

**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**

**STATEMENT OF DEFENCE**

**July 2, 2019**

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Trade Law Bureau  
Government of Canada  
Lester B. Pearson Building  
125 Sussex Drive  
Ottawa, Ontario  
K1A 0G2  
CANADA

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## I. INTRODUCTION

1. In its Notice of Arbitration (“NOA”), Tennant Energy, LLC (“Tennant” or the “Claimant”), alleges that certain measures taken by the Government of Ontario in its development and implementation of the Feed-in Tariff Program (“FIT Program”) were applied arbitrarily and unfairly in violation of Chapter Eleven of the *North American Free Trade Agreement* (“NAFTA”). Tennant also claims that the Government of Ontario granted special transmission access privileges to Samsung C&T Corporation and Korea Electric Power Corporation (collectively, the “Korean Consortium”). In addition, the Claimant alleges that government records documenting the nature and extent of the challenged measures were improperly destroyed.

2. Canada does not consent to arbitrate Tennant’s claim because it is time-barred. All of the measures alleged to be in breach of the NAFTA took place more than three years prior to the submission of the NOA, and the Claimant knew, or should have known, of the alleged breaches and the damages caused over three years before filing its NOA. Moreover, the allegation regarding the destruction of documents does not relate to the Claimant or its FIT Program application, as required under NAFTA Chapter Eleven. Accordingly, the Tribunal lacks jurisdiction over the claim, and need not consider the merits of the Claimant’s allegations, which should be dismissed in their entirety.

3. Pursuant to the instructions provided by the Tribunal on April 2, 2019, as incorporated in the draft version of Procedural Order No. 1,<sup>1</sup> this Statement of Defence is limited to Canada’s jurisdictional objections. The factual background that follows is limited to the main elements that provide the necessary context to those objections and Canada reserves its right to present additional factual elements in future submissions.

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<sup>1</sup> Draft Procedural Order No. 1 of April 2, 2019, p. 17: (“While the Tribunal does not consider that the submission of a Statement of Defence by Canada is a prerequisite to the issue of whether or not the Tribunal can decide the bifurcation of the proceedings, the Tribunal shares the Claimant’s concerns that all jurisdictional objections should be articulated by the time any bifurcation request is made. The Tribunal therefore directs that Canada files a Statement of Defence which is limited to and setting forth all of its jurisdictional objections.”)

## II. FACTUAL BACKGROUND

4. In 2008, during the economic crisis, the Government of Ontario saw an opportunity to use its procurement power in the electricity sector not only to meet Ontario's generation needs but also as an economic stimulus to create opportunities and jobs. The *Green Energy and Green Economy Act* ("GEGEA") and the *Green Energy Investment Agreement* ("GEIA") were part of the Government of Ontario's renewable energy initiatives.

### A. The GEGEA and the FIT Program

5. The GEGEA received Royal Assent on May 14, 2009. The GEGEA created new standalone legislation known as the *Green Energy Act, 2009* and amended 15 other existing statutes. In addition, the GEGEA added a new section to the *Electricity Act, 1998* that authorized the Ontario Minister of Energy<sup>2</sup> to direct the Ontario Power Authority ("OPA") to develop a FIT Program.

6. The OPA was an independent, non-profit corporation established under the *Electricity Restructuring Act, 2004*. It was responsible for long-term system planning, conservation, demand management and procurement of new electricity generation. The OPA was also charged with developing long-term integrated system plans to manage and respond to the demand, supply and transmission goals identified by the Government of Ontario.<sup>3</sup>

7. The development of the FIT Program by the Ministry of Energy and the OPA involved extensive consultations between the Ministry and the OPA, as well as with the Independent Electricity System Operator ("IESO"), Hydro One and public stakeholders.<sup>4</sup> On October 1, 2009, the OPA formally launched the FIT Program.

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<sup>2</sup> Ministry of Energy and Infrastructure ("MEI") was the name of the Ministry between 2007 and 2010. Since then, the Ministry's name has changed over the years. For the purposes of this Statement of Defence, "Ministry of Energy" is used to refer to this Ministry, regardless of any prior or subsequent name changes.

