

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

BETWEEN:

MESA POWER GROUP, LLC

Claimant

AND:

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

SUBMISSION ON COSTS

March 3, 2015

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Trade and Development
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I. INTRODUCTION

1. This is a claim that should never have been brought. As Canada has shown throughout these proceedings, the Claimant's case is meritless. It relies upon distorted legal interpretations of the provisions of NAFTA and allegations that are not supported by any evidence.

2. Moreover, this claim should never have been pursued in the manner that it was by the Claimant. As shown below, the Claimant's conduct throughout this arbitration has evidenced a disregard for the provisions in NAFTA and a disdain for the procedural rules established by the Tribunal. The Claimant also needlessly complicated the issues and adopted an unnecessarily antagonistic position towards Canada that resulted in nearly every matter, even simple extension requests, requiring resolution by the Tribunal.

3. For these reasons, Canada should be awarded all of its costs in this arbitration, including both its share of the Tribunal's fees and expenses, and the reasonable costs of its legal representation and assistance. These costs total approximately \$6,934 million. In light of the length of the proceedings and the conduct of the Claimant, these costs are reasonable.

II. THE TRIBUNAL SHOULD AWARD CANADA ITS ARBITRATION COSTS

4. Under Article 1135 of NAFTA, the Tribunal has the authority to award Canada its costs in this arbitration in accordance with the applicable provisions of the UNCITRAL Arbitration Rules. Pursuant to Article 38 of those Rules, Canada's costs, summarized in the table below, include the fees and expenses of the Tribunal, as well as the reasonable costs for Canada's legal representation and assistance.

SUMMARY OF COSTS	
Arbitration Costs	\$825,000.00
Legal Representation and Assistance ¹	\$6,109,001.95
TOTAL	\$6,934,001.95

5. With respect to the apportionment of these costs, Article 40 of the UNCITRAL Arbitration Rules provides:

Article 40

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. 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. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

6. NAFTA tribunals have consistently recognized that these Rules, and the principles which they embody, apply to disputes brought under Chapter 11.² In determining how to exercise its discretion and apportion costs under Article 40, the Tribunal should have regard “both to the outcome of the proceedings and to other relevant factors”³ in order to “serve[] the dual function of reparation and dissuasion.”⁴

¹ Further detail on Canada’s costs of legal representation and assistance are provided in Annexes I and II.

² **RL-114**, *S.D. Myers, Inc. v. Canada*, (UNCITRAL) Final Award on Costs, 30 December 2002, ¶¶ 8-10, 12, 15; **CL-194**, *International Thunderbird Gaming Corporation v. Mexico* (UNCITRAL) Award, 26 January 2006, (“*Thunderbird*”) ¶¶ 212-215; **CL-022**, *Methanex v. United States*, (UNCITRAL), Final Award, 3 August 2005, Part V, ¶¶ 1-12; **CL-090**, *Chemtura Corporation v. Canada* (UNCITRAL) Award, 3 August 2010, ¶ 272; **CL-091**, *Waste Management Inc. v. Mexico* (ICSID No. ARB(AF)00/3) Award, 30 April 2004 (“*Waste Management II*”), ¶ 183.

³ **CL-091**, *Waste Management II*, ¶ 183.

⁴ **CL-104**, *Azinian, Davitian, & Baca v. Mexico* (ICSID No. ARB (AF)/97/2) Award, 1 November 1999, ¶ 125 (“*Azinian*”).

7. The “other relevant factors” that tribunals have looked to in the past include the “efficien[cy] and professional manner” in which the case was presented.⁵ As recently noted by the UNCITRAL Working Group considering revisions and updates to the *UNCITRAL Notes on Organizing Arbitral Proceedings*, “certain arbitral institutions have included in their guidance or rules examples of unreasonable parties’ behavior which may be taken into account by the arbitral tribunal when apportioning costs, such as excess document requests, excessive cross-examination, exaggerated claims and failure to comply with procedural orders.”⁶

8. Consistent with these principles, the Tribunal should apportion all of the Tribunal’s fees and expenses to the Claimant under Article 40(1). Further, under Article 40(2), it should determine that the Claimant is to bear all of Canada’s costs for legal representation and assistance in its defence of this meritless claim.

9. First, as Canada has shown throughout this arbitration, the Claimant’s claims are speculative and unreasonable. In particular, they are based on meritless interpretations of NAFTA that stretch and distort its provisions beyond recognition; they rely on unfounded assertions and wild conspiracy theories based on nothing more than insinuation and assumption; and they offer an exaggerated and baseless calculation of damages that blithely ignores the requirement to prove how the alleged breaches caused the alleged losses. Canada has already proven all of the above in its previous submissions and will not repeat itself here. Instead, it relies on those submissions as proving that the Claimant’s legal arguments and claims were not only meritless, but in many cases, frivolous and vexatious. For these reasons alone, and in the interests of providing reparation to Canada and dissuading similarly frivolous and meritless claims, Canada should be granted all of its costs in this arbitration.

10. Second, as Canada explains in more detail below, the Claimant has pursued its claims in this arbitration in an inefficient and needlessly complex way that has wasted time and money. In

⁵ **CL-104**, *Azinian*, ¶ 126; **CL-194**, *Thunderbird*, ¶ 218.

