Date: 20051130

Docket: T-2022-89

Citation: 2005 FC 1622

BETWEEN:

CHIEF VICTOR BUFFALO acting on his own behalf and on behalf of all the other members of the Samson Indian Nation and Band, and THE SAMSON INDIAN BAND AND NATION

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, THE MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, AND THE MINISTER OF FINANCE

Defendants

and

CHIEF JEROME MORIN acting on his own behalf as well as on behalf of all the MEMBERS OF ENOCH'S BAND OF INDIANS AND THE RESIDENTS THEREOF ON AND OF STONY PLAIN RESERVE NO. 135

Intervenors

and

EMILY STOYKA and SARA SCHUG

Intervenors

REASONS FOR JUDGMENT

TEITELBAUM, J.

I. Introduction

A. Overview

[1] On its face, this case appears to be about money – royalties that were generated by the commercial exploitation of the Bonnie Glen D3A oil and gas field underlying the Pigeon Lake Reserve and the interest that was, in turn, paid on these royalties. If only things were that simple. This case is also about a relationship that is often described as *sui generis*, that is, unique, unlike any other. The parties to this *sui generis* relationship are the Plains Cree of Treaty 6 – more particularly, the Samson Cree Nation – and the Crown, or the Canadian Government. In some instances, I may speak of the Plains Cree in a general and wider sense; at other times, I will focus on the Samson Cree Nation. I wish to stress the very important point that I am not attempting to describe or define the Crown's relationship with all First Nations or aboriginal people; rather, I am concerned with their relationship vis-à-vis Samson Cree Nation.

[2] The origins of this relationship are steeped in history. Treaty 6 was concluded in August and September 1876. The Dominion of Canada came into being on July 1,

1867, with Confederation. While the country was young at treaty time, European presence on the North American continent, and in the Canadian Northwest in particular, dated back centuries. Of course, it is too simplistic to speak of one history. There are many, and they are rich and varied. They include the origins, cultures, and lives of the tapestry of First Nations across the continent; the fur trade and economic history; the political histories of French, British, and American colonies; and of course, the development of Canada.

[3] While at times it felt like the Court had been sent back to school, the historical information and interpretations presented were always interesting and, on many occasions, quite fascinating. It would have been all too easy to wander down the many well-trod avenues, lesser byways, and faint trails of our history.

[4] A vast quantity of evidence and documents was produced at trial. For example, exhibit SEC-427 comprises 48 binders containing 1234 documents. Exhibit SC-428 marks a series of 90 binders containing a further 3061 documents. Yet another 40 binders, holding 1363 documents, were marked as S-985. Then there are several other smaller series of binders consisting of documents tendered by one party but objected to by the other or agreed to by all parties. Clearly, much ink has been spilled and reams of paper devoured over the course of this action.

[5] I am sure that all counsel believed every bit of this material is important and merits mention. Counsel and their experts obviously went to a great deal of trouble and effort to assemble this information for the Court's benefit. Much of it has been helpful. I am greatly appreciative and commend all counsel for their efforts in this regard. I do, however, offer this caveat: while I have sought to consider all relevant material, it is not possible to reproduce, or describe, in these Reasons all of the evidence adduced, nor is it necessary. I shall endeavour to present intelligently and succinctly what took 370 days over the course of nearly five years to present at trial. I have attempted to present, for the most part, an historical chronology, as opposed to drifting into any analytical abstractionism, which is best left to academics, not judges.

[6] On February 24, 1994, Jerome A.C.J. ordered that Federal Court Actions T-2022-89 (the "Samson action"), T-1254-92 (the "Ermineskin action"), and T-1386-90 (the "Enoch action") be heard together. The Enoch action, however, was subsequently severed from the Samson and Ermineskin actions, by Order dated June 20, 1996. On October 1, 1999, MacKay J. ordered that the Samson and Ermineskin actions be heard together, commencing on May 1, 2000 in Calgary.

[7] On June 2, 2000, this Court set out the manner in which evidence was to be treated in these actions. The Federal Court of Appeal amended paragraphs 3 and 4 of that Order, on September 11, 2000, for purposes of clarity. The effect of the Order is that the actions were not conducted on the basis of common evidence. A system was established whereby a plaintiff could elect to adopt a witness's evidence, before that witness testified, so that the entirety of the witness's evidence was evidence in that plaintiff's case. Thus, each plaintiff retained control and discretion over the manner in which it chose to litigate its case, subject, of course, to the Court's ultimate control over the proceedings. While the two actions were heard together, each maintained its integrity as a separate, discrete action.

[8] The parties agreed to proceed with the trial in phases: General and Historical, Money Management, Oil and Gas, Other Oil and Gas Issue (plaintiffs call it the Tax Issue; the Crown refers to it as the Regulated Price Regime Issue), and Programs and Services (including Per Capita Distribution Issue, which I note seems to have morphed into its own phase at some point) (S-221). Soon after the trial began, it became readily apparent that all of these phases could not be heard within the 120 trial days originally forecasted by the parties. Indeed, that forecast was completely divorced from reality and may better be described as an example of wishful thinking or perhaps boundless optimism. Accordingly, and on consent of the parties, I ordered, on September 17,

2002, that I would continue as trial judge for the first two phases only and that the other phases be severed off to be heard by another judge at some point in the future.

B. Objections Taken Under Reserve

[9] During the course of most, if not all, trials, one can expect to hear objections by counsel. Given the length and complexity of this particular trial, there were numerous objections. Some were decided at once, while others were taken under reserve, with the evidence objected to being allowed in for the sake of a complete record and any appellate action. I propose now to set out the disposition of those objections, where relevant and necessary for the purposes of these Reasons. Wherever possible, I have tried to pinpoint the objections by reference to transcript volumes and page numbers. What follows is the disposition of the outstanding objections:

> (i) Transcript volume 10, pp. 1740-1762; transcript volume 11, pp. 1783-1786; transcript volume 12, pp. 1835-1836; transcript volume 15, pp. 2081-2086; transcript volume 20, pp. 2479-2483; and transcript volume 21, p. 2598: these objections relate to portions of Treaty 6 oral histories told by Elders Pete Waskahat, Margaret Quinney, and Jacob Bill. The

Crown's objection is denied. It is important for the Court to hear all available evidence as to the making of Treaty 6 and its meaning.

(ii) Transcript volume 20, pp. 2526-2530 and transcript volume 21, pp. 2635-2642: the Crown's objection is allowed. The elder's oral history deals with the Northwest Rebellion of 1885 and is therefore irrelevant to the issues in this action.

(iii) Transcript volume 26, pp. 3550-3553: the Crown's objection is allowed. The disputed references are beyond the scope of the expert's qualifications.

(iv) Transcript volumes 32-35: the Crown's objection regarding the off-reserve surrender issue is denied. This objection arises again many other times over the course of the first phase and thus, even if the specific transcript references are not made here, this is a blanket ruling and I have allowed in all such evidence pertaining to the off-reserve surrender issue.

(v) Transcript volume 44, pp. 6369-6407: the Crown's objection is allowed insofar as Dr. Beal refers to the starvation issue, which is not relevant to the issues in this action. Objections regarding land surrender and reserve surveys are denied.

(vi) Transcript volume 65, pp. 9544-9552 and 9570-9571; and transcript volume 69, pp. 10049-10054: the Crown's objections to Ms. Louis's testimony are allowed. No proper foundation was laid as to the reliability of this evidence as oral history evidence. Her answers regarding how she came to know this information were simply too vague to make it reliable.

(vii) Transcript volume 69, pp. 10064-10073; and transcript volume 80, pp. 11760-11761: the Crown's objections to S-63 and S-63A are allowed. The witness testified in the capacity of a lay witness; consequently, his Masters thesis, which contains opinions and deals with matters not relevant to this action, is not admissible.

(viii) Transcript volume 90, pp. 12615 and 12684-12687: the Crown's objections are denied regarding the off-reserve surrender issue and the Penner Report (S-94). With regard to the disputed portions of Minister Crombie's memo (S-95), the objection is denied and the entire memo is allowed in.

(ix) Transcript volume 93, pp. 13071-13088: the Crown's objection is allowed.

(x) Transcript volume 125, pp. 17422-17423: the Crown's objection is allowed. This is opinion evidence and thus not the province of a lay witness. Transcript volume 125, pp. 17436-17440, 17512-17513, 17514, and 17516-17519: the Crown's objections are allowed. Transcript volume 125, pp. 17485-17487: the Crown's objection is denied; however, the evidence has very little weight.

(xi) Transcript volume 141, pp. 19196-19197: the Crown's objection is denied. Transcript volume 141, pp. 19201-19203: the Crown's objection is allowed. Transcript volume 141, pp. 19206-19207: the Crown's objection is allowed.

(xii) Transcript volume 197, pp. 28008-28023: the Crown's objection to SE-453 is denied.

(xiii) Transcript volume 201, pp. 28407-28409: the plaintiffs' objection is denied.

(xiv) Transcript volume 202, pp. 28565-28576: the plaintiffs' objection is denied. The question relates to facts and is not seeking to elicit a legal opinion.

(xv) Transcript volume 216, pp. 30946-30953: Ermineskin's objection is allowed. C-490 is an exhibit in the Samson action only.

(xvi) Transcript volume 220, pp. 31542-31561: the Crown's objection is denied. The questions relate to facts within the witness's direct knowledge and experience.

(xvii) Transcript volumes 223-227: the plaintiffs' objections to the admissibility of the without prejudice privilege documents are denied. Such documents are allowed in solely to contradict facts or assertions made by the plaintiffs and not to show any weakness in their case. Evidence on band spending and investments is also not admissible

(xviii) Transcript volume 334, pp. 158-162: the plaintiffs' objection is denied and the question permitted.

(xix) Transcript volume 335, pp. 95-104: the plaintiffs' objection is denied and questions on the target ratio are allowed.

(xx) Transcript volume 339, pp. 165-168: the Crown's objection is allowed. Oil and gas valuations are not relevant for the first two phases of this action. Transcript volume 339, pp. 178-182: the Crown's objection is

allowed. The cut-off issue and the Crown's subsequent settlement of that issue are of no relevance to the ongoing action.

(xxi) Transcript volume 344, pp. 47-63: The Crown's objections to S-1017 and S-1018 are allowed. These reports are totally irrelevant to the first two phases.

(xxii) The plaintiffs object to the entirety of the reports (C-286 and C-287) and *viva voce* evidence of Professor Flanagan. The objections are denied.

(xxiii) The plaintiffs object to the reports (C-341 and C-342) and *viva voce* evidence of Dr. von Gernet. The objections are denied.

(xxiv) The plaintiffs object to the reports (C-910, C-911, and C-912) and evidence of Mr. Ambachtsheer. Their objections raise serious issues. The Court will not consider those passages of Mr. Ambachtsheer's reports that were shown to arise largely, if not entirely, from the pen of Crown counsel. The Court will permit as admissible Mr. Ambachtsheer's *viva voce* evidence; the weight it will be assigned remains to be determined.

(xxv) The plaintiffs object to the report (C-897) and *viva voce* evidence of Mr. Bertram. The plaintiffs' objections are denied.

(xxvi) The plaintiffs object to the reports (C-998 and C-999) and *viva voce* evidence of Mr. Scalf. The objections are denied.

(xxvii) The plaintiffs object to the report (C-1008) and *viva voce* evidence of Mr. John Williams. The objections are denied.

[10] If I have failed to include any other objections taken under reserve, it is because it was not necessary to decide them for the resolution of the issues before the Court.

C. Profile of the Plaintiffs

[11] In this section, I shall sketch out a brief profile of the plaintiffs, the Samson Cree Nation, along with some background to the case. I emphasize that this is a sketch, not a portrait. I shall rely on the plaintiffs' Request to Admit (S-343) and the Crown's Response to Request to Admit (S-344), two pamphlets produced by the Samson Cree Nation (C-26 and S-52), as well as some of the testimony of Ms. Barbara Louis, who, at the time of her testimony in May 2001 was serving her third term as an elected councillor of the Samson Cree Nation.

[12] The Samson Cree Nation is a part of the larger entity known as the Plains Cree and described in the text of Treaty 6 as the Plains Cree Tribe of Indians (S-343 and S-344, para. 8).

[13] Samson Indian Reserve No. 137 was set aside by the Crown in 1889, pursuant to Treaty 6 and confirmed by Order-in-Council No. P.C. 1151, dated May 17, 1889. The reserve is located near the hamlet of Hobbema, Alberta (S-343 and S-344, para. 27).

[14] Pigeon Lake Indian Reserve No. 138A was set aside by the Crown in 1896, pursuant to Treaty 6 and confirmed by Order-in-Council No. P.C. 2471, dated July 8, 1896. The Pigeon Lake Reserve was set apart for the use and benefit of the Indians of the Hobbema Agency, which include Samson (S-343 and S-344, para. 28).

[15] Samson shares the Pigeon Lake Reserve with three other Cree First Nations: Ermineskin, Montana, and Louis Bull, whose home reserves also neighbour Samson's. Originally, the Pigeon Lake Reserve was established as a fishing station from which the four bands could provide for themselves. The reserve continues to provide for them, not in the form of fish, but rather through a bounty of oil and gas resources (C-26, p. 6).

[16] On May 30, 1946, a Surrender of Minerals was executed on behalf of Samson. The Surrender reads as follows:

> KNOW ALL MEN BY THESE PRESENTS THAT WE, the undersigned Chief and Principal men of the Samson's Band of Indians, resident on our Reserve 137 and 138A in the Province of Alberta and Dominion of Canada, for and acting on behalf of the whole people of our said band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto our Sovereign Lord the King, His Heirs and Successors forever, ALL the land deemed to contain salt, petroleum, natural gas, coal, gold, silver, copper, iron and other minerals, underlying the surface of the area within the boundaries of the Samson Reserve No. 137 ... and such timber contained within the boundaries of any mineral claim staked or leased in accordance with the Regulations, as may be necessary for the development and proper working of such mineral deposits, subject to the payment of stumpage dues thereon; providing however, that a recorded holder of a mineral claim may, free from dues, lop, top or cut down trees growing on the mineral claim, removal of which is necessary for the proper working of the claim.
>
> TO HAVE AND TO HOLD the same unto his said Majesty the King, his Heirs and Successors, forever, in trust to grant in respect of such land the right to prospect for, mine, recover and take away any or all minerals contained therein, to such person or persons, and upon such terms and conditions as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people; and upon further conditions that money received from the permit proceeds of 10 ¢ per acre to be paid immediately on a per capita distribution.
>
> AND WE, the said Chief and Principal men of the said Samson's Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done in connection with the management and operation of the said lands and the disposal and sale of the minerals contained therein.
>
> (S-343 and S-344, para. 43; SEC-427, binder 2, tab 25, document 75)

[17] By Order-in-Council P.C. 2662-1946, dated June 28, 1946, the Crown accepted the Surrender so that the mineral interests and accompanying mining rights could be leased for the benefit of Samson, Ermineskin, Montana, and Louis Bull (S-343 and S-344, para. 46; see also SEC-427, binder 3, tab 5, document 80).

[18] In 1952, commercial quantities of oil and gas reserves were discovered underlying the surface of the Pigeon Lake Reserve – known as the Bonnie Glen D3A pool – and production began in that same year (S-343 and S-344, paras. 51 and 54; S-52, p. 3).

[19] The Crown prepared and executed leases with oil and gas companies with regard to exploration and extraction rights. Since that time, significant royalty moneys have been paid to the Crown on behalf of Samson (S-343 and S-344, paras. 47-48 and 57).

[20] The Samson Cree Nation has an elected council, consisting of a Chief and 12 councillors. Since 1993, elections have been held according to band custom, which mandates a majority of eligible voters (transcript volume 65, pp. 9511-9512). The government administration also maintains the principles of traditional Indian government, involving elders in discussions and consultations (C-26, p. 7). Along with the elected council, the Samson Cree Nation also has myriad divisions, departments, and various commercial enterprises, including Peace Hills Trust Company, the first native owned trust company in Canada.

II. Phase One: General & Historical

A. Issues

[21] During one of the many pre-trial conferences, I asked the parties to submit to the Court briefs with their views of the issues. Only one party did so, and the other promptly disputed it. The parties could not agree on the issues and the matter was dropped until the parties submitted their closing argument briefs, which contained their views of the issues. Ultimately, of course, it is the Court's responsibility to determine the issues and I have done so, based on the pleadings and materials at hand. I do note, however, that in Book XII of its closing argument briefs, titled The Moneys Returns, Claims, Admissions and Issues, one can find Samson's articulation of the issues. For the purposes of the first phase, I reproduce parts A and B:

> A. Aboriginal Rights
>
> 134. Whether Samson Cree Nation has an existing aboriginal (or inherent) right of self-determination?
>
> 135. Whether an existing aboriginal or inherent right of self-determination entitles Samson Cree Nation to the control of the trust moneys so that Samson Cree Nation can assume the Crown trust in the place of the Crown in regard to the trust moneys of Samson Cree Nation?

136. Whether Samson Cree Nation existed as a distinct component of the Plains Cree Nation prior to Treaty 6?

137. Whether part of the Plains Cree traditional territory encompassed the Treaty No. 6 area and whether the Crown is estopped by Treaty No. 6 from contesting this?

B. Treaty Rights

138. Whether Treaty No. 6 is a treaty of alliance and partnership?

139. Whether the oral history of the Plains Cree about the negotiations surrounding Treaty No. 6 will be given weight equal to that of the accounts of Lieutenant Governor Morris and Secretary Jackes?

140. Whether the intention of the parties to Treaty No. 6 was to preserve and protect reserve lands and interests therein for the exclusive benefit of the Indian parties to the Treaty for whom the reserves were set aside?

141. Whether trust obligations of the Crown arose from a historical trust?

142. Whether Treaty No. 6 is the source of trust obligations of the Crown?

143. Whether the Crown breached Treaty No. 6 from shortly after the Treaty?

144. Whether the conduct of the Crown respecting Treaty No. 6 has an impact on the treaty obligations of the Crown?

145. What is the nature and extent of the treaty obligations of the Crown in respect to the royalty moneys?

146. Whether ss. 61 to 68 of the *Indian Act* constitute a breach of Samson's treaty rights?

147. Whether the Crown can justify the infringement of the treaty rights of Samson Plaintiffs in respect to the royalty moneys of Samson Plaintiffs?

(Samson Written Closing Argument, Book XII, tab 4, pp. 33-34)

[22] The starting point is Treaty 6. Samson contends that Treaty 6 governs the relationship between the parties and is the primary law. Samson also asserts that Treaty 6 is the source, or one of the sources, of the trust and fiduciary relationship between the parties.

[23] I am mindful of the fact that there is a phase to be heard later in the trial – if or when this trial continues – tentatively called Programs and Services. I will not attempt to define the exact parameters of that phase, but I do note that it will deal with, at least in part, treaty rights and entitlements. However, it is inescapable that Treaty 6 – the historical context and surrounding circumstances of its creation, as well as its content – has been put very much at issue in this first phase. Accordingly, I will make the necessary relevant findings pertaining to Treaty 6.

[24] Samson also seeks judicial recognition of its right to self-determination. Samson contends that this is an inherent right, aboriginal right, and treaty right. The right of self-determination, or self-government, claimed by Samson is in regard to the control of its capital and revenue monies, generated by the oil and gas resources of the Pigeon Lake Reserve, and presently under the control and management of the Crown.

[25] Samson asserts that there is a trust relationship between Samson and the Crown. Samson alleges that this includes an historical trust, constitutional trust, express trust, common law trust, a trust arising from the 1946 Surrender, and a statutory trust. Samson also asserts a *sui generis* trust or fiduciary relationship.

[26] Samson contends that that there have been serious breaches by the Crown of its trust, treaty, fiduciary, and constitutional obligations relating to the control and management by the Crown of Samson's monies.

[27] Samson also contests the constitutionality, or constitutional inapplicability, of sections 61 to 68 and section 17 of the *Indian Act*, R.S.C. 1985, c. I-5. In the alternative, Samson submits, these sections are subject to their treaty and aboriginal rights, as well as the trust, fiduciary, or constitutional obligations owed by the Crown.

[28] I note that many of these latter issues stray into Phase Two territory. The trial was divided into separate phases, but there has been unavoidable overlap. These are not, as it has been said on many occasions, watertight compartments.

[29] Finally, there remains the issue of aboriginal title. A great deal of evidence was led on what became known as the off-reserve surrender issue. The Crown vigorously objected to this evidence from the start. Given the complexity of this trial and the inability of the parties to agree on the issues, I allowed in evidence on this matter under reserve of the Crown's objection. In its closing argument, Samson contends that it has proved aboriginal title, in common with other aboriginal nations, to significant parts of the area contemplated by Treaty 6, but that it is not necessary for the Court to

pronounce upon this issue. If it is not necessary, then why was so much time spent and evidence adduced on it? The Court will indeed pronounce upon this issue in these Reasons.

B. Legal Framework

[30] Counsel for Samson submitted ten volumes, containing 96 tabs, of authorities back in May 2000, at the outset of the opening statements. During the course of the trial – and indeed after it closed in January 2005 – counsel for all parties have continued to supply the Court with jurisprudence they believe is helpful. I thank counsel for their Herculean efforts and excellent arguments. However, I think it is unnecessary to refer to many of the cases insofar as this particular section is concerned because the Supreme Court of Canada has, in recent jurisprudence, lessened the work of trial judges somewhat by summarizing and listing the relevant legal principles and tests for treaty interpretation, oral history evidence, and aboriginal rights. Thus, I need not review the long development of the case law, but instead I defer to the Supreme Court's wisdom on the current state of the law in these areas.

I. Treaty Interpretation

[31] Treaty 6 is part of a series of treaties the government made with various aboriginal peoples often referred to as the numbered treaties, or western numbered treaties. Samson plaintiffs led a great deal of evidence on the making of Treaty 6, as well as historical events

and circumstances preceding the treaty. A contentious issue in the trial of this action was what the Cree understood they were giving up when they took treaty. Samson tendered a vast amount of evidence on what is referred to as the land surrender clause, or the off-reserve surrender issue. The Crown disputed the relevance of this evidence as there is no claim for any off-reserve aboriginal rights or aboriginal title. In their closing argument, Samson appears to ask the Court to refrain from making any findings on this point. I will be discussing this issue in greater detail further in these Reasons. I mention it now only as a prelude to laying out the general principles of treaty interpretation, as set out by the Supreme Court of Canada. The meaning and interpretation of Treaty 6 have been put in issue in this trial and I intend to make certain, specific findings, based on the evidence tendered in Court.

[32] In *R.* v. *Marshall*, [1999] 3 S.C.R. 456, McLachlin J., as she then was, set out the principles governing treaty interpretation. While her opinion was in dissent, the overview she provided was based on a survey of past jurisprudence. I note also that the list is not exhaustive. The following are the principles as set out in paragraph 78 of *R.* v. *Marshall*:

1. Aboriginal treaties constitute a unique type of agreement and attract special principles of interpretation: *R.* v. *Sundown*, [1999] 1 S.C.R. 393, at para. 24; *R*. v. Badger, [1996] 1 S.C.R. 771, at para. 78; *R*. v. *Sioui*, [1990] 1 S.C.R. 1025, at p. 1043; *Simon* v. *The Queen*, [1985] 2 S.C.R. 387, at p. 404. See also: J. (Sákéj) Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997), 36 *Alta. L. Rev.* 46; L. I. Rotman, "Defining Parameters: Aboriginal Rights. Treaty Rights, and the *Sparrow*

1. Les traités conclus avec les Autochtones constituent un type d'accord unique, qui demandent l'application de principes d'interprétation spéciaux: *R.* c. *Sundown*, [1999] 1 R.C.S. 393, au par. 24; *R*. c. *Badger,* [1996] 1 R.C.S. 771, au par. 78; *R* c. Sioui, [1990] 1 R.C.S. 1025, à la p. 1043; *Simon c. La Reine*, [1985] 2 R.C.S. 387, à la p. 404. Voir également: J. (Sákéj) Youngblood Henderson, «Interpreting *Sui Generis* Treaties» (1997), 36 *Alta. L. Rev.* 46; L. I. Rotman, « Defining Parameters:

Justificatory Test" (1997), 36 *Alta. L. Rev.* 149.

2. Treaties should be liberally construed and ambiguities or doubtful expressions should be resolved in favour of the aboriginal signatories: *Simon*, *supra*, at p. 402; *Sioui*, *supra*, at p. 1035; *Badger, supra*, at para. 52.

3. The goal of treaty interpretation is to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed: *Sioui*, *supra*, at pp. 1068-69.

4. In searching for the common intention of the parties, the integrity and honour of the Crown is presumed: *Badger*, *supra*, at para. 41.

5. In determining the signatories' respective understanding and intentions, the court must be sensitive to the unique cultural and linguistic differences between the parties: *Badger*, *supra*, at paras. 52-54; *R.* v. *Horseman*, [1990] 1 S.C.R. 901, at p. 907.

6. The words of the treaty must be given the sense which they would naturally have held for the parties at the time: *Badger, supra*, at paras. 53 *et seq.*; *Nowegijick* v*. The Queen*, [1983] 1 S.C.R. 29, at p. 36.

7. A technical or contractual interpretation of treaty wording should be avoided: *Badger*, *supra*; *Horseman*, *supra*; *Nowegijick*, *supra*.

8. While construing the language generously, courts cannot alter the terms of the treaty by exceeding what "is possible on the language" or realistic: *Badger*, *supra,* at para. 76; *Sioui*, *supra*, at p. 1069; *Horseman*, *supra*, at p. 908

9. Treaty rights of aboriginal peoples must not be interpreted in a static or rigid way. They are not frozen at the date of signature. The interpreting court must update treaty rights to provide for their modern exercise. This

Aboriginal Rights, Treaty Rights, and the *Sparrow* Justificatory Test» (1997), 36 *Alta.L.. Rev.* 149.

2. Les traités doivent recevoir une interprétation libérale, et toute ambiguité doit profiter aux signataires autochtones: *Simon*, précité, à la p. 402; *Sioui,* précité, à la p. 1035; *Badger*, précité, au par. 52.

3. L'interprétation des traités a pour objet de choisir, parmi les interprétations possibles de l'intention commune, celle qui concilie le mieux les intérêts des deux parties à l'époque de la signature: *Sioui*, précité, aux pp. 1068 et 1069.

4. Dans la recherche de l'intention commune des parties, l'intégrité et l'honneur de la Couronne sont présumées: *Badger*, précité, au par. 41.

5. Dans l'appréciation de la compréhension et de l'intention respectives des signataires, le tribunal doit être attentif aux différences particulières d'ordre culturel et linguistique qui existaient entre les parties: *Badger*, précité, aux par. 52 à 54; *R*. c. *Horseman*, [1990]1 R.C.S. 901, à la p. 907.

6. IL faut donner au texte du traité le sens que lui auraient naturellement donné les parties à l'époque: *Badger*, précité, aux par. 53 et suiv.; *Nowegijick* c*. La Reine*, [1983] 1 R.C.S. 29, à la p. 36.

7. Il faut éviter de donner aux traités une interprétation formaliste ou inspirée du droit contractuel: *Badger*, *précité, Horseman,* précité, et *Nowegijick*, précité.

8. Tout en donnant une interprétation généreuse du texte du traité, les tribunaux ne peuvent en modifier les conditions en allant au-delà de ce qui est réaliste ou de ce que « le language utilisé [...] permet»: *Badger, précité, au par. 76;* Sioui*, précité*, à la p. 1069; *Horseman*, précité, à la p. 908.

9. Les droits issus de traités des peuples autochtones ne doivent pas être interprétés de façon statique ou rigide. Ils ne sont pas figés à la date de la signature. Les tribunaux doivent les interpréter de manière

involves determining what modern practices are reasonably incidental to the core treaty right in its modern context: *Sundown*, *supra*, at para. 32; *Simon, supra,* at p. 402.

à permettre leur exercice dans le monde moderne. Il faut pour cela déterminer quelles sont les pratiques modernes qui sont raisonnablement accessoires à l'exercice du droit fondamental issu de traité dans son contexte moderne: *Sundown*, précité, au par. 32; *Simon*, précité, à la p. 402.

[33] Chief Justice McLachlin discussed the matter of extrinsic evidence of the historical and cultural context of a particular treaty and concluded that courts have allowed such evidence, even absent any ambiguity (see paragraph 81). The Chief Justice set out a two step approach to treaty interpretation:

The fact that both the words of the treaty and its historic and cultural context must be considered suggests that it may be useful to approach the interpretation of a treaty in two steps. First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause. As noted in *Badger, supra,* at para. 76, "the scope of treaty rights will be determined by their wording". The objective at this stage is to develop a preliminary, but not necessarily determinative, framework for the historical context inquiry, taking into account the need to avoid an unduly restrictive interpretation and the need to give effect to the principles of interpretation.

At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty's historical and cultural backdrop. A consideration of

Le fait qu'il faille examiner tant le texte du traité que son contexte historique et culturel tend à indiquer qu'il peut être utile d'interpréter un traité en deux étapes. Dans un premier temps, il convient d'examiner le texte de la clause litigieuse pour en déterminer le sens apparent, dans la mesure où il peut être dégagé, en soulignant toute ambiguité et tout malentendu manifestes pouvant résulter de différences linguistiques et culturelles. Cet examen conduira à une ou à plusieurs interprétations possibles de la clause. Comme il a été souligné dans *Badger*, précité, au par. 76, «la portée des droits issus de traités est fonction de leur libellé». À cette étape, l'objectif est d'élaborer, pour l'analyse du contexte historique, un cadre préliminaire – mais pas nécessairement définitif – qui tienne compte d'un double impératif, celui d'éviter une interprétation trop restrictive et celui de donner effet aux principes d'interprétation.

Dans un deuxième temps, le ou les sens dégagés du texte du droit issu de traité doivent être examinés sur la toile de fond historique et culturelle du traité. Il est possible que l'examen de l'arrière-plan historique fasse ressortir des ambiuités latentes ou d'autres interprétations que la première lecture

the historical background may suggest latent ambiguities or alternative interpretations not detected at first reading. Faced with a possible range of interpretations, courts must rely on the historical context to determine which comes closest to reflecting the parties' common intention. This determination requires choosing "from among the various possible interpretations of the common intention the one which best reconciles" the parties' interests: *Sioui*, *supra*, at p. 1069. Finally, if the court identifies a particular right which was intended to pass from generation to generation, the historical context may assist the court in determining the modern counterpart of that right: *Simon*, *supra*, at pp. 402-3; *Sundown*, *supra*, at paras. 30 and 33.

n'a pas permis de déceler. Confronté à une éventuelle gamme d'interprétations, le tribunal doit s'appuyer sur le contexte historique pour déterminer laquelle traduit le mieux l'intention commune des parties. Pour faire cette détermination, le tribunal doit choisir, «parmi les interprétations de l'intention commune qui s'offrent à [lui], celle qui concilie le mieux» les intérêts des parties: *Sioui*, précité, à la p. 1069. Enfin, si le tribunal conclut à l'existence d'un droit particulier qui était censé se transmettre de génération en géneration, le contexte historique peut l'aider à déterminer l'équivalent moderne de ce droit: *Simon*, précité, aux pp. 402 et 403; *Sundown*, précité, aux par. 30 et 33.

[34] The third principle enumerated in *Marshall* is that of determining the common intention of the parties at treaty time. I quote also from Justice Binnie's opinion in *Marshall*, at paragraph 14, on common intention:

"Generous" rules of interpretation should not be confused with a vague sense of after-the-fact largesse. The special rules are dictated by the special difficulties of ascertaining what in fact was agreed to. The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations. Certain assumptions are therefore made about the Crown's approach to treaty making (honourable) which the Court acts upon in its approach to treaty interpretation (flexible) as to the existence of a treaty (*Sioui*, *supra*, at p. 1049), the completeness of any written record (the use, e.g., of context and implied terms to make honourable sense of the treaty arrangement: *Simon* v*. The Queen*, [1985] 2 S.C.R. 387, and *R.* v. *Sundown*, [1999] 1 S.C.R. 393), and the interpretation of treaty terms once found to exist (*Badger*). The bottom line is the Court's obligation is to "choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles" the Mi'kmaq interests and those of the British Crown (*Sioui*, *per* Lamer J., at p. 1069 (emphasis added)).

Il ne faut pas confondre les règles «généreuses» d'interprétation avec un vague sentiment de largesse a posteriori. L'application de règles spéciales est dictée par les difficultés particulières que pose la détermination de ce qui a été convenu dans les faits. Les parties indiennes n'ont à toutes fins pratiques pas eu la possiblilité de créer leurs propres compte-rendus écrits des négociations. Certaines présomptions sont donc appliquées relativement à l'approche suivie par la Couronne dans la conclusion des traités (conduite honorable), présomptions dont notre Cour tient compte dans son approche en matière d'interprétation des traités (souplesse) pour statuer sur l'existence d'un traité (*Sioui*, précité, à la p. 1049), le caractière exhaustif de tout écrit (par exemple l'utilisation du contexte et des conditions implicites pour donner un sens honorable à ce qui a été convenu par traité: *Simon c. La Reine*, [1985] 2 R.C.S. 387, et *R. c. Sundown,*
[1999] 1 R.C.S. 393), et l'interprétation des conditions du traité, une fois qu'il a été conclu à leur existence (*Badger*). En bout de ligne, la Cour a l'obligation «de choisir, parmi les interprétations de l'intention

> commune [au moment de la conclusion du traité] qui s'offrent à [elle], celle qui concilie le mieux» les intérêts des Mi'kmaq et ceux de la Couronne britannique (*Sioui*, le juge Lamer, à la p. 1069 (je souligne)).

[35] A generous interpretation must be realistic and reflect the intentions of both parties, not just the aboriginal side: see Lamer J., as he then was, in *R.* v. *Sioui,* [1990] 1 S.C.R. 1025 at 1069.

[36] Treaty interpretation also involves the principle of the honour of the Crown. This principle derives from the Crown's assertion of sovereignty in the face of prior occupation by aboriginal people: see *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, 2004 S.C.C. 74 at paragraph 24. The honour of the Crown is a "core precept" that finds its application in concrete practices: see *Haida Nation* v. *British Columbia (Minister of Forests*), [2004] S.C.J. No. 70, 2004 S.C.C. 73 at paragraph 16. Moreover, the honour of the Crown is always at stake in its dealings with aboriginal people: see *R.* v. *Badger*, [1996] 1 S.C.R. 771 at paragraph 41.

[37] Chief Justice McLachlin further elaborated on the honour of the Crown in *Mitchell* [2001] 1 S.C.R. 911, at paragraphs 17 and 19:

> 17. The second factor, the nature of the conflict between the claimed right and the relevant legislation, while more neutral, does not displace this conclusion. The law in conflict with the alleged right is the *Customs Act*. It applies both to personal goods and goods for trade.
>
> * * *
>
> 19. I conclude that the *Van der Peet* factors of the impugned action, the governmental action or legislation with which it conflicts, and the ancestral practice relied on, all suggest the claim here is properly characterized as the right to bring goods across the Canada-United States boundary at the St. Lawrence River for purposes of trade.

ii. Oral History

[38] In cases involving treaty interpretation, the aboriginal perspective and understanding must be considered. Oral histories, oral traditions, and other extrinsic evidence may provide some illumination; however, they also raise important evidentiary issues.

[39] In *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507 at paragraph 68, Lamer C.J. stated that, in aboriginal claims, courts must approach the rules of evidence bearing in mind the evidentiary difficulties inherent in such cases:

> In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists,
>
> Pour déterminer si un demandeur autochtone a produit une preuve suffisante pour établir que ses activités sont un aspect d'une coutume, pratique ou tradition qui fait partie intégrante d'une culture autochtone distinctive, le tribunal doit appliquer les règles de preuve et

with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example a private law torts case.

interpréter la preuve existante en étant conscient de la nature particulière des revendications des autochtones et des difficultés que soulève la preuve d'un droit qui remonte à une époque où les coutumes, pratiques et traditions n'étaient pas consignées par écrit. Les tribunaux doivent se garder d'accorder un poids insuffisant à la preuve présentée par les demandeurs autochtones simplement parce que cette preuve ne respecte pas de façon précise les normes qui seraient appliquées dans une affaire de responsabilité civile délictuelle par exemple.

[40] Chief Justice Lamer revisited the comments he made in *Van der Peet* the following year in the landmark decision in *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010. In that case, the Court held that a misapprehension of the evidentiary value of oral history evidence amounted to an error in law warranting appellate intervention. Chief Justice Lamer noted, at paragraph 81, that the justification for the approach he set forth in *Van der Peet* could be found in the nature of aboriginal rights, which are aimed at the reconciliation of the prior occupation of North America by aboriginal societies with the assertion of crown sovereignty over Canadian territory.

[41] The Supreme Court recognized the challenges created by the use of oral histories as proof of historical facts. Nevertheless, the rules of evidence must be adapted to accommodate this type of evidence and place it on an equal footing with other, more familiar, types of historical evidence (see: *Delgamuukw* at paragraph 87). The

accommodation of such evidence must be done in a manner that does not strain the Canadian legal and constitutional structure (see: *Delgamuukw* at paragraph 82).

[42] In *Mitchell* v. *Canada (Minister of National Revenue)*, [2001] 1 S.C.R. 911, Chief Justice McLachlin revisited the issue of oral history evidence. The Chief Justice set out the criteria for the admission of such evidence, at paragraphs 27 to 34, as follows:

> (1) Evidentiary Concerns - Proving Aboriginal Rights
>
> ¶ 27 Aboriginal right claims give rise to unique and inherent evidentiary difficulties. Claimants are called upon to demonstrate features of their pre-contact society, across a gulf of centuries and without the aid of written records. Recognizing these difficulties, this Court has cautioned that the rights protected under s. 35(1) should not be rendered illusory by imposing an impossible burden of proof on those claiming this protection (*Simon* v. *The Queen*, [1985] 2 S.C.R. 387, at p. 408). Thus in *Van der Peet*, supra, the majority of this Court stated that "a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in" (para. 68).
>
> ¶ 28 This guideline applies both to the admissibility of evidence and weighing of aboriginal oral history (*Van der Peet*, *supra*; *Delgamuukw*, supra, at para. 82).
>
> (a) Admissibility of Evidence in Aboriginal Right Claims
>
> ¶ 29 Courts render decisions on the basis of evidence. This fundamental principle applies to aboriginal claims as much as to any other claim. *Van der Peet* and *Delgamuukw* affirm the continued applicability of the rules of evidence, while cautioning that these rules must be applied flexibly, in a manner commensurate with the inherent difficulties posed by such claims and the promise of reconciliation embodied in s. 35(1). This flexible application of the rules of evidence permits, for example, the admissibility of evidence of post-contact activities to prove continuity with pre-contact practices, customs and traditions (*Van der Peet*, *supra*, at para. 62) and the meaningful consideration of various forms of oral history (*Delgamuukw*, supra).

¶ 30 The flexible adaptation of traditional rules of evidence to the challenge of doing justice in aboriginal claims is but an application of the time-honoured principle that the rules of evidence are not "cast in stone, nor are they enacted in a vacuum" (*R.* v *Levogiannis*, [1993] 4 S.C.R. 475, at p. 487). Rather, they are animated by broad, flexible principles, applied purposively to promote truth-finding and fairness. The rules of evidence should facilitate justice, not stand in its way. Underlying the diverse rules on the admissibility of evidence are three simple ideas. First, the evidence must be useful in the sense of tending to prove a fact relevant to the issues in the case. Second, the evidence must be reasonably reliable; unreliable evidence may hinder the search for the truth more than help it. Third, even useful and reasonably reliable evidence may be excluded in the discretion of the trial judge if its probative value is overshadowed by its potential for prejudice.

¶ 31 In *Delgamuukw*, mindful of these principles, the majority of this Court held that the rules of evidence must be adapted to accommodate oral histories, but did not mandate the blanket admissibility of such evidence or the weight it should be accorded by the trier of fact; rather, it emphasized that admissibility must be determined on a case-by-case basis (para. 87). Oral histories are admissible as evidence where they are both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge.

¶ 32 Aboriginal oral histories may meet the test of usefulness on two grounds. First, they may offer evidence of ancestral practices and their significance that would not otherwise be available. No other means of obtaining the same evidence may exist, given the absence of contemporaneous records. Second, oral histories may provide the aboriginal perspective on the right claimed. Without such evidence, it might be impossible to gain a true picture of the aboriginal practice relied on or its significance to the society in question. Determining what practices existed, and distinguishing central, defining features of a culture from traits that are marginal or peripheral, is no easy task at a remove of 400 years. Cultural identity is a subjective matter and not easily discerned: see R. L. Barsh and J. Y. Henderson, "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand" (1997), 42 McGill L.J. 993, at p. 1000, and J. Woodward, Native Law (loose-leaf), at p. 137. Also see Sparrow, supra, at p. 1103; *Delgamuukw*, *supra*, at paras. 82-87, and J. Borrows, "The Trickster: Integral to a Distinctive Culture" (1997), 8 Constitutional Forum 27.

¶ 33 The second factor that must be considered in determining the admissibility of evidence in aboriginal cases is reliability: does the witness represent a reasonably reliable source of the particular people's history? The trial judge need not go so far as to find a special guarantee of reliability. However, inquiries as to the witness's ability to know and testify to orally transmitted aboriginal traditions and history may be appropriate both on the question of admissibility and the weight to be assigned the evidence if admitted.

¶ 34 In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts and traditions. Oral histories reflect the distinctive perspectives and cultures of the communities from which they originate and should not be discounted simply because they do not conform to the expectations of the non-aboriginal perspective. Thus, *Delgamuukw* cautions

> against facilely rejecting oral histories simply because they do not convey "historical" truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted.

[43] The Chief Justice commented on the interpretation and weighing of evidence in aboriginal right claims at paragraphs 36 to 39:

> (b) The Interpretation of Evidence in Aboriginal Right Claims
>
> ¶ 36 The second facet of the *Van der Peet* approach to evidence, and the more contentious issue in the present case, relates to the interpretation and weighing of evidence in support of aboriginal claims once it has cleared the threshold for admission. For the most part, the rules of evidence are concerned with issues of admissibility and the means by which facts may be proved. As J. Sopinka and S. N. Lederman observe, "[t]he value to be given to such facts does not...lend itself as readily to precise rules. Accordingly, there are no absolute principles which govern the assessment of evidence by the trial judge" (The Law of Evidence in Civil Cases (1974), at p. 524). This Court has not attempted to set out "precises rules" or "absolute principles" governing the interpretation or weighing of evidence in aboriginal claims. This reticence is appropriate, as this process is generally the domain of the trial judge, who is best situated to assess the evidence as it is presented, and is consequently accorded significant latitude in this regard. Moreover, weighing evidence is an exercise inherently specific to the case at hand.
>
> ¶ 37 Nonetheless, the present case requires us to clarify the general principles laid down in *Van der Peet* and *Delgamuukw* regarding the assessment of evidence in aboriginal right claims. The requirement that courts interpret and weigh the evidence with a consciousness of the special nature of aboriginal claims is critical to the meaningful protection of s. 35(1) rights. As Lamer C.J. observed in *Delgamuukw*, the admission of oral histories represents a hollow recognition of the aboriginal perspective where this evidence is then systematically and consistently undervalued or deprived of all independent weight (para. 98). Thus, it is imperative that the laws of evidence operate to ensure that the aboriginal perspective is "given due weight by the courts" (para. 84).

¶ 38 Again, however, it must be emphasized that a consciousness of the special nature of aboriginal claims does not negate the operation of general evidentiary principles. While evidence adduced in support of aboriginal claims must not be undervalued, neither should it be interpreted or weighed in a manner that fundamentally contravenes the principles of evidence law, which, as they relate to the valuing of evidence, are often synonymous with the "general principles of common sense" (Sopinka and Lederman, supra, at p. 524). As Lamer C.J. emphasized in *Delgamuukw*, supra, at para. 82:

> [A]boriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain "the Canadian legal and constitutional structure" [*Van der Peet* at para. 49]. Both the principles laid down in *Van der Peet* - first, that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit - must be understood against his background.

¶ 39 There is a boundary that must be crossed between a sensitive application and a complete abandonment of the rules of evidence. As Binnie J. observed in the context of treaty rights, "[g]enerous rules of interpretation should not be confused with a vague sense of after-the-fact largesse" (*R.* v. *Marshall*, [1999] 3 S,.C.R. 456, at para. 14). In particular, the *Van der Peet* approach does not operate to amplify the cogency of evidence adduced in support of an aboriginal claim. Evidence advanced in support of aboriginal claims, like the evidence offered in any case, can run the gamut of cogency from the highly compelling to the highly dubious. Claims must still be established on the basis of persuasive evidence demonstrating their validity on the balance of probabilities. Placing "due weight" on the aboriginal perspective, or ensuring its supporting evidence an "equal footing" with more familiar forms of evidence, means precisely what these phrases suggest: equal and due treatment. While the evidence presented by aboriginal claimants should not be undervalued "simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case" (*Van der Peet*, *supra*, at para. 68), neither should it be artificially strained to carry more weight than it can reasonably support. If this is an obvious proposition, it must nonetheless be stated.

[44] Trial judges face an enormous challenge in hearing, understanding, analysing, and according due weight to oral history evidence.

[45] During the course of the trial, Samson presented a great deal of evidence through Cree elders and other Cree witnesses. These witnesses provided evidence on the making of Treaty 6, the Cree perspective, as well as Cree culture and territory. Samson also tendered expert evidence on oral history. Dr. Winona Wheeler testified on the academic and cultural framework within which oral histories and oral traditions are to be understood, although she did not apply this to any of the oral traditions presented to the Court. The Crown tendered Dr. Alexander von Gernet; among other things, he analysed the contents of some of the oral traditions presented at Court. I will comment further and in greater detail when I address the witnesses and evidence. I note only at this point that it was a near daunting challenge to appropriately weigh this evidence to conclude what happened at, and indeed before, European contact and the course of subsequent events.

iii. Aboriginal Rights

[46] In the case at bar, Samson claims that it has an aboriginal right to manage its resources - its oil and gas - and the money they generate. Further, Samson appears to claim a general right of self-government. In its Amended Statement of Claim (No. 4), Samson pleaded:

> 7. Pursuant to Treaty No. 6, Plaintiff the Samson Indian Nation retained its rights as a nation, encompassing, *inter alia*, its right to self determination,

> including the right to determine its own membership, which rights are recognized and affirmed and constitutionally protected by Section 35 of the *Constitution Act, 1982*.
>
> 7A. Samson Cree Nation existed as a Nation in 1876 and 1877 and was recognized as such by the Crown in Treaty No. 6 and the 1877 Adhesion to Treaty No. 6 made by Kiskaquin (or Bobtail) on behalf of the Samson Cree Nation and continues to exist as a Nation.
>
> 7B. The Samson Cree Nation possessed and continues to possess aboriginal or inherent rights and powers in respect of governance, citizenship, taxation, trade and management of its resources and revenues. These inherent rights and powers were affirmed by Treaty No. 6, the *Royal Proclamation*, *1763*, treaties with the Hudson's Bay Company and various constitutional instruments.
>
> * * *
>
> 63. Moreover, sections 61 to 68 of the *Indian Act* violate, contravene and are incompatible with the *Constitution Act*, *1982*, particularly sections 15, 25 and 35 thereof and it is expedient that sections 61 to 68 of the Indian Act be declared to be illegal, unconstitutional, null and void in respect to Plaintiffs and the moneys entrusted to Defendant Her Majesty for Plaintiffs or alternatively constitutionally inapplicable to Plaintiffs and their moneys or subject to the treaty and aboriginal rights of Plaintiffs.

[47] While the assertions of the aboriginal rights claimed also relate to matters addressed in Phase Two, Money Management, of this trial, the historical and factual background were dealt with, for the most part, in Phase One. Thus, it is appropriate to address, albeit briefly, the jurisprudence on aboriginal rights at this early stage.

[48] In *Mitchell*, the Chief Justice commented on the criteria for establishing an aboriginal right and its characterization at paragraphs 12 to 15:

¶ 12 In the seminal cases of *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, and *Delgamuukw*, *supra*, this Court affirmed the foregoing principles and set out the test for establishing an aboriginal right. Since s. 35(1) is aimed at reconciling the prior occupation of North America by aboriginal societies with the Crown's assertion of sovereignty, the test for establishing an aboriginal right focuses on identifying the integral, defining features of those societies. Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact. The practice, custom or tradition must have been "integral to the distinctive culture" of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (*Van der Peet*, *supra*, at paras. 54-59 (emphasis in original)). This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society's cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society in question.

¶ 13 Once an aboriginal right is established, the issue is whether the act which gave rise to the case at bar is an expression of that right. Aboriginal rights are not frozen in their pre-contact form: ancestral rights may find modern expression. The question is whether the impugned act represents the modern exercise of an ancestral practice, custom or tradition.

B. What is the Aboriginal Right Claimed?

¶ 14 Before we can address the question of whether an aboriginal right had been established, we must first characterize the right claimed. The event giving rise to litigation merely represents an alleged exercise of an underlying right; it does not, in itself, tell us the scope of the right claimed. Therefore it is necessary to determine the nature of the claimed right. At this initial stage of characterization, the focus is on ascertaining the true nature of the claim, not assessing the merits of this claim or the evidence offered in its support.

¶ 15 In *Van der Peet*, *supra*, at para. 53, the majority of this Court provided three factors that should guide a court's characterization of a claimed aboriginal right: (1) the nature of the action which the applicant is claiming was done pursuant to an aboriginal right. (2) the nature of the governmental legislation or action alleged to infringe the right, i.e. the conflict between the claim and the limitation; and (3) the ancestral traditions and practices relied upon to establish the right. The right claimed must be characterized in context and not distorted to fit the desired result. It must be neither artificially broadened nor narrowed. An overly narrow characterization risks the dismissal of valid claims and an overly broad characterization risks distorting the right by neglecting the specific culture and history of the claimant's society: see *R.* v. *Pamajewon*, [1996] 2 S.C.R. 821.

[49] Thus, the aboriginal right being claimed must first be defined or characterized. The right cannot be painted in broad or general terms. In *Van der Peet*, at paragraph 69, Chief Justice Lamer held,

> Courts considering a claim to the existence of an aboriginal right must focus specifically on the traditions, customs and practices of the particular aboriginal group claiming the right. In the case of *Kruger*, *supra*, this Court rejected the notion that claims to aboriginal rights could be determined on a general basis. This position is correct; the existence of an aboriginal right will depend entirely on the traditions, customs and practices of the particular aboriginal community claiming the right. As has already been suggested, aboriginal rights are constitutional rights, but that does not negate the central fact that the interests aboriginal rights are intended to protect relate to the specific history of the group claiming the right. Aboriginal rights are not general and universal; their scope and content must be determined on a case by case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.

[50] The following points, I note, can be taken from the Supreme Court's pronouncements on the law as it relates to aboriginal rights. First, a claimant must prove that a modern practice, tradition, or custom has a reasonable degree of continuity with a practice, tradition, or custom that existed before contact. Second, the practice, tradition, or custom must have been "integral to the distinctive culture" of the aboriginal group; it distinguished or characterized their culture, and lay at the core of their identity. Third, aboriginal rights are not frozen in their pre-contact form, but rather may be exercised in

modern ways, as long as the modern expression is connected to the ancestral practice, tradition, or custom.

C. Witnesses

I. Experts

1. *For the plaintiffs*

Professor Arthur Ray

[51] Professor Ray tendered a report titled “The Economic Background to Treaty 6" and a rebuttal report titled “Commentary on Report of Dr. Thomas Flanagan” (both filed as exhibit S-3). Professor Ray earned his Ph.D. in historical geography in 1971 from the University of Wisconsin for his thesis “Indian Exploitation of the Forest-Greenland Transition Zone in Western Canada, 1650-1860: A Geographical View of Two Centuries of Change.” He has held the rank of Professor and taught in the History Department at the University of British Columbia since 1981. Professor Ray has taught numerous courses in the Department of History, and has published extensively, including the book *Indians in the Fur Trade*. Professor Ray was qualified at trial as “an expert in the historical geography of

the Aboriginal Peoples of Canada, with a particular expertise on the fur trade and the economic history of the Canadian Aboriginal Peoples, including the Plains Cree."

Joan Holmes

[52] Ms. Holmes, a research consultant, tendered a report titled "A History of Aboriginal Transborder Activity from Lake of the Woods to the Rocky Mountains, 1790-1900" and a surrebuttal report titled "Response to Professor Alexander von Gernet's Rebuttal of 'A History of Aboriginal Transborder Activity from Lake of the Woods to the Rocky Mountains, 1790-1900'" (both filed as exhibit S-12). Ms. Holmes earned an M.A. in northern and native issues from Carleton University in 1983. From 1983 until at least the time of her testimony in the autumn of 2000, Ms. Holmes was president of Joan Holmes and Associates Inc., Aboriginal Rights and Land Claims Research Consulting. She was qualified at trial as "a research consultant and analyst with expertise in the field of Aboriginal Claims and Crown First Nation relations during the latter half of the 17th century and 18th, 19th, and 20th centuries as revealed through archival documentation[,] including archival documentation on federal policies, legislation and administrative practices regarding Indian affairs generally and border-crossing and transportation practices of Indians in particular, published accounts of traders, missionaries, travelers [sic], explorers, government officials and contemporary observers and secondary sources."

Bob Beal

[53] Mr. Beal, an historian, tendered an expert report titled “Treaty Relationships and Treaty Six” and a rebuttal report titled “Response to ‘Expert Report of Dr. Thomas Flanagan’” (S-17). Mr. Beal earned an M.A. in history from the University of Alberta in 1993. He describes himself on his C.V. as a self-employed historian, editor, and writer. He co-authored, with Rod Macleod, the book *Prairie Fire: the 1885 North-West Rebellion*. Mr. Beal was qualified at trial as “an historian whose expertise includes the development of British-Canadian treaty relationships with First Nations in the eighteenth and nineteenth centuries, with particular emphasis on the treaty relationships between the British and the Wabanaki peoples during the eighteenth century, the treaty relationships between the Canadian and Prairie First Nations in the nineteenth century, the buffalo robe trade, and socioeconomic conditions on the Canadian Prairies in the 1870s and the 1880s, and particularly in the context of the North-West Rebellion of 1885.”

Dr. Carl Beal

[54] Dr. Beal (no relation to Bob Beal) tendered expert and rebuttal reports, respectively titled “Report on the Treaty Promises and Breaches, Treaty 6, Hobbema Agency - 1877-1930s” and “Rebuttal Report to Thomas Flanagan’s ‘Analysis of Plaintiffs’ Experts’ Reports

in the Case of *Chief Victor Buffalo* v. *Her Majesty the Queen et al*.'" (S-31). Dr. Beal received his Ph.D. in economics from the University of Manitoba in 1995 for his doctoral thesis "Money, Markets and Economic Development in Indian Reserve Communities in Saskatchewan, 1870-1930s." At the time of his testimony, in November and December 2000, Dr. Beal was an Associate Professor of Indian Studies at the Saskatchewan Indian Federated College, a member of the Faculty of Arts and the Faculty of Graduate Studies and Research at the University of Regina. Dr. Beal was qualified at trial as "an expert historical economist specializing in the period from 1815 to 1950 in the Northwest Territories, now Alberta and Saskatchewan."

Professor Douglas Sanders

[55] Professor Sanders, a lawyer and legal historian, tendered an expert report titled "Historical Thinking and Practice on the Relationship between Indian Tribes and the Crown in Canada" (S-49). Professor Sanders received his Master of Laws from the University of California, Berkeley in 1963. Professor Sanders practised law in Vancouver from 1964 until 1969 and in Victoria from 1975 until 1977. He was an Associate Professor in the Faculty of Law at the University of Windsor from 1969 to 1972. He was director of the Native Law Centre at Carleton University from 1972 until 1974. Professor Sanders acted as legal counsel and research coordinator for the Union of British Columbia Indian Chiefs from 1974 to 1975. At the time of his testimony, in January 2001, he had been a Professor of Law at

the University of British Columbia since 1977. His C.V. lists his principal teaching areas as Indigenous Peoples, federalism, international human rights, and sexuality. Professor Sanders was qualified at trial as “an expert legal historian with particular expertise in comparative policy and international developments in relation to indigenous peoples, and with particular attention to the evolution of government policy in Canada relating to aboriginal peoples, including the role of treaties and the development of government policy relating to Aboriginal self-government.”

Professor H. C. Wolfart

[56] Professor Wolfart, a linguist, tendered an expert report titled “Linguistic Aspects of Treaty Six” and a surrebuttal report titled “Aspects of Linguistics” (S-68). Professor Wolfart earned an M.A. from Cornell University in 1967. He also earned an M.A. in 1966, M.Phil. in 1967, and a Ph.D. in 1969 from Yale University. Since 1969, Professor Wolfart has been at the University of Manitoba. From 1969 to 1972, he was an Assistant Professor; and from 1972 until 1977, he was an Associate Professor, both positions in linguistics / anthropology. From 1977 to 1984, he was a Professor in linguistics / anthropology, and he served as head of the Anthropology Department from 1977 to 1978. Professor Wolfart was a Professor of Linguistics from 1969 to 1987, and was head of the Linguistics Department from 1987 until 1996. Since 1993 until at least the time of his testimony in March and April 2001, he has held the rank of University Distinguished Professor in Linguistics. His C.V. (S-66) demonstrates that he has published rather extensively in, among many other things,

the area of Algonquian linguistics, and more particularly, the Cree language. Professor Wolfart was qualified at trial as “an expert in general and historical linguistics, the history of linguistics with an emphasis on linguistic and philological methods, the linguistic analysis of Cree, and the analysis of texts and their structures.”

