Canada has provided the Tribunal with a fully substantiated statement of the relevant details and facts in this case. As a result, Canada will not include a separate statement of relevant facts in this submission. Instead, to the extent that there remain particular facts to be addressed because of the skewed or inaccurate claims made by the Claimant in its Reply, Canada will address them in the context of the relevant legal arguments below.

relevant time, this Tribunal lacks jurisdiction because the Claimant failed to submit its claim to arbitration within the three-year limitation period stipulated in Article 1116(2).

11. Canada files with this Rejoinder the **Expert Report of Margaret Lodise**.³ Ms. Lodise is a partner at Sacks, Glazier, Franklin & Lodise LLP, a California law firm specializing in trusts and estates litigation. Ms. Lodise handles appellate work on trusts, estates, and conservatorships. She has 30 years' experience representing beneficiaries and trustees. In her Expert Report, Ms. Lodise describes the high standard to prove the existence of an orally created trust under California law, and addresses specific issues concerning the Claimant's alleged trust under California law.

II. CLARIFICATIONS REGARDING THE JURISDICTIONAL ISSUES BEFORE THE TRIBUNAL

A. Consent to Arbitration Under NAFTA Chapter Eleven is a Question of Jurisdiction, Not Admissibility

12. The Claimant continues to argue that, "the questions raised by Canada are fundamentally ones of admissibility rather than questions of jurisdiction"⁴ and in particular, contends that the limitation period under Article 1116(2) is an issue of admissibility.⁵ In its Counter-Memorial on Jurisdiction, Canada explained that fulfillment of Article 1116's requirements is one of the pre-conditions that must be met to establish a NAFTA Party's consent to arbitration, and in turn a tribunal's jurisdiction.⁶ Failure to meet those conditions renders a tribunal without jurisdiction.⁷

³ **RER-1**, Expert Report of Margaret Lodise, 26 May 2021 ("**RER-1**, Lodise Report").

⁴ Claimant's Reply, ¶ 183.

⁵ Claimant's Reply, ¶ 214.

⁶ See Canada's Memorial on Jurisdiction, 21 September 2020 ("Canada's Counter-Memorial on Jurisdiction"), ¶¶ 55-57.

⁷ **RLA-002**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002, ¶ 120: ("In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.") With respect to Article 1116(1)'s requirements, NAFTA tribunals agree that they will lack jurisdiction *ratione temporis* if a claimant cannot meet the preconditions to submit a claim under Article 1116(1) or under its parallel provision, Article 1117(1). See for e.g., **RLA-001**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016 ("*Mesa – Award*"), ¶¶ 324-327; **RLA-004**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011 ("*Gallo – Award*"), ¶¶ 324-326. For cases where NAFTA tribunals have agreed

13. The Claimant has pointed to *Pope & Talbot*, *Feldman*, and *TECMED* in an attempt to support its proposition that compliance with Article 1116(2) is a question of admissibility.⁸ Canada's Counter-Memorial on Jurisdiction has already demonstrated how *Pope & Talbot* is unhelpful to the Claimant because the tribunal in that case did not rule that the limitation period was a question of admissibility.⁹ That issue was, in fact, never raised.¹⁰

14. Additionally, the Claimant's assertion that the *Feldman v. Mexico* tribunal "came to the determination that time limitations issues are not jurisdictional issues"¹¹ is incorrect. There was no finding in the *Feldman* award that limitation period issues are questions of admissibility – indeed, the tribunal listed the limitation period in Article 1117(2) as a "preliminary jurisdictional question[]".¹²

15. Further, while the tribunal in *TECMED* ruled in 2003 that Mexico's limitation period objection did not relate to the tribunal's jurisdiction but rather to "(non)compliance with certain requirements of the Agreement governing the admissibility of the foreign investor's claims",¹³ the NAFTA Parties have not accepted this interpretation as correct. Nor does the *TECMED* tribunal's position accord

that a tribunal is without jurisdiction if a claim is submitted outside of Article 1116(2)'s three-year limitation period, *see* fn. 14.

⁸ Claimant's Reply, ¶ 214 and fn. 150.

⁹ Canada's Counter-Memorial on Jurisdiction, ¶ 57.

¹⁰ **RLA-036**, *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Award on Harmac Motion, 24 February 2000 ("*Pope & Talbot – Award on Harmac Motion*"), ¶ 11. The investor had filed a timely claim but omitted to file a waiver with respect to its investment Harmac Pacific, Inc. pursuant to Article 1121(1) until after its Notice of Arbitration. Canada argued that this meant the limitation period had expired with respect to Harmac, but the tribunal decided that there was no evidence to presume that there had been actual or constructive knowledge of loss or damage at the time Canada suggested. The scenario there bears no resemblance to this or other NAFTA cases in the past 20 years. *See* Canada's Counter-Memorial on Jurisdiction, ¶ 57.

¹¹ Claimant's Reply, ¶ 214, fn. 150: ("See also *Feldman* which came to the determination that time limitations issues are not jurisdictional issues, discussed *infra*").

¹² In its Award, the *Feldman* tribunal noted that it identified five "preliminary jurisdictional questions" on which the parties were to submit written pleadings, including "[w]hether the Respondent was entitled to raise any defense on the basis of the time limitation set forth in NAFTA Article 1117(2)". *See* **RLA-081**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002 ("*Feldman – Award*"), ¶¶ 46-47.

¹³ **CLA-113**, *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2) Award (English), 29 May 2003, ¶ 73. The claim was brought under the *Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and the United Mexican States*.

with the consistent view taken by NAFTA tribunals that compliance with Article 1116(2)'s limitation period goes to a tribunal's jurisdiction.¹⁴

B. The Claimant Cannot Evade Its Burden of Proof by Mischaracterizing Canada's Jurisdictional Objections

16. It is trite law that a disputant who advances a claim has the onus to prove it. As Canada explained in its Counter-Memorial on Jurisdiction, a claimant bringing a claim under NAFTA Chapter Eleven bears the burden of proving that it has satisfied the conditions precedent to commence arbitration and that the tribunal has jurisdiction over the dispute.¹⁵ In an attempt to avoid its burden, the Claimant now argues that Canada's jurisdictional objections are affirmative defences and that as such, "Canada bears the burden of proving facts sufficient to justify" them.¹⁶

17. As an initial matter, Canada must dispel the Claimant's suggestion that Canada has "admitted" it bears the burden with respect to jurisdictional matters.¹⁷ Canada's position is clear: the Claimant bears the burden of establishing the Tribunal's jurisdiction. For example, in its Statement of Defence,

¹⁴ See **RLA-079**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Decision on Jurisdiction and Admissibility, 30 January 2018 ("*Resolute – Decision on Jurisdiction and Admissibility*"), ¶ 83: ("The clear inference is that arbitration of a claim not submitted in accordance with those procedures is not consented to and that the tribunal lacks jurisdiction. Although the time limit specified in Articles 1116(2) and 1117(2) is not itself a procedure, compliance with it is required for the bringing of a claim, which is certainly a procedure. This is enough to justify the conclusion that compliance with the time limit goes to jurisdiction."). See also, **RLA-080**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013 ("*Apotex – Award on Jurisdiction*"), ¶ 335: (concluding that the tribunal had no jurisdiction *ratione temporis* over measures that fell outside NAFTA Chapter Eleven's three-year limitation period); **RLA-003**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015 ("*Bilcon – Award on Jurisdiction and Liability*"), ¶¶ 266-282, 742, (finding that events that occurred outside the three-year limitation period were beyond the tribunal's jurisdiction); **RLA-070**, *Grand River Enterprises Six Nations, Ltd., et al v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006 ("*Grand River – Decision on Objections to Jurisdiction*"), ¶ 3: ("This Decision on Objections to Jurisdiction addresses a single jurisdictional issue raised by Respondent and identified for separate treatment as a preliminary issue by the Tribunal: whether certain of the Claimants' claims must be barred as not timely under NAFTA Articles 1116(2) and 1117(2).")

¹⁵ Canada's Counter-Memorial on Jurisdiction, ¶¶ 58-61.

¹⁶ Claimant's Reply, ¶¶ 23, 191.

¹⁷ See Claimant's Reply, ¶ 259 where the Claimant states that: ("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.") Canada's Response to Claimant's Request for Interim Measures contained an inadvertent drafting error. However, in light of Canada's unequivocal and consistent submissions with respect to the burden of proof on jurisdictional matters elsewhere in this arbitration, Canada's drafting error should be disregarded.

Canada stated that, “[t]he Claimant bears the burden of proving the Tribunal has the jurisdiction to hear this dispute.”¹⁸ Similarly, during the January 2020 procedural hearing Canada stated that, “[i]t is the Claimant that has the burden to establish its claim meets the jurisdictional requirement of NAFTA, one being it meets the requirements of the time bar.”¹⁹ Most recently, in its Counter-Memorial on Jurisdiction, Canada noted that an investor “bears the burden of proving that it has satisfied the conditions precedent to commence arbitration and that the tribunal has jurisdiction over the dispute”, citing numerous NAFTA tribunals that have reached the same conclusion.²⁰

18. Canada has provided the Tribunal with ample authority demonstrating that the Claimant bears the burden of proving the jurisdictional requirements of Article 1116(1)²¹ and Article 1116(2).²² In support of its argument that Canada's jurisdictional objections are “affirmative defences”, the Claimant relies only on an incorrect interpretation of Article 24(1) of the UNCITRAL Arbitration Rules (1976) (the “1976 UNCITRAL Rules”) and on dictum from the *Pope & Talbot* tribunal that

¹⁸ Canada's Statement of Defence, ¶ 25; *see also*, ¶ 46: (“The burden of proving that the Claimant is an investor under NAFTA Chapter Eleven and that the Tribunal has jurisdiction to hear its claim falls on the Claimant.”) The Claimant simply ignores these statements, instead pointing to paragraphs of the Statement of Defence that do not even address the burden of proof. *See e.g.*, ¶¶ 29-30.

¹⁹ Procedural Hearing Transcript, 14 January 2020, Day 1 (“Procedural Hearing Transcript, Day 1”), pp. 132:23-133:18. *See also*, Procedural Hearing Transcript, Day 1, p. 100:3-5: (“[T]he Claimant has not met its burden of establishing that this Tribunal has jurisdiction to hear its claim.”)

²⁰ Canada's Counter-Memorial on Jurisdiction, ¶¶ 58-61, under the heading “THE CLAIMANT BEARS THE BURDEN OF ESTABLISHING THAT THIS TRIBUNAL HAS JURISDICTION.”

²¹ NAFTA Chapter Eleven tribunals have consistently held that if a claimant cannot establish it was a protected investor with a protected investment when an alleged breach occurred, a tribunal lacks temporal jurisdiction. *See, e.g.*, **RLA-001**, *Mesa – Award*, ¶ 326: (“As a consequence, investment arbitration tribunals have repeatedly found that they do not have jurisdiction *ratione temporis* unless the claimant can establish that it had an investment at the time the challenged measure was adopted.”); **RLA-004**, *Gallo – Award*, ¶ 277: (the “claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted.”); **RLA-121**, *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Partial Award, 19 July 2019 (“*B-Mex – Partial Award*”), ¶ 145: (“The parties agree that the Claimants must establish that they owned or controlled the Mexican Companies at the time of the treaty breaches.”). Outside the NAFTA context, *see e.g.*, **RLA-005**, *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, 15 April 2009 (“*Phoenix Action – Award*”), ¶ 68; **RLA-139**, *Cementownia “Nowa Huta” S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/2) Award, 17 September 2009 (“*Cementownia – Award*”), ¶ 112; **RLA-140**, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru* (ICSID Case No. ARB/11/17) Award, 9 January 2015 (“*Rose Levy – Award*”), ¶¶ 146-148; **RLA-143**, *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8) Award, 2 September 2011 (“*Libananco – Award*”), ¶¶ 121-128.

²² *See* **RLA-079**, *Resolute – Decision on Jurisdiction and Admissibility*, ¶ 84; **RLA-136**, *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica* (UNCITRAL) Corrected Interim Award, 30 May 2017 (“*Spence – Corrected Interim Award*”), ¶¶ 163, 239, 245-246.

has been repudiated by subsequent tribunals.²³ Neither of these authorities changes the clear legal view that the Claimant bears the burden to prove this Tribunal has jurisdiction to hear the Claimant's claim.

19. First, Article 24(1) of the 1976 UNCITRAL Rules states, as an evidentiary proposition, that "[e]ach party shall have the burden of proving the facts relied on to support his claim or defence." According to Caron *et al.*, this is "simply a restatement of the 'general principle that each party has the burden of proving the facts on which he relied in his claim or in his defence', or else risk an adverse decision."²⁴ It does not "alter the standard rule that the claimant has the burden of demonstrating the legal obligation on which its claim is based."²⁵ As such, Article 24(1) does not override the Claimant's legal burden of establishing the Tribunal's jurisdiction.²⁶

20. Second, the tribunal in *Pope & Talbot* remains the only NAFTA Chapter Eleven tribunal to have held that an objection to jurisdiction based on the limitation period in Article 1116(2) is an affirmative defence.²⁷ The tribunal's award, rendered over twenty years ago, was wrong on this point and its finding has never been accepted by another NAFTA tribunal. The *Pope & Talbot* tribunal's conclusion that the respondent bears the "burden of proof"²⁸ to establish that a NAFTA tribunal does not have jurisdiction has been discounted by more recent decisions in a number of cases (*Resolute*,

²³ Claimant's Reply, ¶¶ 23, 191-192.

²⁴ **RLA-074**, David D. Caron and Lee M. Caplan, "The UNCITRAL Arbitration Rules: A Commentary", 2nd Edition (Oxford University Press, 2012) ("Caron and Caplan") [Updated Excerpt], p. 558.

²⁵ **RLA-074**, *Caron and Caplan*, p. 558.

²⁶ See Canada's Counter-Memorial on Jurisdiction, ¶ 59 citing to the *Resolute* tribunal's discussion of the burden of proof in the context of the 1976 UNCITRAL Rules where the tribunal stated: ("Article 24(1) of the UNCITRAL Rules, which are applicable here by virtue of Article 1120(1) of NAFTA, imposes on the relevant party 'the burden of proving the facts relied on to support [its] claim or defence'. The Tribunal does not see any reason to limit Article 24(1) to matters of substance, and the facts necessary to establish that a claim has been brought in accordance with Section B of Chapter Eleven are, in its view, facts relied on in support of the claim.") See **RLA-079**, *Resolute – Decision on Jurisdiction and Admissibility*, ¶ 84.

²⁷ Notably, the Claimant fails to cite to a single case to support its position that Canada bears the burden of proof concerning the Article 1116(1) objection.

²⁸ **RLA-036**, *Pope & Talbot – Award on Harmac Motion*, ¶ 11.

Mesa, Apotex, Methanex, Bayview, Grand River, and Gallo).²⁹ In *Resolute*, the tribunal specifically disagreed with *Pope & Talbot*, stating:

The Tribunal does not agree with the *Pope & Talbot* dictum that time bar objections under NAFTA Articles 1116(2) and 1117(2) constitute an 'affirmative defence'. The language of NAFTA treats the 3-year time limit as one among a number of requirements that a claimant under Chapter Eleven has to meet to attract jurisdiction over a claim. The Tribunal agrees with later tribunals, and with the United States and Mexico in their Article 1128 submissions, that the claimant has to establish its case on this and other points.³⁰

21. As the requirements under Articles 1116(1) and 1116(2) are pre-conditions to establish a tribunal's jurisdiction, the Claimant bears the burden of proving it qualified as an "investor of a Party" when the alleged breach occurred under Article 1116(1) and that its claim was timely under Article 1116(2).

C. The Claimant Must Prove the Facts on Which It Alleges the Tribunal's Jurisdiction Rests at the Jurisdictional Stage

22. A mere assertion by the Claimant that the jurisdictional requirements under Articles 1116(1) and 1116(2) are met is insufficient to establish the Tribunal's jurisdiction under NAFTA Chapter

²⁹ See Canada's Counter-Memorial on Jurisdiction, ¶ 58 and fns. 132 and 133, citing to: **RLA-001**, *Mesa – Award*, ¶ 236; **RLA-080**, *Apotex – Award on Jurisdiction*, ¶ 150, citing **RLA-005**, *Phoenix Action – Award*, ¶¶ 58-64: (summarizing previous decisions, and concluding that "if jurisdiction rests on the existence of certain facts, they have to be proven [rather than merely established prima facie] at the jurisdictional phase."); **RLA-065**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB(AF)/0501) Award, 19 June 2007, ¶¶ 63, 122: (finding that "Claimants have not demonstrated that their claims fall within the scope and coverage of NAFTA Chapter Eleven" and rejecting claimant's submission that "Respondent bears the burden of demonstrating that the Tribunal should not hear the claim"); **RLA-132**, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America* (UNCITRAL) Award, 12 January 2011, ¶ 122: (holding that "Claimants must [...] establish an investment that falls within one or more of the categories established by that Article [1139]"); **RLA-004**, *Gallo – Award*, ¶ 328: (stating that "[i]nvestment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted."). See also, Canada's Counter-Memorial on Jurisdiction, ¶ 60 and fns. 135 and 136, where it affirms that the principle that a claimant bears the burden of proving all facts necessary to establish a tribunal's jurisdiction is well established in international investment arbitration more generally and cites to numerous cases where this principle has been recognized.

³⁰ **RLA-079**, *Resolute – Decision on Jurisdiction and Admissibility*, ¶ 85. See also, **RLA-169**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) 1128 Submission of the United States of America, 14 June 2017, ¶ 5; **RLA-160**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Mexico Article 1128 Submission on Jurisdiction, 14 June 2017, ¶¶ 2-5.

Eleven. A claimant must present sufficient evidence of the alleged facts on which jurisdiction rests to prove that the Tribunal has jurisdiction.³¹

23. The Claimant argues that, “[a]bsent 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”.³² This is unsupported and incorrect. The Claimant’s position is contrary to the well-established principle in international investment arbitration that “if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage.”³³ As previous tribunals have recognized, when the facts alleged by a claimant are facts on which the jurisdiction of the tribunal rests, “it seems evident that the tribunal has to decide on those facts, if contested between the parties, and cannot accept the facts as alleged by the claimant.”³⁴ Such facts must be proven. In this regard, the *Phoenix Action* tribunal further remarked:

³¹ Canada acknowledges that the facts as alleged by a claimant that go to the merits of a case are to be accepted on a *prima facie* basis at the jurisdictional phase. **RLA-005**, *Phoenix Action – Award*, ¶¶ 61-62 and 64; **RLA-170**, *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ICSID Case No. ARB/03/28) Decision on Annulment, 1 March 2011 (“*Duke Energy – Decision on Annulment*”), ¶ 118; **RLA-171**, *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Republic of Hungary* (ICSID Case No. ARB/12/2) Award, 16 April 2014 (“*Emmis – Award*”), ¶¶ 171-172; **CLA-062**, *Saipem S.p.A. v. People’s Republic of Bangladesh* (ICSID Case No. ARB/05/7) Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶ 83.

