NOTICE OF ARBITRATION
UNDER THE ARBITRATION RULES OF THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND
THE NORTH AMERICAN FREE TRADE AGREEMENT

TENNANT ENERGY, LLC

Investor

v.

GOVERNMENT OF CANADA

Party

June 1, 2017

Pursuant to Article 3 of the United Nations Commission on International Trade Law ("UNCITRAL") Rules of Arbitration and Articles 1116 and 1120 of the North American Free Trade Agreement ("NAFTA"), the Investor, **TENNANT ENERGY, LLC**, initiates recourse to arbitration under the UNCITRAL Rules of Arbitration (Resolution 31/98 Adopted by the General Assembly on December 15, 1976).

A. DEMAND THAT THE DISPUTE BE REFERRED TO ARBITRATION

1. Under Article 1120(1)(c) of the NAFTA, the Investor demands that the dispute between it and the Government of Canada ("Canada") be referred to arbitration under the UNCITRAL Arbitration Rules.

2. Under Article 1119 of the NAFTA, the Investor delivered a Notice of Intent to Submit a Claim to Arbitration to Canada on March 2, 2017, more than ninety days before the submission of this claim. Canada acknowledged receipt of the submission of this Notice of Intent by a letter from Vernon MacKay from Global Affairs Canada, dated May 18, 2017.

3. Under Article 1121 of the NAFTA, the Investor consents to arbitration in accordance with the procedures set out in the NAFTA. The Investor hereby waives its right to initiate or continue before any administrative tribunal or any court, or any other dispute settlement procedures, any proceedings with respect to the measures outlined herein, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving payment of damages, before an administrative tribunal or court under the laws of Canada. The Investor's executed consent and waiver, and the waiver of the Investment are attached to this Notice of Arbitration.[1]

B. NAMES AND ADDRESSES OF THE PARTIES

4. The names and addresses of the Parties are as follows:

   a. The Investor, Tennant Energy, LLC., is located at 27 Edgefield Ct., Napa, California 94558.

   b. This arbitration is with respect to the operations of an Investment, Skyway 127 Wind Energy Inc. ("Skyway 127" or the "Investment"), an enterprise which developed a 100 MW wind project near the town of Port Elgin in the province of Ontario, Canada. The Investment, Skyway 127, was incorporated in Ontario in October 2007 with a registered office at 3042 Concession 3, Adjala, Ontario, RRI, Hockley Valley, Palgrave, Ontario, L0N 1P0.

[1] The duly executed consent and waiver of Tennant Energy, LLC. is attached at Exhibit 1. The duly executed waiver of the investment is attached at Exhibit 2.

c. The Government of Canada is a Party to this arbitration and is notified through the Office of the Deputy Attorney General of Canada, 50 O'Connor Street, Ottawa, ON KIA 0H8.

C. ARBITRATION CLAUSE OR SEPARATE ARBITRATION AGREEMENT INVOKED

5. The Investor invokes Section B of Chapter Eleven of the NAFTA, and specifically Articles 1116, 1120 and 1122 of the NAFTA, as authority for this arbitration. Section B of Chapter Eleven of the NAFTA sets out the provisions concerning the settlement of disputes between a Party and an investor of another Party.

D. CONTRACT OUT OF OR IN RELATION TO WHICH THE DISPUTE ARISES

6. The dispute is about the Investor's investment in Canada and the damages that have arisen out of Canada's breach of its obligations under Section A of Chapter Eleven of the NAFTA.

E. THE GENERAL NATURE OF THE CLAIM

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"). The Claim is described in detail herein.

Tennant Energy is an Investor of the United States

8. The Investor, Tennant Energy, LLC. ("Tennant Energy"), is a California Limited Liability Corporation. Tennant Energy directly owns and controls Skyway 127.

9. Tennant Energy wholly owns and controls Skyway 127, a wind project designed to produce 100 MW of wind power.

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. ("General Electric" or "GE") and John Tennant, a US national. Mr. Tennant is a US citizen and GE Energy is a limited liability corporation incorporated in the state of Delaware.

    a. GE Energy acquired its initial equity investment in Skyway 127 as of November 24, 2009.

    b. John Tennant acquired his initial equity investment in Skyway 127 on April 19, 2011.

11. Tennant Energy continued the investment of these American entities in Skyway 127 through a corporate reorganization on January 15, 2015. Tennant Energy acquired GE Energy's investment in Skyway 127, along with its intangible rights associated with this investment, as of June 30, 2016.

12. Tennant Energy owns and controls the investment. At all material times in respect to this claim, Tennant Energy, GE Energy and John Tennant have been American nationals. Collectively, GE Energy and John Tennant have owned and controlled the investment, and Tennant Energy has continued as successor in interest to own and controls the Investment.

13. GE Energy acquired its equity in Skyway 127 as follows:

    a. GE Energy physically received shares evidencing its 15% interest in the share equity in Skyway 127 on November 29, 2009; on November 24, 2009, GE Energy issued a letter of guarantee for the entire project to the Ontario Power Authority. The Guarantee confirmed its 15% interest in the Skyway 127 project.

    b. GE Energy acquired a further 35% interest in the share equity in Skyway 127 on June 1, 2011.

14. John Tennant is a US citizen, resident in California. He made an investment in Skyway 127 as follows:

    a. On April 19, 2011, John Tennant acquired a 11.3% interest in the share equity of Skyway 127;

    b. He received a further 11.3% interest of the share equity on December 30, 2011.

15. The predecessors in interest of Tennant Energy owned and controlled a majority of the shares of the company before damage was suffered by the Investment, and before the Investor knew of the breach of the NAFTA that give rise to this claim.

The Respondent

16. Canada is a Party to the NAFTA. The Province of Ontario is a subnational government of Canada. Canada is responsible for Ontario's observance of the NAFTA pursuant to NAFTA Article 105.

17. Energy policy in Ontario is directed by the Ontario Minister of Energy through the Ministry of Energy. The Minister of Energy directed a controlled-instrumentality, the Ontario Power Authority ("OPA") to implement the FIT Program. This implementation took place by mandatory directives from the Ministry of Energy. As a matter of Ontario law, the Ontario Power Authority was required to carry out the directions and directives received from the Minister of Energy.

18. As directed by the Ministry of Energy under powers conferred by Ontario law, the OPA is responsible for implementing the FIT Program, including the setting of prices and the administration of contracts. The defined power purchase rates are paid for under the contracts between the OPA and electricity generators.[2]

19. The measures at issue were taken by Ontario, either directly by its Ministry of Energy, or at the direction of its Ministry of Energy by the Ontario Power Authority under mandatory provisions of Ontario's *Electricity Act*.

20. As a result of the actions by the Government of Ontario, Canada failed to meet its international law obligations contained in Chapter Eleven of the North American Free Trade Agreement. These actions resulted in harm to the Investor.

The FIT Program

21. In Ontario, electricity is privately generated and distributed. Energy is instantaneously connected from the energy generator to the Ontario Transmission Grid and then to consumers.

22. Ontario's government launched its Feed-in Tariff Program ("FIT Program") in 2009.[3] The various government directives, orders, rules, programs and practices that comprised the FIT Program are set out in Annex A to this Claim.

23. Through long-term fixed price contracts with the OPA, the Ontario FIT Program guaranteed electrical grid access to renewable energy producers. As a green energy supplier, Tennant Energy needed to enter into contractual relations with the OPA to have the opportunity to conduct business with the local distribution companies and the transmission asset owners with whom electricity generators benefiting from the FIT Program need to work with to connect to the network.

24. All renewable energy produced by a generator under a FIT Contract is supplied into the Ontario Transmission Grid.

25. A successful applicant under the FIT Program would receive a Power Purchase Agreement (PPA) from the OPA, which guaranteed a set purchase price over a twenty year period (the "FIT Contract").[4] This guaranteed purchase price was based on 13.5 cents per kilowatt hour plus escalators.

26. The Bruce to Milton Transmission Project was a key element to enable power production in the Bruce Region under the FIT Program. This project was designed to allow the OPA

[2] Feed-in Tariff Program, *FIT Rules Version 1.5*, June 3, 2011, Ontario Power Authority at para. 1.2.
[3] The Ontario legislature enacted the *Green Energy Act* on May 14, 2009. *Green Energy Act, 2009,* SO 2009, c.12, Sched. A.
[4] Feed-in Tariff Program, *Program Overview*, August 2010 at para. 6.4.

to offer contracts under the FIT Program in the region from Bruce County to Milton, Ontario. The process was to offer 1,200 MW of renewable energy contracts with this region of the province of Ontario.

27. A proponent would only be offered a FIT Contract if there is sufficient transmission capacity available to connect the project. To determine whether the necessary connection resources were available to the applicant, the OPA provided tools designed to identify connection availability. Provided that the project was not exempt from the OPA's project capacity allocation, then all proposed projects were to be assessed within sixty days of a complete application.

28. On November 24, 2009, Skyway 127 initiated an application for 100 MW of wind power in the Bruce Transmission zone during the launch-period of the FIT Program.

