

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT AND THE
UNCITRAL ARBITRATION RULES, 1976**

-between-

**TENNANT ENERGY, LLC
(the “Claimant”)**

-and-

**GOVERNMENT OF CANADA
(the “Respondent”, and together with the Claimant, the “Parties”)**

PROCEDURAL ORDER NO. 9

The Arbitral Tribunal

Mr. Cavinder Bull SC (Presiding Arbitrator)

Mr. R. Doak Bishop

Sir Daniel Bethlehem QC

Registry

Permanent Court of Arbitration

Tribunal Secretary

Ms. Christel Y. Tham

10 March 2021

I. RELEVANT PROCEDURAL HISTORY

1. On 24 June 2019, the Tribunal issued Procedural Order No. 1 (“**PO 1**”) establishing the procedural calendar for an initial phase up to the Tribunal’s decision on bifurcation and preliminary motions, and two alternative timetables for a subsequent phase applicable (i) should the proceedings not be bifurcated; and (ii) should the proceedings be bifurcated.
2. On 23 September 2019, the Respondent submitted a **Request for Bifurcation**, requesting that the Tribunal address in a preliminary phase the Respondent’s time-bar jurisdictional objection under Article 1116(2) of the North American Free Trade Agreement (“**NAFTA**”).
3. On 23 October 2019, the Claimant submitted its **Response to the Request for Bifurcation**.
4. From 14 to 15 January 2020, a hearing on the issues of bifurcation and preliminary motions took place in Washington, D.C.
5. On 27 February 2020, the Tribunal issued Procedural Order No. 4 (“**PO 4**”), in which it dismissed the Respondent’s request for bifurcation on the ground that it was premature. The Tribunal further determined that the proceedings would continue in accordance with the procedural timetable set out in PO 1 for the non-bifurcated scenario, with certain modifications adopted to allow the Respondent to pursue the bifurcation of the proceedings after having had sight of the Claimant’s Memorial. The Tribunal further directed that the Memorial would set out in full detail the Claimant’s pleading on issues of jurisdiction, including the issue of the time-bar. In the event that the Respondent decided to renew its request for bifurcation, the Tribunal held that it would decide on that request on the papers without a hearing, and issue relevant procedural directions thereafter.
6. On 7 August 2020, the Claimant submitted its Memorial on Jurisdiction, Merits and Quantum (the “**Memorial**”).
7. On 21 September 2020, the Respondent submitted its Memorial on Jurisdiction (the “**Counter-Memorial on Jurisdiction**”) and, in a separate filing, its renewed request for bifurcation (the “**Renewed Request for Bifurcation**”). In its Renewed Request for Bifurcation, the Respondent sought to have two jurisdictional objections determined on a preliminary basis, namely: (i) the Claimant was not a protected “investor of a Party” when the alleged breach occurred, and therefore the Claimant has not met the requirements of Article 1116(1) of the NAFTA (“**First Objection**”); and (ii) the claim was not filed prior to the expiry of the 3-year limitation period articulated in Article 1116(2) of the NAFTA (“**Second Objection**”).
8. On 13 October 2020, the Claimant filed its response to the Respondent’s renewed request for bifurcation (the “**Response to Renewed Bifurcation Request**”).
9. On 12 November 2020, the Tribunal issued Procedural Order No. 8 (“**PO 8**”), *inter alia*, granting the Respondent’s Renewed Request for Bifurcation, but holding that the scope of the bifurcated jurisdictional hearing shall be determined after the Claimant’s next submission on jurisdiction is filed on 11 January 2021. The Tribunal reasoned, in relevant part, that:
 42. Thirdly, the Tribunal considers that the Respondent’s First Objection can be examined without delving into the merits of the Claimant’s claim. The Respondent’s First Objection is discrete and focuses on: (i) when the alleged breach occurred; and (ii) when did the Claimant become an “investor of a Party” with an investment in Skyway 127. This is separate from the question of whether there is merit to the Claimant’s allegations of breach. This is also separate from

the question of whether the Claimant knew or should have known about the alleged breach, and/or the loss or damage arising from the breach.

