

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

**BETWEEN:**

**TENNANT ENERGY, LLC**

**Claimant**

**AND**

**GOVERNMENT OF CANADA**

**Respondent**

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**GOVERNMENT OF CANADA  
POST-HEARING SUBMISSION**

**December 17, 2021**

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## I. INTRODUCTION

1. On June 1, 2017, Tennant Energy, LLC (the “Claimant” or “Tennant Energy”) submitted a claim to arbitration under Section B of NAFTA Chapter Eleven alleging that certain measures taken by the Government of Ontario (“Ontario”) and the Ontario Power Authority (“OPA”) violated NAFTA Article 1105 – the Minimum Standard of Treatment.<sup>1</sup> Over four years later, and following multiple pleadings and a jurisdictional hearing (the “Hearing”), the Claimant has failed to demonstrate that this Tribunal has jurisdiction.

2. In this post-hearing submission, Canada responds to specific questions raised by the Tribunal during the Hearing and explains how evidence arising there supports Canada’s jurisdictional objections. Canada also briefly responds to the Claimant’s apparent attempt to re-characterize the nature of its claim during the Hearing.

3. On Canada’s first jurisdictional objection – that the Claimant was not a protected “investor of a Party” when the alleged breach occurred, as required by NAFTA Article 1116(1) – Canada addresses the Tribunal’s inquiries on *S.D. Myers* and dispels the Claimant’s notion that NAFTA claims may be assigned between investors after the alleged breach occurred. The Claimant’s legal theories run counter to the text of Article 1116(1), the position of all three NAFTA Parties, and relevant jurisprudence. Canada also summarizes the evidentiary lacunae and factual inconsistencies in the Claimant’s case, which became manifest at the Hearing. Each of these arguments supports Canada’s position that this Tribunal has no jurisdiction under Article 1116(1).

4. On Canada’s second jurisdictional objection – that the Claimant’s claim was submitted outside the three-year limitation period prescribed in NAFTA Article 1116(2) – Canada explains that the law on Article 1116(2) is well-settled, and the burden is squarely on the Claimant to demonstrate that the requirements of this provision are met. The evidence shows that the Claimant had constructive knowledge of the alleged breach prior to June 1, 2014 (the “Critical Date”). This cannot be changed based on subjective factors: once constructive knowledge of the alleged breach and loss is imputed to the Claimant, the clock starts running under Article 1116(2). In addition, the Claimant cannot avoid the limitation period with its unfounded assertions of “suppression” of

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<sup>1</sup> Terms that are not specifically defined in Canada's Post-Hearing Submission shall retain the definitions ascribed to them in Canada's previous pleadings, including its Counter-Memorial on Jurisdiction and Rejoinder Memorial on Jurisdiction.

information. There is no evidence to support such assertions, which rest solely on failed arguments made by another NAFTA claimant. Moreover, the Claimant has not demonstrated that the information that became known to it after the Critical Date gives rise to a self-standing cause of action. Information such as the name of an additional alleged political favourite (International Power) and the name of a meeting (Breakfast Club) does not alter the essence of the Claimant's claim, which could and should have been submitted to arbitration prior to June 1, 2014.

## II. THE CLAIMANT FAILED TO ESTABLISH JURISDICTION UNDER NAFTA ARTICLE 1116(1)

5. The Claimant bears the burden of proving it was a protected "investor of a Party" when the alleged breach occurred to establish jurisdiction under Article 1116(1).<sup>2</sup> The NAFTA Parties agree on this jurisdictional rule.<sup>3</sup> Tribunals and scholars have consistently confirmed it.<sup>4</sup> Thus, only two dates are relevant to Canada's objection under Article 1116(1): (1) the date when the alleged breach occurred; and (2) the date when the Claimant became an "investor of a Party".

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<sup>2</sup> *Tennant Energy, LLC v. Government of Canada* (UNCITRAL), Canada's Counter-Memorial on Jurisdiction, 21 September 2020 ("Canada's Counter-Memorial on Jurisdiction"), ¶¶ 64-74; *Tennant Energy, LLC v. Government of Canada* (UNCITRAL), Canada's Rejoinder Memorial on Jurisdiction, 26 May 2021 ("Canada's Rejoinder Memorial on Jurisdiction"), ¶¶ 28-31; *Tennant Energy, LLC v. Government of Canada* (UNCITRAL), Reply of the Government of Canada to the NAFTA Article 1128 Submissions of the Governments of the United States of America and the United Mexican States, 26 July 2021 ("Canada's Reply to the Second Article 1128 Submissions of the U.S. and Mexico"), ¶¶ 12-16; *Tennant Energy, LLC v. Government of Canada* (UNCITRAL), Jurisdictional Hearing Transcript, Days 1-5, 15-19 November 2020 ("Jurisdictional Hearing Transcript"), p. 711:19-22.

<sup>3</sup> *Tennant Energy, LLC v. Government of Canada* (UNCITRAL), Second Article 1128 Submission of the United States, 25 June 2021 ("Second Article 1128 Submission of the U.S."), ¶ 11; *Tennant Energy, LLC v. Government of Canada* (UNCITRAL), Second Article 1128 Submission of Mexico, 25 June 2021 ("Second Article 1128 Submission of Mexico"), ¶ 6; Canada's Reply to the Second Article 1128 Submissions of the U.S. and Mexico, ¶ 12.

<sup>4</sup> Canada's Counter-Memorial on Jurisdiction, ¶¶ 68-73 and footnotes therein; Canada's Rejoinder Memorial on Jurisdiction, ¶ 28 and footnotes therein. Goh and Wheland note that claimants trying to bring assigned claims face temporal and personal jurisdiction impediments, particularly on alleged breaches occurring before an assignment. **RLA-138**, Nelson Goh, "The Assignment of Investment Treaty Claims: Mapping the Principles", in Thomas Schultz (ed.), *Journal of International Dispute Settlement*, 2019, Volume 10, Issue 1 ("Goh"), p. 41; **RLA-137**, Hanno Wehland, "The Transfer of Investments and Rights of Investors under International Investment Agreements — Some Unresolved Issues", in *Arbitration International*, Volume 30, Issue 3, 1 September 2014 ("Wehland"), p. 575.

6. The alleged breach date is July 4, 2011,<sup>5</sup> when the Claimant says the challenged measures culminated in its failure to receive a FIT Contract.<sup>6</sup> The investment is the beneficial ownership of Skyway 127 shares held by John Tennant.<sup>7</sup> The Claimant tries to prove it acquired the investment and became a protected investor before the alleged breach occurred by relying solely on its claim that John Tennant created an oral trust to hold the investment on April 19, 2011, and designated Tennant Travel (the Claimant's name then) as the beneficiary on April 26, 2011. Thus, failure to prove the alleged trust's existence means the Tribunal cannot find that the Claimant was a protected investor at the time of the alleged breach and the Tribunal lacks jurisdiction.<sup>8</sup>

7. To save its claim after its failure to prove the alleged trust, the Claimant now proposes two alternative legal theories in an attempt to find jurisdiction. First, it asserts that *S.D. Myers* permits this Tribunal to find jurisdiction merely if one of the Claimant's alleged owners held the investment when the alleged breach occurred. Second, the Claimant argues NAFTA claims can be assigned to "successors in interest". It advances these theories as conclusions, with virtually no legal reasoning or relevant jurisprudence. Yet, neither of these theories displaces the well-settled rule that the Claimant itself must have been a protected investor at the time of the alleged breach.

8. Nonetheless, to assist the Tribunal Canada responds to the Claimant's cursory arguments. In Section II.A, Canada explains that the Claimant's legal theories are incorrect, unsupported, and do not establish the Tribunal's jurisdiction. In Section II.B, Canada explains that testimony arising at the Hearing supports Canada's argument that the Claimant has not met its burden to prove it was a protected investor when the alleged breach occurred.

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<sup>5</sup> Canada's Counter-Memorial on Jurisdiction, ¶¶ 18, 31, 45, 83, 123, 156, 158; Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 68, 69, 81, 104, 106-107.

<sup>6</sup> Canada's Counter-Memorial on Jurisdiction, Part V.B.1, ¶¶ 122-123, and ¶¶ 81-85; Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 68-69.

<sup>7</sup> The specific share percentages held by John Tennant were 11.3% as of June 20, 2011, and 22.6% from December 30, 2011 to January 15, 2015. See *Tennant Energy, LLC v. Government of Canada* (UNCITRAL) Claimant's Reply Memorial on Jurisdiction, 1 March 2021 ("Claimant's Reply Memorial on Jurisdiction") ¶¶ 96, 117, 125, 156. See also Canada's Rejoinder on Jurisdiction, ¶¶ 32-33; C-117, Shareholder's Ledger Skyway 127, 20 June 2011; C-114, Shareholder's Ledger Skyway 127, 30 December 2011.

<sup>8</sup> Canada's Counter-Memorial on Jurisdiction, ¶ 88; Canada's Rejoinder Memorial on Jurisdiction, ¶ 26; Jurisdictional Hearing Transcript, Day 5, pp. 708:17-710:11.

## A. The Claimant's Alternative Legal Theories Are Incorrect and Unsupported

### 1. *S.D. Myers* Does Not Help the Claimant Establish Jurisdiction

9. At the Hearing, the Tribunal inquired into the parties' positions on the relevance of the decision in *S.D. Myers*, where the claimant (SDMI) did not own shares in the alleged investment (Myers Canada) at the time of the alleged breach.<sup>9</sup> Instead, four members of the "Myers family" equally owned Myers Canada; and they owned the shares of the claimant, SDMI, in different proportions. The tribunal found that one member of the family, Dana Myers, owned 51% of SDMI; was the CEO of SDMI; and was the "authoritative voice" over both SDMI and Myers Canada.<sup>10</sup> In that context, the tribunal held<sup>11</sup> that SDMI qualified as an "investor" and Myers Canada as an "investment" within the definitions of Article 1139.<sup>12</sup> It found the claimant held indirect control over the investment based on Dana Myers' control over the claimant, SDMI, and the alleged investment, Myers Canada. The tribunal's very brief analysis on this is 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 organise the way in which it conducts its business affairs. The Tribunal's view is reinforced by the use of the word "indirectly" in [the definition of "investment of an investor of a party"].<sup>13</sup>

10. Tennant Energy argues that even if it has not proven the alleged trust, the Tribunal could still have jurisdiction because John Tennant owned the investment (the shares in Skyway 127) and allegedly owned 90% of the Claimant when the alleged breach occurred. Yet *S.D. Myers* does not help the Claimant to establish jurisdiction.

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<sup>9</sup> CLA-111, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 12 November 2000 ("*S.D. Myers – Partial Award*"), ¶ 227.

<sup>10</sup> CLA-111, *S.D. Myers – Partial Award*, ¶¶ 227-228.

<sup>11</sup> CLA-111, *S.D. Myers – Partial Award*, ¶¶ 229-231.

<sup>12</sup> Article 1139 (Definitions): "**investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment"; "**investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of such Party".

<sup>13</sup> CLA-111, *S.D. Myers – Partial Award*, ¶ 229.

11. First, the *S.D. Myers* tribunal's reasoning that jurisdictional impediments should not prevent it from hearing an otherwise meritorious claim is flawed. As Douglas explains, this "is tantamount to saying that jurisdictional rules should give way to a good claim on the merits."<sup>14</sup> The potential strength of a claim on its merits cannot establish a NAFTA Party's consent to arbitration. It is inappropriate to evaluate the merits of a claim at the jurisdictional stage.<sup>15</sup> The right to bring a NAFTA claim is conditional on the Claimant establishing that it meets the jurisdictional requirements of Section B in Chapter Eleven, not whether its claim has merit.

12. Moreover, the *S.D. Myers* tribunal offered virtually no reasoning on how it reached its conclusion. It did not specify which "objectives of the NAFTA" it considered, nor did it explain how the term "indirectly" in the definition of "investment of an investor of a Party" "reinforced" its conclusion. The reader is left to infer how these factors shaped the decision. It offers no interpretive guidance to this Tribunal's determination of jurisdiction under Article 1116(1).

13. Second, irrespective of *S.D. Myers*, the Claimant has no basis under NAFTA or international law to ask the Tribunal to "pierce the corporate veil" of Tennant Energy to find jurisdiction based on its owners' alleged interests in the Claimant and the investment. As explained below, the NAFTA Parties offer their consent to arbitrate only with the disputing investor that files a claim – not with other parties who might have an interest in the claimant, such as its owners. International law and domestic legal regimes widely recognize the corporation has separate legal personality.<sup>16</sup> The NAFTA Parties did not derogate from customary international law by authorizing tribunals to pierce a claimant's corporate veil to find jurisdiction based on whether its owners were protected investors at the time of the alleged breach.<sup>17</sup> A tribunal should not suspend separate personality to

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<sup>14</sup> **RLA-117**, Zachary Douglas, *The International Law of Investment Claims* (New York: Cambridge University Press, 2009) [Excerpt], ¶ 569.

<sup>15</sup> For the purpose of its jurisdictional determination, a tribunal must presume the facts which found the claim on the merits as alleged by the claimant to be true. Yet in assessing jurisdiction, the tribunal may not simply adopt the claimant's characterisation without examination. **RLA-170**, *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ICSID Case No. ARB/03/28) Decision on Annulment, 1 March 2011, ¶ 118. See also **RLA-005**, *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, 15 April 2009, ¶ 63.

<sup>16</sup> **RLA-152**, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (I.C.J. Reports 1970) Second Phase, Judgment, 5 February 1970, ¶ 38.

<sup>17</sup> It is well recognized that an important principle of international law should not be held to have been tacitly dispensed with. See **RLA-148**, *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)* (1989 I.C.J. 15) Judgment, 20 July 1989, ¶ 50.



find jurisdiction<sup>18</sup> absent specific treaty language.<sup>19</sup> For instance, the *MAKAE Europe* tribunal did not pierce the claimant's corporate veil, even though one of its owners, Mr. Alenizi, controlled the investment.<sup>20</sup> Neither should this Tribunal pierce Tennant Energy's veil merely because John Tennant owned the investment.

