

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

BETWEEN:

**WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON,
DOUGLAS CLAYTON, DANIEL CLAYTON AND BILCON OF
DELAWARE INC.**

Claimants

AND:

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

SUBMISSION ON COSTS

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I. INTRODUCTION

1. The Claimants cannot be considered the “winners” in this arbitration. After 17 years, they find themselves walking away with minimal damages, which pale in comparison to the unrealistic claims they advanced over the course of the proceedings. From start to finish, the Claimants went “all in”, challenging virtually every step taken over the course of the Whites Point Environmental Assessment (“EA”) process as a NAFTA violation regardless of merit, and pushing an inflated damages model that bore no relation to the Tribunal’s liability finding.

2. The Claimants were rightly rewarded with minimal returns. Moreover, their conduct in making this arbitration far more protracted and expensive than it needed to be – conduct that continues to this day through their groundless and time-barred challenge to the Tribunal adjudicating the issue of costs – has wasted countless hours and dollars. The meagre outcome achieved by the Claimants and their unreasonable conduct throughout the arbitration must be reflected in the Tribunal’s costs award.

3. The costs award should be proportionate to the relative success of the disputing parties on each and every one of the claims put before the Tribunal. This approach will not only lead to a more equitable result reflecting the actual outcome of this dispute but is also necessary to rebuke and deter future frivolous and unmeritorious claims that bear no relationship to governing facts or law. Given the sheer number of unsuccessful claims made by the Claimants, they simply cannot be considered the “successful party”. The Tribunal rejected the majority of their claims in the jurisdiction and liability phase, finding many to be time-barred, or wholly without merit. In the damages phase, the Claimants failed on both causation and valuation, with the Tribunal awarding just USD 7 million on a claim for USD 458.6 million, that is just 1.5% of the amount sought.

4. Regarding the Claimants’ unreasonable conduct, this arbitration has been plagued by needless delay, expense, and complexity. The Claimants ran their case with little regard for the procedural rules governing this arbitration. In specific instances, they unilaterally re-wrote the procedural rules when it suited them, necessitating a response from Canada and requiring the Tribunal to waste time and money setting the proceedings back on the correct path. Most significantly, the Claimants founded their entire damages claim on a lost profits model that had no place in this arbitration. The significant time and expense incurred by Canada to respond to this

claim was entirely foreseeable and could have been avoided had the Claimants advanced a reasonable damages model – one that reflected the NAFTA violation found by the Tribunal.

5. Given the Claimants' limited success and unreasonable conduct, Canada submits that a more than just and reasonable costs award should order that: (1) each disputing party bears its own share of the arbitration costs; (2) each disputing party bears its own legal fees and expert costs and disbursements in the jurisdiction and liability phase; and, (3) the Claimants bear Canada's legal fees and expert costs and disbursements in the damages phase.

6. This submission on costs is organized as follows: **Section II** outlines the applicable rules and principles regarding the Tribunal's discretion to apportion arbitration and legal costs pursuant to the UNCITRAL Rules. In **Section III**, Canada demonstrates why it is appropriate in the circumstances of this case for the Tribunal to order that each disputing party bear their own share of arbitration costs and their own costs of the jurisdiction and liability phase, and that the Claimants compensate Canada for its legal fees and expert costs and disbursements in the damages phase. Canada provides a detailed account of its costs and disbursements in **Section IV** and explains why the costs it has incurred and the claims it makes are reasonable. **Section V** concludes this submission with the order requested by Canada.

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

7. NAFTA Article 1135 provides that when an arbitral tribunal makes a final award, it may award costs in accordance with the applicable arbitration rules.

8. Article 40 of the UNCITRAL Rules divides costs into two categories: (1) arbitration costs; and (2) costs of legal representation and disbursements. Article 40(1) of the Rules provides that, in principle, the arbitration costs should be borne by the losing party unless apportionment of the costs between the parties is reasonable under the circumstances of the case. With respect to the costs of legal representation and disbursements, Article 40(2) of the Rules provides that the Tribunal, taking into account the circumstances of the case, is free to determine which party shall bear such costs or may apportion such costs between the disputing parties if it determines that apportionment is reasonable.

9. Article 40 of the UNCITRAL Rules provides arbitral tribunals with “wide discretion”.¹ In determining the appropriate allocation of arbitration costs and legal representation costs and disbursements, the Tribunal should follow two guiding principles. The first of these is that “costs follow the event”, which entails consideration not just of the ultimate outcome of the proceedings but of the disputing parties’ relative success on all of the issues put before the Tribunal. The second is that, to ensure the apportionment is reasonable, the Tribunal must take into account the circumstances of the case, including relevant factors such as the conduct of the disputing parties.

A. The Outcome of the Arbitration and the Relative Success of the Disputing Parties on All Disputed Issues

10. With respect to the first guiding principle (“costs follow the event”),² as noted by the *S.D. Myers v. Canada* and *International Thunderbird v. Mexico* tribunals, Article 40(1) emphasizes “success”, and establishes a presumption that the cost of arbitration should be borne by the

¹ **RA-161**, *International Thunderbird Gaming Corporation v. United Mexican States*, Memorandum Opinion of the US District Court for the District of Columbia on Petition to Set Aside Award, 14 February 2007, p. 7; and **RA-162**, *Detroit International Bridge Company v. Government of Canada* (UNCITRAL), Award on Costs, 17 August 2015 (“*DIBC – Award on Costs*”), ¶ 48: (“In summary, an arbitral tribunal has near total discretion to allocate the costs of arbitration pursuant to Article 42(1) of the UNCITRAL Arbitration Rules.”)

² **RA-163**, *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); **RA-164**, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Final Award on Costs, 30 December 2002 (“*S.D. Myers – Award on Costs*”), ¶¶ 29, 49 (losing respondent ordered to pay CAD 350,000 in respect of arbitration costs and CAD 500,000 in respect of legal costs); **RA-044**, *Methanex Corporation v. United States of America* (UNCITRAL), Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005 (“*Methanex – Award on Jurisdiction and Merits*”), Part V, ¶ 13 (ordering claimant to bear cost of entire arbitration and to pay prevailing respondent’s legal fees and costs); **RA-032**, *International Thunderbird Gaming Corporation v. United Mexican States* (UNCITRAL), Final Award, 26 January 2006 (“*Thunderbird – Final Award*”), ¶¶ 220-221 (allocating and fees on a three-quarter to one-quarter basis in favor of the prevailing respondent); **RA-165**, *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); **CA-117**, *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); **RA-029**, *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); **RA-018**, *Chemtura Corporation v. Government of Canada* (UNCITRAL), Award, 2 August 2010, ¶¶ 272-273 (awarding prevailing respondent one half of its fees and costs, and ordering the claimant to bear cost of entire arbitration); **RA-166**, *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); **RA-167**, *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); **RA-162**, *DIBC – Award on Costs*, ¶ 61 (claimant ordered to bear 2/3 of Canada’s reasonable legal costs and expenses in the arbitration and all of the costs of the proceedings); **RA-082**, *Waste Management Inc. v. United Mexican States* (ICSID Case No. ARB (AF)/00/3), Award, 30 April 2004 (“*Waste Management II – Award*”), ¶ 183.

unsuccessful party.³ The *Methanex v. United States* tribunal found that in the absence of a compelling reason not to do so, an arbitral tribunal should follow this approach and award arbitration costs to the successful party.⁴

11. Similarly, NAFTA tribunals have upheld the principle of “costs follow the event” with respect to legal representation costs. This is because the principle is equitable with regards to the outcome and because it serves to discourage vexatious and frivolous claims. As noted by the *Azinian v. Mexico* tribunal, the common practice of ordering a losing claimant to bear the costs of arbitration, as well as the prevailing respondent’s reasonable costs of representation “serves the dual function of reparation and dissuasion.”⁵

12. The application of this principle must be “based on an assessment of relative success rather than simply on which party won the case.”⁶ Accordingly, a claimant could only be considered to be wholly successful if a tribunal has agreed with it on every claim that it advanced. Where a claimant is successful on only some of its claims and is unsuccessful on others, the tribunal should exercise its discretion under Article 40 of the Rules and apportion the arbitration costs reasonably and appropriately.

