

**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

GOVERNMENT OF CANADA

SUBMISSION ON COSTS

April 11, 2016

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Trade and Development
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CANADA

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I. INTRODUCTION

1. Pursuant to NAFTA Article 1135 and Article 42 of the 2010 UNCITRAL Arbitration Rules (“UNCITRAL Arbitration Rules”), the Tribunal should direct that the costs of the arbitration be borne by the unsuccessful party, except if it determines that the circumstances require apportionment between the parties. For the reasons explained below, the Claimant should be required to bear all or at least some of Canada’s costs in this arbitration. Further, in no circumstances should Canada be required to bear any of the Claimant’s costs.

2. First, all of the costs should be borne by the Claimant, because, as Canada has demonstrated throughout these proceedings, all of its claims are without merit. These costs include Canada’s share of the Tribunal’s fees and expenses, and Canada’s legal and other costs. Together these costs total approximately \$8.26 million, as itemized in Annexes I and II. Canada’s costs are reasonable in light of the case presented by the Claimant.

3. Second, in the event that the Tribunal were to allow some, but not all of Windstream’s claims, the Tribunal should carefully assess costs related to the different aspects of the proceedings and look beyond the overall result in the arbitration. Specifically, the Tribunal should consider whether the Claimant was successful on each of the claims that it advanced and maintained. Canada should not be made to pay for having to defend against any of the Claimant’s failed claims. In particular, the Claimant should bear Canada’s costs to defend against claims that were unclear, unsubstantiated and unjustified, including its jurisdictional arguments, its Article 1102 and 1103 claims, and its claim for lost profits.¹

4. Third, even if the Claimant were to succeed in all of its claims, the additional unnecessary costs to both disputing parties and to the Tribunal resulting from the Claimant’s litigation

¹ The costs for Canada to defend against merely these frivolous claims include all of Canada’s expert costs for URS, and Green Giraffe and most of Canada’s costs for Berkeley Research Group (BRG) totaling approximately \$3,073 million, and approximately one third of Canada’s legal fees. The only expert costs unrelated to lost profits are parts of the BRG Rejoinder Expert Report on sunk costs, including the audit it conducted at a cost of \$182,655.77, and a small amount of hearing time and related preparation.

strategy, make clear that the Tribunal should exercise its discretion and require each party to bear its own costs.

II. THE TRIBUNAL HAS THE DISCRETION TO DETERMINE THE APPORTIONMENT OF COSTS

5. Article 1135(1) of the NAFTA grants the Tribunal the authority to award Canada its costs in this arbitration in accordance with the applicable provisions of the UNCITRAL Arbitration Rules. Pursuant to Article 40 of those Rules, Canada's costs, summarized in the table below, include the fees and expenses of the Tribunal, as well as Canada's reasonable legal costs.²

SUMMARY OF COSTS	
Arbitration Costs	\$ 650,000.00
Legal and other Costs ³	\$7,611,052.35
TOTAL	\$8,261,052.35

6. With respect to the apportionment of these costs, Article 42 of the UNCITRAL Arbitration Rules provides:

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party

² "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."

³ Further detail on Canada's legal costs and disbursements is provided in Annexes I and II.

may have to pay to another party as a result of the decision on allocation of costs.

7. In determining how to exercise its discretion to apportion costs, the Tribunal should have regard to “both to the outcome of the proceedings and to other relevant factors”⁴ in order to serve “the dual function of reparation and dissuasion.”⁵ “Other relevant factors” that tribunals have considered in allocating costs include the extent to which the case was presented in an “efficient and professional manner”.⁶

III. AS THE CLAIMANT HAS FAILED TO ESTABLISH ANY BREACH, THE TRIBUNAL SHOULD AWARD ALL OF CANADA’S ARBITRATION COSTS

8. Pursuant to Article 42(1) of the UNCITRAL Arbitration Rules, in exercising its discretion to allocate the costs of the arbitration, the Tribunal should be mindful of the presumption that the unsuccessful party will bear the arbitral costs, which, as of 2010, includes both the arbitral fees and the party’s reasonable legal and other costs.⁷ The general presumption that costs follow the event has been supported by investment treaty tribunals,⁸ including numerous NAFTA tribunals,

⁴ **CL-091**, *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3) Award, 30 April 2004, ¶ 183 (“*Waste Management II - Award*”).

⁵ **RL-007**, *Robert Azinian, Kenneth Davitian & Ellen Bacan v. The United Mexican States* (ICSID Case No. ARB(AF)/97/2) Award, 1 November 1999, ¶ 125 (“*Azinian - Award*”).

⁶ **RL-007**, *Azinian – Award*, ¶ 126; **CL-057**, *International Thunderbird Gaming Corporation v. Mexico* (UNCITRAL) Award, 26 January 2006, ¶ 218 (“*Thunderbird – Award*”). As recently noted by the UNCITRAL Working Group considering revisions and updates to the UNCITRAL Notes on Organizing Arbitral Proceedings, “[t]he arbitral tribunal may also consider the conduct of the parties in allocating costs”, which may include consideration of “procedural requests by a party (for example, document requests, procedural applications and cross-examination requests) to the extent that any such failure actually had a direct impact on the costs of the arbitration and/or is determined by the arbitral tribunal to have unnecessarily delayed or obstructed the arbitral proceedings.” **RL-108**, UNCITRAL, “Settlement of commercial disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings”, A/CN.9.WG.II/WP.194, Sixty-Fourth Session, New York, 1-5 February 2016, ¶ 47.