43. With regard to the Respondent's Second Objection however, it is not yet clear to the Tribunal whether it would be able to determine this objection without delving into the merits of the Claimant's claim. At the heart of this objection is the question of whether the Claimant knew or should have known about the alleged breaches, as well as the loss or damage arising out of those breaches, more than three years prior to the filing of its Notice of Arbitration. On one hand, this could well be a relatively straightforward issue for decision on a preliminary basis. The Respondent's case is simply that the Claimant's allegations should have been known to the Claimant based on information that was publicly available prior to 1 June 2014, including the numerous public documents used in the *Mesa Power* arbitration and the *Mesa Power* submissions. On the other hand, depending on the evidence which the Claimant intends to adduce, the Tribunal may be required to substantially engage in the facts of the dispute, and to establish certain facts and connections between these facts. This may also involve significant testimony from, and cross-examination of, witnesses. In that case, the inquiry would be best conducted together with the merits phase when the Tribunal has the benefit of the entire record.
 44. In the premises, the Tribunal grants the Respondent's Renewed Request for Bifurcation, at least with respect to the First Objection. However, with respect to the Second Objection, the Tribunal finds that it would be able to better assess whether this objection should similarly be decided on a preliminary basis after it has had sight of the Claimant's Counter-Memorial on Jurisdiction. The Tribunal shall therefore determine the scope of the bifurcated jurisdictional hearing after the Claimant's Counter-Memorial on Jurisdiction is filed.
10. On 19 November 2020, the Tribunal, in light of its decision in PO 8, informed the Parties that it was considering a three-day period in September 2021 for the bifurcated jurisdictional hearing, and invited the Parties to indicate (i) the number of days that they expect to require for the hearing; and (ii) whether they would be available during the dates the Tribunal was considering.
 11. On 27 November 2020, the Respondent informed, *inter alia*, that it was agreeable to the dates being considered by the Tribunal.
 12. By letter dated 30 November 2020, the Claimant informed that both its lead counsel are unavailable in September 2021. Concerning the length of the hearing, the Claimant submitted that while it is currently "not possible to determine the number of witnesses that will need to be heard" at the bifurcated hearing, in its view, "it seems unlikely that three days will be sufficient" and that a "full week hearing would be the minimum period needed." In the same letter, the Claimant separately contended that "fairness and due process require" that there be document production in the preliminary phase of the proceedings. The Claimant accordingly submitted that it should file its Counter-Memorial on Jurisdiction only after the Respondent has filed its Counter-Memorial on merits and damages, and the proposed document production phase has occurred.
 13. On 3 December 2020, the Tribunal invited the Parties to confer and revert with possible hearing dates in the first three weeks of November. The Tribunal noted that the Parties' responses would be without prejudice to the outstanding issues raised in the Claimant's 30 November 2020 letter.
 14. On 9 December 2020, the Claimant updated the Tribunal on the Parties' discussions concerning hearing dates and, *inter alia*, informed that the Parties are available from 8 to 19 November 2021, with a preference on the Claimant's part for 15 to 19 November 2021.