<sup>3</sup> Effective January 1, 2015, the former OPA and the Independent Electricity System Operator ("IESO") were amalgamated and continued as one entity under the name IESO. The IESO administers the electricity market and directs the flow of electricity from generators to consumers through the transmission system. The Government of Ontario appoints its Board of Directors.

<sup>4</sup> Hydro One is an electricity transmission and distribution service provider in Ontario. It distributes electricity primarily to rural customers.

8. The OPA published Version 1.1 of the FIT Program Rules ("FIT Rules") in September 2009.<sup>5</sup> The amount of new renewable energy generating capacity that could be developed in the province was limited by the amount of capacity that could be accommodated by the electricity transmission and distribution system in Ontario. The FIT Rules established a methodology through which a priority ranking could be given to applications to determine the order in which the OPA would test them for connection capacity at their proposed connection point. If successful in the connection capacity tests, the OPA would offer the project a contract under the FIT Program. The OPA issued additional documents providing direction on the FIT Program to potential applicants, including the FIT Program Overview and FIT Program Contract ("FIT Contract") in September and November 2009.

9. Under the FIT Rules, applications received during the FIT Program launch period from October 1, 2009 to November 30, 2009 ("Launch Period") were considered by the OPA to be received at the same time and were subject to a special review by the OPA. In the context of this review, the OPA considered the status of each project's environmental approvals, as well as the applicant's control of major generation equipment required for the project, previous experience developing renewable energy projects, and financial capacity to support the construction of the project. The purpose of this review was to prioritize the most "shovel-ready" projects so that they would be the first in line to be considered for FIT Contract offers, subject to available connection capacity. Applications for a FIT Contract submitted after the Launch Period were time-stamped upon receipt by the OPA. The order in which applications submitted after the Launch Period were tested for available connection capacity was based solely on the order in which they were time-stamped.

10. After reviewing for initial eligibility and prioritizing applications, the OPA considered whether there was connection capacity for the proposed projects to connect to the grid. The OPA would not enter into a contract with a FIT Program applicant if there was no connection capacity available for it. Applications were tested and contracts were awarded until there was no connection capacity left.

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<sup>5</sup> The FIT Rules Version 1.1 were released on September 30, 2009, and the FIT Rules Version 1.2, which had minor modifications, were released on November 19, 2009.

11. On April 8, 2010, after the connection capacity availability tests were completed, the OPA offered a first round of 184 FIT Contracts to Launch Period applicants. At that time, no such contracts were awarded to any projects in the Bruce transmission region, due to transmission congestion and limited connection capacity in this area.

**B. The Claimant's FIT Application**

12. The Claimant's alleged investment, Skyway 127 Wind Energy Inc. ("Skyway 127"), submitted an application for a 100 megawatts ("MW") onshore wind project in the Bruce transmission region during the Launch Period. Due to a lack of connection capacity at its proposed connection point, Skyway 127 was not awarded one of the Launch Period FIT Contracts in April 2010. Like other applicants that did not receive a FIT Contract, it was placed in a queue for future consideration.

**C. The GEIA and the Korean Consortium**

13. In June 2008, the Korean Consortium approached the Ministry of Energy regarding a proposal for a major investment in Ontario's renewable energy sector. These discussions predated and were not part of the development of the FIT Program.

14. On September 30, 2009 (shortly before the launch of the FIT Program), the Government of Ontario stated that the Province was exploring opportunities in the renewable energy sector and that it had signed a "province-wide framework agreement" with certain proponents to further enable the development of Ontario's green energy economy. On January 21, 2010, the Government of Ontario and the Korean Consortium executed the Green Energy Investment Agreement ("GEIA"). Under the GEIA, the Korean Consortium committed to opening four new manufacturing facilities for renewable energy in Ontario. In exchange, the Korean Consortium would have priority access to 2,500 MW of wind and solar generating capacity in Ontario to be allocated in five phases over five years, with each phase targeting approximately 500 MW of generating capacity.

**D. Construction of the Bruce to Milton Transmission Line**

15. While the FIT Program was being developed, the Government of Ontario announced that it was seeking to increase the amount of transmission capacity available in the province. A transmission line known as the "Bruce to Milton" line, which was under development since before

the adoption of the GEGEA, was the first to be completed. Some of the new connection capacity created by this transmission line was to be allocated to renewable energy projects, including FIT Program applicants and the Korean Consortium under the GEIA.

