

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
AND THE 2010 UNCITRAL ARBITRATION RULES**

BETWEEN:

WINDSTREAM ENERGY LLC

Claimant

and

GOVERNMENT OF CANADA

Respondent

CLAIMANT'S REPLY COSTS SUBMISSIONS

April 26, 2016



Torys LLP
Suite 3000
79 Wellington St. W.
Box 270, TD Centre
Toronto, Ontario
Canada M5K 1N2

John A. Terry
Myriam M. Seers
Nick E. Kennedy
Emily S. Sherkey

Counsel for the Claimant,
Windstream Energy LLC

TABLE OF CONTENTS

	Page
I. OVERVIEW	1
II. CANADA IS NOT ENTITLED TO ITS COSTS IF WINDSTREAM IS PARTIALLY SUCCESSFUL	2
A. Legal Authorities Do Not Support Canada’s Claim to Costs	2
B. Windstream Has Not Advanced Any Manifestly Untenable or Frivolous Claims	3
1. Windstream Argued in the Alternative that the OPA Excercised Delegated Government Authority	4
2. Windstream Properly Advanced and Maintained Its Claims Regarding Articles 1102 and 1103	5
C. Windstream’s Damages Claim was Appropriate, and Canada Unnecessarily Increased the Cost of its Damages Evidence	5
D. Cost Submissions Not Appropriate for Rearguing Merits of the Case	7
III. WINDSTREAM’S ACTIONS DID NOT INCREASE CANADA’S COSTS	8
A. Expert Reports Identified by Canada Did Not Increase Canada’s Costs	8
B. Windstream’s Document Requests Did Not Increase Canada’s Costs	9
IV. CANADA’S LEGAL COSTS ARE NOT REASONABLE	10

I. OVERVIEW

1. Both Parties agree that under NAFTA Article 1135 and Article 42 of the 2010 UNCITRAL Arbitration Rules, costs should, as a general matter, “follow the event” and be borne by the unsuccessful party, subject to the Tribunal’s discretion to apportion costs or have each party bear its costs based on the particular circumstances of a case.

2. Canada advances no tenable reason why the Tribunal should depart from this principle and not award Windstream its costs if it is successful in this arbitration. Instead, Canada argues that if Windstream is partially successful, the Tribunal should order Windstream to pay Canada’s costs for the portion of Windstream’s claim that did not succeed. This position should be rejected. It is entirely without merit, lacks support in arbitral precedent and is contrary to the principle that costs should be borne by the unsuccessful party.

3. Windstream maintains its position that even if Canada is successful in this arbitration, the Tribunal should refer to the decisions of several NAFTA tribunals which declined to order an unsuccessful claimant to pay the respondent’s costs, particularly where, as here, the claimant brought the arbitration in good faith and had no other meaningful way of obtaining compensation. This became even more apparent as the hearing progressed and Canada admitted that Ontario was not doing the scientific studies it said were necessary,¹ and the OPA’s witness admitted that the Project could not now be built with the FIT Contract timelines.² If this Tribunal awards Canada its costs, then Windstream submits that the amounts claimed are unreasonable, and the Tribunal should reduce any amount awarded accordingly.

4. Finally, Canada has used its costs submissions to repeat its arguments on the merits. Costs submissions are not intended to provide an opportunity to the parties to re-argue the merits of a case. The case has already been argued and the issues canvassed extensively. The Tribunal should therefore disregard these portions of Canada’s cost submissions.

¹ Transcript (Full Version), February 15, 2016, p. 210.

² Transcript (Full Version), February 17, 2016, pp. 206-207.

