SUPREME COURT OF CANADA

CITATION: Ermineskin Indian Band and Nation *v.* Canada, 2009 SCC 9

DATE: 20090213
DOCKETS: 31875, 31869

BETWEEN:

Chief John Ermineskin, Lawrence Wildcat, Gordon Lee, Art Littlechild, Maurice Wolfe, Curtis Ermineskin, Gerry Ermineskin, Earl Ermineskin, Rick Wolfe, Ken Cutarm, Brian Less and Lester Fraynn, the elected Chief and Councillors of the Ermineskin Indian Band and Nation, suing on their own behalf and on behalf of all the other members of the Ermineskin Indian Band and Nation

Appellants

and

Her Majesty The Queen in Right of Canada, Minister of Indian Affairs and Northern Development and Minister of Finance

Respondents

- and -

Attorney General of Ontario, Attorney General of Quebec, Attorney General of Alberta, Assembly of First Nations and Lac Seul First Nation

Interveners

AND BETWEEN:

Chief Victor Buffalo, acting on his own behalf and on behalf of all the other members of the Samson Indian Band and Nation, and Samson Indian Band and Nation

Appellants

and

Her Majesty The Queen in Right of Canada, Minister of Indian Affairs and Northern Development and Minister of Finance

Respondents

- and -

Attorney General of Ontario, Attorney General of Quebec, Attorney General of Alberta, Assembly of First Nations, Saddle Lake Indian Band, Stoney Indian Band and Lac Seul First Nation

Interveners

CORAM: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 203) — Rothstein J. (McLachlin C.J. and LeBel, Deschamps, Fish, Abella and Charron JJ. concurring)

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ermineskin indian band and nation *v.* canada

Chief John Ermineskin, Lawrence Wildcat, Gordon Lee, Art Littlechild, Maurice Wolfe, Curtis Ermineskin, Gerry Ermineskin, Earl Ermineskin, Rick Wolfe, Ken Cutarm, Brian Less and Lester Fraynn, the elected Chief and Councillors of the Ermineskin Indian Band and Nation, suing on their own behalf and on behalf of all the other members of the Ermineskin Indian Band and Nation *Appellants*

v.

Her Majesty The Queen in Right of Canada, Minister of Indian Affairs and Northern Development and Minister of Finance *Respondents*

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General of Alberta, Assembly of First Nations and Lac Seul First Nation *Interveners*

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Chief Victor Buffalo, acting on his own behalf and on behalf of all the other members of the Samson Indian Band and Nation, and Samson Indian Band and Nation *Appellants*

v.

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Indexed as: Ermineskin Indian Band and Nation *v.* Canada

Neutral citation: 2009 SCC 9.

File Nos.: 31875, 31869.

2008: May 22; 2009: February 13.

Present: McLachlin C.J. and LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the federal court of appeal

Aboriginal law — Crown — Fiduciary duty — Management of oil and gas royalties — Indian bands surrendering mineral rights on reserves to Crown — Crown holding bands' oil and gas royalties in Consolidated Revenue Fund and paying interest at rate tied to the yield on

long-term government bonds but adjusted periodically — Whether Crown was obligated as fiduciary to invest oil and gas royalties — Whether Crown breached its fiduciary obligations in way in which it calculated and paid interest on royalties — Indian Act, R.S.C. 1985, c. I-5, ss. 61 to 69 — Financial Administration Act, R.S.C. 1985, c. F-11, ss. 2 "public money", 17(1), 21(1), 90(1)(b) — Indian Oil and Gas Act, R.S.C. 1985, c. I-7, s. 4(1).

Unjust enrichment — Crown — Management of Indian bands' oil and gas royalties — Statutory scheme requiring Crown to hold bands' oil and gas royalties in Consolidated Revenue Fund and to pay interest — Whether Crown was unjustly enriched by making use of bands' royalties and setting interest rate paid to bands.

Constitutional law — Charter of Rights — Right to equality — Money management provisions of Indian Act precluding investment of Indian moneys by Crown — Provisions creating distinction between Indians and non-Indians — Whether distinction creating disadvantage by perpetuating prejudice and stereotyping — Canadian Charter of Rights and Freedoms, s. 15(1) — Indian Act, R.S.C. 1985, c. I-5, ss. 61 to 68.

The Ermineskin Nation and the Samson Nation are "bands" within the meaning of the *Indian Act* and are entitled to the benefit of Treaty No. 6, which was entered into in 1876. The Crown held money in trust for the bands, comprised mainly of royalties derived from the oil and gas reserves found beneath the surface of the Samson Reserve and Pigeon Lake Reserve in Alberta. Under the terms of Treaty No. 6 and the *Indian Act*, it was necessary that the bands' interests in the oil and gas under the reserves be surrendered to the Crown so that the Crown could enter into

arrangements with third parties in order to exploit the resources. Two identical instruments of surrender were executed in 1946 and were accepted by the Crown. The statutory scheme governing the handling of Indian moneys, including the oil and gas royalties, involves the *Indian Act*, the *Financial Administration Act* ("FAA") and the *Indian Oil and Gas Act* ("IOGA"). Under the *Indian Act*, Indian moneys is characterized as "capital moneys" or "revenue moneys". There are separate revenue and capital accounts kept by the Crown for each of the bands. The royalties are characterized as "capital moneys" and have been deposited in the Consolidated Revenue Fund ("CRF") to the credit of the Receiver General of Canada pursuant to the FAA. Interest has been paid on that money by the Crown pursuant to Orders in Council made under the *Indian Act*. Between 1859 and 1969 the interest rate on Indian moneys changed from time to time, ranging from 3 percent to 6 percent. In 1969, the Crown decided to tie the rate of interest to the market yield of government bonds having terms to maturity of ten years or over (the "Indian moneys formula"). Discussions took place in the late 1970s and early 1980s between the Crown and leaders of various bands. A new Order in Council was enacted in 1981, which provided that interest would be calculated on the quarterly average of the market yields of the Government of Canada bond issues, which have terms to maturity of ten years or over. The discussions between the Crown and the bands also led to a Crown policy of crediting interest semi-annually, rather than annually.

Samson and Ermineskin filed statements of claim respectively in 1989 and in 1992, alleging that the Crown's fiduciary obligations required it to invest oil and gas royalties received on behalf of the bands as a prudent investor would, that is, to invest the royalties in a diversified portfolio. They submit that the refusal or neglect of the Crown to invest their royalties has deprived them of hundreds of millions of dollars since 1972. The Federal Court dismissed their claims and

a majority of the Federal Court of Appeal upheld the decision.

Held: The appeals should be dismissed.

The Crown has fiduciary obligations with respect to the bands' royalties. However, whether the fiduciary relationship arose out of Treaty No. 6 or from the instruments of surrender, when read together with the IOGA, the FAA and the *Indian Act*, the Crown did not have the obligation or the authority to invest the bands' royalties. [44] [46] [48] [67] [80]

The language of Treaty No. 6 does not support an intention to impose on the Crown the duties of a common law trustee. All rights were relinquished to the Crown, and the Crown then agreed to set aside certain lands for use by the Indian signatories. The language and circumstances point to a conditional transfer of the land, rather than the establishment of a common law trust. Neither did the oral terms of Treaty No. 6, create a trust in the common law sense. There is no duty of a trustee at common law to guarantee against risk of loss to the trust corpus or that the corpus would increase. Therefore, even if Treaty No. 6, including the representation by the Crown that the proceeds of the sale of any part of the reserve would be "put away to increase", constituted the basis of the Crown's fiduciary obligation to the bands, it did not obligate investment by the Crown; rather, the Crown had the obligation to guarantee that the funds would be preserved and would increase. Because there is no treaty right to investment by the Crown, s. 35(1) of the *Constitution Act, 1982*, is not engaged. [50] [53] [56-57] [67]

The relationship between the Crown and the bands under the 1946 instruments of

surrender is a fiduciary relationship that is trust-like in nature. Pursuant to these instruments, the Crown may only grant rights over the minerals upon terms that are most conducive to the welfare of the bands, and will hold the proceeds of the granting of those rights on behalf of the bands. Where the Crown is in the position of a fiduciary, although not strictly speaking a trustee at common law, and holds funds on behalf of a band, it is not improper to ascribe to the Crown a duty to invest those funds in the manner of a common law trustee, subject to any legislation limiting its ability to do so. The statutory framework within which the Crown must carry out its fiduciary obligations in this case limits its ability to invest the bands' royalties. [73-74] [80]

The *Indian Act*, the FAA, and the IOGA do not permit investment by the Crown of the royalties. The IOGA only confirms that the royalties in relation to oil and gas on reserves are to be paid to the Crown in trust for the bands. The IOGA does not set out any terms of trust or duties of the Crown and therefore does not limit the Crown's fiduciary duties to the bands. Although the IOGA does not preclude investment by the Crown of the royalties, it does not purport to restrict or override application of provisions in other statutes. Because the royalties are money collected by Canada on behalf of the bands pursuant to the IOGA, they are "public money" as defined by the FAA and as such must be dealt with in accordance with the provisions of the FAA. This Act provides that the royalties must be held in the CRF and only paid out in accordance with any applicable statute (s. 21(1)). Furthermore, the acquisition of securities by the Crown is prohibited unless authorized by an Act of Parliament (s. 90(1)(*b*)). In this case, the relevant applicable statute is the *Indian Act* because it is the statutory scheme governing the control and management of Indian moneys. It provides no authority for any expenditure or payment of Indian moneys other than for the purposes provided for in the Act. The wording of the *Indian Act* and the legislative changes

made in 1951 indicate that no power existed after that time for the Crown to make, hold and manage investments made with Indian moneys held in the CRF. From 1859 to 1951, the Crown had not engaged in investing Indian moneys but rather paid interest at rates from 3 to 6 percent. It is reasonable to infer that in repealing the investment power in the *Indian Act*, the Crown was bringing the legislation into conformity with actual practice. [80] [83] [85] [91] [94] [98-99] [117] [122-123]

The Crown's actions under the authority of the FAA and the *Indian Act* were consistent with its fiduciary obligations to the bands. The Crown, which is in a unique position as a fiduciary with respect to the royalties and the payment of interest, is not in a position of conflict of interest when it borrows the bands' money held in the CRF without their consent. The borrowing is required by the legislation and a fiduciary that acts in accordance with legislation cannot be said to be breaching its fiduciary duty. The situation which the bands characterize as a conflict of interest is an inherent and inevitable consequence of the statutory scheme. The Crown's position in the setting of the interest rate paid to the bands is also unique: the Crown must consider not only the interest of the bands but also the interests of other Canadians when it sets the interest rate paid to the bands. Within the Crown's discretion as a fiduciary it had a number of options for setting the interest rate. Of the alternatives considered, it is apparent that short-term rates would not have been in the best interests of the bands when it was possible for the Crown to pay interest at a higher rate in view of the Crown's diversified borrowing patterns. A fixed rate of interest would not have been sufficiently flexible to account for changes in prevailing interest rates and inflation. Payment of interest equivalent to what might have been earned in a diversified portfolio would have required subsidization from the public treasury. A fiduciary is not required to supplement the return it is legislatively restricted to providing from its own resources, in this case, the public treasury. The two

alternatives that could have been selected by a prudent person managing his or her own affairs but modified by the constraints applicable to the Crown were the fluctuating rate approach adopted by the Crown and the laddered bond approach. When the Indian moneys formula was adopted in 1969, interest rates were tending upwards. In hindsight, because interest rates have tended downwards since the 1980s, investment in a laddered bond portfolio would have produced higher returns for the bands since that time than the long-term floating rate approach that was adopted. However, compliance by the Crown with its fiduciary obligations to the bands must be viewed prospectively. Without knowing the direction of interest rates and anticipated inflation, it cannot be said that the adoption of a floating long-term rate was an imprudent choice by the Crown. It was a way of contending with interest rates and inflation risk. Therefore, in selecting the floating rate methodology of the Indian moneys formula, there was no breach of the fiduciary duty owed by the Crown to the bands. [124] [126-129] [132] [147-149]

As an alternative to the payment of interest by the Crown, s. 64(1)(*k*) of the *Indian Act* provided authority for the transfer of capital moneys from the Crown to either the bands themselves or to an independent trust for the bands. However, in accordance with its fiduciary obligations and s. 64(1)(*k*), the Crown had to be satisfied that any transfer was in the best interests of the bands. With respect to Samson, the evidence indicates that the Crown was supportive of the band's proposals to transfer money for the establishment of trust funds by the bands. However, due to difficulties uncovering information as to the disposition of a previous transfer of money, the failure of Samson to provide adequate financial plans and assurances of band support, and conflict within the Samson band council, the Crown was unable to assure itself that transferring further funds would be in the best interests of Samson. Having regard to the evidence, for the Crown to have agreed to

further transfers prior to 2005 would have been imprudent. As for Ermineskin, in the event of a transfer, the Crown's fiduciary obligations with regard to the funds had to come to an end. The Crown could not be expected to remain responsible for funds over which it no longer had control. In the absence of a release from the band to the Crown, the Crown could not be expected to transfer funds from the CRF to Ermineskin. [150-152] [169-170] [181]

