

**(SR1) - NRCB Application No. 1701**

**NATURAL RESOURCES CONSERVATION BOARD**

**IN THE MATTER OF THE  
*NATURAL RESOURCES CONSERVATION BOARD ACT, RSA 2000, c. N-3***

**IN THE MATTER OF NRCB APPLICATION NO. 1701  
BY ALBERTA TRANSPORTATION**

**SPRINGBANK OFF-STREAM RESERVOIR PROJECT**

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**ALBERTA TRANSPORTATION  
RESPONSE TO COST CLAIMS OF THE SR1 CONCERNED  
LANDOWNERS GROUP AND STONEY NAKODA NATIONS**

**May 21, 2021**

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## TABLE OF CONTENTS

PART 1	INTRODUCTION .....	1
PART 2	STATEMENT OF FACTS .....	1
PART 3	TEST FOR NRCB COSTS CLAIMS.....	2
PART 4	SUBMISSIONS ON COST CLAIMS.....	5
A.	LEGAL FEES AND DISBURSEMENTS.....	6
(a)	Legal Fees .....	6
(i)	Time incurred prior to the Pre-Hearing Decision Report .....	6
(ii)	Activities not requiring legal counsel .....	8
(iii)	Duplication and Overlap of Time .....	9
(iv)	Extent to which item assisted the Board in reaching its decision .....	9
(b)	Disbursements.....	10
(c)	Conclusion on Legal Fees and Disbursements .....	10
B.	EXPERT FEES AND DISBURSEMENTS.....	11
(a)	Extent to which expert was required to attend hearing.....	11
(b)	Extent to which expert evidence provided a better understanding of issues that were relevant and important to the assessment of the Project .....	12
(c)	Conclusion on Expert Fees and Disbursements.....	13
PART 5	CONCLUSION.....	14

## PART 1 INTRODUCTION

1. Alberta Transportation makes the following submissions with respect to the final costs claims of the SR1 Concerned Landowners Group (“SCLG”) and the Stoney Nakoda Nations (“SNN” or “Stoney”) with respect to the Natural Resources Conservation Board’s (the “Board” or “NRCB”) public hearing held for Alberta Transportation’s application for the Springbank Off-Stream Reservoir Project (“Project”).
2. Alberta Transportation is obliged to raise a number of issues and concerns with respect to the costs claims having regard to the use of public funds to satisfy these claims and seeks the Board’s review and direction as to what costs are reasonable.

## PART 2 STATEMENT OF FACTS

3. On October 5, 2020, the Board issued a Notice of Pre-Hearing Conference advising that the NRCB would hold a virtual oral pre-hearing on December 2, 2020. The Notice stated that eligible individuals may apply for intervener funding pursuant to the *Natural Resources Conservation Board Act*. Advance funding requests were submitted by the SCLG, Blood Tribe/Kainai and Ermineskin Cree Nation.
4. On December 10, 2020, the Board issued the *Pre-Hearing Conference Decision Report*.<sup>1</sup> which addressed various procedural matters, including the issuance of advance cost awards. In the Report, parties were advised that the hearing would commence on March 22, 2021 and was estimated to be completed within 10 hearing days, with an extra 5 hearing days set aside if necessary.
5. On January 20, 2021, the SNN submitted a letter to the Board requesting advance funding. On February 9, 2021, the Board issued the *Decision Report on the Stoney Nakoda Nations’ Application*.<sup>2</sup>

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<sup>1</sup> Pre-Hearing Conference Decision Report, NRCB Application No. 1701 (December 10, 2020) [“Pre-Hearing Decision Report”]

<sup>2</sup> Decision Report on the Stoney Nakoda Nations’ January 20 2021 Applications, NRCB Application No. 1701 (February 9, 2021) [“SNN Decision Report”]

6. The hearing commenced virtually on March 22, 2021 and continued for 10.5 days, concluding on April 7, 2021. Following the conclusion of the hearing, final cost claims were submitted by the SCLG and Stoney (collectively, the “Cost Claimants”). In response to the claims of the Cost Claimants, Alberta Transportation provides the following submissions.

