

**IN THE MATTER OF AN ARBITRATION UNDER THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND THE NORTH AMERICAN FREE TRADE AGREEMENT**

BETWEEN:

TENNANT ENERGY, LLC

Claimant

AND

GOVERNMENT OF CANADA

Respondent

**GOVERNMENT OF CANADA
REQUEST FOR BIFURCATION**

September 23, 2019

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I. INTRODUCTION

1. In accordance with Article 21.4 of the 1976 UNCITRAL Arbitration Rules (the “1976 UNCITRAL Rules”), Canada respectfully requests that the Tribunal bifurcate these arbitration proceedings in order to consider Canada’s jurisdictional objection concerning NAFTA Article 1116(2) as a preliminary question.¹ As explained in Canada’s Statement of Defence, dated July 2, 2019, Tennant Energy, LLC (“Tennant” or the “Claimant”) failed to meet the conditions precedent for submitting a claim to arbitration pursuant to Article 1116(2). Tennant filed its Notice of Arbitration (“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.² As such, the claim is time-barred and Canada has not consented to arbitrate Tennant’s claim under NAFTA Chapter Eleven.³

2. This Request for Bifurcation (the “Request”) demonstrates that these proceedings should be bifurcated for reasons of fairness and procedural efficiency. Canada’s jurisdictional objection with respect to NAFTA Article 1116(2) is discrete, succinct and ripe for determination by the Tribunal. It is serious and substantial because it goes to the very basis of the Tribunal’s authority to hear the claim. Moreover, the Tribunal will not need to delve into the merits of Tennant’s claim to address Canada’s jurisdictional objection.

3. Most critically, as the measures underlying the Claimant’s complaint are time-barred under NAFTA Article 1116(2), if Canada is successful on its jurisdictional objection, Tennant’s claim will be dismissed and these proceedings would be over. The complete dismissal of Tennant’s claim during a jurisdictional phase achieves considerable efficiency in the NAFTA Chapter Eleven arbitral process.

¹ 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.”

² Canada’s Statement of Defence, 2 July 2019, ¶¶ 2, 29.

³ Canada’s Statement of Defence, ¶¶ 2, 29.

4. Simply, the Claimant knew or should have known about each and every one of the “four categories of wrongful actions”⁴ and the resultant damages that it alleges well before three years prior to when it submitted this claim to arbitration. The Claimant has failed to respect the critical three-year limitation period prescribed by NAFTA Article 1116(2) and therefore, each and every one of the measures is beyond the Tribunal’s jurisdiction. This is exactly the type of case for which bifurcation should be ordered. Canada should not be required to expend substantial personnel resources and millions of dollars defending itself against a claim over which the Tribunal manifestly has no jurisdiction.

5. Canada does not propose to include the other jurisdictional objections raised in its Statement of Defence in a preliminary phase because such objections may be more closely intertwined with the merits of this dispute.⁵ As such, Canada’s Request only addresses the fact that this claim is time-barred and is without prejudice to other jurisdictional objections to be made in future pleadings.

II. APPLICABLE LAW

6. Article 21.4 of the 1976 UNCITRAL Rules provides, in relevant part: “[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question.”⁶ This rule creates a clear presumption in favour of bifurcating jurisdictional questions.⁷

⁴ Notice of Arbitration, 1 June 2017, ¶ 91.

⁵ See Canada’s Statement of Defence, ¶¶ 40-46, where Canada sets out jurisdictional objections with regard to (a) NAFTA Article 1101(1) and the alleged destruction of evidence not “relating to” the Claimant or its alleged investment; (b) the Claimant’s failure to explain how it has standing to bring this claim under NAFTA Article 1116; and (c) the Claimant’s failure to explain that it is an “investor” entitled to the protections of NAFTA Chapter Eleven.

⁶ UNCITRAL Arbitration Rules (1976), Article 21.4.