The Crown was not unjustly enriched by making use of the bands' royalties and paying the rate of interest that it did. This was an inevitable result of the statutory scheme, which requires that the Crown hold the bands' royalties in the CRF and pay interest to the bands. The basis for determining whether the Crown was enriched is a comparison with what would have been the case had the Crown not had access to the royalties in the CRF. The trial judge found that the Crown could have obtained replacement funds at a lower cost than the interest it actually provided on the royalties. [182] [184]

Finally, the money management provisions found in ss. 61 to 68 of the *Indian Act* do not infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*. There is a distinction between Indians and non-Indians, but that distinction is not discriminatory. The provisions of the *Indian Act* that prohibit investment of the royalties by the Crown do not draw a distinction that perpetuates disadvantage through prejudice or stereotyping. The provisions do not preclude investment, provided the investments are made by the bands or trustees on their behalf after expenditure of funds from the CRF to the bands and the release of the Crown from further responsibility with respect to the royalties. Such an approach involves greater control and decision making by the bands themselves. Any expenditure of the funds for investment is required to be in

the best interests of the bands. Until the funds are expended by the Crown for the purposes of investment by the bands or trustees on their behalf, they are held by the Crown in the CRF and the bands are provided with liquidity and a return on the royalties. [190] [201-202]

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Referred to: *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302; *R. v. Badger*, [1996] 1 S.C.R. 771; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40; *Authorson (Litigation Administrator of) v. Canada (Attorney General)*, 2007 ONCA 501, 86 O.R. (3d) 321, leave to appeal refused, [2008] 1 S.C.R. v; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476; *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Samson Indian Nation and Band v. Canada*, 2005 FC 136, [2005] 2 C.N.L.R. 358.

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Indian Act, R.S.C. 1985, c. I-5, ss. 2, 4, 6(1), 61 to 69.

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Indian Oil and Gas Act, R.S.C. 1985, c. I-7, s. 4(1).

Indian Oil and Gas Regulations, 1995, SOR/94-753, s. 33(5).

Treaty

Treaty No. 6 (1876).

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APPEALS from a judgment of the Federal Court of Appeal (Richard C.J. and Sexton and Sharlow JJ.A.), 2006 FCA 415, [2007] 3 F.C.R. 245, 357 N.R. 1, [2007] 2 C.N.L.R. 51, [2006]

F.C.J. No. 1961 (QL), 2006 CarswellNat 4511, affirming decisions of Teitelbaum J., 2005 FC 1623, 269 F.T.R. 188, [2005] F.C.J. No. 1992 (QL), 2005 CarswellNat 3953, 2005 FC 1622, 269 F.T.R. 1, [2006] 1 C.N.L.R. 100, [2005] F.C.J. No. 1991 (QL), 2005 CarswellNat 3959. Appeals dismissed.

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The judgment of the Court was delivered by

ROTHSTEIN J. —

I. Introduction

[1] These two appeals were heard together and mark the culmination of a very long process, including a lengthy joint trial lasting for a number of years. This judgment concerns only a portion of the issues that were dealt with at trial.

[2] The appellants submit that the Crown's fiduciary obligations required it to invest oil and gas royalties received on behalf of the appellants as a prudent investor would, that is, to invest the royalties in a diversified portfolio. Instead, the Crown retained the royalties in the Consolidated Revenue Fund ("CRF") and credited interest to the appellants in accordance with a formula based on the market yield of long-term government bonds. The appellants say that the refusal or neglect of the Crown to invest their royalties has deprived them of hundreds of millions of dollars since 1972.

[3] The Federal Court dismissed the appellants' claims and a majority of the Court of Appeal dismissed their appeals. For the reasons that follow I am also of the opinion that both appeals should be dismissed.

II. Facts

[4] The appellants in the Ermineskin appeal ("Ermineskin") are Chief John Ermineskin and the

Councillors of the Ermineskin Indian Band and Nation ("Ermineskin Nation"), acting on their own behalf and on behalf of the other members of the Ermineskin Nation. The appellants in the Samson appeal ("Samson") are the Samson Indian Band and Nation ("Samson Nation") and Chief Victor Buffalo, acting on his own behalf and on behalf of the other members of the Samson Nation.

[5] The Ermineskin Nation and the Samson Nation are "bands" within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5, s. 2. They are referred to as such in these reasons. Additionally, they are "bands" entitled to the benefit of Treaty No. 6, which was entered into in 1876. I have used the term "the bands" in these reasons to refer to all appellants collectively.

[6] The respondents in both appeals are Her Majesty the Queen in Right of Canada, the Minister of Indian Affairs and Northern Development and the Minister of Finance. I have used the term "the Crown" to refer to the respondents collectively. Indian and Northern Affairs Canada is the "applied title" of the Department of Indian Affairs and Northern Development ("DIAND"). I have used the legal title DIAND throughout these reasons.

[7] Due to the large number of claims, both the Ermineskin and Samson actions have been divided into phases. The trial leading to the present appeals dealt with the first two phases: the "General and Historical Phase", concerning the historical and background evidence relating to the specific claims in the other phases, and the "Money Management Phase", concerning allegations that the Crown has breached its obligations with respect to money held in trust for the bands. The issues on appeal here relate to the "Money Management Phase".

[8] The money held in trust for the bands is composed mainly of royalties derived from the oil and gas reserves found beneath the surface of the Samson Reserve and Pigeon Lake Reserve in Alberta. The Samson Reserve was established in 1889 pursuant to Treaty No. 6 for the Samson Nation. The Pigeon Lake Reserve was established in 1896 pursuant to Treaty No. 6 for four bands (often referred to as the "Four Bands"), including the Samson Nation and the Ermineskin Nation. The reserve belonging to the Ermineskin Nation exclusively has not produced any royalties.

[9] Under the terms of Treaty No. 6 and the *Indian Act*, it was necessary that the bands' interests in the oil and gas under the reserves be surrendered to the Crown so that the Crown could enter into arrangements with third parties in order to exploit the resources. The Four Bands in respect of the Pigeon Lake Reserve and Samson in respect of the Samson Reserve executed instruments of surrender in 1946 (the "Surrenders"). The Surrenders were accepted by the Crown. The terms of the two surrenders were identical.

[10] The statutory scheme governing the handling of Indian moneys, including the oil and gas royalties at issue in this case, involves the *Indian Act*, the *Financial Administration Act*, R.S.C. 1985, c. F-11 ("FAA"), and the *Indian Oil and Gas Act*, R.S.C. 1985, c. I-7 ("IOGA"). The relevant legislative and regulatory provisions referred to in these reasons are contained in the Appendix.

[11] Under the *Indian Act*, Indian moneys are characterized as "capital moneys" or "revenue moneys", and accounts for each of the two are kept separately by the Crown. There are separate revenue and capital accounts for each of the Four Bands, including the Samson Nation and Ermineskin Nation.

[12] The royalties are characterized as "capital moneys" and have been deposited in the CRF to the credit of the Receiver General of Canada pursuant to the FAA. Interest has been paid on that money by the Crown pursuant to an Order in Council made under s. 61(2) of the *Indian Act*.

[13] In 1859, the interest rate on Indian moneys was fixed by the Province of Canada at 6 percent. In 1861, an Order in Council lowered the rate on newly received money to 5 percent but continued the rate of 6 percent on money already held by the Crown in Right of the Province and, after Confederation in 1867, the Crown in Right of the Dominion of Canada. Between 1861 and 1969, the rate of interest changed from time to time, ranging from 3 percent to 5 percent, although it does appear that the rate of 6 percent remained for those funds in trust prior to 1861.

[14] In 1969, it was proposed by the Minister of Indian Affairs and Northern Development to tie the rate of interest to the market yield of government bonds having terms to maturity of ten years or over (the "Indian moneys formula"), as well as to discontinue the guarantee of 6 percent on pre-1861 money. The Crown adopted those proposals. As a result, the interest rate has varied with the changes in the market yield on long-term government bonds.

[15] Discussions took place in the late 1970s and early 1980s between the Crown and leaders of various bands, including those of Samson and Ermineskin. This was in part because of an inversion, a situation that resulted in the market yield on short-term debt being greater than that on long-term debt. This situation did not last, but a new Order in Council was enacted in 1981.

[16] The new Order in Council provided that interest would be calculated on the quarterly average of the market yields of the Government of Canada bond issues as published each Wednesday by the Bank of Canada, which have terms to maturity of ten years or over. The discussions between the Crown and the bands also led to a Crown policy of crediting interest semi-annually, rather than annually. From April 1980 to the present, interest has been credited semi-annually at the rate determined in accordance with the 1981 Order in Council.

[17] The Samson statement of claim was filed in 1989 and the Ermineskin statement of claim in 1992.

[18] Pursuant to an order of the trial judge dated December 22, 2005, on February 1, 2006, capital moneys belonging to Samson were transferred from the Samson capital account in the CRF to the Kisoniyaminaw Heritage Trust Fund.

[19] The amounts of money involved in this case are very large. The bands presented evidence at trial estimating the additional amounts which they argued might have been earned had their royalties been invested rather than earning interest under the Indian moneys formula. Using approximate numbers, these estimates ranged from $239 million to $1.53 billion for Samson, and from $156 million to $217 million for Ermineskin.

III. Issues

[20] The primary issue in these appeals is whether the Crown was obligated as a fiduciary to

invest the oil and gas royalties that it was holding on behalf of the bands. If it is determined that there was no such obligation, the issue is then whether the Crown breached its fiduciary obligations in the way in which it calculated and paid interest on the royalties.

[21] The bands also argued that the Crown breached its obligations to the bands because it was in a conflict of interest as a fiduciary by "borrowing" the royalties without permission, and that the Crown was unjustly enriched by this "borrowing".

[22] The appellants have also argued that if ss. 61 to 68 of the *Indian Act* do preclude the Crown from investing the royalties, those provisions infringe their right to equality under s. 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*").

IV. Judgments Below

A. *Federal Court*

[23] Teitelbaum J., the trial judge, dismissed Ermineskin's and Samson's actions against the Crown: 2005 FC 1622, 269 F.T.R. 1, and 2005 FC 1623, 269 F.T.R. 188.

[24] Teitelbaum J. noted that the Crown conceded that it was a trustee of the royalties, but he stated that he would have found the Crown to be a trustee even if the Crown had not conceded that it was.

[25] He did not agree with the bands that the trust arose from the historical relationship between the Crown and Aboriginal peoples or from Treaty No. 6. The words of the Surrenders were sufficient to create a trust; they contained the required certainties of intent, subject matter and object, and explicitly contemplated a trust.

[26] Teitelbaum J. held that the legislation informed the Crown's duties as trustee and did not permit the Crown to invest the royalties. While the Crown, as a trustee, has the duty to invest according to the standard of "reasonable care and skill of an ordinary prudent person" (*Samson* reasons, at para. 670, *Ermineskin* reasons, at para. 278), the Crown discharged its duty as trustee to invest by paying a rate of interest under s. 61(2) of the *Indian Act*.

[27] On the issue of whether the provisions of the *Indian Act* infringed or were inconsistent with the bands' rights under s. 35(1) of the *Constitution Act, 1982*, Teitelbaum J. held that Samson had not established Aboriginal or treaty rights regarding either self-government or the Indian moneys. Ermineskin made no claim for self-government, but did assert that if the legislation deprived Ermineskin of its rights as a beneficiary, then the legislation would be constitutionally invalid. However, since he held that the trust arose from the Surrenders, the rights of the bands were not treaty rights.

[28] Further, he held that the bands were not individuals for the purposes of the *Charter* and that they therefore had no standing to bring a s. 15(1) claim.

[29] Finally, he found that the Crown was not enriched by the "borrowing" of the bands' money.

He also determined that the statutory scheme provided a juristic reason even if there had been enrichment.

B. *Federal Court of Appeal*

(1) Richard C.J. and Sharlow J.A.

[30] Richard C.J. and Sharlow J.A. dismissed the appeals of Samson and Ermineskin: 2006 FCA 415, [2007] 3 F.C.R. 245. They held that the Crown's obligations as trustee of the royalties differ substantially from the obligations of a common law trustee because of the combined effect of the *Indian Act* and the FAA. If Parliament had intended the Crown to have a duty to invest, it would have enacted appropriate legislation to provide it with that authority. The majority held that as both Samson and Ermineskin conceded that neither of their band councils had provided consent to use capital money for investment, the Crown could not have used the money to make investments for the bands' benefit in any event.

