IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT AND THE
UNCITRAL ARBITRATION RULES, 1976

PCA CASE NO. 2018-54

In the Matter of Arbitration Between:

TENNANT ENERGY, LLC,

Claimant,

and

GOVERNMENT OF CANADA,

Respondent.

Volume 4

Thursday, November 18, 2021

The hearing in the above-entitled matter came on at 9:00 a.m. (EST) before:

MR. CAVINDER BULL SC, President

MR. R. DOAK BISHOP, Arbitrator

SIR DANIEL BETHLEHEM, Arbitrator

ALSO PRESENT:

Registry, Permanent Court of Arbitration:

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Legal Counsel

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Assistant Legal Counsel

MS. DIANA PYRIKOVA
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APPEARANCES: (Continued)

On behalf of Respondent:

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MR. MARK KLAVER
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MR. STEFAN KUUSKNE
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APPEARANCES: (Continued)

Ministry of Energy, Government of Ontario:

MR. ERIK GULOIEN
MS. KAREN SLAWNER
MR. WILLIAM COUTTS

Independent Electricity System Operator:

MS. EVA MARKOWSKI

C O N T E N T S

P R O C E E D I N G S

PRESIDENT BULL: Right. I'm told we have everything in the main room now, so let's begin for today.

This is Day 4 of the jurisdictional hearing for Tennant Energy and Government of Canada.

Before we begin with the Expert Witness presentations, just on housekeeping, can I check if Parties have any issues to raise?

MR. MULLINS: On behalf of the Claimant, we do not, other than just understanding the Schedule, now that you've raised it.

So, as I understand it, there is going to be a direct that will allow the Expert to give a presentation, then cross-examination, and then we will do Canada's Expert, and then there will be a 'hot tub' essentially, for lack of a better word, in the afternoon. I'm wondering, if, just so I can plan accordingly and so we can be efficient, if the Parties will be able to ask questions themselves during the hot tub for stuff that comes out during the hot-tub session just so I can plan accordingly in terms of what would be most efficient for purposes of having a hot tub.

PRESIDENT BULL: Thank you for raising that, Mr. Mullins.

If Parties recall, the way in which the option of

having a hot tub came up was because of the sequence of witnesses and their evidence, so this is very much something that has been put there in case we need it, and we want to make sure, in particular, that Justice Grignon has the chance to respond to what Ms. Lodise might say after her. So, it's there for that purpose.

It may well be that because of cross-examination and questions from the Tribunal to the Experts during their initial sessions that the hot-tubbing might be either brief or unnecessary, so that's how I'm approaching it rather than thinking that counsel would have to prepare to ask questions during the hot tub, though I will ask counsel if there are questions that they want to ask arising from questions that the Tribunal has asked them during the witness conferencing.

MR. MULLINS: That was actually helpful.

So, I guess your plans, then, would be to ask questions as they arise during the initial presentations of the Expert, and if it turns out there is no need to have a hot tub, we may not even have one.

PRESIDENT BULL: That's correct.

MR. MULLINS: Okay. That was helpful. I raised it. Thank you.

PRESIDENT BULL: Any housekeeping matters from Canada?

MS. SQUIRES: No. Nothing from us. We are always disappointed when things related to hot tubs get canceled, but no, that plan sounds great to us.

PRESIDENT BULL: Well, we don't know if they'll be canceled. We'll see.

There were two matters that the Tribunal wanted to raise with the Parties before we start with the Experts.

The first one relates to the Closing Statements tomorrow. The Tribunal would like to strongly encourage both Parties to engage with the arguments of the other side during the presentations tomorrow. We just very recently a few days ago had the Opening Statements. We've also obviously read the papers, so we know your initial positions. What would be helpful for the Tribunal would be not so much another presentation of your position but more rebuttals and rejoinders to what you may have heard from your opponents.

In that same vein, the Tribunal would strongly encourage Parties to deal with the evidence that has come up in the midst of the Hearing; and so, if your Closing presentations were focused more on those two matters, engaging with the arguments and with the evidence that's come out, that will be very helpful to the Tribunal.

The other matter that we wanted to raise concerns Post-Hearing Briefs. Now, we want to have a discussion

with counsel at the end of tomorrow about this, but we wanted to flag some initial thoughts so that you can discuss this amongst your own counsel teams as well as, if you feel necessary, with each other.

At the moment, the Tribunal is inclined to the idea that Post-Hearing Briefs be limited to matters which arose during the Hearing. Now, that would obviously include evidence that has come up and how Parties would like to characterize and make submissions on the basis of what has come up in the evidence, both fact and expert, of course; but also if you've heard arguments that have perhaps taken a new emphasis or slant during this Hearing, that too is something that we would think the Post-Hearing Briefs should be focused on.

That's what we would like the Post-Hearing Briefs to be about rather than again another opportunity to do what, in effect, would be an opening statement, so the same sort of philosophy as what we are encouraging you for the oral closings.

We, as the Tribunal, are also very much inclined to have a page limit or a word limit for the Post-Hearing Briefs. And I think I don't need to say anything more, but those are the sorts of issues that you might want to start thinking about, perhaps have a discussion with each other about, and that way we can have a good fruitful discussion

at the end of tomorrow.

Now, if Parties wanted to let the Tribunal know their positions on Post-Hearing Briefs before the end of the day tomorrow by e-mail correspondence, that would also be perfectly fine. I leave that up to you and to your discussions.

Hopefully that's of assistance to the Parties, and if that's clear, then, we can begin with the Experts.

I just pause to see whether there are any clarifications that Parties need on what I've just said.

MR. MULLINS: Not for the Claimant.

MS. SQUIRES: Perfectly clear, thank you.

PRESIDENT BULL: Very good. Thank you.

JUSTICE MARGARET GRIGNON, CLAIMANT'S WITNESS, CALLED

PRESIDENT BULL: Then let's begin with Justice Grignon, and I see her on the screen. Can you see and hear me?

THE WITNESS: Yes, I can, President Bull.

PRESIDENT BULL: Very good. Can I trouble you to start by just stating your full name, please.

THE WITNESS: Yes. Margaret Morrow Grignon: M-O-R-R-O-W; Grignon, G-R-I-G-N-O-N.

PRESIDENT BULL: Thank you.

You've been watching the proceedings before today?

THE WITNESS: I have read the transcripts, President Bull, for November 15, 16, and 17th.

PRESIDENT BULL: All right. Well, as you know, I'm President of the Tribunal, and you'll see on the screen my two fellow Arbitrators, Mr. Doak Bishop and Sir Daniel Bethlehem, and thank you for being here to help with us this case.

THE WITNESS: You're welcome.

PRESIDENT BULL: You'll see already on the screen a declaration, which I would be most grateful if you would take.

THE WITNESS: I solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief.

PRESIDENT BULL: Thank you very much.

Mister--well, I'll leave it to counsel--to take things forward and lead you into the presentation you will give.

MR. MULLINS: Thank you, Chair Bull.

DIRECT EXAMINATION

BY MR. MULLINS:

Q. Justice Grignon, thank you so much for coming this morning. Do you have your Expert Report before you?

A. I have it, yes.

Q. And do you have any changes in the Report today?

A. So, the only change that I have in the Report is I have a new address. Instead of the address that's in the Report, we've moved our office to 3780 Kilroy--K-I-L-R-O-Y--Airport Way, Suite 200, Long Beach, California 90806.

Q. And in addition to what you reviewed in your Report, did you review anything else in preparation for your testimony today?

A. Yes. In preparation for my Report (CER-2), I reviewed the Witness Statements of John and Derek Tennant (CWS-2, CWS-3). Subsequently, I reviewed the Witness Statement of John Pennie (CWS-1), the Transcripts of November 15th, 16th, and 17th, and the Expert Report of Ms. Lodise (RER-1).

Q. Before I turn you over for your Opening Statement, one thing I wanted to point out, I notice in your résumé you worked for a law firm called Reed Smith, which I'm familiar with.

Have we ever been partners before, Justice Grignon?

A. No. I worked for Reed Smith until the end of 2015 in the Los Angeles office. Reed Smith is an international law firm, as you know. At the time that I worked in the Los Angeles office, it did not even have a Florida office, and you were, in fact, not part of the firm.

Q. Prior to our retention of you, had you and I ever met?

A. We had not.

Q. With that, I'm going to turn it over to you to give a presentation to the Tribunal as to the application of California--well, a description of California Law on oral trusts and to help the Tribunal in this arbitration.

A. Thank you.

DIRECT PRESENTATION

A. So, I will begin with just a few facts that I think are evidenced in the testimony and are important for my opinion.

Both John Tennant and Derek Tennant stated and testified that John stated he would hold the Shares that he received from I.Q. Properties in a holding company that he would designate at a later time, and he testi--they stated and testified that that happened on April 19th, 2011, and that testimony was corroborated by John Pennie.

They also both stated and testified that on April 26, 2011, John Tennant designated Tennant Travel as the holding company that would hold the Shares.

And then on January 15, 2015, John Tennant--and let me back up for a moment. Thereafter, once the Share Transfer appeared on the Share Register, the Shares were held in the name of John Tennant. And then on January 15,

2015, John Tennant transferred those Shares directly to Tennant Travel and assigned all of his rights, title, and interest in the Shares to Tennant Travel, which, a couple of months later, in April of 2015, became Tennant Energy.

So, with those facts in mind, I will start with Oral Trust Law in California.

Under California law, a trust in personal property may be created by an oral declaration of the trustee, and you find that in Probate Code, Section 15200 and 15207 (CLA-292). This oral declaration is simply a unilateral declaration of the trustee, which evidences an intent to create a trust, and it can be created by words saying no more than 'I intend'-'I hold these Shares in Trust for another party.'

The intent to create a trust is found in Probate Code 15201.

To have a trust, you have to have a few things. You have to have trust property or res, and here the property is clearly the Shares of the Corporation.

You also have to have a beneficiary. You have to have a beneficiary but you don't have to have a named beneficiary. Under Probate Code, Section 15205 and 15207, the beneficiary can be someone in a class of beneficiaries; it can be someone that will be designated later. You simply have to have a beneficiary described sufficiently so

that it can be readily ascertained, and case law makes clear that descriptions such as a holding company to be designated by the trustee in the future comply with those--with that requirement for designating a beneficiary.

You also need to have a purpose--the trust needs to have a purpose but it can be any purpose as long as it's not unlawful. It can be any purpose even if it's indefinite or general, and it can certainly be for purposes of holding the Shares in another company.

The creation of an oral trust does not require any consideration. It's enough to say, 'I'm holding these Shares for another party,' and that is sufficient under 15208 of the Probate Code.

No transfer of the property directly into the trust is required under the Heggstad case (CLA-296) and on the restatement second cited in that case. It's not required that the trust actually be--that the Shares actually be transferred to the trust.

The trustee does not need to use the word 'trust.' It's again sufficient for the trustee to say that he is holding the Shares for another party, and that can be found in the Weiner case (CLA-298), which is also cited in the Expert Reports.

The property is held in the name of the trustee. So, in this case it's held in the name of John Tennant.

Under California law, the trust is not a legal entity. It has no status as a legal entity, and it is the trustees who holds the shares in the trustees' names.

The Probate Code requires that an oral trust be established by clear and convincing evidence; and, in California, 'clear and convincing evidence' is defined in our jury instructions. So, California has a set of approved jury instructions which are what are read to juries to decide cases. And in this case, our Jury Instruction Number 201 defines 'clear and convincing evidence' as 'highly probable,' so it just- 'preponderance of the evidence' is more probable than not, and 'clear and convincing' is highly probable.

The additional language that Ms. Lodise cited in her Report is not part of the jury instruction that's used in California and, in fact, there are cases which have rejected adding that language into the jury instruction because it tends to bleed over into the third standard of proof which is 'beyond a reasonable doubt,' which is the proof that's used in a criminal case. So again, preponderance of the evidence is more likely than not; clear and convincing evidence is highly probable; and then beyond a reasonable doubt is more akin to the language that Ms. Lodise stated in her Report (RER-1).

Probate Code Section 15207 also says that the

oral declaration of the Settlor, standing alone, is not sufficient evidence of the creation of an oral trust. What that refers to is the oral declaration of trust. So, if the only evidence that we have in this case was that John Tennant said that he held the property in trust for Tennant Travel, that would not be sufficient to create the oral trust, but that's not what we have here.

What we have here is the testimony of John Tennant that that's what he said. We have the testimony of his brother Derek that that's what he said, and we have circumstances and conduct that's consistent with that behavior.

The Law Revision Commission (R-091) documents that Ms. Lodise pointed to are concerned with Settlors or Trustees who have--who are deceased so that no one--if you just have a deceased Trustee or Settlor whose--and you have evidence that the Trustee said that he was holding the Shares in trust for another party, that that would not be sufficient, but those cases and the statute do not apply to the actual testimony of the trustee. And you'll note in the recommendations that Ms. Lodise presented, they are talking about to prevent perjury in the case of a party--of a trustee who has become deceased, so that's the purpose of that.

And finally, the recommendations of the Law

Revision--the Law Revision Commission (R-091) is--I'm not certain if it's just in California, but it's a commission that's established with respect to various laws in California, and it conducts studies and does analyses and prevents that recommendation to the legislature, and then the legislature adopts a statute, so the statute that controls, and the statutory language says the oral declaration is not sufficient. It does not contain the-- any of the other recommendation of the Law Revision Commission, and it's the statute that controls and not the recommendation.

So, based on all of that and based on the facts that I have indicated, I would reiterate that, in my opinion, John Tennant created an oral trust on April 19th, 2011, and designated Tennant Travel, soon to become Energy, April 26, 2011.

And that, in addition, he transferred all of the Shares in January of 2015 to Tennant Travel which became Tennant Energy in April 2015 and assigned all of his rights and interests in the Shares at that point, including tangible and intangible rights and including what I would call a 'chosen action'; in other words, if the Shares had a right to bring an action, then when he transferred those Shares, that right to bring an action was transferred with the Shares to Tennant Travel/Energy, and I will leave my

Opening Statement at that.

PRESIDENT BULL: Thank you very much, Justice Grignon.

Can I ask if my colleagues have any questions?

We're going to leave most of our substantive questions until after the cross examination, but if there is any clarification that my colleagues want to make about the presentation, I'm happy to pause here and let that be done.

ARBITRATOR BISHOP: Yeah, I'd like to, but I think Sir Daniel may have a question first.

ARBITRATOR BETHLEHEM: Go ahead, Doak. I'll follow you.

ARBITRATOR BISHOP: Okay.

You referred to Jury Instruction 201, defining 'clear and convincing evidence' as 'highly probable.' I have two questions about that to clarify it.

Number 1 is: What is the context of this particular jury instruction, and that is, is it defining the term 'clear and convincing evidence' in a context that's similar to the one we're dealing with or is it a different context? What is the context?

And then Number 2, my question is: Are there other words defining 'clear and convincing evidence' in this jury instruction other than simply the words 'highly

probable'?

THE WITNESS: Thank you, Arbitrator Doak.

Let me just indicate, I'm just looking quickly for the jury instruction. Do we happen to have that jury instruction, by any chance?

MR. MULLINS: Yeah. If you give us a moment, we can pull it up.

THE WITNESS: Okay.

MR. MULLINS: That's great if that will help everyone.

ARBITRATOR BETHLEHEM: Perhaps I might add a codicil to Arbitrator Bishop's position because it's going in the same direction, and forgive me because I'm sitting in London and I come through the prism, look at this through the prism of English law. And when you talk about jury instructions, my immediate inclination is to think about criminal proceedings, and I know that in U.S. and in California you use juries rather more widely for civil proceedings. So, I'd be grateful in your response to Arbitrator Bishop's question if you could just explain to a non-Californian lawyer the kind of proceedings that you have in mind, whether it goes beyond criminal proceedings.

THE WITNESS: Yes, thank you.

So, the jury instruction (C-270) is very short. It says (reading): 'Highly Probable Clear and Convincing

Proof. Certain facts must be proved by clear and convincing evidence, which is a higher burden of proof.' That higher burden, the previous instruction talks about preponderance of the evidence. 'This means the party must persuade you that it is highly probable that the fact is true. I will tell you specifically which facts must be proved by clear and convincing evidence.'

So, that is the entire instruction.

MR. KUUSKNE: Mr. President, I must interject here, I apologize. I believe this is new evidence that has not been yet introduced to the record in this arbitration.

THE WITNESS: I think that's probably correct.

MR. KUUSKNE: And under the Procedural Orders, new evidence is not permitted.

THE WITNESS: It's not really evidence. It's law--

(Overlapping speakers.)

MR. MULLINS: Could I respond to that, to the objection?

PRESIDENT BULL: Mr. Mullins, go ahead.

MR. MULLINS: Thank you.

First off, we did not have a chance to respond to the Expert Report of Ms. Lodise. Our belief, as testified already in the record, is that she's using the wrong standard. The statute uses 'clear and convincing evidence

for purposes of oral trust' is defined under California law by simply--and I'll let the Expert talk about how the standard is applied in various contexts beyond trust. It's a common term, there's--and so she's allowed to explain it.

But we are here, as I understand it, to learn what Florida law is--California law, California--sorry, I'm a lawyer--what California law is, and I believe we are entitled to have the Tribunal understand what that law is. I plan to cross-examine Ms. Lodise on what California law is in cases that she didn't recite that our Expert cited, for example. This is not a situation of legal authorities for explaining the NAFTA. We are here to determine what California law is. And both Experts should be able to testify what California law and, by the same token, be able to cross on it.

But it would be very shocking and disappointing for Canada not to allow this Expert to explain interpretation of a standard that her Expert has applied if we believe, and I think our Expert has already testified that she's applying the wrong standard.

PRESIDENT BULL: Mr. Mullins, I think the point is a little different. I think the point is whether the Claimant could have put this jury instruction into the record prior to today in anticipation that it would be used by the Expert in the presentation and so that the

Government of Canada would have some advance notice of it. It's not so much--my concern is not so much that--well, the Expert needs to refer to this to answer to deal with the point, but whether this could have been disclosed into the record prior to this moment.

MR. MULLINS: We had asked to give her an opportunity to respond to Justice Lodise's Expert Report, and we were not allowed to do that. This is a one page document that is pretty clear, and she's a longstanding California lawyer.

What is the purpose of having a hot tub situation? What is the purpose of having these--or your ability to have the Experts talk about if they can't be impeached with what California law is. It might be different from what they said. We are here--just like any experts who try to figure out what the damages are, we are here to determine what California law is, and it would be very disappointing and absurd that our Expert not be able to talk about--and she already has--talked about what California law is, as to what 'clear and convincing' means. If the Arbitrator Doak has asked the question and now we're not going to be able to answer the question based on her testimony, the record is what it is, it's already in. Arbitrator Doak asked is 'clear and convincing' used in other contexts and how does it apply here, and I think that

the Expert should be entitled to answer.

PRESIDENT BULL: So, Mr. Mullins, just so you understand what's going on in my mind, I don't think you've answered my question. I'm not--nothing you've said answers my question. My question is why wasn't this put into the record in anticipation of the presentation? If there is a reason, let me know. If there isn't, there is something else I want to raise with Canada.

MR. MULLINS: Well, the answer is we just recently figured out that, looking back on the standard, that the test that was being used by Ms. Lodise had been rejected in the title, so that has been recent. We are not trying to surprise anyone, so I--that's the answer to that.

PRESIDENT BULL: Thank you.

MR. MULLINS: But I do think there is little surprise here for purposes of being able to have a California lawyer, their Expert, talk about the standard to be applied, but that's the answer to the question Justice Grignon recently gave us to our present--to our notes and, in fact, yesterday, and that's why we give it today.

PRESIDENT BULL: Thank you for that answer.

Turning, I guess, to you, Ms. Squires, since you're on the screen, can I ask you what though does the Government of Canada want the Tribunal to do? Because there is some sense in what Mr. Mullins says that we are

here to figure out what the correct answer is. I appreciate that this document, this jury instruction may not have been highlighted to you, and so you may want some opportunity to deal with it, but I'm really asking now what Canada wants from the Tribunal because at one level you could be asking us to exclude this, and on the other hand, you may be asking for some other direction so that you can deal with it.

MS. SQUIRES: Yeah, thank you, for the opportunity to respond.

I think, first--the first thing I'd like to say is that Canada's objection is to highlight the importance of following the procedural rules in the Arbitration. They are there for a reason. It's to provide each Party with an opportunity to respond, and I don't think in any circumstance just table dropping a piece of evidence and then asking for forgiveness for filing after the fact is appropriate.

With that in mind, I agree wholeheartedly with you, Arbitrator Bull, that we are in the pursuit of truth here, and in order to do that it's important to perhaps look at this document, determine if it has any weight, it should be accorded any weight for this Tribunal, and in doing, so Canada would just request an opportunity to be able to respond to arguments made on this document, either

through cross examination or in the presentation of Canada's Expert that will follow shortly after.

PRESIDENT BULL: I think that's very reasonable of you, Ms. Squires. Thank you for that.

So, I think we will move forward in that way, and as we do move forward, if there are other directions that the Government of Canada wants to seek, then you should raise that to the Tribunal, but for the moment we will allow this document to be referred to by the witness and to hear what she has to say about it.

THE WITNESS: Thank you.

Should I answer the questions now?

PRESIDENT BULL: Yes, please.

THE WITNESS: Okay.

So, this standard of proof of clear and convincing evidence is used in California law in a number of situations.

For example, punitive damages have to be proved to a jury by clear and convincing evidence. Elder abuse has to be proved by clear and convincing evidence, and there are a number of other circumstances.

Typically, these--this burden of proof is applicable in civil jury trials. It's not applicable in a

criminal jury trial which is where it's beyond a reasonable doubt, so--

(Coughing.)

THE WITNESS: I'm so very sorry.

So, this is going to be in civil jury trials.

Now, in California, Probate Court is not generally presented to a jury. It's generally decided by a judge, but the judge follows the same instructional requirements as would be presented to a jury, and frequently judges that are trying cases to the Court use the jury instructions as a guide.

I hope that answers the question--the questions.

ARBITRATOR BETHLEHEM: May I, just as a practical matter, raise to you--and if you think it's appropriate we could put it to the Parties--we, the Tribunal, of course, are only just seeing this on the screen. We don't have a copy of this document. I imagine that, as a matter of formality, it will be appropriate that the document is introduced under the principle that you've just articulated, but I wonder pending the introduction of that document whether the Tribunal might not be provided by a copy of it through the Tribunal's Secretary so at least

we've got a hard copy that we can look at because the moment that this is taken off the screen, we will have lost it--we will have lost sight of it.

PRESIDENT BULL: Thank you, Sir Daniel. I think that will be imminently sensible.

And, Mr. Mullins, if you can take the necessary steps to have that done.

MR. MULLINS: We will do so forthwith.

PRESIDENT BULL: Thank you.

ARBITRATOR BISHOP: Is it only this one page, or is there--does it go further than just this one page?

THE WITNESS: That's only just one page.

ARBITRATOR BISHOP: Okay.

MR. MULLINS: Well, what we provided you--and I assume that Arbitrator Bishop, you know, understands this, so this is the jury instruction for clear and convincing proof, just like any jury instructions, obviously other ones, but this is the one for just clear and convincing. If you want the whole jury instruction, we can provide that, but I assumed you just want the one up there. That's all.

ARBITRATOR BISHOP: And could I ask the

Witness--in this one page it says--there's a heading "Directions for Use" and then there's another heading "Sources and Authority," and then there are, I think, six bullet points under that. Can you tell us what is the meaning and use of the sources and authority section of this jury--of this model jury charge?

THE WITNESS: So, there is a commission that develops jury instructions that are then approved; and, when they develop jury instructions, they set forth in the sources and authority the case law upon which they relied, the statutory and case law upon which they relied in drafting the instruction. And you'll note that, in some of these cases, there is language similar to the language that Ms. Lodise pointed to. In fact, one of the cases she pointed to--but the case that I think is the--probably the most compelling is the last one, the Nevarrez case, in which someone specifically asked that the jury instruction be modified to include this language that Ms. Lodise pointed to, and the Court said, expressly, "We're not doing that because that really bleeds over into the criminal standard of beyond a reasonable doubt, and we think the "highly probable" language is the correct language."

ARBITRATOR BETHLEHEM: May I just raise another question, and perhaps counsel for Canada could come on to the screen as I do so, because I'd like to put the question to the Witness. Is counsel for Canada there, please?

Thank you.

