Date: 20080229

Docket: T-66-86A

Citation: 2008 FC 267

Ottawa, Ontario, this 29th day of February, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SAWRIDGE BAND

Plaintiff

- and -

HER MAJESTY THE QUEEN

Defendant

- and -

CONGRESS OF ABORIGINAL PEOPLES,
NATIVE COUNCIL OF CANADA (ALBERTA),
NON-STATUS INDIAN ASSOCIATION OF ALBERTA
and NATIVE WOMEN'S ASSOCIATION OF CANADA

Interveners

Docket: T-66-86-B

BETWEEN:

TSUU T'INA FIRST NATION

Plaintiff

- and -

HER MAJESTY THE QUEEN

Defendant

- and -

**CONGRESS OF ABORIGINAL PEOPLES,
NATIVE COUNCIL OF CANADA (ALBERTA),
NON-STATUS INDIAN ASSOCIATION OF ALBERTA
and NATIVE WOMEN'S ASSOCIATION OF CANADA**

Interveners

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REASONS FOR ORDER AND ORDER

THE MOTIONS

[1] This is a cluster of motions for costs brought by the Crown and the Interveners related to extraordinary conduct and revelations that have occurred during the trial of these two actions.

[2] The Crown is seeking an order:

1. Granting the Crown a fixed lump sum award of costs in accordance with the Crown's draft Bill of Costs, and related to the Plaintiffs' Mistrial Motion, the Consequential Reasons for Order and Order, the Oral ruling of September 11, 2007, the subsequent striking of all lay witness testimony and the further Order disallowing the other lay witnesses of the Plaintiffs from testifying, and the Court attendance of October 15, 2007:
   a) calculated according to 2.0 times the upper end of Column V of Tariff B of the *Federal Courts Rules*; and
   b) payable by the Plaintiffs forthwith and in any event of the cause;

2. Granting the Crown costs of this motion:
   a) calculated in accordance with Column III of Tariff B of the *Federal Courts Rules*; and
   b) payable by the Plaintiffs forthwith and in any event of the cause; and

3. Granting the Crown an Order that fees payable under Tariff A, paragraph 2 of the *Federal Courts Rules* for the entirety of the trial, except for opening statements and the Documents Motion, calculated according to 2.0 times the upper end of Column V of Tariff B of the Federal Court Rules, all in accordance with the Crown's draft Bill of Costs, be borne by the Plaintiffs, and payable immediately and in any event of the cause.

[3] NWAC is seeking an order:

1. Granting NWAC a lump sum award of costs in the amount shown on the draft Bill of Costs, Exhibit A to the Affidavit of Christine Soukup, sworn on November 16, 2007 for the Plaintiffs' Motion for Adjournment, heard September 28, 2006:
   a) payable by the Plaintiffs forthwith and in any event of the cause; and
   b) calculated according to the high end of Column V of Tariff B of the *Federal Courts Rules*, with a multiplier of 2;

2. Granting NWAC a lump sum award of costs in the amount shown on the draft Bill of Costs, Exhibit B to the Affidavit of Christine Soukup, sworn November 16, 2007, for the Plaintiffs' Mistrial Motion and proceedings to determine the Plaintiffs' compliance with the Court's July 5, 2007 Direction and August 9, 2007 Order, down to and including the proceedings of September 11; and of the Plaintiffs' motion to settle the terms of the Order of October 11, 2007, and of costs thrown away with respect to the hearing of the Plaintiffs' lay witnesses in this matter in accordance with the ruling of September 11, 2007:

a. payable by the Plaintiffs forthwith and in any event of the cause; and

b. calculated according to two times the high end of Column V of Tariff B of the *Federal Courts Rules*;

3. Granting NWAC the costs of this motion:

a. payable by the Plaintiffs forthwith and in any event of the cause; and

b. calculated according to two times the high end of Column V of Tariff B;

4. Granting leave for late service of the Bill of Costs for the costs of this motion, and leave to file such Bill of Costs after the determination of this motion, as the time and disbursements are not all presently known; and

5. Granting such further and other relief as this Honourable Court deems appropriate.

[4] NSIAA is seeking an order:

1. Awarding NSIAA solicitor-client costs of the trial of these actions from January 30, 2007 to September 11, 2007, including the solicitor-client costs of the Plaintiffs' April-May 2007 Motion for Mistrial, and subsequent proceedings to determine the Plaintiffs' compliance with the Court's July 5, 2007 Direction and August 9, 2007 Consequential Order, and NSIAA's costs thrown away in relation to the hearing of the Plaintiffs' lay witnesses now struck;

2. Fixing NSIAA's solicitor-client costs of the trial of these actions from January 30, 2007 to September 11, 2007 at $198,012.21, or such other amount as the Court deems appropriate, and ordering costs payable forthwith;

3. In the alternative, awarding costs to NSIAA of the trial of these actions from January 30, 2007 to September 11, 2007 in the lump sum amount of $216,106.58, based on 1.5 times the high end of Column V of Tariff B, plus disbursements, and payable forthwith;

4. Awarding NSIAA costs of the Plaintiffs' unsuccessful motion for an adjournment of the trial of these actions (the Adjournment Motion), brought before this Court on September 28, 2006, in the lump sum amount of $8,204.63, based on 1.5 times the high end of Column V of Tariff B plus disbursements, payable forthwith;

5. Awarding costs to NSIAA in the lump sum amount of $7,500.00 for this motion; and

6. Granting such further and other relief as this Honourable Court deems appropriate.

[5] CAP is seeking an order:

1. Awarding costs to CAP in relation to the motion filed by the Plaintiffs seeking an adjournment of the trial in this matter, and dealt with in this Court's October 12, 2006 Order (the Adjournment Motion);

2. Awarding costs to CAP in relation to the Plaintiffs' Mistrial Motion and the matters addressed in this Court's orders dated June 19, 2007, August 9, 2007, September 11, 2007 and October 15, 2007, including thrown-away costs for the trial time between January 30, 2007 and October 15, 2007;

3. Directing payment of a lump sum for costs of the above matters, based on the application of the high end of Column V of Tariff B on the Adjournment Motion and the high end of Column V of Tariff B, with a multiplier of two applied, on the thrown-away costs of trial and costs of the Mistrial Motion and related proceedings;

4. Directing that these costs awards be paid to CAP by the Plaintiffs forthwith and in any event of the cause; and

5. Granting such further and other relief as counsel may request and this Honourable Court permits.

[6] NCC(A) is seeking an order:

1. Granting NCC(A) a lump sum award of costs for NCC(A)'s participation in the trial of this matter from January 30, 2007 to October 15, 2007:

a. payable by the Plaintiffs forthwith and in any event of the cause;

b. in an amount equal to two times the upper end of Column V of Tariff B of the *Federal Courts Rules*;

in accordance with the draft Bill of Costs submitted by NCC(A);

2. Granting NCC(A) a lump sum award for costs of the Plaintiffs' motion to adjourn the trial, heard September 28, 2006, payable by the Plaintiffs forthwith and in any event of the cause, in an amount equal to the upper end of Column V of Tariff B of the *Federal Courts Rules* in accordance with the draft Bill of Costs submitted by NCC(A); and

3. Granting NCC(A) the costs of this motion, payable by the Plaintiffs forthwith and in any event of the cause.

[7] Although the motions differ somewhat in emphasis and detail they are all related to matters that have significantly impeded the progress of the trial and which have given rise to much controversy. They overlap to such an extent that it is possible to review the core issues collectively before dealing with the discrete details of each motion.

[8] All of the participants are of the view that the motions can be dealt with in writing pursuant to Rule 369. After reviewing all of the materials submitted, the Court is convinced that, although complex and extensive, the relevant parts of the record are sufficiently well-known to all participants, as well as the Court, to allow me to address each motion without the need for a hearing

in open Court. A disproportionate amount of time in Court has already been taken up with the underlying conflicts and the procedural stalemate that has prompted the Crown and the Interveners to seek enhanced costs payable immediately and irrespective of the cause. Any further expenditure is best avoided.

BACKGROUND

The General Problem

[9] These claims for enhanced costs are based upon abusive and wasteful conduct by the Plaintiffs that has its origins in the pre-trial phase of these proceedings. The sums claimed are hefty by any standards and great care is needed to ensure that they are appropriate, principled and understood.

[10] Much of the relevant record has already been recited and referred to in various orders, reasons, decisions and rulings made by me since I was appointed trial judge in 2004. That record is well-known to all participants and does not need to be repeated here again in detail. Some portions of the background were addressed in the Mistrial Motion that finally brought a long history of procedural conflict to a head. Also, in my conclusions and reasons of September 11, 2007, I made it clear that the overall impact of the Plaintiffs' conduct was to take the Court and the other participants back to the Fall of 2004 when I was compelled to strike the Plaintiffs' lay witnesses because of the Plaintiffs' breach of Justice Hugessen's Pre-Trial Order of March 26, 2004 and the

Plaintiffs' failure at that time to cooperate in providing a "workable solution" to the problems they had caused regarding non-compliance with will-say requirements.

[11] As I pointed out in my reasons of August 9, 2007, there is a continuum to the problems that have given rise to these costs motions, and any award of costs cannot be fully understood or justified without some reference to that continuum. Practically speaking, however, every relevant detail cannot be recited here and I can only provide an outline of some of the highlights and make a few connecting links. This is not meant to supplant or modify my previous decisions, reasons and rulings, but is an attempt to provide an overview so that these considerable cost claims can be better understood and evaluated. In addition, new light has now been thrown on previous conduct as a result of the latest revelations, and this also has some relevance for the motions presently before me.

[12] The general underlying problem is that, after having their lay witnesses struck in 2004 because of their refusal to comply with will-say disclosure requirements, the Plaintiffs were ordered by the Court to produce and serve standard-compliant will-says for each lay witness they intended to call. The Plaintiffs assured the Court and the other participants that they had done this and that they wanted to proceed in accordance with the rules that the Court had set for the presentation of their case. At trial, however, after calling eight lay witnesses, the Plaintiffs attempted to terminate the trial through a mistrial motion in the course of which they revealed that they had not produced and served standard-compliant will-says and that they repudiated any connection between will-say disclosure and evidence to be called at trial. The Court examined the Plaintiffs' mistrial allegations but declined to terminate the trial. Instead, the Court found that the Plaintiffs were attempting to avoid responsibility for problems that were of their own making and which they had been given

ample time and opportunity to avoid, and which they had assured the Court and the other participants they had resolved. So the Court put the Plaintiffs to an election: they could either retain the witnesses they had called and call further lay witnesses in accordance with the rules that had been established for will-says or have their witnesses struck again for non-compliance as they had been struck in 2004. Rather than submit to the will-say rules, the Plaintiffs elected not to provide the reassurances of compliance requested by the Court. This election has given rise to enormous costs consequences that are referred to in the present motions.

Pre-Trial Phase

[13] The record is clear that the Plaintiffs breached Justice Hugessen's Pre-Trial Order of March 26, 2004 and failed to produce will-say statements for their new lay witnesses by the deadline set in that order.

[14] The Court struck the witness list that had been produced by the Plaintiffs but gave them the opportunity to come up with a "workable solution" to the problems they had caused as a result of their breach. They failed to do this so that the Court stepped in and, on November 25, 2004, ordered the Plaintiffs to produce will-says that complied with the disclosure standards set by the Court for each of the new lay witnesses they intended to call. The Plaintiffs said they needed until December 14, 2004 to do this, and the Court granted them the time requested.

[15] These concessions were granted in the face of opposition from the Crown who felt that the Plaintiffs should not be given an opportunity to redeem themselves from an unjustifiable breach of a

court order to produce will-says and/or from their failure to cooperate in providing a "workable solution" to the problems caused by that breach.

[16] Having been ordered by the Court to produce will-says that met the synoptic standards set by the Court for new lay witnesses, the Plaintiffs assured the Court and the other participants that the will-says they had served either met or exceeded the disclosure standards. That assurance was necessary because failure to comply would have meant a breach of my Order of November 25, 2004.

[17] The Plaintiffs then went on to demonstrate their understanding of, and concurrence with, the will-say rules in various ways. For example, they brought their own motion and asked the Court to order the Crown and the Interveners to produce will-says that met the synoptic disclosure standards for any lay witnesses they intended to call. The Court supported the Plaintiffs' position in this regard and granted the relief requested.

[18] The Plaintiffs also demonstrated their support for the will-say disclosure system at the *de bene esse* hearing for Ms. Florence Peshee. In essence, the Plaintiffs asked the Court to protect them from ambush at trial by excluding evidence that had not been adequately disclosed in Ms. Peshee's will-say statement. Once again, the Court supported the Plaintiffs in the position they took on the relationship between will-says and evidence at trial and made rulings excluding some of Ms. Peshee's evidence. The Plaintiffs said it was "all about giving notice" and giving notice was "guided by the standards in the will-say."

[19] Having both urged and observed the use of will-says at the Peshee hearing to exclude relevant evidence at trial, the Plaintiffs then went on to confirm their support for the will-say system and its connection to the case they proposed to make when they affirmed to the Court and the other participants on January 7, 2005 that they had "presented their case through the service of will-say statements … in accordance with the way in which the Court [had] permitted [them] to present their case," and that they wanted to proceed on this basis and have the Crown and the Interveners comply in the same way. This statement was made following the Peshee hearing at which the Plaintiffs had assured the Court and the other participants they would examine the issues raised at Peshee, consult with other participants, and bring forward any concerns in a timely way.

[20] In November 2005, the Court was called upon by the Crown to strike certain of the Plaintiffs' will-says for various reasons. The Court's decision of November 7, 2005, which deals extensively with the basic principles that underlie the will-say requirements, once again makes it clear that will-says that meet the synoptic standards set by the Court are a pre-requisite for calling witnesses, and that is an inevitable consequence of my earlier orders of October 18, 2004 and November 25, 2004. The principles upon which that order was based are as follows:

> 324. In view of the preceding discussion, and in order to balance the competing interests in a way that will result in the most just, expeditious and efficient determination of these proceedings on the merits, the Court believes that the following principles and procedures should govern its decision in this motion:
>
> > a. The Plaintiffs should be entirely free to lead all relevant and otherwise admissible evidence they have disclosed that they propose to lead in their will-says served within the time-frame which the Plaintiffs requested and the Court allowed, i.e. December 14/15, 2004;

> b. In order to lead evidence in accordance with paragraph one (a) above, a summary of that evidence must have been disclosed in a way that meets the standards for disclosure already set by the Court in previous decisions and orders, which standards have been accepted by the Plaintiffs as being applicable to them and other parties to the proceedings;
> …
>
> j. The purpose of any order made by the Court on this motion is solely to complete the process began on September 17, 2004, as more specifically defined in the Orders of October 18, 2004 and November 25, 2004. That process was intended to ensure compliance with Mr. Justice Hugessen's Pre-Trial Order of March 26, 2004, to effect full pre-trial disclosure by ordering compliant will-says, to try and resolve the difficulties occasioned by the "philosophical difference" over the scope of the pleadings, and to indicate which witnesses and/or evidence the Plaintiffs should not call, either because of their continuing failure to make disclosure in accordance with the standards articulated by the Court, or because the proposed witnesses and/or evidence clearly went beyond the scope of the pleadings.
>
> [emphasis added]

The decision of November 7, 2005 was upheld on appeal by the Federal Court of Appeal.

[21] The commencement of the trial was thwarted in 2005 by a motion brought by the Plaintiffs, ostensibly based upon apprehended bias, but also containing some allegations of bias ("Bias Motion"), that the Court found to be totally groundless and unwarranted. Following that motion the Plaintiffs eventually decided to appoint new lead counsel but retained former counsel as part of their litigation team.

[22] The Plaintiffs appointed new lead counsel in July, 2005 and, in order to accommodate them and give them an opportunity to sort out problems they had caused, the Plaintiffs were given significant amounts of additional time to set their house in order and prepare for trial. The trial commencement date was pushed forward to January 2007 to accommodate the Plaintiffs in this regard.

[23] In order to ensure that actual progress towards trial was being made, the Court imposed an obligation upon the Plaintiffs to produce monthly progress reports and to alert the Court to any problems that might prevent the commencement of the trial in January, 2007. In their monthly written progress reports to the Court and the other participants, new counsel for the Plaintiffs indicated that they might bring a motion about will-says. But as time went on no such motion was forthcoming.

[24] The Court eventually issued an August 24, 2006 direction in which the Plaintiffs were told that five days would be set aside for a hearing of any possible motions described on pages 21 and 22 of their December 2005 Progress Report. This included any motions regarding the "role and use of will-says at trial." That deadline passed without the Plaintiffs bringing any motion regarding the role and use of will-says at trial. Nor was the Court advised of any mutually satisfactory alternative agreement on the will-say issue in accordance with paragraph 28 of the Court's August 24, 2006 direction. In their September 2006 Report, the Plaintiffs indicated that they would not be bringing a motion on the role and use of will-says at trial and that will-say issues (they did not specify what they might be) would be dealt with at trial.

[25] On December 7, 2006, I allowed the Plaintiffs, following a motion, to rehabilitate one of the witnesses excluded by my November 7, 2005 order, but I disallowed the rehabilitation of four other witnesses proposed by the Plaintiffs and made it clear that the time had long past for the renovation of will-say statements. This decision was not appealed.

The Trial Phase

[26] The trial proper began in January 2007, and, following opening statements, the Plaintiffs began to call their lay witnesses. The Court was called upon to make various rulings regarding ambush at trial raised by the Crown. Gradually, the Plaintiffs began to assert a position regarding the use of will-says at trial that was at odd's with the will-say rules established by Court decisions and affirmed in rulings, as well as the Plaintiffs' own previous representations and assurances made to the Court and the other participants.

[27] The Plaintiffs' new position, as they finally articulated it at the Mistrial Motion in 2007, was that "the acceptance of a standard of will-says in pre-trial disclosure … is … unrelated to the admissibility of evidence at trial" and that they "do not understand nor do they accept the use of will-says at trial to exclude relevant admissible evidence called by either party." As demonstrated at the Peshee hearing in 2004 – as urged on the Court by the Plaintiffs and as an inevitable consequence of Court decisions dealing with will-says – the connection between will-says and otherwise relevant evidence called at trial arises in the context of an objection to evidence based upon ambush. The Plaintiffs had asked the Court at the Peshee hearing to protect them from ambush by referring to the pre-trial disclosure in Ms. Peshee's will-say. But now, at trial in 2007, they were

saying that, as far as their witnesses were concerned, there was no connection between will-say disclosure standards and the evidence called at trial. In various rulings, the Court had explained why the approach now urged upon the Court by the Plaintiffs was unacceptable, why the will-say rules had to remain intact, and how they related to ambush at trial. Nevertheless, at the Mistrial Motion, the Plaintiffs said that "unequivocally," they would not accept any such connection.

[28] As the Court has pointed out, if there is no connection between pre-trial disclosure and evidence at trial, as the Plaintiffs assert, then will-says become a tool for creating ambush at trial rather than avoiding it. The Court has ruled that will-says are not an automatic exclusionary rule and that the Plaintiffs are at liberty, if an objection based upon ambush is made, to demonstrate to the Court that, notwithstanding what may or may not have been disclosed in a relevant will-say, no real ambush can, reasonably speaking, have occurred. But the Plaintiffs have provided no acceptable explanation or justification as to why, when real ambush is assessed on an objection by objection basis, will-says, which are a significant part of pre-trial disclosure, should not be used as part of the determination of whether real ambush has occurred. They have attempted to avoid the consequences of their own actions and the illogicality of their position by accusing the Court of using the will-says as an exclusionary rule in its rulings regarding ambush and then, when the contradictory nature of that accusation was pointed out to them, accusing the Court of using a comprehensive and detailed standard of pre-trial disclosure for will-says to exclude the Plaintiffs' evidence. Neither accusation can be substantiated and the Plaintiffs are simply left with a "position" that pre-trial disclosure in will-says somehow has no connection to evidence at trial when ambush becomes an issue, even though they do not appear to argue that ambush itself is not a justifiable ground of exclusion.

[29] Notwithstanding the detailed guidance on this issue in the Court's rulings, and notwithstanding the obvious fact that any problems or constraints they might be experiencing at trial were entirely of their own making, the Plaintiffs have persisted in re-arguing the basic points time and again. But the Court has remained consistent with its own prior decisions, reasons and rulings, as well as the representations and assurances given earlier by the Plaintiffs concerning the state of their will-says and the way they had presented their case through their will-says in accordance with the standards, and their earlier "position" that they wanted "to proceed on that basis and have my friends comply in the same way."

The Mistrial Motion

[30] The Mistrial Motion was an attempt by the Plaintiffs to avoid problems they had caused through their breach of Court decisions and rulings and their own representations and reassurances regarding will-say compliance. Instead of acknowledging the real source of the problem, they attempted to terminate the trial. The whole matter finally came to a head when the Plaintiffs, after calling eight new lay witnesses at the trial, rose in Court on April 25, 2007 and, although ostensibly asking the Court for guidance, eventually revealed that what they wanted the Court to do was declare a mistrial on the basis that the Court had foreclosed on the ability of the Plaintiffs to adequately state their case because the Court "has created a situation where the will-says are, in fact, and have been established as a legal ground for the exclusion of relevant, admissibility evidence." This assertion remained unsubstantiated and was a contradiction of what the Court had explained it was doing in its rulings regarding ambush. The Court was not told what evidence had been, or might be, excluded, or why the Plaintiffs could not adequately state their case. Nor was it clear what

the Plaintiffs meant by "adequate". When later pressed, they said that they can "prove" their case, but they have – apparently, though this is not clear – been prevented from calling some evidence they would like to call that would allow them to adequately "state" their case. However, it has not been made clear to the Court what this evidence was, or why its exclusion would warrant a mistrial, or how it related to the Plaintiffs' ability to prove their case.

