

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

**BETWEEN:**

**WINDSTREAM ENERGY, LLC**

**Claimant**

**AND:**

**GOVERNMENT OF CANADA**

**Respondent**

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**GOVERNMENT OF CANADA**

**REPLY TO THE CLAIMANT'S SUBMISSION ON COSTS**

**April 26, 2016**

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## **I. INTRODUCTION**

1. Canada and the Claimant appear to agree on the primary legal principle governing an award of costs under Article 42 of the 2010 UNCITRAL Arbitration Rules (“UNCITRAL Arbitration Rules”): the party that is successful should be able to recover its costs related to the claims upon which it was successful, unless circumstances exist that would render it inappropriate to allow such recovery. In its costs submission, the Claimant has argued that circumstances exist that would make it inappropriate for Canada to recover its costs even if the Claimant is wholly unsuccessful on all of its claims. Further, the Claimant argues that even if the Claimant is only partially successful, Canada should have to bear both the Claimant’s costs for the claims on which it was successful, and all of its own costs for the claims on which the Claimant was unsuccessful. The Claimant is wrong.

2. As Canada has explained in its costs submission, the proper application of the principle in Article 42 of the UNCITRAL Arbitration Rules in the circumstances of this case should allow Canada to recover all of its costs, and should, in no circumstances, require Canada to bear any of the Claimant’s costs. Moreover, even if the Tribunal disagrees and allows the Claimant to recover some of its costs, the Claimant’s request is unreasonable and includes illegitimate items. It should be rejected on that ground as well.

## **II. CANADA SHOULD BE PERMITTED TO RECOVER ALL OF ITS COSTS IF THE CLAIMANT IS WHOLLY UNSUCCESSFUL**

3. The Claimant argues that if it is wholly unsuccessful, the Tribunal should still require Canada to bear all of its own costs in this arbitration.<sup>1</sup> It fails, however, to offer a compelling reason to justify such a departure from the general principle discussed above that is found in Article 42 of the UNCITRAL Arbitration Rules.

4. In making its arguments, the Claimant asks the Tribunal to consider what it calls “the substantial number of NAFTA decisions” which did not order the unsuccessful claimant to pay

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<sup>1</sup> Claimant’s Costs Submissions, ¶¶ 44, 53.

costs, placing particular reliance on *Mondev v. United States*.<sup>2</sup> However, the *Mondev* decision fails to support the Claimant's position. We are no longer in the "early days of NAFTA arbitration", and Canada did not raise a "number of [unsuccessful] arguments on which significant time and costs were expended".<sup>3</sup> Moreover, the Claimant's reliance on the opinions of its own witnesses about whether it was treated unfairly are ill-placed. Whether or not the Claimant feels that it was treated in violation of Canada's obligations under the NAFTA is irrelevant, both for the purposes of the Tribunal's decision on the merits and its assessment of costs. The Claimant's subjective belief that they were wronged does not provide them with an excuse for bringing a claim under NAFTA Chapter 11 that should never have been brought.

5. In sum, the Claimant's submission fails to offer any circumstances which would justify an order requiring Canada to bear its own costs in the event the Claimant is wholly unsuccessful in this arbitration.

### **III. CANADA SHOULD BE PERMITTED TO RECOVER SOME OF ITS COSTS IF THE CLAIMANT IS ONLY PARTIALLY SUCCESSFUL**

6. The Claimant also argues that even if the Claimant is only partially successful, Canada should have to bear both the Claimant's costs for the claims on which it was successful, and all of its own costs for the claims on which the Claimant was unsuccessful, "because the actions of the respondent forced the claimant to initiate the arbitration."<sup>4</sup> Despite referring to "cases" to support its position, the Claimant only expressly cites to one case, *PSEG v. Turkey*. In that case, the tribunal allowed the Claimant to recover some of its costs even though it was only partially successful. However, contrary to what the Claimant implies, that case does not support the principle that awarding a claimant partial costs is the appropriate result in every case in which a claimant is partially successful. Indeed, the Tribunal took the approach that it did in *PSEG v. Turkey* because the case involved a denial of justice and, thus, the claimant there had no option

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<sup>2</sup> Claimant's Costs Submissions, ¶ 53.