I'd like to put the question to the Witness, but I'd like to do so--and if the Witness could pause before she responds because I think it would be appropriate to hear whether Canada would object to the Witness responding to this question now in the light of any cross-examination.

And my question to the Witness is that--I'm looking at some of the case law that's been appended to the various expert evidence, and I see that, for example--I have no idea of whether it's relevant, but in particular with regards to clear and convincing, sort of, evidence that the Probate Code Section 5301 was amended, and part of that amendment seems to be address the "clear and convincing evidence" standard.

Now, I'm just trying to understand to our--you know, for our Expert Witness. You said a moment ago, I think, if I understood correctly, that the courts--the probate courts work on basis of different rules but they

apply a clear and convincing standard test, and I'd just like to make sure, before we go down this, sort of, a rabbit hole of these jury directions, whether the jury directions are the appropriate document that we should be looking at or whether there is something else in the Probate Code or in any other code before there's too much water under the bridge.

But with the President's indulgence, I'd like to just pause there and see whether I'm stressing--I'm stepping into cross-examination territory because then it would be appropriate that this issue is addressed at a later stage.

MS. SQUIRES: Canada is happy to allow that question to proceed, and I would encourage, Sir Daniel, if you'd like to ask the--Canada's Expert the same question, I think both may--should have an opportunity to respond to that.

ARBITRATOR BETHLEHEM: Well, Canada's Expert is, no doubt, listening in to this, and I'm sure she'll have an opportunity to respond, but I know we haven't even got out of the starting blocks on cross-examination. This is all raised because of the jury directions. So, I'd just like

to understand whether the jury directions are going to be at least controlling of what this Expert Witness has to say to us or whether we should be--we should have in mind that there are other documents as well.

THE WITNESS: I will answer this to the best of my ability, and that is that 15-207 says that (reading) the existence in terms of an oral trust of personal property may be established only by clear and convincing evidence. I do not know of anything else in the Probate Code that addresses that, although I could perhaps not know it, but the "clear and convincing evidence" standard is the standard that's used in many statutes in California; and as far as I know, it means the same thing in every statute.

ARBITRATOR BETHLEHEM: Thank you very much.

ARBITRATOR BISHOP: Could I ask one other question before we go on.

You referred us to Probate Code 15-207, and the point that an oral declaration of the testator is not sufficient in and of itself, and then you said: "However, this situation is different," and you cited us to the testimony of John Tennant, Derek Tennant, and John Pennie, and then you said: "The circumstances are consistent with

this."

Could you elaborate on what are the circumstances that you see in the evidence in this case that are consistent with an oral trust.

THE WITNESS: So, you have the statement, the Declaration by John Tennant, which is then corroborated by his testimony. So, in other words, you're not just dependent on someone saying what John Tennant said in 2011. You have John Tennant's testimony that that's what he said, that's what he intended. You have the fact that these--these Shares were held in his name, which is consistent with being held in Trust for Tennant Travel. You have the actual--he also testified that he intended to hold the Shares in Trust for Tennant Travel until he could transfer the Shares to Tennant Travel, and that we know that he, in fact, transferred the Shares to Tennant Travel in January of 2015.

We have the memorandum, the February of 2016 memorandum, and I'm trying to think if there was anything else I was looking at.

For right now, that's what I'm--what I'm thinking as the consistent testimony--

(Overlapping speakers.)

ARBITRATOR BISHOP: I'm sorry.

THE WITNESS: One other thing is that he testified that he--that he wanted to put it in a holding company, and that--then we know that he got a holding company from his brother Jim Tennant and used that holding company to hold the Shares. So, the fact that he used a holding company that came from his brother, Jim Tennant, is also consistent with his testimony.

ARBITRATOR BISHOP: Okay. Thank you.

One last question: When 15-207 says that the statement of the testator, as to the existence of an oral trust, is not, in and of itself, sufficient, is that statute, in that provision, have the same effect when there are two other people who say they heard the testator say that? That is to say, is the existence of other people who heard that oral declaration corroborative in the law so that you go beyond this statement in 15-207, or is it still the same that the oral statement by itself isn't sufficient?

I don't know if I'm making myself clear, but if you understand that question, if you could answer it, I

would appreciate it.

THE WITNESS: Yes, I think I understand it.

So, if, for example, you had only--let's assume that John Tennant wasn't available to testify, and the only statement--the only evidence you had was Derek Tennant saying that John Tennant made an oral declaration to create an oral trust. This statute says that wouldn't be sufficient. But what you have here is the testimony of the Trustee who says this is what I said, and that's the part that is very different in this case from all of the other cases where the test--the Trustee is deceased or not available, and you only have the people who allegedly heard what the--what he said to testify before the--the trier of fact.

ARBITRATOR BISHOP: So, in other words, if you have the actual Trustee himself alive and testifying as to what he said, then that takes it out of this particular provision in Probate Code 15-207.

THE WITNESS: Yes, because then you don't simply have the oral Declaration, which is what he said at the time in 2011. Instead, you have his testimony, which is different than--than someone else testifying about what he

said.

In other words, it doesn't say--it says "declaration" and not testimony. If it had meant "testimony," it would have said "declaration" and "testimony," but it said "declaration," which has this particular meaning in the law to be a statement that someone made previously.

ARBITRATOR BISHOP: Okay. Now I understand. Thank you very much. I don't have any other questions.

PRESIDENT BULL: Justice Grignon, I have something much simpler--I hope much simpler--and it takes us back to the standard of proof. I just want to make sure I understood what you said during your presentation.

I understood from what you said that the "clear and convincing evidence" standard is in between the criminal standard, beyond reasonable doubt, and the--this is my phrase--the usual civil standard of--"balance of probabilities" is the language we use. I think you used "more likely than not"--is that correct? It's somewhere in between?

THE WITNESS: That's correct.

PRESIDENT BULL: Okay. Thank you very much.

That's all I wanted to clarify.

I think, then, we should move to cross-examination, and counsel for Canada can proceed once they're ready.

CROSS-EXAMINATION

BY MR. KUUSKNE:

Q. Good morning, Justice Grignon. How are you?

A. Good morning. I'm good, thank you.

Q. I hope all is well where you are.

A. It's just early is all, but it's well.

Q. Thank you for joining us at this unreasonable hour for you.

My name is Stefan Kuuskne. I am counsel with the Government of Canada in this Arbitration.

I will be asking you a series of questions in connection with your testimony made in this Arbitration, particularly your Expert Report (CER-2) and the contents therein.

Throughout this process, it is important that we understand each other, of course. So, if at any time you don't understand me or require clarity, please don't hesitate to ask.

Also for the sake of clarity, if you could please respond in the first instance to my questions, if possible, with a 'yes' or a 'no,' and then if further clarification

is needed, please take the time to further elaborate.

I also wanted to, just let you know, of course, that this arbitration and cross examination is publicly available and is being recorded, so in the event that we need to enter confidential session, I will indicate as much and pause to confirm that we have entered confidential session. Is that agreeable, Justice Grignon?

A. Yes, thank you.

Q. Wonderful, thank you.

So, Justice Grignon you have access to your Expert Report and certain exhibits available to you; correct?

A. I do.

Q. Thank you.

At certain points in your cross examination, I will be calling up sections of exhibits and your Expert Report. They will appear before you on your screen. If you have any problems with that, please also let me know, and we will rectify them accordingly.

Do you have any questions before we begin?

A. I do not, thank you.

Q. Thank you.

So, Justice Grignon, you have relied only on the written Witness Statements of John and Derek Tennant (CWS-2, CWS-3) and the documents contained therein in preparing

the conclusions provided in your Expert Report; correct?

A. That's correct.

Q. And you assume all the facts therein to be true; correct?

A. I assumed the facts to be true, to the extent they were found to be true by the Tribunal.

Q. Okay. Justice Grignon, can we take you to Paragraph 12 of your Report, please.

A. Yes.

Q. So, if you look at Paragraph 12 of your opinion, you state that--sorry.

Thanks, Gen.

You state: 'I have reviewed the Witness Statement of John Tennant and the Witness Statement of Derek Tennant, the Supporting Documents, the facts that follow were taken exclusively from those documents and I have assumed them to be true.' Correct?

A. Yes, that's correct.

Q. And that statement remains true?

A. It is true, yes.

Q. Great. Justice Grignon, you're also aware that the Tribunal has not yet ruled on any of these factual assertions; correct?

A. Correct.

Q. Lovely, thank you.

Now, Justice Grignon, as a judge in California, if you were deciding a question of fact in an adversarial dispute, you wouldn't simply assume one side's version of the facts to be true; right?

A. I don't understand the question.

Q. So, if you were sitting as a trier of fact and you were deciding a question of fact, in an adversarial dispute where there were competing interests, you wouldn't simply assume one side's version of those facts to be true, would you?

A. I would decide what the facts were and then apply the law to the facts.

Q. Weighing those facts?

A. I would decide what the facts were after listening to the evidence and the testimony and then apply the law to the facts that I found to be true.

Q. Excellent, thank you.

So, Justice Grignon, if it was determined by this Tribunal that facts that you assumed to be true were not so, is it possible that your conclusions regarding the existence of the alleged trust could change?

A. If the Tribunal were to find that facts were not true, I would need to know what facts they decided in order to decide whether my opinion was--continued to be correct or not.

Q. Right.

So, within the realm of possibilities, it's possible that your opinion could change; correct?

A. Of course.

Q. Justice Grignon, thank you so much. I have no further questions.

PRESIDENT BULL: Thank you, Mr. Kuuskne.

MR. MULLINS: I have some redirect.

PRESIDENT BULL: Yes, Mr. Mullins.

MR. MULLINS: Thank you.

REDIRECT EXAMINATION

BY MR. MULLINS:

Q. Going back to what we just heard from Canada's expert--sorry, attorney, you're--what you have done is explained to us what California law is; correct, Justice Grignon?

A. That is correct.

Q. But you've also looked at the testimony of the Witness Statements that have been provided; correct?

A. Correct.

Q. If you look at the testimony that was provided yesterday or provided last--this week to determine whether or not that changed your opinion?

A. There was nothing I read in the testimony that changed my opinion.

Q. And when you say that--as I understand what you say, you assumed the facts to be true, can you explain what you mean by that in the context of your Expert Report and how you approached your project here to help the Arbitral Tribunal?

A. When you are giving an opinion on law, I could, of course, just have given an opinion that was totally unrelated to the facts, and that would have been of no use to anyone; or I could take the facts as I understood them and that were present in the statements that I reviewed and arrived and applied the law to those facts that were evidenced before me. I did not see any other facts that would have pointed me in a different direction. And so, with the facts that I had in front of me, I assumed that those facts were true. I assumed that the Tribunal would find them to be true to the extent necessary, and then applied the law as I understand it to those facts.

Q. So, as I understand what you're saying is that, do you--well, let me ask you this: Do you believe as an expert it's your place to determine the credibility of a witness?

A. It is not. That is clearly for the Tribunal to decide based on all of the evidence that's presented to the Tribunal and their evaluation of credibility based on seeing the Witnesses.

Q. And so, if, for example, if you were acting--you were formerly an appellate judge, I think you said.

A. I was both a trial judge and an appellate judge.

Q. How long were you an appellate judge?

A. 14 years.

Q. And just so we have the edification for some of us who are not here in the United States of common law procedures, so for example, you might get an appeal that came up on a, what we would call a 'failure to state a claim' standard; correct?

A. Yes.

Q. And can you describe for us what that means when you're an appellate judge looking at the allegations of a complaint and how you apply those as an appellate judge?

A. Yes. We call it a 'demur' in California, and basically you look at the allegations of the complaint, and you assume them to be true, and you say do these allegations, if they're proven, state a claim, and that's the basis that we review the issue on appeal.

Q. And then you go all the way through a trial, the opposite end, and there is a trial and a trial judge might make certain determinations, what would the appellate review be there?

A. So, the standard of proof that we've been talking about, the preponderance of the evidence or clear and

convincing, has almost no relevance at the appellate level. At the appellate level, the question is, is there substantial evidence to support the finder of fact's decision, and so you look at the record to see if there is substantial evidence which is, you know, significant evidence, meaningful evidence. And if there is, then you affirm the Judgment regardless of what your thoughts are with respect to the evidence.

Q. Counsel Kuuskne pointed out that it would be impossible for any expert to determine whether or not the standard had been met on a sort of an appellate view because the Tribunal hasn't made the determination of the facts. Do you agree with that statement?

A. I agree.

Q. And so--but you were able to look at the testimony of the Witnesses that testified that described what happened in the statements, so can you tell us, given that you have now looked at that and you're saying you're not changing your opinion, how you applied the evidence that you've seen to your Expert Opinion and why you haven't changed it, given where we are now in the proceedings?

A. So, I looked at the three Witness Statements, and I read the testimony of those three witnesses and the cross examination, and I didn't see anything in the testimony--in the written testimony that contradicted in any significant

way. There were obvious--there always are some discrepancies, but I didn't see anything that contradicted in any significant way the statements that the Witnesses made in the--in their Witness Statements, number one.

And number two, at least through today, I haven't seen any other evidence that was presented that would change my opinion. In other words, of course, if Canada had called witnesses that testified contrary to the Witnesses that were presented by the Claimant, then that would be something to take into account, but I didn't see any of that.

Q. So, then, if I could try to understand and codify that, but it sounds like you're saying that, assuming that now having, the testimony is out there now, assuming that the Tribunal understands the act or believes the credibility of the Witnesses and understands this is what's happened, then you essentially say that would meet the 'clear and convincing' standard if the facts as testified to were true once the Tribunal makes that determination; is that fair?

A. That's a fair statement.

And I would just add that in California the testimony of a single witness that's believed by the trier of fact constitutes substantial evidence and it can constitute clear and convincing evidence on the part of the

trier of fact.

Q. And with the Tribunal's discretion, I want to follow up on a couple of questions by the Tribunal. I could wait until the hot tub, but we may not be doing it, so I thought I would do it now, if that makes more sense.

PRESIDENT BULL: Mr. Mullins, you might want to hold that in reserve for a moment because there are substantive questions that the Tribunal will be asking the Witness. We had asked questions just to clarify on her presentation just now.

MR. MULLINS: I see.

PRESIDENT BULL: And so, why don't--if I could pause you there and then--

MR. MULLINS: No, I understand. Perhaps you were expecting a more fulsome cross examination, and now you're going to have to ask more questions, so I fully understand that, so I will turn it over to the Tribunal.

QUESTIONS FROM THE TRIBUNAL

PRESIDENT BULL: Our expectations about the cross examination aside, Justice Grignon, I have a few questions, if you would help me. This relates to something we haven't discussed yet today.

Now, counsel for Claimant mentioned in Opening that Paragraph 19 of your Expert Report effectively said that there was an assignment. Now, Paragraph 19 of your

Report does not use that word, but it says what it says, and I have it open in front of me. I just wanted to ask you, firstly:

Was that what you meant by Paragraph 19, that there was an 'assignment'?

THE WITNESS: Yes. A transfer of all intangible rights that you possess is an assignment. That's what I meant.

PRESIDENT BULL: Thank you.

And you, of course, know the document we have been calling C-268. That's the document dated 8 February 2016.

THE WITNESS: Yes.

PRESIDENT BULL: Can I ask you, do you see that--in your analysis, do you see that document as an assignment or do you see that as evidence of an assignment having been made previously.

THE WITNESS: I believe that an assignment was made by operation of law when the Shares were transferred directly to Tennant Travel/Energy, and that the 2016 memorandum is a confirmation that that's what was intended by the transfer of the Shares.

PRESIDENT BULL: I see.

Can I ask you this: Is it possible for the Claimant to say that there is a trust and at the same time

say that there is an assignment? Or must those be in the alternative?

THE WITNESS: It's two separate--two separate things. So, in April of 2011, a trust was created for a holding company to be designated on April 26, and that the Shares were held in Trust for that holding company, Tennant Travel, until January of 2015, when actual transfer of the Shares was made to Tennant.

So, prior to January 2015, there's a trust; and, then after January of 2015, there's a transfer--a direct transfer of the Shares.

PRESIDENT BULL: I see.

So, when you talk about assignment, you're really talking about sort of the second step after having declared the Trust earlier there's then subsequently a transfer of the interests, and it's that second step what you're referring to as the 'assignment'?

THE WITNESS: Yes.

Let me just make myself clear, and that is that the Tennant--Tennant Travel had the beneficial interest in the Shares from 2011 to 2015 as the beneficiary of the Trust; and then, after January of 2015, it owned the actual shares. And so, any interest that Mr. Tennant had as either a trustee or an individual, everything went to Tennant Travel on that date.

PRESIDENT BULL: So, it sounds to me, and correct me if I'm wrong, but it sounds to me like you're saying that, the Assignment does not stand apart from the Trust argument, the assertion of the Trust and the way things unfolded, included the Assignment that happened in 2015.

THE WITNESS: I think the Trust and the Assignment in 2015 are separate. They're on a continuum, obviously, but they are separate legal transfers, so the legal transfer in 2011 was to the Trust of which Tennant Travel/Energy was the beneficiary, and then that was changed in 2015 when Tennant Travel became the direct owner of the Shares by transfer and assignment.

PRESIDENT BULL: I see.

So, at that point the Trust came to an end?

THE WITNESS: Yes.

PRESIDENT BULL: And when I say 'at that point,' at the point where the Assignment took place, the Trust came to an end.

THE WITNESS: That would be my understanding.

PRESIDENT BULL: I see.

So one other thing I wanted to ask you is this: You'll know from the facts asserted by the Claimant that John Tennant says he was holding the Shares on Trust as yet undesignated company for a period, and then his evidence is that he then designated the Company a little while later.

Now, during his testimony, I asked him whether during that time period before he designated the Company, could he have changed his mind about the Trust, about holding those Shares on Trust or the Company that he was going to designate? And he said yes, he could change his mind. Of course, I'm using my words and you can take it as correct. He said he could change his mind, in other words, no longer hold it on Trust for the as yet undesignated company.

Does that affect your analysis in any way?

THE WITNESS: It does not.

In California, which is I think unusual, a trust is deemed to be irrevocable--I'm sorry, is deemed to be revocable, and I think that's 15400. So, it's deemed to be revocable unless the Declaration expressly says that it's not revocable or it's irrevocable. So, it in fact was revocable, but that doesn't mean anything because--I mean, it's not that it doesn't mean anything--it doesn't affect this situation because it was not revoked. The fact that he could have revoked it doesn't mean that it changes the status of the Trust until and unless it is revoked, and in this case, of course, it wasn't revoked.

PRESIDENT BULL: Thank you very much. I understand what you're saying, and I'm most grateful to you.

Do my colleagues have other questions for the Expert?

ARBITRATOR BISHOP: Yes, I have one, if I may--well, let me ask, I have a hypothetical scenario. Let me ask you to assume that what John Tennant said in April 2011 was that he intended to put the Shares of Skyway into a holding company. Assume that he never used the word 'trust,' but he simply said he intended to put the Shares into a holding company, and then he did not actually transfer them for four years. Is that a trust?

THE WITNESS: It is--it is a trust because he did designate a holding company at some point. I believe he transferred--he designated the holding company on April 26, according to his testimony, but the law is clear that, as long as the--and that was 15205, that as long as the Trustee has discretion to name a beneficiary that that's acceptable and that creates a trust, and the Trust then--the person then is named later.

For example, there are many cases where a Trustee will say I'm holding this in Trust for my children. Or in one of the cases that we cited--give me just a moment. I will explain it and then give you the name of the case. In one of the cases we cited, the husband bought a life insurance policy and named his wife as beneficiary with the oral agreement that she would hold the proceeds for the

benefit of whatever debtors he had when he died, and that was found to be an oral trust.

ARBITRATOR BISHOP: Okay. In the scenario that I'm positing, however, he never says he's holding the Shares in Trust. He simply says to his brother, 'I intend to put the shares into a holding company,' that is, have them owned by a holding company, and then he doesn't take action to do that for four years.

So, if that's all he says and then doesn't actually effect the transfer for four years, I think that's my question: Is that enough to create an oral trust?

THE WITNESS: So, let me just go back to my last statement which that was from the Fahrney case, F-A-H-R-N-E-Y, which were the life insurance proceeds case. Another case that was cited is the Weiner case (CLA-298), WEINER, and that case makes it clear that you don't have to say you're going to hold it in Trust. You don't have to mention the word 'trust.' You just have to say 'I have these Shares, and they're for the holding company.' 'I'm putting them in the holding company' or 'I'm holding them for the holding company,' so I don't think that that makes any difference. He held the Shares for an entity, and that's what creates the Trusts, regardless of the language that he uses.

ARBITRATOR BISHOP: So, you don't actually have

to have-(coughing) excuse me, I'm sorry. You don't actually have to have an intent that you're taking on fiduciary duties for the other--you only have to say that you intend to put them into another company, and that's sufficient?

THE WITNESS: An intent to hold the property on behalf of someone else creates an oral trust, and the fiduciary duties that go with that, go with that regardless of whether you say them or not.

ARBITRATOR BISHOP: Okay. Thank you. That's all I have.

PRESIDENT BULL: Just to follow up on Arbitrator Bishop's hypothetical, is it not possible that somebody who says, 'I intend to put these Shares in a holding company', that it seems to me that there are two possibilities from that statement: One is that he intends to hold it-he's holding it in Trust for that holding company until he designates that and transfers it.

But isn't it also possible that he's just saying, 'I'm going to own these Shares until I actually transfer them,' just a statement that he's at a future point in time going to effect a transfer?

THE WITNESS: It's my--it's my understanding that he intended to hold the Shares in Trust until he actually effected the transfer. If he intended to hold them on his

own, I mean, if that was what he said or what the Tribunal found that he didn't intend to hold them for the benefit of the holding company or the LLC, then that would be a different situation, but here we have evidence that he intended to hold them for the benefit of the LLC until he, in fact, transferred them in 2015.

PRESIDENT BULL: Right.

I guess what I took away from the hypothetical that Arbitrator Bishop was putting--and that might not have been his intention; but it's my question now--if there is a statement made by the prospective Settlor which can have two meanings, it's somewhat ambiguous, does that cause a problem in terms of the Constitution of a Trust, or must the Declaration of Trust be clear and unequivocal?

THE WITNESS: The cases say that the Declaration of Trust can be established by circumstantial evidence, by extrinsic evidence, by parole evidence, by conduct, by words, by written statements. It can be established in any number of ways. It does not have to be a clear and unequivocal statement that I am holding this property in Trust.

In the Weiner case (CLA-298), for example, the brothers said to his sisters, 'oh, mom wanted you to have a share in this,' and the property had been transferred just to the brother's name, but he said to his sisters, 'mom

wanted us to share this equally,' and the Court found that that constituted the creation of an oral trust.

PRESIDENT BULL: So I understand that no formal words are necessary, and I understand those cases, but I think in those cases, the Court comes to the conclusion that whatever form of words or circumstances they were uttered in was sufficient to allow the Court to come to a conclusion about the actual intention.

The hypothetical that I'm pursuing at the moment is what if the facts are such that they honestly allow for two possibilities so they don't compel one conclusion or the other. They're both possible. And in that situation, would that--would we be able to say that that was sufficient for a trust to be created, considering that there is, in my hypothetical, some ambiguity?

THE WITNESS: So, in my view, the Tribunal would weigh the evidence and decide what happened, would decide what the facts were, and make that determination based on all of the evidence that was presented before it. So, you know, lots of times there's conflicting evidence or there's ambiguities, and it is the trier of fact that decides what, in fact, happened.

PRESIDENT BULL: Thank you.

I think Sir Daniel had some questions.

ARBITRATOR BETHLEHEM: Yes, thank you very much,

Justice Grignon. I think the Tribunal is going to be detaining you longer than counsel for the Respondent here.

We are, of course, as you've observed, the trier and the decider of facts as well as the law; and, for these purposes, as an international tribunal, California law is fact to us rather than law. And one of the challenges I think that we face is that we've got two experts' reports which are quite starkly divergent. There is not a lot of overlap between the two reports, so hence the questions that we're putting to you.

Given the brevity of the Respondent's cross examination but also the concerns that have been expressed to us by counsel for the Claimant, that you, as the Expert Witness, who, as you were first out of the blocks, did not have a chance to respond to the Expert Report of Margaret Lodise (RER-1), I would just like to ask first of all, whether you have anything that you would like to say to us about your response to Margaret Lodise. You have already taken issue with a number of things that have been said in your Expert Report, but I think it would be sort of appropriate now to give you this opportunity because we don't yet know whether we will be going into some witness conferencing.