13. The approach of determining of costs based on the relative success of the disputing parties has been applied by many international investment tribunals. For example, as explained by the tribunal in *Euram Bank v. Slovakia*, “the party who is successful overall should in principle be made whole, but not necessarily in respect of independent claims, jurisdictional objections, or procedural applications, on which it was not successful and which have contributed to the overall

³ RA-164, *S.D. Myers* – Award on Costs, ¶ 15; RA-032, *Thunderbird* – Final Award, ¶¶ 213-214.

⁴ RA-044, *Methanex* – Award on Jurisdiction and Merits, Part V, ¶ 5.

⁵ RA-005, *Azinian, Davitian & Baca v. Mexico* (ICSID No. ARB (AF)/97/2), Award, 1 November 1999 (“*Azinian* – Award”), ¶ 125.

⁶ CA-311, M. Kinneer, A. Bjorklund and J. Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11*, (Kluwer, 2006) at Article 1135, p. 33.

costs of the arbitration in a significant and measurable way.”⁷

14. Even in cases where a claimant has succeeded on issues concerning jurisdiction, admissibility and liability, international investment tribunals have taken into account the respondent's success on other issues such as causation and compensation to decline awarding costs in favour of the claimant.⁸

15. Simply put by the tribunal in *Eastern Sugar B.V. v. Czech Republic*, the “costs follow the event” approach “does not mean that the winner on balance takes it all. On the contrary, it means that the costs must be borne in proportion to the outcome.”⁹ The investment jurisprudence

⁷ **RA-168**, *European American Investment Bank AG (Austria) v. The Slovak Republic* (UNCITRAL), Award on Costs, 20 August 2014 (“*European American Bank – Award on Costs*”), ¶ 42. See also, **RA-169**, *Eli Lilly v. Government of Canada* (ICSID Case No. UNCT/14/2), Final Award, 16 March 2017, ¶ 455: (“Although the UNCITRAL Rules do not elaborate upon the relevant ‘circumstances of the case’ to be considered, Article 40 has been interpreted and applied by numerous tribunals. In the Tribunal’s view Respondent has correctly identified four of the circumstances most commonly examined in this context (i) the relative success of the parties, (ii) quality of the claims, (iii) complexity of the issues, and (iv) reasonableness of the parties’ incurred expenses.”); **RA-170**, *Oxus Gold plc v. Republic of Uzbekistan* (UNCITRAL), Final Award, 17 December 2014, ¶ 1040: (“the Arbitral Tribunal therefore considers that costs should in principle be awarded ‘following the event,’ i.e. taking into account the parties’ relative success regarding their claims and defenses.”); **RA-171**, *EBL (Genossenschaft Elektra Baselland) and Tubo Sol PE2 S.L. v. Kingdom of Spain* (ICSID Case No. ARB/18/42), Award, 11 January 2024, ¶¶ 909-914 (In light of the nuanced outcome where each party had prevailed partially on issues of jurisdiction and liability, the tribunal ordered the claimants to bear 70% of the costs of proceeding and reimburse the respondent 70% of the latter’s legal fees and expenses.); **RA-172**, *SAUR International SA v. Republic of Argentina* (ICSID Case No. ARB/04/4), Award, 22 May 2014 [Unofficial translation], ¶ 414 (The Tribunal noted that the Claimant had reduced its damages claim by 72% during the merits phase. Reasoning that only 28% of the Claimant’s initial damages claims were therefore accepted, the Tribunal ordered the Respondent to pay only 28% of the Claimant’s fees for the merits phase).

⁸ For instance, in *Chevron v. Ecuador*, the tribunal declined to award the claimants all the costs, considering that they were unsuccessful on damages (**RA-173**, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador I* (PCA Case No. 2007-02/AA277), Final Award, 31 August 2011, ¶ 376). Similarly, in *Cargill v. Poland*, the tribunal declined to award the claimant costs, taking into account, *inter alia*, the fact that it did not prevail on a “major” portion of its damages claim (**RA-156**, *Cargill, Incorporated v. Republic of Poland* (UNCITRAL), Final Award, 5 March 2008, ¶ 694). Also in *Mason Capital v. Korea*, the tribunal apportioned costs taking into account the claimant’s relative success with respect to preliminary objections and most of issues of jurisdiction, liability and causation, but the fact that they were only awarded one sixth of the damages claimed (**RA-174**, *Mason Capital L.P. and Mason Management LLC v. Republic of Korea* (UNCITRAL), Final Award, 11 April 2024, ¶¶ 1141-1142). Further, in *Siag and Vecchi v. Egypt*, the tribunal declined to grant recovery of the fees pertaining to the claimants’ quantification expert, noting that “it has accepted Egypt’s submission that the DCF analysis presented by the Claimants’ expert, LECG, was an insufficiently certain basis upon which to calculate damages in the present case.” (**CA-335**, *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt* (ICSID Case No. ARB/05/15), Award, 1 June 2009, ¶ 626). Arbitrator Philippe Sands submitted a “Declaration on Costs” in the *Eco Oro v. Colombia* arbitration, noting with respect to the Claimant’s USD 2.8 million in costs to retain its damages expert, that “there is much that could be said about a decision to expend such a sum of money on a case with such limited prospects of material success.” (**RA-175**, *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41), Declaration on Costs of Arbitrator Philippe Sands, 4 April 2024, ¶¶ 6-8).

⁹ **RA-176**, *Eastern Sugar B.V. v. The Czech Republic* (SCC Case No. 088/2004), Partial Award, 27 March 2007, ¶ 379.

demonstrates that, where a claimant recovers significantly less than the damages claimed, it cannot be described as a “winning” party for the purposes of the application of the principle in the UNCITRAL Rules. Therefore, the Tribunal is required to look specifically at which claims were won and which were lost.

B. The Conduct of a Disputing Party That Has Needlessly Protracted the Proceedings

16. With respect to the second guiding principle, Article 40 of the UNCITRAL Rules also requires the Tribunal to take into account the circumstances of the case, which may affect the apportionment of costs. In this regard, the *Waste Management Inc. v. Mexico (II)* tribunal observed that “[i]n the end the question of costs is a matter within the discretion of the Tribunal, having regard both to the outcome of the proceedings and to other relevant factors.”¹⁰

17. Regarding such other relevant factors, tribunals have considered, amongst others, the extent to which the case was presented in an efficient and professional manner,¹¹ and the conduct of each disputing party where it has led to costs being unnecessarily incurred. For example, in *Euram Bank v. Slovakia* the tribunal held that “[s]uccess is not, however, the only relevant criterion. The conduct of each party is a material consideration, particularly where it has led to costs being unnecessarily incurred. Thus, if a party advanced a claim (or a jurisdictional objection) that was manifestly untenable or frivolous, that would be a highly pertinent consideration.”¹²

18. Consideration of the conduct of the disputing parties in the determination of costs has also been well-recognized in ongoing reform initiations. For example, in the context of recent amendments to the ICSID rules, the ICSID Secretariat has noted that “[t]ribunals increasingly allocate costs by taking specific factors into consideration, including the outcome of proceedings or the behaviour of the parties.”¹³ Accordingly, ICSID has incorporated a new rule on Decisions on Costs, which requires the Tribunal to consider all relevant circumstances in allocating costs, including “(a) the outcome of the proceeding or any part of it; (b) the conduct of the parties during the proceeding, including the extent to which they acted in an expeditious and cost-effective

¹⁰ RA-082, *Waste Management II* – Award, ¶ 183.