16. In particular, pursuant to the GEIA, and as directed by the Minister of Energy on September 17, 2010, 500 MW of connection capacity in the Bruce transmission region was reserved for some of the Korean Consortium's projects. On June 3, 2011, the Minister of Energy directed the OPA to also allocate 750 MW of the new connection capacity created by the Bruce to Milton transmission line (which would come into service in June 2012) to proposed FIT Program projects and to set out a process for doing so (the "June 3<sup>rd</sup> letter of direction").

17. Since the start of the FIT Program, the OPA had stated in stakeholder presentations that the allocation of additional connection capacity from the Bruce to Milton transmission line would include an opportunity for FIT Program applicants to change connection points.<sup>6</sup> Accordingly, the June 3<sup>rd</sup> letter of direction directed the OPA to offer FIT Program applicants a five-day window during which they could change the point where they wished to connect their project to the electricity grid. This five-day period, known as the "Connection Point Amendment Window", ran from June 6 to June 10, 2011. On July 4, 2011, connection capacity from the Bruce to Milton transmission line was allocated to 14 FIT Program applicants for a total of almost 750 MW, including five projects that had changed their connection points during the Connection Point Amendment Window.

#### **E. Changes to Ontario's Transmission System and the FIT Program**

18. In its *2011 Annual Report*, the Office of the Auditor General of Ontario conducted a review of the FIT Program and the award of renewable energy contracts by the Province (the "Report"). The Report commented on the impacts of the limited capacity available on Ontario's transmission and distribution systems on the award of FIT Contracts. The Report specifically noted that a higher-than-anticipated number of renewable energy projects under the FIT Program were awaiting connection to the distribution grid and that, as of April 1, 2011, more than 3,000 FIT Program

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<sup>6</sup> **RLA-001**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016 ("*Mesa – Award*"), ¶¶ 646-647. See e.g., **R-001**, Ontario Power Authority Presentation, "The Economic Connection Test Process" (Mar. 23, 2010), slide 14.

applications could not be accommodated into the existing power grid.<sup>7</sup> The Report also considered the GEIA, noting that the Korean Consortium's priority access to Ontario's transmission system would impact transmission availability for other renewable energy projects.<sup>8</sup> The Report was tabled in the Legislative Assembly of Ontario on December 5, 2011.

19. On June 12, 2013, the Minister of Energy directed the OPA to "not procure any additional MW under the FIT Program for Large FIT projects", generally those larger than 500 kilowatts (0.5 MW). The FIT Program for Large projects would be replaced with a new competitive procurement process for large renewable projects that would take into account local needs and considerations before the issuance of FIT Contracts. As such, all projects larger than 500 kilowatts, including Skyway 127's application, became ineligible to participate in the FIT Program.

#### **F. The Alleged Document Destruction and Spoliation of Evidence**

20. In its NOA, the Claimant raises the alleged destruction of certain documents by senior government officials.<sup>9</sup> The Claimant appears to base its allegations on an investigation that is completely unrelated to its alleged investment in a 100 MW onshore wind project.

21. In 2010 and 2011, Ontario cancelled the contracts for two gas power plants in Ontario. This decision led to a legislative investigation to explore both the reason for the cancellation and the cost of the cancelled contracts to Ontario's taxpayers. Through that process, which occurred in 2011-2013, the Estimates Committee of the Legislative Assembly of Ontario in 2012 made requests to the Ministry of Energy, the former Minister of Energy and the OPA to produce relevant documents. The Estimates Committee subsequently referred the matter to the Standing Committee on Justice Policy for further investigation. On June 5, 2013, the Information and Privacy Commissioner of Ontario ("IPC") also released a report making note of the potential spoliation of documents.<sup>10</sup> On

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<sup>7</sup> **R-002**, Office of the Auditor General of Ontario, *2011 Annual Report* [Excerpt], p. 91.

<sup>8</sup> **R-002**, Office of the Auditor General of Ontario, *2011 Annual Report* [Excerpt], p. 116.

<sup>9</sup> Claimant's Notice of Arbitration, 1 June 2017 ("NOA"), ¶¶ 113-123.