29. On December 21, 2010, the OPA issued its first-round priority ranking, and indicated that priority ranking was based on the acceleration – shovel-readiness criteria.[5] Skyway 127 ranked in the sixth priority position in the Bruce Transmission area based on the publically released rankings. The Ontario Power Authority stated that there was 1200 MW of electricity transmission available to projects in the Bruce Region.[6] The five projects ranking in priority ahead of Skyway 127 would consume only 280 MW of this 1200 MW of available transmission access. Skyway 127 thus had a very successful ranking.[7]

The Korean Consortium's Green Energy Investment Agreement

30. On January 21, 2010, two Korean-controlled companies, Samsung C&T Corporation and Korea Electric Power Corporation, signed a $7 billion green energy investment agreement with Ontario's Premier and with Ontario's Minister of Energy (The Agreement is known as the *Green Energy Investment Agreement*).[8] The secretly negotiated GEIA granted the Korean Consortium 2500 MW of privileged transmission access for renewable energy generated projects anywhere in Ontario. The existence of the agreement was public, but its terms and conditions were kept secret. The secret agreement granted Samsung C&T and Korea Electric Power Corporation significantly better access to renewable energy transmission and generation than to other energy providers in the province of Ontario including other companies participating in the FIT Program.

31. The Korean Consortium was able to obtain FIT Contacts for their projects under the terms of the GEIA rather than under the terms of the FIT Program.

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[5] Feed-in-Tariff Program, Program Update, *Priority ranking for First Round FIT Contracts*, December 21, 2010.
[6] OPA, *Priority ranking for First Round FIT Contracts*, December 21, 2010.
[7] OPA, *Priority ranking for First Round FIT Contracts*, December 21, 2010.
[8] Samsung C&T Press Release, January 21, 2010. The Press release also indicates that Samsung C&T is currently engaged in renewable energy projects in Korea, Italy, Greece, Turkey, Costa Rica and the United States.

Delay and the Korean Consortium's Predatory Activity

32. In April 2010, the Ontario Power Authority awarded FIT Contracts to FIT Proponents in all Ontario Transmission zones other than the Bruce and the West of London zones. Skyway 127's projects did not receive a contract in this round at this time because all FIT Contract awards in the Bruce zone were delayed. Two more stages of awarding contracts were planned but a Proponent required transmission capacity and an availability tests still to be conducted, such as a Transmission Availability Test ("TAT") for the second round of contract awards and an Economic Connection Test ("ECT") for the third round of contract awards, for which Skyway was competing.[9] For such tests to be performed it was required that proponents had have to have chosen their connection points.

33. Canada gave specific assurances to individual proponents that the first ECT would begin in August 2010.[10] In a webinar in May 2010, the OPA confirmed that the results of the August 2010 ECT "will be available in early 2011."[11] It is further reasonable to expect that, as set out in the FIT Rules, the ECT would be run every six months thereafter.[12]

34. For reasons unexplained, the Korean Consortium, knowing that it had guaranteed and priority transmission access, delayed choosing its transmission points. The OPA allowed the Korean Consortium to delay, and subsequently the OPA delayed the testing process and contract awards for all FIT proponents.

35. This was confirmed by Ontario's Auditor General who stated that the ECT could not be run because the Korean Consortium had not finalized connection points for its projects under the GEIA, which granted the Consortium priority access to transmission capacity.[13]

36. Ontario and the OPA never notified the FIT proponents that the scheduled ECT was delayed to accommodate the wishes of the Korean Consortium and its projects under the GEIA.

37. From the text of the GEIA (that was not available until more than 4 years after its signature), it is clear that the Korean Consortium was required to identify and commence development of its wind projects on a timely basis and in a manner consistent with the deadlines in the GEIA.

38. The GEIA set out specific deadlines for renewable energy projects. Phase 1 of the *Green Energy Investment Agreement* was to provide for Targeted Generation Capacity of 400

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[9] *Mesa v. Canada*, Investor's Memorial, at ¶¶565-566; the running of the ECT was dependent on the OPA completing the TAT round.
[10] Letter from [redacted] April 8, 2010.
[11] OPA, Presentation, "The Economic Connection Test - Approach, Metrics and Process", May 19, 2010, at p.39.
[12] OPA, *FIT Rules Version 1.2,* November 19, 2009, s. 5.4(a).
[13] Annual Report of the Auditor General of Ontario, 2011, Chapter 3, at p.116.

MW of wind power and 100 MW of solar power with the targeted commercial operation date as of March 31, 2013.[14]

39. To satisfy Phase 1 of the *Green Energy Investment Agreement*, the Ontario Ministry of Energy directed the OPA on September 30, 2009 to hold in reserve 240 MW of transmission capacity in Haldimand County, Ontario and a total 260 MW of transmission capacity in Essex County and the Municipality of Chatham-Kent jointly for renewable energy generating facilities with respect to proponents that signed province-wide framework agreements.[15] Because of the *Green Energy Investment Agreement*, the Korean Consortium received a guaranteed right of the first refusal on transmission access in these transmission zones in the Province of Ontario.

40. Susan Lo admitted during her testimony that almost immediately the Korean Consortium had problems meetings its deadlines for commercial operation of its phase 1 and 2 generation projects.[16]

41. Article 11.1(e) of the GEIA required the Korean Consortium to:

    a. "[S]pecify Points of Connection to the existing Transmission System or specify project locations for the generation connection for the Generation Facilities for Phase 2 on or before July 30, 2010 …" and
    b. For Phases 2 to 5 "demonstrate the necessary Access Rights, including Points of Connection, for a Generation Facility at least three years prior to the Targeted Commercial Operation Date for the Phase."[17] For Phase 2, under the valid agreement in 2010, the target COD was December 31, 2013.[18]

42. The Korean Consortium did not meet either of these requirements.[19]

43. Ontario had the right to terminate the GEIA if deadlines were not met.[20] Yet, despite that these deadlines were not met, the GEIA was not terminated. Had Ontario terminated the agreement, more capacity would have been available for the FIT program, including in the Bruce Region.

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[14] Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, April 1, 2010.

[15] Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, April 1, 2010.

[16] *Mesa v. Canada*, Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.94-95, lns.23-2.

[17] GEIA, Art. 11.1(e).

[18] GEIA, Art. 3.2.

[19] The *Mesa v. Canada*, Investor's Post Hearing Submission at ¶¶92-93 references the following: GEIA Working Group Meeting, Minutes/Agenda, September 9, 2010 ***[CONFIDENTIAL]***. These meeting minutes show that the connection points had not yet been selected; Ontario Power Authority, News Release, "Power purchase agreements signed with Korean Consortium", August 3, 2011**.** The wind sites used for Phase 2 by the Korean Consortium in August of 2011 were K2 and Armow; Ontario Power Authority; The K2 and Armow projects were in the FIT program in July 2011.

[20] GEIA, Art. 14.2(d). Article 14.2 granted Ontario the right to terminate if any of the conditions listed in 11.1 with respect to Phases 2 to 5 are not satisfied.

44. Susan Lo admitted that the Ministry of Energy reviewed with its legal counsel the leverage that Ontario could exercise with the Korean Consortium to renegotiate a more favourable agreement,[21] and that this leverage was exercised.[22] Ontario did not terminate the agreement however, despite the benefits of doing so to the FIT stakeholders, because it did not want the GEIA nullified for political reasons.[23] Instead, Ontario excused the Korean Consortium's breaches, amending the GEIA twice: once in July 2011, coinciding with the July 2011 FIT awards;[24] and again in June 2013, coinciding with the termination of the FIT program.[25]

45. Under the first amendment, the Economic Development Adder ("EDA") was reduced in exchange for an extension of the deadlines,[26] and the deadline for specifying Phase 2 connections points was eliminated entirely.[27] Additionally, this amendment provided that "bringing Manufacturing Plants to Ontario includes the use of existing facilities for a new purpose."[28] Further, on August 3, 2011, the Ontario Ministry of Energy announced changes to the generous terms granted to the Korean Consortium.[29] The Minister gave a one-year extension to the Consortium to create jobs in Ontario.

46. Under the second amending agreement, the priority capacity granted to the Korean Consortium was reduced from 2500 MW to 1369 MW.[30]

47. Despite the fact that the GEIA specified that "time is of the essence," Ontario allowed the Korean Consortium to miss its deadlines with impunity. Its justification, as Ms. Lo explained, was that, despite having received a special deal, the Korean Consortium wanted the same treatment as FIT proponents,[31] when it was to its favour.