[31] In fact, the Plaintiffs have declined to explain in any satisfactory way how the will-say rules ordered by Justice Hugessen and deployed in these actions have, either conceptually or practically, prevented them from adequately stating their case. The closest they have come to any kind of explanation was in response to an assertion by the Crown that they could not "prove" their case. In their response, the Plaintiffs drew the Court's attention to a conceptual distinction between not being able to adequately state their case and not being able to prove their case. But they did not explain how that conceptual distinction applied to the facts in this case, and they did not attempt to demonstrate what evidence may have been excluded, or might be excluded, that would prevent them from being able to state their case adequately (whatever that term might mean in this context). The Court has repeatedly made it clear in its rulings that the will-say rules, as conceived and deployed in these proceedings, are not an exclusionary rule of evidence but are a tool to facilitate trial preparation and avoid ambush at trial. Apart from "positions" and bald assertions the Plaintiffs have made no real attempt to demonstrate how they have been prevented from presenting to the Court what their lay witnesses have to say, or from adequately stating their case, because of the way in which the will-say rules have been applied. In fact, they have reassured the Court and the other participants on previous occasions that quite the contrary is true. They were given the time they requested to complete will-says and, after doing so, they reported to the Court and the other

participants that they had presented their case through their will-says and wanted to proceed on this basis; and they said this after they had themselves established at the Peshee hearing the ways in which will-says should come into play when ambush becomes an issue at trial.

[32] The Plaintiffs have also refused to explain why (if they could not adequately state their case because their witnesses were only being allowed to say what their will-says said they would say) they had previously confirmed to the Court and the other participants that the will-says they had produced and served met (or exceeded) the standards of disclosure, and that they had been able to present their case through those will-says in accordance with the standards and wanted to proceed on that basis.

[33] Conceptually and otherwise, the Plaintiffs have not satisfactorily explained how, after being given the opportunity to call new lay witnesses, and having been given the time they asked for to prepare will-says for those witnesses, and after having confirmed to the Court that they had done just that, the will-say rules can have prevented them from calling any witness they have wanted to call who can provide relevant evidence. The will-say rules merely require that what a witness will say be disclosed in synoptic form in advance of trial so that adequate preparation for cross-examination is possible and ambush will not become a problem at trial. A summary form of pre-trial disclosure is not a limit on relevant evidence, and the Court has previously ruled to this effect in a decision that the Plaintiffs did not appeal. The Court has also ruled at trial that the Plaintiffs are not prevented from asking any question of a witness they please. They must simply be prepared to answer an objection based upon ambush that the Crown might raise; and in answering that

objection, will-say disclosure will, inevitably, come into play. However, if disclosure has occurred in accordance with the synoptic standards set by the Court then ambush cannot be an issue at trial.

[34] For purposes of these costs motions, the significance of the Plaintiffs asking for a mistrial in the way they did, without any real attempt to satisfy the legal requirements for such a drastic remedy or to explore with the Court other possible ways of addressing their concerns, has to be looked at in conjunction with the Plaintiffs earlier attempts in the Bias Motion to avoid the consequences of previous decisions of this Court and the Federal Court of Appeal by returning the proceedings to the case management phase on grounds that were not only unsubstantiated but were completely at odds with the record.

[35] In the course of their second major attempt to avoid responsibility for their own conduct and to abort these proceedings at the Mistrial Motion (another motion that would have avoided the adverse consequences of decisions and rulings made to date) the Plaintiffs revealed procedural problems concerning their own conduct and the basis upon which they have called lay witnesses at the trial. The Plaintiffs revealed, for example, non-compliance of their will-says with the Court-ordered disclosure standards in several basic ways. First of all, the whole basis of their Mistrial Motion was an allegation that the Court had used will-says to simply exclude evidence not disclosed in a will-say. As explained in my rulings and reasons, this is not the case, but such an allegation was tantamount to an assertion that, if the Plaintiffs were confined to the disclosure in their will-says, they could not adequately state their case. And the problem with such an assertion was that it contradicts the clear representations and assurances that the Plaintiffs earlier made to the Court and the other participants that their will-says met (indeed some exceeded) the disclosure standards and

that the Plaintiffs had presented their case through their will-says in accordance with those standards, and that they wanted to proceed on that basis and have all other participants do the same. So the Plaintiffs were, in effect, saying that it was unfair because they were only being allowed to present the case they had reassured the other participants and the Court that they wanted to present.

[36] Another major difficulty was that, when the Court attempted to seek an explanation from the Plaintiffs at the Mistrial Motion as to how the constraints they were facing had arisen, and how big was the problem they faced, and why they could not adequately state their case if their will-says met the synoptic disclosure standards, the Plaintiffs confirmed on the record that, in fact, at least some of their will-says were certainly deficient in terms of disclosing, in accordance with the synoptic standards, what witnesses were called to say; although they would not reveal which ones were deficient, how extensive the problem was, or how it had occurred. Their approach was simply to blame the Court for difficulties that were obviously of their own making and to seek a mistrial without providing any real basis or justification for such a drastic remedy.

[37] In assessing the Plaintiffs' mistrial claims, the Court pointed out the inconsistencies and procedural problems that the Plaintiffs had placed on the record. As regards the basic disclosure issue (How could the Plaintiffs be prevented from calling relevant evidence if their will-says disclosed their case in accordance with the standards?), the Plaintiffs' response brought out even more problems and ambiguities. They could not, or would not, explain the inconsistency inherent in their Mistrial Motion, so they shifted ground. In shifting ground, they simply increased the difficulties confronting the Court. First of all, shifting ground was a tacit acknowledgment of the basic inconsistency inherent in their Mistrial Motion. Secondly, they revealed that they are quite

prepared to go on levelling unsubstantiated accusations against the Court in order to avoid explaining the real basis of their problems and allegations. They attempted to explain the inconsistency by alleging (but avoiding any attempt at substantiation) that the Court had itself invented a whole new standard for will-say disclosure (a comprehensive and detailed standard, rather than a synoptic standard) and was using that standard to exclude evidence that the Plaintiffs wished to call. Their new tack was to continue to allege that their will-says were compliant with the synoptic standards of disclosure (a position contradicted by their own confirmation in open Court that at least some of their will-says were certainly deficient in terms of disclosing what their witnesses were called to say), and to allege that the Court had made rulings to exclude relevant evidence that was not described in a will-say "in a comprehensive and detailed form." The Court has gone to great lengths to explain in its rulings the principles it has applied when ambush is alleged. At no time has the Court said it has excluded evidence because that evidence was not described "in a comprehensive and detailed form in a will-say." Nor has the Court acted on such a basis. So this was another unsubstantiated accusation that the Court was not doing what it said it was doing. The implication was clearly that the Court was doing something surreptitious and undeclared that was not disclosed in its rulings. This is a serious allegation, and particularly so given that the Plaintiffs have made groundless and unsubstantiated allegations in the past (most notably in the Bias Motion) and the Court has awarded enhanced costs against them for this practice and has told them to desist. The unsubstantiated allegation that the Court was using a comprehensive and detailed standard in its rulings and that the Plaintiffs' will-says were compliant with the synoptic standard was also contradicted by the Plaintiffs' own counsel. Mr. Molstad has advised the Court that he has reviewed the Plaintiffs' will-says against the synoptic standard and he has confirmed that

they are certainly deficient against that standard. He has not advised the Court that the will-says are deficient against a comprehensive and detailed standard.

[38] Another major problem was that the Plaintiffs revealed at the Mistrial Motion that when they said their "position" was that their will-says met the synoptic disclosure standards set by the Court, this position did not necessarily correspond with what the Court has said compliance with those standards entails. When the Court asked Plaintiffs' legal counsel if he had examined the will-says himself against the synoptic standards, he was perfectly candid in disclosing that he had done so, and he confirmed that at least some of them were deficient in disclosing what a witness was called to say. So this meant that the Court could place no reliance upon the Plaintiffs' "position" as regards compliance with the disclosure standards and needed to get to the bottom of the problem in order to determine the implications for the conduct of the trial as a whole.

[39] As a consequence of their mistrial initiative, the Plaintiffs had revealed that at least some of their will-says did not meet the synoptic disclosure standards set by the Court, even if they were unwilling to disclose the full extent of the problem. And this factor placed the Plaintiffs at odds with previous Court decisions and rulings dealing with will-says, as well as the Plaintiffs earlier assurances that they had produced will-says that met the disclosure standards and that they had presented their case through their will-says in accordance with those standards.

[40] Even more fundamental, however, was the fact that, while ostensibly seeking guidance from the Court, the Plaintiffs delivered and placed on the record at the Mistrial Motion a very carefully-worded repudiation of the will-say rules as the basis upon which they were leading lay evidence.

They were quite unequivocal that they did not "understand … nor accept the use of will-says at trial to exclude relevant admissible evidence … ." and that "the acceptance of a standard of will-says in pre-trial disclosure … is … unrelated to the admissibility of evidence at trial." In fact, after the Court had pointed out to them that they had "clearly represented to the Court, on several occasions, that they accept the will-say standards and … they're preparing for trial on the basis of those standards and that they expect other participants to do the same," they said that they wanted the Court to understand their repudiation of this position "unequivocally."

[41] In more colloquial terms, what this meant was that the Plaintiffs repudiated all Court decisions and rulings that establish the connection between will-says and evidence at trial, and refused to acknowledge or accept that any of their lay witnesses are called on the basis of such a connection. The Plaintiffs then went on to reveal that, as well as repudiating Court decisions and rulings dealing with this matter (which go back to 2004), they also – and contrary to their own earlier reassurances to the contrary – had not produced will-says that met the synoptic disclosure standards. In effect, the Plaintiffs revealed that they were proceeding on the basis that no connection existed between will-says and the right to call lay witnesses, or between will-says and the admissibility of evidence at trial. It was obvious that the problems that the Plaintiffs had created for themselves were of such a magnitude that they felt they had to find some way of completely circumventing the will-say rules. Their chosen methodology was to blame others. In the course of blaming others they inevitably had to resort to inconsistencies and evasions so transparent that the real source of the problem became more than manifest.

[42] Having made their ‘position’ “unequivocally” clear, and having disclosed non-compliance with disclosure standards, the Plaintiffs then went on to advise the Court that it should continue the trial with that repudiation and non-compliance on the record. In the Court’s view, this was clearly inappropriate.

[43] The Mistrial Motion is important because, having failed to persuade the Court to abandon the will-say rules that the Court had enforced in their favour against the “other side,” the Plaintiffs placed on the record an unequivocal repudiation of any connection between will-say disclosure and admissibility at trial and, at the same time, they revealed that they had not complied with the Court decisions and rulings regarding will-say disclosure in accordance with the synoptic standards set by the Court. Notwithstanding their repudiation and breach, they simply insisted on retaining and calling all of their witnesses, even though the right to call those witnesses, as they knew, was conditional upon their providing a will-say for each witness so called that met the disclosure standards. In effect, this was notification to the Court and the other participants that, irrespective of Court decisions and rulings, the Plaintiffs refused to retain or call their lay witnesses in accordance with the will-say rules. They were again insisting on the position they had taken in 2004 when the Court had had to strike all of their lay witnesses and order them to provide will-says that met the disclosure standards. The choice for the Court was whether to simply capitulate to this further breach of Court decisions and rulings and just allow the Plaintiffs to do what they wanted, or to remain consistent with those decisions and rulings.

[44] As paragraph 79 of my June 19, 2007 reasons makes clear, in light of the revelations, inconsistencies and outright rejection of the will-say rules by the Plaintiffs that finally came to light

at the Mistrial Motion, the Court began to look for solutions that would allow the Plaintiffs to call their lay witnesses in a way that was consistent with the will-say rules established by Court decisions and rulings. But, as subsequent events revealed, the Court had to try and do this in the face of non-cooperation and obstruction by the Plaintiffs. In the end, the Plaintiffs simply refused to either retain or call any of their lay witnesses in a way that was consistent with Court decisions and rulings on will-says.

The Mistrial Aftermath

[45] In light of the Plaintiffs' resistance to explaining or acknowledging the real source of their problems and the inconsistencies and groundless assertions that they had placed on the record, the Court directed the Plaintiffs to answer a series of specific questions designed to elicit relevant information that could be used to craft a solution. The Plaintiffs provided a reply to the Court's direction of July 5, 2007.

[46] As the Court subsequently found, the Plaintiffs' reply was to simply refuse to answer the questions in any meaningful way and to obstruct the Court's attempts to get to the bottom of the problem and devise a solution that would allow the actions to go forward in accordance with normal procedure and the particular court-crafted processes embodied in the will-say rules previously confirmed by all participants. At this point, the Plaintiffs would not answer the questions properly or come forward with any suggestions of their own. They merely asserted the right to proceed with their non-compliance disclosures and repudiation on the record in a way that would throw the conduct of the trial into disarray. They wanted the Court to just ignore the whole will-say issue and

their revelations of non-compliance and allow them to retain and call witnesses in breach of the will-say requirements and on the basis of their assertion that "the acceptance of a standard of will-says in pre-trial disclosure … is … unrelated to the admissibility of evidence at trial" and that they did not "understand nor … accept the use of will-says at trial to exclude relevant admissible evidence … ." When inconsistencies with previous representations and assurances were pointed out to them, those inconsistencies were simply ignored.

[47] The Plaintiffs then went on to exacerbate the problems further by placing yet more inconsistencies on the record. While retreating to their position that all of their will-says met the disclosure standards set by the Court and complied with all relevant decisions and rulings (earlier contradicted by their own counsel) they also asserted in their reply to my direction of July 5, 2007 that their will-says (no qualifications) were "deficient based on the Court's rulings made during trial," and then, in the PL20 response of August 24, 2007 they made to my order of August 9, 2007, the Plaintiffs informed the Court that "on the basis of previous Court rulings during trial excluding evidence, we expect that the will-say statements of all future lay witnesses will be found by the Court to be deficient."

[48] After reviewing the mistrial submissions, the Court concluded that there was no real basis in fact or logic for the Plaintiffs' assertions of imbalance or unfairness, and that the Plaintiffs were merely attempting to re-argue the whole will-say issue. But, through the use of their mistrial initiative, the Plaintiffs had, in effect, brought the whole trial to a standstill because of what they had revealed and asserted concerning their rejection of the will-say rules as the basis for calling their witnesses, the state of their will-says, and their conduct of these proceedings. Up to this point, the

Court had assumed that the Plaintiffs were calling witnesses on the basis of will-says that met the synoptic disclosure standards set in previous Court decisions, and affirmed by the representations and assurances given by the Plaintiffs that this was so. As the Court said in its decision of November 7, 2005 at paragraph 324(b), "In order to lead evidence in accordance with paragraph one (a) above, a summary of that evidence must have been disclosed in a way that meets the standards of disclosure already set by the Court in previous decisions and orders, which standards have been accepted by the Plaintiffs as being applicable to them and other parties to the proceedings." But now, as a result of what the Plaintiffs had revealed at the Mistrial Motion, such an assumption could no longer be made and the Court was left to deal with the future of the proceedings in the face of obstructive, confusing and inconsistent statements from the Plaintiffs.

[49] In addition, the Plaintiffs had also revealed that they had brought forward all of their witnesses on the basis that the will-say standards were unrelated to the admissibility of evidence at trial and that they did not understand or accept the use of will-says at trial to exclude relevant evidence. In other words, the Plaintiffs had placed clearly on the record, not only that they had not complied with the disclosure requirements of the will-say rules, but also that they rejected the will-say system as being unrelated to the calling of evidence at trial.

[50] The Plaintiffs have made no real attempt to demonstrate or substantiate their various assertions regarding these matters, so the Court and the other participants have simply been left to try and understand and respond to the inconsistent "positions" that the Plaintiffs have taken from time to time, even though it is obvious that the source of the problem is either inadequate will-say disclosure or a lack of interest on the part of the Plaintiffs in presenting the case they once assured

the Court and the other participants they had presented through their will-says in accordance with the rules. For example, the Plaintiffs appear to assume that the obligation to produce will-says that meet the synoptic standards of pre-trial disclosure can be somehow separated from their "position" that will-say disclosure is not connected to evidence at trial. The fact is that, if the Plaintiffs have produced will-says that meet the synoptic standards of pre-trial disclosure then they can have no problem with adequately stating or proving their case at trial because ambush could not be sustained. On the other hand, if will-say disclosure is not connected with evidence at trial in the way it has been connected in these proceedings when ambush is raised (and both the Plaintiffs and the Crown have raised ambush to exclude evidence) then whether or not pre-trial disclosure has occurred in accordance with the synoptic standards becomes irrelevant. If the Plaintiffs do not substantiate their positions, and refuse to answer questions contained in a Court direction aimed at garnering relevant information to deal with the problems, then the inherent paradoxes in the Plaintiffs' positions cannot be addressed, and this has been an inevitable consequence of the Plaintiffs' refusal to cooperate in sorting out the problems they have caused. Their refusal to explain, substantiate and cooperate has resulted in a tremendous waste of time and resources for all other participants, as well as the public purse.

[51] The Crown and NWAC considered that the Plaintiffs' whole approach was an abuse of process and asked the Court to dismiss the actions. The Court agreed that a serious abuse of process had occurred, but decided to try and salvage the situation and go on to hear the merits of the Plaintiffs' claims.

[52] Looking back over the record for the Mistrial Motion and its aftermath, it now seems clear that, having failed to secure their major objective of aborting the trial, the Plaintiffs then attempted to disconnect will-say disclosure from ambush issues. They not only refused to explain major inconsistencies and confusions or go to the actual record, they also defied a Court directive to provide relevant information that the Court needed to deal with problems they had caused. They called this obstruction their "best efforts." Their PL20 reply was simply a continuation of a defiant and obstructive approach to these proceedings. They refused to address the issues raised by the Crown and the Interveners, insisted on continuing the proceedings on their own terms, and professed they had "properly responded to the matters raised in the Court's consequential Reasons for Order and Order dated August 9, 2007."

The Court's Attempt at a Solution

[53] In the face of the Plaintiffs' refusal to either cooperate or disclose information requested by the Court to find a solution to the problems they had caused, the Court, in its order of August 9, 2007, laid down strict conditions for the future conduct of the proceedings in an attempt to discourage any further abuses of process and to try and move forward to hear the merits of the actions in a way that was consistent with previous Court decisions and rulings.

[54] As regards will-say compliance, the Court made it clear in its August 9, 2007 order that it required clear confirmation from the Plaintiffs that previous Court decisions had not been breached and that witnesses had been called and would be called on the basis of those decisions and the earlier reassurances given by the Plaintiffs that their will-says met the synoptic disclosure standards,

and that they had presented their case through their will-says in accordance with those standards. Paragraphs 6, 7 and 8 of my August 9, 2007 Order set out what was required. Such confirmation was needed not only to ensure compliance with Court decisions but also to prevent further abusive conduct and chaos regarding the basis upon which the trial was being conducted. The Plaintiffs' unsubstantiated assertion that the Court had foreclosed on their being able to adequately state their case, their rejection of the will-say rules as the basis upon which their witnesses were called, and their refusal to clarify the situation by answering the questions as directed by the Court, meant that there was complete uncertainty on major issues that would resound throughout these actions. Having been refused an adequate explanation or cooperation by the Plaintiffs, the Court sought clarity and consistency for the basis upon which the Plaintiffs were calling their witnesses. But the Plaintiffs' PL20 response of August 24, 2007 and the oral presentation that followed it were again non-responsive and evasive. The response also further contradicted the Plaintiffs' "position" that they had complied with all disclosure requirements, and this left the door open for further abusive conduct. What the Plaintiffs'PL20 response revealed about their conduct of these actions is important for these motions for enhanced costs and needs to be set out in some detail.

[55] By the time of my Consequential Reasons for Order and Order of August 9, 2007, the Court could not rely upon a bald assertion from the Plaintiffs that their will-says met the standards of disclosure set out in Court rulings and decisions. The Plaintiffs had already contradicted such an assertion in numerous ways, not the least of which was that, if it were true, then the whole Mistrial Motion was brought upon the basis of a fallacious and unsupportable premise. It is not possible that the Court could be using deficient will-say disclosure to exclude evidence if that evidence has been disclosed in the will-says in accordance with the synoptic standards. So there was obviously

something seriously wrong with the Plaintiffs' will-say disclosure if they said they could not adequately state their case to a degree that warranted a mistrial. Either that, or the Plaintiffs were simply not interested in presenting the case they once said they had presented through their will-says in accordance with the rules. In addition, if the Plaintiffs' will-says met all Court standards for disclosure, as the Plaintiffs continued to assert, then there would be no need for the Plaintiffs to bring their witnesses forward on the basis that "the acceptance of a standard of will-says in pre-trial disclosure and the Plaintiffs' effort to comply with that standard is … unrelated to the admissibility of evidence at trial." Likewise, if the Plaintiffs "have presented their case through the service of will-say statements … in accordance with the way in which the Court has permitted the Plaintiffs to present their case, and [they] want to proceed on that basis … ," as the Plaintiffs had previously assured the Court and the other participants, then it is not possible that the Court can have prevented the Plaintiffs from adequately stating their case in breach of the Canadian Bill of Rights by referring to what a will-say discloses when ambush is raised. If the Plaintiffs' case has been presented in their will-says in accordance with the synoptic standards, as they have assured the Court, then the Plaintiffs have told the Court that, in fact, they have been able to present their case and have not been prevented from doing so by reference to those standards. The Plaintiffs have made no real effort to address these inconsistencies and ambiguities and have simply wanted the Court to ignore them and carry them forward into the balance of the trial along with the Plaintiffs' repudiation of the will-say rules. The Court asked for clarity and consistency, but was refused for no reason that the Court can accept.

[56] In order to solve these problems and move forward, the Court simply decided to hold the Plaintiffs to their word by putting them to an election. This meant dealing with both past and future lay witnesses.

