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 5

Friday, November 19, 2021

The hearing in the above-entitled matter came on at 9:00 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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APPEARANCES: (Continued)

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MR. ERIK GULOIEN
MS. KAREN SLAWNER
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Independent Electricity System Operator:

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 day to everyone.

Let's begin proceedings for today. This is Tennant Energy and the Government of Canada, Day 5 of the jurisdictional hearing.

Before we kick off with the Closing Submissions, I just want to deal with housekeeping matters, and I'll turn to Parties in a moment, but first I just want to sort some things out.

There were some authorities that were put into the record yesterday, and I want to make sure that the exhibit numbers are clear so that reference can be made to them in an efficient manner.

So, the first thing that came in yesterday was the California jury instruction that we looked at together, and the proposal from Claimant was that that would be marked as Exhibit C-270. I assume that's--there's no problem with that from Canada's side?

MS. SQUIRES: No, no problem.

PRESIDENT BULL: Right. Then that will be marked as Exhibit C-270.

Then there were two authorities that we--the Tribunal admitted yesterday, the Nevarrez case and the Butte case, and again Mr. Appleton's helpful e-mail yesterday suggested that the Nevarrez case would be marked

CLA-334 and the Butte Fire case be marked CLA-335.

And, Ms. Squires, there's no problem with that?

MS. SQUIRES: No problem.

PRESIDENT BULL: All right. Then those are so marked.

And then, finally, there was the application made late last night, depending in what jurisdiction you're in, for Eco Oro Minerals to be admitted into the record. The Tribunal has granted that, and I wanted to have an exhibit number for that. Ms. Squires, could you help me?

MS. SQUIRES: Yes, that should be RLA-206.

PRESIDENT BULL: RLA-206.

And, Mr. Appleton, no problem with that; right?

MR. APPLETON: No problem.

PRESIDENT BULL: Thank you.

So, I also wanted to just say that I know the Tribunal took a little while coming back on that application as well as on Claimant's Application for Further Directions. The time difference--with the time differences, it was the best that we could do in the circumstances, and I hope that matters can proceed from there in an efficient manner.

So, those were the markings I wanted to make. Can I just check with Parties whether there are

housekeeping matters you want to raise before we get into closings.

And first, Government of Canada.

MS. SQUIRES: No, nothing from us, thank you.

PRESIDENT BULL: Thank you.

And, Mr. Appleton, anything from the Claimant?

MR. APPLETON: Nothing this morning.

PRESIDENT BULL: Thank you, Mr. Appleton.

Then--right. Then I think we can proceed to the Closing Submissions, and we are scheduled to hear from Canada first, and I'll stop talking and let counsel for Canada proceed with the submissions.

MS. SQUIRES: Thank you. It will be a minute to get our slides up on the screen.

CLOSING ARGUMENT BY COUNSEL FOR RESPONDENT

MS. SQUIRES: Okay. Perfect.

Thank you, Mr. President and Members of the Tribunal, and good morning or good afternoon as the case may be.

This past week has been very interesting. It has brought out many of the issues that Canada has been grappling with since the Claimant filed its Notice of Arbitration in June of 2017, and one thing that we hope the Tribunal will come away with is an understanding that, while Canada's position has been consistent throughout as

to what the Claimant needs to demonstrate to establish this Tribunal's jurisdiction, the Claimant has been constantly shifting the goalposts of their claim, the Measures at issue and the law, simply to pursue a litigation strategy that must be rejected.

The Claimant's presentation on Monday brought up a lot of confusion, not just about the breach but the facts in general. This lack of clarity is intended to hide the flaws in their case. I started off this week by saying that this dispute is simple, and despite what we have heard this week, Canada maintains that position.

This morning, we are going to attempt to drill into the Claimant's arguments further, to demonstrate that this Tribunal does not have jurisdiction. We will split our time between both of Canada's jurisdictional objections: That the Claimant was not a protected Investor at the time of the alleged breach per Article 1116(1) of the NAFTA; and that the Claimant's claim was untimely per Article 1116(2).

What we learned this week directly supports Canada's position in this regard. The Claimant's failure to meet its burden with respect to establishing this Tribunal's jurisdiction cannot be overstated. Like Canada's opening on Monday, you will hear from myself, Mr. Klaver, and Ms. Dosman this morning. We will

specifically focus on responding to what the Claimant said this past week and the questions the Tribunal has posed in particular.

You will first hear from Mr. Klaver, who will summarize what we heard from the Claimant's representatives and the expert witnesses with respect to the alleged trust and explain what this means for Canada's objection under Article 1116(1).

He will also address the Tribunal's questions with respect to control as well as assignment by discussing recent jurisprudence and demonstrating why, based on the evidence before this Tribunal, the Claimant has not met its burden with respect to establishing itself as a protected Investor at the time of the alleged breach.

Once Mr. Klaver is done, I will return. At that point, I will clarify for the Tribunal what the Claimant alleges is the breach at issue here. I will do this by answering three questions that Sir Daniel posed to the disputing parties on Monday and specifically address the reasoning of the Spence decision at Paragraphs 208 to 210. That will lead me into some discussion with respect to the Claimant's--or Canada's second jurisdictional objection, that the Claimant's claim was not filed within the three-year limitation period in Article 1116(2) of the NAFTA. Ms. Dosman will then complete our submission on

the limitation period.

Now, on Monday, Ms. Dosman walked you through the Claimant's constructive knowledge. This morning, she will take the Tribunal through some additional facts that we learned this week that go to the Claimant's knowledge. In doing so, she will make some factual corrections to the statements that Claimant made in its Opening with respect to the testimony of Susan Lo in the Mesa Power arbitration, upon which the Claimant so heavily relies.

Importantly, as well, as she addresses the specific facts of this case, she will address the Tribunal's question with respect to constructive knowledge and how the limitation period is triggered.

Like always, we are happy to take your questions at any time.

With that, I will yield the floor to Mr. Klaver.

ARBITRATOR BETHLEHEM: As you do, so I may just ask, have we been given a copy of these slides that you're using?

MS. SQUIRES: Yes. I believe they were sent around about 20-25 minutes ago.

ARBITRATOR BETHLEHEM: All right. I must have missed them. I'm sorry.

MS. SQUIRES: If there's any issue with them showing up, let us know, and we can send them again.

ARBITRATOR BETHLEHEM: Thank you. I'm sure the Tribunal Secretary perhaps could send them around again. I didn't seem to have seen them.

MR. KLAVER: Members of the Tribunal, as Ms. Squires explained, I will provide Canada's Closing Submission concerning the first jurisdictional objection.

In line with the Tribunal's requests, my presentation aims to avoid repetition with the Opening and it's structured in response to the Tribunal's questions. As you can see on the slide, I will address 10 of your questions.

I have ordered the questions in what hopefully is a logical sequence. In responding to certain questions, I may cross-reference previous or upcoming answers. I welcome any questions from the Tribunal during this presentation.

The first question is: What is the relevance of their being a trust or not? The alleged trust goes directly to the power of the Tribunal to hear this claim. The Tribunal has no jurisdiction if the Claimant cannot meet its burden of convincing the Tribunal that the alleged Trust existed.

To establish jurisdiction under Article 1116(1), the Claimant must prove it was a protected Investor of a party who owned or controlled the Investment when the

alleged breach occurred.

As discussed in the Opening, the Claimant's alleged investment at the time of the alleged breach is not Skyway 127 itself but the beneficial ownership of about 22.6 percent of Skyway 127 Shares.

We can click once more.

Now, the Claimant alleged it owned these Shares through the alleged trust; thus, if it cannot prove that John Tennant created the Trust, then the Claimant failed to establish that it owned the Investment when the alleged breach occurred.

The Claimant also alleged it controlled the Investment through the alleged trust. We will discuss the meaning of "control" in detail later. For now, I'd note that Tennant Energy has not articulated how it controlled beneficial ownership of the Shares beyond its unsubstantiated claim that it owned the Shares. Thus, its argument on control over the Investment is inseparable from its case on ownership.

However, the Claimant also asserts that, as Trustee, John Tennant led a voting bloc with John Pennie and Marilyn Field that controlled Skyway 127. The Claimant was not part of this voting bloc. Therefore, its alleged control over Skyway 127 through the voting bloc depends on proving that it beneficially owned shares in

Skyway 127 through the alleged trust. Again, this means its argument on control over Skyway 127 also relies on its case that it owned the Shares through the alleged trust.

Thus, if the Tribunal finds the Trust did not exist, the Claimant neither owned nor controlled the Investment at the time of the alleged breach. The Claimant would have failed to establish jurisdiction under NAFTA Article 1116(1) as it was not a protected Investor at the requisite time. I will explain later that the Claimant did not provide adequate evidence to meet this burden.

The second question is: Assuming a trust is found, what is the relevance of the time when the Trust came into being? This will determine which measures the Claimant can challenge. The Claimant could not challenge measures that pre-dated when it became a protected Investor through the Trust. If the Tribunal found the alleged trust was created on June 20, 2011, it would have no jurisdiction over the Claims regarding measures that preceded June 20th, 2011, including many of the GEIA-related measures, and the June 3rd Direction (C-176). If the Tribunal found that the alleged trust was created on December 30, 2011, then the Claimant cannot challenge the award of FIT Contracts on July 4, 2011 (C-025).

The third question is how do the definitions of

"Investor of a Party" and "investment of an investor of a Party" in NAFTA Article 1139 interact with Article 1101?

Article 1116(1) sets out the circumstances under which an Investor of a Party may bring a claim on its own behalf. So provision requires that a claim pertained to be alleged breach of an obligation under Section A of NAFTA Chapter 11. Section A begins with Article 1101(1), the gateway to NAFTA Chapter 11, which sets out the scope and coverage of the chapter. Article 1101(1) circumscribes the application of the obligations in Section A and the dispute-settlement mechanism in Section B.

Article 1101(1) provides that Chapter 11 applies to measures adopted or maintained by a Party that relate to Investors of another party and investments of Investors of another party. The substantive obligations in Section A do not relate to a Claimant until it becomes a protected investor of a Party. Therefore, a NAFTA tribunal's jurisdiction under Articles 1101(1) and 1116(1) is limited to alleged breaches of those obligations and resulting loss or damage that occurred when a Claimant becomes an investor of a Party.

NAFTA Chapter 11 provides further guidance on when a person or entity becomes an investor of a Party and when an investment of an investor of a Party is

established such that they might fall within the scope of the chapter. NAFTA article 1139 defines these terms in relevant part as follows: Investor of a Party means an enterprise of such Party that seeks to make, is making or has made an investment; investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party.

A corporate entity thus becomes an investor of a Party under NAFTA Chapter 11 when it is both constituted or organized under the applicable law and seeks to make, is making or has made an investment.

Similarly, an investment of an investor of a Party is established when the relevant investor of a Party qualifies as such under NAFTA and acquires ownership or control of the enterprise or other interest forming the basis of an investment. Thus, the Claimant must establish it was an investor of a Party seeking to make, making or having obtained ownership or control of the beneficial ownership of the Skyway 127 Shares when the alleged breach occurred.

Now, the term "indirectly" in the definition of "investment of an investor of a Party" means that a NAFTA tribunal can look down the corporate chain--you can click once--to determine if the Claimant owned or controlled the investment through intermediaries.

Now we can click again.

This does not empower a NAFTA tribunal to pierce the corporate veil of a Claimant by looking up the corporate chain to determine if its owners owned or controlled the Investment at the requisite times. The NAFTA Parties did not authorize tribunals to find jurisdiction based on whether a Claimant's owners were protected Investors when the alleged breach occurred. Accordingly, the Claimant cannot prove that it was a protected Investor based on one of its owners, John Tennant, qualifying as such. The Claimant is the disputing Investor here, and it must establish Canada's consent to arbitrate with it.

The fourth question is what is the relevance--yes.

ARBITRATOR BETHLEHEM: Mr. Klaver, may I just stop you there. I mean, are you going to direct us to any authority beyond the slide in the proposition on this point?

MR. KLAVER: Well, yes, I certainly can. Customary international law has long upheld the principle of separate legal personality of the Corporation. This goes back to Barcelona Traction (RLA-152) and more recent cases such--well, not that recent, the Tokios decision (CLA-233)--

ARBITRATOR BETHLEHEM: Let me sort of interject because I'm not really inviting you to give us a thesis on Barcelona Traction piercing the corporate veil.

MR. KLAVER: Okay.

ARBITRATOR BETHLEHEM: I'm just wondering whether there's any NAFTA Chapter 11 jurisprudence on this point.

MR. KLAVER: Well, we have, in Waste Management (CLA-126) the Tribunal looked down the corporate chain through intermediaries to find that the Claimant owned or controlled the Investment, but there is not jurisprudence that would support the proposition that you could pierce the corporate veil of the Claimant, at least none that Canada would agree with.

ARBITRATOR BETHLEHEM: Sorry, "none that Canada would agree with," so there is jurisprudence but you disagree with it.

MR. KLAVER: Well, I--so, in S.D. Myers (CLA-111), that's the sole case that I'm aware of where a Tribunal did that, and Canada would not agree with that approach because, in that case the Tribunal looked through the corporate veil to the Claimant to find jurisdiction based on, one, an individual who owned the Claimant, and Canada maintains that that was not a proper approach to finding jurisdiction. And that Tribunal made that

Decision largely because it considered that formalities around jurisdiction should not have stopped it from hearing the merits of a claim, and that is simply not the proper approach to finding jurisdiction. The Tribunal has to be confident and certain it has jurisdiction over the case.

ARBITRATOR BETHLEHEM: Okay. So, we are going to hear from the Claimant in due course, then, about S.D. Myers. I'm not asking you to respond to that. I'm just wondering--I'm wondering why you gave us the bare proposition rather than actually developing the argument.

MR. KLAVER: It's--I'm sorry for not further developing the argument. I think the reason behind that is because the Claimant has in substantiated--has not provided sufficient precision on its claim. There are circumstances where it alleges that it was the protected Investor and at other times it says that it was the mere successor-in-interest to a protected Investor.

So, it has not contended that the Tribunal has authority to pierce the veil of the Claimant to find jurisdiction based on John Tennant being protected Investor at the time of the alleged breach, but we would maintain that that is not permissible for the Claimant--for the Tribunal to do. Its jurisdiction is based on Canada's consent to arbitrate with the disputing

Investor. I think that's the key proposition here, is that the Tribunal has to be confident that the Claimant has made its case, that Canada consents to arbitrate with Tennant Energy, not with John Tennant. John Tennant did not bring this claim.

ARBITRATOR BETHLEHEM: Thank you very much.

MR. KLAVER: Now, we'll move to the fourth question on what is the relevance, if any, of whether there was an assignment of NAFTA rights.

Now, I will first note here again the Claimant did not provide adequate precision on its case as to what specifically was being assigned. In the opening, Mr. Appleton suggested that, through Exhibit C-268, John Tennant assigned Skyway 127 Shares. Yet, John Tennant confirmed that he could not assign the Shares with this letter dated February 2016 because he no longer held shares in Skyway 127 as of January 2015.

Nonetheless, Canada understands the Claimant to argue that, even if the Tribunal finds that the Claimant failed to prove the alleged trust, it still has standing to bring this claim because John Tennant assigned rights to bring a NAFTA claim to Tennant Travel on January 15, 2015.

NAFTA claims and potential causes of action under NAFTA cannot be assigned. There is no mechanism

under NAFTA Chapter 11 that allows a disputing Investor to assign or sell a potential NAFTA claim to another Investor and establish the Party's consent to arbitration on the basis that the previous Investor was protected at the time of the alleged breach. A NAFTA Party's consent to arbitration under a claim brought under Section B is specific to the disputing Investor that brought the Claim.

To establish jurisdiction under Articles 1116(1) and 1101(1), a NAFTA claim must be brought by the Investor of a Party to whom the Measure relates, who is the subject of the alleged breaches of obligations contained in Section A as a protected Investor of a Party, and to incur resulting damages. This has been well-established since at least Methanex, which defined the scope of the Arbitration Clause to include Articles 1101 and 1116.

Had the NAFTA Parties intended to establish a mechanism to allow the assignment of claims, they would have done so expressly. Section B of NAFTA Chapter 11 provides access to an extraordinary remedy that cannot be expanded beyond its terms. Investment claims under NAFTA are not equivalent to property rights that Investors can buy and sell freely on the open market.

This is true for a claim under Article 1116(1) which concerns a claim brought by an investor on its own behalf.

We'll move back a slide, please. Thanks, Gen.

The NAFTA Parties--we'll just jump back one slide, please. Thank you.

Now here, we can see the NAFTA Parties--if we could go to the--yes, this is the slide, thank you, Gen. Perfect.

Now, as you can see on the slide and as the Tribunal is well-aware of the NAFTA Parties--Canada, the United States, and Mexico--agree that a claimant cannot bring a claim based on an alleged breach relating to another investor in its alleged law. Canada has identified numerous NAFTA cases supporting this position such as Gallo (RLA-004), Mesa (RLA-001), and B-Mex (RLA-121).

Moreover, GEA Group (RLA-122) and STEAG (RLA-174) show that even when there is continuous foreign nationality, the Claimant must establish that it was a protected investor when the alleged breach occurred. There is no case law under NAFTA that has allowed an investment claim to be sold, assigned or transferred from one Investor to another. Not one. The Claimant offers no textual or jurisprudential basis to find that the NAFTA Parties intended to allow the assignment of claims. The Claimant cited Daimler (CLA-309) in its pleadings. Yet that case stands for the proposition that the original

Investor who held the Investment when the alleged breach occurred can transfer the Investment while retaining the ability to bring the Claim. It does not stand for the proposition that the recipient of the Investment can initiate a claim based on events that pre-dated the acquisition of its investment.

Consequently, whatever rights John Tennant might have assigned to Tennant Travel on January 15, 2015, through the Share Transfer (C-115), the right to initiate a NAFTA claim was not one of them.

The fifth question is: What is the legal standard for proving control, including indicia of control, as identified in the case law? I first wish to reiterate that control over the Investment is the Claimant's case to make, and it has failed to provide substantive legal argumentation and evidence to meet its burden.

Nevertheless, NAFTA does not define the term "control." Investment tribunals have held that "control" can take two forms: legal control and de facto control. In either case, the assessment of control of an enterprise is a fact-based inquiry that must be considered on a case-by-case basis. Moreover, depending on the context, the meaning of "control" may be informed by domestic law, which determines certain issues on the nature of control

over an investment and property rights. Tribunals in Perenco, Exhibit RLA-182, and Nelson, Exhibit RLA-181, confirmed this approach of resorting to domestic law.

Thus, the meaning of an acquisition of control here is partly a matter of Ontario Business Law, as Skyway 127 is an Ontario enterprise.

The Ontario Business Corporations Act, Exhibit R-097, states that, "a corporation is controlled when one holds over 50 percent of the votes that may be cast to elect Directors of the Corporation, and the votes attached to those securities are sufficient, if exercised, to elect a majority of the Directors of the Corporation." Thus, for the Claimant to prove that it held legal control over Skyway 127, it would need to establish that Tennant Travel held over 50 percent of the votes that may elect Skyway 127's Directors. I will explain that it did not meet this standard at the time of the alleged breach.

Where there is no legal control, it is imperative to provide compelling evidence to prove de facto control, which is manifestly absent here. Investment tribunals maintain a high standard of proof to establish de facto control. The NAFTA Tribunal in Thunderbird, Exhibit CLA-136, held de facto control must be established beyond any reasonable doubt.

The Perenco Tribunal, in Exhibit RLA-182, cited

this statement with approval.

The Aguas del Tunari Tribunal, Exhibit R-183, expressed apprehension over the evidentiary challenges of a de facto control standard.

The B-Mex Tribunal, RLA-121, found a dual consonance of the Thunderbird and Aguas del Tunari opinions, as both found that de facto control will typically and logically present a greater evidentiary challenge.

Now, I think this is very significant because not only is there a clear and convincing evidence standard to prove the alleged trust, which is a higher standard of proof, but to prove de facto control you also have a greater evidentiary challenge for the Claimant to meet.

Now, in addition to holding the power to appoint a majority of the board, control may be established where a person otherwise has the right to direct the actions of the enterprise. However, day-to-day operational management of the enterprise does not, on its own, establish control of an enterprise.

In Philip Morris, Exhibit RLA-141, the case referred to by Sir Daniel, the Tribunal considered that oversight and management did not seem sufficient to establish control. However, the Tribunal ultimately found that, even if a substantial interest, as provided in the

definition of "controlling" in the relevant Hong Kong-Australia Treaty, could be defined through management control, the Claimant had not proven that Philip Morris Asia exercised management control over the Australian subsidiaries.

Notably, the Tribunal examined the documentary evidence referred to by the Respondent which indicated that financial performance and budget, ultimate approvals, and major initiatives were approved by another entity than the Claimant. Thus, the Tribunal found that sufficient evidence regarding management control was not provided by the Claimant.

Moreover, other investment tribunals have identified factors or circumstances that do not amount to control. For instance, in United Utilities, Exhibit RLA-184, the Tribunal stated, "not any substantial Minority Shareholding should be considered as 'control'." References also made--frequently made to other factors, including voting rights and contractual arrangements such as shareholder agreements.

In Vacuum Salt, Exhibit RLA-185--and apologies for the length of this slide--the Tribunal stated that control over purely technical matters by a foreign minority shareholder did not suffice to attract jurisdiction under the relevant treaty.

In MAKAE Europe, Exhibit RLA-205, the Tribunal considered that the Claimant failed to establish de facto control because the owner of the Claimant described his role as the controlling personality setting overall direction and strategy for the whole group of MAKAE companies.

Finally, I will end this discussion on the jurisprudence of control with a recent decision that is relevant to the Claimant's alleged voting bloc, Eco Oro, RLA-206, which the Tribunal has just admitted into the record. In this case, the Respondent sought to deny the benefits of the Treaty because it alleged that non-Canadian Investors, non-protected investors, controlled the Investment. The Tribunal noted that the non-Canadian Investors at issue would not have sufficient voting power to be able to exercise control. It stated: "Even if they did collectively own 49.61 percent, this could not result in control. Colombia has adduced no evidence that any of the other non-Canadian Shareholders were acting in concert, nor that there was any communication of any nature between them. The Tribunal cannot plausibly proceed on the basis that it should infer control in these circumstances."

It is worth noting here that, where tribunals identified some factors that were absent and found no

control, that does not mean that the presence of such factors would have led the tribunals to find control. We cannot make that prediction. What is critical, is that the Claimant has not met its burden to present evidence that it controlled the Investment when the alleged breach occurred.

ARBITRATOR BETHLEHEM: Mr. Klaver, may I just ask on Eco Oro, the part that you've taken us to, was that a unanimous part of the Decision? Because I note that there were two partial dissents.

MR. KLAVER: That is a fair question, and I will have to get back to you on that, Sir Daniel. I'm sorry.

ARBITRATOR BETHLEHEM: Thank you, very much.

MR. KLAVER: Now, this raises the sixth question: What is the relevance, if any, of the alleged voting bloc?

The alleged voting bloc is largely irrelevant because it depends on whether the Claimant can prove the alleged trust. If the Tribunal finds that the alleged trust existed in April 2011, then the Claimant was a protected investor when the alleged breach occurred, and the Tribunal has jurisdiction. If the Tribunal finds that the alleged trust did not exist, then the Claimant cannot prove control over the Shares, or over Skyway 127, through the alleged voting bloc because the Claimant was not part

of it. Either way, the voting bloc is largely irrelevant.

Even if the Tribunal assessed the voting bloc in greater detail, the Claimant did not control Skyway 127 in 2011 under Ontario law, as Tennant Travel did not hold the majority of votes needed to elect a majority of the Skyway 127 Board, nor did the voting bloc. The alleged voting bloc appears to have held approximately 45 percent of Skyway 127 Shares.

John Tennant and Derek Tennant both confirmed on cross-examination that the voting bloc did not hold the power to appoint majority of the Board of Directors, or otherwise have rights to direct the actions of the enterprise. Just as in Eco Oro, this voting bloc lacked a voting majority to equip it with control over Skyway 127. Moreover, a glaring deficiency in the Claimant's case about the alleged voting bloc is that the Claimant provided no contemporaneous written evidence that the alleged voting bloc even existed, let alone voted together. No Shareholder voting results, no meeting minutes corroborating the witness testimonies about this voting bloc. All three witnesses confirmed that they could provide no such documentary evidence of this alleged voting bloc.

GE Energy's 50 percent shareholding demonstrates that the Claimant lacked the voting power to control

Skyway 127, and the Claimant provided no evidence that GE Energy did not vote its 50 percent shareholding in Skyway 127.

Thus, Tennant Energy failed to meet its evidentiary burden to prove control over the Investment when the alleged breach occurred.

The seventh question is: What is the relevance of the specific dates when there were different levels of share ownership in Skyway 127?

April 19, 2011, is relevant to determining whether John Tennant acquired the Skyway 127 Shares on that date and whether the alleged trust could have been created in April 2011.

April 26, 2011, is relevant to determining whether the Claimant has met its burden of convincing the Tribunal that it has jurisdiction over this claim, based on whether the alleged trust was created on this date. This date is central to the Claimant's case.

June 20, 2011, is also relevant to determining whether the Claimant proved the alleged trust, since this is the first date showing that John Tennant actually acquired shares in Skyway 127 (C-117), it undermines the notion that he created the alleged trust on April 26 because he didn't even have those Shares yet.

December 30, 2011 is relevant to the Claimant's

assertion that it acquired control over Skyway 127 through the alleged voting bloc (C-114).

January 15, 2015, is the first date when contemporaneous documentary evidence on the record shows that the Claimant obtained an ownership interest in Skyway 127 (C-115).

The eighth question is: What is the relevance of the alleged Share Transfer from GE Energy to the Claimant in 2016 or 2017?

Canada maintains that this is irrelevant. It does not help the Claimant establish the Tribunal's jurisdiction as it is a share happened--Share Transfer that happened years after the alleged breach had occurred. Nonetheless, Canada also notes that the Claimant failed to prove that GE Energy did, in fact, transfer shares to Tennant Energy in 2016-2017. None of the three witnesses could explain how this occurred, given that GE Energy held no shares in Skyway 127 by late 2014, and had transferred its 50 percent shareholding to Derek Tennant and John Pennie, two non-U.S. citizens.

This refutes the Claimant's argument that there was continuous U.S. national ownership over the Investment, while Canada has shown that the Investment was not Skyway 127 and that NAFTA claims cannot be assigned, even if the Tribunal were to disagree with us on these

points, a claim could not be assigned here because there was not continuous national ownership over Skyway 127.

The 9th question is: What is the evidence--I'm sorry, what evidence is there of the declaration of an oral trust? There is no reliable evidence of a declaration of an oral trust.

Moreover, the wording that the Claimant's Witnesses point to in support of the alleged creation of this Trust instead indicate that John Tennant was not creating a trust but merely identifying a holding company that he wanted to transfer his shares to.

For instance, in his Witness Statement at Paragraph 19 (CWS-2), John Tennant states: "On April 26, 2011, I confirmed with Derek that I would nominate Tennant Travel to hold the Skyway 127 Shares." None of the evidence arising from his cross-examination indicates that he held an intention on April 19th or April 26th to create a trust rather than to transfer shares to a holding company that he would designate in the future.

The 10th question is: What evidence is particularly relevant to the lack of an oral trust and how does it fit with the legal standard?

As the Tribunal is well-aware, the legal standard is the "clear and convincing" standard under California law. As the Experts discussed at length

yesterday, this is a higher standard of proof than the "balance of probabilities" standard. It requires a high probability.

The Butte Fire case (CLA-335) states that the evidence must be "so clear as to leave no substantial doubt" and "sufficiently strong to command the unhesitating assent of every reasonable mind." This aligns with the Higgins (R-094) requirement for evidence, "clear enough to leave no substantial doubt and strong enough that every reasonable person would agree." It is particularly relevant that the Claimant filed no contemporaneous documentary evidence to prove that John Tennant created the alleged trust, put the Skyway 127 Shares in Trust, designated Tennant Travel as the beneficiary, set the terms of the alleged trust, administered the alleged trust, or terminated the alleged trust. These factors relate to the requirement in the California Probate Code (R-090) to provide clear and convincing evidence.

