IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT AND THE
UNCITRAL ARBITRATION RULES, 1976

PCA CASE NO. 2018-54

In the Matter of Arbitration Between:

TENNANT ENERGY, LLC,

Claimant,

and

GOVERNMENT OF CANADA,

Respondent.

Volume 1

Monday, November 15, 2021

The hearing in the above-entitled matter came on at 9:04 a.m. (EST) before:

MR. CAVINDER BULL SC, President

MR. R. DOAK BISHOP, Arbitrator

SIR DANIEL BETHLEHEM, Arbitrator

ALSO PRESENT:

Registry, Permanent Court of Arbitration:

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MS. EVA MARKOWSKI

C O N T E N T S

P R O C E E D I N G S

PRESIDENT BULL: Good morning or good afternoon to everyone.

Can I just check whether we are waiting for anyone else, and perhaps I can just check with Ms. Squires first, anyone else from Canada we should be waiting for?

MS. SQUIRES: No, I believe we are all here.

PRESIDENT BULL: Thank you. And either Mr. Appleton or Mr. Mullins, are we waiting for anyone else from Claimant?

MR. APPLETON: All are present, Mr. President.

PRESIDENT BULL: Very good.

Then let's begin.

This is Tennant Energy LLC and Government of Canada PCA Case Number 2018-54, and this is the Hearing of some of the jurisdictional objections raised by Canada. My name is Cavinder Bull, I'm Presiding Arbitrator. Attending also are my fellow Arbitrators, Mr. Doak Bishop and Sir Daniel Bethlehem.

The Tribunal's Secretary present is Mr. José Luis Aragón Cardiel.

Can I ask that Ms. Squires or one of your team could introduce those present for Canada?

MS. SQUIRES: Yes, absolutely. Good morning, everybody. Or good afternoon, depending on where you are.

So, I have my colleagues from the Trade Law Bureau here in the room with me. As you know, I'm Heather Squires. I have Mr. Mark Klaver, Ms. Alexandra Dosman, and Mr. Stefan Kuuskne who are all counsel for the Government of Canada. I also have Benjamin Tait and Krystal Girvan, who are paralegals for the Government of Canada. And one of our colleagues from the Ministry of Economic Development, Job Creation and Trade for the Government of Ontario, Saroja Kuruganty--apologies for that. Also on the line, there's quite a few people who have joined in as well. I won't list them all off for the sake of time. I will say that the list matches whoever we had indicated to the PCA would be attending. I would point out in particular, though, that our Expert, Ms. Meg Lodise has joined us this morning as well.

PRESIDENT BULL: Thank you, Ms. Squires.

And can I trouble one of lead counsel, perhaps Mr. Appleton, to introduce those for the Claimant.

MR. APPLETON: Excellent. I'm going to use my local time, simply to make this easier for everyone.

Good morning, Mr. President and Honourable Members of the Tribunal. As you know, I'm Barry Appleton from the law firm of Appleton and Associates International Lawyers L.P., and I'm joined by my co-lead counsel, Edward Mullins from the Reed Smith law firm, and we're actually

all together in their Miami office in a conference room, so you will see the feed from the conference room but you will see our picture as we come through, so we just want you to know that we're in one room.

You will be hearing also during the next few days from Sujey Herrera, who is with us here in the conference room, she's from the Reed Smith law firm, and also Gabriel Marshall from the Appleton & Associates International Law Firm and he's in the room with us now. We also are joined remotely today by Cristina Cardenas, she's from Reed Smith, and our IT technical assistant, who's not in the room, Jarol Gutierrez.

And then of course, we would like to introduce John C. Pennie, he's the client representative of Tennant Energy. And Tennant Energy LLC is an established wind energy developer. He was a Wind Energy developer at Windrush Properties and the Director of Skyway 127. You will be hearing from Mr. Pennie tomorrow as a witness. You will also hear tomorrow from John H. Tennant, who will join us, as well as--sorry, not tomorrow--tomorrow you'll--it's on Wednesday, you will be--John H. Tennant and Derek Tennant. And then on Thursday morning, you will be joined by retired California Court of Appeal Justice Margaret Grignon, but she's not with us this morning.

PRESIDENT BULL: Thank you very much,

Mr. Appleton.

Now, we have Opening Statements from both Parties today, but before we get on to those, can I just check with both Parties whether there are any housekeeping matters to raise?

Perhaps first Canada.

MS. SQUIRES: No, nothing on our end. Thank you.

PRESIDENT BULL: Thank you. And then from the Claimant?

MR. APPLETON: Just a simple matter. We had made an inquiry to Canada if they would identify the identity of their client representative in the delegation. They didn't respond on that, we just wondered if they would be in a position to identify that for the record so we are aware of who can give instructions to the legal team from the Government of Canada.

MS. SQUIRES: Thank you. We don't have a particular client representative to designate.

PRESIDENT BULL: Right.

There are two things that I wanted to raise by way of housekeeping just for clarity before we launch into the presentations. The first one is I wanted to remind both Parties of what's stated in correspondence from the Tribunal to the Parties, that as far as the Opening

Statements go, the Tribunal's questions and answers, as we get to them, those exchanges, any time taken for that will be part of the time that has been allocated to each Party for their Opening Statement, and that will be the same arrangement for the Closing Statements. I just wanted to remind Parties of that.

I also like to remind both Parties that whilst the Hearing Schedule doesn't specify it save for saying so in a footnote, you should bear in mind that there needs to be a 15-minute break in the middle of each Opening Statement if counsel can find a convenient moment convenient for your presentation so that it's not too broken up, and fairly midway in your presentation that would be very helpful for everyone, especially the Transcribers who will be going for quite a long time if we don't take that break.

Now, those are just two things that I wanted to remind, and if there is nothing else from anybody else, then I think we can begin, and first up would be the Opening Statement from Canada.

And Ms. Squires, over to you and your team.

MS. SQUIRES: Thank you very much.

OPENING STATEMENT BY COUNSEL FOR RESPONDENT

MS. SQUIRES: Good morning, again, everybody or good afternoon.

As you know, my name is Heather Squires, and I'm counsel for the Government of Canada in these proceedings.

It is a privilege to appear before you today, and I'm looking forward to having some fruitful discussions in the week ahead.

As the Tribunal knows, the Claimant has alleged that certain measures taken by the Government of Ontario a decade ago, with respect to its Feed-In-Tariff program, breached the NAFTA. Specifically, the Claimant alleges that favorable treatment of certain FIT proponents by the Ontario Government, breaches the minimum standard of treatment in Article 1105.

Now, Canada's Statement of Defence has already demonstrated that the legal and factual basis of these Claims are so weak that pursuing them on the merits is futile, but this Tribunal need not and, in fact, cannot, even get to the merits of this dispute because of the jurisdictional problems that stand in the way of Tennant Energy's claim.

Over the course of the next couple hours--and, in fact, over the course of the entire week--my colleagues and I will demonstrate to you why this claim cannot proceed.

The Claimant is attempting to bring a claim to arbitration here which is excluded from the scope of

Chapter Eleven. The Claimant was not a protected Investor at the time of the alleged breach. That alone should end the Claimant's claim, full stop. However, even if the Claimant meets the jurisdictional requirements, its claim can still not proceed as its Claim was filed outside the three-year limitation period stipulated in the NAFTA. Again, such a finding by this Tribunal would dismiss the Claimant's claim in its entirety.

Canada's message is clear on both accounts. This Tribunal lacks jurisdiction, and this claim should not proceed to the merits.

In that regard, I will pause here for a minute to give you a brief roadmap of how we will approach our Opening here this morning. For the next 25 minutes, I will provide the Tribunal with a short overview of this claim, and I will walk you through the law that applies to both of Canada's jurisdictional objection.

I will discuss some general jurisdictional principles followed by the law with respect to Article 1116(1), while explaining that Canada's consent to arbitration is contingent on the Claimant meeting the requirements of that provision.

After that, I will yield the floor to my colleague, Mr. Mark Klaver, who will explain in detail why, based on the evidentiary record before this

Tribunal--or more accurately the lack thereof--that Claimant has not met its burden with respect to Article 1116(1). And as such, the Claimant was not protected Investor at the time of the alleged breach.

I think after that presentation would be a good time to take our 15-minute break. Because following Mr. Klaver, I will then return to the Tribunal to walk you through Canada's second jurisdictional objection that the Claimant's claim is untimely.

My colleague Ms. Alexandra Dosman will then follow me to explain why the Claimant should have had knowledge of the alleged breach and loss or damage before the Critical Date of June 1st, 2014. And as such, the Claimant's claim was submitted outside the three-year limitation period prescribed in Article 1116(2) of the NAFTA. We are, of course, happy to take questions at any time.

Now, before I move on to the law at issue, I do want to take a few minutes to say some brief words about the Claimant's claim generally, and perhaps give a bit of context to each of Canada's objections.

Over the past four years, you have read numerous pages of written submissions, Expert Reports, and witness testimony, yet despite the volumes of materials before you, the facts aren't that complicated and the law isn't

either. The Claimant alleges that three groups of measures taken by the Government of Ontario and the Ontario Power Authority resulted in a breach of Article 1105. These are: First, measures concerning the Green Energy Investment Agreement and the Korean Consortium; second, measures concerning the administration of the FIT Program; and third, the handling of documents by the Government of Ontario.

Based on these measures, the Claimant alleges that Ontario unfairly manipulated the award of access to the electricity transmission grid, that it unfairly, manipulated the dissemination of information under the FIT Program, and that Ontario unfairly manipulated the awarding of FIT contracts.

The Claimant itself summarizes its claim in its Reply at Paragraph 27, where it notes very clearly: "There is no question that this claim is about the unfair and wrongful administration of Ontario's FIT Program."

It notes that: "Government officials admitted widespread governmental conspiracy that took place in 2011 to help friends of the Government unfairly," and that "Ontario took steps to manipulate the amount of power transmission that would be available to assist its political allies, and in doing so, it denied Skyway 127 the FIT Contract that it fairly and properly was entitled

to under the FIT Rules."

Now, despite the facts and pieces of evidence that feed into the Claimant's claims, it is ultimately arguing that the actions of the Government of Ontario that led to the publicly announced June 3rd, 2011 direction and FIT Rule change (C-176) resulted in its failure to receive a FIT Rule Contract on July 4th, 2011. It alleges that these actions breach Article 1105, the minimum standard of treatment.

Now, another NAFTA Tribunal has already determined that every one of these Measures challenged by the Claimant is consistent with Article 1105. However, that's not what we are here today to discuss. Instead, we will focus our arguments on both of Canada's jurisdictional objections as this is the hurdle that the Claimant must overcome at this stage, and Canada's position is that the Claimant has simply not met its burden.

Over the course of this week, the Tribunal must really only satisfy itself with three simple questions: First, when did the alleged breach of Article 1105 occur?

Second, when did the Claimant become a protected Investor?

And third, when did the Claimant know, or should it have known, about the alleged breach and loss or

damage?

The answer to these questions, equally as simple. The alleged breach occurred on July 4th, 2011. The Claimant became a protected Investor on January 15, 2015. And the Claimant knew, or should have known, about the alleged breach and loss or damage arising out of that breach in 2011, and certainly well before the critical date of June 1st, 2014, three years before the Claimant filed its Notice of Arbitration on June 1st, 2017.

I will come back to the date of the breach shortly because there is some disagreement between the Parties on that point, but on the latter two questions, I think it is important to take really take some pause and consider what the Claimant is asking of this Tribunal. My colleagues will explain fully in a few moments, but for now I will say this: The Claimant's case revolves around two key arguments:

First, it alleges that it held an investment as of April 26, 2011; and, therefore, the requirements of Article 1116(1) have been met.

It argues, secondly, that the Claimant could not have known either through constructive or actual knowledge of the alleged breach until August 2015; and, as such, its claim was filed in accordance with the three-year limitation period.

Yet the Claimant's case falls on the evidence. On the first, it falls on the lack thereof. On the second, it fails on the overwhelming amount of evidence that directly contradicts the Claimant's arguments. I will explain briefly now, my colleagues will expand on this shortly.

According to the Claimant, in November 2009, Skyway 127 Wind Energy Inc., a corporation owned at the time by Mr. Derek Tennant's Holding Company, I.Q. Properties; Mr. John Pennie and other investors applied for the FIT Program. The Project, a 100 megawatt onshore wind project named Skyway 127 located in the Bruce Region of Ontario. This wind project was funded partially by a loan that I.Q. Properties received from Derek Tennant's brother, Mr. John Tennant, in October 2007. This loan was secured by Derek Tennant's shares in Skyway 127 Inc.

In 2011, Derek defaulted on that loan. The result, Shares in Skyway 127 Inc were transferred to John Tennant on June 20, 2011. These Shares in Skyway 127 Inc, and ones John Tennant subsequently received on December 30, 2011, are the investments at issue in this Arbitration.

Now, those Shares were transferred to the Claimant outright on January 15th, 2015. However, the Claimant alleges that John Tennant held those Shares in

Trust for the Claimant in the intervening period. This week, one of our main goals is to address the veracity of that statement. As Mr. Klaver will show, the Claimant failed to file adequate evidence to prove the existence of the alleged trust.

If I could just get more click on the presentation there. Thank you.

The Claimant is asking this Tribunal to simply believe it when it says that Mr. John Tennant held the Shares in Skyway 127 in Trust for the Claimant as far back as 2011. Yet, it has no evidence to support this conclusion, aside from a document created in contemplation of this Arbitration (C-268) and its own witness testimony. Not a single document. This should strike the Tribunal as odd. Why did the Claimant keep records of certain corporate transactions but not this one? Why is the only document evidencing the Claimant's alleged trust created after it first met with counsel for this Arbitration?

The Claimant's claim continues to shift in response to Canada's submissions on this issue. Its Notice of Arbitration, not a single mention of a trust. In fact, its Notice of Arbitration refers to John Tennant's equity interest, and that Tennant Energy continued the investment of John Tennant in January 15, 2015.

Its Memorial, an unsupported reference that Mr. John Tennant held the Shares in Skyway 127 as a Bare Trustee by another individual, Mr. Pennie, but again, no documents.

It was not until its Reply that the Claimant finally attempted to address this Tribunal's jurisdiction under Article 1116(1), yet the Claimant has still failed to demonstrate why this claim should proceed. As Canada's expert, Ms. Lodise, notes, the lack of clear and convincing evidence put forward by the Claimant in its Reply would fail to meet the standard to establish a trust under Californian law. The Claimant has been given ample opportunity to address the flaws in its case, and it has failed repeatedly.

The Claimant also fails to appreciate well-settled law with respect to the Limitations Period. As I will explain in a few minutes, it's irrelevant that the Claimant did not have actual knowledge of the alleged breach of the NAFTA until 2015, even if that is true. The Claimant's reliance on subjective belief ignores the key words of Article 1116(2). Canada's arguments are met by the fact that the Claimant should have had knowledge of the alleged breach and loss or damage prior to the Critical Date.

Just over 10 years ago, on October 4th, 2011,

Canada received an NOA that claimed a breach of NAFTA Article 1105 based on the same groups of measures the Claimant now challenges here. That Claimant, Mesa Power, alleged that the Government of Ontario was administering the FIT Program in an unfair and transparent manner, and that officials were beholden to political cronyism, such that it failed to receive a FIT Contract on July 4, 2011, the same time the Claimant failed to receive one.

That was 10 years ago.

Mr. Appleton, Mr. Mullins and I have argued the merits of this case already, seven years ago, in October 2014. Canada was successful. The clear overlap between both of these Claims is obvious on the face of the pleadings. Fundamentally, they are the same. Different FIT proponents, same counsel, same claim.

Like Mesa, Tennant could have made its claim as articulated in submission as early as 2011. Not only this, but they had the benefit of three years of Mesa pleadings being public prior to the Critical Date. The Claimant's argument that it did not and could not know of the alleged breach until it met with counsel in May of 2015 and was shown the Mesa Post-Hearing Briefs and Hearing Transcripts in August of 2015, is entirely unavailing. The Claimants in Grand River attempted to make the very same argument, and it was rejected outright

because the public record demonstrated that such an argument did nothing more than show the willful blindness of the Claimant, and this Tribunal should find the same.

Turning now to the legal arguments that the Claimant has raised with respect to the Tribunal's jurisdiction more generally, and there are three points that I wish to discuss. While these points are important, as Canada has noted in its submissions, the law is well-settled.

First, both of Canada's objections go to this Tribunal's jurisdiction. They are not questions of admissibility.

Second, it is the Claimant, and not Canada, that bears the burden of proving this Tribunal's jurisdiction.

And third, the date of the breach does not depend on the Claimant's knowledge, and it is, in fact, to be addressed on an objective standard.

Turning to that first point, Canada's objections go to the jurisdiction of this Tribunal.

Article 1122(1) of the NAFTA affirms that Canada has conditioned its consent on claims that have been submitted in accordance with the procedures set out in this Agreement. This is clearly laid out by the Tribunal in the Methanex Case (RLA-002), who held that the NAFTA Parties' consent to arbitrate is only established once the

requirements laid out in Article 1122 have been satisfied. This includes that a claim has been properly brought in accordance with Article 1116 or Article 1117, as the case may be. As such, the fulfillment of Article 1116's requirements are one of the preconditions that must be met to establish a NAFTA Party's consent to arbitration and, as such, the Tribunal's jurisdiction.

This has been the consistent position of all three NAFTA Parties, including in this case. As the United States noted in its 1128 submission, a tribunal has no jurisdiction to hear a claim under Chapter Eleven unless the Claimant also satisfies at least one of these provisions, referring to Articles 1116 and 1117. Mexico had similarly noted that compliance with Article 1116 is a matter of jurisdiction and not admissibility.

Such a position has also been widely supported in investor-State jurisprudence. As the Tribunal can see on these slides, previous NAFTA Tribunals such as Mesa Power (RLA-001), Gallo (RLA-004), and Resolute (RLA-079), have all accepted that if a claimant cannot meet the preconditions to submit a claim under Article 1116, a NAFTA Tribunal will be without jurisdiction.

Turning now to my second point on jurisdiction generally, the burden is squarely on the Claimant, and not Canada, to demonstrate that this Tribunal has

jurisdiction. Again, this point is well supported in investment treaty arbitration. As the Tribunal in Tulip Real Estate (RLA-133) held, as a Party bears the burden of proving the facts it assert, it is for the Claimant to satisfy the burden of proof required at the jurisdictional stage.

This is similarly confirmed by the Bayindir (RLA-134) and the ICS (RLA-135) Tribunals, as well as the Spence Tribunal (RLA-136), who rightfully noted that the burden is on the Claimant to prove the facts necessary to establish the Tribunal's jurisdiction. It is not for Canada to make the Claimant's case for it. When the facts alleged by a claimant are facts on which the jurisdiction rests, as the Phoenix Action Tribunal noted (RLA-005), it seems evident that the Tribunal had to decide on those facts if contested between the Parties, and the Tribunal cannot accept the facts as alleged by the Claimant. This Tribunal cannot, as the Claimant's Expert Justice Grignon has done, assume the facts as pled by the Claimant to be true.

Turning now to the date of the breach, Canada's position is that the alleged breach occurred on July 4th, 2011. As I mentioned a few minutes ago, this is the date upon which the Claimant was told it would not get a FIT Contract following allocation of transmission capacity in

the Bruce Region. Canada is not alone in this position but July 4th is the date of the alleged breach. Indeed, the Claimant's own experts confirm this date. As Deloitte (CER-1) notes, as a result of the notification on July 4, 2011, that it would not receive a FIT Contract but will be placed on a priority waitlist, Tennant had been treated unfairly by July 4th, 2011, given that it expected a higher ranking based on its FIT applications.

Mr. Pennie also confirmed the same in his Witness Statement, where he notes that Paragraph 60 that Contracts were awarded on July 4th, 2011, and that changes in available transmission capacity resulted in us not having enough transmission capacity for a FIT Contract.

One more click on this slide, Jen. Thanks.

Now, the Claimant will take some time today, I'm sure, to try and convince the Tribunal that the date of the alleged breach is August 15, 2015 when it allegedly became aware of the alleged breach through the release of public versions of the Mesa Power Post-Hearing Briefs (C-017, R-100) and the Hearing Transcript (C-170, C-121, C-122, C-123, C-125). I would like to dispel that theory before the Claimant even begins.

First of all, as a matter of correction for the record, the Post-Hearing Briefs were public in January 2015, not August. The Hearing Transcripts,

April 2015. Neither of these were made public on August 15, 2015.

Further, I invite the Tribunal to look at Exhibit C-124. The only document that Claimant relies on for this factual assertion, this is an e-mail from the PCA to the Mesa Power disputing parties letting them know that certain documents were going to be placed in the PCA repository on August 15, 2015, not the PCA's website. The Post-Hearing Briefs are not listed there, nor are the Hearing Transcripts. Why? Because they were already public. The Claimant's continued reliance on August 15, 2015 is entirely misguided as a matter of fact. The Claimant's legal arguments are equally as misguided:

First, there is nothing in the text of the NAFTA, not in Article 1116(1), 1116(2), or otherwise, that supports the Claimant's position. There is no basis to support a conclusion that there is a knowledge component linked to the dates for determining jurisdiction ratione temporis under Article 1116.

The challenge measures that constitute the alleged breach are objective events that cannot be changed by the subjective knowledge of the Claimant. They cannot be changed to suit a claimant's particular litigation strategy. As Canada has demonstrated in its written pleadings, and investment jurisprudence has confirmed a

tribunal's analysis, under Article 1116(1), cannot hinge on whether the Claimant knew of the purported treaty violations. The Claimant has not put forward a single authority for its self-serving theory that its knowledge determines the date of the alleged breach.

Second, the Tribunal has already confirmed in Procedural Order No. 8 that the question of when an alleged breach occurs is separate from the question of whether the Claimant knew, or should have known, about the alleged breach and the loss or damage arising from that breach. The August date put forward by the Claimant is, therefore, incorrect in every respect.