¹¹ RA-005, *Azinian* – Award, ¶ 126.

¹² RA-168, *European American Bank* – Award on Costs, ¶ 43.

¹³ RA-177, ICSID Secretariat, Working Paper #1 Proposals for Amendment of the ICSID Rules, Volume 3, 2 August 2018 [Excerpt], Rule 19, ¶¶ 216-227.

manner and complied with these Rules and the orders and decisions of the Tribunal; (c) the complexity of the issues; and (d) the reasonableness of the costs claimed.”¹⁴ In UNCITRAL Working Group III, examples of unreasonable behavior by a disputing party have been noted to include “excess document requests, excessive cross-examination, exaggerated claims and failure to comply with procedural orders.”¹⁵

19. Canada has been forced to incur significant expense to defend against the Claimants’ unsuccessful claims and to respond to the Claimants’ unreasonable conduct over the course of the arbitration. As explained below, in view of the overall outcome and the circumstances of this case, the Tribunal should issue a costs award that reflects the disputing parties’ relative success, and that takes into account the Claimants’ role in making this arbitration far more costly and protracted than it needed to be.

III. THE COSTS AWARD IN THIS CASE MUST REFLECT THE CLAIMANTS’ LIMITED SUCCESS AND UNREASONABLE CONDUCT IN THE ARBITRATION

A. The Claimants Failed on the Majority of the Claims they Advanced in the Arbitration

20. Canada was found liable for having violated NAFTA and the Claimants will walk away with a small amount in compensation. But this is about all that can be said with respect to the “success” the Claimants have achieved. The simple fact is that Canada successfully defended against the vast majority of the issues in dispute in this arbitration. The Claimants were by no means the winner in either phase of the arbitration and this must be reflected in the Tribunal’s costs award.

21. With respect to the jurisdiction and liability phase, the Tribunal’s finding of NAFTA breach based on two distinct measures pales in comparison to the many claims the Tribunal either found to be time-barred, or simply rejected or discounted on the merits. In this regard, the claims submitted to arbitration by the Claimants were wide-ranging and encompassed virtually all aspects of the Whites Point EA. The Claimants alleged that no less than 27 measures taken in the review

¹⁴ **RA-178**, ICSID Arbitration Rules, 2022, Rule 52.

¹⁵ **RA-179**, 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.

of their project breached NAFTA Chapter Eleven.

22. Canada had no choice but to incur significant cost in gathering evidence, calling witnesses, retaining experts, and spending counsel time defending against these claims in written pleadings and at the hearing. And the Tribunal had no choice but to spend time, deliberate, and deliver an Award that addressed the Claimants' claims. But as illustrated in the following chart, at the end of the day the Tribunal determined that only two of these measures actually violated NAFTA Chapter Eleven; all of the others were either rejected because they were found to be time-barred or not a violation of NAFTA, or were simply discounted by the Tribunal.

The Claimants' Minimal Relative Success at Jurisdiction and Liability Phase

	Claims Regarding Measures Alleged to have Breached NAFTA	Tribunal Finding
1	Nova Scotia manipulates legal system to include federal government in EA process (Memorial, ¶ 486)	Rejected. Time Barred (Award, ¶ 281)
2	DFO imposition of blasting conditions on 3.9 ha quarry (Memorial, ¶¶ 459(a), 460)	Rejected. Time Barred (Award, ¶ 281)
3	DFO requests and decisions regarding revised blasting plan and determination re: same (Memorial, ¶¶ 459(b), 491-496)	Rejected. Time Barred (Award, ¶ 281)
4	DFO imposition of comprehensive study level of EA (Memorial, ¶ 459(c))	Rejected. Time Barred (Award, ¶ 281)
5	Nova Scotia/DFO determination dock was a marine based construction to trigger federal EA process (Memorial, ¶ 487)	Rejected. Time Barred (Award, ¶ 281)
6	DFO concocts determination that it was Responsible Authority (Memorial, ¶ 490)	Rejected. Time Barred (Award, ¶ 281)
7	DFO decision to scope quarry into EA (Memorial, ¶ 459 (d))	Rejected. Time Barred (Award, ¶ 281)
8	DFO referral of project to a JRP (Memorial, ¶ 505)	Rejected. Time Barred (Award, ¶ 281)
9	Delay by DFO in its process (Memorial, ¶¶ 521-525)	Rejected. Time Barred (Award, ¶ 281)
10	Political interference in the environmental assessment process (Memorial ¶¶ 500-504, 506-507)	No finding of breach
11	Canada's appointment of JRP members (Memorial, ¶¶ 461-463)	Rejected (Award, ¶ 496)
12	JRP distorted EIS Guidelines (Memorial, ¶¶ 464, 468-471)	Rejected (Award, ¶ 501)
13	JRP conduct of scoping sessions on EIS Guidelines (Memorial, ¶ 465)	Rejected (Award, ¶ 501)
14	JRP subjects Bilcon to unreasonable information requests (Reply, ¶ 615)	No finding of breach

15	JRP conduct of JRP hearings (Memorial, ¶¶ 509-520)	Rejected (Award, ¶ 576)
16	JRP did not question Bilcon's experts (Memorial, ¶ 472)	Rejected (Award, ¶ 576)
17	DFAIT's participation in JRP's public hearings (Memorial, ¶¶ 528-535)	No finding of breach
18	JRP reliance on core community values in its recommendations (Memorial, ¶ 474)	Finding of breach (Award, ¶ 543)
19	JRP does not report on mitigation measures in its report (Reply Memorial, ¶ 601)	Finding of breach (Award, ¶¶ 544-547)
20	JRP rejection of Bilcon's adaptive management approach (Memorial, ¶ 473)	No finding of breach
21	JRP application of concept of cumulative effects (Memorial, ¶¶ 476, 478)	No finding of breach
22	JRP application of precautionary principle (Reply, ¶ 589)	No finding of breach
23	JRP consideration of adverse effects arising from ANFO in blasting (Memorial, ¶ 477)	No finding of breach
24	Factual errors in JRP report (Memorial, ¶ 269)	No finding of breach
25	JRP concludes the project was not justified in the circumstances (Memorial, ¶ 499)	No finding of breach
26	Nova Scotia and Federal Minister of Environment refuse to meet with Bilcon to discuss concerns (Memorial, ¶¶ 270-275, 483, 277, 483)	Rejected (Award, ¶ 586)
27	Federal and provincial response to JRP report resulting in rejection of project (Memorial, ¶¶ 482, 485)	Rejected (Award, ¶¶ 586-587)

23. The Claimants succeeded on only two of the 27 measures alleged to be in breach, a success rate of approximately seven percent. The Claimants should have taken a harder look at the facts and governing law before making so many unfounded claims. Their decision not to do so must be addressed by the Tribunal in its apportionment of costs.

24. The Claimants realized even less success in the damages phase. To be clear, in light of the liability finding, the Claimants were entitled to some compensation – specifically in an amount equivalent to the injury caused by the breach. But the theory the Claimants put forward on causation and quantum, while costly, was wholly unhelpful and rejected by the Tribunal.