⁷ Article 42 of the 2010 UNCITRAL Arbitration Rules was specifically amended from Article 40 of the 1976 UNCITRAL Arbitration Rules to remove language providing that the costs of legal representation and assistance were not included in the costs of arbitration.

⁸ **RL-020**, *EDF (Services) Limited v. Romania* (ICSID Case No. ARB/05/13) Award, 8 October 2009, ¶¶ 321-329; **RL-103**, *Iberdrola Energia S.A. v. Republic of Guatemala* (ICSID Case No. ARB/09/5) Award, 17 August 2012, ¶¶ 509-518; **RL-099**, *Achmea B.V. v. Slovak Republic (formerly Eureko B.V. v. The Slovak Republic)* (UNCITRAL) Final Award, 7 December 2012, ¶¶ 347-351; **RL-057**, *Generation Ukraine, Inc. v. Ukraine* (ICSID Case No. ARB/00/9) Award, 16 September 2003, ¶¶ 24.1-24.8; **CL-021**, *ADC Affiliate Limited and ADC & ADMC*

which have held that the prevailing party in an arbitration should be awarded its arbitration costs in whole or in part.⁹

9. As Canada's submissions established, all of the claims brought by the Claimant lack merit – not a single claim should result in liability on the part of Canada. The Claimant's allegations were based on misinterpretations of the NAFTA provisions, conspiracy theories, improper assumptions, reliance on irrelevant expert reports, and an obfuscation of the facts. In addition to the unmeritorious nature of the claims, the Claimant also failed to prove how the alleged breaches caused any of its alleged losses and thus failed to support any of its claims for damages in fact or law.

Management Limited v. The Republic of Hungary (ICSID Case No. ARB/03/16) Award of the Tribunal, 2 October 2006, ¶ 533.

⁹ **RL-105**, *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL) Award in Respect of Costs, 26 November 2002, ¶ 18 (losing respondent ordered to bear more than 50% of arbitration costs); **RL-106**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Final Award on Costs, 30 December 2002, ¶¶ 29, 49 (losing respondent ordered to pay CAN\$350,000 in respect of arbitration costs and CAN\$500,000 in respect of legal costs); **CL-063**, *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part V, ¶ 13 (ordering claimant to bear cost of entire arbitration and to pay prevailing respondent's legal fees and costs); **CL-057**, *Thunderbird - Award*, ¶¶ 220-221 (allocating and fees on a three-quarter to one-quarter basis in favor of the prevailing respondent); **RL-107**, *Softwood Lumber Cases (Canfor Corporation v. United States of America, Tembec v. United States of America, and Terminal Forest Products Ltd. v. United States of America)* (UNCITRAL) Joint Order on the Costs of Arbitration and for the Termination of Certain Arbitral Proceedings, 19 July 2007, ¶¶ 152, 190 (awarding costs to prevailing respondent after claimant unilaterally withdrew from Chapter 11 arbitration); **CL-031**, *Cargill, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶ 547 (ordering the losing respondent to pay all of the arbitration costs and half of the claimant's legal costs); **CL-053**, *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) Award, 8 June 2009, ¶ 833 (ordering the losing claimant to bear two-thirds of the arbitration costs); **CL-037**, *Chemtura Corporation v. Government of Canada* (UNCITRAL) Award, 3 August 2010, ¶¶ 272-273 (awarding prevailing respondent one half of its fees and costs, and ordering the claimant to bear cost of entire arbitration); **RL-100**, *Melvin J. Howard, Centurion Health Corp. & Howard Family Trust v. Government of Canada* (UNCITRAL) Order for the Termination of Proceedings and Award of Costs, 2 August 2010, ¶¶ 77, 82 (ordering that claimants bear cost of entire arbitration and certain of respondent's legal costs and fees); **RL-006**, *Apotex Inc. v. United States of America* (UNCITRAL) Award on Jurisdiction and Admissibility, 14 June 2013, ¶¶ 340, 346, 352 (claimant ordered to bear the entire arbitration costs and all of respondent's legal costs); **RL-101**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL) Award on Costs, 17 August 2015, ¶ 61 (claimant ordered to bear 2/3rds of Canada's reasonable legal costs and expenses in the arbitration and all of the costs of the proceedings); **CL-091**, *Waste Management II - Award*, ¶ 183. As ICSID Secretary-General Meg Kinnear has written, NAFTA tribunals have "followed the 'costs follow the event' rule, but based on an assessment of relative success rather than simply on which party won the case." **RL-104**, M. Kinnear, A. Bjorklund and J. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, (Kluwer, 2006) ("Kinnear") at Article 1135, p. 33.