Turning now to Canada's first jurisdictional objection, that the Claimant was not a protected Investor at the time of the alleged breach, and we do note here that the Claimant does not appear to challenge Canada on our legal position. Instead, the case turns on the evidence alone. Despite this, Canada provides a brief overview nonetheless.

Article 1116(1) of the NAFTA states in relevant part, that an investor of a Party may submit to arbitration under this section a claim that another Party has breached an obligation under Section A, and that the Investor has incurred loss or damage by reason of, or arising out of, that breach. Together with Article

1101(1), this Article sets a temporal limitation on a tribunal's jurisdiction. In short, the NAFTA Parties do not owe substantive obligations to a prospective Claimant until it becomes a protected Investor of a Party.

The language of Article 1116(1) refers specifically to a claim submitted by a claimant on its own behalf for damage or loss that the Investor has incurred. These words must be given meaning. The jurisdiction of a NAFTA Tribunal is thus limited to alleged breaches that occurred after the Claimant itself became a protected Investor of a Party, not any other investor.

ARBITRATOR BETHLEHEM: Ms. Squires, may I stop you just for a moment just to clarify a point. It's not, I think, an earth-shattering point, but you said that 1116(1) is a temporal limitation. Is that the right formulation? I don't quite see that there is a time dimension to it, it seems to me that it's a question of status. Maybe nothing turns on it.

MS. SQUIRES: We've characterized it as a jurisdiction ratione temporis insofar as a prospective Investor, or protected Investor, must be protected at the time of the alleged breach, so in that sense there is a timing element to it. But to your point, it could be seen as well as a particular status, that you must have the status of a protected Investor, but again at the time of

the alleged breach.

ARBITRATOR BETHLEHEM: I'm just wondering whether the--and again, this may not ultimately be relevant having regard to the pleadings of the Parties, but whether the issue of its characterization as something temporal, or something that is status related personae, goes to the question of whether it's jurisdictional or admissibility, but in any event I leave that both to you and to Claimant's counsel to reflect upon. Temporal seems to me to be something that turns on an issue of timing. This seems to turn on the issue of whether it's--the Claimant is an Investor.

MS. SQUIRES: Our position on that, as a matter of jurisdiction versus admissibility, is that meeting the requirements of Article 1116(1), however characterized, are questions of jurisdiction for this Tribunal.

ARBITRATOR BETHLEHEM: Thank you very much. I understand that, yes.

MS. SQUIRES: Turning back now to the law on 1116(1), and just a couple more points before I pass everything over to Mr. Klaver. I would note that State conduct cannot be governed by Rules that are not applicable when the conduct occurs. This approach is consistent with the non-retroactive application of the substantive obligations in the NAFTA and international

treaties in general.

It is also supported by the other NAFTA Parties. For example, the U.S. has noted that Chapter Eleven--there is no provision in Chapter Eleven which authorizes an investor to bring a claim for an alleged breach relating to a different Investor.

Mexico similarly agrees, where they noted that Articles 1101(1) and 1116(1) set a temporal limitation on a NAFTA Tribunal's jurisdiction, requiring a claimant to demonstrate that it was an investor of a Party when the alleged breach occurred.

International jurisprudence has also been clear on the point. As the Tribunal in Phoenix Action (RLA-005) held, the Tribunal is limited ratione temporis to judging only those acts and omissions occurring after the date of the Investor's proposed investment. Therefore, such obligations cannot be breached by the host State until there is an investment of a national of the other State. This approach was similarly taken by other NAFTA Tribunals such as Mesa (RLA-001), GAMI (CLA-135), B-Mex (RLA-121), and Gallo (RLA-004).

Canada's position is also valid despite the Claimant's cursory arguments with respect to the continuous nationality of John Tennant and Tennant Energy. In fact, this very issue was addressed by the Tribunals in

GEA Group (RLA-146) and STEAG (RLA-174). In both of those cases, the Tribunal found that the Claimant must be a protected Investor at the time of the alleged breach in a situation where the Claimant and previous owners of its investment held the same nationality.

The Claimant, once again, has not advanced any authorities that oppose Canada's position. As the Indian Metals Tribunal (RLA-142) rightfully noted, the fact that a protected Investor later made an investment in the subject matter of the dispute cannot convert what was not a treaty violation into a treaty violation simply because the affected investment is taken over by a protected Investor.

With that, I will now yield the floor to my colleague, Mr. Klaver, who will address the factual issues with respect to Canada's first jurisdictional objection.

MR. KLAVER: Thank you, Ms. Squires, President Bull, Arbitrator Bethlehem and Arbitrator Bishop. It is truly a privilege to appear before you again, albeit under these different circumstances.

As Ms. Squires explained, to establish jurisdiction under NAFTA Article 1116(1), the Claimant bears the burden to prove that it was a protected Investor when the alleged breach occurred.

As the slide shows, the challenged measures

occurred from 2008 to 2013 at the latest. The Claimant asserts that it became a protected Investor in 2011 when it says that John Tennant orally created a trust to hold shares in Skyway 127 for the benefit of Tennant Travel, as the Claimant was then known. The Claimant also alleges that it controlled the Investment through this alleged trust.

My objective today is to present Canada's position that the Claimant has failed to establish that it was a protected Investor at the time of the alleged breach through this alleged trust. In fact, one of the key themes throughout this entire week will be the glaring deficiencies in the evidentiary record concerning this alleged trust. As the slide shows, I will address three main topics today:

First, to meet the standard of proof, the Claimant had to submit reliable evidence of its alleged ownership and control of the Investment through this alleged trust.

Second, the Claimant filed no such evidence. It, therefore, failed to prove that it owned the Investment when the alleged breach occurred.

And third, the Claimant also failed to prove it controlled the Investment at that time.

Ultimately, the Claimant's story about this

alleged trust appears to be a post hoc rationale designed solely to establish this Tribunal's jurisdiction. Canada does not consent to arbitrate this NAFTA claim because the Claimant was not protected at the time of the alleged breach.

Starting on the standard of proof under international law, investment tribunals have identified certain key points for establishing ownership and control of an investment. It is uncontroversial that a claimant must submit cogent evidence. For instance, in Mesa (RLA-001), the Tribunal rejected many of the Claimant's allegations that it was seeking to make an investment in Ontario before the alleged breach occurred because the Claimant failed to marshal cogent evidence.

Even more pertinent for this case, where a claimant advances testimony from witnesses who have an interest in the outcome of the Arbitration, it is critical to provide contemporaneous documentary evidence to corroborate those witness testimonies about the Claimant's alleged ownership and control of an investment. The recent award in MAKAE Europe (RLA-205) is highly instructive in this regard. The Investment comprised retail and restaurant businesses in Saudi Arabia. The Claimant was owned by a Kuwaiti national, Mr. Alenezi and his two sons. And the Claimant alleged that it held de

facto control over the Investment at the time of the alleged breach. To support this assertion, it filed Witness Statements from Mr. Alenezi, and it is worth reviewing how the Tribunal treated his Witness Testimony.

Without wishing to impugn Mr. Alenezi's recollection or understanding of events that occurred many years ago, it is the case that he and his sons are the sole owners of the Claimant. He has a potentially substantial personal interest in the outcome of this Arbitration.

Given this situation and the need for each ICSID Claimant to present sufficient evidence to prove matters essential to its claim, the Tribunal has carefully considered the evidence of the record in addition to Mr. Alenezi's testimony. The Tribunal then found that none of the evidence on the record corroborated his Witness Testimony about the Claimant's alleged de facto control over the Investment.

The Tribunal stated it has not been pointed--the Tribunal has not been pointed to evidence corroborating that a transfer to MAKAE Europe of Mr. Alenezi's responsibility for the MAKAE group's branding and strategic decision making was being organized or would occur at any future time. Nor is there evidence confirming that MAKAE Europe continued to control the

Investment.

Similarly, in this case, I will explain that there is no contemporaneous documentary evidence corroborating John Tennant's, Derek Tennant's and John Pennie's Witness Testimonies that Tennant Travel beneficially owned shares in Skyway 127 through this alleged trust.

The MAKAE Europe Tribunal also made a relevant finding concerning expert testimony. Where the Claimants' Expert assumed the facts as alleged by the Claimant to be true, the Tribunal held that it could not rely on the Expert's testimony when assessing the veracity of those factual claims. The Tribunal explained how it treated the testimony of the Claimant's Expert, Mr. Sherwin, as follows:

"Mr. Sherwin makes clear that he has no personal knowledge of the Claimant or its activities and bases his testimony regarding the Claimant on documents and information he was provided by counsel." He adds that: "Where I have relied on certain facts from the record, in the course of my analysis, I have been instructed by counsel to accept the facts presented by the Claimant as true." Accordingly, Mr. Sherwin's testimony does not assist the Tribunal insofar as it concerns the nature and extent of the Claimant's actual activities.

Similarly, I will explain that, because the opinion of Justice Grignon assumes the Witness testimonies of John Tennant and Derek Tennant to be true, her opinion does not assist the Tribunal in its task of assessing the veracity of their factual claims about the alleged trust.

Ultimately, the MAKAE Europe Tribunal declined jurisdiction as the Claimant did not meet its evidentiary burden to prove its alleged control over the Investment.

Other tribunals have similarly held that for a claimant to meet the standard of proof of an alleged trust, it is critical to provide contemporaneous documentation of the trust creation and terms rather than relying solely on materials prepared after the alleged breach.

For instance, in Ampal (RLA-175), the Claimants alleged they beneficially owned the Investment through a trust. Yet they filed no contemporaneous evidence of it, and instead relied on documents prepared years after the alleged breach had occurred said to apply retroactively.

As the slide shows, the Tribunal remarked how no Trustee evidencing the double-blind trust had been submitted to the Tribunal. The Tribunal had no clear evidence on the terms of the Trust or beneficial ownership. And in view of the many missing evidentiary links, the Tribunal concluded that the Claimant had not

discharged his burden of proving he made a protected investment. Similarly, the record in this Arbitration contains no evidence of the terms of this alleged trust, and Tennant Energy's reliance on a document, created years after the alleged breach occurred, does not offer a reliable basis to prove the alleged trust existed.

The Claimant in Gallo (RLA-004) also tried to prove he owned the Investment at the time of the alleged breach with documents created afterwards. The Tribunal rejected this as a clear attempt to establish jurisdiction after the fact.

Writing in 2011, a decade ago, the Gallo Tribunal said it would have expected at least some contemporaneous written evidence to corroborate the Witness's statements about the ownership of the Investment. Yet it found there is none. In an age where almost every human action leaves a written record, it is simply unconceivable that the Claimant has not been able to produce one single shred of documentary evidence confirming the date when Mr. Gallo acquired ownership. No agreement. No contract. No confirmation slip. No instruction letter. No memorandum. No invoice. No e-mail. No file note. No tax declaration. No submission to any authority. Absolutely nothing.

It is equally confounding that Tennant Energy

could provide no contemporaneous evidence of its alleged ownership of the Investment.

Now, Tribunals have also held that where contemporaneous evidence on the record is inconsistent with the Claimant's alleged ownership. It discredits that assertion. In Europe Cement (RLA-180), the Claimant argued that it beneficially owned shares when the alleged breach occurred. Yet the contemporaneous documents that it filed, including Financial Statements, made no mention of the Claimant's alleged ownership.

The Claimant tried to explain this as an oversight, but the Tribunal considered that the Directors of Europe Cement simply overlooked this when signing the Financial Statements seems highly implausible. The Claimant's attempt to explain this as an oversight strains credulity. It all points to the inference that no Share Transfer took place.

The Tribunal also doubted that the alleged transfer happened because it was a substantial monetary transaction, yet no contemporaneous documentation proved it occurred.

In Tennant Energy's case, I will explain that its story that each of the individuals all overlooked making any records of the alleged trust strains credulity, particularly because of the substantial monetary sums

involved.

My final point on the standard of proof is that when witnesses with an interest in the outcome of the Arbitration advance hearsay evidence, international investment tribunals have given little to no weight to such hearsay without corroboration, such as in Helnan (RLA-150) and EDF (RLA-151). Tennant Energy attempted to dismiss these two cases based on the domestic laws of the Respondent State. This is misguided as these investment arbitrations were decided under international law and the relevant investment treaties.

Having addressed the law on the standard of proof, I will now turn to the second main part of my presentation, on the Claimant's assertion that it owned the Investment at the time of the alleged breach through this alleged trust.

Now, it is first necessary to clarify that the Investment at the time of the alleged breach is not Skyway 127 itself. Here, we will just briefly enter confidential session.

(End of open session. Attorneys' Eyes Only session begins.

ATTORNEYS' EYES ONLY SESSION

MR. KLAVER: The Claimant explains that the investment is the intangible property rights in the form of beneficial rights in up to 22.6 percent of Skyway 127's shares, which John Tennant held from June 20, 2011, to January 15, 2015.

The Claimant also states Tennant Travel made an investment once it had the beneficial interest of the Skyway 127 shares in Trust.

PRESIDENT BULL: Sorry, Counsel, may I ask you to stop for a second. I think the webcam has been paused. If you could spare me for a second.

MR. KLAVER: No problem.

PRESIDENT BULL: It is now. Thank you so much.

MR. KLAVER: Okay.

We can leave confidential session. It was a short one.

(Attorneys' Eyes Only session ends.)

OPEN SESSION

MR. KLAVER: Now to support its account that John Tennant orally created a trust, to hold shares for Tennant Travel, the Claimant filed three Witness Statements by John Tennant, Derek Tennant, and John Pennie; a legal opinion from Justice Grignon; and a letter from John Tennant dated 2016, Exhibit C-268. I will show that none of this evidence, individually or collectively, can meet the standard of proof to establish that the Claimant was a protected Investor when the alleged breach occurred for five main reasons shown on the slide:

First, the Claimant's three Witness Statements warrant little to no weight in the absence of reliable evidence corroborating them.

Second, the opinion of Justice Grignon is not relevant to evaluating the evidence.

Third, Exhibit C-268 does not offer reliable evidence of the alleged trust.

Fourth, the Claimant filed no reliable evidence to prove the alleged trust existed.

Fifth, the evidence on the record discredits the Claimant's story about the alleged trust.

Starting with the Claimant's fact witnesses, John Tennant, Derek Tennant, and John Pennie each have a personal interest in the outcome of this Arbitration.

John Tennant and Derek Tennant are members of Tennant Energy. They have ownership interests in the Claimant. They're also members of its Management Board along with John Pennie.

These three witnesses are not impartial to the outcome of this Arbitration. They stand to gain significantly from a potential award in the Claimant's favor. In these circumstances, just as in MAKAE Europe (RLA-205), the Tribunal must look beyond their witness testimonies to determine if there is any contemporaneous evidence on the record that can corroborate their statements about the alleged trust. Without such evidence, their testimonies on the alleged trust warrant little to no weight.

Furthermore, Derek Tennant's and John Pennie's testimonies about the alleged trust are hearsay. Derek Tennant says: "On April 26, 2011, my brother John informed me of his decision to designate Tennant Travel to be the Holding Company."

"My brother John said that he was holding the Shares in Trust for Tennant Travel."

John Pennie says: "John Tennant told me he was holding the Skyway 127 shares as a Bare Trustee for a corporation to be named."

As in Helnan (RLA-150) and EDF (RLA-151), these

hearsay statements about the alleged trust warrant little to no weight in the absence of evidence to corroborate that.

Moving to the opinion of the Claimant's Expert Witness, Justice Grignon. This opinion is based on assumed facts.

As the slide shows, the opinion states at the outset: "I have reviewed the Witness Statement of John Tennant and the Witness Statement of Derek Tennant with the Supporting Documents. The facts that follow are taken exclusively from those documents and I have assumed them to be true." I have assumed the facts to be true.

In discussing the facts, the opinion repeatedly refers to what John and Derek both testify to and what John testifies to. The opinion merely assumed the testimonies of these two witnesses who have a clear interest in the outcome of the Arbitration to be true, and based on that major assumption, the opinion goes on to conclude that under California law a valid oral trust was created.

Yet, just like the Expert in MAKAE Europe (RLA-205), this opinion does not assist the Tribunal in its central task of determining whether John Tennant's and Derek Tennant's factual claims about the alleged trust are true. The Claimant simply cannot meet its burden based on

unsupported assumptions over facts that are critical to this Tribunal's jurisdiction.

Moving to Exhibit C-268, the sole exhibit the Claimant filed in attempt to prove the alleged trust. Curiously, the Claimant did not file this exhibit with its Memorial but with its Reply, its last Submission on Jurisdiction before the Hearing. As the slide shows, the document is dated February 8, 2016, years after the alleged breach occurred. It was also created in contemplation of this NAFTA arbitration. The Claimant explains in its Notice of Arbitration that representatives from Skyway 127 had met with counsel to discuss a potential NAFTA claim on March 16, 2015, 11 months before Exhibit C-268 was written.

Exhibit C-268 even refers to the NAFTA. This is exactly the type of non-contemporaneous material prepared after the alleged breach occurred, in contemplation of arbitration that tribunals in Ampal (RLA-175) and Gallo (RLA-004) found unreliable. Exhibit C-268 does not offer cogent evidence corroborating the Witnesses testimonies about the alleged trust.

This raises the central law in the Claimant's story about its alleged trust: The lack of reliable evidence to prove it. The applicable law in this Arbitration, of course, is NAFTA and international law,

but the Claimant alleged that, under California law, John Tennant created a valid oral trust. As a result, Canada retained Ms. Margaret Lodise as an expert, as she has over 30 years of experience in the specific field of California Trust Law. Her mandate was to advise on how California Trust Law would apply to the available evidence on the record.

Unlike Justice Grignon's opinion, her Expert Report did not assume every factual statement of the witnesses to be true.

Ms. Lodise explained that oral trusts are rarely proven in California due to the high standard of proof. The applicable law on trusts in California, the California Probate Code (R-090), provides: "The existence and terms of an oral trust of Personal Property may be established only by 'clear and convincing' evidence."

"The oral declaration of the settlor, standing alone, is not sufficient evidence of the creation of a trust of Personal Property."

When enacting the law codifying the rules on oral trust, the California Law Revision Commission (R-091) cautioned: "A major problem with an oral trust is the difficulty of proving its terms." There is also a risk of perjury. There is also a risk of perjury, particularly by those who have something to gain.

"The proposed law requires some corroboration in the form of a transfer, earmarking, or written evidence in order to uphold a trust supported by an oral rather than a written Declaration of the settlor. Hence, if the owner of shares of stock makes an oral Declaration that he holds it in trust, the Trust would fail unless there was some written evidence of a transfer in Trust."

California jurisprudence confirms the clear and convincing standard sets a high standard of proof--it's at the high evidentiary threshold, I should clarify.

In 2017, quite recently, California's Fifth Circuit Court of Appeals (R-094) stated: "The clear and convincing evidence test requires evidence clear enough to leave no substantial doubt and strong enough that every reasonable person would agree." Every reasonable person would agree."

In this case, Ms. Lodise considers the primary problem with the alleged trust is the lack of evidence, of its existence, which would meet the clear and convincing standard under California law.

In particular, the Claimant filed no contemporaneous documentation to prove that John Tennant created the oral trust; put the Skyway 127 shares in Trust, designated Tennant Travel as the beneficiary, set the terms of the alleged trust, administer the alleged

trust, or terminated the alleged trust.

The Claimant filed no contemporaneous Financial Statements, corporate records, tax filings, proving the existence of the alleged trust. It filed no contemporaneous e-mails, faxes, letters from the many individuals involved to mention the alleged trust. This could have been John Tennant, Derek Tennant, John Pennie, Jim Tennant, Tennant Travel, Skyway 127. No mention of that trust from any of them.

This afternoon, the Claimant's counsel is almost certain to speak of the alleged trust as a matter of fact, settled. When they do, I implore the Tribunal to consider where is the evidence, where is the evidence of this alleged trust because it is not on the record.

To paraphrase the Gallo Tribunal (RLA-004), in an age where almost every human action leaves a written record, it is simply unconceivable that Tennant Energy was unable to produce a single shred of contemporaneous documentation of this alleged trust. Just as in MAKAE Europe (RLA-205), Ampal (RLA-175), Gallo (RLA-004), Europe Cement (RLA-180), this Tribunal has no reliable evidence before it on the Claimant's alleged ownership of the Investment. The many missing evidentiary links in its case are sufficient to conclude that the Claimant failed to prove it owned the Investment when the alleged breach

occurred.

This is not, however, just a case of missing evidence. The evidence that is on the record actually discredits the Claimant's story about the alleged trust. The Claimant says that the Trust creation date is April 26, 2011, and that John Tennant nominated Tennant Travel as the Trust beneficiary on this date. Yet, in its own Reply, the Claimant said Tennant Travel held a beneficial interest in Skyway 127 since June 2011, not April 2011. And again, Tennant Energy had beneficial entitlement to the Skyway 127 shares since June 2011; and again, these Shares have been beneficially held for the Holding Company since June 2011.

Was the alleged trust even created--allegedly created in April or June? We don't know. It's impossible to know because the Claimant cannot keep its own story straight.

We'll now enter confidential session.

(End of open session. Attorneys' Eyes Only session begins.)

ATTORNEYS' EYES ONLY SESSION

MR. KLAVER: Okay. On the slide we have the Skyway 127 Shareholder ledger for June 9, 2011 (C-116). John Tennant is not even identified as a shareholder on this date. The ledgers show that John Tennant first acquired the Shares on June 20, 2011 (C-117). Yet the ledger for this date and for December 30, 2011 (C-114), makes no reference to Tennant Travel or to the Trust.

These are the few documents we have from the time of the alleged trust with absolutely no indication that it existed. The ledgers reveal that Tennant Travel first received shares in Skyway 127 on January 15, 2015, years after the alleged breach occurred. The Claimant's attempt to explain these discrepancies between its story and the evidence strains credulity.