[57] Paragraph 7 of the Court's Order of August 9, 2007 was the Court's request for confirmation and reassurance on past witnesses. If, as the Plaintiffs asserted, their will-says for past witnesses met the synoptic standards for will-say disclosure, then it must mean that, for purposes of preparation and cross-examination by the other side, what those will-says disclosed in accordance with those synoptic standards was what a witness had been called to say. So paragraph 7 merely required the Plaintiffs to either disclose which of their will-says for past witnesses they regarded as deficient, or confirm the necessary correlative of their assertion that all of their will-says met the standards. The choice was entirely up to them. They were at liberty to provide the confirmation for all of the witnesses they had called. The Plaintiffs would not do either. Their response was a further attempt at avoidance and obfuscation. The Plaintiffs simply wanted to abandon the will-say rules while, at the same time, professing they had complied with those rules as far as disclosure was concerned.

[58] It is important to bear in mind that paragraph 7 is not some new disclosure obligation imposed by the Court. It merely asked the Plaintiffs to confirm the necessary correlative of their own "position" on standard-compliant will-says. But it was also a way of checking what they really meant by that position. While asserting compliance with the synoptic standards, the Plaintiffs have also tried to hedge that assertion by referring to "best efforts." Even though the Court has ruled this concept out, the Plaintiffs resurrected it again in their PL20 response. So it is not clear what they

really mean by compliance with synoptic standards even at a conceptual level. Paragraph 7 required them, among other things, to remove this ambiguity. If their will-says met the disclosure standards set by the Court as they asserted in their "position", then what those will-says disclosed in accordance with those standards must be what the Crown and the Interveners should rely upon as an indication of what a witness was called to say. In their PL20 response, the Plaintiffs said they had properly responded to the Court's paragraph 7 conditions, but a review of both their written PL20 reply and their verbal response in open Court revealed that they had not. The ambiguities and the inconsistencies remained.

[59] It is also important to bear in mind for the purpose of these costs motions that compliance with paragraph 7 would have accomplished at least three important objectives for the future of these proceedings:

a. Confirmation of compliance would have allowed the evidentiary record to stand exactly as it stood at that time;
b. It would have allowed the Plaintiffs to comply (at least in spirit) with previous court orders, decisions and rulings giving them the opportunity to call lay witnesses for whom they had provided will-says that met the synoptic disclosure standards;
c. It would have allowed the Plaintiffs to remain consistent with their own prior representations and assurances made to the Court and the other participants that the will-says they had produced met the synoptic standards, and that they had presented the case they wanted to make through their will-says in accordance with the standards, and that was the basis upon which the Plaintiffs wanted to proceed and upon which they wanted all other participants to proceed.

> But instead of going forward on this basis the Plaintiffs made it clear in their response to paragraph 7 that they intended to continue the obfuscation and avoidance of the past in an attempt to simply jettison the will-say rules. That response also left on the record the several inconsistent positions and statements of the Plaintiffs that reveal that their will-says do not meet the synoptic disclosure standards set in Court decisions and rulings, and that the Plaintiffs have brought forward their witnesses on the basis that "the acceptance of a standard of will-says in pre-trial disclosure and the Plaintiffs' effort to comply with that standard is … unrelated to the admissibility of evidence at trial" and they do not "understand nor … accept the use of will-says at trial to exclude relevant admissible evidence … ."

[60] The Plaintiffs' response to paragraph 8 was also revealing. Once again, paragraph 8 merely asked the Plaintiffs to confirm and bring forward their witnesses on the basis of their own assertion that their will-says for future witnesses met the synoptic disclosure standards set by the Court. It asked the Plaintiffs to show and give notice that the future witnesses they would bring forward had will-says that met those standards. If this were indeed the case, then it would be easy to demonstrate this fact to the Court each time a future witness was called. But once the Plaintiffs realized that the Court was serious about holding them to their own "position" and representations regarding compliance, and was actually going to take a look at the reality instead of just allowing reliance upon unsubstantiated "positions," they changed their position yet again and said that, if this were to occur, then the Court would find that "on the basis of previous Court rulings during trial excluding evidence, we expect that the will-say statements of all future lay witnesses will be found by the Court to be deficient." No explanation was provided as to how, if their previous position was true

and that all of their will-says were compliant with the synoptic standards, the Court would find those will-says to be deficient against the synoptic standards. Past rulings of the Court when will-says have come up in the context of an ambush claim have been based firmly on the synoptic standards of disclosure. So this was a clear indication that the Plaintiffs' will-says for future witness were all deficient and they were not prepared to substantiate their former assertions to the contrary, or proceed as the Court had previously suggested on the basis that what a will-say disclosed in accordance with the synoptic standards could be taken as disclosure of what a witness was being called to say. In effect, in their PL20 response the Plaintiffs told the Court that, if their will-says were examined they would be found to be deficient. At the same time they continued with their assertion that they had complied with the synoptic disclosure standards. The Plaintiffs were merely insisting on having it both ways. They wanted to assert compliance with the will-say rules and jettison those rules at the same time.

[61] It is also important to bear in mind for purposes of these cost motions that the Court has made it clear to the Plaintiffs that deficiencies in will-say disclosure need not necessarily be a bar to either retaining or calling their lay witnesses. In my reasons of August 9, 2007, I indicated as follows:

> 115. Before I identify the main grounds of abuse, let me say that I do not regard the underlying will-say problem as inherently complex or unresolvable. But it has now been rendered extremely difficult to deal with as a result of the Plaintiffs' approach to the whole issue. Once the Plaintiffs realized that their will-says were deficient, a simple acknowledgement of that fact would have suggested that they must assume responsibility for the defects and conduct these actions on the basis that what was set out in the will-says that met the standards would be considered as the full scope of what each witness had to say, and ambush issues would be dealt with accordingly in the ways already described by the Court in the mistrial decision and in earlier rulings.

> 116. All participants are confronted with the same problem. If any will-say does not cover the full range of evidence in accordance with the standards, then, in the event that ambush is alleged at trial, the responsibility must fall upon the participant who has produced the will-say.
>
> 117. But the Plaintiffs have thwarted this simple solution by their repeated argument and position that "the acceptance of a standard of will-says in pre-trial disclosure and the plaintiffs' effort to comply with that standard is … unrelated to the admissibility of evidence at trial." This is tantamount to saying that deficient will-says are somebody else's problem. And it means that the only way for the Court to ensure that ambush is not occurring is to ensure that the will-says do, in fact, meet the standards of disclosure set by the Court and that the Plaintiffs are not, and have not, called witnesses in breach of Court orders and their own reassurances to the Court and the other participants.

[62] I do not think there could be any more obvious signal from the Court that it was looking for a solution that would keep the evidentiary record intact, and that the Court was open to any suggestion that was consistent with the will-say rules as established by past decisions and rulings. However, as the Plaintiffs' subsequent conduct revealed, they were not interested in such a solution. They simply insisted on retaining witnesses, and calling further witnesses, for whom will-says had not been provided in accordance with past decisions and the disclosure standards, and on the basis that the Plaintiffs do not "understand nor … accept the use of will-says at trial to exclude relevant admissible evidence … ."

The Plaintiffs' Election

[63] It is important to keep in mind that there has been nothing to prevent the Plaintiffs from retaining <u>all</u> of their lay witnesses other than the Plaintiffs' own decisions. These actions were

proceeding and lay evidence was being led until the Plaintiffs attempted to stop that process by securing a mistrial. No one asked the Plaintiffs to take such drastic action. Likewise, no one forced the Plaintiffs to reject the will-say rules. And even after these matters did come to light no one prevented the Plaintiffs from retaining and calling all of their lay witnesses except the Plaintiffs themselves who would not confirm in the way requested by the Court their own "position" that their will-says were not in breach of Court orders and proceed to retain and call witnesses accordingly.

[64] When it came to the Plaintiffs' response to my order of August 9, 2007, the Plaintiffs chose their words very carefully, and because the costs claims in these motions have so much to do with wasted effort and resources, it is necessary to examine that response closely.

[65] Instead of electing to preserve their witnesses and their evidence, the Plaintiffs chose to provide a response that, as they had been foretold, would result in the striking of their witnesses and their evidence. This election is very important, not only for the costs claims set out in the present motions before me, but also for the balance of these proceedings.

[66] In their letter of August 28, 2007 the Plaintiffs summarized their own PL20 response as follows:

> The Plaintiffs submit that the allegations made by the Crown and the Interveners are devoid of merit, inappropriate and offensive. The Plaintiffs deny the allegations put forth by the Crown and the Interveners and submit that the Plaintiffs have properly responded to the matters raised in the Court's Consequential Reasons for Order and Order dated August 9, 2007.

[67] On the face of it, these words make it sound as though the Plaintiffs at least tried to give the reassurances that the court asked for in its August 9, 2007 order. But the full context reveals that this was not the case.

[68] The real choice that the Plaintiffs make is to maintain their repudiation of the will-say rules and to continue to insist that they be allowed to both retain and call witnesses even though they have revealed themselves to be in breach of the pre-trial disclosure requirement that is a pre-requisite for calling their lay witnesses.

[69] The Plaintiffs' response was, notwithstanding their words of August 28, 2007 that they had "properly responded," an election to maintain their repudiation of the will-say rules even if this meant losing all of their lay witnesses.

[70] Revealingly at this point, the Plaintiffs did not argue that the Court could not ask for reassurances of compliance, or strike witnesses if they were not forthcoming. The Plaintiffs' position was that they had "properly responded."

[71] As the Court explained at the time, the Plaintiffs provided the semblance of a reply that, in fact, simply continued both their revealed breaches of Court decisions and rulings regarding proper disclosure and their repudiation of the will-say rules.

[72] By "properly responded" the Plaintiffs' actual response reveals that they did not mean they had provided the reassurances that the Court asked for in its August 9, 2007 order. The full context

shows that what they meant was that their response properly preserves the positions they have taken that their will-says comply with the disclosure requirements and that there is no connection between will-say disclosure and evidence at trial. The context as a whole makes this very clear. A proper response for the Plaintiffs is revealed to be one that preserves their "position." But that was not what the Court asked for. As paragraph 6 of the August 9, 2007 order makes clear, the Court was looking for a response that would keep the Plaintiffs consistent with Court decisions and rulings, and with the Plaintiffs' own previous representations and assurances regarding the state of their will-says and their compliance with the disclosure requirements. So what the Plaintiffs mean by "properly responded," and what their PL20 written response and the Courtroom presentation that accompanied it reveal is, in fact, the opposite of what the Court would regard as a proper response and, when the Crown and the Interveners pointed this out, the Plaintiffs attempted to evade the issues with a simple dismissal: what the Crown and the Interveners had to say was "devoid of merit, inappropriate and offensive" simply because the Plaintiffs said so. Of course, that was not the case, and the Plaintiffs merely saying so without engaging the substance of what the Crown and the Interveners had to say is not argument. It is evasion. It is on a par with refusing to provide a responsive answer to the Court's direction and then calling it "best efforts."

[73] It is important to keep in mind at this point that the Court, in its August 9, 2007 decision, was giving the Plaintiffs the opportunity – notwithstanding their abuse of process, and even though they had breached Court decisions and their own representations and assurances regarding compliance with the will-say rules – to retain and call <u>all</u> of their lay witnesses if they would respect the will-say rules in the ways they had earlier represented to the Court and the other participants that they would.

[74] It is very revealing that the Plaintiffs, neither in their August 28, 2007 letter or otherwise, do not say they have given the reassurances requested by the Court, or that they ever intend to. This is why they simply dismiss the substantive issues raised by the Crown and the Interveners and stay with their previously stated "position" on compliance and disconnectedness.

[75] The same approach is evident in the Plaintiffs' repeated assertions that they meet the will-say disclosure standards. The full context reveals that what they mean is that they have met the disclosure standards as they have now chosen to define those standards at trial, hedged about with notions of "best efforts" and doing their best which, as I will explain later, simply dissolve the standards and render them meaningless. This is not what the Court means by compliance with the synoptic disclosure standards, and the Plaintiffs know that because I have made it very clear in reasons and rulings what the Court means.

[76] As the Court pointed out at the time, if the Plaintiffs had had any intention of providing a responsive reply to my August 9, 2007 order, they would have tracked the wording, or provided wording that in substance gave the reassurances ordered by the Court, they would have responded to the points raised by the Crown and the Interveners, and they would have somehow communicated to the Court that they intended to do what the Court was asking.

[77] Having said that they had "properly responded," the Plaintiffs simply stayed with their unsubstantiated and repeatedly contradicted "position" that they had complied with Court decisions

and rulings regarding will-says, and gave a response that would, if accepted, allow them to carry their breaches, evasions and inconsistencies forward into the trial.

[78] So the Plaintiffs' PL20 response was yet another exercise in equivocation. But it was also an election. They were warned of the consequences of not providing a reply that was truly responsive to the Court's August 9, 2007 order, they had ample time within which to assess the situation and put together a carefully-worded reply, and they were even told of the deficiencies in their response ahead of time.

[79] The carefully prepared answers that the Plaintiffs provided in their PL20 response should be compared in this regard with the spontaneous answers that Plaintiffs' counsel has provided in open Court when the Court has asked whether the will-says have been checked against the synoptic standards (yes they have and they are deficient), or what Mr. Healey could possibly have meant by some of the words he used at the Peshee hearing (see paras. 97-106 of my June 19, 2007 reasons).

[80] The Plaintiffs' PL20 response was an election not to give the Court the assurances it asked for with full knowledge of the consequences. As the Court had made clear to the Plaintiffs, the time for equivocation was over. The Plaintiffs chose not to proceed in the way stipulated by the Court. The consequences of that choice were inevitable.

[81] I said at the time that I understood the Plaintiffs' election as being consistent with their previously stated positions. And those positions were that they had complied with all Court decisions and rulings regarding will-say disclosure (a position that the Court must reject because of

what the Plaintiffs have otherwise revealed and because, if that were the case, the Plaintiffs would have no problem providing the reassurances required under paragraphs 6, 7 and 8 of my August 9, 2007 order), and that they "unequivocally" repudiate any connection between will-say disclosure and evidence at trial (a position that the Plaintiffs have not satisfactorily explained even at a conceptual level, and that is entirely at odds with Court decisions and rulings that lay down the will-say rules, as well as with the Plaintiffs own previous position as dramatized at Peshee). The Plaintiffs, rather than retain and call all of their lay witnesses, elected to remain consistent with positions that, in my view, are simply untenable in the context of these proceedings as a whole.

[82] The Court made it clear to the Plaintiffs that the time for equivocation was over. The choice before them was to either proceed in accordance with the will-say rules for all of their lay witnesses or to lose those witnesses. The Plaintiffs chose not to live by the rules but rather to stay with their previously asserted positions. That choice had a tremendous impact upon the time and resources wasted by the Crown and the Interveners, not to mention the public purse and, having made that choice, the Plaintiffs must face the costs consequences.

Best Efforts

[83] The Plaintiffs' election not to provide the Court with the reassurances it ordered on August 9, 2007 can also be seen in the Plaintiffs' re-deployment of the "best efforts" equivocation in their PL20 response.

[84] As they have come under pressure to explain themselves the Plaintiffs have vacillated between asserting that they have complied with the synoptic disclosure requirements (see paragraph 26 in their written submissions for these costs motions) and an alternative position that the Plaintiffs made every effort, or used their best efforts, to meet the synoptic standards. As a result, it is not possible to tell whether the Plaintiffs are asserting that they have met the synoptic standards, or that they have not, but did their best to meet them. This vacillation reveals the Plaintiffs attempting to absolve themselves of the consequences of non-compliance and, once again, have it both ways. It means that they can assert compliance even if there are gaps in their disclosure. It allows them to say that they did their best and the synoptic standards do not require the Plaintiffs to disclose what a witness will say, but only to do their best to disclose it. In other words, the Plaintiffs are trying to shift the risk of ambush to the other side. Such a position means that, if the Plaintiffs failed to meet the synoptic standards, then that is not their problem, it is the Crown's.

[85] In my reasons of June 19, 2007, I discussed this issue extensively at paragraphs 87-95 and ruled that the will-say requirement could not be plainer and that there was nothing "best efforts" or otherwise permissive about Court orders setting the standards for will-say disclosure.

[86] And yet, in their PL20 response, after the Plaintiffs had been told to stop re-arguing matters already dealt with by the Court and to give re-assurances of compliance with Court decisions regarding will-say disclosure, the Plaintiffs say "Again, we submit that no breach of a Court order has occurred in the circumstances where despite best efforts of counsel it turns out that the synopsis is wanting in detail."

[87] The Court had not asked the Plaintiffs for further argument on best efforts and its relationship to the synoptic standards. The Court had already made its position clear on that issue. The Court had asked for confirmation of compliance with Court decisions and rulings as those decisions and rulings have been explained by the Court. In order to avoid giving the Court what it asks for, the Plaintiffs embarked upon yet another attempt to slip "best efforts" back into the proceedings notwithstanding their assurances given on other occasions that they have met the synoptic standards. In the process they elected not to address the paragraph 7 requirements of my August 9, 2007 order.

[88] Best efforts is irrelevant to the issue of ambush. Whether or not the Plaintiffs used their best efforts to produce their will-says, it is what the will-say actually discloses in accordance with the standards that the other side must be able to rely upon for preparation and cross-examination. Failing to disclose what a witness will say in accordance with the synoptic standards means that the risk of ambush falls upon the party who produced the will-say, not upon the other side who had no hand in producing the will-say.

[89] At the Peshee hearing when they were asserting the importance of proper notice, guided by the standards in the will-say, the Plaintiffs did not argue that they should assume the risk of ambush because NSIAA had used its best efforts to produce a will-say that met best efforts standards but had failed to meet synoptic disclosure. They advocated that, in dealing with ambush, the Court must look at what is actually disclosed in a will-say in accordance with the synoptic standards. It could not be any other way if will-say disclosure is to play the role that both the Plaintiffs and the Crown have assigned it in these proceedings.

[90] And as I have said before, there is no evidence before me to show that the Plaintiffs used their best efforts even if the concept was relevant to ambush issues. The evidence before me is just as consistent with any other interpretation of why the Plaintiffs might have produced and served deficient will-says. But more important is the fact that the Plaintiffs were given the time they asked for to produce will-says that met the disclosure standards the Court has clearly articulated for them, and the Plaintiffs represented to the Court and the other participants that they had done precisely that. The Plaintiffs may well have used their best efforts to meet the standards, but if they have failed to do so the risk of an ambush at trial falls upon them, not upon the other side, and if they have failed to disclose what a witness will say then they are in breach of the disclosure requirements even if they used best efforts.

[91] By attempting to re-argue this whole issue in their response to paragraph 7, the Plaintiffs were attempting to re-assert a position the Court had already rejected. They were not attempting to provide the reassurances the Court had ordered them to give if they wanted to preserve their witnesses. By electing not to respond in the way that was ordered, the Plaintiffs were electing to lose their witnesses in order to stay with their previously stated positions on will-says which, as I have pointed out, the Court had already found untenable.

Summary

[92] The Plaintiffs' problem is obvious. The Mistrial Motion revealed that they would prefer to terminate the trial and start again. They have revealed that the will-say rules must be abandoned for

them to continue with their lay witnesses. This is why they have repudiated those rules "unequivocally." Either their will-say disclosure is so deficient that they see no point in continuing with their lay witnesses if will-say disclosure is connected to ambush at trial in the way it has been connected to date, or they want to be free of the will-say rules because they are no longer interested in presenting their case in the way they once assured the Court and the other participants they had presented it in accordance with the will-say rules.

[93] The Plaintiffs have refused the further opportunity held out to them by the Court to retain the evidence of lay witnesses already called and to call all future lay witnesses in accordance with the will-say rules. They want to have it both ways. They insist they have complied with the disclosure standards (a position they have contradicted in numerous ways) and so have attained the right to call their witnesses in accordance with Court decisions, but they also insist that those same witnesses are called on the basis that there is no connection between disclosure standards and evidence at trial. In other words, when ambush comes up, the will-says are somehow irrelevant.

[94] But this is not the basis upon which the Plaintiffs were allowed to call new lay witnesses and their recalcitrance in revealing and dealing with the problem has prevented any solution short of striking their witnesses. The Plaintiffs have been given a full opportunity to call new lay witnesses and to lead relevant evidence through those witnesses. The problem relates to the Plaintiffs' repeated refusal to respect the will-say rules that (bearing in mind the difficulties encountered during discovery) were devised to avoid ambush at trial and allow the other side to prepare adequately for trial.

[95] In their PL20 response, the Plaintiffs refused to confirm in the way requested by the Court that they had called their witnesses in accordance with the disclosure rules that bind all participants. This meant that they continued their stated position that (even though they had used the disclosure rules to their own advantage in excluding evidence at the Peshee hearing) their witnesses were called on the basis that "the acceptance of a standard of will-says in pre-trial disclosure and the Plaintiffs' effort to comply with that standard is … unrelated to the admissibility of evidence at trial." They also did not revise their previous assertion that, somehow, they just did not "understand nor … accept the use of will-says at trial … [to] exclude relevant, admissible evidence." Yet it was the Plaintiffs themselves who, at the Peshee hearing, had insisted that the "ultimate question" when ambush is raised at trial is adequate "notice" and "the answer to that question is guided by the standard in the will-say." The will-say is not everything but it is connected to ambush issues and thus to evidence at trial.

[96] It is also important to bear in mind for purposes of deciding these costs motions that when it came to complying with paragraphs 6, 7 and 8 of my August 9, 2007 Order, the Plaintiffs were given notice of the deficiencies in their PL20 written response of August 24, 2004, but declined to address those deficiencies. A trial management conference was held on September 4, 2007 at which I pointed out the consequences of non-compliance. I even went so far as to give the Plaintiffs some of my preliminary concerns over the way they had responded to paragraph 8 and warned them that they needed to be careful.

[97] When the Court reconvened on September 10 and 11, 2007, and after hearing full argument, I had to conclude that the Plaintiffs had chosen "not to address in any detail the points raised by the

Crown and the Interveners." In the end, the Plaintiffs simply re-asserted their unresponsive and inconsistent "position." It was clear they had elected not to provide the assurances the Court had asked for, even though the consequences had been brought to their attention as well as the defects in their response. They simply chose not to comply or deal in any meaningful way with the concerns raised by the Crown and the other participants.

