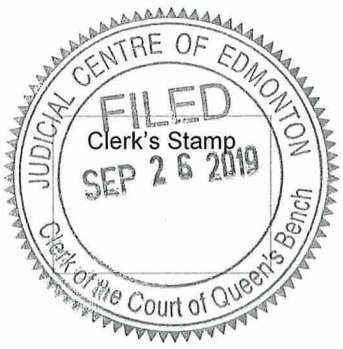

COURT FILE NUMBER	1103 14112
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	EDMONTON
	IN THE MATTER OF THE *TRUSTEE ACT*, RSA 2000, c T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS:	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWINN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("Sawridge Trustees")
DOCUMENT	**BRIEF OF SAWRIDGE FIRST NATION ON ITS APPLICATION FOR INTERVENOR STATUS IN THE JURISDICTION APPLICATIONS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Parlee McLaws LLP Barristers and Solicitors 1700 Enbridge Centre 10175-101 Street Edmonton, AB T5J 0H3 Attention: **Edward H. Molstad, Q.C.** Telephone: 780-423-8506 Facsimile: 780-423-2870 File No.: 64203-7/EHM

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I. INTRODUCTION

1. Sawridge First Nation ("Sawridge") applies pursuant to Rule 2.10 for intervenor status in the hearing on the Jurisdictional Question ordered by the Honourable Mr. Justice J.T. Henderson ("Justice Henderson") pursuant to a Consent Order on December 18, 2018 and in the application filed by the Trustees of the 1985 Sawridge Inter Vivos Settlement (the "1985 Trust") on September 13, 2019 (collectively, the "Jurisdiction Applications").[1]

2. These submissions have been filed and served along with Sawridge's Application for Intervenor Status and the Affidavit of Darcy Twin, sworn on September 24, 2019, in accordance with Justice Henderson's directions at the case management conference on September 4, 2019.[2]

3. Justice Henderson has described the question of the effect of the August 24, 2016 Consent Order approving the transfer of assets from the Sawridge Band Trust (the "1982 Trust") to the 1985 Trust as a "foundational" and "pivotal" issue in the underlying Advice and Direction Application, has stated that one possibility is that the trust assets transferred from the 1982 Trust to the 1985 Trust remain subject to the terms of the 1982 Trust, and has specifically directed the Parties to address the question of the terms pursuant to which those transferred assets are held by way of further submissions.[3]

4. Sawridge should be granted intervenor status in the Jurisdiction Applications because it is specially affected by the issues which the Court will consider: its members are the beneficiaries of the 1982 Trust, Chief and Council are the Trustees of the 1982 Trust, and the source of funds used to purchase the assets held in the 1982 Trust were Sawridge capital and/or revenue expenditures made pursuant to sections 64 and 66 of the *Indian Act*, which must only be used for the benefit of members of Sawridge.[4] Sawridge has a unique and different perspective concerning the issues raised by the Jurisdiction Applications, as the interests of the Trustees and

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[1] Affidavit of Darcy Twin sworn September 24, 2019 ["Twin Affidavit"] at para 17, Exhibits H (September 13, 2019 Application) and I (December 18, 2018 Consent Order)
[2] Twin Affidavit, Exhibit G (Transcript of the September 4, 2019 Proceeding) at 21:14-40, 22:1-10
[3] Twin Affidavit, Exhibit E (April 25, 2019 email from Justice Henderson), Exhibit F (Transcript of the April 25, 2019 Proceeding) at 4:16-19, and Exhibit G (Transcript of the September 4, 2019 Proceeding) at 13:16-21, 14:3-13, 20:26-28, 20:32-33, 22:29-31, 26:3-7
[4] Twin Affidavit at paras 1-3, 5-8, and 14-16

the beneficiaries of the 1982 Trust are not currently represented by the Parties, and its submissions could be useful to the Court in its deliberations.[5]

II. FACTS

A. Current Status of The Jurisdictional Question and Transfer of Assets Issues

5. This Action arises from an Application for Advice and Direction by the Trustees of the 1985 Trust wherein they have sought the advice and direction of this Honourable Court in relation to the transfer of assets from the 1982 Trust to the 1985 Trust and in relation to the definition of beneficiaries in the 1985 Trust deed.

6. On August 24, 2016, the Parties to this Action presented to Justice Thomas a Consent Order, along with a written brief prepared by the 1985 Trustees, which would approve the transfer of assets from the 1982 Trust to the 1985 Trust *nunc pro tunc*. Justice Thomas granted the Order, which states the following:

> UPON HEARING representations from counsel for the Sawridge Trustees that the Sawridge Trustees have exhausted all reasonable options to obtain a complete documentary record regarding the transfer of assets from the 1982 Trust to the 1985 Trust; AND that the parties to this Consent Order have been given access to all documents regarding the transfer of assets from the 1982 Trust to the 1985 Trust that the Trustees have reviewed; AND that the Trustees are not seeking an accounting of the assets transferred into the 1982 Trust; AND that the Trustees are not seeking an accounting of the assets transferred into the 1985 Trust; AND UPON noting that little information is available regarding the transfer of assets from the 1982 Trust to the 1985 Trust;
>
> IT IS HEREBY ORDERED THAT:
>
> 1. The transfer of assets which occurred in 1985 from the Sawridge Band Trust ("1982 Trust") to the Sawridge Band Inter Vivos Settlement ("1985 Trust") is approved *nunc pro tunc*. The approval of the transfer shall not be deemed to be an accounting of the assets of the 1982 Trust that were transferred and shall not be deemed to be an accounting of the assets in the 1985 Trust that existed upon settlement of the 1985 Trust.
>
> 2. Without limiting the generality of the foregoing, the Trustees' application and this Consent Order cannot be relied upon by the Trustees in the future as a basis to oppose or prevent a beneficiary from seeking an accounting from the

[5] Twin Affidavit at paras 14-16

> 1985 Trust, including an accounting to determine the assets that were transferred into the 1985 Trust from the 1982 Trust or an accounting of the assets transferred into the 1982 Trust.[6]

7. While its counsel was present in the courtroom on August 24, 2016 to respond to a Rule 5.13 production application brought against it by the Office of the Public Guardian and Trustee of Alberta, Sawridge was not a party to the Consent Order and its counsel therefore declined to make submissions on its behalf in relation to the Consent Order.[7]

8. By Consent Order dated December 18, 2018, the Parties to the underlying Advice and Direction Application agreed to a hearing before Justice Henderson on a directed issue, being the "Jurisdictional Question" as described in the Order, which hearing is currently adjourned, but which will consider the jurisdiction of the Court to amend the beneficiary definition contained in the 1985 Trust.[8]

9. On April 25, 2019, prior to the case management hearing scheduled for that afternoon to consider the Jurisdictional Question, Justice Henderson emailed the Parties to raise his concern about the terms of the August 24, 2016 Consent Order and the impact that order has on the trust terms pursuant to which the trust assets are currently being held, which he identified as a foundational issue:

> In my view it is necessary, as part of the Jurisdictional Issue, to consider the terms of the Consent Order and to fully consider what impact that Order has on the trust terms pursuant to which the trust assets are currently being held. One possibility is that the trust assets are being held for the benefit of the "Beneficiaries" as defined in the 1985 Trust and the 1985 Trust terms govern. However, that is not the only possibility. The Consent Order says that the transfer of assets is "approved *nunc pro tunc*". But the Order does not address the issue of the terms under which the assets are being held. The Consent Order does not appear to be a variation of the 1982 Trust and a variation would likely not be possible without the consent of the beneficiaries (although this clearly looks like what the trustees were attempting to do in 1985). It is possible that the 1985 Trust is a successor trust, but again that does not address the question of the terms on which the trust assets are being held or whether there is an ongoing requirement for the 1985 Trust to account to the 1982 Trust with respect to the trust assets.

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[6] Twin Affidavit at para 9, Exhibit D (August 24, 2016 Consent Order)
[7] Twin Affidavit at paras 9-10, Exhibit D (August 24, 2016 Consent Order)
[8] Twin Affidavit at Exhibit I (December 18, 2018 Consent Order)

> I raise these issues so that you will be aware that I am concerned about them. Counsel may have a simple explanation which I have overlooked. In any event this is a foundational issue which needs to be addressed before considering whether the 1985 trust can be varied.[9]

10. During the April 25, 2019 case management hearing, Justice Henderson noted that the directed hearing on the Jurisdictional Question leaves open two avenues for amending or modifying the definition of Beneficiary of the 1985 Trust, namely: (1) section 42 of the *Trustee Act*, and (2) the common law jurisdiction of the Court. He noted that the 1985 Trustees are unlikely to get one hundred percent approval of beneficiaries under section 42, and that the common law restricts the ability of the Court to exercise jurisdiction to amend or modify a trust. He expressed concern that this might require him to develop the common law in a way that has not quite been developed to date, such that he would be required to consider available alternatives to extending the common law. He noted that one such possibility is to find that the assets situated in the 1985 Trust are still subject to the terms of the 1982 Trust, such that the definition of beneficiaries is members or future members of Sawridge.[10]

11. At a further case management hearing on September 4, 2019, Justice Henderson again identified the effect of the August 24, 2016 Consent Order as a foundational and pivotal issue:

> [D]oes the 2016 Order mean that the monies or the assets transferred from 1982 to 1985 and that those assets are then to be administered under the terms of the 1985 Trust for the benefit of those beneficiaries as described in the 1985, or are the 1985 Trustees holding the assets in some form, and I use the term loosely, so I – without meaning to ascribe any legal definition to it, are they holding it by way of constructive trust for the beneficiaries as defined in the 1982 Trust?"[11]

12. Justice Henderson further noted, with respect to the Jurisdictional Question and his concern over the effect of the August 24, 2016 Consent Order:

> Well, you can go ahead and continue with the application that is currently before me, that is whether or not the 1985 Trust terms should be modified so as to change the beneficiary, definition of beneficiaries, but as I tried to explain last time, one of the things that's – if I can't satisfy this foundational problem, one of the options available to me is to say I'm not going to do anything to modify the definition of beneficiary in the 1985 Trust terms, because there are no Trust assets

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[9] Twin Affidavit at para 11, Exhibit E (April 25, 2019 email from Justice Henderson)
[10] Twin Affidavit, Exhibit F (Transcript of April 25, 2019 Proceeding) at 3:21-41, 4:16-19
[11] Twin Affidavit, Exhibit G (Transcript of September 4, 2019 Proceeding) at 13:16-21

> held for the benefit of the 1985 beneficiaries. They're being held for the benefit of the 1982 beneficiaries. That's the terms that we need to be dealing with. That's one of the options that's available. So unless we deal with this foundational issue, I'm not going to be able to carry forward and give you a meaningful answer in relation to the modification of the 1985 Trust terms.[12]

13. Justice Henderson further described his concern and the issue as follows:

> When the Order says that the transfer of assets from 1985 to 1982 [sic] is approved, it's approved, so the assets are here to there. On what terms are those assets being held?...Are they being held subject to 1985 or subject to 1982? That's the issue for me.[13]

14. Justice Henderson directed the filing of an application to have the following issue determined:

> …the meaning and consequences that flow from Justice Thomas' order of August 24th, 2016, specifically with respect to whether or not after the transfer of assets to the 1985 Trust, those assets are being held subject to the terms of the 1985 Trust, or whether they're being held subject to the terms of the 1982 Trust.[14]

15. Justice Henderson then further stated the foundational issue as follows:

> [W]hat flows from the order of Justice Thomas on August 24th, 2016, and whether, as a result of that order, the Trust assets are held subject to the terms of the 1985 Trust, whether the beneficiaries as described in the 1985 Trust are actually the beneficiaries of these Trust assets, and whether that took away the Trust obligation that existed in the 1982 Trust.[15]

16. On September 13, 2019, the 1985 Trustees filed the Application directed by Justice Henderson seeking, *inter alia*, a determination of the effect of the August 24, 2016 Consent Order.[16]

B. The 1982 Trust and Source of Funds to Purchase Trust Assets

17. The 1982 Trust was settled on April 15, 1982 by Walter Patrick Twinn, in his capacity as Chief of Sawridge.[17] The beneficiaries of the 1982 Trust are "all members, present and future of

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[12] Twin Affidavit, Exhibit G (Transcript of September 4, 2019 Proceeding) at 14:3-13
[13] Twin Affidavit, Exhibit G (Transcript of September 4, 2019 Proceeding) at 20:25-27, 31-32
[14] Twin Affidavit at para 12, Exhibit G (Transcript of September 4, 2019 Proceeding) at 22:28-31
[15] Twin Affidavit, Exhibit G (Transcript of September 4, 2019 Proceeding) at 26:3-7
[16] Twin Affidavit at para 13, Exhibit H (September 13, 2019 Application)
[17] Twin Affidavit at paras 1, 5-6, Exhibit A (1982 Trust – Declaration of Trust)

[Sawridge]", and the Trustees of the 1982 Trust are Sawridge Chief and Council, the current members of which are Chief Roland Twinn, Councillor Darcy Twin, and Councillor Gina Donald.[18] As duly elected Chief and Council, these individuals also represent the members of Sawridge.[19]

18. The terms of the 1982 Trust deed requires the Trustees to deal with the trust assets in accordance with the terms and conditions of the deed.[20] Its terms prohibit the use of the trust assets or the diversion of trust assets for any purposes other than those set out in the deed, which in turn states that the trust assets are to be held for the benefit of all members, present and future, of Sawridge.[21]

19. Sawridge currently has 45 members, one of whom is a minor.[22] These members are, by definition, the only beneficiaries of the 1982 Trust.[23]

20. When Walter Patrick Twinn became Chief of Sawridge in 1966, Sawridge did not have any businesses. Sawridge's goal was to save as much as possible and use its capital and revenue funds to become totally self-supporting one day.[24]

21. The primary source of income of Sawridge originated with the discovery of oil on the Sawridge reserve lands. The royalty monies resulting from the sale of oil and gas were received and held in Sawridge's capital account in accordance with the *Indian Act*, and Sawridge capital moneys were expended with the authority and direction of the Minister and the consent of the Council of Sawridge, as discussed below. The Sawridge capital moneys were used for economic development, specifically to invest in various companies carrying on business under the Sawridge name, and were placed in the Sawridge Trusts.[25]

22. Sawridge adhered to Treaty No. 8, the written text of which provides, in part, that the Sawridge "reserves of land, or any interest therein, may be sold or otherwise disposed of by Her

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[18] Twin Affidavit at paras 1, 5-6, Exhibit A (1982 Trust – Declaration of Trust) at paras 5-6
[19] Twin Affidavit at para 3
[20] Twin Affidavit at Exhibit A (1982 Trust – Declaration of Trust) at para 3
[21] Twin Affidavit at Exhibit A (1982 Trust – Declaration of Trust) at paras 3 and 6
[22] Twin Affidavit at para 2
[23] Twin Affidavit at para 2, Exhibit A (1982 Trust – Declaration of Trust) at preamble and para 6
[24] Twin Affidavit at para 7, Exhibit B at 3418, 3885-3887.
[25] Twin Affidavit at para 7, Exhibit B at 3953-3957, 4004-4005.

Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained."[26]

23. The oil and gas underlying the Sawridge reserves constitutes an interest in their land. Pursuant to the terms of Treaty No. 8, the *Indian Act* and regulations and the *Indian Oil and Gas Act* and regulations, Canada granted oil and gas leases to third parties with respect to Sawridge reserve lands. Oil and gas was produced from Sawridge reserve lands and the royalties from this production was paid to Canada in trust for Sawridge.

24. Pursuant to s. 4 of the *Indian Oil and Gas Act*, and regulations, the royalty money was paid to Canada in trust only for the benefit of Sawridge as the "Indian Band concerned". Section 4 of the *Indian Oil and Gas Act* provides as follows:

> Royalties
>
> 4.(1) Notwithstanding any term or condition in any grant, lease, permit, licence or other disposition or any provision in any regulation respecting oil or gas or both oil and gas or the terms and conditions of any agreement respecting royalties in relation to oil or gas or both oil and gas, whether granted, issued, made or entered into before or after December 20, 1974, but subject to subsection (2), all oil and gas obtained from Indian lands after April 22, 1977 is subject to the payment to Her Majesty in right of Canada, in trust for the Indian bands concerned, of the royalties prescribed from time to time by the regulations.
>
> Special agreements
>
> (2) The Minister may, with the approval of the council of the band concerned, enter into a special agreement with any person for a reduction or an increase, or a variation in the basis of calculation of royalties payable under subsection (1).[27]

25. Section 61(1) of the *Indian Act* provides as follows:

> Indian moneys to be held for use and benefit
>
> 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

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[26] "Treaty No. 8 – Indian and Northern Affairs", Woodward, *Consolidated Native Law Statutes, Regulations and Treaties 2019* (Thomson Reuters: Toronto, 2018) at 1086 **[Tab 1]**

[27] *Indian Oil and Gas Act*, RSC 1985, c I-7, s 4 **[Tab 2]**

> 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.[28]

26. Section 61(1) of the *Indian Act* mandates that Indian money must only be expended for the "use and benefit" of Sawridge.[29] The Supreme Court of Canada has also confirmed that royalties (capital money) must only be paid out in accordance with the *Indian Act*.[30]

27. The *Indian Act* provides that Sawridge was and continues to be the legal owner of the royalty money paid in trust to Canada. Pursuant to section 62 of the *Indian Act,* the royalty money is deemed to be capital moneys of Sawridge:

> Capital and revenue
>
> 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.[31]

28. The money received by Canada for surface rent and the interest paid on capital moneys are deemed to be revenue moneys of Sawridge. Pursuant to section 64 of the *Indian Act*, the expenditure of capital moneys requires the consent of the Council of a band and the authorization and direction of the Minister.[32]

29. Unless an investment by a band falls within s. 64(1)(a) to (j) of the *Indian Act*, the capital moneys of Sawridge were expended pursuant to s. 64(1)(k) of the *Indian Act*, which states:

> Expenditure of capital moneys with consent
>
> 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
>
> (k) for any other purpose that in the opinion of the Minister is for the benefit of the band.[33]

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[28] *Indian Act*, RSC 1985, c I-5, s 61(1) [*Indian Act*] **[Tab 3]**
[29] *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 [*Ermineskin*] at para 100 **[Tab 4]**
[30] *Ermineskin* at para 94 **[Tab 4]**
[31] *Indian Act*, s 62 **[Tab 3]**
[32] *Indian Act*, s 64 **[Tab 3]**
[33] *Indian Act*, s 64(1)(k) **[Tab 3]**

30. Section 64(1)(k) of the *Indian Act* provides authority for the transfer of capital money from the Crown to either Sawridge or an independent trust for Sawridge.[34]

31. In a letter from the Assistant Deputy Minister, Lands and Trust Services, Indian & Northern Affairs Canada dated December 23, 1993, it was confirmed that the trusts held substantial sums which, to a large extent, had been derived from Sawridge capital and revenue moneys previously released by the Minister and such moneys were expended pursuant to sections 64 and 66 of the *Indian Act* for the benefit of the members of Sawridge.[35]

32. When Chief Walter Patrick Twinn testified in October, 1993 at the Bill C-31 trial, he testified that reason for establishing the Sawridge trusts was that, at that time, Sawridge was not considered to be a legal entity.[36]

33. Chief Walter Patrick Twinn further testified that Sawridge was concerned that Bill C-31 would result in automatic reinstatement of a large group to membership in Sawridge.[37] The 1985 Trust was created two days before Bill C-31 became law, in anticipation of the passage of Bill C-31, and with the objectives that the beneficiaries of the 1985 Trust would be people who were considered Sawridge members before the passage of Bill C-31, that the people who might become Sawridge members under Bill C-31 would be excluded as beneficiaries for a short time until Sawridge could see what Bill C-31 would bring about. The people who might become Sawridge members under Bill C-31 would be excluded as beneficiaries.[38] Ultimately, however, the intention was that the assets from the 1985 Trust would be placed in the 1986 Trust (whose beneficiaries are defined as members of Sawridge).[39]

III. ISSUE

34. The issue before this Honourable Court is as follows:

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[34] *Ermineskin* at para 151 **[Tab 4]**
[35] Twin Affidavit at para 8, Exhibit C (December 23, 1993 letter)
[36] Twin Affidavit at para 7, Exhibit B (Excerpts of Transcript of Walter Patrick Twinn October 1993) at 3957
[37] Twin Affidavit at para 7, Exhibit B (Excerpts of Transcript of Walter Patrick Twinn October 1993) at 3761
[38] Twin Affidavit at para 7, Exhibit B (Excerpts of Transcript of Walter Patrick Twinn October 1993) at 3906-3909
[39] Twin Affidavit at para 7, Exhibit B (Excerpts of Transcript of Walter Patrick Twinn October 1993) at 3948-3949; Affidavit of Paul Bujold sworn September 12, 2011, Exhibit K (The Sawridge Band Trust dated August 15, 1986) at para 2(a)

(a) Should Sawridge be granted intervenor status in the Jurisdiction Applications, pursuant to Rule 2.10 of the *Alberta Rules of Court*?

IV. LAW & ANALYSIS

A. The Applicable Rule and Test on an Application for Intervenor Status

35. Rule 2.10 of the *Alberta Rules of Court* authorizes the Court to grant a person intervenor status in an action subject to any terms and conditions it deems appropriate:

> 2.10 On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.[40]

36. In *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, Chief Justice Fraser summarized the two-step approach for reviewing applications to intervene as follows:

> A two-step approach is commonly used to determine an intervener application. The Court typically first considers the subject matter of the proceeding and second, determines the proposed intervener's interest in that subject matter.[41]

37. With regard to the second step of the two-step approach, Courts have generally held that a party should be given intervenor status if (i) it is specially affected by the decision in a matter, or (ii) it has special expertise or perspective concerning the subject matter in issue that will assist the Court in its deliberations.[42]

38. Courts have also granted intervenor status where the intervenor has an interest in the outcome of the proceedings and its interests may not be fully protected or argued by the parties.[43]

39. Alberta Courts have interpreted Rule 2.10 as allowing them to order that a person may intervene in an application. In *Suncor Energy Inc. v Unifor (Local 707 A)*, for example, Chief Justice Wittmann (as he then was) granted intervenor status to two not-for-profit organizations in

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[40] *Alberta Rules of Court*, Alta Reg 124/2010, Rule 2.10 **[Tab 5]**
[41] *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2005 ABCA 320 [*Papaschase*] at para 5 **[Tab 6]**
[42] *Papaschase* at para 2 **[Tab 6]**; *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2014 ABCA 340 [*Edmonton*] at para 8 **[Tab 7]**
[43] *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City of)*, 2002 ABCA 243 at para 2 **[Tab 8]**; *Suncor Energy Inc. v Unifor (Local 707 A)*, 2014 ABQB 555 [*Suncor*] at para 8 **[Tab 9]**

a judicial review application. Specifically, Chief Justice Wittmann (as he then was) permitted the intervenors to make written and oral submissions in relation to the application.[44]

40. In summary, in order to obtain intervenor status, Sawridge must show that it will be directly and significantly affected by a decision in the Jurisdiction Application or that it has special expertise or perspective relating to the subject matter of the Application that will assist the Court in its deliberations.[45] An intervenor makes an implied promise that the intervention will be useful and different from the submissions of the parties.[46]

B. Sawridge should be granted intervenor status in the Jurisdiction Applications

41. Justice Henderson has identified transfer of assets issue and the effect of the August 24, 2016 Consent Order as a "foundational issue", and he has specifically raised the wording of, and the restrictions contained in, the 1982 Trust deed. He has identified the possibility that the assets in the 1985 Trust are subject to the terms of the 1982 Trust deed as an alternative to expanding the common law and the jurisdiction of the Court to amend or modify the definition of Beneficiary in the 1985 Trust as it relates to the Jurisdictional Question. He has specifically requested that further submissions be made on this point.

42. Sawridge is specially affected by any decision that might be made concerning these issues. In particular, the beneficiaries of the 1982 Trust are defined as "all members, present and future of the Band"[47]. Sawridge through its duly elected Chief and Council represents the members of Sawridge. Further, the Trustees of the 1982 Trust are Sawridge Chief and Council.[48] Finally, the source of funds used to purchase the assets settled into the 1982 Trust (and the 1985 Trust) are Sawridge capital and/or revenue expenditures made pursuant to sections 64 and 66 of the *Indian Act*, which must only be used for the benefit of the members of Sawridge.[49] Further, the 1982

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[44] *Suncor* at paras 7-8 **[Tab 9]**
[45] *Edmonton* at para 8 **[Tab 7]**
[46] *Edmonton* at para 9 **[Tab 7]**
[47] Twin Affidavit at paras 5-6, Exhibit A (1982 Trust – Trust Declaration) at para 6
[48] Twin Affidavit at paras 5-6, Exhibit A (1982 Trust – Trust Declaration) at para 5
[49] Twin Affidavit at paras 7-8, Exhibit B (Excerpts of Transcript of Walter Patrick Twinn October 1993), and Exhibit C (December 23, 1993 letter); see also the discussion above regarding the *Indian Act* and the *Indian Oil and Gas Act*.

Trust deed expressly states that the assets may only be used for the purposes set out in the 1982 Trust deed:

> The Trustees shall hold the Trust Fund in trust and shall deal with it in accordance with the terms and conditions of this agreement. No part of the Trust Fund shall be used for or diverted to purposes other than those purposes set out herein.[50]

43. The interests of Sawridge may not be fully protected or argued by the Parties, none of whom represent the members of Sawridge to the exclusion of other persons, and none of whom represent Chief and Council of Sawridge in that capacity or in their capacity as Trustees of the 1982 Trust.

44. Sawridge therefore provides a different perspective on a foundational issue which would be useful to this Court in its deliberations. If granted intervenor status, Sawridge intends to put forth positions which are not positions that have been (or are likely to be) advanced by the Parties, and which include the following:

(a) As it relates to the effect of the August 24, 2016 Consent Order, the assets transferred from the 1982 Trust to the 1985 Trust remain 1982 Trust property and are therefore impressed with and subject to the terms of the 1982 Trust deed, which describes the beneficiaries as those present and future members of Sawridge and which prohibits the diversion of those trust assets to purposes other than those set out in the 1982 Trust deed.

(b) Alternatively, if the Court find that the assets that were transferred from the 1982 Trust to the 1985 Trust are subject to the terms of the 1985 Trust deed, then any jurisdiction to amend the beneficiary definition in the 1985 Trust deed should be restricted to amendments that limit beneficiaries to members of Sawridge, having regard to, *inter alia*, the 1982 Trust terms and the source of funds used to purchase the trust assets which funds may only be used for the benefit of Sawridge members. Further, if any further assets transferred to the 1985 Trust

[50] Twin Affidavit, Exhibit A (1982 Trust – Declaration of Trust) at para 3

were similarly held in trust for Sawridge and may only be used for the benefit of members of Sawridge.

V. RELIEF SOUGHT

45. For the above reasons, Sawridge seeks an Order granting it intervenor status in the Jurisdiction Applications, on terms which would permit Sawridge to make written and oral submissions on all issues raised in the Jurisdiction Applications, in reliance on the affidavit of Darcy Twin, the Affidavits of Paul Bujold filed in this Action, the transcripts from the Questionings on Affidavit of Paul Bujold in May 2014 and July 2016, the undertakings of Paul Bujold arising therefrom, and the affidavits of records and producible documents filed in the within Action.

46. For greater certainty, Sawridge seeks and Order granting it intervenor status in the Jurisdiction Applications and permitting it make written and oral submissions on the issues raised in the Jurisdiction Applications, including:

(a) The determination and direction of the Court as to the effect of the consent order made by the Honourable Mr. Justice D.R.G. Thomas pronounced on August 24, 2016 (the "2016 Order") respecting the transfer of assets from the Sawridge Band Trust dated April 15, 1982 (the "1982 Trust") to the Sawridge Band Inter Vivos Settlement dated April 15, 1985 (the "1985 Trust").

(b) Determination of the sufficiency of service of the 2016 Order.

(c) Alternatively, the determination of the ability to perform a subsequent trust to trust transfer, similar to what was approved by the 2016 Order.

(d) The determination as to whether the Court has the jurisdiction to amend the beneficiary definition contained in the 1985 Trust, on the basis of section 42 of the *Trustee Act*, public policy, its inherent jurisdiction or any other common law plenary power.

(e) The scope of the Court's jurisdiction to amend the beneficiary definition contained in the 1985 Trust.

47. Further, if the Application is opposed, the Sawridge First Nation seeks costs of its Application for Intervenor status on a party-and-party basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of September, 2019.

PARLEE McLAWS LLP

EDWARD H. MOLSTAD, Q.C.
Counsel for Sawridge First Nation

VI. LIST OF AUTHORITIES

Tab 1 "Treaty No. 8 – Indian and Northern Affairs", Woodward, *Consolidated Native Law Statutes, Regulations and Treaties 2019* (Thomson Reuters: Toronto, 2018)

Tab 2 *Indian Oil and Gas Act*, RSC 1985, c I-7

Tab 3 *Indian Act*, RSC 1985, c I-5

Tab 4 *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9

Tab 5 *Alberta Rules of Court*, Alta Reg 124/2010, Rule 2.10

Tab 6 *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2005 ABCA 320

Tab 7 *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2014 ABCA 340

Tab 8 *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City of)*, 2002 ABCA 243

Tab 9 *Suncor Energy Inc. v Unifor (Local 707 A)*, 2014 ABQB 555

TAB 1

CARSWELL

CONSOLIDATED NATIVE LAW STATUTES, REGULATIONS AND TREATIES 2019

Jack Woodward, Q.C.,
OF THE BRITISH COLUMBIA BAR

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TREATY NO. 8 — INDIAN AND NORTHERN AFFAIRS CANADA

ARTICLES OF TREATY made and concluded at the several dates mentioned therein, in the year of Our Lord one thousand eight hundred and ninety-nine, between Her most Gracious Majesty the Queen of Great Britain and Ireland, by Her Commissioners the Honourable David Laird, of Winnipeg, Manitoba, Indian Commissioner for the said Province and the Northwest Territories; James Andrew Joseph McKenna, of Ottawa, Ontario, Esquire, and the Honourable James Hamilton Ross, of Regina, in the Northwest Territories, of the one part; and the Cree, Beaver, Chipewyan and other Indians, inhabitants of the territory within the limits hereinafter defined and described, by their Chiefs and Headmen, hereunto subscribed, of the other part: —

WHEREAS, the Indians inhabiting the territory hereinafter defined have, pursuant to notice given by the Honourable Superintendant General of Indian Affairs in the year 1898, been convened to meet a Commission representing Her Majesty's Government of the Dominion of Canada at certain places in the said territory in this present year 1899, to deliberate upon certain matters of interest to Her Most Gracious Majesty, of the one part, and the said Indians of the other.

AND WHEREAS, the said Indians have been notified and informed by Her Majesty's said Commission that it is Her desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to Her Majesty may seem meet, a tract of country bounded and described as hereinafter mentioned, and to obtain the consent thereto of Her Indian subjects inhabiting the said tract, and to make a treaty, and arrange with them, so that there may be peace and good will between them and Her Majesty's other subjects, and that Her Indian people may know and be assured of what allowances they are to count upon and receive from Her Majesty's bounty and benevolence.

AND WHEREAS, the Indians of the said tract, duly convened in council at the respective points named hereunder, and being requested by Her Majesty's Commissioners to name certain Chiefs and Headmen who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for the faithful performance by their respective bands of such obligations as shall be assumed by them, the said Indians have therefore acknowledged for that purpose the several Chiefs and Headmen who have subscribed hereto.

AND WHEREAS, the said Commissioners have proceeded to negotiate a treaty with the Cree, Beaver, Chipewyan and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon and concluded by the respective bands at the dates mentioned hereunder, the said Indians do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors for every, all their rights, titles

and privileges whatsoever, to the lands included within the following limits, that is to say: —

Commencing at the source of the main branch of the Red Deer River in Alberta, thence due west to the central range of the Rocky Mountains, thence northwesterly along the said range to the point where it intersects the 60th parallel of north latitude, thence east along said parallel to the point where it intersects Hay River, thence northeasterly down said river to the south shore of Great Slave Lake, thence along the said shore northeasterly (and including such rights to the islands in said lakes as the Indians mentioned in the treaty may possess), and thence easterly and northeasterly along the south shores of Christie's Bay and McLeod's Bay to old Fort Reliance near the mouth of Lockhart's River, thence southeasterly in a straight line to and including Black Lake, thence southwesterly up the stream from Cree Lake, thence including said Lake southwesterly along the height of land between the Athabasca and Churchill Rivers to where it intersects the northern boundary of Treaty Six, and along the said boundary easterly, northerly and southwesterly, to the place of commencement.

AND ALSO the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in the Northwest Territories, British Columbia, or in any other portion of the Dominion of Canada.

TO HAVE AND TO HOLD the same to Her Majesty the Queen and Her successors for ever.

And Her Majesty the Queen hereby agrees with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for such bands as desire reserves, the same not to exceed in all one square mile for each family of five for such number of families as may elect to reside on reserves, or in that proportion for larger or smaller families; and for such families or individual Indians as may prefer to live apart from band reserves, Her Majesty undertakes to provide land in severalty to the extent of 160 acres to each Indian, the land to be conveyed with a priviso as to non-alienation without the consent of the Governor General in Council of Canada, the selection of such reserves, and lands in severalty, to be made in the manner following, namely, the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection.

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 may see 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.

It is further agreed between Her Majesty and Her said Indian subjects that such portions of the reserves and lands above indicated as may at any time be required for public works, building, railways, or roads of whatsoever nature may be appropriated for that purpose by Her Majesty's Government of the Dominion of Canada, due compensation being made to the Indians for the value of any improvements thereon, and an equivalent in land, money or other consideration for the area of the reserve so appropriated.

And with a view to show the satisfaction of Her Majesty with the behaviour and good conduct of Her Indians, and in extinguishment of all their past claims, She hereby, through Her Commissioners, agrees to make each Chief a present of thirty-two dollars in cash, to each Headman twenty-two dollars, and to every other Indian of whatever age, of the families represented at the time and place of payment, twelve dollars.

Her Majesty also agrees that next year, and annually afterwards for ever, She will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, to each Chief twenty-five dollars, each Headman, not to exceed four to a large Band and two to a small Band, fifteen dollars, and to every other Indian, of whatever age, five dollars, the same, unless there be some exceptional reason, to be paid only to heads of families for those belonging thereto.

FURTHER, Her Majesty agrees that each Chief, after signing the treaty, shall receive a silver medal and a suitable flag, and next year, and every third year thereafter, each Chief and Headman shall receive a suitable suit of clothing.

FURTHER, Her Majesty agrees to pay the salaries of such teachers to instruct the children of said Indians as to Her Majesty's Government of Canada may seem advisable.

FURTHER, Her Majesty agrees to supply each Chief of a Band that selects a reserve, for the use of that Band, ten axes, five hand-saws, five augers, one grindstone, and the necessary files and whetstones.