<sup>10</sup> On June 5, 2013, the IPC issued a special investigation report entitled *Deleting Accountability: Records Management Practices of Political Staff*. See **R-003**, Information and Privacy Commissioner of Ontario, *Deleting Accountability: Records Management Practices of Political Staff, A Special Investigation Report* (Jun. 5, 2013), p. 3 ("IPC Report"), available at: <https://www.ipc.on.ca/wp-content/uploads/2016/08/2013-06-05-Deleting-Accountability.pdf>. The Commissioner later reopened the investigation and released an addendum to this report on August 20, 2013. The Commissioner reopened the investigation due to new information that her office had received regarding the Ontario

June 7, 2013, two days after the IPC's report was released, the Ontario Provincial Police launched a criminal investigation into the destruction of e-mails relating to the relocation and cancellation of the gas power plants.<sup>11</sup>

### G. Previous NAFTA Chapter Eleven Arbitrations

22. Canada has been a disputing party to two other arbitrations under NAFTA Chapter Eleven concerning the FIT Program and the alleged spoliation of documents: *Mesa Power Group, LLC v. Canada* and *Windstream Energy, LLC v. Canada*. Both arbitrations raised almost identical issues to those disputed by the Claimant.

23. Mesa Power Group, LLC ("Mesa") filed its Notice of Arbitration on October 4, 2011, and the tribunal in that arbitration issued a final award on March 24, 2016. Mesa's claims related to its investments in Canadian companies that had applied for FIT Contracts to develop onshore wind projects in the Bruce transmission region during the Launch Period. None of Mesa's FIT Program applications were successful. Mesa alleged that the treatment of its applications by the Government of Ontario and the OPA breached several of Canada's NAFTA obligations, including Article 1105 (Minimum Standard of Treatment).<sup>12</sup>

24. Windstream Energy LLC ("Windstream") filed its Notice of Arbitration on January 28, 2013, and the tribunal in that arbitration issued its final award on September 27, 2016. Windstream's claims related to its investment in a proposed 300 MW offshore wind project in the shallow shoals off of Wolfe Island in Lake Ontario. Windstream's claims included an alleged breach under Article 1105.<sup>13</sup> It asked the tribunal to draw an adverse inference against Canada based on allegations with respect to the destruction of government records in relation to the deferral of offshore wind

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Public Service Enterprise Email System. See **R-004**, Information & Privacy Commissioner of Ontario, *ADDENDUM to Deleting Accountability: Records Management Practices of Political Staff, A Special Investigation Report* (Aug. 20, 2013), p. 3 ("IPC Report Addendum"), available at: <https://www.ipc.on.ca/wp-content/uploads/2016/08/2013-08-20-Deleting-Accountability-addendum.pdf>.

<sup>11</sup> See **R-004**, IPC Report Addendum, p. 3.

<sup>12</sup> In addition to its claim under Article 1105, Mesa also made claims under Articles 1102 (National Treatment), 1103 (Most-Favoured-Nation Treatment) and 1106 (Performance Requirements).

<sup>13</sup> In addition to its claim under Article 1105, Windstream also made claims under Articles 1102 (National Treatment), 1103 (Most-Favoured-Nation Treatment) and 1110 (Expropriation and Compensation).

projects. These allegations referred to the domestic review and investigations into the Government of Ontario's handling of documents, discussed above.

### III. THE TRIBUNAL DOES NOT HAVE JURISDICTION TO HEAR THE CLAIM

25. The Claimant bears the burden of proving the Tribunal has the jurisdiction to hear this dispute. It has not met this burden. Specifically, the Claimant has not established that: (1) the claim was commenced within the three-year time limitation period set out in Article 1116(2); and (2) the alleged destruction of evidence is a measure *related to* the Claimant, as required by Article 1101(1). Moreover, as Canada explains in Section III-C, there are other outstanding issues with respect to the Claimant's standing and the Tribunal's jurisdiction to hear its claim.

