

**From:** [Barry Appleton](#)  
**To:** "[Cavinder Bull](#)"; "[Doak Bishop](#)"; "[Daniel Bethlehem QC](#)"  
**Cc:** "[Benjamin.Tait@international.gc.ca](#)"; "[Krystal.Girvan@international.gc.ca](#)"; "[david.kasdan@wwreporting.com](#)"; "[Diana.Pyrkova@international.gc.ca](#)"; "[Jose Luis Aragon Cardiel](#)"; "[Heather.Squires@international.gc.ca](#)"; "[Sylvie.Zidan@international.gc.ca](#)"; "[Ed Mullins](#)"; "[Tennant Claimant](#)"; "[Anabel Blanco](#)"  
**Subject:** Tennant Energy - Investor's Response on the NAFTA Jurisdiction Hearing Transcript Revisions  
**Date:** 06 December 2021 23:01:08  
**Attachments:** [2021-11-23 - appleton to Tait - RE Tennant Energy v Canada - NAFTA Jurisdiction Hearing Transcript Corrections.pdf](#)  
[2021-11-23 - Tait to Appleton - RE Tennant Energy v Canada - NAFTA Jurisdiction Hearing Transcript Corrections.pdf](#)  
[Tennant - Investors Juris Transcript Rectification Summary Index.docx](#)

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Dear Mr. President and Members of the Tribunal

The Investor seeks directions from the Tribunal concerning the processing of the Transcript of the Jurisdictional hearing. The Tribunal is already in receipt of Canada's motion to the PCA Secretary. This brief submission concerns the Transcript and the matters connected to Canada's submission. Because of the need for a transcript to complete the Post-Hearing Briefs, the Investor requests an expedited determination of this matter.

At this point, each disputing party has provided rectifications to the Court Reporter. In addition, the disputing parties have agreed upon a set of augmentations to the record – setting out additions to the certified record.

The Jurisdictional Hearing Transcript is certified. This means that the Court Reporter reviews the record and independently certifies any correction. The purpose of rectifications is to rectify typographical or similar errors and not change the Transcript. If the parties propose a change not supported by the audiotapes, the Court Reporter cannot certify that change.

Canada already had its Thanksgiving Holiday in October. As the Tribunal is aware, the US Thanksgiving holiday took place shortly after the November jurisdictional hearing. Ignoring the discussion of this holiday issue at the Jurisdictional Hearing, Canada demanded that the Investor work through the holiday to develop a joint draft of the augmentations and a joint draft of the rectifications.

On November 23, the Investor wrote to Canada advising that its staff resources were limited due to the holiday. It said that it could work with Canada on a joint augmentation draft but that it did not have staff available to develop a process to have a joint draft on rectification prior to the Tribunal deadline for submitting the rectifications. Since rectifications need to be certified by the Court Report, the Investor advised that each side could supply its rectifications to the Court Reporter directly on December 3<sup>rd</sup> and that the Court Reporter would then determine the appropriate rectifications.

This arrangement would ensure that both the augmentations and the rectifications were provided by December 3<sup>rd</sup>. The focus was on the augmentations as additions to the record required the consent of the disputing parties. The rectifications would be provided by the December 3<sup>r</sup> deadline.

Canada outright ignores the fact that Canada agreed to the Investor's proposed procedure on November 23, 2021. Canada omitted to disclose the agreed-upon solution, which was that Canada would follow the Investor's process and that "To the extent the court reporter finds an inconsistency, then we will ask them to reach out for clarification from the parties." A copy of the correspondence underlying this arrangement is attached. The Investor relied in good faith on Canada's communication, its further non-objection, and it acquiesced to Canada's condition regarding what to do in the event of conflicting rectifications.

Based on the November 23<sup>rd</sup> agreement, the disputing parties submitted augmentations and drafts identifying rectification to the Court Reporter. The Investor also submitted a short index identifying in one document each proposed rectification and where it was located in the Transcript. ( A copy of the short document index submitted by the Investor is enclosed).