<sup>3</sup> **CL-066**, *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2) Award, 11 October 2002, ¶ 159.

<sup>4</sup> Claimant's Costs Submissions, ¶ 51.

but to bring the arbitration forward.<sup>5</sup> This justification is simply inapplicable here, despite the Claimant's assertion otherwise.<sup>6</sup> There has been no denial of justice here, and the Claimant had other grounds to seek redress. In fact, as the evidence showed at the hearing, both Ontario and the OPA were willing to negotiate a reasonable solution to the dispute between the parties.

7. The Claimant must bear the costs of its litigation strategy and, in particular to pursue claims that were without merit, such as its claims for a breach of Article 1102 and 1103, and its claim for lost profits. If the Claimant is only partially successful, Canada should be awarded the costs related to those aspects of the claim on which the Claimant was unsuccessful.

#### **IV. CANADA SHOULD NOT BE REQUIRED TO BEAR THE CLAIMANT'S COSTS EVEN IF THE CLAIMANT IS WHOLLY SUCCESSFUL**

8. As Canada noted in its Submission on Costs, even if the Claimant is successful on all of its claims, the Tribunal should exercise its discretion and order each party to bear its own costs because of the inefficient manner in which the Claimant presented its case.<sup>7</sup> None of the arguments presented by the Claimant in its cost submission should lead the Tribunal to conclude differently.

#### **V. EVEN IF AN AWARD OF COSTS FOR THE CLAIMANT COULD BE JUSTIFIED, THE CLAIMANT'S CLAIMED COSTS ARE UNREASONABLE**

##### **A. The Claimant's Costs Were Caused by Its Own Litigation Strategy, Not Canada's Actions**

9. The Claimant was, at all times, in control of the claims that it made and the manner in which it pursued them. For example, it bemoans the extensive volume of evidence,<sup>8</sup> but it was the one that filed thousands of exhibits, the majority of the witness statements, many of which were

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<sup>5</sup> **CL-076**, *PSEG Global Inc. and Konya Ilgın Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award, 19 January 2007, ¶¶ 247-249, 352.

<sup>6</sup> Claimant's Costs Submissions, ¶ 44.

<sup>7</sup> Canada's Submission on Costs, ¶ 25.

<sup>8</sup> Claimant's Costs Submissions, ¶ 6.

repetitive, and submissions that were twice as long as Canada's. It also points to the 10-day hearing, but such a lengthy hearing was required as a result of its lost profits claim, which was based on the evidence of 16 expert witnesses. Indeed, ten of the fifteen expert witnesses present at the hearing were engaged by the Claimant as part of its unjustified lost profits claim.<sup>9</sup> Further, for the reasons explained below, the Tribunal should reject the Claimant's baseless assertion that Canada's conduct in relation to document production, procedural requests, and expert reports caused the Claimant to incur additional costs.<sup>10</sup>

### **1. The Tribunal Has Already Ruled that Canada's Document Production Efforts Were Satisfactory**

10. The Claimant argues that Canada failed to provide responsive documents in a timely manner, which increased the Claimant's legal fees and expenses.<sup>11</sup> These arguments are baseless. The Tribunal has already decided on the sufficiency of Canada's document production following the Claimant's unreasonable, untimely and unjustified requests for Canada to re-conduct its document searches.<sup>12</sup> In each instance, the Tribunal denied the Claimant's request,<sup>13</sup> thus speaking to the Claimant's inefficiencies, not Canada's.

