

Global Affairs Canada
Department of Justice



Affaires mondiales Canada
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VIA EMAIL

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Dear Members of the Tribunal:

Re: *Tennant Energy, LLC v. Government of Canada*

In this letter, Canada respectfully (i) requests to submit a new legal authority into the record, and (ii) re-applies for security for costs.

I. New Legal Authority

Canada respectfully requests permission to submit the following legal authority into the record:

Westmoreland Mining Holdings LLC v. Government of Canada (ICSID Case No. UNCT/20/3) Final Award, 31 January 2022 (“*Westmoreland* Final Award”).

The *Westmoreland* Final Award was issued on January 31, 2022, and was publicly released on today’s date. As such, this is the earliest opportunity to request to submit the legal authority into the record. The *Westmoreland* Final Award contains a decision by an international investment tribunal on certain jurisdictional objections and questions of treaty interpretation, including under NAFTA Article 1116(1), that are directly relevant to a jurisdictional objection with which the Tribunal in this arbitration is presently seized.

Canada notes that Article 8.4 of Procedural Order No. 1 (“PO 1”) provides that “the Tribunal shall not consider any evidence that has not been introduced as part of the written submissions of the Parties, unless the Tribunal grants leave on the basis of exceptional circumstances.” However, Article 8.4 does not apply to requests to introduce new legal authorities. Thus, the Parties are not required to show “exceptional circumstances” to submit new legal authorities into the record.

If the Tribunal admits the *Westmoreland* Final Award into the record, and if the Tribunal wishes to receive submissions on it, Canada would be amenable to each Party providing a brief, page-limited submission on the relevance of the *Westmoreland* Final Award to the issues arising in this arbitration.

Canada has not annexed this legal authority and will await the Tribunal’s decision on whether it may be admitted into the record.

II. Canada’s Re-Application for Security for Costs

In accordance with Article 16.3 of PO 1 and Article 26.1 of the 1976 UNCITRAL Arbitration Rules (the “1976 UNCITRAL Rules”), Canada respectfully re-applies for an order from the Tribunal directing Tennant Energy, LLC (“Tennant Energy” or the “Claimant”) to issue security for costs.

In Procedural Order No. 4 (“PO 4”), the Tribunal confirmed its authority to order security for costs under Article 26.1 of the 1976 UNCITRAL Rules, and found that NAFTA Article 1134 does not limit that authority.¹ However, the Tribunal rejected Canada’s original motion for security for costs² because it found that Canada had not met its burden of proving “exceptional circumstances”, for two reasons.³ First, the Tribunal held that Canada had not established a reasonable basis to find that Tennant Energy is impecunious.⁴ Second, the Tribunal observed that the existence of a third-party funding agreement alone was not sufficient to grant security for costs, and noted the decision in *Dirk Herzig v. Turkmenistan*, which turned, *inter alia*, on the issue of “the explicit non-liability of the third-party funder for a costs award adverse to its funded party”.⁵ Nonetheless, the Tribunal stated that Canada could re-apply for security for costs if new evidence indicates that Tennant Energy would be unable to comply with an adverse costs order:

The Respondent’s motion for security for costs is therefore dismissed. For the avoidance of the doubt, however, the dismissal does not preclude the Respondent

¹ PO 4, ¶¶ 165-171.

² Canada’s Motion for Security for Costs and Disclosure of Third Party Funding, 16 August 2019 (“Canada’s original motion”).

³ PO 4, ¶¶ 173, 177-179, 183(d).

⁴ PO 4, ¶ 178: “It is not the case that there is something which suggests that the Claimant does not hold financial assets”.

⁵ PO 4, ¶ 179, citing **RLA-112**, *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan* (ICSID Case No. ARB/18/35) Decision on Respondent’s Request for Security for Costs, 27 January 2020 (“*Herzig – Decision on Request for Security for Costs*”), ¶ 57.

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.⁶

In response to Canada's request in the original motion,⁷ the Tribunal also ordered Tennant Energy to disclose (a) the identity of its third-party funder, and (b) any terms contained in the third-party funding agreement on the payment of adverse costs orders against the Claimant.⁸ In accordance with PO 4, on March 12, 2020 the Claimant disclosed that (a) its third party funder is Therium Litigation Finance A IC ("Therium"), and (b) the funding agreement explicitly precludes Therium from liability for any adverse costs order arising in this arbitration.⁹ The Claimant also disclosed that it entered an agreement with Therium providing that Tennant Energy is presently not required to take out and maintain a legal expenses insurance policy sufficient to pay any adverse costs order.¹⁰

Canada now re-applies for security for costs because in the Hearing on Jurisdiction, new evidence arose which provides a reasonable basis to find that the Claimant is impecunious. Mr. John Tennant,

⁶ PO 4, ¶ 181 (emphasis added).

⁷ Canada's original motion, ¶¶ 41-45, 46(b).

⁸ PO 4, ¶ 106.

⁹ Email from Barry Appleton, "Confidential Disclosure required under PO 4", 12 March 2020. The Litigation Funding Agreement between Tennant Energy and Therium (the "LFA") states at Section 8:

8.1 Unless agreed by the Parties in writing, the Claimant shall use reasonable endeavors to take out and maintain a Legal Expenses Insurance Policy (at their own risk) sufficient throughout the Proceedings to meet any risk of any Adverse Costs Order in favor of the Defendant or any third party relating to the Claim and the Proceedings.

8.2 Without prejudice to clause 8.1 above, nothing in this Agreement shall confer any liability on Therium for any adverse costs and/ or any Adverse Costs Order and the Claimant shall indemnify Therium against any order for costs as may be made against Therium. [...] (Emphasis added.)

