2006 FCA 415

A-618-05

Chief John Ermineskin, Lawrence Wildcat, Gordon Lee, Art Littlechild, Maurice Wolfe, Curtis Ermineskin, Gerry Ermineskin, Earl Ermineskin, Rick Wolfe, Ken Cutarm, Brian Less, 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, the Minister of Indian Affairs and Northern Development and **the Minister of Finance** (*Respondents*)

A-629-05

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

v.

Her Majesty the Queen in right of Canada, the Minister of Indian Affairs and Northern Develop-ment and **the Minister of Finance** (*Respondents*)

and

The Attorney General of the Province of Alberta (*Intervener*)

and

The Attorney General for the Province of Saskatchewan (*Intervener*)

INDEXED AS: ERMINESKIN INDIAN BAND AND NATION v. CANADA (F.C.A.) (CROSS REF: SAMSON INDIAN NATION AND BAND V. CANADA)

Federal Court of Appeal, Richard C.J., Sexton and Sharlow JJ.A.—Ottawa, October 16-19, 23-26, 30-31, November 6-10 and December 20, 2006.

Aboriginal Peoples — Appeals from dismissal of actions brought as result of respondents' failure to invest royalties derived from oil and gas resources beneath appellants' reserves — Royalties, coming under definition of "public money" under Financial Administration Act (FAA) and under definition of "Indian moneys" (more specifically, "capital moneys") under Indian Act, deposited in Consolidated Revenue Fund pursuant to FAA, s. 17(1), interest credited pursuant to Order in Council made under Indian Act, s. 61(2) — Conditions for expenditure of capital moneys set out in Indian Act, s. 64 — That section not authorizing Crown to invest moneys in manner common-law trustee would invest them, i.e. by acquiring income-earning property, and Crown under no obligation to propose investment plan to appellants — Trial Judge's conclusion interest paid herein reasonable, not warranting intervention — Crown's obligations as trustee of appellants' royalties met in case at bar — Appeals dismissed — Per Sexton J.A. (dissenting): Indian Act not preventing Crown from investing Indian moneys — Crown should have devised, presented investment plans to appellants on ongoing basis for their consent.

Crown — Trusts — Actions by appellants with respect to accumulated royalties held in trust for them by respondents (Crown) in Consolidated Revenue Fund — Arguing Crown had duty to make income-earning investments with those royalties as would trustee at common law, failure to do so breach of trust — Because royalties capital moneys under

Indian Act, their expenditure subject to Indian Act, s. 64 — That section not authorizing Crown's use of capital moneys to acquire income-earning investments as would common-law trustee — Per Sexton J.A. (dissenting): While legislation modifying Crown's duties, Crown primarily bound to perform as would trustee at common law — Crown breached its duties when handling appellants' royalty moneys.

Construction of Statutes — Royalties derived from exploitation of oil and gas resources beneath surface of appellants' reserves held in trust for them by respondents (Crown) — Statutory definition of "public money" in Financial Administration Act applying to royalties notwithstanding fact technically not belonging to Canada — Royalties therefore having to be paid into Consolidated Revenue Fund, interest paid thereon — Royalties also "capital moneys" under Indian Act — S. 64 of that Act setting out permitted expenditures for such moneys — S. 64 not authorizing Crown to invest capital moneys in income-earning property, provision permitting such acquisitions having been repealed in 1951 — Furthermore, expression "authorize and direct expenditure of capital moneys of the band" in Indian Act, s. 64 not requiring Crown to propose investment plan to appellants — Financial Administration Act, ss. 18(2), 21(1) also of no assistance to appellants — Per Sexton J.A. (dissenting): Financial Administration Act, s. 17 (requiring public money to be deposited to credit of Receiver General), *Indian Act, s. 61(2) (providing for payment of interest* on Indian moneys held in Consolidated Revenue Fund) *not evincing requisite clear intention to circumscribe common-law duties of trustee — 1951 amendments merely establishing new regime for making expenditures requiring band consent — Indian Act, s. 64(1)(k) authorizing investment of Indian moneys with such consent.*

Constitutional Law — Charter of Rights — Equality Rights — Whether provisions of Indian Act dealing with management of Indian moneys contrary to Charter, s. 15 — Individual band members herein having no personal interest to enforce as claim relating to communal right (management of band property) — Charter, s. 15 of no assistance to them — Per Sexton J.A. (dissenting): Collective rights at issue not a bar to applicability of s. 15 — Conclusion Crown having no duty to invest subjecting appellants to discriminatory treatment in violation of s. 15 — Such violation not saved under s. 1.

Constitutional Law — Aboriginal and Treaty Rights — Appellants arguing rights in relation to their capital moneys treaty rights pursuant to Constitution Act, 1982, s. 35 — Nevertheless, repeal of statutory investment power in Indian Act not infringing any of their treaty rights.

Restitution — Unjust enrichment — Trial Judge's assessment of evidence pertaining to argument Crown enriched by use of appellants' capital moneys held in Consolidated Revenue Fund disclosing no error — No basis for interfering with conclusion Crown not enriched.

These were two appeals from judgments of the Federal Court dismissing the appellants' actions in which they alleged that the Crown had breached its legal obligations in respect of certain funds, comprised mainly of accumulated royalties derived from the exploitation of oil and gas resources found beneath the surface of the Samson Indian Nation and Band and the Ermineskin Indian Band and Nation's reserves, held in trust for them.

Under the terms of Treaty No. 6, entered into in 1876 between the Crown and the appellant bands (among others), and the statutory scheme of the *Indian Act*, it was necessary for the appellants to surrender the oil and gas resources discovered under their reserves. Instruments of surrender were executed in 1946. Section 4 of the *Indian Oil and Gas Act* states that royalty payments are received by the Crown in trust for the bands. The Crown considered the royalties derived from the reserves to fall within the definition of "public money" in section 2 of the *Financial Administration Act* (FAA), and therefore deposited them as received in the Consolidated Revenue Fund (CRF) pursuant to subsection 17(1) of the FAA. The royalties also came within the definition of "Indian moneys" in section 2 of the *Indian Act*. Sections 61 to 69 of that Act deal with the management of those moneys, which are categorized as either "revenue moneys" or "capital moneys". Royalties fall under the category of capital moneys, and certain conditions (set out in section 64 of the *Indian Act*) must be met for the expenditure of those moneys (the list of permitted expenditures is set out at paragraphs 64(1)(*a*) to (*k*)).

Before Confederation and for some time after, the Crown exercised direct control of the management of all Indian moneys, which were held in trust and could be invested in commercial securities and municipal debentures. That investment power was not actually used after 1859, and the express reference to investment that once appeared in the

Indian Act disappeared when the Act was substantially revised in 1951. For most of the period relevant to the appeals, the Crown took the position that it had no statutory authority to use the capital moneys standing to the credit of bands in the CRF to make income-earning investments, or to transfer it unconditionally to a trustee or to the bands themselves at their direction for investment purposes. Instead the Crown credited interest on all Indian moneys in the CRF in accordance with an Order in Council made under subsection 61(2) of the *Indian Act*. From time to time the Crown invited proposals for an investment plan that could be assessed by the Minister in accordance with the requirements of section 61 and paragraph 64(1)(*k*) (expenditure for any other purpose that in the opinion of the Minister is for the benefit of the band) of the *Indian Act*, but no such proposal was made by the appellants (until a proposal by Samson in 2005). Nor was any consensus ever reached with respect to the amendment of the *Indian Act*. Therefore, the Crown considered itself compelled to maintain its practice of retaining the capital moneys of bands in special accounts in the CRF, and paying interest in accordance with the applicable Orders in Council.

The appellants were of the view that the Crown, as trustee of their capital moneys, has and has always had a duty at common law to invest the capital moneys prudently, that the Crown's refusal to even consider doing so was a breach of trust, and that they have the right to sue for damages if the income that should have been earned by the prudent investment of their capital moneys would have exceeded the interest they received under the relevant Orders in Council.

The appellants claimed damages or equitable disgorgement based on mismanagement of hundreds of millions of dollars derived from their royalties.

Held (Sexton J.A. dissenting), the appeals should be dismissed.

Per Richard C.J. and Sharlow J.A.: The Crown was a trustee of the royalties held in the CRF. Because these royalties fell within paragraph 2(*d*) of the definition of "public money" in the FAA, the Crown had to pay the royalties into the CRF when they were received, thus creating a liability on the part of the Crown to pay those amounts to the appellants upon compliance with the conditions in section 64 of the *Indian Act*. This liability was a debt that bore interest. However, the Crown did not have a duty to invest the appellants' capital moneys as though it was a common-law trustee. Nothing in section 64 authorizes capital moneys of a band to be invested by the Crown in the manner in which a common-law trustee would invest it, that is, by acquiring income-earning property that the Crown in its sole discretion considers appropriate. That conclusion is reinforced by the fact that the *Indian Act* provision that gave the Crown the authority to invest capital moneys of a band held in trust was repealed in 1951, thus implying the removal of such authority. The appellants' capital moneys could not be used for any purpose unless the statutory conditions in section 64 were met. One of these conditions was band council consent. The appellants conceded that their respective band councils had not given the requisite consent for the moneys to be invested.

The Crown did however have an obligation to pay a rate of return on Indian moneys held in the CRF in accordance with subsection 61(2) of the *Indian Act*. There was a sufficient evidentiary foundation to support the Judge's conclusion that the rates of interest paid were reasonable. And the Crown properly managed the rate of return pursuant to subsection 61(2) of the *Indian Act*, which provides for a rate to be fixed from "time to time", and appropriately consulted with the bands in that regard whenever the bands requested such consultations.

Subsection 21(1) of the FAA, which allows for money to be paid out of the CRF for the special purpose for which it was paid in, was of no assistance to the appellants as that subsection was subject to the *Indian Act*. Subsection 18(2) of the FAA, authorizing the Minister of Finance to invest public money, was also of no assistance as it contemplates the investment of the Crown's own money, not Indian moneys. The Crown was also under no obligation to propose an investment plan to the appellants, as such an obligation cannot be read into section 64 of the *Indian Act*, which empowers the Minister to "authorize and direct the expenditure of capital moneys of the band" with the consent of the band council. This interpretation accords with the intention of Parliament to give the bands the initiative with respect to the use of their capital moneys.

The trial Judge approached the issue of whether the Crown was unjustly enriched by its use of the appellants' capital moneys while they were held in the CRF correctly when he asked himself what the Crown would have done had it not had access to these moneys, and a careful review of the relevant evidence disclosed no error in his assessment of

the evidence on that point. There was therefore no basis for interfering with his conclusion that the Crown was not enriched.

The appellants also argued that, because they are Indians, they have been deprived by the *Indian Act* of the rights that are available to non-Indian individuals whose property is held in trust, contrary to section 15 of the *Canadian Charter of Rights and Freedoms*. Even if the individual band members (as opposed to the appellant bands themselves, which were held not to have standing to make a Charter claim by the trial Judge) had standing to assert a section 15 claim, they had no interest to enforce, as there can be a remedy under subsection 15(1) of the Charter only where a personal right has been infringed, and the claim in this case was not a claim in relation to a personal right, but a claim in relation to the management of property of the band (a communal right).

The record contained nothing from which it could be inferred that the Crown promised that the statutory investment power in the *Indian Act* would remain forever unchanged. The repeal of that power was done after consultation, with no evidence of any objection by the appellants. It did not infringe or deprive them of any of their rights under Treaty No. 6, which they argued were constitutionally protected by section 35 of the *Constitution Act, 1982*.

The Crown met all of its obligations as trustee of the appellants' royalties. These obligations required the Crown to deposit the royalties into the appropriate reserve or band capital account in the CRF, to pay interest at the rate stipulated by the applicable Order in Council, to maintain accurate accounts, to provide periodic reports to the appellants, to consider any requests by the appellants to authorize and direct expenditure of the capital moneys as proposed by a band council resolution, and to establish a rate of interest that was reasonable in the circumstances.

Per Sexton J.A. (dissenting): The trial Judge wrongly interpreted the *Indian Act* as not authorizing the Crown to invest Indian moneys. The Crown's principal failure was in neglecting to consider investment of the royalty moneys, to devise and present to the appellants investment plans on an ongoing basis and to seek their consent. The trial Judge also concluded incorrectly that the legislation "informs and defines the Crown's duty as trustee", and that as such the Crown is bound to hold the Indian moneys in the CRF and pay interest thereon. A proper analysis of the authorities revealed that while the legislation in an important respect modifies the Crown's duties, the Crown is primarily bound to perform as would a trustee at common law.

Section 17 of the FAA, and subsection 61(2) of the *Indian Act*, do not evince the requisite clear intention to circumscribe the common-law duties of a trustee. All that these sections require is that when moneys are on deposit in the CRF, interest must be paid by the Crown. The Crown's power to invest was not removed by the 1951 *Indian Act* amendments. These amendments merely established a new regime for making expenditures that requires the Crown to seek band consent before investing trust moneys.

The Crown breached its duties when handling the appellants' royalty moneys. It made no attempt to set goals or objectives for the trust moneys, to seek expert advice about prudent investment strategies or to establish an investment plan to propose to the appellants. Nor did it monitor the appropriateness of the rate of interest paid on the royalty moneys in light of prevailing market conditions. In fact, it was far from clear that the interest paid on the royalty moneys was reasonable.

As to section 15 of the Charter, the fact that collective rights were at issue was not a bar to its applicability. Individual band members clearly have an interest in the moneys owned by the band in common for all members. Here, concluding that the Crown has no duty or power to invest the Indian moneys would subject Indians to inferior treatment based on their Indian status and membership in an Indian Band, which would appear to constitute discriminatory treatment on the part of the government in violation of subsection 15(1) of the Charter on the basis of race, or national or ethnic origin. Such a violation would not be justified under section 1 of the Charter.

statutes and regulations judicially
considered

An Act further to amend The Indian Act, S.C. 1894, c. 32, s. 11.
An Act to amend The Indian Act, S.C. 1906, c. 20, s. 1.
An Act to amend the Indian Act, S.C. 1918, c. 26, s. 4.

An Act to amend the Indian Act, S.C. 1919, c. 56, s. 2.
An Act to amend the Indian Act, S.C. 1956, c. 40, s. 15.
Canada Pension Plan Investment Board Act, S.C. 1997, c. 40, s. 5 (as am. by S.C. 2003, c. 5, s. 13).
Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], ss. 1, 15.
Civil Code of Québec, S.Q. 1991, c. 64, Art. 1278, 1339, 1343.
Constitution Act, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 35.
Federal Court Act, R.S.C., 1985, c. F-7, s. 39 (as am. by S.C. 1990, c. 8, s. 10).
Federal Courts Rules, SOR/98-106, rr. 1 (as am. by SOR/2004-283, s. 2), 403.
Financial Administration Act, R.S.C., 1985, c. F-11, s. 2 "public money" [as am. by S.C. 1999, c. 31, s. 98(F)], 17, 18 (as am. by S.C. 1995, c. 17, s. 58; rep. by 1999, c. 26, s. 20), 21, 26, 27-41, 46 (as am. *idem*).
Indian Act, R.S.C. 1906, c. 81, s. 90.
Indian Act, R.S.C. 1927, c. 98, ss. 92, 93.
Indian Act, R.S.C. 1970, c. I-6, s. 64.
Indian Act, R.S.C., 1985, c. I-5, ss. 2(1) "band", "Indian moneys", "reserve" (as am. by R.S.C., 1985 (4th Supp.), c. 17, s. 1), "surrendered lands", 18(1), 37 (as am. *idem*, s. 2), 38 (as am. *idem*), 39(1) (as am. *idem*, s. 3), 53(1) (as am. *idem*, s. 5), 61, 62, 63, 64 (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 10), 64.1 (as enacted idem), 65, 66 (as am. *idem*, s. 12; S.C. 1996, c. 23, s. 187), 67, 68 (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 13; S.C. 2002, c. 12, s. 152), 69.
Indian Act (The), R.S.C. 1886, c. 43, s. 139 (as enacted by S.C. 1894, c. 32, s. 11).
Indian Act (The), S.C. 1951, c. 29, s. 64 (as am. by S.C. 1956, c. 40, s. 15).
Indian Act, 1876 *(The)*, S.C. 1876, c. 18, ss. 58, 59, 60.
Indian Act, 1880 *(The)*, S.C. 1880, c. 28, s. 70.
Indian Oil and Gas Act, R.S.C., 1985, c. I-7, s. 4.
Indian Oil and Gas Act, S.C. 1974-75-76, c. 15.
Interpretation Act, R.S.C. 1927, c. 1, s. 21(1).
Judicature Act, R.S.A. 1980, c. J-1, s. 14.
Limitation of Actions Act, R.S.A. 1980, c. L-15, ss. 40, 41.
Order in Council P.C. 1969-1934.
Order in Council P.C. 1981-3/255.
Public Sector Pension Investment Board Act, S.C. 1999, c. 34, s. 4 (as am. by S.C. 2005, c. 10, s. 34).
Royal Proclamation, 1763 (The), R.S.C., 1985, Appendix II, No. 1.
Treaty No. 6 (1876).
Trustee Act, C.C.S.M. c. T160, s. 68.
Trustee Act, R.S.A. 2000, c. T-8, ss. 3 (as am. by S.A. 2001, c. 28, s. 2), 4(1) (as am. *idem*).
Trustee Act, R.S.B.C. 1996, c. 464, s. 15.1 (as enacted by S.B.C. 2002, c. 33, s. 23).
Trustees Act, R.S.N.B. 1973, c. T-15, s. 2.
Trustee Act, R.S.N.L. 1990, c. T-10, s. 3 (as am. by S.N.L. 2000, c. 28, s. 1).
Trustee Act, R.S.N.S. 1989, c. 479, s. 3 (as am. by S.N.S. 2002, c. 10, s. 45).
Trustee Act, R.S.N.W.T. 1988, c. T-8, s. 2.
Trustee Act, R.S.O. 1990, c. T.23, s. 27 (as am. by S.O. 1998, c. 18, Sch. B, s. 16; 2001, c. 9, Sch. B, s. 13).
Trustee Act, R.S.P.E.I. 1988, c. T-8, s. 2 (as am. by S.P.E.I. 1997, c. 51, s. 1).
Trustee Act, R.S.S. 1978, c. T-23, s. 3 (as am. by S.S. 1998, c. 40, s. 3).
Trustee Act, R.S.Y. 2002, c. 223, s. 2.

cases judicially considered

applied:

Mitchell v. M.N.R., [2001] 1 S.C.R. 911; (2001), 199 D.L.R. (4th) 385; [2001] 3 C.N.L.R. 122; 83 C.R.R. (2d) 1; [2002] 3 C.T.C. 359; 269 N.R. 207; 5 T.T.R. (2d) 567; 2001 SCC 33; *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601; (2005), 259 D.L.R. (4th) 193; [2005] 5 C.T.C. 215; 2005 D.T.C. 5523; 340 N.R. 1; 2005 SCC 54; *Fales et al. v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302; (1976), 70 D.L.R. (3d) 257; [1976] 6 W.W.R.

10; 11 N.R. 48; *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629; (2004), 237 D.L.R. (4th) 385; 43 B.L.R. (3d) 163; 9 E.T.R. (3d) 163; 186 O.A.C. 128; 319 N.R. 38; 2004 SCC 25.

considered:

Samson Indian Nation and Band v. Canada, [2005] 2 C.N.L.R. 358; 2005 FC 136; *Guerin et al. v. The Queen et al.*, [1984] 2 S.C.R. 335; (1984), 13 D.L.R. (4th) 321; [1984] 6 W.W.R. 481; 59 B.C.L.R. 301; [1985] 1 C.N.L.R. 120; 20 E.T.R. 6; 55 N.R. 161; 36 R.P.R. 1; *Nechako Lakes School District No. 91 v. Patrick* (2002), 97 B.C.L.R. (3d) 364; [2002] 3 C.N.L.R. 116; 2002 BCSC 19; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [2001] 4 F.C. 451; (2001), 201 D.L.R. (4th) 35; [2001] 3 C.N.L.R. 72; 6 C.P.C. (5th) 1; 274 N.R. 304; 2001 FCA 67; *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235; (2002), 211 D.L.R. (4th) 577; [2002] 7 W.W.R. 1; 219 Sask. R. 1; 10 C.C.L.T. (3d) 157; 30 M.P.L.R. (3d) 1; 286 N.R. 1; 2002 SCC 33; *Baker Petrolite Corp. v. Canwell Enviro-Industries Ltd.*, [2003] 1 F.C. 49; (2002), 211 D.L.R. (4th) 696; 17 C.P.R. (4th) 478; 288 N.R. 201; 2002 FCA 158; *Authorson (Litigation guardian of) v. Canada (Attorney General)* (2002), 215 D.L.R. (4th) 496; 35 C.P.C. (5th) 203; 160 O.A.C. 136 (Ont. C.A.); revd on other grounds *Authorson v. Canada (Attorney General)*, [2003] 2 S.C.R. 40; (2003), 227 D.L.R. (4th) 385; 4 Admin. L.R. (4th) 167; 36 C.C.P.B. 29; 109 C.R.R. (2d) 220; 306 N.R. 335; 175 O.A.C. 363; 2003 SCC 39; *Wells v. Newfoundland*, [1999] 3 S.C.R. 199; (1999), 180 Nfld & P.E.I.R. 269; 177 D.L.R. (4th) 73; 15 Admin. L.R. (3d) 274; 46 C.C.E.L. (2d) 165; 99 CLLC 210-047; 245 N.R. 275; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; (1995), 130 D.L.R. (4th) 193; [1996] 2 C.N.L.R. 25; 190 N.R. 89; *Samson Indian Nation and Band v. Canada*, [2005] 2 C.N.L.R. 358; 2005 FC 136; *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245; (2002), 220 D.L.R. (4th) 1; [2003] 1 C.N.L.R. 341; 297 N.R. 1; 2002 SCC 79; *Cowan and others v Scargill and others*, [1984] 2 All E.R. 750 (Ch.); *Cheyenne-Arapaho Tribes of Indians v. United States*, 512 F.2d 1390 (Ct. Cl. 1975); *Carley Estate (Re)* (1994), 2 E.T.R. (2d) 142 (Ont. Gen. Div.); *Miller Estate (Re)* (1987), 26 E.T.R. 188 (Ont. Surr. Ct.); *Semiahmoo Indian Band v. Canada*, [1998] 1 F.C. 3; (1997), 148 D.L.R. (4th) 523; [1998] 1 C.N.L.R. 250; 215 N.R. 241 (C.A.); *Fairford First Nation v. Canada (Attorney General)*, [1999] 2 F.C. 48; [1999] 2 C.N.L.R. 60; (1998), 156 F.T.R. 1 (T.D.); *Authorson (Litigation guardian of) v. Canada (Attorney General)* (2004), 249 D.L.R. (4th) 214; 44 C.C.P.B. 11; [2004] O.T.C. 1154 (Ont. S.C.J.); *R. v. Zundel*, [1992] 2 S.C.R. 731; (1992), 95 D.L.R. (4th) 202; 75 C.C.C. (3d) 449; 16 C.R. (4th) 1; 140 N.R. 1; 56 O.A.C. 161; *R. v. Sharpe*, [2001] 1 S.C.R. 45; (2001), 194 D.L.R. (4th) 1; [2001] 6 W.W.R. 1; (2001), 88 B.C.L.R. (3d) 1; 146 B.C.A.C. 161; 150 C.C.C. (3d) 321; 39 C.R. (5th) 72; 86 C.R.R. (2d) 1; 2001 SCC 2; *Ardoch Algonquin First Nation v. Canada (Attorney General)*, [2004] 2 F.C.R. 108; [2004] 2 C.N.L.R. 118; (2003), 315 N.R. 76; 2003 FCA 473; *Métis National Council of Women v. Canada (Attorney General)*, [2005] 4 F.C.R. 272; [2005] 2 C.N.L.R. 192; (2005), 265 F.T.R. 162; 2005 FC 230; affd [2006] 2 C.N.L.R. 99; (2006), 139 C.R.R. (2d) 307; 2006 FCA 77; *Lovelace v. Ontario*, [2000] 1 S.C.R. 950; (2000), 188 D.L.R. (4th) 193; [2000] 4 C.N.L.R. 145; 75 C.R.R. (2d) 189; 255 N.R. 1; 134 O.A.C. 201; 2000 SCC 37; *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; (1999), 170 D.L.R. (4th) 1; 43 C.C.E.L. (2d) 49; 236 N.R. 1; *The Queen v. Oakes*, [1986] 1 S.C.R. 103; (1986), 26 D.L.R. (4th) 200; 24 C.C.C. (3d) 321; 50 C.R. (3d) 1; 19 C.R.R. 308; 65 N.R. 87; 14 O.A.C. 335; *Kruger v. The Queen*, [1986] 1 F.C. 3; (1985), 17 D.L.R. (4th) 591; [1985] 3 C.N.L.R. 15; 32 L.C.R. 65; 58 N.R. 241 (C.A.); *Nilsson Livestock Ltd. v. MacDonald* (1993), 140 A.R. 214; 11 Alta. L.R. (3d) 155; 19 C.P.C. (3d) 66 (Q.B.); *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; (1992), 96 D.L.R. (4th) 289; 14 C.C.L.T. (2d) 1; 142 N.R. 321; 57 O.A.C. 321; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; (1986), 75 N.S.R. (2d) 109; 31 D.L.R. (4th) 481; 186 A.P.R. 109; 34 B.L.R. 187; 37 C.C.L.T. 117; 42 R.P.C. 161; *Luscar Ltd. v. Pembina Resources Ltd.* (1994), 162 A.R. 35; [1995] 2 W.W.R. 153; 24 Alta. L.R. (3d) 305 (C.A.); *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534; (1991), 85 D.L.R. (4th) 129; [1992] 1 W.W.R. 245; 6 B.C.A.C. 1; 61 B.C.L.R. (2d) 1; 9 C.C.L.T. (2d) 1; 39 C.P.R. (3d) 449; 43 E.T.R. 201; 131 N.R. 321.

referred to:

R. v. Van der Peet, [1996] 2 S.C.R. 507; (1996), 137 D.L.R. (4th) 289; [1996] 9 W.W.R. 1; 23 B.C.L.R. (3d) 1; 80 B.C.A.C. 81; 109 C.C.C. (3d) 1; [1996] 4 C.N.L.R. 177; 50 C.R. (4th) 1; 200 N.R. 1; 130 W.A.C. 81; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; (1997), 153 D.L.R. (4th) 193; 99 B.C.A.C. 161; 220 N.R. 161; 162 W.A.C. 161; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; (1995), 129 D.L.R. (4th) 609; [1996] 2 W.W.R. 77; 14 B.C.L.R. (3d) 1; 26 B.L.R. (2d) 169; 27 C.C.L.T. (2d) 1; 190 N.R. 241; *Nestle v. National Westminster Bank Plc*, [1992] EWCA Civ 12 (C.A.); *Long Plain First Nation Trust (Trustee of) v. Long Plain Indian Band* (2002), 162

Man. R. (2d) 166; 43 E.T.R. (2d) 266; 2002 MBQB 48; *Peter v. Beblow*, [1993] 1 S.C.R. 980; (1993), 101 D.L.R. (4th) 621; [1993] 3 W.W.R. 337; 77 B.C.L.R. (2d) 1; 23 B.C.A.C. 81; 48 E.T.R. 1; 150 N.R. 1; 44 R.F.L. (3d) 329.

authors cited

Ambachtseer, Keith P. and Don Ezra. *Pension Fund Excellence: Creating Value for Stakeholders*. N.Y.: Wiley, 1998.

Canada. Department of Indian Affairs and Northern Development. *Project F2 Trust Fund Management: Final Report*, Vol. 1. Ottawa: DIAND, 1983.

Canada. House of Commons. Special Committee on Indian Self-Government. *Indian Self-Government in Canada: Report of the Special Committee*. Ottawa: Queen's Printer, 1983 (Chairman: Keith Penner).

Halsbury's Laws of England, 4th ed. Vol. 48, London: Butterworths, 1984.

Mowbray, J. Q.C. *et al. Lewin on Trusts*, 17th ed. London: Sweet & Maxwell, 2000.

Ontario Law Reform Commission. *Report on the Law of Trusts*. Toronto: Ministry of the Attorney General, 1984.

Restatement of the Law Third, Trusts: Prudent Investor Rule. St. Paul, Minn.: American Law Institute, 1992.

Sullivan, Ruth. *Sullivan and Driedger on the Construction of Statutes*, 4th ed. Toronto: Butterworths, 2002

Waters, Donovan W. M., Q.C., editor-in-chief, Mark Gillen and Lionel Smith, eds. *Waters' Law of Trusts in Canada*, 3rd ed. Toronto: Thomson Carswell, 2005.

APPEALS from decisions of the Federal Court (*Ermineskin Indian Band and Nations v. Canada* (2005), 269 F.T.R. 188; 2005 FC 1623; *Samson Indian Nation and Band v. Canada*, [2006] 1 C.N.L.R. 100; (2005), 269 F.T.R. 1; 2005 FC 1622) dismissing the appellants' actions brought as a result of the respondents' failure to invest capital moneys it held in trust for them. Appeals dismissed, Sexton J.A. dissenting.

appearances:

Marvin R. V. Storrow, Q.C., *Joseph C. McArthur*, *Maria A. Morellato* and *Joanne Lysyk* for appellants Chief John Ermineskin et al.

James A. O'Reilly, *Edward H. Molstad, Q.C.*, *Marco S. Poretti*, *Nathan J. Whitling* and *Peter W. Hutchins* for appellants Chief Victor Buffalo et al.