II. CANADA IS NOT ENTITLED TO ITS COSTS IF WINDSTREAM IS PARTIALLY SUCCESSFUL

A. Legal Authorities Do Not Support Canada's Claim to Costs

5. Canada argues that if Windstream is only partially successful in this arbitration, then Windstream should bear Canada's costs for defending the unsuccessful claims. This position should be rejected. It is directly contrary to the presumption set out in Article 42 of the UNCITRAL Arbitration Rules that the *unsuccessful party* should bear the costs of the arbitration. It also lacks any tenable basis in law. The authority relied on by Canada for this proposition – *European American Investment Bank v. The Slovak Republic* – does not support Canada's argument.³

6. In *European American Investment Bank*, the Tribunal issued two awards on jurisdiction. In the first, the tribunal allowed one of three jurisdictional objections.⁴ However, in the second award, the tribunal found that it lacked jurisdiction to hear the remaining claims and dismissed the arbitration.⁵ In its costs submissions, the claimant requested the tribunal award it 30% of its costs for the first phase of the jurisdictional proceedings as the costs of defending the unsuccessful jurisdictional objections.⁶ This was rejected by the tribunal. Despite the fact that the respondent's jurisdictional objections were only partially successful in the the first phase (it succeeded on one of three objections), the tribunal declined to award the claimant its legal costs for successfully resisting the respondent's two other jurisdictional objections. Instead, the respondent's partial success was cited to reduce the amount it was owed to it by the claimant.⁷

7. This is not the first time Canada has argued that it should be awarded its costs for successfully resisting a portion of a claim, even if the investor was on the whole successful. Canada argued this in *Pope & Talbot*, where it was rejected. In that case, the investor prevailed on liability, but not on all of its claims, and it was awarded a fraction of the damages claimed. Canada argued that although the investor "won" the arbitration, it was unsuccessful on some issues. Therefore,

³ Canada's Submission on Costs, ¶ 13.

⁴ **RL-102**, *European American Investment Bank AG (Austria) v. The Slovak Republic* (UNCITRAL) Award on Costs, 20 August 2014, ¶ 8.

⁵ **RL-102**, *European American Investment Bank AG (Austria)*, ¶ 9.

⁶ **RL-102**, *European American Investment Bank AG (Austria)*, ¶ 36.

⁷ **RL-102**, *European American Investment Bank AG (Austria)*, ¶¶ 47, 50-52, 55, 60.

Canada said the investor should pay Canada’s legal costs.⁸ Taking an “overall view of the case,” the tribunal concluded that since success was mixed, each party should bear its own legal costs and the costs of the arbitration should be apportioned in favour of the investor.⁹

8. This is consistent with the authorities, which take an “overall view of the case” approach. When a claimant succeeds in part, tribunals generally award the claimant part of its legal costs. In *Rumeli*, the tribunal awarded the claimants, who prevailed on the substance of the dispute, but who “failed on a number of allegations” and were awarded less damages than were claimed, their partial legal costs.¹⁰ In *Cargill*, the claimant succeeded on its claim for breaches of Articles 1105, 1102 and 1106, but failed on its claims for breaches of Articles 1110 and 1103. The tribunal awarded the claimant its arbitration costs and half of its legal costs.¹¹ Finally, in *PSEG* the claimant was only partially successful. However, because the claimant had no option but to bring the arbitration and incur the associated costs “[t]o obtain justice” the tribunal ordered the respondent to pay the claimant US\$13.5 million, representing 65% of the costs of the arbitration, including legal costs and fees.¹² Under the circumstances, there is no reason to depart from this well-established principle. If Windstream is successful, even on only part of its claim, then it should not be ordered to pay Canada’s costs for defending the unsuccessful portions of Windstream’s claim.

B. Windstream Has Not Advanced Any Manifestly Untenable or Frivolous Claims

9. Canada claims that Windstream “advanced a number of manifestly untenable or frivolous claims that unnecessarily contributed to the overall costs of the arbitration.”¹³ There is no merit to this argument. Windstream advanced only claims it legitimately and in good faith believed were appropriate claims supported by the evidence. It conducted itself in a reasonable and efficient

⁸ **CL-152**, *Pope & Talbot v. Government of Canada* (UNCITRAL) Award on Costs, 26 November 2002 (“*Pope & Talbot*”), ¶ 8.

⁹ **CL-152**, *Pope & Talbot*, ¶ 17.

¹⁰ **CL-129**, *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S., v. Republic of Kazakhstan* (ICSID Case No. ARB/05/16), Award, 29 July 2008, ¶ 819.

¹¹ **CL-031**, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶ 561.