⁷ See e.g., **RLA-052**, *Resolute Forest Products Inc. v. Government of Canada* (UNCITRAL) Procedural Order No. 4 - Decision on Bifurcation, 18 November 2016 (“*Resolute – Decision on Bifurcation*”), ¶ 4.3: (“As a starting point, Article 21(4) of the UNCITRAL Rules provides that ‘[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.’ This creates a presumption in favour of bifurcation, subject to the Tribunal exercising discretion to deal with jurisdictional pleas together with the merits in appropriate circumstances.”); **RLA-053**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Procedural Order No. 2, 18 January 2013, ¶ 16: (“The Tribunal further notes that Article 21(4) of the UNCITRAL Rules provides that ‘[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary matter’. It follows that when a Party raises an objection to jurisdiction, the presumption is in favor of addressing the objection as a preliminary question.”) See also, **RLA-054**, *Glamis Gold, Ltd. v. The United States of America* (UNCITRAL)

7. Authorities on international arbitration law and practice have remarked that dealing with a challenge to a tribunal's jurisdiction in a preliminary phase "enables the parties to know where they stand at an early stage; and it will save them spending time and money on arbitral proceedings that prove to be invalid."⁸ Arbitral tribunals have also noted that dealing with jurisdictional objections preliminarily "so as to avoid imposing full-fledged proceedings on a party disputing that it is subject to arbitration" is good practice, particularly when bifurcation results in increased efficiency in terms of both time and costs.⁹ Accordingly, NAFTA Chapter Eleven tribunals have frequently decided questions of jurisdiction as a preliminary matter prior to hearing the case on the merits.¹⁰ Additionally, NAFTA Chapter Eleven tribunals have often

Procedural Order No. 2 (Revised), 31 May 2005 ("*Glamis – Procedural Order No. 2*"), ¶¶ 9, 12(b); **RLA-055**, *President Allende Foundation, Victor Pey Casado and Coral Pey Grebe v. Republic of Chile II* (UNCITRAL) Decision on Respondent's Request for Bifurcation, 27 June 2018 ("*Pey Casado – Decision on Bifurcation*"), ¶¶ 100-101; **RLA-056**, *Cairn Energy PLC and Cairn UK Holdings Limited (CUHL) v. Republic of India* (UNCITRAL) Procedural Order No. 4 - Decision on the Respondent Application for Bifurcation, 19 April 2017 ("*Cairn – Procedural Order No. 4*"), ¶ 70.

⁸ **RLA-057**, Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, 4th edition (London: Sweet & Maxwell, 2004), pp. 257-258. See also, **RLA-058**, Gary Born, *International Commercial Arbitration*, 2nd edition (Kluwer Law International, 2014), pp. 1245-1246: ("Although no absolute rules can be prescribed, the more appropriate course for the arbitral tribunal is generally to conduct at least some preliminary, independent inquiry into jurisdictional objections. If it appears that a credible, good faith jurisdictional challenge has been raised, it is ordinarily appropriate to provide the parties with an opportunity to submit legal argument and evidence on the challenge [...]. This course permits the parties to fully address (and the tribunal to fully consider) jurisdictional objections and, if jurisdiction is lacking, avoids the expense of presenting the case on the merits. It also avoids forcing a party, who may not be subject to a tribunal's jurisdiction, to litigate the merits of its claims in what may be an illegitimate forum.")

⁹ **RLA-059**, *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste* (ICSID Case No. ARB/15/2) Procedural Order No. 3 – Decision on Bifurcation and Related Requests, 8 July 2016 ("*Lighthouse – Procedural Order No. 3*"), ¶ 19. See also, **RLA-060**, *Philip Morris Asia Limited v. Commonwealth of Australia* (UNCITRAL) Procedural Order No. 8 Regarding Bifurcation of the Procedure, 14 April 2014 ("*Philip Morris – Decision on Bifurcation*"), ¶ 106: ("On the other hand, already from the Statement of Claim and the Statement of Defence that have been submitted so far it is obvious that, should the proceedings reach the merits phase, they will be extremely large and complex in the submissions, documents, witness and expert testimonies, and issues to be evaluated. Therefore, should preliminary objections prevail with the result that no procedure on the merits becomes necessary, this would result in a major saving of work and costs."); **RLA-061**, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28) Decision on Request for Bifurcation under Article 41(2) of the ICSID Convention, 2 November 2012 ("*Tulip Real Estate – Decision on Bifurcation*"), ¶ 55: ("...the Tribunal is satisfied that: ... (c) procedural economy would be served by dealing [with] this objection prior to the merits, avoiding the possibility that the entire case is heard and the Tribunal then finding that a pre-condition to arbitration was not satisfied."); **RLA-062**, *Caratube International Oil Company LLP v. Republic of Kazakhstan* (ICSID Case No. ARB/08/12) Award, 5 June 2012, ¶ 487: ("In the result Claimant has failed on the first hurdle of jurisdiction. With the wisdom of hindsight, the majority of the costs and expenses of each party and of the dispute, both in duration and expense, would have been avoided had Respondent opted for bifurcation and the preliminary determination of its equivalent of Rule 41(1) objections under the Rules.")