[98] The order of August 9, 2007 asked the Plaintiffs to play by the rules they had earlier confirmed and exploited to their own advantage. They refused. The Plaintiffs have always been free to call witnesses if they will respect the will-say rules. Yet, knowing the consequences of, and the deficiencies in, their evasive and non-responsive PL20 reply, they gave the Court no indication that they were prepared to do this.

[99] So, once again, the Plaintiffs refused to accept a solution that merely asked them to confirm the necessary correlative of their own "position" regarding compliance with Court decisions dealing with will-says. They wanted to have it both ways.

[100] In relation to all of their witnesses, the Plaintiffs have revealed (after calling eight of them) that they have sought to create and exploit ambiguities and inconsistencies in order to try and break free of the will-say rules. Their PL20 response confirmed that they intended to continue to conduct the balance of the trial in the same manner. For example, when it comes to excluding the evidence of what they call "the other side" the Plaintiffs have said in the past that the "ultimate question" is "notice" and that "the answer to that question is guided by the standard in the will-say." The Plaintiffs have also urged that "it's important that both sides have notice, the same kind of notice."

But when it comes to their own evidence the Plaintiffs now maintain that "the acceptance of a standard of will-says in pre-trial disclosure and the plaintiffs' effort to comply with that standard is … unrelated to the admissibility of evidence at trial." The Court has refused to accept this kind of ambiguity or inconsistency. The Plaintiffs have refused to clarify their position in any way the Court can either understand or accept. The Court has, through its direction of July 5, 2007 and its Order of August 7, 2007 asked the Plaintiffs to either reveal which will-says are deficient and how and why they are deficient so that the problem can be understood and solved, or to bring forward their witnesses on the basis that what is disclosed in their will-says that meets the disclosure standards is what a witness was, or is, brought forward to say. While insisting that they have met the standards of disclosure for their witnesses (but then contradicting this position) the Plaintiffs have refused to provide the clarity requested and have attempted, through their several non-responsive replies, to add further ambiguity to the situation. If they cannot succeed in having the trial aborted then they want their witnesses not to be subject to the kind of rulings the Court has had to make regarding ambush in which will-say disclosure has been a strong factor to date. They want their witnesses to testify in a way that is totally free of will-say disclosure and what they have told the Crown their witnesses will say. They want to be free of the will-say rules but they know that under Court decisions and rulings they can only bring lay witnesses forward in accordance with the will-say rules. They want to say their witnesses have complied with the rules for purposes of taking the stand but the rules do not apply to them once they take the stand. Rather than remove the inconsistencies and comply with the will-say rules, the Plaintiffs have chosen to allow their witnesses to be struck.

[101] The Plaintiffs were given full notice of the assurances the Court required and of the consequences of their not providing those assurances. They expressed no confusion about what was

needed. They were given advance notice from both the Court and the other participants that their PL20 written response did not address the issues adequately and they made no real attempt at the hearing to address the points raised.

[102] The reality is that the Plaintiffs have refused the solution and further opportunity offered to them to retain their lay witnesses (a solution entirely consistent with their own assertions of compliance) and have continued with their insistence that the proceedings move forward notwithstanding the problems they have caused. At bottom, this is an assertion that Court decisions and the Plaintiffs' own earlier representations and assurances should be ignored and that the Plaintiffs should be free to call any evidence at trial in total disregard of the will-say rules. The Plaintiffs have never adequately explained how will-say rules applicable to all participants can be unfair or can have prevented them from calling any evidence they want to call at trial. The pre-trial synoptic disclosure of what a witness will say, designed to facilitate preparation and allow effective cross-examination at trial, is not a limitation on evidence. In addition, the Plaintiffs have assured the Court that their case has been presented in their will-says "in accordance with the way in which the Court has permitted the Plaintiffs to present their case, and we want to proceed on that basis … ." The Plaintiffs have refused to explain how this earlier position might have changed. They have simply tried to browbeat the Court into discarding the will-say rules in their entirety when it comes to their own evidence at trial. In doing this they have revealed that either their will-say disclosure is so deficient that there is just no point to retaining or calling lay witnesses if the will-say rules apply, or that the case they said they wanted to present to the Court in accordance with the will-say rules is not the case they now want to present, so that they now want a mistrial declaration or their witnesses

to be entirely free to present something that has not been disclosed in accordance with the synoptic standards they earlier affirmed.

Why Does It Matter?

[103] The implications and repercussions of ignoring the problems the Plaintiffs have caused, and of allowing them to simply proceed on the basis they have asserted, are legion. Some of them are as follows:

a. The detailed impact upon the evidence of any witness led, or to be led, or upon evidence given, or upon the course of the trial and any rulings (past or present) of the Court, is unknown because the Plaintiffs have refused to provide the information that the Court needs and has requested to make such an assessment. The Court can only assume, in light of such resistance, that the Plaintiffs must perceive and/or have achieved a material advantage to proceeding in breach of Court decisions and their own previous representations and assurances. Otherwise, there would be no reason to obstruct the Court in the ways they have;

b. The status of all evidence called on the basis of there being no connection between standards and evidence at trial, and any rulings made with regard to that evidence that involved the will-say rules or individual will-says, would be highly ambiguous and open to challenge. The Court has asked the Plaintiffs to confirm compliance with Court orders and rulings regarding disclosure. The Plaintiffs have refused to provide any such confirmation;

c. It would permit and condone a breach of Court decisions and rulings that lay down the rules of compliance and establish the connection between will-says and evidence called at trial. This would be an affront to the authority and dignity of the Court. It would mean excusing the Plaintiffs, yet again, for breaches of Court orders and decisions and giving them a right and an opportunity afforded to no other participant;

d. The pre-requisites for calling lay witnesses and the connection between will-says and evidence at trial are established in Court decisions and rulings and are *res judicata*. To allow the Plaintiffs to call and/or retain evidence they have now revealed was called in breach of disclosure requirements and on the basis of there being no connection between standards and evidence at trial is to allocate to the Plaintiffs a right to disregard and re-argue matters that are *res judicata*. For example, the Plaintiffs' revelations of non-compliance with disclosure standards take the proceedings back to my decisions and orders of October 18, 2004 and November 25, 2004 that struck their non-compliant will-says and ordered the Plaintiffs to produce standard-compliant will-says for the lay witnesses they intended to call. Those orders remain in effect. They were not appealed. The Plaintiffs accepted that the Court could strike witnesses if they failed to produce will-says that met the standards. Once the Plaintiffs revealed that they had called their witnesses on the basis of no connection between standards and evidence at trial, and that their will-says were deficient in terms of those standards, the decisions and orders of 2004 immediately came back into play;

e. It would allow the Plaintiffs further opportunity to continue to exploit their own inconsistencies, evasions and obstructions on the basis that they are conducting themselves in accordance with their "best efforts" and encourage them in the view that they do not need to provide clarity and consistency in their conduct of these actions and in their statements to the Court and the other participants, and upon which both the Court and the other participants rely;

f. It would allow the continuation of abusive conduct that has already taken up a vast amount of pre-trial and trial time at the expense of other participants and the public purse. One of the purposes of the will-say rules was to ensure an efficient trial after years of difficult wrangling. The Plaintiffs have already thwarted that purpose and their rejection of the will-say rules means that they intend to go on thwarting that purpose. This is an abuse of process that the Court cannot allow to continue. The Plaintiffs have attempted to perpetuate the chaos that, in my decision of October 18, 2004 at paragraph 47, I told them was unacceptable;

g. It is not possible for the Court to ensure a fair, just and efficient resolution on the merits when one party rejects the rules established for these proceedings and declares and reveals that it is proceeding on a basis that does not accord with Court decisions and rulings, particularly a party that has already succeeded in excluding evidence it did not want on the record by using the will-say rules to its own advantage;

h. To allow the Plaintiffs to retain witnesses, and call further evidence, that they have now revealed were called or will be called in breach of Court decisions and rulings, and their own reassurances of compliance, would be to allow the Plaintiffs to do what they would not have been able to do if their breaches and rejection of the will-say rules, and their connection to evidence at trial, had been declared or revealed before those witnesses were called. Had the Plaintiffs revealed what they intended to do before the trial, or had they brought a motion on the role and use of will-says at trial within the time directed by the Court, all of these issues would have come to light and the Plaintiffs would have been put to the same election that is contained in my order of August 9, 2007. The Plaintiffs cannot be allowed to circumvent the will-say rules as a result of their refusal to do what they should have done before the trial by retaining and calling witnesses in breach of the system and then profit by that circumvention.

[104] In my October 18, 2004 decision I dealt with the Plaintiffs' assertion that they have an "absolute right" to decide how they should present their case in Court. I refer to those issues at paragraph 83 of my June 19, 2007 decision. Once again, we are really back to 2004. The Plaintiffs are, in effect, claiming an "absolute right" to conduct this trial in total disregard of the will-say rules. The answer and the ruling I gave them in 2004 still stand. The Court must remain consistent with that decision.

[105] Both sides have asserted the importance of will-say compliance for adequate preparation and avoidance of ambush at trial. They have also asserted the connection between will-say standards and evidence at trial. The Crown has made it clear that it is crucial for dealing with the kinds of oral

history and other culture-specific evidence that the Plaintiffs wish to bring forward. The Crown has also demonstrated to the Court some of the ways in which the will-say rules adopted in this case became necessary as a result of resistance to disclosure by the Plaintiffs at the discovery phase. But the Plaintiffs have also asserted and demonstrated the importance of disclosure in accordance with the standards for their own preparation and conduct of the trial as well as their acceptance of the connection between will-says and the calling of evidence at trial. They brought a motion asking the Court to order the Crown and the Interveners to provide will-says that met the disclosure standards set by the Court. The Court supported them in this endeavour and granted the relief requested. They also fiercely asserted the importance of will-say disclosure and connectedness for evidence at trial at the Peshee hearing and received the Court's support. They cannot now bring witnesses forward as though the past never happened and will-say disclosure and connection do not matter at trial when it comes to ambush and the exclusion of evidence.

[106] Following the Court's decision of August 9, 2007 and the Crown's abuse of process complaints, it has been obvious that, notwithstanding their repeated breaches of Court orders and the Crown's justifiable objections, the Court is prepared to allow the Plaintiffs to both retain and call their lay witnesses provided they will respect and abide by the will-say rules established by Court orders and rulings, and confirmed and used by the Plaintiffs themselves. At no time have the Plaintiffs given any indication that they are willing to do this. In fact, it is now clear that if they cannot abort the trial and start again, for whatever purpose they have not disclosed, it is imperative for them to break free of the will-say rules, and they have told the Court "unequivocally" that they will not accept any connection between will-say disclosure and evidence at trial.

[107] Compliance with the will-say rules requires no great effort or hardship. In fact, it only requires the Plaintiffs to provide a synoptic account of what each lay witness will say in accordance with the disclosure standards set by the Court, or accept that what is disclosed in accordance with those standards is what the Crown is entitled to rely upon as indicating what a witness will say for purposes of preparation and cross-examination at trial. And this means that if an ambush objection is raised at trial then the relevant will-say is one document that can be referred to in deciding whether or not ambush has really occurred from an objective and common sense perspective.

[108] The Plaintiffs have themselves asked the Court to enforce these principles. They brought a motion to ensure that the Crown and the Interveners had produced will-says that met the synoptic standards of disclosure. The Court granted that motion and ordered the Crown and the Interveners to provide the Plaintiffs with will-says that met the synoptic standards. At the Peshee hearing the Plaintiffs asked the Court to protect them against ambush and they asked the Court to refer to Ms. Peshee's will-say in order to determine whether ambush had occurred. The Court has simply told the Plaintiffs that they are bound by the same principles. But the Plaintiffs have said "unequivocally" that they will not accept or comply with these principles when it comes to any of their witnesses. In fact, the Plaintiffs have elected to have all of their lay witnesses struck rather than confirm disclosure in accordance with the rules.

[109] Behind all of the Plaintiffs' accusatory and obstructive tactics lies the reality that all the Court has attempted to do is have the Plaintiffs respect the rules established by the Court for pre-trial disclosure and its implications when ambush arises at trial. And to be blunt about it, the Plaintiffs' response to these efforts has been that, notwithstanding their own repeated breaches, and

notwithstanding the Court's repeated attempts to allow them to call their lay evidence, they simply refuse to either retain the witnesses already called, or to call further lay witnesses, if will-says are going to be connected to ambush at trial. They simply insist that their lay evidence be called without regard for the will-say rules established by Court decisions and rulings, even rulings that were made in their favour at the Peshee hearing.

[110] The Plaintiffs have at all times been free to elicit any evidence they please through their lay witnesses, provided it is relevant to the pleadings, and they have been given all the time they said they needed to do it. But they have not complied with the will-say rules in terms of disclosure and they have rejected all connection between pre-trial will-say disclosure and the calling of evidence at trial. These breaches and rejection are rendered more reprehensible in light of the Plaintiffs' assurances and representations to the contrary:

> My Lord, you set the rules, and we have complied with them as best we can. And we are working under the rules that have been set by the Court. So the Plaintiffs have presented their case through the service of will-say statements and the December 21 submission in accordance with the way in which the Court has permitted the Plaintiffs to present their case, and we want to proceed on that basis and have my friends comply in the same way. [emphasis added]

These are matters that must be taken into account in the costs motions presently before me.

Stating and Proving their Case

[111] Although the Plaintiffs' PL20 reply was non-responsive and obfuscatory as regards paragraphs 6, 7 and 8 of my August 9, 2007 Order, it was dramatically plain on one point. The Court was compelled to ask the Plaintiffs for the response referred to in paragraph 11 of my order

because it was entirely unclear what the Plaintiffs meant when they said in the Mistrial Motion that they could not adequately state their case.

[112] In their response to paragraph 11 of my August 9, 2007 order, the Plaintiffs were (when compared to their response to paragraphs 6, 7 and 8) revealingly brief and to-the-point:

> The Plaintiffs confirm that they can prove their case even if their will-says are connected to admissibility at trial in the way already found by the Court, and even if the Court uses the same standards in deciding admissibility as the standards used in Court rulings to date, although the Plaintiffs respectfully maintain that the exclusion of relevant evidence has compromised their ability to adequately state their case.

[113] What is clear about this response is that the Plaintiffs have said they can prove their case if the will-say rules are applied. Of course, this is not evidence that they can. As the Plaintiffs have demonstrated to the Court over disclosure and compliance issues, they have no problem in stating a "position" that may be contradicted and undercut in other ways. All that can be said about their response to paragraph 11 is that the Plaintiffs took a "position" that they could "prove" their case, even if the Court were to go on doing precisely what the Plaintiffs had accused the Court of doing i.e. applying a comprehensive and detailed standard in its rulings on ambush. This position casts a strong light upon other things the Plaintiffs have said, and other "positions" they have taken. It is also a "position" that renders their election to allow their witnesses to be struck extremely troubling.

[114] First of all, this is a clear statement that, as far as the Plaintiffs are concerned, the will-say rules, as established in Court decisions and rulings, are not an obstacle to the Plaintiffs' "proving" their case. And yet, it is just as clear that the Plaintiffs would prefer to abort the trial if they could, and if they can't, that they do not want the will-say rules to apply to their witnesses.

[115] Secondly, it means that when the Plaintiffs chose to have their witnesses struck under paragraphs 7 and 8 of my August 9, 2007 order, they were electing not to proceed with their actions on a basis that, if their response is to be taken at face value, would have allowed them to prove their case. This sounds highly implausible to me because it would mean that the Plaintiffs rejected a process that would have allowed them to prove their case merely because that process "compromised their ability to adequately state their case" in a way that has not really been explained.

[116] Thirdly, it reveals the Plaintiffs once again retreating into a vague and unsubstantiated "position." During the Mistrial Motion they said that the Court had "foreclosed the Plaintiffs' opportunity to adequately state their case." Now they say that "the exclusion of relevant evidence has compromised their ability to adequately state their case." Their position is not that it has compromised their ability to adequately prove their case. And this is why it is extremely difficult to understand or accept.

[117] This reveals several important matters. The Plaintiffs have not shown the Court what relevant evidence, if any, may have been excluded, or what relevant evidence might be excluded, by the Court's will-say rulings, that would compromise their ability to adequately state their case, even though they say they can prove their case.

[118] The Court has no way of knowing what "compromised" might amount to in terms of evidence exclusion, even if it could give a contextual meaning to the word. "Compromised" does

not mean the same thing as "foreclosed." Foreclosed means that the Plaintiffs have been prevented or shut out from adequately stating their cases. "Compromised" means that there is some impact, but it reveals nothing about how slight or significant that impact might be, let alone what it has to do with proving their case.

[119] This is not a matter of semantics. What it shows is that, in the absence of specific evidence concerning what has been excluded, the concept of adequately stating a case, as opposed to proving it, is pretty well meaningless. It evaporates, and its evaporation, even in the minds of the Plaintiffs, is shown to have begun in the shift from "foreclosed" to "compromised." They will not reveal what they mean by it or show the Court what it really does to prevent them from presenting the case they want to present to the Court. Yet, they asked the court to declare a mistrial on the basis of this unexplained and unsubstantiated concept in a situation where they say they could prove their case. This is very difficult to accept or understand.

[120] The only sense I can make of what the Plaintiffs mean by a distinction between being able to prove their case and being able to adequately state it or, as they now say, being compromised in their ability to adequately state their case, is that they must be allowed to elicit evidence from lay witnesses entirely free of the will-say rules irrespective of how those rules might impact their overall ability to present the case they want to present to the Court. If they are not given that freedom, then they say they will be able to prove their case but they will be compromised in their ability to adequately state it, even though they are not prepared to demonstrate to the Court what they mean by "compromised" – or even "foreclosed" – in this context. This seems to mean that, as the Plaintiffs elicit evidence from their witnesses, the Court must not allow the Crown to object on

the basis of ambush or, if such an objection is allowed, then the relevant will-say must not be referred to, because there must be no connection between that will-say and the evidence to be called at trial. If this is indeed what the Plaintiffs mean, and it is the only sense I can make of it, then the Plaintiffs have yet to explain why they asked to be protected from ambush at the Peshee hearing and advised the Court that, in dealing with ambush, the will-say standards were the guiding principal. They have argued that Peshee was only about excluding oral history evidence (not correct) given by an Intervener witness. But the Plaintiffs' statements at Peshee were clearly about "both sides" and the role that will-says have played in ambush situations is clearly a function of Court decisions and rulings. In addition, if this is what the Plaintiffs mean by being compromised in their ability to adequately state their case, they have yet to explain how a pre-trial requirement of synoptic disclosure (that they profess to have complied with) can have compromised their ability to present to the Court any case they want to present. On January 7, 2005, they were clear that it had not, and would not, do so. And they have neglected and refused to explain to the Court what might have changed in the interim.

[121] Once again, it would appear that the Plaintiffs have raised an unexplained concept (adequately stating their case) in order to justify their position that there can be no connection between will-say disclosure and evidence at trial. They simply want to break the connection so that their witnesses will be free of any ambush restrictions if they go into areas that are outside the case the Plaintiffs have assured the Court and the other participants they have presented through their will-says in accordance with the rules. The Plaintiffs refuse to substantiate the concept because that would lead back to will-say disclosure problems and their former promises concerning will-say disclosure.

[122] Failure to explain these matters and to demonstrate what "compromise" means, has left the Court to ponder a further problem: Why, if the Plaintiffs felt they could prove their case if the will-say rules was connected to the Court's rulings on ambush, and the Plaintiffs only felt themselves to be "compromised" in their ability to adequately state their case, did the Plaintiffs elect to have their witnesses struck by repudiating the will-say rules and failing to confirm disclosure in accordance with the standards? Once again, the inference seems unavoidable that, if the Plaintiffs cannot secure a mistrial, their will-say disclosure is such that there is no point in retaining or calling lay witnesses either because ambush issues render it pointless or because the case that they want to present through those witnesses is not the case they assured the Court and the other participants was presented through their will-says in accordance with the rules.

[123] In any event, there is no evidence before me, and no plausible explanation, that the Court's rulings regarding ambush at trial have had, or could have for future witnesses, any impact upon the Plaintiffs' ability to prove their case or to state their case, whatever that might mean in the context of these actions. The Plaintiffs have refused to demonstrate the impact of Court rulings under either concept. It is just another unsubstantiated assertion or "position" that the Court is expected to accept at face value. Although the Plaintiffs have asserted (without substantiation) to the contrary, ambush rulings in these proceedings have been factual determinations, made on an objection by objection basis, and using the Court's discretion to determine, reasonably speaking and as a matter of common sense, whether real ambush has occurred. In those ambush determinations made to date, will-says have played a prominent role for reasons that the Court has already set out elsewhere in considerable detail. But each determination has been factual and discretionary. There is no way to

tell what might have happened in the case of future witnesses who, because of the Plaintiffs' election not to proceed in accordance with the will-say rules, will not be called. In fact, there is now no way to determine what the full impact might be on witnesses already called because, at the time the Plaintiffs made their election and those witnesses were struck, the Court had not yet provided its final rulings on the ambush objections raised during the testimony of Elder Bruce Starlight.

[124] The Court is left with a "position" that the Plaintiffs do not understand and do not accept a connection between pre-trial disclosure standards and the admissibility of evidence at trial even though, if such a connection is made in the way the Court has made it in its rulings, the Plaintiffs say they can prove their case. What the Plaintiffs object to is that such a connection has "compromised" their ability to state their case, but there is no clear indication of what "compromised" might mean in terms of what has happened before the Court, and there is no indication as to how being "compromised" in stating their case is related, if at all, to their ability to prove their case, and there is certainly no indication as to what any of this might mean in the context of the full range of evidence the Plaintiffs have said they plan to lead before the Court.

[125] I cannot understand or accept a refusal to proceed under the will-say rules because those rules "compromise" the Plaintiffs' ability to state their case when it is impossible to determine or demonstrate at this juncture what compromise can possibly mean in the context of the overall panoply of evidence that the Plaintiffs have told the Court they plan to lead. Such a determination could only be made when all of the evidence is in and the Court has made its decision. Unless, of course, the Plaintiffs feel there is no point, or have no interest, in trying to prove their case in accordance with the will-say rules.