As discussed in a previous response, one major evidentiary issue here is whether John Tennant ever intended to create a trust instead of transferring the Shares to a holding company. The evidence on the record and the witness testimonies and the cross-examinations demonstrate that John Tennant always intended to transfer

the Shares to a holding company. He even said that he instructed Mr. Pennie to do so on April 26, 2011. This evidence undermines the notion that John Tennant intended to create a trust.

Derek Tennant confirmed that his agreement with John Tennant was not to create a trust but to put the Shares in a holding company.

Moreover, at least four different explanations arose from the different witnesses over the course of the Hearing about the purpose of this alleged trust: avoiding a community property dispute, preventing the dilution of voting control, avoiding taxes, pursuing the continuity of control over the Shares. This leaves the purpose of the alleged trust unclear.

Another evidentiary gap concerns the designation of the beneficiary. The Claimant's own client representative, John Pennie, confirmed that John Tennant had not designated a holding company by December 30, 2011.

Ms. Lodise explained yesterday that this could lead to a finding that the evidence does not establish an oral trust due to the lack of an identified beneficiary.

Furthermore, John Tennant stated on cross-examination that he designated the holding company in June 2011, not April 2011. In fact, the Claimant never even argued that John Tennant had designated Tennant

Travel as the beneficiary of the alleged trust on April 26th until its Reply Memorial.

The changes in its story, the inconsistencies in its story, the inconsistencies in the evidence, make it even harder for the Claimant to prove that it has provided clear and convincing evidence to establish that the alleged trust was created.

Moreover, the fact that John Tennant filed no contemporaneous evidence proving that he owned 90 percent of Tennant Travel when the alleged breach occurred, leaves further evidentiary gaps over the ultimate beneficiary of the Shares.

Another concern with the witness testimonies, concerns the changes that they made to some very relevant facts here. For instance, the Witnesses had never clarified in their written submissions that Mr. Pennie, the client representative, and his wife, together owned 45 percent of the Claimant.

Moreover, Derek Tennant's clarification that he was not an owner of Tennant Energy nor on its Management Board leads to greater uncertainties over the reliability of the Witness testimonies.

Furthermore, the fact that the evidence on the record indicated that John Tennant never acquired the Shares until June 2011, strongly indicates that the

Claimant failed to support its case that the Shares were transferred in Trust in April 2011. The Witnesses confirmed that John Tennant and I.Q. Properties did not send a written consent or direction to transfer the Shares to Tennant Travel in April 2011, which would have been required to transfer the Shares because John Tennant did not acquire them until June 2011.

Now, all of these evidentiary issues mean the Claimant has failed to offer reliable evidence to meet the standard of proof to establish that it owned or controlled the Investment when the alleged breach occurred.

Again, I wish to emphasize the question of the alleged trust is not a simple factual question among others. It goes to the heart of the Tribunal's jurisdiction over this claim. Yet the Claimant's case relies extensively on oral evidence alone from witnesses who have an interest in the outcome of the Arbitration, who have changed their stories and who offer inconsistent evidence. In these circumstances, the Claimant has failed to meet its burden to prove the Tribunal's jurisdiction.

That is the end of my presentation. I welcome any questions from the Tribunal now or I can also address them later.

PRESIDENT BULL: Thank you, Mr. Klaver.

I don't have any questions for you at the

moment, but if my colleagues do, they should feel free.

ARBITRATOR BISHOP: I do not at this time.

ARBITRATOR BETHLEHEM: Neither do I.

PRESIDENT BULL: Then, thank you, Mr. Klaver. We'll hear, I think, from Ms. Squires next.

MR. KLAVER: Yes. Thank you.

MS. SQUIRES: Hello again.

Over the course of the next 20 minutes, I will attempt to clarify for this Tribunal what the Claimant alleges is the breach at issue here. I'm going to frame my argument, as I mentioned, with specific reference to the Spence Decision (RLA-136), and particularly Paragraphs 208 to 2011, as the guidance provided there is helpful to this Tribunal as it looks at the issues before us.

I would remind the Tribunal, however, much as like Mr. Klaver has done, that it's not Canada's burden to clarify the Claimant's claim or make out its case for it. The Claimant has been asked repeatedly for clarification on its claim. It has failed to do so on every occasion. The Claimant's claim does not demonstrate that this Tribunal had jurisdiction.

With that in mind, let's take a look at what the Claimant has said about its claim. What is the essence of its claim? Like the Tribunal in Spence, that is the

foundation from which we suggest the Tribunal should start its analysis with respect to Article 1116(2).

In its Notice of Arbitration, the Claimant alleged that this claim arises under the arbitrary and unfair application of Ontario Government measures related to the regulation and administration of a renewable energy transmission and production program in Ontario known as the Feed-In-Tariff Program.

The Claimant further summarized its claim at Paragraph 91 of its Notice of Arbitration where it points to what it calls four categories of wrongful action arising in this claim. Those are the unfairly manipulation--the unfair manipulation of the award of access to the electricity transmission grid; that Ontario unfairly manipulated the dissemination of program information under the FIT Program; that Ontario unfairly manipulated the awarding of FIT Contracts; and that senior officials of the Government of Ontario improperly destroyed necessary and material evidence. These wrongful actions allegedly resulted in the Claimant not obtaining a FIT Contract on July 4th, 2011.

Now, the Claimant repeats these same four assertions in its Memorial at Paragraph 717. Again, a claim that certain measures taken by the Ontario Power Authority and the Government of Ontario resulted in less

transmission capacity being available for the Claimant's project when contracts were awarded on July 4th, 2011.

In its Reply at Paragraph 27, it states again that this Claim is as follow, using the words "there is no question that this Claim is about the unfair and wrongful administration of the FIT Program."

The essence of the Claimant's claim, then: the Government of Ontario failed to administer the FIT Program in a fair and transparent manner that resulted in Skyway 127 being deprived of a FIT Contract in a manner that is in violation of Article 1105 of the NAFTA.

That is exactly what the Claimant has quantified in its damages analysis. As Deloitte (CER-1) notes, "based on their project ranking, but for the changes in the program issued by the OPA on June 3rd, 2011, the Skyway Project would have received a FIT Contract."

Deloitte refers specifically to the Claim as stated in Paragraph 91 of the Claimant's Notice of Arbitration. The one I drew your attention to moments ago. There can be no doubt that this claim is about the administration of the FIT Program, the alleged measures that led to the June 3rd, 2011 Decision--Direction (C-176),Direction, and the award of FIT Contracts that followed on July 4, 2011 (C-025).

But then we got to the Hearing this week and

here is how the Claimant tried to characterize its claim, and I'm going to read out what they said.

Next slide, Gen.

"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." Entirely unclear. A shift in its arguments, perhaps. However, despite this and fundamentally as we saw in the witness testimony, this Claim is still about the failure to receive a FIT Contract on July 4, 2011 and nothing else.

On Monday, the Tribunal asked the Claimant to question with respect to its claim. It asked whether what it was saying had three possible scenarios. Three questions arose out of that question.

Go to the next slide.

Is the alleged hiding and disclosing, which the Claimant only alleged it discovered in August of 2015, a cause of action in its own right, such that it is not barred by the limitation period in Article 1116(2) of the

NAFTA?

Or did the alleged breach happen prior to the Critical Date, but instead is the knowledge obtained as a result of the Mesa Power proceeding in 2014 and 2015 the first time the Claimant was put on notice of a prior alleged breach?

And a third possible scenario, is what the Claimant is alleging, a continuing breach that began before the Critical Date and went through to the disclosures in the Mesa Power proceeding.

The Claimant's answer to these three alternative questions: yes, yes, yes. How can the answer to all three of these questions be "yes"? They cannot. And let me explain why.

On the first question, the Tribunal must satisfy itself of two factors to answer this question:

First, does the action in question which occurred within the limitation period constitute a measure? If it does, is that measure capable of constituting a claim, a cause of action, in its own right, such as to bring in the Measure within the jurisdiction of this Tribunal? This is precisely what the Spence Tribunal (RLA-136) was grappling at at Paragraph 210 where it held that, for a component of a dispute to be justiciable in the face of a time-barred limitation clause, that

component must be separately actionable, it must constitute a cause of action, a claim, in its own right.

The answer to these questions is very much a fact-based inquiry, and for this you must look at the Claim as plead by the Claimant. That analysis, however, starts with the text of the NAFTA to apply those facts.

And isn't it strange that we have to go back to the basics at this stage of the proceeding that the Claimant's lack of clarity has led us here? Article 1101 of the NAFTA indicates that Chapter Eleven applies to measures adopted or maintained by a Party. As the Mesa Tribunal (RLA-001) noted: "In order for Claims to fall within the scope of Chapter Eleven, they must target measures adopted or maintained by a Party affecting Investors or investments of Investors of another party." To have a claim, then, the Claimant must point to a measure. What then is a measure as defined in the NAFTA?

The term "measure" is defined to include any law, regulation, procedure, requirement or practice. This is a very broad term. But it is not completely unbound. Not every action of a State amounts to a measure.

Now, I'm going to break down for the Tribunal all the components that the Claimant alleges either happened after the Critical Date or that occurred prior to it but it only had knowledge of post Critical Date to

demonstrate that they are either, first, not measures as defined in the NAFTA; or if they are, in fact, measures, they are not measures capable of rising to their own cause of action, and thus not measures within the jurisdiction ratione temporis of this Tribunal.

These components are: First, Canada's response to allegations made in the Mesa pleadings.

Second, Canada's application of confidential designations in the Mesa proceedings.

Both of these go to the Claimant's apparent new formulation of these actions that these actions delayed and denied and that the Claimant's access to justice was impacted. The Claimant alleged in its Opening that the discovery of the breach was done in the context of denials, of misrepresentation, and that is, in itself, an actionable and wrongful conduct, a factual manner that would give support to the breach of Article 1105.

According to the Claimant, then, denials and misrepresentations are actionable and wrongful conduct. For the sake of completeness, I'm also going to touch on two other alleged measures that keep coming up in the Claimant's arguments: The existence of the Breakfast Club and alleged special treatment that was afforded to International Power Corporation prior to the June 3rd Direction (CLA-335).

So, let's go through these one at a time.

On the first point, Canada's response to allegations made in the Mesa pleadings. In its Opening, Claimant's counsel took the Tribunal through 16 slides where it argued that Canada's pleadings in the Mesa arbitration showed express denial of a breach or it strenuously denied the Claim. In cross-examination, Mr. Pennie similarly pointed to statements made in phone conversations with witnesses in the Mesa Power arbitration whereby those witnesses said "everything is fine, everything was being followed according to the rule of law according to the policy."

It argues that these denials are wrongful conduct in breach of Article 1105. However, defending one's self in an ongoing litigation or responding to questions that are consistent with the position taken in that litigation is not a law, a regulation, a procedure, a requirement or a practice. It is certainly not a measure in how broadly that term is construed. As the NAFTA Parties noted in their statement on implementation of the NAFTA, "the term 'measure' is a non-exhaustive definition of the ways in which governments impose discipline in their respective jurisdictions." It is very hard to see how such actions fall within this understanding. It is not a measure. It cannot be a cause of action in its own

right.

Canada's--second, Canada's application of confidential designations in the Mesa proceedings. In its Opening, the Claimant also stated that Canada just asserted dubious claims of business confidentiality for the purposes of suppressing public release of information about its wrongful conduct relating to designations made in the Mesa pleadings that were available to the Claimant prior to the Critical Date.

Yet again, validly applied confidential designations are not a measure for the purposes of the NAFTA. These designations were either agreed upon by the disputing parties or litigated between the Parties and decided upon by the Tribunal. A ruling by a tribunal on a confidential designation is not a measure of Canada, not a measure, not a cause of action in its own right.

Third, the existence of the Breakfast Club. What exactly became known to the Claimant on this after the Critical Date? Let's look at the Claimant's own words.

It said in its Opening: "On the Breakfast Club conspiracy, this was never referenced in Canada's pleadings on the public statements issued by Mesa. As we noted, its existence only became known during the Mesa Power Hearing and only became public after the testimony

was available in Post-Hearing Brief." Its existence only became known. Learning of the existence of a meeting is not a measure. The existence of a meeting is not a law, a procedure, a regulation or a requirement or a practice, however broadly again that that term is interpreted. Again, not a measure, not a cause of action in its own right.

That brings me to the fourth item: International Power Corporation.

Now, the Claimant's argument here appears to be that it did not know of special treatment afforded to International Power Corporation prior to the June 3rd, 2011 Direction (C-176), and the July 4 Contract Award (C-025). Canada agrees that allegedly better treatment offered to other FIT Applicants as well as meetings with other FIT Applicants which leads to alleged benefits not available to the Claimant would constitute a measure. However, the analysis does not end there. That's when we move to the analysis of the Spence Tribunal (RLA-136) that they undertook in Paragraph 210. Is the Claim as it relates to International Power Corporation a separately actionable claim that arises within the limitation period? Let me explain to you why the answer to that is "no".

Recall earlier that I discussed the essential character of the Claimant's claims or the essence of its

Claims. That is, an alleged breach of NAFTA Article 1105 based on Ontario's allegedly wrongful conduct. That conduct being favoritism of certain political allies which resulted in the Claimant not receiving a FIT Contract on July 4, 2011.

The Claimant has failed to show in the face of pre-limitation period conduct of which they had constructive knowledge that alleged actions taken by Ontario with respect to IPC are independently actionable breaches. They are, to echo the wording of the Spence Tribunal, inseparable from the pre-limitation period conduct in which their claim is so deeply rooted.

And I think to fully answer this question, we can turn to the Mesa Power Award (RLA-001) as the Tribunal requested on Monday.

In that case, the Tribunal also dealt with some jurisdictional issues. One of those was the Claimant's compliance with Article 1120 of the NAFTA, the cooling-off period. While Canada was unsuccessful--was ultimately unsuccessful in that argument, the Tribunal has left us with some reasoning that is perhaps instructive to the Tribunal with respect to the Limitation Period.

And I know both sides have been focusing a lot on what was in the Mesa Power dispute over the past week, but I ask you to bear with me on this. The Decision of

another tribunal that deals with the exact same measures at issue in this Arbitration is highly relevant for certain purposes.

Now, Article 1120 of the NAFTA requires a Claimant to wait six months from events giving rise to a claim before submitting its claim to arbitration. The Mesa Tribunal then had to undertake an analysis of whether events giving rise to a claim were submitted six months prior to October 6th, 2011, the date Mesa Power submitted its Notice of Arbitration.

The Claimant contended that the requirements of Article 1120 are satisfied provided that some events giving rise to the claim have occurred more than six months before the start of the Arbitration. The Tribunal in that case agreed. They held that if additional events occur within the six-month period which are part of the claim brought to arbitration, they can be regarded as not affecting a tribunal's jurisdiction over that claim.

The Tribunal went on to define the Claimant's claim. When it did, it defined it in the same way the Claimant defined its Claim in this case. The Mesa Tribunal relied on the Claimant's Notice of Arbitration where it stated: "This Claim arises out of the arbitrary and unfair application of various Government measures related to the regulation and production of renewable

energy in Ontario. Canada, through its subnational organs, imposed sudden and discriminatory changes to establish a scheme for renewable energy, namely FIT Program."

As a last step, the Tribunal went on to look at what events occurred in the six months prior to the Notice of Arbitration submitted on October 6, 2011, to determine whether these events were sufficient to give rise to the Claim as pled by the Claimant, that the award of FIT Contracts on July 4th, 2011, violated Article 1105. The Tribunal held there was. Those events: The ranking of the FIT Projects, the reduction in transmission capacity for the Korean Consortium--due to the Korean Consortium and the long term energy plant, the reservation of capacity in the Bruce Region.

It then held that the two events within the six-month period, the June 3rd Direction (C-176) and the July 4th Contract Award (C-025) were merely developments of events that had taken place earlier in the six-month period. The impugned events, to borrow the expression of the Claimants, are interrelated with earlier events.

In that same vein, the alleged treatment of International Power Corporation that went into the Government of Ontario's Decision to issue the June 3rd Direction cannot be divorced from the numerous events

which were known to the Claimant prior to the Critical Date which also went into that Direction. These include: The change in available transmission capacity, the reservation of capacity for the Korean Consortium, the alleged treatment of other political favourites such as NextEra. These are all part of one package, one claim of a breach of Article 1105. Once that claim arises, additional facts or measures going to that same underlying breach cannot, without more, reset the limitation period.

Facts surrounding the alleged treatment of International Power Corporation cannot be used to refresh a claim of a breach that occurred on July 4th, 2011, and of which the Claimant had constructive knowledge before the Critical Date. Ms. Dosman will say more on those specific facts shortly.

The Claimant has not pointed to any measures at issue in this Arbitration which can be parsed out from the events that occurred prior to the Critical Date in order to create a separate cause of action. To use the wording of the Spence (RLA-136) and Ansung (RLA-161) Tribunals, allowing the Claimant to parse out its claim in this manner to evade the limitation period should not be allowed. As the Grand River Tribunal (RLA-070) noted, such a position would render the limitation period ineffective in any situation involving a series of similar

and related actions by a Respondent State since the Claimant will be free to base its claim on the most recent transgression, even if it had knowledge of earlier breach and injury.

So, where does that leave us in response to the Tribunal's first question, as to whether any of the hiding and disclosing, which the Claimant only alleged it discovered in August 2015, is a cause of action in its own right. The answer to that question is most certainly "no."

Let's turn now to the second question: Whether the alleged breach occurred prior to the Critical Date and whether the alleged suppression of information only goes to knowledge of that breach, thus bringing it within the time bar period. President Bull had a similar question to this on Monday when he asked the question on the screen. I think I will be very short on this because Canada has already answered this question in its Opening and in its Written Submissions, and I don't propose to repeat them here. The answer to this question is "yes." This is a one-time instantaneous breach and the question of alleged suppression only goes to the Claimant's ability to obtain the requisite knowledge of that breach.

The Claimant's expert, Deloitte, confirms that the Claimant has the same view. At Paragraph 4.2.8 of the

Deloitte report (CER-1) under the heading "the Claim" and the breach of Article 1105, Deloitte noted: "As a result of a notification on July 4th, 2011, that it would not receive a FIT Contract but will be placed on a priority waitlist, Tennant had been treated unfairly by July 4, 2011, given that it expected a higher ranking based on its FIT Application. However, Tennant did not become aware of the NAFTA inconsistent reason for this unfairness until much later."

All of the Measures complained of by the Claimant here occurred prior to the Critical Date. That is an objective fact. Every single one of them. This is not a case of some measures occurring before the Critical Date and some occurring after. The only element that the Claimant alleges occurred after the Critical Date is the requisite knowledge to bring its claim.

But Ms. Dosman explained in her Opening that the Claimant had and could have had knowledge of the alleged breach prior to the Critical Date. She will expand on that shortly. The alleged suppression of information did not, even if it is true, prevent the Claimant to know of the alleged breach in any respect. This point was comprehensively covered in Canada's written submissions.

Further, the Claimant's argument in this regard appear to defy common sense in some respect. It alleges

that it could not have known about the alleged breach until sometime in 2015 when the Mesa Power Post-Hearing Brief--Mesa Power's own brief (C-017), became public or when Hearing Transcripts were made public (C-170, C-121, C-122, C-123, C-125). But at this very same time, Canada is maintaining the same legal position that there is no breach and the confidential designations in that arbitration have not changed. The very same things that the Claimant says it prevented it from learning of the breach.

Recall that there is not even a Mesa Award at this time. The Claimant has simply changed who it wants to believe at a certain time to suit a particular litigation strategy.

And then the third question is what the Claimant is alleging instead, a continuing breach that began before the Critical Date and went through to the disclosure in the Mesa Power proceedings. The Claimant seems to vacillate back and forth over whether the series of events it alleges breached the NAFTA constitutes a continuing breach or not. At some point, they even said in its Opening that it was a continuing breach and a composite breach. That is perplexing, and I invite the Claimant to clarify how it can be both. Much like the Claimant in Spence, this Claimant is casting its claim in the language

of both continuing and composite acts to try and get around the jurisdictional limits imposed by NAFTA Article 1116(2). Yet such efforts are in vain.

As Paragraph 208 of the Spence Award (RLA-136) addressed this very issue. It noted that such conduct, continuing conduct, cannot, without more, renew the limitation period. Such an approach, if allowed, would encourage attempts at the--I think we should go to the next slide, Gen, sorry--would encourage attempts--keep going, Gen, I'm sorry.

ARBITRATOR BETHLEHEM: I don't think it's there.

MS. SQUIRES: Okay. That's fine.

Would encourage attempts at the endless parsing of a claim into ever-finer subcomponents of a breach over time, in an attempt to come within the limitation period. This does not comport with the policy choice of the Parties to the Treaty.

I have already explained that the breach here, is a single one-time act that had continuing events for the Claimant. It is not a continuing breach, and that breach is not ongoing. However, for the sake of completeness, let's engage on the issue for a moment.

As I understand it, and as you can see from the Claimant's words on the screen--so, we'll go back two slides, Gen--you can see that the Claimant is saying that

Canada took measures, with respect to the award of FIT Contracts, that was contrary to the NAFTA and Canada then made false representations in the context of an ongoing litigation that such measures were consistent with the NAFTA. And that forms a continuing breach. It alleges that this continuing breach ended, in part, when certain allegations were made in the public release of Mesa Power Post-Hearing Briefs.

However, a continuing course of conduct does not toll the limitation period. This approach--the approach taken by the Bilcon Tribunal (CLA-208, RLA-003) is of no assistance either. I've already demonstrated that there is nothing within the limitation period that either constitutes a measure for the purposes of the NAFTA or constitutes a cause of action or a claim in its own right. There is no basis to consider any of the elements after the Critical Date.

Also, I would note that they are focusing on the last of the events, arguments made by Mesa in its Post-Hearing Submission (C-017) in support of its limitation period argument. However, the wording in Article 1116(2) is not when the Claimant first acquired knowledge of the end of its breach. It is when the Claimant first acquired knowledge of the alleged breach itself. The answer to the Tribunal's third question is

then "no."

I will make one final point on this before handing the floor over to Ms. Dosman to address what we learned this week, with respect to the Claimant's knowledge, and provide further support for the conclusions I have just made, and this relates to the notion of jurisdiction and damages.

In the event this Tribunal finds it has jurisdiction over a measure that is capable of constituting a cause of action in its own right, that is not barred by the limitation period in Article 1116(2), we would simply state, as the Spence Tribunal (RLA-136) did in Paragraph 211, that in such cases, damages will be necessarily linked to and constrained by a breach of what it is seized over and of which it has jurisdiction. Like pre-entry into forced conduct, facts or events, or even omissions, that the Claimant knew of, or should have known of, pre-Critical Date cannot constitute a cause of action over which this Tribunal has jurisdiction. Although, such conduct may constitute circumstantial evidence, which confirms or vitiates a separate cause of action, that is not time-barred, it cannot be relied upon to find liability in and of itself, and therefore, damages cannot flow from those measures. That means that if this Tribunal has no jurisdiction over the June 3rd Direction

(C-176) for example, but is still able to find jurisdiction under Article 1116(2) elsewhere, it cannot award damages as a result of that Direction.

With that, it ends my time with you this morning and I will now yield the floor to Ms. Dosman, or perhaps answer questions, or as a third alternative, perhaps suggest a small break.

PRESIDENT BULL: Ms. Squires, I just wanted to clarify one point. A little while ago, you were dealing with Claimant's argument that they only knew certain things when the Mesa Power Post-Hearing Brief became public, and you said that at that time, at the time of Mesa Power's Post-Hearing Brief, Canada was still maintaining the same legal position that there was no breach and that was the position that Claimants had said they believed previously.

MS. SQUIRES: Yes.

PRESIDENT BULL: As I understand the Claimant's argument, and I could be wrong about this, but as I understand their argument, they're saying that at a certain point, the nature of what was coming out from the Mesa Power case changed in that they were able to see evidence, statements by witnesses, rather than just position-taking in memorials or briefs. If--would that make a difference? Because I can understand the Claimant

might look at the contrasting positions being taken by Claimant and Canada and Mesa Power, and not be able to get very much past the fact there are positions being taken.

But it seemed to me what they're saying is that they had reached the point where they actually saw some evidence that was compelling. Now, I'm not saying that it is compelling or not, but wouldn't that be somewhat different.

MS. SQUIRES: So, I think in the abstract, there can be information that comes out that is different at a later point in time. However, on the facts that we have here, that information related to International Power Corporation, as I mentioned when discussing whether it was a separate actionable claim, is, in fact, not separate and distinct from all the other pieces of evidence that were available to the Claimant.

So, I think, even if the Tribunal was to engage with the Claimant on that to say that it could not have known about IPC, it is, in fact, a distinct piece of evidence that arose with the Mesa Power Post-Hearing Briefs. It then has to revert back to the first question the Tribunal asked: Is that a separate actionable conduct which is within the limitation period? And our answer to that is "no."

PRESIDENT BULL: Okay, I understand what you're

saying, thank you.

Any questions from my colleagues at this point?

ARBITRATOR BISHOP: I just have one quick question, which is: In your position, whose burden of proof is it on the statute of limitations issues?

MS. SQUIRES: The burden of proof on jurisdictional issues rests with Claimant, not Canada.

ARBITRATOR BISHOP: Is that true for statute of limitations as well?

MS. SQUIRES: Yes. The three NAFTA Parties have been clear, as well as jurisprudence, that to establish a tribunal's jurisdiction, the burden rests on the Claimant, and Article 1116(2), the limitation period, is a question of this Tribunal's jurisdiction.

ARBITRATOR BISHOP: So, in your view, the Claimant has to prove that the statute of limitations has not run?

MS. SQUIRES: That is correct.

ARBITRATOR BISHOP: Thank you.

MS. SQUIRES: That it could not have had knowledge of alleged breach until the time that it says.

ARBITRATOR BISHOP: Thank you.

ARBITRATOR BETHLEHEM: I don't think I've got any questions. I'm waiting for Ms. Dosman because I think the point you've left open is whether the Claimant could

only have acquired knowledge within the limitation period, and that's still to come, so I will keep any questions until later. Thank you.

MS. SQUIRES: I apologize for putting Ms. Dosman in the hot seat again, as I did on Monday.

Perhaps time for a short break, then?

PRESIDENT BULL: Yes, I think that's a good idea, and then we could hear in one fell swoop from Ms. Dosman.

We will take a 15-minute break now.

(Recess.)

PRESIDENT BULL: Right. Let's proceed, and I think, Ms. Dosman, you will take us forward; right?

MS. DOSMAN: If I could just perhaps start with a point of videoconference etiquette and request--he has dropped off. Excellent.

Good day, Members of the Tribunal. I will address you today on three topics:

First, I will correct certain assertions made by the Claimant with respect to Ms. Sue Lo's testimony during the Mesa Power Hearing.

Second, I will come back to the Tribunal's questions on the topic of constructive knowledge.

And third, I will make a few final points on the time limitation period in Article 1116(2).

First topic: Sue Lo. On Monday, the Claimant's counsel took you to transcripts of Sue Lo's testimony during the Mesa Power Hearing. Those were Slides 31 to 35 of their Opening. They referred to Ms. Lo's testimony on Day 3 of that hearing (C-204, C-121).

The Claimant relies heavily on these excerpts from Ms. Lo's testimony. And from listening to counsel on Monday, you could be forgiven for thinking that Ms. Lo confessed to a vast conspiracy in favour of friends of the Government in the allocation of FIT Program Contracts.

I'd like to clear up the record about what Ms. Lo said and, perhaps more, importantly what she didn't say.

Let's go first to the testimony that the Claimant put to you on Monday.

If you go forward, yeah, excellent.

This is Mr. Mullins cross-examining Ms. Lo with regard to an e-mail she had sent. The reference is C-121, Pages 171 to 172. I'll read it:

Question: What does B club mean in the re: line?