14. Where the NAFTA Parties intended to permit a tribunal to look through the ownership structure of certain enterprises, the treaty expressly provides for it.<sup>21</sup> The term "indirectly" in referring to ownership or control in the definition of "investment of an investor of a Party" means a tribunal can look *down* the corporate chain, to determine if *the claimant* owned or controlled the investment via intermediaries it owned or controlled.<sup>22</sup> This does not allow a tribunal to pierce the claimant's veil by looking *up* the corporate chain, to determine if its *owners* owned or controlled the investment at the requisite times. The identity of the disputing investor and its legal personality are not mere formalities. Depending who brought the claim, a NAFTA Party's defense may differ substantively on issues of jurisdiction, the merits, and the damages that could properly be awarded. These concerns cannot be dismissed.

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<sup>18</sup> See **RLA-177**, Julien Fouret, Gloria Alvarez, Remy Gerbay, "The ICSID Convention, Regulations and Rules – A Practical Commentary", (Edward Elgar Publishing 2019) [Excerpt], ¶ 0.87 ("arbitral tribunals have shown to be reluctant to pierce the corporate veil"). The *Tokios* tribunal declined to pierce the corporate veil of the claimant even though it was owned by shareholders in the host State. See **CLA-233**, *Tokios Tokekés v Ukraine* (ICSID Case No. ARB/02/18) Decision on Jurisdiction (Dissenting Opinion attached to the Decision on Jurisdiction), 29 April 2004, ¶ 54.

<sup>19</sup> For example, the *Perenco* tribunal found the France-Ecuador treaty expressly authorized it to find jurisdiction over a claimant of a non-party if French shareholders controlled it. See **RLA-182**, *Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6) Decision on Jurisdiction and Liability, 12 September 2014, ¶ 216.

<sup>20</sup> **RLA-205**, *MAKAE Europe SARL v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/17/42) Award, 30 August 2021 ("*MAKAE*"), ¶ 164.

<sup>21</sup> Article 1113 (Denial of Benefits) is the only provision in NAFTA Chapter Eleven that allows a tribunal to look through a disputing investor, where a Party seeks to deny the benefits of Chapter Eleven in specific circumstances. Those specific circumstances are where an investor of a non-Party owns or controls an investor of another Party that is an enterprise of that Party, and the denying Party either does not maintain diplomatic relations with the non-Party, or adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be circumvented or violated if the benefits of the Chapter were accorded to the enterprise or its investments.

<sup>22</sup> In *Waste Management*, the tribunal looked down the corporate chain from the claimant, through intermediaries, to the investment. The tribunal recognized NAFTA permits this. **CLA-126**, *Waste Management II – Award*, ¶¶ 80-85.

15. The Tribunal inquired into any implications of the Federal Court of Canada's (the "Court") decision on Canada's application to set aside the *S.D. Myers* decision.<sup>23</sup> The Court observed that it had limited jurisdiction under the *Commercial Arbitration Code* to hear an application to set aside the arbitral award.<sup>24</sup> It rejected the application on the basis that Canada had not objected to the tribunal's jurisdiction at the outset of the arbitration.<sup>25</sup> This judgment was dispositive to the application.<sup>26</sup> Despite this, the Court considered, "in the alternative", whether the claimant qualified as an investor.<sup>27</sup> In finding that it did, the Court improperly pierced the veil of the claimant, by attributing control to it based on its owner's control over the investment.<sup>28</sup> Canada explained above why this is inappropriate. Additionally, the Court found that the claimant held control over the investment because the claimant, SDMI, advanced the money necessary for the operations of the investment, expected to share in the profits of the investment, and provided personnel and technical support for the investment, none of which have been proven here.<sup>29</sup>

16. The facts in *S.D. Myers* differ significantly from this case. While the *S.D. Myers* tribunal found evidence that Dana Myers exercised many elements of control over the claimant and investment,<sup>30</sup> Tennant Energy has failed to file any reliable evidence of John Tennant's alleged 90% ownership of the Claimant from 2011 to 2015.<sup>31</sup> The witness testimonies at the Hearing discredited this alleged ownership.<sup>32</sup> Moreover, while the investment was not Skyway 127 itself,

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<sup>23</sup> **R-080**, *Canada (Attorney General) v. S.D. Myers Inc.*, 2004 FC 38, [2004] 3 FCR 368 ("*S.D. Myers – Federal Court Decision*").

<sup>24</sup> **R-080**, *S.D. Myers – Federal Court Decision*, ¶¶ 43-44.

<sup>25</sup> **R-080**, *S.D. Myers – Federal Court Decision*, ¶¶ 49, 53.

<sup>26</sup> The Court also determined that the tribunal's decision did not conflict with public policy, and thus could not be set aside on this basis: **R-080**, *S.D. Myers – Federal Court Decision*, ¶ 76.

<sup>27</sup> **R-080**, *S.D. Myers – Federal Court Decision*, ¶ 57. The Court explained that whether SDMI controlled Myers Canada was a question of fact, so the standard of review was reasonableness, not correctness. See ¶¶ 52, 57, 60, 64.

<sup>28</sup> **R-080**, *S.D. Myers – Federal Court Decision*, ¶¶ 64, 67.

<sup>29</sup> **R-080**, *S.D. Myers – Federal Court Decision*, ¶ 64.

<sup>30</sup> **CLA-111**, *S.D. Myers – Partial Award*, ¶¶ 227-231; **R-080**, *S.D. Myers – Federal Court Decision*, ¶¶ 67-70.

<sup>31</sup> The *S.D. Myers* tribunal found the "uncontroverted evidence" was that the Myers family owned the claimant. See **CLA-111**, *S.D. Myers – Partial Award*, ¶ 230. John Tennant merely said Jim Tennant "let" him "have" Tennant Travel, without providing evidence of this purported share transfer. See Jurisdictional Hearing Transcript, Day 3, p. 366:7-10.

<sup>32</sup> John Pennie confirmed he and Marilyn Field together received 45% of Skyway 127 shares on January 15, 2015 from Jim Tennant, not John Tennant. See Jurisdictional Hearing Transcript, Day 2, p. 260:6-9. This indicates John

members of the Tennant family did not wholly- or majority-own Skyway 127 when the alleged breach occurred. As explained below, GE Energy held 50% of the Skyway 127 shares in 2011.<sup>33</sup> The Claimant also filed none of the evidence considered relevant by the *S.D. Myers* tribunal and Court to find indirect control.<sup>34</sup> It provided no evidence that Tennant Travel provided Skyway 127 with funding, technical assistance, or personnel, or that Tennant Travel expected to share in the profits of Skyway 127.<sup>35</sup> Ultimately, *S.D. Myers* does not help the Claimant establish jurisdiction.

## 2. NAFTA Offers No Mechanism to Assign Investment Claims

17. The Tribunal also inquired into the Claimant's other alternative legal theory: that NAFTA claims can be assigned to what Tennant Energy calls "successors in interest".<sup>36</sup> Under the Claimant's theory, an investor who was not protected when the alleged breach occurred can nonetheless have standing under Article 1116(1) if it received the investment from an investor who was protected at that time.

18. In attempting to make out this claim, the Claimant took shifting positions at the Hearing over which rights were allegedly assigned and when.<sup>37</sup> Canada understands the Claimant's case to be

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Tennant did not own 90% of Skyway 127 shares before January 15, 2015. The fact that John Tennant did not become a member of the management board of Tennant Travel in 2011, but in 2015, when he first transferred the shares to Tennant Travel, also suggests he may have not attained ownership in Tennant Travel in 2011. *See* Jurisdictional Hearing Transcript, Day 3, p. 366:11-20. John Tennant could not recall exactly when he thought Jim Tennant give him a 90% ownership stake in Tennant Travel. *See* Jurisdictional Hearing Transcript, Day 3, pp. 365:5-366:4.

<sup>33</sup> Starting on June 9, 2011, GE Energy owned 50% of Skyway 127 shares; and many other individuals outside the Tennant family also owned shares. **C-116**, Skyway 127 Shareholder Ledger, 9 June 2011.

<sup>34</sup> None of the factors that Bryan Schwartz identified in his Separate Opinion to find that SDMI qualified as a protected investor applies here. For instance, the record contains no evidence that when the alleged breach occurred, Tennant Travel and Skyway 127 were affiliates; Tennant Travel had made a protected investment through a loan to Skyway 127; the employees of Skyway 127 acted in concert with those of Tennant Travel, a holding company that had no employees; or the *raison d'être* of Skyway 127 was to serve the interests of Tennant Travel. **CLA-336**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Separate Opinion by Dr. Bryan Schwartz, concurring except with respect to performance requirements, in the partial award of the tribunal, 12 November 2000, ¶¶ 38-40.

<sup>35</sup> *See* Canada's Counter-Memorial on Jurisdiction, fn. 224; and Canada's Rejoinder on Jurisdiction, fn. 133. The *S.D. Myers* tribunal also said there were other possible grounds for SDMI's standing to bring a claim, including that (a) SDMI and Myers Canada were in a joint venture, (b) Myers Canada was a branch of SDMI, (c) SDMI made a loan to Myers Canada, and (d) its market share in Canada constituted an investment, ¶ 232. These factors do not pertain here.

<sup>36</sup> Claimant's Reply Memorial on Jurisdiction, ¶ 105. The Claimant confirmed that its legal arguments on assignment and "successors in interest" are the same. Jurisdictional Hearing Transcript, Day 5, pp. 835:1-8; 909:25-910:1.

<sup>37</sup> In the opening, Mr. Appleton suggested John Tennant assigned Skyway 127 shares through exhibit **C-268**. *See*: Jurisdictional Hearing Transcript, Day 1, p. 164:13-23. Yet John Tennant confirmed he could not assign the shares with this letter in February 2016, as he no longer held shares in Skyway 127 as of January 15, 2015. *See* Jurisdictional

that even if Tennant Travel had not acquired the investment through the alleged trust, John Tennant assigned his right to file a NAFTA claim to Tennant Travel when he transferred the Skyway 127 shares to it on January 15, 2015. The Claimant argues this assignment was evidenced in a letter from John Tennant to the Management Board of Tennant Energy on February 8, 2016.<sup>38</sup> However, the Claimant has failed to cite any language in NAFTA or any investment cases supporting its theory that Chapter Eleven offers a mechanism for one investor to assign a potential NAFTA claim to a different investor, and for the latter investor to establish a NAFTA Party's consent because the former investor was protected when the alleged breach occurred.

19. NAFTA claims, and potential causes of action under NAFTA, cannot be assigned to other investors freely on the open market. As noted above, a NAFTA Party's consent under Section B is specific to the disputing investor that brings the claim. Article 1116(1) grants standing to a disputing investor only for a claim filed on its own behalf, as expressly stated in the title "(Claim by an Investor of a Party on Its Own Behalf)" (emphasis added). Under Article 1116(1), an investor who wishes to pursue a claim must allege that "another Party" has breached specified obligations in the NAFTA owed *to that investor* and further that "the investor has incurred loss or damage by reason of, or arising out of, that breach." Article 1101(1) requires, among other things, that the challenged measures relate to the investor and the investment. Thus, to establish jurisdiction under Articles 1116(1) and 1101(1), the Claimant must be the same investor who experienced the alleged breach and the resulting loss.<sup>39</sup>

20. Chapter Eleven does not authorize an investor to bring an assigned claim for an alleged breach relating to a different investor. Moreover, Article 1116(1) does not authorize an investor to bring an assigned claim on behalf of a different investor who suffered the loss or damage from the

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Hearing Transcript, Day 3, p. 417:14-19. The Claimant stated in its Reply that with exhibit C-268, John Tennant assigned rights held by the trustee for the trust. See Claimant's Reply Memorial on Jurisdiction, ¶ 87. The Claimant does not specify which "rights held by the trustee" were allegedly assigned. Nor did it advance legal argumentation for the proposition that a "bare trustee" who did not beneficially own the investment has a right to bring a claim under NAFTA. Nor did the Claimant prove John Tennant served as a "bare trustee".

<sup>38</sup> C-268, John Tennant to Tennant Energy regarding trust transfer and successor in Interest ("John Tennant Letter, 8 February 2016").

<sup>39</sup> Canada's Counter-Memorial on Jurisdiction, ¶¶ 64-74; Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 28-31.

alleged breach.<sup>40</sup> Nothing in the text of Article 1116(1) permits a claimant to establish jurisdiction based on the protected status of another investor.<sup>41</sup> Taking jurisdiction on that basis would render the provision meaningless, and extend the scope of Chapter Eleven beyond what the treaty Parties intended.<sup>42</sup> Thus, the Claimant cannot establish jurisdiction simply because John Tennant owned the Skyway 127 shares when the alleged breach occurred and transferred them to the Claimant. The Tribunal has jurisdiction only if it finds that Canada consents to arbitrate with Tennant Energy, by finding that Tennant Energy was a protected investor when the alleged breach occurred.

21. The three NAFTA Parties agree that a claimant cannot bring a claim under Article 1116(1) based on an alleged breach that occurred before the claimant became a protected investor, which instead relates to a different investor and its alleged loss.<sup>43</sup> Under the *Vienna Convention on the Law of Treaties*, the Tribunal must consider the NAFTA Parties' agreed interpretation, and should give it considerable weight.<sup>44</sup> Had the NAFTA Parties intended to establish a mechanism to assign claims, they would have done so expressly – such as in the case of subrogation, which provides an exception to the general rule that a claim cannot be assigned.<sup>45</sup>

22. The Claimant's theory that investors can assign NAFTA claims raises four risks to the dispute settlement mechanism established in Section B of Chapter Eleven. First, it could render

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<sup>40</sup> Second Article 1128 Submission of the U.S., ¶ 11. *See also* Canada's Counter-Memorial on Jurisdiction, ¶¶ 64-74; Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 28-31.

<sup>41</sup> Canada's Reply to the Second Article 1128 Submissions of the U.S. and Mexico, ¶¶ 13-14; Canada's Rejoinder Memorial on Jurisdiction, ¶ 28; Canada's Counter-Memorial on Jurisdiction, ¶ 67.