26. In its NOA, the Claimant refers to the following "four categories of wrongful actions" as the alleged breaches: (i) the unfair manipulation of the award of access to the electricity transmission grid; (ii) the unfair manipulation of the dissemination of FIT Program information; (iii) the unfair manipulation of the awarding of FIT Contracts; and (iv) the improper destruction of necessary and material evidence by senior officials in the Government of Ontario.<sup>14</sup>

27. Canada's time bar objection under Article 1116(2) applies to all four categories of alleged wrongful actions. Canada's subject matter objection under Article 1101(1) pertains only to the last category, namely the alleged destruction of evidence. Given that the Claimant has not complied with the procedural requirements to bring an arbitration against Canada set out in NAFTA Articles 1116(2) and 1101(1), the Tribunal does not have jurisdiction to hear the claim put forward by the Claimant. As such, Canada has not consented to this arbitration or to the jurisdiction of this Tribunal.<sup>15</sup> The claim must therefore be dismissed in its entirety without proceeding to the merits.

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<sup>14</sup> NOA, ¶ 91.

<sup>15</sup> The Claimant seems to argue that compliance with the requirements of Article 1116(2) is an issue of admissibility rather than jurisdiction and it cites the *Pope & Talbot* award in support of its position. See footnote 86 of NOA. However, NAFTA tribunals have generally rejected this approach and treated the time limitation as going to jurisdiction rather than admissibility. See **RLA-002**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002 ("*Methanex – Partial Award*"), ¶ 120; **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, ¶ 229.

**A. The Claim is Time-Barred**

28. As Canada explained in its letter to the Tribunal of November 13, 2018, “[t]he NAFTA Parties have only offered their consent to arbitration with respect to particular types of claims, investors, and circumstances” and “[c]ertain procedures and certain requirements must be met when submitting a claim to arbitration.”<sup>16</sup> Simply put, the NAFTA Parties’ consent to arbitration is not unqualified.

29. In this arbitration, the Claimant has failed to meet the conditions precedent for submitting a claim to arbitration under NAFTA Chapter Eleven.<sup>17</sup> In particular, and in contravention of NAFTA Article 1116(2), the Claimant filed its NOA more than three years after it first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that it incurred loss or damage as a result of the breach.<sup>18</sup>

30. The limitation period set out in Article 1116(2) runs from the date on which the investor first acquires or should have first acquired knowledge of: (a) the alleged breach, and (b) the resulting loss or damage it incurred. If knowledge of the breach and the resulting loss or damage is not simultaneous, the limitation period runs from the later of the two events.<sup>19</sup>

**1. The Claimant knew, or should have known, about the alleged breaches more than three years before it submitted its claim to arbitration**

31. In a dispute governed by the UNCITRAL Arbitration Rules, a claim is submitted to arbitration when the disputing Party receives the NOA.<sup>20</sup> The Claimant filed its NOA (and thus submitted its claim to arbitration) on June 1, 2017, which means that the critical date to assess the

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<sup>16</sup> Canada’s Letter to the Tribunal dated November 13, 2018, p. 2.

<sup>17</sup> NAFTA Article 1122 (Consent to Arbitrate) provides that “[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.”

<sup>18</sup> NAFTA Article 1116(2) provides that “[a]n investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.”

<sup>19</sup> **RLA-002, Methanex – Partial Award**, ¶¶ 137-139.

<sup>20</sup> Article 1137(1)(c) (General – Time when a Claim is Submitted to Arbitration) provides that “[a] claim is submitted to arbitration under this Section when: [...] (c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.”

timeliness of its claim is June 1, 2014.<sup>21</sup> The claim will be time-barred if the Claimant first acquired, or should have first acquired, knowledge of the alleged NAFTA breaches and of the resulting loss or damage before June 1, 2014.

32. Notably, by the time the Claimant filed its NOA, two investment claims regarding the measures at issue in this arbitration had been submitted to arbitration under NAFTA Chapter Eleven, and they had been submitted more than three years earlier. If the claimants in these other arbitrations had sufficient knowledge to bring their claims forward in 2011 and 2013, there is no reason why Tennant could not have done the same.

