Date: 20080307

Docket: T-66-86A

Citation: 2008 FC 322

Ottawa, Ontario, this 7th day of March, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SAWRIDGE BAND

Plaintiff

- and -

HER MAJESTY THE QUEEN

Defendant

- and -

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

Interveners

Docket: T-66-86-B

BETWEEN:

TSUU T'INA FIRST NATION

Plaintiff

- and -

HER MAJESTY THE QUEEN

Defendant

- and -

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

Interveners

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REASONS FOR JUDGMENT

INTRODUCTION

[1] On January 7, 2008, the Plaintiffs informed the Court that "the Plaintiffs shall not be calling any further evidence before your Lordship, and as a result we are closing our case."

[2] This abrupt end to the Plaintiffs' presentation of their case before the Court was preceded by a brief written notification to the Crown and the other participants of December 28, 2007, a copy of which was provided to the Court and is now marked as PL40.

[3] In that notification the Plaintiffs said that "after consideration of a number of factors, the Plaintiffs … have come to a decision during the past two days that they wish to proceed with an Appeal to the Federal Court of Appeal at this time."

[4] The PL40 notification came at the end of a two-month adjournment granted at the Plaintiffs' request on October 15, 2007, which they said was required to allow them to prepare their expert witnesses to give evidence at trial.

[5] It also came at the end of a difficult year of a severely disrupted trial that was, by and large, waylaid by one major procedural issue: the Plaintiffs' attempts to avoid compliance with, and the

consequences of, Court decisions and rulings that lay down the conditions under which all participants may call new lay witnesses and, in particular, the will-say disclosure requirements and their connection to evidence at trial that bind all participants. The will-say requirement was imposed by Justice Hugessen, the case management judge, on March 26, 2004, and, in various decisions and rulings, the Court has explained and established its significance for the calling of lay evidence at trial for all participants.

[6] The full impact upon the proceedings of the Plaintiffs' non-compliance with, and repudiation of, the will-say rules finally became known on September 11, 2007, when, the Court ruled upon the Plaintiffs' decision not to provide the Court with the reassurances of compliance with Court decisions on will-say disclosure which the Court had ordered on August 9, 2007. In effect, this amounted to a decision by the Plaintiffs not to retain or call their lay witnesses in accordance with the will-say rules so that those witnesses were either struck or remained struck in accordance with my August 9, 2007 decision.

[7] The Plaintiffs' decision to close their case and proceed with an appeal also follows a significant period of additional preparation time that was extended to them before the trial finally commenced in January 2007. During that period of time, the Plaintiffs were given a further opportunity to examine their will-says against Court decisions and rulings and to bring forward any problems they might have in a timely manner.

[8] The granting of additional time to the Plaintiffs to ready themselves for trial followed approximately seven years of case management, under Justice Hugessen as case management judge, after these actions were returned by the Federal Court of Appeal for re-trial in 1997.

[9] So three years after the re-trial was originally scheduled to commence in January 2005 – years during which the Plaintiffs were given significant amounts of time to set their house in order so that the trial could be handled efficiently and free of major procedural disputes that have plagued these proceedings in the past –the Plaintiffs have now closed their case because, ostensibly at least, they have not been allowed by the Court to conduct these actions in ways that breach Court decisions and rulings regarding will-says, and in ways that are totally at odds with the representations and assurances that the Plaintiffs gave to the Court and the other participants that they accepted the rules related to will-says and wanted to proceed with these actions on the basis of those rules. Having been given large extensions of time to prepare for trial on the basis of representations that they understood and accepted the will-say rules that were devised to meet the particular exigencies of these actions, the Plaintiffs have now chosen not to proceed further after they were ordered to keep their assurances and respect Court orders and rulings regarding will-says.

[10] The Plaintiffs now say they agree with the Crown that, as a result of their decision to now close their case, the Court "should dismiss this action based upon their request as clearly there is no evidence before you in relation to this matter."

[11] The Plaintiffs and the Crown agree that both actions should be dismissed because there is no evidence before the Court on either action, and the Crown, therefore, has no case to answer. This is indeed a strange conclusion to what has been a difficult and irregular trial process hampered by inconsistency, obfuscation and obstruction on the part of the Plaintiffs.

[12] The Plaintiffs say that their decision to close their case at this time is the result of "unprecedented actions on the part of the Court," and they have put the Court on notice that they plan to lay reasonable apprehension of bias allegations before the Federal Court of Appeal.

[13] They have not, however, chosen to bring such allegations before the trial judge and, in bringing their case to an abrupt close in the way they have, they have not provided this Court with any cogent explanation or justification for their decision other than a bald and unsubstantiated assertion that the Court has prevented them "from adducing relevant, probative and corroborative evidence" and that this will have "a detrimental effect on the Plaintiffs' ability to prove their case" and will also "prevent the Plaintiffs from adequately stating their case" and this "will result in an unfair trial." Hence the Plaintiffs have offered as a reason for closing their case a position that does not accord with how the Plaintiffs' lay witnesses came to be struck, and which their own actions have now ensured cannot be substantiated or objectively assessed.

[14] The Plaintiffs' decision to close their case at this time deprives the Court of any means of assessing the impact that the loss of their lay witnesses might have upon the Plaintiffs' ability to present their case before the Court, and this is even more troubling when it is born in mind that the

decision not to retain or call lay witnesses in accordance with the will-say rules that bind all participants was made by the Plaintiffs themselves. The Court has made it clear in its rulings that the Plaintiffs were free to retain and call any or all of their lay witnesses provided they would confirm to the Court that they were doing so in accordance with the will-say rules. Having declined to retain or adduce evidence in accordance with the will-say rules, they are now saying that it was the Court who prevented them from leading that evidence. But the record shows that the striking of the Plaintiffs' lay-witnesses was something that the Plaintiffs' compliance with the will-say rules would have prevented.

[15] Having revealed themselves to be, again, in breach of the will-say disclosure requirements that bind all participants who wish to call lay witnesses, and having repudiated any connection between will-say disclosure and evidence at trial, the Plaintiffs were given a further opportunity to retain and call all of their lay witnesses. They elected not to confirm or meet the will-say disclosure requirements that are mandated by Court decisions and rulings which the Plaintiffs have themselves affirmed and used to their own advantage and, as a consequence, lost the right to retain and call their lay witnesses.

[16] The Court has not prevented the Plaintiffs from calling any, or all, of the lay witnesses they may wish to call. The Court has simply told the Plaintiffs that they cannot breach Court decisions and rulings that bind all participants and retain and call their lay witnesses regardless of this fact.

[17] Quite apart from the fact that the striking of their lay witnesses was something the Plaintiffs could have prevented through a simple notification of compliance in the ways directed by the Court, there is nothing before the Court that would allow it to assess in any objective way why the Plaintiffs have chosen to close their case at this time. The Plaintiffs have disrupted the trial process to such an extent through inconsistency, obfuscation and obstruction, that it is not possible for the Court to accept or rely upon the reasons they now put forward, or to ascertain and assess what impact the loss of their lay witnesses might have upon the case they wish to present to the Court.

[18] Obviously, the Plaintiffs' decision to conclude their case at this point so early in the proceedings, and their notifying the Court about the apprehended bias allegations they plan to bring before the Federal Court of Appeal, bespeak a sense of grievance and a strong desire on the part of the Plaintiffs to terminate the present proceedings and start over afresh. However, the Plaintiffs are entirely responsible for any difficulties they are facing at this point in the proceedings. They are seeking a re-trial at a time when they are in breach of Court orders to produce standard-compliant will-says and, as a result of that breach, have found themselves constrained at trial in ways they do not wish to accept. But their problems are entirely of their own making and they have been given all the time and encouragement necessary to ensure it did not occur. They seek to blame others for their own breaches of Court decisions and rulings and their failure to keep their earlier commitments to the court and the other participants.

[19] In bringing their case to a close at this time, the Plaintiffs have not provided any explanation for their earlier decision not to retain or call their lay witnesses in accordance with the will-say rules,

and they have left the Court with no means of assessing whether, indeed, the exclusion of lay witnesses has deprived them of "relevant, probative and corroborative evidence." This is significant because the Plaintiffs' earlier obstructed the Court's attempts to obtain objective and material information that would have allowed it to assess the Plaintiffs' assertion that the Court had foreclosed on the Plaintiffs' ability to adequately state their case, and the Plaintiffs defied a Court direction that required them to provide such information.

[20] Consequently, at this point in the proceedings, the Court has no consistent and cogent explanation, and certainly no substantiated rationale, that can be relied upon as to why the Plaintiffs would elect to lose their lay witnesses rather than calling them in accordance with the will-say rules, or what, indeed, should be made of their latest assertion that the loss of those witnesses means the loss of relevant, probative and corroborative evidence that impacts in any material way the case they want to present to the Court.

[21] The decision not to proceed further with their case is a decision made by the Plaintiffs. The Court has refused a request from the Crown to dismiss the Plaintiffs' actions for abuse of process and has asked the Plaintiffs to proceed with calling their evidence in a non-abusive way so that the Court can hear the merits of the case they wish to present. The decision not to proceed in this fashion is one that the Plaintiffs, and the Plaintiffs alone, have made. On August 9, 2007, the Court ordered the Plaintiffs to proceed as follows:

> 12. Subject to satisfying the Court concerning the compliance of their will-says as indicated, the Plaintiffs will proceed to call their witnesses or conclude their case and shall conduct the balance of the trial in accordance with all relevant Court decisions, findings,

> rulings, and orders and directions made to date and will desist from the conduct that the Court has identified as abusive.

[22] As these words make clear, the Court wanted to retain the Plaintiffs' lay evidence and hear their remaining lay witnesses. All the Plaintiffs had to do was confirm compliance with the will-say disclosure requirements in the way requested by the Court and proceed to call their witnesses.

[23] Following this order, the Plaintiffs chose not to provide the reassurances the Court ordered regarding the compliance of their will-says with previous Court decisions and rulings, and they chose, instead, in their response to continue to conduct the trial in an abusive manner. Satisfying the Court concerning compliance would have preserved all of the Plaintiffs' witnesses called to date and would have allowed them to call any future lay witnesses they wanted to call in accordance with the will-say rules.

[24] The Plaintiffs' decision not to retain or call their lay witnesses in accordance with the will-say rules, and their subsequent decision to close their case and to ask the Court to dismiss their actions because there is no evidence before me upon which I could reach a conclusion favourable to the Plaintiffs, require a context that the Plaintiffs have not provided.

THE FULL CONTEXT

The General Situation

[25] It is extremely important to place the Plaintiffs' decision to close their case in its full context. That context reveals that the Court has not, in fact, merely struck the Plaintiffs' lay witnesses as they now allege. The Court has permitted the Plaintiffs to retain and call any or all of their lay witnesses, but it has told them they must do so in a non-abusive way and in accordance with the will-say rules established in these proceedings for the lay witnesses of all participants. Those will-say rules are laid down in Court decisions and rulings that the Plaintiffs have not successfully challenged. The rules have also been confirmed earlier in the proceedings by the Plaintiffs themselves, and they have been used by the Plaintiffs at trial to exclude the evidence of another participant that the Plaintiffs did not want on the record. Notwithstanding such earlier confirmation and use of the will-say rules, the Plaintiffs have elected not to retain and/or call any of their lay witnesses under those rules.

[26] The Plaintiffs' inconsistent position on the use of will-says at trial, their failure to comply with the disclosure requirement, and their repudiation of any connection between will-say disclosure and evidence at trial, have been the subject of numerous motions, reasons, decisions and rulings made during the course of these proceedings.

[27] Those reasons, decisions and rulings do not need to be repeated here and they are part of the record that reveals how and why the Plaintiffs and the Crown now agree that these actions must be dismissed.

[28] Notwithstanding that record, however, the Plaintiffs' decision to close their case in such a manner at this stage in the proceedings casts a significant light on what has occurred to date and places the Court's previous reasons, decisions and rulings in a context that, until the decision to close their case was made, was not entirely understood.

Procedure, Not Merits

[29] It is also important to bear in mind that the Plaintiffs' decision to close their case at this point means that the Court has had no opportunity to assess the merits of their claims. The points of contention between the parties have been entirely procedural in nature, and it is necessary to be precise about what those points are because they are extremely narrow.

[30] As the full record makes clear, the Plaintiffs have been free to lead any lay evidence they want to lead that is relevant to the pleadings, and the Plaintiffs have not contended in any convincing way that the will-say requirements were unachievable or prevented them from bringing forward the lay witnesses they needed to present their case. The real dispute has been over what function will-says should play at trial when lay evidence was actually called.

The Procedural Dispute Between the Parties

[31] The will-say requirements have only impacted evidence at trial in two ways:

a. First of all, in order to bring a new lay witness forward, the Plaintiffs, as well as all other participants, had to provide a synoptic account of what that witness will say that meets the standards of disclosure set by the Court and accepted by the Plaintiffs and the other participants. This disclosure requirement is contained in several Court decisions, and the Plaintiffs have continued to acknowledge it throughout the trial. They have argued and asserted that they have met this threshold requirement and that they have produced will-says for each of their lay witnesses that meet all disclosure requirements set by the Court. Unfortunately, the Plaintiffs have also revealed that, notwithstanding their "position" that they have met the threshold disclosure requirement, they have, in fact, not done so. But they have refused to explain or reveal why they have not met the threshold requirement set out in Court decisions and previously affirmed by the Plaintiffs. The Plaintiffs have revealed their breach of the disclosure requirement in several ways I have referred to in previous decisions. However, even the Plaintiffs' own legal counsel has confirmed to the Court that the Plaintiffs have produced will-says that do not disclose what a witness will say in accordance with the synoptic standards. The Court has both asked and directed the Plaintiffs to explain the discrepancy between their "position" on disclosure compliance and what their legal counsel has confirmed; but they have simply refused

to even address the issue. It is a blatant inconsistency they have chosen to leave, unexplained, on the record. As found in previous decisions and rulings, the best evidence available to the Court on the issue of will-say disclosure compliance by the Plaintiffs is that the Plaintiffs have not met the threshold requirement for any of their lay witnesses. Notwithstanding this breach, the Court has made it clear to the Plaintiffs that they can retain any or all lay witnesses already called, and call any future lay witnesses they wish to call, if they will treat the actual disclosure in their will-says as disclosure in accordance with the synoptic standards, so that the Crown can prepare for trial on that basis. In the end, the Plaintiffs have refused to either retain witnesses or call further witnesses on the basis that what their will-says disclose in accordance with the disclosure standards is what their witnesses will say for purposes of trial preparation and cross-examination by the Crown and the Interveners. Their stand on this issue remains entirely inconsistent. They insist on a "position" that they have met the synoptic standards of disclosure for all of their will-says, but they will not confirm that what their will-says disclose in accordance with the standards is what a witness will say. They merely insist, in the face of all evidence to the contrary (including advice to the Court by their own legal counsel), that the Court must accept without question a "position" that is simply untenable;

b. Secondly, the only other way that will-says have been relevant to evidence at trial has arisen in the context of ambush claims by either side. The Court's rulings on ambush have been purely factual in nature and the whole record is available to either

side to demonstrate to the Court whether, reasonably speaking and as a matter of common sense, real ambush has or has not occurred. The relevance of a will-say statement to a claim for ambush is inherent in the will-say requirement to produce will-says for any new lay witness who is called. The purpose of the will-say is to allow the other side to prepare for trial and to avoid ambush at trial that would prevent effective cross-examination. The Plaintiffs were the first party to argue and apply these principles in the case of an actual witness at trial. This occurred at the *de bene esse* hearing for Ms. Florence Peshee (an Intervener witness) when the Plaintiffs sought the Court's protection from ambush and used Ms. Peshee's will-say to demonstrate that ambush had occurred. In the course of doing so they forcefully asserted the general principal that is an inherent and inevitable part of the will-say rules devised to meet the particular exigencies of these actions: "The question for the Court is: Does the other side have notice of what it is you're going to be dealing with? … . And the answer to that question is guided by the standard in the will-say. And it's important that both sides have notice, the same kind of notice." Notwithstanding their advocacy and espousal of the relationship between will-say disclosure and ambush at trial, the Plaintiffs eventually placed on the record an unequivocal repudiation of the same principle. At the Mistrial Motion, during which the Plaintiffs attempted to terminate the trial and return the proceedings to the discovery stage, they said they did not understand or accept the use of will-says at trial to exclude evidence. The only way that will-says have been used in this trial to exclude evidence is that, when ambush objections to evidence have been raised, the

> relevant will-say has been referred to in the context of the Court's making a ruling on whether, as an issue of fact, ambush has really occurred.

[32] The Court has made it clear in its rulings that will-say disclosure is relevant to ambush determinations, although a will-say cannot be used as an automatic exclusionary rule of evidence. All ambush rulings have been dealt with on an objection by objection basis. And this is what the Plaintiffs have refused to accept, even though the procedure used by the Court is an inherent and inevitable consequence of the will-say disclosure rules devised for these proceedings. When all is said and done, this is the requirement (the connection between will-say disclosure and ambush at trial) that the Plaintiffs have repudiated for all of their lay witnesses. From the Court's perspective, and as the record will show, this has been the gravamen of the procedural dispute between the parties to this point in the trial, and this is what has led, ostensibly, to the Plaintiffs' latest decision to close their case at this point in the proceedings, although it is not possible for various reasons to tell whether this is the real basis of the decision because the Plaintiffs have attempted to terminate these proceedings before, and have expressed an ambivalence about presenting their case in the Federal Court. The Court has said that if the Plaintiffs wish to retain or call lay witnesses they must do so in accordance with the will-say rules. The Plaintiffs have revealed themselves to be in breach of the will-say rules, and they have repudiated those rules and refuse to either retain or call witnesses in a way that complies with those rules. That is the crux of the dispute over will-says.

[33] However, the matter does not end there because, in order to repudiate the will-say rules and to try and dissolve the connection between will-say disclosure and ambush rulings at trial, the

Plaintiffs have engaged in repetitive abusive conduct that I have dealt with in previous reasons and orders. The present decision by the Plaintiffs to close their case now sheds further light upon that conduct.

[34] As far as the Court is concerned, however, notwithstanding that it has had to deal repeatedly with abuse of process issues, the major contentious issue between the parties to date has been the connection between will-say disclosure and ambush rulings at trial. In a series of decisions and rulings the Court has attempted to have the Plaintiffs respect the disclosure requirements established by previous decisions and rulings, and the inevitable connection between will-say disclosure and ambush rulings at trial, and to have the Plaintiffs remain faithful to the representations and assurances they gave to the Court and the other participants that they would work within the will-say rules and that they wanted "to proceed on that basis" and have the other participants comply in the same way. The Plaintiffs lost their lay witness because, in the end, they refused to keep this commitment and revealed themselves to be leading witnesses in breach of Court orders and rulings, and refused the further opportunity offered to them by the Court to both retain and call all of their witnesses in accordance with the will-say requirements. Having elected to lose their witnesses, the Plaintiffs have now abruptly closed their case in a way that leaves entirely unanswered some very serious questions about why the Plaintiffs would make such an election and then bring these proceedings to a sudden halt.

The Plaintiffs' Preferred Procedure

[35] During my tenure as trial judge, the Plaintiffs have made two strenuous attempts to abort the proceeding and return to the pre-trial discovery stage in a way that would allow them to avoid years of decisions and rulings, in both the Federal Court and the Federal Court of Appeal, that have gone against them and that have constrained the ways in which they can conduct these proceedings. Their recent rejection of the will-say rules resulting in the loss of their lay witnesses and their subsequent decision to close their case have to be seen in the full context of that preferred procedure.

[36] The Plaintiffs' 2005 Bias Motion was an attack upon the Federal Court as an institution and upon the ways that Justices Hugessen and Russell have handled these proceedings.

[37] In the case of my own role as trial judge, the Plaintiffs' Bias Motion contained a personal attack, the full consequences of which I have yet to deal with. Those consequences had to be set aside to be dealt with at a later date because they were threatening to subvert the whole trial process and obliterate the rights of the parties, including the rights of Plaintiffs.

[38] I found the Bias Motion to be entirely groundless and unwarranted and I awarded enhanced costs against the Plaintiffs for various reasons, including the fact that the materials they submitted for that motion were intended to "intimidate the Court and subvert the judicial process itself in order to evade the consequences of adverse rulings and orders … ."

[39] After calling eight lay witnesses at trial, the Plaintiffs began a mistrial initiative that was also without merit. Its purpose, they eventually revealed, was to abort the trial and return the proceedings to the discovery stage. That mistrial initiative was premised upon the unsupportable and unsubstantiated accusation that the Court, notwithstanding its own statements to the contrary, was using the Plaintiffs' will-says as "a legal ground for the exclusion of relevant admissible evidence." When it was pointed out to them that such an assertion was entirely inconsistent with their "position" that they had produced will-says that met the synoptic disclosure standards, the Plaintiffs did not deny that it was inconsistent. They simply shifted ground and accused the Court of excluding evidence by using a "comprehensive and detailed" standard of disclosure for will-says to exclude their evidence. The Mistrial Motion was groundless, not only because it contained unsubstantiated allegations that were contrary to the record, but also because, if the Plaintiffs had indeed produced standard-compliant will-says as they alleged, then there could be no problem with the exclusion of evidence at trial as a result of ambush. The Plaintiffs were simply trying to blame others for problems that were of their own making.

[40] And now, after being given a further opportunity to both retain and call all of their lay witnesses if they would live by the spirit and intent of the will-say rules, as they had previously assured the Court and the other participants that they would, the Plaintiffs have both refused to retain and call witnesses in accordance with those rules and have closed their case in order to seek a re-trial of these actions from the Federal Court of Appeal.

[41] One thing, at least, is now clear as a result of the Plaintiffs' mistrial initiative and their subsequent decision to close their case: they are obviously not interested in bringing before this Court the case that was disclosed in their will-says in accordance with the disclosure standards. But on January 7, 2005 that was precisely what the Plaintiffs assured the Court and the other participants that they did want to do, and the discrepancy between those two contrary positions has not been explained to the Court.