<sup>42</sup> Second Article 1128 Submission of the U.S., ¶¶ 9-12; Second Article 1128 Submission of Mexico, ¶¶ 6-7; Canada's Reply to the Second Article 1128 Submissions of the U.S. and Mexico, ¶ 12-16.

<sup>43</sup> Second Article 1128 Submission of the U.S., ¶ 11; Second Article 1128 Submission of Mexico, ¶ 6; Canada's Reply to the Second Article 1128 Submissions of the U.S. and Mexico, ¶ 12.

<sup>44</sup> **RLA-031**, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (entered into force 27 January 1980) 23 May 1969. **RLA-063**, *The Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008, ¶¶ 181-189. **RLA-100**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL) Award on Damages, 10 January 2019, ¶ 377.

<sup>45</sup> Subrogation is a special case of assignment that arises where the investor has received an indemnity under an insurance claim. Under its terms, the insured investor's claim against the host State is assigned to the insurer upon payment of the claim arising from the insurance. The insurer succeeds to all the rights of the beneficiary who has received compensation under the insurance contract. In the context of investment law, the host State agrees to the subrogation, typically through an investment treaty between the host State and the investor's State of nationality. Many investment treaties contain subrogation clauses of this kind. *See e.g.*, **CLA-294**, Canada-United States-Mexico Free Trade Agreement, Chapter 14 – Investment, Article 14.15. *See also* **RLA-137**, Wehland, p. 575.

the waiver provision in Article 1121(1)(b) meaningless. Respondents might face duplicative domestic and international proceedings over the same alleged breach from the assignor and assignee.<sup>46</sup> Second, permitting the assignment of NAFTA claims could incentivize claim shopping, as nothing would prevent an investor from acquiring investments solely to file a claim. Third, permitting the assignment of NAFTA claims to any “successor in interest” would create significant uncertainty for the NAFTA Parties, who would have little to no predictability as to the scope of potential claimants.<sup>47</sup> Fourth, investors could avoid personal liability for adverse costs orders if they transfer their shares to a holding company after the alleged breach occurred for the purpose of bringing a NAFTA claim.<sup>48</sup> This risk appears salient here: Tennant Energy is a holding company that received the investment after the alleged breach occurred; currently has no other purposes besides holding the Skyway 127 shares and bringing this claim against the Government of Canada, which John Tennant acknowledged;<sup>49</sup> and almost certainly cannot pay an adverse costs order, as John Tennant confirmed that Tennant Energy has no assets besides Skyway 127 shares, nor any financial resources in a bank account.<sup>50</sup>

23. NAFTA jurisprudence confirms that a claimant must prove it was a protected investor when the alleged breach occurred to establish jurisdiction.<sup>51</sup> Moreover, *GEA Group* and *STEAG* involved similar facts to those here, in which one protected investor transferred the investment to another protected investor. Instead, they confirmed that they would have no jurisdiction over alleged breaches that occurred before the claimant became a protected investor.<sup>52</sup> The *GEA Group* tribunal

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<sup>46</sup> Canada's Reply to the Second Article 1128 Submissions of the U.S. and Mexico ¶ 15; Second Article 1128 Submission of the U.S., ¶¶ 14-15.

<sup>47</sup> **RLA-137**, Wehland, p. 575.

<sup>48</sup> **RLA-138**, Goh, p. 29.

<sup>49</sup> John Tennant confirmed this on cross-examination. See Jurisdictional Hearing Transcript, Day 3, p. 395:21-24.

<sup>50</sup> Jurisdictional Hearing Transcript, Day 3, p. 395:16-24.

<sup>51</sup> See above, fn. 4.

<sup>52</sup> **RLA-146**, *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16) Award, 31 March 2011 (“*GEA Group – Award*”), ¶¶ 168-170; **RLA-174**, *STEAG GmbH v. Kingdom of Spain* (ICSID Case No. ARB/15/4) Decision on Jurisdiction, Liability and Principles of Quantum, 8 October 2020 [Spanish, with attached translated excerpts], ¶¶ 145-151, 380; Canada's Counter-Memorial on Jurisdiction, ¶ 73; Canada's Rejoinder Memorial on Jurisdiction, fn. 44. Both tribunals also treated continuous foreign nationality of the investor as insufficient to find jurisdiction.

stated, “for [a] tribunal to hear the Claimant’s claim, the Claimant must have held an interest in the alleged investment before the alleged treaty violations were committed”.<sup>53</sup>

24. The Claimant has failed to cite any authorities demonstrating that an investment claim can be assigned from one investor to another. The three investor-State cases that the Claimant cites in support of its theory on assignment are irrelevant or do not support it. First, *Daimler* does not stand for the proposition that the recipient of the investment can initiate a claim about events that predated its acquisition of the investment.<sup>54</sup> The tribunal noted that a “strong argument can be made that the ICSID Convention and many BITs accord standing only to the original investor and not to any subsequent would-be purchasers of the underlying investment.”<sup>55</sup> Second, the *Loewen* tribunal declined jurisdiction, and never held that a claimant need not be a protected investor when the alleged breach occurred to bring a NAFTA claim.<sup>56</sup> The tribunal did not find that the NAFTA Parties consent to arbitrate with investors who try to advance assigned claims. Third, *Enron* did not involve the issue of an assigned claim, but rather issues relating to reflective loss and investments held indirectly by claimants who were protected when the alleged breach occurred.<sup>57</sup>

25. In addition, the US–Iran and US–Mexico Claims Tribunals cases that the Claimant cites for its “successor in interest” theory are irrelevant.<sup>58</sup> Those cases involved State-to-State claims. The right of States to bring claims under the international law procedures of diplomatic protection is

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<sup>53</sup> **RLA-146**, *GEA Group – Award*, ¶¶ 168-170.

<sup>54</sup> **CLA-309**, *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1) Award, 22 August 2012 (“*Daimler – Award*”), ¶¶ 40-44. The tribunal rejected the respondent’s argument that the right to file a claim transferred with the investment, and concluded that it “should accord standing to any qualifying investor under the relevant treaty texts who suffered damages as a result of the allegedly offending governmental measures at the time that those measures were taken”. See ¶ 145.

<sup>55</sup> **CLA-309**, *Daimler – Award*, ¶ 144 (emphasis added); Canada’s Rejoinder Memorial on Jurisdiction, fn. 46.

<sup>56</sup> The company that emerged from bankruptcy as the parent of the investment had become a U.S. company. **CLA-138**, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (Case No. ARB(AF)/98/3), Award, 26 June 2003, ¶ 237. The Tribunal refused to accept that the Canadian company to which the claim was transferred could proceed with the claim as it was a naked shell company with no ownership of any assets of the investment.

<sup>57</sup> **CLA-333**, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Jurisdiction, 14 January 2004, ¶ 52.

<sup>58</sup> *Tennant Energy, LLC v. Government of Canada* (UNCITRAL), Investor’s Second NAFTA Article 1128 Response, 26 July 2021 (“Claimant’s Response to the Second Article 1128 submissions of the U.S. and Mexico”), ¶ 17.

distinct from an investor's right to bring a claim under Section B of Chapter Eleven. Section B is *lex specialis*, and the Tribunal must assess its jurisdiction pursuant to the terms of the NAFTA, and specifically Article 1116(1). None of the Claims Tribunal cases cited by the Claimant provides that Section B enables individual investors to assign the right to bring a NAFTA claim to other investors.<sup>59</sup> All of the cases are also distinguishable from the facts here.<sup>60</sup> They do not support the Claimant's theory that being a "successor in interest" exempts a claimant from the rule that it must prove it was a protected investor when the alleged breach occurred to establish jurisdiction.

26. Further, the Claimant's concern that the NAFTA Parties' interpretation on Article 1116(1) may impede access to justice if an investor passes away is entirely overstated.<sup>61</sup> The definition of "investor of a Party" includes an "enterprise of a Party", which means any entity constituted or organized under applicable law.<sup>62</sup> There may be scenarios where an investor maintains the same legal personality after a death, or corporate reorganization, under the applicable domestic law. Determining whether that transpires requires a case-specific and fact-based inquiry.<sup>63</sup> If under applicable domestic law, the deceased's estate is treated as a continuation of the deceased's legal personality, this may permit the estate to file or continue a NAFTA claim, subject to the facts. Yet this issue does not arise here: Tennant Energy and John Tennant have distinct legal personalities.

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<sup>59</sup> See Claimant's Response to the Second Article 1128 Submissions of the U.S. and Mexico, fn. 3 and 4.

<sup>60</sup> In *Isaiah* (CLA-321), the successor was the respondent, not the claimant. The *Caire* decision does not appear to involve a successor in interest, but is unreported. (CLA-322). *Chattin* merely concerns a State's right to espouse a claim even where a fugitive may lose his right to standing. (CLA-323, ¶¶ 4-5) *Harry Roberts* also concerns the State's ability to advance a claim on behalf of its national. (CLA-324) *Sabla* provided that the U.S. could continue a claim despite the death of Mr. de Sabla as the claim belonged to the U.S., which was competent to bring the claim for Mr. de Sabla's heir and executrix because it belonged to the U.S. The Commission found that the rules of the United States-Panama Claims Commission explicitly provided for a claim to be filed on behalf of an heir for damages suffered by a deceased national. (CLA-325, p. 359) The Commission in *Dujay* also located the right of the U.S. to bring a claim on Mrs. Dujay's behalf in the text of the Claims Commission's Convention. (CLA-330, p. 452) *Stephens* involves a claim advanced by the U.S. for injuries incurred by two brothers from the unlawful killing of their brother, rather than any successor in interest. (CLA-331, ¶ 3) *Greenstreet* merely upheld the U.S.'s right to bring the claim following a re-organization from a bankruptcy. (C-332, p. 463)

<sup>61</sup> Claimant's Response to the Second Article 1128 submissions of the U.S. and Mexico, ¶ 16.

<sup>62</sup> Article 201 states: "**enterprise of a Party** means an enterprise constituted or organized under the law of a Party;" and "**enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association".

<sup>63</sup> Second Article 1128 Submission of the U.S., fn. 15.



27. Finally, the Claimant's case on assignment is faulty in two further respects. First, the applicable law to determine whether NAFTA claims may be assigned is NAFTA and international law, not California law. Thus, Justice Grignon's opinion on whether John Tennant assigned the right to bring a NAFTA claim under California law is not dispositive.<sup>64</sup> Whatever rights John Tennant might have assigned to Tennant Travel under California law on January 15, 2015, the right to initiate a NAFTA claim over an alleged breach on July 4, 2011 was not one of them. Second, the Claimant provided no reliable evidence to support its assertion that Tennant Energy was a "successor in interest" to John Tennant or GE Energy under the applicable law.<sup>65</sup> Overall, the Claimant's argument on the assignment of claims is incorrect, unsupported, and does not enable it to overcome the jurisdictional barrier that Article 1116(1) presents to its claim.

**B. The Tribunal Has No Jurisdiction Under Article 1116(1) as the Claimant Did Not Prove It Was a Protected Investor When the Alleged Breach Occurred**

28. To meet its burden, the Claimant must present sufficient evidence of the alleged facts on which jurisdiction rests.<sup>66</sup> The Claimant alleges it became a protected investor before the alleged breach occurred through the oral trust allegedly created by John Tennant. In subsection II.B(1), Canada summarizes the standard of proof under international law and California law. In subsection II.B(2), Canada explains that the Claimant failed to prove the alleged trust's existence, and thus failed to prove it owned the investment when the alleged breach occurred. In subsection II.B(3), Canada outlines the indicia to find control of an investment, and shows the Claimant failed to prove it controlled the investment, or Skyway 127 itself, when the alleged breach occurred.

**1. The Standard of Proof in the Circumstances of this Claim is High**

29. Because it relies solely on testimony from witnesses with an interest in the outcome of the arbitration, and a document created in contemplation of arbitration, the Claimant must file contemporaneous documentary evidence to prove it was a protected investor when the alleged

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<sup>64</sup> Jurisdictional Hearing Transcript, Day 4, pp. 505:17-25, 523:24-524:3, 553:18-22.

<sup>65</sup> *Tennant Energy, LLC v. Government of Canada* (UNCITRAL), Notice of Arbitration, 1 June 2017 ("NOA") ¶ 10: "Tennant Energy is the successor in interest to two US nationals, which transferred their equity in the Investment to Tennant Energy. These US nationals are General Electric Energy LLC."

<sup>66</sup> Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 22-24.

breach occurred.<sup>67</sup> Further, hearsay should be accorded little to no weight in these circumstances, without reliable evidence in corroboration.<sup>68</sup>

30. Since the Claimant alleges it owned and controlled the investment through an oral trust in California, California law offers definitive guidance on whether the Claimant can satisfy the standard of proof under international law with respect ownership or control over the alleged investment. California law requires “clear and convincing evidence” to prove an oral trust.<sup>69</sup> This is a higher standard than the balance of probabilities.<sup>70</sup> It requires a “high probability” that an oral trust was created.<sup>71</sup> Multiple California courts, including the California Supreme Court, have held it requires evidence “clear enough to leave no substantial doubt and strong enough that every reasonable person would agree.”<sup>72</sup> In the rare cases where an oral trust is proven, it is because some reliable written evidence confirms its existence.<sup>73</sup> A trust is created under California law only if there is a trust beneficiary; the trust purpose is not against public policy; the settlor properly manifests an intention to create a trust; and there is trust property.<sup>74</sup>

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<sup>67</sup> Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 34-38 and footnotes cited therein. *See also* **RLA-205**, *MAKAE*, ¶¶ 142-143, 169, 171.

<sup>68</sup> **RLA-151**, *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13) Award, 8 October 2009 (“*EDF – Award*”), ¶ 224; **RLA-150**, *Helnan International Hotels A/S v. Arab Republic of Egypt* (ICSID Case No. ARB/05/19) Award, 3 July 2008 (“*Helnan – Award*”), ¶ 157.