Dr. Winona Wheeler

[57] Dr. Wheeler tendered a report titled “Indigenous Oral Tradition Histories, An Academic Predicament” (S-217) and a surrebuttal report titled “Surrebuttal to Dr. Alexander von Gernet’s ‘Comments on Winona Wheeler’s Indigenous Oral Tradition Histories, An Academic Predicament’” (S-299). Dr. Wheeler earned an M.A. in history from the University of British Columbia in 1988. She received a Ph.D. in ethnic/Native American studies from the University of California, Berkeley in 2000 for the doctoral thesis “Decolonizing Tribal Histories.” Since 1988 until the time of her testimony in November 2001, Dr. Wheeler has held the ranks of Assistant Professor, Associate Professor, and Adjunct Professor in the Native American Studies Department at the University of Saskatchewan. Since July 2001 until at least the time of her testimony, she was Acting Dean and Associate Professor in the Indian Studies Department of the Saskatoon campus of the Saskatchewan Indian Federated College. Dr. Wheeler has taught a variety of courses at Saskatchewan Indian Federated College and the University of Saskatchewan and has numerous publications to

her credit. Dr. Wheeler was qualified at trial as “an expert in Native American Studies with particular emphasis on comparative oral histories and the academic treatment of Indigenous oral histories.”

Professor Leroy Little Bear

[58] Professor Little Bear tendered an expert report titled “Aboriginal Paradigms: Implications for Relationships to Land and Treaty Making” (S-223). Professor Little Bear earned a B.A. from the University of Lethbridge in 1971 and a J.D. from the University of Utah in 1975. He was an Associate Professor in the Native American Studies Department, which he was initially recruited to establish, at the University of Lethbridge from 1975 to 1996. He chaired the Department for most of his tenure at the University. Professor Little Bear taught courses in law, Native philosophy, and economic development. He was also Director of the Native American program at Harvard University for the year 1998. At the time of his testimony in October 2001, he was a Visiting Professor at the University of Lethbridge. Professor Little Bear was qualified at trial as “an aboriginal professor of Native Studies and as an educator with expertise in Native American Studies, with a concentration on the philosophy, culture, values and customs of the Plains Indians and on the aboriginal

perspective on land, society and culture and the impact of these on aboriginal/european [*sic*] relationships, including treaty-making."

2. *For the defendants*

Dr. Thomas Flanagan

[59] Dr. Flanagan, a political scientist, tendered a report titled "Analysis of Plaintiffs' Experts' Reports in the Case of *Chief Victor Buffalo* v. *Her Majesty the Queen et al.*" (C-286) and a rebuttal report to Professor Wolfart's report (C-287). Dr. Flanagan earned his Ph.D. in political science from Duke University in 1970 for his dissertation "Robert Musil and the Second Reality." He has been with the University of Calgary's Department of Political Science since 1968 and until at least the time of his testimony in January and May 2002. He became a Professor in 1979 and served as department head from 1982 until 1987. He was academic policy advisor to the president from 1988 to 1990. Dr. Flanagan served as the director of policy, strategy, and communications, then director of research for the Reform Party of Canada from 1991 to 1992. At the time of his testimony in May 2002, he indicated he would be seeking a secondment from the University of Calgary so as to become the director of operations for the Office of the Leader of the Opposition in Ottawa. Dr. Flanagan has published extensively, including the book *First Nations? Second Thoughts* (C-277). Dr. Flanagan was qualified at trial as "a political scientist and historian

whose expertise includes Western Canadian Political History generally and, in particular, the history of aboriginal and government relations, including treaties and the administration of government programs. He also has expertise in the use of historical research methodologies, including the analysis and interpretation of historical primary source documents."

Dr. Alexander von Gernet

[60] Dr. von Gernet, an anthropologist, tendered the following reports: "Aboriginal Oral Documents and Treaty Six" (C-341); "An Assessment of Certain Evidence Relating to Plains Cree Practices" (C-323), which serves as a rebuttal to Ms. Holmes's report; "Cree Territory at the Time of First European Contact" (C-322); "Comments on Winona Wheeler's 'Indigenous Oral Tradition Histories, An Academic Predicament'" (C-321); and "Treaty Six: An Assessment of the Written and Oral Documents" (C-320), which, I note, replaces and updates an earlier report (C-342). Dr. von Gernet received a Ph.D. in anthropology from McGill University in 1989, where he specialized in ethnohistory and archaeology of Aboriginal peoples in North America. Since 1989, he has been at the Department of Anthropology, University of Toronto, Mississauga campus, where he is an Adjunct Professor. He has consulted for the Government of Canada on various occasions on aboriginal issues; he has also testified as an expert witness, including *Benoit* v. *Canada*, [2002] F.C.J. No. 257. Dr. von Gernet was qualified at trial as "an anthropologist and ethnohistorian specializing in the use and analysis of archaeological evidence, written

documentation and oral traditions to reconstruct the history and past cultures of Aboriginal peoples (including the Cree), as well as the history of contact between Aboriginal peoples and European newcomers throughout Canada."

ii. Elders

For the plaintiffs

[61] In June 2000, the Court held sittings for three weeks on the Samson Cree Nation Reserve, at Hobbema, Alberta. Five Cree elders from the Treaty 6 territory testified. Each elder was introduced by someone from the Cree community who spoke to the reputation and status of the elder within the wider Cree community. Clifford John Crier, a Samson Cree Nation member, was chosen by Samson elders to act as *Oskapewsak*, or helper, to the elders. He was the trial's first witness. Mr. Crier described the method by which the elders' evidence was gathered, including the use of protocol and ceremonies (C-1092, tab 2).

[62] Eric Tootoosis of the Poundmaker Nation (C-1092, tab 3) introduced the first elder to testify, Elder Pete Waskahat (C-1092, tab 4). Elder Waskahat is a member of the Frog Lake Cree Nation. He told part of the Cree creation story, spoke of Cree laws and life before Treaty 6, and also told an oral tradition of the making of Treaty 6 at Fort Pitt.

[63] Cherrilene Steinhauer of the Saddle Lake Cree Nation (C-1092, tab 5) introduced Elder Margaret Quinney (C-1092, tab 6). Elder Quinney, a member of the Frog Lake First Nation, spoke of the Cree people and their spirituality. The elder told oral tradition stories of a boy protected by his grandfather, a bear, and also a story about the buffalo and their role in Cree culture. Elder Quinney also told an oral tradition about the making of Treaty 6 at Fort Pitt.

[64] Rita Okanee of Thunderchild Cree Nation (C-1092, tab 7) served as the introducer for Elder Jacob Bill (C-1092, tab 8). Elder Bill, a member of Chachakew Lake (Pelican Lake) spoke about Cree spirituality, ceremonies, and laws. He also related an oral tradition about the Treaty 6 negotiations at Fort Carlton.

[65] Linda Oldpan was the next introducer (C-1092, tab 9). It is not entirely clear from the transcripts whether she is a member of the Samson Cree Nation as counsel only asked her whether she is from Hobbema, to which she responded affirmatively. At any rate, she introduced Elder Amelia Potts, who is a member of the Samson Cree Nation (C-1092, tab 10). The elder spoke of Cree life before contact with Europeans and told an oral tradition

about the 1885 Northwest Rebellion and the subsequent flight of Big Bear and his followers from Battleford to *Maskwachees*.

[66] Chief Ben Weeni of the Sweet Grass Reserve (C-1092, tab 11) introduced the last elder to be heard during the sitting on the Samson Cree Nation, Elder Solomon Stone (C-1092, tab 12). Elder Stone is a member of the Mosquito Nation and is Assiniboine. He related an oral tradition, which included a song, about the Northwest Rebellion.

[67] Three more Samson elders testified in May 2001: Pearl Crier, Justine Simon, and Monica Soosay. They spoke about their genealogies, linking them and their families to Kanatakasu (Chief Samson) and Maskepetoon. They also testified about Cree culture and lifestyle.

[68] Thomas Cardinal, an elder from the Saddle Lake First Nation, testified about Cree customs, traditions, lifestyle, and Treaty 6.

iii. Lay Witnesses

For the plaintiffs

[69] The Court heard testimony from Barb Louis, a Samson Cree Nation member. Ms. Louis testified about the Samson people, their language, culture, ceremonies, territory, and history. She also described the current organization of the Samson Cree Nation's administration, businesses, and other entities.

[70] Walter Lightning, also a member of the Samson Cree Nation, testified about his family tree, Plains Cree culture, philosophy, traditions, protocol, ceremonies, feasts, and customs. He spoke about his work at Maskwachees Cultural College (MCC), located on the Samson Cree Nation reserve, especially as it related to the videotaped interviews with specific elders, including Elder Waskahat. He also related to the Court oral traditions, including treaty stories.

[71] The Court heard testimony from three former Ministers of the Department of Indian Affairs and Northern Development (DIAND). David Crombie served as Minister from September 1984 until the end of June 1986. John Munro was a member of Cabinet for some 15 years; he acted as Minister of DIAND from 1980 until 1984. Warren Allmand, was Minister of DIAND from September 1976 to October 1977. He was also a member of the Special Committee of the House of Commons on Indian Self-Government, more commonly known as the Penner Committee. Mr. Allmand also testified about the development of

international human rights and democracy, in his capacity as President of the International Centre for Human Rights and Democratic Development (Rights and Democracy).

[72] Bruce Cutknife, a Samson Cree Nation member, testified about his genealogy, Plains Cree culture, protocol, ceremonies, and traditions. He testified about his work at MCC. Mr. Cutknife also spoke about Cree syllabics and testified about a map identifying Cree place names in Alberta and Saskatchewan.

[73] The Court also heard testimony from Harvey Buffalo, a Samson Cree Nation member. He testified about several genealogies, including his family tree and the Dion/Buffalo family trees. Mr. Buffalo spoke about treaty pay lists, a 1901 federal government census, Kanatakasu, and Maskepetoon.

[74] Two witnesses for Samson, Steve Skakum and Jerry Saddleback, testified regarding certain deceased elders. Videotaped interviews of these elders were filed as exhibits (S-132, S-199, S-202, S-203, S-204, and S-205). Both of these witnesses worked at MCC and were familiar with the school’s program for videotaping elders.

[75] The Court heard testimony from Dr. Peter Meekison. He testified primarily on his personal experience as a Commissioner on the Royal Commission on Aboriginal Peoples of Canada (RCAP). He testified about the RCAP's mandate, terms of reference, hearing process, final report, and the federal government's report in response. Dr. Meekison also spoke about his experience as an advisor to the Alberta government during the constitutional conferences in the 1980s, as well as the constitutional discussions regarding the Meech Lake Accord and the Charlottetown Accord.

[76] Sol Sanderson is from the James Smith Band, and at the time of his testimony, was Chief of the Chakastaypasin Nation, a band which is not registered under the *Indian Act*. He testified about Plains Cree culture, spirituality, and their understanding of Treaty 6. He also spoke about his personal involvement in political work and constitutional matters in regard to First Nations.

[77] Arrol Crier, a Samson Cree Nation member, told the Court several oral traditions. The stories dealt with hunting, social organization, traditions, Maskepetoon, Kanatakasu, and Katochat.

[78] Vivian Samson, another Samson Cree Nation member, testified about her family ancestry and, in particular, about her ancestor Kanatakasu, or Samson. She related to the Court oral traditions about Kanatakasu and Maskepetoon.

[79] The former prime minister, the Right Honourable Jean Chrétien, testified on behalf of Samson in February 2004. His evidence covered matters falling into both phases of the trial. He testified as to the 1968 *Indian Act* consultation meetings, the 1969 White Paper, the 1970 Red Paper, various federal initiatives during the 1970s regarding the *Indian Act*, the interest rate regime for Indian monies and changes to its methodology, his involvement with and understanding of aboriginal and treaty rights, constitutional developments, and Canada's position regarding the treaties, and attempts to amend the *Indian Act* in the 1990s.

D. Historical Background

i. Treaty-Making in Ontario and the West

Pre-Robinson Treaties

[80] In his expert report, Professor Ray wrote,

> Until the end of the War of 1812, Upper Canada was highly vulnerable to attack by American forces. Consequently, courting Native support remained a cornerstone of British policy until 1816. For this reason, colonial governments adhered to the practice of following the guidelines set out in the Royal Proclamation of 1763 for the surrender of aboriginal title. These principles were:
>
> 1. Surrenders had to be voluntary.
>
> 2. Aboriginal land could only be surrendered to the Crown.
>
> 3. Negotiations had to take place in public at meetings specifically called for the purpose of negotiating the surrenders of title.
>
> (S-4, pp. 37-38)

[81] The pre-Robinson treaties, negotiated with Ojibway groups in what was then Upper Canada and Canada West, were essentially land purchases by the government. Professor Ray testified,

> And so in the early treaties, these were simply what were called “simple purchases,” in which natives signed the treaties. They received a one-time payment in cash or goods for surrendering the land, and they simply moved a little bit further north.
>
> (transcript vol. 23, p. 2943)

[82] The pre-Robinson treaties are noteworthy in that they did not provide for annuities, reserves, or livelihood rights (e.g., hunting and fishing clauses). These treaties were driven by the government’s desire to acquire land for colonization and agricultural development (transcript, vol 23, p. 2947).

[83] After 1818, the British Crown initiated a change in policy whereby the colonies would shoulder the burden of paying for aboriginal land. Colonial governments, however, lacked the cash for these purchases. Sir Peregrine Maitland, Lieutenant-Governor of Upper Canada, devised a solution. Instead of a lump sum payment, the colonial government would pay the Indians – those who signed the treaties and their descendants – annuities in perpetuity. The money for the annuities would come from interest payments made by the land developers and settlers who would subsequently purchase the land from the government.

[84] As time went on, however, the land available for the Ojibway to move to was rapidly diminishing. Thus, the practice began of setting aside reserves. According to Professor Ray, missionaries and social reformers were strong supporters of natives having their own land base, so as to secure their future economic well-being.

Robinson Treaties of 1850

[85] While the pre-Robinson treaties were motivated by the desire for land for agricultural and colonial development, the Robinson treaties of 1850 had their genesis in the great mineral wealth found in the upper Great Lakes region. By the 1840s, non-natives were developing copper mines along the shores of Lake Huron and Lake Superior. The colony

of Canada, formed by the union of Upper and Lower Canada in 1840, began issuing mining licences, despite not having secured any land surrenders from the aboriginal people in the area. Professor Ray testified that the Ojibway, too, were issuing their own mining licences (transcript vol. 23, p. 2949). Faced with the uncertainty of who had the right to issue these licences, Métis and Ojibway seized the Quebec Mining Company's property at Mica Bay in 1849 in a bid to force the colonial government to the negotiating table.

[86] Further pressure for treaties was added by the Governor General of Canada, James Bruce, 8th Earl of Elgin. He wrote to the colonial secretary in London, complaining about Canada's practice of issuing mining licences for areas where no land surrenders had been obtained.

[87] Eventually, the colonial government sent out surveyors and then representatives to negotiate treaties. The results were the Robinson Superior Treaty and the Robinson Huron Treaty, signed in September, 1850. In his expert report, Professor Ray noted,

> These two treaties encompassed more territory than did all of the previous Upper Canadian cessions combined. Significantly, the Robinson agreements included all of the major elements of previous treaties – annuities, a distribution of gifts at the conclusion of negotiations, and the establishment of reserves – and some very important new provisions. The most significant addition was the written guarantee that the Aboriginal People could always hunt, trap, and fish on undeveloped Crown lands, as was their custom from time immemorial.
>
> [underlining in the original]
>
> (S-3, p. 40)

[88] The Robinson Treaties also addressed the issue of mineral deposits that might be found on native reserves:

> And should the said Chiefs and their respective tribes at any time desire to dispose of any such reservations, or of any mineral or other valuable productions thereon, the same will be sold or leased at their request by the Superintendent-General of Indian Affairs for the time being, or other officer having authority so to do, for their sole benefit, and to the best advantage.
>
> (Morris, S-4, Robinson Huron Treaty, p. 305; see p. 303 for similar provision in Robinson Superior Treaty)

Numbered Treaties, 1 - 5

Pressures for Treaties

[89] The economic potential of Rupert's Land began to attract the attention of developers following the conclusion of the earlier treaties in the east. Development interest was further fuelled by reports stemming from two scientific expeditions to the territory in the late 1850s. Captain John Palliser, an experienced traveller and adventurer, led a British-backed expedition. Henry Youle Hind, a professor in chemistry and geology at the University of Toronto, headed a party sponsored by the government of Canada West. Although the American west was somewhat developed, not much was known about Rupert's Land, beyond the world of the fur traders and their native allies. The prairies were still quite wild and sparsely populated. The expeditions reported on the territory's plants, animals, climate, soil, terrain, minerals, and rivers. They observed the land for its agricultural and development potential, and made note of possible transportation routes. Palliser was

interested in finding a practical route through the Rockies to the Pacific Ocean. Early in the 19th century, fur trader and explorer David Thompson had blazed a route through these mountains; however, it was farther to the north, using the Athabasca Pass.

[90] Their reports, according to Professor Ray, were key factors in the decision by the International Financial Society (IFS) – a consortium of European bankers and stock promoters – to buy control of the HBC in 1863. The IFS reissued HBC stock in a large public offering; shares were snapped up by those hoping to turn a quick profit from the HBC's impending sale of Rupert's Land to either the Canadian or British governments. The latter, however, had no intention of buying the land. Canada eventually bought the territory for £300 000 ($1.5 million Canadian), much less than expected by the IFS. Under the terms of the 1870 Deed of Surrender, the HBC retained its trading posts and land surrounding them, one-twentieth of lands in the Fertile Belt (described in the Deed as the land stretching from the U.S. border in the south, the North Saskatchewan River to the north, the Rocky Mountains to the west, and to the east by Lake Winnipeg, Lake of the Woods, and their connecting waters), as well as an indemnity against "exceptional taxes" on its trade, land, and employees. The Order-in-Council, dated June 23, 1870, which effected the title transfer, contained an article stating that the HBC was relieved of any claims by aboriginal people for compensation for lands required for purposes of settlement; that obligation was thus assumed by Canada (S-3, App. 3).

[91] Native people in the territory were outraged over the sale and concerned for their futures. The Red River Uprising by Métis in Manitoba in 1869-70 was one repercussion. Among other things, it led to the *Manitoba Act* of 1870, and the birth of the province of Manitoba. The insurgency also acted as an unsettling force among native people in the west (transcript, vol. 23, p. 2988).

[92] Events happening south of the border also played a role in shaping future treaty-making in the west. From 1860 to 1890, the U.S. government was engaged in the Indian Wars on its western frontier. Hind addressed these events in his report:

> In Canada, much trouble, great expense, and endless enquiry have been created by Indian claims, which even now remain in part unsettled, and are a source of many incidental expenses to the government, which might have been avoided if proper arrangements had been made at the right season. In Rupert's Land, where disaffected Indians can influence the savage prairie tribes and arouse them to hostility, the subject is one of great magnitude; open war with the Sioux, Assiniboines, Plains Cree or Blackfeet, might render a vast area of prairie country unapproachable for many years, and expose settlers to constant alarms and depredations. The Indian wars undertaken by the United States government during the last half century, have cost infinitely more than the most liberal annuities or comprehensive efforts for the amelioration of the condition of the aborigines would have done; and in relation to the northern prairie tribes, war is always to be expected at a day's notice.
>
> (S-3, p. 44)

[93] Hind's report refers to the HBC's role as a stabilizing force in Rupert's Land. Native relationships and alliances with the HBC, dating back hundreds of years in some instances, had helped keep the peace; however, growing unrest among Indians over the increasing numbers of settlers and diminishing numbers of buffalo threatened that peace.

[94] Furthermore, the Plains Cree were considered a military threat at that time. On December 28, 1870, HBC trader Richard Hardisty wrote to William Christie, Chief Factor of the HBC's Saskatchewan district, airing his concerns,

> With reference to your letter of 15th November respecting the Indians, I will now give you my opinion as far as it has come under my own observation, as regards their trade and their present disaffection towards the Whites in the Saskatchewan District.
>
> In the present unprotected state of the Country, the trade with the plain Indians is a dead loss to the Concern. As it had been customary before the introduction of Free Traders into the district to advance these Indians with Supplies, it has been continued more or less up to the present time; as long as the Indians had none but the Company to look to for supplies, they were, in some measure Kept in check and would make some attempts to pay up their Debts. At present, they demand supplies without any intention of ever paying them and even go so far as to threaten the Shooting of our animals and even further if refused.
>
> For the last few years a great many dissatisfied Halfbreeds have lived among the Indians and done all they could to sow seeds of discord in the Indian minds, and again as the Buffalo have been scarce for some years, many have been ready to catch at the idea that whites coming into the Country have been the cause of the absence of Buffalo, and that the Company are to blame for this change. If they could prevent the settlement of whites in the Country they would gladly do it.
>
> The plain Indians as far back as I can recollect have always considered the whites and Halfbreeds as aggressors on their lands when parties have gone to the plains to make provisions, but as it has always been our policy to have staunch men from among them-selves as Guides and Hunters, no very serious collusions has ever taken place, but latterly, the aspect of things has changed con-considerably, and as I have mentioned above, the disturbances in Red River, have sensibly affected the Indian mind in this part of the Country, and again the small pox having carried away so many of their friends for which they blame the whites there appears to be a careless indifference as to the future not caring how soon troubles may commence.
>
> In the month of October when the Victoria freemen were out on the Plains, a party of Plain Crees came to their Camp with the deliberate intention of pillaging them and even going further if necessary, but then the Crees saw that the freemen armed them-selves and were determined to resist them, they considered it useless to attempt anything. If the Crees party had been larger it would likely have ended in bloodshed.
>
> It is my opinion that, as soon as an influx of whites comes to the Country and especially of miners and if there is no protection speedily sent into the Country or law enforced, which will be wanted as much for the Indians as the white man, and even more so, the Country will be embroiled in Indian troubles which none of us may live to see the end of.

(S-3, pp. 52-53)

[95] On April 13, 1871, Christie received a visit from several Cree Chiefs, including Sweet Grass, a prominent Cree Chief. Christie sent a letter, dated that same day, to Lieutenant-Governor Adams Archibald at Fort Garry, Red River Settlement. Messages from four Cree chiefs, translated into English, were attached to the letter. Christie also included a memorandum containing a warning. I quote the document in its entirety as it adds considerably to the historical context of the growing pressures for treaties in the territory:

Edmonton House, 13th April, 1871.

On the 13th instant (April) I had a visit from the Cree Chiefs, representing the Plain Crees from this to Carlton, accompanied by a few followers.

The object of their visit was to ascertain whether their lands had been sold or not, and what was the intention of the Canadian Government in relation to them. They referred to the epidemic that had raged throughout the past summer, and the subsequent starvation, the poverty of their country, the visible diminution of the buffalo, their sole support, ending by requesting certain presents *at once*, and that I should lay their case before Her Majesty's representative at Fort Garry. Many stories have reached these Indians through various channels, ever since the transfer of the North-West Territories to the Dominion of Canada, and they were most anxious to hear from myself what had taken place.

I told them that the Canadian Government had as yet made no application for their lands or hunting grounds, and when anything was required of them, *most likely Commissioners* would be sent beforehand to treat with them, and that until then they should remain quiet and live at peace with all men. I further stated that Canada, in her treaties with Indians, heretofore, had dealt most liberally with them, and that they were now in settled houses and well off, and that I had no doubt in settling with them the same liberal policy would be followed.

As I was aware that they had heard many exaggerated stories about the troops in Red River, I took the opportunity of telling them why troops had been sent; and if Her Majesty sent troops to the Saskatchewan, it was as much for the protection of the red as the white man, and that they would be for the maintenance of law and order.

They were highly satisfied with the explanations offered, and said they would welcome civilization. As their demands were complied with, and presents given to them, their immediate followers, and for the young men left in camp, they departed well pleased for the present time, with fair promises for the future. At a subsequent interview, with the Chiefs alone, they requested that I should write down their words, or messages to their Great Masters in Red River. I accordingly did so, and have transmitted the messages as delivered. Copies of the proclamation issued, prohibiting the traffic in spirituous liquors to Indians or others, and the use of strychnine in the destruction of animal life, have been received, and due publicity given to them. But without any power to enforce these laws, it is almost useless to publish them here; and I take this opportunity of most earnestly soliciting, on behalf of the Company's servants, and settlers in this district, that protection be afforded to life and property here as soon as possible, and that Commissioners be sent to speak with the Indians on behalf of the Canadian Government.

MEMORANDA:

Had I not complied with the demands of the Indians – giving them some little presents – and otherwise satisfied them, I have no doubt that they would have proceeded to acts of violence, and once that had commenced, there would have been the beginning of an Indian war, which it is difficult to say when it would have ended.

The buffalo will soon be exterminated, and when starvation comes, these Plain Indian tribes will fall back on the Hudson's Bay Forts and settlements for relief and assistance. If not complied with, or no steps taken to make some provision for them, they will most assuredly help themselves; and there being no force or any law up there to protect the settlers, they must either quietly submit to be pillaged, or lose their lives in the defence of their families and property, against such fearful odds that will leave no hope for their side.

Gold may be discovered in paying quantities, any day, on the eastern slope of the Rocky Mountains. We have, in Montana, and in the mining settlements close to our boundary line, a large mixed frontier population, who are now only waiting and watching to hear of gold discoveries to rush into the Saskatchewan and, without any form of Government or established laws up there, or force to protect whites or Indians, it is very plain what will be the result.

I think that the establishment of law and order in the Saskatchewan District, as early as possible, is of most vital importance to the future of the country and the interest of Canada, and also the making of some treaty or settlement with the Indians who inhabit the Saskatchewan District.

W.J. CHRISTIE, *Chief Factor,*

In charge of Saskatchewan District,

Hudson's Bay Company.

Messages from the Cree Chiefs of the Plains, Saskatchewan, to His Excellency Governor Archibald, our Great Mother's representative at Fort Garry, Red River Settlement.

1. The Chief Sweet Grass, The Chief of the country.

GREAT FATHER, – I shake hands with you, and bid you welcome. We heard that our lands were sold and we did not like it; we don't want to sell our lands; it is our property, and no one has a right to sell them.

Our country is getting ruined of fur-bearing animals, hitherto our sole support, and now we are poor and want help – we want you to pity us. We want cattle, tools, agricultural implements, and assistance in everything when we come to settle – our country is no longer able to support us.

Make provision for us against years of starvation. We have had great starvation the past winter, and the small-pox took away many of our people, the old, young, and children.

We want you to stop the Americans from coming to trade on our lands, and giving firewater, ammunition and arms to our enemies the Blackfeet.

We made a peace this winter with the Blackfeet. Our young men are foolish, it may not last long.

> We invite you to come and see us and to speak with us. If you can't come yourself, send some one in your place.
>
> We send these words by our Master, Mr. Christie, in whom we have every confidence. – That is all.
>
> 2. Ki-he-win, The Eagle.
>
> GREAT FATHER, – Let us be friendly. We never shed any white man's blood, and have always been friendly with the whites, and want workmen, carpenters and farmers to assist us when we settle. I want all my brother, Sweet Grass, asks. That is all.
>
> 3. The Little Hunter.
>
> You, my brother, the Great Chief in Red River, treat me as a brother, that is, as a Great Chief.
>
> 4. Kis-ki-on, or Short Tail.
>
> My brother, that is coming close, I look upon you, as if I saw you; I want you to pity me, and I want help to cultivate the ground for myself and descendants. Come and see us.
>
> (S-4, Morris, pp. 169-171)

[96] In his book on the treaties, Morris included a letter penned by Indian Commissioner Wemyss Simpson, dated November 3, 1871, to the Secretary of State. In the extract, Simpson touches on the topic of the Indians' knowledge of other treaties, as well as emphasizing the importance of making a treaty in order to preserve the peace. Simpson wrote:

> I desire also to call the attention of His Excellency to the state of affairs in the Indian country on the Saskatchewan. The intelligence that Her Majesty is treating with the Chippewa Indians has already reached the ears of the Cree and Blackfeet tribes. In the neighbourhood of Fort Edmonton, on the Saskatchewan, there is a rapidly increasing population of miners and other

> white people, and it is the opinion of Mr. W.J. Christie, the officer in charge of the Saskatchewan District, that a treaty with the Indians of that country, or at least an assurance during the coming year that a treaty will shortly be made, is essential to the peace, if not the actual retention, of the country.
>
> (S-4, p. 168)

[97] Lieutenant-Governor Morris shared similar concerns about the potential military threat posed by the Cree. On August 2, 1873, he wrote the following to Alexander Campbell, Deputy Minister of the Interior,

> The numbers of the Indians west of Fort Ellice (up to which point treaties have been made with the Indians) are formidable. I have made enquiries of persons likely to know the numbers, such as Bishop Granden, Père Andre, Honble Pascal Breland, Honble J. McKay, and others. From these sources of information, I estimate the number dwelling in the Plain country as follows: - Blackfeet, (a very warlike tribe, well armed and supplied with horses) 7000. Plain Crees (another warlike tribe, at present at peace with their hereditary foes, the Blackfeet) 5000. Assiniboines 2000 - = 14000.
>
> But these numbers are liable to be largely increased at any time by members of these tribes, and others, such as the Sioux in the U.S. who cross the line for hunting purposes.
>
> The number of children in Indian families is small, averaging probably three per family, so that in the event of hostilities arising, I believe the Indians could place in the field 5000 mounted warriors, well armed.
>
> The Americans are obliged to maintain a large force in the adjoining State and Territories ... . By pursuing a policy of conciliation, I believe the Dominion might secure the preservation of peace by maintaining, in addition to the proposed Police force, a Military Force of 500 men in the N.W. This I regard as absolute necessity. Already the Indian Tribes have formed a very low estimate of the Military power of Canada, and believe that about 3000 warriors could drive the Canadians from the country. If there were no force here the results would be disastrous and at any moment the scenes of Massacre, plunder, and violence enacted in Minnesota might be repeated here.
>
> (S-3, supporting documentation, volume II, tab 54, pp. 3-6)

[98] Campbell replied on August 6, 1873:

> I myself was in favor or going on with the treaty this year ... because I conceived it would be easier to deal with the Indians now than hereafter, and also that dealing with them now would be the means of preserving peace amongst them, but Sir John Macdonald and all my colleagues were of the other opinion holding that there was no use making a treaty so long in advance of our requiring the land.
>
> (S-3, supporting documentation, volume II, tab 55, pp. 2-3)

[99] Morris continued to relay his concerns to Campbell, sending the following on October 23, 1873:

> I have inc. copy of a confidential statement, given to me by Mr. Bell, of the Geological Survey, at my request. He has just returned from the Territories, and reports to me that a very bad feeling exists among the Indians, as also that the Half-breeds at Lake Qu'Appelle, claimed that there is no visible government there, and no policy, and that they did not wish strangers to enter the country. I transmitted to the Government, on the 5th June last, a letter from the Half-Breeds there, presented by one Fisher, and my reply. Fisher then stated that they did not want any strangers to come into the country; but I told him that the country was open to all, but that they would be dealt with justly. I am led to fear, from various sources of information, some movement there which may give trouble, and think that the Government should reconsider their decision as to making a Treaty with the Indians in the region I indicated to them in my dispatch of July 26th.
>
> (S-3, supporting documentation, volume II, tab 55, pp. 1-2)

[100] Morris had the support of the Territorial government, whose members resolved on September 8, 1873,

> That the Council of the North-West are of opinion, that in view of the rapid increase of Settlement in the North-West Territories, and the present disturbed condition of the Indians and their anxiety as to the future, it is imperatively necessary that a Treaty should be concluded with the bands of Indians living between the Western Boundary of that portion of the Territory in which the Indian Title has already been extinguished, and Fort Carlton or thereabouts.
>
> The Council are of opinion that to defer the negotiation of a Treaty of this nature beyond the earliest time possible in the year 1874 would be attended with unfortunate results.
>
> (S-3, supporting documentation, volume II, tab 56, p. 1000)

[101] The Canadian Government, while it wanted to eventually open the West for settlement, was in no great hurry to do so. As Professor Ray termed it, Canada had a “go slow policy” in regard to development (transcript vol. 23, p. 3016). Development costs would be substantial. Land surveys, roads and railway construction, and other necessary infrastructure, not to mention treaties and their associated costs, were expensive and the Canadian government had limited financial resources. Thus, such development, and the treaties that would precede it, would only occur once sufficient pressure could justify it. And this is demonstrated in the slow, but steady, march west of the numbered treaties.

Treaty Negotiations, 1-5

[102] In 1880, Morris published *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*; it included accounts of negotiations, official government reports, and the texts of treaties and adhesions. His preface reads as follows,

> The question of the relations of the Dominion of Canada to the Indians of the North-West, is one of great practical importance. The work, of obtaining their good will, by entering into treaties of alliance with them, has now been completed in all the region from Lake Superior to the foot of the Rocky Mountains. As an aid to the other and equally important duty – that of carrying out, in their integrity, the obligations of these treaties, and devising means whereby the Indian population of the Fertile Belt can be rescued from the hard fate which otherwise awaits them, owing to the speedy destruction of the buffalo, hitherto the principal food supply of the Plain Indians, and that they may be induced to become, by the adoption of agricultural and pastoral pursuits, a self-supporting community – I have prepared this collection of the treaties made with them, and of information, relating to the negotiations, on which these treaties were based, in the hope that I may thereby contribute to the completion of a work, in which I had considerable part, that, of , by treaties, securing the good will of the Indian tribes, and by the helpful hand of the Dominion, opening up to them, a future of promise, based upon the foundations of instruction and the many other advantages of civilized life.
>
> (S-4, preface)

[103] Morris served as a government Commissioner for Treaties 3, 4, 5, and 6; he also dealt with the revisions to Treaties 1 and 2 – the “outside promises” issue. He was also Lieutenant-Governor of Manitoba and the North-West Territories.

[104] The Indians were tough negotiators; their very future was at stake. By the early 1870s, the winds of change were blowing through the west. The vast herds of buffalo, so vital to the culture and survival of the Plains Indians, were greatly reduced in size. The collapse of the buffalo hunting economy was no longer simply a dreaded possibility; it was imminent. Settlers and surveyors, the latter busy preparing the way for telegraph and railway, were arriving in increasing numbers, thanks, in part, to the Dawson Road. This route, which took three years to build, was something of an engineering marvel of its time, as well as a testimony to sheer hard, back-breaking labour. It was built through the forest, muskeg, and Precambrian rock of what is now northern Ontario. The Dawson Road began at Prince Arthur’s landing on the eastern end of Lake Superior and ended at Fort Garry. Until the railway was built, this was an important thoroughfare for those travelling to the west.

[105] Indians in the North-West Territories were aware of these changes and were anxious to secure a place for themselves in the new economic order. As we shall see further on in

these Reasons, Indian negotiators placed great emphasis on economic issues and tangible goods during treaty talks.

[106] Treaties 1 and 2 are essentially identical. The former was concluded at Stone Fort (Lower Fort Garry), while the latter was signed at Manitoba Post, an HBC fort at the north end of Lake Manitoba. The Indians of the area had applied in the autumn of 1870 to Lieutenant-Governor Adams Archibald for a treaty. By the following August, both treaties were concluded. Morris noted that the Indians were,

> full of uneasiness, owing to the influx of population, denied the validity of the Selkirk Treaty, and had in some instances obstructed settlers and surveyors.
>
> (S-4, pp. 25-26)

[107] These treaties provided for, amongst other things, relinquishment of aboriginal title, provision of reserves, maintenance of schools on reserves, hunting and fishing on unoccupied land, prohibition of the sale of liquor, and annuities.

[108] A controversy arose later over these treaties, having to do with what were called the “outside promises.” A memorandum, signed by the treaty commissioners and containing their understanding of the treaties’ terms, was attached to Treaty 1. However, certain verbal

promises (also found in the memorandum) failed to be included in the written text of the treaties, and thus were not implemented. This caused great consternation and dissatisfaction amongst the affected Indians. Eventually, the Privy Council agreed to consider the memorandum as part of the treaties and agreed to carry out its terms. Additional payments of money and clothing were also made. Morris and the Indian Commissioner, Lieutenant-Colonel Provencher, were sent out in October 1875 to meet with the treaty bands and secure their consent to the revisions. Morris reflected upon this episode,

> The experience derived from this misunderstanding, proved however, of benefit with regard to all the treaties, subsequent to Treaties One and Two, as the greatest care was thereafter taken to have all promises fully set out in the treaties, and to have the treaties thoroughly and fully explained to the Indians, and understood by them to contain the whole of the agreement between them and the Crown.
>
> [Underling is mine]
>
> (S-4, p. 128)

[109] Treaty 3, the North-West Angle Treaty, covered the lake and forest country from the watershed of Lake Superior to the north-west angle of the Lake of the Woods, and from the U.S. border to the height of land from which the streams drain into Hudson's Bay. Morris described this treaty as necessary,

> in order to make the route known as "the Dawson route," ... which was then being opened up, "secure for the passage of emigrants and of the people of the Dominion generally," and also to enable the Government to throw open for settlement any portion of the land which might be susceptible of improvement and profitable occupation.
>
> (S-4, p. 44)

[110] The government commissioners first met with the Indians concerned at Fort Francis in July, 1871. They explained the government's intention of obtaining a surrender of the Indians' territorial rights; in return, the Indians would receive reserves and annuities. The Indians contended that they were owed compensation for the raw materials used to construct the Dawson Road, as well as for rights of access and land use. The commissioners agreed to pay a small sum of money, as well as some provisions and clothing to settle the matter. No treaty, however, was concluded and the parties agreed to meet the next summer. Negotiations were further postponed until the fall of 1873.

[111] Meanwhile, Morris was appointed treaty commissioner in 1873. He and the other commissioners met with the Indians at the north-west angle of the Lake of the Woods in September, 1873. According to Morris, negotiations were "protracted and difficult" (S-4, p. 45).

[112] In his chapter on Treaty 3, Morris included an extract of a report published in the newspaper the *Manitoban*, dated October 18, 1873. The report contains speeches from the negotiations, taken down by a short-hand reporter. Morris described the report as presenting "an accurate view of the course of the discussions, and a vivid representation of the habits of Indian thought" (S-4, p. 52). The *Manitoban* extract reports the following

speech, by one of the chiefs on the third day of the negotiations, when the topic of mineral resources was raised,

> CHIEF – "My terms I am going to lay down before you; the decision of our chiefs; ever since we came to a decision you push it back. *The sound of the rustling of the gold is under my feet where I stand*; we have a rich country; it is the Great Spirit who gave us this; where we stand upon is the Indians' property, and belongs to them. If you grant us our requests you will not go back without making the treaty."
>
> (S-4, p. 62)

[113] Further along in the newspaper report appears this exchange between Morris and a chief:

> CHIEF – "Should we discover any metal that was of use, could we have the privilege of putting our own price on it?"
>
> GOVERNOR – "If any important minerals are discovered on any of their reserves the minerals will be sold for their benefit with their consent, but not on any other land that discoveries may take place upon; as regards other discoveries, of course, the Indian is like any other man. He can sell his information if he can find a purchaser."
>
> [underlining is mine]
>
> (S-4, p. 70)

[114] Morris also included this latter discussion in his official report to the government, dated October 14, 1873 (S-4, p. 50).

[115] Pondering the significance of Treaty 3, Morris wrote,

> This treaty was one of great importance, as it not only tranquilized the large Indian population affected by it, but eventually shaped the terms of all the treaties, four, five, six and seven, which have since been made with the Indians of the North-West Territories – who speedily became apprised of the concessions which had been granted to the Ojibbeway nation.
>
> (S-4, p. 45)

[116] The next agreement, Treaty 4, is also known as the Qu'Appelle Treaty because it was concluded at Qu'Appelle Lakes in what is now the province of Saskatchewan. It was signed in September 1874. Once again, Morris acted for the government as a treaty commissioner, along with the Hon. David Laird, Minister of the Interior, and W. J. Christie, now retired from working for the HBC. Morris described the negotiations,

> The Commissioners encountered great difficulties, arising, from the excessive demands of the Indians, and from the jealousies, existing between the two Nations, Crees and Chippawas, but by perseverance, firmness and tact, they succeeded in overcoming the obstacles, they had to encounter, and eventually effected a treaty, whereby the Indian title was extinguished in a tract of country, embracing 75,000 square miles of territory. After long and animated discussions the Indians, asked to be granted the same terms as were accorded to the Indians of Treaty Number Three, at the North-West Angle, hereinbefore mentioned. The Commissioners assented to their request and the treaty was signed accordingly.
>
> (S-4, pp. 78-79)

[117] Treaty 5, the Lake Winnipeg Treaty, was signed in September, 1875 with the Saulteaux and Swampy Cree. Its terms were virtually identical to those of Treaties 3 and

4. Morris and James McKay acted as treaty commissioners. They travelled this immense lake using the HBC's new steamship, the Colville. Morris noted the impetus for this treaty,

> The necessity for it had become urgent. The lake is a large and valuable sheet of water, being some three hundred miles long. The Red River flows into it and the Nelson River flows from it into Hudson's Bay. Steam navigation had been successfully established by the Hudson's Bay Company on Lake Winnipeg ... .
>
> (S-4, p. 143)

[118] Morris also remarked upon the potential value of the land,

> The east coast is much inferior to the west coast, as far as I could learn, but appeared to be thickly wooded, and it is understood that indications of minerals have been found in several places.
>
> (S-4, p. 150)

ii. The Making of Treaty 6

[119] Treaty 6 was signed in August and September 1876 at Forts Carlton and Pitt, respectively. James McKay and W.J. Christie acted as treaty commissioners, along with Morris. Christie, as previously noted, had been Chief Factor of the HBC in the Saskatchewan District. He was of mixed blood and spoke Cree. He had also acted as a treaty commissioner at the Qu'Appelle Lakes Treaty. Over the course of his life, both in his personal and working spheres, he had extensive contact and interactions with aboriginal

people. James McKay was a Métis from Red River and was Minister of Agriculture in the Manitoba government.

[120] The Treaty Commission was assisted by Dr. A.G. Jackes, the commission secretary. He recorded a daily narrative of the negotiations. Morris considered it an “accurate account of the speeches of the Commissioners and Indians” (S-4, p. 180; see also p. 195).

[121] Thus, contemporary documentary accounts of Treaty 6 consist of Morris’s report and the Jackes narrative, contained within the Morris text. Another source is the book *Buffalo Days and Nights*, the autobiography of Peter Erasmus, as told by Erasmus to Henry Thompson. Erasmus lived from 1833 to 1931. He acted as interpreter for the Cree at Treaty 6, having been hired by Cree chiefs Mista-wa-sis and Ah-tuk-a-kup. Thompson interviewed Erasmus twice, first in 1920 and then later in 1928, to clear up uncertainties in the manuscript generated from the 1920 interview. The manuscript became the book, *Buffalo Days and Nights*, told in the first person; in that sense, it is an oral history, albeit frozen in documentary form. The introduction to the book, penned by historian Irene Spry, notes that some changes were made to the book, but with Thompson’s approval. Reference notes were inserted to explain substantial alterations; asterisks denote minor changes (C-7, introduction, p. xii).

[122] The Erasmus account is not perfect. Some passages are nearly identical to Morris and Jackes, suggesting some reliance by Erasmus on them to refresh his memory. Yet, despite these shortcomings and perhaps a tendency towards self-aggrandizement, Erasmus provides a valuable eyewitness recollection of what occurred during the Fort Carlton negotiations, and especially the Cree council, which he attended.

[123] The Reverend John McDougall, a Methodist minister, was present at the Fort Pitt negotiations, and signed the treaty as a witness. Rev. McDougall was also present at the Treaty 6 adhesion at Blackfoot Crossing. He is recorded on the adhesion document as having explained it to the Indians; he also signed it as a witness. Rev. McDougall recorded his account of the Fort Pitt talks in his book *Opening the Great West* (C-8).

[124] The other sources for reconstructing the creation of Treaty 6 are the Cree oral traditions presented at trial. Elder Jacob Bill testified during court sittings held on the Samson Cree Nation reserve in June 2000. His Treaty 6 story is about Fort Carlton, or Pehonanihk, the “Waiting Place” (C-1092, tab 8, p. 2433). Elder Pete Waskahat, of Frog Lake, told a treaty story set in Fort Pitt, the “Little House” (C-1092, tab 4, pp. 1735 & ff.). Other treaty stories told by Elder Waskahat and recorded on videotape were entered into evidence as exhibits. I will have more to say on these later in the Reasons. Elder Margaret

Quinney, of Frog Lake, also told a Treaty 6 story during the June 2000 sittings. A 1974 treaty story recounted by Elder Quinney for the Treaty and Aboriginal Rights Research ("T.A.R.R.") Interview with Elders Program was also examined by Dr. von Gernet. The final Treaty 6 account comes from the 1935 case of *Dreaver* v. *R.*, heard in the Exchequer Court (C-25).

Documentary / Eyewitness Accounts

1. Prelude to a Treaty

[125] As early as 1871, Cree chiefs, of what was to become Treaty 6 territory, had petitioned the government for a treaty (as seen with Christie's letter of April 13, 1871; S-4, pp. 169-171). The government, however, was in no hurry to obtain title surrenders for land until it was needed for settlement. And so, the Indians waited while to the east the numbered treaties slowly began to cover territory closer and closer to them.

[126] After Treaty 5 was concluded in 1875, the government finally turned its gaze towards Treaty 6 territory. In order to pave the way for negotiations, Morris engaged Rev. George McDougall to travel about the territory explaining the government's intentions. McDougall, father of Rev. John McDougall, was also a Methodist minister. The McDougalls had emigrated from Ontario to the west in 1862. They first established a mission at Victoria,

near Edmonton, in 1862, and later one at Morley, in 1873. The elder McDougall perished in January 1876, after losing his way on the prairie one night.

[127] According to Morris, Rev. McDougall carried a letter from the Lieutenant-Governor, stating that commissioners would meet with the Indians the next summer for treaty talks (S-4, p. 173). Rev. McDougall reported to Morris on his travels and the councils he attended. The report, dated October 23, 1875, is reproduced in the Morris text. Rev. McDougall noted that he was informed by Indians near Carlton that the Crees and Plain Assiniboines were united on two points:

> 1st. That they would not receive any presents from Government until a definite time for treaty was stated. 2nd. Though they deplored the necessity of resorting to extreme measures, yet they were unanimous in their determination to oppose the running of lines, or the making of roads through their country, until a settlement between the Government and them had been effected.
>
> (S-4, p. 173)

[128] Further along, Rev. McDougall reported on the topics discussed by the Indians and which they planned to put to the commissioners at the treaty talks. He set it out using their words, but translated into English:

> "Tell the Great Chief that we are glad the traders are prohibited bringing spirits into our country; when we see it we want to drink it, and it destroys us; when we do not see it we do not think about it. Ask for us a strong law, prohibiting the free use of poison (strychnine). It has almost exterminated the animals of our country, and often makes us bad friends with our white neighbors. We further request, that a law be made, equally applicable to the Half-breed and Indian, punishing all parties who set fire to our forest or plain. Not many years ago we attribute

> a prairie fire to the malevolence of an enemy, now every one is reckless in the use of fire, and every year large numbers of valuable animals and birds perish in consequence. We would further ask that our chiefships be established by the Government. Of late years almost every trader sets up his own Chief and the result is we are broken into little parties, and our best men are no longer respected."
>
> (S-4, pp. 174-175)

2. Negotiations at Fort Carlton

[129] Morris, McKay, and their party arrived at Fort Carlton on August 15, 1876. The previous day, they encountered a Cree messenger at Dumont's Crossing at the South Saskatchewan River. The messenger gave Morris a "letter of welcome in the name of their nation" (S-4, p. 181). According to Morris, this was done because some Saulteaux from Quill Lake, in Treaty 4 territory, had suggested uniting with the Cree to prevent Morris from crossing the river and entering "the Indian country." The Crees rejected this offer and welcomed Morris (S-4, p. 181).

[130] On the morning of the 15th, Morris met up with fellow commissioner James McKay at Duck Lake, about 12 miles from Fort Carlton. Chief Beardy of the Willow Crees also met with Morris at this point. He wished to make the treaty at Duck Lake. Morris went to Beardy's encampment, but declined to change the venue from Fort Carlton. Instead, the party carried on to Fort Carlton, where they took rooms at the HBC fort, which was under the command of Chief Factor Lawrence Clarke. McKay eschewed these rooms and camped about four miles away. Morris remarked on this arrangement in his report:

> I have to acknowledge the benefit I derived from the services of the Hon. James McKay, camping as he did near the Indian encampment. He had the opportunity of meeting with them constantly, and learning their views which his familiarity with the Indian dialects enabled him to do.
>
> (S-4, p. 195)

[131] In the evening, Cree chiefs Mista-wa-sis and Ah-tuk-a-kup paid a visit to Morris. Erasmus was present at this meeting and described it thus:

> The Governor [Morris] advanced and shook hands with the chiefs, saying, “I have come to meet you Cree chiefs to make a treaty with you for the surrender of your rights of the land to the government ... .”
>
> (C-7, pp. 237-238)

[132] A discussion about the interpreters followed. Morris said it was unnecessary for the Indians to have hired their own interpreter as the government had brought two interpreters, Peter Ballenden and the Reverend John McKay, brother of Commissioner McKay. Erasmus reported Mista-wa-sis insisted that the Indian side would use its own interpreter and Morris acceded (C-7, p. 238).

[133] The next day, the Crees requested a postponement so that they could use the day to confer further amongst themselves. Morris agreed. On the 17th, they sent word to Morris that they would be ready to begin formal talks the following day.

[134] On the morning of August 18th, a troop of North-West Mounted Police escorted the treaty commissioners from the fort to the Indian encampment, where the treaty talks would take place. This is how Morris described the scene in his report,

> On my arrival I found that the ground had been most judiciously chosen, being elevated, with abundance of trees, hay marshes and small lakes. The spot which the Indians had left for my council tent overlooked the whole.
>
> The view was very beautiful: the hills and the trees in the distance, and in the foreground, the meadow land being dotted with clumps of wood, with the Indian tents clustered here and there to the number of two hundred.
>
> (S-4, p. 182)

[135] The Union Jack was raised and the Crees began to assemble in front of the council tent. A calumet, or pipe stem, ceremony was performed. After the ceremony, Morris opened the proceedings with an address to the assembled Indians. His report contains a brief synopsis of the speech; the Jackes narrative records what appears to be the text of the speech (S-4, pp. 183; 199-202).

[136] Erasmus's account of this first day focusses more on his own role. He recorded the beginning of Morris's speech, with the Rev. McKay interpreting, as,

> "You nations of the Crees," he began, "I am here on a most important mission as representing Her Majesty the Queen Mother to form a treaty with you in her name, that you surrender your rights in these northern territories to the government."
>
> (C-7, p. 242)

[137] Erasmus offered this opinion on the capabilities of the commission's interpreters:

> I knew that Peter Ballenden had not the education or practice to interpret, and his voice had no carrying quality to make himself heard before all this large assembly. The Rev. McKay had learned his Cree among the Swampy and Saulteaux. While there was a similarity in some words, and I had learned both languages, the Prairie Crees would not understand his Cree. Further, the Prairie Crees looked down on the Swampy and Saulteaux as an inferior race. They would be intolerant at being addressed in Swampy or Saulteaux words. I knew that McKay was not sufficiently versed in the Prairie Cree to confine his interpretations to their own language.
>
> (C-7, p. 241)

[138] Eventually, it was settled that Erasmus would translate Morris's speech. Erasmus noted,

> The Governor spoke for an hour or so explaining the purpose of the treaty and its objectives, and describing in some detail the terms. He especially emphasized the money each person would get.
>
> (C-7, p. 243)

[139] The Crees asked for an adjournment after the speech so they could meet in council. And so ended the first day of treaty negotiations.

[140] That evening, according to Erasmus, he was summoned to Morris's rooms. Morris complimented him on his translating labours that day and formally hired him for the balance of the treaty talks (C-7, pp. 243-244).

[141] The second day of negotiations is recounted in the greatest detail in the Jackes narrative. Upon assembly, the Cree chiefs were presented to Morris. A messenger from Chief Beardy's Duck Lake Indians arrived at that point and asked to be told the treaty's terms. Morris refused, but advised him to stay to hear the day's proceedings (S-4, pp. 203-204)

[142] Morris began the talks by speaking of his concern for the Crees' future and the impact of the growing scarcity of the large game on which they depended. He told them of Indians to the east who had successfully taken up agriculture and permanent homes, but added this,

> Understand me, I do not want to interfere with your hunting and fishing. I want you to pursue it through the country, as you have heretofore done; but I would like your children to be able to find food for themselves and their children that come after them. Sometimes when you go to hunt you can leave your wives and children at home to take care of your gardens.
>
> (S-4, p. 204)

[143] Morris moved on to the topic of reserves and the reality of non-native settlers moving into the country in the near future:

> I am glad to know that some of you have already begun to build and to plant; and I would like on behalf of the Queen to give each band that desires it a home of their own; I want to act in this matter while it is time. The country is wide and you are scattered, other people will come in. Now unless the places where you would like to live are secured soon there might be difficulty. The white man might come and settle on the very place where you would like to be.
>
> (S-4, p. 204)

[144] Morris then explained how the size and location of reserves would be determined and the land surrender process (S-4, p. 205).

[145] Morris went on to discuss maintenance of schools on reserves, prohibition of the sale or use of liquor on reserves, and the provision of various agricultural tools, equipment, livestock, and seed. He spoke of Chiefs and Councillors and the respect they deserved. Morris also stated that the Queen expected her laws to be obeyed by everyone, native and non-native (S-4, p. 206). He also spoke of the 1873 Cypress Hills massacre, where a group

of American wolfers killed some Assiniboines encamped in the hills. Morris related this to the presence of the NWMP and the security and protection they would provide. Morris indicated that chiefs and councillors would be given uniforms, medals, and flags, in recognition of their positions (S-4, p. 207).

[146] Religious services were held on Sunday. Jackes reported that, at the request of the Indians, Rev. McKay held a service with them in the afternoon, “preaching in their own tongue to a congregation of over two hundred adult Crees” (S-4, p. 209). Further negotiations were postponed until Tuesday, August 22nd, to allow the Crees to consult amongst themselves.

[147] The Crees held their council on Monday. Erasmus was the only non-native present. His account of it in *Buffalo Days and Nights* constitutes the sole evidence tendered at trial about this event (C-7, pp. 245-251). Erasmus explained the purpose of his attendance:

> I was asked to attend the council with them and was personally escorted to the meeting by Mista-wa-sis and his ally Star Blanket. They said that I might be called upon to explain the talks, in case of any misunderstanding of my interpretations of the treaty terms. “There are many among us who are trying to confuse and mislead the people; that is why I thought it best to give them lots of time for their bad work. Today they will have to come out in the open and will be forced to show their intentions,” said Big Child.
>
> The chiefs were in agreement that it was better to bring about an understanding among their own people before meeting with the Commissioner.
>
> (C-7, pp. 245-246)

[148] According to Erasmus, Poundmaker and the Badger led the faction opposed to taking treaty. As the day wore on, Erasmus despaired of any hope of reaching an agreement. Finally, Mista-wa-sis arose and addressed the council. After lamenting the destruction of the buffalo and the passing of their old way of life, Mista-wa-sis said,

> "I speak directly to Poundmaker and The Badger and those others who object to signing this treaty. Have you anything better to offer our people? I ask, again, can you suggest anything that will bring these things back for tomorrow and all the tomorrows that face our people?
>
> "I for one think that the Great White Queen Mother has offered us a way of life when the buffalo are no more. Gone they will be before many snows have come to cover our heads or graves if such should be."
>
> (C-7, p. 247)

[149] Mista-wa-sis spoke of the hardships faced by the Blackfoot, especially those stemming from incursions by American traders ("Big Knives" or "Long Knives") into their territory:

> "These traders, who were not of our land, with smooth talk and cheap goods persuaded the southern tribes it would be a good thing to have a place to trade products of the hunt, the hides and tanned goods. The traders came and built strong forts, and with their long rifles that can kill at twice the distance of our own and the short guns that can spout death six times quicker than you can tell about it, they had the people at their mercy. The Blackfoot soon found out the traders had nothing but whisky to exchange for their skins. Oh, yes! They were generous at first with their rotten whisky, but not for long. The traders demanded pay and got Blackfoot horses, buffalo robes, and all other things they had to offer.
>
> "Those traders laughed at them for fools, and so they were, to sell their heritage for ruin and debauchery. Some of the bravest of the Blackfoot tried to get revenge for the losses but they were shot down like dogs and dragged to the open plains on horses to rot or be eaten by wolves."
>
> (C-7, pp. 247-248)

[150] He spoke of the NWMP, or Red Coats, sent forth to expel the whisky traders and protect the Blackfoot. He advised the assembly to heed the experiences of Indians south of the border, where the Indian Wars were causing great loss of life and, ultimately, land (C-7, p. 249).