John Tennant says (CWS-2): "I had assumed that the corporate records of Skyway 127 reflected the fact that I had the Investment for the benefit of Tennant Travel." Yet, just as in Europe Cement (RLA-180), the explanation that every one involved all overlooked making any records of the transfer of beneficial ownership in the Shares of Skyway 127 to Tennant Travel is highly implausible, particularly given the substantial monetary sums involved here.

John Tennant originally lent Derek Tennant

$200,000 on October 19, 2007. The loan was secured with 11.3 percent of Skyway 127 shares. A 10 percent interest per year over three-and-a-half years, the original debt presumably would have exceeded $270,000 when John Tennant demanded to receive the Shares on June 20, 2011.

Unlike the alleged trust, these matters were well-documented. The Claimant filed into evidence documentation on John Tennant's bank account and checks for the original loan (C-264).

The Promissory Note between John Tennant and Derek Tennant's Holding Company, I.Q. Properties (C-265). Skyway 127's acknowledgement of the Promissory Note (C-266). The demand notice that John Tennant wrote when the loan came due in October 2010 (C-267). And the direction from John Tennant and I.Q. Properties to transfer the Shares to John Tennant on June 20th, 2011 (C-267, p. 2).

We can leave confidential session now.

(Attorneys' Eyes Only session ends.)

OPEN SESSION

MR. KLAVER: As this slide shows, John Tennant showed much diligence by documenting and retaining many records concerning the loan and the Shares used as collateral. It is, therefore, incongruous that he would not have documented any details about the alleged trust, which purportedly held those Shares and which he received for a $200,000 debt. Yet, as this next timeline slide shows, the materials the Claimant filed on the alleged trust all derived from years after the alleged breach occurred.

Another gap in the evidentiary record concerns John Tennant's account that his brother, Jim Tennant, simply let John have the company, Tennant Travel (CWS-2). If this change in corporate ownership happened, why couldn't the Claimant provide some documentation of it? Here again, the record contains no written evidence showing that Jim Tennant gave Tennant Travel to John Tennant, or that Jim Tennant held any ownership stake in Tennant Travel from 2011 onwards.

It is also implausible that, as the alleged owner of the holding company Tennant Travel, John Tennant did not ensure that at least some records reflected its beneficial ownership of those Skyway 127 shares.

Surprisingly, John Tennant says: "I never owned

the Shares in Skyway 127 for my personal benefit." This is incompatible with his own statement that he wanted an ownership interest in Skyway 127 if Derek Tennant did not repay the loan (CWS-2). Derek Tennant confirms (CWS-3): "John was always interested in obtaining an interest in Skyway 127."

John Tennant offers no rationale why, after obtaining the Shares that he wanted and received, in full satisfaction of the debt, he would relinquish his beneficial interest in the Shares. It suggests that he chose to receive nothing in return for a $200,000 debt. This story betrays common sense.

John Tennant also says that he wanted Tennant Travel to hold the Shares so they would not get caught up, tied up in a community property dispute. Under California law, income and assets acquired by either spouse during a marriage are generally considered community property of both partners. If the purpose of this alleged trust was to prevent John Tennant's spouse from accessing the Shares, then even if John Tennant had tried to create it, Ms. Lodise explains that, under California law, the alleged trust would have likely violated public policy and, therefore, be invalid (RER-1).

Further more, the notion that the alleged trust served as an asset-protection device, yet John Tennant did

nothing to document the steps he took to protect the assets in trust, leaves major evidentiary gaps in his account.

After reviewing all of the evidence, Ms. Lodise concludes the available evidence does not meet the clear and convincing standard to prove the existence of the alleged oral trust under California law (RER-1). It is not strong enough to conclude that every reasonable person would agree that the alleged oral trust existed, as California law requires. Consequently, the Claimant did not submit evidence that could meet the standard of proof under international law for its claim that it owned the Investment when the alleged breach occurred.

I will now turn to the third and final part of my presentation on the Claimant's assertion that it controlled the Investment at the time of the alleged breach. This will be short because the Claimant offers very limited argumentation on this point and even less evidence.

As explained earlier, the alleged trust--or the alleged investment from 2011 to 2015 is not Skyway 127 itself but the beneficial ownership of a minority of its Shares. Since the Claimant failed to establish that it owned these Shares, its case on control collapses with its case on ownership. Moreover, even if the Tribunal

considered who controlled Skyway 127 at the time of the alleged breach, it was not Tennant Travel.

The Claimant alleges that Skyway 127 was controlled by a voting bloc of John Tennant, John Pennie, and Marilyn Field, John Pennie's wife. Yet the flaws with this claim are at least fivefold:

First, the Claimant was not even part of this voting bloc.

Second, in a clear theme throughout the Claimant's case, it provided no contemporaneous evidence that this alleged voting bloc existed or voted together.

Third, the alleged voting bloc did not even hold a majority of voting shares in Skyway 127.

Fourth, the Claimant provided no written evidence for its claim that GE Energy chose not to vote its 50 percent shareholding in Skyway 127.

Finally, the slide shows the FIT Rules on changes of control over FIT Applicants (R-026). Skyway 127 was subject to these rules. If Tennant Travel had acquired control over Skyway 127 in 2011, then under the FIT Rules, Skyway 127 almost certainly would have been required to notify the Ontario Power Authority of this change of control; yet, it never did tell the Ontario Power Authority that Tennant Travel had acquired control over Skyway 127 in 2011. Clearly, it did not happen.

Accordingly, the Claimant completely failed to substantiate its claim that it controlled the Investment at the time of the alleged breach.

I wish to conclude by noting that the main issue for the Tribunal to resolve concerning Canada's first jurisdictional objection is actually very simple. The Claimant has not filed evidence that comes anywhere close to proving it was a protected Investor when the alleged breach occurred: Under NAFTA Article 1116(1), Canada does not consent to arbitrate this claim. As a result, the Tribunal has no jurisdiction to proceed to the merits.

I would be happy to answer any question from the Tribunal now or later. Otherwise, this might be an appropriate time for the short break.

PRESIDENT BULL: Thank you, Mr. Klaver.

Can I just check if my colleagues have questions for Mr. Klaver at the moment?

ARBITRATOR BISHOP: I have no questions at this time.

ARBITRATOR BETHLEHEM: Neither do I.

PRESIDENT BULL: Good.

Then, why don't we take a 15-minute break, and then we can resume.

(Recess.)

PRESIDENT BULL: Right. We are back on the

record, and I think Ms. Squires you're taking us forward?

MS. SQUIRES: I am. Nice to see you again.

I would like to take the next few minutes to speak to the Tribunal about Canada's second jurisdictional objection that the Claimant failed to submit its claim in accordance with the three-year limitation period prescribed by Article 1116(2) of the NAFTA. As I previously mentioned, the question before this Tribunal in this regard is straightforward: When did the Claimant acquire knowledge, either actual or constructive, of the alleged breach of Article 1105 and loss or damage? If the answer to this question is prior to the Critical Date of June 1st, 2014, then the Claimant's claim cannot advance for want of jurisdiction.

My colleague, Ms. Dosman, will answer the factual questions with respect to this objection shortly, but right now, I will spend a little time addressing the law with respect to Canada's objection. And specifically address some points raised by the Claimant in order to lay the framework for what's to come.

Article 1116(2) of the NAFTA establishes a three-year limitation period for an investor to bring a claim under Chapter Eleven. This standard articulated in Article 1116(2) is a strict limitation period that forms one of the fundamental bases of Canada's consent to

arbitrate disputes under NAFTA Chapter Eleven, as the Feldman Tribunal rightfully noted (RLA-081).

As the text of Article 1116(2) states: "The limitation period begins to run from the date on which the Claimant first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it has incurred loss or damage."

Knowledge that may commence from two possible points in time: When a Claimant first acquires actual knowledge or when it first acquires constructive knowledge.

On the notion of first acquire, I would like to take a minute to address an argument that the Claimant has made and that I believe we will hear more on later today, and that is the relationship between a continuing breach, a composite breach, and the limitation period.

On the topic of continuing breaches, I think it's important to first note that this is not a case of a continuing breach. It involves a single alleged breach of Article 1105 leading to a single source of alleged loss that were incurred on July 4th, 2011, the date the Claimant did not get a FIT Contract. As such, any argument that there is a continuing breach at issue here by the Claimant is incorrect.

Further, the approach to justify the Claimant

that the limitation period is somehow told by a continuing act has been rejected outright by tribunals and should also not carry any weight here.

With respect to the notion of a composite breach, the Claimant has not meaningfully explained how the measures they challenge form a composite breach. Further, while Canada disagrees that the Claimant's characterization, that disagreement is ultimately irrelevant, even if the Claimant was able to explain why we are looking at a composite breach, any such breach would have crystallized on July 4th, 2011. And as Ms. Dosman will explain, the Claimant should have had knowledge of such a breach well before the Critical Date of June 1st, 2014.

And that brings me to my next point: Of critical importance to this Tribunal is the notion of constructive knowledge. Constructive knowledge is measured based on what a prudent Claimant should have known or must reasonably be deemed to have known, it is to be assessed on an entirely objective standard. The Claimant cannot merely assert when it first acquires knowledge. As the Grand River Tribunal put it (RLA-070), constructive knowledge of a fact is to be imputed to a person if by exercise of care or diligence, that person would have known the fact. All three NAFTA Parties agree

on this point.

It is constructive knowledge to which Canada wishes to draw the Tribunal's attention. The Claimant has taken up a lot of space in its submissions attempting to demonstrate that it acquired actual knowledge of the alleged breach of Article 1105 after the Critical Date, but these arguments are irrelevant, even if they are true. It is a constructive knowledge that it had prior to the Critical Date that is detrimental to Tennant Energy's claims, and as we proceed through the next week, this is where the Tribunal should focus its attention. Indeed, as Ms. Dosman will explain, the Claimant should have had knowledge of each of the Measures it alleged breached the NAFTA prior to the Critical Date.

Further, even if certain facts could only be learned of by the Claimant after the Critical Date, such facts do not impact this Tribunal's jurisdiction unless they form the basis of a new cause of action. The Claimant has failed to dispel Canada's argument that as the Spence Tribunal held (RLA-136), the limitation period starts running when a claimant is deemed to have first acquired knowledge of the breach that forms the essence of their claim.

The Claimant cannot ignore facts underlying the alleged breach, that it should have acquired knowledge of

prior to the Critical Date, and focus only on additional factual details, as the Claimant has put it, that it allegedly only became known to it after the Critical Date in an attempt to reset the limitation period. This is critical. As the Tribunal in Indian Metals held (RLA-142), once an investor has knowledge that it is confirmed by a particular State act, alleged to breach an obligation in a Treaty, additional conduct relating to the same underlying terms cannot, without more, renew the limitation period. If the three years have lapsed from first knowledge, then that particular investment dispute cannot be revised. The Spence Tribunal (RLA-136) similarly noted that acquiring further knowledge of one's claim does not generate a newly independent actionable breach separate from the conduct that preceded it of which the Claimants were aware.

The Ansung Tribunal (RLA-161) has already held that such a litigation strategy must be rejected, where it noted that the endless parsing of a claim into even finer subcomponents of a breach over time in an attempt to come within the limitation period, cannot be sustained. To borrow from the words of the Spence Tribunal, according to the Claimant's recently derived knowledge, the way that they propose would turn the limitation clause on its head.

The legal position put forward by the Claimant

in this regard must be dismissed. It is again not put forward a single authority that supports this attempt to splice up its claim in a manner that resets the limitation period or starts it afresh. As the Grand River Tribunal (RLA-070) cautioned, such an approach would render the limitations period 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.

I will close my arguments this morning with one final point, and I think it's a very important one. The standard articulated in Article 1116(2) is a strict limitation period that forms one of the fundamental bases of Canada's consent to arbitrate. This is consistent with the very purpose of 1116(2) which provides legal predictability and certainty by ensuring that the NAFTA Parties are not forced to defend stale claims for which evidence may no longer be readily available or which require witnesses to recollect events that are long passed. The limitation-period provision ensures that any alleged breach of the NAFTA obligation will be addressed promptly rather than to be allowed to linger for a decade. As all three NAFTA Parties have noted, the limitation period guarantees a degree of certainty and finality. It

should not be easily set aside and certainly not because of a litigation strategy put forward by a Claimant to suit its particular need. As the Grand River Tribunal (RLA-070) noted, agreements like the NAFTA, which are intended to protect international investments, are not substitutes for prudent and diligent inquiries by a Claimant.

With that, it ends my time this morning. I will now yield the floor to--

ARBITRATOR BETHLEHEM: Before you go, Ms. Squires, I would just like to clarify a couple of points:

First of all, can you just clarify, in case I sort of missed this with all the dates that have been thrown about, I understood you to say that the--perhaps let me ask you: When do you say that the three-year limitation period ends? In other words, what's the Critical Date for our purposes?

MS. SQUIRES: That would be June 1st, 2017.

ARBITRATOR BETHLEHEM: And why--

MS. SQUIRES: 2014. Sorry, 2014.

ARBITRATOR BETHLEHEM: And why is it June 1st, 2014, when you have, I think, on a couple of occasions now, said that the date of the alleged breach, which is uncontroversial between the Parties--I'm paraphrasing you--was the 4th of July 2011 because that's the date when

the Claimant alleges that it didn't get the FIT Contract. So, how do you get to 1st June when it's the 4th of July, 2011? Now, this may not make any difference in terms of 15th of August 2015, but I would just like to be clear on the dates.

MS. SQUIRES: Absolutely.

The Claimant's Notice of Arbitration was filed on June 1st, 2017. The NAFTA requires--has a three-year limitation period, so if the Claimant has acquired knowledge, either constructive or actual knowledge, more than three years before it submitted its claim, that it is, in fact, time-barred. So, the three year is a count back from the Date of Submission of its Notice of Arbitration on June 1st, 2017 to June 1st, 2014.

ARBITRATOR BETHLEHEM: Okay. So, that's what I want to just test you with, please. Because you seem to be counting back, and I wonder whether you shouldn't be counting forward? Because if you say that the--or you at least imply--that the date of constructive knowledge would be the date of the alleged breach, that's the 4th of July 2011, why aren't you counting three years from the 4th of July, 2011 to the 4th of July, 2014?

MS. SQUIRES: I think in effect you might end up with the same result there. The Claimant had constructive knowledge of the breach, in our view, on July 4th, 2011

when that breach occurred. The Claimant then has three years to submit its claim to arbitration which would, in effect, bring it to July 4th, 2014, and it did not file its claim until June 1st, 2017.

ARBITRATOR BETHLEHEM: I understand your point that it's not going to make any different because it only filed--it only filed subsequently, but I just want to get the dates correct. And as I say, I understood you to be counting back, and it seems to me that you should be counting forward in terms of the methodology, so it's from the date at which they could only, in terms of constructive knowledge, have acquired knowledge of the breach that must be 4th of July 2011, so presumably you must be counting forward three years from that point.

MS. SQUIRES: That's right. Their claim would have--in order to comply with Article 1116(2), they would have to have filed their claim by July 4th, 2014.

ARBITRATOR BETHLEHEM: Right.

The second question that I have is that you said quite properly that there are, as it were, two alternatives that they have actual knowledge or a date of constructive knowledge, and you've addressed the issue of knowledge of the alleged breach. You have done me the courtesy of quoting Spence (RLA-136) all over the place, so I suppose I just want to test you on this.

1116(2) actually talks about something more, and you haven't yet addressed that, but maybe you're going to leave that to your colleague because it talks about Investor first acquired, that's your actual knowledge--or should have acquired--that's your constructive knowledge; knowledge of the alleged breach; and knowledge that the Investor incurred loss or damage.

And one of the issues that was addressed in Spence (RLA-136) in some detail from Paragraphs 211 through to 213 is that the Investor may acquire knowledge of breach at some point but not knowledge that it has suffered loss at that point, and it has to acquire knowledge of both, so you may wish to defer this or say that your colleague is going to be addressing it, but I would like you to at some point come back to me on that point, the knowledge of the loss and the extent of the knowledge of the loss that's necessary.

MS. SQUIRES: Yes, exactly. I think my colleague, Ms. Dosman, will speak to this in a bit greater detail in terms of the facts, but our position is that the Claimant had knowledge of loss on July 1st--July 4th, 2011 as well. At the outer most possible date, it would be the end of the FIT Program for large-scale projects which was in 2013, June of 2013, for loss, but our position, as Ms. Dosman will explain, is that it was on July 4th, 2011.

In terms of the amount of knowledge that has to be known, a Claimant must know that it has incurred some loss. The particular quantification of that loss does not need to be known at that point in time to start the clock running, the Grand River Tribunal (RLA-070) was fairly clear on that point. But as I said, Ms. Dosman will come back to the factual issue on loss shortly.

ARBITRATOR BETHLEHEM: Okay. Thank you very much.

ARBITRATOR BISHOP: I would like to ask a question or two, if I may.

Article 1116(2) which you have on Slide 85, if you want to put that up, speaks, as we can all see, of actual knowledge or constructive knowledge of the alleged breach and knowledge that the Investor has incurred loss or damage. And I want to ask about the constructive knowledge issue which you addressed. You said it's an objective standard that's imputed if there is a need for--excuse me, if there is a requirement of an exercise of care or diligence, the facts would have been known.

But since we're talking about knowledge, doesn't there have to be proof of a trigger or a suspicion in order to trigger the exercise of care or diligence? What is it that would have triggered the Claimant to do an investigation by which it would have come into possession

of the knowledge of the alleged breach? I think that's my question, if you can address that issue.

MS. SQUIRES: Absolutely. And I don't mean to dodge the question at all but I think Ms. Dosman is going to answer your question very shortly. It's a factual question as to what knowledge was available to the Claimant, and as she will demonstrate through various public documents and through the Mesa proceedings there was, in fact, a sort of trigger to put the Claimant on notice of a potential claim, and I think she will address your questions quite fully in just a moment.

ARBITRATOR BISHOP: Okay. That will be fine.

My other question is this: You talk about July 4, 2011 when it had not received a FIT Contract in June 2013 when the FIT Program ended, and you alleged that, as the date of breach. But if I understand the Claimant's case, the Claimant's case is that it puts its case in terms of why it did not receive a FIT Contract, and consequently the key knowledge is the knowledge of why it did not receive this Contract. And I don't know whether you address that issue in terms of the statute of limitations that is not just the knowledge of when the FIT Program ended or it didn't receive a contract, but the knowledge of why it didn't receive it, at least on its case, and whether you are the proper person to address

that or someone else, I would like for someone to address that during the course of the week.

Thank you.

MS. SQUIRES: Yes. That will be, again, fully addressed by Ms. Dosman. I'm in the wrong hot seat right now. But I will say "yes," generally speaking, a Claimant would need to have a sense that there has been some wrongdoing. I don't think the intention is ever to have claims being filed without any kind of suspicion of wrongdoing. It would be a very great career strategy and a lot of work, but no, certainly not. And as Ms. Dosman will explain, in this particular case, there was certainly a lot of information available to the Claimant.

ARBITRATOR BISHOP: Thank you very much. I appreciate it.

MS. SQUIRES: All right. So, with that, I will give you the lady that has the answers to all your question, apparently, Ms. Dosman.

ARBITRATOR BISHOP: You come with a lot of fanfare, Ms. Dosman.

MS. DOSMAN: I was just going to say, expectations are high.

And I would like to invite the Tribunal to ask questions at any time. I'm not fussed about when that happens.

So, good day, Members of the Tribunal. You have heard from Ms. Squires about the legal principles applicable to the three-year limitation period. And as she mentioned, I will now turn to the facts to examine the record and see whether there is any evidence to support a finding that the Claimant first acquired, or should have first acquired, knowledge of the alleged breach and loss only after the Critical Date.

I will do so in three parts:

First, I will recall the nature of the breach and the claim alleged by the Claimant.

Second, I will go through each piece of information on which the Claimant relies to argue that it could not have made its claim, that is to say, it could not have known why it did not receive a FIT Program Contract and show that the information was either public prior to the Critical Date or cannot, as the Claimant suggests, reset the limitation period.

Third, I will provide a summary of the constructive knowledge that may be imputed to the Claimant prior to the Critical Date and show that it covers the entirety of the Claim.

For that reason, the Tribunal lacks jurisdiction for the second independent reason that the Claimant has failed to meet the requirement of NAFTA Article 1116(2).

REALTIME STENOGRAPHER: I'm sorry, I'm hearing some background noise. Can someone mute their microphone, please. Okay, let's try it again. Go ahead.

MS. DOSMAN: Let's look at the alleged breach and claim.

As you can see on the slide (#98), the Claimant seeks damages for a breach of NAFTA Article 1105. The Claimant instructed its damages Expert that the primary claim in this Arbitration relates to unfair treatment, covertly and systematically provided in 2011 by Ontario, to improperly allocate FIT Contracts. And as you have seen, in its Reply, the Claimant confirms that there is no question that this claim is about the unfair and wrongful administration of Ontario's FIT Program.

Ordered by the Tribunal to clarify its claim, the Claimant also referred to allegations with respect to the Korean Consortium and to the alleged spoliation of documents.

Canada has shown in its written pleadings that the Measures challenged by the Claimants were also challenged by another Claimant, Mesa Power, which launched a NAFTA arbitration in 2011. As you can see, in 2011, Mesa Power introduced its case as one about "unfairness, abuse of power, and undue political influence in the regulation of renewable energy in Ontario." (R-058) Six

years later, the Claimant introduced its claim by alleging the "blatant disregard of fairness in the allocation of multi-million dollar renewable energy contracts." (Claimant's Memorial)

In 2013, Mesa Power alleged that Ontario gave unfair discriminatory preferences to its competitors resulting in Mesa Power not receiving a FIT Program Contract (R-013). Four years later, the Claimant repeated the allegation that Ontario provided selective advance access to competitors resulting in the Claimant not receiving a FIT Program Contract (Claimant's Memorial). The name of the Claimant aside, it's not possible to tell which allegation is from which case. The allegation--the essence of the Claim is the same. An alleged breach of NAFTA 1105 based on Ontario's allegedly wrongful administration of the FIT Program resulting in the Claimant not receiving a contract on July 4th, 2011.