³² Claimant’s Reply, ¶¶ 54-55, and ¶ 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.”)

³³ **RLA-005**, *Phoenix Action – Award*, ¶ 61. *See also*, **RLA-172**, *Gustav F.W. Hamester GmbH & Co KG v. Republic of Ghana* (ICSID Case No. ARB/07/24) Award, 18 June 2010, ¶ 143; **CLA-226**, *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12) Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, ¶ 2.8: (“[T]he Tribunal considers that it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant’s CAFTA claims on the basis of an assumed fact (i.e. alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent). The application of that ‘prima facie’ or other like standard is limited to testing the merits of a claimant’s case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal’s jurisdiction directly depends... In the context of factual issues which are common to both jurisdictional issues and the merits, there could be, of course, no difficulty in joining the same factual issues to the merits. That, however, is not the situation here, where a factual issue relevant only to jurisdiction and not to the merits requires more than a decision *pro tempore* by a tribunal.”)

³⁴ **RLA-005**, *Phoenix Action – Award*, ¶ 63. *See also*, **RLA-170**, *Duke Energy – Decision on Annulment*, ¶ 118: (“First, since – as the Tribunal here correctly observed – it ‘*must not in any way prejudge the merits of the case*’, an arbitral tribunal must, for the purpose of its jurisdictional determination, presume the facts which found the claim on the merits as alleged by the claimant to be true (unless they are plainly without any foundation). In that sense, its determination may be said to be *prima facie*. But, second, in the application of those presumed facts to the legal question of jurisdiction before it, the tribunal must objectively characterise those facts in order to determine finally whether they fall within or outside the scope of the parties’ consent. In making this determination, the tribunal may not simply adopt the claimant’s

[W]hen a particular circumstance constitutes a critical element for the establishment of the jurisdiction itself, such fact must be proven, and the Tribunal must take a decision thereon when ruling on its jurisdiction. In our case, this means that the Tribunal must ascertain that the prerequisites for its jurisdiction are fulfilled, and that the facts on which its jurisdiction can be based are proven.³⁵

24. The Claimant bears the burden to prove the facts supporting its effort to establish jurisdiction under Articles 1116(1) and 1116(2). The Claimant cannot merely make assertions about facts that are integral to establishing jurisdiction and request that the Tribunal defer to the Claimant's judgment.³⁶

III. THE CLAIMANT DID NOT MEET ITS EVIDENTIARY BURDEN TO ESTABLISH JURISDICTION *RATIONE TEMPORIS* UNDER ARTICLE 1116(1)

25. The Claimant has attempted to establish jurisdiction *ratione temporis* under Article 1116(1) by asserting that Tennant Travel Services, LLC³⁷ ("Tennant Travel") was an "investor of a Party" who beneficially owned shares in, and controlled, Skyway 127 when the alleged breach occurred.³⁸

26. As Canada explained in its Counter-Memorial on Jurisdiction, to prove these assertions the Claimant must provide reliable, contemporaneous documentary evidence demonstrating that it owned

characterisation without examination. In this way, a tribunal whose jurisdiction is contested strikes the balance between avoiding pre-judging the merits, on the one hand, and objectively determining the question of jurisdiction on the other.") (emphasis added). See also, **RLA-173**, *Carlos Rios and Francisco Rios v. Republic of Chile* (ICSID Case No. ARB/17/16) Award, 11 January 2021 [Spanish, with attached translated excerpts] ("*Carlos Rios – Award*"), ¶ 172: (noting that although the limitation period provision's use of "alleged" indicates that the breach must be identified on the basis of assumptions made by the claimants, this does not imply that the tribunal has to accept the claimants' arguments in their entirety. Otherwise, claimants could characterize their claims in a way that the treaty's jurisdictional requirements would be obviated.).

³⁵ **RLA-005**, *Phoenix Action – Award*, ¶ 64. This general approach was confirmed by the tribunal in *Emmis* when deciding the jurisdictional issues presented in that case, noting: ("Issues that are essential to establish jurisdiction, such as the existence or ownership of a covered investment, must be dealt with decisively in the jurisdictional phase"); **RLA-171**, *Emmis – Award*, ¶ 174; see also, ¶¶ 172-173.

³⁶ See for example, **RLA-171**, *Emmis – Award*, ¶ 173: ("In the context of the present case, the Claimants bear the burden of proving that they owned an investment capable of expropriation. This task lies fully within the ambit of the jurisdictional phase. This burden is to be contrasted with the need to establish on a *prima facie* basis at the jurisdictional phase that the Respondent breached the treaty. This question is based on whether the alleged unlawful conduct giving rise to the treaty breach—if it can be established in the merits phase—is capable of falling within the treaty provisions invoked.")

³⁷ Tennant Travel Services, LLC is the predecessor in name to Tennant Energy, LLC. See Canada's Counter-Memorial on Jurisdiction, ¶ 86.

³⁸ Claimant's Reply, ¶ 143.

or controlled the investment at the time of the alleged breach, namely from 2008 to 2013.³⁹ In its Reply, the Claimant failed to meet this evidentiary burden. Instead it filed two self-serving witness statements from John Tennant and Derek Tennant, and a non-contemporaneous document created in contemplation of arbitration. The Claimant's failure to identify any reliable, contemporaneous documentary evidence on the formation of the alleged trust or the alleged designation of the Claimant as its beneficiary, as well as the absence of evidence that the Claimant otherwise controlled the investment, means the Claimant's claim must be rejected for want of jurisdiction. The only reliable evidence on the record proves that the Claimant first acquired ownership of shares in Skyway 127 on January 15, 2015 – years after the alleged breach occurred. Furthermore, the expert opinion filed by the Claimant does not compensate for the evidentiary failures in its claim. The opinion assumes the facts presented in the witness statements of John Tennant and Derek Tennant to be true – an assumption this Tribunal cannot make.⁴⁰

27. In this section, Canada addresses the following five issues: (A) to establish jurisdiction *ratione temporis* under Article 1116(1), the Claimant must prove it was an “investor of a Party” when the alleged breach occurred; (B) the alleged “investment” at that time is the beneficial ownership of up to ████████ of Skyway 127 shares; (C) the Claimant must submit reliable, contemporaneous documentary evidence to prove it owned or controlled this investment at the relevant time; (D) the Claimant has failed to prove it owned the investment when the alleged breach occurred; and (E) the Claimant has failed to prove it controlled the investment when the alleged breach occurred. Ultimately, the Claimant's narrative of a trust through which it owned and controlled the investment appears to be a *post hoc* rationale developed solely to establish the Tribunal's jurisdiction in this arbitration, and must be rejected.

A. To Establish Jurisdiction Under Article 1116(1), the Claimant Must Prove It Was an “Investor of a Party” When the Alleged Breach Occurred

28. In its Counter-Memorial on Jurisdiction, Canada explained that a NAFTA tribunal's jurisdiction *ratione temporis* over a claim submitted by a claimant “on its own behalf” under

³⁹ Canada's Counter-Memorial on Jurisdiction, ¶¶ 4, 75-92.

⁴⁰ See Part II.C, above.

Article 1116(1) is limited to claims by a claimant who qualified as an “investor of a Party” when the alleged breach occurred.⁴¹ Articles 1116(1) and 1101(1) set a temporal limitation on a tribunal’s jurisdiction over a claim of an alleged breach of the substantive obligations owed to an investor of a Party pursuant to Section A of Chapter Eleven.⁴² The NAFTA Parties do not owe those substantive obligations to a prospective claimant until it becomes a protected investor of a Party.⁴³ The jurisdiction of a NAFTA tribunal is thus limited to alleged breaches of the substantive obligations that occurred after a claimant becomes a protected investor of a Party. International investment tribunals⁴⁴ and scholars⁴⁵ have consistently held that if a claimant cannot establish it was a protected investor with a protected investment when an alleged breach occurred, a tribunal lacks jurisdiction.

29. The Claimant does not appear to disagree with this legal principle.⁴⁶ However, it contends that under Article 1116(1), the legally relevant time to prove it was an “investor of a Party” is

⁴¹ Canada’s Counter-Memorial on Jurisdiction, ¶¶ 64-74. The title of Article 1116 is “Claim by an Investor of a Party on Its Own Behalf”. Article 1139 defines an “investor of a Party” as ‘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’.

⁴² Canada’s Counter-Memorial on Jurisdiction, ¶¶ 64-67. NAFTA Article 1101(1)(a) states: “This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party”.

⁴³ **RLA-001**, *Mesa – Award*, ¶¶ 325-327; **RLA-004**, *Gallo – Award*, ¶¶ 284-297; **CLA-135**, *GAMI Investments, Inc. v. The Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004, ¶ 93; and **RLA-121**, *B-Mex – Partial Award*, ¶ 145.

⁴⁴ **RLA-146**, *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16) Award, 31 March 2011, ¶¶ 36-40, 150, 172; **RLA-005**, *Phoenix Action – Award*, ¶ 68; **RLA-139**, *Cementownia – Award*, ¶ 112; **RLA-140**, *Rose Levy – Award*, ¶¶ 146-147; **RLA-141**, *Philip Morris Asia Limited v. Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 529; **RLA-142**, *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia* (UNCITRAL) Award, 29 March 2019 (“*Indian Metals – Award*”), ¶ 107; **RLA-143**, *Libananco – Award*, ¶¶ 121-128; **RLA-144**, *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A.v. The Dominican Republic* (UNCITRAL) Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶¶ 106-107; **RLA-145**, *ST-AD GmbH v. Republic of Bulgaria* (UNCITRAL) Award on Jurisdiction, 18 July 2013, ¶ 300; **RLA-174**, *STEAG GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/4) Decision on Jurisdiction, Liability and Principles of Quantum, 8 October 2020 [Spanish, with attached translated excerpts], ¶¶ 145-151: (describing the German claimant’s acquisition of the previous German investor’s interests in the investment); and ¶ 380 (explaining that any dispute arising from alleged treaty breaches in relation to the claimant’s investment, but which arose before the claimant acquired the investment, would not be within the jurisdiction *ratione temporis* of the tribunal).

⁴⁵ See e.g. **RLA-117**, Zachary Douglas, “The International Law of Investment Claims” (New York: Cambridge University Press, 2009) (“Douglas”) [Excerpt], ¶ 303, ¶ 631, and Rule 32; **RLA-137**, Hanno Wehland, “The Transfer of Investments and Rights of Investors under International Investment Agreements — Some Unresolved Issues”, in *Arbitration International*, Volume 30, Issue 3, 1 September 2014, p. 568; **RLA-138**, Nelson Goh, “The Assignment of Investment Treaty Claims: Mapping the Principles”, in Thomas Schultz (ed), *Journal of International Dispute Settlement*, 2019, Volume 10, Issue 1, p. 35.

⁴⁶ The Claimant submits that *Daimler* supports its case (See Claimant’s Reply, ¶ 104), which is incorrect for at least two reasons. First, the Claimant has not alleged that it transferred its investment to another investor, while the Claimant still seeks standing. In *Daimler*, the measures forming the basis of the alleged breach arose in 2001 and 2002; the claimant

August 15, 2015, when “Tennant Energy became aware or could have been aware of the internationally wrongful act.”⁴⁷ This is misguided.

30. The Claimant confuses the distinct temporal pre-requisites to establish jurisdiction under Article 1116(1) with those under Article 1116(2).⁴⁸ Unlike under Article 1116(2), there is no knowledge component linked to the dates for determining jurisdiction *ratione temporis* under Article 1116(1). Rather, the relevant dates are (i) when the alleged breach occurred; and (ii) when the Claimant became an “investor of a Party”.⁴⁹ The date of the alleged breach is an objective event, and cannot be changed by the subjective knowledge of a claimant. In Procedural Order No. 8, the Tribunal indicated agreement with Canada on this point:

transferred its shares in the Argentinian enterprise to its German parent effective April 1, 2002; and the claimant filed its request for arbitration in August 2004. **CLA-309**, *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1) Award, 22 August 2012 (“*Daimler – Award*”), ¶¶ 40-44. The tribunal held that a “strong argument can be made that the ICSID Convention and many BITs accord standing only to the original investor and not to any subsequent would-be purchasers of the underlying investment.” **CLA-309**, *Daimler – Award*, ¶ 144 (emphasis added). Thus, the tribunal rejected the respondent’s argument that the right to file a claim transferred with the investment, and concluded that it “should accord standing to any qualifying investor under the relevant treaty texts who suffered damages as a result of the allegedly offending governmental measures at the time that those measures were taken”. See **CLA-309**, *Daimler – Award*, ¶ 145 (emphasis added). Second, *Daimler* is distinguishable because the Claimant here failed to establish it owned or controlled the investment when the alleged breach occurred. The evidence demonstrates that John Tennant owned the Skyway 127 shares from June 2011 to January 2015. He did not commence a NAFTA claim over the challenged measures and attempt to continue it himself or to assign it to the Claimant. In January 2015, he transferred his shareholding in Skyway 127 to the Claimant, who in June 2017 initiated a NAFTA claim on its own behalf under Article 1116(1).

⁴⁷ Claimant’s Reply, ¶ 171.

⁴⁸ The claimant in *Indian Metals* made a similar argument on the relevant date for jurisdiction *ratione temporis*. The tribunal explained:

The Tribunal was not impressed with the Claimant’s interpretation of the *Gremcitel v. Peru* and the *Philip Morris* awards and the argument that the “critical date” for the temporal consideration is the date when the impugned measure was published and the claimant “became aware” of the alleged treaty breach.

Indeed, in the context of dealing with a temporal objection, the tribunal in *GEA Group AG* case rejected an identical submission concerning the alleged requirement of the claimant’s awareness of the treaty breach and held that “[c]ontrary to the Claimant’s assertions, the Tribunal’s analysis cannot hinge on whether the Claimant knew of Ukraine’s purported treaty violations”.

See **RLA-142**, *Indian Metals – Award*, ¶¶ 109-110 (emphasis added). See also, Canada’s Counter-Memorial on Jurisdiction, ¶ 73 for its analysis of *GEA Group*. See also, Canada’s Counter-Memorial on Jurisdiction, ¶¶ 68-72.

⁴⁹ Canada’s Counter-Memorial on Jurisdiction, ¶ 80. Prof. Douglas states: (“the timing of the investor’s acquisition of its investment determines the commencement of the substantive protection afforded by the investment treaty and hence the temporal scope for the tribunal’s adjudicative power over claims based upon an investment treaty obligation.”) See **RLA-117**, *Douglas*, ¶ 303, ¶ 631, and Rule 32: (“Hence the tribunal’s jurisdiction *ratione temporis* commences at the latter of two events: (i) the claimant’s acquisition of an investment; and, (ii) the obligation forming the basis of the claim entering into force and binding the host state.”)

[t]he 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.⁵⁰

31. The parties agree that each of the challenged measures underlying the alleged breach of Article 1105 occurred from 2008 to 2013.⁵¹ The Tribunal must focus its Article 1116(1) analysis on this period. As explained below, none of the evidence offered by the Claimant establishes that it became an "investor of a Party" before January 15, 2015.

B. The Alleged "Investment" When the Alleged Breach Occurred is the Beneficial Ownership of Up To ██████ of Skyway 127 Shares

32. The Claimant argues that the "investment" when the alleged breach occurred is "the intangible property rights in the form of beneficial rights" in up to ██████ of the Skyway 127 shares that John Tennant held from 2011 to 2015.⁵² Indeed, the Claimant defines the alleged "investment" when the alleged breach occurred as follows:

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 ["investment" under] NAFTA Article 1139.⁵³

Tennant Travel made an investment once it had the beneficial interest of the Skyway 127 shares in trust on April 26, 2011.⁵⁴

⁵⁰ Procedural Order No. 8, ¶ 42; *see also*, Canada's Counter-Memorial on Jurisdiction, ¶ 80.

⁵¹ Canada's Counter-Memorial on Jurisdiction, ¶¶ 81-85. The Claimant itself states: ("There is no dispute that these measures took place before June 1, 2014.") *See* Claimant's Reply, ¶ 42.

⁵² Claimant's Reply, ¶ 125. Even if the Claimant marshals reliable, contemporaneous evidence proving that it beneficially owned shares in Skyway 127 when John Tennant acquired his shares on June 20, 2011, the Tribunal's jurisdiction would nonetheless be limited to an alleged breach that occurred on June 20, 2011 and thereafter. *See* Canada's Counter-Memorial on Jurisdiction, fn. 223.

⁵³ Claimant's Reply, ¶ 125. *See also*, Claimant's Reply, ¶ 96: ("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)."); ¶ 117: ("the shares beneficially owned by Tennant Travel Services through John Tennant as a bare trustee in 2011 meet the definition of a covered investment"); ¶ 156: ("John Tennant [...] vested equitable rights to the shares in Tennant Travel Services. These rights are a protected investment under the NAFTA definition of investment").

⁵⁴ Claimant's Reply, ¶ 119 (emphasis added).

33. More specifically, the alleged investment is the beneficial ownership of shares held by John Tennant as follows: ██████ of Skyway 127 shares as of June 20, 2011, and then ██████ of Skyway 127 shares (as John Tennant's shareholding increased in December 2011⁵⁵) from December 30, 2011 to January 15, 2015.

C. The Claimant Must File Reliable, Contemporaneous Documentary Evidence to Prove that It Owned or Controlled the Investment

34. As explained above, the Claimant bears the burden to prove it owned the investment when the alleged breach occurred – the onus is not on Canada to disprove the Claimant's allegations.⁵⁶ Simply producing evidence does not automatically satisfy the Claimant's burden to establish jurisdiction under Article 1116(1).⁵⁷ The Claimant must also meet the applicable standard of proof.⁵⁸ As Professor Bin Cheng stated:

[A] party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency of proof.⁵⁹

35. Tribunals have offered four points of guidance on the standard of proof that are relevant in this case.⁶⁰ First, cogent evidence is required.⁶¹ Tribunals have denied claims for failure to provide such

⁵⁵ John Tennant's shareholding in Skyway 127 increased from ██████ to ██████ on December 30 or 31, 2011. See **C-114**, Shareholder's Ledger Skyway 127, 30 December 2011; Witness Statement of John Tennant, 1 March 2021 ("CWS-2-John Tennant"), ¶ 25. See also, Canada's Counter-Memorial on Jurisdiction, ¶ 93.