Ms. Lo answers: That was just a name we used for the highest level meetings with--

And then Mr. Mullins cuts her off.

Breakfast Club or something?

She answers, yes, it was the Breakfast Club.

Then there's some joking, and she lists the people who would typically attend this meeting. That's it on the Breakfast Club. There are no remaining references save for counsel's misleading and inflammatory interpretation of Ms. Lo's testimony.

Far from admitting to a conspiracy, Ms. Lo, in fact, confirmed her written testimony (C-180) that no special preferences were accorded as between FIT Program developers.

You can see her direct testimony on the slide. She said: "At no time were any special" preferences--"promises made to individual developers, and at no time were any special preferences accorded. Other than wanting the most shovel-ready projects, the Government of Ontario had no particular preference as to which developers would be awarded contracts as long as its policy goals were being met."

The Claimant then took you to a confidential document, and to address their submissions, I will now ask that we enter confidential session.

(End of open session. Attorneys' Eyes Only session begins at 10:40 a.m.)

ATTORNEYS' EYES ONLY SESSION

MS. DOSMAN: Let's go to the e-mail, or at least the extract of it, that the Claimant put before you on Monday. This is their Opening Slide 33, reproducing and highlighting Exhibit C-179.

The e-mail is from Ms. Lo to Mr. Andrew Mitchell, who was the Director of Policy in the Premier's office at the time. It is mid-May 2011, and the two are discussing potential options for the allocation of transmission capacity on the Bruce to Milton line. No decision has yet been made on that point.

On cross-examination, Ms. Lo said, I quote: "We didn't pay attention to the politics. The Korean Consortium received priority access, but amongst FIT Proponents we did not play favourites. Did we play favourites? No."

Question: "And IPC, the President of that company was the President of the Federal Liberal Party?"

Answer: "I wouldn't know that."

Mr. Mullins then goes on in an attempt to testify for Ms. Lo: Question: "These people you made sure you protected; they're high profile. You played favourites with them, did you not? Isn't that what this e-mail tells Mr. Mitchell; I want to protect these high profile projects?"

Answer: "This is a consideration."

And there's some confusion and the question: "IPC is a Canadian company, isn't it?"

Answer: "I don't know."

What does she mean during this point of her testimony? At this point we don't know. The cross-examination moved on.

Going a little farther in her testimony, you will see that Ms. Lo's concern was the advancement of the Province's policy goals, that is to say wanting the most shovel-ready projects.

She says: "There were only two projects in the Province that were shovel-ready, meaning that they had their Environmental Assessment, or 'EA.'" That is the context of her e-mail comment in the exchange of views with Andrew Mitchell that "The new proposal helps us with stakeholders because the West of London area has a couple of shovel-ready, high-profile projects that we would be potentially bumped out by the Korean Consortium if we set aside the entire West of London area."

And I must apologize here and correct the slide reference. The middle text box is referring back to C-179, Ms. Lo's e-mail of May 12th, which the Claimant took you to in its opening, and which we just saw on Slide 79

We can now exit confidential session.

(Attorneys' Eyes Only session ends at 10:44 a.m.)

OPEN SESSION

MS. DOSMAN: Gen, if you could move the slide forward. Thank you. No slides up at this point.

(Pause.)

MS. DOSMAN: That, Members of the Tribunal, is it. That is the so-called "conspiracy." Unsurprisingly, Mesa Power failed to establish any NAFTA violation whether based on allegations of favouritism or otherwise. Even the dissenting member of the Mesa Power Tribunal who would have found a violation of Article 1105 on the basis of the GEIA and the Korean Consortium did not even mention allegations of favouritism as between FIT Program Proponents. There was no mention of this alleged incendiary conspiracy because there was simply no basis.

Then, sometime in 2015, Mr. Pennie, Mr. John Tennant, and Mr. Derek Tennant met with Mr. Appleton. We don't know exactly what they discussed. We only know that at some point after that meeting they became convinced that they were the victims of a conspiracy that caused Skyway 127 to fail to obtain a FIT Program Contract.

With those factual corrections in mind, I'd like to turn to the Tribunal's specific questions on constructive knowledge.

On Monday, Arbitrator Bishop asked two questions regarding what triggers a duty to carry out due diligence

and about the level of knowledge required in order for the limitation period to start running. This dovetails well with Sir Daniel's three questions from yesterday on constructive knowledge.

So I've taken the liberty of combining these questions into four:

One: what are the criteria to be applied when assessing constructive knowledge under Article 1116(2)?

Two: What was the trigger for suspicion or investigation here?

Three: What was the required content of the constructive knowledge sufficient to start the limitation period?

Four: What are the specific news articles or other evidence that should have put the Claimant on notice of inquiry?

First question--and we don't need slides for this part--the Tribunal will be aware of the standard for constructive knowledge as articulated in Grand River (RLA-070) and in Spence (RLA-136). We took the Tribunal's question here to be more targeted as a request for criteria or parameters to be used when applying that standard. We suggest that the Tribunal consider factors such as the following:

The position of the Claimant's representatives.

How expert do they hold themselves out to be in the relevant economic sector?

How closely does the economic sector map to the Claimant's business?

That is to say, does the knowledge to be imputed concern the exact subsector of business in which the Claimant is engaged?

How would the information--how important would the information be to the Claimant's business?

Does the information concern an ancillary element of the Claimant's business, or would it be of central importance?

The notoriety of the information, how widespread was it? Had it been covered in the specialty media? In industry publications? Had it reached the mainstream media?

How sustained was the public coverage? Was this a flash in the pan, gone in a minute, or it was in the public eye over time?

And where was the information now? Was it only in the media or did it go beyond, into Government reports or legislative debate or commentary?

What about public information filed in a high-profile arbitration case that itself attracted significant media attention?

And finally, the Tribunal may wish to consider in a given case what type of information the Claimant relies on for its alleged source of actual knowledge? If a Claimant is relying on one type or source of information for pleading such knowledge, should constructive knowledge of that same type or source be accorded more weight?

These are the types of factors that the Tribunal may wish to use in evaluating the Claimant's constructive knowledge in this case, where the Claimant's representatives hold themselves out as experts in onshore wind farming in Ontario; where the knowledge to be imputed concerns the very economic subsector and procurement program at the core of the Claimant's business; where the information was notorious and went beyond industry media and into the mainstream media where it received sustained treatment and coverage in multiple public fora, and in the context of a high-profile arbitration that alleged a claim with the same essence as the one now advanced by the Claimant. And finally, where the Claimant points to pleadings from that arbitration as the source of its actual knowledge.

Those are the criteria and the parameters that we would suggest the Tribunal consider in applying the standard of constructive knowledge.

Second question: What was the trigger for

suspicion or investigation here? As we knew from Mr. Pennie's Witness Statement (CWS-1) and as reinforced in his testimony on Tuesday, Mr. Pennie had a contemporaneous sense of unfairness regarding the award of FIT Program contracts on July 4th, 2011. Here are some extracts, and they should come up on a slide.

"We were unfairly treated and not awarded the FIT Contract." "It was grossly unfair and lacked evenhandedness." "The changes in the June 3rd, 2011, Direction were unexpected and unfair." And he said: "I was concerned about that and surprised about it, and I did feel it was unfair," again referring to the June 3rd, 2011, Directions (C-176).

And this week, we learned--yes?

ARBITRATOR BISHOP: Excuse me. Before you go on, for Slide 84, is--did he testify that he knew each of these things in 2011?

MS. DOSMAN: I believe so, yes, but we will come back to that with more specific references, and certainly he did testify on Tuesday that that was his contemporaneous feeling of unfairness.

ARBITRATOR BISHOP: Thank you.

MS. DOSMAN: So, this week, coming back to the trigger, we learned that leaving aside any theoretical discussion of when a trigger would have been triggered,

there must have been a sufficient trigger because Mr. Pennie did, in fact, reach out to his contacts at the OPA. He made inquiries of his contact at the OPA, a fact we had not heard of prior to Tuesday. Prior--sorry. Beyond his statements on redirect on Tuesday, we don't have any evidence of what took place during those conversations. But regardless, there must have been a trigger not only from Mesa Power, which actually proceeded with its arbitration, but also for this Claimant, which had enough information to prompt inquiries.

Third question: What did the Claimant have to know? That it didn't receive a contract or why it didn't receive a contract, or something else? What exactly was the content of the constructive knowledge that was required, and how detailed did it need to be?

The mere non-receipt of a FIT Contract on July 4th, 2011, without more, is not sufficient to start the time limitation clock. But the NAFTA also doesn't require Claimants to know the details of their claim before the limitation period begins to run. Article 1116(2) states that time runs from knowledge of the alleged breach, not the exact details of the alleged breach or the particulars of the alleged breach or the establishment of a breach in another case.

On the Claimant's case, it had to know that IPC

and the Breakfast Club conspiracy existed prior to the time limitation beginning to run. And leaving aside the point that no such conspiracy existed and could therefore not be the subject of knowledge of any kind, the standard proposed by the Claimant is far too high. The Claimant had a sense of unfairness, and it knew that Mesa Power was making serious allegations regarding undue political interference in the award of contracts on July 4th, 2011.

To come back to Arbitrator Bishop's question, that's an appropriate level of "why": Why didn't we receive a contract? There was something unfair here, which others think rise to the level of a NAFTA breach, details TBD. And the NAFTA gives you three years to make inquiries further into the reason.

ARBITRATOR BETHLEHEM: Ms. Dosman, may I ask you--

MS. DOSMAN: I thought that this section might provoke a question or two.

ARBITRATOR BETHLEHEM: Yes. Taking your submissions as they stand, what would you say might have been the Claimant's justiciable claim at this stage. They say they were treated unfairly, there was this sense of it being unfair, could they bring an unparticularized claim, saying we were treated unfairly and we were not awarded a FIT Contract and there is something in the air that just

makes us feel a bit uncomfortable? What would have been the particularized claim until they actually had knowledge?

MS. DOSMAN: I mean, I think I would take us back to--I apologize, but to the Mesa Power Claim which, indeed--which did proceed on the basis of publicly available information.

So Mesa Power, in the period shortly after the July 4th, 2011 Contract awards (C-025), was able to put together from the June 3rd Direction (C-176), from the FIT rule changes (C-129), from that table in December 2010 (C-104, C-131) that we saw and comparing it to the actual award of contracts, was able to particularize its claim sufficiently so as to proceed and submit the Claim to arbitration under the NAFTA.

Sorry, I've lost track a little bit of your question.

ARBITRATOR BETHLEHEM: My question, so you can gather your thoughts, is you have taken us to all of these extracts from Mr. Pennie's Witness Statement, which I think largely track the extracts that I've put to Mr. Pennie himself. My question to you is, at this point in 2011--or no, in the periods immediately after when you say the tolling begins to run--what could their claim have been until they were put on--on their evidence actual

notice arising out of the publication or the opening of the Mesa proceedings?

MS. DOSMAN: They could have made exactly the same claims as Mesa Power did. They filed their Notice of Intent on June 6, 2011 (R-058) alleging undue political interference in the allocation of FIT Contracts as well as the preceding events that rose to the level of a breach of Article 1105.

ARBITRATOR BETHLEHEM: So, are you saying that we can hold the Claimants, in this case, to constructive knowledge of undue political interference such that they ought to have brought a Claim at that stage?

MS. DOSMAN: I think we will get to the sort of mountains of evidence or public information in the following question, but yes, given that they were on notice and they had made inquiries, they could and should have investigated further: what did Mesa Power mean by undue political interference? We know that Mr. Pennie read that exact allegation in the Globe and Mail article (R-059). We know that Mr. Pennie actually, in fact, did the comparison as between the December rankings in C-104 and the actual Contract award in C-025. We saw his markup of those documents in C-027.

Given that all of this information was public, given that Mesa Power had determined that there was some

basis on which to allege undue political interference, what Mesa Power did was it looked at the list of people who did receive contracts following the rule changes, and it looked at political donations that were made. So, its allegation may have been based--or one of the documents that was exhibited to its Notice of Arbitration (R-005) was evidence of political contributions made by NextEra, which is the parent company Boulevard, which, in fact, received contracts on July 4th, 2011.

So, essentially, given all of this sort of accumulation of evidence, including the fact that another FIT proponent was able to make that allegation, yes, it is our view that they could have made the same allegation of undue political interference.

ARBITRATOR BETHLEHEM: I don't want to sort of prolong this unduly, but just one further follow-up question. Do I take it from what you just said that it is implicit in Canada's case that with the sense of unfairness in 2011 came, if you like, a due-diligence obligation to make further inquiries, and are you saying essentially that those--that the inquiries were not sufficient and that that is why the tolling started but did not stop?

MS. DOSMAN: That's correct. Mr. Pennie did make inquiries; they were insufficient. He got as far as

the position-taking that was consistent with Canada's position in an active arbitration. He did not talk to anyone from Mesa Power. He knew Chuck Eddy, who was associated with Mesa Power. He didn't call him up and ask him: "Hey, on what basis are you alleging this? It seems pretty serious, and I'm in the same position as you. I have done the comparison, and I too would have gotten an award. If the things that you say were unfair, are, in fact, unfair, tell me more about that."

ARBITRATOR BETHLEHEM: That's very interesting because you are, I think, treading then into the space of what you say are the reasonable inquiries that should have been made, and you're saying that in Canada's estimation, it would have been reasonable for the Claimants to have gone to their competitors and said, you know, they've put everything on the table, we also feel unfairly, tell us everything. Is that a reasonable assumption to make?

MS. DOSMAN: I take your point but I would maybe frame it the other way, which is that what the Claimant did not rise to the level of "reasonable"; that is to say, he called someone he knew and he accepted at face value their assurance. That is not sufficient.

I can only speculate--I'm giving some examples about what he could have done based on what we know of his relationships and his involvement in this economic sector,

his involvement in the CANWEA--I'm pronouncing that wrong, but the Wind Energy Association--his frequent contacts within the industry.

I simply point to those things as examples as something that he could and should potentially have done. And yes, it is Canada's case that the simple inquiry and repetition of a position taken in litigation is not sufficient. No.

ARBITRATOR BETHLEHEM: Thank you very much.

PRESIDENT BULL: Ms. Dosman, just since we are on this, I'm wondering whether it matters why a Party doesn't sue, well, within a certain time period, and let me back up and come back to the question.

So, if the Tribunal finds that either there was sufficient knowledge or there could have been sufficient knowledge of the requisite facts in order to commence proceedings, does it matter why proceedings were not commenced? Because it seems that the Claimant is saying they didn't commence proceedings because they believed certain people, certain documents. I'm just wondering whether that's relevant because, at one level, one could make the argument that it's just a question of whether there was sufficient knowledge because, in all sort of cases like this, there is a decision not to sue, and that's in some cases that I have read not really the focus

of the legal analysis, so I wonder what you think about that.

MS. DOSMAN: I think that it goes more to Sir Daniel's question about the due-diligence and the approach to that. I do agree that there can be sufficient knowledge in the penumbra in the public view that would then trigger the requirement to start the limitation period.

And just to maybe supplement that, we have many cases in which measures are ongoing. The fact that measures are ongoing doesn't toll the limitation period.

I'm just trying to look back in the Transcript because I have a sneaking suspicion that I haven't actually answered your question because I wouldn't want to leave things that way.

PRESIDENT BULL: My question is really trying to see whether there is a valid distinction, and there may not be, between the knowledge, actual or constructive, and the reason why a Party doesn't act. A Party could actually have all the information to draft a pleading, but then decided to believe that the statements made by the other side, nothing was wrong.

Now, strictly speaking, time starts to run when there is sufficient knowledge for you to be able to plead the Claim. I'm not sure that one is connected to the

other. It may well be.

And it seems like both Parties are assuming it is connected, so I wanted to understand that perspective.

MS. DOSMAN: No, I think I understand now. And that is that, yes, once we're in the realm of constructive knowledge sort of outside the realm of what exactly did this Witness do or what exactly could this Witness have done, we're into this realm of this was accessible, this was information that either because of the prompting of due-diligence inquiries or otherwise is sufficient in order to trigger knowledge of alleged breach and related harm, so I do, I appreciate the distinction, sort of being in the realm of constructive knowledge, and, in that realm, perhaps the sort of actual actions or beliefs or even said reliance of individuals may not be of as great importance.

PRESIDENT BULL: So, you might want to take that away and think about it because it may be useful to give me some assistance on that.

I just want to also clarify one thing. I do think there needs to be a trigger, and to have all that information and not realize its import, so accepting that there's a trigger and there's constructive knowledge--the reason why one doesn't act, is that relevant?

And I'm quite happy with your answer so far and

to leave it for follow-up at a later stage.

MS. DOSMAN: Great. Thank you.

So, I think that's actually a nice transition to the fourth question posed by the Tribunal: What are the specific news articles or other evidence that would have put the Claimant on notice.

I would like to note that Ontario's energy policy was very much in the mainstream news at the time in 2008 to 2011. Ms. Squires directed us on Tuesday to the Witness Statement of Mr. Peter Wolchak who was put forward as a witness by Mesa Power in that arbitration, and it appears on our record at C-203.

The purpose of his statement was, I quote: "To summarize and contextualize media reporting on the politics of Ontario's energy policy in relation to renewable and clean energy."

And he went on to provide over 20 paragraphs of testimony on press articles that treated the Green Energy and Green Economy Act, the FIT Program, the GEIA, the call for the Auditor General to investigate with many references to press articles as you can see on the screen.

I would also like to recall my Opening Submissions regarding press coverage of the Mesa Power arbitration, and I have provided those exhibit references here for your convenience.

And just to come back to an earlier discussion with Sir Daniel, yes, we have talked a fair amount about the Mesa Power arbitration this week, but I think it is very important to recall that its Notice of Arbitration was itself built on public information, so we put for you the list of documents to which Mesa Power cited in its NoA (R-005).

I've got these slides slightly out of order, and I apologize. Gen, if you could go to the next slide, I believe. There we go.

Save for the last document on this list, all are public documents and on our record, and you will see that we've put references at the bottom of the slide to which documents from the Schedule to Mesa Power's NoA referred to which exhibit number on our record (C-129; C-126; C-127; C-128; C-174; C-044; C-132; C-139; C-142; C-131; C-160; C-155; C-176; C-143; C-147; C-193).

And then, if we want to move forward or in the slides move back to the end of 2011 and into 2013, the public record becomes even more detailed with substantive pleadings from the Mesa Power arbitration being public on the Global Affairs website, and we've put there--sorry, I have really messed up the order of these slides. If you could go forward, Gen, again.

There we are.

Substantive pleadings by this point were public on the Global Affairs website (R-058; R-005; R-081; R-012; R-082; R-083; R-013; C-082).

So, I think, in light of the factors that we discussed just a bit earlier today, to be applied when assessing constructive knowledge, all of this public information more than suffices to impute knowledge of the alleged breach to the Claimant prior to the Critical Date.

A couple of more brief points from me today. This week we learned additional facts going to actual knowledge. This week prior to coming in, we knew that Mr. Pennie knew that the Mesa Arbitration was underway but also that the Claimant's witnesses did not consider it relevant enough to attend the Hearing. And this week, we learned that Mr. Pennie read press articles concerning the Mesa Power Arbitration at the time, in particular, the Globe and Mail article that detailed Mesa Power's allegations with respect to undue political influence that was published in July 2011 (R-059).

He also noted that he knew of other articles but did not review them in detail, and those Transcript references are to Day 2, starting at Page 289.

We also confirmed that he had contemporaneous actual knowledge of the sense of unfairness in the allocation of Contract awards and the prior June 3rd rule

changes (C-129).

Second, Sir Daniel had asked that we come back to him on knowledge of loss. Ms. Squires has already noted that the Tribunal's jurisdiction with respect to damages is necessarily constrained by the scope of jurisdiction over the breach, and this is particularly important in our case where it seems as though the Claimant's claim may now have been narrowed to focus on IPC and the Breakfast Club. And, of course, we know from Mondev (RLA-083) and Grand River (R-070) and others that the NAFTA limitation clock begins when a Claimant acquired first appreciation of loss or damage arising out of the alleged breach. Knowledge of the precise extent of the loss is not required.

Here we know that the Claimant has claimed losses based on its failure to receive a FIT Program Contract on July 4th, 2011. We know that it had actual, as well as constructive knowledge, of alleged unfairness in the award of those contracts at or about the time they were awarded. And in these circumstances, it is reasonable to impute knowledge of loss to the same time as knowledge of breach.

Perhaps making one small addendum to my response to the President's comments, when we come back to you in more detail on your question, we will be going to again

this distinction that if there are objective reasons enough to start a claim, the subject of reasoning is not relevant. That is to say, you can rely solely on the objective or constructive knowledge element separate and apart from whatever may have been going on in the minds of individual's appetite.

PRESIDENT BULL: There is, of course, one obvious exception to that, which is what I suspect the Claimant is trying to say, which is where there is deliberate conduct on the part of a Party that results in things being hidden, and for want of a better word, "fraud."

MS. DOSMAN: Right. Right. And in theory--

PRESIDENT BULL: And that raises the question in my mind of whether it's relevant who those statements of alleged fraud were being made to because if it's one thing for a potential defendant to make false statements to a potential plaintiff to try and trick it into not suing, it's another thing for--it may be another thing for the potential defendant to make false statements to a third party and then the potential plaintiff relying on them. It may not be different. It may be exactly the same thing, but those are the--those are the nuances that I'm trying to sort out in my own mind.

MS. DOSMAN: Very good, and that's helpful.

Certainly, my only comment at this stage is that all of this would have to be--that there is a problem with the Claimant's case and that it hasn't put forward enough evidence to come forward with respect to this burden, but we will come back to you on those more precise topics.

ARBITRATOR BETHLEHEM: Let me just put to you another hypothetical, and this is a spontaneous thought, so maybe I'm going to be unfair to you, but if in 2011 or 2012 when you say the Claimant should have had knowledge of all of this, and you seem to be saying of what they could have done is they could have brought a claim for purposes of stopping the time sort of running, but wouldn't Canada's response simply end up being you can't bring an unparticularized claim. You have to proceed or we're going to apply to the Tribunal to strike this out because what are your allegations?

So, in a sense, had they sat down--the Claimants sat down with Mesa Power, as you suggest, and Mesa Power put all their cards on the table and said, "This is our claim here insofar as we are permitted to do so, we are going to share everything sort of with you," why could not the Claimants have said to themselves, well, we can--we should wait and see how this plays out?

MS. DOSMAN: I think the answer is that they had knowledge of the alleged breach and the alleged loss

arising from that breach. They, like Mesa Power, had access to the publicly available information on which Mesa Power was able to put together and submit its Claim to Arbitration. But Canada did not object that the Mesa Power Notice of Arbitration was somehow deficient. The pleading standards at that stage certainly do not require such a detailed level of particularized allegations.

And I should add that this is all assuming that there is an independently actionable breach to be alleged; that is to say, we are in the realm of the Claimant's frame of mind where we're identifying IPC as an additional political favourite could, in fact, stand on its own because that's the knowledge to which they keep referring us.

ARBITRATOR BETHLEHEM: Just sort of a follow-up question to that, and apologies because it's no doubt in the written pleadings and I just can't recall it at this stage. But to what extent are you saying to us that we can and should properly be guided by the majority Decision in Mesa Power (RLA-001) that there was no breach of 1105 in the sense that insofar as the factual predicate in the two cases overlap. I mean, is that a relevant consideration? I know we are not bound, obviously, by Mesa Power, but is the finding on the 1105, in a sense, influential on this point as to whether or not there was a

proper inappreciation of breach?

MS. DOSMAN: I think I would draw a distinction because we are at the jurisdictional stage, so we are not entering into the merits of the Claim.

I do think it may be relevant for the Tribunal to see how the Tribunal in Mesa Power characterized the evidence on the record before it; which is, all of the evidence that the Claimant now relies upon. It may wish to have regard to that. Again, you're not bound by it, of course, but yes, the manner in which that evidentiary record was treated and perhaps the manner in which the elements that the Claimant says are so--so incendiary as to create an entirely new claim, how that Tribunal and indeed how the dissenting member of that Tribunal treated or did not treat that information may be of relevance to the Tribunal.

ARBITRATOR BETHLEHEM: I think I was perhaps edging towards a slightly different but related point and that is, of course, you are correct in saying we are at the jurisdictional phase, but the big issue that everything is turning around at this point is whether the Claimant could have had an appreciation of breach earlier on before the Mesa--before its claimed knowledge through the Mesa proceedings.

But the reality is the Mesa Power Tribunal found

that there was no breach, so I'm wondering how, if at all, the finding that there was no breach by Mesa Power has an impact on the knowledge that the Claimant says it became aware of by reference to Mesa Power which it is then reading back into the 2010-'11 period.

MS. DOSMAN: I think maybe the point there is to recall that the knowledge that the Claimant points to is, in fact, legal arguments position-taking by one of the members--one of the sides of that dispute, and so--

ARBITRATOR BETHLEHEM: Perhaps we should have a hot tubbing with counsel.

MS. DOSMAN: I lost my train of thought on this point but, you know, you're certainly not bound by the, you know, the Merits Decision. I think it is relevant to note, you know, to what the Claimant specifically is referring, and you will see that they're referring to arguments of counsel, but that may be of interest.

ARBITRATOR BETHLEHEM: No doubt you will come back to this, and so will Claimant's counsel. Thank you.

MS. DOSMAN: Thank you.

One final point on 1116(2) before we close out for Canada for today; and simply that there are important policy reasons behind time limitation periods such as Article 1116(2). They provide certainty, and they prevent stale claims when evidence is no longer available or

witness recollections have faded. And we went back, and both of those issues were on display this week. We had missing evidence in the form of a key page of a Shareholder Register that was simply not on the record.

And in answer to Canada's questions, the Claimant's Witnesses, through no fault of them, because these events took place a long ago, responded with "I don't know," "I don't recall," "I don't recall," or "I'm not sure," no less than 70 times--so we're well into the rationale for the policy--rationale for these provisions to begin with.

Thanks, Gen, you can bring down the slide.

So, we've had quite a week together. I think we've learned many things, and to bring Canada's submissions to a close, I would like to underline that the Claimants--that Canada's consent to arbitration is conditional on a Claimant satisfying its burden with respect to both subparagraphs of Article 1116.

And, during the past five days and the past four years, the Claimant has failed to show that it was a protected Investor at the time of the alleged breach and it has failed to show that it brought its claim within three year of first knowledge, actual or constructive, of the alleged breach and loss.

Canada has not consented to arbitrate this

dispute and this Tribunal, therefore, lacks jurisdiction.

Thank you.

PRESIDENT BULL: Thank you, Ms. Dosman.

Do my colleagues have any other questions for Canada? And I think this would be not just for Ms. Dosman but on any aspect of Canada's case. I'm saying that to forewarn counsel more than anything.

ARBITRATOR BISHOP: No, I do not have any questions. Thank you.

ARBITRATOR BETHLEHEM: I may--let me see.

Let me put to you a couple of propositions and just see because I'll perhaps put the same to counsel for Claimants in due course.

I mean, it seems to me that both sides are agreed here that the relevant test is when the Claimant could or should have acquired knowledge. We're in constructive-knowledge territory. Do you accept that?

MS. DOSMAN: I would with the caveat that we did learn about some actual knowledge.

ARBITRATOR BETHLEHEM: So, is the essential dispute on the time-bar issue really focused on the Tribunal's appreciation of the factual dimension? In other words, when could, from the Tribunal's perspective, could the Claimants be deemed to have constructive knowledge? I mean, is that your position, that the

essential issue is not an issue of law. We know what the legal test is around constructive knowledge. It's a question of the appreciation of fact.

MS. DOSMAN: That's correct.

ARBITRATOR BETHLEHEM: And I understand from what you've said a little bit earlier on that, your--Canada's primary submissions on this block of issues because we will hear from the Claimant that it ticks all three of the boxes that you've put up, that your primary submissions are that there was enough in the public domain to have triggered a due-diligence inquiry, and that the Claimants did not acquit their due-diligence inquiry within the limitation period, and for that reason the statute applies.