W. Clarke Hunter, *Wendy K. McCallum*, *Mary E. Comeau* and *J. Raymond Chartier* for respondents.

S. H. S. Rutwind, Q.C. and *Sandra C. M. Folkins* for intervener Attorney General of Alberta.

No one appearing for intervener Attorney General for Saskatchewan.

solicitors of record:

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The Attorney General of Alberta, Calgary, for intervener Attorney General of Alberta.

The following are the reasons for judgment rendered in English by

[1] RICHARD C.J. AND SHARLOW J.A.: These two appeals, heard together, are from judgments of the Federal Court rendered on November 30, 2005 after a very long trial of two actions that were heard together. The appeal in A-618-05 (the *Ermineskin* appeal) is from *Ermineskin Indian Band and Nations v. Canada* (2005), 269 F.T.R. 188 (F.C.). The appeal in A-629-05 (the *Samson* appeal) is from *Samson Indian Nation and Band v. Canada*, [2006] 1 C.N.L.R. 100 (F.C.).

[2] We have concluded that these appeals must be dismissed. Our reasons are set out below under the following headings: *

I. The parties

[3] The appellants in the *Ermineskin* appeal (collectively, Ermineskin) are Chief John Ermineskin and the councillors of the Ermineskin Indian Band and Nations (the Ermineskin Nation), acting on their own behalf and on behalf of all of the other members of the Ermineskin Nations. The appellants in the *Samson* appeal (collectively, Samson) are the Samson Indian Nation and Band (the Samson Nation), and Chief Victor Buffalo of the Samson Nation, acting on his own behalf and on behalf of all of the other members of the Samson Nation.

[4] The Ermineskin Nation and the Samson Nation are "band[s]" within the meaning of the *Indian Act*, R.S.C., 1985, c. I-5 [subsection 2(1)]. They are also "bands" that are entitled to the benefit of Treaty No. 6, entered into in 1876 between the Crown and the Plain and Wood Cree and other Indians then living in the area covered by Treaty No. 6.

[5] The respondents are the Crown in right of Canada, the Minister of Indian Affairs and Northern Development, and the Minister of Finance. For ease of reference, we use the expression "the Crown" to refer to the respondents. The Minister of Indian Affairs and Northern Development, who is responsible for the administration of the *Indian Act*, will be referred to as the "Minister".

II. Preliminary matters

(a) The severance of the actions into phases

[6] Both actions involve a large number of claims, and both have been divided into phases. In the trials that led to the judgments under appeal, evidence was adduced in respect of only the first two phases, referred to as the "general and historical phase" and the "money management phase".

[7] The evidence presented as part of the general and historical phase apparently was intended to provide historical and other background evidence relating to the specific claims in all phases of the actions, including the money management phase. Evidence adduced in relation to the first two phases of the action will be treated as part of the record of the trial in the remaining phases to the extent it is relevant.

[8] The claims made in relation to the money management phase are based on allegations that the Crown has breached one or more of its legal obligations in respect of certain funds held in trust for Ermineskin and Samson.

[9] The trust funds are comprised mainly of accumulated royalties derived from the exploitation of oil and gas resources found beneath the surface of the Samson Reserve (which belongs to the Samson Nation), and the Pigeon Lake Reserve (which is shared by the members of four bands, often referred to as the "Four Bands": the Ermineskin Nation, the Samson Nation, and two other bands that are not parties to these appeals). The Ermineskin Nation also has its own reserve (the Ermineskin Reserve), but that reserve has not yet produced any royalties. The events that led to the Crown's receipt of the royalties are described later in these reasons.

* Editor's Note: The Table of Contents has been omitted for reasons of brevity.

(b) Scope of the judgments under appeal

[10] The judgments under appeal state that the actions are dismissed. All parties agree that those judgments must be understood as dismissing only the claims of Ermineskin and Samson in relation to the money management phase, except the claims of Samson that became moot as the result of the transfer of the Samson trust funds pursuant to a series of orders made by the Judge in 2005 (described below).

[11] The claims in the remaining phases of the actions have yet to be heard. All parties agree, as they must, that the judgments under appeal do not dispose of any claims that have not been heard.

(c) Grounds of appeal relating to evidentiary rulings

[12] In the course of the trial, numerous objections were made in relation to the admissibility of evidence, and the Judge made rulings on those objections. Samson and Ermineskin raised several grounds of appeal in relation to evidentiary rulings against them. The Crown responded to those arguments, and also made a number of arguments of its own relating to evidentiary rulings against the Crown. As a result, each memorandum of fact and law contains a detailed review of the many alleged errors of the Judge in relation to those evidentiary rulings, and significant time was spent on oral argument on those issues. However, on the view we have taken of the substantive issues in this case, we have not considered it necessary to express an opinion on the evidentiary issues.

(d) Transfer of Samson trust funds to the control of the Samson Nation

[13] One of the remedies requested in the Samson pleadings at trial is an order requiring the Crown to transfer all of Samson's capital moneys to the control of the Samson Nation. During the submissions at the close of the trial, the Crown indicated its willingness to make such a transfer, subject to certain conditions. According-ly, the Judge made an order on January 27, 2005 setting out the steps to be taken to effect the transfer, and the conditions to be met before the transfer could occur (see *Samson Indian Nation and Band v. Canada*, [2005] 2 C.N.L.R. 358 (F.C.)).

[14] The conditions were that: (1) the Samson Nation execute a trust agreement with certain provisions, subject to the approval of the Court; (2) the Crown be released from any future liability in relation to the Samson capital money; (3) the approval of Samson be obtained by means of a referendum meeting certain conditions; (4) the Council of the Samson Nation submit to the Minister a band council resolution containing certain information; and (5) any capital money received by the Crown for Samson in future was to be transferred to Samson on terms to be agreed between Samson and the Crown, or failing that, as determined by the Court. In the same order, the Judge declared that the transfer would be for the benefit of the Samson Nation, and that it was authorized by paragraph 64(1)(*k*) [as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 10] of the *Indian Act*.

[15] Paragraph 64(1)(*k*) of the *Indian Act* is discussed later in these reasons. At this point it is convenient to mention parenthetically a minor legal argument about its scope. Section 64 of the *Indian Act* sets out the conditions that must be met for the "expenditure" of the capital moneys of a band. Paragraphs 64(1)(*a*) to (*k*) list the permitted expenditures. Paragraph 64(1)(*k*), the most general item of that list, includes as a condition that the Minister be of the opinion that the expenditure is for the benefit of the band. There was some debate in these appeals as to whether the word "expenditure" is broad enough to cover the transfer of capital moneys to a trust fund as contemplated by the January 27, 2005 order referred to above, or the use of the capital moneys to purchase an income-earning investment. In our view, it is. The word "expenditure" connotes "spending," and is broad enough to include any use of money to acquire something. Thus, a transfer of the capital moneys of a band to a trustee or trustees for the purpose of acquiring income-earning investments for the band is an "expenditure" within the meaning of section 64. Such a transaction is permitted by paragraph 64(1)(*k*), if the statutory conditions are met.

[16] On October 17, 2005, the Judge made an order approving the terms of a trust deed dated July 21, 2005 (the Kisoniyaminaw Heritage Trust Deed) under which it was proposed to transfer the Samson capital moneys to a trust fund (the Kisoniyaminaw Heritage Trust Fund), and the holding of a referendum to approve the transfer. On October 31, 2005, the Judge made (a) an order approving an amendment to the Kisoniyaminaw Heritage Trust Deed, (b) an order approving the terms of Samson's release of the Crown, to take effect upon the transfer of the moneys, and (c) an order confirming the appointment of trustees for the Kisoniyaminaw Heritage Trust Fund and the referendum

regulations and procedure.

[17] On December 22, 2005, the Judge declared that the conditions for the transfer of Samson's capital money to the Kisoniyaminaw Heritage Trust Fund had been met, and he approved the transfer, subject to a small holdback and other relatively minor conditions. The transfer was implemented on February 1, 2006.

[18] It was one of the claims of Samson at trial that it has an Aboriginal right to manage its own moneys. Counsel for Samson properly conceded that this claim was rendered moot by the transfer of Samson's capital moneys to the Kisoniyaminaw Heritage Trust Fund. The remaining claims of Samson in the money management phase deal only with the acts and omissions of the Crown during the period ending on February 1, 2006.

[19] No appeal was taken from any of the orders of the Judge relating to the establishment of the Kisoniyaminaw Heritage Trust Fund and the transfer of Samson's capital moneys to that trust fund.

[20] Ermineskin did not seek an order requiring the transfer of its capital moneys to its control or to a trust fund, and has not claimed that it has an Aboriginal right to manage its capital moneys. Ermineskin was aware of the orders and transactions involving the Kisoniyaminaw Heritage Trust Fund, but as of the date of the hearing of these appeals, Ermineskin had not chosen to undertake a similar arrangement.

III. Reasonable apprehension of bias

[21] Samson alleges a reasonable apprehension of bias on the part of the Judge. Ermineskin makes no such allegation.

[22] The arguments of Samson on the issue of reasonable apprehension of bias are addressed in detail in the memoranda of fact and law submitted by Samson and by the Crown. By way of summary, Samson alleges that the Judge engaged in improper cross-examination of the Samson witnesses, interfered improperly with the cross-examinations conducted by counsel for Samson, made statements indicating that he had prejudged whether certain treaty issues were justiciable, improperly exhorted the parties to settle certain issues raised in the money management phase, prejudged the credibility of Samson witnesses, permitted the Crown to submit late expert reports without regard to the possible prejudice caused to Samson, arbitrarily adjourned the trial at one point, improperly admonished counsel for Samson, awarded costs against Samson on a motion without hearing from counsel for Samson, decided issues against Samson for which Samson did not seek relief and failed to decide issues for which Samson sought relief, found a large number of Samson's witnesses not to be credible, and failed to criticize or reject the evidence of certain expert witnesses for the Crown.

[23] At the hearing of the appeal, counsel for Samson addressed each of these grounds, with extensive references to the transcript and other relevant documents. We concluded that Samson had not made out an arguable case for the existence of a reasonable apprehension of bias. We did not require counsel for the Crown to make oral submissions on this point.

[24] Many of the factual allegations made by Samson in support of the argument that there was a reasonable apprehension of bias also relate to other grounds of appeal raised by Samson. The rejection of Samson's argument that there was a reasonable apprehension of bias did not preclude Samson from referring to those factual allegations in the context of those other grounds of appeal.

IV. General and Historical Phase

(a) Introduction

[25] Before dealing with the issues in the money management phase, it is convenient to dispose of a number of issues arising from the argument of Samson and Ermineskin that the Judge erred in law in determining a number of issues that are not relevant to the claims made in the money management phase. Those determinations relate primarily to the claim, asserted by Samson only, that the "cede, release and surrender" clause in Treaty No. 6 does not mean to the Cree people what it means to the Crown.

[26] Ermineskin and Samson were and are part of the Plains Cree, and are parties to Treaty No. 6 which was signed in 1876. The geographical area covered by Treaty No. 6 includes much of what is now Alberta and Saskatchewan, including the area that is the source of the royalties referred to above. The portions of Treaty No. 6 that are relevant specifically to the money management phase are discussed later in these reasons.

[27] The "cede, release and surrender" clause of Treaty No. 6 reads as follows:

The Plain and Wood Cree Tribes of Indians, and all [the other] Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges, whatsoever, to the lands included within the following limits . . . .

(b) Evidence in the General and Historical Phase

[28] In support of what Samson claims to be the Cree understanding of the "cede, release and surrender" clause in Treaty No. 6, Samson adduced a large body of oral history evidence of many Cree elders and other Cree people, and also a large body of expert evidence, including a report by Professor H. C. Wolfart.

[29] The report of Professor Wolfart contains a lengthy analysis of many aspects of the Cree language, including an analysis of a Cree language text containing what is said to be the story of the making of Treaty No. 6. The Cree text, with an English translation, is found in an appendix to Professor Wolfart's report.

[30] The English translation of the Cree text seems to suggest that the Cree leaders understood that the Crown was "buying" the Cree homeland for a perpetual stream of payments, but only the surface of the land. According to the English translation, the Crown representatives told the Cree: "No, I do not buy from you what is deep beneath this land, only one foot deep whence the White-Man makes his living, that is what I buy from you. Indeed, from here on, any monies drawn from beneath the ground, let people understand that this is one benefit which the Crees will continue to be paid from their homeland." Some of the oral history evidence supports that view of Treaty No. 6.

[31] The Crown objected to the admission of all evidence on this point. The Judge admitted the evidence and reserved his decision on the objection. In the end, it was admitted.

[32] The Supreme Court of Canada has given substantial guidance and direction concerning the admissibility and weight of oral history evidence in Aboriginal rights claims. The relevant issues are discussed most recently in *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, *per* Chief Justice McLachlin, building on the teaching of *R. v. Van der Peet*, [1996] 2 S.C.R. 507 and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. All of these cases are referred to in the Judge's reasons in *Samson*, at paragraphs 38 to 43.

[33] In our view, the Judge demonstrated in his reasons that he was aware of the principles stated in *Mitchell*, at paragraphs 29 to 39, which we summarize as follows. In determining a claim to an Aboriginal right or title, rules of evidence must be applied flexibly, in a manner commensurate with the inherent difficulties posed by such claims and the promise of reconciliation embodied in subsection 35(1) of the *Constitution Act, 1982* [Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]]. Evidentiary principles must be sensitively applied to Aboriginal claims but they cannot be strained beyond reason. Oral history is admissible if it is both useful and reasonably reliable, subject always to the exclusionary discretion of the trial judge. Oral history evidence may meet the test of usefulness if it offers evidence of ancestral practices and their significance that would not otherwise be available, given the absence of contemporaneous written records, or if it provides the Aboriginal perspective on the right claimed. In considering the reliability of oral evidence, a trial Judge may inquire as to the witness' ability to know and to testify as to Aboriginal traditions and history that have been orally transmitted. Such inquiries may be appropriate on the question of the admissibility of the evidence, and the weight to be assigned to the evidence if admitted.

(c) The relevance of the oral history evidence

[34] Samson asserted what it claims to be the Cree understanding of Treaty No. 6 to support one of the legal

theories underlying its claims, which is that the Plains Cree (including Samson) have and have always had Aboriginal title to the oil and gas resources underlying the land to which Treaty No. 6 relates. That would include the land that later came to comprise the Pigeon Lake Reserve and the Samson Reserve. It is implicit in the position of Samson that the Cree Aboriginal title to those resources was not surrendered under Treaty No. 6.

[35] If the argument of Samson on this point is valid, then it is also arguable that Samson's Aboriginal title to the oil and gas resources survived the subsequent creation of the Pigeon Lake Reserve and the Samson Reserve, and perhaps subsists to this day except to the extent it has been validly extinguished. It is also arguable, based on Samson's theory, that its Aboriginal title to the oil and gas resources underlying the Pigeon Lake and Samson reserves obtained the status of a constitutional right upon the coming into force of section 35 of the *Constitution Act, 1982*.

[36] Another potential consequence of the Samson theory is that the Samson and other Cree people could assert Aboriginal title to all of the oil and gas reserves within the area covered by Treaty No. 6 that comprises any part of the historic Cree homeland, subject to any valid extinguishment of that Aboriginal title. That potential consequence (sometimes referred to as the "off-reserve surrender question") prompted the Government of Alberta and the Government of Saskatchewan to intervene in this case in support of the position of the Crown.

[37] It was because of the claim of Aboriginal title that the Judge admitted, over the Crown's objection, the oral history evidence and the expert evidence relating to the meaning of the "cede, release and surrender" clause in Treaty No. 6. As a claim of Aboriginal title may require certain evidence relating to pre-contact history, territory and practices, evidence on those points was also permitted.

(d) Judge's determinations relating to evidence in the general and historical phase

[38] In Samson's closing argument at trial, counsel for Samson conceded that the meaning of the "cede, release and surrender" clause of Treaty No. 6 (and by extension, the evidence relating to pre-contact history, territory and practices) was not relevant to Samson's claims in the money management phase. For that reason, Samson argued that the Judge should not reach any conclusions in the Samson action with respect to the evidence adduced on that point.

[39] In Ermineskin's closing argument at trial, counsel for Ermineskin argued that, for two reasons, the Judge should not reach any conclusions in the *Ermineskin* action with respect to the meaning of the "cede, release and surrender" clause of Treaty No. 6. First, Ermineskin's pleadings do not put the meaning of that clause in issue. Second, although Ermineskin adopted minor portions of the evidence adduced by Samson on that point, none of that evidence is relevant to the claims of Ermineskin in the money management phase.

[40] In the Crown's closing argument at trial, counsel for the Crown agreed that this evidence was not relevant to any of the claims of Samson or Ermineskin in the money management phase, but he argued that the Judge should nevertheless make provisional findings on these points because the evidence might be relevant in a subsequent phase, and the Judge who heard the evidence was in the best position to assess it.

[41] The Judge indicated that he would make findings on these points, and he did so. His summary of the evidence and his analysis is lengthy, and results in a number of conclusions. All of his conclusions appear in his reasons in the *Samson* case, and some appear also in his reasons in the *Ermineskin* case. We summarize as follows the most important conclusions reached by the Judge:

1. In assessing the oral history evidence, the approach advocated by Dr. von Gernet (an expert witness for the Crown) is preferable to the approach advocated by Dr. Wheeler (an expert witness for Samson) (Judge's reasons in *Samson*, at paragraph 453).

2. The oral history evidence of the Samson elders should be discounted because the story probably was not transmitted to them as they recalled it, and alternatively because it is implausible that the Crown representatives who negotiated Treaty No. 6 would have agreed to accept a surrender of the land only to a certain depth (Judge's reasons in *Samson*, at paragraphs 458 to 494).

3. The evidence represented by the Cree language text attached to the expert report of Professor Wolfart bears little weight because there is little evidence as to the provenance of the story it contains (Judge's reasons in *Samson*, at paragraph 495).

4. The evidence of Professor Wolfart that the Cree leaders who signed Treaty No. 6 could not have understood the "cede, surrender and release" clause bears little weight because his evidence does not explain how he reached that conclusion (Judge's reasons in *Samson*, at paragraph 503, and in *Ermineskin*, at paragraph 195).

5. The contemporaneous accounts of the signing of Treaty No. 6 that were written by Alexander Morris, A. G. Jackes, Peter Erasmus and John McDougall are reliable (Judge's reasons in *Samson*, at paragraphs 504 to 508, and in *Ermineskin*, at paragraphs 196 to 200).

6. The Cree leaders were aware that, for the Crown, the purpose of Treaty No. 6 was to secure the surrender of Aboriginal title to a vast tract of land so as to open it up for settlement and development, and that the land surrender clause was absolutely non-negotiable, unlike certain other clauses such as those relating to money, agricultural implements and livestock (Judge's reasons in *Samson*, at paragraph 509, and in *Ermineskin*, at paragraph 201).

7. Alexander Morris, who represented the Crown at the negotiation of Treaty No. 6, assured the Cree that they could continue to hunt and fish as before except on land taken up for settlement, that reserves would be set aside for the Cree, that no one could take their homes from them, that if they wanted to sell all or part of their reserves, this could be done only by the Crown with their consent, and that the proceeds would be kept by the Crown and "put away to increase" (Judge's reasons in *Samson*, at paragraph 510, and in *Ermineskin*, at paragraph 202).

8. The evidence does not justify interpreting the "cede, release and surrender" clause as being limited to the land only to a certain depth (Judge's reasons in *Samson*, at paragraph 512).

9. It is likely that the theory relating to such a limitation has emerged within the past few decades as a motif within the Cree oral traditions, and may represent a present day reconstruction of what current generations wished had happened, or thought should have happened, in 1876 (Judge's reasons in *Samson*, at paragraph 513).

10. The "cede, release and surrender" clause in Treaty No. 6 was explained to the Cree leaders in 1876, and they understood that clause when they signed Treaty No. 6 (Judge's reasons in *Samson*, at paragraph 532).

11. For the purposes of the test in *R. v. Van der Peet*, cited above, the date of contact between the Cree and the European settlers is 1670 (Judge's reasons in *Samson*, at paragraph 550).

12. Before European contact, the Cree people occupied what is now Manitoba and Saskatchewan, but they are not indigenous to central Alberta and were not present there until sometime after European contact (Judge's reasons in *Samson*, at paragraph 576).

13. The evidence does not establish pre-contact trade by the Cree in any particular item. Specifically, there is no evidence of any trade by the Cree in minerals, including salt, oil, gas, or anything analogous (Judge's reasons in *Samson*, at paragraph 588).

[42] The arguments of the parties in these appeals are similar to their closing arguments at trial. Ermineskin argues that the Judge erred in law in considering and determining the meaning of the "cede, release and surrender clause" in Treaty No. 6 in relation to the Ermineskin action, because that issue was not raised in the Ermineskin pleadings. Ermineskin emphasizes the importance of these issues, and also emphasizes the unfairness of an adverse finding that, for practical purposes, might be considered binding on Ermineskin although it was not an issue raised in the pleadings in its case.

[43] Samson argues that the Judge erred in law in the *Samson* case in stating the conclusions summarized above because, although they relate to issues raised in the pleadings in the Samson case, they are not relevant to any of the claims made by Samson in the money management phase. Samson also argues that in any event the conclusions are incorrect because of a number of errors of law and in the assessment of the credibility and reliability of significant

portions of the evidence.

[44] The Crown argues that although it is true that these conclusions are not relevant to any of the claims made by Ermineskin or Samson in the money management phase, the Judge made no error in reaching or stating these conclusions because they may be relevant in future phases and because, as the Judge heard all of the evidence, he is in the best position to assess it. The interveners generally support the position of the Crown, and emphasize that the findings are potentially of critical importance to Alberta and Saskatchewan.

(e) Discussion

[45] We have considerable sympathy for the difficult position in which the Judge found himself at the close of the trial. Early in the trial he had acceded to Samson's request to hear an enormous body of controversial evidence, the admissibility of which was the subject of lengthy and intense debate. According to the Samson memorandum of fact and law, the evidence relating to the general and historical phase (including the evidence relating to the meaning of the "cede, release and surrender" clause) took 174 hearing days out of a total of 370 hearing days (of which 19 days consisted of oral submissions at the conclusion of the trial).

[46] And yet, at the conclusion of the trial, the Judge was faced with arguments that were the opposite of the arguments made at the outset. Counsel for Samson had been responsible for the evidence being presented, but he argued that it should be disregarded because it was irrelevant. Counsel for the Crown maintained his argument that the evidence was irrelevant to the money management phase but, despite his earlier objection to the evidence being admitted, urged the Judge nevertheless to assess the evidence and reach conclusions about it.

[47] Given those circumstances, and the amount of time and resources invested in the general and historical phase evidence, it is not difficult to understand why the Judge considered himself obliged to undertake the difficult task of assessing that evidence.

[48] Nevertheless, all parties agreed at the close of the trial, and still agree, that the conclusions summarized above are not relevant to any of the claims made in the money management phase. We agree also. For that reason we express no opinion as to whether those conclusions are correct. As a matter of legal analysis, they are *obiter dicta*. It follows that the "off-reserve surrender question" remains unresolved.

[49] It appears to be common ground that some or all of the evidence presented during the general and historical phase, including the evidence relating to the meaning of the "cede, release and surrender" clause of Treaty No. 6, may be relevant to one or more of the claims of the subsequent phases of the Samson and Ermineskin actions (although we did not obtain from counsel a clear picture of exactly how it might be relevant).

[50] However, none of the conclusions summarized above are binding on any judge who hears the subsequent phases. If, during the trial of the subsequent phases, a party wishes to refer to any of the evidence from the general and historical phase, the relevance of that evidence to those phases will have to be determined anew, and fresh consideration will have to be given to its credibility, reliability and weight.

V. The facts relevant to the money management phase

(a) Preliminary point

[51] This section contains a factual summary. It includes references to statutes and legal principles, and also descriptions of the position taken by the Crown on certain legal issues, where those references are necessary to appreciate the factual context of these appeals. That is because the acts and omissions of the Crown of which Samson and Ermineskin complain were premised on the Crown's belief that it was acting throughout in a manner that was mandated by law. In reviewing these facts, it must be borne in mind that Samson and Ermineskin take issue with many of the Crown's legal conclusions. Nothing in this factual summary is intended to be read as an expression of the opinion of this Court on any of the disputed legal issues. Our analysis of the legal debate is set out later in these reasons.

(b) Treaty No. 6

[52] In 1889, the Samson Reserve was established pursuant to Treaty No. 6 for the Samson Nation. In 1896, the Pigeon Lake Reserve was established pursuant to Treaty No. 6 for the Four Bands (including, as stated above, the Samson Nation, the Ermineskin Nation, and two other bands).

[53] The portion of Treaty No. 6 that is most relevant to the claims in the money management phase reads as follows (our emphasis):

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, provided all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them;

Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any Band as She shall deem fit, and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained; and with a view to show the satisfaction of Her Majesty with the behavior and good conduct of Her Indians, She hereby, through Her Commissioners, makes them a present of twelve dollars for each man, woman and child belonging to the Bands here represented, in extinguishment of all claims heretofore preferred.

(c) The *Indian Act*—provisions relating to reserves

[54] The *Indian Act* contains a number of provisions relating to reserves which, in relation to the Pigeon Lake Reserve and the Samson Reserve, must be understood to be subject to the provisions of Treaty No. 6. The following provisions of the *Indian Act* relating to reserves appear to be generally relevant to the claims in the money management phase [ss. 2(1) "reserve" (as am. by R.S.C., 1985 (4th Supp.), c. 17, s. 1), 37 (as am. *idem*, s. 2), 38 (as am. *idem*), 39(1) (as am. *idem*, s. 3), 53(1) (as am. *idem*, s. 5)]:

2. (1) In this Act,

. . .

"reserve" . . . means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band . . .

. . .

"surrendered lands" means a reserve or part of a reserve or any interest therein, the legal title to which remains vested in Her Majesty, that has been released or surrendered by the band for whose use and benefit it was set apart;

. . .

18. (1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, 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 lands in a reserve are used or are to be used is for the use and benefit of the band.

. . .

37. (1) Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to

Her Majesty pursuant to subsection 38(1) by the band for whose use and benefit in common the reserve was set apart.

(2) Except where this Act otherwise provides, lands in a reserve shall not be leased nor an interest in them granted until they have been surrendered to Her Majesty pursuant to subsection 38(2) by the band for whose use and benefit in common the reserve was set apart.

38. (1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.

(2) A band may, conditionally or unconditionally, designate, by way of a surrender to Her Majesty that is not absolute, any right or interest of the band and its members in all or part of a reserve, for the purpose of its being leased or a right or interest therein being granted.

39. (1) An absolute surrender or a designation is void unless

(*a*) it is made to Her Majesty;

(*b*) it is assented to by a majority of the electors of the band

(i) at a general meeting of the band called by the council of the band,

(ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed absolute surrender or designation, or

(iii) by a referendum as provided in the regulations; and

(*c*) it is accepted by the Governor in Council.

. . .

53. (1) The Minister or a person appointed by the Minister for the purpose may, in accordance with this Act and the terms of the absolute surrender or designation, as the case may be,

(*a*) manage or sell absolutely surrendered lands; or

(*b*) manage, lease or carry out any other transaction affecting designated lands.

[55] The Crown interprets the quoted provisions of the *Indian Act*, in so far as they relate to reserves established under Treaty No. 6, as providing a statutory mechanism by which the Crown can ensure that the reserve lands are not dealt with in any manner that is not consistent with Treaty No. 6. Specifically, the Crown considers these provisions to be consistent with the Crown's promise in Treaty No. 6 that an interest in a reserve cannot be alienated except by the Crown, and then only for the benefit and with the consent of the members of the band or bands for which the reserve was established. The Crown also considers the statutory scheme to be consistent with the Crown's fiduciary obligations in relation to the Samson Reserve and the Pigeon Lake Reserve.

(d) <u>The surrender to the Crown of the oil and gas resources on the reserves</u>

[56] Evidence of oil and gas was discovered under the surface of the Samson Reserve and the Pigeon Lake Reserve. In 1946, it was deemed advantageous to find a way to permit the oil and gas resources to be exploited in a manner that would produce a financial return for the bands for which those reserves were established.

[57] Under the terms of Treaty No. 6 and the statutory scheme in the *Indian Act*, it was necessary for the oil and gas resources to be surrendered to the Crown, with the consent of the respective bands, on terms that would permit the Crown to enter into the necessary arrangements with third parties to conduct exploration, development and

extraction activities on the surrendered reserve lands.

[58] To that end, the Four Bands and Samson, respectively, executed instruments of surrender in 1946. The terms of the surrenders are identical and read in relevant part as follows:

WE, the undersigned Chief and Principal men of the [Band] . . . , for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto our Sovereign Lord the King, His Heirs and Successors forever, ALL the land deemed to contain salt, petroleum, natural gas, coal, gold, silver, copper, iron and other minerals, underlying the surface of the area within the boundaries of the [Reserve] . . . , and such timber contained within the boundaries of any mineral claim staked or leased in accordance with the Regulations, as may be necessary for the development and proper working of such mineral deposits. . . .

TO HAVE AND TO HOLD the same unto his said Majesty the King, his Heirs and Successors, forever, in trust to grant in respect of such land the right to prospect for, mine, recover and take away any or all minerals contained therein, to such person or persons, and upon such terms and conditions as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people;

and upon further conditions that money received from the permit proceeds of 10¢ per acre be paid immediately on a per capita distribution.

AND WE, the said Chief and Principal men of the said [Band] . . . do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done in connection with the management and operation of the said lands and the disposal and sale of the minerals contained therein.

[59] The Crown used a standard printed form for the surrender documents. The phrase relating to the per capita distribution of 10¢ per acre was added to the form. One portion of the standard form was crossed out. The crossed out words read as follows:

. . . and upon the further condition that all moneys received and to which we are entitled by law and pursuant to the Surrender, shall be placed to our credit and interest thereon paid to us in the usual manner.