11. The Claimant's grievance that it had to resort to requesting documents from Ontario for this arbitration under Ontario's *Freedom of Information and Protection of Privacy Act* ("FIPPA")<sup>14</sup> fails to support the Claimant's plea for costs. This issue was fully briefed by the parties and

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<sup>9</sup> This includes Sarah Powell, Deloitte (Robert Low and Remo Bucci), 4C Offshore, SgurrEnergy, WF Baird, WSP, Weeks Marine, COWI and Ortech. See Canada's Submission on Costs, ¶¶ 17-24.

<sup>10</sup> See Claimant's Costs Submissions, ¶¶ 28-43.

<sup>11</sup> Claimant's Costs Submissions, ¶ 29.

<sup>12</sup> Letter from the Claimant to the Tribunal dated November 7, 2014; see also, Letter from the Claimant to Canada dated October 6, 2014 (**Tab 1 to Canada's Submission on Costs**); Canada's Submission on Costs, ¶ 31.

<sup>13</sup> Letter from the Claimant to the Tribunal dated November 24, 2014; Letter from Canada to the Tribunal dated November 28, 2014; Letter from Canada to the Tribunal dated December 18, 2014; Letter from Canada to the Tribunal dated January 7, 2015; Letter from the Claimant to the Tribunal dated January 9, 2015; Letter from Canada to the Tribunal dated January 14, 2015; Procedural Order No. 3, s. 4; Procedural Order No. 5, s. 4; Procedural Order No. 5, ¶ 3.4.

<sup>14</sup> Claimant's Costs Submissions, ¶ 31.

decided by the Tribunal in Canada's favour in Procedural Order No. 3 on January 21, 2015.<sup>15</sup> The Claimant simply wants to relitigate points that the Tribunal has already decided. The fact that the Claimant was able to obtain additional documents through the FIPPA process, the large majority of which were not responsive to the Claimant's document requests in this arbitration, speaks again to the inefficient way in which the Claimant argued its case.

12. The Claimant also relies on the fact that, on May 8, 2015, Canada produced an additional 727 documents, including 228 documents involving the Premier's Office, despite having stated that it "had met its document production obligations".<sup>16</sup> Canada stands by its representations to the Tribunal and to the Claimant, which were true to the best of the knowledge of the Government of Canada's counsel at the time they were made. As Canada explained in its Counter-Memorial, its first-round production included 80 documents from the Premier's Office.<sup>17</sup> Canada was later informed and explained to both the Tribunal and the Claimant, that additional documents were discovered as part of other document collection processes in unrelated domestic litigation and pursuant to the FIPPA process.<sup>18</sup> Once Canada obtained these documents, it produced them to the Claimant as quickly as possible. The Claimant has not suggested otherwise.<sup>19</sup> The late production of documents had no cost impact on the Claimant, for the same reason that the Claimant's production of additional documents after the April 21, 2014 deadline had no cost impact on Canada.<sup>20</sup> Indeed, any potential prejudice due to this late production was

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<sup>15</sup> Procedural Order No. 3, ¶¶ 3.27-3.37.

<sup>16</sup> See Claimant's Costs Submissions, ¶¶ 32-33.

<sup>17</sup> Canada's Counter-Memorial, ¶ 573.

<sup>18</sup> **C-1186**, E-mail from Rodney Neufeld, Trade Law Bureau to Myriam Seers, Torys LLP (Jun. 5, 2015).

<sup>19</sup> Canada maintains that the motion was correctly decided as "[t]he document production process is a human process requiring best efforts made in good faith" (Letter from Canada to the Tribunal dated November 18, 2014, p. 5).