10. The Claimant also advanced numerous legal claims and arguments that it knew or ought to have known were without merit.¹⁰ It filed many expert reports that were entirely irrelevant to the arbitration,¹¹ and it made unnecessary and improper procedural motions.¹² Moreover, it presented an incoherent damages case based on an inappropriate valuation methodology and an insufficient evidentiary record to meet its burden of proof.¹³

11. In accordance with Article 42(1) of the UNCITRAL Arbitration Rules, the Tribunal should therefore apportion all of the costs of this arbitration to the Claimant, including Canada's legal and other costs, as set out in Annexes I and II.

IV. EVEN IF THE CLAIMANT IS PARTIALLY SUCCESSFUL, IT SHOULD BE REQUIRED TO BEAR CANADA'S COSTS FOR ITS UNSUCCESSFUL CLAIMS

12. Where a claimant is successful on only some of its claims, and is unsuccessful on others, a tribunal should exercise its discretion under Article 42 of the UNCITRAL Arbitration Rules and apportion the arbitration costs reasonably and appropriately. This is because the principle that costs follow the event must be "based on an assessment of relative success rather than simply on which party won the case."¹⁴ The Tribunal must therefore look specifically at which claims were won and lost, and whether it was efficient for the Claimant to have brought and maintained them.

13. Such an approach was taken recently by the Tribunal in *European American Investment Bank AG (Austria) v. The Slovak Republic*, which explained that "the party who is successful overall should in principle be made whole, but not necessarily in respect of independent claims,

¹⁰ See ¶¶ 17-19 below.

¹¹ See ¶¶ 21-22, 26-30 below.

¹² See ¶¶ 30-32 below.

¹³ See ¶¶ 20-24 below.

¹⁴ **RL-104**, *Kinnear*, Article 1135, p. 33.

jurisdictional objections, or procedural applications, on which it was not successful and which have contributed to the overall costs of the arbitration in a significant and measurable way.”¹⁵

14. It is not sufficient to assess the Claimant’s success on the basis of just one of its claims, and it would be highly inappropriate to award the Claimant the entirety of its legal costs where it has been successful on only one or some of its claims. Canada has incurred costs defending against every claim, and it will be wholly successful only when the Tribunal has rejected every claim on at least some ground. Thus, where the Claimant has been only partially successful, the Tribunal should take a granular approach to assessing costs and evaluate the success and failure of each claim put forward by the claimant. As recognized by the Tribunal in *European American Investment Bank*, “if a party advanced a claim (or a jurisdictional objection) that was manifestly untenable or frivolous, that would be a highly pertinent consideration.”¹⁶

15. As is further explained below, the Claimant advanced a number of manifestly untenable or frivolous claims that unnecessarily contributed to the overall costs of the arbitration in a significant and measurable way, including its jurisdictional arguments regarding the OPA, its Article 1102 and 1103 claims, and its claim for lost profits. Such frivolous claims constitute “highly pertinent considerations”¹⁷ that should lead the Tribunal to exercise its discretion to make a more careful assessment of costs if the Claimant is successful on some, but not all of its claims.

16. While it is difficult to measure with precision costs related to the various claims made by the Claimant, Canada estimates that its legal costs (not including disbursements) can be divided out in even thirds between the facts, law and damages. Of the one-third apportioned to defending against the legal claims, approximately 40 per cent of Canada’s legal costs relate to Article 1105,

¹⁵ **RL-102**, *European American Investment Bank AG (Austria) v. The Slovak Republic* (UNCITRAL) Award on Costs, 20 August 2014, ¶ 42 (“*Euram Bank – Award on Costs*”).

¹⁶ **RL-102**, *Euram Bank – Award on Costs*, ¶ 43; while the Tribunal’s decision is based the 1976 UNCITRAL Arbitration Rules, the principle behind the Tribunal’s decision applies equally with respect to 2010 UNCITRAL Arbitration Rules.

¹⁷ **RL-102**, *Euram Bank – Award on Costs*, ¶ 43.

40 per cent to Article 1110, and 20 per cent to Articles 1102, 1103, procurement, jurisdiction and adverse inference.

A. The Claimant Inappropriately Advanced and Maintained Jurisdictional Arguments Relating to the OPA

17. The Claimant inappropriately advanced and maintained jurisdictional arguments relating to the OPA.¹⁸ Canada established in its submissions that the Claimant was not in fact challenging any measure adopted or maintained by the OPA, and put the Claimant on notice that its jurisdictional arguments in this regard had no relevance to the arbitration.¹⁹ There was simply no legal or evidentiary basis put forward by the Claimant for its “alternative argument” that the OPA was exercising delegated government authority when it failed to implement an alleged commitment by the Ministry of Energy to “freeze” Windstream’s FIT Contract.²⁰ As Canada pointed out many times,²¹ the Claimant’s allegations related to alleged errors and omissions of the Government, not the OPA.

B. The Claimant Inappropriately Advanced and Maintained Its Claims Regarding Alleged Breaches of Articles 1102 and 1103

18. The Claimant inappropriately advanced and maintained claims under Articles 1102 and 1103, which it knew or ought to have known were completely unfounded in law and for which it presented no evidence. These claims should not have been brought in the first place, as Canada

¹⁸ Claimant’s Memorial, ¶¶ 505-541; Claimant’s Reply Memorial, ¶¶ 632-640.