⁶ **RL-115**, UNCITRAL, “Settlement of commercial disputes: Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings”, A/CN.9.WG.II/WP.186, Sixty-Second Session, New York, 2-6 February 2015, ¶ 35.

particular, the Claimant (1) failed to respect NAFTA's 6-month cooling-off period, (2) engaged in unauthorized and excessively burdensome fishing expeditions for documents, (3) ignored the Tribunal's rulings and procedures on confidentiality, (4) filed unnecessary and duplicative procedural requests, (5) consistently disrespected the Tribunal's rules on the number of submissions permitted on procedural requests, (6) sought to prejudice Canada with untimely, last-minute submissions of exhibits, (7) failed to clarify whether it was continuing to pursue certain claims based on measures of the Ontario Power Authority ("OPA"), (8) presented circular arguments on the nature of the FIT Program that led to unnecessary disputes, and (9) conducted unnecessary cross-examinations on irrelevant issues at the hearing. For all of these reasons, the Tribunal should award Canada all of its costs in this arbitration.

1. The Claimant Failed to Respect the Cooling-Off Period in Article 1120

11. The Claimant's disregard for the governing law in this arbitration was apparent from the moment it submitted its claim. As Canada noted in its Objection to Jurisdiction and its Counter-Memorial and Reply on Jurisdiction, in submitting its claim, the Claimant failed to comply with the 6-month cooling-off period required by Article 1120.⁷ The events giving rise to the Claimant's claim occurred on July 4, 2011 – when it did not receive an offer of a FIT Contract for its projects in Ontario. Yet, the Claimant filed its Notice of Arbitration on October 4, 2011, only three months after these events. It was the Claimant's choice to ignore the clear conditions of Canada's consent for the submission of a claim to arbitration. Moreover, the Claimant had ample opportunity to remedy its error and resubmit its claim in compliance with Article 1120 at any time after January 4, 2012. There would have been no prejudice to it doing so. Indeed, doing so would not even have impeded the constitution of this Tribunal since the Claimant did not request the appointment of the Presiding Arbitrator by the Secretary-General of ICSID until May 2012.

⁷ Canada's Counter-Memorial, ¶¶ 91-100; Canada's Objection to Jurisdiction, ¶¶ 17-41.

12. As a result of the Claimant's refusal to respect the conditions of Canada's consent to arbitration, Canada was left with no choice but to seek the dismissal of the Claimant's claim based on a lack of jurisdiction. This resulted in additional costs being incurred – substantial costs which could have been avoided had the Claimant simply waited to submit its claim as required. In *Ethyl v. Canada*, the Tribunal was faced with a similar disrespect of the conditions of Canada's consent to arbitrate by the claimant (represented by the same counsel as the Claimant here), and held that the claimant should pay the resulting costs.⁸ The Tribunal should do the same here.

2. The Claimant Engaged in Unauthorized and Excessively Burdensome Discovery

13. The Claimant inappropriately ignored the authority of the Tribunal to control the collection of evidence in this arbitration. In particular, instead of waiting for authorization from the Tribunal to seek relevant and material documents, the Claimant made applications for judicial assistance in the U.S. courts *after* the filing of its Notice of Arbitration on October 4, 2011, but *prior* to the constitution of the Tribunal. It did so on an *ex parte* basis, prejudicing Canada and necessitating numerous disputes that needed to be resolved by the Tribunal.⁹ There was no reason why the Claimant needed to proceed to the U.S. courts prior to this Tribunal being constituted. It could have waited and respected the authority of the Tribunal to control the discovery process. It chose not to. Although the Tribunal did not pre-emptively reject this evidence solely on the ground that it had been obtained through Section 1782 proceedings, it did agree with Canada that further efforts by the Claimant to obtain evidence should be pursued exclusively under the supervision of the Tribunal.¹⁰ In fact, the Claimant requested authorization from the Tribunal to make additional requests pursuant to Section 1782, and the Tribunal rejected

⁸ **CL-013**, *Ethyl Corp. v. Canada*, Jurisdiction Award, 1998 WL 34334636 (June 24, 1998), ¶ 96(3). Canada has been unable to isolate its costs related to jurisdiction but, if the Tribunal decides to award costs, Canada should be awarded a reasonable amount for these costs.

⁹ See, for example, Canada's letter to the Tribunal dated October 5, 2012, pp. 5-8; Canada's letter to the Tribunal dated November 9, 2012, pp. 3-4.

¹⁰ Procedural Order No. 3, ¶ 68.

them. The Tribunal indicated, amongst other things, that given the stage of the proceedings at the time, it “should refrain from allowing *ex parte* collection of evidence in different proceedings”.¹¹

14. The Claimant’s unnecessary *ex parte* collection of evidence from U.S. courts also generated numerous conflicts between the Tribunal’s Orders and the U.S. Court orders, particularly on issues of confidentiality, discussed more fully in Section 3 below. These conflicts resulted in significant costs – all of which were wholly unnecessary and could have been avoided if the Claimant had simply waited to conduct its discovery in accordance with the rules established by the Tribunal.