After receiving this material containing the rectifications, the court reporter sought clarification.

Rather than communicating the practical agreement between disputing parties, paralegals for Canada, late on Friday night, misleadingly advised there was no agreement between the disputing parties.

Much later that evening, the Investor provided a copy of the emails to the PCA – identifying the existence of an agreement between the parties. As the record demonstrates, there clearly was an agreement, which Canada augmented with an additional term regarding how to handle differences between the two different versions

Astonishingly, Canada ignored the agreement on Friday, December 3<sup>rd</sup>, and again in its "clarification" of Monday, December 6<sup>th</sup>. Yet again, Canada regrettably failed to act consistently with its duty of forthrightness and diligence to the Tribunal.

The issue of Canada's conduct will be addressed in due course.

The Investor will not have available staff to review the changes for a considerable period (as previously discussed, one of the lead counsel is in a 3-week trial and then has another full hearing in another investor-state arbitration administered by the PCA, which I am also a part of).

However, the Court Reporters have precisely what they need from the parties to rectify the Transcript without any further delay. The Court Reporters have:

- An agreed draft from the disputing parties on augmentations,
- Two different notes identify possible rectification errors subject to the Court Reporter's certification.
- A process agreed to by the disputing parties in writing about what to do in the unlikely circumstance that there is a direct conflict between the two sets of rectifications.

Canada has not followed the terms of the agreement, and this needlessly leaves the existing procedure in disarray.

As a result of Canada's change of position, the Investor seeks the following order from the Tribunal:

1. The Court Reporters make augmentation changes as set out in the agreed draft
2. The Court Reporters review the proposed rectifications set out in the drafts and certify those changes that the Court Reporters independently confirm.
3. The Court Reporter should provide the disputing parties with a report about any direct conflicts between the rectifications sought by the disputing parties.

This proposal reflects the underlying original agreement. It is both practical and efficient in that it enables the Court Reporters to produce a transcript so post-hearing briefs may proceed on time later this month.

Accordingly, the Investor requests that the Tribunal reflect the existing agreement of the disputing parties and make the Investor's requested order.

It is apparent at every hearing that Canada has many more lawyers and assistants available than the Investor. Canada attempts to take advantage of its superior financial resources at every turn.

The Investor further opposes Canada's new proposal, which creates additional burdens for resolving corrections while counsel is entrenched in preparing their post-hearing briefs. Under Canada's proposal, Canada would interrupt the Investor's preparation and attention to the post-hearing brief to deal with corrections that are best resolved by the Court Reporters. Perhaps more egregiously, Canada makes this proposal while knowing that counsel for the Investor is currently in the midst of a 3-week trial. It seems very unlikely that the current Post Hearing Brief deadlines could be maintained if Canada's request was granted.

I am the only counsel not involved in the current three-week trial. Still, I am receiving medical attention for a severe neuro-spinal condition that worsened at the Jurisdictional Hearing. I currently am receiving treatment

six times a week over each of the following two weeks for the condition. As the Tribunal can appreciate, it is challenging to meet the current deadlines set for the Post-Hearing Brief in such circumstances where none of the counsel for the Investor has further availability.

Not only are Canada's additional demands unfeasible – but they are completely unnecessary given that the Court Reporters have all that they need to deal with the rectification and the consent document dealing with the augmentation.

Canada's proposal is not workable with the current post-hearing brief deadline. Canada's making of this request shows the lengths Canada will go to prevent the Investor from adequately presenting its case. Canada's request should accordingly be denied, and the Tribunal should grant the request of the Investor – which would give formal effect to the understanding already reached by the disputing parties (which is confirmed in the email filed with this email).

On behalf of counsel for the Investor,



**Barry Appleton, FCI Arb, LL.M, JD**

*Managing Partner*

*Appleton & Associates International Lawyers LP*

Tel 416.966.8800 • Fax 416.966.8801

[bappleton@appletonlaw.com](mailto:bappleton@appletonlaw.com) • [www.appletonlaw.com](http://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](mailto:Barry.appleton@nyls.edu)