

**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

**SUBMISSION ON LEGAL AUTHORITY REGARDING CANADA'S MOTION FOR
SECURITY FOR COSTS AND DISCLOSURE OF THIRD-PARTY FUNDING**

February 17, 2020

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I. OVERVIEW

1. On January 27, 2020, the tribunal in *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan* (“*Herzig*”) issued its *Decision on the Respondent’s Request for Security for Costs and the Claimant’s Request for Security for Claim* (the “*Decision*”) in which a tribunal majority ordered the claimant to post security in the amount of US\$ 3 million. The *Herzig* decision addresses the very concerns that Canada highlighted in its Motion for Security for Costs and Disclosure of Third-Party Funding and demonstrates why this Tribunal should grant the orders Canada has requested.

2. At the outset, Canada notes that although *Herzig* is an arbitration governed by the ICSID Convention and its arbitration rules, the majority’s reasoning and the factors it took into account are equally relevant to this arbitration. In making its determination to award security for costs, the *Herzig* majority considered authorities under the UNCITRAL arbitration rules, such as *Garcia Armas*, to be relevant, noting, “[t]he Tribunal sees no reason to distinguish *Garcia Armas*, as Dr Herzig asks, on the grounds that it was an UNCITRAL rather than an ICSID treaty arbitration.”¹ In the same vein, there is no reason in this case to disregard this new authority on the basis that it was governed by the ICSID Convention.

II. THE FACTORS WARRANTING SECURITY IN *HERZIG* ARE ENGAGED IN THE *TENNANT* CASE

3. In *Herzig*, three key factors confirmed that without security it would be “effectively impossible for Turkmenistan to enforce and collect upon an adverse costs award.”² These were: (1) the claimant’s insolvency; (2) the involvement of a third-party funder in the arbitration; and (3) the explicit non-liability of the third-party funder for a costs award adverse to its funded party.³ Like in *Garcia Armas*, these three factors were sufficient to show that it would be effectively impossible for a claimant to pay an adverse costs award.

4. In this arbitration, these three factors have either been confirmed or are very likely present. First, despite Canada’s due diligence pointing to Tennant being entirely impecunious⁴, Tennant has failed to provide a single assurance that it is solvent and would be able – either on its own or through its third-party funder – to cover a costs award in Canada’s favour. Tennant’s silence on

¹ **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*”), ¶ 60.

² **RLA-112**, *Herzig*, ¶ 58.

³ **RLA-112**, *Herzig*, ¶ 57-58. Although the *Herzig* tribunal applied an exceptional circumstances standard to its evaluation of the request for security for costs and found that the existence of the three factors constituted exceptional circumstances, Canada maintains its position that the appropriate test for security for costs under Article 26.1 of the 1976 UNCITRAL Rules is one of necessity and that it meets this test. Nevertheless, even if an exceptional circumstances standard were to be applied by the Tribunal, Canada has also demonstrated why the circumstances of this case are truly exceptional. See Second Procedural Hearing Transcript Day 2 - 2020-01-15 (Uncorrected version) at p. 239: 8-19, p. 244: 9-25, p. 245: 1-24, p. 263:7-13, p. 269: 9-25, p. 270: 1-9.

⁴ See Canada’s Motion for Security for Costs and Disclosure of Third-Party Funding, August 16, 2019, ¶ 30; Second Procedural Hearing Transcript Day 2 - 2020-01-15 (Uncorrected version) at p. 248: 2-13, 22-24, p. 250: 6-16.

this point is striking. Second, Tennant has confirmed the involvement of a third-party funder in this arbitration.

5. Finally, at the time it made its decision to grant the respondent's request for security for costs, the tribunal in *Herzig* had been made aware that the claimant was relying on third-party funding and that the third-party funder was "expressly not liable under the funding contract for an ultimate award of costs in Turkmenistan's favor".⁵ For this very reason, it is essential that Tennant disclose the terms of the funding agreement to allow the Tribunal to fully assess Canada's request for security. Knowledge of whether there exists a term that would absolve a third-party funder of responsibility to pay an adverse costs order, or even silence on this issue in the funding agreement, is critical. The existence of such a term or silence in the agreement on who bears responsibility over an adverse costs order would confirm the need for security for costs in this arbitration. Canada cannot be put in a position of spending public funds to defend this arbitration without any recourse to recover those funds should costs be awarded in its favour.

III. TENNANT HAS FAILED TO PROVIDE ANY ASSURANCE IT CAN SATISFY AN ADVERSE COSTS AWARD

6. Canada has established a reasonable presumption to show that Tennant would fail to pay a costs order in Canada's favour. While the *Herzig* majority remarked that it "would perhaps see fit to deny the Respondent's Request for Security for Costs if there were some objective assurance that the Claimant could meet an adverse costs award",⁶ Tennant has done nothing to rebut that presumption and has not provided any objective assurance that it could meet such an order. Neither could the Claimant in the *Herzig* arbitration. Tennant has failed to produce any information or documentation to prove that it could pay an adverse costs order, or that its third party funder would do so. Without more, Tennant has yet to meet its burden and security for costs must be ordered.

IV. SECURITY FOR COSTS CAN BE BALANCED AGAINST ACCESS TO JUSTICE

7. 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.⁷ However, it is important to note, that in striking this balance, the *Herzig* majority rejected the claimant's contention that it was unreasonable to award security for costs to the respondent when it was the respondent who had allegedly caused the investor's insolvency.⁸ It found that this was a merits issue subject to a later assessment.⁹ This Tribunal should follow the same reasoning.

⁵ RLA-112, *Herzig*, ¶¶ 3 and 57.

⁶ RLA-112, *Herzig*, ¶ 63.

⁷ In this arbitration, Canada has pursued a reasonable approach to its request for security for costs. For example, if the proceedings are bifurcated, Canada has proposed that security be ordered in phases: first, for the procedural and jurisdictional phases; and second, only if the case proceeds, for the merits phase. Canada is also open to different forms the security could take, including a bank guarantee or payment into an escrow account.

⁸ RLA-112, *Herzig*, ¶ 66.

⁹ RLA-112, *Herzig*, ¶ 66.

February 17, 2020

Respectfully submitted on behalf of the
Government of Canada,

A handwritten signature in black ink, appearing to be 'H.S.' or similar initials.

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