[42] Looked at in the context of these proceedings as a whole, the Plaintiffs' cumulative decision to breach the disclosure requirements, repudiate the will-say rules, and close their case suggests that they are no longer interested in presenting the case that they assured the Court and the other participants they had presented through the service of will-say statements "in accordance with the way in which the Court has permitted the Plaintiffs to present their case … ." on January 7, 2005.

Abuse Issues

[43] The findings of abuse, although real enough, and the sequence of events that came about as a result of the Mistrial Motion and its aftermath, should not be allowed to confuse the real procedural bone of contention that has finally led the Plaintiffs, ostensibly at least, to close their case at this point in the proceedings.

[44] The Plaintiffs' abusive conduct during trial has, primarily, been aimed at disconnecting will-say disclosure from evidence at trial when ambush is raised as an objection. By the time of the

Mistrial Motion the Plaintiffs had made a full assessment of the ways in which will-say disclosure was coming into play when ambush was raised. That is why the Mistrial Motion contained an unequivocal repudiation of the relevance of will-say disclosure to ambush rulings at trial. However, abuse aside, the Plaintiffs have not adequately explained why will-says cannot, or should not, be referred to when ambush becomes an issue at trial. They have not explained why will-say statements are not relevant or are not connected to ambush issues.

[45] The Plaintiffs have not argued – or justified on any legal or logical basis – that ambush cannot be used as a ground for the exclusion of relevant evidence. The Plaintiffs have, in fact, used ambush themselves as a ground for excluding relevant evidence that they did not want on the record. Their position appears to be, rather, that there can be no connection between will-say disclosure and evidence at trial. Will-says have been connected to evidence at trial in these proceedings only when ambush has been raised as an objection which, as the Plaintiffs have themselves previously argued before the Court, is the appropriate way to use will-says.

[46] The Plaintiffs have not satisfactorily explained how will-says could possibly be disconnected from evidence in the context of an ambush ruling. As the Court has ruled, when ambush comes up, the whole record is available to either side to demonstrate whether or not real ambush has occurred. That record includes will-say statements.

[47] For the Plaintiffs to argue that there is no connection between will-say disclosure and the exclusion of relevant evidence at trial in these proceedings is to argue that, in effect, when the

Crown raises ambush as a ground of exclusion, the Plaintiffs can refer the Court to the entire record to demonstrate that no real ambush has occurred but the Crown cannot refer to the relevant will-say to try and demonstrate that it has. The Plaintiffs have not satisfactorily explained how such a paradoxical imbalance could be justified or allowed to prevail in these proceedings. They have argued that disclosure throughout the record as a whole obviates ambush, but they have not explained why will-say disclosure standards have no connection to the ambush issue, and they have been given full opportunity by the Court to refer to the rest of the record to establish that no real ambush has occurred whenever a particular objection to evidence based upon ambush has arisen.

[48] The Plaintiffs are aware of the fallacy in their position even though they have declined to address it. Instead, they have sought to avoid the problem by asserting (but not attempting to substantiate) that the Court has used will-says "as a legal ground of exclusion of relevant admissible evidence" in order to foreclose on the Plaintiffs' "opportunity to adequately state their case" and then, when the contradictory nature of that position was pointed out to them, they have resorted to the unsubstantiated accusation that the Court has, in some clandestine and undeclared way not reflected in its rulings, used a "comprehensive and detailed" standard of will-say disclosure to "foreclose" (later changed to "compromise") the Plaintiffs ability to adequately state their case. At the same time, their own legal counsel has revealed the real cause of the Plaintiffs' problems in his confirmation that, when the Plaintiffs' will-says are examined against the synoptic standards set by the Court, there is a deficiency in terms of disclosing what witnesses are going to say.

Proving and Stating their Case

[49] At no time have the Plaintiffs alleged or demonstrated that the will-say rules prevent the Plaintiffs from proving their case, and, as the Court has pointed out in previous decisions and rulings, the connection between stating and proving their case in the context of these proceedings remains unexplained and unsubstantiated. In fact, the Plaintiffs' recent allegations that the will-say rules, and Court rulings based upon them, have somehow "compromised" the Plaintiffs from adequately stating their case are inconsistent with the Plaintiffs' earlier assurances that they had presented their case through their will-says and wanted to proceed on that basis.

[50] These unsubstantiated allegations have been used to conceal the basic fallacy at the centre of the Plaintiffs' repudiation of the will-say rules (not disclosed until the trial) and their failure to explain how will-say disclosure can be disconnected from ambush considerations at trial.

[51] The Plaintiffs have also used abusive conduct, identified by the Court in previous decisions and rulings, to mask the fallacies of their position and their failure to explain or justify how or why will-say disclosure can be disconnected from ambush issues at trial.

The Real Issue

[52] Behind all of their tactics, however, the real issue remains unexplained and unjustified. That issue is the Plaintiffs' breach of the disclosure requirements for will-says, their repudiation of any

connection between will-say disclosure and ambush issues at trial, and the Plaintiffs' refusal to proceed with the presentation of their case (both in terms of retaining witnesses already called, and calling further witnesses) in accordance with past decisions and rulings of the Court that establish the will-say rules.

[53] There is no doubt that the Plaintiffs could have continued these actions and called any or all of their lay witnesses in accordance with the will-say rules they had earlier confirmed. In fact, that is how matters were proceeding until the Plaintiffs, after calling eight lay witnesses, rose in Court and "unequivocally" repudiated any connection between will-say disclosure and evidence at trial, accused the Court of excluding evidence in a way that was not disclosed in the Court's rulings, revealed that they were in breach of Court decisions and rulings regarding will-say disclosure, and then attempted to abort the trial by securing a mistrial. No one asked the Plaintiffs to take such drastic action. The Court declined to grant a mistrial and made it clear that the Plaintiffs could continue to retain and call their lay witnesses if they would do so in accordance with the will-say rules. The Plaintiffs declined to continue on that basis and now they have brought their case to a close without calling any further evidence at all.

[54] In 2004/2005, the Plaintiffs assured the Court and the other participants that they had produced will-says that met the disclosure standards and that, on the basis of those will-says, they had presented their case and wanted to proceed on this basis.

[55] In April 2007, the Plaintiffs rose in Court and announced, in effect, that on the basis of the same will-says they would not be able to state their case adequately if they were held to the will-say rules.

[56] The Plaintiffs' will-says have not changed between 2004/2005 and 2007 except that those portions dealing with broad self-government claims have been excluded because the Court has found that broad self-government claims were not encompassed by the pleadings. So all that has changed is that broad self-government has been removed as an issue from the claims. The Plaintiffs have not referred to this factor as having any bearing on their decision to repudiate the will-say rules and close their case. In fact, they have confirmed on the record that if the Court applies the will-say rules in the way it has applied them when dealing with ambush, this will not prevent the Plaintiffs from proving their case. And yet they have declined to retain or call lay witnesses on the basis of those rules.

[57] In September, 2007 the Plaintiffs declined to provide the reassurances of compliance ordered by the Court and retain lay witnesses already called, or call new lay witnesses, in accordance with the will-say rules which, back in 2004/2005, they said had allowed them to present their case in the way they wanted to proceed. The September 2007 decision has now been quickly followed in January 2008 by a decision by the Plaintiffs to close their case.

[58] At no time have the Plaintiffs offered an explanation as to how, or why, if the Plaintiffs had wanted to present the case outlined in their pleadings to the Court, they could not have done so on

the basis of will-says which, as they assured the Court and the other participants in 2004/2005, presented their case in the way they wanted to proceed.

[59] In the absence of any such explanation, and as a result of other inconsistencies, obstruction and ambiguities referred to elsewhere, the Court cannot accept the reasons put forward by the Plaintiffs for closing their case at this time as either an explanation or substantiation for such a decision.

Summary

[60] On the basis of what the Plaintiffs have revealed or stated before the Court to date on the issue of will-says and their role in these proceedings, as well as what the Plaintiffs have refused to explain or reveal, the decision by the Plaintiffs to close their case at this point and pursue an appeal to the Federal Court of Appeal leads to the following conclusions and findings:

a. The Plaintiffs are in breach of Court decisions and orders to produce standard-compliant will-says for their lay witnesses, and they are also in breach of their own representations to the Court and the other participants that they have done so. These breaches follow previous breaches of Court orders and decisions dealing with will-says;

b. The Plaintiffs have repudiated the will-say rules under which they were allowed (following their breaches of Court orders) to bring forward their lay witnesses, which

repudiation is also a breach of their former representations to the Court and the other participants that they were working under the rules and had "presented their case through the service of will-say statements … in accordance with the way in which the Court has permitted the Plaintiffs to present their case, and we want to proceed on that basis … ." The closure of their case comes at a time when they have said, on the record, that "unequivocally … the Plaintiffs do not understand nor do they accept the use of will-says at trial … to exclude relevant, admissible evidence called by either party" and that "the acceptance of a standard of will-says in pre-trial disclosure and the Plaintiffs' efforts to comply with that standard is … unrelated to the admissibility of evidence at trial";

c. The Plaintiffs have refused to come forward with any solution to their own breaches that will allow them to proceed in a way consistent with the will-say rules established for these proceedings, and they have obstructed the Court's attempts to find a solution that will allow them to preserve and call all of their lay evidence in a way that is consistent with Court decisions and rulings;

d. The Plaintiffs have declined to accept further concessions from the Court that, notwithstanding their breaches of Court orders and their own representations regarding compliance with will-say disclosure requirements, they both retain witnesses already called, and call future lay witnesses, on the basis that what is

actually disclosed in a will-say be treated as disclosure in accordance with the Court-defined standards for purposes of preparation and cross-examination by the other side;

e. Notwithstanding their repudiation of the will-say rules, the Plaintiffs have asserted that they can "prove" their case if the Court applies those rules as they have been applied in Court rulings on ambush;

f. According to the Plaintiffs, the only way the will-say rules might impact the presentation of the Plaintiffs' case is that "the exclusion of relevant evidence has compromised their ability to adequately state their case." This statement can only have meaning for the eight lay witnesses already called ("has compromised") because the Court has not heard future witnesses, has made no rulings concerning the evidence of future witnesses, and the Crown has raised no objection to the evidence of future witnesses, so that the impact of the will-say rules upon the evidence of future lay witnesses and the way that any sustainable objections might impact the Plaintiffs' ability to adequately state their case (whatever that might mean) is entirely unknown and unsubstantiated;

g. The Plaintiffs have declined to explain or substantiate what "relevant evidence" may have been excluded that may have "compromised their ability to adequately state their case even though they can still "prove" their case, and they have failed to explain or substantiate the relationship, in the context of these proceedings, between stating their

case and proving their case. If what they mean is that, as a result of the Court's ambush rulings to date, some relevant evidence has been excluded, they have (after being asked to do so) failed to explain or substantiate what that relevant evidence might be or how it could impact the outcome of these proceedings in the context of the panoply of additional evidence the Plaintiffs have told the Court they also planned to introduce;

h. The Plaintiffs' decision to repudiate the will-say rules and not to proceed with the trial under those rules is made on the basis of an unexplained and unsubstantiated position that the rules have "compromised their ability to adequately state their case," even though they can prove their case under those rules. This unexplained and unsubstantiated "position" is inconsistent with the Plaintiffs' prior representations concerning the production of disclosure-compliant will-says and their assurance to the Court and the other participants that they had "presented their case through the service of will-say statements" and that they wanted to "proceed on that basis … .";

i. The inconsistencies in the Plaintiffs' different "positions" before the Court have been brought to the Plaintiffs' attention, but they have declined to explain or address them in any acceptable way. See, for example, my efforts in this regard at paragraph 424 of my reasons of June 19, 2007;

j. If the Plaintiffs had produced standard-compliant will-says that allowed them to present their case in January 2005, when they assured the Court and the other participants that they wanted to proceed on this basis, the Plaintiffs have offered no explanation or substantiation regarding how, in 2007/08, those same will-says could either prevent them from proving their case or from adequately stating their case (whatever that might mean), or why, if the will-say rules allowed them in January, 2005 to present their case in the way they wanted to present it, the situation could have changed in 2007/08 when the Plaintiffs were using the same will-says and made their decision to repudiate the will-say rules and to close their case. The Plaintiffs have declined to explain how the connection between will-say disclosure standards and evidence at trial, which the Plaintiffs now so "unequivocally" repudiate, could have any significance or impact upon their presenting their case to the Court if their January 7, 2005 statement were correct;

k. The Plaintiffs, in closing their case at this time, have left the Court with two contradictory positions and with no idea of which "position" can be connected to an underlying reality. In January 2005 they assured the Court that they had presented their case through their will-says and they wanted to proceed on that basis. In 2007 they have told the Court that the will-say rules will compromise their ability to adequately state their case, and that they "unequivocally" reject those rules;

l. The Plaintiffs have been asked to explain these discrepancies (as well as others). They have refused to provide any acceptable explanation, and now they have closed their case without having done so.

TIMING AND OTHER CONCESSIONS

[61] The Plaintiffs' decision to repudiate the will-say rules and to close their case must also be seen in the context in the extensive amount of time and other concessions they have received to ensure that they have had a full and fair opportunity to present their case before the Court.

[62] One of my first tasks as trial judge was to find a way to deal with the Plaintiffs' breach of Justice Hugessen's Pre-Trial Order of March 26, 2004 and their failure to produce will-says by the deadline set in that order.

[63] The Crown asked the Court to simply strike the Plaintiffs' lay witnesses and proceed to trial on the basis of the other evidence that includes the record of the first trial. The Plaintiffs were not helpful in their own response and came up with no "workable solution" to the problems that their breach had caused for the timing and conduct of the trial. As they did later at the trial, they simply insisted that the proceedings go ahead notwithstanding their own breaches of Court decisions.

[64] The Court rejected the approaches of both the Plaintiffs and the Crown and tried to move the proceedings along by:

a. Clearly setting out the synoptic standards for will-say disclosure; and

b. Giving the Plaintiffs the time they said they needed to produce will-says for the lay witnesses they wanted to call in accordance with those standards.

[65] The Plaintiffs later confirmed to the Court that they had produced will-says that met the standards set by the Court, and there has been nothing to substantiate that the Plaintiffs have been prevented from producing will-says that met the synoptic standards set by the Court for any lay witnesses they wanted to call;

[66] The *de bene esse* hearing for Ms. Florence Peshee in December, 2004 gave the Plaintiffs a full opportunity to see how will-says would come into play when ambush became an issue at trial. The Plaintiffs themselves utilized the general principles that connect will-say disclosure to evidence at trial and secured the exclusion of relevant evidence based upon a claim for ambush. They emphasized that proper notice was the issue and that it was important that "both sides" have proper notice.

[67] But the Peshee hearing is also important because the Court went out of its way to ensure that what took place there in terms of will-says and evidence was acceptable to all participants, including the Plaintiffs. The Court asked the Plaintiffs to check their will-says for any problems in light of what had been established at the Peshee hearing and to get back to the Court in a timely manner.

The Plaintiffs confirmed to the Court that they would do this. So the Plaintiffs were given another opportunity to review their will-says and get back to the Court with any problems.

[68] Following the Peshee hearing, the Plaintiffs confirmed to the Court and the other participants that they had presented their case through their will-say statements in the ways laid down by the Court, and they confirmed that they wanted to proceed with their actions on this basis.

[69] The first indication of a possible problem over will-says that the Court had was the Plaintiffs' allegations in their Bias Motion in 2005 that the Court had somehow colluded with the Crown to ensure that the Plaintiffs had not received the time they needed to produce their will-says. But there was no repudiation of the will-say rules or the connection between will-say disclosure and evidence at trial at that time. Given the actual record and what it revealed, the Plaintiffs' allegations of collusion were groundless, to say the least, and I have dealt with them at length elsewhere. But they are very revealing in other ways that do not favour the Plaintiffs:

a. They show that at the time when the Plaintiffs had reassured the Court and the other participants that they had produced will-says that complied with the disclosure standards, and that they wanted to proceed with the presentation of their case on this basis, they were also planning a groundless Bias Motion in which they would allege, *inter alia*, that the Court had colluded with the Crown to ensure that they did not have the time to produce the will-says that they needed;

b. They reveal that the Plaintiffs already knew that their representations before the Court concerning standard-compliant will-says were not correct, and that, instead of coming forward in the way the Court had asked at Peshee to resolve any such problems, the Plaintiffs decided to begin blaming the Court for creating problems that the Court could not possibly know about if their representations to the Court were true i.e. "[The will-says] comply with all the requirements, My Lord, that your Lordship indicated. In fact they go even further, they are extremely detailed."

So, in retrospect, the Bias Motion reveals that not only did the Plaintiffs know they had problems with will-say disclosure, they also knew those problems – particularly given what had happened at the Peshee hearing – could cause difficulties at trial. Yet instead of dealing with these problems in the way they had assured the Court they would, they left their own representations regarding compliance with the disclosure standards and their commitment to the rules on the record.

[70] As a result of what the Bias Motion revealed about the Plaintiffs' approach to these proceedings and their attitude towards the Court, I concluded that the legal process had, in fact, broken down and the Plaintiffs were simply subverting civil procedure in abusive and totally unacceptable ways. The Plaintiffs' response to the problem was to appoint new lead counsel and in July, 2005, Mr. Molstad and his immediate team from Parlee McLaws LLP entered the picture.

[71] The Plaintiffs then asked for significant amounts of additional time for their new lead counsel to come up to speed and review the whole file. Notwithstanding the fact that previous

counsel (Mr. Healey and Ms. Twinn) remained part of the team, and notwithstanding resistance from the Crown concerning the amount of time requested, the Court moved the commencement of the trial proper ahead to January 2007 in order to accommodate the Plaintiffs.

[72] The Plaintiffs' new counsel indicated that part of their review involved looking at the Plaintiffs' will-say statements. They indicated that they might even bring a motion to deal with the role and use of will-says at trial. So, obviously, this was an issue that was carefully reviewed by the Plaintiffs over a long period of time.

[73] As the date for the commencement of the trial began to loom again, the Court set a deadline for the bringing of any such motion and the Plaintiffs indicated they would not be bringing a motion about will-says and their role and use at trial.

[74] That decision, of course, was made against the background of what had transpired to that time, including the Court's telling the Plaintiffs at the Peshee hearing to review their will-says in light of what had happened at Peshee and to get back with any problems in a timely manner before the trial.

[75] But after being given a significant stretch of time to review their will-says and consider any problems and ways to deal with them, the Plaintiffs chose to leave things as they were and they brought all participants into trial on that basis.

[76] After calling eight witnesses at the trial, the Plaintiffs stood up and began the irregular initiative that became the Mistrial Motion. As part of that initiative they revealed in Court that they had not, in fact, produced will-says that meet the disclosure standards and that they "unequivocally" repudiated any connection between will-say disclosure and evidence at trial.

[77] Significantly, however, they tried to establish their new position on will-says as though their earlier representations before the Court on compliance and connection with evidence at trial just did not exist. No cogent explanation for the inconsistencies has been offered and the Court has been met with an obstructive refusal to deal with them when the Court asked for specifics and an explanation.

[78] As this background shows, the Plaintiffs have been given all the time they asked for to produce the will-says they needed to present their case before the Court. They have confirmed to the Court that this was done. They have been given additional time and encouragement following Peshee to review the situation on will-says again and to get back to the Court with any problems before trial. They have no excuse whatsoever for any deficiency in their will-say disclosure and for bringing all participants into trial with will-say problems unresolved.

[79] And after being given generous concessions of time and relief from their own breaches of Court orders, the Plaintiffs have now both repudiated the will-say rules and closed their case.

[80] Needless to say, any problems about will-says should have (and the Court was told had been) dealt with years ago. There has been nothing to stand in the way of the Plaintiffs complying

with the will-say disclosure requirements in the way that they once assured the Court they had complied. And if they had complied then there could be no problems at trial over ambush issues and no reason whatsoever why the Plaintiffs would need to attack and repudiate the will-say rules and, when that attack failed, close their case.

[81] Once again, the Plaintiffs' failure to offer the Court any cogent explanation for the problems that have arisen, given the time and the opportunities they have been given, renders their present reasons for closing their case entirely unsatisfactory and unsubstantiated.

THE OFFERED EXPLANATION

[82] The Plaintiffs have offered the following principal reason for closing their case at this time:

> Mr. Molstad: Now, My Lord, as the Court and all of the participants in these proceedings are aware, the plaintiffs recently attempted to appeal Your Lordship's rulings and orders of September 11th, 2007, August 9th, 2007 and June 19th, 2007 to the Federal Court of Appeal.
>
> The effect of these decisions are (*sic*), in our submission, unprecedented, as they – as you and the participants are aware, they strike the evidence from the record of eight witnesses who testified commencing January 30th, 2007, and ending April 25th, 2007, and they, of course, further prohibit the plaintiffs from calling 17 other lay witnesses. And as we believe the Court and the participants are aware, many of these witnesses are elders whose oral history, of course, will not be heard by this Court.
>
> We submit, My Lord, that the importance of oral history in a case involving Aboriginal title, Aboriginal rights, and treaty rights cannot be overstated. And as we have submitted previously in the Plaintiffs' response to the Court's direction of October 31st, 2007, which was submitted November 14, 2007, the Plaintiffs' respectful submission

> at that time was that the exclusion of all of the evidence already given by lay witnesses and elders and the September 11th, 2007, order prohibiting the plaintiffs from calling future lay witnesses and elders will prevent the plaintiffs from adducing relevant, probative, and corroborative evidence.
>
> This, of course, will have a detrimental affect on the plaintiffs' ability to prove their case. It will also, in our respectful submission, prevent the plaintiffs from adequately stating their case and, as we had submitted respectfully previously, will result in an unfair trial.

[83] For purposes of clarification, I think the Court is obliged to say that the reasons given by the Plaintiffs for closing their case at this point in the proceedings do not accord with the Court's understanding of what has happened to date and with what the record reveals.