15. In addition, despite the fact that the Claimant had already obtained hundreds of documents through its *ex parte* Section 1782 proceedings, it proceeded to make numerous and excessively broad document requests to Canada.¹² In doing so, it ignored the explicit order from the Tribunal that document requests be narrow and specific¹³ and acted contrary to Article 3.3 of the IBA Rules.¹⁴ In fact, out of the 81 document requests made by the Claimant during the initial round of document production, the Tribunal denied 32 requests and seriously limited an additional 31 requests.¹⁵ In sum, less than a quarter of the Claimant’s document requests were considered appropriate by the Tribunal. The excessive nature of the Claimant’s requests is also evidenced by

¹¹ Letter from the Tribunal dated December 30, 2013; Procedural Order No. 6, ¶¶ 28-39.

¹² Procedural Order No. 4, Annex A.

¹³ Paragraph 12.1 of Procedural Order No. 1 clearly states that: (“[s]uch a request for production shall identify each document or category of documents sought with a sufficient degree of precision and establish its relevance and materiality to the dispute”).

¹⁴ Article 3.3 of the IBA Rules indicates: (“A Request to Produce shall contain:(a) (i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner; (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and(c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party”).

¹⁵ Procedural Order No. 4, Annex A.

the fact that while Canada produced 8,303 documents in response to the Claimant's requests, the Claimant relied on only 153 of those documents (1.84% of what Canada produced). Having to object and respond to the Claimant's excessively broad document requests, and to produce immaterial and irrelevant documents, resulted in significant costs to Canada.

3. The Claimant Disrespected the Procedural Rules and Tribunal's Orders Governing Confidentiality

16. In Procedural Order No. 1 the Tribunal, with the consent of the parties, determined that this arbitration would be open to the public, and that documents submitted to or issued by the Tribunal would be publicly available, subject to appropriate redactions for confidential or restricted access information.¹⁶ In its Confidentiality Order, the Tribunal described, again with the consent of the parties, the type of information that could be designated as confidential or restricted access information.¹⁷ Yet, throughout this arbitration the Claimant did not respect the provisions of the Tribunal's Confidentiality Order.

17. First, the Claimant designated significant amounts of information as confidential, even though it was publicly available on the internet, or did not otherwise meet the definition of confidential information in the Tribunal's Order.¹⁸ Second, the Claimant designated a significant amount of information as restricted access information, which meant that it was not to be shared with officials from the Government of Ontario. However, in almost every case, the information that the Claimant designated as restricted access information was *Ontario's information*.¹⁹ Finally, despite the Confidentiality Order clearly requiring the designation of specific

¹⁶ Procedural Order No. 1, ¶ 22.1.

¹⁷ Confidentiality Order, ¶ 1.

¹⁸ See for example, Procedural Order No. 6, Annex A; Procedural Order No. 8, Annex A; Procedural Order No. 9, Annex A; Procedural Order No. 10, Annex A.

¹⁹ See for example, Canada's letter to the Tribunal dated November 25, 2013; Letter from the Tribunal dated December 16, 2013, ¶¶ 9-16; Procedural Order No. 6, Annex B; Procedural Order No. 8, Annex A; Procedural Order No. 10, Annex A.

information in a document as confidential, the Claimant applied blanket designations to its exhibits.²⁰

18. Canada was forced to spend an enormous amount of time and resources to challenge the Claimant's inappropriate confidentiality designations. In numerous instances, the Claimant withdrew its designation, recognizing its inappropriateness and conceding, in essence, that such designations should never have been made. In other cases, the Claimant maintained its designations, only to have them subsequently rejected as inappropriate by the Tribunal. In total, Canada was forced to challenge 458 confidentiality designations made by the Claimant. The Claimant voluntarily withdrew 210 of those designations, and the Tribunal wholly rejected another 212. In sum, of the Claimant's designations that Canada had to expend time and money to dispute, only 36 (8%) were found to be consistent with the Tribunal's orders.²¹

19. However, even when the Tribunal ruled against the Claimant on confidentiality, the Claimant sometimes refused to comply with the Tribunal's decision. For example, in Procedural Order No. 6, the Tribunal directed the Claimant to re-designate the specific information in its exhibits which it alleged was "Restricted Access" or "Confidential" in accordance with the provisions of the Confidentiality Order by March 17, 2014.²² In its communications of March 13 and 25, 2014, the Claimant refused, arguing that the Tribunal's order directing it to amend the designation of its exhibits imposed an "arduous burden" and that it was "prejudicing the Claimant's compliance with the U.S. court orders".²³ Canada had no choice but to respond and

²⁰ See for example, Canada's letter to the Tribunal dated December 20, 2013; Canada's letter to the Tribunal dated January 20, 2014; Procedural Order No. 6, ¶¶ 50-60; Procedural Order No. 8, Annex A; Procedural Order No. 10, Annex A.

²¹ Where the Claimant designated the same information as both confidential and restricted access and was granted a confidential designation, we have counted that as a partial rejection by the Tribunal.

²² Procedural Order No. 6, ¶¶ 50-60.