33. With respect to the first three categories of alleged wrongful actions listed in the NOA, the Claimant asserts that it did not have knowledge of the breaches until sometime after March 16, 2015 when representatives of Skyway 127 met with legal counsel “about the applicability of the evidence adduced from the [Mesa] NAFTA claim” or until it reviewed the post-hearing brief filed by Mesa, which occurred sometime after March 16, 2015.<sup>22</sup>

34. The Claimant's purported lack of knowledge of the alleged breaches falling in these three categories is not credible. Mesa's notice of arbitration filed in October 2011 contained nearly identical allegations to the ones that are now being put forward by the Claimant. Specifically, Mesa's notice of arbitration included allegations regarding the Korean Consortium's access to the electricity transmission grid, the treatment of other FIT Program proponents, such as Boulevard Associates (a subsidiary of NextEra), and the process for allocating transmission capacity on the Bruce to Milton transmission line resulting from the June 3<sup>rd</sup> letter of direction.<sup>23</sup> In light of the Mesa allegations, the Claimant should have reasonably known about the alleged breaches years before it filed its NOA in June 2017.

35. In addition, with respect to the Claimant's allegations of unfair manipulation of the award of access to the electricity transmission grid, the 2011 Auditor General's Report discussed the reasons

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<sup>21</sup> Procedural Hearing Transcript, pp. 12:21-13:2.

<sup>22</sup> NOA, ¶¶ 126(a), 126(b) and 126(c).

<sup>23</sup> NOA, ¶¶ 22-37, 46-50.

for the delay in the award of the transmission access.<sup>24</sup> As explained above, the Report was made public in December 2011, about two and half years before June 1, 2014, the critical date for the purposes of Article 1116(2). Thus, as early as December 2011, the Claimant should have known of the reasons behind the delay.

36. In relation to the fourth category of alleged wrongful actions in the NOA, the Claimant asserts that it did not have knowledge of the alleged breach caused by the spoliation of documents until after April 30, 2015,<sup>25</sup> the date of the publication of the transcripts of the hearing held in the *Mesa* proceedings.<sup>26</sup>

37. As Canada explains above,<sup>27</sup> the issues that the Claimant raises with respect to spoliation allegations in relation to the Ontario government were publicized in 2011 to 2013, well before the critical June 1, 2014 date for the purposes of filing a claim under Article 1116(2). Thus, Tennant's claim with respect to the alleged improper destruction of evidence is time-barred and outside the jurisdiction of the Tribunal.

38. In sum, based on the information publicly available more than three years prior to the submission of the Claimant's NOA, and the similarities between the current claim and Mesa's claim submitted to arbitration in 2011, the Claimant should have known about the alleged breaches well before the critical date of June 1, 2014. The fact that certain information became available at a later date did not prevent Mesa from proceeding with almost identical claims in 2011 and a prudent claimant should have known of the alleged breaches by June 1, 2014.

**2. The Claimant knew, or should have known, about the alleged loss or damage more than three years before it submitted its claim to arbitration**

39. Contrary to the Claimant's unsupported assertion that it only became aware that it had suffered damages in relation to the so-called "wrongful actions" in 2015,<sup>28</sup> it knew, or should have

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<sup>24</sup> R-002, Office of the Auditor General of Ontario, *2011 Annual Report* [Excerpt].

<sup>25</sup> NOA, ¶ 126(d).

<sup>26</sup> NOA, ¶ 117(c).

<sup>27</sup> See above, ¶¶ 20-21.

<sup>28</sup> NOA, ¶¶ 120-121 and 123.

known, that it suffered the alleged damages in July 2011 when it was not awarded a FIT Contract.<sup>29</sup> Moreover, even if the Tribunal were to use the date on which the FIT Program for Large projects was terminated (June 2013)<sup>30</sup> and Tennant's FIT Program application was cancelled, the Claimant's knowledge of the alleged loss would still fall outside the three-year limitation period.

**B. The Alleged Improper Destruction of Evidence Does Not “Relate To” the Claimant or Its Alleged Investment**

40. In order for a measure to be captured by the scope of NAFTA Chapter Eleven, Article 1101(1) requires that the measure “relates to” an investor of another Party or its investments.<sup>31</sup>

41. The Claimant appears to allege in its NOA that senior officials in the Government of Ontario caused spoliation of evidence that was detrimental to it as an investor.<sup>32</sup> It does so without providing any support for this claim and without explaining how the destruction of certain information allegedly related to the Claimant or Skyway 127. There is no evidence that information concerning Skyway 127 or on-shore wind projects more generally was destroyed. Therefore, the alleged spoliation of documents does not constitute a measure that “relates to” the Claimant or its alleged investment, Skyway 127. As a result, any allegation of breach based on this measure is not within the jurisdiction of the Tribunal.