In connection with the LFA, Tennant Energy and Therium entered an agreement commencing in January 2018, which states the understanding of Tennant Energy and Therium as follows:

2. There is no actual or potential legal or other basis known to the Claimant nor Therium pursuant to which Therium could possibly have any potential liability for the adverse costs of the Government of Canada in defending the Claim or for providing security for costs in connection with the Claim; and

3. There are no other proceedings intended or proposed at this time which could potentially expose Therium to a risk of liability for the adverse costs of the Government of Canada [...].

¹⁰ Under the January 2018 agreement with Therium, Tennant Energy is not required, until further notice from Therium, to take out and maintain any Legal Expenses Insurance policy to meet any Adverse Costs Order (as defined in the LFA), pursuant to Section 8.1 of the LFA. Email from Barry Appleton, "Confidential Disclosure required under PO 4", 12 March 2020.

who is a member of the Management Board of Tennant Energy¹¹ and currently owns the largest individual shareholding in Tennant Energy (of 45%),¹² stated:

- Q. Tennant Energy remains a holding company; right?
A. Correct.
Q. The Company has never sold any goods or services to consumers; right?
A. That's correct.
Q. It has no assets besides the Skyway 127 Shares, does it?
A. No.
Q. It has no financial resources in a bank account?
A. No.¹³

Thus, Tennant Energy is a holding company with no financial resources in a bank account, no assets apart from shares in Skyway 127, and no business operations selling goods or services to consumers for revenues. This evidence strongly suggests that the Claimant would be unable to comply with an adverse costs order.¹⁴ Combined with the facts that the Claimant's third-party funding agreement expressly excludes Therium from liability for any adverse costs order, and that Tennant Energy has no insurance policy to pay any adverse costs order, these are "exceptional circumstances" which satisfy the conditions that investment tribunals have considered sufficient to order security for costs.¹⁵

Consequently, to protect the integrity of these arbitral proceedings and Canada's right to recover a costs order in its favour,¹⁶ Canada respectfully requests the Tribunal to order Tennant Energy to issue:

- a) security for costs within 90 days of the order, either by depositing the security into an escrow account arranged by the Permanent Court of Arbitration or by submitting a bank guarantee, in the amount of **1,477,098.91 CAD** for the procedural and jurisdictional phase of the proceeding; and

¹¹ **CWS-2**, John Tennant, ¶ 3; Jurisdiction Hearing Transcript, Day 3, 17 November 2021, p. 340:12-17.

¹² John Pennie and Marilyn Field each own 22.5% of Tennant Energy, and Jim Tennant owns 10%. See Jurisdiction Hearing Transcript, Day 2, 16 November 2021, pp. 260:23-261:7; Jurisdiction Hearing Transcript, Day 3, 17 November 2021, p. 342:3-6.

¹³ Jurisdiction Hearing Transcript, Day 3, 17 November 2021, p. 395:10-20 (emphasis added).

¹⁴ See also Canada's original motion, ¶ 30; Procedural Hearing Transcript, Day 2, 15 January 2020, p. 251:1-12; p. 257:12-17; pp. 260:13-261:8.

¹⁵ **RLA-112**, *Herzig – Decision on Request for Security for Costs*, ¶¶ 57-58; **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] ("*García Armas – Decision on Provisional Measures*"), ¶¶ 191, 193, 194, 224, 226, 231, 250, and 261; PO 4, ¶ 172. See also Canada's original motion ¶¶ 11, 16, 24-36, 46(a); Canada's Submission on New Legal Authority, 17 February 2020, ¶ 3; and Procedural Hearing Transcript, Day 2, 15 January 2020, pp. 245:20-246:4; p. 246:14-20; p. 249:1-7; p. 268:2-8; p. 271:11-20.

¹⁶ See Canada's original motion ¶¶ 10, 24, 34, 37; **RLA-006**, *García Armas – Decision on Provisional Measures*, ¶ 201.

- b) security for costs in the amount of **5,456,903.04 CAD** for the remaining phases of the arbitration at a later date that the Tribunal deems appropriate, should the arbitration proceed to the merits and damages phases.¹⁷

Canada recognizes that a balance can be struck between a claimant's right to pursue its claim and a respondent's right to recover costs in its favour.¹⁸ If the Tribunal issues an order for security for costs, and if the Claimant subsequently indicates that it has been unable to obtain the funds or a bank guarantee to satisfy the order, Canada requests that the Tribunal:

- a) order Tennant Energy to credibly demonstrate best efforts taken to obtain funds from Therium or another potential funder, or a bank guarantee from a bank, in order to satisfy the order for security for costs;
- b) order Tennant Energy to sign an undertaking confirming that the Claimant will pay any adverse costs order rendered against it; and
- c) take into account Tennant Energy's non-compliance with the order for security for costs in the Tribunal's final decision on the allocation of costs in these arbitration proceedings.

Respectfully submitted on behalf
of the Government of Canada,



Heather Squires
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cc: Barry Appleton, TennantClaimant@appletonlaw.com (Appleton & Associates)
Ed Mullins (Reed Smith LLP)
José Luis Aragón Cardiel, Diana Pyrikova (Permanent Court of Arbitration)
Mark Klaver, Alexandra Dosman, Stefan Kuuskne (Trade Law Bureau)

¹⁷ For accounting details on the amounts of security for costs requested, *see* Canada's original motion, ¶¶ 37-40 and Annexes I and II. Canada re-applies for security for costs without prejudice to Canada's position that the Tribunal lacks jurisdiction over Tennant Energy's claim in this arbitration.

¹⁸ Canada's original motion, ¶¶ 32-34; Canada's Submission on New Legal Authority, 17 February 2020, ¶ 7; Procedural Hearing Transcript, Day 2, 15 January 2020, p. 268:9-12; p. 270:10-22; **RLA-112**, *Herzig – Decision on Request for Security for Costs*, ¶ 66.