48. While the OPA was delaying contract awards for the Korean Consortium, on December 21, 2010, the OPA issued its first-round priority ranking. Priority ranking was based on the acceleration on account of the project's shovel-readiness and other FIT Program criteria.[32]

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[21] *Mesa v. Canada*, Testimony of Sue Lo, Hearing Transcript, Day 3, at p.94, lns.8-5.
[22] *Mesa v. Canada*, Testimony of Sue Lo, Hearing Transcript, Day 3, at p.94, lns.16-18.
[23] *Mesa v. Canada*, Testimony of Sue Lo, Hearing Transcript, Day 3, at p.91, lns.19-25.
[24] *Green Energy Investment Agreement Amending Agreement*, July 29, 2011.
[25] *Amended and Restated Green Energy Investment Agreement,* June 20, 2013.
[26] *Green Energy Investment Agreement Amending Agreement*, July 29, 2011, at ¶15.
[27] *Green Energy Investment Agreement Amending Agreement*, July 29, 2011, at ¶¶9, 17, 19-20.
[28] *Green Energy Investment Agreement Amending Agreement*, July 29, 2011, at ¶¶ 12.
[29] Ministry of Energy, Statement from Minister of Energy, the Honourable Brad Duguid, August 3, 2011 (Elaborating on changes to the generous terms granted to Samsung C&T and its Consortium Partners).
[30] *Amended and Restated Green Energy Investment Agreement*, Art. 3.
[31] Testimony of Sue Lo, *Mesa* Hearing Transcript, Day 3, at pp.94-95, lns.23-4: The Korean Consortium wanted extensions of their phase 1 and 2 commercial operation dates. This is something that was provided to all FIT proponents in a – by the OPA at the Ministry's request. So what they wanted was the same treatment as every FIT proponent had received." (Emphasis added)
[32] OPA, FIT Priority Ranking List, December 21, 2010.

49. The public release of the December 2010 rankings by the OPA allowed the Korean Consortium to determine which projects would receive FIT contracts. With guaranteed transmission access and a lack of shovel-ready projects to fulfill their obligations under the GEIA this knowledge proved critical for Pattern Energy and the Korean Consortium who could then approach promising developments that were not in a position to obtain FIT contracts with offers well below the market pricing. Evidence from the *Mesa* hearing revealed that the Korean Consortium, and its joint venture partner Pattern Energy, had delayed its connection point and used the delay, to pick "low hanging fruit" – projects ranked too low to obtain a FIT contract – in the FIT process to then convert into GEIA projects.

50. At the *Mesa Power* hearing, OPA's FIT Manager, Jim MacDougall, testified that the OPA knew about this predatory strategy Pattern was using to obtain FIT Contracts from projects that would otherwise not succeed under the FIT Program.[33]

51. Hence, the FIT proponents invested money and time to obtain access rights, chose connection points, and developed their projects to ensure that they were "shovel ready," the Korean Consortium and Pattern could sit back, wait for FIT proponents to do the heavy lifting, and then buy them out to satisfy their own GEIA commitments. Evidence at the hearing showed that they bought numerous low-ranked projects. This occurred despite the fact that the Korean Consortium was given a special, "sweetheart" deal based on its public non-binding representations that it would create jobs.

52. Meanwhile, buying viable, but low-ranked, projects for salvage value and converting them to successful FIT Projects effectively meant the Korean Consortium did not meet its 2010 obligations – it had waited until the regional FIT rankings were announced to determine which FIT proponents it could attempt to buy out at rock bottom prices. Despite its breach, Ontario never held the Korean Consortium in default and provided all of the benefits of the GEIA to the Korean Consortium.

53. As noted in Judge Brower's separate and dissenting award in the *Mesa Power* case:

> By August 2011, the Korean Consortium had acquired two low-ranked projects in the Bruce region that never stood a chance of obtaining a FIT Contract, but were nevertheless granted PPAs under GEIA. First, the Korean Consortium acquired the Amrow project from Acciona, which was ranked 21st in the Bruce region. Second, the Korean Consortium acquired the K2 wind project from Capital Power, which was ranked 24th in

[33] *Mesa v. Canada*, Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp.200-01, lns.19-19. Sue Lo also discussed this strategy: "[i]t would make sense" that the Korean Consortium was purchasing "low-ranked projects that really had no realistic opportunity to become part of the FIT program in order to satisfy their obligations under the GEIA" but she was "not aware or unaware": *Mesa v. Canada*, Hearing Transcript, Day 3, at p.87, lns.13-24.

> the Bruce region. Thus, these projects were well behind TTD and Arran, which had been ranked 3rd and 4th respectively.[34]

54. Correspondingly, had the Korean Consortium not been given a 500 MW reservation, and taking into consideration the combined kW of the projects ranked ahead of Skyway 127 at the time of the December 2010 ranking (280 MW), it was highly likely that Skyway 127 would have received a FIT contract based upon the MW available in that region and Skyway's rank in priority list for receiving contracts.

The GEIA was cloaked in secrecy by Ontario

55. The issue of public transparency of the GEIA was canvassed in the *Mesa Power* NAFTA arbitration.[35] That Tribunal concluded that only the following aspects of the GEIA were publically known, from the minimal press releases and news stories available at the time:

> These facts appear to indicate that the Ministry worked towards two parallel renewable energy programs – the GEIA and the FIT Program – without fully informing the public and other stakeholders of one of them, namely the GEIA. Be that as it may, prior to the Claimant's investment in November 2009, the following information was publicly available and known to the Claimant: (i) the negotiations with the Korean Consortium were at an "advanced stage"; (ii) pursuant to those negotiations, the Korean Consortium would get an "economic adder" or EDA in addition to the regular rate "if [it] commit[ted] to manufacturing its equipment in Ontario"; (iii) the OPA had been instructed to hold in reserve transmission capacity for "generating facilities whose proponents have signed a province-wide framework agreement"; and (iv) the agreement with the Korean Consortium "would give them priority access to Ontario['s] grid space".[36]

This summary expresses the totality of all public information regarding the GEIA at that time as determined by that Tribunal. There was no indication as to how the GEIA would interact with the FIT Program, that stakeholders who otherwise would be eligible for a FIT contract could be bumped by the Korean Consortium after-the-fact or what obligations the Korean Consortium had undertaken. The decisions made by the government afterward relating to the GEIA's management were equally non-transparent.

56. Pattern Energy Group LLC. ("Pattern Energy") is an independent, fully-integrated energy company that develops, constructs, owns and operates renewable energy and transmissions assets in the United States, Canada and Latin America.[37] On April 18, 2011, Pattern Energy joined the Korean Consortium to acquire wind projects in Ontario.

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[34] *Mesa Power Group, LLC v. Government of Canada,* Dissenting and Concurring Opinion of Judge Charles Brower, ¶15, p.8.

[35] The majority award of the NAFTA Power Tribunal is currently under judicial review for set aside in the District Court of the District of Columbia. The separate dissenting award of Judge Charles Brower has not been challenged in this procedure.

[36] *Mesa Power v. Canada* at para. 607 (footnotes omitted).

[37] Pattern Energy has a head office in San Francisco, California, and offices in Houston, New York and Toronto. Pattern Energy Press Release, April 18, 2011.

Pattern Energy joined into the benefits of the *Green Energy Investment Agreement*, by jointly acquiring land from two wind development projects in the Regional Municipality of Chatham-Kent.[38]

57. A few days later, on April 26, 2011, Pattern Energy collaborated with Samsung Renewable Energy to acquire wind power projects in Ontario.[39] Samsung noted that this successfully "secured dedicated transmission capacity for these initial projects."[40]

The July 4, 2011 Contract Awards

58. On Friday, June 3, 2011, the OPA, without any prior notice, and contrary to its established practice, issued a new set of rules for awarding FIT Program contracts based on a directive it received from the Ontario Minister of Energy.[41] The new rules made four fundamental changes:

    a. The Ontario Power Authority was directed to award 750 MW of FIT Program contracts in the Bruce Region transmission zone, and 300 MW in the West of London Region transmission zone;[42]

    b. Each project was now to be provided the opportunity to change its interconnect point during a five-day period commencing Monday, June 6, 2011;[43]

    c. Projects in the Bruce or West of London Regions could change and select an interconnect point outside their region, and could build long transmission lines outside of their regions and into neighboring regions; and

    d. Instead of evaluating projects on the previously published priority rankings for the region, the projects were now to be evaluated on a provincial-wide ranking.

59. Because of these last minute new rules, several existing wind projects in the FIT Program queue in the Bruce Region transmission zone no longer were able to receive transmission capacity at their specific designated locations (their transmission interconnect points).

60. On July 4, 2011 Skyway consequently was not offered a FIT Program Contract, because of the 750 MW limit on awards in the Bruce Region, even though there was still available transmission capacity at each of their respective interconnects. The Investment was put

[38] Pattern Energy Press Release, April 18, 2011.
[39] Pattern Energy Press Release, April 26, 2011.
[40] Pattern Energy Press Release, April 26, 2011.
[41] Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, June 3, 2011.
[42] Feed-in Tariff Program, *FIT Rules Version 1.5*, June 3, 2011, Ontario Power Authority at ¶. 5.4.1(c)(iv).
[43] Public News Release, *Allocating Capacity and Offering FIT Contracts for Bruce to Milton Enabled Projects*, June 3, 2011, Ontario Power Generation.

on the priority waitlist. This left the Investment in the position that it still might be awarded a FIT Contact until June 2013 when the Program was disbanded.

61. Rather than allow the FIT Program to be impartially assessed through the ordinary approval process, Ministers and other government officials used extraordinary unilateral Ministerial directives to interfere with Tennant Energy's property rights and the conduct and operations of its investments. These measures were taken without any consultation or notice to the Investor or its investments.