¹⁰ See e.g., **RLA-052**, *Resolute – Decision on Bifurcation*, ¶ 5.1 (tribunal deciding to hear the respondent's objections to jurisdiction and admissibility as preliminary questions and to bifurcate proceedings); **RLA-004**, *Vito*

dealt with time bar objections in a preliminary phase.¹¹ For instance, the tribunal in *Resolute v. Canada* stated, “[a]s a matter of NAFTA practice, time bar issues are normally decided as preliminary questions.”¹²

8. In exercising their discretion to bifurcate proceedings into a separate jurisdictional phase, tribunals have been guided by principles of fairness and efficiency. As stated by the tribunal in *Accession Mezzanine v. Hungary*, when deciding whether to hear jurisdictional objections as a preliminary matter, “the Tribunal shall consider as an overarching question whether fairness and procedural efficiency would be preserved or improved.”¹³ When exercising this discretion under Article 21.4 of the 1976 UNCITRAL Rules, the tribunal in *Glamis Gold v. United States* noted:

G. Gallo v. The Government of Canada (UNCITRAL) Award, 15 September 2011, ¶¶ 83, 119 (tribunal noting its decision to bifurcate the proceedings to address jurisdictional issues in a separate procedure and concluding it lacked jurisdiction to decide the claims); **RLA-063**, *The Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008, ¶ 14 (tribunal citing Procedural Order No. 1, paragraph 3.6 noting agreement to bifurcate the procedure to decide one preliminary jurisdictional issue) and see also ¶ 233 (tribunal concluding it did not have jurisdiction to consider the claims); **RLA-064**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 2 April 2015, ¶¶ 77 (tribunal noting disputing parties’ agreement to bifurcate the proceedings into three phases (jurisdiction, merits, and damages)) and see also ¶ 340 (tribunal concluding it did not have jurisdiction to consider the claims); **RLA-065**, *Bayview Irrigation District et al. v. United Mexican States* (ICSID Case No. ARB(AF)/05/1) Award, 19 June 2007 (“*Bayview – Award*”), ¶ 10 (tribunal recalling its decision to consider the question of jurisdiction as a preliminary issue) and see also ¶¶ 122-123 (tribunal concluding it did not have jurisdiction to consider the claims); **RLA-066**, *Canfor Corp. v. United States of America* (UNCITRAL) Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings, 23 January 2004, ¶ 55(c) (Tribunal deciding to treat the respondent’s jurisdictional objection as a preliminary question); **RLA-067**, *Canfor Corp. and Terminal Forest Products Ltd. v. United States of America* (UNCITRAL) Decision on Preliminary Question, 6 June 2006, ¶ 2 (Tribunal deciding as a preliminary question that it had no jurisdiction to decide on the claimant’s claims to the extent that they concerned United States antidumping and countervailing duty law); **RLA-068**, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Decision of the Tribunal on the Filing of a Statement of Defence, 17 October 2001, ¶¶ 10-11, 16: (“[Jurisdictional issues] are ... frequently, as the UNCITRAL rules indicate they should be, dealt with as a preliminary matter.”); **RLA-069**, *Ethyl Corporation v. Government of Canada* (UNCITRAL) Award on Jurisdiction, 24 June 1998 (Tribunal hearing preliminary jurisdictional objections prior to proceeding on the merits).