Turning to the second part of my presentation, what does the evidence show about the Claimant's knowledge, actual or constructive, of the alleged breach prior to the Critical Date? Let's recall that the Claimant has acknowledged that the Measures themselves underlying its claim took place prior to the Critical Date. And Canada's pleadings discuss in detail the extensive allegations and information in the public domain

regarding these Measures that were public prior to the Critical Date, including in the press and in public documentation about the FIT Program.

You will see I will be referring to Mesa Power's allegations throughout my submissions, but I wish to underline that Mesa Power's claim itself was informed by extensive public information, and I will refer you to Paragraphs 126 to 154 in Canada's Memorial on Jurisdiction, for example.

You will be relieved to hear that we don't have the time to review all of the relevant pre-Critical Date public information today. Instead, I would like to spend our time together focusing on the specific pieces of information on which the Claimant relies to argue that it could not have brought its claim prior to the Critical Date, and I hope here that we'll get into the substance of Arbitrator Bishop's questions.

These pieces of information on which the Claimant relies are all extracts of testimony or arguments based on characterizations of testimony from the Mesa Power Hearing. In order for the Claimant to meet its burden under NAFTA Article 1116(2), these pieces of information must meet two thresholds. Of course, the information must not have been known or knowable prior to the Critical Date. That is, the information must actually

be new. And even if that threshold is met, the information must also be sufficiently different from pre-Critical Date information so as to found a new claim.

With those criteria in mind, here are the five pieces of alleged additional information on which the Claimant relies:

The alleged Breakfast Club;

The allegation that International Power Canada obtained preferential treatment;

Alleged special meetings involving senior Ontario government officials;

The allegation that the Ontario Ministry of Energy decided not to follow the FIT Program's terms; and

Ontario's decision not to allocate all the available power in the Bruce transmission area.

Elsewhere in its pleadings, the Claimant points to four particular facts that it says helps to clarify its claim, and it calls these "factual antecedents" to the Claim. Here on the slide, you will see the four alleged factual antecedents, an alleged delay in the award of FIT Contracts because of favorable treatment provided to the Korean Consortium;

An allegation of unfair program information, including secret meetings and a decision not to award all available transmission in proofs; and

Allegation of unfair administration of the FIT Program by the secret Breakfast Club; and

Spoliation of documents.

As you can see, there is a fair amount of repetition here, so for the sake of good order and completeness, I have consolidated the lists and removed the duplicative items.

Here then are the seven pieces of information on which the Claimant relies to assert that it could not have made its claim prior to the Critical Date. I propose to take the Tribunal through the list and show that these items were either public prior to the Critical Date or are so similar to pre-Critical Date information that they cannot found an independently actionable claim capable of restarting the limitation period. Let's look at Item 1, delay in awarding FIT program Contracts because of the Korean Consortium receiving special benefits.

What exactly is the Claimant's complaint here? It is that the Korean Consortium received special benefits such as priority access to transmission, extensions of time, and tolerance of so-called "predatory behavior." But the record shows that the Claimant could have made these allegations prior to the Critical Date based on publicly available information.

First, the priority access given to the Korean

Consortium and the reservation of transmission capacity were clear from the Ministerial directions of April 1st, 2010 (C-139) and September 17, 2010 (R-043). As well as from the 2011 Auditor General's report (R-002). All of this information was public prior to the Critical Date.

And as you can see, the allegations made by Mesa Power and the Claimant regarding the Korean Consortium's priority access are identical.

Second, it was public knowledge that the FIT Program was delayed because of the Korean Consortium's need to finalize connection points: The 2011 Auditor General's report (R-002) stated that the timely connection of other generators was delayed because the OPA could not start to assess the transmission availability until the Consortium finalized the connection point.

Third, the fact that the GEIA, that's the Green Energy Investment Agreement (C-210) with the Korean Consortium, was renegotiated, and the fact that the Korean Consortium was granted an extension, were made public in the Ontario Auditor General's report (R-002).

Finally, the evidence shows that the Claimant should have known of alleged predatory behavior by the Korean Consortium prior to the Critical Date. Mesa Power had already made the allegation, which was public, in 2013 that the Korean Consortium was improperly buying up

lower-ranked projects from the FIT Program (R-013).

And I should add that the Claimant had actual knowledge of the Korean Consortium's practice of purchasing lower-ranked FIT Program projects. You will see at Paragraph 59 of the Witness Statement of Mr. John Pennie that he states that the Claimant itself attempted, albeit unsuccessfully, to sell Skyway 127 to the local partner of the Korean Consortium back in 2010.

Sufficient information was available to the Claimant prior to the Critical Date for it to make a claim based on the fact that it was allegedly wronged based on allegedly preferential treatment provided to the Korean Consortium. This so-called "factual antecedent" was public prior to the Critical Date, and it cannot, in any event, support an entirely new claim for breach of the NAFTA.

Turning to Item 2--

ARBITRATOR BISHOP: Before you go on, could I ask one quick question. You rely to a fair extent upon the 2011 Auditor General's Report (R-002), but my question to you is: Why should the Claimant have reviewed that Report in 2011, 2012, 2013? What would have directed its attention to that Report specifically?

MS. DOSMAN: Sure.

I think the context here, and it appeared on an

earlier slide (#104) was quite extensive treatment in the press, including in the mainstream press, about allegations that the Korean Consortium was receiving preferential treatment, that it was getting special favors, as well as the fact that Mesa had launched an arbitration.

So, both Mesa and the Claimant were Investors, or alleged Investors, in the renewable energy market in Ontario which was going through, you know, fairly significant changes.

So, it's our view that the Claimant would have been on notice, at least that it should have made further inquiries. So, in the face of press reporting about alleged improprieties, or alleged problems in the FIT Program and in the FIT Program's relationship with the GEIA or the relationship with the Korean Consortium, that should have triggered for a reasonable potential Claimant, a reasonable Participant in this market, further inquiries what is Mesa Power saying, what are they saying about what was unfair about the FIT Program; what's happening in terms of investigations into these issues?

The Auditor General's report (R-002) is an important document that treated exactly those issues, what's happening in the Ontario renewable energy market, so that would have been, I think, one of the public

documents that the Claimant could have referred to.

And I should, of course, add that the Claimant, you know, admits that it knew that the Mesa Power Arbitration was ongoing, so all of the documents, all of the allegations that were made in that case prior to the Critical Date, you know, even one of them, let alone the mountains of allegations that were public, should have triggered, you know, a duty to inquire on the part of this Claimant.

ARBITRATOR BISHOP: Thank you.

ARBITRATOR BETHLEHEM: Ms. Dosman, may I just follow up on Mr. Bishop's inquiry and just probe a little bit about sort of the consequences of someone else bringing a case.

MS. DOSMAN: Sure.

ARBITRATOR BETHLEHEM: Because it seems to me that you're saying that when someone else brings a case, the whole world is on notice, at least, let's say reasonably so if it's public. Therefore, a clock starts to run at least in terms of due diligence inquiries. Is that what the import of your argument is, that the minute someone else in the universe out there who's sort of operating in the same economic space, brings a case, that has got to trigger an inquiry because you have been put on notice and your three-year clock starts to run. That's

quite an expansive statement.

MS. DOSMAN: No, and I think we should break that down into a couple of components.

So, no, you know, one item happening in one part of the universe doesn't trigger--not everyone is forced to read Global Arbitration Review, for example. That said, on the facts of this case, where Skyway 127 knew--admitted that it knew at the time that Mesa Power had brought a claim; that this was not a low key claim. This was reported in the mainstream press, so anyone reading their morning newspaper would have read that Mesa Power had brought a claim. It was also reported in the specialized press in exactly this economic sector.

So, Skyway 127, which was a neighbor to Arran, the Project that Mesa Power was concerned with, yes, did have constructive notice of the Mesa Power Claim. And, in fact, actual notice. Mr. Pennie states he knew that the NAFTA--that Mesa Power had brought a NAFTA challenge.

And we just think it's quite remarkable that following that type of widespread coverage and exact treatment of the exact same process that this Claimant claims caused it harm, that is to say, alleged unfairness in the process leading up to the award of those contracts, this Claimant would have been laser-focused on, you know, we didn't get a contract, I wonder why? Oh, I see that

this other--our neighbor and our competitor has brought a claim regarding this exact same process.

ARBITRATOR BETHLEHEM: So, I think I understand that sort of ultimately your argument is going to be you'll put it in terms of, you know, either individually or collectively but it's the sort of accretion of incidents. But I'm wondering why, you know, a company of the person who's been put on constructive notice because something has happened in the sort of a commercial space in which they're operating because a claim has been brought, might not legitimately say to themselves, "Well, we may be affected by this as well. We should wait to see how this plays out and what comes out of these other proceedings." And here we know that Mesa Power Final Award (RLA-001) was issued in March 2016.

So what I'm trying to--what I would like to probe at is just whether you are building up sort of layers of your pyramid and this is just one of the layers or whether you're actually saying to us, because they're on notice, they should have brought their own claim, which seems perhaps to be counterintuitive and cut across Ms. Squires' comments about, you know, the purpose of these limitation periods as being, you know, an economy of efforts to engender certainty and so on.

MS. DOSMAN: Well, I would maybe just respond to

that very last point that, you know, it would not make policy sense for claims to be fully breaches, alleged breaches, to be fully litigated; and then, as a result of whatever that result, for new claims to arise.

So, you know, independently of Mesa Power, there was--if we're just thinking about the Claimant here, there were rule changes in June of 2011 that it says were unfair, and then it failed to receive the Contract a month later in July of 2011. It would then have thought, why; right? That's the whole question here. It's saying, "Well, why didn't we receive a contract?"

It would have looked around into, you know, the publicly available information and seeing that someone else was alleging that the process leading up to it was unfair.

I don't think it was required. The breach was--the breach of which it complains occurred back in July of 2011; that is to say, the breach is not a determination by another tribunal years down the line about whether or not a breach had occurred back in the day, if that makes sense. Exactly. It's not three years from when you know you have a winning case. It's three years from when you know or at least you have a suspicion that there has been a breach and resulting loss.

You know, Tennant Energy here could have filed

an NoA and then sat on it for years and waited to see what happened with Mesa, but you precisely cannot wait and see for years and years, and then depending on what happens later, refresh your breach. The breach happened on an objective date, as we've heard. The question here is whether there was enough information in the public sphere to trigger a duty to inquire or investigate. Here we know that they, the Claimant's proponents, were on notice--they knew about Mesa Power--and in that case, yes, they would have known that someone else was saying that their NAFTA 1105 right were breached on June 4th, 2011, exactly like the Claimant.

ARBITRATOR BETHLEHEM: Thank you.

MS. DOSMAN: Is that--have I covered the entirety of your question, though?

ARBITRATOR BETHLEHEM: I don't want to subvert you from your arguments.

MS. DOSMAN: No, I mean, I prefer to be subverted. I would like to know what--

ARBITRATOR BETHLEHEM: I'm sure we will be revisiting this. I'm just trying to probe how central Mesa Power is to your argument because both in this hearing and previously in the pleadings, Mesa Power seems to be looming perhaps larger than life. And from what I take it from what you've just said, you are focused on the

events around 4th of July 2011. I take from your response that Mesa is, if you like, part of the surrounding noise. But as I say, I don't want to subvert you from the other important parts of your argument on which we want to hear you.

MS. DOSMAN: No, no, and it's a fair point, yes.

What was revealed in the Mesa Power arbitration was part of the publicly available noise that would have been on the Claimant's radar or should have been on the Claimant's radar in this case.

Okay. Let's go back to Item 2.

ARBITRATOR BISHOP: Sorry, can I just ask one question about constructive knowledge, and I apologize, but I just want to make sure I understand the legal requirements.

As I understand "constructive knowledge," there are two possibilities of showing constructive knowledge. One would be showing that a Claimant had sufficient, actual knowledge to create a suspicion, not necessarily to know all of the elements of the breach but to create a suspicion sufficient to put them on inquiry.

And the second would be the possibility of the key facts being so notoriously known in the public domain that anyone would have known of them and been on inquiry. Is that analysis correct as you understand it, or do I

have that wrong?

MS. DOSMAN: As I understand it, that's correct. There is the possibility of extreme notoriety. There's also the possibility of there being enough to trigger a duty to inquire.

ARBITRATOR BISHOP: Enough actual knowledge to--

MS. DOSMAN: Well, enough constructive knowledge, enough--enough in the public domain to trigger a requirement to investigate.

ARBITRATOR BISHOP: Yeah. And I think that's my question, that, as between those two alternatives that I laid out, your case is simply the second aspect of it, that the information was so notorious in the public domain that that, in itself, should have required inquiry; is that correct?

MS. DOSMAN: That's certainly part of it, but we always have here evidence of, specifically, actual knowledge on the part of Mr. John Pennie of the existence of this other arbitration challenging exactly the same measure.

ARBITRATOR BISHOP: Okay. I understand. Thank you very much.

MS. DOSMAN: And I do want to just reserve, in case I have messed that up, for Ms. Squires to come back and tell you otherwise about that specific legal point.

My knowledge is very much focused on what was known about International Power Canada back before the Critical Date, so let's return to that.

So, we've seen from the record that allegations that improprieties and unfairness in favor of FIT Program competitors were made as early as 2011 and were explored in detail in the press, in public filings in the Mesa proceedings.

What the Claimant is saying here is that the limitation period should be renewed because it learned the identity of another alleged political favorite. So Mesa Power had challenged these Measures, had alleged a breach on the basis of favoritism being granted to NextEra. But there's nothing specific to NextEra as opposed to IPC or any other competitor that distinguishes the allegation with respect to IPC from the very public allegations of political cronyism that were public prior to the Critical Date. Let's just explore that a little bit.

So, Mesa Power initially challenged the unfair treatment of NextEra and Pattern Energy, which was the local partner of the Korean Consortium. Having made it's claim, it went on to develop its case and its list of other FIT Program components that allegedly benefited from this unfair treatment. And in dismissing the Mesa Power's claims on the merits, the Tribunal explicitly referenced

IPC alongside NextEra as an alleged beneficiary of special treatment (RLA-001).

And I refer to this simply to note that the scope of Mesa power's claim regarding alleged favoritism in the allocation of FIT Contract was not limited to NextEra but, rather, included alleged favoritism to other FIT Program competitors.

The Claimant could have done the same thing. It could have alleged that there was unfairness based on what it knew and further developed its claim to discover additional names of alleged political favorites. But the Claimant didn't. It waited for another six years before submitting its claim.

And even if, for the sake of argument here, the name of another specific alleged competitor could reset the limitation period, I would like to show you that the Claimant could have made this allegation with respect to IPC, International Power Canada, prior to the Critical Date. What I would like to show is that the allegation that the June 3rd rule changes to the FIT Program were unfair could have also identified IPC as an alleged beneficiary of that rule change, alongside NextEra, way back in 2011. So, just bear with me on the details here.

Back in April 2010, Ontario announced the first round of FIT Program Contract awards. And then in 2010,

in December, it released the rankings of the remaining projects from the launch period that had not received contracts in April of that year.

I'd like to take us to Exhibit C-104. This is the December 2010 rankings of launch period applications for FIT Program contracts in various transmission areas. This slide shows excerpts from the rankings for the Bruce transmission area. Boulevard, which was a subsidiary of NextEra, had ranked projects, Goshen and East Durham, and you'll see those in green, as to Skyway 127 in blue, and IPC in yellow.

The next slide shows Page 6 of the same document (C-104) and shows the rankings in the "West of London" area. IPC had ranked projects in yellow, as did NextEra in green.

So, as of December 2010, IPC, NextEra, and Skyway all had projects on the priority waitlist that were not awarded FIT Contracts.

I'd like to turn now to Exhibit C-176. This is the June 3rd, 2013, direction from the Minister to the OPA. What did this direction do? Paragraph 1 allowed connections which required paid upgrades by FIT Program proponents.

Paragraph 3 allowed connection point changes for projects in the "Bruce" and "West of London" areas.

Paragraph 4 capped procurement in the Bruce area at 750 megawatts.

And Paragraph 5 did the same for West of London at 300 megawatts. These directions were public, of course, as were the accompanying changes to the FIT Program Rules. Let's move forward now to our date of July 4th, 2011, when FIT Program contracts were awarded. This is Exhibit C-25, and it sets out the projects that awarded contract in the "Bruce" and "West of London" areas.

NextEra, Boulevard and IPC were awarded contracts. Skyway 127 was not. And a comparison with the December 2010 list (C-104) shows why, and you can see, in accordance with the 3rd June direction, NextEra switched transmission areas for Blue Water and Jericho projects from West of London to Bruce, and it paid for an upgrade for its Goshen project. Those three projects were awarded contracts. IPC's Contract projects remained in the "West of London" area, and two of its projects were awarded contracts. And Skyway 127, as we know, was not awarded a contract.

So, by July 4th, 2011, Tennant Energy knew or should have been known that NextEra, IPC, and Skyway all had projects that did not receive contracts in April 2010; that the rules changed as a result of the June 3rd, 2011,

direction (C-176); and that on July 4th, 2011, NextEra and IPC did, in fact, receive contracts whereas Skyway did not.

When it submitted its claim in 2011, Mesa Power named NextEra as a competitor that allegedly benefited from this process, but IPC could have been named then as well since they both won contracts at the same time following the same rule change.

The Claimant itself acknowledges as much in its Memorial. Stating with respect to the June 3rd, 2011, rule change, that "two politically connected companies benefited from this sudden and drastic rule change," identifying both NextEra and IPC.

So, this item fails the test. The identification of IPC, an alleged political favorite, in addition to other previously identified political favorites, does not reset the limitation period; and, had it wished to do so, the Claimant could have made this specific allegation with respect to IPC to the Critical Date.

I'd like to move, barring any questions, to Item 3, the Breakfast Club.

The Claimant alleges that the identification of a meeting as the Breakfast Club constitutes new information that can reset the limitation period.

However, there is nothing different here from other allegations of political favoritism and secret meetings that were public long before the critical date.

Mesa Power too alleged there were secret meetings of senior government officials that rendered the FIT Program unfair. Mesa Power developed its claim, and the Mesa Power Tribunal considered all the evidence on the record, including the nickname of the meeting, the "Breakfast Club," and went on to allegations of systemic benefits to other fit program proponents as unfounded.

Regardless, the Claimant has not shown why the nickname of a meeting alters in any way the previously public allegations of illicit meetings at which other FIT Program proponents were allegedly favored. It's an insufficient basis on which to make a new NAFTA claim.

Next item, Item 4. The allegation that Ontario failed to follow the FIT Program's terms or that the June 3rd, 2011, direction was unfair, could have been made prior to the critical date. It is not new information. Mesa Power made almost identical allegations prior to June 14 regarding the alleged failure to follow the process set out in the FIT program rules, and unreasonable, unforeseeable, and unfair rule changes that benefited competitors with preferential access (R-013).

As you can see on the following two slides,

which we'll go through very quickly, Mesa Power's pre-Critical Date allegations regarding the June 3rd, 2011, rule changes and those of the Claimant in 2017 are interchangeable.

Perhaps to go back directly to Arbitrator Bishop's question, the Claimant is saying it cannot have it--didn't know why it wasn't awarded a contract on the basis that there was this decision not to follow the FIT Program's terms, but it could have known that prior to the Critical Date. All of the information was public.

Item 5. The allegation of special meetings between senior Ontario government officials and senior wind power corporate officials. Here, too, allegations of improper secret meetings that influence the award of FIT Program Contracts were in the public domain prior to the Critical Date. For example. In documents that were public prior to the Critical Date (R-013), Mesa Power alleged that NextEra had advance notice of the rule change and that other competitors had private and secret meetings with the governmental authority.

What the Claimant is saying here is that the existence of one meeting as opposed to other meetings involving senior government officials resets the limitation period. In Canada's submission, that cannot be right. There is nothing separately actionable about one

alleged improper meeting as opposed to another when both were for the same alleged purpose--that is, granting special treatment to political favorites--and where both have the same alleged effect--that is, unfair awarding of FIT Program Contracts.

Item 6, the decision not to allocate all the available power transmission to successful FIT Program Applicants. The Claimant's allegation that Ontario decided not to allocate all available power transmission is also not new information. It was on the public record as of June 2011 (C-176), three years prior to the Critical Date.

In December 2010, the OPA stated that 1200 megawatts of additional capacity would be made available by the Bruce to Milton transmission line. You can find that in C-104. However, in the public direction of June 3rd, 2011 (C-176), the Minister of Energy directed the OPA to cap remaining procurement under the FIT Program at 1,050 megawatts, 750 in Bruce and 300 in West of London; that is to say, in June 2011, Ontario stated that it was limiting the remaining FIT Program for procurement to 1,050 megawatts less than previously announced. Had it wished to do so, the Claimant could have made an allegation of breach based on this information prior to the Critical Date.

And finally, the last item, alleged spoliation of documents. The Claimant's that Ontario withdrew or suppressed relevant documents is pure speculation. The Claimant has presented precisely no evidence linking Ontario's handling of documents with the on-shore FIT Program generally or with its claim in particular. If this allegation is considered, however, the record shows that the Claimant could have made it prior to the Critical Date.

The Claimant relies here on allegations related to Ontario's decision to cancel two gas plants in 2010 and 2011. Ontario's treatment of documents was debated publicly in the Ontario Legislature, was extensively documented, and the Ontario Privacy Commissioner's Report (R-003), and was reported in the press (C-183, C-184), all prior to the Critical Date. Mesa Power itself raised issues related to documents and, in so doing, it relied on those same news articles that were published prior to the Critical Date.

That brings us to the end of the list of the Claimant's alleged additional information or factual antecedents. Not one of these items meets the two thresholds of being unknowable prior to the Critical Date and sufficiently different from pre-Critical Date information so as to start a new three-year limitation

period.