⁵⁶ See Part II.B. See **RLA-004**, *Gallo – Award*, ¶ 284: ("[i]n accordance with the principle *actori incumbit probatio*, it is for the Claimant to marshal convincing evidence showing the date when he acquired ownership of the Enterprise's share capital.")

⁵⁷ **RLA-175**, *Ampal-American Israel Corporation and others v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11) Decision on Jurisdiction, 1 February 2016 ("*Ampal – Decision on Jurisdiction*"), ¶ 219. See also, **RLA-176**, Frederic Sourgens, Kabir Duggal, Ian A Laird, "Evidence in International Investment Arbitration", (2018) [Excerpt] ("*Sourgens et. al.*"), ¶ 4.04. **RLA-177**, Julien Fouret, Gloria Alvarez, Remy Gerbay, "The ICSID Convention, Regulations and Rules – A Practical Commentary", (Edward Elgar Publishing, 2019) [Excerpt], fn. 444. The standard of proof is distinct from the burden of proof, which denotes the obligation on a party to prove (or disprove) a fact in issue to the requisite standard of proof. See Canada's Counter-Memorial on Jurisdiction, ¶ 75.

⁵⁸ The most common standard of proof in investment arbitration is the "balance of probabilities" or a "preponderance of evidence". See **RLA-176**, *Sourgens et. al.*, ¶¶ 5.09-5.16.

⁵⁹ **RLA-178**, Bin Cheng, "General Principles of Law as Applied by International Courts and Tribunals", (1953) [Excerpt], p. 329.

⁶⁰ See Canada's Counter-Memorial on Jurisdiction, ¶¶ 75-79, and 88.

⁶¹ For example, in assessing a claim for legitimate expectations, the *Metalpar* tribunal looked for concrete evidence to substantiate the claim. The tribunal ultimately rejected the claim because there was no bid, license, permit or contract of

evidence.⁶² For example, the *Mesa* tribunal rejected many of the claimant's allegations due to its failure to marshal cogent evidence that it was seeking to make an investment through the Ontario FIT Program before the alleged breach occurred.⁶³

36. Second, in the case of alleged ownership of an investment, such evidence should take the form of reliable, contemporaneous documentary evidence.⁶⁴ Materials drafted in contemplation of arbitration do not offer reliable evidence of ownership.⁶⁵ For example, the *Gallo* tribunal declined jurisdiction as the claimant did not file reliable, contemporaneous documentary evidence proving his ownership of shares when the alleged breach occurred.⁶⁶ In *Ampal*, the claimants argued that they beneficially owned the investment through an alleged trust. The tribunal found that the claimants did not meet their burden, as they filed no contemporaneous evidence and relied on documents prepared years after the breach and said to apply retroactively:

any kind arising at the material time between the State and the claimant. See **RLA-179**, *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic* (ICSID Case No. ARB/03/5) Award, 6 June 2008 ("*Metalpar – Award*"), ¶ 186.

⁶² **RLA-179**, *Metalpar – Award*, ¶ 186; **RLA-001**, *Mesa – Award*, ¶ 329; fn. 76.

⁶³ On *Mesa*'s assertions that it was seeking to make its investments before the alleged breach occurred, the tribunal stated that: ("[n]o cogent evidence has been submitted by the Claimant for the North Bruce and Summerhill projects"). See **RLA-001**, *Mesa – Award*, ¶ 329. The tribunal elaborated: ("the Claimant submitted that it was seeking to make an investment before the FIT applications were made for these projects in May 2010 without providing any evidence in support. It also submitted that "[t]he North Bruce and Summerhill projects w[e]re simply an expansion of the original Investment" (Reply §859), also without furnishing any evidence in support.") **RLA-001**, *Mesa – Award*, fn. 76. *Mesa* also alleged that if more capacity had been awarded in West of London, high-ranked projects that displaced Bruce region projects would not have switched regions. The tribunal observed *Mesa* "has furnished the Tribunal with no evidence in support of this allegation". ¶¶ 654-655. On some of the claimant's accusations with respect to NextEra, the tribunal noted, "[n]one of these allegations is supported by cogent evidence. In the circumstances, the facts so alleged have simply not been established." **RLA-001**, *Mesa – Award*, ¶ 680.

⁶⁴ **RLA-004**, *Gallo – Award*, ¶¶ 216, 292-296; **RLA-175**, *Ampal – Decision on Jurisdiction*, ¶¶ 223-226. Depending on the circumstances, evidence of ownership could be established through one or several documents such as a trust deed, trust reporting materials, tax filings, corporate records, financial statements, shareholder ledgers or resolutions, contracts, share certificates, cheques, dividend statements, or bank records. See e.g., **RLA-180**, *Europe Cement Investment & Trade SA v Republic of Turkey* (ICSID Case No ARB(AF)/07/2) Award, 13 August 2009 ("*Europe Cement – Award*"), ¶¶ 156-157; **CLA-057**, *Invesmart B.V. v. Czech Republic* (UNCITRAL), Award, 26 June 2009, ¶ 251.

⁶⁵ **RLA-004**, *Gallo – Award*, ¶¶ 174, 216-219, 286-290. See also, **RLA-180**, *Europe Cement – Award*, ¶ 153: "the share transfer agreements were in fact executed in 2005 and back-dated to 20 May 2003 in order to meet the jurisdictional requirements of Europe Cement's claim."

⁶⁶ **RLA-004**, *Gallo – Award*, ¶¶ 289, 290, 297, 312, 325-326. The tribunal found: ("there is a total absence of written circumstantial evidence. The record lacks any document of any type proving that Mr. Gallo became the shareholder of the Enterprise before the enactment of the AMLA"). See ¶ 218. Not only did the claimant fail to provide contemporaneous documents in *Gallo*, but the tribunal found that the documents provided were also backdated and signed after the alleged breach in an attempt to establish jurisdiction after the fact. See **RLA-004**, *Gallo – Award*, ¶¶ 218-219, 297.

223. The only evidence submitted in respect of Mr. Fischer's beneficial ownership is a one line statement in one of the exhibits (C-318) that the shares in DF Holdings Investments Limited are beneficially owned by Mr. Fischer. No trust deed evidencing the double blind trust has been submitted to the Tribunal. [...]

224. In these circumstances, the Tribunal has no clear evidence before it relating to the terms of such trust or beneficial ownership. [...]

225. In addition, the Tribunal notes that many of the documents produced by the Claimants in support of Mr. Fischer's alleged investment are executed on 2 May 2012 but, conveniently, they are said to take effect retroactively on 25 June 2007, five years earlier.

226. In view of the many missing evidentiary links, the Tribunal concludes that Mr. Fischer has not discharged his burden of proving that he made an investment that is protected under the German/Egypt BIT.⁶⁷

37. Third, contemporaneous documentary evidence that is inconsistent with a claimant's asserted ownership of an investment may disprove that assertion. For example, in *Europe Cement*, the claimant argued it beneficially owned shares when the alleged breach occurred, but it filed contemporaneous financial statements and corporate documents that gave no indication of the claimant's purported ownership. To the tribunal, "[t]he Claimant's attempt to explain this as an 'oversight' strains credulity. It all points to the inference that no share transfer took place [...]"⁶⁸ In declining jurisdiction, the tribunal also expressed incredulity because the claimant's alleged share purchase was a substantial transaction, yet no contemporaneous evidence proved it occurred.⁶⁹

38. Fourth, relying on a witness with a personal interest in the arbitration is not sufficient, on its own, to prove ownership of an investment.⁷⁰ Reliable, contemporaneous documentary evidence is needed to corroborate such a witness's factual assertions. Moreover, while a tribunal has discretion over the weight of evidence,⁷¹ hearsay in a self-serving witness statement that lacks independent

⁶⁷ **RLA-175**, *Amal – Decision on Jurisdiction*, ¶¶ 223-226 (emphasis added).

⁶⁸ **RLA-180**, *Europe Cement – Award*, ¶ 158 (emphasis added). The tribunal held: ("[t]hat the directors of Europe Cement simply overlooked this when signing the financial statements seems highly implausible.") See ¶ 157.

⁶⁹ **RLA-180**, *Europe Cement – Award*, ¶¶ 140-143, 156, 163-167, 170.

⁷⁰ See e.g., Canada's Counter-Memorial on Jurisdiction, ¶ 76; citing **RLA-004**, *Gallo – Award*, ¶ 289, citing: **RLA-149**, *Hussein Nuaman Soufraki v. The United Arab Emirates* (ICSID Case No. ARB/02/7) Award, 7 July 2004, ¶ 78.

⁷¹ Procedural Order No. 1, ¶ 8.1; 1976 UNCITRAL Arbitration Rules, Article 26.6; IBA Rules, Article 9.1.

corroboration warrants no weight.⁷² As explained below, the witness statements filed by the Claimant are self-serving and raise serious doubts as to credibility. The Claimant can only meet the standard of proof with reliable, contemporaneous documentary evidence of its alleged ownership or control of the investment at the relevant time.

D. The Claimant Did Not Prove It Owned the Investment When the Alleged Breach Occurred

39. In its Reply, the Claimant argued it was an “investor of a Party” when the alleged breach occurred because John Tennant allegedly created a trust orally to hold the Skyway 127 shares for Tennant Travel as the beneficiary.⁷³ The Claimant filed four documents to support this account with its Reply: two witness statements, from John Tennant and Derek Tennant; a memorandum from February 2016 (Exhibit C-268); and a legal opinion from Justice Grignon. These documents, taken separately or together, do not satisfy the Claimant’s burden of proving this Tribunal has jurisdiction.

40. John Tennant’s and Derek Tennant’s testimony on the alleged trust warrant no weight. Both individuals have a personal interest in this arbitration and are not impartial to its outcome. John Tennant and Derek Tennant both are members of the Claimant and members of its management board.⁷⁴ Derek Tennant is also the President of Skyway 127.⁷⁵ Without reliable, contemporaneous documentary evidence to independently verify their assertions, their witness statements are insufficient to meet the Claimant’s burden of proof concerning jurisdiction. Moreover, Derek Tennant’s statements on what John Tennant told him are hearsay.⁷⁶ Like the hearsay in John Pennie’s

⁷² **RLA-151**, *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13) Award, 8 October 2009, ¶ 224; **RLA-150**, *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19) Award, 3 July 2008, ¶ 157; Canada’s Counter-Memorial on Jurisdiction, ¶ 79. See e.g., Canada’s Counter-Memorial on Jurisdiction, ¶¶ 78-79.

⁷³ CWS-2-John Tennant, ¶ 21; Witness Statement of Derek Tennant, 1 March 2021 (“CWS-3-Derek Tennant”), ¶ 24.

⁷⁴ CWS-2-John Tennant, ¶ 3; CWS-3-Derek Tennant, ¶ 2.

⁷⁵ Claimant’s Memorial on Jurisdiction, Merits, and Damages, 7 August 2020 (“Claimant’s Memorial”), ¶¶ 125, 156; CWS-3-Derek Tennant, ¶ 2.

⁷⁶ Derek Tennant states that: (“on April 26, 2011, my brother John informed me of his decision to designate Tennant Travel Services, LLC (‘Tennant Travel’) to be the holding company.”) See CWS-3-Derek Tennant, ¶ 21: (“[m]y brother John said that he was holding the shares in trust for Tennant Travel Services LLC.”) See CWS-3-Derek Tennant, ¶ 24 (emphasis added).

witness statement, Derek Tennant's hearsay warrants no weight: he is a partial witness and no reliable evidence was advanced to corroborate his claims.⁷⁷

41. The Claimant has filed just one exhibit (C-268) to show it beneficially owned the Skyway 127 shares at the requisite time.⁷⁸ The document, dated February 8, 2016, was created years after the alleged breach occurred, and in contemplation of arbitration. The Claimant had already met with its counsel (on March 16, 2015) and discussed the current NAFTA case before Exhibit C-268 was created.⁷⁹ The document even refers to the NAFTA.⁸⁰ This is exactly the type of non-contemporaneous material prepared in contemplation of arbitration that tribunals have found unreliable.⁸¹ Exhibit C-268, like the Claimant's witness statements, fails to offer reliable, contemporaneous documentary evidence to prove the Claimant's alleged ownership of the investment.

42. Just as important to resolving the Article 1116(1) objection is the information the Claimant did not file to prove its claim. In her Expert Report, Ms. Lodise observes that in her 30 years of practice in California trusts law, "oral trusts are rarely argued or proven, due to the high standard of proof."⁸² The California Probate Code provides that, "[a] trust is created only if the settlor properly manifests an intention to create a trust."⁸³ Section 15207 of that Code states:

(a) The existence and terms of an oral trust of personal property may be established only by clear and convincing evidence.

⁷⁷ See Canada's Counter-Memorial on Jurisdiction, ¶¶ 76-79, 89.

⁷⁸ **C-268**, John Tennant to Tennant Energy regarding trust transfer and successor in Interest ("John Tennant Letter, 8 February 2016"). See also, Claimant's Reply, ¶¶ 163-165.

⁷⁹ The Claimant states: ("March 16, 2015 [is] when Skyway 127's representatives first met with legal counsel about the applicability of the evidence adduced from the Mesa Power NAFTA claim.") See Claimant's Reply, ¶ 245, citing Claimant's Notice of Arbitration, 1 June 2017 ("Claimant's NOA"), ¶ 126(a).

⁸⁰ **C-268**, John Tennant Letter, 8 February 2016, ¶ 1, stating that John Tennant confirms his "irrevocable transfer of all interests and rights under the North American Free Trade Agreement".

⁸¹ **RLA-004**, *Gallo – Award*, ¶¶ 174, 216-219, 286-290; **RLA-180**, *Europe Cement – Award*, ¶ 153; **RLA-175**, *Ampal – Decision on Jurisdiction*, ¶¶ 223-226.

⁸² **RER-1**, Lodise Report ¶ 37.

⁸³ **R-090**, California Probate Code, Division 9 - Trust Law [15000-19530], Enacted by Stats. 1990, Ch. 79 [Excerpt] ("California Probate Code"), § 15201.

(b) The oral declaration of the settlor, standing alone, is not sufficient evidence of the creation of a trust of personal property.⁸⁴

43. Thus, the supposed oral declarations of John Tennant, taken on their own, *cannot* prove the existence of the alleged trust under California law.⁸⁵ Instead, the Claimant must provide “clear and convincing evidence” of the alleged trust. California jurisprudence confirms this is a high evidentiary threshold.⁸⁶ In Ms. Lodise’s experience, where an oral trust is proven, it is because there is reliable documentary evidence of the trust, such as trust-related written materials prepared by the settlor or trustee.⁸⁷ She finds that “[t]he alleged trust in this case runs afoul of many of the rules on the creation and proof of oral trusts under California law.”⁸⁸

44. In particular, the Claimant filed no contemporaneous documentary evidence to prove that John Tennant: (1) created the alleged trust; (2) put the Skyway 127 shares in the alleged trust; or (3) designated Tennant Travel as the beneficiary.⁸⁹ Nor did the Claimant prove the existence of the alleged trust by filing contemporaneous documentary evidence showing that John Tennant administered or terminated the alleged trust.⁹⁰ The Claimant filed no contemporaneous emails or

⁸⁴ **R-090**, California Probate Code, § 15207 (emphasis added). A settlor is a person or entity that establishes a trust. *See RER-1*, Lodise Report, fn. 40. A trustee is a person or entity that holds and administers property or assets for the benefit of a third party, the beneficiary. **RER-1**, Lodise Report, ¶ 31.

⁸⁵ The disputing parties agree that California law is the applicable law for determining the existence of the alleged trust, and thus ownership of the alleged investment.

⁸⁶ **RER-1**, Lodise Report, ¶¶ 32-36. **R-094**, *Higgins v. Higgins*, 11 Cal.App.5th 648, 661 (2017): (“[f]inding under the clear and convincing evidence test requires evidence clear enough to leave no substantial doubt and strong enough that every reasonable person would agree.” (emphasis added)). *See also*, **R-091**, *California Law Revision Commission Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm’s Reports, 1986 [Excerpt], p. 525: (“A major problem with an oral trust is the difficulty of proving its terms. [...] There is also a risk of perjury, particularly by those with something to gain [...] Hence, if the owner of shares of stock makes an oral declaration that he or she holds in it trust [...], the trust would fail unless there was some written evidence of a transfer in trust”). *See also*, **R-092**, *LeFrooth v. Prentice*, 202 Cal. 215 (1927); **R-095**, *Newman v. CIR*, 222 F.2d 131 (9th Cir. 1955); **R-093**, *Chard v. O’Connell*, 7 Cal.2d 663 (1936).

⁸⁷ **RER-1**, Lodise Report, ¶ 37.

⁸⁸ **RER-1**, Lodise Report, ¶ 38.

⁸⁹ **RER-1**, Lodise Report, ¶¶ 38, 46, 48, 50.

⁹⁰ For instance, the Claimant did not file trust deeds, term sheets, accounting materials, corporate records, tax filings, financial statements, shareholder registries or resolutions, corporate contracts, share certificates, cancelled cheques, dividend statements, or bank records referencing the alleged trust. Had the oral trust existed, it would be reasonable to expect the Claimant to file some such documentary evidence.

letters mentioning the alleged trust from the many individuals and entities alleged to have known of it – John Tennant, Derek Tennant, Jim Tennant, John Pennie, Tennant Travel, and Skyway 127.

45. The Claimant alleges it “had a fully registered interest in the shares of Skyway 127 before August 15, 2015”, without filing any evidence of such registration.⁹¹ The record contains no contemporaneous evidence that any of the above individuals did anything to make the Claimant the beneficial owner of the shares. Thus, Ms. Lodise concludes that “the primary problem with the alleged trust, [is] the lack of evidence of its existence which would meet the clear and convincing evidence standard under California law.”⁹²

46. Moreover, the contemporaneous documentary evidence on the record discredits the Claimant's asserted ownership of the investment. The Skyway 127 shareholder ledgers of June 9, 2011, June 20, 2011, and December 30, 2011 contain no reference to Tennant Travel.⁹³ If the Claimant truly was the beneficiary of the Skyway 127 shares, those ledgers would have reflected that.⁹⁴ Instead, the ledgers of June 20, 2011 and December 30, 2011 refer to John Tennant owning the shares.⁹⁵

47. Neither John Tennant, Derek Tennant, nor the Claimant explains why the ledgers did not reflect the Claimant's alleged beneficial ownership. John Tennant says he told John Pennie, the corporate secretary of Skyway 127, “that the shares should be transferred to Tennant Travel.”⁹⁶ The Claimant says John Tennant made this request again after he acquired more Skyway 127 shares in December 2011.⁹⁷ Despite this, John Pennie does not attest to these events in his witness statement. Instead, he explains that he updated the ledger of June 20, 2011 to ensure it reflected *John Tennant's shareholding*.⁹⁸ It is unlikely that, in trying to correct the ledger to clarify who owned these shares,

⁹¹ Claimant's Reply, ¶ 170 (emphasis added).