MS. DOSMAN: I would say not only for that reason, but for also the reason that knowledge can be imputed to it from the public information prior to the Critical Date. That is to say, if we are not even thinking about the due-diligence inquiry, there was sufficient information. In this case, we saw that there was a due-diligence inquiry that was itself not sufficient.

ARBITRATOR BETHLEHEM: Okay. Thank you very much.

PRESIDENT BULL: Good. Then I think the

Tribunal's grateful to Canada for the submissions, and I think we're a little ahead of time, but we should probably take the lunch break now and then come back and hear from Claimants.

We're scheduled to have a 45-minute lunch break, and I suggest we take that now and then come back at 15 minutes past the hour.

(Pause.)

MR. APPLETON: Can you hear me?

PRESIDENT BULL: Yes, we can hear you, Mr. Appleton.

MR. APPLETON: Unfortunately, my video signal has gone down, but if you could hear me, we would be happy to consent to that arrangement.

PRESIDENT BULL: Right.

And I see Ms. Dosman nodding earlier, and I assume Canada would be fine with that, so let's take the 45-minute break now, and we can resume at, as I said, 15 minutes past the hour.

MS. DOSMAN: Very good. Thank you.

(Recess.)

PRESIDENT BULL: Right. Let's resume proceedings. We will hear from the Claimant.

Mr. Appleton, whenever you're ready.

MR. APPLETON: I just want to do a technical

check. You can hear me?

PRESIDENT BULL: Yes, I can hear you.

MR. APPLETON: Excellent. Thank you. I just thought we'd get that out of the way.

OPENING STATEMENT BY COUNSEL FOR CLAIMANT

MR. APPLETON: Mr. President and Members of the Tribunal, thank you for your time and effort in this very significant case. We also at the outset want to thank the Secretariat of the Permanent Court of Arbitration for their tireless service, including late nights and early mornings, and the Transcription team ably led by David Kasdan.

Now, this dispute is simple. It's a dispute alleged by the investor. It is not the faulty claim recast by Canada as the Investor's case. The Investor is the Claimant in this case. The Claimants are entitled to assert their claims, and that claim was filed within three years of the Claim that is at issue here.

The Investor has an investment. The Investor was an investor of another party with an investment in place before the Claim was filed and within three years of the breach.

Now, as we said in our Opening, the Tennant Energy Claim is a story about deception and the eventual discovery of the truth. And at its bedrock is whether a

foreign investor should rely in good faith on official government statements, how that should be relevant to the context, and what happens once that knowledge is obtained.

We have a number of issues to address today, and we've organized our presentation to move quickly to address the evidence and its contextual significance.

So, here is our plan to address the Tribunal's questions and the open issues that are here before the Tribunal. Put them up on the slide.

So, Mr. Mullins will take you through matters related to the investment. I will then return to review the nature of the dispute, the technical issues related to the measure, and I will also address additional responsive issues that have arisen during this hearing.

Now, let's start with the issue termed by Sir Daniel as the one that perhaps the Parties might throw up their hands in horror. This is the issue of ownership and the Trust, and on that matter I'm going to cede the floor to Mr. Mullins, and he's going to take you through, and I just note for the record that we have two slide decks. Slide deck one, the first one is going be with Mr. Mullins, Deck A. The second one I will take you through when we proceed just to assist in keeping track of the matters and the numbers that might be related to each individual deck today.

So, with that, I am going turn you over to Mr. Mullins.

Mr. Mullins, you have the floor.

MR. MULLINS: Good afternoon. I also join in with the comments of my colleague, Mr. Appleton, about thanking the Tribunal and the Secretariat for--in this--and counsel for Canada for this opportunity.

I want to talk today about the nature of whether or not Tennant is an investor under NAFTA for purposes of this Claim. The answer is clearly yes, under multiple reasons, and we do think that in a lot of ways Canada has made the proverbial mountain out of a molehill.

(Pause.)

MR. MULLINS: So, the question is: Are the Investor under the NAFTA in the relevant time period? We just skip ahead, when did the breach occur. The breach is going--is occurred on August 15 and Mr. Pennie determined what happened simply with the IPC, as we talked about and heard this morning, and my co-counsel, Mr. Appleton, will talk more in detail about that. I'm just going to focus, with the Tribunal's discretion, on the latter parts of the issue about whether or not Tennant is an investor.

First, Tennant becomes an investor in April 2011. You remember that Canada has admitted, during its Opening, that the loan transactions between John

Tennant and Derek Tennant was well-documented and, in fact, they had--their slide indicated that it was reliable evidence. There is no question that Mr. Tennant invested his funds. The only question is, you know, did he create a trust? The answer is clearly yes, and I'm going to go through that, and the proper application of the law on the record will show that there is no question that a trust was created and I'll go through that.

We didn't hear a lot about the application of the law this morning; you will this afternoon, and that Derek Tennant and John Pennie has confirmed the testimony.

What's critical about this is, unlike a lot of the cases relied upon by Canada, whether or not there is a trust or not, you have heard no one this week--no one--say it was not a trust. When you talk about conflicting evidence, usually the wife comes in and says, "What are you talking about? My husband never intended to do this." And you have testimony of conflict. And what I will show you later that even in those circumstances clear and convincing evidence is met, here there is--no one has come in and denied that a trust was created.

In any event, it's undisputed that Tennant Travel acquired legal title on January 15, 2015. It's uncontroverted that shares are transferred. Canada has admitted it in its Opening, and so there's really--their

position, Claimant became a protected Investor on January 15, 2015. And what you will hear later is, in fact, no matter what, giving--there was an assignment by Mr. Tennant to Tennant Travel in January 15, 2015. Under the undisputed expert testimony, Tennant Travel has been an Investor and it's gotten the rights going back to April 2011 under either theory of trust, which we believe is clearly met; but, if not, under the assignment. So, let's talk about the trust issue first.

Both experts--and I spent a lot of time cross-examining Ms. Lodise, and I did that on purpose to go through some principles because when you've gone through her Report, she made some pretty broad statements, and when we broke it down, as Sir Daniel wisely pointed out, there is not a lot of distinction here about the law of California. The law of California is pretty clear about what needs to be required. The question is the application of that law.

But what we need to be dispelled here is a trust, an oral trust under California law is not a complicated thing to do. It's not a very difficult thing. It doesn't need elaborate documents. You don't need documentation. You just need the idea that the Trustee has taken on the responsibility and has declared that he or she is holding the property in trust, and doesn't even

need to say those words, "I'm holding for the benefit. I'm holding for the purpose." All that creates a trust and implies legal duties under the law, and that's why, for example, we were talking about attorney-client with Ms. Lodise on the cross-examination.

When you--when attorney is hired by a client, there are duties; they're entitled by the law. The same thing happens with you become an oral trustee under California law. The elements are very clear. It doesn't require a lot. You need a present intent to create a trust and a designation of a trustee, and that was John Tennant. We don't dispute that he would be the Trustee; most people know that. You need a res or a trust of property. I know there has been some confusion on the record. When I say res, I mean not R-A-C-E; I mean res, R-E-S. It's a Latin term for the property. And here I think it's critical to understand the uncontroverted testimony that is the Shares and/or the right to Shares. In other words, the fact--the mere fact that you had the right--the immediate right to Shares is trust property, and the law is clear, and it's in this witness--expert, uncontroverted testimony of Ms. Grignon that--or Justice Grignon that the ability, the right to have shares is trust property, and I asked Ms. Lodise if she agreed, and she did. And again, if you go through my

cross-examination, you'll find she basically agreed with everything that Justice Grignon had testified.

The purpose is clear. Just as Ms. Lodise admitted that having a voting bloc would be a proper purpose, we've heard a lot, "Wow, could have been for, you know, community property and that could be a problem. At the end of the day when you drill down, you heard John Tennant say, "My wife knew all about this." And you read his statement, he said it wasn't--it was the value that they were concerned about, so what would happen--if something happened, God forbid to John's wife, which never happened, the value would have been valued for the purposes of community property but the trust--the assets themselves or the Shares would have stayed there. You heard that Miss--Justice Grignon and Ms. Lodise yesterday talked about that's okay. There was not an invalid purpose, and the sketch doesn't require a lot. A trust created for an indefinite or general purpose is not invalidated for that reason. It doesn't need some big elaborate document, hundreds of pages long. It's a very, very loose and, you know, very, you know, uncomplicated thing. You need a beneficiary.

And this is important. In April 19th, the law--and I asked Ms. Lodise and she agreed this is the law--as long as you have a designated class, you're okay,

and so in April 19, he says, "I say I want to get a holding company," and he couldn't decide which one. He immediately created a trust, and then that becomes official on April 26 when he names Tennant Travel.

All that has been established here--

ARBITRATOR BISHOP: Before you go on, could I go back to the last slide. You put up--and I think you just said the purpose is a voting bloc. Is that the Claimant's position, that the purpose of this Trust was to create a voting bloc?

MR. MULLINS: It was, but I--and I also want to say that community property was laid into that. So I don't--it's not--it clearly was not to hide assets from Mrs. Tennant, and actually John clearly testified to that. The community property issue was related to the voting bloc, but the idea was that the stock itself would be--stayed with the family, and so it's related, but it's not--and everybody--the Experts all agree that would be okay as long as you're not trying to hide assets, and Mr. Tennant was clearly said--he was asked--I believe by one of the arbitrators, did--you know, "Did your wife know about this?" And he laughed, "Of course she did." And so that's uncontroverted. So that is the point. It's the voting bloc and it's related to the concern.

Now look, it may very well be that they were

wrong on the law, on the California law, but I think everybody would agree that you--and I think Ms. Lodise agreed to this yesterday--you can do that, it was all valid as long as everybody knows about it and would--and it would keep it within the family as long as you're not trying to circumvent, you know, somebody's rights. Clearly, (a) it never happened because they're still married and it's all great, but (b), all that would happen is that the value of whatever that is, if there was a divorce or something, that that value would be ascertained and, therefore, would be attributed.

So, I do think it's related to the community property, but I--we say the voting bloc, the purpose was to keep it within the family.

(Overlapping speakers.)

ARBITRATOR BISHOP: Okay. So, when you use the term "voting bloc" here, you're not using it in a narrow technical sense, but you're using it, I think, in the sense of what--I think it was Derek Tennant who testified that the purpose was continuity of the Shares--

MR. MULLINS: Yes. Make sure there wasn't a dilution of the Shares from outside the family. That's exactly right.

ARBITRATOR BISHOP: All right. Thank you.

MR. MULLINS: And if there are no other

questions, I'll move on to the next slide.

Let's talk--it's easier if we talk about what was needed, let's talk about what's not needed. You don't need a writing. It's an oral trust. Both experts agreed. Remember I asked--you look at the record. I asked Ms. Lodise, do you need a writing? The answer was no.

You don't even need a specific definition of the beneficiary, in an oral trust you could have a class, and as I said earlier, on April 19th, he said it was going to be a holding company in the future and then he designates that on April 26. You don't need complexity.

As I--we talked about earlier, the law applies fiduciary obligations once you're a trustee, and once you say I'm a Trustee, you've got obligations whether or not it's in writing or not. You don't even need to use the word "trust." I'm holding for the benefit. I'm holding for the purpose. You don't need to use the word "trust."

And you don't need transfer of title. The legal title is held by the Trustee. A trust under California law--it's in the Expert Reports--is not a separate legal entity. I asked Ms. Lodise. She agreed. So, the title is held by John Tennant. This is going to be important later when we talk about the assignment, and that's why it's not a surprise or shock on the Shareholder Register which says John Tennant because it's not a trust that's

holding legal title. It's John Tennant.

Next slide. Mr. Tennant was asked, he's testified, and this is in his Witness Statement here. "I was holding them in Trust until I could put them in a holding company that I own," and he was going to set it up in the future and until he did that, until he actually transferred the Shares, he's holding them in Trust, and he--the statement talks about how he thought it had happened and never got going on, but he--that was--he did that. He kept those obligations as Trustee, and they're applied under law.

ARBITRATOR BISHOP: Was there any testimony or evidence as to why he waited four years before he transferred?

MR. MULLINS: In the Witness Statement, he testified that he always thought it had happened, that it was--it already happened, and that that--and he realized in 2014--it's in his statement--that he realized later it did not happen, and that's--he--but that's--that was the thought. He was holding the Trust until he got it set up. And until it actually happened, he was still the trustee.

Now--and--did we go back--oh, yeah, so this is--again, it was corroborated by two witnesses.

REALTIME STENOGRAPHER: I'm sorry, Mr. Mullins, could you slow down just a little bit please. You're

losing me now. Thank you.

MR. MULLINS: I apologize.

It was corroborated by two additional witnesses: Derek Tennant, again John Tennant in trust for a company he was going to designate, which became eventually Tennant Travel. John Pennie, he told me he wanted at the time of getting the Shares--again, this was April 2011--and that was back in April, that he wanted to hold the Shares as Trustee for a corporation, a holding company that he would acquire or whatever, and he couldn't name it then, so when he was a Trustee for the Shares, he wanted to be the Trustee for the Shares.

Next slide.

And this is a very important document, and I want to walk through with you in a moment, not right now but spend a little time on it. We talked about this with the Experts. Both Experts agree that this gave the immediate right to John Tennant for these Shares. On April 19, he had a right to those Shares. That alone creates a res. And in the case law, it's in--Justice Grignon's testimony--is the right to the Shares can be a res. So, even if the Panel determines, "Well, you didn't really get the Shares until later," it's irrelevant. He had the right, and so that right is--he's holding in trust for the holding company, which he announced "I'm going to

do on April 19, I'm going to pick one," and then later he does. That alone is property, gives the beneficial interest to the beneficiary, which is Tennant Travel.

Next slide.

And John Tennant was asked about this, and he said, "Well, if I demand those, I tell him I want the Shares." He doesn't pay, and he didn't pay, it was automatic. And again, Canada said that test--that evidence is reliable.

In Slide 77, their Opening, they said that was all reliable documents.

Next slide.

John Tennant confirmed. He said, "so what I'm asking you is on April 19, 2011"--that's asked by counsel for Canada--"when Derek defaulted, you again had a choice of five options." He goes through his options. And so you saw he could see all these options, yes, but he said "yeah, I probably"--but the item you just had up, "I already told him before in the demand that I wanted the shares automatically." That's what the document said.

And what--I asked Ms. Lodise about this.

Slide 11.

Let's go to the right to the Shares. Would the right of the Shares be sufficient for a res for purposes of creating a trust? The answer: It could be.

This has all been, honestly, a lot of time for--and it was kind of remarkable that there was only one question on redirect by Canada's counsel and no substantive questions of my expert on this law. None. Because it's all clear. When you actually drill down to the law, it's clear, and so the answer is she agreed with me, yes. If they had a right to the Shares, it was automatic in April of 2011.

Next slide.

And we know that for purpose that--Arbitrator Bishop was asking about, you are go--or "are you trying to hide something from Barbara?" He said, "I'm not trying to hide anything from Barbara." Remember he laughed. "You can't hide anything from Barbara." The Shares would stay together in a holding company but the value, it would be part of the community property if anything happened to me or we split up.

And so, again, going to Arbitrator Bishop's question, it's part of the voting bloc but it's also to keep it in part of the continuity of the family, and the idea was that we put in--for the benefit of the holding company, and then if something happens, then the value of that would be taken into consideration in whatever property they owned, so that's what he meant by that. He testified, and it's very clear.

Next slide.

Again, both Experts agree that a class of persons be designated. There's no problem that he had not picked his--on April 19 he hadn't picked the holding company yet. You know, Justice Grignon who said under Probate Code 15205 and 15207, the beneficiary can be somebody in a class--someone in a class of beneficiaries, it could be someone that will be designated later, so it's not a problem. Especially even if you give the Trustee the special right here to pick whatever holding company it is, it's a personal decision, and to Justice--and to Arbitrator Bull's question, yes it could be revocable; yes, he could change his mind. Yes, yes. But he didn't do it, and so because he didn't do it, it's a trust.

And as I said--Lodise agreed with this. I said in April I'm holding this in Trust for a holding company. I said what I'm saying is if he says I said April is I'm holding this in Trust for a holding company that I'm going to name, and it will be sufficient to create this Trust for a class of the holding company is defined enough as a beneficiary at that point; correct?

She said yes, it could be. She did not deny the legal point.

Next slide.

And I went on with her, and I said--so I asked

her, well I'm not asking you to apply the facts but legally the Tribunal had come to a conclusion that that would be sufficient; correct? Just under a matter of law, there's nothing legally prohibiting the Tribunal for making that determination if it so chooses. She agreed with me. Legally, if the Tribunal determined that there was a granted power to the Trustee to make a determination or there was a beneficiary or ascertainable class of beneficiaries to identify, that's what the statute provides for. That's their Expert.

Next slide.

Testimony is undisputed. John Tennant designated on April 26. And, you know, they point out that there was some confusion. If you drill down, John Tennant and Derek Tennant clearly said that J.C. Pennie, when he was questioned again by Arbitrator Bishop and then by me, he said he literally didn't remember exactly when it happened. It was clear testimony by John Tennant and Derek Tennant, and it's sufficient.

Now let's talk about clear and convincing. That's the standard you apply. We all now agree that the jury instructions define the clear and convincing is high probability, and it's somewhere between preponderance, which is 50 percent plus one, and beyond a reasonable doubt. I submit it's in the middle. And I thought it was

interesting this morning where Canada did not put up the Nevarrez case on their slides, talking about what it means to be clear and convincing, and they--that's the very case that their Expert read at lunch and recognized that I was interpreting incorrectly about what happened.

The case they did rely on was Butte Fire, and I would submit--and we'll talk a little bit about how the courts are organized.

So, the California Supreme Court is the ultimate determination of California law. Then you have intermediate appellate courts. They may disagree with each. It happens in Florida. It happens in Texas. It happens in New York, the intermediate appellate courts. And then there--and eventually the California Supreme Court will say this is the law. The jury instructions are very, very important because by 2020, despite that there is some distinction in the law about what clear and convincing might be, they had decided not to change from the high probability standard. They had the opportunity in a number of revisions to adopt a higher standard is--California Supreme Court has not done that.

And when you look at the Butte case, I would declare that it's dicta because in Butte's, they talk about the strong--sufficiently strong to command the unhesitating assent of every reasonable mind, but when you

look at the case, there is no one arguing that that standard is wrong.

Contrast that with Nevarrez. And dicta, again, it's a common law term. It's not essential to the holding so that's what we would call "dicta."

So, contrast Butte to what's happened in Nevarrez because, unlike Butte, the very issue that's being asked to the Tribunal was argued in full because there, the jury was instructed with a high probability, and the loser was saying "no, no, no, you need to use the strong--sufficiently strong to command unhesitating assent of every reasonable mind." And the Court said, "we're not doing that."

And you read the case, and you remember yesterday, I said I don't want to beat a dead horse because I don't want to get into an argument with Ms. Lodise, but her interpretation of that case was completely not fair.

And if you look at what it said, the Court, the Appellate Court, intermediary Appellate Court, said that the California Supreme Court, more recently, our Supreme Court, stated that evidence of a charge is clear and convincing as long as it bears a high probability.

And so, the Nevarrez case was saying that the Supreme Court of California has adopted the high

probability, and it goes on to say we decline to hold that the jury instructions, CACI 201, should be augmented to require that "the evidence must be so clear to leave no substantial doubt and sufficiently strong as to command the unhesitating assent of every reasonable mind," and it says, "the prior case in Angelia, nor any more recent authority mandates that augmentation."

So, the very issue you're deciding, what proper standard you're going to apply, I submit Nevarrez is the standard, it's the standard adopted by the California Supreme Court.

And I want to talk a little about Fahrney, because all of this means, really, nothing. So, how do you apply, Mr. Mullins, a "clear and convincing" standard? What does that mean in the context of the evidence we've heard today. We saw the written statements, we've heard the testimony. What does that mean? And I think if you read Fahrney, which is a pretty good case for explaining how this is applied, they clearly apply the "clear and convincing" standard. Remember this is the case where the guy gets--insurance policy, and he says, "I'm going to hold it--for when--I'm going to--you know, when I die, it goes to the benefit of my creditors." He doesn't use the word "trust". There is no written document on this.

And here is the key. There is not a single

scrap of paper identified in that case. It's not required, and the Court still found clear and convincing evidence of the Trust. That was conflicting evidence because there, the wife came in and said, "what are you talking about? He never said that. This is my money." And the Court rejected it, said, "despite this conflicting evidence, I find clear and convincing evidence there was a trust here." We don't have that. We don't have the Trustee, the purported Trustee coming in and saying, "I didn't do this." We have the opposite.

And remember, we talked about declaring. Declaring is a declaration at the time of the trust in April. What Justice Grignon was saying is that's completely different when the guy comes in and testifies. We had a lot of creative interpretation of the law condition about how it was edited there. What they're worried about is someone dead and people coming in and trying to argue that "this is what Mary said before she died." Mary's here, it's John Tennant. It was heavily disputed by the wife, to use the terms of Sir Daniel. There was heavily disputed evidence there. That evidence, unlike like, here, Canada's got nothing. They didn't bring anybody in. All he said was to protect my creditors, that was all that's required in a created oral trust, and as I said, there was not a single scrap of

paper on that Slide.

ARBITRATOR BETHLEHEM: Mr. Mullins, may I, just, sort of stop you there, and maybe it's something that you will come on to when you pull the threads together, but if not, I would be grateful if you could sort of respond to the concern in my mind, at least--"concern" is not the right word--the sort of the churning of the arguments in my mind. Now, I can see everything that you say, and I have no difficulty with the legal standard, and I'm hearing everything that you say about these cases.

I think--excuse me--where the issues are, I would be grateful if you could sort of satisfy me on, is that--we're talking here about reasonably sophisticated commercial businesspeople. We're talking about quite a lot of money at stake--I mean, it's at least the value of 200,000 and perhaps more because you're looking at, sort of, the future value of the shares as well, and what I'm struggling with is that there seem to be no extrinsic evidence at all in circumstances in which, intuitively, I would have thought commercial operators--sophisticated commercial operators--would have documented what they were doing. The February 2016 documents, it introduces uncertainty rather than clarity or, it may be said that the 2016 document introduces uncertainty rather than clarity because it's not clear whether it's

contemporaneous, it uses the word "affirming," whether it's talking about something that already happened, there is a paucity of dates.

And so, not to put too fine a point on it, the issue, I think, that you have to grapple with is: Is this a lawyer's construct that we are being faced with, or is there some other explanation for the fact that this does not seem to be as clearly crystallized evidence as one--as one might have thought?

Apologies for putting it in those terms, but I would be grateful if you could deal with that point head on.

MR. MULLINS: Sure.

It's not a lawyer's construct, but the concept is it's not shocking that there is not a documented or evidence when family is working together, and this is what everybody intended, and these guys were family.

And I go back to the Fahrney case, okay? This guy was a pretty successful businessman, and there was the debate about--you looked at the case, there was debate about whether or not they were going to close the business down, and you're thinking--and the wife is saying, "come on, if you really wanted to do this, where is the writing? Where is the letter? Why is there not a document on this?" And the insurance agents come in and said, "look,

this is what the guy wanted, he already had it under insurance." And they looked at circumstantial evidence.

There is nothing--the fact this family did not have a writing is not shocking, okay? It doesn't shock the conscience. The question is: Is there conflicting evidence and are the clear and convincing evidence--the answer is "no." Okay--is "no." And the concept of--"I'm going to appoint this holding company to hold the Shares, and until I do so, I'm holding them in Trust" because he's taking the Shares immediately, that concept creates the Trust. And, yes, it's a legal fiction because all trusts are legal fictions, of course they are, but that's what the oral trust is. It's the concept, just like the immediate right of shares, the trust itself becomes a concept, so you don't have to use the word "trust", okay? You just had to say, "I have to hold them in benefit." The testimony is, "I'm holding them in a trust," that's what was the concept, and that is undisputed.

And I'm still on that slide, as I said, no witness has testified otherwise, and there has been some dispute about what a declaration is. A declaration is Mr. Tennant's declaration that he's holding this, you know, in Trust, and that's declaration. His testimony is different and that's different than a case where the person's dead. And, as I've said, there's been no

material conflict between the Parties as to--that this was a trust and that there was a transfer of Title to Derek in 2015, Grignon said that's actually evidence that they really wanted to do this--it's the actual company that eventually was a beneficiary.

And I'm going to talk about the 2016 memo--memorandum in that slide, but before I--well, it will be a couple of slides, but just some false conflicts, you know, it doesn't matter that the beneficiary was named later. There was some testimony about John Tennant saying, well, you saw on a slide today he said that, you know, he wasn't sure when it ended. Well, Lodise told us this. Once there was a transfer of the res, it ended automatically because the res element--the res property gets transferred to Tennant Energy and, therefore, the Trust fails as a matter of law--John Tennant's not a lawyer. He's using these concepts.

Again, I've mentioned this earlier, the fact that John Tennant's listed in the Registry is not shocking because John has legal title and so, that's the appropriate--he would be the person that would be listed as the legal title owner.

Next slide.

And I almost spent a lot of time on this. I've mentioned this earlier, the Law Commission quote that you

heard from Ms. Lodise whenever it was--it was edited very carefully, but I--one thing I want to point out, the only question that was asked by Canada's counsel to their own Expert was: If the answer--if the answer is only oral testimony, in this situation, is that clear and convincing evidence that the Tribunal believed it and gave it credibility? The answer is "yes," it goes to the way of course (unclear) evidence that's reliable, but as a matter of law, there's nothing prohibiting you finding the fact that there is no written document, the fact that there is not written corroboration, is not sufficient as a matter of law to find no clear and convincing evidence.

Next slide.

And as I said, and asked--Arbitrator Bishop asked specifically, so my question is: Under California law, would the testimony of Derek Tennant and John Pennie be considered corroboration? And she testified if the testimony was deemed to be reliable, I think it probably could be considered to be corroboration. In other words, you're asking whether or not it was sufficient if two people came in and the answer was "yes."

Next slide.

All right. So, I spent a lot of time on trust, but I'm going back to Arbitrator--Sir Daniel's original questions, "does this really matter?" And we're not sure

it really does. And I want--it goes into the 2016 memorandum, but not only that, it's, more importantly, the legal effect of the transfer in 2015.

Even if John Tennant owned the Shares personally, the assignment of the claim to a successor company is permitted under NAFTA, and it's not just--it's because of the Shares themselves were transferred.

Now, let's go to the next slide.

There is no restriction on assignment of a claim from one American to another, remember, John Tennant was an American, Tennant Travel was American. A successor in interest may file a claim.

Next slide.

The shares were transferred on January 15, 2015. Tennant Travel was renamed April 20th. And there is the memorandum confirming the Assignment on February 8, 2016. And then the NAFTA claim does not get filed until June 1. The assignment clearly is before the filing of a Claim.

Next slide.

And this is very important, and I want you to focus on this. The only expert to testify about the legal effect of a sale of the Shares was our Expert, Ms. Grignon, and she testified, in addition, he, John Tennant transferred all the Shares in January 2015 to Tennant Travel, which became Tennant Energy in April 2015,

and assigned all his rights and interests in the Shares at that point, not February 2016. In April 2015, by the mere selling of shares, and she goes on and says, "including tangible"--sorry, January 2015. I apologize. I misspoke. April 2015 is when they change it. So, in January 2015, not in February 2016. And go on in her quote, "including tangible and intangible rights, and including, what I would call, a chose in action." In other words, if the Shares had a right--if the Shares had a right in action, then when he transferred those Shares, that right to bring an action was transferred with the Shares to Tennant Travel/Energy. That's under California law.

And the Witness says, "I believe"--President Bull was asked, "can you see in your analysis a document of assignment? You see that in evidence?" Arbitrator Bull was asking, "Well, is it the February document that is the Assignment or is it evidence of assignment?" And she says, "I believe the Assignment was made by operation of law when the Shares were transferred directly to Tennant Travel and that the 2016 memorandum is a confirmation that that was intended by the transfer of the Shares, but it already happened in January 2015."