FURTHER, Her Majesty agrees that each Band that elects to take a reserve and cultivate the soil, shall, as soon as convenient after such reserve is set aside and settled upon, and the Band has signified its choice and its prepared to break up the soil, receive two hoes, one spade, one scythe and two hay forks for every family so settled, and for every three families one plough and one harrow, and to the Chief, for the use of his Band, two horses or a yoke of oxen, and for each Band potatoes, barley, oats and wheat (if such seed be suited to the locality of the reserve), to plant the land actually broken up, and provisions for one month in the spring for several years while planting such seeds; and to every family one cow, and every Chief one bull, and one mowing-machine and one reaper for the use of his Band when it is ready for them; for such families as prefer to raise stock instead of cultivating the soil, every family of five persons, two cows, and every Chief two bulls and two mowing-machines when ready for their use, and a like proportion for smaller or larger families. The aforesaid articles, machines and cattle to be given one for all for the encouragement of agriculture and stock raising; and for such Bands as prefer to continue hunting and fishing, as much ammunition and twine for making nets

annually as will amount in value to one dollar per head of the families so engaged in hunting and fishing.

And the undersigned Cree, Beaver, Chipewyan and other Indian Chiefs and Headmen, on their own behalf and on behalf of all the Indians whom they represent, do hereby solemnly promise and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen.

THEY PROMISE AND ENGAGE that they will, in all respects, obey and abide by the law; that they will maintain peace between each other, and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, half-breeds or whites, this year inhabiting and hereafter to inhabit any part of the said ceded territory; and that they will not molest the person or property of any inhabitant of such ceded tract, or of any other district or country, or interfere with or trouble any person passing or travelling through the said tract or any part thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulations of this Treaty or infringing the law in force in the country so ceded.

IN WITNESS WHEREOF Her Majesty's said Commissioners and the Cree Chief and Headmen of Lesser Slave Lake and the adjacent territory, have hereunto set their hands at Lesser Slave Lake on the twenty-first day of June, in the year herein first above written.

Signed by the parties hereto, in the presence of the undersigned witnesses, the same having been first explained to the Indians by Albert Tate and Samuel Cunningham, Interpreters.

TAB 2

CANADA

CONSOLIDATION

CODIFICATION

Indian Oil and Gas Act

Loi sur le pétrole et le gaz des terres indiennes

R.S.C., 1985, c. I-7

L.R.C. (1985), ch. I-7

Current to June 21, 2019

À jour au 21 juin 2019

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General

Regulations

3 The Governor in Council may make regulations

(a) respecting the granting of leases, permits and licences for the exploitation of oil and gas in Indian lands, and the terms and conditions thereof;

(b) respecting the disposition of any interest in Indian lands necessarily incidental to the exploitation of oil and gas in those lands, and the terms and conditions thereof;

(c) providing for the seizure and forfeiture of any oil or gas taken in contravention of any regulation made under this section or any lease, licence or permit granted under such regulation;

(d) prescribing the royalties on oil and gas obtained from Indian lands;

(e) prescribing the fine not exceeding five thousand dollars that may be imposed on summary conviction for contravention of any regulation made under this section or failure to comply with any lease, permit or licence granted pursuant to any regulation under this section; and

(f) generally for carrying out the purposes of this Act and for the exploitation of oil and gas in Indian lands.

1974-75-76, c. 15, s. 4.

Royalties

4 (1) Notwithstanding any term or condition in any grant, lease, permit, licence or other disposition or any provision in any regulation respecting oil or gas or both oil and gas or the terms and conditions of any agreement respecting royalties in relation to oil or gas or both oil and gas, whether granted, issued, made or entered into before or after December 20, 1974, but subject to subsection (2), all oil and gas obtained from Indian lands after April 22, 1977 is subject to the payment to Her Majesty in right of Canada, in trust for the Indian bands concerned, of the royalties prescribed from time to time by the regulations.

Special agreements

(2) The Minister may, with the approval of the council of the band concerned, enter into a special agreement with any person for a reduction or an increase, or a variation

Dispositions générales

Règlements

3 Le gouverneur en conseil peut prendre des règlements :

a) concernant l'octroi et les modalités de baux, de permis et de licences pour l'exploitation du pétrole et du gaz des terres indiennes;

b) concernant l'aliénation de droits sur des terres indiennes, lorsque ces droits sont nécessairement accessoires à l'exploitation du pétrole et du gaz sur ces terres, ainsi que les modalités de cette aliénation;

c) prévoyant la saisie et la confiscation du pétrole ou du gaz extrait en contravention avec un règlement pris en vertu du présent article ou un bail, un permis ou une licence accordés en vertu d'un tel règlement;

d) prescrivant les redevances sur le pétrole et le gaz tirés des terres indiennes;

e) prescrivant l'amende maximale de cinq mille dollars, qui peut être imposée, sur déclaration de culpabilité par procédure sommaire, pour la violation d'un règlement pris en vertu du présent article ou pour l'inobservation d'un bail, d'un permis ou d'une licence, consentis conformément à un règlement pris en vertu du présent article;

f) d'une manière générale, concernant l'application de la présente loi et l'exploitation du pétrole et du gaz des terres indiennes.

1974-75-76, ch. 15, art. 4.

Redevances

4 (1) Nonobstant les modalités d'une concession, d'un bail, d'un permis, d'une licence ou d'un autre acte d'aliénation, les dispositions d'un règlement sur le pétrole ou sur le gaz ou les modalités d'un accord sur les redevances applicables au pétrole ou au gaz, qu'ils soient ou non survenus avant le 20 décembre 1974, mais sous réserve du paragraphe (2), le pétrole et le gaz tirés des terres indiennes après le 22 avril 1977 sont assujettis au paiement à Sa Majesté du chef du Canada, en fiducie pour les bandes indiennes concernées, des redevances réglementaires.

Accords spéciaux

(2) Le ministre peut, lorsqu'il y est autorisé par le conseil de la bande intéressée, conclure avec quiconque un accord spécial portant réduction ou augmentation des

in the basis of calculation of royalties payable under subsection (1).

1974-75-76, c. 15, s. 5.

redevances payables en vertu du paragraphe (1) ou modification de leur base de calcul.

1974-75-76, ch. 15, art. 5.

Existing grants, leases, etc.

5 Every grant, lease, permit, licence or other disposition respecting the exploitation of oil or gas in Indian lands, whether granted, issued, made or entered into before or after December 20, 1974, and, without restricting the generality of the foregoing, any grant, lease, permit, licence or other disposition respecting oil or gas or both oil and gas issued or made or purported to be issued or made pursuant to any other regulation or order made under the provisions of the *Indian Act* is deemed to be subject to any regulations made under this Act.

R.S., 1985, c. I-7, s. 5; 1999, c. 31, s. 137(E).

Concessions, baux existants, etc.

5 Les concessions, baux, permis, licences ou autres actes d'aliénation concernant l'exploitation du pétrole ou du gaz des terres indiennes, qu'ils soient ou non survenus avant le 20 décembre 1974, et notamment les concessions, baux, permis, licences ou autres actes d'aliénation concernant du pétrole ou du gaz, accordés ou conclus ou ostensiblement accordés ou conclus en application d'un règlement ou d'un décret pris en vertu de la *Loi sur les Indiens*, sont censés être assujettis aux règlements pris en vertu de la présente loi.

L.R. (1985), ch. I-7, art. 5; 1999, ch. 31, art. 137(A).

Minister to consult

6 (1) The Minister, in administering this Act, shall consult, on a continuing basis, persons representative of the Indian bands most directly affected thereby.

Consultation par le ministre

6 (1) Pour l'application de la présente loi, le ministre consulte en permanence les représentants des bandes indiennes les plus directement touchées.

Rights not abrogated

(2) Nothing in this Act shall be deemed to abrogate the rights of Indian people or preclude them from negotiating for oil and gas benefits in those areas in which land claims have not been settled.

1974-75-76, c. 15, s. 7.

Maintien des droits

(2) La présente loi n'a pas pour effet d'abroger les droits du peuple indien ou de l'empêcher de négocier l'obtention d'avantages pour le pétrole et le gaz dans les régions où les revendications de terres n'ont pas été réglées.

1974-75-76, ch. 15, art. 7.

TAB 3

CANADA

CONSOLIDATION

CODIFICATION

Indian Act

Loi sur les Indiens

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

L.R.C. (1985), ch. I-5

Current to June 21, 2019

Last amended on December 22, 2017

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Withdrawal

(2) The Governor in Council may at any time withdraw from a band a right conferred on the band under subsection (1).

R.S., c. I-6, s. 60.

Retrait

(2) Le gouverneur en conseil peut retirer à une bande un droit qui lui a été conféré sous le régime du paragraphe (1).

S.R., ch. I-6, art. 60.

Management of Indian Moneys

Administration de l'argent des indiens

Indian moneys to be held for use and benefit

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.

L'argent des Indiens est détenu pour usage et profit

61 (1) L'argent des Indiens ne peut être dépensé qu'au bénéfice des Indiens ou des bandes à l'usage et au profit communs desquels il est reçu ou détenu, et, sous réserve des autres dispositions de la présente loi et des clauses de tout traité ou cession, le gouverneur en conseil peut décider si les fins auxquelles l'argent des Indiens est employé ou doit l'être, est à l'usage et au profit de la bande.

Interest

(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.

R.S., c. I-6, s. 61.

Intérêts

(2) Les intérêts sur l'argent des Indiens détenu au Trésor sont alloués au taux que fixe le gouverneur en conseil.

S.R., ch. I-6, art. 61.

Capital and revenue

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.

R.S., c. I-6, s. 62.

Capital et revenu

62 L'argent des Indiens qui provient de la vente de terres cédées ou de biens de capital d'une bande est réputé appartenir au compte en capital de la bande; les autres sommes d'argent des Indiens sont réputées appartenir au compte de revenu de la bande.

S.R., ch. I-6, art. 62.

Payments to Indians

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

R.S., c. I-6, s. 63.

Versements aux Indiens

63 Par dérogation à la *Loi sur la gestion des finances publiques*, lorsque des sommes d'argent auxquelles un Indien a droit sont versées à un surintendant en vertu d'un bail ou d'une entente passé sous le régime de la présente loi, le surintendant peut remettre ces sommes à l'Indien.

S.R., ch. I-6, art. 63.

Expenditure of capital moneys with consent

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;

Dépense de sommes d'argent au compte en capital avec consentement

64 (1) Avec le consentement du conseil d'une bande, le ministre peut autoriser et prescrire la dépense de sommes d'argent au compte en capital de la bande :

a) pour distribuer *per capita* aux membres de la bande un montant maximal de cinquante pour cent des sommes d'argent au compte en capital de la bande, provenant de la vente de terres cédées;

(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.

b) pour construire et entretenir des routes, ponts, fossés et cours d'eau dans des réserves ou sur des terres cédées;

c) pour construire et entretenir des clôtures de délimitation extérieure sur les réserves;

d) pour acheter des terrains que la bande emploiera comme réserve ou comme addition à une réserve;

e) pour acheter pour la bande les droits d'un membre de la bande sur des terrains sur une réserve;

f) pour acheter des animaux, des instruments ou de l'outillage de ferme ou des machines pour la bande;

g) pour établir et entretenir dans une réserve ou à l'égard d'une réserve les améliorations ou ouvrages permanents qui, de l'avis du ministre, seront d'une valeur permanente pour la bande ou constitueront un placement en capital;

h) pour consentir aux membres de la bande, en vue de favoriser son bien-être, des prêts n'excédant pas la moitié de la valeur globale des éléments suivants :

(i) les biens meubles appartenant à l'emprunteur,

(ii) la terre concernant laquelle il détient ou a le droit de recevoir un certificat de possession,

et percevoir des intérêts et recevoir des gages à cet égard;

i) pour subvenir aux frais nécessairement accessoires à la gestion de terres situées sur une réserve, de terres cédées et de tout bien appartenant à la bande;

j) pour construire des maisons destinées aux membres de la bande, pour consentir des prêts aux membres de la bande aux fins de construction, avec ou sans garantie, et pour prévoir la garantie des prêts consentis aux membres de la bande en vue de la construction;

k) pour toute autre fin qui, d'après le ministre, est à l'avantage de la bande.

Expenditure of capital moneys in accordance with by-laws

(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.

R.S., 1985, c. I-5, s. 64; R.S., 1985, c. 32 (1st Supp.), s. 10.

Dépenses sur les sommes d'argent au compte de capital

(2) Le ministre peut effectuer des dépenses sur les sommes d'argent au compte de capital d'une bande conformément aux règlements administratifs pris en vertu de l'alinéa 81(1)p.3) en vue de faire des paiements à toute personne dont le nom a été retranché de la liste de

TAB 4

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

v.

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

and

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

- and -

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

v.

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

and

Attorney General of Ontario, Attorney General of Quebec, Attorney General of Alberta, Assembly of First Nations, Saddle Lake Indian Band,

Chef John Ermineskin, Lawrence Wildcat, Gordon Lee, Art Littlechild, Maurice Wolfe, Curtis Ermineskin, Gerry Ermineskin, Earl Ermineskin, Rick Wolfe, Ken Cutarm, Brian Less et Lester Fraynn, le chef et les conseillers élus de la bande et nation indiennes d'Ermineskin, en leur nom et en celui des autres membres de la bande et nation indiennes d'Ermineskin *Appelants*

c.

Sa Majesté la Reine du chef du Canada, ministre des Affaires indiennes et du Nord canadien et ministre des Finances *Intimés*

et

Procureur général de l'Ontario, procureur général du Québec, procureur général de l'Alberta, Assemblée des Premières Nations et Première Nation du Lac Seul *Intervenants*

- et -

Chef Victor Buffalo, en son nom et en celui des autres membres de la bande et nation indiennes de Samson, et bande et nation indiennes de Samson *Appelants*

c.

Sa Majesté la Reine du chef du Canada, ministre des Affaires indiennes et du Nord canadien et ministre des Finances *Intimés*

et

Procureur général de l'Ontario, procureur général du Québec, procureur général de l'Alberta, Assemblée des Premières Nations, bande indienne de Saddle Lake, bande

Stoney Indian Band and Lac Seul First Nation *Interveners*

INDEXED AS: ERMINESKIN INDIAN BAND AND NATION *v.* CANADA

Neutral citation: 2009 SCC 9.

File Nos.: 31875, 31869.

2008: May 22; 2009: February 13.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Aboriginal law — Crown — Fiduciary duty — Management of oil and gas royalties — Indian bands surrendering mineral rights on reserves to Crown — Crown holding bands' oil and gas royalties in Consolidated Revenue Fund and paying interest at rate tied to the yield on long-term government bonds but adjusted periodically — Whether Crown was obligated as fiduciary to invest oil and gas royalties — Whether Crown breached its fiduciary obligations in way in which it calculated and paid interest on royalties — Indian Act, R.S.C. 1985, c. I-5, ss. 61 to 69 — Financial Administration Act, R.S.C. 1985, c. F-11, ss. 2 "public money", 17(1), 21(1), 90(1)(b) — Indian Oil and Gas Act, R.S.C. 1985, c. I-7, s. 4(1).

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

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

indienne de Stoney et Première Nation du Lac Seul *Intervenants*

RÉPERTORIÉ : BANDE ET NATION INDIENNES D'ERMINESKIN *c.* CANADA

Référence neutre : 2009 CSC 9.

N[os] du greffe : 31875, 31869.

2008 : 22 mai; 2009 : 13 février.

Présents : La juge en chef McLachlin et les juges LeBel, Deschamps, Fish, Abella, Charron et Rothstein.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit des Autochtones — Couronne — Obligation fiduciale — Gestion de redevances pétrolières et gazières — Bandes indiennes ayant cédé à la Couronne leurs droits sur les minéraux de leurs réserves — Redevances pétrolières et gazières des bandes déposées dans le Trésor et intérêts payés par la Couronne à un taux lié au rendement des obligations à long terme du gouvernement, mais rajusté périodiquement — La Couronne avait-elle l'obligation fiduciale d'investir les redevances pétrolières et gazières? — Par la manière dont elle a fixé et payé l'intérêt sur les redevances, la Couronne a-t-elle manqué à ses obligations fiduciales? — Loi sur les Indiens, L.R.C. 1985, ch. I-5, art. 61 à 69 — Loi sur la gestion des finances publiques, L.R.C. 1985, ch. F-11, art. 2 « fonds publics », 17(1), 21(1), 90(1)b) — Loi sur le pétrole et le gaz des terres indiennes, L.R.C. 1985, ch. I-7, art. 4(1).

Enrichissement injustifié — Couronne — Gestion des redevances pétrolières et gazières des bandes indiennes — Régime législatif exigeant de la Couronne qu'elle détienne dans le Trésor les redevances pétrolières et gazières des bandes et qu'elle verse de l'intérêt — La Couronne s'est-elle injustement enrichie en utilisant les redevances et en fixant le taux de l'intérêt versé aux bandes?

Droit constitutionnel — Charte des droits — Droit à l'égalité — Dispositions pertinentes de la Loi sur les Indiens empêchant la Couronne d'investir l'argent des Indiens — Dispositions établissant une distinction entre Indiens et non-Indiens — La distinction crée-t-elle un désavantage par la perpétuation d'un préjugé ou l'application de stéréotypes? — Charte canadienne des droits et libertés, art. 15(1) — Loi sur les Indiens, L.R.C. 1985, ch. I-5, art. 61 à 68.

The Ermineskin Nation and the Samson Nation are "bands" within the meaning of the *Indian Act* and are entitled to the benefit of Treaty No. 6, which was entered into in 1876. The Crown held money in trust for the bands, composed mainly of royalties derived from the oil and gas reserves found beneath the surface of the Samson Reserve and Pigeon Lake Reserve in Alberta. Under the terms of Treaty No. 6 and the *Indian Act*, it was necessary that the bands' interests in the oil and gas under the reserves be surrendered to the Crown so that the Crown could enter into arrangements with third parties in order to exploit the resources. Two identical instruments of surrender were executed in 1946 and were accepted by the Crown. The statutory scheme governing the handling of Indian moneys, including the oil and gas royalties, involves the *Indian Act*, the *Financial Administration Act* ("FAA") and the *Indian Oil and Gas Act* ("IOGA"). Under the *Indian Act*, Indian moneys are characterized as "capital moneys" or "revenue moneys". There are separate revenue and capital accounts kept by the Crown for each of the bands. The royalties are characterized as "capital moneys" and have been deposited in the Consolidated Revenue Fund ("CRF") to the credit of the Receiver General of Canada pursuant to the FAA. Interest has been paid on that money by the Crown pursuant to Orders in Council made under the *Indian Act*. Between 1859 and 1969 the interest rate on Indian moneys changed from time to time, ranging from 3 percent to 6 percent. In 1969, the Crown decided to tie the rate of interest to the market yield of government bonds having terms to maturity of 10 years or over (the "Indian moneys formula"). Discussions took place in the late 1970s and early 1980s between the Crown and leaders of various bands. A new Order in Council was enacted in 1981, which provided that interest would be calculated on the quarterly average of the market yields of the Government of Canada bond issues, which have terms to maturity of 10 years or over. The discussions between the Crown and the bands also led to a Crown policy of crediting interest semi-annually, rather than annually.

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

Chacune des nations d'Ermineskin et de Samson constitue une « bande » au sens de la *Loi sur les Indiens* et bénéficie de l'application du Traité nº 6 conclu en 1876. La Couronne détenait en fiducie pour les bandes des sommes composées principalement des redevances tirées de l'exploitation des ressources pétrolières et gazières découvertes dans le sous-sol des réserves de Samson et de Pigeon Lake, en Alberta. Le Traité nº 6 et la *Loi sur les Indiens* exigeaient la cession par les bandes de leurs droits sur ces ressources afin que la Couronne puisse conclure avec des tiers des accords d'exploitation. Deux actes de cession aux dispositions identiques ont été signés en 1946, et la Couronne a accepté les cessions. Le régime législatif applicable à la gestion de l'argent des Indiens, y compris les redevances pétrolières et gazières, comprend la *Loi sur les Indiens*, la *Loi sur la gestion des finances publiques* (« LGFP ») et la *Loi sur le pétrole et le gaz des terres indiennes* (« LPGTI »). Dans la *Loi sur les Indiens*, l'argent des Indiens appartient soit au « compte en capital », soit au « compte de revenu », lesquels sont tenus séparément par la Couronne pour chacune des bandes. Les redevances — qui appartiennent au « compte en capital » — ont été versées au Trésor au crédit du receveur général du Canada conformément à la LGFP. La Couronne a payé à leur égard un intérêt dont le taux a été fixé par des décrets pris en application de la *Loi sur les Indiens*. Entre 1859 et 1969, le taux de l'intérêt sur l'argent des Indiens a été modifié à l'occasion, oscillant entre 3 et 6 p. 100. En 1969, la Couronne a décidé de lier le taux d'intérêt au rendement sur le marché des obligations du gouvernement d'une durée de 10 ans ou plus (la « formule applicable à l'argent des Indiens »). À la fin des années 1970 et au début des années 1980, la Couronne et les dirigeants de différentes bandes ont eu des discussions. En 1981, un nouveau décret prévoyait que l'intérêt était calculé selon la moyenne trimestrielle des rendements sur le marché des obligations du gouvernement du Canada d'une durée de 10 ans ou plus. Les discussions entre la Couronne et les bandes ont également mené à l'adoption d'un mode de calcul consistant à créditer les intérêts semestriellement plutôt qu'annuellement.

La nation de Samson a déposé sa déclaration en 1989, et celle d'Ermineskin a déposé la sienne en 1992. Elles y prétendaient que les obligations fiduciales de la Couronne exigeaient qu'elle investisse de façon prudente, à savoir dans un portefeuille diversifié, les redevances pétrolières et gazières touchées en leur nom. Elles soutenaient que depuis 1972, le refus ou l'omission de la Couronne d'investir leurs redevances les privait de centaines de millions de dollars. La Cour fédérale les a déboutées, et les juges majoritaires de la Cour d'appel fédérale ont confirmé cette décision.

Held: The appeals should be dismissed.

The Crown has fiduciary obligations with respect to the bands' royalties. However, whether the fiduciary relationship arose out of Treaty No. 6 or from the instruments of surrender, when read together with the IOGA, the FAA and the *Indian Act*, the Crown did not have the obligation or the authority to invest the bands' royalties. [44] [45] [67] [80]

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

The relationship between the Crown and the bands under the 1946 instruments of surrender is a fiduciary relationship that is trust-like in nature. Pursuant to these instruments, the Crown may only grant rights over the minerals upon terms that are most conducive to the welfare of the bands, and will hold the proceeds of the granting of those rights on behalf of the bands. Where the Crown is in the position of a fiduciary, although not strictly speaking a trustee at common law, and holds funds on behalf of a band, it is not improper to ascribe to the Crown a duty to invest those funds in the manner of a common law trustee, subject to any legislation limiting its ability to do so. The statutory framework within which the Crown must carry out its fiduciary obligations in this case limits its ability to invest the bands' royalties. [73-74] [80]

The *Indian Act*, the FAA, and the IOGA do not permit investment by the Crown of the royalties. The IOGA only confirms that the royalties in relation to oil and gas on reserves are to be paid to the Crown in trust for the bands. The IOGA does not set out any terms of

Arrêt : Les pourvois sont rejetés.

La Couronne a des obligations fiduciales à l'égard des redevances des bandes. Cependant, que la relation fiduciale découle du Traité n^{o} 6 ou des actes de cession, interprétés de pair avec la LPGTI, la LGFP et la *Loi sur les Indiens*, la Couronne n'avait ni l'obligation ni le pouvoir d'investir les redevances des bandes. [44] [45] [67] [80]

Le texte du Traité n^{o} 6 n'étaye pas l'existence de l'intention d'imposer à la Couronne les obligations d'un fiduciaire de common law. Tous les droits ont été cédés à la Couronne, qui a alors convenu de réserver certaines terres à l'usage des Indiens signataires. Le libellé du traité et le contexte donnent à penser qu'il y a eu transfert conditionnel des terres, et non établissement d'une fiducie de common law. Les conditions verbales du Traité n^{o} 6 n'ont pas non plus créé une fiducie de common law comme telle. Il n'incombe pas à un fiduciaire de common law de garantir la masse fiduciaire contre le risque de perte ni d'assurer sa croissance. Partant, même si le Traité n^{o} 6, y compris la promesse de la Couronne que le produit de la vente de toute partie de la réserve serait « mis de côté pour qu'il fructifie », constituait le fondement de l'obligation fiduciale envers les bandes, il n'obligeait pas la Couronne à investir les redevances, mais bien à les conserver en sûreté et à les faire s'accroître. Vu l'absence d'un droit issu de traité à l'investissement des sommes par la Couronne, le par. 35(1) de la *Loi constitutionnelle de 1982* ne s'applique pas. [50] [56-57] [67]

La relation entre la Couronne et les bandes établie par les actes de cession de 1946 est fiduciale et s'apparente à celle créée par une fiducie. Suivant ces actes, la Couronne ne peut accorder de droits sur les minéraux qu'aux conditions les plus appropriées pour assurer le bien-être des bandes, et elle conserve le produit de l'octroi de ces droits pour le compte de celles-ci. Lorsque la Couronne agit à titre de fiducial mais non, à strictement parler, de fiduciaire de common law, et qu'elle détient des fonds pour le compte d'une bande, il n'est pas injustifié de lui attribuer l'obligation d'investir ces fonds comme le ferait un fiduciaire de common law, sous réserve de toute disposition législative limitant son pouvoir de le faire. Le cadre législatif dans lequel la Couronne doit remplir ses obligations fiduciales en l'espèce limite son pouvoir d'investir les redevances des bandes. [73-74] [80]

La *Loi sur les Indiens*, la LGFP et la LPGTI n'autorisent pas la Couronne à investir les redevances. La LPGTI confirme seulement que les redevances applicables au pétrole et au gaz des réserves sont versées à la Couronne en fiducie pour les bandes. Comme cette loi

trust or duties of the Crown and therefore does not limit the Crown's fiduciary duties to the bands. Although the IOGA does not preclude investment by the Crown of the royalties, it does not purport to restrict or override application of provisions in other statutes. Because the royalties are money collected by Canada on behalf of the bands pursuant to the IOGA, they are "public money" as defined by the FAA and as such must be dealt with in accordance with the provisions of the FAA. This Act provides that the royalties must be held in the CRF and only paid out in accordance with any applicable statute (s. 21(1)). Furthermore, the acquisition of securities by the Crown is prohibited unless authorized by an Act of Parliament (s. 90(1)(*b*)). In this case, the relevant applicable statute is the *Indian Act* because it is the statutory scheme governing the control and management of Indian moneys. It provides no authority for any expenditure or payment of Indian moneys other than for the purposes provided for in the Act. The wording of the *Indian Act* and the legislative changes made in 1951 indicate that no power existed after that time for the Crown to make, hold and manage investments made with Indian moneys held in the CRF. From 1859 to 1951, the Crown had not engaged in investing Indian moneys but rather paid interest at rates from 3 to 6 percent. It is reasonable to infer that in repealing the investment power in the *Indian Act*, the Crown was bringing the legislation into conformity with actual practice. [83] [85] [91] [94] [98] [117] [122-123]

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

n'établit ni les conditions de la fiducie ni les obligations de la Couronne, elle ne restreint pas les obligations fiduciales de la Couronne envers les bandes. Elle n'empêche pas la Couronne d'investir les redevances, mais elle n'a pas pour objet de limiter ou d'écarter l'application des dispositions d'autres lois. Les redevances étant perçues par le Canada pour le compte des bandes en conformité avec la LPGTI, elles constituent des « fonds publics » au sens de la LGFP et doivent donc être considérées au regard de celle-ci. Cette loi dispose que les fonds doivent être conservés dans le Trésor et qu'ils ne peuvent être prélevés que sous réserve des lois applicables (par. 21(1)). En outre, l'acquisition d'actions est prohibée, sauf autorisation de la Couronne par une loi fédérale (al. 90(1)*b*)). La loi applicable en l'espèce est la *Loi sur les Indiens*, car celle-ci encadre la possession et la gestion de l'argent des Indiens. Elle ne permet pas la dépense ou le versement de cet argent à d'autres fins que celles qu'elle énumère. Il appert de son libellé et des modifications apportées en 1951 que la Couronne ne pouvait plus dès lors placer l'argent des Indiens, ni administrer et gérer le placement de l'argent des Indiens détenu dans le Trésor. Entre 1859 et 1951, la Couronne n'avait pas investi l'argent des Indiens, mais avait plutôt versé de l'intérêt à un taux oscillant entre 3 et 6 p. 100. Il est raisonnable d'inférer de l'abrogation du pouvoir d'investir prévu dans la *Loi sur les Indiens* que le législateur voulait rendre la loi conforme à la pratique établie. [83] [85] [91] [94] [98] [117] [122-123]

Les mesures prises par la Couronne sur le fondement de la LGFP et de la *Loi sur les Indiens* sont compatibles avec ses obligations fiduciales envers les bandes. La Couronne, dont le rôle de fiducial est unique vis-à-vis des redevances et du paiement d'intérêts, n'est pas en conflit d'intérêts lorsqu'elle emprunte sans le consentement des intéressés l'argent des bandes détenu dans le Trésor. L'emprunt est exigé par la loi, et on ne saurait dire du fiducial qui se conforme à la loi qu'il manque à son obligation fiduciale. La situation que les bandes qualifient de conflit d'intérêts est une conséquence inhérente au régime législatif et elle est de ce fait inévitable. La Couronne se trouve également dans une situation unique lorsqu'elle fixe le taux de l'intérêt payé aux bandes : elle doit tenir compte à la fois des intérêts des bandes et de ceux des autres Canadiens. Dans l'exercice de son pouvoir discrétionnaire à titre de fiducial, la Couronne disposait d'un certain nombre d'options pour la fixation du taux d'intérêt. Il ressort de l'examen des autres solutions possibles qu'un taux fondé sur le rendement de titres à court terme n'aurait pas été au mieux des intérêts des bandes lorsque la Couronne aurait pu payer un intérêt plus élevé compte tenu de ses emprunts diversifiés. Un taux d'intérêt fixe n'aurait pas eu la souplesse voulue pour tenir compte de la fluctuation des

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

As an alternative to the payment of interest by the Crown, s. 64(1)(*k*) of the *Indian Act* provided authority for the transfer of capital moneys from the Crown to either the bands themselves or to an independent trust for the bands. However, in accordance with its fiduciary obligations and s. 64(1)(*k*), the Crown had to be satisfied that any transfer was in the best interests of the bands. With respect to Samson, the evidence indicates that the Crown was supportive of the band's proposals to transfer money for the establishment of trust funds by the bands. However, due to difficulties uncovering information as to the disposition of a previous transfer of money, the failure of Samson to provide adequate financial plans and assurances of band support, and conflict within the Samson band council, the Crown was unable to assure itself that transferring further funds would be in the best interests of Samson. Having regard to the evidence, for the Crown to have agreed to further transfers prior to 2005 would have been imprudent. As for Ermineskin, in the event of a transfer, the Crown's fiduciary obligations with regard to the funds had to come to an end. The Crown could not be expected to remain responsible for funds over which it no longer had control. In the absence of a release from the band to

taux d'intérêt et de l'inflation. Le trésor public aurait dû subventionner le paiement d'un intérêt équivalant au rendement d'un portefeuille diversifié. Le fiducial n'a pas à puiser dans ses propres ressources, en l'occurrence le trésor public, pour bonifier le rendement qu'il peut verser eu égard aux contraintes légales. Les deux choix qu'aurait pu faire une personne prudente administrant ses propres affaires, mais tenant compte des contraintes applicables à la Couronne, étaient celui du taux d'intérêt variable, retenu par la Couronne, et celui du portefeuille échelonné d'obligations. Lorsque la formule applicable à l'argent des Indiens a été adoptée en 1969, les taux d'intérêt étaient à la hausse. Vu la tendance à la baisse observée depuis les années 1980, on peut dire avec le recul qu'un portefeuille échelonné aurait dès lors permis aux bandes de toucher un rendement supérieur au taux variable fondé sur les obligations à long terme du gouvernement, taux pour lequel la Couronne a opté. Cependant, le respect des obligations fiduciales de la Couronne envers les bandes doit être considéré prospectivement. Comme elle ne pouvait connaître à l'avance l'évolution des taux d'intérêt et de l'inflation, la Couronne n'a pas fait preuve d'imprudence en optant pour un taux variable fondé sur le rendement des obligations à long terme du gouvernement. C'était un moyen de se prémunir contre le risque de fluctuation des taux d'intérêt et de l'inflation. En appliquant la formule du taux variable à l'argent des Indiens, la Couronne n'a donc pas manqué à son obligation fiduciale envers les bandes. [124] [126-129] [132] [147-149]

Au lieu de verser de l'intérêt, la Couronne aurait pu, suivant l'al. 64(1)*k*) de la *Loi sur les Indiens*, transférer l'argent du compte en capital soit aux bandes, soit à un fiduciaire indépendant pour leur compte. Suivant ses obligations fiduciales et l'al. 64(1)*k*), il aurait toutefois fallu qu'elle soit convaincue que l'opération servait au mieux les intérêts des bandes. En ce qui concerne la nation de Samson, la preuve révèle que la Couronne appuyait ses propositions de transfert visant la mise sur pied de fiducies. Toutefois, vu la difficulté d'obtenir des précisions sur l'utilisation de fonds déjà transférés, l'omission de la nation de Samson de présenter des plans financiers valables et d'offrir quelque preuve de l'appui de ses membres, ainsi que les divergences au sein du conseil de bande, la Couronne n'a pu s'assurer qu'il était au mieux des intérêts de la nation de Samson de transférer d'autres fonds. Eu égard à la preuve, la Couronne aurait été imprudente si elle avait acquiescé à des transferts supplémentaires avant 2005. Pour ce qui est de la nation d'Ermineskin, un transfert aurait dû mettre fin aux obligations fiduciales de la Couronne à l'égard des fonds. On ne pouvait s'attendre à ce que la Couronne demeure responsable de fonds sur lesquels elle n'exerçait plus aucun pouvoir. Si la bande ne libérait pas la

the Crown, the Crown could not be expected to transfer funds from the CRF to Ermineskin. [150-152] [169-170] [181]

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

Finally, the money management provisions found in ss. 61 to 68 of the *Indian Act* do not infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms*. There is a distinction between Indians and non-Indians, but that distinction is not discriminatory. The provisions of the *Indian Act* that prohibit investment of the royalties by the Crown do not draw a distinction that perpetuates disadvantage through prejudice or stereotyping. The provisions do not preclude investment, provided the investments are made by the bands or trustees on their behalf after expenditure of funds from the CRF to the bands and the release of the Crown from further responsibility with respect to the royalties. Such an approach involves greater control and decision making by the bands themselves. Any expenditure of the funds for investment is required to be in the best interests of the bands. Until the funds are expended by the Crown for the purposes of investment by the bands or trustees on their behalf, they are held by the Crown in the CRF and the bands are provided with liquidity and a return on the royalties. [190] [201-202]

Cases Cited

Referred to: *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Sioui*, [1990] 1 S.C.R. 1025; *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302; *R. v. Badger*, [1996] 1 S.C.R. 771; *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344; *Guerin v. The Queen*, [1984] 2 S.C.R. 335; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138; *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40; *Authorson (Litigation Administrator of) v. Canada (Attorney General)*, 2007 ONCA 501, 86 O.R. (3d) 321, leave to appeal refused, [2008] 1 S.C.R. v; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476; *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846;

Couronne de ses obligations, elle ne pouvait s'attendre à ce que les fonds détenus dans le Trésor lui soient transférés. [150-152] [169-170] [181]

La Couronne ne s'est pas enrichie sans cause en utilisant les redevances des bandes et en payant de l'intérêt au taux fixé par elle. Il s'agissait d'une conséquence inévitable du régime législatif, qui exige de la Couronne qu'elle dépose les redevances dans le Trésor et qu'elle verse des intérêts aux bandes. Pour déterminer si la Couronne s'est enrichie, il faut se demander quelle aurait été la situation si elle n'avait pas eu accès aux redevances versées dans le Trésor. Le juge de première instance a conclu que la Couronne aurait pu obtenir d'autres fonds à un taux moins élevé que celui consenti sur les redevances. [182] [184]

Enfin, les dispositions régissant la gestion de l'argent des Indiens, à savoir les art. 61 à 68 de la *Loi sur les Indiens*, ne portent pas atteinte aux droits garantis au par. 15(1) de la *Charte canadienne des droits et libertés*. Une distinction est établie entre Indiens et non-Indiens, mais elle n'est pas discriminatoire. Les dispositions de la *Loi sur les Indiens* qui interdisent à la Couronne d'investir les redevances ne créent pas une distinction perpétuant un préjugé ou l'application de stéréotypes. Les dispositions en cause n'empêchent pas les bandes ou leurs fiduciaires d'investir les fonds détenus dans le Trésor que la Couronne leur transfère après avoir été exonérée de toute responsabilité ultérieure à leur égard. Les bandes exercent ainsi un plus grand pouvoir, notamment sur le plan décisionnel. Le transfert de sommes d'argent destinées à l'investissement doit servir au mieux les intérêts des bandes. Dans l'intervalle, la Couronne détient les fonds dans le Trésor en mettant des liquidités à la disposition des bandes et en faisant fructifier les redevances de celles-ci. [190] [201-202]

Jurisprudence

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

James A. O'Reilly, Edward H. Molstad, Q.C., Marco Poretti, L. Douglas Rae, Nathan Whitling and *David Sharko*, for the appellants Chief Victor Buffalo et al.