¹¹ See e.g., **RLA-052**, *Resolute – Decision on Bifurcation*, ¶ 5.1(1); **RLA-070**, *Grand River Enterprises Six Nations, Ltd., et al v. United States of America* (UNCITRAL) Decision on Objections to Jurisdiction, 20 July 2006 (“*Grand River – Decision on Jurisdiction*”), ¶ 29: (“Since Articles 1116(2) and 1117(2) introduced a clear and rigid limitation defence – not subject to any suspension, prolongation or other qualification - the Tribunal decided to bifurcate the time limitation issue for trial as a preliminary issue.”); **RLA-065**, *Bayview – Award*, ¶¶ 34-36 (where in the bifurcated jurisdictional phase, the tribunal heard arguments on the timeliness of the claims under Article 1116(2)).

¹² **RLA-052**, *Resolute – Decision on Bifurcation*, ¶ 4.6.

¹³ **RLA-071**, *Accession Mezzanine Capital L.P. and Danubius Kereskedohaz Vagyonkezele v. Hungary* (ICSID Case No. ARB/12/3) Decision on Respondent’s Notice of Jurisdictional Objections and Request for Bifurcation, 8 August 2013, ¶ 38. See also **RLA-056**, *Cairn – Procedural Order No. 4*, ¶ 78; **RLA-072**, *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41) Procedural Order No. 2 – Decision on Bifurcation, 28 June

[i]n examining the drafting history of Article 21(4) of the UNCITRAL Rules, the Tribunal finds that the primary motive for the creation of a presumption in favor of the preliminary consideration of a jurisdictional objection was to ensure efficiency in the proceedings.¹⁴

9. When deciding if bifurcation is appropriate in a particular case and if it would promote fairness and procedural efficiency, tribunals operating under NAFTA Chapter Eleven and other investment treaties have considered the following three criteria:

- (i) whether the objection is *prima facie* serious and substantial;
- (ii) whether the objection can be examined without prejudging or entering the merits; and
- (iii) whether the objection, if successful, could dispose of all or an essential part of the claims raised.¹⁵

III. BIFURCATION IS APPROPRIATE IN THIS ARBITRATION

10. As Canada demonstrates below, its objection to the Tribunal's jurisdiction on the basis that the claim is time-barred satisfies all three criteria relevant to a decision to bifurcate pursuant to Article 21.4 of the 1976 UNCITRAL Rules. Accordingly, this Tribunal should hold a separate jurisdictional phase to rule on Canada's objection.

2018 (“*Eco Oro – Procedural Order No. 2*”), ¶ 50; **RLA-061**, *Tulip Real Estate – Decision on Bifurcation*, ¶¶ 55-56; **RLA-073**, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Procedural Order Deciding Bifurcation and Non-Bifurcation, 25 January 2013, ¶ 11.

¹⁴ **RLA-054**, *Glamis – Procedural Order No. 2*, ¶ 11. See also **RLA-074**, David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2nd Edition (Oxford University Press, 2012), p. 458: (“The above discussion points to efficiency as the prime factor in determining whether a tribunal should rule on objections concerning jurisdiction as a preliminary matter.”)

¹⁵ **RLA-052**, *Resolute – Decision on Bifurcation*, ¶ 4.3; **RLA-060**, *Philip Morris – Decision on Bifurcation*, ¶ 109; **RLA-075**, *Global Telecom Holding S.A.E. v. Government of Canada* (ICSID Case No. ARB/16/16) Procedural Order No. 2 – Decision on Respondent's Request for Bifurcation, 14 December 2017 (“*Global Telecom – Decision on Bifurcation*”), ¶ 100; **RLA-072**, *Eco Oro – Procedural Order No. 2*, ¶ 49; **RLA-076**, *Bay View Group LLC and the Spalena Company LLC v. Republic of Rwanda* (ICSID Case No. ARB/18/21) Procedural Order No. 2 on Bifurcation, 28 June 2019 (“*Bay View – Decision on Bifurcation*”), ¶¶ 9, 36. Similar criteria have been applied by NAFTA and other investment treaty arbitration tribunals: see e.g., **RLA-054**, *Glamis – Procedural Order No. 2*, ¶ 12(c): (“Considerations relevant to this analysis include, *inter alia*, (1) whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding; (2) whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider whether the costs and time required of a preliminary proceedings, even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings); and (3) whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost.”); **RLA-055**, *Pey Casado – Decision on Bifurcation*, ¶ 102; **RLA-056**, *Cairn – Procedural Order No. 4*, ¶ 76; **RLA-077**, *Emmis International Holding, B.V. et al. v. Hungary* (ICSID Case No. ARB/12/2) Decision on Respondent's Application for Bifurcation, 13 June 2013, ¶ 37(2).