Next slide.

I asked Ms. Lodise--well, Ms. Lodise was asked about it, and it was me, I asked her, I said, "well, do

you disagree with what Ms. Grignon is doing?" And she says, "I'm not going to render any opinion on the Assignment. I wasn't asked." So it's undisputed testimony. The assignment is not something that was California Trust Law, and it wasn't asked, so it's undisputed testimony.

By the way, it was in the Expert Report of Grignon that Lodise did not--chose not to respond to it. That's all nil.

And if you look at--this is the document that Sir Daniel was asking about, if you look at it, it says on Paragraph (2), "for greater certainty, I transferred all share property interests in Skyway 127, both tangible"--I transferred. Not now--I'm not transferring, "I transferred all share property interest in Skyway 127, both tangible and intangible, including all shares of Skyway 127 to Tennant Travel." That means, when he did it in January--all things got transferred. It's whatever rights he had as a Shareholder, whether it's as Trustee or as a Shareholder, got transferred. This is all fairly moot. It really is.

And all--and then it goes on to talk about what happened with the Trust, and he said, I so informed them in 2011, each subsequent time, and again, you know, lawyers don't write this, but the concept was--and he was

asked about it, he said--he testified this is what I intended, that I meant that Tennant Travel was always going to be the Trustee until the transfer, which happened in January 2015.

But at the end of the day, it's really the share transfer that doesn't, not so much the document. The document just confirms what happened, but it's actually the Share Transfer, under Justice Grignon's testimony, unrebutted that that's why the Assignment happens.

Next slide.

PRESIDENT BULL: Sorry, Mr. Mullins, can I just check something with you about this. The--you said a moment ago that this issue of assignment was actually in Justice Grignon's Report, and I recall Mr. Appleton had said it was in Paragraph 19, and I asked Justice Grignon whether in Paragraph 19 she was actually referring to an assignment, and she said "yes." That paragraph doesn't have the word "assignment." And that, of course, is not determinative of the issue.

But I wanted to know: Is that the only portion of the Report I should look at to find what that Expert was saying about assignment? And if that's something you want to check on and then give me a more certain answer later, that's fine, as well. I just want to know where I should be looking.

MR. MULLINS: Well, if you look at--so, if you read, for example, Paragraph 36.

PRESIDENT BULL: I'm with you.

MR. MULLINS: And so the question was did John Tennant have the authority to transfer, for example, property rights to Tennant Energy, okay, that's the Assignment. She's being asked they're not--that part of the question is not is there a trust. She's talking about as a Trustee, a Trustee has the power to acquire and dispose of the property. That's the Assignment. "In my opinion" at Paragraph 37, "as Trustee holding Skyway 127 Shares, John had the authority to acquire, retain and transfer Tennant Energy any intangible property rights associated with Skyway 127," Paragraph 37. That's the Assignment. That's what she was asked.

PRESIDENT BULL: Well, she seems to be saying that he had the ability to transfer.

MR. MULLINS: But Paragraph 37 she said he did it. Next page.

PRESIDENT BULL: I'm there. It says, (reading) "in my opinion as Trustee, John had the authority to"--and I'm skipping some words--"to transfer to Tennant Energy any tangible property he held in Trust."

MR. MULLINS: Well, I thought it was--I think it's clear enough, and certainly she testified yesterday

that's what happened under the law. And really had the power to do it, and she clearly testified in 19 that that's what happened, and--I'm sorry to really cut you off if you had any questions, but I believe that the unrebutted expert testimony is that the transfer of the Shares automatically became the Assignment and legally transferred the intangible rights.

PRESIDENT BULL: Right. So, I just want to make sure that I weigh up the expert evidence on this point.

And so, you would have me look at 19, 36, and 37 at least. I mean, there may be more paragraphs, but those you would point me to in terms of where the Expert's talking about assignment.

MR. MULLINS: Also 34 and 35, I'm being reminded by my co-counsel.

PRESIDENT BULL: Okay, I understand.

MR. MULLINS: Just to clarify it, just so we go through it because maybe the question is pretty clear. He's asking did it get transferred, and 34 and 35 she said "yes," and then C says did he have the authority to do it, and the answer was "yes." So, this is what the Assignment is.

And the Assignment is another term for did he have the right to transfer the tangible rights, and she said "yes," and that's what it in this statement--in this

opinion. There is no doubt about it, and she stated yesterday, and for whatever reason, Canada's expert did not oppose this expert opinion which is clearly in her expert opinion.

PRESIDENT BULL: So, I can see that there is reference to transfers and authority to transfer and the conclusion that a transfer was made. And it may be that you're using "assignment" and "transfer" interchangeably.

But in terms of an assignment, that being a legal term of art, I was wondering where one would look for the elements that would be necessary for a legal assignment.

MR. MULLINS: We're using the term assignment to deal with the legal construct that is clearly explained in her effort for it, and she testified about it yesterday, that as a matter of law by selling the transfer--by transferring the Shares, the--all intangible rights have been assigned to, as a matter of law, to the successor corporation which becomes Tennant Energy. That's what she's explaining, and I don't think--it's not helpful at least if we cause a confusion on it be caught up on the word "Assignment" as opposed to the legal concept which she clearly testified about, and both in her Expert Report and in her testimony that that's the legal effect of the transfer of shares, she clearly is talking about the

January 2015.

Look at Paragraph 34, "On January 15, 2015, John's Skyway's 127 shares were formally transferred to Tennant Travel," and he "also transferred any intangible rights that he or the Trust possessed in Skyway 127 Shares."

And so, she testified yesterday that happened as a matter of legal--of law because whatever rights a shareholder had by benefit of holding those shares, once you sold those--or transferred those Shares, rather, to the Company, legal title left John Tennant as either Trustee or personally, and goes to Tennant Travel and those rights are transferred.

We use the term "assignment" for the purpose of that. Does our legal document say "assignment"? No. It's a matter of legal construct as explained by Justice Grignon in her testimony, and there was no rebuttal testimony and I say this was all in her Report, and they didn't respond to it. They didn't dispute what she was saying as a matter of law what happened by the transfer of the Shares.

Does that answer your question?

PRESIDENT BULL: I think it does, but let me just make sure I understand.

What I hear you saying is let's put aside the

word "assignment."

MR. MULLINS: Yes, do that.

PRESIDENT BULL: What I hear you saying is that there was a transfer of the Shares, and this is what the effect of that transfer is.

MR. MULLINS: That's exactly right.

PRESIDENT BULL: So, it's not quite an assignment. And maybe assignment--assignment wasn't even used in the Expert Report, but we don't need to trouble ourselves with that word.

MR. MULLINS: I think that's right. I don't believe there is a legal difference in what I'm saying as to what the effect, the legal effect of assignment is, but I think that's right.

PRESIDENT BULL: Okay.

MR. MULLINS: It essentially has the same legal effect as what the testimony was. So, I take your point, it has the same legal effect. I don't think there's a material difference.

PRESIDENT BULL: The only way in which it makes a difference is that when you put to Ms. Lodise the question about assignment, that may have had a different meaning to her because, as I said, "assignment" is a term of art.

There is a reference to assignment in Claimant's

Memorials, and I wanted to check with you whether when you referred to "assignment" in the Memorials, you're referring to this effect of the transfer.

MR. MULLINS: We are.

And just a couple of points; if I could go back to--if we go back, fair enough, in terms of assignment, and you may say, well, look, Ms. Lodise didn't have an opportunity, but it doesn't really make any difference. She certainly had the opportunity to respond to parts (b) and (c) of our Expert Report, and she didn't do so on the legal effect, so whether or not she opined on the assignment or not, she chose not to dispute the Expert opinion in B and C. And if you look at Grignon's testimony explained in detail exactly what she meant, and she had an opportunity to be cross-examined by Canada's counsel.

But you're right, we use the word "assignment", but instead you feel like Ms. Lodise may not have had--I'm not an expert on assignment law, it really is a moot point because Canada or Lodise or any expert, they did not respond to B and C of our Expert Report.

PRESIDENT BULL: Right. So, let's put that aside. I just want a clear answer to this one, which I think I got.

MR. MULLINS: Okay.

PRESIDENT BULL: References to assignment in the Memorials from the Claimant is a reference to this issue about the transfer and the legal effect; right?

THE WITNESS: If you're talking about this particular transfer, the answer is "yes."

PRESIDENT BULL: Okay. Thank you, Mr. Mullins. That's actually quite helpful to me.

MR. MULLINS: [unclear] This particular transfer there might be other issues, but particularly in that transfer, yes.

ARBITRATOR BISHOP: Before you go on, could I ask one other question.

In terms of the evidence in the case, what is the evidence as to why John Tennant transferred the Shares to Tennant Travel on January 15, 2015?

MR. MULLINS: I believe if you look at--I believe Mr. Pennie was asked about that, if I'm not mistaken, also I believe it may have been asked to John Tennant, but the testimony was that they wanted--and it's also in the Witness Statements--it's in there as well but I was talking about the live testimony, but it's all consistent that's what they wanted basically consolidated formally into the Trust. I'm sorry, into the actual company, and to do it more formally.

And one thing I want to point out, January 2015

is well before any alleged--when the conversations with Mr. Appleton occurred, so there was some suggestion by Canada this was all done to set up a claim. That's certainly not true, and the evidence is clear there is no suggestion whatsoever that any of these people had spoken to Mr. Appleton or me as a set-up, so I want to make sure that was clear because that was suggested in the testimony.

(Overlapping speakers.)

ARBITRATOR BISHOP: But why January 15, 2015? Why did Mr. Tennant transfer the Shares at that time? If there is any evidence on it. If not, then that's the answer, of course.

MR. MULLINS: It's in his Witness Statement probably more clearly because (unclear) on it, but Canada has never debated that legal title that was held by Tennant Travel is January 2015. I believe that's why they didn't ask a lot of questions about this. But his testimony is that he said he discovered in December 2014 that what he intended to was actually have these Shares eventually put in Tennant Travel but formally had not done been, and they did it all together, and that's what he said. That's the testimony of the statement.

And I apologize, I (unclear) here right now if he was asked about that in his cross-examination, I don't

think he was, but it's in his Witness Statement.

ARBITRATOR BISHOP: Okay. Could you just remind me, one last question, what is the percentage of Skyway stock that is owned by Tennant Energy today?

MR. MULLINS: Currently?

ARBITRATOR BISHOP: Yes.

MR. MULLINS: It's 90-something percent at this point. We could refer to that because we're talking about now as oppose to other periods of time, I think it's 90s--we will give you the exact number in a Post-Hearing Brief, if--I don't want to say something that's incorrect.

ARBITRATOR BISHOP: Well, I guess I'm confused. I understood that Tennant Energy was owned 90 percent by John Tennant and 10 percent by Jim Tennant, and I thought that was the current ownership of it, but maybe I'm mistaken on it. Am I mistaken?

MR. MULLINS: If my colleague could answer the question--and I misspoke, too, because I thought for some reason I thought you were talking about Skyway. That was my fault. But Mr. Appleton will respond to your question.

ARBITRATOR BISHOP: I was talking about Skyway, but now I'm talking about Tennant Energy.

MR. MULLINS: Okay. If I could, I will turn it over to Mr. Appleton because I don't want to say something wrong to answer your question.

ARBITRATOR BISHOP: Okay. Sure.

MR. APPLETON: Arbitrator Bishop, the current holding of Tennant Energy is a small host. At least there are four members, it's an LLC, so it's a member-driven corporation, and the testimony was that John Tennant has 45 percent. He's resident in California. His brother Jim Tennant, who is a resident in California and signs the documents, he has 10 percent. That's John Pennie has 22 for that fractionable percent, 22.5 or something, and his wife Marilyn Field also has 22.5 percent. And I believe that comes to 100 percent. If my math is good, then that answers that properly for you.

ARBITRATOR BISHOP: So that's the owners of Tennant Energy.

MR. APPLETON: Yeah, Tennant Energy LLC, yes.

ARBITRATOR BISHOP: And what is the ownership of Skyway?

MR. APPLETON: I believe that Tennant Energy owns more than 90 percent of Skyway. I believe there is some--of Skyway 127. It may even be 95. We can go back and double-check the numbers. It's a very large number.

ARBITRATOR BISHOP: Okay. There was testimony at one point that Skyway was owned 25 percent by Derek Tennant and 25 percent, I think, by Mr. Pennie, but they no longer own shares in Skyway, I gather?

MR. APPLETON: No. I will unpack it for you.

So, Derek Tennant had shares for a while, and then they were gone. They were sold. John Pennie still, I believe, may have some shares--I will have to check--but I think that the vast majority of all of the Shares are gone, and were transferred into Tennant Energy, so it depends on where you are in time, but I believe that today, I do not believe that John Pennie or Derek Tennant have any holding in Skyway 127. I believe all that was put into Tennant Energy LLC. Tennant Energy LLC has the position of John Tennant, of course, as well.

ARBITRATOR BISHOP: I see. So, Mr. Pennie and his wife transferred their shares in Skyway to Tennant Energy in exchange for shares to Tennant Energy?

MR. APPLETON: That's exactly what it appears to be, correct.

PRESIDENT BULL: Thank you.

ARBITRATOR BISHOP: Thank you.

When did that occur, by the way?

MR. APPLETON: I believe that occurred in 2015--somewhere between January and April. I will go and double-check for you, but I believe the intention was all to take place by January 15, I think that was the date, Arbitrator Bishop, and I think that's what triggered it. I think they were intending to do this, they wanted to put

it into the next tax year. I think that John Tennant from his Witness Statement mentioned this in December, I think the family did something around Christmas, and I think that they waited until January to be able to deal with this, and I think they had some benefit for pushing to the next tax year in Canada to deal with this--their position.

ARBITRATOR BISHOP: So, what I'm understanding what you're saying then on January 15, 2015, John transferred his Shares in Skyway to Tennant Travel, and Mr. Pennie and his wife transferred their Shares in Skyway to Tennant Travel in exchange for stock in Tennant Travel?

MR. APPLETON: Yes, I believe that's correct. That was in April.

(Unclear.)

MR. MULLINS: That's accurate. And I'm actually done. I just want to go to the last slide.

ARBITRATOR BETHLEHEM: Mr. Mullins, before you do, sorry, to make it a trilogy of questions, I have one question on the previous Slide C-268. Could you just remind us, please, of what the evidence is in the record as to why this document was written when it was written? I mean, it reads like a note to file. We have just been discussing the transfer of the Shares in January 2015, and then we have 13 months later this note to file confirming. Why is this note, this memorandum produced when it was

produced and in this form? What's the evidence in the record?

MR. MULLINS: I think we may have to deal with that in Post-Hearing Brief. Because I don't know if anybody was asked that question.

ARBITRATOR BETHLEHEM: Yes, they were definitely asked because there were questions to John Tennant about whether this was drafted by Mr. Appleton or was it drafted by a lawyer, so this was definitely--I just don't know, you know, why it came out then and so on.

MR. MULLINS: Yeah, that's what I say, I know there was testimony about the document, and I also know they were not talking to a lawyer. The idea is that this was a document what had happened, but I don't know--but I don't know--we could handle it in our Post-Hearing Brief if there's any specific testimony with more elaborate of that.

ARBITRATOR BETHLEHEM: Thank you.

MR. MULLINS: The record is what it is. I take your point, their clearly was testimony lawyers were not involved, et cetera.

ARBITRATOR BETHLEHEM: Thank you.

MR. MULLINS: Again, we'll put that in our Post-Hearing Brief to make it more clear if there is anything else in the record on that.

I wanted to end on the last point which was going to Sir Daniel's point is, I don't want you to pull your hair out, but what does all this matter? Does it make a difference whether or not the Trust is this or not because at the end of the day, we've scratched or heads on it as well, that I think it only would become relevant in the chance that the Tribunal finds that there was no assignment of intangible rights as a matter of law as the testimony I just went through, then Tennant Energy's beneficial ownership would only be from--as of April 2011 as opposed to (unclear)statutory interest because there is no (unclear) that Tennant Energy (unclear) from 2015 forward, so that's I think the only relevance of the question, and it actually prompted our analysis, Sir Daniel, is what difference it really makes. I don't know if it really does. We spent a lot of time talking about the Trust but I'm not sure it makes that much difference because the Panel is either way either finding the Trust or as assignment really comes to the same spot.

And the control issue for purposes of this, is not really relevant for purposes of jurisdiction, and with that I am going to turn it over to Mr. Appleton who is going to talk about--a little bit more about assignment law with respect to the NAFTA, what it means by successor-in-interest.

MR. APPLETON: We might take a break.

MR. MULLINS: After a break. That makes more sense.

PRESIDENT BULL: We can take a break, but I wanted to ask a question, Mr. Mullins, to follow up on the transfer issue. I'm not sure whether Mr. Appleton is the one that's going to deal with this, but I just wanted to make sure I understood the successor-in-interest point.

So, the way I understand what's being said is, it may not matter at all whether or not there is a trust because, on a certain date, there was a transfer of the Shares, and when that happened--and this I think is Claimant's case, when that transfer of the Shares took place, all of the rights that John Tennant had were also transferred by operation of law. I've got that right so far?

MR. MULLINS: You do.

PRESIDENT BULL: Right.

REALTIME STENOGAPHER: I'm sorry, I did not hear the answer.

MR. MULLINS: You do.

REALTIME STENOGAPHER: Thank you.

PRESIDENT BULL: So, Mr. Mullins, am I right that what Claimant is really saying is that--assume there is no trust; right? Before the transfer of the Shares,

John Tennant had a NAFTA claim, and that claim was then assigned--sorry, that claim then was transferred, that right to make a claim was then transferred to Tennant Energy when the Shares were transferred.

MR. MULLINS: Yeah, if I could put a more finer point on it, our evidence is it's undisputed that he intended to have a trust. If the Panel for whatever reason thinks that the standard of clear and convincing has not been met for whatever reason you know, there's no conflicting evidence, testimony, then by operation in the title to those Shares will be held by John Tennant and the right to the Shares prior to whatever--to the transfer of the Shares, is the same notion that he had both the right to the Shares which is an interest, and then the Shares themselves, all of that on the same time period, and he would have that by full title without a beneficial--beneficiary behind him if for whatever reason the Panel says there is no trust.

So, to make sure I'm clear, (unclear) and legal effect of finding of no trust. So, let's just make that clear. So then yes, at that point, once he sells the Shares by--I'm sorry, transfers the Shares by sale, once he transfers the Shares, all rights are affixed to the Shares and that includes choses in action as explained by the testimony of Justice Grignon. And if that's done,

either if he--either it it's--he--it's only him personally owned his shares or as a trustee which he has legal title to the Shares and then for the benefit of Tennant Travel, under either Scenario the Tribunal finds, once that's done, the transfer to Tennant Travel, the same effect happens.

And so, I didn't want to oversimplify the argument. I think your question makes it simple, more clear how that works. It's just that the same legal effects happen no matter what you find on the trust for that reason.

MR. APPLETON: Could I just add one technical point?

And Mr. President, just as a matter of the NAFTA itself--I happen to have the NAFTA with me--Article 1139 has the definitions of investment, and in the definition, it's quite a long and extensive definition, it's non-exhaustive, but you will see, I believe it's 1139(g)--wrong way--1139(g) tells us that real estate or other property, both tangible and intangible, constitutes an investment that's protected by the Treaty and, of course, shares are considered to be intangibles, and so would choses in action as described by Justice Grignon. And as a result that that would all be protected under the NAFTA as a protected investment. And as a result of that,

it would be covered.

So, I just thought we would get through that. I actually have slides to talk to you about the law with respect to successors-in-interest, and just so we don't have to wait because I don't have this by memory, because I know that it's in the Investor's Counter-Memorial on Jurisdiction, I believe, at Paragraphs 104 to 106, has also really detailed in the Investor's second 1128 submission response where we have detailed paragraphs to the entire section addressed on that, and I will take the Tribunal to that--I promise--later on in the presentation. We actually have a specific slide to deal with that. And there are numerous cases that go back over 100 years that we can go through in terms of existing law, and I will take you to the NAFTA Decisions on this point. And unfortunately, my friends from Canada did not take you to, but there are specific NAFTA Decisions which also confirm this, not just, by the way, the S.D. Myers case where I was counsel, but also other cases, including the Loewen Decision where the Tribunal accepted the transfer to a bankruptcy Trustee, but then there was the problem of continuous nationality.

And the key thing here is there is no change in continuous nationality.

And the articles that I will take you to, which

Canada put in the record by Goh and by Wehland, both deal with that, and the key element is there is no change of nationality, the continuous nationality concept, whether you accept it as having three points or two points would certainly have to be there for the Investor and the Investment at that time. There is no change. That's the key thing. It's not a treaty forum-shopping situation. It's an American to an American corporation, no change, protected by the Treaty and confirmed by earlier NAFTA Decisions.

So--

ARBITRATOR BISHOP: But just a second. If I could follow up on the President's question, I understand it's your position that from April 2011--April or June 2011 that John Tennant held the Shares in Skyway in Trust for Tennant Travel. That is your position; correct?

MR. APPLETON: Our position is that, as of April the 19th 2011--

ARBITRATOR BISHOP: Yes.

MR. APPLETON: --Mr. Tennant held it, and that was confirmed by Justice Grignon, yes.

ARBITRATOR BISHOP: He held them in Trust?

MR. APPLETON: In Trust.

I'll let Mr. Mullins--it's an area where we have convergence and--

MR. MULLINS: And part of this is I've been handling the California law part of this, and Mr. Appleton will explain how it effects on the NAFTA. Our position is as of April 19, he is a Trustee for a company to be named in the future and then a week later in place sits the company's name. So, by April 26, Tennant Travel becomes a beneficiary. April 9--April 19, he creates a trust for a company to be held in the future, and then Justice Grignon said that that the class could have the discretion to do that, but the beneficiary then is named on April 26.

ARBITRATOR BISHOP: But if that's correct then your position is then John Tennant did not hold the Shares during that period from April 2011 to January 2015? He did not hold the Shares--he did not hold any beneficial interest in those Shares? I mean, that's the corollary of your position; correct?

MR. MULLINS: Our position is that, for purposes of--couple of things, and I want to make sure we're legally going through this.

Our position is under either a trust situation, if you find a trust, or that there was no trust because you don't think there is clear and convincing evidence, either legally under the law--it's in Justice Grignon's testimony and it's not disputed by Lodise--the legal title of those Shares is always John Tennant because under a

trust situation, the Trustee owns legal title, period. It's only--the beneficiary just has a beneficial title.

So going to your point then, if it's a trust, then yes, the Tennant Energy then has the beneficial title and John Tennant has legal title. If you find no clear and convincing evidence of a trust, then essentially you're right, there is no beneficial interest at all. It's all just a legal title owned by John Tennant.

Our point is that it's sort of a moot point because when you get to April--sorry, January 2015, either personally because, you know, I've just personally transferred the Shares or as Trustee he transfers legal title to Tennant Travel, and so--but that's a significant legal point, which is under either scenario, legal title's always held by John Tennant under a matter of California law.

ARBITRATOR BISHOP: So, your position is, in the alternative, your position is that John Tennant held the Shares as a trustee or alternatively he held the Shares as both legal and beneficial owner; is that right?

MR. MULLINS: That's accurate.

And the reason we say that is because we felt a lot of times that they're attacking the Trust, and we wanted to tell you where does that leave Canada? Let's say you're right, Canada. Let's say there was no trust.

So, that means who owns the Shares? John Tennant. He's transferred them in January 2015. So, where does that help you? That doesn't make any difference. That's the point we've been trying to make, is there is no legal difference here, and that's the point we've been trying to make.

ARBITRATOR BISHOP: Okay. But there was no assignment of a claim. It was the transfer of shares in January 2015, but there was no separate assignment of a NAFTA claim; correct?

MR. MULLINS: That's correct, by Justice Grignon's testimony that the Shareholder as either legal title owner as Trustee or as John Tennant legal titleholder alone, as a matter of law the transfer of the Shares to Tennant Energy transfers all intangible rights with it which include any choses of action that that shareholder would have by merely being a shareholder. And so, for example, being a trustee, as a trustee he had a right to bring a claim. And on behalf and for the benefit of Tennant Travel as legal title owner he could do so, but in either scenario, that's the legal effect of the transfer.

ARBITRATOR BISHOP: All right. Thank you.

ARBITRATOR BETHLEHEM: Can I just make sure that I understand what you just said there, Mr. Mullins. So,

if we were to conclude that there is no trust, your position is that John Tennant was the legal owner until he transferred to Tennant Travel in January 2015; is that correct?

MR. MULLINS: It is, but just to correct it, he's a legal title owner under either scenario. The answer is "yes."

ARBITRATOR BETHLEHEM: Well, he's the legal titleholder under either scenario until January 2015.

MR. MULLINS: Right.

ARBITRATOR BETHLEHEM: When he transfers to Tennant Travel. That was correct, wasn't it?

MR. MULLINS: Yes.

ARBITRATOR BETHLEHEM: And then the further point that you were making and this is in response to, I think, what Canada was saying earlier, is that, in those circumstances, those circumstances in which there was no trust, John Tennant was the legal titleholder until January 2015. He then transfers to Tennant Travel which becomes Tennant Energy, and you say that at the point in which this legal title coalesces in Tennant Travel, Tennant Travel succeeds to all the rights to sue that there may have been previously?

MR. MULLINS: That's accurate.

ARBITRATOR BETHLEHEM: Right. And that's the

reason why you say it doesn't matter, and that's your response to Canada's argument earlier on today that, you know, it's materially important as to when a trust was established, whether it was April or June or December or whenever, you're saying ultimately it doesn't matter because at the end of the day, the rights crystallized in Tennant Travel/Tennant Energy, and they have the right to bring a claim not simply from the point at which they became the legal owner, but also in respect of all the rights that were accrued with that ownership?

MR. MULLINS: I do agree. The only thing I want to make clear is that, and I put this in my presentation, invoked the scenario of the Trust situation or if it's just John Tennant. He has (unclear) the same scenario that he immediately starts April 19, to say there was no trust, it was just him, because he has a right to the Shares so he has an interest in that, and that's a protectable interest, and then once he gets the Shares, he has that.

So, our position is--just so we're clear and there's no confusion later--that either if you find the Trust or as he's just legal title owner alone with no trust, Mr. Tennant's rights, as legal titleholder of the rights to the Shares begins on April 19 because of the situation of the demand that we talked about earlier.

ARBITRATOR BETHLEHEM: Okay. Thank you very much. That's clear.

ARBITRATOR BISHOP: But before you go on, there is an important distinction here, isn't there? I mean, assuming that everything you said is correct, John Tennant only owned 22, I think, and a half percent, if I remember correctly, of the Shares of Skyway as of January 14, 2015? Or I believe as Trustee or as personally; is that correct?

MR. MULLINS: Correct.

ARBITRATOR BISHOP: But Tennant Travel is a U.S. company. But before January 15, 2015, to the extent that there was a claim by a U.S. Shareholder, it would have been John Tennant either as Trustee or as personal owner of the Shares of Skyway but only for his percentage of the Shares; correct?

MR. MULLINS: That gets into the control issue, not that--this was going to be handled by my colleague, Mr. Appleton.

ARBITRATOR BISHOP: That's fine.

MR. MULLINS: We are just dealing with a pure jurisdictional issue as to there is an investor--investment here. To the extent of--what extent of that investment for purposes of things like damages, we think it's probably more of a merits question, but the question for jurisdictional purposes, is there an

investment by an American from April of 2011, the answer is clearly "yes," under any scenario, either scenario under the Trust or legal title owner solely by John Tennant.

ARBITRATOR BISHOP: Okay. Thank you.

MR. MULLINS: For (unclear) jurisdiction.

That concludes--we are here to answer any question, but that concludes our presentation on the Investment side of this. My co-counsel will be talking about the issues of the Measure and those issues were the second issues for the jurisdictional hearing. There will be some other overlap, but I think that if we take the break now, this is probably a good break. I guess that's the first issue now and we will be going to the second issue which will be handled by Mr. Appleton.