¹² **CL-076**, *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey* (ICSID Case No. ARB/02/5) Award, 19 January 2007 (“PSEG”), ¶ 352.

¹³ Canada’s Submissions on Costs, ¶ 15.

manner. If Windstream is partially successful in this arbitration, it recognizes the Tribunal may apportion the costs it awards accordingly. However, Windstream should not be penalized for having brought forward legitimate claims that were litigated in a reasonable and efficient manner, even if the Tribunal ultimately dismisses them.

1. Windstream Argued in the Alternative that the OPA Exercised Delegated Government Authority

10. Canada has used its costs submission to re-assert its Counter-Memorial and Rejoinder arguments, to which Windstream has already replied in full.¹⁴ Windstream simply notes in reply that it has always maintained that the failures and omissions at issue in this case are a failure of the Ministry of Energy and the Premier’s Office, and so are attributable to the Government of Canada.¹⁵ Windstream’s claim that the failure to “freeze” the FIT Contract is an omission of the OPA was always raised as an alternative argument.¹⁶ This argument was appropriately raised, and Windstream had a strong legal and evidentiary basis for putting it forward. This is affirmed by the recent decision in *Mesa Power Group LLC v. Government of Canada*, in which the tribunal found that measures taken by the OPA in connection with the FIT Program were attributable to Canada because it found that the OPA was a state enterprise exercising delegated governmental authority.¹⁷ This also shows that Windstream was correct to request documents from the OPA, and that Canada was wrong to deny these were not under its possession, power and control.

11. In any event, Windstream did not inappropriately increase either party’s costs in this arbitration by advancing this argument. This was a concisely argued alternative argument and did not create any new or additional evidence in the record.¹⁸ Windstream set out its argument in detail in its submissions and did not spend unnecessary time repeating itself at the hearing on this point. It therefore did not unnecessarily contribute to the overall costs of the arbitration in a material way.

¹⁴ See ¶¶ 625-640 of Windstream’s Reply Memorial.

¹⁵ Windstream’s Memorial, ¶¶ 511-535; Windstream’s Reply Memorial, ¶¶ 625-631.

¹⁶ Windstream’s Memorial, ¶¶ 536-541; Windstream’s Reply Memorial, ¶¶ 632-640.

¹⁷ **CL-153**, *Mesa Power Group LLC v. Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016 (“*Mesa Power*”), ¶¶ 368-375.

¹⁸ This argument represented a combined 13 paragraphs in Windstream’s Memorial and Reply Memorial (Windstream’s Memorial, ¶¶ 536-541; Windstream’s Reply Memorial, ¶¶ 632-640) and a combined 23 paragraphs in Canada’s Counter-Memorial and Rejoinder (Canada’s Counter-Memorial, ¶¶ 300-317; Canada’s Rejoinder Memorial, ¶¶ 34-40).

2. Windstream Properly Advanced and Maintained Its Claims Regarding Articles 1102 and 1103

12. Windstream maintains its position that these claims are meritorious and that Canada is responsible for the Ontario government's conduct that treated Windstream less favourably than two investors in like circumstances: TransCanada, a Canadian investor, and Samsung, an investor of a third party, contrary to Articles 1102 and 1103 of NAFTA. Windstream sets out its position in detail in its Memorial and Reply Memorial.¹⁹ Canada is again using its costs submissions as a means to re-assert its argument that these claims lack merit, rather than providing the Tribunal with information to assist it in its determination of costs.

13. Windstream's position on these claims was enhanced at the hearing by witnesses who recognized that Windstream was not treated fairly by the Ontario government. For example, when asked by Dr. Cremades whether he felt that Windstream was "treated unfairly by the government, and especially in comparison with other projects [he had] been getting in the past?", Mr. Roeper responded that, in his view, Windstream was not treated fairly compared to other FIT projects or TranCanada.²⁰

14. Canada has failed to illustrate how Windstream's decision to advance these claims caused it to incur substantial additional costs. In particular with respect to the claim in connection with Article 1103, very little time was spent on this claim by either party. As with the jurisdictional argument regarding the OPA, Windstream set out its argument in detail in its submissions and did not spend unnecessary time repeating itself at the hearing on this point. It therefore did not unnecessarily contribute to the overall costs of the arbitration in a material way.