¹⁹ Canada’s Counter-Memorial, ¶¶ 302-303; Canada’s Rejoinder Memorial, ¶¶ 29-33.

²⁰ See Claimant’s Memorial, ¶¶ 536-541; Claimant’s Reply Memorial, ¶¶ 632-640.

²¹ Canada’s Counter-Memorial, ¶¶ 302-303; Canada’s Rejoinder Memorial, ¶¶ 29-33.

pointed out in its first submission,²² yet the Claimant maintained these points in its Reply²³ and at the hearing.²⁴

19. The Claimant's Article 1102 arguments in its Reply Memorial merely repeated its earlier allegations without even attempting to address the flaws of its argument identified by Canada, such as the different circumstances underlying the treatment or the absence of nationality-based discrimination.²⁵ With respect to Article 1103, the Claimant failed to provide any evidence whatsoever relating to the treatment allegedly accorded to Samsung, nor did it even attempt to present arguments in support of its claim or respond to the arguments that Canada raised in its Response to the Notice of Arbitration,²⁶ its Counter-Memorial²⁷ or at the hearing.²⁸ Instead, the Claimant maintained its arguments while admitting that "[t]he circumstances surrounding the awarding of the solar project to Samsung are not currently known to Windstream."²⁹ It did not even attempt to quantify such a breach.³⁰ The Claimant asserted this despite the fact that it obtained testimony from Ms. Sarah Powell, who regularly acts for Samsung and its partner Pattern in relation to wind power projects developed under the Green Energy Investment Agreement ("GEIA"),³¹ and Mr. George Smitherman who was Minister of Energy and

²² Canada's Counter-Memorial, ¶¶ 338-340.

²³ Claimant's Reply Memorial, ¶¶ 606-624.

²⁴ Claimant's Opening Statements, Hearing Transcript Day 1, p. 113:4-9; Canada's Opening Statements, Hearing Transcript Day 1, p. 137:23-25 and p. 138:1-4; Claimant's Closing Statements, Hearing Day 10, p. 9:23-25 and p. 10:1-2; Canada's Closing Statements, Hearing Transcript Day 10, p. 151:15-24 and p. 152:16-25 and p. 153:1-7.

²⁵ Claimant's Reply Memorial, ¶¶ 606-624.

²⁶ Canada's Response to the Notice of Arbitration, ¶¶ 44-48.

²⁷ Canada's Counter-Memorial, ¶¶ 338-360.

²⁸ Claimant's Opening Statements, Hearing Transcript Day 1, p. 113:4-9; Canada's Opening Statements, Hearing Transcript Day 1, p. 137:23-25 and p. 138:1-4; Claimant's Closing Statements, Hearing Day 10, p. 9:23-25 and p. 10:1-2; Canada's Closing Statements, Hearing Transcript Day 10, p. 151:15-24 and p. 152:16-25 and p. 153:1-7.

²⁹ Claimant's Memorial, ¶ 645.

³⁰ CER-Deloitte (Low & Taylor)-1; CER-Deloitte (Low & Taylor)-2; Canada's Counter-Memorial, ¶ 522; Canada's Rejoinder Memorial, ¶ 262.

³¹ Powell, Hearing Transcript Day 4, p. 23:22-23; p. 120:24-25 and p. 121:1-7; CER-Powell, Powell Curriculum Vitae, p. 1.

Infrastructure when Ontario negotiated the GEIA with Samsung.³² The Claimant's failure to withdraw these manifestly untenable claims unnecessarily forced Canada to devote time and resources to defend itself, and requires the Tribunal to incur additional costs to make a determination on them.

C. The Claimant's Damages Claim Was Incoherent and Based on an Inappropriate Valuation Methodology and Insufficient Evidentiary Record

20. The Claimant's request for lost profits between \$357.5 and \$486.6 million, or alternatively, between \$427.9 and \$568.5 million in damages was inappropriate and should never have been pursued.

21. First, as Canada demonstrated in its written submissions³³ and at the hearing,³⁴ a claim for lost profits is entirely improper for a speculative, non-going concern like the Claimant's proposed offshore wind project. The Claimant's decision to continue with this line of argument resulted in Canada incurring substantial costs, not only in lawyer hours, but also in expert fees that would otherwise have been unnecessary. In fact, in an attempt to prove that it was entitled to hundreds of millions of dollars in lost profits, the Claimant introduced reports of no less than 14 experts.³⁵ These reports covered a wide range of issues related to environmental permitting of the project (including WSP, ORTECH, Kerlinger, Reynolds, Powell, Aercoustics, HGC, Baird), engineering development and design risks (such as SgurrEnergy, COWI, Weeks), scheduling (SgurrEnergy), financeability (Bucci) and project costs (4C Offshore), which all fed into the Claimant's application of the DCF methodology (Low & Taylor).

22. In response, Canada had no choice but to retain its own experts (URS and Green Giraffe) to assess the risk associated with the Claimant's proposed offshore wind project and its ability to

³² Canada's Closing Statements, Hearing Transcript Day 10, p. 152:21-23.

³³ Canada's Counter-Memorial, ¶¶ 560-565; Canada's Rejoinder, ¶¶ 290-291.

