Federal Court  Cour fédérale

CANADA

Date: 20070619

Docket: T-66-86

Citation: 2007 FC 657

Edmonton, Alberta, this 19th day of June, 2007

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

Table of Contents

REASONS FOR ORDER AND ORDER

THE MOTION

[1] This somewhat extraordinary motion has arisen during the course of the trial and has a serious bearing upon the future of these proceedings.

[2] The Plaintiffs are asking the Court to declare a mistrial of both actions.

[3] The basis for the motion is an allegation by the Plaintiffs that the Court has foreclosed the Plaintiffs' opportunity to adequately state their case and has made rulings regarding the admissibility of evidence that have rendered the trial unfair. There are several dimensions to this basic allegation but the central issues from the Plaintiffs' perspective are that the Court has created a situation where the will-says submitted by the Plaintiffs in accordance with Justice Hugessen's Pre-Trial Order of March 26, 2004 and my order of November 25, 2004 have been used as a legal ground for the exclusion of relevant, admissible evidence at trial. What is more, the Plaintiffs say that rulings made by the Court to this point in the trial show that the Crown has a "huge advantage" over the Plaintiffs because "the playing field is no longer level … ."

[4] The motion began in open Court as a request for guidance by the Plaintiffs. The Court heard representations from all participants and it was subsequently agreed by all concerned that the Court should treat the issues raised as a formal motion, review the relevant record, and provide a

decision that might resolve the present impasse or move the proceedings back to case management on the basis of mistrial.

THE RECORD

[5] Because of the extraordinary way in which this motion arose, the Court does not have a full record to work with. The parties have asked the Court to base its decision upon:

a. The trial record and exhibits introduced to date;

b. The arguments of the participants on point given in open Court;

c. Background orders of the Court subsequent to Justice Hugessen's Pre-Trial Order of March 26, 2004;

d. Related directions and transcripts relevant to the full context in which the Plaintiffs raise their concerns.

No affidavits have been submitted to support or refute the motion.

THE POSITION OF THE PARTIES

[6] For purposes of context and understanding, I am going to set out some of the more important arguments put forward by the parties. I do not intend this to be an exhaustive account of everything that was presented to me. I have considered all points raised by the parties as part of this decision, and I have also considered the brief contributions of the Interveners which I do not summarize here.

The Plaintiffs

[7] From the Plaintiffs' perspective, the fundamental concerns that they cannot adequately make their case and that the trial has become unfair manifest themselves in several important ways:

1. The Use of Will-Says at Trial

The Plaintiffs say that the Court has created a situation at trial where the will-says produced by the Plaintiffs in accordance with Justice Hugessen's order of March 26, 2004 and my order of November 25, 2004, have been used by the Crown and the Court to create "a situation where the will-says are, in fact, and have been established as a legal ground for the exclusion of relevant admissible evidences." They say that will-says cannot be used in this way at trial and that, in the present proceedings, it was never intended that will-says should be used in this way, and the Plaintiffs do not understand and do not accept the use of will-says at trial to exclude relevant admissible evidence called by either party. They take the 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." Because of the way the Court has used will-says, say the Plaintiffs, "this Court has foreclosed the Plaintiffs' opportunity to adequately state their case."

2. The Peshee Hearing

The Plaintiffs say that the rulings made by the Court and the discussion between counsel and the Court at the *de bene esse* hearing for Ms. Florence Peshee held December 13, 2004 in Calgary do not establish a precedent regarding the use of will-

says that should be applicable at trial, and do not demonstrate an understanding by the Plaintiffs that will-says would be used at trial to exclude relevant evidence of their own witnesses. The Plaintiffs take the position that Ms. Peshee was a witness called by an Intervener, so that the same exclusionary rules should not apply to the Plaintiffs' own witnesses. They also say that the objections raised by Mr. Healey (Plaintiffs' counsel) to Ms. Peshee's evidence were related solely to oral history issues, and that anything Mr. Healey may have said generally concerning the use of will-says at trial was directed at Intervener evidence and oral history issues and was not intended to encompass the evidence led through the Plaintiffs' own witnesses.

3. Post Peshee

The Plaintiffs say that events and documentation referred to and produced in the period following the Peshee hearing and leading up to the commencement of the trial on January 24, 2007, show that, whatever may have happened at the Peshee hearing, the Plaintiffs made it clear they did not accept that will-says would be used to exclude their own evidence at trial, and that the Plaintiffs indicated to the Crown that the role and use of will-says would be dealt with at trial, and the Crown understood and accepted this.

4. Compliant Will-Says

The Plaintiffs have represented to the Court that the will-says prepared for their witnesses are fully compliant with all Court orders dealing with will-says.

5. Lessons from the Testimony of Elder Starlight

The Plaintiffs further say that, when the testimony given by Elder Bruce Starlight is viewed as a whole, it is clear that the Crown now has a "huge advantage", and can, for example, roam over the whole Court record for purposes of cross-examination while the Plaintiffs are, in effect, confined to the will-says for purposes of examination-in-chief;

6. Conclusions About Rulings

The Plaintiffs have reviewed the Court's admissibility rulings to date and say that the following rules now apply to the evidence of their lay witnesses:

> And we understand, sir, that your rulings to date are as follows:
>
> **Number one**, if the Crown objects to evidence of a witness called by the plaintiffs on the basis of non-disclosure, if the witness was not produced as a deponent for the plaintiffs at examinations for discovery, the Crown will only be required to show that the evidence is not described in a will-say of the witness and the brief description related to the witness in the letter of explanation, Exhibit E for Identification. If the evidence is not described in these two documents, the evidence will be inadmissible and excluded.
>
> **Two**, if the Crown objects to the evidence of a witness called by the plaintiffs on the basis of non-disclosure, the Court will not consider any disclosure that has occurred as a result of, (a), the pleadings; (b), the examination for discovery, including answers to undertakings conducted by the Crown before the first trial, the examinations for discovery, including answers to undertakings and written interrogatories conducted by the Crown after the first trial and before this trial unless the witness was produced by the Plaintiffs as a deponent at examinations for discoveries; (c) transcripts of the evidence from the first trial and all of the evidence adduced, including evidence adduced by the plaintiffs through direct testimony and cross-examination by the Crown; (d), exhibits entered into evidence at the first trial; (e), the detailed oral history summary marked as Exhibit F for Identification; (f), all document production of the plaintiffs and the Crown; (g), expert reports that have been

served by both the plaintiffs and the Crown; (h) the will-says of any other witness called or to be called by the plaintiffs; (i), the evidence of any witness who has already testified at this trial; (j), exhibits entered into evidence at this trial; and, (k), the information of the Crown from any other source.

Three, if the Crown objects to evidence of a witness called by the plaintiffs on the basis of non-disclosure, and the witness was a deponent for one of the plaintiffs at examinations for discovery, the Court will not consider the fact that the Crown had an opportunity to examine the witness, as the Court does not see (quoted): "...how the Crown, at discovery, could have been expected to know and prepare for the fact that if something was not disclosed in a will-say, they would be held to account for not eliciting that information at discovery." And that is a quotation from the remarks of the court that I referred to, sir, found at March 21 of 2007, page 19, lines 16 to 21.

Four, if the Crown objects to evidence of a witness called by the plaintiffs on the basis of non-disclosure, and the witness was a deponent for one of the plaintiffs at examination for discovery, and if the Crown examined the witness in relation to the subject matter of the evidence that is objected to, unless the examination by the Crown elicits the evidence objected to in a full and complete way, the evidence will be found to be inadmissible and excluded.

Five, if the Crown objects to the evidence of a witness called by the plaintiffs on the basis of non-disclosure, and the evidence was adduced as a result of a proper question being put to the witness to elicit evidence in a will-say, and the witness answer included evidence not described in the will-say of the witness or the letter of explanation, Exhibit E for Identification, the evidence will be found to be inadmissible and excluded.

Six, if the Crown objects to the evidence of a witness called by the plaintiffs on the basis of non-disclosure, the Court will not consider remedying any surprise or prejudice alleged on the part of the Crown by directing adjournments of the trial, nor will the Court consider the length of any adjournment or delay which has actually occurred between the calling of the plaintiffs' witnesses and the commencement of the Crown's cross-examination.

[8] The Plaintiffs say that they propose to conduct the balance of the trial "on the basis of this understanding of your rulings, and if we are incorrect in any way in relation to this understanding, we ask that you advise us of that."

The Crown

1. General

The Crown's position is that this motion discloses no new circumstances and no new concerns that would justify the Court overruling itself on previous evidentiary rulings it has made.

2. Plaintiffs' Failure to Explain

The Crown also points out that if the Court has indeed excluded relevant evidence because it is not disclosed in a will-say, then the Plaintiffs have failed to explain why that relevant evidence was not disclosed in accordance with the standards. The Court cannot lose sight of the fact that the Plaintiffs were ordered to do this and, to the extent that this motion discloses that this was not done, it is simply an acknowledgement by the Plaintiffs that they have, yet again, breached a Court-ordered deadline.

3. The Real Issue

The Crown says this motion merely asks the Court to ignore will-say statements when considering admissibility issues. This is an option that the court has already rejected several times, going back to the Court's November 25, 2005 decision when the Court first

deemed inadmissible certain proposed evidence for failing to comply with the will-say standard of providing a summary of what witnesses were expected to say with sufficient detail to allow other participants to prepare for trial. That decision was upheld by the Federal Court of Appeal and leave to appeal to the Supreme Court of Canada was denied.

4. Inadequate Substantiation

The Crown is of the view that the positions advanced by the Plaintiffs in this motion are unsupported by any evidence or authority and are based upon misconceptions of what has actually occurred to date in these proceedings.

5. Opportunities to Lead Relevant Evidence

As regards disclosure and the leading of evidence, the Crown points out that any evidence that the Plaintiffs felt was important and wanted to lead could, and should, have been disclosed in their will-ways. The whole pre-trial record was available to the Plaintiffs and they were free to include any and all matters they thought were necessary to make their case. In fact, they were not just free to do so, they were ordered to do so by the Court, and no explanation has ever been provided as to why the Plaintiffs did not disclose in their will-says evidence that was relevant and material to their case. In addition to the materials from the pre-trial record referred to by the Plaintiffs, the Plaintiffs also had access to the witnesses themselves, as well as all oral histories and their sources.These areas were not available to the Crown.

The Crown says that evidence has not been excluded in the ways that the Plaintiffs suggest. It is for the Crown to object to evidence that it sees as not having been disclosed, or discovered upon when a deponent is called, and the Plaintiffs have been given an opportunity to respond fully to the Crown's objections. There is no additional onus on the Plaintiffs as they elicit testimony to show where it has been disclosed.

6. Endorsement by Federal Court of Appeal

The Crown points out that the Federal Court of Appeal has already commented upon the fairness of excluding evidence in the way it has been excluded in these proceedings.

7. Pre-Trial Decisions

The Crown further says that various pre-trial decisions by this Court also support what has occurred at trial concerning the exclusion of evidence. For example, the Court's decision of December 7, 2006 that denied the Plaintiffs the right to simply renovate their will-says. There is really no difference between a proposal to renovate will-says shortly before the trial began and a proposal made at trial to disregard the will-say requirement and standards altogether and to allow witnesses to testify on any topic, except that the timing of allowing this at trial would be even more dismissive of the regime that has been set up by the Court to ensure effective preparation and planning for cross-examination.

8. Rulings to Date at Trial

As regards the implications of rulings to date, the Crown has its own views on what they indicate but points out that rulings really need to be considered on a case by case basis in

the context of witnesses that are called when they propose to give evidence. The Crown says that an examination of the record shows that the Crown has no advantage when it comes to cross-examination and there is no unfairness, either with regard to any particular witness or with respect to how the system works. The will-say requirement set in motion by Justice Hugessen does not produce any unfairness. The Plaintiffs are, in fact, merely bemoaning the very nature of cross-examination, and it is a red-herring to equate the broad scope of cross-examination as some sort of disadvantage created by the will-say requirement. The will-says do not enhance the ability of the Crown on cross-examination to cover ground or topics not covered in direct.

9. Resilement

The Crown says that the Plaintiffs merely wish to now resile from the representations they made to the Court and the other participants that they accepted the will-say requirement and their will-says disclosed what their witnesses would say. In the end, the Plaintiffs are simply asking to be released from some of the disclosure requirements imposed upon them when the Court restored their right to call any lay witnesses.

10. Crown's Rights

The Crown points out that it is entitled to the benefit of the most just, expeditious and least expensive determination of these proceedings as much as any other litigant. Rule 3 of the *Federal Court Rules* is undermined by the present motion which revisits rulings previously made by the Court under the guise of interpreting them without anything truly new having occurred in the interim.

REASONS

Introduction

[9] This trial has reached an impasse that must be resolved. The Plaintiffs say it has become unfair and they cannot adequately make their case. The Crown says the Plaintiffs are simply trying to avoid the disclosure requirements that are a condition to calling their witnesses. Both sides are frustrated and the proceedings have become deadlocked. In an attempt to bring some stability and clarity to the situation and to allow the parties to plan for the future of the trial, the Court has agreed to consider the Plaintiffs' complaints as a motion on the basis of the agreed record. Many of the points raised have already been considered and decided by the Court, either in the form of rulings at trial or in motions brought before me by both parties (though usually the Crown) on matters related to the trial. Hence, the Court regards itself as bound by precedent and *res judicata* in some ways that will later be addressed.

[10] Reduced to basics the Plaintiffs' principal argument is as follows:

a. The Plaintiffs have produced will-say statements for their witnesses that comply with all court-ordered requirements for will-says and disclose what each witness will say in accordance with the standards set by the Court;

b. The Court, through its rulings, has created an imbalance and has prevented the Plaintiffs from adequately making their case because the Court has adopted a legal rule at the urging of the Crown and the Interveners that excludes relevant evidence

> that has not been disclosed in a will-say in accordance with the Court-ordered standards.

In a nutshell, the Plaintiffs' will-says disclose what their witnesses will say, but they cannot adequately make their case because the Court will only allow witnesses to say what the Plaintiffs have disclosed they will say in their will-says.

[11] The Court has not, in fact, adopted and applied such a legal rule of exclusion. But even if the Plaintiffs were correct in this regard, the motion as presented to the Court contains an unexplained contradiction. If the Plaintiffs' will-says disclose what each witness will say in accordance with the standards set by the Court, then their evidence given at trial cannot be excluded in the way they say it has been, even by a legal rule that excludes evidence not disclosed in a will-say in accordance with those standards.

[12] So, on the basis of the information presented to the Court, it would appear that the Plaintiffs are saying they cannot adequately make their case if their witnesses say what their fully-compliant will-says say they will say.

[13] The Plaintiffs have not attempted to explain this contradiction even though its implications affect everything they place before the Court in this motion, and even though it has far-reaching consequences for the future of these proceedings.

Rulings to Date - Guidance

[14] As Trial Judge, I believe I am obliged to ensure the just, most expeditious and least expensive determination of these actions in accordance with the *Federal Court Rules*. As part of that obligation I believe I can provide a limited form of guidance from time to time, but I do not think I am in a position to, in effect, provide the kind of extrapolated opinion the Plaintiffs appear to want concerning what my rulings may mean for the rest of the trial.

[15] There are many reasons for this. The rulings speak for themselves and if I were now to provide the kind of gloss the Plaintiffs request of the Court, this might lead to inconsistency and confusion. The Court cannot confirm or deny positions the Plaintiffs may now wish to establish for any number of their own strategic purposes. Counsel must come to their own conclusions about the scope and significance of rulings and advise their clients accordingly.

[16] As a new ruling comes along, I may well consider the lessons of a former ruling and I believe I must aim for consistency, but circumstances may well vary so that the confirmation of any generalization put forward by the Plaintiffs at this juncture would be both dangerous and entirely misleading about what the Court is trying to do in each instance: i.e. decide what is just and fair on the merits and on the basis of the facts and arguments that counsel bring to each separate objection.

[17] The Court is not trying to make it difficult for Plaintiffs' counsel on this issue. Plaintiffs' counsel are now faced with decisions on what evidence to call given what has transpired to date, and given that, if matters proceed as they have, the Plaintiffs cannot adequately make their case.

But this is the job of all counsel in all trials. What I think I can say is that the Plaintiffs' six conclusions are based upon the inaccurate premise that the Court is using will-says as a legal ground to exclude relevant evidence. The truth of the matter is that the Court is dealing with objections based upon surprise and ambush raised by the Crown (as they have also been raised by the Plaintiffs) in relation to which the will-says produced by the Plaintiffs have so far played a significant role for the reasons given for each ruling. Because the legal and *de facto* justification for sustaining any relevant objection has been the acceptance of ambush in each case, the Court just cannot tell what is likely to happen in relation to future witnesses and what role the will-says will continue to play in relation to any future objection raised by the Crown.

[18] Because I asked the Crown to respond to the Plaintiffs' allegations in this motion, the Crown has produced its own conclusions about the implications of my rulings to date.

[19] However, neither side accurately captures what the Court sees happening here. Both sides - quite naturally and for their own strategic purposes - would like to pin me down and remove the flexibility I believe I need to deal with each objection on its merits.

[20] The Court has made it very clear in its rulings that it refuses to use will-says as an exclusionary rule of evidence, and that just because something does not appear in a will-say does not mean it is inadmissible. The Court has made equally clear that each objection will be considered on a separate basis with a view to determining, as a matter of reasonableness and common sense, whether there is real surprise or ambush on a material point. In considering this issue, the Court has indicated that the whole record can be used by either side to argue for or

against surprise. Behind the Plaintiffs latest assertions of unfairness lies the reality that, in looking at what each side has brought to each separate ruling, I have not found most of the Plaintiffs' arguments persuasive, and that some materials (i.e. the will-says) have been more compelling indicators of reasonable surprise than others. But variants will no doubt arise from time to time (as they did with Elder Starlight) and the Court will have to exercise its discretion each time based upon what is argued and revealed.

[21] The significant role that the Plaintiffs lament has been played by the will-says to date in deciding whether real surprise and ambush have occurred in each instance can hardly be unexpected given the following:

a. The pre-trial disclosure problems and demands peculiar to these proceedings;

b. The particular court-crafted solutions (that included will-says) that were necessary to deal with those disclosure problems and demands in order to bring these actions to trial;

c. The extremely fractious history of these proceedings that required, first, the case management judge, Justice Hugessen, and then the trial judge to order that certain things be done (in the face of strong resistance from the Plaintiffs and breach of court orders), including the production of will-says that provided a level of disclosure that would allow for meaningful trial preparation and the avoidance of ambush at trial;

d. The reasons and orders of the Court that clearly instructed the Plaintiffs as to what they needed to produce in terms of will-say disclosure, and then gave them the time they said they needed to produce compliant will-says;

e. The Plaintiffs own representations and reassurances given to the Court and the other participants that their will-says meet the standards set by the Court and so reveal what each witness will actually say in accordance with those standards. Those reassurances persist during this motion;

f. The Plaintiffs' own objections based upon ambush at the *de bene esse* hearing for Ms. Florence Peshee and their use of Ms. Peshee's will-say to convince the Court that ambush had occurred. The Plaintiffs have strenuously insisted that what happened at the Peshee hearing is distinguishable and should not apply to their own evidence but (for reasons I will refer to later) the Court has found their arguments unconvincing and inconsistent with the clear wording of the record and basic common sense concerning reciprocal obligations in law suits;

g. General remarks made by the Plaintiffs, both at the Peshee hearing and elsewhere, on how will-says should be used in relation to evidence to be called at this trial by all participants in order to decide whether ambush has occurred.

I shall refer to and/or illustrate these factors throughout these reasons.

[22] For example, the Plaintiffs appear to expect the Court to accept that if they have told the Crown in a will-say that a witness will deal only with the areas of evidence set out in the will-say (the standards require disclosure of what a witness "will-say" in synoptic form) then the Crown must also be prepared – and should not be surprised – to cross-examine that witness in <u>any</u> area of evidence at trial, even if that evidence is not referred to in the will-say in accordance with the standards. The Plaintiffs have advanced various arguments as to why this should be so (usually

based upon the pre-trial disclosure record as a whole), but they have not satisfactorily addressed the obvious point that if the Crown should be ready to cross-examine a witness on any area of evidence at all, then the will-says would have no purpose, and it would make no sense to submit witness-specific will-says that clearly represent that individual witnesses will deal with discrete areas of evidence. The Plaintiffs have also refused to acknowledge and deal with the obvious point that if they are allowed to represent to the Crown, through individual will-says, that a witness' testimony will be limited to the areas indicated in accordance with the standards set by the Court, but then proceed to use that witness to testify in other undisclosed areas, the will-say may well become a means of creating ambush at trial rather than a way of avoiding it.

[23] The Plaintiffs now say that, in allowing the Crown to object to evidence on the basis of ambush at trial (something the Plaintiffs have done themselves) and in allowing the Crown to refer to a witness' will-say to explain how ambush has occurred, the Court has made the will-says into a legal ground for the exclusion of evidence. But the Court has not done this; the Court has merely examined the arguments for and against ambush as each objection has arisen and has decided, on a reasonable and common-sense basis, whether there is real ambush. The Plaintiffs say that the acceptance of standards and the production of will-says in pre-trial disclosure should not be related to the admissibility of evidence at trial. They want to disconnect will-says from any admissibility determination. But they have not said the Crown cannot object on the basis of ambush at trail; they merely object to the will-says being used in the way they have to determine whether real ambush has occurred. For reasons already given by the Court, the Court is of the view that it can come as no surprise that, when ambush is alleged at trial, the will-says will play a prominent role, and this is because of the role that will-says have been assigned in these

proceedings generally, and because of the problems related to pre-trial disclosure that will-says were intended to solve.

[24] It has also not escaped the Court's notice that the witnesses called by the Plaintiffs to date have confirmed the basic scheme and impression that the will-says, viewed collectively, convey: i.e. that individual witnesses have different areas of knowledge and can only speak to specific topics.

[25] In this context, and given the role that will-says were intended to play in these proceedings, the Court is of the view that it was inevitable they would figure prominently in rulings related to ambush at trial. But that certainly does not mean that the Court has made will-says into a legal rule of exclusion. In fact, the Court has specifically refused to do this. By alleging otherwise in this motion, the Plaintiffs appear to be asserting that the Court does not mean what it says, or that the Court is not doing what it says it is doing. But the Plaintiffs have adduced no evidence to support this apparent questioning of the Court's sincerity, and they don't circumvent the explicit remarks made by the Court that contradict the point of view they are putting forward in this motion.

[26] A review of the record reveals to the Court that the Plaintiffs have long understood the connection between will-says and surprise at trial, and have also advocated the use of will-says to determine whether surprise has occurred. As I have pointed out elsewhere, all of this was demonstrated at the *de bene esse* hearing for Ms. Florence Peshee, but there are many other occasions when this has occurred that I will come to later.

[27] I mention these matters here only to indicate that the Plaintiffs' present position that they somehow don't understand how will-says have come to figure so prominently when ambush at trial becomes an issue is not a position the Court can accept.

[28] And quite apart from what the Plaintiffs now say they understand or don't understand, the use of will-says to prevent ambush at trial is an inevitable consequence of those Court orders that set the standards required and compelled all participants, including the Plaintiffs, to produce will-says that comply with those standards. The Plaintiffs, by written motion, have actually requested and obtained the assistance of the Court in ensuring that the Crown and the Interveners produce compliant will-says.

[29] The fact that the Plaintiffs now wish to repudiate former positions they have taken (even after they have gained an advantage by using a will-say at trial to exclude evidence offered by another participant) and now want the Court to abandon the connection between ambush at trial and disclosure in will-says does not render these proceedings unfair or unbalanced. And this is particularly so given the fact that the Plaintiffs were allowed a significant extension of time to prepare for trial and to bring any pre-trial motions they thought necessary or desirable, including any motion they thought necessary to address the use and role of the will-says at trial. The Plaintiffs declined to bring any such motion and now expect that the obvious connection between will-says and ambush at trial can simply be abandoned at trial. This is just not possible from the Court's perspective. The Plaintiffs have been given the time they said they needed to produce will-says that complied with the standards set by the Court; they have been given additional time

to review the pre-trial situation following the appointment of new counsel and to bring any motions that new counsel may have wished to bring; and they have long understood, in the Court's view, the connection between the will-says and ambush at trial. They can hardly now expect that, when ambush is alleged, the will-says will not come into play in a significant way.