A. Canada's Time Bar Objection is Serious and Substantial

11. The NAFTA Chapter Eleven tribunal in *Resolute* noted that, in determining whether an objection is *prima facie* serious and substantial, a tribunal is “only required to be satisfied that the objections are not frivolous or vexatious.”¹⁶ Tribunals have ruled that an objection is *prima facie* serious and substantial when they consider that it is credible, has been advanced in good faith, and goes to the very basis of the tribunal's power to hear a claim.¹⁷

12. Canada's time bar objection is serious as it goes to the very basis of the Tribunal's authority to hear this claim. A NAFTA Party's consent to arbitration under Chapter Eleven crystallizes only when a claimant submits a claim “in accordance with the procedures set out in [the] Agreement.”¹⁸ Article 1116(2) contains one such procedural requirement, namely 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.”¹⁹ Therefore, a claimant must demonstrate that its claim is timely. Otherwise, Canada does not consent to arbitrate the claim, and the tribunal does not have jurisdiction over it.²⁰

13. In practice, NAFTA Chapter Eleven tribunals have strictly applied the limitation period in Article 1116(2).²¹ In *Feldman v. United States*, the tribunal recognized that Article 1116(2)

¹⁶ **RLA-052**, *Resolute – Decision on Bifurcation*, ¶ 4.4. See also, **RLA-075**, *Global Telecom – Decision on Bifurcation*, ¶ 102; **RLA-056**, *Cairn – Procedural Order No. 4*, ¶ 82(a); **RLA-059**, *Lighthouse – Procedural Order No. 3*, ¶ 23.

¹⁷ See e.g., **RLA-052**, *Resolute – Decision on Bifurcation*, ¶ 4.4 (In that case, the tribunal was satisfied that Canada's preliminary objections, including one on time bar under Article 1116(2), were “each credible and brought in good faith and cannot be excluded on a *prima facie* basis”); **RLA-075**, *Global Telecom – Decision on Bifurcation*, ¶ 102; **RLA-078**, *AIYY Ltd. v. Czech Republic (UNCITRAL) Procedural Order No. 2 – Decision on Bifurcation*, 5 October 2015, ¶ 59; **RLA-055**, *Pey Casado – Decision on Bifurcation*, ¶¶ 104, 114, 115.

¹⁸ NAFTA Article 1122(1).

¹⁹ NAFTA Article 1116(2).

²⁰ See **RLA-079**, *Resolute Forest Products Inc. v. Government of Canada (UNCITRAL) Decision on Jurisdiction and Admissibility*, 30 January 2018 (“*Resolute – Decision on Jurisdiction*”), ¶ 83: (“Although the time limit specified in Articles 1116(2) and 1117(2) is not itself a procedure, compliance with it is required for the bringing of a claim, which is certainly a procedure. This is enough to justify the conclusion that compliance with the time limit goes to jurisdiction.”)

²¹ As the Tribunal in *Resolute* stated when referring to Article 1116(2), “this time limit is strict, not flexible. There is no provision for the Tribunal to extend the limitation period...” (**RLA-079**, *Resolute – Decision on Jurisdiction*, ¶ 153). See also, **RLA-070**, *Grand River – Decision on Jurisdiction*, ¶¶ 29, 103; **RLA-080**, *Apotex Holdings Inc. and*

offers a “clear and rigid limitation defense which, as such, is not subject to any suspension [...], prolongation or other qualification.”²² NAFTA Chapter Eleven tribunals have expressly recognized that the limitation period is an integral aspect of the NAFTA Parties’ consent to arbitration.²³

14. Tennant did not submit its claim within the three-year limitation period under Article 1116(2) and thus, Canada has not consented to arbitrate this claim.

