

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT AND THE
UNCITRAL ARBITRATION RULES, 1976**

-between-

TENNANT ENERGY, LLC
(the “Claimant”)

-and-

GOVERNMENT OF CANADA
(the “Respondent”, and together with the Claimant, the “Parties”)

PROCEDURAL ORDER NO. 6

The Arbitral Tribunal

Mr Cavinder Bull SC (Presiding Arbitrator)

Mr Doak Bishop

Sir Daniel Bethlehem QC

Registry

Permanent Court of Arbitration

Tribunal Secretary

Ms Christel Y. Tham

6 May 2020

1. Relevant Procedural History

1. On 24 June 2019, the Tribunal issued Procedural Order No. 1 (“**PO1**”), establishing the procedural calendar of the arbitration. Under Scenario 1 of the procedural calendar (“*Should the proceedings not be bifurcated*”), the document production phase of the proceedings is scheduled to take place 30 days after the submission of the Respondent’s Counter-Memorial.
2. On 27 February 2020, the Tribunal issued Procedural Order No. 4 (“**PO4**”), deciding, *inter alia*, the Respondent’s Motions for Security for Costs and for the Disclosure of Third-Party Funding. The Tribunal dismissed the Respondent’s Motion for Security for Costs, noting however that “the dismissal does not preclude the Respondent from re-applying for security costs if there is a change in circumstances or if there is new evidence which suggests that the Claimant may not, or may not be able to, comply with an adverse costs order.”
3. As to the Motion for the Disclosure of Third-Party Funding, the Tribunal ordered the Claimant to disclose (i) the identity of any third-party funder, and (ii) any terms contained in the third-party funding arrangement relating to the payment of adverse costs orders against the Claimant in this arbitration.
4. On 12 March 2020, the Claimant disclosed what the Respondent has characterized as “the identity of [the Claimant’s] third-party funder, the terms in the funding arrangement confirming that the third-party funder is not liable for the payment of an adverse costs award against the Claimant, and the terms of a side letter between the Claimant and the third-party funder waiving the Claimant’s requirement to take out and maintain legal expenses insurance”¹ (the “**March 12 Disclosure**”).
5. On 3 April 2020, the Respondent filed a Motion for Targeted Document Production with respect to the Claimant’s ability to comply with an adverse costs award (the “**Respondent’s Motion**”). Together with its Motion, the Respondent filed a Redfern Schedule listing the documents for which it requests production.
6. On 6 April 2020, the Tribunal invited the Claimant to (i) comment on whether the Respondent’s Motion should be entertained now or await the document phase envisaged in Annex I to PO1; and (ii) provide any comments it may have on the Respondent’s proposed schedule for document production set out at page 9 of the Respondent’s Motion. The Tribunal also stated that it did not require the Claimant to respond to the Redfern Schedule enclosed with the Respondent’s Motion at this time.
7. On 20 April 2020, the Claimant filed a Response to the Respondent’s Motion (the “**Response**”), requesting that the Respondent’s Motion be denied.

¹ Respondent’s Motion, ¶ 7.

2. The Respondent's Motion

8. The Respondent argues that the Claimant's March 12 Disclosure constitutes a change in circumstances that necessitates the Respondent's document production request at this stage in the proceedings.²
9. The Respondent refers to the three requirements established by the *Dirk Herzig v. Turkmenistan* and *Garcia Armas v. Venezuela* tribunals for the granting of security for costs, and contends that that two of those requirements (i.e. the involvement of a third-party funder and the explicit non-liability of the funder for payment of an adverse costs order) are fulfilled in the instant case, since "it is now clear" that it is the Claimant, and not its third-party funder, who would be responsible for paying an adverse costs award.³ It is only the third element (i.e. the Claimant's solvency) that is yet to be confirmed, and that can only be done "by the Claimant's production of targeted documents" with respect to the Claimant's financial condition.⁴ The Respondent states in this regard that the Claimant has so far failed to file any rebuttal evidence to the effect that it could meet an adverse costs award.⁵
10. According to the Respondent, its request should be distinguished from the Claimant's earlier request to depart from the procedural calendar for the purposes of producing documents related to the *Windstream* arbitration. This is because, unlike in that case, here "the 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".⁶ By contrast, in its current Motion, the Respondent offers detailed reasons regarding the relevance and materiality of the requested documents, which were not present in the Claimant's earlier request.⁷
11. If it decided to pursue bifurcation of the proceedings – under the conditions set forth in PO4 – the Respondent states that the arbitration "would be decided without any document production phase altogether", leaving it without information on the Claimant's financial condition and potentially with a costs award in its favor that it cannot collect.⁸
12. Lastly, the Respondent argues that it only requests "narrow and specific categories of documents and has provided sufficient detail as to what is being requested". These documents are "either basic records that would be kept by a corporate organization in the ordinary course of business

² Respondent's Motion, ¶ 2.