15. By letter dated 15 December 2020, and at the Tribunal's invitation, the Respondent responded to the Claimant's 30 November 2020 letter. The Respondent (i) stated that it considered a three-day hearing to be sufficient; (ii) objected to the Claimant's submissions concerning the procedural calendar in their entirety; and (iii) requested the Tribunal to award all associated costs incurred in its favour.
16. On 15 December 2020, the Claimant, *inter alia*, sought leave from the Tribunal to submit a response to the Respondent's 15 December 2020 letter within 14 days. On the same day, the Respondent, *inter alia*, objected to the Claimant's request on the basis that it was neither necessary nor efficient.
17. On 18 December 2020, the Tribunal rejected the Claimant's request, noting its view that no further submissions from the Parties were necessary, and stated that it will revert to the Parties concerning the outstanding matters in due course.
18. By letter dated 23 December 2020, the Tribunal rejected the Claimant's submissions concerning the procedural calendar, including its proposal for document production in the preliminary phase of proceedings, and "confirm[ed] that, in accordance with PO1 and PO8, the Claimant's Counter-Memorial on Jurisdiction shall be due on 11 January 2021. Thereafter, after determining whether the Second Objection will be addressed in the preliminary phase of the proceedings, the Tribunal shall fix the deadlines for the remaining procedural steps in accordance with the procedural calendar set out in Annex 1 of PO1." The Tribunal further requested all parties to tentatively reserve at least five days, from 15 to 19 November 2021, as potential dates for the hearing, and noted that it would confirm the length of the bifurcated hearing once it has decided on its scope.
19. By letter dated 23 December 2020, the Claimant (i) requested an extension from 11 January to 1 March 2021 for the filing of its next submission on jurisdiction; and (ii) proposed a revised procedural calendar, which reflected corresponding adjustments to what it considered to be the remaining procedural events for this phase, namely the Reply and Rejoinder Memorials on Jurisdiction, the non-disputing Party submissions, and the disputing Parties' responses to those submissions.
20. By letter dated 29 December 2020, the Respondent responded to the Claimant's 23 December letter at the Tribunal's invitation, agreeing to the Claimant's extension request, but objecting to the Claimant's proposed procedural calendar. The Respondent contended in particular that (i) Reply and Rejoinder Memorials on Jurisdiction are not necessary since both Parties would have each already completed two rounds of submissions on jurisdiction; and (ii) the proposed calendar does not account for the Tribunal's decision on the scope of the preliminary phase following the Claimant's next submission on jurisdiction.
21. By letter dated 10 January 2021, the Tribunal (i) confirmed, in accordance with the Parties' consent, that the deadline for the Claimant's next submission on jurisdiction is extended from 11 January to 1 March 2021; and (ii) agreed with the Respondent that two rounds of submissions on jurisdiction from each Party are sufficient, and adopted the following procedural calendar proposed by the Respondent:

Procedural Event	Date
Claimant's Reply on Jurisdiction	1 March 2021
Tribunal's Decision on Scope of Bifurcated Phase of Proceedings	[TBD]

Procedural Event	Date
Respondent's Rejoinder Memorial on Jurisdiction	+ 45 days
Submissions of the United States and Mexico Pursuant to NAFTA Article 1128 (if any)	+30 days
Responses to 1128 Submissions (if any)	+15 days

22. On 1 March 2021, the Claimant submitted its Counter-Memorial on Jurisdiction (the “**Reply on Jurisdiction**”).

II. THE PARTIES' POSITIONS

23. The Parties' arguments concerning the Respondent's Renewed Request for Bifurcation, as set out in the Respondent's and the Claimant's respective submissions of 21 September and 13 October 2020, have been summarized in PO 8¹ and shall not be repeated here.
24. In its Reply on Jurisdiction, which was submitted after PO 8 was issued, the Claimant restated and elaborated upon two arguments that it had previously made in support of its position that the Tribunal should reject the Respondent's request to consider the Second Objection in a preliminary phase.² Specifically, that bifurcating the Second Objection would be inefficient because (i) said Objection is frivolous and inconsistent with the facts pleaded in the arbitration; and (ii) the Tribunal would need to engage in a substantial consideration of the merits in order to determine said Objection.³
25. First, the Claimant maintained that the Respondent's objection under Article 1116(2) of the NAFTA, namely that the Claimant's claim is barred because it was filed after the expiry of the 3-year limitation, is not sustainable. This is because, as the Claimant has pleaded, it did not know and could not have known about the wrongful conduct of the government officials administrating the Ontario Feed-In Tariff (“FIT”) program, which forms the fundamental basis of its claim, before 15 August 2015, the date of publication of the *Mesa Power* post-hearing briefs.⁴
26. For the same reason, the Claimant further argued in its Reply on Jurisdiction that the two alternative dates of breach alleged by the Respondent, 4 July 2011 and 12 June 2013, must be rejected.⁵ 4 July 2011 was the date on which Skyway 127 was placed on a FIT priority waiting list, instead of being awarded a FIT Contract. The Claimant contended that this date could not have been the date of breach because, at the time, Skyway 127 was also informed that it remained in the running for a contract.⁶ The Claimant similarly asserted that 12 June 2013, the date the FIT Program was terminated, could not have been the date of breach either because, at that time, the Claimant did not have actual or constructive knowledge of the Ontario government's wrongful conduct.⁷
27. The Claimant also rejected the Respondent's claim that “somehow knowledge of other factors relating to Canada's wrongful administration of the FIT Program should have enabled