Mitchell R. Taylor, Q.C., W. Clarke Hunter, Q.C., and *Michele E. Annich*, for the respondents.

E. Ria Tzimas, for the intervener the Attorney General of Ontario.

Sylvain Leboeuf and *Monique Rousseau*, for the intervener the Attorney General of Quebec.

Stanley H. Rutwind, Q.C., for the intervener the Attorney General of Alberta.

Jack R. London, Q.C., and *Bryan P. Schwartz*, for the intervener the Assembly of First Nations.

W. Tibor Osvath, for the interveners the Saddle Lake Indian Band and the Stoney Indian Band.

Joseph Eliot Magnet and *William Major*, for the intervener the Lac Seul First Nation.

Marvin R. V. Storrow, c.r., Maria A. Morellato, c.r., Joseph C. McArthur et *Joanne Lysyk*, pour les appelants Chief John Ermineskin et autres.

James A. O'Reilly, Edward H. Molstad, c.r., Marco Poretti, L. Douglas Rae, Nathan Whitling et *David Sharko*, pour les appelants Chef Victor Buffalo et autres.

Mitchell R. Taylor, c.r., W. Clarke Hunter, c.r., et *Michele E. Annich*, pour les intimés.

E. Ria Tzimas, pour l'intervenant le procureur général de l'Ontario.

Sylvain Leboeuf et *Monique Rousseau*, pour l'intervenant le procureur général du Québec.

Stanley H. Rutwind, c.r., pour l'intervenant le procureur général de l'Alberta.

Jack R. London, c.r., et *Bryan P. Schwartz*, pour l'intervenante l'Assemblée des Premières Nations.

W. Tibor Osvath, pour les intervenantes la bande indienne de Saddle Lake et la bande indienne de Stoney.

Joseph Eliot Magnet et *William Major*, pour l'intervenante la Première Nation du Lac Seul.

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ROTHSTEIN J. —

I. Introduction

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

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

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

II. Facts

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

Version française du jugement de la Cour rendu par

LE JUGE ROTHSTEIN —

I. Introduction

[1] Les deux présents pourvois ont été entendus simultanément et marquent le point culminant d'un très long processus, dont un procès conjoint qui a duré plusieurs années. Le présent jugement ne porte que sur certaines des questions examinées en première instance.

[2] Les appelants prétendent que les obligations fiduciales (« *fiduciary* ») de la Couronne exigeaient qu'elle investisse de façon prudente, à savoir dans un portefeuille diversifié, les redevances pétrolières et gazières touchées en leur nom. La Couronne les a plutôt versées au Trésor, portant au crédit des appelants un intérêt calculé selon le rendement sur le marché des obligations à long terme du gouvernement. Les appelants soutiennent que depuis 1972, le refus ou l'omission de la Couronne d'investir leurs redevances les prive de centaines de millions de dollars.

[3] La Cour fédérale a débouté les appelants, et les juges majoritaires de la Cour d'appel fédérale ont rejeté leurs appels. Pour les motifs exposés ci-après, je suis également d'avis de rejeter les deux pourvois.

II. Les faits

[4] Dans le pourvoi *Ermineskin*, les appelants sont le chef John Ermineskin et les conseillers de la

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

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

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

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

[8] The money held in trust for the bands is composed mainly of royalties derived from the oil and gas reserves found beneath the surface of the Samson Reserve and Pigeon Lake Reserve in Alberta. The Samson Reserve was established in 1889 pursuant

bande et nation indiennes d'Ermineskin (« nation d'Ermineskin »), en leur nom et en celui des autres membres de la nation d'Ermineskin. Dans le pourvoi *Samson*, les appelants sont la bande et nation indiennes de Samson (« nation de Samson ») et le chef Victor Buffalo, en son nom et en celui des autres membres de la nation de Samson.

[5] Chacune des nations d'Ermineskin et de Samson est une « bande » au sens de la *Loi sur les Indiens*, L.R.C. 1985, ch. I-5, art. 2, et ce terme est employé dans les présents motifs pour les désigner. Chacune constitue également une « bande » bénéficiant du Traité n^{o} 6 conclu en 1876. L'expression les « bandes » désigne collectivement tous les appelants.

[6] Dans les deux pourvois, les intimés sont Sa Majesté la Reine du chef du Canada, le ministre des Affaires indiennes et du Nord canadien et le ministre des Finances (collectivement, la « Couronne »). Affaires indiennes et du Nord Canada est le « titre d'usage » du ministère des Affaires indiennes et du Nord canadien (« MAINC »). J'emploie l'acronyme du nom légal — MAINC — dans les présents motifs.

[7] Vu le grand nombre de prétentions, les actions des nations d'Ermineskin et de Samson ont été divisées en plusieurs parties. L'instruction ayant mené aux présents pourvois a porté sur les deux premières, celle des « données générales et historiques », à savoir les éléments de preuve historique et contextuelle relatifs aux prétentions précises formulées dans les autres parties, et celle de l'« administration de l'argent » relative aux allégations de manquement de la Couronne à ses obligations à l'égard de sommes d'argent détenues en fiducie pour les bandes. Les questions qui font l'objet du présent pourvoi ont trait à la « phase de l'administration de l'argent ».

[8] Les sommes détenues en fiducie pour les bandes se composent principalement des redevances tirées de l'exploitation des ressources pétrolières et gazières découvertes dans le sous-sol des réserves de Samson et de Pigeon Lake, en Alberta.

to Treaty No. 6 for the Samson Nation. The Pigeon Lake Reserve was established in 1896 pursuant to Treaty No. 6 for four bands (often referred to as the "Four Bands"), including the Samson Nation and the Ermineskin Nation. The reserve belonging to the Ermineskin Nation exclusively has not produced any royalties.

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

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

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

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

[13] In 1859, the interest rate on Indian moneys was fixed by the Province of Canada at 6 percent. In 1861, an Order in Council lowered the rate on

La réserve de Samson a été établie en 1889 conformément au Traité nº 6 pour la nation de Samson, et celle de Pigeon Lake en 1896 conformément au Traité nº 6 pour quatre bandes (souvent appelées « les quatre bandes »), dont les nations de Samson et d'Ermineskin. La réserve appartenant en propre à la nation d'Ermineskin n'a pas produit de redevances.

[9] Le Traité nº 6 et la *Loi sur les Indiens* exigeaient la cession par les bandes de leurs droits sur les ressources pétrolières et gazières se trouvant dans le sous-sol de leurs réserves afin que la Couronne puisse conclure avec des tiers les accords voulus pour l'exploitation des ressources. Des actes de cession aux dispositions identiques ont été signés en 1946 (« actes de cession ») par les quatre bandes pour la réserve de Pigeon Lake et par la nation de Samson pour la réserve de Samson, et la Couronne a accepté les cessions.

[10] Le régime législatif applicable à la gestion de l'argent des Indiens, auquel sont assimilées les redevances pétrolières et gazières visées en l'espèce, comprend la *Loi sur les Indiens*, la *Loi sur la gestion des finances publiques*, L.R.C. 1985, ch. F-11 (« LGFP »), et la *Loi sur le pétrole et le gaz des terres indiennes*, L.R.C. 1985, ch. I-7 (« LPGTI »). Les dispositions législatives et réglementaires pertinentes sont reproduites en annexe.

[11] Dans la *Loi sur les Indiens*, l'argent des Indiens appartient soit au « compte en capital », soit au « compte de revenu », lesquels sont tenus séparément par la Couronne. Il existe pour chacune des quatre bandes, dont la nation de Samson et celle d'Ermineskin, un compte en capital et un compte de revenu distincts.

[12] Les redevances — qui appartiennent au « compte en capital » — ont été versées au Trésor au crédit du receveur général du Canada conformément à la LGFP. La Couronne a payé à leur égard un intérêt dont le taux a été fixé par un décret pris en application du par. 61(2) de la *Loi sur les Indiens*.

[13] En 1859, le taux d'intérêt sur l'argent des Indiens a été fixé par la province du Canada à 6 p. 100. En 1861, un décret a abaissé ce taux à

newly received money to 5 percent but continued the rate of 6 percent on money already held by the Crown in Right of the Province and, after Confederation in 1867, the Crown in Right of the Dominion of Canada. Between 1861 and 1969, the rate of interest changed from time to time, ranging from 3 percent to 5 percent, although it does appear that the rate of 6 percent remained for those funds in trust prior to 1861.

[14] In 1969, it was proposed by the Minister of Indian Affairs and Northern Development to tie the rate of interest to the market yield of government bonds having terms to maturity of 10 years or over (the "Indian moneys formula"), as well as to discontinue the guarantee of 6 percent on pre-1861 money. The Crown adopted those proposals. As a result, the interest rate has varied with the changes in the market yield on long-term government bonds.

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

[16] The new Order in Council provided that interest would be calculated on the quarterly average of the market yields of the Government of Canada bond issues as published each Wednesday by the Bank of Canada, which have terms to maturity of 10 years or over. The discussions between the Crown and the bands also led to a Crown policy of crediting interest semi-annually, rather than annually. From April 1980 to the present, interest has been credited semi-annually at the rate determined in accordance with the 1981 Order in Council.

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

[18] Pursuant to an order of the trial judge dated December 22, 2005, on February 1, 2006, capital

5 p. 100 pour les nouvelles sommes touchées, mais maintenu le taux de 6 p. 100 pour l'argent que détenait déjà la Couronne du chef de la Province puis, après la Confédération de 1867, la Couronne du chef du Dominion du Canada. Entre 1861 et 1969, le taux a été modifié à l'occasion, se situant entre 3 et 5 p. 100, bien qu'il semble que le taux de 6 p. 100 soit demeuré applicable aux sommes détenues en fiducie avant 1861.

[14] En 1969, le ministre des Affaires indiennes et du Nord canadien a proposé — et la Couronne a accepté — de lier le taux d'intérêt au rendement sur le marché des obligations du gouvernement d'une durée de 10 ans ou plus (la « formule applicable à l'argent des Indiens ») et de ne plus maintenir à 6 p. 100 le taux d'intérêt consenti sur les sommes détenues avant 1861. Dès lors, le taux a donc varié au gré des fluctuations du rendement sur le marché des obligations à long terme du gouvernement.

[15] À la fin des années 1970 et au début des années 1980, la Couronne et les dirigeants de différentes bandes, dont celles de Samson et d'Ermineskin, ont eu des discussions par suite, notamment, d'une inversion où, pendant une brève période, le rendement sur le marché des investissements à court terme a dépassé celui des investissements à long terme. La situation s'est rétablie, mais un nouveau décret a été adopté en 1981.

[16] Le nouveau décret prévoyait que l'intérêt serait calculé selon la moyenne trimestrielle des rendements sur le marché des obligations du gouvernement du Canada d'une durée de 10 ans ou plus publiés chaque mercredi par la Banque du Canada. Les discussions entre la Couronne et les bandes ont également mené à l'adoption d'un mode de calcul consistant à créditer les intérêts semestriellement plutôt qu'annuellement. Depuis avril 1980, les intérêts sont crédités tous les six mois au taux fixé conformément au décret de 1981.

[17] La déclaration de la nation de Samson a été déposée en 1989, celle de la nation d'Ermineskin, en 1992.

[18] Le 1er février 2006, en application d'une ordonnance rendue par le juge de première instance

moneys belonging to Samson were transferred from the Samson capital account in the CRF to the Kisoniyaminaw Heritage Trust Fund.

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

III. Issues

[20] The primary issue in these appeals is whether the Crown was obligated as a fiduciary to invest the oil and gas royalties that it was holding on behalf of the bands. If it is determined that there was no such obligation, the issue is then whether the Crown breached its fiduciary obligations in the way in which it calculated and paid interest on the royalties.

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

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

IV. Judgments Below

A. *Federal Court*

[23] Teitelbaum J., the trial judge, dismissed Ermineskin's and Samson's actions against the

le 22 décembre 2005, les sommes d'argent au compte en capital de la nation de Samson ont été transférées du Trésor à la fiducie patrimoniale Kisoniyaminaw.

[19] Dans la présente affaire, les sommes en cause sont très importantes. Au procès, les bandes ont présenté des éléments de preuve sur les sommes supplémentaires estimatives qu'elles auraient pu toucher, suivant leur thèse, si leurs redevances avaient été investies sur le marché au lieu de rapporter de l'intérêt selon la formule applicable à l'argent des Indiens. Ce manque à gagner se situerait approximativement entre 239 millions et 1,53 milliard de dollars pour la nation de Samson, et entre 156 et 217 millions de dollars pour la nation d'Ermineskin.

III. Les questions en litige

[20] La principale question en litige dans les présents pourvois est celle de savoir s'il incombait à la Couronne, en tant que fiducial, d'investir les redevances pétrolières et gazières qu'elle détenait pour le compte des bandes. À défaut d'une telle obligation, il faut alors déterminer si, par la manière dont elle a fixé et payé l'intérêt sur les redevances, la Couronne a manqué à ses obligations fiduciales en payant l'intérêt sur les redevances et en fixant le taux de cet intérêt.

[21] Les bandes font également valoir que la Couronne a manqué à ses obligations à leur égard parce que, en qualité de fiducial, elle s'est trouvée en conflit d'intérêts en « empruntant » les redevances sans permission, et qu'il y a eu enrichissement sans cause du fait de cet « emprunt ».

[22] Les appelants soutiennent par ailleurs que si les art. 61 à 68 de la *Loi sur les Indiens* empêchent la Couronne d'investir les redevances, ces dispositions portent atteinte à leur droit à l'égalité garanti à l'art. 15 de la *Charte canadienne des droits et libertés.*

IV. Les décisions antérieures

A. *Cour fédérale*

[23] En première instance, le juge Teitelbaum a rejeté les actions des nations de Samson et

Crown: 2005 FC 1622, 269 F.T.R. 1, and 2005 FC 1623, 269 F.T.R. 188.

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

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

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

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

[28] Further, he held that the bands were not individuals for the purposes of the *Charter* and that

d'Ermineskin contre la Couronne : 2005 CF 1622, [2005] A.C.F. n^{o} 1991 (QL), et 2005 CF 1623, [2005] A.C.F. n^{o} 1992 (QL).

[24] Le juge Teitelbaum relève que la Couronne a reconnu son rôle de fiduciaire à l'égard des redevances, mais il ajoute qu'il aurait conclu à son existence même sans cet aveu.

[25] Il ne convient pas avec les bandes que la fiducie découle soit des relations historiques entre la Couronne et les peuples autochtones, soit du Traité n^{o} 6. Le texte des actes de cession suffit à établir une fiducie; il offre la certitude voulue quant à l'intention, à la matière et à l'objet, et il renvoie explicitement à une fiducie.

[26] Le juge Teitelbaum statue que la loi éclaire les obligations fiduciaires de la Couronne et qu'elle n'autorise pas cette dernière à investir les redevances. Même si, en qualité de fiduciaire, il incombe à la Couronne d'investir l'argent selon la norme du « soin et [de] l'habileté raisonnables d'un bon père de famille » (motifs *Samson*, par. 670, motifs *Ermineskin*, par. 278), la Couronne s'est acquittée de cette obligation en payant de l'intérêt conformément au par. 61(2) de la *Loi sur les Indiens*.

[27] En ce qui concerne la question de savoir si les dispositions de la *Loi sur les Indiens* portent atteinte aux droits des bandes garantis au par. 35(1) de la *Loi constitutionnelle de 1982* ou si elles sont incompatibles avec eux, le juge Teitelbaum conclut que la nation de Samson n'a pas établi l'existence de droits ancestraux ou issus de traités relativement à l'autonomie gouvernementale ou à l'argent des Indiens. La nation d'Ermineskin n'a pas revendiqué l'autonomie gouvernementale, mais elle a fait valoir que la loi était inconstitutionnelle si elle avait pour effet de la priver de ses droits à titre de bénéficiaire. Cependant, le juge de première instance statue que la fiducie a pour origine les actes de cession, de sorte que les droits des bandes ne sont pas issus de traités.

[28] Le juge Teitelbaum statue en outre que les bandes ne sont pas visées par le mot « tous »

they therefore had no standing to bring a s. 15(1) claim.

[29] Finally, he found that the Crown was not enriched by the "borrowing" of the bands' money. He also determined that the statutory scheme provided a juristic reason even if there had been enrichment.

B. *Federal Court of Appeal*

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

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

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

[32] The majority found that if the bands requested capital money from the CRF for investment by the bands themselves, it would be reasonable for the Crown to require an investment plan to satisfy itself that the expenditure was for the benefit of the bands as required by s. 64(1)(*k*) of the *Indian Act*.

employé au par. 15(1) de la *Charte* et qu'elles n'ont donc pas qualité pour faire valoir un droit garanti par cette disposition.

[29] Enfin, il conclut que la Couronne ne s'est pas enrichie par l'« emprunt » de l'argent des bandes et que s'il y avait eu enrichissement de sa part, il aurait été justifié par le régime législatif.

B. *Cour d'appel fédérale*

(1) Le juge en chef Richard et la juge Sharlow

[30] Le juge en chef Richard et la juge Sharlow rejettent les appels des nations de Samson et d'Ermineskin : 2006 CAF 415, [2007] 3 R.C.F. 245. Ils estiment qu'en raison de l'application simultanée de la *Loi sur les Indiens* et de la LGFP, les obligations fiduciaires de la Couronne vis-à-vis des redevances diffèrent fondamentalement de celles d'un fiduciaire de common law. Si le législateur avait voulu que la Couronne soit tenue d'investir, il aurait adopté le texte législatif voulu pour lui conférer ce pouvoir. Les nations de Samson et d'Ermineskin ayant reconnu l'absence de consentement de leurs conseils de bande respectifs à l'investissement de l'argent du compte en capital, les juges majoritaires estiment que la Couronne n'aurait pu, de toute façon, investir l'argent au profit des bandes.

[31] Ils affirment que la Couronne est fiduciaire des redevances parce que c'est « ce qui est énoncé à l'article 4 de la *Loi sur le pétrole et le gaz des terres indiennes* » et que « s'il y avait eu le moindre doute au sujet de l'existence d'une fiducie, ce doute n'aurait pu subsister après l'édiction de la *Loi sur le pétrole et le gaz des terres indiennes* » (par. 109). Ils ajoutent que même si cette loi n'avait pas été adoptée, la Couronne aurait été fiduciaire par l'effet du Traité n° 6 et de la *Loi sur les Indiens*.

[32] Ils estiment que si les bandes lui demandaient de leur verser l'argent du compte en capital pour qu'elles l'investissent elles-mêmes, la Couronne pouvait raisonnablement exiger un plan d'investissement la convainquant que la dépense serait à l'avantage des bandes comme le veut l'al. 64(1)*k*)

There was no obligation on the part of the Crown to propose an investment plan to the bands. It was the intention of Parliament to give bands that initiative with respect to use of their capital money, and the bands would generally be in a better position than the Crown to determine what expenditures are required.

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

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

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

de la *Loi sur les Indiens*. La Couronne n'était pas tenue de proposer un plan d'investissement aux bandes. L'intention du législateur était de laisser aux bandes le soin de décider de l'utilisation de l'argent du compte en capital, et ces dernières sont généralement plus en mesure que la Couronne de déterminer les dépenses nécessaires.

[33] De l'avis des juges majoritaires, la décision du gouverneur en conseil relative au taux d'intérêt et à la formule applicable à l'argent des Indiens doit être considérée au regard de la norme de la décision raisonnable. De nature essentiellement discrétionnaire, elle résulte cependant de l'exercice du pouvoir discrétionnaire dans un contexte où la Couronne s'acquitte d'une obligation fiduciaire et engage son honneur. Elle est confirmée lorsqu'elle se fonde sur des éléments rationnels et non hors de propos et qu'elle se situe à l'intérieur de la « marge de manœuvre prévue par le texte législatif qui accorde le pouvoir discrétionnaire » (par. 167). Les motifs du juge de première instance sont brefs sur ce point, mais « suffisamment d'éléments de preuve étaya[ie]nt [s]a conclusion [. . .] selon laquelle les taux d'intérêt étaient raisonnables » (par. 168). De plus, chaque fois que les bandes l'ont demandé, la Couronne les a consultées convenablement pour la fixation du taux.

[34] Les juges majoritaires rejettent la thèse des bandes fondées sur le par. 35(1) de la *Loi constitutionnelle de 1982*. Selon eux, l'abrogation en 1951 des dispositions leur conférant le pouvoir d'investir les redevances ne les a pas privées de leurs droits issus du Traité n^{o} 6 et n'a pas porté atteinte à ceux-ci. Ils concluent que la Couronne n'a jamais promis de conserver intact le pouvoir d'investissement prévu dans la *Loi sur les Indiens*.

[35] Ils écartent les prétentions des bandes fondées sur le par. 15(1) de la *Charte*. Ils concluent que même si chacun des membres de la bande avait qualité pour agir, ils n'auraient aucun droit à faire valoir, car sa demande toucherait la gestion d'un bien de la bande, et non un droit personnel. Même si les allégations sont formulées dans le cadre de recours collectifs, il ne s'agit pas pour autant de demandes individuelles.

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

[37] The majority dismissed the bands' appeals.

(2) Sexton J.A.

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

[39] The standard of care and diligence required of the Crown was that of a man of ordinary prudence in managing his own affairs. This required the Crown, among other things, to assess the circumstances of the fund and the beneficiaries to ascertain appropriate investments, build a diversified portfolio where appropriate, monitor the investments, seek expert advice and maintain an even hand between successive beneficiaries. The Crown was required to obtain the best possible return in a manner consistent with sound investment practices. The Crown breached its duties by failing to seek expert advice about prudent investment strategies, by failing to propose an investment plan to the bands, by failing to engage in any active management of the funds, and by failing to ascertain the circumstances of the fund.

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

[41] Because of his conclusion that the Crown breached its duty to invest, it was not necessary for

[36] Les allégations d'enrichissement sans cause et de conflit d'intérêts sont rejetées. Suivant les faits établis par le juge de première instance, la Couronne ne s'est pas enrichie. Tout conflit d'intérêts découle inévitablement du régime législatif et est licite.

[37] Les juges majoritaires rejettent les appels des bandes.

(2) Le juge Sexton

[38] Dissident, le juge Sexton aurait accueilli les appels. Selon lui, les actes de cession sont à l'origine de la fiducie. La Couronne devait avant tout agir comme fiduciaire de common law et elle avait le pouvoir d'investir les redevances des bandes. La *Loi sur les Indiens* ne l'empêchait pas d'investir les sommes en cause. Elle n'exigeait pas non plus que l'argent des Indiens demeure indéfiniment dans le Trésor.

[39] La Couronne avait l'obligation d'agir avec le soin et la diligence qu'une personne normalement prudente apporte à l'administration de ses propres affaires, de sorte qu'elle devait notamment évaluer la situation du fonds et des bénéficiaires afin d'arrêter les bons placements, constituer au besoin un portefeuille diversifié, assurer le suivi des investissements, consulter des spécialistes et faire preuve d'équité envers les bénéficiaires successifs. La Couronne devait obtenir le meilleur rendement possible grâce à de bons placements. Elle a manqué à ses obligations en omettant de consulter un expert sur les stratégies prudentes en la matière, de proposer un plan d'investissement aux bandes, de s'engager activement dans la gestion de l'argent et d'évaluer la situation du fonds.

[40] Le juge Sexton souligne l'abondance de la preuve d'expert sur le caractère raisonnable ou non du rendement versé par la Couronne. Il estime qu'il est « loin d'être certain que le [. . .] rendement de l'argent des [bandes] était raisonnable » (par. 296).

[41] Vu sa conclusion selon laquelle la Couronne a manqué à son obligation d'investir, il ne lui paraît

him to deal with the issue of s. 15(1) of the *Charter*. However, he did comment that in his view, the interpretation of the legislation adopted by the trial judge would result in a violation of s. 15(1) because the legislation subjects Indians to inferior and discriminatory treatment based on their Indian status and membership in a band, as compared to non-Indians. Because the action was a representative action brought on behalf of all individual members of the bands, there was standing to maintain the claim.

[42] Finally, Sexton J.A. held that it was not necessary to resolve the question of conflict of interest or unjust enrichment. However, he did say that the Crown did not receive any benefit or enrichment and that he would not set aside the trial judge's findings on that point. On the conflict of interest issue, the Crown should have sought to avoid being in a conflict by putting together prudent investment plans on a continual basis for approval by the bands.

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

V. Analysis

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

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

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

[46] If the fiduciary relationship arose out of Treaty No. 6, arguably the rights of the bands as beneficiaries of the relationship are treaty rights

pas nécessaire de se prononcer sur l'application du par. 15(1) de la *Charte*. Cependant, il estime que l'interprétation du juge de première instance va à l'encontre du par. 15(1), car la loi réserve aux Indiens par rapport aux non-Indiens un traitement inférieur fondé sur leur statut d'Indiens et leur appartenance à une bande. L'action ayant été intentée au nom de chacun de leurs membres, les bandes avaient qualité pour invoquer le par. 15(1).

[42] Enfin, le juge Sexton opine qu'il n'y a pas lieu de statuer sur les allégations de conflit d'intérêts et d'enrichissement sans cause. Il ajoute toutefois que la Couronne n'a bénéficié d'aucun avantage ou enrichissement et qu'il ne convient pas d'annuler les conclusions du juge de première instance sur ce point. En ce qui concerne le conflit d'intérêts, la Couronne aurait dû l'éviter en soumettant continuellement des plans d'investissement prudents à l'approbation des bandes.

[43] Le juge Sexton aurait accueilli les appels et renvoyé l'affaire à la Cour fédérale pour détermination du préjudice.

V. Analyse

A. *La source des obligations fiduciales de la Couronne*

[44] En l'espèce, la Couronne a manifestement — elle l'a reconnu — des obligations fiduciales en ce qui concerne les redevances des bandes. Ce qu'il faut déterminer c'est le fondement et la teneur de ces obligations.

[45] En l'espèce, la « source » des obligations fiduciales de la Couronne a suscité moult débats. Les bandes soutiennent que le Traité n^{o} 6 est la source première de la relation fiduciale entre la Couronne et elles, mais que cette relation découle également des actes de cession, de la LPGTI, de la common law et de la *Loi sur les Indiens*.

[46] Si la relation fiduciale découle du Traité n^{o} 6, on peut soutenir que les droits des bandes, en tant que bénéficiaires de la relation, sont issus de

and thus constitutionally protected under s. 35(1) of the *Constitution Act, 1982*. The bands submit that any legislation purporting to restrict the Crown's fiduciary obligations and the bands' corresponding rights as beneficiaries would be inconsistent with their rights under Treaty No. 6, and therefore unconstitutional and of no force and effect according to s. 52 of the *Constitution Act, 1982*.

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

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

B. *Treaty No. 6*

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

traités et sont de ce fait garantis au par. 35(1) de la *Loi constitutionnelle de 1982*. Les bandes font valoir que toute disposition législative dont l'objet serait de limiter les obligations fiduciales de la Couronne et les droits correspondants des bandes en qualité de bénéficiaires serait incompatible avec leurs droits issus du Traité n^{o} 6 et, en conséquence, inconstitutionnelle et inopérante suivant l'art. 52 de la *Loi constitutionnelle de 1982*.

[47] Plus précisément, les bandes soutiennent que la Couronne doit s'acquitter des mêmes obligations que celles du fiduciaire de common law, ce qui comprend l'obligation d'investir les sommes en cause. Elles prétendent essentiellement jouir du droit constitutionnel issu d'un traité à l'investissement de leurs redevances par la Couronne. Si tel était le cas, toute disposition de la *Loi sur les Indiens* empêchant la Couronne d'investir les redevances serait inconstitutionnelle et inopérante.

[48] Si, par contre, les obligations fiduciales de la Couronne découlaient des actes de cession, de la LPGTI ou de la *Loi sur les Indiens*, ou des trois, les bandes seraient titulaires de droits en tant que bénéficiaires des obligations de la Couronne, mais ces droits ne seraient pas garantis par la Constitution. Dans ce contexte, toute disposition législative faisant obstacle à l'investissement des redevances des Indiens serait valide.

B. *Le Traité n^{o} 6*

[49] Selon les bandes, le traité impose à la Couronne les obligations d'un fiduciaire de common law. À mon avis, pareille intention n'y est pas exprimée. Il y est précisé par exemple que les tribus indiennes Cris des Plaines et Cris des Bois renoncent à « tous droits, titres et privilèges quelconques, qu'ils peuvent avoir aux terres [dans le territoire délimité] ». Le traité mentionne en outre que des terres sont mises à part et que la Couronne peut aliéner les réserves de terre « pour le bénéfice et avantage des dits Sauvages, qui y auront droit », avec le consentement de ceux-ci. La Couronne conserve toutefois aussi le droit de prendre, moyennant indemnité convenable, des réserves de terre à des fins publiques.

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

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

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

> [T]he aforesaid reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained ; . . .

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

> They [other bands], when they found they had too much land, asked the Queen to sell it for them; they kept as much as they could want, and the price for which the remainder was sold was put away to increase for them, and many bands now have a yearly income from the land. [Emphasis added.]

[54] It has been held that it is unconscionable for the Crown to ignore oral terms and rely simply on the written words of a treaty. Extrinsic evidence

[50] Ces éléments n'étayent pas l'existence de l'intention d'imposer à la Couronne les obligations d'un fiduciaire de common law. Tous les droits ont été cédés à la Couronne, qui a alors convenu de réserver certaines terres à l'usage des Indiens signataires. Le libellé du traité et le contexte donnent à penser qu'il y a eu transfert conditionnel des terres, et non établissement d'une fiducie de common law.

[51] Quoi qu'il en soit, le Traité n^{o} 6 n'étaye pas selon moi la thèse des bandes, et l'invoquer comme fondement des obligations fiduciales de la Couronne ne leur permet pas d'obtenir le résultat escompté, à savoir la reconnaissance de l'obligation de la Couronne d'investir les redevances.

[52] Selon les bandes, les obligations de la Couronne à l'égard de leurs redevances découlent du passage suivant du Traité n^{o} 6 :

> [L]es dites réserves de terre ou tout droit en icelles pourront être vendues et adjugées par le gouvernement de Sa Majesté pour le bénéfice et avantage des dits Sauvages, qui y auront droit, après qu'on aura au préalable obtenu leur consentement; . . .

[53] Les bandes font aussi valoir que les « conditions verbales » du Traité n^{o} 6 englobent la promesse d'Alexander Morris, lieutenant-gouverneur du Manitoba et des Territoires du Nord-Ouest, qu'en cas de vente d'une partie des réserves, le produit de la vente serait [TRADUCTION] « mis de côté pour qu'il fructifie ». Selon le compte rendu des négociations préalables à la signature du Traité n^{o} 6 rédigé par le secrétaire de la commission, A. G. Jackes, le lieutenant-gouverneur Morris aurait déclaré ce qui suit :

> [TRADUCTION] Lorsque [les autres bandes] ont constaté qu'[elles] avaient trop de terre, [elles] ont demandé à la Reine de la vendre pour [elles]; [elles] en ont conservé autant qu'[elles] le voulaient, et le prix auquel le reste fut vendu fut mis de côté pour qu'il fructifie, et de nombreuses bandes tirent aujourd'hui un revenu annuel de la terre. [Je souligne.]

[54] Il a été jugé inacceptable que la Couronne fasse fi des conditions verbales d'un traité et s'en remette uniquement au texte écrit. On peut recourir

can be used to give the proper effect to the terms of the treaty as they were understood by all signatories (see *R. v. Marshall*, [1999] 3 S.C.R. 456, at para. 12). While the statement made by Lieutenant-Governor Morris was with respect to the previous sale of reserve land of other Indians, the representatives of the bands hearing the promise would have considered the statement to be a representation that such an arrangement would apply to them as well.

[55] The task of a court when interpreting a treaty is to "'choose from among the various possible interpretations of the common intention [at the time the treaty was made] the one which best reconciles' the [Aboriginals'] interests and those of the British Crown" (*Marshall*, at para. 14 (emphasis deleted), quoting Lamer J. (as he then was) in *R. v. Sioui*, [1990] 1 S.C.R. 1025, at p. 1069).

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

[57] However, the promise that the proceeds of sale would be "put away to increase" did not create a trust in the common law sense, whereby the Crown had the same duties as a common law trustee. There is no duty of a trustee at common law to guarantee against risk of loss to the trust corpus or that the corpus would increase. "Traditionally, the standard of care and diligence required of a trustee in administering a trust is that of a man of ordinary prudence in managing his own affairs", *per* Dickson J. (as he then was) in *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302, at p. 315. However, in *Fales*, Dickson J. observed, at p.

à la preuve extrinsèque pour donner l'effet voulu aux conditions du traité définies suivant leur interprétation par tous les signataires (voir l'arrêt *R. c. Marshall*, [1999] 3 R.C.S. 456, par. 12). Alors que les propos du lieutenant-gouverneur Morris se rapportaient à la vente antérieure de réserves de terre d'autres Indiens, les représentants des bandes auraient vu dans la promesse qui leur était faite l'affirmation que l'entente en question vaudrait aussi pour elles.

[55] Lorsqu'elle interprète un traité, la Cour doit « "choisir, parmi les interprétations de l'intention commune [au moment de la conclusion du traité] qui s'offrent à [elle], celle qui concilie le mieux" les intérêts des [Autochtones] et ceux de la Couronne britannique » (*Marshall*, par. 14 (soulignement supprimé), citant le juge Lamer (plus tard Juge en chef) dans l'arrêt *R. c. Sioui*, [1990] 1 R.C.S. 1025, p. 1069).