PRESIDENT BULL: Sure, thank you, Mr. Mullins, and yes, we can take the 15-minute break now.

MR. MULLINS: Thank you.

(Recess.)

PRESIDENT BULL: So, we are all back from the break now. We're due to hear from Mr. Appleton, I think, but I see Ms. Squires signaling.

Is there something you wish to raise, Ms. Squires?

MS. SQUIRES: Yes, just something very quickly.

During the break, the alarm for the building we are in has been going off for some incident that is happening in the concourse below the building. We are on standby waiting for the Fire Department--

(Alarm sounds.)

(Pause.)

MS. SQUIRES: We are waiting to hear from Toronto fire services as to whether there something needs to be done with us moving. If you see us on the screen, things are still okay, and we well let you if we are told we have to leave the building.

PRESIDENT BULL: Ms. Squires, you're all right proceeding for now?

MS. SQUIRES: Yeah, yeah, we're good.

PRESIDENT BULL: Just let us know.

Mr. Appleton, over to you.

MR. APPLETON: Right. So I want to, of course, thank Mr. Mullins for taking us through the material.

Because of the issue of time, we're going to switch over to a different set of slides, but the Tribunal will not be able to follow what I'm going to do in order because I'm going to start with addressing some issues that arose--or that I had planned to deal with at the end to make sure that they're all covered. And then I'm going to come back to the issue with respect to the measure

because we will have a lot of opportunity to talk about that, but you'll have--I will obviously omit some material and otherwise plan to be able to give some context to the international-law meaning, particularly that which arises from a full and proper understanding of the operations of the Articles of State Responsibility for Internationally Wrongful Acts, particularly Articles 14 and 15.

And so, I will do my best to try to cover what I can, but I want to make sure that I am able to address the questions at various points raised by the Tribunal. So, I'm warning you that it may take a little bit as we deal with the slides. Ms. Herrera has agreed kindly to run the slides for me, but normally I run them myself, but I could not run back and forth and do the presentation in the Closing.

So, just with that warning, and since I did not intend this to be my first issue, I'm going to try to run the slides in the order in this area. We're going to start with a matter that was raised by Canada during its Opening, and just so that--Ms. Herrera is going to start with Slide 45--and that is an issue about the name change of Tennant Energy--this is not the most important issue that we'd start with, but they're all in order here.

And so, during the Opening, Canada raised a concern that Tennant Travel changed its name in 2015 to

Tennant Energy with a sense of somehow suggestion that this was in anticipation with respect to bringing a NAFTA claim, and I think that if we looked specifically with the review to the documents that were in the file filed by Canada with respect to Tennant Energy and Tennant Travel, we will see that, in fact, that is completely incorrect.

So, if we could look at this, you'll see that, in this particular Tennant family company, the name has been changed four times over the years. The Company started as Tennant Consulting and then changed its name to Wine Destinations because that's where Jim Tennant--he's a U.S. citizen. He lives in Napa, California. So, he changed it to Wine Destinations. He then changed it to Tennant Travel in 2002, and that also had nothing to do with this NAFTA claim, and then in 2015 they changed it again to Tennant Energy and that's because the Tennant family changes the name of the companies specifically to deal with whatever they do. There is no other meaning or other nefarious intent that we should take for that. The transfer was done before any discussion with the NAFTA counsel that first date of the meeting with NAFTA counsel was June 15--sorry, June 16, 2015, as confirmed by Mr. Pennie.

And again, just for the avoidance of doubt, that was initially in the pleadings. We didn't have the date.

He said it was sometime after March 15, 2015, because we just simply didn't know; and then when we had Mr. Pennie file his Witness Statement and with the pleading that went with that, it was corrected so the date was the actual date, which was in June 2015, and that may help explain some of that confusion.

Now, I'd like to turn to an issue that I think the Tribunal would be quite interested in, which is the issue of successors in interest and assignments. And for me I've used this interchangeably, and so I just want to make sure that we're quite clear that the--that often in international law we use the term "assignment" and "successors-in-interest" both in the same way, and the key case on this really is Daimler, but there are other cases I'm going to take you through. I wanted to identify for you that Canada's authorities, as I mentioned earlier, both Hanno Wehland and Mr. Goh, RLA-137, 138--these are Canada's authorities--confirmed validity of assignments.

And then we put in materials to the record specifically, and as I said earlier--I got it right--the Counter-Memorial on Jurisdiction, at Paragraphs 104 to 106 and in particular, the Investor's Second Response on the Article 1128 submissions, at Paragraphs 16 to 21, and I'm going to take you to some of the information on that in the next slide.

So, if you could just pop over the next one.

And so here we really want to talk about the successor-in-interest. And so the position of United States or Mexico, I can't remember, a position that was expressed was that you could not assign a NAFTA claim, but, in fact, you could always deal with successors-in-interest, and there is a tremendous amount of international law on this topic, just as Sir Daniel will be very well aware of the laws with respect to successor states. There are many issues that happen. States have it. People have it. Many different things. There are many different circumstances in which someone steps in to the position of an earlier Party. And so what becomes important here are duly respecting international law principles about continuity of nationality so that you could have, whether it's a diplomatic protection model or whether it's a bilateral investment treaty type of model, that's the Golden Rule: You must not change that issue, and of course that's not an issue here.

And as I identified earlier, Loewen Group is a very important case here, because in Loewen Group--and that's CLA-285--in Loewen Group, the Canadian funeral home company went into bankruptcy, assigned their rights to a bankruptcy trustee, and the problem in that case wasn't the assignment--that was accepted, that was not a

challenge whatsoever--but the nationality of the assignment, which happened very late in the process, happened to be an American against the Claim against the United States, and that was problematic. So a change of nationality becomes important but not the issue of an assignment, not the issue of being a successor-in-interest. That is permitted.

Furthermore, there are long-standing case law, and I've given various examples in the 1128, the second 1128 submission, which include--I'm just giving you some selections here but I had the 1128 submission with me if you want to discuss it--but I had identified, for example, the Caire claim, well-known in the area of State responsibility. De Sabla claim from the U.S.-Venezuela Claims Commission. That's an issue where a widow succeeds to the rights of her late husband and brings a Claim and the issues about delay and timing or the issue of the Caire case, which also deals with family succession with respect to a matter for someone who is murdered. I believe Chattin and Roberts from the U.S.-Mexico Claims Commission, which are listed here, have similar issues like that.

And then, of course, that will bring us to issues such as S.D. Myers. Now, I'm going to deal with S.D. Myers in a moment with control, but I simply want to

flag that it also could be in the successor-in-interest category as well.

But for sure, Canada did not take you to the Loewen Group, and for sure Loewen Group is very relevant here because of course you can, and it just follows the common standard everyday practice of international law. There is nothing particularly unusual about a successor-in-interest as long as you respect the continuous nationality rule, and that, of course, has been respected here.

Now, I would like to talk about control. Now, Mr. Mullins very ably took you through the issue of control, but there are some international law issues on this, of course, and Arbitrator Bishop had requested that we deal with this as well.

Now, upon review of the evidence and discussion of what's gone in the last few days, including the very lengthy decision that we received last evening--that we weren't quite sure where it was, so I had to spend a lot of time and effort reviewing that until we were able to get an answer at 7:00 this morning--we do not believe that de facto control is going to be an issue that's going to be helpful for us to consider what the purpose specifically of jurisdiction, de jure control for sure, but the issue fundamentally is that at the relevant time,

which we believe is in 2015, Tennant Energy certainly had de jure control, without a question.

There's clear evidence in the written statements of control. Mr. Mullins took you through that. John Tennant and Derek Tennant testified--actually, I believe it was Derek Tennant who testified about control at the Hearing, and John Tennant gave evidence about it in his Witness Statements.

But I want to take you through the S.D. Myers case, and if you recall this morning I believe it was Sir Daniel who was asking questions--I believe it was of Mr. Klaver--with respect to this issue of control, and whether there were cases, and you notice that Canada did not offer up the S.D. Myers case, and Canada did not offer up a lot of discussion necessarily or freely about it, but it was eventually coaxed out by thorough questioning, but no doubt I will be able to experience myself later on today.

And so, here I want to identify two documents in the record, CLA-111, which is Canada Attorney General versus S.D. Myers; that is the case at the Federal Court of Canada, which I happened to attend as counsel, and also CLA-293, which is the S.D. Myers Second Partial Award. I believe that's the right one. The First Award is also in the record, but I'm quite certain that what we're looking

at are issues that are addressed in the Second Partial Award, so that's why I'm relying on it, and if I am mistaken, you'll hear from--

ARBITRATOR BETHLEHEM: Mr. Appleton, could you just--I'm just looking at the transcript--could you just recite those please so that David can get those correctly, please.

MR. APPLETON: Yes.

CLA-293 is the Myers Second Partial Award, and CLA-111 is the Federal Court of Canada Decision in Canada Attorney General versus S.D. Myers. That is Canada lost the case and brought a judicial review in which--where it was unsuccessful before the Canadian courts that also confirmed the Decision in the S.D. Myers case.

And so the fundamental issue is the following, a very interesting situation and not that dissimilar from what we have here. S.D. Myers is a fairly large American company, quite successful in hazardous waste remediation, based in the northern United States with a subsidiary in Canada, and it was family run. There were four brothers, and Dana Myers was the sort of Head of the family after the death of his father, and so the family believed that its subsidiary in Canada was owned by the U.S. parent corporation.

What they didn't realize because they were

operating under a mistake was that their accountants shifted the ownership from the American company to their names personally for tax reasons. Unfortunately, they originally had set it up through the Company and didn't give the family members the correct legal documents and, therefore, quite to their surprise because they provided the lawyers with the legal documents that said it was set up in the Company, and then we discovered later, after the Claim was done and after it could be amended, that the family members owned it, not the Company.

And so the issue was could you pierce the corporate veil there? Could you look at the group together and deal with it? You could imagine that the Government of Canada did not appreciate that idea. They liked the idea of having a technical defence saying, no, they didn't bring a claim, we're not going to allow an amendment of the Claim. They should not have their day in court. They should be struck out.

The Tribunal said something different. They said, we are to look at the totality of the facts. We're to look at what's here, and they looked at the issue and indicia of control. They looked at who ran it. They looked at what was put together, and they said, well, you know, it may very well be that in a family business people didn't keep their records as well as they might do in a

public company. Remember we're not at a (unclear) standard--we're not at that level. These are really not large companies on the development side. They become large later when they make their large investments, the large investment being when they put the winds tower up, when they put the cell up. The value is in getting the contract and in redeveloping the land in the right area. That is what the work is for a wind farm. You have to locate the right area and get very good relationships with the people who have the wind leases. You have to put that all together, have excellent partners because at that time it was very hard to get a FIT Program compliant wind tower and a cell, and the cell is the entity that you put the blades on, the turbine, it's hard to get the turbines. They had to be compliant for Ontario which meant that there was a local content requirement, which was part of the complaint in S.D. Myers, which is not in this case, you'll see. There are a number of elements in the S.D. Myers--sorry--in the Mesa Power case that are not an issue in this case.

But--so, the issue in S.D. Myers was that the family thought it was done one way, it was done another way by mistake, and the Tribunal sat there and it said we're going to figure out what's really going on here. And if the family is working together in concerted effort,

these are the types of economic relationships that are to be protected by the NAFTA. The NAFTA definition of what is an investor is for someone who makes or seeks to make or has made an investment. The concept of an enterprise is any form of economic activity done whether there is a list, whether it includes a trust in a partnership and other joint types of economic cooperation, because the idea of the NAFTA was to protect all forms of investment and find predictable commercial relationships in North America. That's what they were looking for.

It's actually the small companies that need the protection much more than the large companies that have lobbyists and large numbers of lawyers and everything else. It's the little ones that were to be protected by rules and fair market dealing. That was the problem.

And so, Canada doesn't like the authority in S.D. Myers. It chooses to ignore it, but it can't, and it should have offered that authority to the Tribunal this morning. They could have said we don't like it, but they didn't offer it up, and they should have.

And I also stress that the Canadian Federal Court not only rejected the arguments of Canada that this was contrary to the NAFTA, so the Tribunal rejected that. They then went for judicial review to the Canadian courts, and they rejected that, and they identified the indicia,

and primary, primo inter pares of the elements in that test was that it was a family business, and that perhaps some of the strict standards it would otherwise look for were not as important in such a context.

They look at what did they do? They looked at the purpose of what was going on, and I think if we looked at that and we look at the Transcript, for example, from Derek Tennant at page 480, at lines 11 to 15 about control, and we see what John Tennant said in his Witness Statement at Paragraph 24--and of course that's CWS-2--John Tennant said, "I would get the last word on corporate decisions in the voting bloc. Any way you look at it, it is actual control." Did he get the last word? That was confirmed by his brother. That was the last word. The last word has to be "control." And that is for exactly the same reason that the S.D. Myers Tribunal concluded the Myers family could bring their claim. They said that Dana Myers, the oldest son, he basically ran the business. Said he doesn't get to run the family but he gets to run the business, and I think that's what is going on here. John Tennant had the last word and he gave him that opportunity with respect to that.

And so, the real impact of control is really not jurisdictional, in our perspective. It's going to be a matter of damages, because you've already heard our view

about successor-in-interests if you don't find that there is a trust. Either way, if there's a trust or if there's a successor-in-interests, we don't really have to worry about the control issue.

I also identified Canada's Statement on Implementation, which is CLA-288, and the Statement of Implementation is a document made in connection with the implementation of the NAFTA. As we know under the Vienna Convention Law of Treaties, we can look to that as a supplemental means of interpretation to the extent that you find the word "control" to be ambiguous, and there we can see again that (a) there was no definition but you can see the broad ideas of control and the broad coverage that was intended by the NAFTA. So, you have an explanation from Canada at the time the NAFTA was being implemented, this was issued, I believe, in 1993 or it might be in their Official Gazette of January 1, 1994, and we filed a copy in the record. And so, that's the basis for our position on that, and we want to make sure that we were very clear.

We also identify that test that we talked about was also, if I recall, even identified by Canada in its own Rejoinder Memorial. So, I simply want to flag that with you.

And I want to talk about another issue, a more

technical issue about change of control, and we are going to go probably to 48.

During Canada's opening, Canada made reference to Section 12.1 of the Ontario FIT Rules, which addressed a change of control of the Applicants, and their Slide 83--this might actually be out of order. That's 48? Could you just go to 49 for a moment and see if that's Canada's slide in there? Yes, okay.

Well, then I'm just to give you reference to Canada's opening slide 83; and, in that, they tell you that there's a problem with respect to control. You had the change of control. You remember they had it in their Opening and in their Closing. They say that that would be a problem with the FIT Rules. What they don't take you to is something that's actually in their own Rejoinder pleadings, and it's in Footnote 141 where they actually give you Section 12.1(b) on assignment and change of control. And what that says is that of course you can have a change of control, but you need the prior written consent of the OPA which consent may not unreasonably be withheld.

So, change in control is not really a significant issue. Now, there is a sub rule that goes in there with respect to if you want to change of control after you have a FIT Contract. Then they have a--then you

have to wait a year after you got a contract, and you didn't get a contract just by being qualified to get a contract. There was still another process after that, after you made it to the list. There was still more you would have to go through before they would actually give you that. That's all outlined in the FIT Rules. So that's just a little bit of context, but Canada didn't tell you the rest. Canada selectively showed you one part, didn't give you all of those parts. And this is simply a mere formality that was not a problem whatsoever. The issue is a complete red herring and a waste of good quality time at this Hearing. Nobody wanted to deal with that.

Another similar issue is about the OPA ranking that the Tribunal remembers Canada showed us Slides 116 and 117 during the Opening which had a variety of ranking information, and they showed us the situation that IPC Canada had some additional projects that were lower in the rankings, and the suggestion was, well, why didn't you look at that or fundamentally you knew that IPC had--International Power Canada had applications of various types. IPC Canada was in the wind business and energy business. It was a power company, and so you would assume it would have various projects. And as I believe the testimony on that was that Mr. Pennie didn't really

look below the line. He looked where he was and thought he would be ahead of him rather than they would be below him.

But these slides are supposed to evidence the detective work that Canada believes that a FIT proponent was supposed to engage in to ascertain the mere fact that IPC in one region got a contract, and that was supposed to be a clue, and this presentation alone shows that the constructive knowledge test fails. It does not. None of that will show us a reason IPC got a contract which, as we know, was due to clandestine group of government officials seeking to benefit a political favourite.

And I think it's even easier when we think about the question raised this morning by the Tribunal about the--on the OPA ranking of IPC because, during the morning session, we saw that even Canada recognized that there is no actual or constructive knowledge of the Breakfast Club or assistance to the Breakfast Club to IPC until after the information was released to the public in 2015 and disclosed in the Mesa Power NAFTA hearing in confidential session in October--late October of 2014.

And so, the problem for Canada is to recall that Tennant Energy could not know. It was impossible for Tennant Energy to know.

Now, Canada realizes that is a great

unfairness--that very--actually--we'll call that a general unfairness, but there is no other evidence, and you needed to be a detective to realize that there's a serious breach in the Treaty. And you if recall President Bull's question: Is this not the reason that the Investor didn't act for purposes--we need to understand, I think, and I'll rephrase it, is there a difference in constructive knowledge that might be different, or differentiated, in the circumstances? Are there circumstances that you need to take into accounts? And, of course, the answer is "yes."

But it's not reasonable just to say that a competitor got a contract that was due to a non-permissible reason. Canada takes it is further. They say that they're advocating an immediate suit. If you look at what Ms. Dosman took us to, Slide 85 about Mr. Wolchak's statement, Mr. Wolchak was a--and they also repeated that error in the Opening, as well, Mr. Wolchak's statement, along with the Mesa Power Memorials, "first of all, they were not available to the public until June 4, 2014, not April 28"--or some date in April. Mr. Wolchak was a professional investigative journalist.

Now, if you recall in the--I flagged that in the Opening, as well, in the letter from the President of that Tribunal, Kaufmann-Kohler, and then the e-mail that came

from Mr. Llamzon to confirm that things were being posted on June 4, and--but now, let me go back to Mr. Wolchak.

Mr. Wolchak was a professional investigative journalist. Now, in this context, in the materials that he filed, an extensive report of what was available in the media, this professional investigative journalist could not find any evidence of the Government conspiracy known as the Breakfast Club or the effect of the Breakfast Club for International Power of Canada. That is the mother's milk that an investigative journalists live for. If a professional could not find this, searching and scouring on the public record, how could the general public? How can we reasonably expect FIT Proponents, the general public, lay people to know--under Canada's test, we're supposed to just look, and if somebody puts a tweet, or something, on social media or--we use the Meta, what used to be known as Facebook--does that mean now, somebody posts something today, that there have to be a slew of cases against the Government of Canada? Because somebody said that somebody did something unfair? That can't be right.

Now, here, Mr. Pennie made actual inquiries to the OPA. There was an issue, it was in the newspaper, he read something in the newspaper, and he read the Minister's statement categorically denying it.

Mr. Pennie called the OPA and asked them is there something wrong here? Is there some issue about if you're fairly following the rules? And they doubled down, as we'd say. They said no, everything is fine.

And so, this is, I think, high problematic. I think that when we want to understand the nature of that, if a professional couldn't do it--and I will take you through the Transcript when I return to the beginning of my remarks, I will take you to the Transcript with respect to Mr. McCall. Mr. McCall admitted that he's a Trade Policy Analyst. He is--that's his expertise, is to follow and maintain information about what's going on on trade policy issues and advise government officials of issues that could be of concern.

And when he was asked about "did you read the Ontario Auditor General's Report," and Ms. Herrera asked him first about 2010, the year before the one that's in this one, he said "I wouldn't read that. That's not something I would normally read." Well, who would normally read that? Who should be expected to be at that standard?

Ms. Herrera asked him a number of other questions. She said, "Mr. McCall, should you be--should the public rely on the representations made by the Government of Canada?" He said "yes." She said "should

they rely on official statements of the Government of Canada made in the trade case?"

He said, "yes, of course." I'm paraphrasing. I'll get you when we get there where we will actually see. And they're in the slides, these extracts. Because that's reasonable. He is a professional who is engaged to do this all the time and report. And if he doesn't look at that, if you recall Ms. Herrera said do you--he put materials and suggested that these were materials that Skyway 127 should have known about, and there was a list, there was Paragraph 3 and Paragraph 5, and Ms. Herrera took him to through and said, "well, did you read all of these?" And he said, "well, I didn't read the Procedural Orders." Well, he doesn't read those and that's his job, how would you expect a lay person, someone in the public, to read it, know about it, evaluate and assess?

This test is simply absurd. It's backwards. You have credible, plausible information from the Government's Minister saying, "we did nothing wrong." Saying, "this was sour grapes and we understand there will be some disappointments." There was a set of deceptive statements made, made to deter people from bringing claims, to delay, to deny and to distract. That's what was going on. They did this specifically so that the public--the FIT Proponents wouldn't know. And they

maintained it. Canada knew they were interviewing witnesses, they were doing things when they were filing their pleadings. They would have to know. Ontario certainly knew because it was their own government officials but they said that they did nothing wrong when they knew they did. Canada did something wrong, and if you want to look about constructive knowledge, and when they should have made the inquiry, they're interviewing witnesses for a claim, Canada should have known that when they made these denials that they were false, but they were perpetuating fabrications and wrongfulness. That's where the test would be.

For sure, but Canada continued. Canada had an obligation of non-repetition, of cessation, under Article 30 of the ILC Articles, ILC Articles of State Responsibility, and they didn't stop. They kept doing it, they kept taking, not only steps to say they didn't do something wrong, they made steps to continue that when discoveries occurred that would have made the public aware, they didn't let them see. They took active steps to not let them see.

And I want to mention that this morning Ms. Squires took efforts to try to say that Canada's efforts to withhold--to suppress this evidence was not a measure under NAFTA, but with all due respect, that's not

correct because a measure is defined--you'll see slide on that on Article 201, and, I believe, Canada took you to it as well, and it includes a practice. And Canada engaged in a practice, and as you know, the Hearing video became available to the public, and at that time it was Canada's act to request to the Permanent Court to have it suppressed. And at that time, and later, they received notification from the client representative of Mesa Power saying that, "we don't believe that this is confidential" and they maintain the confidentiality. They didn't have to. That was a choice, especially in the circumstances when it had been made available for almost five years to the public.

Now, that's for Canada to answer to--in another case and to its own public. Canada's also withheld that information from its own Parliamentary Committee, that can otherwise supervise. So, there are a variety of thing that all the FIT Applicants who would have known, who would have had the benefit of being able to see and judge for themselves, and that would be the point where you would have inquiry. So you have a web of deceit that's put out there, so you have an issue. You then have a variety of explanations from the Government, that seemed very plausible, and we want to believe governments. We want to presume good faith in the act of governments.

And then we have something extraordinary. We have a senior official of the Government of Ontario who freely admits in cross-examination under oath that she is part of a conspiracy. She identifies the conspirators. She identifies what their purpose is. And Canada wasn't entirely forthwith with you today with what they did and I'm going to take you through that because, in fact, when we see, she was impeached for her testimony. This is not a situation--you're getting some parts where she's repeating things that are untrue, and then she's impeached by Mr. Mullins. Mr. Mullins takes her to that e-mail, and impeaches her.

Now, I'm going to have to go into closed section for a moment so I can take you through that testimony, and then I'm also going to take you to another piece of testimony at that hearing that shows, yet again, that the answer of Ms. Lo was probably untrue, yet again. That--the material that Canada took you to today about her knowledge, about the nationality and role of IPC was well-known within the Ministry. I'm going to take you to that.

So, if we could go briefly to confidential session, I'm trying to keep the public aware as much as possible in this, but if I could take you there, I think that would be a good idea. So, can someone tell me when

we're in confidential mode.

(End of open session. Attorneys' Eyes Only session begins at 2:29 p.m.)

ATTORNEYS' EYES ONLY SESSION

SECRETARY ARAGÓN CARDIEL: We're in closed session now, Mr. Appleton.

MR. APPLETON: Thank you.

And so, if we could just put up the testimony, and I'm looking for my notes here--so, as you can see that this was the slide in the Opening Statement and--that took you through in the--and they made reference to this e-mail. This has the B-Club in it, and as you can see that--as we go through, that--and perhaps we'll go to the next page, what's going on is that the Government is considering--oh, actually, sorry--can we go back one. Sorry, I'm a little out of it.

The Government is considering what can be done, and it says that there are various proponents that are likely to be critical--the KC, the Korean Consortium--and then they're talking about taking the allocation and moving it over to the London Group so that they can make a better situation for their top-ranking proponents because that's better than a hard "no" because they don't want to shut them out.

So, this is a political decision of what they're doing, and then she's being asked about how they're making that Decision. And then Mr. Mullins says to Ms. Lo, do you know who this is--he said, you know, who owned them?

Said, "they changed their name a couple of times, but I think at the time that we knew them, they were called IPC."

And then he says, "and IPC"--this was surprising to Mr. Mullins because IPC really doesn't come up before this. Says, "IPC--the President of that company was the President of the Federal Liberal Party?" And Ms. Lo says, "I wouldn't know that." Okay?

And then, if we go to the next--and Mr. Mullins said, "you played favourites with them?" Ms. Lo says, "which ones? The Korean Consortium?" And Mr. Mullins in impeachment--this is not his testimony, it's his impeachment of her--said, "these people you made sure you protected, they're high profile. You played favourites with them, did you not? Isn't that what this e-mail tells Mr. Mitchell," the policy advisor, "I want to protect these high profile projects?"

And Sue Lo said "this was the consideration."

So, she doesn't deny it. How could she deny it? Of course not. Now, what she didn't tell you was that there's clearly something else that's wrong.

Can you just flip over to the next one?

I can take you to--so, we've gone back to the Hearing video, and we've given you--we had to write it down because there's not a Transcript from the Hearing

video--the Transcript from Mr. MacDougall. And Mr. MacDougall was the manager of the Fit Program. Mr. Mullins asked him, who's a witness, "just one question, Mr. MacDougall, have you ever heard of International Power Canada?"

He says, "yes I have."

"And do you know who the President is?"

"I believe it was Mike Crawley." Can you flip to the next one?

"Can you tell us who Mike Crawley is?"

"He was an early wind developer."

Okay. "I don't mean to cut you off. You're also aware of his role in the Liberal Party of Canada?"

Mr. MacDougall: "Yes, more recently."

And Mr. Mullins says, "and the provincial Liberal Party of Ontario?"

Mr. MacDougall says, "I was more familiar with the Federal role."

Of course. You understand where he was on January 14, 2012, he was elected President of the Liberal Party of Canada?

Mr. MacDougall said: "Yes, that's where I knew he had Liberal Party affiliations."

Okay. So, we know--everybody knows it's notorious, it's well-known, it's just not believable that

someone as connected as Ms. Lo, as part of the Breakfast Club conspiracy, would not be aware--but even if she wasn't, it really didn't make a difference because the question isn't "are we helping the Liberal Party?," the question is "are we helping anybody?" "We treated everybody fairly. Everybody was treated the same way." That was--what was--clearly that was not the case.

We can take this down and go out of confidential session.

(Attorneys' Eyes Only session ends at 2:34 p.m.)

OPEN SESSION

MR. APPLETON: I'm going to take just a moment because I would like to turn to the issue of the Measure, and I need to just have a little look at the slides that I wanted to put in front of you, so if you just give me a moment to try to deal with that because I'm mindful of our time. I might ask Mr. Aragón Cardiel if you could tell me how much time is remaining for the Claimant?

SECRETARY ARAGÓN CARDIEL: A bit under half an hour, Mr. Appleton.

MR. APPLETON: Excellent.

What I would like to do is to answer some of the questions that the Tribunal raised, and then I'm going to come specifically to the issue of the Measure. Perhaps I think what we might want to do, I think the Tribunal articulated earlier today a pretty clear understanding of the Measure, but let me just articulate that specifically and clearly.

Under international law, there are actually three different types of measures that are non-instantaneous. There is a continuous breach, there is a composite breach, and there is another type of breach that is not in the ILC Articles called a complex breach, which is a matter of some considerable debate and discussion. And so I have a slide, I don't know if Ms.