[30] In the end, in deciding whether there has been real ambush at trial, the decision is a balance of principle and discretion and, as the Court has stated clearly, the matter will be looked at from the perspective of reasonableness and common sense. The Plaintiffs may certainly disagree with the Court concerning what is reasonable and what constitutes common sense in any particular instance. But that is simply a disagreement about a discretionary decision that the Court has to make each time an objection is raised. In such a situation one side is likely to feel that the Court has got it wrong. All other participants have had to produce will-says and the same discretionary decisions will have to be made when their evidence is called.

[31] The Plaintiffs now feel constrained by a system that they are, at least partially, responsible for and have used to their own advantage. But this does not make that system unfair or likely to lead to an unbalanced trial.

[32] So, in setting out their own conclusions and inviting the Court to confirm them, the Plaintiffs have characterized the basis of the Court's rulings in a way that may well assist their present strategic objectives in this motion, but that characterization does not correspond to what the record reveals has actually occurred. There is no legal rule in these proceedings that excludes evidence because it does not appear in a will-say statement. And the Plaintiffs are inviting the

Court to lay down general, fixed, and extrapolated conclusions in a situation where the Court has refused to make blanket rulings and has explained why, of necessity, this must be so in order to give the Court the flexibility it needs to decide objections on their merits on a reasonable and common sense basis after hearing the arguments and evidence that counsel can bring to bear each time an objection arises.

[33] The Plaintiffs are asking the Court to provide guidance based upon the assumption that everything the Plaintiffs allege in this motion is correct. The Court cannot, of course, accept that assumption.This does not mean that the Court cannot provide guidance to the Plaintiffs, but any such guidance must be based upon an accurate account of the record and the principles the Court has stated it is using to deal with ambush at trial.

The Issue is Ambush Not Will-Says

[34] My review of the relevant portions of the record reveals that the Plaintiffs' motion mischaracterizes what is actually occurring as this trial unfolds. The Plaintiffs say that the Court has created a situation at trial where the will-says produced by the Plaintiffs have been used by the Crown and the Court to create a situation where will-says are, in fact, and have been established as a legal ground for the exclusion of relevant admissible evidence. The Plaintiffs assert that will-says cannot be used in this way at trail and that it was never intended that will-says would be used in this way, and the Plaintiffs say they do not understand and do not accept the use of will-says at trial to exclude relevant evidence called by either party. They take the

position that the acceptance of a standard for will-says in pre-trial disclosure and the Plaintiffs' effort to comply with that standard is unrelated to the admissibility of evidence at trial.

[35] This position remains little more than an unsubstantiated assertion made by the Plaintiffs to support the objectives of this motion. It is not supported by what is revealed by the record and, as I will discuss, it is a disavowal of positions the Plaintiffs have taken in the past. In addition, it is also an attempt to re-argue findings and rulings made right at the beginning of the trial with respect to objections raised to the evidence of Mr. Darrell Crowchild.

[36] As already pointed out, the assertion is grounded on an inaccurate characterization of the Court's rulings to date. In order to make it the Plaintiffs must be taken to imply that the Court is not sincere when it says that will-says are not a legal exclusionary rule.

[37] As has happened in the past, the Court has been left to review the record itself in order to test the accuracy of the Plaintiffs assertions and to decide what that record reveals about the Court's own pronouncements.

[38] What the Court has said on point is very clear and straightforward. I have said it in different ways a significant number of times now. I merely choose, for convenience, to quote what I said on my first ruling related to an objection raised to the evidence of Mr. Darrell Crowchild:

> Fourthly, and I think this is very, very important, there must, however, be real ambush and a loss of opportunity to prepare to cross-examine. The will-says are not, *per se*, a legal ground for the exclusion of evidence. They were designed as a procedural tool to

> ensure fairness, efficiency, preparedness, and to prevent ambush at trial.

[39] I said many other things on that occasion that make or support the same point. And the Court has certainly practiced what it preached in making subsequent rulings.

[40] The Plaintiffs are entitled to disagree with the Court, of course. But I don't believe they are entitled, in a motion as serious as this one and in which they accuse the Court of foreclosing on their ability to adequately make their case, to simply ignore what the Court has said and done on point without dealing with specifics.

[41] The Court has specifically and emphatically rejected the use of will-says as either a legal or de facto ground for the exclusion of relevant evidence at trial.

[42] But is the Court as good as its word?

[43] Well, my own review of the record concerning ambush rulings made to date reveals the following:

a. No use of will-says has been made at all unless either the Plaintiffs or the Crown have alleged ambush and introduced the relevant will-say as a means of demonstrating ambush. The Court has made no ruling that either side must not seek to lead evidence that is not contained in a will-say. Unless ambush is alleged, will-says do not even come into play;

b. Evidence has been led and placed on the record that is not set out in a will-say in accordance with the standards;

c. When ambush has been alleged the Court has not automatically excluded it because it does not appear in a will-say. The Court has allowed counsel the opportunity to try and demonstrate that, notwithstanding the fact that the will-say does not set out what the witness will say in accordance with the standards, there is no real ambush. The fact that the Court has found some arguments less persuasive than others when reviewing real ambush and, for reasons already explained, the will-says have played a prominent role in this process, does not mean that the Court has closed its mind and has opted to rely exclusively on the will-says as a legal rule to exclude relevant evidence;

d. There have been rulings that have found the letter of explanation and (in the case of Elder Starlight) discovery persuasive on certain matters not set out in the will-say.

[44] Quite apart from past rulings, there is no telling what may come to light in relation to future witnesses that may offset the persuasiveness of their will-say statements when it comes to deciding whether real ambush has occurred.

[45] The record is unequivocal that the Court is focused upon real ambush and is not using will-says as a legal ground to exclude evidence, notwithstanding the fact that, for obvious reasons, the will-says have played a prominent role so far in deciding whether real ambush has occurred. This being so, the Plaintiffs basic premise for this entire mistrial motion is negated on this ground alone. The Plaintiffs have not demonstrated from the record that the Court is using

will-says as a legal ground to exclude relevant evidence at trial, and everything they allege in this motion is based upon this premise. They simply ignore what the Court has actually said and done. For this reason alone, and there are many others, the Court has to dismiss the entire motion.

[46] For if the Court is truly granting the Crown relief on the basis of ambush, just as it granted the Plaintiffs relief from ambush at the Peshee hearing, there can be no imbalance or unfairness on this ground. So far, the Plaintiffs have called the majority of witnesses. Unfairness or imbalance would occur only if, in deciding objections based upon ambush, the Court was either arranging matters so that the Plaintiffs (who have the onus of proof) could not marshall their witnesses and anticipated evidence in such a way that they can discharge that onus, or was treating the Plaintiffs' witnesses in some different way from the witnesses of other participants. Neither of these factors comes into play in the present motion or in these proceedings generally and the Plaintiffs, apart from unsupported assertions, do not demonstrate that they do. The Court has already granted the Plaintiffs the time they asked for to marshall their witnesses and their evidence in accordance with the will-say process and the standards of disclosure set by the Court. The Plaintiffs have assured the Court that this has been done. And even if that assurance had not been given (it was given again during the course of this motion), it would not matter because the Court (in order to ensure that the Plaintiffs would be able to call the new witnesses they needed – notwithstanding the fact that the Plaintiffs were in breach of a Court order to produce will-says) ordered the Plaintiffs to produce will-says that met the standards of disclosure set by the Court.

[47] Obviously, it cannot be demonstrated at this point that the Court is treating the Plaintiffs' witnesses differently when it comes to ambush from the witnesses of other participants. The only evidence we have in this regard comes from the Peshee hearing where the Court was very sympathetic to the Plaintiffs' objections against ambush and allowed the Plaintiffs to refer to Ms. Peshee's will-say to demonstrate that ambush had occurred.

[48] So the Plaintiffs' basic assertion that the will-says have been used as a legal ground to exclude relevant evidence is not supported by what the record reveals has occurred in relation to objections raised to date. The record shows that the will-says have certainly figured prominently in relation to the Plaintiffs' witnesses. But they did at the Peshee hearing too when the Plaintiffs sought relief from ambush. And there is no reason to suspect that they will not figure prominently when the witnesses of other participants are called. When the Crown has raised ambush concerns, it has been over points of evidence that are important for the principal issues at stake in these actions, and where pre-trial discovery did not yield the information necessary to prepare for trial, or where the Plaintiffs have made it clear that particular witnesses will only be dealing with a limited range of evidence so that the Crown has no reason to prepare to cross-examine those witnesses in areas not revealed in accordance with the will-say standards. The Court has heard argument from counsel on each objection, has considered each objection on its merits, and has applied a reasonable, common-sense approach to determine whether real surprise or ambush have occurred. This does not amount to using will-says as a legal, or *de facto*, ground for excluding evidence.

[49] The Plaintiffs' assertion that the will-says **cannot** be used at trial as a legal ground to exclude relevant evidence also collapses because will-says have not been so used. There is no authority or logic to suggest that the Crown or the Plaintiffs cannot seek relief from ambush at trial and cannot use will-say statements to demonstrate how that ambush may have occurred. Will-says have been used by both parties to seek relief from ambush at trial and the Plaintiffs do not suggest in this motion that it is not open to either side to allege ambush when evidence is led. The will-says are merely one means of establishing ambush; a means that the Plaintiffs themselves have already used to their own advantage.

[50] The Plaintiffs' allegation that will-says were never intended to be used in the way they have been used is premised, once again, upon their inaccurate assertion that the will-says have been used as a legal or *de facto* ground to exclude relevant evidence. But the way that the will-says have, in reality, been used was clearly an inevitable consequence of the whole pre-trial disclosure system devised to solve the particular problems and demands to which these actions have given rise. What is more, the Plaintiffs own past statements and practices clearly illustrate that they both knew and intended that will-says would be used in relation to allegations of surprise and ambush at trial. This was made remarkably clear at the Peshee hearing where the Plaintiffs not only used a will-say to demonstrate ambush, but they also made general remarks and demonstrated a clear understanding that will-says would be used in this way in relation to the witnesses of all participants. I will address this more specifically when I come to the Plaintiffs' latest assertions concerning the Peshee hearing, but I have also addressed the issue in my rulings.

[51] The Plaintiffs may well **now** take the position at trial that the acceptance of a standard for will-says in pre-trial disclosure, and the Plaintiffs' efforts to comply with that standard, are unrelated to the admissibility of evidence at trial, but this position is entirely inconsistent with the whole system of pre-trial disclosure implemented by the Court in these proceedings (including the will-say requirement itself) as embodied in various Court decisions, and it is also inconsistent with rulings made by the Court to date in favour of the Plaintiffs when they were in trial at the Peshee hearing. In addition, it is inconsistent with past practices and representations made by the Plaintiffs themselves both at the Peshee hearing and elsewhere. In the end it amounts to an attempt by the Plaintiffs to re-argue the whole will-say issue again at trial.

The Plaintiffs' Predicament

[52] The Plaintiffs have placed on the record the predicament they now face in these actions, and this may go a considerable way to explaining their bringing an extraordinary motion for a mistrial at this stage in the proceedings.

[53] The Plaintiffs say they cannot adequately make their case. The reason they give for this is that the Court has caused the difficulty 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, admissible evidence."

[54] As already discussed, the Plaintiffs' rationale is not supported by the record. But it still means the Plaintiffs cannot adequately make their case. And this is where the Plaintiffs' predicament raises extremely serious concerns about the future of these actions.

[55] If the Court were to assume that the Plaintiffs are correct and that they cannot make their case because the Court is using the will-says as a legal ground to exclude relevant evidence, this would mean that the Plaintiffs have not disclosed sufficient relevant evidence in their will-says to adequately make their case. Obviously, if anticipated evidence (i.e. what each witness will say) has been disclosed in the will-says in accordance with the standards set by the Court (and the Plaintiffs have assured the Court that it has) then even using the will-says as a legal ground of exclusion would not prevent the Plaintiffs' witnesses from saying what their will-says say they will say. So this means that, if the Plaintiffs' witnesses only say what their will-says say they will say, the Plaintiffs are saying they cannot adequately make their case.

[56] On the facts as presented as part of this motion, there can only be two reasons for this. First of all, it could be because the will-says do not, in fact, comply with the standards set by the Court so that the will-says do not disclose what witnesses will say, and if witnesses are allowed to say more than is disclosed in their will-says, the Plaintiffs **will** be able to adequately make their case. The Plaintiffs have assured the Court, however, that the will-says meet the standards of disclosure set by the Court, so if this is correct non-compliance cannot be the cause of the problem.

[57] The only other possible explanation is that the will-says (which the Plaintiffs say are fully compliant) reveal that the Plaintiffs could not make their case when the will-says were drafted.

[58] And this in turn suggests that the Plaintiffs may have brought all participants to trial with either non-compliant will-says that are in breach of Court orders or on the basis of compliant will-says that indicate the Plaintiffs cannot adequately make their case. And they have done this after being given the additional time they said they needed to complete compliant will-says. The Plaintiffs' failure to clarify this fundamental issue undermines the whole position they take in this motion.

[59] In a motion for a mistrial where the Plaintiffs say the Court has foreclosed on their making their case by using the will-says as a legal ground to exclude relevant evidence it is naturally a matter of interest to the Court as to whether the Plaintiffs ever could adequately make their case. The Plaintiffs, however, have neglected to address this important matter and the Court has had to raise it with them.

[60] It is important to keep in mind at this point that I am not referring to matters of leeway. All participants have acknowledged that some leeway is required when will-says are used at the trial. The Plaintiffs have in the past taken the position at trial that, in addressing matters of leeway, the standards set by the Court are "the key." At the hearing for Ms. Florence Peshee the Plaintiffs asserted that "Counsel have to have some leeway. But you can't get into new areas":

> 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 (*sic*) in the will-say. And it's important that both sides have notice, the same kind of notice.

[61] The problem the Court is confronted with in this motion goes beyond leeway. The problem here is that the Plaintiffs are saying that, even though their will-says meet the standards (and so disclose in synoptic form what each witness will say) they cannot make their case adequately.

[62] It would be different, of course, if the Plaintiffs were to say that the will-says were deficient and did not set out in accordance with the standards what each witness will say. The Court would then understand why the Plaintiffs cannot adequately make their case but might be able to if their witnesses went beyond the will-says and testified on matters that have not been disclosed in accordance with the standards. But the Plaintiffs insist that this is not the case, and that the will-says do, in fact, meet the standards set by the Court.

[63] The Court has an obligation to ensure the just, most expeditious and lease expensive determination of these actions on their merits in accordance with the *Federal Court Rules*. Hence the Court has to find out what the Plaintiffs hope to achieve in a trial where they insist they cannot adequately make their case and where they are re-arguing issues that the Court has already decided, in accordance with the *Federal Court Rules*. The Court is also concerned about abuse of process issues in a situation where Court orders and decisions have imposed strict obligations on the Plaintiffs to deliver compliant will-says for any lay witnesses they may choose to call. Notwithstanding their neglect of this fundamental issue, the Court has attempted to draw

the Plaintiffs out and the following exchange took place between the Court and Plaintiffs' counsel:

> THE COURT: Okay. Now, I guess this is just a sort of -- I need to orientate myself for coming discussions, so I think from what you've told me, then, is it the position of the plaintiffs that their will-says are fully compliant or -- with Court orders setting the standards and telling the plaintiffs to produce will-says in accordance with those standards. Is that your position today –
>
> MR. MOLSTAD: Yeah, the position that the plaintiffs take in terms of the will-says is that they did make every effort and met the standard that you had set in terms of will-says and putting information in them, but as I had pointed out to you, My Lord, they -- and today and, I think I pointed out to you earlier, is that they were dealing with a large number of witnesses in a fairly short period of time, did not have the man power that we now have on this file and it was an exceptionally difficult task. And there is not yet a trial that I have conducted where I have led a witness where additional information has come from that witness not heard from me before in preparing that witness for trial.
>
> THE COURT: Okay. Have you yourself or your new team, then, been able to review those will-says and determine, you know, how deficient they are in terms of describing what witnesses are going to say?
>
> MR. MOLSTAD: Well –
>
> THE COURT: Because, you know, we're looking to the future, and you've told me about the problem you have. I'm trying to find out how big a problem you have. Is this an awful big problem?
>
> MR. MOLSTAD: Well, it's hard to assess in that regard. I mean, it depends how the use of will-says at trial. I mean the use of will-says at trial is such that it isn't written precisely in a will-say it's not evidence, then we have a huge problem.
>
> THE COURT: I'm not saying that. I'm saying have you reviewed them in accordance with the standard and I mean the standards are rough and ready, you've got to state the area of the topic and give a summary of what the witness is going to say. Have you reviewed them from that perspective.

MR. MOLSTAD: Yes, and some are better than others.

THE COURT: So some of them are certainly deficient in terms of what witnesses are going to say.

MR. MOLSTAD: Some are, yes.

[64] There is much in the Plaintiffs' answers to the Court's questions that is simply non-responsive and off-point. For example, no one has ever suggested that will-says have to say "precisely" what a witness will say. The standards merely require a synoptic account. All participants have acknowledged the need for some leeway, and the Plaintiffs themselves have advocated at trial that, in matters of leeway, the standards set by the Court are "the key." Likewise, the fact that witnesses often come up with additional information is not the issue. The issue is whether the Plaintiffs' will-says disclosed, in accordance with the standards, sufficient anticipated evidence to allow the Plaintiffs to adequately make their case at the time the will-says were drafted.

[65] The answers that Plaintiffs' counsel gives on-point suggest that at least some of the will-says are deficient and do not meet the standards because they do not disclose what a witness will say. But the Court is not told the extent of the problem. "Some" is an indefinite quantity, but at least the Court is told that there are some will-says that do not reveal what witnesses will say and, if the Court's rulings are consistent with past rulings, then the Plaintiffs cannot adequately make their case..

[66] The problem is that this answer appears to contradict the Plaintiffs' repeated assurances that their will-says meet the standards set by the Court. The Plaintiffs are trying to have it both

ways. They insist that their will-says disclose what each witness will say – "they did make every effort and met the standard you had set in terms of will-says" – but their counsel confirms that at least some of the will-says – he does not disclose how many – are certainly deficient in terms of disclosing what witnesses will say in accordance with the standards.

[67] This may look like a contradiction, but it is clear from the record that it cannot be laid at Mr. Molstad's feet. He is being quite meticulous. When he gives me the Plaintiffs' "position" it is this:

> The position that the Plaintiffs take in terms of the will-says is that they did make every effort and met the standard that you had set in terms of will-says and putting information in them … .

But when I ask him whether he has **personally** checked the will-says to see if they meet the standards he confirms that some of them are certainly deficient in terms of what witnesses are going to say. The "position" that the Plaintiffs take may be based upon any number of qualifications that are not clarified. For example, that they have complied with the standards because the standards only required them to use best efforts (a position I have rejected). But what I want to know is whether the will-says actually do meet the spirit and meaning of the standards as I have defined them in Court orders.

[68] Because I have no means of assessing the will-says in question as part of this motion I have no means of checking the Plaintiffs' "position." The only evidence I have before me on this point comes from Mr. Molstad personally and he confirms that some of them are deficient in terms of what witnesses are going to say.

[69] The Plaintiffs obviously had the opportunity to place sufficient evidence before the Court to demonstrate their assertion that their will-says are not in breach of Court orders and to clarify this matter but have declined to do so. So, in dealing with this issue, the Court has to look at what has been placed before it.

[70] All I have to go on at the moment is information provided or confirmed by counsel for the Plaintiffs to the effect that:

a. The Plaintiffs cannot adequately make their case; and

b. Some of the Plaintiffs' will-says are deficient in the sense that they don't disclose what a witness will say.

[71] The reason these factors are important is because, in my view, they raise an obligation for the Court to inquire why the Plaintiffs are conducting a trial in which they insist they cannot adequately make their case and where they are raising issues the Court has already decided in accordance with the *Federal Court Rules*. The reason they give for this is an assertion (which I have rejected) that the Court has turned the will-says into a legal rule to exclude relevant evidence. But even if this assertion were true, the Court's rulings could not be the basis for the Plaintiffs not being able to adequately make their case. And the reasons for this are fairly straightforward.

[72] If only "some" of the Plaintiffs' will-says are deficient and do not meet standards then some are obviously not. For those will-says that are not deficient there can be no danger of the Crown seeking to exclude relevant evidence through a claim of ambush, even if the will-says in

question were used as a legal ground to exclude evidence. If will-says disclose what a witness will say in accordance with the standards there can be no sustainable claim of ambush.

[73] So the problem has to reside with those will-says that are deficient and do not disclose what a witness will say, so that any objection the Crown might raise about ambush might be sustained. And Plaintiffs' counsel says this problem is such that the Plaintiffs cannot adequately make their case. So the Court does not know how many "some" is, but it does know that "some" represents sufficient will-says to prevent the Plaintiffs from adequately making their case, when taken in conjunction with evidence the Plaintiffs have placed on the record through the witnesses the Plaintiffs have called to date.

[74] Mr. Molstad has made submissions to the Court during the course of this motion "Based up us (*sic*) being an officer of the Court and advising you." So Mr. Molstad has advised the Court that the Plaintiffs cannot adequately make their case and (as an officer of the Court) has confirmed that some of the will-says are certainly deficient in terms of what witnesses are going to say.

[75] So the state of the record is such that the Court cannot simply ignore this issue. The Plaintiffs insist they cannot adequately make their case. The only information that the Court has concerning the reason for this comes by way of their own counsel and it is a confirmation that some of their will-says are certainly deficient in terms of what witnesses are going to say.

[76] There may, of course, be some other explanation. But it is difficult to see what it could be given what the Plaintiffs have told the Court. And the Plaintiffs certainly chose not to explain or demonstrate any alternative as part of this motion in which they ask the Court to declare a mistrial.

[77] This highlights a significant problem that lies behind the present motion for a mistrial and drags the Court back to Justice Hugessen's Pre-Trial Order of March 26, 2004 and everything that has flowed from that order. From the information before me, it looks as though the Court is faced with a very old issue it thought was resolved some years ago.

[78] If "some" of the will-says are deficient and do not meet standards, then it could mean those will-says are in breach of the Court's order of November 25, 2004 that compelled the Plaintiffs to produce will-says that met the standards set by the Court. And that peremptory order was necessary because the Court had found that the Plaintiffs had breached Justice Hugessen's order of March 26, 2004 and had not produced will-says in accordance with that order. It would also mean that the Court must seek an explanation for the repeated reassurances given to the Court by the Plaintiffs that their will-says meet the standards set by the Court (and I will refer to those reassurances later).

[79] If the Plaintiffs now seek to call witnesses (or have already called witnesses) for whom they have not produced will-says that comply with Court orders, this would bring into play the dignity and authority of the Court. If the Plaintiffs can breach two orders of the Court, reassure the Court that they have complied with those orders, and then reveal that their will-says are

certainly deficient in terms of what witnesses are going to say, but call those witnesses in any event, it would mean that this Court's orders can be ignored by the Plaintiffs without consequence. And that cannot be. If "some" of the will-says are deficient and do not meet the standards and are in breach of Court orders, then those witnesses should not be called without further consent of the Court. Similar problems could arise in relation to witnesses who have already testified.

[80] The Plaintiffs appear to be aware of this problem, because they have hinted at ways that might save them from the consequences I have outlined above.

[81] First of all, as can be seen from the portion of the record quoted above, the Plaintiffs have said that "they were dealing with a large number of witnesses in a fairly short period of time, did not have the manpower that we now have on this file and it was an exceptionally difficult task."

