

**IN THE MATTER OF AN ARBITRATION UNDER THE
UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW
AND THE NORTH AMERICAN FREE TRADE AGREEMENT**

BETWEEN:

TENNANT ENERGY, LLC

Claimant

AND

GOVERNMENT OF CANADA

Respondent

GOVERNMENT OF CANADA

MOTION FOR TARGETED DOCUMENT PRODUCTION

April 3, 2020

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I. OVERVIEW

1. Canada writes pursuant to paragraphs 15.2 and 16.3 of Procedural Order No. 1 (“PO1”) and paragraph 181 of Procedural Order No. 4 (“PO4”) to request that the Tribunal order targeted document production with respect to Tennant Energy, LLC’s (“Tennant” or the “Claimant”) ability to comply with an adverse costs award, should one be made in this arbitration.

2. In PO4, the Tribunal dismissed Canada’s Motion for Security for Costs and Disclosure of Third-Party Funding (“Motion for Security for Costs”) but noted that this decision did not preclude Canada from reviving its motion “if there is a change in circumstances or if there is new evidence which suggests the Claimant may not, or may not be able to, comply with an adverse costs order.”¹ There has now been such a change in circumstances, in the form of new evidence, that further supports Canada’s argument that the Claimant cannot comply with an adverse costs order. Specifically, the Claimant has disclosed the details of its third party funding arrangement,

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████████████████████ In order for Canada to evaluate whether it wishes to revive its motion for security for costs, and so that the Tribunal can fully and properly assess Canada’s motion, the Claimant must be ordered to produce targeted documents relevant to its financial position.

3. As set out in the attached Redfern Schedule in Appendix A, Canada seeks only documents that should be in the possession, custody or control of the Claimant because they are either basic records that would be kept by a corporate organization in the ordinary course of business or specific records regarding an ability to pay an adverse costs award in this arbitration. Without having access to these documents, Canada will be unable to assess the Claimant’s financial condition, will not be in a position to discharge its burden of demonstrating the exceptional circumstances that are required for the Tribunal to order security for costs, and consequently will be unable to revive its motion for security for costs should it wish to do so. Further, this Tribunal will not be able to fully assess whether security for costs are warranted in this arbitration without such evidence before it. Currently, Canada is left in an untenable position in which it cannot meet its burden, as all relevant evidence lies solely in the hands of the Claimant. If such evidence is not ordered to be produced,

¹ Procedural Order No. 4, 27 February 2020 (“PO4”), ¶ 181.

the Tribunal will effectively be denying any future motion by Canada for security for costs without having had the benefit of the full picture before it.

II. RELEVANT PROCEDURAL HISTORY

4. On August 16, 2019, Canada submitted its Motion for Security for Costs, to which the Claimant replied on September 23, 2019. Following the Second Procedural Hearing held on January 14-15, 2020, where the disputing parties made oral submissions on these issues, the Tribunal issued PO4 on February 27, 2020.

5. With respect to third-party funding, the Tribunal ordered that the Claimant make the following disclosures to both the Tribunal and Canada by March 12, 2020: (a) the identity of any third-party funder; and (b) any terms contained in the third-party funding arrangement relating to the payment of adverse costs orders against the Claimant. The Tribunal based its decision on the fact that “the existence of third-party funding agreements can be relevant to the Tribunal’s assessment of applications for security for costs” and for reasons of transparency in order to “determine whether any conflict of interest exists.”²

6. The Tribunal also held that a security for costs order may only be obtained in “exceptional circumstances” and that it was not persuaded that Canada had met its burden of proving that element.³ In support of this, the Tribunal found that Canada had not discharged its initial burden of establishing a reasonable basis that the Claimant was impecunious.⁴ In dismissing Canada’s Motion for Security for Costs, however, the Tribunal noted that its decision did not preclude Canada from re-applying for security for costs should there be a change in circumstances or if new evidence suggesting the Claimant may not, or may not be able to, comply with an adverse costs order comes to light.⁵

7. On March 12, 2020, the Claimant disclosed the identity of its third-party funder, the terms in the funding arrangement [REDACTED]

² PO4, ¶¶ 109-110.

³ PO4, ¶¶ 173 and 177.

⁴ PO4, ¶¶ 177-178.

⁵ PO4, ¶ 181.

[REDACTED]

8. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

III. THE CLAIMANT’S DISCLOSURE CONSTITUTES A CHANGE IN CIRCUMSTANCES THAT NECESSITATES TARGETED DOCUMENT PRODUCTION

9. The Claimant’s March 12 Disclosure fully justifies Canada’s request for targeted document production by the Claimant in order to evaluate whether Canada wishes to revive a motion for security for costs in this arbitration. [REDACTED]

⁶ E-mail from Claimant to Tribunal, re: “Tennant Energy v. Canada – Confidential Disclosure required under PO 4”, 12 March 2020 (“Claimant’s Disclosure, 12 March 2020”).