[56] En l'espèce, la promesse du lieutenant-gouverneur Morris constituait une affirmation de la Couronne que le produit de la vente de toute partie de la réserve serait « mis de côté pour qu'il fructifie ». À mon sens, les Indiens signataires du Traité n^{o} 6 ont vraisemblablement vu dans cette affirmation la garantie que le produit de la vente de toute partie d'une réserve serait conservé pour eux par la Couronne, qu'il serait en sûreté et qu'il croîtrait avec le temps. La Couronne a en effet garanti la restitution aux bandes de l'argent du compte en capital ainsi que l'obtention d'un rendement sans risque de perte.

[57] Cependant, la promesse que le produit de la vente serait « mis de côté pour qu'il fructifie » n'a pas établi de fiducie de common law ni imposé à la Couronne les obligations d'un fiduciaire de common law. Il n'incombe pas à un tel fiduciaire de garantir la masse fiduciaire contre le risque de perte ni d'assurer sa croissance. Pour reprendre les propos du juge Dickson (plus tard Juge en chef) dans l'arrêt *Fales c. Canada Permanent Trust Co.*, [1977] 2 R.C.S. 302, p. 315, « [t]raditionnellement, le soin et la diligence que l'on exige d'un fiduciaire dans l'administration d'une fiducie sont ceux qu'un bon père de famille apporte à l'administration de ses propres

319, that "[a] trustee is not expected to be infallible nor is a trustee the guarantor of the safety of estate assets". In D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at p. 962, the authors write:

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

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

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

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

[61] Thereafter, funds belonging to the Indians were never invested by the government. The

affaires ». Il ajoute cependant qu'« [u]n fiduciaire n'est pas tenu à l'infaillibilité, pas plus qu'il n'est le garant de la sécurité de l'actif de la succession » (p. 319). Le passage suivant de *Waters' Law of Trusts in Canada* (3e éd. 2005), D. W. M. Waters, M. R. Gillen et L. D. Smith, dir., le confirme (p. 962) :

> [TRADUCTION] La prudence d'un investissement n'écarte pas tout risque de perte, et compte tenu de la volatilité des marchés boursiers, un fiduciaire peut fort bien satisfaire à la norme de diligence même lorsque la valeur des investissements fléchit.

[58] Les capitaux investis sont toujours exposés à un certain risque. Si la Couronne avait investi les redevances, leur valeur aurait pu connaître une baisse importante au moment où les bandes auraient eu besoin de liquidités.

[59] L'interprétation de la promesse faite par traité — soit la garantie et l'appréciation des sommes — est compatible avec le dossier historique, la pratique du gouvernement et la compréhension qu'en avaient les Indiens au moment de la signature du traité.

[60] En 1859, le gouvernement de la province du Canada était saisi de la question de la [TRADUCTION] « gestion de la fiducie et des fonds des Indiens ». Le 25 août 1859, John A. Macdonald, plus tard premier ministre, a adressé au Conseil exécutif un document recommandant de virer les fonds des Indiens [TRADUCTION] « au Fonds consolidé [. . .] au crédit de la fiducie, et d'imputer les intérêts annuels au débit du Fonds consolidé » plutôt que de conserver l'ancien « système d'investissements comportant un risque de perte pour la fiducie » (recommandation au Conseil exécutif, 25 août 1859, d.i., p. 657-658). Il a été reconnu que tout défaut de paiement des sommes annuelles requises par les Indiens [TRADUCTION] « serait certainement imputé à un abus de confiance de la part du gouvernement et [qu'il] ne pourrait pas être expliqué à la satisfaction des tribus » et que le « Parlement jugerait probablement nécessaire de compenser les pertes de la fiducie » (d.i., p. 657-658).

[61] Le gouvernement n'a plus jamais investi l'argent des Indiens. Dès lors, le gouvernement

consistent position of the government of the Province of Canada and later the Dominion of Canada was to hold funds belonging to the Indians in the CRF and to pay interest on those funds ranging from 3 to 6 percent per annum.

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

[63] The bands argue that the promise that the funds would be "put away to increase" represents "an attempt to convey the concept of investment in simple language to persons presumably unfamiliar with the concept" (Ermineskin factum, at para. 102). I do not think that that is a plausible interpretation of the promise that was made or the way in which the bands' representatives at the time would have understood the promise. As Samson says in its factum, at para. 105: "The Plains Cree had limited familiarity with money and trusted the Queen to handle their affairs." Macdonald observed that loss of the bands' funds would be difficult to explain and would be viewed as a breach of faith. I believe that is the context in which the promise was made and understood.

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

[65] That treaty promise, therefore, created two alternatives, neither of which required the Crown to invest the royalties. The first was that the Crown would not invest the royalties. The second was that the Crown would invest the royalties, as permitted by the legislation in force at the time, but would have to assume the risk of decrease and would not

de la province du Canada, puis le Dominion du Canada, ont toujours versé cet argent au Trésor et payé de l'intérêt à un taux annuel variant entre 3 et 6 p. 100.

[62] Enfin, la détention des fonds pour leur compte et le paiement d'un intérêt annuel correspondaient aux attentes mêmes des Indiens.

[63] Selon les bandes, la promesse que l'argent serait « mis de côté pour qu'il fructifie » visait [TRADUCTION] « à simplifier la notion d'investissement à l'intention de personnes vraisemblablement non familiarisées avec elle (mémoire de la nation d'Ermineskin, par. 102). Je ne crois pas qu'il s'agisse d'une interprétation plausible de la promesse ou de la compréhension que les représentants des bandes en ont eue à l'époque. Dans son mémoire, la nation de Samson affirme que [TRADUCTION] « les Cris des Plaines étaient très peu familiarisés avec l'argent et s'en remettaient à la Reine pour s'occuper de leurs affaires » (par. 105). Macdonald a fait observer que la perte des fonds serait difficile à expliquer aux bandes et serait vue comme un abus de confiance. Je crois que la promesse a été faite et comprise dans ce contexte.

[64] La promesse ambiguë faite par traité doit certes être interprétée de la manière qui soit la plus favorable aux Autochtones signataires (voir *R. c. Badger*, [1996] 1 R.C.S. 771, par. 9), mais l'interprétation doit demeurer réaliste. Suivant la promesse faite en l'espèce, l'argent devait être « mis de côté pour qu'il fructifie ». Le gouvernement ne pouvait la remplir et les Indiens ne pouvaient être assurés de son respect que par le dépôt des fonds dans le Trésor au crédit des Indiens.

[65] Deux possibilités s'offraient à la Couronne, et aucune n'exigeait le placement des redevances. La première était de ne pas investir les redevances. La deuxième consistait à les investir conformément aux dispositions législatives alors en vigueur, s'exposant alors au risque d'une perte qu'elle serait tenue de compenser, comme l'avait prévu Macdonald, en

only be obligated to make good any lost royalties as forecasted by Macdonald, but would also be obligated to provide a return. However, as explained, nothing requires a common law fiduciary to assume such an obligation.

[66] Under the legislation in force until 1951 (*Indian Act*, R.S.C. 1927, c. 98, s. 92), the Crown could have chosen to invest Indian moneys, but could not be forced to do so. Requiring the Crown to invest and to assume the associated risk would take the fiduciary concept too far. If the Crown was unwilling to assume that risk, it was open to it to hold the moneys in the CRF and provide the bands with a return that satisfied its treaty promise that the funds would increase.

[67] For these reasons, I conclude that if Treaty No. 6, including the promise of Lieutenant-Governor Morris, constituted the basis of the Crown's fiduciary obligation to the bands, the obligation was that the royalties would be kept safe and secure and would increase over time. That could be guaranteed by the Crown holding the royalties and paying a rate of interest to the bands so that the funds would indeed increase. Treaty No. 6 did not obligate investment by the Crown. Rather than the Crown having the obligation to invest the royalties, it had the obligation to guarantee that the funds would be preserved and would increase. Because there is no treaty right to investment by the Crown, s. 35(1) of the *Constitution Act, 1982* is not engaged.

C. *The 1946 Surrenders*

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

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

plus d'être tenu d'assurer un rendement. Or, je le répète, rien n'oblige le fiduciaire de common law à se rendre débiteur d'une telle obligation.

[66] Suivant les dispositions en vigueur jusqu'en 1951 (*Loi des Indiens*, S.R.C. 1927, ch. 98, art. 92), la Couronne aurait pu investir l'argent des Indiens, mais elle ne pouvait être contrainte de le faire. La notion d'obligation fiduciale serait poussée trop loin si la Couronne devait investir l'argent et courir le risque y associé. Pour ne pas s'exposer à ce risque, la Couronne pouvait détenir les sommes dans le Trésor et verser aux bandes un rendement de nature à remplir sa promesse d'appréciation faite par voie de traité.

[67] Pour ces motifs, je conclus que si le Traité n^{o} 6, y compris la promesse du lieutenant-gouverneur Morris, constituait le fondement de l'obligation fiduciale de la Couronne envers les bandes, cette obligation consistait à conserver les redevances en sûreté et à les faire s'accroître avec le temps. La Couronne pouvait s'en acquitter en détenant les redevances et en payant de l'intérêt de façon que la valeur des fonds augmente. Le Traité n^{o} 6 ne l'obligeait nullement à les investir. Elle devait plutôt assurer la conservation des fonds et leur appréciation. Vu l'absence d'un droit issu de traité à l'investissement des sommes par la Couronne, le par. 35(1) de la *Loi constitutionnelle de 1982* ne s'applique pas.

C. *Les actes de cession de 1946*

[68] Les bandes soutiennent que les actes de cession de 1946 rendaient la Couronne débitrice de l'obligation du fiduciaire de common law d'investir leurs redevances. Voici le passage pertinent des actes de cession :

[TRADUCTION] POUR par Sa Majesté le Roi et ses successeurs avoir et posséder ladite étendue de pays, à toujours, en fiducie pour que soit concédé, à l'égard de telle étendue, le droit de prospecter, d'extraire, de recouvrer et d'enlever les minéraux qui s'y trouvent, aux personnes et selon les conditions que le gouvernement

the Dominion of Canada may deem most conducive to our welfare and that of our people; [Emphasis added.]

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

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

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

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

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

du Canada peut juger les plus appropriées pour assurer à notre bien-être et celui de notre peuple; [Je souligne.]

Les actes de cession prévoient expressément que la Couronne conserve les minéraux en fiducie et que les conditions auxquelles elle peut accorder à un tiers le droit de les exploiter doivent être les plus appropriées pour assurer le bien-être des bandes.

[69] La Couronne pouvait à son gré déterminer les conditions d'octroi du droit d'exploiter les minéraux ainsi que le sort réservé aux redevances touchées pour le compte des bandes. Elle devait exercer son pouvoir discrétionnaire au bénéfice des bandes, qui s'étaient rendues vulnérables par la cession à la Couronne de leurs droits sur les minéraux. Les bandes étaient en droit d'escompter que la Couronne exerce ce pouvoir avec loyauté et diligence.

[70] Dans l'arrêt *Bande indienne de la rivière Blueberry c. Canada (Ministère des Affaires indiennes et du Nord canadien)*, [1995] 4 R.C.S. 344, notre Cour a statué qu'une cession avait imposé une obligation fiduciale à la Couronne. Dans cette affaire, la formulation de la cession était presque identique à celle visée en l'espèce. Plus particulièrement, elle renvoyait aux conditions [TRADUCTION] « que le gouvernement du Canada peut juger les plus appropriées pour assurer notre bien-être et celui de notre peuple ». J'estime que les obligations fiduciales de la Couronne quant à l'octroi à des tiers du droit d'exploiter les ressources minérales des bandes et quant à la gestion des redevances perçues existent du fait des actes de cession de 1946.

[71] Dans l'arrêt *Guerin c. La Reine*, [1984] 2 R.C.S. 335, le juge Dickson explique en termes généraux la nature de la relation fiduciale (p. 384) :

> [L]orsqu'une loi, un contrat ou peut-être un engagement unilatéral impose à une partie l'obligation d'agir au profit d'une autre partie et que cette obligation est assortie d'un pouvoir discrétionnaire, la personne investie de ce pouvoir devient un fiducia[l]. L'*equity* vient alors exercer un contrôle sur ce rapport en imposant à la personne en question l'obligation de satisfaire aux normes strictes de conduite auxquelles le fiducia[l] est tenu de se conformer.

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

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

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

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

[72] Les bandes affirment que la Couronne était tenue aux obligations d'un fiduciaire de common law, dont celle d'investir leur argent. Au fil des ans, la jurisprudence, la législation et la doctrine ont cerné et expliqué la relation fiduciaire en common law, mais je ne vois aucune raison pour laquelle les obligations du fiduciaire de common law ne vaudraient pas dans le cadre d'une autre relation fiduciale lorsque la nature de celle-ci l'exige. Comme l'affirme le juge La Forest dans l'arrêt *McInerney c. MacDonald*, [1992] 2 R.C.S. 138, « les relations et les obligations fiducia[l]es ne sont pas toutes les mêmes; elles sont tributaires des exigences de la situation » (p. 149).

[73] Lorsque la situation d'un fiducial s'apparente à celle d'un fiduciaire de common law sans qu'il s'agisse nécessairement d'une « fiducie de common law », je ne vois pas pourquoi les obligations du fiduciaire de common law ne pourraient pas s'appliquer lorsque les circonstances l'exigent. En l'espèce, les bandes insistent particulièrement sur l'obligation du fiduciaire d'investir la masse fiduciaire constituée de leurs redevances. À mon avis, lorsque les circonstances font de la Couronne un fiducial, mais non, à strictement parler, un fiduciaire de common law, et qu'elle détient des fonds pour le compte des bandes, il n'est pas injustifié de lui attribuer l'obligation d'investir ces fonds comme le ferait un fiduciaire de common law, sous réserve de toute disposition législative limitant son pouvoir de le faire.

[74] J'estime par conséquent que la relation entre la Couronne et les bandes est fiduciale et s'apparente à celle établie par une fiducie. La Couronne a le pouvoir discrétionnaire d'agir au mieux des intérêts des bandes, et ces dernières sont en situation de vulnérabilité quant à l'exercice de ce pouvoir. La Couronne ne peut accorder de droits sur les minéraux qu'aux conditions les plus appropriées pour assurer le bien-être des bandes, et elle conserve le produit de l'octroi de ces droits pour le compte de celles-ci.

[75] Rappelons que le pouvoir discrétionnaire et les actes d'un fiducial — qu'il s'agisse de la Couronne ou d'une autre personne — peuvent être limités par la loi.

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

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

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

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

[78] *Authorson* dealt with a similar issue to the one in this case, and consisted of a number of proceedings that were in fact part of the same case. In the Ontario Court of Appeal's decision in *Authorson (Litigation Administrator of) v. Canada (Attorney General)*, 2007 ONCA 501, 86 O.R. (3d) 321 (leave to appeal refused, [2008] 1 S.C.R. v), the Court of Appeal said, at para. 102:

[76] Dans l'arrêt *Guerin*, le juge Dickson dit à la p. 387 :

Le pouvoir discrétionnaire qui constitue la marque distinctive de tout rapport fiducia[l] peut, dans un cas donné, être considérablement restreint. Cela s'applique aussi bien au pouvoir discrétionnaire que possède Sa Majesté à l'égard des Indiens qu'au pouvoir discrétionnaire des fiduciaires, des mandataires et des personnes qui relèvent des autres catégories traditionnelles de fiducia[l]. Les paragraphes 18(1) et 38(2) de la *Loi sur les Indiens* prévoient expressément une telle restriction. Il va toutefois sans dire que l'obligation [fiduciale] n'est pas supprimée par l'imposition de conditions ayant pour effet de restreindre le pouvoir discrétionnaire du fiducia[l]. Le défaut de remplir ces conditions constitue tout simplement, à première vue, un manquement à l'obligation.

[77] L'arrêt *Authorson c. Canada (Procureur général)*, 2003 CSC 39, [2003] 2 R.C.S. 40, a été rendu dans une affaire où la Couronne gérait, en qualité de fiducial, les pensions et d'autres allocations pour d'anciens combattants invalides. Avant 1990, la Couronne avait rarement versé de l'intérêt et elle avait rarement investi les fonds. En 1990, le ministère des Anciens combattants a commencé à verser des intérêts, mais le législateur a limité l'obligation antérieure de l'État d'en payer en modifiant la *Loi sur le ministère des Anciens combattants*, L.R.C. 1985, ch. V-1. Concluant que le demandeur n'avait pas le droit de réclamer à l'État des intérêts pour la période antérieure, le juge Major dit au par. 62 :

Des décennies d'intérêts sur leurs pensions et allocations sont dues à l'intimé et aux anciens combattants invalides qu'il représente. L'État ne conteste pas ces conclusions. Le législateur a toutefois décidé, pour des raisons qu'il n'a pas dévoilées, de refuser en toute légalité ces intérêts — dus en vertu de la common law, de l'equity ou d'une fiducie — aux anciens combattants envers lesquels l'État avait néanmoins une obligation [fiduciale].

[78] Constituée de plusieurs instances faisant en réalité partie d'un même dossier, *Authorson* avait pour objet une question semblable à celle considérée en l'espèce. Dans l'arrêt *Authorson (Litigation Administrator of) c. Canada (Attorney General)*, 2007 ONCA 501, 86 O.R. (3d) 321 (autorisation de pourvoi refusée, [2008] 1 R.C.S. v), la Cour d'appel de l'Ontario affirme ce qui suit (par. 102) :

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

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

D. *The Statutory Framework*

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

[81] In order to determine the effect of the legislation on the Crown's obligations, it is necessary to examine the entire legislative scheme, starting with the IOGA. It will then be necessary to look at the FAA and the *Indian Act* and, in particular, how the provisions of those two statutes work together to inform the Crown's duties in the management of the oil and gas royalties.

(1) The *Indian Oil and Gas Act*

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

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

[TRADUCTION] La Couronne devait respecter des limitations législatives claires dans l'administration du Trésor lorsqu'elle était légalement tenue de détenir les fonds gérés par [le ministère des Anciens combattants]. Comme nous l'expliquons ci-après, le cadre législatif applicable ne permettait pas à la Couronne d'investir sur les marchés extérieurs ou d'offrir un autre rendement que l'intérêt. La Couronne ne peut enfreindre la loi même lorsqu'elle agit à titre de fiducial. Pendant la période considérée, l'intérêt était la seule forme de rendement que la Couronne pouvait légalement être tenue de verser.

[79] Dans les arrêts *Guerin* et *Authorson*, notre Cour a statué que le législateur peut adopter des lois limitant ou supprimant les obligations fiduciales de la Couronne. Il incombe à celle-ci de s'acquitter de ses obligations fiduciales conformément aux limites que leur apporte la loi applicable. Il faut donc se demander si la loi limite les obligations fiduciales de la Couronne envers les bandes à l'égard de leurs redevances.

D. *Le cadre législatif*

[80] Le cadre législatif dans lequel la Couronne remplit ses obligations comprend la *Loi sur les Indiens*, la LGFP et la LPGTI. Selon les bandes, le régime législatif, plus précisément le par. 61(1) de la *Loi sur les Indiens*, autorise la Couronne à investir les redevances. Je ne partage pas cet avis.

[81] Afin de déterminer l'effet de la législation sur les obligations de la Couronne, il est nécessaire d'examiner le régime législatif en entier, à commencer par la LPGTI. Il faut ensuite considérer la LGFP et la *Loi sur les Indiens* et, plus particulièrement, l'incidence de leurs dispositions sur les obligations de la Couronne dans la gestion des redevances pétrolières et gazières.

(1) La *Loi sur le pétrole et le gaz des terres indiennes*

[82] Le paragraphe 4(1) de la LPGTI est libellé comme suit :

4. (1) Nonobstant les modalités d'une concession, d'un bail, d'un permis, d'une licence ou d'un autre acte d'aliénation, les dispositions d'un règlement sur le

oil and gas or the terms and conditions of any agreement respecting royalties in relation to oil or gas or both oil and gas, whether granted, issued, made or entered into before or after December 20, 1974, but subject to subsection (2), all oil and gas obtained from Indian lands after April 22, 1977 is subject to the payment to Her Majesty in right of Canada, in trust for the Indian bands concerned, of the royalties prescribed from time to time by the regulations.

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

[84] The interveners Saddle Lake Indian Band and Stoney Indian Band argued that the IOGA is a complete and comprehensive legislative scheme with respect to oil and gas royalties. According to these interveners, statements made during Parliamentary debates on the enactment of the IOGA confirm that the intent was to ensure that bands receive "the fullest benefits" and "[t]he greatest possible return" on oil and gas forming part of reserves (*House of Commons Debates*, vol. I, 1st Sess., 30th Parl., October 21, 1974, at p. 558). These statements formed the basis of commitments to those bands that the Crown will obtain "the greatest possible benefits from the oil and gas interests" (Saddle Lake and Stoney Indian Bands factum, at para. 45). These interveners argued that the IOGA contains specific "trust" language and that the honour of the Crown obligates the Crown to fulfill these commitments through private law trust duties.

[85] I am unable to infer from these statements of general intent, the specific intent that the Crown was to act as a common law trustee in respect of oil and gas royalties. If the intent was that the Crown act as a trustee at common law unconstrained by

pétrole ou sur le gaz ou les modalités d'un accord sur les redevances applicables au pétrole ou au gaz, qu'ils soient ou non survenus avant le 20 décembre 1974, mais sous réserve du paragraphe (2), le pétrole et le gaz tirés des terres indiennes après le 22 avril 1977 sont assujettis au paiement à Sa Majesté du chef du Canada, en fiducie pour les bandes indiennes concernées, des redevances réglementaires.

[83] La LPGTI a été sanctionnée en 1974, soit 28 ans après les actes de cession. Les obligations de la Couronne découlent de ceux-ci, et non de la LPGTI, laquelle confirme seulement que les redevances pétrolières et gazières doivent être versées à la Couronne en fiducie pour les bandes. Comme cette loi n'établit ni les conditions de la fiducie ni les obligations de la Couronne, elle ne restreint pas les obligations fiduciales de la Couronne. Elle n'apporte pas de limitation empêchant la Couronne d'investir les redevances.

[84] Les intervenantes les bandes indiennes de Saddle Lake et de Stoney prétendent que la LPGTI constitue un régime législatif complet et exhaustif à l'égard des redevances pétrolières et gazières. Selon elles, les propos tenus lors des débats parlementaires préalables à son adoption confirment que l'intention du législateur était de faire en sorte que les bandes touchent « tous les profits » et « [l]e plus grand revenu possible » sur le pétrole et le gaz tirés de leurs réserves (*Débats de la Chambre des communes*, vol. I, 1re sess., 30e Parl., 21 octobre 1974, p. 558). Tel serait le fondement de l'engagement de la Couronne envers ces bandes à obtenir [TRADUCTION] « le plus grand profit possible de l'exploitation du pétrole et du gaz sur leurs terres » (mémoire des bandes indiennes de Saddle Lake et de Stoney, par. 45). Ces intervenantes soutiennent que la LPGTI emploie des termes propres à la « fiducie » et que l'honneur contraint la Couronne à respecter cet engagement en s'acquittant des obligations d'un fiduciaire de droit privé.

[85] Je ne peux déduire de ces déclarations d'intention générale l'intention précise que la Couronne agisse à titre de fiduciaire de common law à l'égard des redevances pétrolières et gazières. Si telle avait été l'intention du législateur, la loi aurait été libellée

other legislative provisions, the statute could have been so worded. It was not. The IOGA does not purport to restrict or override application of provisions in other statutes such as the *Indian Act* and the FAA.

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

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

[88] In my opinion, there is nothing preventing cash royalties from being dealt with under the FAA and the *Indian Act*. The fact that the IOGA allows for "in kind" royalties does not render these

en conséquence, ce qui n'est pas le cas. La LPGTI n'a pas pour objet de limiter ou d'écarter l'application des dispositions d'autres lois comme la *Loi sur les Indiens* ou la LGFP.

[86] Quoi qu'il en soit, je ne crois pas que les propos susmentionnés tenus lors des débats parlementaires l'aient été dans l'optique de l'investissement des redevances. Ils visaient plutôt à garantir « aux Indiens une juste part des profits réalisés par l'exploitation du pétrole et du gaz sur leurs terres » et à faire en sorte que « [l]e plus grand revenu possible [soit] perçu par la bande indienne lors de l'extraction du pétrole, car par la suite, il sera perdu à jamais pour elle » (*Débats de la Chambre des communes*, vol. I, 1re sess., 30e Parl., le 21 octobre 1974, p. 557-558). Il semble que l'examen du Parlement ait porté sur l'obtention par les bandes du meilleur prix possible pour leurs réserves de pétrole et de gaz, et non sur la question de savoir si les redevances porteraient intérêt au taux fixé par le gouvernement ou si elles seraient investies dans un portefeuille de valeurs ou de titres.

[87] Les bandes indiennes de Saddle Lake et de Stoney font également valoir que dans la mesure où les redevances peuvent être payées en espèces ou « en nature » suivant le par. 33(5) du *Règlement de 1995 sur le pétrole et le gaz des terres indiennes*, DORS/94-753, pris en vertu de la LPGTI (et ses versions antérieures remontant au moins au 1er avril 1974), et où la LGFP et la *Loi sur les Indiens* ne s'appliquent pas aux redevances « en nature », [TRADUCTION] « les dispositions de la *Loi sur les Indiens* et de la LGFP qui confèrent à la Couronne un pouvoir discrétionnaire sur l'argent sont incompatibles et ne sauraient donc constituer la toile de fond de l'examen des obligations fiduciaires de Sa Majesté à l'égard des redevances pétrolières et gazières des Indiens » (mémoire, par. 28). En conséquence, la Couronne doit gérer les redevances comme le ferait un fiduciaire de common law.

[88] À mon avis, rien ne s'oppose à ce que les redevances en espèces soient examinées au regard de la LGFP et de la *Loi sur les Indiens*. Même si la LGFP autorise le paiement de redevances « en

statutes inapplicable to cash royalties. The FAA and the *Indian Act* apply to cash royalties because those funds fall within the definition of "public money" in the FAA. There is nothing inconsistent between the IOGA and the application of the FAA and *Indian Act* to cash royalties.

(2) The *Financial Administration Act*

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

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

> . . . all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person authorized to receive or collect such money, and includes
>
> . . .
>
> (*d*) all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract;

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

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

[93] According to s. 2, all money on deposit to the credit of the Receiver General forms the CRF. The "Consolidated Revenue Fund" is defined as "the aggregate of all public moneys that are on deposit at the credit of the Receiver General". Pursuant to

nature », ces lois demeurent applicables aux redevances en espèces. Les deux textes législatifs s'appliquent aux redevances en espèces, car celles-ci sont visées par la définition de « fonds publics » de la LGFP. Il n'y a rien d'incompatible entre la LPGTI et l'application de la LGFP et de la *Loi sur les Indiens* aux redevances en espèces.

(2) La *Loi sur la gestion des finances publiques*

[89] La LGFP régit l'administration et la gestion de l'État, en particulier sa gestion financière et ses dépenses. Elle établit des règles précises pour le prélèvement, la gestion et la dépense des fonds publics.

[90] Voici comment l'art. 2 de la LGFP définit les « fonds publics » :

> Fonds appartenant au Canada, prélevés ou reçus par le receveur général ou un autre fonctionnaire public agissant en sa qualité officielle ou toute autre personne autorisée à en prélever ou recevoir. La présente définition vise notamment :
>
> . . .
>
> *d*) les fonds prélevés ou reçus par un fonctionnaire public sous le régime d'un traité, d'une loi, d'une fiducie, d'un contrat ou d'un engagement et affectés à une fin particulière précisée dans l'acte en question ou conformément à celui-ci.

[91] Les redevances étant perçues par le Canada pour le compte des bandes en conformité avec la LPGTI, elles constituent des « fonds publics » au sens de cette loi et doivent donc être considérées au regard de celle-ci.

[92] Le paragraphe 17(1) prévoit que « [s]ous réserve des autres dispositions de la présente partie, les fonds publics sont déposés au crédit du receveur général. »

[93] Suivant l'article 2, tous les fonds déposés au crédit du receveur général constituent le « Trésor », qui est défini comme « [l]e total des fonds publics en dépôt au crédit du receveur général ». Le paragraphe 21(1) dispose que les redevances, qui

s. 21(1), the royalties, as public money under the definition in para. (*d*), may only be paid out of the CRF "subject to any statute applicable thereto". Section 21(1) states:

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

[94] Samson argued that s. 17(1) only requires that money be paid into the CRF and does not require that money be held in the CRF. According to Samson, investment by the Crown is not prohibited. I cannot agree. Section 21(1) provides that funds may only be paid out of the CRF in accordance with any statute applicable thereto. It is necessarily implied that the royalties must be held in the CRF and only paid out in accordance with any applicable statute. The applicable statute is the *Indian Act*.

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

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

[96] Sections 18(1) and 18(2), however, did not authorize investment in the public securities market. Rather, they provided only for the

constituent des fonds publics suivant l'al. *d*) de la définition, ne peuvent être prélevées sur le Trésor que sous réserve « des lois applicables » :

> Les fonds visés à l'alinéa *d*) de la définition de « fonds publics » à l'article 2 et qui sont reçus par Sa Majesté, ou en son nom, à des fins particulières et versés au Trésor peuvent être prélevés à ces fins sur le Trésor sous réserve des lois applicables.

[94] La nation de Samson fait valoir que le par. 17(1) exige seulement que les sommes soient versées au Trésor, et non qu'elles y soient conservées. Selon elle, il n'est pas interdit à la Couronne de les investir. Je ne peux être d'accord. Le paragraphe 21(1) dispose que les fonds ne peuvent être prélevés que sous réserve des lois applicables. Il s'ensuit nécessairement que les redevances doivent être détenues dans le Trésor et ne doivent être prélevées que sous réserve de toute loi applicable, soit en l'espèce la *Loi sur les Indiens*.

[95] La nation de Samson prétend par ailleurs que l'ancien art. 18 de la LGFP, adopté en 1951, mais abrogé en 1999 (L.C. 1999, ch. 26, art. 20), conférait à la Couronne le pouvoir d'investir les redevances. Selon elle, son adoption (il s'agissait alors de l'art. 17) a coïncidé avec la modification de la *Loi sur les Indiens* en 1951 et il devait remplacer l'ancienne disposition de la *Loi sur les Indiens* portant sur l'investissement. Les anciens par. 18(1) et (2) étaient rédigés comme suit :

> (1) Au présent article, « valeurs » s'entend des titres émis ou garantis par le Canada, ainsi que de ceux qui sont mentionnés dans la définition de « valeurs » ou « titres » à l'article 2.
>
> (2) Le ministre peut, lorsqu'il le juge opportun pour la bonne gestion des fonds publics ou de la dette publique, acheter ou acquérir des valeurs, y compris lors de leur émission, les payer sur le Trésor et les détenir.

[96] Or, les par. 18(1) et (2) n'autorisaient pas l'investissement dans le marché public des valeurs mobilières, mais prévoyaient uniquement l'acquisition de

acquisition of "securities", defined in that section and in s. 2 of the FAA as securities representing part of the public debt of Canada. This is explained by the Ontario Court of Appeal in *Authorson*. That court looked at the effect of the relevant legislation, including s. 18(2) and s. 90 of the FAA. Section 90 prohibits any person, unless authorized by an Act of Parliament, to acquire shares of a corporation that would be held by or on behalf of or in trust for the Crown.

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

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

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

(3) The *Indian Act*

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

« valeurs » ou de « titres » au sens de ces paragraphes et de l'art. 2 de la LGFP, à savoir des valeurs représentant une partie de la dette publique du Canada. La Cour d'appel de l'Ontario l'explique dans l'arrêt *Authorson*, où elle se penche sur l'effet de la législation applicable, dont le par. 18(2) et l'art. 90 de la LGFP. Sauf autorisation d'une loi fédérale, l'art. 90 interdit l'acquisition d'actions d'une personne morale qui seraient détenues par Sa Majesté, en son nom ou en fiducie pour elle.

[97] La Cour d'appel de l'Ontario a statué que les fonds gérés par le ministère des Anciens combattants ne pouvaient être investis dans le marché public des valeurs mobilières. Elle dit au par. 109 de ses motifs :

> [TRADUCTION] [C]ompte tenu de ce contexte législatif et de l'absence de dispositions législatives expresses à l'effet contraire, les fonds gérés par le ministère des Anciens combattants et visés en l'espèce entrent dans la définition des « fonds publics » qui doivent être détenus dans le Trésor conformément aux attributions et aux restrictions prévues dans la *LGFP*, de sorte qu'ils ne pouvaient pas être investis sur les marchés extérieurs.

[98] Les mêmes dispositions législatives s'appliquent en l'espèce. L'ancien par. 18(2) de la LGFP n'autorisait pas la Couronne à investir sur les marchés extérieurs. Son alinéa 90(1)*b*) interdit l'acquisition d'actions, sauf autorisation de la Couronne par une loi fédérale. Il faut donc trouver dans la *Loi sur les Indiens* le pouvoir du gouvernement du Canada — ou d'un tiers pour le compte du gouvernement du Canada ou en fiducie pour lui — d'acquérir et de détenir des actions. En conséquence, je ne puis faire droit à la prétention de la nation de Samson selon laquelle l'ancien par. 18(2) de la LGFP autorisait la Couronne à investir dans le marché public des valeurs mobilières. Nous devons donc nous en remettre à la *Loi sur les Indiens* pour déterminer si la Couronne avait le pouvoir d'investir les redevances.

(3) La *Loi sur les Indiens*

[99] La *Loi sur les Indiens* compte un certain nombre d'articles sous la rubrique « Administration de l'argent des Indiens », à savoir les art. 61 à 69. Le paragraphe 61(1) dispose :

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

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

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

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

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

[103] Section 64(1) of the *Indian Act* provides that "[w]ith the consent of the council of a band, the Minister may authorize and direct the expenditure

L'argent des Indiens ne peut être dépensé qu'au bénéfice des Indiens ou des bandes à l'usage et au profit communs desquels il est reçu ou détenu, et, sous réserve des autres dispositions de la présente loi et des clauses de tout traité ou cession, le gouverneur en conseil peut décider si les fins auxquelles l'argent des Indiens est employé ou doit l'être, est à l'usage et au profit de la bande.

La question est celle de savoir si le mot « dépensé » autorise la Couronne à investir l'argent des Indiens détenu dans le Trésor.

[100] Les bandes font valoir que la seconde partie du par. 61(1) — « le gouverneur en conseil peut décider si les fins auxquelles l'argent des Indiens est employé ou doit l'être, est à l'usage et au profit de la bande » — permet l'investissement des redevances parce que cette mesure serait à l'usage et au profit de la bande. Or, le paragraphe doit être considéré dans son ensemble (voir l'arrêt *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, 2003 CSC 28, [2003] 1 R.C.S. 476, par. 27). Considéré globalement, le paragraphe dispose que l'argent des Indiens ne peut être « dépensé » qu'à l'« usage et au profit » des bandes.

[101] C'est le contexte dans lequel un mot est employé qui doit être pris en compte pour déterminer son sens et sa portée. La signification du mot « dépensé » doit donc être circonscrite eu égard aux dispositions dans lesquelles il figure à la rubrique « Administration de l'argent des Indiens » constituée des art. 61 à 69. Le mot « dépensé(e) » ou « dépense » est utilisé aux art. 61, 64, 66 et 67 de la *Loi sur les Indiens*.