[31] The majority said that the Crown is a trustee of the royalties because "[s]ection 4 of the *Indian Oil and Gas Act* says so" and that "[i]f there had been any doubt about the existence of a trust, that doubt could not have survived the enactment of the *Indian Oil and Gas Act*" (para. 109). Additionally, the majority said that had the IOGA not been enacted, the Crown would have been a trustee by virtue of Treaty No. 6 and the *Indian Act*.

[32] The majority found that if the bands requested capital money from the CRF for investment

by the bands themselves, it would be reasonable for the Crown to require an investment plan to satisfy itself that the expenditure was for the benefit of the bands as required by s. 64(1)(*k*) of the *Indian Act*. There was no obligation on the part of the Crown to propose an investment plan to the bands. It was the intention of Parliament to give bands that initiative with respect to use of their capital money, and the bands would generally be in a better position than the Crown to determine what expenditures are required.

[33] The majority found that the decision of the Governor in Council regarding the interest rate and the methodology of the Indian moneys formula should be assessed against a standard of reasonableness. Those choices are essentially discretionary, but that discretion is exercised in circumstances in which the Crown has fiduciary obligations and in which the honour of the Crown is engaged. If the discretionary decision is based on rational factors and not on irrelevant considerations, and is within the "margin of manoeuvre contemplated by the legislation that grants the discretionary authority", it will be permitted to stand (para. 167). Although the trial judge produced only short reasons on this point, there was a "sufficient evidentiary foundation to support the Judge's conclusion that the rates of interest paid were reasonable" (para. 168). Additionally, the Crown appropriately consulted with the bands regarding the fixing of the rate whenever the bands requested consultation.

[34] The majority dismissed the bands' arguments based on s. 35(1) of the *Constitution Act, 1982*. They held that the repeal of the statutory investment power in 1951 did not infringe or deprive the bands of any rights under Treaty No. 6. They found that the Crown never promised that the investment power in the *Indian Act* would remain unchanged.

[35] The majority dismissed the bands' arguments regarding s. 15(1) of the *Charter*. They held that even if the individual band members had standing, they would have no interest to enforce because their claims related to the management of band property and not a personal right. Although the claims were representative actions, that fact did not convert the communal claims into personal claims.

[36] The claims relating to unjust enrichment and conflict of interest were dismissed. The Crown was not enriched based on the facts as determined by the trial judge. Any conflict of interest was an unavoidable consequence of the statutory scheme and was lawful.

[37] The majority dismissed the bands' appeals.

(2) Sexton J.A.

[38] Sexton J.A. dissented and would have allowed the appeals. In his view, the source of the trust was the Surrenders. The Crown was primarily required to act as a trustee at common law and had the power to invest the royalties of the bands. In his opinion, the provisions of the *Indian Act* did not prohibit investment by the Crown and did not require that Indian moneys remain in the CRF indefinitely.

[39] The standard of care and diligence required of the Crown was that of a man of ordinary prudence in managing his own affairs. This required the Crown, among other things, to assess the

circumstances of the fund and the beneficiaries to ascertain appropriate investments, build a diversified portfolio where appropriate, monitor the investments, seek expert advice and maintain an even hand between successive beneficiaries. The Crown was required to obtain the best possible return in a manner consistent with sound investment practices. The Crown breached its duties by failing to seek expert advice about prudent investment strategies, by failing to propose an investment plan to the bands, by failing to engage in any active management of the funds, and by failing to ascertain the circumstances of the fund.

[40] Sexton J.A. noted that there was a great deal of expert evidence on the issue of whether the rate of return paid by the Crown was reasonable. He held that it was "far from clear that the rate of return on the [bands' money] was reasonable" (para. 296).

[41] Because of his conclusion that the Crown breached its duty to invest, it was not necessary for him to deal with the issue of s. 15(1) of the *Charter*. However, he did comment that in his view, the interpretation of the legislation adopted by the trial judge would result in a violation of s. 15(1) because the legislation subjects Indians to inferior and discriminatory treatment based on their Indian status and membership in a band, as compared to non-Indians. Because the action was a representative action brought on behalf of all individual members of the bands, there was standing to maintain the claim.

[42] Finally, Sexton J.A. held that it was not necessary to resolve the question of conflict of interest or unjust enrichment. However, he did say that the Crown did not receive any benefit or enrichment and that he would not set aside the trial judge's findings on that point. On the conflict

of interest issue, the Crown should have sought to avoid being in a conflict by putting together prudent investment plans on a continual basis for approval by the bands.

[43] Sexton J.A. would have allowed the appeals and remitted the matter to the Federal Court for the assessment of damages.

V. Analysis

A. *The Source of the Crown's Fiduciary Obligations*

[44] There is no doubt that the Crown in this case has fiduciary obligations with respect to the bands' royalties. The Crown conceded as much. What must be determined is the basis and content of those obligations.

[45] There has been much discussion in this case of the "source" of the Crown's fiduciary obligations. The bands submit that the fiduciary relationship between the Crown and the bands arose initially out of Treaty No. 6, but that it also flows from the Surrenders, the IOGA, the common law and the *Indian Act*.

[46] If the fiduciary relationship arose out of Treaty No. 6, arguably the rights of the bands as beneficiaries of the relationship are treaty rights and thus constitutionally protected under s. 35(1) of the *Constitution Act, 1982*. The bands submit that any legislation purporting to restrict the Crown's fiduciary obligations and the bands' corresponding rights as beneficiaries would be

inconsistent with their rights under Treaty No. 6, and therefore unconstitutional and of no force and effect according to s. 52 of the *Constitution Act, 1982*.

[47] Specifically, the bands argue that the Crown is obligated to act in accordance with the same duties as a trustee at common law, which include the duty to invest. The bands are essentially saying that they have a constitutional treaty right to have the royalties invested by the Crown. If this is correct, any provisions of the *Indian Act* which preclude the Crown's ability to invest the royalties would be unconstitutional and of no force and effect.

[48] If, on the other hand, the Crown's fiduciary obligations arose from the Surrenders, the IOGA and/or the *Indian Act*, the bands will have rights as beneficiaries of the Crown's obligations, but they will not be constitutionally protected rights. As such, legislation that precludes investment of Indian royalties by the Crown will be valid legislation.

B. *Treaty No. 6*

[49] The bands say that Treaty No. 6 imposed on the Crown the duties of a common law trustee. In my view, Treaty No. 6 did not express such an intention For example, the treaty states that the Plain and Wood Cree Tribes of Indians relinquished "all their rights, titles and privileges whatsoever, to the lands [within the specified territory]". The Treaty further states that reserves would be set aside and that the Crown would be entitled to sell or dispose of the reserve lands "for the use and benefit of the said Indians entitled thereto with their consent". However, the Crown also retained the right to appropriate reserve land for any public purpose with payment of due

compensation.

[50] This language does not support an intention to impose on the Crown the duties of a common law trustee. All rights were relinquished to the Crown, and the Crown then agreed to set aside certain lands for use by the Indian signatories. The language and circumstances point to a conditional transfer of the land, rather than the establishment of a common law trust.

[51] In any event, in my opinion, Treaty No. 6 does not assist the bands. Invoking it as the foundation for the Crown's fiduciary duties does not lead to the result that they seek — an obligation on the part of the Crown to invest royalties.

[52] The bands submit that the following words of Treaty No. 6 give rise to the Crown's obligations with respect to their royalties:

> [T]he 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.

[53] The bands also submit that the "oral terms" of Treaty No. 6 included a promise by Alexander Morris, Lieutenant-Governor of Manitoba and the North-West Territories, that if any part of the reserves was sold, the proceeds of sale would be "put away to increase". According to the narrative of the negotiations leading to Treaty No. 6 prepared by A. G. Jackes, Secretary to the Commission, Lieut.-Gov. Morris had stated:

> They [other bands], 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. [Emphasis added.]

[54] It has been held that it is unconscionable for the Crown to ignore oral terms and rely simply on the written words of a treaty. Extrinsic evidence can be used to give the proper effect to the terms of the treaty as they were understood by all signatories (see *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 12). While the statement made by Lieut.-Gov. Morris was with respect to the previous sale of reserve land of other Indians, the representatives of the bands hearing the promise would have considered the statement to be a representation that such an arrangement would apply to them as well.

[55] The task of a court when interpreting a treaty 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 [Aboriginals'] interests and those of the British Crown" (*Marshall*, at para. 14 (emphasis deleted), quoting Lamer J. (as he then was) in *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1069).

[56] In this case, the promise of Lieut.-Gov. Morris constituted a representation by the Crown that the proceeds of the sale of any part of the reserve would be "put away to increase". In my opinion, it is likely that the Indian signatories to Treaty No. 6 interpreted and understood Lieut.-Gov. Morris' statement as amounting to a guarantee that the proceeds of the sale of any part of a reserve would be kept for them by the Crown and that it would be safe and secure and over time would increase. In effect, the Crown guaranteed that there would be a return of and a return on the bands'

capital funds with no associated risk of loss.

[57] However, the promise that the proceeds of sale would be "put away to increase" did not create a trust in the common law sense, whereby the Crown had the same duties as a common law trustee. There is no duty of a trustee at common law to guarantee against risk of loss to the trust corpus or that the corpus would increase. "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", *per* Dickson J. (as he then was) in *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at p. 315. However, in *Fales*, Dickson J. observed, at p. 319, that "[a] trustee is not expected to be infallible nor is a trustee the guarantor of the safety of estate assets". In D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 962, the authors write:

> Prudence does not entail that a loss in investments shall never occur, and it is quite possible, given the volatility of equity markets, that a trustee can satisfy the standard of care even though the investments have fallen in value.

[58] Investment always involves some measure of risk to capital. If the Crown were to have invested the royalties, then, depending on when the bands required liquidity, the royalties could have incurred a significant decrease in value.

[59] The interpretation of the treaty promise — that the money would be guaranteed and would increase — is consistent with the historical record, the actual practice of the government and with the Indians' understanding at the time of the treaty.

[60] In 1859, the government of the Province of Canada was faced with the question of the "Management of the Indian Trust and Funds". John A. Macdonald, later Prime Minister, signed a written submission to the Executive Council on August 25, 1859 recommending that Indian funds be carried "at the credit of the Trust to the Consolidated Fund, and to charge the annual interest upon that Fund" rather than continuing the former "System of investment which involves at a possible loss to the Trust" (Executive Council Recommendation 1859-08-25, R.R., at pp. 657-58). It was recognized that the possibility of any failure in the payment of annual sums required for the Indians "would certainly be attributed to a breach of faith on the part of the Government and could more [sic] be explained to the satisfaction of the Tribes" and that "Parliament would probably find it necessary to make good the losses of the Trust" (R.R., at pp. 657-58).

[61] Thereafter, funds belonging to the Indians were never invested by the government. The consistent position of the government of the Province of Canada and later the Dominion of Canada was to hold funds belonging to the Indians in the CRF and to pay interest on those funds ranging from 3 to 6 percent per annum.

[62] Finally, holding funds to the credit of the Indians and crediting annual interest thereon was consistent with what the Indians themselves would have expected.

[63] The bands argue that the promise that the funds would be "put away to increase" represents "an attempt to convey the concept of investment in simple language to persons presumably unfamiliar with the concept" (Ermineskin factum, at para. 102). I do not think that that is a plausible

interpretation of the promise that was made or the way in which the bands' representatives at the time would have understood the promise. As Samson says in its factum, at para. 105: "The Plains Cree had limited familiarity with money and trusted the Queen to handle their affairs." Macdonald observed that loss of the bands' funds would be difficult to explain and would be viewed as a breach of faith. I believe that is the context in which the promise was made and understood.

[64] While ambiguous treaty promises must be interpreted in a manner most favourable to the Aboriginal signatories (see *R. v. Badger*, [1996] 1 S.C.R. 771, at para. 9), that does not mean that an interpretation that is favourable but unrealistic is to be selected. The promise here was that the funds would be "put away to increase", and the only way that the government could fulfill that promise and that the Indians would be satisfied that it would be fulfilled would be for the government to carry the funds to the credit of the Indians in the CRF.

[65] That treaty promise, therefore, created two alternatives, neither of which required the Crown to invest the royalties. The first was that the Crown would not invest the royalties. The second was that the Crown would invest the royalties, as permitted by the legislation in force at the time, but would have to assume the risk of decrease and would not only be obligated to make good any lost royalties as forecasted by Macdonald, but would also be obligated to provide a return. However, as explained, nothing requires a common law fiduciary to assume such an obligation.

[66] Under the legislation in force until 1951 (*Indian Act*, R.S.C. 1927, c. 98, s. 92), the Crown could have chosen to invest Indian moneys, but could not be forced to do so. Requiring the Crown to invest and to assume the associated risk would take the fiduciary concept too far. If the Crown

was unwilling to assume that risk, it was open to it to hold the moneys in the CRF and provide the bands with a return that satisfied its treaty promise that the funds would increase.