Herrera could help me find that slide. It simply was going to give you references to the three. You'll see, if you look for complex, you'll find that. That will be the easiest way. I will just put that on the screen while we're talking about the nature of the breach. I was going to take you through the ILC Principles and the ILC rules, explain to you the nature of the continuous breach, the fact is is that a continuous breach basically will continue until it doesn't, that a composite breach which is relatively easier to deal with, deals with systemic issues, and would involve a conspiracy, for example. You can be a composite breach and be a continuous breach, there's no reason that you couldn't be. And actually in this case, because a composite breach usually involves harms that affect multiple victims, so there is more than just Skyway 127, that we know for a fact that it affected Mesa Power, it also affected other proponents. And so, that is why we would be a composite breach.

And in addition, we also have the situation of being a complex breach. A complex breach usually affects only one Party, so that's different from a composite breach. These all are referenced in, I believe it's CLA-185, which is the Report from the International Law Commission, and there are a couple of key cases that come in--you need to find the slide--there will be a list of

cases. You could look for a case called Loizidou, L-O-I-Z, it will make it easier, or Z, as my American friends would say.

ARBITRATOR BISHOP: Mr. Appleton, just one quick question. Didn't the ILC--Professor Crawford, for example--in the development of the ILC Articles ultimately reject the concept of a complex breach reasoning that it was effectively the same as a composite breach and that it would be going too far to distinguish it? I mean, isn't it--isn't composite breach and complex breach effectively the same thing?

MR. APPLETON: Mr. Bishop, actually they're not, and he didn't reject it, but there was a note. For sure, the late Professor Crawford did not like the idea of the complex breach. That was a strong argument of Professor Ago, who is a former Special Rapporteur, and he had actually articulated that in the Morocco Phosphates Case.

And so, it was for sure it was confusing and in order to be able to get consensus of what was in the rules, he took it out. He also personally didn't like it. But as Professor Crawford would tell everybody, he liked having the rules called draft rules because he expected them to change, he expected them to evolve, then there would be other areas that would come in, and there is a note that talks about this.

So, part of the 1986 aquis that brought this in is where he talks about the complex breach. He also talks about it in some damage related areas as well, but for sure it was not a topic of polite conversation. I'm sure Sir Daniel had many conversations where these would have come up, and so it was not a very popular idea but I simply identify what I called the trifecta here because each of them could be available.

The reason why I want to talk about these is because--this is, yes, this is Slide 24--because there were a number of key cases that identify, and in these types of cases, you could have a breach that would go right back to 2011 that would still allow you to be able to bring this claim.

Now, I'm going to get to the Spence case in a minute, but the fact of the matter is, Lovelace is a case where it's more than 20 years (unclear) against Canada, more than 20 years of systemic discrimination, the law has to do with a situation where you have an expropriation that basically would have been time-barred but the denial of the access is how the European Court of Human Rights decided that there was a breach and found in that way. And that's actually quite similar to Papamichaelopoulus and Loizidou are similar to the situation we have here. So, whether you would think about it as tolling the

limitation period, that's one way of expressing it or whether you would see it as just the breach goes on.

But I think in this case, what's particularly significant is that the breach is fundamentally the wrongful and deceptive practices done by the Government of Canada. The practices are intended to delay, to deny, to defer, they are intended to keep everyone away from being able to assert their rights or know their rights, and they continue this. And because they keep continuing the acts actively ongoingly for the same purpose and then the first thing Canada does is bring a limitation defence. They brought a limitation defence in Mesa Power too early, they brought a limitation defence here too late. But this is part of an ongoing strategy, and yet they're still having to disclose, we know more because of Mesa Power and the post-hearing brief. We know a little more again because of the release from the video, but Canada knows everything and doesn't disclose to the public. The public is put at risk, and international law does not, as a general principal, allow you to profit from your own laws and your own wrongdoing. And that is exactly what would occur in this case, and that is the problem: Canada never disclosed special preferential treatment to International Power, or they never disclosed the existence of the Breakfast Club. The Breakfast Club conspiracy was

specifically a conspiracy of senior officials, and it's acknowledged, this is credible evidence on cross-examination, and it was Canada's decision not to publish this, and that Decision is a measure under Article 201. It's not that it's just imposed on them. They made a choice. They could have released in light of the letter in May of 2021 for Mesa Power's representative. They chose not to.

And that choice is yet again a measure because what we have is that Tennant Energy, before discovering this information, had no idea of a parallel universe of deception and concealment occurring behind their backs in contradiction to the public statements with a purpose of depriving them of fairness and equality. Canada distracted the FIT Proponents, Canada benefited from the reliance of this deception, and that is very particular. That is a very particular claim that has been raised from the very beginning in this case. It's in the Notice of Arbitration, it's in the Memorial, it's in Mr. Pennie's Witness Statements. It's identified expressly. And so, that is one of the key issues.

And now, I would like to turn to the issue of the impact of the breach because there were questions. And the first question was that during the Opening, President Bull asked, well, how would the impact of acts

be a continuous breach. And he inquired about how an instantaneous act might have effects? So, if you have an instantaneous act, it could very well have lingering effects. That's not what we're talking about. This is a continuous act which has occurred in the time zone, in the three-year zone, and with the effect of delaying, denying and distracting.

So, that takes us fundamentally to--and I guess I have to say that it's important to understand the nature of the NAFTA. NAFTA is the governing law in this case under Article 1131, and the NAFTA fundamentally tells us about its objectives, the goals that it has here. Those goals are to have commercial predictability, to be able to have rules-based systems.

And so, what I would like to do is take us to Spence. If you give me a moment, I just need to find where that is.

Let me go back to one point. The effects of the lack of knowledge--if you can just take me to Slide 25--is to mislead the FIT Proponents to the latest proponents who are bringing claims because of non-succession of the action, it's ongoing harm that creates new harm, and these all arise from the effects of Canada's untruths, which they continue.

And so, if we go to Spence, and we go in

particular to Paragraph 210, that's Slide 26, so you saw this from Canada already, is that the issue here is that in the current case, the breach gives rise to a self-standing cause of action. A breach of the NAFTA, in particular NAFTA Article 1105 in particular, perhaps also Articles 1102 and 1103, with respect to Canada's abuse of process and deception. And the Investor first acquired knowledge of the cause of action in 2015 and the disclosure occurred in the fall of 2014 but was not known--there is no way you could have had constructive knowledge if you can't know. But if you cannot be there and you can't get access as a confidential session of a confidential conspiracy, not like there's a sign that says "Breakfast Club conspirators meet here," you don't see that. There is no sign in the legislature. That's the whole purpose of a secret conspiracy.

And so, Paragraph 208 of Spence mentions the date on which the Claimants first acquired knowledge of the breach, and this is expanded in Paragraph 209 which holds that first acquired knowledge standard is an objective standard--and Slide 28--when should you first have acquired knowledge.

And as we know in their Opening, knowledge is not just mere suspicion, there has to be something more. It's simply not possible to know of a statement made in a

nonpublic NAFTA hearing taking place in late October 2014 before that information was made available to the public and certainly how could you know before the statement was ever made? You couldn't know this in 2013. You couldn't know it earlier in 2014. And since the--objectively, how could anybody know.

So, when we look at the second paragraph of the Spence Award on Slide 29, that we--and there there's some discussion of a case, I call it Bilcon, here it's referred to as Clayton, the Clayton family owned Bilcon, therefore that multiplicity of names. Here, the question is how do you deal with the issues here, and here the Tribunal says that there could be a series of related events each giving rise to self-standing causes of actions which may be separated into distinct components, and we understand that. Some may be time-barred, some eligible for consideration on the merits.

All right. For sure, in this case, that claims that arise from discovery have to be within the jurisdiction of this Tribunal. Those are not new, and those are not invented, those are not changing. Those are things that were raised as early as could be and were. The Claimant has always said this is how we discovered it, this is what came in, we didn't know before then.

Now, continuing breaches can go back some way,

that's a possibility, but any way you look at this, in our view, the breach should have arisen within the three-year period of bringing the claim on June the 1st, 2017 because of--at a minimum because of the key promises made, the denials that were made available to the public in the Mesa pleadings which were released on June the 4th, 2014, after that period begins.

And by the way, that's just--a release doesn't mean it would be reasonable for anyone to see it on that day. It just means that they would be released on a fairly esoteric website. I don't mean to belittle the PCA, it's a wonderful institution, but not everybody goes there first for their news.

And so, Canada claims that Ontario did nothing wrong. Ontario claims it did nothing wrong, and then fundamentally we have Canada's Mesa Memorial that again says that it was made public after that date in the limitation period, and the truth becomes known. And during the Opening we took the Tribunal to a timeline slide--I'll just go to No. 30, I'm not going to spend a lot of time on it--but you see that the third box is after the limitation period, and there were reasons not to follow the first two because of active engagements, those were those two boxes in red, Ontario said all FIT Applicants are treated fairly. Canada says there's no

NAFTA breach, everyone is treated fairly and they say in particular Mesa is just disappointed, and that would be the reason.

And the evidence that we then discover from the admission of the senior government officials is highly credible evidence. An actual senior Government and assistant Deputy Minister of Energy running that department that deals with these issues admitting the existence of a conspiracy. This is not some type of fabrication you might see on the internet or in a Tom Clancy novel, although it does sound a little bit like it. It is actual admission of on impeachment during cross-examination.

Now, revelation ends the wrongful conduct. Whether it's composite, or continuous, or even complex, and so this is--when you get a release of information, that part of the Measure under the ILC Rules is now crystalized. That's when the breach occurs.

And by the way, Canada now says it goes to the beginning of the period, but if you look at their position in Mesa Power, they said that it was at the end of the period. The ILC says it's the end of the period, too, for this. You can't complete the Act here because of the nature of this breach. The breach can't be completed until you're aware of it, and the ILC gives references to

persons who have been disappeared, so they're murdered, the breach is not just a murder. That's, of course, an instantaneous act, or we hope it's instantaneous. We have a situation of it's on discovery that the breach is crystallized. And that is what we're looking at here, it's upon discovery. You will see a slide on that, but I can't find it in time to take you to it, and instead, I would like to take you with the remaining time that we have left, to one last item, so just give me one moment so I can do that, so I would like to have a few minutes to be able to answer questions that you may have.

But I wanted to make sure that we could talk about the breach, talk about the nature of the breach, talk about your questions about Spence, make sure that we talk about the nature--I didn't want to mention again a point that I raised in the Opening about Tecmed; that the issue that was raised in Tecmed was that you have to deal with the relative circumstances. You need to look in the contexts that, in Tecmed, and I think if we go to Slide 36--actually, let's go to Slide 35, first. Slide 535 in Tecmed we see that events or conduct prior to the entry into force of an agreement are not relevant for purposes of determining whether the Respondent violated the agreement through conduct which took place after its entry into force.

So, Tecmed says that it happens before--here we're talking about a treaty not being in force, that you could take into account but you don't actually--it's a question. The question is going to be are we continuous or not.

Let's go to the next slide for a moment, and here at Slide 36, it's only by observation as a whole or as a unit that's possible to see to what extent a violation of a treaty or international law rises or to what extent damage is caused.

And then the next Slide 37, that acts or omissions of the Respondents which although they happened before the entry into force may be considered a constituting part, concurrent factor or aggravating or mitigating elements of conducts, do not fall within the scope of the tribunal. That's because they're before the Treaty comes into force That's ILC Article 28. That is not our situation here. Our situation here would be that either you have acts that are told in which case you would take them into account, and if you recall, the harm could not have occurred to this company because of the letter from the OPA, from Joanne Butler, Vice President of the OPA, put Tennant Energy on the FIT Priority List, so harm could never have occurred before, June, I believe it's 13, 2013, because the programs Canada always have given to

Ontario, they have always given them a contract. So for sure, they would have had that.

And then the question is does that get told? So you know you have some harm. NAFTA 1116 gives us two things you need to know. Knowledge of some harm and knowledge of the breach, and knowledge means you have to know what was wrong. And that's where this case is different from many other cases because of the active, deceptive practices done by Canada, by Ontario, to make sure that we didn't know.

And if I just take you--we will do that in Post-Hearing Brief.

So, I think it would be better to actually be in a position to answer questions that you might have, but I wanted to make sure that we canvassed the nature of the breach. I'm sorry we went a little longer with the excellent discussion from Mr. Mullins and it just put me at a slight disadvantage with respect as to how I wanted to structure the conversation but I think I've got the most important parts out with respect to the measure, with respect to the process to answer the questions that were posed and to be able to deal with the issues that were there earlier today.

So, perhaps we could just see if there is something I can do to assist you with--I'm sure you have

many issues still to grapple with.

ARBITRATOR BISHOP: I have just one question or one hopefully short line of questions.

Canada has taken the position, as you know, that the Article 1116, the statute of limitations is jurisdictional, and that because it's jurisdictional, therefore, the Claimant bears the burden of proof to prove that the statute of limitations has not run, at least that's my understanding, and I assume that Canada's position for why Article 1116 is jurisdictional is that it is akin to a primary obligation in the terms that HLA Hart discusses, and I think--I understand that the Claimant has denied and disagrees with Canada on those positions.

The first question I have is: Has there been any official statement from the NAFTA Commission on whether Article 1116 is jurisdictional or not?

MR. APPLETON: There has been no statement whatsoever, no interpretive statements that would be binding on that matter.

ARBITRATOR BISHOP: Okay. And the second question I have is whether you would like to elaborate on the reasons why you say you disagree with Canada's position, for example, on the burden of proof on statute of limitations.

MR. APPLETON: Certainly.

So, first of all, it's interesting that this has been an attempt to try to limit the consent to arbitration to make it easier to be able to deal with judicial review and to vacate the courts. And the consent of Canada in Article 1122 is quite clear. And so, Canada says, well, that's subject to procedures.

Now, for example, in the Ethyl Case, the first case, I happened to be counsel in that one as well--I'm showing my age these days--so, in that case, they said, well, everything--they had a variety of issues about whether or not things were done too early in that case, there was a piece of legislation that had gone to the Senate of Canada, it had been approved by the Senate but not signed by the Governor or General, and they said well, you brought your claim to these too early because it had been voted on and passed by Parliament but hadn't been signed into law and therefore you violated a rule. And of course, that doesn't go to the consent. That's a procedural issue.

And in that case, I believe the Decision was from Judge Brower, and he said, look, at the end of the day, that is not a question of consent. It's a question about a procedural matter, and procedural matters like that do not go to your consent to jurisdiction. Your consent was there. There are many little procedural

issues that we're not talking about.

In the same manner, an issue about timing is generally considered to be an admissibility matter rather than to be a matter that would be jurisdictional, and so here it's the same type of issue.

But I think that the better way, the more sophisticated way to look at this, Canada has made everything in a Manichean sense, black and white, there's no space in the middle. And as we all know, there's a quest for reasonableness. What's a reasonable answer? And the reasonable answer is there's probably a hybrid answer, an answer that says that some issues may well be jurisdictional and other issues are not, and there may be some differences in how the burden goes, but when you look at these things, it just can't be right that a NAFTA Party can say that any issue in any way, if I don't put the proper page number, the procedural order that says I have to put page numbers in 12 point and I put it in 10 point, but that could mean that the Tribunal doesn't have jurisdiction, because they don't have consent. That cannot be correct. That consent is a sovereign act done in the Treaty put in place. I mean, it takes to us an absurd length.

And so, the difficulty--our position about the subsequent practice and the impact you should have about

the position of the NAFTA Parties when occasionally they agree on litigation position. And again, I stress that litigation positions change all the time, just like even in this one, Canada's position on timing is 180 degrees different than their position in the Mesa Power Claim.

And remember that Mesa Power in this claim, they're not the same claims but they do arise out of the same regulatory structure which would explain why when you're discussing the regulatory structure, you would have some similarity, same Ministry, same things. I'm sure that happened also in Windstream. That doesn't mean it's the same claim. But the fact of the matter is, is that if you have a matter--the UNCITRAL Rules say each side has the burden of proving its own case, if you're a moving Party you have to deal with that. If I assert a defence, I have the burden of that defence. If I assert something else, I have the burden of dealing with that.

Here, we have been able to show, we believe, on more than a prima facie basis, now that we've been through this, that there was an investment, we believe that investment occurred on April the 19th, 2011. We have given you different ways how that would occur.

We also know that there is an investment in 2015. (unclear) could (unclear) that, and that is the burden that we would normally have to be able to

demonstrate. And we've also shown that there is a breach of Section (a) of NAFTA Chapter Eleven, and we've identified those, namely Articles 1102, 1103, 1105, and we might have thrown in 1104 which is the better of 1102 and 1103.

ARBITRATOR BISHOP: Let me direct you to the one issue on this, which is if the Claimant is required to prove that the statute of limitations has not run, it might be suggested that that is having to prove a negative. In terms of Article 1116 where it says that--where it provides a standard of the Claimant's knowledge of the alleged breach and the loss or damage or should have known, in terms of that formulation, would that be--would that require the Claimant to prove a negative or not?

MR. APPLETON: Yes.

ARBITRATOR BISHOP: Why?

MR. APPLETON: Well, the problem is--first of all, you can't prove a negative. I mean, that's the fundamental problem. I mean, the difficulty, Arbitrator Bishop, is this: We have given evidence of knowledge. Knowledge means something more than just some type of information and some type of suspicion. But Canada--it's a suspicion that doesn't make any sense. They've equated this claim to another claim that this is not.

The issues are different. There was no evidence because Canada hid it. So, in Mesa Power they didn't know. There's no reference to IPC, there is no reference to Breakfast Club, no reference to the knowledge that you could have, could have known that your legal security had been impaired.

And that is an obligation under 1105 that you know that type of stuff. That's good faith. That is the rule of law, that's protection against abuse of rights. That is at its heart what the NAFTA was set to protect. You are protected if you are big or small. You are protected if you're a large corporation or a small. This is a family company with a very, very good investment. (unclear)very good wind(unclear)--they worked very hard to be able to get the best type of location with the best quality of wind, they followed all the Rules and they got highly ranked. And the only thing they didn't know was that it didn't make a difference because they weren't one of the high value proponents which is code for "friends and family of the Government." They couldn't win. They fight the bull fight, the bull comes into the fight and thinks it's fair. It's the only person in the arena that thinks it's going to be fair. It's not fair, but they still believe.

And Canada kept telling them, it's fair, you're

going to be fine. It's fair, you're following the rules. We're following the rules. But it wasn't. That was deceptive.

And that is the gravamen of this claim. That is what Canada did. That is the type of breach that's here, so that's the problem.

But from what we've been able to do--

ARBITRATOR BISHOP: I think I understand your answer. Thank you.

MR. APPLETON: Thank you, Arbitrator Bishop.

ARBITRATOR BETHLEHEM: Mr. Appleton, I have a number of questions, and thank you very much for your submissions. And perhaps you will be relieved to know that I'm not going to take you either into the Articles on State Responsibility or into Spence, but there are a number of things that I would like just to try and clarify.

But just to begin with--and this is sort of an observation that I'm directing to both Parties, I must say I'm a little dismayed that the Parties have only joined the issue on the successor-on-interest point on this very last day, and I do very much appreciate that the point is trailed in the pleadings, and in particular in the Claimant's 1128 Response there is this section, the Investor may include a successor-in-interest, but it seems

to me that this is a sufficiently big point that it might have emerged in the pleadings before now.

You--I mean, Canada's counsel referenced S.D. Myers on questioning and you addressed S.D. Myers in some detail. I think certainly I would invite both Parties in Post-Hearing Submissions to come back and address this, and I would like to just make the inquiry a little bit more specific. I'm looking at Paragraph 229 of the S.D. Myers Partial Award, and I will just read it into the record.

MR. APPLETON: Sir Daniel, is it the First Partial Award?

ARBITRATOR BETHLEHEM: First Partial Award, it's the one that you were referring to on the issue of the Investor.

MR. APPLETON: I believe that might be the Second Partial Award.

ARBITRATOR BETHLEHEM: Perhaps so. I wasn't able to find the CLA reference that you were referring to. But perhaps I could just read this into the record and I'm assuming that the S.D. Myers awards are in the record of this case.

MR. APPLETON: First Partial Award might not be, Sir Daniel. That's why--the only reason why I interrupted you which I would never do generally.

ARBITRATOR BETHLEHEM: Well, then I won't read it into the record so as not to sort of prejudice anyone, but I will invite both Parties in Post-Hearing Submissions to address the S.D. Myers Decision because certainly Mr. Appleton, in terms of your submissions, it seems to be on point. I think Canada seems to have accepted that it was on point but they disagree with it, and I would like both Parties to join issue with it.

For myself, looking at Paragraph 229 of this Partial Award, it requires some explanation for my purposes. I will just leave it at that. I won't ask you to go into any further.

My next question--or a question to you is--and I presume that this is going to be uncontroversial, but do you accept that it is a matter for Tribunal appreciation of whether the Claimant should be deemed to have known of the matters of which it now alleges before the 1st of June 2014? So it's our assessment, if you like, of fact, whether we impute constructive knowledge to the Claimant in the period before the 1st of June 2014. Is that a fair marching order to the Tribunal, if you like?

MR. APPLETON: Sir Daniel, first, fundamentally, that's really a merits issue, which should have been in merits where we would have the opportunity to really deal with those issues, which require, I believe, in the

context as in Tecmed that we would need to be able to discuss the nature of what the Measures--of the breach of the context of all the pieces which we have not really been able to do. I spent a lot of my time in the Opening talking about the big general pictures and that didn't leave us with the opportunity to talk about specific concerns. So, in this closing we tried to talk about the specific concerns which leaves us unable to talk about the big measures.

ARBITRATOR BETHLEHEM: I'm not sure that I follow you when you say that this is a merits issue. I mean, essentially, you brought your claim on the 1st of June 2017; is that correct?

MR. APPLETON: Yes, for sure. Certainly.

ARBITRATOR BETHLEHEM: You brought your claim on the 1st of June 2017. We've got a three-year limitation period. If you can establish that, as it were, your cause of action, arose after the 1st of June 2014, then you're going to be home and dry on the limitation objection. If Canada can show that you must be deemed to have known about this before the 1st of June 2014, well, we may have to get into your arguments about whether this was a continuous breach and so on. But essentially Canada is going to be largely home on the issue of constructive knowledge; is that not correct?

MR. APPLETON: That's a possibility.

My concern, Sir Daniel, is about the extent of what the Tribunal should be doing with respect to constructive knowledge rather than its ability. Let me just break this up. It's more of a question of admissibility rather than of other things. So that you--at least I would like you to understand where I'm thinking about this and where I'm coming from.

The Tribunal, I believe, should determine those elements that are necessary to address the jurisdictional question. And so, in this jurisdictional question, if there is jurisdiction to the claims that it asserted, the way that we used to look at that was did you claim something, that if accepted on its face on a prima facie basis, would that fit within the jurisdiction of this Tribunal? We believe we met that test. Now we've had a jurisdictional hearing, we've upped that standard to show that we actually meet that test, not just on a prima facie basis, on an actual basis. And so, if you--and there is no dispute between the Parties that there is jurisdiction with respect to a claim that would arise from January 15, 2015. Canada doesn't dispute that.

And so, the only question is, did this Investor have an obligation to bring a claim that it didn't bring, in our view, about issues that are--that are not there.

In other words, there are different issues, and so that's where I'm coming from, just so you understand my concern with respect to the termination. The Tribunal certainly has the right to be able to come to a conclusion about the nature of constructive knowledge--it has to have that--but I'm saying the way it should use it rather than what it has a right to do. That's why I use the analogy of admissibility.

ARBITRATOR BETHLEHEM: Thank you, Mr. Appleton, I understand that, I suppose what I'm trying to sort of establish is that we've heard you, at some length, and counsel for Canada at some length about the legal and the factual aspects around the 1116(2) test. I haven't heard you to say that the analysis in Grand River, in Spence, in Clayton, in Mondev is wrong. What I've heard you to be saying is that your circumstance, you know, come in on the basis of that analysis because there is constructive knowledge if one were to go down the route of that jurisprudence.

Similarly, I haven't heard Government of Canada, apart from taking issue with S.D. Myers, I haven't heard them say on the 1116(2) point that Grand River, Spence, Clayton, Mondev or any of the other cases are wrongly decided. What they are joining issue with you on, as I understand it, is that Claimant seems to be saying "we

only found out with the public release of the Mesa information that there was a cause of action. And we were wrong going back to 2010-2011." And what Respondent seemed to be saying is Claimant could and should have known about a cause of action before the 1st of June 2014.

So, I'm understanding the dispute between the Parties not to be a dispute about the legal standards that apply but to be a dispute about the evidential appreciation that the Tribunal needs to bring to bear about the constructive knowledge or the actual knowledge of the Claimant. Is that an unfair or a faulty understanding?

MR. APPLETON: I will give you my view on it because I actually prepared it and then because of the--really the question was unable to get to it, and just for the record, Grand River is RLA-070, Spence is RLA-136, and Ansung, another case that would be in that series we will call it, is RLA-113.

Now, our view is we have three reasons why we don't believe they apply, so it's a bad application. The first reason is factual and that's because Canada engaged in such practices.

So, the nature of the breach takes us to a different approach, and we don't need to worry about constructive. You can't have constructive if you can't

know. If you cannot know about it, you can't be there, suspicion untethered to something substantial cannot be constructive. That's why when you asked me my question about constructive, constructive has to be tethered to something real, not something fictitious. And so, if you can't, though, if you physically couldn't know because it's not--it didn't occur, doesn't happen, it's been withheld, and the Breakfast Club is a secret conspiracy. That's my second point. It was not recorded in public documents, it wasn't in Hansard, it wasn't disclosed anywhere. Mesa Power had no opportunity to discover on it. It came up at the end of a hearing in an admission by a witness who I'm certain is very unhappy that she ever ventured into those waters.

And so, this is a secret body of the highest ranking officials that got discovered, and so--and it was effective at what it did, and so that's the second point.

The third is there is no way--no way--that Tennant could ever know the real reasons that it didn't obtain a FIT Contract. And so, the only way you can get constructive knowledge is to actually go to say where you would have had to believe one side over another.

And if you remember Mr. Kuuskne, Mr. Kuuskne is the counsel for Canada who examined Justice Grignon, if you recall that on, I believe it was yesterday, Justice

Grignon was on--Sujey, could you just take this slide forward--I have the testimony, and Mr. Kuuskne asked the Judge if basically "you wouldn't simply assume one side's version of the facts to be true, would you, Justice Grignon?" And the Justice said, "I decide what the facts were after listening to the evidence." She said "I have to listen to both sides. I look at them, I get some information, but then I would evaluate" basically. That's what judges do, of course.

And so, Canada now comes to this Hearing and says a FIT Proponent should engage in all out course of litigation against the State simply by reading the position of one side, whether it's on-line or on Twitter or on Facebook, and Canada called Mesa Power a pointed competitor, and now Canada takes a complete opposite position to challenge (unclear) thought was a very fair and balanced approach of the evaluation of the evidence by Justice Grignon.

And so, our concern is that those standards aren't really the applicable standards because of the particular facts.

Or my other way of putting it would be that these facts on these breaches are so bad, are so unique that the normal evaluative approach that we would take can be applied. And as far as I can tell, we have never seen

a case quite like this of such a systemic ongoing conspiracy.

Remember, you only have this conspiracy here, but with respect to the--one of the Members of the Breakfast Club conspiracy was criminally convicted for destroying evidence and they only got the discovery from the Ontario courts that they were using code words to hide access to find things so that you couldn't actually get Document Production, and they could evade subpoenas.

And then that wasn't enough, because it looked like they were getting it to destroy everything on the Energy's side.

ARBITRATOR BETHLEHEM: Mr. Appleton, thank you. I don't mean to interrupt you.

MR. APPLETON: I'm all done with the diatribe. I apologize, Sir Daniel.

ARBITRATOR BETHLEHEM: Well, just to say I thank you for that. That's very helpful to hear your response. I didn't mean or intend you to be taken down the sort of route, as it were, rearticulating your argument but just in response to that question.