[82] Now if this is indeed the case, it would appear to contradict statements made by the Plaintiffs and referred to in other decisions that the will-says do indeed meet the standards. And those reassurances have been relied upon by the Court and other participants in preparing for trial. I have referred to these matters before and all counsel are aware of what I have said in my decisions. For example, on the bias motion decision of May 30, 2006, I dealt at length with what the record revealed regarding the Plaintiffs' acceptance of standards and the timing issues associated with the production of will-says. The bias motion need not be examined in full, but I think a few quotations would help to place the present motion in context:

> [441.] Reading this letter in total, I believe that the reasonable person would draw the following conclusions:

1. Apart from about seven or eight witnesses for whom a "short extension" will be requested, the Plaintiffs have been able to produce the will-says they will need for their evidence;
2. There is no explicit or implicit suggestion in this letter that the Plaintiffs have been prevented from marshalling the witnesses they will need for the trial on self-government, or any other issue
3. Ms. Twinn feels entirely comfortable in asking the Court to extend the December 14, 2004 deadline to allow for a handful of exceptional cases;
4. The Plaintiffs can now elicit their evidence from 69 witnesses, approximately 50% of the number they identified on September 5, 2004;
5. The Plaintiffs feel they have complied fully with the standards for will-says set by Russell J.

[448] To place this matter beyond any doubt, Mr. Healey had the following to say at the January 7, 2005 conference meeting:

My Lord, you set the rules, and we have complied by 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]

[451] I also believe that, when the transcript of the hearing on November 18, 2004 – where the "workable solution" proposed by the Plaintiffs was discussed – is reviewed, the reasonable person would be interested in the following sequences related to Mr. Shibley's argument:

1. Acceptance of Standards Imposed

   Mr. Healey It is my submission they [the 18 will-says submitted at that time] comply with all the requirements, My Lord, that your Lordship indicated. In fact they go even further, they are extremely detailed. Much more detailed than, for example, was contemplated by the order of Mr. Justice McKay in the *Buffalo* case.

   (pages 32: 8-13)

2. The Number of Witnesses

The Court puts the following question to Mr. Healey:

JUSTICE RUSSELL: All right. Do you – do you still anticipate the hundred and forty-two (142) or – what are the numbers?

(page 19-21)

Mr. Healey does not provide an answer.

3. Adjournment of the Trial Date

Russell J. took this matter up with Mr. Faulds, legal counsel for Native Council of Canada (Alberta), one of the Interveners.

JUSTICE RUSSELL: But let's – let's assume for the time being they need a hundred and fifty (150) witnesses, what could they do?

MR. JON FAULDS: Well in – in that case I suppose all they would do would be apply for an adjournment of the trial and accept … them to – bring that about. And that would be an acknowledgment of the – of the deficiencies of – or the difficulties that they have caused.

What they have done instead, My Lord, is take a position that does nothing to address the detriment which they have caused to the other parties and which allows them to continue to produce will-says for a period of three (3) months after the original deadline in no particular order, in no particular number.

(page 55: 10-25)

MS. MARY EBERTS: This leaves two (2) choices basically. One (1) is to maintain the status quo as it was as of October 18, 2004 namely that the Plaintiffs are not allowed to bring these witnesses.

The other option is that the Plaintiffs be given the opportunity or take the opportunity to apply for an adjournment of the commencement of the trial. Any such application for an adjournment, in our respectful submission, should contain a detailed timetable and series of commitments about when things will be done.

(page 65: 11-20)

MR. KINDRAKE: The loss of trial prep time the Crown was counting on is lost unless the trial is adjourned to take account of it.

(page 46: 18-20)

Mr. Healey's response to these suggestions was as follows:

"[W]e want to start on the 10th and we're going to be giving them will says."

(page 72: 10-11)

"Interveners have no right to ask for an adjournment."

(page 76: 3-4)

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.

4. The December 14, 2004 Date

MS. MARY EBERTS: One (1) very important matter was the issue of trial planning.

Is it going to be possible to have the pre-trial and at-trial issues that still need to be determined with the Plaintiffs will says and witness list in the shape that they were in at that time.

(page 59: 22-25 and page 60: 1-3)

This leaves us in a situation where there – it – it can be confidently predicted that the Plaintiffs' will says will not be on the table in their fullness, in their full numbers by December 14, as they have promised.

And even if they were, even if they managed to telescope seven (7) months work of work into the remaining month, production of all the will says by December 14 leaves, if you count both the 14th and the 10th, it leaves twenty-six (26) days between their proposed target date and the opening of trial and that twenty-six (26) days

> encompasses the Christmas and New Year and other holiday seasonal break.
>
> It is our respectful submission that this produces a total impossibility.
>
> (page 61: 1-15)
>
> Once again, Mr. Healey's response is as follows:
>
> MR. PHILIP HEALEY: And then she (Ms. Eberts) comes out with this formula, My Lord, where she says, well, eighteen (18) a month and divided by one forty-four (144), that means this many months to get ready for trial. I said December 14, okay? She doesn't have to worry about some formula she's made up in her head. [emphasis added]
>
> (page 81: 8-14)
>
> Mr. Healey was aggressively indignant at any suggestion that the schedule should build in more time to produce will-says, or that the trial date should be postponed.

[83] Another problem with the Plaintiffs' timing and "manpower" remarks is that they have a decidedly familiar and ominous ring to them. This is also something I have dealt with and ruled upon before, and not just in the bias motion. In my decision of October 18, 2004 in which I struck the Plaintiffs' will-says for not being will-says at all, and for being in breach of Justice Hugessen's Pre-Trial Order of March 2004, Plaintiffs' counsel belatedly suggested to the Court (after the Court made inquiry) that timing and resources may have been a problem. No details were provided and no evidence was adduced to support anything of the kind, but it is one of the reasons why I did not accede to the Crown's request that I simply strike all of the Plaintiffs' witnesses and will-says and proceed to trial on the basis of the record from the first trial. I wanted to hear the Plaintiffs' new witnesses, and so I asked them to come up with a workable solution themselves and, when they failed to do this, I stepped in an ordered them to produce

will-says that met the standards for witnesses they wanted to call at trial. What is more, I gave them the time they asked for to do this, and I received reassurances it had been done. I have set this whole sequence out in previous decisions, but a few brief paragraphs from my October 18, 2004, reasons will also help define the full context for the present motion:

> [45] The suggestion appears to be that the Plaintiffs cannot, or will not, comply with Justice Hugessen's Pre-Trial Order regarding witness lists and will says and that the Court has no effective remedy in this situation because, each litigant has "an absolute right to decide how to proceed with and present its case to the Court …".
>
> [46] In my view, the arguments produced by the Plaintiffs to resist compliance with Justice Hugessen's Pre-Trial Order are spurious and disingenuous. No one is trying to interfere with the way the Plaintiffs present their case; the Plaintiffs are merely being asked to recognize the rights of the other parties to this litigation to prepare themselves adequately for this trial in accordance with the scheme established by Justice Hugessen's order and to cooperate in ensuring the most just, expeditious and least expensive determination of this proceeding occurs on its merits. The Plaintiffs appear to think they can merely do as they wish. The history of this file is replete with warnings. In an order dated March 6, 2002, Justice Hugessen had the following to say:
>
> I am driven to the regretful conclusion that the parties are simply incapable or cannot be trusted to conduct this litigation themselves, even when case managed.
>
> This is a sorry state of affairs that this motion reveals has not changed.
>
> [47] The Plaintiffs have been given every opportunity to present their case in the way they consider appropriate. They have chosen, however, not to produce a true witness list or meaningful will says in accordance with a Court order that required them to do so by September 15, 2004. Instead, the Plaintiffs propose to take the Court and the parties down a path that has no clear end in sight and that will lead to chaos at the trial. The Plaintiffs could have suggested ways to remedy the situation but they have chosen not to, and now raise "practical difficulties" that should have been raised and addressed long ago. They have, in effect, decided to put the whole conduct of the trial on the line. Under these circumstances,

> the rights of the other parties and the integrity of the litigation process require the Court to act in a decisive manner before the whole process subsides into chaos.
> [emphasis added]

[84] And now, 29 months later, after being given extensive amounts of additional time to ready themselves for trial, the Plaintiffs say there were timing and resource issues behind the will-says that were produced, even though I have already accommodated them in this regard and have given them the time they said they needed to complete will-says that met the standards, and they have told the Court and the other participants that this has been done.

[85] Quite apart from the contradictory nature of these remarks, the lack of any evidence to support them, and the Plaintiffs refusal to even refer to these problems in their mistrial motion until the Court questioned them, there has never been any suggestion that, had the Plaintiffs really experienced timing and resource problems when they were drafting their will-says, they could not have come to the Court for assistance in a timely manner and explained the problem with adequate proof.

[86] In an attempt to justify the present motion based upon unfairness and imbalance, the Plaintiffs have simply ignored, or are attempting to re-argue, issues that were raised and decided back in 2004. This is not an appropriate use of trial time.

[87] As another possible way around the problem, the Plaintiffs have intimated that they regard the will-say requirement as some kind of “best efforts” obligation. They offer no support for this position from the record and it is obviously contrary to my orders dealing with the will-

says, and the assurances the Plaintiffs have given to the Court that their will-says meet the standards I have set.

[88] Once again, it is not clear what the Plaintiffs mean by "best efforts" in this context or why, for example, best efforts would relieve them of the consequences of ambush at trial. The Crown might still be ambushed even if the Plaintiffs have done their best to meet the standards, but have failed.

[89] The implication appears to be that a will-say does not need to indicate what a particular witness will say in accordance with the standards; it only needs to disclose what the Plaintiffs were able to ascertain a witness would say given the time and resources available to the Plaintiffs at the time the will-says were produced.

[90] Quite apart from the fact that the time available to the Plaintiffs to draft their will-says was the time they said they needed to produce will-says in accordance with the standards (emphatically confirmed when they rejected Ms. Eberts' suggestion that timing might be a problem), there is no indication of how or why resources available at the time would allow the Plaintiffs to find out some of the things a witness might have to say but not others.

[91] This is, at bottom, an argument for variable standards for will-says. The Court has rejected a variable standard (emphatically so and in favour of the Plaintiffs at the Peshee hearing) and the Plaintiffs themselves have not only advocated that all participants are bound by the same

standards of will-say disclosure, they have also brought a motion before the Court based upon this principle and aimed at ensuring that all participants meet the same standards.

[92] The Court's order of November 25, 2004 that allowed the Plaintiffs to call new witnesses in these actions by ordering them to produce will-says reads as follows in relevant part:

> 1. The Plaintiffs' motion is denied. However, on or before December 14, 2004, the Plaintiffs will serve the Crown and the Interveners with their witness lists and will-say statements in a form that complies with Mr. Justice Hugessen's Pre-Trial Order of March 26, 2004, as that order has been further interpreted by this Court, together with a schedule indicating the sequence and the duration for calling their witnesses at trial.

[93] There is nothing "best efforts" or otherwise permissive about this order. It is peremptory, and it is peremptory for a reason. The Plaintiffs were in breach of a court order to produce will-says and had, in fact, produced an extensive witness list and a list of topics that did not comply with Justice Hugessen' order. The Plaintiffs were insisting upon going to trial without meaningful will-says. The Crown had pressed the Court to exclude the Plaintiffs' new witnesses because of the Plaintiffs' breach. The Court was looking for a way to allow the Plaintiffs to call their new witnesses and ensure that the pre-trial disclosure mandated by Justice Hugessen occurred. The Court had asked the Plaintiffs to come up with a workable solution, but they had failed to do so. Continuing disclosure problems and chaos at trial were the likely result. The only effective way to deal with the situation was to give the Plaintiffs an opportunity to call new witnesses for whom they would provide will-says that met the standards. Hence the Court ordered the Plaintiffs to produce compliant will-says for the witnesses they intended to call. And that is what the order of November 25, 2004 does, among other things.

[94] The Court's Decision of November 7, 2005 which deals extensively with the will-say requirements, also makes it clear that compliant will-says are a pre-requisite for calling witnesses. The principles upon which that order is 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]

[95] The will-say requirement and its relation to evidence to be called at trial could not be plainer. Yet the Plaintiffs have chosen not to refer to or explain any of these important issues in a motion that requests a mistrial. Their approach to the problem is to allege in this motion that they cannot adequately make their case because the Court has made the will-says into a legal rule that excludes relevant evidence. Quite apart from the inaccuracy of this allegation, it still does not explain why, even if the Plaintiffs were confined to the disclosure in their will-says as they suggest, the Plaintiffs cannot adequately make their case if their will-says meet the standards of disclosure set by the Court, as the Plaintiffs continue to insist that they do.

[96] This is a matter of vital concern for the future of these actions. As matters now stand, the Plaintiffs have stated clearly that they cannot adequately make their case. They have not explained why they have brought all participants to trial if they cannot adequately make their case and they have not explained how their present predicament arises if they have complied with Court orders regarding will-says.

The Peshee Hearing

[97] Even though I have now made clear rulings to the contrary, the Plaintiffs continue to insist:

a. The Peshee hearing does not confirm that will-says will come into play at trial to decide matters of surprise and ambush for the witnesses of all participants;

b. That Peshee was only about Intervener evidence and has no application to the Plaintiffs evidence at trial;

c. That Peshee is only about the use of will-says with an Intervener to exclude oral history evidence;

d. That Mr. Healey did not indicate his understanding that will-says would come into play when assessing matters of surprise and ambush in relation to the witnesses of all participants.

[98] As I have previously ruled, none of these positions is reasonably sustainable. The context of relevant Court orders made with regards to will-says cannot support them; the context of the Peshee hearing as a whole cannot support them; and even actual words spoken at the Peshee hearing cannot support them.

[99] On the one hand, the Court is presented (through Mr. Molstad as an officer of the Court and without any evidence) with Mr. Healey's present account of what he meant and understood at the Peshee hearing. On the other hand, the Court has the understanding of the other participants at that hearing, the transcript, the plain English of Mr. Healey's words spoken at the time, and what I saw with own eyes and heard with my own ears. Given this evidence, I don't think it unreasonable that the Court has been unable to accept the Plaintiffs' present position on any of these points as convincing. The simple fact is that there would be no point at all in Mr. Healey acknowledging the concerns of Mr. Faulds and worrying out loud to the Court about "detail" and "leeway" if he did not understand and imply that the Plaintiffs' own will-says would

inevitably come under scrutiny in the same way that Ms. Peshee's will-say had at the *de bene esse* hearing. For the same reason, there would be no point in his saying the following:

> I first stood up and there was some divergence from the will – Will Say Statement I – I indicated, well counsel have to have some leeway. But you can't get into new areas.
>
> 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 – the answer to that question is: Guided by the standard in the will way.
>
> And it's important that both sides have notice, the same kind of notice.

[100] Mr. Healey now offers (but only through Mr. Molstad and not under oath) an explanation that:

a. When he was referring to counsel and new areas, he was referring to Mr. Faulds;
b. When he was referring to "new areas" he was referring to oral history;
c. The standard in the will-say was a reference to the obligation to provide a synopsis of the witness' evidence in a will-say.

[101] So Mr. Healey, without putting this into an affidavit, appears to be suggesting that in this passage he is only talking about Mr. Faulds, oral history and the Plaintiffs.

[102] But this does not explain why only Mr. Faulds needs leeway or why only Mr. Faulds cannot get into new areas; or why the question for the Court in relation to Mr. Faulds and oral history should be any different if the Court is asked to decide an ambush objection made by the Crown or any other participant. And if the "other side" is exclusively the Plaintiffs, then the

argument must be that only the Plaintiffs require notice in accordance with the standards to avoid ambush, and it doesn't matter for the Crown and other participants. And if the "other side" is just the Plaintiffs, who are "both sides" in line 11? Mr. Healey appears to be suggesting that he is saying that only Mr. Faulds and the Plaintiffs require notice in accordance with the standards, but the Crown and the other participants do not. I notice, for instance, that when I asked Mr. Molstad what Mr. Healey meant by the word "counsel", he took the obvious meaning of the words and said "I can only assume he's referring to all counsel." And that, of course, is the only reasonable interpretation that the word can yield in its full context.

[103] There is, of course, nothing to prevent counsel from offering *ex post facto* rationalizations of what was said on a former occasion, but I don't think the Plaintiffs should be too surprised if the Court does not accept them as persuasive if they cannot be reconciled with the obvious semantic and contextual indicators in the record and the other evidence available to the Court.

[104] I think the record should show that Mr. Healey has been present in Court and available to assist Plaintiffs' present counsel on issues that are obviously beyond their immediate knowledge.

[105] The Court's view of the Peshee hearing is not confined to this one excerpt. I have set my full view out clearly in my rulings to date. I merely refer to this one matter as a way of illustrating that the Plaintiffs' position is not supported by the record, even at a basic syntactical level.

[106] Nor should it be assumed that the Court regards the Plaintiffs' consent or understanding regarding the use of will-says at trial as necessary. Such use is dictated by, and is the logical outcome of, Court orders that impose the will-say requirement and set the standards for will-says. It would make no sense to require will-says and fix standards if they could not be referred to at trial when ambush becomes an issue. My sole purpose in referring to the Peshee hearing on this point is to show why the Plaintiffs' current assertions that they did not understand that will-says would be used at trial in the way they have been used are not reconcilable with the record.

Other Remarks by the Plaintiffs

[107] It is an extremely serious moment in any trial when the Plaintiffs are compelled to seek the advice of the Court and find themselves in a situation where they cannot adequately make their case. In this motion, the Plaintiffs have taken great pains, and have taken a significant amount of time, to make me aware of the gravity of their situation. Time does not allow me to address every argument or point they raise, but I want to make it clear in these reasons that I have listened carefully and have carried out the review of the record requested as best I can. For this reason, I want to try and address at least some of the issues that were brought to my attention by the Plaintiffs during the course of their presentation in open Court.

[108] But I think I have to preface my remarks by saying that a great deal of what the Plaintiffs say in this motion is an attempt to re-argue old issues that the Court has already decided. In addressing the points raised here by the Plaintiffs, the Court is not revisiting rulings it has already made and is not supporting the view that the Plaintiffs can re-argue rulings indefinitely.

It is not entirely clear what status the Plaintiffs ascribe to their present arguments and my response to them. Presumably, they are part of the general thesis advanced in this motion that the Court's rulings have resulted in an unfair advantage to the Crown, and it is from that perspective alone that the Court is willing to look at them now. Because they go over so much old ground, and are so extensive in nature I propose to address them in point form only. But what I say here is not a reconsideration of any orders or rulings I may already have made. I just do not want to deal with the Plaintiffs' concerns in a summary way at such a serious and difficult point in the trial:

1. There was substantial evidence that was adduced through Ms. Peshee that was not in her will-say

[109] The Court has ruled that will-says are not legal grounds for excluding evidence. Just because something does not appear in a will-say does not mean it cannot be entered at trial. Unless objections are raised and sustained, then evidence that is not referred to in a will-say may well be entered at trial. So everything depends upon the particular piece of evidence that a participant attempts to lead and the nature and scope of the objection. Evidence has been given by the Plaintiffs' witnesses that is not referred to in will-says in accordance with the standards. A point by point comparison with Peshee on this basis is not helpful because Peshee occurred without the benefit of opening statements and at a time when the process had not been refined in the way it has now been refined. That is why the Court suggested Peshee need not be a benchmark for future objections.

[110] The importance of Peshee lies in the general principles that were highlighted, by and large at the urging of the Plaintiffs. Those general principles are an inevitable consequence of the court orders that compel all participants to produce will-says that comply with the standards set by the Court:

1. The parties can seek relief from the Court from ambush at trial;
2. Will-says can be used to demonstrate that ambush has occurred;
3. When it comes to leeway, the standards are the key. "Does the other side have notice of what it is that you're going to be dealing with? That's the ultimate question … And it's important that both sides have notice, the same kind of notice."

So if evidence was adduced through Ms Peshee that was not in her will-say that does not support the Plaintiffs present contention that will-say standards are unrelated to the admissibility of evidence at trial. It confirms that the real issue is "ambush".

2. Ms. Peshee was a witness called by an intervener and not one of the parties

[111] This is an old argument I have already dealt with and ruled upon. The principles established in Peshee were obviously intended to apply to all participants and the Plaintiffs understood and expressed their view that they should apply generally. Mr. Healey was the first counsel to seek relief for ambush, he was the first to use a will-say to convince the Court that ambush had occurred, and he advanced a clear position that the "key" concept for the Court to focus on when considering the notice that both sides should expect in a will-say was the standards set by the Court.

[112] The Plaintiffs have made no convincing argument that ambush is any less ambush just because it occurs in relation to a party witness rather than an Intervener witness. And there is no reason why a will-say should be relevant when considering ambush in relation to an Intervener witness and not relevant when considering ambush in relation to a party witness. The general difference will be that, for a party witness, there will be other areas of discovery and the record that can be used to try and demonstrate that, notwithstanding the will-say, no real ambush has occurred. An example of this occurred with Elder Starlight. Even though the materials and other details may differ when it comes to party witnesses, the purpose and the principles are the same: to consider whether real ambush has occurred and whether, given the will-say and any other part of the record referred to by counsel, common sense and reasonableness suggest that a case for ambush has been made out.

[113] As a general point, it is much more important for the Court to hear effective cross-examination of a party witness than of an Intervener witness. And this is why pre-trial discovery problems and the will-says generally are much more important when considering ambush in relation to a party witness.

3. The Real Issue Dealt with in Peshee was Oral History

[114] This is another point I have already ruled upon. Oral history evidence and its relation to disclosure and admissibility was an aspect of Peshee, but it was not the only aspect. The general principles established were obviously intended to apply to ambush in any area of evidence and

were expressed to so apply. The general discussion between all counsel and the Court made it clear that the application was general and Plaintiffs' counsel both accepted and advocated general principles tied to the key concept of the standards.

[115] There is no reason at all why ambush at trial should be confined to matters of oral history. And many of the Crown's objections have been related to oral history.

4. The Court stated it was not setting some kind of Benchmark

[116] Peshee did not need to be considered a benchmark in terms of the details of the actual rulings. This is because they were made without benefit of opening statements and without extensive discussion and consideration of what should be regarded ambush at trial. But Mr. Healey certainly made clear that his objections were based upon the "key" concept of the standards, and the Court endorsed him in that regard through its rulings.

[117] In the general discussion between counsel and the Court, various matters were referred to as requiring future consideration. But no one raised, or even suggested, that will-says would not play a role in deciding ambush at trial, or that the will-says were unconnected with the admissibility of evidence at trial (the Plaintiffs' present position). The one important relevant matter that was raised was the issue of leeway and detail. This was raised by Mr. Faulds as a general issue and confirmed as such by Mr. Healey.

[118] Mr. Healey did not say that matters of leeway and detail would not be important for the Plaintiffs' witnesses because, at trial, there would be no connection between the Plaintiffs' will-says and the admissibility of the evidence led.

[119] Mr. Healey said he was considering matters of leeway and detail in relation to the Plaintiffs' will-says. This only makes sense if Mr. Healey understood that there would be a connection between will-says and ambush issues at trial for the Plaintiffs and all participants.

[120] Mr. Healey advocated at Peshee the position for all participants that the Court has, in fact, adopted: the standards are the key in deciding whether adequate notice has been given to the other side.

[121] The standards are not the sole consideration but, as Plaintiffs' counsel pointed out, they have become the key in relation to the Plaintiffs' own witnesses. Mr. Healey obviously knew and accepted this or he would not have advocated the general position he did at Peshee.

[122] A full reading of the Peshee transcript reveals that when the Court refers to benchmarks it is talking about where the line has to be drawn to allow for adequate disclosure. For example, see page 89, line 23 to page 90, line 20. The Court is saying it is willing to hear further discussion about where the line should be drawn for the purposes of the whole trial. Also, see, for example, page 92, lines 1-13.

[123] There is nothing here to suggest that will-says will not be connected to the admissibility if evidence at trial. The whole discussions would make no sense if that were the case.

5. Resilement

[124] Mr. Molstad says:

> We have heard no submission during this trial that the Crown is withdrawing on resiling from their submissions made at the Peshee hearing. And we have to assume that they were speaking the truth.

[125] We have to assume that the Plaintiffs were speaking the truth at the Peshee hearing also, as well as on those occasions, when other assurances were given to the Court concerning their will-says.

[126] The Plaintiffs have now resiled from those positions, but that does not mean the Plaintiffs were not speaking the truth at the time.

[127] The Crown has not resiled from any position taken at Peshee. It is the Plaintiffs who have resiled.