### **PART 3 TEST FOR NRCB COSTS CLAIMS**

7. Section 31(2) of the *Rules of Practice of the Natural Resources Conservation Board Regulation*, AR 77/2005 (the “Rules”) allows the Board to award costs to an eligible intervener for “costs that, in the Board’s opinion, are reasonable and are directly and necessarily related to the preparation and presentation of the eligible intervener’s submission.” Costs awards to eligible interveners are determined on a project-by-project basis, having regard to factors such as:
  - (a) any comments, replies or information that is provided by the intervener or the applicant;
  - (b) whether the intervention was presented by or on behalf of an eligible intervener or whether the eligible intervener represents an interest that should have been represented before the Board;
  - (c) whether the representation of such an interest contributed to the proceedings;
  - (d) whether the interest was adequately represented by other interveners;
  - (e) whether the eligible intervener attempted to bring related interests together and pool resources; and
  - (f) any other thing the Board considers appropriate.<sup>3</sup>

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<sup>3</sup> Rules, section 31(4)

8. Further, section 31(3) of the *Rules* provides the Board with discretion to deny a claim for funding, in whole or in part, in the following circumstances:
- (a) if the Board is not satisfied that the costs were reasonable and directly and necessarily related to the preparation and presentation of the eligible intervener's submission,
  - (b) if the Board is not satisfied that the eligible intervener was in need of legal or technical assistance in the preparation and presentation of the eligible intervener's submission,
  - (c) if the Board is not satisfied that the intervention was conducted economically,
  - (d) if, in the Board's opinion,
    - (i) the intervention and its presentation were unnecessary, irrelevant, improper or intended to delay the proceedings with respect to an application, or
    - (ii) the claim is excessive, having regard to the nature of the application and the intervention, or
  - (e) for any other reason the Board considers appropriate.<sup>4</sup>
9. The central guiding principle is that claimed costs must be reasonable and directly related to the preparation and presentation of the eligible intervener's submission. In addition to the factors listed in sections 31(3) and (4) of the *Rules*, the NRCB has established through previous costs awards several principles that help guide the assessment of costs claims, which include:
- (a) the NRCB will normally require all interveners to pay a significant portion of the cost of their intervention. Costs are not meant to fully indemnify interveners.

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<sup>4</sup> Rules, section 31(3)

Interveners may be expected to bear a reasonable proportion of the costs of the preparation and presentation of an intervention.<sup>5</sup>

- (b) any funding for interveners should enable them to provide information that would not otherwise be available to the Board in determining whether the project is in the public interest.<sup>6</sup>
- (c) in determining if final costs for a particular item are appropriate, the Board will normally take into account the extent to which that item assisted the Board in reaching its decision. An objective of the Board is that intervener funding, when awarded, should result in a positive contribution to a review and assist the Board in reaching a decision.<sup>7</sup>
- (d) final cost awards are made having regard to the length of the hearing, the contribution of the interveners' experts to relevant issues, and budgets determined by the advance funding process. Final cost awards will be made based on what actually transpires at the hearing. However, the Board generally expects that final cost claims will closely correlate to the advance funding decision.<sup>8</sup>
- (e) cost awards should only cover legal costs for hearings. Such costs would "normally include preparing lay and expert witnesses to give evidence, reviewing or assisting in the preparation of any written submissions to ensure they are legally proper, leading evidence, asking questions at the hearing and dealing with specific legal issues."<sup>9</sup>
- (f) the Board does not believe that legal assistance should be necessary in all interventions or for all parts of any given intervention and has held that it would be unfair to the applicant to award costs incurred due to the inappropriate use of

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<sup>5</sup> Alberta Sulphur Terminals Ltd. Report on Final Costs, Application No. 0702 (August 13, 2009) ["AST"], pg. 2

<sup>6</sup> *Ibid*

<sup>7</sup> *Ibid*

<sup>8</sup> *Ibid* at pg. 5

<sup>9</sup> *Ibid* at pg. 3; Vacation Alberta Corporation Report on Final Costs Awards, Application No. 9201 (February 9, 1994) ["Vacation Alberta"], pg. 6

legal counsel for functions which could have been undertaken in an equally effective and efficient manner by others such as the executive of the group or association.<sup>10</sup>