³ Respondent's Motion, ¶¶ 10-11, referring to *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] (RL-006), ¶ 250; *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 v. Turkmenistan*") (RLA-112), ¶¶ 57-60.

⁴ Respondent's Motion, ¶ 11.

⁵ Respondent's Motion, ¶¶ 12-13, 15.

⁶ Respondent's Motion, ¶¶ 16-18.

⁷ Respondent's Motion, ¶ 19.

⁸ Respondent's Motion, ¶ 20.

or specific records regarding an ability to pay an adverse costs award [...]”. Therefore, the document production request would not unduly burden the Claimant.⁹

3. The Claimant’s Position

13. The Claimant characterizes the Respondent’s Motion as “highly inappropriate”, as it “seeks to re-argue issues already decided by the Tribunal when it rejected Respondent’s Motion for Security for Costs [...]”¹⁰ and also seeks “highly intrusive documents”.¹¹
14. In the Claimant’s view, the Respondent’s Motion does not meet any of the four principal requirements for the granting of interim measures, that is: (i) a risk of serious or irreparable harm; (ii) urgency; (iii) no prejudgment of the merits of the case; and (iv) a *prima facie* case on the merits.¹² In particular, the Respondent’s request does not meet the requirements of irreparable harm and urgency.¹³
15. The Claimant is critical of the fact that the Respondent’s Motion has been filed in the midst of a global pandemic. The Claimant provides an account of the impediments that the COVID-19 crisis has placed upon the Claimant and its legal team, which would bar them from providing the requested documents, or at least make the production of those documents disproportionately burdensome.¹⁴
16. The Claimant rejects the Respondent’s argument to the effect that the March 12 Disclosure constitutes “new evidence”. The Claimant stresses that the reason why the Tribunal rejected the Respondent’s Motion for Security for Costs was that the necessary “exceptional circumstances” were not met.¹⁵ In particular, the Claimant notes that none of the examples of situations giving rise to “exceptional circumstances” contained in PO4 or referred to in the *RSM v. Saint Lucia* and *Eurogas v. Slovak Republic* cases are comparable to the present case.¹⁶ The Claimant rejects the Respondent’s reliance in this regard on *Dirk Herzig v. Turkmenistan*, arguing that it should be distinguished from the present case on various accounts.¹⁷
17. The Claimant further notes that it recently advanced a similar motion to deviate from the Procedural Calendar, which was dismissed by the Tribunal in PO4. Now, according to the Claimant, the Respondent seeks “better treatment” than that afforded to the Claimant.¹⁸ As the Parties’ respective requests are comparable, granting the current Motion would amount to the Tribunal providing more favorable treatment to one of the Parties, and thus to a violation of the

⁹ Respondent’s Motion, ¶¶ 22-23.

¹⁰ Response, ¶¶ 4, 36.

¹¹ Response, ¶¶ 13, 50.

¹² Response, ¶ 9, referring to Excerpt from Gary Born, *International Commercial Arbitration* (2014), 2468 (CLA-44).

¹³ Response, ¶¶ 12, 45.

¹⁴ Response, ¶¶ 16-23.

¹⁵ Response, ¶¶ 24-29, citing PO4, ¶ 174.

¹⁶ Response, ¶¶ 29-32, citing PO4 ¶¶ 175-176.

¹⁷ Response, ¶ 33.

¹⁸ Response, ¶ 26.

principle of equality of treatment required by NAFTA Article 1115 and Article 15 of the UNCITRAL Rules.¹⁹

18. The Claimant also rejects the Respondent's arguments in connection with the Respondent's potential bifurcation request to be irrelevant, as even "in the unlikely event that Motion [to Bifurcate] is granted by the Tribunal, there will be little harm to Canada", since the Respondent will either "prevail and thus will have not expended as much resources, or it will lose, thus making it much less likely it ever will be able to prove exceptional circumstances".²⁰
19. Finally, the Claimant argues that the document production request is "not workable", and the production of the documents would be in conflict with the Claimant's obligation to file its Memorial within the agreed deadline.²¹ If the Motion is eventually upheld, the Claimant "would need to work with the Tribunal on production schedules in light of the fluidity of the current circumstances".²²

4. The Tribunal's Analysis

20. The Respondent's Motion is a request for the disclosure of documents in advance of the document production procedure addressed in §7 of PO1 and the accompanying procedural calendar, a procedure that is scheduled to take place after the first round of written pleadings of the Parties as part of the merits phase of the written proceedings. The Tribunal notes that Parties are in agreement that the Respondent must show that targeted document production of the Claimant's financial condition is "necessary" at this stage in the proceedings.²³ For the purposes of this Procedural Order, the issue before the Tribunal is whether the Respondent's Motion should be entertained at this stage in the proceedings. The issue is not whether the Respondent's document requests relating to the Claimant's financial condition, as set out in the Redfern Schedule enclosed with the Respondent's Motion, should be allowed.
21. According to the Respondent, there is a change in circumstances resulting from the March 12 Disclosure which raises "serious questions" about whether the Respondent could collect any future costs award in its favour, which necessitates a targeted document production in order for the Respondent to evaluate whether it should revive a motion for security for costs in this arbitration.²⁴ The Tribunal is unable to agree.
22. As a preliminary matter, the Tribunal observes that document production is not a procedure usually given in anticipation of and to aid a party's application for security for costs. It is usually a procedure that follows the parties' first round of written pleadings, going to the evidence that ought properly to be disclosed for purposes of assessment of the merits of each party's case. The Respondent's Motion is seeking to depart from that usual process to enable it to obtain information to support a renewed, putative, application for security for costs.