²³ Claimant's letter to the Tribunal dated March 13, 2014; Claimant's letter to the Tribunal dated March 25, 2014.

the Tribunal was obliged to issue another Procedural Order reiterating again that it did not accept the Claimant's arguments and ordering it to comply.²⁴

20. Similarly, the Tribunal ruled in Procedural Order No. 8 that the Claimant "should not simply reflect the designations made by third parties to the arbitration, but should satisfy the requirements of the Confidentiality Order".²⁵ However, despite this ruling, in making its designations, the Claimant often continued to simply reflect the designation made by third parties in the U.S. court proceedings. Indeed, in some cases the Claimant continued to designate information as confidential or restricted access even though the Tribunal had already ruled that same information to be public.²⁶

21. In attempting to explain its refusal to comply with the Tribunal's Orders, the Claimant often asserted that it had no choice because complying with the Tribunal's decisions would put it in violation of the orders of the U.S. Courts to which it was subject. Leaving aside the fact that this was a result of its own making, as explained below, such claims were not always true.

22. In particular, the Claimant wasted the time of both Canada and the Tribunal by misrepresenting the facts surrounding the removal of the restricted access designation of seven NextEra documents that were at issue around the time period of December 2013 to April, 2014. The Claimant obtained the documents in question as a result of its Section 1782 proceedings in the U.S. Courts and blanket-designated them as restricted access information in this arbitration. Canada challenged that blanket designation on the grounds that the Claimant was required to designate specific information as restricted access information under the terms of the Confidentiality Order.²⁷ The Tribunal agreed and ordered the Claimant to make specific

²⁴ Canada's letter to the Tribunal dated March 20, 2014; Canada's letter to the Tribunal dated March 21, 2014; Canada's letter to the Tribunal dated April 2, 2014; Procedural Order No. 7, ¶ 31.

²⁵ Procedural Order No. 8, ¶¶ 7-11.

²⁶ Canada's letter to the Tribunal dated May 16, 2014; Procedural Order No. 10, Annex A.

²⁷ Canada's letter to the Tribunal dated December 20, 2013; Canada's letter to the Tribunal dated January 3, 2014; Canada's letter to the Tribunal January 20, 2014.

restricted access designations on these documents to which Canada could respond.²⁸ The Claimant refused, contending that it could not do so because NextEra refused, in the context of the U.S. Court proceedings, to allow any of the documents to be seen by Canada and Ontario.²⁹

23. This claim resulted in numerous additional submissions by the parties and a further Procedural Order being issued by the Tribunal.³⁰ However, while all of this was going on, the Claimant was aware that NextEra had consented to the disclosure of these documents to Canada and Ontario, making the Tribunal's procedural order and the further submissions by the parties on the matter entirely unnecessary. Indeed, after reaching out to NextEra on the issue, Canada was informed that NextEra had agreed in writing to change the designation of these, and other documents, to "confidential" on March 27, 2014 – weeks prior to the Claimant's representations to the contrary.³¹ In short, despite the fact that the Claimant knew that there was consent to disclosure to Canada and Ontario, it wasted countless hours of Canada's and the Tribunal's time.³²

4. The Claimant Made Unnecessary Procedural Requests and Offered Meritless Opposition to Requests Made by Canada

24. Over the course of this arbitration, the Claimant brought numerous unnecessary procedural requests to the Tribunal, including some that repeated earlier requestes that had already been denied. In addition, the Claimant opposed nearly every request made by Canada even when such requests were simple matters of scheduling that would not prejudice the Claimant in any way – requests that one would expect to be unopposed as a matter of courtesy between the parties. Responding to these motions and objections required Canada and the Tribunal to waste a great deal of time, effort and expense.

²⁸ Procedural Order No. 6, ¶¶ 59, 83(iii)(b).

²⁹ Claimant's letter to the Tribunal dated March 14, 2014.

³⁰ Canada's letter to the Tribunal dated March 21, 2014; Claimant's letter to the Tribunal dated March 25, 2014; Canada's letter to the Tribunal dated April 2, 2014; Procedural Order No. 7, ¶¶ 23-27.

³¹ Canada's letter to the Tribunal dated April 17, 2014.

³² Canada's letter dated April 15, 2014.

25. For instance, on June 10, 2013, the Claimant filed yet another motion requesting that the Tribunal amend the established procedural calendar and direct Canada to file a response to a Request for Particulars.³³ The Tribunal denied this request, recalling that the Claimant had already made similar requests which had been refused.³⁴ The Tribunal pointed to the Claimant's "failure to allege, let alone demonstrate, any compelling reason to revisit the sequence previously adopted."³⁵

26. On December 9, 2013, as a result of the Claimant's refusal to do so voluntarily, Canada was forced to ask the Tribunal to order the Claimant to provide the native Excel models used by its damages expert in the report attached to the Claimant's Memorial.³⁶ Once again, the Tribunal found no compelling reason for the Claimant's position. As a result, the Tribunal ordered the Claimant to produce the models.³⁷ However, despite this ruling, when Canada requested the models again from the Claimant after its Reply expert report, the Claimant ignored Canada's request, requiring Canada to once again seek relief from the Tribunal.³⁸

27. In its communications of December 24, 2013 and January 15, 2014, the Claimant requested that the Tribunal strike the confidentiality designations on documents produced by Hydro One and direct Canada to produce documents from Hydro One that Hydro One had not turned over to Canada.³⁹ The Tribunal denied both requests concluding that, as Canada argued, the confidentiality designations were consistent with the Tribunal's Confidentiality Order and that there was no reason to believe that Canada had not used its best efforts to produce responsive

³³ Claimant's letter to the Tribunal dated June 10, 2013; Request for Particulars dated June 4, 2013.