[151] After Mista-wa-sis sat down, Ah-tuk-a-kup stood and spoke of the ravages of war with the Blackfoot and the devastation wrought by small pox. He agreed with Mista-wa-sis about the impending destruction of the buffalo and spoke of the necessity of taking up agriculture. Ah-tuk-a-kup finished his speech with these words,

> "For my part, I think that the Queen Mother has offered us a new way and I have faith in the things my brother Mista-wa-sis has told you. The mother earth has always given us plenty with the grass that fed the buffalo. Surely we Indians can learn the ways of living that made the white man strong and able to vanquish all the great tribes of the southern nations. The white men never had the buffalo but I am told they have cattle in the thousands, that are covering the prairie for miles and will replace the buffalo in the Long Knives' country and may even spread over our lands. The white men number their lodges in the thousands, not like us who can only count our teepees by tens. I will accept the Queen's hand for my people. I have spoken."
>
> (C-7, p. 250)

[152] Erasmus noted that the councillors of these two chiefs indicated, by gestures, their acceptance of the chiefs' position. He further noted that the majority accepted their views as well. Mista-wa-sis ended the meeting by assuring everyone that they would have the

chance to ask questions and that their interpreter would mark down the things they thought they should have under the treaty (C-7, p. 250).

[153] The third day of treaty negotiations took place on Tuesday, August 22nd. Morris opened the talks by asking to hear the chiefs' views (S-4, p. 184). Poundmaker responded. He asked for government assistance once the Indians began to settle on reserves. Morris replied that the government could not feed the Indians, but only assist them when they settled (S-4, pp. 184-185). In his report, Morris remarked that the Badger, Soh-ah-moos (Sak-ah-moos in Jackes and Sakamoos in Erasmus), and several others reiterated Poundmaker's request (S-4, pp. 184-185).

[154] Morris responded by telling them that the government sent money to Indians whose crops had been destroyed by grasshoppers, even though such aid was not promised in their treaty (S-4, p. 211).

[155] Commissioner McKay addressed the assembly next, speaking in Cree. The Jackes narrative has Morris inviting McKay to speak (S-4, p. 211). Jackes reported McKay's speech as follows:

> "My friends, I wish to make you a clear explanation of some things that it appears you do not understand. It has been said to you by your Governor that we did not come here to barter or trade with you for the land. You have made demands on the Governor, and from the way you have put them a white man would understand that you asked for daily provisions, also supplies for your hunt and for your pleasure excursions. Now my reasons for explaining to you are based on my past experience of treaties, for no sooner will the Governor and Commissioners turn their backs on you than some of you will say this thing and that thing was promised and the promise not fulfilled; that you cannot rely on the Queen's representative, that even he will not tell the truth, whilst among yourselves are the falsifiers. Now before we rise from here it must be understood, and it must be in writing, all that you are promised by the Governor and Commissioners, and I hope you will not leave until you have thoroughly understood the meaning of every word that comes from us. We have not come here to deceive you, we have not come here to rob you, we have not come here to take away anything that belongs to you, and we are not here to make peace as we would to hostile Indians, because you are the children of the Great Queen as we are, and there has never been anything but peace between us. What you have not understood clearly we will do our utmost to make perfectly plain to you."
>
> (S-4, pp. 211-212)

[156] In the Jackes narrative, Morris spoke immediately after McKay, recounting a further story about aid given to the Red River people after a grasshopper plague. He noted that in that instance, there was no treaty; the people were simply the Queen's subjects. Jackes then recorded the Badger responding to McKay's remarks (S-4, pp. 212-213). Morris's account is similar to Jackes, although much less detailed.

[157] Erasmus painted a rather different picture. He described McKay's tone as arrogant and said he admonished the Cree for their excessive demands; he also noted that there was a murmur of disapproval from the assembled Indians (C-7, p. 251). According to Erasmus, after McKay sat down, the Badger leapt to his feet and scolded McKay,

> "I did not say that I wanted to be fed every day. You, I know, understand our language and yet you twist my words to suit your own meaning. What I did say was that when we settle on the

> ground to work the land, that is when we will need help and that is the only way a poor Indian can get along."
>
> (C-7, pp. 251-252)

[158] According to Jackes, the third day of talks ended after Mista-wa-sis stated that the Indians did not want food everyday, but only when they began farming, and in case of famine or calamity. Ah-tuk-a-kup reiterated this request and then asked for an adjournment (S-4, p. 213). Morris included a similar, albeit truncated, version in his report and noted,

> The whole day was occupied with this discussion on the food question, and it was the turning point with regard to the treaty.
>
> The Indians were, as they had been for some time past, full of uneasiness.
>
> They saw the buffalo, the only means of their support, passing away. They were anxious to learn to support themselves by agriculture, but felt too ignorant to do so, and they dreaded that during the transition period they would be swept off by disease or famine – already they have suffered terribly from the ravages of measles, scarlet fever and small-pox.
>
> It was impossible to listen to them without interest, they were not exacting, but they were very apprehensive of their future, and thankful, as one of them put it, "a new life was dawning upon them."
>
> (S-4, p. 185)

[159] Erasmus's rendition of many of the third day's speeches is very similar to the Jackes narrative. He differed in his portrayal of McKay's speech; indeed, his report of the Badger's angry response, *viz*. that McKay deliberately distorted the Badger's words, shows that the Cree were mindful of how their speeches were understood and used by the government's side.

[160] The final day of formal talks occurred on the 23rd. In the Jackes narrative, Morris admonished a Chippewa, who had interrupted the proceedings. Morris said that if the Chippewas wanted to speak to him, he would hear them after he finished the treaty talks. He observed that the buffalo were near and the Cree were anxious to go hunting, and then said he was ready to hear them (S-4, p. 214).

[161] Erasmus recounted that a man named Teequaysay (Tee-Tee-Quay-Say in the Jackes narrative) stood and told the Crees,

> "Listen, my friends, all of you sitting around here, be patient and listen to what our interpreter has been instructed to tell you. What he will tell you are the things our main chiefs and councillors have decided to ask for and have agreed are for our best interests. There will be no more talk or questions asked of the Governor."
>
> (C-7, p. 253)

[162] Morris reported that the interpreter, Erasmus, read out the Crees' demands (S-4, p. 185). The Jackes narrative also contains this part of the proceedings (S-4, pp. 214-215). Both of these accounts specify the items and changes sought by the Crees. According to Erasmus, he explained to the commissioners that the list had been prepared by the main chiefs and their councillors and that it contained little more than what had been promised.

Erasmus interpreted the list to the assembled Indians for their agreement and then handed it to Morris (C-7, p. 253).

[163] The Jackes narrative provides the greatest level of detail regarding Morris's response to the Cree counter-proposal. Morris responded to the Crees by noting that some of what they asked for was already promised, but also, more importantly, by making three major concessions. He promised one thousand dollars each spring for three years to assist in the transition to agriculture upon settlement on reserves. He agreed to a famine clause, where help would be rendered in times of national famine or sickness. Morris also agreed to what became known as the medicine chest clause. The other concessions involved increasing the number of various agricultural implements and livestock to be provided under treaty. He rejected the Crees' request for provisions for the poor, blind, and lame. He also declined their request for missionaries and ministers, saying that while he was pleased by the request, the Cree must look to the churches and various societies for such people. Regarding military conscription, he said Indians would not have to fight unless they desired to do so, but that if the Queen called on them to fight to protect their wives and children, he was sure they would do so (S-4, pp. 217-219).

[164] Poundmaker and Joseph Thoma spoke out after Morris's response, both objecting to what was offered. Thoma said that he was speaking on behalf of Red Pheasant, chief

of the Battle River Indians. Some of his remarks, as recorded by Jackes, show an awareness of a previous treaty and also of the issue of land value:

> It is true the Governor says he takes the responsibility on himself in granting the extra requests of the Indians, but let him consider on the quality of the land he has already treated for. There is no farming land whatever at the north-west angle, and he goes by what he has down there. What I want, as he has said, is twenty-five dollars to each Chief and to his head men twenty dollars. I do not want to keep the lands nor do I give away, but I have set the value. I want to ask as much as will cover the skin of the people, no more nor less. I think what he has offered is too little. When you spoke you mentioned ammunition; I did not hear mention of a gun; we will not be able to kill anything simply by setting fire to powder. I want a gun for each Chief and head man, and I want ten miles around the reserve where I may be settled. I have told the value I have put on my land.
>
> (S-4, p. 220)

[165] Morris rejected Thoma's additional demands, and scolded Red Pheasant for sitting silently earlier when Erasmus read the list of demands. Red Pheasant stood and repudiated Thoma's remarks (S-4, p. 221). Erasmus mentioned this episode briefly (C-7, p. 253); Morris also included it in his report (S-4, p. 186).

[166] After this incident, the principal Cree chiefs demonstrated their acceptance of the proposed terms. Morris then said the following,

> I will ask the interpreter to read to you what has been written, and before I go away I will have a copy made to leave with the principal Chiefs. The payments will be made tomorrow, the suits of clothes, medals and flags given also, besides which a present of calicoes, shirts, tobacco, pipes and other articles will be given to the Indians.
>
> (S-4, pp. 221-222)

[167] Erasmus described the revisions, reading, and signing process thus,

> The Governor thanked the Indians for their attention and co-operation in all the proceedings and stated that the additional requests would be written in the treaty in all things he had agreed to. These special provisions were added into the draft of the treaty before the signing began. There were fifty signatures to that historic document and other adhesions following the same wording as that signed at Carlton. The reading of the treaty took a great deal of time and required the services of all the interpreters but this time there were no fireworks in the matter of words used, nor the objection to Ballenden's voice. Half the Indians were not concerned.
>
> Mista-wa-sis had called me aside and told me to keep a close watch on the wording to see that it included everything that had been promised. However, the other chiefs appeared satisfied that the Governor would carry out his promises to the letter. I was able to assure Mista-wa-sis that everything promised had been included in the writing. He was satisfied and his name was the first in the signing.
>
> (C-7, pp. 253-254)

[168] The revisions made to Treaty 6 are apparent on the document. The treaty commissioners either arrived at Fort Carlton with a treaty already written out on several sheets of parchment, its terms based on those of the earlier numbered treaties, or had one drawn up before making the concessions to the Cree. After the Cree proved to be formidable negotiators, revisions were made in the field; additions were written in and extra pages were added before the signature page (see S-1).

[169] On the morning of the 24th, Morris presented the head chiefs with their medals, uniforms, and flags. Christie gave the same to the other chiefs and councillors that evening. Treaty payments commenced that day and finished on the 25th. Erasmus assisted Christie in this task (C-7, p. 254). Erasmus also recounted that Morris hired him to interpret at Fort Pitt and paid him for his work at Fort Carlton (C-7, p. 255).

[170] In Morris's report, and in the Jackes narrative, an encounter with some Saulteaux Indians is recorded (Jackes names them as Chippewas). Morris noted,

> Besides these Saulteaux, there were others present who disapproved of their proceedings, amongst them being Kis-so-way-is, already mentioned, and Pecheeto, who was the chief spokesman at Qu'Appelle, but is now a Councillor of the Fort Ellice Band.
>
> (S-4, p. 187)

[171] It is apparent that there were those who resisted taking treaty at Fort Carlton. Erasmus's description of the Cree council noted, as well, that there were factions of the Indians who were opposed. Speeches made by Poundmaker and Joseph Thoma show this as well. However, these voices did not carry the day and the Cree leadership at Fort Carlton signed the treaty.

[172] On the morning of August 26th, the Cree camp paid a farewell visit to Morris at the fort. The Willow Indians sent a message the next day from Duck Lake, in reply to a message sent to them by Morris. In his report, Morris wrote that it was undesirable that so many Indians should be excluded from the treaty (S-4, p. 187). The Willow Indians agreed to meet with the commissioners at McKay's camp on the 28th (S-4, p. 225).

[173] Accordingly, both sides met. The chief of the Willow Indians, Beardy, expressed some unhappiness with the treaty's terms, and said there were not enough of some things. He spoke about his concern for the future and asked for assistance. He also requested a blue coat, rather than a red one (S-4, pp. 226-227).

[174] Morris responded by saying he would speak as he had to the other Indians: the government would not feed them on a daily basis, but the Willow Indians would get their share of the thousand dollars' worth of provisions once they settled on reserves and took up tilling the soil. Morris also explained that the government would help out in times of national famine or sickness, and referred to the Red River grasshopper plague again as an example. He refused Chief Beardy's request for a blue coat. Morris agreed that the preservation of the buffalo was important and that the territorial government would consider the matter of passing a law on it. He finished be restating what he had said at Fort Carlton, that the treaty was only for the Indians, not the half-breeds (S-4, pp. 227-228).

[175] In his December 1876 report, Morris made these observations:

> The persistency with which these Indians clung to their endeavor to compel the Commissioners to proceed to Duck Lake was in part owing to superstition, the Chief, Beardy, having announced that he had a vision, in which it was made known to him that the treaty would be made there.

> It was partly, also, owing to hostility to the treaty, as they endeavored to induce the Carlton Indians to make no treaty, and urged them not to sell the land, but to lend it for four years.
>
> The good sense and intelligence of the head Chiefs led them to reject their proposals, and the Willow Indians eventually, as I have reported, accepted the treaty.
>
> (S-4, pp. 188-189)

[176] August 29th was spent by Christie settling accounts, taking stock of the clothing, and preparing for departure. Morris and Christie left for Fort Pitt on the 31st, McKay having preceded them by way of Battle River (S-4, p. 189).

3. Negotiations at Fort Pitt

[177] Erasmus arrived at Fort Pitt with his companion Little Hunter, ahead of the government party (C-7, p. 258). John McDougall, accompanied by his younger brother George, also arrived several days before the treaty commissioners:

> From Victoria to Fort Pitt, George and I made a rapid trip. Here we found the Indians assembling in large numbers from the prairies and the woods. No such event as this had ever taken place in all their history and all through the camps now becoming numerous dotting the hills back of the fort there was much speculation as to what was about to happen.
>
> Many of my old friend and acquaintances came to see me in the fort and also invited me to their lodges. I continued to assure them that the representatives of the Queen would do what was right and fair. I asked them to wait patiently until the commissioners came to place before them the proposals of the government.
>
> Sweetgrass was the head chief of the Plains Crees and Chief Pakan of the Wood and semi-Wood Crees. It was very evident that the chiefs were feeling keenly the responsibility of the time. There were some rebellious elements among the tribes. These men who had lived in absolute freedom did not want any change. It was a question of just how much influence they might exert among the lodges when matters came to an issue. Thus these days were tense.
>
> (C-8, pp. 56-57)

[178] Jackes and Morris reported that the government party arrived at the fort on September 5th. Colonel Jarvis and a detachment of North-West Mounted Police met them about six miles from the fort and provided an escort. The Indians, expecting the arrival of more people, asked for an adjournment until the 7th (S-4, pp. 228-229). Both Jackes and Morris recounted a welcoming visit from Chief Sweet Grass and 30 of his men on the morning of the 6th (S-4, p. 189 and pp. 228-229).

[179] In *Buffalo Days and Nights*, Erasmus told of a meeting he had with the Cree chiefs, at their request, on September 6th:

> I was questioned at some length about the attitude of the tribes who signed the treaty at Carlton, about details in reference to treaty concessions, and the terms agreed upon, which by that time I had memorized by heart. I gave them a review of the discussions of the council meeting of the chiefs at Carlton, reporting the objections raised by those who opposed the signing, and spoke of the petition that had been drawn up for the Commissioner, with the points agreed to and those refused. I mentioned Poundmaker's and The Badger's efforts at trying to block or misinterpret the terms of the treaty, at which there were some expressions of disgust about their attitude. Then I wound up my talk by a report of the two speeches made by Mista-wa-sis and Ah-tuk-a-kup that had swung the whole opinion of the assembly in favour of the signing.
>
> Sweet Grass, who was the most important chief among those gathered in council, rose to his feet to speak to their people.
>
> "Mista-wa-sis and Ah-tuk-a-kup, I consider, are far wiser than I am; therefore if they have accepted this treaty for their people after many days of talk and careful thought, then I am prepared to accept for my people."
>
> Chief Seenum then took his place and spoke. "You have all questioned Peter Erasmus on the things that have taken place at Carlton. He is a stranger to many of you but I am well acquainted with him. I have respect for his words and have confidence in his truthfulness. Mista-wa-sis and Ah-tuk-a-kup both sent their sons all the way from Carlton to where he lives, and he is married to one of our favourite daughters. He was not at home but they followed him to the prairie where he was hunting buffalo with our people. Little Hunter is a chief and brings back a good report of his work during treaty talks. He would not tell us something that was not for our good. Therefore, as those other chiefs who are in greater number than we are have found this treaty good, I and my head man will sign for our people. I have spoken."
>
> Each of the other chiefs with their councillors expressed agreement, each man expressing in his own words ideas that conformed to the general acceptance of treaty terms. They were all willing to sign the treaty and there was not a single dissenting voice.

(C-7, pp. 258-259)

[180] Everyone began to assemble before the council tent late in the morning of September 7th. The negotiations were opened by ceremonies. Morris gave an opening address. He noted his concern for their future well-being. He spoke of the Fort Carlton negotiations and reiterated his concern for the future and the disappearance of the buffalo. He also said that despite the difficulties he had with Chief Beardy, he was able to bring him into treaty. Morris spoke of previous treaties. He also spoke of the Cypress Hills massacre of 1873, and the protection now afforded by the NWMP. He reassured the Indians that they would not be subject to military conscription (S-4, pp. 230-234).

[181] Morris closed his address by saying he expected that they were prepared for his message, and he would go no further until any chiefs, who wished, spoke. Sweet Grass then arose, took Morris by the hand, and asked to hear the treaty's terms before adjourning so they could meet in council. Jackes reported,

> The Governor then very carefully and distinctly explained the terms and promises of the treaty as made at Carlton; this was received by the Indians with loud assenting exclamations.
>
> (S-4, p. 235)

[182] John McDougall attended this first day of talks. He noted that he was asked by whites and Indians to watch carefully and take note of everything. He reported the opening talks thus:

> The Indians gave strict attention and when the chief commissioner had finished with his proposals and a full explanation thereof, Sweetgrass arose in his place and in a very few words thanked the commissioner for the occasion. He said also that he and his fellow chiefs and head men having listened would now, with the consent of these great men representing the government, retire to their council lodge. He hoped that on the third day from that time that they would be ready to come before the great men with their answer. To this the chief commissioner replied that it was most reasonable and he would expect to meet them at the time proposed in friendliness and peace. This whole proceeding occupied a brief hour and this unique gathering separated.
>
> (C-8, p. 58)

[183] The McDougall account differs from Morris in the length of time taken up by these opening addresses. McDougall recalls it as a brief hour, whereas Morris, in his report, stated that it took him three hours.

[184] The Erasmus account of Fort Pitt differs somewhat from those of Morris, Jackes, and McDougall. He described the opening ceremonies and mentioned Morris's speech, but did not provide details. His account then diverges in that he recalled that Chief Eagle (Ku-ye-win) responded to Morris by urging the people not to be afraid to speak their minds on anything they did not understand or wished to know. No one did and then, according to Erasmus, Sweet Grass made a speech accepting the treaty's terms.

[185] After this, Erasmus noted that Chief James Seenum asked Morris for a large tract of land for all the Cree who did not take treaty. Morris replied that he could not grant such a request,

> "It is not in my power to add clauses to this treaty, no more than you have already been promised, but I will bring your request before the House at Ottawa. However, I know that it will not be accepted. As you said so, being a chief, I will bring the matter to the attention of my superiors."
>
> (c-7, PP. 260-261)

[186] The chronology as presented by Erasmus does not match Morris, Jackes, or McDougall. Erasmus omitted mention of the assembly adjourning for the Cree council. However, he did note that the treaty terms were read and explained to the people on September 9th, and that the chiefs agreed and signed on that day. He also noted that there was none of the dissension that had occurred at Fort Carlton (C-7, p. 261).

[187] Morris noted in his report that the Crees asked for more time to meet in council:

> On the 8th the Indians asked for more time to deliberate, which was granted, as we learned that some of them desired to make exorbitant demands, and we wished to let them understand through the avenues by which we had access to them that these would be fruitless.
>
> (S-4, p. 190)

[188] In his book *Opening the Great West*, Rev. McDougall recounted how he was summoned by Chief Sweet Grass to attend the Cree council and what ensued:

> The next afternoon a messenger from the Head Chief Sweetgrass brought a request that I should go up to their council lodge. Having made sure that the request was bona fide, I went up the hill to the gathering of Indians. There I was taken forward to sit immediately beside the head chief. Sweetgrass introduced me as an old friend and the one white man he had found with an Indian heart. He had known my parents who were, without doubt the true friends of the Indian peoples. "Moreover this young man speaks and understands our language just like ourselves. I have sent for him to tell us what the proposals of the treaty mean, to give us fully what the white chief said, to go over all his promises and interpret them to us so that I and you, my people, may truly understand what was said to us yesterday. Remember that his young man whom I call my grandson has my full confidence and when he speaks I always believe him." Then turning to me he said, "Now, John my grandson, tell these Chiefs what you understood the white Chief to say when we met him yesterday."
>
> "Very carefully and minutely I went over my notes of yesterday explaining fully and causing my audience to see and understand what it meant. When I was through with my explanations the chief again approached me. "I thank you for what you have told us," he said. "Now I want you to go further and put yourself in our place. Forget that you are a white man and think you are, for the time, one of us, and from that standpoint speak out your mind as to what we should do at this time."
>
> For a moment I felt embarrassed. Then bracing up I first thanked the chief for his confidence and spoke fully of British justice and Canadian Government fair play. I told these chiefs and warriors what I had seen among the Indians of Eastern Canada. There they held their reserves among the white people and were living in peace. I predicted that the same conditions would come to pass in this country. I strongly advised them to go before the commissioners on the morrow and signify their acceptance of the proposals brought to them. When I was through I retired with a feeling of deep satisfaction that after sixteen years of association and intercourse with these western tribes that they had thought me worthy of their utmost confidence in deciding these affairs so vitally important to them and their descendants for generations to come.
>
> (C-8, pp. 58-59)

[189] Morris noted that the Indians were slow to assemble at the council tent on the day following their deliberations (S-4, p. 190). Jackes observed,

> On the morning of the 9th the Indians were slow in gathering, as they wished to settle all difficulties and misunderstandings amongst themselves before coming to the treaty tent, this was apparently accomplished about eleven a.m., when the whole body approached and seated themselves in good order... .
>
> (S-4, p. 235)

[190] Once everyone assembled, Morris asked for the Crees to give him their response. As noted by Erasmus, the Eagle stood and encouraged the Cree to speak their minds. No one spoke, and Morris asked once more for them to give him their response (S-4, pp. 235-236).

[191] Chief Sweet Grass arose and spoke. He accepted the treaty and Jackes observed, “The Chief’s remarks were assented to by the Indians by loud ejaculations” (S-4, pp. 236-237). Morris replied that he was glad they accepted the offer, and said,

> I feel that we have done to-day a good work; the years will pass away and we with them, but the work we have done to-day will stand as the hills. What we have said and done has been written down and cannot be rubbed out, so there can be no mistake about what is agreed upon. I will now have the terms of the treaty fully read and explained to you, and before I go away I will leave a copy with your principal Chief.
>
> (S-4, p. 237)

[192] Jackes wrapped up his narrative of this day of treaty talks by recounting speeches made by several Cree men (S-4, pp. 238-239). Rev. McDougall’s account of this day is brief. His record of the speech made by Chief Sweet Grass accepting the treaty terms is very similar to that of Jackes. Thus, his record may not be entirely independent; he may have relied on Jackes when he came to write this portion of his memoirs, which were written around 1912.

[193] As mentioned above, Erasmus mentioned September 9th almost in passing, noting,

> On September 9th, the treaty terms were read and explained to the people. The chiefs agreed to sign, and so the treaty was quickly completed with none of the dissension that had occurred at Carlton. The paying of treaty money and issuing of uniforms took the greater part of two more days.
>
> (C-7, p. 261)

[194] The next day was a Sunday. Rev. McKay held a service for the police. Rev. McDougall held a service in Cree, while Bishop Grandin and Rev. Scollen also had services for the Crees and Chippewayans (S-4, p. 192).

[195] Treaty payments and the distribution of provisions were completed by Christie on the 11th of September. Morris noted in his report that the Great Bear (named Big Bear in the Jackes account) paid him a visit on the 12th of September. He had been out hunting, but upon hearing of the treaty talks, had been sent in by the Crees and Assiniboines to speak for them. Morris reported that he told the Great Bear of what went on at Forts Carlton and Pitt and they resolved to meet again the next day (S-4, p. 192).

[196] On the morning of the 13th of September, Chief Sweet Grass and the other chiefs and head men came to the fort to pay their respects and bid farewell to the commissioners. Jackes recorded their remarks to Morris. Big Bear again expressed that he was there on behalf of several bands that were out on the plains hunting. Sweet Grass and the White

Fish Lake chief urged Big Bear to agree to the treaty and take the hand of Morris. Big Bear told them to stop, that he had never seen Morris before, but that he had seen Christie many times. Big Bear asked that Morris save him from what he dreaded most, that a rope should be around his neck. Morris answered that murder was punishable by death, except in instances of self-defence. Big Bear also spoke of protecting the buffalo. Morris told Big Bear to tell the others out on the plains that they could join the treaty next year. He also asked Big Bear to tell them the following,

> I wish you to understand fully about two questions, and tell the others. The North-West Council is considering the framing of a law to protect the buffaloes, and when they make it, they will expect the Indians to obey it. The Government will not interfere with the Indian's daily life, they will not bind him. They will only help him to make a living on the reserves, by giving him the means of growing from the soil, his food. The only occasion when help would be given, would be if Providence should send a great famine or pestilence upon the whole Indian people included in the treaty. We only looked at something unforeseen and not at hard winters or the hardships of single bands, and this, both you and I, fully understood.
>
> (S-4, p. 241)

[197] Morris then bid the Indians farewell, and said he did not expect to see them again and that another Governor would come in his place. Everyone shook hands. Big Bear said that he would not sign because his people were not present, but that he would come next year. The group broke apart. Big Bear returned to see Morris at the fort about an hour later and reiterated his comments and that he would sign the treaty the following year (S-4, pp. 239-242).

[198] The treaty commissioners left Fort Pitt on September 13th and arrived at Battle River on the 15th. There were no Indians there but Red Pheasant and his band, who had taken treaty at Fort Pitt. On the 16th, the commissioners met with Red Pheasant and they discussed the location of the band's reserve. Morris urged them to select a place as soon as possible, so that they would have access to the agricultural implements and livestock promised under treaty. The commissioners left Battle River on September 19th, and Morris returned to Fort Garry on October 6 (S-4, pp. 242-244).

[199] The government responded rather negatively to Morris's inclusion of the famine clause, as demonstrated in a letter to Morris from the Department of the Interior, dated March 1, 1877:

> His Excellency [the Governor General] finds that in some respects, especially in the matter of the distribution of agricultural implements, and the provision of seed grain, the terms of the treaty are more onerous than those of former Treaties; and he regrets especially to find that the Commissioners felt it necessary to include in the Treaty, a novel provision, binding the Govt. to come to the assistance of the Indians included in the Treaty in the event of their being visited by any pestilence or famine. It cannot be doubted that this stipulation as understood by the Indians, will have a tendency to predispose them to idleness and to make them less inclined to put forth proper exertions to supply themselves with food and clothing.
>
> It is to be feared to that the publication of the terms of this Treaty may render the Indians heretofore negotiated with dissatisfied with the less favorable terms which have been secured to them, and make those still to be treated with more exacting in their demands than they otherwise would have been.
>
> But while his Excellency has felt that for the reasons above given, the Treaty was open to objection, he has thought it advisable to ratify it, believing that the mischiefs which might result from a refusal to do so might produce discontent and dissatisfaction, which would ultimately prove more detrimental to the country, than the ratification of the Treaty.
>
> (C-303, tab 41)

4. Blackfoot Crossing: Bobtail's Adhesion

[200] Treaty 7 was concluded with the Blackfoot, Blood, Peigan, Sarcee, and Stony Indians on September 22, 1877 at Blackfoot Crossing, on the Bow River. Morris did not act as treaty commissioner. The Northwest Territories Act came into effect after Treaty 6 was signed. David Laird travelled to the west and became Lieutenant-Governor and Indian Commissioner of the Territories in November 1876. Morris's involvement with the western numbered treaties, of which he had been such a strong proponent, ended with Treaty 6.

[201] Morris included Laird's report on what transpired at Blackfoot Crossing in his book on the treaties. The following excerpt from Laird's report deals with the adhesion of Cree Chief Bobtail:

> On the evening of Monday I also received a message from Bobtail, a Cree chief, who, with the larger portion of the band, had come to the treaty grounds. He represented that he had not been received into any treaty. He, however, had not attended the meeting that day, because he was uncertain whether the Commissioners would be willing to receive him along with the Blackfeet. I asked him and his band to meet with the Commissioners separate from the other Indians on the following day.
>
> On Tuesday, at two o'clock, the Cree Chief and his band assembled according to appointment. The Commissioners ascertained from him that he had frequented for some time the Upper Bow River country, and might fairly be taken into the present treaty, but he expressed a wish to have his reserve near Pigeon Lake, within the limits of Treaty Number Six, and from what we could learn of the feelings of the Blackfeet toward the Crees, we considered it advisable to keep them separate as much as possible. We therefore informed the Chief that it would be most expedient for him to give in his adhesion to the treaty of last year, and be paid annually, on the north of the Red Deer River, with the other Cree Chiefs. He consented. We then told him that we could not pay him until after the Blackfeet had been dealt with, as it might create jealousy among them, but that in the meantime his band could receive rations. He said it was right that he should wait until we had settled with the Blackfeet, and agreed to come and sign his adhesion to Treaty Number Six at any time I was prepared to receive him.
>
> (S-4, pp. 256-257)

[202] Bobtail's adhesion was considered to bind Samson and Ermineskin to Treaty 6. Certainly, no evidence, or even suggestion, was presented at trial to dispute this scenario.

The Oral Traditions

1. Negotiations at Fort Carlton

Elder Jacob Bill

[203] Elder Bill's oral tradition touches upon the Crees' preparedness going into the talks:

> And so, this treaty: It was a difficult time for the Cree people when the Queen's representative came to see them. They were unsettled and apprehensive as to what to do, but they did have meetings. They didn't give these people that they were negotiating with an answer right away.
>
> Finally, they decided what they were going to do. "We have to negotiate with this one. It is inevitable that we will have to negotiate with this one. It is the Creator's will, so we must negotiate with him." That is when they agreed to negotiate with him.
>
> (C-1092, tab 8, p. 2436)

[204] His treaty story compresses the several days of negotiations and adjournments into a single session. While Elder Bill's account mentions a translator, it does not refer to

Erasmus, or indeed anyone, reading a list of Cree demands for specific changes. In his oral tradition, an unnamed Cree man addresses the Queen's representative,

> "You cannot buy my land from me. I cannot sell my land. It is beautiful. It is clean. You will dirty my land. You cannot buy it from me. It is a great land, for it is clean." And so the Cree people told him, "It is a great land. You could never finish paying for it if you tried to buy it from me. It is a great land. It is beautiful. From where you have come, if you were to place money end to end from there to here, it would not be enough to pay me. This is how much this great land is revered." This is what the Cree people said.
>
> "You will wipe out everything. What am I to live on? Whatever I depend on to live, you will destroy it all. I will have nothing to live on." That is what they told him.
>
> (C-1092, tab 8, p. 2437)

[205] In the oral tradition, the Queen's representative replied,

> "Those that you live on, that is not what I am asking from you. Those are still yours to own, and I will not interfere with them. You can still live off them. You will not despair for food." That is what he said. "I will provide it; I will feed you something to eat. You will not despair for food, ever." That is what he said, the one who travelled.
>
> * * *
>
> The one who travelled here, he requested, "This land, your land, I want to borrow it from you. I want to seed this land. That is how I am going to make a living. I am going to enable my people to live off this land, so they can live off this land. But also you will be able to live from that." That is what he said. "These are the things I want: timber, land that I am going to work on, and grasses so that my animals may survive. These are the things that I want to negotiate. This is what I want. This is what I want to negotiate on." That is what he said, the one who travelled.
>
> "These things that you live on like the animals, fish and such, that is not what I want. These are yours." That is what he told them.
>
> (C-1092, tab 8, p. 2439).

[206] Thus, according to Elder Bill's oral tradition, the Crees rejected the land surrender at the very outset of the treaty negotiations, and the Queen's representative accepted their position that the land be borrowed, and only to a certain depth.

[207] Elder Bill's account then turns to the specific promises. The Crees were promised the means of making homes, education and schools, and medicine. They were also given an open-ended promise, leaving them free to increase the size of their reserves should the need arise (C-1092, tab 8, pp. 2440-2441). According to this oral tradition, the Queen's representative promised to give them medals and treaty cards, to be shown if they were ever being bothered about or by the treaty (C-1092, tab 8, pp. 2441-2442). Annuities were also promised in the amount of $12 per person, with chiefs and councillors receiving $25 and $15 respectively. Elder Bill then interjected his own comment into the treaty story. He noted that the person who told him this story said the $12 was reduced, perhaps within two years, to $5 and that maybe the $7 was being put away somewhere for future use (C-1092, tab 8, p. 2442).

[208] Elder Bill told a second treaty story during his testimony, when he was asked by Samson counsel to tell a story of how the Cree prepared themselves for treaty making. This story also has the Cree telling the Queen's representative that they will only loan the land:

> After they had made up their minds, they decided to make the treaty. This is how they prepared. "Now with respect to the land. I am not negotiating with you for anything that is

> underground." "Only this much," the one who told me this story said, putting his hands like this. "I am not lending you anything underground."
>
> And so he answered, "It is true, I am going to seed, for I am going to work this land. That is all," he answered. True, that is all. They had negotiated with each other for only this much. How much that was; I don't know how much it is from their hand gestures. This is how they gestured with their hands. That is all that was loaned the one who came to negotiate.
>
> (C-1092, tab 8, p. 2444)

[209] The hand gesture demonstrated by Elder Bill was described by Samson counsel for the record:

> MS. KENNEDY: Mr. Bill is holding his left hand above his right hand, has the hand at a 45-degree angle with the thumb pointing upwards and the fingers outstretched. The right hand is beneath the left hand approximately 135 degrees with the four fingers outstretched and the thumb – may I step closer, My Lord?
>
> The thumb of the right hand is tucked beneath the palm of the right fingers.
>
> Thank you.
>
> (C-1092, tab 8, p. 2491)

[210] In this treaty story, the Queen's representative promised to give the Cree men who would look after the treaty:

> "My young men, I will give them to you so that they will be able to look after the treaty," is what he said.
>
> "One of them will be a money chief I will give him to you. However it is that you want things, you tell him and he will get it for you.
>
> "Also one who feeds, and one called the one who seeds. The one who feeds will provide you with food; and if you are going to work, if you want to seed your

> land, this one will give you any kind of seed or grain, and he will show you how to seed. You will get the grain to seed with." This is what he had said.
>
> "And what I have said, my young men, the money chief, the one who feeds and the one who seeds; and also the red coat [simanakanis], I will give him to you. This red coat will take care of you; he will back you up if something is bothering you." This is what he also said.
>
> "There is also one other. He is also my young man. This is one who takes care of your animals," is what he said. He must have been – I am not sure what they are called, possibly keepers [Okanawehicikewak], like the ones that work in the bush. He must be that kind, but "He will care for your animals," is what he said.
>
> "These young men of mine, they are your young men too. They are yours. They do not own you. Whatever you say, they must do. This is the way I give them to you." This is what he said.
>
> (C-1092, tab 8, pp. 2444-2446)

[211] The Cree, in this treaty story, were promised they would be able to continue hunting anywhere, but they must respect settlers' property. They were also promised they could fish anywhere (C-1092, tab 8, p. 2445).

[212] It is unclear whether this second treaty story is actually a stand alone story, or whether it is part of the first one. There were no questions posed as to its provenance. Counsel simply asked the Elder to tell a story about how the Cree prepared themselves for treaty-making (C-1092, tab 8, p. 2443).

[213] More importantly, there are provenance issues surrounding the first treaty story. Elder Bill's testimony in direct on this point is as follows:

> This chief who was the first chief from Big River, Sisiwayham was his name, he was the first chief there, and he took part in the treaty-making.
>
> And then there were two other Cree men that were there. Kinomatayew was one name. This is where the story came from, what I am going to tell you. This is their story.
>
> At that time there was another who was called Pahpiween who was also from Big River. These three elders I have named, these three were the chiefs from this reserve. This is where the story came from.
>
> I will name another. His name was Masinastewakohp. The old man who told me this story was always with this man. They were close friends. After this, Masinastewakohp was a chief. Natokowapiskapo was from our reserve. He was a councillor, and he worked with Masinastewakohp. This is where they obtained the story, from that old man Pahpiween. This is the way the old man told the story to them as to what was done. That is what this story is. This is how the old man told the story; he was the one who told them.
>
> Natokowapiskapo told me this story when I was chief. Because I was chief, he wanted me to know what the treaty was about. And so he told me the story in the proper way. "This is how it was done. This is how they negotiated when they made treaty and the treaty promises.
>
> (C-1092, tab 8, pp. 2435-2436).

[214] On cross examination, Elder Bill confirmed the Treaty 6 story was told to him by Natokowapiskapo, whose English name is Harry Harris, when Elder Bill became chief in 1970 (C-1092, tab 8, p. 2493). Elder Bill testified that Natokowapiskapo told him this story on more than one occasion (C-1092, tab 8, p. 2494). Returning to the issue of the story's transmission, Elder Bill reiterated his earlier testimony. I repeat it here for further clarity on this point:

> Q. And, Mr. Bill, one of the individuals that provided the Treaty 6 story to Natokowapiskapo was Sisiwayham; is that correct?
>
> A. He said that Pahpiween [Laughing Man], was the one that rightfully told this to him. But Pahpiween [Laughing Man], was told this story by Sisiwayham [He Rattles It].
>
> (C-1092, tab 8, p. 2511)

[215] Thus, to summarize, Elder Bill's Treaty 6 story originated with Sisiwayham, who is alleged to have been present at the signing of Treaty 6; and, indeed, the story is set in Fort Carlton. The Morris book's appendix contains the text of Treaty 6 and its adhesions (S-4, pp. 351-367). No one named Sisiwayham, or anything similar, signed at either Fort Carlton or Fort Pitt. However, someone named Sa-Se-Wa-Hum signed an adhesion on behalf of the Wood Cree tribe of Indians at Carlton on September 3, 1878.

2. Negotiations at Fort Pitt

Elder Margaret Quinney

[216] Elder Margaret Quinney testified on June 13, 14, 15, 19, and 20, 2000 at the sittings held on the Samson Cree Nation Reserve. Elder Quinney was born on the Frog Lake reserve and is a member of that First Nation. She was introduced in court by Cherrilene Steinhauer, a current member and former chief of Saddle Lake Cree Nation. Ms. Steinhauer testified that both she and the wider Cree community consider Margaret Quinney to be an elder (C-1092, tab 5, pp. 1943-1944).

[217] Elder Quinney told the Court her grandfather's story about the making of Treaty 6 at Fort Pitt. Her grandfather's name was Papakachas ("Thin Stomach") and his English name was Simon Gadwa. Elder Quinney testified that Papakachas told her he was about 17 years old at treaty time (C-1092, tab 6, p. 2040).

[218] Elder Quinney testified that Europeans sought to buy the land long before Treaty 6 was made:

> This, before the treaty at the time when our brothers arrived here, as my grandfather had stated, that they coveted this land. They would arrive from time to time wanting to buy this land. However, these brave-hearted men did not want to give away this island because of the highest esteem in which they held it. They had much respect for it because they were blessed with this island, and thus had the highest regard for it so that they would never want to sell it.
>
> So then these people would go home back across the ocean and return here once more. At one of those times when they arrived here again to ask them once again, it was then that a brave-hearted man took some soil in his hand and lifted it in the palm of his hand.
>
> * * *
>
> And he said, "Okay, do you see this? This is so divinely sacred beyond human comprehension, it is kindness itself from where I obtain life and from where all the animals here obtain life. Never will you be able to afford to pay for it, for it is so that everything grows from there. It is divinely sacred beyond human comprehension, and it is kindness itself. Never will I be able to sell this land," was what he said to him. So they went back home.
>
> Then, once again, they were informed that these people were going to arrive once again. They were coming to negotiate a treaty.
>
> (C-1092, tab 6, pp. 2040-2042)

[219] Elder Quinney testified that Papakachas and his father went to Fort Pitt to hear the treaty talks. They sat about three feet from the Commissioner, who sat with the secretaries on either side, as well as the interpreter. Papakachas's father told him to listen closely and remember what occurred (C-1092, tab 6, p. 2044).

[220] Elder Quinney told the Court that Morris said to the assembled Cree,

> "... the Queen has sent me here to negotiate a treaty with you. I did not come here to buy land but to negotiate a treaty. The Queen is borrowing your land from you. Only this much... .
>
> * * *
>
> "Only this much, the top of the land that the Queen has sent me to borrow so that I can sustain myself, I can sustain my children, and I can sustain my livestock."
>
> (C-1092, tab 6, pp. 2044-2045)

[221] Elder Quinney made a hand gesture when she spoke Morris's words regarding how much land he wanted to borrow. Interpreter Ron Lameman described her gesture,

> INTERPRETER LAMEMAN: And at this time again, the elder made a gesture with her hands, one on top of the other with the thumb on the top hand, extending upward.
>
> (C-1092, tab 6, pp. 2044-2045)

[222] The elder testified that Morris asked for only three things: the topsoil of the land to sustain family and livestock, spruce trees to build a house, and hay to sustain his livestock. In exchange, the Queen would give the Cree three things: a school on their land, free medicine, and a ration house on their reserve (C-1092, tab 6, p. 2045).

[223] According to Elder Quinney's treaty story, Morris then spoke of reserves:

> "And then you will take, if you agree, you will take your land wherever you want, any place. There we will make solidly, markers. We will put iron stakes in four places so that no one will ever bother you. That will be the law so that you can live in peace just as before. There is no person that will be allowed to set foot in there... ."
>
> (C-1092, tab 6, pp. 2045-2046)

[224] Elder Quinney testified that Morris spoke of chiefs and councillors:

> "Within your land, you will choose a chief, and I will give him clothing that will be recognized. He will be decorated with red markings and yellow markings. That chief I will give my buttons so that he will have power and ability, as I have power and ability... .
>
> "This is how the chief will be decorated on your land. The councillors too, we will give them clothing also so that they too will shine. We will give to the chief a horse and a small wagon so that he can take care of his people."
>
> (C-1092, tab 6, p. 2046)

[225] In Elder Quinney's treaty story, Morris promised not to disturb the Cree way of life:

> "I did not come here to bother your animals, only the farming way of life. Your animals will still be yours. We will not bother them. You will still be able to hunt anywhere. You will be given shells every year, and you will continue to be able to hunt anywhere you want to hunt on this island. You will never be bothered about it. Fish nets will be given to you every year as Cree people so that you can fish anywhere, in any lake. The fish are still yours."
>
> (C-1092, tab 6, pp. 2046-2047)

[226] Elder Quinney testified that the Cree were told they could keep anything of value found on their land. Morris also promised that he and the Cree would each own half of the police. The Cree were promised that they would have to pay only half fare wherever they travelled. The elder also testified that the Cree were promised that land taxes paid by

whites would be given to the Cree and, further, that the Cree would never have to pay land taxes (C-1092, tab 6, p. 2047).

[227] Elder Quinney said it took three days to negotiate the treaty. She testified that after they heard the promises, the Cree spoke to each other and then agreed to shake hands with the Queen's representative and sign the treaty. One elder, however, did not initially move to shake hands with Morris. His name was Chipmunk. He appeared disinclined to believe the promises, but he eventually ended up shaking hands with Morris (C-1092, tab 6, p. 2049).

[228] According to Elder Quinney's treaty story, the pipe ceremony occurred after the hand shaking:

> It was then that they had the pipe ceremony. And the Queen's representative also smoked. That was when they talked about how long this treaty would last. As I said today about this spiritual being that shines a light on us. As long as the river flows and the grass grows, that is how long.
>
> Then at that time they shook hands, having given a scared solemn oath on this treaty that it was sacred, likening it to the spiritual beings. They had made a sacred, solemn oath. This is the story that my grandfather had told me.
>
> (C-1092, tab 6, pp. 2049-2050)

[229] Elder Quinney offered some more information upon further questions in direct as to the completeness of her treaty story:

> Q Is there anything to be added to complete the treaty story?
>
> A Yes.
>
> Q What is to be added?
>
> A What I forgot to add was, “There will always be a school on your land.” But the Queen had also said, “My child who has so much intelligence, your child will have the same intelligence. You will be given servants: a farm instructor, an Indian agent and a person to distribute food to the people. The farm instructor will teach you how to farm. The Indian agent will be there in case you are in need of anything. He is your servant. The administrator of food will ensure that people will not go hungry. You will receive cattle every year. Good cattle. White headed cattle.”
>
> That is what I forgot to mention yesterday. I did not want to leave them out because, as Indian people, we use these things. Every day we want that education. I did not make this up. This is the truth that I am using.
>
> (C-1092, tab 6, pp. 2097-2098)

[230] On cross-examination, Elder Quinney testified that she thought her grandfather had said that Erasmus was the interpreter at Fort Pitt and that he spoke good Cree (C-1092, tab 6, p. 2297). She reiterated this on re-direct and added some personal speculation as to Erasmus’s abilities (C-1092, tab 6, p. 2287).

[231] Elder Quinney’s treaty story is the only account presented in Court that puts the pipe ceremony at the conclusion of the negotiations. All of the other accounts describe the treaty talks as being opened by the pipe ceremony.

Elder Pete Waskahat

[232] Pete Waskahat, of the Frog Lake Cree Nation, testified at the Samson Cree Nation Reserve sittings on June 6, 7, 8, 9, and 12, 2000; he was recalled for further cross-examination and testified in Calgary in November 2001. He was introduced in court by Eric Tootoosis, from the Poundmaker Indian Reserve. Mr. Tootoosis testified that he has known Pete Waskahat for about 15 years (C-1092, tab 3, pp. 1614-1615). He testified that he considers Pete Waskahat to be an elder because of his upbringing, past loyalty to other elders, respect for indigenous ways, and the manner in which he has handled himself since being sanctioned for the role of elder. Mr. Tootoosis testified that Pete Waskahat is well-recognized within the wider Cree community as an elder (C-1092, tab 3, pp. 1615-1616).

[233] Elder Waskahat is the carrier of a particular Treaty 6 story, and it is this one that he told the Court during the June 2000 sittings. He testified that it was passed on to him, with a pipe ceremony, by his grandfather Mostos. According to Elder Waskahat, Mostos was told this story by an elder man named Seekaskootch (C-1092, tab 4, p. 173). Both Mostos and Seekaskootch attended the Fort Pitt treaty talks.

[234] According to this treaty story, the Indians conferred amongst themselves, and were told in advance of the impending treaty talks (C-1092, tab 4, p. 1737). The treaty talks took

place at Fort Pitt, and the post's factor prepared by making a wooden platform with chairs in each corner and two in the middle. The Queen's representative, unnamed in the story but presumably Morris, arrived by steamboat. The Indians met him halfway between the river and the trading post. Nothing else was done on that first day (C-1092, tab 4, pp. 1738-1739).

[235] The next day, according to the elder's treaty story, everyone assembled:

> After the dawning of the following day is when they got together. The Indian people were already decided on how they were going to speak to him, and also how they were going to look at the borrowing regarding the land that they came to borrow.
>
> (C-1092, tab 4, p. 1739)

[236] The Queen's representative mounted the platform. Secretaries sat in the four corners. An interpreter was also on the stage. Morris was stopped from beginning to speak by a Cree man. The Cree man said, "I cannot give you my land. I cannot give you my land. The Creator has put me here for this to be my land" (C-1092, tab 4, p. 1740). The man continued,

> "From where you are, you departed. Even if you put money one after another from there to where you are standing now, you would never be able to afford to buy my land,["] is what he said to him. "However, if you want to borrow it from me to live side by side with me, I will agree."
>
> (C-1092, tab 4, pp. 1763-1764)

[237] According to Elder Waskahat, the Cree told Morris about their four spiritual protectors: the sun, water, mother earth, and all that grows upon the earth. These protectors would ensure the treaty's perpetual duration. They also meant that the Cree could never give up their land (C-1092, tab 4, pp. 1765-1768). After listing and explaining these, the Cree man said,

> "So you agree, but understand that I am not giving you this land, I am not giving it to you, I am agreeing that you can live side by side with me in this land.
>
> "Also, my way of life you are never to interfere with. My way of belief, my self-determination, these I will keep for myself. You will not tell me how you will give me things. I will tell you... ."
>
> (C-1092, tab 4, pp. 1767-1768)

[238] Elder Waskahat testified that Morris agreed and said he was taking on the responsibility to look after the Cree people. Morris then explained that when his people arrived, they would want only enough land so that they could sustain themselves and the animals that they would be bringing. He added, "Whatever is underneath, that is yours. That is not what I want" (C-1092, tab 4, pp. 1768-1769). Thus, according to Elder Waskahat's oral tradition, Morris asserted that he was not claiming any subsurface rights to the land.

[239] Elder Waskahat told the Court that Morris asked the Cree to let him use four kinds of trees: jack pine, spruce, tamarack, and birch. These trees would be used for building houses, making paper, and tools (C-1092, tab 4, p. 1769). Morris said he was not asking for the animals, birds, or fish; these creatures would remain in the Crees' possession, to continue to use for their livelihood (C-1092, tab 4, p. 1790).

[240] The next day, Sweet Grass, described as an elder man in the treaty story, stood and asked Morris what the four secretaries were doing. Morris replied that they were writing everything down. When Morris returned to where the Queen lived, what they talked about would be written on something where it would never fade; and it would be hung at the head of the Queen's bed to serve as a daily reminder of the Cree people (C-1092, tab 4, p. 1791).

[241] Elder Waskahat testified that Morris asked the Cree to tell him what they wanted. Some men wanted to preserve their way of healing themselves. Morris agreed and added that the Cree could also have white people's medicine at no cost:

> "Where I come from, there exists medicine that is good which my people have made. A lot of that medicine, maybe you don't have here, but when I bring it, it will be the same as if you own it.
>
> "It will be given to you. You will not have to pay for it. Land payment you will be given forever. Land payment because you have loaned me your land. You own it, I do not... ."
>
> (C-1092, tab 4, p. 1792)

[242] Elder Waskahat testified that Morris promised the Cree they could have the same education as white people:

> "As I am standing here, maybe in the future, when there are a lot of my people, there will exist at that time what is called 'education.' As you have told me of the way in which you have educated your people, in a similar manner, my people are educated about life.
>
> "Maybe in the future you will desire or want this also. If you desire it, it will be the same also as if you owned it. Never will you have to pay for education. As long as this treaty shall last, you will never have to pay for it... ."
>
> (C-1092, tab 4, p. 1793)

[243] According to Elder Waskahat's treaty story, Morris promised the Cree could have a sawmill if they so desired. Again, it was to be considered as land payment. Morris also promised a ration house where they lived and that it would always be full of food (C-1092, tab 4, p. 1794). Morris promised to give them an Indian agent, along with some men. They would all be under the control of the Crees (C-1092, tab 4, p. 1795).

[244] Elder Waskahat testified that Morris returned to the topic of education. Morris promised that schools would be built on their reserves, as part of the land payment. According to Elder Waskahat, Morris said,

> "As the schools progress to the higher levels; as your children complete these levels and it is not possible for your children to finish school within the reserve and they have to go elsewhere for schooling, maybe far away, the treaty will still take care of their education.
>
> "They will still be looked after and their education paid for until they finish the highest level of education that they can achieve. This is how your children will be looked after... ."
>
> (C-1092, tab 4, p. 1796)

[245] Morris remarked that the Indians could not always live in teepees. If they wanted houses like those of white men, they would be built at no cost. There would always be food for the Cree people; the Indian agent would bring it to them so they would not go hungry. Morris also promised that a red coat, or policeman, would be theirs, to help the Cree people uphold the treaty (C-1092, tab 4, pp. 1796-1797).

[246] After the promises were listed, an elder named Sasakawapisk (“Chipmunk”) asked Morris how he could possibly look after the Cree from so far away. Morris replied that his arms were long and he would be able to reach the Cree and take care of them wherever they were. They would never be in want (C-1092, tab 4, pp. 1797-1798).

[247] Elder Waskahat demonstrated a hand gesture during his treaty story. It indicated what Morris had asked for regarding use of the land. Counsel for Samson described the gesture for the record:

> “His thumb from his right hand extended upwards, and his fingers curled towards the palm, and the thumb of his left hand touching the bottom of his right hand and his fingers of his left hand curled towards the palm.”
>
> (C-1092, tab 4, p. 1812)

[248] On cross-examination, Elder Waskahat testified that he was ten years old when Mostos told him this treaty story (C-1092, tab 4, p. 1924). He testified that he had heard

from other elders that the Cree people were aware of other treaties further to the east (C-1092, tab 4, p. 1934). He testified that he had never heard anything about Fort Carlton (C-1092, tab 4, p. 1935). The elder also testified that this was the first time he had told this story as extensively as what he had heard from Mostos (C-1092, tab 4, p. 1938).

[249] Elder Waskahat's treaty story takes place at Fort Pitt. I note that the Treaty 6 text contained in the appendix to the Morris book indicates that a Cree chief named See-kahs-kootch signed Treaty 6 at Fort Pitt on September 9, 1876 (S-4, p. 358). Thus, the story's source was an eyewitness to the proceedings.

E. The Expert Opinion: Historical Context and Meaning of Treaty 6 and Other Issues

i. The Treaty Commissioners

[250] As noted previously, three men acted for the Canadian government as treaty commissioners for the 1876 Treaty 6 negotiations: Alexander Morris, William J. Christie, and James McKay.

[251] Morris was the lead negotiator for the government side. At the time of Treaty 6, Morris was Lieutenant-Governor of Manitoba, the North-West Territories, and Keewatin. He had also been appointed Chief Justice of the Court of Queen's Bench of Manitoba in July, 1872. Morris was the government's chief negotiator for Treaties 3, 4, and 5, and was also in charge of dealing with the "outside promises" of Treaties 1 and 2, and their subsequent revision. Morris's involvement in the treaty process ended with Treaty 6.

[252] W. J. Christie acted as a treaty commissioner for Treaties 4 and 6. He had spent his adult career as a trader with the HBC, starting as an apprentice clerk at Rocky Mountain House in 1843. He rose to the rank of Chief Factor of the Saskatchewan District, at Edmonton House, a position he held from1860 until his retirement in 1873. He had worked with Morris as commissioner during the Treaty 4 negotiations.

[253] The third commissioner at Treaty 6 was James McKay. He was a Métis from Red River and was Minister of Agriculture in the Manitoba government. McKay was a witness and translator for Treaties 1,2, and 3. He also served as a treaty commissioner alongside Morris at Treaty 5.

[254] The three commissioners representing Canada at the Treaty 6 negotiations had, between them all, extensive experience in the treaty negotiation process. Two were

experienced in government, and the other had spent his adult life working as an HBC trader in the west. Two of the commissioners, Christie and McKay, spoke Cree. Thus, they were not unfamiliar with conditions in the west, nor were they unfamiliar with, or to, aboriginal people.

[255] The commissioners negotiated Treaty 6 with the government's objectives and intentions in mind. I turn now to the expert opinion on this matter.

[256] Professor Ray wrote, in the abstract at the outset of his report, that Canada's goals and needs helped shape the timing and character of Treaty 6 (S-3, p. iii). Canada had recently purchased Rupert's Land and was anxious to clear aboriginal title to the land, through treaties, as cheaply as possible. The government also wished to avoid war with the Plains Indians. War would be costly in human lives and financial terms; furthermore, it would delay the migration of settlers (see also S-3, pp. 51-62).

[257] On cross-examination, Professor Ray agreed that Canada's objective was to extinguish aboriginal title, so as to make room for settlers and the development of agriculture and mining (transcript volume 24, pp. 3201-3202).

[258] Bob Beal noted, in his report, that Canada believed it was necessary to gain voluntary surrender of Indian land rights, in accordance with the rules set out by the Royal Proclamation of 1763. In Mr. Beal's opinion, Canada was not in a position to gain control or access to the west without Indian consent (S-17, p. 26). Mr. Beal is in agreement with Professor Ray on the point that the government wanted to avoid the danger and expense of a western Indian war (S-17, pp. 29-33). Mr. Beal also testified that Canada's objective was to open up the west for settlement (transcript volume 38, p. 5540).

[259] In his report, Professor Sanders listed what he described as themes, gleaned from government accounts, in western numbered treaty making from 1867 to the 1920s (S-49, p. 14). Through the treaties, the government sought to secure peaceful relations, open up the territory to settlement, protect a limited regime of Indian rights, develop agriculture or cattle raising by Indians, develop an education system, prohibit alcohol, and organize the tribes into bands with government recognized leaders.

[260] For Dr. Carl Beal, the Canadian government wanted to open up the western territories for settlement. Treaties were necessary so that various initiatives that would precede settlement, such as land and geological surveys, extension of telegraph lines, and

railway construction, could proceed peacefully and unhindered (transcript volume 44, p. 6435).

[261] Dr. von Gernet offered a slightly different opinion on the military threat posed by the Cree; he did not think they had the capability to mount a war against Canada in the 1870s. Dr. von Gernet testified that he did not think that the government viewed the threat of an Indian war as a major reason for Treaty 6. In his opinion, the government was more likely interested in preventing friction or hostilities between settlers and natives (transcript volume 168, p. 23 269). Dr. von Gernet characterized the *raison d'être* of treaty making, on the part of the government, as land cessions, or quit claims. He noted that the language of the land surrender clause of Treaty 6 is similar to dozens of pre-Confederation instruments (C-320, pp. 26-27).