- (g) legal costs related to preparing and making a request for intervener funding should not normally be paid by the applicant<sup>11</sup>

#### PART 4 SUBMISSIONS ON COST CLAIMS

10. The SCLG's total costs claim is **\$369,203.74**, broken down as follows:

Legal Fees and Disbursements	\$282,052.68
Experts/Consultants	\$233,531.06
Interveners	\$3,250.00
Witnesses	<u>\$150.00</u>
Total amount of final cost claim	\$518,983.74
Less advance cost award	<u>(\$149,780.00)</u>
<b>Total additional claim</b>	<b>\$369,203.74</b>

11. The Wesley, Chiniki and Bearspaw First Nations (collectively, the SNN) have each submitted identical final cost claims in the collective total of **\$75,377.82**, broken down as follows:

Legal Fees and Disbursements	\$72,692.82
Experts/Consultants	\$31,335.00
Interveners	\$3,300.00
Witnesses	<u>\$2,250.00</u>
Total amount of final cost claim	\$106,577.82
Less advance cost award	<u>(\$31,200.00)</u>
<b>Total additional claim</b>	<b>\$75,377.82<sup>12</sup></b>

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<sup>10</sup> Three Sisters Golf Resorts Inc. Report on Final Costs Award, Application No. 9103 (February 12, 1993) ["Three Sisters"]. pg. 10

<sup>11</sup> AST, pg. 3

<sup>12</sup> Each Nation claims 1/3 of this total additional claim amount.

12. Alberta Transportation has the following concerns with respect to these cost claims. Generally, the concern is that the Cost Claimants have failed to demonstrate that the claimed costs align with the factors in s. 31 of the *Rules* and principles established by the NRCB in previous costs decisions. Further, some costs appear to be excessive and well above those amounts recognized by the Board in the *Pre-Hearing Decision Report* and the *SNN Decision Report*. Finally, certain portions of the cost claims do not appear to be directly or necessarily related to the preparation and presentation of the submissions or proportionate to the Cost Claimants' role in the Hearing or did not address the issues identified for the Hearing.

**A. LEGAL FEES AND DISBURSEMENTS**

13. The legal fees and disbursements submitted by the Cost Claimants exceed the amounts recognized by the Board in its decision on advance funding<sup>13</sup> without any explanation for the increase. Alberta Transportation submits the costs claimed by the Cost Claimants for legal fees warrant a critical review and adjustment for the following reasons.

**(a) Legal Fees**

**(i) Time incurred prior to the Pre-Hearing Decision Report**

14. Although the NRCB does not have a rule which explicitly excludes costs claimed for work done before a notice of hearing is issued, this principle is recognized in previous NRCB decisions. For example, the Board has stated that "legal costs related to preparing and making a request for intervener funding should not normally be paid by the Applicant."<sup>14</sup> In the Board's Report on Final Cost Awards in the Agrium proceeding, it reduced the amount claimed for legal fees for services related to the Pre-Hearing Meeting.<sup>15</sup> This aligns with the principle that "the primary purpose of cost awards is to

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<sup>13</sup> Pre-Hearing Decision Report and SNN Decision Report

<sup>14</sup> Agrium Products Inc. Report on Final Cost Awards, Application No. 03-01 (October 22, 2004) ["Agrium"], pg. 3; see also Vacation Alberta, pg. 7

<sup>15</sup> Agrium Final Cost Award pg. 6



fund the preparation and presentation of intervener submissions at the hearing itself and not for matters such as the determination of an intervener's status as "directly affected"<sup>16</sup>

15. Further support for the above can be found by relying on general rules from other regulators with similar cost provisions, such as the Alberta Energy Regulator (the "AER"). The AER *Rules of Practice* sets out the general rule that the AER will not award costs for work done before a notice of hearing was issued. In Costs Order 2019-01, the AER Panel explained:

In accordance with the Rules of Practice, the AER generally does not award costs for work done before it is clear that a matter is to go to hearing and a notice of hearing issued. To be eligible for an award, costs must be necessarily and reasonably incurred for the direct purposes of a hearing, and if there is no certainty of a hearing (i.e., no notice of hearing), that test cannot be met. As the AER noted in AER Costs Order 2016-001 (at paragraph 16), any party claiming costs incurred before a notice of hearing is issued would have to provide compelling evidence as to why the AER should depart from this general rule and award costs.<sup>17</sup>

16. Alberta Transportation submits that it would be inappropriate to award costs related to legal services performed prior to the issuance of the *Pre-Hearing Conference Decision Report* (December 10, 2020) as that work does not relate to the preparation and presentation of intervener submissions at the hearing itself, but instead principally relates to the preparation and request for intervener funding.<sup>18</sup> Similarly, it would be inappropriate to award costs related to legal services performed after the closing of the hearing.<sup>19</sup>

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<sup>16</sup> Three Sisters, pg. 10 (The Board also believes it is reasonable to expect that interveners in a hearing would typically provide considerable time and effort on a voluntary basis for certain activities, including the preparation and submission of cost claim documentation to the Board.)

<sup>17</sup> Costs Order 2019-01 at para 35

<sup>18</sup> See for example: SCLG Final Cost Claim, pdf. pg. 22-31

<sup>19</sup> See for example: SNN Final Costs Claim for BFN, CFN and WFN ("SNN Final Costs Claims"), pdf. pg. 15-16

*(ii) Activities not requiring legal counsel*

17. Alberta Transportation acknowledges that the Cost Claimants include groups of individuals and that time and resources were devoted by its members and legal counsel in support of its participation in the hearing. Further, Alberta Transportation recognizes the benefit in having the interests of a group of directly affected (and interested parties) represented. However, Alberta Transportation submits that costs awards should only cover legal costs for those functions that require legal expertise, which would “include advising on legal matters, ensuring that the submission is legally proper, and preparing those portions of submissions that deal with legal issues.”<sup>20</sup> Claimed legal costs should not include fees for performing administrative tasks such as downloading documents or videos, scheduling meetings or assembling binders.<sup>21</sup>
18. As stated by the Board in the Three Sisters Final Costs Decision “it would not be fair to the Applicant to award costs incurred due to the inappropriate use of legal counsel for functions, such as the “coordination” of a group intervention, which could have been undertaken in an equally effective and efficient manner by others, such as the executive of the groups or associations.”<sup>22</sup>
19. Alberta Transportation submits that time related to communications with members of the Cost Claimants may have been reduced as facilitation of this type of communication could have been undertaken in an equally effective and efficient manner by others within the intervening groups.
20. Alberta Transportation accepts that legal counsel may need to consult with expert or other witnesses, when preparing closing argument. However, it asks the Board to assess whether the time claimed for such activities is excessive and therefore, warrants a reduction, especially in light of the fact the final argument proceeded orally.

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<sup>20</sup> Three Sisters, pg. 10

<sup>21</sup> See for example: SNN Final Costs Claims, pdf pg. 7-16 for time claimed for “Administration”

<sup>22</sup> Three Sisters, pg. 10.

***(iii) Duplication and Overlap of Time***

21. Further, Alberta Transportation submits legal fees should be assessed for entries that constitute duplication of work, such as:
- (a) legal counsel reviewing and responding to internal communications with one another via email and text messages;
  - (b) extensive correspondence with witnesses from each other's assigned topic blocks.
  - (c) both legal counsel attending the same meetings and charging for the full time of their attendance; and
  - (d) extensive overlapping attendance of both legal counsel through the duration of the hearing.<sup>23</sup>

***(iv) Extent to which item assisted the Board in reaching its decision***

22. Alberta Transportation submits that it is appropriate for the Board to assess the value of the extensive cross-examinations conducted by the Cost Claimants to determine whether the full extent of those cross-examinations were necessary to provide the Board with an understanding of the issues and whether that time might have been reduced. Alberta Transportation notes that much of the evidence presented by the Cost Claimants' witnesses or the cross-examination by legal counsel appeared to focus on information outside the "reviewable project", such as the MC1 alternative or future and existing projects on the Bow River.<sup>24</sup>
23. The Cost Claimants' extended cross-examination on issues outside of the hearing not only created an unnecessary cost for Alberta Transportation and the Board, it is not reasonable that the cost should now be paid to support that activity.