¹ PO 8, ¶¶ 16-36.

² See Reply on Jurisdiction, Section III.D.

³ See PO 8, ¶¶ 27-29, 33-34.

⁴ See PO 8, ¶¶ 27-29; Reply on Jurisdiction, ¶ 268.

⁵ Reply on Jurisdiction, ¶ 265.

⁶ Reply on Jurisdiction, ¶ 266.

⁷ Reply on Jurisdiction, ¶ 267

Tennant Energy to realize that [the alleged breach had occurred].”⁸ According to the Claimant and its witnesses, “Skyway 127 and Tennant Energy believed Ontario conducted the FIT Program under its rules in a fair manner” up until 15 August 2015.⁹ In fact, the Claimant further argued, the Ontario government’s concealment of this information up until that date “forms an essential part of the composite breach.”¹⁰

28. Secondly, the Claimant reiterated that the Tribunal would need to engage in a substantial consideration of the merits in order to determine the Second Objection.¹¹ In the Claimant’s view, the “three-year-limitation provision is not designed for the Tribunal to determine before a merits-hearing which will enable the tribunal to determine whether a claim existed at a particular point in time or the scope of that claim.”¹² In particular, the Claimant contends that the Tribunal “would be required to review the merits of this case in a detailed manner” in order to determine whether the Claimant should have known about the wrongful conduct years before 15 August 2015, despite the Ontario government’s failure to date to publicly disclose the existence of a decision-making body such as the “Breakfast Club”.¹³

III. THE TRIBUNAL’S ANALYSIS

29. As stated in PO 4, the Tribunal is guided by three relevant considerations in the exercise of its discretion to bifurcate. These considerations are (i) whether the jurisdictional objection is frivolous; (ii) whether the objection, if successful, would materially reduce the time and costs of the proceeding; and (iii) whether the objection concerns issues intertwined with the merits of the arbitration.
30. Having carefully considered the submissions of the parties, the Tribunal concluded in PO8 that these considerations favour a bifurcation of the proceedings, at least with respect of the First Objection.
31. As for the Second Objection, the Tribunal decided in PO 8 that the Second Objection could not be said to be frivolous, and if successful, could potentially dispose of the totality, and if not, essential parts of the Claimant’s claim. However, at the time PO 8 was issued, it was not yet clear to the Tribunal whether it would be able to determine this objection without delving into the merits of the Claimant’s claim. Consequently, the Tribunal held that it would determine the scope of the bifurcated jurisdictional hearing after the Claimant’s Reply on Jurisdiction is filed.
32. The Tribunal has reviewed the Claimant’s Reply on Jurisdiction and finds that the Second Objection should similarly be decided on a preliminary basis at the bifurcated jurisdictional hearing.
33. As the Tribunal observed in PO8, at the heart of the Second Objection is the question of whether the Claimant knew or should have known about the alleged breaches, as well as loss or damage arising out of those breaches, more than three years prior to the filing of its Notice of Arbitration. Based on the Parties’ submissions on jurisdiction to date, this issue appears to be relatively straightforward and one that is suitable for decision on a preliminary basis.
34. The Respondent’s case is that the Claimant’s allegations should have been known to the Claimant based on information that was publicly available prior to 1 June 2014, including

⁸ Reply on Jurisdiction, ¶ 269.