[262] Professor Ray wrote that Canada's treaty officials operated on the basis of established treaty-making practices, using the Robinson accords and Treaties 1 through 3 as the crucial blueprint (S-3, p. 93). Indeed, Morris explicitly set out this very same blueprint in chapter 12 of his 1880 book (S-4, pp. 285-292).

[263] Professor Ray also believes that the Canadian government appointed Christie as a treaty commissioner so as to establish a link with the tradition of the HBC serving as the

Crown's de facto representative in the west (transcript volume 23, pp. 3111-3112). This would effectively tap into Cree familiarity with that tradition, including their long history of negotiating various accords with the HBC and, of course, their longstanding relationship based on the fur trade.

ii. The Cree Side

[264] In his book, Morris characterized Mista-wa-sis and Ah-tuk-uh-kup as head chiefs of the Cree at Fort Carlton, and Sweet Grass as the principal chief of the Plains Cree (S-4, pp. 176 and 179). The signature page of Treaty 6, included in the appendix to the Morris book, describes Mista-wa-sis and Ah-tuk-uh-kup as Head Chiefs of the Carlton Indians; several other chiefs and their councillors are also recognized on the written document of the treaty and its various adhesions. Thus, the treaty was concluded with the Cree leadership. But what were their intentions and objectives?

[265] According to Professor Ray, the Cree's treaty-making objectives were largely determined by their immediate needs and concerns (S-3, pp. ii-iii). Smallpox and other epidemics had caused great suffering and death amongst the Cree. By the 1870s, the buffalo herds were greatly reduced in size and the collapse of the buffalo hunting economies of the Plains Cree was imminent. The Cree wanted assistance in making the

transition to agriculture as their primary means of survival. They were angry over the sale of their lands by the HBC to Canada in 1870, and also disturbed to see surveyors entering their territory and running lines for railways, telegraphs, and the Canada-United States boundary. But it was the impending collapse of the buffalo and the change in their relationship with the HBC that drove the Cree to the bargaining table (S-3, p. 93).

[266] In Professor Ray's opinion, the Cree would have used Treaties 1 through 5 as their primary reference points; they would have had knowledge about these treaties through native informants, white traders, and government negotiators (S-4, p. iii). Professor Ray also noted that Indians received advice from HBC officers and servants, as well as missionaries, all of whom would be reasonably well-informed about the economic changes that were in the wind (S-3, p. 64). A central issue in all of the treaty negotiations of the 1870s related to livelihood rights, that is, hunting, trapping, and fishing rights (S-3, pp. 64-65). The Cree were attempting to secure their future in ways that were compatible with their traditions (transcript volume 23, pp. 3025-3026).

[267] According to Mr. Beal, the Cree, like the Canadian government, wanted to preserve peace and order; they also wanted the whiskey trade stopped (transcript volume 38, p. 5541). Mr. Beal also considered the impending disappearance of the buffalo acted as an impetus for treaty on the Cree side (transcript volume 38, p. 5578).

[268] Mr. Beal testified that the Cree knew that settlement was going to increase and they wanted a treaty before that happened (transcript volume 38, pp. 5529-5530). He reiterated this point when he said that the Cree recognized it was in their interest not to allow incursions into their territory until they had made an arrangement (transcript volume 38, p. 5540).

[269] Mr. Beal testified that the Cree at Treaty 6 were aware of Treaty 3 and, more particularly, Treaty 4, through the Cree communication network (transcript volume 39, pp. 5823-5824).

[270] Dr. Flanagan testified that the Cree were not confronted with a completely novel situation with regard to Treaty 6 (transcript volume 152, p. 21100). The Cree, according to Dr. Flanagan, had heard about treaties in the United States, as well as Treaties 1 through 5. He believed they would have had a general idea of what was involved: there would be negotiations, reserves of land set aside for them, and other benefits, such as annuities and agricultural implements.

[271] Dr. von Gernet testified that the Cree leadership would have been aware of previous treaties and that, to some extent, the leaders would have discussed such things with their constituencies (transcript volume 138, p. 23298). He further testified that the Cree would have been aware of the outside promises issue regarding Treaties 1 and 2, which he characterized as a matter of some notoriety (transcript volume 138, pp. 23299-23300).

iii. Land Surrender Clause

[272] Perhaps one of the most hotly contested issues in Phase One of the trial is the interpretation to be placed upon the land surrender clause of Treaty 6, which reads as follows:

> The Plain and Wood Cree Tribes of Indians, and all the other Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits ... .
>
> And also all their rights, titles and privileges whatsoever, to all other lands, wherever situated, in the North-West Territories, or in any other Province or portion of Her Majesty's Dominions, situated and being within the Dominion of Canada;
>
> The tract comprised within the lines above described, embracing an area of one hundred and twenty-one thousand square miles, be the same more or less;
>
> To have and to hold the same to Her Majesty the Queen and her successors forever... .
>
> (S-4, p. 352)

[273] As I noted earlier in these Reasons, Samson adduced a great deal of evidence on the land surrender issue. Several elders told the Court their oral traditions on Treaty 6. Samson also called expert evidence on this issue, primarily from Professor Ray, Bob Beal, Professor Wolfart, Professor Sanders, and Dr. Wheeler. I will analyse and comment on the oral history in a separate section. The Crown objected to the land surrender issue from the start; I took the objection under reserve and allowed in the evidence. The Crown presented evidence on this issue through its experts, Drs. Flanagan and von Gernet.

[274] Professor Ray's thesis in regard to the land surrender issue was that the theme, or tenor, of Morris's message to the Indians during the Treaty 6 negotiations was that they wanted to share the land with the Indians and not take anything away from the Indians' livelihood. What Morris had to offer was a gift, on top of what the Indians already had (transcript volume 24, p. 3208). Professor Ray opined that this would be in accord with the native tradition of sharing their territory with others for specific purposes. He pointed to the HBC's history of negotiating with Indians for rights of access so as to build their trading posts in Indian territory. In Professor Ray's opinion, aboriginal people were not familiar with the concept of absolute ownership (transcript volume 23, pp. 3039-3048). He also pointed to the Indians' demand for compensation during Treaty 3 talks with respect to the Dawson Road (transcript volume 23, pp. 3049-3054; volume 24, pp. 3155-3161).

[275] Professor Ray emphasized in his testimony that the documentary record is silent on the topic of the surrender clause. He maintained that nothing in the record indicates that this clause was ever translated or explained to the Cree at Treaty 6; rather, the focus of the treaty talks was on what the Cree were to receive (transcript volume 23, pp. 3085-3089; volume 24, p. 3162-3166; volume 25, pp. 3390-3392). He did not accept the proposition that lack of discussion of the surrender clause was because both sides understood that was the treaty's purpose (transcript volume 24, pp. 3207-3212).

[276] According to Mr. Beal, land issues are fundamental to treaty relationships because one party is beginning to occupy another party's land and that the parties therefore need to come to some arrangement (transcript volume 36, pp. 5194-5195). He shared Professor Ray's opinion that there is no evidence in the documentary record showing that the question of land rights were ever discussed; he characterized this as a "stark absence" (transcript volume 36, pp. 5619-5624; S-17, rebuttal report, pp. 10-15).

[277] Mr. Beal agreed that the Cree had a concept of territory insofar as allowing others into it, but he was unsure as to whether this could be extended to understanding a concept of parcelling out land for ownership (transcript volume 40, pp. 4930-4940).

[278] Mr. Beal had deep reservations about the reliability of the Peter Erasmus account, *Buffalo Days and Nights* (C-7), mainly because it was set down by a reporter, and was based on two interviews with Erasmus, conducted eight years apart, and towards the end of Erasmus's life (transcript volume 38, pp. 5649-5650). Mr. Beal seemed suspicious of the reporter, Henry Thompson, and his effect as a filter in the recording and reporting process that created the book (transcript volume 39, pp. 5812-5817). While Mr. Beal had no doubt Erasmus was a "good translator", he wondered how close Erasmus was to the Cree culture (transcript volume 39, pp. 5812-5817). Mr. Beal thought that Erasmus's report of Morris saying he had come to make a treaty for the surrender of the Indians' rights to the land was a "very weak indication" that the surrender clause was ever discussed (transcript volume 40, pp. 5943-5949; C-7, pp. 237 and 242).

[279] Mr. Beal was also not swayed by the account in Morris of Chief Beardy urging the Crees to only lend their land for four years. It merely left him "wondering"(transcript volume 40, pp. 5956-5960; S-4, 188-189).

[280] Professor Sanders also viewed the land surrender clause and, indeed the treaty as a whole, as allowing for sharing of the land. The land was not being given up in a complete way because the Cree could continue to hunt and fish, except where settlers might establish themselves (transcript volume 62, pp. 9078-9082; S-49, para. 6.7).

[281] Professor Little Bear was of the opinion that land could not be sold because it is part of the relational network, with Mother Earth as the source of all life. Furthermore, the animals have an interest in the land; thus, it could not be sold without first consulting them (transcript volume 131, pp. 18469-18473).

[282] Professor Wolfart, the linguist, is of the opinion that the Cree term for land, *askiy*, at the time of Treaty 6 would have meant land in an unbounded and person-based sense (transcript volume 73, pp. 10645-10646). According to Professor Wolfart, the concept of a circumferential definition of territory, in the sense of outlining a boundary, would have been “utterly incomprehensible to the Cree speakers in the year 1876" (transcript volume 74, pp. 10733-10734). If a Cree concept of land existed, it would, according to Professor Wolfart, be defined by its centre, and not its periphery (transcript volume 80, pp. 11499-11500).

[283] Professor Wolfart contended that the translation efforts at Treaty 6 were “wretched” and that there was a complete breakdown in the communications between the parties (transcript volume 73, p. 10557; volume 75, p. 10848). Professor Wolfart considered that Erasmus’s abilities as translator would have been rather narrow and at the lower end of the range of registers; he found it extremely unlikely that Erasmus would have been in control,

or indeed comfortable, with the higher registers of English or Cree, based on the text of *Buffalo Days and Nights*, Irene Spry's introduction, and biographical information on Erasmus (transcript volume 72, pp. 10533-10534; volume 76, p. 1103; volume 77, p. 1190).

[284] Professor Wolfart appeared astounded that the treaty commissioners failed to grasp the significance of the pipestem, which he characterized as akin to the Ark of the Covenant. In his opinion, the failure to fully and properly understand the pipestem ceremony at Treaty 6, as demonstrated by the Morris and Jackes accounts, demonstrates a complete breakdown in the interpretations (transcript volume 75, pp. 10845-10848).

[285] Professor Wolfart did allow that there was some comprehension by both sides in regard to part of the treaty (transcript volume 76, p. 11031).

[286] Professor Wolfart based many of his conclusions as to the translation efforts at Treaty 6 on his examination of a translation of a Cree Treaty 6 story, told by Jim Kâ-Nîpitêhtêw (S-68).

[287] Dr. Flanagan maintained that the Cree would have been aware of Treaties 1 through 5 at the time of Treaty 6, and thus would have had some degree of understanding of the treaty's objective (C-286, p. 17). Dr. Flanagan contended that while one cannot say exactly what the Cree were told and with what words, it is clear from the written record that Treaty 6 was explained at length and translated several times (transcript volume 154, pp. 21364-21368). Dr. Flanagan also pointed out that Morris indicated that at the end of the negotiations, Treaty 6 was read aloud; at that point, the Cree had to understand that they were giving up their right to the land in return for certain benefits (transcript volume 154, pp. 21401-21429).

[288] Dr. Flanagan found it difficult to believe that Morris would have asked to borrow the land only to the depth of a ploughshare. Morris had specific instructions and he knew the government regarded the numbered treaties as all similar in purpose (transcript volume 152, pp. 21188-21189).

[289] For the Cree concept of land at the time of Treaty 6, Dr. Flanagan relied on Morris's reference to Chief Beardy urging the Cree to just lend their land for a term of four years. This indicates, according to Dr. Flanagan, an understanding of the distinction between buying and selling in regard to land (transcript volume 152, pp. 21140-21143).

[290] Dr. Flanagan also responded to Professor Wolfart's report in relation to the surrender clause and translation issues (C-287). Dr. Flanagan considered Professor Wolfart to be a perfectionist in setting such high standards for translations that took place in the field in 1876. Dr. Flanagan's opinion is that Erasmus would have had a natural fluency in Cree and his fairly high degree of formal education would have helped him understand the treaty commissioners' language and concepts (transcript volume 152, pp. 21102-21103).

[291] Dr. von Gernet agreed that the Morris account barely mentions what the Cree would be giving up (transcript volume 167, p. 23117). However, for Dr. von Gernet, the land surrender is axiomatic and non-negotiable, hence its minimal discussion (transcript volume 167, 23147-23148). Morris's previous experience with the revisions to Treaties 1 and 2 stemming from the outside promises, shows he would have been aware of the necessity of ensuring that the Cree understood the treaty (transcript volume 167, p. 23191). The hunting and fishing clause in the treaty, according to Dr. von Gernet, make it clear that there would be restrictions on the Cree use of the land (transcript volume 167, p. 23193). Dr. von Gernet was of the opinion that the Cree understood they would be giving up the land, but this did not preclude their concept of sharing in that they could continue to hunt, fish, and trap (transcript volume 172, pp. 23951-23971).

iv. The Oral Traditions

[292] Dr. Wheeler testified for Samson on the issue of oral traditions. She did not analyse any of the oral traditions tendered at court (transcript volume 157, p. 21836). The thesis of her report is found at page 3 and reads as follows:

> The following opinion posits that oral tradition histories found in societies throughout the world have long posed a predicament to modern scholarship because, to varying degrees, they do not ascribe to the criteria and expectations of Western historiography as it evolved in the 19th century. Indigenous oral tradition histories are so complex that debates in the scholarly literature about their nature, qualities, and potential value abound.
>
> (S-217, p. 3)

[293] Dr. Wheeler conducted an interdisciplinary review of the academic literature. She concluded that scholars recognize that histories other than those more familiar in the West have survived and continue to exist. She further concluded that scholars recognize that an understanding of the histories of non-Western societies cannot be achieved by applying standards established outside of the cultural context and intellectual tradition of these societies (transcript volume 126, p. 1703).

[294] Dr. Wheeler preferred to use the term “oral traditions history” and defines it as history that comes from oral accounts of events from the distant past, beyond the living memory of contemporary storytellers (transcript volume 126, pp. 17740-17741). In her

opinion, oral narratives must be examined on a case-by-case basis. Cree oral tradition is like an encyclopaedia, holding all of the community's knowledge in various different kinds of stories. Oral traditions serve to instruct, entertain, preserve knowledge, explain world systems, maintain continuity between past and present, and socialize individuals (transcript volume 127, pp. 17780-17781 and 17862-17894; S-217, pp. 42-53).

[295] Dr. Wheeler explained that there are many different types of stories within the Cree oral tradition. One such category, family stories or family story bundles, may contain accounts of significant past events; many become the officially sanctioned versions and only designated family members have the authority to recount them (S-217, p. 51; transcript volume 127, pp. 17885-17896). The sanctioning process depends on the community and cultural context. Often, it is an informal process where there is general agreement in the community (transcript volume 130, pp. 18315-18318).

[296] Official accounts of significant historical events are held by specialists, well-trained in the arts of memory-keeping, and designated by the community or leadership to protect and maintain the remembrances. Dr. Wheeler noted that Treaty 6 stories are protected by ceremony and protocols. Treaty 6 story-keepers have apprentices and the process of teaching them takes years. Very few people are considered the official keepers or historians of Treaty 6 (S-217, pp. 51-53).

[297] According to Dr. Wheeler, the primary methodological error made by historians is to treat oral history like any other documentary source (S-217, pp. 59-60). In her opinion, a full evaluation of oral tradition histories cannot be made without a thorough understanding of their nature and cultural context, best done on a case-by-case basis. Methods used for evaluating documents are not rigorous enough for oral tradition histories. Communities have their own scholars – in the context of culture and tradition – who have a solid understanding of the evaluation process for oral narratives (transcript volume 128, pp. 17938-17944).

[298] In Dr. Wheeler's opinion, treating oral tradition histories like archival documents, sifting them for facts, discarding the mythical, and forcing the stories to conform to Western standards results in the stories being stripped of their original intent and cultural context. According to her, the voice becomes silent and the story dies. Even if recorded, the oral tradition history cannot be treated like a document because the voice on the tape is still perceived to be alive; once transformed to paper, it becomes an object and appears lifeless. Audio or tape recordings are preferable over transcripts because the oral context is preserved (transcript volume 128, pp. 17945-17958).

[299] Dr. Wheeler explained that presentism is the infusion of present interests that may have an influence on narratives of historical events (transcript volume 128, p. 18017). The feedback effect is a form of presentism. It involves co-opting extraneous printed or written information into previously oral accounts (S-217, p. 90; transcript volume 128, pp. 18033-18035).

[300] Dr. Wheeler explained that variation in the telling of a story may occur because the tellers change over time, but the story's "core" never changes. Variation may also occur in the context of the audience and the environment in which the story is told. Many elders will not tell their treaty stories in full outside of their cultural context; for example, if they speak in a classroom, they will only tell the parts they think are relevant or are safe (transcript volume 128, pp. 18046-18051; S-217, pp. 94-103).

[301] Dr. Wheeler also discussed verification. She believed that verification must occur within the context of the oral tradition histories; one must be aware of the internal checks and balances within the cultural context. Foremost, however, is the storyteller's reputation. Elders are held in high esteem and are expected to be truthful. Elders may assist each other in ensuring that a proper rendition of a story is given. Repercussions result also from any break in protocol (transcript volume 128, pp. 18052-18056).

[302] Dr. Wheeler testified,

> So knowing who the storyteller is is absolutely vital; their reputation in the community; how they are viewed by others; checking with other stories; comparing stories from one storyteller to another for the purpose of locating that core, understanding what the protocols are. The proper method by which that story should be transmitted is absolutely vital.
>
> (transcript volume 128, p. 18055)

[303] Dr. Wheeler discussed translation issues with regard to the transformation of oral histories from oral to written form. Scholars must be part of the translation process, even if they do not speak the indigenous language. Indeed, one must also investigate the translator's background. As well, it is preferable to have more than one translator so that they can discuss their translations and act as a check and balance against each other (transcript volume 129, pp. 18092-18096).

[304] Dr. Wheeler also addressed the issue of temporality and the concept of time (S-217, pp. 103-112). She testified,

> In Cree oral tradition histories, cause-and-effect analyses are the responsibility of the listeners, not the storytellers, and temporal frameworks for cause-and-effect analyses are built in. Cree histories focus on place, actors, and events. Specific time referents are not vital components to that construct.

> Now, taking that a bit further: In some oral tradition histories, you will find interpretive interpolations tossed in where storytellers of the 20th century are now trying to add some temporal construct by way of anecdote. But that wasn't either a vital or a prevalent feature in the original narrative. Those are predominantly current interpolations to try to accommodate mainstream society's need for temporal referencing.
>
> (transcript volume 129, pp. 18104-18105)

[305] According to Dr. Wheeler oral histories may contain a number of time distortions: telescoping, foreshortening or flattening time, and floating bits; oral histories seldom adhere to conventional notions of time. However, these should not be fatal; they merely complicate the interpretation process (transcript volume 129, pp. 18106-18108; S-217, p. 103).

[306] In Dr. Wheeler's opinion, the Cree concept of time is neither linear, nor cyclical; rather, time spirals in an unbroken chain, linking past, present, and future together. Understanding time in the Cree world requires an intimate knowledge of the local land and environment as time is often tied to season and climate (transcript volume 129, pp. 18120-18125).

[307] Dr. Wheeler also briefly discussed human memory. She asserted that, among the Cree, memory capabilities were nurtured and disciplined from early childhood (S-217, p. 115). Commemorative events and mnemonic devices – such as landscape, visual aids, or music – also play a role in aiding recall and strengthening memory (transcript volume 129, pp. 18162-18172; S-217, pp. 118-121).

[308] Dr. Wheeler was critical of Dr. von Gernet for, what she termed, his huge methodological leap in that he ignored the creation, context, and translation process that resulted in written transcripts of the oral histories (transcript volume 157, p. 21721).

[309] Dr. Wheeler gave an illustration of what her practical methodology would be if she was confronted with a particular aspect of a treaty story. As an outsider who is not fluent in Cree, she would rely on scholars within the community to help her ask questions of the narrative, seek out its provenance (or, as she termed it, its genealogy), and determine the culture's internal checks and balances. She said she would also need assistance in determining how to engage in such an analysis within the culture. Translation issues would also require study. To determine the internal checks and balances, Dr. Wheeler testified that she would have to spend time within the community to see how they determine validity and verification. She agreed she would want to find out whether there were any biases or distortions due to presentism or feedback. Comparisons may be made with other official stories, as well as testing against any written documents (transcript volume 157, pp. 21830-21836).

[310] Further on the topic of checks and balances, Dr. Wheeler testified that she would want to know how people in the community evaluate truth and their local protocols for challenging interpretations (transcript volume 157, p. 21853).

[311] The Court asked Dr. Wheeler how it should evaluate the translation of an oral tradition transcript. Dr. Wheeler answered,

> Somebody trained in oral histories research can provide you with the interpretation, the full contextual reading you require to see the transcript beyond a literal reading.
>
> ...the transcript is a representation of the original full story, and to get a full understanding of the meaning, we have to go back there. And that's what the local experts, I guess, who are not considered experts by the Court – they are the key. They are the ones that I go to for assistance to help me understand transcripts and oral histories that have been taped. So the local experts are in the best position to do that, because they can provide the context I need to be able to read that document more completely and more fully.
>
> (transcript volume 157, pp. 21901-21902)

[312] Dr. von Gernet testified for the Crown on the topic of oral traditions, as well as in regard to specific oral traditions tendered at Court. In his opinion, it is not inappropriate to record oral traditions and reduce them to transcripts because that is the only way to render them comparable to other evidence, especially if the oral traditions are being tendered as evidence about past events. He characterized them as oral documents (transcript volume 166, pp. 22915-22918).

[313] According to Dr. von Gernet, the crucial difference between oral documents and archival documents is the matter of “pastness.” Oral traditions are generated in the present, so their pastness cannot be assumed, but must be demonstrated. There is a further complication with the matter of subjectivity. A written document’s subjectivity is confined to its original encoding and later retrieval; however, oral traditions involve multiple encoding and retrieval segments, so there is much more subjectivity involved (transcript volume 166, pp. 22918-229190.

[314] With regard to his methodology, Dr. von Gernet testified that other versions of an oral tradition by the same informant allow for testing of internal consistency and range of variability. These versions can also be compared with traditions told by other storytellers about the same historical events. The final step involves looking for independent evidence and assessing it against the oral tradition. He testified that he would also look for evidence of feedback – subtle influences from the written record – as well as conflation (transcript volume 166, pp. 22920-22922; C-320, pp. 8-11).

[315] Dr. von Gernet testified that anthropologists may study oral traditions to illuminate a culture’s belief system. However, in this instance, he looked at them as historical evidence about actual past events, rather than as evidence about a belief in that past (transcript volume 169, pp. 23525-23528). He did not assess or comment on Cree creation

stories, spiritual stories, or stories about Cree laws (transcript volume 169, pp. 23528-23540).

[316] With regard to protocol, Dr. von Gernet testified that he does not create any association between protocol and validation. Protocol may be an indication that the person relating the oral tradition is relating something that is serious and sacred. However, in his opinion, honestly-held beliefs can still be demonstrably false and no amount of protocol can overcome that fact (transcript volume 171, pp. 23873-23879; C-320, pp. 17-18).

[317] Dr. von Gernet assessed the oral traditions pertaining to Treaty 6 that were presented to the Court during the June 2000 sittings (C-320, pp. 43-58). He compared Elder Waskahat's 2000 version with several earlier recorded versions made in 1980, 1983, 1985, and 1991 at the Maskwachees Cultural College. Dr. von Gernet compared Elder Quinney's 2000 version with an interview she gave in 1974 as part of the Treaty and Aboriginal Rights Research (TARR) Interview with Elders program, as well as with an oral history given by Elder Thomas Quinney at Frog Lake on January 17, 1973. His story came from the same source as Elder Waskahat's 1980 version and Elder Margaret Quinney's 1974 and 2000 versions. Finally, Dr. von Gernet analysed Elder Bill's account on its own, as there are no other extant versions available for comparison.

[318] Dr. von Gernet observed that while there are some important internal consistencies in Elder Waskahat's five recorded treaty stories – what he termed the Waskahat tradition – there are also modifications and changes in the language. In particular, Dr. von Gernet noted the change between 1980 and 2000 from "buying," "selling," and "giving up" to "borrowing" and "lending" the land. In Dr. von Gernet's opinion, this is likely due to *post factum* reasoning influencing a reconstruction of the past.

[319] With regard to Elder Quinney, Dr. von Gernet noted both similarities and changes in her two recorded versions. Again, there is the change from "buying" to "borrowing" the land; however, both versions refer only to the topsoil. Interestingly, in the 2000 version, the Commissioner specifically says he did not come to buy the land. Both versions have a *quid pro quo* triad. In the 1974 rendition, the Commissioner asked for land, grass for livestock, and spruce to build houses in return for a school, Indian Agent, and a medicine chest. In the 2000 telling, asked for the same three things and promised to give in return a school, medicine, and a ration house.

[320] Elder Thomas Quinney's 1973 version, which Dr. von Gernet noted had the same source as the treaty stories of Elder Margaret Quinney and Elder Waskahat (1980), refers to buying the land and lists the same requested triad.

[321] Finally, with regard to Elder Bill, Dr. von Gernet concluded that his oral tradition could not have followed the chain of transmission to which the elder testified. Moreover, the story is likely set at an adhesion to Treaty 6 that took place about two years after the Fort Carlton negotiations.

[322] Dr. von Gernet took some pains to note that he was not challenging the honesty or integrity of the elders. Rather, it is his contention that the oral traditions may contain honestly held beliefs subjected to unconscious and subtle alterations (C-320, p. 61).

[323] Dr. von Gernet also reviewed discovery and trial testimony from the 1935 *Dreaver* case (C-25). The transcripts contain the testimony of Chief George Dreaver and John Smith of the Mista-wa-sis Band, a Treaty 6 band located in Saskatchewan. The men were direct descendants of two Treaty 6 signatories and had also themselves been present at the treaty talks.

[324] In his report, Dr. von Gernet noted that Chief Dreaver, an eyewitness to the treaty negotiations and approximately 20 years old at that time, did not mention anything about lending or borrowing only the topsoil. According to Dr. von Gernet, Chief Dreaver's

testimony reveals his view of Treaty 6 as a *quid pro quo* arrangement: the Cree received things such as medical care and a school in return for giving up their land.

[325] Dr. von Gernet also examined John Smith's testimony in that same case. Smith was 16 years old at the time of Treaty 6, and attended the negotiations at Fort Carlton. His father, Chief John Smith, signed the treaty. According to Dr. von Gernet, Smith's *Dreaver* testimony echoed that of Chief Dreaver, to the effect that the Cree would get free medicine because they gave their land to the Crown.

v. Post-Treaty 6 Events

[326] Samson tendered evidence by Mr. Bob Beal and Dr. Carl Beal on the issue of the Crown's conduct following Treaty 6. They assert that the Crown breached its treaty obligations and acted in a manner that led to starvation, poverty, and other dire social consequences.

[327] Mr. Beal testified that the Canadian government failed to live up to its treaty responsibilities. He cited an excerpt from an article written by Thomas White in 1879. White was an M.P. and the editor and publisher of the Montreal *Gazette*. He wrote a series of

articles, “Chronicles By the Way,” describing his visit to the North-West. White met with Cree chiefs Mista-wa-sis and Ah-tuk-uh-kup and took seriously their complaint of a lack of good faith on the government’s part in fulfilling its treaty obligations regarding the provision of agricultural tools and implements and livestock (S-17, rebuttal, pp. 34-36, tabs 129-130). White wrote that he heard similar complaints from Indians at Cumberland House (transcript volume 38, pp. 5668-5672; volume 39, pp. 5683-5912). On cross-examination, Mr. Beal agreed that these articles did not refer to the Hobbema area and one, in particular, dealt with Treaty 5 (transcript volume 41, pp. 6085-6088; S-17, rebuttal, tab 130). Mr. Beal also agreed that, further on in their letter, Mista-wa-sis and Ah-tuk-uh-kup stated that they received a good deal of food the last winter from the government and were thankful (transcript volume 41, pp. 6088-6090).

[328] Mr. Beal testified about the Annual Report for the Department of the Interior for 1879; at that time Edgar Dewdney was the Indian Affairs Commissioner. Dewdney seemed to agree with White’s report of complaints made by Mista-wa-sis and Ah-tuk-uh-kup regarding the poor quality of cattle provided under treaty. Dewdney promised to replace them (transcript volume 39, pp. 5712-5715; S-17, tab 164, p. 87). Mr. Beal also agreed, on cross-examination, that Dewdney dispatched rations to help aid 1300 destitute Indians he encountered at Blackfoot Crossing (transcript volume 40, pp. 6020-6023; S-17, tab 162, pp. 78 and 80).

[329] Mr. Beal also cited an 1884 editorial by Frank Oliver, who owned the Edmonton *Bulletin*. The editorial stated that while the Indians in a general way had been well treated, the government failed to recognize the sacredness of a promise and treaty stipulations (S-17, rebuttal, p. 33; transcript volume 39, pp. 5717-5718). Mr. Beal referred to another editorial, this one written by Patrick Gammie Laurie, who owned and edited the Saskatchewan *Herald*. Laurie complained that the condition of the Indians was deplorable; he urged Cabinet members to visit Manitoba to explain why treaty obligations had not been carried out (transcript volume 39, pp. 5719-5720; S-17, rebuttal, pp. 33-34).

[330] In Mr. Beal's opinion, the government's policy was to keep aboriginal people on short rations. This may have been due to humanitarian reasons in that the government did not want to encourage dependence (S-17, rebuttal, p. 19; transcript volume 39, pp. 5720-5733).

[331] Mr. Beal agreed there were infrastructure and logistical difficulties in the North-West in the years before and after Treaty 6, but he did not think that they were serious. He testified that railway crews, surveying parties, and settler communities could all get supplies. According to Mr. Beal, by 1882 there was nothing wrong with transportation infrastructure in the North-West, including the Treaty 6 area (transcript volume 39, pp. 5741-5742 and 5774-5775).

[332] Mr. Beal was critical of the competence of some Indian Agents and thought that the government could have put more effort into supervising them and replacing the ones who were not up to scratch (transcript volume 39, pp. 5742-5744; S-17, rebuttal, pp. 39-40).

[333] Mr. Beal was also critical of the quality of rations provided to the Cree in the years following treaty (transcript volume 39, pp. 5744-5748; S-17, rebuttal, pp. 36-39).

[334] Mr. Beal referred to a letter, dated January 7, 1883, addressed to John A. Macdonald, who was Minister of the Interior at that time. The letter was signed by Chiefs Bobtail, Samson, Ermineskin, and Woodpecker, as well as some other people. They asserted that they had suffered destitution, cold and hunger, and had received no help. They conclude that if no attention is paid to their grievances, then Treaty 6 was meaningless (transcript volume 39, pp. 5750-5758).

[335] Mr. Beal testified that Indian frustration with the government's behaviour in the treaty relationships and the starvation that resulted from a breach of Treaty 6 were factors that led to Indian involvement in the 1885 North-West Rebellion (transcript volume 39, pp. 5759-5764; S-17, pp. 50-53).

[336] On cross-examination, Mr. Beal agreed that both the government and the Cree expected that there would be a gradual transition to agriculture (transcript volume 40, p. 6019). He also agreed that Treaty 6 states that agricultural implements and livestock would be provided upon settlement on reserves (transcript volume 40, p. 6020).

[337] On cross-examination, it was pointed out to Mr. Beal that an article he relied on in his report with regard to starvation in the Hobbema area actually dealt with Bloods, Blackfoot, and Stoneys, not Cree. A second article dealt with Chief Bobtail of the Hobbema area, and contained no indication of the Cree there suffering hunger or starvation (transcript volume 40, pp. 6034-6037; S-17, pp. 47-48; tab 189).

[338] Mr. Beal also agreed that one could not use an example of hunger or starvation in one area and then presume the presence of similar conditions in another area (transcript volume 40, pp. 6037-6038). His rebuttal report mentioned several incidents of hunger or starvation regarding the Blackfoot in 1880; at Crooked Lakes, east of Regina, in 1883; at Indian Head, Saskatchewan in 1884; and in the Battleford, Saskatchewan area (transcript volume 40, pp. 6041-6042; S-17, rebuttal report, pp. 16-21; tabs 61 and 72; S-17, expert report, tab 190).

[339] Dr. Carl Beal prepared a report and testified about post-Treaty 6 events and the government's record in fulfilling its treaty obligations. He began his testimony by detailing the specific economic promises contained in Treaty 6 (transcript volume 44, pp. 6443-6450; S-31, pp. 10-11).

[340] According to Dr. Beal, the government knew that the terms of Treaty 6 were "manifestly inadequate for homestead agriculture" (S-31, p. 9). The Cree were not fully knowledgeable about the requirements for developing an agricultural base, and had to trust that what the government offered was sufficient (transcript volume 45, pp. 6562-6563).

[341] Dr. Beal testified that by 1876, an alarm had been raised within government circles as to the extent of the diminution of the buffalo (transcript volume 44, p. 6454). However, he also noted that the government was caught off guard by how rapidly the buffalo disappeared (transcript volume 44, p. 6452; S-31, p. 11).

[342] In Dr. Beal's opinion, the provisions procured by the government were inadequate. He referred to Dewdney's Annual Report for 1880, where Dewdney observed that there

was starvation and a need for continuous assistance (S-31, p. 13; tab 15). However, the part of Dewdney's report which is excerpted in Dr. Beal's report refers to the Blackfoot and Assiniboine, not the Cree.

[343] Dr. Beal referred to a letter, dated September 30, 1880, written by Inspector Wadsworth, which indicated that the three bands at Peace Hills "expressed great dread of suffering and starvation, which they fear is in store for them the coming winter" (S-31, p. 14; transcript volume 44, pp. 6476-6482). However, no evidence was provided to show that this, in fact, came to pass.

[344] Dr. Beal also cited articles from Frank Oliver's Edmonton *Bulletin* on the topic of famine and the distressed conditions of the Indians in the Edmonton area (S-31, pp. 15-18; transcript volume 44, pp. 6485-6507).

[345] In Dr. Beal's opinion, the government had a starvation policy. It was designed to force the Indians to settle on reserves, and to attempt to restrict movement between reserves by Indians who were developing a political movement to secure a greatly enlarged Indian territory and to revise the treaty's terms (S-31, p. 18; transcript volume 44, pp. 6512-6519).

[346] According to Dr. Beal, after the 1885 Northwest Rebellion, the government implemented a reward and punishment policy. Dr. Beal referred to Dewdney's Annual Report for 1885-1886, which specifically mentioned rewarding faithful Indians and withholding annuities from those who had participated in the Rebellion (S-31, pp. 18-18; tab 32; transcript volume 45, pp. 6519-6525 and 6555-6559).

[347] Dr. Beal also addressed the government's support of agricultural development, in particular as it pertained to the provision of tools, implements, and livestock. Dr. Beal referred to the February 3, 1883 edition of the Edmonton *Bulletin*, which published an open letter to John A. Macdonald, outlining the grievances of Indians in the Edmonton area (S-31, pp. 20-22; tab 39; transcript volume 45, pp. 6541-6548).

[348] In Dr. Beal's opinion, the government's policy in the years following Treaty 6 was largely shaped by the desire to reduce expenditures in terms of provisions, administration, equipment, and livestock (S-31, pp. 26-29).

[349] Dr. Beal's evidence also dealt with the government's administration of reserves. He maintained that the government's delay – until 1885 – in surveying lands for reserves at

Hobbema led to confusion amongst the Cree. The delay also had a negative affect on their farming efforts (S-31, pp. 30-31).

[350] Dr. Beal considered land surrenders and band amalgamations for the period 1904 to 1919. In his opinion, the land surrenders were not carried out for the benefit of the Indians, but rather to obtain land for settlement and generate revenue to offset the costs of Indian administration (S-31, pp. 79-114).

[351] Dr. Beal also covered the Greater Production Scheme, which ran during the time of the First World War. The program had three components: encouraging Indians to increase their crop production; leasing reserve lands to non-native farmers for cultivation and grazing; and establishing greater production farms on Indian lands (S-31, pp. 117-136).

[352] On cross-examination, Dr. Beal agreed that the Greater Production Scheme was beneficial in that it resulted in the development of considerable capacity, a half a dozen greater production farms, and also generated revenue from grazing and farming leases for the Hobbema reserves (transcript volume 51, p. 7581).

[353] Dr. Beal examined Samson, Ermineskin, Louis Bull, and Pigeon Lake band trust accounts for the period 1901 to 1927. He concluded that the government used band revenues to defray administration costs at the Hobbema Agency (S-31, pp. 119-128).

[354] Dr. Beal also examined Indian incomes at the Hobbema Agency for the period 1914 to 1939. He concluded that the gap between per capita incomes of all Albertans and the Indians at Hobbema remained large. He also concluded that this was a period of relative economic stagnation at the Hobbema Agency, alleviated somewhat by wartime inflation and the 1920s boom (S-31, pp. 129-136).

[355] Dr. Flanagan testified for the Crown on the issue of post-treaty events and government conduct (C-286). In his opinion, Dr. Beal took an “expansive” view of the government’s treaty obligations. The general language used in some of the treaty’s clauses, such as the famine and medicine chest clauses, made it inevitable that a large amount of government policy would come into play in the fulfilment of treaty obligations (transcript volume 153, p. 21200-21202; C-286, pp. 39-41).

[356] In his report, Dr. Flanagan outlined the government’s relief efforts during the famine crisis that resulted from the disappearance of the buffalo, starting in 1879. According to Dr. Flanagan, objective difficulties existed in moving supplies. While the number of people

in need was not large, the magnitude of the territory, dispersion of people, and absence of infrastructure complicated efforts (transcript volume 153, pp. 21217-21224; C-286, pp. 50-56).

[357] In Dr. Flanagan's opinion, late 19th century attitude held that feeding people without requiring work was dangerous and that rations should be kept to a minimum so as to retain an incentive to work. At the same time, the government was also trying to economize (transcript volume 153, pp. 21225-21227).

[358] According to Dr. Flanagan, the Hobbema Agency data shows that the Cree of that area made a successful transition to their new agricultural life (transcript volume 21230-21236; C-286, pp. 59-65 and 119-121).

[359] Dr. Flanagan conceded that Dr. Beal was correct in pointing out, in his criticism of the government for delay in surveying the reserves, that the Department had its own team of surveyors and thus could have surveyed in advance of the Dominion Lands Survey. However, Dr. Flanagan maintained that it was still not possible to conduct an earlier land survey because the population was shifting and settlement was not complete until 1884 (transcript volume 153, pp. 21246-21248).

[360] With regard to agricultural development, Dr. Flanagan agreed with Dr. Beal that the market was “thin” prior to 1895. He pointed out, however, that transportation was limited until the railway linking Edmonton and Calgary was completed in 1891. Moreover, the land was sparsely settled. Dr. Flanagan’s understanding of the permit system, whereby Indians needed the agent’s approval in order to sell their produce or livestock, was that it was motivated by a paternalistic belief that they needed to be protected from unscrupulous traders, as well as a response to complaints from non-native farmers about subsidized competition. Dr. Flanagan did not consider that the pass and permit systems had a stunting, or negative, effect on the development of agriculture on the Hobbema reserves. He acknowledged that, in light of the policy’s discontinuation, that perhaps criticism of it was justified (transcript volume 153, pp. 21256-21260; C-286, pp. 85-89 and 93-94).

[361] On the issue of land surrenders during the period 1904 to 1914, Dr. Flanagan concluded that the government followed the process required by law and never forced Indians to sell their land (transcript volume 153, pp. 21267-21270; C-286, pp. 94-108).

[362] With regard to Dr. Beal’s economic analysis of the Hobbema Agency, Dr. Flanagan’s opinion was that there was substantial progress made on the reserves and their development. He criticized Dr. Beal’s per capita income analysis for failing to take into

account “in kind” income of Indians on reserves – things such as medical benefits and tax exemptions (transcript volume 153, pp. 21275-21297; C-286, pp. 109-116).

vi. Contact

[363] The evidence of three experts dealt with the issue of contact: Professor Ray, Ms. Holmes, and Dr. von Gernet.

[364] The Abstract at the outset of Professor Ray’s report states that the Aboriginal Nations of the Western Interior had established “enduring relations with European newcomers by the second half of the 17th Century through the fur trade” (S-3, pp. ii, 3). In his testimony, Professor Ray divided contact into three phases: pre-contact, proto-contact, and contact. During pre-contact, aboriginal people have no knowledge about Europeans, and thus are not influenced by them in any way. During proto-contact, aboriginal people begin to learn about Europeans, and begin trading with them through aboriginal middlemen, or trading specialists. The initial fur trade was between aboriginal traders and European traders, with the aboriginal traders collecting the furs from their aboriginal clients (transcript volume 22, pp. 2808-2811).

[365] In Professor Ray's opinion, first contact between the Cree and Europeans, outside of Cree territory, was during the period from the 1650s to the 1680s. Contact within Cree territory occurred when inland trading posts were set up by the Europeans – both British and French expansion – by the end of the middle of the 18th century (transcript volume 22, pp. 2811-2813; pp. 2855-2857).

[366] Ms. Holmes described the pre-contact period as a time when aboriginal people came into contact with European physical goods from the fur trade, but did not actually come into direct contact with Europeans (although, presumably, some number of aboriginals must have had face-to-face contact in order to obtain the European trade goods) (transcript volume 27, pp. 3736-3737).

[367] Ms. Holmes places the earliest date of contact as 1690, when the Hudson's Bay Company established trading posts along Hudson Bay. Significant contact took place about a century later, when the HBC and North-West traders (from the east) built inland posts along the Saskatchewan River. This contact took place, in her opinion, during the period of the 1770s to the 1790s (transcript volume 27, pp. 3737-3738).

[368] In her testimony, Ms. Holmes interpreted an excerpt from a book by historian John Milloy to the effect that he used 1770 as the date of first contact. Later, in cross-examination, she conceded that she had misread the quotation, and that Milloy actually said that first contact occurred between the Cree and Europeans in 1670 and that the Cree moved onto the plains in 1770 (transcript volume 27, pp. 3739-3740; volume 29, pp. 4090-4091; S-12, tab 18, p. 118).

[369] According to Ms. Holmes, significant contact entails the presence of European people and their trade goods in substantial quantity that leads to some kind of impact and the formation of lasting relationships. She considered that European trade goods did not have a significant impact on the Cree until towards the end of the 1700s. Ms. Holmes conceded that European trade goods were significant to the Cree qua traders, but reiterated that there was not European contact in their territory – the Saskatchewan country — until the 1770s to 1790s (transcript volume 29, pp. 4077-4080; volume 31, p. 4304).

[370] Ms. Holmes refused to comment on the impact of European goods on aboriginals before face-to-face contact as that was not her focus in writing her report. She indicated in her testimony that there was considerable academic controversy over this ethnographic issue, but did not get into any specifics (transcript volume 29, pp. 4080-4081; volume 30, p. 4106).

[371] With regard to Mandelbaum, Ms. Holmes testified that his views that first contact occurred between 1640 and 1690, and that tribal locales and culture changed greatly under English influence are not accepted by all scholars and mentioned Professor Ray in particular. Ms. Holmes appeared to retreat somewhat from this opinion when she stated that most of the disagreement can be found in primary sources (transcript volume 30, pp. 4111-4128; C-15).

[372] Dr. von Gernet opined that developments in the archaeological record show that degrees of contact and European influence on aboriginal societies have been greatly underestimated in scholarly circles. He agreed that contact involves several stages, and is not simply a matter of the arrival of Europeans or face-to-face meetings. He identified the proto-historic as a transition period, between the first evidence of European influence and the period that marks the beginning of the written record. In Alberta, according to Dr. von Gernet, the proto-historic period began in the late 17th and early 18th centuries. If pressed, Dr. von Gernet stated that he would choose 1670 as a convenient date for contact as that marks the arrival of Europeans and the establishment of the HBC. Immediately following the HBC's charter in 1670, there was considerable European influence on the Cree, who acted as middlemen in the trade. Dr. von Gernet testified that no such category as "significant contact" exists in his academic profession; nevertheless, he considers the fur

trade to amount to significant contact (transcript volume 166, pp. 22994-22999; volume 173, p. 24170). He stated that he would prefer, as an anthropologist, to have a range of dates for contact, but reiterated that 1670 is an appropriate date as it marks the beginning of intensive fur trade activities (transcript volume 173, pp. 24164-24182).

[373] On cross-examination, Dr. von Gernet said that there could be no contact between the Plains Cree and Europeans in 1670 in Alberta precisely because there were no Plains Cree living in Alberta at that time (transcript volume 173, pp. 24168).

[374] Dr. von Gernet disagreed with Ms. Holmes's assertion that the late 1700s / early 1800s are appropriate dates for contact and could not think of any other scholars who would agree with her on that point (transcript volume 166, pp. 23005-23006).

vii. Territory

[375] Ms. Holmes testified at length on the subject of Cree territory. Her report includes the statement that since at least the 1750s, and probably much earlier, Cree and Assiniboine had been recorded as residing in the area 50 to 60 miles south of Edmonton

– where the Samson, Ermineskin, Louis Bull, and Montana reserves are located (S-12, p. 72). She relied on the work of Dale Russell in his 1991 work, *Eighteenth-Century Western Cree and their Neighbours* who, in turn, relied on the journal of HBC fur trader Anthony Henday. Henday travelled inland to the Red Deer River area from the HBC's post at York Factory with a group of Cree in 1754-1755 in order to make contact with other aboriginal groups for the purpose of establishing trading ties. Russell concluded, based on the Henday journal, that the Cree were documented as living peacefully in central Alberta in the mid-1700s.(transcript volume 27, pp. 3631-3632).

[376] The Henday journal entry reads as follows:

> [December]26 & 27 Thursday & Friday. Killed 2 Waskesew and 2 Moose: I set a Wolf-Hap. I asked the Natives why they did not Hap Wolves; they made Answer that the Archithinue [Blackfoot?] Natives would kill them if they trapped in their country. I then asked them when & where they were to get the Wolves &c, to carry down in the Spring. They made no answer; but laughed to one another.
>
> 28. Saturday. Frost & snow & very cold weather: I travelled 5 Miles N.E.b.N. Level land, & narrow ledges of poplar, Alder & trees. got a Wolf in my Hap, & set 2 morel; the Wolves are numerous. An Indian told me that my tent-mates were angry with me last night for speaking so much concerning Happing, & advised me to say no more about it, for they would get more Wolves, Beaver &c. from the Archithinue Natives in the spring, than they can carry.
>
> (S-12, surrebuttal, p. 11; tab 17, p. 344; C-322, p. 5; tab 4, p. 344)

[377] Ms. Holmes acknowledged that this entry shows the Blackfoot had allowed the Cree into their territory, where Henday travelled, but she considers that to be an instance of shared territory (transcript volume 26, pp. 3613-3614).

[378] Ms. Holmes also relied on a 1987 article by James Smith, “The Western Woods Cree: Anthropological Myth and Historical Reality” (insert tab reference, S-12). Smith contends that the archaeological evidence confirms that the Cree were pre-contact occupants of northern Manitoba, Saskatchewan, and the Lac la Biche area of Alberta (transcript volume 27, pp. 3631-3632; S-12, surrebuttal, p. 4).

[379] In her surrebuttal report, Ms. Holmes responded to Dr. von Gernet’s reliance on the 1986 paper by Alberta archaeologist Jack Brink, titled “Dog Days in Southern Alberta” (C-16). Brink mapped the distributions of aboriginal groups in the northwestern plains, circa 1700 (C-16, p. 57). His work places the Cree in Saskatchewan, in the vicinity of present-day Prince Albert. Sarsi and Blackfoot territory covers the area between Edmonton and Red Deer, where the Samson Cree Nation Reserve is presently located.

[380] Ms. Holmes, in her response, noted that locating the Cree was not the focus of Brink’s study. She emphasizes the caveats Brink placed on his work and the inherent difficulties in mapping tribal distributions, which he called a “best-fit scenario.” Ms. Holmes also highlighted Brink’s observation that applying the European concept of territory may not be appropriate (S-12, surrebuttal, pp. 5-7; C-16, pp. iii, 55, and 58-60).

[381] In her testimony, Ms. Holmes relied on the work of Professor Ray, James Smith, and Jack Brink to support her opinion that the Cree resided near Edmonton in the 1750s. However, she was unable to find any references in their work that supported her position (transcript volume 30, pp. 4176-4179).

[382] Ms. Holmes relied on a map in the 1940 book *The Plains Cree*, by anthropologist David Mandelbaum to conclude that the Cree occupied central Alberta in 1770 (C-15, p. 7). She also relied on journals of fur traders and officers for their references to sightings of Cree at various trading posts from the1790s to the 1820s.

[383] Ms. Holmes also relied on references to Cree leader Maskepetoon in the journals of Methodist missionary Robert Rundle to place the Cree in central Alberta. The first references place Maskepetoon in Alberta in the 1840s (S-12, pp. 73-77; transcript volume 27, pp. 3651 and 3680; volume 30, pp. 4248-4249).

[384] Ms. Holmes's main point about Cree territory, however, seems to be that they occupied central Alberta at least by the 1750s.

[385] While Ms. Holmes was the primary expert witness for Samson on the issue of territory, Professors Little Bear and Ray also offered some opinions on this matter.

[386] Professor Little Bear testified that the Blackfoot understood the concepts of territory and dominion over territory (transcript volume 132, pp. 18577-18578).

[387] Professor Little Bear submitted a paper to the Royal Commission on Aboriginal Peoples, titled “In a Nutshell: The Relationship of Aboriginal People to the Land and the Aboriginal Perspective on Aboriginal Title” (an excerpt was marked as C-225). He read into the record a portion from the paper’s section describing the Blackfoot understanding of their traditional territory:

> Traditional Blackfoot territory stretched approximately from the present North Saskatchewan River in the north, in present day Alberta, to the Yellowstone River in the south, in present day Montana, from the continental divide of the Rocky Mountains in the west, to a little bit east of present day Alberta-Saskatchewan border. Blackfoot legend has it that this is where the Creator placed the Blackfoot people. Blackfoot memory traces the occupation of this territory long before the arrival of Europeans to America. Medicine wheels, rudimentary pottery making, pictoglyphs [*sic*] and buffalo jumps bear witness to this memory. Cree neighbours to the east refer to the Blackfoot as the “Old Ones,” implying that they have been in the country even before they, the Cree, came out onto the plains.
>
> (transcript volume 132, pp. 18578-18579; C-225, p. 8).

[388] He testified that the Blackfoot considered the Cree to be their neighbours to the north and northeast of this traditional territory (transcript volume 132, p. 18595).

[389] During his testimony, Professor Little Bear said that while Aboriginal people recognized that different groups had different territories, the edges of these territories were not fixed, but rather overlapped; he characterized these as “joint-use areas” (transcript volume 132, pp. 18531-18537; pp. 18581-18585).

[390] This concept of overlapping territories was not mentioned in Professor Little Bear’s RCAP submission. His explanation to the Court was that he wrote his paper strictly from a Blackfoot perspective; if he had been asked to write for both Blackfoot and Cree, then he would have included the notion of overlap (transcript volume 132, pp. 18601-18604). I observe, however, that he did testify that the notion of overlap is a recognized part of Blackfoot oral tradition and mind set (transcript volume 132, pp. 18597-18598).

[391] Professor Ray also testified about territory. In his report, Professor Ray writes that it is not possible to determine precisely when the Cree arrived in the Treaty 6 region; however, documentary evidence indicates that they occupied most of the central and

eastern parts of the area before European contact (S-3, p. 1). His report reproduces a map, Figure 1, showing the distribution of Indians trading at York Factory from 1714 to 1717. The area between the branches of the North Saskatchewan River is identified as Blood and Blackfoot territory; Cree territory is depicted with a western boundary penetrating very slightly into present day Alberta, but all north of the North Saskatchewan River. An excerpt from his book *Indians in the Fur Trade* contains two maps showing Cree distributions for 1790 to 1821 and tribal distributions for 1821 (C-9, pp. 100-101, figures 32 and 33). The first map shows the Cree, in what is now the province of Saskatchewan, occupying the North Saskatchewan River and territory to the north. The western boundary extends slightly into northeastern Alberta, and the eastern boundary extends across Manitoba. The second map depicts the Cree in central Saskatchewan and northeastern Alberta, and the Blackfoot in central and southern Alberta.

[392] Professor Ray also referred to the Henday journal of his travels in 1754-1755. He characterized the Cree access to Blackfoot territory as a sharing of territory, based on their economic symbiotic relationship (transcript volume 22, pp. 2847-2850; volume 25, pp. 3358-3359).

[393] The Crown tendered Dr. von Gernet to opine on the question of Cree territory. In his opinion, the Cree are not indigenous to central Alberta, and they were not there until a

"considerable period" after contact (C-323, p. 5; transcript volume 166, p. 23014). Dr. von Gernet believes the Cree presence in central Alberta came about as a result of their participation as middlemen in the fur trade. According to Dr. von Gernet, the ethnohistoric record suggests that the territory between Edmonton and Red Deer was Blackfoot country in the mid-18th century (C-322, p. 1).

[394] Dr. von Gernet cited three scholars who adhere to what he calls the traditional view, *viz*., that Cree migration into more westerly parts of present day Canada is a post-contact phenomenon associated with their role in the fur trade. Mandelbaum postulates that the Cree were west only so far as the area between Hudson's Bay and Lake Superior; Professor Ray, in the 1974 edition of his book *Indians in the Fur Trade*, situated the western limits of the Cree as Manitoba; and historian John Milloy placed the Cree no further west than the Winnipeg River (C-322, p. 4).

[395] Dr. von Gernet noted that Professor Ray modified his view in the introduction to the 1998 edition of his book. In the new introduction, Professor Ray stated that there is convincing archaeological evidence that the Cree lived well to the west of the Manitoba / Saskatchewan provincial boundaries long before indirect trading contact began, and that the Cree likely moved west in a series of migration waves (C-9, xxi-xxii).

[396] Dr. von Gernet referred to Smith and Russell, who challenge the traditional view of the Cree western limits; they argue that the Cree were as far west as Alberta at the time of, or prior to, European contact. As noted above, Ms. Holmes relied on the work of these two scholars.

[397] Dr. von Gernet challenged Russell's interpretation of the Henday journal as support for the contention that the Cree were living in central Alberta in the mid-1700s. In Dr. von Gernet's opinion, the journal suggests that the Cree travelling with Henday knew that they had entered the territory of a neighbouring group. Dr. von Gernet interpreted the journal excerpt noted above as indicating that the Cree were reluctant to trap wolves for their pelts in the Blackfoot territory because that would jeopardize their trade relationship and middleman position (C-322, p. 5).

[398] Dr. von Gernet also challenged Smith's conclusion that archaeological evidence shows the Cree were the pre-contact inhabitants of northern Manitoba, Saskatchewan, and the Lac la Biche area of Alberta. While Dr. von Gernet agreed that the archaeological record supports a Cree presence in Manitoba and Saskatchewan prior to the European fur trade, he contended that it cannot be extended into Alberta (C-322, p. 6).

[399] Dr. von Gernet relied on the work of David Meyer, who he described as an authority on the archaeology of the Cree. In Meyer's 1987 article "Time-Depth of the Western Woods Cree Occupation of Northern Ontario, Manitoba, and Saskatchewan," he noted there is a general consensus that Cree ancestors produced pre-contact and proto-historic archaeological material known as Selkirk. Meyer mapped Selkirk distribution through western Canada and found it compared favourably with the known area of the Western Woods Cree occupation in the early contact period, 1690-1720 (C-322, p. 16, Figure 1). Meyer concluded that the Cree had been as far west as Saskatchewan centuries before European contact, but he did not find any Selkirk remains in Alberta (c-322, pp. 8-9).

[400] Returning to Smith, recall that Smith's 1987 article contends that Cree cultural material (Selkirk) was found as far west as the Lac la Biche area in Alberta. According to Dr. von Gernet, Smith relied on Wright, who, in turn, said that the western limit of Selkirk remains was Île-à-la-Cross, Saskatchewan. Meyer, however, examined the Lac la Biche material and concluded that it was not Selkirk (C-322, p. 9).

[401] With regard to Brink's paper, "Dog Days in Southern Alberta," and his map showing tribal distributions circa 1700, Dr. von Gernet contended that the Cree were not the focus of Brink's work – as Ms. Holmes suggested – because they were not within his

geographical and temporal focus. As for Brink's caveats, Dr. von Gernet asserted that uncertainty is inherent in the task of reconstructing aboriginal history and that should not preclude attempts to map aboriginal distributions and territories (C-322, pp. 10-11).

[402] Dr. von Gernet also relied on the Magne maps (C-322, pp. 17-20. Figures 2-5; see also C-325, C-326, and C-327). The maps are the product of a survey of 25 scholars in Alberta and Saskatchewan, who were sent blank maps and asked to outline aboriginal distributions for 1700 to 1850 (transcript volume 174, pp. 24291-24310; C-322, pp. 11-12).