C. Windstream's Damages Claim was Appropriate, and Canada Unnecessarily Increased the Cost of its Damages Evidence

15. Windstream's claim is that as a result of the wrongful conduct of the Ontario government, it has been deprived of the economic benefit of the FIT Contract. Windstream's damages claim sought compensation for that loss. The fact that Canada would have preferred that Windstream

¹⁹ Windstream's Memorial, ¶¶ 634-645; Windstream's Reply Memorial, ¶¶ 606-624.

²⁰ Transcript (Full Version), February 17, 2016, pp. 121-122.

seek a smaller quantum of damages for the Ontario government's wrongdoing is not relevant to this costs analysis.

16. Canada's damages evidence was unnecessarily expensive. First, Canada claims \$1,975,382.05 for BRG's two responding reports.²¹ This is nearly \$800,000 more than the \$1,169,052.50 Windstream seeks to recover for Deloitte's four reports.²² Canada has provided no rationale for this discrepancy, and Windstream should not be required to pay the unreasonable costs of Canada's evidence, regardless of the outcome of this arbitration.

17. Second, Canada unnecessarily increased its own costs by incurring \$182,655.77 for BRG's "forensic audit." This is unreasonable, and Windstream should not be required to pay for this work. As Windstream's expert witness Robert Low explained, in litigation, business records are generally acceptable for proving sunk costs.²³ Windstream provided these to substantiate its sunk costs, including audited financial statements from PricewaterhouseCooper,²⁴ and its general ledgers.²⁵ Deloitte conducted analyses of Windstream's invoices to verify its sunk costs.²⁶ Despite this, Canada instructed BRG to conduct a full forensic audit of Windstream's sunk costs.²⁷ According to Mr. Low, this "was significant overkill and has raised an issue of verifiable expenses here that has gone to the extreme." This level of analysis was not consistent with his experience.²⁸

18. In any event, this audit was replete with inaccuracies, which were pointed out by Mr. Low²⁹ and by counsel for Windstream during Mr. Goncalves' cross-examination.³⁰ On cross-examination, Mr. Goncalves admitted that invoices for geophysical surveys for the project,³¹ a legal bill from a

²¹ Canada's Submissions on Costs, Annex II – Disbursements.

²² Windstream's Submissions on Costs, Disbursements.

²³ Transcript (Full Version), February 23, 2016, p. 222.

²⁴ Reply Memorial, ¶ 724; Transcript (Full Version), February 24, 2016, p. 368.

²⁵ C-1898, Windstream General Ledger.

²⁶ CER-Deloitte-2, ¶ 6.25.

²⁷ Transcript (Full Version), February 24, 2016, pp. 366. Canada asked BRG to conduct a full forensic audit of Windstream's invoices. However, Canada acknowledges that it only received a sample of those. It is not possible to conduct a full forensic audit of all of Windstream's expenses based on only a sample, yet Canada and BRG never requested further invoices.

²⁸ Transcript (Full Version), February 23, 2016, pp. 49, 222-223.

²⁹ Transcript (Full Version), February 23, 2016, pp. 222-225.

³⁰ Transcript (Full Version), February 24, 2016, pp. 364-394.

³¹ Transcript (Full Version), February 24, 2016, p. 387.

Canadian law firm for work related to an “Offshore Wind Project,”³² and the fees payable for interest on the \$6 million letter of credit posted by Windstream as security for the FIT Contract were excluded in error from BRG’s assessment of Windstream’s sunk costs.³³ BRG’s “forensic audit” is simply too unreliable to inform this Tribunal’s assessment of Windstream’s sunk costs. Costs incurred conducting it were wasted.

D. Cost Submissions Not Appropriate for Rearguing Merits of the Case

19. The purpose of costs submissions is to address the appropriate allocation of costs, not to reargue the merits of the case. In its submissions on costs, Canada has claimed that it is entitled to its costs because “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.”³⁴ Costs submissions are not the appropriate forum to make conclusory, bald statements about the outcome of the arbitration and the nature of the claims advanced. These statements will not be refuted here.

