From:	Barry Appleton
To:	Jose Luis Aragon Cardiel; Cavinder.Bull@drewnapier.com; dbethlehem@twentyessex.com; DBishop@kslaw.com
Cc:	Ed Mullins; Tennant Claimant
Subject:	PCA Case No 2018-54 Tennant Energy LLC- Procedural issues re PO 14
Date:	15 October 2021 00:36:22
Attachments:	image002.png

Dear President Bull and members of the Tribunal,

Counsel for Tennant Energy writes regarding the terms within Draft *Procedural Order No. 14*. We are filing this simultaneous submission with the Secretary according to the provisions of paragraph 6.8 of *Procedural Order No. 1*.

As the Tribunal is aware, the disputing parties have conferred and consulted regarding the specifics of *Procedural Order No. 14*. At this point, we have been able to find agreement on some matters, but there remain a limited number of matters which require determination by the Tribunal.

It would be helpful if the Tribunal could guide the disputing parties in advance of our scheduled procedural conference call on Tuesday, October 19, 2021.

1. Expert Witness issues

The first issue that requires the Tribunal's guidance is concerning the direct examination of the expert witnesses. There are two expert witnesses – both of whom are testifying about domestic California trust law. One expert, Justice Margaret Grignon, is a retired California Court of Appeal Justice, and the other, Margaret Lodise, is an experienced Trusts lawyer. Both have filed expert reports on the domestic law of California.

Paragraph 9.11(b) of *Procedural Order No. 1* deals with general witness testimony at the hearing. It provides:

> Although direct examination will be given in the form of witness statements and expert reports, the party presenting the witness may conduct a brief direct examination for the purpose of introducing the witness, correcting, if necessary, any errors in the witness statement and addressing matters that have arisen after the witness statement was given, if any.

Paragraph 10.3 of *Procedural Order No. 1* provides assistance in relation to Expert Witness testimony. It builds on the earlier provisions [which it references as being in paragraph 9.11 (a)] stating:

> The provisions set out in relation to witnesses shall apply, *mutatis mutandis*, to the evidence of experts, except that, unless the Parties agree otherwise, expert witnesses shall be allowed to be present in the hearing room at any time and in addition to paragraph 9.11(a), may at the request of the presenting Party, provide a presentation on his or report(s) for a duration to be determined at the Pre-Hearing Conference by the Tribunal in consultation with the Parties.

It is envisioned that the expert witnesses will be given a brief time to summarize the conclusions in their expert reports. Such a presentation comes from the time equally allocated to each disputing party in the hearing. There is disagreement on expert witness summary presentation in paragraph 10.4 of draft *Procedural Order No. 14*. While paragraph 10.3 of *Procedural Order No. 1* says that this is a matter for the Procedural Hearing (scheduled for October 19, 2021), the disputing parties have put it before the Tribunal within *Procedural Order No. 14.*

Canada wishes a maximum limit on summary presentations of 20 minutes. The Investor seeks 30 minutes as a maximum. It is understood that these periods will fit within the overall check-clock allocation of time between the disputing parties.

The Investor is unaware of how much time Justice Grignon might require for her summary. The Investor's concern is that a twenty-minute limit is arbitrary and may well prove to be insufficient. Both sides have the same amount of time available, and the expert's presentation time comes from the overall aggregate time allocated to the disputing party Thus, the disputing parties will be treated equally concerning time.

However, both sides may not be treated equally for other reasons. The reason for the slightly longer available period proposed by the Investor is to ensure adequate time for Justice Grignon to summarize her opinion to ensure that the Investor can have its call fully heard as required by Article 15 of the UNCITRAL Arbitration Rules and NAFTA Article 1115.

Further, Tennant Energy notes that Canada and Canada's expert witness, Margaret Lodise, has raised issues and legal points to which Justice Grignon could not respond in her earlier Expert Report as the Investor only had one opportunity to file in this proceeding.

Paragraph 10.3 of Procedural Order No. 1 says that the:

> The provisions set out in relation to witnesses shall apply, *mutatis mutandis*, to the evidence of experts, except that, unless the Parties agree otherwise, expert witnesses shall be allowed to be present in the hearing room at any time and in addition to paragraph 9.11(a), may at the

request of the presenting Party, provide a presentation on his or report(s) for a duration to be determined at the Pre-Hearing Conference by the Tribunal in consultation with the Parties

Because of the presence of the word "except" in the paragraph may be ambiguous. Out of an abundance of caution, the Investor seeks confirmation from the Tribunal that the reference to paragraph 9.11(a) in paragraph 10.3 of *Procedural Order No. 1* should have been a reference to paragraph 9.11 in its entirety or paragraph 9.11(b) as Article 9.11(a) is merely a requirement that the witness represents the truthfulness of his or her testimony rather than the reference to direct testimony located in 9.11(b).