25. The Claimants should have valued the damages that they claimed with a view to the breach found by the Tribunal and the injury that the breach caused – specifically that the NAFTA violation caused the Claimants to lose the opportunity inherent in a legally compliant EA process under the laws of Canada. In a but-for world, their project proposal remained unpermitted, unconstructed,

non-operational, with no track record of profitability, and subject to a host of factors that would have impeded its realization. Their damages model should have acknowledged these limitations. But they ignored the basic facts and advanced only a lost profits claim of USD 458.6 million.¹⁶

26. In its Award on Damages, the Tribunal unequivocally found that the Claimants had “failed to prove, to the standard applicable under international law, that the Whites Point Project would have obtained environmental approval.”¹⁷ Their failure on the issue of causation was decisive – that is, without demonstrating that the project would have been approved, the Claimants’ claim for lost profits could not succeed. The Tribunal expressly concluded that its “analysis of the Investors’ lost profits claim ends here, as, without a high degree of certainty as to regulatory approval, it goes without saying that no damages based on the profitable operation of the quarry can be awarded.”¹⁸ All of the “lost profits” evidence, witnesses, and expert testimony put forward by the Claimants that were founded upon their incorrect and unreasonable theory of causation was a complete waste of time for Canada and the Tribunal.

27. Ultimately, the Tribunal rejected both the Claimants’ theory of causation, and their exorbitant damages claim, and it awarded only USD 7 million for the Claimants’ loss of opportunity, just 1.5% of the amount sought.¹⁹ As in the jurisdiction and liability phase, this meagre result needs to be accounted for in the Tribunal’s apportionment of costs.

B. The Claimants’ Unreasonable Conduct Resulted in an Arbitration that was Far More Costly, Complex and Protracted Than it Needed to Be

28. In this case, the manner in which the Claimants conducted the arbitration is just as relevant to an appropriate apportionment of costs as is the limited outcome that they achieved. In just 20 pages, it is impossible to highlight the totality of the Claimants’ unreasonable positions, unilateral actions, and misguided approaches over the past 17 years that unnecessarily inflated the costs of this process. But they have been legion, and they continue to the present day through the Claimants’ groundless challenge to the Tribunal’s jurisdiction for the adjudication of costs. Below,

¹⁶ Claimants’ Reply Memorial on Damages, 23 August 2017, ¶¶ 18, 174-204, 221; Reply Expert Report of FTI Consulting (Howard Rosen), 23 August 2017, ¶ 8.1.

¹⁷ Award on Damages, 10 January 2019 (“Award on Damages”), ¶ 276.

¹⁸ Award on Damages, ¶ 276.

¹⁹ Award on Damages, ¶ 303.

Canada provides just a few examples of the kind of conduct the Tribunal should rebuke through its apportionment of costs.

1. The Claimants Advanced a Completely Inappropriate Lost Profits Claim that was Rejected by the Tribunal and that Needlessly Made the Damages Phase More Costly and Complex

29. The Claimants' approach to the damages phase of the arbitration, more than any other act taken over the course of the arbitration, must be accounted for by the Tribunal in its costs award. From the very outset, it should have been clear that a claim for lost profits was inappropriate, especially considering the breaches found by the Tribunal in the Award on Jurisdiction and Liability. Yet the Claimants gave no consideration to advancing a reasonable theory of damages.

30. In light of the Claimants' stated intention to press forward with a DCF based approach at the beginning of the damages phase, Canada filed a motion requesting the Tribunal to consider the scope of issues to be addressed in the damages phase as a preliminary matter.²⁰ Canada's central point in making its motion was that "the damages the Claimants may recover, if any, are extremely limited, and do not include the lost profits associated with a fully operational quarry and marine terminal at Whites Point."²¹ Canada explained that the Claimants' intention to seek lost profits would effectively require the Tribunal to conduct its own environmental assessment, and would necessitate extensive document production and witness testimony in order to make out and respond to a claim.²² Canada took the step of filing this motion in an attempt to avoid both sides, and the Tribunal, incurring the needless expense of litigating the issues of causation and quantum that would be engaged by the Claimants' approach. Nevertheless, the Claimants opposed Canada's motion, arguing that they were entitled to advance a complete evidentiary record under any applicable head of damage.²³

31. In the face of the Claimants' opposition, the Tribunal had to deny Canada's motion. But even at that time, it held that the Claimants' persistence with a lost profits claim – which might

²⁰ Canada's Motion Requesting the Tribunal to Consider the Scope of Issues to be Addressed in the Damages Phase as a Preliminary Matter, 15 September 2015 ("Canada's Motion on Scope").

²¹ Canada's Motion on Scope, ¶ 4.

²² Canada's Motion on Scope, ¶¶ 7-8.

²³ Claimants' Rejoinder regarding Canada's Scope of Damages Motion, 23 October 2015, ¶¶ 20-21.

ultimately turn out to be unsuccessful – could be addressed through cost consequences, once damages were decided:

In light of Canada's understandable expressions of concern about the extent and expense of the remaining proceedings, the Tribunal notes that at an appropriate stage it will be prepared to consider the Parties' submissions as to cost consequences that may arise in respect of the unsuccessful claims.²⁴

32. The time is now for the Tribunal to impose these cost consequences. The Claimants' insistence on proceeding with a flawed and unreliable lost profits claim of USD 458.6 million for a proposed 50-year quarry project resulted in both disputing parties incurring significant and unnecessary costs, including legal representation costs. Particularly, in attempting to support its argument that it was entitled to almost a half billion dollars in lost profits, the Claimants put forward 17 experts²⁵ and 8 witnesses²⁶ to testify about how, but-for the breach, the approval of the project was a sure thing, and how the project would then be successfully developed and operated. Since the Claimants' project was in an early stage of development and had never been a going-concern, the evidence and testimony of these witnesses covered a wide range of immaterial and highly speculative issues. In addition, all of this testimony provided the basis for FTI Consulting's discounted cash flow ("DCF") valuation of the Claimants' project, which the Tribunal rejected.²⁷

33. In response, Canada was required to retain 8 experts²⁸ and 1 fact witness²⁹ to demonstrate how, but-for the breach, the approval of the project by government decision-makers was not a sure thing, in addition to all of the contingencies and risks that could impede realization of the development and 50-year operation of the project. Canada also devoted two full-time counsel to a

²⁴ Procedural Order No. 20, ¶ 39.

²⁵ The Claimants put forward **11 experts** with its Memorial on Damages: Howard Rosen (FTI Consulting); Michael Cullen (Mercator Geological Services); Peter Oram (GHD); Wayne Morrison (Tamarack Resources); George Bickford (LB&W Engineering); Michael Washer (LB&W Engineering); Christopher Fudge and Ryan MacPherson (SNC-Lavalin); Michael Wick (John T Boyd Company); John Lizak (Mineral Valuation & Capital); Lorne Sossin; and David Estrin. With its Reply Memorial on Damages, the Claimants put forward an additional **6 experts**: Bill Collins (SNC-Lavalin); Jussi Jaakkola (SNC-Lavalin); John D. McCamus; Michael W. Colborne (Thorsteinssons LLP); Stephen E. Shay; and George Seamen (GS Management Inc.)

²⁶ William Ralph Clayton; William Richard Clayton; Joe Forestieri; Paul Buxton; John Wall; Tom Dooley; Dan Fougere; Dan Kontak.

²⁷ Award on Damages, ¶¶ 276-279.

²⁸ Lesley Griffiths; Tony Blouin; Robert G. Connelly; Peter Geddes; Darrell Chodorow (The Brattle Group); Arlie G. Sterling (Marsoft Inc.); SC Market Analytics; The Honourable Thomas Cromwell.

²⁹ Mark McLean.

review, prepare for and rebut the Claimants' DCF valuation. Other counsel on Canada's legal team were required to work on the lost profits claim from time to time. Moreover, Canada incurred significant sums retaining and working with damages experts (Marsoft, SC Market Analytics, and Brattle) to demonstrate all of the problems attendant with FTI's valuation methodology. All of this time and expense in the damages phase of the arbitration could have been avoided had the Claimants taken a more reasonable approach to damages.