You may have noticed that I haven't to date yet addressed the knowledge of loss component of Article 1116(2), and that's because the Claimant acknowledges that it had actual knowledge that it had lost out on the FIT Program in 2011, and consistent with this, the Claimant has quantified its damages based on its failure to receive a FIT Program Contract in 2011. At the very outermost, the Claimant cannot date its knowledge to any later than June 12, 2013, when Ontario ended the FIT Program for projects of Skyway's size.

I'd like now to move to the third and final part of my presentation, a comparison of the Claimant's Claims with the knowledge that must be imputed to it prior to the Critical Date. And in so doing, I'd like to come back to the discussion we were having earlier of constructive knowledge because here it's important to note that the Claimant and its executives were not passive observers in the Ontario renewable energy market. They allege that they were experienced investors and developers, ask they've testified that they knew the Mesa arbitration was ongoing, meaning that they were on notice precisely of an alleged breach of Article 1105 with respect to the allocation of Contract under the FIT Program. Mr. Pennie says that he knew Mesa Power had raised a challenge (CWS-

1), but Mr. John Tennant and Mr. Derek Tennant say they were not aware that they would have any reason to go to those hearings (CWS-2, CWS-3).

This is remarkable, given that the Mesa Power Claim was brought by a direct competitor of the Claimant, regarding transmission on the same Bruce to Milton line, subject to the same FIT Program Rules and rule changes on June 3rd, 2011, for damages based on the same failure to receive a contract on July 4th, 2011.

A reasonable investor ought to have at least engaged in due diligence inquiries. The NAFTA doesn't permit potential claimants to wait until they have the perfect potential case. And yet there's no evidence on the record that the Claimant or its executives made any inquiries about the Mesa Power case or about the other public allegations and many public documents regarding the administration of the FIT Program in 2011. The Claimant's executives did not pick up the phone, did not read the Mesa pleadings, did not contact counsel. In fact, they did nothing until 2015 when they entered into contact with counsel for Mesa Power.

We submit that the constructive knowledge element of Article 1116(2) protects against this type of willful blindness on the part of potential claimants.

So, let's go back to immediately prior to the

Critical Date. What would a reasonably prudent participant in the Ontario onshore wind renewable energy market have known? And let's go back here to the particulars of the Claimant's claim.

Based on publicly available information, including the FIT Program Rules and the pleadings in the Mesa arbitration, Government documents, and press reporting, the Claimant knew or ought to have known at minimum that there were allegations of special business opportunities being provided to politically connected local favorites; that there were allegations of improper senior level meetings that benefited other FIT Program proponents and rewarded political favorites at the expense of everyone else; that Ontario had decided to cap transmission at 750 megawatts in the Bruce transmission area; and that there were allegations that Ontario had failed to follow the FIT Program Rules.

In addition, it ought to have known that the Award of FIT Contracts was delayed in part because of the Korean Consortium, and that the GEIA was renegotiated in part due to the Korean Consortium's request for an extension.

Finally, it ought to have known that there were allegations that Ontario inappropriately deleted documents and failed to comply with records' retention requirements.

Like Mesa Power, the Claimant could have brought its claim when it failed to receive a FIT Program Contract on July 4th, 2011. It could have developed its case and presented evidence to the Tribunal, including arguing that alleged favoritism to IPC caused a NAFTA breach. But the Claimant failed to act. This is precisely the circumstance barred by NAFTA Article 1116(2); and, as a result, this Tribunal lacks jurisdiction and the Claim cannot proceed.

This brings Canada's Opening Submissions to a close, but I would like to invite again further discussion of the Tribunal's questions.

ARBITRATOR BISHOP: I have one--sorry, I have one request with respect to your last slide, Slide 131, your chart. At some point during the week, or at least in Closing Arguments, I would find it helpful to receive a different version of that chart with citations to the evidence to the record for each statement in that chart, if you could do that.

MS. DOSMAN: Yes, we have them at the bottom, but we will make it more clear for the Tribunal.

ARBITRATOR BISHOP: Thank you.

PRESIDENT BULL: Ms. Dosman, I had a question about something you said just before you ended. You used the phrase "willful blindness," and you seemed to say, if

I understood you correctly, that the Claimant's executives knew about the Mesa Power arbitration, but they chose not to find out the details, if I've understood that. Correct me so far?

MS. DOSMAN: We know that they failed to make any inquiries, so they failed to inform themselves--once they were on notice of this claim of unfairness in the process leading up to the award of contracts, failed to take any further action.

PRESIDENT BULL: Right.

So, is it Canada's case that those executives did not actually take any steps or--and this may be in the alternative--is it Canada's case that it's difficult to believe that somebody in their position would not have taken those steps?

MS. DOSMAN: I think we're rather constrained here by the record, and what the record shows is no evidence of any steps. So, you know, we can speculate. We have no evidence that any steps were taken, even though they knew that the Mesa Power arbitration was ongoing.

PRESIDENT BULL: I see. I understand. Thank you.

MS. DOSMAN: Okay. Yes?

PRESIDENT BULL: No, I was just going to check if Sir Daniel has any questions at this stage.

ARBITRATOR BETHLEHEM: I don't think so. There may be some issues to come back to in advance of the closing but not at this stage. Thank you very much.

MS. DOSMAN: Very good. It's been a pleasure, and I'll see you later on this week.

PRESIDENT BULL: Very good. Thank you.

Does that conclude Canada's Opening Statement, then?

MS. DOSMAN: It does.

PRESIDENT BULL: Thank you very much.

Then let's take our half-an-hour break, and we can be back at 15 minutes past the hour, and we'll hear from Claimants at that time.

ARBITRATOR BETHLEHEM: Can I just check, we'll be taking our half-an-hour break a little bit early rather than running to the time limits as we were--I have no objection. I just want to make sure that I understand clearly.

PRESIDENT BULL: Yes. I think let's do that. We'll take the half-an-hour break 15 minutes earlier than normal, and then we can press ahead with Claimant's presentation.

Good.

MS. DOSMAN: See you then.

(Recess.)

REALTIME STENOGRAPHER: Okay. I'm ready.

PRESIDENT BULL: Right. Let's go back on the record, and I think we have Claimant's Opening Statement next, and Mr. Appleton, whenever you're ready.

MR. APPLETON: Thank you very much, Mr. President.

I am going to be handling the slides myself, so you just have to excuse me for a moment while I put the share on, and then I will be operating them this way. Actually, it's quite a complicated technological mess here. I have to figure out how we share.

Here we go. Share.

If you can just confirm that you can see the slides.

PRESIDENT BULL: Yes, I can.

MR. APPLETON: Excellent. All right. Very good.

OPENING STATEMENT BY COUNSEL FOR CLAIMANT

MR. APPLETON: So, thank you, Mr. President, thank you for allowing us to deal with the small technical matters.

As you heard this morning from counsel for Canada, Ontario publicly announced a standard offer Feed-In-Tariff program to regulate and award renewable energy contracts starting in 2009.

The FIT Program was a standard term contract. FIT Proponents had to follow terms set out in detail through the FIT Program Rules, and the applications were assessed based on those Rules. Proponents seeking to obtain contracts had to comply strictly with the FIT (Feed-In-Tariff) Program Rules.

The Government required proponents to attend many sessions and complete many forms to demonstrate financial capacity, wind availability, and availability of critical equipment such as wind turbines, which were often in short supply. This was a rigorous and expensive process necessary to qualify for a place in the line for a lucrative renewable energy contract.

This arbitration case involves the application of one of many FIT Program Proponents, namely Skyway 127 Wind Energy, which was an investment made by American Investors.

Skyway 127 made foreign investments in Canada on the basis that there was a stable and predictable framework for investments established by Canadian law. They base this on their past successful dealings with the Government of Ontario, and by the representations of the Ontario Government and the Ontario Power Authority, which I will generally refer to as the "OPA," which was directed to do this program by the Government and its regulatory

agencies such as the Independent Electricity System Operator, commonly known as the IESO, which later took over the OPA and even has somebody as part of the delegation watching this today.

The Skyway 127 Project sought 100 megawatts of transmission near the Eastern shore of Lake Huron, one of the five Great Lakes of Canada. It enjoyed excellent wind potential at this location. Skyway 127 invested in this project with a strongly experienced team.

The team included General Electric Energy, one of the leading developers and service providers of wind turbines and energy in the world.

Skyway 127 had an experienced team of wind developers led by John C. Pennie, who had a record of demonstrated achievement in building and operating Ontario wind projects in collaboration with the Ontario Power Authority since 2006 under its earlier RESOP, R-E-S-O-P, program. Derek Tennant and Tracy Oliver also were part of this team. Derek Tennant was the President of Skyway 127 and focused on the capital-raising operations for this enterprise.

Now, in particular, because of the robust FIT Application, Skyway 127 was ranked highly with the FIT queue for the Bruce transmission zones. Transmission was done on the basis of zone, the Bruce Region being one of

the transmission zones, and you will hear a lot about that over the next four days. The Government had announced at least 1200 megawatts of transmission would be available for contracts in the Bruce Region.

Now, Ontario produced a ranking report on June 3, 2011. It's Exhibit C-148. Slide 2 is--this is Slide 2--is an extract from this OPA Report, and identifies the competitive position of Skyway 127.

Now, let me just talk to you for a moment about these OPA Reports. You saw some of them earlier today. That was also an extract from an OPA Report. These are very long--they're long, long documents, and we're just extracting information, and Canada earlier today should have told you they were simply extracting some information out of these long reports as well.

Now, according to this extract, we can see the competitive position of Skyway 127; and, according to this queue information, Skyway 127 was sixth in line for a FIT Contract, with five projects ahead of it seeking only 280 megawatts of transmission before Skyway 127's 100 megawatts.

So, to read this, on June 30, 2011, if there was 380 megawatts of available power in the Bruce Region, Skyway 127 would have had a FIT Contract because it was a standard program, and that was their position in the

standardized program.

And thus Skyway 127 was well-placed within the 1200 megawatts of available electrical transmission of energy, and its ranking has it in place for a FIT contract at that time those Contracts were awarded.

But when the Contracts were awarded, they were awarded on July the 4th, 2011, Skyway did not obtain a contract at that time.

Now, the OPA only awarded much less the minimum amount, as I said, of 1200 megawatts of transmission contemplated for the Bruce Region. The OPA actually awarded 750 megawatts in the Bruce and Skyway somehow was not within that 750 megawatts that was allocated. While this is an important fact, however, this is not the Measure underpinning this NAFTA claim. It is simply a factual antecedent, one of many.

Skyway 127's FIT Application was not struck when the July 4, 2011, Bruce Region Contracts were announced. Skyway 127 was sent a letter from Joanne Butler, Vice President of Electricity Resources of the OPA, advising that Skyway 127 was in the Priority Queue. That letter is Exhibit C-149--let's see C-149--and that was a letter sent shortly after the Contracts were announced--in fact, that same day. It was sent on July 4th, 2011.

Now, as we know from reading this witness

testimony that has already been provided to the Tribunal, and from the pleadings in this Arbitration, Tennant Energy and Skyway 127 believed that the Government of Ontario would carry out the FIT Program in a fair rules-based manner on the FIT Program Rules because the OPA said it would do this, as did the Ontario Ministry of Energy and in particular the Ontario Minister of Energy.

These rules and practices included the fact that all available transmission would be used for the FIT Program. And that electricity transmission would be distributed fairly and without cronyism or political considerations. Since there was a lot more transmission available, as Skyway 127 was at the top of the waitlist, Skyway 127 waited for its FIT Contract in the Priority Queue, until that time that the Ontario Energy Charter Treaty Minister by directive of FIT Program June 13, 2013. That is C-152. Canada already put that into its presentation this morning.

So, just to make sure we get the dates right, the Contract are announced for this region in June--sorry, July 4, 2011. They say, "Skyway 127, you're on the waitlist," and the waitlist continues until the program is terminated--it's actually replaced by another program, another energy program--that program ends on June 13, 2013.

Now, Canada told you that July 4, 2011, is the latest time for a breach, but Canada has to be mistaken on that date. Indeed, as Ms. Squires said this morning in the Opening, "the facts aren't that complicated and the law isn't either", but you have to be looking at relevant facts and the relevant law, and Canada hasn't taken you to this.

In fact, this is like two ships passing in the night, and it's our job this afternoon to try to explain what's going on and to point this Tribunal on to the right path so you can ask the right questions and determine the right types of answers for this situation.

Fairness is the issue. This is a NAFTA claim that focuses on the simple concept of fairness. The NAFTA has made the promotion and protection of fairness a central concept in its investment-protection regime.

For example, NAFTA's national-treatment obligation in NAFTA Article 1102 is a fairness principle. It's unfair to treat one set of competing market players better than those from other NAFTA Parties. This is an expression of the principle of even-handedness, a concept that underscores many NAFTA obligations, including, of course, NAFTA Article 1105.

Now, this Article set out here on Slide 3 requires Canada provide international-law standards of

treatment to investors and investments--actually, investments of investors of the NAFTA Parties. This international-law treatment includes the provision of fair and equitable treatment, and we discussed that in our Memorial in Part III. So again, I don't want to reargue the merits. We will try to stay on to the jurisdictional question as much as we can.

Its also fundamentally deals with issues of good faith, which means Canada must act in good faith towards the American investor and the investments of the American investor. It protects legitimate expectations, the concept of even-handedness and due process, and it protects against an abuse of process.

Article 1105 fundamentally enshrines protections for fair and equitable treatment within the core meaning of international-law standards, and this is an absolute level of protection rather than the relative concept of fairness that we might find in national treatment. National treatment is comparative, and the international law standard looks at fairness on a more objective standard on an objective basis.

And the Tennant Energy NAFTA Claim before this Tribunal is exactly the type of claim for which the NAFTA was designed. This is a claim about fairness of how governmental powers and prerogatives were abused to

empower and enrich some, while distorting the predictable operation of free markets. At the heart of this claim, we're dealing with a fundamental unfairness, a lack of even-handedness that the Canadian Governments created, has stood by, permitted to continue, and in some respects continues to this very day.

Now, at its heart in this claim, we are dealing with a fundamental--fundamental--problem: A lack of unfairness is fundamental to what's going on.

Now, let me just step back for a minute, and on January 1, 1994, the Governments of Canada, the United States, and Mexico brought a North American Free Trade Agreement into force. This Agreement created a continental free-trade area that liberalized the cross-border movement of goods, services capital, and to some extent labor mobility. The three sovereign governments recognized that protecting domestic firms from foreign competition undermined their mutual economic development and global competitiveness by restricting consumer choice and dampening innovation. And at the same time, these governments knew that they were susceptible to political temptations if these free-market commitments were want memorialized in international agreements. And it was the NAFTA that memorialized these commitments in a binding, powerful, and meaningful way.

Now, before we actually turn to the actual breach, I want to comment on the role of one of the interpretive principles, that of transparency, and that has a key role in the NAFTA. Now, Mr. Klaver, who you heard very eloquently this morning already, was also--appeared before you as counsel for Canada in the second Procedural Hearing. At that time, he eloquently summed up Canada's position on the essential role of transparency in the NAFTA as follows, and I'm just quoting from the Transcript.

Now, starting with transparency, this is an integral principle in the international arbitration. Transparency upholds the legitimacy of investment proceedings.

Now, on this point, Mr. Klaver and the Investor are in total alignment. The principle of transparency is a core mandatory interpretive principle of the NAFTA. It is enshrined in NAFTA Article 102 to interpret the objectives of the NAFTA. And the principles that are set out here on this slide, in Article 102, they say: "The objectives of this Agreement," "this Agreement" being the NAFTA, "as elaborated most specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency," and they go on and will talk about the objectives themselves.

And so the objectives of the Agreements themselves would include the following: Promoting conditions of fair competition in the free-trade area, increasing substantially investment opportunities in the territories of the Parties, and creating effective procedures for the implementation and application of the Agreement, of course, going to administration and for resolution of disputes.

So, these principles and rules--national treatment, most favored nation, and transparency--are required to be used to interpret the principle. That's what we're going to see now in Article 102, Paragraph 2, which says: "The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in Paragraph 1 and in accordance with the applicable rules of international law."

Okay. The Tribunal has set out two questions in Procedural Order 8:

Was Tennant Energy a protected Investor of a Party when the alleged breach occurred?

Two, was the Claim filed prior to the expiry of the three-year limitation period in NAFTA Article 1116(2)?

However, we cannot answer Questions 1 or 2 without understanding the question of what is the breach. And, in fact, if you look at Canada's questions this

morning, they said the same thing. They made it into three. And we are heading first to what the question of what the breach is so we can answer the question about fundamentally that we need we will get to this--look at the nature of what is the Claim for this Tribunal.

Now, at the outset, we need to summarize the undeniable basis of Tennant Energy's claims:

First, Ontario (through its Energy Minister) and its agent, the Ontario Power Authority, made clear representations about fairness and even-handedness of the operation of Ontario's FIT Program. They did so to the public; they did so to the proponents.

Ontario set out a complex set of rules for a standard-offer contracts. It was rule-intensive, rules-based. You can see here from Slide 9 there is a process flowchart just from the application itself is complex. The proponents were required to carefully follow the rules and were penalized for non-compliance with the rules.

Now, Canada has spent a great deal of time identifying factual statements in the pleadings that Canada says confirms that a breach occurred well before June 1, 2014. That's the three-year limitation date arising from the filing of the Claim on June 1, 2017. However, about the date that Canada has used, Canada is

mistaken.

To help understand this factual matrix, we need to flag some key milestone events. Then we are going to take the Tribunal to some of materials that Canada omitted to review. I know it's hard to believe with all of the material Canada took you through, but yes, they omitted key--key--materials that we will--do not worry, we will take you through them this afternoon.

First of all, turn to Slide 10.

There are four key dates on Slide 10 that I would like to bring to your attention. The first one is the NAFTA Notice of Intent. It's actually filed on June 6th of 2011. There is a typo of 2014. June 6, 2011.

Second is June 13, 2013, when the Minister of Energy, by directive, shut down the FIT Program.

Then we have in this teal-colored box the three-year time-limit date, and that is June 1 of 2014, and that relates directly to Tennant Energy's NAFTA claim submission which was on June 1 of 2017.

Now, I'm going to give you another timeline, and that timeline is going to show you in red materials that Canada didn't take you to.

So, we are going to see false representations about the operation of the FIT Program. Again, all the items in red under the line demonstrate representations

made by Canada expressly denying the accordance of unequal preferences under the FIT Program, the FIT Proponents, and denying the legitimacy of the Mesa Power claim. These representations, once considered against the evidence, prove to be misrepresentations falsely made by Canada as part of what I call the 3-D strategy: Delay, deny, and distract the proponents for purpose of avoiding liability for its internationally wrongful actions.

Now, the first key date here is July 14, 2011. This introduces us to a newspaper story it was on, if you recall this morning, a large number of media stories, we are actually going to read them. The difference between us and Canada is if we're actually going to look at some of these. And if you look at this June 14--sorry, July 14, 2011, story--that's Globe and Mail, a major Canadian newspaper--you will see that there is a story in here done by Sean McCarthy. That says, "Oil tycoon takes on Ontario Green Energy Act over wind farm," and that contains a statement from Ontario's Energy Minister. This is R-059 in the record. It says: "'The Ontario Power Authority runs an open, fair, and transparent process to award clean-energy contracts under the Feed-In-Tariff program,' he said, 'and all companies are treated equally with the same opportunities to participate, regardless of whether they are Ontario-based or internationally based.'"

So, Ontario energy, Brad Duguid, dismissed the concerns, including those advanced by Mesa Power in its Notice of Intent that was issued just a few days earlier on July the 6th. Canada made unambiguous representations about the supposed lack of credibility of the complaints against the administration of the FIT Program advanced by Mesa Power just after Mesa Power raised its concerns. And remember, these concerns aren't in Notice of Intent. Not even the Notice of Claim. This is the first step in the process.

Now, to go back to the timeline, you see the next queue date is May 8, 2013, and this is the date when Canada continues to deny its wrongdoing to the public in express written statements. We're here now at 516. This is--we're going to look at R-81, to start with, which is a document called the "Outline of potential issues," and according to Canada's document--I'm sorry, according to Canada's witness who will be before you tomorrow, Lucas McCall, this document was first available to the public on May 8, 2013.

Now, Slides 17 and 18 are going to show us expressly Canada's denial in R-81 in May of 2013. You can see Canada denies that any of the Measures mentioned in the Notice of Intent or invalid Notice of Arbitration breach Canada's objections under Chapter Eleven.

And then it goes on in the bottom to say the Government of Ontario and the OPA acted in a non-discriminatory manner consistent with all of Canada's obligations under the NAFTA.

And then in Slide 18, Canada trivializes Mesa Power's concerns as follows. It says there is no doubt that some FIT Program applicants were disappointed when their projects were not selected for contracts. However, such disappointment is not grounds for a claim under NAFTA.

REALTIME STENOGRAPHER: I'm sorry, Mr. Appleton. Can we pause just a second? I had a disconnect. Can you just give me one minute, please.

MR. APPLETON: of course.

REALTIME STENOGRAPHER: Thank you.

(Pause.)

MR. APPLETON: Mr. President, I may continue?

PRESIDENT BULL: Yes, please.

MR. APPLETON: Thank you.

If you recall just before our short little break, I have taken you through R-81, where the Government of Canada says that disappointment is not a ground for a claim under NAFTA. It merely says that Mesa Power is disappointing.

Now, Canada's statement was available to the

public on May 8, 2013. This was about one month before Ontario issued its ministerial directive to terminate the FIT Program in June of 2013. That FIT Program that was subsequently replaced by another Feed-In-Tariff Program as I had mentioned earlier.