THE WITNESS: So, I think the areas where we disagree on the law are clear, you know, and those have to

do with what does 'clear and convincing' mean, what does 'oral Declaration of the Trustee' mean. And I think that I have explained those, and I'm content to stay with that.

The other thing I would point out, at this point, is that we have, in my view, a diametrically opposed view of the role of an expert witness. My role--I view my role as explaining what the law is and how that would apply to the facts as I understand them to be. When I view Ms. Lodise's Report, she makes credibility determinations and decides what the facts are and, in my view, intrudes on to the--into the realm of the Tribunal.

PRESIDENT BULL: Thank you very much. And the point that you've made I think is the point that I would like to go to next.

I would just like to inquire--when you were approached by Claimant's counsel to provide your Expert Legal Opinion, were you provided any wider context? You know, for example, indicating that it would be relevant for a jurisdictional decision that the Tribunal was taking?

THE WITNESS: So, it's been some time ago, and I don't recall that I was given a broader context. I mean, obviously I knew it had something to do with an international arbitration in Canada, but I basically was given the facts and asked the questions that I outlined in my Report and took it from there and decided what the

applicable law would be and addressed those issues. I don't think I was told--I don't have a recollection of being told anything about the context.

ARBITRATOR BETHLEHEM: Thank you very much. I think you may not be able to see me, but I hope that you can hear me so that you'll be aware that I'm in fact on a sort of a backup connection. Please let me know if for any reason it's not sort of comfortable for you to proceed this way without the visual.

THE WITNESS: No, this is fine.

ARBITRATOR BETHLEHEM: Thank you very much.

(Sound interference.)

ARBITRATOR BETHLEHEM: There we are. I'm sort of back in visible on the main connection.

So, I understand that about the context that you were provided and you've indicated in Paragraph 8 of your Expert Report (CER-2)--you don't need to have a look at it; I'm not taking you to that--but that you had a look at the two opinions by John and Derek Tennant (CWS-2, CWS-3) and the documents attached thereto, and you indicated just in opening today that you reviewed the Transcripts of the first three days. And if I recall correctly, perhaps you also indicated that you had a look at some of the documents that were referred to therein.

And I'm just wondering why you didn't feel it

necessary either to request of your own accord to go back and have a look at any of the pleadings or the other documents in this case for purposes of your Expert Report?

THE WITNESS: I apologize. I did read--I was given--after my Report, I was given the three Memorial briefs, and I did read them.

ARBITRATOR BETHLEHEM: You did read them?

THE WITNESS: Yes.

I'm sorry, I forgot to mention that.

ARBITRATOR BETHLEHEM: Okay. So, in fact, when you reached your conclusion in Paragraph 28 of your Report where you say, 'In my opinion, the Witness Statements and Supporting Documents provide clear and convincing evidence that John created an oral trust,' et cetera, are you basing that on something other than just the two Witness Statements or are you basing it on the record of the case as a whole? What are you basing that conclusion on?

THE WITNESS: That Report was written after I had only read the two Witness Statements. I don't recall the date of the report. But then subsequently I read the--I think they're called 'memorials,' I read the memorials and Mr. Pennie's Statement (CWS-1) and Ms. Lodise's Report (RER-1) and concluded that my opinion did not change.

ARBITRATOR BETHLEHEM: Thank you very much. That's very clear.

On the 'clear and convincing evidence' standard, and we've heard now quite a lot about this in terms of it being a jury direction and we've taken you also to the Probate Code (CLA-292, R-090), I would just like to understand a little bit better. We know the ballpark of where this is situated. It's somewhere between, you know, preponderance of evidence or a balance of probability and beyond a reasonable doubt. My question is whether it is a flexible concept which is dependent on the circumstances?

I mean, for example, we are not here concerned with an issue of probate, so we are not here concerned with an issue where it is impossible to identify the intention of a testator, for example, so I'm wondering whether there is a different approach to identifying clear and convincing when you're dealing with probate and non-probate cases.

Similarly, I'm wondering whether there is a different approach than ought to be adopted in circumstances in which we only have the evidence of the signor, if that's the right description, or in circumstances in which there is other extrinsic documentary--as a third possibility (drop in audio)--apologies for what seems to be a faulty connection, but please just signal if you can hear me?

THE WITNESS: Yes.

ARBITRATOR BETHLEHEM: As a third possibility, in

circumstances in which it is manifest that the factual evidence is heavily contested, such as in our case, is there a different approach to be adopted to circumstances in which the factual evidence is largely uncontested? So, I would just like your response on that question about whether the 'clear and convincing' evidence standard is a bearable standard depending on the circumstances?

THE WITNESS: I think that the standard itself means highly probable in all circumstances, what that means to individual triers of fact, of course, is up to them in the circumstances. Standards of proof, regardless of whether it's clear and convincing, preponderance or beyond a reasonable doubt often apply in situations where the evidence is in conflict, and the trier of fact has to make a decision based on clear and convincing evidence.

I don't know if any special rules apply with respect to this Tribunal, but as I indicated in California, what 'clear and convincing evidence' means to me is that, if the Tribunal is convinced by the testimony of even one witness of a fact and that that fact is dispositive, then that would be clear and convincing evidence.

ARBITRATOR BETHLEHEM: Right.

So, it's not a question of in circumstances in which there is a heavily contested facts which you will not have known when you set out to write your Expert Report

because you had no sense of the wider hinterland of the case, of which you know now. If there is a heavily contested facts, that you would simply say that it's a question for us to decide whether we, as it were, regard the evidence in the Tennants' Witness Statements as dispositive and that it doesn't have to displace anything on the other side. That's a rather crude way of putting it, but is that accurate?

THE WITNESS: I'm not certain I understood the question. In other words, maybe you could ask it one more time.

ARBITRATOR BETHLEHEM: Well, the situation that we are faced with is that--or let's go back to a hypothetical which is close to the case, if there was evidence from John Tennant and Derek Tennant and John Pennie and that evidence was not contested at all by the Government of Canada, by the Respondent in this case, then in a sense that evidence would occupy the space, and we, the Tribunal, would be able to say, well, we rely on that evidence as clear and convincing because it is uncontested.

Now, in the circumstances with which we are faced, the evidence is contested all over the place, and I'm not sure necessarily that we have the tools so far as a matter of our appreciation of the fact of Californian law how we are supposed to weigh that in circumstances in which

the factual predicate that is put before us is very heavily contested, and the Witness for the Claimant is simply saying, 'Here are the assumed facts. On the basis of the assumed facts. I believe there was a trust.'

THE WITNESS: I guess I will have to say again that the Tribunal needs to decide what it finds the facts to be, whether they are contested or not contested. And once the Tribunal finds the facts to be a certain way--in other words, if the Tribunal were to conclude that the--that the evidence in the statements were true, then that would, in my view, constitute a clear and convincing evidence that there was a trust from April 2011.

ARBITRATOR BETHLEHEM: Thank you very much.

My apologies. My apologies to all for the technical glitches that obviously I'm facing with the--at least the video stream.

I've just got two other sort of questions, if I may.

We, the Tribunal, are facing an issue which we have to decide where there are lots of variable dates. You, for example, have already referenced the April 2011 date, and there are other dates in 2011. I think you've testified that, in your view, the Trust was created in April 2011, the transfer was made in January 2015, and then President Bull has drawn your attention to the (drop in

audio) the document of the 8th of February of 2016 (C-268). And if I recall correctly, that document of the 8th of February 2016, you have said you--

(Sound interference.)

ARBITRATOR BETHLEHEM: Sorry. My apologies. Can you hear me again clearly?

THE WITNESS: Yes.

ARBITRATOR BETHLEHEM: You have said that you regard the document of February 2016 (C-268) as being evidence of a trust that was created in April 2011 rather than in a sense the Trust document itself. Am I understanding that correctly?

THE WITNESS: That's correct.

ARBITRATOR BETHLEHEM: Now, were we, the Tribunal, to conclude that, as a matter of fact, there was a trust but the trust was created at some later stage or that the document of February 2016 (C-268) was evidence of a trust created at a later stage, would, as a matter of California law, a post hoc Declaration of Trust be sufficient to establish the Trust ab initio, if I can put it in those terms, or does there have to be a kind of a conscious intent to create the Trust at the outset?

Again, apologies if that's not terribly clear. If it's not, I'll try and clarify.

THE WITNESS: The Trust is created when the

Trustee declares that he is holding the property for the benefit of another person or entity, and so not when--not in 2016 when he confirmed that the Shares that he got in 2011 he was holding in Trust, but when he said in 2011 that he was holding the Shares for a holding company that he would designate in the future.

ARBITRATOR BETHLEHEM: And if we were to conclude as a matter of fact that he didn't say what he purported to say in 2011 or he didn't say it with the requisite clarity, and that some years later he said, 'it was my intention in 2011 to do X,' can that post hoc Declaration of what would have been the intention five years earlier be sufficient to have caused the Trust to be created, if you like, five years earlier?

THE WITNESS: If I understand your question, I do not believe you can create a trust retroactively but that that statement is evidence that he created the Trust in 2011.

ARBITRATOR BETHLEHEM: Thank you very much.

And then my last question is--and I may be stumbling about in the dark here, so do forgive me, but I know that, looking at the two Expert Reports (CER-2, RER-1), there is some element about the creation of a trust also having to comport with public policy and so on, and I'm wondering whether there is anything to the issue of

whether the creation of a bare trust simply by affirmation could be effective for purposes of giving an entity standing to sue in circumstances in which there would not otherwise be standing to sue. In other words, I'm sort of wondering how much specificity there has to be in the creation of a trust if the Trust or an entity that would otherwise be entitled subsequently or through the Trust to act in a certain circumstance? Where does a bare trust leave us in terms of the substance of that Trust?

THE WITNESS: I'm not certain that bare trust is a California word, but the Trust only means, first of all, California allows oral trusts. When something--with respect to personal property. When something has to be in writing, California says that very clearly, anything having to do with Real Property, any contracts lasting for more than a year. In this case, the Legislature specifically said you could adopt an oral trust. And it has very few requirements. Trustee, beneficiary, any general or indefinite purpose and property. And all of those things are present here, and I think the terms of the Trust are sufficiently clear. Simply the holding company would hold--he would hold the Shares for the holding company.

And that's typical. Many, many people, you know, hold their property in various entities. And, in fact, one of the things that John--that Derek Tennant testified about

was that Derek Tennant and Jim Tennant both had holding companies, and they held their property in holding companies for various reasons, so it's not unusual that someone would hold property either in Trust for a holding company or, in fact, in the holding company. And I think that the terms of the Trust are sufficient under the California statutes to have created an oral trust in this case.

ARBITRATOR BETHLEHEM: Thank you.

And that would be even in circumstances in which we're moving beyond the probate context where there will be a protective element to the trust to something in the ballpark in which we are considering whether there will be tax dimensions and there will be all sorts of other dimensions. It can be done simply by that sort of bear form of words without other documentary intent, without other evidence as to the content, if you like, of the trust requirements.

THE WITNESS: I understand that there are no additional requirements.

ARBITRATOR BETHLEHEM: Thank you very much. And my apologizes once again for the technical (drop in audio).

ARBITRATOR BISHOP: Can I ask just one last question, which is, California law allows an oral trust but then it requires that there be clear and convincing

evidence of that Trust. What is the purpose--in California law, what is the policy requiring clear and convincing evidence? That is to say, why does California require that standard of evidence to prove an oral trust?

THE WITNESS: I think probably because, in virtually every case that I have seen but one, the Settlor or the Trustee is deceased, and so I think that this situation comes up frequently in areas where the person who may have taken the action isn't there to testify or to tell the trier of fact what he or she was doing. And for that reason, that's the reason why the oral Declaration in itself without that testimony is not sufficient, and I think that's also why clear and convincing evidence is required so that there can be a protection against taking advantage of the fact that a person is unavailable to testify.

ARBITRATOR BISHOP: Okay. Thank you very much.

PRESIDENT BULL: Right. I think it would be appropriate for us to take a 15 minute break now.

Now, when we return, I appreciate that there has been quite a few questions from the Tribunal. I'm going to ask whether counsel would like to ask questions arising from that, but we will deal with that after the break. Let's take 15 minutes now.

(Recess.)

PRESIDENT BULL: All right. We're back on the record now.

Before we continue, I wanted to say this, on our schedule for today we're slated to have lunch in five minutes' time, and the Tribunal would prefer to finish the examination of Justice Grignon first before taking lunch, which means that we'll have to push lunch back a little. I think we will be able to catch up because the witness conferencing will be somewhat shorter than scheduled, at least that's what it looks like at the moment.

Does that present a problem for either Party? Because I would very much like to finish this Witness before--finish this Witness's testimony before we break for lunch. Is that acceptable to Canada?

MR. KLAVER: Yes, absolutely.

PRESIDENT BULL: And to the Claimant?

MR. MULLINS: That's fine.

PRESIDENT BULL: Thank you very much. Now, the Tribunal's had a quick word, and we feel that quite a few things have been raised by the Tribunal. And if there are questions that Canada wants to put to this Expert relating to what the Tribunal has asked, we would give Canada that opportunity now. You don't have to, but we want to give you that opportunity now. And after that, then Mr. Mullins would do his re-examination, and he would be the last one

to examine.

MR. KLAVER: Thank you for that opportunity.

At this point I don't think we'll put any questions to Justice Grignon, but we may appreciate the opportunity to do so involved in the potential hot tub, and we also appreciate our Expert can address them via issues that have arisen today.

PRESIDENT BULL: Okay. Thank you very much.

Then, Mr. Mullins, over to you for any further redirect.

FURTHER REDIRECT EXAMINATION

BY MR. MULLINS:

Q. Justice Grignon, I want to clarify a couple of things that I caught during the questioning of the Tribunal, so, and part of this may be because of the different cultures and also just my understanding, for example--well, let me just ask you--let's talk about the jury instructions, for example.

How are jury instructions created and what are their purposes under California law?

A. Jury instructions are created by a Commission that's appointed by the Supreme Court, and probably with some input from the State Bar, and they gather all the information and case law and statutes on a particular subject, and they prepare proposed jury instructions that

they then circulate for comment, and then after that they're adopted and approved by the Supreme Court.

And they are used in jury trials, but I have been involved in cases that are court trials where judges use the jury instructions--

MR. KUUSKNE: I just wanted to recall that the redirect is limited to questions that were raised during cross examination. Thank you.

MR. MULLINS: I--actually, I'm asking a follow--up from Sir Daniel's question. I was trying to help clarify the record as to what jury instructions are and how they might apply because I think Sir Daniel's concerned that they might not apply outside of the context of a jury. So, that's why I was asking the question.

PRESIDENT BULL: Mr. Mullins, can you go ahead.

BY MR. MULLINS:

Q. So, that's where I was headed and thank you for that.

So, what--can you finish--were you finished with your answer before you were interrupted?

A. I'm not certain that I finished the sentence, but all I was going to say was that judges frequently use the jury instructions as a guidance for what they need to find if they're trying a matter as a court trial instead of a jury trial.

Q. And when you mean a 'court trial' as well as a 'jury trial,' we, in Florida, would call it a 'bench trial.' Is that--are we talking about the same thing?

A. We're talking about the same thing. I'm very sorry. In California we call it a 'court trial.'

Q. That's okay. We're all different cultures here.

And so--and just so some of the Members of the Tribunal are not here in a commonwealth jurisdiction--U.S. law, which is even different from English law. So, can you tell us the difference between how it is somebody might have to go to a jury trial versus a court trial, how that works out?

A. Well, actually it is based to a large extent on English law; and, in California, you have the right to a jury trial. If you had a right to a jury trial under English law, and in addition--but you can waive it, and so, a lot of times it's a case where a party has a right to a jury trial and they waive that, and then they have a court trial or bench trial instead, but you have a right to jury trial in all criminal matters, except probably not infractions, and you have a right to a jury trial in a lot of civil matters--in most civil matters.

Q. And so, when--and when--you'd offer to waive a jury trial but I assume in a contract or an arbitration; correct?

A. Correct.

Q. And so--but the purpose, then, of these jury instructions, then, is for the California Supreme Court to identify what the law would be in contexts where a jury trial is going to be had, but not specifically to say this is the only time we're going to use this law outside of a jury; is that fair?

A. Well, the jury--the jury instructions are intended to state what California law is. They are instructions that are given to juries because that's their purpose. But to the extent they state what the law is, then they apply, in general, to all kinds of trials.

Q. The other thing that came up, and we're not clarified, why is it that the Oral Trust Law is found in the Probate Code (CLA-292, R-090)? Do you have a--can you help us on that?

A. Well, it's in the Probate Code because everything relating to trusts and estates in California is in the Probate Code, regardless--you know, regardless of the situation, it's just--it should probably be called The Trusts and Estates Code.

Q. So, an oral trust, it comes up in a commercial case, would you--is there a separate statute to cite for oral trust or commercial cases, or are you going to be citing a Probate Code?

A. I don't know of a commercial trust statute.

Q. And so, no matter what the context or complexity of the case, if an oral trust is in play, it's the Probate Code that's relied upon for the authority as to what the standard is?

A. As I understand it, yes.

Q. Now, you were asked, I think, by Arbitrator Bishop, about what potentially could happen here and what is required to create a trust. So, in this hypothetical, if the statement, hypothetically, was simply, 'I'm going to--I'm going to--the Shares that I'm getting, I'm going to put them in a corporation that I'm going to name in the future,' if that's what's there, and obviously there's other evidence, but would that create a trust, and how is that?

A. I guess the answer to that is, if the trier of fact were to concluded that that was a present intent to hold them in Trust for the Corporation until they were actually transferred, that would create a trust; but, if it's just, 'I'm going to buy these Shares for the Corporation,' I'm not certain that there is a trust.

Q. But if the intent is 'I'm getting the property now and I'm going to transfer later to a trust but--a company that will be named in the future,' does that change your analysis, or does it take effect?

A. The issue is, is the Trustee indicating an intent to hold the property for the holding company or the Corporation, and if there is that intent to hold the property for the Corporation, then that's sufficient to create a trust.

Q. And did you see evidence of that here in the record?

A. Yes. There's evidence of that from the testimony of John Tennant, the testimony of Derek Tennant, the testimony of John Pennie.

It's also corroborated by the fact that the holding company was designated to be Tennant Travel; that Jim Tennant had such an entity, and allowed John to use it. And that ultimately, the Shares were, in fact, transferred to Tennant Travel at a time before, as I understand it, at a time before any issue with respect to a NAFTA claim arose.

So it--the transfer, the absolute transfer--the direct transfer to Tennant Travel occurred in January of 2015, and the Tennant Travel's name was changed to 'Tennant Energy' in, I think, April of 2015. And John Tennant was a California resident, and so is Tennant Travel.

And so, it seems to me from the evidence that the transfer occurred at a time when there was no reason to think it was anything other than what was intended in 2011.

Q. And the fact that they had they waited a week to name the actual beneficiary specifically, how does that affect--you had talked about that you could have a class of beneficiaries. Can you explain that with more detail.

A. Yes.

You can--the Statute 15205 (R-090) makes clear that you don't have to have a name--you have to have a beneficiary that can be ascertained, but you don't have to have a named beneficiary. You could have either a class of beneficiaries, like my creditors when I die, my children if I have any, or in this case a holding company that I will designate in the future, and that--then when you designate, or when those facts come into existence or you designate the holding company, as happened here, that, sort of, completes the loop with respect to the beneficiary.

Q. And if the settlor effectively says, 'I was intending to hold this for benefit of a holding company and I understood the holding company was going to get these Shares,' does that create a fiduciary obligation by the Trustee to the benefit of a holding company?

A. Yes.

Q. And that's by creation of Trust Law?

A. Right. By simple creation of Trust Law, if the Trustee creates a trust for the benefit of a beneficiary, then there is a fiduciary duty.

Q. And--now, you talked about the...

(Pause.)

Q. And if you look at this document (C-268), I think you were asked, was this both a--creates the Trust and creates the Assignment, did I understand your testimony that it actually does multiple things?

A. So, it does multiple things. It confirms the Trust in April of 2011 in the first paragraph when it talks about the settlement of the 2,000--obtained the Shares for settlement of the $2,000 loan. It confirms that John Tennant has been, at all times, holding the Shares in Trust for Tennant Travel.

And it confirms that Tennant Energy is a successor in interest to John Tennant to the extent of any interest he held, either as a Trustee or as an individual. And it confirms the Assignment when the Shares were transferred in January of 2015.

Q. So, when it talked about--that I might have, as Trustee or personally, if, for whatever reason, the Tribunal says, 'I'm not sure that there's actually a trust here,' and we don't think that's our position that that's true, but if the Tribunal said, 'Well, I'm not sure a trust was actually created,' then who owned the Shares that were given in 2011, later--you know, first in June--first in April and then later in December, who would actually have

those Shares?

A. If John Tennant was not a Trustee for Tennant Travel, he would have owned them individually.

Q. And then when he--then this reflects that he transferred those Shares in January of 2015, then if any rights he has as an individual owner, if that's what's been found, how--was that then transferred over to Tennant Travel?

A. It was transferred over to Tennant Travel. I believe it was transferred when the Shares were transferred by operation of law, and that this memorandum confirms the transfer in January 2015.

MR. MULLINS: And--could I take a break to see if my co-counsel had any other questions?

PRESIDENT BULL: That's fine.

(Pause.)

MR. MULLINS: On behalf of the Claimant, we have no further questions. I wanted to thank Justice Grignon, and if--obviously we'll see if we're going to have any other questions at the end of the day, so I guess I would ask her to stay for the Hearing to see--for the cross-examination on--testimony of Ms. Lodise, and then we can see where we are from there.

PRESIDENT BULL: Thank you, Mr. Mullins.

So, Justice Grignon, if you would be so kind as

to stay with us in the Hearing and watch the examination of Ms. Lodise, we may come back to you at the tail end of today's proceedings, but for now I think we can take the lunch break. I know it's a little early for some for lunch, but we should take the lunch break, and we're scheduled to have a one hour and 15 minutes' break.

And I--well, unless either counsel wants to shorten that, we can stick to that plan.

MR. MULLINS: On behalf of the Claimant, we are prepared to go shorter like we have in the past. I will say that our office is having their early Thanksgiving dinner, which is going to be later in the day anyway, so I was just going to have a little snack, so I could have a chance to opportune in that. So, I'm not going to be able to eat with the Thanksgiving even if we take two hours, because they're doing it later in the day, but that's just not me. But in any event, I'm perfectly going in 45 minutes like we have all week. I don't know if we need an hour and 15.

PRESIDENT BULL: Okay. Canada?

MR. KLAVER: Canada concurs. We would be happy to start in even less time, half an hour, but 45 minutes is fine as well.

PRESIDENT BULL: Okay. I suggest 45 minutes, but I should also just look to my fellow Arbitrators whether

that inconveniences them in any way.

ARBITRATOR BISHOP: I think 45 minutes will be perfect for me.

ARBITRATOR BETHLEHEM: Me too.

PRESIDENT BULL: Wonderful. Then, we are all agreed about lunch. So, let's take a 45-minute break, and then we can come back and we will hear, then, from Ms. Lodise.

(Recess.)

PRESIDENT BULL: Right. We are back on the record.

And before we turn to Ms. Lodise, the Tribunal has decided to admit into the record the jury instruction (C-270), the document that was referred to by Justice Grignon earlier, and which--a copy of which has been sent to us by Mr. Appleton. So, we will admit that into the record.

Could I ask that both counsel sort out what the exhibit number should be, and then let us know by e-mail, but that document is on the record now.

Good. So, we will proceed now with the evidence of Ms. Lodise.

MARGARET G. LODISE, RESPONDENT'S WITNESS, CALLED

PRESIDENT BULL: Can you see and hear me, Ms. Lodise?

THE WITNESS: Yes, I can.

PRESIDENT BULL: Could we start with you stating your full name for the record, please.

THE WITNESS: Sure.

It's Margaret G. Lodise.

PRESIDENT BULL: And Ms. Lodise, you have been watching proceedings in previous days; right?

THE WITNESS: I have been, yes.

PRESIDENT BULL: So, you know I'm President of the Tribunal, and you will recognize, of course, the other two arbitrators, Mr. Bishop and Sir Daniel?

THE WITNESS: Yes, I do.

PRESIDENT BULL: Good. Thank you for being here to assist us.

You will see the Declaration for expert witnesses on the screen. When you're ready could you say that out loud, please?

THE WITNESS: Certainly.