⁹ Reply on Jurisdiction, ¶ 272.

¹⁰ Reply on Jurisdiction, ¶ 271.

¹¹ Reply on Jurisdiction, ¶ 273.

¹² Reply on Jurisdiction, ¶ 53.

¹³ Reply on Jurisdiction, ¶¶ 273-274.

the numerous public documents used in the *Mesa Power* arbitration and the *Mesa Power* submissions.

35. In response, the Claimant has made clear that its claim is about: (i) special business opportunities provided to a politically connected local favourite, IPC; (ii) the “Breakfast Club” cabal of politicians and senior officials systemically abusing the process to reward friends at the expense of everyone else; (iii) Ontario’s decision to not complete its FIT Program for the Bruce Region contrary to the legitimate expectation of FIT Proponents such as Skyway 127; (iv) the delay of the award of contracts because of Korean Consortium’s failure to comply with its contractual obligations; and (v) the conspiracy in the systemic violations of the NAFTA and the spoliation and wanton destruction of evidence by Ontario.¹⁴ According to the Claimant, all the allegations as articulated above “*deal with information that Canada suppressed from the public and which was not and could not be known before June 1 2014*”,¹⁵ which “*only became known because of cross-examinations of Canada’s witnesses at the Mesa Power Hearing in October 2014, and subsequently disclosed in 2015*”.¹⁶
36. The Tribunal considers that the Respondent’s Second Objection can be examined without delving into or prejudging the merits of the Claimant’s claim. The Tribunal need only consider whether the Claimant knew or did not know at the material time, or whether it should have reasonably known about the alleged breaches and losses, having regard to the specific allegations of breach as pleaded by the Claimant. It is not for the Tribunal to consider at the bifurcated jurisdictional hearing whether there is merit to the Claimant’s pleaded allegations.
37. In addition, the Tribunal is of the view that the determination of the Second Objection would not involve significant testimony from, and cross-examination of witnesses. The Claimant has proffered three factual witnesses in support of its Second Objection, namely Mr John C Pennie, Mr John Tennant and Mr Derek Tennant. The crux of all three witness testimonies is simply that the Claimant had no knowledge of the allegations until 2015 when the events of the *Mesa Power* Hearing were made public, and that there was an expectation that the Respondent would act in good faith regarding Skyway 127’s application in the FIT Program.¹⁷
38. The Tribunal further notes that the Claimant has proffered these same three factual witnesses in respect of the First Objection. Thus, having the First Objection and Second Objection heard together at the bifurcated jurisdictional hearing would likely result in efficiency savings.

IV. THE TRIBUNAL’S DECISION

39. For the foregoing reasons, the Tribunal determines and orders as follows:
- a. The Respondent’s Renewed Request for Bifurcation is granted in respect of both the First Objection and the Second Objection; and
 - b. The issue of costs arising from the Respondent’s Renewed Request for Bifurcation is reserved to a further order, decision or award.

¹⁴ Reply on Jurisdiction, ¶¶ 11-13.

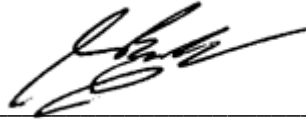
¹⁵ Reply on Jurisdiction, ¶ 14.

¹⁶ Reply on Jurisdiction, ¶ 15.

¹⁷ Reply on Jurisdiction, ¶¶ 412-420.

Dated: 10 March 2021

Place of Arbitration: Washington, D.C.

A handwritten signature in black ink, appearing to read 'Cavinder Bull', is written over a horizontal line. The signature is stylized and cursive.

Mr. Cavinder Bull SC
(Presiding Arbitrator)

On behalf of the Tribunal