[67] For these reasons, I conclude that if Treaty No. 6, including the promise of Lieut.-Gov. Morris, constituted the basis of the Crown's fiduciary obligation to the bands, the obligation was that the royalties would be kept safe and secure and would increase over time. That could be guaranteed by the Crown holding the royalties and paying a rate of interest to the bands so that the funds would indeed increase. Treaty No. 6 did not obligate investment by the Crown. Rather than the Crown having the obligation to invest the royalties, it had the obligation to guarantee that the funds would be preserved and would increase. Because there is no treaty right to investment by the Crown, s. 35(1) is not engaged.

C. *The 1946 Surrenders*

[68] The bands argue that under the 1946 Surrenders, the Crown had the obligation of a common law trustee to invest their royalties. The relevant words of the Surrenders are:

> 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. [Emphasis added.]

The Surrenders expressly state that the Crown is to hold the mineral interests in trust and the terms on which it may grant rights to others to exploit those interests must be those that are most

conducive to the welfare of the bands.

[69] The Crown had discretion with respect to the terms on which it granted rights to exploit the minerals and with respect to the way in which it dealt with the royalties it received on the bands' behalf. It was obligated to exercise that discretion for the benefit of the bands who rendered themselves vulnerable by having ceded their power over the minerals to the Crown by reason of the Surrenders. The bands were entitled to expect that the Crown would exercise its discretionary power with loyalty and care.

[70] In *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, a surrender was found to have imposed a fiduciary duty on the Crown. The wording of the surrender in that case was virtually identical to the wording of the Surrenders in the present case. Specifically, it contained the phrase "as the Government of the Dominion of Canada may deem most conducive to our Welfare and that of our people". I believe that the Crown's fiduciary obligations to the bands with respect to the granting of rights to others to exploit the mineral resources of the bands and the way in which the royalties received were handled take hold by reason of the Surrenders in 1946.

[71] In *Guerin v. The Queen*, [1984] 2 S.C.R. 335, Dickson J. explained the nature of the fiduciary relationship in general terms, at p. 384:

> [W]here, by statute agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

[72] The bands say that the duties of the Crown were that of a common law trustee, which would include the obligation to invest their moneys. While the common law trust relationship is one that has been developed and explained through years of jurisprudence, legislation and commentary, I see no reason why the duties of a common law trustee cannot be applied to any other fiduciary relationship if the nature of the relationship requires it. As La Forest J. stated in *McInerney v. MacDonald*, [1992] 2 S.C.R. 138, "not all fiduciary relationships and not all fiduciary obligations are the same; these are shaped by the demands of the situation" (p. 149).

[73] If a situation is such that a fiduciary is in a position similar to that of a trustee, even though the situation cannot necessarily be categorized as a "common law trust", I do not see why the common law duties of a trustee cannot be applied to that fiduciary if that is what the particular situation warrants. In this case, the bands have placed particular emphasis on a trustee's duty to invest their royalties — the trust corpus. In my opinion, if the situation is such that the Crown is in the position of a fiduciary, although not strictly speaking a trustee at common law, and holds funds on behalf of the bands, it is not improper to ascribe to the Crown a duty to invest those funds in the manner of a common law trustee, subject to any legislation limiting its ability to do so.

[74] In my view, therefore, the relationship between the Crown and the bands is a fiduciary relationship that is trust-like in nature. The Crown possesses a discretionary power to act in the best interests of the bands, and the bands are vulnerable to the Crown's exercise of that discretion. The Crown may only grant rights over the minerals upon terms that are most conducive to the welfare of the bands, and will hold the proceeds of the granting of those rights on behalf of the bands.

[75] As I have indicated, legislation may limit the discretion and actions of a fiduciary, whether that fiduciary is the Crown or anyone else.

[76] In *Guerin*, Dickson J. stated, at p. 387:

> The discretion which is the hallmark of any fiduciary relationship is capable of being considerably narrowed in a particular case. This is as true of the Crown's discretion *vis-à-vis* the Indians as it is of the discretion of trustees, agents, and other traditonal categories of fiduciary. The *Indian Act* makes specific provision for such narrowing in ss. 18(1) and 38(2). A fiduciary obligation will not, of course, be eliminated by the imposition of conditions that have the effect of restricting the fiduciary's discretion. A failure to adhere to the imposed conditions will simply itself be a *prima facie* breach of the obligation.

[77] In *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40, the Crown was a fiduciary administering pensions and other benefits for disabled veterans. The funds were rarely credited with interest or invested prior to 1990. In 1990, the Department of Veterans Affairs began paying interest but Parliament limited the Crown's liability for past interest by amendments to the *Department of Veterans Affairs Act*, R.S.C. 1985, c. V-1. In concluding that the plaintiff had no claim for past interest against the government, Major J. stated, at para. 62:

> The respondent and the class of disabled veterans it represents are owed decades of interest on their pension and benefit funds. The Crown does not dispute these findings. But Parliament has chosen for undisclosed reasons to lawfully deny the veterans, to whom the Crown owed a fiduciary duty, these benefits whether legal, equitable or fiduciary.

[78] *Authorson* dealt with a similar issue to the one in this case, and consisted of a number of proceedings that were in fact part of the same case. In the Ontario Court of Appeal's decision in

Authorson (Litigation Administrator of) v. Canada (Attorney General), 2007 ONCA 501, 86 O.R. (3d) 321 (leave to appeal refused, [2008] 1 S.C.R. v), the Court of Appeal said, at para. 102:

> There are clear legislative limitations imposed on the Crown in the administration of the Consolidated Revenue Fund, where the [Department of Veterans' Affairs] - administered funds were required by law to be held. As we explain below, the governing legislative framework prevented the Crown from investing in external markets or from paying anything but interest as an investment return. The Crown, even when acting as a fiduciary, cannot act contrary to the law. Interest was the only form of investment return for which the government could in law have been liable during the relevant time period.

[79] This Court has held in *Guerin* and *Authorson* that when the Crown is a fiduciary, Parliament may legislate in ways that constrain or eliminate the Crown's fiduciary duties. The Crown's obligation is to act in a way that is consistent with its fiduciary duties as constrained by valid legislation. It is therefore necessary to consider whether legislation limits the Crown's fiduciary duties to the bands with respect to their royalties.

D. *The Statutory Framework*

[80] The statutory framework within which the Crown carries out its obligations is composed of the *Indian Act*, the FAA, and the IOGA. The bands argued that the statutory scheme permits investment by the Crown of the royalties, specifically, under s. 61(1) of the *Indian Act*. In my opinion, it does not.

[81] In order to determine the effect of the legislation on the Crown's obligations, it is necessary to examine the entire legislative scheme, starting with the IOGA. It will then be necessary to look

at the FAA and the *Indian Act* and, in particular, how the provisions of those two statutes work together to inform the Crown's duties in the management of the oil and gas royalties.

(1) The *Indian Oil and Gas Act*

[82] Section 4(1) of the IOGA reads:

> 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.

[83] The IOGA was assented to in 1974, 28 years after the Surrenders. The Crown's obligations arise from the Surrenders, not the IOGA. The IOGA only confirms that the royalties in relation to oil and gas on reserves are to be paid to the Crown in trust for the bands. The IOGA does not set out any terms of trust or duties of the Crown and therefore does not limit the Crown's fiduciary duties to the bands. It is not a legislative restriction that would preclude investment by the Crown of the royalties.

[84] The interveners Saddle Lake Indian Band and Stoney Indian Band argued that the IOGA is a complete and comprehensive legislative scheme with respect to oil and gas royalties. According to these interveners, statements made during Parliamentary debates on the enactment of the IOGA confirm that the intent was to ensure that bands receive "the fullest benefits" and "[t]he greatest possible return" on oil and gas forming part of reserves (*House of Commons Debates*, vol. I, 1st

Sess., 30th Parl., October 21, 1974, at p. 558). These statements formed the basis of commitments to those bands that the Crown will obtain "the greatest possible benefits from the oil and gas interests" (Saddle Lake and Stoney Indian Bands factum para. 45). These interveners argued that the IOGA contains specific "trust" language and that the honour of the Crown obligates the Crown to fulfill these commitments through private law trust duties.

[85] I am unable to infer from these statements of general intent, the specific intent that the Crown was to act as a common law trustee in respect of oil and gas royalties. If the intent was that the Crown act as a trustee at common law unconstrained by other legislative provisions, the statute could have been so worded. It was not. The IOGA does not purport to restrict or override application of provisions in other statutes such as the *Indian Act* and the FAA.

[86] In any event, I do not think that the above statements in Parliament were made in the context of the investment of royalties. Rather, they were made with a view to ensuring "that equitable benefits from oil and gas production on Indian lands go to the Indian people" and that "[t]he greatest possible return must flow to the band when the oil is taken from the ground and is lost to them forever" (*House of Commons Debates*, vol. I, 1st Sess., 30th Parl., October 21, 1974, at p. 558). Parliament's focus appears to have been on ensuring that bands were getting the best possible proceeds from their oil and gas reserves, not whether royalties would accrue interest from the government or be invested in a portfolio of securities.

[87] The Saddle Lake and Stoney Indian Bands also argued that because the oil and gas royalties can be either money or "in kind" according to s. 33(5) of the *Indian Oil and Gas*

Regulations, 1995, SOR/94-753, passed under the IOGA (and previous versions of s. 33(5) since at least April 1, 1974) , and because the FAA and *Indian Act* would have no application to "in kind" royalties, "the discretionary monies provisions of the *Indian Act* and the *FAA* [are] incompatible and thus wholly inappropriate legislation through which the trust duties of Her Majesty in relation to Indian oil and gas royalties are to be considered" (factum, at para. 28). The Crown must therefore manage the royalties as a common law trustee.

[88] In my opinion, there is nothing preventing cash royalties from being dealt with under the FAA and the *Indian Act*. The fact that the IOGA allows for "in kind" royalties does not render these statutes inapplicable to cash royalties. The FAA and the *Indian Act* apply to cash royalties because those funds fall within the definition of "public money" in the FAA. There is nothing inconsistent between the IOGA and the application of the FAA and *Indian Act* to cash royalties.

(2) The *Financial Administration Act*

[89] The FAA governs the administration and management of government, particularly financial management and government spending. It sets out specific rules on the collection, management and spending of public funds.

[90] Section 2 of the FAA defines "public money" as:

> ... 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;

[91] Because the royalties are money collected by Canada on behalf of the bands pursuant to the IOGA, they are "public money" within this definition and as such must be dealt with in accordance with the provisions of the FAA.

[92] Section 17(1) provides that "[s]ubject to this Part, all public money shall be deposited to the credit of the Receiver General."

[93] According to s. 2, all money on deposit to the credit of the Receiver General forms the CRF. The "Consolidated Revenue Fund" is defined as "the aggregate of all public moneys that are on deposit at the credit of the Receiver General". Pursuant to s. 21(1), the royalties, as public money under the definition in para. (*d*), may only be paid out of the CRF "subject to any statute applicable thereto". Section 21(1) states:

> Money referred to in paragraph (*d*) of the definition "public money" in section 2 that is received by or on behalf of Her Majesty for a special purpose and paid into the Consolidated Revenue Fund may be paid out of the Consolidated Revenue Fund for that purpose, subject to any statute applicable thereto.

[94] Samson argued that s. 17(1) only requires that money be paid into the CRF and does not require that money be held in the CRF. According to Samson, investment by the Crown is not prohibited. I cannot agree. Section 21(1) provides that funds may only be paid out of the CRF in

accordance with any statute applicable thereto. It is necessarily implied that the royalties must be held in the CRF and only paid out in accordance with any applicable statute. The applicable statute is the *Indian Act*.

[95] Samson also argued that the former s. 18 of the FAA, enacted in 1951 (but repealed in 1999 (S.C. 1999, c. 26, s. 20)), was authority for investment by the Crown. According to Samson, the introduction of s. 18 (which at the time was s. 17) coincided with the 1951 amendments to the *Indian Act*, and was intended to replace the former investment section of the *Indian Act*. Former ss. 18(1) and 18(2) read:

> (1) In this section, "securities" means securities of or guaranteed by Canada and includes any other securities described in the definition "securities" in section 2.
>
> (2) The Minister may, when he or she deems it advisable for the sound and efficient management of public money or the public debt, purchase or acquire securities, including securities on their issuance,payfor the securities out of the Consolidated Revenue Fund and hold the securities.