20. However, in light of Canada’s assertion that Windstream’s position was based on “misinterpretations of the NAFTA provisions,” Windstream again refers the Tribunal to the *Mesa Power* award, in which the tribunal adopted the interpretation of Article 1105 advanced by Windstream: that the decision in *Waste Management II* correctly identifies the content of the customary international law minimum standard of treatment found in Article 1105,³⁵ that the minimum standard of treatment has evolved since the *Neer* decision,³⁶ and that “a failure to respect an investor’s legitimate expectations in and of itself does not constitute a breach of Article 1105, but is an element to take into account when assessing whether other components of the standard are breached.”³⁷

³² Transcript (Full Version), February 24, 2016, pp. 389-390. Mr. Goncalves acknowledged that there was only one Offshore Wind Project, so it is unclear how this invoice was excluded.

³³ Transcript (Full Version), February 24, 2016, pp. 390-394.

³⁴ Canada’s Submission on Costs, ¶ 9.

³⁵ CL-153, *Mesa Power*, ¶ 501.

³⁶ CL-153, *Mesa Power*, ¶ 500.

³⁷ CL-153, *Mesa Power*, ¶ 502.

III. WINDSTREAM'S ACTIONS DID NOT INCREASE CANADA'S COSTS

21. Canada claims that even if Windstream is completely successful in this arbitration, Windstream should be required to bear all its own costs.³⁸ Canada gives two reasons for this: Windstream's filing of "irrelevant expert reports," and its "continuous fishing expeditions for documents and evidence, including evidence outside of Canada's care, custody and control."³⁹ Neither of these reasons provide a basis for denying Windstream its costs if it is successful.

A. Expert Reports Identified by Canada Did Not Increase Canada's Costs

22. Canada relies on three brief expert reports filed by Windstream in this arbitration to support its first reason for denying Windstream its costs. However, there is no evidence whatsoever that Canada incurred any costs responding to these reports. The Power Advisory and Compass Renewables reports are not even addressed in Canada's Counter-Memorial, Rejoinder, or expert reports. In any event, these reports are relevant to the matters at issue in this arbitration. Compass' report provides information about the pricing assumptions built into FIT contract prices by the OPA, and explains how the OPA set the FIT contract price for offshore wind. Power Advisory's report helps to illustrate the value of the FIT Contract, and why concerns about costs motivated the Ontario government to terminate the FIT Contract.

23. Canada devoted a mere eight paragraphs to responding to Professor Dolzer's report in its Counter-Memorial, but did not make the claim, as it now does, that "expert evidence on international law has no place" in an investment arbitration.⁴⁰ The applicable standard under Article 1105(1) of the NAFTA was one of the mostly heavily argued issues in this arbitration. It was appropriate for Windstream to lead evidence on this issue. Professor Dolzer's evidence was consistent with the position Canada has taken on this issue, which is that NAFTA claimants bear the burden of proving the existence of a relevant rule of customary international law through state practice and *opinio juris*.⁴¹ Professor Dolzer does this: "[t]hus, in this particular case, the proliferation of BITs and other investment treaties that contain FET provisions, combined with the

³⁸ Canada's Costs Submissions, ¶ 25.

³⁹ Canada's Costs Submissions, ¶ 25.

⁴⁰ Canada's Counter-Memorial, ¶¶ 371-379.

⁴¹ Canada's Rejoinder Memorial, ¶ 198.

fact that states are acting out of a sense of obligation in entering into these provisions, provides evidence of both state practice and *opinio juris*.”⁴²

B. Windstream’s Document Requests Did Not Increase Canada’s Costs

24. Canada’s allegation that Windstream engaged in “continuous fishing expeditions for documents and evidence” ignores the reason why Windstream pursued further document production: Canada’s repeated failure to comply with its documentary production obligations.⁴³ Windstream first highlighted the deficiencies in Canada’s document productions in its Memorial, where it explained that “Canada has produced no documents from email accounts of Premier’s Office staff involved in the energy portfolio, and only three relevant emails from the Minister of Energy’s Chief of Staff, despite the central role played by Premier’s Office and the Minister’s Chief of Staff in the events that led to the moratorium.”⁴⁴ As a result of Canada’s failure, the extent of which became even more apparent when documents from the Premier’s Office were later produced on May 8, 2015, Windstream had no choice but to pursue further document requests.