[84] The Plaintiffs are now saying that the Court must simply accept as a given something that the Plaintiffs have refused to explain or substantiate, i.e. that the Court has somehow compromised their ability to adequately present the case they want to present before the Court. The Court has nothing before it to support such a position either in terms of consistent statements regarding the role and use of will-says at trial or any substantiation of the impact of Court decisions and rulings upon relevant evidence, but it has much before it to suggest that such a position cannot be accepted without a full explanation and substantiation. The Court has done nothing to prevent the Plaintiffs from presenting the case they assured the Court they wanted to present in accordance with the will-say rules. It is the Plaintiffs who have chosen not to present their case in accordance with those rules and who have now closed their case without substantiating any of their claims regarding impact. The Court's order of August 9, 2007 ordered the Plaintiffs, "subject to satisfying the Court concerning the compliance of their will-says as indicated" to "proceed to call their witnesses … ."

[85] The Plaintiffs are also leaving out of account that it was the Plaintiffs who made strenuous efforts to terminate the trial after they had called only eight witnesses based upon a mistrial initiative the basic premise of which was that it was unfair that their witnesses were only being allowed to say what the Plaintiffs had assured the Crown they would say. The Plaintiffs wanted the trial to end, but they could find no good reason to justify that result. And the reason they wanted it to end was, ostensibly at least, that their will-say disclosure was preventing them from presenting the case they wanted to present. When the Court ruled that there was no good reason to end the trial, the Plaintiffs went on to make it clear that they would not retain or call witnesses in accordance with the will-say rules.

Unprecedented

[86] There is no evidence before the Court that the "the effect of these decisions are (*sic*) … unprecedented … ." The Plaintiffs put forward a "position" which they make no attempt to substantiate, either factually, or in terms of legal precedent or principle.

[87] If there is some problem in the Court striking witnesses, then the Plaintiffs made no such argument on principal or authority in their PL20 response. The Plaintiffs were told what would happen to their witnesses if they did not provide the reassurances or compliance requested by the Court. The Plaintiffs represented to the Court and the other participants that "the Plaintiffs have properly responded to the matters raised in the Court's Consequential Reasons for Order and Order

dated August 9, 2007." So the only issue that the Plaintiffs placed before the Court, and that the Court had to decide on September 11, 2007 was whether the Plaintiffs had "properly responded" in accordance with their August 28, 2007 representation to that effect.

[88] As the Plaintiffs made clear in their August 28, 2007 letter, they were in agreement with moving forward on the basis of the Court's August 9, 2007 reasons and order because the Plaintiffs said they were "prepared to call their next lay witness when the trial resumes on September 4, 2007, and we seek the Court's direction in this regard."

[89] Had the Court decided that they had "properly responded," the Plaintiffs were obviously willing to proceed on the basis of the August 9, 2007 decision and the answers contained in their PL20 response. Having represented this position to the Court, and having made it clear that the Plaintiffs relied upon the adequacy of their own response, the Plaintiffs can hardly complain now that what happened was "unprecedented." They were told what was going to happen, they were advised of the inadequacies in their response, they were told to be careful, and they chose not to provide the response that would have satisfied "the Court concerning the compliance of their will-says … ." And this is because the Plaintiffs elected to stay with the positions they had stated earlier i.e. that all of their will-says were compliant with Court decisions and rulings (even though the Court has found they were not), and that they "unequivocally … do not understand nor do they accept the use of will-says at trial … to exclude relevant, admissible evidence" and that "the acceptance of a standard of will-says in pre-trial disclosure and the Plaintiffs' efforts to comply with that standard is … unrelated to the admissibility of evidence at trial."

[90] Instead of providing an overt rejection of the assurances of compliance the Court had ordered, they provided the semblance of an answer that they hoped would allow them to retain and call their witnesses but which would, at the same time, preserve their previous positions. That is why they represented in their August 28, 2007 letter that they had "properly responded." As the full context reveals, to the Plaintiffs, a proper response means one that preserves their repudiation of the will-say rules and which also allows them to retain their witnesses. They wanted to have it both ways. But the trouble with trying to have it both ways is that the result is inevitable if the Court is asking for something else entirely. And what the Court asked for was confirmation that the Plaintiffs had complied with the will-say disclosure requirements so that the actions could go forward in a way that was consistent with Court decisions and rulings on will-says. They were told what would happen if they did not provide that confirmation and they made their choice.

[91] The Plaintiffs appear to be saying now that it doesn't matter what they did that led to the striking of their witnesses, the Court just cannot strike witnesses. But they provide no rationale or authority for such a position. And as the Plaintiffs have clearly demonstrated, without the threat of extraordinary sanctions, they are quite prepared to go on defying and ignoring Court decisions, directions and rulings.

[92] In addition, there is indeed a precedent for striking witnesses that is highly germane to these proceedings, and it is one that the Plaintiffs are very familiar with. In 2004, the Court struck approximately 150 lay witnesses that the Plaintiffs said, at that time, they would be calling at trial

because of the Plaintiffs' failure to produce will-says for those witnesses in accordance with Justice Hugessen's Pre-Trial Order of March 26, 2004.. The Plaintiffs did not appeal the Court order that struck their proposed witnesses. Those witnesses had not given evidence. But the only reason that the Plaintiffs first eight witnesses were allowed to take the stand at the trial was because the Plaintiffs had represented to the Court and the other participants that standard-compliant will-says had been produced and served for those witnesses. The Plaintiffs cannot be allowed to breach Court orders, call witnesses on the basis of misrepresentations, and then retain those witnesses once it comes to light that breaches have occurred that would have prevented those witnesses being called in the first place. The Plaintiffs accused the Court of foreclosing on their ability to adequately state their case because the Court was using the will-say "as a legal ground for the exclusion of relevant admissible evidence." This statement was not correct but it revealed that the Plaintiffs had not, in the will-says for the eight witnesses already called, disclosed in accordance with the synoptic standards what the Plaintiffs now wanted to introduce as evidence to adequately state their case. They were confirming their own breach, which they then went on to confirm in other ways. And the Plaintiffs were first given a full opportunity to rectify those breaches and misrepresentations before the witnesses were struck, and they were fully warned of what would happen if they did not confirm that their witnesses had been called in accordance with the will-say rules. The election that was put to the Plaintiffs was an inevitable consequence of what had occurred in 2004. It was, in fact, a return to the position that existed in 2004 when all of the Plaintiffs' witnesses were struck because the Plaintiffs had breached a Court order concerning will-says. It must not be forgotten that the Court has been hearing two separate actions. Under T-66-86A, Sawridge Band has not called any witnesses. No evidence of theirs has been struck. Their lay witnesses merely reverted to the position

they were in in 2004 when they were struck for the first time pending the production of standard-compliant will-says. Sawridge said in their PL20 response that all of their will-says would be found to be deficient. So this automatically meant a reversion to the 2004 situation. It was only Tsuu T'ina First Nation who had called witnesses under T-66-86B who needed to confirm that disclosure had been compliant with Court decisions and rulings so that the evidentiary record could have remained intact.

[93] As regards witnesses not called, the Plaintiffs themselves, in their PL20 response, indicated that they were "also considering whether they intend to call all of the witnesses identified above." So all future witnesses remained proposed witnesses only and occupied the same status as witnesses struck in 2004 under Court orders that the Plaintiffs have not challenged. As in 2004, the Plaintiffs were given the opportunity to call witnesses for whom they had produced will-says that met the synoptic disclosure standards. But after telling the Court that all of their will-says were compliant with disclosure standards, as soon as they realized they would have to demonstrate the reality of this "position," they then said that the will-says for future witnesses would all be found deficient. And they did not take up the Court's concession to treat what was disclosed in accordance with the standards as compliant disclosure of what a witness would say. It would be entirely inconsistent if witnesses struck in 2004 for deficient disclosure could be called at trial in breach of Court orders and rulings compelling disclosure in accordance with the synoptic standards. In striking witnesses, the Court was merely acting in a way that was consistent with previous Court decisions and rulings and a process the Plaintiffs had long ago accepted.

Impact

[94] The Plaintiffs say that they have been prevented "from adducing relevant, probative, and corroborative evidence":

> This, of course, will have a detrimental effect on the plaintiffs' ability to prove their case. It will also, in our respectful submission, prevent the plaintiffs from adequately stating their case and, as we had submitted respectfully previously, will result in an unfair trial.

[95] There is no doubt that the Plaintiffs could have retained their lay witnesses by a simple confirmation of compliance with the will-say disclosure requirements in the way ordered by the Court. As there is no reason or excuse for the Plaintiffs to be in breach of those requirements, or for the Plaintiffs not to provide the confirmation ordered by the Court, the loss of any evidence is the sole responsibility of the Plaintiffs.

[96] The Plaintiffs have confirmed on the record that the will-say rules, and Court rulings on ambush that referred to will-says, would not prevent them from proving their case. They have repudiated the will-say rules on the sole ground that they "compromise" the Plaintiffs' ability to state their case, although they have neither explained this concept fully or substantiated it in the present context, and they have not explained the inconsistency with their earlier reassurance that they had presented their case in their will-says in accordance with the rules and wanted to proceed on that basis.

[97] So, in the end, the Plaintiffs chose not to provide the confirmations of compliance ordered by the Court on the basis of an unexplained and unsubstantiated assertion that the will-say rules compromised their ability to state their case, even though they did not prevent them from proving their case.

[98] When the Court directed the Plaintiffs on July 5, 2007 to explain why the Plaintiffs' will-says were deficient and why they did not allow the Plaintiffs to adequately state their case, the Plaintiffs refused to provide the explanation requested and denied the Court the opportunity to assess whether and to what extent this inconsistent assertion by the Plaintiffs might be true.

[99] In their refusal to either fully explain the concept in its applicability to the facts of this case, or substantiate its impact upon the Plaintiffs' ability to prove their case, the Plaintiffs have deliberately obstructed and denied the Court the opportunity to assess the impact of the will-say rules and the Court's rulings upon their ability to present their case before the Court. They cannot, therefore, legitimately offer, and expect the Court to now accept that there is some established ground for their decision not to retain and call their lay witnesses in accordance with the will-say rules, and then to close their case.

[100] In not retaining or calling witnesses in accordance with the will-say rules, and in closing their case, the Plaintiffs have removed all means of determining whether either the will-say rules, or the loss of their witnesses, can or will have any impact upon the Plaintiffs' ability to either prove or state their case. They merely assert, "of course," that it will have a "detrimental effect" upon their

ability to prove their case and will prevent them from adequately stating their case, whatever they may mean by that concept.

[101] But there is no "of course" about it. The Plaintiffs have lost their lay witnesses because they will not lead their evidence in accordance with the will-say rules. That was their choice. Having denied the Court the explanation and information it requested to assess how the will-say rules and Court rulings based upon them could have impacted the Plaintiffs' ability to state their case, the Plaintiffs have now deprived the Court of any opportunity to assess what impact the loss of their lay witnesses might have upon their ability to either prove or state their case.

[102] If the excluded oral history evidence has the importance that the Plaintiffs now ascribe to it, then it is implausible that they would elect to have their witnesses struck in a situation where, by their own account, compliance with the will-say rules would have allowed them to prove their case and all they had to do to retain or call any of their lay witnesses was confirm their own position and give the Court the assurances it needed concerning compliance. The Plaintiffs have not explained why they did not provide the Court with confirmation of their own "position" that they had met the disclosure requirements set by the Court in the way requested by the Court, and then both retain and call witnesses on that basis. Nor have they explained why will-say rules that allowed them to present the case they wanted to present in 2004/05, somehow compromised their ability to state their case at trial in 2007.

[103] As regards the eight witnesses already called, the provision of the assurances of compliance with previous decisions ordered by the Court would have preserved the evidentiary record intact and as it existed at that time. Rather than preserve that record intact, the Plaintiffs chose to preserve their "position" that there is no connection between will-says and evidence at trial, and their obviously untenable "position" that they had produced standard-compliant will-says for all of their witnesses. The choice was for the Plaintiffs to make.

[104] As regards future witnesses who were not called, the choice was, once again, entirely for the Plaintiffs to make. In this case, however, the Plaintiffs, after representing to the Court that all of their will-says were compliant, then went on, in their PL20 response, to inform the Court that "on the basis of previous Court rulings during trial excluding evidence, we expect that the will-say statements of all future lay witnesses will be found by the Court to be deficient." The Plaintiffs then said they intended to call various named witnesses but that they were "considering whether they intend to call all of the witnesses identified above." So there was no clear indication of who, or how many, of the named witnesses the Plaintiffs would eventually call, and there was certainly no indication that they would bring them forward on the basis of will-say compliance as the Court had ordered.

[105] The statement in their PL20 response that the Court would find their will-says deficient confirmed Mr. Molstad's earlier advice to the Court that the Plaintiffs' had produced will-says that were deficient in terms of the synoptic disclosure standards. However, paragraph 8 of the Court's August 9, 2007 order did not ask the Plaintiffs to confirm their breach and then call their witnesses

anyway. Paragraph 8 said that witnesses should be called on the basis of the Plaintiffs' representations of compliance with the will-say disclosure rules:

> 8. All future law witnesses that the Plaintiffs are presently authorized to call are struck and shall not be called unless and until the Plaintiffs demonstrate to the satisfaction of the Court prior to calling any such witnesses that the will-say for that witness is a disclosure of what that witness will say made in accordance with the standards set by the Court.

[106] All that this required the Plaintiffs to do was establish the truth of their own assertion that all of their will-says were standard-compliant. And standard-compliant as the Court (not the Plaintiffs) had defined compliance. So as soon as it became evident to the Plaintiffs that the Court was actually going to look at their future will-says to check whether their representations of compliance were correct, the Plaintiffs said that, if the Court did this, it would find all of the will-says deficient. No explanation was provided as to why the Court would find will-says deficient if the Plaintiffs' "position" on compliance was correct.

[107] But, more important, an acknowledgment of deficiency was not what paragraph 8 called for. Paragraph 8 asked for notification of witnesses who would be called on the basis of compliance. Compliance could be achieved in two ways. Either the will-says were actually compliant because when they were originally produced they set out what a witness would say in accordance with the standards (the Plaintiffs confirmed that none of their will-says did this), or they were compliant because (as the Court had allowed in order to assist the Plaintiffs to call all of their lay witnesses) what was set out in a will-say could be treated as disclosure in accordance with the standards for purposes of the Crown's preparation and cross-examination. The Plaintiffs did not confirm

compliance in this sense either. What the Plaintiffs did was to confirm deficiency and then add the following:

> However, we acknowledge that the Court's evidentiary rulings are binding on the Plaintiffs and that the will-say statements for each witness is therefore a disclosure of what that witness will be permitted to testify to.

[108] This was not the Plaintiffs taking the hand the Court has extended to them. It was a reiteration of the Plaintiffs' own mischaracterization of the Court's rulings that they had used as the basis for their Mistrial Motion. If the Court were to accept this as being compliance with paragraph 8, the Court would have to accept the Plaintiffs' mischaracterization of previous Court rulings that will-says have been used by the Court as a rule of evidence to confine "what witnesses will be permitted to testify to." The Court brought this problem in their response to the attention of the Plaintiffs but received no comfort or clarification.

[109] What a witness is "permitted to testify to" is not confined by what is disclosed in the will-say for that witness. A will-say will only come into play if the other side raises an objection based upon ambush. And even if such an objection is raised, the Plaintiffs can refer the Court anywhere in the record to show that real ambush, reasonably speaking, cannot have occurred.

[110] So this statement is, in fact, not an acceptance of the Court's helping hand, but rather a re-iteration of the Plaintiffs' previous unsubstantiated accusation that the Court has used will-says as an exclusionary rule to confine what a witness "will be permitted to say."

[111] The Court has ruled that a witness can say anything that is relevant to the pleadings. If ambush is not raised, then it does not matter whether it is referred to in the will-say for that witness.

[112] The Court could not accept such a statement as a response to what the Court has asked for in paragraph 8.

[113] And there was no mistaking the Plaintiffs intention here because, in the conference call on September 4, 2007 that preceded the oral hearing, the Court brought this very problem to the Plaintiffs' attention. First of all, the Court warned the Plaintiffs that their paragraph 8 response was non-responsive.

> I think I should indicate that the written response is not what paragraph 8 asked for. The Plaintiffs need to read paragraph 8 carefully and decide whether they can comply, because if they now bring witnesses forward in the wrong way, they must expect further costs consequences.

[114] In the same teleconference call, the Crown also told the Plaintiffs that "we view both paragraph 7 and 8 as not being compliant with your order … ."

[115] The Court then gave the Plaintiffs some of its preliminary concerns about their response to paragraph 8 and indicated how it would like the Plaintiffs to bring forward future witnesses and demonstrate how each will-say was compliant. The Court then came to specifics:

> The second significant opening statement the plaintiffs make is as follows (quoted):
>
> > "However, we acknowledge that the Court's evidentiary rulings are binding on the Plaintiffs and

> that the will-say statement for each witness is therefore a disclosure of what that witness will be permitted to testify to."
>
> Of course. But that is not what paragraph 8 deals with. What a witness will be permitted to testify to depends on a great many factors that the Court has set out in its rulings and will be decided on an objection-by-objection basis if and when objections are raised.
>
> Paragraph 8, on the other hand, says that – says that the plaintiffs, that before they call a future witness, the plaintiffs, because of their – their lack of sufficient response to assist the Court in understanding the contradictions of the past, the plaintiffs will have to demonstrate that the will-say for that witness complies with previous Court orders regarding standards and the representation I – these are not alternatives – that the plaintiffs have merely confirmed in their representations and assurances previously given by – by – by the plaintiffs to the Court that there has been compliance.
>
> So I guess I anticipate – I had anticipated that the plaintiffs would produce the relevant will-say and show how it complies with the standards and the assurances; i.e., we will now look at specific documents. We will no longer deal in generalities, and I anticipate that the plaintiffs will attempt to show me how each will-say discloses what a will – what a witness will say in accordance with the synoptic standards set by the Court.

[116] So, once again, the Plaintiffs had full notice of the deficiencies in their response. They also had an indication from the Court (albeit only in a rough, preliminary form) that their response was not sufficient and that they should be careful, and that the Court would like to see the Plaintiffs bring their witnesses forward in a way that would qualify them in accordance with prior Court decisions and rulings regarding will-say compliance.

[117] Yet the Plaintiffs heeded none of this. They refused the hand that was offered them and, once again, they wanted to have both ways. They wanted to bring future witnesses forward, acknowledging that their will-says were deficient, but in no way modifying their unequivocal repudiation of the will-say rules or accepting that what had been disclosed in a will-say in accordance with the disclosure rules was what the Crown could use for purposes of preparation for cross-examination.

[118] It was the Plaintiffs' choice. They certainly had enough forewarning and encouragement to proceed in accordance with the rules and to understand what was wrong with their PL20 reply.

[119] It was open to the Plaintiffs at all material times to both retain witnesses already called, and call any future witnesses that would help them, if they would respect the will-say rules. But they chose to reject those rules with the inevitable consequences that were spelled out to them in advance. Having been given a significant amount of help and advance notice as to why their PL20 response was inadequate, not to mention the Court's warnings to be careful, the Plaintiffs gave no indication that they really did want to comply and provide a response that would give the Court the reassurances on compliance it had ordered. In effect, they maintained their unequivocal repudiation of the will-say rules, and their position that they should proceed in breach of Court decisions and rulings – not to mention their own representations – that had formed the basis for calling their lay witnesses.

[120] As regards any future witnesses, there is no evidence before the Court that what they would have been able to say was relevant or admissible in any way, just as there is no evidence that the Crown would have challenged the evidence of future witnesses. The Court has made it clear in its rulings that it will only consider objections on an individual basis and it will not proceed with blanket exclusions based upon will-says.

[121] It is important to bear in mind that the result of the Mistrial Motion had no impact upon the Plaintiffs' ability to present their case. They faced costs consequences as a result of their abusive conduct, but the Court indicated that it wanted to hear the merits and simply asked the Plaintiffs to play by the rules. Playing by the rules would have had no effect upon the Plaintiffs' ability to adequately state or prove their case if their "position" on will-say compliance was correct. The Court merely asked them to provide confirmation of that position in a way that would preserve all evidence called and allow them to call any future witnesses they wanted to call. The Plaintiffs lost their witnesses because they refused to confirm, in the way requested by the Court, their own position on compliance as the Court wanted it confirmed so that the ambiguities in their "position" would be removed. When the Court imposed conditions 6, 7 and 8 of its August 9, 2007 order it did so on the representations of the Plaintiffs that all of their will-says were compliant. Those paragraphs were not meant to trick the Plaintiffs. They were a response to what the Plaintiffs had represented to the Court and simply asked them to confirm their own "position" in a way acceptable to the Court. The Plaintiffs were not asked to shoulder some new and onerous burden. All paragraph 7 did, in essence, was to ask the Plaintiffs to confirm that, if they had met the synoptic standards for will-say disclosure (as they had represented to the Court) then what was disclosed in accordance

with those standards was what a witness had been called to say for purposes of preparation and cross-examination by the Crown. Similarly, in relation to paragraph 8, the essence was that if all of the will-says met the synoptic standards (as the Plaintiffs said they did) then there would be no problem demonstrating this to the Court when each witness was called. The notice and assurances of compliance asked for by the Court merely required the Plaintiffs to confirm and/or demonstrate their own "position" on will-say disclosure compliance. But the Plaintiffs would not verify and/or demonstrate their own "position," even though they were told what the consequences would be if they refused to provide what the Court had requested. In fact, they contradicted their own position and said that "we expect that the will-say statements for the future lay witnesses will be found by the Court to be deficient," and did not provide the notification required.