I solemnly declare upon my honor and conscience that my statement will be in accordance with my sincere belief.

PRESIDENT BULL: Thank you very much.

And I think counsel for Canada, Mr. Klaver, can proceed.

MR. KLAVER: Thank you.

DIRECT EXAMINATION

BY MR. KLAVER:

Q. Good morning, Ms. Lodise.

A. Good morning.

Q. Now, just to confirm, you have a copy of your Expert Report (RER-1) and the opinion of Justice Grignon (CER-2) in front of you?

A. Yes, I do.

Q. Is there anything you would like to correct in your Report?

A. The only correction I note in my Report is at Paragraph 2, I stated that I was practicing--licensed in California from 1989. That should be 1988.

Q. Okay, perfect.

A. Other than that, no changes.

Q. Okay. We will pass the floor to counsel for the Claimant.

PRESIDENT BULL: I think there is a presentation, first.

MR. KLAVER: I'm sorry, that's right.

DIRECT PRESENTATION

THE WITNESS: And I believe there are some slides that they are going to share with the presentation.

So, I would like to start out first by introducing myself. As indicated, I'm Margaret Lodise, I

am a partner in the law firm of Sacks, Glazier, Franklin & Lodise here in California. I've practiced trusts and estate law for approximately 30 years, exclusively trusts and estate law. I'm a Fellow of the American College of Trust and Estates Counsel and have also served as President of the California State Bar Trusts and Estates Executive Committee and the LA County bar Trusts and Estates Section as a Chair.

I referenced those simply because a lot of what I've done, both with ACTEC, the State Bar and even with the local county section, involves issues related to legislative formulation and legislative interpretation, and I think that some of that is relevant to what we're talking about here today.

I've served as an Adjunct Professor at Loyola and have acted as a mediator in various trusts and estates disputes, so basically have focused on trust and estates work for most of my career.

Can we turn on, I think we need to go to the next slide after that.

In terms of the legal requirements for the creation of a trust, I don't think that Justice Grignon and I differ greatly in terms of what those requirements are. A trust may be created for any purpose that's not illegal or against public policy. And even a trust, if created for

an indefinite or general purpose, is not invalid solely for that reason if there is reasonable certainty as to what the purpose of the Trust was.

So, next slide.

The other issues regarding a creation of a trust have to do with the existence of a beneficiary, a trust other than a Charitable Trust is created only if there is a beneficiary, and in this case obviously we're not discussing a Charitable Trust. There must be trust property. And it's significant that a promise to create a trust in the future is enforceable only if requirements for an enforceable contract are satisfied. So, in other words, if John Tennant said, 'I'm going to create a trust in the--at some point in the future,' the only way that could be enforceable is if there were actual consideration for that. And so far as I'm aware, there is no discussion about any consideration for any such trust to be created in the future. So, the issue here is the Trust needed to be created at the time of the receipt of the property.

The next slide. None of what I think I just said is anything where I think Justice Grignon and I disagree, and I think we don't even disagree on some of what is coming next, but the existence of an oral trust in California over personal property may be established only by clear and convincing evidence; and, in that regard, as

has been discussed already this morning, the oral Declaration of the Settlor standing alone is not sufficient evidence of the creation of a trust of personal property. And Justice Grignon suggests that what I've put in my Report in terms of the 'clear and convincing evidence' standard is beyond what that standard actually is. I don't think that that's actually true.

And I think it's also important to consider the context. Justice Grignon talked about the issue of not allowing simply the oral Declaration of the Settlor standing alone to be evidence of an oral trust in the context of claims against a decedent's estate. And essentially a claim that after the decedent died somebody comes in and says well, the decedent said that this was in Trust for me. And that that is not sufficient. There has to be other evidence.

But it's important to look at the context, I would mention that a number of the cases that have been referenced by both Justice Grignon and myself don't arise in the case of decedent's estates, they arise in the case of situations where the trustors or the alleged trustors are very much alive, and the 'clear and convincing evidence' standard still applies to that, and that there must be evidence in the case law references the fact that there must be evidence beyond just the statement of the

Settlor in order to allow for creation of the Trust.

So, let's go to the next slide.

This slide, and the point here is this is the issue. This is the Law Revision Commission (R-091) comment to the statute. And Justice Grignon made a point of saying that the Law Revision Commission comments are not themselves statutes, and that's true. They're not statutory law. They are used, however, to interpret statutory law and they are viewed essentially as legislative intent. The Court--the Legislature passes the statute, and the Law Revision Commission comments are frequently appended in the very case--in the very statutory books that we all use to interpret the statute, and they're regularly used by the courts in interpreting the statute.

So, in other words, the Law Revision Commission comments are very much used by all of the courts of California in interpreting trusts.

And the Law Revision Commission points out that the major problem with an oral trust is the difficulty of proving its terms and I think the evidence in this case suggests exactly why that is. They mention the risk of perjury particularly by those who have something to gain.

And corollary to that is not necessarily even perjury but the failure of memory. If you're looking at the existence of an oral trust and figuring out what

happened many years ago, you may have issues where people simply don't remember exactly what happened, and where you're trying to determine whether or not you have the necessary terms, and people can't remember what happened or what the terms were, that creates an issue.

And the Law Revision Commission also pointed out that even the clear and convincing standard might not be sufficient to guard against overreaching in cases where you don't have an actual transfer of property, and so therefore, the proposed law requires some corroboration in the form of a transfer or earmarking, in other words, putting the name of somebody on, for instance, some securities or some written evidence in order to uphold the Trust supported by an oral rather than written Declaration of the Settlor.

In the case law, this has largely been interpreted as some sort of contemporaneous evidence as to the creation of the Trust.

So, let's turn to the case law. Let's look at the next slide.

The Higgins case (R-094) sets forth the standard and it says it requires evidence which is clear enough to leave no substantial doubt and strong enough that every reasonable person would agree.

Now, Justice Grignon took issue with this, and

the Claimants argued that the California jury instruction 201 actually modifies this standard.

Can we put that jury instruction up? I think it's page--there it is (C-270).

So, the jury instruction was discussed earlier this morning, and it talks about--it talks about highly probable. But if we scroll down to the sources and authority, we will see that one of the matters that's listed is Butte Fire cases. And if you look at the standard that's referenced in the Butte Fire case (CLA-335), it says: 'Under the clear and convincing standard, the evidence must be so clear as to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind.' That is virtually identical to the standard in Higgins (R-094), as evidence so strong--strong enough that every reasonable person would agree.

And Claimants then in Justice Grignon's presentation talk about the next case, the Nevarrez case (CLA-334) to suggest that somehow this modifies the standard. In fact, it doesn't. I reviewed the Nevarrez case. The Nevarrez case came up in a situation where the Claimants were asking for a jury instruction that had this language in it, and the Appellate Court was asked to determine whether or not the trial court had committed a

reversible error in not giving the stronger jury instruction, and the language they talk about there is that you don't have to augment--they're not willing to augment the jury instruction. However, the case quite clearly talks about the standard that exists in California, and it's the same standard. And they point out the Supreme Court has issued this same standard, the same standard that's referred to in Butte, the same standard that's referred to in Higgins (R-094).

And I would point out that the Nevarrez case is 2013(CLA-334); the Butte Fire case is 2018 (CLA-335). They arise in different circuits in California, but neither of them is considered that that law has been overturned. And as I say, the Supreme Court standard, which is referenced in Butte and is referenced in Nevarrez is not questioned. And so, that's still the standard even though the jury instruction is somewhat less. And the reasoning in Nevarrez about not changing the jury instruction because you don't want to create confusion in the mind of the juror as to whether or not you're moving up to the beyond a reasonable doubt standard, is a valid concern. It's frequently a concern with jury instructions that they be clear, but it does not change the standard that the courts apply in terms of determining whether or not there is clear and convincing evidence.

And so, the standard that's set forth in Higgins (R-094) and in Butte (CLA-335) is, indeed, the standard.

So, let's go to the next slide. Next one after that. Yeah.

So, what I would like to do now is touch briefly on the cases that are referenced and how they interpret this particular standard.

The LeFrooth case (R-092) says that it's a cardinal rule that trusts and fiduciary duty may be created, declared or admitted verbally and they may be proved by parole evidence that the evidence at all times must be clear and unequivocal.

And Chard (R-093), finding that general family conversations, even the gifting of a portion of the proceeds to other siblings did not prove an oral trust, I think is a particularly instructive case here. In that case, the son had determined that his mother might have some claims. He went out and pursued the Claims in his own name. There was some discussion among the family about whether or not once those claims were--once the money was obtained from those claims, it should be shared among the siblings, but the Court found that even the fact that the son, after receiving the proceed-s had made some gifts to some of the siblings, did not create an oral trust. In other words, there was no oral trust impressed against him.

And I think the Chard case (R-093) sort of goes to this point. One of the contexts in which many of these cases arise is that somebody is trying to impress upon another person an oral trust saying that they have a claim to assets as opposed to a situation where the Claimant is arguing that they created a trust orally, and that Trust then gives them benefits.

The Newman case (R-095) is particularly useful in that regard. The Newman case arose from the tax case, Tax Court situation. And in Newman, the Court ultimately concluded that the spoken word must yield to the documented conclusion that no irrevocable oral or written trust existed. In the Newman case, there was a written trust that was created by a mother on behalf of her daughter. She even filed a tax return in which she referenced the fact that she had gifted property to her daughter. Later on there was an issue about when the irrevocable gift had occurred and what would be the tax basis for purpose of determining who would be taxed.

And the Tax Court ultimately--and the mother at that point several years after the original gift and the original written trust had occurred stated that she intended the Trust to be an oral--she intended and said orally that the Trust was irrevocable. Her statement was confirmed by the broker who had the assets in his control,

and the Court ultimately concluded that the statement that it was irrevocable did not match the various documentary evidence and, therefore, you could not have a finding of irrevocable trust because of the fact that she had not-- there was no evidence of the creation of an actual irrevocable trust at the time that the Trust was created.

So, in other words, when the Trust or in the Newman case (R-095) was trying to take the position that she was benefited by a trust that she said was created orally with terms that she said were beneficial to her, the taxing authorities found that that was not sufficient evidence to create a trust.

So, then let's look at the record in this case, and what we find in this case is that, at least, in the evidence that I reviewed, it does not appear that there is contemporaneous evidence from 2011 about the creation of the alleged trust. There is John Tennant's testimony and Derek Tennant's testimony, but there is no written contemporaneous evidence. There is no written contemporaneous evidence of the Skyway 127 Shares being put into a trust. Obviously, the actual transfer into Tennant Travel occurs in January of 2015.

There is nothing that sets forth the terms of the Trust. All we have is John Tennant's statement saying 'yes, I intend to put it in Trust,' and that statement is

not particularly clear in terms of when the timing of when that occurred. Certainly, Tennant Travel had not been designated as a beneficiary at the time of the Trust. There was some reference to perhaps to a holding company, and John Tennant and Derek Tennant both talk about it happening perhaps in April. John Pennie testified that as far as he was concerned it was still undesignated at least as late as December 2011.

There is no evidence whatsoever of any administration of the Trust. And in terms of the termination of the Trust, John Tennant, you will recall, testified that he--he didn't know if the Trust had terminated. And so, there is nothing that shows--there's no contemporaneous evidence showing what the term of the Trust was in terms of when it would terminate.

So, I think let's go to the next slide just reflects the timing, obviously, of the challenged measures, and the bottom line is that in the review of the evidence that I looked at and comparing it with what California law requires in terms of contemporaneous evidence to meet this 'clear and convincing' standard, there is nothing within the 2008--2013 period, and indeed, the first written reference to a trust is in this March--is in the February 2016 letter (C-268) from John Tennant.

So, next slide.

The other issue in connection with a trust is that there has to be some certainty in terms of an identifiable purpose and a beneficiary. And in this case, it does not appear that you have such evidence. John Tennant said he wanted to be repaid or have ownership in Skyway 127. He said he didn't have a holding company, but Jim had a company, and he let him have the Company. There is no evidence of when that transfer actually occurred.

Then John Tennant also said he 'never owned shares in Skyway 127 for my personal benefit,' but it's not clear what the benefit was since we don't know who the holding company--when he was going to transfer to the holding company or who the persons who were interested in the holding company were. The statements, of course, said that Derek Tennant was one of the Members, and that apparently has been changed, but it looks like John and Jim were at all times Members of Tennant, and others joined after that.

Let's turn to the next slide.

The next issue is an issue of the proper purpose of a trust. And obviously California law (R-090) says that a trust may be invalid if it violates public policy.

John Tennant and Derek Tennant (CWS-2, CWS-3) testify that one of the reasons for the Trust may have been to ensure that the Trust did not--that the Shares did not

constitute community property. The evidence suggests that the marital assets were used when the money came from a joint bank account to make the original loan. And obviously, if there was any attempt to hide marital assets, that would be against public policy which could invalidate the Trust under California law.

It's not clear that that was the intent. It's just that this is part of the issue with not understanding fully the purpose of the Trust and the lack of certainty as to the purpose of the Trust because it could be that it was to evade the application of community property.

Now, Justice Grignon in her opinion (CER-2) talks about the purpose of the Trust to prevent the dilution of voting control of the Shares. That gets into some of the voting bloc testimony, and that could be a proper purpose certainly of the Trust, but again it's not clear what the real purpose of the Trust was. We don't know that.

And then John Pennie, in his testimony, recited yet a third potential purpose which was he suggested that John Tennant may have wanted to do this to avoid tax consequences. If that were the purpose of the Trust, just as I discussed in my Report with the community property purpose, it doesn't seem that the--that what was done could have protected that just as the Newman case (R-095) didn't find that there was sufficient evidence of the creation of

a trust if John Tennant were attempting to suggest that he received these Shares always as the holding company and never personally, so no capital gains could potentially attach. The evidence in the record certainly suggests that he got them individually. That's what's on the Shareholder record for many years until 2015.

So, let's look--the next slide also goes to the issue of uncertainty. One of the things that is significant here is this acknowledgment (C-266) when the loan was originally made and the Shares were pledged. And the acknowledgment (C-266) required written consent and direction to transfer the Shares to anyone other than John Tennant, and there is no such written direction in the record. There is certainly nothing--there is no written direction to make any transfer to anyone other than John Tennant on April 19th or April 26th, 2011.

And the only direction that does exist is the June 20th, 2011, direction to transfer the Shares to John Tennant (C-267, p.2).

So, again, the timing of the creation of the alleged trust is uncertain because--is uncertain under California law, I would argue, because you can't tell when it was transferred into trust, and the written evidence requires--would appear to have required that there be some written direction to transfer into trust.

A transfer to John Tennant is not the same as a transfer to John Tennant as the Trustee, under California law (R-090). And Justice Grignon is correct in stating that the Trust itself is not an entity that the Trustee holds things in Trust; that the Trustee needs to be identified, and the Trustee, John Tennant as the Trustee, would not be the same as John Tennant as an individual. And John Tennant as an individual obviously signed the original acknowledgment (C-266), and the acknowledgment talks about a transfer to John Tennant as an individual and does not talk about a transfer to John Tennant as the Trustee.

So, all of that leads me to the conclusions, and I think that's the final slide, that under California law, it does not appear that the evidence meets the 'clear and convincing' standard. And it's not my judgment on the evidence. It's the fact that although there is the verbal evidence and testimony of the Parties who benefit from this. There is also a written record, and the written record appears to contradict most of what's put in the oral record. And if you look at the California case law, the California case law uniformly finds that the written record tends to--the written record, if looked at, prevents the establishment of a clear and convincing finding of an oral trust. And this record simply contains no contemporaneous

documentation of the alleged trust. And thus, it does not appear that the available evidence would meet the California standard that every reasonable person would agree that the alleged oral trust existed as required by California law.

PRESIDENT BULL: That's your presentation?

THE WITNESS: That's my presentation. I'm sorry.

PRESIDENT BULL: That's perfectly fine. I just wanted to make sure.

QUESTIONS FROM THE TRIBUNAL

PRESIDENT BULL: I had a question, just to clarify so that I understand your presentation, and it relates to the issue of the purpose of the Trust.

Now, your Report says that the purpose of the Trust is unclear. I've read that correctly; right?

THE WITNESS: Yes.

PRESIDENT BULL: And during your presentation, you mentioned the testimony that the Tribunal has heard about the voting bloc.

THE WITNESS: Yes.

PRESIDENT BULL: And I wanted to ask you this: Did I understand you correctly that, if the Tribunal accepts the evidence--and I don't know whether we will or we won't--but assuming we accept the evidence that the purpose of the Trust was to prevent dilution of voting

control of the Shares, if we accept that evidence as true, that would be a proper purpose; correct?

THE WITNESS: Yes. That would be a proper purpose, yes.

And I believe my point--I mean, there is an issue about whether or not there is an improper purpose which could invalidate a trust, but the other--the other point is that the purpose is very much uncertain. I mean, there does need to be purpose and you need to be able to ascertain the purpose, and the testimony suggests at least three different purposes.

PRESIDENT BULL: Right. No, I understood that part--

THE WITNESS: Yeah.

PRESIDENT BULL: --of your presentation as well. Thank you.

That's all I wanted to clarify about your presentation.

Do my colleagues have any clarificatory questions about the presentation at this stage?

ARBITRATOR BISHOP: I'd like to ask just a couple of questions.

I think there may have been a fourth purpose testified to by John Tennant, if I recall his testimony yesterday. I think he said that there was a purpose, and

it was in, I think, Paragraph 19 or 17 of his Witness Statement--or excuse me, I think it may have been Derek who testified to it saying it was his idea to have the Shares held in--by a holding company, and I believe he said that the purpose was to--for continuity of Skyway; that is, in case anything happened to John that his Shares would be held by a corporation to be named later, which ultimately was Tennant Travel; and that there was this continuity of the Company--the other company Skyway.

Would that be a proper purpose for a trust?

THE WITNESS: Yes, yes. That would be--that's frequently a reason for creating a trust, in fact, is to create ongoing management that doesn't get disrupted.

ARBITRATOR BISHOP: Okay. You also mentioned the terms of the Trust. When we're dealing with an oral trust, how do you ever know what the terms of the Trust are if it's just--if it's just oral, do the terms of the Trust have to be stated, the full terms of the Trust, in a Declaration or how do you know what they are?

THE WITNESS: Well, it depends. If there is sufficient evidence to create a trust, for instance, Justice Grignon referenced the Fahrney case (CLA-301), which is the case where the decedent had obtained life insurance, and he had stated to the agent--to various people before he obtained the insurance and to the agent

and his wife had confirmed that he was obtaining the life insurance for the purpose of making sure that the debtors to his corporation were satisfied following his death, and that's ultimately--and the wife ultimately tried to refute.

After she later on actually told these same creditors after her husband died, that when she got the insurance proceeds, she was going to pay them, and then tried to go back on that and say that the insurance proceeds were not for the creditors. And so, in that case, the Court found that an oral trust existed, and it was an oral trust for the purpose of the payment of the creditors of the decedent's business, and so it was considered specific enough, and it obviously was--the timing could be established because it was upon his death the creditors of the business.

So, there were sufficient aspects, but this is the main problem with an oral trust, is that frequently you don't have sufficient findings of that, and that's why the vast bulk of the cases that are cited both in Justice Grignon's Report and mine, do not ultimately find an oral trust. There are cases where there is enough written evidence that they find evidence on the written record, but--and there is evidence of constructive trusts where trusts are imposed because somebody is going to, you know, unduly benefit if a trust is not imposed and that's where

most of these cases arise. There is very, very few instances of actual oral trusts, just because of these requirements.

ARBITRATOR BISHOP: What terms of a trust have to be ascertainable in order to find that there is a real trust established?

THE WITNESS: I think that's the existence, the Trust purpose, the Trust beneficiary, the Trust property, and the intent to create a trust.

ARBITRATOR BISHOP: Oh. So, those are sufficient terms--

THE WITNESS: Those are sufficient terms.

ARBITRATOR BISHOP: I see. I see.

Okay. Thank you very much.

ARBITRATOR BETHLEHEM: Could I--I just have a couple of questions going to clear and convincing evidence, and I'm hoping that my video connection is going to be stable enough to put these questions.

One is just a question, really, as a matter of the technicalities of it, and I don't know whether counsel for Canada can put up the standard again that you drew our attention to that we had been talking about on that fourth page. Is Canada hearing? Can you acknowledge? Can you put it up?

MS. BARLOW: I'm sorry, I missed that. Can you

tell me again? I'll be happy to put it up.

ARBITRATOR BETHLEHEM: The clear and convincing evidence document that we've been talking about that you put up earlier.

THE WITNESS: The jury instruction (C-270).

ARBITRATOR BETHLEHEM: The jury instruction.

MS. BARLOW: Sure.

ARBITRATOR BETHLEHEM: Thank you. And if we could go to, I think it's the fourth page of that, the page the Witness was talking about.

Scroll down again. I'm sure nothing turns on this, but you took us to the Butte fire case (CLA-335), and that's a case of 2018. At the top it says, 'in respect of this standard, new September 2003 revised October 2004, June 2015.' My question is simply whether the sources and authority section is something that's updated on a regular basis. It says updated June 2015, but the Butte Fire case is 2018, and as I understand it, the Higgins case (R-094), which you cite to us on the reasonable--on the reasonableness point is a 2017 Decision, so I would just like to know a little bit more about this document.

THE WITNESS: Yes.

The reference to new September 2003 revised October 2004 and June 2015 is to the jury instruction itself. So, that's when the jury instruction was last

revised was June 2015. The sources and authority are updated, and those reference both cases that were in existence prior to the adopting of the standard obviously in cases that had interpreted the standard or referenced the standard subsequent to its adoption.

ARBITRATOR BETHLEHEM: Thank you.

And, I mean, you've taken us specifically, I think, to Higgins which is a 2017 Decision (R-094), as I understand. Butte Fire's 2018 (CLA-335), I mean, to the extent that, you know, we, the Tribunal, looking in to Californian law, with curiosity, should be driven by a particular jurisprudence. I mean, does Butte as sort of--incorporate trumps the 'later in time' decision, where would you direct our attention to?

THE WITNESS: Actually, the Butte case (CLA-335) and the Nevarrez case (CLA-334) both come out of their--you'll see that their reference is Cal. Apps., they're from the appellate-level courts that the structure in California is Trial Court, Appellate Court, and then the Supreme Court. The Nevarrez case (CLA-334), which--and I took a look at that--I have not specifically read the Butte case (CLA-335), other than the reference in here, but the Nevarrez case (CLA-334) contains a reference to the California Supreme Court case of 'in re: Angelia P,' and it says the Nevarrez case says--that quotes that case, saying

that, 'clear and convincing evidence requires a finding of high probability. The standard is not new. We described such a test 80 years ago as requiring the evidence to be so clear as to leave no substantial doubt sufficiently strong to command the unhesitating assent of every reasonable mind,' so that's the California Supreme Court's standard. And as they say, that's apparently referenced in Angelia P both the Nevarrez case and, obviously, the Butte case (CLA-335) are referring back to the Supreme Court case, and the Supreme Court case is the overall--you know, that's the standard. Whatever the--the appellate courts have to follow the Supreme Court.

ARBITRATOR BETHLEHEM: Thank you. I understand that, and again, maybe nothing turns on this, and I'm trying to get things clear in my own mind, but you seem to place a lot of emphasis on Higgins (R-094). It's the first case that you, I think, took us to, it's referenced in your report, and you underscored the language 'every reasonable person would agree.' It's a case which seems to be earlier in time to the Butte Fire's case (CLA-335), where the discussion--there are references to 'unhesitating ascent of every reasonable mind.' I'm just wondering whether we need to take anything from the fact you seem to be prioritizing Higgins in your Report to us as opposed to--as opposed to Butte. It may be just that you were not focusing on the

jury direction authorities.

THE WITNESS: Yes. I refer to Higgins (R-094) simply because Higgins is in the context of a trust case, which neither--which these other cases are not. The Higgins case was a case of attempting to impose a constructive trust, and the language I just quoted you that decided in Nevarrez (CLA-334) is from a 1981 Supreme Court case, and so the point is this language has been around for, you know, nearly 40 years at this point, and so, all of these cases refer back to that. And I cited to Higgins case (R-094), and even though it's a 19--2017 case, simply because it's in the trust context, and I believe it's actually referred to--similarly to the references here, under the jury instructions to source as an authority. The Probate Code (R-090)--under each of the-in the statutory provisions has, sort of, citing references down below, and Higgins (R-094) is one of the references that's referenced in the Probate Code in the sections that we're discussing here.