³⁴ Canada's Closing Statements, Hearing Transcript Day 10, p. 222:3-25 and p. 223:1-10.

³⁵ Deloitte (Low & Taylor), Deloitte (Bucci), 4C Offshore, SgurrEnergy (appending the reports of COWI and Weeks Marine), Baird, Kerlinger, Reynolds, HGC (Brian Howe), Ortech, WSP, Aercoustics, and Powell.

meet the timelines of its FIT Contract. These reports fed directly into BRG's reports that opined on the future profitability of the project using a DCF methodology. With the exception of few pages devoted to investment costs, none of the BRG and Low & Taylor reports would have been necessary if the Claimant had not brought a claim for lost profits. Together, these reports cost Canada \$2,890,873.94,³⁶ excluding the substantial number of hours required of Canada's counsel to prepare its submissions responding to these points. Should the Tribunal determine that the Claimant's claim for lost profits is not appropriate, the Claimant must bear the costs of all of the expert reports that Canada was required to file, as well as the portion of Canada's legal costs to respond to the Claimant's arguments.

23. Second, the Claimant presented an unsubstantiated estimate of its investment costs. The Claimant's Memorial provided no evidence to support the approximately \$15 million it claimed in investment costs at the time, and instead, merely relied on a summary of costs incurred to date.³⁷ It was only after Canada pointed out that the Claimant had failed to provide any of the underlying information used to calculate its costs, including its capitalized costs, accrued expenses and management fees,³⁸ that the Claimant submitted "a broad sample of invoices and bank statements", arguing that Deloitte's audit of 30 per cent of these invoices was sufficient to substantiate its increased sunk cost claim for \$17 million.³⁹ In order to demonstrate the insufficient nature of the Claimant's evidence, Canada retained BRG to conduct a full audit of all of the evidence and supporting documents put forward by the Claimant in support of its claim for investment costs. The results of this audit demonstrated that the majority of the investment costs claimed by the Claimant were unsubstantiated, incurred for the purposes of this arbitration or unrelated to its proposed offshore wind project.⁴⁰ Indeed, the Claimant had substantiated at most

³⁶ This amount does not include the cost of the audit of the Claimant's investment costs that Canada was required to perform.

³⁷ CER-Deloitte (Low & Taylor), Schedule 3b.

³⁸ Canada's Counter-Memorial, ¶¶ 566-567.

³⁹ Claimant's Reply Memorial, ¶ 724.

⁴⁰ Canada's Rejoinder, ¶¶ 333-334.

10 per cent of the investment costs it claims, despite it being the Claimant's burden to demonstrate it suffered such losses.⁴¹ Only after BRG completed this audit did the Claimant acknowledge and attempt to meet its burden of proof for investment costs – something it should have done at the time of filing its Memorial.⁴²

24. The total cost of the audit that Canada was required to perform was \$182,655.77, excluding the number of hours required of Canada's counsel to prepare its submissions responding to these points. Even if the Tribunal agrees with the Claimant that Canada has breached the NAFTA and determines that the Claimant is entitled to some of its sunk costs as compensation, the Claimant should bear the costs incurred by Canada in substantiating the actual amount of the Claimant's investment costs.

V. EVEN IF THE CLAIMANT IS SUCCESSFUL ON ALL OF ITS CLAIMS, EACH PARTY SHOULD BEAR ITS OWN COSTS

25. Finally, even if the Tribunal holds that the Claimant is successful on all of its claims, it should exercise its discretion in these circumstances and determine that each party should bear its own arbitration and legal costs because of the inefficient manner in which the Claimant presented its case. The Claimant's filing of numerous expert reports that were irrelevant to its claims in addition to those discussed above, and its continued fishing expeditions for documents and evidence, including evidence outside of Canada's care, custody and control created additional costs and inefficiencies in the arbitral process.

⁴¹ Canada's Rejoinder, ¶ 257.

⁴² Claimant's Closing Presentation, Hearing Transcript Day 10, p. 282:16 to p. 283:23. According to the presentation of the Claimant's damages expert at the hearing, in response to BRG's Rejoinder Report, Deloitte "verified all payments that BRG indicated were substantiated but payment could not be verified." (Richard Low Expert Presentation, slide 26). However, no evidence as to methodology or the scope of Deloitte's subsequent audit was provided by the Claimant.

A. The Claimant Filed Expert Reports that Were Irrelevant or Unnecessary to Establish Its Claims

26. The Claimant's submission of expert reports that were irrelevant or unnecessary to establish its claims added unnecessary length to its submissions, and in some circumstances forced Canada to correct or clarify matters.

27. The Claimant's submission of expert reports from Compass Renewable Energy Consulting ("Compass"),⁴³ Power Advisory LLC ("Power Advisory")⁴⁴ and Professor Rudolf Dolzer⁴⁵ were wholly unnecessary to establish the alleged NAFTA breaches. Indeed, the Compass and Power Advisory reports were completely irrelevant. The Compass report summarized the considerations and assumptions that were used by the OPA to determine the FIT Program design and pricing.⁴⁶ However, the Claimant did not challenge the design and pricing of the FIT Program as a NAFTA breach. The Claimant cited the Compass report a total of three times throughout its pleadings, to back-up the fact that FIT pricing was developed using a DCF methodology. That matter is totally irrelevant to the legal question of whether the DCF methodology is appropriate for valuing damages for a non-going concern before a NAFTA tribunal. Canada did not respond to this report in any of its submissions due to its irrelevance. The cost of this report should be borne by the Claimant.