So, Canada's official position was that there was no merit to the Mesa Power Claim, and Canada strenuously denied it at the time. Ontario's Minister strenuously denied it at the time, and further, Canada said that Mesa Power was simply just a sore loser and that its NAFTA claim was just disappointment, and again a disappointment is not grounds for a claim under the NAFTA. As we can see from the timeline, that the next statement from Canada came on June 4, 2014.

Now, we note that the Mesa Power pleadings, such as the Memorial and the Counter-Memorial, are available within the three-year time line which commenced three days earlier on June 1, 2013, so information that was first obtained from these documents could not cause an issue with Canada's time limits under NAFTA Article 1116. Earlier this morning it appears that Canada may have misspoken with respect to the date, and there is a specific document, we'll take you right to it at the end of the slides, where there is a communication from the PCA confirming that on June the 4th that the Memorials were

being posted, that they were behind in what they had done. They were originally scheduled to put things out earlier, but they actually had not and that they wrote in an e-mail to Jennifer Montfort from Appleton & Associates, confirming the actual posting and asking her before posting to physically confirm the documents that was going to be posted, and that document I believe is C-130 in the record. And if we have time, I may go back there and actually show you the actual documents. I stuck it at the last page of the slide deck just to get you to go there.

What's important here is that we know that the materials in the Mesa Memorial, Counter-Memorial, all of these pleadings are not available (sound interference) after June 1, 2013, in the three-year period, asserted by Canada under Article 1116(2) they call it the good side of the line rather than the bad side of the line.

Now, Slide 20 shows you what's in this Mesa Memorial. This is Canada's Counter-Memorial, C-177 is the exhibit number, and Paragraph 4 Canada says specifically that it acted fairly and in good faith, and in particular they treated all Applicants consistently and equally in the creation and administration of a FIT Program.

Slide 21, this is Paragraph 12, and it says: "No FIT Applicant received different or more favorable treatment under the FIT Program."

Slide 22 shows us Paragraph 209 which says: "No developer was given advance notice or preferential access to information regarding the details of the Bruce to Milton allocation process that we were developing."

Slide 23 sets out Paragraph 423, and here again, this is Document C-177, Canada's Counter-Memorial in Mesa. Canada denies that there was any evidence that NextEra was given any advantage at all. It says: "Indeed, there is no real evidence that NextEra was given any sort of advance information that gave them an unfair advantage or that the Government of Ontario or OPA discussed ways in which their projects would most benefit."

And they go on to say this is hardly evidence that demonstrates discriminatory intent or favoritism.

And they go on in the next paragraph, Slide 24, to say at Paragraph 424: "NextEra gains"--sorry--"the Claimant alleges that NextEra gained assistance through the Ontario Premier's office" which expressed its political preferences, and then they go on to say that they know the Premier's preference is to speed up the contracted work process and they said there's nothing to it.

So, as we see, Canada has denied unfairness involving NextEra, claimed everyone was treating it the same, and denied NextEra had any assistance obtained from

the Ontario Premier's office. There appears to be no controversy about the existence of these statements. Canada relied on them expressly in the Mesa Power Arbitration, and again in this Arbitration. And again, we stress that this was made available on June 4, 2014, after the June 1, 2014 dates. And thus, this information (drop in audio) fits within the three-year time limitation period under Article 1116(2).

Let's turn to our second point here. Canada's statements about the operation of the FIT Program were untethered to the truth.

Now, when it comes to addressing false statements, fundamentally, the truth will set you free, and in international law this is particularly important.

Tennant Energy's investment, Skyway 127, relied upon Canada's repeated statements that Ontario followed the FIT Rules that everybody was treated fairly under the Rules. And in the words of Arbitrator Bishop's question from earlier this morning, "we need a trigger or a suspicion to exercise the care or diligence." And Canada's statements resulted in there being no reasonable suspicion.

No one would have a reasonable suspicion when the Government expressly identifies that we follow the Rules. We took care, we did all these things, and it's

just simply disappointments. The Minister said it, the Government of Canada said it, then OPA made statements that they were following the Rules. They did so publicly, they did so with great notoriety.

And so, Tennant Energy and Skyway 127 expected that Ontario would follow the FIT Rules and would not breach the FIT terms in an extra-contractual way, and that's the reason why Tennant Energy and Skyway didn't know of Canada's wrongfulness.

Canada made clear statements to the contrary, again and again and again, Canada kept denying wrongful conduct. But as we will see shortly in the evidence, Canada knew these statements were false. Yet Canada made them, maintained them, repeated them. Canada did nothing to correct the false statements. Canada took no steps to prevent making new false statements.

And, indeed, Canada went so far as to even take efforts to suppress truthful information from being known by FIT proponents and the public.

Now, upon cross-examination before the Mesa Power Tribunal, Canada's own officials later admitted under oath that some FIT proponents were treated better than others.

Now, we know this evidence, and we're going to go look at the evidence directly in confidential session,

but this is critical as it demonstrates that the Ministry of Energy was concerned about what would happen--I can't say that. I've got to wait for the story. Sorry, it's something I'm not allowed to say.

Let's look at Slide 31, what I can say. This is public.

The Ministry of Energy was concerned about what would happen if the Korean Consortium went into the West of London area. High profile projects would be shut out. Here we have on Slide 31 as part of the public record of the Breakfast Club testimony. The Transcripts were available, by the way, on April the 30th, 2015. The Mesa Power Hearing where this took place was October of 2014, and this particular day where these omissions took place were October 28, 2014. This is Day 3 of the Transcript.

And as we can see, it says--the question is, there is an e-mail that has been brought to Assistant Deputy Energy Minister Sue Lo's attention. This was brought to her attention by Mr. Ed Mullins, who is here with me in the room today, who is acting on behalf of Mesa Power, and he posed the questions to Assistant Deputy Minister Sue Lo. And with the e-mail, which is confidential so we're going to see that in a minute in closed session, he asks about the term B Club that appeared in the e-mail, that's not confidential.

And the Transcript shows what does that B Club mean in the re: line?

Answer. That was just a name we used for the highest level meetings with--

Breakfast Club or something, Mr. Mullins asks?

Yes, it was the Breakfast Club.

So, the highest level meetings are taking place by an entity called the "Breakfast Club."

Now, Assistant Deputy Minister Lo admits about the existence of a high level conspiracy, but these admissions did not become public until one year later, and she's admitted the Breakfast Club includes a virtual cornucopia of senior Government and political leaders -- meeting in an off-the-books set of meetings. And in the confidential portion, which we'll get to, she names the numbers of the conspiracy, and I'm going to deal with that now because I'm going to ask that we go briefly into closed session, so could we just close session for one moment? I know there are people that would like to see this watching remotely but I'm not allowed to discuss that outside of the confidential process, but I will be as short as I can.

Can you tell me when we're closed?

(End of open session. Attorneys' Eyes Only session begins.)

ATTORNEYS' EYES ONLY SESSION

PRESIDENT BULL: We are, Mr. Appleton.

MR. APPLETON: Thank you. I don't expect this to take very long.

So, Slide 33 is--sorry, I missed a slide in here. I read it. Slide 33 is the e-mail that is the source of this examination, and this is between Sue Lo, the Assistant Deputy Minister, and the Energy Minister's Chief Policy Advisor, a political advisor, Andrew Mitchell, and this is dated on May 12, 2011, so someone in the Minister's office. It's a political spot rather than somewhere else.

Going back to the e-mail, we want to learn what the Minister is trying to protect, the e-mail here that says B Club, and it says, "we have not promised KC," KC bring the Korean Consortium, "any specific set-asides for West of London or London east. Hence they will need to look for projects after we give them a specific set-aside for a specific area."

The new proposal helps us with stakeholders because the West of London area has a couple of shovel-ready, high-profile projects that would be potentially bumped out by the KC if we set aside the entire West of London area. The proponents are likely to be quite critical of the KC set-aside if it were the

London west area. And then it goes on to say, just a little bit further, the part in yellow, if we ultimately allocate 200 to the KC, 150 still available to the top-ranking other FIT proponents, this is better than a hard no to what could potentially happen in the West of London area where we shut out everyone other than the KC.

And that's because the transmission was going to go to the Bruce Region, and that would shut out the West of London Region, and therefore, these projects would not have transmission. That's what the context of this is.

Now, Slide 34, another confidential one, is the confidential testimony available from the Mesa Power Hearing. This is the unredacted hearing video, has given us the information, and we created this part of the Transcript from the Hearing video that we've made. And so, this is on Day 3, during the examination of Sue Lo.

Mr. Mullins: And who were the high profile projects that you were trying to protect?

Sue low: There were a couple, 16 projects that had already gone through the environmental approval process, and so I think they were located somewhere in the area.

"Who owned them?"

Sue low: "I think they changed names a couple times, but I think at the time we knew of them, they were

called IPC."

For the record, since IPC is International Power Canada, which is prominently referenced in the Tennant Energy Claim.

And then Mr. Mullins says: "The IPC, the President of that company was the President of the Federal Liberal Party?"

Sue Lo says: "Oh, I wouldn't know that."

Okay. Now, let's go to the next slide, 35. Same day, Mr. Mullins says: "You played favorites with them?" This is, again, cross-examining Ms. Lo.

"Which ones? The Korean Consortium?"

Mr. Mullins: "These people you made sure you protected; they're high profile. You played favorites with them, did you not? Isn't that what this e-mail tells Mr. Mitchell: I want to protect these high-profile projects?"

Sue Lo: "This is a consideration."

So, we know--we know from the evidence--we know from this confidential evidence that there were things going on, and we know that these statements had been made by Canada and these statements made by the Minister are not tethered to the truth.

Now there were discoveries--sorry, let me stop there.

We also have learned, just from that same part of the testimony, of the identity of the Breakfast Club, obviously to identify who they are so that you have an idea while we're in confidential session. They are--were identified by Assistant Deputy Minister Lo as the Head of the Ontario Civil Service, the chief bureaucrat for all of Ontario; the Chief of Staff to the Premier of Ontario; the Deputy to the Cabinet office; a deputy from the Finance Ministry; and other officials as necessary.

Now, this Chief of Staff to the Premier is the same person that you are going to hear about who has gone to jail for criminal destruction of the energy documents. He is a member of the Breakfast Club, and that's why some of those issues tie in when we get there. But as I identify this, I want to make sure that we're very clear.

And, of course, Ms. Lo was also a member of this exclusive and powerful secret club that would be able to take care of these high value matters.

Now, we can go out of the confidential mode now. And you'll tell me when you're ready.

(Attorneys' Eyes Only session ends.)

OPEN SESSION

PRESIDENT BULL: Yes, we are.

MR. APPLETON: Thank you. All right.

So, the testimony that we just referred to, which was in confidential session was from the Mesa Power Hearing, and the admissions that took place there that I can't describe and those I earlier could describe in the public session came as a surprise to Mesa Power. Mesa Power had not made document requests about IPC Canada or the Breakfast Club conspiracy. Mesa Power had not made any, depositions or other cross-examinations because it did not know about the Breakfast Club and its role to protect high-value performance. All of this came as a surprise in admissions at the Mesa Power Hearing.

But Canada immediately claimed that this damning set of admissions of favoritism and abuse of process by its most senior officials was somehow confidential business information and thus deprived the public of the knowledge of these admissions of wrongful conduct, and other damaging evidence made by Canada's witnesses under oath.

While I can't describe again what was in the confidential discussion just a few moments ago, you can see that none of that was confidential business information. None of that was.

I also note that in this examination as--during Mesa Power, Judge Brower, Judge Charles Brower, one of the arbitrators noted that the Breakfast Club meetings disclosed by Assistant Deputy Minister Lo took place around the same time that the FIT Program Rules were changed in June of 2011, which resulted in the change of Skyway's ranking and resulted, obviously, in them not getting a contract at the time and being placed on the Priority Queue. And that's C-121, public Transcript at Pages 173 and 174 for the examination comments of Judge Brower.

Now, Canada then took measures not only to propagate false information, but it took measures to hide contrary evidence, and in violation of Canada's earlier protestations, this wrongful conduct was admitted under oath by officials. It's nothing less than shocking.

Now, Ontario's courts themselves had most recently identified the types of extreme steps that Ontario officials took to hide and mischaracterize energy evidence to block its production and its disclosure to the public.

We're going to see that here on Slide 36, CLA-278. But here we were referring to a document that's been put before the Court, and it says (reading): The defendant assigned a code name to the internal

communications regarding offshore wind and did so with the express purpose of hiding its misfeasance specifically targeted to injure the plaintiff, consistent with and concurrently with the defendant's use of a code name "Project Vapour" to hide its communications regarding the concurrent cancellation of the gas-fired electricity-generating plants in Ontario. The defendants have not disclosed the code name it assigned to offshore. This is offshore winds.

We also do not know the code name for onshore projects under the FIT Program, projects in the Bruce Region, or the code name for Skyway 127.

But this was all done to make it difficult if not impossible to obtain document production and access to information to hide and disclose improperly the type of information, and we know that the types of materials that are in there include at least one member that I cannot describe in the public session but that was listed in the confidential testimony that you heard before.

ARBITRATOR BETHLEHEM: Mr. Appleton, I'm prompted to raise the question so you can have your cup of coffee and draw a breath.

MR. APPLETON: That's good because I was just going to take the break, so I'm delighted to have your question now.

ARBITRATOR BETHLEHEM: Right. Thank you.

I just want to make sure that I'm understanding things correctly. In your Slide 5, you said to us before we can understand or respond to the two questions that this hearing is all about, we need to know what is the breach, and that was your slide, and I'm understanding all of your submissions, including the evidence that you are putting to us in both open and confidential session to be going to this question of what is the breach.

And I'd just like to clarify--I mean, first of all, I'm understanding that although you have not yet joined the dots, that you are in essence making preparatory submissions to the time-bar point; is that correct?

MR. APPLETON: Yes, that's correct, and we will turn to that when we get--after the break, we're going to talk about continuous breach.

ARBITRATOR BETHLEHEM: Right. I understand that--

(Overlapping speakers.)

MR. APPLETON: Yes, to bring you--is to connect the dots, yes.

ARBITRATOR BETHLEHEM: Right. So, I'd just like to understand, and please feel free to say you'll get to that after the break, the evidence that you have put to us

is evidence that is dated in late 2014, and that's obviously within the three-year period if we take your Notice of Arbitration on the 1st of June 2017.

Can you tell us at this stage whether the points that you are putting before us about hiding and not disclosing, whether you are saying to us that those are causes of actions in their own right, or are you saying to us that this was the first time that your clients, the Claimant, was put on notice because of this information of a breach that took place earlier, or are you going to be joining the dots even more substantially and saying this is a continuing breach that began all the way back then and went through to these disclosures in late 2014? I'd just like to have a better understanding as to what this evidence is being advanced for.

MR. APPLETON: Sir Daniel, the answer to your first question is yes. The answer to your second question is yes. The answer to your third question is no, and I will be delighted after the break to take you through in detail exactly how we get there, how we put this together, and exactly where the pieces come together because your questions are the questions that are before this Tribunal, and the reason that we've gone through this preparatory process is because otherwise you can't understand or appreciate fully in the relevant context the nature of

what's there in that reading is the test, and I'm going to suggest to you that that's what we have to do, and that's why we need you to do it.

And I was quite surprised by Canada's entire omission of all of these items this morning because you can't appreciate the nature of what's here without appreciating the nature of what the Government has done. So, if you'll allow me to leave it at that for now with the admonition that you will keep my feet to the fire should I fail you in the next part. Is that all right?

ARBITRATOR BETHLEHEM: That's completely all right, and I look forward to that, and my question was motivated in part by Ms. Dosman's submissions where, as I recall--I'm paraphrasing her--she was saying in respect of the various items, this is not a new cause of action.

So, I'm trying to understand whether you are identifying a cause of action or you're identifying a notification of a prior cause of action or whether you are moving towards a continuous breach. But as I say, I'm happy to hold my tongues and sit on my hands and all the right metaphors and wait and hear what you have to say.

PRESIDENT BULL: Can I just check if Mr. Bishop has anything to ask at this point?

ARBITRATOR BISHOP: No, not at this point.

PRESIDENT BULL: Good.

Then, Mr. Appleton, I think you've indicated this is a convenient time to take a break, so let's take a 15-minute break, and then we can return for the rest of Claimant's opening.

MR. APPLETON: Thank you very much.

(Recess.)

PRESIDENT BULL: Mr. Appleton, whenever you're ready, you may proceed.

MR. APPLETON: Excellent.

Just 10 seconds.

(Pause.)

MR. APPLETON: Very good.

Thank you, Mr. President.

When we left, we left on the cusp of the discussion of issues of continuous breach, and I would like to now turn to the issue of continuous breach.

Just before we go there, I just want to make sure we clarify, Sir Daniel had asked the question, and in that question he had mentioned a date of 2014. I believe he was referring to information arising from the Mesa Power NAFTA hearing, and that NAFTA hearing took place in late October of 2014, and the information that arose from that was not available to the public until specific dates in 2015. And so even though the NAFTA hearing took place in October of 2014, the information would not be known or

available until specific dates, and part of it would be available, we've identified it in the record, part was available on April the 30th of 2015. A part was available like the Post-Hearing Briefs, the most significant part, on April the 15th of 2015. To the extent that that's relevant, I just wanted to make sure that you had that specific dates.

Okay. So, Canada's breaches are not instantaneous acts. They are continuous breaches. And simply, let's see if I can get us to a slide. The slides are not working.

(Pause.)

MR. APPLETON: Can you see my slides now?

PRESIDENT BULL: Yes, we can.

MR. APPLETON: I'm sorry, I understood that I was not projecting before.

ARBITRATOR BISHOP: I'm not seeing them, but that's not been unusual right after the break. If you could just give me the number, I have a hard copy here that I'm following, thank you.

MR. APPLETON: Well, actually, this isn't working for me, either. We're going to go to 37, but actually nothing is working either.

Would you just excuse me for a moment. We're having a slight technical problem.

Got it, all right.

Can you see--for those of you that can see, Mr. President, can you see Slide 37 showing?

PRESIDENT BULL: Yes. Slide 37 is showing.

MR. APPLETON: And Arbitrator Bishop, you cannot see any of the slides right now?

ARBITRATOR BISHOP: No. Every time we go out for a break, my slides don't come back on until I can get my IT person back in to do his magic. But I have hard copies, so as long as you give me the numbers, it's not a problem.

MR. APPLETON: I will make sure that I keep on top of that, and we are going to proceed with Slide 37. And if it's all right with Mr. President, I would like to begin again. Yes?

PRESIDENT BULL: Yes, go ahead.

MR. APPLETON: Excellent. All right. So, as I was saying, and now we're looking at Slide 37, Canada's breaches are not instantaneous acts. They are a continuous breach. Simply, it works as follows: Canada made false representations about measures involving the FIT Program about its actions. They were untruthful. Canada relied on its untruthfulness. Canada then hid the evidence of its unfair acts. Canada's non-cessation and repetition of the Internationally Wrongful Acts continue

as Canada failed to disclose the truth.

Now, the breach only ends when Canada discloses the truth or the truth gets disclosed, and that has to be by Canada that gets disclosed, disclosure that ends that breach. And it could be ended partially, we can get partial disclosure, or fully if you get full disclosure. At this time, we still have at best partial disclosure.

And so, that is the key breach that we're looking at. Canada knew that its earlier statements about the fair operation of the FIT Program that were public, that were made to the proponents were untrue. Canada never corrected the record. Canada relied on that and had that benefit of in essence being immune from suit because people didn't know. They didn't know what was going on. In fact, they gave them other reasons and told them through misrepresentations and falsehoods what was going on.

On the Breakfast Club conspiracy, so that's Slide 38--this was never referenced in Canada's pleadings or in the public statements issued by Mesa Power. As we noted, its existence only became known during the Mesa Power Hearing and only became public after that testimony was available in the Post-Hearing Brief.

And if you recall, while Canada could have allowed this evidence to be public, especially after it

was discovered to be posted in a video on the PCA website for nearly five years, Canada didn't take any step to make it public, even when Mesa Power wrote a letter--it's client representative wrote a letter and said, "we don't consider this to be private or confidential any longer." Canada had instructed the PCA to take that information down and kept it down, and didn't take any steps to make it public so that the public, the FIT proponents do not know.

As we see from the testimony of the Mesa Power Hearing in closed session, there was no business confidentiality there about this conspiracy of the high-level projects. Canada just asserted dubious claims of business confidentiality for the purpose of suppressing public release of information about its wrongful conduct. Now, thankfully, some public disclosure, partial disclosure is what we would call it, first occurred through the public release of the Mesa Power Post-Hearing Briefs on August 15, 2015.

Now, that partial release of information triggered the end of that part of the continuous breach with respect to that information, but other non-disclosed breaches continue because Canada continues to rely on the false statements and not in the record.

Ontario and Canada never informed FIT Proponents

that the unambiguous representations about the fair operation of the FIT Program actually were false. Canada took no steps to ensure non-repetition of these false statement. I know there's at least seven to ten senior lawyers and government officials watching in a public room today, and the first thing they should be doing because under international law they know under Article 30 of ILC Articles of State Responsibility for Internationally Wrongful Acts, you have a duty of cessation and non-repetition. But they should be doing that, but they're not. They say they believe in transparency, but they don't. So, the knowledge of the Breakfast Club conspiracy only first occurred--and this is on Slide 39--after the three-year time limit, after Tennant Energy obtained legal title to Skyway 127 shares, that was on January 15, 2015; after Tennant Energy had control of Skyway 127, and after Tennant Energy had obtained an assignment. That's at document C-268.

So, meanwhile, Tennant Energy and its investment Skyway 127, believed that the Government of Ontario would carry out the FIT Program in the fair manner based on the Rules of the FIT Program that the OPA said they were going to do, and the Ontario Minister said they'd do and that Canada said they did. And we know that Tennant Energy brought its claim within three years of its discovery of

Canada's untruths from the Mesa Power Post-Hearing Brief. They discovered--basically they discovered in August of 2015, and they bring their claim on June 1, 2017. So, of course, they brought a timely claim.