[128] The Crown's position at Peshee was that it supported Mr. Faulds in his suggestion that a less exacting standard should apply when using will-says at trial to determine matters of leeway and ambush.

[129] The support for a more relaxed standard on that occasion means necessarily that the Crown understood and advocated that will-says would play a role when considering ambush at trial. There was never any discussion that the will-says would not be connected with evidence at trial. In fact, the discussion about standards assumes that there must be such a connection.

[130] Such a connection was, in any event, an inevitable consequence of the Court orders that set the standards and ordered the participants to produce will-says in accordance with those standards.

[131] The only relevant discussion for present purposes that took place at Peshee was related to leeway. On this issue the Crown supported Mr. Faulds in his advocacy of a more flexible approach than Mr. Healey had advocated and the Court had adopted at Peshee.

[132] The Crown's concern was that the Plaintiffs were being allowed to profit from their own breach because they had been given the opportunity to revise their will-says to meet the standards set by the Court, but the Crown and the Interveners had not been given such an opportunity. Everything Ms. Koch said about leeway and the amount of detail in will-says was premised on this concern.

[133] When Ms. Koch concurred with Mr. Faulds in advocating a more flexible standard, that concurrence was contingent upon the limited picture she had seen at the hearing. She did not know that the Crown and the Interveners would be able to revise their will-says to meet the

standards (i.e. given the same opportunity as the Plaintiffs) as a result of the Plaintiffs' 369 Motion:

> Ms. Jenell Koch: I'm somewhat at a .. a disadvantage today in that I have not seen Mr. Healey's Rule 369 motion because it was sent to our office on Friday, but I – based upon what I've seen today, I concur with Mr. Faulds … (Page 186, lines 16-20)

[134] Mr. Healey's 369 motion resolved the concern that Ms. Koch had. The Crown and the Interveners were given the same opportunity to revise will-says that had been given to the Plaintiffs. There can be no resiling from a position based upon a contingency if future events change the basis for the position taken.

[135] But there is resilement when the Court accepts the position advocated by the Plaintiffs at Peshee and elsewhere, and the Plaintiffs now take a position that disclosure in a will-say should not be connected to admissible evidence at trial.

[136] As regards Mr. Fauld's position at Peshee, Mr. Faulds never advocated that the will-says would not impact the calling of evidence at trial (the position now taken by the Plaintiffs). Mr. Fauld's big concern was leeway. Once again, this concern is understandable given the fact that the Plaintiffs had been given the additional time they said they needed to revise their will-says in accordance with the standards and the Interveners had not (in the case of Ms. Peshee, she was never given that opportunity and the Plaintiffs strenuously resisted any suggestion that she should be).

[137] So the Court has rejected Mr. Fauld's softer approach to will-says and adopted the position advocated by the Plaintiffs. The Plaintiffs were given the time they said they needed to revise their will-says to meet the standards, but Ms. Peshee was not.

[138] Having advocated that Ms. Peshee should not have such an opportunity, the Plaintiffs now say that will-says should not impact the evidence they wish to call.

[139] This does not accord with the Court's ideas of fairness and consistency.

6. Comments about Crown Counsel

[140] The Plaintiffs complain as follows:

> … there has been no submission made to this Court in these proceedings to my knowledge at any time that the Crown counsel who appeared on December 13th of '04 was uninformed or suffering from any disability. We would submit that there has been no submission made to this Court that Mr. Donaldson's views were not being accurately described to the Court on December 13th of 2004 …

This assertion is extremely peripheral to any ruling I have made in these proceedings. It is related to a remark that was a mere aside.

[141] The Court has never said that Crown counsel (Ms. Koch in this case) may have been suffering from a "disability", or that Mr. Donaldson's views were not accurately described to the Court.

[142] The Court has said (and this is the main point) that there was nothing compelling Mr. Healey to take the positions he did at Peshee and "the Crown was not represented by its usual front row with a full grasp of the significance of the will-says and the whole history of this dispute …" For example, there was nothing to prevent Mr. Healey from arguing at Peshee that will-says should not affect the calling of relevant evidence at trial if ambush is raised. But he certainly did not argue that position.

[143] As I have already pointed out, Ms. Koch herself indicated at Peshee that she was "at a disadvantage" when it came to the standards issue because she had not seen the Plaintiffs' 369 motion.

[144] But it was Mr. Fauld's who put the Court on notice that, in dealing with will-say issues, Ms. Koch really needed to consult with Ms. Kohlman and Mr. Kindrake: He said "I entirely concur that that's – that that's a proper subject for a further pre-trial management conference and I would imagine Ms. Koch would want Mr. Kindrake and Ms. Kohlman to be available for any discussion of that nature."

[145] I am entitled to rely upon what counsel tell me as officer's of the Court if I wish (Mr. Molstad has asked me to do just that) and I have my own eyes. I am aware that Ms. Koch does not suffer from a disability (I never said she did) and that she is a very capable lawyer. But I don't even need Mr. Fauld's to intimate to me who are the senior counsel on this file for the Crown with a full grasp of the complexities of these actions.

[146] As for Mr. Donaldson, I did not say that Mr. Donaldson's views were not accurately described. I said he had to instruct Mr. Fauld's from a distance. He had to do so when important decisions were being made about his client in Court. The fact of his eventual arrival in the Court room did not change this.

[147] But my comments in this regard had no impact upon the ruling I made. I was merely pointing out that, at the Peshee hearing, Mr. Healey could easily have embraced the more flexible approach to will-say use that Mr. Fauld's and Ms. Koch – for the contingent reasons they gave on that day – put forward. But Mr. Healey advocated an approach based upon the standards in the will-says ("the key") and I agreed with that approach. His approach is consistent with the Court orders establishing the will-say requirement and the standards set by the Court. It is also necessary, in my view, in order to resolve the problems specific to these proceedings that gave rise to those Court orders.

7. The Full Context

[148] Mr. Molstad warns the Court as follows:

> We also submit, My Lord, that if this Court is going to place the emphasis that it has in terms of what occurred at the Peshee hearing that it ought to consider what occurred at the hearing in its entirety.

[149] The Court has indicated in its rulings that relate to Peshee that it has read the transcript of the hearing in its entirety. So I don't know what further guidance I might give on this issue.

[150] I think I must assume that Mr. Molstad has not read my rulings concerning Peshee in their entirety.

[151] But, of course, there is more to interpreting Peshee than the transcript. As Mr. Molstad has demonstrated, he was not present at Peshee and is reliant upon other counsel for what happened there. I labour under no such disadvantage. I was present at Peshee.

8. Summary of Peshee Hearing

[152] Notwithstanding the fact that I have read the Peshee transcript and have indicated in my rulings that I have read it, Mr. Molstad has again led the Court through significant portions of that transcript. I have checked the transcript again for this motion and I have to conclude that everything he draws to my attention merely confirms the correctness of the conclusions I have drawn from Peshee, as incorporated into my rulings.

9. Connection with September 2006 Progress Report

[153] One of the ways that the Plaintiffs now attempt to circumvent my rulings that deal with the significance of the Peshee hearing is to quote from their September 2006 Progress Report and to draw my attention to the following:

> (g) Role and use of will-says at Trial
>
> The Plaintiffs do not intend to bring a motion in this regard. However, we expect that the role and use of will-says will have to be addressed at trial.

[154] I will have much more to say about this document in the context of my discussion of what happened after the Peshee hearing. But the Plaintiffs also make the following general point:

> We would respectfully submit, My Lord, that it is both unfair and incorrect to interpret the discussion with all counsel at the end of the Peshee hearing as a representation of the plaintiff particularly considering our communication to the Court and all counsel in September of 06 that we anticipated that this would be dealt with at trial.

[155] It is not clear what the Plaintiffs mean by "representation" here, but I am assuming that the Plaintiffs mean anything Mr. Healey might have said regarding will-says and any future discussions about will-says.

[156] The suggestion appears to be that when the Plaintiffs said in September 2006 that "we expect that the role and use of will-says will have to be addressed at trial" anything that may have been established or said about will-says to that date was dissolved and the whole matter could then be debated anew at trial.

[157] There is also a suggestion that something said by new counsel in September 2006 should constitute a guide to what previous counsel may have meant by his representations in December 2004.

[158] I am unable to make the connections between the Plaintiffs' September 2006 Progress Report and the Peshee hearing that the Plaintiffs want me to make.

[159] First of all, there were no representations at Peshee that will-says should not be used at trial when ambush was raised. All counsel merely assumed that they would be so used. And this is because their use in this way is an inevitable consequence of the Court orders that impose a will-say requirement, set the standards, and order the Plaintiffs and other participants to produce will-says that comply with those standards.

[160] The only discussion relevant to this motion that took place at Peshee regarding will-says was about scope and leeway issues. No one suggested or debated the issue of whether will-says should be used at all at trial; it was a given, and what Peshee did was to dramatize what would happen when ambush was alleged at trial. It gave all participants the opportunity to review the results and see if they might want to change the impact of the will-says statements upon evidence to be called at trial. But no one argued that there should be no impact. It was obvious that there had to be unless the Court orders that gave rise to the will-says and set the standards were countermanded. And that could only be done by further Court order, which has not occurred.

[161] Conceivably, of course, the parties might have agreed that the will-says should not be used as they were used at Peshee and as they have been used since.

[162] But that would have required, not only agreement between the parties, but also a further Court order to amend or supplement the Court orders that dealt with will-says.

[163] Such a change might also have been achieved by one of the parties bringing its own motion and asking the Court to change the regime that had been established for will-says. No such motion was ever undertaken.

[164] To some extent, the role and use of will-says have been addressed at trial in accordance with the Plaintiffs' September 2006 Progress Report. But they have not been addressed in a vacuum that disregards Court orders and the precedents established at Peshee. Further refinement was required and that has taken place. We have also clearly established just what the system did entail and what Peshee demonstrated. Nothing in that background even suggested that there should be no connection between will-says and ambush at trial, or that the acceptance of will-say standards was merely a matter of pre-trial disclosure and could not be used to consider admissible evidence at trial if ambush was raised as an objection.

[165] Also important is that the Plaintiffs' September 2006 position to have the role and use of will-says addressed at trial could have no impact upon the Plaintiffs' obligations to produce will-says that meet the standards set by the Court, and that I ordered the Plaintiffs to produce on November 25, 2004.

[166] And none of this creates any unfairness or imbalance. Both sides can claim relief from ambush at trial and can refer to will-says to demonstrate ambush, and both sides have done this.

[167] As for connecting the September 2006 Progress Report to an interpretation of the discussion that took place in December 2004 at Peshee, the Court has considered the matter, but I can give it little weight when it is placed beside the contemporaneous evidence.

10. Dealing with Evidence at Trial

[168] The Plaintiffs assert that "it is entirely appropriate that the admissibility of evidence at trial be dealt with at trial."

[169] The Court **has** dealt with the admissibility of evidence at trial. Everything relevant that occurred before the trial was related to pre-trial disclosure and the scope of pleadings. But dealing with evidence at trial means dealing with objections to that evidence, including ambush. And ambush, in this case, requires a consideration of pre-trial disclosure.

[170] The Court has consistently said in its rulings that the will-says are not evidence, and it has never dealt with them as evidence prior to trial or at trial.

[171] The Plaintiffs have suggested elsewhere that ambush at trial could be dealt with, not by reference to the will-says and pre-trial discovery, but by allowing the opposing party the time it needed to go away and prepare for cross-examination.

[172] Such an approach is clearly unworkable. The only place where the Crown could obtain much of the pre-trial disclosure it needs to prepare to cross-examine the Plaintiffs' witnesses is

from the Plaintiffs. The Plaintiffs have not cooperated in the past in providing that disclosure. That is why the will-says were needed. The Plaintiffs now say that the Court should jettison the will-says and revert to the very system that did not work in the past; the system that gave rise to the will-say requirement.

[173] In any event, having spent extensive amounts of time implementing the will-say system to allow for preparation and effective cross-examination at trial, and having given the Plaintiffs the time they said they needed to produce their will-says, and having been assured by the Plaintiffs that they have produced will-says that meet the standards, it makes no sense to the Court to abandon the present system and spend trial time that was supposed to be saved by the will-say system.

[174] The Plaintiffs are prejudiced in no way by this approach and have not been prevented from bringing any relevant evidence before the Court. They have merely been asked to (and then ordered) to make the pre-trial disclosure necessary to allow the Crown to effectively cross-examine on relevant evidence at trial.

[175] There are also a number of additional issues and arguments that the Plaintiffs raise in their reply to justify a mistrial that, in my view, are not supported by the record and that need to be addressed for the reasons I have given. Once again, I will address them in point form only:

1. **The Procedure that has been adopted by the Court in relation to the use of will-says at trial has been urged upon the Court by the Crown and as of**

yesterday endorsed, as we understand the interveners submissions, by the interveners.

[176] The procedure adopted by the Court deals with relief from ambush at trial. As part of that process, the will-says and other areas of the pre-trial disclosure record have come into play in handling individual objections on their merits. This procedure has also been urged upon the Court by the Plaintiffs who have secured relief from the Court from ambush, and have used a will-say to convince the Court that ambush has occurred. The Plaintiffs have resiled from the position they formerly took and are now saying that what the Court is doing has been urged upon the Court by the Crown and the Interveners. But the fact is that the Court's approach to dealing with ambush at trial is merely a continuation of the pre-trial process and trial proceedings at the Peshee hearing. I have already ruled upon this.

2. We wish to reassure the Court that we do not seek to re-argue the rulings that have been made.

[177] What the Plaintiffs have argued is plain on the face of the record and speaks for itself. From the Court's perspective, the decision of the Plaintiffs indicated in their September 2006 Monthly Report to deal with the role and use of will-says at trial, rather than as directed by the Court, was a decision to re-argue the whole pre-trial disclosure system involving will-says as set out and ruled upon by the Court in various Court orders. In their several attempts to change the system at trial the Plaintiffs have noticeably failed to address and deal with the principal pillars of that system and their implications for trial. For example, the Court's order of November 25,

2004 mandating the production of will-says that meet the standards. Although the Court has been dealing with particular objections based upon ambush, the Plaintiffs have been attempting to persuade the Court to abandon any connection between disclosure in will-says and ambush at trial. But that connection is a necessary result of the pre-trial disclosure system devised to deal with the on-going problems encountered during the case management phase and beyond. The Plaintiffs have also been attempting to persuade the Court to abandon the precedent values and lessons of the Peshee *de bene esse* hearing.

[178] In addition, and as part of this motion, the Plaintiffs have re-argued Peshee and the Court's rulings merely by saying, but not demonstrating, that those rulings have resulted in an imbalance and a huge advantage to the Crown. In order to argue the issues raised in this motion (imbalance and inability to make their case) it is not necessary for the Plaintiffs to re-argue why the Court's previous orders or rulings were wrong. Those rulings stand. It is their impact that is at issue, not a re-hash of how the Court got it wrong or additional argument and evidence that the Plaintiffs failed to provide when the orders or rulings in question were made.

3. The Crown's Position

[179] The Plaintiffs point to the following submission of the Crown:

> The Crown's position in a nutshell is that the Principle that in order to be admissible, proposed evidence had to have been disclosed in the will-say statements in accordance with the standards set by this Court remains sound.

The Plaintiffs say that this submission relates to will-says. It does not relate to the issues of disclosure and surprise.

[180] The Crown's words need to be read in their full context. It has been made very clear that, when objections are raised, it is real ambush that is the issue.

[181] The issue in this motion is not the Crown's position, in any event. The issue is the Court's position and the procedures adopted to deal with particular objections based upon ambush.

[182] It is telling that, in a motion that claims that the Court's rulings have created a huge imbalance, and that the Court has adopted a legal rule to exclude relevant evidence not contained in a will-say, the Plaintiffs quote the Crown but fail to address and confute the importance of the Court's own words that say will-says are not a rule of exclusion, and that the issue is real surprise and ambush, or to take the Court to actual rulings to show what the Court is really doing.

4. This Court, and any Court of review, will now be able to see just how extensive that discovery was and we point out that that discovery transcript was not ever put before the Federal Court of Appeal.

[183] As individual objections have arisen, the Plaintiffs have been free to place before the Court any portion of the pre-trial record they choose to refute a claim of ambush. They have, in

fact, made much reference to that record and the Court has exercised its discretion in each case, and has given reasons.

[184] It is not entirely clear to me why the Plaintiffs want to tell me what will be put before an appellate Court at this stage in the trial. Many other things would presumably go before any such appellate Court, including my reasons for rejecting or accepting the Plaintiffs' arguments, evidence put forward on each objection, the discovery problems that required the imposition of a will-say requirement in addition to whatever the rest of the discovery process might reveal, prior Court orders dealing with will-says, and the Plaintiffs own endorsement of the system and use at trial prior to their more recent attempts to resile from former positions they urged upon the Court and from which they have benefited.

[185] It is noticeable in this motion that although the Plaintiffs refer to an extensive record in a general way and select those aspects that support their position, they never actually explain or refer specifically to what the rulings to date stop them from doing with specific witnesses except the general "to adequately state their case." But the Court is never shown how or why.

5. We submit, My Lord, that the decision of the Court of Appeal was a decision that was with respect to case management. We are no longer in case management; we are in trial.

[186] Any decisions that the Court of Appeal may have made with respect to my decisions have been appeals from decisions of the trial judge. Every meeting of counsel I have attended has been a trial management meeting.

6. We submit that the amount of disclosure the Crown has received is unprecedented, and you have heard nothing to contradict our submission in that regard.

[187] This is merely a repetition of arguments the Plaintiffs have made at each objection dealing with ambush. The Court has dealt with it in its rulings.

[188] In a general sense, it is also not born out by the record. For example, the Court has been shown in relation to specific objections how those objection relate to questions put to the Plaintiffs in discovery that were never answered in any meaningful way.

7. We haven't seen my friend produce decisions where evidence of a lay witness was excluded on the basis of will-says in a civil trial.

[189] Once again, the Plaintiffs mischaracterize the issue. Evidence has been excluded in these proceedings on the basis of ambush, not because the will-says are a legal ground of exclusion as alleged by the Plaintiffs.

[190] Rulings based upon the exclusion of evidence for ambush, and the use of a will-say to demonstrate ambush have been referred to. They were made at the Peshee hearing (at trial) in these proceedings at the urging of the Plaintiffs.

[191] There was no dispute at Peshee over whether the Court could exclude evidence on the basis of ambush and refer to a will-say statement to ascertain whether ambush had occurred. All counsel concurred with this procedure, and it was Plaintiffs' counsel who actually urged it upon the Court.

8. To treat a lay witness in the same way as an expert witness in terms of comparing a will-say with an expert report is, in our submission, unfair.

[192] The Court has clearly explained in its rulings what it has done. The Court has never said it is treating a lay witness in the same way as an expert witness. This is an unsubstantiated assertion by the Plaintiffs and, had it been done, whether it would be unfair or not in the circumstances of this case, has never been fully argued before me.

9. The Plaintiffs further say that the Court heard the oral history evidence anyway at the Peshee hearing.

[193] In their various arguments related to the Peshee hearing the Plaintiffs tend to decontextualize remarks, select wording they believe supports their own view, but omit to address words that obviously do not, and then suggest that, in its rulings related to Peshee, the

Court should really have read the full transcript, even though the Court has said on the record that it has read the full transcript.

[194] Mr. Faulds made it quite clear at the Peshee hearing that Ms. Peshee was called "as an ordinary witness … to give evidence of matters that are within her knowledge in the ordinary way … ."

[195] He said "this witness is not being asked to give evidence about what the customs are, she's simply being asked to say what she knows about events that happened within her family, and this is for that limited purpose."

[196] And in my rulings on the Peshee evidence I said as follows:

> … he's merely telling me that he wants to have a statement of fact as to where Ms. Goodstone went, and I'm accepting it on that basis. I'm not accepting it as establishing *per se*, any kind -- any kind of custom as to where she went.

[197] It would be of greater assistance to the Court if the Plaintiffs attempted to deal with rulings and/or remarks in their full context.

10. So what we know is that Mr. Healey [at Peshee] was saying, she's giving evidence outside the will-say and he's not objecting.

[198] If this is a suggestion that Mr. Healey was a paragon of leniency at Peshee, while the Crown has been costively pedantic in its objections and overly scrupulous in its cross-

examination, then I don't think it is supported by Mr. Healey's actual objections at Peshee or his cross-examination.

[199] The reason why evidence was given outside of the will-say at Peshee, and has been given outside of the will-says of Plaintiffs' witnesses, is because the will-says are not, contrary to the Plaintiffs' assertions in this motion, a legal rule of exclusion. If no objection is made, it is because there is no ambush and the evidence can go in. The fact of Mr. Healey's not objecting to some evidence of Ms. Peshee that did not appear in her will-say confirms that will-says are not a legal rule of exclusion in these proceedings.

11. Your ruling in the Peshee transcript would support hearing evidence as opposed to excluding evidence.

[200] I have already ruled on what the Peshee transcript reveals about my rulings at the Peshee hearing. There is no point in debating that issue again in this motion.

[201] The Court always wants to hear relevant evidence. But the Court also has to deal with objections to evidence, and that is what the Court has done at Peshee and with the Plaintiffs' witnesses.

12. The use of will-says at trial, particularly between parties, was clearly stated to be an issue (at Peshee) that should be dealt with, either in

advance of trial or at trial. And we've now found ourselves dealing with it at trial.

[202] This is an assertion (unsupported) that, in trying to re-argue the whole will-say issue at trial, the Plaintiffs have merely followed Peshee.

[203] First of all, Peshee did not establish that the role and use of will-says at trial was a completely open question. The issues that remained to be resolved after Peshee were stated at Peshee.

[204] For present purposes, the issues of leeway and detail were identified at Peshee. Leeway and detail would not need to be resolved if all participants at Peshee did not understand and agree that the will-says would come into play when considering objections to evidence at trial based upon ambush, and that there is a necessary connection between the will-says and the admissibility evidence at trial.

[205] The Plaintiffs' present position that the acceptance of a standard of will-says in pre-trial disclosure and the Plaintiffs' effort to comply with the standard is unrelated to the admissibility of evidence at trial did not come up at Peshee.

[206] It did not come up at Peshee for a host of reasons. Some of them are:

a. The necessary connection between the will-says and ambush at trial is mandated by the standards and the Court orders dealing with will-says. It would make no sense to

order the participants to produce will-says that met the standards if that left participants free to lead any evidence without fear of an ambush objection at trial;

b. In seeking relief from the Court from ambush at Peshee, and in using a will-say to do that, Mr. Healey necessarily asserted the obvious point that the issue of notice and ambush are connected to the standards. He said that the standards are "the key";

c. When making objections at Peshee, Mr. Healey did not argue that pre-trial disclosure and the will-says were unrelated to the admissibility at trial. In fact, he argued the opposite and won the Court's acceptance of that connection.

[207] At the end of Peshee, there remained a number of matters related to will-says that needed further exploration. But the necessary connection between will-says and the admissibility of evidence at trial when it came to ambush objections was established by Court order and confirmed at Peshee.

[208] At the end of Peshee I indicated that:

> What I'd like to happen is that when we go away from here today with the list of issues that have been raised and which have come out of today's proceedings … that you will go through the consultation process and confer with other and perhaps let me know what should be put on the table and when we could usefully have such a management discussion and talk about how to resolve it..

[209] And then I add:

> … I'm assuming I'd be hearing from you in the fairly near future, bearing in mind what our general timetable is and what we have to put right in the small amount of time available to us [i.e. before the commencement of the trial paper].

[210] Following Peshee, there were discussions but nothing was resolved regarding outstanding will-say matters. For this reason, the Plaintiffs realized they would need to bring a motion to deal with any concerns they might have regarding will-says.

[211] Such a motion was not brought and eventually the Court had to set a deadline for any motions the Plaintiffs might wish to bring. That deadline passed.

[212] The Plaintiffs indicated in September 2006 that they would not be bringing a motion but had decided to leave the issue of the role and use of will-says until the trial.

[213] That has occurred.