ARBITRATOR BETHLEHEM: Okay. Thank you.

And that brings me to my, sort of, concluding question, which is really the same question that I put to Justice Grignon, and that is, that the two of you--the two Expert Witnesses, seem to be agreed on the 'clear and convincing evidence' standard, and you're both taking us to

documents, which seem to be ad idem, and there doesn't seem to be any conflict there. Where the conflict seems to arise between the two of you is on how you interpret that in the context of a particular case and perhaps how you view--your expert evidence remit.

My question--and I put to Justice Grignon, was that we, the Tribunal, or at least I speak for myself, I understand that the 'clear and convincing evidence' standard is a high standard, but it's somewhere between balance of probability and beyond all reasonable doubt.

And the question that I put to Justice Grignon, and I put to you, as well, is: Is there an appreciation as to how that standard ought to be implemented depending on the circumstances? And I think the three, you know, 'what if' circumstances that I gave to Justice Grignon, were in circumstances of probate versus non-probate, where you've got no possibility of the testator actually coming to give, sort of, evidence in person and non-probate, where you may have such a possibility of circumstances, in which, there is extrinsic documentary evidence in the circumstances, in which, there is no extrinsic documentary evidence. Or circumstances, in which, there is no contest about the factual predicate of the Trust or circumstances, in which, there is very heavily contested, sort of, factual predicate.

I mean, in those kinds of circumstances, are we, or would California law, bring a--an appreciation to bear, or is there simply just a standard of clear and convincing evidence?

THE WITNESS: There--I believe there is a standard. However, the reason for discussing the case law and how they interpret the standard, I think, goes specifically to those specific--those instances you're talking about. I don't think there's a difference between probate and non--probate. And in this context--and I think it was referenced earlier--you know, Trust Law is very much part of--it's part of the Probate Code (R-090), and it's determined in the probate courts in California, and I think somebody said that, probably, it should be called the Trust and Probate Code, and I think that's probably accurate. So, we're talking about trusts, and so, we're not always talking about situations where we have decedents who are not able to testify. We do have trusts and, as I say, a number of the cases that are cited actually refer to trustors and the persons who supposedly made, or did not make, the Declarations actually being alive and able to testify, so that doesn't make a distinction.

But I think the Newman case (R-095) is somewhat instructive, in terms of how this interplays, because the Newman case refers to a decision by the Probate Court,

where all the parties, the wife and the daughter came in and made--and I think the broker came in and made an application to the court to find that there was an oral irrevocable trust, and there was no evidence presented otherwise, and the Court wound up finding that that was a term of the Trust, and the Taxing Authorities, in front of the Tax Court, wound up disagreeing with that because they said that it was essentially collusive. There was no-- there was no advocacy on either side, they all wanted the same result, which was vis--à--vis the taxing authority.

So, there is--you know, how the standard is applied depends on the evidence. Judge--Justice Grignon said--mentioned the idea of, you know, one--one witness that the Court believes can amount to clear and convincing evidence, and she is accurate in that, the Court can, you know, when it's applying the standard, can discount all other evidence. But when looking at the California law, in terms of how they apply this standard, it seems--it's very clear that they look primarily to written evidence and find that that written evidence has to be considered in the context of whether or not the 'clear and convincing evidence' standard has been met, particularly where you've got witnesses who have reasons to be testifying in one regard when there's a written record in the other regard.

And I don't know if that answers your question.

ARBITRATOR BETHLEHEM: Well, thank you very much.

And I apologize if my question was taking you into territory that is more appropriately covered by cross examination. I'm really just trying to understand this document that was put before us in the context of the evidence that we heard.

And I just have one last question, and I'm looking to counsel for the Claimant. You may want to object, and say, 'this is something that will dealt with in cross examination.'

I'd simply like to know, as a measure of Californian law, whether the existence of a trust is a matter of fact or a matter of law, and therefore, whether this 'clear and convincing evidence' standard applies to it.

THE WITNESS: Well, I would guess that--I mean--I think it--I'm trying to think how to parse that. The existence of a trust--I mean, a trust--it's a factual issue in the sense that you have to have these terms, and whether or not you've proven that those terms exist, such that you've created a trust, is a matter, in the case of an oral trust, there being clear and convincing. Obviously, in the case of a written trust, you don't have that issue, but in the case of an oral trust, you can't--you must have clear and convincing evidence for the court to find that a trust

exists and you have to--you look to the facts. So, I guess, it's ultimately a matter of applying the facts to the law, but it's a factual matter whether a trust exists, but evaluating those facts, you cannot say the Trust exists unless you have clear and convincing evidence of the facts that would support the Trust.

ARBITRATOR BETHLEHEM: Thank you very much.

Apologies, counsel, if I took the Witness beyond the clarification points.

PRESIDENT BULL: Ms. Lodise, I just wanted to clarify something from what you said in response to Sir Daniel's questions.

The Butte Fire (CLA-335) cases that are referenced in the jury instruction (C-270), was that a trust case? And if you don't know, can you let me know that, as well, but was it a trust case?

THE WITNESS: I don't know whether it was. From the title of it, it doesn't sound like it was a trust case, just because trust cases tend to--they tend to say 'in re:' and they--

The other case, the Nevarrez case (CLA-334), was also not a trust case, it was--although it dealt with an elder abuse situation, so it, you know, it touches on similar issues, but it was also not a trust case. I mean, it was not a trust case.

PRESIDENT BULL: Right. Thank you.

Can I just ask this of counsel: Are these two cases in the record?

MR. MULLINS: They are not.

I am--I was going to ask about that. Of the two cases, the Nevarrez case I pulled, and I was going to question counsel--the Expert on it because she said she read it, and I'd like to put it in the record, and I'm perfectly fine having Butte (CLA-335)--and Marino--sorry, Nevarrez (CLA-334) in the record, given that the Expert has relied on Nevarrez, and there's--I'd like to question her on it because I--I would like to question her on it. I have no problem putting in the record she's already testified about it, that's why I didn't object.

PRESIDENT BULL: So, you've answered my question, I'm grateful, Mr. Mullins, that they're not on the record.

I hear you that you want to cross examine the Witness on it. And maybe since you said that, Mr. Klaver may have something to say.

MR. KLAVER: Definitely. We've already consented to bringing the jury instructions on to the record. Now, counsel for the Claimant wants to cross examine our Expert on cases that are not on the record. This is just procedurally inappropriate.

PRESIDENT BULL: Yeah.

So, Mr. Klaver, I do understand that point, and it is not without force, at least in my mind. However, it seemed to me that Ms. Lodise was referring to those cases to try and make a point. The difficulty I have, though, is that Ms. Lodise may not have had sufficient time to look at those cases and offer a considered view, so I guess what I'm saying is I see both sides of the coin at the moment.

MR. MULLINS: Well, Mr. Chair, I feel at a little bit of disadvantage. I would have objected, but she's now put in the record that she's studied the case and she was testifying about it. And I was ready--I didn't object because I assumed, based on that testimony, I would be able to question her about the case.

(Overlapping speakers.)

MR. MULLINS: I have no problem putting it in the record, she said that she read the case and she started to describe to Tribunal what it said. I didn't object, because I thought 'Okay, that's great. We'll put it in the record.' Now to have her not do that really puts us at an extreme disadvantage.

I have no problem having both cases in the record. And if she needs to take a break to read them more carefully, she can, but she said she read it over the break.

PRESIDENT BULL: Now, Mr. Mullins, she's said she

read one of the cases, the other one she hasn't, but, Mr. Mullins, you may well ask her a question about this, but if, in the end, she says in her answer, she says, 'well, I can't give you an intelligent answer right now because I have to read the case and think about it,' we're not really going to get that much further.

So, it's--to me, the issue is not really whether you're allowed to put the question. It's how do we get--how do we get something reliable from the Expert Witnesses, both of them.

(Overlapping speakers.)

MR. MULLINS: That's fair. So I'm clear, because I want them to state what was going on. I think she said, 'I had not read Butte,' (CLA-335) but she's talked about what--just basically, 'I haven't had a chance to read it,' and then she said she did read Nevarrez (CLA-334). I think, for purposes of trying to find out what the law is, I think the most proper thing would be to do is put both of them in the record. If later, either Expert needs to opine on it, we could have a briefing or however you'd want to handle it. But I do think, at this point, given that there's been reliance on it, clearly with Nevarrez (CLA-334) and I'm perfectly fine to putting on the screen to show her sections of the case. But, however the Panel wants to have it, but I do think, at this point, they have

to be brought into the record. I should be able to ask her questions about it because she's already testified--at least for Nevarrez, that she relied on it, for her testimony that she gave in response to Arbitrator questions.

PRESIDENT BULL: Mr. Klaver, you to want say something?

MR. KLAVER: I agree, it would not be appropriate to put questions to the Expert when she has not had adequate time to prepare and review these cases. It was very diligent of Ms. Lodise to promptly try to get caught up on the cases that we've just learned about today. That should not be held against her.

Now, if the Claimant does insist on seeking to put these cases on the record as new exhibits, we are amenable to that, but I don't think it would be appropriate to put questions to the Expert right now. As you indicate, President Bull, this would not provide a reliable basis on which to truly assess these cases.

PRESIDENT BULL: Okay. What I would like to do is I would like to have a short discussion with my colleagues, and we will exit to the breakout rooms. And I don't imagine this will take more than three or four minutes.

(Tribunal conferring outside the room.)

PRESIDENT BULL: Right. The Tribunal has conferred, and we have decided that we would like the Butte case and the Nevarrez case (CLA-334) to both be admitted into the record. We would like to see what those cases say in the light of what has gone on today.

Secondly, we will allow Mr. Mullins to ask questions of Ms. Lodise about these cases. However, we do want to say this, that if Ms. Lodise can be helpful in answering the questions, that's fine, but if she feels that it would not be appropriate and it would not be of clear assistance to us for her to answer without having had the opportunity to read those cases, actually consider them, perhaps look at other material before giving us input, then she can say in response to the questions that that's something that she is unable to deal with now, and she can say so.

And the Tribunal wants to stress if Ms. Lodise takes that course with any question, we would not take it that she was being unresponsive to the question because of the circumstances in which things have come up. We think that would be perfectly--and in fact, we would expect that of an expert witness to tell us that she was not in a position to assist us yet, about this. It may well be that subsequently Canada might be able to address those issues raised by Mr. Mullins's questions in another manner, and

that may well be helpful, but for today we will go ahead with those two cases can come in. If it's possible for copies to be sent to the Tribunal concurrently by e-mail, that would be good, and Mr. Mullins can ask questions of Ms. Lodise. And as I said, Ms. Lodise can answer in the various manners that I have described.

Ms. Lodise, have I been clear enough?

THE WITNESS: Yes, you have been. Thank you.

PRESIDENT BULL: Very good.

I'm asking the Witness since she's in the hot seat. I'm quite clear--I'm sure counsel understands me.

With that, I think the clarificatory questions are done, and so next up is cross-examination, then, Mr. Mullins, we're in your hands.

MR. MULLINS: Thank you.

And while we are on the questions, we will go ahead and send the decisions to the Panel.

CROSS-EXAMINATION

BY MR. MULLINS:

Q. Good afternoon, Ms. Lodise. I don't think we've met. My name is Ed Mullins. I'm counsel for the Claimant here, co-counsel. Thank you for your time today.

A. Hello.

Q. Can you tell us what you did to prepare for your testimony here today?

A. As I noted in my Report (RER-1), I reviewed some--certain portions of the Claimant's Memorial on Jurisdiction, Canada's Memorial, the Reply Memorial, as well as the Witness Statements for John Pennie (CWS-1), John Tennant (CWS-2), Derek Tennant (CWS-3). And obviously as you're aware, I've attended the Hearings--the arbitration proceedings this week and have listened to the statements, and I've reviewed various of the documentary evidence as well.

And in addition to that, I obviously did legal research in connection with the cases that are cited in the--in the statement that I prepared.

Q. The legal research that you did, have you cited every case that you relied on?

A. With the exception of the discussion of the Nevarrez case (CLA-334) just now, I believe that--I have cited every case that I specifically relied upon. Obviously, with 30 years in practice in trusts and estates law, I think there are probably concepts on which I relied that are not cited but I think everything that is necessary to make my determination is included.

Q. You did not--did you do an exhaustive research to determine that you made sure you looked for every single published and unpublished decision regarding oral trusts before you testified?

A. I would not--I would not be able to claim that I have been through every single published and unpublished decision about oral trusts, although I did do fairly extensive research.

Q. And I take it you have read cases cited by Justice Grignon?

A. I have, indeed.

Q. So, I can ask you questions about those?

A. Yes.

Q. Now, are you familiar with Justice Grignon?

A. Yes. In fact, I think that her office and mine have worked together in the past. I can't remember--I can't remember the specific situation, but I think she worked with my partner Bob Sacks on a matter.

Q. Have you ever had the privilege to argue in front of her when she was an appellate judge or a state court judge?

A. No. She was in Northern California, and I'm in Southern.

Q. But you don't dispute her qualifications to discuss oral Trust Law in California, given her credentials; correct?

A. She obviously has very good credentials. I don't believe her expertise over the years has been in Trust Law, although she obviously is quite well qualified on

California law.

Q. She's qualified to testify about oral trusts under California law, given that it was a pretty simple trust; don't you agree?

A. I don't dispute her qualifications, Mr. Mullins.

Q. Okay. In fact, you talked about your experience in trusts. I mean, you don't see a lot of oral trusts all the time; right? Your experience in trusts are pretty complicated documents; right?

A. I don't see a lot of oral trusts. I can think of one instance where I had a trial on an issue of somebody who claimed to--basically an oral joint tenancy with rights of survivorship, which was the equivalent of creating an oral trust, which was not upheld by the trial court, but--so, no, I don't see them frequently, and they don't show up frequently in California law.

Q. Okay. So, your expertise, when you talk about you have testified 40 times regarding Trust Law, when you've testified--you haven't testified 40 times about what an oral trust is; right?

A. That's correct.

Q. You have testified about pretty complicated documents that are written down, and there's really no disputes about whether or not somebody actually complied with their fiduciary obligations with the clear written

document in a complicated Trust Agreement; is that true?

A. I--I have testified in those situations. I have testified in situations that are less clear than that, but, you know, some of them are complicated, some of them are not. There are a wide variety of trusts out there.

Q. And you also have been an expert in malpractice cases where you talk about what a fiduciary obligation is; correct?

A. Yes.

Q. For example, you could have a fiduciary obligation when you have an attorney-client relationship; correct?

A. You could, yes.

Q. For example, so if somebody hires somebody as an attorney, there is automatically under California law a fiduciary obligation the mere fact that you're hired as an attorney; correct?

A. That's correct, yes.

Q. And so, what happens is that, if someone violates their fiduciary obligation, there may not be a document to look at. You just know under the law the position because there is an attorney-client relationship; right?

A. As a general statement, yes, that's correct.

Q. So, when you testified as an oral--on the malpractice cases about fiduciary obligations, you may not

even be looking at a document when you do that. You're talking about what the law implies because you're a fiduciary as a lawyer; right?

MR. KLAVER: I'm sorry, I have to interject. I do not see how this is relevant to Ms. Lodise's Report (RER-1). You're discussing solicitor-client privilege right now. The topic is Trust Law.

MR. MULLINS: I will explain.

The concepts that she's testified as an expert, she said she's an expert in Trust Law. She actually also testified--she just testified that she also does malpractice cases. The concept is fiduciary, so I'm just exploring that the concept of a fiduciary does not require a written document, but I'll ask that question.

BY MR. MULLINS:

Q. You agree with me that a fiduciary does not require a written document. The obligations can be implied by law. You agree with that; right?

A. A person can become a fiduciary as required by law. I would not say that--I think your characterization of my testimony in malpractice cases unrelated to trusts and estates is probably inaccurate. But yes, you can have a fiduciary relationship imposed by law. Many of the cases that are cited by Justice Grignon and myself applied a constructive trust, which is essentially the legal

imposition of a fiduciary relationship.

Q. And so, for example. So, if there is an oral trust that's created--and in answer to Arbitrator Bishop's question, so all you need, as I understand it, is a Settlor. You need a beneficiary. You need a purpose, and you need *trust res*, and you basically have all the essential elements of a trust if you have all of those four elements. Did I get that right?

A. If you have those four elements, that's what California law says creates a trust.

Q. I'm sorry, go ahead.

A. No, that's fine.

Q. And just so we're clear, once you have those four elements, the law imposes a fiduciary obligation on the Trustee as to what even though there may not be a clear direction exactly what we want that Trustee to do. Do you agree with that?

A. I don't necessarily agree with that because it would depend on what's in the Trust. For instance, John Tennant testified that he could have changed--he said there was a trust, and President Bull asked him if he could have changed that, and he said yes he could have if it's a revocable trust. There are very limited fiduciary duties which are imposed. If there are other situations where different fiduciary duties are imposed and the California

law provides that the first place you look for the fiduciary duty or for the duties of a Trustee is the Trust, then you look at the Probate Code where the Trust is silent, and then obviously you look to case law.

So, what fiduciary duties apply to a Trustee in a given situation depend entirely on the Trust.

Q. I take that--so you agree, then, that, if it was a trust, it was revocable because he could have changed it at any time?

A. I don't know whether it was revocable or irrevocable. I know that in his February 16th memo (C-268) he talks about having irrevocably transferred these interests, and it's not clear to me whether he's purporting to mean that when he purportedly created the Trust it was irrevocable or whether he is changing it to irrevocable at some later date.

Q. But that document, if the Tribunal interprets it as Justice Grignon did, that what he was saying is that on irrevocably transferring to January 2015, if they interpret it that way, that's not the Trust. That's the Assignment; correct?

A. I'm not going to render any opinion on an Assignment. I wasn't asked. And Assignment is not something that is in California Trust Law and I wasn't asked to opine on that.

All I'm saying is that he uses the term irrevocable in his February 2016 document, Justice Grignon said that that document, if nothing else appears to provide some evidence of the existence of a Trust, and I just am pointing out that it's not clear to me whether the Trust is revocable or irrevocable.

Q. But you heard Justice Grignon testify that she interpreted the document as saying that the Trust ended in January 2015. And just hypothetically, to see if we're on the same page, if you agree with that--I'm not saying you have to, but--if you agree with that hypothetical, if John Tennant could terminate the oral trust at any time, that would be a revocable trust; correct?

A. Well, I think you're confusing two concepts. Irrevocable trust--certainly a revocable trust, and Justice Grignon is correct that the California law presumes trust to be revocable unless there is some evidence to the contrary. A revocable trust could be terminated by the person with the right to revoke, which, in this case, if it's John Tennant's property he has the right to revoke. It could be terminated.

The Trust, though, could be also terminated, and I think the reference to termination that Justice Grignon is talking about is if the Trust property was the Shares and the Shares are transferred out to somebody else, then

the Trust would terminate by--would terminate, because the Trust would cease to exist, and that's not by revocation, by John Tennant. That's just the conclusion of the Trust.

(Overlapping speakers.)

A. Although it's not clear because obviously John Tennant testified that he wasn't sure whether the Trust was terminated or not.

Q. Well, we will get to that, but you actually did that much better than I would have. Thank you.

Now, you would agree here that your mission here is to provide expert opinion on California law.

A. Yes.

Q. On Trust Law.

And you're not here--you don't have any personal knowledge of the facts; right?

A. The only knowledge I have of the facts is the Witness Statements and the testimony that I have observed.

Q. Okay. And you're not here to judge the credibility of any witness; right?

A. I am not judging the credibility of the Witness. I'm just speaking as to how California law might apply to the various facts that are in front of the Tribunal.

Q. That's the Tribunal's job. The Tribunal's job is to look at the evidence and to judge what happened; correct?

A. That is the Tribunal's job, correct.

Q. And what Justice Grignon said was that if you--I've looked at the evidence, and if it's believed and she looked at now the Transcript and the evidence, she says if it's believed, then I believe that satisfies the 'clear and convincing' standard. Do you agree that that's what she's doing?

A. That is what she's doing, yes.

Q. And on the opposite end, what you're doing is not saying 'I disbelieve any particular evidence,' you're saying that if you were a judge, you might come at a different level that if--you may find that the evidence, even if believed, is not sufficient or you're saying you don't believe some of the evidence? What are you saying?

A. No, I'm saying that the evidence that's in front of it does not--that is in front of the Tribunal, all of the evidence, the oral evidence, the documentary evidence, does not appear to meet the 'clear and convincing' standard that California law requires. So, I'm testifying as to you know, if you take all of that evidence into account, you apply the California 'clear and convincing' standard to that evidence. It does not create an oral trust under California law.

Q. Are you discounting any evidence when you testify that way?

A. I am not necessarily discounting any evidence. I am--I am raising issues about--because I am noting that there are discrepancies between evidence that is stated and documentary evidence, and there are, for instance, a number of times when the witnesses this week testified to the fact that they simply didn't remember what happened, so there are issues with the evidence. I am noting that.

Q. The clear and convincing evidence standard does not require 100 percent unanimity in the evidence. You agree with that; correct?

A. I agree.

Q. All right. So, let's talk about some of the law.

Why don't we go to that jury instruction (C-270) first so we can clarify the 'clear and convincing' standard.

I believe we're calling it C-270. We haven't had an opportunity to consult with Canada on our numbering, but as long as--we believe our next number is C--270.

And for the record, this is the 2020 version of the jury instructions, and so--because I think that there was quite clear questions by Sir Daniel as to why there are different dates here. So, as I understand it, assuming we're on the same page, Ms. Lodise, what we have here is the jury instruction on top; right? This is the black letter of the law; correct?

A. Yes.

Q. And that's going to be told to the jury, if you have a jury trial, the California Supreme Court is telling the jury--telling the trial judges, if you're telling a jury what 'clear and convincing' means in any circumstance, this is the standard we're going to give to the jury. Is that--is that your understanding of what the black letter is on top?

A. If you were giving an instruction to a jury, this is--this is an approved form of jury instruction, and it is a jury--it's an instruction that would be given to the jury, yes.

Q. And that standard, if this is a jury trial on oral trust, the standard in the black letter--you see on top where it says 'certain facts must be approved by clear and convincing evidence, which is a higher burden of proof, this means the Party must persuade you that it's highly probable that the fact is true. I will tell you just simply which facts must be proved by clear and convincing evidence.' That's what I'm calling the 'black letter.' Do you agree with that?

A. The only portion I don't agree is that if you were raising an issue of whether or not an oral trust existed in California, you would not be in front of a jury. It's not an issue that is tried to a jury.

Q. Fair enough. Fair enough. Okay.

But if...--fair enough.

However, if you're allowed to--if an issue came up on clear and convincing evidence in a jury, this is the standard that the jury would be told?

A. This is the jury instruction (C-270) if an issue of clear and convincing evidence came up in front of a jury, yes.

Q. And it shows here there were revisions that were had to this, and the Nevarrez case (CLA-334) is a 2013. If I understand what this is, is that the Nevarrez case had come out prior to the last revision in June of 2015, would that be accurate?

A. I have not studied the history of the--I mean, that appears to be what this document says, but I certainly have not studied the history of--what was revised at what time and what issues were considered in connection with the revisions. I mean, sometimes, revisions are to change language so that you're using proper pronouns, and it's not--I don't know what was considered on that June 2015 revision.

Obviously, the Nevarrez case (CLA-334) existed prior to the June 2015 revision but I don't know what the revision was.

Q. And so, no matter what, we know, as of 2020, for

any issue tried to a jury on clear and convincing evidence, this is the standard that's going to be told to them in the black letter; correct?

A. It is.

Q. Let's look at the Nevarrez case (CLA-334) for a moment, that you had a chance to look at lunch. And if we go to Page 23 of 47. If you scroll down.

And you had a chance to look at--I assume--you had a chance to look at this portion of the case, but this is talking about jury instruction CACI No. 201 (C-270). That's the same one we're looking at; right?

A. Yes.

Q. And the issue in the case was that the loser was arguing that the jury instruction that was given to the jury did not have the language with a higher standard. Isn't that what was going on in the case?

A. Yes. They argued--that appears to be what happened. They appear to have argued that an additional instruction should have been given to the jury, and as I stated before, the Appellate Court agreed that the Trial Court had not erred in refusing to give an additional instruction.