The record discloses no explanation for the deletion of these words, but it is not suggested that the deletion of these words from the surrender form is relevant to any of the issues in these appeals.

[60] The surrenders were accepted by the Crown. Within a few years, commercial quantities of oil and gas were discovered on the Pigeon Lake Reserve and the Samson Reserve. Beginning in 1952, the Crown prepared and executed leases with oil and gas companies that would yield royalties for Samson and Ermineskin.

(e) The Crown's admission—beneficial title to the oil and gas resources on the reserves

[61] The Crown admitted during the trial of the money management phase that at all relevant times, the oil and gas resources under the Pigeon Lake Reserve and the Samson Reserve were and are beneficially owned by Samson and Ermineskin (in the case of the Pigeon Lake Reserve, to the extent of their respective shares). At the hearing of the appeals there was some debate about the timing of that admission, but at this stage the timing is not relevant.

(f) The *Indian Oil and Gas Act*

[62] The statutory scheme relating to the administration of Indian oil and gas resources includes the *Indian Oil and Gas Act*, R.S.C., 1985, c. I-7, enacted in 1974 [S.C. 1974-75-76, c. 15]. It appears to be common ground that the amount of royalties derived from the Samson and Ermineskin oil and gas resources prior to 1974 was relatively minor, and that the *Indian Oil and Gas Act* is relevant to substantially all of the accumulated royalties that are the subject of the money management phase. The part of the *Indian Oil and Gas Act* that is most relevant to claims in the money management phase reads as follows (our emphasis):

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.

(g) The management of the royalties received by the Crown

[63] During the period relevant to these appeals, the Crown dealt with the royalties derived from the Pigeon Lake Reserve and the Samson Reserve in a manner that the Crown considered to be mandated by the statutory scheme that includes section 4 of the *Indian Oil and Gas Act* (which states that the royalty payments are received by the Crown in trust for the bands), certain provisions of the *Indian Act*, and certain provisions of the *Financial Administration Act*, R.S.C., 1985, c. F-11.

[64] The Crown has always taken the position, and still takes the position, that as a matter of law the statutory scheme is consistent with Treaty No. 6, and that the Crown is obliged to adhere to that statutory scheme and cannot deal with the royalties in any manner that is not contemplated by that statutory scheme. Samson and Ermineskin do not contend that the Crown is entitled to disregard the statutory scheme but they argue that the Crown's narrow interpretation of the scheme is not correct (or alternatively, if the Crown's view of the statutory scheme is correct as a matter of statutory interpretation, the statutory scheme breaches the rights of Samson and Ermineskin, or necessarily results in a breach of their rights).

(1) *Financial Administration Act*

[65] The operation of the statutory scheme, as understood by the Crown, is based on the premise that the royalties fall within the definition of "public money" [as am. by S.C. 1999, c. 31, s. 98(F)] in section 2 of the *Financial Administration Act*. The definition reads as follows (our emphasis):

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;

[66] Because the Crown considered the royalties to be "public money", they were deposited as received by the Crown in the Consolidated Revenue Fund pursuant to subsection 17(1) of the *Financial Administration Act*, which reads as follows:

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

[67] The authority of the Crown to pay money out of the Consolidated Revenue Fund is subject to section 26 of the *Financial Administration Act*, which reads as follows:

26. Subject to the *Constitution Acts, 1867 to 1982*, no payments shall be made out of the Consolidated Revenue Fund without the authority of Parliament.

[68] Generally, the authority of Parliament to make a payment out of the Consolidated Revenue Fund must be found in the *Financial Administration Act* or another statute, or in an appropriation or a special warrant (see sections 27 to 41 of the *Financial Administration Act*).

[69] In the case of money received on behalf of a band and held in the Consolidated Revenue Fund, the requisite authority for expenditures is found in the combined operation of subsection 21(1) of the *Financial Administration Act* and sections 61 to 69 of the *Indian Act* [ss. 64.1 (as enacted by R.S.C., 1985 (1st Supp.), c. 32, s. 10), 66 (as am. *idem*), s. 12; S.C. 1996, c. 23, s. 187), 68 (as am. by R.S.C., 1985 (1st Supp.), c. 32, s. 13; S.C. 2002, c. 12, s. 152)] (those provisions are discussed in more detail in the next section of these reasons).

[70] Subsection 21(1) of the *Financial Administration Act* reads as follows:

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) Money management provisions of the *Indian Act*

[71] It is common ground that the royalties that are the subject of the claims of Samson and Ermineskin in the money management phase come within the definition of "Indian moneys" in section 2 of the *Indian Act*. That definition reads as follows:

2. (1) In this Act, . . .

"Indian moneys" means all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands;

[72] Sections 61 to 69 of the *Indian Act* deal with the management of Indian moneys. The relevant portions of sections 61 to 69 of the *Indian Act* read as follows:

61. (1) Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which Indian moneys are used or are to be used is for the use and benefit of the band.

(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.

. . .

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.

. . .

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.

[73] Subsection 61(1) states three general principles relating to the management of Indian moneys. Those principles may be summarized as follows:

1. Indian moneys are expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held.

2. 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.

3. The determination of the Governor in Council is subject to the *Indian Act* and to the terms of any treaty or surrender.

[74] One feature of the money management provisions of the *Indian Act* is that all Indian moneys are categorized as either “revenue moneys” or “capital moneys” (see section 62). The two categories of moneys are managed differently, and so they must be accounted for separately. The Crown maintains separate capital accounts and revenue accounts for Indian moneys held in the Consolidated Revenue Fund. There is a capital account and a revenue account for the Pigeon Lake Reserve, which is held for the Four Bands and periodically allocated among them according to their respective populations. There are also capital accounts and revenue accounts for each of the

Four Bands, including the Ermineskin Nation and the Samson Nation.

[75] A band may manage its own revenue moneys if an order to that effect is made by the Governor in Council under subsection 69(1). In 1964, Orders in Council were made under subsection 69(1) for the Samson Nation and the Ermineskin Nation. They have managed their own revenue moneys since that time. There is a routine procedure by which revenue moneys received by the Crown for the Samson Nation or the Ermineskin Nation is handed over to the respective band councils, subject to certain requirements such as the presentation of an appropriate budget which, among other things, permits the Crown to determine that the revenue moneys are intended to be expended in compliance with section 62 (quoted above). Neither Samson nor Ermineskin has made any claim in the money management phase in relation to their revenue moneys.

[76] Section 64 of the *Indian Act* deals with the management of capital moneys of the bands. Royalties derived from the Pigeon Lake Reserve and the Samson Reserve come within the category of capital moneys. For that reason, royalties received by the Crown in relation to those reserves are credited to the appropriate capital account. Royalties in the Pigeon Lake capital account are allocated periodically to the capital accounts of the Four Bands in accordance with their respective populations.

[77] Capital moneys remain credited to the capital accounts of the respective bands until it is expended pursuant to section 64 of the *Indian Act.* A section 64 expenditure requires the consent of the band council and, in the case of an expenditure under paragraph 64(1)(*k*), the opinion of the Minister that the expenditure is being made for a purpose that is for the benefit of the band. In the case of Samson and Ermineskin, a proposal for an expenditure of capital moneys typically is initiated by the band council, which submits a band council resolution to the Minister containing particulars of the proposal. The request is considered and, if it is approved by the Minister, the moneys are released to the band or as the band directs.

[78] There is no dispute between the parties as to the amount of royalties derived from the Pigeon Lake Reserve or the Samson Reserve. With respect to the royalties derived from the Pigeon Lake Reserve, there is no dispute about the correctness of the allocation of the royalties among the Four Bands. From 1969 to 2003, the total royalties were approximately $993 million for Samson and $505 million for Ermineskin.

(h) Statutory provisions relating to the investment of the capital moneys of Indian bands

[79] Before Confederation (1867) and for some time after Confederation, the Crown exercised direct control of the management of all Indian moneys, which were held in trust and could be invested in commercial securities and municipal debentures. Early versions of the *Indian Act* specifically gave the Governor in Council complete control over the use of what later would be categorized as the capital moneys of a band. For example, section 70 of the *The Indian Act*, 1880, S.C. 1880, c. 28, reads as follows:

70. The Governor in Council may, subject to the provisions of this Act, direct how, and in what manner, and by whom the moneys arising from sales of Indian lands, and from the property held or to be held in trust for the Indians, or from any timber on Indian lands or reserves, or from any other source for the benefit of Indians (with the exception of any small sum not exceeding ten per cent. of the proceeds of any lands, timber or property, which may be agreed at the time of the surrender to be paid to the members of the band interested therein), shall be invested from time to time. . . .

[80] In 1906, section 70 was amended to limit the investment authority of the Governor in Council, so that it could not be applied to up to 50% of the proceeds of Indian lands or 10% of the proceeds of any timber or other property "as is agreed at the time of the surrender to be paid to the members of the band interested therein" ([An Act to amend the Indian Act] S.C. 1906, c. 20, s. 1). The 10% limit applicable to the proceeds of timber was increased in 1919 to 50% ([*An Act to amend the Indian Act*] S.C. 1919, c. 56, s. 2).

[81] It appears that the investment power was not actually used after 1859, for reasons that are explained in the following submission to the Executive Council, signed by John A. Macdonald on August 25, 1859:

On the reference of the Report of the Superintendent General of Indian Affairs, and Documents connected therewith,

the Minister of Finance respectfully reports that the subject of the Management of the Indian Trust and Funds must necessarily soon be brought under the notice of the Provincial Legislature. And it may ultimately be considered advisable for the Province to assume the Fund, and to grant Annuities charged on the Consolidated Revenue, rather than to continue the present system of investment which involves a possible loss to the Trust, as has already occurred in the case of the Grand River Navigation Stock.

In dealing with the Indians of whom the Government has constituted itself the Guardian, it would appear desirable so to secure the funds as to prevent the possibility of any failure in the payment of the Annual Sums required for the Indians, as such failure would certainly be attributed to a breach of faith on the part of the Government and [could not] be explained to the satisfaction of the Tribes. By maintaining the present system of investment, it might also result that one Tribe would find its Annual interest regularly paid, while others would meet with disappointment. Should such an event arise, Parliament would probably find it necessary to make good the losses of the Trust, and it would therefore be more advisable to carry the funds at the credit of the Trust to the Consolidated Fund, and to charge the annual interest upon that Fund at such scale as might appear equitable to the Legislature.

Further receipts on account of the Indians might be kept at their Credit in account with the Receiver General—allowing the Trust six per cent interest thereon pending the decision of Parliament on the general subject.

With reference to the present investments held by the Indian Trust, that portion consisting of Provincial and Consolidated Municipal loan Fund Debentures might now, under the Authority of Parliament, be assumed by the Province. But until arrangements are made for the general redemption of these securities, it is suggested that they might remain in their present form, unless His Excellency could effect such arrangements as would ensure the immediate realization of the price at which they stand in the Indian Fund—in which case the money might remain at interest in the hands of the Receiver General.

With reference to the other Funds, it is recommended that steps be taken for the collection of the Sums due to the Indian Fund, and for the realization of the Securities, as it would appear desirable that when the question of the future management of the Indian Trust comes before Parliament, the funds should be available at once in cash.

[82] The express reference to investment that once appeared in section 70 of *The Indian Act*, 1880 disappeared when the *Indian Act* was substantially revised in 1951 (S.C. 1951, c. 29). Since 1951, the *Indian Act* has been silent on that point.

[83] The *Indian Act* has gradually been changed to permit the bands to become more involved in decisions relating to the expenditure of their capital moneys. The first step in that direction was made in 1894 when the *The Indian Act* [R.S.C. 1886, c. 43] was amended by [*An Act further to amend the Indian Act*], S.C. 1894, c. 32, s. 11, to add section 139, the predecessor to what is now paragraph 64(1)(*k*) of the *Indian Act*. Section 139 of the *Indian Act* permitted the Governor in Council to authorize and direct the expenditure of any capital moneys standing to the credit of a band, with the consent of the band, which in the opinion of the Governor in Council would be of permanent value to the band or would, when completed, properly represent capital. When the *Indian Act* was consolidated in 1906 (R.S.C. 1906, c. 81), section 139 became section 90.

[84] In 1918 [*An Act to amend the Indian Act*, S.C. 1918, c. 26, s. 4], section 90 was amended to permit the Governor in Council to direct the expenditure of capital moneys of a band for a "reasonable and proper" purpose, without the band's consent, if the band refused to consent and the Governor in Council considered the refusal detrimental to the progress or welfare of the band. That overriding authority has since been considerably reduced. Under the current *Indian Act*, only section 65 provides expressly for the expenditure of the capital moneys of a band without the band's consent. It permits the Minister to use a band's capital moneys to compensate an Indian for land compulsorily taken from him for band purposes, or to pay expenses incurred to prevent or suppress grass or forest fires or to protect the property of Indians in cases of emergency.

[85] Section 90 of the *Indian Act* (R.S.C. 1906) became section 93 in the 1927 consolidation: *Indian Act*, R.S.C. 1927, c. 98. A series of amendments gradually expanded the list of uses to which the capital moneys of a band could be put with the band's consent. By the time the *Indian Act* was extensively revised in 1951, section 93 had become section 64, which read nearly as it does now except for an amendment in 1956 [*An Act to amend the Indian Act*, S.C.

1956, c. 40, s. 15] to add paragraph 64(*j*), to permit the use of the capital moneys of a band for housing, and housing loans and guarantees.

[86] For most of the period relevant to these appeals, the Crown took the position that it had no statutory authority, even under paragraph 64(1)(*k*) of the *Indian Act*, to use the capital moneys standing to the credit of bands in the Consolidated Revenue Fund to make income-earning investments, or to transfer it unconditionally to a trustee or to the bands themselves or at their direction for investment purposes.

[87] In 1982, Mr. Paul Ollivier, Q.C., the Associate Deputy Minister of the Department of Justice, formed the view that paragraph 64(*k*) of the *Indian Act* [R.S.C. 1970, c. I-6] had to that point been interpreted too narrowly, and that it could be interpreted to permit the expenditure of capital moneys of a band to make income-earning investments, with the band's consent. His opinion is set out in a letter dated August 30, 1982 to Mr. R. J. Fournier, Senior Assistant Deputy Minister of Finance and Management with the Department of Indian Affairs and Northern Development.

[88] Mr. Ollivier's opinion was prompted by concerns as to the propriety of the Minister's decision to authorize a particular expenditure under paragraph 64(*k*). The expenditure in question was the use of approximately $35 million of Samson's capital moneys to capitalize its own trust company and its own management company, the Peace Hills Trust Company and the New-West Investment Company. The substantive portion of Mr. Ollivier's opinion reads as follows (emphasis in original):

The moneys we are concerned with are Indian moneys which are defined in section 2 of the [*Indian Act*] as moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands. The moneys belong to the Crown and are derived for the most part, I believe, from the sale, lease or other disposition of Crown lands or of an interest therein. Though lawyers for the Samson Band take a different position, I have no doubt that these moneys are public moneys as defined in the *Financial Administration Act*, i.e. moneys belonging to Canada and received for a special purpose, namely for the use and benefit of the Indians. Under section 15 of the *Financial Administration Act*, moneys received for a special purpose may be paid out of the Consolidated Revenue Funds for that purpose subject to any statute applicable thereto.

The control and management of Indians moneys is the responsibility of the Crown. Under section 61, the moneys must be expended for the use and benefit of the Indians but subject to the 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 a band. Under section 69(1) the Governor in Council may permit a band to control, manage and expend in whole or in part its revenue moneys. It follows that with regard to the capital moneys of the Band, the control and management of these moneys must in the final analysis remain the responsibility of the Crown and cannot be delegated either to the Band or to any other body.

The actual management of the capital moneys of the band is the responsibility of the Minister of Indian Affairs. Section 64 sets out the purposes for which moneys may be expended and section 64(k) provides that the Minister may authorize and direct the expenditure of the capital moneys of the band "*for any other purpose that in the opinion of the Minister is for the benefit of the Band*". I am aware that the Department has until now been operating on the basis of a restricted interpretation of this provision. While such an interpretation is understandable given the very narrow scope of the preceding subsections, nevertheless I find no common genus in these other provisions that necessarily limits the generality of the language used in sub-section (k).

In my opinion, the Minister may authorize, without risk of liability, an expenditure for any purpose that he honestly and in good faith believes is for the use and benefit of a band. Of course, the purpose of the expenditure that he is asked to approve should be sufficiently defined so as to allow the Minister to determine whether it is in the interest of the Band. In my opinion a vaguely worded purpose such as "*for economic development*" does not meet this test. In addition, while the Act may not require anything more than that the Minister act in good faith, I have no doubt that the spirit of the Act contemplates that he will exercise his powers with prudence so as to enhance and not impair the bands' capital.

A critical question is whether the Minister must personally approve every single expenditure of a band's capital moneys.

First of all, I see no reason why the Minister cannot approve a class of expenditure—or an investment plan—as being for the benefit of the band. Such a plan could include the type of proposed expenditures (corporate securities, real estate, government bonds, etc.), the proportion of moneys to be expended on each type, and other financial guidelines.

Secondly, I see no reason why the Minister should not delegate the day to day management of these expenditures, within the overall framework of the approved plan, to an agent under his supervision or control. While there might well have been a time when the Minister could be expected to personally authorize every expenditure, I think it is unreasonable to expect him to do so today given the vast sums involved. I am sure that he neither has the time nor, I would think, the expertise required to make every decision with regard to these moneys.

While our view, as you know, is that the Minister is not a trustee in the private law sense, I note that even under the modern law of trusts, the trustee may employ an agent to perform some of the duties of the trust. In *Waters, Law of Trusts in Canada*, the powers that can be delegated are dealt with as follows: [quotation omitted].

While the "*approved plan*" may envisage a role for a financial intermediary such as the Peace Hills Trust Company, the role would have to be commensurate with the skill and experience of the financial intermediary selected. The Minister would have to satisfy himself on a case by case basis that his "*agents*" were equal to the tasks proposed to be assigned to them.

Thirdly, consistently with the view expressed above that the control and management of capital moneys in the final analysis remains the responsibility of the Crown, the Minister would be obliged on a periodic basis to review the way in which his approved expenditure plan was being implemented, and to make any adjustments in the plan or in its implementation which appeared to him to be for the benefit of the band.

In the case of the expenditure of $35 million of the capital funds of the Samson Band referred to above, consideration should be given to preparation of an "*expenditure plan*" which when approved by the Minister, with appropriate guidelines and controls, could serve to regularize that situation. Because of the somewhat unorthodox way in which those moneys were originally handed over to the Band, consideration might also be given, in the case of that particular payment, to preparation of an Order in Council under section 61 of the *Indian Act* to confirm that this expenditure was, in the view of the Governor in Council, for the use and benefit of the Band.

Any further payments out of band capital would be made by the Minister, using the procedure suggested above, without the necessity of obtaining confirmation by Order in Council.

Undoubtedly the interpretation of section 64(k) expressed in this letter, while it goes well beyond the strict interpretation previously adhered to, will continue to involve a closer degree of government supervision of the expenditure of capital moneys than Indian bands may feel is appropriate. Consideration may therefore have to be given to appropriate statutory amendments, either to the *Oil and Gas Act* or to the *Indian Act* itself.

Bands such as the Samson Band must accept the fact that under the present Act the Minister must retain ultimate control over the management of the band's capital moneys. However, subject to the Minister's overriding control, it is surely in the best interest of the bands that they participate as fully as the present Act allows in the administration of the moneys being held for their use and benefit.

Finally, I would suggest that any scheme involving a substantial part of a band's capital assets be approved by the Band membership as well as by the Band Council.

If there is any serious challenge to the scheme on legal grounds, consideration could be given to referring the matter to the Federal Court under section 17 of the *Federal Court Act*.

[89] Mr. Ollivier's opinion has been endorsed in certain respects by the orders of the Judge that led to the transfer

of the Samson trust funds to the Kisoniyaminaw Heritage Trust Fund in February of 2006 (described above). As we understand Mr. Ollivier's opinion, he concluded that in circumstances like those in the *Samson* case, and subject to certain conditions such as the existence of an appropriate trust agreement, paragraph 64(1)(*k*) of the *Indian Act* may permit the transfer of capital moneys of a band to a trustee for the purpose of making income earning investments for the benefit of the band. One element of the arrangements relating to the Kisoniyaminaw Heritage Trust Fund that was not contemplated by the opinion of Mr. Ollivier is that the Crown has no further involvement in the management of the transferred funds, and has been released from any risk of future liability in that regard.

(i) Interest on Indian moneys in the Consolidated Revenue Fund

[90] Interest is credited on all Indian moneys in the Consolidated Revenue Fund in accordance with an Order in Council made under subsection 61(2) of the *Indian Act* (quoted above). That applies to both capital moneys and revenue moneys. Interest is treated as revenue moneys, whether it is credited to a capital account or revenue account.

[91] From 1859, the rate of interest on Indian moneys was fixed at 6%. In 1861, an Order in Council retained the 6% rate for Indian moneys then held in trust, but fixed a rate of 5% for funds newly received. From 1861 until 1969, the rate of interest was changed periodically, although it appears that the 6% rate was retained for the funds on which that rate was paid in 1861. For the remaining funds, the rate was 5% until December 31, 1882; 4% from January 1, 1883 to June 30, 1892; 3½% from July 1, 1892 to December 31, 1897; 3% from January 1, 1898 to March 31, 1917; and 5% from April 1, 1917 to March 31, 1969. By 1969, approximately $600,000 of Indian moneys was still bearing the rate of 6%, based on the policy established in 1861.

[92] In 1969, the Minister submitted to the Governor in Council a proposal to tie the rate of interest on Indian moneys held in the Consolidated Revenue Fund to the market yield of government bonds having a term of 10 years or more. It was also proposed to discontinue the practice of guaranteeing a 6% rate of interest on the pre-1861 funds. Those proposals were adopted. They are reflected in Order in Council P.C. 1969-1934, which stipulates an interest rate for Indian moneys in the Consolidated Revenue Fund based on the following formula, starting April 1, 1969:

Interest to be paid on Indian Band funds held in the Consolidated Revenue Fund which represent capitalized annuities at the time of Confederation and proceeds from the sale of Indian assets since that time, pursuant to subsection (2) of Section 61 of the Indian Act, at a rate equal to the monthly average of those market yields of Government of Canada bond issues as published each Wednesday by the Bank of Canada as part of its weekly financial statistics which have terms to maturity of 10 years or over, the appropriate rate for calculating and crediting interest on the opening balance as of April 1 in each year in accordance with Treasury Board Minute No. 678135 of March 29, 1968 to be the monthly average of the preceding month together with an adjustment to correct for the amount by which rates during the course of the previous year will have varied from the rate established at the commencement of that year.

[93] When the 1969 Order in Council was passed, it resulted in an effective rate of interest of 7.24% on all Indian moneys then held in trust. The rate varied with changes in the market yield of long-term government bonds.

[94] The method of calculating interest after 1969 varied from time to time. From April 1, 1969 to March 31, 1974, interest was calculated and credited on the basis of the opening balance in the accounts as of April 1 of each year. From April 1, 1974 to March 31, 1980, interest was credited in advance at the beginning of each fiscal year and adjusted at the end of each fiscal year to reflect the result of the statutory formula.

[95] The rate of interest paid on Indian moneys was the subject of discussions in the late 1970s and the early 1980s between officials of the Crown and leaders of various bands, including the Four Bands. Those discussions were motivated in part by a situation referred to as an "inversion" which, for a relatively short period of time, resulted in the market yield on short-term investments being greater than the market rate of interest on long-term investments. The inversion soon corrected itself, but nevertheless in 1981, Order in Council P.C. 1981-3/255 was enacted to replace the 1969 Order in Council.

[96] The 1981 Order in Council retained the comparison to market yields on government bonds with a term of 10 years or more, but provided for interest to be calculated on quarterly rather than monthly averages. The 1981 Order

in Council reads as follows:

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Minister of Indian Affairs and Northern Development and the Treasury Board, pursuant to subsection 61(2) of the Indian Act, is pleased hereby to revoke Order in Council P.C. 1969-1934 of the 8th of October, 1969 and to fix the rate of interest to be allowed, commencing the 1st day of April, 1980, on Indian Bands' Revenue and Capital moneys held in the Consolidated Revenue Fund at the quarterly average of those market yields of the Government of Canada bond issues as published each Wednesday by the Bank of Canada as part of its weekly financial statistics, which have terms to maturity of 10 years or over.

[97] In addition, the discussions led to the adoption by the Crown of a policy by which interest was credited to the Indian moneys accounts semi-annually, rather than annually. From April 1, 1980 to the present, interest paid on Indian moneys has been paid semi-annually at the rate fixed by the 1981 Order in Council.

[98] The rates of interest paid on Indian moneys from 1970 to 2004 were as follows:

1969 Order in Council

1970	7.24%
1971	8.60%
1972	6.34%
1973	7.24%
1974	7.53%
1975	8.32%
1976	8.25%
1977	9.47%
1978	8.76%
1979	9.15%
1980	9.91%

1981 Order in Council

1981	12.90%	1993	8.80%
1982	16.14%	1994	7.74%
1983	13.93%	1995	9.23%
1984	12.22%	1996	8.16%
1985	13.03%	1997	7.49%
1986	10.96%	1998	6.25%
1987	9.50%	1999	5.43%
1988	10.39%	2001	6.01%
1989	10.63%	2002	5.88%
1990	10.15%	2003	5.90%
1991	11.02%	2004	5.66%
1992	9.78%		

(j) Discussions and negotiations relating to the handling of Indian moneys

[99] As mentioned above, the 1981 Order in Council was the result of discussions during the 1970s and early 1980s between the Crown and certain bands, including the Four Bands. The record indicates that the Crown has been open to discussion with respect to the applicable interest rate on Indian moneys held in the Consolidated Revenue Fund.

[100] There have also been discussions relating to the investment of Indian moneys. As explained above, the only provision of the *Indian Act* that referred expressly to the investment of Indian moneys by the Crown alone

was repealed in 1951 when the *Indian Act* was substantially revised. That revision followed extensive discussions, including a clause-by-clause review with Aboriginal representatives, including Samson and Ermineskin. There is no evidence that the investment clause was discussed or referred to in any way during those discussions. However, there is evidence that the Indian Association of Alberta recommended that the interest rate on Indian moneys in the Consolidated Revenue Fund remain at its current rate, which then was 5%.

[101] From the 1960s and continuing into recent years, there have been numerous occasions for discussion and negotiation with respect to the treatment of Indian moneys, generally in the context of a consideration of broader issues. One theme of those discussions was the desirability of encouraging Aboriginal self-determination and self-government, and greater participation by Aboriginal peoples in decisions relating to their affairs. Another theme was the need to amend the *Indian Act*.

[102] The Crown's stated policy, at least from the 1960s, has been to respect band decision making and to encourage the bands in their aspirations of greater control, as far as possible under the applicable legislation. An important aspect of the Crown's policy was not to amend the *Indian Act* without first consulting with and obtaining the support of those affected; see for example (1) Canada, House of Commons, Special Committee on Indian Self-Government. *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Queen's Printer, 1983) (Chairman: Keith Penner), (2) Canada. Department of Indian Affairs and Northern Development, *Project F2 Trust Fund Management: Final Report*, Volume 1 (Ottawa: INAC, 1983), and (3) the annual reports of the Department of Indian Affairs and Northern Development through the 1990s.

[103] The issue of the investment of the capital moneys of bands was included in the discussions between the Crown and Aboriginal representatives over many years. Some of the wealthier bands, including the Samson Nation and the Ermineskin Nation, made proposals of various kinds that would have given them greater control over their capital moneys.

[104] The Crown was not unsympathetic to the objective of those demands but believed that it was precluded by law from acquiring income earning investments with the capital moneys of the bands and was also precluded by law from simply transferring to the bands the power of disposition of the capital moneys.

[105] From time to time the Crown invited proposals for an investment plan that could be assessed by the Minister in accordance with the requirements of section 61 and paragraph 64(1)(*k*), but no such proposal was made by Ermineskin or by Samson (until the proposal of Samson in 2005 relating to the Kisoniyaminaw Heritage Trust Fund). Nor was any consensus ever reached with respect to the amendment of the *Indian Act*. Therefore, the Crown considered itself compelled to maintain its practice of retaining the capital moneys of bands in special accounts in the Consolidated Revenue Fund, and paying interest in accordance with the applicable Orders in Council.

[106] At some point (it is not clear exactly when), Samson and Ermineskin began to advocate the position they now take, which in broad terms is this: the Crown, as trustee of the capital moneys of Samson and Ermineskin, has and has always had a duty at common law to invest the capital moneys prudently, that the Crown's refusal to even consider doing so was a breach of trust, and that Samson and Ermineskin have the right to sue for damages if the income that should have been earned by the prudent investment of their capital moneys would have exceeded the interest they received under the 1969 and 1981 Orders in Council.

[107] The judgments now under appeal were the result of actions commenced by Samson in 1989, and by Ermineskin in 1992. Samson and Ermineskin claim damages or equitable disgorgement, based on what they say is the mismanagement of hundreds of millions of dollars derived from their royalties.

VI. Analysis

[108] In this analysis we discuss the legal conclusions reached by the Crown as described above that are disputed by Samson and Ermineskin, and the additional legal issues raised in the appeals in relation to the money management phase. The most critical issues in this appeal are matters of statutory interpretation. Our approach to statutory interpretation must be guided by the jurisprudence of the Supreme Court of Canada, as

most recently summarized in *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601, at paragraph 10:

It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

(a) Whether the Crown is a trustee of the royalties

[109] We agree with the Judge that the Crown is a trustee of the royalties held in the Consolidated Revenue Fund (Judge's reasons in *Samson*, paragraph 653, and in *Ermineskin*, paragraph 261). Section 4 of the *Indian Oil and Gas Act* says so, and there is no reason to conclude that section 4 is not intended to mean what it says. If 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*.

