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

- between -

WINDSTREAM ENERGY LLC

(the "Claimant")

- and -

GOVERNMENT OF CANADA

(the "Respondent")

PROCEDURAL ORDER NO. 4

ARBITRAL TRIBUNAL:
Dr. Veijo Heiskanen (President)
Mr. R. Doak Bishop
Dr. Bernardo Cremades

REGISTRY:
Permanent Court of Arbitration

23 February 2015

Pursuant to Sections 4.2 and 16.1 of Procedural Order No. 1 dated 16 September 2013 (as amended), the Tribunal issues the following Procedural Order.

1 Procedural background

1.1 On 20 January 2015, the Respondent submitted its Counter-Memorial in these proceedings. In a letter to the Tribunal accompanying the submission, the Respondent argued that the Claimant in its written submissions had "inappropriately relied upon information that is protected from use in legal proceedings by Parliamentary privilege." The Respondent indicated that it would be bringing a motion shortly for an order to strike this material from the record, however, "in the interests of providing a complete response at this time, and without waiving the privilege in any way, Canada has responded to the Claimant's allegations on their merits in its written submissions as well."

1.2 In its Counter-Memorial the Respondent made a similar statement.[1]

1.3 On 6 February 2015, the Respondent submitted a motion to the Tribunal, requesting that "the information and exhibits listed in the Annex attached hereto be disregarded and excluded from evidence" (the "**Motion**"). The Respondent contends that "[t]he information and exhibits at issue … contain witness testimony given before the Standing Committee on Justice Policy of the Legislative Assembly of Ontario" (the "**Ontario Standing Committee**"), and that "such evidence is protected by parliamentary privilege." Annex A to the Motion contains a "List of Statements in the Claimant's Memorial Relying on Information Subject to Parliamentary Privilege" with 57 entries, detailing the relevant passages and corresponding references. Together with the Motion, the Respondent submitted a total of sixteen supporting documents.

1.4 On 9 February 2015, the Tribunal invited the Claimant to provide its comments on the Respondent's Motion by 13 February 2015.

1.5 On 13 February 2015, the Claimant submitted a response to the Respondent's Motion (the "**Response**"), requesting that the Motion be dismissed. Together with its Response, the Claimant submitted a "Book of Authorities," containing a total of fourteen supporting documents.

2 The issues disputed between the Parties

2.1 The Parties' positions on the disputed issues that are addressed in this Procedural Order can be summarized as follows.

a) The position of the Respondent

2.2 The Respondent refers to Article 27(4) of the 2010 UNCITRAL Arbitration Rules, which provides that the Tribunal "shall determine the admissibility, relevance, materiality and weight of the evidence offered," and suggests that, "[i]n making such determinations, the Tribunal may seek guidance from the 2010 IBA Rules on the Taking of Evidence in International Arbitration" (the "**IBA Rules**"). According to the Respondent, the evidence specified in Annex A to the Motion is "protected by parliamentary privilege" and "must be excluded from evidence in this arbitration, and all references to it in the Claimant's submissions must be disregarded." Specifically, the Respondent "requests that the Tribunal order that the witness testimony detailed in the … Annex be disregarded and excluded from the record," that "[w]here the statement is taken directly from the transcript or report of the Ontario Standing Committee … the exhibit also be excluded from the record," and that "[w]here the statement has been repeated in a secondary source … the part of the secondary source containing the witness testimony be disregarded and excluded from the record."

[1] Respondent's Counter-Memorial, para. 570.

2.3 The Respondent contends that the parliamentary privilege of freedom of speech is recognized in parliamentary democracies around the world, and that it is "essential to ensuring full disclosure and honesty in standing and legislative committee proceedings." While statements made during parliamentary proceedings would normally be "public by nature," parliamentary privilege would "prevent[] the use of those statements in subsequent legal proceedings." Specifically, the Respondent points out that in Canada, the parliamentary privilege of freedom of speech extends to witnesses appearing before parliamentary committees and that "[o]nce the privilege is found to apply to the evidence at issue, the Tribunal or court need not consider the interests of the parties in using such evidence."

2.4 The Respondent refers to Article 9.2(b) of the IBA Rules as directing the Tribunal to "exclude from evidence any '[d]ocument, statement, oral testimony or inspection' where there is a 'legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.'" The Respondent further refers to Article 9.3 of the IBA Rules, according to which "the Tribunal should take into account 'the expectations of the Parties and their advisors at the time the legal impediment or privilege is said to have arisen,'" and the Commentary on the IBA Rules, which notes that "expectations will be formed by the approach to privilege prevailing in the home jurisdiction."