[122] The Plaintiffs' PL20 response was revealing of their approach to taking up equivocal positions before the Court. Paragraph 7 of the Court's August 9, 2007 order was not really addressed at all, but the Plaintiffs showed no hesitation in saying that they expected that "the will-say statements for the future lay witnesses will be found by the Court to be deficient." Yet the Plaintiffs, in paragraph 26 of their recent response to the motions for enhanced costs brought by the Crown and the Interveners, refer to and rely upon the following exchange:

> THE COURT: Yes. Just – from what you said, just one point of clarification that I need to be absolutely certain on, Mr. Molstad. In your written submission you refer to two standards: the synoptic standard, which you say you complied with and, you know, for want of a better term, the comprehensive detail standard. Now, when you're referring to the synoptic standard, are you referring to the standards set by the Court in 2004? You are saying, those are the standards that we've complied with?
>
> MR. MOLSTAD: Yes.

> THE COURT: Right. Okay. This is not some separate synoptic standard that you think ought to have been applicable; you are saying we have complied with those standards as set by the Court?
>
> MR. MOLSTAD: Yes. That's correct.
>
> THE COURT: Thank you, Mr. Molstad.
>
> Transcript of July 24, 2007, 78:13 – 79:7. [Tab 21]

Any reasonable person reading this exchange would understand the Plaintiffs to be confirming that their will-says met the synoptic disclosure standards set by the Court in 2004. But if this is the case then the Plaintiffs could not have a problem in "adequately stating their case" because it means that the Crown could not sustain any objection based upon ambush. And so the Plaintiffs could have had no problem providing the reassurances in accordance with the Court's order of August 9, 2007. Also, if what this passage appears to reveal is true, why did Mr. Molstad confirm to the Court that there were will-says that did not disclose what a witness would say in accordance with the synoptic standards? And if this is what the Plaintiffs mean by complying with the synoptic standards, why have they kept trying to introduce the concept of "best efforts" into the picture? No plausible explanations have been offered on these inconsistencies and basic points of concern. The Plaintiffs' position before the court on these matters is equivocal and non-responsive.

[123] The Plaintiffs appear to see no problem in asserting that they have complied with the synoptic standards and, at the same time, asserting that the Court will find their will-says to be deficient if it looks at them against the synoptic standards.

[124] This is unacceptable. The Plaintiffs have simply insisted that they be allowed to proceed with fundamental inconsistencies and ambiguities on the record. They want to have it both ways.

[125] So although the Plaintiffs assert the importance of excluded oral history evidence in closing their case at this juncture, they have not explained to the Court why they refused to confirm will-say compliance and call those witnesses in accordance with their own "position." There was nothing to prevent them from retaining and calling lay witnesses in accordance with their own "position" on compliance if they had confirmed that position in the way ordered by the Court. They expressed no confusion about what the Court had ordered them to do. They simply refused to confirm or demonstrate compliance in the way requested by the Court or, in fact, in any other way. The lack of an explanation means there can be no cogency to their assertion that they are closing their case because the Court has simply prevented them from leading evidence they want to lead.

[126] The Plaintiffs' continuing "position," in the face of all evidence to the contrary, that all of their will-says meet the synoptic disclosure standards set by the Court is an affirmation of the threshold requirement that they must produce a will-say that meets the synoptic standards for each witness they call. The fallacy behind this "position" is that if the threshold requirement is met, then there can be no problem with a connection between disclosure standards and evidence at trial. In fact, if the threshold requirement is met, then the Plaintiffs cannot be constrained in leading evidence at trial in the ways they claim to have been constrained. They cannot have been "foreclosed" or "compromised" in their ability to adequately state their case, let alone to prove their case. But, once again, instead of confronting this fallacy when it was pointed out to them, they have

simply insisted that they must be allowed by the Court to have it both ways: they insist they have met the synoptic disclosure standards but, at the same time, they insist they have been compromised in their ability to make their case because the Court has excluded evidence not disclosed in accordance with those standards. The Plaintiffs are aware of this fallacy because, as soon as it was pointed out to them, they shifted ground and accused the Court of using a "comprehensive and detailed" standard in its rulings on ambush in order to exclude their evidence. This serious accusation that the Court was doing something not declared and revealed in its rulings in order to ensure that relevant evidence was excluded, has been dealt with in the most recent costs motion brought by the Crown and the Interveners. But it is revealing of the Plaintiffs' approach to these actions that, in order to avoid the fallacies of their own "position," they feel it appropriate to simply accuse the Court of doing something clandestine and undeclared, without any attempt to substantiate such an accusation. Even now they have closed their case without providing an explanation for such an unsubstantiated accusation, and they expect their assertions concerning impact to be accepted on an "of course" basis.

[127] In the end, the Plaintiffs have simply refused to conduct these actions on the basis of will-say rules that they earlier confirmed and used to their own advantage at trial. They have even elected to have their lay witnesses struck rather than retain or call them on the basis of those rules. This was a consequence the Court encouraged them to avoid by offering a way around the problem and by asking them to be careful in the way they responded to the Court's August 9, 2007 order. But this was all to no avail. The Plaintiffs opted to continue their breach of the disclosure standards and their repudiation of the will-say rules, even though, instead of making this choice clear, they

professed that their PL20 reply "properly responded to the matters raised in the Court's Consequential Reasons for Order and Order dated August 9, 2007."

[128] A proper response is not, of course, necessarily a response that the Court asked for or ordered. In this context it appears to mean a response that preserves the Plaintiffs' position on disclosure compliance and repudiation of any connection between will-say disclosure and evidence at trial.

[129] But what is clear is that the Plaintiffs' PL20 response did not provide the confirmation and the assurances the Court had ordered the Plaintiffs to provide so that they could retain and call their lay witnesses.

[130] At the end of the day, the Plaintiffs chose to have their witnesses struck rather than accept the will-say rules. That was their choice to make. But is casts a significant light on the decision they have now made to close their case without calling any further evidence. The Plaintiffs have available to them, and have now refused to call, a vast array of evidence that includes, but is not limited to, read-ins from the transcripts of discoveries held before the first trial of these actions, read-ins from the transcripts of discoveries for the re-trial, expert evidence, and evidence from the first trial of these proceedings.

[131] Following close upon the heals of their decision to repudiate the will-say rules for their lay witnesses, the closing of their case means that the Plaintiffs have now chosen to discontinue these

proceedings if the will-say rules are to apply to their lay witnesses. And that decision is problematic for a variety of reasons, not the least of which is the Plaintiffs' assurance to the Court and the other participants that they accepted the will-say rules and wanted to proceed on that basis. It must also, in the absence of a full and cogent explanation and substantiation, render the reasons they offer to the Court for closing their case unconvincing and unverified.

[132] The Plaintiffs have made various attempts to avoid the consequences of Court decisions on will-says and to resile from former positions before the Court. The most important are the Bias Motion and the Mistrial Motion. They have now reached a stage when, rather than continue the trial on the basis of their earlier representations, they have closed the proceedings in order to seek a re-trial before the Court of Appeal.

[133] When the whole context is reviewed, it is clear the Plaintiffs have concluded they do not wish to conduct these actions in accordance with the will-say rules and the representations and assurances they made earlier before the Court that they confirmed those rules and wanted to proceed on that basis. This also means that the reasons they now offer for closing their case, in the absence of a cogent explanation and substantiation, cannot be accepted by the Court.

[134] The Plaintiffs' ability to prove their case, or even their interest in doing so, has been a continuing concern since at lease the Mistrial Motion in April 2007 when the Plaintiffs claimed that the Court's rulings on ambush had "foreclosed the Plaintiffs' opportunity to adequately state their case." By the time of their PL20 response, the Plaintiffs were saying that the exclusion of relevant

evidence as a result of the Court's rulings had "compromised their ability to adequately state their case."

[135] And now, in closing their case, they say that the exclusion of their lay witnesses "will have a detrimental effect on the Plaintiffs' ability to prove their case" and it will also "prevent the plaintiffs from adequately stating their case … ."

[136] It must not be forgotten that it was the Plaintiffs who first raised impact issues before the Court when they complained that the Court's rulings, based upon the will-say rules, were somehow compromising their ability to present their case before the Court. But when the Court has asked the Plaintiffs to explain inconsistencies and demonstrate or substantiate positions they have taken on this issue they have simply refused to cooperate and have, in fact, defied a specific Court directive that ordered them to provide information the Court needed to assess their assertions regarding the impact of Court rulings upon evidence and the Plaintiffs' ability to present their case before the Court. The Plaintiffs' assertions on impact cannot be taken as established when they have failed to provide explanations when directed to do so and have obstructed the Court's attempts at assessing impact.

[137] In closing their case, the Plaintiffs have still not done what the Court asked of them in this regard, and they have chosen to leave inconsistencies unexplained and to continue their reliance upon assertions and positions that they are not prepared to substantiate in any way.

[138] There is nothing before this Court to substantiate or verify any position the Plaintiffs have taken on the impact of Court rulings, whether with regard to the ability of the Plaintiffs to prove their case or to state their case. In fact, closing their case at this juncture simply avoids having to provide the substantiation on impact that the Court has asked for in the past. Without the ability to objectively assess the Plaintiffs' recent decision to close their case, that decision is just as consistent with other objectives the Plaintiffs have indicated from time to time (for example, their desire to avoid the impact of Court decisions and rulings as demonstrated in the Bias Motion and the Mistrial Motion, and to start again without the constraints imposed by those decisions and rulings) as it is with the narrow evidentiary issues they have cited as a rationale.

[139] Without a full explanation on the inconsistencies and obstruction that have characterized the Plaintiffs' position on will-says, and without an account of how the evidence of lay witnesses will impact the Plaintiffs' ability to either prove or state their case in the context of the panoply of evidence the Plaintiffs informed the Court they planned to call, the Court is left with nothing but another unsubstantiated "position" on impact that the Plaintiffs have taken up in order to justify their closing their case at this point to seek a re-trial in circumstances where they have received extensive time and other concessions so that the kinds of problems this trial has faced did not occur.

[140] What the Court is left with in the end is yet another unexplained and unsubstantiated "position" in proceedings where inconsistency and a lack of substantiation by the Plaintiffs have been a major procedural problem, and where the Court has had to order the Plaintiffs to desist from

such conduct and has awarded enhanced costs against them to encourage them to do so. It is just more of the same.

[141] The Plaintiffs have made it clear to the Court that when they assert a "position" before the Court, that position need not necessarily be something that can be reconciled with the record or with other positions the Plaintiffs have taken. A few examples relevant to the will-say issue will illustrate the difficulties that this causes for the Court in assessing their latest decision to close their case and the reasons offered for doing so:

a. Counsel for the Plaintiffs (Mr. Healey confirmed by Ms. Twinn) have sworn under oath as witnesses for the Plaintiffs that the trial judge has "engaged in private conversations with the Crown to schedule a summary motion filed by the Crown designed to defeat the central allegation raised by the Plaintiffs in their pleadings" and that the trial judge somehow colluded with the Crown to ensure that the Plaintiffs did not have the time they needed to complete their will-says: "he was putting pressure on us and he knew he was putting pressure on us, and he knew that you and opposite counsel were putting pressure on us."

   The reality check against the record shows that the Plaintiffs were given the time they asked for to complete their will-says and that they became quite irate at Ms. Eberts of NWAC when she suggested they might need more time to complete their will-says. They insisted on the December 14, 2004 deadline.

The explanation offered for this gross discrepancy was that it was all inadvertent and unintended.

b. In 2004, the Plaintiffs assured the Court and the other participants that their will-says "comply with all the requirements, My Lord, that your Lordship indicated. In fact they go even further, they are extremely detailed."

At trial in 2007 Plaintiffs' counsel confirmed to the Court that some of the Plaintiffs' will-says he had seen were "certainly deficient in terms of what witnesses are going to say" when measured against the synoptic standards.

No explanation has been offered for this inconsistency even after it was brought to the Plaintiffs' attention.

c. At the *de bene esse* hearing for Ms. Florence Peshee in December, 2004 the Plaintiffs urged upon the Court, and secured the Court's support for the position that when it came to the evidence of "both sides" at trial, when ambush became an issue then the question for the Court is "Does the other side have notice of what it is that you're going to be dealing with?" and the answer to this question "is guided by the standard in the will-say. And it's important that both sides have notice, the same kind of notice."

At trial in 2007, the Plaintiffs have said that "unequivocally" they repudiate this position. Their new position is that they do not "understand … nor accept the use of will-says at trial to exclude relevant admissible evidence" and that "the acceptance of a standard of will-says in pre-trial disclosure … is … unrelated to the admissibility of evidence at trial."

The explanation offered is that, at Peshee, the Court was only dealing with the exclusion of undisclosed oral history evidence by an Intervener witness and the Plaintiffs' general remarks were only meant to refer to Mr. Faulds who, on that day, was representing NSIAA.

This revisionist account cannot even be squared with the syntactical meanings of the plain language that was used on that day. And there is no explanation as to why the Plaintiffs do not "understand" the connection;

d. In January 2005, the Plaintiffs assured the Court and the other participants that they were working under the will-say rules and had "presented their case through the service of will-say statements" and that they wanted "to proceed on that basis and have my friends comply in the same way."

At trial in 2007, the Plaintiffs have repudiated the will-say rules, revealed that they are in breach of the disclosure requirements, and claim that if they are held to the will-say rules then they cannot "adequately state their case."

No explanation is offered for this change of position.

e. At trial in 2007, the Plaintiffs have taken the "position" that all of their will-says meet the disclosure requirements set out in Court decisions and rulings. However, at the same time their legal counsel has advised the court that he has examined the will-says against the synoptic disclosure standards and he has confirmed that some of them are certainly deficient when it comes to revealing what witnesses will say in accordance with those standards.

No explanation has been provided for this inconsistency even after the Court specifically directed the Plaintiffs to explain.

The Plaintiffs have also revealed in other ways that their will-says are deficient against the synoptic standards. They took a "position" before the Court that all of their will-says met the standards of disclosure set by the Court but, as soon as the Court indicated it would look at will-says to determine whether this was so, the Plaintiffs said that, if the Court were to do this, "the will-say statements for the future lay witnesses will be found by the Court to be deficient."

f. At trial in 2007, the Plaintiffs accused the Court of using the will-says "as a legal ground for the exclusion of relevant admissible evidence."

The record clearly shows that the Court has said "The will-says are not, *per se*, a legal ground for the exclusion of evidence" and the Court has certainly not used them as such.

The Plaintiffs have made no attempt to explain their accusations or to substantiate them against the actual record. Their accusation is nothing more than the unsupported gainsaying of what the Court has said it has done and what it has actually done;

g. The Plaintiffs have accused the Court at trial of using a "comprehensive and detailed" standard for will-say disclosure in order to exclude their evidence.

No attempt has been made to substantiate this accusation against the record. It remains an unsupported accusation that the Court is doing something it has not disclosed it is doing, and it is completely at odds with what the record shows the Court is doing in its ambush rulings;

h. The Plaintiffs have said at trial that when they say they have fulfilled the synoptic disclosure requirements for will-says, they mean that they have made disclosure in accordance with the standards set by the Court in 2004.

The Plaintiffs have also said at trial that their position is that "their obligation was to provide a synopsis of the witnesses' evidence using best efforts to prepare the will-says in accordance with this standard, and that this obligation was met." This means, say the Plaintiffs, that if a will-say does not provide complete disclosure, they have still met the synoptic standards set by the Court.

As a consequence, it is not clear to the Court what the Plaintiffs mean on any particular occasion when they say they have met the synoptic standards. Their PL20 response seems to suggest that they only mean they have done their best and cannot be held responsible for gaps in disclosure that do not meet the synoptic standards. This has been clearly ruled out by the Court. But in the passage I referred to earlier at paragraph 122 of these reasons, the Plaintiffs are clearly reassuring the court that they are referring to what the Court means by compliance with the synoptic standards, and that they do not mean "some separate synoptic standard that [they] think ought to have been applicable … ." These inconsistencies mean that the Court is deprived of the means of knowing what the Plaintiffs really mean on this crucial issue.

[142] This disturbing record of inconsistency, equivocation and the taking of unsubstantiated positions at odds with the transcript leads me to the conclusion that there is something so wrong with the Plaintiffs' will-say disclosure that they cannot present the case they have now decided they want to present, unless will-say disclosure is totally disconnected form ambush rulings at trial. This is why, after calling eight witnesses, they attempted to terminate the trial by securing a mistrial so that they could start again, and why they have allowed their lay witnesses to be struck rather than call them in accordance with the will-say rules. The Court's extending a further opportunity to them to both retain and call all of their lay witnesses was not accepted because they only want to proceed if there is no connection between will-says and evidence at trial. This explains their PL20 response and their almost immediately subsequent decision to close their case.

[143] But the level of inconsistency and equivocation evident in the Plaintiffs' conduct does not mean they have been treated unfairly. They have been given all the time they asked for and every encouragement to avoid the problems of inadequate will-says. As they have shown, the Plaintiffs have wanted for some time to terminate this trial so that they can start again free of the constraints they have found themselves under as a result of their will-says. They have now decided that the only way to achieve this is to terminate their case and attempt to secure a re-trial. But the predicament they find themselves in is of their own making. They drafted the will-says. They assured the Court and the other participants that they had met the standards of disclosure and wanted to continue on that basis. They decided not to bring any problems in will-say disclosure before the Court in a timely manner before the trial began.

[144] The Plaintiffs have obstructed the Court's efforts to get at the source of the problem. That obstruction, and the record of inconsistency and equivocation that goes with it, means that the Court cannot accept the rationale now put forward by the Plaintiffs to justify the closing of their case without further explanation of the inconsistencies, substantiation of the impact allegations, and an account of what has transpired in this case to make the Plaintiffs' will-says the basis for their decision to close their case.

[145] Normal assumptions are not helpful in this context. Litigants do not normally, after calling eight witnesses, attempt to terminate the trial on the basis that they cannot adequately state their case because their witnesses are only being allowed to say what they have assured the other side they will say. In the normal course, litigants do not elect to lose their lay witnesses because they refuse to accept will-say rules that merely require them to confirm a "position" on compliance that they have taken before the Court, and the acceptance of which would not, according to the Plaintiffs in this case, prevent them from proving their case. And in the normal course, litigants follow court directives aimed at providing the facts and information the Court needs to assess for itself the impact of its rulings. And in the normal course, there is no first trial record available, or vast amounts of documentary and other evidence available that the Plaintiffs in this case informed the Court they would be calling in addition to new lay witnesses who had not testified at the first trial.

[146] The Plaintiffs cannot simply withhold relevant facts and information that the Court needs to make its own assessment and then expect the Court to accept the Plaintiffs' "position" on why they

have now closed their case and the impact that Court rulings have had on the ability of the Plaintiffs to present their case before the Court.

[147] Quite apart from the fact that the loss of lay witnesses was an election made by the Plaintiffs, in closing their case at this point the Plaintiffs have foreclosed on any opportunity that any Court will have to either gauge the impact of the will-say rules or the loss of witnesses on the Plaintiffs' ability to either prove or state their case in light of all of the other evidence available to the Plaintiffs and which they said they intended to call. They have closed their case on the basis of an assertion that they have not substantiated in any way, and in a context where their inconsistent and obstructive conduct has been aimed at preventing any real objective assessment by the Court.

[148] They assert a "detrimental effect" but they provide no means with which the Court can gauge what that term means in the context of these proceedings. Past experience on "positions" taken by the Plaintiffs suggests that the meaning of such a term cannot be accepted as a given.

[149] Even the Plaintiffs themselves have emphasized the impossibility of determining what impact the loss of their lay witnesses can have without a full trial, and without the Court's hearing all of the other evidence that the Plaintiffs have said they intend to call. Following the loss of their lay witnesses, the Court asked the Plaintiffs for an impact assessment and, in their response of November 14, 2007, the Plaintiffs advised, *inter alia*, as follows:

> In response to this direction, the Plaintiffs respectfully submit as follows:

a. The Plaintiffs' response is under compulsion of the Direction of the Court and it is not to be taken as an acknowledgement by the Plaintiffs that the question is a proper one for a Trial Judge to be asking the Plaintiffs. The Plaintiffs do not waive and indeed reserve their right to raise the matter of whether this is a proper question to be put to the Plaintiffs in any future appeal or appeals in these proceedings.

b. The Plaintiffs' position is that the exclusion of all of the evidence already given by lay witnesses and Elders and the September 11, 2007 Order prohibiting the Plaintiffs from calling future lay witnesses and Elders will prevent the Plaintiffs from adducing relevant, probative and corroborative evidence. This will have a detrimental effect on the Plaintiffs' ability to prove their case. It will also prevent the Plaintiffs from adequately stating their case and will result in an unfair trial.

c. The Plaintiffs do not concede that they cannot prove their case. However, it should be noted that proof of their case will depend upon, *inter alia*, evidence that will be admitted during the balance of the trial and the weight that will be attributed to this evidence by the Trial Judge.

d. The Plaintiffs at this time have no way of evaluating what evidence will be admitted or excluded in the remainder of the trial, nor how the Trial Judge will ultimately assess the evidence presented at the trial.

e. The Plaintiffs will continue in their efforts to lead relevant, probative evidence in relation to the issues in dispute and at the conclusion of their case it is possible that there will be sufficient evidence before the Trial Judge to permit the Court to grant the relief that is being claimed by the Plaintiffs.

[Emphasis added]

[150] If the Plaintiffs have no way of evaluating these matters then neither does the Court. In other words, the meaning of "detrimental effect" cannot be known, and it cannot be substantiated, without a full trial and the hearing of all the evidence. There is no way to assess the impact of the loss of lay witnesses unless and until the other evidence is heard. In closing their case on January 7, 2008, the

Plaintiffs have provided no further information that would allow the Court to assess these impact issues. The Plaintiffs have now, after electing not to call their lay witnesses in accordance with the will-say rules, simply abandoned these actions at a time and in a way that prevents any impact assessment by the Court. They ascribe blame for the exclusion of evidence to the Court, but the Court has only excluded evidence in accordance with the will-say rules (which the Plaintiffs have assured the Court would allow them to present their case). It is the Plaintiffs who have elected not to proceed with these actions on the basis of rules they said would allow them to present their case before the Court, and in the manner in which they once assured the Court they wanted to proceed.