[110] Indeed, even if the *Indian Oil and Gas Act* had never been enacted, the Crown would have been a trustee of any royalties derived from the exploitation of the oil and gas reserves in relation to the surrendered interests in the Samson Reserve and the Pigeon Lake Reserve. That conclusion is compelled by the promises of Treaty No. 6, as well as the provisions of the *Indian Act* relating to reserves and the management of Indian moneys. The Crown clearly has fiduciary obligations to Ermineskin and Samson with respect to the use and exploitation of their respective shares of the oil and gas resources on the Pigeon Lake Reserve and the Samson Reserve, and also with respect to their respective shares of the royalties derived from the exploitation of those resources: see *Guerin et al. v. The Queen et al.*, [1984] 2 S.C.R. 335, *per* Wilson J., at pages 349-350 and *per* Dickson J. [as he then was] at page 382.

[111] The conclusion that the Crown is a trustee of the royalties is consistent with the Crown's admission at trial that the oil and gas resources under the Pigeon Lake Reserve and the Samson Reserve were and are beneficially owned by Samson and Ermineskin (in the case of the Pigeon Lake Reserve, to the extent of their respective shares). It is also consistent with the Crown's understanding of its obligations with respect to the handling of Indian moneys. The record establishes that even before Confederation, the Crown acknowledged that it holds all Indian moneys in trust. The record is replete with similar acknowledgements, some predating Confederation.

(b) Whether the royalties are "public money" as defined in the *Financial Administration Act*

[112] The Crown argues that even if it is a trustee of the royalties, it is not required or permitted to deal with the royalties as a trustee would at common law, but must deposit the royalties into the Consolidated Revenue Fund to the credit of the capital accounts of Samson and Ermineskin, as described above.

[113] The Crown's argument is based on the premise that the royalties fall within paragraph (*d*) of the definition of "public money" in section 2 of the *Financial Administration Act* (quoted above), reproduced here for ease of reference:

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; [Emphasis added.]

[114] Samson and Ermineskin challenged that premise at trial and in this appeal. They argue that the royalties do not "belong to Canada" as required by the opening words of the definition, and therefore they cannot possibly fall within paragraph (*d*) of the definition.

[115] The Judge agreed with the Crown on this point, and we do as well. Although the royalties do not "belong to Canada" in the ordinary sense of those words, we interpret the statutory definition of "public money" as applying to the royalties nevertheless. That is because the phrase immediately preceding the list in paragraphs (*a*) through (*d*) of the definition of "public money" is "and includes", indicating that paragraphs (*a*) through (*d*) are intended to expand the more general opening words.

[116] As well, the royalties fall literally within the language of paragraph (*d*) of the definition. They are paid to the Crown for the benefit of a band, in accordance with one or more of the *Indian Oil and Gas Act*, the lease agreements, the *Indian Act*, and Treaty No. 6, and if they are to be disbursed, they must be disbursed for the benefit of the band, in accordance with Treaty No. 6 and the *Indian Act.*

(c) Whether the Crown improperly made use of the capital moneys

[117] The fact that the royalties are "public money" as defined in the *Financial Administration Act* leaves the Crown with no choice but to pay the royalties into the Consolidated Revenue Fund when they are received. At the same time, the Crown must recognize that Samson and Ermineskin are beneficially entitled to the royalties. The Crown does that by maintaining separate accounts for each band, and crediting those accounts with the royalties as received or, in the case of the royalties from the Pigeon Lake Reserve, as allocated from time to time.

[118] Samson and Ermineskin argue in various ways that regardless of the Crown's accounting methods, the consequence of paying the royalties into the Consolidated Revenue Fund is that the capital moneys of Samson and Ermineskin is used by the Crown for its own purposes until it is paid out to the bands under section 64 of the *Indian Act*. Samson and Ermineskin characterize that as a "forced borrowing" by the Crown of the capital moneys of Samson and Ermineskin, which is improper or unlawful without their consent, either because it is a breach of the common-law trust principles, or a breach of the Crown's overriding obligation to deal with Indians and their money honourably and in a manner that is consistent with the promises of Treaty No. 6.

[119] We take it as given that when the Crown re-ceives the royalties of Samson and Ermineskin, it cannot simply retain the money in the form of cash and store it in boxes until it is needed for expenditure by Samson or Ermineskin. Rather, as explained above, the Crown must deposit the royalties to the credit of the Samson and Ermineskin capital accounts in the Consolidated Revenue Fund. That automatically creates a liability on the part of the Crown to pay those amounts to Samson and Ermineskin upon compliance with the conditions in section 64 of the *Indian Act*. By operation of law, that liability is a debt that bears interest, as the Crown has always acknowledged in its public accounts.

[120] As a factual matter, this treatment of the capital moneys of Samson and Ermineskin results in the Crown making use of the money for its own purposes as long as the Crown's liability to Samson and Ermineskin subsists, or in other words until the money is expended in accordance with section 64. If that is aptly described in practical terms as a "forced borrowing," it is an inevitable consequence of the combined operation of the *Indian Act* and the *Financial Administration Act*, and is therefore lawful.

[121] Our rejection of the "forced borrowing" argument of Samson and Ermineskin leaves open several

questions: (1) whether the Crown could and should have put the money to some other use once it was deposited into the Consolidated Revenue Fund (such as acquiring income-earning investments or establishing a separately managed trust fund); (2) whether the Crown properly compensated Samson and Ermineskin for the use of their money; and (3) whether the Crown was unjustly enriched by the use of that money. Those issues are discussed below.

(d) Whether the royalties could and should have been invested

[122] Samson and Ermineskin argue that because the Crown is a trustee of the capital moneys that are held in the Consolidated Revenue Fund, it follows that the Crown is obliged by the common law of trusts to invest those moneys, and in so doing, to meet the standard of care described as follows in *Fales et al. v. Canada Permanen Trust Co.*, [1977] 2 S.C.R. 302, at page 315:

Traditionally, the standard of care and diligence required of a trustee in administering a trust is that of a man of ordinary prudence in managing his own affairs (*Learoyd v. Whiteley* ((1887), 12 App. Cas. 727), at p. 733; *Underhill's Law of Trusts and Trustees*, 12th ed., art. 49; *Restatement of the Law on Trusts*, 2nd ed., para. 174) and traditionally the standard has been applied equally to professional and non-professional trustees.

[123] The Crown does not deny that it is a trustee of the royalties of Samson and Ermineskin when it receives them, and for as long as it holds those capital moneys in the Consolidated Revenue Fund, but argues that its obligations as trustee are not determined by common-law principles, but by the *Indian Act*.

(1) The *Indian Act*

[124] The Crown argues that it does not have a duty to invest the capital moneys of Samson and Ermineskin as though it were a common-law trustee, because Parliament has enacted statutory provisions that are not consistent with that common-law duty. Specifically, the Crown argues that any exercise of the right of disposal of the capital moneys of a band, including any use of those moneys to acquire income-earning investments, is subject to the requirements of the *Financial Administration Act* and the *Indian Act*. Section 64 of the *Indian Act* precludes the Crown from making any use of the capital moneys of a band without the consent of the band council. Samson and Ermineskin concede that their respective band councils have not provided the requisite consent. Therefore, the Crown could not have used the capital moneys of Samson or Ermineskin to make investments for their benefit.

[125] We agree with the Crown that, because of section 64 of the *Indian Act*, the Crown cannot act unilaterally to use the capital moneys of a band to make income-earning investments for the benefit of the bands, as a common-law trustee would. That conclusion is reinforced by a consideration of the legislative history.

[126] As explained above, there was at one time a provision in the *Indian Act* that permitted the Crown to use a specified portion of the capital moneys of a band held by the Crown in trust to acquire income-earning investments: see, for example, section 70 of *The Indian Act*, 1880. That provision was the functional equivalent of the statutory investment authority found in the modern trust legislation of the provinces and territories: see, for example, the *Trustee Act*, R.S.A. 2000, c. T-8 (section 3 [as am. by S.A. 2001, c. 28, s. 2]), the *Trustee Act*, R.S.O. 1990, c. T.23 (section 27 [as am. by S.O. 1998, c. 18, Sch. B, s. 16; 2001, c. 9, Sch. B, s. 13]), the *Trustee Act*, R.S.B.C. 1996, c. 464 (section 15.1 [as enacted by S.B.C. 2002, c. 33, s. 23]), the *Civil Code of Québec*, S.Q. 1991, c. 64 (Articles 1278, 1339 and 1343), the *Trustee Act*, R.S.S. 1978, c. T-23 (section 3 [as am. by S.S. 1998, c. 40, s. 3]), the *Trustee Act*, C.C.S.M. c. T160 (section 68), the *Trustees Act*, R.S.N.B. 1973, c. T-15 (section 2), the *Trustee Act*, R.S.N.S. 1989, c. 479 (section 3 [as am. by S.N.S. 2002, c. 10, s. 45]), the *Trustee Act*, R.S.P.E.I. 1988, c. T-8 (section 2 [as am. by S.P.E.I. 1997, c. 51, s. 1]), the *Trustee Act*, R.S.N.L. 1990, c. T-10 (section 3 [as am. by S.N.L. 2000, c. 28, s. 1]), the *Trustee Act*, R.S.Y. 2002, c. 223 (section 2), the *Trustee Act*, R.S.N.W.T. 1988, c. T-8 (section 2).

[127] Section 70 of *The Indian Act*, 1880 was repealed in 1951. The inescapable inference is that in 1951, Parliament withdrew from the Crown the authority to invest the capital moneys of a band held by the Crown in trust. There is no federal legislation of general application that deals with the rights and obligations of the trustee

of a trust established or governed by federal law, and no federal legislation replacing the provision that was repealed in 1951. We find no legal basis upon which this Court can find that the Crown has the legal authority to invest Indian moneys, in the face of an Act of Parliament in 1951 that intentionally took that authority away from the Crown.

[128] If Parliament had intended the Minister to have a duty to invest Indian moneys held in trust in the Consolidated Revenue Fund, appropriate legislation could have been enacted, but that has not been done. Certainly Parliament knows how to enact such legislation. There are federal statutory schemes that contemplate the investment of funds under the management of a federal authority. The two most prominent examples are the *Canada Pension Plan Investment Board Act*, S.C. 1997, c. 40 (see section 5 [as am. by S.C. 2003, c. 5, s. 13]), and the *Public Sector Pension Investment Board Act*, S.C. 1999, c. 34 (see section 4 [as am. by S.C. 2005, c. 10, s. 34]).

(2) Section 15 of the Charter

[129] At trial and in this appeal, Samson and Ermineskin have challenged the constitutional validity or operability of sections 61 to 68 of the *Indian Act* as contrary to section 15 of the *Canadian Charter of Rights and Freedoms* [being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]]. They argue that if this Court finds that those provisions preclude them from asserting a claim for damages for a breach by the Crown of the common-law duties of a trustee, the result is discrimination that contravenes subsection 15(1) of the Charter. They argue that, because they are Indians, they have been deprived by the *Indian Act* of the rights that are available to non-Indian individuals whose property is held in trust.

[129] À l'instruction et dans le présent appel, Samson et Ermineskin ont contesté la validité ou l'applicabilité constitutionnelle des articles 61 à 68 de la *Loi sur les Indiens*, qui iraient à l'encontre de l'article 15 de la *Charte canadienne des droits et libertés* [qui constitue la partie I de la *Loi constitutionnelle de 1982*, annexe B, *Loi de 1982 sur le Canada*, 1982, ch. 11 (R.-U.) [L.R.C. (1985), appendice II, nº 44]]. Elles soutiennent que, si la Cour d'appel conclut que ces dispositions les empêchent de réclamer des dommages-intérêts pour cause de manquement par la Couronne aux obligations que la common law impose au fiduciaire, le résultat constituera une forme de discrimination allant à l'encontre du paragraphe 15(1) de la Charte. Elles ajoutent que, parce qu'elles sont des Indiens, elles ont été privées par la *Loi sur les Indiens* des droits que peuvent faire valoir les autres personnes dont les biens sont détenus en fiducie.

[130] Subsection 15(1) reads as follows:

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.

[131] The Judge rejected the Charter challenge because he concluded that the bands (that is, the Samson Nation and the Ermineskin Nation) have no standing to assert it (Judge's reasons in *Samson* at paragraphs 778 to 780 and in *Ermineskin* at paragraphs 319 to 321; see also *Nechako Lakes School District No. 91 v. Patrick* (2002), 97 B.C.L.R. (3d) 364 (S.C.), at paragraphs 103 to 111).

[132] Samson and Ermineskin do not challenge the conclusion that the bands, as such, do not have standing to make a Charter challenge based on subsection 15(1). They rely on the fact that these are representative actions. The representatives are the Chief of the Samson Nation and the Chief and Council of the Ermineskin Nation, but the real claimants are the individuals who are members of the Samson Nation and the Ermineskin Nation. Samson and Ermineskin argue that those individuals have standing to challenge the provisions of the *Indian Act* based on subsection 15(1) of the Charter, because they are asserting a claim in respect of their interest in the property of the band of which they are members.

[133] Even if the individual band members had standing, they would have no interest to enforce under the relevant provisions of the *Indian Act*. There can be a remedy under subsection 15(1) of the Charter only where a

personal right has been infringed. The claim in this case is not a claim in relation to a personal right, but a claim relating to the management of property of the band. The right of a member of an Indian band in relation to band property is a communal right, not a personal right. That is explained by Justice Rothstein, writing for this Court in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [2001] 4 F.C. 451 (C.A.), at paragraph 16:

. . . it does not follow that because an Indian band is not a legal entity, rights accruing to the band are the rights of its members or their descendants in their individual capacities. The definition of "band" uses the term "in common" in relation to the interest that the members of the band have in the reserve. The term "in common" connotes a communal, as opposed to a private interest in the reserve, by the members of the band. In other words, an individual member of a band has an interest in association with, but not independent of the interest of the other members of the band.

[134] The interests at issue in these cases are the rights of the bands in relation to their royalties, which comprise most if not all of the capital moneys of the bands. Those moneys are the property of the bands (see section 62 and subsection 64(1) of the *Indian Act*). The individuals who are members of the bands have, together, a communal interest in the property of the band (including the capital moneys), but none of them has a personal right to that property, or to a share of that property. In our view, the fact that the claims in each of these cases have been asserted by band members through representatives does not convert what is essentially a claim relating to band property into a claim relating to the personal rights of the members of the bands. We conclude that subsection 15(1) of the Charter is of no assistance to Samson or Ermineskin in advancing any claims made in the money management phase of their actions.

(3) The *Financial Administration Act*

[135] Samson and Ermineskin argue, in slightly different ways, that even if the Crown is required by the *Financial Administration Act* to pay the royalties into the Consolidated Revenue Fund, and even if the *Indian Act* contains no investment authority, there are provisions of the *Financial Administration Act* that would authorize the Crown to use the money to make income-earning investments for the benefit of the bands. That argument is supported by two alternative lines of reasoning, one based on subsection 21(1) of the *Financial Administration Act* (submitted by Samson and Ermineskin), the other based on section 18 [as am. by S.C. 1995, c. 17, s. 58] of the *Financial Administration Act* (submitted only by Samson).

[136] Subsection 21(1) of the *Financial Administration Act* reads as follows:

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.

[137] We summarize as follows the argument based on subsection 21(1) of the *Financial Administration Act*. Even if the royalties had to be paid into the Consolidated Revenue Fund, they did not have to stay there. If they fall within paragraph (*d*) of the definition of "public money" in section 2 of the *Financial Administration Act*, it must be because they were paid to the Crown for a particular purpose (to be held in trust for Samson and Ermineskin). If that is so, then it must also be the case that, according to subsection 21(1) of the *Financial Administration Act*, the royalties may be paid out of the Consolidated Revenue Fund for that same purpose, namely, to fulfil the purpose of the trust, or to benefit Samson or Ermineskin, as the case may be.

[138] The difficulty with this argument is that it ignores the proviso at the end of subsection 21(1), "subject to any statute applicable thereto". The *Indian Act* applies to the royalties. It characterizes them as capital moneys and permits them to be expended, but only in accordance with section 64 of the *Indian Act*. There is nothing in section 64 that can possibly be interpreted to authorize capital moneys of a band to be invested by the Crown in the manner in which a trustee would invest it, that is, by acquiring income earning property that the Crown in its sole discretion considers appropriate. On the contrary, the capital moneys of Samson and Ermineskin cannot be used for any purpose unless the statutory conditions in section 64 are met. One of those conditions is band council consent. It is conceded by Samson and Ermineskin that their respective band councils have not given the

requisite consent.

[139] Section 18 of the *Financial Administration Act* read as follows (until its repeal in 1999, S.C. 1999, c. 26, s. 20):

18. (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, pay for the securities out of the Consolidated Revenue Fund and hold the securities.

(3) The Minister may sell or lend any securities purchased, acquired or held pursuant to subsection (2), and the proceeds of the sales or lending shall be deposited to the credit of the Receiver General.

(4) Any net profit resulting in any fiscal year from the purchase, holding, sale or lending of securities pursuant to this section shall be credited to the revenues of that fiscal year, and any net loss resulting in any fiscal year from that purchase, holding, sale or lending shall be charged to an appropriation provided by Parliament for the purpose.

(5) For the purposes of subsection (4), the net profit or loss in any fiscal year shall be determined by taking into account realized profits and losses on securities sold or loaned, the amortization applicable to the fiscal year of premiums and discounts on securities, and interest applicable to the fiscal year.

[140] We summarize as follows the argument of Samson based on subsection 18(2) of the *Financial Administration Act*. If the royalties are public money, then every provision of the *Financial Administration Act* that refers to public money must apply to it. Since subsection 18(2) authorizes the Minister of Finance to invest public money, the Minister of Finance is authorized to invest the royalties.

[141] We are unable to accept this argument. In our view, section 18 of the *Financial Administration Act* is not intended to function as statutory authority for the investment of Indian moneys for the benefit of the bands. Rather, section 18 contemplates the investment of the Crown’s own money for the account of the Crown. It is the Crown that is entitled to the profits from any investments made under section 18, and that bears any investment losses (see subsection 18(4)). If Parliament had intended subsection 18(2) to be interpreted to permit the investment of Indian moneys as a trustee would invest it, section 18 would have provided that any profits and losses from the investments would be for the account of the bands, not the Crown.

[142] Section 18 of the *Financial Administration Act* was replaced in 1999 by what is now section 46 (S.C. 1999, c. 26, sections 20 and 22). Samson made no submissions relating to the current provision.

(4) Whether the statutory scheme breaches or results in a breach of Treaty No. 6

[143] Samson and Ermineskin argue, in slightly different ways, that their rights in relation to their capital moneys are treaty rights, and thus must be recognized as constitutional rights pursuant to section 35 of the *Constitution Act, 1982*, and cannot be abrogated by statute. It follows, they argue, that if the statutory scheme precludes the Crown from investing Indian moneys as a trustee is obliged to do, then either the statutory scheme cannot stand, or it must be read down.

[144] We are prepared to assume, without deciding, that Treaty No. 6 might have been understood by the Indian signatories as establishing a promise on the part of the Crown to hold Indian moneys in trust, at least in so far as the Indian moneys were derived from the disposition of reserve land or an interest in reserve land. In 1876, when Treaty No. 6 was signed, the *Indian Act* gave the Governor in Council complete control over Indian moneys held in trust, and permitted the moneys to be invested without band consent [*The Indian Act*, 1876, S.C. 1876, c. 18, ss. 58, 59, 60].

[145] However, the record contains nothing from which we can infer that the Crown promised that the statutory investment power in the *Indian Act* would remain forever unchanged. In fact, that investment power was repealed in 1951, after consultation, with no evidence of any objection by Samson or Ermineskin, or any other band. In our view, the repeal of the statutory investment power does not infringe or deprive Samson and Ermineskin of any of their rights under Treaty No. 6.

(e) Whether the Crown was obliged to propose an investment plan

[146] The constraints represented by the *Indian Act* and the *Financial Administration Act* do not preclude all investment of the capital moneys of Samson and Ermineskin. That was finally demonstrated by the transfer of the Samson capital moneys to the Kisoniyaminaw Heritage Trust Fund. Samson and Ermineskin argue that the Crown should have recognized long ago that its interpretation of the scope of paragraph 64(1)(*k*) of the *Indian Act* was too narrow, and should have devised an appropriate investment proposal that would conform to the requirements of paragraph 64(1)(*k*), and put the proposal to Samson and Ermineskin to seek their consent. They also argue that the Crown, in arguing that it was not required to take this initiative, is improperly trying to shift its legal obligation as trustee to the beneficiaries of the trust.

[147] We do not agree with Samson and Ermineskin that the Crown had a legal obligation to take the initiative to propose a plan of investment for the capital moneys of Samson and Ermineskin. Section 64 of the *Indian Act* empowers the Minister to "authorize and direct the expenditure of capital moneys of the band" with the consent of the band council. That presupposes that a proposal for the expenditure of capital moneys is to be made by the band council, and that the Minister would consider whether to authorize it, with or without directions. We are unable to read into the expression "authorize and direct" an obligation on the part of the Crown to make a proposal for expenditure.

[148] In our view, this interpretation of paragraph 64(1)(*k*) accords with the intention of Parliament to give the bands the initiative with respect to the use of their capital moneys. It also accords with common sense. Generally, it is to be expected that Samson and Ermineskin are in a better position than the Minister to determine what expenditures are required. If a request is made for the expenditure of the capital moneys of a band for the purpose of investment, then it is reasonable for the Minister to require a plan of investment to satisfy itself that the expenditure is for the benefit of the band as required by paragraph 64(1)(*k*).

[149] This conclusion is also consistent with the long- standing practice of the Minister in relation to the expenditure of the capital moneys of Samson and Ermineskin. Typically, the band council determines a need for an expenditure of capital moneys and prepares a band council resolution, which is then submitted to the Minister for authorization. With respect to the Peace Hills Trust, for example, the Samson Band council prepared a resolution for the expenditure of capital moneys for economic development purposes and the establishment of Peace Hills Trust. Those Band council resolutions were approved by the Minister, $35 million was released and the Peace Hills Trust was established.

(f) Unjust enrichment

[150] The claims of Samson and Ermineskin for breach of trust are framed in a number of different ways, most relating in some way to the argument that the Crown has a duty to invest the royalties as a trustee would do. We have rejected that argument for the reasons explained above. An alternative basis for the breach of trust argument is that, by making use of the capital moneys of Samson and Ermineskin and paying the rate of interest that it did, the Crown was unjustly enriched.

[151] In our view, if the elements of unjust enrichment are established on the facts of these cases, Samson and Ermineskin would be entitled to a remedy. It seems to us axiomatic that the Crown should not be permitted to enrich itself to the detriment of Samson and Ermineskin. That would be a breach of the Crown's fiduciary obligations to Samson and Ermineskin, and more fundamentally it would not be consistent with the honour of the Crown.

[152] The question of unjust enrichment arises inevitably from the statutory scheme, which requires the

Crown to retain the capital moneys of Samson and Ermineskin in the Consolidated Revenue Fund, and thus to use the moneys. If the Crown fails to compensate Samson and Ermineskin appropriately for that use, there would be unjust enrichment.

[153] In *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, Justice Iacobucci stated the test for unjust enrichment (at paragraph 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).

[154] The Judge reasoned that there was no deprivation because the Crown paid Samson and Ermineskin the interest required by law (that is, the Orders in Council), but even if there was a deprivation those Orders in Council provided the necessary juristic reason (Judge's reasons in *Samson*, at paragraph 710, and in *Ermineskin* at paragraph 291).

[155] The Judge also concluded that the Crown was not enriched. Samson and Ermineskin argued at trial, and in these appeals, that because their capital moneys were on deposit in the Consolidated Revenue Fund for long periods of time and the Crown did not lock in high interest rates when they prevailed for long-term federal government debt (especially during the early 1980s), the Crown was enriched because it paid less for the use of Indian moneys than it did for other long-term debt.

[156] The factual premise of the enrichment argument is that if the Crown had not had access to Indian moneys in the Consolidated Revenue Fund, it would necessarily have borrowed more money from others by issuing more long-term government debt, which bore a higher rate of interest than the rate established by the Orders in Council.

[157] In order to assess the validity of that factual premise, the Judge examined and analysed a considerable body of conflicting expert evidence. In the end, he preferred on this point the expert evidence of Mr. King, a Crown witness, who was an economist with specific expertise in government debt management. Mr. King's opinion, based on the Crown's debt strategy during the relevant period, was that if the Crown had not had access to Indian moneys (that is, if the Indian moneys had never existed), the Crown would have issued more treasury bills or a mix of treasury bills and whatever long-term bonds the Crown had targeted for the relevant period. Either choice would have resulted in a lower cost to the Crown than the interest actually paid on the Indian moneys from 1971 to 2000. It follows that the Crown was not enriched by having paid interest on Indian moneys at the rates established by the Orders in Council. In fact, the Crown could and would have obtained the same funding less expensively if the Indian moneys had not existed.

[158] In our opinion, the Judge approached the enrichment issue correctly when he asked himself what the Crown would have done had it not had access to the Indian moneys, and a careful review of the relevant evidence discloses no error in his assessment of the evidence on that point. For that reason, we have no basis for interfering with his conclusion that the Crown was not enriched by its use of the capital moneys of Samson and Ermineskin while it was held in the Consolidated Revenue Fund. As that element of the unjust enrichment test was not met, there was no unjust enrichment.

[159] Samson and Ermineskin criticize the Judge's unjust enrichment analysis because it seems to imply that the Crown can always avoid an unjust enrichment claim by requiring the interest rate on Indian moneys to be established by Order in Council, thereby establishing in every case a juristic reason for a particular rate of interest for the use of Indian moneys. In our view, that criticism is not sound. To illustrate by an absurd example, assume that during a certain period all market debt instruments bear interest at 12% per year or more, and that for the same period there is an Order in Council fixing the rate of interest on Indian moneys at 1% per year. In that situation it would be obvious that the Crown would be enriched and the bands correspondingly deprived. We doubt that on those facts, the existence of an Order in Council fixing a 1% interest rate would be accepted as a juristic reason for the enrichment.

(g) Rate of return

[160] Although the Crown did not have a duty to invest Indian moneys or to present a plan of investment, it did have an obligation to pay a rate of return on Indian moneys held in the Consolidated Revenue Fund in accordance with subsection 61(2) of the *Indian Act*. It is clear that at all relevant times there was an Order in Council stipulating the rate of interest to be paid, and that interest was in fact paid accordingly. The only question is whether any rights of Samson and Ermineskin were breached by the choice of interest rate or interest rate methodology established by those Orders in Council.

[161] There is a dispute between the parties as to whether the Governor in Council, in exercising its authority under subsection 61(2) of the *Indian Act* to set the rate of interest to be paid on Indian moneys, is bound by the fiduciary obligations that the Crown owes to all bands and all Indians. In our view, the answer to that question must be yes.

[162] The statutory scheme for the administration of Indian moneys requires the moneys to be held in trust in the Consolidated Revenue Fund. For that reason, Indian moneys are used by the Crown. However, the statutory scheme also requires the payment of interest, fixed unilaterally by the Crown, as compensation for the use of those moneys. This places the Crown inevitably in a position where it has conflicting duties. Its duty to the Indian people is to pay interest on their moneys at a rate that it must fix, but its duty to all Canadians is not to expend excessive amounts on financing government operations. The existence of that conflict is acknowledged by the Crown when it says that, in addressing the Governor in Council in relation to the interest payable on Indian moneys, the Minister of Indian Affairs and Northern Development must advoca-te for higher interest for Indian people, while the Minister of Finance must advocate against excessive financing costs. However, despite that internal govern-ment conflict, Samson and Ermineskin are entitled to expect the Crown, as an indivisible whole, to fulfil its fiduciary obligations.

[163] In our view, when the Governor in Council passes an Order in Council to fix the rate of interest on Indian moneys and the interest rate methodology pursuant to subsection 61(2) of the *Indian Act*, it is functioning as the Crown with respect to the bands who are beneficially entitled to those moneys. The choices made by the Governor in Council in that regard must fulfil the Crown's fiduciary obligations to those bands.

[164] Samson and Ermineskin argue that, because the Indian moneys are held in trust, the rate of interest should be at least the equivalent of what would have been achieved if the Crown had been required and permitted to invest the Indian moneys as a trustee would have done. They presented considerable evidence in an attempt to establish that the rates of interest set out in the Orders in Council do not meet that standard. Based on that evidence, a trier of fact could reasonably find that, until 2002, the Orders in Council yielded a return on the Indian moneys that was less than might have been achieved if that money had been invested on the basis of an investment strategy of the kind that might have been followed by a trustee governed by the common law of trusts.

[165] The Crown submits that the obligation of the Governor in Council, in setting the rate of interest payable on Indian moneys, is to ensure that the rate of return on Indian moneys is reasonable in all the circumstances, and that the Governor in Council has met that obligation. That argument rests principally on three points:

1. It is not rational to require the Crown to pay interest at a rate that might have been achieved with the most advantageous possible investment strategy, because the money was not and could not have been invested in that manner without the consent of the band councils, and the band councils did not consent.

2. If any comparison is to be made with investment returns that might have been achieved with an actual investment, the comparison must take into account that there is no risk of capital loss in relation to money held in the Consolidated Revenue Fund, and that there was complete liquidity in the sense that the money was always available on short notice if expenditures were required. None of the comparisons proposed by Samson or Ermineskin involved the management of large funds in similar circumstances.