[96] Sections 18(1) and 18(2), however, did not authorize investment in the public securities market. Rather, they provided only for the acquisition of "securities", defined in that section and in s. 2 of the FAA as securities representing part of the public debt of Canada. This is explained by the Ontario Court of Appeal in *Authorson*. That court looked at the effect of the relevant legislation, including s. 18(2) and s. 90 of the FAA. Section 90 prohibits any person, unless authorized by an Act of Parliament, to acquire shares of a corporation that would be held by or on behalf of or in trust for the Crown.

[97] The Court of Appeal held that the funds administered by the Department of Veterans Affairs could not be invested in the public securities market. At para. 109, the Court of Appeal stated:

> [I]n the light of this legislative framework and in the absence of any specific legislation providing otherwise, the DVA-administered funds at issue on this appeal fall within the definition of "public money" to be held in the Consolidated Revenue Fund pursuant to the powers and limitations imposed by the *FA Act*, and accordingly could not be invested in external markets.

[98] The same legislation applied in this case. The former s. 18(2) of the FAA did not authorize external investment by the Crown. Section 90(1)(*b*) of the FAA prohibits the acquisition of securities by the Crown unless authorized by an Act of Parliament. For this reason, it is necessary to find the power to invest and hold securities by or on behalf of or in trust for the Government of Canada in the *Indian Act*. As a result, I am unable to agree with Samson's submission that former s. 18(2) of the FAA authorized the Crown to invest in the public securities market. It is therefore necessary to turn to the *Indian Act* to determine if the Crown had the authority to invest.

(3) The *Indian Act*

[99] The *Indian Act* contains a number of sections under the heading "Management of Indian Moneys", namely ss. 61 to 69. Section 61(1) provides:

> 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.

The question is whether the term "expended" permits the investment by the Crown of Indian moneys held in the CRF.

[100] It was argued by the bands that the latter half of s. 61(1), "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", permits the investment of the royalties because such investment would be for the use and benefit of the band. However, the section must be read as a whole (see *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, at para. 27). The section, when read as a whole, mandates that Indian moneys are only to be "expended" for the "use and benefit" of the bands.

[101] It is the context in which terms are used that is to be considered when attempting to determine their meaning and application. It is necessary to determine the meaning of "expended", having regard to the provisions in which they appear, namely the sections of the *Indian Act* under the heading "Management of Indian Moneys", ss. 61 to 69. Within those sections, the terms "expended" or "expenditure" appear in ss. 61, 64, 66 and 67.

[102] Section 62 draws a distinction between capital moneys and revenue moneys. Section 64 deals with the expenditure of capital moneys, while s. 66 deals with the expenditure of revenue moneys. What is contemplated by the term "expenditure" in connection with capital moneys will be taken from the context in which the term is used in the provisions dealing with capital moneys.

[103] Section 64(1) of the *Indian Act* provides that "[w]ith the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band" for a number of listed permitted uses. The permitted expenditures in s. 64(1)(*a*) to (*j*) include per capita distributions, the construction of roads, bridges and outer boundary fences on reserves, the purchase of land for use as a reserve, the purchase of the interest of a band member in reserve lands, the purchase of livestock and farm equipment, the construction and maintenance of permanent improvements or works, loans to members of the band, expenses for the management of reserve lands, and the construction of houses on reserves. Section 64(1)(*k*) allows for expenditure of capital moneys "for any other purpose that in the opinion of the Minister is for the benefit of the band".

[104] It is apparent that the kinds of expenditures contemplated in s. 64(1)(*a*) to (*j*) are for expenses (e.g. for the management of the reserve) or assets (e.g. land, houses) that are physically related or connected to the reserve and the activities that take place on it. Under s. 64(1), once the funds are expended with the consent of the band, the Crown no longer has control over the funds. Nor does it hold or manage the assets that may have been acquired.

(a) *Section 64(1)(k)*

[105] The only part of s. 64(1) that could permit investment of the royalties is s. 64(1)(*k*). The question is whether investment by the Crown could be an "other purpose" recognized by s. 64(1)(*k*). In the Federal Court and the Federal Court of Appeal, the bands' argument had been that s. 64(1)(*k*) did not permit investment and that investment was instead authorized by s. 61(1). It appears that

the bands were concerned that because s. 64(1) required their consent before an expenditure could be made from the CRF, this would dilute the responsibility of the Crown to invest the royalty funds. In this Court, Ermineskin now takes the position, in the alternative, that s. 64(1)(*k*) authorizes investment of royalty funds by the Crown.

[106] As I have indicated, s. 64(1) says that the Minister may direct and authorize the "expenditure" of capital moneys for a number of purposes. Under the rule of *ejusdem generis*, the type of expenditures permitted under s. 64(1)(*k*) take on meaning from the prior enumerated expenditures in s. 64(1). One marker of those expenditures is that the expenses incurred or assets acquired are such that the Crown no longer has control over them and for which it has no responsibility to manage. Absence of control or management responsibility would therefore also apply to expenditures for expenses or assets under s. 64(1)(*k*).

[107] In oral argument, the intervener Assembly of First Nations argued that s. 64(1) contains three provisions that contemplate investment and, therefore, the context of s. 64(1) should not preclude investment under s. 64(1)(*k*). The Assembly referred to s. 64(1)(*g*), the construction and maintenance of permanent improvements or works, s. 64(1)(*h*), loans to members of the band for which interest may be charged and security taken, and s. 64(1)(*j*), loans to members for building purposes. However, the expenditures listed in those three paragraphs are for assets on the reserve. They are not investments held, controlled and managed by the Crown.

[108] The provisions that may be regarded as most like investments made and controlled by the Crown are s. 64(1)(*h*) and (*j*), under which loans may be made to band members, and, in the case

of para. (*h*), under which interest may be charged and security taken. The record does not indicate whether the loan and security arrangements are between the Crown and the member or between the band and the member. In any event, it is apparent that these interest and security arrangements are merely incidental to the main purpose of the expenditures, which is to provide tangible benefits and assistance to the band and its members. Indeed, the charging of interest and the taking of security are discretionary, hardly an indication of prudent investment. Sections 64(1)(*h*) and (*j*) provide for physical improvements to the reserve, housing and loans to members. They do not provide for investments made and controlled by the Crown to earn income.

[109] A provision such as 64(1)(*k*) is worded very broadly and, in the abstract, might be thought to include anything for which funds could be expended. However, as I have stated, the nature of the expenditures contemplated by s. 64(1)(*k*) must take on meaning from the prior enumerated expenditures, according to the rule of *ejusdem generis*. Expenditures for investments in securities held and managed by the Crown are foreign to the context of s. 64(1) and, in my opinion, are not contemplated by s. 64(1)(*k*).

(b) *Other Moneys Management Provisions*

[110] Other sections under the heading "Management of Indian Moneys" provide for payments to individuals out of capital moneys. Section 63 allows for payments to Indians under leases or agreements made under the *Indian Act*. Section 64(2) refers to expenditures of capital moneys to make payments to individual persons whose names have been deleted from the band list of a band. Section 66(3) states that the Minister may authorize expenditure of revenue moneys for a number

of listed purposes, including for the destruction of weeds, insects and pests, to control diseases on reserves, to inspect premises on reserves, to prevent overcrowding of premises, to provide for sanitary conditions on reserves, and for the construction and maintenance of boundary fences. Section 68 permits payments of an "annuity or interest money" to which an Indian is entitled to be applied in specified circumstances to the support of that Indian's spouse, common-law partner or family. The reference to "interest money" in s. 68 is a further indication that Parliament expected that the moneys in the CRF for "payment" or "expenditure" under the *Indian Act* would be subject to the accrual of interest, not investment.

[111] Nowhere in ss. 61 to 69 of the *Indian Act* are investments of Indian moneys made, held and managed by the Crown contemplated.

(c) *The 1951 Amendments*

[112] Prior to the amendments to the *Indian Act* enacted in 1951, there was express permission granted under the Act to the Governor in Council to invest Indian moneys. The former s. 92 of the *Indian Act*, R.S.C. 1927, c. 98, read:

> 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 the 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.

[113] This provision was repealed in 1951 (*The Indian Act*, S.C. 1951, c. 29, s. 123), and no provision authorizing investment took its place. The Assembly of First Nations argued that the investment power formerly contained in the *Indian Act* was transferred to s. 64(1)(*k*) in 1951 (which at the time was s. 64(1)(*j*)). However, an expenditure provision very similar to the present s. 64(1) was already in existence prior to the 1951 amendments when the investment provision was repealed. The expenditure section, formerly s. 93 of R.S.C. 1927, c. 98, read:

> The Governor in Council may, with the consent of a band, authorize and direct the expenditure of any capital moneys standing at the credit of such band, in the purchase of land as a reserve for the band or as an addition to its reserve, or in the purchase of cattle, implements or machinery for the band, or in the construction of permanent improvements upon the reserve of the band, or such works thereon or in connection therewith as, in his opinion, will be of permanent value to the band, or will, when completed, properly represent capital or in the making of loans to members of the band to promote progress, no such loan, however, to exceed in amount one-half of the appraised value of the interest of the borrower in the lands held by him.

[114] Upon comparing the former s. 93 and the current s. 64(1) of the *Indian Act*, it is apparent that s. 64(1) is an expanded version of s. 93. Each allowable expenditure listed in s. 93 appears in the new s. 64(1). Section 64(1) contains some additional expenditures, as well as the "for any other purpose" provision in s. 64(1)(*k*).

[115] Prior to 1951, Parliament contemplated separate expenditure and investment provisions. It cannot be inferred that Parliament intended to preserve the Crown's prior express investment power that it specifically removed, through s. 64(1)(*k*), a general, non-specific expenditure power that follows a list of authorized expenditures for expenses or assets over which the Crown had no control or responsibility. After removing a provision expressly permitting investment, it could not

have been the intention of Parliament to then preserve that power through a residual clause in a section providing for the "expenditure" of funds.

[116] The absence of any statutory regime regulating investment of Indian moneys is also significant. As the Ontario Court of Appeal noted in *Authorson*, "[w]here Parliament has authorized external investment, it has done so expressly through complex statutory regimes" (para. 108). No such complex statutory regime appears in the *Indian Act*.

[117] A further indication of Parliament's intent can be drawn from the fact that from 1859 to 1951, the Crown had not engaged in investing Indian moneys but rather paid interest at rates from 3 to 6 percent. It is reasonable to infer that in repealing the investment power in the *Indian Act*, the Crown was bringing the legislation into conformity with actual practice.

[118] The bands have argued that the Crown could have used s. 4(2) of the *Indian Act* to render ss. 61 to 68 of the Act inapplicable. If those provisions were proclaimed to be inapplicable, it is argued that there would be no legislative restriction on the power of the Crown to invest. Section 4(2) states:

> (2) 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 any group or band of Indians, or
>
> (*b*) any reserve or any surrendered lands or any part thereof,
>
> and may by proclamation revoke any such declaration.

[119] However, the use of s. 4(2) in this manner would have had the effect of removing the application of those sections of the *Indian Act* for all purposes relating to the expenditure of capital and revenue moneys of the bands in question, not just in relation to investment of their royalties. By these money management provisions, Parliament created a complete code for the handling of Indian moneys. The inapplicability of the money management provisions would thus have far-reaching implications. For example, it would eliminate the requirement under the Act that the Crown obtain the consent of the bands for the expenditure of funds from the CRF. That the Crown could have used s. 4(2) in the manner suggested by the bands is unrealistic because of its broad impact.

(4) Section 21(1) of the *Financial Administration Act*

[120] The intervener Lac Seul First Nation argued that the FAA and *Indian Act* do not modify the Crown's duty as a common law trustee. It argued that "investment" is not an "expenditure", that s. 64 of the *Indian Act* does not apply, and that the *Indian Act* is therefore not an "applicable" statute within the meaning of s. 21 of the FAA. As a result, s. 21 operates as general authority to pay moneys out of the CRF to satisfy the Crown's common law duties as trustee, which include investment.

[121] I am unable to accept these submissions. Section 21(1) of the FAA says that money may only be paid out of the CRF "subject to any statute applicable thereto". Parliament could not have intended that the Crown retain a residual unilateral power to pay out band moneys from the CRF without consent of the bands for purposes not referred to in the *Indian Act*. Overriding the bands'

consent would be contrary to the scheme of the *Indian Act*, which intended to recognize greater self-determination for Indians, while still protecting their interests. In *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846, McLachlin C.J. referred to the Parliamentary debates on the amendments to the *Indian Act* in 1951. While that case concerned the provisions of the *Indian Act* dealing with property on reserves that was exempt from seizure, the concerns of Parliament at that time were not restricted solely to those provisions. As she noted, at para. 55, during the Parliamentary debates on the amendments, then-Minister of Citizenship and Immigration Walter Edward Harris put the issue in general terms as follows:

> The problem is to maintain the balance of administration of the Indian Act in such a way as to give self-determination and self-government as the circumstances may warrant to all Indians in Canada, but that in the meantime we should have the legislative authority to afford any necessary protection and assistance.
>
> (*House of Commons Debates*, vol. II, 4th Sess., 21st Parl., March 16, 1951, at p. 1352)

[122] The relevant applicable statute is the *Indian Act* because it is the statutory scheme governing the control and management of Indian moneys. It provides no authority for any expenditure or payment of Indian moneys other than for the purposes provided for in the Act. The *Indian Act* does not provide for investment.