⁹² **RER-1**, Lodise Report, ¶ 46.

⁹³ **C-116**, Shareholder's Ledger Skyway 127, 9 June 2011; **C-117**, Shareholder's Ledger Skyway 127, 20 June 2011; **C-114**, Shareholder's Ledger Skyway 127, 30 December 2011, respectively.

⁹⁴ See Canada's Counter-Memorial on Jurisdiction, ¶ 90.

⁹⁵ **C-117**, Shareholder's Ledger Skyway 127, 20 June 2011; **C-114**, Shareholder's Ledger Skyway 127, 30 December 2011.

⁹⁶ CWS-2-John Tennant, ¶ 20.

⁹⁷ Claimant's Reply, ¶ 154.

⁹⁸ Witness Statement of John C. Pennie, 7 August 2020 (“CWS-1-John Pennie”), ¶ 48.

John Pennie would have omitted to reflect their transfer to the Claimant. Moreover, he did not fix this alleged oversight in the ledger of December 30, 2011. The theory that John Pennie, John Tennant, and Derek Tennant all overlooked the issue of recording *any* information on the alleged trust – in the ledgers or anywhere else – is unconvincing.⁹⁹

48. The Claimant's narrative about the alleged trust is particularly implausible when the Tribunal considers that the shares served as collateral for the loan of a significant sum (John Tennant's \$200,000 loan to Derek Tennant), and that matters concerning the loan were well documented. The Claimant filed into evidence details on the loan, collateral, and demand notice:

- John Tennant's Bank Statements with copies of cashed cheques showing the transfer of the \$200,000 to [REDACTED];¹⁰⁰
- Promissory Note between [REDACTED] and John Tennant;¹⁰¹
- Acknowledgement of Promissory Note between [REDACTED] and John Tennant;¹⁰² and
- Demand Notice to [REDACTED] from John Tennant, and Direction to John Pennie from Derek Tennant and John Tennant to transfer the Skyway 127 shares to John Tennant.¹⁰³

49. John Tennant states, "I did not worry about how the shares were held until sometime in late 2014."¹⁰⁴ However, under the Claimant's account, John Tennant diligently documented and retained records of his financial practices regarding the \$200,000 loan. It is incongruous that he would not have documented any details on the alleged trust holding the shares he received in return for the loan or the designation of a beneficiary. Given the significant value of the loan, this narrative is not credible. Instead, the fact that John Tennant did nothing to document the alleged transfer of the shares into the alleged trust strongly suggests it never happened.

⁹⁹ John Tennant says: ("I had assumed that the corporate records of Skyway 127 reflected the fact that I had the investment in Skyway 127 for the benefit of Tennant Travel Services LLC.") See CWS-2-John Tennant, ¶ 28.

¹⁰⁰ C-264, John Tennant Bank Statements with copies of cashed checks to Derek Tennant, September 2007.

¹⁰¹ C-265, Promissory Note between [REDACTED] and John Tennant, 19 October 2007.

¹⁰² C-266, Acknowledgement of Promissory Note between [REDACTED] and John Tennant, 20 October 2007.

¹⁰³ C-267, Demand Notice to [REDACTED] from John Tennant on Promissory Note, 19 October 2011 ("Demand Notice, 19 October 2010, p. 1" or "Direction, 20 June 2011, p. 2").

¹⁰⁴ CWS-2-John Tennant, ¶ 28.

Public Version

Tennant Energy, LLC v. Government of Canada

Canada's Rejoinder Memorial on Jurisdiction

May 26, 2021

50. John Tennant's story of the creation of the alleged trust is unreliable in three further respects. First, he says, "I did not have a holding company, but Jim had a company, Tennant Travel Services LLC. Jim was not doing anything with it. He let me have the company."¹⁰⁵ Yet the Claimant provided no documentary evidence showing that John Tennant owned Tennant Travel when the alleged breach occurred, or with respect to this alleged transaction.¹⁰⁶ This lack of evidence undermines the Claimant's account that John Tennant used Tennant Travel as the holding company for his shares.¹⁰⁷ It is also implausible that as the alleged owner of the Claimant, John Tennant did not ensure that some records reflected the Claimant's alleged beneficial ownership of the assets in the alleged trust.¹⁰⁸

51. Second, John Tennant states, "I never owned the shares in Skyway 127 for my personal benefit".¹⁰⁹ Yet he offers no rationale as to why he would relinquish his beneficial ownership in the shares.¹¹⁰ It strains credulity that John Tennant would serve as a "bare trustee"¹¹¹ so that an inactive holding company¹¹² could be the beneficiary of the shares rather than himself. His assertion, means, in effect, that he received nothing in return for his \$200,000 loan to Derek Tennant.¹¹³

52. Third, John Tennant says that, at Derek Tennant's request, he intended to hold the Skyway 127 shares in a holding company so they "would not be at risk of being tied up in any potential community property dispute."¹¹⁴ Under California law, income and assets acquired by either spouse during a

¹⁰⁵ CWS-2-John Tennant, ¶ 18 (emphasis added).

¹⁰⁶ Instead, the witness statements state that John Tennant and Derek Tennant are both currently members of the Claimant. *See* CWS-2-John Tennant, ¶ 3; CWS-3-Derek Tennant, ¶ 2.

¹⁰⁷ Claimant's Reply, ¶¶ 68, 72x; CWS-2-John Tennant, ¶ 35. *See also*, Canada's Counter-Memorial on Jurisdiction, ¶ 91; **RER-1**, Lodise Report, ¶ 44.

¹⁰⁸ **RER-1**, Lodise Report, ¶ 45.

¹⁰⁹ CWS-2-John Tennant, ¶ 35. *See also*, Claimant's Reply, ¶ 76.

¹¹⁰ CWS-2-John Tennant, ¶ 10 noting that John Tennant acquired the shares in place of the \$200,000 loan he gave Derek Tennant (plus interest at 10% per year).

¹¹¹ Canada's Counter-Memorial on Jurisdiction, ¶¶ 88-89; Claimant's Memorial, ¶ 126.

¹¹² CWS-2-John Tennant, ¶ 18; Claimant's Reply, ¶ 76: "[t]hese shares always were held for the benefit of a holding company to be named".

¹¹³ **RER-1**, Lodise Report, ¶¶ 39, 44.

¹¹⁴ CWS-2-John Tennant, ¶ 17. John Tennant's and Derek Tennant's witness statements appear inconsistent with Justice Grignon's account of the rationale for the alleged trust. While she says John Tennant created the alleged trust to "prevent dilution of voting control", neither John Tennant's nor Derek Tennant's witness statement states this. *See* Expert Legal

marriage are generally considered community property belonging to both partners.¹¹⁵ Ms. Lodise explains that if the original \$200,000 loan was community property, the Skyway 127 shares that John Tennant acquired were also community property.¹¹⁶ In that case, John Tennant's purported attempt to create the alleged trust so that his spouse could not access the shares would likely render the alleged trust (if John Tennant did try to create it) invalid under California law for violating public policy.¹¹⁷

53. Moreover, if the rationale for the alleged trust was to "protect" the Skyway 127 shares from John Tennant's spouse in adversarial judicial proceedings, then it would be critical to produce and retain documentary records of the creation and terms of the trust so that it would be uncontroverted in court.¹¹⁸ The story that the alleged trust served as an asset protection device, without John Tennant taking any steps to protect the assets in that trust through documentation, is implausible.¹¹⁹

54. Finally, Justice Grignon's expert opinion states:

I have reviewed the Witness Statement of John Tennant (CWS-2) and the Witness Statement of Derek Tennant (CWS-3) with the supporting documents. The facts that follow are taken exclusively from those documents and I have assumed them to be true.¹²⁰

55. Justice Grignon's opinion is based on assumed facts: it assumes the testimony of John Tennant and Derek Tennant to be true and it concludes that the Claimant beneficially owned the shares on that basis.¹²¹ The opinion takes no position on a key issue facing the Tribunal: whether John Tennant's and Derek Tennant's factual assertions on the existence of the alleged trust are true. This Tribunal cannot similarly assume John Tennant's and Derek Tennant's testimony is true. The Claimant must prove the veracity of the evidence on which it relies to establish jurisdiction, including

Opinion of Margaret Grignon, February 23, 2021 ("CER-Grignon"), ¶ 29; CWS-2-John Tennant, ¶ 17; CWS-3-Derek Tennant, ¶ 19; **RER-1**, Lodise Report, ¶¶ 40-42.

¹¹⁵ **RER-1**, Lodise Report, fn. 53. Inheritance funds do not constitute community property under California law.

¹¹⁶ **RER-1**, Lodise Report, ¶ 40.

¹¹⁷ **RER-1**, Lodise Report, ¶ 40. See **R-090**, California Probate Code, § 15203: ("A trust may be created for any purpose that is not illegal or against public policy.")

¹¹⁸ **RER-1**, Lodise Report, ¶¶ 41-42.

¹¹⁹ **RER-1**, Lodise Report, ¶¶ 41-42.

¹²⁰ **CER-Grignon**, ¶ 12.

¹²¹ **CER-Grignon**, ¶ 12.

affirmations made in witness statements. This Tribunal alone has the discretion and duty to determine the probative value of the evidence before it.¹²²

56. The evidentiary lacuna in the Claimant's case covered above demonstrates why the assumption underlying Justice Grignon's legal opinion is untenable.¹²³ Ms. Lodise finds that the evidence on the record is inconsistent with the witnesses' statements that Tennant Travel was the beneficiary of the Skyway 127 shares.¹²⁴ In her opinion:

[T]he available evidence does not meet the clear and convincing standard to prove the existence of the alleged oral trust under California law in my opinion. The record contains no contemporaneous documentation supporting the existence of the alleged trust, but instead indicates that John Tennant nominally and beneficially owned the shares until transferring them to Tennant Travel in January 2015. The available evidence is not strong enough to conclude that every reasonable person would agree that the alleged oral trust existed, as California law requires.¹²⁵

57. As Ms. Lodise observes, the only reliable evidence on the record shows that John Tennant was the *nominal and beneficial* owner of the Skyway 127 shares starting on June 20, 2011.¹²⁶ He then

¹²² Procedural Order No. 1, ¶ 8.1; 1976 UNCITRAL Arbitration Rules, Article 25.6; IBA Rules, Article 9.1. *See above* Part II.C.

¹²³ At the very least, Justice Grignon appears to have been unaware of the many missing evidentiary links in the Claimant's narrative. She says she was "not aware of any conflicting evidence" to her view that the Claimant beneficially owned the shares. *See* CER-Grignon, ¶ 32. Yet as explained above, the ledgers offer directly conflicting contemporaneous evidence by identifying John Tennant as the shareholder rather than the Claimant. *See* C-116, Shareholder's Ledger Skyway 127, 9 June 2011; C-117, Shareholder's Ledger Skyway 127, 20 June 2011; C-114, Shareholder's Ledger Skyway 127, 30 December 2011. *See also*, RER-1, Lodise Report, ¶¶ 47-48.

¹²⁴ RER-1, Lodise Report, ¶ 38-50.

¹²⁵ RER-1, Lodise Report, ¶ 50 (emphasis added). R-094, *Higgins v. Higgins*, 11 Cal.App.5th 648, 661 (2017).

¹²⁶ *See* Canada's Counter-Memorial on Jurisdiction, ¶ 91. The Claimant states that on April 19, 2011: ("John Tennant received the shares of Skyway 127 as a trustee for a US company to be designated later"). *See* Claimant's Reply, ¶ 68 (emphasis added). *See also*, ¶ 69: Tennant Travel was to operate as a holding company for the Skyway 127 shares: ("[a]round 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"); ¶ 71: ("Tennant Energy served as the holding company for the shares." *See* CWS-2-John Tennant, ¶ 35 "[t]hese shares always were held for the benefit of a holding company to be named, which was Tennant Travel, currently known as Tennant Energy, LLC."); CWS-2-John Tennant, ¶ 17: ("I agreed to Derek's condition that I hold the Skyway 127 shares in a US holding company that I would designate.") C-268, John Tennant Letter, 8 February 2016, states: ("[a]t all times, I have held the shares of Skyway 127 Wind Energy Inc., as a bare trustee for a US company to be designated in the future." (emphasis added)). Derek Tennant states: ("my brother John agreed to hold the Skyway 127 shares in a US holding company that he would designate.") CWS-3-Derek Tennant, ¶ 19.

transferred the shares to Tennant Travel on January 15, 2015.¹²⁷ Thus, as in *Gallo*, *Ampal*, and *Europe Cement*, the claim must be dismissed because the Claimant did not submit adequate evidence to meet the standard of proof under international law for its claim that it owned the investment when the alleged breach occurred.

E. The Claimant Did Not Prove It Controlled the Investment When the Alleged Breach Occurred

58. The Claimant also failed to prove it controlled the investment at the requisite time, for three reasons. First, the Claimant said it controlled Skyway 127 when the alleged breach occurred;¹²⁸ yet this argument is misguided because Skyway 127 was not the alleged “investment” in 2011. As explained above, the alleged investment was the “intangible property rights in the form of beneficial rights” of up to ████████ of Skyway 127 shares.¹²⁹ The Claimant has not articulated how it controlled this investment,¹³⁰ beyond its unsubstantiated claim that it beneficially owned the shares.¹³¹ Consequently, its arguments on control collapse along with its case on ownership.

59. Second, while Skyway 127 was not the alleged investment when the alleged breach occurred, even if the Tribunal were to consider who controlled Skyway 127 at that time, it was not Tennant Travel. The assessment of control of an enterprise is a fact-based inquiry that must be considered on a case-by-case basis, with guidance from domestic law.¹³² Under Ontario law, the Claimant did not control Skyway 127 from 2008 to 2013, as Tennant Travel did not hold the majority of votes needed to elect a majority of the Skyway 127 board.¹³³

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

¹²⁸ Claimant's Reply, ¶¶ 141-143: (“Tennant Energy qualifies as an investor given its control of Skyway 127 Energy Inc.”)

¹²⁹ Claimant's Reply, ¶ 125. *See above*, ¶ 32.

¹³⁰ Control in the case of property rights such as ownership is generally manifest through unlimited privileges of use over that property and *prima facie* unlimited powers of transmission. *See RLA-117, Douglas*, ¶ 557.

¹³¹ *See e.g.*, Claimant's Reply, ¶ 158: (“the Trust's current shareholding was controlling the company's day-to-day activities and had been since 2011.”); ¶ 166: (“control came through the exercise of common share voting rights”); ¶ 168: (“John Tennant on behalf of Tennant Travel exercised *de facto* control over Skyway 127 when he was the trustee for the benefit of Tennant Travel.”)

¹³² **RLA-181**, *Joshua Dean Nelson v. United Mexican States* (UNCITRAL) Final Award, 5 June 2020, ¶¶ 189-191.

¹³³ The *Ontario Business Corporations Act* states that a corporation is “controlled” when one holds over 50% of the votes that may be cast to elect directors of the corporation; and the votes attached to those securities are sufficient, if exercised,

60. Third, while the Claimant alleged that a “voting bloc” of John Tennant, John Pennie, and Marilyn Field controlled Skyway 127 when the alleged breach occurred,¹³⁴ Canada explained in its Counter-Memorial on Jurisdiction that the Claimant cannot be conflated with John Tennant.¹³⁵ The Claimant has separate legal personality under international and domestic law.¹³⁶ Thus, the alleged voting patterns of John Tennant are not attributable to the Claimant. This is particularly true because the Claimant failed to prove it beneficially owned the shares when the alleged breach occurred.

61. In any event, the alleged “voting bloc” involved a cumulative shareholding of only ██████ which did not confer control of Skyway 127 under Ontario law.¹³⁷ Moreover, the Claimant filed no reliable, contemporaneous documentary evidence: of the alleged “voting bloc”¹³⁸; that GE Energy, which held ██████ of the Skyway 127 shares at the time of the alleged breach, did not vote its shares¹³⁹; or of the U.S. nationality of the three “active shareholders”, which would be required to establish foreign control by the alleged “voting bloc”.¹⁴⁰ Furthermore, if the Claimant truly had acquired

to elect a majority of the directors of the corporation. See **R-097**, *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 [Excerpt] (“*OBCA*”), s. 1(5). The Claimant also filed none of the evidence considered relevant by some tribunals in assessing control. See Canada’s Counter-Memorial on Jurisdiction, ¶ 96, citing **R-080**, *Canada (Attorney General) v S.D. Myers Inc.*, 2004 FC 38, [2004] 3 FCR 368, ¶ 64; **CLA-111**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 12 November 2000, ¶ 226. See also, **CLA-136**, *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Award, 26 January 2006, ¶¶ 106-107: (“[i]n the absence of legal control [...] the Tribunal is of the opinion that *de facto control must be established beyond any reasonable doubt.*”) **RLA-182**, *Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6) Decision on Jurisdiction and Liability, 12 September 2014, ¶ 526; **RLA-183**, *Aguas del Tunari, S.A., v. Republic of Bolivia* (ICSID Case No. ARB/02/3) Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, ¶ 264; **RLA-121**, *B-Mex – Partial Award*, ¶ 220; **RLA-184**, *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia* (ICSID Case No. ARB/14/24) Award, 21 June 2019, ¶ 369; **RLA-185**, *Vacuum Salt Products Limited v Republic of Ghana* (ICSID Case No. ARB/92/1) Award, 16 February 1994, ¶ 53. Day-to-day operational management of the enterprise does not, on its own, establish control of an enterprise.

¹³⁴ Claimant’s Reply, ¶¶ 149, 154; CWS-2-John Tennant, ¶¶ 24-25.

¹³⁵ Canada’s Counter-Memorial on Jurisdiction, ¶ 95.