<sup>20</sup> On August 1, 2014, the Claimant produced an additional 261 documents. On September 15, 2014, the Claimant produced an additional 84 documents.

remedied by the agreement to extend the Claimant's filing deadline.<sup>21</sup> With the extension, the Claimant had a month longer to prepare its Reply Memorial than it did to prepare its Memorial.<sup>22</sup>

## **2. Canada's Motion to Strike Portions of the Record Based on Parliamentary Privilege Has No Bearing on any Cost Award**

13. The Claimant argues that its legal costs increased as a result of having to respond to Canada's motion on parliamentary privilege at the same time as it was preparing its Reply Memorial.<sup>23</sup> The Claimant failed to quantify the associated costs, but it is inconceivable that the costs the Claimant incurred are greater than the costs incurred by Canada to defend against the two motions that the Claimant brought. Canada was forced to respond to the Claimant's unsuccessful motion requesting an order that Canada restore back-up tapes and search restored documents, disclose its privileged document search process, and produce additional documents all while it was completing its Counter-Memorial.<sup>24</sup> It is a fact of arbitration and litigation that parties are often called upon to address multiple issues at the same time.

## **3. Costs Incurred by the Claimant's Experts Were the Result of the Claimant's Inefficient Strategy**

14. The Claimant's argument that it incurred "substantial" costs in addressing alleged "inaccuracies and unsubstantiated assertions" in Canada's rejoinder expert reports<sup>25</sup> is ill-founded. It was in fact the Claimant that caused these expenses by pursuing a claim for lost profits that should never have been brought,<sup>26</sup> and by failing to substantiate its claim for sunk

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<sup>21</sup> See E-mail from Myriam Seers, Torys LLP to Hanno Wehland, Permanent Court of Arbitration dated May 14, 2015; Procedural Order No. 1, Annex A, Arbitration Calendar (as amended May 14, 2015).

<sup>22</sup> See Procedural Order No. 1, Annex A, Arbitration Calendar (as amended May 14, 2015) (the Claimant had four months to file its Memorial from the date of document production on April 21, 2014, and it had five months to file its Reply Memorial from the date of Canada's Counter-Memorial on January 20, 2015).

<sup>23</sup> Claimant's Costs Submissions, ¶¶ 35-37.

<sup>24</sup> See Procedural Order No. 3; see also Revised Procedural Order No. 5.

<sup>25</sup> See Claimant's Costs Submissions, ¶ 38.

<sup>26</sup> Canada's Submission on Costs, ¶¶ 20-22.

costs.<sup>27</sup> The examples cited by the Claimant<sup>28</sup> reflect a normal exchange of expert opinion on matters that the Claimant put at issue, not Canada. The Claimant appears to presume that Canada's experts should have simply agreed with the Claimant's. This is absurd. Moreover, the Claimant specifically requested that the Tribunal expand the scope of experts' presentations to include not only a summary of their reports but new evidence as well, which Canada specifically resisted.<sup>29</sup> To argue now that these presentations caused it to incur additional costs<sup>30</sup> is simply disingenuous.

15. Finally, the Tribunal should reject the Claimant's attempt to hold Canada responsible through a costs award for the failure of independent experts to produce the business confidential information of their clients.<sup>31</sup> Here again, the Claimant is attempting to reargue its failed motion for Canada to produce documents not in its possession, custody or control.<sup>32</sup> Canada cannot be faulted for failing to produce documents over which it had no power to compel production.<sup>33</sup> Further, the Claimant accuses Canada of not producing documents held by its experts or the Ontario Power Authority ("OPA") while ignoring the fact, which became abundantly clear at the

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<sup>27</sup> Canada's Submission on Costs, ¶¶ 23-24. The audit that BRG conducted was reasonable and necessary given that the Claimant had made no effort to substantiate the quantum of sunk costs claimed.

<sup>28</sup> The exchange between experts over the permitting for the proposed onshore foundation fabrication facility actually relates to errors introduced by the Claimant's expert WSP and not URS as the Claimant argues (Rose, Hearing Transcript Day 5, p. 239:9-18). Moreover, the Claimant's positions on several key issues regarding the feasibility of its project within the timelines provided by the FIT Contract were constantly moving targets.