2.5 The Respondent points out that "[t]he Claimant's Memorial relies on direct and paraphrased quotations from sworn testimony found in the transcripts of proceedings before the Ontario Standing Committee" as well as on "reproductions of such quotations in secondary sources" in two respects. First, the Claimant would use that testimony "to demonstrate that 'relevant documents … have been deleted' and to argue that the Tribunal should draw an adverse inference that 'such emails would have contained information detrimental to Canada's case.'" Second, the Claimant would use the testimony "to support its arguments relating to the cancellation of gas plants and an alleged commitment the Government of Ontario made to TransCanada Corporation …, attempting to prove, amongst other things, that it was treated less favorably than TransCanada in violation of NAFTA Articles 1102 and 1105."

2.6 The Respondent claims that "[t]he witnesses that provided sworn testimony to the Ontario Standing Committee did so with the expectation that their testimony could not be used in a subsequent legal proceeding" and that "without the ongoing protection of Ontario Standing Committee witnesses in domestic court and international arbitration, the investigative function of the Ontario Standing Committee would be seriously compromised." In addition, "the Ontario Standing Committee itself would be hampered in its functions for a similar reason if statements made during its sessions … could be used in subsequent legal proceedings against the Government."

2.7 As a subsidiary argument, the Respondent requests that "if the Tribunal finds that Article 9.2(b) does not apply … the information and exhibits in the … Annex be disregarded and excluded from evidence pursuant to Article 9.2(f) of the IBA Rules," providing that "a Tribunal shall exclude from evidence any '[d]ocument, statement, oral testimony or inspection' where there are 'grounds of special political or institutional sensitivity … that the Arbitral Tribunal determines to be compelling.'" Referring to the decision rendered by the tribunal in *Bilcon v. Canada*, the Respondent contends that the balancing between "the Claimant's interest in the use of the evidence in question to advance its case" and "the Respondent's interest having the evidence excluded" also requires the Tribunal to take into account "the 'extent to which [the Respondent's] interests are protected or recognized as legitimate in its domestic legislation' as well as the availability of non-privileged sources of information with related content."

2.8 The Respondent argues that, in the present case, "it is evident that the need to maintain the confidence of the Ontario Standing Committee's investigative process significantly outweighs the Claimant's interest in relying on that testimony." The evidence relied on by the Claimant would be "unnecessary and irrelevant to the issues in this arbitration" because, amongst other

things, there would be no basis for the adverse inference that the Claimant is seeking and the Claimant and TransCanada were not "in like circumstances," thus excluding any possible discrimination. According to the Respondent, "[t]he Claimant's interest in using irrelevant information for no clear purpose cannot outweigh the compelling need for Canada and Ontario to ensure that it has a fully operational and robust parliamentary investigatory system."

b) The position of the Claimant

2.9 The Claimant argues in response that, contrary to the Respondent's unsupported assertions, "the scope of protection under Canadian law against admitting into evidence testimony before parliamentary committees is limited," and that "there is no 'absolute bar.'" Canadian courts would "frequently refer to and rely on the transcripts of testimony before committee of Parliament and the provincial legislatures" and the Respondent itself would have "relied on such evidence to support its argument in other cases." A principle according to which parliamentary privilege would render inadmissible evidence based on the testimony provided by a witness before a parliamentary committee would only have been recognized by Canadian courts where the evidence was used "to establish the civil or criminal liability of the witness in a legal proceeding against the witness" or "to impugn the credibility of the witness on cross examination" (emphasis in original). In addition, according to the Claimant, "[t]he burden of proving that parliamentary privilege applies lies with the party who asserts it."

2.10 The Claimant argues that, based on these principles, the evidence that the Respondent seeks to exclude "is not protected by parliamentary privilege in the context of this arbitration," pointing out that "[t]his proceeding is not a civil or criminal proceeding against any of the witnesses" that gave evidence before the Ontario Standing Committee, "[n]or is the credibility of those witnesses being challenged in this proceeding." According to the Claimant, the Respondent has not discharged "its burden to prove that it is necessary for this Tribunal to expand the scope of parliamentary privilege beyond the scope already recognized by Canadian courts" and there is no basis for the "unsupported assertion that 'witnesses may be reticent to provide full and frank disclosure'" if their evidence is used in proceedings "in which those witnesses do not face personal liability and in which their credibility is not being challenged."