62. The arbitrary and non-transparent use of these extraordinary powers resulted in a direct and immediate benefit to the better-treated companies, and were taken in the context of an Ontario provincial general election to be held on October 6, 2011.

63. Projects in the West of London region, which had a higher provincial-wide priority ranking, could now build long transmission lines to interconnect in the Bruce Region and thereby jump ahead in the priority ranking.

64. For example, a domestic competitor to the Claimants, Boulevard Associates Canada, Inc., was able to bring four of its West of London region projects, that were previously not eligible to receive contracts because of the 300 MW limit in that region, over to the Bruce Region. This allowed Boulevard Associates Canada, Inc. to jump to the front of the priority line, bumping ahead of the projects that had been in the Bruce Region since the beginning of the FIT Program, including the Investor's projects.

65. In contrast to numerous other rule changes that would substantively affect the rights of proponents,[44] the OPA provided no advance notice of the June 3 rule change, nor did it undertake stakeholder consultations.[45] At the *Mesa* NAFTA hearing, witnesses testifying on behalf of Canada confirmed that this was not the usual practice under the FIT.[46] One witness testified that the reason for denying FIT investors the right to comment on the rule change was politics.[47] Ontario was in a hurry to award contracts before the elections

[44] A number of previous rule changes included notice and an opportunity to comment. OPA, "FIT Program Update: Summary of changes to the FIT Rules, contract and standard definitions, Version 1.3.1", July 2, 2010**;** OPA, "FIT Program Update: Summary of changes to the FIT Rules, contract and standard definitions, Version 1.3.2", October 29, 2010**;** OPA, "Proposed rule change for capacity allocation exempt (CAE) FIT Applications", December 8, 2010**.**

[45] *Mesa v. Canada*, Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.235, lns.3-8**.**

[46] *Mesa v. Canada*, Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.234, lns.4-14; *Mesa v. Canada*, Testimony of Shawn Cronkwright, Hearing Transcript, Day 4, at p.59, lns.14-21**.**

[47] *Mesa v. Canada*, Testimony of Sue Lo, Hearing Transcript, Day 3, at p.156, lns.5-13 ("THE CHAIR: I am not sure. So why did you not give an opportunity to comment to the proponents? THE WITNESS: I think at that time, going back to the summer of 2011, what was also happening was that the government really wanted to have those contract awards as soon as possible, and to provide a comment period would have slowed down the awarding of contracts.")**.**

in order to promote the success of the program.[48] For this purpose, due process rights of stakeholders were ignored.

66. As a result of the Ministerial Direction (June 2011) and the newly incorporated Section 5.4.1 to the FIT Rules, wind projects located in the West of London region were able to connect to the Bruce Region transmission capacity. Consequently, several of the wind projects in the Bruce Region transmission zone, including Skyway 127, lost available transmission capacity in their designated interconnects. Skyway 127 lost its opportunity for a FIT contract as a result.

67. Projects included in the assessment announced on June 3, 2011 were required to be on the FIT Priority Ranking list for either the Bruce or West of London transmission areas. The OPA posted the ranking alongside the June 3, 2011 announcement.

68. On July 4, 2011 the Investor consequently lost their priority ranking and was not offered FIT Program contracts, because of the 750 MW limit on awards in the Bruce Region, even though there was still available transmission capacity at each of their respective interconnects.

69. On August 2, 2011, the OPA announced that it would modify the termination provisions of the FIT Program to ensure that any contract awarded could not be terminated under the existing four-month termination provisions in the FIT Program.[49]

70. On August 3, 2011, the Ontario Ministry of Energy announced changes to the generous terms granted to Samsung C&T and its Consortium Partners.[50] The Minister gave a one-year extension to the Consortium.

SKYWAY 127 and the Bruce to Milton Transmission

71. As a result of the unprecedented June 3, 2011, rule changes projects in the West of London area that had a higher provincial-wide priority ranking could now build long transmission lines to interconnect in the Bruce Transmission Region, and thereby trump Skyway 127's projects in the OPA priority ranking.

72. This was the case with a domestic competitor to Skyway 127, Boulevard Associates Canada, Inc. Boulevard Associates was able to move four of its unsuccessful West of London projects over to the Bruce Region as a result of the rule change, even through the Boulevard projects would take many years to build and at least one of the projects did not even have a wind turbine agreement. The Ministerial Direction of June 2011 allowed Boulevard Associates Canada, Inc. to jump to the front of the priority line for the Bruce

[48] *Mesa v. Canada*, Testimony of Sue Lo, Hearing Transcript, Day 3, at p.158, lns.4-5 (the government wanted the awards as soon as possible); p.178, lns.19-25 (the government wanted to make "a splash in terms of awarding contracts" because they were up for re-election).

[49] Directive from Minister of Energy, the Honourable Brad Duguid to Colin Andersen, CEO, Ontario Power Authority, August 2, 2011.

[50] Public News Release from Ontario Minister of Energy, the Honourable Brad Duguid, August 3, 2011.

Transmission Region and bump ahead some of the projects, including Skyway 127, that had been in the top ten in that area since the launch of the FIT Program.[51]

73. On July 4, 2011, the Skyway project was not offered a FIT Contract at that time, in spite of the fact that it ranked 6th in the ECT and there was sufficient transmission capacity to permit the Investment to obtain a FIT Contract at that time. However, Skyway 127 was told it remained in the running for a contract. JoAnne Butler, VP at the OPA, wrote to Skyway 127 stating: "At this time your project will remain in the Priority Ranking and proceed to the Economic Connection Test."[52]

NextEra and the Bruce to Milton Transmission

74. Looking at Skyway's competitors a different story emerges. On the published ECT report from the Ontario Power Authority prior to June 4, 2010, NextEra's projects were located in the West of London region and not shown in the Bruce transmission area, but due to the limited capacity that would be activated in this region (300 MW), most of NextEra's projects would not have received a contract in the West of London region.[39]

75. Realizing this, NextEra began lobbying the Ontario government for a change to the rules to allow changes in connection points amongst regions.

76. Jim MacDougall, the former FIT Program manager at the OPA, confirmed during the *Mesa* NAFTA hearing that, after he left his employment at the OPA, he had heard that the reason the rules were changed to allow connection point changes between regions was because NextEra had lobbied for this result.[53] He explained that NextEra had bundled its projects as the NextEra "six-pack approach" to "share a common connection, whose connection would be relatively expensive, but shared across six projects would make a connection economically viable."[54]

77. NextEra accomplished this through ties with the Ontario government. After a concerted lobbying campaign, NextEra was given preferential access to government officials. NextEra's Vice President, Al Wiley, personally met with high level officials.[55] On May 11, 2011, Mr. Wiley met with Andrew Mitchell, Senior Policy Advisor in the Minister of Energy's Office, to discuss whether a connection point change window would be opened prior to the next round of FIT contract awards, which was a "a very significant issue for NextEra."[56]

78. NextEra's efforts worked. On May 12, the Premier met with the Ministry of Energy, and

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[51] OPA, FIT CAR Priority Ranking by Region, June 3, 2011.
[52] Letter from JoAnne Butler, OPA to John Pennie, Skyway 127, July 4, 2011.
[53] *Mesa v. Canada,* Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.225, lns.5-9.
[54] *Mesa v. Canada,* Testimony of Jim MacDougall, Hearing Transcript, Day 3, at p.228 lns.1-7.
[55] The Investor's Post Hearing Brief in Mesa Power refers to this issue at para. 156 and references an Email from Al Wiley (NextEra), dated May 10, 2011 ***[CONFIDENTIAL]***.
[56] The Investor's Post Hearing Brief in Mesa Power refers to this issue at para. 156 and references an Email from Sue Lo (Ministry of Energy) to Phil Dewan (Counsel Public Affairs), May 12, 2011.

the decision was made to allow a connection point window change.[57] On May 13, the morning *after* this decision was made, Ms. Lo, then Assistant Deputy Minister at the Ontario Ministry of Energy, met with NextEra, and in response to this call, Mr. Wiley sent Ms. Lo the names of the six NextEra projects "remaining in the FIT queue."[58]

79. As a result of the change to the FIT Rules on June 3, 2011, all of NextEra's six projects were granted FIT contracts.

IPC and the Bruce to Milton Transmission

80. At the *Mesa* NAFTA hearing, it was revealed that politics came to play in yet another project. Ontario government officials took steps to give better treatment to selected privileged Canadian FIT proponents to protect these projects from the set-aside provided to the Korean Consortium.

81. During the *Mesa* hearing, the closing statements confirm that evidence from the hearing was presented that Sue Lo testified that there was not an "even playing field" between the Korean Consortium and FIT proponents. When asked about an email she had written, she had confirmed that two projects owned by a Canadian project, International Power Canada ("IPC"), would be given special treatment to protect it against the effects of the Korean Consortium's transmission set-aside. The President of IPC was the past president of the governing Ontario Liberal Party.[59] As a result of protection afforded to IPC, IPC projects received FIT contracts. Without similar protection from Ontario, Skyway 127 lost its position and thus the fair opportunity for contracts.