⁷ [REDACTED]

three elements were sufficient to show that it would be effectively impossible for a claimant to pay an adverse costs order.¹¹ [REDACTED]

[REDACTED] The third factor – the Claimant’s solvency – remains to be confirmed and can only be confirmed by the Claimant’s production of targeted documents.

12. In its Motion for Security for Costs, Canada explained that its due diligence based on publicly available information pointed to the Claimant being entirely impecunious and unable to pay an adverse costs order.¹² In doing so, Canada emphasized that a claimant’s solvency and ability to pay an adverse costs order are of utmost importance in determining whether an order for security for costs is necessary.¹³ Canada reiterated this point, and the Claimant’s apparent impecuniosity, at the Second Procedural Hearing and the Claimant did not submit any rebuttal evidence.¹⁴ In the face of the evidence and arguments put forward by Canada, it is telling that the Claimant has failed to file any rebuttal evidence that might satisfy the Tribunal that it can meet an adverse costs award. It has filed absolutely no evidence in this regard.

13. Canada is now in a position where it cannot meet the burden placed upon it “of establishing a reasonable basis that the Claimant is impecunious such that the burden then shifts to the Claimant to produce evidence of its ability to meet a costs award.”¹⁵ All information about the financial status of the Claimant rests with the Claimant itself because it is a private company that is not traded and does not have public financial records or publicly known assets. Even the Feed-In Tariff (“FIT”) Application for the Skyway 127 Project (the Claimant’s alleged investment), which was submitted by Skyway 127 Wind Energy Inc. (“Skyway 127”), fails to show any financial

¹¹ **RLA-006**, *Manuel García Armas et al. v. Bolivarian Republic of Venezuela* (UNCITRAL) Procedural Order No. 9 Decision on Provisional Measures, 20 June 2018 [Spanish, with attached translated excerpts in English] (“*García Armas – Procedural Order No. 9*”), ¶ 250; **RLA-112**, *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan* (ICSID Case No. ARB/18/35) Decision on the Respondent’s Request for Security for Costs and the Claimant’s Request for Security for Claim, 27 January 2020 (“*Dirk Herzig – Decision on Request for Security for Costs*”), ¶¶ 57-60.

¹² See Canada’s Motion for Security for Costs and Disclosure of Third-Party Funding, 16 August 2019, ¶ 30; Canada’s Submission on Legal Authority Regarding Canada’s Motion for Security for Costs and Disclosure of Third-Party Funding, 17 February 2020, ¶ 4.

¹³ Canada’s Motion for Security for Costs and Disclosure of Third-Party Funding, ¶ 28.

¹⁴ Second Procedural Hearing Transcript Day 2 - 2020-01-15 (Final Version), p. 251:1-12, 21-23, p. 253:5-15.

¹⁵ PO4, ¶ 178.

information with respect to the Claimant.¹⁶ First, there is no reference to the Claimant in Skyway 127's FIT Application, likely because the Claimant was not involved in the Skyway 127 Project at the time that the FIT Application was submitted in 2009.¹⁷ Second, while proof of financial capacity was submitted as part of Skyway 127's FIT Application, since General Electric was part owner of the Project at the time, only financial information from General Electric was included.¹⁸

14. The Claimant must bear some responsibility at this stage, to assist the Tribunal in making a determination with respect to any motion that Canada brings with respect to security for costs. That responsibility arises in the form of responding to targeted document requests on the Claimant's financial status. This is consistent with the tribunal's approach in *Garcia Armas* where, prior to granting Venezuela's request for security for costs, the tribunal ordered that the claimants provide to both the tribunal and the respondent documents that would clearly demonstrate their solvency.¹⁹ The *Garcia Armas* tribunal did so in order to be fully informed as to whether the claimants could pay an adverse costs order prior to ordering security for costs.

15. Canada is seeking a full opportunity to discharge its burden by requesting that the Tribunal allow targeted document production with respect to the Claimant's financial condition. Only then, after such evidence is made available, will the Tribunal have the full picture it needs to make a determination with respect to security for costs in this arbitration.

¹⁶ **R-025**, Skyway 127 FIT Application (Nov. 27, 2009) (Portions of the FIT Application for the Skyway 127 Project designated as non-confidential were filed as part of the claimant's Reply submission in *Mesa Power v. Canada* (exhibit C-0491). The exhibit included with this Motion is a copy of exhibit C-0491 in the *Mesa Power v. Canada* arbitration, and represents the portions of Skyway 127's FIT Application that Skyway 127, as the FIT applicant, consented to being produced through the document production phase in that arbitration. Neither Canada nor Mesa Power requested the document be designated as confidential or restricted access information pursuant to the Confidentiality Order in *Mesa Power v. Canada*. Canada has cited to that **public, non-confidential exhibit** as part of this motion.)

¹⁷ See Notice of Arbitration, 1 June 2017, ¶¶ 10 and 11. As such, any proof as to financial capacity that was provided when applying to the FIT Program would have been in respect of the original applicant and/or other project partners at the time and is irrelevant to showing that the Claimant would now or in the future be capable of satisfying an adverse costs award.