2. The Claimants' Disregard for the Procedural Rules Governing the Arbitration Resulted in a Waste of Canada's and the Tribunal's Time

34. In addition to the substance of their unsuccessful lost profits claim, the Claimants' disregard for the procedural rules they were bound to abide by resulted in unnecessary costs in the proceedings. As Canada illustrates below, in the damages phase in particular, the Claimants' improper conduct extended to the unauthorized filing of expert reports, delayed and incomplete filing of submissions, and a blatant disregard for the procedural rules and the Tribunal's orders governing confidentiality.

a) Unauthorized Filing of Expert Reports, Exhibits and Authorities

35. The Claimants' cavalier attitude toward compliance with the procedural rules governing this arbitration is perhaps no better illustrated by their improper attempt to unilaterally file two expert reports completely outside of the briefing schedule – the Reply Rejoinder Reports of Lorne Sossin and of David E. Estrin (the “Reply Rejoinder Reports”). Despite the Tribunal's procedural calendar, which provided for two rounds of pleadings from each of the disputing parties, the Claimants took it upon themselves to file the Reply Rejoinder Reports in what would have served as a “third round”, without notice to Canada or permission from the Tribunal. To make matters worse, they attempted to do so less than 30 days before the oral hearing on damages was scheduled to commence, exhibiting a complete disregard for the prejudice their filing would cause Canada or the logistical difficulties it would engage for the Tribunal.³⁰

36. To avoid having the Tribunal becoming tainted by the improper filings, Canada was required to immediately drop its preparation for the hearing and to challenge the Claimants'

³⁰ **R-848**, Claimants' Letter to Tribunal, 17 January 2018.

unauthorized filing,³¹ resulting in further rounds of submissions on the admissibility of the materials.³² While the challenge was ongoing, the Claimants unilaterally filed new exhibits and authorities relating to the Reply Rejoinder Reports, which Canada was also required to challenge.³³ After the disputing parties made their submissions on the improper filing, and despite the Tribunal's indication that it "considers that the matter is now sufficiently briefed for it to take a decision",³⁴ the Claimants responded with another unauthorized submission.³⁵

37. Ultimately, the Tribunal rightly rejected the Claimants' attempted filing.³⁶ But the Claimants' improper conduct had by this time wasted the time of both Canada and the Tribunal on the eve of the hearing. This is the exact kind of machination that should be addressed in the apportionment of costs.

b) Delayed and Incomplete Filings

38. The Claimants' unreasonable approach of unilaterally delaying and filing incomplete written submissions during the damages phase also resulted in wasted time and effort by Canada. Despite Canada having consented to a six-week extension to the filing of the Claimants' Memorial on Damages to December 16, 2016,³⁷ the Claimants unilaterally filed their Memorial a day late, without prior notice, and with a cover note flippantly stating that they "expect Mr. Estrin's Expert Report to be delivered almost two months later, by February 15, 2017."³⁸

39. As Canada noted in its letter to the Tribunal regarding the Claimants' delayed and incomplete filing,³⁹ the Claimants' approach was contrary to paragraph 38 of Procedural Order

³¹ **R-849**, Canada's E-mail to Tribunal, 18 January 2018.

³² **R-850**, Claimants' Letter to the Tribunal, 19 January 2018; **R-851**, Canada's Letter to the Tribunal, 24 January 2018.

³³ **R-852**, E-mail Chain between Claimants and Canada to the Tribunal, 22 January 2018 (Claimants' E-mail to Tribunal, 22 January 2018; Canada's E-mail to the Tribunal, 22 January 2018; Claimants' Additional E-mail to the Tribunal, 22 January 2018).

³⁴ **R-853**, Tribunal's E-mail to the Parties, 24 January 2018.

³⁵ **R-854**, Claimants' E-mail to the Tribunal, 24 January 2018.

³⁶ **R-855**, Tribunal's Letter to the Parties, 26 January 2018.

³⁷ **R-856**, Claimants' Letter to Tribunal, 2 November 2016.

³⁸ **R-857**, Claimants' Letter to the Tribunal, 17 December 2016.

³⁹ **R-858**, Canada's Letter to the Tribunal, 12 January 2017.

No. 1.⁴⁰ In addition to the issue of the late filing, Canada was also forced to notify the Claimants of a number of deficiencies in their Damages Memorial that were contrary to the procedures set out by this Tribunal.⁴¹ The delayed and incomplete filing of Mr. Estrin's report prejudiced Canada in preparing its Counter-Memorial on Damages and created further uncertainty surrounding the timelines and next steps in the arbitration leading to further rounds of submissions.⁴²

40. Ultimately this issue culminated in the Tribunal's issuance of Procedural Order No. 22, wherein the Claimant was ordered to either elect to treat their incomplete filing as complete or otherwise file a revised memorial with all exhibits, witnesses, and expert sources by February 27, 2017.⁴³ In spite of the clear directive, the Claimants refused commit to a deadline, and instead created further uncertainty by responding that "they elect to resubmit their Damages Memorial once the expert report of David Estrin is available."⁴⁴ It was only after Canada sought further clarification that the Claimants specified they would file their Memorial on March 10, 2017.⁴⁵ Again, this Chapter in the arbitration, and the wasted time and expense resulting from same, was one authored entirely by the Claimants.

c) Disregard For the Tribunal's Confidentiality Order

41. Another example of the Claimants' disregard for the procedural rules is illustrated by their approach to confidentiality designations. In Procedural Order No. 2 ("Confidentiality Order"), the Tribunal set down a simple rule: documents submitted to or issued by the Tribunal would be publicly available subject to appropriate redactions for confidential or restricted access information.⁴⁶ The Tribunal then clearly defined the type of information that could be designated

⁴⁰ Procedural Order No. 1 provides that "[e]xpert reports, witness statements and other evidence on which a Disputing Party intends to rely are to be included with the Memorial and Counter-Memorial." *See*, ¶ 38.

⁴¹ **R-859**, Canada's Letter to the Claimants, 12 January 2017 (Memorial filing was not in accordance with procedures for designating confidential information in accordance with Procedural Order No. 2; the Claimants had failed to provide all of the sources and documentary evidence on which its experts and witnesses rely; the Claimants had failed to number their exhibits in accordance with Procedural Order No. 3.)

⁴² **R-858**, Canada's Letter to the Tribunal, 12 January 2017; **R-860**, Claimants' Letter to the Tribunal, 18 January 2017; **R-861**, Claimants' E-mail to the Tribunal, 20 January 2017; **R-862**, Canada's Letter to the Tribunal, 24 January 2017; **R-863**, Claimants' Letter to the Tribunal, 1 February 2017.

⁴³ Procedural Order No. 22, 14 February 2017, ¶ 42.

⁴⁴ **R-864**, Claimants' Letter to the Tribunal, 20 February 2017.

⁴⁵ **R-865**, Canada's Letter to the Tribunal, 21 February 2017; **R-866**, Claimants' Letter to the Tribunal, 3 March 2017.

⁴⁶ Procedural Order No. 2, 4 May 2009, ¶ 27.

as confidential or restricted access.⁴⁷ Yet, throughout the damages phase, the Claimants showed complete disregard for these rules.