3. There is evidence that over the relevant period, the Orders in Council resulted in a positive real rate of return

on Indian moneys (that is, after accounting for inflation) that was in excess of 4% (as much as 5.7% according to one expert), and there is also evidence that a real rate of return in excess of 4% falls within the range of even current expectations for large private funds, and significantly above the 3% long-term real rate of return expectation which was typically set by private funds in the 1970s.

[166] Samson and Ermineskin adduced a large body of evidence that was aimed at establishing that the rate of interest was not reasonable, because it did not result in a rate of return that was commensurate with one of a number of investment strategies that would have been appropriate for a trustee making investments of a large fund. Samson and Ermineskin also point to evidence from the Crown's own witnesses that the Crown did not consider itself obliged to match an investment rate of return, and its senior officials did not even put their minds to that question.

[167] We agree with the Crown that the decision of the Governor in Council as to the choice of the rate of interest and the interest rate methodology should be assessed against a standard of reasonableness. Those choices fundamentally are an exercise of discretion, albeit a discretion that is exercised in circumstances in which the Crown has a fiduciary obligation, and in which the honour of the Crown is engaged. Generally, a discretionary decision must be permitted to stand if it 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.

[168] The Judge concluded that the rates of interest chosen by the Governor in Council for the relevant period were reasonable. Samson and Ermineskin criticize that conclusion because the Judge did not set out an analysis of the massive body of evidence that was relevant to that issue. It is true that the Judge's reasons on this point are short. However, we have reviewed carefully the portions of the record to which we were referred in argument. That review included evidence in support of the Crown's arguments as summarized above, and the conflicting evidence of Samson and Ermineskin explaining why a higher rate of interest is justified by comparisons to any number of investment strategies. We find that there is a sufficient evidentiary foundation to support the Judge's conclusion that the rates of interest paid were reasonable.We are unable to find any basis for intervening in the conclusion of the Judge that the rate of return generated by the Orders in Council was a reasonable one.

[169] We are also satisfied that the Crown properly managed the rate of return pursuant to subsection 61(2), which provides for a rate to be fixed from "time to time", and that the Crown consulted with the bands appropriately in that regard whenever the bands requested such consultations. The Governor in Council changed the rate and the methodology in 1969 on the initiative of the Minister and did so again in 1981 after representations by the bands. The issue did not require more frequent attention because, from 1969 forward, the rate of interest was linked to the market yield on long-term Canada bonds, with the result that the rate adjusted automatically to reflect current market rates.

[170] Samson and Ermineskin also criticize the Crown for treating all Indian band accounts in the same manner in that they were all subject to the same interest rate methodology, regardless of their balances. However, the real issue in this case is whether Samson and Ermineskin received a reasonable rate of return. Having found that they did, Samson and Ermineskin cannot complain that the benefit they received was also given to other bands. They have no right to receive a rate of interest that was necessarily higher than that received by other bands.

(h) Summary

[171] The Crown's obligations as trustee of the royalties received for the benefit of Samson and Ermineskin are substantially different from the obligations of a common-law trustee, because of the combined operation of the *Financial Administration Act* and the *Indian Act*. Those obligations fall on the Minister in relation to the management of Indian moneys, and on the Governor in Council in establishing how much interest is to be paid on Indian moneys.

[172] The Minister's obligations are to deposit the royalties into the appropriate reserve or band capital

account in the Consolidated Revenue Fund, to pay interest at the rate stipulated by the applicable Order in Council, to maintain accurate accounts, to provide periodic reports to Samson and Ermineskin, and to consider any requests by Samson or Ermineskin to authorize and direct expenditure of the capital moneys as proposed by a band council resolution. The Governor in Council, for its part, must establish a rate of interest that is reasonable in the circumstances.

[173] We agree with the Judge that the Crown has met all of its obligations as trustee of the royalties of Samson and Ermineskin. We conclude that the Judge was correct to dismiss the claims of Samson and Ermineskin in the money management phase.

VII. Conclusion

[174] For the reasons stated above, we would dismiss this appeal with costs, but without prejudice to the right of the parties to seek directions on costs pursuant to rule 403 of the *Federal Courts Rules* [SOR/98-106, r. 1 (as am. by SOR/2004-283, s. 2)].

* * *

The following are the reasons for judgment rendered in English by

SEXTON J.A. (dissenting):

INTRODUCTION

[175] Oil is an essential resource in our society. Consequently, those who have oil resources have earned large sums of money when they permit others to exploit those resources. Such large sums of money may be placed with trustees who have expertise in investing and those trustees are expected to manage the moneys by prudently investing them. The main issue in this case is whether the appellant Aboriginal Bands who were entitled to the benefits from oil resources beneath their reserves, and obliged by law to surrender their oil resources to the Crown as trustee, can be deprived of the same right to have their moneys invested by the Crown when it is acting as their trustee. In the present case the Crown has taken the position that legislation which it has passed has precluded its officials from investing the oil moneys of Samson and Ermineskin (collectively referred to in these reasons as “the Bands”) and instead has deposited those moneys into its own account, used the moneys itself, and paid interest to the Bands. The Bands say they could have earned many millions of dollars more if the moneys had been prudently invested.

FACTS

[176] I adopt the facts set forth in the reasons of Richard C.J. and Sharlow J.A., and their conclusions with respect to the general and historical phase, the issue of reasonable apprehension of bias, and the objections to the admissibility of evidence. The reasons which follow include additional facts from the record below, at points in the analysis where they are pertinent, in order to provide a complete factual understanding of the money management phase.

WHAT ARE THE DUTIES OF THE CROWN AS A TRUSTEE?

I. Introduction

[177] In the money management phase of these actions, the appellants claim damages, or alternatively, equitable disgorgement for the Crown’s alleged mismanagement of hundreds of millions of dollars of royalty moneys derived from the oil and gas deposits underlying the Pigeon Lake and Samson Reserves. These moneys, say the appellants, are held by the Crown in trust and the Crown is therefore subject to all of the duties imposed upon a common-law trustee in handling them. Most importantly, the appellants allege that, by failing to invest their funds as would a prudent private trustee, the Crown failed to ensure that Samson and Ermineskin received an adequate return on their moneys.

[178] To establish their claims, the appellants called twelve expert witnesses in the money management phase, at least eight of which gave evidence as to the investment practices that would be expected of managers of large sums of money. These experts testified that the Crown should have obtained expertise in the management of large sums of money, assessed the risk tolerance of the funds and the needs of the beneficiaries, set performance targets for the funds, invested the funds in a diversified portfolio and continually monitored the performance of the investments to ensure that the maximum return consistent with sound investment practices was being obtained. Upon reviewing the Crown's conduct, the experts concluded that the Crown's handling of the Bands' funds fell short of prevailing and acceptable industry practices expected of trustees.

[179] The appellants compare the Crown's conduct to other money managers to illustrate the drastic difference between the services the Bands received and the standards prevailing in the private sector. Crown witnesses admitted that the Crown does not actively manage the funds entrusted to it by First Nations and that no one with investment expertise was hired or consulted in relation to the Bands' moneys. In contrast, the appellants point, for example, to the Ontario Teachers' Pension Plan which they say has a staff of over 150 persons qualified as Chartered Financial Analysts continuously managing the pension moneys for which it is responsible. Crown witness Robert Bertram, Executive Vice-President of the Ontario Teachers' Pension Plan, agreed in his testimony that the Crown's failure to actively manage the Indian moneys would be unheard of for someone in his position.

[180] As a result of these alleged failures, the appellants claim to have suffered significant damages over the period in which royalty moneys have been held by the Crown. In Samson's case, they claim damages of at least $650 million for the Crown's mismanagement of their capital moneys. In Ermineskin's case, up to $217 million in damages have been claimed. The appellants' claims are supported by voluminous expert evidence which was not taken into account by the trial Judge.

[181] The respondents admit the Crown holds the royalty moneys in trust for the appellants, but they claim the Crown's duties with respect to those funds are entirely defined by legislation. They assert the legislation gives the Crown no power or duty to invest the moneys but rather obliges it to hold the moneys in the Consolidated Revenue Fund (CRF) and pay the rate of interest set by Order in Council. Even if the legislation does authorize investment in private markets, the respondents submit the Crown's policy of not investing Indian moneys was a reasonable one in light of its overall policy of encouraging Aboriginal self- government. In any event, the respondents claim that they could not invest the Indian moneys because of the expenditure patterns of the Bands and the risk associated with the volatile nature of the revenue funds from the oil.

[182] As will be elaborated more fully below, I think the Crown was bound to invest the trust moneys, provided it first obtained the consent of the Bands. Because it failed to even attempt to obtain the Bands' consent to invest, it is liable for any damage this failure has caused. I am not persuaded that any of the defences proposed by the respondents exonerate the Crown.

II. Standard of Review

[183] In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (*Housen*), the Supreme Court of Canada set out the standards of review to be used by appellate courts when reviewing trial judgments. In appellate review, the nature of the questions at issue determines the applicable standard. Questions of law are reviewable on a standard of correctness (*Housen*, at paragraph 8). The trial Judge's findings of fact will be set aside only if he has committed a palpable and overriding error (*Housen*, at paragraph 10). For questions of mixed fact and law, the standard of palpable and overriding error applies unless the trial Judge wrongly characterized the correct legal standard or failed to apply the correct standard, in which case a standard of correctness applies (*Housen*, at paragraph 37).

[184] Central to this appeal is the question of whether the Crown satisfied the duties expected of it as trustee of the appellants' royalty moneys. In order to answer this question, it is necessary to first identify what duties were applicable to the Crown and secondly, to assess whether the Crown's conduct was sufficient to comply with those duties. The former is purely a question of law. It involves interpreting the applicable legislation and canvassing the case law to identify the duties of a trustee at common law. Consequently, the trial Judge's

assessment of these duties is reviewable on a standard of correctness. The latter question is one of mixed fact and law. It involves measuring the Crown's conduct against that expected of it at law to determine whether there was a breach of trust. Accordingly, unless there is an extricable error of law, this Court would normally only be permitted to interfere with the trial Judge's conclusions on this question if he made a palpable and overriding error.

[185] The following excerpt outlines the trial Judge's conclusions on the issue of breach of trust in *Samson Indian Nation and Band v. Canada*, [2006] 1 C.N.L.R. 100 (F.C.) (*Samson*) (at paragraphs 691-694). Although there are some minor differences in the wording of the corresponding passages in the trial judgment in *Ermineskin Indian Band and Nations v. Canada* (2005), 269 F.T.R. 188 (F.C.) (*Ermineskin*), at paragraphs 280-283) the effect is the same:

I am satisfied that the legislation informs the Crown's duties as trustee for Indian moneys. There is no doubt that the royalty moneys are to be held in trust. That language appears in the 1946 Surrender and later in section 4 of the *Indian Oil and Gas Act*. Although that piece of legislation was enacted in 1974 and royalties had been collected by the Crown long before that date, the *Indian Oil and Gas Act* found its genesis in the world oil crisis of 1973. Section 4 and the words "in trust" merely confirm what was an already existing situation and in no way altered the manner in which the funds were to be held and administered.

While section 4 of the *Indian Oil and Gas Act* confirms the trust, the characterization of Indian moneys as public money within the meaning of section 2 of the *Financial Administration Act* means that they must be deposited into the CRF, pursuant to section 17. Section 61(2) of the *Indian Act* mandates that they be paid interest at a rate to be determined by the Governor in Council. There is no choice in whether or not to pay interest: the Crown must. However, the Crown also has discretion in fixing the rate.

I am also satisfied that no legal authority exists that would permit the Minister to purchase investments with Indian moneys, instead of paying a rate of interest. Recall that when the *Indian Act* was amended in 1951, the power to make investments, under section 92, was specifically removed.

In paying a rate of interest to the Indian moneys pursuant to section 61(2) of the *Indian Act*, I am satisfied that the Minister has discharged his duty as a trustee to invest the trust *corpus*. In fixing a rate of interest—or investing—the trustee's duty is not to maximize profits. If that was the case, then any trustee failing to earn the maximum possible on property entrusted to her, would be liable for breach of trust. Rather, the standard that applies to the duty to invest is that of reasonableness. The trustee must, of course, act prudently. In the case of the Indian moneys, the rate of interest is tied to long-term Government of Canada bonds. The money is not committed to remain in the CRF for any specified period of time and may be withdrawn, subject to the parameters established by section 64 of the *Indian Act*. I am satisfied that the rate of interest meets the reasonableness standard for assessing a trustee's conduct.

[186] As will be elaborated upon more fully in the subsequent sections, the trial Judge's conclusions in the money management phase are premised on at least two critical errors of law, both of which are reviewable by this Court on a standard of correctness. First, the trial Judge wrongly interpreted the *Indian Act*, R.S.C., 1985, c. I-5 as not authorizing the Crown to invest Indian moneys. In these reasons it will become clear that the Crown's principal failure was in neglecting to consider investment of the royalty moneys, to devise and present to the Bands investment plans on an ongoing basis and to seek their consent. Concluding at the outset that the Crown had no power to invest, therefore, significantly tainted the trial Judge's reasoning. Secondly, the trial Judge concluded incorrectly that the legislation "informs and defines the Crown's duty as trustee" (*Samson*, at paragraph 696; *Ermineskin*, at paragraph 285), apparently leading him to determine that the Crown is bound to hold the Indian moneys in the CRF and pay interest thereon (*Samson*, at paragraph 692; *Ermineskin*, at paragraph 281). A proper analysis of the authorities reveals that while the legislation in an important respect modifies the Crown's duties, the Crown is primarily bound to perform as would a trustee at common law. The legislation does not, therefore, define the Crown's duties in their entirety. This critical error in identifying the Crown's duties likewise taints the trial Judge's conclusions.

[187] The trial Judge's erroneous interpretation of the duties and powers of the Crown as trustee constitutes an

error of law extricable from the question of whether he appropriately assessed the facts in light of those duties and powers. Because of the trial Judge's legal errors in identifying the Crown's duties, he could not have properly assessed whether the Crown met its duties as trustee, and this Court must, therefore, intervene. In any event, because of the inadequacy of the trial Judge's reasons on this question, intervention of this Court is warranted.

[188] The appellants led evidence from eight experts on the issue of investment, including Allen Lambert, the former president and CEO of the Toronto Dominion Bank; Stephen Jarislowsky, a noted investment expert; Donald McDougall, director of RBC Global Services' Benchmark Investment Analysis practice; Alan Hockin, a Department of Finance employee for over 20 years and a former vice-president of the Toronto Dominion Bank; and Alan Marchment, president and CEO of Guaranteed Trust and advisor to Canadian Deposit Insurance Corporation. The trial Judge, however, felt it was unnecessary for him to consider any of this evidence going to the question of whether the Crown had satisfied its duties as trustee (*Samson*, at paragraph 696; *Ermineskin*, at paragraph 285):

Since I have found that the Crown may—and indeed must—rely on the legislation, as it informs and defines the Crown's duty as trustee, I need not review or comment on the wealth of expert evidence presented to me on the industry standards, norms, and practices of commercial trustees.

Moreover, the trial judgment contains no analysis of voluminous non-expert evidence critical to establishing that the Crown breached its duties as trustee. The trial Judge consequently made no findings of fact going to the question of whether the Crown breached its duties, nor did he give any indication of his reasoning in coming to the conclusion that the Crown satisfied its duties because it acted reasonably.

[189] In the face of a failure by the trial Judge to identify the applicable legal test and the complete absence of any factual findings in the application of the test to the facts, this Court must conduct its own review of the evidence before the trial Court and assess it in light of the correct characterization of the Crown's duties. The words of Rothstein J.A. (as he then was) in *Baker Petrolite v. Canwell Enviro-Industries*, [2003] 1 F.C. 49 (C.A.), at paragraph 72 are apposite:

I readily recognize that there was much evidence in this case and many issues, and that this placed a heavy burden on the Trial Judge. Nonetheless, the summary way in which the Trial Judge reached his conclusion respecting anticipation precludes this Court from understanding his reasoning process. The Trial Judge made no findings of fact with respect to the expert evidence. He simply quoted two opposing expert opinions without commenting on them. While he concluded that the expert evidence was "ambivalent and, in totality . . . quite unsatisfactory", he provided no explanation for this conclusion. Nor does his final conclusion, at paragraph 93, provide any factual underpinning to give content to his reasoning.

[190] An appellate court must, of course, exercise caution in embarking on an assessment of the evidence, having not had the benefit of seeing the witnesses and conducting its own assessment of their credibility (*Housen*, at paragraphs 11-14). However, in the present case, a great deal of evidence is documentary. In addition, the parties have already invested considerable time in this matter. Samson filed its statement of claim in 1989; Ermineskin in 1992. The trial lasted nearly four years. The oral hearings in this appeal spanned four weeks. Critically, the parties are only in the middle of a very long proceeding, having argued only with respect to two of the phases of the action. The appropriateness of the appellate court intervening in such circumstances was approved by the Supreme Court of Canada in *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, at paragraph 33.

[191] Perhaps more importantly, in this case, many of the factual issues on the breach of trust issue are not in dispute; the only dispute relates to the legal consequences flowing from these facts.

III. Duties of the Crown in the Present Case

a. The Crown is a Trustee

[192] It is uncontested in the present case that the Crown holds the royalty moneys in trust for the Bands. There was a dispute, however, as to whether the source of the trust is Treaty No. 6 or the surrender in 1946. I am in agreement with the reasons of the trial Judge that the source of the trust is the 1946 surrender (*Samson*, at paragraphs 663, 664, 666):

In the case at bar, the Crown holds the Indian moneys, pursuant to section 61(1) of the *Indian Act*, for the "use and benefit" of Indians or bands; the funds may only be expended for their "benefit." At the very least, this gives rise to a fiduciary obligation. However, in my opinion, insofar as Indian moneys are concerned, a trust *corpus*, or *res*, exists. The Indian moneys, derive from the disposition of an interest in land, in the case at bar, through the 1946 Surrender. In *Guerin*, upon the surrender of the land, the band's right in the land disappeared; nothing more remained that could constitute the trust *corpus.* In the instant case, however, the disposition of the plaintiffs' interest in the land leads to the royalty moneys, which form the trust corpus.

As for the source of this trust, I do not agree with the plaintiffs' assertion that the trust arises from either the historical relationship between the Crown and aboriginal people, or Treaty No. 6. In my opinion, the treaty is of no assistance in this matter. It does not speak to the issue of how Indian moneys are to be held and administered. The only part of the treaty that may possibly pertain to this issue—and it is a most tenuous connection at best—is the clause dealing with reserve creation. That part of Treaty No. 6 reads as follows:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered. . . .

. . .

In my opinion, both the reserve clause in Treaty No. 6 and Morris's remarks cannot be relied on as the source of the trust. At that time, the Indian moneys that are the subject matter of this action did not exist. They came into being subsequent to the execution of the 1946 Surrender of Minerals document. The words contained in that document are sufficient to create a trust: there are certainties of intent, subject-matter, and object. The agreement explicitly contemplates a trust; the subject-matter is the royalty moneys; and the object, or beneficiary, is clearly the plaintiffs.

[193] In any event, whatever the source, it cannot be disputed that a trust exists in this case. The 1946 surrender provides for the holding of the surrendered mineral rights in trust for the appellants and the *Indian Oil and Gas Act*, R.S.C., 1985, c. I-7, which was enacted in 1974 [S.C. 1974-75-76, c. 15], confirms in subsection 4(1) the royalty moneys derived from these minerals are to be held in trust. In addition, the Crown has referred to itself as trustee on numerous occasions.

b. Duties of a Common-Law Trustee

[194] A number of duties applicable to a trustee at common law have been identified by the courts. Although the main issue in the present case is whether the Crown had the power and the duty to invest, the appellants also allege that the Crown breached additional duties owed by trustees at common law, particularly the duty to account and the duty of loyalty, which encompasses the duty to avoid conflicts of interest and the duty of the trustee not to profit from her office. I do not feel that these latter issues are critical to this case for reasons which will be explained below.

[195] In *Fales et al. v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at page 315 (*Fales*), Dickson J. identified that "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." A primary responsibility of the prudent trustee is the duty to invest. As the trial Judge recognized [*Samson*, at paragraph 668; *Ermineskin*, at paragraph 276], "a trustee owes a positive duty to invest the *corpus*—or, put another way, to make it productive—when the *corpus* is a wasting asset, such as money. The trust *corpus* may not lie fallow. This is the duty to invest." Lord Hailsham of St. Marylebone in *Halsbury's Laws of England*, 4th ed., Vol. 48, London: Butterworths, 1984, at paragraph 835, characterized the duty to invest as follows:

835. Duty to invest. Pending the negotiation and preparation of a mortgage, or during any other time in which an investment is being sought, a trustee may pay trust money into a bank to a deposit or other account, the interest on it, if any, being treated as income. Subject to this, or unless a trustee is expressly otherwise authorised or required under the terms of his trust, he must duly and promptly invest all capital trust money coming into his hands, and all income which cannot be immediately applied for the purposes of the trust, and he is liable for any loss which may result from its being improperly invested or being left uninvested for an unreasonable length of time, and for interest during the period of its being so left.

[196] In Donovan W. M. Waters, Q.C. editor-in-chief, Mark Gillen and Lionel Smith, eds., *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Carswell, 2005), at page 941 the authors note the importance of acting prudently in carrying out the duty to invest:

Prudence is the essential quality expected of trustees; prudence in the selection of good investments, and prudence in ensuring that those investments are also suitable, given the particular trust terms and the interests of each of the trust beneficiaries.

Investment will often be the most difficult task the trustee has to perform because on the one hand he is required to invest as wisely as he can, given the state of the market, and on the other hand he must adjust his investment plans to the needs of the trust objects.

[197] That the duty to invest is imposed upon trustees at common law was not controversial in this case. The dispute between the parties lay, however, in determining the extent to which this duty applies to the Crown as trustee of the appellants' royalty moneys. The Crown's duties will be explained in the following section.

c. The Crown's Power and Duty to Invest

[198] Whether the Crown had a duty to invest is at the heart of this case. The respondents argue that the Crown was precluded from investing by the legislation in two ways. First, the respondents allege that the Crown had no duty to invest. By virtue of section 17 of the *Financial Administration Act*, R.S.C., 1985, c. F-11 (FAA) and subsection 61(2) of the *Indian Act*, they say the Crown's only obligations were to hold the moneys in the CRF and pay interest on them at a rate set by Order in Council. Secondly, the Crown says it has no power to invest in any event, that power having been removed when what was section 92 in the *Indian Act*, R.S.C. 1927, c. 98 was removed during the 1951 amendments to that Act. In my view, the Crown is wrong in both respects. The analysis that follows will explain that the Crown's duties as trustee are not exhausted by the legislation. It is primarily bound to act as would a trustee at common law. Likewise, the removal of section 92 of the *Indian Act* in 1951 did not have the effect of removing the power of the Crown to invest Indian moneys. A proper review of the relevant legislation reveals that the power to invest continues under paragraph 64(1)(*k*), but only with the consent of the Band. Having established both that the Crown continues to have the duty to invest and the power to invest, I will then explain how the Crown's duty to invest operates in view of the consent requirement in paragraph 64(1)(*k*).

i. The common-law duties have not been displaced by legislation

[199] In order for legislation to circumscribe the common-law duties of a trustee, that intention must be clear (see *Authorson (Litigation guardian of) v. Canada (Attorney General)* (2002), 215 D.L.R. (4th) 496 (Ont. C.A.), at paragraph 80, revd on other grounds, [2003] 2 S.C.R. 40). To allow otherwise would be contrary to the principle set out by the Supreme Court of Canada in *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at paragraph 46:

In a nation governed by the rule of law, we assume that the government will honour its obligations unless it explicitly exercises its power not to. In the absence of a clear express intent to abrogate rights and obligations—rights of the highest importance to the individual—those rights remain in force. To argue the opposite is to say that the government is bound only by its whim, not its word. In Canada this is unacceptable, and does not accord with the nation's understanding of the relationship between the state and its citizens.

[200] Section 17 does not evince the requisite clear intention, nor does it even require, as the Crown suggests, that the moneys be held in the CRF. It merely requires that all public money, which includes the royalty moneys, be deposited in the CRF:

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

[201] Likewise, subsection 61(2) of the *Indian Act* does not mandate that interest be paid on all Indian moneys. The provision requires only that when such moneys are held in the CRF, the Crown must pay interest at the rate set by the Governor in Council:

61. . . .

(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.

[202] These sections do not mandate that the Indian moneys remain indefinitely in the CRF. They do not prohibit withdrawal. They simply mandate that when moneys are on deposit in the CRF, interest must be paid by the Crown.

[203] The common-law duties of a trustee, therefore, have not been replaced by narrower, legislative obligations, as the Crown suggests. Although nobody argued this, it is worthwhile to note that there is nothing in provincial legislation that would derogate from the obligation of the Crown to invest. In the Alberta *Trustee Act*, R.S.A. 2000, c. T-8, for example, trustees are empowered with the authority to invest trust funds (section 3) and are liable if they do not exercise reasonable skill and prudence in making the investments (subsection 4(1) [as am. by S.A. 2001, c. 28, s. 2]). Consequently, the starting point for determining Crown's duties are those of a trustee at common law. These will be outlined in the section that follows.

[204] This holding is consistent with the landmark decision of the Supreme Court of Canada in *Guerin et al. v. The Queen et al.*, [1984] 2 S.C.R. 335 (*Guerin*). In that case, Dickson J., for the majority, determined that when reserve lands were surrendered to the Crown, the arrangement was "trust-like" and the consequences for breach of the Crown's fiduciary duties were likewise similar to those imposed on a common-law trustee. In *Guerin*, Dickson J. could not find a trust because of the nature of Aboriginal title: when lands bearing Aboriginal title are surrendered to the Crown, the Aboriginal group no longer holds an interest in them and therefore there is no legal interest which can form the *corpus* of the trust. As the trial Judge properly identified, no such difficulty exists with respect to the royalty moneys in the present case because moneys beneficially owned by the Bands can form the *corpus* of a trust. In *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, at paragraph 13 (*Blueberry*), the Supreme Court of Canada underscored the use of trust concepts. While acknowledging that in the case of a land surrender, for the reasons expressed by Dickson J. in *Guerin*, a strict common-law trust could not be identified, Gonthier J. nevertheless held that the surrenders at issue "were framed as trusts, and the parties therefore intended to create a trust-like relationship. Thus, for lack of a better label, I think that it is appropriate to refer to these surrenders as trusts in Indian land."

ii. Does the Crown have the power to invest or was it lost by the repeal of the investment section?

[205] The respondents submit that the Crown lost its power to invest when section 92 of the *Indian Act*, R.S.C. 1927, c. 98, which authorized the Crown to make investments of Indian moneys, was repealed in 1951.

[206] In 1951, the *Indian Act* underwent significant amendments. One of such amendments was the removal of what were then sections 92 and 93. These sections provided as follows:

92. With the exception of such sum not exceeding fifty per centum of the proceeds of any land, timber or other property, as is agreed at the time of 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.

2. The Governor in Council may provide for the general management of such moneys, and direct what percentage or proportion thereof shall be set apart, from time to time, to cover the cost of and incidental to the management of reserves, lands, property and moneys under the provisions of this Part, and may authorize and direct the expenditure of such moneys for surveys, for compensation to Indians for improvements or any interest they had in lands taken from then, for the construction or repair of roads, bridges, ditches and watercourses on such reserves or lands, for the construction and repair of school buildings and charitable institutions, and by way of contribution to schools attended by such Indians: Provided that where the capital standing to the credit of a band does not exceed the sum of two thousand dollars the Governor in Council may direct and authorize the expenditure of such capital for any purpose which may be deemed to be for the general welfare of the band.

93. 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.

2. In the event of a band refusing to consent to the expenditure of such capital moneys as the Superintendent General may consider advisable for any of the purposes mentioned in subsection one of this section, and it appearing to the Superintendent General that such refusal is detrimental to the progress or welfare of the band, the Governor in Council may, without the consent of the band, authorize and direct the expenditure of such capital for such of the said purposes as may be considered reasonable and proper.

3. Whenever any land in a reserve whether held in common or by an individual Indian is uncultivated and the band or individual is unable or neglects to cultivate the same, the Superintendent General, notwithstanding anything in this Act to the contrary, may, without a surrender, grant a lease of such lands for agricultural or grazing purposes for the benefit of the band or individual, or may employ such persons as may be considered necessary to improve or cultivate such lands during the pleasure of the Superintendent General, and may authorize and direct the expenditure of so much of the capital funds of the band as may be considered necessary for the improvements of such land, or for the purchase of such stock, machinery, material or labour as may be considered necessary for the cultivation or grazing of the same, and in such case all the proceeds derived from such lands, except a reasonable rent to be paid for any individual holding, shall be placed to the credit of the band.

4. In the event of improvements being made on the lands of an individual the Superintendent General may deduct the value of such improvements from the rental payable for such lands.

[207] The Crown relies on the removal of section 92 to establish that the Crown no longer has the power to invest. However, a review of section 64 of the present *Indian Act*, which has existed largely unchanged from the form adopted during the 1951 amendments, illustrates that rather than removing the power to invest or the power to make the other expenditures from Indian capital moneys listed in sections 92 and 93, the 1951 amendments merely established a new regime for making such expenditures. Under the new regime, the Minister continues to have considerable scope to make expenditures, including investments, of band capital moneys, but he or she can no longer do so without the band's consent. Section 64 provides as follows:

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.