The FIT Program is Terminated

82. The FIT program was ended on June 12, 2013.[60] With the termination of the FIT Program, Skyway 127's place on the priority waiting list for a FIT Contract also was terminated.

Ontario unfairly manipulated the dissemination of information under the FIT Program

83. Ontario arbitrarily modified the FIT Program Rules in a manner that disadvantaged the Investment to the benefit of other proponents. The Investor's Post-Hearing Brief in *Mesa Power* demonstrates the following evidence on these points from that NAFTA hearing on the FIT Program:

    a. That the Ministry of Energy interposed itself in the operation of the selection process of a multi-million dollar award of lucrative FIT contracts. Despite even at the Mesa Power hearing, Ontario's energy officials were contending that it would be improper

[57] *Mesa v. Canada,* Rejoinder Statement of Shawn Cronkwright, at ¶21.
[58] The Investor's Post Hearing Brief in Mesa Power at para. 156 refers to this issue and references an Email from Sue Lo (MOE) to Al Wiley (NextEra), dated May 13, 2011.
[59] *Mesa v. Canada*, Closing Statements, Hearing Transcript, Day 6: p.54, lns.19-23 and p.284, lns.11-16.
[60] Direction from Minister of Energy Bob Chiarelli to Colin Anderson, OPA, June 12, 2013.

for the Ministry of Energy to prefer one applicant over another, the evidence shows that this is exactly what happened. The Ministry had access to confidential rankings of FIT applicants to see how contracts would be given and how changes would affect applicants.

b. With Ontario knowing this information, one applicant, NextEra Energy, was given access to high-level government officials and succeeded in lobbying for a FIT rule change while at the same time receiving prior knowledge of the change. Blatant protection was afforded to International Power Canada, a Canadian company whose exclusive leadership at the time was a well-known political backer of the Ontario Liberal government.[61]

c. The result was a capriciously misapplied process contaminated by selective and improper investor protection, a lack of minimal due process, and a complete lack of transparency and candor. This culminated in a significant rule change that was decided without any consultation with stakeholders, and literally was given a weekend's advance notice. Mesa has also shown that the culmination of all these facts were in complete disregard of the international principles of fair and equitable treatment.[62]

Spoliation of Evidence

84. Tennant Energy, along with other FIT proponents, were only able to ascertain what occurred well after the termination of the FIT Program due to the non-transparent administration of the FIT Program.

85. The terms of the GEIA were actively suppressed by the Government of Ontario, and were not released until a judicial intervention was filed in the United States, where a US Court ordered an American company with a copy of the GEIA to turn it over to another FIT Proponent who had commenced an international arbitration claim against Canada. Only in this specific and unusual circumstance did a FIT Proponent obtain a copy of the GEIA. This document was subject to a confidentiality order and was not available at that time to be shared with other FIT Proponents.

86. In 2011, Trillium Wind Power Corporation, another FIT proponent, filed domestic lawsuit in Ontario against the Government of Ontario. Among other claims, Trillium Wind made claims for malfeasance in public office.[63] In 2015, the Ontario Court of Appeal, overruled the objections of Ontario and allowed the claims for consideration on the issues of malfeasance in public office, as well as for spoliation of evidence, which

[61] Hearing Transcript, Day 6, at p. 284, lns.11-16.
[62] Testimony of Jim MacDougall, Hearing Transcript, Day 3, at pp.234-235, lns.1-20.
[63] *Trillium Power Wind Corporation v. Ontario* (Natural Resources), 2013 ONCA 683.

became apparent after the discovery phase of the case took place.[64] The case is pending before the Court of Appeal. The basis for this claim related to documents not disclosed by Ontario in Trillium Wind's domestic case.

87. Further, in May 2014, the Ontario Provincial Police launched a criminal probe over the alleged destruction of documents by government officials about Trillium's case.[65] The investigation is still ongoing.

88. Senior officials in the office of the Premier were criminally charged for the destruction and non-disclosure of evidence about another large energy project in Ontario.

89. On September 13, 2012, the Ontario legislature issued a preliminary ruling against the Minister of Energy, Chris Bentley, and declared him in contempt of the legislature for refusing to disclose all the documents relating to the cancellation of the gas plant. In 2013, the Chief of Staff and the Deputy Chief of Staff to the Premier of Ontario were charged with breach of trust, mischief about data, and misuse of a computer system about the alleged destruction of documents of the canceled two gas plants. The trial is set to begin in the fall of 2017.

F. BREACH OF OBLIGATIONS

90. The Investor claims that Canada has violated at least Article 1105 of Section A of NAFTA Chapter Eleven. These breaches have resulted in damage to the Investor.

91. There are four categories of wrongful actions arising in this claim:

a. Ontario unfairly manipulated the award of access to the electricity transmission grid, resulting in unfair treated to the Investment.

b. Ontario unfairly manipulated the dissemination of program information under the FIT Program;

c. Ontario unfairly manipulated the awarding of Contracts under the FIT Program; and

d. Senior officials improperly destroyed necessary and material evidence of their internationally unlawful actions in an attempt to avoid liability for their wrongfulness.

[64] Trillium Power Wind Corporation media release, June 22, 2015.
[65] Reevely, David, *OPP probes wind-farm records*, Ottawa Citizen, May 4, 2016, available at: http://ottawacitizen.com/news/local-news/exclusive-opp-probes-wind-farm-records.

92. Each of these governmental measures was taken by the Government of Ontario or by its directed and controlled state enterprise, the Ontario Power Authority.

NAFTA ARTICLE 1105 – THE INTERNATIONAL LAW STANDARD OF TREATMENT

93. NAFTA Article 1105 sets out the international law standard of treatment that a NAFTA Party is obliged to accord investments of another NAFTA Party. Canada must ensure that the Investment receives treatment in accordance with the international law standard of treatment, including fair and equitable treatment, freedom from discrimination and full protection and security.

94. Ontario ignored the fundamental legal duty and responsibility of all public servants, who exercise either statutory or discretionary authority, to perform their duties fairly, reasonably, and in good faith. The Rule of Law applies to the exercise of all public authority. It requires that no public authority be unfettered and that all public authority is exercised fairly and in good faith, on the basis only of relevant considerations – assessed reasonably, honestly, objectively, transparently, and impartially – and only for the purpose for which the authority was granted.

95. Ontario's unfair decisions violated fundamental principles of fair and equitable treatment by disregarding and disrespecting the basic principles of fairness, due process, transparency, candor, and the expectations of foreign investors. It is these precise actions, such as protection from petty local politics, which the NAFTA protects.

96. Ontario has a history of unfair administration in relation to renewable energy. This unfairness was confirmed by the NAFTA Tribunal in *Windstream Energy, LLC v. Canada* where that Tribunal unanimously found that Ontario's failure to fairly to fairly administer the FIT Program had breached the fair and equitable treatment obligation. [66]

97. Ontario's violation of the international law standard of treatment is multifaceted; however, when looked at as a whole, the facts demonstrate flagrant breaches of fairness and equality of treatment. Ontario's representatives failed to comply with these duties when carrying out the FIT renewable energy program.

Ontario unfairly manipulated the award of access to the electricity transmission grid, resulting in unfair treatment to the Investment.

98. Ontario arbitrarily and capriciously provided access to the electricity transmission grid to protect some proponents in a way that unfairly prevented the Investment from gaining access to the transmission grid. By covertly changing the available transmission capacity and delaying transmission access to accommodate the commercial preferences of

[66] *Windstream Energy, LLC v. Government of Canada*, Award, PCA Case No.2013-22, September 26, 2016.

transmission access competitors, these unfair acts resulted in the Investment losing its priority for a FIT Contract.

99. Ontario granted special transmission access privileges to the members of the Korean Consortium despite the fact that the Korean Consortium was non-compliant with the binding terms of the GEIA Agreement between Ontario and the Korean Consortium in 2011.

100. The unfair manipulation of access to the electricity grid resulted in delaying all awards in Bruce and West of London Transmission zones. The impact of the delay on FIT contract awards of the Korean Consortium is confirmed in testimony before the Mesa Power NAFTA Tribunal by the then-Energy Assistant Deputy Minister Susan Lo. According to the written Post-Hearing Briefs, Ms. Lo confirmed at the Hearing on October 28, 2014 that Ontario did not terminate the GEIA deal when the Korean Consortium was in breach of this agreement. If Ontario followed the terms of the Agreement, Ontario would have protected FIT stakeholders like the Investor. By providing benefits that fell outside of what a contravening party was entitled to, Ontario caused detriment to the Investment.

101. On the better treatment to the Korean Consortium, the *Mesa Power* Investor's Post-Hearing Brief stated:

> 171. During the hearing, it was revealed that Ontario held back available capacity in the Bruce and West of London regions when awarding contracts for political reasons. Ms. Lo testified that "there was a desire not to award all of the contracts that could connect, and that's why we capped the number of megawatts in the Minister's direction. I think it was 750 and 300 megawatts, because if more projects could have connected, we didn't want to pay for the additional megawatts that would come on stream."[67]
>
> 172. This action by Ontario violated the legitimate expectation of the investors. To induce investment, Ontario represented that it would allocate all available capacity to FIT proponents.[68] For example, in December 2009, the Ontario government represented that the "basis of the FIT program is having the system built to accommodate all generators who wish to connect."[69]

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[67] This is referenced in the Investor's Post Hearing Brief in Mesa Power as follows: Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.180-181, lns.22-6 (Emphasis added).