[102] L'article 62 établit une distinction entre l'argent du compte en capital et celui du compte de revenu. L'article 64 porte sur la dépense de l'argent du compte en capital, et l'art. 66 sur celle de l'argent du compte de revenu. Ce qu'il faut entendre par « dépense » de l'argent du compte en capital tient au contexte dans lequel ce mot est employé dans les dispositions portant sur cet argent.

[103] Le paragraphe 64(1) de la *Loi sur les Indiens* énonce qu'« [a]vec le consentement du conseil d'une bande, le ministre peut autoriser et

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

prescrire la dépense de sommes d'argent au compte en capital de la bande » aux fins énumérées. Les dépenses qu'autorisent les al. 64(1)*a*) à *j*) comprennent la distribution *per capita*, la construction de routes et de ponts, la construction de clôtures de délimitation extérieure sur les réserves, l'achat de terrains devant constituer une réserve, l'achat des droits d'un membre de la bande sur les terrains d'une réserve, l'achat d'animaux et de matériel de ferme, l'établissement et l'entretien des améliorations ou ouvrages permanents, l'octroi de prêts aux membres de la bande, le paiement de frais accessoires à la gestion des terres d'une réserve et la construction de maisons dans une réserve. L'alinéa 64(1)*k*) autorise la dépense de sommes d'argent au compte en capital « pour toute autre fin qui, d'après le ministre, est à l'avantage de la bande ».

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

[104] Les alinéas 64(1)*a*) à *j*) visent clairement des dépenses (p. ex. pour la gestion de la réserve) ou des éléments d'actif (comme les terrains ou les maisons) qui sont physiquement liés à la réserve et aux activités qui s'y déroulent. Suivant le par. 64(1), dès que les fonds sont dépensés avec le consentement de la bande, leur gestion échappe à la Couronne, tout comme la possession ou l'administration des éléments d'actif acquis.

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

a) *L'alinéa 64(1)k)*

[105] The only part of s. 64(1) that could permit investment of the royalties is s. 64(1)(*k*). The question is whether investment by the Crown could be an "other purpose" recognized by s. 64(1)(*k*). In the Federal Court and the Federal Court of Appeal, the bands' argument had been that s. 64(1)(*k*) did not permit investment and that investment was instead authorized by s. 61(1). It appears that the bands were concerned that because s. 64(1) required their consent before an expenditure could be made from the CRF, this would dilute the responsibility of the Crown to invest the royalty funds. In this Court, Ermineskin now takes the position, in the alternative, that s. 64(1)(*k*) authorizes investment of royalty funds by the Crown.

[105] L'alinéa 64(1)*k*) est le seul élément du par. 64(1) susceptible d'autoriser l'investissement des redevances. La question qui se pose est celle de savoir si l'investissement par la Couronne pourrait être assimilé à une « autre fin » au sens de l'al. 64(1)*k*). En Cour fédérale et en Cour d'appel fédérale, les bandes ont soutenu que l'al. 64(1)*k*) ne permettait pas l'investissement de ces sommes, mais que c'était plutôt le par. 61(1) qui l'autorisait. Il semble que les bandes aient craint que l'exigence, prévue au par. 64(1), que la Couronne obtienne leur consentement à toute dépense effectuée par prélèvement sur le Trésor atténue son obligation d'investir les redevances. Devant notre Cour, la nation d'Ermineskin fait maintenant valoir à titre subsidiaire que l'al. 64(1)*k*) autorise l'investissement des redevances par la Couronne.

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

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

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

[106] Je le répète, le par. 64(1) prévoit que le ministre peut autoriser et prescrire la « dépense » de l'argent du compte en capital à un certain nombre de fins. La règle *ejusdem generis* veut que la dépense autorisée à l'al. 64(1)*k*) soit du même ordre que celles énumérées aux alinéas précédents. Les dépenses ont une caractéristique commune : dès qu'elles sont effectuées, la Couronne n'a plus de droit de regard sur les fonds prélevés ou sur les biens acquis ni aucune obligation de gestion s'y rattachant. Par conséquent, cette absence de droit de regard ou d'obligation de gestion vaudrait aussi pour les dépenses effectuées et les éléments d'actif acquis sur le fondement de l'al. 64(1)*k*).

[107] L'intervenante Assemblée des Premières Nations a soutenu en plaidoirie que le par. 64(1) renferme trois alinéas touchant l'investissement, de sorte que le contexte du par. 64(1) ne devrait pas empêcher l'investissement fondé sur l'al. 64(1)*k*). Elle cite l'al. 64(1)*g*), qui prévoit l'établissement et l'entretien des améliorations ou des ouvrages permanents, l'al. 64(1)*h*), qui prévoit l'octroi de prêts aux membres de la bande, de même que la perception d'intérêts et l'obtention de gages à cet égard, et l'al. 64(1)*j*), qui prévoit l'octroi de prêts aux membres de la bande aux fins de construction. Or, ces dépenses visent des éléments d'actif situés sur la réserve. Il ne s'agit pas de placements détenus, gérés et administrés par la Couronne.

[108] Les alinéas dont l'objet s'apparente le plus à l'investissement effectué et géré par la Couronne sont les al. 64(1)*h*) et *j*), qui disposent que des prêts peuvent être consentis aux membres de la bande et, dans le cas de l'al. *h*), que des intérêts peuvent être perçus et des gages obtenus. Le dossier ne précise pas si les arrangements relatifs au prêt et à la garantie interviennent entre la Couronne et le membre de la bande ou entre la bande et l'un de ses membres. De toute manière, il est évident que ces arrangements ne sont qu'accessoires à la fin première de la dépense, à savoir fournir des avantages et un appui tangibles à la bande ainsi qu'à ses membres. En effet, la perception d'intérêts et l'obtention d'une garantie étant discrétionnaires, on peut difficilement y voir un indice d'investissement prudent. Les alinéas 64(1)*h*) et *j*) visent l'amélioration physique

loans to members. They do not provide for investments made and controlled by the Crown to earn income.

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

(b) *Other Moneys Management Provisions*

[110] Other sections under the heading "Management of Indian Moneys" provide for payments to individuals out of capital moneys. Section 63 allows for payments to Indians under leases or agreements made under the *Indian Act*. Section 64(2) refers to expenditures of capital moneys to make payments to individual persons whose names have been deleted from the band list of a band. Section 66(3) states that the Minister may authorize expenditure of revenue moneys for a number of listed purposes, including for the destruction of weeds, insects and pests, to control diseases on reserves, to inspect premises on reserves, to prevent overcrowding of premises, to provide for sanitary conditions on reserves, and for the construction and maintenance of boundary fences. Section 68 permits payments of an "annuity or interest money" to which an Indian is entitled to be applied in specified circumstances to the support of that Indian's spouse, common-law partner or family. The reference to "interest money" in s. 68 is a further indication that Parliament expected that the moneys in the CRF for "payment" or "expenditure" under the *Indian Act* would be subject to the accrual of interest, not investment.

de la réserve, la construction de maisons et l'octroi de prêts aux membres de la bande. Ils ne prévoient pas l'investissement effectué et géré par la Couronne pour en tirer un revenu.

[109] L'alinéa 64(1)*k*) est une disposition formulée d'une manière très générale et, dans l'abstrait, il pourrait englober tout motif de dépenser des fonds. Toutefois, je le rappelle, suivant la règle *ejusdem generis*, les dépenses visées à l'al. 64(1)*k*) sont du même ordre que celles énumérées précédemment. La dépense effectuée pour investir dans des valeurs ou des titres détenus et gérés par la Couronne est étrangère au contexte du par. 64(1) et, à mon avis, elle n'est pas envisagée à l'al. 64(1)*k*).

b) *Autres dispositions relatives à l'administration de l'argent*

[110] À la rubrique « Administration de l'argent des Indiens », d'autres dispositions prévoient le versement de sommes d'argent à des personnes par prélèvement sur le compte en capital. L'article 63 autorise le versement à un Indien de sommes touchées en application d'un bail ou d'une entente conclu sous le régime de la *Loi sur les Indiens*. Le paragraphe 64(2) permet des dépenses sur les sommes d'argent au compte de capital en vue de faire des paiements à toute personne dont le nom a été retranché de la liste de la bande. Le paragraphe 66(3) dispose que le ministre peut autoriser la dépense de sommes d'argent du compte de revenu pour les objets qui y sont énumérés, dont la destruction d'herbes nuisibles, d'insectes et de parasites, la prophylaxie de maladies, l'inspection des locaux et la prévention de leur surpeuplement, leur salubrité, ainsi que la construction et l'entretien de clôtures de délimitation, toujours dans une réserve. L'article 68 autorise les paiements « de rentes ou d'intérêts » auxquels a droit un Indien et qui, dans certains cas précis, serviront au soutien de l'époux, du conjoint de fait ou de sa famille. L'emploi du mot « intérêts » à l'art. 68 permet encore de conclure que le législateur s'attendait à ce que l'argent versé au Trésor aux fins de « paiement » ou de « dépense » suivant la *Loi sur les Indiens* porte intérêt, et non qu'il soit investi.

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

(c) *The 1951 Amendments*

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

With the exception of such sum not exceeding fifty per centum of the proceeds of any land, timber or other property, as is agreed at the time of the surrender to be paid to the members of the band interested therein, the Governor in Council may, subject to the provisions of this Part, direct how and in what manner, and by whom, the moneys arising from the disposal of Indian lands, or of property held or to be held in trust for Indians, or timber on Indian lands or reserves, or from any other source for the benefit of Indians, shall be invested from time to time, and how the payments or assistance to which the Indians are entitled shall be made or given.

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

The Governor in Council may, with the consent of a band, authorize and direct the expenditure of any capital moneys standing at the credit of such band, in the purchase of land as a reserve for the band or as an addition to its reserve, or in the purchase of cattle, implements or machinery for the band, or in the construction of permanent improvements upon the reserve of the band, or such works thereon or in connection therewith as, in his opinion, will be of permanent value to the band, or will, when completed, properly represent capital or in the making of loans to members of the band to

[111] Aucun des art. 61 à 69 de la *Loi sur les Indiens* n'envisage que l'argent des Indiens fasse l'objet de placements effectués, détenus et administrés par la Couronne.

c) *Les modifications de 1951*

[112] Avant sa modification en 1951, la *Loi sur les Indiens* autorisait expressément le gouverneur en conseil à investir l'argent des Indiens. Voici le texte de l'ancien art. 92 de la *Loi des Indiens*, S.R.C. 1927, ch. 98 :

À l'exception de la somme, n'excédant pas cinquante pour cent du produit d'une terre, de bois de construction ou d'autres biens qu'il est convenu, lors de la rétrocession, de verser aux membres de la bande y intéressée, le gouverneur en son conseil peut, sous réserve des dispositions de la présente Partie, prescrire comment, de quelle manière et par qui les deniers provenant de l'aliénation ou de la vente de terres indiennes, ou de biens tenus ou à tenir en fiducie pour les Indiens, ou de bois de construction sur les terres ou dans les réserves indiennes, ou provenant de toute autre source au bénéfice des Indiens, doivent être placés à toute époque, et il peut prescrire le mode de versement ou de secours auxquels les Indiens ont droit.

[113] Abrogée en 1951 (*Loi sur les Indiens*, S.C. 1951, ch. 29, art. 123), cette disposition n'a été remplacée par aucune autre autorisant le placement. L'Assemblée des Premières Nations soutient que le pouvoir d'investir que conférait auparavant la *Loi sur les Indiens* s'est retrouvé à l'al. 64(1)*k*) dès 1951 (qui correspondait alors à l'al. 64(1)*j*)). Toutefois, une disposition sur les dépenses très semblable à l'actuel par. 64(1) existait déjà avant les modifications de 1951 et l'abrogation de la disposition sur le placement. Il s'agit de l'ancien art. 93, S.R.C. 1927, ch. 98, dont voici le texte :

Le gouverneur en son conseil peut, du consentement d'une bande, autoriser et prescrire l'emploi de capitaux portés au crédit de la bande, à l'achat de terrains devant servir de réserve à la bande ou augmenter sa réserve, ou à l'achat de bestiaux, d'instruments aratoires ou de machines pour la bande, ou à l'exécution d'améliorations permanentes dans la réserve de la bande, ou aux travaux dans la réserve ou connexes à la réserve, qu'il estime devoir procurer une valeur permanente, ou qui, après leur achèvement, représenteront un capital effectif, ou à faire des prêts aux membres de la bande afin

promote progress, no such loan, however, to exceed in amount one-half of the appraised value of the interest of the borrower in the lands held by him.

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

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

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

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

[118] The bands have argued that the Crown could have used s. 4(2) of the *Indian Act* to render ss. 61

de favoriser le progrès; toutefois, ces prêts ne doivent pas être supérieurs à la moitié de la valeur estimative de l'intérêt de l'emprunteur dans les terres qu'il détient.

[114] La confrontation de l'ancien art. 93 et de l'actuel par. 64(1) de la *Loi sur les Indiens* révèle que le second correspond à une version élargie du premier. Chacune des dépenses permises à l'art. 93 se retrouve dans le nouveau par. 64(1), ce à quoi s'ajoutent quelques dépenses supplémentaires et l'expression « pour toute autre fin » employée à l'al. 64(1)*k*).

[115] Avant 1951, le législateur envisageait des dispositions distinctes pour les dépenses et les placements. On ne peut inférer que son intention était de reprendre, à l'al. 64(1)*k*), le pouvoir exprès de la Couronne de placer l'argent qu'il avait supprimé. L'alinéa 64(1)*k*) confère un pouvoir général et non spécifique de dépenser qui suit l'énumération de dépenses ou d'acquisitions à l'égard desquels la Couronne n'a aucun pouvoir ni aucune obligation. Après avoir abrogé la disposition autorisant expressément l'investissement, le législateur n'a pu vouloir préserver ce pouvoir au moyen de la disposition supplétive d'un article sur la « dépense » de sommes d'argent.

[116] L'absence de tout régime législatif régissant l'investissement de l'argent des Indiens est également révélateur. Comme le signale la Cour d'appel de l'Ontario dans l'arrêt *Authorson*, [TRADUCTION] « [l]orsque le législateur a autorisé l'investissement sur les marchés extérieurs, il l'a fait expressément au moyen de régimes législatifs complexes » (par. 108). La *Loi sur les Indiens* n'établit aucun régime législatif complexe de cette nature.

[117] Un autre indice de l'intention du législateur réside dans l'omission de la Couronne d'investir l'argent des Indiens, entre 1859 et 1951, et dans son choix de verser de l'intérêt à un taux oscillant entre 3 et 6 p. 100. Il est raisonnable d'inférer de l'abrogation du pouvoir d'investir prévu dans la *Loi sur les Indiens* que le législateur voulait rendre la loi conforme à la pratique établie.

[118] Les bandes font valoir que le législateur aurait pu, grâce au par. 4(2) de la *Loi sur les*

to 68 of the Act inapplicable. If those provisions were proclaimed to be inapplicable, it is argued that there would be no legislative restriction on the power of the Crown to invest. Section 4(2) states:

(2) The Governor in Council may by proclamation declare that this Act or any portion thereof, except sections 5 to 14.3 or sections 37 to 41, shall not apply to

(*a*) any Indians or any group or band of Indians, or

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

and may by proclamation revoke any such declaration.

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

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

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

Indiens, rendre inapplicables les art. 61 à 68. Si ces derniers étaient privés d'effet par proclamation, le pouvoir d'investir de la Couronne ne connaîtrait aucune limitation législative. Le paragraphe 4(2) est rédigé comme suit :

(2) Le gouverneur en conseil peut, par proclamation, déclarer que la présente loi, ou toute partie de celle-ci, sauf les articles 5 à 14.3 et 37 à 41, ne s'applique pas :

a) à des Indiens ou à un groupe ou une bande d'Indiens;

b) à une réserve ou à des terres cédées, ou à une partie y afférente.

Il peut en outre, par proclamation, révoquer toute semblable déclaration.

[119] Toutefois, un tel recours au par. 4(2) aurait eu pour effet de rendre inapplicables les dispositions en question de la *Loi sur les Indiens* à toute fin liée à la dépense de l'argent du compte en capital et du compte de revenu des bandes en cause, et non seulement en ce qui a trait à l'investissement de leurs redevances. Par l'adoption de ces dispositions sur l'administration de l'argent, le législateur a créé un code complet de gestion de l'argent des Indiens. L'inapplicabilité des dispositions sur l'administration de l'argent aurait donc de graves conséquences, dont la suppression de l'obligation légale de la Couronne d'obtenir le consentement des bandes pour la dépense des sommes détenues dans le Trésor. Il n'aurait pas été réaliste que le législateur recoure au par. 4(2) comme le préconisent les bandes vu l'incidence considérable d'une telle mesure.

(4) Le paragraphe 21(1) de la *Loi sur la gestion des finances publiques*

[120] L'intervenante Première Nation du Lac Seul soutient que la LGFP et la *Loi sur les Indiens* ne modifient pas l'obligation de la Couronne en tant que fiduciaire de common law. Elle fait valoir qu'un « investissement » n'est pas une « dépense », que l'art. 64 de la *Loi sur les Indiens* ne s'applique pas et que la *Loi sur les Indiens* ne constitue donc pas une loi « applicabl[e] » au sens de l'art. 21

out of the CRF to satisfy the Crown's common law duties as trustee, which include investment.

[121] I am unable to accept these submissions. Section 21(1) of the FAA says that money may only be paid out of the CRF "subject to any statute applicable thereto". Parliament could not have intended that the Crown retain a residual unilateral power to pay out band moneys from the CRF without consent of the bands for purposes not referred to in the *Indian Act*. Overriding the bands' consent would be contrary to the scheme of the *Indian Act*, which intended to recognize greater self-determination for Indians, while still protecting their interests. In *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846, McLachlin C.J. referred to the Parliamentary debates on the amendments to the *Indian Act* in 1951. While that case concerned the provisions of the *Indian Act* dealing with property on reserves that was exempt from seizure, the concerns of Parliament at that time were not restricted solely to those provisions. As she noted, at para. 55, during the Parliamentary debates on the amendments, then-Minister of Citizenship and Immigration Walter Edward Harris put the issue in general terms as follows:

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

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

de la LGFP. En conséquence, l'art. 21 confère à la Couronne le pouvoir général de prélever des sommes sur le Trésor pour s'acquitter de ses obligations à titre de fiduciaire de common law, notamment pour investir.

[121] Je ne puis faire droit à cette prétention. Suivant le paragraphe 21(1) de la LGFP, des fonds ne peuvent être prélevés sur le Trésor que « sous réserve des lois applicables ». Le législateur ne peut avoir voulu que la Couronne conserve le pouvoir unilatéral de prélever des sommes sur l'argent des Indiens détenu dans le Trésor sans le consentement des bandes et à des fins non prévues dans la *Loi sur les Indiens*. Faire fi de l'exigence du consentement des bandes serait contraire à l'esprit de la *Loi sur les Indiens*, qui vise à reconnaître aux Indiens un droit accru à l'autodétermination, tout en protégeant leurs intérêts. Dans l'arrêt *McDiarmid Lumber Ltd. c. Première Nation de God's Lake*, 2006 CSC 58, [2006] 2 R.C.S. 846, la juge en chef McLachlin renvoie aux débats de la Chambre des communes sur la réforme de la *Loi sur les Indiens* de 1951. Dans cette affaire, le litige portait sur les dispositions de la *Loi sur les Indiens* prévoyant l'insaisissabilité de biens situés sur une réserve. Or, ces dispositions n'étaient pas le seul sujet de préoccupation du Parlement en 1951. Comme la juge en chef le fait observer au par. 55, lors des débats de la Chambre des communes sur la réforme proposée, le ministre de la Citoyenneté et de l'Immigration d'alors, Walter Edward Harris, a résumé l'enjeu en termes généraux :

> Il s'agit de répartir l'administration de la loi sur les Indiens de façon à accorder à tous les Indiens du pays la liberté d'action et l'autonomie administrative qui paraîtront opportunes, tout en nous assurant, dans l'intervalle, l'autorité législative dont nous avons besoin pour les protéger et les aider.
>
> (*Débats de la Chambre des communes*, vol. II, 4e sess., 21e lég., 16 mars 1951, p. 1380)

[122] La loi applicable est la *Loi sur les Indiens*, car celle-ci encadre la possession et la gestion de l'argent des Indiens. Elle ne permet pas la dépense ou le versement de cet argent à d'autres fins que celles énumérées, non plus que son investissement.

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

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

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

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

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

[127] The Crown is in a unique position as a fiduciary with respect to the royalties and the payment of interest. The Crown is borrowing the bands' money held in the CRF. However, the borrowing is required by the legislation. According to s. 61(2) of

[123] Il appert du libellé de la *Loi sur les Indiens* et des modifications législatives qui y ont été apportées en 1951 que la Couronne ne pouvait plus dès lors placer l'argent des Indiens, ni administrer et gérer le placement de cet argent.

E. *Obligations fiduciales de la Couronne envers les bandes*

[124] Il faut maintenant déterminer si les mesures prises par la Couronne sur le fondement de la LGFP et de la *Loi sur les Indiens*, dont le recours à la formule applicable à l'argent des Indiens, étaient compatibles avec ses obligations fiduciales envers les bandes.

[125] Un principe fondamental sous-tendant la relation fiduciale veut que le fiducial doive agir [TRADUCTION] « uniquement au bénéfice de l'autre, en faisant totalement abstraction de ses propres intérêts » (Waters, Gillen et Smith, p. 877). Il s'agit de l'obligation de loyauté, qui exige du fiducial qu'il évite tout conflit d'intérêts. Le fiducial doit se soustraire à toute situation où son obligation d'agir au seul bénéfice de la fiducie et de ses bénéficiaires entre en conflit avec ses propres intérêts ou ses obligations envers un tiers (voir Waters, Gillen et Smith, p. 877, et l'arrêt *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574, p. 646-647).

[126] En common law, le fiduciaire ne peut emprunter une somme à la fiducie, car il en résulterait un conflit d'intérêts. Les bandes font valoir que la Couronne s'est placée en situation de conflit d'intérêts et qu'elle a donc manqué à ses obligations fiduciales envers elles en déposant leurs redevances au Trésor et en les gardant à sa disposition. À leur avis, le versement des redevances au Trésor et leur mise à la disposition de la Couronne équivalaient à un « prêt forcé » qui, en l'absence de leur consentement, était irrégulier ou illicite.

[127] La situation de la Couronne en tant que fiducial est unique en ce qui concerne les redevances et le paiement d'intérêts. La Couronne emprunte l'argent des bandes déposé dans le Trésor, mais cet emprunt est exigé par la loi. En effet, suivant

the *Indian Act*, "[i]nterest on Indian moneys held in the Consolidated Revenue Fund shall be allowed at a rate to be fixed from time to time by the Governor in Council." As the majority of the Court of Appeal noted, this borrowing is an "inevitable consequence of the combined operation of the *Indian Act* and the *Financial Administration Act*" (para. 120).

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

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

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

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

le par. 61(2) de la *Loi sur les Indiens*, « [l]es intérêts sur l'argent des Indiens détenu au Trésor sont alloués au taux que fixe le gouverneur en conseil. » Comme le font remarquer les juges majoritaires de la Cour d'appel fédérale, cet emprunt « constitue une conséquence inévitable de l'effet combiné de la *Loi sur les Indiens* et de la *Loi sur la gestion des finances publiques* » (par. 120).

[128] On ne saurait dire du fiducial qui se conforme à la loi qu'il manque à son obligation fiduciale. La situation que les bandes qualifient de conflit d'intérêts est une conséquence inhérente au régime législatif et elle est de ce fait inévitable.

[129] La situation de la Couronne lorsqu'elle fixe le taux de l'intérêt payé aux bandes est elle aussi unique. D'une part, elle a envers les bandes des obligations fiduciales, dont celles de faire preuve de loyauté et d'agir au mieux de leurs intérêts. D'autre part, elle doit payer l'intérêt dû aux bandes par prélèvement sur le trésor public, à savoir l'argent des contribuables. La Couronne a des obligations envers l'ensemble des Canadiens et une pondération des divers intérêts en jeu s'impose inévitablement.

[130] Comme le dit le juge Binnie dans l'arrêt *Bande indienne Wewaykum c. Canada*, 2002 CSC 79, [2002] 4 R.C.S. 245, par. 96, « [l]a Couronne ne saurait être un fiducia[l] ordinaire; elle agit en plusieurs qualités et représente de nombreux intérêts, dont certains sont immanquablement opposés ». En l'espèce, la Couronne doit prendre en considération non seulement les intérêts des bandes, mais également ceux des autres Canadiens lorsqu'elle fixe le taux de l'intérêt payé aux bandes.

[131] Suivant l'arrêt *Fales*, le soin exigé de la Couronne dans l'administration des fonds des Indiens est celui « qu'un bon père de famille apporte à l'administration de ses propres affaires » (le juge Dickson, p. 315). Toutefois, comme la Couronne « ne saurait être un fiducia[l] ordinaire », son obligation d'agir comme le ferait une personne avisée administrant ses propres affaires est façonnée par les lois applicables et les considérations susmentionnées.

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

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

(1) Flat Rate

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

(2) Short-Term Treasury Bill Return

[134] A return based on short-term treasury bills has the advantage of providing liquidity to the bands. It also minimizes the cost of borrowing as short-term borrowings generally pay lower interest than longer term borrowings. However, this option fails to take into account the fact that at least some of the bands' royalties would be held in the CRF over longer periods. Although the Crown has used returns on short-term treasury bills to show that the bands received substantially more, the Crown does not suggest that interest based on short-term treasury bills was an appropriate alternative.

F. *Détermination de l'obligation de la Couronne de faire fructifier l'argent des bandes*

[132] Dans l'exercice de son pouvoir discrétionnaire à titre de fiducial, la Couronne disposait d'un certain nombre d'options concernant l'intérêt payé aux bandes, dont l'adoption (1) d'un taux fixe ajustable périodiquement, (2) d'un taux fondé sur le rendement des bons du Trésor à court terme, (3) d'un taux équivalant au rendement d'un portefeuille diversifié, (4) d'un taux lié au rendement des obligations à long terme du gouvernement rajusté périodiquement ou (5) d'un taux équivalant au rendement des obligations à long terme du gouvernement garanti jusqu'à l'échéance, soit le rendement d'un portefeuille échelonné d'obligations.

(1) Taux fixe

[133] De 1859 à 1969, la Couronne a versé sur l'argent des Indiens des intérêts à un taux fixe rajusté périodiquement. La formule est simple à comprendre et à appliquer, mais elle ne tient pas compte des fluctuations du taux d'inflation au moment où elles surviennent, car la modification du taux d'intérêt nécessite l'adoption d'un nouveau décret et, par conséquent, la consultation des bandes concernées. Nul ne préconise l'application de cette formule, de sorte qu'il n'y a pas lieu de s'y attarder davantage.

(2) Rendement des bons du Trésor à court terme

[134] Un taux lié au rendement des bons du Trésor à court terme présente l'avantage de mettre des liquidités à la dispositions des bandes. Il diminue également le coût d'emprunt étant donné que l'intérêt sur un prêt à court terme est généralement moins élevé que l'intérêt sur un prêt à long terme. Cependant, cette formule ne tient pas compte du fait qu'au moins une partie des redevances des bandes serait néanmoins détenue dans le Trésor à plus long terme. La Couronne fait état du rendement des bons du Trésor à court terme pour montrer que les bandes ont touché un intérêt bien supérieur, mais elle ne privilégie pas un taux d'intérêt fondé sur ce rendement.

(3) Diversified Portfolio Return

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

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

(4) Adjusted Long-Term Rate

[137] The interest rate methodology instituted by the Crown in 1969 and continued in 1981 involved a floating interest rate, with the rate adjusted initially monthly, and as of 1981, quarterly. The interest rate was tied to the market yield on government bonds having terms to maturity of 10 years or over. Since interest rates and anticipated inflation are generally correlated, the quarterly adjustment offered some protection against inflation.

[138] This option provided the bands with liquidity. The bands received the benefit of a long-term bond yield without the associated risk of locking in the funds for the long term. While there was the possibility of declining interest rates, in which case the bands would not receive the benefit of a locked-in rate, there was also the possibility of the opposite

(3) Rendement d'un portefeuille diversifié

[135] Les bandes font valoir que si le régime législatif l'empêchait d'investir les redevances, la Couronne aurait dû néanmoins payer de l'intérêt aux bandes à un taux équivalant au rendement qu'elles auraient obtenu si leurs fonds avaient été placés dans un portefeuille diversifié. Dans son mémoire, la nation d'Ermineskin soutient que [TRADUCTION] « la Couronne aurait pu et aurait dû [la] faire bénéficier d'un rendement équivalent à celui qu'elle aurait touché en investissant prudemment » (par. 177).

[136] Un fiducial n'est pas tenu d'assurer au bénéficiaire, en puisant dans ses propres ressources, le rendement qu'il aurait pu obtenir si son pouvoir discrétionnaire n'avait pas été limité par voie législative ou contractuelle. Exiger de la Couronne qu'elle paie de l'intérêt à un taux équivalant au rendement qu'aurait procuré l'investissement dans un portefeuille diversifié l'obligerait, en qualité de fiducial, à verser, par prélèvement sur le trésor public, le rendement que la loi l'empêchait d'obtenir, ce qu'elle ne saurait être tenue de faire.

(4) Taux variable fondé sur le rendement des obligations à long terme du gouvernement

[137] Suivant la formule de fixation du taux d'intérêt qu'elle a adoptée en 1969, puis décidé de conserver en 1981, la Couronne appliquait un taux variable qui, au début, était rajusté mensuellement puis, dès 1981, trimestriellement. Le taux d'intérêt était lié au rendement sur le marché des obligations du gouvernement à échéance de 10 ans ou plus. Vu la corrélation habituelle entre les taux d'intérêt et le taux d'inflation prévu, le rajustement trimestriel offrait une certaine protection contre l'inflation.

[138] Cette option mettait des liquidités à la disposition des bandes, qui obtenaient le rendement d'une obligation à long terme sans courir le risque lié à l'immobilisation de fonds sur une longue période. Les taux d'intérêt pouvaient baisser, auquel cas les bandes ne profitaient pas des avantages d'un taux d'intérêt immobilisé, mais ils pouvaient aussi

occurring. If interest rates were to increase, the bands would get the benefit of the increase on all their funds within three months, rather than having them locked in at lower rates for long periods of time.

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

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

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

(5) Laddered Bond Portfolio

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

grimper. Ainsi, advenant le relèvement des taux d'intérêt, les bandes voyaient l'ensemble de leurs fonds en bénéficier dans les trois mois au lieu d'être immobilisés à des taux inférieurs sur de longues périodes.

[139] Les mesures prises par la Couronne ne peuvent être jugées après coup. Dans l'arrêt *Rivière Blueberry*, la juge McLachlin (maintenant Juge en chef) conclut que la vente par la Couronne des terres en cause au Directeur de la *Loi sur les terres destinées aux anciens combattants* ne constituait pas un manquement à son obligation fiduciale. Un certain nombre de possibilités d'aliénation des terres étaient envisagées et « [o]n a accordé la plus grande attention aux intérêts et aux désirs des Indiens avant de décider » (par. 51). Elle ajoute, toujours au par. 51 :

> À l'époque, [la vente des terres constituait] un choix défendable. De fait, on peut prétendre que la vente des droits de superficie était la seule solution qui répondait au besoin manifeste de la bande d'obtenir des terres plus près de ses sentiers de piégeage. Avec le recul du temps, compte tenu du déclin du piégeage et de la découverte de pétrole et de gaz, il est possible d'affirmer que la vente des terres s'est révélée une décision malencontreuse. Toutefois, à l'époque, elle pouvait se défendre en tant que solution raisonnable aux problèmes auxquels la bande faisait alors face.

[140] En l'espèce, compte tenu des autres possibilités qui s'offraient à elle, on ne peut dire qu'en optant pour un taux variable, la Couronne a fait preuve d'imprudence ou n'a pas agi au mieux des intérêts des bandes. La formule mettait en effet des liquidités à la disposition des bandes et protégeait le capital contre l'inflation et le risque lié à son immobilisation. On ne saurait affirmer qu'une personne prudente administrant ses propres affaires et assujettie aux mêmes contraintes légales que la Couronne n'aurait pas opté pour cette formule.

(5) Portefeuille échelonné d'obligations

[141] La nation de Samson fait valoir qu'au lieu d'investir les redevances dans un portefeuille diversifié, la Couronne aurait pu les placer dans un portefeuille échelonné d'obligations.

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

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

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

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

[142] Dans ce cas, les fonds des bandes détenus dans le Trésor sont considérés comme des fonds investis dans des obligations du gouvernement comportant des échéances échelonnées sur plusieurs années. L'objectif consiste à tirer avantage du rendement supérieur des obligations à long terme tout en assurant l'accès à des liquidités grâce à l'échelonnement des échéances. Au départ, cet échelonnement peut se faire par le placement de montants égaux dans des obligations venant à échéance dans un an, deux ans, trois ans et chaque année subséquente, jusqu'à concurrence d'un maximum déterminé par le fiduciaire.

[143] Chaque année, le produit des obligations échues est investi dans des obligations venant à échéance après la période d'échelonnement. Si les échéances sont réparties sur 20 ans, chaque année, le produit des obligations échues est investi dans des obligations échéant 20 ans plus tard.

[144] Chaque année, les bandes peuvent disposer non seulement de l'intérêt versé, mais aussi du produit des obligations échues lorsque leurs besoins de liquidités à quelque fin font en sorte qu'il n'y a pas de réinvestissement. Au besoin, les obligations peuvent être vendues avant l'échéance, mais aux prix alors offerts sur le marché. En pareil cas, l'équilibre du portefeuille échelonné est évidemment compromis, mais il peut être rétabli grâce aux nouvelles redevances versées au Trésor.

[145] La nation de Samson soutient qu'un portefeuille échelonné d'obligations aurait rapporté plus que la formule du taux rajusté adoptée par la Couronne, car les rendements substantiels obtenus en période d'inflation élevée, notamment dans les années 1970 et 1980, auraient été maintenus pendant la durée des obligations. Elle a raison sur ce point. Cependant, on ne peut l'affirmer aujourd'hui qu'avec le recul. À la fin des années 1980, l'inflation et les taux d'intérêt étaient à la baisse. Depuis la fin des années 1990, et particulièrement pendant la première décennie du 21^{e} siècle, les taux d'intérêt sont demeurés bas et relativement stables. Mais on ne peut prévoir l'évolution de l'inflation et des taux d'intérêt. Si ceux-ci avaient augmenté pendant

inflation and interest rates increased over some part of the period, locking into a laddered bond portfolio would have been detrimental in that period. So there is risk in a laddered bond approach.

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

(6) Conclusion Respecting the Methodology Selected by the Crown

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

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

une certaine partie de la période considérée, l'investissement dans un portefeuille échelonné aurait alors été désavantageux. Cette stratégie d'investissement n'est donc pas sans risques.