[208] There is no evidence that the investment clause was discussed or referred to in the discussions leading up to the 1951 amendments. This was confirmed by the Crown in oral argument. It would seem that if there was an intention to remove such an important power as the power to invest, that there would have been some discussion of this intention. Rather, it is evident on the face of these provisions that the amendments were not an attempt to reduce the type of expenditures, such as investments, that could be made with Indian moneys, but rather were intended to remove the Crown's power to make expenditures and investments of Indian capital moneys without the need to obtain the consent of the band. Under section 92, the Governor in Council had complete authority to make expenditures for the listed purposes without seeking consent of the band. Under section 93, although subsection (1) appears to indicate that the Governor in Council must seek band consent before directing expenditures of capital funds for the listed purposes, subsection (2) in fact permits the Governor in Council to make expenditures even if the band refuses to consent, if the Superintendent General considers the refusal detrimental to the progress or welfare of the band. Under section 64 the Minister no longer has any power to make expenditures of band capital moneys without first obtaining the consent of the band council.

[209] A comparison of sections 92 and 93 of the former *Indian Act* with the present section 64 reveals that the former provisions were consolidated into a single provision intended to govern all capital expenditures in a unified manner; section 92 was not simply removed in its entirety. The reference to investment previously found in section 92 has been replaced by the broader authority in paragraph 64(1)(*k*) to use capital moneys "for any other purpose that in the opinion of the Minister is for the benefit of the band." The permissible expenditures in the former section 92, including the authority to pay expenses incidental to the management of reserves, lands and property; the authority to pay for the construction or repair of roads, bridges, ditches and watercourses on reserves or surrendered lands; and the authority to make distributions to band members of no more than fifty per cent of the value of surrendered property, have been combined with the permissible expenditures from the former section 93 into the current section 64.

[210] The work of the Special Joint Committee of the Senate and House of Commons appointed to examine and consider the *Indian Act* in 1946, 1947, and 1948, and the Parliamentary debates leading up to the enactment of the consolidated *Indian Act* in 1951 also indicate that the thrust of the change to the money management provisions was not to remove the power of the Crown to invest, but rather to give bands greater control over their expenditures. Numerous Aboriginal groups, including the Indian Association of Alberta, made submissions to the Special Joint Committee requesting that the power of the Governor in Council to unilaterally authorize expenditures of capital moneys be removed from the Act. Likewise, members of Parliament indicated a desire to give Aboriginal peoples greater control over their own affairs. This respect for the decisions of bands themselves is similarly reflected in the approach taken to amending the *Indian Act* in 1951, which involved extensive consultation with Aboriginal groups before the new legislation was enacted and it is also more in accord with Treaty No. 6, which contemplates that the consent of the bands would be obtained when their assets were being dealt with by the Crown.

[211] This interpretation is also consistent with subsection 21(2) of the *Interpretation Act*, R.S.C. 1927, c. 1, in force when the 1951 amendments to the *Indian Act* came into force, which stated: "The amendment of any Act shall not be deemed to be or to involve a declaration that the law under such Act was, or was considered by Parliament to have been, different from the law as it has become under such Act as so amended." By this section, the Court is required to presume where possible that the meaning of the provisions of the pre-amendment legislation bear the same meaning as their counterparts after amendment. A construction of the relevant provisions consistent with this principle, such as the one I have set out above, must therefore be adopted in favour of a construction that results in a change in legislative meaning.

[212] Moreover, the trial Judge's order on January 27, 2005 allowing the transfer of all of Samson's capital moneys to the Band was made under the authority of paragraph 64(1)(*k*) of the *Indian Act*. A condition of that transfer was the preparation and execution of a trust instrument detailing an investment plan for the funds [*Samson Indian Nation and Band v. Canada*, [2005] 2 C.N.L.R. 358 (FC)], at paragraph 6):

Samson must prepare and execute a trust agreement with provisions satisfactory to the Court. The agreement will name an external trustee or board of trustees, independent of Samson, which will hold the money. It will contain provisions dealing with a detailed financial plan which, in turn, will set out the fund's investment and spending policies. The trust agreement will establish the conditions necessary for the payout of income and encroachments upon capital. The agreement will contain provisions concerning the selection and dismissal of investment managers and trustees. It will establish processes for monitoring and reviewing the performance of the funds and the investment policy, as well as reporting to Samson Cree Nation members.

[213] Following the trial Judge's January 27, 2005 order, the Kisoniyaminaw Heritage Trust Deed (the deed) was consented to by the Crown and approved by the trial Judge. The deed sets out the objects of the trust as follows:

ARTICLE 3—TRUST OBJECTS

3.1 The objects of the Trust are that the Trustees manage and invest the Trust Fund on behalf of the Beneficiary. The Trustees shall have the following responsibilities:

(a) They are to manage and invest as a prudent person would.

(b) They are to invest to attempt to generate sufficient Net Income annually to assist the Beneficiary to meet its responsibilities to present and future members.

(c) They are to attempt to maintain the purchasing power of the Trust Fund by endeavouring to ensure that over the long term the value of the Net Capital of the Trust remains at least at the real dollar level of 2005 in respect of sums transferred to the Trust in 2005, and at least at the real dollar level of the year in which other sums are transferred to the Trust in respect of any other amounts transferred to the Trustees for the purposes of the Trust. The real dollar level is to be determined by reference to the Consumer Price Index as published by Statistics Canada from time to time.

3.2 In managing and investing as a prudent person would:

(a) The Trustees may invest the Trust Funds in any kind of property if the investment is made in accordance with this Trust Deed.

(b) The Trustees must invest the Trust Funds with a view to obtaining a reasonable return while avoiding undue risk, having regard to the circumstances of the Trust.

(c) The Trustees must review the Trust investments at reasonable intervals for the purpose of determining that the investments continue to be appropriate to the circumstances of the Trust.

(d) The Trustees who have invested trust funds in property may exercise for the benefit of the Trust any right or power that a person who was both the legal and beneficial owner of the Trust's interest in the property could exercise.

(e) Without restricting the matters that the Trustees may consider, in planning the investment of the Trust Funds the Trustees must consider the following matters, insofar as they are relevant to the circumstances of the Trust:

(i) the purposes and probable duration of the Trust, the total value of the Trust Fund and the needs and circumstances of the Beneficiary;

(ii) the duty to act impartially towards the Beneficiary and between different members of the Beneficiary;

(iii) the special relationship or value of an asset to the purpose of the Trust or to the Beneficiary;

(iv) the need to maintain the real value of the capital or income of the Trust;

(v) the need to maintain a balance that is appropriate to the circumstances of the Trust between

(A) risk,

(B) expected total return from income and the appreciation of capital,

(C) liquidity, and

(D) regularity of income;

(vi) the importance of diversifying the investments to an extent that is appropriate to the circumstances of the Trust;

(vii) the role of different investments or courses of action in the Trust portfolio;

(viii) the costs, such as commissions and fees, of investment decisions or strategies;

(ix) the expected tax consequences of investment decisions or strategies.

[214] The deed also specifies a number of administrative matters including:

11.1 The Trustees shall appoint a qualified auditor for the Trust and shall insure that at all times a qualified auditor for the Trust is in office. The Trustees may change auditors as may be necessary.

11.2 The Trustees may retain staff to carry on any of the administrative duties and responsibilities of the Trustees.

11.3 The Trustees may retain by contract or otherwise, any person or persons who they in their absolute

discretion feel can best advise them on matters relating to the administration of the Trust or the Trust fund including but not limited to legal, accounting and investment advisors.

11.4 The Trustees shall also, as a high priority, develop an investment policy and shall retain professional investment advisors with suitable qualifications to aid them in developing that policy and investing the Trust Fund. The Trustees shall, at least once a year, review the policy to determine whether it remains appropriate and if it is not, to make such changes as may be necessary. The Trustees shall also continuously monitor and at least annually review the investment returns of the Trust Fund.

[215] By virtue of its approval of the deed and accompanying investment policy, the Crown consented to the transfer of Samson's capital moneys to a trustee to perform all the investment functions the Crown now says it had no authority to perform itself. The Crown's position is completely inconsistent. It is illogical to interpret paragraph 64(1)(*k*) on the one hand as permitting the Crown to agree that all of Samson's capital moneys be turned over to a trustee to invest with the Band's consent, but on the other hand to argue that the same provision of the *Indian Act* would not permit the government to itself invest the moneys under the same investment terms with the Band's consent.

[216] I any event, the Crown did not strongly recommend at an early stage to the Bands that because their position was that the Crown could not invest, that the Bands should consent to turning over the moneys to an independent trustee with powers comparable to those which appeared much later in the Kisoniyaminaw Heritage Trust Deed. Such a recommendation would have been consistent not only with the Crown's duties as a trustee, but also with its general fiduciary duties to Aboriginal bands.

[217] A further inconsistency in the conduct of the Crown is shown by its approval of a number of investments under paragraph 64(1)(*k*) including the purchase from Samson's capital moneys of $1,000,000 worth of shares in General Systems Research Ltd.

[218] Finally, from at least 1982, the Crown had legal advice suggesting a more expansive interpretation of section 64. In that year, a legal opinion was provided by Paul Ollivier, Q.C., Associate Deputy Minister of the Department of Justice, to R. J. Fournier of the Department of Indian Affairs and Northern Develop-ment. The full text of the opinion was set out in the reasons of my colleagues. Here I wish to focus on several important aspects. First, it states that there is "no common genus" between [then] paragraphs 64(*a*) to (*j*) which necessarily limits the generality of paragraph 64(*k*). It also says that the Minister need not under paragraph 64(*k*) obtain consent for each expenditure of capital moneys. Rather, the Minister is permitted to approve a class of expenditures such as an investment plan:

First of all, I see no reason why the Minister cannot approve a class of expenditure—or an investment plan—as being for the benefit of the band. Such a plan could include the type of proposed expenditures (corporate securities, real estate, government bonds, etc.), the proportion of moneys to be expended on each type, and other financial guidelines.

[219] Moreover, the Ollivier opinion states the Minister is permitted to delegate the day-to-day management of such a plan to an agent under his supervision, but that the Minister has the responsibility to review on a periodic basis the way in which the expenditure plan is being implemented. Lastly, the opinion suggests that if there is a dispute about the meaning of paragraph 64(*k*), the matter should be referred to the Federal Court.

[220] Paragraph 64(1)(*k*), then, authorizes the Minister to invest Indian moneys, but only with the consent of the bands. The legislative requirement that the Crown must first seek band consent before investing trust moneys only shows respect for the decision making of bands in regards to their moneys and gives them an important level of control over the actions of their trustee which most beneficiaries are not afforded. It also accords with the submissions of Aboriginal groups, including the Indian Association of Alberta, to the Special Joint Committee of the Senate and House of Commons appointed to review the *Indian Act* prior to the introduction to the 1951 amendments to the legislation.

[221] The concept of requiring a trustee to obtain the consent of a third person in order to make investments is

not an unknown concept at common law. Although such a requirement can prove cumbersome and is perhaps not advisable, nevertheless it may exist at common law (Waters, at pages 958-959).

iii. Does the Crown have the power to invest without the consent of the Bands?

[222] Although paragraph 64(1)(*k*) gives the Crown the power to invest the trust moneys, the appellants claim that the Crown has the power, and indeed the duty, to invest the trust moneys without first obtaining the Bands' consent. I disagree.

[223] The appellants' primary position is that the royalty moneys are not "public money" within the definition in section 2 of the FAA and therefore they are not to be paid into the CRF in accordance with section 17. It follows, they say, that the Crown is able to invest the moneys as part of its common-law duties as trustee.

[224] The appellants' position is incorrect. The definition of "public money" encompasses the Bands' royalty moneys paid to the Crown in trust. The definition provides:

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;

The trial Judge was correct to conclude that the phrase "and includes" expands the definition to not only include money beneficially belonging to Canada, but also money held by the Crown in trust.

[225] The appellants' second position is that even if the royalty moneys are "public money" and must therefore be deposited in the CRF pursuant to section 17 of the FAA, they may be paid out of the CRF for the purpose of investment in accordance with subsection 21(1). Subsection 21(1) provides that moneys paid into the CRF for a special purpose may be paid out of the CRF for that purpose:

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.

The appellants maintain that because the moneys are paid into the CRF in trust for the Bands, they may be paid out of the CRF for the purpose of fulfilling the Crown's trust duties, including investment. Thus there is no requirement, they claim, for the Crown to seek the Band's consent before investing.

[226] Again, I cannot agree. While the royalty moneys may be the type of "special purpose" funds to which subsection 21(1) refers, that provision states specifically that the payment of such funds out of the CRF is to be "subject to any statute applicable thereto." The applicable statute is the *Indian Act* and in section 64, the *Indian Act* outlines the two conditions that must be met before capital moneys are to be paid out of the CRF: (1) the expenditure must fall within one of the listed categories or otherwise be for the benefit of the band; and (2) the consent of the council of the band must be obtained. Without band consent in accordance with subsection 64(1) of the *Indian Act*, the Minister is not permitted to remove money from the CRF through subsection 21(1) of the

FAA. The general provision in the FAA, section 21, cannot overrule section 64 of the *Indian Act*, which deals specifically with Indian capital moneys.

[227] Samson, but not Ermineskin, argues further that section 18 of the FAA, now repealed [S.C. 1999, c. 26, s. 20], authorized the Crown to invest the trust moneys. Section 18 read:

18. (1) In this section, "securities" means securities of or guaranteed by Canada and includes any other securities described in the definition of "securities" in section 2.

(2) The Minister may, when he deems it advisable for the sound and efficient management of public money or the public debt, purchase, acquire and hold securities and pay therefor out of the Consolidated Revenue Fund.

(3) The Minister may sell any securities purchased, acquired or held pursuant to subsection (2), and the proceeds of the sales shall be deposited to the credit of the Receiver General.

(4) Any net profit resulting in any fiscal year from the purchase, holding or sale of securities pursuant to this section shall be credited to the revenues of that fiscal year, and any net loss resulting in any fiscal year from that purchase, holding or sale shall be charged to an appropriation provided by Parliament for the purpose.

(5) For the purposes of subsection (4), the net profit or loss in any fiscal year shall be determined by taking into account realized profits and losses on securities sold or loaned, the amortization applicable to the fiscal year of premiums and discounts on securities, and interest applicable to the fiscal year.

[228] I do not agree with *Samson*. It is clear section 18 was not intended to refer to funds not beneficially belonging to Canada. As the trial Judge held, "[e]ven a cursory reading of this section reveals that it simply cannot be applied to Indian moneys. If Indian moneys were invested pursuant to this section, then the Crown would gain or lose, not the plaintiffs." (*Samson*, at paragraph 689.)

iv. What is the scope of the Crown's duty to invest?

[229] Having established that the Crown has retained both the power and duty to invest when acting as trustee for the royalty moneys, the scope of that duty to invest must now be explained.

[230] The starting point for assessing the scope of the Crown's duty to invest in the present case is the standard of prudence for assessing the conduct of a trustee set out in *Fales*. In *Blueberry*, the Supreme Court of Canada considered whether the Crown had breached its fiduciary duty to an Indian band when it failed to reserve the mineral rights, which later became very valuable, from a transfer of band lands to the Director, The Veterans' Land Act. At paragraph 104, McLachlin J. (as she then was) adopted the common-law standard as set out in the *Fales* case as setting out the test against which to measure the Crown's conduct as a fiduciary:

The matter comes down to this. The duty on the Crown as fiduciary was "that of a man of ordinary prudence in managing his own affairs": *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at p. 315. A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserved out its minerals. It should have done the same for the Band.

[231] In *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, the Supreme Court of Canada was charged with explaining the extent of the fiduciary duty applicable to the Crown at the point of reserve creation. Binnie J., at paragraph 94, cited the paragraph quoted above from McLachlin J.'s reasons in *Blueberry* as establishing the appropriate standard.

[232] In order to meet this standard of prudence, a trustee is obliged to perform a number of actions, including assessing the circumstances of the fund and the beneficiaries to ascertain the appropriate invest-ments, building a diversified portfolio where appro-priate, monitoring the investments periodically, seeking expert advice before making investments and main-taining an even hand between successive beneficiaries. Ultimately, the trustee is

obliged to obtain the best return possible consistent with sound investment practices. This concept was stated in by Megarry V.C. in *Cowan and others v Scargill and others*, [1984] 2 All E.R. 750 (Ch.), at page 760 (*Cowan*) as follows:

In the case of a power of investment, as in the present case, the power must be exercised so as to yield the best return for the beneficiaries, judged in relation to the risks of the investments in question; and the prospects of the yield of income and capital appreciation both have to be considered in judging the return from the investment.

(See also Ontario Law Reform Commission, *Report on the Law of Trusts*, 1984; *Cheyenne-Arapaho Tribes of Indians v. United States*, 512 F.2d 1390 (Ct. Cl. 1975), at page 1394 (*Cheyenne-Arapaho*).)

[233] In order to fully understand the Crown's obligations, it is necessary to review in greater detail the sound investment practices that are to be taken by any trustee with the obligation to invest.

[234] The duty to consider the circumstances of the fund when selecting investments: The first practice to be followed by the prudent trustee seeking to invest the trust assets is to consider the circumstances of the fund. Experts called by both the appellants and respondents agreed that the circumstances requiring consideration include the nature of the funds, time horizon and cash flow patterns; the interests and needs of the beneficiary; the risk tolerance of the fund; and the expected risk and returns from various investment policies. As is noted in the *Restatement of the Law Third, Trusts: Prudent Investor Rule*: (St. Paul: American Law Institute Publishers, 1992), at §227, pages 14-15,

The trustee must give reasonably careful consideration to both the formulation and the implementation of an appropriate investment strategy, with investments to be selected and reviewed in a manner reasonably appropriate to that strategy. Ordinarily this involves obtaining relevant information about such matters as the circumstances and requirements of the trust and its beneficiaries, the contents and resources of the trust estate, and the nature and characteristics of available investment alternatives.

In order to fulfil this obligation, the trustee must consult with the beneficiary to understand its risk tolerance, income needs and expenditure plans.

[235] The duty to take appropriate advice where necessary: The standard of prudence requires the trustee to seek expert advice in making investments. In *Cowan*, at page 762, the Court held that the duty to act prudently "includes the duty to seek advice on matters which the trustee does not understand, such as the making of investments, and on receiving such advice to act with the same degree of prudence." This important principle was also well stated in *Miller Estate (Re)* (1987), 26 E.T.R. 188 (Ont. Surr. Ct.), at page 191, where the Court held:

Investment is no longer a choice between government bonds and blue chip stocks. It requires assessment of many rapidly changing factors in political, economic and financial areas, which in turn requires the assimilation of large amounts of detailed information. The ordinary prudent person in the conduct of his or her own investment affairs turns now as a matter of course to investment counsellors and advisers. . . .

[236] Even the Crown's expert witness, Keith Ambachtsheer, recognized the importance of seeking expert advice in his book, *Pension Fund Excellence: Creating Value for Stakeholders*, N.Y.: Wiley, 1998, at page 35:

. . . the fiduciary must be assumed to be knowledgeable. In particular, when advice from an expert is available, prudent trustees will avail themselves of this advice. In this sense, there is no excuse for failing to get expert input before decisions are made. Hence the standard is usually called the "prudent expert" standard.

[237] The duty to maintain an even hand between successive beneficiaries: When the trust has successive beneficiaries, the standard of prudence requires that the investments generate sufficient income for the income beneficiary and that the investments do not favour the capital beneficiary by preserving the capital at the expense of income. (See, e.g. *Nestle v. National Westminster Bank Plc*, [1992] EWCA Civ 12 (C.A.); *Carley Estate (Re)* (1994), 2 E.T.R. (2d) 142 (Ont. Gen. Div.); *Long Plain First Nation Trust (Trustee of) v. Long Plain*

Indian Band (2002), 162 Man. R. (2d) 166 (Q.B.).)

[238] The duty to diversify trust assets where appropriate: In many cases, the prudent approach will be for the trustee to diversify the portfolio of investments held by the trust. This principle was endorsed in *Carley Estate (Re)*, at page 157, where the Court adopted the following passage from Waters: "All capital is now at risk, and the task of the trustee is to keep his portfolio reasonably balanced between investments so as to maintain and, if possible, expand the capital value of the trust funds."

[239] The duty to periodically monitor the trust portfolio in light of market conditions: Finally, the prudent trustee must monitor the performance of the investments she has made. This obligation was described in *Cheyenne-Arapaho*, at page 1394, where the Court held that a corollary duty of the duty to prudently invest trust funds "is the responsibility to keep informed so that when a previously proper investment becomes improper, perhaps because of the opportunity for better (and equally safe) investment elsewhere, funds can be reinvested." Dickson J. in *Fales*, at page 317 likewise identified this duty to monitor: "A trustee must also be alert to changes in the fortunes of the companies represented in the portfolio of the trust estate."

[240] High-ranking Crown officials were aware of the Crown's duty to carry out these sound investment practices and in doing so, to strive to attain the best return possible consistent with these practices. For example, in a news release from November 1969, then Minister of Indian Affairs, Jean Chrétien, was quoted as saying, "my Department is acting as trustee for the Indian people of Canada, it has a duty to obtain as high a rate of interest as possible consistent with sound investment practices." Likewise, at trial, Crown witness and former Associate Deputy Minister of Indian Affairs, Dennis Wallace, testified that the Crown took the position that as trustee, it was to obtain a rate of return consistent with sound investment practices for the bands. Finally, by letter on May 16, 1973, P. B. Lesaux, Director of the Indian-Eskimo Economic Development Branch, wrote, "In many instances, Bands accumulate significant sums of money in Band accounts. We must surely view it as part of our trust responsibility to effect optimum return on these funds, while at the same time, minimize the risk factor."

[241] Unlike an ordinary trustee, however, the Crown has an obligation to seek the consent of First Nations for whom it holds money in trust before investing. Although consent may be sought with respect to individual investments, it is unlikely that the standard of prudence can be met without attempting to implement an investment plan. When the Crown assesses the circumstances of the fund, obtains expert advice, determines the appropriate balance between present and future beneficiaries and considers diversification, these practices will be directed not to the immediate purchase of investments, but to the creation of an investment plan that will be put to the bands for their approval. Such investment plans must be produced for approval by the bands on a continuing basis, with plans being proposed at least once per year, and might resemble the Kisoniyaminaw Heritage Trust Deed and accompanying statement of investment policies and procedures which the Crown approved in the order of the trial Judge on October 17, 2005. Once a plan is implemented, the Crown must then monitor the performance of the investments and, if any necessary changes are outside the scope of the initial investment plan, it must seek the consent of the bands before such changes are made.

[242] In proposing investments to the bands, the Crown must do more than present an investment plan. It must explain to the bands the benefits and risks involved with investment, and it must describe the financial consequences of a bands' decision not to approve the plan. In effect, the Crown must explain its own reasoning in establishing and recommending the investment plan to the bands so that they can make an informed decision about whether or not it is appropriate for them.

IV. Did the Crown Breach Its Duties?

[243] I now come to the important question of whether the Crown breached these duties when handling the appellants' royalty moneys. To answer this question, it will first be necessary to explain in greater detail the Crown's approach to managing the royalty moneys it collected in trust and to then compare the Crown's conduct to that expected of a trustee. As the discussion that follows will illustrate, the Crown's conduct in this case fell short of satisfying its duties as trustee.

a. The Nature and Size of the Funds

[244] Because the royalty moneys received from the Samson and Pigeon Lake Reserves are derived from a non-renewable resource, they are treated as capital moneys by the Crown and accordingly kept in capital accounts. Prior to the transfer of the entirety of Samson's trust moneys to it, each Band had a capital account in its name. In addition, the Crown maintained a separate Pigeon Lake Capital Account and credited to it royalties received from production from the Pigeon Lake Reserve. The amounts in that account were distributed annually to the Samson and Ermineskin Capital Accounts in proportion to each Bands' entitlement. Interest paid on the moneys is treated as revenue and accordingly recorded in revenue accounts. This case concerns only the moneys that have been retained in the capital accounts.

[245] When analysing the appropriateness of the Crown's conduct in executing its trust duties, it is important to bear in mind that the sums held by the Crown on behalf of Samson and Ermineskin were large and they were held by the Crown on a long-term basis.

[246] The balances in each of Samson and Ermineskin's capital accounts have grown substantially since at least 1969. At year-end in 1969, Samson held $1,513,957; Ermineskin held $1,182,745. By year-end, 1982, Samson held over $100 million in its account, a milestone achieved by Ermineskin two years later. Both Bands reached their highest year-end balances in 1997, with Samson holding $414,412,667 and Ermineskin holding $219,879,147. At all material times, therefore, the Crown was responsible for considerable sums of money.

[247] These statistics also illustrate the long-term nature of these funds, as do additional calculations provided by the experts. For example, depending upon whether a "first in first out or a last in first out" analysis is used, the balance in Ermineskin's capital account as of December 31, 1999 had been owing for either 11.8 or 16.4 years, both of which are considered "long term" by financial analysts. In Samson's case, using the "last in first out" method, the length of time the December 31, 1999 balance had been owing was 17.4 years.

b. The Crown's Approach to Handling Indian moneys

[248] The Crown's approach to handling the royalty moneys it collects on behalf of the bands involves paying the funds into the CRF and paying a rate of interest on them in accordance with the Order in Council passed pursuant to subsection 61(2) of the *Indian Act* (the "Indian moneys methodology"). As has already been established, the royalty moneys are "public money" within the definition in section 2 of the FAA and therefore in accordance with section 17 of that Act, they are to be deposited in the CRF upon receipt. The Crown has authorized a variety of withdrawals from both Bands' capital accounts for such purposes as per capita distributions to Band members and the building of infrastructure on reserves. The moneys not withdrawn by the Bands have remained in the CRF and are accounted for in each Band's capital account.

[249] From the time of the surrender until March 31, 1969, the Crown paid a consistent 5% interest on the Indian moneys held in the CRF. Effective April 1, 1969, a new method of calculating interest was developed according to a formula contained in a new Order in Council (P.C. 1969-1934). A second Order in Council was issued in 1981 (P.C. 1981-3/255), which followed essentially the same method of calculating interest as the 1969 Order in Council but modified how interest was credited, changed which balances would be used and used quarterly as opposed to monthly averages of market yields of Government of Canada bond issues as the basis for calculation. The formula set out in the 1981 Order in Council has not changed since that time. It effectively provides for a short-term rate of interest because it is subject to change every 90 days. Further, the formula applies to all Indian moneys, no matter what their size or the length of time they are to be held in trust by the Crown.

c. The Crown Breached Its Duty to Invest

[250] Having reviewed what approach the Crown took in handling Indian moneys, it is necessary to assess whether that approach fulfills the Crown's duties as trustee. As this Court stressed in *Semiahmoo Indian Band v. Canada*, [1998] 1 F.C. 3, at paragraph 45, "[a]s a fiduciary, the Crown must be held to a strict standard of conduct." On its face, it would appear that simply paying a rate of interest according to a formula that has

remained unchanged for 26 years could not satisfy the Crown's duty to invest. As the following discussion will illustrate, a more thorough review of the evidence confirms that the Crown did not satisfy this duty.

[251] The evidence at trial reveals that the Crown made no attempt to set goals or objectives for the trust moneys, to seek expert advice about prudent investment strategies or to establish an investment plan to propose to the Bands. Moreover, it did not even, at least since 1981, monitor the appropriateness of the rate of interest paid on the royalty moneys under the Indian moneys methodology in light of prevailing market conditions.

[252] Consistent with the respondents' primary position in this case, the Crown officials responsible for handling Indian moneys did not engage in any active management of the funds. As Gregor MacIntosh, a Crown official responsible for expenditures of the funds, stated:

We do nothing regarding the management of the Indian monies when they are in the Consolidated Revenue Fund. That is the Consolidated Revenue Fund and it's managed by legislation.

[253] The Crown officials responsible for managing the funds in any event did not have the specialized investment expertise required when managing large sums of money, nor did they attempt to obtain the relevant expertise by engaging outside advisors. Gregor MacIntosh confirmed that Department of Indian Affairs and Northern Development officials did not have the relevant expertise:

Q. But in any event, no one that you know of in the Government of Canada, presently, or in the past, has had any special training which would enable that person to hold himself out or herself out as having expertise in the investment of large sums of money or the management of large sums of money; is that so?

. . .

A. Currently, not that I know of.

Q. What about in the past, do you know of anybody in the past?

A. Not offhand, no.

[254] Mr. MacIntosh likewise confirmed that outside advisors had not been retained with a view to putting together an investment plan:

Q. MR. O'REILLY: Now, whether or not it has been possible to make any investments, Mr. MacIntosh, out of proceeds of oil and gas monies or debiting monies to the credit of the Samson, Ermineskin, Enoch bands, has the Department of Indian Affairs and Northern Development, since 1969, ever sought the advice of investment managers or taken other steps to invest monies for the credit of the Samson, Ermineskin and Enoch bands in securities?

A. Not to my knowledge, Mr. O'Reilly.

Q. There haven't been any investment plans formulated by the Department of Indian Affairs or the Department of Finance in respect of possible investments in securities for the benefit of Samson or Ermineskin or Enoch during the period even from 1951 until date [*sic*]?

A. Not to my knowledge. The only thing I'm thinking about is when we agreed to do the special legislation for the Ermineskin Band, but I don't think we had a detained [*sic*] plan of investments at that time.

Q. But the Government of Canada, then, hasn't tried to obtain investment counsel or talked to different financial people and said well, what could be an alternative plan than simply paying interest on these Indian monies pursuant to Orders in Council D-39 and D-41, since 1951?

A. Not to my recollection, Mr. O'Reilly.

. . .

Q. MR. O'REILLY: But as of now, the answer is no, there was no such plan, there were no such consultations; is that correct?

A. Not in anything I've read, Mr. O'Reilly, or in any research that I've been able to do.

[255] The Crown likewise did not fulfill the trustee's obligation to ascertain the circumstances of the fund. Gregor MacIntosh stated on discovery that the Department of Indian Affairs and Northern Develop-ment had no written goals or objectives relating to the return on Indian moneys. When asked specifically about Ermineskin, he further testified that the Crown did not have an understanding of the income requirements or risk tolerance of the Band, and would not have felt it appropriate to inquire.

