

IN THE MATTER OF AN ARBITRATION UNDER THE RULES OF
THE UNITED NATIONS COMMISSION ON INTERNATIONAL
TRADE LAW

PCA CASE NO 2018-54

BETWEEN

Tennant Energy LLC

INVESTOR

AND

Government of Canada

RESPONDENT

**Investor's Motion to Modify Procedural
Schedule**

MAY 2, 2020

APPLETON & ASSOCIATES
INTERNATIONAL LAWYERS

ReedSmith

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Investor's Motion to Modify the Procedural Schedule

1. Tennant Energy LLC (the "Investor") seeks a brief modification of the procedural schedule due to the impact of factors beyond its control.
2. On February 27, 2020, the Tribunal issued *Procedural Order No. 4*. Paragraph 93 of *Procedural Order No. 4* dismissed the Respondent's Motion for Bifurcation and ordered the Investor to file a Memorial. The Tribunal made the following order:
 - (a) The Claimant is to set out in full its detailed pleading on the issue of jurisdiction in its Memorial and specifically on the issue of time-bar which has been raised by the Respondent. In accordance with the procedural timetable set out in *Procedural Order No 1*, this Memorial is due to be filed 90 days from the date of this Procedural Order (i.e. **Wednesday, 27 May 2020**).
 - (b) Should the Respondent wish to pursue Bifurcation of the proceedings after having had sight of the Claimant's Memorial, the Respondent is to file its detailed objections on jurisdiction and a request for Bifurcation within 45 days from the date of the Claimant's Memorial (i.e. **Monday, 13 July 2020**).
 - (c) If the Respondent files a request for Bifurcation in accordance with (b) above, the Claimant is to file its response to the Respondent's request for Bifurcation within 21 days from the date of that request (i.e. **Monday, 3 August 2020**).
3. At the time of the issuance of the revised Procedural Timetable, the Investor reasonably believed that it would be possible to meet the revised Memorial deadline. But it is now clear that subsequent developments arising from the global Coronavirus-19 pandemic, and due to factors beyond the Investor's control, the Investor requires a modification of the deadlines set out in *Procedural Order No. 4*.

The Status of the Pandemic

4. As the Tribunal is fully aware, the World Health Organization has declared the rapidly developing virus disease a worldwide pandemic.^{1[00]} At the time of this writing, the

¹The World Health Organization (WHO) Emergency Committee under the International Health Regulations issued a Public Health Emergency of International Concern (PHEIC) about the novel coronavirus on January 30, 2020. A declaration of a pandemic by the WHO Director General was issued on March 11, 2020. See <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>

United States, where the Investor's counsel currently are located under mandatory lockdown orders, has over 1.1 million confirmed COVID-19 cases and a tragic number of over 65,000 deaths. Canada has reported more than 56,000 infections and more than 3500 deaths.

5. To combat the spread of the COVID-19 virus, public authorities in the United States and Canada have imposed escalating isolation and social disengagement measures.
 - a. On March 1, 2020, the Governor of Florida issued a mandatory stay-at-home order applicable to the entire state of Florida. This affects Ed Mullins and others working with him from the Miami office of Reed Smith.
 - b. The Miami office of Reed Smith remains closed indefinitely. Courts in the city have been closed to the public for weeks. State court trials have been prohibited through May, federal jury trials have been delayed until July 6, 2020.
 - c. Further, another senior member of the Investor's counsel team, Barry Appleton, is currently located in another US state where he is subject to a mandatory stay-in-place lockdown. At this time, severe transportation restrictions are affecting Mr. Appleton's return to Canada, as direct flights to Canada are no longer available. Assuming that he remains healthy and without infection, Mr. Appleton subsequently will have a mandatory fourteen-day mandatory quarantine imposed upon him after his return to Canada – which will likely further impede his ability to work on this matter.
 - d. Mr. Appleton is the co-director of the New York Law School Center for International Law, where he also teaches as a senior fellow. The New York Law School has been under continuous lockdown (initially by the NY City Public Health Department) since early March due to COVID-19 infections at the law school.
 - e. On March 17, 2020, a COVID-19 pandemic state of emergency was declared in the province of Ontario.
 - f. As described in more detail below, the Canada – US border is closed to non-essential travel, which also detrimentally may affect the Investor's ability to respond to a document request process and affect the ability of counsel to travel to review, sort, and scan documents *in situ*.
6. Counsel for the Investor have not been in their offices since March, with no end to this situation currently in sight. Reed Smith, for example, has closed its 31 offices as a result of the virus. This includes the New York office where Ben Love is located; the

New York metropolitan area has seen almost half the cases in the U.S. All Reed Smith lawyers have been working online as of Friday, March 13th. The Appleton Office in Toronto is currently under shutdown and has been closed since the third week of March.