You mentioned in your response here the discovery through the local courts. Is that in relation to what you allege is the wrongdoing of the Government of Canada officials?

MR. APPLETON: I believe it's the wrongdoing that's part of the process of the--well, part of the Cana--Ontario government officials. It's the government.

ARBITRATOR BETHLEHEM: Is that on record in these proceedings?

MR. APPLETON: Yes, it's--and that was in 2020, I believe that information was done. Yes, it is in this proceeding.

ARBITRATOR BETHLEHEM: Perhaps in your Post-Hearing Submissions you could simply draw our attention to that or when it comes to the correction of the Transcript, subject to the direction of the President, you could put in those references. I would find that useful to see.

MR. APPLETON: Sir Daniel, to assist you, I believe we had reference to it in the Opening slides.

ARBITRATOR BETHLEHEM: Thank you very much. I'll go back and remind myself.

And then I just have one last question, and I put it to you out of fairness because I put it to--the same question to counsel for Canada. We've heard a lot from both--from each side here about the relevance of Mesa Power and the disclosures that came from that case. That case resulted in a finding of no breach of Article 1105, and yet it seems to me that a good part of your case is

predicated on the discovery of unfair conduct which you are now pulling in to characterize as a breach on the part of Tennant Energy.

So, I'm just wondering whether the Mesa Power Tribunal finding that there was no breach of 1105 has any bearing on the jurisdictional issue that we are faced with, which is whether you are entitled to assert a breach on the basis of the finding--on the basis of the public disclosures that came out of the Mesa proceedings.

MR. APPLETON: Sir Daniel, I can do this fairly briefly and I can be very specific.

The issues in Mesa Power are different, and let me be very particular. And I'm mindful that we're still in public session, so I will be careful about some of my references that may require the Tribunal to fill in a few blanks but not many. If you need more, I will go to confidential session.

So, there is no reference to the Breakfast Club. There is no reference to IPC. IPC is not NextEra. That is a totally different type of situation. It is significantly different, and it's significantly worse.

With respect to NextEra, there were allegations about some meetings of mid-level officials had done in February of that year. They are not information that was disclosed, meetings of the highest-ranking officials just

before the changes remained that were highly beneficial to that company. I can't identify that further without going into confidential session, but I'm sure you're following with your knowledge of what that was.

That was unknown. That's completely a different grade of outrage. And it's not--Canada says, well, you knew that something bad, something smelled with NextEra because they're the lobbyist at meetings. This Claimant says, we don't think it's wrong. And that's what the Tribunal said. We don't think regular meetings are a problem. This wasn't a regular meeting. This was something more. But it wasn't--what was being articulated in the Mesa Power claim and it wasn't the focus of the submissions because it just happened to get blurted out in the Hearing.

With respect to--so those are the reasons why this is a different claim.

Furthermore, the remaining issues in the Mesa Power Case, they are just not here. There are claims about how the--there are claims about local content and violations of Article 1106 of the NAFTA. (audio distortion) so they were quite different too.

ARBITRATOR BETHLEHEM: So again, Mr. Appleton, just I'm understanding your point very, very clearly, but in the interest of expedition here, I understand you to be

saying that the 1105 finding of no breach in Mesa does not recycle back into these proceedings because, in essence, the Mesa proceedings and the alleged breach there and your alleged breach are different.

MR. APPLETON: Sir Daniel, there was no discovery. There was no document production. There was no true line of inquiry because there was no knowledge of that in Mesa Power. That is what separates the determinations of Mesa Power from the determination that would be made, necessarily made, in this type of case. That's how we come to that determination, and they're very significantly different.

ARBITRATOR BETHLEHEM: Thank you very much. That's very helpful. Thank you.

MR. APPLETON: Is there something else I can do to be of help of with that?

PRESIDENT BULL: So, Mr. Appleton, I do have a comment that I want to just address to both Parties, but I think--and then we are going to have a discussion about Post-Hearing Briefs, a discussion with counsel about Post-Hearing Briefs. I think we should take a five-minute break first and then we can come back and resume.

MR. APPLETON: Are you resuming with questions or you're just coming--or we're finished with this section?

PRESIDENT BULL: We're not finished with the section yet.

MR. APPLETON: I see. Very good. Five-minute break. Excellent.

PRESIDENT BULL: Thank you.

(Recess.)

PRESIDENT BULL: Right. So, we're back on the record, and I'm grateful to have both counsel on the screen because there are just a couple of points that we wanted to direct to both counsel. Let me go first, and it's a very short point, and it's not a new one.

I just wanted to echo what has already been said about the successor-in-interest point. Speaking for myself, I've acquired a much greater level of clarity about what the Claimant's position is, and I'm grateful for that, and I now believe I understand Claimant's position on that.

I don't think that I have understood Canada to have joined issue on that or given their response to that, and I just wanted to say that I could be wrong, it might be somewhere in the materials, but it's escaping me at the moment, and it well may be that Canada hasn't taken a position on this or explained or joined issue with this, and I wanted to say that clearly that that's the way I see things because, if that's the case, then some assistance

from Canada for their position on this would be very much welcomed by me, and I think others on the Panel have said something similar.

So, that's what I wanted to say, and then there was a short point that Sir Daniel wanted to come back to.

ARBITRATOR BETHLEHEM: Thank you, and it just builds on exactly what the President has just said, and it goes back to the S.D. Myers awards, and we're clear that everything is on the record. I think CLA-111 is the Partial Award of the 13th of November 2000. Then there is CLA-193, I believe, rather than 293, 193, which is the Second Partial Award. And I think R-080 is the Federal Court Decision.

Now, I would very much like the Parties to address the relevance of S.D. Myers, and in particular I'm thinking of the Partial Award of the 13th of November 2000 at CLA-111 at Paragraph 229, and I think it's probably helpful if I do read it into the record; it's not very long.

It's as follows: "Taking into account the objectives of the NAFTA and the obligation of the Parties to interpret and apply its provisions in light of those objectives, the Tribunal does not accept that an otherwise meritorious claim should fail solely by reason of the corporate structure adopted by a Claimant in order to

organize the way in which it conducts its business affairs. The Tribunal's view is reinforced by the use of the word 'indirectly' in the second of the definitions quoted above." That's the end of the paragraph.

I'm struggling with this paragraph. There are lots of aspects to it which I think would benefit from comment by the Parties, so I invite them to do so. I note that the Federal Court's Decision at Paragraph 65 concludes that the broad definition of an "investor of a Party," et cetera, et cetera, together with the objectives of the NAFTA support the finding of the Tribunal at Paragraph 231, which is essentially a summary of the finding of Paragraph 229. So, I would like to direct that the Parties to please address that specifically and anything arising out of that when it comes to the Post-Hearing Submissions.

We can't hear you, Mr. Appleton. Still can't hear you.

MR. APPLETON: Can you hear me now?

ARBITRATOR BETHLEHEM: Yes.

MR. APPLETON: Thank you.

In the event, step back from memory from 20 years ago--

ARBITRATOR BETHLEHEM: Sorry, Mr. Appleton, before you do, I'm not inviting you to address this issue

now.

MR. APPLETON: I'm not addressing the issue. It's something very particular that will be necessary to address the issue.

If my memory is correct, there is a third S.D. Myers Decision by the Tribunal that may address this particular issue, and so to the extent that their Damage Award is relevant to this was we would be able to also rely on it because I believe--I believe that one of these awards, one of the three dealt with it as well, and I just don't remember which--and I wasn't prepared for that today because I didn't think we were going to have that discussion, so that's why I'm asking because it would be a new authority but specifically to address your particular issue. And so obviously I'm not interested in the quantification of damages. I'm interested in there was a decision that was rendered by that Tribunal that addressed some of these factors in more depth. And I do not recall if it was the Second Partial Award or the Damages Award, and that's why I'm asking.

ARBITRATOR BETHLEHEM: I think that will be a matter for directions coming through the Tribunal President shortly in the context of our discussion for Post-Hearing Submissions, and I imagine the same injunction given to you last night in terms to see if you

can reach agreement with the other side and then make an application to the Tribunal will be the appropriate way forward. But I'm looking to President Bull on that issue.

PRESIDENT BULL: Yes, I think we will deal with it in the same manner, but could I just say on this specific question that Mr. Appleton is asking about, if there was something that you wanted to refer to in the Third Award, I would encourage Canada to be as reasonable as it always tries to be on this limited issue because the question is about that particular case.

ARBITRATOR BETHLEHEM: And perhaps looking at Ms. Squires, it might be useful in your response if you could give us any learning on any limitations that you, Government of Canada, have in going beyond the decisions in your Federal Courts when addressing interpretation of the NAFTA. I don't know if it's relevant, but obviously we've got a Federal Court opining on the correctness of the S.D. Myers Decision.

MS. SQUIRES: Certainly.

PROCEDURAL DISCUSSION

PRESIDENT BULL: Good. Then we have come to deal with some directions, and there are just two issues. The bigger and perhaps more important issue is Post-Hearing Briefs, but I want to deal first with the more routine matter of corrections to Transcripts. What I

would like to do is to set a time limit for corrections to the Transcripts because that will aid the Post-Hearing Briefs, and I would like to know from counsel whether this can be done within seven days.

MR. APPLETON: Mr. President, there is--(drop in audio).

PRESIDENT BULL: We've lost you, Mr. Appleton, in terms of the audio.

MR. APPLETON: Mr. President, there is a very major American holiday which is about to take place.

PRESIDENT BULL: Yes.

MR. APPLETON: I believe that would be very problematic, and so I would suggest that, in that circumstance, it might be better to have a slightly longer period, but I appreciate where you're coming from, but it's a major holiday, it's not a minor one.

PRESIDENT BULL: I understand, and I should have remembered.

What do you suggest?

MR. APPLETON: Two weeks.

PRESIDENT BULL: Ms. Squires, would two weeks work?

MS. SQUIRES: Yes, that's fine with us.

PRESIDENT BULL: Okay. Then let's work on that basis that corrections to Transcripts dealt with within

two weeks.

And the Tribunal grants leave to the Parties to add to the Transcript references to the record of documents actually referred to, so we're not asking for additional footnoting about other documents that were not referred to orally but would support the proposition--we're not talking about that--it's just that it would aid our reading of the Transcript if all the references to where we can find the document are added in because occasionally that hasn't been articulated verbally--it's on a slide or something--and so putting that in would be helpful to us, and we grant leave to the Parties to work with the Transcribers to add those in to the extent that you think will be helpful to the Tribunal. It's not an order that all references be added in, but leave is granted to you to do that.

MR. APPLETON: Mr. President, are you finished with this part?

PRESIDENT BULL: Yes.

MR. APPLETON: Just before we broke, I had asked you if we were finished with this phase. It appears we were finished with the phase, but I had a point that I wanted to deal with before we finished our closing. That was simply to correct a misstatement that I had said along the way, and we just moved to the next part, I assume,

because there were no other questions.

I don't mind going through these things, as long as you give me the opportunity. It's one point and one minor one, and it has a slide, you can rest assured, and it's something in relation to a response I gave to a question. I just wanted to make sure I could deal with that before we finish today.

PRESIDENT BULL: Sure, Mr. Appleton. And why don't you do that now. We are done with the corrections to the Transcript, and we are coming to Post-Hearing Brief directions, so you can deal with that point now before we deal with directions.

MR. APPLETON: Thank you.

It's simply with response, I have not about been able to see the Transcript as I talked to you at the podium, and so in response to the question from Arbitrator Bishop specifically with respect to burden of proof on the question of limitation period, I want to make sure that it's clear that my position isn't--because apparently I said both yes and no and I want to make sure we're very clear, that our position has always been the statute of limitations issue is an affirmative defence. We had pleaded that earlier before, we called it that, and I want to make sure because fundamentally, how do I prove that I could not know? I mean, I did not know, and in this case

we had things I could not know because they did not occur, but for other areas how do I prove that? And that is why is the affirmative defence that I mentioned about the hybrid concept, and that would be part of that hybrid concept, that there has to be a burden on the side that's claiming that rather than the other way around.

And that is very consistent, we believe, with the fundamental rule--I believe it's UNCITRAL Rule 26, but the rule that says each side has the burden to prove the positions, whether its defence or its claim with respect to that. That's how that would be, so I don't know if you want to call that burden shifts or something else for affirmative defence, that's the way they have to be. I want to make sure that was very clear because apparently I might not have been as clear.

PRESIDENT BULL: Thank you, Mr. Appleton.

ARBITRATOR BISHOP: Thank you.

PRESIDENT BULL: So, we then come to the issue of Post-Hearing Briefs. Both parties have heard what the Tribunal's initial thoughts were about this, and we would like to hear from Parties about what they suggest. We would be delighted if you had an agreement already about how Post-Hearing Briefs would be done, but let me turn first to Canada and ask what your position is on this.

MS. SQUIRES: Thank you.

Unfortunately, we do not have an agreement. I guess I could make a couple of points on how we think that type of submission should proceed.

In our view, the Post-Hearing Brief should probably be a tool for the Tribunal to take the propositions that have been made and a very handy way to reference the evidence that supports that proposition or the legal authority that supports the legal assertion that has been made. In that regard, we think something fairly brief, a skeleton-type argument that says this is the proposition and this is where it could be supported. That can be done in 20 pages, recalling here that we're at a jurisdictional stage and that the Rejoinder Memorial was 53 pages, so I don't think we need to be getting into even that length of a document. I don't want to have us rehashing our submissions.

In terms of deadline, Canada's preference would be to get this done while this is all very fresh in our minds, so perhaps deadline of December 17, so four weeks from today to get it done.

An example of something that we think would be quite effective: the Mesa Post-Hearing Brief from Canada is on the record. Unfortunately, I don't have that number in front of me--I could see if I could get it--but essentially it lays out a table or chart that the

allegations and the evidence or authorities that support it, if something like that would be useful to the Tribunal.

Aside from that, I have one just minor point of clarification that came up in Claimant's Closing Argument right before we broke, and I believe they made reference to possibly the addition of 1102, 1103, and an 1104 issue here. I would like to flag those have never been raised before, and to the extent that Claimant is now attempting to add those as part of its claim, it is too late for that. We would want to make submissions on that. The Post-Hearing Briefs are almost certainly not the place to do that, so I want to lay down that marker now that my understanding may be incorrect--and Claimant can correct me on that--but they did make reference to 1102, 1103, and 1104, and they have not advanced that at all in this Arbitration.

PRESIDENT BULL: And Ms. Squires, your suggestion of about 20 pages in four weeks, you would envisage that being an exchange?

MS. SQUIRES: I think simultaneous is okay.

PRESIDENT BULL: Yes, that's what I meant, a simultaneous exchange.

MS. SQUIRES: Yes.

PRESIDENT BULL: And you were thinking of one

round?

MS. SQUIRES: Absolutely.

PRESIDENT BULL: Mr. Appleton, Claimant's position on this?

MR. APPLETON: We have the impact of that holiday and the other impacts that go with it, so frankly we're a little concerned. We would like to get this done before the end of the year--so that would be the first thing--but I'm not sure that we can do it by the deadline envisioned by Ms. Squires.

And with respect to length, we had thought it might be slightly longer, but we're not looking for--we just think that 20 pages does not provide something as useful that is nicely formatted. We know what happens with 20 pages, which looks like something that my students at the university think they can get away with and I do not accept. I worry about that because I don't think it's useful. The idea is to have something useful and a clear approach.

But we're in your hands, and it depends there are very specific questions that have raised and other questions need to be done, and to the extent you would like us to canvass the questions you have, we are going to need to have just enough space to do that properly.

PRESIDENT BULL: And just to help me out,

Mr. Appleton, if you were to put the number to that in terms of pages, what do you think it would be?

MR. APPLETON: I think we would normally say not more than 50, and I would be prepared to offer you up 40 to be--make an accommodation. But I think that that's the wrong place for economy necessarily. It's simply--you want something that you can work with that makes your life easier. That would be my sense. Sometimes you could use a slightly bigger call car sometimes you need a smaller car. That's all.

PRESIDENT BULL: Mr. Appleton, on timing, I hear you say a little more time is needed. If you were to give me a time period, Ms. Squires says four weeks. What do you suggest?

MR. APPLETON: Let me check our schedule right now.

(Pause.)

MR. APPLETON: We have come to a discussion which will make none of our families happy, and suggestion would be that we think the 22nd of December.

PRESIDENT BULL: And you also envisaged this to be one round, a simultaneous exchange?

MR. APPLETON: Whatever the Tribunal thinks is best, but certainly that would be what we would have in mind initially, and we would hope that would be it.

PRESIDENT BULL: Right. Okay.

MR. APPLETON: Mr. President, we need to advise you that Mr. Mullins and I have another arbitration, quite a complex one, that was rescheduled into January at the PCA, and the reason for that, I don't know if this Tribunal was aware was because of the passing of Mr. Mullins's father, so we had to move the Hearing and push that over, and so unfortunately that happened just before everything happened just before the Hearing. And so we have to make sure that that can be done effectively because it was very unfortunate and at the last minute.

PRESIDENT BULL: Of course. I see.

Right.

MR. APPLETON: (Unclear) Otherwise, really, we have to push something off a considerable period of time, when we really don't want to do that. That's also why we are trying to find a date as quickly as possible that would be reasonable.

PRESIDENT BULL: I guess the tension is always between whether we set it at one exchange and see whether there is an application after that for some sort of a second round or whether we legislate for it now so that everyone can plan their schedules, but I think we've got both Parties' preferences.

What we intend to do is just to go into the

breakout room, have a quick word, and then we'll come back and give you the directions, so if you will excuse us for a few minutes.

(Tribunal confers outside the room.)

PRESIDENT BULL: Right. So, we're back on the record.

The Tribunal has had a discussion, and what we direct is that the first round of Post-Hearing Briefs should be limited to 40 pages, four-zero. And just to give some guidance, 1.5 line spacing, 12-point font, please, and that's just to make this usable for us. And that first round should be a simultaneous exchange on the 22nd of December.

Now, I would like to remind both Parties that, as previously envisaged, and as I told you, what we want is for the Post-Hearing Briefs to be limited to dealing with matters that arose during these five days of hearing, whether that's evidential or submissions. Both are fine to deal with, but limited to matters that have come up.

Now, that's the directions that we're making in the first stage.

Now, it occurs to us that, in particular in relation to the successor-in-interest issue, that this issue is really crystallized and become clear, at least for me, and I think for the whole Tribunal I can speak for

the Tribunal there, only today. And so, as I said earlier, it's not apparent to me what Canada's response is to that, and obviously that's something that we've invited Canada to respond to in the Post-Hearing Briefs.

And which then leads the Tribunal to think that the Claimant would not have had a chance to respond to what Canada has said, and normally this would not be the case at this stage because the joined-up issue would have happened much earlier. That's not a criticism of anyone. We are just trying to be fair to both Parties. And it struck us that the Claimant, certainly on this issue, may need to have a second round of submissions, and if there was going to be a second round we would have it as a simultaneous exchange.

Now, we wanted to mention this thought to both Parties, if having said this, both Parties still tell us that one round is enough, then that's fine with the Tribunal, but we did want to articulate this concern because it's quite specific and to see whether Parties have a differing view whether they still think one round would be enough.

Obviously, the second round is not just limited to dealing with this issue. If there was a second round, then it would be a second round to respond to what you have received from the other side.

So, perhaps I should hear from Claimant first.

MR. APPLETON: Two matters, Mr. President. The first is I don't know if you actually are aware of the extensive argument made by Canada about assignment, which is--we've looked at assignment and successor-in-interest interchangeably. In their Rejoinder Memorial, I believe it's at Footnote 46, I only know it because it's one of the longest footnotes I have ever seen. It's highly detailed and exceptionally rich, shall we say, robust and rich. And so Canada has a position that's already there, and in many respects Canada chose not to do more.

And so we simply--so we don't invite Canada to have a whole new position here when they had the opportunity to address things, did address things, but did it in such a way that no one actually might have given it the full regard it otherwise would have had, had they decided to put it above the line rather than below the line, so to speak. I'm not sure if you knew that, and I just wanted to flag that.

The second factor is, our hearing, which is a full-on hearing on merits and damages is at the end of January, and so if we were to have a second round, we really would not be in a position to be able to see things or do things at the beginning until the beginning of February, and so it would take a considerable period of

time. I simply want to flag that so you understand where we're coming from.

PRESIDENT BULL: Mr. Appleton, I understand both points and thank you for making them.

The Tribunal wants to hear from Canada in a more fulsome manner on the point, so if you take that as a given, then--and they may choose to be brief about it and just tell us please look at footnote such-and-such, but we are making this invitation because we want to understand their position. So, if that's the case, then does Claimant want to have a second round?

And then in terms of timing, I do understand if counsel have a big hearing, that's a fair point, but first does Claimant want to have a second round in light of what I've said?

MR. APPLETON: Yes, of course we do, that's such an important issue, without question.

PRESIDENT BULL: And if we were to have a second round, bearing in mind the other obligations that you and your counsel team have, what might you suggest for a date when the second round might happen?

MR. APPLETON: We are just looking at it, but just give me one moment.

PRESIDENT BULL: Yes.

(Pause.)

MR. APPLETON: Mr. President, so not only do we have a situation of this Hearing, but now I found out Mr. Mullins's sitting as arbitrator in yet another hearing that commences almost immediately at the end of the other hearing. His first open day is the 11th of February to even be able to see something for the first time, so that we would be really--I would imagine that we wouldn't be in a position to have anything until probably the very end of that month or the beginning of March. That's just the Schedule. I'm sorry.

PRESIDENT BULL: I should hear from Canada.

MS. SQUIRES: Thanks, and I'm not sure if I'm going to help or add some more confusion to this, but I'm wondering if a possibility to maybe add a bit of efficiency and to deal with the--allowing the Claimant a chance to respond to Canada's submissions on the issue the Tribunal wants to hear from, is whether instead of doing simultaneous submissions, each disputing party just has one submission where Canada goes first and then the Respondent--or the Claimant responds to that. We would be happy to stick to the December 17th deadline and then--or figure out some deadline that works where the Claimant can then respond. I'm throwing it out there as an option, but I do recognize that the Claimant should have a right to respond to the extent we're going to raise something in

that submission.

(Pause.)

PRESIDENT BULL: Mr. Appleton, we can hear you in case you don't want us to.

MR. APPLETON: Oh, no, that was my submission to you, Mr. President.

PRESIDENT BULL: Then I couldn't hear you clearly enough.

MR. APPLETON: Oh, I'm sorry.

I was saying that, if we were to follow Canada's submission, then our first opportunity to respond on anything would be the end of February. We just think that's a very long time.

PRESIDENT BULL: Well, I think the suggestion is this: That Canada would put something in on the 17th of December, and you would put in something on the 22nd of December, and you would be able to do most of your submission without having sight of theirs, and then have the benefit of seeing theirs for a few days before filing five days later. Now, I mean, it's just a suggestion, but I think that's what Canada's suggestion amounts to.

MS. SQUIRES: Yes, I think so.

MR. APPLETON: I don't think that we would be very happy with that simply with respect to how we deal with Parties fairly and with equality. I don't think

that's very workable.

So, we would say--we could do our submissions that would be done on the 22nd, both sides would come in that day, and in the event that there was a need for another submission that couldn't happen until late February. That's just--we all are experiencing--I'm sure Members of the Tribunal have the same thing--with COVID reschedulings and everything else, it's just a big mess.

PRESIDENT BULL: Yes, Ms. Squires.

MS. SQUIRES: I'm trying to decide whether I want to say anything further on this.

Perhaps--I think everybody is busy. The case has been going on since 2017. It's quite some time. I'm very hesitant to drag this out into March or April of next year.

To the extent we can commit to file something by December 17th, perhaps the Claimant could file something by January 4th, 5th, 6th, something early in the new year because that will give them time to then continue on preparation for their upcoming hearing. I'm trying to find a middle ground here that doesn't get us into April--March and April for our filings here and that works with--

PRESIDENT BULL: What about--Mr. Appleton, what about this suggestion? What if we had an exchange on the

17th, and so both Parties' simultaneous exchange on the 17th of December, and then we grant leave to the Claimant to file an additional submission by the 22nd of December, limited only to responding on the point to Canada's submissions on the point of successor-in-interest?

MR. APPLETON: It just doesn't seem--since we don't know what's going to be there, we don't know what they're going to say.

Just give me a moment to consult.

(Pause.)

MR. APPLETON: All right. We are going to propose the following, and we will work on that basis, but in the event that we just need more time that would not work, we want the Tribunal to be aware of that because it's difficult, and we're right in the middle of the holidays. Staff aren't available, facilities aren't available. I mean, we get right into our next hearing. So, we are happy to try, but I can't--I normally would not want to guarantee not knowing what we're going to see in that way. That's all.

PRESIDENT BULL: Mr. Appleton, that's really very helpful, and thank you for that.

So, the directions I mentioned just now will be adjusted so that the first exchange, or the only simultaneous exchange, will happen on the 17th of December

instead of the 22nd of December, and the Respondent--sorry, I beg your pardon. The Claimant has leave to file a further submission on the 22nd of December limited to responding to Canada's further submissions on the successor-in-interest point.

And I will say this for the record: If that turns out to be insufficient time for--and there is good reason for an extension of time, the Claimant should make that application to us in the usual way, and the Tribunal will remember this conversation and the various constraints that have been mentioned by counsel in this discussion. And then we will figure out what to do. But if we can set forth on this basis, I think it would be very useful to the Tribunal.

Now, those are our directions, and can I check whether there are any substantive issues, any procedural issues, that either Party wants to raise before I make some closing remarks?

Ms. Squires?

MS. SQUIRES: No. I would just like to say thank you, everybody, for your time. It has been a really fantastic week, some great questions. I can speak on behalf of my team, it was quite a pleasure to appear before the three of you, and I thank you for that, and I wish you good holidays ahead.

PRESIDENT BULL: Thank you, Ms. Squires.

Anything to raise, Mr. Appleton?

MR. APPLETON: We had the opportunity to express our thanks. We would like to reiterate, now that the Hearing is, we believe, complete, I would like to thank all of the Participants. There are many members of Canada's team. I would like to thank them. Obviously, they spent a lot of time and effort on this.

I would like to thank the PCA, which we really know has done so much work, I see them early in the morning when we connect in, and thank them for what they are doing. Mr. Aragón Cardiel has done a fabulous job putting this altogether.

Mr. Kasdan and his team, they're very high quality transcripts, and they really worked hard to get them on a timely basis, and we appreciate that.

And we see the exceptional work that's been done by the Tribunal carefully going through things, considering what's there, and so we just don't want this to end without letting you know that we appreciate your attention to this matter and to the detail that you obviously have already paid, and we will do everything we can to be able to give you whatever you need to be able to make your decision in this matter because one thing that certainly we agree on with Ms. Squires is that it's taken

a very long time so far to be able to have this matter move along, and we would like to do that, as you've seen. We have some very nice clients, but they are of a certain age and would like to have things move along.

PRESIDENT BULL: Thank you for that, Mr. Appleton.

So, as President of the Tribunal, I should say on behalf of the Tribunal that we are very grateful to all those who have helped make this Hearing possible--transcribers, hearing managers--and we want to place on record our thanks in particular to the Tribunal Secretary and the team at the PCA.

I speak for the whole Tribunal when I say we are grateful to both counsel teams for your diligence and your assistance throughout these five days. Thank you very much for that. We look forward to your continued assistance, and thank you for making things move smoothly these five days.

With that, I think we are done for these five days, and I wish everyone a good weekend. We're adjourned.

MS. SQUIRES: Thank you so much.

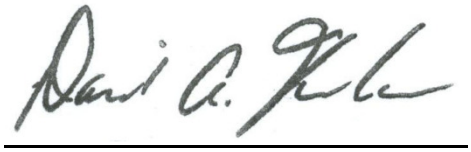
ARBITRATOR BETHLEHEM: Thank you very much.

(Whereupon, at 4:22 p.m. (EST), the Hearing was concluded.)

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