[151] It is important to remember that the Court has been hearing two separate actions. The only witnesses actually called by the Plaintiffs have been in relation to T-66-86B. No witnesses have been called on T-66-86A so that it is not possible to know, for example, if the will-say rules had applied, whether those further witnesses would have had anything to contribute, or even if they had anything to contribute without the rules. In their PL20 response, the Plaintiffs advised the Court as follows regarding <u>all</u> of their future lay witnesses:

> The Plaintiffs are also considering whether they intend to call all of the witnesses identified above. To date, nothing has been decided in this regard.

So there is now no way of knowing which, or how many, of the possible remaining lay witnesses would actually have been called. It was still under consideration. There is also no way of assessing what impact any evidence provided by those witnesses might have had upon the Plaintiffs' ability to either prove or state their case in the context of a full evidentiary record.

[152] In addition, in their PL20 response, the Plaintiffs also advised the Court as follows:

> The Plaintiffs also reserve the right to seek leave of the Court to call lay witnesses in reply or to subpoena the attendance of a witness adverse in interest. The Plaintiffs may also seek leave of the Court to call evidence of recent events or newly discovered evidence not previously disclosed in a will-say statement.

[153] In other words, the Plaintiffs acknowledged that the will-say rules did not exclude other areas of relevant evidence that may not have been disclosed in will-says when they were originally produced.

[154] The impact of any of this, and the meaning of the Plaintiffs' latest position on "detrimental effect," simply cannot be known without a full trial and without the Court's hearing the full panoply of evidence that the Plaintiffs said, on the record, they intended to call. The Plaintiffs' stated reasons for closing their case at this time cannot be substantiated from the record and they have not been explained against the background of inconsistency and obstruction that has preceded the decision to close their case.

[155] The important point, however, is that the Plaintiffs have only ever been prevented form retaining or calling lay witnesses in breach of the will-say rules. All witnesses and evidence already called were retainable by a simple confirmation of the Plaintiffs' own stated "position" on compliance in the way ordered by the Court, and all future witnesses could have been called by the Plaintiffs simply providing notice that they would be brought forward on the basis that what their will-says disclosed in accordance with the synoptic standards could be taken as disclosure of what they would say for purposes of preparation and examination by the "other side."

[156] There is no full explanation or objective, independent means that would allow the Court to assess the impact that the loss of the Plaintiffs' lay witnesses might have upon their ability to present their case before the Court. The Plaintiffs have taken up too many inconsistent positions and have denied the Court the facts and the explanations it needs to assess this latest assertion. I have tried to get to the bottom of these inconsistencies and have the Plaintiffs provide information and explanations that will allow me to assess the reality that lies beneath. The Plaintiffs have refused to cooperate. The Plaintiffs' decision to abandon these actions now means that no such reality-based assessment can ever be made. And the Plaintiffs cannot say that the Court has deprived them of the "opportunity" to retain or call any lay witnesses. The Court has simply indicated that, when they call their lay witnesses, they must do so in accordance with the will-say rules established in Court decisions and rulings and both affirmed by the Plaintiffs and used by the Plaintiffs to their own advantage. The Plaintiffs have refused to call their lay witnesses on that basis.

[157] In their eagerness to avoid the jurisdiction of this Court and to move to an appeal in a situation where they have simply refused to explain repeated inconsistencies, and have withheld information and explanations needed to assess their various inconsistent positions over will-says, the Plaintiffs have also deprived themselves of the means of establishing a reliable and verifiable justification for closing their case at this time.

GROUNDS OF APPEAL

Apprehension of Bias

[158] The Plaintiffs' grounds of appeal are no business of this Court. But in closing their case at this time the Plaintiffs have placed various statements on the record to which I am obliged to respond lest the Court's position is misunderstood. In fact, the Plaintiffs' decision to close their case and to proceed with an appeal re-introduces into these proceedings issues I hoped would take on less significance as the actions progressed and the Court heard the full range of evidence that the Plaintiffs said they intended to call. This cannot now occur.

[159] Plaintiffs' counsel has informed me that the Plaintiffs' plan to appeal "numerous rulings made since your assignment as trial judge … ." I was appointed as trial judge in 2004 and I do not know what the Plaintiffs mean by "rulings" in this context. However, I am also informed that

> the grounds of appeal will include a submission that Your Lordship's conduct since your assignment as trial judge would raise a reasonable apprehension of bias in the mind of a reasonable right-minded and informed observer.

[160] I have not been told what is included in the term "conduct," but it would appear that the Plaintiffs will be making submissions that go all the way back to the time of my "assignment as trial judge." This is indeed an extensive record that includes many decisions and rulings, some of which have already been appealed. However, it also raises dormant issues and problems that will now have

to be dragged back into the light of day and which now oblige me to address matters I had hoped could be left until after the determination of the merits of these actions.

Avoidance of Trial Judge not a Necessity

[161] The Plaintiffs' decision to use apprehended bias as a ground of appeal, but not to bring any such allegations before me, is a considered tactical choice. During the time of their discontent over the Mistrial Motion the Plaintiffs mentioned possible bias allegations and, for scheduling purposes, I raised with them the issue of whether they would be bringing any such allegations before me. After considering the matter, the Plaintiffs informed me that they did not wish to bring any such allegations before me but reserved their right to raise them on appeal.

[162] In other words, the Plaintiffs have made a deliberate tactical decision not to allow the trial judge any knowledge of the grounds for their apprehended bias allegations, or any opportunity to review and respond to those grounds.

[163] A decision not to raise apprehended bias allegations with the trial judge, but to save them for appeal, is problematic in any proceeding, but it is particularly so in the context of these actions.

Extensive Record

[164] These proceedings go back many years, and even my own limited involvement as trial judge now covers an extensive record extending over a three-year period. A knowledge of that full record and of the particular procedural difficulties encountered in these actions, is essential in order to deal appropriately with the full context of any allegations of apprehended bias. However, that is not the only difficulty that arises as a result of the Plaintiffs' decision to proceed on appeal in the manner they have chosen.

Conduct Issues

[165] These proceedings, since the time of my involvement, have at times been extremely vexed and difficult. In addition to anything else, there have been conduct issues on the part of Plaintiffs' counsel that the Court has had to deal with and which are still outstanding. Those conduct issues were so severe that, as I found in the Plaintiffs' Bias Motion, they subverted the whole legal process. A way forward was found by the Plaintiffs' appointing new lead counsel and by the Court making a deliberate decision to put conduct issues aside to be dealt with later so that the rights of the parties could be protected and the Court could hear the actions on their merits. However, those same conduct issues were waiting in the wings to be dealt with once the merits had been decided. Although the Plaintiffs have appointed new lead counsel, both of the Plaintiffs' former counsel involved in the conduct issues have remained members of the Plaintiffs' legal team and will, no doubt, be assisting with the appeal of these actions that the Plaintiffs have informed the Court they

intend to make. Now that apprehended bias has been re-introduced into these proceedings by way of appeal I think I am obliged to set out the ways in which those conduct issues have continued to plague the trial and how they must, inevitably, now come back into the proceedings in a highly material and problematic way.

Conduct Issues and the Process of the Trial

[166] The personal animus that, as a consequence of the Bias Motion, the Court found Mr. Healey in particular has directed at the Court in the past cannot be left out of account even though new lead counsel have been appointed. I have no complaints about the conduct of the Plaintiffs' present front-row team of Mr Molstad, Mr. Whitling, Mr. Poretti and Mr. Sharko, but they have been dependent upon Mr. Healey and Ms. Twinn for certain crucial aspects of their presentation, and the Plaintiffs' decision to, once again, mount an attack upon my conduct going all the way back to my appointment as trial judge means, inevitably, that the personal animus issues of the past cannot be left out of account, because Mr. Healey and Ms. Twinn were the counsel who had conduct of these actions until Mr. Molstad and his immediate team from Parlee McLaws LLP were appointed. They are also the counsel who had conduct of these actions when the Plaintiffs were ordered by the Court to provide will-says that met the disclosure standards set by the Court, and they were the counsel who, on behalf of the Plaintiffs, assured the Court that this had been done.

[167] The extent of Mr. Molstad's reliance upon Mr. Healey for his knowledge and interpretation of past events involving Mr. Healey and Ms. Twinn was disconcertingly demonstrated to the Court

during the course of the Mistrial Motion when Mr. Molstad placed Mr. Healey's present account of what transpired at the Peshee hearing before the Court but, rather than call Mr. Healey as a witness, reported Mr. Healey's account as an officer of the Court.

[168] Disagreement over what took place at the Peshee hearing, and what Mr. Healey now says he meant by what he said on behalf of the Plaintiffs at that hearing, has taken on a crucial significance for the Plaintiffs' whole position on the role and use of will-says at trial. The Plaintiffs have repeatedly re-argued the meaning and significance of the Peshee hearing. But Mr. Molstad, the Plaintiffs' present lead counsel, has revealed in a very telling way both who and what he is relying upon for the Plaintiffs' present interpretation of what they intended at the Peshee hearing. This is not meant as criticism of Mr. Molstad or his approach to these matters. The fact is that Mr. Healey is the only member of the Plaintiffs' legal team who can provide that information. I had to deal with the problems that this causes as part of my reasons of June 19, 2007 for the Mistrial Motion:

> **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. <u>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.</u>

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.

[169] So Mr. Healey and Ms. Twinn have remained heavily involved with the principal issue of dispute concerning the role and use of will-says at trial. They are not only supporting the Plaintiffs' present front-line team; Mr. Healey is actually putting on the record, through Mr. Molstad as an officer of the Court, his account of what he meant at the Peshee hearing by certain words. Yet Mr. Healey and Ms. Twinn have not offered themselves for cross-examination in any way. And, of course, it is obvious that the Plaintiffs must remain heavily dependent upon Mr. Healey and Ms. Twinn for knowledge of what was meant by words spoken and positions taken before the Court prior to the appointment of new lead counsel.

[170] Yet Mr. Healey and Ms. Twinn have been severely reprimanded by the Court for their conduct in the Bias Motion. In fact, Mr. Healey and Ms. Twinn were the architects of the Bias Motion. They swore the principal affidavits and prepared the written materials. As counsel they used themselves as witnesses to mount an attack on the Federal Court generally and upon the trial judge in particular. Mr. Shibley, who appeared in Court on behalf of the Plaintiffs to argue the Bias

Motion, informed the Court that he had not read the record himself but was dependent upon Mr. Healey and Ms. Twinn for his knowledge of what had transpired. Mr. Healey and Ms. Twinn still remain to be dealt with by the Court for their conduct as officers of the Court in the Bias Motion. And yet the Plaintiffs are using Mr. Healey as a source for what was intended at the Peshee hearing, and they have put his present account on the record as something that this Court, and any other Court, should rely upon. The Plaintiffs have decided to allege apprehended bias against the trial judge for conduct going back to my appointment and, quite apart from that, the Peshee hearing, and what transpired and was said at that hearing, will be highly material to any appeal the Plaintiffs make, because it was at the Peshee hearing that the Plaintiffs advocated the use of will-says to protect them against ambush, and will-says and the way they were originally produced are at the centre of the Plaintiffs' procedural dispute with the Crown that has brought the trial to a sudden halt.

[171] In this dispute over will-says, the Plaintiffs must, as they have already demonstrated to the Court, fall back on Mr. Healey because Mr. Molstad and his immediate team were not there when the will-says were drafted and the important reassurances of compliance were given and the rulings at Peshee were made in favour of the Plaintiffs. And Mr. Healey has not been examined under oath on what he now says about these matters, and Mr. Healey's conduct is under intense scrutiny, not only because of the personal animus he directed at the Court as part of the Bias Motion, but because it was Mr. Healey who had conduct of these actions as lead counsel for the Plaintiffs when matters central to the procedural dispute between the parties, and the Plaintiffs current position, were first brought before the Court. It was Mr. Healey, supported by Ms. Twinn, who assured the Court that the will-says produced by the Plaintiffs met (some even exceeded) the disclosure standards. It was

Mr. Healey who put forward the position at Peshee that the will-say standards were the guide to proper notice and ambush at trial. And it was Mr. Healey who told the Court and the other participants that the Plaintiffs wished to proceed to present their case as it had been presented in their will-says. So Mr. Healey and Ms. Twinn are very much at the heart of the representations and positions that have continued to plague these actions and that have now led the Plaintiffs to close their case without calling any further evidence. The Plaintiffs' decision to close their case at this point in the proceedings means, inevitably, that the full panoply of evidence available to the Plaintiffs cannot be brought to bear upon, or place in perspective, the difficulties that have arisen as a result of the controversy over the will-say issue, so that the conduct issues associated with Mr. Healey and Ms. Twinn, together with the Plaintiffs' apparent endorsement of that conduct, must now loom large in any assessment of what has occurred in this trial to date, and of what has led the Plaintiffs to close their case in the way they have.

[172] The Plaintiffs have chosen not to place the merits of their case before the Court but, rather, to close their case and undertake an appeal on the basis of an extremely vexed procedural issue that, at its core, brings into play the conduct of Mr. Healey and Ms. Twinn and the Plaintiffs' own attitudes towards that conduct. And this is why I think my findings from the Bias Motion must now inevitably come to the fore again and cannot be left out of account in any appeal of these actions or in any consideration of what has brought this trial to a close. Some of those findings are as follows:

> …
>
> 121. Also, in terms of context, and to place this motion in perspective, it is worth considering what the consequences would be if the Court were to grant the relief requested by the Plaintiffs.

122. At its narrowest, if Russell J. were to recuse himself, it would take the proceedings back to, at least, the Pre-Trial Order of Hugessen J. of March 26, 2004. That would mean that the parties would still have to face the scope and relevancy issues raised by the Crown, and the Plaintiffs would be free to argue anew such matters as amendments to pleadings, will-say statements and the role of Interveners at trial.

123. At its broadest, (the Plaintiffs allege a reasonable apprehension of bias on the part of Hugessen J. and the Federal Court) the relief could mean that these proceedings would revert to the status they had following the decision of the Federal Court of Appeal in 1997. In other words, everything would be wide open and the parties would have to begin again the tortuous path of confronting pleadings, evidence, discoveries, and, indeed, everything that has transpired since 1997.

124. These consequences should not matter if a reasonable apprehension of bias exists, but they do suggest that extreme caution should be used by the Court before committing all parties involved in this dispute to such a devastating result.

THE PLAINTIFFS' MATERIALS

125. The Court has serious concerns about the core materials compiled by Ms. Twinn and Mr. Healey, Plaintiffs' counsel, for this motion. The Court raised those concerns with Mr. Shibley, who argued the motion for the Plaintiffs at the hearing in Edmonton. The basic problem is that the Plaintiffs provide no objective, reliable evidence in their materials that the Court can use to assess the very serious accusations made in this motion. Their evidence, for the most, is little more than subjective opinion, often based upon false assumptions and inaccurate information about the state of the proceedings to date. It is self-referential. At bottom, it is nothing more than legal counsel arguing with the Court, and supplying opinion-based affidavits to back up that argument.

126. The Court has no real independent evidence it can rely upon, except what the Court can find for itself in the Court record.

127. The Court's unease was deepened when Ms. Eberts, counsel for the Native Women's Association of Canada, took the Court through the structural convolutions of the Plaintiffs' materials in considerable

detail and pointed out the conflation of evidence and argument and the resulting confusion. The cross-referencing between affidavits, and between affidavits and the Memorandum of Argument and other materials, is such that it is difficult to tell who is opining to what and where evidence ends and argument begins.

128. These concerns are not merely of a technical nature. The core of the Plaintiffs' case is contained in the affidavits filed and in their written argument. Those materials were compiled by Ms. Twinn and Mr. Healey and those who they supervise.

129. Ms. Twinn is a member of one of the Plaintiff bands. She is the solicitor of record for these proceedings. She is a witness in this motion. And, she is one of the lawyers responsible for the written argument.

130. Mr. Healey is the lead counsel for the proceedings. He is the principal witness and architect of this motion. He, together with Ms. Twinn, has compiled the written argument that is before the Court. And Mr. Healey's conduct and the Court's response to that conduct constitutes a considerable aspect of what this whole motion is about.

131. When considering the consequences of granting the relief requested, these are matters that the Court cannot ignore as merely technical. There are reasons why lawyers should not both give evidence and provide argument based on that evidence, and the inevitable problems are more than apparent in the materials filed by the Plaintiffs in this motion: evidence and argument are merged; necessary context is left out; interpretations are skewed and highly subjective. Often, the evidence presented in this motion is little more than the subjective states of mind of Ms. Twinn and Mr. Healey. This is not a satisfactory basis for the Court to use when considering a motion for apprehended bias.

132. Nor are these concerns remedied by having Mr. Shibley conduct the oral argument at the hearing. Mr. Shibley graciously conceded that Ms. Twinn and Mr. Healey had compiled the written argument, that he does not have a knowledge of the full record, and that he was highly dependent upon Mr. Healey and Ms. Twinn for what he presented to the Court. Mr. Shibley adapted and endorsed their written argument (with several important exceptions which I will come to later), even though his oral argument was a masterful attempt to avoid its excesses and distortions. In effect, Ms. Twinn and Mr. Healey are the ones who have composed the argument and

Mr. Shibley has tried to organize it better and to assist the Court in understanding its difficulties. Mr. Shibley has not reviewed the record afresh or presented his own objective appraisal to the Court. He has merely tried to make the argument of Mr. Healey and Ms. Twinn, which is backed by their own affidavits, more presentable.

133. When the Court put these concerns to Mr. Shibley, he advised that the important thing is the Court record, and that I should concentrate on that. While I agree with him that the Court must examine the Court's decisions and transcripts carefully, I do not think the problem ends there.

134. The onus is on the Plaintiffs to prove a reasonable apprehension of bias before the Court. A significant part of the Plaintiffs' argument/evidence is a highly subjective, selective interpretation on the part of Ms. Twinn and Mr. Healey, who are wearing far too many hats in this motion for the Court's comfort. What is more, even the lay witnesses brought forward by the Plaintiffs are totally dependent upon Ms. Twinn and Mr. Healey for their interpretations of the effects of Court orders and Court actions, and have signed affidavits that were prepared for them by Mr. Healey and/or Ms. Twinn and/or someone working under their direction.

135. Mr. Shibley has cautioned the Court against relying upon "technical" matters, rather than addressing the real issues in dispute in this motion. In my view, however, reliable evidence and objective argument are not merely technical matters. They are the very life blood of the Court, and the only basis upon which it can make decisions.

136. The fact is that, in accordance with Rule 82, of the *Federal Court Rules, 1998* a solicitor cannot, except with leave of the Court, both depose to an affidavit and present argument to the Court based on that affidavit. It is true that Mr. Shibley appeared to argue the case at the hearing, but in so doing he told the Court he was merely presenting the arguments of Ms. Twinn and Mr. Healey modified by his own style of presentation. He also adopted the Memorandum of Argument that was prepared by Ms. Twinn and Mr. Healey. In essence then, Ms. Twinn and Mr. Healey have provided argument for this motion based upon their own affidavits or upon affidavits of others that they prepared and that are almost totally about what Ms. Twinn and Mr. Healey have advised the affiants. In the present case, the Court's consent has never even been sought, let alone granted for what has been filed. I have in the past made it very clear to counsel

for the Plaintiffs - indeed to all parties to these proceedings - that practises and procedures that do not accord with the *Federal Court Rules, 1998* are not acceptable. In the Plaintiffs' motion to amend pleadings that came before me in June, 2004, Plaintiffs' counsel submitted an affidavit sworn by counsel, despite Hugessen J. having criticized such practice in the past. In my reasons of June 29, 2004, dealing with the proposed amendments, I gave the following direction at paragraphs 22 and 23:

> The Band has sought leave of the Court to file its solicitor's affidavit. However, as the responses of both the Crown and NSIAA make abundantly clear, some of the Band's proposed amendments are highly contentious and, looked at objectively, I think Band counsel should have appreciated this.
>
> In view of the history of this file, and the long road that lies ahead, I think it is best to make it clear to all parties that practices and procedures that do not accord with the Federal Court Rules, 1998 are not acceptable. Consequently, the affidavit of Counsel for the Band, in so far as it strays beyond mere housekeeping and non-contentious issues, is not acceptable and cannot be relied upon in the Band Motion.

137. Consequently, I do not think the Plaintiffs can be too surprised by the Court's remaining consistent with this warning and refusing to accept the affidavits of Ms. Twinn and Mr. Healey and those portions of the written argument adopted as evidence and incorporated into their affidavits. The matters before the Court in the present motion are highly contentious and the affidavits of Ms. Twinn and Mr. Healey contain a great deal that is merely their own feelings and states of mind on conduct and procedural issues that involve them in a highly personal way. In my view, this is not an acceptable evidentiary base for a motion that seeks to show bias (apprehended or otherwise) on the part of specific judges and, possibly, the Federal Court. At the very least, the Court would have to say that this evidence must be treated as highly suspect and afforded little weight, even when the oral argument is made by Mr. Shibley.

138. There is an irony in this problem that places the Court in a very difficult situation. This is a motion in which one of the allegations

against the trial judge is that Russell J. has applied double standards in relation to materials produced by the Plaintiffs and materials produced by the Crown and the Interveners. The allegation is that Russell J. has favoured the Crown and the Interveners in this regard. However, in a motion where the effect of granting the full relief requested would be simply devastating on the rights of other parties, and upon the difficult work accomplished by all parties to date, the Court is somehow supposed to overlook the evidentiary and procedural problems inherent in the Plaintiffs' materials and decide the issue by some other means.

139. Of course, the Court cannot do that. The Court is impartial. It cannot just step in and rectify shortcomings in the Plaintiffs' presentation and conduct of this motion. It is the Plaintiffs' responsibility to prove a reasonable apprehension of bias, and it is the Plaintiffs' responsibility to provide the Court with the materials it needs to assess the extremely serious allegation they make in this motion.