[256] As would be expected from the foregoing, the Crown made no attempt to actually invest the appellants' moneys by preparing an investment plan for approval by the Bands. Crown counsel admitted before us that there is no evidence that the Crown drafted an investment plan to be proposed to the Bands. The Crown's approach, he explained, was to wait for the Bands to develop such a plan themselves.

[257] The evidence establishes that even when the Bands requested that the Crown invest their moneys, the Crown was not prepared to do so. A letter written by Gregor MacIntosh to Chief John B. Ermineskin in 1992 shows the Crown was not prepared to hire an outside independent investment advisor for the Band funds. Likewise, in 1994 and 1996, in response to letters from Ermineskin counsel, the Crown refused to invest the trust moneys.

[258] This approach is, of course, consistent with the Crown's primary position taken in this case that it did not have the authority to invest the funds. As I have already shown, not only was this view incorrect on a proper interpretation of the evidence, it contradicts the legal opinion provided to the Crown in 1982 by Mr. Ollivier which concluded the Crown was able to invest the band funds under what is now paragraph 64(1)(*k*) by putting an investment plan to the bands. At that point, had the Crown continued to be unsure as to the scope of its legal authority to invest, it should have referred the question to the Federal Court, as recommended in the Olliver opinion.

[259] The approach taken by the Crown, which exhibits no attempt to even draft a proposed investment plan for approval by the bands, could not, of course, satisfy the Crown's duty to invest, as modified by paragraph 64(1)(*k*). The onus is on the Crown to generate a plan, based on the size of the trust fund, the spending requirements of the bands and the need for conservatism in order to preserve capital for future beneficiaries. Although the Crown must seek consent of the bands before investing, it does not follow that the Crown, as trustee, can shift this obligation to create an investment plan to the trust beneficiary.

[260] When it agreed to become trustee of the royalty moneys, the Crown undertook the obligation to look after the best interests of the bands. In giving the Crown the power to manage their moneys, the bands trusted the Crown to exercise its authority over their funds with care. As McLachlin J. (as she then was) stated in *Blueberry*, at paragraph 38:

Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 S.C.R. 99; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.

[261] To borrow the words of Justice Rothstein in *Fairford First Nation v. Canada (Attorney General)*, [1999] 2 F.C. 48 (T.D.), at paragraph 171, the Bands became "completely reliant" on the Crown and the Crown "failed

to act in a reasonable and prudent manner as if it were looking after its own interests."

[262] Having been entrusted by the Bands with the authority to manage their moneys, the Crown could not rely on the Bands to formulate the requisite investment plans. It is well established in trust law that it is the trustee who has the responsibility to develop an investment plan for the trust funds. This principle is acknowledged in Waters, at page 963:

In selecting an investment, the trustee must consider a range of matters concerning the market conditions, the quality and probable duration of the proposed investment, the duration of the trust and the beneficial interests involved, the financial situation of income beneficiaries, and the impact of taxation and inflation. He must also consider in the planning of his portfolio of trust investments, whether and, if so, to what extent and in what manner, he ought to diversify. [Emphasis added.]

[263] The *Restatement of the Law Third, Trusts: Prudent Investor Rule*, at §227, page 8 also highlights the obligation of the trustee to outline an investment strategy:

The trustee is under a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.

(a) This standard requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust. [Emphasis added.]

[264] The Ollivier opinion likewise identified that the onus is on the Crown to properly manage the bands' capital moneys:

Thirdly, consistently with the view expressed above that the control and management of capital moneys in the final analysis remains the responsibility of the Crown, the Minister would be obliged on a periodic basis to review the way in which his approved expenditure plan was being implemented, and to make any adjustments in the plan or in its implementation which appeared to him to be for the benefit of the band. [Emphasis added.]

[265] Therefore, it is unrealistic to suggest that the Crown is excused from investing because the Bands did not give consent. The Bands were not presented with any plan of investment for approval to which they could consent.

[266] Expert evidence helps to illuminate what was expected of the Crown by establishing the standards applicable to professional trustees. In *Authorson (Litigation guardian of) v. Canada (Attorney General)* (2004), 249 D.L.R. (4th) 214 (Ont. S.C. J.), at paragraph 143, Brockenshire J. recognized that the appropriate model against which to assess the Crown's conduct is against the practice of professional trustees:

. . . the most appropriate model, to satisfy the fiduciary obligation to invest and keep invested the funds under administration, is that used by professional trustees, who face exactly the same type of obligation, and . . . have faced it since long before the Crown first undertook the obligation at issue in this case.

[267] The expert evidence adduced at trial highlights the Crown's obligation to generate an investment plan for the royalty moneys. For example, Robert Bertram, a Crown expert, agreed with the statement that "in the management of large sums of money, say, $50 million or more, an investment strategy is an absolutely necessary thing to have."

[268] Tony Williams, another expert, stated that in order to comply with the prudent person standard, the Crown should have "set up appropriate investment policies" and "documented the policies in a written statement of investment policies and goals."

[269] Likewise, according to the testimony of Professor Laurence Booth,

. . . it was the Crown's responsibility to do what any financial planner would have done, which is to go through a financial plan, to look at revenues, to look at expenses, to look at all of the factors that go into this holistic approach, and design an investment strategy consistent with those spendings and those other responsibilities.

[270] Despite this onus on the Crown to prepare an investment plan and present it to the Bands, the evidence shows that the Crown never sought the consent of the Bands to invest their moneys. The following excerpt from the discovery transcript of Reinhard Kohls, a Crown employee, was adduced at trial:

Q. And as I understand it, I'd simply like you to confirm that the Crown has never asked the Ermineskin Band whether it would approve the government investing monies on its behalf? Is that right?

A. Not—not to my knowledge, without the change to legislation and so on.

Q. But it's never asked that question —

A. No.

[271] The expert evidence as to the duties of a trustee adduced at trial likewise supports the conclusion that the Crown was required to carry out a variety of sound investment practices in fulfilling its duty to invest prudently. The experts noted that the Crown failed to properly manage the Bands' moneys because:

(a) the Crown should have analysed the present and future needs of the Band members (born and unborn);

(b) the Crown should have deployed either in-house expertise in the management of substantial sums of money or retained outside expertise in this regard;

(c) the Crown should have set performance targets for the funds;

(d) the Crown should have monitored the results of its investment decisions on an ongoing basis;

(e) the Crown should have diversified the investment of the appellants' royalty moneys;

(f) the Crown should have preserved capital funds from diminution due to inflation and increased them for the benefit of future generations;

(g) the Crown should have taken account of the fact that the funds received in trust were from a non-renewable and depleting asset;

(h) the Crown should have evaluated the nature of the funds, time horizon and cash flow patterns;

(i) the Crown should have assessed the risk tolerance of the fund; and

(j) the Crown should have determined the risks and returns from various investment policies.

[272] The investment experts confirmed that the Crown's lack of an investment policy resulted in poor performance of the funds and that based on a review of investment returns available during the period through diversification, a wide margin of incremental gain was forfeited over the last 20 years. In summary, the experts concluded the Crown's treatment of the Bands' funds did not conform to the prevailing and acceptable industry practices.

d. Alternative Defences of the Crown

i. The government policy of promoting self-government for the Bands and their attempts to implement it

did not excuse the Crown

[273] If the Court were to find, as I have, that the Crown's duties as fiduciary are defined by the common-law as modified by legislation, the Crown's alternative defence is that its decision not to invest the trust moneys was appropriate in light of the Crown's policy of promoting self-government among Aboriginal peoples.

[274] The Crown pointed to numerous initiatives specific to Samson and Ermineskin or intended to be of general application to all First Nations across the country designed to devolve decision-making authority to First Nations and to transfer to them all of the moneys the Crown had previously held in trust on their behalf. In the Crown's view, it was a reasonable decision to focus its efforts entirely on building Aboriginal self-government, rather than attempting to prudently manage the trust moneys of First Nations. At least two reasons prevent the Crown from relying on its self-government policy as a valid defence.

[275] First, while the Crown's self-government policy may have been laudable, that did not excuse the Crown from fulfilling its trust duties until such time as self-government, at least to the extent of having the Bands take control of the trust funds, could be implemented. Self-government for Canada's Aboriginal peoples is an important goal and indeed, a goal expressed by many Aboriginal peoples themselves. However, self-government is a long-term objective. The paternalism and dependence characteristic of the relationship between the Crown and Aboriginal peoples cannot be undone overnight. In the meantime, the Crown must fulfill its trust responsibilities by properly managing the funds entrusted to it. The evidence supports this proposition, indicating that while both Bands at times expressed interest in collapsing the existing trust and taking full control of their moneys, such initiatives failed. It was not appropriate, therefore, for the Crown to work solely towards these ultimately unsuccessful initiatives. The Crown was obliged to continue to fulfill its trust duties by, in particular, creating investment proposals on a continuing basis for approval by the Bands.

[276] Secondly, while senior government officials may have had a policy directed to developing initiatives to build Aboriginal self-government, there is no evidence that this policy was communicated to the public servants actually handling the trust moneys as a reason why the funds could not be invested. Throughout the relevant period government officials maintained the funds could not be invested not because of a desire to establish self-government amongst Aboriginal peoples, but because they were of the view that the *Indian Act* did not permit investments, because of a Crown policy against taking risks with Indian moneys, and because of a desire to avoid earning different returns for different bands.

[277] These reasons against investment were evident from early evidence covering the period up to the 1970s. The trial Judge quoted from an 1859 Executive Council recommendation signed by John A. MacDonald which disclosed the government's concern with making actual investments of Indian moneys (quoted in *Samson*, at paragraph 648; *Ermineskin*, at paragraph 256):

In dealing with the Indians of whom the Government has constituted itself the Guardian, it would appear desirable so to secure the funds as to prevent the possibility of any failure in the payment of the Annual Sums required for the Indians, as such failure would certainly be attributed to a breach of faith on the part of the Government and [could not] be explained to the satisfaction of the Tribes. By maintaining the present system of investment, it might also result that one Tribe would find its Annual interest regularly paid, while others would meet with disappointment. Should such an event arise, Parliament would probably find it necessary to make good the losses of the Trust, and it would therefore be more advisable to carry the funds at the credit of the Trust to the Consolidated Fund, and to charge the annual interest upon that Fund at such scale as might appear equitable to the Legislature.

Further receipts on account of the Indians might be kept at their Credit in account with the Receiver General—allowing the Trust Six per cent interest thereon pending the decision of Parliament on the general Subject.

[278] An August 28, 1973 letter by V. M. Gran, Chief, Band Management Division, a Crown official, confirms the view that the Crown should not invest Indian moneys because of the risk of criticism from failing to do so appropriately:

. . . I submit that the Department should not attempt to become involved deeply in the matter of investment of surplus Band funds on behalf of Bands. The fact that the Minister is always subject to criticism regardless of how wisely the money is invested, or how great the return to the Band is important. The Band is always in a position to levy criticism against the Minister even with respect to the possibility that he did not invest their funds and obtain the highest return possible whether he did or not.

[279] Likewise, a December 9, 1974 letter from Jacques Roy, Director, Legal Services, Indian and Northern Affairs, to Mr. V. M. Gran reveals the Crown's view about investment of Indian moneys:

This office has on several occasions studied the questions you have raised and it is our opinion that the *Indian Act* does not allow for the investment of Capital Band Funds nor for the transferring of these capital funds which would permit a band to manage, control and expend its capital monies.

[280] The evidence also reveals that the same reasons for failing to invest were given into the 1990s. Ermineskin counsel wrote first to Crown counsel and then to Prime Minister Jean Chrétien in 1994 and 1996, respectively, asking for the Crown to fulfill its duties as trustee by obtaining the best yield for the Bands. The responses on behalf of the Crown in both cases indicate that the legislative and policy concerns against investment present in the 1970s remained. The response to the first letter, provided by Alan D. Macleod on June 13, 1994, states:

. . . as long as it has responsibility for the monies, Her Majesty's Government is not prepared to turn them over to third parties to invest those funds; it is not prepared to risk band capital accounts in the marketplace. The capital and revenue accounts in the consolidated revenue fund constitute a very safe investment which attracts a favourable interest rate. Moreover, the bands have demonstrated a requirement for funds annually, which funds have been derived from the interest earned and the bands have, from time to time, availed themselves of opportunities to access the capital accounts through Section 64(1) of the *Indian Act*.

[281] Ronald A. Irwin, P.C., M.P. responded to the second letter on March 26, 1996 by stating,

As you know, the holding of Band funds in the Consolidated Revenue Fund is mandated by legislation. Moreover, given that the funds are not at risk, the Crown's position is that the interest formula applicable to Band capital and revenue accounts provides a reasonable rate of return, particularly given the fact that these funds are accessible under section 64 of the Indian Act.

With respect to the investment of Band funds, the Government of Canada will not place the funds of the Ermineskin Band at risk by making investments in which there is a possibility of a decline in value, even though it might produce a higher rate of return.

[282] In sum, while self-government is an important policy objective to be pursued by the Crown, it cannot excuse the Crown from performing its duties as trustee until self-government is in fact implemented, particularly in the circumstances of this case, where the desire for self-government was never considered by Crown officials responsible for the trust moneys to be the reason for the Crown's refusal to invest.

[282] Bref, même si l'autonomie gouvernementale représente un objectif politique important pour la Couronne, il ne peut soustraire celle-ci au devoir de s'acquitter de ses obligations fiduciaires jusqu'à ce que l'autonomie gouvernementale soit effectivement réalisée, surtout dans les circonstances de la présente affaire, où les fonctionnaires responsables du traitement des sommes en fiducie n'ont jamais considéré cette politique comme la raison expliquant le refus d'investir de la Couronne.

ii. <u>The spending habits of the Bands and the volatility of oil revenues did not preclude the Crown from investing</u>

[283] The respondents also argue in defence that in any event, investment could not be made in light of the fact that the Bands did not have a sufficiently disciplined spending policy to enable a long-term investment strategy of the type that might have lead to greater returns for the Bands. Moreover, the respondents reject the

appellants' submission that even high levels of spending could be tolerated by the fund because of substantial oil royalty forecasts. According to the Crown, oil revenues were too volatile to compensate sufficiently for Band spending.

[284] The Bands admit that their spending was high. According to statistics provided by the Crown, from 1969 to 1999, Samson withdrew and spent or invested $1.74 billion of its $2.2 billion in total revenues—roughly 80%, while Ermineskin withdrew over 70% of all its royalty and interest revenue. However, despite these significant withdrawals from the Bands' capital and revenue accounts, it is important to bear in mind the substantial balances that remained in the Bands' capital accounts in the relevant periods. From at least 1969, the balance in the Bands' accounts continued to grow for most years with substantial balances being maintained. Thus it is clear that despite the spending habits of the Bands, their capital accounts kept increasing. This evidence should have persuaded the Crown that there were substantial sums available for investment. The following excerpt from an exhibit entitled, "Summary Of Pigeon Lake Royalty Distribution To Samson Cree Nation's And Ermineskin Cree Nation's Capital Accounts," illustrates this concept:

DATE	Samson Cree Nation Year-End Balance (1)	Ermineskin Cree Nation Year-End Balance (2)
Mar-69	$ 1,513,957	$ 1,182,745
Mar-70	1,778,394	1,349,376
Mar-71	2,102,723	1,209,315
Mar-72	2,545,360	1,108,608
Mar-73	3,407,378	1,611,779
Mar-74	5,728,755	2,621,713
Mar-75	17,241,933	8,022,490
Mar-76	24,680,137	11,995,141
Mar-77	32,270,573	14,478,410
Mar-78	37,177,922	19,324,259
Mar-79	47,239,365	25,315,319
Mar-80	70,811,276	42,233,855
Mar-81	80,889,955	41,198,787
Mar-82	114,395,897	55,908,238
Mar-83	151,612,576	79,467,586
Mar-84	232,983,762	116,547,244
Mar-85	329,311,768	158,058,905
Mar-86	391,298,391	199,546,404
Mar-87	383,983,082	196,683,252
Mar-88	376,674,227	199,045,135
Mar-89	387,898,365	202,915,058
Mar-90	399,875,433	205,822,562
Mar-91	405,868,224	210,599,263
Mar-92	409,587,208	213,934,172
Mar-93	406,149,559	216,930,163
Mar-94	408,573,936	216,746,868
Mar-95	409,935,537	217,464,396
Mar-96	414,082,421	216,874,109
Mar-97	414,412,667	219,879,147
Mar-98	410,808,220	218,372,038
Mar-99	348,604,338	210,824,436

Notes: (1) Includes Samson's pro-rata share of Pigeon Lake capital balance as of each March 31st.

(2) Includes Ermineskin's pro-rata share of Pigeon Lake capital balance as of each March 31st.

Preliminary, subject to minor revision.

[285] Furthermore, the Crown should have made inquiries of the Bands on a periodic basis to determine the

Band's spending requirements. The evidence of the Crown is that they did not do so, nor even believe that they should. When asked whether the Crown had "any understanding of what the income requirements and risk tolerance of the Ermineskin capital accounts were," Gregor MacIntosh responded "it's not our business to know what the band wants to spend or what the band thinks it needs to live off of anymore [*sic*] they'd know what I think I need to live off of."

[286] Moreover, it is impossible to know how the Bands' spending habits would have changed had they been confronted with the possibility of making actual investments and locking-in their funds on a long-term basis in order to obtain higher returns. The evidence in fact indicates that at least in Ermineskin's case, the Band was capable of curbing excessive spending. After its withdrawals hit a peak of $42 million in 1987, Ermineskin developed a plan to reduce spending and saw its expenditures decrease to $17 million in 2000 despite the fact that over that period the Band's population increased by approximately 53%.

iii. It is far from clear that the rate of return was reasonable

[287] The respondents say that in any event, the interest they paid was reasonable in the sense that it provided the appellants with a reasonable return on their moneys. However, the Crown made little attempt to ascertain how the rate being paid compared to rates of return that could be obtained through investment and therefore had no way of assessing the "reasonableness" of the rate of interest being paid. As Mr. MacIntosh stated on discovery:

Q. But no one has been specifically designated, as I understood your earlier testimony, to be reviewing the Globe and Mail, the interest rates on long-term Government of Canada bonds, the stock market, to say that all told, if we had a portfolio of $100 million, what is the returns of other portfolios, similar portfolios and comparing that to the returns on Indian monies? No one was charged with that function?

MR. MACLEOD: Other than the process we've described about getting information on a weekly basis from the Bank of Canada and doing the actual calculation; I think that's been described before. You are talking about somebody taking that information and assessing its quality, if you like, against the marketplace?

MR. O'REILLY: Yes, on an ongoing basis.

Q. No one was doing that, Mr. MacIntosh?

A. No one does that, Mr. O'Reilly; because Indian monies isn't set aside for someone to look at the specific rate of return on a daily basis. The funds from Indian monies, as you are aware, are part of the government operating cash in the CRF.

From time to time, people do look at the rate of return that is given to Indian monies. That's why it's been changed over since 1868 a number of times, as indicated in the listing that I gave you.

But no one sits down on a daily basis and looks at the specific rate of return on a portfolio of 400 million, say, for Samson.

[288] The Crown likewise made no attempt to hire outside advisors to assess the reasonableness of the rate of interest being paid:

Q. MR. O'REILLY: Well, did the department ever consider hiring or did they hire any professionals in the area of Finance, money markets, security, to do an analysis or a comparison of the rates of return on the Indian monies in relation to funds in the private sector?

A. Not that I know of while I was in this area, other than the people I have mentioned or talked to. Why would we, Mr. O'Reilly?

MR. MACLEOD: Well, let's not get into that.

Q. MR. O'REILLY: Well, you have testified, though, that you have had, on a number of occasions, Indian bands including Samson, who have complained that the rates of return were not high enough. You acknowledge that, you just acknowledged that this morning, I believe, Mr. MacIntosh?

A. That's correct.

Q. So, faced with those complaints, why did you not hire persons before Mr. Mundell, for instance, to do such a comparison?

A. Because we felt that the rate of return that we were giving, under the circumstances, was reasonable; no costs, no risk.

Q. But you hadn't checked that out with a report or verified that with a report like Mr. Mundell's report?

A. No.

Q. When you said you felt that the rates were reasonable, it was just based on the general information from Finance or was it based on your instinct or —

A. My instinct, what I read, the people I talked to.

[289] Moreover, the appellants presented expert evidence showing the additional moneys which they could have received if their moneys had been managed by a prudent trustee. For Samson, the estimates for such additional returns ranged from approximately $239 million to approximately $1.53 billion. For Ermineskin, the estimates ranged from approximately $156 million to approximately $217 million.

[290] There was voluminous expert evidence from many witnesses at the trial over an extended period of time. Some of this evidence was conflicting. The trial Judge, without canvassing this evidence, simply found that the rate of interest which the Crown paid was reasonable. In my view, it would be unwise for this Court to attempt to determine whether or not the rate of interest paid was reasonable without reviewing all of the evidence and giving reasons as to which evidence should be preferred. This would involve reviewing many exhibits, as well as what appear to be thousands of pages of transcript and then assessing that evidence without the benefit of seeing and hearing the evidence of the experts and without having the benefit of a finding by the trial Judge on the credibility of the various experts or indeed any adequate reasons of the trial Judge as to why he said the rate of interest was reasonable.

[291] By way of example, the evidence of just two of such experts was summarized as follows by counsel for Samson. It should be noted that several of these calculations are based on notional investment in bonds, just as the interest in fact paid by the Crown was based on a notional investment in bonds.

891. The additional returns that Samson would have received based on different calculation's [*sic*] carried out by Mr. Perreault and Mr. Williams are as follows:

i) $239 million—**SEI Median Large Plans**, after investment management fees (as at September 30, 2002)—the SEI Large Plans Universe is representative of pension plans that have in excess of $250 million in assets. These plans invest their moneys in diversified portfolios of stocks and bonds, which investment strategy is recommended for moneys with a long-term horizon. [Updated to December 31, 2003—$322 million.]

ii) $230 million—**SEI Median Balanced Funds**, after investment management fees (as at September 30, 2002)—the SEI Balanced Fund Universe is representative of performances obtained by individual investment counsellors having a balanced fund mandate. These plans invest their moneys in diversified portfolios of stocks and bonds, which investment strategy is recommended for moneys with a long-term horizon. [Updated to December 31, 2003—$295 million.]

iii) $1.53 billion—**S&P 500 Index**, after investment management fees (as at September 30, 2002)—the Standard & Poor's 500 stock composite index is a capitalization-weighted index of 500 publicly traded stocks issued by U.S. companies. The index is converted to Canadian dollars. [Updated to December 31, 2003—$1.74 billion.]

iv) $845 million—**MSCI EAFE Index**, after investment management fees (as at September 30, 2002)—the Morgan Stanley Europe, Australia, Far East stock market index is a capitalization-weighted index representing 20 developed countries outside of North America. The index is converted to Canadian dollars. [Updated to December 31, 2003—$1.04 billion.]

v) $755 million—**MSCI World Index**, after investment management fees (as at September 30, 2002)—the Morgan Stanley World index is a capitalization weighted index representing 22 developed countries around the world. The index is converted to Canadian dollars. [Updated to December 31, 2003—$894 million.]

vi) $395 million—**Long-term Government of Canada Bond Portfolio** (as at September 30, 2002)—this calculation represents what the total additional return would have been had Samson's moneys been notionally invested in long-term Government of Canada Bonds with terms to maturity of ten years or more. This calculation uses the same bonds used by the Crown in applying the Indian moneys methodology, however the bonds are notionally purchased and held to maturity. This has the effect of locking in the interest rates for the duration of the bond, as opposed to the Crown methodology which resulted in a floating rate of interest. [Updated to December 31, 2003—$408 million.]

vii) $650 million—**formula approximating the return of Long-term Government of Canada Bond Portfolio** (as at September 30, 2002)—this calculation represents the additional return Samson would have received had a formula been used which captured the capital gains and losses and coupon interest from the same bonds used in the Indian moneys methodology. The calculation is based on the Scotia Capital Markets Long Term (Canada only) Bond Index. When a bond's maturity falls below ten years, it is dropped from the calculation. This is the main difference between this calculation and paragraph vi), above. [Updated to December 31, 2003—$706 million.]

viii) $746 million—**Scotia Capital Markets Long Term Bond Index** (as at September 30, 2002)—this calculation represents the additional return Samson would have received had a formula been used to replicate the returns on this index. The index captures the capital gains and losses and coupon interest from the Government of Canada, provincial and corporate bonds with terms to maturity of 10 years and more which comprise this Index. [Updated to December 31, 2003—$836 million.]

ix) $445 million—**Scotia Capital Markets Universe Bond Index** (as at September 30, 2002)—this calculation represents the additional return Samson would have received had a formula been used to replicate the returns on this index. The index captures the capital gains and losses and coupon interest from the short-term (47%), mid-term (27%) and long-term (26%) bonds which comprise this Index. [Updated to December 31, 2003—$477 million.]

x) $327 million—**Simulated 15-year Government of Canada Bond portfolio** (as at September 30, 2002)—this calculation represents what the total accumulated additional dollar return, including the market value of the notional bonds, would have been if the interest rates actually used for crediting interest to Samson's moneys had been locked in for a period of 15 years. [Updated to December 31, 2003—$343 million.]

xi) $365 million—**Simulated 17-year Government of Canada Bond portfolio** (as at September 30, 2002)—this calculation represents what the total accumulated additional dollar return, including the market value of the notional bonds, would have been if the interest rates actually used for crediting interest to Samson's moneys had been locked in for a period of 17 years. [Updated to December 31, 2003—$394 million.]

xii) $618 million—**PSSA interest rate methodology** (as at June 30, 2002)—this calculation represents the

additional return Samson would have received had the PSSA formula been used to credit interest on Samson's account. This approximates the return which would have been achieved had Samson's moneys been locked in to 20-year bonds.

[292] The Crown likewise spent considerable time addressing this issue. In its factum it utilized at least 30 pages discussing it.

[293] Perhaps the clearest way of graphically showing the divergence of views is to show them by reference to an exhibit, which illustrates how the rates of return obtained by the Crown for the Bands compared with other rates of return.

ANNUALIZED RATES OF RETURN
FOR PERIODS ENDING DECEMBER 31, 1999

	30 YRS	25 YRS	20 YRS	15 YRS	10 YRS	8 YRS	7 YRS	6 YRS	5 YRS	4 YRS	3 YRS	2 YRS	1 YR
SAMSON CREE NATION RATE	9.3	9.8	9.9	8.8	8.0	7.4	7.2	7.1	6.8	6.4	5.9	5.6	5.7
ERMINESKIN CREE NATION RATE	9.4	9.8	10.0	8.8	8.1	7.5	7.2	7.1	6.8	6.4	5.9	5.7	5.8
MAJOR MARKET INDICES													
TSE 300[1]	11.0	13.4	11.3	11.7	10.6	14.0	16.4	13.9	17.0	17.6	14.2	13.8	31.7
S&P 500[2]	14.8	19.0	19.1	19.6	20.8	23.1	23.7	25.4	29.3	28.2	29.8	25.3	13.9
EAFE[3]	13.5	16.7	15.5	16.7	9.5	14.2	16.9	13.7	13.6	15.0	18.0	24.	20.0
WORLD[4]	12.9	16.7	16.3	17.2	14.0	18.1	20.2	19.0	20.6	21.4	24.0	25.5	18.0
SCM UNIVERSE[5]	N/A	N/A	11.6	10.8	10.1	9.0	8.9	7.4	9.9	7.4	5.8	3.9	-1.1
SCM LONG TERM[6]	10.9	11.7	12.6	12.4	11.6	10.9	10.8	9.0	12.6	9.4	7.9	3.0	-6.0
SCM L-T (CANADA ONLY)[7]	N/A	N/A	12.5	12.3	11.3	10.6	10.4	8.8	12.5	9.4	8.1	3.2	-6.7
SCM 91-DAY T-BILLS[8]	8.5	9.1	9.2	7.7	6.6	5.4	5.1	5.1	5.0	4.4	4.2	4.7	4.7
SEI MEDIAN RETURNS													
CANADIAN EQUITIES	N/A	N/A	12.6	12.6	11.0	14.0	15.8	13.2	16.3	16.9	12.6	11.0	24.1
FOREIGN EQUITIES	N/A	N/A	17.7	17.0	17.5	18.8	19.2	18.9	21.0	20.8	22.1	21.0	17.0
FIXED INCOME	N/A	N/A	11.7	10.8	10.2	9.1	8.9	7.4	10.0	7.4	5.8	3.9	-1.3
BALANCED FUNDS	N/A	N/A	12.1	12.4	11.7	12.1	13.1	11.5	14.4	13.5	11.3	9.9	11.4

ENDOWMENTS & FOUNDATIONS	N/A	N/A	N/A	N/A	12.3	12.5	13.1	11.9	14.8	14.0	11.8	10.1	10.4
LARGE PLANS	N/A	N/A	12.3	12.0	11.2	12.0	12.9	11.7	14.3	13.4	11.8	10.4	12.1

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[1] TSE 300 Index — A capitalization-weighted index of the 300 most actively traded and largest market capitalization stocks on the Toronto Stock Exchange.
[2] S&P 500 Index — *Standard & Poor's 500* stock composite index is a capitalization-weighted index of 500 publicly traded stocks issued by U.S. componies. The index is converted to Canadian dollars.
[3] Morgan Stanley EAFE Index — *The Morgan Stanley Europe, Australia, Far East* stock market index is a capitalization-weighted index representing 20 developed countries outside of North American. It is also converted to Canadian dollars.
[4] Morgan Stanley World Index – *The Morgan Stanley World* index is a capitalization-weighted index representing— 22 developed countries around the world. It is also converted to Canadian dollars.
[5] Scotia Capital Markets Universe Bond Index — *The Scotia Capital Markets Universe* bond index is a capitalization-weighted index of Canadian bonds with terms to maturity of one year and more. The index is comprised of 47.4% short-term bonds (from 1 to 5 years) 27.1% mid-term bonds (from 5 to 10 years), and 25.5% long-term bonds (over 10 years left to maturity) at December 1999.
[6] Scotia Capital Markets Long Term Bond Index — *The Scotia Capital Markets Long Term* bond index is a capitalization-weighted index of Canadian bonds with terms to maturity of 10 years and more. The index is comprised of 48.6% Government of Canada bonds, 34.2% provincial bonds and 17.2% corporate bonds at December 1999.
[7] SCM Long Term (Canada Only) — *The Scotia Capital Markets Long Term (Canada only)* bond index is a sub-set of the Long Term Bond Index. The index is comprised of Government of Canada bonds with terms to maturity of 10 years and over.
[8] *Scotia Capital Markets 91-day Treasury Bills — Government of Canada 91-day Treasury Bills* as calculated by Scotia Capital Markets.