**C. Other Issues Relating to Standing and Jurisdiction**

42. In addition to the objections described above, the NOA fails to explain how the Claimant has standing to bring this claim under NAFTA Article 1116 or that it is an investor entitled to the protections of NAFTA Chapter Eleven.

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<sup>29</sup> NOA, ¶¶ 66, 68 and 73.

<sup>30</sup> NOA, ¶ 60.

<sup>31</sup> Article 1101(1) provides as follows in relevant part:

This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of another Party;

(b) investments of investors of another Party in the territory of the Party; and

[...]

<sup>32</sup> See NOA, ¶¶ 113-114, and also ¶¶ 86-89, 118-119.

43. Regarding the issue of standing, the Claimant has only submitted its claims to arbitration pursuant to NAFTA Article 1116, which allows an investor to bring a claim on its own behalf on the grounds that it “has incurred loss or damage” as a result of an alleged breach of NAFTA.<sup>33</sup> In light of the text of Article 1116, the Claimant must prove damages incurred directly as an investor that are separate and distinct from the losses incurred by the enterprise.

44. However, in its NOA, the Claimant alleges that “[t]he effect of the various measures has caused loss and damage to the Investor’s related business operations”.<sup>34</sup> It then adds that “[t]he Investor and Investment have suffered loss arising from governmental unfair and arbitrary actions” and that “[t]he Investment has suffered loss and damage arising from Canada’s failure to comply with its NAFTA Chapter Eleven obligations”.<sup>35</sup> According to the NOA, the Claimant also claims moral damages on its own behalf and on behalf of Skyway 127.<sup>36</sup> It is unclear how any of these damages are separate and distinct from the alleged losses of Skyway 127.

45. Regarding the issue of whether the Claimant is an “investor”, NAFTA Article 1101 provides that a tribunal only has jurisdiction to hear claims pertaining to “measures adopted or maintained” that relate to “investors of another Party” and “investments of investors of another Party.”<sup>37</sup> As explained in *Gallo v. Canada*, for a tribunal to have jurisdiction, an “investment must be owned or controlled by an investor of another party, and ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained.”<sup>38</sup>

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<sup>33</sup> Article 1116(1) provides:

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

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

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

<sup>34</sup> NOA, ¶ 129.

<sup>35</sup> NOA, ¶ 130.

<sup>36</sup> NOA, ¶ 131.

<sup>37</sup> **RLA-001**, *Mesa – Award*, ¶ 325.

<sup>38</sup> **RLA-004**, *Vito G. Gallo v. Government of Canada* (UNCITRAL) Award, 15 September 2011, ¶ 325. *See also* **RLA-005**, *Phoenix Action, Ltd. v. Czech Republic* (ICSID Case No. ARB/06/5) Award, 15 April 2009, ¶¶ 67-68; **RLA-001**, *Mesa – Award*, ¶ 326 (emphasis added).

46. The burden of proving that the Claimant is an investor under NAFTA Chapter Eleven and that the Tribunal has jurisdiction to hear its claim falls on the Claimant. While the Claimant alleges that it “continued the investment” of two U.S. nationals that owned and controlled the Skyway 127 Project at the relevant time,<sup>39</sup> it has provided no evidence of its alleged ownership or control of investments in Canada at the time of the alleged breaches. To the extent that the Claimant fails to offer sufficient evidence that it was an investor holding an investment at the time the challenged measures were adopted, Canada has not consented to this arbitration and the Tribunal lacks jurisdiction to hear the claim.

#### IV. REQUEST FOR RELIEF

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

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

July 2, 2019

Respectfully submitted on behalf of Canada,



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Lori Di Pierdomenico  
Heather Squires  
Annie Ouellet  
Susanna Kam  
Mark Klaver  
Johannie Dallaire  
Maria Cristina Harris

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<sup>39</sup> NOA, ¶¶ 11-12.