[126] It was made clear to the Plaintiffs that they could retain and call all their lay witnesses if they would respect and adhere to the will-say rules. They have told the Court that, if they adhere to the will-say rules, they can prove their case. And yet, they have rejected that system and have elected to have their witnesses struck.

[127] The Plaintiffs have revealed that they do not wish to explain such paradoxes, or address inconsistencies and demonstrate to the Court what they mean by statements and positions they advance in order to secure a mistrial. Similarly, they will not explain why they are not willing to retain and call witnesses in accordance with will-say rules that, by their own account, would allow them to prove their case.

[128] They simply refuse to engage with the Court on these basic issues. Their stand is that the Court must allow them to proceed as they wish and in accordance with whatever position on will-says and evidence they may state from time to time. This untenable position has to be taken into account in these costs motions.

[129] In the end, the Plaintiffs have left the Court with two inconsistent positions on this point. They now say that the will-say rules will compromise their ability to state their case. In 2004/05, however, the Plaintiffs told the Court and the other participants that they had produced will-says that met (some even exceeded) the disclosure standards, and that they had presented their case through their will-says and wanted to proceed on that basis. In the absence of an explanation, the Court must conclude that these positions cannot be reconciled, but the Plaintiffs have refused to provide the

Court with the facts and explanation it needs to determine what these inconsistent positions actually mean, and what has changed in the interim.

[130] In the absence of an explanation it seems incontrovertible that if the Plaintiffs cannot adequately state their case now, then they could not adequately state it when their will-says were drafted, and yet they have previously told the Court and the other participants that they wanted to proceed on the basis of what they had produced and served. The condition of will-says, and what they allow the Plaintiffs to do, are the sole responsibility of the Plaintiffs.

[131] The Plaintiffs are aware of these inconsistencies and vagueries because, in order to absolve themselves of responsibility, they have gone so far as to accuse the Court of using a "comprehensive and detailed" standard for will-say disclosure when making ambush rulings at trial. But the Plaintiffs make no attempt to substantiate such an accusation and, from my knowledge of the record and what I have done, I know I have not done that.

The Plaintiffs' Awareness of the Compliance Problems

[132] The Plaintiffs have known about their will-say problems for some time, or at least they have been in position to know. In December 2004, at the Peshee hearing, the Plaintiffs assured the Court that they would examine their will-says in a timely manner for problems. They reported back to the Court and the other participants on January 7, 2005 that the Plaintiffs had presented their case through their will-says in accordance with the standards and the rules and they wanted to proceed on that basis and have other participants do likewise.

[133] As revealed in their successive monthly reports after new lead counsel were appointed, the Plaintiffs examined their will-says again. They considered whether a motion would be necessary to address the role and use of will-says at trial, but when the Court placed a deadline on the bringing of any such motion they indicated they would not be bringing one and that any will-say issues could be left to the trial.

[134] The Plaintiffs chose to bring all participants into trial on the basis of unrevised Court decisions and rulings that dealt with will-says and their use at trial, as well as their own representations and reassurances that their will-says met the disclosure standards, that they had presented their case in their will-says in accordance with those standards, and that they wanted to proceed on that basis.

[135] There was some discussion between participants after January 2005 about will-says and their use at trial, but, as I have found elsewhere, those discussions did not go very far and petered out largely because the Plaintiffs failed to respond to a request to explain how their proposal of May 19, 2005 differed in any way from what had already been established. And the truth is that there was no articulated difference. So the representations and reassurances remained in place, as did everything that had been established about will-says through Court decisions and rulings.

[136] Likewise, the reassurances given by the Plaintiffs to the Court at Peshee that any will-say issue would be addressed in a timely manner before trial were simply ignored. The Plaintiffs' final word on this appears to have been their September 2006 Report when they decided there was no

need for a motion on the role and use of will-says at trial and that any outstanding will-say issues could be left until the trial.

[137] Allegations made as part of the Bias Motion to the effect that the Court had applied pressure and somehow prevented the Plaintiffs from preparing the will-says they needed are also indicative of an early awareness by the Plaintiffs that they had problems and that they had decided to try and circumvent those problems by blaming the Court and attempting to abort the proceedings to avoid the consequences of previous Court decisions and rulings. The great irony here is that NWAC attempted to draw the Plaintiffs' attention to the practicalities of meeting the December 14, 2004 deadline but was rebuffed by the Plaintiffs who insisted on that deadline. As I have pointed out elsewhere, there was nothing to prevent the Plaintiffs from coming to the Court in a timely and appropriate manner if they needed more time and, as part of the Peshee hearing, I asked them to review their will-says and come forward with any issues quickly. Their response on January 7, 2005, was to confirm that they had been able to present their case through their will-says in the ways allowed by the Court, and they wanted to proceed on that basis.

[138] When they ran into problems at trial, the Plaintiffs ascribed all blame for their predicament to others. They fixed upon the Court as the source of their troubles. Without attempting to substantiate it, and in the face of repeated Court statements to the contrary, they accused the Court of using the will-says as an exclusionary rule of evidence. When the inconsistent nature of that position was pointed out to them, they did not deny it was inconsistent; they simply shifted ground and accused the Court of inventing a new comprehensive and detailed standard for will-says and

using that in some clandestine and undeclared way to exclude their evidence. Once again, no attempt was made to substantiate or demonstrate such an allegation.

[139] The Mistrial Motion was a second major attempt by the Plaintiffs, first by asking the Court on its own initiative, and then by agreeing to have their complaints and accusations treated as a formal motion, to abort this trial and return the proceedings to the pre-trial situation that had been going on for some seven years before I took over as trial judge, the consequences of which have, in one way or another, continued into the trial. The allegations in the Mistrial Motion and consequential exchanges to the effect that the Court was doing something undeclared and not revealed in its reasons or rulings bore no relation to the record and, for the most, the Plaintiffs did not even attempt to substantiate them. And this was done after the Plaintiffs were ordered to desist from such conduct, and after enhanced costs had been assessed against them for abusive conduct and groundless, unsubstantiated accusations.

[140] One of the more puzzling and wasteful aspects of the Plaintiffs' approach to this issue is that, after the Peshee hearing at which the connection between will-says and evidence at trial was clearly demonstrated to the advantage of the Plaintiffs, and after the Plaintiffs were told to examine their will-says for any problems in light of Peshee and to bring forward quickly anything that needed to be dealt with before trial, the Plaintiffs reported that all was well as regards will-says and they wanted to proceed on the basis of the rules that had been established. They then took another two years to prepare themselves for trial and, instead of bringing any will-say issues forward in a timely manner, they continued on the basis of how matters stood after Peshee, but then began to

blame others for will-say problems they had been given an opportunity to fix and which they had assured the Court and the other participants they had fixed.

[141] In other words, having been given the time and the opportunity they said they needed to fix their will-says, and then after a further opportunity following Peshee to make sure that they were ready for trial and that their will-says were adequate, the Plaintiffs represented that they had presented their case through their will-says in accordance with the rules, but began the process (evident at the Bias Motion) of blaming others, and then bringing other participants into trial and continuing at trial to blame others for the state of their will-says, and the constraints they were facing as a result of the state of their will-says.

Conclusions

[142] Looking back over my period of involvement in these proceedings as trial judge, and after having given the Plaintiffs repeated opportunities to explain themselves and demonstrate to the contrary, the Court is compelled to reach the following conclusions and findings of relevance to these costs motions:

a) Having breached Justice Hugessen's Pre-Trial Order of March 26, 2004, and having had all of their lay witnesses struck as a consequence, and after their refusal to come forward with a "workable solution" to the problems they had caused, the Plaintiffs were, nevertheless, allowed by the Court to redeem and rehabilitate any lay witnesses they wanted to call on the basis that they would produce will-says for each

such lay witnesses that complied with the synoptic standards of disclosure set out by the Court;

b) The Plaintiffs then represented to the Court and the other participants that they had produced standard-compliant will-says for each of the lay witnesses they intended to call:

> [The will-says] … comply with all the requirements, My Lord, that your lordship has indicated. In fact they go even further, they are extremely detailed.

c) This earlier position is now revealed to be inconsistent with what has emerged at trial, and even with what the Plaintiffs' present lead counsel says about the will-says he has examined. It is not clear whether this inconsistency is totally innocent and inadvertent or whether it has come about in some other way. But the Plaintiffs have offered no explanation, even when the inconsistencies were pointed out to them, and they have obstructed the Court's attempts (even defying a Court direction) to find information that would reveal the nature and cause of the problem and work towards a viable solution that would preserve their lay witnesses at trial;

d) At the Peshee hearing the Plaintiffs demonstrated the reliance and importance they placed upon will-say disclosure in accordance with the synoptic standards and confirmed to the Court their position that evidence at trial should be excluded if ambush occurred and that, in deciding ambush issues, the ultimate question was notice. They emphasised that this was important for "both sides" and that the answer

to the question of adequate "notice" must be "guided by the standard in the will-say":

> The key – what's the question for the Court? The question for the Court is: Does the other side have notice of what it is that you're going to be dealing with? That's the ultimate question, in my submission. And the – answer to that question is guided by the standard in the will-say. And it's important that both sides have notice, the same kind of notice. [emphasis added]

e) The Plaintiffs have revealed at trial that they now repudiate any connection between will-say disclosure in accordance with the standards and relevant and otherwise admissible evidence at trial. Once again, how this inconsistency has come about has not been explained in any way the Court can accept. Each ruling on ambush is separate and distinct and everything will depend upon what the whole record reveals in terms of real surprise. But how can there now be no connection between will-say disclosure and ambush rulings on evidence at trial? After calling 8 witnesses, the Plaintiffs now say they do not "understand nor do they accept the use of will-says at trial" to exclude relevant, admissible evidence, and that will-say "standards" are "unrelated to the admissibility of evidence at trial." The Court can at least comprehend what the Plaintiffs mean when they say they, unequivocally, do not "accept the use of will-says at trial": this is simply resiling from their previous position. But what the Court cannot even understand is how it is possible for the Plaintiffs not to "understand" something they have advocated before the Court;

f) Following the Peshee hearing, and after being asked to review their will-says for any problems in light of what had occurred at Peshee, the Plaintiffs once again

represented to the Court and the other participants that they had complied with will-say disclosure standards and they wanted to proceed on the basis of the rules that the Court had established for will-says:

> My Lord, you set the rules, and we have complied with them as best we can. And we are working under the rules that have been set by the Court. So the Plaintiffs have presented their case through the service of will-say statements and the December 21 submission in accordance with the way in which the Court has permitted the Plaintiffs to present their case, and we want to proceed on that basis and have my friends comply in the same way. [emphasis added]

g) At the trial, the Plaintiffs have now revealed that they have not presented the case they want to make in their will-says and they now claim that their will-say disclosure in accordance with "the way in which the Court has permitted the Plaintiffs to present their case" will not allow them to "adequately state their case." They have also repudiated the will-say rules and declared that they now refuse to present their case "on that basis." Once again, whether these inconsistencies are inadvertent and totally innocent, or whether they have some other cause, has not been disclosed, but the Plaintiffs have offered no plausible explanation and they have obstructed and defied the Court's attempts to elicit information that would reveal the nature and the cause of the problem and work towards a viable solution that would preserve their lay witnesses at trial. The Plaintiffs have revealed at trial that they have not made disclosure in accordance with the rules set by the Court and that they have no intention of proceeding on the basis of the will-say rules. They have "unequivocally" repudiated those rules and now profess that they do not even understand them;

h) In 2005, the Plaintiffs made their first attempt to abort the proceedings in order to avoid the consequences of their own actions. In order to do this they levelled accusations of apprehended bias against the Federal Court generally, and against Justices Hugessen and Russell in particular. I found all accusations to be entirely groundless and unwarranted and eventually concluded that the whole purpose of the Bias Motion was an attempt to intimidate the Court and subvert the judicial process itself in order to evade the consequences of adverse rulings and orders. The inconsistencies, distortions and other excesses that rendered the Bias Motion incomprehensible except as an attempt to subvert these proceedings, clearly demonstrated the Plaintiffs' eagerness to circumvent adverse decisions and rulings.

The Plaintiffs have still not provided the Court with an acceptable explanation as to why some of the more extreme and unsubstantiated accusations were made in the first place, and the Court has yet to fully deal with the issue from the perspective of counsel involved.

The same attitude can be detected in the Plaintiffs' allegations at the Bias Motion that the Court colluded with the Crown to ensure the Plaintiffs did not have the time to produce the will-says they needed. I have dealt with this matter extensively elsewhere but, for purposes of these costs motions and the continuing allegations that the Court is responsible for the Plaintiffs' will-say problems, my conclusions in paragraph 451 of my May 3, 2005 reasons should be kept in mind:

> In other words, at any suggestion of an adjournment, Mr. Healey waxes indignant and tells the Court it cannot even listen

> to proposals of the Interveners on this issue. Yet the Plaintiffs' argument in this motion is that the Court presents a reasonable apprehension of having colluded with the Crown and the Interveners to ensure that the Plaintiffs did not have the time they needed, and the Court's position was that the January 10, 2005 trial date could not be changed, until the Crown needed more time.

In view of what the Plaintiffs have now revealed about the state of their will-say statements as a result of the Mistrial Motion, and their further attempts to blame the Court for their problems by alleging that the Court has not done what it says it has done in its rulings, but has, rather, applied an undeclared comprehensive and detailed standard for will-say disclosure in order to exclude evidence, then the earlier attempts by the Plaintiffs to discredit the Court in the Bias Motion take on an added significance. The Plaintiffs appear to have known early in 2005 that their will-say disclosure was not what they had represented it to be;

i) Having acquired two additional years to ready themselves for trial and to bring before the Court any issues that might delay the trial or impede its progress, the Plaintiffs brought all participants into the trial on the basis of Court decisions and rulings that clearly established the basic rules regarding the role and use of will-says at trial, and on the basis of their own representations and assurances that they had complied with the disclosure requirements and wanted to proceed on the basis of the will-say rules set by the Court;

j) In a second major attempt to abort the trial, after calling eight witnesses, the Plaintiffs embarked upon a mistrial initiative and accused the Court of doing things to exclude evidence that were not disclosed in the Court's rulings. In the course of this initiative and its aftermath, the Plaintiffs revealed the full extent of their non-compliance with disclosure standards and their unequivocal refusal to accept any connection between disclosure and evidence at trial for any of their witnesses;

k) After obstructing and resisting the Court's attempts to preserve the evidentiary record as it stood, and to allow them to call further witnesses, the Plaintiffs elected to have all of their witnesses struck rather than comply with previous Court decisions and rulings and remain consistent with their own previous representations to the Court and the other participants. That election was made by the Plaintiffs even though they asserted that calling their witnesses in accordance with the will-say rules as applied by the Court in its rulings would not prevent them from proving their case, and notwithstanding that the inevitable consequence is a complete waste of the time and resources of the other participants as well as the public purse.

[143] I have indicated before that I feel I can only press the Plaintiffs so far on these matters, explain the problems to them, and then ask for or direct cooperation.

[144] The Court's order of August 9, 2007, and, in particular, paragraphs 6, 7 and 8, was an attempt by the Court to resolve the will-say issue in a way that would allow the Plaintiffs to remain

consistent with Court decisions as well as their own "position" that their will-says comply with all disclosure requirements, and that would allow the evidentiary record to remain intact.

[145] But the Court could go no further than this. To simply allow the Plaintiffs to proceed as though their revelations and declarations about will-say non-compliance and non-connectedness had not been made would have meant condoning the Plaintiffs' conduct and allowing them to abandon the will-say rules in their conduct of the trial, which would have been entirely inconsistent with previous Court decisions and rulings, as well as unfair to other participants who are bound by those rules and have prepared for trial relying upon them. In spite of their protestations of compliance, PL20 and the oral presentation that went with it were a clear indication that the Plaintiffs are not willing to call their witnesses (past or present) on the basis of the will-say rules. The Plaintiffs have been free to call any relevant evidence they please. What they will not accept is that the Crown may raise ambush at trial and, in doing so, may refer to the relevant will-say statement produced in pre-trial. The Plaintiffs say a will-say cannot be used to exclude evidence. But they have not satisfactorily explained how a will-say can be left out of account when considering whether ambush has really occurred at trial.

[146] Had the Plaintiffs' approach to will-says as articulated and revealed at the Mistrial Motion and its aftermath been declared earlier, the Plaintiffs would have been confronted with the same questions and election issues at an earlier stage in the proceedings and significant costs and waste could have been avoided.

[147] The Plaintiffs have revealed that they have been conducting, and are only willing to conduct, these actions as though the will-say rules of disclosure and their implications for the calling of evidence at trial do not exist, having previously assured the Crown and the Interveners that the will-say requirements do exist, that they have complied with them, have presented their case through them, and after having previously succeeded in excluding evidence they do not want on the record by the use of a will-say.

[148] The end result is breach of Court decisions and rulings, obstruction, inconsistency and ambiguity, a repetition of abusive conduct, and a reprehensible waste of time and resources. When such breaches, unsubstantiated accusations, changes of position, inconsistencies, ambiguities and obstruction are looked at in total, the Court has to conclude that the trial cannot be conducted in such a manner. Clarity and consistency are required. The Court cannot simply accept as a given whatever particular "position" the Plaintiffs may choose to put forward from time to time. To do this would be to grant the Plaintiffs a privilege that no other participant in this or any other law suit enjoys. And the Plaintiffs have revealed themselves to be uncompromising in this regard. They have made no efforts to find "workable solutions." They have attempted to take advantage of their own breaches, and they have obstructed and rebuffed the Court's attempts to proceed on a clear and consistent basis.

[149] It must also be born in mind for purposes of these cost claims that the Plaintiffs have spent an inordinate amount of pre-trial and trial time and resources attempting to abort these proceedings so that they will revert to the discovery stage. A pattern has now emerged.

[150] As I pointed out in the Bias Motion itself, and when dealing with costs for that motion, the Bias Motion was entirely groundless and unwarranted and was a collateral attack upon prior Court orders either not appealed or appealed and confirmed by the Federal Court of Appeal. It was full of "misrepresentations and inaccuracies that were intended, not to advance the proceedings on the merits, but to intimidate the Court and subvert the judicial process itself in order to evade the consequences of adverse rulings and orders."

[151] In the Mistrial Motion the Plaintiffs revealed that they were interested in only one remedy which, again, had nothing to do with advancing the proceedings but would have returned the process to the discovery stage. In order to achieve this, they avoided providing details of their assertions about what had been excluded that prevented them from adequately stating their case, and they built their complaints around an unsubstantiated accusation that the Court was doing something in its rulings that it had specifically said it was not doing.

[152] The Plaintiffs' replies to the Court's direction of July 5, 2007, and their PL20 response to my Order of August 9, 2007 now reveal that if they cannot abort these proceedings and return them to the discovery stage, they are not willing to proceed in accordance with the will-say rules established by the Court's decisions and rulings. The Plaintiffs gave replies that confirmed their position remains unequivocal that will-say disclosure is unrelated to the admissibility of evidence at trial, and they do not understand and do not accept the use of will-says at trial to exclude relevant evidence.

[153] Notwithstanding this pattern, the Plaintiffs, when they were eager to establish compliance with will-say requirements in 2004 and in 2005, had no hesitation in assuring the Court and the other participants that they had presented their case through their will-says, that they wanted to proceed on this basis, and that they wanted to have the other participants comply in the same way.

[154] The Plaintiffs remain unrepentant. They have repeatedly refused to provide responsive answers to questions asked by the Court, and they will not provide responsive replies to conditions imposed by Court order.

[155] The Court has now made three attempts to relieve the Plaintiffs from the consequences of their breach of Court orders and directions and their own recalcitrance. What happened as a consequence of the Mistrial Motion, its aftermath, and the eventual striking of witnesses was very much a repetition of what occurred in 2004. In 2004 the Plaintiffs refused to provide meaningful will-says, refused to come up with a workable solution to the problems they had caused for the progress and process of the trial, were given a chance to redeem themselves and the time they said they needed to do it, and were ordered to produce will-says that met the disclosure standards the Court had defined for them, so that they knew precisely what they had to do.

[156] At the trial in 2007, the Plaintiffs eventually revealed that they had not produced will-says that met the disclosure standards, that they rejected the will-say rules with regards to evidence to be led at trial, and refused to offer any kind of workable solution to the problems they had caused. They also obstructed the Court’s efforts to find a viable solution. Finally, when the Court gave them another opportunity to retain and call witnesses if they would accept the will-say rules, they simply

refused to cooperate and attempted to take advantage of their own breaches by continuing the trial process with inconsistencies, confusion and non-responsiveness.

[157] This time, however, the Plaintiffs' rejection of the Court's efforts is much more severe in terms of abuse and waste because, after being told precisely what they needed to do to produce compliant will-says, and after being given the time they said they needed to do it, and after assuring the Court and the other participants that they had done it, they have now revealed that they did not, in fact, produce compliant will-says and that they "unequivocally" repudiate any connection between will-say disclosure and evidence at trial.

[158] When their mistrial initiative failed and the Crown picked up on the disclosure issues, the Plaintiffs simply refused to cooperate because that would have meant revealing the history of these problems and the real source and extent of their own difficulties. So they stonewalled and simply ignored what they had said and done in the past.

[159] These problems should have been addressed years ago. In fact, the Court and the other participants were told that they had been addressed. In the Fall of 2004, NWAC asked the Plaintiffs to consider the practicalities involved but was rebuffed. As a consequence of the Peshee hearing the Court asked the Plaintiffs to again look at their will-says and deal with any issues quickly. The result was a confirmation that they had complied with the rules and wanted to proceed on that basis.

[160] The decision to bring all participants into the trial with will-say problems unresolved has resulted in an enormous waste of time and money and the Plaintiffs must now assume responsibility for what they have done.