<sup>69</sup> **R-090**, California Probate Code, Division 9 - Trust Law [15000-19530], Enacted by Stats. 1990, Ch. 79 [Excerpt] (“California Probate Code”), § 15207.

<sup>70</sup> Jurisdictional Hearing Transcript, Day 4, pp. 659:7-10; 537:14-17; 648:20-23.

<sup>71</sup> **C-270**, Judicial Council of California Civil Jury Instructions S.201, “Certain facts must be proved by clear and convincing evidence, which is a higher burden of proof. This means the party must persuade you that it is highly probable that the fact is true.”

<sup>72</sup> **R-094**, *Higgins v. Higgins*, 11 Cal.App.5th (2017), p. 21 (emphasis added). *Butte Fire* 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.” **CLA-335**, *Butte Fire Cases*, (2018)24 Cal.App.5th 1150, 1158 [235 Cal.Rptr.3d 228].

<sup>73</sup> **RER-1**, Expert Report of Margaret Lodise, 25 May 2021 (“Expert Report of Margaret Lodise”), ¶ 37. *See also* **R-091**, California Law Revision Commission Recommendation Proposing the Trust Law, 18 Cal. L. Revision Comm's Reports, 1986 [Excerpt], p. 525.

<sup>74</sup> **R-090**, California Probate Code, §§15205, 15203, 15201, 15202, respectively.

## 2. The Claimant Failed to Prove It Owned the Investment When the Alleged Breach Occurred

31. After multiple submissions on jurisdiction and the Hearing, it is evident that the Claimant has not met the standard of proof to demonstrate it owned the investment when the alleged breach occurred. First, the primary problem with the Claimant's case is that it filed no reliable evidence to prove it acquired the investment through the alleged oral trust. It was unable to produce a single piece of contemporaneous documentation of the existence of or terms of the alleged trust.<sup>75</sup> The Claimant provided no contemporaneous documentation that John Tennant: (1) created the alleged trust; (2) put the Skyway 127 shares in trust; (3) designated Tennant Travel as the beneficiary; (4) set the terms of the alleged trust; (5) administered the alleged trust; or (6) terminated the alleged trust. The Claimant's failure to provide any reliable evidence on these points means it cannot meet the clear and convincing standard under California law.<sup>76</sup>

32. Instead, the Claimant asks the Tribunal to accept that all the key events relating to the alleged trust occurred orally. At the Hearing, the witnesses admitted they had no contemporaneous documentary evidence of the following alleged events: (1) the agreement between John Tennant and Derek Tennant to release Derek Tennant from personal liability, in return for John Tennant putting the Skyway 127 shares in a holding company, in **April 2011**, for which the brothers admitted they had no documentation;<sup>77</sup> (2) Jim Tennant giving John Tennant 90% of Tennant Travel, in **April 2011**, an event for which John Tennant confirmed he had no written evidence;<sup>78</sup> (3) John Tennant exercising the call option in the Promissory Note to seek the shares, on **April 19, 2011**, which all three witnesses said was merely oral;<sup>79</sup> (4) John Tennant acquiring the shares, on **April 19, 2011**, admittedly without documentation;<sup>80</sup> (5) John Tennant creating the alleged trust,

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<sup>75</sup> **RLA-004**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011 ("Gallo"), ¶ 289. John Pennie stated that John Tennant never told him any terms of the alleged trust. See Jurisdictional Hearing Transcript, Day 2, p. 250:11-25.

<sup>76</sup> **RER-1**, Expert Report of Margaret Lodise, ¶ 46.

<sup>77</sup> Jurisdictional Hearing Transcript, Day 3, p. 446:3-22.

<sup>78</sup> Jurisdictional Hearing Transcript, Day 3, pp. 365:2-366:10.

<sup>79</sup> **C-265**, Promissory Note between I.Q. Properties and John Tennant, 19 October 2007; Jurisdictional Hearing Transcript, Day 3, p. 441:3-7.

<sup>80</sup> Jurisdictional Hearing Transcript, Day 3, pp. 414:17-415:10.

on **April 19, 2011**, which all three witnesses admitted to having no evidence;<sup>81</sup> (6) John Tennant designating Tennant Travel as the holding company and advising Derek Tennant of this, on **April 26, 2011**, which the witnesses confirmed happened without documentation;<sup>82</sup> (7) John Tennant telling Derek Tennant and John Pennie that he was holding the shares in trust for Tennant Travel, on **April 26, 2011**, also without written evidence;<sup>83</sup> and (8) John Tennant telling Mr. Pennie the shares should be transferred to Tennant Travel, in **April 26, 2011**.<sup>84</sup> All of the alleged events from the month when the Claimant says it became a protected investor – April 2011 – are based on oral assertions and nothing more. This strongly indicates that John Tennant never created the alleged trust, and the Claimant never acquired the Skyway 127 shares at that time.

33. John Tennant obtained the Skyway 127 shares as repayment for a debt exceeding \$270,000 from his brother Derek Tennant.<sup>85</sup> John Tennant and Derek Tennant documented many details of that loan, and the Skyway 127 shares used as collateral to secure it.<sup>86</sup> Given this practice and the substantial monetary sums involved, it is highly implausible that John Tennant transferred beneficial ownership of the shares to Tennant Travel without recording that transaction in writing even once.<sup>87</sup> The absence of any contemporaneous documentation on the alleged trust is sufficient to conclude that the Claimant has not met the standard of proof under international law to prove it was a protected investor before the alleged breach occurred by acquiring the shares through the alleged trust on April 26, 2011.<sup>88</sup>

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<sup>81</sup> Jurisdictional Hearing Transcript, Day 3, pp. 378:22-379:7.

<sup>82</sup> Jurisdictional Hearing Transcript, Day 3, p. 372:7-19.

<sup>83</sup> Jurisdictional Hearing Transcript, Day 3, p. 379:8-15.

<sup>84</sup> Jurisdictional Hearing Transcript, Day 3, p. 377:4-24.

<sup>85</sup> The witnesses confirmed the original \$200,000 loan with resulting interest constituted a debt exceeding \$270,000 when it came due again on April 19, 2011. *See* Jurisdictional Hearing Transcript, Day 3, pp. 351:14-18; 437:5-15.

<sup>86</sup> **C-264**, John Tennant Bank Statements with copies of cashed checks to Derek Tennant, September 2007; **C-265**, Promissory Note between I.Q. Properties and John Tennant, 19 October 2007; **C-266**, Acknowledgement of Promissory Note, 20 October 2007; **C-267**, Demand Notice to I.Q. Properties from John Tennant on Promissory Note, 19 October 2011; **C-267**, Direction to John Pennie, June 20, 2011, p. 2.

<sup>87</sup> *See RLA-180, Europe Cement Investment & Trade SA v. Republic of Turkey* (ICSID Case No. ARB(AF)/07/2) Award, 13 August 2009, ¶ 157. *See also* Jurisdictional Hearing Transcript, Day 3, p. 347:4-6.

<sup>88</sup> **RER-1**, Expert Report of Margaret Lodise, ¶ 38.

34. Second, the witness statements that the Claimant filed in its attempt to prove the alleged trust do not compensate for the evidentiary deficiencies in its case. John Tennant, Derek Tennant, and John Pennie each have an interest in the outcome of the arbitration.<sup>89</sup> They stand to gain significantly from an award in the Claimant's favour. Their statements do not satisfy the clear and convincing standard under California law or the standard of proof under international law, as no contemporaneous documentation corroborates their claims about the alleged trust.<sup>90</sup> Derek Tennant's and John Pennie's testimony on the alleged trust are also hearsay – based on what they say John Tennant told them.<sup>91</sup> This hearsay warrants no weight, as the witnesses have an interest in the outcome of the arbitration, and no reliable evidence corroborates their claims.<sup>92</sup>

35. The witness testimony, both written and oral, is also unreliable due to extensive inconsistencies. Over the course of his direct- and cross-examination, John Pennie reversed his attempted correction and confirmed that John Tennant had not designated a company to hold his Skyway 127 shares by December 30, 2011.<sup>93</sup> In discussing Mr. Pennie's Witness Statement, where Mr. Pennie had stated that the holding company was undesignated in December 2011, the President asked Mr. Pennie: “[s]o, the sentence should read at the end: ‘In December 2011, in Trust for the benefit of the undesignated holding company,’ full stop; correct.” Mr. Pennie replied: “Yes, sir”.<sup>94</sup>

36. Derek Tennant confirmed Mr. Pennie's testimony on this point.<sup>95</sup> This testimony from the Claimant's witnesses raises serious doubt as to the Claimant's assertion that Tennant Travel was

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<sup>89</sup> While the Claimant failed to provide any written evidence on its ownership, the witnesses stated that John Tennant owns 45% of Tennant Energy; John Pennie and his wife, Marilyn Field, own 45%; and Jim Tennant owns 10%. See Jurisdictional Hearing Transcript, Day 3, p. 404:17-23. Moreover, John Tennant and John Pennie are on the management board of Tennant Energy, while Derek Tennant is an advisor to it and the President of Skyway 127. John Pennie is also a Director and Secretary of Skyway 127. See Jurisdictional Hearing Transcript, Day 2, p. 234:2-20.

<sup>90</sup> Jurisdictional Hearing Transcript, Day 4, pp. 650:17-651:4; **RLA-205**, *MAKAE*, ¶ 67; **RLA-175**, *Ampal- American Israel Corporation and others v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11) Decision on Jurisdiction, 1 February 2016 (“*Ampal*”) ¶¶ 306-309.

<sup>91</sup> **CWS-3**, Witness Statement of Derek Tennant, 12 February 2021 (“Derek Tennant Witness Statement”), ¶¶ 21, 24; **CWS-1**, Witness Statement of John Pennie, 7 August 2020 (“John Pennie Witness Statement”), ¶ 48.

<sup>92</sup> **RLA-151**, *EDF – Award*, ¶ 224; **RLA-150**, *Helnan – Award*.

<sup>93</sup> Jurisdictional Hearing Transcript, Day 2, p.247:16-24; **CWS-1**, John Pennie Witness Statement, ¶ 48.

<sup>94</sup> Jurisdictional Hearing Transcript, Day 2, p.254:18-21; **CWS-1**, John Pennie Witness Statement, ¶ 48.

<sup>95</sup> Jurisdictional Hearing Transcript, Day 3, p.454:11-15. John Tennant also said that he was holding the shares in the alleged trust for Tennant Travel or for a company to be named later, suggesting he had not settled on designating Tennant Travel as the trust beneficiary. Jurisdictional Hearing Transcript, Day 3, p.407:20-23. He also confirmed that

a designated beneficiary of the alleged trust on April 26, 2011, before the alleged breach occurred on July 4, 2011.<sup>96</sup> John Pennie's and Derek Tennant's testimony also supports a finding that John Tennant did not create an oral trust at all, due to the lack of a beneficiary, as required by California law.<sup>97</sup> John Tennant contradicted the other witnesses in this respect, alleging he had designated Tennant Travel as the holding company on April 26, 2011. Yet, John Tennant also said the designation occurred in June 2011.<sup>98</sup> Without reliable documentary evidence, there is no manner by which the Tribunal can resolve these inconsistencies.

37. Moreover, four different potential purposes of the alleged trust arose in the Hearing: (1) avoiding a community property dispute;<sup>99</sup> (2) preventing the dilution of voting control;<sup>100</sup> (3) avoiding taxes;<sup>101</sup> and (4) continuity of control over the shares.<sup>102</sup> This inconsistency leaves the purpose of the alleged trust uncertain, and likely not in conformity with California law.<sup>103</sup>

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he could change his mind on the designated beneficiary or transferring the shares to a holding company at all. Jurisdictional Hearing Transcript, Day 3, p. 409:2-12.

<sup>96</sup> John Tennant's letter to the Management Board of Tennant Energy dated February 8, 2016, exhibit **C-268**, states that each subsequent time he received additional Skyway 127 shares, he informed John Pennie and Derek Tennant that he was holding those shares "as a bare trustee for a US company to be designated in the future." This corroborates John Pennie's testimony that the holding company remained undesignated in December 2011.

<sup>97</sup> Jurisdictional Hearing Transcript, Day 4, pp. 617:17-618:5. **R-090**, California Probate Code §15205(a): "(a) A trust, other than a charitable trust, is created only if there is a beneficiary."

<sup>98</sup> Jurisdictional Hearing Transcript, Day 3, p. 406:14-16.

<sup>99</sup> Jurisdictional Hearing Transcript, Day 3, pp. 382:18-25–383:1-18.

<sup>100</sup> Jurisdictional Hearing Transcript, Day 3, p. 384:3-6.

<sup>101</sup> Jurisdictional Hearing Transcript, Day 2, p. 249:21-25.

<sup>102</sup> Jurisdictional Hearing Transcript, Day 3, p. 469:2-5.

<sup>103</sup> **R-090**, California Probate Code § 15203. Jurisdictional Hearing Transcript, Day 4, pp. 570:22-572:8: John Tennant confirmed the \$200,000 loan came from the joint bank account with Barbara Anderson. These funds might constitute community property. Derek Tennant confirmed that his goal was to ensure John Tennant's wife, Barbara Anderson, could not access the voting power of the shares in the event of a divorce. Jurisdictional Hearing Transcript, Day 3, p. 456:8-16: Thus, the purpose of the alleged trust, had John Tennant even tried to create it, might violate public policy under California law. **RER-1**, Expert Report of Margaret Lodise, ¶¶ 28, 38-43.

38. At the Hearing, all three witnesses revised their testimonies on their ownership of Tennant Energy.<sup>104</sup> On many other alleged events, they did not recall what occurred.<sup>105</sup> Their inconsistent testimonies, revised statements, and variable recollections do not offer a reliable basis to establish the Claimant's alleged acquisition of the investment before the alleged breach occurred.