³⁴ Procedural Order No. 4, ¶¶ 13-18.

³⁵ *Ibid.*

³⁶ Canada's letter to the Tribunal dated December 9, 2013.

³⁷ Procedural Order No. 6, ¶¶ 25-27.

³⁸ Canada's letter to the Tribunal dated May 27, 2014; Claimant's letter to the Tribunal dated May 27, 2014; Letter from the Tribunal dated May 28, 2014.

³⁹ Claimant's letter to the Tribunal dated December 24, 2013; Claimant's letter to the Tribunal dated January 15, 2014.

documents from Hydro One, which was a third party.⁴⁰ However, despite this ruling, on May 30 and June 12, 2014, the Claimant made exactly the same arguments with respect to documents produced by the OPA, also a third party, as if the Tribunal's earlier ruling simply did not exist.⁴¹ The Tribunal denied this request as well.⁴²

28. On March 10, 2014, only six months before the hearing and after the initial round of pleadings, the Claimant requested that the Tribunal bifurcate the proceedings and make a preliminary determination on Canada's reliance on Article 1108 of the NAFTA.⁴³ Canada opposed the request on the basis that the Tribunal had yet to determine that it had jurisdiction over the issues in dispute, that the request was untimely, and that bifurcating the proceedings at this late stage would not be efficient.⁴⁴ The Tribunal agreed with Canada, indicating that it would first have to establish its jurisdiction over the dispute in order to decide on the Claimant's request and further pointed out that the Claimant's request was untimely since it had knowledge of Canada's Article 1108 argument since July, 2012.⁴⁵ Making a request for bifurcation at such an advanced stage of the proceeding when it had been aware of the issues for several years was highly inefficient, and resulted in substantial costs for Canada to respond to this motion.

29. Finally, even with respect to this cost submission itself, the Claimant unnecessarily opposed Canada's request for an extension of the deadline by a single month.⁴⁶ It did so, despite the fact that it must have been aware that agreeing to the extension would have caused it no prejudice whatsoever as the post-hearing submissions in this matter had just been filed. As a result of what amounts to no more than the Claimant's stubborn antagonism, Canada was forced

⁴⁰ Procedural Order No. 6, ¶¶ 66-77.

⁴¹ Claimant's letter to the Tribunal dated May 30, 2014.

⁴² Procedural Order No. 11, ¶¶ 9-11 and Annex A.

⁴³ Claimant's letter to the Tribunal dated March 10, 2014; Claimant's letter to the Tribunal dated March 18, 2014; Claimant's letter to the Tribunal dated March 20, 2014.

⁴⁴ Canada's letter to the Tribunal dated March 18, 2014.

⁴⁵ Procedural Order No. 7, ¶¶ 2-5.

⁴⁶ Canada's letter to the Tribunal dated January 27, 2015, Tabs 2, 3 and 4.

to once again seek the intervention of the Tribunal.⁴⁷ The Tribunal granted Canada the requested extension.⁴⁸

5. The Claimant Failed to Respect the Procedural Rules With Respect to Submissions on Procedural Requests

30. Not only did the Claimant file numerous unnecessary procedural requests, it also consistently ignored the Tribunal's rules with respect to submissions on such requests. Procedural Order No. 1 is clear – the requesting party is not permitted a reply submission unless advance permission is granted by the Tribunal.⁴⁹ The Claimant disregarded this rule on so many occasions that they are impossible to list exhaustively.⁵⁰ The fact is the Claimant continually seized for itself the final word on its procedural requests, blatantly ignoring the Tribunal's Procedural Order. Moreover, it continued to do so even after the Tribunal reminded the Claimant (on several occasions) that advance permission from the Tribunal was required before reply submissions on procedural requests could be made.⁵¹ Finally, even when it did “request” permission at times, it did so attaching the very submission that it was seeking permission to file – effectively nullifying the Procedural Order which was intended to keep unauthorized submissions from being presented to the Tribunal.⁵² Such unauthorized submissions resulted in Canada having to prepare further responses at a substantial cost.

⁴⁷ Canada's letter to the Tribunal dated January 27, 2015.

⁴⁸ Letter from the Tribunal dated February 2, 2015.

⁴⁹ Procedural Order No. 1, ¶ 15.1.

⁵⁰ As one example, see the Claimant's letter dated January 15, 2014, which the Tribunal noted in its letter of January 20, 2014 contained an unauthorized reply to Canada's letter dated January 3, 2014.

⁵¹ See, for example, the Tribunal's letter to the Parties of March 27, 2014, noting that the Claimant's letter to the Tribunal of March 25, 2014 was again unsolicited.

⁵² Letter from the Tribunal dated August 22, 2014.

6. The Claimant Ignored the Rules for the Submission of Evidence into the Record and Inappropriately Sought to Prejudice Canada with Last Minute Submissions

31. Procedural Order No. 1 makes clear that evidence is to be filed with the written submissions that it supports.⁵³ On several occasions, the Claimant sought to exploit this rule in order to pad the record with evidence at the last minute.