140. If the Court had ever suspended rules of evidence and procedure in favour of the Crown and the Interveners in a matter as important as the present motion, I have no doubt it would have been cited by the Plaintiffs as a clear instance of apprehended bias on the part of the Court.

141. In my view then, the Court must regard the affidavits of Ms. Twinn and Mr. Healey and the evidence they incorporate from their Memorandum of Argument as inadmissible. In addition, to the extent that the lay witnesses merely recount opinions and facts provided to them by Ms. Twinn and Mr. Healey, their evidence is hearsay and opinion and inadmissible for that reason.

142. However, even though the Court is obliged to point out these problems and to reach such a conclusion, no one (and I feel confident including the Crown and the Interveners in what I say) wants this motion to be dismissed upon the basis of evidentiary and procedural issues alone. If the Court did this, the proceedings would continue to stagnate and the likelihood of progressing towards trial any time soon would significantly diminish. I believe that all parties are of the view that some kind of clearing of the air is required at this time.

143. Hence, it is my intention to try and address Mr. Shibley's oral arguments, and the written arguments of Ms. Twinn and Mr. Healey as contained in the Plaintiffs' Memorandum of Argument, by direct

reference to the Court record, bearing in mind, however, that those arguments are highly tainted by the problems I have referred to above. But what the Court is really doing here, in effect, is proceeding with its own examination of the record in the light of the Plaintiffs' professed concerns. The Court cannot say that the Plaintiffs have discharged the onus upon them that the law demands in a motion of this nature, and proceeding further with these reasons should not be taken as any indication that the Court accepts the written materials filed, or has chosen to overlook the evidentiary difficulties referred to above.

…

THE LAW

156. But I would also like to emphasize and expand upon two points that Ms. Eberts identifies in her written brief. First of all, I believe our legal system depends upon the assumption that judges must be presumed to be impartial. This does not mean that counsel should be intimidated or chary of challenging decisions or judicial conduct where the circumstances warrant it. Our system presumes judges to be impartial, but it also depends upon forthright and intrepid counsel to raise the alarm when they think an apprehension of unfairness has entered the process. Much depends upon the sound judgment and good faith of counsel. There are checks and balances that should ensure applications are only brought in appropriate circumstances. However, if the Court feels the allegations are not appropriate, it must be equally forthright in identifying what it sees as any abuse, bad faith, or irresponsibility on the part of counsel. The respective duties of judge and counsel demand plain speaking on what can be somewhat delicate issues. But, in my view, the fairness and integrity of our judicial system demands that appearance of bias applications not be handled with coyness. They strike at the heart of the administration of justice and undermine public confidence in the impartiality and integrity of the judiciary. Allegations are easy to make and difficult to repel. They must be dealt with openly and firmly.

157. Secondly, I do not believe it can be emphasized too much that the inquiry to which a reasonable apprehension of bias allegation gives rise must be highly fact-specific. The complete context of each situation, and the particular circumstances are of the utmost importance. This is why, in my view, the Court must be wary of taking a result in one case and assuming, because it might seem to

address a particular point, that it can be useful in dealing with an entire application: facts are infinitely variable; the mix needs to be reviewed carefully; and the record must be considered in its entirely to determine the cumulative effect of any alleged transgression or impropriety.

…

THE PLAINTIFFS' ORAL ARGUMENT

160. The Plaintiffs' oral argument was very different in tone and emphasis from the Plaintiffs' written argument. Mr. Shibley was most helpful to the Court because he brought a fresh appraisal to the present impasse and he made a strenuous effort to distill the essence of the Plaintiffs' concerns and to extrapolate them from the convoluted excesses of their written materials.

161. However, notwithstanding these attempts at clarification, there were several ways in which the oral argument mimicked the approach apparent in the Plaintiffs' written brief: it did not review the whole context or the complete record, and it made highly selective and partial use of some items in the record, while neglecting to mention other material facts entirely. This was because, in the end, the oral argument was completely dependant upon the written argument for its authority and points of reference.

162. In an application where context is everything, such an approach is of limited use to the Court. As I mentioned earlier, Mr. Shibley was exemplary in his forthright disclosure that he did not know the whole record and was dependent upon Ms. Twinn and Mr. Healey to guide him.

163. The onus is on the Plaintiffs to prove a reasonable apprehension of bias. If they choose not to deal with the whole context, then they will have a very difficult time convincing the Court that they have satisfied the jurisprudence and met the reasonable person test.

…

THE REPRIMAND

471. I have agreed with Mr. Shibley that this motion is not the place to address the complaints of opposing counsel directed at Mr. Healey

and, for this reason, I wish to make what I have to say as neutral as possible. However, the conduct of Plaintiffs' counsel has been put in issue by the Plaintiffs and the Court must address it to the extent that it relates to the reasonable apprehension of bias motion that has been placed before the Court and to the extent that it impacts upon the integrity of these proceedings.

472. Mr. Shibley makes two important points that the Court should address. One of them is what he terms the "one-sided problem." Once again, he is neglecting the full record. The Court's general directions upon conduct have been directed at all counsel. Even in the Court's December 6, 2004 reasons, at paragraph 68, the Court's comments are directed at "all counsel."

473. But this does not mean that all counsel have engaged in unacceptable conduct. The record shows where individual counsel have transgressed and, in any future context where conduct may become an issue, it should be the full record that is looked at, and not anything that was said as part of the hearing for this motion where all involved behaved impeccably.

474. In the December 6, 2004 reasons, Mr. Healey is singled out for observation because the Court felt that, on that occasion, his conduct was not acceptable. The Court had no problem with the conduct of opposing counsel because, although they took strong issue with what Mr. Healey said, they remained professional and did not allow their feelings to disrupt the process or to deteriorate into a personal attack upon Mr. Healey before the Court.

475. The second important issue is Mr. Shibley's assertion that the "evidentiary base ... does not appear to have been fully addressed."

476. Paragraph 35 of the reasons of December 6, 2004 makes it clear that the reason why the Court felt it necessary to reprimand Mr. Healey was because the "progress of the dispute was impeded, and valuable Court time was wasted, in addressing matters that, on examination, are clearly *res judicata*."

477. The Court felt it had been misled on one of the principle issues in the motion: *res judicata*. By alleging that the Interveners were misleading the Court on this issue, the Court allowed argument from Plaintiffs' counsel that should not have been allowed because the issues had "already been argued ad nauseam before the Court," and

were matters upon which the Court "and the Federal Court of Appeal" had already ruled.

478. So this aspect of the reprimand was that the Court did not appreciate having to listen to arguments on matters that were *res judicata*. The evidentiary base for this conclusion is set out in the reasons and the materials submitted by counsel who participated in that motion.

479. The second aspect of the reprimand was disapproval of Mr. Healey's *ad hominem* attacks upon opposing counsel. In other words, he made it too personal.

480. Throughout the hearing on November 18 and 19, 2004, and not just in relation to one contentious matter, Mr. Healey made extensive use of words such as "misrepresentation," "mischief," "they will say anything," "mislead," "complete misstatement," "trickery," "most ridiculous position," "false," and "that's just made up." Russell J. did not in the reasons address every instance where such words were used. But the evidentiary base for the reprimand was everything heard by the Court, and that appears in the transcript. The overall impression conveyed by Mr. Healey was that the Interveners were dishonest and that they were out to trick the Court on issues concerning their role and standing in these proceedings. And, after I had heard argument, I agreed with the Interveners that the issue of their role had been dealt with to a considerable extent in previous Court orders and did not need to be argued all over again.

481. Russell J. did not detect or record a similar animus on the part of the Interveners when they were dealing with Mr. Healey's arguments, even though he was re-arguing matters that were *res judicata*.

482. It has to be kept in mind that, in paragraphs 34 and 35 of the reasons, the Court is focused upon the issue of *res judicata*. As the reasons also make clear, Mr. Healey argued that the Federal Court of Appeal had directed certain things which Russell J. found that Court had not directed. The Plaintiffs cited the Federal Court of Appeal out of context, and then claimed that the Federal Court was being misled by the Interveners and that they were creating mischief.

483. So the evidentiary base for the Court's remarks can be found in previous decisions of the Federal Court and the Federal Court of Appeal as referred to in the reasons. The Court indicates in

paragraph 34, that it examined the allegations that Mr. Healey made (including those against Mr. Donaldson and Mr. Faulds) and the Court did not find that the Interveners were creating mischief or deliberately misleading the Court. If Mr. Healey has a problem with that finding he can take it up with the Federal Court of Appeal. Differences of interpretation do not require an all-out attack on the honesty of opposing counsel. That is what warranted the reprimand. Counsel can be wrong (and I'm not saying they were in this case) without being dishonest, and I have noticed in Mr. Healey's cross-examination for this motion, when Mr. Kindrake took him through a number of inaccurate statements he has made to the Court, he was very forgiving of himself. Those inaccuracies were merely "mistakes."

484. I believe the reasonable person would see the reprimand as an attempt to maintain courtroom decorum in a situation where disagreement between counsel resulted in one counsel resorting to ad hominem attacks in order to distract the Court from the basic issue of whether the role of the Interveners was or was not a matter of *res judicata*. As the reasons make clear, the full evidentiary base was examined. The response was measured and appropriate and I do not believe that the reasonable person, fully informed, would reasonably apprehend bias against Mr. Healey or the Plaintiffs.

…

THE PLAINTIFFS' WRITTEN ARGUMENT

496. Following his oral presentation, Mr. Shibley adopted and endorsed the Plaintiffs' written argument with the exception of two important allegations which I will come to shortly.

497. The Plaintiffs' written argument was not prepared by Mr. Shibley and it is the Court's understanding that he had very little input, if any, in putting it together. The written argument is signed by Ms. Twinn and Mr. Healey, and Mr. Healey has indicated in cross-examination that he and Ms. Twinn (together with those they supervise) are responsible for it. Mr. Healey is primarily responsible.

498. The two allegations that were withdrawn are important. The first one is contained in paragraph (a) (xv) of the Notice of Motion and 5(j) of the Plaintiffs' Memorandum of Argument to the effect that Russell J. engaged in private conversations with the Crown to thwart the Plaintiffs' plans to call their evidence on self-government.

499. There are clear indications here of a deep-seated hostility towards the Court and its processes. Until the day of the hearing, Plaintiffs' counsel continued to allege that Russell J. "engaged in private conversations with the Crown to schedule a summary motion filed by the Crown designed to defeat the central allegation raised by the Plaintiffs in this proceeding, namely the Plaintiffs' right of self-government ... . It was only through the inadvertence of the Crown that the Plaintiffs became aware of these conversations ... . Russell J. did not inform the Plaintiffs at the time or shortly after these discussions occurred that there were such discussions or what was discussed... . Russell J. only responded when the Plaintiffs raised it with him one week later."

500. This sounds, and is meant to sound, absolutely appalling. It conjures up images of Russell J. picking up the phone and plotting with Mr. Kimmis to thwart the Plaintiffs' alleged claim to self-government.

501. What really happened was that a filing date for Crown materials fell on a Saturday and the Crown contacted the Court registry to find out what it should do. The registry applied the usual rule in these situations of allowing filing on the next business day. The registry checked with Russell J. to ensure that there was no problem in following the normal procedure in this instance. And thus, says Plaintiffs' counsel, Russell J. "engaged in private conversations with the Crown ... ."

502. The Plaintiffs had to know immediately that they received materials on Monday and not Saturday, and as soon as Russell J. became aware that Plaintiffs' counsel was concerned, a full written explanation was provided forthwith. Yet the allegation was still made. What is more, it was sworn to under oath by counsel for the Plaintiffs.

503. What we see happening here is Mr. Healey and Ms. Twinn abandoning all proportion and objectivity to mount a personal attack on the integrity of the trial judge, although I am not clear from the evidence of the extent to which Ms. Twinn is a participant in this approach.

504. Fortunately, a wiser head prevailed and Mr. Shibley withdrew the allegation at the hearing. But the fact that it was made at all under the circumstances would not be lost on the reasonable person.

505. The fact that it appeared in the Notice of Motion and the Memorandum of Argument, after full explanation was promptly provided, highlights the significant difficulties the Plaintiffs" written materials present for the Court and why argument (written or otherwise) should not be made by someone who, in the case of Ms. Twinn, is a band member, solicitor of record and witness, and, in the case of Mr. Healey, is leading counsel, witness and personally involved with many of the issues raised.

506. The second important item that was withdrawn is even more problematic for the Court. At the end of his presentation, and after he had endorsed and adopted the Plaintiffs' written argument, the Court drew Mr. Shibley's attention to paragraph 3 and the following sentence:

> They (i.e. the Plaintiffs) do not seek a determination of actual bias. There is however some evidence to support such a finding.

507. The Court is never told what this evidence of actual bias is, although there are allegations throughout of actual bias rather than apprehended bias. But Mr. Shibley assured the Court that this motion was based upon apprehended bias.

508. An allegation of actual bias without evidence is nothing more than a slur. And an allegation of actual bias in a motion that claims to be about apprehended bias is irrelevant and, therefore, a gratuitous slur.

509. To his credit, Mr. Shibley withdrew the allegation in paragraph 3 as soon as the Court brought it to his attention and I do not for one moment entertain the thought that, in endorsing the Plaintiffs' written argument, he meant to endorse that allegation.

510. I also agree with Mr. Shibley that complaints by the Crown and/or the Interveners related to the conduct of Plaintiffs' counsel should not be dealt with as part of this motion except, of course, where Plaintiffs' counsel's conduct is specifically raised by the Plaintiffs and the Court is, therefore, obliged to deal with it, and where the materials themselves bring up conduct issues that the Court cannot ignore.

511. However, notwithstanding its withdrawal at the hearing, the inclusion of an allegation of actual bias raises the same general concern that the Court has already expressed about the materials having been prepared by counsel for the Plaintiffs who have abandoned objectivity and any sense of proportion in what they are prepared to say. And the allegations of actual bias are so ingrained and interwoven throughout the Memorandum of Argument and the evidence of Mr. Healey that removing a sentence from paragraph 3 does not solve the problem.

512. The Plaintiffs' Memorandum of Argument presents a litany of allegations that goes on for almost 100 pages. It is not easy to decipher and no assistance was offered to the Court at the hearing by the Plaintiffs that would help in the process. The Court is merely left to make what it can of decontextualized quotations and accusations, highly subjective and skewed interpretations, attempts to re-argue untenable positions, and a great deal of what can only be called innuendo.

513. The net effect of this approach is to force upon the Court and the other parties the job of providing the full context needed to place the Plaintiffs' arguments in a perspective that will enable the reasonable person to assess them. The Court has to keep in mind that the onus is on the Plaintiffs to prove a reasonable apprehension bias, and it is not the role of the Court and/or the other parties to try and make clear what is obscured by the Plaintiffs' materials. But allegations of bias (actual or apprehended) are very easy to make and very difficult to dispel. They strike at the heart of our justice system and they undermine public confidence in the integrity of the judiciary. This is why they should not be made in an irresponsible way and before an objective appraisal is made of the record, the materials and the position of counsel who is making them. If undertaken irresponsibly they create alienation and estrangement from the whole justice system.

514. The Plaintiffs were given a significant amount of time to prepare this motion and their materials. Extensions were granted when requested. All other pending matters were suspended so that they could concentrate on the task in hand. And Mr. Donaldson, who represents NSIAA, one of the Interveners, even went so far as to assist the Plaintiffs and the Court in preparing and organizing two volumes of Transcripts, Pre-Trial Orders and Directions that are essential for an understanding of the full context of this motion.

Notwithstanding all of this accommodation, the end result is confused and, at times, just plain baffling.

515. The first problem for the Court is to determine what the Plaintiffs' Memorandum of Argument actually is and how it can be used. In their affidavits, Ms. Twinn and Mr. Healey adopt the document, or at least parts of it, as evidence. Mr. Shibley could not really help the Court much with this problem:

> In any event, it's not a factum, in my view, in the normal sense of that term; its written argument, which I found to be helpful, and I hope you do too. It's comprehensive beyond what is normal. There is no question about that.(Transcript, vol. 2, page 28: 8 - 13)

516. So the Court is left to make of this "written argument" what it can. However, the Court was very unnerved by the following information from Mr. Shibley:

> Well, I've read it more than once; I've read it a number of times. And I say with respect, I, submit to you, My Lord, that it's very worthy of reading. It is elaborate. And sometimes the reproduction of transcript is elaborate. I found it useful because I didn't have to read the transcript, get the volumes out. [Emphasis added](Transcript, vol. 2, page 32: 3 - 10)

517. The Court can only say that it gains little comfort from the knowledge that Mr. Shibley did not have to read the transcript because, had he done so, he might have alerted himself to the fact that the allegations and assertions contained in the Memorandum of Argument are difficult to reconcile with the actual record.

518. In his summary, Mr. Shibley advised the Court that "the record must be considered in its entirety to determine the cumulative effect of any transgressions or improprieties." Having now spent weeks doing just that, I am left wishing heartily that the Plaintiffs had followed their own advice.

…

556. Mr. Shibley has asked that opposing counsels' criticism of Mr. Healey's conduct in these proceedings not be made the focus of this motion, and I have agreed with him in a general sense. But to totally neglect Mr. Healey's conduct would be to neglect a fundamental part of his own argument, because he squarely places his conduct before the Court and invites the Court to address it as part of the apprehended bias allegations. He also reveals quite clearly in paragraph 20 quoted above that there is a significant personal dimension to this motion, and I will address the implications of that later.

…

559. So, apart from the specific allegations against Justices Hugessen and Russell, what have the Plaintiffs provided to the Court for consideration from the perspective of the reasonable person? They have presented elliptical quotations taken out of context, skewed interpretations, much that is simply irrelevant, quotations that do not stand for what the Plaintiffs say they stand for, hearsay and innuendo.

560. There is nothing here that a reasonable person would consider as giving rise to a reasonable apprehension of bias within the Federal Court. As for the Plaintiffs' apprehensions about receiving an unbiased hearing in the Federal Court and what I surmise to be a suggestion of "estrangement" from the processes of this Court, my view is that the arguments put forward in the written brief do not assist in alleviating that feeling. In fact, quite the reverse; they appear to me to build and exacerbate alienation and estrangement.

561. Against all of this, however, there is, in fact, a clear message in the materials about what the Plaintiffs' real apprehensions are concerning the Federal Court. With exemplary candour, Chief Roland Twinn, during cross-examination on his affidavit for this motion, came directly to the point:

Q. Okay. Now one of the other pieces of relief that's asked for here in this case is that the possibility that the matter could be transferred to – in your Affidavit, paragraph 4, it says: the Provincial Court. So which Court is that?

A. The Court of Queen's Bench.

Q. Any do you have any specific judge in mind in the Court of Queen's Bench?

A. No, I do not.

Q. Can you tell me why you say the Court of Queen's Bench might be more inclined to be fair to your case than the Federal Court?

A. It is my belief that the Provincial Court has had some more favourable rulings towards First Nations.

(Roland Twinn cross-examination, page 11: 10 - 23)

562. Chief Twinn cannot be faulted for wanting a judge who will see matters as he sees them and give him the relief he wants. That is his job and it is what all plaintiffs want. But a judge who does not see things the Plaintiffs' way, on some particular procedural decision such as has occurred in this case, does not, for that reason, create a reasonable apprehension of bias, and decisions against the Plaintiffs on procedural matters do not, per se, give rise to a reasonable apprehension of bias. By asking the Court for a say in picking the judge who will hear this case (even as modified at the hearing to a request that I recommend to the Chief Justice of the Federal Court that they have a say), the Plaintiffs are clearly concerned to find someone who will be more disposed to their case than they believe Russell J. to be. The problem with this is that the Federal Court of Appeal, who the Plaintiffs appear to trust, has said in Samson that it cannot be:

> In our view, what the Appellants seek in these appeals is the removal of Teitlebaum J. as trial judge and his replacement by a judge of their own preference to preside over what are admittedly two important trials. This approach to the selection of a trial judge is foreign to the practice of this Court. We do not wish to encourage it in any way.

…

577. The remaining 65 pages of the Plaintiffs' Memorandum of Argument are a, sometimes vitriolic, attack upon the role played by Russell J. since his appointment as trial judge in 2004.

578. Much of it is an attempt to drag the Court back over old arguments that the Court has rejected in its decisions: the implication being that the Court got it so wrong that any reasonable person would apprehend bias.

579. Quotations are taken out of context and/or most of the context that a reasonable person would need to judge the allegations is just not provided. Elliptical quotations are occasionally used. Unsupported assertions are made that are just plain wrong. Plaintiffs' counsel have culled the whole record for words and passages that can be assembled into a revisionist collage of what has transpired.

580. Any attempt to cite in full relevant portions of the record to provide the complete context for the positions put forward by the Plaintiffs would require a gargantuan effort on the part of the Court. In a motion for apprehended bias, where context is everything, Plaintiffs' counsel have gone out of their way to provide a very unbalanced account of what has taken place. As I mentioned earlier, this seems to be the inevitable consequence of counsel wearing so many hats at the same time. Objectivity and a sense of proportion are lost.

581. On the other hand, the allegations made are so serious (some of them amounting to actual bias) that the Court is compelled to make some effort to come to terms with this material, lest it be thought that silence is concurrence and the Plaintiffs' people are left with the impression that the Court just doesn't care about such matters and they lose their confidence in the integrity of the proceedings.

…

593. It is just not possible for the Court to address separately in these reasons every allegation and every quotation that appears in the Plaintiffs' Memorandum of Argument.

594. The Court has tried to "muddle through" as best it can, but the evidentiary and discursive problems in the materials mean that the positions put forward are highly suspect and, even if the document were acceptable on formal grounds, the reasonable person could hardly give it any real weight in terms of the allegations advanced.

595. There is one respect, however, in which the Plaintiffs' written materials have a very solid evidentiary value that would not be lost on the reasonable person.

596. The problems that the Court has been attempting to resolve since this matter was returned for re-trial in 1997, have had less to do with the underlying issues in the dispute than they have with the procedure and conduct of counsel. And these materials are evidence for the reasonable person who needs to understand what some of those problems have been, and continue to be.