[68] This is referenced in the Investor's Post Hearing Brief in Mesa Power as follows: 2 FIT/Micro FIT Announcement, dated December 15, 2009, at p.3; Meeting Notes, LDK Solar and Ministry of Energy and Infrastructure, February 25, 2010 ***[CONFIDENTIAL]*** ("The Green Energy Act includes the right-to-connect. If the transmission capacity is not available and projects meet certain technical and economic criteria, the system will be expanded to connect them.") (Emphasis added).

[69] This is referenced in the Investor's Post Hearing Brief in Mesa Power as follows: 3 FIT/Micro FIT Announcement, dated December 15, 2009, at p.3; Meeting Notes, LDK Solar and Ministry of Energy and Infrastructure, February 25, 2010 ***[CONFIDENTIAL]***.

173. The OPA itself recognized that it did not have the authority to hold back available capacity from the FIT program.[70]

174. Despite this, because Ontario did not want to pay the price it had promised investors when it induced them to invest, it held back otherwise available capacity.[71] For example, Ontario only awarded 300 MW of capacity in the West of London region, but contemporaneous emails show that there was 550 MW of available capacity.[72] Had more capacity been awarded in the West of London, some high-ranked projects that displaced Bruce region projects would not have switched regions.

175. If Ontario had not been holding back capacity to avoid paying FIT investors then Mesa likely would have received a contract for at least one of its TTD and Arran projects.[73]

102. The Korean Consortium's initial transmission capacity reservation was made in September 2009 in regards to the Chatham-Kent region, before the signing of the GEIA. Here, the Korean Consortium was able to step into the front of the line in that region, as transmission capacity was reserved for them without prior notice to any other investor and even without having signed the GEIA.[74]

103. This practice of allowing the Korean Consortium to skip to the front of the line in exchange for nothing caused damage to the Investor when the Korean Consortium was allowed to do this again in the Bruce Region in September of 2010, and was a manifest disregard of the NAFTA's international law standard of treatment.

104. The further reservation of transmission capacity for the Korean Consortium in the Bruce Region immediately harmed the Investment. Had Canada stopped there, the Investment would still have been successful as there was sufficient transmission capacity available in the Bruce Region for the Skyway 127 project to successfully be awarded FIT contracts.

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[70] This is referenced in the Investor's Post Hearing Brief in Mesa Power as follows: Ontario Power Authority Draft Presentation, 'Implications of the Economic Connection Test', March 8, 2011, at p.3 ("OPA has little ability to withhold amounts discovered due to wind diversity … and is obligated to reveal the 150 MW of additional capacity in the Bruce when the next steps for ECT are announced").

[71] This is referenced in the Investor's Post Hearing Brief in Mesa Power as follows: Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.180-181, lns.22-6.

[72] This is referenced in the Investor's Post Hearing Brief in Mesa Power as follows: Ministry of Energy presentation, "Bruce to Milton Transmission Line – FIT Contract Awards", May 26, 2011 ***[CONFIDENTIAL]***; Email from Yuna Kim (Ministry of Energy) to Sunita Chander (Ministry of Energy), May 31, 2011 ***[CONFIDENTIAL]***.

[73] *Mesa Power*, Investor's Post Hearing Brief (Footnote references omitted). Para. 171 – 175.

[74] Letter from Brad Duguid (Ministry of Energy) to Colin Andersen (OPA), September 17, 2010.

But Ontario then began to engage in unfair favoritism amongst FIT applicants for political reasons. This resulted in additional harm to Skyway 127.

105. The Ministry of Energy interposed itself in the operation of the selection process of a multi-million dollar award of lucrative FIT contracts. The Ministry had access to confidential rankings of FIT applicants to see how contracts would be given and how changes would affect applicants.[75]

106. With Ontario knowing this information, 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 same time receiving prior knowledge of the change.[76]

107. Perhaps most disturbingly, as was eventually disclosed at the Mesa Power hearing, it was revealed that blatant protection was afforded to International Power Canada, a Canadian company whose executive leadership at the time was a well-known political backer of the Ontario Liberal government.[77]

108. The result was a capriciously misapplied process contaminated by selective and improper investor protection, a lack of minimal due process, and a complete lack of transparency and candor. This culminated in a significant rule change that was decided without any consultation with stakeholders, and literally was given a weekend's notice. Judge Brower in his *Mesa Power* award, demonstrated that the culmination of all these facts constituted a disregard of the international principles of fair and equitable treatment.

Ontario unfairly manipulated the dissemination of program information under the FIT Program

109. Ontario provided selective advance access to information and program decision makers to the Canadian subsidiary of NextEra and subsequently arbitrarily modified the FIT Program rules in a manner that disadvantaged the Investment to the benefit of other proponents.

Ontario unfairly manipulated the awarding of Contracts under the FIT Program

110. Ontario covertly provided better treatment to program proponents in a manner that disadvantaged the Investment and other proponents. This included advantageous actions

[75] This information has not been made public but a reference to the existence of this information was released in the *Mesa Power* Post Hearing Brief (released to the public on January 9, 2015). The Brief references the following document - Bruce Area Scenario Analysis, Table of results, April 13, 2011.

[76] This information has not been made public but a reference to the existence of this information was released in the *Mesa Power* Post Hearing Brief (released to the public on January 9, 2015). The Brief references the following document - Email from Al Wiley (NextEra), dated May 10, 2011.

[77] This information has not been made public but a reference to the existence of this information was released in the *Mesa Power* Post Hearing Brief (released to the public on January 9, 2015).

taken by officials to ensure contracts for the Canadian wind power projects of NextEra and to International Power Canada ("IPC").

111. On the better treatment to IPC, the *Mesa Power* Investor's Post-Hearing Brief stated:

> 143. Ms. Lo also testified that although there was not an "even playing field" between the Korean Consortium and FIT proponents, all FIT proponents were treated the same.[78]
> 144. Her testimony demonstrates otherwise. When asked about the subject line of the email that confirms that International Power Canada's ("IPC") projects would be protected by Ontario from a Korean Consortium set-aside, [redacted confidential information]
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> 145. As part of this email, when considering setting aside capacity in the West of London for GEIA projects, Ms. Lo 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.[79]
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> 146. Ms. Lo, upon being questioned on the political connections of IPC's President and CEO, contended that the Ministry "didn't pay attention to the politics,"[80] but then admitted that the short time frame for changing connection points was driven by political considerations, specifically wanting "good news" and the ruling government being able to "talk about its millions and millions of dollars in investment that it would attract" for re-election purposes.[81] These political considerations were also apparent as the timing coincided with the August 2, 2011 direction from the Minister of Energy, to eliminate the FIT contract termination provisions so that any PPA awarded could not be terminated under the existing four-month termination provisions in the FIT Program.[82]

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[78] This is referenced in the Investor's Post Hearing Brief in Mesa Power as follows: Testimony of Sue Lo, Hearing Transcript, Day 3, at p.186, lns.5-8.

[79] This is referenced in the Investor's Post Hearing Brief in Mesa Power as follows: This information has not been made public but a reference to the existence of this information was released in the *Mesa Power* Post Hearing Brief (released to the public on January 9, 2015) Testimony of Sue Lo, Hearing Transcript, Day 3, at pp.182-185, lns.8-3.

[80] This is referenced in the Investor's Post Hearing Brief in Mesa Power as follows: This information has not been made public but a reference to the existence of this information was released in the *Mesa Power* Post Hearing Brief (released to the public on January 9, 2015) Testimony of Sue Lo, Hearing Transcript, Day 3, at p.184, lns.16-17.

[81] This is referenced in the Investor's Post Hearing Brief in Mesa Power as follows: Testimony of Sue Lo, Hearing Transcript, Day 3, at p.179, lns.5-8.

[82] This is referenced in the Investor's Post Hearing Brief in Mesa Power as follows: Letter from the Honourable Brad Duguid, Minister of Energy to Colin Andersen, Ontario Power Authority, August 2, 2011.