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<sup>23</sup> See for example: SCLG Final Cost Claim, pdf pgs. 47-53; and SNN Final Costs Claims, pdf pg. 11-16

<sup>24</sup> See for example: Exhibit 349, pg. 127-142, 153-213; Exhibit 379, pg. 1448-1451; and 232-239; and Exhibit 413

**(b) Disbursements**

24. Alberta Transportation takes no position with respect to the disbursements claimed.

**(c) Conclusion on Legal Fees and Disbursements**

25. Alberta Transportation submits that the legal fees claimed for preparation and attendance by the Cost Claimants exceed what the Board recognized in the *Pre-Hearing Conference Decision Report* and the *Decision Report on the Stoney Nakoda Nations' Application*. The Cost Claimants' advance funding requests were based on preparation and attendance for a 10 day hearing. The hearing actually ran for 10.5 days (with the final half day dedicated solely to Alberta Transportation's reply argument). Nor were extended hearing hours required, generally speaking. In other words, the hearing ran very close to what had been scheduled.
26. Alberta Transportation asks the Board to consider whether the Cost Claimants have provided compelling evidence to justify the increases in legal fees from the budgets presented in their advance funding requests. This was not a situation where the hearing was longer than the Board anticipated or where scheduling difficulties arose or unexpected delays were encountered.<sup>25</sup> Instead, the hearing flowed smoothly over the 10.5 days, only going past 5:00 pm on a handful of occasions.
27. Alberta Transportation submits that the Board should consider whether it would be appropriate that the Cost Claimants' legal fees be restricted to the budgeted amounts approved by the Board in its ruling on advance funding, less the advanced costs award allocated to legal fees. Alternatively, a percentage reduction might be appropriate.

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<sup>25</sup> Vacation Alberta, pg. 9; Glacier Power Ltd. (Dunvegan Hydroelectric Facility) Cost Order 2009-008 (February 24, 2009)

**B. EXPERT FEES AND DISBURSEMENTS**

28. For the reasons which follow, Alberta Transportation submits that insofar as the Board awards the Cost Claimants costs for expert witnesses, amounts should be restricted to the amounts approved by the Board in its ruling on advance funding and where advance expert costs were not previously provided then a reduction would be warranted.

29. In general, Alberta Transportation submits that many of the experts retained by the Cost Claimants provided minimal contribution to an understanding of the issues at the hearing and therefore, a significant reduction in the costs claimed for these experts may be warranted.

**(a) Extent to which expert was required to attend hearing**

30. Alberta Transportation submits that a review of the invoices prepared by many of the experts fees shows that they include significant time spent on the following tasks:

(a) time entries relating to preparing cross-examination for legal counsel and monitoring the hearing during topic blocks the expert was not presenting evidence during;

(b) time entries related to reviewing transcripts; and

(c) time entries related to preparing the final argument.<sup>26</sup>

31. Alberta Transportation submits that expert witnesses are expected to be experienced professionals who will be reasonable in deciding when to arrive and depart from the hearing. As stated in the NRCB Intervener Funding Process Guide, “[a]n expert may appear as an expert witness to support part of a submission that was prepared by that expert, [however], normally, an expert need not attend the whole hearing.”<sup>27</sup> Claimable costs for time in attendance should be reduced to reflect the actual time the expert witness was required to attend (i.e. during the topic block that expert presented evidence during).