¹⁹ Response, ¶¶ 37-41, 47.

²⁰ Response, ¶¶ 42-43.

²¹ Response, ¶¶ 49-52.

²² Response, ¶¶ 55-56.

²³ Respondent's Motion, ¶21.

²⁴ Respondent's Motion, ¶¶ 16, 21.

23. The burden of proof rests on the Respondent as the Party making, or intending to make, an application for security for costs. The burden is not on the Claimant to prove that it has sufficient funds to meet an adverse costs order. By requesting that the Claimant produce documents on its financial condition, the Respondent is effectively seeking a reversal in the burden of proof. The Respondent has not provided any basis on which the Tribunal can properly conclude that the burden of proof should be reversed. In the Tribunal's view, the March 12 Disclosure is not sufficient to justify any such reversal. The Tribunal cannot assume, on the basis of the March 12 Disclosure alone, that there are "serious questions" about whether the Respondent could collect any future costs award in its favour. The Respondent has not presented any evidential basis that would justify the departure from the usual time and procedure of document production.
24. In denying the Respondent's Motion for Security for Costs in PO4, the Tribunal stated that the existence of a funding agreement alone would not be sufficient to grant security for costs. Instead, the Respondent would have to show "exceptional circumstances", which would include, for instance (i) a claimant's track record of non-payment of costs awards in prior proceedings; (ii) a claimant's improper behaviour in the proceedings at issue; (iii) evidence of a claimant moving or hiding assets to avoid any potential exposure to a costs award; or (iv) other evidence of a claimant's bad faith or improper behaviour. Yet, no such "exceptional circumstances" have been evidenced in the present case which may justify a targeted document production of the Claimant's financial condition.
25. In this regard, the Respondent relies on the recent decision in *Dirk Herzig v. Turkmenistan*²⁵ to argue that the Claimant's disclosure with respect to the absence of liability on the part of the third-party funder for an adverse costs award is critical. In the Tribunal's view, however, *Dirk Herzig v. Turkmenistan* can be distinguished from the present case. In that case, the tribunal itself noted that the facts presented a "more extreme situation" *beyond* impecunity and third-party funding.²⁶ In particular, the claimant in that case, Dr Dirk Herzig, was the insolvency administrator who brought the claim on behalf of the bankrupt company Unionmatex Industrieanlagen GmbH. As Unionmatex was insolvent, a third-party funder was engaged to fund the claimant's costs in those proceedings. In that context, the practical import of the third-party funder's absence of liability for an adverse costs award meant that it was "effectively impossible" for Dr Herzig to pay an adverse costs award without security.²⁷
26. The Respondent further argues that, should it pursue bifurcation of the proceedings and be successful on its jurisdictional claims, it would be left in a position where it would not have an opportunity to revive a motion for security for costs, as the timelines and procedures for document production set out in PO1 would never arise. In the Tribunal's view, this misses the point. The issue is not whether the Respondent would or may have an opportunity to revive its motion for security for costs at some future date. The issue is whether the Respondent has made out a sufficient case at this point that would justify a shifting of the burden of proof to the Claimant and the adoption of a highly unusual document production procedure. The Tribunal considers that the Respondent has not made out such a case. As noted above, document

²⁵ *Dirk Herzig v. Turkmenistan*.

²⁶ *Dirk Herzig v. Turkmenistan*, ¶ 57.

²⁷ *Dirk Herzig v. Turkmenistan*, ¶ 58.

production is not a procedure usually given to aid a party's application for security for costs. In any event, the Respondent is not precluded from re-applying for targeted document production relating to the Claimant's financial condition, whether or not the proceedings are bifurcated, if the circumstances so warrant. One such circumstance would be where the Claimant has consistently failed to comply with the Tribunal's monetary orders.

27. In the premises, the Tribunal is not persuaded that the March 12 Disclosure is in itself sufficient to justify a targeted production of documents relating to the Claimant's financial condition at this stage in the proceedings.
28. For the avoidance of doubt, this conclusion is without prejudice to any decision by the Tribunal on any renewed application for security for costs that the Respondent may wish to make in due course, in the event that it has new evidence to support such an application.
29. The Respondent's Motion is therefore dismissed. The issue of costs of this application is to be reserved to be decided at a later stage.

Dated: 6 May 2020

Place of Arbitration: Washington, D.C.



Cavinder Bull SC
(Presiding Arbitrator)

On behalf of the Tribunal