32. For example, in response to the Article 1128 submissions of the United States and Mexico, on August 27, 2014, the Claimant filed a 50-page “response” along with 32 new documentary exhibits.⁵⁴ The Claimant’s alleged response was, in fact, an entirely new submission that went well beyond responding to the Article 1128 submissions. While the submissions of the U.S. and Mexico were confined to their observations on the interpretation of NAFTA,⁵⁵ the Claimant used its response as another opportunity to address the facts of the case and submit additional exhibits into the record. It had these exhibits in its possession prior to filing its written submissions. Further, these exhibits were related to points that it had made in those submissions. As a result, there was no justification for the Claimant to fail to attach this evidence to its earlier pleadings.⁵⁶ Although the Tribunal allowed these exhibits into the record, it was forced to grant Canada an opportunity to comment on the exhibits filed with the Claimant’s response, observing that Canada’s witnesses would have been prevented from offering any direct testimony about them before the hearing.⁵⁷

33. Additionally, on October 3, 2014 the Tribunal issued Procedural Order No. 14, which allowed the parties to file “corrections” to witness statements and expert reports in order to avoid wasting hearing time on the cross-examination of minor errors.⁵⁸ It was, in fact, the Claimant’s

⁵³ Procedural Order No. 1, ¶¶ 10.1-10.4.

⁵⁴ Claimant’s Response to the 1128 Submissions of the Non-Disputing Parties dated August 27, 2014.

⁵⁵ Submission of Mexico Pursuant to NAFTA Article 1128 dated July 25, 2014; Submission of the United States of America dated July 25, 2014.

⁵⁶ Canada’s letter to the Tribunal dated September 2, 2014.

⁵⁷ Procedural Order No. 14, ¶¶ 46-49.

⁵⁸ Procedural Order No. 14, ¶ 37.

proposal during the pre-hearing call to file such corrections. On October 17, 2014, a Friday evening and only 9 days before the hearing, the Claimant filed as a purported correction to the Expert Report of Messrs. Low and Taylor an entirely new theory of its damages case, as well as numerous new exhibits – exhibits which it had in its possession for the entirety of the arbitration – in support of this new theory. The Claimant’s tactics necessitated rapid weekend submissions by Canada⁵⁹ and a ruling from the Tribunal that such actions by the Claimant would prejudice Canada’s due process rights. The Tribunal gave the Claimant the option to either bifurcate the damages portion of the hearing, or to withdraw its submission.⁶⁰ The Claimant purported to withdraw this submission from the written record,⁶¹ but as became clear at the hearing, it only did so because it intended to introduce this same evidence orally at the hearing.⁶² This once again required written submissions from the parties during the hearing,⁶³ the engagement of costly damages experts and deliberations by and rulings from the Tribunal.⁶⁴ Once again, such tactics required time and money to be wasted at the hearing to address the Claimant’s conduct.

7. The Claimant Failed to Clarify Whether It Was Dropping Certain Claims Concerning the Conduct of the Ontario Power Authority

34. In its written submissions, the Claimant alleged that the ranking of its TTD and Arran projects during the launch period violated Article 1105.⁶⁵ It also alleged that some of the technical decisions made by the OPA in the Bruce-to-Milton allocation process about whether to award contracts to certain projects connecting at particular circuits or on particular lines violated Canada’s obligations under Articles 1102⁶⁶ and 1105.⁶⁷ In fact, in its written submissions, the

⁵⁹ Canada’s letter to the Tribunal dated October 18, 2014.

⁶⁰ Letter from the Tribunal dated October 20, 2014.

⁶¹ Claimant’s letter to the Tribunal dated October 21, 2014.

⁶² Hearing Transcript, October 26, 2014, pp. 95:21-119:16.

⁶³ E-mail from Professor Kaufmann-Kohler dated October 26, 2014; Letter from Claimant’s expert dated October 27, 2014; Canada’s letter to the Tribunal dated October 28, 2014.

⁶⁴ Hearing Transcript, October 29, 2014, pp. 322:17-329:10.

⁶⁵ Claimant’s Memorial, ¶¶ 793-806; Claimant’s Reply Memorial, ¶¶ 712-764.

⁶⁶ Claimant’s Memorial, ¶¶ 651-675, 628-644; Claimant’s Reply Memorial, ¶¶ 429-433.

Claimant devoted over 141 paragraphs to these allegations. This required Canada to obtain witness statements from current and former employees of the OPA⁶⁸ and to devote significant time and resources to explanations of this highly technical area.

35. However, at the hearing, the Claimant said almost nothing about any of these allegations. In fact, the Claimant did not even cross-examine Canada's witness on the OPA rankings, Richard Duffy, and while it did examine Bob Chow, it did not ask him a single question with respect to the technical decisions made by the OPA, such as the connections to the 500kV Bruce-to-Longwood line, that it had previously challenged as wrongful. At the hearing, Canada requested that the Claimant clarify whether it was continuing to pursue these allegations.⁶⁹ It never responded, and as a result, Canada was forced to devote time and resources to preparing post-hearing submissions on these measures.