42. First, the Claimants designated significant amounts of information in their Memorial on Damages as confidential, even though it was publicly available on the internet, or otherwise clearly did not meet the definition of confidential information. For example, after the Tribunal ordered in Procedural Order No. 22 that the Claimants' blanket designation of its entire Memorial on Damages pleading as "confidential" did not meet the rules prescribed in its Confidentiality Order and ordered them to provide a redacted version of the Memorial,⁴⁸ the Claimants failed to designate any information in the expert reports submitted with their Memorial on Damages within the prescribed timelines. Canada was forced to seek confirmation that they were maintaining blanket designations over the entirety of the expert reports.⁴⁹ The Claimants confirmed they were indeed asserting blanket designations over the entirety of nine expert reports submitted with its Memorial, despite the Tribunal's previous ruling that "materials designated as containing confidential information are generally assumed to contain confidential information only in part, and, thus, to be capable of redaction."⁵⁰ Canada was accordingly forced to write to the Tribunal to object to their misuse of confidentiality designations.⁵¹

43. Canada had to spend an enormous amount of time and resources to challenge the Claimants' inappropriate confidentiality designations which included over 115 instances of overbroad designations. In many instances, the information was either clearly publicly available or was not consistently designated throughout the remaining areas of the Claimants' Memorial.⁵²

44. Rather than addressing each of Canada's objections, the Claimants instead submitted a lengthy letter to the Tribunal requesting that the Tribunal uphold the Claimants' designations.⁵³

⁴⁷ Procedural Order No. 2, 4 May 2009, ¶ 1(b) and (c).

⁴⁸ Procedural Order No. 22, 14 February 2017, ¶¶ 28-29.

⁴⁹ **R-867**, Canada's Letter to the Claimants, 18 April 2017.

⁵⁰ **R-868**, Claimants' Letter to Canada, 26 April 2017: ("We confirm that the expert reports included in the Investors' Damages Memorial Record, except for those of David Estrin and Lorne Sossin, are confidential and are designated "CONFIDENTIAL" by the Investors."); Procedural Order No. 22, 14 February 2017, ¶ 27.

⁵¹ **R-869**, Canada's Letter to the Tribunal *attaching* Annexes I and II, 10 May 2017.

⁵² *For example*, see **R-869**, Canada's Letter to the Tribunal, 10 May 2017, Annex I, rows 1, 4, 5, 9, 10, 64, 107.

⁵³ **R-870**, Claimants' Letter to the Tribunal, 25 May 2017.

The Tribunal had to then issue a decision addressing the disputing parties' disagreement and enclosing a version of the Damages Memorial that it had redacted, requesting that the Claimants modify their redactions in accordance with the Tribunal's designations.⁵⁴

45. Despite the Tribunal's clear instructions, the Claimants persisted with their use of overbroad designations in their Reply Memorial, requiring Canada to again spend significant time and expense reviewing and responding to the Claimants' designations, and necessitating a further response from the Tribunal.⁵⁵ It was neither Canada's nor the Tribunal's responsibility to waste time reviewing and redacting the Claimants' designations, but their forced involvement in the matter was the by-product of the Claimants' unreasonable conduct, which must be addressed by the Tribunal in its apportionment of costs.

C. Canada's Request for A Just and Reasonable Cost Award In Light of the Claimants' Limited Success and Unreasonable Conduct Throughout the Arbitration

46. As Canada has explained above, had the Claimants advanced a more reasonable claim, and had they conducted their case in a more reasonable manner, this arbitration would not have been as lengthy, complex, or expensive as it ended up being. In particular, the costly path of the damages phase was dictated entirely by the Claimants, yet, other than being awarded a negligible amount in compensation, they were unsuccessful in all respects on damages.

47. Taking all of the above into account, Canada submits that a just and reasonable costs award in this case should order the disputing parties to equally bear the arbitration costs in this matter. Likewise, given the outcome of the jurisdiction and liability phase (a finding of liability in respect of just two measures while Canada successfully defended the Claimants' claims pertaining to 25 other measures), the disputing parties should bear their own legal fees and expert costs and disbursements incurred in the jurisdiction and liability phase. However, the Claimants should be ordered to pay Canada's legal fees and expert costs and disbursements in the damages phase of the arbitration. This approach would recognize the Claimants' abject failure in the claim that they advanced for lost profits, the Tribunal's warning that there should be cost consequences for such failure, and the Claimants' unreasonable conduct throughout the damages phase.

⁵⁴ **R-871**, Tribunal's Letter to the Parties, 27 June 2017.

⁵⁵ Procedural Order No. 26, 8 December 2017, ¶ 24.

IV. THE COSTS INCURRED AND CLAIMED BY CANADA ARE REASONABLE

48. The costs that Canada incurred in this arbitration are reasonable in light of the length of the proceedings and the complexity and extent of the issues raised by the Claimants. In Annexes I and II to this submission, which respectively pertain to the jurisdiction and liability phase (Annex I) and the damages phase (Annex II), Canada has set out the following categories of the costs it has incurred: (A) arbitration costs; (B) legal fees; and, (C) expert costs and additional disbursements.⁵⁶ Below, Canada explains each of these cost categories in relation to the costs award it is requesting from the Tribunal.

A. Arbitration Costs

49. Paragraphs 38 (a)-(c) of the UNCITRAL Arbitration Rules include the fees of the arbitral tribunal, including the cost of assistance required by the Tribunal, travel and other expenses, as allowable costs that a disputing party may seek to recover. As can be seen in part A of Annexes I and II respectively, Canada has paid **CAD 937,347.01** in Tribunal advances in the jurisdiction and liability phase, and **CAD 514,720.00** in the damages phase, for a total of **CAD 1,452,067.01** in Tribunal advances. **Canada is requesting that the Tribunal order that each disputing party bear its own share of arbitration costs.**

B. Legal Fees

50. Paragraphs 38(d) and (e) of the UNCITRAL Arbitration Rules concern costs for legal representation and assistance, such as witness and expert costs and additional disbursements, incurred in relation to the arbitration.

51. With respect to its legal fees, Canada was represented in this arbitration by lawyers employed by the Trade Law Bureau of the Government of Canada. A detailed breakdown of the total time spent on by these lawyers on Canada's defence, by calendar year, is set out in part B of

⁵⁶ For the Tribunal's reference, Canada has also prepared Annex II-A – Summary of Legal Fees and Expert Costs Relating Specifically to Claimants' DCF Model. This Annex provides a breakdown of a sub-set of Canada's legal fees and expert costs in the damages phase set out in Annex II – specifically fees and costs incurred to respond directly to the Claimants' lost profits model (i.e., it is exclusive of legal fees or expert costs relating to matters such as causation or mitigation). Canada started tracking these legal fees and costs separately in light of the Tribunal's reference to "cost consequences" of a failed lost profits claim in its Procedural Order No. 20, ¶ 39. To be clear, Canada is making a claim for the entirety of its legal fees and expert costs and disbursements in the damages phase, but it provides the data in Annex II-A for the benefit of the Tribunal.

Annexes I and II. In total, Canada incurred **CAD 7,722,292.86** in legal fees in the jurisdiction and liability phase and **CAD 2,458,866.25** in the damages phase (which includes time spent over the course of 2025 dealing with the Claimants' meritless challenge to the Tribunal⁵⁷) for a total of **CAD 10,181,159.11**. **Canada is requesting the Tribunal to order that the disputing parties bear their own legal fees in the jurisdiction and liability phase** in light of the Claimants' very limited success in this phase relative to the number of claims that they made. However, in light of the outcome of the damages phase and the Claimants' role in making this phase far more expensive than it needed to be, **Canada is requesting the Tribunal to order the Claimants to pay Canada's legal fees in the damages phase – a total of CAD 2,458,866.25**.

C. Expert Costs and Additional Disbursements

52. Canada also required the services of many experts and witnesses to address the Claimants' claims throughout the arbitration. As can be seen in Part C of Annex I, in the jurisdiction and liability phase, Canada incurred CAD 1,562,419.62 in expert costs and CAD 370,184.15 in disbursements, for a total of **CAD 1,932,603.77**. As can be seen in Part C of Annex II, in the damages phase, Canada incurred CAD 2,557,456.34 in expert costs and CAD 226,913.26 in disbursements, for a total of **CAD 2,784,369.60**.