[214] Because the Court-imposed deadline for motions on will-says has passed, the Plaintiffs are clearly not now in a position to bring a motion at trail dealing with the role and use of will-says. And yet, although the present motion is couched as a mistrial motion, it is really about the role and use of will-says at trial. Hence, on that basis alone, it would have to be denied because the Plaintiffs were given time to bring a motion about the role and use of will-says at trial and they declined to do so by the deadline.

[215] The Plaintiffs cannot now attempt to accomplish, first through rulings, and now as part of a mistrial motion, what they were directed to deal with before trial.

[216] In addition, any outstanding matters concerning the role and use of will-says at trial did not include the issues of whether or not will-say standards should be unrelated to the admissibility of evidence at trial. That connection is established by Court order (the necessary connection) and it is confirmed by Peshee. Any changes to that position could only be achieved by motion, and the court made it clear that any motion dealing with the role use of will-says at trial had to be brought by the deadline.

[217] So if the present motion involves any attempt by the Plaintiffs to disconnect the relationship between will-says and the admissibility of evidence at trail when ambush is alleged, the Plaintiffs are out of time.

[218] A mistrial motion *per se* is not ruled out. But such a motion must assume the necessary connection between the standards set for will-says (which the Plaintiffs have said are "the key") and the admissibility of evidence in the event that an objection based upon ambush is raised.

[219] The Plaintiffs cannot disregard a deadline set by the Court and then bring a motion at trial to deal with the subject-matter (the role and use of will-says at trial) they were told to deal with by way of motion by that deadline.

[220] The assertion by the Plaintiffs that Peshee established that the outstanding will-say issues could be dealt with at trial is unsupported by any reference to Peshee and it is clearly contradicted by my words at Peshee and the later deadline I imposed in my direction of August 24, 2006.

13. I don't want to re-argue your rulings, our submission is that that's the position that was taken.

[221] This distinction is not tenable. The positions that were taken at Peshee have been referred to in my rulings and form part of the basis for my rulings. To argue that positions taken at Peshee do not accord with my rulings is to re-argue my rulings.

[222] This is obviously a matter of great concern in proceedings where the Court has had to warn the Plaintiffs in the past about re-arguing issues that have already been decided, and where costs have been awarded against the Plaintiffs to discourage this practice.

14. The Plaintiffs have many lay witnesses and the Crown has only one, so the will-say requirement operates unfairly.

[223] This is an unsupported assertion that the Plaintiffs have not even attempted to prove or justify. It has never been raised before trial, and the Plaintiffs have assured the Court in the past, that they were able to complete will-says that met the standards.

[224] In reviewing the Peshee transcript yet again for the purposes of this motion, I see that Mr. Healey provides the answers to this argument on several occasions. For example, at page 85, lines 14 to 18, he says:

> And what I'm concerned about here, is not just fairness and the double standard. An ambush is an ambush. I mean, the substance of

> the evidence that Mr. Faulds sought to call here wasn't even in the will say statement.

It is difficult for the Court to understand why the Plaintiffs now allege that the Court has created an unfair trial when the Court has merely done things that were vehemently advocated by their own counsel.

[225] Ambush is ambush, irrespective of the number of witnesses. The same standards apply to all lay witnesses. To remove the connection between will-says and ambush would merely give the Plaintiffs the right to ambush the Crown through the use of will-says that represent that witnesses will only address what is contained in their will-says. The fact that the Plaintiffs have many lay witnesses just makes cross-examination more onerous and the need for will-says in these proceedings more necessary.

> **15. With the number of witnesses that the plaintiffs are calling, with the difficult task ahead of the Plaintiffs in relation to proof of events that occurred hundreds of years ago, and with the onus which is on the plaintiffs in terms of advancing a claim, … these are factors that you should consider before you decide to exclude evidence that's not in a will-say but may be relevant and material.**

[226] The Court has considered these factors in the course of its rulings. The Plaintiffs are merely re-arguing decisions that have already been made.

[227] The will-says and the standards were set long ago and accepted by the Plaintiffs. The same difficulties existed then, and the Plaintiffs have provided repeated assurances to the Court and the other participants that their will-says conform to Court orders dealing with will-says, even as part of this motion.

[228] Events that happened long ago are even more difficult to cross-examine on. The Plaintiffs have access to their witnesses. The Crown does not, and is reliant upon disclosure to avoid ambush. That is why will-says were imposed.

16. Our submission is it (i.e. the role of will-says and their connection to evidence at trial) should not be resolved in case management, and our submission is it should be resolved at trial before the trial judge.

[229] I am not, and never have been, involved in case management. All of my decisions regarding will-says have been resolved as a trial judge. Peshee was the trial.

[230] The will-say requirement was imposed by the case management judge but those aspects concerning the role and use of will-says at trial that have come before me have been dealt with by the trial judge.

17. The cross-examination of one witness can, in fact, provide clues with respect to the cross-examination that might occur with respect to the next witness.

[231] All of which can be taken into account when a particular objection is raised. The Plaintiffs are obviously free to make this argument at the appropriate time.

18. Your decisions in October of 2004 and November of 2004 – that's October 18th and November 25the, are pre-trial case management decisions. We are now at trial.

[232] I have never been case management judge. All of my decisions have been made as trial judge. Because some of those decisions have been made by way of motion before the trial proper begins does not make them case management decisions. They were all motions that would have come up at the trial if trial had commenced without them being made. Delays in commencing the trial at the appointed time were, by and large, a result of the Plaintiffs' breach of Court orders. Motions the Plaintiffs brought delayed the trial even further. The Plaintiffs were later given additional time so that their new counsel could familiarize themselves with the proceedings.

19. A trial judge cannot be fettered in most circumstances through case management.

[233] I have been dealing with ambush at trial. As a consequence I have been forced to look at pre-trial disclosure to make sense of what is occurring before me at trial. But my decisions are made at trial. In arguing those decisions counsel are at liberty to refer me to whatever they want me to look at. The Plaintiffs have certainly done this.

[234] The Plaintiffs make various comments concerning the respective roles of a case management judge and a trial judge, but no specifics are presented and there is no indication as to how such distinctions may have impacted the issues of fairness raised in this motion.

20. The trial process is such that the admissibility of evidence at trial is determined at trial by the trial judge.

[235] That is precisely what has happened in this case. I have dealt with each objection as it has arisen. But such decisions are not made in a vacuum. Factors to consider in relation to admissibility at trial may well arise from the pre-trial situation. They certainly did at Peshee.

21. It's not an answer that you can fix this in re-examination. Our submission is that it is unfair for the Plaintiffs to be precluded from leading that evidence in the first instance. And our submission also is that it is unfair for the plaintiffs to have to wait to see if the Crown attempts to ask questions in cross-examination.

[236] What the Plaintiffs are implying here is that they have decided that they are going to treat their own will-says as a legal ground to exclude relevant evidence and that their own decision to do so is unfair.

[237] The Plaintiffs are not precluded from trying to lead any evidence in the first place, even if it is not in a will-say. If they don't attempt to lead all the evidence they want to lead, then that is their decision, not the Court's.

[238] If there is no objection, then the will-say will not even come into play.

[239] If there is an objection, then the Court will deal with it on its merits.

[240] Because they do not like some of the past decisions that the Court has made, the Plaintiffs are, in effect, saying that if the Court does not disconnect the will-says and the issue of ambush at trial, the Plaintiffs won't attempt to lead evidence not disclosed in their will-says in accordance with the standards.

[241] But this is all premised on the fallacy that the Court, notwithstanding its specific words to contrary, has made the will-says a legal ground of exclusion.

[242] If the Plaintiffs proceed in the way they indicate here, it will be the Plaintiffs who have decided to treat their own will-says as a legal ground of exclusion.

[243] The Plaintiffs do not have to wait to see if the Crown attempts to ask questions in cross-examination. This is another fallacy.

[244] The Plaintiffs are merely aggrieved that, in leading their evidence, they have been faced with objections based upon ambush, and they want the Court to foreclose on the Crown raising ambush arguments even though the Plaintiffs themselves raised ambush arguments at Peshee.

[245] And the Plaintiffs have declined to address the central inconsistency embodied in this position: if their will-says are compliant with Court-ordered standards (as the Plaintiffs have repeatedly alleged) how could the Plaintiffs be precluded from leading any evidence they want to lead, even if the will-says were a legal ground of exclusion.

[246] The Plaintiffs submissions are unsubstantiated, they are at odds with what the Court has said it is doing and is actually doing, and they contain a fundamental contradiction that renders them unpersuasive and certainly no ground for the declaration of a mistrial.

[247] There are many other reasons that dictate against the Court being able to accept the Plaintiffs' position on unfairness over this point. For example, if there is evidence that the Plaintiffs wish to lead, they have been given the time they said they needed to ensure that it appears in their will-says so that no objection based upon ambush can even arise at the trial. What is more, the Plaintiffs have repeatedly reassured the Court and the other participants that what their witnesses have to say is set out in their will-says in accordance with the standards.

22. We do not resile from any position that we have taken in relation to will-says. We submit that they were for the purpose of pre-trial disclosure. We also

submit that they were not intended for the purpose of excluding relevant evidence presented at trial.

[248] The Court has already found that the Plaintiffs have resiled from former positions taken at Peshee and from the necessary implications of their repeated assurances that their will-says are compliant with Court-ordered standards.

[249] The will-says were part of pre-trial disclosure; a very important part. This fact does not render them irrelevant for purposes of dealing with objections at trial based upon ambush.

[250] The Plaintiffs have not demonstrated from the record where, prior to the trial, they argued or took the position that will-says would not play a role when it came to considering the admissibility of relevant evidence at trial in the event of an objection based upon ambush.

[251] Nor have the Plaintiffs alleged that the Crown cannot raise objections based upon ambush. They base this motion upon a general erroneous argument that the Court is using the will-says as a legal ground to exclude relevant evidence. But they don't address the specific rulings of the Court that suggest otherwise.

23. This trial has been allowed to evolve into what is not a normal trial and it has evolved into what is not a normal trial very early in the proceedings when you heard the positions advanced by the Crown pertaining to will-says related to Darrel Crowchild and Regena Crowchild.

[252] If this trial had indeed evolved into an abnormal trial, the time when it happened would be at the Peshee hearing and on the advise of Plaintiffs' counsel.

[253] But this trial is not abnormal. There is nothing abnormal about the Court having to deal with objections based upon ambush at trial and examining relevant parts of the record referred to by counsel to make rulings on the merits.

24. We understand that this Court has already decided that it will exclude evidence, notwithstanding disclosure.

[254] There is a clear distinction between what the Plaintiffs may understand and what the Court has really decided. The responsibility for what the Plaintiffs may "understand" rests with counsel for the Plaintiffs. It does not rest with the Court. The Court's rulings have dealt with ambush.

25. Now, we certainly agree that during the case management there were directives issued that the parties, the two plaintiffs and the Crown and the Interveners would be required to provide will-says.

[255] The record says otherwise. Justice Hugessen's Pre-Trial Order of March 26, 2004 was not a directive. It was a Court order that the Plaintiffs' breached.

[256] In addition, my dealings with this matter as trial judge are embodied in Court orders with which the Plaintiffs have assured the Court and the other participants they have complied.

26. I'm going to refer you first of all to a transcript of case management proceedings by way of telephone conference call on the 7 January, 2005.

[257] This is incorrect. The official Court record identifies this as a trial management conference.

27. Telling the Crown

> [350]
>
> The Court: I'm looking for … a clear message. This is going to be our position at trial. And get ready.
> …
>
> Mr. Molstad: Advocacy and preparation for trial is something that I submit all counsel can speak to, and when counsel are provided with will-says in a civil action in relation to witnesses that might be called, it is .. it is highly, highly unlikely that they would simply sit, read the will-says and walk into a courtroom, particularly when there's been extensive disclosure that's already occurred in this, including a previous trial.

[258] The Court's question is never really answered. The record reveals there was no clear indication that the Plaintiffs were going to take the position that their will-says could not be connected to allegations of ambush raised at trial or the admissibility of evidence.

[259] Mr. Molstad's answer also leaves out of account the particular nature of the pre-trial problems in these proceedings, why the will-says were needed, the particular form these will-says had to take (i.e. the "key" standards) and the repeated representations made by the Plaintiffs to the effect that their will-says conformed to the standards and so had to be an account, in synoptic form, of what each witness would actually say.

28. The Plaintiffs find themselves in a position where they are unable to lead evidence notwithstanding that there has been disclosure.

[260] The record says otherwise. The Plaintiffs can attempt to lead any evidence they choose, but they must be prepared to deal with objections based upon ambush. If those objections are made, then the Plaintiffs can demonstrate to the Court on each objection what disclosure there has been, and why it should negate the claim of ambush in the particular instance.

[261] The Plaintiffs have also indicated clearly to the Court and the other participants that the evidence they wish to lead through their witnesses is set out in their respective will-says in accordance with the standards set by the Court. There is nothing in any ruling that prevents the Plaintiffs from doing precisely this.

29. The Plaintiffs cannot have the witness address a matter not in the will-say, even if they anticipate that the Crown will cross-examine in relation to that specific matter.

[262] The record says otherwise. The Plaintiffs can ask a witness to address any matter, even if it is not in a will-say. They have already done this.

[263] The Plaintiffs do not have to anticipate anything the Crown might do. All they need to do, as in any trial, is lead the evidence they want to lead through a witness and deal with objections as they arise.

[264] What the Court has learned during the course of this motion suggests that the Plaintiffs' present predicament, and the problems they are experiencing, may go back to their will-says. If the will-says are compliant, as the Plaintiffs insist they are, then there can be no ambush issues to deal with. The Plaintiffs were told what to put in their will-says. They were given the time they said they needed to meet the standards. Indeed, they were ordered to do it. They have assured the Court and the other participants that they have met the standards.

[265] They now want the Court to accept, in effect, that they should not be responsible if it turns out they have breached a Court order and their representations and assurances turn out to be inaccurate.

[266] But it is obvious that the responsibility rests squarely with the Plaintiffs and cannot be sloughed off onto the Crown or the Court by alleging that the whole system is unfair, particularly when the Plaintiffs have already used the system to their own advantage at trial and did not find it unfair at that time.

Post Peshee

[267] The Plaintiffs have now brought to my attention new materials, including correspondence between counsel and monthly reports, which they say support their position in this motion. But the Court does not see how they assist the Plaintiffs in any way.

[268] The Plaintiffs' position in this motion is that the Court has used will-says as a legal ground to exclude relevant evidence that the Plaintiffs wish to introduce. As already pointed out, this is not what the Court has done. The Court has assessed objections to evidence based upon ambush and, as part of that assessment, has considered the significance of will-says. The Plaintiffs have not argued – at least not directly – that objections to evidence based upon ambush cannot be made. And if they can be made, it is difficult to see why the Crown, or any objecting party, should not be allowed to refer to the relevant will-say, or any other part of the record or other documentation, to demonstrate ambush. There is nothing in the new materials presented to the Court for the post Peshee period that affects this basic situation.

[269] The Plaintiffs want the Court to accept their present position that the acceptance of a standard for will-says in pre-trial disclosure and the Plaintiffs' effort to comply with that standard is unrelated to the admissibility of evidence at trial. It is not clear what accepting this proposition would entail.

[270] For example, would it mean that all participants would be prevented from objecting to the introduction of evidence at trial or the grounds of ambush? Bearing in mind that the Plaintiffs

have not argued for such a position, and have themselves sought and obtained relief at trial based upon ambush, this would seem unlikely.

[271] Or would it mean that, when objections are made based upon ambush, no reference can be made to the will-says to demonstrate ambush? Once again, it is difficult to understand how or why any part of the record, or any documents, should not be relevant to the issue of ambush, or why either party should not refer to will-says, particularly, once again, when the Plaintiffs have done this themselves.

[272] It seems to the Court that the Plaintiffs' contention that the acceptance of a standard for will-says and the Plaintiffs' efforts to comply is unrelated to the admissibility of evidence at trial could only make sense if the Court were to accept the Plaintiffs' erroneous thesis that the Court has used will-says as a legal ground to exclude relevant admissible evidence at trial; and the problem with this position is that the Court has done no such thing.

[273] Hence, it is difficult to see what relevance or impact the post Peshee materials might have on the disclosure regime and the factors that have come into play when the Court has considered objections at trial based upon ambush.

[274] The Court itself asked the Plaintiffs when it was that they first indicated to the Crown that they would not regard themselves as bound by the confines of the will-says at trial? As the Crown has pointed out, this question does not quite raise the right issue, but it was the Court's way of trying to find out whether the Plaintiffs had given the Crown notice, or whether the

Crown has acknowledged or accepted the Plaintiffs' position, that the acceptance of a standard for will-says at pre-trial would be unrelated to the admissibility of evidence at trial, or that the will-say regime embodied in Court orders, representations and assurances given by the Plaintiffs, directions of the Court, and in the precedent values of Peshee, was dissolved, and the role and use of will-says was an open matter that could be re-argued at trial.

[275] The Plaintiffs' basic position seems to be that because they indicated in their September 2006 report that they did not intend to bring a motion, and because they said they expected that the role and use of will-says would have to be dealt with at trial, this both rendered the role and use of will-says at trial an entirely open matter and gave the Crown notice of the position the Plaintiffs would take.

[276] As I have already pointed out, there is nothing about the unilateral decision embodied in the September 2006 report that could render the role and use of will-says as an entirely open matter that still needed to be established at trial. Following Peshee, it was obvious that some matters still needed to be discussed. They were identified at Peshee. But the Plaintiffs' present contention that the acceptance of standards for pre-trial disclosure is unrelated to the admissibility of evidence at trial was not raised or identified at Peshee. And this is because the relationship between the standards and the admissibility of evidence at trial is a necessary consequence of the Court's orders dealing with will-says, the Plaintiffs acceptance of the standards set by the Court, and the reassurances given (even as part of this motion) that the Plaintiffs have met those standards.

[277] So it is difficult for the Court to understand how the factors that govern the relationship between the will-say standards and admissibility at trial could change after Peshee merely as a result of the Plaintiffs' unilateral decision not to bring a motion about will-says, but to raise and argue their role and use at trial. Of course, the Plaintiffs have argued their role and use at trial, but that does not mean the relationship in question (which comes together over ambush) is an entirely open question. That relationship, by the time of trial, had already been well-established in the ways I have indicated. The only relevance of anything that occurred after Peshee would be to demonstrate how that connection may have been severed so as to render the role and use of will-says at trial a totally open question. And even if it were a totally open question, this would not for that reason invalidate in any way rulings made to date at trial or make them unfair. So the Plaintiffs somehow need to show that their position of no connection between pre-trial standards and admissible evidence was accepted by the Crown, or that the Crown had agreed the issue was still unresolved and could be argued at trial. And there is just no evidence of this.

[278] There is an obvious explanation as to why there is no such evidence. It would mean that the Crown would have agreed either that it would not raise ambush issues at trial or, if ambush issues were raised, no reference would be made to will-says to demonstrate ambush. In view of everything that has happened in this law suit, and the pre-trial disclosure issues that made the will-says necessary, it would make no sense at all for the Crown to accept that there should be no connection between will-says standards and the admissibility of evidence at trial, or that the Plaintiffs could re-argue that issue at trial without regard to the necessary implications of the Court orders and the precedent values of Peshee.

[279] The party that argued at Peshee that will-say standards are "the key" when it comes to ambush and adequate notice is now alleging, not only that the standards have no connection to ambush and notice, but also that the Crown agreed, or at least understood, that they would have no such connection, or that the Crown agreed that the Plaintiffs were free to re-argue the matter *de novo*. This is an argument that has no inherent plausibility about it, and it would require clear evidence that the Crown had taken such a position. There is no such evidence.

[280] The Plaintiffs' view of what the new documentation shows is as follows:

> What these documents show is that two years ago – or approximately two years ago – it will be two years in another week, the plaintiffs communicated to the Crown and the Interveners that it was their position that the pleadings, not the will-says, should govern the relevance and the admissibility of evidence at trial.

[281] This is a curious conclusion in several ways. First of all, relevance is not an issue in this motion and no one has argued that the will-says govern relevance. Relevance is governed by the pleadings.

[282] Secondly, no one has argued that the pleadings don't relate to admissibility. If only relevant evidence is admissible, then the pleadings obviously impact issues of admissibility. But just because evidence is relevant, does not mean that it is automatically admissible. There are reasons why relevant evidence might be excluded, and in this trial ambush has been one such reason. Ambush has been used by both the Plaintiffs and the Crown as a ground to exclude relevant evidence. And both the Plaintiffs and the Crown have used will-says to justify objections based upon ambush.

[283] Thirdly, the position is, in fact, a "proposal" and a proposal cannot change the status quo unless it is accepted in some way. There is no evidence of acceptance.

[284] And fourthly, even the Plaintiffs' summary of what was communicated to the Crown is not born out by the full context of the record.

[285] If the Plaintiffs' position is that "the acceptance of a standard for will-says in pre-trial disclosure and the Plaintiffs' effort to comply with that standard is … unrelated to the admissibility of evidence at trial," then such a proposal was never even made by the Plaintiffs, let alone accepted by the Crown.

[286] The evidence shows that Mr. Shibley used his good offices to try and have all participants agree about the role and use of will-says at trial and so obviate the need for a formal motion. I endorsed this process in certain directions, but precisely what was going on, and what was being proposed was not something I considered. I merely directed that "Counsel will continue their attempts to finalize an agreement concerning the impact of will-says on the evidence to be adduced at trial." My assumptions at that time were that counsel were following up on my suggestions made at the Peshee hearing and were discussing matters that had been identified at the Peshee hearing as requiring further discussion and the eventual blessing of the Court before the trial began.

[287] The only proposal I can find in the documents the Plaintiffs have now referred me to is the one put forward by Mr. Healey and Ms. Hiptner on May 19, 2005, which reads as follows:

> The following is the Plaintiffs' proposal concerning the role, use and effect of will-says at trial. The pleadings, not the will-says, shall govern the relevance and admissibility of evidence at trial. They will be used to provide notice and avoid surprise. Provided that the will-say refers to the areas of evidence and the gist of the evidence that the witness will give that is sufficient to provide notice and avoid surprise at trial.

[288] This proposal deals with two important documents: the pleadings and the individual will-say of each witness.

[289] As regards the pleadings, it says they should govern relevance and admissibility of evidence at trial. There is no argument about relevance and, of course, the pleadings do govern general admissibility because that is connected to relevance.

[290] But the proposal also says that, when it comes to surprise at trial, the pleadings will come into play but the will-say will also play a role. If the pleadings were intended to be the exclusive measure of surprise at trial there would be no reason for the sentence about will-says. Either this is so, or the proposal is highly ambiguous.

[291] Indeed, other counsel picked this ambiguity up and sought clarification. The Plaintiffs were asked how this proposal differed from what had occurred at Peshee. But clarification was not provided.

[292] The Crown made it clear that it did not regard anything the Plaintiffs put forward "as any kind of reasonable or substantive proposal for how we should proceed at trial." If Mr. Healey's letter of May 19, 2005 is anything to go by, I can see why. It is ambiguous.

[293] Ambiguous as it is, however, there are several matters that the letter does make clear. One of them is that, when it comes to considering surprise at trial, the Plaintiffs' view was that the role of the will-say was to provide notice and avoid surprise at trial. Secondly, surprise at trial is made dependent upon the specific will-say that each witness will give. There is no mention of the rest of the pre-trial disclosure record. The primary documents for avoiding surprise are the pleadings and the will-say.

[294] We can also clarify this proposal a little further because we know what Mr. Healey meant by the "gist of the evidence." And this is because he had used and clarified this phase at Peshee:

> It's all about giving notice. And when I say gist of the evidence [emphasis added], that's – it just brings back to my mind Mr. Justice Rothstein's use of that word when dealing with will-says, but that's a – that's what I'm trying to do.
>
> I'm – I – your order does set out – it's either paragraph 28 or 38 of your October 18th reasons, its sets out in detail what it is that you're asking for and that's what we're trying to comply with. [emphasis added]
>
> (Page 97, lines 15-23)

So what Mr. Healey means by "gist of the evidence" is the standards I have set, and the standards govern surprise at trial.