15. Canada’s time bar objection is substantial. The facts alleged in the Claimant’s NOA make clear that all of the measures alleged to be in breach of the NAFTA took place well before three years prior to the submission of its NOA.²⁴ As such, the Claimant knew, or should have known, of the alleged breaches and the damages or loss caused prior to the critical date of June 1, 2014 (three years before filing its NOA).

16. As explained in the Statement of Defence, Canada’s time bar objection applies to each of the “four categories of wrongful actions”²⁵ alleged by the Claimant in its NOA, namely: (a) the unfair manipulation of the award of access to the electricity transmission grid; (b) the unfair

Apotex Inc. v. United States of America (ICSID Case No. ARB(AF)/12/1) Award on Jurisdiction and Admissibility, 14 June 2013 (“*Apotex – Award on Jurisdiction*”), ¶¶ 301-304; 326-327; **RLA-003**, *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction and Liability, 17 March 2015 (“*Bilcon – Award on Jurisdiction and Liability*”), ¶¶ 258-282.

²² **RLA-081**, *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1) Award, 16 December 2002 (“*Feldman – Award*”), ¶ 63. See also, **RLA-070**, *Grand River – Decision on Jurisdiction*, ¶ 29; **RLA-080**, *Apotex – Award on Jurisdiction*, ¶ 327. See also, **RLA-082**, *Corona Materials, LLC v. Dominican Republic* (ICSID Case No. ARB(AF)/14/3) Award on the Respondent’s Expedited Preliminary Objections in Accordance with Article 10.20.5 of the DR-CAFTA, 31 May 2016, ¶¶ 192, 199 (citing **RLA-081**, *Feldman – Award* with approval in interpreting the equivalent three-year limitations period in the DR-CAFTA as “strict” and not susceptible to suspension or tolling).

²³ See e.g., **RLA-002**, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002, ¶ 120 (holding that in order to establish consent to arbitration under NAFTA Chapter Eleven, a Claimant must show, among other things, that the “claim has been brought by a claimant investor in accordance with Articles 1116 or 1117”); **RLA-003**, *Bilcon – Award on Jurisdiction and Liability*, ¶ 229 (holding that “[t]he heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent, in Chapter Eleven, to an overall enhancement of their exposure to remedial actions by investors”, and proceeding to analyze Canada’s time bar objection as a jurisdictional defence).

²⁴ See e.g., Notice of Arbitration, ¶¶ 30, 32, 58-73, 82, 87-89.

²⁵ Notice of Arbitration, ¶ 91.

manipulation of the dissemination of Feed-In Tariff Program (“FIT Program”) information; (c) the unfair manipulation of the awarding of FIT Program Contracts; and (d) the improper destruction of necessary and material evidence by senior officials in the Government of Ontario.²⁶

17. With respect to the first three categories of alleged wrongful actions, an examination of the facts and dates alleged by the Claimant in its NOA and those alleged by Mesa Power Group, LLC (“Mesa”) in a past NAFTA Chapter Eleven arbitration, *Mesa v. Canada*, clearly demonstrates that Tennant’s claim is outside the Article 1116(2) limitation period.

18. Mesa’s Notice of Arbitration, dated October 4, 2011, included nearly identical allegations to those 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, and the process for allocating transmission capacity on the Bruce to Milton transmission line following the Ontario Minister of Energy’s June 3, 2011 letter of direction.²⁷ Moreover, as it specifically relates to the third category of alleged wrongful actions, in December 2011, the Office of the Auditor General of Ontario made public its 2011 Annual Report, which explained the reasons for the FIT Program’s delay in awarding transmission access.²⁸

19. If Mesa had sufficient knowledge to make these allegations in 2011 based on the information that was publicly available at the time, there is no reason why Tennant could not have done the same, given the nearly identical nature of both Tennant and Mesa’s claims.