> 147. The government of Ontario protected a Canadian FIT proponent's projects from a Korean Consortium set aside. It ensured that there would be capacity in the West of London to accommodate IPC's projects under the FIT program before reserving capacity for the Korean Consortium.
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> 148. Under Article 1102 and 1103, this favorable treatment accorded to a Canadian investor should have been accorded to Mesa, as a U.S. investor. Had this treatment, at a minimum, been accorded to Mesa and other FIT proponents, contracts would have been awarded in Bruce first under the FIT program. If this had occurred, Mesa would have received contracts for Arran and TTD. This is undisputed, and supported by Canada's expert.[83]

112. On the better treatment to the Korean Consortium, the *Mesa Power* Investor's Post-Hearing Brief stated:

> 101. Ms. Lo testified that the Korean Consortium was having trouble meetings its Phase 1 and two deadlines because of delays in the regulatory approval process: I think the Korean Consortium were having trouble meeting the deadlines, but also so many FIT proponents were having trouble meeting the deadlines, too. … Everybody was having trouble meeting deadlines, because the renewable energy approval process took more time than they would have thought.
>
> 102. What Ms. Lo did not testify was that the Phase 2 delays, which involved the set aside in the Bruce region, had nothing to do with regulatory approval and everything to do with the Korean Consortium and Pattern's strategy of picking "low hanging fruit" in the FIT process to then convert into GEIA projects.
>
> 103. Colin Edwards of Pattern testified during a *Section 1782* deposition that this was Pattern's strategy and that it allowed them to buy the projects at significantly lower prices:
>
> Q. And how would that affect your decision, the ranking?
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> A. We would – parties who were ranked higher on the list would be more likely to stay in the queue in hopes of keeping their project and receiving a FIT contract, knowing that there was transmission capacity coming to this area.
>
> Q. And the lower ones would be low-hanging fruit, right?
>
> A. The lower ranked parties would have a lesser chance to get a FIT contract.
>
> Q. And it would be more easily able to buy their assets in order to fulfill your obligations under the GEIA as a joint venture, correct?
>
> A. Perhaps.

[83] This is referenced in the Investor's Post Hearing Brief in Mesa Power as follows: Testimony of Christopher Goncalves, Hearing Transcript, Day 5, at pp.143-144, lns.21-4 ("Turning to the GEIA counter factual, we then take away the breach, which is the 500-megawatt allocation of transmission capacity to the Korean Consortium. … TTD and Arran make the cut and get FIT contracts in that scenario").

> […]
>
> 134. However, the ECT was delayed for the benefit of the Korean Consortium, because the "OPA could not start to assess the transmission availability until the consortium finalized the connection points for phases two and three of its projects."
>
> […]
>
> 299. Yet, Ontario entered into the GEIA in January 2010, and permitted the GEIA and FIT to "compete" against each other for capacity access to a limited transmission system, despite the knowledge dating back to March of 2009, that interest in the FIT Program would exceed renewable energy generation capacity through the FIT Program.[84]
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> 300. This "competition" was illusory, as the Korean Consortium was guaranteed capacity, did not have to compete for capacity, and was allowed to engage in predatory tactics, such as its wait and see approach to acquire developed FIT projects that were not likely to get contracts and then convert them to GEIA projects.[85]

Ontario destroyed critical evidence to frustrate independent review of its actions

113. The destruction of such material and necessary evidence to protect the political leadership of Ontario is a serious matter that, if unaddressed by the Tribunal, has had a serious detriment to the Investor.

114. Senior Ontario government officials destroyed government communications about the administration of the Government's Renewable Energy Programs such as the FIT Program. This destruction was in violation of government rules requiring the retention of such documents, and in violation of subpoena orders. The most senior staff in the Office of the then Premier of Ontario have been criminally charged in this matter.

115. Ontario's administration of the FIT Program was nontransparent and opaque. The FIT Program was operated in a manner that was inconsistent with fairness, due process, and the rule of law.

116. Ontario had a process that provided treatment that is more favorable to some proponents over companies that followed the published FIT Program rules, like the Investment. These more favored companies obtained secret insider information regarding the administration of the FIT Program, separate preferential regulatory access to obtain FIT Contracts, advanced non-public knowledge of upcoming FIT Rule changes, special

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[84] This is referenced in the Investor's Post Hearing Brief in Mesa Power as follows: Testimony of Jim MacDougall, Hearing Transcript, Day 3, p.262, lns.14-20.

[85] *Mesa Power*, Investor's Post Hearing Brief, Released on the PCA Website on January 9, 2015. (Paragraphs as indicted in the citation).

protection given to politically connected investments, and special access to governmental energy officials. This special and better treatment was not disclosed to the public and not available to Ordinary FIT Proponents, who simply followed the published rules of the FIT Program.

117. This treatment was not publically disclosed until many years later. Ordinary FIT Proponents could not have known about the full extent of the actions of Ontario until the public disclosure of the following:

a. The complete terms of the *Green Energy Investment Agreement* which were not made public on the signing of the agreement in 2010 and were not finally released to the public until after the public disclosure of information arising from the NAFTA Chapter Eleven arbitration in *Mesa Power Group v. Canada*,

b. The claims made in the NAFTA Chapter Eleven proceeding in the *Mesa Power* v *Canada* proceeding which was posted by the Permanent Court of Arbitration on June 4, 2014 (but without paid advertising or direct communication by the PCA or Canada to those who had been FIT proponents.)

c. The public release of the transcript of the NAFTA hearing by the PCA in *Mesa* on April 30, 2015 (but without paid advertising or direct communication by the PCA or Canada to those who had been FIT proponents).

d. The public posting of the NAFTA Tribunal decision in *Windstream Energy v. Canada* on December 6, 2016 (but without paid advertising or direct communication by the PCA or Canada to those who had been FIT proponents).

118. Ontario, in fact, took steps to suppress the release of information about its secret preferential measures. As a result, ordinary FIT Proponents, like the Investment, believed that the process would be conducted fairly and in a manner fully accordance with the public rules. Ordinary FIT Proponents were unaware of the unlawful measures taken by Ontario until the above disclosures.

119. Ontario continued to take steps to destroy government records documenting its unfair energy regulatory measures. The destruction of important records has been investigated by police authorities and criminal charges have been laid in connection with these actions.

120. Tennant Energy, and its investment, Skyway 127, were unaware of the unlawfulness of Ontario's measures due to non-transparent nature surrounding Ontario's actions until the spring of 2015 when the *Mesa Power v. Canada* hearing transcripts became publically available. It was only through the public availability of this material that Tennant Energy and its investment Skyway 127 were able to understand the facts of the matter that had occurred under the FIT Program.

121. In 2015, the Investor became aware of the following:

a. Ontario allowed the members of the Korean Consortium to delay the transmission availability test mandated by the FIT Rules. This change in the regulatory process, and permitted the Korean Consortium to obtain knowledge of all FIT Proponents and their projects in the Bruce Region, including low ranking projects when the OPA publically released a ranking of FIT Projects. The Korean Consortium used this information and the hardship arising from the delay in awarding FIT contracts suffered by the FIT Proponents to acquire low-ranking wind projects in the Bruce Zone at bottom prices. The Korean Consortium was awarded the FIT Contracts for previously unsuccessful wind projects.

b. Ontario protected certain Canadian FIT Projects which had close connections to the governing political party, such as International Power Canada ("IPC"), from any adverse effects of the FIT Program Rule changes.

c. NextEra was provided special treatment in the form of special access to Ontario government officials and advanced notice of the FIT rule change that occurred on June 3, 2011, in the Bruce Region, which allowed it to successfully move four of its unsuccessful projects from the West of London Zone to Bruce Zone.

d. The Korean Consortium failed to fulfill its obligations under the GEIA but still was provided with all the benefits of the GEIA, even before the GEIA was signed, and later when the Korean Consortium was in breach of the terms of the GEIA.

122. The arbitrary and non-transparent use of these extraordinary and unfair powers resulted in a direct and immediate benefit to the better-treated companies.

123. Only at the time of the public release of this information could the Investor be aware of Ontario's violation of the NAFTA, and the fact that damage arose in connection with the NAFTA breach.

G. THIS TRIBUNAL CAN RULE

124. The Tribunal has jurisdiction to rule on this claim as follows:

a. The Investor is a national of one NAFTA Party asserting a claim under Section B of NAFTA Chapter Eleven against another NAFTA Party.

b. The Claimant asserts the inconsistency of a provision of an obligation in Section A of NAFTA Chapter Eleven which has resulted in loss or damage to the Investor.

125. While not a question of jurisdiction, the claim is timely.[86]

[86] The *Pope & Talbot* Tribunal correctly identified that questions about compliance with the requirements of

a. The Investor first acquired knowledge of the breach of the NAFTA within three years of the submission of the Claim to Arbitration;

b. The Investor submitted its Notice of Intent on March 2, 2017, and this Notice of Claim on June 1, 2017. At least 90 days elapsed between these two events.