Q. And the additional instruction that--so this was an elder abuse verdict; right? So the standard that was required was clear and convincing evidence in an elder

abuse case, and the standard that they wanted to apply was the standard that you're telling us should apply in clear and convincing evidence; right? If you look at the next column, what they wanted to apply was the standard that says 'so clear as to leave no substantial doubt sufficiently strong to command the unhesitating assent of every reasonable mind.' That's the standard that the Court said the jury should not--it was not an error for the trial judge not to give that instruction; correct?

A. That appears to be--what the Court said which was not an error to not give that instruction because it might create confusion. I don't believe the Court is saying that's not an appropriate standard to consider. It's just that the jury instruction does not need to include that.

And if you scroll down, they say, you know, if the jury instruction should include that, then, you know, the Supreme Court can instruct us to change the jury instruction.

But it doesn't (overlapping speakers)--it doesn't--the point that I was making because you raised the jury instruction in Justice Grignon's testimony this morning, is that the jury instruction alone is not the sole criteria upon which you can look to this because it is unquestionable that the Supreme Court has described clear and convincing evidence in the same way that it's described

in Higgins (R-094) and in Butte (CLA-335)and in Angelia.

Q. Actually, let's keep on going through the case, so--it was a little bit--a little bit more complicated than that.

So, what happened is, if you keep on going down to--let's go to the paragraph that says 'courts have rejected similar arguments.'

So, remember they're trying to apply the standard you say the Supreme Court had said before, and it says 'courts have rejected similar arguments' which defines 'clear and convincing evidence,' from Angelia which should be updated, and if you go to the next column, it says, in a two-to--one decision, division three changed its position finding that the more stringent language in Angelia, which would impose a burden--would impose a burden approaching a criminal burden proved/proof beyond a reasonable doubt, and so what happened was this Court was saying the standard about leaving no substantial doubt and too strong a command an unhesitating assent of every reasonable mind was just too close to the criminal standard. Isn't that what this case is saying?

A. I don't know if that's what this case is saying that's what they're referring to on this. And now we do get to the point where, obviously, I have not read all of the other cases cited. I have read this portion of it, and

the point that the Court is making is this is an approved jury instruction. The Court did not err in making this approved jury instruction. There have been arguments that we should modify the jury instruction to include this language. However, none of this says that the Supreme Court's finding that that--which is recited in multiple cases, the same language that's in Higgins, the same language that's in Butte, the same language that's cited by the appellants here, nobody has questioned that Supreme Court finding that that is the standard, they're just not applying it to the jury instruction.

Q. Well, actually, you say you're not sure what's going on. Let's go to the paragraph that says 'we decline to hold,' so, if they're saying we decline to hold the CAC No. 201 jury instruction, should be augmented to require that, 'the evidence must be so clear as to leave no substantial doubt, and sufficiently strong to command the unhesitating assent of every reasonable mind, neither in Angelia or any more recent authority mandates that augmentation and to propose additional language is dangerously similar to that describing the burden of proof in criminal cases.' So there's really no doubt that this is what this Court was holding; right?

A. The Court was holding that they--that they are not--that court, is not going to augment the jury

instruction, to change the jury instruction. The Court was not holding, I don't believe, that that is not an appropriate standard for evaluation of clear and convincing evidence. They said that they are concerned that the jury would be confused and think it was similar to a burden in criminal cases, which it's clearly not.

So, it's, as I say, it's not--there is a difference between this particular Appellate Court being asked to modify the California jury instruction (C-270) and saying that it's declining to impose that restriction on the Court, and saying that that is not an appropriate evaluation of clear and convincing evidence as treated in the case law and as recited by the California Supreme Court.

There is an ongoing element certainly in California, I suspect in other cases of concerns about what a jury will understand and become confused about and what a court can apply. I mean, if you have a bench trial, obviously there are times when a court--a judge will say I can--you know, we can let that evidence in. There is no danger that it's going to bias me because I know how to apply the evidence correctly.

Q. So, it's your testimony that a California Supreme Court doesn't trust jurors to apply the law correctly?

A. That's not what I'm saying. What I'm saying is

there is a concern, and it's referenced in this language right here, it says the language is dangerously similar to that describing a burden of proof. It's not saying it's the same. And there is not a California Supreme Court case that I'm aware of that says that the standard that's referenced in Higgins (R-094), referenced in Butte (CLA-335), referenced by the appellants here (CLA-334) is not an appropriate standard. It's different from whether or not it's the jury instruction (C-270).

Q. But what we do know, though, that, at least as of 2020, the California Supreme Court has not changed the model jury instruction to adopt that higher standard; correct?

A. That is true.

Q. Okay. So, let's move on.

Now, I want to make sure we're all on the same page of what a declaration is. Can we go to Probate Code 15207 (CLA-292).

And I'm just warning you, this is going to be a little bit long, because I'm going to be bringing up documents, and it will take a while to pull stuff up, so you will have to bear with me, it's going to take a little bit to do that.

So, this is 15207 (CLA-292). So, I think all the statutes are here, so we will be going back and forth.

All right. Now, so this is where the 'clear and convincing' standard comes up; right? You see in 15207(a), the standard is clear and convincing, there is no other language, so it's the same standard clear and convincing that would apply in any case dealing with clear and convincing evidence. Do you agree with that?

A. Yes.

Q. So, what it says is--and I want to make sure we're on the same page, Ms. Lodise--it says, now in (b)(CLA-292), the oral Declaration of the Settlor--okay--standing alone, is not sufficient evidence of the creation of a trust of personal property.

And Justice Grignon testified this morning that that Declaration is not testimony from the Settlor. It's the actual Declaration of a trust. You agree with that; correct?

A. I believe that is correct. It's talking about a statement by the Settlor saying that I'm holding this in Trust.

Q. So, all that means is that if there was absolutely no evidence other than the oral--the original Declaration of a Settlor, there is no other evidence, that alone is not sufficient to create a trust of personal property. Isn't that what that means?

A. That is certainly--yes, they can't, and it goes

back to, you know, basically--you know, you can't come in, your Settlor is deceased and you walk in and say he told me this was in Trust for me and there's no other evidence.

Q. Thank you.

PRESIDENT BULL: Mr. Mullins?

MR. MULLINS: Yes.

PRESIDENT BULL: Would it be convenient to take a 15-minute break now?

MR. MULLINS: That would be fine.

PRESIDENT BULL: Great. Thank you. Then let's do that.

(Recess.)

PRESIDENT BULL: Good. I think we are all back, so Mr. Mullins, whenever you're ready, you can proceed.

(Pause.)

ARBITRATOR BETHLEHEM: I think you need the microphone, Mr. Mullins.

MR. MULLINS: I was told I was on it.

BY MR. MULLINS:

Q. Good afternoon, Ms. Lodise. Are you ready to go back?

A. I am. And it's still morning here.

Q. I apologize. That's correct. You're in California.

All right. So, going back to our questioning,

you would agree with me, do you not, that, under California law, a trust can be for an indefinite or a general purpose?

A. So long as that purpose can be ascertained, yes.

Q. Okay. And you also agree you don't need consideration for a trust?

A. If you presently create a trust, you do not need consideration. If you intend to create a trust in the future, you do need consideration.

Q. Okay. And you also agree that if you have a trust and the property goes to the Trustee, the legal title is in the Trustee; right?

(Overlapping speakers.)

A. Yes. If the Trust exists and the Trustee holds title, the legal title is in the Trustee, then the Trustee can act with the property.

Q. And so the onus(unclear) becomes that the legal title to the Trustee--

REALTIME STENOGRAPHER: Sorry, Mr. Mullins, start your question again. I didn't catch that third word. 'And so the' what?

BY MR. MULLINS:

Q. The legal title is in the Trustee, and the beneficial interest is with the beneficiary; correct?

A. Yes.

Q. And in this situation, if the Trust that's being

alleged here is that Mr. John Tennant was a Trustee and the beneficiary was Tennant Travel; correct?

A. That's--that appears to be what John Tennant says that Tennant Travel--well, not Tennant Travel. There was some undesignated holding company who was the beneficiary.

Q. Well, originally, he said that the beneficiary could--would be named in the future when he decides what he's going to do, and a week later he testified he chose Tennant Travel on April 26; correct?

A. Yes. That's what--he testified that it was around that time that he chose that, yes.

Q. And so--and so the Trust, under the law, if the Panel finds that saying the holding company that will be named is a sufficient class of a beneficiary, technically the Trust was actually created on April 19th, and then the beneficiary can be named in April 26. Do you agree with that?

A. I'm not sure because it wasn't clear to me when exactly it was created because it's not clear to me which conversations supposedly created it. There are multiple conversations that John Tennant and Derek Tennant testified to, and Mr. Pennie.

Q. Understood.

And I'm not asking you to comment on the question. I'm asking you a hypothetical. The testimony

shows what it does. I don't think it's going to inure to either of one of our benefits to argue what the testimony was.

So, what I'm really asking you is: If the evidence showed--if you want this as a hypothetical or however you want to do it, but if the evidence showed that if he picked--if he says, 'I am going to act as a Trustee for a holding company, I will name in the future what I decide to do it,' that actually--the Panel could determine that is actually a viable class of beneficiary as such that that actually would create a trust that he could then pick a beneficiary later. You agree with that?

A. The Panel could agree to that, although I have a little trouble with your formulation because if he said, 'I am going to create a trust and pick a beneficiary,' that is not, 'I have created a trust,' 'I am now creating a trust.'

Q. I appreciate that. I misspoke.

What I'm saying is if he says, 'I said April 19 I'm holding this in Trust for a holding company that I'm going to name,' then that would be sufficient to create this Trust with a class of a holding company that's defined enough as a beneficiary at that point; correct?

A. It...--I mean, it could be. It's not entirely clear to me, based on the law in terms of what sufficiently designates a beneficiary, as to whether that sufficiently

designates a beneficiary. The law on beneficiaries is you either have to be able to identify the beneficiary at the time the Trust was created or there needs to be an ascertainable standard for the creation of the beneficiary, and it's not--and most of the cases about beneficiary designation arise in the context of written trusts and evaluating what's in a written--what's said in a written trust and the evidence reflecting there, so you've got an oral trust that's less certain. It's not clear to me, you know, whether that would be sufficient to identify a beneficiary.

Q. Let's go through that.

Just A second. Just give me a moment. I'm trying to find a...

(Pause.)

Q. Could we pull up 5115205 (sic).

Can you see 15205 (CLA-292)?

A. Yes.

Q. And what it says is--(a) says you have to have a beneficiary; right?

A. Right.

Q. (b) says that, however, if a beneficiary or class of beneficiaries is ascertainable with reasonable certainty or is sufficiently described so it can be determined that some person meets the description or is within the class;

right?

A. Correct.

Q. And (2) says, the granted power to the Trustee or some other person to select the beneficiaries based on standard or in discretion of a trustee or other person. So, in other words, in the creation of a trust, he simply says, 'I am going to hold my shares in Trust for a corporation to determine at my discretion in the future,' that would satisfy 15205; correct?

A. It could. The issue is whether or not--I believe--I believe it could satisfy that. I think there is a question about the standard, as I say. The case is about whether or not a beneficiary or class of beneficiaries is ascertainable tend to come up on the written record.

For instance, in connection with a class of beneficiaries, a designation to my family has been sufficient and designation to relatives has been determined not sufficient. So, it's not clear to me if some unnamed corporation reaches the standard.

I mean, could Tennant Travel have come in and say they were beneficiary? I don't think they could. They couldn't have claimed to be beneficiary based on what we knew.

Q. That's a fair point because what you--they don't become--that's an excellent point. I think we're on the

same page. Let's break that down.

So, if a Settlor says, 'I'm hereby creating a trust for the benefit of my children,' that would be reasonably ascertainable, and that could be done even if it's an oral trust; right?

A. Right, because the children could come in and say, 'We're beneficiaries.'

Q. If a Settlor says - I'm sorry. I didn't mean to cut you off but this point of line of question and we could go on. I love this stuff.

So, if a Settlor comes in and says, 'I'm creating a trust for the benefit of my relatives,' that would not be sufficient because it's not really clear who the relative is. That could be your second cousin or could be your children. That's your point?

A. Yes.

And the case law says 'relative' is not sufficiently definite.

Q. And so--but, in this situation, if he says, 'I am going to pick a corporation that I will name in the future,' your point is that, until he names the corporation, that corporation itself can't claim it's a beneficiary, but that doesn't stop the Settlor, here Mr. Tennant, from claiming that 'I had discretion to pick that corporation later whenever I chose to do.' Correct?

A. I mean, he could claim that. I guess what my point is it creates--I believe it creates a lack of certainty, under California law, as to whether or not, you know, there is a beneficiary of that Trust. I mean, if he--

Q. I'm sorry, go ahead.

A. I was going to--if he has said it's going to be named later and he testified that he could just revoke and change his mind, it's not--it's not clear to me there is an identifiable beneficiary in those circumstances.

Q. But again--but that's just applying the facts. Legally, the Tribunal could come to a conclusion that that would be sufficient; correct? Just under a matter of law, there is nothing legally prohibiting the Tribunal from making that determination if it so--chose?

A. Legally, if the Tribunal determined that there was a grant power to the Trustee to make a determination or there was a beneficiary or an ascertainable class of beneficiaries identified, that's what--that's what the statute provides for.

Q. And then by the same token, it's almost somewhat of a moot point because if he identified in April 26 and a week later, then at that point, there is no doubt as to who at least he claims the beneficiary was; correct?

(Overlapping speakers.)

A. If he identified on April 26, it's--it's not clear because, you know, on June 20, 2011, obviously he merely directed to him and John Pennie testified that, as of December 2011, it was still undesignated, so it's not--it's not clear, but if the Tribunal--(overlapping speakers)--if the Tribunal agrees that he identified a beneficiary on April 26th, that could be--that could be the beneficiary if that was the designation was needed to create the benefit of--the Trust, but that still goes back to the issue of whether April 19 or 26 is the appropriate date.

Q. Right.

And I'm also trying to understand your legal point because again I don't think it's productive for us to debate what the evidence is; right? I'm just saying if the evidence--what I'm trying to get is the Tribunal finds this is what happened legally this creates a trust. That's the point of my question. It's not for you to comment on the evidence. Is that fair?

A. If the Tribunal finds that there was a beneficiary or there was an identified beneficiary, then yes, legally that is enough to create a trust.

Q. Okay. Thank you.

And then let's talk about--could we put up your slide number--I'm going to go through some of the stuff

that you talked about. We've covered a lot of this already. We covered your Slide 5. We talked about what a declaration is. Let's go to Slide 6, then.

Now, this is--you're quoting here from the Commission; correct? Give me a second to get the--your Witness Statement. You quote this in your Witness Statement (RER-1) as well at Paragraph 32.

A. Yes.

Q. There it is on the bottom, California Law Revision Commission Recommendation (R-091) Proposing the Trust Law.

A. Right.

Q. You heard today Justice Grignon talk about what that Commission does and its purpose. Do you have any disagreement about what she described as the purpose of the Commission and its legal effect?

A. I think the only disagreement I have, and I referenced this in my testimony, is that the Law Revision Commission--Law Revision Commission (R-091) comments are treated as Legislative History and used for interpretation of the statute. I think that Justice Grignon said the statute is the statute and didn't sort of--didn't--and that's the law and, indeed, that is the law, but in terms of interpreting the statute, the comments are treated as Legislative History.

Q. Now we're going to get into the weeds of Legislative History, but is the law similar in California that you don't go to the Legislative History unless the statute is unclear? Is that...

A. I mean, that's similar, t-hat is--yes, I mean, if--the statute is completely clear on its face, you don't need to rely upon Legislative History. I do think that, you know, obviously in this case there is--you know, it's instructive in terms of why the Law Revision Commission (R-091) put the statute--put the provisions in the statute that it did.

Q. When they write this history, anything that the Legislature decides that they feel like they necessarily need in a statute, they could do that; right? Unless you talk about how you get there, but if there is anything they really want in the statute from the Law Revision Commission, they just could add that right in there; right?

A. They could.

And presumably, what the Commission proposed after it had its deliberations was the law as it was adopted, so I don't think the Law Revision Commission was suggesting different wording either. It was just explaining why it requires clear and convincing proof of an oral trust.

Q. Understood. That was helpful.

Why don't we pull up your Witness Statement (RER-1) at Paragraph 32, and I believe it's the same quote.

And I'm looking at your slide, so--and first sentence of your slide says the major problem with an oral trust is the difficulty proving its terms, and that's what you've highlighted there in your first sentence; right?

A. Yes.

Q. And then what you--in your slide, you drop down with the next quote, 'there is also a risk of perjury,' and then you highlighted on your slide, 'particularly by those with something to gain.' Right?

A. Yes.

Q. You compare the slide you wrote on them, right?

A. I only have right now the--my Report (RER-1) in front of me, but I think it's the same on the slide.

Q. I didn't mean to cut you off but let's compare the slide to what you put in your Witness Statement (RER-1). Can we compare it page by page? Are we able to do that?

Why don't we pull up the slide again.

A. Okay. I'm looking at it, and I guess the rest of the phrase is 'after the death of the purported settlor.' Is that what you're pointing at?

Q. Yeah.

If you go back to the slide, and you say, 'there

is a risk that there is perjury, particularly by those who have something to gain.' And going back to the actual quote, it's 'something to gain after the death of a purported settlor.'

So, isn't that the better quote for the Tribunal? It's not just people with something to gain. It's people with something to gain after the Settlor is not around to say 'I didn't say that'; right?

A. Well, that--number one, I don't think--it wasn't the intention to deliberately obscure that. Obviously, it's in my Report. And the point is there is a risk of perjury, and that phrase qualifies, it says 'particularly by those with something to gain after the death of the purported settlor.' It says, 'there is a risk of perjury' there is for anyone who has something to gain.

And as I believe I pointed out earlier, there are a number of these cases that have arisen and are cited by Justice Grignon and myself that arise where the Settlor is very much alive, so the cases do not simply arise when there is a dead settlor. There certainly is a concern that somebody dies and somebody walks in and says, 'Uncle John told me he was holding this in Trust for me,' and that is a particular concern. It is not the only concern you have with an oral trust.

Q. Did you write this slide to make sure that the

quote was accurate, or did someone else write this for you?

A. I--I put together the slides, and as I said, I was not deliberate--I was trying to edit things down. I was not deliberately trying to say anything to limit what the Tribunal is considering. And, obviously, they have my Report (RER-1) in front of them that has the full quote.

Q. And I don't want to accuse you of trying to mislead the Tribunal, either. I do think you agree with me, that if you were going to be more accurate, the Commission's concern with the people 'with something to gain' are those after the death of a purported settlor. That's what they wrote.

MR. KLAVER: Counsel, asked and answered. You're belaboring a point. The Expert has already addressed your question.

MR. MULLINS: Well, I could move on. I think it's pretty clear.

MR. KLAVER: It's not appropriate.

MR. MULLINS: That's fine. I will move on.

BY MR. MULLINS:

Q. So, let's keep on, if I could be allowed to keep on talking about this stuff.

And then--but it's not the only time they talked about this issue about purported settlor being dead; right? So, we go back to your slide, and you talk about the 'clear

and convincing evidence' standard may not be sufficient to guard against over-reaching in cases where there is no transfer of property, and then there is ellipses, and proposed law requires some corroboration, and it goes on transfer, earmarking or written evidence in order to uphold a trust.

And then if you go back to the paragraph actually what the Commission (R-091) actually said in your Report (RER-1), it says, right after you quote, 'The problem is acute where, after the death of a purported settlor, evidence is offered of the Settlor past statement but there has been no transfer of property claimed in a trust.'

And then it goes on as to, in that situation, there was a concern that people were going to come in afterwards. Isn't that what the Commission (R-091) is writing about, Ms. Lodise?

A. The Commission was highlighting the problem that occurs after the death of a settlor. However, as you point out, if you go to the statute, the statute says, 'An oral trust must be proved by clear and convincing evidence.' It doesn't say, 'An oral trust that is attempted to be proved after the death of a settlor must be proved by clear and convincing evidence.' It says, 'An oral trust must be proved by clear and convincing evidence.'

So, the Commission is clearly highlighting the

issue that happens upon death, but the fact of the matter is an oral trust in California must be proved by clear and convincing evidence, regardless whether the Settlor is alive or dead.

Q. Thank you.

Now, let's talk about some of the case law. Are you familiar with the Estate of Gardner (CLA-302)?

A. Yes. I have read it.

Q. Fair enough. There is some cases cited here.

Isn't that a case where the Court was reversed because the Court--the Trial Court improperly dismissed a claim for an oral trust?

A. Yes. That was the case that came up on demur, and the Trial Court had said that they did not believe that the Claimants recited a sufficient claim for an oral trust because there were competing claims for holding the property differently. The Appellate Court said that the facts, as pled, sufficiently stated a cause of action, although it was on demur so they remanded it to the Trial Court to determine whether or not the evidence found that an oral trust existed on those facts.

Q. In so doing so, the Appellate Court said that an oral trust of personal property is valid and may be proved by parole evidence; correct?

A. That's correct.

Q. So, there is not a requirement under California law that you must have a writing contemporaneous to prove an oral trust; isn't that true?

A. Well, it said--what the Court says is that there can be--it can be proved by parole evidence, and parole evidence could be writing, it could be contemporaneous actions. I mean, there is any number of things that could be parole evidence, and that's--I mean, that's what that case says.

Q. Fair enough. Parole evidence typically is parole evidence, isn't it?

A. Parole evidence is just evidence outside the role of the document, so in this case the instrument. I mean, it's other--it's other evidence.

Q. Okay. Well, let me just ask you, though: There is nothing prohibiting--rephrase.

There is nothing under California law that requires contemporaneous writing to prove an oral trust; do you agree with that?

A. There does not have to be contemporaneous writing to prove an oral trust, that's correct.

Q. Thank you.

Let's go to Heggstad (CLA-296). Are you familiar with this case?

A. I'm familiar with this case. I did not review it

in the context of this particular assignment simply because I'm familiar with Heggstad because it's used regularly in California law for the principle of the fact that you can--you can bring things in. It's typically used where somebody forgot to assign somebody to the Trust and you're trying to pull it back in so it doesn't go to probate.

Q. Right.

And so, the Court held that a Declaration of Trust is sufficient to create a trust without the need of conveyance of title to the Settlor as Trustee; right?

A. Right, although you have--Heggstad case is a case, it's a written trust, there was a Declaration of Trust, and the Settlors did not subsequently transfer their Real Property into the Trust, but there was a reference in the Trust to the intention to transfer the Real Property into the Trust.

Q. In other words--so, if there was a delay in the transfer of shares to Mr. Tennant, that would not be fatal to a finding of an oral trust given that the res was identified and he doesn't have to have actual title at the time of declaring the Trust nor as to create the Trust; correct?

A. Not necessarily, although again it goes to the certainty of the Trust. And I will point out that Heggstad is not--I mean, there are plenty of cases in California

where people have attempted to bring property into the Trust under Heggstad, and the Court has found that there is insufficient evidence that the property belongs to the Trust.

Q. Okay. So, sometimes people talk-look at the Transcript you say 'not necessarily.' So, what you're saying is, it's not--I asked a 'yes' or 'no' question, and you answered 'not necessarily,' and so I want to make sure we are on the same page.

It would not be fatal, 'yes' or 'no,' to a finding of an oral trust if the res has been identified, but the Settlor doesn't actually have actual title yet; yes?

A. Well, the reason I said 'not necessarily' is because you're saying it would not be fatal. It might be fatal. It depends.

Q. Well, it might be fatal because there would not be sufficient evidence. I'm saying as a matter of law--as a matter of law, not what the evidence shows, but I was just trying to come up with the legal principle, that in an oral trust, the Settlor does not actually have to have the physical *res* title in order to create the Trust. It's sufficient that the *res* be identified. Isn't that the principle coming from the Estate of Heggstad-?

A. I don't know if you take it that far. I mean,

the requirements for the creation of a trust are the intention to create the Trust, the purpose, the beneficiary, and the Trust property. So, if you're saying--you know, in this case, if you're saying the Trust property didn't come into existence until sometime later, it's not clear to me whether or not then you have the Trust property.

Q. You know what the Trust property is? For example, if Mr. Tennant had a right to the Shares on April 19, there is no debate as to what the *res* is in that situation; correct?

A. Well, he apparently had the right to the Shares on April 19th. Whether or not he had the Shares and could put them into Trust is not clear. I mean, he didn't actually demand the Shares and have them turned over to him until June 2011.

Q. Okay. But if--let's go with the rights of the Shares. Would the rights of the Shares be sufficient to *res* for purposes of creating a trust?