39. Third, the Claimant's expert testimony does not help it establish jurisdiction. Justice Grignon's view that the available evidence on the alleged trust meets the clear and convincing standard assumes the Tribunal accepts the witness's testimony as true.<sup>106</sup> Yet she accepted that a trier of fact would have to weigh the evidence of the alleged trust.<sup>107</sup> Her testimony thus does not assist the Tribunal in determining the veracity of the witness's factual claims.<sup>108</sup> Moreover, her conclusion that their testimony, if true, would meet the high standard to prove that the Claimant became the beneficial owner of the shares on April 26, 2011 is not credible, as John Pennie testified that John Tennant had not identified Tennant Travel as the beneficiary by December 30, 2011.<sup>109</sup>

40. Fourth, the sole exhibit the Claimant filed in attempt to prove the alleged trust, exhibit C-268, should carry no weight. It does not constitute contemporaneous evidence of the alleged trust. Exhibit C-268 was prepared on February 8, 2016, over a year after the alleged trust was purportedly terminated on January 15, 2015, and many years after the alleged breach occurred. Exhibit C-268 was also drafted in contemplation of this arbitration. The document refers to alleged rights under NAFTA. The witnesses confirmed they met with the Claimant's counsel in June 2015 to discuss a NAFTA claim.<sup>110</sup> Moreover, in March 2016, one month after exhibit C-268 was drafted, Cole

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<sup>104</sup> John Pennie never mentioned in his Witness Statement that with his wife, he owned 45% of the Claimant, but stated this on cross-examination. Jurisdictional Hearing Transcript, Day 2, p. 261:4-7. Derek Tennant stated in his Witness Statement that he was a member of Tennant Energy and a member of the Management Board, but clarified on cross-examination that he had no ownership stake in Tennant Energy and was not on the Management Board. **CWS-3**, Derek Tennant Witness Statement, ¶ 46; Jurisdictional Transcripts Day 3, pp. 429:21-430:6, 434:1-5.

<sup>105</sup> See e.g., Jurisdictional Hearing Transcripts, Day 2, pp. 247:16-25, 248:1-3; Day 3, pp. 360:20-361:1, 391:16-25, 457:7-12, 458:3-8, 461:16-25, 458:15-21, 462:3-7.

<sup>106</sup> Jurisdictional Hearing Transcript, Day 4, p. 515:8-11; **CER-2**, Legal Opinion of Margaret Grignon, ¶¶ 12, 28.

<sup>107</sup> Jurisdictional Hearing Transcript, Day 4, p. 516:11-21.

<sup>108</sup> **RLA-205**, *MAKAE*, ¶ 138.

<sup>109</sup> Jurisdictional Hearing Transcript, Day 2, p. 247:16-24.

<sup>110</sup> John Tennant confirmed that after discussing his alleged NAFTA rights with Barry Appleton, he drafted exhibit C-268 discussing his purported NAFTA rights, Jurisdictional Hearing Transcript, Day 3, p. 391:2-23. John Tennant

Robertson, the client representative of Mesa Power in its NAFTA claim, confirmed Mesa Power's consent to share non-confidential information arising from the *Mesa Power* arbitration with other clients of Mr. Appleton.<sup>111</sup> Thus, exhibit C-268 was drafted around the time counsel was taking steps to prepare this claim. As a non-contemporaneous document, prepared after the alleged breach, in contemplation of arbitration, exhibit C-268 is simply not reliable evidence that would corroborate the witness claims about the alleged trust.<sup>112</sup>

41. Fifth, the evidence on the record offers compelling reasons to conclude that John Tennant never created the alleged trust. John Tennant confirmed at the Hearing that once he obtained the Skyway 127 shares, he intended to transfer the shares to a holding company, not hold them in trust.<sup>113</sup> John Tennant and Derek Tennant confirmed that their agreement was for John Tennant to put the shares in a holding company.<sup>114</sup> John Tennant said he instructed John Pennie to transfer the shares to the holding company on April 26, 2011.<sup>115</sup> John Tennant was unable to explain why he would create a trust when he had already told John Pennie to transfer ownership of the shares to the holding company.<sup>116</sup> The fact that the transfer did not occur until January 15, 2015 confirms John Tennant's plan to transfer the shares to the holding company. In addition, the purported purposes of the alleged trust, such as preserving continuity of legal ownership over the shares and preventing dilution of voting control, speak clearly to the objective of transfer the shares to a holding company.<sup>117</sup> An intention to put shares into a holding company should not be conflated

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also noted that the term "bare trustee" contained in exhibit C-268 was suggested by someone else, as he did not know what it meant. *See* Jurisdictional Hearing Transcript, Day 3, p. 408:2-9.

<sup>111</sup> Email from Edward Mullins to the Tribunal, dated 14 March 2021, attaching "2016-03-14 – notes from call with T. Boone Pickens re Mesa Power".

<sup>112</sup> **RLA-175**, *Ampal*, ¶¶ 303-306; **RLA-004**, *Gallo*, ¶¶ 291-296.

<sup>113</sup> Jurisdictional Hearing Transcript, Day 3, p. 406:21-24.

<sup>114</sup> Jurisdictional Hearing Transcript, Day 3, pp. 363:2-9; 369:4-8; 406:22-23; 449:2-6.

<sup>115</sup> John Tennant confirmed on cross-examination that he wanted John Pennie to transfer the shares to Tennant Travel within a "reasonable time". Jurisdictional Hearing Transcript, Day 3, p. 377:20-24.

<sup>116</sup> Jurisdictional Hearing Transcript, Day 3, pp. 378:22-379:3.

<sup>117</sup> Derek Tennant considered the "wise" approach was to put the shares in a holding company. Jurisdictional Hearing Transcript, Day 3, pp. 448:15-19; 469:6-22.



with an intention to create an oral trust. It is highly uncertain that John Tennant properly manifested an intention to create a trust, as California law requires.<sup>118</sup>

42. Furthermore, the Skyway 127 shareholder ledgers – the few contemporaneous documents on the record – indicate John Tennant did not acquire the Skyway 127 shares on April 19, 2011, but did so on June 20, 2011.<sup>119</sup> This evidence contradicts the Claimant's claim that John Tennant acquired the shares on April 19, 2011 and transferred beneficial ownership of the shares to Tennant Travel on April 26, 2011.<sup>120</sup> Without owning the shares, John Tennant could not create a trust on April 19, 2011 under California law, as there was no trust property.<sup>121</sup> Moreover, under the Acknowledgement, John Tennant and I.Q. Properties would have been required to send a written consent or direction to transfer the shares to Tennant Travel on April 26, 2011,<sup>122</sup> because John Tennant did not acquire the shares on April 19, 2011.<sup>123</sup> The witnesses confirmed no such written consent or direction was made.<sup>124</sup> Further, the ledgers indicate that Tennant Travel first acquired ownership of the Skyway 127 shares on January 15, 2015, years after the alleged breach.<sup>125</sup>

43. The available evidence does not meet the clear and convincing standard to prove the existence of the alleged oral trust under California law.<sup>126</sup> Consequently, the Claimant failed to

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<sup>118</sup> **R-090**, California Probate Code, § 15201.

<sup>119</sup> **C-116**, Shareholder's Ledger Skyway 127, 9 June 2011; **C-117**, Shareholder's Ledger Skyway 127, 20 June 2011. John Pennie stated that he did not transfer the shares to John Tennant before June 20, 2011, because he did not have the signed share certificate from Derek Tennant. Jurisdictional Hearing Transcript, Day 3, pp. 243:9-11; 246:7-18.

<sup>120</sup> John Tennant acknowledged that exercising the call option in the Promissory Note was not automatic on April 19, 2011, as he had a choice of five options upon Derek Tennant's default on the loan. Jurisdictional Hearing Transcript, Day 3, p. 352:5-15. He provided no contemporaneous evidence of exercising the call option on April 19, 2011.

<sup>121</sup> **R-090**, California Probate Code, §15202: "A trust is created only if there is trust property." See also **RER-1**, Expert Report of Margaret Lodise, ¶ 48.

<sup>122</sup> **C-266**, Acknowledgement of Promissory Note between I.Q. Properties and John Tennant, 20 October 2007; **RER-1**, Expert Report of Margaret Lodise, ¶ 47; Jurisdictional Hearing Transcript, Day 3, p. 439:3-19.

<sup>123</sup> John Tennant acknowledged that according to the Claimant's Memorial, he did not acquire the shares on April 19, 2011. Jurisdictional Hearing Transcript, Day 3, p. 354:15-22.

<sup>124</sup> Jurisdictional Hearing Transcript, Day 3, pp. 355:14-17, 442:3-6.

<sup>125</sup> **C-115**, Shareholder's Ledger Skyway 127, 15 January 2015. John Tennant conceded that his previous testimony that on January 15, 2015, John Pennie and Marilyn Field transferred their shares to John Tennant as trustee was incorrect, as they transferred them to Tennant Travel then. **CWS-2**, Witness Statement of John Tennant, 3 February 2021 ("John Tennant Witness Statement"), ¶¶28-29; Jurisdictional Hearing Transcript, Day 3, pp. 361:8-362:14.]

<sup>126</sup> **RER-1**, Expert Report of Margaret Lodise ¶ 50.

prove that it acquired ownership of the investment on April 26, 2011 such that it became a protected “investor of a Party” under NAFTA before the alleged breach occurred on July 4, 2011.

### **3. The Claimant Failed to Prove It Controlled the Investment, or Skyway 127 Itself, When the Alleged Breach Occurred**

44. At the Hearing, the Tribunal inquired into the parties’ positions on the indicia to find control of an investment.<sup>127</sup> Canada first notes that both of the Claimant’s assertions of control over the investment and Skyway 127 itself are faulty because they depend on the existence of the unproven trust. Under the Claimant’s own case, it could only control the investment if it beneficially owned the Skyway 127 shares through the alleged trust. Without the alleged trust, the Claimant did not explain how Tennant Travel could have controlled the investment.

45. Similarly, the Claimant alleged it controlled Skyway 127 through a voting bloc of John Tennant, John Pennie, and Marilyn Field. This argument is irrelevant because Skyway 127 was not the investment when the alleged breach occurred. Nonetheless, the Claimant did not explain how it controlled Skyway 127 other than through its beneficial ownership of the shares allegedly held in trust. Thus, its case on control over Skyway 127 also collapses with its failure to prove the alleged trust. Despite this outcome, Canada addresses the legal standard to prove control and the Claimant’s assertion that it controlled Skyway 127 itself through the alleged voting bloc.<sup>128</sup>

46. While NAFTA does not define the term “control”, investment tribunals have held that “control” can take two forms: legal control and *de facto* control.<sup>129</sup> 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. 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 of property rights.<sup>130</sup>

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<sup>127</sup> The Claimant appeared to drop its argument on control at the hearing. Jurisdictional Hearing Transcript, Day 5, pp. 819:15-16: “And the control issue for purposes of this, is not really relevant for purposes of jurisdiction [...]”, 838:14-17: “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 [...]”

<sup>128</sup> Claimant’s Reply Memorial on Jurisdiction ¶¶ 149, 154; CWS-2, John Tennant Witness Statement, ¶¶ 24-25.

<sup>129</sup> See e.g., RLA-121, *B-Mex- Partial Award*, ¶ 220.

<sup>130</sup> RLA-181, *Joshua Dean Nelson v. United Mexican States* (UNCITRAL) Final Award, 5 June 2020, ¶¶ 189-191; RLA-182, *Perenco Ecuador Limited v. Republic of Ecuador* (ICSID Case No. ARB/08/6) Decision on Jurisdiction and Liability, 12 September 2014 (“*Perenco – Decision on Jurisdiction*”), ¶ 526.

Where there is no legal control, it is imperative to provide compelling evidence to prove *de facto* control. Investment tribunals maintain a high standard of proof to establish *de facto* control.<sup>131</sup>

47. Control may be established where one holds the power to appoint a majority of the board of directors, or otherwise has the rights to direct the actions of the enterprise.<sup>132</sup> However, where a voting bloc lacks majority voting power, a tribunal cannot infer control in the absence of compelling evidence of the bloc acting in concert with other voters.<sup>133</sup> Day-to-day operational management of the enterprise does not, on its own, establish control of an enterprise.<sup>134</sup>

48. In this case, Ontario law is relevant to assessing if Tennant Travel controlled Skyway 127, which is an Ontario enterprise. The *Ontario Business Corporations Act* states that a corporation is “controlled” when one holds over 50% of the votes that may be cast to elect directors of the corporation; and the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the corporation.<sup>135</sup> Tennant Travel did not acquire a majority of voting shares in Skyway 127 until 2016 at the earliest. Thus under Ontario law, the Claimant did not have legal control over Skyway 127 when the alleged breach occurred. Nor did the alleged voting bloc hold such control, as its voting power was approximately 45% of Skyway 127 shares.<sup>136</sup>

49. Moreover, the Claimant’s witnesses conceded that they could provide no contemporaneous written evidence that the alleged voting bloc existed, that it voted together, or that GE Energy did

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<sup>131</sup> **CLA-136**, *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL) Award, 26 January 2006, ¶¶ 106-107; **RLA-182**, *Perenco – Decision on Jurisdiction*, ¶ 526; **RLA-183**, *Aguas del Tunari, S.A., v. Republic of Bolivia* (ICSID Case No. ARB/02/3) Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, ¶ 264; **RLA-121**, *B-Mex – Partial Award*, ¶ 220.

<sup>132</sup> **RLA-184**, *United Utilities (Tallinn) B.V. and Aktiaselts Tallinna Vesi v. Republic of Estonia* (ICSID Case No. ARB/14/24) Award, 21 June 2019, ¶ 369.

<sup>133</sup> **RLA-206**, *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41) Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021 (“*Eco Oro – Decision*”), ¶ 252. Evidence of a voting bloc acting in concert might not be sufficient to establish control.

<sup>134</sup> **RLA-141**, *Phillip Morris Asia Limited v. Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 497. The tribunal considered that oversight and management did not seem sufficient to establish control, but found the claimant had not demonstrated management control. *See also* **RLA-185**, *Vacuum Salt Products Limited v Republic of Ghana* (ICSID Case No. ARB/92/1) Award, 16 February 1994, ¶ 53.

<sup>135</sup> **R-097**, Ontario Business Corporations Act, R.S.O. 1990, c. B.16 [Excerpt], s. 1(5).