<sup>29</sup> See Letter from Canada to the Claimant dated December 17, 2015, p. 3 (**Tab 1**); E-mail from Myriam Seers, Torys LLP to Rodney Neufeld, Trade Law Bureau et al., attaching responses to Canada's Letter (Dec. 31, 2015), pp. 5-6 (**Tab 2**); Letter from the Parties to the Tribunal dated January 19, 2016, pp. 5-6; Letter from the Tribunal to the Parties dated January 25, 2016, p. 2.

<sup>30</sup> See Claimant's Costs Submissions, ¶ 3.

<sup>31</sup> Claimant's Costs Submissions, ¶ 41.

<sup>32</sup> Letter from the Tribunal to the Parties dated February 8, 2016, p. 2.

<sup>33</sup> Canada also notes that, as the Tribunal has already held, the issue of non-production of documents relied on by experts goes to the weight of the evidence under Article 27(4) of the UNCITRAL Arbitration Rules (Letter from the Tribunal to the Parties dated February 8, 2016). It is not the proper subject of a costs award.

hearing, that its own experts also held information which could not be disclosed at the hearing because of reasons of client confidentiality.<sup>34</sup>

### **B. The Claimant Seeks to Recover as Costs Illegitimate Amounts**

16. The Claimant's request for costs is also unreasonable because it is attempting to recover amounts that are not included in the definition of costs set out in Article 40 of the UNCITRAL Arbitration Rules.<sup>35</sup> Specifically, within the category of "costs of expert witnesses, third-party service providers and witness travel costs", the Claimant has claimed a total of \$19,817.83 allegedly paid to 905085 Inc. and White Owl Capital for "attendance at the hearing and travel expenses" of Messrs Ian Baines, David Mars and William Ziegler.<sup>36</sup> While Article 40(2)(d) allows the Claimant to claim the reasonable travel and other expenses of these individuals as witnesses, it does not allow the Claimant to pass on costs incurred unnecessarily, or allow the Claimant to recoup its own time and disbursements. Mr. Mars' testimony was complete on the first day, yet he continued to attend all ten days of the hearing as the Claimant's party-appointed representative. In this capacity he acted as agent for the Claimant, monitoring developments in the arbitration and giving instructions to the Claimant's counsel. These are not recoverable costs. Similarly, Mr. Baines was only required to appear for cross-examination on the second day of the hearing, but he attended the rest of the hearing in its entirety. It is unreasonable for the Claimant to seek recovery of its internal expenses or the expenses of witnesses who wished to remain present for the entire hearing. In fact, Canada notes that the hearing was also attended by numerous representatives of the federal government and the provincial government of Ontario,

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<sup>34</sup> Hearing Transcript Day 5, pp. 6-9, p. 13:3-18; Palmer, Hearing Transcript Day 6, p. 139:18-25, p. 141:2-9.

<sup>35</sup> "Costs" are defined in Article 40(2) of the UNCITRAL Arbitration Rules as "(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41; (b) The reasonable travel and other expenses incurred by the arbitrators; (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal; (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal; (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; (f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA."

<sup>36</sup> Claimant's Costs Submissions, ¶ 2(b) and Costs of Witnesses & Third Parties, pp. 8-9. This amount represents \$17,134.75 for Mr. Mars and Mr. Ziegler, and \$2,683.08 for Mr. Baines.

who were there for the same reasons as Mr. Mars and Mr. Baines, to monitor the arbitration and provide instructions to counsel. Canada's cost calculation would be much higher if, like the Claimant, it had inappropriately included the expenses of the attendance of such representatives.

17. Similarly, the Claimant cannot recover costs associated with its FIPPA requests. These are not costs of this arbitration. This includes the claim for \$3,150.00 for the Bentham & Associates third party expenditure for access to information requests, as well as the "significant time and effort" by Windstream's legal counsel to submit, pursue, and review these freedom of information requests.<sup>37</sup> Canada also notes that both policy staff and legal counsel for the Ontario Government incurred substantial costs reviewing the documents that the Claimant obtained through the FIPPA process outside this arbitration, which Canada has not included in its claim for the costs of legal representation and assistance. Should the Tribunal determine that the costs associated with the Claimant's FIPPA requests are valid arbitration costs, Canada reserves the right to seek to recover the costs that it incurred.