* All major indices presented in this report reflect Total Return, they include both price appreciation and income. Morgan Stanley reflect Total Returns net of divident withholding taxes.

[294] Even small changes in the rates of return achieved are significant and therefore it is important for the Court to be accurate when assessing whether the rate of return was reasonable. In his testimony at trial, Donald McDougall, an expert called by the appellants, stated:

. . .an investment manager in a bond mandate would get terminated for underperforming the Scotia universe index by a half a percent over four or five years. That manager would get fired on the spot for underperformance, all things being equal.

[295] Keith Ambachtsheer, a Crown expert, agreed that a 0.66 percent return increment represented a highly material difference. It could represent a difference in the millions of dollars.

Q. And so I take it that you would agree with respect to a large fund with a long-term horizon, a difference of less than 1 percent, to be precise, .66 percent basis points, is a highly material difference; is that correct?

A. Yes it is.

[296] It is therefore far from clear that the rate of return on the appellants' moneys was reasonable.

V. Section 15 of the Charter

[297] Because I have concluded that the Crown breached its duty to invest, it is not strictly speaking necessary for me to deal with the appellants' submission that the legislation relied upon by the Crown violates

subsection 15(1) of the Charter. However, there is a principle that legislation should be interpreted so as to be in accord with the Charter (see e.g. Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002), at page 367). McLachlin J. (as she then was), in *R. v. Zundel*, [1992] 2 S.C.R. 731, at page 771, reviewed the case law on this point and concluded as follows:

These authorities confirm the following basic propositions: that the common law should develop in accordance with the values of the *Charter* (*Salituro*, *supra*, at p. 675), and that where a legislative provision, on a reasonable interpretation of its history and on the plain reading of its text, is subject to two equally persuasive interpretations, the Court should adopt that interpretation which accords with the *Charter* and the values to which it gives expression (*Hills* and *Slaight*, *supra*).

Likewise, in *R. v. Sharpe*, [2001] 1 S.C.R. 45, at paragraph 33, McLachlin C.J. stated: "If a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted."

[298] This principle supports the interpretation I have placed on the legislation. In my view, the interpretation adopted by the trial Judge would result in a breach of the appellants' rights under subsection 15(1) of the Charter. Subsection 15(1) provides as follows:

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.

[299] Concluding that the Crown has no duty or power to invest the Indian moneys would subject Indians, who must deal with the Crown as their trustee, to inferior treatment merely because of their Indian status and membership in an Indian band. This would appear to constitute discriminatory treatment on the part of the government in violation of subsection 15(1) of the Charter on the basis of race, or national or ethnic origin.

[300] The respondents argue that the appellants lack standing to bring a subsection 15(1) claim. The respondents say that the trial Judge was correct in holding that because subsection 15(1) refers to an "individual" and an Indian band is not an individual, the Bands had no standing to bring the subsection 15(1) claim. Moreover, the Crown submits that because collective rights, not individual rights, are at issue, no subsection 15(1) argument can be made. The appellants, on the other hand, stress that the actions in this case are representative actions on behalf of all individual members of the Samson and Ermineskin Nations. Accordingly, there is no bar to the applicability of subsection 15(1) to this action. For the reasons that follow, I agree with the appellants that because this action was brought on behalf of all individual members of the Bands, they have standing to maintain a subsection 15(1) claim. Furthermore, the fact that collective rights are at issue is not a bar to the applicability of the Charter.

[301] The trial Judge disposed of the appellants' section 15 claim by relying on the holding of the British Columbia Supreme Court in *Nechako Lakes School District No. 91 v. Patrick*, wherein Garson J. held that because Indian bands are not individuals, section 15 does not apply to them. Not only am I not bound by the decision in *Nechako Lakes*, I need not consider the question of whether Indian bands can validly bring a subsection 15(1) claim in their own name, because in the present case, the action is brought on behalf of each individual Band member. As this Court held in *Ardoch Algonquin First Nation v. Canada (Attorney General)*, [2004] 2 F.C.R. 108 (F.C.A.), at paragraph 23, while section 15 may not apply to collectivities, it certainly applies to individuals:

> . . the section 15 guarantee of equality only extends to individuals. As a result, the two respondent organizations, Ardoch and ACW, would appear to lack standing to bring a section 15 claim. However, the individual respondents clearly do have standing to bring such a claim and an appropriate remedy may still be granted if they successfully establish that their rights have been infringed. [Emphasis added.]

[302] The same reasoning was applied by Kelen J. in *Métis National Council of Women v. Canada (Attorney General)*, [2005] 4 F.C.R. 272 (F.C.), at paragraph 50, affd [2006] 2 C.N.L.R. 99 (F.C.A.). There he was faced with a claim of discrimination by the Métis National Council of Women (MNCW), an incorporated non-profit

organization. Although the Council itself did not enjoy section 15 rights, Kelen J. held that the MNCW nevertheless had standing to bring a section 15 claim on behalf of the individual women it represents:

The difficulty with the applicants' argument is that it is premised solely on the exclusion of the MNCW which, as a corporation, does not enjoy equality rights under the Charter nor does it have innate personal characteristics. See *Ardoch* (F.C.A.), at paragraph 23. Thus the fact that the MNCW has been excluded does not by itself demonstrate that there has been differential treatment within the meaning of subsection 15(1). In my view, to establish differential treatment the applicants have to demonstrate that the exclusion of the MNCW from negotiations and bilateral agreements has the effect of treating the individual applicant or Métis women in general differently on the basis of gender. To accomplish this, the applicants first have to demonstrate that MNCW represents the interests of Métis women and second, that the MNC, which purports to represent all Métis people, does not adequately represent the needs and interests of Métis women.

[303] In upholding Kelen J.'s reasons, Sharlow J.A. for this Court, at paragraph 7, further emphasized that when rights are asserted on behalf of individuals by a representative, as they are in this case, relief under section 15 is available, provided the factual elements of discrimination are present:

The Charter rights that the appellants claim have been breached are rights that can be asserted only by or on behalf of an individual. However, it is part of the foundation of the appellants' case that the MNCW, through the various Métis women's organizations that comprise its membership, represents all or at least a substantial number of Métis women in Canada.

[304] The individual band members clearly have an interest in the moneys owned by the band in common for all members. As Rothstein J.A. (as he then was) held in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, at paragraph 16: "an individual member of a band has an interest in association with, but not independent of, the interest of the other members of the band." Therefore, their representatives have standing to bring a section 15 claim.

[305] The next question is whether the fact that collective rights are at issue in any event bars their access to section 15. The answer to this question lies in a review of the Supreme Court of Canada's decision in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950 (*Lovelace*). In *Lovelace*, a number of Aboriginal communities, none of which constituted bands under the *Indian Act* regime, brought an action against the Province of Ontario alleging discrimination under subsection 15(1) of the Charter. The Province had established a fund from which the profits from Casino Rama would be distributed to First Nations. As in the present case, therefore, the right at issue was a collective right. However, only those First Nations registered as bands under the *Indian Act* qualified for the distribution, thereby excluding the plaintiff Aboriginal communities. Although the Supreme Court was ultimately unable to find that there had been impermissible discrimination, it did not reject the claim outright on the basis that it was brought by groups of individuals or because it involved collective rights. In fact, the Supreme Court's analysis selects bands as the appropriate comparator group for the claims of the non-band communities (*Lovelace*, at paragraph 64).

[306] Once it is established that individual band members are entitled to claim discrimination under section 15 of the Charter in relation to collective rights, the substance of the section 15 claim must be evaluated. In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 (*Law*), the Supreme Court of Canada set out guidelines for analysis under subsection 15(1). According to the Court, at paragraph 88, the purpose of the equality guarantee is to prevent the violation of essential human dignity:

In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

[307] Iacobucci J., at paragraph 53, went on to describe the type of law that would violate human dignity:

Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced

when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

[308] The conduct to which the appellants have been subjected in the handling of their trust moneys by the Crown treats them unfairly by imposing upon them inferior treatments as compared to non-Indian trust beneficiaries. If the laws do mandate this conduct they constitute a violation of essential human dignity contrary to subsection 15(1) of the Charter. The appellants, by virtue of such instruments as *The Royal Proclamation, 1763* [R.S.C., 1985, Appendix II, No. 1], Treaty No. 6 and section 37 of the *Indian Act*, must surrender their interests in property to the Crown if they wish to sell them. When those property interests are sold, the Crown holds the proceeds in trust for the bands entitled to them (see, e.g. *Indian Oil and Gas Act*, subsection 4(1)). The appellants, therefore, have no ability to choose their trustee. They must deal with the Crown as trustee and, according to the reasoning of the trial Judge, they must accept the inferior trust services the Crown is willing to provide. Whereas any other trustee would be required to prudently invest trust funds, the Crown is able to borrow the funds and select a rate of interest that takes into account the desire of the government to reduce borrowing costs for the benefit of other Canadians.

[309] Because of their race, or national or ethnic origin, the appellants are subjected to a regime whereby they are not entitled to the full benefits that equity confers on beneficiaries generally, in order to allow the Crown to promote its own interests, such as avoiding criticism of Aboriginal beneficiaries who receive inadequate returns from investment or returns that differ from those obtained by other Aboriginal beneficiaries, simplifying the administration of trusts by not having to engage the machinery required to properly invest trust funds, and ensuring non-Aboriginal Canadians are not burdened by this policy choice of the government by reducing the rate of interest paid by the Crown on Indian moneys below that which would have been obtained by prudent investment. This is the type of conduct section 15 is intended to prevent.

[310] It is unlikely that a violation of subsection 15(1) on these grounds could be justified under section 1 of the Charter. According to *The Queen v. Oakes*, [1986] 1 S.C.R. 103, in order for a violation of Charter rights to be justified by the government, the law must have a pressing and substantial objective, the means chosen must be rationally connected to achieving the objective, rights must be minimally impaired, and the deleterious effects of the law must not be disproportionately severe.

[311] The Crown maintains that the legislative objective behind sections 61-68 of the *Indian Act* was the protection of the Indian interest. This may be a valid objective. The scheme of holding the Indian moneys in the CRF, a very safe depository, may even be rationally connected to this objective. However, I have difficulty accepting that this scheme impairs rights as little as possible. The alternative approach I have outlined in these reasons would better protect the appellants' rights and would be more likely to protect their interests. A system whereby the band is consulted to determine its spending needs and risk tolerances, and an investment plan is developed based on a diversified portfolio would protect bands against the risk of investment, it would take into account the actual interests of each band, and it would be more likely to lead to a maximum return. Most importantly, all of this could be achieved in a way that promotes the dignity and worth of Band members, by providing them with the same possibilities as non-Aboriginal peoples are provided.

VI. Conclusions

[312] When the Crown took surrender of the appellants' interests in the oil and gas rights underlying their reserve lands and later converted those rights into proceeds, it accepted the role of trustee of the appellants' property. In doing so, it undertook to perform the duties expected of a trustee at common-law. Most importantly for this case, it undertook the duty to invest trust funds as would an ordinarily prudent person managing his or her own affairs. This essential duty could not be abrogated except by clear legislative language, which was never enacted. To the contrary, by virtue of the enactment of paragraph 64(1)(*k*), the Minister has retained the power and duty to invest trust funds, provided consent of the relevant band is obtained.

[313] The Crown made no attempt to ascertain whether actual investment of the significant sums held in trust for the appellants would be a more prudent course of action than simply retaining the money in the CRF and paying the rate of interest mandated by Order in Council, nor did it make any attempt to formulate investment plans for approval by the bands. As it has been shown, none of the defences proposed by the Crown for failing to develop and propose investment plans, such as the policy of promoting self-government and the spending patterns of the bands, excuse the Crown from its duty to prepare investment plans for approval by the bands.

[314] The Crown was aware throughout that it had a duty to obtain the highest return on the Indian moneys consistent with sound investment practices, yet it made no attempt to ensure that its method of handling the trust moneys satisfied this duty.

[315] In John Mowbray, Q.C. *et al*., *Lewin on Trusts*, 17th ed. (London: Sweet & Maxwell, 2000), at pages 1200-1201, paragraphs 39-24 to 39-26, the authors state the consequences for the failure of the trustee to prudently invest, or in the case of the Crown, to attempt to formulate a prudent investment plan:

Failure to invest

A trustee guilty of unreasonable delay in investing the trust fund, or in transferring it to the beneficiary, is liable for interest during the period of delay and costs. It is not an excuse that the trustee made no personal use of the money, but lodged it in his bank, even to a separate account, because it was a breach of trust to retain the money uninvested. Interest will not normally be awarded on lost income.

. . .

Failure to invest prudently

Trustees who fail to exercise their powers of investment in a prudent fashion, for instance by failing to diversify a fund of government securities into equities when any prudent trustee would have done so, may be liable to pay compensation if damage can be proved.

[316] The Crown, in my view, is liable to the Bands for any damages they suffered as a result of the Crown's breach of the duty to invest. The issue of damages and any limitations to the appellants' entitlement to damages will be canvassed at the end of these reasons.

DUTY TO ACCOUNT

[317] It was briefly argued by the appellants that there was a breach of the duty to account, because of the seeming difficulty of the Crown in having an audit of the funds performed on a timely basis, and problems with the timeliness and quality of reports. It is unnecessary, however, to deal with this question because the appellants failed to point to any evidence that they suffered damages as a result of the alleged breach of the duty to account.

CONFLICT OF INTEREST AND UNJUST ENRICH-MENT

[318] Finally, a matter of considerable dispute in this appeal was whether the Crown was in an impermissible conflict of interest which created an independent breach of trust. The appellants argue that by depositing the royalty moneys in the CRF, the Crown was "borrowing" the Indian moneys, constituting the type of self-dealing in which trustees are not permitted to engage. In addition, the appellants submit that in setting the rate of interest payable on Indian moneys, the Crown should have been guided solely by its duties as trustee and was not entitled to consider any other interests. As a result of this conflict of interest, the appellants argue that the Crown was unjustly enriched and they are therefore entitled to equitable disgorgement of the Crown's benefit as an alternative to damages for breach of trust if they so elect.

[319] The respondents argue that by virtue of the requirement in section 17 of the FAA that Indian moneys be paid into the CRF, the Crown's "borrowing" of Indian moneys was authorized by legislation, displacing the

common-law rule against self-dealing. With respect to the setting of the Indian moneys interest rate, the Crown argues that it was required to take into account not only its duties to its First Nations trust beneficiaries, but also the duty owed to other Canadians not to pay excessive interest rates on borrowed money and its policy of paying the same rate of interest to all bands. Moreover, it claims that the Supreme Court of Canada in *Blueberry* and this Court in *Kruger v. The Queen*, [1986] 1 F.C. 3, approved this type of conflict of interest, and that the Courts in those decisions required only that the Crown act reasonably in balancing such competing interests.

[320] It is not necessary to resolve this dispute because finding a breach of trust on the basis of a conflict of interest would not result in any higher damages than the appellants would already be entitled to as a result of the breach of the duty to invest. The trial Judge found as a fact that if the Crown had not been borrowing the royalty moneys and paying interest in accordance with the Indian moneys methodology, it would have issued more short-term debt and therefore would have reduced its borrowing costs. That finding is also a complete answer to the appellants' suggestion that the Crown was unjustly enriched by putting itself in a conflict of interest position whereby it "borrowed" the Indian moneys. It is well established that in order to make out a claim of unjust enrichment, the claimant must first establish that the respondent benefited or was enriched by its conduct (see, e.g. *Peter v. Beblow*, [1993] 1 S.C.R. 980, at page 987). In the present case, the Crown received no "benefit" or "enrichment" on which to ground the unjust enrichment claim and the appellants have not shown any basis on which to conclude that the trial Judge committed a palpable and overriding error in making this finding. There is therefore no basis on which I would be justified in setting it aside.

[321] If the Crown had attempted to put prudent investment plans to the Bands on an ongoing basis but the Bands rejected them, the Crown would have been forced to be in a conflict position. It would have had to hold the moneys in the CRF, "borrow" the moneys, and pay interest in exchange for the use of the moneys. The interest rate paid would have had to have been equal to or greater than the Crown's alternative borrowing cost. The Crown would not be required in this situation to pay a notional rate of interest equal to that which would be earned by a prudent trustee investing in public markets. In order to earn a higher rate of return, the Bands must be prepared to approve the making of actual investments with their moneys. As the Crown expert, Mr. King, testified, the higher returns accompanying prudent investment are earned only because investors are willing to commit their funds to be invested on a long-term basis. The Bands cannot refuse a prudent investment plan proposed by the Crown and still demand that the Crown pay a rate of interest on the trust moneys equal to that which would be earned through actual prudent investment of the moneys. In the circumstances, to ask the Crown to pay more interest than the investment is returning is to ask more of the Crown than would be asked of a trustee at common law.

[322] Finally, the Crown should have sought to avoid being in a conflict of interest position in the first place by putting together prudent investment plans on a continuing basis for approval by the Bands. If the Bands had approved the plans, allowing the Crown to invest their moneys, the Crown would not have held the moneys in the CRF, and accordingly would not have "borrowed" the moneys. The Crown would likewise not have been in a situation of managing competing interests from various constituents. Moreover, the trial Judge found as a fact that if the Crown had not been borrowing the royalty moneys and paying interest in accordance with the Indian moneys methodology, it would have issued more short-term debt and therefore would have reduced its borrowing costs. Thus, by properly performing its duty to invest, the Crown would not only have avoided a conflict of interest in the first place, it would also have reduced its own overall borrowing costs, thus benefiting the Canadian public.

LIMITATION OF ACTIONS AND LACHES

I. Statutory Limitation of Actions

[323] The respondents submit that any damages arising from the Crown's conduct more than six years prior to the filing of the statement of claim in each action are statute-barred as a result of the application of section 39 [as am. by S.C. 1990, c. 8, s. 10] of the *Federal Court Act*, R.S.C., 1985, c. F-7. The appellants raise a number of defences to this claim, none of which, in my view, are persuasive.

a. Which Statute of Limitations Applies?

[324] Provincial limitation periods are incorporated by reference in subsection 39(1) of the *Federal Court Act*, which states that the laws relating to prescription and limitation of actions in force in a province will govern with respect to any cause of action arising in that province. In order to evaluate the Crown's limitations defence it is necessary, therefore, to determine which province's statute of limitations applies. The statute of limitations to be applied is that of the province where the cause of action, that is where the breach of trust, occurred. To determine the location of the cause of action, the province with the most substantial connection to the trust must be ascertained. Both the Crown and Ermineskin maintain that Alberta's *Limitation of Actions Act*, R.S.A. 1980, c. L-15 is the applicable statute. The province of Alberta, they say, has the closest connection to the administration of the trust in this case because the appellants reside in Alberta and their oil and gas assets are located there.

[325] Samson, however, alleges that the cause of action occurred in Ontario. It suggests that the proper law applicable in actions respecting the administration of a trust, including actions respecting the liability of the trustees for breach of a trust, is the law of the residence of the trustees. They contend that the *situs* of the trustee in this case is in Ottawa, Ontario because that is the *situs* of the Government according to the Constitution. Therefore, it is their submission that Ontario limitations legislation should apply.

[326] In my view, Samson's contentions do not accurately depict the applicable law. While the residence or place of business of the trustee can be a significant factor when determining where the cause of action arose, it is not determinative (Waters, at page 1392). Alberta clearly has the most substantial connection to the breach of trust as all of the key elements of the cause of action can be found there. Specifically, the beneficiaries of the trust, the trust *corpus*, and the trustees with the power of administration all reside in Alberta. Though the technical *situs* of the Crown is in Ottawa, this is not enough to establish that the cause of action arose in Ontario as Samson alleges. Consequently, the cause of action can be said to have arisen in Alberta.

b. Does section 14 of the *Judicature Act* of Alberta prevent the Crown from relying on the Alberta *Limitation of Actions Act*

[327] The appellants argue that if the breach of trust is found to have occurred in Alberta, no statutory limitation period is applicable to them by virtue of section 14 of the *Judicature Act*, R.S.A. 1980, c. J-1, which states:

14. No claim of a cestui que trust against his trustee for any property held on an express trust or in respect of a breach of the trust shall be held to be barred by a Statute of Limitations.

[328] The respondents submit, however, that section 14 of the *Judicature Act* has no application, having been displaced by sections 40 and 41 of the Alberta *Limitation of Actions Act*, which provide as follows:

40 Subject to the other provisions of this Part, no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of a breach of the trust, shall be held to be barred by this Act.

41 (1) In this section, "trustee" includes an executor, an administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee, and also includes a joint trustee.

(2) In an action against a trustee or a person claiming through him,

(a) rights and privileges conferred by this Act shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in the action if the trustee or person claiming through him had not been a trustee or person claiming through a trustee, and

(b) if the action is brought to recover money or other property and is one to which no limitation provision of this Act applies, the trustee or person claiming through him is entitled to the benefit of and is at liberty to plead the lapse of time as a bar to the action in the like manner and to the same extent as if the claim had been against him in an action for money had and received,

except when the claim is founded on a fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use.

[329] Reconciling section 14 of the *Judicature Act* and sections 40 and 41 of the *Limitation of Actions Act* is not an easy task. The case law is conflicting without any appellate level decisions. However, I find the comments made by Girgulis J. in *Nilsson Livestock Ltd. v. MacDonald* (1993), 140 A.R. 214 (Q.B.) (*Nilsson Livestock*) the most compelling. Justice Girgulis held at paragraphs 61-71, that there was no conflict between section 14 of the *Judicature Act* and Part 7 of Alberta's *Limitation of Actions Act*, which deals with actions by trust beneficiaries and includes sections 40 and 41. Instead, he concluded that both section 14 of the *Judicature Act* and paragraph 41(2)(*b*) of the *Limitation of Actions Act* carve out exceptions to the general applicability of limitations legislation to trustees. Specifically, he held that section 14 of the *Judicature Act*, when interpreted properly, prevents limitations legislation from applying to trustees who still have the trust property in their possession, whether they obtained it as a result of an express trust or as a result of a breach of trust. Similarly, Girgulis J. held that section 41 of the *Limitation of Actions Act* carves out further exceptions—namely it prevents limitation periods from applying to claims based on fraudulent behaviour or to property recovery where the proceeds are still retained by the trustee or were previously received by the trustee and converted to their use. Consequently, according to Girgulis J.'s interpretation of the two sections, both can be read together without one having to give way to the other.

[330] The interpretation proposed in *Nilsson Livestock* is compelling because it accords with the presumption of coherence within a body of legislation. As stated in Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed., at page 263: "[i]t is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other." Under Girgulis J.'s interpretation of the two statutes, both pieces of legislation can be applied without any conflict.

[331] In addition, Girgulis J.'s interpretation of the legislation is consistent with the plain wording of section 14 of the *Judicature Act*, which states that limitation periods shall not bar a claim of a beneficiary "against his trustee for any property." Beneficiaries should always have recourse against a trustee who is holding their property given that every day that a trustee wrongly holds the beneficiary's property is arguably a new breach. Furthermore, this interpretation of the legislation does not arbitrarily deprive a trustee of all the normal protections that other defendants receive under the statute of limitations, but instead restricts the trustee's use of the legislation only in situations that the special nature of a trust relationship requires.

[332] The action in this case is not for the recovery of property held by the trustee but for damages and accordingly, section 14 does not operate to bar the Crown from raising a limitations defence in this case. There has also been no allegation of fraudulent behaviour on the part of the Crown. For these reasons, the appellants are likewise unable to rely on either of the exceptions in subsection 41(2) to the application of the limitation period.

c. Discoverability

[333] The principle of discoverability applies to statutory limitation periods unless it is displaced by clear legislative language. Where the cause of action is not discoverable, the operation of the limitations period is suspended until the plaintiff discovers or ought to have discovered through the exercise of reasonable diligence the material facts upon which the cause of action is based. The rule was identified by La Forest J. in *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, at page 34, quoting from *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at page 224:

. . . a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. . . .

[334] However, discoverability applies only to the facts of a situation and not to the law. In *Luscar Ltd. v. Pembina Resources Ltd.* (1994), 162 A.R. 35 (C.A.), Conrad J.A. found at paragraph 127 that "[d]iscoverability

refers to facts, not law. Error or ignorance of the law, or uncertainty of the law, does not postpone any limitation period." The Court also held, with specific reference to the Alberta limitations legislation applicable in this case, that "'cause of action', as that phrase is used in s. 4(1)(e) of the *Limitation of Actions Act*, refers to facts and not legal principles." In addition, the Court held that subsequent clarification or evolution of the law will not postpone the discovery of the material facts so as to extend the limitation period and that the onus of disproving discovery rests on the appellant when the respondent raises a limitation period.

[335] The breach in this case was the failure of the Crown to present the appellants with a plan of investment. Discoverability or discovery occurred, therefore, not when the appellants discovered, or ought to have discovered, that the Crown had the legal duty to present a plan of investment to them, but instead, at the time that the Bands either realized that the Crown had not presented them with a plan or at the point when the appellants reasonably ought to have known that the Crown had not presented them with a plan. In either case, the limitation period would have started to run almost immediately upon the Crown's receipt of the funds. However, the duty to present investment plans was a continuing duty over the years. Consequently, the Bands are not barred completely from remedy. However, they are limited to seeking damages to a period six years prior to filing their statements of claim.

[336] In conclusion, by the combined operation of subsection 39(1) of the *Federal Court Act* and section 4 of the Alberta *Limitation of Actions Act*, the appellants are not entitled to damages for any breaches of the Crown's duties as trustee more than six years prior to the filing of the statements of claim in each action.

II. Laches and Acquiescence

[337] The Crown also submits that the equitable doctrines of laches and acquiescence apply in this case to limit the appellants' entitlement to damages. In light of my conclusion that the Crown's statutory limitations defences have succeeded, however, I need not address the issue of laches and acquiescence.

DAMAGES

[338] The voluminous and often conflicting evidence as to whether the interest paid by the Crown was reasonable perhaps explains why, if liability was found against the Crown, that Ermineskin requested a reference for an assessment of damages. Significantly, the Crown agreed, thus implicitly acknowledging the difficulty for this Court in determining whether the return provided by the Crown was reasonable. While Samson requested the Court to assess damages up to 1999, it nevertheless agreed that a reference was required for assessing the period beyond 1999.

[339] In my view, damages can be appropriately assessed only by directing a reference to the Federal Court covering the entire period. It is recognized that the assessment of the performance of a fund is more accurate the longer the period of time over which it is reviewed. When making her or his assessment, the referee should have regard to the following directions.

[340] In assessing damages the referee should consider that the Crown should have achieved a rate of return comparable to that which a prudent trustee would have earned, having regard to the following factors:

1. The Bands had substantial and increasing year-end balances in their trust accounts over time.

2. The Bands' spending requirements were considerable and there was a need for liquidity to ensure the spending requirements could be satisfied.

3. Because it was necessary to preserve capital for future beneficiaries, the investments that should have been made should not have been in the high-risk category.

4. There was a requirement that the Crown obtain the Bands' consent before making investments, limiting the ability of the Crown to make investment decisions.

5. The calculation of damages should be made on the assumption that there would be regular and periodic reviews at least once per year of the results earned to date and recommendations for the future.

6. The period for assessing damages should run from six years prior to the filing of the statement of claim in each action to the date of assessment.

[341] The referee should also have regard to the following principles of law to aid in her or his assessment:

1. *Canson Enterprises Ltd. v. Broughton & Co.*, [1991] 3 S.C.R. 534, at page 556, McLachlin J. (as she then was) held that when assessing a remedy for breach of fiduciary duty, “the plaintiff’s actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight.”

2. In determining the rate of return that would have been achieved by a prudent trustee, the Court may rely upon expert evidence and the performance of other comparable trusts in the marketplace. As stated in the *Restatement of the Law Third, Trusts: Prudent Investor Rule*, at § 211, page 164:

If the trustee has general authority to invest funds in securities that are proper investments for the trust and neglects to make any investment, unless the beneficiaries are not disadvantaged by this inaction, the trustee is chargeable with the amount of return (that is, taking account of both income and changes in principal value) that would have accrued from a suitable portfolio of investments for the trust. An appropriate basis for measuring such liability might be the average performance of investments of some representative sample of generally comparable trusts.

[342] The evidence already led in this action can be relied on by the referee and the parties, and it shall be open to the parties to lead such further evidence covering the entire period of the assessment as is relevant.

DISPOSITION

[343] I would therefore allow the appeals and refer the matter to the Federal Court for assessment of damages having regard to the principles outlined above. The decision with respect to costs should be reserved pending the result of the reference.