<sup>136</sup> Canada’s Rejoinder Memorial on Jurisdiction, ¶ 61; Jurisdictional Hearing Transcript, Day 3, p. 399:20-23. *See also* **RLA-206**, *Eco Oro – Decision*, ¶¶ 240-243.

not vote its 50% shareholding in Skyway 127 in 2011.<sup>137</sup> John Tennant and Derek Tennant also confirmed at the Hearing that Tennant Travel did not otherwise hold the rights to direct the actions of Skyway 127.<sup>138</sup> Finally, Skyway 127 never informed the Ontario Power Authority that Tennant Travel acquired control over it in 2011, although the FIT Rules almost certainly would have required it to provide this notification.<sup>139</sup> Thus, the Claimant failed to prove it acquired legal or *de facto* control over the investment or Skyway 127 itself before the alleged breach occurred.

50. The Claimant has not met its burden under Article 1116(1) to establish that it was a protected “investor of a Party” when the alleged breach occurred, due to the many missing evidentiary links in its case. Lacking any contemporaneous documentation to prove its alleged ownership and control of the investment at that time, the Claimant’s case relies extensively on oral evidence alone, from witnesses who have an interest in the outcome of the arbitration, and who offered inconsistent testimonies at the Hearing. Moreover, the Claimant’s attempt to create jurisdiction with its alternative legal theories on *S.D. Myers* and the assignment of claims are incorrect and unsupported under the text of NAFTA or investment case law. Thus, the Claimant failed prove Canada’s consent to arbitration, and the Tribunal has no jurisdiction over this NAFTA claim.

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

51. The Claimant bears the burden to prove it submitted its claim in accordance with the limitation period prescribed in Article 1116(2). The NAFTA Parties do not consent to arbitrate any disputes that are untimely under this provision. The facts giving rise to the single alleged breach

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<sup>137</sup> Jurisdictional Hearing Transcript, Day 2, p. 274:1-11; Jurisdictional Hearing Transcript, Day 3, pp. 400:3-6; 465:13-16. Although the alleged transfer of shares from GE Energy to Tennant Energy is not relevant, as it occurred after the alleged breach, Canada notes that the Claimant failed to prove that GE Energy did, in fact, transfer shares to Tennant Energy in 2016 or 2017. John Tennant could not recall this transfer happening in 2016. *See* Jurisdictional Hearing Transcript, Day 2, p. 266:10-12. It appears two non-U.S. nationals, John Pennie and Derek Tennant, transferred 50% of Skyway 127 shares around that time. 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 Canada on these points, a claim could not be assigned here because there was not continuous U.S. national ownership over Skyway 127.

<sup>138</sup> John Tennant and Derek Tennant acknowledged on cross-examination that they could not identify any evidence of these indicators of control, or any other documentation of Tennant Travel effectively controlling Skyway 127. Jurisdictional Hearing Transcript, Day 3, pp. 400:1-21; 465:13-466:1.

<sup>139</sup> **R-026**, Ontario Power Authority, FIT Rules, Version 1.2, 19 November 2009, s. 12.1(b) (Assignment and Change of Control). *See also* Canada’s Rejoinder Memorial on Jurisdiction, fn. 141.

of Article 1105 that the Claimant alleges – that the FIT Program was administered in a manner that allegedly favoured certain political favourites – were either known or should have been known to the Claimant prior to the Critical Date for applying the three-year limitation period of June 1, 2014.

52. At the Hearing, the Claimant continued to advance a series of unsupported legal theories and factual arguments relating to the timeliness of its claim. While frequently unclear,<sup>140</sup> the Claimant's arguments appear to rest on the Tribunal finding that information the Claimant learned during the *Mesa Power* proceeding was previously “supressed”, such that it could not have learned of such information prior to August 2015. However, the Claimant's arguments must fail

53. In Section III.A, Canada demonstrates that the legal principles applicable to Article 1116(2) are well-settled and require a claimant to demonstrate that it did not, and could not, acquire knowledge of the alleged breach and resulting loss or damage prior to the Critical Date. In Section III.B, Canada demonstrates that the Claimant has failed to meet its burden. The Claimant has not put forward any evidence to support its allegations of suppression of information. In fact, the Claimant confirmed at the Hearing that no new information arose after the Critical Date such that it could not have brought its claim well before the expiration of the limitation period in Article 1116(2). Further, to the extent such information is new, it does not rise to a self-standing cause of action such that the Claimant's claim is timely under Article 1116(2).

**A. The Legal Principles Applicable to Article 1116(2) Are Well-Settled and Require a Claimant to Demonstrate That It Did Not and Could Not Acquire Knowledge of the Alleged Breach and Resulting Loss or Damage Prior to the Critical Date**

**1. The Burden is Squarely on the Claimant to Establish this Tribunal's Jurisdiction under Article 1116(2)**

54. The Claimant continues to rely on legal theories that find no support in the text of Article 1116(2) or in investment jurisprudence. It is well-settled law that a claimant bringing a claim under NAFTA Chapter Eleven bears the burden of proving that it has satisfied the conditions precedent to commence arbitration and that a tribunal has jurisdiction over the dispute, including the requisite

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<sup>140</sup> Jurisdictional Hearing Transcript, Day 1, pp. 131:16-18; 134:8-9; Day 5, pp. 736:16-737:13.

factual elements.<sup>141</sup> This includes the requirements of Article 1116(2), which are matters of a tribunal's jurisdiction, not admissibility.<sup>142</sup> This has been confirmed by all three NAFTA Parties.<sup>143</sup> There is no jurisprudence to support the position that objecting to a tribunal's jurisdiction under Article 1116(2) is an affirmative defence such that the burden of proof shifts to Canada. Indeed, this line of argument has been expressly rejected by NAFTA tribunals.<sup>144</sup>

55. To meet its burden under Article 1116(2), Tennant Energy must demonstrate that it did not, or could not, acquire knowledge of the alleged breach and loss or damage before the Critical Date. A claimant must demonstrate that, based on the facts of its case, there was no manner in which it could obtain actual knowledge of the alleged breach and loss or damage prior to the Critical Date (for example, that there was suppression of information), or that there was insufficient information available to support an objective finding of constructive knowledge. Article 1116(2) does not require the Claimant to prove a negative – that it did not have actual knowledge.

56. In this case, the Claimant has alleged that suppression of certain information prevented it from acquiring knowledge, both actual and constructive, of the alleged breach prior to the Critical Date. It alleges that “Canada never disclosed special preferential treatment to International Power, or they never disclosed the existence of the Breakfast Club” until the *Mesa Power* post-hearing briefs were public in 2015.<sup>145</sup> In order to overcome the three year limitation period stipulated in Article 1116(2) it is therefore incumbent on the Claimant to prove two elements: (i) there was suppression of information such that the Claimant could not have acquired knowledge of such

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<sup>141</sup> Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 16-21; Canada's Counter-Memorial on Jurisdiction, ¶¶ 58-61, Jurisdictional Hearing Transcript, Day 1, pp. 23:23–24:18.

<sup>142</sup> The three NAFTA Parties and NAFTA Tribunals have expressly rejected the characterization of such objections as ones of admissibility. *See* Canada's Counter-Memorial on Jurisdiction, ¶¶ 55-57; Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 12-15.

<sup>143</sup> At the hearing, Arbitrator Bishop asked “Has there been any official statement from the NAFTA Commission on whether Article 1116 is jurisdictional or not?” *See* Jurisdictional Hearing Transcript, Day 5, p. 874:12-14. While no such statement exists, all three NAFTA Parties have confirmed this position (*See* Canada's Counter-Memorial on Jurisdiction, fn.127; Second Article 1128 Submission of the U.S., ¶ 3, Second Article 1128 Submission of Mexico, ¶ 4.) Such confirmation should be given significant weight by this Tribunal in accordance with the Vienna Convention on the Law of Treaties, Article 31(3) (**RLA-031**, VCLT).

<sup>144</sup> *See* Canada's Counter-Memorial on Jurisdiction, ¶ 57 and footnotes therein; and Canada's Rejoinder on Jurisdiction, ¶¶ 18-20 and footnotes therein.

<sup>145</sup> Jurisdictional Hearing Transcript, Day 5, p. 864:22-24.

information prior to the Critical Date; and (ii) the information that allegedly only became known to it after the Critical Date is a measure rising to a cause of action that is separate and distinct from pre-Critical Date conduct of which it had knowledge. As explained below, the Claimant has failed on both accounts.

## 2. The Legal Test with Respect to the Limitation Period Under Article 1116(2) is Well-Settled

57. At the Hearing, the Claimant was asked by the Tribunal to confirm whether the dispute between the parties was a dispute about the legal standard or instead “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”.<sup>146</sup> In response, the Claimant indicated that it does not “believe”<sup>147</sup> the legal standard put forward by Canada applies.<sup>148</sup> However, the Claimant has not put forward any legal argument, either in the form of jurisprudence or otherwise, in response to Canada’s position that the correct legal test to apply with respect to Article 1116(2) is illustrated in *Grand River*, *Bilcon*, and *Mondev*, as well as the non-NAFTA cases, *Spence*, *Ansung*, *Nissan Motor*, and *Indian Metals*.<sup>149</sup> Moreover, even if it was relevant, the Claimant has not provided a rebuttal to the long-standing principle that a continuing breach does not toll the limitation period.<sup>150</sup> Therefore, the sole issue with respect to Canada’s Article 1116(2) objection that requires a determination by this Tribunal is the factual knowledge (either actual or constructive) of the Claimant.

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<sup>146</sup> Jurisdictional Hearing Transcript, Day 5, p. 886:4-10.

<sup>147</sup> Jurisdictional Hearing Transcript, Day 5, p. 886:18.

<sup>148</sup> Jurisdictional Hearing Transcript, Day 5, pp. 886:17-889:10.

<sup>149</sup> **RLA-070**, *Grand River Enterprises Six Nations, Ltd., et al v. United States of America* (UNCITRAL), Decision on Objections to Jurisdiction, 20 July 2006 (“*Grand River – Decision on Jurisdiction*”), ¶ 59; **RLA-003**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015 (“*Bilcon – Award on Jurisdiction*”), ¶ 275; **RLA-083**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 87; **RLA-161**, *Ansung Housing Co., Ltd. v. People’s Republic of China* (ICSID Case No. ARB/14/25) Award, 9 March 2017, ¶ 113; **RLA-155**, *Nissan Motor Co., Ltd. v. Republic of India* (UNCITRAL) Decision on Jurisdiction, 29 April 2019, ¶ 325; **RLA-142**, *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia* (UNCITRAL) Award, 29 March 2019, ¶ 108; **RLA-136**, *Spence International Investments, LLC, Berkowitz, et al. v. Republic of Costa Rica* (UNCITRAL) Corrected Interim Award, 30 May 2017 (“*Spence – Corrected Interim Award*”), ¶ 299.

<sup>150</sup> Jurisdictional Hearing Transcript, Day 1, pp. 57:11- 58:2; Canada’s Counter-Memorial on Jurisdiction, fn. 252; Canada’s Rejoinder Memorial on Jurisdiction, ¶ 81 and footnotes therein.

### 3. The Limitation Period in Article 1116(2) Begins to Run with Actual or Constructive Knowledge; Either is Sufficient

58. The limitation period in Article 1116(2) is triggered at one of two points in time: (i) a claimant has acquired actual knowledge, or (ii) a claimant has acquired constructive knowledge, of both the alleged breach and the alleged loss or damage.<sup>151</sup> These are two distinct categories of knowledge. If a claimant acquired knowledge under either category before the Critical Date, then a tribunal has no jurisdiction under Article 1116(2).

59. At the Hearing, the Tribunal inquired into the relevance of the subjective reasons for bringing a claim. Constructive knowledge “of a fact is imputed to a person if by exercise of reasonable care or diligence, the person would have known of that fact.”<sup>152</sup> This is an objective test, contrasted to the subjective notion of actual knowledge.<sup>153</sup> Once constructive knowledge is imputed to a claimant, its subjective knowledge – including the reason why it does not pursue a claim at a particular time – is irrelevant under Article 1116(2). A claimant’s actual knowledge (or lack thereof) does not change this conclusion. A claimant cannot simply “wait and see” if further facts come to light, or if a similarly situated claimant will be successful in other litigation with respect to the same or similar measures. The limitation period in Article 1116(2) is “not subject to any suspension, prolongation or other qualification.”<sup>154</sup>

60. Further, at the Hearing, the Tribunal raised a question about the reasonableness of the Claimant’s inquiries regarding the alleged breach,<sup>155</sup> and whether Canada’s position rested solely on constructive notice deriving from the existence of the *Mesa Power* arbitration.<sup>156</sup> Canada’s case does not turn on the Claimant’s inquiries or constructive notice arising out of the *Mesa Power*

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<sup>151</sup> **RLA-070**, *Grand River – Decision on Jurisdiction*, ¶¶ 53, 58; **RLA-003**, *Bilcon – Award on Jurisdiction*, ¶ 273. See also: **RLA-082**, *Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3) Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶¶ 193, 217; **RLA-136**, *Spence – Corrected Interim Award*, ¶ 170.

<sup>152</sup> **RLA-070**, *Grand River – Decision on Jurisdiction*, ¶ 59.

<sup>153</sup> **RLA-136**, *Spence – Corrected Interim Award*, ¶¶ 163 (“to an objective standard”), 170 (“what, as an objective matter”), 209 (“is an objective standard”).

<sup>154</sup> **RLA-070**, *Grand River – Decision on Jurisdiction*, ¶ 29.

<sup>155</sup> Jurisdictional Hearing Transcript, Day 5, pp. 771:15-773:9.