¹⁸ **R-025**, Skyway 127 FIT Application (Nov. 27, 2009), pp. 29-84. The FIT Rules only required the applicant to show the tangible net worth of one equity holder in the Project, so long as that equity investment accounted for "15% or more of the direct or indirect Economic Interest in the Applicant". (See **R-026**, Ontario Power Authority, FIT Rules Version 1.2 (Nov. 19, 2009), s. 13.4(a)(iv)). General Electric met this criteria.

¹⁹ **RLA-006**, *García Armas – Procedural Order No. 9*, ¶ 7. See also Canada's Motion for Security for Costs and Disclosure of Third-Party Funding, ¶ 31.

IV. TARGETED DOCUMENT PRODUCTION ON THE CLAIMANT'S FINANCIAL CONDITION IS NECESSARY AT THIS STAGE IN THE PROCEEDING

16. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. This change in circumstances resulting from the March 12 Disclosure emphasizes the necessity of targeted document production on the Claimant's financial condition at this stage in the proceedings, requiring a departure from the timelines and procedures set out for document production in PO1.

17. Canada cannot wait until the document production phase provided for by the procedural calendar in PO1 to obtain information on the Claimant's financial condition before it re-applies for security for costs. And although in PO4, the Tribunal refused the Claimant's request for a departure from the calendar in PO1 and consequently refused the Claimant's request for an early production of the *Windstream* Documents,²⁰ Canada's request is completely distinguishable.

18. First, unlike the Claimant's request for production of the *Windstream* Documents, the types of documents that Canada is requesting are very limited in scope and distinct from those that relate to issues that would arise in the merits or damages phase of the arbitration. Canada's motion pertains to a discrete issue that is unrelated to the merits of the case, and therefore warrants different consideration from other document requests made pursuant to PO1.

19. Second, unlike the Claimant, who did not even attempt to demonstrate how the *Windstream* Documents were relevant and material to its pleaded claim²¹, as explained in this motion and as set out in the attached Redfern Schedule in Appendix A, Canada is demonstrating how the documents it is requesting are both relevant and material to a determination of whether the Claimant would be able to meet an adverse costs award.

20. Third, should Canada pursue bifurcation of the proceedings (as provided for in PO4) and be successful on its jurisdictional claims, this arbitration would be decided without any document

²⁰ PO4, ¶¶ 59 and 69.

²¹ PO4, ¶ 61.

production phase altogether, leaving Canada in a position where it does not obtain information on the Claimant's financial condition, never has an opportunity to revive a motion for security for costs, and is potentially left with a costs award in its favour that it cannot collect.²² In such a scenario, the timelines and procedures for document production set out in PO1 would never arise.

21. The March 12 Disclosure raises serious questions about whether Canada could collect any future cost award in its favour. It is both necessary and appropriate for the Tribunal to order targeted document production on the Claimant's financial condition at this stage of the proceedings. Only with this information will Canada be able to assess whether it should revive a motion for security for costs and mitigate any concerns with respect to its ability to collect a cost award in its favour as this arbitration proceeds.

V. CANADA'S TARGETED DOCUMENT PRODUCTION REQUESTS WILL NOT UNDULY BURDEN THE CLAIMANT

22. Canada's requests for documents relating to the Claimant's financial condition, set out in the Redfern Schedule in Appendix A, are made in accordance with paragraph 7.2 of PO1 and Article 3.3 of the *IBA Rules on the Taking of Evidence in International Arbitration 2010*. Canada is requesting narrow and specific categories of documents and has provided sufficient detail as to what is being requested. The narrow and specific categories of documents requested by Canada are relevant to determining whether the Claimant would be able to meet an adverse costs award and are material to a determination of whether it is necessary for Canada to pursue security for costs in this arbitration.

23. Canada's motion for document production is for the discrete and limited purpose of determining whether the Claimant has the ability to pay an adverse costs award. Canada's requests extend only to documents that should be in the possession, custody or control of the Claimant because they are either basic records that would be kept by a corporate organization in the ordinary course of business or specific records regarding an ability to pay an adverse costs award in this arbitration, such as existing financial statements, bank balance summaries and details on assets

²² See Procedural Order No. 1, 24 June 2019, Annex I: Procedural Calendar, s. 2 "Should the proceedings be bifurcated".

held. Production of documents on Tennant's financial condition at this stage in the proceedings will therefore not be unduly burdensome for the Claimant.

VI. ORDER REQUESTED

24. In light of the information obtained through the March 12 Disclosure, Canada requests targeted document production with respect to the Claimant's financial condition, as set out in the attached Redfern Schedule in Appendix A. In this regard, Canada requests that the Tribunal order targeted document production in accordance with the following schedule:

Event	Date
A. Tribunal Decision on Canada's Motion	[TBD]
B. Claimant's Objections to Canada's document requests (if any) and production of documents in response to non-disputed requests	A + 10 days
C. Canada's Response to the Claimant's Objections (if any)	B + 5 days
D. Tribunal decision on Objections to document requests (if any)	TBD
E. Production of all remaining documents	D + 15 days

April 3, 2020

Respectfully submitted on behalf of the
Government of Canada,



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