[161] In the end, behind all of the wrangling and abusive conduct lies a basic refusal by the Plaintiffs to respond to the Court's requests that they simply conduct themselves in accordance with Court decisions and rulings as they once assured the Court and the other participants they would:

> My Lord, you set the rules, and we have complied with them as best we can. And we are working under the rules that have been set by the Court … and we want to proceed on that basis and have my friends comply in the same way.

GENERAL ISSUES

Enhanced Costs

[162] All of the motions set out extensive reasons and authority for an award of enhanced costs against the Plaintiffs.

[163] In their response, the Plaintiffs have chosen not to fully answer the merits of the case against them for enhanced costs.

[164] Instead, the Plaintiffs point out that the Crown and the Interveners rely upon various Court findings and decisions that the Plaintiffs may decide to appeal at some time in the future.

[165] The Plaintiffs also say that they are unable to respond to the substance of the allegations "due to the previous orders of this Court, notably paragraph 12 of this Court's order of August 9, 2007… ."

[166] Paragraph 12, of my August 9, 2007 Order reads as follows:

> Subject to satisfying the Court concerning the compliance of their will-says as indicated, the Plaintiffs will proceed to call their witnesses or conclude their case and shall conduct the balance of the trial in accordance with all relevant Court decisions, findings, rulings, and orders and directions made to date and will desist from the conduct that the Court has identified as abusive. If there are any further attempts by the Plaintiffs to impede the progress of these actions by abusive conduct, or to prevent the Court from dealing with the merits of these actions in the most just, efficient and least expensive way, the Court may consider further measures to ensure these actions are dealt with on their merits or, should this not prove possible, whether the actions should be dismissed, and the decision to continue with the proceedings at this stage should not be construed as a final disposal of the Plaintiffs' conduct to date;

[167] The Plaintiffs do not really explain how paragraph 12 prevents them from responding to the grounds put forward for enhanced costs. I can only surmise that the Plaintiffs want to re-argue the Court's findings and say that the Court was wrong in its conclusions, so that enhanced costs should not be awarded.

[168] But that is not what these cost motions require the Plaintiffs to do. The Crown points out that, given the Court's findings to date, an award of enhanced costs is required. This is not an invitation to re-argue the Court's findings and rulings with the Crown or the Court. But the Plaintiffs are not constrained in any way from disputing the Crown's version of what the Court has found, raising any mitigating factors, or disputing whether the Court's finding warrant enhanced

costs or any costs at all. An examination of their written submissions reveals, in fact, that the Plaintiffs do take issue with the Crown and the Interveners on some issues.

[169] If the Plaintiffs are suggesting that the Court has already dealt extensively with the law of enhanced costs and its applicability to the kind of conduct found and referred to in these motions, so that there is no real point in taking issue and going over the same ground again, then I think they are correct. I have already been over much of the ground and the applicable jurisprudence in the costs motions that eventually followed the Plaintiffs' Bias Motion.

[170] Nor does the prospect of an appeal of the Court's findings prevent the Plaintiffs from answering the merits of the claims for enhanced costs at this time.

[171] The Plaintiffs' real argument appears to be that the Court should not deal with these costs issues now. But that is not a response to the merits of the claims that enhanced costs are justified on the basis of the Court's findings.

[172] Notwithstanding the Plaintiffs' assertion that they cannot respond to the merits of the Crown's motion because of paragraph 12 of my August 9, 2007 Order, it is obvious that the Plaintiffs have provided an oblique response in their account of the "Background" to the present motions. That account does not provide an adequate context for assessing these costs claims. A selective approach to the record is a form of argument, and there are also unsupported assertions I will come to later.

The Plaintiffs' Background Account

[173] The Mistrial Motion and its aftermath cannot be understood in isolation. The full context goes back to Justice Hugessen's Pre-Trial Order of March 26, 2004 and the discovery and disclosure problems that order was intended to solve. In these reasons, I have attempted to give some impression of the relevant background and the connections between various decisions and rulings that come into play. The Plaintiffs' account of the relevant background does not provide the context needed to address the arguments for enhanced costs raised by the other participants:

Paragraphs 2 and 10: The Request for Guidance

[174] As explained in previous reasons, the Plaintiffs purpose in rising on April 25, 2007 went beyond seeking guidance. They were not dragooned into the Mistrial Motion. They agreed to it. It was the Plaintiffs who first suggested that their complaints warranted a declaration of mistrial.

[175] The Plaintiffs' request for guidance included an invitation to the Court to characterize its own rulings in a way that was at odds with the stated rationale for those rulings. The Court corrected the Plaintiffs' mischaracterization of its rulings and provided the Plaintiffs with guidance for the future based upon the correct characterization.

[176] The Plaintiffs' request for guidance contained an unequivocal and carefully-worded repudiation of the connection between will-says and evidence at trial and revealed that the Plaintiffs

were in breach of previous Court decisions and rulings regarding the disclosure standards for will-says.

Paragraph 4: Counsel responded by suggestions that in the future, this Court should allow the witnesses to testify and to seek the truth, justice and a fair determination on the merits

[177] Who could argue with the proposition that the Court should seek the truth, justice and a fair determination on the merits? What the Plaintiffs leave out of account is that this is precisely why the will-say rules became necessary in these actions. The truth is ascertained by allowing the parties to call the evidence they want to call and ensuring it is subjected to effective cross-examination. The Plaintiffs have been allowed to call whatever relevant evidence they wish through new lay witnesses. A requirement that they provide pre-trial synoptic disclosure does not limit the number of witnesses or what those witnesses will say. They have also been allowed to test some of the evidence of what they call the "other side," and have persuaded the Court to exclude evidence whose truth cannot be tested because of ambush. When it came to their own witnesses they sought to exclude effective cross-examination by trying to disconnect will-say disclosure from evidence at trial.

[178] The Plaintiffs have intimated on several occasions during the course of these proceedings that the Court, by allowing the Crown to use will-says to demonstrate ambush, is not allowing the truth to emerge. This is not an argument that the Plaintiffs raised at the Peshee hearing when they urged the Court to exclude evidence because of ambush. Ambush does not lead to the truth.

Effective cross-examination does. No participant in these proceedings has a monopoly on the truth. If the will-say requirement was not needed to assist in reaching the truth in these proceedings, then Justice Hugessen would not have imposed it.

Paragraph 7: The Crown Agreed with the Appellant's (*sic*) Summary

[179] The Plaintiffs leave out of account the Crown's objections to the irregularity of the process that the Plaintiffs initiated and pursued with the Court. The Crown's response of May 1, 2007 was made at the request of the Court. The Crown's basic position was that the Plaintiffs' whole initiative was irregular and the Court should not be listening to it. The Crown qualified its answers in several ways that make it clear the Crown was not entirely clear about what the Plaintiffs were saying. And, as the Plaintiffs' excerpt from the transcript makes clear, the Crown underscored everything it said with the warning that "the impact of your rulings really needs to be considered on a case-by-case basis in the context of witnesses that are called when they propose to give certain evidence."

Paragraphs 9 and 11: The Crown did not submit on May 1, 2007, that the Appellants (*sic*) had engaged in any abuse of process etc.

[180] The Court allowed the Plaintiffs to make their presentation over the objections of the Crown, but made it clear that the Crown could then make its arguments about irregularity. Having heard the Plaintiffs out and having reviewed the record at the request of all participants, the Court concluded that the Crown was correct. The whole process was, indeed, irregular. It was, in fact,

abusive. The Plaintiffs did not like these conclusions, but the whole process took place with their concurrence and followed inevitably from their decision to push for a mistrial.

[181] The Plaintiffs make several suggestions regarding an overactive Court that went beyond what it was asked to do. But the concerns raised by the Court grew out of the Crown's complaints about irregularity and the simple fact that it was not possible to follow the logic of the Plaintiffs' assertions. The Plaintiffs placed on the record positions that, given the history of these actions, did not make sense. For example, how could the Court make a decision about how and why evidence had been excluded without a clear account from the Plaintiffs about the state of their own will-says, or some explanation concerning what evidence had actually been excluded, and why this meant they could not adequately state their case? If the Plaintiffs complain to the Court that they cannot adequately state their case because their witnesses are only being allowed to say what the Plaintiffs have disclosed to the other participants in pre-trial they will say, then I think the Plaintiffs should expect to be asked to explain such an obviously paradoxical proposition. In fact, they should not have to be asked for an explanation, and they certainly should not throw up obstructions and obfuscation when the Court asks them to explain what they mean. The Court needed to understand various matters of relevance and sought explanations from the Plaintiffs, but the Plaintiffs refused to cooperate. If the Plaintiffs wanted the Court to consider a mistrial then they had to explain how evidence could possibly have been excluded if they had produced will-says that met disclosure standards. This inconsistency (notwithstanding the Plaintiffs' attempts to blame the Court for applying a comprehensive and detailed standard) has still not been explained. It was the failure of the Plaintiffs to provide an explanation for inconsistent positions they placed on the record that

eventually forced the Court to ask for reassurances concerning compliance with previous Court orders and the will-say rules.

[182] The Plaintiffs wanted the benefits of a motion without the risks and so, initially, asked the Court to declare a mistrial on its own motion. In the past they have been warned about groundless motions (e.g. the Bias Motion).

[183] The Plaintiffs' initial presentation in the Mistrial Motion contained a declaration that they repudiated any connection between will-say disclosure and evidence at trial as a basis for bringing forward their witnesses and they revealed that they were in breach of the disclosure requirements. They made it clear that, "unequivocally," they did not understand, and they did not accept, that will-says could be used at trial as they had been used. The Court could not simply allow the trial to continue under such conditions and was compelled to look for a clear and consistent basis for the calling of all witnesses. If the Court is accused of preventing the Plaintiffs from adequately stating their case, then the Court is compelled to find out what this means and whether the accusation is accurate and, if it is not, why it was made. By making their complaints about process and unfairness, the Plaintiffs inevitably opened up a line of inquiry that forced the Court to consider compliance in order to respond in any meaningful way to their accusations and complaints.

Paragraph 12: Plaintiffs' counsel also advised that it was the Plaintiffs' position that the Plaintiffs have complied with orders of the Court

[184] The Plaintiffs have revealed in a variety of ways that there is a significant difference between their "position" on the state of their will-says and what an examination of those will-says will actually reveal. These actions cannot proceed on the basis of inconsistencies and ambiguities that the Crown and the Court cannot understand merely because the Plaintiffs assert a "position" they insist the Court must accept without question and without explanation.

Paragraph 14: Among other things, counsel expressly confirmed that the Plaintiffs had never stated that they could not make or prove their case on the basis of the evidence set out in the will-says

[185] What the Plaintiffs said was that "the will-says are, in fact, and have been established as a legal ground for the exclusion of relevant admissible evidence" and this means that "this Court has foreclosed the Plaintiffs' opportunity to adequately state their case."

[186] Not being able to adequately state a case can mean many things. The Plaintiffs' position was that the situation was so bad that the Court should declare a mistrial. But they left the meaning of "adequate" vague and they avoided specifics so that the Court and the other participants had no means of ascertaining what the real problem could be or what might have been excluded that would warrant a mistrial.

[187] The issue of what the Plaintiffs meant by not being able to state their case adequately has still not been explained fully. All the Court knows is that the Plaintiffs take a position that there is a difference between stating a case and proving a case. But the Court still does not know what the Plaintiffs say they have been unable to state, or why it would justify a mistrial. The Plaintiffs had previously assured the Court and the other participants that they had been able to present their case through their will-says in accordance with the standards, and that they wanted to proceed on that basis. If this was so, then how could the Court's rulings have prevented the Plaintiffs from adequately stating their case? This is not explained in any way that can be substantiated from the record. The Plaintiffs' allegation that the Court was applying a comprehensive and detailed standard to exclude their evidence is a bald accusation that the Plaintiffs did not even attempt to authenticate. The Court has simply been denied the logic or the facts it needs to assess what is going on and find a solution. The Plaintiffs have created, and then sought to exploit, unexplained inconsistencies.

Paragraph 26: Compliance with Synoptic Standards

[188] The Plaintiffs cite just one of the Court's attempts to confirm and get at what they meant by compliance with the disclosure standards set by the Court. What the Plaintiffs fail to refer to are the numerous ways in which they contradict the answer given in this paragraph. They also fail to refer to those aspects of the record where the Court is looking for an explanation of how there can be any problem at all – let alone a problem warranting a mistrial – if the answer given here means what it appears to mean. Or yet again, the Plaintiffs fail to refer to those places in the record where the Plaintiffs undercut or hedge the answer given here with "best efforts" concepts that cannot be reconciled with Court decisions and reasons.

Paragraph 27: Neither the Crown nor the Interveners asked this Court to strike the Plaintiffs' previous lay witnesses

[189] The Court was advised of the flexibility it had to deal with abuse of process and, in the face of the Plaintiffs' refusal to advise or assist (except to invite the Court to ignore the whole problem without saying why it could be ignored), the Court had no choice except to either allow the Plaintiffs to proceed as though nothing had come to light as a result of their mistrial initiate, or to require the Plaintiffs to confirm that they were not conducting these actions in breach of Court decisions and rulings and their own previous assurances. Such confirmation would have cost the Plaintiffs nothing if their assertion was correct that their disclosure complied with all previous Court decisions and rulings regarding will-says. One of those decisions is the Court's Decision of November 7, 2005 which, at paragraph 324(b) reads as follows:

> In order to lead evidence in accordance with paragraph one (a) above, a summary of that evidence must have been disclosed in a way that meets the standards for disclosure already set by the Court in previous decisions and orders, which standards have been accepted by the Plaintiffs as being applicable to them and other parties to the proceedings.

[190] The Plaintiffs know that will-say disclosure in accordance with the synoptic standards is required for them to bring a lay witness forward. Otherwise they would not need to assert that they have met the disclosure standards. If there is no connection between pre-trial disclosure standards and evidence at trial – which is their position – then compliance with disclosure standards can only have one purpose, which is to permit any particular witness to be brought forward.

[191] If the Plaintiffs assert that their will-says comply with Court decisions related to will-says, then it is no hardship for the Plaintiffs to confirm that what their will-says disclose in accordance with the synoptic standards is what their witnesses will say for purposes of preparation and cross-examination by the Crown and the Interveners. Yet the Plaintiffs have refused to provide this simple confirmation and to move forward on a footing that recognizes and respects the Court's previous decisions and the will-say rules embodied in those decisions. And this is because the Plaintiffs have now disclosed that they are conducting these actions on the basis that there is no connection between will-say standards and the evidence that can be called at trial, and that they do not understand or accept the use of will-says at trial to exclude relevant admissible evidence. This is another of their stated "positions." Without assistance from the Plaintiffs in understanding these anomalies and their implications for the trial, there is little the Court can do except ask for, and insist upon, clarity, consistency, and compliance with its own decisions and rulings. That is why the Court had to ask for such confirmation in its Order of August 9, 2007. The Court could not simply allow the trial to drift on in the face of the Plaintiffs' inconsistency and obstruction. The problem was fully explained to the Plaintiffs and they were given – yet another – opportunity to remove the difficulties and both retain the witnesses they had called and call witnesses they wanted to call. They were advised fully of the consequences of not availing themselves of that opportunity. They were even advised in advance that their written response was not adequate; but they refused to change it or give the assurance that was asked for. They took a hard line in a situation where they merely had to confirm in the way requested by the Court the inevitable correlative of one of their own positions: i.e. that witnesses had been brought forward, and would be brought forward, on the basis that what was revealed in their will-says that met the synoptic standards for disclosure was what those witnesses would say for purposes of preparation and cross-examination by the other side. The

choice was for the Plaintiffs to make. The consequences were clear and, in my view, inevitable given past Court decisions that the Plaintiffs have not successfully challenged.

[192] Even though the Plaintiffs were forewarned that their PL20 response was inadequate, they refused to make any meaningful adjustments or concessions. It was obvious what was needed to comply with paragraphs 6, 7 and 8 of my Orders of August 9, 2007. The fact is that the Plaintiffs refused to give the reassurances requested by the Court and, instead of directly stating this fact, they presented the semblance of a response that continued the very problems that the Court was attempting to resolve. However the sequence is analysed, the end result was that the Plaintiffs were in breach of Court decisions and their own previous representations, and they refused to submit to the will-say rules for either witnesses already called or future witnesses.

[193] In their abuse of process requests, the Crown and NWAC asked that the Court dismiss the Plaintiffs' actions in their entirety because the Plaintiffs had shown themselves to be ungovernable. The Court resisted that approach for reasons given, but it was obvious that, in doing so, the Court would have to ensure full compliance with its own decisions and rulings for both past and future witnesses and establish a clear and consistent basis for bringing witnesses forward and hearing evidence. In view of the Plaintiffs' inconsistency, obstruction and evasiveness, that could only be done by putting the Plaintiffs to the election embodied in paragraphs 6, 7 and 8 of my August 9, 2007 Order. The only alternative would have been to accede to the Plaintiffs' position that they were at liberty to conduct the trial as though the will-say rules and previous Court decisions and rulings did not exist. It was plainly not possible for the Court to allow the Plaintiffs to proceed in this way.

[194] In its Direction of July 5, 2007, the Court specifically asked the Plaintiffs to address compliance issues "for witnesses already called and for witnesses the Plaintiffs plan to call," so the Plaintiffs had full notice that they needed to satisfy the Court on all lay witnesses.

[195] In their reply of July 13, 2007, the Plaintiffs placed on the record in response to question (iii) that their will-says (no exceptions) "are deficient based on the Court's rulings made during trial excluding relevant evidence if it is not described in a will-say in a comprehensive and detailed form." Because the Court has not, in its rulings, excluded relevant evidence not described in a comprehensive and detailed form, the Plaintiffs were clearly, in their haste to accuse the Court, putting at issue the deficiency of all of their will-says against the synoptic standard. This was also clearly placed in issue by the paradoxes inherent in the Plaintiffs' Mistrial Motion and the fact that, as a general proposition, the Court could not rely upon the Plaintiffs' bald and unsubstantiated assertion that all of their will-says were compliant with disclosure standards when that position had been contradicted by the Plaintiffs themselves through their own counsel. Hence, the Court needed to have the Plaintiffs provide reassurance regarding the will-says for witnesses already called, as well as those to be called.

[196] During the abuse of process presentation made by the Crown and the Interveners, the Court was advised and invited by those participants who felt the situation could be salvaged to order the Plaintiffs, for example, "to do or not to do whatever is appropriate in the circumstances." (NSIAA) Short of dismissing the actions in their entirety for abuse, the Court intervened in ways not

dissimilar from previous interventions in an attempt to ensure clarity, consistency and compliance with Court decisions, and to move the actions forward.

[197] Even if it were nothing else, the Plaintiffs' PL20 response was a continuation of obstructive and obfuscatory conduct that the Court had already identified as abusive. In my August 9, 2007 decision I pointed out to the Plaintiffs that I wanted to continue to hear the merits but that they must expect further sanctions and consequences if their abusive conduct continued. I even pointed out in that decision what those consequences would be: the striking of their witnesses. They knew precisely what would happen if they continued to be evasive and non-responsive. But they challenged the authority of the Court on this issue and elected not to comply.

[198] In addition, the Plaintiffs are leaving entirely out of account the fact that the Crown asked the Court to strike all of the Plaintiffs' lay witnesses in 2004, and that the Court struck all of those witnesses at that time. The 2004 decisions and orders of the Court are still in effect. Contrary to their previous assurances about compliance with those 2004 decisions and orders, the Plaintiffs have now revealed that those assurances of compliance were not correct. What is more, the Plaintiffs have refused to accept the Court's attempts to give them a further opportunity to bring themselves in line with, at least the spirit, of the 2004 decisions and orders. This is why the Plaintiffs, as pointed out by the Court, have taken the proceedings back to 2004 as regards the right to call, and the actual calling of, their lay witnesses.

[199] The Crown did not ask the Court to give the Plaintiffs yet another chance to retain their lay witnesses in the face of yet another breach of a Court order and obstructive, abusive conduct. But the Court gave the Plaintiffs that chance.

[200] I explained the problems clearly to the Plaintiffs in paragraph 79 of my June 19, 2007 decision and told them that they should be seeking further consent of the Court. A way was opened up to them to resolve the problems they had caused. They did not seek leave of the Court. They chose to defy the Court and forced the election that was placed before them in my decision of August 9, 2007.

Conclusions

[201] All in all then, the Plaintiffs have chosen not to address in this motion the full merits of the claims for enhanced costs. Their "Factual Background" is incomplete and decontextualized. They simply ignore those portions of the record that tell against them in an attempt to suggest that what has happened to date is totally unwarranted and unprecedented.

[202] I do not think there can be any real dispute over the Crown's or the Interveners' recitation of some of the Court's more serious findings and their relevance for an enhanced claim for costs. And if the Plaintiffs do not see the need to take issue with them at this time, I have to say they certainly correspond with my understanding of what is contained in relevant decisions, reasons, findings and rulings.

When Assessed and Payable?

[203] However, I do think the Plaintiffs raise a legitimate issue for the Court to consider when they question whether costs should be assessed and payable now and whether they should be taxable.

[204] In order to address these issues, it seems to me that, given the Court's findings to date in past decisions and rulings where conduct has been an issue, as well as the Court's abuse findings in the Mistrial Motion and its aftermath, and given the fact that, in their response to these costs motions, the Plaintiffs do not really take effective issue with the assessments of the Court's findings put forward by the Crown and the Interveners, then the Court must ask itself:

a. What is required by way of a costs in order to both sanction the Plaintiffs' conduct and to really compensate the Crown and the Interveners for the excessive waste of time and resources they have suffered as a result of the Plaintiffs' abuse of conduct, including the Plaintiffs' refusal to go forward with these actions on the basis of the will-say rules established by Court decisions and rulings to date;

b. What is required by way of a costs sanction, given the repetitive nature of much of the conduct complained of, to ensure that the Plaintiffs desist from their objectionable approach and conduct to date, and so that these actions can be dealt with on their merits in the most just, cost-effective and expeditious manner; and

c. Should the Crown and the Interveners be made to continue to subsidize conduct on the part of the Plaintiffs that the Court has found on several occasions now to be wasteful, abusive and vexatious?