[403] According to Dr. von Gernet, the maps suggest that the area where the Samson Cree Nation reserve is now located was well outside Cree territory in 1700 and for a considerable period after. The western limit of the Cree, according to the 1800 map (Figure 4), is in the northeastern portion of Alberta.

[404] Dr. von Gernet also considered the use of Cree place names in determining territorial distributions. According to Dr. von Gernet, place names – or toponyms – are among the least valuable indicators of antiquity. He noted that people routinely name places whenever they migrate out of traditional territories, even in recent times. In his opinion, Cree toponyms shed no light on whether the Samson Cree Nation Reserve and

surrounding lands were part of Cree territory at the time of European contact (C-322, pp. 12-13).

viii. Trade

[405] Ms. Holmes provided evidence on Cree transborder trading activity from 1790 to 1900, from the Lake of the Woods in the east to the Rocky Mountains in the west (S-12, p. i). Ms. Holmes testified that trade was an integral feature of Plains Cree and Samson Cree economic and political life (transcript volume 28, pp. 3831-3832).

[406] For aboriginal trade practices prior to “early contact,” Ms. Holmes relied on the work of archaeologist J.V. Wright in the *Historical Atlas of Canada: From the Beginning to 1800* (S-12, tab 3, Plate 14). Wright’s map gives an overview of some 12000 years of the movement of trade goods on the North American continent. Ms. Holmes testified that the map does not delineate aboriginal tribal or ethnic divisions, beyond stating that trade occurred between Algonquian and Siouian speakers (transcript volume 28, p. 3842; volume 30, p. 4251). No definition of the map’s term “early contact” was provided either (transcript volume 30, pp. 4145-4147 and 4153). Ms. Holmes also agreed that it was the trade goods, not the people, that moved over the long distances shown on the map (transcript volume 30, pp. 4149-4150).

[407] According to Wright, the bulk of the trade was in perishable and semi-perishable items; they have essentially disappeared from the archaeological record. Evidence of surviving trade goods, such as those made of stone, metal, or shell, demonstrates they were often transported hundreds or thousands of kilometres from their source. Trade goods were usually finished products and were traded between neighbouring people on their seasonal rounds of hunting and fishing (S-12, tab 3).

[408] In her testimony, Ms. Holmes proposed that the Cree traded in minerals prior to 1770. She relied on the *Historical Atlas*, which she said referred to trade in minerals in the general area of Algonquian speakers (transcript volume 30, p. 4252). Ms. Holmes also relied on a book by fur trader Edwin Denig, who wrote *Five Tribes of the Upper Missouri* in 1855. Denig traded in American territory on the Missouri River from 1830 to 1850. Denig described Cree territory and noted that some springs were “impregnated with saline and sulphurous substances and from some a great quantity of good salt is produced by the natives” (S-12, p. 67; tab 146, pp. 101 and 104). Based on this, Ms. Holmes surmised that Denig suggested there was some exchange or trade in salt by the Cree and specifically mentioned minerals in a list of aboriginal trade goods (transcript volume 28, p. 3922; volume 29, p. 4056; and S-12, p. 164). On cross-examination, however, Ms. Holmes conceded that Denig did not say salt was traded. Indeed, she testified that she was

unaware of any record of trade in salt or any other minerals (transcript volume 30, pp. 4252-4255).

[409] Ms. Holmes testified that the Cree participated in the Mandan-Hidatsa trade network from pre-contact to 1818. The Mandan-Hidatsa were an aboriginal group with a major trading centre located at the confluence of the Missouri and Knife Rivers. This trading centre existed from pre-contact times to the 1830s (transcript volume 28, pp. 3857-3859). Ms. Holmes noted the work of historian John Milloy, who observed that horses were the most significant item of aboriginal trade and were originally obtained from the Spanish to the south (S-12, p. ii). Ms. Holmes testified that ethnologist John Ewers noted the Cree got horses from the Mandan-Hidatsa villages in exchange for European trade goods, which the Cree obtained based on their role as middlemen in the European fur trade (transcript volume 28, pp. 3861-3862).

[410] Ms. Holmes relied upon the journals and observations of fur traders and explorers for her conclusions on the nature of trade in early and pre-contact times. For example, she referred to Alexander Henry the Elder and his descriptions in 1775 of the rice trade at the Lake of the Woods (S-12, p. 5). Ms. Holmes also referred to La Vérendrye's descriptions of horse trading at the Mandan-Hidatsa villages in 1741, an activity in which his men also

participated (S-12, pp. 6-7). She also relied on Anthony Henday's journal which shows the Cree were trading as middlemen in the fur trade in 1754 (transcript volume 28, p. 3871).

[411] According to Ms. Holmes, the Cree and Assiniboine dominated inland trade. They traded with plains people for goods secured from York Factory, the HBC post on Hudson Bay (S-12, p. 12). The Cree shifted their focus to the provisioning trade during the 1770s to 1790s, once Europeans set up inland posts in the Saskatchewan country (transcript volume 30, p. 4155).

[412] Ms. Holmes's evidence also dealt with the issue of cross-border movement and trade. She testified that Cree from the Lake of the Woods area travelled to the Mandan-Hidatsa villages to trade in 1690, relying on the journal of trader Henry Kelsey (S-12, p. 6). On cross-examination, she was unable to say whether these people were ancestors of the Plains Cree (transcript volume 29, pp. 4068-4074). And, further, this trade included European goods (S-12, p. 6, surrebuttal, p. 12).

[413] Ms. Holmes cited an 1833 entry from the Edmonton Post Journal to tie Cree, who were trading in the Edmonton House vicinity, to trips made to the Mandan-Hidatsa villages for trading purposes (transcript volume 28, pp. 3916-3917; S-12, p. 65; S-12, tab 251). The

entry, however, refers to a large party of Crees who have gone to the Mandans to seek revenge for an insult offered the previous year.

[414] Ms. Holmes provided several historical references to Cree chief Maskepetoon to support her assertion that he was involved in cross-border travel and trade (S-12, pp. 69-83; surrebuttal, pp. 8-10). Most references are lacking in detail. Evidence regarding Maskepetoon's visit to Washington D.C. does not include any reference to trade. One reference to Maskepetoon engaging in trade comes from the Palliser Expedition, and notes that he had come to trade with James McKay at Qu'Appelle Lakes, in Saskatchewan, in September 1857 (S-12, p. 80; transcript volume 28, pp. 3934-3936). In another reference, Denig described Maskepetoon in rather unfavourable terms and noted that he was despised by traders (S-12, tab 22, p. 88).

[415] Ms. Holmes also provided evidence on post-Treaty 6 trade practices and movement. She testified that Erasmus had been retained by the government to convince aboriginal people from the Edmonton area, who had travelled south of the border, to return north and settle on reserves (transcript volume 29, pp. 4004-4005). On cross-examination, she conceded that she had misread the documents and that Erasmus had been charged with moving aboriginal people from the area around Fort Walsh, at Cypress Hills in present-day Saskatchewan, to their reserves (transcript volume 30, pp. 4257-4264).

[416] In her report, Ms. Holmes asserted that in 1881 and 1882, a large camp of Crees, including members from the Edmonton and Bear Hills area, were congregated on the Missouri River, where they hunted and traded (S-12, p. 123). She relied on a letter, dated December 14, 1881, from Indian Agent Denny at Fort Walsh to Indian Commissioner Dewdney, describing this camp. However, it appears that it was Big Bear and his people who were camped on the Missouri. The reference to Crees from the Edmonton House area indicates that they were camped around Fort Walsh; however, the letter states that when their provisions ran out, they would cross the border for buffalo and whiskey (S-12, tab 466). There is nothing in the letter about cross-border trade.

[417] Ms. Holmes's report contains a section on Cree deportations (S-12, pp. 148-156). The references are, however, to Big Bear and his people, not any Samson members.

[418] Dr. von Gernet also testified about Cree trade practices (C-323). In his expert report, Dr. von Gernet states that there is no question that the Cree have always engaged in trade with one another, as well as with other groups. In his opinion, trade is a human universal and that all human groups have engaged in trade of some form. The issue is the degree of trade and the role it played in a society's culture (C-323, pp. 9-10). Anthropologists

assess this by a comparative approach (transcript volume 166, pp. 23016-23017 and volume 174, pp. 24363-24364).

[419] According to Dr. von Gernet, there were two distinct cultural adaptations on the Plains: riverine horticulturalists of the Missouri and its tributaries, and nomadic foragers, who lived primarily by hunting (C-323, pp. 11-12). The Mandan-Hidatsa were an example of the former cultural adaptation. They led a semi-sedentary life and engaged in horticulture, producing beans, corn, and squash. Surpluses were stored for future use and traded to their non-agricultural neighbours in an elaborate trade system (transcript volume 174, p. 24382).

[420] Dr. von Gernet agreed that by the late 18th and early 19th centuries, Assiniboine and Cree hunters were bringing meat and hides to trade at the Mandan-Hidatsa trading centres (transcript volume 174, p. 24366). He also testified that there are sporadic references to Cree from Alberta, who have adopted horses by then, travelling south in the 19th century to the Dakotas; however, he could not say whether this was a regular practice (transcript volume 174, pp. 24378-24379). In Dr. von Gernet's opinion, the Cree were not dependent upon the Mandan for their survival; the trading trips were less important to the Cree than they were to the Mandan (transcript volume 174, pp. 24382-24384).

[421] In Dr. von Gernet's opinion, Plate 14 in the *Historical Atlas of Canada*, upon which Ms. Holmes relied, cannot serve as evidence of pre-contact trade among Plains Cree. The map does not provide ethnic or cultural identification, nor does it show what, if any, goods originating in Alberta were traded elsewhere; it does suggest, however, that groups in Alberta received materials such as obsidian and silica. In Dr. von Gernet's opinion, this map only supports the conclusions that there was pre-contact trade, and that the raw materials or finished goods travelled over long distances (C-323, pp. 10-11; transcript volume 166, pp. 23019-23020).

[422] Dr. von Gernet opined that what made Cree trade practice distinctive, was their role as middlemen in the European fur trade; however, he could not extend that back into pre-contact times (transcript volume 174, pp. 24368). He testified that the Cree were well known as middlemen by the middle of the 18th century and that trade was important to them by that time (transcript volume 174, pp. 24376-24377).

[423] In Dr. von Gernet's opinion, there is no evidence, or record, of the Cree trading in minerals. They did not extract and trade subterranean resources like oil or gas; he could find no evidence that they traded in salt either (transcript volume 166, p. 23019; C-323, p. 13).

F. Other Evidence: Elders and Lay Witnesses

I. Territory

[424] Harvey Buffalo provided some evidence on Cree territory. He concluded that the Cree had historically lived in central Alberta, dating from the mid-1750s. Mr. Buffalo based his opinion on MCC videotapes of elders, stories from his great-grandmother Mary Buffalo, as well as his own reading of archival documents and history books (transcript volume 109, pp. 15276-15283). Mr. Buffalo testified that the elders identified the Samson Cree as having lived in the areas of Buffalo Lake, Camrose, Pigeon Lake, and Gull Lake. I note, however, that the specific videotapes were never identified or marked as exhibits.

[425] Mr. Buffalo prepared and tendered a volume of historical documents relating to Cree chief Maskepetoon (S-174). The portions pertaining to Maskepetoon, for the most part, post-date the 1830s. On cross-examination, Mr. Buffalo agreed that some of the historical references indicate Maskepetoon was killed in 1869 in Blackfoot territory, which included the Red Deer River (S-174, tab 55, p. 115).

[426] Mr. Buffalo relied on his review of Treaty paylists to identify Kanatakasu, or Samson, as succeeding Maskepetoon as leader of the group now known as the Samson Cree (transcript volume 112, p. 15608). He tendered a volume, which he prepared, of historical references relating to Samson (S-177). The references to Samson being present in central Alberta do not predate 1844.

[427] Bruce Cutknife testified about two maps he had prepared showing Cree place names for the Maskwachees, or Bear Hills, area and south-central Alberta (S-138 and S-139). His main sources for the names were the late Elder Louis Sunchild of the Sunchild Reserve and the late Jackson Roan (transcript volume 103, p. 14555). Mr. Cutknife also relied on a book called *The Name Places of Alberta* (transcript volume 103, p. 14557). The majority of the names on Mr. Cutknife's maps come from Cree syllabics written by Elder Sunchild (transcript volume 103, p. 14558). Mr. Cutknife testified that he also had discussions about these Cree names with other Samson members, some now deceased. He named, in particular, his uncle Dolphus Buffalo and his aunt Alice Northwest. Other sources include members of other First Nations he has visited, MCC videotapes of elders and conversations during or after taping sessions, and an elder's speech to MCC students (transcript volume 103, pp. 14559-14560; volume 105, pp. 14712-14713; volume 107, pp. 14985-14990 and 15003-15004).

[428] Mr. Cutknife testified that the purpose of the maps was not necessarily to mark out Cree territory, but rather to set out Cree place names (transcript volume 103, pp. 14563-14564). Yet, he did testify that the area on the map marked S-139 would be part of what Samson considers its territory (transcript volume 103, p. 14556). However, Mr. Cutknife also testified that he could not say that the Cree used this area to the exclusion of all others. He stated that the Cree shared this territory with others since Creation, in times of peace and battle (transcript volume 108, pp. 15188-15189). Mr. Cutknife testified that he has heard that the Blackfoot once lived where the Cree are now. He also agreed that some places do not just have Cree names, and that the names often mean the same thing in the language of other First Nations, as well as Cree (transcript volume 108, pp. 15174 and 15188-15189). Indeed, he testified that Ponoka, located just south of the Samson Cree Nation Reserve, is a Blackfoot name meaning “elk” (transcript volume 107, p. 15016).

[429] With regard to time depth, Mr. Cutknife stated that the Cree names of S-139 predated European arrival (transcript volume 106, p. 14850). However, in later testimony, Mr. Cutknife said that “a great many” of the names predated European arrival; other names were obviously from a later time, for example trading post sites (transcript volume 107, p. 15036).

[430] Mr. Cutknife testified that, insofar as Cree use of Pigeon Lake is concerned, he has heard elders use the Cree words *kayas*, meaning “a long time ago,” and *metino kayas*, meaning “a very, very long time ago.” The former might mean 100 years ago, while the latter could mean several centuries (transcript volume 108, pp. 15131-15134). Later in his testimony, after the morning break, Mr. Cutknife said that elders have used the Cree word *kiyahte* to refer to how long Samson’s ancestors have been using the area depicted on the map S-138. *Kiyahte* is another word for “a long time” and can also be translated as “it has always been like that.” Mr. Cutknife interpreted that to mean well before European arrival. He suggested that these Cree words have been used by elders with regard to the majority of the areas marked on the map S-139 (transcript volume 108, pp. 15160-15162).

[431] Somewhat confusingly, Mr. Cutknife testified on cross-examination that there were not too many stories about Pigeon Lake where the elders would say “a long time ago” or “a very long time ago.” Instead, elders would just say the area was used for a “very long time ago.” He said the elders did not use words indicating the area had always been used by their ancestors (transcript volume 108, p. 15173). He also admitted that he had discussed the issue of time terminology with Samson counsel over the morning break (transcript volume 108, pp. 15170-15171).

[432] Samson Elders Pearl Crier and Monica Soosay also testified about life before Treaty 6 and the territory their ancestors occupied.

[433] Elder Crier testified that her sources for information were her father-in-law Johnny Crier and Maria Saddleback. Mr. Crier's source, in turn, was his father Macoskis, who lived at the time of Kanatakasu. Ms. Saddleback's sources were unnamed elders (transcript volume 86, pp. 12182-12185).

[434] Elder Crier testified that the way of life before Treaty 6 involved mostly hunting and berry picking. She identified Buffalo Lake, the North and South Saskatchewan Rivers, and the Red Deer River as areas where hunting and berry picking took place (transcript volume 86, pp. 12185-12186).

[435] Elder Soosay told the Court information she received from her grandmother Mary Simon and her stepfather Sam Saddleback. Elder Soosay's grandmother told her that the Cree would pick berries and hunt game at Buffalo Lake, trap and hunt at Pine Lake, and also visit Pigeon Lake. Her grandmother told her that they would travel as far to the east as Eagle Hills and Red Pheasant area and as far to the west as the mountains. Elder Soosay was unsure of how far to the north the Cree travelled, but said they went to a place where certain trees grow with sap the Cree would use to make sugar. Elder Soosay

testified that her grandmother told her the Cree would travel south of the Saskatchewan River; she also mentioned a “big river,” called *Mississippi* or *Ka-misak-sipi* in Cree. The elder’s grandmother also spoke of travelling south and meeting with Crow, Gros Ventre, and people who lived in earth lodges, the Mandans. Elder Soosay’s grandmother said that in the time of her father and grandfather, the Cree travelled to the edge of the ocean, which is called *kihcikamiy* in Cree. Her grandmother also told her about Battle River, Red Deer River, Lying Man River, Milk River, Elbow River, and the Ghost River (transcript volume 88, pp. 12337-12343).

[436] Elder Soosay did not know when her grandmother was born, but said Mary Simon was 12 at the time of the 1885 Rebellion and died in 1954 (transcript volume 88, p. 12358).

[437] Sam Saddleback, Elder Soosay’s stepfather, told her about the Cree using a buffalo jump. She said it is near Buffalo Lake, south of Alix and near Bashaw. She also said that perhaps the Blackfoot had also used the buffalo jump (transcript volume 88, pp. 12327-12328, 12360).

ii. Trade

[438] Most of the evidence on Cree trade and trading practices was adduced through the expert witnesses. No oral traditions were presented to the Court on this issue. Mr. Buffalo's volume on historical references to Maskepetoon (S-174), however, does contain two references to Maskepetoon and trade.

[439] The first reference is found in tab 1, an excerpt from the Dictionary of Canadian Biography, volume IX (1861-1870). The excerpt provides a brief biographical sketch of Maskepetoon. Maskepetoon was also known as Broken Arm or Crooked Arm, and his date of birth is given as "probably 1807 in the Saskatchewan River area" and his death is noted as having occurred in 1869 at "a Blackfoot camp in central Alberta." The trade reference is found in the excerpt's third paragraph, which notes,

> Late in 1831, while on a trading expedition to Fort Union on the Missouri River, Maskepetoon was invited to accompany three other chiefs, from the Assiniboin, Saulteaux, and Sioux tribes, to Washington, D.C., to meet President Andrew Jackson, who wanted to establish peaceful relations with the western tribes and also to impress them with the might of his government.
>
> (S-174, tab 1, p. 537)

[440] The other reference to Maskepetoon and trade lies in tab 4, which contains an excerpt from *Indian Life on the Upper Missouri*, by John Ewers. It refers to a man known as "Eyes on Both Sides", who was better known to traders by the name of Broken Arm (S-174, tab 4, p. 79).

iii. Post-Treaty 6 Events

[441] Samson led some evidence on post-treaty events and life from lay witnesses Barb Louis and Arrol Crier, and Elders Solomon Stone and Monica Soosay.

[442] Ms. Louis told the Court an oral tradition she heard on many occasions from her father and paternal grandfather. When the Indian Agent first arrived, the Samson people were hungry, so he killed some cows for them to eat. Some of the Samson people got sick and others died because they were not used to this sort of food (transcript volume 66, pp. 9588-9591 and 9717-9719).

[443] Ms. Louis told the Court that her grandfather used to talk about having to get a permit to leave the reserve. She testified that her father and grandfather spoke about having to get permits to sell cows or grain (transcript volume 66, pp. 9717-9720).

[444] Mr. Crier told the Court that the people would have to get permission from the agent to leave the reserve or sell things like their hay. He mentioned that people were starving because they no longer lived their traditional way of life. Mr. Crier also told the Court that Cree religious ceremonies were banned and that there is a story of a NWMP officer who

chopped down a Sundance lodge and told the people that it was wrong. Mr. Crier said his father told him that they could not speak Cree at boarding school and were punished when they did so (transcript volume 138, pp.18961-18962).

[445] Elder Solomon Stone, of Mosquito First Nation in Saskatchewan, testified during the Court sittings on the Samson Cree Nation Reserve in June 2000 (C-1092, tab 12). He was introduced by Chief Ben Weeni, of the Sweet Grass Reserve. Chief Weeni testified that he considered Elder Stone, who is Assinibione, to be a traditional elder (C-1092, tab 11, pp. 2517-2520).

[446] Elder Stone testified that his grandmother began teaching him stories when he was between 8 and 10 years old, and that she continued to do so until he was 18 (C-1092, tab 12, pp. 2606-2607).

[447] Elder Stone testified that his grandmother told him one story about events after treaty. She was 13 years old at the time of the events in the story (C-1092, tab 12, p. 2607). Her uncle was a man named Kahpinawayt (“Sheds Hair”). He had a sick daughter, but the ration agent refused to give him any food. His daughter died in the night. Later, tobacco was brought from Batoche so that the people would rise up and make war on the white

people. The chief gathered the men together to decide what to do. Kahpinawayt was given permission to deal with the ration agent.

[448] Kahpinawayt took a loaded gun and covered himself with a woolen blanket. He went to the ration house at dawn and knocked down the agent as the man returned from the barn with two pails of fresh milk. The agent was dragged down to the lake and left to be devoured by his pigs. The men ransacked the ration house.

[449] After, they moved camp toward the Battle River. They dug trenches and fought with the whites. When the fighting ended, they returned home. Kahpinawayt and another man were arrested and hung in public. The police confiscated all of the Indians' guns, so they continued to hunt with bows and arrows. In the spring, they received rations, but threw the bacon away (C-1092, tab 12, pp. 2616-2628).

[450] Elder Monica Soosay also told a Rebellion story, which she had been told by her grandmother, Mary Simon. Elder Soosay's grandmother and her people fled south of the border after the Indian Agent was shot because he was starving them. A Stoney man shot the agent, a man named Thomas Quinn. Big Bear, who was Mary Simon's grandfather, told

his people to flee south. They went to Montana, and when they eventually returned to Canada, they named their reserve Montana (transcript volume 88, pp. 12350-12357).

G. Findings

i. Treaty 6: Oral Traditions & Documentary Accounts

[451] The SCC's decision in *Delgamuukw*, *supra*, does not mandate blanket admissibility of oral history or oral tradition evidence; nor does it establish the amount of weight that should be placed upon such evidence by a trial judge. The decision merely speaks of "due weight." This does not amount to equal weight, an interpretation which the plaintiffs seem to suggest. In *Mitchell*, *supra*, McLachlin C.J. held that "due weight" meant that oral tradition evidence is entitled to "equal and due treatment." It should neither be undervalued, nor artificially constrained to carry more weight than it could reasonably support.

[452] The Chief Justice also stated, at paragraph 33 of *Mitchell*, that it is necessary to inquire into a witness' ability to know and to testify with respect to a particular peoples' history. This inquiry is appropriate on the questions of both admissibility and, if admitted, weight.

[453] In the present case, oral traditions were tendered at trial regarding the negotiations of Treaty 6 at Fort Carlton and Fort Pitt. The purpose in presenting such evidence was to

provide the aboriginal perspective on these historical events. In assessing this evidence, I prefer the approach advocated by Dr. von Gernet over that of Dr. Wheeler. In response to a question from the Court as to how it should evaluate an oral tradition reduced to a transcript, Dr. Wheeler replied that the Court should seek assistance from "local experts" for a full contextual reading (transcript volume 157, pp. 21901-21902). While Dr. Wheeler's approach may suit scholars, it is simply not feasible, nor is it realistic, for a trial judge. The Court cannot embark upon independent fact-finding investigations into evidence tendered at trial. The Court must rely upon the parties for the evidence and any assistance from experts. And while Dr. Wheeler offered some interesting insights into the nature of oral traditions and oral histories, she did not present the Court with any analysis of the oral traditions tendered at trial.

[454] In his expert report, Dr. von Gernet summarized his approach as follows:

> In my opinion, the most useful approach recognizes the legitimacy of self-representation and acknowledges that what people believe about their own past must be respected and receive serious historical consideration. At the same time, it assumes that there was a real past independent of what people presently believe it to be, and that valuable information about that past may be derived from various sources including oral histories and oral traditions. It accepts that both non-Aboriginal and Aboriginal scholars can be biased, that various pasts can be invented or used for political reasons, and that a completely value-free history is an impossible ideal. Nevertheless, it postulates that the past constrains the way in which modern interpreters can manipulate it for various purposes. While the actual past is beyond retrieval, this must remain the aim. The reconstruction that results may not have a privileged claim on universal "truth," but it will have the advantage of being rigorous. The approach rejects the fashionable notion that, because Aboriginal oral documents are not Western, they cannot be assessed using Western methods and should be allowed to escape the type of scrutiny given to other forms of evidence. Ultimately, the perspective is in accord with the belief of the highly-regarded anthropologist Bruce Trigger: public wrongs cannot be atoned by abandoning

> scientific standards in the historical study of relations between Aboriginal and non-Aboriginal peoples.
>
> Those who marshal Aboriginal oral histories and traditions and submit them as evidence about past events have at least one major hurdle to overcome – how to convince skeptics that documents generated in the present contain accurate information about the past.
>
> (C-320, p. 6)
>
> It is clear that for many Aboriginal people preserving history involves not only passing information orally to one another, but also temporarily freezing oral documents by writing them down so that they can be used to advance alternative pasts in contemporary political discourse and in courtrooms across the nation. Once reduced to writing, there is no compelling reason why the traditions should not be subjected to the same type of scrutiny as is commonplace in the study of any other written document.
>
> (C-320, p. 21)

[455] I note that Dr. von Gernet's approach to oral tradition and oral history evidence was endorsed by the Federal Court of Appeal in *Benoit* v. *Canada*, [2003] F.C.J. No. 923 at paragraphs 111-113.

[456] The oral traditions tendered at trial stand in contrast to that presented in *Delgamuukw*. In that case, the oral histories of the Gitskan and Wet'suwet'en people, called the adaawak and kungax, were considered as "sacred 'official' litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House." Specially appointed people were allowed to repeat these stories at certain community events, where other people could raise objections to any errors made in the recitals, thus ensuring a measure of authenticity.

[457] The oral history tendered in *Delgamuukw* appears to be far more formal and regimented than that which was tendered in the present case. Protocol was used in these proceedings, including presenting the elders with gifts of tobacco. I accept that the use of protocol indicates that the elder was relating something serious and sacred; however, I agree with Dr. von Gernet that protocol does not, by itself, ensure validation.

[458] Turning to the oral traditions, I will deal first with Elder Bill's oral tradition of the Treaty 6 negotiations at Fort Carlton. Elder Bill testified that when he became Chief, he was told the Treaty 6 oral tradition by Natokowapiskapo, or Harry Harris. Natokowapiskapo heard the story from Pahpiween who, in turn, was told the story by its eyewitness source, Sisiwayham, the first Chief from Big River. Elder Bill also names Kinomatayew as another man who was with Sisiwayham at treaty time (C-1092, tab 8, pp. 2435-2436; 2493-2496; and 2510-2512).

[459] Dr. von Gernet investigated this chain of transmission (C-320, pp. 55-58). A treaty annuity pay list from 1878 confirms there was a Chief named "Say-se-wa-him"; subsequent pay lists suggest that these were Pelican Lake Indians, paid at Big River. Say-se-wa-him was not paid an annuity in 1879, indicating he had died sometime after September, 1878. Headman "Ken-e-mo-ta-yo" replaced him as Chief by 1880. By 1918, "Pah-pee-wee-in"

was listed as Chief. DIAND's Indian Registry Membership Record for the Big River Band lists "Pahweein" as having been born in 1874 and died in 1961.

[460] Pahpiween was four or five years old when Sisiwayham died. He could not possibly have been the recipient of Sisiwayham's oral history at such a young age. Accordingly, the chain of transmission cannot be as Elder Bill testified.

[461] Further on the provenance issue, the reproduction of the Treaty 6 document, including its various adhesions, in an appendix of the Morris text shows that a "Sa-se-wa-hum" and a "Kene-mo-tay" signed a Wood Cree adhesion at Carlton on September 3, 1878 (S-4, pp. 364-365). No chief or councillor with the same, or similar, names signed Treaty 6 at Fort Carlton on August 23, 1876 (S-4, pp. 356-358).

[462] Thus, the original eyewitness source for Elder Bill's oral tradition may not have been in attendance at the original treaty negotiations. However, even if he did attend but declined to sign the treaty until two years later, or alternatively, the story's proper setting is the 1878 adhesion, the chain of transmission immediately falls under question; it is not plausible that a child of four or five years of age could have been the next recipient of the story, as Elder

Bill testified. Accordingly, I cannot give this evidence any weight because its reliability is too suspect.

[463] If I am wrong to discount Elder Bill's oral tradition on the basis of the impossible chain of transmission, I find that some of its content is implausible. According to the oral tradition, the Cree rejected the land surrender at the very outset of the talks and the Queen's representative accepted this position, agreeing to borrow the land to a certain depth. This stands in stark contrast with the Treaty Commissioners' mandate and objective, *viz.* to secure a land surrender. Elder Bill's oral tradition also contains an open-ended promise that the Cree could unilaterally increase the size of their reserves, should the need arise.

[464] The documentary accounts do not contain any promises regarding a right to increase reserve size in a unilateral or unlimited fashion. I agree that reserves, their size and the surveying process, were discussed during the negotiations. A speech made by Poundmaker, and presented in Erasmus's account, shows an understanding, at the very least by Poundmaker, of the matter of reserves:

> Poundmaker, who was not a chief at that time but just a brave, spoke up and said, "The governor mentions how much land is to be given to us. He says 640 acres, one mile square for each family, he will give us." And in a loud voice he shouted, "This is our land! It isn't a piece of pemmican to be cut off and given in little pieces back to us. It is ours and we will take what we want."
>
> (C-7, p. 244)

[465] Elder Bill's oral tradition also contains promises that the Cree will be given men to look after money, food, seed, and livestock. I find these promises, as well as the promise that the Cree could unilaterally increase the size of their reserves, not plausible, nor do they accord with the text of Treaty 6.

[466] I now turn to the oral tradition of Treaty 6 negotiations at Fort Pitt presented by Elder Quinney. According to Elder Quinney's testimony, the oral tradition was passed on to her by her grandfather, Papakachas, or Simon Gadwa. She testified that her grandfather told her he was about 17 years old at treaty time, and had attended with his father. According to Dr. von Gernet's research, a 1947 treaty annuity pay list indicates that Simon Gadwa was 82 that year; a 1948 pay list shows him as being 83, but also as having died in1947. Dr. von Gernet also found a death certificate indicating Simon Gadwa died in 1947, aged 82 (C-320, p. 52; supporting documentation, volume B, tab 32).

[467] Thus, Elder Quinney's grandfather, and the source of her oral tradition, could not have been 17 years old at treaty time, but rather was 11 years old.

[468] According to Dr. von Gernet's report, Elder Quinney was interviewed on February 18, 1974 at Charlie Blackman's home in Legoff, Alberta as part of the TARR Interview with Elders Program (C-320, pp. 51-52; supporting documentation, volume C, tab 58). In this 1974 interview, Elder Quinney said that her story was one that was passed down from her grandfather, Simon Gadwa. He told her that the "government man" came to the treaty to "buy only three things": land to the depth of one foot; grass for livestock; and spruce trees to make homes. In return, the Cree would receive a school on the reserve, an Indian Agent, and a medicine chest. Further, if gold was ever discovered on their lands, they would live like a king on a cushion. The promises were written on paper.

[469] As noted above, Elder Quinney testified at trial and told her grandfather's Treaty 6 story. However, in this version, the treaty commissioner states at the outset of the negotiations that he did not come to buy the land, but to borrow it, and only to a certain depth. He also wanted to borrow spruce trees to build homes and hay for his livestock. In return, the Cree would receive a school, free medicine, and a ration house on their reserve.

[470] The 1974 and 2000 versions contain the same *quid pro quo* triad. While the depth of the land requested is the same, the language describing the nature of the transaction has changed from "buy" to "borrow". This is a major difference. Indeed, in her testimony at Court, Elder Quinney relates that the Queen's representative specifically said he did not

come to buy the land, but rather to borrow it, indicating an understanding of the difference between these concepts.

[471] During her testimony, Elder Quinney denied ever having been to Charlie Blackman's house in the 1970s. She denied ever having heard a man named Fred Horse speak about Treaty 6. Elder Quinney did not recall having any involvement with TARR, but did remember being interviewed by two woman, who recorded her treaty story on paper (C-1092, tab 6, pp. 2185-2191 and 2204-2205).

[472] In the supporting documentation to his expert report, Dr. von Gernet included a document pertaining to the February 18, 1974 interview of Elder Quinney (C-320, supporting documentation, volume C, tab 58). The interview's location is noted as Charlie Blackman's residence, Legoff, Alberta. Under the section titled "Highlights", Elder Quinney is noted as saying,

> My grandfather used to tell us quite a bit of the time of the treaties. And I've listened to these stories closely enough to remember what he used to say. What Fred Horse has just said is very true. As I'm not trying to duplicate as to what Fred Horse had told you.

[473] Further on in the same document, Elder Quinney's relates her grandfather's treaty story, and makes use of the word "buy" in reference to the land, grass, and spruce.

[474] Insofar as Elder Quinney denied ever having heard Fred Horse speak about Treaty 6, the above quoted excerpt shows that she did hear him speak on it. A similar document recording the Fred Horse interview indicates that it occurred on the same day as Elder Quinney's interview and was also at Charlie Blackman's house. The "Highlights" section records his treaty story. Interestingly, in Mr. Horse's version, the pipe ceremony was conducted at the end of the treaty negotiations, similar to Elder Quinney's oral tradition. Mr. Horse also relates that the land was bought, but only to a certain depth, as well as grass and timber (C-320, supporting documentation, volume B, tab 39).

[475] Dr. von Gernet also included a document pertaining to a January 17, 1973 interview with a man named Thomas Quinney, of Frog Lake, Alberta (C-320, supporting documentation, volume C, tab 60). Under the "Highlights" section, Mr. Quinney's Treaty 6 story stems from the same source, Simon Gadwa (noted in the document as Simon Jodwa). The commissioner, in this version, states that he came to buy the land, but to the depth of six inches. The other two items requested are timber for houses and hay for livestock.

[476] It is fortunate that Elder Quinney's 1974 version exists for comparative purposes. While the *quid pro quo* triad remains essentially the same, the striking difference is in the shift from "buy" to "borrow". That change cannot be overlooked or easily brushed aside as it goes to the very heart of the arrangements made between the parties to Treaty 6. I cannot place any weight on her use of the term "borrow" in her testimony at Court.

[477] Certain elements of her treaty story accord with the documentary record – the negotiations taking place over three days; the Cree meeting amongst themselves to discuss the promises; and the promises regarding schools, the medicine chest, supplies of ammunition and nets, and hunting and fishing rights. However, promises said to be made by Morris regarding half fare travel, half ownership of the police, and land taxes paid by whites to be turned over to the Crees neither appear in the text of Treaty 6, nor in any of the eye witness accounts of Morris, Jackes, Erasmus, or McDougall. Given Morris's previous experience with the outside promises and subsequent revisions of Treaties 1 and 2 in 1875, as well as his comments on that experience (S-4, p. 128), it is both unlikely and unreasonable to assume he made these promises. Had he done so, he would have extended himself well beyond what was authorized.

[478] Elder Waskahat related to the Court a Treaty 6 oral tradition on the Fort Pitt negotiations. Dr. von Gernet also analysed several earlier versions of treaty stories told by Elder Waskahat in 1980, 1983, 1985, and 1991 (C-320, pp. 44-51).

[479] In the 1980 version, Elder Waskahat states that the story's source is "He is a small boy" (Kanapesowit), the son of Papacachas, who had attended the Edmonton negotiations as a young boy. The Queen's representative states that he came to buy the top layer of the land; anything of value that is found below that layer would belong to the Indians. He also wanted to buy four species of trees. The Indians would not have to pay land taxes and were promised self-government. The Indian Agent would build a house on the reserve and fill it with food that would be handed out for free. The Agent also had to build schools so that children could attend to the highest level without leaving the reserve. The Indians were promised they could continue to use their own medicine and maintain their religious beliefs.

[480] In the 1983 version, Elder Waskahat indicates that it is set at Edmonton. The story's source is not entirely clear, but there is reference to an old man named Mostos. The land is requested only to the depth of its top layer; however, the terminology has changed to "borrow."

[481] The 1985 version also uses the term “share” to describe the land arrangements. Indeed, one of the Cree negotiators specifically says that he cannot give the commissioner his land, but he can only share it as partners.

[482] Elder Waskahat gives the source of his 1991 version as Mostos, who was about 18 years old at treaty time. The story is set at Fort Pitt. Sweet Grass says to the Queen’s representative that he is willing to share his land, but he cannot give him his land. The Queen’s representative is told that he will have to pay for the land forever. He agrees that he will share the land. Again, the land is only to be shared to the depth of its top layer.

[483] In his testimony at Court in June 2000, Elder Waskahat named Mostos as his source and adds that Mostos heard the story from Seekaskootch. In this oral tradition, the commissioner is explicitly told by a Cree man that the land cannot be bought, but only borrowed.

[484] I note that during his testimony in June 2000, Elder Waskahat acknowledged that he had heard treaty stories other than the one he had been told by Mostos, but that he could not recall the names of the other elders who had told these versions (C-1092, tab 4, pp. 1931-1932).

[485] In terms of the provenance of Elder Waskahat's June 2000 oral tradition, he testified that he was told the story by Mostos, who had been at Fort Pitt. Mostos was very young at the time and had sat quite a ways from the actual proceedings. Several years later, Seekaskootch, the Onion Lake Chief, told him the treaty story and clarified things that Mostos had not heard during the treaty talks (C-1091, tab 5, pp. 18815-18816; tab 6, pp. 18899-18901). Elder Waskahat testified that Mostos told him this particular story only once, when Elder Waskahat was 11 years old (C-1091, tab 6, p. 18902-18904).

[486] It is readily apparent from an examination of the various treaty stories told by Elder Waskahat that there has been a significant shift in the language relating to the land transaction, from "buy" and "sell" to "share," "borrow," and "loan." The tradition is consistent, however, in that the land transactions only related to the top layer, with the Cree retaining the subsurface.

[487] Elder Waskahat testified that he told the Kanapesowit treaty story in 1980 because it was a counselling story for young people (C-1091, tab 2, pp. 18658-18659; tab 5, pp. 18818-18820). Yet, that story indicates that the land was bought by the Queen's representative. If the elder was trying to counsel, and perhaps educate, young people, it

is bizarre that he would tell an oral tradition that gives a completely different understanding of how the land transaction was conducted than the oral tradition which he told the Court.

[488] Elder Waskahat testified that oral traditions may change from one teller to the next. He testified that in a lot of cases, the person who passed on the story did not fully understand it (C-1091, tab 4, pp. 18749-18750). He also testified that it is up to the teller to decide whether the story should be passed on as it was heard, or whether it should be changed (C-1091, tab 5, p. 18822). Elder Waskahat testified that the way he sees the audience determines the manner in which he tells a story; in most cases, he never tells the entire story (C-1091, tab 5, pp. 18822-18823).

[489] With regard to the oral tradition Elder Waskahat told in Court, the Cree deliberated amongst themselves before the treaty talks started. This accords with the Erasmus record reviewed earlier. Nothing in the documentary records tendered at trial indicated that the treaty commissioners arrived at Fort Pitt via steamboat, as alleged in Elder Waskahat's oral tradition. However, Morris and the other treaty commissioners used a steamship, the HBC's Colville, to travel Lake Winnipeg for Treaty 5 talks in September 1875. This may be an instance of cross-fertilization, where a detail from another treaty story or tradition, about an entirely different set of events, came to be a part of the oral tradition. What matters more,

besides picayune details, however, is whether the oral tradition accords with other independent evidence and whether it is plausible within the larger historical context.

[490] In Elder Waskahat's treaty story, Morris was told at the very outset of the talks that the Crees could not give him their land. Morris is said to have accepted this position and asked only for the topsoil. I note that this aspect of Elder Waskahat's oral tradition, while it is consistent with the oral traditions of Elders Quinney and Bill, is completely at odds with the written text of Treaty 6; the recorded eyewitness accounts of Morris, Jackes, Erasmus, and McDougall; as well as the government's objective of entering into the western numbered treaties.

[491] On the second day of talks, according to Elder Waskahat's oral tradition, Morris asked the Crees to tell him what they wanted; they responded by asking for free medicine. Morris had already accepted this at Fort Carlton, where he had made several major concessions in response to the Crees' tough bargaining stance. This resulted in the inclusion of the medicine chest clause. It would have been made known to the Crees at Fort Pitt through Erasmus, McDougall, the explanation of the treaty's terms on September 7, as well as through Indian informants and informal communications. This appears to be an instance of conflation – an event which occurred at Fort Carlton has become part of an oral tradition about the Fort Pitt treaty talks.

[492] Similarly, education had been discussed earlier at Fort Carlton and a clause promising schools to be built on reserves was already part of Treaty 6. Elder Waskahat's rendition of what Morris offered, with its mention of completing levels and going off-reserve for further education, appears to have more of the present in it, than the past. Regardless of how that promise, or clause, has been subsequently interpreted, the discussion at treaty time had a much narrower focus and centred on the matter of building schools on reserves.

[493] Further, Elder Waskahat's treaty story contains a promise that a ration house full of food would be kept on the reserves. This simply does not accord with the Morris or Jackes records on this point. Morris, according to these accounts, said several times to the Indians that the government would not feed them every day. He accepted the famine clause at Fort Carlton, but explained it was only for times of national famine or pestilence, for extraordinary circumstances. Indeed, recall Erasmus noted the Badger admonishing Commissioner McKay for twisting his words and assuming he was asking to be fed every day, which he was not (C-7, pp. 251-252). According to Jackes, on the third day of talks at Fort Carlton, Mista-wa-sis and Ah-tuk-a-kup stated they did not want food every day; they wanted help only when they commenced tilling the soil and in case of famine or calamity (S-4, p. 213). Morris also included this in his report (S-4, p. 185).

[494] Based on Elder Waskahat's statements about how an oral tradition may be told differently because of how the storyteller perceives the audience, as well as the evolution in the language relating to the land transaction from "buy" to "share" and "borrow," I find I cannot place much, if any, weight on the treaty story told by Elder Waskahat to the Court. I am very disturbed to find that he adjusts his telling, or his version, based on the audience. Furthermore, he testified that he never tells a story in its entirety; yet, he also testified that he told the oral tradition as it was told to him (C-1091, tab 6, p. 18882).

[495] Another oral tradition account was presented to the Court through the testimony of the linguist, Professor Wolfart. He analysed a treaty story told by Jim Kâ-Nîpitêhtêw. It is not clear whether the story relates to Fort Pitt or Fort Carlton, or conflates accounts of both proceedings. There is precious little information about the story's provenance. Accordingly, I cannot place much weight on this account.

[496] Professor Wolfart gave evidence for a period of approximately 11 days. Upon reading his evidence the first time, I was left with the feeling that most, if not all of his evidence was totally irrelevant, unless, of course, it was important for the Court to know that Professor Wolfart had been a linguist for 35 years.

[497] I did not count how many times Professor Wolfart informed the Court of this fact. I am sure it was at least five times. Why it was necessary for Professor Wolfart to repeat this fact, I am at a total loss.

[498] In the same way I am at a total loss as to about 90% of his evidence. I challenge anyone to read what Professor Wolfart stated in evidence and come away with more than 10% of what he stated that could be considered relevant.

[499] As an example, and there are many in the reading of Professor Wolfart's evidence, of the verbosity of the answers, when Professor Wolfart, on page 10479, is asked a relatively simple question, it took him eight typewritten pages to answer, from page 10479 to 10487.

[500] I also have difficulty in accepting Professor Wolfart's evidence as relating to the issue of translating the English terms of the Treaty to Cree. On page 10557, Professor Wolfart states, among many things:

> "Now, clearly I have trespassed upon this set of highly technical terms by presuming that there would be a few that might have come up even in the wretched interpretations that I maintain was used at the time of the conclusion of Treaty 6."

[501] It is interesting to note that Professor Wolfart states the "interpretation", and I add, translation, was *wretched* as it applies to what the Indians of Treaty 6 were told and this based on what he believes is involved in the interpretation of the words of the Treaty.

[502] He, of course, has not the faintest knowledge of what was said by Peter Erasmus to the Cree Indians attending the signing of the Treaty. It is obvious that Professor Wolfart has no knowledge of what Cree words were used by Peter Erasmus to explain to the Cree Indians that in return to get food, medicine, cattle, resources, they would have to give up certain things.

[503] For Professor Wolfart to tell me that the Indians could not possibly understand that they had to give up certain things, that is, cede their land but could easily understand that they were to receive food, medicine, cattle and resources, remains a total mystery to me.

[504] Turning to the documentary, or contemporary eyewitness accounts, I find those of Morris and Jackes to be reliable records of the Treaty 6 negotiations. I acknowledge that neither man was a disinterested, or independent, party; indeed, Morris and Jackes acted on behalf of the Canadian government during the treaty proceedings. However, I have no evidence before me that would either impugn or cast doubt upon the essential objectivity of their respective accounts. Jackes created his account so as to provide a record of the proceedings. Morris wrote both an official report and a book, which incorporated his report and published publicly for the first time the Jackes narrative. Given the official and, later public, nature of these accounts and the ensuing scrutiny to which they would be subjected, I find this only increases their reliability and thus the weight that this Court can place on them.

[505] Unlike the oral traditions presented in this case, the Morris and Jackes accounts were generated in the past, contemporaneous to the events which they record. Thus, their pastness does not have to be demonstrated and the records are immune from present-day influences.

[506] The Erasmus account, *Buffalo Days and Nights*, is an oral history in that the book presents his recollections of past events in which he participated. While the Erasmus account was recorded by journalist Henry Thompson, I share none of Mr. Bob Beal's vague and ill-defined unease with Thompson's purported motives. Erasmus may have been prone

to self-aggrandizement, as well as a certain degree of arrogance and bluster; nonetheless, he provides valuable insights and details into the treaty negotiations, especially the Cree council. I am satisfied that, given his background, education, and circumstances, Erasmus was more than an able and competent translator. Unlike Professor Wolfart, I am not of the opinion that Erasmus's translation efforts were "wretched." If one were to abide by Professor Wolfart's lofty standards, it would have been nigh well impossible to conclude a treaty at all. Parts of the Erasmus account may rely on the Jackes narrative and thus may not be completely independent; however, I conclude that the Erasmus account is a reliable record of the treaty talks.

[507] Similarly, I find the McDougall account, *Opening the Great West*, to be a reliable record of the treaty talks at Fort Pitt. McDougall was certainly a proponent and advocate of taking treaty because he saw that as being in the Crees' best interests. McDougall was married to a half-Cree woman and spoke Cree himself, having moved west in 1862 with his family. While he may not have been a fluent speaker of Cree, the evidence shows that McDougall was familiar with and attuned to their culture and way of life.

[508] It is clear that Rev. McDougall understood what was being asked of the Crees, *viz*. to surrender their rights to the land in return for certain promises from the government. His remark that he referred to notes he took during the speech by Morris as to what the treaty terms were only enhances the reliability of his explanations to his Cree audience. His pro-

treaty stance does not diminish his role or his ability to explain to the Cree council what the treaty entailed. Indeed, Rev. McDougall's remarks at the end of his book demonstrate that he understood what the treaty meant in terms of the parties' relations to the land:

> The Indians reserved certain areas in the proportion of one section of good land for every five souls. They were to select these reserves, the government was to have them surveyed and to maintain these reserves for the Indians inviolate so long as the grass grows and rivers run. The Cree word *Iskoman* means that which is kept back and is the equivalent of the Anglo-Saxon word "reserve". Thus an immense area which today embraces very large portions of the best parts both of Saskatchewan and Alberta passed by treaty into the hands of the Canadian Government and the aboriginal and long conceded territorial right thereto was given over with full consent of the tribes dwelling therein to our government – the reserves above described being excepted.
>
> (C-8, p. 60)

[509] In my opinion, the purpose of Treaty 6, insofar as the Canadian government was concerned, was to secure the surrender of aboriginal title to a vast tract of land so as to open it up for settlement and development. The treaty was also an instrument of peace and friendship, in that it forged an alliance between the aboriginal people of that area with the Canadian government. Thus, from the government's perspective, the land surrender was absolutely non-negotiable – unlike various other parts of the treaty, such as money, agricultural implements, and livestock. The amounts of such provisions were open to revision and increase, whereas the land surrender clause was not. In my opinion, the Cree leadership was aware of this and accepted it going into treaty, hence the lack of protracted discussion on this topic. The focus of the treaty talks were on what the Cree would receive, not what they were giving up. The evidence shows that the Cree were aware of previous treaties to the east. Chief Sweet Grass sent a letter, through William Christie, to the government asking for a treaty in 1871. During the Treaty 6 talks, the Cree had the advice

and counsel of people like Erasmus and McDougall, who understood the purpose of Treaty 6 and would have no motive to sugarcoat, or indeed misrepresent, the land surrender clause.

[510] During the treaty talks, Morris assured the Cree that they could continue with their traditional way of life. Yet he also tempered these remarks with explicit warnings of change with the impending arrival of settlers. Morris was quite clear in stating that while the Cree could continue to hunt and fish as before, this would only pertain to land that was not taken up for settlement. However, he was also quite clear that the reserves would be set aside for the benefit of the Cree and that no one could take their homes from them. Moreover, if they wanted to sell all, or part, of their reserves, this could only be done by the Queen with their consent; the proceeds would also be kept by the Queen and "put away to increase."

[511] For their part, the Cree leadership was concerned with their people's economic security. The bison herds, which once blanketed the Great Plains, were fast diminishing and retreating. The leadership was aware of this, and other crises, such as epidemics, which had caused terrible hardship and suffering. They were keen to protect their people from famine and disease, hence the focus of the treaty talks on what the Cree would receive.

[512] Insofar as the issue of the depth of the land that was surrendered is concerned, I find that while the oral traditions are consistent on this point, at least since the 1970s, it is simply not plausible that this was understood to be part of the treaty. The land surrender clause in Treaty 6 makes no mention of this purported limitation. Furthermore, I cannot accept that Morris would have either proposed such a thing or agreed to it. His previous experience with the treaties and their purpose argues against it. In particular, recall that during the North-West Angle Treaty talks, Morris was asked by an unnamed chief about mineral rights. Morris responded that any minerals discovered on reserves would be sold with the consent of the Indians and for their benefit; however, with regard to off-reserve mineral discoveries, the Indian would be free to sell this information like any other person.

[513] Thus, I find it implausible to accept that Morris would reverse course insofar as Treaty 6 is concerned and exempt subsurface rights from the land surrender. What is more likely is that the topsoil theme has emerged within the past few decades as a sort of motif within these oral traditions. It may represent a present-day reconstruction of what current generations wished had happened, or thought should have happened, in 1876.

[514] The plaintiffs also rely upon an excerpt from the 1936 text by historian George Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (S-289) for their contention that the land was never surrendered by the Cree. According to Dr. Stanley, the idea prevailed, among aboriginals, that the "white men" had come only to borrow the land, not to buy it. To support his opinion, Dr. Stanley referred to an excerpt from a speech given in 1884. In a supporting footnote, Dr. Stanley noted,

> These words were evidently part of a speech delivered at an Indian Council at Carlton in August 1884 (*cf. supra* p. 290). The memorandum of the speech is on rough paper and bears no clue as to the writer. It may have been the work of a half-breed as it is to be found among the Riel papers in the Confidential Papers of the Department of Justice relative to the Trial of Louis Riel, P.A.C.
>
> (S-289, p. 438, footnote 25)

[515] A copy of the original document containing the speech, along with an accompanying transcription, was subsequently tendered at trial (S-338). Nothing on the document's face indicates who recorded the speech, where, or when. I note that the document contains an inconsistency with regard to the land surrender issue. The speaker claims that Morris specifically said it was impossible to buy the country; instead, Morris is purported to have stated that they came to borrow the country and keep it for the Indians. Further on, however, the speaker describes the treaty as "an agreement in return for our lands we would get what the Gov [*sic*] promised and we asked" (S-338, p. 2).

[516] The document goes on to read,

> after they went to Ottawa they sent another printed copy [of the treaty]. We found that half the sweet things were taken out, and lots of sour things left in. This is what the Indian knows about the treaty.
>
> (S-338, transcription, p. 2)

[517] This assertion calls to mind the testimony of the plaintiffs' witness Thomas Cardinal. According to Mr. Cardinal, the original Treaty 6 was inscribed on a moose hide and:

> A. They took that hide back to Ottawa on three occasions, three different times, and changed the wording of the treaties. And every time they came back, they said, Oh, we didn't say this. We didn't say that. We didn't promise this, you know.
>
> (transcript volume 96, p. 13513)

[518] I do not accept this testimony. There is absolutely no support for the assertion that the Treaty 6 text was taken to Ottawa, amended or tinkered with in some manner detrimental to the Cree interest, and sent back to them. This notion may have arisen because the actual text of the original Treaty 6 document contains amendments, deletions, and interlineations that were made in the field.

[519] Returning then to the 1884 speech, it identifies several others who are also being spoken for: Chiefs John Smith and James Smith, and three councillors. The group claims to also speak for other chiefs in voicing their opinion that the land was merely borrowed (S-338, transcription, p. 1).

[520] However, a letter written by Constable Joseph MacDermot, dated 10 August 1884, indicates otherwise (C-1106, tab 8). Constable MacDermot's letter reports on an Indian Council, based on information he received from a source. His letter notes that 11 chiefs and 14 "head men" met for several days. After the meeting, John Smith and James Smith met together, along with three head men. Constable MacDermot sets out the substance of their conversation. This is where the idea is aired that Morris stated he had come only to borrow the land.

[521] In my opinion, the 1884 speech was accurately described by Constable MacDermot: a meeting between the two chiefs and three councillors. Its sentiment, vis-à-vis that the land was borrowed, cannot be extended to encompass the other Treaty 6 chiefs present at the council. In this regard, Dr. Stanley placed far too great an emphasis upon the document containing the 1884 speech. It cannot support his contention that "[a]mong the Indians the idea prevailed that the white men had come to 'borrow' their land, not to buy it" (S-289, p. 275).

[522] Dr. Stanley also pointed to a letter written to Louis Riel on 13 March 1885 by Antoine Lose Brave (S-289, p. 276). A copy of the original letter, with an accompanying transcription, was also tendered at trial (S-339). The letter's language is rather confusing and the author's meaning thus, at times, obscured. By way of example, Mr. Brave wrote,

> We sent to each of you all our thoughts to set out as a platform; by our possion [*sic*: possession] of this our Great Country a New World to them our White skinfolks.
>
> (S-339, transcription, p. 1)

[523] Does this show an understanding that possession of the country had been transferred, or given, to white people? Further on, the letter seems to indicate that numerous chiefs denied, when asked by the letter writer, whether "they did make a bargin [*sic*] by the whiteskin folk For their native country..." (S-339, transcription, p. 1). Indeed, according to the letter, "they all said No Even we did not heard them our dicease [*sic*: deceased?] parents to make bargin [*sic*] with them by such a thing neither our Grand Fathers..." (S-339, transcription, p. 1).

[524] In my opinion, Dr. Stanley erred in placing such reliance on this letter. I find I can give it no weight at all in determining the land surrender issue. The letter denies the very existence of any bargain relating to the land. Yet this stands in stark contrast to both the written text of Treaty 6, the accounts of Morris, Jackes, Erasmus, and McDougall, as well

as the Cree oral histories presented at trial. While the oral histories deny that the Cree gave up their land and that the land was borrowed only to the depth of a ploughshare, they nonetheless acknowledge that an arrangement was made with regard to the land during the treaty talks.

[525] Again returning to what Dr. Stanley described as the 1884 speech, I find that it is more properly characterized as a record of a conversation among Chiefs John Smith and James Smith, and the three named councillors, prior to a meeting with Louis Riel.

[526] After this August 1884 Indian Council, Inspector Wadsworth toured the Edmonton district. He made a report of his inspection to Indian Commissioner Dewdney by letter dated 11 September 1884 (S-182A). During this time, Wadsworth met with the Samson Band. Nothing in his report indicates that they repudiated or questioned the land surrender.

[527] Assistant Indian Commissioner Hayter Reed was sent to meet with those who had attended the August 1884 council in order to ascertain their treaty grievances. This was done in direct response to a report made by Sub-Agent Andsell Macrae about a meeting he had to hear Cree grievances about the Crown's compliance, or lack thereof, with the treaty's promises (S-337).Macrae's report shows their understanding of the treaty as

containing certain promises made by the Crown in exchange for the land (S-337, p. 3). Reed's subsequent report, dated 23 January 1885, found some of the complaints valid (C-1106, tab 10). Nothing in this report indicates any understanding, or even contention, that the Crown had merely borrowed the land.