597. Also, strongly on display in the Memorandum of Argument is Plaintiffs' counsel's insistence upon re-arguing issues that have already been decided and which are *res judicata*. That problem was very much at the heart of the Court's decision of December 6, 2004 dealing with the role of the Interveners. In this motion on apprehended bias, for instance, we see Plaintiffs' counsel again going through the will-say standard issues in an attempt to show that the Court obviously got that decision wrong, so the reasonable person would apprehend bias. Yet, this is a decision that the Plaintiffs (who are not shy of appealing Court orders) did not appeal, and in relation to which Plaintiffs' counsel has indicated to the Court that the Plaintiffs accept the standards set by the Court, and according to Ms. Twinn's correspondence, have actually completed will-says that meet those standards.

598. Judges are not infallible. They can make mistakes. When they do, the Federal Court of Appeal is there to correct them. If the Plaintiffs cannot accept a Federal Court decision, they can appeal it. Alleging apprehended bias after the appeal period has expired is just a way of avoiding the Federal Court of Appeal and trying to have the issue argued all over again before another trial level judge.

599. We also see in these materials how unhelpful the elliptical quotation can be. I have already mentioned an egregious example of this device in paragraph 15 of the Plaintiffs' Memorandum of Argument, but it is not the only one.

600. And, of course, there is the general tendency prevalent throughout in this motion of using selective quotation, de-contextualizing the record, and a reliance upon innuendo and revisionist statements.

601. Elliptical quotation, innuendo and revisionism are neither evidence nor argument. They contribute nothing to the matter in hand.

602. In the context of a single motion, these practices might not seem like much of a hindrance, but in the context of a long dispute (that has been going on since 1986, and where it was as long ago as 1997 when the matter was returned for re-trial, and where the trial looks like being lengthy), these things are a major concern because their deployment impedes the efficient administration of justice. The whole written production of the Plaintiffs in this motion lacks objectivity and balance, and the credibility that can only come from objectivity and balance. It attempts to present its targets in the most discreditable light possible, and for this reason is not a reliable basis for the judgment of the reasonable person, fully informed, who has thought the matter through.

603. I believe that the reasonable person would take note of these additional factors when assessing some of stern language that Hugessen J. and Russell J. have felt compelled to use in order to curb attitudes, practices and arguments that they have felt were not assisting progress towards trial.

604. I raise these matters here with some reluctance because of the already over-charged atmosphere of these proceedings, but the nature of the allegations made in this motion requires the Court to say something about them, and Plaintiffs' counsel, Mr. Healey, has chosen to put his own conduct directly at issue. Finally, it also has to be stated clearly that the questionable practices, excesses and prolixities on full display in these materials necessitate an inordinate amount of time and effort on the part of other counsel and the Court to correct them, and seriously impede the progress of these proceedings. These matters will obviously have to be taken into account when costs are considered.

…

CONDUCT ISSUES

621. Notwithstanding the Court's general feeling that this is not the appropriate time to address conduct issues head-on, the problem that the Court now faces is that, having reviewed the written materials submitted for this motion at considerable length, there is a significant issue that cannot be ignored. And this is now the time for plain

speaking from the Court which, as I mentioned earlier, is absolutely essential, in my view, in this kind of motion to avoid bias (apprehended or otherwise) being raised merely as a matter of course. The jurisprudence is replete with warnings that allegations of bias (apprehended or otherwise) should not be made lightly and that they should only be made if supported by sufficient material. This is because such allegations strike at the heart of our judicial system and undermine public confidence in the impartiality and integrity of the judiciary. At a personal level, of course, there can be no greater criticism of an individual judge than that she or he is in breach of the oath of office. As this motion has shown, such allegations are easy to make, but difficult to repel.

622. Having reviewed the oral and written submissions of Plaintiffs' counsel against the record, I have been driven to certain conclusions that are deeply troubling but which, on the basis of what I now see before me, it is my duty to address in some way.

623. Mr. Healey is the architect of this motion. His affidavit is the principal evidence offered against Hugessen J. and Russell J. and he is an author of the Memorandum of Argument that details the Plaintiffs' complaints about the Court and the judges it names. He is the one responsible for the lay affidavits that are formulaic and identical in nature and that do little more that repeat opinions he has provided. Those witnesses are not objective observers of the situation who can speak to material issues that have not been filtered through Mr. Healey and Ms. Twinn. Ms. Twinn says she has read the affidavit of Philip Healey and she agrees with its content. So, in the end, just about everything comes back to Mr. Healey.

624. Mr. Healey has said clearly that, as regards Russell J., he has been treated at all times with appropriate courtesy in his appearances before the Court. He has also said that he does not believe that Russell J. has acted or spoken in any way that would suggest personal animus or bias towards him as a lawyer.

625. The gravamen of his complaint is that he believes Russell J. is pre-disposed against the position of his clients on the self-government issue and he does not like the "tone" used by the Court in some of its decisions. Presumably, he has no complaint against the Court where its decisions show an acceptance of positions he has advanced, although, even here, he appears to suggest that acceptance only occurs when the jurisprudence is so "trite" that the Court cannot follow its natural inclinations and favour the Crown. But what he

truly does not like is the "tone" evident in some of the reasons where his arguments have not been accepted by the Court.

626. It is apparent to me from my review of the materials that Mr. Healey does not like being told that certain arguments he has brought to the Court are untenable. He does not like being told that he should not use his clients' breach of a Pre-Trial Order as an opportunity to discount the rights of other parties. He does not like being told that ad hominem attacks upon opposing counsel are not acceptable to the Court. He does not like being told that the Court does not appreciate his re-arguing issues before the Court that the Court feels are clearly *res judicata*.

627. Of course, if he disagrees with decisions of the Court, he can advise his clients to appeal. But in this motion a collateral attack is made on several decisions that were not appealed, and the mechanism used is apprehended and, sometimes, actual bias.

628. The written materials submitted for this motion reveal that Mr. Healey, rather than correct the matters of concern drawn to his attention by the Court, and rather than appeal certain decisions, has chosen instead to question the impartiality of various judges of the Federal Court in a way that is, at times, personal.

629. Mr. Healey's evidence and the Memorandum of Argument are imbued with language and methodologies that suggest that he seeks to impugn the integrity the trial judge in particular, and this factor cannot be eradicated by simply removing the allegation that Russell J. "engaged in private conversations with the Crown... ." The personal attack is deeply ingrained in the written materials and accounts for their excesses, their skewed interpretations, and their inaccuracies. There can be no mistaking the implications: "and he was putting pressure on us and he knew he was putting pressure on us, and he knew that you and opposite counsel were putting pressure on us. And there can be no doubt about who Mr. Healey thinks he is defending: "he has never been treated or had his arguments described in such a way."

630. The message in the materials is loud and clear: Mr. Healey not only sees these proceedings as a personal battle with opposing counsel, he has also placed himself in personal confrontation with the Court.

631. This confrontational approach, and the willingness to impugn in a personal way the integrity of named judges, has no place in a Court of Law. It has no place because it impedes the fair and efficient administration of justice and is a direct threat to the rights of all parties involved. And the Court has a duty to ensure that the rights of all parties do not become trammelled in what one legal counsel has come to see as his own personal confrontation. What I see in these materials is clear evidence of a breakdown of legal process in this case. Mr. Healey in this motion is not fulfilling his duties to the Court from a position of detachment, and he is not conducting himself with the objectivity required by our adversary system.

632. The Plaintiffs and the Crown have reached a point in these proceedings where an extremely important matter needs to be determined before the trial begins: to what extent is self-government an issue raised by the pleadings? The answer to this question will have a direct impact upon preparation for trial and the nature of the evidence that both sides decide to call.

633. The Court is being hampered from resolving this impasse by the present motion. It is extremely unfair to all parties to have decisions on important issues delayed because Mr. Healey does not like the "tone" used by the Court from time to time, unless, of course, that tone is evidence of some kind of bias against the rights of the Plaintiffs. My review of the record has convinced me that, from the perspective of the reasonable person test, there are no grounds whatsoever for suggesting that the Court is not fully alive to the Plaintiffs' rights or that it has not taken active steps to protect them, sometimes in the face of inconsistent and extremely discouraging behaviour on the part of Mr. Healey. That "tone" has not jeopardized the respective rights of the parties and has, in fact, been part of the Court's attempts to ensure those rights are not undermined by personal confrontation.

634. Mr. Healey also appears to believe that Russell J. can be made to change his position and to favour his arguments if Mr. Healey alleges an apprehension of bias in a notice of appeal. In other words, after first being manipulated by the Crown and the Interveners into excluding evidence relevant to the Plaintiffs' claim, Russell J. can then be made to come over to the Plaintiffs' side and be fair for a change.

635. These are direct attacks upon the integrity of a judge and his attitude towards his oath of office. Needless to say, they are not particularly pleasant views to hear, but that is not my real concern.

636. What they tell the Court at this stage, and this is my concern, is that conduct the Court has attempted to correct as a prelude to moving into a long trial is not going to be corrected, and that Mr. Healey remains unrepentant and is prepared to confront the Court in a personal way rather than follow the procedures and directions embodied in the Court's decisions.

637. I do not believe that the rights of the parties can be fully protected if the proceedings are conducted at this level. There is, first of all, the enormous waste of resources to consider that can be somewhat compensated for in costs, but not entirely. There is also the unnecessary confrontation that results if legal counsel decides it is acceptable to engage in personal attacks against opposing counsel and to attack the integrity of the trial judge. And, of course, there is a terrible disservice to the parties when their rights are lost sight of, and the Court becomes embroiled in deciding issues that have no real reason to be before the Court and finds itself sidetracked by personal confrontation.

638. Mr. Shibley's impeccable handling of the argument at the hearing of this motion cannot be used to mask the real problems that beset these proceedings. As I said at the time, he was more help to the Court that he realized because, although he did not know the record and was dependent for his arguments and his view of the facts upon Ms. Twinn and Mr. Healey, he reminded the Court of just how cooperative and efficient opposing counsel can be, even when they appear as adversaries in a highly-charged and contentious motion.

639. I said at the hearing that something constructive needs to come out of this motion for the sake of the parties involved. I cannot withdraw because, in my view, the law is very clear that it is my duty not to stand aside in these circumstances. At the same time, however, I do not see how these proceedings can continue if detachment and objectivity are abandoned and personal confrontation is allowed to hold sway.

640. I will need advice from all counsel on this issue. I had hoped to avoid this conclusion, and that the problem would correct itself, but a careful review of the materials placed before me in this motion has convinced me that turning a blind eye to it now is not commensurate

> with protecting the rights of all parties and ensuring a fair and efficient trial on the merits.

[173] In closing their case at this time, the Plaintiffs had the following to say regarding the conduct issues related to Mr. Healey and Ms. Twinn:

> [I]n terms of the conduct of counsel, we submit that that has been dealt with and we remind you, My Lord, that we did telephone conference with you.

Nothing could be further from what the record actually shows. Matters related to the conduct of counsel have not been dealt with. In addition, all of the Court's findings at the Bias Motion concerning the Plaintiffs' purpose in bringing that motion remain in place and are unchallenged.

[174] So the Plaintiffs' position in closing their case at this time and seeking an appeal is that the conduct of the trial judge "since your assignment as trial judge" will now be placed before the Federal Court of Appeal but that the conduct of the Plaintiffs' legal counsel referred to above "has been dealt with" and so is, somehow, a thing of the past. It would appear that the Plaintiffs intend that not only will the past conduct of counsel and their own responsibility for the excesses of the Bias Motion be left out of account, but the latest apprehension of bias allegations will not even be placed before the trial judge. The Plaintiffs are seeking an immunity from review of the role that their own counsel, always acting on their behalf, have played regarding the issues that are central to their decision to close their case at this time. From my perspective as trial judge, I think that no such immunity is possible if the points at issue are to be understood in their full context. A decision to close their case at this time and to pursue an appeal means that the controversial will-say issue will be closely examined, and at the centre of the will-say issue lies the conduct of Mr. Healey and Ms.

Twinn, and the Plaintiffs' approach to these proceedings as manifested in the Bias Motion. Such conduct is inextricably linked to what has become the major issue, at least ostensibly, that has brought the Plaintiffs' case to a close.

[175] The way this matter was left is that, during the course of a teleconference on July 27, 2006, Mr. Molstad offered the following explanation on the part of the Plaintiffs and Mr. Healey and Ms. Twinn:

> MR. MOLSTAD: Thank you very much, My Lord. My Lord, this statement is intended to address certain remarks by the Court in the May 3rd, 2005, reasons regarding the apprehension of bias motion and the May 3rd, 2006 reasons regarding costs.
>
> Mr. Healey and Ms. Twinn, responding both as officers of the court and in their role as counsel of choice of the plaintiffs, wish to provide the Court with the explanation and clarification that the Court has indicated were required.
>
> The arguments filed in support of the application that Your Lordship recuse himself should not have contained any language capable of suggesting that the plaintiffs were alleging that there was actual bias on the part of the Court. Although Mr. Healey and Ms. Twinn had intended that the relief sought in conjunction with their assurances in the argument to the contrary would prevent such a conclusion being drawn, they sincerely apologize for any language capable of that interpretation being included.
>
> Ms. Twinn and Mr. Healey made best efforts during the preparation of the memorandum to ensure compliance and compatibility with the opening statement of the memorandum, which read (quoted as read):
>
> "The issue raised is apprehended bias""
>
> Despite these best efforts, including review of the memorandum by independent, senior counsel and other advisors,

some language capable of an interpretation giving offence was inadvertently retained.

At the hearing on the motion for apprehended bias, Mr. Shibley on behalf of the plaintiffs immediately and unequivocally confirmed that the motion before the Court was one raising reasonable apprehension of bias, not actual bias.

Ms. Twinn and Mr. Healey regret and apologize for any injury or offence that may have resulted from any language capable of suggesting actual bias on the part of the Court. As officers of the court, they wish to assure the Court that in no way did they have an intention to allege anything bur reasonable apprehension of bias.

Mr. Healey and Ms. Twinn also wish to state as officers of the court that they at no time knowingly have made misrepresentations of any kind to the Court, have not knowingly misled the Court as to the facts or the law, have never intended to intimidate the Court or distract it from the merits of the case, and have never intentionally attempted to subvert any of the judgments rendered in this matter that were not appealed. They regret if in any way room has been left for any ambiguity permitting such a conclusion to be drawn, since that conclusion would be contrary to their intentions.

The plaintiffs have willingly come before the Federal Court of Canada for adjudication of matters of great societal and cultural importance to them, believing in the justice system. Ms. Twinn and Mr. Healey would not and certainly did not intend to do anything to subvert the process in which their clients have put their faith.

Ms. Twinn’s cultural values coincide with her professional responsibility to seek a peaceful, positive, and respectful atmosphere in which these proceedings may go forward, going to this objective by Mr. Healey and, indeed, by all those now counsel for the plaintiffs.

It is the sincere wish of Ms. Twinn and Mr. Healey that this statement will be accepted as evidence of their good faith and their commitment to the system of justice as well as to the best interests of their clients.

> That is the submission that we make, My Lord.

[176] The Court responded as follows:

> I've been left in the dark for quite a while wondering what has been going on, so I very much appreciate from my own personal perspective that you've offered some clarification of this point. And I guess what I can say is, you know, for whatever it says I appreciate it having been said at this time.
>
> What it means in terms of the future, well, as I said before in my previous reasons, I really want to put this matter to one side. I suppose when we do consider what it means, it will certainly be something that I will take into account in deciding whether or not anything further needs to be done on this matter.
>
> But what I would like to do is to just leave it where it is now. You have tabled that apology. It's much appreciated, very mush appreciated, and I would like to now proceed with the merits of the case and get on with those merits. So thank you very much.

[177] I think it is very clear from this sequence that:

a. The apology is tabled;

b. The Court will consider its significance at the appropriate time;

c. The Court remains principally concerned to put conduct issues aside so that it can proceed to hear the merits of the case.

[178] This is not the place for the Court to now consider the implications of that apology and explanation "in deciding whether or not anything further needs to be done on this matter." The matter in question was the personal conduct of Mr. Healey and Ms. Twinn as officers of this Court.

The Plaintiffs have already been fixed with responsibility for the excesses of the Bias Motion and I have awarded enhanced costs against them for that motion. The Plaintiffs' apology and explanation does not affect the findings of the Bias Motion which remain unchallenged.

[179] But the Plaintiffs' decision to close their case and base their appeal upon what has transpired in these proceedings since my appointment as trial judge, means that I am now forced to say something about the apology and explanation offered on July 27, 2006 in so far as the issues it raises are germane to the Plaintiffs' present position.

[180] I had hoped that, following a full trial, such conduct issues would subside and pale against the full body of evidence that the Plaintiffs informed the Court they planned to introduce. But the Plaintiffs have chosen, not to present the merits of their claims to the Court, but to close their case and focus upon procedural matters that, inevitably, go back to the initial preparation and production of will-says and what was said about those will-says at the time of their production and service and the way the will-says were dealt with at the Peshee hearing. And that, inevitably, brings back into the picture the very matters that the Court said it wanted to avoid and leave on one side until it had heard and decided the merits.

[181] The apology offered through Mr. Molstad raises the following matters of relevance to the Plaintiffs' decision to close their case in order to pursue an appeal at this time:

a. Mr. Healey and Ms. Twinn are responding through Mr. Molstad "both as officers of the Court and in their role as counsel of choice of the plaintiffs";

b. The allegations in the Bias Motion concerning actual bias were "inadvertently retained";

c. Mr. Shibley made it clear at the hearing of the Bias Motion that the Plaintiffs were relying upon a "reasonable apprehension of bias, not actual bias";

d. Mr. Healey and Ms. Twinn, speaking personally say that "As officers of the Court, they wish to assure the Court that in no way did they have an intention to allege anything but reasonable apprehension of bias";

e. Mr. Healey and Ms. Twinn say that they did not "knowingly" do the various things that the Court found had occurred as part of the Bias Motion, and it was certainly not their intention to do those things.

[182] As I have said, this is not the place to deal with this apology and explanation and its significance for the conduct issues that remain before the Court concerning Mr. Healey and Ms. Twinn as officers of this Court. But I think it is immediately apparent that the Plaintiffs confirm that Mr. Healey and Ms. Twinn were acting for the Plaintiffs in all they did, and that any offence or allegation of actual bias is attributed to mere inadvertence. I think I also have to make abundantly clear that this apology and explanation change nothing about my findings in the Bias Motion. My conclusions remain the same at this time.

[183] I think it is also immediately apparent that the apology and the explanation do not answer the present difficulties before the Court or disconnect conduct issues from the Plaintiffs' present decision to close their case and to proceed with an appeal. As I found, the excesses of the Bias

Motion and the personal animus were not just visible in one accusation that was eventually withdrawn at the hearing and they were not removed by a decision to only allege apprehended bias; they were part of the very texture of the materials that were submitted with that motion and the way it had been put together, as well as its content. In changing their approach to a reasonable apprehension of bias, the Plaintiffs did not withdraw the materials upon which their motion was based, and those materials, as the Court found, were imbued with a personal animus against the Court that could not be expunged.

[184] When the time comes to consider conduct issues, one of the matters the Court will have to assess is how it could possibly be inadvertent for an officer of this Court to swear under oath that the trial judge "engaged in private conversations with Crown to schedule a summary motion filed by the Crown designed to defeat the central allegation raised by the Plaintiffs in this proceeding, namely the Plaintiffs' right of self-government … . It was only through the inadvertence of the Crown that the Plaintiffs became aware of these conversations …," and then maintain this position until it was withdrawn at the actual hearing. The last minute change of tactics at the hearing does not change the import of Mr. Healey's conduct as an officer of this Court, or Ms. Twinn's in supporting him and endorsing what he was willing to swear under oath.

[185] And this, say Mr. Healey and Ms. Twinn and the Plaintiffs, was mere inadvertence and no harm or disrespect was intended.

[186] Mr. Shibley removed this allegation at the hearing, but no explanation has been offered as to why it was ever made in the first place, why it was maintained on the record until the hearing so that the Crown had to prepare to answer it, or what was the intent when it was made. Mr. Shibley withdrew the allegations of actual bias but he did not withdraw the materials upon which the application was based, and what the Court found in those materials after it examined them at Mr. Shibley's invitation was a deeply ingrained personal animus against the Court that could not be separated from the way the materials had been put together or from their general content:

> 629. Mr. Healey's evidence and the Memorandum of Argument are imbued with language and methodologies that suggest that he seeks to impugn the integrity the trial judge in particular, and this factor cannot be eradicated by simply removing the allegation that Russell J. "engaged in private conversations with the Crown... ." The personal attack is deeply ingrained in the written materials and accounts for their excesses, their skewed interpretations, and their inaccuracies. There can be no mistaking the implications: "and he was putting pressure on us and he knew he was putting pressure on us, and he knew that you and opposite counsel were putting pressure on us." And there can be no doubt about who Mr. Healey thinks he is defending: "he has never been treated or had his arguments described in such a way."

[187] I cannot say what I will find when these matters are finally considered. But I think I have to say now that the explanation offered by the Plaintiffs and by Mr. Healey and Ms. Twinn for the excesses of the Bias Motion falls within no "perceptual norms" of which I am presently aware, although I keep an open mind and await future developments. However, these perceptual norms cannot be now left out of account in any assessment of what has transpired to bring this trial to a close. The excesses of the Bias Motion were totally unintentional and inadvertent as far as the Plaintiffs are concerned, just as a refusal to answer in a responsive way a Court direction asking for information about the will-say problem is "best efforts" as far as the Plaintiffs are concerned. The

Plaintiffs cannot have it both ways. If these are the perceptual norms they wish to put forward for consideration by the Court, then those norms must be taken into account in assessing their views as to what has happened to date to cause them to close their case.