[295] Although Mr. Healey's proposal is ambiguous in some respects, at least one way to read it is that it proposes precisely what the Court has done in dealing with surprise and ambush at trial. Mr. Healey was asked for clarification, but he failed to provide it. The Plaintiffs cannot now say that this letter proposes that pre-trial disclosure in a will-say should be unrelated to the admissibility of relevant evidence at trial, because that kind of proposal would obviate the need for the sentence about will-says. In fact, if that is what the letter proposes, the sentence about will-says would be redundant.

[296] And this is just a proposal. Proposals change nothing.

[297] Based upon this whole exchange, the Plaintiffs appear to be asking the Court to accept, not only that the whole system of pre-trial disclosure was changed, so that there would be no connection between will-says, and the standards in will-says, and the admissibility of evidence at trial, but that the Crown somehow accepted this change, or at least accepted that it would be discussed and decided at trial without reference to the precedents and authorities that had been established in these proceedings to deal with standards and ambush at trial.

[298] And I have to keep in mind that the Plaintiffs were the party who told the Court that the will-say standards were "the key" when it came to deciding whether the other side had been given adequate notice.

[299] Needless to say, the Court cannot accept the Plaintiffs' present position on these matters. The correspondence and exchanges I have been asked to look at merely confirm the positions I have already taken on these issues. But they also bring up one new matter of significant import.

[300] The Report Letter of September 2006 shows that a strategic decision was made by the Plaintiffs concerning will-says. The Plaintiffs decided that, instead of following Court directions to work out will-say issues by agreement or bring a pre-trial motion to have the Court decide them, they would simply leave them to be dealt with at trial. In light of what Plaintiffs' counsel has now confirmed to me about the deficiency of some of the Plaintiffs' will-says and the Plaintiffs inability to adequately make their case at trial, I can certainly understand that strategic decision, but it has cost the Court and other participants sorely in terms of time and resources at trail in dealing with issues that the Court said it wanted dealt with before trial.

[301] In the context of the whole sequence going back to the Peshee hearing, it is clear that my direction of August 24, 2006 required the Plaintiffs to bring any motion they intended to bring regarding the role and use of will-says at trial by the deadlines imposed in that direction. The Plaintiffs declined to bring such a motion by the deadlines and, as far as the Court is concerned, that was an election by the Plaintiffs to go to trial on the basis of what the Court had already established regarding the role and use of will-says in its orders, and at Peshee and otherwise.

[302] The Plaintiffs must now live with the consequences.

[303] In making that election, the Plaintiffs did not reserve to themselves the right to re-argue and change what had already been established about the role and use of will-says at trial without resort to a motion. They merely elected to go to trial on the basis of what had already been established. My direction did not given them a choice.

[304] My rulings so far in these proceedings have already made clear what was established at Peshee, together with the more detailed elaboration of basic principles required to deal with the specific objections raised in relation to the Plaintiffs' witnesses.

[305] So, to the extent that the present motion asks the Court to address again the role and use of will-says at trial (and that is what it really does) it is, in my view, an abuse of process. The trial cannot proceed as it should if one of the parties keeps dragging the Court back to issues that have already been decided with the addition of some arguments and perspectives that were not brought to my attention the first time around.

[306] And to the extent that the present motion is a "motion" dealing with the role and use of will-says at trial, it is time-barred by my direction of August 24, 2006, and is, in that regard, also an abuse of process.

[307] I do not think these conclusions are harsh or unwarranted and I will explain why I have come to them.

[308] At Peshee I made it clear that I wanted any outstanding issues regarding will-says dealt with quickly and before trial:

> COURT: And I guess what I'd like to happen is that when we go away from here today with the list of issues that have been raised and which have come out of today's proceedings, that of course the, there are other people who are not here who need to be consulted, at the very least, that you will go through that consultation process and confer with each other and perhaps let me know what should be put on the table and when we could usefully have such a management discussion and talk about how to resolve it. Perhaps I could hear you respond to that. Mr. Healey, do you have any problem with that?
>
> MR. HEALEY: No, My Lord, of course not. I'm – I'm going to do whatever the Court – I – I think that's a constructive suggestion.
>
> COURT: Okay. Mr. Faulds?
>
> MR. FAULDS: Yes, I agree entirely.
>
> COURT: Okay. Ms. Koch?
>
> MS. KOCH: I agree.
>
> COURT: Okay. Well, I think that's possibly, then, where we should leave that, purposes (*sic*) of today, with a view that I'm assuming I'll be hearing from you in the fairly near future, bearing in mind what our general time-table is and what we have to get put right in the small amount of time available to us. [emphasis added]

[309] The Court is here telling all participants that if, as a result of what they have seen at the Peshee hearing, they want to change anything about the role and use of will-says at trial, then they had better discuss it and get on with it. The trial date was postponed for various reasons so that the urgency associated with this matter abated. But the urgency came back in the late summer and fall of 2006 when the trial date began to loom again and the Plaintiffs, who had

been indicating for months that they were considering a motion on will-says, were told by the Court that if they were going to bring a motion they would have to do it by the deadline.

[310] What correspondence I have seen reveals Mr. Shibley trying to get agreement to obviate the need for a motion, but no agreement was possible.

[311] In their September 2006 Monthly Report, the Plaintiffs indicated they would not be bringing a motion and expected the role and use of will-says would have to be dealt with at trial. So the whole matter was punted into the trial at the election of the Plaintiffs.

[312] The record suggests that Mr. Shibley was aware that, if no agreement was possible, a formal motion would be necessary to change anything already established concerning the will-say regime and the role and use of will-says at trial.

[313] What had been established was contained in Court orders and Peshee. The Plaintiffs' decision in September 2006 to forgo a motion and punt the whole matter into the trial did not change what had already happened. It merely loaded the trial down with issues that the Court had wanted settled before trial and (this is important) issues that the Court gave the Plaintiffs a significant amount of additional time to review with new counsel.

[314] But the Court has had to deal with the matter at trial and, in so doing, has ruled on the consistency and applicability of what had already been established in Court orders and at Peshee as individual objections have arisen. The will-say regime and its applicability at trial is now

contained in the foundational Court orders that brought it into being and that ordered the Plaintiffs to comply with the standards, in the rulings and general principles behind the rulings made at Peshee, and in the rulings made in relation to the Plaintiffs' witnesses that contain a significant amount of detail about what is already established and how the system works when objections based upon ambush are raised at trial.

[315] And now the Plaintiffs bring a mistrial motion that is really about the role and use of will-says at trial, even though they were told to bring any such motion they wanted to bring in that regard back in the fall of 2006. Considering the amount of additional time the Plaintiffs were given, and the deadlines that were set, the Court cannot help but regret the amount of trial time that has gone into re-arguing matters that are already settled by Court order, rulings at Peshee, and more recent rulings related to the Plaintiffs' witnesses.

[316] That is why I believe this motion is an abuse of process. When the Court looks at what has really been argued and the Plaintiffs' failure to substantiate anything that is new, this motion fails to go beyond matters already decided, or compels the Court to deal with matters that could and should have been dealt with in the fall of 2006.

Imbalance Issues

General

[317] To make a general point about imbalance and unfairness, the Plaintiffs list various forms of disclosure that the Crown has had the advantage of besides will-says: examinations for

discovery, answers to undertakings, written interrogatories, transcript from the first trial, evidence through direct testimony and cross-examination, exhibits, oral history summary, document production, expert reports, other witnesses, any other information that the Crown may have.

[318] The Court has, of course, considered the Plaintiffs' arguments concerning disclosure from sources other than the will-says when dealing with specific objections, but the Court has found the Plaintiffs' arguments unconvincing for a variety of reasons and has ruled accordingly.

[319] Although the Plaintiffs' list sounds impressive, the Plaintiffs fail to address many other important issues that are likely to come into play when ambush is alleged at trial. For example:

a) If the pre-trial disclosure is as extensive and helpful as the Plaintiffs say it is, why did Justice Hugessen decide that additional disclosure was necessary and order the production of will-says?

b) What about the problems of obtaining proper discovery that the Crown has brought before the Court?

c) This is just a general list of possible sources. How does it relate to the actual subject matter of any particular objection? The Plaintiffs are perfectly free to refer the Court to any of these sources on any objection that arises and to convince the Court that the Crown has the disclosure it needs to cross-examine adequately. The Court will rule, and

has ruled, on an objection by objection basis. References to a general list are neither helpful nor convincing without specifics. It is just another way of saying that the will-says really add nothing to the pre-trial disclosure that the Crown has already received. And this is illogical because, if that were the case, there would have been no need to order will-says in the first place.

d) And what about the repeated representations and reassurances by the Plaintiffs that their will-says meet the standards set by the Court, and so must contain a synoptic account of what a particular witness will say?

These are just a few of the matters that the Plaintiffs have not fully addressed as part of this motion, and as part of their allegations of general unfairness and imbalance.

[320] So the list of disclosure may look impressive in the abstract. But it is how it comes into play for each particular objection that matters, and if Plaintiffs' counsel say that Crown counsel should be able to relate a particular area of testimony to a particular part of the record apart from the will-say then, no doubt, Plaintiffs' counsel will be able to take me to that area of the record concerned and demonstrate, reasonably and as a matter of common sense, why ambush should not be countenanced.

Specific Arguments

[321] The Plaintiffs say that unfairness has resulted at this trial to a degree that justifies a mistrial declaration. They advance two principal arguments for this position:

(1) The Court's Rulings To Date

[322] The Plaintiffs assert, but provide insufficient explanation or evidence, that the Court's rulings with respect to testimony of their eight lay witnesses called to date and, in particular, Elder Starlight have caused an imbalance in the conduct of these proceedings that requires the Court to declare a mistrial.

[323] This is important, so I am going to quote the Plaintiffs' position at some length:

> Based upon your rulings, My Lord, the plaintiffs find themselves in a position where unless the evidence that they wish to lead is described in detail in the will-say or Exhibit E, a letter which was directed by this Court to be brief, they cannot lead evidence. And the only exception to this is if the evidence was a deponent at discovery, and if the Crown chose to examine the witness in a fulsome way in relation to the witness' evidence at discovery.
>
> What this means, sir is that the plaintiffs cannot, based upon your rulings, lead any evidence at this trial, notwithstanding that there has been disclosure that has occurred in relation to the pleadings, the examinations for discovery, including answers to undertakings conducted by the Crown before the first trial, the examinations for discovery including answers to undertakings, and written interrogatories conducted by the Crown after the first trial and before this trial, unless the witness was produced by the plaintiffs as a deponent at discovery; notwithstanding that there's been disclosure in terms of the transcripts of the evidence from the first trial and all the evidence adduced, including evidence adduced by the plaintiffs through direct testimony and cross-examination; notwithstanding disclosure in terms of exhibits entered into evidence at the first trial; notwithstanding disclosure in terms of the detailed oral history summary marked as Exhibit F for Identification; notwithstanding disclosure in the form of all of the document production of the plaintiffs and the Crown; notwithstanding disclosure in terms of expert reports that have been served by both the plaintiffs and the Crown; notwithstanding disclosure in the will-says of other witnesses called or to be called by the plaintiffs; notwithstanding disclosure in the form of the evidence of any witness who has already testified; and

> notwithstanding disclosure in terms of exhibits entered into evidence at this trial; and notwithstanding disclosure in terms of any other information that the Crown may have.

[324] In my view, these assertions are not supported by the record.

[325] First of all, the Plaintiffs can try to lead any evidence they please, irrespective of whether it is referred to in a will-say or the Exhibit E letter of explanation. As the Court has taken great pains to point out, the will-says are not a legal ground of exclusion. This means that the Plaintiffs are free to try and lead any evidence they wish through their witnesses. If no objection is raised, then evidence is entered on the record irrespective of whether it appears in a will-say or Exhibit E.

[326] The will-say and, indeed, the rest of the pre-trial disclosure record only come into play if an objection based upon ambush at trial is raised. The Plaintiffs do not assert that objections based upon ambush cannot be made at trial.

[327] What has happened to the Plaintiffs' eight lay witnesses called to date is nothing new at this trial. The Plaintiffs are merely experiencing the impact on their own witnesses of what they have advocated in the past should occur to the witnesses of other participants and will, in all likelihood, occur to the witnesses of other participants called in the future.

[328] So it is not accurate to say that the only exception occurs if a witness was a deponent and was examined at discovery, and if the Crown chose to examine the witness in a fulsome way.

[329] As they did with their six conclusions referred to earlier, the Plaintiffs are attempting to establish that the Court has used will-says as a legal rule to exclude relevant evidence, but they are mischaracterizing what has happened to date in order to support this position. They are attempting to raise to the status of a general, inflexible rule of exclusion a ruling related to the specifics of one objection, and in contradiction of the Court's own rulings that it will look at each objection separately, and deal with it on the merits.

[330] The accurate characterization of what has happened to date has already been set out in these reasons.

[331] In their recitation of what has taken place as part of pre-trial discovery, the Plaintiffs are merely listing factors that the Court has either considered each time an objection based upon ambush is raised or that the Plaintiff can draw to the Court's attention for any future objections. They are saying, in effect, that given the factors they have placed before the Court, they disagree with the rulings that the Court has made. They are re-arguing my rulings and saying they disagree with them because they make the whole trial unfair.

[332] The Plaintiffs may disagree with rulings the Court has made, but the Court has given its reasons in each case. Hence, anything the Plaintiffs may say here as regards those rulings is an issue for any appeal that might be taken and not an issue for mistrial.

[333] It only becomes an issue for mistrial in theory because the Plaintiffs say the whole situation is so unfair that they cannot adequately make their case. And on that point, the Plaintiffs have not attempted to demonstrate why this is attributable to rulings of the Court, rather than the state of their own will-says, or the evidence their witnesses can be expected to give. The basis of the Plaintiffs' motion for mistrial (i.e. that they cannot adequately make their case because of rulings of the Court) is little more than an unsupported assertion. What is more, the Court can place little reliance upon such an assertion because, when it comes to the crucial matter of will-say compliance, the Plaintiffs' position before the Court is ambivalent and contradictory in a way I have already explained.

[334] So based upon what the Plaintiffs have been willing to disclose and lay before the Court in this motion, the Court has no way of knowing what impact its rulings to date might have upon the evidence of future witnesses or the ability of the Plaintiffs to make their case. This is not a sound basis for a declaration of mistrial with all the drastic effects such a declaration would have.

Advantage of the Crown

[335] The second ground put forward by the Plaintiffs to justify a mistrial is that an imbalance has occurred and the Crown now has "a huge advantage over the Plaintiffs."

[336] Once again, this is important, so I am going to recite the Plaintiffs' argument in full:

As we have seen sir, from the cross-examination of Elder Starlight, the Crown has no limitation with respect to matters it wishes to take the witness to. And that generally is what happens at a trial with respect to cross-examination.

We have the cross-examination of the Crown including evidence that they argue is inadmissible. During the course of cross-examination, the Crown took Elder Starlight on at least three occasions to evidence that they argue ought to be excluded and asked that he read it and referred it to him in their cross-examination.

In that regard, I won't give you the details,[details were later provided] but I refer you to the April 3rd transcript at page 51, where they make reference to the February 28th transcript; the same transcript, the April 3rd transcript at page 48 and 59 where they make reference to the February 27th transcript; and also the April 3rd transcript at page 71, where they make reference to the February 27th transcript.

So notwithstanding that the deponents of the plaintiffs at discovery were produced as representative of these First Nations and, I believe, in – at least in one instance that we know of, in a personal capacity as well, notwithstanding, though, that they are, of course, representatives of the First Nations, disclosure at discovery does not allow the plaintiffs in this trial to lead evidence consistent with the disclosure unless the witness was a deponent, and further conditional on the Crown counsel having brought out the evidence in a fulsome way.

And, of course, the Crown can cross-examine any witness in relation to that disclosure, and we've seen that occur with Elder Starlight.

If the plaintiffs anticipate areas that the Crown might cross-examine a witness in relation to, they can't lead evidence from that witness as they would during the course of a trial, unless it's in the will-say or the letter, which is marked as Exhibit E for Identification. And as I've stated before, there is really no limitation that's been placed upon the Crown in relation to cross-examination.

Now, this Court has stated previously that the will-says are not, per se, a legal ground for the exclusion of evidence. With the greatest of respect, sir, as we understand your rulings – and we do need feedback in that regard, as we've stated our understanding of

> them to the Court – that is exactly what this Court has created, a situation where the will-says are, in fact, and had been established as a legal ground for the exclusion of relevant, admissible evidence.
>
> The Crown has urged, and the Court has decided to put the plaintiffs into a position where not only do they have the onus of proof in this case, as all plaintiffs do, they now have an additional onus to establish that the evidence that they intend to lead was described in the will-say, the letter, Exhibit E for Identification, or, if a deponent at discovery – that it's – was asked of the witness and answered in a fulsome way. And if they don't, as we understand your rulings, the evidence will be excluded.
>
> We submit that it is apparent from what has occurred in the cross-examination and in the evidence of Elder Starlight that a situation has been created in this trial where the Crown has a huge advantage over the plaintiffs. We would submit that the playing field is no longer level, that the advantage is with the Crown.
>
> We submit that with the greatest of respect, that that is unfair, and it will, in our submission, result in an unfair trial. And I want to repeat what I've stated previously in these proceedings, the words of Chief Justice Fauteux in Duke and The Queen, [1972] S.C.R. 917, where he is referring to Section 2(e) of the *Canadian Bill of Rights* and states under Section 2(e) of the *Bill of Rights* (quoted as read):
>
> > "… no law of Canada shall be construed or applied so as to deprive him of 'a fair hearing in accordance with the principles of fundamental justice'. Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case."
>
> And it is our submission that, with the greatest of respect, this Court has foreclosed the plaintiffs' opportunity to adequately state their case and that that, in our submission, will result in an unfair trial.

[337] I also think it is worth pointing out that the Plaintiffs appear to be of the view that the pre-trial disclosure system (including the will-says) ordered by Justice Hugessen, and which I

have had cause to refine and deal with at trial, is something that was imposed upon the Plaintiffs alone, against their will, and for which they have no responsibility. Hence, if something were to go wrong with the system, their approach is that this must be the fault of others and, even though the Plaintiffs have used and benefited from the system in the past, if it now does not yield the results they want, it must be abandoned entirely, whatever the cost in terms of time and resources.

[338] There is no acknowledgement from the Plaintiffs that they were, at least partially, responsible for Justice Hugessen ordering will-says and for the orders I have had to make regarding will-says as a trial judge. There is no acknowledgement of the huge cost involved in bringing these actions to trial in very difficult circumstances. And there is no acknowledgement of the fact that, if the Court were to declare a mistrial, the impact upon many people – including the Plaintiffs – would be astronomical and the end result would be that these actions could easily return to the unproductive stand-off from which Justice Hugessen liberated them after years of difficult case management.

[339] The result of a mistrial would not be just a new trial. It would likely be, if the past is anything to go by, more years of costly and bitter non-cooperation between the parties.

[340] But the Plaintiffs' present position is that, even though they have used the pre-trail disclosure system to their own advantage at trial, it must be faulty and scrapped if it constrains them in the calling of evidence.

[341] It is significant, I believe, that in pointing out what they perceive as an unfairness in the system, the Plaintiffs do not suggest ways in which the system might be adjusted to ensure that it works as they think it should work, and so that the tremendous waste and additional cost of declaring a mistrial could be avoided.

[342] The Plaintiffs appear to be intent upon abandoning the system entirely, as opposed to adjusting it and making it work. And this is a system they have a responsibility for creating and whose standards they have endorsed, and which they have used to their own advantage. In relation to any particular witness or objection, the Plaintiffs are free to point to any unfairness or imbalance and, to the extent they have already done so, I have already ruled upon it. My understanding of the jurisprudence on mistrial is that it is a most extraordinary remedy and that, before using it, I must consider alternatives that could alleviate any unfairness that is demonstrated. But the Plaintiffs offer no assistance to the Court in this regard. The only result they are interested in is mistrial. And I think this is another reason why the Court is obliged to try and discover the root of the Plaintiffs' assertion that they cannot adequately make their case. Unless the Court is given the complete picture, it cannot gauge how its own rulings may have rendered the proceedings unfair, and it cannot gauge whether mistrial is necessary, or whether some other approach might be used to alleviate any difficulties and save the enormous waste and cost of a draconian mistrial declaration.

[343] The Plaintiffs uncompromising approach clearly supports their assertion that they cannot adequately make their case. It amounts to saying that, unless the will-says are disconnected from

the concept of ambush at trial and the Plaintiffs are allowed to lead any relevant evidence through any witness, then they cannot adequately make their case.

[344] I point this out at this stage because, in dealing with the imbalance allegations raised by the Plaintiffs, I think I have to take note of the fact that the Plaintiffs have concluded they cannot adequately make their case, and they are focussed on abandoning a system they feel they can no longer serve them in the way it did at the Peshee hearing. What is more, they have no suggestions as to how abandoning a system they helped to create would lead to the resolution of these actions. They merely wish to plunge the proceedings back into pre-trial case management where the old problems will re-surface and, will have to be dealt with again. Who knows? The case management judge might have to resort to will-says. But the Plaintiffs certainly make no suggestions as to how, in the event of a mistrial, any other system other than the one we now have would work, or why Justice Hugessen's assessment of what was needed should now be second-guessed and abandoned.

[345] Because the Court is fixed with the responsibility of ensuring the just, most efficient and least expensive resolution to these proceedings in accordance with the *Federal Court Rules*, these have to be matters of grave concern. And yet the Plaintiffs do not address them in their motion.

Elder Starlight's Evidence

[346] The Plaintiffs' case for general unfairness and a "huge imbalance" in favour of the Crown is focussed upon the testimony of Elder Starlight.

[347] This fact, in itself, weighs heavily against the Plaintiffs's case because, of all the witnesses called by the Plaintiffs so far, he was exceptional for a variety of reasons, and in terms of future witnesses, the Plaintiffs have made no attempt to connect what happened in the case of Elder Starlight to what could happen to future witnesses.

[348] Elder Starlight was an exceptional witness because he was also a discovery deponent and his will-say statement was extremely comprehensive and exponentially different from the will-says of other witnesses called to date.

[349] Also of significance is that Elder Starlight's testimony in chief refutes the Plaintiffs' theory that the Court has used the will-says as a legal rule to exclude relevant testimony. When ambush objections arose in Elder Starlight's case, his discovery also became a significant factor for the Court in dealing with the issue of real surprise and ambush. My rulings permitted Elder Starlight to testify in chief concerning matters he had been discovered upon; whether or not those matters appeared in his will-say statement. This in itself made the cross-examination of Elder Starlight different from that of other witnesses.

[350] In looking at my rulings made with respect to Elder Starlight to date (and I still have some to make) it is clear that when I found that the Crown had, as a matter of reasonableness and common sense, made a case for ambush, the evidence in question was either not disclosed at all,

or it had not been disclosed sufficiently in accordance with the standards (which the Plaintiffs have advocated as "the key" for making that kind of determination), either in his will-say statement or at discovery.

[351] The Plaintiffs have made much of the fact that, because Elder Starlight was a deponent at discovery, the Crown had an opportunity to examine him on any area of choice, and if it did not avail itself of that opportunity then it should not be able to claim ambush at trial.

[352] The trouble with this argument is that it fails to examine and present to the Court the ways in which the problems associated with discovery, and which have been demonstrated to the Court by the Crown, were overcome in the particular instances complained of in this motion.

[353] It also leaves out of account the representational value of a will-say and the repeated reassurances that the Plaintiffs have given that all of their will-says – including Elder Starlight's – meet those standards and actually disclose what each witness is going to say in synoptic form.

[354] The Plaintiffs are, at this point in the trial, hinting at least that they only regard the will-say requirement as some kind of "best efforts" obligation. I have rejected this for reasons given. And whatever the Plaintiffs may now say on this issue, any reasonable party, looking at the Court orders dealing with will-says and standards, and looking at the assurances the Plaintiffs have given, and looking at what the Plaintiffs argued and the Court ruled in Peshee, would have to assume that the will-say of Elder Starlight, or any other witness, would give the kind of

disclosure on the full range of topics the witness would address at trial, and so would prepare to cross-examine that witness accordingly.