## **VI. THE CLAIMANT'S SUBMISSION SUPPORTS THE REASONABLENESS OF CANADA'S LEGAL REPRESENTATION COSTS**

18. Finally, Canada maintains that all costs it has claimed are reasonable, including its legal representation costs.<sup>38</sup> While the Claimant claims relatively lower costs of legal representation,<sup>39</sup> this does not undermine the reasonableness of the legal representation costs claimed by Canada, for several reasons. The Claimant admits that it presented a factually complex case involving extensive fact and expert evidence, a lengthy hearing and a voluminous documentary record,<sup>40</sup> in

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<sup>37</sup> Claimant's Costs Submissions, ¶ 31 and Costs of Witnesses & Third Parties, p. 8.

<sup>38</sup> Canada notes that its legal representation costs in this case are in line with those incurred by Canada in the *Mesa Power Group, LLC v. Canada* arbitration. In that case, Canada claimed legal representation costs of \$4,225,547.67, which were expressly deemed reasonable by the Tribunal. *See, Mesa Power Group, LLC v. Government of Canada* (UNCITRAL) Award, 24 March 2016, ¶ 695 (Excerpt Regarding Costs) (**Tab 3**). That arbitration also involved a challenge to the Ontario government measures under the FIT Program and to conduct of the OPA in administering that program.

<sup>39</sup> Claimant's Costs Submissions, ¶ 2 (claiming legal fees of \$3,323,115.01).

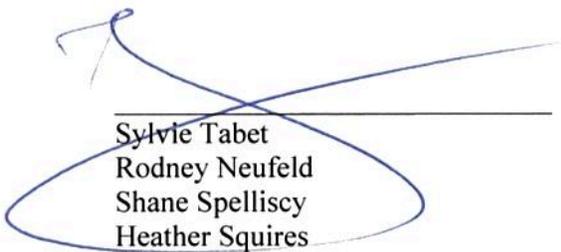
<sup>40</sup> Canada's Submission on Costs, ¶ 33; Claimant's Costs Submissions, ¶ 6.

which it sought \$568,500,000.<sup>41</sup> The Claimant also recognizes that Canada produced a significant number of documents,<sup>42</sup> which required review by Canada's counsel in advance of production for responsiveness and privilege, increasing Canada's legal costs. Moreover, Canada's role as Respondent raised additional complexities not faced by the Claimant. For example, as the case involved sub-federal measures, Canada's legal counsel had to secure the cooperation of various Ministries of the Ontario Government and the OPA to obtain information and documents and coordinate Canada's defence.

## VII. CONCLUSION

19. In conclusion, the Tribunal must order that the Claimant bear all of Canada's costs in defending any of the Claimant's claims and arguments that fail, as the Claimant has not rebutted the presumption under Article 42 of the UNCITRAL Arbitration Rules that costs should follow the cause. The costs that Canada has claimed against the Claimant are reasonable in the circumstances. If the Claimant is fully successful, Canada has rebutted this presumption and each party should bear its own costs. If the Claimant is successful on only some of its Claims, the Claimant must still bear Canada's costs for claims in which it was not successful, as laid out in Canada's Submission on Costs.

April 26, 2016



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<sup>41</sup> See Claimant's Memorial, ¶ 682; Claimant's Reply Memorial, ¶ 641.

<sup>42</sup> Claimant's Costs Submissions, ¶ 6 and fn.2: ("Windstream produced a total of 1,570 documents in response to Canada's document requests, and Canada produced a total of 13,069 documents in response to Windstream's document requests [...] These figures only represent the documents exchanged by the Parties on April 14, 2014. They do not include any of the documents produced at a later date").

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