[146] L'investissement dans un portefeuille échelonné d'obligations aurait certes procuré de meilleurs rendements que la formule retenue. Toutefois, même si le recul permet de constater que les rendements auraient pu être plus élevés, la Couronne n'a pas pour autant manqué à ses obligations fiduciales envers les bandes en optant pour une solution tout aussi prudente, à savoir celle du taux variable fondé sur le rendement des obligations à long terme du gouvernement.

(6) Conclusion concernant la formule retenue par la Couronne

[147] Il ressort de l'examen des autres solutions possibles qu'un taux fondé sur le rendement de titres à court terme n'aurait pas été au mieux des intérêts des bandes lorsque la Couronne aurait pu payer un intérêt plus élevé compte tenu de ses emprunts diversifiés. Un taux d'intérêt fixe n'aurait pas eu la souplesse voulue pour tenir compte de la fluctuation des taux d'intérêt et de l'inflation. Par ailleurs, le trésor public aurait dû subventionner le paiement d'un intérêt équivalant au rendement d'un portefeuille diversifié. Le fiducial n'a pas à puiser dans ses propres ressources, en l'occurrence le trésor public, pour bonifier le rendement qu'il peut verser eu égard aux contraintes légales.

[148] Les deux choix qu'aurait pu faire une personne prudente administrant ses propres affaires, mais tenant compte des contraintes applicables à la Couronne, étaient celui du taux d'intérêt variable, appliqué par la Couronne, et celui du portefeuille échelonné d'obligations. Lorsque la formule applicable à l'argent des Indiens a été adoptée en 1969, les taux d'intérêt étaient à la hausse. Vu la tendance à la baisse observée depuis les années 1980, on peut dire avec le recul qu'un portefeuille échelonné aurait dès lors permis aux bandes de toucher un rendement supérieur au taux variable fondé sur les obligations à long terme du gouvernement, taux

with its fiduciary obligations to the bands must be viewed prospectively.

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

G. *Transfer of Funds to the Bands*

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

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

[152] However, the Crown cannot simply transfer funds. In accordance with its fiduciary obligations and s. 64(1)(*k*) of the *Indian Act*, it must be satisfied that any transfer is in the best interests of the bands. Once a transfer is effected, the Crown's fiduciary obligations with regard to the funds in question must cease, as it no longer has control over

pour lequel la Couronne a opté. Cependant, le respect des obligations fiduciales de la Couronne doit être considéré prospectivement.

[149] Comme elle ne pouvait connaître à l'avance l'évolution des taux d'intérêt et de l'inflation, la Couronne n'a pas fait preuve d'imprudence en optant pour un taux variable fondé sur le rendement des obligations à long terme du gouvernement. C'était un moyen de se prémunir contre le risque de fluctuation des taux d'intérêt et de l'inflation. Selon moi, en appliquant la formule du taux variable à l'argent des Indiens, la Couronne n'a pas manqué à son obligation fiduciale envers les bandes.

G. *Transfert de sommes d'argent aux bandes*

[150] Au lieu de verser de l'intérêt, la Couronne aurait pu choisir de transférer les sommes d'argent aux bandes ou à un fiduciaire indépendant, qui auraient pu ensuite les investir sans immixtion de la Couronne. Les bandes disent avoir exigé maintes fois que leur argent leur soit versé directement ou à un fiduciaire indépendant, mais avoir essuyé un refus. Cette affirmation ne vise pas à appuyer l'allégation de manquement à l'obligation fiduciale comme telle. Les bandes font simplement valoir que la Couronne a refusé non seulement d'investir les redevances, mais également de leur permettre de le faire.

[151] Devant notre Cour, les parties prétendent que l'al. 64(1)*k*) de la *Loi sur les Indiens* autorise la Couronne à transférer l'argent du compte en capital soit aux bandes, soit à un fiduciaire indépendant pour leur compte. Un transfert de fonds constitue une « dépense », car l'argent n'est plus détenu en fiducie par la Couronne. Je partage cet avis.

[152] Toutefois, la Couronne ne peut pas simplement transférer les fonds. Suivant ses obligations fiduciales et l'al. 64(1)*k*) de la *Loi sur les Indiens*, il lui faut être convaincue que l'opération sert au mieux les intérêts des bandes. Une fois les fonds transférés, la Couronne n'a plus d'obligations fiduciales à leur égard, car elle n'a plus de droit de

the funds and is not responsible for their management. It is therefore necessary to consider history of dealings between the bands and the Crown to determine whether the Crown should have transferred some or all of the funds to the bands.

(1) Samson

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

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

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

[155] In particular, in April 1981, the then-Assistant Deputy Minister of Indian and Inuit Affairs, Donald K. Goodwin, sent a letter to Samson's Chief regarding the band council resolutions providing for the transfer of the royalties. In that letter, Goodwin requested further information concerning the disposition of the $35 million already transferred to the band in relation to the establishment of Peace Hills Trust. The letter stated

regard ni d'obligation de gestion s'y rattachant. Il est donc nécessaire d'examiner l'historique des rapports entre les bandes et la Couronne pour déterminer si cette dernière aurait dû transférer tout ou partie des fonds aux bandes.

(1) La nation de Samson

[153] En février et en avril 1980, la nation de Samson a demandé le transfert, par prélèvement sur son compte en capital, de la somme de 35 millions de dollars destinée à la mise sur pied de la fiducie Peace Hills. La Couronne a accédé à sa demande. Il appert que lors du versement de la somme, les représentants du MAINC croyaient que l'opération servait au mieux les intérêts de la nation de Samson. Toutefois, un rapport établi pour celle-ci en décembre 1979 par les conseillers en gestion P. S. Ross & Partners conclut que [TRADUCTION] « [l]a planification à long terme, notamment financière, fait défaut à toute l'organisation. » En voici un autre extrait :

> [TRADUCTION] De plus, plusieurs décisions financières importantes ne sont pas prises dans le cadre d'un plan d'ensemble, avec des objectifs précis, mais plutôt de façon émotive, compte tenu uniquement des éventuels avantages à court terme. Les répercussions que ces investissements pourraient avoir à long terme ne sont pas vraiment prises en compte. [d.i., p. 2514]

[154] En décembre 1980, la nation de Samson a demandé le transfert à la fiducie Peace Hills du solde en entier de ses redevances détenues dans le Trésor. Lors de discussions entre ses représentants et ceux de la nation de Samson en 1981, le MAINC a dit avoir besoin au préalable de renseignements supplémentaires. Seulement une partie de ces renseignements lui a été communiquée.

[155] Plus particulièrement, en avril 1981, le sous-ministre adjoint des Affaires indiennes et inuits d'alors, Donald K. Goodwin, a fait parvenir au chef de la nation de Samson une lettre portant sur les résolutions du conseil de bande relatives au transfert des redevances. Il demandait des renseignements supplémentaires sur l'utilisation des 35 millions de dollars déjà versés pour la mise sur pied de la fiducie Peace Hills, car [TRADUCTION] « [r]ien

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

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

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

> It is in the interest of everyone, but of Band members in particular, that all necessary information be available in order to best determine whether the proposals are first, within the limits imposed on the Minister's authority by section 64 of the Indian Act; secondly, are in the best interests of the Band members; and thirdly, meet the trust responsibilities of the Minister. [R.R., at p. 2543]

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

n'indique que les fonds ont été dépensés aux fins approuvées, ni même que les fonds sont administrés par la société de fiducie » (d.i., p. 2541). La lettre visait l'obtention de renseignements sur l'affectation de ces fonds, notamment le montant et la nature des dépôts et des placements touchant la fiducie Peace Hills, ainsi que le rendement de ces dépôts ou placements.

[156] M. Goodwin demandait également la preuve de l'approbation du transfert par les membres de la nation de Samson. Le MAINC avait auparavant demandé copie du procès-verbal de l'assemblée attestant le large appui de la bande au transfert du solde des fonds détenus dans le Trésor. La bande n'avait toutefois pas accédé à sa demande. Par ailleurs, comme la fiducie Peace Hills n'avait été autorisée qu'en janvier 1981, son rendement ne pouvait être établi que sur quelques mois d'activité. M. Goodwin demandait copie des états financiers intermédiaires et des accords de gestion entre la nation de Samson et la fiducie Peace Hills. Enfin, il rappelait que les résolutions pertinentes du conseil de bande étaient ambiguës et il demandait des renseignements plus précis sur l'utilisation projetée des fonds.

[157] Il appert de la lettre que le MAINC avait à l'esprit les obligations fiduciales de la Couronne envers la nation de Samson :

> [TRADUCTION] Il est dans l'intérêt de tous, et des membres de la bande en particulier, que nous obtenions tous les renseignements requis afin de déterminer au mieux si, premièrement, les propositions respectent les contraintes du ministre suivant l'article 64 de la *Loi sur les Indiens*, deuxièmement, si elles servent au mieux les intérêts des membres de la bande et, troisièmement, si elles sont conformes aux obligations fiduciales du ministre. [d.i., p. 2543]

[158] Une note de service datée du 29 mai 1981 indique que le MAINC ne jugeait pas satisfaisante la réponse de la nation de Samson à sa demande de précisions (d.i., p. 2556-2559). Fait important, le MAINC s'interrogeait toujours sur l'utilisation des 35 millions de dollars déjà transférés à la bande et se demandait pourquoi environ 18 millions de dollars

(an officer of Peace Hills Trust) "in trust" for Samson.

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

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

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

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

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

étaient détenus au nom de Robert F. Roddick (un dirigeant de la fiducie Peace Hills) « en fiducie » pour la nation de Samson.

[159] En octobre 1981, le ministre des Affaires indiennes et du Nord canadien d'alors, John C. Munro, a adressé à la nation de Samson une lettre faisant état de ses préoccupations concernant l'existence de certificats de placement garantis d'une valeur de 18 millions de dollars établis au nom de R. F. Roddick en fiducie pour la bande indienne de Samson. M. Roddick étant un dirigeant de la fiducie Peace Hills, le vérificateur général et le Département des Assurances jugeaient la situation [TRADUCTION] « très irrégulière ». Voici un extrait de la lettre :

> [TRADUCTION] Étant donné le refus de la bande indienne de Samson de conclure une convention de fiducie pour la gestion des 18 millions de dollars déposés auprès de la fiducie Peace Hills, nous n'avons d'autre choix que de demander à votre conseil de rendre la somme au receveur général pour qu'il la dépose dans votre compte. [d.i., p. 2860]

[160] Le dossier n'indique pas que la somme de 18 millions de dollars a été rendue ou qu'une explication satisfaisante a été donnée en ce qui concerne l'utilisation des 35 millions de dollars déjà transférés.

[161] Le transfert du solde des fonds de la bande de Samson détenus dans le Trésor n'a pas eu lieu.

[162] En 1983, la nation de Samson a proposé que 50 millions de dollars soient prélevés de son compte en capital dans le Trésor pour mettre sur pied sa propre fiducie patrimoniale (d.i., p. 2753). La somme devait financer des projets d'habitation dans la réserve, et la fiducie Peace Hills devait tenir lieu de bailleur de fonds. Or, comme l'atteste une lettre du vice-président de la fiducie Peace Hills, Roy Louis (d.i., p. 2763), rien n'a été fait en raison de [TRADUCTION] « difficultés internes ». Le dossier révèle que c'est la bande qui connaissait de telles difficultés. Pendant toute cette période, le MAINC a tenté en vain d'obtenir une explication valable du fait que 18 millions de dollars, prélevés sur les

$35 million transfer. No satisfactory explanation was provided.

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

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

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

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

[167] Ultimately, in 2005 during the trial, Teitelbaum J. set out conditions for the transfer of

35 millions de dollars versés précédemment, étaient détenus par M. Roddick en fiducie pour la bande.

[163] En 1986, la nation de Samson a une fois de plus proposé la création d'une fiducie patrimoniale. Cependant, il semble qu'aucun transfert n'ait jamais eu lieu à cause de divergences au sein du conseil de bande.

[164] En 1990, la nation de Samson a demandé à la Cour fédérale de nommer un administrateur-séquestre pour gérer l'argent de son compte en capital détenu dans le Trésor. Les négociations se sont poursuivies en vue d'arriver à un accord de transfert, mais la Couronne exigeait un plan financier. En janvier 1992, le juge en chef adjoint Jerome a rejeté la demande de la bande (d.i., p. 4121-4124), ordonnant la poursuite des négociations. Toutefois, lors des négociations qui ont suivi, la nation de Samson n'a pas présenté de plan financier de nature à convaincre la Couronne que le transfert servait au mieux les intérêts de la bande. La Couronne a continué d'exiger un tel plan financier, mais aussi l'assurance qu'elle serait libérée de toute obligation à l'égard des fonds après le transfert et la consultation des membres de la bande par référendum.

[165] En mars 1993, la Couronne a fait parvenir à la nation de Samson l'ébauche d'un acte de fiducie. En juin 1994, elle n'avait toujours pas reçu de réponse (lettre du cabinet Macleod Dixon, d.i., p. 4045-4046). Or, il appert du dossier que les négociations se sont poursuivies jusqu'à ce que, en 1997, la Couronne fasse parvenir à la nation de Samson une ébauche d'ordonnance de transfert provisoire des fonds. Par la suite, les discussions ont porté sur l'ordonnance et le transfert éventuel.

[166] En février 2001, la Couronne a fait parvenir à la nation de Samson l'ébauche d'une proposition de transfert. Dans sa réponse datant d'avril 2002, la bande affirme que la Couronne n'a jamais eu l'intention véritable de transférer les fonds et que sa lettre de 2001 trahissait une absence de sincérité (d.i., p. 4392-4393).

[167] Finalement, en 2005, pendant le procès, le juge Teitelbaum a énoncé les conditions du transfert

control over Samson's capital moneys in the CRF. Samson agreed to abide by conditions set by the court, and the Crown was willing to transfer control, subject to the court setting such conditions and a declaration by the court that the Minister of Indian Affairs and Northern Development had the legal authority to make the transfer.

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

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

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

(2) Ermineskin

[171] In 1983, the Crown contacted Ermineskin with invitations to consider the transfer of funds

à la nation de Samson de la gestion des sommes d'argent de son compte en capital détenues dans le Trésor. La nation de Samson s'est engagée à les respecter et la Couronne était disposée à aller de l'avant pour autant que la Cour fixe ces conditions et déclare que le ministre des Affaires indiennes et du Nord canadien pouvait légalement effectuer le transfert.

[168] Suivant les conditions établies par le juge Teitelbaum, la nation de Samson devait préparer et signer une convention de fiducie qui renfermait un plan financier détaillé exposant ses politiques en matière d'investissements et de dépenses, exonérer la Couronne de toute responsabilité future à l'égard de l'argent du compte en capital, consulter ses membres par référendum et soumettre à l'approbation du conseil de bande une résolution demandant le transfert du solde intégral de son compte en capital, sauf trois millions de dollars devant être conservés en vue du règlement de toute question encore en suspens (2005 CF 136, [2005] A.C.F. n^{o} 156 (QL)).

[169] La preuve révèle que tout au long des démêlés entre la nation de Samson et la Couronne, cette dernière appuyait les propositions de transfert visant la mise sur pied de la fiducie Peace Hills et de la fiducie patrimoniale de la bande. Toutefois, en raison de la difficulté d'obtenir des précisions sur l'utilisation des 35 millions de dollars déjà transférés et de l'omission de la nation de Samson de présenter des plans financiers valables et d'offrir quelque preuve de l'appui de ses membres, ainsi qu'à cause de divergences au sein du conseil de bande, la Couronne n'a pu s'assurer qu'il était au mieux des intérêts de la nation de Samson de transférer d'autres fonds.

[170] Eu égard à la preuve, je suis d'avis que la Couronne aurait été imprudente si elle avait acquiescé à des transferts supplémentaires avant l'ordonnance du juge Teitelbaum en 2005.

(2) La nation d'Ermineskin

[171] En 1983, la Couronne a invité la nation d'Ermineskin à envisager le transfert de sommes

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

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

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

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

d'argent de son compte en capital détenues dans le Trésor afin qu'elle en assure elle-même la gestion. En janvier 1985, lors d'une présentation au ministre des Affaires indiennes et du Nord canadien d'alors, David Crombie, les quatre bandes (dont celle d'Ermineskin) ont fait connaître leur projet de fiducie patrimoniale dont la mise sur pied nécessitait le prélèvement de fonds sur leur compte en capital (d.i., p. 2833-2838). Dans une lettre adressée au chef Littlechild en novembre 1985, M. Crombie indiquait qu'aucune demande officielle de transfert n'avait encore été formellement présentée par la nation d'Ermineskin et qu'une décision ne pouvait être prise avant que le détail de la proposition ne soit connu (d.i., p. 3115-3116).

[172] En septembre 1988, la nation d'Ermineskin a proposé au MAINC pour la première fois de manière formelle la création de sa fiducie patrimoniale. Elle a présenté à l'appui une résolution du conseil de bande, une ébauche d'acte de fiducie, une décision anticipée en matière d'impôt sur le revenu et un document de planification à long terme. Le MAINC était favorable à la proposition, mais il s'interrogeait toujours sur sa responsabilité et sur son pouvoir d'autoriser le transfert en vertu de la *Loi sur les Indiens*.

[173] Un certain nombre d'échanges ont eu lieu entre la Couronne et la nation d'Ermineskin. Un plan a finalement vu le jour pour l'adoption d'une loi visant la nation d'Ermineskin et satisfaisant la Couronne quant à son pouvoir légal d'effectuer le transfert. La nation d'Ermineskin s'est vu transmettre l'ébauche des instructions relatives à la rédaction de la loi, et la Couronne a retenu la plupart de ses remarques.

[174] Il appert du dossier qu'avant de transférer l'argent du compte en capital, du Trésor à la fiducie patrimoniale d'Ermineskin, la Couronne voulait être totalement libérée de ses obligations à l'égard de cet argent. Or, lors d'une réunion au début de l'année 1990, le conseil de bande de la nation d'Ermineskin a abandonné son projet de fiducie patrimoniale parce qu'il n'était pas disposé à exonérer la Couronne de toute responsabilité future à l'égard de la gestion des fonds transférés (d.i., p. 3582-3585).

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

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

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

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

[179] In 1996, Ermineskin again demanded that the Crown invest its capital moneys (Blake, Cassels & Graydon letter, February 15, 1996, R.R., at p. 4072). The Crown's response stated that while it

[175] En janvier 1991, dans sa proposition concernant la gestion de l'argent des Indiens, la nation d'Ermineskin disait souhaiter analyser elle-même les diverses options pour la gestion des fonds (d.i., p. 3683). Le dossier n'indique pas que d'autres mesures ont été prises par la suite.

[176] En novembre 1990, la Couronne a créé le comité sur la gestion de l'argent des Indiens afin que les Autochtones puissent participer à la réforme législative apparemment jugée nécessaire pour que leur soit confiée la gestion des sommes d'argent provenant de leur compte en capital. La nation d'Ermineskin y a participé activement. Le comité a recommandé l'adoption d'une loi permettant aux bandes de se soustraire à l'application de la *Loi sur les Indiens* et de gérer leur propre argent. La Couronne a accepté la plupart des recommandations du comité, et la rédaction de la loi a été entreprise.

[177] En mai 1992, la nation d'Ermineskin a intenté son action contre la Couronne. Le processus de rédaction s'est néanmoins poursuivi, et l'ébauche définitive de la loi sur la gestion de l'argent des Premières Nations a vu le jour en 1993. En janvier 1994, dans une lettre de ses avocats, la nation d'Ermineskin a exigé que la Couronne investisse elle-même les redevances de la bande. Or, selon une lettre que les coprésidents du comité sur la gestion de l'argent des Indiens ont transmise un mois plus tard au ministre des Affaires indiennes et du Nord canadien d'alors, Ronald Irwin, la nation d'Ermineskin appuyait le texte de la loi proposée (d.i., p. 4047-4048).

[178] Il appert du dossier que seulement deux bandes ont participé à la rencontre du MAINC et du comité au mois d'août 1994, et que la Couronne refusait de poursuivre le processus législatif sans un large appui des bandes.

[179] En 1996, la nation d'Ermineskin a de nouveau exigé de la Couronne qu'elle investisse l'argent de son compte en capital (lettre du cabinet Blake, Cassels & Graydon, 15 février 1996, d.i., p. 4072).

would not invest the funds itself, it would be willing to resurrect the Ermineskin Heritage Trust Proposal. Ermineskin continued to reiterate its demand that the Crown invest its moneys, but it appears that no further developments occurred. Ermineskin never revived the Ermineskin Heritage Trust Proposal, and the proposed money management legislation was never enacted.

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

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

H. *Unjust Enrichment*

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

[183] The test for unjust enrichment was recently restated by Iacobucci J. in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 30:

La Couronne lui a répondu qu'elle n'investirait pas elle-même les sommes en question, mais qu'elle était disposée à reconsidérer le projet de fiducie patrimoniale. La nation d'Ermineskin a maintenu son exigence, mais les choses en seraient restées là. La nation n'a jamais relancé l'idée d'une fiducie patrimoniale, et la loi proposée sur la gestion de l'argent des Premières Nations n'a jamais été adoptée.

[180] Le désaccord aurait principalement porté sur l'exigence de la nation d'Ermineskin que la Couronne investisse ses redevances et sur son refus d'exonérer la Couronne de toute responsabilité pour l'avenir advenant le transfert des fonds à la bande pour qu'elle les investisse elle-même. La nation d'Ermineskin affirme dans son mémoire que [TRADUCTION] « ses membres étaient réticents à mettre fin à la relation fiduciaire avec la Couronne » (par. 62). Toutefois, la Couronne ne pouvait accepter de demeurer responsable de fonds dont elle n'avait plus la gestion.

[181] Comme je l'ai déjà expliqué, la loi n'autorisait pas la Couronne à investir les redevances et elle ne pouvait accéder aux demandes de la bande en ce sens. Un transfert aurait mis fin aux obligations fiduciales de la Couronne à l'égard des fonds. On ne pouvait s'attendre à ce que la Couronne demeure responsable de fonds sur lesquels elle n'exerçait plus aucun pouvoir. Si la nation d'Ermineskin ne libérait pas la Couronne de ses obligations, elle ne pouvait s'attendre à ce que les fonds détenus dans le Trésor lui soient transférés.

H. *Enrichissement sans cause*

[182] Les bandes font valoir que la Couronne s'est enrichie sans cause en utilisant leurs redevances et en leur payant de l'intérêt au taux fixé par elle. Il s'agit pourtant d'une conséquence inévitable du régime législatif applicable, qui exige de la Couronne qu'elle dépose les redevances dans le Trésor et qu'elle verse des intérêts aux bandes.

[183] Le critère applicable en matière d'enrichissement sans cause a récemment été reformulé par le juge Iacobucci dans l'arrêt *Garland c. Consumers' Gas Co.*, 2004 CSC 25, [2004] 1 R.C.S. 629, par. 30 :

As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment (*Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 848; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762, at p. 784).

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

I. *Section 15(1) of the Canadian Charter of Rights and Freedoms*

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

[186] Section 15(1) reads:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[187] The trial judge and the majority of the Court of Appeal found that the bands lacked standing to bring a claim under s. 15(1) on the basis that the bands were asserting a claim in relation to the management of band property and not a claim relating

En général, le critère applicable en matière d'enrichissement sans cause est bien établi au Canada. La cause d'action comporte trois éléments : (1) l'enrichissement du défendeur, (2) l'appauvrissement correspondant du demandeur et (3) l'absence de motif juridique justifiant l'enrichissement (*Pettkus c. Becker*, [1980] 2 R.C.S. 834, p. 848; *Peel (Municipalité régionale) c. Canada*, [1992] 3 R.C.S. 762, p. 784).

[184] Pour déterminer si la Couronne s'est enrichie, il faut se demander quelle aurait été la situation si elle n'avait pas eu accès aux redevances versées dans le Trésor. Le juge de première instance a conclu que la Couronne aurait pu obtenir (et aurait obtenu) d'autres fonds à un taux moins élevé — celui des bons du Trésor à court terme — que le taux consenti sur les redevances. Je conviens avec lui et avec la Cour d'appel fédérale que la Couronne ne s'est pas enrichie.

I. *Paragraphe 15(1) de la Charte canadienne des droits et libertés*

[185] Au procès et devant notre Cour, les bandes ont contesté la validité constitutionnelle des art. 61 à 68 de la *Loi sur les Indiens* au motif qu'ils portent atteinte aux droits garantis au par. 15(1) de la *Charte*. Selon elles, si ces dispositions empêchent la Couronne d'investir les redevances comme le ferait un fiduciaire de common law, leur effet est discriminatoire. Parce qu'elles sont des Indiens au sens de la *Loi sur les Indiens*, celle-ci les a privées des droits reconnus aux non-Indiens lorsque la Couronne détient leurs biens en fiducie.

[186] Le paragraphe 15(1) est rédigé comme suit :

> La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

[187] Le juge de première instance et les juges majoritaires de la Cour d'appel fédérale ont conclu que les bandes n'avaient pas qualité pour invoquer le par. 15(1), car leur recours avait trait à la gestion de biens leur appartenant, et non aux droits

to personal rights of band members. As such, they were of the opinion that there was no personal s. 15(1) right engaged. As I am of the opinion that the bands' s. 15(1) claim should be dismissed, I prefer to explain my reasons on a substantive rather than procedural basis.

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

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

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

[191] It was argued that the inability of the Crown to invest resulted in lower returns than those available to non-Indians, and that this amounted to a disadvantage to the bands. In purely financial terms, it is not readily apparent that precluding investment by the Crown necessarily amounts to a disadvantage. It is true that interest calculated on the

personnels de leurs membres. Ils ont donc estimé qu'aucun droit personnel visé au par. 15(1) n'était en jeu. Comme je suis d'avis de rejeter la prétention fondée sur le par. 15(1), je préfère m'appuyer sur des considérations de fond et non de procédure.

[188] La jurisprudence de notre Cour sur le droit à l'égalité établit clairement que toute distinction n'est pas discriminatoire. Le fait que des groupes soient traités différemment ne constitue pas en soi une atteinte aux droits garantis au par. 15(1). Comme notre Cour l'a dit dans l'arrêt *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, p. 182 (et réaffirmé dans l'arrêt *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483, par. 28), le plaignant doit démontrer « non seulement qu'il ne bénéficie pas d'un traitement égal devant la loi et dans la loi, ou encore que la loi a un effet particulier sur lui en ce qui concerne la protection ou le bénéfice qu'elle offre, mais encore que la loi a un effet discriminatoire sur le plan législatif » (je souligne). La méthode d'analyse établie dans l'arrêt *Andrews* comporte deux volets : premièrement, la loi établit-elle une distinction fondée sur un motif énuméré ou analogue et, deuxièmement, la distinction crée-t-elle un désavantage par la perpétuation d'un préjugé ou l'application de stéréotypes?

[189] Dans les circonstances du présent pourvoi, la première exigence est manifestement remplie : la loi contestée crée une distinction entre Indiens et non-Indiens étant donné qu'elle ne s'applique qu'aux premiers.

[190] Il faut donc se demander si les dispositions régissant la gestion de l'argent des Indiens, qui empêchent la Couronne d'investir cet argent, perpétuent un préjugé ou l'application de stéréotypes. Il faut selon moi répondre par la négative.

[191] Les bandes ont soutenu que l'impossibilité pour la Couronne de faire des placements les a fait bénéficier de rendements inférieurs à ceux que pouvaient obtenir les non-Indiens, ce qui leur a infligé un désavantage. D'un point de vue strictement financier, le fait que la Couronne ne puisse faire de placements n'inflige pas d'emblée un désavantage.

basis of the yield on long-term government bonds, adjusted quarterly, will, in most cases and over the long term, lead to lower returns than might accrue through a diversified investment plan.

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

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

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

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

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

Il est vrai que l'intérêt fondé sur le rendement des obligations à long terme du gouvernement rajusté trimestriellement est, la plupart du temps, sur une longue période, inférieur au rendement d'un portefeuille de placement diversifié.

[192] Cela dit, en détenant les fonds dans le Trésor et en payant des intérêts conformément au par. 61(2), la Couronne a assuré la liquidité des fonds, de sorte que le solde intégral des comptes des bandes pouvait à tout moment être dépensé. De plus, les redevances étaient à l'abri du risque de perte. Il est trompeur d'apprécier un désavantage en se fondant sur la seule comparaison des rendements, car il faut aussi tenir compte du risque couru et de la liquidité des fonds. Toutefois, même si la loi empêche la Couronne de faire des placements et crée de ce fait un désavantage, elle ne porte atteinte aux droits garantis au par. 15(1) que lorsque ce désavantage est discriminatoire, c'est-à-dire s'il perpétue un préjugé ou l'application de stéréotypes.

[193] Pour déterminer s'il y a discrimination, il faut tenir compte du contexte et ne pas s'en tenir au texte de la disposition législative en cause. Dans l'arrêt *R. c. Turpin*, [1989] 1 R.C.S. 1296, la Cour dit :

> Pour déterminer s'il y a discrimination pour des motifs liés à des caractéristiques personnelles d'un individu ou d'un groupe d'individus, il importe d'examiner non seulement la disposition législative contestée qui établit une distinction contraire au droit à l'égalité, mais aussi d'examiner l'ensemble des contextes social, politique et juridique. [p. 1331]

[194] Ce passage montre l'importance de tenir compte, dans l'analyse portant sur l'égalité réelle, de l'ensemble du contexte dans lequel s'inscrit une distinction.

[195] La question de la gestion de l'argent des Indiens fait nécessairement entrer en jeu de nombreuses considérations, dont l'autodétermination et l'autonomie des Autochtones et le rôle que la Couronne doit jouer à cet égard. Il s'agit d'une situation fort différente des autres relations fiduciaires où le risque et le rendement financier constituent généralement les seules considérations pertinentes et où le pouvoir discrétionnaire absolu du

of acceptable risk, as to where and how the trust corpus is managed and invested.

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

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

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

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

fiduciaire de gérer et d'investir la masse fiduciaire, sous réserve de l'acceptabilité du risque, ne suscite pas d'inquiétudes.

[196] Suivant la formule applicable à l'argent des Indiens, la Couronne exerce un moins grand pouvoir sur l'utilisation des redevances et sur les dépenses des bandes que si elle investissait dans un portefeuille diversifié. Dans cette dernière hypothèse, la Couronne devrait, en tant que fiduciaire, juger de l'acceptabilité du risque et choisir les véhicules de placement. Elle pourrait même également devoir exercer un pouvoir accru sur les habitudes de dépense des bandes, car les redevances ne pourraient être entièrement liquides sans qu'il n'en résulte un risque de perte importante.

[197] Selon le dossier, les bandes se sont opposées à une mesure de la Couronne qui, à leur yeux, visait l'exercice d'un pouvoir accru sur l'argent et les dépenses des Indiens. En 1981, le MAINC a proposé de limiter la distribution *per capita* aux mineurs à 3 000 $ par année. Sa directive précisait l'objectif de la mesure :

> [TRADUCTION] . . . énoncer la procédure du ministère encadrant la distribution *per capita* de sommes du compte en capital d'une bande et les exigences essentielles devant être remplies pour que la distribution ait lieu, afin que le ministre s'acquitte de ses obligations fiduciaires et bénéficie d'une protection à cet égard. [d.i., p. 2027]

[198] En réponse à cette proposition, les quatre bandes, dont les bandes appelantes, ont écrit : [TRADUCTION] « les quatre bandes d'Hobbema, à savoir celles d'Ermineskin, de Louis Bull, de Montana et de Samson, par l'entremise de leurs chefs et de leurs conseils respectifs, s'opposent fermement à la politique et à sa mise en œuvre » (d.i., p. 2035). Selon elles, il y avait lieu de croire que [TRADUCTION] « l'objectif de la directive ministérielle, en tant que politique d'interprétation de l'al. 64a) de la Loi sur les Indiens, constitue en fait un moyen d'exercer un pouvoir sur les sommes d'argent du compte en capital des bandes », ce qui ne favorisait pas l'autonomie des bandes (d.i., p. 2035). Elles concluaient :

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

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

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

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

[TRADUCTION] Toutefois, s'agissant de l'« ARGENT DES INDIENS », il appartient au chef et au conseil par l'entremise des membres et en tant qu'instance dirigeante de déterminer la manière dont les fonds seront affectés et dépensés ou investis, ainsi que le moment et le lieu où ils le seront. [d.i., p. 2037-2038]

[199] Les bandes estimaient qu'un plus grand pouvoir de la Couronne serait incompatible avec leur droit accru à l'autodétermination.

[200] De fait, les dispositions contestées ne font pas obstacle à l'investissement de l'argent des Indiens par les bandes elles-mêmes ou leurs fiduciaires. J'ai conclu que l'al. 64(1)*k*) de la *Loi sur les Indiens* permet à la Couronne de verser l'argent du compte en capital à une bande ou à son fiduciaire en vue de son placement. En 1980, la Couronne a transféré 35 millions de dollars à la nation de Samson pour la mise sur pied de la fiducie Peace Hills. Le dossier révèle que lorsque les bandes pouvaient convaincre la Couronne qu'un transfert de fonds aux fins d'investissement servait au mieux leurs intérêts et qu'elles exonéraient la Couronne de toute responsabilité à l'égard des fonds dont elle n'avait plus la gestion, le transfert avait lieu. D'ailleurs, l'ordonnance rendue par le juge Teitelbaum le 22 décembre 2005 autorise le transfert des fonds de la nation de Samson. Exiger des bandes qu'elles convainquent la Couronne que le transfert servait au mieux leurs intérêts était conforme non seulement aux dispositions de la *Loi sur les Indiens*, mais aussi aux obligations fiduciales de la Couronne à l'égard des redevances.

[201] Au vu de ce qui précède, je ne puis convenir que les dispositions contestées de la *Loi sur les Indiens* portent atteinte aux droits garantis au par. 15(1) de la *Charte* suivant le critère établi dans l'arrêt *Andrews* et confirmé dans l'arrêt *Kapp* : « (1) [l]a loi crée-t-elle une distinction fondée sur un motif énuméré ou analogue (2) [l]a distinction crée-t-elle un désavantage par la perpétuation d'un préjugé ou l'application de stéréotypes? » (*Kapp*, par. 17). Une distinction est établie entre Indiens et non-Indiens, mais elle n'est pas discriminatoire. Les dispositions en cause n'empêchent pas les bandes ou leurs fiduciaires d'investir les fonds détenus dans le Trésor que la Couronne leur transfère après avoir été

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

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

VI. Conclusion

[203] I would dismiss the appeals with costs.

APPENDIX

Canadian Charter of Rights and Freedoms

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Constitution Act, 1982

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

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

2. In this Act,

. . .

"public money" means all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or

exonérée de toute responsabilité ultérieure à leur égard. Les bandes exercent ainsi un plus grand pouvoir, notamment sur le plan décisionnel. Le transfert aux bandes ou à leurs fiduciaires de sommes d'argent destinées à l'investissement doit servir au mieux les intérêts des bandes. Dans l'intervalle, la Couronne détient les fonds dans le Trésor en mettant des liquidités à la disposition des bandes et en faisant fructifier les redevances de celles-ci.

[202] Je suis donc d'avis que les dispositions contestées de la *Loi sur les Indiens*, qui interdisent à la Couronne d'investir les redevances, ne créent pas une distinction perpétuant un préjugé ou l'application de stéréotypes. Il n'y a pas eu violation du par. 15(1) de la *Charte.*

VI. Conclusion

[203] Je suis d'avis de rejeter les pourvois avec dépens.