[355] The Plaintiffs have not pointed to what evidence has been excluded, or is likely to be excluded, that would allow them to make their case, so it is really impossible for the Court to accept as demonstrated that what happened in Elder Starlight's cross-examination will either lead to an imbalance or foreclose on the Plaintiffs from being able to make their case adequately.

[356] All the Court knows is that the Plaintiffs have a problem with the exclusions made in relation to Elder Starlight in those instances where the Crown alleged ambush, and in those instances the findings were that ambush had been demonstrated and disclosure had not occurred anywhere in the record brought to the Court's attention that would negate the claim to reasonable ambush.

[357] In other words, there was no disclosure in his will-say or the discovery record of Elder Starlight concerning the objections at issue that would negate a reasonable claim of ambush, and the Plaintiffs were unable to demonstrate to the Court how the Crown could have known about the matters at issue in any other way that would accord with reasonableness and common sense.

[358] When the Plaintiffs talk about alternative disclosure that obviates ambush, they talk in general terms, and they are simply attempting to re-argue the whole situation again in this motion.

[359] The Plaintiffs ignore the motions that the Crown had to bring to try to obtain better disclosure from the Plaintiffs, and they fail to connect past difficulties to the problems that the Crown is facing at trial when ambush comes up.

[360] Notwithstanding these, and other, special considerations that apply to Elder Starlight, the Plaintiffs have asked the Court to draw certain general conclusions from what happened in his case as follows. I repeat them again for clarity:

a) The Crown has no limitation with respect to matters it wishes to take the witness to;

b) During the course of cross-examination, the Crown took Elder Starlight on at least three occasions to evidence that they argue ought to be excluded and asked that he read it and referred it to him in his cross-examination;

c) If the Plaintiffs anticipate areas that the Crown might cross-examine a witness in relation to, they can't lead evidence from that witness as they would during the course of a trial, unless it is in the will-say or the letter of explanation;

d) It is apparent from what has occurred in cross-examination and in the evidence of Elder Starlight that a situation has been created where the Crown has a huge advantage over the Plaintiffs.

[361] I have already dealt with some of these points elsewhere in these reasons. But for clarity, they not only do not demonstrate how unfairness has occurred and a "huge imbalance" has been created in favour of the Crown as regards relevant testimony from either past or future witnesses, but they do not correspond with what the record reveals about the procedures established in this case.

[362] Before addressing each point, I think it would assist if I set out how the process is actually working:

I. Examination in Chief

[363] The Plaintiffs, as in any normal trial, are free to try to lead any evidence they wish through their witnesses. They are not limited to what they have disclosed in will-say statements, although they have to bear in mind that if the system put in place to solve pre-trial disclosure problems has not been adhered to, they can expect objections from the Crown based upon ambush;

[364] If no objection is made, the evidence is entered even if it was not referred to in a will-say in accordance with the standards;

[365] Any ambush objection could have been easily avoided. All the Plaintiffs had to do was disclose what each witness would say in accordance with the standards. So they could range all over the record or simply explore with each witness what he or she had to say and, if it was

relevant, set it out in the will-say in accordance with the standards. There were no limitations on this process except relevance. The Plaintiffs were, in fact, ordered to do this, and they assure the Court they have done it.

[366] The will-say would only be a possible limitation if the witness wanted to give evidence outside of the disclosure in the will-say. But the Plaintiffs have asserted as part of this motion that their will-says disclose what each witness will say. If this is the case, there can be no exclusion of relevant evidence as a result of an objection based upon ambush.

[367] If an objection based upon ambush is made, then the objecting party can refer the Court to any part of the record – including the will-says – to try and demonstrate ambush. The party leading the evidence can refer the Court to any part of the record to try and demonstrate that ambush has not occurred. The Court makes a decision, after hearing argument, on the merits in each instance and decides whether, as a matter of reasonableness and common sense, ambush has been established and the evidence should be excluded.

2. Cross-Examination

[368] Any witness can be cross-examined in the usual way, with no restriction based upon the will-say, and any part of the record can be used in cross-examination.

[369] If cross-examination takes the witness to a point not addressed in examination in chief, then the other side can address it in re-direct in accordance with the usual rules.

[370] If cross-examination takes the witness to an area or a topic that was excluded in chief as a result of a sustained objection for ambush, then the cross-examining party could, conceivably, and depending upon the particular factors at play in each instance, and the usual reasonable and common sense criteria, nullify the whole objection, so that the whole area could be opened up to the other side. This has not occurred to date.

[371] As can be seen, there is nothing inherently unfair about this process. It is merely the usual trial process adapted to a situation where ambush allegations may be more frequent than usual because of the pre-trial discovery problems peculiar to these proceedings. Both sides have already alleged ambush and sought relief from the Court. Both sides have used will-says to demonstrate ambush. Both sides have been sustained.

[372] So if I now turn to the actual points of unfairness and imbalance alleged by the Plaintiffs in this motion with regard to Elder Starlight, the record demonstrates as follows:

a) There are no limitations in this system regarding the matters that the Plaintiffs can take witnesses to. There is merely an ambush factor to take into account for all participants and a simple mechanism to avoid having relevant evidence excluded for ambush, which mechanism the Plaintiffs say they have taken full advantage of;
b) The Plaintiffs do not have to anticipate anything the Crown might do in cross-examination. They just proceed to try and lead the evidence they want to head as already described;

c) No imbalance or unfairness has been demonstrated in the case of Elder Starlight, let alone any unfairness or imbalance that could be connected to the system as a whole to make it unfair, or any unfairness or imbalance that could not be addressed in a simple way by the system in place so that a mistrial remedy would be unnecessary.

[373] As regards the three occasions alleged by the Plaintiffs to create unfairness and imbalance that arose during cross-examination of Elder Starlight, the Court has examined each in turn.

[374] The Plaintiffs' complaint appears to be that the Crown has cross examined Elder Starlight in areas where, in examination in chief, the Crown objected to the Plaintiffs' leading evidence.

[375] The three areas of concern appear to relate to objections that were raised over protocols of oral history, transmission or informants, including the use of the pipe, designated recipients of that oral history, or repetition.

[376] But the Plaintiffs have not addressed or explained to the Court what specific evidence the Plaintiffs wanted to lead through Elder Starlight that was excluded by the objection and why cross-examination elicited evidence that rendered the exclusion unfair, or prevented the problem from being corrected in re-direct, or rendered the Crown's claim of ambush unreasonable.

[377] Nor have the Plaintiffs demonstrated to the Court how the three instances referred to relate to the Plaintiffs' other past or future witnesses, or relate to other areas of evidence in a

way that gives the Crown a “huge advantage” that would require a declaration of mistrial to remedy it.

[378] The Court is just left with a general assertion that “it is apparent from what has occurred in the cross-examination and in the evidence of Elder Starlight that a situation has been created where the Crown has a huge advantage over the Plaintiffs.” The Plaintiffs, however, do not demonstrate how or why this is apparent in a way that would warrant a mistrial.

[379] The Crown concedes that “in one of these instances we did ask a question that related to informants of the oral history.” The question was:

> And you told us that your grandmother told you this story. Which grandmother told you that story.

[380] On the basis of what the Plaintiffs have put forward in this motion concerning the cross-examination of Elder Starlight, it is not possible for the Court to determine what unfairness, if any, may have occurred, and how it might relate to the proceedings generally and the ability of the Plaintiffs to adequately make their case. And my own review leads me to conclude that no unfairness has occurred and the Crown does not enjoy some advantage in cross-examination or otherwise that would render the proceedings unfair.

CONCLUSIONS

[381] From what has been presented to me, and from what I have learned, during this motion, it would appear that, unless the Plaintiffs are allowed, after repeated re-assurances that they have

complied, to now breach the will-say requirement and the standards ordered by the Court, the Plaintiffs cannot adequately make their case.

[382] This is because, in order to allow the Plaintiffs to adequately make their case, the Plaintiffs are saying that the Court, in its rulings on admissibility based upon ambush, should have disconnected the will-says standards (which they themselves have argued at trial are the "key" to notice and ambush issues) from any consideration of the admissibility of relevant evidence at trial. They want a mistrial because the Court has not made this disconnection.

[383] And they take this position even though:

a. They were clearly told what the will-say standards were;
b. They were excused from their breach of Justice Hugessen's Pre-Trial Order and given the time they said they needed to produce will-says that met the standards;
c. They have indicated their acceptance of the standards and have asserted that all participants are bound by them;
d. They have reassured the Court and the other participants that they have produced will-says that meet the standards;
e. They have identified the standards as the key when it comes to looking at notice and objections at trial based upon ambush;
f. They have secured relief from the Court at trial from ambush by using a will-say to demonstrate surprise.

[384] It seems to the Court that if the Plaintiffs have come to trial with will-says that do not allow them to adequately make their case then a lot of people, including the Court, are likely to have been misled.

[385] The Plaintiffs have now used up days of Court time and the resources of the Court and other participants dealing with a motion that:

a) Is about the role and use of will-says at trial and which they were directed to bring by the deadlines specified in the Court's August 24, 2006 directions;
b) Attempts to re-argue points and rulings on issues that the Court has already ruled upon and dealt with before;
c) Simply ignores or fails to deal with fundamental things the Court has actually said and done in relation to the points raised;
d) Proceeds on the basis of a mischaracterization of what the Court has actually ruled;
e) Fails to explain a fundamental contradiction concerning why the Plaintiffs cannot adequately make their case if their will-says meet the standards set out in Court orders that the Plaintiffs were ordered to comply with;
f) Contradicts representations and assurances previously made and relied upon by the Court.

[386] It would seem as though the Plaintiffs have now come to the conclusion that they cannot adequately make their case if the trial continues as it has. They have made several attempts to off-load the problem onto the Crown and the Court. In effect, they are saying that the trial should have been conducted as though there never were any problems at discovery that required will-

says, and as though there never were any Court orders that compelled the Plaintiffs to produce will-says to meet the standards of disclosure set by the Court.

[387] But the whole structure of these proceedings cannot now be changed because the Plaintiffs did not, in the past, ensure that the will-says they were ordered to produce give them sufficient scope to adequately make their case. It was the responsibility of the Plaintiffs to ensure that they did this. It was not the responsibility of the Crown or the Court.

[388] To change the system at trial to disconnect will-say disclosure from questions of the admissibility of evidence, would, after all the reassurances the Plaintiffs have given concerning their will-says, condone, encourage and enhance the opportunities for the very thing that the will-says were intended to prevent: ambush at trial.

THE JURISPRUDENCE ON MISTRIAL

General

[389] Many of the general principles related to mistrial are to be gleaned from criminal jurisprudence. The criminal cases usually deal with situations where there has been an inadvertent reception of inadmissible evidence. Typically, the trial judge admits that the evidence should not have been received and has to determine whether the prejudice is significant enough to grant a mistrial. For this reason there is not a significant amount of jurisprudence in the Federal

Court relating to mistrials. The issues raised in the present motion are more typically raised on appeal.

[390] A few cases in the criminal context provide some limited guidance as to the basic principles governing the declaration of a mistrial. For example, the Supreme Court of Canada recently stated in *R. v. Burke*, 2002 SCC 55 at paragraphs 74 and 75:

> […] There are broad common law powers to declare a mistrial. Mistrials have been ordered or considered as a potential solution in a range of situations: where a jury member is discharged (*R. v. Taillefer* (1995), 40 C.R. (4th) 287 (Que. C.A.), leave to appeal refused, [1996] 1 S.C.R. x; and *R. v. Lessard* (1992), 74 C.C.C. (3d) 552, [1992] R.J.Q. 1205 (C.A.), leave to appeal refused, [1992] 3 S.C.R. vii; where inadmissible evidence is adduced during trial which might influence the jury (*R. v. Woods* (1989), 49 C.C.C. (3d) 20 (Ont. C.A.), leave to appeal refused, [1990] 2 S.C.R. xii); where there is inadmissible communication between a witness and a juror causing prejudice (*R. v. Martineau* (1986), 33 C.C.C. (3d) 573 (Que. C.A.)); where disclosure is made immediately prior to or during the trial (*R. v. Antinello* (1995), 97 C.C.C. (3d) 126 (Alta. C.A.); *R. v. T.* (L.A.) (1993), 84 C.C.C. (3d) 90 (Ont. C.A.)); and where the jury had already rendered a verdict but had not decided on the issue of mental disorder, making it impossible for the judge to enter the intended conviction without "taint" (*R. v. Rondeau*, [1998] O.J. No. 5759 (QL) (Gen. Div.)). The common theme running through this case law is the test of whether there is a [TRANSLATION] "real danger" of prejudice to the accused or danger of a miscarriage of justice: Lessard, *supra*, at p. 562 C.C.C.
>
> In declaring a mistrial, the trial judge therefore turns his or her mind to the question of whether a mistrial is needed to prevent a miscarriage of justice. This determination will necessarily involve an examination of the surrounding circumstances […](emphasis added)

[391] Justice Major then goes on to give a list of different considerations. Because they relate specifically to an accused in the criminal context, they are not of direct relevance to the matters raised in this motion. However, the general principle that ordering a mistrial is an exercise in

judicial discretion which involves assessing the danger of a miscarriage of justice would seem to be applicable to both civil and criminal proceedings.

[392] Justice Proulx of the Quebec Court of Appeal in *R. v. Taillefer and Duguay,* (1995), 40 C.R. (4th) 287 (Que. C.A.) provided a similar analysis:

> My review of the Canadian and British jurisprudence leads me to say right away that the present approach does not favour the theory that the trial is automatically null. Rather, the principle is that, in the exercise of his discretion, the judge, considering the nature of the incident in question, in light of the evidence at trial, the conduct of the parties and the whole of the circumstances particular to that trial, must ask himself whether this incident can cause prejudice to the parties and what is the appropriate remedy to repair this prejudice. With respect to the accused, it is ultimately a question of whether or not the incident may have affected his right to a fair trial.

[393] Justice Proulx then outlines the factors that should be considered. First, a judge must consider whether the incident in question discloses a reasonable possibility of prejudice to or impairment of the right to a fair trial. Of course Justice Proulx specifies that question is to be asked where the fate of an accused is in issue. Second, the considerations should include application of the principle of fundamental importance that justice should not only be done, but be manifestly and undoubtedly seen to be done.

[394] The Saskatchewan Court of Appeal in *R. v. Bertucci* (1984), 11 C.C.C. (3d) 83 (Sask. C.A.) added that a mistrial might occur where an objective party might perceive the proceedings to be so tainted that a new trial was mandated.

[395] Superior and appellate courts have granted trial judges a broad discretion in determining when a mistrial should be granted or whether it is preferable to take other corrective action to cure any prejudice that may have occurred. According to the Supreme Court of Canada in *Emkeit v. The Queen* (1972), 6 C.C.C. (2d) 1 at 139-40 (S.C.C.) and *R. v. Woods* (1989), 49 C.C.C. (3d) 20 (Ont. C.A.), leave to appeal refused, [1990] 2 S.C.R. xii, appellate courts recognize the advantage which a trial judge has in weighing the effect of an impropriety upon the fairness of the trial. According to the Supreme Court of Canada in *R. v. Khan,* 2001 SCC 86 at para. 79, the decision of whether or not to declare a mistrial falls within the discretion of the judge, who must assess whether there is a real danger that trial fairness has been compromised.

Mistrial and the Admissibility of Evidence

[396] While there have been some cases where a party has requested a mistrial at the trial level, they generally deal with the presence or inadvertent reception of inadmissible evidence.

[397] The case law makes it clear that a judge has discretion not to grant a mistrial even where there has been inadmissible evidence admitted. In the present motion, I have excluded evidence, so I don't think I need to address any possible prejudice I might have for knowing something I should not know.

[398] In *R. v. Barnard,* [1999] 4 C.N.L.R. 133 (N.S. Prov. Ct.) at paragraphs 18 and 19, Justice Ryan stated as follows:

> Decisions such as *R. v. Bucholtz* (1976), 32 C.C.C. (2d) and *R. v. Bertucci* (1984), 11 C.C.C. (3d) 83 make it clear that a judge must

> have "good and sufficient" reason to declare a mistrial (Bucholtz at pp. 333.) The misreception of evidence by a judge sitting alone is not sufficient reason, in and of itself, to declare a mistrial. That misreception must be coupled with the trier's inability to disabuse his or her mind of that evidence before a mistrial may be declared. Such a decision should be made when it appears there is a "reasonable" or "real" apprehension of bias *R. v. McClevis*, [1971] 1 O.R. 42; *R. v. Collins* (1986), 17 W.C.B. 279.
>
> It is my understanding of the case law dealing with the issue of mistrial that such a remedy may be declared on the ground that:
>
> - there was a misreception of evidence plus an inability of the judge to disabuse his or her mind of the inadmissible evidence
>
> - an appearance or indication of potential prejudice to the accused.
>
> - a reasonable apprehension of bias toward the accused.
>
> - withholding and later introduction of evidence which should have been led at a voir dire and which may have changed the outcome of the voir dire (not relevant to this case).

[399] First, it is evident that at least some of these principles do not apply in the civil context where the rights of the accused are not in issue. Furthermore, it is more likely in this motion that the issues raised are really matters for appeal because the Plaintiffs are seeking to challenge my admissibility rulings which they allege have made the trial unfair and have prevented them from adequately making their case. When motions for mistrial arise at trial relating to the admissibility of evidence, they seem to focus primarily on inadvertent reception of inadmissible evidence during the trial. In those situations, the trial judge agrees that the evidence was inadmissible. However, there is some case law to suggest that the Court can consider a mistrial motion in a civil context, although it is not clear how the principles might apply to the facts before me in this motion.

The Federal Jurisdiction

[400] There have been two cases in the federal jurisdiction in which one party requested a mistrial. Neither is factually similar to the matter in issue. The first arose in the court martial appeal context in *Schick v. Canada (Attorney General)* (1986), 5 F.T.R. 82 (T.D.). In that case, before the Disciplinary Court Martial, defence counsel brought a motion in the course of hearing evidence seeking a declaration of a mistrial, based partly on the introduction of certain evidence in cross-examination, prejudicial to the accused. The Judge Advocate General granted a mistrial under section 24 of the *Charter of Rights and Freedoms* because no procedure existed to do so in Court Martial proceedings. The only issue before the Court was whether the Judge Advocate General had jurisdiction to grant that relief.

[401] The only case considering a mistrial in the Federal Court I have been able to find is *Canada (M.C.I.) v. Seifert,* 2006 FC 223. In that case, an electronic problem resulted in a gap in the transcript. After finding that Rule 89(4) of the *Federal Court Rules* requiring court reporters to record evidence word for word was mandatory, Justice O'Reilly held that not all omissions in the record will give rise to a mistrial or a re-hearing of evidence.

Other Cases

[402] The Plaintiffs have referred me to the Manitoba Court of Queen's Bench decision in *Spiring* v. *Young* [2005] M.J. No. 86.

[403] In *Spiring*, following the conclusion of the trial a document bearing directly on one of the central issues in the proceedings came to light. The document was so important that it changed the complexion of everything that had been heard at the trial. Such a situation hardly accords with what the Court faces in this motion, and I cannot really extract any general guidance from *Spiring* except to note that in the motion before me I have not been shown any excluded evidence that might make the trial unfair. I have certainly excluded evidence as a result of rulings made in response to objections, but such rulings occur in every trial and I am not convinced that my rulings make the trial unfair. The Plaintiffs are simply disagreeing with my rulings, for which reasons have been given, and such disagreement is a matter for appeal, not mistrial at this stage. The Plaintiffs' general complaint about imbalance and the "huge advantage" that the Crown enjoys if it can allege ambush, and refer to will-says to demonstrate ambush, is not born out by the full context of these proceedings. And I cannot see any concerns as yet regarding cross-examination or re-direct, or why, if any concerns arose in the future, they could not be addressed as part of the process that is now under way.

[404] Also, the Plaintiffs have made no attempt to demonstrate how any of the evidence that may have been excluded, or which might be excluded, as a result of my sustaining an ambush allegation is evidence that the Plaintiffs could not, with reasonable diligence and in accordance with Court orders, have referred to in their will-says in accordance with the standards. In fact, I was reassured that this had been done. And I have certainly not been shown how any excluded evidence might affect the outcome of the trial to an extent to warrant a mistrial declaration.

[405] The participants have also jointly referred me to several cases from which some general principles can be gleaned. I have read all of the materials I was referred to but I will merely list the cases and quotations I have found particularly helpful:

1. *Spartan Developments Ltd. v. Capital City Savings and Credit Union Ltd.*, [2003] A.J. No. 1626, para. 10;

   > The decision to grant a mistrial in a civil case is discretionary. The standard of review is, again, high; the appellant must demonstrate that the failure to do so was at best unreasonable. The trial judge reasonably concluded that the interest of justice favoured refusing the application for a mistrial and we find no reviewable error in his decision to do so.

2. *Carey v. Ontario* (Ont. C.A.), [1991] O.J. No. 1819, p. 6

   > [W]e are all of the opinion that the trial judge was right in refusing to hold that there had been a mistrial and that the order he made was both fair and just in the circumstances. There was no substantial wrong or miscarriage of justice

Carey shows that a trial judge can exercise significant ingenuity in adjusting the trial process and procedure in order to correct any unfairness that might have occurred without resort to the drastic and costly remedy of mistrial.

3. *Tupper v. Van Rody (c.o.b. Past Reflections Antiques)*, [2006] O.J. No. 1419, paras. 7 and 15.

   > It was clear that the trial judge was looking for any conceivable way to save the trial. She found none, and with great reluctance ordered a mistrial.
   >
   > *Carey* confirms that if an issue arises in a judge alone trial that may result in a mistrial, options should be canvassed to see if the trial can be saved, so long as the continued trial and measures imposed are fair and just in the circumstances. If this test cannot be

met, as in this case, the trial judge may have no alternative in his or her discretion but to order a mistrial.

4. *Degroote v. Canadian Imperial Bank of Commerce*, [1998] O.J. No. 1696 (Ont. Cr. Justice)

…

13. The plaintiffs' argument is simply that justice can only be served in this matter by permitting them to do now that which they say their former solicitor ought to have done in November 1996. Apart from Castlerigg and Mele, which, in my view are clearly distinguishable on their facts, the plaintiffs rely on a series of decisions which have little or no application on a motion to re-open judgment: *Halton Community Credit Union Ltd. v. ICL Computers Ltd.* (1985), 1 C.P.C. (2d) 24 (Ont. C.A.); *Sandulo v. Robinson* (1975), 10 O.R. (2d) 778 (H.C.J.); *Lico v. Griffiths* (1996), 28 O.R. (3d) 688 (Ont. Gen. Div.). These cases all concern procedural irregularities where there was no adjudication on the merits. Moreover, in each instance, the trier considered and found that there was no irrevocable prejudice to the innocent adversary in exercising its discretion to permit the irregularity to be cured. This is not a case of a procedural irregularity, nor is it a situation like *Ferguson v. Panelart Products Inc.*, [1995] O.J. No. 2026 (Gen. Div.) where the application was brought by the plaintiff two days after trial in circumstances where the defendant had called no evidence and judgment was reserved. The court allowed the application. Although the trial judge appears to have adopted the Castlerigg test, he nevertheless issued this caveat at paragraph 18:

> Although a civil trial is a search for the truth, it must be done within the context of the adversary system. It must be remembered that the defence may take a particular position at trial and not pursue the questioning of witnesses on a certain point, not because of an intention to hide or suppress relevant evidence, but because counsel for the defence may not feel that it is a meritorious issue. In short, the trial judge must remember that counsel may have adopted a certain tactical position at trial based on the pleadings and discovery. The trial judge must ensure that in allowing a re-opening of proceedings, the defendant's position has not been prejudiced.

It is also worthy of note that in *Ferguson*, *supra*, there was a serious issue of fraud to be determined. In this sense, the facts are not unlike those which were present in Castlerigg and Mele, but which are not present here.

14. Unquestionably, there is prejudice to the defendants in this case. There is a long history to this litigation. The defendants properly brought a motion before the court under Rule 20 of the Rules of Civil Procedure. The plaintiffs resisted the hearing of the motion and were unsuccessful in that effort. They were also unsuccessful on the merits of the motion. It is no passing coincidence that it was only after reasons for judgment were released that the plaintiffs sought to re-open the judgment. As was aptly stated by Wilkins J. in *Strategic*, *supra*, at p. 421:

> After the trial is complete and judgment is rendered, it is always a simple matter, utilizing hindsight, to go about reconstructing a better method of presenting the case when one finds oneself in the sorry position of loser.