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<sup>26</sup> See for example: SCLG Final Cost Claim, pdf. pg. 55, 57-58, 66, and 72-73

<sup>27</sup> NRCB Intervener Process Guide, pdf pg. 14

**(b) Extent to which expert evidence provided a better understanding of issues that were relevant and important to the assessment of the Project**

32. Alberta Transportation asks the Board to assess the extent to which each expert contributed to a better understanding of issues that were relevant and important to the assessment of the Project application. Alberta Transportation submits costs claimed for expert fees should be reduced where an expert's evidence is found to have been of limited contribution to assisting the Board, for example where:

- (a) the expert's evidence failed to establish potential impacts would arise from the Project outside the Project Development Area;
- (b) the expert's evidence attempted but failed to challenge or disprove Alberta Transportation's modeling that demonstrated any potential impacts would not extend beyond the Project Development Area, would be short lived and reversible;<sup>28</sup>
- (c) the expert presented evidence on recommended mitigation measures that Alberta Transportation had already committed to implement<sup>29</sup>;
- (d) the expert lacked the appropriate expertise to comment on the issues he or she presented evidence on<sup>30</sup>;
- (e) the expert went beyond reviewing and critiquing Alberta Transportation's evidence and advocated for a particular result, as opposed to acting as an objective and independent expert witness<sup>31</sup>;
- (f) the expert did not provide an independent written report to the Board<sup>32</sup>;

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<sup>28</sup> See for example: Exhibit 395, pg. 1972-1999

<sup>29</sup> See for example Exhibit 406, pg. 2458-2465.

<sup>30</sup> "[A]n expert's assistance must be related to that expert's area of special knowledge." see NRCB Intervener Funding Process Guide pdf. pg. 14; See for example Exhibit 395, pg. 1790-1802, 1947-1954, and 1975.

<sup>31</sup> See for example: Exhibit 395, pg. 1881-1884;

<sup>32</sup> See for example: Exhibit 406, pg. 2353-2355

- (g) the expert performed a superficial assessment in preparing his or her evidence. For example, where the expert did not conduct any type of assessment or investigation of the Project Development Area in preparing his or her evidence or review the appropriate evidence<sup>33</sup>; and
- (h) the materials the expert assisted the Cost Claimant in preparing were revealed to be fundamentally inaccurate.<sup>34</sup>

**(c) Conclusion on Expert Fees and Disbursements**

33. As with the amounts claimed for legal fees, the final amounts claimed by the Cost Claimants for expert fees are higher than the advances approved by the Board (where previously provided), without any justification for this increase. Alberta Transportation submits such increases are unwarranted. While the Board has previously recognized an increase in fees claimed where the scope of the work performed by an expert is increased by additional material filed by the proponent between the time of the pre-hearing and hearing, this was not such a situation.<sup>35</sup> In most cases, nothing changed materially between Alberta Transportation's initial filings and the expert witnesses' responses.
34. Alberta Transportation submits that the time claimed for costs relating to the Cost Claimant's experts should be restricted to the budgeted amounts approved by the Board, less the advanced costs award allocated. Where such budgets were not previously provided by the Cost Claimant in their advance funding request, Alberta Transportation submits that insofar as the Board awards costs, those costs should be reduced by an amount the Board determines is reasonable to reflect the extent to which that expert's evidence contributed to a better understanding of the issues at hand.

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<sup>33</sup> Exhibit 368, pg. 948; Exhibit 395, pg. 1790-1802, and Exhibit 406, pg. 2353-2366

<sup>34</sup> See for example: Exhibit 406, pg. 2353-2366

<sup>35</sup> AST, pg. 5

35. Further, for those cost claims that were not budgeted, Alberta Transportation respectfully requests that the Board critically evaluate whether there was sufficient value to those expert's evidence.

## **PART 5 CONCLUSION**

36. In summary, a reasonable final award of costs for the Cost Claimants' participation should be reduced to reflect the budgeted amounts recognized by the Board in their ruling on advance funding, plus amounts for interveners and witnesses attendance. For those Cost Claimants' experts, that did not have budgeted amounts recognized by the Board, Alberta Transportation submits that it would be appropriate for the Board to reduce or dismiss those as its deems reasonable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Edmonton, in the Province of Alberta, this 21<sup>st</sup> day of May, 2021.

**MCLENNAN ROSS LLP**



Per:

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