[123] The wording of the *Indian Act* and the legislative changes made in 1951 indicate that no power existed after that time for the Crown to make, hold and manage investments made with Indian moneys.

E. *The Crown's Fiduciary Obligations to the Bands*

[124] It is next necessary to determine whether the Crown's actions under the authority of the FAA and the *Indian Act*, including the Indian moneys formula, were consistent with its fiduciary obligations to the bands.

[125] A fundamental principle underlying the fiduciary relationship is the requirement that a fiduciary acts "exclusively for the benefit of the other, putting his own interests completely aside" (Waters, Gillen and Smith, at p. 877). This is the duty of loyalty and it requires the trustee to avoid conflicts of interest. A fiduciary is required to avoid situations where its duty to act for the sole benefit of the trust and its beneficiaries conflicts with its own self-interest or its duties to another (see Waters, Gillen and Smith, at p. 877, and *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 646-47).

[126] At common law, a trustee is not permitted to borrow from the trust, as this would constitute a conflict of interest. The bands argued that the Crown was in a position of conflict of interest and therefore in breach of its fiduciary duty to them because their royalties were held in the CRF for use by the Crown. The bands have characterized the fact that the royalties are held in the CRF for use by the Crown as a "forced borrowing", and that without their consent it is improper or unlawful.

[127] The Crown is in a unique position as a fiduciary with respect to the royalties and the payment of interest. The Crown is borrowing the bands' money held in the CRF. However, the borrowing is required by the legislation. According to s. 61(2) of the *Indian Act*, "[i]nterest 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". As the majority of the Court of Appeal noted, this

borrowing is an "inevitable consequence of the combined operation of the *Indian Act* and the *Financial Administration Act*" (para. 120).

[128] A fiduciary that acts in accordance with legislation cannot be said to be breaching its fiduciary duty. The situation which the bands characterize as a conflict of interest is an inherent and inevitable consequence of the statutory scheme.

[129] The Crown's position in the setting of the interest rate paid to the bands is also unique. On the one hand, it has fiduciary duties that are owed to the bands, including the duty of loyalty and the obligation to act in the bands' best interests. On the other hand, the Crown must pay the interest owed to the bands with funds from the public treasury financed by taxpayers. The Crown has responsibilities to all Canadians, and some balancing inevitably must be involved.

[130] As Binnie J. stated in *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 96, "[t]he Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting". In the present case, the Crown must consider not only the interests of the bands but also the interests of other Canadians when it sets the interest rate paid to the bands.

[131] The standard of care required of the Crown in administering the funds of the bands is that of "a man of ordinary prudence in managing his own affairs", *per* Dickson J. in *Fales*, at p. 315. However, because the Crown "can be no ordinary fiduciary", its obligation to act as a person of ordinary prudence in managing his or her own affairs is modified by relevant legislation and by the

kinds of considerations outlined above.

F. *The Test for Determining the Obligations of the Crown in Providing a Return to the Bands*

[132] Within the Crown's discretion as a fiduciary, it had a number of options for setting the interest rate paid to the bands. The range of options included: (1) a flat rate of interest that might be adjusted from time to time; (2) interest at the rate of return of short-term treasury bills; (3) interest equivalent to the return on a diversified portfolio; (4) interest at a rate tied to the yield on long-term government bonds but adjusted periodically; or (5) interest at the yield on long-term government bonds guaranteed for the term of the bonds, i.e. a laddered bond portfolio.

(1) Flat Rate

[133] From 1859 to 1969, the Crown paid a flat rate of interest, adjusted periodically, on Indian moneys. While simple to administer and understand, a flat rate of interest does not accommodate changes in the rate of inflation in a timely way because the changing of the rate would require a new Order in Council, which in turn likely would have required consultation with the affected bands. No one has suggested this as an adequate alternative, and no further consideration need be given to it.

(2) Short-Term Treasury Bill Return

[134] A return based on short-term treasury bills has the advantage of providing liquidity to the bands. It also minimizes the cost of borrowing as short-term borrowings generally pay lower

interest than longer term borrowings. However, this option fails to take into account the fact that at least some of the bands' royalties would be held in the CRF over longer periods. Although the Crown has used returns on short-term treasury bills to show that the bands received substantially more, the Crown does not suggest that interest based on short-term treasury bills was an appropriate alternative.

(3) Diversified Portfolio Return

[135] The bands submit that if the statutory scheme prevented the Crown from investing the royalties, the Crown should nonetheless have provided the bands with an interest rate that was equivalent to what the return would have been had their funds been invested in a diversified portfolio. Ermineskin, in its factum, submits that "the Crown could have, and ought to have, provided Ermineskin with a return on its moneys commensurate with what would have been obtained through prudent investment" (para. 177).

[136] A fiduciary is not required to provide the beneficiary, out of the fiduciary's own resources, what could have been obtained had legislative or contractual limits on its discretion not existed. Requiring the Crown to pay a rate of interest equivalent to what would have been obtained through investment in a diversified portfolio would require the Crown, in its fiduciary capacity, to supplement, out of the public treasury, the return that it was statutorily prevented from obtaining. It was not required to do so.

(4) Adjusted Long-Term Rate

[137] The interest rate methodology instituted by the Crown in 1969 and continued in 1981 involved a floating interest rate, with the rate adjusted initially monthly, and as of 1981, quarterly. The interest rate was tied to the market yield on government bonds having terms to maturity of ten years or over. Since interest rates and anticipated inflation are generally correlated, the quarterly adjustment offered some protection against inflation.

[138] This option provided the bands with liquidity. The bands received the benefit of a long-term bond yield without the associated risk of locking in the funds for the long term. While there was the possibility of declining interest rates, in which case the bands would not receive the benefit of a locked-in rate, there was also the possibility of the opposite occurring. If interest rates were to increase, the bands would get the benefit of the increase on all their funds within three months, rather than having them locked in at lower rates for long periods of time.

[139] The Crown's conduct cannot be measured in hindsight. In *Blueberry River*, McLachlin J. (as she then was) determined that the Crown's sale of the land in question to the Director of the *Veterans' Land Act* was not in breach of the Crown's fiduciary duty. A number of possible options for the disposition of the land were considered and "[t]he interests and wishes of the Band were given utmost consideration throughout" (para. 51). At para. 51, she stated:

> At the time, [the sale of the land] was a defensible choice. Indeed, it can be argued that the sale of the surface rights was the only alternative that met the Band's apparent need to obtain land nearer its trap lines. In retrospect, with the decline of trapping and the discovery of oil and gas, the decision may be argued to have been unfortunate. But at the time, it may be defended as a reasonable solution to the problems the Band faced.

[140] In this case, it cannot be said that the floating rate approach adopted by the Crown was not a prudent course of action having regard to the options available. Nor can it be said that it was selected without regard to the best interests of the bands. It provided liquidity and some protection against inflation, without the risks associated with locking in the funds. It cannot be said that a prudent person managing his or her own affairs under the same legislative constraints as the Crown would not have chosen this option.

(5) Laddered Bond Portfolio

[141] Samson argued that one alternative to a diversified investment portfolio would have been a laddered bond portfolio.

[142] This approach would treat the bands' funds in the CRF as if they were invested in government bonds with maturity staggered over a series of years. The objective is to take advantage of the higher yields on longer term bonds while providing for liquidity by having bonds mature each year. The bond ladder might, at the outset, have equal amounts allocated to bonds maturing in years one, two, three, *et cetera*, up to the maximum thought appropriate by the trustee.

[143] Each year, the funds from the bonds maturing in that year would be allocated to bonds maturing at the end of the ladder. If the ladder was to be over 20 years, each year the funds from maturing bonds would be allocated to bonds maturing in 20 years from that year.

[144] In addition to the interest available each year, the proceeds of the bonds maturing in each

year would be available if liquidity requirements demanded that the funds not be reinvested but used for other purposes. If necessary, bonds could be disposed of prior to maturity but subject to market prices at the time of disposition. Of course, if this occurred, the balance in the ladder would be affected, but with new royalties coming into the CRF, the ladder could be re-balanced with those funds.

[145] Samson says that a laddered bond approach would have produced higher returns than the adjusted rate approach adopted by the Crown because the higher yields available in periods of higher inflation such as was experienced in the 1970s and the 1980s would have been locked in for the duration of the life of the bonds. Samson is correct on this point. However, that is only something that is now known in hindsight. The period beginning in the later 1980s was characterized by declining inflation and interest rates. During the latter part of the 1990s and particularly in the first decade of the 21st century, interest rates remained low and relatively stable. But the direction of inflation and interest rates cannot be predicted in advance. Had inflation and interest rates increased over some part of the period, locking into a laddered bond portfolio would have been detrimental in that period. So there is risk in a laddered bond approach.

[146] As said, it is true that a laddered bond approach would have yielded better returns than the approach selected. However, just because in hindsight it is apparent that the returns may have been greater does not mean that the Crown breached its fiduciary duties to the bands by adopting an equally prudent floating long-term rate approach.

(6) Conclusion Respecting the Methodology Selected By the Crown

[147] Of the alternatives considered, it is apparent that short-term rates would not have been in the best interests of the bands when it was possible for the Crown to pay interest at a higher rate in view of the Crown's diversified borrowing patterns. A fixed rate of interest would not have been sufficiently flexible to account for changes in prevailing interest rates and inflation. Payment of interest equivalent to what might have been earned in a diversified portfolio would have required subsidization from the public treasury. A fiduciary is not required to supplement the return it is legislatively restricted to providing from its own resources, in this case, the public treasury.

[148] The two alternatives that could have been selected by a prudent person managing his or her own affairs but modified by the constraints applicable to the Crown were the fluctuating rate approach adopted by the Crown and the laddered bond approach. When the Indian moneys formula was adopted in 1969, interest rates were tending upwards. In hindsight, because interest rates have tended downwards since the 1980s, investment in a laddered bond portfolio would have produced higher returns for the bands since that time than the long-term floating rate approach that was adopted. However, compliance by the Crown with its fiduciary obligations to the bands must be viewed prospectively.

[149] Without knowing the direction of interest rates and anticipated inflation, it cannot be said that the adoption of a floating long-term rate was an imprudent choice by the Crown. It was a way of contending with interest rates and inflation risk. I am of the opinion that in selecting the floating rate methodology of the Indian moneys formula, there was no breach of the fiduciary duty owed by the Crown to the bands.

G. *Transfer of Funds to the Bands*

[150] An alternative to the payment of interest by the Crown would have been the transfer of funds to the bands or to independent trustees for the benefit of the bands. The funds could then be invested by the bands or their trustees without control or management by the Crown. The bands assert that they had repeatedly demanded that their moneys be released to them by the Crown or to independent trustees but that the Crown had refused to do so. This position was not specifically argued as a breach of trust or fiduciary duty by the Crown. The bands simply argued that the Crown not only refused to invest the royalties, but also refused to allow the bands to invest them.

[151] Before this Court, the parties have argued that s. 64(1)(*k*) of the *Indian Act* provides authority for the transfer of capital moneys from the Crown to either the bands themselves or to an independent trust for the bands. When funds are transferred, the transfer constitutes an "expenditure" because the funds are no longer held by the Crown in trust. I accept this position.

[152] However, the Crown cannot simply transfer funds. In accordance with its fiduciary obligations and s. 64(1)(*k*) of the *Indian Act*, it must be satisfied that any transfer is in the best interests of the bands. Once a transfer is effected, the Crown's fiduciary obligations with regard to the funds in question must cease, as it no longer has control over the funds and is not responsible for their management. It is therefore necessary to consider history of dealings between the bands and the Crown to determine whether the Crown should have transferred some or all of the funds to the bands.

(1) Samson

[153] In February and April 1980, Samson requested transfer of $35 million from its capital funds in the CRF to establish Peace Hills Trust. This money was transferred by the Crown. It appears that when the $35 million was transferred to Samson to establish Peace Hills Trust, DIAND officials believed that the transfer was in the best interests of Samson. However, a report prepared for Samson by management consultants P. S. Ross & Partners in December 1979 had found that "[a] lack of long-range planning, including financial planning, prevails across the organization". The report stated:

> Furthermore, major financial decisions are not made as part of an overall plan to achieve specific results, but on an emotional basis, with consideration only being given to the possible short-term benefits. No serious consideration is given to the long term effects which these investments may have.
>
> (R.R., at p. 2514)

[154] Samson requested a further transfer of all its remaining royalties in the CRF to Peace Hills Trust in December 1980. During discussions between members of Samson and DIAND officials in early 1981, DIAND expressed the view that additional information regarding the requested transfer would be necessary. Some of this additional information was provided to DIAND, but not all the information that was requested.