2.11 As a consequence, the Claimant contends that there is no "legal impediment or privilege under the legal or ethical rules … applicable" within the meaning of Article 9.2(b) of the IBA Rules. Even if the evidence were subject to parliamentary privilege under Canadian law, the Claimant argues that "the Tribunal is not bound by Canadian law with respect to parliamentary privilege" and that the Respondent has therefore not shown that the evidence should be excluded from evidence pursuant to Article 9.2(b) of the IBA Rules.

2.12 The Claimant further contends that there are no "special grounds of political or institutional sensitivity" within the meaning of Article 9.2(f) of the IBA Rules that would warrant an exclusion of the evidence in question. Quoting from the decision rendered in *Bilcon v. Canada*, the Claimant points out that "[t]he mere assertion of sensitivity is not enough to sustain a privilege claim" and that "[t]he party that resists disclosure … must adduce additional information to demonstrate that its special political or institutional sensitivity claims are compelling." As to the evidence at issue here, the Claimant suggests that "[n]othing … raises special concerns of political or institutional sensitivity."

2.13 In addition, the Claimant argues that Article 9.2(f) is only "intended to protect from disclosure … documents that reveal state secrets or similarly sensitive information" and "does not apply to documents that are already in the public domain." According to the Claimant, "[e]ven under Canadian law, politically sensitive information that would otherwise be immune from disclosure loses that immunity once it has been publicly disclosed." The fact that the evidence in question "has been broadcast live and published on the Internet" as well as "been

the subject of extensive media coverage" would be "fatal to Canada's request under Article 9.2(f)."

2.14 In any event, even where special grounds of political or institutional sensitivity are established, tribunals would "have applied a balancing test to determine, on a document-by-document basis, whether the political or institutional sensitivity outweighs" the interests of the party relying on the evidence. The Claimant points out that "Canada has not even purported to complete" the document-by-document balancing analysis required in this regard.

2.15 Finally, the Claimant insists that the evidence is "relevant to the issues of (1) the relationship between the OPA and the Ministry of Energy; (2) whether TransCanada Corporation was in like circumstances to Windstream …; and (3) whether staff at the Premier's Office or the Ministry of Energy are likely to have deleted emails that would be relevant to this case." According to the Claimant, Canada's position in this regard "effectively asks the Tribunal to prejudge the merits of the case before the hearing of the merits" and should therefore be rejected.

3 Reasons

3.1 The difference between the Parties concerns the scope of parliamentary privilege under Canadian law and its applicability in international arbitration proceedings where Canada itself is a party. While the Respondent takes the view that parliamentary privilege is "absolute" and prevents the use of statements made by members of the legislature and by witnesses appearing before a parliamentary committee in subsequent legal proceedings, the Claimant argues that the privilege only precludes the use of such statements in subsequent civil and criminal proceedings against the individual who made the statement. The Claimant also contends that, although parliamentary privilege also precludes the cross-examination of an individual on statements made before a parliamentary committee, the credibility of the individuals who made the statements relied upon by the Claimant will not be challenged in this arbitration as the Respondent has not called any of these individuals as witnesses, and the Claimant does not challenge their credibility but on the contrary relies on their statements.

3.2 The Tribunal notes that there is no dispute between the Parties insofar as they both appear to agree that under Canadian law parliamentary privilege precludes reliance on statements made before a parliamentary committee as evidence in civil and criminal proceedings against the individual who made the statement. However, this aspect of parliamentary privilege is irrelevant here as the purpose of this arbitration is not to determine the civil or criminal liability of any of the individuals in question, and obviously none of them appears as a respondent.

3.3 The Tribunal is also satisfied, and the Parties appear to agree, that under Canadian law parliamentary privilege precludes reliance on statements made before a parliamentary committee in cross-examination in the context of a subsequent legal proceeding of the individual who made the statement, for the purpose of impugning the credibility of the witness.[2]

3.4 However, the Tribunal is not satisfied, and finds that the Respondent has failed to show, that under Canadian law testimony given before a parliamentary committee is governed by parliamentary privilege in circumstances where, as here, the purpose of the proceedings is not to establish the civil or criminal liability of the witness in a legal proceeding against the

[2] *See, e.g., Gagliano v. Canada (Procureur général)*, 2005 FC 576 ¶ 77, 108 [Respondent's Book of Authorities, Tab 14] ("Parliamentary privilege helps to demarcate the legitimate spheres of jurisdiction, and is therefore a fundamental aspect of our constitutional democracy. It makes those powers, privileges and immunities which are necessary to Parliament's functioning in the present Canadian context subject to the exclusive jurisdiction of Parliament. It is my opinion that precluding cross-examination based on evidence presented to a Parliamentary committee is necessary for that committee, primarily because it encourages witnesses to speak openly.")