ANNEXE

Charte canadienne des droits et libertés

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Loi constitutionnelle de 1982

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

Loi sur la gestion des finances publiques, L.R.C. 1985, ch. F-11

2. Les définitions qui suivent s'appliquent à la présente loi.

. . .

« fonds publics » Fonds appartenant au Canada, prélevés ou reçus par le receveur général ou un autre fonctionnaire public agissant en sa qualité officielle

any person authorized to receive or collect such money, and includes

(*a*) duties and revenues of Canada,

(*b*) money borrowed by Canada or received through the issue or sale of securities,

(*c*) money received or collected for or on behalf of Canada, and

(*d*) all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract;

. . .

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

. . .

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

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

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

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

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

(*c*) apply for articles that would add to or otherwise make a material change in the objects or purposes for which a parent Crown corporation is incorporated, or the restrictions on the businesses or activities that a parent Crown corporation may carry on, as set out in its articles;

ou toute autre personne autorisée à en prélever ou recevoir. La présente définition vise notamment :

a) les recettes de l'État;

b) les emprunts effectués par le Canada ou les produits de l'émission ou de la vente de titres;

c) les fonds prélevés ou reçus pour le compte du Canada ou en son nom;

d) les fonds prélevés ou reçus par un fonctionnaire public sous le régime d'un traité, d'une loi, d'une fiducie, d'un contrat ou d'un engagement et affectés à une fin particulière précisée dans l'acte en question ou conformément à celui-ci.

. . .

17. (1) Sous réserve des autres dispositions de la présente partie, les fonds publics sont déposés au crédit du receveur général.

. . .

21. (1) Les fonds visés à l'alinéa *d*) de la définition de « fonds publics » à l'article 2 et qui sont reçus par Sa Majesté, ou en son nom, à des fins particulières et versés au Trésor peuvent être prélevés à ces fins sur le Trésor sous réserve des lois applicables.

(2) Sous réserve des autres lois fédérales, les fonds visés au paragraphe (1) peuvent être majorés d'intérêts payables sur le Trésor aux taux fixés par le ministre avec l'approbation du gouverneur en conseil.

90. (1) Sauf autorisation donnée par une loi fédérale, il est interdit :

a) de constituer une personne morale dont une action au moins, lors de la constitution, serait détenue par Sa Majesté, en son nom ou en fiducie pour elle;

b) d'acquérir des actions d'une personne morale qui, lors de l'acquisition, seraient détenues par Sa Majesté, en son nom ou en fiducie pour elle;

c) de demander des statuts qui apporteraient une adjonction ou une modification importante aux buts pour lesquels une société d'État mère a été constituée ou aux restrictions à l'égard des activités qu'elle peut exercer, tels qu'ils figurent dans ses statuts;

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

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

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

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

(2) The Governor in Council may by proclamation declare that this Act or any portion thereof, except sections 5 to 14.3 or sections 37 to 41, shall not apply to

(*a*) any Indians or any group or band of Indians, or

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

and may by proclamation revoke any such declaration.

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

(2) Interest on Indian moneys held in the Consolidated Revenue Fund shall be allowed at a rate to be fixed from time to time by the Governor in Council.

62. All Indian moneys derived from the sale of surrendered lands or the sale of capital assets of a band shall be deemed to be capital moneys of the band and all Indian moneys other than capital moneys shall be deemed to be revenue moneys of the band.

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

64. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band

(*a*) to distribute per capita to the members of the band an amount not exceeding fifty per cent of the

d) de vendre ou, d'une façon générale, de céder des actions d'une société d'État mère;

e) de dissoudre ou fusionner une société d'État mère.

Loi sur les Indiens, L.R.C. 1985, ch. I-5

4. (1) La mention d'un Indien, dans la présente loi, exclut une personne de la race d'aborigènes communément appelés Inuit.

(2) Le gouverneur en conseil peut, par proclamation, déclarer que la présente loi, ou toute partie de celle-ci, sauf les articles 5 à 14.3 et 37 à 41, ne s'applique pas :

a) à des Indiens ou à un groupe ou une bande d'Indiens;

b) à une réserve ou à des terres cédées, ou à une partie y afférente.

Il peut en outre, par proclamation, révoquer toute semblable déclaration.

61. (1) L'argent des Indiens ne peut être dépensé qu'au bénéfice des Indiens ou des bandes à l'usage et au profit communs desquels il est reçu ou détenu, et, sous réserve des autres dispositions de la présente loi et des clauses de tout traité ou cession, le gouverneur en conseil peut décider si les fins auxquelles l'argent des Indiens est employé ou doit l'être, est à l'usage et au profit de la bande.

(2) Les intérêts sur l'argent des Indiens détenu au Trésor sont alloués au taux que fixe le gouverneur en conseil.

62. L'argent des Indiens qui provient de la vente de terres cédées ou de biens de capital d'une bande est réputé appartenir au compte en capital de la bande; les autres sommes d'argent des Indiens sont réputées appartenir au compte de revenu de la bande.

63. Par dérogation à la *Loi sur la gestion des finances publiques*, lorsque des sommes d'argent auxquelles un Indien a droit sont versées à un surintendant en vertu d'un bail ou d'une entente passé sous le régime de la présente loi, le surintendant peut remettre ces sommes à l'Indien.

64. (1) Avec le consentement du conseil d'une bande, le ministre peut autoriser et prescrire la dépense de sommes d'argent au compte en capital de la bande :

a) pour distribuer *per capita* aux membres de la bande un montant maximal de cinquante pour cent

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

des sommes d'argent au compte en capital de la bande, provenant de la vente de terres cédées;

b) pour construire et entretenir des routes, ponts, fossés et cours d'eau dans des réserves ou sur des terres cédées;

c) pour construire et entretenir des clôtures de délimitation extérieure sur les réserves;

d) pour acheter des terrains que la bande emploiera comme réserve ou comme addition à une réserve;

e) pour acheter pour la bande les droits d'un membre de la bande sur des terrains sur une réserve;

f) pour acheter des animaux, des instruments ou de l'outillage de ferme ou des machines pour la bande;

g) pour établir et entretenir dans une réserve ou à l'égard d'une réserve les améliorations ou ouvrages permanents qui, de l'avis du ministre, seront d'une valeur permanente pour la bande ou constitueront un placement en capital;

h) pour consentir aux membres de la bande, en vue de favoriser son bien-être, des prêts n'excédant pas la moitié de la valeur globale des éléments suivants :

(i) les biens meubles appartenant à l'emprunteur,

(ii) la terre concernant laquelle il détient ou a le droit de recevoir un certificat de possession,

et percevoir des intérêts et recevoir des gages à cet égard;

i) pour subvenir aux frais nécessairement accessoires à la gestion de terres situées sur une réserve, de terres cédées et de tout bien appartenant à la bande;

j) pour construire des maisons destinées aux membres de la bande, pour consentir des prêts aux membres de la bande aux fins de construction, avec ou sans garantie, et pour prévoir la garantie des prêts consentis aux membres de la bande en vue de la construction;

k) pour toute autre fin qui, d'après le ministre, est à l'avantage de la bande.

(2) Le ministre peut effectuer des dépenses sur les sommes d'argent au compte de capital d'une bande conformément aux règlements administratifs pris en vertu de l'alinéa 81(1)*p*.3) en vue de faire des paiements à toute personne dont le nom a été retranché de la liste

amount not exceeding one per capita share of the capital moneys.

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

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

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

65. The Minister may pay from capital moneys

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

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

66. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of revenue moneys for any purpose that in the opinion of the Minister will promote the general progress and welfare of the band or any member of the band.

de la bande pour un montant ne dépassant pas une part *per capita* de ces sommes.

64.1 (1) Une personne qui a reçu un montant supérieur à mille dollars en vertu de l'alinéa 15(1)*a*), dans sa version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, du fait qu'elle a cessé d'être membre d'une bande dans les circonstances prévues aux alinéas 6(1)*c*), *d*) ou *e*) n'a pas le droit de recevoir de montant en vertu de l'alinéa 64(1)*a*) jusqu'à ce que le total de tous les montants qu'elle aurait reçus en vertu de l'alinéa 64(1)*a*), n'eût été le présent paragraphe, soit égal à l'excédent du montant qu'elle a reçu en vertu de l'alinéa 15(1)*a*), dans sa version antérieure au 17 avril 1985, ou en vertu de toute disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, sur mille dollars, y compris les intérêts.

(2) Lorsque le conseil d'une bande prend, en vertu de l'alinéa 81(1)*p*.4), des règlements administratifs mettant en vigueur le présent paragraphe, la personne qui a reçu un montant supérieur à mille dollars en vertu de l'alinéa 15(1)*a*) dans sa version antérieure au 17 avril 1985, ou en vertu de toute autre disposition antérieure de la présente loi portant sur le même sujet que celui de cet alinéa, parce qu'elle a cessé d'être membre de la bande dans les circonstances prévues aux alinéas 6(1)*c*), *d*) ou *e*) n'a le droit de recevoir aucun des avantages offerts aux membres de la bande à titre individuel résultant de la dépense d'argent des Indiens au titre des alinéas 64(1)*b*) à *k*), du paragraphe 66(1) ou du paragraphe 69(1) jusqu'à ce que l'excédent du montant ainsi reçu sur mille dollars, y compris l'intérêt sur celui-ci, ait été remboursé à la bande.

(3) Le gouverneur en conseil peut prendre des règlements prévoyant la façon de déterminer les intérêts pour l'application des paragraphes (1) et (2).

65. Le ministre peut payer, sur les sommes d'argent au compte en capital :

a) une indemnité à un Indien, au montant déterminé en conformité avec la présente loi comme lui étant payable à l'égard de terres qui lui ont été enlevées obligatoirement pour les fins de la bande;

b) les dépenses subies afin de prévenir ou maîtriser les incendies d'herbes ou de forêts ou pour protéger les biens des Indiens en cas d'urgence.

66. (1) Avec le consentement du conseil d'une bande, le ministre peut autoriser et ordonner la dépense de sommes d'argent du compte de revenu à toute fin qui, d'après lui, favorisera le progrès général et le bien-être de la bande ou d'un de ses membres.

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

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

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

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

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

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

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

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

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

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

68. Where the Minister is satisfied that an Indian

(2) Le ministre peut dépenser l'argent du compte de revenu de la bande en vue d'aider les Indiens malades, invalides, âgés ou indigents de la bande et pour pourvoir aux funérailles des membres indigents de celle-ci, de même qu'en vue de pourvoir au versement des contributions sous le régime de la *Loi sur l'assurance-emploi* pour le compte de personnes employées qui sont payées, à l'égard de leur emploi, sur l'argent de la bande.

(2.1) Le ministre peut effectuer des dépenses sur les sommes d'argent de revenu de la bande conformément aux règlements administratifs visés à l'alinéa 81(1)*p*.3) en vue d'effectuer des paiements à une personne dont le nom a été retranché de la liste de bande jusqu'à concurrence d'un montant n'excédant pas une part *per capita* de ces sommes.

(3) Le ministre peut autoriser la dépense de sommes d'argent du compte de revenu de la bande pour l'ensemble ou l'un des objets suivants :

a) la destruction des herbes nuisibles et la prévention de la propagation ou de la présence généralisée des insectes, parasites ou maladies susceptibles de ruiner ou d'endommager la végétation dans les réserves indiennes;

b) la prophylaxie des maladies infectieuses ou contagieuses, ou non, sur les réserves;

c) l'inspection des locaux sur les réserves et la destruction, la modification ou la rénovation de ces locaux;

d) l'adoption de mesures préventives contre le surpeuplement des locaux utilisés comme logements sur les réserves;

e) la salubrité dans les locaux privés comme dans les endroits publics, sur les réserves;

f) la construction et l'entretien de clôtures de délimitation.

67. Lorsqu'une somme d'argent est dépensée par Sa Majesté pour procurer ou percevoir des sommes d'argent destinées aux Indiens, le ministre peut autoriser le recouvrement du montant ainsi dépensé sur l'argent de la bande.

68. Le ministre peut ordonner que les paiements de rentes ou d'intérêts auxquels un Indien a droit soient appliqués au soutien de l'époux ou conjoint de fait ou de la famille de celui-ci, ou des deux, lorsqu'il est convaincu que cet Indien, selon le cas :

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

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

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

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

. . .

69. (1) The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order.

(2) The Governor in Council may make regulations to give effect to subsection (1) and may declare therein the extent to which this Act and the *Financial Administration Act* shall not apply to a band to which an order made under subsection (1) applies.

Indian Oil and Gas Act, R.S.C. 1985, c. I-7

4. (1) Notwithstanding any term or condition in any grant, lease, permit, licence or other disposition or any provision in any regulation respecting oil or gas or both oil and gas or the terms and conditions of any agreement respecting royalties in relation to oil or gas or both oil and gas, whether granted, issued, made or entered into before or after December 20, 1974, but subject to subsection (2), all oil and gas obtained from Indian lands after April 22, 1977 is subject to the payment to Her Majesty in right of Canada, in trust for the Indian bands concerned, of the royalties prescribed from time to time by the regulations.

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

33. . . .

(5) At any time after giving reasonable notice in writing to the operator and giving due consideration to any obligations that the operator may have in respect of the sale of oil or gas, the Executive Director may, with

a) a abandonné son époux ou conjoint de fait ou sa famille sans raison suffisante;

b) s'est conduit de façon à justifier le refus de son époux ou conjoint de fait ou de sa famille de vivre avec lui;

c) a été séparé de son époux ou conjoint de fait et de sa famille par emprisonnement.

. . .

69. (1) Le gouverneur en conseil peut, par décret, permettre à une bande de contrôler, administrer et dépenser la totalité ou une partie de l'argent de son compte de revenu; il peut aussi modifier ou révoquer un tel décret.

(2) Le gouverneur en conseil peut prendre des règlements pour donner effet au paragraphe (1) et y déclarer dans quelle mesure la présente loi et la *Loi sur la gestion des finances publiques* ne s'appliquent pas à une bande visée par un décret pris sous le régime du paragraphe (1).

Loi sur le pétrole et le gaz des terres indiennes, L.R.C. 1985, ch. I-7

4. (1) Nonobstant les modalités d'une concession, d'un bail, d'un permis, d'une licence ou d'un autre acte d'aliénation, les dispositions d'un règlement sur le pétrole ou sur le gaz ou les modalités d'un accord sur les redevances applicables au pétrole ou au gaz, qu'ils soient ou non survenus avant le 20 décembre 1974, mais sous réserve du paragraphe (2), le pétrole et le gaz tirés des terres indiennes après le 22 avril 1977 sont assujettis au paiement à Sa Majesté du chef du Canada, en fiducie pour les bandes indiennes concernées, des redevances réglementaires.

Règlement de 1995 sur le pétrole et le gaz des terres indiennes, DORS/94-753

33. . . .

(5) Avec l'autorisation du conseil de bande, le directeur exécutif peut, en tout temps après avoir donné un avis écrit raisonnable à l'exploitant et après avoir étudié les obligations de ce dernier quant à la vente du pétrole

the approval of the band council, direct that all or a part of the oil or gas that is a royalty payable under this section be paid in kind for a specified or indefinite period or until the Executive Director directs otherwise.

Appeals dismissed with costs.

Solicitors for the appellants Chief John Ermineskin et al.: Blake, Cassels & Graydon, Vancouver.

Solicitors for the appellants Chief Victor Buffalo et al.: O'Reilly & Associés, Montréal.

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

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

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

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

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

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

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

et du gaz, ordonner que tout ou partie du pétrole ou du gaz qui constitue la redevance payable en vertu du présent article soit payé en nature pour une période spécifiée ou indéterminée ou jusqu'à ce qu'il en ordonne autrement.

Pourvois rejetés avec dépens.

Procureurs des appelants Chef John Ermineskin et autres : Blake, Cassels & Graydon, Vancouver.

Procureurs des appelants Chef Victor Buffalo et autres : O'Reilly & Associés, Montréal.

Procureur des intimés : Procureur général du Canada, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureur de l'intervenant le procureur général du Québec : Procureur général du Québec, Sainte-Foy.

Procureur de l'intervenant le procureur général de l'Alberta : Procureur général de l'Alberta, Edmonton.

Procureurs de l'intervenante l'Assemblée des Premières Nations : Pitblado, Winnipeg.

Procureurs des intervenantes la bande indienne de Saddle Lake et la bande indienne de Stoney : Rae and Company, Calgary.

Procureur de l'intervenante la Première Nation du Lac Seul : Joseph Eliot Magnet, Ottawa.

TAB 5

Intervenor status

2.10 On application, a Court may grant status to a person to intervene in an action subject to any terms and conditions and with the rights and privileges specified by the Court.

Division 2
Litigation Representatives

Litigation representative required

2.11 Unless otherwise ordered by the Court, the following individuals or estates must have a litigation representative to bring or defend an action or to continue or to participate in an action, or for an action to be brought or to be continued against them:

(a) an individual under 18 years of age;

(b) an individual declared to be a missing person under section 7 of the *Public Trustee Act*;

(c) an adult who, in respect of matters relating to a claim in an action, lacks capacity, as defined in the *Adult Guardianship and Trusteeship Act*, to make decisions;

(d) an individual who is a represented adult under the *Adult Guardianship and Trusteeship Act* in respect of whom no person is appointed to make a decision about a claim;

(e) an estate for which no personal representative has obtained a grant under the *Surrogate Rules* (AR 130/95) and that has an interest in a claim or intended claim.

AR 124/2010 s2.11;122/2012

Types of litigation representatives and service of documents

2.12(1) There are 3 types of litigation representatives under these rules:

(a) an automatic litigation representative described in rule 2.13;

(b) a self-appointed litigation representative under rule 2.14;

(c) a Court-appointed litigation representative under rule 2.15, 2.16 or 2.21.

(2) Despite any other provision of these rules, if an individual has a litigation representative in an action,

TAB 6

In the Court of Appeal of Alberta

Citation: Papaschase Indian Band (Descendants of) v. Canada (Attorney General), 2005 ABCA 320

Date: 20050930
Docket: 0403-0299-AC
Registry: Edmonton

Between:

Rose Lameman, Francis Saulteaux, Nora Alook, Samuel Waskewitch, and Elsie Gladue on their own behalf and on behalf of all descendants of the Papaschase Indian Band No. 136

Respondents
(Appellants/Plaintiffs)

- and -

Attorney General of Canada

Respondent
(Respondent/Defendant)

- and -

Her Majesty the Queen in Right of Alberta

Respondent
(Respondent/Third Party)

- and -

Federation of Saskatchewan Indian Nations

Applicant
Proposed Intervener

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Madam Justice Anne Russell
The Honourable Madam Justice Ellen Picard

Memorandum of Judgment
Delivered from the Bench

Application for Leave to Intervene

Memorandum of Judgment
Delivered from the Bench

Fraser, C.J.A. (for the Court):

[1] This is an application for intervener status by the Federation of Saskatchewan Indian Nations (FSIN). The respondents in this application, Rose Lameman et al. (who are the appellants in the main action and are referred to herein as the "appellants"), support FSIN's application, but the application is opposed by the respondent, Canada. The respondent, Her Majesty the Queen in Right of Alberta, takes no position on this issue.

[2] It may be fairly stated that, as a general principle, an intervention may be allowed where the proposed intervener is specially affected by the decision facing the Court or the proposed intervener has some special expertise or insight to bring to bear on the issues facing the court. As explained by the Supreme Court of Canada in *R. v. Morgentaler*, [1993] 1 S.C.R. 462 at para. 1: "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal."

[3] That said, it is clear as noted by the Federal Court of Appeal in *Batchewana Indian Band v. Canada (Minister of Indian and Northern Affairs* (1996), 199 N.R. 1 that ". . . an intervenor in an appellate court must take the case as she finds it and cannot, to the prejudice of the parties, argue new issues which require the introduction of fresh evidence."

[4] FSIN applies for intervener status on the basis that it represents 74 First Nations in Saskatchewan whose interests will be specially affected by the outcome of this appeal. It also claims expertise in the subject matters of the appeal. The FSIN's mandate is to enhance, protect and promote treaty and inherent rights of its member First Nations, and under its land and resource portfolio, the FSIN runs the Indian rights and treaties research program responsible for researching, preparing and submitting specific claims on behalf of Saskatchewan First Nations. FSIN points to this research work as an indication of the expertise that it has developed in a number of the issues facing this Court. As a result, FSIN proposes to make submissions as an intervener in support of the appellants on certain of those issues.

[5] A two-step approach is commonly used to determine an intervener application. The Court typically first considers the subject matter of the proceeding and second, determines the proposed intervener's interest in that subject matter. It is clear from reviewing the appellants' factum that there are three main issues on the appeal:

1. The tests for striking pleadings and summary judgment and, in particular, whether summary judgment is appropriate for resolution of complex evidentiary and novel legal issues based on aboriginal and treaty rights.

2. Whether the appellants lack standing to assert claims based on aboriginal and treaty rights because they are not a band. This, in turn, involves a number of potential issues including treaty rights under Treaty 6 and constitutional protection of treaty and aboriginal rights under s. 35(1) of the *Constitution Act, 1982*.

3. To what extent, if any, provincial limitation periods can be invoked to extinguish aboriginal or treaty rights.

[6] In cases involving constitutional issues or which have a constitutional dimension to them, courts are generally more lenient in granting intervener status: *R. v. Trang*, [2002] 8 W.W.R. 755, 2002 ABQB 185 and *Alberta Sports & Recreation Assn. for the Blind v. Edmonton (City)*, [1994] 2 W.W.R. 659 (Alta. Q.B.). Similarly, appellate courts are more willing to consider intervener applications than courts of first instance. As noted by Hugessen J. in *First Nations of Saskatchewan v. Canada (A-G)*, 2002 FCT 1001 (T.D.):

> . . . [T]he test for allowing intervener standing for argument at the appellate level is necessarily different from that which is used at trial; trials must remain manageable and the parties must be able to define the issues and the evidence on which they will be decided. An appellate court on the other hand deals with a pre-established record that is not normally subject to change. And an appellate court, while benefiting from the different viewpoints expressed by interveners, is far better equipped to limit and control the length and nature of their interventions.

[7] In this case, in assessing the subject matter of the issues in dispute, we see two key issues on which it can be argued that the FSIN should be permitted to intervene. The first relates to whether provincial limitation periods can oust the protection afforded under s. 35(1) of the *Constitution Act, 1982* including whether other constitutional issues are therefore engaged. The second involves the issue of standing, that is whether the appellants have the standing to pursue their claim.

[8] The next step is to consider the FSIN's interest in the subject matter, which should be more than simply jurisprudential.

[9] In constitutional cases, if an applicant can show its interests will be affected by the outcome of the litigation, intervener status should be granted: *Law Society of Upper Canada v. Skapinker* (1984), 9 D.L.R. (4th) 161 (S.C.C.). Or, as already noted, if the intervener applicant possesses some expertise which might be of assistance to the court in resolving the issues before it, that too will do. As explained by Brian Crane in *Practice and Advocacy in the Supreme Court*, (British Columbia Continuing Legal Education Seminar, 1983), at p. 1.1.05, and approved by the Supreme Court of Canada in *Reference Re Workers' Compensation Act, 1983 (Nfld)*, [1989] 2 S.C.R. 335 at 340:

> an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important constitutional or public issue.

[10] In our view, for purposes of the subject appeal, the FSIN possesses some special expertise and insight that will assist this Court in determining the outcome of the appeal on certain issues. Having concluded that this is so, it is not necessary to consider whether some or all of FSIN's membership may be affected by the appeal. The test for intervention has been met.

[11] We are equally satisfied however that the grounds on which the FSIN should be permitted to intervene should properly be limited to the two key issues we have identified. Therefore, we grant intervener status to the FSIN.

[12] Dealing first with the limitations issue, the FSIN is permitted to file a factum and make oral submissions on provincial statutes of limitation and their relationship or application to treaty and aboriginal rights in light of treaty interpretation and s. 35(1) of the *Constitution Act, 1982*. With respect to the standing issue, the FSIN is permitted to file a factum and make oral submissions on whether the appellants have standing to pursue the subject claims. This includes addressing the status of First Nations not recognized as such whether because of alleged surrender of treaty rights or claimed amalgamations with other First Nations or otherwise.

(Discussion as to when factums are to be filed)

[13] The FSIN factums will be filed and served by the end of the day on October 31, 2005. The reply factums from each of Canada and Alberta are to be filed and served by the end of the day on November 23, 2005.

(Discussion as to costs)

[14] We order that each party and the intervener bear its own costs.

Appeal heard on September 22, 2005

Memorandum filed at Edmonton, Alberta
this 30th day of September, 2005

Fraser, C.J.A.

Appearances:

J. Tannahill-Marcano
for the Respondents (Rose Lameman et al.)

M.E. Annich
for the Respondent (Attorney General of Canada)

S. Latimer
for the Respondent (Canada)

D.N. Kruk
for the Respondent (Alberta)

M.J. Ouellette
for the Applicant Proposed Intervener (Federation of Saskatchewan Indian Nations)

TAB 7

In the Court of Appeal of Alberta

Citation: Edmonton (City) v Edmonton (Subdivision and Development Appeal Board), 2014 ABCA 340

Date: 20141020
Docket: 1403-0130-AC
Registry: Edmonton

Between:

City of Edmonton

Respondent

- and -

City of Edmonton (Subdivision and Development Appeal Board)

Respondent

- and –

HV Nine Ltd.

Respondent

- and -

Urban Development Institute

Applicant

Corrected judgment: A corrigendum was issued on October 28, 2014; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision of
The Honourable Mr. Justice Thomas W. Wakeling

Application for Permission to Intervene

Reasons for Decision of
The Honourable Mr. Justice Thomas W. Wakeling

I. Introduction

[1] The Urban Development Institute – Edmonton Region[1] seeks intervenor status[2] in an appeal brought by the City of Edmonton[3] against a decision of the Subdivision and Development Appeal Board for the City of Edmonton.[4] At issue in the appeal is the validity of a Board decision to delete a condition attached to a subdivision permit granted to HV Nine Ltd. by the subdivision authority. The outcome of the appeal will affect the funding model for future light rail transit expansion through undeveloped land in Edmonton. The City, residents of Edmonton and developers will be directly affected by the disposition of this appeal.

II. Questions Presented

[2] Has the Institute demonstrated that it will be directly and significantly affected by the outcome of the appeal or that it has some special expertise or perspective which will be of assistance to the Court hearing the appeal?

III. Brief Answers

[3] The developer members of the Institute will be directly and significantly affected by the outcome of this appeal. Its members are responsible for the development of most of the raw land in Edmonton. This is a direct and significant interest which justifies granting the applicant intervenor status. As well, the Institute has a special expertise or perspective which will assist the Court with its deliberations.

---

[1] Referred to in this decision as the "Institute".

[2] Rule 14.58(1) of the *Alberta Rules of Court*, Alta. Reg. 124/2010, as amended by the *Alberta Rules of Court Amendment Regulation, 2014*, Alta. Reg. 41/2014 provides that "a single appeal judge may grant status to a person to intervene in an appeal, subject to any terms and conditions and with the rights and privileges specified by the judge". Rules 14.26(3) and 14.58(2) and (3) refer to the person granted leave to intervene as the "intervenor". Before September 1, 2014, the date the *Alberta Rules of Court Amendment Regulation, 2014* came into force, Alberta courts generally referred to this person as an "intervener". E.g., *Telus Communications Inc. v. Telecommunications Workers Union*, 401 A.R. 57, 59 (C.A. 2006). So does r. 59(2) of the *Rules of the Supreme Court of Canada*, SOR/2002-156.

[3] Referred to in this decision generally as the "City".

[4] Referred to in this decision as the "Board".

[4] Permission to intervene is granted.[5]

IV. Statement of Facts

[5] The question before the Court of Appeal is whether the Board acted lawfully in deleting a condition imposed by the City's subdivision authority in a subdivision permit granted to HV Nine Ltd. requiring HV Nine Ltd., at its cost, to provide the City with an LRT corridor through the proposed subdivision.

[6] In granting the City leave to appeal, I noted that "[t]he answer to this question is of importance to the City, the residents of Edmonton and developers. The diversity of the interests affected and the effect a cost-distribution methodology will have on all these interests leads to the conclusion that the legal question is of sufficient importance to merit appellate review". 2014 ABCA 337, ¶17.

[7] The chair of the Institute, in a July 18, 2014 affidavit, explained why it wished to participate in the appeal if this Court granted the City leave to appeal:

> 4. In accordance with its objectives, UDI has acted as the coordinating and liaison body between its members and ... the City of Edmonton ... regarding various issues relating to subdivision, development and servicing of land within the City.
>
> 5. UDI has 186 members of whom 41 are developers. It is my belief ..., that on average, over the past 5 years, between 85 to 95% of raw land servicing in the City is carried out by UDI developer members.
>
> 6. The decision from which the City is seeking leave dealt with whether the City could impose a requirement to dedicate land for an LRT station and LRT lines without compensation as a condition of a specific subdivision approval. While the decision appears to be fact based, the grounds on which leave is sought are framed more broadly. Therefore, if the Court is inclined to consider the broader issues raised by the grounds of appeal (as opposed to strictly dealing with the case on its facts), then the grounds raised in the Notice of Motion will have implications for development in the City in general, which in turn will directly impact on UDI developer members.

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[5] The City, HV Nine Ltd. and the Institute asked the Court to make its decision based on the Court's review of filed written material.

7. Further, UDI has a different perspective regarding the grounds on which leave is sought than the specific development in this case. My expectation is that the developer's focus will be directed at the specific facts of this case. On the other hand, UDI has a broader perspective as it is concerned with potential implications of this case on development in the City in general and not solely with the specific facts of this case.

V. Analysis

A. The Court May Grant Intervenor Status to an Applicant Whose Participation Will Assist the Court in Its Deliberations

[8] My review of the case law on intervention leads me to conclude that the following proposition is sound:

> A single appeal judge may[6] grant permission to intervene in an appeal if satisfied that the applicant
>
> (a) will be directly and significantly affected[7] by the outcome of the appeal or

[6] This is a discretionary decision. See *Reference re Workers' Compensation Act*, [1989] 2 S.C.R. 335, 339 ("Rule 18 [of the Rules of the Supreme Court of Canada] gives this Court a wide discretion in deciding whether to allow a person to intervene as well as the discretion to determine the terms and conditions of the intervention"); *Norcan Ltd. v. Lebrock*, [1969] S.C.R. 665, 666 ("any interest is sufficient to support an application under ... [rule 60] subject always to the exercise of discretion") & *The Queen v. Neve*, 184 A.R. 359, 363 (C.A. 1996) ("intervenor status is discretionary, and ought to be exercised sparingly").

(b) has special expertise or perspective[8] relating to the subject matter of the appeal[9] that will assist the Court in its deliberations.[10]

[9] The Supreme Court of Canada has declared that the "purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a

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[7] *Winner v. S.M.T. (Eastern) Ltd.,* [1951] S.C.R. 887 (the Court accorded intervenor status to Canadian National Railway Co. and Canadian Pacific Railway in a case determining whether a provincial regulation applied to interprovincial or international undertakings); *Lockerbie & Hole Industrial Inc. v. Alberta,* 2010 ABCA 184, ¶¶8-9 (the Court granted intervenor status to the Construction Owners Association of Alberta and Construction Labour Relations-an Alberta Association because their members would be significantly affected if Syncrude was adjudged to be an employer of a contractor's employees); *Chiasson v. Kellogg Brown & Root (Canada) Co.,* 2007 ABCA 175, ¶4 (the Court granted intervenor status to Syncrude Canada Ltd., Suncor Energy Inc., Imperial Oil Ltd. and Nexon Inc. and others in a case determining whether pre-employment drug testing contravened the *Human Rights and Citizenship and Multiculturalism Act*); *The Queen v. Big M. Drug Mart Ltd.,* 5 D.L.R. (4th) 121, 125 (Alta. C.A. 1983) (the Court granted intervenor status in the Sunday-closing case to the Seventh Day Adventist Church in Canada, whose members celebrate the Sabbath on Saturday, and London Drugs Ltd., a business charged with contravening the *Lord's Day Act)*; *United Transportation Union v. B.C. Rail Ltd.*, 45 C.P.C. 2d 33, 37 (B.C.C.A. 1990) (the Court granted an organization representing businesses which were adversely affected by a railway workers' strike intervenor status); *Iron v. Saskatchewan*, [1993] 3 W.W.R. 309 (Sask. Q.B. 1992) (the Court granted intervenor status to a company whose pulp supply would be adversely affected if the Court granted a judicial review applicant the requested relief) & *Temagami Wilderness Society v. Ontario*, 33 O.A.C. 356, 357 (Div. Ct. 1989) (the Court granted intervenor status to two lumber companies and a local industry association because the applicants "have established ... that the economic viability of their lumber operations in the area to be served by the road in question may be adversely affected by the ruling of this court").

[8] *MacMillan Bloedel Ltd. v. Mullin*, 50 C.P.C. 298, 301 (B.C.C.A. 1985) (the Court granted intervenor status to Indian Tribunal Councils and the Union of B.C. Indian Chiefs so that they could, from their special perspective, address "[t]he issue whether aboriginal rights existed and whether, if they did, they were extinguished").

[9] Regardless of the directness and significance of the impact the court's determination may have on the applicant or the special expertise or perspective the applicant may have, if the court concludes that the applicant cannot provide enough or any assistance, it will dismiss an intervenor application. *Royal Canadian Legion Norwood (Alberta) Branch v. City of Edmonton*, 141 A.R. 290, 290 (C.A. 1993) (the Court denied intervenor status to the Alberta Urban Municipalities Association because the Court was satisfied that the City would present all sound arguments on a narrow statutory construction point) & *Mohr v. Scoffield*, 80 Alta. L.R. 2d 97, 97 (C.A. 1991) (the Court denied intervenor status to the Canadian Paraplegic Association Alberta because the appeal may be disposed of for reasons which would make it unnecessary to address the constitutional issue the applicant wished to address).

[10] *Telus Communications Inc. v. Telecommunications Workers Union,* 401 A.R. 57, 59 (C.A. 2006) ("As a general principle, an intervention may be allowed when the proposed intervener is specially affected by the decision facing the court, or the proposed intervener has some special expertise or insight to bring to bear on the issues facing the court").

non-party who has a special interest or particular expertise in the subject matter of the appeal".[11] As Justice Major stated, "The implied promise of the intervener is that intervention will be useful and different from the submission of the appellant and respondent". "Interveners and the Supreme Court of Canada", May 1999 National 27. An applicant who can enhance the Court's understanding of the competing interests is an excellent candidate for intervenor status.

[10] A court must be reluctant to decline assistance from an organization whose members are major participants in a business or other sector that will be directly affected by the Court's decision and would be in a position to address the implications of different potential solutions.[12] At the same time, a court must not be oblivious to the fact that an intervenor most likely will increase the private and public costs of the litigation.[13] A balanced assessment of these conflicting values is required.

B. The Applicant's Interests Will Be Directly and Specially Affected by the Outcome of This Appeal

[11] In granting the City of Edmonton leave to appeal the Court expressly acknowledged the impact the LRT funding model would have on developers who carry on business in Edmonton. 2014 ABCA 337, ¶17.