[155] In particular, in April 1981, the then-Assistant Deputy Minister of Indian and Inuit Affairs, Donald K. Goodwin, sent a letter to Samson's Chief regarding the Band Council Resolutions providing for the transfer of the royalties. In that letter, Goodwin requested further information

concerning the disposition of the $35 million already transferred to the band in relation to the establishment of Peace Hills Trust. The letter stated "[t]here is no indication that the funds have been expended for the purpose approved, nor is there any indication that the funds are even under the management of the Trust Company" (R.R., at p. 2541). The letter requested information regarding the disposition of those funds, including the amount and nature of funds deposited, invested or placed with Peace Hills Trust, and the rate of return in respect of those deposits or investments.

[156] Goodwin also requested evidence of support of Samson's members. DIAND had previously requested copies of band meeting minutes demonstrating evidence of broad support for the transfer of the balance of Samson's funds in the CRF. However, DIAND had not received those minutes. Additionally, as Peace Hills Trust had only been licensed in January 1981 and there were therefore only a few months from which to show a performance record, Goodwin requested copies of interim financial statements and management agreements between Samson and Peace Hills Trust. Finally, Goodwin noted that it had previously been indicated to Samson that the wording of the relevant Band Council Resolutions was ambiguous, and requested more precise information about the intended use of the funds.

[157] The letter indicates that DIAND had the Crown's fiduciary responsibilities to Samson in mind. The letter stated:

> It is in the interest of everyone, but of Band members in particular, that all necessary information be available in order to best determine whether the proposals are first, within the limits imposed on the Minister's authority by section 64 of the Indian Act; secondly, are in the best interests of the Band members; and thirdly, meet the trust responsibilities

of the Minister.

(R.R., at p. 2543)

[158] A May 29, 1981 DIAND memo indicated that the response of Samson to the request for further information had been inadequate (R.R., at pp. 2556-59). Significantly, DIAND still had concerns about the disposition of the $35 million already transferred, and questioned why approximately $18 million was in the name of one Robert F. Roddick (an officer of Peace Hills Trust) "in trust" for Samson.

[159] In October 1981, John C. Munro, then-Minister of Indian and Northern Affairs Canada, wrote a letter to Samson expressing concern regarding the $18 million in Guaranteed Investment Certificates in the name of R. F. Roddick for the Samson Band. As Roddick was an officer of Peace Hills Trust, this was viewed as "highly irregular" by the Auditor General and the Department of Insurance. The letter stated (at p. 1):

> In light of the fact that the Samson Band has indicated its unwillingness to enter into a trust agreement with respect to the management of the $18 million on deposit with Peace Hills Trust Company, we have no other alternative but to ask that your council return the amount to the Receiver General to be held on deposit in your account.
>
> (R.R., at p. 2860)

[160] The record does not indicate that the $18 million was returned or that a satisfactory explanation was given with respect to the disposition of the $35 million that had already been transferred.

[161] The transfer of the balance of the Samson funds in the CRF was not proceeded with at this time.

[162] In 1983, Samson proposed that $50 million be transferred from its capital account in the CRF to establish the Samson Band Heritage Trust Fund (R.R., at p. 2753). The funds were to finance on-reserve housing projects using Peace Hills Trust as the lender. However, due to apparent "internal difficulties" as indicated in a letter from the Vice-President of Peace Hills Trust, Roy Louis (R.R., at p. 2763), no progress was made. The record indicates that these "internal difficulties" were within the Samson band. Throughout this period, DIAND had been attempting to obtain an accurate explanation as to the disposition of the $18 million held by Roddick in trust for the band from the earlier $35 million transfer. No satisfactory explanation was provided.

[163] In 1986, Samson again proposed the creation of the Heritage Trust. However, it appears that due to conflict within the Samson band council, no transfer was ever effected.

[164] In 1990, Samson applied to the Federal Court to appoint a receiver-manager of its capital moneys in the CRF. Negotiations for a transfer agreement continued, but the Crown insisted upon a financial plan. Samson's application was dismissed in January 1992 by Jerome A.C.J. (R.R., at pp. 4121-24), with a direction to negotiate. However, throughout the subsequent negotiations, Samson failed to provide the Crown with a financial plan that would satisfy the Crown that the transfer was in the band's best interests. The Crown continued to maintain that it required such a plan, in addition to a guarantee that the Crown would have no further obligations with regard to the funds after the transfer and a band referendum.

[165] The Crown sent Samson a draft trust deed in March 1993. By June 1994 it had not yet received Samson's response (Macleod Dixon letter, R.R., at pp. 4045-46). It appears from the record, however, that negotiations continued until 1997, when the Crown forwarded Samson a draft order for the interim transfer of funds, after which the parties continued to discuss both the order and the potential of a transfer of funds.

[166] In February 2001, the Crown sent Samson a draft proposal for a transfer. Samson's response in April 2002 asserted that the Crown had never had any intentions of transferring the funds and that the 2001 letter was insincere. (R.R., at pp. 4392-93).

[167] Ultimately, in 2005 during the trial, Teitelbaum J. set out conditions for the transfer of control over Samson's capital moneys in the CRF. Samson agreed to abide by conditions set by the court, and the Crown was willing to transfer control, subject to the court setting such conditions and a declaration by the court that the Minister of Indian Affairs and Northern Development had the legal authority to make the transfer.

[168] The conditions for transfer established by Teitelbaum J.'s order were that Samson prepare and execute a trust agreement containing a detailed financial plan setting out the band's investment and spending policies, that Samson release the Crown from any future liability for the capital moneys, that Samson hold a referendum among band members, and that Samson submit a band council resolution requesting transfer of all capital moneys, with the exception of $3 million to be held back to resolve any outstanding issues (2005 FC 136, [2005] 2 C.N.L.R. 358).

[169] Throughout the dealings between Samson and the Crown, the evidence indicates that the Crown was supportive of the band's proposals to transfer money for the establishment of Peace Hills Trust and Samson Band Heritage Trust Fund. However, due to difficulties uncovering information as to the disposition of the $35 million actually transferred, the failure of Samson to provide adequate financial plans and assurances of band support and conflict within the Samson band council, the Crown was unable to assure itself that transferring further funds would be in the best interests of Samson.

[170] Having regard to the evidence, in my opinion, for the Crown to have agreed to further transfers prior to the order of Teitelbaum J. in 2005 would have been imprudent.

(2) Ermineskin

[171] In 1983, the Crown contacted Ermineskin with invitations to consider the transfer of funds from Ermineskin's capital accounts in the CRF to Ermineskin's control and management. In January 1985, the Four Bands (which included Ermineskin) made a presentation to David Crombie, the then-Minister of Indian and Northern Affairs, stating that a Heritage Trust concept had been developed that would require the release of funds from their capital account (R.R., at pp. 2833-38). A November 1985 letter from Crombie to Ermineskin's Chief Littlechild stated that a transfer proposal had not yet been formally submitted by Ermineskin and that a determination could not be made until the details of the proposal were known (R.R., at pp. 3115-16).

[172] For the first time, in September 1988, Ermineskin formally proposed the creation of the Ermineskin Heritage Trust. Ermineskin submitted a Band Council Resolution, draft trust deed, tax ruling and long-range planning memorandum to DIAND. DIAND was supportive of this proposal, although it remained concerned about its responsibilities and authority to approve such a transfer under the *Indian Act*.

[173] A number of discussions took place between the Crown and Ermineskin. Eventually, a plan was developed for legislation specific to Ermineskin which would satisfy the Crown's concerns about legal authority for the transfer. Ermineskin was sent the drafting instructions for the legislation and offered comments, most of which were accepted by the Crown.

[174] According to the record, in order to effect a transfer of capital funds from the CRF to the Ermineskin Heritage Trust, the Crown asked for a full release of any obligations with respect to the transferred funds. However, at an Ermineskin band council meeting in early 1990, it was decided not to proceed with the Ermineskin Heritage Trust because Ermineskin was unwilling to release the Crown from any future responsibility for the management of the transferred funds (R.R., at pp. 3582-85).

[175] In January 1991, Ermineskin submitted a "Proposal of Ermineskin Indian Band Regarding Management of Indian Moneys", which stated that Ermineskin wished to conduct its own analysis of available money management options (R.R., at p. 3683). The record does not indicate that any further steps were taken.

[176] In November 1990, the Crown had created the Indian Moneys Committee to address the need for Indian participation in and support of legislative reform apparently thought necessary to enable Indian control of capital moneys. Ermineskin actively participated in the Committee. The Committee recommended optional legislation which would allow bands to opt out of the provisions of the *Indian Act* and manage their own moneys. The majority of the recommendations of the Committee were accepted by the Crown, and drafting began.

[177] In May 1992, Ermineskin commenced its action against the Crown. Work continued on the proposed legislation, however, and a final draft of the proposed *First Nations Moneys Management Act* was prepared in 1993. In January 1994, a letter from Ermineskin's counsel to the Crown demanded that the Crown invest Ermineskin's royalties itself. However, a letter from the co-chairs of the Indian Moneys Committee to Ronald Irwin, the then-Minister of Indian Affairs and Northern Development, a month later stated that Ermineskin supported the text of the proposed legislation (R.R., at pp. 4047-48).

[178] The record indicates that at a meeting between DIAND and the Committee in August 1994, representatives of only two bands attended and that the Crown was not willing to proceed with the legislation without widespread support of the bands.

[179] In 1996, Ermineskin again demanded that the Crown invest its capital moneys (Blake, Cassels and Graydon letter, February 15, 1996, R.F., at p. 223). The Crown's response stated that while it would not invest the funds itself, it would be willing to resurrect the Ermineskin Heritage Trust Proposal. Ermineskin continued to reiterate its demand that the Crown invest its moneys, but

it appears that no further developments occurred. Ermineskin never revived the Ermineskin Heritage Trust Proposal, and the proposed money management legislation was never enacted.

[180] It appears that the major points of contention were Ermineskin's demands that the Crown invest its royalties and its refusal to release the Crown of ongoing responsibility in the event of a transfer of the funds for investment by the band itself. Ermineskin stated in its factum that "Ermineskin members have been reluctant to terminate the trust relationship with the Crown" (Ermineskin factum, at para. 62). However, the Crown could not agree to ongoing responsibility without having control over the management of the funds.

[181] As I have explained earlier, the Crown was restricted by legislation from investing Ermineskin's royalties and could not accede to the band's demands to do so. In the event of a transfer, the Crown's fiduciary obligations with regard to the funds had to come to an end. The Crown could not be expected to remain responsible for funds over which it no longer had control. In the absence of a release from the band to the Crown, the Crown could not be expected to transfer funds from the CRF to Ermineskin.

H. *Unjust Enrichment*

[182] The bands argued that the Crown was unjustly enriched by making use of the bands' royalties and paying the rate of interest that it did. However, this is an inevitable result of the statutory scheme, which requires that the Crown hold the bands' royalties in the CRF and pay interest to the bands.

[183] The test for unjust enrichment was recently restated by Iacobucci J. in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, 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).

[184] The basis for determining whether the Crown was enriched is a comparison with what would have been the case had the Crown not had access to the royalties in the CRF. The trial judge found that the Crown could (and would) have obtained replacement funds at a lower cost, i.e. the short-term treasury bill rate, than the interest it actually provided on the royalties. I agree with the trial judge and the Court of Appeal that the Crown was not enriched.

I. *Section 15(1) of the Charter*

[185] At trial and in this appeal, the bands challenged the constitutional validity of ss. 61 to 68 of the *Indian Act* as being contrary to s. 15(1) of the *Charter*. They argue that if this Court finds that those provisions preclude the Crown from investing the royalties in the manner of a common law trustee, the result is discriminatory. They argue that because they are Indians, they have been deprived by the *Indian Act* of the rights that are available to non-Indians whose property is held in trust by the Crown.

[186] Section 15(1) reads:

> 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.

[187] The trial judge and the majority of the Court of Appeal found that the bands lacked standing to bring a claim under s. 15(1) on the basis that the bands were asserting a claim in relation to the management of band property and not a claim relating to personal rights of band members. As such, they were of the opinion that there was no personal s. 15(1) right engaged. As I am of the opinion that the bands' s. 15(1) claim should be dismissed, I prefer to explain my reasons on a substantive rather than procedural basis.