A. It could be.

Q. Thank you.

Let's go on to another case. (Unclear) I'm going through my outline and not going to cases. This will move faster.

Justice Grignon was talking about a case called

'Fahrney.' Are you familiar with that case?

A. Yes.

Q. All right. Let's talk about Fahrney (CLA-301). Maybe we could pull that one up.

In this case--actually, if I remember, you talked a little bit about this case in your direct. This is the case, just to remind the Tribunal, where the--this was actually somebody who was deceased; right? So, it was one of those situations that the Commission (R-091) was worried about, and the questions was whether or not the wife that gets the insurance benefits is now holding them in trust for these creditors. Is that a fair description of the case?

A. Yes.

Q. And what happens is that after he dies, she comes in and says, 'I want the insurance proceeds,' and so there was a dispute as to whether or not her husband, her deceased husband--she was actually acting as Trustee or if she was, you know, basically get a--she has to get the benefit and she was, you know, just being his wife; right?

A. Correct.

Q. And so what happens is there is a dispute in the testimony; right? It was conflicting evidence here; correct?

A. Well, there was--the wife was apparently trying

to use the proceeds. I'm not sure how much conflicting evidence there was as to the testimony about the creation of a trust.

Q. Actually, look at what I would call Headnote 6 in the case. Actually, the Court simply said the evidence was conflicting; right? Although conflicting, the evidence is disclosed in the record, record support supports the conclusion of the Trial Court, and the conclusion was that there was an oral trust; correct?

A. The conclusion was that there was an oral trust based on the husband's statements before and after he took out the policy and the wife's statements after the policy was taken out. Yes.

Q. Under California law, the fact there is conflicting evidence is not fatal to finding clear and convincing evidence of oral trust; is that right?

A. That's true.

Q. And just so the record is clear, because it had no form, that is standard they are using, clear and convincing.

Do you see that?

A. Yes, because it's a question of an oral trust and had to be proved by clear and convincing evidence.

Q. And not only was there conflicting evidence in this case, there was hearsay; right?

A. Which evidence are you specifically referring to?

I mean, it's always going to be hearsay. It's whether or not it comes in with an exception. This is--the statement of the decedent is hearsay.

Q. Well, actually, let's talk about that because the Court dealt with that in Note 3. It's not a long case, and I think we could follow along easily. The defendant--that's the wife--says any extrajudicial statements made by her deceased husband out of her presence were inadmissible under the hearsay rule, and they should have disclosed it. So, what she was saying is, 'You brought these people in and saying what my deceased husband said, that's inadmissible because that's all hearsay.' Is that what she argued?

A. That's what she argued, and the Court said that although they were indeed hearsay, they are admissible as evidence of his intent and state of mind, so it's exception to the hearsay rule.

Q. So, in other words, Derek Tennant (CWS-3) testifying what John Tennant said on April 19 or April 26th is not hearsay under California law; correct?

A. It--it is hearsay under California law. The question is whether or not it comes in under an exception to the hearsay rule because this says--I mean, if you look at what the Court said, the statements, though hearsay,

were admissible as circumstantial evidence of his intent or state of mind at the time he applied for the policy.

Q. So, Derek's testimony about what John Tennant said--John Tennant said is exception under the hearsay rule under California law; correct-?

A. It could be--yes, it could be received as evidence of his intent at the time that it was said, and there are--you know, obviously other issues that fall into hearsay in terms of determining whether or not a statement is reliable, et cetera, but yes, it could--it could fall under an exception to the hearsay rule.

Q. And that evidence can be used to support a clear and convincing evidence of an oral trust; correct?

A. It could. Any evidence that comes in could be used to support a finding of clear and convincing evidence.

Q. And in this case, in addition, they actually--who were the beneficiaries of this Trust that was found by the Court?

A. Ultimately, it was the decedent's--the debtors, creditors of decedent's--I mean, creditors of the decedent's business.

Q. And so that was a definable class. In other words, it wasn't--he didn't identify specifically what creditor was going to be a beneficiary. He simply says it's going to be the creditors; right?

A. Right.

Q. And so that was found to be an oral trust saying creditors is a sufficient definition for a defined beneficiary for that oral trust; correct?

A. In that particular case, yes, the Court found that it created an express trust for the benefit of the creditors.

Q. And this is a pretty simple trust, so let's go through the elements as found by this Court for a trust.

We had a settlor who was dead but he's a settlor. He's the person that died; right?

A. Yes.

Q. And--well, and then the Trustee becomes, actually his wife because she gets the money--right?--so she becomes the Trustee upon his death.

A. Right.

Q. Is that what happened? Correct?

A. Yeah--well, because she was deemed the Trustee because the insurance proceeds were payable to her.

Q. And then the Court found that her sole purpose was that, as Trustee, she had to make sure with the insurance proceeds that all his creditors were paid before she got paid. That's the sum and total of this Trust that the Court found was fine; correct?

A. That's--that's essentially what the Court found,

created a trust.

Q. Thank you.

Now, let's talk about your some of your cases. You mentioned LeFrooth (R-092), I think, in your presentation

A. Yes.

Q. That case goes back to 1927; right?

A. That's correct.

Q. And in this case, this is the case where again the defendant is dead; right?

(Overlapping speakers.)

Q. I'm sorry, go ahead.

A. I believe so.

Huh?

Q. I didn't mean the defendant but deceased in this case, the Settlor; right?

A. I believe so, although it arose in connection with whether or not property had been transferred away from this brokerage company that was being sued.

Q. And that the issue was that the testimony was unclear as to whether he was acting as a trustee or he was going to act--he was actually giving it to the trust company. Isn't that the issue?

A. It was whether or not he had given it to--and I'm not remembering at all exactly, but it's whether or not he

had given it--he was acting as Trustee for property given to his children, I think, ultimately, and whether or not that sufficed. I mean, there are a number of overlying issues, too, because there is the question of fraudulent conveyances.

Q. Right.

There has been no issue of fraudulent conveyance, as you understand it, in this case; right?

A. No.

Q. In our case.

You also talk about the Chard case (R-093). That's another one going back to the Thirties; right? 1936, Chard?

A. It is.

Q. Okay. And in this case, what happened is--again, we have a deceased person; right? And there was a dispute as to what her intent was; right?

A. There is--there was the mother and--as I think explained this earlier, there was the question about whether or not the son who had obtained this property held it in Trust for his siblings.

Q. Okay. And what happened was that the siblings, you know, were arguing about what her--what the mom actually said. This is the kind of stuff that the Commission was worried about where you have family members

come back and say, 'Well, this is what mom wanted, this is what mom did.' Isn't that what is going on in Chard (R-093) case?

A. That's--that's part of what's going on, and there is question about--because the son who was obtaining this wasn't present in any of those discussions.

Q. And this week we hadn't heard anybody come in and testify there was no trust; right? We haven't heard anybody come in and say there actually was no trust at all; correct? We never heard that; correct?

A. No, because there are no--all of the Witnesses are from the Parties who want to have the Trust established. As I say, this is similar to the Newman (R-094) situation.

MR. KLAVER: Sorry, counsel, I would just like to interject for a moment. I'm just seeing the time and wondering if we could get a sense of how much longer counsel intends to conduct this cross-examination. We do have a hot tub at least on the schedule, so could you just provide some more insight into your timing.

MR. MULLINS: Actually, I think it's a good time to take a five minute break to see if co-counsel has any other questions, and I will be able to answer that question because I think I'm almost done, but I take your point, so I would like to take a five-minute break to see if I have

any more questions, and we could see if we are done.

PRESIDENT BULL: Fine. Let's do that.

(Recess.)

PRESIDENT BULL: Mr. Mullins, do you have any further questions?

MR. MULLINS: I just have--the break was actually fortuitous because I did go through my notes, I need to follow one thing because she mentioned the Newman case.

BY MR. MULLINS:

Q. Ms. Lodise, you mentioned Newman (R-094). The Court actually found the Trust in that case, right? Ultimately.

A. No. Well, there was a trust. There was a written trust. The issue was whether or not the oral statement that the Trust was irrevocable was supported, and the Court found there was no irrevocable trust, that the oral statement did not support that. As in many of the cases that are actually cited here, the trust principles are talked about, but in many cases were not--most of these are not actually dealing with actual oral trust. They're dealing with some form of writing or the imposition of constructive trust. In Newman, the issue was whether or not it was an irrevocable trust, not whether it was a trust.

Q. So, there was actually a written Trust Agreement

in Newman?

A. There was.

Q. Oaky. All right. Well, with that, thank you so much for your time, and that was really interesting to talk about Trust Law, and I enjoyed having a chance to question you. Thank you very much for your time today.

A. Thank you.

PRESIDENT BULL: Right. Can I, before asking Canada to do redirect, can I ask my colleagues if they have any questions for Ms. Lodise?

ARBITRATOR BISHOP: I have just a couple of questions.

QUESTIONS FROM THE TRIBUNAL

ARBITRATOR BISHOP: And if we go to your Witness Statement at Paragraph 49 on the last page, you say that, 'Moreover'--it's on the last page.

THE WITNESS: Yes, I have it.

ARBITRATOR BISHOP: Yes.

'Moreover, if the Shares were irrevocably transferred to what the Claimant labels the Tennant Travel Trust, then John as Trustee would not only have reporting requirements to the taxing authorities but would also have had reporting requirements to the beneficiary,' what reporting requirements exist in California law to the beneficiary in a situation like this?

THE WITNESS: Since there aren't any specific terms set forth, you know--assuming it's an oral trust and we don't have any other specific term set forth, they would have to comply with the Probate Code which requires typically and annual accounting by the Trustee to the beneficiaries. And if the beneficiaries were to request information about the Trust, the Trustee would be required to give them that information.

ARBITRATOR BISHOP: Where do we find that in the Probate Code (R-070, CLA-272)?

THE WITNESS: I have to--give me a moment to figure that out. I think it's in the--I believe it's in the 15,000s, but I will find that specific requirement.

ARBITRATOR BISHOP: Okay. What I'm actually, I guess, asking for is: Does that require a written report to the beneficiary on an annual basis?

THE WITNESS: It does not--I think it could be satisfied without a written report. It's typically a written report.

ARBITRATOR BISHOP: Are there any exceptions to that requirement of reporting?

THE WITNESS: Not in the case of an irrevocable trust. I mean, the typical exceptions to the reporting requirement are in the case--situation of a revocable trust because where the Trustor and the Trustee and the

beneficiary are identical, there is no--there is obviously no requirement of a report to that person, but where you've got a trustee and a beneficiary, and you're got an irrevocable trust, the beneficiary is completely entitled to an accounting from the Trustee.

ARBITRATOR BISHOP: Okay. I think that's exactly what I was asking. Thank you.

And let me ask this as a simple question which may not be simple, but at this point, does it matter if the Trust--assuming that there was a trust, does it matter at this point whether the Trust was revocable or irrevocable in the period between 2011 and 2015?

THE WITNESS: I think it only matters to the extent--well, it matters on a couple of issues. It matters--if it were irrevocable and they were an irrevocable transfer to a trust, as I mentioned in my report, there is a tax reporting requirement. If Mr. Tennant made an irrevocable transfer to a trust, that would be considered by the U.S. taxing authority as a gift which should have been reported. And depending on the value of the gift and what Mr. Tennant's exclusion is, whether or not there would be a tax that would be created. So, the taxing authorities in the United States would certainly care whether it was revocable or irrevocable between June 2011 and 2015.

I'm not sure for purposes of any other matters that it particularly matters, and my reference to it was simply in terms of sort of the issue of looking again at the evidentiary standard and whether or not it meets the test because it's just another element as to, you know, the certainty of the Trust.

ARBITRATOR BISHOP: Okay. You were asked about Slide 6 in your slide deck, which has to do, I guess, with the California Law Revision Commission (R-091), where it says in the last bullet, 'the proposed law requires some corroboration,' and it goes on 'in the form of a transfer, earmarking or written evidence.'

So, my question to you is: Under California law, would the testimony of Derek Tennant and John Pennie be considered as corroboration?

THE WITNESS: If that testimony were deemed to be reliable testimony, I think it probably could be considered to be corroboration.

And getting back to your other point in terms of the duty to inform the Probate Code (R-090) section that deals with that begins with Section 16060 and following. Code Section 16060 is the Probate Code section that deals with the duty to inform by, and there are subsequent sections that talk in more detail about the Trustee's duty to account.

ARBITRATOR BISHOP: Okay. Thank you. I don't have anything else.

PRESIDENT BULL: Sir Daniel.

ARBITRATOR BETHLEHEM: I have just a couple of questions, and I'm looking also at Justice Grignon because she will have an opportunity to come back in due course, but I take it both from her testimony and from your testimony that there are, in fact, quite a number of points on which you agree. And as a Member of the Tribunal, I'm obviously most focused on how we move forward from here, and what I would like to do is just to put to you a number of propositions and to see whether you take issue with any of those propositions in terms of the intersection between you and Justice Grignon.

THE WITNESS: Okay.

ARBITRATOR BETHLEHEM: The first proposition is that I take it in which there is agreement is that there is a--for purposes of identifying whether or not there is a trust, there is a requirement of clear and convincing evidence. I take it that you agree with that.

THE WITNESS: Yes, in connection with an oral trust, yes.

ARBITRATOR BETHLEHEM: Second, we can be safely and properly guided by the relevant formulation in the jury instructions.

THE WITNESS: I--yes, I believe the jury instruct--I think the jury instructions--… (overlap)

ARBITRATOR BETHLEHEM: I'm going to come on to sort of the sub-elements.

THE WITNESS: Okay. Fine.

Yes, the jury instructions are, I agree those are the jury instructions that are given and would be given to a jury deciding an issue of clear and convincing evidence.

ARBITRATOR BETHLEHEM: Right, and as a sort of codicil to that, the 'clear and convincing evidence' formulation in the jury instructions are also relevant to the probate and trust context?

THE WITNESS: They are to some degree, although, as I pointed out, the probate and trust context in California--probates and trusts issues--such as these in California never go to a jury.

ARBITRATOR BETHLEHEM: I appreciate that, and thank you for the clarification, but insofar as we are swimming in the space, if you like, of clear and convincing evidence, the jury instructions are a touchstone on what is meant by 'clear and convincing evidence'?

THE WITNESS: They are--I think they are a touchstone in the sense that they--they are what the courts would instruct a jury to--I think there are nuances to it, but yes.

ARBITRATOR BETHLEHEM: Thank you. So, coming to those nuances, moving beyond the jury instructions, the standard of clear and convincing evidence is a standard which is--this is my word--it's probably not an appropriate word, but it's supplemented by the authorities, so in other words, when the California Supreme Court or the Court of Appeal or anyone gives some kind of clarification, that is a supplement to the words that are expressed in the jury instructions.

THE WITNESS: I agree.

ARBITRATOR BETHLEHEM: The standard is somewhere between a balance of probabilities on the one hand and a beyond all reasonable doubt standard on the other hand.

THE WITNESS: Correct.

ARBITRATOR BETHLEHEM: And that having regard to the Authorities, whether those that you put before us or those quoted by Justice Grignon or those set out in the sources and authorities section of the jury instructions, if the standard is one of finding of high probability on the evidence--and I'm reading here from the document--where there is no substantial doubt and an unhesitating assent of every reasonable mind. Would we be safe in taking that as our marching orders in terms of how we consider clear and convincing evidence?

THE WITNESS: I believe that is the standard that

would apply in connection with the Trust matters. That's certainly what Higgins (R-094) says. I think that the high probability standard, if you look at some of the case law, it looks like in looking at--pursuant to our discussion today, it's sort of a definition of what 'high probability' means, it's this substantial doubt--no substantial doubt, strong evidence that every reasonable person would agree, which is what Higgins formulates it as.

ARBITRATOR BETHLEHEM: Thank you for that clarification. Obviously, it would be a matter for the Tribunal to apply what we take from the evidence of the Experts to the facts that are set before us, but I'm taking from what you've just said that, subject to those nuances which are in the fringes, you agree with the propositions that I just put to you in terms of the 'clear and convincing evidence' standard.

THE WITNESS: I do.

ARBITRATOR BETHLEHEM: You do. And, of course, I'm going to put that question to--without going through all the declensions--but to Justice Grignon. She, I see, is making a note of all of this, and I will invite her to agree to that as well. But those are the questions that I had. Thank you very much and thank you for your assistance so far.

PRESIDENT BULL: Ms. Lodise, I don't have any

questions beyond what my colleagues have asked, so Mr. Klaver, is there any re-examination?

MR. KLAVER: Just one question.

PRESIDENT BULL: Please.

MR. KLAVER: Thank you.

REDIRECT EXAMINATION

BY MR. KLAVER:

Q. Ms. Lodise, in response to Arbitrator Bishop, you noted that John Pennie's hearsay comments on the alleged Trust might be corroborating. I'm just wondering, is hearsay from a witness with an interest in the outcome of the case reliable evidence of an oral trust under California law?

A. It goes to the weight of the evidence. Obviously, I mean, and that's an issue with hearsay all the time as well is whether or not the--Court is entitled to consider whether or not the evidence is otherwise reliable, and so the interest of a Party in what they're saying would obviously go to the weight of the evidence.

Q. Okay. Thank you. That's all for us.

PRESIDENT BULL: I'm sorry, I have done this out of sequence, but I just realized I should have asked Mr. Mullins whether there was anything arising from the Tribunal's questions to Ms. Lodise that prompted a question that you need to ask.

MR. MULLINS: I did actually have one on Paragraph 49 that Arbitrator Bishop had mentioned if I could just follow up on it.

PRESIDENT BULL: Please.

RECROSS-EXAMINATION

BY MR. MULLINS:

Q. Ms. Lodise, I'm not saying you have to agree to the facts, but you heard the testimony of Justice Grignon say that her interpretation of the February 2016 document was that the--that it was recognizing that the transfer in January of 2015 was an irrevocable transfer of all rights to Tennant Travel, but not saying it was actually changing the Trust. Do you remember that testimony?

A. I--I remember you asking me about that testimony, I'm not sure if I understood Justice Grignon's testimony to be that, but if--I don't necessarily disagree with that.

Q. Okay. Fair enough. That's all I have.

PRESIDENT BULL: Mr. Klaver, anything arising from that?

MR. KLAVER: No, thank you.

WITNESS CONFERENCING

PRESIDENT BULL: Good. Thank you very much.

So, we are just going to move into a witness conferencing phase, and the principal reason why we wanted this phase was just to make sure that, as a matter of

fairness, that Justice Grignon had an opportunity to say anything to assist the Tribunal in relation to what Ms. Lodise had said in the Hearing since she goes second. And I'm looking at Justice Grignon, and wondering whether there is anything you feel is necessary for you to address that arises from what Ms. Lodise says.

THE WITNESS: (Justice Grignon) I think the only thing that I would address is in her Witness Statement Ms. Lodise talked about how oral trusts are very rare in California and she has rarely, if ever, seen one, and I just wanted to explain a little bit about Appellate Decisions in California. In California, we have two kinds of Appellate Decisions; we have Decisions that are published or precedential, and Decisions that are unpublished and nonprecedential. And the unpublished cases tend to be more routine kinds of cases where is no issue of first impression and nothing that needs to be said to the whole world. And I think you might notice from my bio that the vast bulk of cases in California end up being unpublished and nonprecedential.

So, when she said she didn't see any oral trusts and was just looking at the published cases, I took a quick look at the unpublished cases and there were any number of oral trust cases in the unpublished cases. And so I just wanted to dispel any sense on the part of the Tribunal that

these kinds of cases are rare. I think in the published cases, we cited there's at least three, and then there's many more in the unpublished cases. And I think that's the only thing that I thought I should reply to.

PRESIDENT BULL: Can I just ask by way of clarification and just so that we have it on the record. What do you mean by 'unpublished'?

THE WITNESS: (Justice Grignon) So, we say 'published' and 'unpublished' but really the right words are 'precedential' and 'nonprecedential.' And a nonprecedential opinion is an opinion that can't be cited, which is why neither one of us presented them to you. In other words, they can't be cited as precedent in any California court and they are basically just Decisions that the Courts reach between the Parties. So the Court tells the Parties how they're deciding the issue and giving them that information, but not writing an opinion that's going to be precedent for other cases going forward. And so, we didn't cite those cases properly, we didn't cite them, but there is a vast bulk of California decisional law is in these nonprecedential cases just to say that there are a lot of oral trust cases out there.

PRESIDENT BULL: I can understand that there are quite a lot of these decisions, but would they be called law?

THE WITNESS: (Justice Grignon) Would they be called law? They're not precedential, so they're not law. And the only reason I'm bringing it up is so that the Panel--or the Tribunal does not think that this issue of oral trust is a rare situation. It's only to show that it comes up frequently, just not in precedential cases because, you know, they're more routine.

PRESIDENT BULL: I see, I understand. Thank you.

Ms. Lodise, any comment or response that you think might be helpful on what Justice Grignon has said?

THE WITNESS: (Ms. Lodise) Yes. Two things. One is part of my reference to the rarity of oral trust was based on my 30 years of experience in this field, and as I say, I think I've come across them once or twice and I have been doing nothing but trust and estate litigation for 30 years here in California.

And I will also say that the unreported cases--I mean, California is somewhat unique in terms of this policy of published cases and unpublished cases and, in fact, you can, if you want, go and ask a case to be published or a case that has been published to be de-published, and so sorting out California law can be a challenge.

But when you do legal research through--electronic research through Westlaw and those sorts of services, they actually do pull up a lot of the

unpublished cases, so I disagree with Justice Grignon, and I guess we could go and look through as to how often these come up because I, even in the unpublished ones, did not run across a lot of oral trusts.

And I will point out that even in the cases we've cited, most of these are not really oral trusts, they're sort of--they come down to more of oral variations on written documents and written trusts.

PRESIDENT BULL: Right. Thank you for that response, Ms. Lodise. I think Sir Daniel had that list of questions that he put to Ms. Lodise, and it would be helpful if, Justice Grignon, if you could address those. Would it help to have Sir Daniel raise them in sequence to you or do you have them down already?

THE WITNESS: (Justice Grignon) I think I have written them down and perhaps he could correct me if I get any wrong.

ARBITRATOR BETHLEHEM: I should say, you may have them written down rather more clearly than I have, because it's just a scribble, but I can certainly remind you of the points, if that would be helpful.

THE WITNESS: (Justice Grignon) I will start, and if I run into any trouble, I will ask.

The first thing you asked was whether clear and convincing evidence was the standard to use for an oral

trust in California, and I agree that it is.

And then you asked whether the jury instruction Number 201 was a formulation of that standard that the Panel should rely on. I think that's what you said, and I agree that it is.

And then you asked a question about whether that standard is supplemented by authorities, and I have a disagreement with that. That standard already takes into account all of the authorities. And if you look at the Authorities, they're in different contexts, for example, let me just talk about Butte Fire, for example, because that's a case that came up today.

REALTIME STENOGRAPHER: I'm sorry, Judge, what was the name of that case again?

THE WITNESS: (Justice Grignon) That's all right. Butte, BUTTE, Fire (CLA-335).

REALTIME STENOGRAPHER: Thank you.

THE WITNESS: (Justice Grignon) So, Butte Fire is a case involving punitive damages, and it comes up on what we have--what we call in California, a summary judgment, which is basically the defendant typically presents evidence and says this is all the evidence there is, I should win, and we don't need to have a trial at all, and the Court decides whether there is a triable issue of fact or not and the case should go to a trial.

And in that context, the Court frequently--I have written a lot of opinions, and what the justices do is they just pick out some language that kind of frames the issue for the case. It's not really--no one is addressing that particular issue, it's not important in the case, and they put the language in the case. So, it's not really the standard to be used in determining what clear and convincing evidence is.

And I think that the Nevarrez case (CLA-334) makes it clear that those authorities do not supplement the standard that the jury instruction has approved. And the reason I say that is it's very different that highly--high probability is very different than the other 'no substantial doubt.' That sounds like no reasonable doubt to me. It sounds like all minds would agree. I don't think that's part of the standard, and that's why I raised it. If I thought it was part of the standard, I don't think I would have disagreed with Ms. Lodise's statement on that.

ARBITRATOR BETHLEHEM: Justice Grignon, perhaps let me just come back on that. Thank you very much for that clarification. I expect that at least from what you said and from Ms. Lodise said, that your disagreement is really more to be found in my formulation, as a non-California lawyer, talking about is to be supplemented by

authority, and I do not--I did not intend it to be taken as with a blackletter formulation in the standard that's set out in the jury instructions as somehow supplemented. What I was trying to connote, and I think Ms. Lodise understood me correctly, but she also provided a clarification, so let me just explain to you what I intended.