Now, Skyway 127 always expected private sector competence. It did not expect cronyism. It had an exceptionally, well-located wind project, significant backing from General Electric. Skyway 127's wind program was highly ranked. Its developer, Windrush and J.C. Pennie, and Tennant had extensive successful experience with multiple programs with the Ontario Power Authority, that are outlined in detail in Mr. Pennie's Witness Statement.

Skyway 127 fit well within the ranking queue any amount of available power, and even when it was put on the wait list, it was next in line. So Skyway 127's hard work in having a high-ranking FIT Program appeared to pay off to them because they were prepared to compete fair and square. They were prepared to take the risks to the market. And when Skyway 127 didn't obtain the Contract at the end of the FIT Program in June 2013. Skyway 127 still believed Ontario's representations made just a month earlier, that all proponents were treated fairly, and all contracts were awarded on a fair basis with no special treatment being given to anybody, in particular that was a

representation made by Canada, actually on behalf of Ontario.

And if we look at Slide 40, if we go back to the timeline, the Tribunal can imagine the shock to Tennant Energy in August 2015 when it discovers for the first time that admissions are made by senior Government of Ontario officials in charge of the renewable energy program at the Ministry of Energy, and these admissions about conduct that took place years prior but hidden--hidden by the Government, and these officials flat out admitted to the existence of a government conspiracy to circumvent the rules and protect friends of the Government so that their local cronies could obtain contracts over those ordinary Applicants who simply just followed the rules.

If you flip to Slide 41, talk about the breach, "put simply, this Claim, as clearly articulated in the Notice of Intent and the Notice of Arbitration, is about the discovery of Canada's wrongful and deceitful acts," (reading) and it is well within the Limitations Period. Canada's omissions to act, its commission of untruths of Skyway 127's failure to obtain FIT Contracts all occurred within three years of Skyway 127/Tennant Energy bringing its claim.

Now, today, Ms. Dosman identified that time should run the public knowledge--identified the issue

about what time should run for public knowledge and inquiry. And in relation to Tennant Energy, she says the following, and I'm quoting from the rough Transcript today. She says about Tennant: And then it failed to receive the Contract a month later in July of 2011. It then would have thought, why? That's the question here, why didn't we receive a contract? It would have looked around into, you know, the publicly available information and seeing that someone else was alleging that process leading up to it was unfair.

Well, first of all, as we see, Skyway 127 and Tennant Energy did because there were public statements made by the Government, by the Minister, by the Government of Canada, again and again to explain what that was.

But second, Ms. Dosman fails to note that a test of NAFTA Article 1116 is the knowledge. Knowledge is in the test. And Canada put out false statements in the public domain, took steps to ensure that contrary evidence would not be known.

And we all patiently listened to Canada discuss its theory about jurisdiction this morning. According to Canada, we shouldn't be here. According to Canada, Tennant Energy shouldn't have its proverbial day in court. Canada basically says we should never have trusted the Government at face value.

Canada's theory is we should have known in 2011 that something was fundamentally corrupt, and there is deep seated deceit at the heart of the Ontario Government. And for Canada to prevail, we have to ignore the clear statement of the Ontario Ministry of Energy's, ignore the Government of Canada's denials of unfair treatment and all of the statements made by Ontario that it follow the FIT Rules and treated everyone fairly.

Astonishingly, Canada tells us that Skyway 127 should have presumed that everything the Canadian officials said, at every time, was false. Somehow Skyway 127 was to know of the secret conspiracy against it, and others, that would perpetuate an abuse of process, and violate good faith. And this abuse of process, remember was that the officials in the conspiracy secretly manipulated the FIT process that was underway to resolve lucrative renewable energy Contracts to local friends of the Government.

Now, Skyway 127 was a victim. It was duped by Canada in 2011 and in 2013. But Canada says the Skyway 127 should suffer again because a reasonable person should not accept Canada at its word. This is absurd. This turns the NAFTA on its head. This concept that you should come at it and shoot first? We've heard that Canada was accusing the Investor here of frivolous cases and yet now

Canada says the only way you can bring a case is to bring a frivolous case when you don't have proof and you don't have knowledge, you don't even have a reasonable suspicion? The Government tells you that they didn't do it, that it isn't there, their senior officials that you worked with and trust come out and tell you that, and now you should say no, you're full of something, full of horse feathers, and we shouldn't give you any credibility and it's never going to sue you? That's ridiculous. That gets rid of the idea of commercial predictability, the fundamental idea of due process. It puts the idea of full protection and security on its head. It turns the NAFTA into a three ring circus.

This idea that Tennant Energy should have shot first and asked questions later filing an arbitration before knowing a breach had occurred makes no sense. And, in fact, that's not what they did. But no one would do that.

Litigating against a sovereign is not something that you do for fun. It's not an easy thing. Look how long Canada has maintained and kept this going. The difficulty and the position it has put onto the Claimants, terrible. Surely, had Skyway 127 done what Canada asked, we would hear new complaints from Canada that the Investor was being precipitous. Instead, an investor will bring a

suit when it reasonably knows that it has a claim, and it does so by knowing, by knowledge, and that knowledge occurred when it saw the admission from a senior official that all the other statements that it had been relying on were falsehoods. That is the key.

Tennant Energy did not miss the boat. Canada says it missed the boat and it's stuck on shore. That is not correct.

Now, at no time today did Canada show you one public statement to the general public, during the NAFTA process, where it deal with absolute denials of its NAFTA wrongfulness. It never took you to any pleading there because it didn't want you to see that it had been doing that. That's a real problem.

Now, the information about Canada's misrepresentation became public in the innards of the Investor's Post-Hearing Brief in the Mesa Power NAFTA arbitration.

But even with this limited disclosure, Ontario and Canada never informed FIT Proponents that the unambiguous representations about the fair operation of FIT Program were untrue.

Certainly to the point that there was a discovery that more information from the NAFTA--from the Mesa Power NAFTA Hearing was public than had been

intended. The Mesa Power NAFTA Hearing videos were public for five years on the PCA website starting in April 2015. At this junction, Ontario and Canada never informed the proponents that the unambiguous representations about the fair operation of the FIT Program were untrue. They could have. They didn't. Instead, Canada continued to take unilateral steps to prevent this information from being seen. You're well aware of it. I don't need to go through this. But what it means is the suppression of the information meant that other FIT Proponents, such as Skyway 127, legislative oversight Committees, others who could have been affected would not be able to see this evidence as Canada runs the clock in an attempt to rely on temporal limitations and other ways to prevent bona fide victims from being able to have their day to be heard as well.

And Canada was careful to scrub references to the admissions of wrongful Government conspiracy from the Mesa Power Hearing Transcript. This is all part of what's going on here.

But then something went wrong because a small portion of the Government's admission about the Breakfast Club conspiracy became public through the Mesa Power Hearing Brief, and in these Briefs, the public disclosure gave Skyway 127 the information to understand that the

Government's earlier statements were false. And again, that date was August 15, 2015.

And it's clear from the testimony of Sue Lo, that the OPA, the Ministry of Energy, and the Government of Canada all misrepresented the truth. What they said, and what that senior official admitted are not consistent. Some FIT Proponents were treated better in the FIT process and for the worst reasons, not the best. And that a special high-level government body was in place to ensure that these special high-value proponents were getting better treatment at the cost of ordinary FIT applications like Skyway 127.

If we turn to Slide 42, what we see is a pattern of behavior, systemic acts by Canada, by making untrue statements that FIT Proponents and the public, proponents relying on good faith on the untrue Government statements to their own detriment. And to the benefit of Canada, Canada continuing the violation by concealing the truth, both lawfully and criminally, and Canada failing to stop with internationally wrongful action. When I deal with criminal, I'm referring to the criminal destruction that was not done by Canada, that was done by the former Chief of Staff to the Premier of Ontario, who was criminally convicted.

Such actions, by definition, constitute an abuse

of process and are a fundamental violation of fair and equitable treatment.

They are continuous acts that are egregious and shocking.

And as the evidence will demonstrate, Skyway 127 and Tennant Energy rely on Ontario and Canada's statements about their propriety under the FIT Program to their detriment. And now Canada dares to come before this Tribunal with dirty hands and says that Canada should benefit from its own wrongdoing.

Now, these acts are still continuing. They are not instantaneous acts. They're wrongful activity continues.

And as a matter of international law, these matters both of Commission and omission continue in time. The breach cannot occur until the disclosure of the truth exposes the wrongfulness, and thus completes it.

And I again stress that Canada's duty under Article 30 of the Articles of State Responsibility for Internationally Wrongful Acts requires Canada to engage in cessation and non-repetition of the internationally wrongful measure. And it's only when the lying stops that at that time the three-year time clock would start to kick in.

And to apply the three-year time limitation to

non-discoverable acts that continue would allow Canada to get away with an ongoing policy of deceit. A policy that its own officials admit to. That's the key thing here. Their senior officials admitted to it. And as a matter of international law, Canada must not be permitted to benefit from its own internationally wrongful acts. Its own intentional internationally wrongful acts. This Tribunal must hold Canada accountable and bring it into conformity with international law if possible.

And so, that's the issue about continuous. As we move to composite, composite breaches deal with systemic breaches. In this Claim, there's admitted evidence by Canada on the existence of a conspiracy in violation of international trade obligations that affected a number of FIT Proponents, and that's at least Skyway 127 and Mesa Power, probably other FIT Proponents in the Bruce Region, they were detrimentally affected by the Breakfast Club conspirators. They were victims. In fact, systemic wrongfulness clearly fits within the definition of a composite breach.

Now, the Investor intends to address these matters after the consideration on the evidence in this Hearing. Because we think we would need to look at the evidence as it comes out to look at these. But concerning jurisdictional objections, at the January 2020 Procedural

Hearing, the Investor addressed these issues and explained that breaches could not have been known by Tennant Energy before June 1, 2014. Because of Canada's policy to conceal and suppress information. At that time, counsel for Tennant Energy explained the information first became available through Tennant's reviewing of the information by actions taken by the most high-ranking Ontario civil servants and about the secret Breakfast Club meetings. And Sue Lo testified that the special protector for high profile proponent companies was provided by the meetings of the Breakfast Club. That's in the public part.

The Post-Hearing Brief was released to the public on August 15, 2015, and that is the key date.

Now, I note that Canada misspoke this morning. The date that the Mesa Power Memorial was posted to the public was on June 4, 2014. This was confirmed by an e-mail from the PCA. I think I may have referenced it earlier, Document C-130. It confirmed that the PCA was experiencing challenges and wanted to confirm the document with Appleton & Associates and Jennifer Montfort from Appleton & Associates International Lawyers prior to uploading it to the website. So, I just wanted to make sure that we were clear, that's the date where that comes in.

Now, I'd like to turn to timing--

ARBITRATOR BETHLEHEM: Mr. Appleton, before you turn to timing, and it may very well be that the question that I'm about to ask is what you intend to address on the timing, but you said a moment ago that you would like to or you propose to address some of the issues around continuous and composite in your Closing submissions only after the evidence has been heard, and I would just like to put down a marker for you and obviously also for Respondent's counsel, I would be grateful if you would address at that stage, if not before, the analysis than you'll find in Paragraph 208 and 210 of the Spence Case, because it goes exactly to the issues that both you and Canada have been addressing. It comes after Grand River, it comes after Clayton, so it draws some of these threads together.

Now, let me just say very clearly, that I invite you to say that the Spence decision was wrong, but I invite you also very much to engage with this issue. The conclusion of the Spence Tribunal is that--I'm looking now at the last sentence of Paragraph 210, while it does not reject the notion of a continuous act, it says that in circumstances in which there is a time bar, it means that for a component of a dispute to be justiciable in the face of a time bar limitation clause, that component must be separately actionable, i.e., it must constitute a cause of

action, a claim, in its own right.

Now, in your Memorial at Paragraph 717 and in your Notice of Arbitration I think at Paragraph 91--and this features in the subsequent pleadings--you have set out a number of issues which you contend amounts to breaches. I must say I'm still struggling to identify the specifics of those breaches and whether you are contending that they are each a separate cause of action or whether you are using the information that came to light, as you say, in 2014 or 2015 for purposes of taking the Claimant's case back to a pre-limitation period causes of action.

So, just to put you on notice that I would like you, please, to address that, if not now, then certainly in your Closing Submissions.

MR. APPLETON: We will certainly deal with the Spence Case in the Closing Submissions. However, let me simply put down the marker, as you would say, to identify that all the pleadings were clear that this claim arose out of the discovery of this wrongful behavior, and that this discovery was done in the context of denials, of misrepresentations, and that is in itself an actionable and wrongful act--factual matter that would give support to the breach of Article 1105 of the NAFTA, possibly others, but certainly that.

And that for certain--for certain--that act

could not be subdivided because it is inherently a continuing act, and that Canada benefited from that continuing act, and there was no admission that was involved, which often is a hallmark of a continuous act.

Furthermore, we have the existence of a conspiracy which also assists us to look at and understand the nature of a composite act.

Now, often we have a situation where you have an act that's instantaneous and then you may have lingering effects, but that's not what we're talking about here. We are--Canada is talking about that. But that's not what we're talking about. We were clear in those pleadings that it arose from the discovery because Canada and Ontario misrepresented. And if you engaged in ongoing misrepresentations, and there are multiple independent ways to understand that, and there are credible reasons to believe that they haven't done something wrong to you and then they do something very bad and very wrong to you, how could you know?

So, your choice is, you have to sue everybody all the time everywhere, without any basis. That seems to be Ms. Dosman's suggestion, that because I can substitute algebraically A for B, therefore I have to sue everybody as a result, every time. Sort of like the wild west when we come out shooting and then we ask questions later. But

that's not what the NAFTA is for. The NAFTA's purpose is for commercial predictability, and that's not the way it's supposed to work.

So, here, instead, you have a very clear situation, and I want to make sure that we reiterate very clearly that the conduct that Canada has engaged in is egregious and serious conduct, serious misrepresentation. They had said, they didn't have to say this, they could have said we're just going to court. Their Minister said we followed everything, we did everything right. It's just sour grapes. They just are disappointed. We never treated anybody differently. We treated everybody the same, and then their Assistant Deputy Minister in charge of the program gets it. There are other admissions in that record, too, that we'll get to, too, when we get to the merits.

And by the way, it's all being done by a conspiracy of the highest level that nobody knows about, an off the books committee that takes care of problems called the "Breakfast Club"?

ARBITRATOR BETHLEHEM: Mr. Appleton, I certainly understand the submissions that you're making, and as I said to Respondent's counsel, I don't want to subvert you from the submissions that you still have to make. So, please don't feel free that you need to follow my question

down the rabbit hole, but this was simply to say that I would be grateful if you would come back to this issue in your Closing Submissions, and I'm hoping, obviously, that we will hear from you now also on the 1116(1) trust issue in this first round of submissions.

MR. APPLETON: Sir Daniel, we will get to that issue in a moment.

With respect to--I think it's important, since you raised the issue, that we advance specifically, and we need to understand that we said yes, this is a continued breach. We say, yes, this was a composite breach. We say what is the gravamen of the untruthful behavior, the lies perpetuated by the Government because we would otherwise not know. We wouldn't be able--if I go to the police and they give me an answer and they tell me something is one way, I would generally believe them; but if the Superintendent of the Police was with me, they were doing something wrong, then I might change my view. Otherwise, I'm inclined to believe. I'm inclined that good faith should be presumed on to the acts of government, not the other way around. That's what makes this shocking and egregious.

And that is the key element of this claim, and that could not have been known before the knowledge took place about Canada's wrongful behavior because otherwise

you would just see Canada saying that we did it for a good reason, and that's really the key thing.

In fact, I would like to turn to Slide 43, which is the Resolute Forest Tribunal Decision, and here--which is RLA-079 at Paragraph 154. The requirement of breach, one, cannot know of a breach until the facts alleged to constitute the breach have actually occurred. And in this case, the facts that constitute a breach occurring is about the misrepresentation being known. It's that knowledge of the misrepresentation. Otherwise, it's just a representation. It's a misrepresentation that brings us in. That's what sets the time of the breach.

So, public knowledge of the false statement ends the suppression of the breach of truthfulness, and some information first arose on April 30, 2015, with the release of the Mesa Transcript, but most of this information was not open to the public, so it didn't happen until a sliver of it came out with the Mesa post-hearing breach--sorry, Post-Hearing Brief, and that occurred on August 15, 2015.

And the effect of the repetition was to mislead the FIT Proponents, including Skyway 127, who all of the FIT Rules, and that included Tennant Energy, and delayed them in bringing claims because they didn't know there were claims. That's the key issue. That's what I'm

trying to get to.

I know that Spence is trying to deal with that, too. That's why I'm trying to give this information so you know where we're coming from, as we look at the evidence as we go along. But for sure I will come back to this with respect to the closing, but I want it to be abundantly clear now so we're on the same page.

But fundamentally, how could Tennant Energy know in 2013 that admissions would be made a year later in October 2014 in a closed session by Assistant Energy Deputy Minister Sue Lo, it couldn't. All Tennant Energy knew were contrary statements made by Canada, that Ontario treated everyone the same in the FIT Program. And they had a history following the OPA, a successful history of a large number of projects that were successfully done.

So, what makes this all so troubling is the lack of transparency, and this was noted at Paragraph 241 in the Jurisdictional Counter-Memorial, I think I put that on Slide 44, it's the general international law principle of nullus commodum: No one may take advantage of their own wrongdoing. And that's a general principle of international law, according to Bin Cheng. He says that at CLA-108. I believe that in his book General Principles of International Law.

So, if Canada were to block the claims of

victims, it would be profiting from its own wrongfulness. And this raises basic principles of legitimacy and transparency and due process. These are the principles of the heart of the Investor's money, that the Investor is entitled to have it's whole case heard, including the damning evidence arising from the admission of Canada's most senior officials.

So, that's what takes then to this issue of the affirmative defense, the issue that I know was raised in some questions earlier because the Investor's are of the view the affirmative defense in this Arbitration, Tennant Energy's claims are time-barred because Tennant Energy must have incurred loss or damage before March 2014, and Tennant Energy knew or ought to have know before that date.

First of all, this is fundamentally a question that actually is temporal; that there is the question of the status of a temporal element of status, so Canada admitted this morning, Ms. Squires admitted that it was a temporal issue. We think it's better to deal with that as an issue of admissibility, but it's clear that there is a split in some of the authority, but we have no stare decisis rule; there is no binding precedent. We think this would be better to have been dealt with by admissibility. Fundamentally, it will make no difference

because the real answer to all of this, it's not really going to be important. The reason it's not going to be important is because the breach arose in 2015; and, therefore, none of this is an issue.

And I remind the Tribunal that Canada does not dispute any jurisdictional issues after January 15, 2015, which is the date that Tennant Energy registered legal title of shares. I'm going to get that before we finished, but I just want to flag that Canada has no jurisdictional challenge about that. And we have flagged that in our pleadings as well.

So, it will be impossible because the foundational knowledge that underpins this claim did not occur until the testimony of Mesa Power which occurred in late October of 2014 and didn't become public until August 2015, it's just impossible that Tennant Energy could have known about the wrongful Government conduct, and that's because Ontario was expressly denying wrongdoing earlier, and the admission of Canada's lies only incurred much later, and that--these are the facts that are known to the Tribunal as part of the evidence.

Now, this morning Ms. Squires says the breach is not an instantaneous act. And if I simply take us to the timeline just for a moment, you can see that there is from each spot in the red that there are a series of actions

repeated again and again for the same effect to preserve the same thing every time they say there is a Mesa Notice of Intent, the Energy Minister shortly says, "Don't follow, don't listen to it, we treat everybody the same." The fifth that Canada says is there is no NAFTA breach, everyone is treated fairly, the FIT Program is over. The proponents believe that they just lost. It's not Grievant. They just believe that they lost fair and square. It's not until later they find it wasn't fair and it wasn't square, but that's what's going on. That is a tell-tale sign of both the continuous breach and because of systemic elements that were composite breach.

So, any of the cases that suggest you cut out everything to the smallest piece, first of all, it doesn't work in this type of an issue if you have a conspiracy and doesn't work as an issue. We have ongoing repetitive wrongfulness that's not corrected. And when you have an omission, that's especially problematic you know that is exactly tells you you have a continuous breach.

So, I'm not going to take us through the timeline. We know that. I would like to talk, though, about Tecmed for a moment.

Tecmed says--and it's our CLA-113--that when we look at the conflict, we put it in perspective, and particularly--I believe this is a decision of the late

Justice Crawford--Sir Daniel, you will remember he was in contact, I recall, he was doing work with Professor Crawford around the time of this, but the Decision says, particularly if that conduct could not reasonably have been fully assessed by the Claimant in their significance and effect when they took place because it was not possible to assess them within the general context of conduct attributable to the Respondent in connection with their Investments, that you have to understand the significance and the effect as they took place; that that conduct that I showed on this slide, that's relevant to the significance of the effect because there is a general context of conduct, and you need to see this in the context of the conduct of the Government saying they've done nothing wrong. You could believe them.

And I will look at that and evaluate the application of this, as I point out earlier in the closing, but we want to put to rest Canada's inchoate arguments that the Measures do not relate to Tennant Energy. As a FIT Proponent, these misrepresentations were intended to deceive and delay claims made from the victims of the Breakfast Club, and that's got to relate; and measures are defined in the NAFTA as practices, and deal with governmental actions, and that's what's going on here.

So, to talk here specifically on the issue of investment to get to what Sir Daniel wanted, so the question on investment: Is there an investment? The answer is yes, Tennant Energy was an investor of the Party, and it has an investment when the alleged breach occurred. And on that, the issue is that it had a legal interest in the Shares. It had a beneficial interest in the Shares. It had--and again I say Canada doesn't dispute any of the issues after January 15, 2015, where there is a legal interest. And since the Claim actually arose in August of 2015, that should just end all of this. It should be as simple as possible because, to the extent that the Measures arise on the discovery of the Breakfast Club conspiracy by the victims that that problem goes away. But even a discovery of information, first it was after June 1, 2014, that limitation period--we can show you that, and that's here on the next slide, okay? To the extent that the Tribunal decides it's necessary to show ownership of Tennant Energy before 2015, Tennant Energy meets that test as well.