[205] The Court has already found that the Crown and the Interveners were correct in their abuse of process allegations and the Court has already acknowledged that costs are the only real sanction available when one of the parties to an action engages in obstructive and abusive conduct and then informs the Court that this is "best efforts." That is, in effect, a declaration that nothing is conceded and nothing is going to change. The Court has agreed with the Crown and the Interveners that abuse of process has occurred to a degree that would warrant dismissing these actions, but the Court has decided they should continue, at least for the time being.

[206] Also, as a matter of basic fairness, not to require the Plaintiffs to pay costs at this time would be to penalize the Crown and the Interveners by making them continue to subsidize repetitive conduct that the Court has found to be an abuse of process and from which the Court has told the Plaintiffs to desist.

[207] If the Plaintiffs, despite past warnings, have persisted with such conduct, surely they should be the ones who finance what it has cost, and is costing, the other participants.

[208] There is also a need, of course, to strongly sanction and discourage a waste of Court resources and the public purse.

[209] None of this has anything to do with the merits of the Plaintiffs' claims in these actions. But the Plaintiffs have chosen the ways in which they have advanced their claims to date. They have been given full and fair warning of the problems they have caused and the consequences of their conduct. They have been given every opportunity to advance the merits of their claims in accordance with normal processes and the particular Court-crafted solutions to the disclosure difficulties that have arisen in this case. The striking of their witnesses was entirely avoidable, and the means to avoid it lay within easy reach of the Plaintiffs. The Plaintiffs have always been free to call evidence through their lay witnesses and have simply, like other participants, been subjected to will-say rules designed to avoid ambush at trial in the context of these particular proceedings.

[210] The Court cannot speculate about the results of some future appeal. I have already addressed the arguments and the authorities regarding the purpose and role of costs in my reasons for the costs awarded in relation to the Plaintiffs' Bias Motion. Those reasons and authorities are applicable here and I adopt them *mutatis mutandis*. The role of costs in litigation has gone well beyond the indemnity principle, as I have already found. I also dealt in that motion with the circumstances under which costs can be awarded to interveners, and I adopt those reasons and authorities, *mutatis mutandis*, for the purposes of the present motions.

[211] As the Crown and the Interveners point out, the Plaintiffs have been warned before about conduct issues but have not been willing to address serious concerns that have been brought to their attention, both in the Bias Motion and elsewhere. However, I would like to make one thing absolutely clear for the purposes of the present motions: the conduct under consideration is the conduct of the Plaintiffs and not the conduct of their counsel. The Bias Motion and the cost

considerations associated with that motion had a dimension that was strongly connected to the conduct of Plaintiffs' counsel. That is not the case here. I do not regard the Crown and/or the Interveners as making any claim for costs in these motions based upon the conduct of Plaintiffs' present front-line team of litigators, and, in my own considerations, the conduct of counsel is not a factor except to the extent that what happened as part of the Bias Motion and as a result of the conduct of these actions before the appointment of the Parlee McLaws LLP group of lawyers does have some carry-over effect upon what has subsequently transpired in the ways I have explained.

[212] The nature of the abuse of process, the repetition of abusive and objectionable conduct already sanctioned by the Court, the disregard for past Court decisions and rulings, the Plaintiffs' thoroughly uncooperative attitude towards solving the problems they have caused for the progress of these proceedings, as well as the waste that could easily have been avoided without any change to the evidentiary record, and the need to let the Plaintiffs know that they must expect to finance such waste and abuse of process, all suggest to me that an immediate award of lump-sum costs payable immediately and in any event of the cause is required of a sufficient magnitude to recognize the egregious nature of what has occurred.

[213] The Plaintiffs' arguments concerning possible future appeals might be more persuasive if they had taken real issue with the summations of the Crown and the Interveners concerning my findings, or if they had truly engaged with the Court when the problems were raised and they were asked to provide explanations. But the Plaintiffs refused to address inconsistencies, ambiguities and the impact of past decisions when their attention was drawn to them. Their response was obfuscation, stonewalling, or just plain silence. In other words, if the Plaintiffs have refused to

engage with the specifics of the problems raised, and have refused to provide the Court with the explanations it needs to understand the nature and source of those problems and the solution required, it is difficult for me to understand in these cost motions what it is the Plaintiffs think should be left for future consideration on appeal. What is the point of not explaining the problems to the trial judge and saving the explanations for a possible appeal to the Court of Appeal? The Plaintiffs cannot sidestep dealing with this Court by saving what they have to say on these matters for the Federal Court of Appeal. I am not anticipating anything the Federal Court of Appeal may decide to do at some time in the future if an appeal is made. All I am saying is that I need answers now to run a trial fairly and efficiently, and that the Plaintiffs have withheld from the Court what is required to do that.

[214] The Plaintiffs have, in fact, been afforded every opportunity to respond to allegations of abuse of process made by the Crown and the Interveners and found by the Court. They have been directed to clear up inconsistencies and provide explanations. They have been given additional opportunities to retain or bring forward all of their lay witnesses if they will agree to respect the will-say rules established by Court decisions and endorsed by their own previous actions and assurances. They have remained unresponsive and have refused to play by the rules. They have refused to provide the clarity and consistency the Court has asked for, and have resorted to further ambiguities and evasiveness.

[215] What the Plaintiffs appear to mean by their complaints in the present motions is that they have not yet addressed these matters before the Federal Court of Appeal. But that is not the same thing as being denied the opportunity to respond to abuse of conduct allegations and findings before

this Court. In this Court, the Plaintiffs have simply chosen to ignore complaints and directions on fundamental issues and inconsistencies.

[216] As a result, the Court has had to resort to extraordinary measures in order to impose clarity and consistency and to try and move forward on a footing that applies to all participants and that is in accordance with Court decisions and rulings. The nature of the problem has been explained to the Plaintiffs. They have been given an opportunity to respond, and an opportunity to retain all of their witnesses, but they have simply chosen to try and exploit further the ambiguities and problems they have created. They have also been forewarned of the costs associated with this kind of conduct.

[217] Short of dismissing the actions for abuse of process (which the Court has rejected), there is little more the Court can do except impose an immediate costs sanction to counter this kind of abusive conduct and to recognize the enormous waste of time and resources it has caused.

[218] These costs motions have nothing to do with the merits of the Plaintiffs' claims. They are about process and the conduct of the Plaintiffs. The Plaintiffs have provided no real justification to persuade me that these costs issues are better left to be dealt with later. Their approach is to try and avoid truly engaging with the Court on the points of concern.

Rule 401(2) Issues

[219] Rule 401(2) provides as follows:

(2) Where the Court is satisfied that a motion should not have	(2) Si la Cour est convaincue qu'une requête n'aurait pas dû

been brought or opposed, the Court shall order that the costs of the motion be payable forthwith.	être présentée ou contestée, elle ordonne que les dépens afférents à la requête soient payés sans délai.

[220] The Plaintiffs advance various arguments related to Rule 401(2) to dissuade the Court from granting the relief sought by the Crown and the Interveners in these motions. I do not think that any of their arguments are persuasive, and the Plaintiffs present no authority to support the positions they take.

[221] First of all, the Plaintiffs say that Rule 401(2), regarding the payment of costs forthwith, does not pertain to trial dates, but only to the costs of motions.

[222] The Crown and the Interveners have directed the Court's attention to the general discretionary power over costs in Rule 400, including Rule 400(6) which is an override provision that allows the Court to award costs "in respect of a particular issue or step in a proceeding." Thus, it seems to me that, as a consequence of Rule 401 and Rule 400, the Court has the power to address all aspects of these motions.

[223] The Plaintiffs also argue that the Mistrial Motion was not a motion brought in accordance with Part 7 of the *Federal Courts Rules*. The reason that the formalities of Part 7 were not imposed upon the Plaintiffs in this case is found on the record. The Crown urged that a formal motion was required, but the Plaintiffs resisted this. Once the Court suggested that the Plaintiffs' presentation to the Court needed to be placed upon a sound legal footing so that the Court could respond

appropriately, all participants agreed that the Court should treat the matter as a formal motion, including the Plaintiffs.

[224] I do not think the Plaintiffs can now avoid the consequences of their mistrial initiative by invoking formalities they agreed the Court should dispense with in order to accommodate them. The Plaintiffs would have been more than willing to accept a result to their motion that favoured them. So the Plaintiffs must also accept a result they do not like and the costs consequences that flow from it. As NWAC points out, there is nothing in Rule 401(2) to suggest that it is restricted to motions made in accordance with Part 7, and the Plaintiffs cite no authority to support their position on this point. It was the Plaintiffs who advised the Court that a formal Notice of Motion was not necessary in the context of a trial. The Court was certainly of the view that the Plaintiffs agreed that their mistrial initiative would be treated as a formal motion, except that they and the other participants would be spared the trouble of complying with all of the formalities. But in any event, in my view, Rule 400 gives the Court the full discretion it needs in these circumstances.

[225] But the Plaintiffs' argument goes further. They say that "no motion was ever brought pursuant to Part 7 to strike evidence given by the Plaintiffs' lay witnesses or for an order prohibiting them calling future lay witnesses."

[226] The striking of witnesses came about as a consequence of what the Plaintiffs revealed and placed on the record during the Mistrial Motion. They initiated a process that required a follow-up and further directions and orders from the Court to deal with issues they had raised and problems they had caused. That follow-up led to the abuse of process relief requested by the Crown and the

Interveners and the Court's attempt to keep the actions going through the imposition of the conditions found in my August 9, 2007 order.

[227] The Crown and NWAC asked the Court to dismiss the Plaintiffs' claims in their entirety. Other interveners agreed that an abuse of process had occurred and that the Court could dismiss, but they felt that the actions could proceed under strict conditions and asked the Court to use its powers and discretion to impose a regime that would discourage the Plaintiffs from further abusive conduct and ensure that the remainder of the trial was conducted in a just and efficient manner. The Court's order of August 9, 2007 imposed such a regime and the need for it was explained in the reasons that accompanied that order. But the starting point for that order was the Plaintiffs' Mistrial Motion and what they placed on the record and revealed as a result of that motion i.e. that there were compliance problems to deal with and the Plaintiffs had brought forward witnesses for whom they took the position that there was no connection between pre-trial disclosure standards and the admissibility of evidence at trail and for whom the Plaintiffs did not accept that will-says could be used to exclude relevant evidence. The Plaintiffs refusal to deal with these issues and their refusal to cooperate led to requests for relief for abuse of process.

[228] The regime of August 9, 2007 was fashioned from the Crown's and the Intervener's request to the Court to stop abuses of process from recurring and the canvassing of a wide range of remedies and solutions.

[229] Rather than simply dismiss the Plaintiffs' claims in their entirety (a remedy that was possible) the Court used its general powers to control the proceedings and decided to give the

Plaintiffs yet another opportunity to demonstrate to the Court that they could and would both desist from their abusive conduct and comply with, at least, the spirit of the will-say rules. The consequences of not doing what the Court asked were set out in the Order of August 9, 2007.

[230] The Plaintiffs informed the Court and the other participants that, in their PL20 reply, they had "properly responded to the matters raised" in the Court's order. After hearing full argument on point, the Court found they had done no such thing. In their letter of August 28, 2007, the Plaintiffs said that the "Plaintiffs deny the allegations put forward by the Crown and the Interveners and submit that the Plaintiffs have properly responded to the matters raised in the Court's Consequential Reasons for Order and Order dated August 9, 2007." The Plaintiffs did not complain that they had not had sufficient notice of the issues or sufficient time within which to respond. They said they had "properly responded."

[231] The Plaintiffs were fully informed of the complaints against them and of the range of relief suggested and available to the Court. The Plaintiffs were warned in advance of the consequences of not providing the reassurances requested. As the Court found, knowing the consequences, the Plaintiffs provided the semblance of a reply to the August 9, 2007 conditions that was evasive and non-responsive and that revealed the Plaintiffs were determined to continue the abusive conduct of the past and maintain their repudiation of the will-say rules.

[232] The Court has a general duty and power to ensure the just and most efficient hearing of these claims. If the Court did not, or does not, have the power to control the Plaintiffs' conduct in the way it did, then the Court would be helpless in the face of the Plaintiffs' recalcitrance. There

was no other practical way to discourage abusive conduct and to continue with the trial and ensure that the Plaintiffs were not calling witnesses in breach of Court decisions and in breach of their own previous undertakings to the Court and the other participants. The Plaintiffs offer no principal or authority that would suggest the Court could not, or should not, have acted as it did.

Alternative Suggestion

[233] I cannot agree with the Plaintiffs' alternative suggestion that any costs ordered payable forthwith should be limited to those dates dedicated to the Mistrial Motion. In these costs motions the Plaintiffs have chosen not to fully answer or significantly challenge the substance of the Crown's and the Intervener's accounts of the Court's findings on abuse of process, or the need for enhanced costs based upon abuse and waste. The Plaintiffs have attempted to take refuge behind paragraph 12 of the Court's order of August 9, 2007, which in no way prevents the Plaintiffs disputing the accounts given, raising mitigating factors or addressing the law of costs.

[234] The Plaintiffs say they might, if necessary, appeal the Court's decisions and rulings, but those decisions and rulings did not deal with costs, and the Plaintiffs do not indicate which of their possible grounds of appeal should cause the Court to hesitate at this point when dealing with costs.

[235] A significant aspect of the Plaintiffs' abusive conduct is that, before the trial, they made strong representations to the Court and the other participants that their will-says met (or exceeded) standards and that they had presented their case through their will-says in accordance with the standards and rules established by the Court and wanted to proceed on that basis. At the Peshee

hearing, the Plaintiffs fiercely demonstrated their view that will-says were intended to prevent ambush at trial and that the "ultimate question" was "does the other side have notice" and the answer to that question "is guided by the standard in the will-say."

[236] From the original trial date in January, 2005, the Plaintiffs eventually gained two additional years to prepare themselves for trial in January, 2007. During those years their earlier representations and assurances stood on the record. The Crown and the Interveners prepared for trial on the basis of those representations and assurances as well as the Court decisions and rulings that lay behind them.

[237] At the trial, the Plaintiffs then revealed that they had changed their position on will-says. After calling eight witnesses, they finally made it clear that, as far as they were concerned, there was no connection between will-say disclosure and evidence to be called at trial and that they did not understand or accept the use of will-says at trial to exclude relevant evidence. They attempted, through re-argument of the Court's decisions and finding, to browbeat the Court into abandoning the will-say rules and, when the Court refused, they eventually stood up and asked for a mistrial. In the course of the Mistrial Motion they revealed the real nature and source of their problem and said things that were inconsistent with their previous undertakings and the Court decisions that had given them the right to call new lay witnesses for whom they would provide will-says that met the disclosure standards set by the Court.

[238] After creating enormous confusion through their ambiguities and inconsistencies, and after refusing to explain in any adequate way how their present predicament could possibly be reconciled

with previous Court decisions and their own representation and assurances to the Court and the other participants, the Court gave the Plaintiffs yet another chance to retain and/or call all of their witnesses in accordance with the will-say rules and their earlier undertakings. The Plaintiffs refused that opportunity and, in effect, returned the situation on lay witnesses to what it had been in 2004, when all of their witnesses were struck, and before the Court gave them an opportunity to redeem themselves and call those lay witnesses.

[239] The Plaintiffs may well have a reason for choosing such a path and reverting to that former position. If they do, it has not been explained to me in any way I can understand or accept. The Plaintiffs now insist that they do not understand or accept the use of will-says at trial to exclude evidence. But this is not an explanation of the inconsistencies and reversals that have led to such a position. However, in the interim between striking witnesses in 2004 and the second striking of witnesses in 2007, the Crown and the Interveners have had to prepare for trial and conduct themselves at trial in accordance with Court decisions and rulings about will-says that bind all participants and with the commitments given to them by the Plaintiffs that the Plaintiffs had presented their case in their will-says in accordance with the standards. And the Plaintiffs' eventual choice to reject the will-say rules and return the proceedings to 2004 as regards their lay witnesses has meant a total waste of time and effort by other participants. Both by Court decision and the Plaintiffs' own representations and assurances, the Crown and the Interveners were bound to prepare for trial and to conduct themselves at trial on the basis that the Plaintiffs – to use their own words – had presented their case through their will-says "in accordance with the way in which the Court has permitted the Plaintiffs to present their case, and we want to proceed on that basis and have my friends comply in the same way."

[240] The Plaintiffs have now, in effect, rejected the will-say rules. So be it, but in the meantime and as a result of that rejection, the time and resources of other participants have been thrown away by the Plaintiffs' decision at this stage in the proceedings not to conduct themselves within the spirit and intent of the will-say rules.

[241] In these motions, the Plaintiffs appear to be suggesting that, at some time in the future, they may want to provide an explanation for their actions to the Court of Appeal.

[242] But the question this Court has to ask itself is why, after having these problems and inconsistencies brought to their attention, the Plaintiffs have simply refused to provide a truly responsive explanation to this Court. On these crucial and inconsistent issues the Plaintiffs have offered this Court little more than silence, obfuscation and stonewalling, and they have told the Court that what they have offered is their "best efforts." I have been provided with no substantive reason for postponing a costs decision with regard to either the Mistrial Motion and its aftermath, or the time and resources wasted as a result of the Plaintiffs' rejection of the will-say rules as a basis for calling their witnesses.

Rates

[243] The Plaintiffs say that these claims for enhanced costs, while within the jurisdiction of the Court, are not justified by the circumstances of this case. But they do not say why they are not justified. The fact is that the Plaintiffs offer very little to refute the arguments of either the Crown or the Interveners as to why enhanced costs are required.

[244] While there are differences between the cost considerations in the Bias Motion and what has been placed before me in these motions, the Plaintiffs have certainly continued some of the conduct that I found objectionable and sanctioned in the Bias Motion and the costs motion associated with it. But the present motions also involve their own egregious forms of abusive conduct that are specifically referred to by the Crown and the Interveners. I accept their accounts of what has taken place and what this Court has found. And I see nothing to question in the rates suggested, particularly when it is borne in mind that the Plaintiffs have shrugged off their own uncooperative and obstructive conduct as "best efforts."

[245] In paragraph 50 of their written representations, dealing with the claims of the Interveners, the Plaintiffs cite "the absence of misconduct on the part of the Plaintiffs and their counsel … " as a justification for avoiding enhanced rates. If this factor has any basis, it would apply to all of the present claims.

[246] As I have already made clear, the conduct of Plaintiffs' counsel is not a direct factor in these motions. However, I am very troubled by what the Plaintiffs call "an absence of misconduct on the part of the Plaintiffs … ." In those sequences of the proceedings to which these motions relate the Court has made some very serious adverse findings concerning the conduct of the Plaintiffs.

[247] It is noticeable that, in making this remark, the Plaintiffs do not feel constrained in addressing what the Court has actually found regarding their conduct, and this would suggest that

the Plaintiffs' remarks in paragraph 34 that "they are unable to respond to these allegations …" does not, perhaps, mean what it appears to mean.

[248] But, more importantly, I think the Plaintiffs are wrong to assert in their paragraph 50 that the Court has found an "absence of misconduct on the part of the Plaintiffs." In fact, one of the problems with this statement in the context of the present motions is that it pretty well undermines much of what the Plaintiffs say against the appropriateness of enhanced rates, because it suggests their view of rates is based upon a mistaken assumption that the Court has found an absence of misconduct, when quite the contrary is true.

THE CROWN'S CLAIM

[249] I accept the Crown's arguments and authorities for the need for enhanced costs to be payable forthwith and in any event of the cause, and the grounds put forward in support. The Plaintiffs have continued with forms of conduct that, in the past, the Court has found to be abusive, reprehensible, scandalous and vexatious, and the Plaintiffs' conduct has resulted in an enormous waste of time and resources.

The Crown's Bill of Costs

[250] The Plaintiffs raise various objections to the Crown's actual Bill of Costs that I think can be addressed in point form:

Hourly Rates

[251] The Plaintiffs object to the Crown seeking counsel fees for attendance at trial assessable at 5 units, or $750.00 per hour. They say that the hourly rate at trial should be assessed at rates no higher than $150.00 per hour.

[252] This is no more than an argument that the present circumstances do not warrant enhanced costs and/or the use of costs as a sanction. As the Crown points out, $150.00 per hour is equivalent to the low end of column 2 of Tariff B and amounts to an indemnity measure for costs. For reasons already given, the Court cannot accept that an indemnity measure is appropriate. A significant sanction is necessary to acknowledge what has been continuing abuse on the part of the Plaintiffs and a pattern of conduct that, despite earlier warning and cost sanctions, has been continued by the Plaintiffs, as well as the enormous waste that has occurred.

Second Counsel Fees

[253] The Plaintiffs complain that the Crown is seeking second counsel fees at the same hourly rate as first counsel fees. The Plaintiffs remind the Court that under Item 14(b) of Tariff B, second counsel fees are allowable at 50% of the rate applicable to first counsel, so that any second counsel fees awarded by the Court should be reduced by 50%.

[254] The Crown says that the complexity of this trial and the massive amounts of documentation involved justify and require two primary counsel for the entirety of the action. The reality is that

both sides regularly have in excess of two counsel present in Court and that, for the most part, two Crown counsel are at trial on every sitting day.

[255] This need for significant numbers of counsel for both parties to deal with the complexity of these proceedings corresponds with my own observations. I accept the Crown's arguments that two primary counsel are required to meet the realities of these actions.

Preparation Time

[256] The Plaintiffs claim that the Crown is abusing Unit 13(b) of Tariff B with the result that the Crown's claim for preparation time is unreasonable and excessive. In particular, the Plaintiffs say that Tariff B does not provide for preparation time in relation to non-court days and weekends.