<sup>156</sup> Jurisdictional Hearing Transcript, Day 1, pp. 78:16-82:13.



arbitration. Instead, it is the public record that demonstrates that the Claimant had constructive knowledge of the alleged breach prior to the Critical Date. This public record includes the documents Mesa Power *relied on* to make its allegations in its notice of arbitration and other submissions (which were also available to the Claimant),<sup>157</sup> news articles which the Claimant acknowledged reading or being aware of at the Hearing,<sup>158</sup> the FIT applicant rankings that were available before the July 4, 2011 FIT Contract awards,<sup>159</sup> the July 4, 2011 contract awards,<sup>160</sup> the Ontario Auditor General's report<sup>161</sup> (which received widespread press coverage<sup>162</sup>), public information on political donations,<sup>163</sup> and numerous Minister of Energy directions to the OPA.<sup>164</sup>

61. Constructive knowledge from publicly available information starts the limitation period. The Claimant's inquiries (whether reasonable or not) do not change what information was readily

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<sup>157</sup> See **C-129**, Ontario Power Authority, Feed-In Tariff Program, FIT Rules, Version 1.5, 3 June 2011; **C-126**, *Green Energy Act*, S.C. 2009 c.12, Schedule. A, 1 July 1905; **C-127**, *Feed In Program Overview, Program Overview* August 2010; **C-104**, Bruce Transmission Project Rankings, 21 December 2010; **C-174**, Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), Direction to the OPA, 24 September 2009; **C-132**, Samsung C&T Press Release, 21 January 2010; **C-139**, Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 1 April 2010; **C-142**, Pattern Energy Press Release, 18 April 2011; **C-128**, Feed in Tariff Program, Program Update, *Priority ranking for First Round FIT Contracts*, 21 December 2010; **C-160**, *Electricity Act*, 1998, S.O. 1998, c.15 Schedule A, last amended 2010, c.8, 2 July 1905; **C-155**, Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 2 August 2011; **C-176**, Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 2 August 2011; **C-143**, *Allocating Capacity and Offering FIT Contracts for Bruce to Milton Enabled Projects*, IESO Public News Release, 3 June 2011; **C-147**, Ministry of Energy, Statement of Minister of energy, the Honourable Brad Duguid, 3 August 2011; **C-193**, Pattern Energy Press Release, 26 April 2011.

<sup>158</sup> Jurisdictional Hearing Transcript, Day 2, pp. 289:4-291:8.

<sup>159</sup> **C-029**, Skyway 127 – Statement for the year ended Dec 31, 2010, 31 December 2010.

<sup>160</sup> **C-025**, Bruce-Milton Contract List – July 4, 2011, 4 July 2011.

<sup>161</sup> **R-002**, Office of the Auditor General of Ontario, 2011.

<sup>162</sup> Canada's Counter-Memorial on Jurisdiction, fns. 99, 343; Canada's Rejoinder Memorial on Jurisdiction, fn. 220.

<sup>163</sup> **C-220**, NextEra's Political Contributions to the Ontario Liberal Party, 2011. See **C-182**, *Mesa Power Group LLC v. Government of Canada* (PCA Case No, 2012-17), Reply Memorial of the Investor (Public Version), 30 April 2014, ¶¶ 319 and 778, citing to political donations that were public in 2011. See also **C-203**, *Mesa Power Group LLC v. Government of Canada* (PCA Case No, 2012-17), Witness Statement of Peter Wolchak, 28 April 2014, ¶ 30.

<sup>164</sup> **R-043**, Direction from Brad Duguid, Minister of Energy, to Colin Andersen, Ontario Power Authority, 17 September 2010; **C-152**, Direction from Minister of Energy, Bob Chiarelli to Colin Anderson, OPA, 12 June 2013; **C-174**, Letter from George Smitherman (Minister of Energy and Infrastructure) to Colin Andersen (OPA), Direction to the OPA, 24 September 2009; **C-186**, Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, 30 September 2009; **C-222**, Letter from Minister Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), Direction to the OPA, 17 February 2011; **C-152**, Direction from Minister of Energy, Bob Chiarelli to Colin Anderson, OPA.

available to the Claimant in the public domain. This Tribunal must still assess, as a separate question, whether constructive knowledge of an alleged breach and loss can be imputed to the Claimant from the expansive public record pertaining to the alleged breach, which in this case existed irrespective of the *Mesa Power* arbitration itself and which was readily available to the Claimant.

**B. The Claimant Has Failed to Demonstrate that it Did Not, and Could Not, Have Acquired Knowledge of the Alleged Breach Prior and Loss or Damage Prior to the Critical Date**

62. As set out in Canada's Counter-Memorial,<sup>165</sup> Rejoinder,<sup>166</sup> and at the Hearing,<sup>167</sup> the Claimant had constructive knowledge of the alleged breach prior to the Critical Date. This is true even without taking three years of evidence arising out of the public pleadings in the *Mesa Power* arbitration into account, despite the additional support those documents provide for Canada's position. Here, Canada provides further submissions arising out of specific questions raised by the Tribunal at the Hearing.

**1. The Information Revealed at the *Mesa Power* Hearing Was Available to the Claimant Prior to the Critical Date**

63. Mr. Pennie admitted at the Hearing that he had a sense of unfairness with respect to the FIT Program contract awards in 2011.<sup>168</sup> He similarly stated as such in its witness statement.<sup>169</sup> When asked at the Hearing by his counsel what he saw in August 2015 that was "so shocking that was different from what you saw before", Mr. Pennie replied:

Well, I saw that IPC, International Power Corporation, the President Mike Crawley was also the President of the Ontario Liberal Party and the Federal Liberal Party. They had gotten preferential treatment out of the West of London Zone, and they had--they had projects that didn't get contracts in the first go-round of that zone, and I think they were blocked because in June--in 2011—I'm trying to think of the date--it might have been May; I'm not sure--the Minister of Energy had issued a directive reserving 500 megawatts in the West of London

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<sup>165</sup> Canada's Counter-Memorial on Jurisdiction, ¶¶ 117-158.

<sup>166</sup> Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 82-108.

<sup>167</sup> Jurisdictional Hearing Transcript, Day 1, pp. 69:1-99:9.

<sup>168</sup> Jurisdictional Hearing Transcript, Day 5, p. 754:2-8.

<sup>169</sup> CWS-1, John Pennie Witness Statement, ¶¶ 32, 42, 61, 75, 81, 86.

Zone for the Samsung Consortium, so it appeared that he got blocked by that earlier, in contracts earlier, so he was allocated given secret access to the Breakfast Club which I had no idea even existed, senior officials to connect into the Bruce, which was given in a five-day window to change a connection point way back in June of--I think it was June 4th, 2011. So, he had used that special access to get contracts, and I wasn't aware of that until then.<sup>170</sup>

64. However, all of the factual information described above was publicly available to Mr. Pennie, and therefore to the Claimant, prior to the Critical Date. Mr. Crawley's relationship with International Power was public in 2011.<sup>171</sup> The fact that International Power did not get a FIT Contract "in the first go around" was public in 2010.<sup>172</sup> The Ministerial direction setting aside 500MW of transmission in the West of London Area for the Korean Consortium was public in 2009.<sup>173</sup> The five day connection point change window was public on June 3, 2011.<sup>174</sup> The fact that International Power subsequently received a FIT Contract was public on July 4, 2011.<sup>175</sup> Mr. Pennie himself admitted to analyzing which FIT applicants received contracts as a result of the June 3, 2011 Direction in September 2011.<sup>176</sup> Further, Mr. Pennie's comment about "secret access to the breakfast club" is unavailing. As explained below, no such "secret access" existed – this comment from Mr. Pennie is an unsupported allegation. The Claimant has not put forward any evidence in its Memorial or otherwise that demonstrates that International Power met with anyone at the Ministry of Energy or the OPA, either in secret or otherwise. The Claimant's case on its ability to acquire knowledge under Article 1116(2), and this Tribunal's jurisdiction, cannot rest on unsupported factual allegations.

65. Further, despite the Claimant's assertion at the Hearing that the situation with respect to International Power "is a totally different situation [and] is significantly worse" from the events

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<sup>170</sup> Jurisdictional Hearing Transcript, Day 2, p. 318:3-24.

<sup>171</sup> **C-166**, Meet Mike, mikecrawley.ca, 2012.

<sup>172</sup> **C-104**, Bruce Transmission Project Rankings, 21 December 2010.

<sup>173</sup> **C-186**, Letter from George Smitherman (Minister of Energy) to Colin Andersen (OPA), Direction to OPA, 30 September 2009.

<sup>174</sup> **C-176**, Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, 3 June 2011.

<sup>175</sup> **C-025**, Bruce-Milton Contract List, 4 July 2011.

<sup>176</sup> See Jurisdictional Hearing Transcript, Day 2, pp. 278:7-280:1, referring to **C-027**, Skyway 127 Project History – Attachments only- Sept 1, 2011.

relating to NextEra,<sup>177</sup> the Claimant has not provided any argument, or evidence, as to how this is the case – not in its written submissions or at the Hearing. Both International Power and NextEra were in line for a FIT Contract along with Skyway 127. Both International Power and NextEra had connections with the Liberal Party of Ontario that were publicly known by 2011-2012,<sup>178</sup> and both received FIT Contracts following the June 3, 2011 FIT Rule change. Moreover, the Claimant's Article 1105 analysis in its Memorial focuses almost exclusively on treatment to the Korean Consortium and NextEra, not International Power.<sup>179</sup> In fact, in arguing that the June 3, 2011 Direction violated Article 1105, the Claimant's arguments focus solely on NextEra.<sup>180</sup> The Claimant does not even attempt to explain how alleged favourable treatment of International Power played into the decision to issue the June 3, 2011 Direction, the subsequent FIT Rule change, or the award of FIT Contracts on July 4, 2011.

66. The Claimant has not articulated anything distinct about its allegations with respect to International Power that distinguish them from its allegations with respect to NextEra. The Claimant's allegations with respect to International Power (which make up three paragraphs of its entire Notice of Arbitration)<sup>181</sup> do nothing more than mirror the allegations made in the previous paragraphs with respect to NextEra in so far as there was alleged political favouritism that affected the outcome of the FIT Contract awards.<sup>182</sup> The Claimant's one reference to the Breakfast Club in

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<sup>177</sup> Jurisdictional Hearing Transcript, Day 5, p. 891:16-19.

<sup>178</sup> **C-166**, Meet Mike, mikecrawley.ca, 2012; **C-164**, Liberals elect Mike Crawley as new party president, *National Post*, 15 January 2012; **C-220**, NextEra's Political Contributions to the Ontario Liberal Party, 2011.

<sup>179</sup> The Claimant's Article 1105 analysis spans ¶¶ 490-680 of its Memorial on Jurisdiction. Only 10 paragraphs of this entire section focus on International Power. The remaining sections alleged that the following breached Article 1105 with a focus on NextEra and the Korean Consortium particularly: alleged advanced notice to NextEra of the June 3, 2011 FIT Rule change (¶¶ 501-510); alleged special privileges granted to Samsung (¶¶ 511-534); the implementation of the June 3, 2011 Rule change (¶¶ 535-568); alleged special privileges granted to NextEra to connect to the Bruce to Longwood Line (¶¶ 569-579); alleged unfair and non-transparent behaviour of Ontario officials with respect to the ECT, allowable transmission caps, and connection point changes (¶¶ 580-628); and alleged pervasive political influence (¶¶ 629-680).

<sup>180</sup> See Claimant's Memorial on Jurisdiction, ¶¶ 501-579.

<sup>181</sup> NOA, ¶¶ 80-81, 111; International Power is also mentioned in passing in ¶ 121(b).

<sup>182</sup> NOA, ¶¶ 74-79. Indeed, later on in its NOA, the Claimant states that "at least one applicant, NextEra, was given access to high-level government officials and succeeded in lobbying for a FIT Rule change while at the time receiving prior knowledge of the change" and that "the result was a capriciously misapplied process [which] culminated in a significant rule change." (See NOA, ¶¶ 106 and 108). The Claimant has failed to demonstrate how eventually learning that International Power received alleged special treatment in any way changes the Claimant's ability to articulate this claim. Indeed, NOA, ¶ 107 could be entirely removed and the Claimant's claim would not change. Paragraph 107 is

its Notice of Arbitration is even more cursory.<sup>183</sup> The Claimant cannot parse facts related to International Power and the Breakfast Club from the other facts in its claim with respect to the limitations period in Article 1116(2) and then argue that those same facts form the basis of its Article 1105 claim.

67. The Claimant could have filed the same claim in 2011 that it filed in 2017. Had it done so, it would not have resulted in a response from Canada that such a claim was “unparticularized” or that the Tribunal should “strike out” the claim because the allegations were unclear, as the Tribunal inquired at the Hearing.<sup>184</sup> Simply speaking, one could remove the three paragraphs on International Power and one reference to the Breakfast Club and be left with the exact same claim – alleged undue political interference that prevented the Claimant from receiving a FIT Contract on July 4, 2011. This is the exact claim that the Claimant’s damages experts quantify. This is the exact claim on which the Claimant’s alleged breach of Article 1105 rests, and the exact one Mesa Power filed in 2011.

68. Further, despite having all the facts before it that the Claimant now alleges with respect to International Power and the Breakfast Club, the *Mesa Power* tribunal also did not see any need to distinguish between the alleged treatment of International Power and that of NextEra.<sup>185</sup> The Claimant’s arguments at the Hearing that the *Mesa Power* tribunal did not decide on issues with respect to International Power or the Breakfast Club because there was “no knowledge of that in

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nothing more than additional facts going to an already untimely claim, one that could have been made based on public information available to it prior to the Critical Date. See also Canada’s Counter-Memorial on Jurisdiction, ¶¶ 122, 143; Canada’s Rejoinder Memorial on Jurisdiction, ¶¶ 70, 87, 89.

<sup>183</sup> NOA, ¶ 111. The Claimant relies on part of Ms. Sue Lo’s testimony from the *Mesa Power* hearing to allege that she “admitted” that “Ontario’s ‘b’club wanted to protect [redacted confidential] The [redacted confidential] that Ontario wanted to protect from the Korean Consortium set aside were owned by International Power Canada (‘IPC’), a Canadian company whose president was the past president of the governing Ontario Provincial Liberal Party, who then became the president of the federal Liberal Party of Canada.” The word “b’club” could be removed from this sentence with no consequence to the point being made by the Claimant.

<sup>184</sup> Jurisdictional Hearing Transcript, Day 5, p. 781:6-23.