So, to be clear, we need to find a starting date for this analysis. Canada gives you two starting dates. One of the starting dates makes no sense. There is no way that the July 4, 2011, starting date would ever be possible because Skyway 127 was the harmed on that date

and here on the list. So, where they're harmed, if you are going to have a harm, but that's different from whether or not the legal definition of loss or damage, but for sure they do not get a contract when the FIT Program ends, and that's in June of 2013.

So, effectively, that's got--there is no legally significant basis to the date of July 4, 2011, because Joanne Butler, Vice President of Energy at the OPA, wrote a letter and told them they're on the list, so that can't be it, okay? And then Skyway 127 was next in line for transmission. Since they thought there was a law of transmission because the OPA said, they are going to take all the available transmission and make it available, and there is a lot of transmission in that area, they believed them. They thought that was credible. They're a regulator as well as doing the Contract.

So, the earliest possible date Canada's argument has to be June 11, 2013. That is the date of the Minister's order there.

Now, there are four grounds upon which Tennant Energy is an investor with an investment, and we will go through each of them.

The first is, of course, the issue of the legal title. That is January 15, 2017.

And then Tennant Energy beneficially owned

shares of Skyway 127 since April 26, 2011. And Canada took you to some pleadings where a date set was June in the Memorial rather than April, and that was obviously a mistake, and I take responsibility. The date should have been April of 2011.

John H. Tennant had shares on April the 19th, 2011, and they were for the purpose of going to a company to be nominated by him. They were nominated by him on April 26th, and that was the date that the Trust was created. That's well before June 13, 2013, which is when the waitlist is ended.

So, for sure, while this program is underway, while they're still on that list, they have an interest, and that interest is through the beneficial interest.

But in any event, Tennant Energy was assigned the rights to Skyway 127 from John H. Tennant as well, and that was done in Document C-268. And this assignment occurred well before the end of the program. And this assignment, by the way, could have been done at any time up to the date upon which the Claimants issued in 2017.

An assignment is successor-in-interest. A successor-in-interest is always entitled to be able to assert a claim as long as the Party was of the same nationality or a treaty party so that they had that capacity to be able to assign, which is exactly what took

place here.

And that answers it all. You don't even have to worry about the Trust because of the assignment. So--that's a simple issue, and the assignment has not been an issue of dispute, and the law of assignment has been filed in the Counter-Memorial on Jurisdiction, and it's clear.

Then we have, of course, the voting bloc.

ARBITRATOR BISHOP: Before you go on--

MR. APPLETON: Yes.

ARBITRATOR BISHOP: Before you go on, when was the assignment? What was the date of that?

MR. APPLETON: The assignment is a document, I believe the date was in February of 2016.

Hold on a second. I will get the document.

It's C-268.

And the assignment--we will go through the assignment, no doubt, with the witnesses, and I will deal with it in the closing, but the assignment goes right back to the beginning and says expressly in its terms because right back to the beginning and that is back to, I would say, April 19, 2011, and the assignment is clear and express.

So, we filed the Daimler case, but also in our response with respect to the 1128 we dealt with

successors.

Yes, Mr. President.

PRESIDENT BULL: Mr. Appleton, I don't understand what you mean by the "assignment" all the way back. Could you do that slowly for me.

MR. APPLETON: Yes, of course.

Unfortunately, I do not have Document C-268 available for me in the slides. Would you like me to pull C-268 and go through it with you?

PRESIDENT BULL: No, I don't need you to take me to the document. I just need to understand what you said.

MR. APPLETON: Well, the document is an express document. The document is issued by John Tennant, and it says in it three things: It says clearly that the intangible rights with respect to the Shares have been assigned to Tennant Energy, and this goes back to the very beginning. It goes back, therefore, to the period of time it would take us right to the beginning of this process.

And because of that assignment--okay, and that assignment was made--it was issued in February of 2016, and since John H. Tennant is the American citizen--we have that evidence in the record--even if, in fact, John H. Tennant had the Shares and they were not in the Trust, he would have been entitled to assign the Shares to Tennant Energy, and that's what it says, that he assigned them in

any event--that's what the terms say--in his personal capacity and as that of Trustee.

And so there are three clauses that deal with it in that document, so that's what I mean by the "assignment."

ARBITRATOR BISHOP: I'm sorry, I don't understand. What was assigned?

MR. APPLETON: The assignment says that the Shares--any shares that he may have had in his own personal capacity or as those of Trustee were assigned to Tennant Energy. From the date he had it, they had all been assigned, and he also had assigned with it is any rights he might have had with respect to the North American Free Trade Agreement. So, to the extent there was any intangible rights that went with that, he assigned it.

PRESIDENT BULL: Right. You see it's not that the document itself is an assignment. You're saying that the document is evidence of a prior assignment?

MR. APPLETON: The document--you're going to be able to ask these witnesses about that.

(Overlapping speakers.)

PRESIDENT BULL: I would like to know your case because you said there was a document dated 2016, so I would like to be clear whether the assignment on your case

happened in 2016 or before.

MR. APPLETON: Justice Grignon says in her Witness Statement, her Expert Statement, at Paragraph 19, that this document in itself constituted a valid assignment, and that it went back to the beginning. But that's her opinion. You will be able to ask her.

There is no contrary response from Canada's expert, Margaret Lodise--didn't deal with it whatsoever--and it would seem to me that it's pretty clear in any event that the document speaks for itself.

So--but it would seem to me that if there is an assignment, that in itself answers the entire question.

PRESIDENT BULL: Mr. Appleton, I now know exactly what you're saying. Thank you.

MR. APPLETON: I invite you to look at document 268.

Now, the last one is that Tennant Energy controlled a voting bloc of Skyway 127, and that voting bloc had control of the Company for a considerable period of time well before June 13th, 2013, which is when the FIT Program ended.

So, each of these grounds confirms that Tennant Energy was an investor with an investment, technically an enterprise, in Skyway 127 that existed well before June 13, 2013, at the end of the FIT Program.

So, we think that there's no real issue here because Tennant Energy already had an investment under either date scenario, the 2013 priority waitlist or the August 15, 2015, discovery, and that's why we thought that this issue would have been relatively easy to be able to address.

And so, if you don't have any more questions, and here I'd just like to conclude, but if you have more questions, this is a good time; if you don't, then I'll say that--

(Overlapping speakers.)

PRESIDENT BULL: Mr. Appleton, sorry, I was a little slow to the "unmute" button. I did have a question on the time-bar issue.

I understand very clearly that you're saying that this was a continuing breach. I understand that. But it seems to me that the breach for which your client is seeking relief is actually the unfairness, the failure to treat these parties in a--treat your client in a fair manner.

And that--is it possible to--for your case to be framed this way, that that is actually an instantaneous breach rather than a continuing breach but there was a course of conduct by the Government that was a continuing course of conduct that kept information away from your

client such that they did not know that they had a cause of action until much later? Now, that seems to me to be a little different from what you were saying. You seemed to be saying that the breach you're suing for is a continuing breach, and you can see the contrast I'm making, and I'm wondering whether the way I've tried to formulate the argument, is that also something you're advancing or that's not your case?

MR. APPLETON: Mr. President, I'm going to slightly revise what you're saying, but you're getting very close. Our case is about a course of conduct. That is what we were--and we will go through, if you like, some of the pleadings and take you through where we've done that, but is about the course of conduct.

The breach in 2013 is over. The breach is that we were delayed and denied the access to justice, the ability to have our rights because we could not know because they hid it. And that is the course of conduct is our claim, and the effects of that course of conduct are the inability to be able to deal with this because we didn't know because they engaged in such wrongful conduct, and that is a continuous breach and because of the nature, a composite breach, and that is exactly what's there.

And if that is what I think you were saying, then you know where we're coming from. But if that's

different, then I think--I want to make sure that you understand precisely because I think it's time that we get very clear here about what we're doing. That's why there was all the discussion all the time about the discovery and what was found and what was--because there was--it's that context. It's Tecmed. Understand the nature of what was going on, and there were many different ways that you could understand it, but it was reasonable to believe the Government until their senior officials admit that they're lying, and then it is no longer reasonable to believe the Government.

And Canada took to you to none of that. Not one word of any of that. That was astonishing to us in the Opening. I thought they would have justified it. I thought they would have explained it. Perhaps they're saving it for the Closing, but that is exactly--I'm sure they will in the closing act, but that for sure is what we need to be able to deal with.

Does that answer your question, Mr. President?

PRESIDENT BULL: Yes. Thank you, Mr. Appleton.

MR. APPLETON: Were there any other questions from your colleagues at this point before I simply tie up with a few pages and I answer the specific questions?

ARBITRATOR BISHOP: Just one, which is what was the purpose of the assignment in 2016? That is to say, if

there was already a trust, why were the Shares assigned to Tennant?

MR. APPLETON: So, Mr. Bishop, I was not counsel to the company when they did the assignment. We were not retained until March of 2017. We had had an interview with the company in June of 2015; that was discussed by Mr. Pennie in his Witness Statement. We thought that--we couldn't remember the dates because it was--a meeting. We knew it was sometime after March 15, so in the pleadings we said sometime after March '15. Mr. Pennie, in his Witness Statement, by the time he gets there identifies the date. It's the 15th of June. And on the 15--but we're not engaged at that time. We don't become engaged by Tennant Energy until March of 2017.

And so, I have an understanding of what I think they were doing, and my understanding is that they were assessing their own position vis-à-vis General Electric, another large investor, and I think it was quite possible that they might have been considering assigning their claim in its entirety to General Electric, who might have brought the Claim against Canada; but instead, General Electric did a major, major global reorganization and got out of a number of businesses, and basically, everybody that involved in this area of their business was flat-lined. They were gone. And as you know, GE is now

splitting up into three companies again, so they are going to go through that yet again.

And so, it appeared that Tennant Energy was going to have bring their claim themselves later, but I think at this time they were considering the situation that maybe they might have assigned the claim, and I think they wanted to get all of their own things together. But I didn't write their documents, and so that would be my understanding of what's there, because it has some lawyer-like words but it's clearly not written by a lawyer, and so, you can ask them for sure, but my sense is is that they wanted to take stock of where they were, and I think they want to cover all the different options. They hadn't brought a claim, and they were basically self-medicating at that time without counsel.

ARBITRATOR BISHOP: Okay. Thank you. I appreciate that.

The only other point I would make is that on your last slide, 53, you referred to an e-mail from the PCA, from Aloysius Llamzon, Louie Llamzon, and I don't think it matters in any respect, but Louie is, of course, a member of our law firm now, and I just wanted to point that out to everyone.

MR. APPLETON: Mr. Bishop, I didn't know that Louie has gone there. He's done some very, very good

writing, you know, on the issue of corruption.

If I can just turn for a moment to the last slide, that's--I put that in to response, if necessary, to the issue about the date; and so, while we're at it, and when I just walk us through it is we can all see it, you'll see that--because this is where I think some--that may have been wrong from Canada--that the Tribunal in this case--and by the way, it's not Canada's fault that they got this wrong because there were documents that said that they were going to make things public but then they had problems making things public because of trying to deal with the issues of declassification of classified information. And so, Canada had suggested that the stuff had been public earlier, but, in fact, as you can see from Louie Llamzon's e-mail that he writes to Ms. Montfort, who was my executive assistant at the time, and copies me and says (reading): Out of an abundance of caution, particularly given the number of versions of documents in circulation, may I request your confirmation that the following copies attached are to be uploaded? And then you'll see the public version of the Memorial submitted by the Claimant.

So, you can see that the Claimant's Memorial had not been updated before Wednesday, June the 4th at 1:56 p.m. We believe that Ms. Montfort responded

immediately to Mr. Llamzon and that they got done later that day. It may have not been done until next day because of the time difference between the PCA and being in the East Coast of North America, but we've been using the date of June the 4th as the date it was posted. It's possible it was posted on June the 5th, but that's the date. It's not an earlier date.

Does that answer--that was the reason why we had it there.

ARBITRATOR BISHOP: Thank you.

MR. APPLETON: And I'm just going to say that in conclusion, in fairness, and assuming the number of questions--

ARBITRATOR BETHLEHEM: There is a question or a--

MR. APPLETON: Oh, I'm sorry, Sir Daniel. I'm so sorry.

ARBITRATOR BETHLEHEM: And I'm not sure whether it's a--let me put it this way, Mr. Appleton. I don't invite you to answer the question now, but I think that this is a point at which I should put it on the record, both for you and for Respondent's counsel because it occurs to me in the light of your response to Mr. Bull's question, and that is that in your analysis for continuing breach, the tail end of that analysis concerns the

disclosures that came out of the Mesa Power proceedings, and I'm conscious that in the Mesa Power Award there was quite some discussion, ultimately finding in your favor on this point, and I think it was not a point that was resisted by Canada but about but whether the trigger, if you like, of Chapter Eleven measures adopted or maintained by a Party were engaged. And I would be interested to hear you in your Closing Submissions, when you come to address in more detail this question of continuing and composite acts, whether you could just reflect on whether you would like to say anything on whether the conduct that you are talking about or the notification that emerged in the context of the Mesa Power proceedings amounted to measures for purposes of Article 1101 and Chapter Eleven of the NAFTA.

MR. APPLETON: Just to be clear, so to make sure that I and the Government of Canada fully understand your question, is your question whether or not the decision of the Tribunal constitutes a Measure?

ARBITRATOR BETHLEHEM: No. No, no, that's not the question at all. Going back to my earlier point in your response to our President's inquiry, I have invited you to address in a more targeted fashion, I suppose, by reference to Spence and Clayton and Grand River, the question of continuing conduct because I'm still

struggling with the issue, myself, as to whether you are making allegations of a new cause of action, post or within the limitation period; or whether the conduct post the limitation period is having the effect of bringing the pre-limitation period conduct within our jurisdiction; or whether, as you put it, it is simply a continuing course of conduct.

And so, I'm struggling to identify what precisely it is within the three-year window that you are saying we should be seized of, and it's in that context that I would like you just to reflect on whether there is any issue about whether that conduct, within the limitation period that you say we should be seized of, constitute measures for purposes of Chapter Eleven of the NAFTA.

MR. APPLETON: All right. And I just want to make sure that I understand then--I think I have a better understanding now--but you're not saying that there is an issue of this Tribunal being able to receive information that may have occurred before the limitation period. You're simply asking in our view whether such measures--such acts and facts might be part of the Measure that we say is before the Tribunal.

ARBITRATOR BETHLEHEM: Well, I'm trying to establish what you say the Measures are that we should be

seized of that come within our jurisdiction, bearing in mind that you are saying to us there is a continuing breach, and the continuing breach starts with certain decisions that were taken in 2011 and go to the revelations and the hiding and the lack of disclosure that you say was brought to light in the Mesa proceedings. Mesa--the Mesa proceedings are--seem to be an issue that everyone in these proceedings are dancing around. There was quite some discussion about whether Measures were engaged by the allegations in Mesa, so it was simply to invite you and counsel for Canada to reflect on that point for purpose of your Closing.

MR. APPLETON: I take note of your explanation, and we will consider our response in light of that.

ARBITRATOR BETHLEHEM: Thank you very much.

MR. APPLETON: Is there something else here or can I simply try to tie up?

PRESIDENT BULL: I think you can go ahead, Mr. Appleton. Thank you.

MR. APPLETON: All right.

Fairness and even-handedness are the bedrock obligations of International Investment Law. In this case, Tennant Energy case, requires us to examine the basic elements of its meaning, mainly where Government conduct has resulted in unfair and less favorable

treatment being given to competing foreign investors.

If the fairness guarantees of NAFTA are violated, when governments favor local national champions, local cronies and local friends over foreign-owned firms giving them special privileges not available to their competitors, they are violated when governments grant their friends and supporters special access without ensuring that those powers are used for public purpose and are, in fact, violated when they're used for improper purchase, and they're violated when there is a lack of evenhandedness. The rule of law, due process and fairness are violated when governments engage in abuse of process, and this occurs especially when they make representations that are untrue that they rely on to absolve themselves or protect themselves for liability.

They relied on these statements to the detriment of others, and these violations only end when the true facts become known. They continue when Canada fails to stop its conduct, and throughout that period when their misrepresentations remain hidden, cloaked and undisclosed. So, the conduct of Canada concerning Skyway 127 Wind Project fundamentally undermines the guarantees of equality of competitive opportunities given to Skyway 127 and Tennant Energy in return for establishing and maintaining their investment in Canada. That is, in fact,

what I mean when I talk about a lack of evenhandedness.

Understanding these concerns are essential to understand the issue of jurisdiction because it's abundantly clear that Canada's conduct was part of a continuous act as well as a composite one. And the long-established body of international law dealing with fair and equitable treatment obliges Canada to provide investments of Investors--of American Investors like Skyway 127, with fairness in administering their laws and freedom from arbitrary and discriminatory acts.

So, Canada's conduct raises basic principles of legitimacy, due process and transparency. These principles are foundational, but the Investor is entitled to have its entire case heard, and when there is unfairness or they're based on a relevance standard or protected by a national treatment, or an absolute standard protected by NAFTA Article 1105, the NAFTA investor chapter provides a remedy. That is what we are seeking, and that is something that this Tribunal has clear jurisdiction to be able to do.

And so, if I just go back to Slide 52 to the two questions, was Tennant Energy a protected investment of a Party when the alleged breach occurred? The answer is yes. The breach occurred in August 2015 when Canada's obfuscation started to end because of the admissions being

public. But even if it occurred in June of 2013, Tennant Energy was an investor protected by the NAFTA at that time.

And the second question: Was the Claim filed to the expiry of the three-year limitation period under NAFTA Article 1116(2)? And the answer here again is yes. Again, the breach occurred in August 2015, again when Canada's suppression of the truth started to end through publication of the truth. It could not have occurred before the admission by Canada's Government witnesses, which took place in October 2014, which is well after the three-year limitation period which was--started on June 1, 2014.

Now, I want to turn to one matter that Canada raised in its Opening. I don't have a slide for it, but I have a copy of their slide or I did up to a moment ago--oh, here it is. And Canada made reference to the report done by Deloitte, CER-1, and that is the Report filed with the Merits Memorial with respect to damages. And in this you'll see that Deloittes have said that they've looked at damages and they said as a result of the notification--this is the Slide 22, I'll also make reference to Slide 98 of Canada's package. I'm just simply quoting a page from the Report, that Canada says--Canada says that the damages team have admitted the

date of breach.

Now, we know, of course, that that's not the case but they say as a result of the notification--this is Deloitte--of July 4, 2011, that it would not receive a FIT Contract but would be placed on a priority waitlist, Tennant had been treated unfairly. Well, that may be, and then they go on to say, Tennant had been treated unfairly by July 4, 2011, given that it expected a higher ranking based on its FIT Applications.

So, with respect to Slide 22, that is not admission of loss or damage or of anything. It's just a statement of a fact. They felt they should have had their contract by then. If you probably asked them, they probably said it looked like their contract earlier because that was already delayed in 2011.

Then we look at Slide 98, and there are three documents that are beautifully laid out in the slides. I give excellent credit to Canada's slide team, and in the middle there are Claimant's instructions to damages' experts, and it says--this is actually the Expert's writing--they say (reading): We understand from counsel that the primary claim in this Arbitration relates to unfair treatment covertly and systemically provided in 2011 by Ontario to improperly allocate FIT Contracts. Well, to International Power Canada from a limited pool of

available FIT Contracts.

Well, that is a primary fact. I wouldn't have called it a primary claim but it's a primary fact. That is a fact. It is not the Claim. But we want to make sure that we're very clear, and that comes in perhaps to one of the questions originally raised by President Bull that the 2011--there is no issue in 2011 because they don't actually lose their claim in 2011. They don't lose their contracts in 2011, so that couldn't be it, but that's a fact that--and we'll discuss this with some detail as we get to Closing after we hear from some of the Witnesses with respect to this. But I wanted to make sure that we were very clear with respect to that.

And finally I want to point out that Canada does not at any time raise any challenge to a claim that arises from January 2015 onwards, that, January 15, 2015, the date that legal title comes to Tennant Energy--we'd say it would be earlier because of assignment, but Canada has no challenge under jurisdiction after that point. So, to the extent that there are issues that clearly arise after that date--and there are--to the extent that there is legal title registered under the Share Registry as of that date, which there is, none of that is an issue. We think that's relevant.

Let me just confer with my colleagues for just

one moment to see if he thinks I've missed anything and...

(Pause.)

MR. APPLETON: And that, we want to thank the Tribunal for its patience. We also want to thank the Government of Canada for its considerable thought and effort and its excellent slides today as we look forward to working very effectively and collegially with counsel for Canada and with the Tribunal over the next few days as we have to go and deal with a large number of witnesses. But I think that we made an excellent start today and that we should be in a very good way to be able to put this together.

And unless the Tribunal has any further questions, I simply would like to thank you for giving us our opportunity today and for allowing us this opportunity to be heard on this very important issue.

PRESIDENT BULL: Thank you, Mr. Appleton.

So that, I think, brings us to the end of today's proceedings. We have two witnesses that will take the stand tomorrow, and we will start at the same time as we started today's hearing. And I think with that, we are adjourned for today and I will see everybody tomorrow.

MR. APPLETON: Thank you.

MS. SQUIRES: Thank you very much.

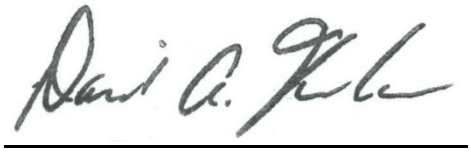
(Whereupon, at 2:53 p.m. (EST), the Hearing was

adjourned until 9:00 a.m. (EST) the following day.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.



DAVID A. KASDAN