witness, or where the credibility of the witness will not and cannot be impugned on cross-examination because none of the individuals in question has been produced as a witness. Indeed, the evidence produced by the Claimant shows that Canadian courts have frequently referred to, and relied upon, statements made before parliamentary committees.[3]

3.5 The Respondent further argues that "the Ontario Standing Committee itself would be hampered in its functions for a similar reason if statements made during its sessions (whether by it or by witnesses) could be used in subsequent legal proceedings against the Government." According to the Respondent, "[a]llowing the testimony to be used in this proceeding would not be fair to the witnesses that provided it or the institution that received it." The Tribunal notes that, to the extent that the Respondent suggests that under Canadian law the scope of parliamentary privilege is so broad as to preclude reliance on the testimony in international arbitral proceedings for the purpose of seeking to establish the responsibility of the State under an international treaty, it has not produced any legal authority to support its position. The Respondent does not appear to argue that there is a doctrine or principle of parliamentary privilege in international law that should be recognized and applied in the present arbitration. The Tribunal is therefore unable to agree with the Respondent's broad reading of the scope of parliamentary privilege.

3.6 The Respondent argues, alternatively, that the testimony given before the Ontario Standing Committee be excluded from evidence on the basis of special political or institutional sensitivity under Article 9.2(f) of the IBA Rules. The Claimant notes, in response, that the testimony in question is in the public domain as it has been broadcast and published, and has also been subject to extensive media coverage. The Tribunal agrees and finds that in the circumstances there cannot be compelling grounds to exclude the testimony from evidence.

3.7 Finally, the Tribunal wishes to clarify the evidentiary issues that have not been decided by the above determinations. As noted above, the Claimant argues that parliamentary privilege, insofar as it protects individuals from being cross-examined on evidence given before a parliamentary committee, is inapplicable in this arbitration as the Respondent has not put forward any of the individuals in question as witnesses in this proceeding, and as the Claimant does not challenge the credibility of these individuals; on the contrary, its submits that their testimony before the Ontario Standing Committee was truthful. The Tribunal understands that the Claimant does not intend to produce any of these individuals as witnesses in this arbitration, and indeed appears to acknowledge that they could not be called as witnesses on the issues on which they testified before the Ontario Standing Committee as their cross-examination on these issues would be incompatible with parliamentary privilege. In these circumstances, the Tribunal's decision to dismiss the Respondent's Motion must remain entirely without prejudice to its subsequent decision as to the evidentiary value to be given in this arbitration to oral evidence produced before the Ontario Standing Committee, to the extent that such evidence will not have been tested, and the Parties appear to agree cannot be tested, in this arbitration. Both Parties remain free to make submissions on this issue, as well as on the relevance and materiality of the evidence offered, in the course of the proceedings.

[3] *See e.g. R v. B. (S.A.)*, 2003 SCC 60, ¶ 49 [Claimant's Book of Authorities **("CBA")**, Tab 1]; *R v. Dow*, 2010 QCCS 4276, ¶¶ 82-92 [CBA, Tab 2]; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, ¶ 213 [CBA, Tab 3]; *R. v. Sharpe*, 2001 SCC 2, ¶¶ 201, 205 [CBA, Tab 4]; *Stevens v. Canada (Commission of Inquiry)*, 2004 FC 82, ¶¶ 9-10 [CBA, Tab 5]; *McIvor v. Canada (Registrar of Indian & Northern Affairs)*, 2007 BCSC 827, ¶¶ 8-9 [CBA, Tab 6], rev'd 2009 BCCA 153 on other grounds.

4 The Tribunal's decision

4.1 In light of the above, the Tribunal decides as follows:

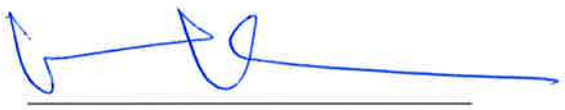
a) The Respondent's request that the information and exhibits listed in the Annex attached to the Respondent's letter of 6 February 2015 be disregarded and excluded from evidence on the grounds that they are protected by parliamentary privilege is denied;

b) The Respondent's alternative request that the information and exhibits listed in the Annex attached to the Respondent's letter of 6 February 2015 be disregarded and excluded from evidence on the grounds of special political or institutional sensitivity is denied; and

c) The Tribunal's decision is without prejudice to its assessment of the evidentiary value to be given to oral evidence produced before the Standing Committee on Justice Policy of the Legislative Assembly of Ontario.

Seat of arbitration: Toronto, Ontario, Canada

Date: 23 February 2015



Dr. Veijo Heiskanen
(Presiding Arbitrator)

On behalf of the Tribunal