<sup>185</sup> **RLA-001**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016 (“*Mesa – Award*”). The sole reference to International Power in the *Mesa Award* can be found at paragraph 671, where the Tribunal summarizes Mesa Power’s arguments with respect to both NextEra and International Power.

*Mesa Power*<sup>186</sup> defies logic. It is the *Mesa Power* proceedings upon which the Claimant exclusively relies for its alleged knowledge with respect to both of those entities.

## **2. Failed Arguments Made by Mesa Power in the Context of the *Mesa Power* Arbitration Cannot Form the Basis of an Alleged Breach**

69. It is important for the Tribunal to closely analyze what specific information was revealed through the *Mesa Power* post-hearing brief and hearing transcript in 2015, on which the Claimant now relies to argue that the limitation period starts afresh. It is not the case that the Claimant was able to “see evidence, or statements by witnesses, rather than just position taking in memorials or briefs”, as the Tribunal inquired.<sup>187</sup> In theory, objective evidence arising after a critical date that gives rise to a new, unrelated cause of action could start a new limitation period if that information was not known, and could not have been known to a claimant prior to the critical date. However, failed arguments by another claimant (*Mesa Power*) in another arbitration do not constitute objective evidence capable of giving rise to a new cause of action. This is not a case of new evidence, but rather a case of the Claimant relying on *positions* taken by *Mesa Power* to re-start the limitation period.

70. As Canada demonstrated at the Hearing, in her testimony in the *Mesa Power* proceeding Ms. Lo did not admit to a “conspiracy” with respect to the administration of the FIT Program that in turn breached Article 1105, as the Claimant alleges.<sup>188</sup> To the contrary, *Mesa Power* took Ms. Lo’s testimony out of context and argued that it constituted evidence of unfair treatment. The *Mesa Power* tribunal dismissed those arguments as unfounded on the evidence, stating that they “rest largely on conjecture”.<sup>189</sup> Canada demonstrated this at the Hearing as well.<sup>190</sup> It is this failed

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<sup>186</sup> Jurisdictional Hearing Transcript, Day 5, p. 893:3-10.

<sup>187</sup> Jurisdictional Hearing Transcript, Day 5, p. 741:6-16.

<sup>188</sup> *See for example*, Jurisdictional Hearing Transcript, Day 5, p. 849 starting at line 24 “evidence of the Government conspiracy known as the breakfast club” and p. 854 line 17 “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”.

<sup>189</sup> **RLA-001**, *Mesa – Award*, ¶¶ 671-673 (“The Claimant submits that because of “irrelevant considerations arising from electioneering, politicization, or favoritism”, other applicants to the FIT Program including NextEra Energy and International Power Canada received better treatment than Mesa, thereby depriving the Claimant of a FIT Contract which otherwise it would have been awarded.”)

<sup>190</sup> Jurisdictional Hearing Transcript, Day 5, pp. 757:1 –762: 23.

argument from Mesa Power that the Claimant now contends is evidence of a “conspiracy” which forms the basis of an alleged breach that then re-sets the limitation period. Such an argument must fail. As Canada noted in its post-hearing brief at that time, Ms. Lo’s testimony confirmed that Ontario had no preference as to which developers would be awarded contracts as a result of the Bruce-to-Milton allocation process.<sup>191</sup> It is inappropriate for the Claimant to attempt to use unfounded allegations by Mesa Power as matters of objective fact to evade the limitation period.

71. Canada’s position is further bolstered by the Claimant’s own arguments at the Hearing, where the Claimant noted that even a “professional investigative journalist could not find any evidence of the Government conspiracy known as the Breakfast Club or effect of the Breakfast Club for International Power of Canada”.<sup>192</sup> Far from evidence of a conspiracy by Ontario to favour certain FIT applicants over others, this in fact illustrates the absence of any evidence that such a conspiracy existed. Indeed, having heard all of the evidence and argument on which the Claimant now relies, the *Mesa Power* tribunal did not find any unfair treatment, let alone a conspiracy.<sup>193</sup>

**3. The Claimant Has Failed to Demonstrate There Was Suppression of Information Such that It Could Not Acquire Knowledge of the Alleged Breach until After the Critical Date**

**a) The Claimant Has Not Put Forward Any Evidence to Support its Allegations of Suppression of Information**

72. The Claimant has not pointed to any evidence that there was deliberate conduct on the part of Canada or Ontario to suppress the existence of the Breakfast Club or alleged favouritism to International Power when administering the FIT Program, such that the limitation period failed to start. Not a single document. There is no evidence on the record that Canada or Ontario deliberately made false or misleading statements to Tennant Energy, or any third party, or that Canada or Ontario had a practice of actively blocking the disclosure of documents. This Tribunal cannot find

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<sup>191</sup> See **R-100**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Canada’s Post-Hearing Submission (Public Version), 18 December 2014, p. 60 (row 85).

<sup>192</sup> Jurisdictional Hearing Transcript, Day 5, pp. 849-850.

<sup>193</sup> The Claimant would have known of the *Mesa Power* tribunal’s findings prior to the filing of its Notice of Arbitration in 2017, given that the *Mesa Power* Award was issued in 2016.

suppression of information based on mere assertions. The Claimant must point to concrete evidence, not mere conjecture.

73. The only evidence the Claimant points to in order to argue that Ontario had a practice of destroying or hiding documents has no bearing on the onshore FIT Program. The Claimant points to an unrelated investigation regarding documents from the Premier's Office that pertain to gas plants.<sup>194</sup> The "code names" referenced by the Claimant arise in that context and have no value here.<sup>195</sup> There is no evidentiary basis on which to suggest that code names are relevant to the FIT Program, onshore wind, or Skyway 127's Project.

74. Further, Canada produced over 8,000 documents in the *Mesa Power* arbitration, nearly all of which were relevant to the alleged breach at issue in this arbitration. Despite the Claimant's arguments that there was no document production with respect to International Power or the Breakfast Club in the *Mesa Power* proceeding, the documents upon which Ms. Lo and Mr. McDougall were cross-examined on at the *Mesa Power* hearing with respect to International Power and the Breakfast Club would have come from documents produced by Canada in that arbitration to the extent they were not available the public domain.

75. Finally, the Claimant's reliance on statements made by the OPA following certain inquiries that "everything was fine" and that "[e]verything was being followed according to the rule of law, according to the policies"<sup>196</sup> as evidence of suppression must be rejected. Mr. Pennie's inquiries involved reaching out to two named witnesses in the *Mesa Power* arbitration.<sup>197</sup> The fact that those witnesses indicated there was no issue with how the FIT Program was being run was a true statement – a statement in line with their written testimony in that arbitration and the eventual

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<sup>194</sup> See Canada's Rejoinder Memorial on Jurisdiction, ¶ 100, fn. 248. An Ontario litigant alleged that Ontario officials used the name "Project Vapour" with respect to "the cancellation of gas fired electricity generating plants in Ontario". While unproven and irrelevant for documents that would relate to onshore wind projects, Canada notes that references to the use of "Project Vapour" can be found in documents that were publicly available before the Critical Date in this arbitration. See, e.g., **R-102**, The Canadian Press, "Ontario power plant cancellation dubbed 'project vapour'", 18 October 2012; **R-103**, Information and Privacy Commissioner, Order PO-3304, 7 February 2014.

<sup>195</sup> Jurisdictional Hearing Transcript, Day 1, p. 128:23-129:7.

<sup>196</sup> Jurisdictional Hearing Transcript, Day 2, p. 309:14-16.

<sup>197</sup> Jurisdictional Hearing Transcript, Day 2, pp. 282:8-284:7. See also **R-005**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Notice of Arbitration, 4 October 2011, fn. 32; **R-006**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Memorial of the Investor, 20 November 2013, ¶¶ 689-690, fns. 782, 783, 784.



decision of the *Mesa Power* tribunal. Those statements cannot be a determining factor on when the limitation period in a separate arbitration begins to run, nor can they be considered evidence of suppression of an alleged breach.

**b) Even if Suppression of Information Can Be Proven, the Claimant Must Still Demonstrate that the Specific Information that was Allegedly Suppressed Rises to a Distinct Cause of Action**

76. Should the Tribunal find for the Claimant with respect to its allegations on suppression of information, the Claimant must still demonstrate that the specific information that was suppressed rises to a distinct cause of action – a claim in its own right – such that the limitation period in Article 1116(2) would only start to run when the Claimant had actual knowledge of such information. Again, the Claimant has failed to do so.

77. Canada has already extensively demonstrated, both in written submissions<sup>198</sup> and at the Hearing,<sup>199</sup> that alleged special preferential treatment to International Power or the existence of the Breakfast Club do not rise to the level of an independent cause of action. The existence of the Breakfast Club is not a measure as defined in Article 201 of the NAFTA.<sup>200</sup> Canada's alleged failure to disclose its existence cannot lead to a self-standing cause of action.<sup>201</sup>

78. Similarly, alleged special treatment to International Power also cannot form a cause of action in its own right – one that is separate and distinct from that which the Claimant should have had knowledge prior to the Critical Date.<sup>202</sup> Again, Canada has demonstrated that such an allegation is not separate and distinct from the allegations that it could have made with respect to NextEra prior to the Critical Date, allegations which go to the essence of the Claimant's claim of political unfairness in the administration of the FIT Program.<sup>203</sup>

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<sup>198</sup> Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 82-92; Canada's Counter-Memorial on Jurisdiction ¶¶ 121-124, 143-145.

<sup>199</sup> Jurisdictional Hearing Transcript, Day 1, pp. 87:4-89:20; Day 5, p.743:6-12.

<sup>200</sup> Jurisdictional Hearing Transcript, Day 5, p. 729:10-25. *See* Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 87-88, 90, 102-103.

<sup>201</sup> Jurisdictional Hearing Transcript, Day 5, p. 729:10-25. *See* Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 8, 80 and fn. 185 therein.

<sup>202</sup> Jurisdictional Hearing Transcript, Day 5, pp. 730:1 –734:20.

<sup>203</sup> Canada's Counter-Memorial on Jurisdiction, ¶¶ 138-139; Canada's Rejoinder Memorial on Jurisdiction, ¶¶ 89, 97.

#### **4. The Claimant Does Not Deny That It Had Knowledge of Loss or Damage Prior to the Critical Date**

79. The Claimant alleges that it was harmed by alleged unfair treatment by Ontario to favour International Power, resulting in Skyway 127 not receiving a FIT Contract on July 4, 2011. Its counsel instructed the Claimant's damages experts that this was the "primary claim" in the arbitration.<sup>204</sup> The Claimant acknowledged at the Hearing that it knew or ought to have known that it had allegedly been harmed by the unfair award of FIT Contracts well before the Critical Date.<sup>205</sup> This should end the Tribunal's analysis with respect to alleged loss or damage.

#### **IV. THE CLAIMANT'S SHIFTING CHARACTERIZATION OF ITS CLAIM**

80. In its Notice of Arbitration,<sup>206</sup> its Memorial,<sup>207</sup> and its Reply on Jurisdiction,<sup>208</sup> the Claimant laid out its claim as one in which certain measures taken by the OPA and Ontario violated Article 1105 when they resulted the Claimant's failure to receive a FIT Contract. As noted above, its damages experts quantify this alleged breach.<sup>209</sup>

81. However, at the Hearing, the Claimant's arguments shifted. The Claimant characterized its claim as one regarding access to justice.<sup>210</sup> Yet the Claimant did not make such an allegation in its written submissions, nor do its arguments of how Article 1105 was allegedly breached turn on this allegation in any respect. The Claimant has also not pled any damages case arising out of that

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<sup>204</sup> CER-1, Valuation Report of Deloitte (Andrade and Taylor), 7 August 2020 ("Deloitte Report"), ¶ 4.2.3. During the hearing, counsel for the Claimant introduced further confusion by appearing to contradict its own damages experts, stating that: "Well, that is a primary fact. I wouldn't have called it a primary claim but it's a primary fact. That is a fact. It is not the Claim." See Jurisdictional Hearing Transcript, Day 1, p.162:1-5.

<sup>205</sup> Jurisdictional Hearing Transcript, Day 1, p.182:2-4.

<sup>206</sup> NOA, ¶ 7 ("This claim arises out of the arbitrary and unfair application of Ontario government measures related to the regulation and administration of a renewable energy transmission and production program in Ontario known as the Feed-in Tariff Program (the 'FIT Program').") See also NOA, ¶ 91.

<sup>207</sup> Canada's Counter-Memorial on Jurisdiction, ¶ 717.

<sup>208</sup> Claimant's Reply on Jurisdiction, ¶ 27.

<sup>209</sup> CER-1, Deloitte Report, ¶ 4.1.4 ("The projects that were ranked higher had an aggregate capacity in excess of 750 MW and therefore Skyway was no longer within the 750 MW capacity constraints for the Bruce Region. Based on the prior project ranking, but for the changes in the program issued by the OPA on June 3, 2011, the Skyway project would have received a FIT contract.")

<sup>210</sup> Jurisdictional Hearing Transcript, Day 1, p. 169:15-23.

alleged breach.<sup>211</sup> Should this case proceed, the only merits argument and damages case to which Canada can respond is the one put forward by the Claimant in its written submissions and discussed in the Deloitte Report.

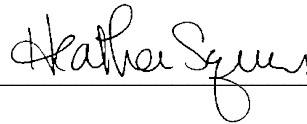
**V. CANADA'S REQUEST FOR RELIEF**

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

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

December 17, 2021

Respectfully submitted on behalf of the  
Government of Canada,



Heather Squires  
Mark Klaver  
E. Alexandra Dosman  
Stefan Kuuskne

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<sup>211</sup> To the extent that the Claimant is arguing that the loss or harm is the same as that arising out of an alleged breach based on the July 4, 2011, such an argument is of no help to the Claimant with respect to the limitation period. As stated by the *Nissan Motors* tribunal, a separate limitation period can only begin where there is a "qualitatively new instance of 'loss or damage' after the critical date". **RLA-155**, *Nissan Motor – Decision on Jurisdiction*, ¶ 325.