7. Members of the legal team have been affected through infection of family members, urgent family duties or the need to tend for professional colleagues or family members who have been stricken by the pandemic.
8. The Government of Canada also has been affected by this tragic pathogen.
 - a. On March 16, 2020, Canadian Prime Minister Trudeau in a public speech extorted Canadians to shelter in place. He stated “All Canadians, as much as possible, should stay home.”²
 - b. On March 30th, Prime Minister Trudeau addressed the impact on Canadian business from the Coronavirus pandemic. The Prime Minister stated:

To fight COVID-19, we are asking everyone to stay home as much as possible. But these recommendations have meant a slowdown for businesses... You know the drill. Stay home as much as possible, wash your hands often, and keep at least two meters from each other.³

- c. Canada’s Cabinet (officially known as the “Governor in Council”) has admitted the imminent and severe risk in Canada to public health arising from this infectious communicable disease in a number of official government instruments. The Canadian Cabinet has most recently acknowledged the state of emergency in its Order in Council extending the closure of the Canadian border. The *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Prohibition of Entry into Canada from the United States)* provides:

Whereas the Governor in Council is of the opinion that:

- (a) based on the declaration of a pandemic by the World Health Organization, there is an outbreak of a communicable disease, namely

² Prime Minister’s remarks on Canada’s evolving response to COVID-19, March 16, 2020 - posted to the Prime Minister’s official website at: <https://pm.gc.ca/en/news/speeches/2020/03/16/prime-ministers-remarks-canadas-evolving-response-covid-19>

³ Prime Minister’s remarks, March 30, 2020 - posted to the Prime Minister’s official website at: <https://pm.gc.ca/en/news/speeches/2020/03/30/prime-ministers-remarks-workers-and-business-owners-facing-challenges-due>

coronavirus disease 2019 (COVID-19), in the majority of foreign countries.

(b) the introduction or spread of the disease would pose an imminent and severe risk to public health in Canada.

(c) the entry of persons into Canada who have recently been in a foreign country may introduce or contribute to the spread of the disease in Canada; and

(d) no reasonable alternatives to prevent the introduction or spread of the disease are available; ⁴

9. Canada has issued orders for public protection (such as the *Minimizing the Risk of Exposure to COVID-19 Coronavirus Disease in Canada Order (Mandatory Isolation)* to the end of June 2020, and the effect of these orders may well be extended.⁵
10. At this time, we are mindful of complying with disease-control restrictions implemented by relevant governmental or health authorities. As a result, counsel acting for the Investor has had to alter their practice habits dramatically.
11. While the Governor of Florida has recently announced plans to ease the opening of most of Florida for business, that does not apply to South Florida (where the Reed Smith team is based) and where well over half of the infections and deaths resulting from the coronavirus are centered for Florida.
12. The imposition of these emergency health and public safety measures have significantly impacted the ability of legal counsel, and those supporting them, to mobilize resources.
13. Similar restrictions apply to the Investor itself:
 - a. John Pennie, the Tennent Energy client representative, is in self-isolation in a rural location in the Province of Ontario. He is located in an area under mandatory lockdown. Mr. Pennie's pre-existing medical condition puts him at extreme risk during this COVID-19 pandemic.
 - b. Others at Tennant Energy LLC that counsel would need to consult are located in

⁴ Canada – Order in Council - Minimizing the Risk of Exposure to COVID-19 Coronavirus Disease in Canada Order (Prohibition of Entry into Canada from the United States) - **PC Number:** 2020-0263 – April 20 2020 . <https://orders-in-council.canada.ca/attachment.php?attach=39170&lang=en>.

⁵ Minimizing the Risk of Exposure to COVID-19 Coronavirus Disease in Canada Order (Mandatory Isolation). PC Number: 2020-0260 Date: 2020-04-14 <https://orders-in-council.canada.ca/attachment.php?attach=39166&lang=en>.

areas that are under mandatory lockdown. One in Ontario and another in California –a state which also has been under lockdown. Both persons are of advanced age, and both suffered medical conditions that place them at high risk for COVID-19. The increased risk to the effects of the COVID-19 virus and the mandatory shelter in place orders severely limits, if not outright eliminates, their ability to leave their home to search for documents necessary for the filing of the Memorial.