[528] One of those present at the 1884 council was Big Bear, according to the record upon which Dr. Stanley relied (S-338). Macrae's report indicates that Big Bear was among those who presented him with extensive treaty grievances (S-337). Recall that Big Bear initially refused to take treaty; eventually he signed, but it cannot be said that he was unaware of the surrender portion of Treaty 6. Hugh Dempsey's biography of Big Bear, poignantly titled *Big Bear: The End of Freedom*, contains a speech attributed to Big Bear at a meeting with Indian Agent Rae in 1883:

> Long before the advent of the palefaces this vast land was the hunting ground of my people... . This land was then the hunting ground of the Plains and the Wood Crees, my fathers. It was then teeming with buffalo and we were happy. This fair land from the Cumberland Hills to the Rockies and northward to Great Green Lake, the River of the Beavers, and the shores of Lac la Biche, and south and westward toward the setting sun ... is now the land of the white man – the land of the stranger. Our big game is no more. You now own our millions of acres – according to the treaty papers – as long as grass grows on the prairies or water runs in our big rivers ... . We have no food. We live not like the white man, nor are we like the Indians who live on fowl and fish. True, we are promised great things but they seem far off and we cannot live and wait.
>
> (C-220, p. 115)

[529] On various other occasions, letters were written on behalf of Treaty Indians or reports were made of meetings to deal with treaty grievances, yet no mention is made of any repudiation or disputation of the land surrender. I do not propose to deal in great depth with the Crown's behaviour in terms of fulfilling its treaty promises in the early years following the signing of Treaty 6. Certainly, some grievances were acknowledged as legitimate by government officials. In this regard, I note that Assistant Indian Commissioner Reed accepted the complaint about the quality of cattle supplied pursuant to treaty; eventually, the "wild and useless" cattle were replaced (C-1106, tab 9). As well, at that time a complaint about the failure to place a medicine chest at Carlton was also accepted.

[530] I note that in 1883, the Edmonton *Bulletin* published a letter to the Minister of the Interior from several Treaty 6 Indians, including Chief Samson (S-31, supporting documents, tab 39). Two of the expert witnesses, Dr. Flanagan and Mr. Bob Beal, reasoned that the letter was written by someone familiar with and sympathetic to the signatories' grievances, and suggested Reverend Constantine Scollen as the likely author. Reverend Scollen signed Treaty 6 as a witness at Fort Pitt and at Bobtail's later adhesion (S-4, pp. 360 and 362). The letter in the *Bulletin* details numerous treaty complaints. However, it does not indicate, or even imply, that the land surrender was either misunderstood, disputed, or denied.

[531] Reverend Scollen had written a letter to Major Irvine of the NWMP, dated 13 April 1879 (S-296). He contended that the Blackfoot had not properly understood Treaty 7, which was signed in the autumn of 1877, and which he had also signed as a witness. Reverend Scollen had been present at the Fort Pitt portion of the Treaty 6 talks and Bobtail's adhesion. If in 1879 Reverend Scollen argued that the Blackfoot did not fully understand the consequences of Treaty 7, then I find it reasonable to conclude that he would not have hesitated to do the same for the Cree of Treaty 6, had he believed they were under a misapprehension as to the nature of the land surrender clause.

[532] Accordingly, I reject the plaintiff's contention that the land surrender clause was not understood by the Cree leadership at the time of Treaty 6 and that they never agreed to it. I find, based on a consideration of the evidence before me, that the land surrender clause was explained to and understood by the Cree signatories to Treaty 6.

ii. Post-Treaty 6 Events

[533] Samson's Amended Statement of Claim (No.4) contains the following allegations regarding the conduct of the parties post-treaty:

7F. The Crown consistently reneged on its treaty promises and undertakings, compounding the economic hardship of Plaintiffs' ancestors, especially in the early years of the treaty relationship established through Treaty No. 6, but Plaintiffs' ancestors and Plaintiffs held to and were held to their treaty undertakings, resulting in substantial economic benefit to the Crown.

66. In addition, Defendants have illegally withheld from Plaintiffs, and have not met their obligations to provide, benefits, programs and services and funding for benefits, programs and services to which Plaintiffs were and are entitled, as treaty rights or otherwise, including treaty rights, benefits, programs and services relating to housing, reserve infrastructure, education, health, roads, economic and social development, capital facilities, band administration and operation and maintenance. Plaintiffs have thus been illegally deprived of their treaty rights and other rights respecting such benefits, programs and services.

66D. Plaintiffs rely upon the whole of Treaty No. 6 as made between the Crown as guardian and trustee and Plaintiffs' ancestors as ward and beneficiary, including the expression of Her Majesty's desire:

... to open up for settlement, immigration and such other purposes as to Her Majesty may seem meet, a tract of country ... and to obtain the consent thereto of Her Indian subjects inhabiting the said tract and to make a treaty and arrange with them, so that there may be peace and good will between them and Her Majesty, and that they may know and be assured of what allowance they are to count upon and receive from Her Majesty's bounty and benevolence.

and, more particularly, upon Her Majesty's express agreement and undertaking in Treaty No. 6:

(i) "...to maintain schools for instruction in such reserves hereby made, as to Her Government of the Dominion of Canada may seem advisable, whenever the Indians of the reserve shall desire it ..."

(ii) "... to lay aside reserves for farming lands ... and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada ..."

(iii) "... that a medicine chest shall be kept at the house of each Indian Agent for the use and benefit of the Indians, at the direction of such Agent."

(iv) "... that in the event hereafter of the Indians comprised within this treaty being overtaken by any pestilence, or by a general famine, the Queen, on being satisfied and certified thereof by Her Indian Agent or Agents, will grant to the Indians assistance of such character and to such extent as Her Chief Superintendent of Indian Affairs shall deem necessary and sufficient to relieve the Indians from the calamity that shall have befallen them ..."

(v) "... that such sections of the reserves above indicated as may at any time be required for public works or buildings of what nature soever, may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made for the value of any improvements thereon ..."

[534] Samson contends that the Crown broke specific treaty promises with regard to supplying provisions in the time of famine, supporting agricultural development, administering Indian lands, and supporting the continuation of the Cree way of life. Samson relies, largely, on the evidence of Bob Beal and Dr. Carl Beal to support these contentions. The Crown, in turn, relies on Dr. Flanagan to rebut this evidence.

[535] I note that the prayer for relief in Samson's statement of claim does not contain any claim based on the allegations of post-treaty conduct. There is no claim for unpaid treaty annuities, nor is there a claim for the Crown's alleged failure to meet specific treaty obligations regarding the provision of implements and tools, livestock, and farming instruction. Samson advances no claim regarding post-treaty land surrenders; indeed, Samson relies upon the 1946 Surrender as one of the sources of the Crown's fiduciary duty in this case. Samson does not make any claim in connection with starvation suffered by either Samson ancestors or other Treaty 6 First Nations. And, finally, there is no claim arising from the 1885 Northwest Rebellion and the Crown's subsequent actions. Indeed, the evidence at trial demonstrated that Samson members declined to take up arms or otherwise participate in the uprising.

[536] Much, if not most, of this evidence is irrelevant to the claims that must be determined in the case at bar. Although I assured counsel on many occasions that my function was not that of a Royal Commission, they chose to forge ahead as if this was such a forum. Accordingly, I do not propose to deal with this evidence any further.

iii. Contact

[537] Three experts testified on the issue of contact: Professor Ray, Ms. Holmes, and Dr. von Gernet. No oral traditions were tendered which dealt with the actual timing of contact.

[538] In *Van der Peet*, at paragraphs 60 and 61, the Supreme Court of Canada clearly established the date of contact between aboriginal and European societies as the touchstone when considering aboriginal rights claims:

> The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.
>
> The fact that the doctrine of aboriginal rights functions to reconcile the existence of pre-existing aboriginal societies with the sovereignty of the Crown does not alter this position. Although it is the sovereignty of the Crown that the pre-existing aboriginal societies are being reconciled with, it is to those pre-existing societies that the court must look in defining aboriginal rights. It is not

> the fact that aboriginal societies existed prior to Crown sovereignty that is relevant: it is the fact that they existed prior to the arrival of Europeans in North America. As such, the relevant time period is the period prior to the arrival of Europeans, not the period prior to the assertion of sovereignty by the Crown.

[539] The *Van der Peet* test was affirmed by Chief Justice McLachlin in *Mitchell* at paragraph 12:

> 12 In the seminal cases of *R*. v. *Van der Peet*, [1996] 2 S.C.R. 507, and *Delgamuukw*, supra, this Court affirmed the foregoing principles and set out the test for establishing an aboriginal right. Since s. 35(1) is aimed at reconciling the prior occupation of North America by aboriginal societies with the Crown's assertion of sovereignty, the test for establishing an aboriginal right focuses on identifying the integral, defining features of those societies. Stripped to essentials, an aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact. The practice, custom or tradition must have been "integral to the distinctive culture" of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (*Van der Peet*, *supra*, at paras. 54-59 (emphasis in original)). This excludes practices, traditions and customs that are only marginal or incidental to the aboriginal society's cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the aboriginal society in question.

[540] The plaintiffs contend that the Supreme Court discarded contact in *R.* v. *Powley*, [2003] 2 S.C.R. 207. According to the plaintiffs, the relevant time is the moment of "effective imposition of European control." They rely on paragraphs 16 and 17 of *Powley*, which read as follows:

> The emphasis on prior occupation as the primary justification for the special protection accorded aboriginal rights led the majority in *Van der Peet* to endorse a pre-contact test for identifying

which customs, practices or traditions were integral to a particular aboriginal culture, and therefore entitled to constitutional protection. However, the majority recognized that the pre-contact test might prove inadequate to capture the range of Métis customs, practices or traditions that are entitled to protection, since Métis cultures by definition post-date European contact. For this reason, Lamer C.J. explicitly reserved the question of how to define Métis aboriginal rights for another day. He wrote at para. 67:

> [T]he history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual and context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question.

As indicated above, the inclusion of the Métis in s. 35 is not traceable to their pre-contact occupation of Canadian territory. The purpose of s. 35 as it relates to the Métis is therefore different from that which relates to the Indians or the Inuit. The constitutionally significant feature of the Métis is their special status as peoples that emerged between first contact and the effective imposition of European control. The inclusion of the Métis in s. 35 represents Canada's commitment to recognize and value the distinctive Métis cultures, which grew up in areas not yet open to colonization, and which the framers of the *Constitution Act, 1982* recognized can only survive if the Métis are protected along with other aboriginal communities.

[541] With respect, I cannot agree with the plaintiffs' interpretation of *Powley*. Their position is not supported by the paragraphs they cite, nor is it supported by any other part of the *Powley* decision. To the contrary, the Supreme Court again endorsed the *Van der Peet* test and the use of contact as the relevant time for assessing aboriginal rights. The Court was quite explicit in limiting the modification of the *Van der Peet* test to the assessment of Métis aboriginal rights.

[542] Thus, contact is part of the legal test for aboriginal rights.

[543] I turn now to the experts. According to Professor Ray, first contact occurred between the Cree and Europeans outside of Cree territory during the 1650s to the 1680s. His evidence is that the aboriginal nations of the western interior had established “enduring relations” with Europeans by the second half of the 1600s, through the fur trade (S-3, p. ii). Contact during this time would involve small groups of Cree travelling to York Factory, shortly after the HBC post was founded in 1670; these Cree would have brought back goods to trade with other Cree. Contact within Cree territory occurred once the inland trading posts were built during the period of British and French expansion, during the latter half of the 1700s. I note that Professor Ray also testified that changes may occur in aboriginal practices due to European influence, but prior to actual face-to-face contact.

[544] Ms. Holmes provided a gloss on the concept of contact, which she subdivided into the notion of “significant contact.” This would happen once Europeans actually arrived in a particular aboriginal group’s territory and established lasting relationships. So long as the Europeans remained in their trading posts – the British on Hudson Bay, for example – and hosted groups of Cree traders, but declined to travel to Cree territory and establish lasting

relations, no significant contact had occurred, despite the fact that the Cree would be bringing boatloads of European goods back into their territory and diffusing them through further trade activity. Ms. Holmes could not identify any scholars who subscribe to this concept of contact. In her opinion, the earliest possible date for contact is 1690; but with regard to people living in the interior of the Saskatchewan country, significant contact did not occur until 1770 to 1790, when the inland posts were set up.

[545] In Dr. von Gernet's opinion, Cree culture would have been influenced to some degree by the European presence in North America long before the HBC established itself on the shores of Hudson Bay in 1670. However, he considered 1670 a convenient date for contact as it marks the date at which the HBC established its post at York Factory. In his opinion, few Cree would not have been affected by European presence by 1700.

[546] With the arrival of the Hudson Bay Company came the establishment of the commercial fur trade and its concomitant exposure to European goods. This had a considerable impact on the Plains Cree. Dr. von Gernet testified on this point as follows:

> ...the fur trade is significant contact. There is no question about it. It does not require face-to-face contact to be significant, because time and time again, we have seen throughout the country that the fur trade and the presence of epidemic diseases has a considerable effect on aboriginal populations; in population movements; in transition from hunter/gatherers to market hunters; in the way in which they organize themselves, where they travel. It is significant.
>
> (transcript volume 166, pp. 22998-22999)

[547] The evidence shows that the Cree recognized the opportunities made available by the fur trade and quickly established themselves as middlemen. Historian David Mandelbaum described the impact on the Cree of the establishment of the European fur trade as follows:

> The advent of the Hudson's Bay Company marked the opening of a new phase in tribal fortunes. No longer dependent upon intermediaries, the Cree thenceforward had easy and direct access to trading posts. The first English supply ship came into Hudson Bay in 1668. Two years later posts were established at the mouth of the Nelson, Moose, and Albany rivers, and the Cree flocked in to trade.
>
> Both the tribal culture and locale changed greatly under the influence of the English. The culture naturally altered with the influx of European goods and with the shift of occupational emphasis from food gathering to fur trapping during certain seasons of the year. The locale was enlarged because the traders sent the natives deeper and deeper into the back country to collect furs from the different tribes and to trap in virgin territory.
>
> (pp. 20-21)

[548] Mandelbaum noted that the Cree readily adapted themselves to European weapons and artifacts, and that the annual trip to the trading post became a vital part of their yearly round (p. 21).

[549] According to Lamer C.J., the purpose of s. 35(1) of the *Constitution Act, 1982* is the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

Aboriginal rights are grounded in the prior occupation of this land by aboriginal peoples, who also had prior social organizations and distinctive cultures (see *Van der Peet* at paragraphs 30, 31, and 74). By using contact – and not some other reference point, such as the date of effective imposition of European control – aboriginal rights are extended to protect those practices, customs, and traditions that are in fact *aboriginal*. As Lamer C.J. noted in *Delgamuukw,* at paragraph 144, those practices, customs, and traditions which arose solely as a response to European influences do not meet the standard for recognition as aboriginal rights.

[550] Accordingly, I accept 1670 as the date of contact for the purposes of the *Van der Peet* test. Of course, I do not assume that the practices, customs, and traditions of the Cree immediately changed at this point. However, this date marks the beginning of a cultural transformation which saw the Cree become immersed in the European fur trade upon the arrival of the Hudson Bay Company and the establishment of their post at York Factory.

iv. Territory

[551] In 1876, when Treaty 6 was concluded, the plaintiffs' ancestors lived in the Maskwachees, or Bear Hills, area where their reserve is presently located, and used

Pigeon Lake for camping and fishing. None of the parties appeared to dispute this. Yet, the plaintiffs still adduced a large amount of evidence relating to the issue of the nature and extent of Plains Cree territory well before the time of Treaty 6.

[552] The Crown has admitted that Samson has beneficial ownership of the Samson Reserve and of its interest in the Pigeon Lake Reserve, which is shared with Ermineskin, Louis Bull, and Montana in accordance with the size of their populations relative to each other. In its closing argument, Samson states that, in consequence of the Crown's admissions, it is not imperative for the Court to pronounce upon aboriginal rights inside the reserves, nor are Samson's alleged aboriginal rights *outside* the reserves in issue at this point of the proceedings. Further on in its argument, Samson asserts that it has proved aboriginal title, in common with other aboriginal nations, over significant parts of the area contemplated by Treaty 6; again, however, Samson indicates that it is not necessary for the Court to pronounce upon the issue at this time.

[553] I disagree. In light of the amount of time spent on the issue of Cree territory, as well as the amount of evidence tendered through expert and lay witnesses, conclusions are warranted.

[554] Samson tendered evidence through expert and lay witnesses, with the latter including two elders. The elders, Pearl Crier and Monica Soosay, testified about the way of life of their Cree ancestors, where they hunted, fished, and camped. I am satisfied that the oral traditions related by these elders are properly admissible according to the principles enunciated by the Chief Justice in *Mitchell*, *supra*. Both witnesses are Cree elders, and they were able to name the sources of their information, who are long since deceased.

[555] The concern the Court has with these oral traditions, however, lies with the time periods to which they relate. Elder Crier was asked only about “the way of life before treaty” (transcript volume 86, pp. 12183-12184; 12185-12186). One of Elder Crier’s sources was her father-in-law, Johnny Crier. Elder Crier named his source as his father, Macoskis, who lived at the same time as Kanatakasu, or Samson. Thus, this information may pre-date Treaty 6, but it is entirely unclear by how much. It is simply far too vague and it would be impossible to say whether the information in regard to the various rivers and lakes that were frequented for hunting and berry picking can be pushed back to before the time of Macoskis.

[556] Elder Soosay's source for some of her oral traditions was her grandmother, Mary Simon. Elder Soosay testified that her grandmother died in 1954 and was 12 years old at the time of the Northwest Rebellion in 1885; thus, Mary Simon was born in approximately 1873. Elder Soosay was asked questions about the "old days," "the times of the old Cree," and "old times" (transcript volume 88, pp. 12338-12341). She was also asked about "people from [Mary Simon's] father's and grandfather's generation and before" (transcript volume 88, p. 12343). When speaking of where the Cree travelled, in particular south of the border, it is apparent that Elder Soosay was speaking of her grandmother's travels. Her response identifying Morley and the Ghost River was the only one relating specifically to the time of Mary Simon's father's and grandfather's generations and before. The rest of her answers seem to be in regard to her grandmother's time, which post-dates Treaty 6 and seems to concern Big Bear's people, not Samson.

[557] Accordingly, I am unable to place much weight on the evidence of Elder Crier and Elder Soosay on the issue of Cree territory. While the evidence suggests that Samson ancestors lived in central Alberta, the evidence is either too vague in terms of the time frame, or relates closely to the time of Treaty 6.

[558] I now turn to the evidence of Samson's lay witnesses on this issue. Mr. Buffalo presented what amounts to lay opinion evidence. While Mr. Buffalo has engaged in historical and archival research for the Samson Cree Nation, and as a personal hobby, he has no formal training or qualifications as an historian.

[559] I acknowledge that the Supreme Court has held that in certain circumstances lay witnesses may be permitted to provide opinion evidence: *Graat* v. *R.*, [1982] 2 S.C.R. 819 at pp. 835-838. At page 837, Justice Dickson held,

> I accept the following passage from Cross as a good statement of the law as to the cases in which non-expert opinion is admissible:
>
> > When, in the words of an American judge, "the facts from which a witness received an impression were too evanescent in their nature to be recollected, or too complicated to be separately and distinctly narrated", a witness may state his opinion or impression. He was better equipped than the jury to form it, and it is impossible for him to convey an adequate idea of the premises on which he acted to the jury:
> >
> > > "Unless opinions, estimates and inferences which men in their daily lives reach without conscious ratiocination as a result of what they have perceived with their physical senses were treated in the law of evidence as if they were mere statements of fact, witnesses would find themselves unable to communicate to the judge an accurate impression of the events they were seeking to describe."
> >
> > There is nothing in the nature of a closed list of cases in which non-expert opinion evidence is admissible. Typical instances are provided by questions concerning age, speed, weather, hand-writing and identity in general [at p. 448].

Thus, a lay witness may give opinion evidence, but only insofar as it assists the witness in more accurately expressing the facts he or she perceived.

[560] Mr. Buffalo's evidence is not based on his perception of events or facts. One might argue that he simply – and neutrally – presented the Court with excerpts from scholarly texts and historical documents, as well as information based on discussions with Cree elders. However, Mr. Buffalo did this with a particular thesis – an opinion – in mind as to the nature of Cree territory, *viz*. that the Cree historically occupied central Alberta. Samson had three experts testify on the issue of Cree territory. It is a topic that requires training and expertise. Mr. Buffalo was not qualified at trial as an expert. His testimony amounts to opinion evidence and, accordingly, is not admissible. If I am incorrect, and his lay opinion evidence is admissible, I find that I cannot put any weight on it for the reasons that I outline below.

[561] Mr. Buffalo testified that elders he had interviewed at MCC for their videotaping program had provided information on which he based his opinion that the Samson Cree had historically lived in central Alberta. As I noted earlier, these tapes were not identified, nor were they translated for the Court or marked as full exhibits. Upon further questioning by the Court for more details as to the sources of this information and to what time period

it pertained, Mr. Buffalo replied in a rather vague manner and seemed to back off from his initial reliance on the elders' videotapes:

> Q. Mr. O'REILLY: Mr. Buffalo, talking about stories about the buffalo hunt in the Buffalo Lake area and the Battle River area, which people told you these stories about the hunting of the Samson Cree members?
>
> A. The Elders that we had interviewed mentioned that we lived in these areas of the Buffalo Lake area and also the Camrose area, and Pigeon Lake area, and the Gull Lake areas, those are for sure.
>
> THE COURT: And they told you stories, sir, about the hunt? At which time? In what year? Was it recently, or – I mean, in what year about the hunt, and these stories that you were told, is it from videotapes or that you, yourself, were told by these Elders, whoever they may be, sir?
>
> A. The stories were not necessarily interviews, but we all knew that we lived in the area of the Buffalo Lake. And that was the last concentration of hunting, and there are still a lot of animals plentiful in the area there.
>
> And all the history books in those towns have exactly the story of the buffalo hunt of groups of Metis people living in three areas around the lake that were buffalo hunters that travelled all the way from Winnipeg and lived and wintered in these sites on the Buffalo Lake.
>
> (transcript volume 109, pp. 15277-15278)

[562] Mr. Buffalo then went on to state that another source was his great-grandmother, Mary Buffalo. However, he said that he was "pretty young" at that time and she spoke in a higher level of Cree than he could understand. Furthermore, she never specified what area they hunted in or what time period, beyond saying "out east" and in the "1800s" and "late 1800s." Upon further questioning, Mr. Buffalo agreed that his great-grandmother told him stories that post-dated Treaty 6 (transcript volume 109, p. 15279-15280). Indeed, he

agreed that he was unable to mention any specific time frame prior to 1882 in regard to hunting and territory (transcript volume 109, p. 15283).

[563] I find that I cannot put any weight on the evidence of Mr. Buffalo in regard to elders' oral traditions or information. It is simply far too vague and, hence, unreliable. The most one could conclude is that at some point, Samson ancestors came to live in the areas mentioned by Mr. Buffalo.

[564] Mr. Buffalo also relied upon historical documents and scholarly texts for his opinion that the ancestors of the Samson Cree lived in central Alberta dating back to the mid-1750s. Mr. Buffalo prepared and tendered a volume of documents relating to Cree chief Maskepetoon, Chief Samson's predecessor (S-174). Various documents in the volume note Maskepetoon's presence at central Alberta locations. Tab 1 of S-174 contains an excerpt from the *Dictionary of Canadian Biography*, volume IX (1861-1870). The biographical note on Maskepetoon, written by Hugh Dempsey, indicates that he was born probably in 1807 in the Saskatchewan River area and died in 1869 at a Blackfoot camp in central Alberta. Most of the entries regarding Maskepetoon post-date the 1830s.

[565] On cross-examination, Mr. Buffalo readily acknowledged that he had never seen the 1865 baptismal records of Maskepetoon and his wife. The Wesleyan Methodist Register of Baptisms, kept in the archives of the Glenbow Museum, show that Maskepetoon was baptised as Abraham, and his wife as Sarah, when they were aged 58 and 55, respectively (C-193, Nos. 71 and 72). Their abode is recorded as Victoria, which Mr. Buffalo agreed is near Whitefish Lake, northeast of Edmonton (transcript volume 118, pp. 16309-16313).

[566] Insofar as Maskepetoon's death is concerned, the biographical sketch, noted above, states that he was killed at a Blackfoot camp in central Alberta. An excerpt from historian John Milloy's text, *The Plains Cree: Trade, Diplomacy and War, 1790-1870*, indicates that Blackfoot territory, at the time of Maskepetoon's death, included the Red Deer River (S-174, tab 55, p. 115).

[567] The documents indicate that Maskepetoon lived and travelled in central Alberta, but they do not lend support to Mr. Buffalo's opinion that the Cree had lived in that area since the mid-1700s. To the contrary, they suggest that central Alberta was Blackfoot territory and continued to be so, at least until the time of Maskepetoon's death.

[568] Aside from these frailties, I find Mr. Buffalo's methodology shaky at best. He testified that he has always had files of material on Maskepetoon and Samson because he felt that it was important material. He presented the files to plaintiffs' counsel and received assistance in organizing them. Most of the books, from which the excerpts were taken, were from the Samson Cree Nation's archives; some excerpts came from books from plaintiffs' counsel's office. However, the problem I have with his methodology has to do with how he selected the excerpts. Mr. Buffalo testified that he just marked everything that had to do with Maskepetoon, Samson, or the Cree people. He did this by referring to the index and table of contents, and then scanning the book. Mr. Buffalo never read the entirety of the books, but rather just the parts that covered his area of interest. (transcript volume 118, pp. 16257-16260; 16271-16275). This approach to research may be suitable for his personal purposes, but the Court cannot rely upon it.

[569] Samson's other lay witness on the topic of Cree territory was Mr. Cutknife. As noted earlier, he testified about two maps he had prepared, which set out the Cree names for various locations in central and southern Alberta (S-138 and S-139). Some of the sources of his information included videotapes and conversations with elders, some of whom are now deceased. Other sources included Samson members and members of other Cree communities. Leaving aside the point that much of this constitutes hearsay and speculation, and cannot be properly admitted as oral tradition evidence, the existence of Cree names

cannot, by itself, be evidence of either the extent of the territory, or of the length of time it has been occupied.

[570] Samson also tendered experts on the issue of territory: Ms. Holmes, Professor Ray, and Professor Little Bear. The Crown's expert testimony came from Dr. von Gernet.

[571] The main thrust of Ms. Holmes's opinion – and although she oft stated that she was not offering any opinions, but rather presenting academic research in a neutral fashion, I consider her reports and testimony to contain her opinions – is that since at least the 1750s, the Cree had been recorded as living in the area 50 to 60 miles south of Edmonton. For her contention that the Cree occupied central Alberta in the 1750s, and indeed earlier, Ms. Holmes relied largely on Dale Russell's interpretation of HBC fur trader Anthony Henday's journal. Henday travelled inland from York Factory in 1754 to 1755 with a group of Cree. The particular journal entry, noted earlier in these Reasons, described the Cree wintering over in small camps in central Alberta, or "Archithinue" country. The journal entry is unequivocal on that point: it is clearly Archithinue territory. Archithinue has been accepted by scholars as most likely meaning Blackfoot. I accept that the Cree were certainly camping there, as Henday described, but they were doing so only at the pleasure of the Blackfoot. Indeed, Henday's Cree companions told him that they would be killed if

they trapped wolves in the Blackfoot territory. The Cree cannot be characterized as occupiers of this territory, based on Henday's journal; they were merely visitors.

[572] Ms. Holmes also relied on James Smith's 1987 article, "The Western Woods Cree: Anthropological Myth and Historical Reality" (S-12, tab 32). Smith contended that archaeological evidence – Cree cultural material, known as Selkirk – confirms that the Cree were the pre-contact occupants of northern Manitoba, Saskatchewan, and the Lac la Biche area of Alberta. Given his extensive training and experience, I prefer Dr. von Gernet's analysis of Smith's work over that of Ms. Holmes. Smith relied on J.V. Wright, who claimed that the western limits of Selkirk remains was Île-à-la Cross, Saskatchewan. According to Dr. von Gernet, archaeologist David Meyer examined the Lac la Biche material and concluded that it is not Selkirk. Thus, the contention that the Cree were further west than Saskatchewan cannot be supported by Smith's article. I accept that there was a Cree presence in Manitoba and Saskatchewan before contact, but I do not accept that their territory extended into central Alberta by the 1750s.

[573] Professor Ray also testified about Cree territory. Relying on the Henday journal, Professor Ray characterized the Cree as "sharing" Blackfoot territory, based on their symbiotic economic relationship in regard to the European fur trade. The Cree acted as

middlemen, trading European goods to the Blackfoot in return for furs. I agree that this appears to be the nature of their relationship, at least insofar as the European fur trade is concerned; however, I disagree with Professor Ray's contention that the Cree shared Blackfoot territory, with its corresponding implication that it was, therefore, Cree territory. I refer to my earlier remarks on the Henday journal: the Cree were visitors in Blackfoot country at that time.

[574] Professor Ray's book *Indians in the Fur Trade* contains two maps showing Cree distributions for 1790 to 1821 and 1821. The first map depicts the Cree in what is now the province of Saskatchewan, occupying the North Saskatchewan River and territory to the north. Their western boundary extends slightly into northeastern Alberta; the eastern boundary extends well into Manitoba. The second map, for 1821, shows the Cree in central Saskatchewan; the Blackfoot are shown as occupying central and southern Alberta (C-9, pp. 100-101). This is consistent with the archaeological evidence relied on by Dr. von Gernet, including the Magne maps, which were produced on the basis of scholarly consensus and outline aboriginal distributions for 1700, 1750, 1800, and 1850 (C-322, pp. 17-20, Figures 2-5).

[575] Professor Little Bear's testimony did not assist the Court in determining the extent of Cree territory. He described traditional Blackfoot territory as stretching from the North Saskatchewan River in Alberta, south to the Yellowstone River in Montana, and from the continental divide in the Rockies to the present-day Alberta / Saskatchewan border in the east. This description was contained in his RCAP submission (C-225, p. 8). He further testified that the Blackfoot considered the Cree to be their neighbours to the north and northeast of this traditional territory. During his testimony, he introduced the concept of overlapping or joint-use areas, found at the edges of various groups' territories. This concept was not part of his RCAP submission. At any rate, according to his testimony of Blackfoot understanding, central Alberta was at the core of the Blackfoot territory, which is consistent with academic opinion on the matter.

[576] I accept that territorial boundaries were somewhat fluid, rather than fixed, or distinct, demarcations. Nevertheless, aboriginal groups certainly understood the concept of territory and exercised control over it, allowing access by other groups on occasion and for specific purposes and this, notwithstanding Professor Wolfart's assertion that the Cree did not understand the concept of territory. I accept, as I said above, that the Cree occupied Manitoba and Saskatchewan before European contact. I also agree with Dr. von Gernet's opinion that the Cree were not indigenous to central Alberta, and were not present there

until sometime after European contact, primarily due to their involvement in the European fur trade.

v. Trade

[577] Evidence on pre-contact aboriginal trade practices was presented, for the most part, through Ms. Holmes and Dr. von Gernet. Oral traditions and information from elders on the Cree way of life before Treaty 6 painted a picture of the Plains Cree as hunters and foragers. The only lay evidence on this issue came from Mr. Buffalo's volume of historical references to Maskepetoon (S-174). The biographical sketch of Maskepetoon notes that in 1831, while on a trading expedition to Fort Union on the Missouri River, he was asked to accompany three other chiefs on a trip to Washington, D.C., to meet President Jackson (S-174, tab 1, p. 537). The second reference is found in an excerpt from John Ewers's book *Life on the Upper Missouri* (S-174, tab 4, p. 79). Ewers wrote that Maskepetoon was better known to the traders as "Broken Arm," a name he had earned on the battlefield.

[578] These references are of no use to the Court because they obviously post-date contact, as Maskepetoon's life spanned the years 1807 to 1869. Moreover, they are

woefully vague; no particularities of trade practices are detailed. Indeed, the references are specific only to Maskepetoon, and not to the Cree as traders in a larger sense.

[579] Ms. Holmes's report examined Cree trading practices from the late 1700s to the early 1900s, from the Lake of the Woods in the east to the Rocky Mountains in the west (S-12). She testified that, in her opinion, trade was an integral feature of Plains Cree and Samson Cree economic and political life.

[580] Ms. Holmes relied on one map, made by archaeologist J.V. Wright, from the *Historical Atlas of Canada* (S-12, tab 3, Plate 14). The map provides an overview of the movement of trade goods, dating back to 10000 B.C., on the North American continent. No aboriginal tribal or ethnic divisions are given, beyond the note that trade occurred between Algonquian and Siouian speakers. The map does not provide any definition for its term "early contact." Ms. Holmes was unable to give an interpretation of this term.

[581] I cannot put much weight on this map as evidence of Cree pre-contact trade practices for several reasons. As noted, the map fails to indicate which particular aboriginal groups were involved. The map shows only the movement of trade goods; it cannot depict

the distances travelled by particular aboriginal groups for trade purposes. Wright's map shows the movement of trade goods into what is now Canada, but it does not identify any trade goods originating from Alberta. Of course, that would also require an assumption that the Cree lived in central Alberta pre-contact, which I do not accept.

[582] Ms. Holmes suggested that the Cree traded in minerals prior to 1770. She relied on Wright's map, which refers to trade in, among other things, obsidian and silica. Ms. Holmes also relied on fur trader Edwin Denig's book, *Five Tribes of the Upper Missouri*. Denig described Cree territory and observed that some springs were "impregnated with saline and sulphurous substances and from some a great quantity of good salt is produced by the natives" (S-12, p. 67; tab 67, pp. 101 and 104). Ms. Holmes surmised that Denig suggested there was some exchange or trade in salt by the Cree; she specifically mentioned minerals in a list of aboriginal trade goods. On cross-examination, however, Ms. Holmes conceded that Denig did not say salt was traded. She testified that she was unaware of any record of trade in salt or any other minerals by the Cree.

[583] The evidence does not establish that the Cree were engaged in any pre-contact trade in minerals, and certainly not oil and gas. I agree that they engaged in trading activities. Certainly, the documentary record shows that post-contact trade involving the

Cree occurred. Journals and observations of fur traders and explorers show that the Cree were trading at the Mandan-Hidatsa trading centres. I agree with Dr. von Gernet's opinion that the Cree were not dependent on these trading trips to the Mandan for their survival; on the contrary, their hunting and foraging activities amply supplied their needs.

[584] The evidence shows that the Cree and the Assiniboine came to dominate inland trade in the European fur trade, which would be by necessity a post-contact activity. The Cree secured European goods from York Factory, the HBC post on Hudson Bay and travelled into the interior to trade for furs with other aboriginal peoples. Both Ms. Holmes and Dr. von Gernet appeared to agree on this point, and the evidence certainly supports this characterization.

[585] Starting in the 1770s, the Europeans began to set up inland posts in the Saskatchewan country. In response, the Cree eventually shifted their focus from that of middleman to the provisioning trade and became market hunters. The Cree were well known for their roles in this trading system, and it may even be properly characterized as a distinctive aboriginal practice of the Plains Cree, but it remains a post-contact activity. It is not possible to use this particular post-contact practice and project back into pre-contact times because the European fur trading system requires contact and arose post-contact.

[586] Ms. Holmes provided testimony on the issue of cross-border trade practices. Cross-border trading trips by the Cree to places such as the Mandan-Hidatsa trading centre occurred and were noted in post-contact documentary records. One could even reasonably infer that such trips occurred back in time before Europeans arrived on the scene to record their observations. However, the Court was not given any evidence, such as archaeological evidence or oral traditions, that would allow it to conclude such cross-border trade occurred to such a degree that it was distinctive to the Cree. The references to Maskepetoon, and in particular his trip to Washington, D.C., do not indicate any pattern of cross-border trade; nor do they demonstrate that either he or his people were renowned as traders. Indeed, Denig described Maskepetoon as “generally despised by the traders” (S-12, tab 22, p. 88). Maskepetoon appears to have been renowned for his skills as a host, diplomat, and peacemaker.

[587] Ms. Holmes also testified about post-Treaty 6 cross-border movement. However, none of the evidence established that the Samson Cree were journeying south of the border to conduct trade in anything in particular. She referred to a large group of Cree, including members from the Edmonton and Bear Hills area, camping on the Missouri River and trading with local traders in 1881 and 1882. She relied on a letter from Indian Agent

Denny at Fort Walsh to Indian Commissioner Dewdney. However, upon examination, the letter describes Big Bear and his people as the ones camping on the Missouri River; Crees from the Edmonton House area were encamped around Fort Walsh, on the Canadian side of the border. Granted, the letter also stated that when their provisions ran out, they would cross the border for buffalo and whiskey; however, there is nothing in the letter to establish evidence of cross-border trade (S-12, tab 466).

[588] In my opinion, there was not sufficient evidence to establish that pre-contact trade in any particular item, let alone at large, was a distinctive practice of the Cree. They surely engaged in trade, but no evidence – such as archaeological evidence – was adduced that could lead the Court to conclude as the plaintiffs desire, *viz.* that it was a defining feature of Cree society. Rather, the evidence seems to point to the Mandan-Hidatsa culture as one where trade was integral and distinctive. The evidence shows that trade did not become a distinctive Cree practice until they came to dominate the European fur trade, first as middlemen and later as market hunters and provisioners. The evidence shows that the Cree were swift to assume this role and ably exploited their position in the new economic order that unfolded with the arrival of the Europeans and the fur trade. Yet, this was necessarily a post-contact activity and cannot be projected back into pre-contact times because there was no European fur trade system for the Cree to exploit. Finally, I reiterate

my earlier comments that there was absolutely no evidence of any trade by the Cree in minerals, including salt, oil, and gas, or indeed anything analogous.

III. Phase Two: Money Management

A. Issues

[589] In Book XII of their written closing arguments, the plaintiffs note that some of the original issues have become moot in light of admissions made by the Crown. Samson asserts that since the Crown has admitted that the plaintiffs are the beneficial owners of the Samson Reserve, their interest in the Pigeon Lake Reserve, and the oil, gas, and other minerals of those reserves, there no longer remains an issue that the royalty moneys belong to Samson. Thus, according to the plaintiffs, they do not have to prove an aboriginal rights entitlement to the money, nor do they have to prove whether the Samson and Pigeon Lake Reserves are part of their traditional lands.

[590] The following constitutes Samson's articulation of the outstanding issues, a part of which was already reproduced in the Phase One portion of these Reasons:

A. Aboriginal Rights

134. Whether Samson Cree Nation has an existing aboriginal (or inherent) right of self-determination?

135. Whether an existing aboriginal or inherent right of self-determination entitles Samson Cree Nation to the control of the trust moneys so that Samson Cree Nation can assume the Crown trust in the place of the Crown in regard to the trust moneys of Samson Cree Nation?

136. Whether Samson Cree Nation existed as a distinct component of the Plains Cree Nation prior to Treaty No. 6?

137. Whether part of the Plains Cree traditional territory encompassed the Treaty No. 6 area and whether the Crown is estopped by Treaty No. 6 from contesting this?

B. Treaty Rights

138. Whether Treaty No. 6 is a treaty of alliance and partnership?

139. Whether the oral history of the Plains Cree about the negotiations surrounding Treaty No. 6 will be given weight equal to that of the accounts of Lieutenant Governor Morris and Secretary Jackes?

140. Whether the intention of the parties to Treaty No. 6 was to preserve and protect reserve lands and interests therein for the exclusive benefit of the Indian parties to the Treaty for whom the reserves were set aside.

141. Whether trust obligations of the Crown arose from a historical trust?

142. Whether Treaty No. 6 is the source of trust obligations of the Crown?

143. Whether the Crown breached Treaty No. 6 from shortly after the Treaty?

144. Whether the conduct of the Crown respecting Treaty No. 6 has an impact on the treaty obligations of the Crown?

145. What is the nature and extent of the treaty obligations of the Crown in respect to the royalty moneys?

146. Whether ss. 61 to 68 of the *Indian Act* constitute a breach of Samson's treaty rights?

147. Whether the Crown can justify the infringement of the treaty rights of Samson Plaintiffs in respect to the royalty moneys of Samson Plaintiffs?

C. Trust Obligations of the Crown (and Trust Beneficiary Rights)

148. Whether the Crown is a trustee of Samson royalty moneys

(a) in virtue of the historic Crown-aboriginal relationship;

(b) in virtue of the constitutional framework and constitutional development of Canada;

(c) in virtue of Treaty No. 6;

(d) in virtue of the 1946 Surrender;

(e) in virtue of the *Indian Oil and Gas Act*;

(f) in virtue of the *Indian Act*;

(g) in virtue of the special comprehensive regime respecting reserve oil and gas;

(h) in virtue of the common law;

(i) in virtue of the Crown's representations and conduct?

149. What is the nature, extent and effect of

(a) the trust obligations of the Crown,

(b) the fiduciary obligations of the Crown?

150. What is the true nature and scope of the Crown's obligations to Samson Plaintiffs in respect to the control, management and administration of the trust or royalty moneys of Samson Plaintiffs?

151. How do the *Indian Act* and the *Indian Oil and Gas Act* apply in respect of the duties and obligations of the Crown?

152. Did the Crown have a duty to act in the sole interest of Samson in respect of the control, management and administration of the trust moneys?

153. Did the Crown legally borrow Samson trust moneys?

154. What was the standard of care applicable to the Crown as trustee or fiduciary in respect to Samson moneys?

155. Did the Crown have an obligation not to encroach upon capital?

156. Did the Crown have the power to invest Samson royalty moneys in securities?

157. Did the Crown act prudently in the "management" of Samson moneys?

158. In particular, in relation to prudent management of Samson moneys:

(a) what was the prudent investment strategy in respect of the trust moneys?

(b) was a long-term investment strategy, such as a diversified portfolio or a laddered bond portfolio, appropriate for the trust moneys?

(c) what relevance is it that the moneys were for the benefit of present and future generations, that Samson had substantial annual needs and that there

were forecasts and an expectation that significant royalties would be received from a non-renewable resource?

159. Was the Indian moneys interest rate methodology prudent in the circumstances?

160. Did the Crown have an obligation to review periodically the returns on Samson's moneys?

161. Did the Crown profit or benefit from the control, management and administration of the trust moneys?

162. More particularly, did the Crown benefit by borrowing the trust moneys and paying less in interest to Samson than it would have paid to an arms-length lender for a loan of a similar duration?

163. Did the Crown benefit by paying a floating rate of interest to Samson, thereby avoiding locking in the high interest rates that existed in the 1980's, the period in which the substantial majority of the trust moneys were received by the Crown?

164. What relevance is it that the Crown expected the high interest rates of the 1980's to decrease, and in accordance with this expectation, managed its own debt by minimizing the amount of long-term debt that it issued?

165. Did the Crown create its own conflict of interest by not handling Samson royalty moneys as trust or fiduciary property?

166. Did the Crown breach the *Indian Oil and Gas Act* in its treatment of Samson royalty moneys?

167. Did the Crown breach its trust or fiduciary obligations to Samson by not recommending or by not taking measures to provide for a higher rate of interest or return than that contemplated in the 1969 and 1981 Orders-in-Councils?

168. Did the Crown breach its obligations to Samson by not exempting Samson Cree Nation and Samson trust moneys and Samson reserve interests from the provisions of ss. 61 and 68 of the *Indian Act* through s. 4 of the *Indian Act*?

169. Was Samson treated unfairly in that the Crown paid Samson less in interest than it paid in respect of its largest internal borrowing, the PSSA?

170. What consequence flows from the fact that both the PSSA and the Samson borrowings were long term in nature, but that the PSSA received interest based on yields which were locked in for 20 years while the interest rate on Samson moneys changed every 90 days?

171. Did the Crown breach its trust or fiduciary duty to future generations by permitting an encroachment on the real value of the capital of the trust moneys?

172. In particular, was the *Indian Act* system of crediting interest to the Revenue Account one that guaranteed the erosion of the capital in real terms?

173. Were withdrawals from the Capital Account of Samson properly approved by the Minister, taking into account his duties to both present and future generations of Samson?

174. Did the Crown fail to account properly for Samson royalty moneys?

175. Did the Crown breach its duty to Samson Plaintiffs in failing to disclose legal opinions to Samson in relation to moneys?

176. Did the Crown breach its duty to Samson Plaintiffs related to the moneys in establishing and implementing a policy to prepare legal opinions most favourable to the position of the Crown?

177. Did the conduct of the Crown in the circumstances of these proceedings constitute a conflict of interest, sharp dealing or equitable fraud on the part of the Crown towards Samson Plaintiffs?

178. Did the Crown properly apply the 1981 Order-in-Council, whereby it credited interest based on a floating rate that changed every 90 days, or should it have notionally locked in the high long-term yields which existed in the 1980's, especially given the expectation that the yields would be declining?

179. What is the nature and extent of the losses and damages caused to Samson arising out of any breaches committed by the Crown?

180. Whether Samson Cree Nation has a constitutional right to the ownership and control of the trust or royalty moneys, whether in virtue of:

(a) self-determination;

(b) treaty rights;

(c) aboriginal rights; and

(d) other bases, such as Charter rights or in virtue of the Surrender?

181. Whether Samson Plaintiffs are entitled to the immediate transfer of the control, management and administration of the trust moneys, whether by injunction or otherwise due to:

(a) beneficial or other ownership of Samson;

(b) breach of trust by the Crown;

(c) abuse of powers by the Crown;

(d) unconstitutionality of ss. 61 to 68 of the *Indian Act*;

(e) in virtue of the Surrender or otherwise?

182. Whether the Crown can transfer trust or royalty moneys to the Samson Indian Band under either or both of the *Financial Administration Act* and the *Indian Act* (e.g. s. 4 of the *Indian Act* and ss. 64 and 65 of the *Indian Act*)?

183. Whether continued retention of the funds by the Crown is unjustified and illegal discrimination breaching a Charter right of Samson Plaintiffs (and whether the provisions of ss. 61 to 68 of the *Indian Act* constitute such unjustified and illegal discrimination)?

184. Whether the Crown has breached its trust or fiduciary duty in refusing to transfer trust or royalty moneys to the control of Samson Indian Band and Nation (in trust for the present and future members of Samson)?

185. What is the tax status of the capital moneys while under the control of the Crown and in the event of control by Samson Plaintiffs?

D. Constitutional Issues

186. Whether ss. 61 to 68 of the *Indian Act* are constitutionally inapplicable to Samson Cree Nation, to Samson interests in reserve lands and to Samson moneys?

187. Whether ss. 61 to 68 of the *Indian Act* breach Samson's aboriginal right of self-determination?

188. Whether the Indian moneys methodology and the retention of Samson's moneys by the Crown breaches Samson's equality rights under s.15 of the *Charter?*

189. Whether ss. 61 to 68 of the *Indian Act* breach the constitutionalized treaty and trust beneficiary rights of Samson?

190. Whether s. 17 of the *Indian Act* is constitutionally applicable to Samson Plaintiffs?

(Samson Written Closing Argument, Book XII, tab 4, pp. 33-40)

[591] The following is the Crown's view of the issues facing the Court in this phase of the trial:

(a) In general terms, how is the relationship between the Crown and the Plaintiffs with respect to their moneys to be characterized? In particular, are there significant differences between this relationship and that between an ordinary private law trustee and beneficiary? The Crown's position is that there are significant differences. The Crown is a trustee of the Indian moneys, but the only terms of that trust are those set out in the governing legislation. Any other obligations which the Crown has with respect to Indian moneys can only be characterized as fiduciary obligations or as implied statutory obligations – not private trust law obligations.

(b) Are the objectives set by the Bands, the degree of long-range planning in which they engaged, and the pattern of their expenditures, significantly different than those typical of

pension and endowment funds generally or the PSSA in particular? The Crown submits that they are.

(c) By virtue of the combination of the *Indian Act* and the *Financial Administration Act* (and since 1977 the *Indian Oil and Gas Act* as well):

> (i) Must the Crown deposit Indian moneys in the CRF rather than investing them in the private markets? The Crown submits that it must.
> (ii) Must the Crown accord the same rate of interest to all Indian Bands? The Crown submits that it must.
>
> (iii) Is the Crown obligated or entitled to make an unconditional transfer of the hundreds of millions of dollars in Samson's capital account upon request by the Band Council, or is new legislation required for this purpose? At minimum, is the Crown entitled to insist upon certain conditions such as the establishment of a long range investment plan, evidence of broad Band membership support, and a full release from any liability for the future handling of the money or the rate of return obtained thereon? The Crown submits that the existing legislation does not permit an unconditional transfer, and that it is entitled if not obliged to insist upon a number of prudent conditions before undertaking any such transfer.

(d) Does the legislation governing the Crown's handling of Indian moneys infringe some Treaty or aboriginal right of the Plaintiffs, or does it otherwise offend the Constitution in some way? More specifically:

> (i) Have the Plaintiffs established that Treaty 6 includes some provision which guarantees them a right to manage large sums of money? The Crown submits that they have not.
>
> (ii) Have the Plaintiffs established the existence of a pre-contact aboriginal practice involving, or analogous to the management of large sums of money, and which can be defined sufficiently narrowly to warrant protection as an aboriginal right under Section 35 of the Constitution? The Crown submits that they have not.
>
> (iii) Does the legislative scheme governing the treatment of Indian moneys infringe the right to equality before the law granted to individuals under Section 15 of the Charter? The Crown submits that it does not.
>
> (iv) Is any infringement of constitutionally protected rights of the Plaintiffs a justifiable one in all of the circumstances? The Crown submits that it is.

In summary, the Crown submits that the legislation governing the Crown's handling of Indian moneys is constitutional. It infringes no Treaty or aboriginal right of the Plaintiffs, and in the alternative is a justifiable infringement in the circumstances.

(e) Is Samson entitled on any basis to an unconditional transfer of the hundreds of millions of dollars in its capital account, or should any such transfer be subject to the establishment of a long-range investment plan, evidence of broad Band membership support and a clear release of the Crown from any responsibility or liability? The Crown submits that regardless of the

determination on the constitutionality of the legislation governing its handling of Indian moneys, no unconditional transfer of such a large amount of money is appropriate.

(f) Does the Parliament of Canada owe any fiduciary duty to the Plaintiffs with respect to the creation of legislation governing Indian moneys? The Crown submits that it does not.

(g) Does the Governor-in-Council owe any fiduciary duty to the Plaintiffs in establishing the interest rate to be paid on Indian moneys pursuant to Section 61(2) of the *Indian Act*? The Crown submits that it does not.

(h) Is the establishment of the interest rate paid by the Governor-in-Council subject to one or more standards that may be implied in Section 61(2) of the *Indian Act*, such as an obligation to act in good faith, an obligation to take the Indian interest into account, an obligation to establish a rate not designed to benefit the Crown, or an obligation to establish a rate which is reasonable in all of the circumstances? If so, has the Crown met any such implied standards? The Crown does not concede that any such standards can be read into the legislation, but submits that if there are to be, the Crown has met all of them.

(i) In establishing the interest rate to be paid on Indian moneys pursuant to Section 61(2), is the Governor-in-Council entitled to take into account:

> (i) the fact that the rate applies to all Indian Bands across the country?
>
> (ii) the fact that Indian moneys are not committed to remain in the CRF for any particular period of time?
>
> (iii) the fact that higher rates benefit Indian Bands but at the expense of increased borrowing costs for Canada?

The Crown submits that the Governor-in-Council is entitled to take into account all of these things.

(j) Is the Indian moneys interest rate formula a reasonable one given all of the circumstances surrounding it, and in particular that:

> (i) It includes a risk premium by virtue of the use of a long bond rate;
>
> (ii) At the same time, it involves no risk to the Bands of any decline in principal value;
>
> (iii) The long bond rate is typically the highest rate paid by the Crown to finance its borrowing requirements;
>
> (iv) The formula applies to all Indian Bands across the country;
>
> (v) Indian moneys are not committed to remain in the CRF for any particular period of time, but instead may be withdrawn at any time upon request by the Bands and approval by the Minister;
>
> (vi) The Crown has been prepared to work with the Bands to establish new mechanisms whereby the Bands themselves can pursue higher rates of return by assuming greater risk with their moneys?

The Crown submits that it is a reasonable formula in all of the circumstances.

(k) At any point in time, was the prospect of declining interest rates so certain that it was unreasonable for the Crown not to have taken steps to lock-in current rates for the Indian moneys, bearing in mind *inter alia* the competing risks entailed in doing so, the fact that Indian moneys were not locked in for any particular time period in the CRF, and the aspirations of the Bands to in fact remove them in the near term. The Crown submits that it was not unreasonable in all of the circumstances.

(l) If the Crown had any authority to make investments with Indian moneys:

> (i) Was the conservatism inherent in the Indian moneys formula nevertheless appropriate for the Plaintiffs given their level of long-range planning, objectives, risk tolerance and spending patterns? The Crown submits that it was.
>
> (ii) Was the Crown entitled to respect the spending decisions of the Bands in view of their demands, and those of aboriginal groups generally, for increased respect by the Crown for their decision-making and increased powers of self-government? The Crown submits that it was, and that it had no obligation to impose upon the Plaintiffs a restricted spending policy contrary to their wishes.
>
> (m) If Indian moneys had not been deposited in the CRF, how would the Crown have met its incremental borrowing costs, and would it have inevitably involved more cost to the Crown? The Crown submits that no increased cost was inevitable because the Crown could have replaced the Indian moneys with the issuance of additional Treasury Bills at lower cost to the Crown. The Crown further submits that this is in fact what it would have done, and that its overall debt management costs would have been lower under any alternative scenario as well.

(Written Closing Argument of the Crown, Moneys Phase, Volume 1, tab 1, pp. 26-30)

B. Witnesses

I. Experts

1. ***For the plaintiffs***

Allen Lambert

[592] Mr. Lambert, a former President and CEO of the Toronto Dominion Bank, tendered an expert report (SE-351), rebuttal report (SE-354), and surrebuttal report (SE-355). Mr. Lambert's involvement with the Canadian banking and financial industry spans some seventy years, beginning in Victoria in 1927 (SE-348). Mr. Lambert was qualified at trial as an "expert in Canadian banking, financial management and money management generally, including investment and trust fund management and Canadian financial services, with considerable experience in monetary policy" (SE-347).

Donald McDougall

[593] Mr. McDougall, Director of RBC Global Services' Benchmark Investment Analysis practice, submitted an expert report (SE-375), surrebuttal report (SE-377), and two further reports updating the investment performance data to December 31, 2001 (SE-378) and June 30, 2002 (SE-379). According to his C.V., before joining RBC Global Services in 2000, Mr. McDougall spent 14 years with SEI Investments (SE-374). At SEI, he was responsible for advisory services to plan sponsors, with particular expertise in policy planning, investment structure, and investment performance analysis. At trial, Mr.

McDougall was qualified as an expert “investment consultant specializing in investment performance measurement” (SE-373).

Stephen Jarislowsky

[594] Mr. Jarislowsky, Chairman and Director of the firm Jarislowsky Fraser Limited, provided an expert report titled “Returns on Royalty Moneys of the Samson Cree Nation and Prudent Investment” (S-398), rebuttal report (S-400), and surrebuttal report (S-401). Mr. Jarislowsky earned an M.B.A. from Harvard in 1949 (S-388). He was qualified as a “professional investment counsellor with some 47 years of experience and with expertise in investment planning, investment strategy and investment management with particular expertise in the planning and management of investment portfolios for pension plans, endowments, foundations, high net worth individual clients and trust funds which over the years have totalled in the billions of dollars and currently total well in excess of $30 billion” (S-387).

Dr. Thomas Wilson

[595] Dr. Wilson, a Professor of Economics at the University of Toronto, tendered an expert report titled “Inflation, Interest Rates and the Government of Canada’s Fiscal Position, 1975-1999" (S-411) and a surrebuttal report (S-412). Dr. Wilson earned a Ph.D. and an A.M. in Economics from Harvard in 1959 and 1961, respectively. Since 2001, he has held the title of Professor Emeritus. His C.V. lists numerous publications and working papers; it also details his consulting and research experience in, among other things, economic forecasting and fiscal policy analysis (S-408). Dr. Wilson was qualified at trial as an “Economist with specific expertise relating to government fiscal and monetary policy, inflation, interest rates, public debt management and economic forecasting” (S-409).

Ronald Parks

[596] Mr. Parks is a Chartered Accountant with Kroll Lindquist Avey. He submitted an expert report titled “Trust Accounting and Reporting Standards” (SE-424) and a surrebuttal report (SE-425). Mr. Parks is a designated specialist in investigative and forensic accounting. He has worked in the area of investigative and forensic accounting since 1987 (SE-416). At trial, Mr. Parks was qualified as a “Chartered Accountant who is a Designated Specialist in Investigative and Forensic Accounting, and an expert in the field of accounting standards and forensic accounting. He has expertise relating to generally accepted

accounting principles and to accounting and reporting standards, practices and objectives, including trust accounting and reporting" (SE-423).

Alan Marchment

[597] Mr. Marchment's career spans over forty years as an officer, director, and trustee of various companies, institutions, and funds. He provided the Court with an expert report (SE-457), rebuttal report (SE-458), and surrebuttal report (SE-459). Mr. Marchment's C.V. reveals that his work experience includes directly managing funds or advising on investment policy through memberships on investment committees acting for individuals and corporations (SE–455). Mr. Marchment was qualified at trial as a "Chartered Accountant with expertise in the area of trusts, investment management, banking, finance and money management generally. He has particular expertise with respect to the management of trust funds, pension funds and endowment funds, including expertise with respect to trust industry practices and standards such as those relating to segregation, borrowing, management, investment and monitoring of trust funds and the formulation of investment policies, procedures, strategies and objectives" (SE-454).

Alan Hockin

[598] Mr. Hockin, a former Assistant Deputy Minister of Finance and Executive Vice-President of the Toronto Dominion Bank, provided the Court with an expert report (SE-470), rebuttal report (SE-471), and surrebuttal report (SE-472). His C.V. shows many years of experience and involvement with various institutions' investment boards or committees (SE-468). Mr. Hockin was qualified as an "expert in Canadian and International banking, financial management and money management, including supervision of investments and trust funds. He is also an expert in investment committee management and the standards and practices of investment boards and committees including the establishment of investment policy and the monitoring of performance" (SE-467).