¹³⁶ See e.g., **RLA-152**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* I.C.J. Reports 1970, Second Phase, Judgment, 5 February 1970, p. 34, ¶¶ 38-45. **RER-1**, Lodise Report, fn. 25: (“A limited liability company is a business structure in California law whereby the owners who are often described as members are not personally liable for the company’s debts or liabilities.”)

¹³⁷ **R-097**, *OBCA*, s. 1(5). See **RLA-121**, *B-Mex – Partial Award*, ¶ 223, where the tribunal found that a voting agreement among shareholders could show legal control upon reaching collective majority ownership.

¹³⁸ See Claimant’s Reply, ¶¶ 149, 154; CWS-2-John Tennant, ¶¶ 24-25; CWS-3-Derek Tennant, ¶¶ 25, 26, 33, 35, 38.

¹³⁹ Claimant’s Reply, ¶ 152, 166; CWS-3-Derek Tennant, ¶¶ 30-31.

¹⁴⁰ CWS-3-Derek Tennant, ¶ 38. The Claimant did not file evidence that John Pennie and Marilyn Field are U.S. nationals. In *Camuzzi*, the tribunal found that an investor shareholder could not show control through the aggregation of its interest in the investment company with the interest of a second investor shareholder with whom it had entered into a

control over Skyway 127 through the alleged “voting bloc” in 2011, then under the FIT Rules, Skyway 127 would almost certainly have been required to notify the OPA of this change of control.¹⁴¹ The fact that the Claimant filed no evidence of such notification further confirms that it did not satisfy the standard of proof to establish its alleged control over Skyway 127.

62. In sum, the Claimant has not met its burden to prove it was an “investor of a Party” that owned or controlled the investment when the alleged breach occurred. As a result, under NAFTA Article 1116(1), the Tribunal has no jurisdiction *ratione temporis* over the claim.

IV. THE TRIBUNAL HAS NO JURISDICTION *RATIONE TEMPORIS* BECAUSE THE CLAIMANT FAILED TO SUBMIT ITS CLAIM TO ARBITRATION WITHIN THE THREE-YEAR LIMITATION PERIOD UNDER ARTICLE 1116(2)

63. As Canada explained in its Counter-Memorial on Jurisdiction¹⁴² and further explains below, the Claimant knew or should have known about the alleged breach and loss prior to the Critical Date. The Claimant's failure to submit its claim within the three-year limitation period prescribed by Article 1116(2) deprives the Tribunal of jurisdiction over the claim. Therefore, even if the Tribunal were to conclude that the Claimant was an “investor of a Party” when the alleged breach occurred, the Tribunal lacks jurisdiction for a second, independent reason.

64. In its Reply, the Claimant advances a convoluted array of unsupported legal and factual assertions relating to its arguments under Article 1116(2). In essence, it argues it could not have

shareholders' agreement, where the second investor was a local entity of the host State. See **RLA-186**, *Camuzzi International S.A. v. Republic of Argentina* (ICSID Case No. ARB/03/7) Decision on Objection to Jurisdiction, 10 June 2005 [Spanish, with attached translated excerpt], ¶ 38.

¹⁴¹ **R-026**, Ontario Power Authority, FIT Rules, Version 1.2, 19 November 2009. Section 12.1(b) (Assignment and Change of Control) states: “(b) Subject to Section 12.1(d), an Applicant shall not permit or allow a change of Control of such Applicant, except with the prior written consent of the OPA, which consent may not be unreasonably withheld.” Section 12.1(d) states: “An Applicant shall not be permitted to assign an Application or permit or allow a change of Control of the Applicant until one year following the submission of the Application, and may not assign its Application or permit or allow a change of Control of the Applicant once the OPA has provided an Offer Notice in respect of such Application.” The Standard Definitions of the FIT Rules v 1.2 states: “**Control** means, with respect to any Person at any time, (i) holding, whether directly or indirectly, as owner or other beneficiary (other than solely as the beneficiary of an unrealized security interest) securities or ownership interests of that Person carrying votes or ownership interests sufficient to elect or appoint fifty percent (50%) or more of the individuals who are responsible for the supervision or management of that Person, or (ii) the exercise of de facto control of that Person, whether direct or indirect and whether through the ownership of securities or ownership interests or by contract, trust or otherwise, and **Controlled by** has a corresponding meaning.” See **R-098**, Ontario Power Authority, Standard FIT Definitions, v 1.2, 19 November 2009.

¹⁴² Canada's Counter-Memorial on Jurisdiction, ¶¶ 97-158.

acquired knowledge of the alleged breach and loss until after the Critical Date, once it learned of certain “factual details” that were disclosed in the *Mesa* arbitration in June 2015.¹⁴³ However, as Canada established in its Counter-Memorial on Jurisdiction, and explains further below, the Claimant *first* acquired constructive knowledge of the three groups of measures that form the basis of the alleged breach of Article 1105 well before the Critical Date.¹⁴⁴ The Claimant also had actual and constructive knowledge of the alleged loss before that date.

65. In addition, Canada has demonstrated that *Mesa* challenged these same measures in 2011.¹⁴⁵ The Claimant could have relied on the same public information that *Mesa* relied on to bring its own claim many years earlier (in 2011). Moreover, it also had the benefit of *three years* of public submissions from the *Mesa* proceeding prior to the Critical Date. Consequently, the claim falls outside the limitation period, and the Tribunal has no jurisdiction *ratione temporis* under Article 1116(2).

66. In this section, Canada: (A) identifies the challenged measures forming the alleged breach, and reiterates how the Claimant's claim is based on the same measures as *Mesa*'s claim; (B) clarifies certain legal issues on the limitation period; (C) explains that additional factual details disclosed in *Mesa* after the Critical Date do not “reset” the limitation period; (D) describes how further arguments raised by the Claimant in its Reply regarding the GEIA and NextEra do not refute the fact that the Claimant first acquired constructive knowledge of the alleged breach before the Critical Date; (E) describes how the Claimant first acquired constructive knowledge of the alleged handling of documents before the Critical Date; and (F) demonstrates that the Claimant acquired actual and constructive knowledge of the alleged loss before the Critical Date.

¹⁴³ Claimant's Reply, ¶ 358; *see also*, ¶ 3.

¹⁴⁴ Canada's Counter-Memorial on Jurisdiction, ¶¶ 124-158.

¹⁴⁵ *See e.g.*, Canada's Counter-Memorial on Jurisdiction, ¶¶ 133, 141. *See also*, **R-005**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Notice of Arbitration, 4 October 2011 (“*Mesa – Notice of Arbitration*”), ¶¶ 22, 24, 28-35, 37, 46-50, 61-63; **R-013**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Investor's Answer on Canada's Preliminary Objections on Jurisdiction, 19 February 2013 (“*Mesa – Investor's Answer on Jurisdictional Objections*”), ¶¶ 71, 72, 74-77, 82-86, 143; **R-058**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Notice of Intent to Arbitrate, 6 July 2011 (“*Mesa – Notice of Intent*”), ¶¶ 1, 24.

A. The Claimant's Claim for Alleged Breach of Article 1105 of the NAFTA is Based on the Same Measures That Mesa Challenged in 2011

67. At the outset, Canada notes that the Tribunal's task of determining how much information is sufficient to acquire constructive knowledge of the Claimant's claim is made significantly simpler because Mesa had enough information to allege that the same measures breached Article 1105 of the NAFTA in 2011. The overlap of the claims cannot be elided by the Claimant's continued attempt to characterize its claim differently by emphasizing certain facts and ignoring others.¹⁴⁶

68. In its Counter-Memorial on Jurisdiction, Canada explained that the Claimant's allegations that Canada breached Article 1105 of the NAFTA arise out of three groups of measures, none of which occurred after 2013.¹⁴⁷ The first group of measures arises out of the GEIA signed between Ontario and the Korean Consortium in 2010. The second arises out of the administration of the FIT Program from 2011 to 2013. The Claimant alleges that the combined actions of Ontario with respect to the GEIA and FIT Program caused it to suffer loss or damage when it did not receive a FIT Contract on July 4, 2011. The third group of measures arises out of the Claimant's challenge to measures allegedly taken by Ontario with respect to the handling of documents from 2011 to 2013.

69. Based on the three groups of measures,¹⁴⁸ the Claimant fundamentally alleges that Canada violated Article 1105 because Ontario's allegedly unfair and wrongful administration of the FIT Program meant Skyway 127 did not receive a FIT Contract on July 4, 2011.¹⁴⁹ These are the

¹⁴⁶ The Claimant appears to suggest that the Tribunal must blindly accept all of the Claimant's submissions. Claimant's Reply, ¶ 319. That was certainly not the holding in *Eli Lilly*, which the Claimant relies on for this point. There, the tribunal carefully reviewed the claimant's allegations and determined that the breach it alleged dated from a court's invalidation of patents, rather than the legal doctrine on which that invalidation was based. **CLA-316**, *Eli Lilly and Company v. Government of Canada* (UNCITRAL) Final Award, 16 March 2017, ¶ 169.

¹⁴⁷ See Canada's Counter-Memorial on Jurisdiction, Part V.B.1 and ¶¶ 122-123; Canada's Counter-Memorial on Jurisdiction, ¶¶ 81-85.

¹⁴⁸ The Claimant has previously used the terms "measures" (Claimant's Memorial, ¶ 89), "claims" (Claimant's Memorial, ¶ 741), and "categories of wrongful actions" (Claimant's Memorial, ¶ 310). It now refers to their underlying facts as "factual antecedents" (Claimant's Reply, ¶ 248), "specific factual details" (Claimant's Reply, ¶ 358), or "breach(es)" (Claimant's Reply, ¶¶ 15, 16). Repeatedly re-naming these measures and their underlying facts does nothing to help the Claimant's case, nor does it change the limitation period related to such measures. Claimant's Reply, ¶ 27; Claimant's NOA, ¶ 7.

¹⁴⁹ Claimant's Reply, ¶ 27; Claimant's NOA, ¶ 7.

challenged measures, and the alleged breach arising from these measures, that the Tribunal must keep in mind when evaluating the Claimant's arguments with respect to Article 1116(2).

70. In this regard, it is imperative not to lose sight of the similarities between this claim and that brought by Mesa in 2011. Like Mesa, the Claimant argued in its Reply that, "[t]here is no question that this claim is about the unfair and wrongful administration of Ontario's FIT Program."¹⁵⁰ In its Memorial, the Claimant also specified the nature of its claim as follows: "This arbitration involves the blatant disregard of fairness in the allocation of multi-million-dollar renewable energy contracts. It involves the protection of companies owned by political cronies to the detriment of investments owned by American investors."¹⁵¹ This is just what Mesa alleged breached Article 1105 many years earlier.¹⁵²

71. In its Reply, the Claimant mischaracterizes certain facts to suggest they were not public before the *Mesa* hearing, when in fact they concern the same measures that Mesa challenged in 2011.¹⁵³ While the Claimant argues that Canada has "recast the facts"¹⁵⁴ or "substitute[d] the facts and recast the actual claim Tennant Energy raises"¹⁵⁵ to make the Claimant's case appear the same as Mesa's, this is incorrect. In its Counter-Memorial on Jurisdiction, Canada demonstrated that the Claimant is

¹⁵⁰ Claimant's Reply, ¶ 27 (emphasis added). This aligns with the Claimant's Notice of Arbitration, which states under a heading titled "THE GENERAL NATURE OF THE CLAIM": ("This claim arises out of the arbitrary and unfair application of Ontario government measures related to the regulation and administration of a renewable energy transmission and production program in Ontario known as the Feed-in Tariff Program"). Claimant's NOA, ¶ 7. Canada's Counter-Memorial on Jurisdiction, ¶¶ 133, 141.

¹⁵¹ Claimant's Memorial, ¶ 1. Mesa developed its claim and went on to allege (unsuccessfully) that the measures underlying its claim for a breach of Article 1105 included "[u]ndue political interference and discriminatory treatment of the Investment and blatant favoritism to other investments" and [f]ailure to provide transparent administration of the FIT Program." C-133, *Mesa Power Group LLC v. Government of Canada* (PCA Case No, 2012-17), Investor's Memorial, Public Version, 20 November 2013 ("*Mesa – Investor's Memorial*"), ¶ 104(c)-(d). See also, ¶ 724 alleging that: ("Tailoring the FIT Program to suit the political needs and priorities of the Premier's office compromised the independence of the regulatory process. Instead of administering the FIT Program on independent and proscribed regulatory criteria, the Premier's office added a layer of irrelevant political considerations, of which Mesa had no knowledge and which then determined regulatory requirements which Mesa expected to be free of political influence.")

¹⁵² Canada's Counter-Memorial on Jurisdiction, ¶¶ 133, 141.

¹⁵³ The Claimant attempts to distinguish its claim from that of Mesa on the basis of snippets of testimony from the *Mesa* hearing which the Claimant misrepresents. For example, Ms. Sue Lo did not "admit" to a conspiracy or to any improper treatment of FIT Program proponents; for this unsupported assertion, the Claimant points to Mesa's (failed) submissions regarding her testimony. See e.g., Claimant's Reply, ¶ 363, referring to Claimant's NOA, ¶ 111.

¹⁵⁴ Claimant's Reply, heading preceding ¶ 315.

¹⁵⁵ Claimant's Reply, ¶ 326.

basing its claim on the same measures as did Mesa¹⁵⁶ – a simple side-by-side text comparison of both claims, using the Claimant's own words, proves it.¹⁵⁷

72. Further, while Mesa did not challenge the handling of documents by Ontario, this part of the Claimant's claim was still filed outside the limitation period of Article 1116(2), as Canada demonstrated in its Counter-Memorial on Jurisdiction and further demonstrates below.

B. Clarification of Certain Legal Issues on the Limitation Period

73. Canada explained in its Counter-Memorial on Jurisdiction that Article 1116(2) imposes a strict limitation period that begins from the date when a claimant first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it has incurred loss or damage.¹⁵⁸ In its Reply, the Claimant does not substantively refute Canada's description of the applicable test under Article 1116(2), but merely notes that it "does not agree with" Canada's position.¹⁵⁹ In practice, the Claimant advances positions that require clarification of two legal issues: (1) the test for constructive knowledge; and (2) whether certain facts may "reset" the limitation period.

1. The Test for Constructive Knowledge is an Objective One and the Claimant Cannot Be Willfully Blind to the Relevant Information

74. The Claimant purports to agree with Canada that constructive knowledge is sufficient for the purposes of Article 1116(2)¹⁶⁰ but argues that it could not have had more than a "suspicion" of the

¹⁵⁶ Mesa's claim arose out of the first two groups of measures challenged by the Claimant in this arbitration (those arising out of the GEIA signed between Ontario and the Korean Consortium in 2010, and those arising out of the administration of the FIT Program from 2011 to 2013). Both Mesa and the Claimant alleged that the combined actions of Ontario with respect to the GEIA and FIT Program caused it to suffer loss or damage when it did not receive a FIT Contract on July 4, 2011.

¹⁵⁷ Canada's Counter-Memorial on Jurisdiction, ¶¶ 133, 141.

¹⁵⁸ Canada's Counter-Memorial on Jurisdiction, ¶¶ 98-114. *See also*, **RLA-070**, *Grand River – Decision on Objections to Jurisdiction*, ¶¶ 53, 58; **RLA-003**, *Bilcon – Award on Jurisdiction and Liability*, ¶ 273; **RLA-082**, *Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3) Award on the Respondent's Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶¶ 193, 217; **RLA-136**, *Spence – Corrected Interim Award*, ¶ 170.

¹⁵⁹ The Claimant simply states that it "notes Canada's position but does not agree with it." *See* Claimant's Reply, ¶ 238, fn. 170.

¹⁶⁰ *See e.g.*, Claimant's Reply, ¶¶ 33, 35, 47, 39.

underlying facts before the Critical Date.¹⁶¹ The Claimant offers no authority for this attempt to reframe the objective test on constructive knowledge (“should have acquired”) as subjective (“having more than a suspicion”). As explained by the tribunal in *Grand River*, “‘constructive knowledge’ of a fact is imputed to [a] person if by exercise of reasonable care or diligence, the person would have known of that fact.”¹⁶² The *Spence* tribunal endorsed this interpretation. Considering the almost identically worded provision in the CAFTA-DR,¹⁶³ that tribunal held that: “the ‘should have first acquired knowledge’ test [...] is an objective standard; what a prudent claimant should have known or must reasonably be deemed to have known.”¹⁶⁴

75. Further, constructive knowledge requires a claimant to exercise “reasonable care” and “diligence” as “a reasonably prudent investor”.¹⁶⁵ A claimant cannot “willfully [abstain] from inquiry in order to avoid actual knowledge.”¹⁶⁶ In this case, the Claimant presents its executives as experienced investors and developers in the renewable energy sector in Ontario.¹⁶⁷ Like the claimant in *Grand River*, the Claimant was far from a “passive observer”¹⁶⁸ of the relevant market. Yet despite admitting that it had a “generalized suspicion”¹⁶⁹ of wrongdoing with respect to the GEIA and the administration of the FIT Program, the Claimant argues it was unaware of alleged improprieties

¹⁶¹ Claimant’s Reply, ¶ 345: (asserting that Article 1116 requires “a much more material and higher standard that [sic] simply having a suspicion that something appears like favoritism.”)

¹⁶² Canada’s Counter-Memorial on Jurisdiction, ¶¶ 110-111, citing **RLA-070**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 59: (“Constructive knowledge” of a fact is imputed to person if by exercise of reasonable care or diligence, the person would have known of that fact. Closely associated is the concept of “constructive notice.” This entails notice that is imputed to a person, either from knowing something that ought to have put the person to further inquiry, or from willfully abstaining from inquiry in order to avoid actual knowledge.”)

¹⁶³ Article 10.18.1 of the CAFTA-DR provides: (“No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 10.16.1 and knowledge that the claimant (for claims brought under Article 10.16.1(a)) or the enterprise (for claims brought under Article 10.16.1(b)) has incurred loss or damage.”) See **RLA-187**, Dominican Republic-Central America-United States Free Trade Agreement, 1 March 2007 [Excerpt], Article 10.18.1.

¹⁶⁴ **RLA-136**, *Spence – Corrected Interim Award*, ¶ 209.

¹⁶⁵ Canada’s Counter-Memorial on Jurisdiction, ¶ 111. See also, **RLA-070**, *Grand River – Decision on Objections to Jurisdiction*, ¶¶ 59, 66; **RLA-136**, *Spence – Corrected Interim Award*, ¶ 209.