126. On the time when the Investor and Investment became aware of the various breaches, the Investor advises of the following particulars:

a. While the Investment was aware of the delay in the awarding of transmission access in the Bruce and the West of London Regions in 2010 and 2011. However, the Invetor did not have knowledge that the reason for the delay in awarding FIT Contracts in 2010 was Ontario's covert decision to benefit the Korean Consortium over FIT Proponents (as the Korean Consortium had not yet identified project locations in the Bruce and West of London regions). The Korean Consortium then used the financial pressure caused by its delay in a predatory fashion to acquire wind projects in the Bruce and West of London in financial distress caused by the transmission delay. The Investor did not obtain knowledge of Ontario's covert actions until sometime after March 16, 2015 when Skyway 127's representatives first met with legal counsel about the applicability of the evidence adduced from the *Mesa Power* NAFTA claim.

b. The Investor did not have knowledge of the breach caused by the unfair preferential dissemination of FIT Program information until sometime after March 16, 2015 when Skyway 127's representative first met with legal counsel about the applicability of the evidence from the Mesa Power NAFTA claim. On this breach, this information first was disclosed confidentially on October 28, 2014 in the testimony of Susan Lo, an Assistant Deputy Minister from the Government of Ontario at pages 172. However, while the hearing transcript of this testimony was apparently declassified by Canada, it was not disclosed to the public and thus not reproduced in the transcript that was released by the PCA on April 30, 2015.[87] The first disclosure of information about this measure (but without any disclosure of the actual testimony) arose in the *Mesa Power* Investor Post-Hearing Brief

NAFTA Articles 1116(2) and 1117(2) were actually issues of admissibility rather than of jurisdiction. *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award by Arbitral Tribunal in relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim from the Record ¶ 11 (Feb. 24, 2000). Other international tribunals have come to a similar conclusion on the treatment of such limitations issues as a matter of admissibility.

[87] The PCA wrote to the Mesa Power parties to say that the transcript and video was posted to the PCA website on April 30, 2015.

(Released on January 9, 2015), however the Investor was not aware of this information until sometime after March 16, 2015.

c. The Investor did not have knowledge of the breach caused by Ontario's unfair administration and arbitrary awarding of FIT Contracts until it reviewed the *Mesa Power* Investor's Post-Hearing Brief. This occurred sometime after March 16, 2015. The Investor's Post-Hearing Brief made reference to actual testimony (not reproduced and subject to confidentiality).[88] This testimony confirmed that IPC received better treatment that other FIT Proponents.

d. The Investor did not have knowledge of the breach caused by the spoliation of documents until after April 30, 2015. Because of the serious and pervasive nature of this wrongful behavior, the extent of the breach cannot be identified until interrogatories or the Tribunal in this claim can order other investigation.

127. Under the requirements of Section B of NAFTA Chapter Eleven:

a. The claims raised by the Investor are timely and within the time limits of the NAFTA.

b. The claims are also related to the Investor and Investment, and accordingly are within the scope and subject matter of this Tribunal.

c. Finally, the Investor is an American juridical national which owns and controls the Investment. The Investor is the successor in interest to two other American national and this US nationality has been continuously maintained. As a result, this Tribunal has personal jurisdiction over this claim.

H. ISSUES RAISED

128. This claim raises the following issues:

a. Has Canada taken measures inconsistent with its obligations under Section A of the NAFTA including Article 1105, of Chapter Eleven of the NAFTA?

b. If so, then what amount of compensation is to be paid to the Investment as a result of Canada's failure to comply with its obligations under the NAFTA?

I. RELIEF SOUGHT AND APPROXIMATE AMOUNT OF DAMAGES CLAIMED

129. The effect of the various measures has caused loss and damage to the Investor's related business operations.

[88] This information has not been made public but a reference to the existence of this information was released in the *Mesa Power* Post Hearing Brief (released to the public on January 9, 2015).

130. These losses are not less than CDN $81 million dollars and the egregious behavior of Ontario is the willful destruction of evidence and the gross misconduct in the operation of the FIT Program results in moral damages of $35 million for a total claim of $116 million. The Investor and Investment have suffered loss arising from governmental unfair and arbitrary actions as well as from the lack of the most basic procedural fairness protections to follow the rule of law. Also, the Investment has suffered loss and damage arising from Canada's failure to comply with its NAFTA Chapter Eleven obligations.

131. Also, the Investor and the Investment have suffered moral damages arising from the unlawful, egregious and unconscionable actions of senior members of the government of Ontario who has shamelessly destroyed government records containing evidence that would be necessary and material to this claim.

132. The Investor respectfully claims:

a. Damages of not less than CDN $81 million in compensation for the loss, harm, injury, damage caused by or resulting from Canada's breach of its obligations under Part A of Chapter Eleven of the NAFTA;

b. Moral damages arising from the improper actions of the Respondent, including improper measures to suppress evidence of its wrongful conduct and for the gross unconscionable conduct of Ontario in the maladministration of this program resulting in an abuse of process and detriment to the Investment and Investor. These moral damages are CDN $35 million;

c. Costs of these proceedings, including all professional fees and disbursements;

d. Fees and expenses incurred to mitigate the effect of the unlawful governmental measures taken by Canada;

e. Pre-award and post-award interest at a rate to be fixed by the Tribunal; and

f. Such further relief as counsel may advise and the Tribunal may deem appropriate.

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BARRY APPLETON
On behalf of Counsel for Tennant Energy LLC.

SERVED TO: Office of the Deputy Attorney General of Canada
50 O'Connor Street
Ottawa, ON K1A 0H8, Canada

Annex A

The FIT Program consists of the following:

a. the *Electricity Act, 1998*, as amended, including in particular Part II.1 (Ontario Power Authority), and Part II.2 (Management of Electricity Supply, Capacity and Demand), thereof, including, in particular, Section 25.35 (Feed-in Tariff Program);[89]

b. the *Green Energy Act, 2009,* as enacted on May 14, 2009;[90]

c. the *Electricity Restructuring Act, 2004*, including in particular Section A, Section 28, enacting Part II.1 of the *Electricity Act, 1998*;

d. FIT Directive dated September 24, 2009, from George Smitherman, Deputy Premier and Minister of Energy and Infrastructure, to Colin Anderson, Chief Executive Officer, Ontario Power Authority, directing OPA to develop a FIT Program and include a requirement that the applicant submit a plan for meeting the domestic content goals in the FIT Rules (Ministerial Direction (September));

e. FIT Directive dated April 1, 2011 from the Minister of Energy to Colin Anderson, Chief Executive Officer, Ontario Power Authority (the Ministerial Direction (April 2011));

f. FIT Directive dated June 3, 2011 from the Minister of Energy to Colin Anderson, Chief Executive Officer, Ontario Power Authority (the Ministerial Direction (June 2011));

g. FIT Directive dated August 2, 2011 from the Ontario Minister of Energy to Colin Anderson, Chief Executive Officer, Ontario Power Authority (the Ministerial Direction (August 2, 2011));

h. FIT Rules, Version 1.5 issued on June, 3 2011 and amended on July 15, 2011 by the OPA;

i. FIT Contract, Version 1.5 (June 3, 2011), including General Terms and Conditions, Exhibits, and Standard Definitions, issued by the OPA;

j. FIT Application Form (December 1, 2009);

k. FIT Price Schedule (June 3, 2011), issued by the OPA;

l. Public Press Release from Minister of Energy, the Honourable Brad Duguid, August 3, 2011;

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[89] *Electricity Act, 1998*, S.O. 1998, c.15 Sched. A, last amended 2010, c.8.
[90] *Green Energy Act, 2009*, S.O. 2009, c.12, Sched. A.

m. FIT Program Interpretations of the Domestic Content Requirements (December 14, 2009), issued by the OPA; and

n. Any amendments or extensions of the foregoing, any replacement measures, any renewal measures, any implementing measures, and any related measures.

EXHIBIT 1

27 Edgefield Court, Napa, California 94558

May 29, 2017

Government of Canada
Office of the Deputy Attorney General of Canada
50 O'Connor St
Ottawa, ON K1A 0H3
Canada

Dear Sir/Madam:

Re: NAFTA Investor-State Claim Tennant Energy, LLC

Pursuant to Article 1121(1)(a) of the North American Free Trade Agreement ("NAFTA"), Tennant Energy, LLC consents to arbitration in accordance with the procedures set out in the NAFTA; and

Pursuant to Article 1121(1)(b) of the NAFTA, Tennant Energy, LLC waives its right to initiate or continue before any administrative tribunal or court under the law of any Party to the NAFTA, or other dispute settlement procedures, any proceedings with respect to all measures, including any laws, regulations, procedures, requirements or practices, taken by the Government of Canada in any measure that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages (except the costs of the action), before an administrative tribunal or court under the laws of Canada.

Yours Very Truly,

By: _____
Managing Member, James Tennant
Tennant Energy, LLC

EXHIBIT 2

SKYWAY
WIND ENERGY GROUP
3042 Concession Road 3 Adjala, RR1, Palgrave, Ontario, Canada L0N 1P0

May 29, 2017

Government of Canada
Office of the Deputy Attorney General of Canada
50 O'Connor St
Ottawa, ON K1A 0H3

Dear Sir/Madam:

Re: NAFTA Investor-State Claim Tennant Energy, LLC

Pursuant to the terms of Article 1121(1)(b) of the North American Free Trade Agreement ("NAFTA"), Skyway 127 Wind Energy Inc. waives its right to initiate or continue before any administrative tribunal or court under the law of any Party to the NAFTA, or other dispute settlement procedures, any proceedings with respect to all measures, including any laws, regulations, procedures, requirements or practices, taken by the Government of Canada in any measure that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages (except the costs of the action), before an administrative tribunal or court under the laws of Canada.

Sincerely,

Skyway 127 Wind Energy Inc.

Per: 

J.C.Pennie, Director