28. Second, the Claimant retained Power Advisory to compare the cost of electricity that the OPA would have procured from the the Claimant's project to the cost of electricity procured from other sources to determine the economic benefit to the Province of Ontario resulting from the alleged cancellation of the Claimant's project.⁴⁷ The Claimant's allegation that Ontario realized a \$1.3 to \$2.1 billion economic benefit as a result of "cancelling" its project is irrelevant to

⁴³ CER-Compass dated July 29, 2014.

⁴⁴ CER-Power Advisory dated July 28, 2014.

⁴⁵ CER-Dolzer dated August 19, 2014.

⁴⁶ CER-Compass, p. 3.

⁴⁷ Claimant's Memorial, ¶ 476; CER-Power Advisory, p. iii.

establishing any of the alleged NAFTA breaches or alleged losses. Indeed, the Claimant did not even rely on this report in its damages valuation. As with the Compass report, due to the Power Advisory report's irrelevance, the cost of this report should be borne by the Claimant.

29. Third, in support of its Article 1105 claim, the Claimant submitted the expert report of Professor Rudolf Dolzer.⁴⁸ This report did not assist the Claimant in meeting its burden of proving the content of an alleged rule of customary international law. Moreover, it was unnecessary in the context of a NAFTA Chapter 11 arbitration, since matters of international law are to be pled by counsel and decided by the Tribunal. NAFTA Article 1131 makes clear that tribunals "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." Accordingly, expert evidence on international law has no place. The Tribunal is properly placed to assess the validity of the parties' arguments with respect to matters relating to the interpretation of the NAFTA provisions and international law.

30. In summary, the Claimant's submission of expert reports which were irrelevant or unnecessary to establishing its claims added additional costs to this arbitration. Canada should not have to bear these costs.

B. The Claimant's Continued Requests for Information, Including Information Outside Canada's Care, Custody and Control, Were Improper

31. In Procedural Order No. 1, the Tribunal established the process for document production.⁴⁹ Unsatisfied, the Claimant continued to make unreasonable, untimely and unjustified requests for Canada to re-conduct its document searches,⁵⁰ to conduct supplementary searches,⁵¹ and to inquire into the process for restoring disaster relief tapes.⁵² These requests resulted in numerous

⁴⁸ CER-Dolzer, ¶¶ 16-18.

⁴⁹ Procedural Order No. 1, s. 7.

⁵⁰ 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**).

⁵¹ Claimant's Supplementary Request to Produce dated April 18, 2015.

⁵² 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**).

additional submissions by the parties and further procedural orders issued by the Tribunal which denied the Claimant's requests.⁵³ For example, as noted by the Tribunal, the Claimant's request for supplementary document production at such an advanced stage of the proceeding – more than three months after Canada filed its Counter-Memorial – was inappropriate and inefficient.⁵⁴ Canada should not have to bear the Claimant's costs incurred relating to these requests.

32. Similarly, the Claimant's repeated requests for evidence from the Ontario Premier's Office were inefficient and improper. Canada explained from the outset that the decision to defer offshore wind was made by former Minister Wilkinson, the Minister of the Environment at the time. Along with its Counter-Memorial, Canada submitted a witness statement from Minister Wilkinson attesting to this fact. Minister Wilkinson was available for examination at the hearing. Nevertheless, the Claimant spent a significant amount of time requesting that Canada put forward an individual from the Premier's Office. When Canada made clear that it had no power over former staff members of the Premier's Office who were no longer government employees, the Claimant persisted, calling upon the Tribunal to order Canada to produce this witness. The Tribunal dismissed the Claimant's request for lack of jurisdiction, but granted the Claimant approval to seek an order from the Ontario Superior Court of Justice for assistance.⁵⁵ The Claimant did just that, and significant time and resources were expended as a result. In the end, the Claimant did not even use the evidence provided by the individual in the domestic proceeding. Canada should not have to bear the Claimant's costs relating to its useless and inefficient fishing expedition.

⁵³ 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.

⁵⁴ Procedural Order No. 5, ¶ 3.4.

⁵⁵ Procedural Order No. 3, ¶ 4.1 (b) and (c).

VI. CANADA'S COSTS ARE REASONABLE

33. In light of the approximately 600 pages of submissions, 1,940 exhibits and 26 expert reports filed by the Claimant in this arbitration, the costs incurred by Canada in its defence are entirely reasonable. Significant resources were necessary to defend this case, owing to the Claimant's numerous allegations of NAFTA breaches, involving three provincial government ministries, the OPA, and former political staff, as well as to the Claimant's inappropriate claim for lost profits, which unnecessarily added significant complexity to the case. The following is a brief overview of the specific cost claims in Annexes I and II.⁵⁶

A. Arbitration Costs

34. Article 40(2)(a) and (b) of the UNCITRAL Arbitration Rules includes the fees of arbitral tribunal, including travel and other expenses, as allowable costs that a successful party may seek to recover. To date, the disputing parties have shared the costs of the arbitration equally. So far, Canada has paid \$650,000.00.