¹⁶⁶ **RLA-070**, *Grand River – Decision on Objections to Jurisdiction*, ¶¶ 59, 66.

¹⁶⁷ CWS-1-John C. Pennie, ¶¶ 7, 15-23; CWS-3-Derek Tennant, ¶ 7.

¹⁶⁸ **RLA-070**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 65: (“The Claimants were not passive observers of the U.S. market.”)

¹⁶⁹ Claimant’s Reply, ¶ 342.

regarding these measures, or the handling of government documents. This is not credible. Given the vast public record that was available to the Claimant prior to the Critical Date, the Claimant could not evade the limitation period by being willfully blind and not obtaining the knowledge any reasonably prudent investor would have acquired.

76. The Claimant's fact witnesses all knew of the existence of the *Mesa* and *Windstream* proceedings.¹⁷⁰ John Tennant and Derek Tennant admit that they merely "assumed" that these cases were irrelevant and were "not aware that [they] would have any reason to go to those hearings."¹⁷¹ The Claimant is accordingly making the surprising claim that it assumed a case concerning another American investor that also applied to the FIT Program (*Mesa*), at the same time (2009), and for the same type of project (an onshore wind farm), and that received a similar priority ranking as the Claimant's (following the first round of FIT Contract offers in April 2010¹⁷²), with the same result (failure to obtain a FIT Program Contract), was irrelevant. This is implausible.

77. Further, Derek Tennant is incorrect in stating that the Claimant could not have known about its claim prior to "the admissions from government officials at the *Mesa* Power Hearing" and that he "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."¹⁷³ There is no evidence that information regarding the administration of the FIT Program and the GEIA was suppressed by the governments of Ontario or Canada or that these governments engaged in "active concealment of information."¹⁷⁴ To the contrary, the record in the *Mesa* proceeding demonstrates the opposite: Canada produced over 8,000 documents related to the measures the Claimant challenges

¹⁷⁰ CWS-1-John C. Pennie, ¶ 94; CWS-2-John Tennant, ¶ 37; CWS-3-Derek Tennant, ¶ 47. Windstream Energy, LLC ("Windstream") filed a NAFTA Chapter Eleven claim against Canada in 2013. That claim related to Windstream's investment in a proposed 300 MW off-shore wind project in Lake Ontario. See Canada's Counter-Memorial on Jurisdiction, ¶¶ 43 and 51.

¹⁷¹ CWS-2-John Tennant, ¶ 37; CWS-3-Derek Tennant, ¶ 47.

¹⁷² **C-104**, Bruce Transmission Project Rankings, 21 December 2010. For further discussion of the ranking process, see Canada's Counter-Memorial on Jurisdiction, ¶¶ 10-13.

¹⁷³ CWS-3-Derek Tennant, ¶ 48 (emphasis added).

¹⁷⁴ Claimant's Reply, ¶ 38.

here (the FIT Program and the GEIA).¹⁷⁵ This alone demonstrates that Canada has not “actively suppressed” documents with respect to the FIT Program or the GEIA.

78. Moreover, the fact that a government does not proactively make documents public with respect to one of its decisions or actions does not amount to suppression or concealment.¹⁷⁶ The Claimant's assertion that Canada is somehow precluded from relying on Article 1116(2) due to its own “wrongfulness”¹⁷⁷ is misguided and, as such, the authorities cited by the Claimant on this point are irrelevant.

2. Knowledge of Additional Factual Details Underlying the Same Alleged Breach Do Not “Reset” the Limitation Period

79. The Claimant has not rebutted Canada's explanation that the limitation period begins when claimants first acquire or should have first acquired “knowledge of the breaches that form the essence

¹⁷⁵ See **R-099**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Canada's Submission on Costs (Public Version), 3 March 2015.

¹⁷⁶ For instance, governments may decide to withhold information for reasons that are commercial in nature. One of Canada's witnesses (Ms. Susan Lo) in the *Mesa* arbitration provided the following explanation in her witness statement: (“The Government of Ontario was as transparent as possible about the GEIA's existence and implementation, recognizing that it is a commercial arrangement and some business confidentiality is required. In particular, the transmission capacity that has been set aside for the Korean Consortium has always been announced publically through ministerial directions” (emphasis added, footnotes omitted)). **C-180**, Witness Statement of Susan Lo, 28 February 2014, ¶ 31. Ms. Lo also explained the following during her testimony: (“Q. [...] Now, in your statement, you say that the Government of Ontario was transparent as possible about the GEIA's assistance and implementation? A. To the extent possible, the Ministry was transparent, but it is a commercial arrangement, and so there were certain aspects that could not be transparent”) See **C-121**, *Mesa Power Group LLC v. Government of Canada* (PCA Case No, 2012-17), Hearing Transcript Day 3 (Public Version), 28 October 2014 (“Mesa Hearing Transcript, Day 3”), p. 23:12-19: (“A. After it was signed, I believe that there was a lot of the agreement that was made public in terms of how many megawatts and what the government would get in exchange for those megawatts, so, for instance, the manufacturing plants and the jobs and what the Korean Consortium was going to invest in Ontario [...] I think in terms of what was kept confidential were some of the commercial terms”) **C-121**, Mesa Hearing Transcript, Day 3, p. 25:10-19. Further, the application of the provisions of a Confidentiality Order, signed by the disputing parties and a tribunal, does not amount to a suppression of information. The same can be said of the alleged use of “code names” with respect to documents concerning offshore wind in Ontario (see Claimant's Reply, ¶¶ 407 and 409). The Claimant fails to demonstrate how the use of such code names in that context, even if true, would prevent it, or the public generally, from obtaining information on the administration of the FIT Program for onshore wind, or the GEIA, an agreement wholly unrelated to offshore wind in the province. Finally, while members of the public can use processes, such as those provided for under access to information legislation, to obtain information that is not disseminated by their governments, the release of such information is not unfettered, and the fact that governments may withhold certain information pursuant to the requirements of this type of legislation does not mean that they are actively suppressing information.

¹⁷⁷ Claimant's Reply, ¶¶ 240-244.

of their claims".¹⁷⁸ The Claimant appears to accept that, in principle, knowledge of "sufficient" (not "all") facts is enough to start the limitation period.¹⁷⁹ However, in practice, the Claimant ignores this by alleging, "knowledge arising from these claims also has the effect of resetting limitation periods for certain claims in this case."¹⁸⁰ The Claimant's position is baseless. The limitation period is not subject to any "suspension," "prolongation," or "other qualification."¹⁸¹ Once a claimant has acquired actual or constructive knowledge of the alleged breach, subsequent disclosure of related factual details does not change the date when the claimant *first* acquired or should have *first* acquired such knowledge.¹⁸²

80. International investment tribunals have cautioned against interpreting limitation periods as the Claimant proposes. For example, the *Ansung* tribunal warned against the "endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period."¹⁸³ Allowing later-revealed information to reset the limitation period would, as the *Grand River* tribunal cautioned, "render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries."¹⁸⁴ The Claimant's view that "confirmation"¹⁸⁵ of facts supporting a claim restarts the limitation period

¹⁷⁸ Canada's Counter-Memorial on Jurisdiction, ¶ 145, citing **RLA-136**, *Spence – Corrected Interim Award*, ¶ 299.

¹⁷⁹ Claimant's Reply, ¶ 53.

¹⁸⁰ Claimant's Reply, ¶ 179 (emphasis added).

¹⁸¹ **RLA-070**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 29; see also, **RLA-081**, *Feldman – Award*, ¶ 63.

¹⁸² **RLA-136**, *Spence – Corrected Interim Award*, ¶¶ 298-299; see also, **RLA-188**, *Seo Jin Hae v. Republic of Korea* (HKIAC Case No. HKIAC/18117) Concurring Opinion of Dr. Benny Lo, 27 September 2019 [Claimant's name redacted], ¶ 37: ("For a "breach" to have occurred, there must have been in existence, at that point in time, sufficient (alleged) facts to constitute a cause of action enabling the Claimant to bring a claim.").

¹⁸³ **RLA-161**, *Ansung Housing Co., Ltd. v. People's Republic of China* (ICSID Case No. ARB/14/25) Award, 9 March 2017 ("*Ansung – Award*"), ¶ 113.

¹⁸⁴ **RLA-070**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 81.

¹⁸⁵ The Claimant describes how "the facts known later confirm Canada's international wrongful conduct". See Claimant's Reply, ¶ 331 (emphasis added). This indicates the Claimant's own view that events relating to the Breakfast Club and IPC are mere confirmations of the alleged breach, as further discussed in Part IV.C below. See also, Claimant's Reply, ¶ 342. Moreover, Canada provided considerable evidence to successfully defended itself against the same allegations of wrongful conduct in *Mesa*. See e.g., **R-100**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Canada's Post-Hearing Submission (Public Version) 18 December 2014 ("*Mesa – Canada's Post-Hearing Submission*"); **RLA-001**, *Mesa – Award*.

would turn Article 1116(2) on its head, by focusing on when the Claimant *last* acquired knowledge.¹⁸⁶ The Tribunal must therefore reject this interpretation of Article 1116(2).

81. In this regard, the Claimant's arguments with respect to a continuing breach¹⁸⁷ are irrelevant. This case is not one of a continuing breach. It involves a single alleged breach leading to a single source of alleged losses that were incurred on one date – July 4, 2011 – the date the Claimant did not receive a FIT Contract.¹⁸⁸ The arguments put forward by the Claimant have been rejected by other tribunals,¹⁸⁹ misrepresent the law,¹⁹⁰ or are unhelpful to its case.¹⁹¹ Moreover, all three NAFTA

¹⁸⁶ **RLA-136**, *Spence – Corrected Interim Award*, ¶ 299.

¹⁸⁷ Claimant's Reply Memorial, ¶ 218.

¹⁸⁸ Alternatively, even if June 12, 2013 was the relevant date (which is the date on which the FIT Program for large projects was terminated and Tennant's FIT Program application was cancelled), the claim would only still involve a single alleged breach leading to a single source of alleged losses that arose on one date.

¹⁸⁹ As noted in Canada's Counter-Memorial on Jurisdiction, tribunals have rejected the Claimant's proposition that continuing breaches renew the limitation period. *See* fn. 252, discussing cases. For example, in *Bilcon*, the claimants submitted a claim to arbitration on June 17, 2008 challenging several government measures from both before and after the relevant limitation period cut-off date of June 17, 2005. The claimants argued that the measures before that cut-off date were "continuing breaches" that tolled the limitation period under Articles 1116(2) and 1117(2). The tribunal disagreed, noting that the breaches alleged by the claimant that arose prior to the three-year period, but that had continuing effects after that date, fell outside of NAFTA's limitation period. **RLA-003**, *Bilcon – Award on Jurisdiction and Liability*, ¶¶ 251-254, 281. *See also*, **RLA-070**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 81. Other international investment tribunals have also expressly rejected the finding in *UPS*. *See e.g.* **RLA-136**, *Spence – Corrected Interim Award*, ¶ 208; **RLA-173**, *Carlos Rios – Award*, ¶ 209: (where the tribunal rejected the conclusions reached by the *UPS* tribunal, noting that the *UPS* tribunal reached its conclusion without considering the relevant provisions of the NAFTA with respect to limitation periods) and *see also*, ¶¶ 202-203, 205: (where the majority of the tribunal rejected the claimants' argument that the limitation period starts running upon the cessation of the continuous wrongful act and instead, ruled that the FTA's 39-month limitation period runs from the time when the claimant first acquires knowledge of the alleged wrongful act, regardless of its duration, and first acquires knowledge that the alleged wrongful act has caused some damage or loss, whatever that may be).

¹⁹⁰ The Claimant cites *Ansung Housing Co., Ltd.* to support its arguments that damages for a continuing breach may be measured from different times and that the determination of when damages first began to run requires a full determination of the merits of the case. *See* Claimant's Reply, ¶ 234 quoting **RLA-161**, *Ansung – Award*, ¶ 112. But the Claimant fails to note that the passage on which it relies is not a decision of the tribunal, but rather an acknowledgement by the tribunal of *the claimant's arguments* in that case. If the Claimant had given the full picture in its submission, it would have noted that the *Ansung* tribunal held that even if there was a continuing breach by China, this did not alter the requirement under the China-Korea BIT that the three-year limitation period starts running on the *first* date when the claimant acquires knowledge that it has incurred loss or damage. *See* **RLA-161**, *Ansung – Award*, ¶ 113.

¹⁹¹ The Claimant's reliance on *Feldman*, *Resolute*, and *Grand River* is misguided. The limitation period issue considered in *Feldman* had nothing to do with the meaning of "first acquired" as used in Article 1116(2) in the context of a continuing course of conduct, and there was also no finding that a continuing course of conduct could toll the limitation period. All of the actions found to have violated Article 1102 took place within the three-year limitation period. In fact, it was during this analysis that the *Feldman* tribunal stressed that NAFTA Articles 1116(2) and 1117(2) "introduce a clear and rigid limitation defense, which, as such, is not subject to any suspension [...], *prolongation* or other qualification". *See* **RLA-081**, *Feldman – Award*, ¶¶ 47, 63-65, 187-188 (emphasis added). The *Resolute* tribunal concluded that the "triggering event [under Articles 1116(2) and 1117(2)] is the knowledge, actual or constructive, that an alleged breach has occurred

Parties disagree with the position put forward by the Claimant.¹⁹² The three-year limitation period under NAFTA Article 1116(2) begins on the date of first acquisition of relevant knowledge – not subsequent, repeated, or ultimate acquisition of such knowledge.¹⁹³

C. The “Factual Details” from *Mesa* Which Became Known to the Claimant in June 2015 Do Not “Reset” the Limitation Period

82. Canada established in its Counter-Memorial on Jurisdiction that, before the Critical Date, extensive information was publicly available with respect to Ontario's allegedly unfair and wrongful administration of the FIT Program and the GEIA.¹⁹⁴ In its Reply, the Claimant does not deny that it could have accessed the public information Canada identified. Instead, its case on Article 1116(2)

and that loss or damage has been incurred as a result” and that the “time limit is strict, not flexible.” See **RLA-079**, *Resolute – Decision on Jurisdiction and Admissibility*, ¶ 153. See **RLA-070**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 81.

¹⁹² See e.g., **RLA-156**, *Merrill & Ring Forestry, L.P. v. Government of Canada* (UNCITRAL) Submission of the United States of America, 14 July 2008 (“*Merrill & Ring – U.S. 1128 Submission*”), July 14, 2008, ¶¶ 8-10; **RLA-189**, *Merrill & Ring Forestry, L.P. v. Government of Canada* (UNCITRAL) Submission of the Government of Mexico, 2 April 2009; **RLA-190**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL) United States Article 1128 Submission, 19 April 2013, ¶ 12; **RLA-191**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) United States Article 1128 Submission, 14 February 2014, ¶ 3; **RLA-158**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Reply of the Government of Canada to the NAFTA Article 1128 Submissions, 3 March 2014, ¶ 29. The Claimant's statements in paragraph 271 of its Reply with regard to composite breach are also incorrect and lack any supporting facts or legal authority. There was no systemic policy or practice carried out by the Government of Ontario that could have resulted in a composite breach of the NAFTA, as that term is contemplated in Article 15 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (the “ILC Articles on State Responsibility”). The Commentary to the ILC Articles explains, “composite acts covered by article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such.” In other words, “the cumulative conduct constitutes the essence of the wrongful act.” Additionally, “the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated.” Thus, the relevant date of the breach is the date of the first of the acts in the series. See **R-101**, Commentary to Articles on State Responsibility, page 62: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. See also, **RLA-159**, *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/12/5) Award, 22 August 2016, ¶ 231, and Canada's Counter-Memorial on Jurisdiction, fn. 252.

¹⁹³ Canada emphasized this point in its Counter-Memorial on Jurisdiction. See Canada's Counter-Memorial on Jurisdiction, ¶¶ 102-106. See also, **RLA-156**, *Merrill & Ring – U.S. 1128 Submission*, ¶ 5; **RLA-173**, *Carlos Rios – Award*, ¶ 205: (in rejecting the claimants' arguments that the limitation period begins with the cessation of the continuing wrong, the tribunal remarked that, instead, the determinative point is when the claimant acquires knowledge of the breach. In other words, a claimant knows of the continuing breach on the first day he or she acquires knowledge (actual or presumptive) of the wrong.).

¹⁹⁴ Canada's Counter-Memorial on Jurisdiction, ¶¶ 115-154.

relies on the proposition that it could only acquire knowledge of the alleged breach of Article 1105 upon learning of “additional facts” arising out of the *Mesa* arbitration.¹⁹⁵

83. The Claimant identifies five alleged facts that John Tennant and Derek Tennant say they first learned of after the *Mesa* hearing and that, in the Claimant's view, restart the limitation period:¹⁹⁶

- 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 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 2015.¹⁹⁷

84. None of these alleged facts “resets” the limitation period.

85. With respect to items (a) and (b), even if these specific alleged “factual details” concerning events that took place in 2011 only became known to the Claimant after the Critical Date, Canada's arguments with respect to Article 1116(2) still stand. The Claimant's arguments are merely an attempt

¹⁹⁵ See e.g., Claimant's Reply, ¶¶ 48, 345.

¹⁹⁶ Canada notes that the Claimant falsely states: (“The evidence already before this Tribunal includes direct admissions, made after June 1, 2014, of international wrongful conduct by government officials administrating the FIT Program — including senior staff within the Ministry of Energy.”) See Claimant's Reply, ¶ 332. This is entirely misleading. The *Mesa* tribunal reached no such conclusion with all of the evidence on the record before it in *Mesa*. Canada provided considerable evidence to successfully defend itself against the same allegations of wrongful conduct in *Mesa*. See e.g., **R-100**, *Mesa – Canada's Post-Hearing Submission*; **RLA-001**, *Mesa – Award*.