Procedural Order No. 1 appears to extend due process and fairness to the expert to allow her to do the following:

> "Correcting, if necessary, any errors in the witness statement and addressing matters that have arisen after the witness statement was given"

Retired California Court of Appeal Justice Grignon will require an opportunity to comment on the issues raised after the giving of her expert report, such as points raised in Canada's jurisdictional submission and Ms. Lodise's Expert Report.

Accordingly, we request the Tribunal to confirm:

a. Each expert witness may have up to 30 minutes for a summary presentation upon her Expert Report, within the period of her direct testimony.
b. That each expert witness will be allowed an adequate time as outlined in paragraph 10.3 to comment upon matters raised after her Expert Report was given.

2. Time for Tribunal Questions

A second matter that needs guidance is whether the Tribunal wishes to raise questions to the disputing parties after the opening statements but before the closing statements. Should the Tribunal wish to leave questions with the disputing parties, a practical time would be at the start of the second day before the first fact witnesses testify.

This would allow the Tribunal an opportunity to reflect on the opening statements from the previous day. This would not be an interactive discussion. It would be an opportunity for the Tribunal to leave questions but that the answers might be addressed in the disputing parties' closing statements later that week.

Tennant Energy also notes that such an approach addresses due process and equality concerns as each disputing party would have the opportunity to comment on questions posed by the Tribunal.

3. The Agreed Hearing Bundle (ABD)

Usually, an Agreed Hearing Bundle ("ABD") is not contentious.

The disputing parties have identified a minimum set of documents that must be in the ABD. Currently, the ABD contains at least the following:

- The constitutive documents and submissions exchanged – specifically the Notice of Intent, Notice of Arbitration, Statement of Defence, Merits Memorial, various jurisdictional memorials.
- The Witness Statements supporting those submissions (and documents relied upon)
- The NAFTA Article 1128 submissions and response
- The relevant chapters of the NAFTA (particularly chapters 1, 2, and 11), the 1976 UNCITRAL Arbitration Rules, the IBA Rules on the Taking of Evidence, the ILC Article on State Responsibility, and the Vienna Convention on the Law of Treaties.

However, there is a lack of final agreement over the nature of expanding this bundle.

Canada wishes to limit the opportunity for each disputing party to expand the bundle. Canada seeks a cap of ten additional documents to the bundle. Canada has not identified what these additional items might contain.

The Investor suggested that the Agreed Bundle could be expanded (it being understood that the expansion would be limited to items already in the record).

The purpose of an agreed bundle of documents is to facilitate the ability to find critical documents that are anticipated to be referenced during the hearing. However, practically, the Investor recognizes that the PCA needs time to prepare the bundle for next month's hearing, and thus there needs to be a decision here.

The Investor cannot agree with Canada's proposal. Tennant Energy does not see any rational nexus that justifies a cap on the additional documents within the ABD. The ten-document maximum is arbitrary and without any rational basis. However, such a limit might impair the ability of a disputing party to have its case fully heard, which must be avoided. Fundamentally, either a document is necessary (and thus should be in the ABD), or it is not.

What makes the cap more difficult to understand is that to date, the disputing parties have not identified any additional documents that must be part of the ABD. In the absence of any agreement, the Investor has revised its position.

The Investor suggests that the ABD should be limited only to those specified documents already agreed upon by the disputing parties as a practical matter. Should a disputing party refer to another document in the record, there would be no prohibition upon that document being referenced during the hearing. That document does not need to be in the ABD as it will be available electronically to all during the hearing.

4. Order of disputing parties

The disputing parties have agreed to develop a schedule after the principal outstanding issues are resolved. The draft Procedural Order does not reference the order for the jurisdictional hearing. The disputing parties have assumed that Canada will speak first since Canada is the moving party on the jurisdictional challenge. Canada's witnesses will be examined before those of the responding party (Tennant Energy). The Investor requests that the Tribunal advise the disputing parties if they operate under mistake concerning this assumption.

Tennant Energy thanks the Tribunal for its consideration of these issues. We hope this will considerably shorten the items to discuss in the upcoming Tuesday October 19th procedural meeting.

On behalf of counsel for the Investor, Tennant Energy

Barry Appleton, FCIArb, LL.M, JD
Managing Partner
Appleton & Associates International Lawyers LP
Tel 416.966.8800 • Fax 416.966.8801
bappleton@appletonlaw.com • www.appletonlaw.com
121 Richmond St. W, Suite 304, Toronto, Ontario • M5R 2K1
Co-Director and Distinguished Senior Fellow, Adjunct Professor of Law
New York Law School, Center for International Law
185 W. Broadway, Rm 910. New York, NY 10013
Barry.appleton@nyls.edu