B. Legal and other Costs

35. Article 40(2)(e) includes legal and other costs, such as expert costs and disbursements, incurred in relation to the arbitration.

1. Lawyer Hours

36. Regarding its legal fees, Canada was represented in this arbitration by lawyers and paralegals employed by the Trade Law Bureau of the Government of Canada. The total time that they spent on Canada's defence since the filing of the Notice of Intent on October 17, 2012 to current day is indicated in Annex I.

⁵⁶ These costs are current up to date of this cost submission and are subject to further updates at such time and as the Tribunal deems appropriate. All figures are set out in Canadian dollars. Upon request, Canada can provide the Tribunal with the invoices in order to verify the accuracy of Canada's costs.

2. Expert and Consultant Costs

37. Canada was required to retain three experts⁵⁷ to respond to the Claimant's lost profits damages claim. These experts identified, clarified and corrected the errors and inaccuracies in the Claimant's assessment of project risks and future profitability. The fees for each of these experts are listed as "Disbursements" in Annex II and total \$3,073,529.71. In addition, Canada retained technical experts to assist with hyperlinking of submissions, and trial technology and graphics.⁵⁸ The fees for each of these experts are listed as "Disbursements" in Annex II and total \$152,382.87.

3. Additional Disbursements

38. Canada incurred travel costs, in the amount of \$102,258.18, for: (1) various meetings with counsel and officials of the Government of Ontario and the OPA, fact witnesses and expert witnesses; and (2) the procedural and arbitral hearings. Canada incurred an additional \$67,326.66 for services and supplies necessary to defend this case, including document production, demonstrative exhibits, printing, photocopying and courier services.⁵⁹

VII. CONCLUSION

39. Pursuant to NAFTA Article 1135 and Article 42 of the UNCITRAL Arbitration Rules, the Tribunal has the authority to apportion the arbitration costs, including its own fees as well as the parties' legal and other costs. As described above, because the Claimant's case is meritless, the Tribunal should award Canada all of its arbitration and legal costs. Such an award is appropriate to compensate Canada for its defence in this arbitration and to deter future meritless claims. In the alternative, if the Tribunal determines that the Claimant is successful in respect of some but not all of its claims, the Claimant should bear the portion of Canada's costs associated with all of the legal claims and arguments that are dismissed. Such a decision should be made without reference

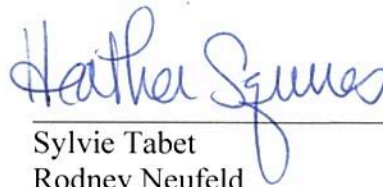
⁵⁷ Namely, BRG, URS and Green Giraffe.

⁵⁸ Namely, iBrief and Core Legal.

⁵⁹ Canada notes that some of costs were incurred in-house and others were contracted externally.

to the amount awarded to the Claimant on its successful claims. Requiring the Claimant to bear the costs associated with Canada's defence of claims that should not have been brought will deter claimants from continually adopting an inappropriate and inefficient approach to arbitration. Finally, in the event that the Claimant is successful on all of its claims, due to its inefficient conduct in this arbitration, the parties should bear their own costs.

April 11, 2016



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ANNEX I – LAWYER HOURS⁶⁰

Description ⁶¹	Lawyers' Fees		
	Rate ⁶²	Hours ⁶³	Total Fees
FISCAL YEAR 2012-2013 (Notice of Intent, Notice of Arbitration, etc.)			
Neufeld, Rodney (LA-2A)*	\$ 250.90	372.00	\$ 93,334.80
Spelliscy, Shane (LA-2A)*	\$ 250.90	216.00	\$ 54,194.40
Squires, Heather (LA-01)	\$ 204.80	5.50	\$ 1,126.40
Paralegals			
Perrault, Melissa (EC-04)*	\$ 153.00	80.00	\$ 12,240.00
Sub-Total (2012-2013):		673.50	\$ 160,895.60
FISCAL YEAR 2013-2014 (Canada's Response to the Notice of Arbitration, Constitution of the Tribunal, First Procedural Hearing, Amended Notice of Arbitration, Canada's Amended Response to the Notice of Arbitration, Document Production, etc.)			
Kam, Susanna (LA-01)*	\$ 218.58	349.00	\$ 76,284.42
Marquis, Laurence (LA-01)*	\$ 218.58	372.50	\$ 81,421.05
Neufeld, Rodney (LA-2A)*	\$ 262.16	174.38	\$ 45,715.46

⁶⁰ Canada was represented in this arbitration by lawyers and support staff employed by the Government of Canada.

⁶¹ Some lawyers are not employed by the Department of Justice but rather by the Department of Foreign Affairs, Trade and Development. In those cases, marked by an asterisk (*) in this section, the classification of the individual has been converted to the equivalent position within the Department of Justice for the purpose of establishing the appropriate billing rate.