- c. In any event, the Investor cannot access storage archives, other non-essential facilities or professional offices due to the impact of the pandemic – as a result of mandatory orders issued by Canada, Ontario and California. At this point, it is impossible to advise when access could be restored.
14. In addition, the Investor is experiencing delays in the preparation of a valuation report from a third-party expert.
 - a. To prepare its Memorial, the expert must obtain information from the Investor. Much of this information is not available to the closure of facilities due to COVID-19 and to the other factors outlined in this Motion.
 - b. Counsel are impeded in its ability to meet and work with client representatives, and to review original documents that are not immediately available;
 - c. Counsel is unable to access materials that might be in the possession of third parties as their offices are closed and the personal are not readily available due the wholesale closures of offices for urgent health and safety reasons;
15. At this time, we are mindful of complying with infectious disease-control restrictions implemented by government and health authorities. Counsel has altered their practice habits dramatically. By way of example, Reed Smith has closed 31 offices as a result of the virus, and only recently opened certain offices in Asia. Its lawyers have been working online as of Friday, March 13th. To combat the spread of the COVID-19 virus, public authorities in the United States and Canada have imposed escalating isolation and social disengagement measures. The imposition of these emergency mandatory health and public safety measures significantly have impacted the ability to meet the May 27, 2020 deadline of *Procedural Order No. 4*.
16. The Investor diligently has attempted to meet the Memorial filing deadline as ordered, but the widespread current limitations resulting from the COVID-19 pandemic in Canada and the United States have presented an unprecedented impediment beyond the reasonable advance contemplation or control of the Investor which impair in the Investor’s ability to prepare the Memorial in a timely manner.

17. Among other things, counsel is experiencing delays in reaching witnesses, accessing documents, and obtaining expert witness reports that would be based on documents that are currently unavailable due to COVID-19 shutdowns.
18. Article 15(1) of the 1976 *UNCITRAL Arbitration Rules* provides that the arbitral tribunal “may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.” In light of these extraordinary circumstances, the Investor seeks that the Tribunal take immediate steps to ensure that both disputing parties have sufficient time and are treated equally.
19. Canada’s border closure regulations currently are effective to the end of June 2020. Accordingly, counsel for the Investor at this time proposes an initial six-week time extension concerning the Memorial deadline.
20. The Investor makes this request in the hope that this additional time will be sufficient. Public health and safety issues related to the COVID-19 pandemic may worsen, which may necessitate seeking additional accommodation on the schedule.
21. A modification of the Memorial deadline will require changing two related deadlines. The Investor proposes the following modifications to the procedural schedule:

Event	Dates in PO 4	New Dates Sought
Investor’s Memorial	May 27, 2020	July 8, 2020
Deadline for Respondent to submit request for Bifurcation	July 13, 2020	August 24, 2020
Deadline for Investor’s Response to Bifurcation Request	August 3, 2020	September 14, 2020

22. The dates for the Counter Memorial, Document Production, Reply Memorial and all other subsequent deadlines should proceed as outlined in Annex I to *Procedural Order No. 1* depending on whether the case is bifurcated or not. The requested time extension provides each disputing party with equal treatment. There is no undue burden imposed upon Canada by the implementation of this reasonable schedule modification.
23. The Respondent already was on notice of the detrimental impact upon the Investor and its counsel arising from the communications exchanged by the parties in April 20, 2020 and of the potential that a request to modify the Memorial schedule would be possible. In paragraph 52 of the April 20, 2020 Response to Canada’s Motion, the Investor stated:

For reasons outside of the Investor's control, and not caused by it, the Investor has encountered extraordinary difficulties in being able to meet the ordinary deadlines originally contained in this arbitration. While the Investor has not yet sought an extension of time for filing its Memorial, the situation described in this Motion is exactly the type of *force majeure* event that would justify an extension of time for the filing of the Memorial.

24. In the interest of time, the urgency of the localized effects of global pandemic upon the Investor, and Canada's prior knowledge of the Investor's ongoing difficulties from the April 20th Response, the Investor has not consulted with counsel for Respondent in advance of this communication to the Tribunal.
25. As a practical matter, the Investor respectfully requests that Respondent be granted a short amount of time to respond to this communication in advance of the current May 27, 2020 deadline for its Memorial.

Prayer for Relief

26. On the basis of the foregoing, Tennant respectfully requests that the Tribunal grants the following modification of the procedural schedule:
 - a. The Investor's Memorial be filed on July 8, 2020
 - b. The deadline for the Respondent to submit a request for Bifurcation be set for August 24, 2020
 - c. The deadline for the Investor's response to the Bifurcation Request be set for September 14, 2020

Respectfully submitted on behalf of the Investor, on May 2, 2020.



Barry Appleton

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