20. Likewise, with respect to the Claimant’s fourth category of alleged wrongful actions, information on the document destruction and spoliation of evidence by senior officials of the

²⁶ See Canada’s Statement of Defence, ¶¶ 26-27; Notice of Arbitration, ¶ 91. See also, ¶¶ 33-37.

²⁷ **R-005**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Notice of Arbitration (Oct. 4, 2011), ¶¶ 22-37, 46-50. See also, Canada’s Statement of Defence, ¶ 16 stating: (“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”)

²⁸ See Canada’s Statement of Defence, ¶ 18.

Government of Ontario was highly publicized between 2011 and 2013, well before the critical date of June 1, 2014.²⁹

21. With respect to knowledge of loss or damage under Article 1116(2), all that is required to trigger the limitation period is knowledge that loss or damage has been caused, even if its extent or quantification is still unclear.³⁰ When Tennant was not awarded a FIT Program Contract in July 2011, the Claimant knew, or should have known, that the loss or damage it alleges had been caused. At the latest, the Claimant knew, or should have known, of the alleged loss or damage on June 12, 2013, the date on which the Ontario Minister of Energy directed the OPA to “not procure any additional MW under the FIT Program for Large FIT projects”.³¹ Accordingly, the Claimant’s knowledge of any alleged loss or damage as a result of the FIT Program clearly pre-dates the three-year limitation period as it had or should have had such knowledge well before June 1, 2014.³²

22. Canada’s time bar objection is serious and substantial: it is not frivolous, but credible; it is made in good faith; and it goes to the very basis of the Tribunal’s authority to hear Tennant’s claim. Based on information publicly available, the Claimant either knew or should have known about the alleged breaches and loss or damage well before the critical date of June 1, 2014.³³ Given that the Claimant failed to file its claim within the three-year limitation period under Article 1116(2), Canada has not provided its consent to arbitrate this claim.

²⁹ See Canada’s Statement of Defence, ¶¶ 20-21 and 37.

³⁰ See e.g., **RLA-083**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 87; **RLA-070**, *Grand River – Decision on Jurisdiction*, ¶¶ 77-78, 82-83; **RLA-080**, *Apotex – Award on Jurisdiction*, ¶ 303; **RLA-003**, *Bilcon – Award on Jurisdiction and Liability*, ¶ 275.

³¹ Canada’s Statement of Defence, ¶ 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.”)

³² See e.g., Notice of Arbitration, ¶ 60.

³³ Unlike what the Claimant alleges in its Notice of Arbitration (see ¶¶ 117, 120, 123, 125-126), the relevant dates are not those pursuant to the publication of documents related to other similar NAFTA Chapter Eleven claims.

B. Canada's Time Bar Objection Does Not Require Prejudging or Entering the Merits

23. Tribunals have determined that when the evidentiary inquiry to decide upon a jurisdictional objection is a limited one or the jurisdictional objection itself is not closely intertwined with the merits of the case, it will not require prejudging or entering the merits of a case.³⁴ A complete separation between the jurisdictional objection and the merits of the case is not necessary, however. Tribunals have determined that as long as there is no substantial overlap between evidence required to consider jurisdictional questions and evidence required to consider the merits of a claim, efficiency may be achieved through a bifurcated process. As explained by the tribunal in *Pey Casado v. Chile II*:

[T]he existence of some degree of overlap between the evidence relevant for answering jurisdictional questions and evidence relevant for answering questions pertaining to the merits is not an obstacle to bifurcation. What would be required in order to join an objection to the merits is a more substantial overlap such that a jurisdictional question could not be decided efficiently without also ruling on the merits of the case.³⁵

24. In these proceedings, the evidentiary inquiry required to rule on Canada's time bar objection is limited. Moreover, the facts applicable to Canada's jurisdictional questions do not substantially overlap with the facts relevant to the merits of Tennant's claim. The Tribunal needs only to determine the dates on which the Claimant first had, or should have had, knowledge of the measures alleged to violate NAFTA Chapter Eleven and the resulting loss or damage.