8. The Claimant's Circular Arguments with Respect to the FIT Program Resulted in Unnecessary Submissions

36. Following the submission of Canada's Rejoinder in this arbitration, the Claimant filed a motion with the Tribunal seeking to have half a sentence from Canada's submission struck from the record.⁷⁰ In fact, over the course of the months following Canada's Rejoinder, the Claimant devoted an extraordinary amount of time to this single half-sentence. However, as Canada pointed out in its reply to the Claimant's motion, the question of whether the FIT Program was a subsidy was not germane to the case at hand because Canada had never contended that it was a subsidy.⁷¹ The sole purpose of the phrase at issue in the Rejoinder was to point out a logical consequence of the Claimant's own mischaracterization of the FIT Program – a mischaracterization that arose because the Claimant tried to import into its Chapter 11

⁶⁷ Claimant's Reply Memorial, ¶¶ 150, 661-674, 765-776.

⁶⁸ Namely, Shawn Cronkwright, Jim MacDougall, Richard Duffy, and Bob Chow.

⁶⁹ Hearing Transcript, October 31, 2014, pp. 138:23-139:9 and 158:24-159:7.

⁷⁰ Claimant's letter to the Tribunal dated August 12, 2014.

⁷¹ Canada's letter to the Tribunal dated August 19, 2014.

submissions the arguments that Japan and the European Union made before the WTO Panel and the Appellate Body in the *Canada-FIT* WTO dispute.⁷² The issue of subsidy was created by the inappropriate way in which the Claimant chose to argue its case, nothing more. As a result, the Claimant should bear all costs associated with it.

9. The Claimant Prolonged the Hearing with Its Oral Arguments and Cross-Examinations of Limited Relevance

37. In April 2010, upon the Claimant's insistence that the hearing be extended, the Tribunal agreed to add an extra day to the beginning of the hearing.⁷³ Then, after the pre-hearing conference call on September 22, 2014, again upon the Claimant's insistence, the Tribunal added an additional day to the end of the hearing.⁷⁴ The Claimant asserted that this extra day was necessary to ensure that it had an opportunity to adequately present its claims. However, at the hearing itself, the Claimant wasted time repeatedly questioning all witnesses, regardless of their role and their personal knowledge, on unsubstantiated arguments related to its conspiracy theories regarding Ontario's investment agreement with the Korean Consortium. It also engaged in unnecessary re-directs, re-crosses, and in several instances re-re-directs and re-re-crosses of Canada's fact witnesses. Finally, when it had the opportunity to cross-examine Canada's damages expert, Mr. Goncalves, the Claimant spent its time (over an hour) trying to discredit his experience and industry expertise, rather than focusing on the substance of his analysis.⁷⁵

38. Ultimately, the extra-day that the Claimant demanded was completely unnecessary and was cancelled. As Canada pointed out at the hearing, this cancellation resulted in significant additional costs for the cancellation of flights, hotels and boardrooms that had been booked for

⁷² Canada's letter to the Tribunal dated August 27, 2014.

⁷³ Procedural Order No. 7, ¶¶ 16-18.

⁷⁴ Procedural Order No. 14, ¶ 24.

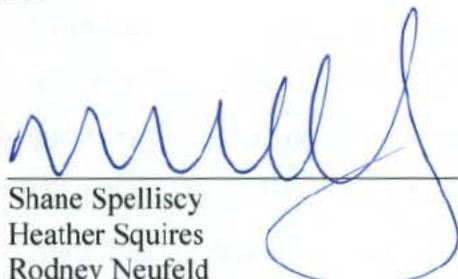
⁷⁵ Hearing Transcript, October 30, 2014, pp. 172:11-220:17.

officials from the Government of Canada as well as its experts, in addition to the extra costs incurred by the Tribunal and the Arbitration Place.⁷⁶

III. CONCLUSION

39. Pursuant to NAFTA Article 1135, and Article 40 of the UNCITRAL Arbitration Rules, the Tribunal has the authority to apportion the arbitration costs, including not only its own fees and expenses but also the costs of legal representation and assistance for the parties, as it believes appropriate. In light of the meritless nature of this case, as well as the Claimant's conduct in this arbitration, the Tribunal should award Canada all of its costs. Such an award will not only compensate Canada, but will also dissuade future meritless claims and the sort of inefficient and inappropriate conduct engaged in by the Claimant here.

March 3, 2015



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Rodney Neufeld
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⁷⁶ Hearing Transcript, October 29, 2014, pp. 138:10-139:6.