¹⁹⁷ CWS-3-Derek Tennant, ¶¶ 48-51; CWS-2-John Tennant, ¶¶ 38-40; Claimant's Reply, ¶ 11.

to parse its claim into numerous pieces so that it can evade the strict requirements of that provision.¹⁹⁸ As the tribunal in *Ansung* held, this approach is unsustainable.¹⁹⁹ This approach was also rejected by the *Spence* tribunal when it held that:

On the issue of first knowledge of the breach, if a claim is to be justiciable for purposes of CAFTA Article 10.18.1, the Tribunal considers that it must rest on a breach that gives rise to a self-standing cause of action in respect of which the claimant first acquired knowledge within the limitation period.²⁰⁰

86. Neither of the factual details raised by the Claimant constitutes a new, self-standing cause of action as they are not separate from the alleged breach of Article 1105 arising from the three groups of challenged measures. Moreover, the Claimant acquired knowledge of the three groups of challenged measures before the Critical Date. To borrow the conclusion of the tribunal in *Nissan Motor*, these facts are nothing more than additional State conduct relating to the same underlying alleged breach, and as such this “dispute cannot be revived.”²⁰¹

¹⁹⁸ The Claimant cannot avoid the defects in its claim by labeling certain facts that it was aware of prior to the Critical Date as “factual antecedents” to its claim. In its latest submission, the Claimant states that there are “four particular facts” or “factual antecedents” that identify “problems with the administration of the FIT Program” – but goes on to state that these “are not the actual measures which form the base of Tennant Energy’s Claim”. See Claimant’s Reply, ¶¶ 247-248. In this regard, the Claimant’s reliance on *Bilcon* at paragraph 322 of its Reply is unhelpful. **RLA-003**, *Bilcon – Award on Jurisdiction and Liability*, ¶ 282. In *Bilcon*, the tribunal noted that events prior to the three-year limitation period “can provide necessary background or context for determining whether breaches occurred during the time-eligible period”. That is irrelevant to Canada’s argument. Here, on the facts as pled by the Claimant, the alleged breach took place prior to the beginning of the limitation period, and none of the Claimant’s post-June 1, 2014 factual allegations serve to state an independent, actionable breach.

¹⁹⁹ **RLA-161**, *Ansung – Award*, ¶ 113: (“However, even assuming a continuing omission breach attributable to China, which the Tribunal must assume, and even assuming *Ansung* might wish to claim damages from a date later than the first knowledge of China’s continuing omission – for example, from November 2, 2011, when *Ansung* tentatively agreed to transfer its shares or even December 17, 2011, when *Ansung*’s commercial patience ran out – that could not change the date on which *Ansung* first knew it had incurred damage. And it is that first date that starts the three-year limitation period in Article 9(7). To allow Claimant to adjust that date of first knowledge by selecting the date from which it wants to claim damages for continuing breach would be, to borrow from the *Spence* decision, to allow an **“endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period.”** (emphasis added)).

²⁰⁰ **RLA-136**, *Spence – Corrected Interim Award*, ¶ 210.

²⁰¹ See **RLA-155**, *Nissan Motor Co., Ltd. v. Republic of India* (UNCITRAL) Decision on Jurisdiction, 29 April 2019 (“*Nissan Motor – Decision on Jurisdiction*”), ¶ 325: (noting that “[o]nce an investor has knowledge that it has been harmed by a particular State act alleged to breach a CEPA obligation, additional conduct relating to the same underlying harm “cannot without more renew the limitation period” for the filing a claim seeking redress. **If the three years have elapsed from first knowledge, then that particular investment dispute cannot be revived.**” (emphasis added)).

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87. Specifically, the Claimant's assertions with respect to the "Breakfast Club" fall directly within the second group of measures the Claimant alleges breached Article 1105, namely those concerning unfair political favouritism in the administration of the FIT Program.²⁰² Like Mesa, which made the same claim three years before the Claimant,²⁰³ the Claimant has made extensive allegations of secretive meetings and political favouritism.²⁰⁴ In outlining "the general legal framework and [...] practices in which the breaches of NAFTA Article 1105 took place", for example, the Claimant includes: "[p]rivate meetings and communications between the OPA and FIT competitors that began on October 5, 2010 and continued through February and May 2011, which led to the FIT Program and Rules being modified to benefit certain FIT applicants".²⁰⁵ The Claimant fails to explain how learning that it was "the secret 'Breakfast Club' Conspirators who were actively assisting competitors of Skyway 127 to the detriment of Skyway 127"²⁰⁶ differs from its other allegations of private meetings between government officials and FIT proponents where favouritism was alleged, which should have been known to the Claimant prior to the Critical Date.²⁰⁷

88. The Claimant's allegations with respect to the "Breakfast Club" are, at best, part of "a series of similar and related actions by a respondent state" that do not generate a self-standing cause of action.²⁰⁸ Canada has already demonstrated that such a claim for a breach of Article 1105 is time-

²⁰² Claimant's Reply, ¶ 48(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.") See also, Canada's Counter-Memorial on Jurisdiction, ¶¶ 136-145.

²⁰³ See Canada's Counter-Memorial on Jurisdiction, ¶ 141. See also, **R-013**, *Mesa – Investor's Answer on Jurisdictional Objections*, ¶ 13, which was made public on the Government of Canada's website no later than September 11, 2013 (RWS-1, McCall Statement, ¶ 5); **R-058**, *Mesa – Notice of Intent*, ¶¶ 16-18, 20-21, 24; **R-005**, *Mesa – Notice of Arbitration*, ¶¶ 29-35, 47, 49- 50; **R-013**, *Mesa – Investor's Answer on Jurisdictional Objections*, ¶¶ 74-82, 85. These allegations were also set out in documents that became public subsequent to the Critical Date. See **C-133**, *Mesa – Investor's Memorial*, ¶¶ 638-675; and **C-182**, *Mesa Power Group, LLC v. Government of Canada (UNCITRAL) Reply Memorial of the Investor*, 30 April 2014 ("*Mesa – Investor's Reply Memorial*"), ¶¶ 426-433.

²⁰⁴ See Canada's Counter-Memorial on Jurisdiction, ¶ 48, citing **R-013**, *Mesa – Investor's Answer on Jurisdictional Objections*, ¶ 13, which was made public on the Government of Canada's website no later than September 11, 2013. See Witness Statement of Lucas McCall, 21 September 2020, ¶ 5; **R-058**, *Mesa – Notice of Intent*, ¶¶ 16-18, 20-21, 24; **R-005**, *Mesa – Notice of Arbitration*, ¶¶ 29-35, 47, 49-50; **R-013**, *Mesa – Investor's Answer on Jurisdictional Objections*, ¶¶ 74-82, 85; and **C-133**, *Mesa – Investor's Memorial*, ¶¶ 638-675; **C-182**, *Mesa – Investor's Reply Memorial*, ¶¶ 426-433. See also, Claimant's Memorial, ¶¶ 540, 648, 649, 655, 677(e) and Claimant's Reply, ¶¶ 366-397.

²⁰⁵ Claimant's Memorial, ¶ 677(e).

²⁰⁶ Claimant's Reply, ¶ 247(c).

²⁰⁷ Canada's Counter-Memorial on Jurisdiction, ¶¶ 136-145.

²⁰⁸ **RLA-070**, *Grand River – Decision on Objections to Jurisdiction*, ¶ 81.

barred.²⁰⁹ Any additional facts allegedly learned of by the Claimant after the Critical Date with respect to secretive meetings and FIT Contract awards are part of a time-barred claim that Skyway 127 did not receive a FIT Contract due to the allegedly unfair and wrongful administration of the FIT Program in breach of NAFTA Article 1105. Such a claim is outside this Tribunal's jurisdiction pursuant to Article 1116(2).

89. The Claimant's assertions on International Power Canada should also fail for the same reasons: far from amounting to a self-standing cause of action, these allegations are, at most, additional factual details that speak to the same time-barred claim. In its Reply, the Claimant alleges, "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."²¹⁰ The Claimant refers heavily to "secret meetings" of high-level Ontario officials and NextEra.²¹¹ Canada has already demonstrated that these allegations should have been known to the Claimant prior to the Critical Date.²¹² The Claimant has failed to demonstrate why the limitation period resets for its claim simply because it learned of another alleged political favourite after the Critical Date.²¹³ The Claimant cannot replace one alleged political favourite (NextEra) with another (International Power Canada) in order to re-start the limitation period under Article 1116(2).

90. Further, the Claimant seems to ignore the fact that Mesa's claim of breach of Article 1105 – the same Article 1105 breach alleged by the Claimant²¹⁴ – also included allegations with respect to International Power Canada and the Breakfast Club, despite Mesa not having these additional facts when it filed its claim in 2011. As the Claimant itself notes, Mesa relied heavily on these allegations

²⁰⁹ Canada's Counter-Memorial on Jurisdiction, ¶¶ 124-154.

²¹⁰ Claimant's Reply, ¶ 386. *See also*, Claimant's Reply, ¶¶ 3(a) and 22.

²¹¹ *See e.g.*, Claimant's NOA, ¶¶ 74-79; Claimant's Memorial, ¶¶ 84-87, 254-258; Claimant's Reply, ¶¶ 366-397.

²¹² *See* Canada's Counter-Memorial on Jurisdiction, ¶¶ 138-139 and chart following ¶ 141, last row (showing extensive allegations with respect to NextEra were public prior to the Critical Date).

²¹³ *See also*, Canada's Counter-Memorial on Jurisdiction ¶¶ 143-145

²¹⁴ Canada's Counter-Memorial on Jurisdiction, ¶¶ 133, 141.

in its post-hearing submissions.²¹⁵ Leaving aside the fact that these allegations were fully considered and dismissed on the merits by the *Mesa* tribunal,²¹⁶ the Claimant fails to appreciate that *Mesa* was able to add allegations to its claim after 2011 as a result of information it learned through document production and cross-examination of Canada's witnesses.²¹⁷ The Claimant should have been capable of doing the same.²¹⁸ The Claimant's failure to bring its claim when it had sufficient information on the alleged breach is not saved by its desire to wait for all, or even additional, information to become public.

91. With respect to items (c)-(e), Canada has already demonstrated that allegations and evidence with respect to the administration of the FIT Program were publicly known prior the Critical Date²¹⁹

²¹⁵ See e.g., **C-017**, *Mesa Power Group, LLC v. Government of Canada*, Investor's Post-Hearing Brief, Public Version, 18 December 2014 ("*Mesa – Investor's Post-Hearing Brief*"), ¶¶ 742-752. See also, Claimant's NOA, ¶¶ 81, 83, 107, 111; Claimant's Memorial, ¶¶ 163, 169-180, 750; Claimant's Reply, ¶ 361.

²¹⁶ With respect to the treatment of International Power Canada (and NextEra), the *Mesa* tribunal noted that: ("The Claimant submits that because of "irrelevant considerations arising from electioneering, politicization, or favoritism", other applicants to the FIT Program including NextEra Energy and International Power Canada received better treatment than *Mesa* [...] and proceeded to find that "The Tribunal cannot discern in this factual matrix the "patent abuse of governmental and regulatory authority" alleged by the Claimant.") **RLA-001**, *Mesa – Award*, ¶¶ 671-672. With respect to the "breakfast club", having heard Ms. Lo's testimony and *Mesa*'s arguments, the *Mesa* tribunal concluded: ("And where the challenged acts involve an allegation of collusion or unfair preference, there is simply insufficient evidence to establish the same.") **RLA-001**, *Mesa – Award*, ¶ 541; see also, **C-121**, *Mesa Hearing Transcript*, Day 3, pp. 170:25-171:22 and **C-017**, *Mesa – Investor's Post-Hearing Brief*, ¶ 156. With respect to the GEIA, the *Mesa* tribunal rejected the claimant's allegation that the reservation of capacity for the Korean Consortium was done in "secret", holding that: ("The record does not substantiate this allegation.") See **RLA-001**, *Mesa – Award*, ¶ 582.

²¹⁷ See e.g., **C-182**, *Mesa – Investor's Reply Memorial*, ¶¶ 4, 779.

²¹⁸ Canada notes paragraph 43 of the Claimant's Reply, which states: ("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.") Thus, the Claimant recognizes there are steps that an investor can take to obtain documents. *Mesa* initiated proceedings to obtain documents related to its claim before U.S. courts *after* it filed its Notice of Arbitration, and prior to document production in that arbitration. See **RLA-001**, *Mesa – Award*, ¶ 703. Moreover, the Claimant contradicts itself in stating that the documents were both destroyed and produced.

²¹⁹ Canada's Counter-Memorial on Jurisdiction, ¶¶ 136-145.

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– whether through public documents such as media reports²²⁰ and government publications,²²¹ or through the submissions in the *Mesa* and *Windstream* arbitrations.²²² This is not “new” information that arose following the Critical Date simply because it was discussed again at the *Mesa* hearing.²²³

²²⁰ See **R-059**, The Globe and Mail, “Oil tycoon takes on Ontario Green Energy Act over wind farm”, 14 July 2011; **R-061**, Recharge News, “Pickens issues NAFTA challenge to Canada over wind rules”, 18 July 2011; **R-062**, Columbia Law School, Climate Law Blog, “Texas Renewable Energy Developer Initiates NAFTA Claim Against Canada”, 22 July 2011; **R-063**, The Star, “Texas firm to challenge to Ontario’s wind power regulations”, 14 July 2011; **R-064**, PR Wire, “Mesa Power Group Files Legal Action Against Canadian Government for NAFTA Infractions”, 14 July 2011; **R-065**, Reuters, “Boone Pickens challenges Canada on green power law”, 14 July 2011; **R-066**, IISD, Investment Treaty News, “Trends in Investor Claims Over Feed-in Tariffs for Renewable Energy”, 19 July 2012 (referring to *Mesa* arbitration); **R-067**, Ontario Wind Resistance, “McGuinty Liberals charged with abuse of power, undue ‘political interference’ in awarding wind contracts”, 17 July 2011 (referring to *Mesa* arbitration); **R-086**, The Globe and Mail, “‘Unfair’ advantage cited in Samsung deal”, 25 January 2010.

²²¹ See **C-139**, Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 1 April 2010; **R-043**, Direction from Brad Duguid, Minister of Energy, to Colin Andersen, Ontario Power Authority, 17 September 2010; **C-176**, Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 3 June 2011; **C-143**, Ontario Power Authority, “Allocating Capacity and Offering FIT Contracts for Bruce to Milton Enabled Projects”, 3 June 2011; **R-002**, Office of the Auditor General of Ontario, 2011 Annual Report (“2011 Auditor Generals Report”) [Excerpt]; **R-087**, Ontario, Official Report of Debates (Hansard), 40th Parl., 1st Sess., No. 47, 3 May 2012, p. 2052.

²²² See **R-081**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Canada’s Outline of Potential Issues, 31 July 2012; **R-012**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Canada’s Objection to Jurisdiction, 3 December 2012; **R-082**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Canada’s Request for Bifurcation, 3 December 2012; **R-083**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Claimant’s Response to Request for Bifurcation, 24 December 2012 (“Mesa – Claimant’s Response to Request for Bifurcation”); **RLA-125**, *Mesa – Procedural Order No. 1*; **RLA-093**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Confidentiality Order, 21 November 2012; **RLA-053**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 2, 18 January 2013; **CLA-001**, *Mesa Power Group, Procedural Order No. 3*, 28 March 2013; **R-030**, Global Affairs Canada, *Mesa Group LLC v. Government of Canada*, Webpage Screenshot, as of 8 May 2013 and 11 September 2013, p. 2; **R-013**, *Mesa – Investor’s Answer on Jurisdictional Objections*; **RLA-162**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 4, 12 July 2013; **RLA-163**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 5, 23 August 2013.

²²³ Regarding item (c), that “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”: Canada has shown that allegations of improper meetings between NextEra and Ontario officials were a matter of public record in 2011-2013. See Canada’s Counter-Memorial on Jurisdiction, ¶¶ 138-139 and chart following ¶ 141; see also, **R-013**, *Mesa – Investor’s Answer on Jurisdictional Objections*, ¶¶ 74-77; see also, Part IV.D below.

Regarding item (d), that “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”: Canada’s Counter-Memorial on Jurisdiction demonstrated that another FIT Program participant made almost identical allegations in 2011. See Canada’s Counter-Memorial on Jurisdiction, ¶¶ 137-138, and chart following ¶ 141.

Regarding item (e), that “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”: had the Claimant wished to challenge the amount of procurement of renewable energy under the FIT Program, it could and should have done so in 2011, six years prior to the Critical Date. See Canada’s Counter-Memorial on

92. Finally, none of the five alleged new facts put forward by the Claimant concern the third group of measures on which the Claimant bases its claim, namely the handling of documents. As such, none of these facts supports an argument that the Claimant could only have known about the alleged improper handling of documents after the Critical Date. On that basis alone, the Claimant's claim for violation of Article 1105 based on measures relating to the handling of documents must be rejected for want of jurisdiction.²²⁴

D. Further Arguments Advanced by the Claimant Regarding the GEIA and NextEra Do Not Change the Date When the Claimant First Acquired Constructive Knowledge of the Alleged Breach

93. Canada has demonstrated that the Claimant had constructive knowledge of the facts underlying the GEIA and FIT Program components of its claim prior to the Critical Date.²²⁵ In its Reply, the Claimant has unsuccessfully attempted to escape this reality.

94. The Claimant has cast a wide range of allegations on the GEIA and the Korean Consortium in this arbitration.²²⁶ In its Reply, the Claimant attempts to reframe the "relevant issue" as the "delay of the award of contracts because of [*sic*] Korean Consortium's failure to comply with its contractual obligations".²²⁷ The Claimant alleges this issue was 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."²²⁸ It also asserts that there was no public information on "predatory measures of the Korean Consortium

Jurisdiction, ¶¶ 137-138 and chart following ¶ 141; *see also*, **RLA-001, Mesa – Award**, ¶ 654: ("The Claimant also challenges the fact that Ontario only awarded 300 MW of capacity in the West of London region, although 550 MW capacity was available there. The Claimant, however, has furnished the Tribunal with no evidence in support of this allegation.") (Emphasis added).

²²⁴ *See also*, Canada's Counter-Memorial on Jurisdiction, ¶¶ 146-154.

²²⁵ Canada's Counter-Memorial on Jurisdiction, ¶¶ 115-154.

²²⁶ The Claimant's allegations on the GEIA and the Korean Consortium include: Ontario negotiated the GEIA in "secret"; Ontario did not make the terms of the GEIA public upon conclusion; Ontario reserved transmission capacity for the Korean Consortium, and provided its projects priority access to transmission capacity; Ontario reserved 500 MW of transmission capacity in the Bruce region for the Korean Consortium; Ontario granted the Korean Consortium an extension to select connection points in the Bruce region, instead of cancelling the GEIA; Ontario allowed the Korean Consortium and its partner Pattern Energy to acquire lower-ranked FIT application projects. *See e.g.*, Claimant's Memorial, ¶¶ 202, 206-208, 227, 511-515, 526. *See also*, the chart on page 37 of Canada's Counter-Memorial on Jurisdiction.

²²⁷ Claimant's Reply, ¶ 349.