[188] The implications for the present situation are that the perceptions of Mr. Healey and Ms. Twinn, as well as the Plaintiffs themselves, concerning what was said and what was meant when the Plaintiffs breached Justice Hugessen's Pre-Trial Order of March 26, 2004 and failed to produce meaningful will-says, so that the Court had to step in and order a solution, are going to be very much at the heart of any appeal that refers to the will-say issue. In addition, of course, the matters referred to in the Court's direction of July 5, 2007 that the Plaintiffs refused to address in any responsive way are pretty well all related to aspects of these proceedings over which Mr. Healey and Ms. Twinn had control as counsel. They produced the will-says in accordance with the Court decisions that preceded their production, and they were the ones who reassured the Court that this had been done. The Court accepts, of course, that in all they did and said they were faithfully representing their clients in these matters and that there is no question of their doing or saying anything that did not have the full approval of the Plaintiffs, and that the Plaintiffs have never suggested otherwise.

[189] This trial has come to a close, ostensibly at least, because the Plaintiffs have refused to call their lay witnesses in accordance with the will-say rules, as well as the Plaintiffs' own previous assurances of compliance, and because the court has remained consistent with its own previous decisions and rulings and has held the Plaintiffs to the will-say rules and their own representations.

At the heart of the will-say issue lie Mr. Healey and Ms. Twinn and their troubled relationship with this Court, as well as the Plaintiffs' repeated attempts, strongly on display at the Bias Motion, to blame the Court for will-say problems that are obviously of their own making. It was Mr. Healey and Ms. Twinn who swore the evidence and assembled the arguments on behalf of the Plaintiffs at the Bias Motion that attempted to make the Court responsible for the state of the Plaintiffs' will-says. And now, those are the very issues – the state of the will-says – that are at the heart of the Plaintiffs' recent decisions and further attempts to blame the Court for the same problems. Throughout the trial the Court has been forced to deal with will-say problems that Mr. Healey and Ms. Twinn on behalf of the Plaintiffs assured the Court and the other participants had been dealt with in 2004. The proceedings have now come full circle. These are extremely contentious and delicate issues that have evolved over a period of years and that have given rise to a voluminous and detailed record. The Plaintiffs' decision to close their case at this time, and without the Court having heard the full range of evidence otherwise available to the Plaintiffs, means that procedural and conduct issues related to will-says must be the focus of any appeal, so that the difficult and fractious nature of this dispute, some of which I have referred to above, will have to be factored into any account that the Plaintiffs offer concerning will-say issues. This will include the crucial former representations concerning compliance with disclosure standards, everything that happened at the Peshee hearing, the assurances given after Peshee that the Plaintiffs had presented their case in accordance with the will-say rules, and indeed anything that occurred before Mr. Molstad took over and had conduct of the proceedings as lead counsel for the Plaintiffs, even though Mr. Healey and Ms. Twinn have continued their involvement throughout the trial and, in ways I have referred to and which are on the record, reliance has had to be placed upon their present accounts by the Plaintiffs

for past sequences that have turned out to be at the heart of the procedural disagreement between the parties that has brought the trial to a close.

[190] To put the Plaintiffs' decision to close their case of this point in perspective, it is worth remembering that, as regards will-says and the Plaintiffs' lay witnesses, these proceedings have not really progressed beyond one of the first major issues I had to deal with as trial judge in the Fall of 2004. Subsequent events have revealed that the Plaintiffs' will-say disclosure originating from that time has become their major preoccupation at trial and has led them, ostensibly at least, to close their case. I have had to spend significant portions of the trial dealing with will-say problems that the Plaintiffs assured the Court and the other participants had been fixed in 2004.

[191] These are just a few of the ways that the conduct issues associated with the Bias Motion have continued to plague these actions and are, in fact, a significant part of the record that is relevant to why the Plaintiffs have now closed their case and abandoned these actions without calling any further evidence. The Plaintiffs' decision not to place their apprehension of bias concerns before the trial judge means that the impact of the conduct of individual counsel, or indeed the Plaintiffs themselves, on the whole vexed will-say issue cannot be fully assessed and adjudicated in the light of whatever grounds of appeal the Plaintiffs may choose to take up. Given the Plaintiffs' groundless and transcript-defying attempts at the Bias Motion to blame the Court in relation to will-says, and their attempts to avoid the effects of Court decisions and rulings regarding will-says, and given the Plaintiffs' demonstrated reliance upon Mr. Healey's revisionist and unsworn accounts concerning what was intended at the Peshee hearing, and given his role in the production of the will-says and

the confirmations of compliance that were given to the Court, a crucial assessment needs to be made concerning how these matters should impact any "position" the Plaintiffs may choose to put forward regarding will-says and their role in bringing these proceedings to a close. By closing their case at this time the Plaintiffs have deprived this Court of the means of making any such assessment. At the same time, however, they have deprived themselves of the means of establishing a reliable and verifiable justification for closing their case at this time.

[192] However, even if the Plaintiffs were not to allege apprehended bias against the Court, as they have given notice they intend to do, the conduct issues identified at the Bias Motion and the Plaintiffs' repeated attempts to circumvent the consequences of their will-says that were produced in 2004 have resounded throughout the trial and cannot be discounted in any appeal based upon what has happened during the course of this trial to date.

[193] The Plaintiffs' notification to the Court that they intend to ask the Federal Court of Appeal to review apprehended bias since the time of my "assignment as trial judge" is in itself revealing of the fact that what has transpired to cause the Plaintiffs to close their case and abandon these actions goes back to that time and cannot be understood without reference to what happened in 2004/2005. But the problem with going back that far is that most of it has already been dealt with and is *res judicata*. As regards will-says, this trial has never really got beyond the position it was in over three years ago in 2004 when I became involved as trial judge. The Plaintiffs have simply attempted to re-argue and avoid decisions that were made back then, some of which they did not appeal, and some of which were confirmed on appeal. The Court has had to spend a year of trial dealing yet again

with what has now been revealed to be the Plaintiffs' further breaches of Justice Hugessen's Pre-Trial Order of March 26, 2004 that required the Plaintiffs to produce will-says for their new lay witnesses and the Plaintiffs' reassurances that they had done this in a way that complied with the will-say rules.

[194] I refer to these matters now because, having been put on notice by the Plaintiffs that they intend to pursue an appeal on the basis, *inter alia*, of apprehended bias going all the way back to my appointment as trial judge, I think the record has to show that the Plaintiffs, for no reason they have explained, have declined to bring such matters before me, and because I do not want the silence of the trial judge to be construed as either condonation of such an approach or as an indication that the problems of the past can somehow be disconnected from the Plaintiffs' decision to close their case and pursue an appeal at this time.

[195] I had hoped that conduct issues could become a thing of the past and that, as the trial progressed, they would be less significant as the full panoply of evidence was placed upon the record. But the Plaintiffs' decision not to bring the full range of their evidence before the Court and to focus, instead, on procedural matters that have transpired in these proceedings to date means, inevitably, that conduct issues must remain a major concern. Once again, it is the Plaintiffs' choice.

The Real Problem

[196] Whatever grounds of appeal the Plaintiffs intend to use, their decision to close their case at this point leads back inevitably to one issue that has plagued these proceedings since I was appointed as trial judge: the role and use of will-say statements.

[197] There is a vast record pertaining to this issue and I cannot refer to it all here. However, I think it is possible to illustrate the problem by reference to inconsistencies that have appeared in the Plaintiffs' position and that have not been explained in any acceptable way. Behind the conduct issues there is really a very simple point of contention that has led, ostensibly at least, to the Plaintiffs' decision to close their case at this time. This issue should not be obscured.

[198] As regards the role and use of will-says in these proceedings, the Plaintiffs made three illustrative promises or assertions to the Court and the other participants that I have referred to frequently in my many decisions and rulings. These promises and assertions do not stand alone and I have singled them out because the whole record is too vast to cite in full every time I have to deal with this issue. But they do illustrate why these proceedings have become trammelled in will-say issues that go back to 2004.

[199] The first promise deals with pre-trial disclosure in accordance with the standards set by the Court:

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

[200] The second promise or assertion deals with the connection between pre-trial disclosure and relevant evidence to be lead at trial:

> 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 – the answer to that question is guided by the standard in the will-say.
>
> And it's important that both sides have notice, the same kind of notice.

[201] The third promise is that the Plaintiffs accept the rules for will-say disclosure set by the Court in its decisions and rulings and have presented their case accordingly, and want to proceed on that basis:

> 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.

[202] The Court's decisions and rulings at trial show that the Plaintiffs have not remained consistent with these promises and assertions at trial. The Plaintiffs have said at trial that they "do not understand nor … accept the use of will-says at trial to exclude relevant admissible evidence … ." and that "the acceptance of a standard of will-says in pre-trial disclosure and the plaintiffs' effort to comply with that standard is … unrelated to the admissibility at trial."

[203] The Plaintiffs have also revealed at trial that they are not working under the will-say rules and have repudiated those rules. They say they do not even "understand" them. And they also say they have not presented their case through their will-says because, on the basis of the very same will-says, they now say they cannot adequately state their case.

[204] The Court has asked the Plaintiffs to provide explanations for these inconsistencies. As regards promises one and two the Plaintiffs have ignored the request and have refused to explain. In relation to the second promise or assertion the Plaintiffs have attempted to make revisionist and implausible distinctions between what happened at Peshee and what should happen in the case of their own witnesses. Not only are such distinctions unsupported by the record, but the Plaintiffs have revealed that they are based upon the advice of Mr. Healey as to what he meant by his words at the Peshee hearing, whose conduct is under consideration by the Court, who has displayed a strong personal animus against the trial judge, and who has not provided his account of Peshee under oath but merely through Mr. Molstad as an officer of the Court.

[205] Notwithstanding these inconsistencies, and the breaches of Court orders and rulings that lie behind them, the Court has told the Plaintiffs that they can retain any or all of their witnesses and call any further lay witnesses provided this is done in accordance with the will-say rules that are established in Court decisions and which the Plaintiffs earlier confirmed and used to their own advantage. Essentially, the Court has told the Plaintiffs that they can both retain and call all of their lay witnesses if they will confirm that they have made disclosure in accordance with the spirit and intent of the will-say rules set by the Court.

[206] The Plaintiffs have elected not to either retain or call further lay witnesses in accordance with the will-say disclosure rules. Quickly following that decision, the Plaintiffs have closed their case and have told the Court that they plan to seek a re-trial based, *inter alia*, on apprehended bias on the part of the trial judge. The Plaintiffs have now revealed that they are not willing to proceed with this trial if they have to abide by the will-say rules. Yet these are the rules under which the Plaintiffs' lay witnesses have been called; they are the rules the Plaintiffs have confirmed; and they are the rules the Plaintiffs have used to their own advantage.

[207] The source of the impasse is now very obvious, even though the Plaintiffs have made repeated attempts to create the impression that the Court is the cause of their problem. But all of their inconsistencies and equivocations over this issue point in one direction.

[208] At the Mistrial Motion, the Plaintiffs revealed that they could not adequately present the case they wanted to present to the Court because their witnesses were only being allowed to say what the Plaintiffs had assured the Crown they would say.

[209] If the Plaintiffs' allegations that they cannot adequately present their case to the Court are correct, then it follows that their will-says as drafted never allowed them to present that case. Yet the Plaintiffs have reassured the other participants that this was not the problem.

[210] But long before the trial, at the Bias Motion, the Plaintiffs revealed that they were concerned about their will-say disclosure because they made strenuous efforts at that time to blame the Court and the Crown for the problem.

[211] At the Mistrial Motion and its aftermath, they continued with groundless and unsubstantiated accusations against the Court and tried to allege that the source of the problem was not their own will-say disclosure but was the Court's applying a "comprehensive and detailed" standard in order to exclude their evidence.

[212] Their repeated attempts to blame the Crown or the Court for the constraints they have faced at trial because of will-says have led them into various inconsistencies and abuses:

a. The excesses of the Bias Motion revealed Mr. Healey and Ms. Twinn – as counsel for the Plaintiffs – swearing affidavits, drafting formulaic affidavits for others to sign, and producing a skewed and inaccurate written argument that could not be substantiated from the record, in which they attempted to establish that the Court had somehow colluded with the Crown and other counsel to ensure that the Plaintiffs did not have the time to produce will-says that the Plaintiffs had earlier said they had produced in accordance with the will-say rules: "and he was putting pressure on us and he knew he was putting pressure on us, and he knew that you and opposite counsel were putting pressure on us." And this was done after the Peshee hearing at which the Court had told the Plaintiffs to check their will-says and bring any problems forward in a timely manner;

b. At the trial proper, the Plaintiffs repudiated the will-say rules and their own previous reassurances that they were conducting the proceedings in accordance with the rules, once again accusing the Court of being the source of the problem and offering a revisionist account of the Peshee hearing in which Mr. Healey's present version of what he meant by his words and actions at that hearing have been used to suggest that the Court is using will-says in a way the Plaintiffs don't even understand in order to deal with ambush issues at trial;

c. When the Court, in its July 5, 2007 direction, told the Plaintiffs to answer questions that would reveal the real source of the problem, the Plaintiffs simply refused to respond to the direction in any meaningful way in a vain attempt to conceal what was more than obvious to everyone concerned i.e. that if the Plaintiffs were having a problem in presenting the case they wanted to present to the Court, then the problem must lie with the Plaintiffs' own will-say disclosure;

d. When the Court offered the Plaintiffs the further opportunity to both retain and call witnesses in compliance with the will-say disclosure requirements, the Plaintiffs refused that opportunity, and they have now closed their case in order to seek a retrial. It is the Plaintiffs who do not wish to proceed if their lay witnesses are going to be constrained in any way by will-say disclosure. So, once again, it is obvious that if the Plaintiffs are truly constrained in presenting the case they wish to present to the

Court, that must be because their will-say disclosure does not allow them to present that case.

[213] The Plaintiffs have not been able to explain or substantiate how will-say rules that emerged from the pre-trial phase of these proceedings can have prevented them from presenting the case they want to make before the Court and which, in 2004/05, they assured the Court and the other participants they wanted to make in accordance with those rules. And now they have closed their case without any such explanation or substantiation.

[214] The decisions not to call or retain lay witnesses and not to proceed with the trial are decisions of the Plaintiffs:

a. The Court was continuing to hear evidence called by the Plaintiffs until the Plaintiffs attempted to terminate the trial on the basis of mistrial. This initiative came from the Plaintiffs. They wanted the Court itself to declare a mistrial on its own motion;

b. After the Plaintiffs engaged in abusive conduct, repudiated any connection between will-say disclosure and evidence at trial, and revealed they were in breach of the disclosure requirements, no one prevented the Plaintiffs from retaining and/or calling any or all of their lay witnesses. All they had to do was confirm and/or demonstrate the truth of their own position that they were compliant with disclosure standards. The Plaintiffs refused to retain and/or call their lay witnesses on this basis. The choice was theirs;

c. The Plaintiffs have now chosen to close their case. No one asked them to do so.

[215] The Plaintiffs have assured the Court in the past that they have presented the case they want to present in their will-says in accordance with the rules set by the Court and that they want to proceed on this basis.

[216] The Plaintiffs have not explained, let alone substantiated, before the Court how they could have been compromised in their ability to present their case by the Court's referring to will-say disclosure in its ambush rulings if the Plaintiffs have, as they once reassured the Court and the other participants, presented their case in their will-says in accordance with the rules. The Court has repeatedly explained to the Plaintiffs that it cannot abandon the will-say rules as the basis upon which all participants were given the opportunity to call lay witnesses. The Plaintiffs have refused to accept this position.

[217] If it is true that the Plaintiffs cannot adequately state their case because their witnesses are only allowed to say what the Plaintiffs have told the Crown they will say in their will-says (and the Plaintiffs have refused to provide the explanations and the substantiation that would allow the Court to determine if this was, in fact, the case) then, on the basis of what the Court has been told, there can only be two reasons for such a predicament:

a. Either the Plaintiffs' will-says do not, in fact, disclose in accordance with the disclosure standards what a witness will say; or

b. The case the Plaintiffs now wish to present is not the case they once assured the other participants and the Court they had presented through their will-says in accordance with the disclosure rules.

[218] If the Plaintiffs' will-says do not contain a synoptic account of what their witnesses will say in accordance with the disclosure rules, that is a matter entirely within the responsibility of the Plaintiffs, and they have been given all the time they asked for to make sure such a synoptic account was provided. Failure to provide it is certainly no fault of the Crown, and it is no fault of the Court as the Plaintiffs have attempted to make it. And the Plaintiffs have refused to acknowledge this obvious fact.

[219] If the Plaintiffs want to present a different case from the one they once said they wanted to present, then they have made no attempt to explain how or why such a change has come about, or why they brought all participants into trial without alerting them to the fact that such a change had occurred. And, once again, this is something that is entirely the responsibility of the Plaintiffs. It would be grossly unfair to insist that the Crown must now be prepared to cross-examine on a different case from the one the Plaintiffs told the Crown it would have to cross-examine on.

[220] The Mistrial Motion revealed that, once the Plaintiffs discovered that they were going to be held to Court decisions and rulings regarding will-say disclosure and the relevance of that disclosure for ambush rulings, as well as their own prior reassurances and positions regarding compliance, they wanted to terminate the trial and start again in a way that would leave them free of such constraints. Once again, a cogent account of what caused this state of affairs is not something the Plaintiffs have been willing to disclose, so that the Court can make no findings in this regard. But however it occurred it is obviously a matter that remains the responsibility of the Plaintiffs.

[221] If there was any problem with will-say disclosure and ambush at trial, it was entirely the responsibility of the Plaintiffs, and they have certainly been given the time and the encouragement to ensure that no such problem would occur. By closing their case at this time, they are seeking to avoid the inevitable consequences of their own actions.

[222] Coming into this trial, the Plaintiffs knew what was in their pleadings; they also knew what was in their will-says; they also knew the will-say rules; and they knew what they had both witnessed and advocated at the Peshee hearing.

[223] The Plaintiffs have themselves asked the Court to enforce the will-say rules against the "other side" and they have received the Court's support in this regard. The Plaintiffs brought a motion to ensure that the Crown and the Interveners had produced and provided the Plaintiffs with will-says for witnesses that met the synoptic disclosure standards set by the Court. The Court granted that motion and ordered the Crown and the Interveners to provide the Plaintiffs with what

they had asked for in terms of will-say disclosure. At the Peshee hearing, the Plaintiffs asked the Court to protect them against ambush, and they asked the Court to refer to a will-say in order to determine whether ambush had occurred. The Court again supported the Plaintiffs against the "other side" when it came to ambush at trial and the use of will-says at trial.

[224] The Plaintiffs now say the Court has acted unfairly by ruling that they are subject to the same rules as the Court enforced on their behalf against the "other side." In fact, they have refused to either retain or call witnesses if they are to be subject to those rules.

[225] That is the issue that lies behind the Plaintiffs' most recent decision to close their case without calling further evidence, or at least that is as much as the Plaintiffs have been willing to reveal. If the Plaintiffs cannot adequately state or prove their case, as they now allege, that can only be because they have refused to retain or call lay witnesses on the basis of the will-says they produced and which they have continued to assure the Court and the other participants are standard-compliant. All of the abuse issues at trial have been related to the Plaintiffs' attempts to force the Court to excuse them from the principles that the Court has enforced, to their advantage, against the "other side," and to which the "other side" would have remained subject when it was their turn to call lay witnesses. The Plaintiffs say this is unfair. The Court does not agree. The Plaintiffs have been given a full and fair opportunity to bring their case before the Court, and the decision to close their case at this point in the proceedings is their's, and theirs alone.

OUTSTANDING ISSUES

[226] The Plaintiffs' decision to close their case at this point does not end my role in these proceedings and there are several matters of which I must remain seized so that I can deal with them at the appropriate time.

[227] Consequently, notwithstanding the Court's decision to dismiss the Plaintiffs' actions for the reasons given, the Court shall remain seized of the following matters to be dealt with as and when appropriate:

a. Any issues arising from the Court's recent decision on the costs motions brought by the Crown and the Interveners for enhanced costs against the Plaintiffs;

b. All matters pertaining to general costs for these proceedings and actions for all participants not already dealt with;

c. All personal conduct issues related to Mr. Healey and Ms. Twinn that the Court has set aside for later determination;

d. Any matters related to fixing the terms of my order of September 11, 2007; and

e. Matters raised by participants in relation to the interlocutory injunction presently in place on the basis that if the Plaintiffs' proposed appeal of this Order is dismissed or does not occur, any participant may bring a motion before the trial judge to address the status or effect, if any, of the injunction granted by Justice Hugessen on March 27, 2003, provided, however, that nothing in this order shall in any way affect, detract from or prejudice the Plaintiffs' right or ability to argue the positions set out under the heading "Interlocutory Injunction" that appears in their letter of February 8, 2008 in relation to NSIAA and CAP, including:

(i) That the Interveners, or any of them, have no right or standing to bring such a motion;

(ii) That the trial judge has no jurisdiction to hear such a motion;

(iii) That there is no legal basis for the Intervener's position on positions taken on such a motion; and

(iv) That the conduct of the trial judge to date provides a basis for a finding of reasonable apprehension of bias.

[228] Subject to the matters with which the Court remains seized as set out above, and subject to the reservations and observations set out in these reasons, and given that the Crown and the

Plaintiffs agree that the Court should dismiss these actions based upon the Crown's request because there is no evidence from the Plaintiffs before me in relation to these actions, the actions are dismissed because there is no case for the Crown to answer.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	T-66-86-A
STYLE OF CAUSE:	**SAWRIDGE BAND v.** **HER MAJESTY THE QUEEN ET AL** T-66-86-B **TSUU T'INA FIRST NATION (formerly the Sarcee Indian Band) v.** **HER MAJESTY THE QUEEN ET AL**
PLACE OF HEARING:	Edmonton, Alberta
DATE OF HEARING:	January 7, 2008
REASONS FOR JUDGMENT2:	RUSSELL J.
DATED:	March 7, 2008

APPEARANCES:

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