ANNEX I – COST OF LEGAL REPRESENTATION⁷⁷

Description ⁷⁸	Lawyers' Fees		
	Rate ⁷⁹	Hours ⁸⁰	Total Fees
FISCAL YEAR 2011-2012 (Notice of Intent, Notice of Arbitration, etc.)			
Owen, Michael (LA-2A)	\$ 240.40	26.50	\$ 6,370.60
Philp, Ian (LA-01)*	\$ 196.30	156.00	\$ 30,622.80
Spelliscy, Shane (LA-2A)*	\$ 240.40	134.50	\$ 32,333.80
Tabet, Sylvie (LA-3A)	\$ 275.80	45.00	\$ 12,411.00
Paralegals			
Perrault, Melissa (EC-04)	\$ 145.30	292.00	\$ 42,427.60
Souliere, Leesa (EC-04)	\$ 145.30	162.50	\$ 23,611.25
Sub-Total (2011-2012):		816.50	\$ 147,777.05
FISCAL YEAR 2012-2013 (Constitution of the Tribunal, First Procedural Hearing, Canada's Objection to Jurisdiction and Request for Bifurcation, Claimant's Answer to Request for Bifurcation, Claimant's Answer on Jurisdiction, Telephone Conference between the Tribunal and the Parties, etc.)			
Owen, Michael (LA-2A)	\$ 250.91	140.00	\$ 35,127.40
Philp, Ian (LA-01)*	\$ 204.78	562.50	\$ 115,188.75
Spelliscy, Shane (LA-2A)*	\$ 250.91	563.00	\$ 141,262.33
Squires, Heather (LA-01)	\$ 204.78	219.00	\$ 44,846.82

⁷⁷ Canada was represented in this arbitration by lawyers and support staff employed by the Government of Canada.

⁷⁸ 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.

⁷⁹ 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 Justice Department 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 \$145.30/hr for paralegals to \$305.19/hr for the most senior lawyers. In all cases, the rate is substantially below the market rate.

⁸⁰ This total includes time spent meeting with clients, assembling and reviewing documentary evidence, 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	Rate	Hours	Total Fees
Paralegals			
Perrault, Melissa (EC-04)	\$ 152.97	1,448.00	\$ 221,500.56
Sub-Total (2012-2013):		2,932.50	\$ 557,925.86
FISCAL YEAR 2013-2014 (Document Production, Claimant's Memorial, Canada's Counter-Memorial, etc.)			
Kam, Susanna (LA-01)*	\$ 218.58	811.00	\$ 177,268.38
Marquis, Laurence (LA-01)*	\$ 218.58	1,598.50	\$ 349,400.13
Mason, Andrew (LA-01)*	\$ 218.58	74.00	\$ 16,174.92
Neufeld, Rodney (LA-2A)*	\$ 262.16	1,808.00	\$ 473,985.28
Spelliscy, Shane (LA-2A)*	\$ 262.16	1,171.00	\$ 306,989.36
Squires, Heather (LA-01)	\$ 218.58	784.75	\$ 171,530.66
Tabet, Sylvie (LA-3A)	\$ 305.19	23.50	\$ 7,171.97
Watchmaker, Raahool (LA-2A)*	\$ 262.16	812.00	\$ 212,873.92
Paralegals			
Perrault, Melissa (EC-04)	\$ 156.11	1,825.00	\$ 284,900.75
Sub-Total (2013-2014):		8,907.75	\$ 2,000,295.36
FISCAL YEAR 2014-2015 (Claimant's Reply Memorial, Canada's Rejoinder Memorial, Non-Disputing Party Submissions, Pre-Hearing Conference Call, Hearing, Post-Hearing Briefs, Costs Submissions, etc.)			
Kam, Susanna (LA-01)*	\$ 218.58	693.25	\$ 151,530.59
Marquis, Laurence (LA-01)*	\$ 218.58	792.00	\$ 173,115.36
Neufeld, Rodney (LA-2A)*	\$ 262.16	302.00	\$ 79,172.32
Spelliscy, Shane (LA-2A)*	\$ 262.16	1,256.00	\$ 329,222.72
Squires, Heather (LA-01)	\$ 218.58	1,080.00	\$ 236,066.40
Tabet, Sylvie (LA-3A)	\$ 305.19	56.00	\$ 17,090.64
Watchmaker, Raahool (LA-2A)*	\$ 262.16	959.00	\$ 251,411.44
Paralegals			
Kawashima, Eiko (EC-03)	\$ 148.01	243.00	\$ 35,966.43
Perrault, Melissa (EC-04)	\$ 156.11	1,551.50	\$ 242,204.67
Parsons, Darian (EC-02)	\$ 142.22	26.50	\$ 3,768.83
Sub-Total (2014-2015):		6,959.25	\$ 1,519,549.40
TOTAL:		19,616.00	\$ 4,225,547.67

ANNEX II – DISBURSEMENTS

Disbursement	Total (\$ CDN)
Berkeley Research Group (Mr. Chris Goncalves)	1,445,439.51
Queen’s Quay (Mr. Steve Dorey)	\$100,050.00
Mr. Jim MacDougall	\$9,044.13
Commonwealth Legal	\$161,172.22
Core Legal (Trial Technology & Graphic Consultants)	\$87,581.36
Printing ⁸¹	\$19,445.87
Courier	\$1,828.52
Hotel Boardroom Rentals (Hearing)	\$10,000.00
Equipment Rental (Hearing)	\$1,113.70
Materials & Supplies	\$1,427.00
Miscellaneous	\$12.00
Travel Costs ⁸²	\$46,339.97
TOTAL DISBURSEMENTS	\$1,883,454.28

⁸¹ Canada incurred some of these printing costs in-house, while private firms provided other services. The Claimant should especially be required to pay Canada’s costs for printing, since it was the Claimant who insisted on the production of paper copies of all submissions and documents.

⁸² This amount includes the costs of attending the initial procedural hearing in Toronto as well as trips to Toronto and Washington, D.C. 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.