[257] The Crown points out that trial preparation time in this case cannot leave out of account that not only have significant amounts of time been required to deal with the lay witnesses called to date, but that significant amounts of time have also gone into preparation for the future lay witnesses who now will not be called. The Crown says that it should be compensated for this wasted preparation time.

[258] What is more, the Crown says that, regardless of what heading is used for the claim of preparation time, the Crown should be properly compensated for the total, unjustifiable waste of all its time in preparing for witnesses ultimately struck, and whether the Crown's preparation took

place before, or during, the trial is irrelevant and can be recognized under Rule 400(1) irrespective of Item 13(b).

[259] Bearing in mind the complexities of these actions, I cannot say that the Crown's approach to addressing preparation time is unreasonable. The gravamen of the case against the Plaintiffs in these costs motions is that their conduct, as well as being abusive, has led to a totally unjustifiable waste of time and resources for the other participants; a waste that the Plaintiffs could easily have avoided by merely conducting themselves within the will-say rules established by the Court's decisions and rulings, and by their remaining consistent with their own assurances and representations to the other participants. In this situation, and irrespective of what Item 13(b) might suggest, I think the Plaintiffs have to assume responsibility for the full extent of that waste and shoulder the financial sanction that their own conduct calls for.

THE CLAIMS OF THE INTERVENERS

[260] Generally speaking, and subject to the exceptions I refer to below, I accept the Interveners' arguments and authorities for the need for an award of enhanced costs payable to each of them forthwith and in any event of the cause, as well as the grounds put forward to support each claim.

[261] In addition to those arguments that the Plaintiffs raise against all the claims for costs at this stage in proceedings, and for which the Court has already stated its position in relation to the Crown, and that can be applied, *mutatis mutandis*, to the Interveners, the Plaintiffs also raise issues that are specifically directed at the Interveners, both as a group and individually:

One Set of Costs or Separate Claims?

[262] To begin with, the Plaintiffs say that any costs awarded to Interveners should be limited to one set of cost for those days during which the Interveners participated in the trial by cross-examining witnesses.

[263] The Plaintiffs' essential point is that, given the "relative lack of participation by the Interveners, the general rule against costs to Interveners, the absence of misconduct on the part of the Plaintiffs and their counsel, and the fact that the Interveners are funded by the Crown, the Plaintiffs submit that the Interveners should be awarded no costs of the trial" or, in the alternative, "the Interveners are not entitled to each receive a set of costs for the trial" and, at most, "should be awarded one set of costs to be divided amongst one another."

[264] As already pointed out, the Plaintiffs' perception of, and reliance upon, an "absence of misconduct on the part of the Plaintiffs" in the face of the Court's clear findings to the contrary undermines to a significant extent the Plaintiffs' position on this point.

[265] There are, of course, differences between the Bias Motion and the conduct that the Court has been asked to acknowledge and sanction in these costs motion, but there are many similarities and continuities, as both the Crown and the Interveners point out in their materials.

[266] If the Plaintiffs mean to suggest that the Court's findings regarding their abuse of process and their waste of time and resources are less serious than the Court's findings regarding their conduct in the Bias Motion, then I think I need to disabuse them of that view.

[267] What has been revealed as a result of the Mistrial Motion and its aftermath is that the Plaintiffs have caused an enormous waste of time and resources. The Bias Motion was groundless and completely unwarranted, but the Mistrial Motion has revealed a course of abusive conduct that is, in my view, irresponsible and disdainful of the rights of other participants. The Plaintiffs have gone from a position of reassuring the Crown and the Interveners that they have complied with Court orders regarding will-say disclosure, and that they have presented their case through their will-says in accordance with the standards and that all participants should do likewise, and of actually using will-says to exclude evidence, to a position at trial where they disclaim any connection between will-say disclosure and evidence at trial and reject the will-say rules. And they have done this without any truly responsive explanation as to why, if they reject the will-say rules, they gave the earlier assurances, or urged the Court at Peshee to protect them from ambush by using the will-say of Ms. Peshee.

[268] If the Plaintiffs had wanted to challenge the will-say rules, they should have done so long ago. They should not be doing it years later at trial, after the time for appealing the Court's decisions and rulings that established the system has lapsed, and after giving notice of compliance and reassuring other participants that, as far as they were concerned, all parties had to play by the same rules.

[269] Not only have the Plaintiffs failed to explain in any acceptable way their further breach of Court decisions and their reneging on their own previous reassurances, they remain entirely unrepentant concerning the problems and the waste they have brought about. Even in their response to the present motions for costs they assert an "absence of misconduct on the part of the Plaintiffs" as a justification for denying the Interveners costs of the trial. This is consistent with their attitude that failing to respond to the Court's direction, and obstructing the Court's attempts to resolve the problems they had caused, was their "best efforts."

[270] As the Interveners point out, the Court has already addressed the issue of why the Interveners are entitled to costs in the face of abusive conduct by the Plaintiffs. In the costs motion related to the Plaintiffs' Bias Motion, the Court pointed out the unique role ascribed to the Interveners in these actions and its recognition by this Court and the Federal Court of Appeal. In order to fulfill that unique role, the Interveners were compelled to prepare themselves for trial and conduct themselves at trial on the assumption that Court decisions and rulings would be respected, and the Plaintiffs would conduct themselves in accordance with those decisions and their own representations. The effective fulfillment of the Interveners' roles in bringing their perspectives to bear on these proceedings in order to assist the Court and make the Court aware of the views and interests of those individuals and groups they represent requires much more than being present to cross-examine on specific days. Participation in a trial requires preparation, observation, cross-examination, deliberation and general advocacy. The Interveners have not abused the participation rights granted to them in relevant Court decisions and rulings, and they have conducted themselves at all times in an efficient manner that avoids duplication and waste and that is commensurate with

the particular interests they each represent. Much of what was said in relation to the Interveners' costs for the Bias Motion is applicable here.

[271] The Plaintiffs' denial of misconduct in the face of strong Court findings to the contrary is not an answer; it is a refusal to provide an answer to the allegations made by the Interveners and their account of the Court's finding on abuse of process and waste.

[272] As in the motion for costs of the Bias Motion, but even more so here, I think the Interveners must receive separate costs for both the Mistrial Motion and its aftermath, and the throw-away costs of the trial. The Interveners have all been subjected to an unjustifiable waste of time and resources as a result of the Court's having to deal with the Mistrial Motion, its aftermath, and the striking of witnesses that arose out of the revelations made in that motion, and the Plaintiffs' refusal to rectify the problems they had caused or to cooperate in maintaining their evidentiary record and the integrity of the will-say rules, and the procedures required by these actions. Once again, as with the Bias Motion, I think I have to take note of what the Federal Court of Appeal has said about the unique role of the Interveners in these proceedings and that Court's awarding of separate costs to the Interveners when the situation has warranted it. In addition, the sanctioning factors that came into play in relation to the motion for costs of Bias Motion must also be taken into account here.

Scale of Costs

[273] The Plaintiffs take the position that if any costs are awarded to the Interveners they should be "taxable costs based upon the mid-range of Column 3 with no multiplier" and taking into consideration various other issues which I will discuss below.

[274] As NWAC points out, this is essentially the same argument on the same evidence of Chief Roland Twinn that the Court rejected in the motion for costs related to the Bias Motion. Much more has now happened that needs to be reflected in a costs award. It has to be born in mind that, following my findings in the Mistrial Motion, the Plaintiffs obstructed the Court's attempts to deal with the problems they had caused, and then called such obstructive conduct their "best efforts." This kind of conduct and attitude cannot be sanctioned by an indemnity-only approach to the waste and havoc that the Plaintiffs have forced upon the Interveners and the contributions the Interveners have made to these proceedings. I pointed out in relation to the costs for the Bias Motion that actual amounts billed and paid to the Interveners did not reflect the totally unjustifiable waste, disruption and financial impact that the Plaintiffs' conduct has had upon the Interveners, their legal counsel and the public purse. The same applies here. Unnecessary, unrepentant and repetitive waste by litigants, who have been told to mend their ways, must be discouraged and a significant sanction, assessed objectively, and taking into account what those litigants have revealed about their attitude to the Court's findings (i.e. that obstruction is "best efforts" and the Court's findings reveal an "absence of misconduct on the part of the Plaintiffs") is really the only practical tool available to the Court as this point to ensure fairness and allow the full costs of the Plaintiffs' conduct to fall on them. In the past, an award of costs to the Interveners at the high end of Tariff V with a multiplier of

1.5 did not deter the repetition of wasteful and abusive conduct. This suggests that the Court must increase the scale again if it is to reflect the Court's disapproval of the Plaintiffs, or of truly compensating the Interveners for the waste of time and resources caused by the Plaintiffs.

The Adjournment Motion

[275] Each of the Interveners has made a claim for enhanced costs for the Adjournment Motion decided by my order dated October 12, 2006.

[276] NWAC says it should have the costs of the Adjournment Motion because "the future of the action as a whole was at stake, [and] NWAC's participation … was necessary to protect its stakeholder interest in seeing a resolution to this matter on its merits."

[277] NWAC says that an increased scale is justifiable for the Adjournment Motion because "this motion wasted the Court's and other participant's time; the Plaintiffs brought the application in the wrong court with no argument or evidence to support their key assertions" and the motion was "an attempt to derail the trial on shaky or non-existent grounds."

[278] CAP says that enhanced costs are justifiable for the Adjournment Motion because "the motion was another example of the type of behaviour the Court has been attempting to discourage" and because the Plaintiffs were, to some degree "revisiting the Court's previous findings about the scope of the amendments and … the scope of the pleadings."

[279] CAP does not seek the same level of increased costs for the Adjournment Motion as for the throw-away costs of the trial, but CAP still feels that the Adjournment Motion "was a waste of the Court's and participants time and resources at a time when all parties were immersed in work for trial preparation."

[280] NCC(A) seeks costs of the Adjournment Motion on the highest level under Tariff B but concedes that the motion "was not found by the Court to have been improper or to involve an abuse of process … ."

[281] NSIAA seeks costs of the Adjournment Motion at 1.5 times the high end of Column V, plus all related travel costs and travel disbursements, on the basis that NSIAA provided the arguments and authorities for the Court's finding that it had no jurisdiction to hear the motion because the remedy sought was a stay and not an adjournment, and because NSIAA warned the Plaintiffs about this issue beforehand and the Plaintiffs went ahead anyway.

[282] Also, NSIAA makes the same point as other Interveners that the "Plaintiffs failed to present any argument or case law … on the question whether their Application satisfied the criteria for a stay of proceedings."

[283] The Plaintiffs do not really respond to these arguments and facts. In paragraph 66 of their written representations, they say that "neither the motion to redeem witnesses nor the present motion for costs reflect the commission of misconduct, abuses of process, or frivolous or vexatious

arguments on the part of the Plaintiffs justifying costs to Interveners or any scale of costs beyond the mid-range of Column III of Tariff B."

[284] First of all, I regard the Plaintiffs' paragraph 66 as containing a typographical error. I think they are obviously referring to the Adjournment Motion and not the Motion to Redeem Witnesses and, even if they are not, the issues they raise need to be considered by the Court.

[285] Secondly, I agree with the Plaintiffs (if they intend to refer to the Adjournment Motion)that the Adjournment Motion did not involve the kinds of abuse of process and waste issues that I am dealing with generally in the present costs motions. I do not agree with them as regards the present motions, which are an inevitable consequence of their own abusive and wasteful conduct.

[286] The Adjournment Motion arose out of the Plaintiffs scope of pleadings concerns and their desire to bring to the Court's attention the fact that they were taking issue with the Federal Court of Appeal's decision in a way that could impact the scope of these proceedings and the evidence that would be called at trial if they were successful before the Supreme Court of Canada.

[287] At the end of the day, I could not agree with the Plaintiffs that I either could, or should, delay the start of the trial proper, but I certainly understood why they had brought the motion and why scope of pleadings issues were a matter of continuing concern to them. The Plaintiffs wanted to assert broad self-government claims. When I examined the pleadings, I could not find that they encompassed such broad claims. In fact, the Plaintiffs had advised Justice Hugessen when seeking amendments that they were not making a broad claim to self-government.

[288] A motion was, perhaps, not the most appropriate way to alert the Court to their continuing interest in broad self-government claims and to explore whether, for this reason, the start of the trial should be delayed. But I could certainly understand the Plaintiffs' desire to raise the issue with the Court. And I do not think that what transpired on that occasion is akin to the abusive and vexatious conduct that has been repeated and intensified in the ways I have already identified, or the truly irresponsible waste that has resulted from the Plaintiffs' repudiation of the will-say rules as applicable to their lay witnesses.

[289] I also do not think that Intervener interests, or their unique perspectives, were engaged in the same say by the Adjournment Motion as they have been by other motions and conduct of the Plaintiffs. I think they were put to the trouble of responding and attending. At the very least, the Plaintiffs' persistent attacks upon the position of the Interveners and their role in these actions have created a need for constant vigilance by the Interveners at all times. Such conduct meant that they had to respond and attend individually. But I cannot agree with NWAC that the future of the action as a whole was at stake in the way that it was, for example, with the Bias Motion, which I found to be groundless and nothing more than a collateral attack upon previous decisions, or in the Mistrial Motion where the Plaintiffs eventually revealed that what they wanted to do was return the proceedings to the discovery stage but provided no real basis or justification for their accusations against the Court, or any real indication of what Court rulings may have excluded that prevented them from adequately stating their case.

[290] For these reasons, I think each of the Interveners should receive their costs for the Adjournment Motion at the mid-range of Column III of Tariff B, plus all related travel costs and expenses, payable forthwith and in any event of the cause.

NWAC

[291] The Plaintiffs complain about NWAC's claim for second counsel fees. I agree with the Plaintiffs on this point. While the separate interests and perspectives of each Intervener require that they be individually represented, I do not think second counsel fees are justified for NWAC. Any sanction element that is necessary is best addressed through a multiplier and enhanced costs, but this does not require the imposition of a second counsel payment upon the Plaintiffs.

[292] The Plaintiffs also point out that NWAC has used a 6-hour court day, even for those days when Court time was far lower, as reflected in the other bills of costs before the Court. NWAC says that its figures reflect those costs that were actually thrown away because, when NWAC's counsel flew to Edmonton from Toronto, this was done on the assumption that the Court would be sitting for full days. Since counsel was away from the office and unable to work on other files, NWAC says the whole day of projected trial time should be billable.

[293] I cannot agree with NWAC's rationale. I am sure that the disruptive sitting pattern that these proceedings have followed to date has caused significant difficulties in the schedules of all counsel. But those difficulties and disruptions are recognized in the multiplier. In this day and age, being away from the office does not necessarily mean counsel cannot work on other files and I assume

that, as the disruptive pattern developed, counsel should have taken mitigating steps to ensure that their time away from the office was not wasted. Notwithstanding the significant distance between Toronto and Edmonton, I do not think that NWAC is really in a different situation from Crown counsel or counsel for the other Interveners. They may be able to get back to their offices when a trial day is interrupted, but NWAC would need to do much more to show the Court that it has not been possible to work on files outside the office to justify placing NWAC in a special category in this regard. The wasteful disruption caused by the Plaintiffs is reflected in the multiplier.

[294] The Plaintiffs also object to NWAC's claiming fees and disbursement for Ms. Soukup who is not a lawyer. The Plaintiffs say that Items 14(a) and 24 apply to counsel fees and disbursements.

[295] NWAC points out that payments are permitted for the cost of a law clerk who is performing tasks permitted in the province where they are done. In both Alberta and Ontario, a law clerk working in the office of counsel is permitted to do the work in respect of which a claim is made for Ms. Soukup, and her time is being claimed at the level permitted by Item 28. The disbursements claimed for her are permissible, as they would be permissible if claimed for a solicitor under Item 24.

[296] My review of this matter suggests to me that NWAC is correct and the claims for Ms. Soukup can be made.

ORDER

FOR REASONS GIVEN, THE COURT HEREBY ORDERS AS FOLLOWS:

A. The Crown shall have and the Plaintiffs shall pay:

1. The costs of the entirety of the trial to date (save for opening statements and the Document Motion during the trial) assessed at two times the high end of column 5 of Tariff B, in accordance with the draft Bills of Costs submitted by the Crown with its motion materials in the amount of $715,361.51, which sum shall be payable forthwith and in any event of the cause; and

2. Costs under Tariff A of the *Federal Courts Rules*, to be payable when assessed by the Court and in any event of the cause; and

3. Costs of this motion, payable forthwith and in any event of the cause, with costs to be spoken to if necessary.

B. NWAC shall have and the Plaintiffs shall pay:

1. The costs and disbursements of the Adjournment Motion as a lump sum award calculated according to the mid-range of Column III of Tariff B of the *Federal*

Courts Rules, plus all related travel costs and expenses, and payable forthwith and in any event of the cause; and

2. Upon service of a revised Bill of Costs, a lump sum award for costs and disbursements in the amount shown on the draft Bill of Costs which is Exhibit B to the Affidavit of Christine Soukup, sworn November 16, 2007, for its costs of the Plaintiffs' Mistrial Motion and of proceedings to determine the Plaintiffs' compliance with the Court's July 5, 2007 Direction and August 9, 2007 Order down to and including the proceedings of September 11, 2007, and of the Plaintiffs' Motion to settle the terms of the Order of October 11, 2007, and its costs thrown away with respect to the hearing of the Plaintiffs' lay witnesses in this matter in accordance with the ruling of September 11, 2007, (except that the amount shown in the said draft Bill of Costs which is Exhibit B shall be reduced to remove second counsel fees and any amounts claimed for court days in excess of actual times reflected in other bills of costs before the Court), calculated according to two times the high end of Column V of Tariff B of the *Federal Courts Rules*, and payable forthwith and in any event of the cause; and

3. The costs and disbursements of this motion calculated according to two times the high end of Column V of Tariff B payable forthwith following service of a bill of costs and in any event of the cause; and

4. Leave for late service of a bill of costs for this motion, and leave to file such bill of costs after the determination of this motion at such time as disbursements are known.

C. CAP shall have and the Plaintiffs shall pay:

1. The costs and disbursements of the Adjournment Motion as a lump sum award calculated according to the mid-range of Column III of Tariff B of the *Federal Courts Rules*, plus all related travel costs and expenses, and payable forthwith and in any event of the cause; and

2. The costs and disbursements in an amount of $247,655.87 as a lump sum award in relation to the Plaintiffs' Mistrial Motion and the matters in the Court's Orders dated June 19, 2007 and October 15, 2007, as well as thrown-away costs for the trial between January 30, 2007 and October 15, 2007, based on the high end of Column V of Tariff B with a multiplier of two applied, all as set out in the draft Bills of Cost attached to the Affidavit of Priscilla Samson and marked as Exhibits "A", which sum shall be payable forthwith and in any event of the cause; and

3. The costs of this motion with costs to be spoken to on the basis that this motion has been dealt with as a Rule 369 motion.

D. NCCA shall have and the Plaintiffs shall pay:

1. The costs and disbursements of the Adjournment Motion as a lump sum award calculated according to the mid-range of Column III of Tariff B of the *Federal Courts Rules*, plus all related travel costs and expenses, and payable forthwith and in any event of the cause; and

2. The costs and disbursements as a lump sum award in the amount of $211,939.00 calculated as an amount equal to two times the upper end of Column V of Tariff B of the *Federal Courts Rules* for its participation in the trial of these actions from January 30, 2007 to October 15, 2007, in accordance with the Bill of Costs submitted with this motion, which sum shall be payable forthwith and in any event of the cause; and

3. The costs of this motion, payable by the Plaintiffs forthwith and in any event of the cause, with such costs to be spoken to if necessary.

E. NSIAA shall have and the Plaintiffs shall pay:

1. The costs and disbursements of the Adjournment Motion as a lump sum award calculated according to the mid-range of Column III of Tariff B of the *Federal Courts Rules*, plus all related travel costs and expenses, and payable forthwith and in any event of the cause; and

2. Solicitor-client costs of the trial of these actions from January 30, 2007 to September 11, 2007, including the solicitor-client costs of the Plaintiffs' April-May 2007 Mistrial Motion, and subsequent proceedings to determine the Plaintiffs' compliance with the Court's July 5, 2007 Direction and August 9, 2007 Consequential Order, and of NSIAA's costs thrown away in relation to the hearing of the Plaintiffs' lay witnesses now struck, which costs shall be fixed at $198,012.21, as set out in the draft Bill of Costs submitted by NSIAA, and which sum shall be payable forthwith and in any event of the cause; and

3. The costs of this motion fixed at $7,500.00 inclusive of disbursements and G.S.T., and payable forthwith and in any event of the cause.

F. Participants may address the Court on any issues arising out of these costs awards and any follow-up that is required.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-66-86-A
STYLE OF CAUSE:	**SAWRIDGE BAND v. HER MAJESTY THE QUEEN ET AL**
	T-66-86-B
	TSUU T'INA FIRST NATION (formerly the Sarcee Indian Band) v. HER MAJESTY THE QUEEN ET AL
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	**Motion dealt with in writing without the appearance of parties.**
REASONS FOR ORDER AND ORDER:	**RUSSELL J.**
DATED:	February 29, 2008

WRITTEN REPRESENTATION BY:

The Plaintiffs, Defendant, and the Interveners

SOLICITORS OF RECORD:

Parlee McLaws LLP Edmonton, Alberta	FOR PLAINTIFFS
Twinn Law Office Slave Lake, Alberta	FOR PLAINTIFFS
John Sims Deputy Attorney General of Canada	FOR DEFENDANT
Chamberlain Hutchison	FOR INTERVENER,

Edmonton, Alberta	CONGRESS OF ABORIGINAL PEOPLES
Field LLP Edmonton, Alberta	FOR INTERVENER, NATIVE COUNCIL OF CANADA (ALBERTA)
Law Office of Mary Eberts Toronto, Ontario	FOR INTERVENER, NATIVE WOMEN'S ASSOCIATION OF CANADA
Burnet Duckworth & Palmer LLP Calgary, Alberta	FOR INTERVENER, NON-STATUS INDIAN ASSOCIATION OF ALBERTA