25. Windstream next pointed this out in its November 7, 2014 letter to the Tribunal, where it explained that Canada had failed to produce documents from the Premier’s Office. It pointed this out again Windstream’s November 24, 2014 letter to the Tribunal where it explained that hundreds of responsive documents that were not produced by Canada were produced to Windstream through Ontario’s freedom of information process.

26. Windstream further highlighted this issue in its Reply Memorial, where it explained that on May 8, 2015, just one month before Windstream’s then deadline to file its Reply Memorial, Canada produced 727 additional documents to Windstream. Of those, nearly 500 were responsive to Windstream’s document requests for which production was due by April 21, 2014.⁴⁵ These included critically important documents, such as the email from the former Premier’s Chief of Staff directing the creation of a policy that would “kill all the projects” except Windstream’s

⁴² CER-Dolzer, ¶ 65.

⁴³ Canada’s Costs Submissions, ¶ 25.

⁴⁴ Windstream’s Memorial, ¶ 366.

⁴⁵ Windstream’s Reply Memorial, ¶ 48.

Project.”⁴⁶ This, and other documents involving the Premier’s Office, were produced for the first time on May 8, 2015 despite Canada’s earlier claim that “there are simply no more documents for Canada to produce in this regard.”⁴⁷ This late production required that much of the Reply Memorial be rewritten in order to incorporate the newly produced documents. Windstream incurred the costs associated with pursuing further discovery because Canada failed in its documentary production obligations. This is no basis to deny Windstream its costs, if it is successful.

IV. CANADA’S LEGAL COSTS ARE NOT REASONABLE

27. Canada’s costs for legal representation in this arbitration are both disproportionate and unreasonable. First, Canada seeks costs for its unreasonably large legal team of seven lawyers and multiple paralegals. This was nearly twice the size of Windstream’s team of four lawyers. Second, Canada’s counsel also spent more than **twice** as many hours as Windstream’s counsel: Canada’s counsel billed 18,705.91 hours, while Windstream’s counsel billed 8,646 hours.⁴⁸ There is no justification for discrepancies of this magnitude. Indeed, it was not uncommon during the proceeding for four or five different lawyers for Canada to participate in the same conference call with only one or two lawyers for Windstream present. While Canada is free to pay for such duplication of effort if it sees fit, Windstream should not have to bear the costs of Canada’s inefficiency.

28. Canada’s total costs for legal representation are \$4,215,554.93,⁴⁹ while Windstream’s are \$3,323,115.01 – nearly \$1 million less.⁵⁰ Normally, the “legal costs incurred by respondent-state parties are usually much lower than costs incurred by claimant-private parties, partly because a claimant bears a greater burden in presenting and proving its case, [and] partly because a state’s billing practices with its legal representatives are different.”⁵¹ Canada has provided no credible explanation why that trend is reversed in this case.

⁴⁶ Windstream’s Reply Memorial, ¶ 49.

⁴⁷ Canada’s Counter-Memorial, ¶ 574 [Emphasis added].

⁴⁸ Canada’s Submission on Costs at Annex I – Lawyer Hours.

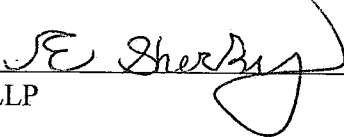
⁴⁹ Canada’s Submission on Costs at Annex I – Lawyer Fees.

⁵⁰ Windstream’s Submissions on Costs, Annex I – Cost of Legal Representation, p. 5.

⁵¹ **CL-052**, *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States* (ICSID Case No. ARB(AF)/04/3) Award, 16 June 2008, ¶ 17-25.

DATED: April 26, 2016

Respectfully submitted on behalf of Windstream Energy LLC,



Torys LLP

Counsel for the Claimant, Windstream Energy LLC