25. The facts alleged by the Claimant in its NOA, even if accepted on their face, and the information that was publicly available related to the Claimant's allegations are alone sufficient to demonstrate that Tennant's claim is time-barred. There is no need for the Tribunal to consider witness or expert testimony, or enter into the substance of any of the contested facts or legal issues related to the merits of the claim.

³⁴ See e.g., **RLA-052**, *Resolute – Decision on Bifurcation*, ¶ 4.9; **RLA-055**, *Pey Casado – Decision on Bifurcation*, ¶ 106; **RLA-059**, *Lighthouse – Procedural Order No. 3*, ¶ 25.

³⁵ **RLA-055**, *Pey Casado – Decision on Bifurcation*, ¶ 106 (footnote omitted). See also, **RLA-059**, *Lighthouse – Procedural Order No. 3*, ¶ 26: ("It thus appears to the Tribunal that the issues to be analysed to determine the Respondent's jurisdictional objections are not very likely to overlap with the issues to be reviewed at the merits phase, if any. Consequently, separating the presentation of these objections and the rest of the proceedings could possibly lead to a more efficient proceeding.")

C. Canada's Time Bar Objection Will Dispose of Tennant's Entire Claim

26. Arbitral tribunals have remarked that bifurcation is advantageous if upholding a jurisdictional objection can result in the dismissal of a claimant's entire claim because it would ensure that "economies of time and costs are made."³⁶

27. As explained above, the Claimant knew or should have known about the alleged breaches and loss or damage arising out of each of the four categories of actions that it alleges breach the NAFTA more than three years prior to the filing of its NOA. Thus, if the Tribunal upholds Canada's objection on time bar, it would dispose of Tennant's claim in its entirety. This would result in substantial savings in time and costs for both Canada and Tennant.

28. The costs incurred by Canada in *Mesa* provide a reasonable basis for what Canada's and Tennant's costs would be in this arbitration. Tennant's claim virtually replicates Mesa's claim.³⁷ Both claims challenged the same measures under NAFTA Article 1105; and the same lead counsel that represented Mesa is now representing Tennant. To defend itself in *Mesa*, Canada incurred costs of 6,934,001.95 CAD, the majority of which were incurred in the merits and damages phase of that proceeding.³⁸ Mesa's costs amounted to 9,306,156.02 USD.³⁹ There is no question that if Canada's challenge to the Tribunal's jurisdiction is granted, it would avoid both disputing parties incurring many millions of dollars in legal and expert fees and other arbitration-related expenses, as well as substantial costs relating to use of personnel resources.

³⁶ **RLA-055**, *Pey Casado – Decision on Bifurcation*, ¶ 105. See also, **RLA-076**, *Bay View – Decision on Bifurcation*, ¶ 37.

³⁷ See Canada's Statement of Defence, ¶¶ 22-23, 32-34; Canada's Motion for Security for Costs and Disclosure of Third-Party Funding, August 16, 2019, ¶¶ 26, 38.

³⁸ **R-007**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Canada's Submission on Costs (Mar. 3, 2015), Annex I – Cost of Legal Representation (see Fiscal Years 2013-2014 and 2014-2015, the years in which the merits and damages arguments took place, where legal representation costs totalled 3,519,844.76 CAD); and Annex II - Disbursements (of the 1,883,454.28 CAD that was claimed in disbursements, approximately 1,839,000 CAD was expended in Fiscal Years 2013-2014 and 2014-2015, representing approximately 97% of the total disbursements claimed).

³⁹ See **R-014**, *Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Claimant's Statement of Costs (Mar. 3, 2015), p. 10.

IV. CONCLUSION

29. For the foregoing reasons, Canada respectfully requests that the Tribunal bifurcate these proceedings and hear Canada's Article 1116(2) jurisdictional objection in a preliminary phase.

30. Canada's objection to this Tribunal's jurisdiction over this matter satisfies all three criteria assessed and found to be relevant by past NAFTA Chapter Eleven and other investment arbitration tribunals to determine objections on a preliminary basis under Article 21.4 of the 1976 UNCITRAL Rules. As such, bifurcation of these proceedings to hear Canada's objection to the Tribunal's jurisdiction in a preliminary phase is the most fair, efficient and economical way to proceed in this matter.

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