53. Canada is requesting that the Tribunal order the disputing parties to bear the expense of their own expert costs and disbursements for the jurisdiction and liability phase of the arbitration. The damages phase of the arbitration is a different matter. As Canada has explained above, the number of experts that Canada had to retain (four to address causation, one to address mitigation, and three to address the Claimants' DCF model), and the extent of their involvement, was a result of the Claimants' unreasonable approach to damages. Given the outcome of this phase of the arbitration, and the Claimants' role in making it unnecessarily protracted, **Canada should be awarded the costs of all of its experts, with the exception of John Evans (Goldblatt Partners)**,⁵⁸ **and additional disbursements for the damages phase – a total of CAD 2,658,119.60**.

⁵⁷ The Claimants should be made to pay all of Canada's legal fees in connection with the Tribunal challenge.

⁵⁸ Canada has not included any expert costs of John Evans related to the mitigation issue in the amount it seeks, as the Tribunal found that in the present case the duty of mitigation of damages did not entail a duty to challenge the JRP Report through local judicial review.

V. ORDER REQUESTED

54. For all of the reasons stated above, Canada respectfully requests that this Tribunal order that:

- a) The disputing parties bear their own share of the arbitration costs.
- b) The disputing parties bear their own legal fees, and expert costs and disbursements of the jurisdiction and liability phase.
- c) The Claimants reimburse Canada its legal fees (CAD 2,458,866.25), and expert costs and disbursements (CAD 2,658,119.60), incurred in the damages phase for a total of CAD 5,116,985.85.

14 January 2026

Respectfully submitted on behalf of Canada,



Scott Little
Yu Cai Tian
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ANNEX I
ARBITRATION COSTS, LEGAL FEES, AND EXPERT COSTS AND
DISBURSEMENTS – JURISDICTION AND LIABILITY PHASE

A. Arbitration Costs

Arbitration Costs	Total (CAD)
Tribunal Advancements	\$937,347.01

B. Legal Fees

FISCAL YEAR 2008-2009			
April 1, 2008 - March 31, 2009			
Participant	Rate	Hours	Total Fees
Scott Little, Counsel	\$213.20	780.08	\$166,313.06
Reuben East, Counsel	\$213.20	469.05	\$100,001.46
Shane Spelliscy, Counsel	\$213.20	462.00	\$98,498.40
Jean François Hébert, Counsel	\$213.20	363.00	\$77,391.60
Adam Douglas, Counsel	\$177.80	68.50	\$12,179.30
Paralegal(s):			
Elizabeth Hrubesz	\$129.00	184.25	\$23,768.25
Sub-Total 2008-2009		2,326.88	\$478,152.07

FISCAL YEAR 2009-2010			
April 1, 2009-March 31, 2010			
Participant	Rate	Hours	Total Fees
Scott Little, Counsel	\$208.70	1452.00	\$303,032.40
Jean François Hébert, Counsel	\$208.70	1186.50	\$247,622.55
Reuben East, Counsel	\$208.70	979.00	\$204,317.30
Adam Douglas, Counsel	\$172.10	679.50	\$116,941.95
Stephen Kurelek, Counsel	\$208.70	632.50	\$132,002.75
Shane Spelliscy, Counsel	\$208.70	494.98	\$103,302.33
Paralegal(s):			
Elizabeth Hrubesz	\$133.20	1398.83	\$186,324.16
Cheryl Fabian	\$118.30	824.00	\$97,479.20
Sub-Total 2009-2010		7,647.31	\$1,391,022.63

FISCAL YEAR 2010-2011			
April 1, 2010-March 31, 2011			
Participant	Rate	Hours	Total Fees
Stephen Kurelek, Counsel	\$237.40	1643.00	\$390,048.20
Scott Little, Counsel	\$237.40	1563.00	\$371,056.20
Reuben East, Counsel	\$237.40	1014.50	\$240,842.30

Jean François Hébert, Counsel	\$237.40	825.00	\$195,855.00
Shane Spelliscy, Counsel	\$237.40	138.50	\$32,879.90
Adam Douglas, Counsel	\$193.00	131.00	\$25,283.00
Paralegal(s):			
Cheryl Fabian-Bernard	\$126.60	1565.50	\$198,192.30
Elizabeth Hrubesz	\$141.50	1392.33	\$197,014.70
Sub-Total 2010-2011		8,272.83	\$1,651,171.60

FISCAL YEAR 2011-2012			
April 1, 2011-March 31, 2012			
Participant	Rate	Hours	Total Fees
Scott Little, Counsel	\$240.20	1959.75	\$470,731.95
Stephen Kurelek, Counsel	\$240.20	1661.00	\$398,972.20
Adam Douglas, Counsel	\$196.20	976.00	\$191,491.20
Shane Spelliscy, Counsel	\$240.20	945.00	\$226,989.00
Jean François Hébert, Counsel	\$240.20	784.00	\$188,316.80
Reuben East, Counsel	\$240.20	155.50	\$37,351.10
Paralegal(s):			
Elizabeth Hrubesz	\$145.40	1430.50	\$207,994.70
Cheryl Fabian-Bernard	\$131.80	1538.25	\$202,741.35
Sub-Total 2011-2012		9,450.00	\$1,924,588.30

FISCAL YEAR 2012-2013			
April 1, 2012-March 31, 2013			
Participant	Rate	Hours	Total Fees
Stephen Kurelek, Counsel	\$250.90	1258.00	\$315,632.20
Scott Little, Counsel	\$250.90	1045.50	\$262,315.95
Shane Spelliscy, Counsel	\$250.90	551.75	\$138,434.08
Jean François Hébert, Counsel	\$250.90	367.00	\$92,080.30
Reuben East, Counsel	\$250.90	88.50	\$22,204.65
Paralegal(s):			
Elizabeth Hrubesz	\$153.00	1118.50	\$171,130.50
Cheryl Fabian-Bernard	\$146.10	1221.50	\$178,461.15
Sub-Total 2012-2013		5,650.75	\$1,180,258.83

FISCAL YEAR 2013-2014			
April 1, 2013-November 1, 2013⁵⁹			

⁵⁹ In this fiscal year, Canada has only included hours billed between April 1, 2013 and November 1, 2013 (following close of the hearing on jurisdiction and liability on 31 October 2013, the Parties were awaiting the Tribunal's Decision, and therefore Canada has excluded any time billed on any procedural or internal administrative matters during this period).

Participant	Rate	Hours	Total Fees
Scott Little, Counsel	\$262.20	973.50	\$255,251.70
Stephen Kurelek, Counsel	\$262.20	906.50	\$237,684.30
Adam Douglas, Counsel	\$218.60	524.00	\$114,546.40
Shane Spelliscy, Counsel	\$262.20	430.50	\$112,877.10
Jean François Hébert, Counsel	\$262.20	346.50	\$90,852.30
Reuben East, Counsel	\$262.20	296.00	\$77,611.20
Paralegal(s):			
Cheryl Fabian-Bernard	\$156.10	555.25	\$86,674.53
Elizabeth Hrubesz	\$156.10	779.00	\$121,601.90
Sub-Total 2013-2014		4,811.25	\$1,097,099.43

TOTAL:	\$7,722,292.86
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C. Expert Costs and Disbursements

Expert and Witness Costs	Total (CAD)
Bennett Jones LLP (Lawrence E Smith)	\$1,393,429.62
Connelly Environmental Assessment (Robert Connelly)	\$154,572.07
Bruce Hood	\$14,417.93
Sub-Total for Expert Costs:	\$1,562,419.62
Additional Disbursements	Total (CAD)
AMS Imaging (Digitizing and Scanning – Document Production)	\$141,199.24
Core Legal (Trial Technology & Graphic Consultants)	\$96,524.02
Travel	\$89,230.80
Printing	\$27,484.00
Meeting Rooms	\$7,980.60
Courier	\$5,023.07
Materials & Supplies	\$2,742.42
Sub-Total for Additional Disbursements:	\$370,184.15
TOTAL:	\$1,932,603.77