[188] This Court's equality jurisprudence makes it clear that not all distinctions are discriminatory. Differential treatment of different groups is not in and of itself a violation of s. 15(1). As this Court stated in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 182 (restated in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 28), a complainant must show "not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory" (emphasis added). The analysis, as established in *Andrews*, consists of two questions: first, does the law create a distinction based on an enumerated or analogous ground; and second, does the distinction create a disadvantage by perpetuating prejudice or stereotyping.

[189] In the circumstances of this case, it is evident that the first requirement is satisfied: the impugned legislation creates a distinction between Indians and non-Indians because the legislation only applies to Indians.

[190] The question that must therefore be asked is whether the money management provisions, which preclude investment of Indian moneys by the Crown, perpetuate prejudice or stereotyping. In my opinion, they do not.

[191] It was argued that the inability of the Crown to invest resulted in lower returns than those available to non-Indians, and that this amounted to a disadvantage to the bands. In purely financial terms, it is not readily apparent that precluding investment by the Crown necessarily amounts to a disadvantage. It is true that interest calculated on the basis of the yield on long-term government bonds, adjusted quarterly, will, in most cases and over the long term, lead to lower returns than might accrue through a diversified investment plan.

[192] That said, holding the funds in the CRF and paying a return in accordance with s. 61(2) ensured the liquidity of the funds such that all funds in the bands' accounts were available for expenditure at any time. In addition, there was no risk of loss of the bands' royalties. It is misleading to gauge disadvantage solely on the basis of comparative returns. Risk and liquidity are also relevant considerations. However, even if the preclusion of investment by the Crown is a disadvantage, the legislation will violate s. 15(1) only if that disadvantage is one that is discriminatory, that is, if it perpetuates prejudice or stereotyping.

[193] The question of whether discrimination exists is to be determined with regard to context, looking beyond simply the legislation in question. In *R. v. Turpin*, [1989] 1 S.C.R. 1296, this Court stated:

> In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context. [p. 1331]

[194] This Court's statement in *Turpin* signals the importance of addressing the broader context of a distinction in a substantive equality analysis.

[195] The question of management of Indian moneys necessarily involves many considerations including Aboriginal self-determination and autonomy and the level of appropriate involvement and control on the part of the Crown. This is in contrast to other trust relationships where risk and financial returns are generally the only considerations, and where there is little concern with the trustee having complete control and discretion, within the limits of acceptable risk, as to where and how the trust corpus is managed and invested.

[196] The Indian moneys formula involves less Crown control over the use of the royalties and the spending of the bands than if the Crown had invested them in a diversified portfolio. Investment by the Crown would have required the Crown, in the role of a trustee, to make decisions regarding the level of risk and the specific investment instruments purchased, and might have even required the Crown to exercise greater control over the spending patterns of the bands because investment in a diversified portfolio would not have permitted complete liquidity of the royalties without the

risk of incurring substantial losses.

[197] The record shows that the bands resisted what they viewed as efforts on the part of the Crown to exercise increased control over Indian moneys and spending. In 1981, DIAND proposed to limit the share of a minor's Per Capita Distribution (PCD) to $3,000 annually. The Directive issued by DIAND stated the purpose for such a limitation as follows:

> ... to outline departmental procedures with respect to control of, and the basic requirements necessary to effect Per Capita Distribution of Band Capital Funds, in order to fulfill and protect the Minister's trust responsibility.
>
> (R.R., at p. 2027)

[198] In reply to this proposal, the Four Bands, of which the appellants were members, wrote that "the Four Bands of Hobbema; namely the Ermineskin, Louis Bull, Montana, and Samson, through their respective Chiefs and Councils, hereby unequivocally oppose the policy and its implementation" (R.R., at p. 2035). According to the Four Bands, it appeared that "the purpose of the Departmental Directive as a policy interpreting Section 64(a) of the Indian Act is to in fact gain control of Band Capital funds", which was not conducive to the autonomy of the bands (R.R., at p. 2035). The Four Bands concluded with the following:

> However, where "INDIAN MONEY" is involved, it is the Chief and Council through its members and as the governing body that have the responsibility to determine how, when, and where their funds will be allocated and expended or invested.
>
> (R.R., at pp. 2037-38)

[199] It was believed that increased control by the Crown would not accord with greater self-determination on the part of the bands.

[200] Indeed, the impugned provisions do not prohibit investment of Indian moneys by the bands themselves or by trustees on their behalf. I have found that s. 64(1)(*k*) of the *Indian Act* permits the expenditure of capital moneys by the Crown to a band or a third party trustee for the band in order for those funds to be invested. In 1980 the Crown did transfer $35 million to Samson for purposes of establishing the Peace Hills Trust Company. The record discloses that, provided the bands could satisfy the Crown that a transfer of funds for investment was in their best interests and that the Crown was relieved from liability for funds over which it no longer had control, transfers would be made. Indeed, by order of Teitelbaum J. of December 22, 2005, the Samson funds were authorized to be transferred. Requiring the bands to satisfy the Crown that a transfer was in their best interests was consistent not only with the provisions of the *Indian Act*, but with the Crown's obligations as a fiduciary with respect to the royalties.

[201] Given these considerations, I am unable to agree that the impugned provisions of the *Indian Act* infringe s. 15(1) of the *Charter* under the test established in *Andrews* and reaffirmed in *Kapp*: "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?" (*Kapp*, at para. 17). There is a distinction between Indians and non-Indians, but that distinction is not discriminatory. The provisions do not preclude investment, provided the investments are made by the bands or trustees on their behalf after expenditure of funds from the CRF to the bands and the release of the Crown from further responsibility with respect to the royalties. Such an approach involves greater

control and decision making by the bands themselves. Any expenditure of the funds for investment is required to be in the best interests of the bands. Until the funds are expended by the Crown for the purposes of investment by the bands or trustees on their behalf, they are held by the Crown in the CRF and the bands are provided with liquidity and a return on the royalties.

[202] I am therefore of the opinion that the provisions of the *Indian Act* that prohibit investment of the royalties by the Crown do not draw a distinction that perpetuates disadvantage through prejudice or stereotyping. There is no violation of s. 15(1) of the *Charter*.

VI. Conclusion

[203] I would dismiss the appeals with costs.

APPENDIX

Canadian Charter of Rights and Freedoms

> **15.** (1) 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.

. . .

Constitution Act, 1982

> **35.** (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Financial Administration Act, R.S.C. 1985, c. F-11

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

(*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;

. . .

17. (1) Subject to this Part, all public money shall be deposited to the credit of the Receiver General.

. . .

21. (1) Money referred to in paragraph (*d*) of the definition "public money" in section 2 that is received by or on behalf of Her Majesty for a special purpose and paid into the Consolidated Revenue Fund may be paid out of the Consolidated Revenue Fund for that purpose, subject to any statute applicable thereto.

(2) Subject to any other Act of Parliament, interest may be allowed and paid from the Consolidated Revenue Fund in respect of money to which subsection (1) applies, in accordance with and at rates fixed by the Minister with the approval of the Governor in Council.

90. (1) No person shall, unless authorized by an Act of Parliament,

(*a*) procure the incorporation of a corporation any shares of which, on incorporation, would be held by, on behalf of or in trust for the Crown;

(*b*) acquire shares of a corporation that, on acquisition, would be held by, on behalf of or in trust for the Crown;

(*c*) apply for articles that would add to or otherwise make a material change in the objects or purposes for which a parent Crown corporation is incorporated, or the

restrictions on the businesses or activities that a parent Crown corporation may carry on, as set out in its articles;

(*d*) sell or otherwise dispose of any shares of a parent Crown corporation; or

(*e*) procure the dissolution or amalgamation of a parent Crown corporation.

. . .

Indian Act, R.S.C. 1985, c. I-5

4. (1) A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Inuit.

(2) 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 any group or band of Indians, or

(*b*) any reserve or any surrendered lands or any part thereof,

and may by proclamation revoke any such declaration.

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.

(2) 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.

62. 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.

63. Notwithstanding the *Financial Administration Act*, where moneys to which an Indian is entitled are paid to a superintendent under any lease or agreement made under this Act, the superintendent may pay the moneys to the Indian.

64. (1) 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 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.

(2) The Minister may make expenditures out of the capital moneys of a band in accordance with by-laws made pursuant to paragraph 81(1)(*p.* 3) for the purpose of making payments to any person whose name was deleted from the Band List of the band in an amount not exceeding one per capita share of the capital moneys.

64.1 (1) A person who has received an amount that exceeds one thousand dollars under paragraph 15(1)(*a*), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, by reason of ceasing to be a member of a band in the circumstances set out in paragraph 6(1)(*c*), (*d*) or (*e*) is not entitled to receive an amount under paragraph 64(1)(*a*) until such time as the

aggregate of all amounts that the person would, but for this subsection, have received under paragraph 64(1)(*a*) is equal to the amount by which the amount that the person received under paragraph 15(1)(*a*), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, exceeds one thousand dollars, together with any interest thereon.

(2) Where the council of a band makes a by-law under paragraph 81(1)(*p*.4) bringing this subsection into effect, a person who has received an amount that exceeds one thousand dollars under paragraph 15(1)(*a*), as it read immediately prior to April 17, 1985, or under any former provision of this Act relating to the same subject-matter as that paragraph, by reason of ceasing to be a member of the band in the circumstances set out in paragraph 6(1)(*c*), (*d*) or (*e*) is not entitled to receive any benefit afforded to members of the band as individuals as a result of the expenditure of Indian moneys under paragraphs 64(1)(*b*) to (*k*), subsection 66(1) or subsection 69(1) until the amount by which the amount so received exceeds one thousand dollars, together with any interest thereon, has been repaid to the band.

(3) The Governor in Council may make regulations prescribing the manner of determining interest for the purpose of subsections (1) and (2).

65. The Minister may pay from capital moneys

(*a*) compensation to an Indian in an amount that is determined in accordance with this Act to be payable to him in respect of land compulsorily taken from him for band purposes; and

(*b*) expenses incurred to prevent or suppress grass or forest fires or to protect the property of Indians in cases of emergency.

66. (1) 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.

(2) The Minister may make expenditures out of the revenue moneys of the band to assist sick, disabled, aged or destitute Indians of the band, to provide for the burial of deceased indigent members of the band and to provide for the payment of contributions under the *Employment Insurance Act* on behalf of employed persons who are paid in respect of their employment out of moneys of the band.

(2.1) The Minister may make expenditures out of the revenue moneys of a band in accordance with by-laws made pursuant to paragraph 81(1)(p.3) for the purpose of making payments to any person whose name was deleted from the Band List of the band in an amount not exceeding one per capita share of the revenue moneys.

(3) The Minister may authorize the expenditure of revenue moneys of the band for all or any of the following purposes, namely,

(*a*) for the destruction of noxious weeds and the prevention of the spreading or prevalence of insects, pests or diseases that may destroy or injure vegetation on Indian reserves;

(*b*) to prevent, mitigate and control the spread of diseases on reserves, whether or not the diseases are infectious or communicable;

(*c*) to provide for the inspection of premises on reserves and the destruction, alteration or renovation thereof;

(*d*) to prevent overcrowding of premises on reserves used as dwellings;

(*e*) to provide for sanitary conditions in private premises on reserves as well as in public places on reserves; and

(*f*) for the construction and maintenance of boundary fences.

67. Where money is expended by Her Majesty for the purpose of raising or collecting Indian moneys, the Minister may authorize the recovery of the amount so expended from the moneys of the band.

68. Where the Minister is satisfied that an Indian

(*a*) has deserted his spouse or common-law partner or family without sufficient cause,

(*b*) has conducted himself in such a manner as to justify the refusal of his spouse or common-law partner or family to live with him, or

(*c*) has been separated by imprisonment from his spouse or common-law partner and family,

the Minister may order that payments of any annuity or interest money to which that Indian is entitled shall be applied to the support of the spouse or common-law partner or family or both the spouse or common-law partner and family of that Indian.

. . .

69. (1) 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) 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.

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.

. . .

Indian Oil and Gas Regulations, 1995, SOR/94-753

33. ... (5) At any time after giving reasonable notice in writing to the operator and giving due consideration to any obligations that the operator may have in respect of the sale of oil or gas, the Executive Director may, with the approval of the band council, direct that all or a part of the oil or gas that is a royalty payable under this section be paid in kind for a specified or indefinite period or until the Executive Director directs otherwise.

Appeals dismissed with costs.

Solicitors for the appellants (31875): Blake, Cassels & Graydon, Vancouver.

Solicitors for the appellants (31869): O'Reilly & Associés, Montréal.

Solicitor for the respondents: Attorney General of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitors for the intervener the Assembly of First Nations: Pitblado, Winnipeg.

Solicitors for the interveners the Saddle Lake Indian Band and the Stoney Indian Band: Rae and Company, Calgary.

Solicitor for the intervener the Lac Seul First Nation: Joseph Eliot Magnet, Ottawa.