[12] The developer members of the Institute will be directly and significantly affected by the outcome of this appeal. Their commercial interests are at stake. What portion of the infrastructure costs associated with the LRT corridor are to be borne by developers affects the profitability of their businesses. The unchallenged affidavit evidence of the applicant's chair is that the developer members of the Institute have been responsible over the last five years for "between 85 to 90% raw

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[11] *The Queen v. Morgentaler,* [1993] 1 S.C.R. 462, 463. See *The Queen v. Finta,* [1993] 1 S.C.R. 1138, 1143 ("these applicants each have distinctive contributions to make in the area of international law theory, comparative law, the Nuremberg principles, and the criminal justice obligations and position of Canada vis-à-vis the victims of war crimes"); *Canadian Council of Churches v. The Queen,* [1992] 1 S.C.R. 236, 256 ("The views and submissions of interveners on issues of public importance frequently provide great assistance to the courts"); *Reference re Workers' Compensation Act, 1983 (Nfld),* [1989] 2 S.C.R. 335, 340 ("an intervention is welcomed if the intervener will provide the Court with fresh information or a fresh perspective on an important … public issue") & *The Queen v. Neve*, 184 A.R. 359, 366 (C.A. 1996) ("The essential question is whether, bearing in mind the appellant's interest and expertise, the applicant will be a hindrance or a help to the Court in deciding the issue").

[12] *Alberta v. Kellogg Brown & Root (Canada) Co.*, 2007 ABCA 175, ¶¶5 &6 (the Court awarded intervenor status to substantial mining companies and a business association so that they could contribute to the Court's understanding of the impact pre-employment drug testing has on their workplaces) & *Adler v. Ontario*, 8 O.R. 3d 200 (Ont. Div. Ct. 1992) (the Court granted intervenor status to the Toronto School Board and the Ontario Public School Boards Association in an action considering the right of Jewish schools to state support).

[13] Counsel must prepare and review additional material. The parties to the appeal and the intervenor must absorb these extra costs. The judges must read this work product. Oral presentations may take more court time. *Adler v. Ontario,* 8 O.R. 3d 200, 205 (Div. Ct. 1992) & *MacMillan Bloedel Ltd. v. Mullin*, 50 C.P.C. 298, 301 (B.C.C.A. 1985).

land servicing in the City". In addition, the Institute's chair deposed that "UDI ... is concerned with potential implications of this case on development in the City in general". That the Institute's connection to this issue is through its developer members does not diminish the effect the outcome of the appeal will have on it.[14] It represents its members' interests.

[13] The applicant's interests will be directly and significantly affected by the outcome of this appeal. A person whose commercial interests are engaged is motivated to marshal and present the best arguments on the questions before the Court.

C. The Applicant Offers Special Insight and Perspective Which Will Assist the Court in Its Deliberations

[14] The Institute will be in a position to offer special insight and perspective which will assist the Court in its deliberations. Its members are major players in the development business in Edmonton. They are ideally situated to assist the Court appreciate the consequences of any potential outcome. The Court benefits from the participation of an organization whose members have special expertise in the subject matter of an appeal. This is particularly so if the issue is an unsettled question of law[15] the answer to which may have unanticipated consequences.

[15] This is a second reason to grant the Institute permission to intervene.

[16] The extra costs associated with granting the Institute intervenor status do not exceed the benefits hearing from the Institute in this important case represents to the adjudication process.

VI. Conclusion

[14] *Lockerbie & Hole Industrial Inc. v. Alberta,* 2010 ABCA 184, ¶¶8 & 9 (the Court expressly relied on an affidavit filed by the applicants which stated that "a finding that Syncrude is an employer under ... the Alberta Human Rights Act [of workers who are not its employees under any other enactment] raises the question whether CLR members who serve as prime contractors and prime subcontractors on industrial construction projects may be employers under the Alberta Human Rights Act of unionized construction workers who are not their employees under the Labour Relations Code"); *Alberta v. Kellogg Brown & Root (Canada) Co.*, 2007 ABCA 175, ¶¶5 & 6 & *United Transportation Union v. B.C. Rail Ltd.,* 45 C.P.C. 2d 33, 37 (B.C.C.A. 1990) ("the members of the [Business] Council [of British Columbia who have 250,000 employees] dependent upon a public carrier surely have a direct interest in quick resolution of industrial relation disputes involving that public carrier").

[15] *Telus Communications Inc. v. Telecommunications Workers Union,* 401 A.R. 57, 59 (C.A. 2006) (one of the Court's reasons for denying intervenor status to Syncrude Canada Ltd. and Canadian National Railway may have been the Court's opinion that the "law is reasonably well settled").

[17] The Institute has permission to intervene in this appeal. It must bear its own costs of this application.[16]

[18] Pursuant to rule 14.26(2)(b) of the *Alberta Rules of Court*, Alta. Reg., 124/2010 as amended, the intervenor may file a factum up to thirty pages in length. Its factum must not contain arguments that are substantially the same as those made by HV Nine Ltd. To ensure that the Institute's factum does not contain arguments substantially the same as those made by HV Nine Ltd. – a duplication which would not assist the Court,[17] the Institute may file its factum up to two business days after the factum of HV Nine Ltd. is due.

[19] The intervenor is entitled to make an oral submission up to thirty minutes in length after the respondents have made their oral presentations unless the panel hearing the appeal directs otherwise.

[20] I leave the question of costs on appeal to the panel that hears the appeal.[18]

Application heard on October 7, 2014

Reasons filed at Edmonton, Alberta
this 20th day of October, 2014

"Wakeling J.A."

Wakeling J.A.

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[16] *Reference re Workers' Compensation Act*, [1989] 2 S.C.R. 335, 341; *Yellowknife Public Denominational District Education Authority v. Northwest Territories*, [2008] 4 W.W.R. 234, 240 (N.W.T.C.A.); *Alberta v. Kellogg, Brown & Root (Canada) Co.*, 2007 ABCA 175, ¶7; *Knox v. Conservative Party of Canada*, 404 A.R. 383, 389 (C.A. 2007); *Lameman v. Canada*, 380 A.R. 301, 305 (C.A. 2005) & *Iron v. Saskatchewan,* [1993] 3 W.W.R. 308, 313 (Sask. Q.B. 1992) (the successful applicants for intervenor status were ordered to bear their own costs).

[17] *Canadian Labour Congress v. Bhindi*, 61 B.C.L.R. 85, 87 (C.A. 1985) ("It is undesirable that an applicant be permitted to intervene if he will do no more than echo the evidence and submissions of others who are already parties").

[18] *Norcan Ltd. v. Lebrock,* [1969] S.C.R. 665, 667 & *Lockerbie & Hole Industrial Inc. v. Alberta*, 2010 ABCA 184, ¶11 (the Court resolving the merits of the appeal is in the best position to address costs).

Appearances:

M.S. Gunther
for the Respondent City of Edmonton

P.A.L. Smith, Q.C. (no appearance)
for the Respondent City of Edmonton (Subdivision and Development Appeal Board)

F.A. Laux, Q.C
for Respondent HV Nine Ltd.

J.A. Agrios, Q.C.
for the Applicant

Corrigendum of the Reasons for Decision of
The Honourable Mr. Justice Thomas W. Wakeling

Paragraph [15] has been corrected to read:

> This is a second reason to grant the Institute permission to intervene.

TAB 8

United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City of), 2002 ABCA 243

Date: 20021017
Docket: 98-17693

IN THE COURT OF APPEAL OF ALBERTA

TRANSCRIPT OF ORAL REASONS
FOR DECISION OF THE HONOURABLE
MADAM JUSTICE CONRAD
DELIVERED SEPTEMBER 20, 2002

BETWEEN:

THE UNITED TAXI DRIVERS' FELLOWSHIP OF SOUTHERN ALBERTA, RASHPAL SINGH GOSAL, HARINGER SINGH DHESI, CHARAN KAMAL SINGH GILL, AERO CAB LTD., GOLDEN CABS INC., SUPERIOR CABS LTD., SUPREME CABS LTD. AND AIR LINKER CAB LTD.

RESPONDENTS
(APPELLANTS)

- and -

THE CITY OF CALGARY

APPLICANT
(RESPONDENT)

CHECKER CABS LTD., YELLOW CAB LIMITED, MAYFAIR TAXI LTD., ALBERTA SOUTH CO-OP TAXI LINE LTD., AND CALGARY TAXI DRIVER ASSOCIATION

INTERVENORS

APPLICATION TO STAY DECISION OF THE COURT OF APPEAL
DATED MAY 29, 2002

E. Fielding
On own behalf

COUNSEL:

R. C. STEELE
For United Taxi Drivers, Gosal and Dhesi

T.B BARDSLEY
For Calgary Taxi Driver Association

G.I. ZINNER
For Aero and Air Linker

L.J. GOSSELIN AND S. SWINN
For the City of Calgary

R.J. Wilkins, Q.C.
For Checker Cabs Ltd. et al.

CONRAD J.A.:

[1] The City of Calgary applies to stay the judgment of the Alberta Court of Appeal in ***United Taxi Drivers' Fellowship of Southern Alberta*** **v.** ***Calgary (City of),*** 2002 ABCA 131, 29 May 2002, pending its application for leave to appeal to the Supreme Court of Canada until determination of the appeal and, if the appeal is not successful, for a stay for a period of 90 days after the Supreme Court decision.

[2] Applications for intervenor status were sought by Elizabeth Fielding, representing the Independent Taxi Drivers' group in opposition to the stay, and by the Calgary Cab Drivers Society in support of the City's request for a stay. I was satisfied that all intervenor applicants had an interest in the outcome of the proceedings and that their interests may not be fully protected or argued by the appellants and respondents and I granted intervenor status.

[3] In ***United Taxi Drivers***, this court declared s. 7(1), parts of s. 9.1 and s. 9.2 of the City of Calgary Taxi Business Bylaw, No. 91/77 as *ultra vires* the City of Calgary under the *Municipal Government Act,* R.S.A. 2000, c. M-26 (formerly S.A. 1994, c. M-26.1 ("the *MGA*"). The effect of the Court of Appeal judgment is to remove the restriction on issuing taxi plate licences ("TPLs"), which would change the current system from a limited plate system to an open or modified open system without limitations on the number of plates issued. The City was granted an extension of time, as the court concluded that severance of the impugned sections was not a satisfactory remedy. It suspended its declaration of invalidity until October 1, 2002, to allow the City an opportunity to deal with the bylaw.

[4] The respondents request that the application be denied, or, alternatively, that an order directing the City to issue temporary TPLs to all individuals with proof of ownership of taxis and valid taxi driver licences pending the application for leave.

The History

[5] The background to this application is set out in this court's judgment, and I do not propose to repeat all of the facts.

The Law

[6] The parties agree that the test for granting a stay of proceedings is the tripartite test set out in ***American Cyanamid Co.*** **v.** ***Ethicon Ltd.***, [1975] A.C. 396 (P.C.), and approved in both ***Manitoba (Attorney General)*** **v.** ***Metropolitan Stores (MTS) Ltd.***, [1987] 1 S.C.R. 110, and ***RJR-Macdonald Inc.*** **v.** ***Canada (Attorney General)*** (1994), 111 D.L.R. (4th) 385 (S.C.C.). The test requires an application for a stay to demonstrate that:

(1) there is a "serious issue" to be tried;
(2) the applicant will suffer irreparable harm if the stay is not granted; and
(3) the balance of convenience favours the applicant.

[7] The City concedes that the subject matter of the appeal raises a serious question to be

tried and that the first part of the tripartite test is met. The real issue revolves around irreparable harm and, to a lesser extent, the balance of convenience.

[8] The Supreme Court of Canada dealt with the issue of irreparable harm in ***RJR-Macdonald,*** *supra,* (at 405) noting that "'[i]rreparable' [harm] refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."

1. Irreparable Harm

[9] On the issue of irreparable harm, the City takes the position that it will suffer irreparable harm in the form of financial expenditures, financial loss and safety concerns. Considering the reasons for judgment, the City argues that when this bylaw was originally passed (in substantially its present form), it was properly authorized by the legislation then in place. As a result, says the City, the existing scheme was determined by a duly elected council to be for the public good. In its view, irreparable harm will be sustained where a bylaw, passed for the public good, does not continue until the issue is finally determined. The presumption is that the bylaw is for the public good and therefore that should weigh high on the scales in favour of finding irreparable harm.

[10] In that regard, it relies in part on ***RJR-Macdonald*** where the Supreme Court stated (at 411):

> We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

[11] The City's real concern stems from the impact it says this decision will have on a municipality's law making ability under the current *MGA.* It argues that this decision could potentially impact its ability to make bylaws under ss. 7, 8, and 9 of the *MGA.*

[12] To support its argument that the public interest can in some circumstances be considered at the irreparable harm stage, the City relies on ***RJR-Macdonald,*** as well as the recent decision of ***Harper* v. *Canada (Attorney General)***, [2000] 2 S.C.R. 764.

[13] The City also submits that it will be required to deregulate and move to either an open or loosely controlled entry system. It relies on a study conducted by KPMG as support for its proposition that it will suffer irreparable harm if forced to change its system before the final outcome of the appeal. It says that the KPMG report supports a finding that change from one

system to another is fraught with turmoil and disruption, creating complex problems that are difficult to assess in advance. Moreover, it argues that there will be considerable financial expenditures, financial loss and safety concerns. The City will have to hire and train new staff, with the difficulties incumbent on evaluating the damage to new employees should the appeal succeed and employees terminated. In addition, a changed system could result in further court proceedings.

[14] While not strictly speaking a public interest, the City notes that a controlled entry, or open entry system would have the effect of immediately rendering the "investment" made by some in the taxi industry in regard to TPLs valueless, resulting in losses as high as $85,000.00. That argument is repeated and emphasized by the intervenors. In addition, it is difficult to assess with any accuracy the impact on persons who set up business, should the City win on appeal. Potentially thousands of citizens obtaining TPLs in the interim may be left with nothing but financial loss, and no TPL, if the appeal is successful.

[15] Finally, the City points to the turmoil likely to occur in this already volatile industry. That, in itself, may create results that are difficult, if not impossible, to assess. In summary, the City argues that there is sufficient evidence to support a finding of irreparable harm, including harm to the travelling public as a result of the turmoil created by change and the irreparable harm by way of financial loss to members of the taxi industry should they lose their businesses in the interim and then have no means of recourse for the damages resulting.

[16] The respondents argue that there is no evidence that the public interest, in the form of public safety, access to taxi service, or price of taxi fares will suffer if the stay application is denied. They suggest that the City is not prevented from maintaining its existing standards in relation to vehicles or driver qualification simply because the restriction on issuing licence plates is removed. They draw an analogy to the recent introduction of an open entry system for the limousine industry in which they say there was "no disruption to the public" and in which, although there may have been some initial confusion from an influx of applications and staff having to answer questions of some ill-informed applicants, there was nothing in the nature of irreparable harm suffered by the City in issuing 1400 limousine licences. Moreover, only about 200 limousines remain on the road, which the respondents state, indicate that the roads will not be flooded with taxicabs.

[17] In regard to the costs associated with issuing new TPLs, the respondents submit that irreparable harm will not occur in the form of wasted expense should the appeal succeed, because the City has already acquired a supply of 3000 TPLs in anticipation of the judgment being enforced. In essence, the respondents say that any potential confusion the City may face does not amount to irreparable harm, as it is defined by law. Arguing that irreparable harm must amount to harm that cannot be reversed as well as serious and grievous prejudice, rather than administrative inconvenience, they say that the City has not met its burden.

[18] Regarding the harm facing current TPL owners, the respondents point out that the ultimate position of TPL holders will not be affected whether the stay is granted or not. If the

City is successful on its appeal, the value of the TPLs will be restored and preserved intact. If, on the other hand, the City is unsuccessful in its appeal, the judicial decision will render the TPLs worthless and there will be no basis on which the TPL holders will then be able to argue that they suffered irreparable harm. Moreover, the value of the TPLs currently existing is wholly irrelevant to this litigation and amount to nothing more than market speculation.

Decision

[19] The Supreme Court of Canada in the recent decision of ***Harper***, *supra*, dealt with an injunction in constitutional proceedings. It held that dealing with the questions of public interest, albeit in respect to balance of convenience in that case, noted (at para. 9):

> The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

[20] The respondents say that ***Harper*** can be distinguished from this case. I need not decide that issue as I have difficulty finding that the public interest is definitive on the facts of this case for another reason. That is because the City readily admitted that it did not enforce its own bylaw. As a result, the scheme in place prior to the judgment was not working in the manner contemplated by the supporting bylaws. Moreover, it does not anticipate enforcing its own bylaw until the end of this litigation. This non-enforcement has given rise to some of the problems emerging in the taxi industry in Calgary.

[21] Under the bylaw, holders of TLPs are prohibited from subleasing for a charge. Yet the City has not enforced that portion of the bylaw. This resulted in a dramatic increase in the value of the plates, with the number of plates being available to individual drivers being substantially reduced from that contemplated by the *MGA*. Moreover, the failure to enforce the restriction on sub-leasing for a fee has, no doubt contributed to the concentration of the limited number of plates in the hands of a few. Rather than a holder or his family using the licence, the holder can sub-lease to others for a charge without fear of repercussions. For instance, out of less than 1400 plates issued over 500 are concentrated in the hands of one broker.

[22] Where, as a result of a lack of enforcement, a licencing scheme is not operating in accordance with its own terms in a material way, it is difficult to accept the public good argument on a stay application. The plan as operating is not the plan that the duly elected representatives had passed for the public good, and the City acknowledged that it would not change during the interim.

[23] I note in passing that the City advises that it intends to enforce these provisions of the bylaw, should it remain intact. But at the present time there is an agreement in place with the respondents (the Fellowship) not to enforce the bylaw during this litigation. Were this enforced, without any ability to purchase licences, the respondents would not even have the ability to sublease. Thus, my comments are not to attack the propriety of the City's actions. I merely find that where it is conceded that the legislation is not operating, and will not be operating in the short term in accordance with material terms, it is difficult to place much weight on the City's public good argument as satisfying the requirement for irreparable harm. I also agree with the respondents that there is very little evidence as to the exact nature of any irreparable harm resulting from a stay. Many of the complaints about financial cost can be remedied.

[24] When I view all of the evidence, however, I am satisfied that the City has met its onus of proving irreparable harm. The KPMG report does support its argument that change results in chaos and the damages that could result should I fail to issue a stay would be difficult, if not impossible, to assess. They are irreparable by their very nature.

[25] In addition, I am satisfied that the current TLP holders could suffer irreparable harm if the stay is not granted. I accept that the value of the plates may currently be damaged by the cloud cast by the current court decision. Nonetheless, I am satisfied that some of the current large TPL holders could suffer irreparable harm to their businesses should the stay not be granted. A sudden influx of licences could easily lead to significant loss of drivers and customers, and eviscerate their operations. Yet, even if successful on appeal, they could be without recourse. The current brokers and owners have a stake in this decision, and I am satisfied they may well sustain irreparable damage that will not be compensable should this court's decision be reversed on appeal.

[26] Finally, there is an issue about the impact of the decision on many of the City's bylaws passed under the current ss.7, 8, and 9 of the ***MGA***. It is difficult to assess the impact of the court's decision at this time.

[27] On the whole of the evidence, including the study attached to the affidavit, and the potential losses to those who currently own and manage taxicabs, I am satisfied that the onus of establishing that irreparable harm will occur if I do not issue this injunction has been met.

2. Balance of Convenience

[28] Finally, the balance of convenience clearly favours the stay. For many of the same reasons noted above, the balance favours granting the stay. A stay will avoid the considerable disruption resulting immediately changing from one system to another, followed by yet another disruption should the appeal fail and the system change yet again. In addition, a decision that favours preserving the integrity of bylaws passed under ss. 7, 8, and 9 until this matter has been finally determined favours the stay.

[29] Moreover, this case has not proceeded with dispatch. The trial judge and the appellate court commented about the applicant's delay. A refusal to grant will, in my view, cause the City and the intervenors considerably more inconvenience than a refusal will cause the respondents. The inconvenience of implementing a wholesale change in short order, which may have to change again should the appeal succeed, favours a stay.

[30] I grant the City's application and direct a stay until such time as the Supreme Court has heard and ruled on the application for leave to appeal. I grant this stay on the understanding that the City will move expeditiously with all steps required by the leave to appeal process. In that regard, I am willing to entertain any applications with respect to time limits this court could impose if the parties feel those are appropriate.

[31] The City has also asked for a 90 days relief period following a refusal of leave - is that correct? Why do you need 90 days? You have already had from May until October, and there will be a further period of several months until the application is heard. When will you be ready to go?

(DISCUSSION AS TO TIME LIMITS)

CONRAD J.A.:

[32] I am prepared to grant some time but I am going to make it very short. In my view, this court addressed the issue of how long preparation for a new system would take. It set from the date of issuance of this judgment in May until October 1st as sufficient time. I am only prepared to allow sufficient time to bring the matter before Council. I will grant a two-week stay from the date that the Supreme Court refuses the application if that is what occurs. I do so because I think it is important that the parties continue to work on a reasonable solution to the taxi problem facing them. I believe a short time limit will encourage all parties to meet and the City to move with dispatch to find a solution to this problem.

[33] In closing, may I extend my appreciation to the parties for their excellent briefs and oral argument. They helped considerably in making this difficult decision.

APPLICATION HEARD on September 20, 2002

TRANSCRIBED at Calgary, Alberta
this 17th day of October, 2002

CONRAD J.A.

TAB 9

Court of Queen's Bench of Alberta

Citation: Suncor Energy Inc v Unifor (Local 707 A), 2014 ABQB 555

Date: 20140908
Docket: 1401 03831
Registry: Calgary

Between:

Suncor Energy Inc.

Applicant

- and -

Unifor, Local 707 A

Respondent

Reasons for Judgment of the
Honourable Chief Justice
Neil Wittmann

Introduction

[1] Unifor, Local 707 A ("the Union") and Suncor Energy Inc. ("the Employer"), are parties to a policy Grievance Arbitration, [2014] A.G.A.A. No. 6, with respect to the Random Alcohol and Drug Testing Policy ("the Policy") of the Employer. A three member panel decided by a majority that the Policy was an unreasonable exercise of the Employer's management rights and allowed the grievance. The Employer has sought judicial review in this Court and a hearing has been scheduled for October 23rd and 24th, 2014. The Applicants, the Mining Association of Canada ("MAC") and Enform Canada ("Enform") have sought leave to attain intervener status, jointly, in the judicial review application. The Union opposes this Court granting intervener

status to the Applicants. The Employer supports this Court granting intervener status to the Applicants.

Background

[2] The Random Alcohol and Drug Testing Policy Grievance Arbitration to be reviewed consists of 592 paragraphs without appendices. The dissent is 242 paragraphs.

[3] From that decision, it appears that alcohol and drug testing in the workplace takes on many forms including testing post-incident, testing upon reasonable grounds, testing as follow-up post rehabilitation and return to work testing. Collectively, it is common ground that this is "for cause" testing. Random testing is the issue in the Grievance Arbitration. At bottom, the parties seem to agree, supported by case authority, most recently, *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC 34, that the arbitration jurisprudence involves balancing safety in the workplace against privacy concerns. In the Grievance Arbitration, the majority relied heavily on *Irving Pulp & Paper.*

[4] MAC is a non-profit national organization purporting to be the voice of the Canadian mining and mineral processing industry. One of its top priorities is workplace safety. Enform is similarly a not for profit organization which promotes workplace safety in the upstream oil and gas industry. It is comprised of six trade associations representing different aspects of the upstream oil and gas industry. Those six associations are the Canadian Association of Petroleum Producers, the Petroleum Services Association of Canada, the Canadian Association of Oil Well Drilling Contractors, the Canadian Energy Pipeline Association, the Canadian Association of Geophysical Contractors, and the Explorers and Producers Association of Canada.

[5] The Applicants' written brief is replete with the safety objectives of their respective organizations.

[6] There appears to be no dispute that parts of the Union workplace in the oil sands may be classified as dangerous. A description of the activities performed, including the equipment used, its size, the number of incidents or accidents occurring, including deaths, seems to demonstrate danger. As will be briefly seen however, the issue is how dangerous, weighed against the privacy concerns or rights of the individuals who work there, who are members of the Union.

The Test for Intervener Status

[7] Although the *Alberta Rules of Court* ("ARC") in ARC 2.10 provide that a Court may grant status to a person to intervene subject to any terms and conditions and with the rights and privileges specified by the Court, no test is set forth to guide the Court in intervention applications. The common law governs.

[8] None of the parties disputes the test to guide judicial discretion. As set forth in the Applicants' brief, the considerations are as follows:

1. Will the proposed interveners be specially or directly affected by the decision of the Court: *Papaschase Indian Band v Canada (Attorney General)*, 2005 ABCA 320, [2005] AJ No 1273 at paragraph 2; *Knox v. Conservative Party of Canada,* 2007 ABCA 141 at paragraph 5; *Alberta (Minister of Justice) v Metis Settlements Appeals Tribunal,* 2005 ABCA 143 at paragraph 4; *R v Finta,* [1993] 1 SCR 1138 at 1143;

Carbon Development Partnership v Alberta (Energy and Utilities Board), 2007 ABCA 231, [2007] AJ No 727 at paragraph 10.

2. Will the proposed interveners bring special expertise or insight to bear on the issues facing the Court: *Papaschase* at paragraph 2; *Goudreau v Falher Consolidated School District No 69*, 1993 ABCA 72 at paragraph 17. This question is akin to whether an intervener would provide "fresh information or fresh perspective". *Reference Re Workers' Compensation Act, 1983 (Nfld)*, [1989] 2 SCR 335 at 340; *Stewart Estate (Re),* 2014 ABCA 222 at paragraph 7.

3. Are the proposed interveners' interests at risk of not being fully protected or fully argued by one of the parties: *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 202 ABCA 243 at paragraph 2; *Gift Lake Metis Settlement v. Canadian Natural Resources Limited*, 2008 ABCA 391 at paragraph 6; Metis Settlements Appeal Tribunal at paragraph 4.

4. Will the interveners presence "provide the Court with fresh information or a fresh perspective on a constitutional or public issue" *Reference Re Workers' Compensation Act* at 340; *Papaschase* at paragraph 9.

Another factor is whether granting a right to intervene would unduly prejudice a party.

[9] Not surprisingly, although the parties and the proposed interveners agree on the factors articulated above, they disagree on the proper application of them.

Applying the Test

1. Specially or Directly Affected

[10] The Applicants say they are specially affected by the issue before the Court and have a direct material interest in making certain that the safety concerns presented by alcohol and drug use of employees, in high risk or safety sensitive industries, are addressed when determining the legality of random drug and alcohol testing. They reference not only a social and corporate responsibility, but also numerous regulatory statutes. The Applicants make the point that this Court's decision in the Judicial Review application will have a significant precedential effect on subsequent arbitrations and court cases dealing with random testing and therefore a significant impact on the Applicants' industries and interests.

[11] The Union says the Applicants do not have any special or direct interest and point out that it is insufficient for the proposed intervener to be simply "concerned about the effect of a decision" or "its precedential value": *Faculty7 Assn. of the University of British Columbia v University of British Columbia*, 2008 BCCA 376, [2008] BCJ No 1823 at paragraphs 9-10. They state that it must be more than "simply jurisprudential": *Papaschase* at paragraph 8. The Union points out that one arbitration board is not bound by the decision of another, even on a similar issue: *Camp Hill Hospital v Nova Scotia Nurses' Union* (1989), 66 DLR (4^{th}) 711 (NSCA) at 714-715.

[12] On this issue, I accept that the Applicants have a special and direct interest. Their concerns and mandates include workplace safety in a dangerous workplace. The industries they represent and the associations involved include the Employer that will be before the Court, an oil

sands employer. While it may not be enough for an intervener to concern itself with the jurisprudential or precedential effect of a decision which directly affects them, if the implementation of the decision has direct ramifications for the Applicants' members, surely they have a direct and special interest, not necessarily in the specific outcome of the case, but in the proper balancing test that will be applied to determine whether a random alcohol and drug testing is allowed in any Applicants' workplace.

2. Special Expertise / Insight into the Issue

[13] The Applicants refer to MAC being permitted to intervene in a wide range of cases including those involving drug and alcohol testing. Enform, they say, has special expertise or insight with respect to the reasonableness of random drug and alcohol testing as part of broad risk mitigation. The Union says the Applicants have no special expertise, nor any fresh perspective. The Union argues because you say you have it doesn't make it so: *Morrow v Zhang*, 2008 ABCA 192, [2008] AJ No. 543 at paragraph 11. There, the Court stated that the special expertise or unique insight must be articulated so as to demonstrate the special expertise or fresh perspective which was not done in that case.

[14] During oral argument, the Applicants' counsel tendered the Employer's brief for the Judicial Review which was ordered filed by this Court approximately two months in advance of the hearings. The brief was provided to the Court without objection by the Union. It contains 133 pages plus appendices. Counsel for the Applicants referred to the index and indicated the Applicants have no intention of repeating arguments made in the Judicial Review by the Employer but rather wish to argue the broader perspective, from an industry standpoint, as to what *Irwin Pulp & Paper* actually decided in terms of how or what factors ought to be properly considered or weighed in balancing privacy interests against safety interests. The Union says that the only issue before the Judicial Review Court in this case will be whether the decision of the arbitration panel was reasonable. The Applicants, on the other hand, say that is only part of the issue, the other issue is whether the arbitration panel properly interpreted *Irwin Pulp & Paper* and then applied it reasonably. The Applicants say that it is not necessary to demonstrate a culture of substance abuse of drugs or alcohol in the workplace, or that workplace accidents have been caused by drug and alcohol abuse, according to *Irwin Pulp & Paper*. The deterrent effect of random drug and alcohol testing ought to be considered, say the Applicants, and there was evidence that was before the arbitration panel that was not taken into account.

[15] I am of the view that the Applicants will bring a special or fresh perspective to the issue before the Court and that this criterion has been satisfied.

3. Will the Proposed Interveners' Interests Be Fully Protected by the Employer and the Union

[16] The Applicants acknowledge that Suncor is fully invested in the Judicial Review to urge the Court that the grievance arbitration panel decision is unreasonable in light of the evidence presented before it. This criterion significantly overlaps with the concern expressed by the Applicants about the precedential value of the reasoning that this Court may arrive at including its interpretation of *Irving Pulp & Paper*. To the extent that the same concerns are present, the criteria has been satisfied. The Applicants' interests may not be fully protected by Suncor. The

proper application of *Irving Pulp & Paper* in the context of the Grievance Arbitration may engage a broader issue than reasonableness. This criterion is satisfied.

4. Constitutional and Public Interest Importance

[17] During oral argument, counsel for Suncor referenced the "quasi-constitutional" aspect of privacy interests. Counsel for the Applicants indicated, that in his view, there were no constitutional issues present. In the Grievance Arbitration, the majority at para 205, referred to *Irving Pulp & Paper* at para 23 in the context of individual privacy rights in Canada. The specific quote from *Irving Pulp & Paper* references the *Canadian Charter of Rights and Freedoms*, *R v Dyment* [1988] 2 SCR 417 at pp 431-432 and *R v. Soker* 2006 SCC 44. Both cases reference the highly intrusive nature of testing urine, blood or breath, the effect on human dignity and a need for standards and safeguards to meet constitutional requirements. For the purposes of this application, I accept the statement of Suncor's counsel, that the issue before the Judicial Review Court will involve "quasi-constitutional" issues in terms of the nature and importance of the privacy rights of an individual.

[18] With respect to the public interest, counsel for the Applicants stressed that the public has an interest in workplace safety as evidenced in regulatory and other statutes concerning the health and safety of not only workers who may have caused or contributed to workplace incidents or accidents, but also to others who may be affected. This includes other people in the workplace site, as well as health care workers and a vast array of health care and rehabilitation providers. Also involved, especially in an oil sands setting, is the protection of, and public interest in, the environment. Thus, from the constitutional and public interest dimensions, the underlying issue is important.

[19] Two other factors deserve mention in this case. In *Communications, Energy and Paper Workers Union, Local 707 v Suncor Energy Inc* 2012 ABQB 627, Macklin J, of this Court, granted an Interim Injunction prohibiting the Employer from implementing random drug and alcohol testing on the Union's members working in safety sensitive or specific positions. The new Policy was to be implemented October 15, 2012 and notification was given to the Union June 20, 2012. This decision was appealed. On the appeal, MAC was granted intervener status. All counsel were closely questioned as to whether there were Reasons from our Court of Appeal given for the granting of intervener status to MAC in this matter and counsel assured me that none were provided. The Union argued, somewhat aggressively, that the Court of Appeal's decision, found at 2012 ABCA 373 was rendered before the decision of the Supreme Court of Canada in *Irving Pulp & Paper*. Therefore, the Union argues that such intervener status would not have been granted had that case been decided before the Court of Appeal heard the appeal on the Interim Injunction. The Union says because *Irving Pulp & Paper* "settled" the law on the test for random drug and alcohol testing MAC would not have received intervener status.

[20] Finally, the Union argues that it will be severely prejudiced should intervener status be granted to the Applicants. When pressed in oral argument why this was so, the Union said that it would "have to face" the Applicants, as well as the Employer. Ultimately, Counsel for the Union indicated that the prejudice would be in the form of having to deal with an additional brief, additional oral argument, if that was to be granted, and the time and effort necessary to respond to each.

Decision

[21] I am persuaded that the proper exercise of discretion in this matter is to allow the Applicants joint intervener status at the Judicial Review application. The Applicants meet the four criteria set forth above. This Court places particular weight on the constitutional and public interest aspects of the Judicial Review issues. In granting intervener status to the Applicants, their counsel agreed that the written submissions of the Applicant would be no more than 20 pages and that the Applicants would abide by any timelines set by this Court for the submission of their brief, which could be done within one week of this decision if intervener status was allowed. Further, the Applicants accepted that the Judicial Review judge hearing the application could decide whether the Applicants would be permitted to make oral argument, although in their written materials they asked that they be permitted to make oral argument which they expect would not exceed one-half hour. The Union argued that if intervener status was granted, that they be permitted an extension of time from that already set for the response to the Employer's brief, namely approximately September 22nd, 2014, the Employer's brief being filed August 22nd, 2014.

[22] Remembering that the application itself is scheduled for two full days, the Court finds it reasonable to allow oral argument on the part of the interveners not to exceed one-half hour, unless otherwise directed by the Judicial Review judge. Accordingly, there will be an Order granting intervener status to the Applicants, MAC and Enform on the condition that the Applicants file a brief not exceeding 20 pages on or before the close of business, September 22nd, 2014. The Union will have an opportunity to respond to this brief on or before the close of business, October 3rd, 2014. The Applicants may make oral submissions at the Judicial Review hearing, not to exceed one-half hour unless extended by the Judicial Review judge. Finally, in accordance with the submissions, not objected to by either the Employer or the Union, no costs will be awarded to the Applicants on this application or on the Judicial Review application, nor will any costs be awarded against them on the Judicial Review application.

Heard on the 4th day of September, 2014.
Dated at the City of Calgary, Alberta this 8th day of September, 2014.

Neil Wittmann
C.J.C.Q.B.A.

Appearances:

Peter A. Gall, Q.C.
for the Applicants

John Carpenter and Vanessa Cosco
for the Respondent, Unifor

Barbara Johnston, Q.C. and April Kosten
For the Respondent, Suncor