Tony Williams

[599] Mr. Williams is an actuary with Buck Consultants. He tendered an expert report (SE-477), rebuttal report (SE-479), two surrebuttal reports (SE-480 and SE-481), and a further report updating his data to June 30, 2002 (SE-484). Mr. Williams's C.V. indicates he became fully qualified as an actuary in 1985, and is a Fellow of the Society of Actuaries and a Fellow of the Canadian Institute of Actuaries (SE-474). His professional memberships include the Association of Canadian Pension Management, the Canadian Pension and Benefits Institute, and the Investment Practice Committee of the Canadian Institute of

Actuaries. Mr. Williams was qualified at trial as an “actuary with expertise relating to the application of mathematics, statistics, probabilities and risk theories to financial problems, including expertise in the development of models to evaluate the financial implications of uncertain future events. He also has expertise as an investment consultant specializing in investment management, investment policy, asset allocation, the selection of investment managers, investment performance monitoring and pension fund asset and liability forecasting, with particular expertise in the management and analysis of private sector and public sector pensions and other large funds (SE-475).

Arthur Drache

[600] Mr. Drache, a lawyer specializing in taxation, provided the Court with an expert report (S-505). His C.V. shows he has been published widely in the area of taxation, especially as it relates to the arts and charitable organizations (SE-496). In the past, Mr. Drache has taught at Queen’s University (1969 to 1973, 1984 to 1988, 2000, and 2002) and the University of Ottawa (1974 to 1981). At trial, Mr. Drache was qualified as an “expert in the areas of taxation, tax planning and the tax treatment of charities and non-profit organizations, with particular expertise in regard to the use of trusts as a tax planning vehicle. Mr. Drache also has special expertise as a professor, writer and practitioner in regard to these subject-matters” (SE-495).

Laurier Perreault

[601] Mr. Perreault, an actuary and Chartered Financial Analyst, tendered an expert report (S-511), surrebuttal report (SE-512), as well as a further report updating his results to September 30, 2002 (S-513). According to his C.V., Mr. Perreault's consulting practice deals with asset management and pension plan liability, as well as the establishment of investment structure, monitoring, and selecting money managers (SE-510). Mr. Perreault was qualified at trial as an "actuary with expertise relating to the application of mathematics, statistics, probabilities and risk theories to financial problems, including expertise in the development of models to evaluate the financial implications of uncertain future events. He is also a Chartered Financial Analyst with expertise as an investment consultant specializing in investment management, investment policy, asset allocation, the selection of investment managers, investment performance monitoring and pension fund asset and liability forecasting, with particular expertise in the management and analysis of public sector and private sector pensions and other large funds" (SE-509).

Laurence Booth

[602] Dr. Booth is a Professor of Finance at the Rotman School of Management at the University of Toronto. He submitted a rebuttal report (SE-548) and a surrebuttal report (SE-549). Dr. Booth earned his M.B.A. and D.B.A. from Indiana University in 1976 and 1978, respectively. His C.V. indicates that his main teaching areas are domestic and international corporate finance (SE-546). Dr. Booth's research focusses on the cost of capital, empirical corporate finance, and capital market theory. His C.V. also contains an extensive list of publications. Dr. Booth was qualified at trial as a "Professor of Finance, with expertise relating to financial market and capital market theory and the application thereof, including the areas of investment management, investment policy, investment strategy, investment portfolio construction and asset allocation" (SE-545).

Derek Malcolm

[603] Mr. Malcolm, a Chartered Accountant, tendered an expert report titled "Interest Calculation Errors - Pigeon Lake Capital Account" (SE-625) and a surrebuttal report titled "Pigeon Lake Account - An Accounting Perspective" (SE-626). According to his C.V., Mr. Malcolm's practice has centred exclusively on forensic and investigative accounting since 1994, and in 2000 he became a designated specialist (SE-623). At trial, Mr. Malcolm was qualified as a "Chartered Accountant who is a Designated Specialist in Investigative and

Forensic Accounting, with expertise including generally accepted accounting principles" (SE-624).

2. *For the defendants*

Robert Bertram

[604] Mr. Bertram, Executive Vice-President of the Ontario Teachers Pension Board, submitted an expert report (C-896), rebuttal report (C-897), and surrebuttal report (C-898). Mr. Bertram's C.V. indicates that he is an investment management executive with experience in all aspects of pension investment management, and that his background includes time spent as a director of various private companies (C-894). In his current capacity, Mr. Bertram is responsible for all aspects of the investment program at Ontario Teachers, which has assets in the range of $68 billion. Mr. Bertram was qualified at trial as a "chartered financial analyst and is an expert in the design, analysis and management of investment portfolios. He has extensive experience with different types of assets. His expertise covers investment strategy, policy, valuation and risk management and also covers matching investment portfolios to expected cash flow" (C-895).

Keith Ambachtsheer

[605] Mr. Ambachtsheer, President of KPA Advisory Services Ltd., presented the Court with an expert report (C-910), rebuttal report (C-911), and surrebuttal report (C-912). His C.V. shows that he earned his M.A. in Economics from Western University in 1967 (C-905). He is also a co-founder and partner of the firm Cost Effectiveness Measurement. At trial, Mr. Ambachtsheer was qualified as an "expert in the following areas relating to large funds of money, including pension and endowment funds: the structural and organizational dimensions of institutional investment; financial issues surrounding fund management; investment policy and strategy; [and] measurement of investment performance and management costs" (C-909).

Gordon King

[606] Mr. King, an economist, submitted to the Court an expert report (C-987), rebuttal report (C-988), and surrebuttal report (C-989). According to his C.V., Mr. King earned his M.A. in Economics from Cambridge in 1966 (C-987; Appendix A). From 1970 until 1980, he held various positions in the Monetary and Financial Analysis Department at the Bank of Canada. After that, he moved to the Department of Finance, where he was Director of the Capital Markets Division and later General Director of the Financial Sector Policy Branch. From 1992 until his retirement in 1995, Mr. King was Advisor and Project Director

of the Department's review of deposit insurance. Mr. King was qualified at trial as an "economist with specific expertise in the following areas: debt management, including specifically government debt management, and the use for that purpose of both external financing and internal sources of funds; government fiscal and monetary policy and fiscal operations; [and] financial institutions and markets" (C-986).

Stewart Scalf

[607] Mr. Scalf, a Chartered Accountant and Chartered Business Valuator, provided the Court with a rebuttal report to the calculations conducted by Mr. T. Williams and Mr. Perreault (C-998) and a summary of financial calculations, which amended some of the calculations contained in his initial report (C-999). His C.V. indicates that he practices in the areas of business valuations, financing, mergers and acquisitions, and the preparation of expert reports for use in litigation (C-994 and S-995). Mr. Scalf was qualified at trial as a "chartered accountant and chartered business valuator with expertise in the areas of collection, quantitative and qualitative assessment and analysis of financial data, and the application of financial models for those purposes" (C-997).

John Williams

[608] Mr. Williams, a Chartered Accountant and Chartered Business Valuator, tendered a rebuttal report titled “Report on Trust Accounting and Reporting Standards” (C-1008). His C.V. sets out in detail his experience in accounting and auditing; conducting investigations for private and public corporations, as well as various levels of government; and litigation services, where he determined economic losses, business valuations, and evaluation of insurance claims (C-1003). Mr. Williams was qualified at trial as a “Chartered Accountant who is a Designated Specialist in Investigative and Forensic Accounting and a Chartered Business Valuator, and an expert in the field of accounting standards and forensic accounting with expertise relating to generally accepted accounting principles” (C-1004).

ii. Lay

1. *For the plaintiffs*

Clifford Potts

[609] Mr. Potts is a member of the Samson Cree Nation. He worked as band administrator from October 1985 until May 1991. Mr. Potts served two terms as an elected band councillor from 1991 until 1996. Since that time, and at least until the time of his testimony in October 2003, Mr. Potts has worked for the Samson Cree Nation on a contract basis as a paralegal coordinator.

Robert Roddick, Q.C.

[610] Mr. Roddick is a lawyer practising in Alberta, where he was called to the Bar in 1968. Mr. Roddick acted as legal counsel for the Samson Cree Nation during the 1970s and part of the 1980s. He subsequently became the first President of Peace Hills Trust Company, following its formation in November 1980.

Owen Jackson

[611] Mr. Jackson, a Chartered Accountant, has audited the Four Nations organization and the Samson Cree Nation since 1988 and 1993, respectively.

2. *For the defendants*

Dennis Wallace

[612] Mr. Wallace joined DIAND in 1975. In 1978, he was District Manager in Kenora, Ontario. In 1981, he worked for one year on the Department's Management Improvement Project. Following that, Mr. Wallace moved to Toronto, where he became Director of Operations, a position he held for four years. From 1985 until 1988, he was a Director General in the Department, based in Edmonton. For the next ten years, Mr. Wallace continued his career in the federal civil service, but worked outside of DIAND. In 1998, he returned to DIAND as Associate Deputy Minister in Ottawa, where he remained until September 2001. Mr. Wallace ended his career with the government in 2003.

Donald Goodwin

[613] Mr. Goodwin worked for the Federal Government in various positions from 1967 until his retirement in 1992, and was with DIAND from 1980 until 1992 (C-830). He was Assistant Deputy Minister, Indian and Inuit Affairs from 1980 until 1985. For the next six years, Mr. Goodwin was the Assistant Deputy Minister, Lands, Revenue and Trusts. During his final year, Mr. Goodwin worked as a Special Advisor to the Deputy Minister on *Indian Act* alternatives.

C. Background

[614] As noted earlier in these Reasons, a Surrender of Minerals was executed on behalf of the plaintiffs on May 30, 1946. It reads as follows:

> KNOW ALL MEN BY THESE PRESENTS THAT WE, the undersigned Chief and Principal men of the Samson's Band of Indians, resident on our Reserve 137 and 138A in the Province of Alberta and Dominion of Canada, for and acting on behalf of the whole people of our said band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto our Sovereign Lord the King, His Heirs and Successors forever, ALL the land deemed to contain salt, petroleum, natural gas, coal, gold, silver, copper, iron and other minerals, underlying the surface of the area within the boundaries of the Samson Reserve No. 137 ... and such timber contained within the boundaries of any mineral claim staked or leased in accordance with the Regulations, as may be necessary for the development and proper working of such mineral deposits, subject to the payment of stumpage dues thereon; providing however, that a recorded holder of a mineral claim may, free from dues, lop, top or cut down trees growing on the mineral claim, removal of which is necessary for the proper working of the claim.
>
> TO HAVE AND TO HOLD the same unto his said Majesty the King, his Heirs and Successors, forever, in trust to grant in respect of such land the right to prospect for, mine, recover and take away any or all minerals contained therein, to such person or persons, and upon such terms and conditions as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people; and upon further conditions that money received from the permit proceeds of 10 ¢ per acre to be paid immediately on a per capita distribution.
>
> AND WE, the said Chief and Principal men of the said Samson's Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done in connection with the management and operation of the said lands and the disposal and sale of the minerals contained therein.
>
> (S-343 and S-344, para. 43)

[615] The Crown used a standard printed form for the surrender document. On the second page of the surrender, a paragraph was crossed out and initialled in the left margin by Hobbema Indian Agent W.P.B. Pugh, and amended to read,

> and upon further conditions that money received from the permit proceeds of 10 ¢ per acre to be paid immediately on a per capita distribution.

[616] The part that was crossed out reads,

> and upon further condition that all moneys received and to which we are entitled by law and pursuant to the surrender, shall be placed to our credit and interest thereon paid to us in the usual manner.

[617] By Order-in-Council P.C. 2662-1946, dated June 28, 1946, the Crown accepted the Surrender so that the mineral interests and accompanying mining rights could be leased for the benefit of Samson, Ermineskin, Montana, and Louis Bull (S-343 and S-344, para. 46; see also SEC-427, binder 3, tab 5, document 80).

[618] In 1952, commercial quantities of oil and gas reserves were discovered underlying the surface of the Pigeon Lake Reserve – known as the Bonnie Glen D3A pool – and production began in that same year (S-343 and S-344, paras. 51 and 54; S-52, p. 3).

[619] The Crown prepared and executed leases with oil and gas companies with regard to the exploration and extraction rights. Since that time, significant royalty moneys have been paid to the Crown on behalf of Samson (S-343 and S-344, para. 47-48 and 57).

[620] The Crown treats Samson's royalty moneys as "public moneys" pursuant to the *Financial Administration Act*, R.S.C. 1985, c. F-11 and, upon receipt by the Receiver General, they are deposited into the Consolidated Revenue Fund (CRF) (S-343 and S-344, para. 65).

[621] The Crown maintains public accounts, which are published annually in a series of volumes called "Public Accounts of Canada." These contain the audited financial statements of the federal government. As part of these accounts and for the purposes of its annual financial statements, the Crown maintains and reports on "Specified Purpose Accounts." Specified Purpose Accounts include the Canada Pension Plan Account, the Federal Public Service Superannuation Account (PSSA), and Trust Accounts (S-343 and S-344, paras. 66-68).

[622] The Crown treats revenues from non-renewable resources on Indian reserves as "capital moneys" and revenue from renewable resources as "revenue moneys." The Crown treats production stemming from oil and gas from Indian reserves as a non-renewable resource (S-343 and S-344, paras. 71-73).

[623] The Crown reports on the plaintiffs' royalty moneys by reference to "Indian Band Funds – Capital Accounts" and it reports on the interest it pays on the capital and revenue accounts by reference to "Indian Band Funds – Revenue Accounts" (S-343 and S-344, para. 74).

[624] The Crown reports on the capital and revenue accounts as a liability in the Public Accounts of Canada. The Crown treats the amount of these accounts as a liability within the Specified Purpose Accounts and there is no corresponding asset. The Crown treats the interest credited by it on the capital and revenue accounts as interest on the public debt (S-343 and S-344, paras. 83 and 84).

[625] The system used by the Crown to calculate interest on the capital and revenue accounts can be summarized as follows:

(a) From Confederation to December 31, 1882, the annual interest rate was fixed at 5%.

(b) From January 1, 1883 to June 30th, 1892, the annual interest rate was fixed at 4%.

(c) From July 1st, 1892 to December 31st, 1897, the annual interest rate was fixed at 3 ½%.

(d) From January 1st, 1898 to March 31st, 1917, the annual interest rate was fixed at 3%.

(e) From April 1st, 1917 to March 31st, 1969, the annual interest rate was fixed at 5%.

(f) From April 1st, 1969, the method of determining the interest rate has been by reference to average market yields of Government of Canada bonds of 10 years or more to maturity. This method is used in both the 1969 Order-in-Council (P.C. 1969-1934) and the 1981 Order-in-Council (P.C. 1981-3/255).

(g) Under the 1969 Order-in-Council, the monthly average of the market yields of Government of Canada Bond issues was prescribed in determining the annual rate of interest. Under the 1981 Order-in-Council, the quarterly average of such market yields was prescribed.

(h) The methods of calculating interest from 1969 to 1980 varied. From the period of April 1st, 1969 to March 31st, 1974, interest was calculated and credited by the Crown on the basis of the opening balance in the accounts respecting Samson as of April 1st of each year.

(i) From April 1st, 1974 to March 31st, 1980 interest was credited in “advance” at the beginning of each fiscal year and adjusted at the end of each fiscal year. The adjustment was determined by comparing the amount of the “advance” to the amount of the interest “earned” during the fiscal year. The interest credited in “advance” was calculated on the April 1st balance, using an “advance” interest rate. The interest “earned” was calculated as follows. The annual average month end balances were determined, from which the interest “advance” was then deducted. The actual average annual rate of interest was then applied to determine the interest “earned” for the year. The interest “earned” for the year would then have the interest “advance” deducted from it to arrive at the final interest adjustment, which was recorded at the end of the fiscal year. This adjustment could be positive or negative.

(j) From April 1st, 1980 to the present, the interest has been calculated on the quarterly average month end balances and credited semi-annually.

(k) Under the 1981 Order-in-Council the practice of crediting interest in “advance” was discontinued.

(S-343 and S-344, para. 85)

[626] The first of the Orders-in-Council referred to above, Order-in-Council P.C. 1969-1934, was issued effective April 1, 1969. Its Appendix provides:

Interest to be paid on Indian Band funds held in the Consolidated Revenue Fund which represent capitalized annuities at the time of Confederation and proceeds from the sale of Indian assets since that time, pursuant to subsection (2) of Section 61 of the Indian Act, at a rate equal

> to the monthly average of those market yields of Government of Canada bond issues as published each Wednesday by the Bank of Canada as part of its weekly financial statistics which have terms to maturity of 10 years or over, the appropriate rate for calculating and crediting interest on the opening balance as of April 1 in each year in accordance with Treasury Board Minute No. 678135 of March 29, 1968 to be the monthly average of the preceding month together with an adjustment to correct for the amount by which rates during the course of the previous year will have varied from the rate established at the commencement of that year.
>
> (SEC-427, binder 7, tab 36, document 286)

[627] The second one, Order-in-Council P.C. 1981-3/255, is dated January 29, 1981 and provides:

> HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Indian Affairs and Northern Development and the Treasury Board, pursuant to subsection 61(2) of the Indian Act, is pleased hereby to revoke Order in Council P.C. 1969-1934 of the 8th of October, 1969 and to fix the rate of interest to be allowed, commencing the 1st day of April, 1980, on Indian Bands' Revenue and Capital moneys held in the Consolidated Revenue Fund at the quarterly average of those market yields of the Government of Canada bond issues as published each Wednesday by the Bank of Canada as part of its weekly financial statistics, which have terms to maturity of 10 years or over.
>
> (SEC-427, binder 18, tab 3, document 602)

D. The Transfer Claim

[628] Part of the relief sought by the plaintiffs is the following, found in their Amended Statement of Claim (No. 4):

2. A declaration that Defendant Her Majesty is in a conflict of interest, has unlawfully profited from moneys entrusted to Her and is subject to immediate removal as trustee of Plaintiffs' moneys.

6. A declaration that the trust moneys entrusted to Defendants for Plaintiff Band must be transferred forthwith to the ownership, management and control of Plaintiff Band.

7. An injunction requiring Defendant Ministers to pay and transfer immediately to the Plaintiff Band the amount of the said trust moneys in an amount of approximately $400 million.

8. In the alternative, the appointment of Peace Hills Trust Company as the trustee of the moneys of the Plaintiffs presently entrusted to Her Majesty.

[629] In an Order dated January 27, 2005 ([2005] F.C.J. No. 156, 2005 FC 136), I ordered:

1. Samson Cree Nation execute a trust agreement with provisions satisfactory to the Court in accordance with the reasons accompanying this Order.

2. Samson Cree Nation release the Crown from any future liability for the capital monies (existing or future) or for their safe custody, management, preservation of capital and rate of return, once the funds are transferred to the agreed upon trust, such release being applicable and remaining valid regardless of whether any sections of the *Indian Act* are subsequently declared unconstitutional.

3. Samson Cree Nation hold a referendum amongst eligible band members on the transfer and release of liability, using procedures satisfactory to the Court and in accordance with the conditions set out in the reasons accompanying this Order, with a regular majority of 50% plus one of those voting constituting a binding result.

4. Samson Cree Nation Chief and Council submit a Band Council Resolution containing all of the above to the Minister of Indian Affairs and Northern Development requesting the transfer of the capital monies, except for the sum of $3 million which shall be held back to resolve any outstanding issues.

5. Upon the Minister's receipt of this Band Council Resolution, and in view of the advice that the Minister has confirmed through counsel to the Court and Samson that he will authorize the transfer of the existing capital monies upon the basis of this Order, this Court declares that the transfer, and transfers of future capital monies, are for the benefit of the Samson Cree Nation, and that the Minister of Indian Affairs and Northern Development has the authority to authorize such transfers pursuant to paragraph 64(1)(k) of the *Indian Act*. The Court also declares that in

> any event it is proper and expedient for the Minister to effect this transfer, and future transfers of new capital monies received, even if that paragraph or any other provisions of the *Indian Act* are subsequently declared unconstitutional.
>
> 6. Future capital monies paid to the Crown for the benefit of Samson shall be transferred to the trust in accordance with arrangements between Samson and the Crown to be agreed upon and, failing such agreement, to be determined by the Court.

[630] Suffice it to say, at the time I made this Order, I was – and remain – satisfied that the Samson Cree Nation has the capability to properly manage and control its capital funds. The Court was not, in the Order, pronouncing upon Samson's constitutional challenges to the Indian moneys provisions of the *Indian Act*, their inherent rights, or their treaty rights. Para. 10 of the Reasons reads as follows,

> I note that by setting out these conditions for the transfer, the Court is not, in any way, pronouncing upon Samson's constitutional challenges and arguments concerning the *Indian Act*, their inherent rights, or their treaty rights. These will be addressed in the Court's final judgment on the first and second phases of this trial.

[631] That remains true and in the Reasons that follow, I address Samson's constitutional challenges and their claimed aboriginal, treaty, and inherent rights.

[632]

E. Legislative Framework

[633] I shall now outline the various provisions of the *Indian Act*, the *Financial Administration Act*, and the *Indian Oil and Gas Act*, as well as the Orders in Council relating to the Indian moneys regime.

[634] Sections 61 through 69 of the *Indian Act* are grouped under the heading "Management of Indian Moneys." Under section 2(1) of the Act, "Indian moneys" are defined as "all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands." Section 61 reads as follows:

> 61. (1) Indian moneys to be held for use and benefit – Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which Indian moneys are used or are to be used is for the use and benefit of the band.
>
> (2) Interest – Interest on Indian moneys held in the Consolidated Revenue Fund shall be allowed at a rate to be fixed from time to time by the Governor in Council.

[635] Section 62 divides Indian moneys into capital and revenue:

62. Capital and revenue – All Indian moneys derived from the sale of surrendered lands or the sale of capital assets of a band shall be deemed to be capital moneys of the band and all Indian moneys other than capital moneys shall be deemed to be revenue moneys of the band.

[636] Section 64 governs the expenditure of capital moneys:

64. (1) Expenditure of capital moneys with consent – With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band

(a) to distribute per capita to the members of the band an amount not exceeding fifty per cent of the capital moneys of the band derived from the sale of surrendered lands;

(b) to construct and maintain roads, bridges, ditches and watercourses on the reserves or on surrendered lands;

(c) to construct and maintain outer boundary fences on reserves;

(d) to purchase land for use by the band as a reserve or as an addition to a reserve;

(e) to purchase for the band the interest of a member of the band in lands on a reserve;

(f) to purchase livestock and farm implements, farm equipment or machinery for the band;

(g) to construct and maintain on or in connection with a reserve such permanent improvements or works as in the opinion of the Minister will be of permanent value to the band or will constitute a capital investment;

(h) to make to members of the band, for the purpose of promoting the welfare of the band, loans not exceeding one-half of the total value of

(i) the chattels owned by the borrower, and

(ii) the land with respect to which he holds or is eligible to receive a Certificate of Possession,

and may charge interest and take security therefor;

(i) to meet expenses necessarily incidental to the management of lands on a reserve, surrendered lands and any band property;

> (j) to construct houses for members of the band, to make loans to members of the band for building purposes with or without security and to provide for the guarantee of loans made to members of the band for building purposes; and
>
> (k) for any other purpose that in the opinion of the Minister is for the benefit of the band.

[637] Sections 66 and 69 relate to the expenditure of revenue moneys:

> 66. (1) Expenditure of revenue moneys with consent of band – With the consent of the council of a band, the Minister may authorize and direct the expenditure of revenue moneys for any purpose that in the opinion of the Minister will promote the general progress and welfare of the band or any member of the band.
>
> 69. (1) Management of revenue moneys by band – The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order.
>
> (2) Regulations – The Governor in Council may make regulations to give effect to subsection (1) and may declare therein the extent to which this Act and the *Financial Administration Act* shall not apply to a band to which an order made under subsection (1) applies.

[638] No section similar to section 69 exists allowing a band to control, manage, and expend its capital moneys.

[639] The *Financial Administration Act* defines “public money” in section 2 as follows:

> "public money" means all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person authorized to receive or collect such money, and includes
>
> > (d) all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract.

[640] Section 17 of that same Act requires all public money to be deposited to the credit of the Receiver General. Section 2 defines the "Consolidated Revenue Fund" as "the aggregate of all public moneys that are on deposit at the credit of the Receiver General." Thus, if Indian moneys are considered public moneys – as will be discussed later – they must be deposited in the CRF and subsequently receive interest pursuant to section 61(2) of the *Indian Act*.

[641] Turning to the *Indian Oil and Gas Act*, R.S.C. 1985, c. 1-7, the important provision, for our purposes, is section 4(1), which governs royalties:

> 4. (1) Notwithstanding any term or condition in any grant, lease, permit, licence or other disposition or any provision in any regulation respecting oil or gas or both oil and gas or the terms and conditions of any agreement respecting royalties in relation to oil or gas or both oil and gas, whether granted, issued, made or entered into before or after December 20, 1974, but subject to subsection (2), all oil and gas obtained from Indian lands after April 22, 1977 is subject to the payment to Her Majesty in right of Canada, in trust for the Indian bands concerned, of the royalties prescribed from time to time by the regulations.

[642] The *Indian Oil and Gas Act* was assented to on December 20, 1974. Previously, oil and gas production on Indian lands was governed by regulations under the *Indian Act*, which were similar to Alberta's regulations concerning exploration, drilling, and production. The regulations allowed for a low royalty rate and long-term leases lasting 10 to 21 years. The 1973 oil crisis revealed the limitations of such a regime and the need for new legislation (S-621, tab 15; *Indian Oil and Gas Act*, Second Reading in the Senate, December 4, 1974, p. 337).

[643] Section 61(2), as noted above, provides that the Governor in Council shall establish the interest rate to be paid on Indian moneys held in the CRF. From the time of the 1946 Surrender until March 31, 1969, the rate of interest was set at 5%. Since 1969, the Crown has paid interest pursuant to a formula set out in two Orders-in-Council, issued in 1969 and 1981. The first of these, Order-in-Council P.C. 1969-1934, was issued effective April 1, 1969; its Appendix reads as follows:

> Interest to be paid on Indian Band funds held in the Consolidated Revenue Fund which represent capitalized annuities at the time of Confederation and proceeds from the sale of Indian assets since that time, pursuant to subsection (2) of Section 61 of the Indian Act, at a rate equal to the monthly average of those market yields of Government of Canada bond issues as published each Wednesday by the Bank of Canada as part of its weekly financial statistics which have terms to maturity of 10 years or over, the appropriate rate for calculating and crediting interest on the opening balance as of April 1 in each year in accordance with Treasury Board Minute No. 678135 of March 29, 1968 to be the monthly average of the preceding month together with an adjustment to correct for the amount by which rates during the course of the previous year will have varied from the rate established at the commencement of that year.

(SEC-427, binder 7, tab 36, document 286)

[644] The second one, Order-in-Council P.C. 1981-3/255, was issued in January 1981 and provides:

> HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Indian Affairs and Northern Development and the Treasury Board, pursuant to subsection 61(2) of the Indian Act, is pleased hereby to revoke Order in Council P.C. 1969-1934 of the 8th of October, 1969 and to fix the rate of interest to be allowed, commencing the 1st day of April, 1980, on Indian Bands' Revenue and Capital moneys held in the Consolidated Revenue Fund at the quarterly average of those market yields of the Government of Canada bond issues as published each Wednesday by the Bank of Canada as part of its weekly financial statistics, which have terms to maturity of 10 years or over.

(SEC-427, binder 18, tab 3, document 602)

[645] The 1969 and 1981 Orders-in-Council are quite similar; the difference between them arises in the manner in which interest is calculated. In 1969, monthly averages of certain Government of Canada bond issues were used, whereas in 1981, that was changed to quarterly averages. While the rate is short-term in the sense that it floats and is subject to change – by 1981 – every 90 days, the rate nonetheless is based on long-term bond issues.

[646] The Crown treats all Indian band accounts in the same manner in that they are all subject to the same interest rate methodology, regardless of their balances.

[647] Before moving on, I find it useful to briefly review some history behind the moneys regime of the *Indian Act*. In a letter to the Deputy Minister of Finance, dated August 28, 1969, the Deputy Minister of Indian Affairs and Northern Development, J.A. MacDonald, provides an overview of interest rates paid on Indian moneys in the past. The letter, which advocates for an increase to the interest rate paid on Indian moneys, reads in part,

> The fund had its beginning with the settlement of Upper Canada and the surrender for sale of Indian lands in that Province. The moneys were at first held by the Receiver General for investment in commercial securities, municipal debentures, etc. In the year 1859 by Order-in-Council dated August 25th the Government assumed these investments which at that time were producing a uniform revenue of 6%.
>
> By Order-in-Council dated September 24, 1861, the amount of 6% was guaranteed on that portion of the fund invested, and 5% on new credits. The payment of interest at the rate of 5% was continued until the year 1883 when it was reduced to 4%. There was no reduction made in that part on which 6% was paid, nor was there any reduction on the rate paid on the capitalized annuities amounting to $620,400.10.
>
> In 1892 the 4% rate was reduced to 3 ½%, and in 1898 was further reduced to 3%. These reductions were made by reason of the continued fall in the value of money, and the resulting decreases from time to time in the rate of interest paid to the depositors on bank savings accounts. As of April 1, 1917, however, due to a general advance in the rate of interest in Canada, the rate paid was increased to 5%, at which it still remains.
>
> (S-820)

[648] With regard to the August 25, 1859 Order-in-Council, a document signed by John A. Macdonald on the same date shows the government's concern with the system, which at that time involved actual investments. Macdonald's letter reads in part,

> In dealing with the Indians of whom the Government has constituted itself the Guardian, it would appear desirable so to secure the funds as to prevent the possibility of any failure in the payment of the Annual Sums required for the Indians, as such failure would certainly be attributed to a breach of faith on the part of the Government and could more be explained to the satisfaction of the Tribes. By maintaining the present system of investment, it might also result that one Tribe would find its Annual interests regularly paid, while others would meet with disappointment. Should such an event arise, Parliament would probably find it necessary to make good the losses of the Trust, and it would therefore be more advisable to carry the funds at the credit of the Trust to the Consolidated Fund, and to charge the annual interest upon that Fund at such scale as might appear equitable to the Legislature.
>
> Further receipts on account of the Indians might be kept at their Credit in account with the Receiver General – allowing the Trust Six per cent interest thereon pending the decision of Parliament on the general Subject.
>
> (SEC-427, binder 1, tab 20, document 20, pp. 1-2)

[649] Thus arose the practice, which continues today, of depositing Indian moneys into the CRF and paying a rate of interest, as opposed to purchasing marketable securities. However, for a time, the Act provided authority for the Crown to purchase actual investments with Indian moneys. The *Indian Act*, R.S.C. 1927, c. 98 provided:

> 92. With the exception of such sum not exceeding fifty per centum of the proceeds of any land, timber or other property, as is agreed at the time of surrender to be paid to the members of the Band interested therein, the Governor in Council may, subject to the provisions of this Part, direct

> how and in what manner, and by whom, the moneys arising from the disposal of Indian lands, or of property held or to be held in trust for Indians, or timber on Indian lands or reserves, or from any other source for the benefit of Indians, shall be invested from time to time, and how the payments or assistance to which the Indians are entitled shall be made or given.

[650] This legislative power to invest Indian moneys was repealed following the enactment of the 1951 *Indian Act*, S.C. 1951 c. 29. The Act, insofar as it relates to the moneys regime, has remained essentially unchanged since 1951.

F. Crown's Obligations and Duties

[651] The Crown concedes that it holds the Indian moneys as a trustee (Written Closing Argument of the Crown, Moneys Phase, Volume 1, tab 2, p. 1). However, the Crown argues that the legislation informs its obligations and duties, and contends that, in any event, its conduct should not be judged against the standard of a private law trustee.

[652] The plaintiffs contend that the Crown is indeed a true trustee and urge the Court to hold the Crown liable for its failure to actively manage their funds in the same manner as a private law trustee. This failure, according to the plaintiffs, resulted in a less than

adequate, or reasonable, return being earned by their funds. The plaintiffs submit that, in the alternative, if the Crown was not permitted to make actual investments with the funds, then the rate of return should have been commensurate with that which might have been earned by making actual investments in the market. The plaintiffs suggest that this could have been done by linking the interest rate formula to a benchmark portfolio or market indices of various types. Much expert evidence was presented to the Court on the sorts of actual or notional investments that the plaintiffs submit the Crown should have made with their funds.

[653] I agree that the Crown is a trustee insofar as the Indian moneys at issue in this action are concerned, and that those moneys are trust funds. Even if the Crown had not admitted the obvious, I would have, in any event, found it to be a trustee.

[654] The *Indian Act* defines “Indian moneys” in section 2(1) as follows,

> “Indian moneys” means all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands.

[655] The *Financial Administration Act* defines “public money” in its section 2 as follows,

> "public money" means all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person authorized to receive or collect such money, and includes
>
> (a) duties and revenues of Canada,
>
> (b) money borrowed by Canada or received through the issue or sale of securities,
>
> (c) money received or collected for or on behalf of Canada, and
>
> (d) all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract.

[656] At first glance, the public money definition seems to exclude Indian moneys through the use of the words "belonging to Canada." It cannot be argued that the Indian moneys at issue *belong* to the Crown. The Crown clearly has no beneficial interest in those moneys. However, the use of the words "and includes" has the effect of expanding the ambit of the definition.

[657] Further on this point, I note *Callie* v. *Canada*, [1991] 2 F.C. 379, which involved a class action for damages for breach of trust or fiduciary duty by the Crown in its administration of war veterans' pension funds from 1946 to 1986. The Department of Veterans Affairs deposited the pension moneys to the credit of the Receiver General. The

plaintiff argued that the pension funds were not public money within the meaning of the *Financial Administration Act* and thus were not subject to that Act. Justice Joyal considered the meaning of the public moneys definition and held that an expansive interpretation of that section was appropriate, given its use of the word “includes.” Those words amplify the meaning of the preceding words. I agree with his words at p. 397 and make them mine:

> As was pointed out in *Nova*, *supra*, when the word “includes” is used in a definition, it is used to amplify or extend the ordinary meaning of the term being defined. That is precisely what paragraph 2(*d*) of the *Financial Administration Act* accomplishes in the present case. The term “public money” has been enlarged to include sums of money which might not otherwise come within the ordinary or everyday meaning of that term.

[658] I note further that section 61(2) of the *Indian Act* contemplates the holding of Indian moneys in the Consolidated Revenue Fund. Such funds would not be held in the CRF if Parliament did not also intend for them to be considered as public money. Accordingly, Indian moneys are public moneys for the purposes of the *Financial Administration Act* and that they must be deposited into the CRF, pursuant to section 17(1) of that Act. However, I also note that even though Indian moneys are considered public money, it does not follow that they lose their character as trust funds.

[659] My opinion that the Crown is a trustee for the Indian moneys is further based on the reasoning of Dickson J. in *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335. *Guerin* is a

watershed decision in that the Supreme Court found the Crown liable for breach of its fiduciary duty to an Indian band with regard to the disposition of part of the band's reserve on terms less favourable than those approved by the band. The Court flatly rejected the old notion of a judicially unenforceable political trust as inapplicable. Instead, the Crown was subject to a fiduciary duty, which courts could supervise and enforce. Dickson J. held, at p. 376 that the origin of this duty lies in the proposition that the aboriginal interest in land is inalienable except upon surrender to the Crown:

> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.
>
> An Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. It is still recognized in the surrender provisions of the *Indian Act*. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.

[660] Further on, Dickson J. held, at p. 383, that the essential obligation of the Crown was to prevent exploitation:

> (c) The Crown's Fiduciary Obligation
>
> The concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery. In the present appeal its relevance is based on the requirement of a "surrender" before Indian land can be alienated.

> The Royal Proclamation of 1763 provided that no private person could purchase from the Indians any lands that the Proclamation had reserved to them, and provided further that all purchases had to be by and in the name of the Crown, in a public assembly of the Indians held by the governor or commander-in-chief of the colony in which the lands in question lay. As Lord Watson pointed out in *St. Catherine's Milling*, *supra*, at p. 54, this policy with respect to the sale or transfer of the Indians' interest in land has been continuously maintained by the British Crown, by the governments of the colonies when they became responsible for the administration of Indian affairs, and, after 1867, by the federal government of Canada. Successive federal statutes, predecessors to the present *Indian Act*, have all provided for the general inalienability of Indian reserve land except upon surrender to the Crown, the relevant provision is the present Act being ss. 37-41.
>
> The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that "great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians ...."

[661] Dickson J. aptly characterized the relationship, at p. 385, as *sui generis*, trust-like in nature, but not a true trust, insofar as land is concerned.

[662] The minority in *Guerin*, per Wilson J. at p. 355, found that the Crown's fiduciary duty, which existed at large, to hold the reserve land for the band's use and benefit, crystallized into an express trust of land for a specific purpose upon the surrender. Dickson J., however, refused to define the Crown's obligations in that case as a trust. He held, at p. 388:

> I agree with Le Dain J. that before surrender the Crown does not hold the land in trust for the Indians. I also agree that the Crown's obligation does not somehow crystallize into a trust, express or implied, at the time of the surrender. The law of trusts is a highly developed, specialized branch of the law. An express trust requires a settlor, a beneficiary, a trust corpus,

> words of settlement, certainty of object and certainty of obligation. Not all of these elements are present here. Indeed, there is not even a trust corpus. As the *Smith* decision, *supra*, makes clear, upon unconditional surrender the Indians' right in the land disappears. No property interest is transferred which could constitute the trust *res*, so that even if the other *indicia* of an express or implied trust could be made out, the basic requirement of a settlement of property has not been met. Accordingly, although the nature of Indian title coupled with the discretion vested in the Crown are sufficient to give rise to a fiduciary obligation, neither an express nor an implied trust arises upon surrender.

[663] In the case at bar, the Crown holds the Indian moneys, pursuant to section 61(1) of the *Indian Act*, for the "use and benefit" of Indians or bands; the funds may only be expended for their "benefit." At the very least, this gives rise to a fiduciary obligation. However, in my opinion, insofar as Indian moneys are concerned, a trust corpus, or *res*, exists. The Indian moneys, derive from the disposition of an interest in land, in the case at bar, through the 1946 Surrender. In *Guerin*, upon the surrender of the land, the band's right in the land disappeared; nothing more remained that could constitute the trust corpus. In the instant case, however, the disposition of the plaintiffs' interest in the land leads to the royalty moneys, which form the trust corpus.

[664] As for the source of this trust, I do not agree with the plaintiffs' assertion that the trust arises from either the historical relationship between the Crown and aboriginal people, or Treaty 6. In my opinion, the treaty is of no assistance in this matter. It does not speak to the issue of how Indian moneys are to be held and administered. The only part of the treaty that may possibly pertain to this issue – and it is a most tenuous connection at best – is the clause dealing with reserve creation. That part of Treaty 6 reads as follows:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, provided all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: –
>
> That the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them;
>
> Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as she shall deem fit, and also that the aforesaid reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained; and with a view to show the satisfaction of Her Majesty with the behavior and good conduct of her Indians, she hereby, through her Commissioners, makes them a present of twelve dollars for each man, woman and child belonging to the bands here represented, in extinguishment of all claims heretofore preferred.
>
> (S-4, pp. 352-353; underlining is mine)

[665] Morris also made some remarks to the Cree during the treaty talks on this matter of selling reserves or portions of reserves. Commission Secretary Jackes recorded Morris's comments:

> "There is one thing I would like to say about the reserves. The land I name is much more than you will ever be able to farm, and it may be that you would like to do as your brothers where I came from did.
>
> They, when they found they had too much land, asked the Queen to sell it for them; they kept as much as they could want, and the price for which the remainder was sold was put away to increase for them, and many bands now have a yearly income from the land.
>
> But understand me, once the reserve is set aside, it could not be sold unless with the consent of the Queen and the Indians; as long as the Indians wish, it will stand there for their good; no one can take their homes."

(S-4, p. 205)

[666] In my opinion, both the reserve clause in Treaty 6 and Morris's remarks cannot be relied on as the source of the trust. At that time, the Indian moneys that are the subject matter of this action did not exist. They came into being subsequent to the execution of the 1946 Surrender of Minerals document. The words contained in that document are sufficient to create a trust: there are certainties of intent, subject-matter, and object. The agreement explicitly contemplates a trust; the subject-matter is the royalty moneys; and the object, or beneficiary, is clearly the plaintiffs.

[667] Having discussed the Crown as a trustee for Indian moneys, I will now examine the nature of its obligations as such.

[668] Many of the duties owed by a trustee are similar to those of a fiduciary. The trustee may not realize a profit from its custody of the trust property, or misuse it in any way. The trustee owes a duty of loyalty and good faith to the beneficiary. The trustee also owes a duty to be evenhanded as between different beneficiaries. However, unlike a fiduciary, a trustee owes a positive duty to invest the corpus – or, put another way, make it productive

– when the corpus is a wasting asset, such as money. The trust corpus may not lie fallow. This is the duty to invest.

[669] The standard of care applicable to a trustee carrying out the administration of a trust was set out by the Dickson J. in *Fales et al.* v. *Canada Permanent Trust Company*, [1977] 2 S.C.R. 302 at p. 315:

> Traditionally, the standard of care and diligence required of a trustee in administering a trust is that of a man of ordinary prudence in managing his own affairs (*Learoyd* v. *Whiteley* [(1887), 12 App. Cas. 727], at p. 733; *Underhill's Law of Trusts and Trustees*, 12th ed., art. 49; *Restatement of the Law on Trusts*, 2nd ed., para. 174) and traditionally the standard has been applied equally to professional and non-professional trustees. The standard has been of general application and objective though, at times, rigorous.

[670] Thus, the standard of care, in terms of the duty to invest, is that of reasonable care and skill of an ordinary prudent person.

[671] The plaintiffs contend that the Crown did not fulfill its duty to invest and that the Crown should have either made actual investments in the market with their funds, or tied the interest rate to benchmarks or market indices. The plaintiffs assert that the Crown possessed the legislative authority to take such actions by virtue of one or all of the following: section 4 of the *Indian Oil and Gas Act*; section 4 of the *Indian Act*, section

64(1)(k) of the *Indian Act*, or section 18 of the *Financial Administration Act*. I will address each of these, in turn, and explain why I do not believe any of these options provide any such legislative authority as the plaintiffs assert.

[672] Section 4 of the *Indian Oil and Gas Act* provides only that the royalty moneys are to be paid to the Crown "in trust." It does not give any further directions or instructions as to how those moneys are to be held. Indeed, the purpose of the Act has to do more with the management of oil and gas resources on Indian lands for commercial extraction and exploitation. I cannot agree with the plaintiffs that the "in trust" language of section 4 operates so as to completely change the way in which Indian moneys are to be held by the Crown. These words serve, in my opinion, to confirm and make explicit what was, until the time the *Indian Oil and Gas Act* was enacted, implicit.

[673] In this regard, I refer to the Minutes of Proceedings and Evidence, dated November 14, 1974, of the Standing Committee on Indian Affairs and Northern Development, regarding Bill C-15, which was eventually enacted as the *Indian Oil and Gas Act*. I refer to the following exchange which occurred during discussion on adding the words "in trust" to the legislation:

> Miss MacDonald (Kingston and the Islands): Yes, Mr. Chairman, this is really introduced more as a matter of clarification because I understand for the most part royalties are paid into the band funds. Nevertheless, in the event that there should be any hold-up in any kind of payment from time to time, we felt that given the testimony of the National Indian Brotherhood, and communication from other bands there should be some verification that the moneys would be held in trust for the Indian bands by Her Majesty in right of Canada.
>
> The Chairman: Mrs. Campagnolo.
>
> Mrs. Campagnolo: Mr. Chairman, I find no disagreement with Mr. Schellenberger's and Miss MacDonald's amendment. I refer to it as the current-day colloquialism as a parenthood amendment, and I am in full agreement with it.
>
> * * *
>
> Mr. Leseaux: I witnessed it for the first time and off-hand I see no objection whatsoever. The lands are surrendered; it is implicit in the surrender that they are in trust. The lease or permit given to an oil company is in trust I think, to make it more explicit and we would certainly have no cause to be concerned with this addition.
>
> (S-621, tab 9, p. 7:18; see also S-621, tab 13, p. 1810)

[674] The plaintiff's witness, Mr. Roddick, who was the Samson lawyer for a number of years, agreed that the words "in trust" were added so as to address concerns that the legislation was not absolutely clear about where the money would go. There had been some suggestion during debates that the resource income should be more widely shared – presumably, I add, with other First Nations. Mr. Roddick testified,

> There were extensive hearings. Proposals were put forward. It was clear that the producing First Nations, of which Samson was one, wanted the legislation to be unequivocal, in that the money went to the First Nation where the production occurred. Those words, in my view, accomplished that.
>
> So I would assume, without ever having specifically asked Samson, that they supported that.
>
> (transcript volume 273, pp. 15-16; see also transcript volume 271 pp. 165-166 and transcript volume 278, pp. 121-122)

[675] Accordingly, I do not agree with the plaintiffs' suggestion that section 4 of the *Indian Oil and Gas Act* somehow created an entirely new regime for the Indian moneys. It merely confirms that they are to be held in trust and provides no further direction as to how that is to be carried out.

[676] The plaintiffs also look to section 4 of the *Indian Act*. They argue that this section could have been applied to them so as to render inapplicable those sections of the Act that prevent the investment of Indian moneys, by the Minister, as an expenditure. Section 4(2) reads as follows:

> 4. (2) Act may be declared inapplicable – The Governor in Council may by proclamation declare that this Act or any portion thereof, except sections 5 to 14.3 or sections 37 to 41, shall not apply to
>
> (a) any Indians or group or band of Indians, or
>
> (b) any reserve or surrendered lands or any part thereof,
>
> and may be proclamation revoke any such declaration.

[677] DIAND considered resorting to this section with regard to exempting the capital funds of the bands from the strictures of section 64 of the *Indian Act*, but concluded that it was not a viable solution. In particular, I note a 1977 DIAND report, which concluded that using section 4 of the *Indian Act* to declare section 64 inapplicable would end up eliminating

any authority for anybody to expend the capital funds and thus the funds would wind up in some sort of limbo (SEC-427, binder 12, tab 17, document 462; see also SEC-427, binder 12, tab 15, document 460).

[678] I also refer to a letter, dated July 28, 1982, written by the Right Honourable Jean Chrétien when he was Minister of Justice. The letter reads, in part,

> We are not prepared to recommend to the Department of Indian Affairs, as a possible solution to the problem that section 4(2) of the Indian Act be used to declare inapplicable to certain bands all of the provisions of section 64 with the exception of sub-section (k). I am not sure that a section 4(2) declaration would achieve the intended purpose but, at any event, if sub-section (k) of section 64 was intended to be read ejusdem generis with the preceding sub-sections, it would, in my view, be an improper use of section 4(2) to use it to circumvent the intention of Parliament in this way. If, on the other hand, the scope of sub-section (k) is not limited by the preceding sub-sections, a declaration under section 4(2) is unnecessary.
>
> (SC-428, binder 12, tab 29, document 529)

[679] The Crown's witness, Mr. Goodwin, also confirmed that DIAND was not prepared to go the route of a section 4 declaration, as they viewed it as unworkable. He testified that he was always advised by the Department of Justice that it was not possible to use section 4(2) of the *Indian Act* to achieve the result of permitting investments (transcript volume 300, p. 79). Mr. Goodwin further testified,

> And I referred to, I believe, it was Mr. Fennell making the same argument to use 64 – I'm sorry, to use Section 4(2), and the same legal argument being presented back to him s we're looking

> at here, that, in fact, in the absence of sections of the act that empower the minister to do certain things, if you wipe it out, then you have a vacuum, and – and it just – it wouldn't be feasible to use 64 in that way.
>
> (transcript volume 311, pp. 153-154)

[680] Samson's witness, Mr. Roddick, also testified about the possible use of section 4(2) of the *Indian Act*:

> Well, it was one of the things that was looked at. One of the problems that came up was that if you took the portion of the act and said it – you know, and took it out so that it didn't apply, how did you handle things? It was looked at, but ultimately, the department indicated that it was not a manner in which they saw this matter being resolved. And it was like often happens, many things are looked at, and this is one that fell by the wayside. But it was looked at. It was raised, examined. My memory is that it was Canada that came to the conclusion that it wasn't something that could work, and that was about it.
>
> (transcript volume 275, pp. 33-34)

[681] Mr. Roddick later conceded that section 4(2) was not a viable option when he confirmed that he could not figure out how that section would accomplish what they were trying to do (transcript volume 276, pp. 134-136).

[682] If section 4(2) of the *Indian Act* was used in the manner the plaintiffs suggest, the result would have made matters worse. There would be no statutory authority to remove their capital moneys from the CRF, which, obviously, would be an unacceptable situation by any measurement.

[683] The plaintiffs also allege that investments and a higher return could have been achieved through section 64(1)(k) of the *Indian Act*, which reads,

> 64. (1) Expenditure of capital moneys with consent – With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band
>
> > (k) for any other purpose that in the opinion of the Minister is for the benefit of the band.

[684] As with section 4(2) of the *Indian Act*, the Crown sought legal opinions as to the possibility of using this section to authorize investments. I note in particular the opinion penned by Mr. Paul Ollivier, dated August 30, 1982 on the interpretation to be applied to section 64(1)(k). Up to that point, DIAND had been operating on a narrow view of the applicability of (k) – where it was given a *ejusdem generis* reading in connection with the preceding subsections. Mr. Ollivier disagreed with that restrictive interpretation:

> While such an interpretation is understandable given the very narrow scope of the preceding sub-sections, nevertheless I find no common genus in these other provisions that necessarily limits the generality of the language used in sub-section (k).
>
> In my opinion, the Minister may authorize, without risk of liability, an expenditure for any purpose that he honestly and in good faith believes is for the use and benefit of a band. Of course, the purpose of the expenditure that he is asked to approve should be sufficiently defined so as to allow the Minister to determine whether it is in the interest of the Band. In my opinion, a vaguely worded purpose such as "*for economic development*" does not meet this test. In addition, while the Act may not require anything more than that the Minister act in good faith, I have no doubt that the spirit of the Act contemplates that he will exercise his powers with prudence so as to enhance and not impair the bands' capital.

> A critical question is whether the Minister must personally approve every single expenditure of a band's capital moneys.
>
> First of all, I see no reason why the Minister cannot approve a class of expenditure – or an investment plan – as being for the benefit of the band. Such a plan could include the type of proposed expenditures (corporate securities, real estate, government bands [*sic*: bonds] etc), the proportion of moneys to be expended on each type, and other financial guidelines.
>
> (SEC-427, binder 22, tab 35, document 703, pp. 2-3)

[685] Mr. Ollivier went on to consider that it would be appropriate for the Minister to delegate the day to day management of such expenditures, within the framework of an approved plan, to an agent, such as a financial institution of some sort. Mr. Ollivier also reiterated the Crown's view that the Minister is not a trustee in the private law sense. Mr. Ollivier's letter concludes,

> Undoubtedly the interpretation of section 64(k) expressed in this letter, while it goes well beyond the strict interpretation previously adhered to, will continue to involve a closer degree of government supervision of the expenditure of capital moneys than Indian bands may feel is appropriate. Consideration may therefore have to be given to appropriate statutory amendments, either to the Oil and Gas Act or to the Indian Act itself.
>
> Bands such as the Samson Band must accept the fact that under the present Act the Minister must retain ultimate control over the management of the band's capital moneys. However, subject to the Minister's overriding control, it is surely in the best interest of the bands that they participate as fully as the present Act allows in the administration of the moneys being held for their use and benefit.
>
> Finally, I would suggest that any scheme involving a substantial part of a band's capital assets be approved by the Band membership as well as by the Band Council.
>
> If there is any serious challenge to the scheme on legal grounds, consideration could be given to referring the matter to the Federal Court under section 17 of the Federal Court Act.
>
> (SEC-427, binder 22, tab 35, document 703, p. 5)

[686] While I note with approval the flexible interpretation Mr. Ollivier presented on section 64(1)(k), I also note that he cautioned against any outright transfer of a “substantial” part of a band’s moneys and considered that certain conditions be met before any such authorization by the Minister.

[687] In my opinion, the Crown could not authorize an outright transfer of the plaintiffs’ funds, either to the band council or to a commercial trustee, for the purpose of making investments. Conditions such as approval of the band membership and an investment plan of some sort would be necessary before the Minister, as trustee, could make any determination as to whether such an expenditure would be for the band’s benefit and best interests.

[688] Finally, the plaintiffs contend that the Crown could have made investments with their funds through the *Financial Administration Act*. Section 18 of that Act provides as follows,

> 18. (1) In this section, “securities” means securities of or guaranteed by Canada and includes any other securities described in the definition of “securities” in section 2.
>
> (2) The Minister may, when he deems it advisable for the sound and efficient management of public money or the public debt, purchase, acquire and hold securities and pay therefor out of the Consolidated Revenue Fund.
>
> (3) The Minister may sell any securities purchased, acquired or held pursuant to subsection (2), and the proceeds of the sales shall be deposited to the credit of the Receiver General.

> (4) Any net profit resulting in any fiscal year from the purchase, holding or sale of securities pursuant to this section shall be credited to the revenues of that fiscal year, and any net loss resulting in any fiscal year from that purchase, holding or sale shall be charged to an appropriation provided by Parliament for the purpose.

[689] Even a cursory reading of this section reveals that it simply cannot be applied to Indian moneys. If Indian moneys were invested pursuant to this section, then the Crown would gain or lose, not the plaintiffs.

[690] All of these four options were simply not viable solutions, absent attaching conditions to a section 64(1)(k) expenditure as suggested by Mr. Ollivier. Indeed, such conditions, and others, form the basis of the Order I made, dated January 27, 2005, authorizing such a transfer to take place.

[691] I am satisfied that the legislation informs the Crown's duties as trustee for Indian moneys. There is no doubt that the royalty moneys are to be held in trust. That language appears in the 1946 Surrender and later in section 4 of the *Indian Oil and Gas Act*. Although that piece of legislation was enacted in 1974 and royalties had been collected by the Crown long before that date, the *Indian Oil and Gas Act* found its genesis in the world oil crisis of 1973. Section 4 and the words "in trust" merely confirm what was an already

existing situation and in no way altered the manner in which the funds were to be held and administered.

[692] While section 4 of the *Indian Oil and Gas Act* confirms the trust, the characterization of Indian moneys as public money within the meaning of section 2 of the *Financial Administration Act* means that they must be deposited into the CRF, pursuant to section 17. Section 61(2) of the *Indian Act* mandates that they be paid interest at a rate to be determined by the Governor in Council. There is no choice in whether or not to pay interest: the Crown must. However, the Crown also has discretion in fixing the rate.

[693] I am also satisfied that no legal authority exists that would permit the Minister to purchase investments with Indian moneys, instead of paying a rate of interest. Recall that when the *Indian Act* was amended in 1951, the power to make investments, under section 92, was specifically removed.

[694] In paying a rate of interest to the Indian moneys pursuant to section 61(2) of the *Indian Act*, I am satisfied that the Minister has discharged his duty as a trustee to invest the trust corpus. In fixing a rate of interest – or investing – the trustee's duty is not to *maximize*

profits. If that was the case, then any trustee failing to earn the maximum possible on property entrusted to her, would be liable for breach of trust. Rather, the standard that applies to the duty to invest is that of reasonableness. The trustee must, of course, act prudently. In the case of the Indian moneys, the rate of interest is tied to long-term Government of Canada bonds. The money is not committed to remain in the CRF for any specified period of time and may be withdrawn, subject to the parameters established by section 64 of the *Indian Act*. I am satisfied that the rate of interest meets the reasonableness standard for assessing a trustee's conduct.

[695] The plaintiffs also contend that the Crown is in breach of its duty as a trustee not to commingle their money with its own by depositing the Indian moneys into the CRF. I have already found that the Crown may rely on the legislation in carrying out its duties as a trustee. The legislation requires that Indian moneys be deposited into the CRF. While in a sense they are commingled, the Crown keeps accounts for the Indian moneys. As I noted earlier in these Reasons, the Crown reports on the royalty moneys by reference to "Indian Band Funds – Capital Accounts." The Crown reports on the interest it pays on the capital and revenue accounts by reference to "Indian Band Funds – Revenue Accounts" (S-343 and S-344, para. 74). The duty to keep trust property separate exists so as to protect the property – perhaps from embezzlement or misappropriation – and prevent it from losing its identity. In the instant case, the trustee is the Crown and the Crown cannot be said to be

akin to an ordinary trustee in every possible way. The plaintiffs' moneys are deposited into the Consolidated Revenue Fund; however, they are reported on and accounted for separately. There is no danger that the moneys are unaccessible or that the Crown will be unable to pay them out. Accordingly, I find there is no breach by the Crown of its duties by depositing the Indian moneys into the CRF.

[696] Since I have found that the Crown may – and indeed must – rely on the legislation, as it informs and defines the Crown's duty as trustee, I need not review or comment on the wealth of expert evidence presented to me on the industry standards, norms, and practices of commercial trustees.

G. Unjust Enrichment Claim

[697] The plaintiffs allege that the Crown was in a conflict of interest because it essentially borrowed their royalty moneys through depositing them in the Consolidated Revenue Fund. As a fiduciary or a trustee, Samson submits, the Crown breached its corresponding duties and profited from this arrangement, thus resulting in an unjust enrichment. Moreover, Samson submits, the Crown's use of the royalty moneys was not required or authorized by the governing legislation, but rather was expressly prohibited.