⁶² The cost of Counsel's time in this arbitration has been assessed by applying the "billable rate" used by the Department of Justice in its cost recovery process. Like its counterpart in private practice, the billable rate established by the Department of Justice is intended to capture all of the costs associated with providing legal services, including the cost of office space and equipment and administrative support. This rate varies according to the position in question, and ranges from \$142.22/hr for paralegals to \$305.19/hr for the most senior lawyers. In all cases, the rate is substantially below the market rate.

⁶³ This total includes time spent meeting with clients within the Government of Canada and with counsel and officials of the Government of Ontario and the OPA, assembling and reviewing documentary evidence (notably, significant efforts were undertaken to respond to the Claimant's 100 document requests, which resulted in the production of almost 14,000 documents), undertaking legal research and analysis, identifying and working with fact and expert witnesses, drafting and reviewing written pleadings, addressing procedural matters and appearing before the arbitrators. Counsel for Canada was also assisted by paralegals, students and technical support staff.

	Lawyers' Fees		
Description ⁶¹	Rate ⁶²	Hours ⁶³	Total Fees
Spelliscy, Shane (LA-2A)*	\$ 262.16	260.50	\$ 68,292.68
Squires, Heather (LA-01)	\$ 218.58	99.50	\$ 21,748.71
Tabet, Sylvie (LA-3A)	\$ 305.19	2.50	\$ 762.98
Paralegals			
Perrault, Melissa (EC-04)*	\$ 156.11	336.50	\$ 52,531.02
Sub-Total (2013-2014):		1,594.88	\$ 346,756.31
FISCAL YEAR 2014-2015 (Document Production, Claimant's Memorial, Canada's Counter-Memorial, etc.)			
Kam, Susanna (LP-01)*	\$ 218.58	1,022.75	\$ 223,552.70
Marquis, Laurence (LP-01)	\$ 218.58	507.50	\$ 110,929.35
Neufeld, Rodney (LP-02)*	\$ 262.16	1,564.85	\$ 410,241.08
Spelliscy, Shane (LP-02)*	\$ 262.16	380.98	\$ 99,877.72
Squires, Heather (LP-01)	\$ 218.58	795.50	\$ 173,880.39
Tabet, Sylvie (LP-04)*	\$ 305.19	8.50	\$ 2,594.12
Wates, Jenna (LP-01)	\$ 218.58	1,401.08	\$ 306,248.07
Paralegals			
Kawashima, Eiko (EC-03)	\$ 148.01	693.00	\$ 102,570.93
Parsons, Darian (EC-02)*	\$ 142.22	174.50	\$ 24,817.39
Perrault, Melissa (EC-04)*	\$ 156.11	668.00	\$ 104,281.48
Sub-Total (2014-2015):		7,216.66	\$ 1,558,993.21
FISCAL YEAR 2015-2016 (up to April 8, 2016) (Claimant's Reply Memorial, Canada's Rejoinder Memorial, Non-Disputing Party Submissions, Pre-Hearing Conference Call, Oral Hearing, Post-Hearing Matters, Costs Submissions, etc.)			
Kam, Susanna (LP-01)*	\$ 218.58	1,335.75	\$ 291,968.24
Neufeld, Rodney (LP-03)*	\$ 281.67	1,537.72	\$ 433,129.59
Spelliscy, Shane (LP-03)*	\$ 281.67	919.75	\$ 259,065.98
Squires, Heather (LP-02)	\$ 262.16	1,525.21	\$ 399,849.05
Tabet, Sylvie (LP-04)	\$ 305.19	125.20	\$ 38,209.79

	Lawyers' Fees		
Description⁶¹	Rate⁶²	Hours⁶³	Total Fees
Wates, Jenna (LP-01)	\$ 218.58	1,390.26	\$ 303,883.03
Paralegals			
Parsons, Darian (EC-02)*	\$ 142.22	1,387.48	\$ 197,327.41
Perrault, Melissa (EC-05)*	\$ 168.77	1,336.00	\$ 225,476.72
Sub-Total (2015-2016):			\$ 2,148,909.81
TOTAL:			\$ 4,215,554.93

ANNEX II – DISBURSEMENTS

Disbursement	Total (\$CDN)
Expert and Consultant Costs	
Berkeley Research Group	\$1,975,382.05
URS	\$944,084.84
Green Giraffe	\$154,062.82
iBrief (Hyperlinking Firm)	\$13,524.08
Core Legal (Trial Technology & Graphic Consultants)	\$138,858.79
Sub-Total for Expert and Consultant Costs	\$3,225,912.58
Additional Disbursements	
Printing ⁶⁴	\$15,973.11
Courier	\$1,159.16
Hotel Boardroom Rentals (Hearing)	\$17,515.00
Materials & Supplies & Miscellaneous	\$10,404.46
Department of Justice Billings (Document Review)	\$22,274.93
Travel Costs ⁶⁵	\$102,258.18
Sub-Total for Additional Disbursements	\$169,584.84
TOTAL DISBURSEMENTS	\$3,395,497.42

⁶⁴ Canada incurred some of these printing costs in-house, while private firms provided other services.

⁶⁵ This amount includes the costs of attending the initial procedural hearing in Toronto as well as trips to Toronto, Washington, D.C., Paris, and London to prepare Canada's defense in this arbitration. Also included in Canada's travel costs are the travel and accommodation costs for the hearing in Toronto.