And, by Gale, C.J.O., Evans and Estey, JJ.A. in *Becker Milk*, *supra*, at p. 556:

> Put shortly, the application to file this additional evidence was rejected because an unsuccessful litigant, save in very special circumstances, should not be allowed to come forward with new evidence available prior to judgment when he was content to have the trial Judge bring forward his judgment based on the record produced at a trial in which that litigant actively participated.

15 I do not think that it matters if the evidence was not originally presented for the reason which the plaintiffs now advance. Whether it is the same solicitor or a new solicitor, who seeks to admit the additional evidence cannot change the test for the admission of the evidence. The test is diligence and not negligence. The conduct of the solicitor is a matter for determination in an action for solicitor's negligence at trial where there is viva voce evidence and credibility can be assessed. If the judgment is in error, this is a matter for appeal. These are the rules under which our system operates. If the court were to further consider re-opening judgment in this action, it would indeed be blessing a staged process which is not contemplated by our rules, which will engender uncertainty and unpredictability in

litigation, and in my opinion, will be highly prejudicial to litigants, the court process and the justice system. I therefore decline to do so.

5. *Degroote v. Canadian Imperial Bank of Commerce*, [1999] O.J. No. 2313 (Ont. C.A.)

1. The decision whether or not to reopen the motion was discretionary. While the test has been expressed in a number of different ways, it essentially comes to this. The court must consider whether the evidence would probably have changed the result and whether that evidence could have been discovered by the exercise of reasonable diligence. The reasonable diligence requirement will, however, be relaxed in exceptional circumstances where necessary to avoid a miscarriage of justice.

2. The motions judge found on a preliminary assessment of the additional material that she was prepared to accept that it would probably have changed the result. She also found, and this is incontrovertible, that the evidence could have been presented on the motion through the exercise of reasonable diligence. The issue then was whether there were exceptional circumstances that warranted setting aside the due diligence requirement. Lax J. fully considered that issue. She was prepared to assume that the solicitor was negligent but that even so the circumstances were not so exceptional as to warrant the exercise of discretion in favour of the appellants. On the basis of the material that we properly before her, there is no basis for interfering with Lax J.'s decision or for holding that she failed to exercise her discretion on proper grounds.

6. *R. v. Marroquin – Pineda*, [2002] O.J. No. 2249 (Ont. Ct. Justice)

30. To begin, mistrials are aborted trials. A mistrial may be declared when the court is satisfied that there is a reasonable apprehension that either party will not have a fair trial if the current trial continues, but a fair trial would be possible if it began anew before a different trial judge. In the present case, the misreception of this prejudicial document raises this reasonable apprehension.

31. In *R. v. Jannetta*, [1998] O.J. No. 3292 (Ont. Ct. (Prov. Div.)), Hackett J. at para. 31, in ruling against a defence request for a mistrial stated:

> given that a mistrial should only be granted when no other remedy will preserve the fairness of the trial …

7. *R. v. Cipriano*, [1999] O.J. No. 3006 (Municipal Court of Montreal)

22. Superior and appeal courts [See Note 19 below] have granted trial judges a large discretion in determining when a mistrial will be granted and when it is preferable to take corrective action to cure a prejudice.

23. In *R. v. Taillefer*, [See note 20 below], after having analysed Canadian, British and Australian jurisprudence, the Court set out some basic principles that should be addressed when a judge exercises his discretion to declare a mistrial:

> "… whether the incident in question discloses a reasonable possibility of prejudice to or impairment of the right to a fair trial."
>
> …
>
> … [apply the principal] of fundamental importance that justice should not only be done, but be manifestly and undoubtedly seen to be done."

24. The second principle was also set out in *R. v. Bertucci* [See Note 21 below] as follows:

> ".. the circumstances are such that an objective court watcher would feel the proceedings were so tainted that a new trial was mandated."

25. One can see therefore that a mistrial is an extreme measure and it should only be used where no other remedy is available short of a stay of proceedings.

8. *de Aranjo v. Read*, [2004] B.C.J. No. 963 (B.C.C.A.)

98. That a trial judge may declare a mistrial proprio motu in appropriate circumstances cannot be disputed. However, it will be an exceptional case where an appellate court will interfere with an exercise of discretion by a trial judge to discharge the jury or to continue with the trial. As Major J. said in *Hamstra v. B.C. Rugby Union*, *supra*, at para. 26:

> It has long been established that, absent an error of law, an appellate court should not interfere with the exercise by a trial judge of his or her discretion in the conduct of a trial. This applies with equal force to a decision to retain or discharge the jury. It cannot be overstated that the trial judge is in the best position to determine how to exercise this discretion.

99. The hardship and expense, both public and private, that a new trial inevitably occasions afford a further policy reason for such deference. The

comments of Meredith J.A. in *Caswell v. Toronto R.W. Co.* (1911), 24 O.L.R. 339 at 350-51 (C.A.), which are set out at para. 55 of my colleague's reasons and which I will repeat for emphasis, express this point:

> A new trial is a hardship under any circumstances; and when granted upon insufficient grounds is a very grave injustice; to take away from any one that which has been fairly won, and to subject him to the delay and cost, and the mental and physical strain, of another trial, as well as to the uncertainty of its outcome, is something which fairly may be thought intolerable. New trials are, of course, occasionally necessary in order that justice may be done between the parties, but they are contrary to the public interests, and may fairly be described as necessary evils, when necessary …
> A strong case must, therefore, be presented before a new trial can properly be directed…

9. *Kralz v. Murray*, [1954] 1 D.L.R. 781 (Ont. C.A.) page 153

I am of the opinion that while in certain circumstances a new trial should be ordered, nevertheless the principles set out on behalf of this Court by Meredith J.A., in *Caswell v. Toronto R.W. Co.* (1911), 24 O.L.R. 339 at pp. 351-1, are here applicable, namely:

A new trial is a hardship under any circumstances; and when granted upon insufficient grounds is a very grave injustice; to take away from any one that which has been fairly won, and to subject him to the delay and cost, and the mental and physical strain, of another trial, as well as to the uncertainty of its outcome, is something which fairly may be thought intolerable. New trials are, of course, occasionally necessary in order that justice may be done between the parties, but they are contrary to the public interests, and may fairly be described as necessary evils, when necessary …

A strong case must, therefore, be presented before a new trial can properly be directed; so strong that even in some cases, where an injustice has been done to one of the parties at the trial a new trial is not granted unless the error was pointedly objected to at the time; and, all through the practice upon applications for new trials, the like reluctance in granting new trials is everywhere evident.

It is, however, sometimes the right of a party to have a new trial; and sometimes the Court, exercising a discretion of its own, grants a new trial, but seldom, and only when the interests of justice plainly require it.

10. *Burgess v. Taylor* 44 S.W. 3d 806 pp. 169-170

The Burgesses next argue that the trial court erred in refusing to grant their motion for a mistrial. The Burgesses contend that no evidence was presented that the horses were actually slaughtered, and that the testimony of Taylor's expert witness, Victoria Coomber, regarding the slaughter business was prejudicial. A mistrial should only be granted by the trial court if there is a manifest, urgent, or real necessity for such action. *Skaggs v. Commonwealth*, Ky., 694 S.W. 2d 672 (1985) cert. denied, 476 U.S. 1130, 106 S. Ct. 1998, 90 L. Ed. 2d 678 (1986). The Kentucky Supreme Court has stated:

It is universally agreed that a mistrial is an extreme [**19] remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained to must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way.

[*815] *Gould v. Charlton Co., Inc., Ky.*, 929 S.W. 2d 734, 738 (1996). With regard to the standard in civil cases, the Court went on to state, "Mistrials in civil cases are generally regarded as the most drastic remedy and should be reserved for the most grievous error where prejudice cannot otherwise be removed.' [Citation omitted.]" ld., quoting *Reed v. Wimmer*, 195 W. Va. 199, 465 S.E. 2d 199, 207 (1995).

11. *Skaggs v. Commonwealth* 694 S.W. 2d 672

The question is whether the appellant is entitled to a new trial upon discovery that an expert witness, selected by appellant, who claimed to be a licensed clinical psychologist and who testified favorably for appellant in his attempt to establish a defense of insanity, was an impostor who did not possess the degrees, credentials or licenses claimed by him.

…

In order for newly discovered evidence to support a motion for new trial, it must be of such decisive force that it would, with reasonable certainty, have changed the verdict [*4] or that it would probably change the result if a new trial were granted. *Hollowell v. Commonwealth, Ky.*, 492 S.W. 2d 884 (1973); *Wheeler v. Commonwealth, Ky.*, 395 S.W. 2d 569 (1965).

…

In ruling upon a motion for mistrial the trial judge is confronted with a plethora of competing interests. The public has an interest in effective and efficient legal proceedings calculated to lead to fair and just results. The litigants have an interest in having their legal matters addressed fairly, [*738] promptly and economically.

> Granting a mistrial delays justice and dramatically increases the costs of the proceedings to both the public and parties. A mistrial inconveniences litigants, jurors and witnesses. Because of the possible unavailability of some witnesses [**12] at a future trial date, granting a mistrial has the potential for changing the outcome of a case.
>
> A motion for mistrial presents not only competing interests but also an unlimited number of varying and unique situations. For these reasons rigid, *per se* standards have been rejected. In order for a trial judge to grant a mistrial the record must reveal "a manifest necessity for such an action or an urgent or real necessity". *Skaggs v. Commonwealth, Ky*., 694 S.W. 2d 672, 678 (1985) (citations omitted). This test permits a balancing of the competing interests present whenever a motion for a mistrial is advanced. Furthermore, it recognizes that each situation must be analyzed according to the unique facts presented. Although *Skaggs* was a criminal case, its flexible standard is appropriate in civil cases and we so hold.
>
> It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no [**13] other way.
>
> > Mistrials in civil cases are generally regarded as the most drastic remedy and should be reserved for the most grievous error where prejudice cannot otherwise be removed. [Citation omitted.]

12. *Sharon Lay ect. (Commonwealth of Kentucky C.A.)*

> It is well-established that a mistrial should only be granted "if there is a manifest, urgent, or real necessity for such action."
>
> > It is universally agreed that a mistrial is an extreme remedy and should be resorted to only when there is a fundamental defect in the proceedings which will result in a manifest injustice. The occurrence complained of must be of such character and magnitude that a litigant will be denied a fair and impartial trial and the prejudicial effect can be removed in no other way."

[406] One matter that concerns me at this stage is whether I have any jurisdiction to declare a mistrial as a judge of the Federal Court. The source of any such jurisdiction has not been established before me on this motion. The Federal Court is a statutory court without inherent jurisdiction and my understanding is that, in the absence of a statutory grant, jurisdiction cannot be conferred upon the Federal Court by consent of the parties. This may or may not be a problem but, on the basis of my review and findings, there is no point in debating this issue at this point. But what I have to say must be premised upon the assumption that I have the jurisdiction to grant the relief claimed in this motion and that the Plaintiffs are not limited to their rights and remedies on appeal.

[407] Assuming that I have jurisdiction, it seems to me that, from the cases cited, the principles that should guide me on the mistrial issue are as follows:

1. The decision to grant a mistrial in the present case is discretionary;
2. In exercising that discretion, should I consider whether, in all of the circumstances of the case, a mistrial is needed to prevent a miscarriage of justice and whether the facts and arguments placed before me disclose a real danger of prejudice or miscarriage of justice or, at the very least, a reasonable possibility of prejudice to the Plaintiffs;
3. I should bear in mind that a mistrial is extraordinary relief and that, even if I think that prejudice has occurred, before granting the remedy, I should allow other options to be canvassed to see if the trial can be saved in a way that is just and fair in the circumstances.

[408] Based upon these principles I am of the view that in all the circumstances of the case as set forth in my reasons, neither with regards to my rulings, the future impact of those rulings, the procedure followed so far in these proceedings, or as regards any particular witness (including the specific issues related to Elder Starlight) have the Plaintiffs demonstrated any prejudice or unfairness to the Plaintiffs, or an imbalance in the process that would be unfair to the Plaintiffs or that might, reasonably speaking, prejudice the Plaintiffs' right to make their case before this Court. The Plaintiffs have been given every opportunity to bring any relevant evidence they wish before the Court.

[409] This being the case, I do not feel at this point that there is a need to canvass alternatives to granting a mistrial.

[410] All of the allegations of unfairness raised by the Plaintiffs in this motion are premised on the assertion that "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, admissible evidence."

[411] But the Plaintiffs cannot have it both ways. They cannot represent to the Court that their will-says are fully compliant with the standards and, at the same time, allege that they are being hampered by a legal rule that excludes relevant evidence not disclosed in a will-say.

[412] And if the Plaintiffs' will-says do not comply with the standards, although this may mean that the Plaintiffs have other problems, there is still no unfairness in the system if the Plaintiffs try to lead evidence not in the will-say. There may be no objection to such evidence and, even if

there is, the Plaintiffs will merely have to deal with the same ambush concerns that the Plaintiffs have raised, and will no doubt raise in future, against the witnesses of other participants.

[413] There is no unfairness in this because all parties have been given the time they needed to draft their will-says to contain anything they chose and so have been able to avoid an allegation of ambush at trial on topics and areas of importance to them.

[414] There is no evidence before me that the Plaintiffs were hampered or unable to complete the task of drafting will-says in accordance with the standards. If there had been a problem, the Plaintiffs were at liberty to seek the Court's assistance in allowing more time to get the task done. They were given the time they asked for and they have repeatedly reassured the Court that their will-says were drafted to standard.

[415] At bottom, the whole process at trial is just not as complicated as the Plaintiffs are making out for present purposes. The real issue that comes up with objections is ambush at trial over points that both sides have identified as important; and both sides have sought and obtained relief against ambush; and both sides have connected ambush to the pre-trial disclosure system that required will-say statements for witnesses.

[416] Ambush at trial is an important issue to both sides and to the Court. Ambush prevents effective cross-examination. Effective cross-examination is absolutely necessary for getting at the truth i.e. the truth, not the truth as propagated by one side to the dispute.

[417] That is why the disclosure system in these proceedings was devised and has evolved in the way it has.

[418] The real issue is getting at the truth in a context where pre-trial disclosure could not be left to conventional methods and the case management judge concluded that Court-crafted solutions, (that included will-says), were necessary to bring these actions to trial, and ensure a fair trial process.

[419] In examining the specific allegations of unfairness with regards to Elder Starlight, the Court can find nothing that would support an allegation that the present process is not capable of yielding a fair result, or that the Plaintiffs are disadvantaged in placing their evidence before the Court, or that the Crown now enjoys any advantage.

CONSEQUENCES

[420] The fact is that I have really dealt with the basic issues in this motion before, and I have made findings that, if the Plaintiffs had paid due heed to them, make it very clear that the positions they take in this motion are not supported by the record. For example, I am frankly puzzled why the Plaintiffs would not refer to and deal with what I said in my decision of November 7, 2005 at paragraphs 194 and 195:

> 194. The standards and degree of disclosure are now well-understood and accepted by all parties, including the Plaintiffs. I set those standards out in detail in my Reasons of October 18, 2004. For convenience, I will repeat here the guidelines provided in October, 2004:

> [38] The witness lists and will say statements produced by the Plaintiffs to date are not in compliance with Justice Hugessen's Pre-Trial Order and are not adequate for preparation and effective trial procedure for a variety of reasons, including the following:
>
> a. They are not individualized. The witness lists need to show who the Plaintiffs actually intend to call, how she or he is in a position to give the evidence, and what each individual witness will say. A large pool of potential witnesses and a list of topics that will be addressed at trial by various groups does not permit adequate preparation and effective trial procedure;
>
> b. The language used by each witness to be called is not identified. Justice Hugessen's Pre-Trial Order specifically says, in para. 9, that the witness list and will say statements have to include "language if other than English and name of interpreter if known." This is information that is obviously required for each witness;
>
> c. They provide a list of topics that the Plaintiffs intend to address rather than a synopsis of what each individual witness will say. Such a synopsis does not need to use the actual words of each witness, but it does need to contain sufficient detail to allow for challenges on the basis of relevancy and otherwise, and for effective preparation for cross-examination. For instance, it is not sufficient to say that evidence will be given concerning the Plaintiffs' laws, customs and practices or their way of life. The will says should indicate what a particular witness will say those laws, customs and practices are, and what the way of life relied upon actually entails;
>
> d. Those will say statements that pertain to oral histories should identify the actual past practices, customs and traditions of the community in question, as well as relevant interactions with other groups.

195. When I say that the Plaintiffs, after showing initial resistance, have now embraced the standards of the October 18, 2004 Order, I have the following in mind:

(a) The Plaintiffs' reassurances given to the Court at the hearing on November 18, 2004, that the will-says the Plaintiffs were preparing "comply with all of the requirements, My Lord, that Your Lordship indicated. In fact they go even further, they are extremely detailed";

(b) The Plaintiffs' reassurances given to the Court at the conference meeting of January 7, 2005, that "we are working under the rules that have been set by the Court," and that "the Plaintiffs have presented their case through the service of will-say statements and the December 21 submission in accordance with the way 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";

(c) The fact that the Plaintiffs have belatedly brought a motion before the Court dealing with the will-says of the Crown and the Interveners asking that those will-says be assessed against the standards set by the Court in the October 18, 2004 Order;

(d) The fact that at the *de bene esse* in Calgary on December 13, 2004, to hear the evidence of Ms. Florence Peshee, witness for NSIAA, one of the Interveners, the Plaintiffs objected to Ms. Peshee giving evidence on matters not disclosed in her will-say on the grounds that to allow her to give such evidence would constitute ambush at trial. In other words, the Plaintiffs have demonstrated clear appreciation and acceptance that the purpose of the will-says and the standards of disclosure imposed by the Court are to prevent ambush at trial, and the Plaintiffs have taken the position that the content of the will-says in these proceedings was to circumscribe what a witness should be allowed to say at trial. What is more, the Court accepted the Plaintiffs' position when if ruled against Ms. Peshee being allowed to give evidence on matters not adequately disclosed in her will-say. This means that, even before the trial proper begins, evidence has been excluded at the request of the Plaintiffs on the basis of a non-compliant will-say. The Court has to be consistent in this regard. [emphasis added]

[421] The Plaintiffs simply ignore the Court's earlier findings and proceed with a motion that goes over the same arguments and issues again.

[422] The Plaintiffs' assurances with regard to will-says were also bolstered in Peshee where Mr. Healey assured the Court that:

> It's all about giving notice…your order does set out – it's either paragraph 28 or 38 of your October 18th reasons, it sets out in detail what it is that you're asking for and that's what we're trying to comply with.
>
> 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 you're going to be dealing with? That's the ultimate question, in my submission. And the – the answer to that question is: Guided by the standards in the will-say.
>
> And it's important that both sides have notice, the same kind of notice.

[423] If I have said all of this before, and if I have been assured by the Plaintiffs' in the ways outlined above, it is entirely inappropriate for the Plaintiffs to now argue before me, in effect, that the acceptance of standards in pre-trial disclosure is unrelated to the admissibility of evidence at trial, and that the Plaintiffs "do not understand" that connection and have not resiled from any former position they might have taken on this matter. These assertions are simply the unsupported gainsaying of what the record so obviously reveals.

[424] The following also gives me grounds for serious concern:

Mr. Healey: [The will-says] …comply with all of the requirements, My	The Court: So some of them are certainly deficient in terms of what witnesses are going

Lord, that your Lordship indicated. In fact they go even further, they are extremely detailed.

to say?

Mr. Molstad: Some are, yes.

[425] If there is some explanation for these two different assessments of the Plaintiffs' will-says provided to the Court by Plaintiffs' counsel, it has not been disclosed to me.

[426] The Plaintiffs have now made it clear that they cannot adequately make their case based upon the evidence their witnesses have given or are expected to give.

[427] This is a matter of grave concern for the Court because I am fixed with a duty to ensure the just, most expeditious and most cost-effective resolution of these proceedings in accordance with the *Federal Court Rules*.

[428] What is more, the Plaintiffs have brought the Court and the other participants into trial on the basis of representations and reassurances that their will-says meet the standards set by the Court and so contain a synopsis of what each witness will say. Their counsel has now confirmed to the Court that "some" of the will-says are certainly deficient and do not say what a witness will say. The Plaintiffs appear to have known about this problem for some time. In their December 25, 2005 Progress Report the Plaintiffs talk about identifying "which of the stricken witnesses, if any, may be able to contribute constructively to the trial record in compliance with the pre-trial orders. [emphasis added]. This will involve ascertaining whether there are any areas of the Plaintiffs' evidence that need to be buttressed and then determining whether any of the witnesses on the stricken list can provide such evidence."

[429] If some will-says are not deficient (and if will-says for witnesses already called were not deficient) and meet the standards set by the Court, there can be no danger of the Crown claiming ambush in relation to what those witnesses have to say, because ambush cannot occur with what is contained in a compliant will-say, even if the Court did use the will-says as a legal ground to exclude evidence (which is not the case, as I have explained).

[430] So this suggests there are sufficient non-compliant will-says to prevent the Plaintiffs from adequately making their case. If will-says are deficient and do not meet the standards then, subject to further explanation and based upon what the Court has been told to date, there is a clear implication that they are in breach of the Court's order of November 25, 2004, which attempted to remedy the Plaintiffs' breach of Justice Hugessen's Pre-Trial Order of March 26, 2004.

[431] If the will-says cannot be disconnected from the admissibility of evidence at trial, (and I have found that they cannot) then this leaves us with the Plaintiffs' own conclusion and advice to the Court that they cannot adequately make their case. Obviously, the Plaintiffs know their own witnesses.

[432] These are serious issues that need to be addressed before this trial can continue. I am going to need some clear guidance.

All counsel should carefully consider these reasons and their implications for the balance of the trial. I expect counsel will also need to consult with their respective clients. We are now moving into the summer break in the trial schedule. I do not want the trial to reconvene in September with these matters still unresolved. Hence, counsel should confer and advise the Court as quickly as possible as to how and when these matters can be addressed soon.

ORDER

THIS COURT ORDERS that

1. The motion is denied for the reasons given;
2. All participants may address the Court on the issue of costs.

"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

PLACE OF HEARING: Edmonton, Alberta

DATE OF HEARING: May 10, 2007

REASONS FOR ORDER: RUSSELL J.

DATED: June 19, 2007

APPEARANCES:

Edward H. Molstad Marco S. Poretti David Sharko Nathan Whitling Catherine Twinn	FOR PLAINTIFF(S)
E. James Kindrake Kathleen Kohlman Wayne M. Schafer Dale Slaferek Janell Koch	FOR DEFENDANT(S)
Janet Hutchison	FOR INTERVENER(S) CONGRESS OF ABORIGINAL PEOPLES
Jon Faulds	NATIVE COUNCIL OF CANADA (ALBERTA)

Derek Cranna
Jeremy L. Taylor

Mary Eberts NATIVE WOMEN'S ASSOCIATION OF CANADA
Kasari Govender

Laura C. Snowball NON-STATUS INDIAN ASSOCIATION OF ALBERTA
Michael Donaldson

SOLICITORS OF RECORD:

Parlee McLaws, LLP FOR PLAINTIFFS
Edmonton, AB

Twinn Law Office FOR PLAINTIFFS
Slave Lake, AB

John H. Sims, QC FOR DEFENDANTS
Deputy Attorney General of Canada

Chamberlain Hutchison FOR INTERVENER.
Edmonton, AB NATIVE WOMEN'S ASSOCIATION OF CANADA

Field LLP FOR INTERVENER,
Edmonton, AB NATIVE COUNCIL OF CANADA (ALBERTA)

Law Office of Mary Eberts FOR INTERVENER,
Toronto, ON NATIVE WOMEN'S ASSOCIATION OF CANADA

Burnet Duckworth & Palmer LLP FOR INTERVENER,
Calgary, AB NON-STATUS INDIAN ASSOCIATION OF ALBERTA