[698] According to Samson, the *Financial Administration Act* did not require the Crown to deposit the royalty moneys in the CRF. Rather, as a trustee or fiduciary, the Crown owed a duty to hold the moneys separate and apart from its own general revenue, as well as a further duty to ensure that the moneys were neither misappropriated nor spent. Samson submits that the *Financial Administration Act* is a general enactment, applicable to all the "public money" belonging to the government of Canada.

[699] Samson disputes that the definition of "public money" in section 2 of the *Financial Administration Act* does not apply to "Indian moneys" because they are not money "belonging to Canada" as the definition states. Flowing from that, the Indian moneys cannot be subject to that Act's section 17 requirement that all public money be deposited to the credit of the Receiver General (i.e., in the CRF).

[700] Samson relies on section 4(1) of the *Indian Oil and Gas Act* which, although set out elsewhere in these Reasons, deserves for clarity's sake to be set out once again:

> 4. (1) Notwithstanding any term or condition in any grant, lease, permit, licence or other disposition or any provision in any regulation respecting oil or gas or both oil and gas or the terms and conditions of any agreement respecting royalties in relation to oil or gas or both oil and gas, whether granted, issued, made or entered into before or after December 20, 1974, but subject to subsection (2), all oil and gas obtained from Indian lands after April 22, 1977 is subject

> to the payment to Her Majesty in right of Canada, in trust for the Indian bands concerned, of the royalties prescribed from time to time by the regulations.

[701] The trust created by this section, Samson contends, impresses upon the Crown an obligation not to commingle these royalty moneys with its own general purpose revenue and, indeed, prohibits the Crown from borrowing these moneys for its own purposes. Thus, section 4(1) of the *Indian Oil and Gas Act* overrides the more generalized obligation of the *Financial Administration Act* to deposit "public money" into the CRF.

[702] Samson further submits that nothing in the *Indian Act* requires "Indian moneys" to be deposited into the CRF and, further, that they are to be held as distinct from borrowed:

> 2. (1) Definitions – In this Act,
>
> "Indian moneys" means all moneys collected, received, or held by Her Majesty for the use and benefit of Indians or bands;

[703] The first reference to the Consolidated Revenue Fund in the *Indian Act* comes in section 61(2):

> 61. (2) Interest – Interest on Indian moneys held in the Consolidated Revenue Fund shall be allowed at a rate to be fixed from time to time by the Governor in Council.

[704] According to Samson, this does not indicate any requirement that Indian moneys be placed into the CRF.

[705] Samson also contends that the Crown's act of borrowing the moneys does not constitute an expenditure as contemplated by section 61(1) of the *Indian Act*, which reads as follows:

> 61. (1) Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which Indian moneys are used or are to be used is for the use and benefit of the band.

[706] The Crown contends that the definition of "public money" in section 2 of the *Financial Administration Act* does include "Indian moneys":

> 2. In this Act,

> "public money" means all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person authorized to receive or collect such money, and includes
>
> > (d) all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract.

[707] The Crown submits that since Indian moneys are public money, then pursuant to section 17(1) of the *Financial Administration Act*, they "shall be deposited to the credit of the Receiver General." This means that the royalty moneys must be held in the CRF and, pursuant to section 61(2) of the *Indian Act*, interest must be paid on them.

[708] The Crown submits that if section 61(2) and the Orders-in-Council issued pursuant to it are found to be valid, then this constitutes an insurmountable obstacle for the plaintiffs' unjust enrichment claim.

[709] In the recent Supreme Court decision in *Garland* v. *Consumers' Gas Co.*, [2004] 1 S.C.R. 629, Justice Iacobucci held at para. 30,

> As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation

> of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pettkus* v. *Becker*, [1980] 2 S.C.R. 834, at p. 848; *Peel (Regional Municipality)* v. *Canada*, [1992] 3 S.C.R. 762, at p. 784).

[710] Because I have found the Crown to be a trustee for Indian moneys and that it may rely on the money management provisions of the *Indian Act* to carry out its duties as a trustee, that leads to the conclusion that there can be no unjust enrichment claim. The Crown has paid the proper amount of interest and the plaintiffs have therefore suffered no deprivation within the confines of the existing legislative regime. Moreover, section 61(2) amounts to a juristic reason. However, in the event that I am incorrect in finding that the Crown may rely on the legislation, I shall briefly consider the three elements necessary for an unjust enrichment claim to succeed.

[711] With regard to the first element, enrichment, the plaintiffs contend that because their moneys have been on deposit in the CRF for long periods of time and the Crown did not lock in the interest rates, the Crown thereby enjoyed an enrichment in that it paid more for other long-term borrowing than it did for the Indian moneys.

[712] The plaintiffs' assertion of the Crown enjoying such a benefit depends upon finding that if the Crown did not have access to the Indian moneys, it would have replaced them with long-term borrowing (i.e., bonds) at fixed rates. The plaintiffs' experts who examined this issue did so in terms of looking at what it would have cost the Crown to replace the Indian moneys with borrowing from a single long-term investor. They did not approach it on the basis of simply asking what the Crown would have done.

[713] Samson expert Mr. Hockin, who is a former Assistant Deputy Minister of Finance, testified that the Crown would have replaced Indian moneys through issuing ten year and over long bonds (transcript volume 203, pp. 28814-28815). I note, however, that his statement of qualifications did not mention anything about Crown debt management or debt strategy and I have some reservations with placing much weight on his opinion on this particular issue (SE-467).

[714] Another Samson expert, Mr. Lambert, was of the strong opinion that the Crown received a clear benefit by way of the operation of the Indian moneys formula (transcript volume 181, p. 25416; SE-351, p. 12). Mr. Lambert testified that he thought the Crown would replace the Indian moneys with long-term borrowing, but he agreed that the Crown expert, Mr. King, was better placed to explain federal government debt strategy, since Mr.

King was qualified as an economist with specific expertise in government debt management strategy (transcript volume 181, pp. 25418-25419; C-986).

[715] Mr. Tony Williams, an actuary who testified for the plaintiffs, examined the issue from the perspective of the Crown externally financing the same amount of debt as the Indian moneys represented and in the same fashion – what he referred to as an independent arm's length borrower with a long-term horizon. He specifically disagreed with Mr. King's approach, *viz.* asking what the Crown would have done instead (transcript volume 216, 31014). However, Mr. Williams did agree that if the Crown did not have access to the Indian moneys, it would not have to replace them entirely with one single arm's length borrower. He also agreed that Treasury Bills – short-term debt – would have been an available option for the Crown in such a scenario (transcript volume 216, pp. 31016-31017).

[716] Yet another of the plaintiffs' experts, Mr. Perreault, conceded that if the Crown had to replace Indian moneys with alternate borrowing, there was no obligation for the Crown to resort exclusively to long-term bonds. Mr. Perreault also agreed that if the Crown went entirely with T-bills, the Crown would have saved over $100 million (transcript volume 232, pp. 33639-33670). However, he did not perform such calculations as his terms of reference

did not mandate him to assess what it would have cost the Crown to replace the Indian moneys with alternate forms of borrowing (transcript volume 232, pp. 33638-33639).

[717] The Crown's expert on this matter was Mr. King. As noted earlier in these Reasons in the section profiling the witnesses, Mr. King is an economist and has held various positions at the Bank of Canada and Department of Finance (C-987, Appendix A). He was qualified as an expert on government debt management and the use of both external financing and internal sources of funds for that purpose (C-986). I prefer his evidence on this issue over that of the plaintiffs' experts.

[718] Mr. King testified that the Crown's debt strategy in the early 1980s was based on a target ratio between fixed and floating debt and that the ratio was set at 50/50 (transcript volume 335, pp. 92-95). The target ratio involved a trade-off between short-term and long-term debt with regard to stability in the public debt charges and interest savings (transcript volume 335, pp. 106-109; transcript volume 348, pp. 157-159). In his opinion, if the Crown did not have access to Indian moneys – if they had never existed – the Crown would have gone with a strategy of Treasury Bill financing, which has the advantage of lowering the long run cost of funds (C-987, p. 7).

[719] Mr. King did consider a second possible strategy. In his opinion, given the relatively small size of the Indian moneys as compared to the Crown's overall borrowings, the loss of the Indian moneys would have simply been regarded as an increase in the amount of money which had to be borrowed and would be replaced by a mix of Treasury Bills and whatever long bonds the Crown had targeted. By Mr. King's calculations, this would still result in a lower cost than what the Crown actually paid on the Indian moneys from 1971/72 to 1999/2000 (C-987, p. 7; transcript volume 336, pp. 115-116).

[720] In my opinion, the correct approach to this issue is to ask what the Crown would have done had it not had access to the Indian moneys. Assume the moneys simply never existed. I do not agree with the approach used by the plaintiffs' experts where they assessed the costs of borrowing assuming there was a single borrower with a long-term horizon. It is clear from the evidence, not only of Mr. King, but also of some of the plaintiffs' experts, that the Crown would have used cheaper short-term debt financing in the absence of Indian moneys. The fact that the Indian moneys may have been on deposit for a long period of time was not the result of any legal requirement. The moneys were never committed to remain in the CRF for any period of time and were always available for withdrawal, subject to section 64 of the *Indian Act*.

[721] The Supreme Court discussed the benefit element of the test for unjust enrichment in *Peel (Regional Municipality)* v. *Canada*, [1992] 3 S.C.R. 762. Justice McLachlin held, at p. 790,

> To date, the cases have recognized two types of benefit. The most common case involves the positive conferral of a benefit upon the defendant, for example the payment of money. But a benefit may also be "negative" in the sense that the benefit conferred upon the defendant is that he or she was spared an expense which he or she would have been required to undertake, i.e., the discharge of a legal liability.

[722] It certainly cannot be argued in the case at bar that the plaintiffs spared the Crown an expense which it was required to undertake. The Crown had no obligation – legal or otherwise – to pay someone else, in the absence of the Indian moneys, an interest rate higher than that paid on the Indian moneys.

[723] As for whether there was a positive benefit, in the sense that the plaintiffs conferred upon the Crown a benefit by virtue of the payment of their royalty moneys into the CRF and the subsequent borrowing by the Crown, the evidence shows that this did not amount to a benefit. At first glance, it may appear that there was a benefit because the plaintiffs' money was collected, held, and borrowed by the Crown. However, when one looks at what

the Crown would have done had it not had any recourse to that money, it leads to the conclusion that the Crown would have sought any additional debt financing through use of short-term instruments. This form of debt financing would have allowed the Crown to reduce its costs, whereas with the Indian moneys on deposit in the CRF, the Crown ended up paying more for access to them.

[724] There can be no corresponding detriment because I have found that the Crown as trustee may rely on section 61(2) of the *Indian Act*, and the Orders-in-Council establishing the interest rate methodology.

[725] Finally, there is the juristic reason element. In *Garland*, at para. 49, the Court held,

> Disposition of law is well established as a category of juristic reason. In *Rathwell*, *supra*, Dickson J. gave as examples of juristic reasons "a contract or disposition of law" (p. 455). In *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445 ("*GST Reference*"), Lamer C.J. held that a valid statute is a juristic reason barring recovery in unjust enrichment. This was affirmed in *Peter*, *supra*, at p. 1018. Most recently, in *Mack* v. *Canada (Attorney General)* (2002), 60 O.R. (3d) 737, the Ontario Court of Appeal held that the legislation which created the Chinese head tax provided a juristic reason which prevented recovery of the head tax in unjust enrichment. In the leading Canadian text, *The Law of Restitution*, *supra*, McCamus and Maddaugh discuss the phrase "disposition of law" from *Rathwell*, *supra*, stating at p. 46:
>
> > ... it is perhaps self-evident that an unjust enrichment will not be established in any case where enrichment of the defendant at the plaintiff's expense is required by law.
>
> It seems clear, then, that valid legislation can provide a juristic reason which bars recovery in restitution.

[726] Thus, even if I am wrong on the enrichment and deprivation elements, the plaintiffs' unjust enrichment claim still fails because valid legislation requires the Crown to deposit the Indian moneys into the CRF pay interest thereon, pursuant to the Orders-in-Council.

H. Constitutional Issues and Self-Government

[727] Samson contends that sections 17 and 61 through 68 of the *Indian Act* are constitutionally inapplicable to Samson, its reserves, resources, and moneys. Samson argues that the terms of the *Indian Act* are constitutionally incompatible with its rights or self-government and self-determination. Samson's Amended Statement of Claim (No. 4) pleads the following:

> 7. Pursuant to Treaty No. 6, Plaintiff the Samson Indian Nation retained its rights as a nation, encompassing, *inter alia*, its right to self-determination, including the right to determine its own membership, which rights are recognized and affirmed and constitutionally protected by Section 35 of the *Constitution Act, 1982*.
>
> 7B. The Samson Cree Nation possessed and continues to possess aboriginal or inherent rights and powers in respect of governance, citizenship, taxation, trade and management of its resources and revenues. These inherent rights and powers were affirmed by Treaty No. 6, the *Royal Proclamation, 1763*, treaties with the Hudson's Bay Company and various constitutional instruments.
>
> 63. Moreover, sections 61 to 68 of the *Indian Act* violate, contravene and are incompatible with the *Constitution Act, 1982*, particularly sections 15, 25 and 35 thereof and it is expedient that sections 61 to 68 of the *Indian Act* be declared to be illegal, unconstitutional, null and void in respect to Plaintiffs and the moneys entrusted to Defendant Her Majesty for Plaintiffs or alternatively constitutionally inapplicable to Plaintiffs and their moneys or subject to the treaty and aboriginal rights of Plaintiffs.

> 66L. Furthermore, and in addition to the equitable obligations of Her Majesty and Plaintiffs' corresponding rights to be dealt with in a fair and evenhanded manner and in addition to the Constitutional responsibility of Her Majesty pursuant to s. 91-24 of the *Constitution Act, 1867*, Plaintiffs rely upon the rights of equality before and under the law guaranteed by s. 15(1) of the Canadian Charter of Rights and Freedoms and upon ss. 35 and 36 of the *Constitution Act, 1982*, and the common law.
>
> 70. Furthermore, it is expedient to declare section 17 of the *Indian Act* unconstitutional, illegal, null and void.
>
> 71. Section 17 of the *Indian Act* violates the right to self-determination of Plaintiffs, the right to own, manage, control and administer their own assets and their aboriginal and treaty rights.
>
> 72. Section 17 of the *Indian Act* violates and contravenes and is incompatible with the *Constitution Act, 1982*, particularly sections 15, 25 and 35 thereof.

[728] Thus, to summarize, Samson contends that it has aboriginal and treaty rights within the meaning of section 35(1) of the *Constitution Act, 1982*. The right of self-government or self-determination is the aboriginal and treaty right which Samson asserts. Moreover, according to Samson, this right is an inherent right, and as such also falls within the ambit of section 35(1). Pursuant to this right of self-government, and on the basis that it is an aboriginal, treaty, and inherent right, Samson contends that it has the right to manage and control its internal affairs, lands, resources, and moneys. Samson submits that sections 17 and 61 to 68 of the *Indian Act* interfere with this right of self-government, and therefore wish the Court to declare those sections as constitutionally infringing its right of self-government and therefore inapplicable to Samson.

[729] Earlier in these Reasons, I reviewed the Chief Justice's comments on the criteria necessary for establishing an aboriginal right in *Mitchell* at paras. 12 through 15. In that case, McLachlin J. stressed the importance of first characterizing the right claimed before one can address the question of whether the aboriginal right has been established.

[730] As noted, Samson claims that sections 17 and 61 through 68 of the *Indian Act* are constitutionally inapplicable because they infringe upon Samson's right of self-government. In *R.* v. *Van der Peet*, Lamer C.J. reiterated the Court's rejection of the notion that aboriginal rights can be determined on a general basis. He held, at para. 69,

> Courts considering a claim to the existence of an aboriginal right must focus specifically on the practices, customs and traditions of the particular aboriginal group claiming the right. In the case of *Kruger*, *supra*, this Court rejected the notion that claims to aboriginal rights could be determined on a general basis. This position is correct; the existence of an aboriginal right will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right. As has already been suggested, aboriginal rights are constitutional rights, but that does not negate the central fact that the interests aboriginal rights are intended to protect relate to the specific history of the group claiming the right. Aboriginal rights are not general and universal; their scope and content must be determined on a case by case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.
>
> [underlining in the original]

[731] In *R.* v. *Pamajewon*, [1996] 2 S.C.R. 821, the appellants advanced the claim that section 35(1) recognizes and affirms the rights of the Shawanaga and Eagle Lake First Nations to conduct gambling activities on their reserves. At para. 24, the Court held,

> The appellants' claim involves the assertion that s. 35(1) encompasses the right of self-government, and that this right includes the right to regulate gambling activities on the reservation. Assuming without deciding that s. 35(1) includes self-government claims, the applicable legal standard is nonetheless that laid out in *Van der Peet*, *supra*. Assuming s. 35(1) encompasses claims to aboriginal self-government, such claims must be considered in light of the purposes underlying that provision and must, therefore, be considered against the test derived from consideration of those purposes. This is the test laid out in *Van der Peet*, *supra*. In so far as they can be made under s. 35(1), claims to self-government are no different from other claims to the enjoyment of aboriginal rights and must, as such, be measured against the same standard.

[732] After reviewing the *Van der Peet* test for aboriginal rights the Court concluded that the appellants' claim was properly characterized as a claim that section 35(1) recognizes and affirms their rights to participate in, and to regulate, high stakes gambling activities on their reserve lands. The Court continued, at para. 27,

> The appellants themselves would have this Court characterize their claim as to "a broad right to manage the use of their reserve lands". To so characterize the appellants' claim would be to cast the Court's inquiry at a level of excessive generality. Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right. The factors laid out in *Van der Peet*, and applied, *supra*, allow the Court to consider the appellants' claim at the appropriate level of specificity; the characterization put forward by the appellants would not allow the Court to do so.

[733] Further along, at para. 29, Lamer C.J. stated,

> I would note that neither of the trial judges in these cases relied upon findings of fact regarding the importance of gambling to the Ojibwa; however, upon review of the evidence, I find myself in agreement with the conclusion arrived at by Osborne J.A. when he said first, at p. 400, that there "is no evidence to support a conclusion that gambling generally or high stakes gambling of the sort in issue here, were part of the First Nation's historic cultures and traditions, or an aspect of their use of their land" and second, at p. 400, that "there is no evidence that gambling on reserve lands generally was ever the subject matter of aboriginal regulation." I also agree with the observation made by Flaherty Prov. Ct. J., in the *Gardner* trial when he said that "... commercial lotteries such as bingo are a twentieth century phenomenon and nothing of the kind existed amongst aboriginal peoples and was never part of the means by which these societies were traditionally sustained or socialized."

[734] In *Delgamuukw*, which was issued in 1997, hard on the heels of *Pamajewon*, the Supreme Court was faced with a claim for the constitutional right of self-government. However, the Court ordered a new trial and declined to address the merits of the self-government claim. The Court stated, at para. 170, that this was not the right case for it to lay down legal principles to guide future litigation and also briefly noted that *Pamajewon* warned against framing claims to self-government in excessively general terms. The Court held, at paras. 170 and 171,

> In the courts below, considerable attention was given to the question of whether s. 35(1) can protect a right to self-government, and if so, what the contours of that right are. The errors of fact made by the trial judge, and the resultant need for a new trial, make it impossible for this Court to determine whether the claim to self-government has been made out. Moreover, this is not the right case for the Court to lay down the legal principles to guide future litigation. The parties seem to have acknowledged this point, perhaps implicitly, by giving the arguments on self-

> government much less weight on appeal. One source of the decreased emphasis on the right to self-government on appeal is this Court's judgment in *Pamajewon*. There, I held that rights to self-government, if they existed, cannot be framed in excessively general terms. The appellants did not have the benefit of my judgment at trial. Unsurprisingly, as counsel for the Wet'suwet'en specifically concedes, the appellants advanced the right to self-government in very broad terms, and therefore in a manner not cognizable under s. 35(1).
>
> The broad nature of the claim at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of aboriginal self-government. The degree of complexity involved can be gleaned from the *Report of the Royal Commission on Aboriginal Peoples*, which devotes 277 pages to the issue. That report describes different models of self-government, each differing with respect to their conception of territory, citizenship, jurisdiction, internal government organization, etc.

[735] Without more, by way of detailed evidence, the Court declined to "step into the breach."

[736] Samson argues that the Supreme Court laid the foundation for the right to self-government in its decision in *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075. Samson further contends that, in recognizing the communal or collective nature of aboriginal rights involving land and resources, the Supreme Court has also recognized the decision-making, regulation, and indeed *governance* of the community over the relevant activities. In my opinion, however, *Sparrow* and other important cases involving aboriginal and treaty rights, such as *R.* v. *Sundown*, [1999] 1 S.C.R. 393 and *R.* v. *Nikal*, [1996] 1 S.C.R. 1013, do not indicate the Supreme Court has supported a general right to self-government. Indeed, as demonstrated by the jurisprudence excerpted above, the Court has explicitly held that such

a right cannot be asserted in a broad manner, but rather must be defined with a certain degree of specificity. Without specificity, any collective right could be argued on the basis of the right to self-government.

[737] Thus, to review, aboriginal rights are not general and universal. They are intended to protect those interests which relate to the specific history of the group asserting the right. The claimed right must be grounded in specific aboriginal practices, customs, or traditions, which pre-date contact. Furthermore, the practice, custom, or tradition must have been integral to the distinctive culture of the group in the sense that it distinguished or characterized their traditional culture and lay at the core of the group's identity. It is also important to emphasize that aboriginal rights are not frozen in their pre-contact form; however, the right claimed must be shown to be directly connected to the pre-contact practice, custom, or tradition.

[738] The right claimed by Samson must first be characterized, or defined. The first of the three guiding factors set out in *Van der Peet,* at para. 53, is the nature of the action which the plaintiff claims was done pursuant to an aboriginal right. In the case at bar, that factor is a dead end. Samson has not committed any action pursuant to an aboriginal right, but rather wishes to commit something.

[739] The next factor involves the nature of the governmental legislation or action alleged to infringe the right. With regard to this factor, Samson has challenged sections 17 and 61 through 68 of the *Indian Act*. Section 17 deals with the creation of new bands and sections 61 through 68 are the Indian moneys provisions.

[740] I note that in their Amended Statement of Claim (No. 4), part of Samson's prayer for relief is an injunction ordering the Crown to transfer to Samson the administration and control of all oil and gas and oil and gas leases on Samson's home reserve. Samson also seeks to have the control and administration of all oil and gas and oil and gas leases on the Pigeon Lake Reserve transferred to the control of the Four Nations Administration.

[741] I further note that Samson is not challenging the constitutionality of the *Indian Oil and Gas Act* and its regulations. In its Notice of Constitutional Questions, dated May 25, 2000, Samson appears to be relying on them when it invokes the paramountcy of federal legislation over certain provincial legislation. Without anything more, I take it from this that Samson acknowledges the validity of legislation allowing the Crown to manage its interests in its oil and gas resources. The attack on the provisions of the *Indian Act* deal with the

control and management of proceeds generated from the disposition of its oil and gas interests.

[742] The third of the *Van der Peet* factors involves the ancestral traditions and practices relied upon to establish the right.

[743] Earlier in these Reasons, after reviewing the expert evidence, I found the appropriate date of contact to be 1670. This date marks the beginning of a cultural transformation which saw the Cree become immersed in the European fur trade upon the arrival of the Hudson's Bay Company and the establishment of their post at York Factory.

[744] I observe that no evidence was presented at trial which traced the specific entity known today as the Samson Cree Nation back to this date of contact. During the first phase of the trial, evidence was tendered about the leader who took Samson into Treaty 6, Kanatakasu, or Samson as he was also known (S-177). Evidence was also presented about Kanatakasu's predecessor, Maskepetoon, who was renowned later in his life as a diplomat and peace-maker (S-174). However, for the purposes of this analysis, the

appropriate aboriginal group to consider as the ancestors of the present-day Samson Cree Nation is the Plains Cree.

[745] The evidence at trial established that the Plains Cree were foragers. Their movements on the land were dictated by the seasons. The Plains Cree provided for themselves by fishing and hunting, as well as by harvesting plants for such things as their roots and berries. The buffalo was perhaps their most important resource as it provided the Plains Cree with food, shelter, clothing, tools, and implements. The later loss of the buffalo, as we saw, was simply devastating.

[746] As I noted earlier in these Reasons, the start of the European fur trade was a watershed event for the Plains Cree. While I agree that the evidence shows the Cree were engaged in trading activities prior to contact, nothing established that such pre-contact trade – whether at large or in relation to any particular item – was something the Cree were known for and was a distinctive practice. The evidence, in my opinion, shows that trade did not become a distinctive Cree practice until they came to dominate the European fur trade, first as middlemen and then later as market hunters and provisioners. However, this is a post-contact activity. Nothing in the evidence allows me to project this back into pre-contact times. There was no pre-contact European trade system. Furthermore, the evidence did

not show that the Cree dominated any other pre-contact aboriginal trade network. The Cree certainly engaged in trading activities; however, it was not a defining characteristic of Plains Cree culture – at least not until the time of the European fur trade.

[747] If the right, however, is not that of actually trading, but rather in managing and controlling the fruits of that trade – i.e., money – the evidence fails to show as well that this was a defining characteristic of the Plains Cree. Indeed, Elder Amelia Potts testified that money was not a concept or thing with which the Cree were familiar. Elder Potts told the Court a story her grandmother had told to her, dating back to treaty time:

> Now they had a meeting at North Battleford. The white men sat there. There was a mysterious metal box beside them. Everyone stood in a lineup, according to families. The half breed stood at the front asking how many people there were in each. He was handing out pieces of paper.
>
> When we [Elder Potts's grandmother] got home, we kept seeing these papers everywhere. This was money. "Blue paper" they called it. We just looked at it. It was given to the children to play with as it had no use. It was not known, although we were told how to use it. "You have to have this to use for trade with the white man, we were told," she said. For everything that he brings here, this white man, you have to have money for trade.
>
> Nobody thought anything of it, this money. Everywhere children played with it. They threaded it on twigs. They would just run and let it blow in the wind. They would stand the twigs up in mole holes, playing this way. The money was just blowing in the wind and scattered all over the places we lived. Nothing was thought of it.
>
> (C-1092, tab 10, pp. 2653-2654)

[748] Elder Potts was asked about the Cree way of life before the coming of the "white man." She told the Court, "There was no such thing as money to use to buy food, my grandmother used to say" (C-1092, tab 10, p. 2580). And further on, the elder testified about what she told the students at Maskwachees Cultural College, where she taught,

> These are the stories I told them of the native way of life that my grandmother had previously related to me. There were no white people here at that time. The way a native person was given the privilege to be on this earth was the way he had been living. He did not need the concept of money because he was surrounded by everything in nature that he needed to survive. His food, medicine and plenty of pure, fresh, clean water. This is the way my grandmother used to tell me.

(C-1092, tab 10, pp. 2584-2585)

[749] Another elder, Elder Justine Simon, spoke about money during an interview for something called "Listening to the Elders." This comes from a translated transcription of the interview:

> What did your parents or grandparents tell you about life on the reserve shortly after the treaty?
>
> "Not too much, I remember my grandmother used to talk about when the white soldiers came. That's all she used to say and when the people first got the treaty money, they didn't know what the money was. I guess the kids were just playing with the money. They didn't know what it was until someone explained it to them and I used to hear them saying every year when they were going to get the treaty money, they were going to go camping, to go celebrate, go camping, dance, buy food, and cook out.

(C-90, p. 3)

[750] Elder Simon testified during the first phase of the trial. She agreed that C-90 was the interview that she gave for the children at the Ermineskin school (transcript volume 87, pp. 12279-12280).

[751] Elder Thomas Cardinal told the Court what his grandmother had told him about Treaty 6. He testified,

> "My grandmother was one that told me a lot of stories about what transpired before the treaties, at the signing of the treaties. Well, she said they didn't know the value of money. The Indian people didn't know the value of the money.
>
> They were given $5 per head, but there was no report prior to the signing of the treaty about treaty numbers, second names when this took place. The kids were just playing with those $5 bills outside. They didn't know. They figured it was a toy. There was $5 bills flying all over. They were playing with the $5 because they didn't know the value of the uses of $5.
>
> (transcript volume 96, p. 13517)

[752] I do note, however, that some of Mr. Cardinal's earlier testimony that same day seemed to show an understanding of money at Treaty 6, when he testified,

> The value of the land was land was so great. Some elders got up and said, My land is not for sale. You do not have enough money to cover my country with dollar bills. That is why I will not be able to sell it to you, but I will live in harmony with you.
>
> (transcript volume 96, p. 13502)

[753] In *Buffalo Days and Nights*, Peter Erasmus recounted an event that happened shortly after the treaty was signed at Fort Carlton and he was making preparations to travel on to Fort Pitt with his friend Hunter:

> An Indian stopped me while I was making the rounds of the traders' stores and offered to buy Whitey, my buffalo runner horse. "I want a hundred dollars for him without the saddle or bridle," I said.
>
> He accepted at once and handed me a roll of bills for me to count out the money. I called Hunter to witness the counting, as he had been instructed in the use of money. The animal was good value for the price but I mention this incident to show how easily at that time the Indians could have been cheated out of their money.
>
> (C-7, p. 256)

[754] In my opinion, the evidence shows that the Cree were not familiar with money – and by that I mean the concept, not just the physical manifestation of it in terms of paper & coins – and that it is something that was introduced to them after contact. Certainly, in the course of trading activities, they must have engaged in a form of barter; however, nothing indicates to me that the Cree had anything resembling a form of money before contact. Even at the time of Treaty 6, they still had a certain degree of unfamiliarity with money. The evidence does not demonstrate any ancestral practices or traditions that would support Samson's claimed right to own, manage, control and administer its moneys.

[755] Another basis for Samson's asserted right to self-government is Treaty 6. Section 35(1) of the *Constitution Act, 1982* recognizes and affirms not only aboriginal rights, but also treaty rights.

[756] The written text of Treaty 6 provides, in part, as follows,

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, provided all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: –
>
> That the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them;
>
> Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as she shall deem fit, and also that the aforesaid reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained; and with a view to show the satisfaction of Her Majesty with the behavior and good conduct of her Indians, she hereby, through her Commissioners, makes them a present of twelve dollars for each man, woman and child belonging to the bands here represented, in extinguishment of all claims heretofore preferred.
>
> (S-4, pp. 352-353; underlining is mine)

[757] The language is clear that the Crown shall administer and deal with Indian reserves. However, further reference on this matter must be had to the remarks made by Morris

during the treaty negotiations. In the Morris text, Commission Secretary Jackes recorded Morris's remarks regarding the possibility of selling reserves. According to Jackes, Morris stated,

> "There is one thing I would like to say about the reserves. The land I name is much more than you will ever be able to farm, and it may be that you would like to do as your brothers where I came from did.
>
> They, when they found they had too much land, asked the Queen to sell it for them; they kept as much as they could want, and the price for which the remainder was sold was put away to increase for them, and many bands now have a yearly income from the land.
>
> But understand me, once the reserve is set aside, it could not be sold unless with the consent of the Queen and the Indians; as long as the Indians wish, it will stand there for their good; no one can take their homes."
>
> (S-4, p. 205)

[758] I return once again to the comments of McLachlin J., at paras. 82 and 83, in *Marshall*, where she discussed a two step approach for treaty interpretation:

> First, the words of the treaty clause at issue should be examined to determine their facial meaning, in so far as this can be ascertained, noting any patent ambiguities and misunderstandings that may have arisen from linguistic and cultural differences. This exercise will lead to one or more possible interpretations of the clause. As noted in *Badger*, *supra*, at para. 76, "the scope of the treaty rights will be determined by their wording." The objective at this stage is to develop a preliminary, but not necessarily determinative, framework for the historical context inquiry, taking into account the need to avoid an unduly restrictive interpretation and the need to give effect to the principles of interpretation.
>
> At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty's historical and cultural backdrop. A consideration of the historical background may suggest latent ambiguities or alternative interpretations not detected at first reading. Faced with a possible range of interpretations, courts must rely on the historical context to determine which comes closest to reflecting the parties'

> common intention. This determination requires choosing "from among the various possible interpretations of the common intention the one which best reconciles" the parties' interests: *Sioui*, *supra*, at p. 1069.

[759] Morris's remarks, as recorded by Jackes, reflect the long-standing Crown policy, dating back to the Royal Proclamation of 1763, which provided that only the Crown could purchase or take possession of Indian lands. This responsibility passed on to colonial governments when they took over the administration of Indian affairs. Following Confederation in 1867, the federal government of Canada assumed this special responsibility. In *Guerin*, at p. 383, Dickson J. held,

> The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself which prefaces the provision making the Crown an intermediary with a declaration that "great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interest and to the great Dissatisfaction of the said Indians... ." Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.

[760] I cannot conclude that anything in either the written text of Treaty 6 or the surrounding negotiations and historical context shows that there was any kind of understanding that bands would administer and manage their reserve lands and resources. Quite the contrary, it is clear that this was to be a function and responsibility of the Crown,

which dates back to the Royal Proclamation of 1763. Neither the written text of Treaty 6 nor the treaty negotiations supports the contention that the Cree retained unto themselves the right to sell, lease, or otherwise dispose of their interests in their reserves. In my opinion, the Cree leadership who signed Treaty 6 understood that by doing so, they would be putting themselves under the protection of the Crown in return for receiving certain specified benefits.

[761] I conclude that Samson has not established an aboriginal or treaty right to own, manage, control and administer their own reserve lands, resources, and any money arising therefrom.

[762] I propose now to deal with Samson's challenge to section 17 of the *Indian Act*. That section, which falls under the heading "New Bands," provides:

> 17. (1) Minister may constitute new bands – The Minister may, whenever he considers it desirable,
>
> > (a) amalgamate bands that, by a vote or a majority of their electors, request to be amalgamated; and
> >
> > (b) constitute new bands and establish Band Lists with respect thereto from existing band Lists, or from the Indian Register, if requested to do so by persons proposing to form the new bands.
>
> (2) Division of reserves and funds – Where pursuant to subsection (1) a new band has been established from an existing band or any part thereof, such portion of the reserve lands and

> funds of the existing band as the Minister determines shall be held for the use and benefit of the new band.
>
> (3) No protest – No protest may be made under section 14.2 in respect of the deletion from or the addition to a Band List consequent on the exercise by the Minister of any of the Minister's powers under subsection (1).

[763] In their Amended Statement of Claim (No. 4), as noted earlier, the plaintiffs allege, in part, the following:

> 70. Furthermore, it is expedient to declare section 17 of the *Indian Act* unconstitutional, illegal, null and void.
>
> 71. Section 17 of the *Indian Act* violates the right to self-determination of Plaintiffs, the right to own, manage, control and administer their own assets and their aboriginal and treaty rights.
>
> 72. Section 17 of the *Indian Act* violates and contravenes and is incompatible with the *Constitution Act, 1982*, particularly sections 15, 25 and 35 thereof.

[764] During the entire course of the trial – some 370 days – no evidence was presented which could even remotely be linked with section 17 of the *Indian Act*. On the facts of this case, section 17 has absolutely no application to the plaintiffs. No evidence was tendered to show that anyone requested that the Minister amalgamate Samson with another band or constitute a new band with reference to Samson's Band List.

[765] I cannot do better than to quote the words of Justice Cory in *MacKay* v. *Manitoba*, [1989] 2 S.C.R. 357 at pp. 361-362, where he held,

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. ... *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

[766] Accordingly, I will deal no further with section 17.

[767] In conclusion, I find that Samson has no existing aboriginal or treaty rights regarding Indian moneys. However, in the event that a higher court disagrees with me, I will address the issues of infringement and justification.

[768] I start this analysis by observing that constitutional rights are not necessarily able to be enjoyed in an absolute sense and that limitations – or infringement – may be legal. In *Sparrow*, at pp. 1109 to 1110, Dickson C.J. stated,

There is no explicit language in the provision [s. 35(1) of the *Constitution Act, 1982*] that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find that the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick*, *supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin* v. *The Queen*, *supra*.

We refer to Professor Slattery's "Understanding Aboriginal Rights", op. cit., with respect to the task of envisioning a s. 35(1) justificatory process. Professor Slattery, at p. 782, points out that a justificatory process is required as a compromise between a "patchwork" characterization of aboriginal rights whereby past regulations would be read into a definition of the rights, and a characterization that would guarantee aboriginal rights in their original form unrestricted by subsequent regulation. We agree with him that these two extreme positions must be rejected in favour of a justificatory scheme.

Section 35(1) suggests that while regulation affecting aboriginal rights is not precluded, such regulation must be enacted according to a valid objective. Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. The way in which a legislative objective is to be attained must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples. The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized so as to ensure recognition and affirmation.

The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s. 35(1).

[769] The Chief Justice continued and, at page 1112, set out the questions that must be asked in determining whether there has been a *prima facie* infringement. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The Chief Justice went on to state that the onus of proving a *prima facie* infringement lies with the person or group challenging the legislation. Thus, for our purposes, Samson bears that onus.

[770] In my opinion, if the money management provisions of the *Indian Act* constitute a limitation, they are not unreasonable. Through the terms of Treaty 6, Samson placed itself under the protection of the Crown. That may not be fashionable to state today, but that is indeed the effect of the treaty. Certainly, one can view the treaty as forming or solidifying an alliance or partnership, but it also meant that Samson's ancestors agreed to allow the Crown to look to their interests. In return, Samson secured certain benefits, set out in the treaty. Crown policy, dating back centuries in some aspects, and legislation flowing therefrom, was to respect and protect Indian interests. That may not always have been the way things operated in reality, but that is the Crown's acknowledged policy, and it has since become enshrined in the jurisprudence. The relationship between the Crown and aboriginal people is ancient and complex. It is also an evolving thing. Ideas of wardship, tutelage, and assimilation have been abandoned in favour of increased decision-making and

empowerment. However, that does not change, in my opinion, the reasonableness of the Indian moneys provisions.

[771] Because the Crown has taken on the responsibility to interpose itself between aboriginal interests and third parties, it has the duty to set out rules governing how that is to play out. In the case of the Indian moneys, the Crown agreed by the 1946 Surrender to safeguard Samson's interests. The Indian moneys enactments contained in the *Indian Act* exist for that purpose. Section 61(1) states that the Crown holds the Indian moneys for the "use and benefit" of the Indian or band on whose behalf they are held. The Crown must pay interest on this money, pursuant to section 61(2); that is mandatory. Expenditures of capital, governed by section 64, may only be authorized and directed by the Minister with the consent of the band council and for a list of enumerated purposes, ending with (k) which is a sort of catch-all clause. But the point of section 64 is that expenditures must be for the *benefit* of the band. The Crown has retained the discretion for itself to decide where best interests lie, but this goes to the heart of the parties' relationship, which is deep, historical, and *sui generis* in nature. The honour of the Crown is always at stake in its dealings with aboriginal people and that "core precept" supervises and governs the exercise of its discretion.

[772] The second question posed in *Sparrow* has to do with undue hardship. Does the regulation impose undue hardship? In my opinion, there is not. The evidence clearly established that Samson has been able to access its capital moneys, and make withdrawals and expenditures. Owen Jackson, a Chartered Accountant who has audited Samson since 1993, testified on behalf of Samson and presented to the Court a document titled “Samson Cree Nation Financial Summary 1971-2002" (S-523). This summary shows the amounts and varieties of revenues and expenditures made by Samson over this 31 year period. The numbers are impressive and show that while Samson experienced some spending difficulties for several years, its equity has grown and continues to grow.

[773] The third question is whether the regulation denies to the holders of the right their preferred means of exercising that right. With respect, while many of the experts testified as to how a professional trustee would manage the money, the evidence did not show how Samson preferred to manage the money, beyond the confines of this lawsuit, wherein they rely on the experts to argue for what the Crown should have done. But much of the evidence showed that Samson had conflicting objectives over the years as to what they wanted to do with their money and how it should be handled.

[774] Returning to *Sparrow*, the Court held that if a *prima facie* interference is found – which, in this case, I have not – the analysis moves to the issue of justification. At p. 1113, Dickson C.J. stated,

> If a *prima facie* interference is found, the analysis moves to the issue of justification. This is the test that addresses the question of what constitutes legitimate regulation of a constitutional aboriginal right. The justification analysis would proceed as follows. First, is there a valid legislative objective? Here the court would inquire into whether the objective of Parliament in authorizing the department to enact regulations regarding fisheries is valid. The objective of the department in setting out the particular regulations would also be scrutinized. An objective aimed at preserving s. 35(1) rights by conserving and managing a natural resource, for example, would be valid. Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial.

[775] If a valid legislative objective is found, then the justification analysis proceeds to the second part. At p. 1114, the Chief Justice continued,

> Here, we refer back to the guiding interpretive principle derived from *Taylor and Williams* and *Guerin*, *supra*. That is, the honour of the Crown is at stake in dealings with aboriginal peoples. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the first consideration in determining whether the legislation or action in question can be justified.

[776] I note that the Supreme Court later approved of this test in *R.* v. *Marshall*, [1999] 3 S.C.R. 533 at p. 555, and also referred to as *Marshall (2)*.

[777] The legislative objective insofar as the *Indian Act* is concerned has been the protection of Indian interests. As I noted above, this stems from the Crown's historical role in which it assumed this duty to protect and secure the interests of aboriginal people from exploitation. In Section 5 of the second volume of the Crown's closing argument briefs relating to the moneys phase, the Crown reviewed the consultations and discussions and various failed initiatives that have taken place over the past few decades regarding how the plaintiffs might assume responsibility for the management of their moneys outside of the *Indian Act* provisions. I do not propose to review that evidence here. Suffice it to say that much work and effort have been expended, but nothing resulted to change the *status quo*. In the meantime, Samson's moneys remain deposited in the CRF and the Crown pays interest. In light of this, I find that, if there is an infringement, it is entirely justified.

[778] I turn now to Samson's invocation of section 15 of the *Charter*, which is found under the heading "Equality Rights" and provides as follows:

> 15. (1) Equality before and under law and equal protection and benefit of law – Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[779] In *Nechako Lakes School District No. 91* v. *Patrick*, [2002] B.C.J. No. 37, the British Columbia Supreme Court had occasion to consider the applicability of section 15 of the *Charter* to Indian bands. The defendant bands were sued for school fees they owed; the bands counterclaimed and, among other things, alleged discrimination pursuant to section 15(1) of the *Charter*. Garson J. analysed the legal character of an Indian band at paras. 103 to 111 and concluded that bands are not individuals for the purposes of the *Charter*. After making that finding, he declined to consider the discrimination argument on its merits:

> ¶ 103 The *Indian Act*, R.S.C. 1985, C. I-5, s. 2(1) defines "band":
>
> "band" means a body of Indians
>
> (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,
>
> (b) for whose use and benefit in common, moneys are held by Her Majesty, or
>
> (c) declared by the Governor in Council to be a band for the purposes of this Act;
>
> ¶ 104 The *Indian Act* defines "council of the band" in s. 2(1) as the council established pursuant to s. 74 of the *Indian Act*, which states that a band council "shall be selected by elections to be held in accordance with this Act."
>
> ¶ 105 In his text *Native Law* (Toronto: Carswell, 1994), J. Woodward at p. 398 says, "[t]he band, as an enduring entity with its own government is a unique type of legal entity under Canadian law."
>
> ¶ 106 In the case of *William* v. *Lake Babine Indian Band* (1999), 30 C.P.C. (4th) 156 (B.C.S.C.), Taylor J. had to determine the proper method of service of a Writ and Statement of Claim on an Indian Band and Band Council. He decided that an Indian Band was more like a trade union than a corporation because it performs a representative function on behalf of its members.
>
> ¶ 107 In the case of *Montana* v. *Canada*, [1998] 2 F.C. 3 (F.C.T.D.) at para. 20, Reed J. stated "neither a band nor a band council have corporate status; nor is either a natural person

> in the eyes of the law." She went on to note that a band has been described as an "unincorporated association of a unique nature, because it is created by statute rather than by consent of its members," and that other commentators have noted that "[t]he rights and obligations of the band are quite distinct from the accumulated rights and obligation of the members of the band ... [i]n law a band is in a class by itself".
>
> ¶ 108 Reed J. noted that in *Clow Darling Ltd.* v. *Big Trout Lake Band* (1989), 70 O.R. (2d) 56 (Ont. (Dist. Ct.)) the court stated "... a band council has the capacity to function and to take on obligations separate and apart from its individual members, as does a corporation ...". She quoted from *Joe* v. *Findlay* (1987), 12 B.C.L.R. (2d) 166 (S.C.), where the court stated "[t]his band council is elected by its members to exercise statutory and other rights and duties ...".
>
> ¶ 109 With respect to Charter actions brought in a representative form, the B.C. Court of Appeal recently refused standing to two trade unions who brought an action for breach of s. 2(d) of the *Charter* (which refers to "everyone") and sought relief under s. 24(1) not on their own behalf, but as agents on behalf of their members (*C.L.A.C*. v. *B.C. Transportation Financing* (2001), 91 B.C.L.R. (3d) 197).
>
> ¶ 110 The impugned Local Education Agreements are not between individuals. In my view a band is a representative body, and also a governing body, but a band does not stand in the place of the individual Indian children as argued by the Bands. A band is not a "human being". The Local Education Agreements are between levels of government or governing bodies. The Local Education Agreements provide for a funding route between levels of government, and enable the Bands to have input into the quality and nature of the education of their children. In no way is any parent of any child required under a Local Education Agreement, to pay on an individual basis for the schooling of his or her child contrary to the School Act. The Band or the Band Council as a party to a Local Education Agreement is acting in a governing or representative capacity. In this capacity it is taking on "rights and obligations separate and apart from its individual members".
>
> ¶ 111 It follows that the Bands and Band Councils are not individuals, and hence s. 15(1) of the *Charter* does not in this case apply to them."

[780] I agree with the analysis and conclusion of Garson J. and adopt them for the purposes of this case. Section 15 of the *Charter* is not available to Samson in the case at bar. I therefore need not delve any further into the discrimination argument.

[781] Before moving on, I want to add some comments on the self-government issue.

[782] During the course of the trial, Samson tendered a great deal of evidence designed to demonstrate its social organization, culture, language, spirituality, laws, customs, traditions, and institutions. Samson submits that this evidence meets the legal criteria for a people to successfully claim the right to self-government: a right existing long before Europeans arrived on this continent, continuing after contact, recognized and preserved through Treaty 6, recognized at common law and international law, and confirmed and protected by virtue of section 35 of the *Constitution Act, 1982*. Samson claims that its right to self-government is an aboriginal right, a treaty right, and an inherent right. Samson links this particular right to its claim for the transfer of its moneys, but Samson also appears to be invoking this right in an "at large" or global sense.

[783] Insofar as the transfer claim is concerned, and as I have already stated, on January 27, 2005 this Court ordered the Crown to transfer all of Samson's capital moneys to Samson, subject to certain conditions.

[784] The Crown, for its part, attempts to show that it has always been prepared to negotiate the issue of self-government (Written Closing Arguments of the Crown, Moneys

Phase, Volume 2, Section 5). According to the Crown, it was never prepared to make investments with the plaintiffs' money, preferring instead to adopt a policy in favour of encouraging greater self-government on the part of First Nations.

[785] The Crown enumerates several aspects of this policy. First, the Crown would respect decision-making of First Nations, so far as possible within the confines of existing legislation. Second, the Crown would encourage and assist First Nations to assume more control over their own affairs, again within the confines of existing legislation. Third, the Crown asserts it was willing to develop new legislation or other mechanisms to accommodate greater control by First Nations over their money. Fourth, the Crown would not proceed unilaterally with new legislation, but rather would proceed only after consultation with, and support from, affected First Nations. The Crown would only proceed unilaterally with new legislation in the case of "fundamental human rights," which I take to be a reference to Bill C-31, which was assented to on June 28, 1985 and amended the *Indian Act* regarding entitlement to registration on Band lists, and which has been the subject of some rather tortuous, ongoing litigation.

[786] In reviewing the evidence presented to the Court on this important matter, I can only marvel at the numerous studies, presentations, projects, reports, reviews, and initiatives

produced over the years by various committees, groups, and interested persons. The following list provides just a taste of these efforts: the 1969 White Paper (C-686); the aboriginal response contained in Citizens Plus, or the Red Paper (SC-428, binder 3, tab 20, document 95); Indian Association of Alberta presentations and letters to the Minister of DIAND (C-572; C-689); the 1983 report of the all-party House of Commons Special Committee on Indian Self-Government, commonly known as the Penner Report (S-94); Bill C-52, the *Indian Self-Government Act*, which flowed from the Penner Report (SC-428, binder 16, tab 29, document 626); the 1984 Dion Report (C-692); community self-government initiatives of the mid-1980s; DIAND's Lands, Revenues & Trusts (LRT) Review conducted in the late 1980s (C-840); the Hall Report (SEC-427, binder 38, tab 6, document 1021); and more recently, the *First Nations Land Management Act* and the *First Nations Money Management Act*, the latter of which failed to be enacted. Of course, this is not an exhaustive list. I note also that, in a very few cases, self-government agreements have been successfully negotiated with specific First Nations.

[787] During the first phase of the trial, the plaintiffs called three former Ministers of DIAND to testify. They also later called the former Prime Minister, the Right Honourable Jean Chrétien, who was also a former DIAND Minister. These witnesses all seemed to agree that the *Indian Act* is deficient and needs to be either amended or scrapped entirely. Mr. Crombie, who was Minister from September 1984 until June 1986, testified that the Act

had no defenders. He described it as oppressive, a “Denver boot,” and a “colonial holdover” (transcript volume 89, pp. 12499-12500). Mr. Munro, who served as Minister of DIAND from 1980 until 1984, described the *Indian Act* as “abominable” and “archaic” (transcript volume 92, p. 12959). Mr. Allmand, who served as Minister of DIAND from 1976 until 1977 and was also a member of the Penner Committee, testified that the Act is paternalistic and, because it was imposed unilaterally on aboriginal people, an “abuse of power” (transcript volume 97, p. 13618). The Right Honourable Mr. Chrétien testified that after the completion of the *Indian Act* consultations held in 1968, he offered to abolish the Act entirely. Aboriginal people, however, did not want that and so he declined to press ahead (transcript volume 296, pp. 38 and 50). The former Prime Minister still agreed with a statement he made in November 1968 while in Kelowna, British Columbia for *Indian Act* consultation meetings, describing the Act as an embarrassment (transcript volume 296, pp. 40-41; S-848, tab 9, p. 61).

[788] What I found to be most significant about the testimony of the former Prime Minster and the former DIAND Ministers was their evidence about the near impossibility of achieving the changes to the *Indian Act* so long desired by aboriginal people and the Crown alike. The Crown’s policy, going back several decades, has been in favour of increased decision-making powers for First Nations. The terminology may have evolved over the

years from devolution to the inherent right of self-government, but the sought after outcome remains essentially the same. And yet it also remains frustratingly elusive.

[789] An important document which bears examination is the Federal Policy Guide: Aboriginal Self-Government, subtitled The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government (S-214) This policy guide was published in 1995. The introductory Message from the Ministers states, in part,

> The recognition of the Inherent Right of Self-Government under section 35 of the Canadian Constitution has been the cornerstone of our government's Aboriginal policy since our election in 1993. ...
>
> ...
>
> The objective of the federal government is clear. Significant change must be made to ensure Aboriginal peoples have greater control over their lives. The most just, reasonable and practical mechanism to achieve this is through negotiated agreements.

[790] The policy guide continues, under Part 1: Policy Framework,

> The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. It recognizes, as well, that the inherent right may find expression in treaties, and in the context of the Crown's relationship with treaty First Nations. Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal

> to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.
>
> The Government acknowledges that the inherent right of self-government may be enforceable through the courts and that there are different views about the nature, scope and content of the inherent right. However, litigation over the inherent right would be lengthy, costly and would tend to foster conflict. In any case, the courts are likely to provide general guidance to the parties involved, leaving it to them to work out detailed arrangements.
>
> For these reasons, the Government is convinced that litigation should be a last resort. Negotiations among governments and Aboriginal peoples are clearly preferable as the most practical and effective way to implement the inherent right of self-government.
>
> (S-214, p. 3)

[791] Thus, since 1995, the Crown has explicitly acknowledged, in terms of policy, that section 35 of the *Constitution Act, 1982* recognizes and protects the inherent right of aboriginal self-government. However, judicial recognition and explanation have not followed.

[792] In the case at bar, I heard extensive evidence on the background, history, and organization of the Samson Cree Nation, as well as the larger entity, the Plains Cree. Despite the length of this litigation and the massive amount of materials and evidence presented to the Court at trial, I am simply not prepared to rule that Samson has the inherent right of self-government and that it is affirmed and protected by section 35 of the Constitution.

[793] I am satisfied from the evidence and from what I have said as to the *vires* of the *Indian Act* and the various sections pertinent to the instant case. I am also satisfied that the plaintiffs have not established that they have aboriginal, treaty, or inherent rights to manage and control its internal affairs, lands, resources, and moneys. Implementing an aboriginal right of self-government requires complex negotiations about the scope of authority and areas of jurisdiction. I am fully cognizant of the enormous efforts required, not just on the part of the Crown, but also on the part of First Nations. My concern, however, is for the Samson Cree Nation and its claim that it has the inherent right of self-government. I strongly urge both parties to negotiate, in good faith and with best efforts, a comprehensive self-government agreement, if that is what Samson desires. The goal is to make the inherent right of self-government a practical reality. This can only be done through negotiation, not litigation. The capital moneys transfer, should the conditions in the transfer order be met, will represent a huge step forward for the Samson Cree Nation in terms of its aspirations to govern itself. I urge the parties to build upon this momentum.

I. Costs

[794] Rule 400 of the *Federal Court Rules* sets out the Court's power to award costs. This power is entirely within the Court's discretion. There has been divided success in this case. Samson has succeeded in achieving the transfer of its moneys from the Crown insofar as the conditions for such a transfer have been set out by Order of this Court. The Crown has also been successful in that it has not been found liable for its handling of the Indian moneys. Therefore, I exercise my discretion and conclude that each party will pay its own costs.

J. Conclusion

[795] For the reasons set out herein, the action against the Crown is dismissed. Furthermore, as there is no liability on the part of the Crown for its conduct, I need not address the issues relating to limitations of actions.

Max M. Teitelbaum

JUDGE

CALGARY, Alberta
November 30, 2005

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-2022-89

STYLE OF CAUSE: CHIEF VICTOR BUFFALO ET AL v. HER MAJESTY THE QUEEN ET AL

PLACE OF HEARING CALGARY, ALBERTA/SAMSON CREE NATION HOBBEMA ALBERTA

DATES OF HEARING: **2000 MAY:** 1 to 4; 8 to 10; **JUNE:** 5 to 9; 12 to 15; 19 to 23; **OCTOBER:** 3 to 6; 11 to 13; 16 to 18; 30 to 31; **NOVEMBER:** 1; 7 to 9; 13 to 16; 27 to 30; **DECEMBER:** 4 to 7; 11 to 13; **2001 JANUARY:** 8 to 11; 15 to 17; 22 to 25; **MARCH:** 12; 14 to 15; 19 to 22; 26 to 29; **APRIL:** 2 to 5; 17 to 19; 30; **MAY:** 1 to 2; 14 to 17; 23 to 25; **JUNE:** 4 to 7; 11 to 14; 18 to 21; **SEPTEMBER:** 4 to 7; 10 to 12; **OCTOBER:** 1 to 4; 9 to 12; 15 to 18; 29 to 31; **NOVEMBER:** 1; 5 to 8; 12 to 15; 27 to 29; **DECEMBER:** 3, 5 to 6; 10 to 11; **2002 JANUARY:** 7 to 8; **MAY:** 6 to 9; 13 to 15; 21 to 24; **JUNE:** 3 to 5; 11 to 14; 19 to 20; **JULY:** 16; **AUGUST:** 26 to 30; **SEPTEMBER:** 10 to 13; 17 to 20; 30; **OCTOBER:** 1 to 3; 7 to 9; 15 to 17; 28 to 29; **NOVEMBER:** 12 to 15; 18 to 21; 25 to 28; **DECEMBER;** 2 to 5; 9; **2003 JANUARY:** 13 to 16; 20; 22 to 23; 27 to 30; **FEBRUARY:** 18 to 21; 24 to 27; **APRIL:** 7; 22 to 23; 29 to 30; **MAY:** 1 to 2; 12 to 16; 20 to 23; 26 to 28; **JUNE:** 9 to 13; 16 to 20; **SEPTEMBER:** 3 to 4; 9; 24; **OCTOBER:** 15 to 17; 20 to 22; 27 to 30; **NOVEMBER:** 3 to 5; 10 to 12; 26 to 28; **DECEMBER:** 1 to 4; **2004 JANUARY:** 12 to 15; 19 to 22; 26 to 29; **FEBRUARY:** 19; 23 to 25; **MARCH:** 24 to 26; 29 to 31; **APRIL:** 1 to 2; 13 to 16; 19 to 22; 26; 28 to 30; **MAY:** 10 to 14; 17 to 21; 25 to 27; **JUNE:** 6 to 8; 10 to 11; 22 to 25; **JULY:** 5 to 9; 13 to 16; 19 to 20; **NOVEMBER:** 30; **DECEMBER:** 1 to 3; 6 to 10; 13 to 17; 20 to 21; **2005 JANUARY:** 20 to 21; **MAY:** 26;

REASONS FOR JUDGMENT : TEITELBAUM, J.

DATED: November 30, 2005

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