²²⁸ Claimant's Reply, ¶ 349.

to buy up FIT competitors' capacity ('low hanging fruit') in order to meet the terms of its exclusive deal."²²⁹

95. Canada already demonstrated that extensive information was available on the GEIA and the Korean Consortium before the Critical Date – including on the Korean Consortium's ability to comply with its contractual obligations.²³⁰ Widespread media coverage, the 2011 Ontario Auditor General's Report, and industry publications discussed this information and the GEIA more generally.²³¹ It was public knowledge that the Korean Consortium's projects faced "challenges" and that the FIT Program was delayed because of the Korean Consortium's need to finalize connection points.²³² For instance, the Auditor General's Report explicitly discussed the Korean Consortium's inability to meet Phase 1 and 2 deadlines:

[T]he Ministry renegotiated the GEIA with the consortium, which had requested a one-year commercial operation date extension for phases one and two of its projects because of challenges in completing its regulatory and environmental studies. In July 2011, as a result of the date extension and other changes, the Ministry amended the GEIA [...].²³³

96. Furthermore, the Claimant's concession that it knew in December 2010 that the Korean Consortium was buying lower ranked FIT projects²³⁴ undermines its allegations that "predatory" behaviour by the Korean Consortium was unknowable prior to the Critical Date.²³⁵ Moreover, Mesa

²²⁹ Claimant's Reply, ¶ 354.

²³⁰ See Canada's Counter-Memorial on Jurisdiction, ¶¶ 126-128.

²³¹ See Canada's Counter-Memorial on Jurisdiction, ¶¶ 126-128. See also, **R-086**, The Globe and Mail, "Unfair advantage cited in Samsung deal" 25 January 2010, p. 3; **R-042**, The Canadian Press, "Korean Deal Approved: Wind, Solar Farms Coming to Ontario", 21 January 2010; **R-041**, Government of Ontario, Ministry of Energy, Archived Backgrounder, "Ontario Delivers \$7 Billion Green Investment", 21 January 2010; **C-142**, Pattern Energy Press Release, April 18, 2011.

²³² See Canada's Counter-Memorial on Jurisdiction, ¶¶ 128-130; **R-002**, 2011 Auditor Generals Report, p. 108.

²³³ **R-002**, 2011 Auditor General's Report, p. 108.

²³⁴ Claimant's Memorial, ¶ 130, citing CWS-1-John Pennie, ¶ 59: ("The Skyway 127 wind project was very desirable. Other competitors for FIT Contracts were interested in obtaining this wind project. Samsung and KEPCO (the Korean Consortium) were interested in obtaining it. A land swap agreement was entered into with the Korean Consortium's local wind partner (Pattern Renewable Holdings Canada ULC) on December 10, 2010 to acquire the Skyway 127 Project. This deal was subsequently terminated by Pattern".)

²³⁵ Claimant's Reply, ¶ 354. See also, **R-013**, Mesa – Investor's Answer on Jurisdictional Objections, ¶ 71: ("In addition to the opaqueness of the OPA ranking system, the Investor has learned that it could be bypassed by members of the Korean Consortium and their partners. The Consortium was granted preferential access to connection points with guaranteed access to transmission capacity. This preferential treatment permitted the Consortium members to identify lower ranked applicants for PPAs, purchase those projects and secure a PPA for those projects by integrating their

had sufficient information in 2010 to make specific allegations that Ontario granted “special privileges in the GEIA”.²³⁶ As previously noted, the *Mesa* arbitration was discussed in both general interest and industry media before the Critical Date.²³⁷ The Claimant, therefore, had access to sufficient information to have first acquired knowledge of the alleged breach as it relates to the GEIA and the Korean Consortium before the Critical Date.

97. As detailed in Canada's Counter-Memorial on Jurisdiction, extensive information on alleged favouritism or unfairness in the administration of the FIT Program and the allocation of FIT Contracts was publicly available before the Critical Date – including on high-level meetings with FIT applicants.²³⁸ In particular, much of the information on the treatment of NextEra was public prior to that date.²³⁹ In this regard, certain allegations of the Claimant must be corrected. Contrary to what the Claimant alleges, Canada has not “completely ignored” 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 successful projects”.²⁴⁰ Canada has already demonstrated that *Mesa* alleged in public submissions that, “[t]he improper awarding of contracts was the culmination of unfair and discriminatory preferences given to other competitors who had private and secret meetings

operation into the Consortium. This scheme granted other investors and their Canadian subsidiaries preferential treatment to the Investor.”)

²³⁶ **R-013**, *Mesa – Investor's Answer on Jurisdictional Objections*, ¶ 86.

²³⁷ See Canada's Counter-Memorial on Jurisdiction, fn. 343.

²³⁸ See Canada's Counter-Memorial on Jurisdiction, ¶¶ 116-128.

²³⁹ See Canada's Counter-Memorial on Jurisdiction, ¶¶ 139; ¶¶ 82-84; ¶¶ 116-120, and the table that follows in ¶ 85. Further, *Mesa* had enough information to file a NAFTA claim on October 4, 2011 alleging “opaque and secret administration”, “favoritism to other investment”, and “private and secret meetings”. Over the nearly three years from that date to June 1, 2014, substantially more information relating to the Claimant's allegations of favouritism became available through the *Mesa* proceeding. See **R-005**, *Mesa – Notice of Arbitration*, ¶¶ 50, 62(c),(d); **R-058**, *Mesa – Notice of Intent*, ¶ 1: (“This case is about unfairness, the abuse of power and process and undue political interference in the regulation of renewable energy in Ontario through the unannounced last-minute imposition of arbitrary measures and through opaque and secret administration [...]”)

²⁴⁰ Claimant's Reply, ¶ 374. It also asserts that this meeting “provides concrete factual evidence as to why Skyway 127 was cut out of line.” ¶ 367. Having heard all the evidence, the *Mesa* tribunal rejected that claimant's contentions (*re* NextEra: “None of these allegations is supported by cogent evidence” ¶ 680); (*re* June 3 Direction and NextEra: “[The Tribunal] comes to the conclusion that the Claimant has not been able to establish its case, which relies largely on conjecture.” ¶ 673); (*re* decision to award only 300MW of capacity in the West of London region: “The Claimant, however, has furnished the Tribunal with no evidence in support of this allegation.” ¶ 653); (*re* NextEra: “Nor are there indications on record allowing the Tribunal to reasonably infer that NextEra exerted influence on Ministry officials to induce them to adopt a specific process.” ¶ 676).

with the governmental authority in January 2011” and that “NextEra was able to submit an application to change its connection point because it had advance notice of the rule change”.²⁴¹

98. The Claimant also attempts to restart the limitation period based on one particular meeting between NextEra and Ontario officials, stating that other meetings “would not give rise to a knowledge” of its claim.²⁴² That attempt must be rejected. In 2011, Mesa alleged that high-level government officials, including ministers, “interfere[d] with the Investor’s rights” in breach of Article 1105.²⁴³ The existence of a meeting involving ██████████ is merely additional information that allegedly supported Mesa’s claim of breach; it is insufficient to found an entirely new cause of action that would restart the limitation period under Article 1116(2).²⁴⁴

E. “Additional Facts” Regarding the Handling of Documents Do Not Change the Date When the Claimant First Acquired Constructive Knowledge of the Alleged Breach

99. In its Counter-Memorial on Jurisdiction, Canada explained that information on the alleged handling of documents on the cancellation of two gas plants and the deferral on the development of off-shore wind projects was made public before the Critical Date.²⁴⁵ Without repeating those arguments, Canada notes that both Mesa and Windstream based their allegations on the handling of government records on documents that were public before the Critical Date.²⁴⁶ The Claimant could have done the same. There was sufficient publicly available information for it to have first acquired

²⁴¹ Canada’s Counter-Memorial on Jurisdiction, p. 73, last row of chart, citing **R-013**, *Mesa – Investor’s Answer on Jurisdictional Objections*, ¶¶ 85, 143(b). (“The events giving rise to this claim occurred 259 days prior to the Notice of Arbitration and these events from January through July 2011 constitute a composite breach of the NAFTA.”) Investor’s Answer, Annex, ¶ 5. Mesa went on to develop its claim, alleging in documents that became public after the Critical Date that “the Premier’s Office was in effect advocating for a process that benefitted NextEra” and that “NextEra also gained assistance through the Ontario Premier’s Office.” See **C-133**, *Mesa – Investor’s Memorial*, ¶¶ 712, 723-724.

²⁴² Claimant’s Reply, ¶ 383.

²⁴³ **R-005**, *Mesa – Notice of Arbitration*, ¶ 34: (“Rather than allow the FIT Program to be impartially assessed through the ordinary approval process, Ministers and other government officials used extraordinary unilateral Ministerial directives to interfere with the Investor’s rights and the conduct and operations of its investments. These measures were taken without any consultation or notice to the four companies or their investments.”)

²⁴⁴ See Part IV.C above.

²⁴⁵ Canada’s Counter-Memorial on Jurisdiction, ¶¶ 33-44.

²⁴⁶ Canada’s Counter-Memorial on Jurisdiction, ¶¶ 150-152.

knowledge of the alleged breach of Article 1105 relating to the handling of documents before the Critical Date.

100. The Claimant sets out April 30, 2015 as the date when it acquired knowledge of the alleged breach concerning the handling of government records.²⁴⁷ It cites as its sources the *Mesa* hearing transcripts and the Amended Statement of Claim (“Amended SOC”) filed in the *Trillium* case before the Ontario Superior Court of Justice.²⁴⁸ While the proceedings in these cases may have provided additional details on the handling of documents by Ontario, the Claimant cannot use the *Mesa* hearing or the Amended SOC in the *Trillium* litigation to restart the clock in this arbitration. Ample information with respect to the handling of documents by Ontario was public prior to the Critical Date.²⁴⁹

101. The Claimant contends that it was “aware that there were acts of spoliation” but that “it needed to obtain information to understand how that spoliation affected its interests”.²⁵⁰ However, it still does not put forward any evidence demonstrating how events that allegedly became known to it after

²⁴⁷ Claimant's Reply, ¶ 15.

²⁴⁸ Claimant's Reply, ¶¶ 404, 407-408. **CLA-278**, *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, CV-11-436012, Sup Ct J Order and Plaintiff Amended Statement of Claim, 18 June 2015. Canada notes that, as of the date of filing of this Rejoinder Memorial, no court decision has been made on Trillium's allegations concerning the use of code names or the spoliation of documents. Therefore, these allegations remain unproven.

²⁴⁹ Canada's Counter-Memorial on Jurisdiction, ¶¶ 33-44. In addition, in its Amended Statement of Claim, Trillium refers to the use of the code name “Project Vapour” with respect to the “cancellation of gas fired electricity generating plants in Ontario”. While unproven and irrelevant for documents that would relate to onshore wind projects, Canada notes that references to the use of that code name can be found in documents that were publicly available before the Critical Date in this arbitration. *See for instance* **R-102**, The Canadian Press, “Ontario power plant cancellation dubbed ‘project vapour’”, 18 October 2012; **R-103**, Information and Privacy Commissioner, Order PO-3304, 7 February 2014. This issue was also discussed during debates held in the Legislative Assembly of Ontario and the Standing Committee on Justice Policy. *See* **R-048**, Ontario, Official Report of Debates (Hansard), 40th Parl., 2nd Sess. No. 9, 5 March 2013, p. 361; **R-049**, Ontario, Official Report of Debates (Hansard), Standing Committee on Justice Policy, 40th Parl., 2nd Sess., No. JP-3, 7 March 2013, p. JP-27; **R-050**, Ontario, Official Report of Debates (Hansard), Standing Committee on Justice Policy, 40th Parl., 2nd Sess., No. JP-10, 9 April 2013, p. JP-202. These debates took place (and were made public) before the Critical Date. *See* Canada's Counter-Memorial on Jurisdiction, ¶ 42 (“The Official Report of Debates in the Ontario Legislature (Hansard) is made public in a matter of hours or days after the adjournment of a sitting or a committee meeting.”)

²⁵⁰ Claimant's Reply, ¶ 402.

the Critical Date result in a self-standing cause of action.²⁵¹ Moreover, the Claimant makes a number of conflicting statements on this issue.²⁵²

102. The Claimant insists that the documents listed at paragraphs 118 and 119 of Canada's Counter-Memorial on Jurisdiction are silent on "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."²⁵³ This is incorrect. Ample public information was available prior to the Critical Date, which discussed issues and allegations made by other parties concerning the handling of documents by Ontario.²⁵⁴ Further, even assuming that the documents listed by Canada in its Counter-Memorial on Jurisdiction did not mention the specific details discussed by the Claimant, there was still enough publicly available information for the Claimant to file its claim years before it finally did.

103. Simply put, claimants do not have the luxury of waiting until they have a complete, perfect set of facts or the best evidence to bring their claims. The Claimant seems to ignore this when it states that, "[w]ith 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."²⁵⁵ The limitation period in Article 1116(2) does not start running only when a claimant

²⁵¹ While not part of this bifurcated phase of proceedings, Canada reminds the Tribunal that the Claimant has not put forward any support to date for its claim that the alleged improper destruction of documents related to the Claimant or Skyway 127. See Canada's Statement of Defence, ¶¶ 40-41, where Canada sets out jurisdictional objections pursuant to NAFTA Article 1101(1).

²⁵² See for instance, Claimant's Reply, ¶ 255: ("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") and ¶ 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"). (Emphasis added)

²⁵³ Claimant's Reply, ¶ 341(e).

²⁵⁴ Canada's Counter-Memorial on Jurisdiction, ¶¶ 33-44.

²⁵⁵ Claimant's Reply, ¶ 410 (emphasis added).

is “better positioned” to know where to look for documents and determine whether applications to domestic courts would be helpful. A claimant cannot sit back and wait for “better evidence” to become available to it. The clock starts running when a claimant *first* acquired, or should have *first* acquired, knowledge of the breach that it alleges.

F. The Claimant First Acquired Actual and Constructive Knowledge of the Alleged Loss Before the Critical Date

104. In its Reply, the Claimant acknowledges that “July 4, 2011 [...] might be relevant to establishing the date of loss.”²⁵⁶ Despite this, the Claimant offers a flawed interpretation of the “loss or damage” element of Article 1116(2) and insists that it could not have learned of loss until after the Critical Date, when it purportedly first learned of the alleged breach.²⁵⁷

105. The arguments put forward by the Claimant appear to suggest that knowledge of loss is a component of knowledge of breach.²⁵⁸ That is incorrect. As the tribunal in *Nissan Motor* held:

[t]he fact that [the claimant] may not yet have conceived of this damage as caused by a CEPA breach is not determinative, when both the relevant State conduct (non-payment) and the relevant loss (non-receipt of payment) predated the critical date. [The claimant] could not point to an additional [respondent entity] act after 23 February 2014 with regard to the same basic harm (for example, a further denial of liability with respect to the same Cell Certificates) as somehow triggering a new supervening CEPA breach for purposes of the limitations period, because the requisite “loss or damage” would be the same as it already had incurred.²⁵⁹

106. As Canada explained in its Counter-Memorial on Jurisdiction, the Claimant's position on knowledge of the alleged loss essentially repeats its faulty position on knowledge of the alleged

²⁵⁶ See Claimant's Reply, ¶ 266.

²⁵⁷ Claimant's Reply, ¶¶ 264-268, 287-288, 331.

²⁵⁸ Claimant's Reply Memorial, ¶ 260(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 [*sic* - 2015].”) See also, ¶ 38: (“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.”).

²⁵⁹ **RLA-155**, *Nissan Motor – Decision on Jurisdiction*, ¶ 325 (footnotes omitted). The tribunal also noted that: (“[T]he triggering event for the running of the limitations period is knowledge that the investor has been harmed (*i.e.*, qualitatively has incurred ‘loss or damage’), not knowledge of the precise calculation of that harm.”)

breach.²⁶⁰ The limitation period begins at the moment of *first* knowledge of loss or damage.²⁶¹ A separate limitation period can only begin where there is a “qualitatively new instance of ‘loss or damage’ after the critical date”.²⁶² That is not the case here. The Claimant suffered a single loss when it failed to receive a FIT Contract on July 4, 2011, or at the very latest, on June 13, 2013²⁶³ – and both of these dates preceded the Critical Date.

107. Lastly, the Claimant has not successfully controverted Canada's arguments that: (i) the Claimant first acquired *actual* knowledge of the alleged loss before the Critical Date because it conceded its understanding that the reservation of transmission capacity in the Bruce transmission zone in September 2010 “immediately harmed” its investment; and (ii) the Claimant first acquired *actual* knowledge of the alleged loss before the Critical Date because Skyway 127 did not obtain a FIT Contract on July 4, 2011.²⁶⁴

108. Any and all alleged loss or damage arising out of the alleged breach was known or should have been known to the Claimant well before the Critical Date. Thus, the claim falls outside the limitation period, and the Tribunal has no jurisdiction *ratione temporis* under Article 1116(2).

²⁶⁰ Canada's Counter-Memorial on Jurisdiction, ¶¶ 157-158.

²⁶¹ Canada's Counter-Memorial on Jurisdiction, ¶ 155.

²⁶² **RLA-155**, *Nissan Motor – Decision on Jurisdiction*, ¶ 325: (additional State conduct relating to the same underlying harm “cannot without more renew the limitation period”). The Claimant's alleged loss is distinct from cases such as *Pope and Talbot*, where the alleged losses were uncertain or “based upon future events”. As the tribunal in *Ansung* noted, the limitation period begins on the date on which the claimant first becomes aware of any damage from the alleged treaty breach. **RLA-161**, *Ansung – Award*, ¶ 113. See **RLA-083**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 87: (“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.”)

²⁶³ On June 12, 2013, Ontario terminated the FIT Program for projects of Skyway 127's size. See Canada's Counter-Memorial on Jurisdiction, ¶ 156.

²⁶⁴ Canada's Counter-Memorial on Jurisdiction, ¶ 156. The Claimant admits that: (“[w]ith the termination of the FIT Program, Skyway 127's place on the priority waiting list for a FIT Contract also was terminated.”) Claimant's NOA, ¶ 82.

V. CONCLUSION AND REQUEST FOR RELIEF

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

- (a) Dismiss the Claimant's claim in its entirety and with prejudice on the grounds of lack of jurisdiction under NAFTA Articles 1116(1) and 1116(2);
- (b) Order the Claimant to bear the costs of this arbitration in full and to indemnify Canada for its legal fees and costs in this arbitration; and
- (c) Grant any further relief it deems just and appropriate under the circumstances.

May 26, 2021

Respectfully submitted on behalf of the
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