What I meant by that was that, for our purposes, as an international tribunal not steeped in Californian law, when we are trying to understand what is meant by clear and convincing evidence, we can also have a look at the case law of the California courts.

Now, the formulation is clear and convincing evidence, but the case law of the Californian courts is going to be also a useful touchstone for us to understand that clear and convincing evidence is not beyond all reasonable doubt, and it's not a balance of probabilities. It's somewhere in the realm of a high probability of evidence. So, that's what I was intending. I don't want my question to provoke a disagreement between the Experts when I don't detect that there really is a disagreement.

THE WITNESS: (Justice Grignon) That's fine. Then to that extent I do agree, and I agree that it does fall on a spectrum between preponderance of the evidence and beyond a reasonable doubt.

But the last question again went back to that

language that I do object to, the language about no substantial doubt and no reasonable mind would think differently. I don't think that--I think that that's very close to beyond a reasonable doubt and not a high probability.

ARBITRATOR BETHLEHEM: That's very helpful.

And with apologies for prolonging this, and perhaps I don't know who is going to find it easier, either the one who is in charge of the docket for Canada or for the Claimants; I would be grateful if you could put up that civil instruction (C-270), please. Page 4 of the document that's now on the record.

Thank you very much.

Justice Grignon, perhaps you could just, in words of one or two syllables, for a foreign lawyer, just take me through this page. We've got the blackletter formulation, then we've got the directions for use, then we've got the sources and authorities. What are we to make of where we are to be looking and what weight is to be attached by the citation of the cases here, for example?

THE WITNESS: (Justice Grignon) So, I think the weight should be given to the exact language of the jury instruction (C-270), jurors who are also triers of fact, do not get any other explanation, and as you can tell from the Nevarrez case that's been discussed, that they not get any

further explanation. This is what they get, high probability.

And so, the sources and authority are the cases that deal with this issue and that have been synthesized or taken into account in coming up with this standard. And that to the extent there is language that is more--requires more, then I would reject it.

And I think that if you look at the cases in particular, this Angelia case, you know, was then cited again by the Supreme Court in a second case, and that used the 'high probability' standard, and so rather than have you get mired in all of these cases to decide which is the most--which one you should pay attention to and what's the right answer, I would just say that the sources and authority are the basis upon which the jury instruction has been adopted, and that is what you should use as the jury instruction.

ARBITRATOR BETHLEHEM: Thank you very much. I'm going to give the point back to Ms. Lodise in just a moment.

We are not a tribunal of California--of Californian law, and whatever we say about Californian law is not going to run through your jurisdiction. We need guidance as to what 'clear and convincing evidence' means beyond clear and convincing evidence. I understand,

notwithstanding the cautionary caveat that you quite properly put to us that we can have regard to the cases that you cite in your Expert Report, and the cases that Ms. Lodise cites in her Expert Report, for purposes of understanding in a more granular fashion what that test is.

THE WITNESS: (Justice Grignon) You can certainly look at the California cases, I agree.

ARBITRATOR BETHLEHEM: Thank you very much.

Ms. Lodise, would you have any comment on this exchange that I've just had with Justice Grignon?

THE WITNESS: (Ms. Lodise) Yes.

I think my only comment is to how the cases fit in, and I do think it important that the language that we're talking about is referenced in that sources and authority. And if you look at the instruction itself, it says 'highly probable,' the Angelia case that's cited under the sources and authority says 'high probability.' And I think where you get to the sufficiently strong to command the unhesitating assent of every reasonable mind or no substantial doubt is the Court's interpretation of what 'highly probable' or 'high probability' means. I mean, I think that's the nuance. And you will find in some of the cases 'highly probable, such that it's so clear as to leave no reasonable doubt' or 'such that it's sufficiently strong to command the unhesitating assent,' so it's a description

of that 'high probability' standard.

ARBITRATOR BETHLEHEM: Thank you very much. I'm going to, in the interests of believing that there is, in fact, some coincidence between the two experts, take those two answers as being very helpful and perhaps of assistance to the Tribunal in our navigation of these points. So, thank you very much.

Those are the only questions I have.

PRESIDENT BULL: Just to follow up on the discussion we've just had, Justice Grignon, I'm getting this particular point from your testimony, that the main reason why your view is that language like 'sufficiently strong command,' 'the unhesitating assent of every reasonable mind,' why you are wary of such language, is that it may lead a tribunal or a court or a jury to fall into the trap of applying the 'beyond a reasonable doubt' standard.

THE WITNESS: (Justice Grignon) Go ahead. I'm sorry.

PRESIDENT BULL: And that the real point is to make sure we don't fall into that because the standard here should not reach the level that we see in criminal cases.

THE WITNESS: (Justice Grignon) That's correct. I would just add that it's not just--you know, I think it sounds very much like 'beyond a reasonable doubt' to mean,

the standard that's being articulated. But so that you don't impose a higher standard of proof than is required by the statute. That's my only concern. And yes, to the extent that that reaches all the way to beyond a reasonable doubt, that would be--that would be way too high. But probably, 'high probability' is right in between 'preponderance of the evidence' and 'beyond a reasonable doubt,' and that's, in my view, the standard that the Tribunal should apply.

PRESIDENT BULL: Thank you.

I wondered, Mr. Bishop has nothing to put in a witness conference?

ARBITRATOR BISHOP: No. I have no questions.

PRESIDENT BULL: Okay. Good.

That's, I think, all the questions the Tribunal had. Are there any issues that counsel think they need to ask some questions on arising only from the Tribunal's questions during this short witness conference?

Mr. Mullins?

MR. MULLINS: I certainly don't want to...

REALTIME STENOGRAPHER: I'm sorry, you're breaking up, Mr. Mullins. Could you please speak up or something.

(Pause.)

MR. MULLINS: As I said, I'm perfectly happy to--

I don't want to belabor the point, but as long as I have--we have an opportunity tomorrow to go through some of the case law because I don't know if the Agreement that Sir Daniel's finding, because if you read the case, the Nevarrez case, contrary to was Lodise was saying it's not subsumed. They specifically rejected that the standard that she's applying is high probability, and they reject it. But I don't think I need to talk to the Experts about it, actually argue with you and show you the case. But I just want to make sure that the record is clear because I don't want to come out of the Hearing and say we all agree that it's subsumed.

I read the case, and again, I'm not the Expert, I am a lawyer in the United States, I read the case as specifically rejecting what Ms. Lodise is saying, but we can argue that to the Panel.

PRESIDENT BULL: And Mr. Klaver, any questions for the Witnesses in witness conference?

MR. KLAVER: Nothing from Canada. Thank you.

PRESIDENT BULL: Okay. Good. Thank you.

Then the Tribunal thanks both the Experts for your time, your assistance. Thank you for your patience with our questions.

Yes, Mr. Mullins?

MR. MULLINS: My co-counsel has one technical

issue before you close.

MR. APPLETON: Are you closing?

PRESIDENT BULL: I was going to release the Witnesses first, and then we have some issues to raise with counsel as well.

So, where was I? Thank you very much, both experts, for your help, and we will no doubt give great thought to what you have said. Thank you for your assistance.

(Witnesses step down.)

PROCEDURAL DISCUSSION

PRESIDENT BULL: So, we have completed the examination of the Experts, and before we ended for today, the Tribunal wanted to, in the same spirit that we've been doing in the last few days, mention some other things that would be helpful for counsel to deal with tomorrow during closings. But, perhaps before that, if there is one issue that Claimant wanted to raise, maybe we can hear that first.

MR. MULLINS: I'm going to give up my chair for Mr. Appleton.

MR. APPLETON: I'm sorry, Mr. President.

ARBITRATOR BETHLEHEM: Sorry. I should say I'm struggling with the microphone for the Claimant's counsel. It's echoing and cutting out. It's as if you've got two

microphones on at the same time.

MR. APPLETON: My own machine has gone down, so I'm not the one causing it.

Can you hear me now? All right. Excellent.

My question rises from the discussion we had early today, if you can remember all the way back, it's been a full day, and it's in relation to the question raised by Arbitrator Bishop, I believe it was yesterday, where he wanted to have a report about the issue of control. And the question here is he wanted to know the most up-to-date material, so that may require us to file cases that are not currently in the record. And given the fact that there has been some issue about filing additional authorities, I want to get some direction and an understanding, that in answering the questions from the Tribunal, do you not wish us to bring in new authorities to answer the Tribunal questions or not. I just need some guidance so we understand what to do.

ARBITRATOR BISHOP: I think the reason that I raised the question is that, as I understand it, and perhaps I don't understand it, but I understand that one of the issues that we might have to decide in determining jurisdiction is whether the Claimant had control of the Investment at whatever the relevant times are, and we've heard the evidence on that, I think, but I don't recall

much discussion in the memorials of the Parties on what the legal standards are; that is what the case is as to what are the indicia of control, whether minority control can be sufficient, under what circumstances.

And I'm thinking that in order to decide the issue of control, we need to understand the legal standards, so that's why I raised the question.

ARBITRATOR BETHLEHEM: Mr. Appleton, before you come back in, can I just supplement what Mr. Bishop has said. You'll recall when I put the question that I put about 1139 and its relationship to 1101, and I prefaced that by saying that, at least in my review of the Parties' pleadings, there have been quite some discussion, in particular in the Claimant's pleading, citing to 1139 for purposes of the definitional aspects. And in the Respondent's objections to jurisdiction in its pleadings, there were some passing references, insofar as I could find footnote references only, to cases such as Philip Morris against Australia, where the issue of control--obviously in the context of an Australian Investment Agreement--but the issue of control was addressed in some considerable detail. I don't have the documents in front of me, but from recollection it's round around Paragraph 503 of that award.

So, the issue of ownership and control, particularly as that's been interpreted under 1139,it may

obviously be a much vaster issue. There is some material in the record that goes to that, but it doesn't seem to be deployed by either Party on that particular point.

So, the question that you raised I think is a very fair one, but this is just to fill out the context.

MR. APPLETON: Sir Daniel, while we have you--you can hear me; yes?

ARBITRATOR BETHLEHEM: Yes.

MR. APPLETON: While we have you, as you're aware, one side of this dispute says that the issue under 1101, which is the--relates to the issue of scope, is irrelevant because of the time of which the Claim arises. The other side says no, it's relevant because we say the Claim arose much earlier and, therefore--and that's the basis of that.

So, I'm trying to understand what you would like so we know how to address and satisfy your request.

ARBITRATOR BETHLEHEM: Mr. Appleton, I mean, Mr. Bishop will come in and I don't want to sort of hijack his question and to clarify further, but for me it's not what I would like, and I would be quite content if either/or both Parties come back tomorrow in due course and say, frankly, this is just irrelevant. What I have been taking away from this week and from the pleadings is that there is a subterranean issue of ownership and control of Tennant Energy and when Tennant Energy was, you know, as it

were, became the--we know when it became the Claimant--but when shares were transferred and whether there was a trust.

I don't know whether I'm identifying a subterranean issue of ownership and control sort of falsely, but in the spirit of the Tribunal's deliberations to come, I wanted to put to both of you squarely that I, at least as one of the Members of the Tribunal, am struggling with an issue which seems to be in the shadows but no one is addressing, and I would like very squarely, as a matter of due diligence, to put this in front of me and say please address the issue of ownership and control as a matter of fact and as a matter of law. And if you come back and say our position is that 1101 is irrelevant and the definition of 'investor' and 'investment' and whatever in 1139 is irrelevant, that's fine. I'll take it away. I don't want there to be any issue in due course that either Party did not have an opportunity to address this point.

ARBITRATOR BISHOP: Yes, I would echo what Sir Daniel just said. I don't care whether it's an issue or not an issue, but if it is an issue, then we just need the materials that are important to decide it. If it's not an issue, that's fine, too.

And I'm certainly not trying to raise an issue that's not there, as like Sir Daniel, but, I mean if it's an issue, tell us to what extent it is, tell us all that we

need to know about it to decide it.

So, I mean, I'm not trying to ask for anything beyond what it is that both Parties are trying to argue here, so I would throw it back to you.

MR. APPLETON: Excellent. No problem. Now that we have a better idea, we thank both arbitrators for their assistance.

PRESIDENT BULL: So, I think there are a few more issues we wanted to flag to both Parties, and for no particular reason, perhaps I'll ask Sir Daniel to go first.

ARBITRATOR BETHLEHEM: Thank you very much.

I'm going to wait until the empty chair for the Claimant is filled; otherwise, I'll think it's Mr. Brezhnev.

Is it Mr. Mullins or Mr. Appleton?

MR. APPLETON: I returned back to my machine to see it had been enabled to be repaired, but it still is repaired. It's gone dead. Oh, you can't see me. I'm sorry. So I'm still going to sit in Mr. Mullins's seat.

ARBITRATOR BETHLEHEM: That's fine. It's just so that I can direct--

MR. APPLETON: Yes.

ARBITRATOR BETHLEHEM: --my comments or questions to a living person.

So, in the same spirit as the questions that

we've been putting over the last few days, I've got a brief series of three closely related questions, which I would be grateful if you could reflect on and come back to tomorrow, and as I come to address them, let me sort of apologize because you've been--both Parties, have been expending a lot of effort on these particular issues, and you may throw up your hands in horror when I ask you to dumb it down.

But I would be very grateful if both Parties in their Closing Submissions tomorrow could in a very pointed and clear way come back to us and tell us what is the relevance of there being a trust or there not being a trust. We've got--I think that this issue has snowballed, you know, beyond whatever.

So, first question: What is the relevance of there being a trust or there not being a trust?

Second question is: Assuming that we find that there is a trust, what is the relevance, if at all, of the time when the Trust came into being? Now we've got multiple dates here. We've got, you know, the document of February 2016 and so on. So, what is the relevance, if at all, of when the Trust came into being?

And the third question is: What is the relevance, if any, of whether there was an assignment of the NAFTA rights? Now, we understand, of course, that this is a NAFTA proceeding and that there have to be certain waivers

and all the rest of it, but we seem to, with a lot of the evidence and the submissions, have lost sight of the focus of these questions for purposes of moving forward, so I would be grateful if we could hear the Parties, both Parties on those questions tomorrow, please.

ARBITRATOR BISHOP: Yes, if I could--Mr. President, if I could add a few things. I absolutely concur in what Sir Daniel is asking. I think those are good questions. Beyond that, in terms of proving an oral trust here, I would like the Parties (audio disruption)--

REALTIME STENOGRAPHER: Sorry, there is audio interference.

(Pause.)

ARBITRATOR BETHLEHEM: Perhaps the listening Parties, Mr. Appleton, could turn off the microphone in your room, please.

ARBITRATOR BISHOP: Okay. Can you hear me clearly now?

REALTIME STENOGRAPHER: I can. Yes, thank you, sir.

ARBITRATOR BISHOP: Yes, alright, thank you.

Yes, in addition to what Sir Daniel has suggested, I would also, in terms of the proof of an oral trust, find it helpful for both Parties to provide us with

the precise evidence, in the Witness Statements or testimony from the last two days, of exactly what the declarations were of an oral trust and precisely what is the corroborating evidence of an oral trust that is argued, and then a list on both sides of what is the evidence that you say is particularly relevant to the proof of an oral trust or the lack of an oral trust. I know that the Respondent, I think, gave us something of a list in Opening Statement, and I would like to see that from both sides.

And going beyond just the list, how you say that it fits with the legal standard that we have heard today for proving an oral trust.

The next question would be with respect to the statute of limitations issues, I would like to hear more from both Parties about the constructive knowledge standard and, as precisely as you can put it to us, what are the legal parameters or criteria for applying the constructive knowledge standard and what is the--what was the trigger for suspicion or investigation here as precisely as you can get into it including, I think, by Respondent, what are the specific news articles or other evidence that you say should have put the Claimant on notice of inquiry.

And then the last question I have goes to this control issue, and I don't know whether this is relevant for tomorrow or not, but again, I would like to know what

is the case law, legal standards for control, the indicia of control; what are the specific dates on which there was certain percentages of ownership, whether it's 22 percent or 45 percent or a hundred percent, and what is the relevance of that, if any; and then what is the evidence of a voting bloc and what is the specific relevance of that.

I mean, those are my questions that I'd like to have addressed in more detail either in the closing arguments tomorrow or in any post-hearing briefs.

Thank you.

PRESIDENT BULL: So, I should just make sure this is clear to the Parties that these questions that we've been putting to you in the course of this week, the Tribunal has been discussing them, and you should take it that regardless of who has articulated the question, that they're really questions from all three of us.

The other thing is just to remind Parties that it would really help the Tribunal if tomorrow was not so much position taking but actually engaging with the other side's argument in dealing with the questions that the Tribunal has.

So, with that final note of encouragement, I propose to adjourn for the day, and we can resume at the usual time tomorrow. Thank you, everyone.

MR. APPLETON: Wait.

PRESIDENT BULL: Yes, Mr. Appleton.

MR. APPLETON: You can hear me.

I just wanted to come back again: What is the position with respect to admitting new authorities to answer these questions? I just need to understand so that we don't waste everybody's time as to what goes through. It may be as we go through and try to answer this, there may be some we saw that already today, now that I understand more about Arbitrator Bishop's question, so I understand that one, but especially with respect to the issues that now come through, I think we just need to have an understanding, so usually one would be able to address if something new comes up. We're going to be now researching tonight to find some answers to some questions here. We may find something that hasn't already been in the record, how do you want us to address such matters?

PRESIDENT BULL: Right. I don't think any of the questions that the Tribunal has asked is actually raising anything new. And I--so to the extent there are cases, authorities that may have been helpful, to be blunt, these should be already in the record.

Now, I think the position is this: Just because we've asked new questions doesn't mean that it's open season to checking new authorities, but if there are new authorities that either Party wants to rely on, then you

should deal with that in the usual way: Give notice to the other side, and you will have to ask for permission to refer to new authorities.

Of course, that may waste some time, and the more that Parties can agree off-line the better, but the questions the Tribunal is asking are not a license to just have new authorities come in without any control.

So, that's as much guidance as I think the Tribunal can give you at this stage. And I know, Mr. Appleton, you're probably asking this in anticipation that you might find some things, and if you do and it's important, then I guess you'll have to do what you need to do in order to raise the possibility of referring to that.

MR. APPLETON: The reason I raise this question is that if the Tribunal allowed a new authority in (audio distortion) 1140 is also one of the issues being raised by the Tribunal now, and there has been no opportunity for us to be able to address that, there has been no opportunity for us to be able to rebut it, and now we're in a situation where either the Tribunal said, well, we would be prepared to take arguments about whether or not it should be given weight (audio interference and unclear) but not whether or not it could be responded to. And so that's--

PRESIDENT BULL: What authority are you referring to?

MR. APPLETON: The most recent authority that came from Canada, MAKAE Europe versus Kingdom of Saudi Arabia.

MR. KLAVER: Counsel, you had an opportunity to address that in your opening. You chose not to. You could still address it in closing.

MR. APPLETON: We can't address it if we can't submit authorities.

MR. KLAVER: It's on the record.

MR. APPLETON: So that's the issue. You bring a new case with new approaches on an issue the Tribunal is now interested in, and it may be that we may want to--I don't know. I mean they just--at the end of the day, since Arbitrator Bishop raises the question and that's where that case comes from or an issue raised by Canada in its Opening, and now we find ourselves in a situation where we're not able to be able to respond.

Now, perhaps the answer would be that's what you can do in the Post-Hearing Brief, but it just comes to that question down the road, and so that is--

PRESIDENT BULL: Stop, stop, stop. Mr. Appleton, if you want to refer to a new authority to deal with the authority that Canada was allowed to refer to, then you make the application. I'm quite sure you know that. So, if there is an authority you want to raise to our

attention, all I'm saying is that there isn't a blank check at the moment, and you make the application. That's all. We will consider that application. Today the Claimant has put forward new authorities, specifically the jury direction, and also asked for two authorities referred to in that document to be added to the record. Tribunal, after considering that, has allowed all three of those authorities in.

So, if there are authorities that you need to rely on, then you'll have to make the application if you cannot get agreement with the other side.

And we'll consider that application. I can't say more than that at the moment because the only other thing the Tribunal could say is that, well, yes, you can bring in as much new authorities as you want, but we're not going to do that. I don't think that would be fair to anyone.

So, I hope that's clear, Mr. Appleton. We're not shutting you out. We're just saying please make the application if you need to.

ARBITRATOR BISHOP: Mr. President, could I ask one question of both Parties, just to try to clarify an issue? I mean, perhaps Sir Daniel and I have misunderstood the Parties' arguments, but I'd just like to pose the question to both Parties: Is the issue of control of the Investment under Article 1139 of NAFTA an issue at this

stage of the case that you're asking us to decide?

MR. APPLETON: From the Investor's perspective, the answer is yes. It's one of the four bases raised in our Opening Statements with respect to the Investments.

MR. KLAVER: Yes. Canada agrees this is certainly an issue live for the Tribunal to resolve.

ARBITRATOR BISHOP: Okay, then--all right. With that understanding, and I think that the Parties have mentioned it, but to the extent that then that there are Legal Authorities in the investment case law that would be relevant to deciding that issue that have not been cited in the Memorials to date, is there an issue between the Parties as to whether or not we can consider that case law?

Perhaps--I don't know if Canada wants to address that issue first or the Claimants or...

MR. KLAVER: I think what I'd would like to just clarify is that the issue of the Claimant's alleged control over the Investment has been present since the start of this claim, since its Notice of Arbitration. This is not a new issue. Now, it's the Claimant's burden to meet the--if the Claimant has to provide additional authorities to meet this burden and to prove this case, we are happy to address it. We've cited some documents, some authorities on control, and we will further brief the Tribunal tomorrow on this issue.

We're also happy to discuss with Claimant's counsel whether to admit any specific authorities into the record. We could do that off-line.

ARBITRATOR BISHOP: Okay.

And, I mean, from the Tribunal's standpoint, I mean, I'm sure that all three of us know some of the case law out there on this topic that probably has not been or may not have been referred to in the Memorial, so it's not a question, you know, that we're not going to be at least generally aware of it; and so I--that's why I'm wondering if we went out and looked at the case law generally on that subject, I don't know whether there would be objections or not, but I know from my standpoint I would want the Parties to comment on it and to be able to raise it. And, of course, if something new is coming up tomorrow, I would expect them to have an opportunity to discuss it fully and fairly in Post-Hearing Briefs so that everyone has a full opportunity to be heard on it.

MR. KLAVER: Yes, Arbitrator Bishop, we absolutely would appreciate the opportunity to address any new authorities in the Post-Hearing Brief. We would never object to the Tribunal considering its own authorities, if that's what you're referring to. We would just like to also have the chance to respond to that.

It is also possible that we seek to bring in a

new authority as well, ourselves, but we will make that decision and make an application per the appropriate procedures.

ARBITRATOR BISHOP: Thank you. That's all I have.

PRESIDENT BULL: So, to be clear, the Tribunal is not shutting out things. It's just that if there are going to be new authorities, they should be brought in in an orderly fashion. And what I would like to encourage Parties to do--and I'm sure both Parties will do this--is talk to each other about it so that it isn't brought in without notice. I think we saw some of that today.

And I'm not criticizing. These things happen during hearings, but try and sort that out. If you can't sort out, then you'll have to ask for permission from the Tribunal.

You've heard what Arbitrator Bishop has said. I would be surprised if Sir Daniel was of a different mind. I certainly have the same inclinations as him. It's just that we do have to make sure things are done in an orderly fashion.

So, talk to each other if there are new authorities you want to rely on, and if that can't resolve it, bring it to our attention, and we can be very quick about this as we have been today.

I hope that helps a little, Mr. Appleton.

MR. APPLETON: More information.

(Audio interference.)

MR. APPLETON: We're having some audio problems.

PRESIDENT BULL: Thank you.

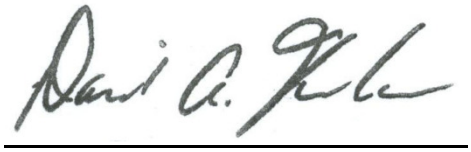
Then, if there is nothing else to be raised, let's adjourn for the day and resume tomorrow. Thank you, everyone.

(Whereupon, at 3:35 p.m. (EST), the Hearing was adjourned until 9:00 a.m. (EST) the following day.)

CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.



DAVID A. KASDAN