ANNEX II
ARBITRATION COSTS, LEGAL FEES, AND EXPERT COSTS AND
DISBURSEMENTS – DAMAGES PHASE

A. Arbitration Costs

Arbitration Costs	Total (CAD)
Tribunal Advancements	\$514,720.00

B. Legal Fees

FISCAL YEAR 2015-2016			
August 11, 2015-March 31, 2016⁶⁰			
Participant	Rate	Hours	Total Fees
Scott Little, Senior Counsel	\$281.70	372.75	\$105,003.68
Susanna Kam, Counsel	\$218.60	71.50	\$15,629.90
Shane Spelliscy, Counsel	\$262.20	49.00	\$12,847.80
Paralegal(s):			
Darian Parsons	\$142.20	88.00	\$12,513.60
Sub-Total 2015-2016		581.25	\$145,994.98

FISCAL YEAR 2016-2017			
April 1, 2016-March 31, 2017			
Participant	Rate	Hours	Total Fees
Susanna Kam, Counsel	\$200.12	1256.67	\$251,484.80
Scott Little, Senior Counsel	\$255.98	484.75	\$124,086.31
Krista Zeman, Counsel	\$200.12	260.17	\$52,065.22
Shane Spelliscy, Senior Counsel	\$255.98	239.75	\$61,371.21
Rodney Neufeld, Senior Counsel	\$255.98	119.00	\$30,461.62
Paralegal(s):			
Darian Parsons	\$126.80	575.08	\$72,920.14
Sub-Total 2016-2017		2,935.42	\$592,389.29

FISCAL YEAR 2017-2018			
April 1, 2017-March 31, 2018			
Participant	Rate	Hours	Total Fees

⁶⁰ In this fiscal year, Canada has only included hours billed between August 11, 2015 and March 31, 2016. Canada has excluded any time billed between April 1, 2014 and August 10, 2015, which encompasses time the Parties were awaiting the Tribunal's decision on jurisdiction and liability as well as time spent on Canada's Motion to Stay the Proceedings pending the outcome of its set aside application in Federal Court.

Susanna Kam, Counsel	\$238.55	1366.81	\$326,052.53
Scott Little, Senior Counsel	\$255.98	1170.16	\$299,537.56
Mark Klaver, Counsel	\$200.12	1119.75	\$224,084.37
Shane Spelliscy, Senior Counsel	\$255.98	949.50	\$243,053.01
Krista Zeman, Counsel	\$238.55	839.50	\$200,262.73
Rodney Neufeld, Senior Counsel	\$255.98	498.00	\$127,478.04
Paralegal(s):			
Darian Parsons	\$126.80	1393.00	\$176,632.40
Benjamin Tait	\$126.80	464.17	\$58,856.76
Sub-Total 2017-2018		7,800.90	\$1,655,957.38

Canada has excluded all time between April 1, 2018 and April 1, 2025 which encompasses the time the disputing parties were awaiting the Tribunal's Award on Damages, and the time that the arbitral proceedings were suspended pending the Claimants' application for set aside in domestic courts.

FISCAL YEAR 2025-2026			
April 1, 2025 -January 14, 2026			
Participant	Rate	Hours	Total Fees
Scott Little, General Counsel	\$306.61	53.5	\$16,403.64
Yu Cai Tian, Counsel	\$250.84	72.5	\$18,185.90
Paralegal(s):			
Darian Bakelaar	\$203.89	88.75	\$18,095.24
Benjamin Tait	\$189.68	62.42	\$11,839.83
Sub-Total 2025-2026		277.17	\$64,524.60

TOTAL:	\$2,458,866.25
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C. Expert Costs and Disbursements

Expert Costs	Total (CAD)
<i>Causation</i>	
Lesley Griffiths	\$97,161.71
Anthony Blouin	\$92,690.85
Connelly Environmental Assessment (Robert Connelly)	\$72,657.08
BLG LLP (Thomas Cromwell)	\$69,967.69
<i>Mitigation</i>	

Goldblatt Partners (John Evans) ⁶¹	\$126,250.00
<i>Quantification of Lost Profits</i>	
The Brattle Group	\$1,529,247.71
SC Market Analytics	\$385,147.12
Marsoft Inc.	\$184,334.18
Sub-Total for Expert and Consultant Costs:	\$2,557,456.34
Additional Disbursements	Total (CAD)
Core Legal (Trial Graphics)	\$127,547.06
Travel	\$59,925.60
Meeting Rooms	\$24,079.56
Printing	\$12,765.06
Materials & Supplies	\$1,509.84
Courier	\$1,086.14
Sub-Total for Additional Disbursements:	\$226,913.26
TOTAL:	\$2,784,369.60

⁶¹ As noted above, Canada has not included any expert costs related to the mitigation issue in the amount it seeks, specifically those of Goldblatt Partners (John Evans).

ANNEX II-A

SUMMARY OF LEGAL FEES AND EXPERT COSTS RELATING SPECIFICALLY TO CLAIMANTS' DCF MODEL

Canada has prepared Annex II-A – Summary of Legal Fees and Expert Costs Relating Specifically to Claimants' DCF Model which provides a breakdown of a sub-set of Canada's legal fees and expert costs in the damages phase set out in Annex II. Here Canada specifically lists the fees and costs incurred to respond directly to the Claimants' lost profits model (i.e., it is exclusive of legal fees or expert costs relating to matters such as causation or mitigation). Canada started tracking these legal fees and costs separately in light of the Tribunal's reference to "cost consequences" of a failed lost profits claim in its Procedural Order No. 20. To be clear, Canada is making a claim for the entirety of its legal fees and expert costs and disbursements in the damages phase, but it provides the data in Annex II-A for the benefit of the Tribunal.

A. Legal Fees

FISCAL YEAR 2016-2017			
April 1, 2016 to March 31, 2017			
Participant	Rate	Hours	Total Fees
Krista Zeman, Counsel	\$200.12	213.92	\$42,809.67
Susanna Kam, Counsel	\$200.12	46.50	\$9,305.58
Shane Spelliscy, Senior Counsel	\$255.98	44.00	\$11,263.12
Scott Little, Senior Counsel	\$255.98	34.00	\$8,703.32
Rodney Neufeld, Senior Counsel	\$255.98	36.50	\$9,343.27
Paralegal(s):			
Darian Parsons	\$126.80	13.00	\$1,648.40
Sub-Total 2016-2017		387.92	\$83,073.36

FISCAL YEAR 2017-2018			
April 1, 2017 to March 31, 2018			
Participant	Rate	Hours	Total Fees
Krista Zeman, Counsel	\$238.55	650.75	\$155,236.41
Shane Spelliscy, Senior Counsel	\$255.98	249.50	\$63,867.01
Susanna Kam, Counsel	\$238.55	71.50	\$17,056.33
Mark Klaver, Counsel	\$200.12	29.40	\$5,883.53
Paralegal(s):			
Darian Parsons	\$126.80	45.50	\$5,769.40
Sub-Total 2017-2018		1,046.65	\$247,812.68

TOTAL:	\$330,886.04
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B. Expert Costs

Expert Costs	Total (CAD)
<i>Quantification of Lost Profits</i>	
The Brattle Group	\$1,529,247.71
SC Market Analytics	\$385,147.12
Marsoft Inc.	\$184,334.18
TOTAL:	\$2,098,729.01