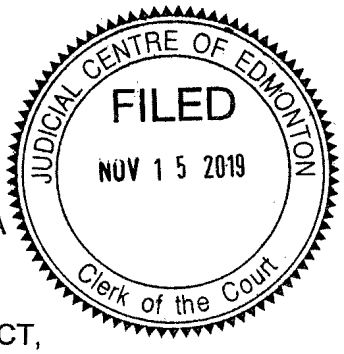

COURT FILE NUMBER	1103 14112
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE TRUSTEE ACT, R.S.A. 2000, c. T-8, AS AMENDED, and IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19 now known as SAWRIDGE FIRST NATION ON APRIL 15, 1985 (the "1985 Sawridge Trust")
APPLICANTS	ROLAND TWINN, MARGARET WARD, TRACEY SCARLETT, EVERETT JUSTIN TWIN AND DAVID MAJESKI, as Trustees for the 1985 Sawridge Trust ("Sawridge Trustees")
DOCUMENT	**BRIEF OF THE INTERVENOR, SAWRIDGE FIRST NATION, ON THE ASSET TRANSFER ISSUE**
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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**Self-Represented Party,
Intervenor on Asset Transfer Issue**

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I. INTRODUCTION

1. This Honourable Court has requested submissions as to the effect of the August 24, 2016 Consent Order approving the transfer of assets from the Sawridge Band Trust (the "1982 Trust") to the Sawridge Band Inter Vivos Settlement (the "1985 Trust") and the terms those upon which those assets are currently held.

2. Based on a review of the applicable evidence and principles of law, Sawridge First Nation ("Sawridge") submits that this Honourable Court should direct that the assets situated in the 1985 Trust remain 1982 Trust property and are held subject to the terms of the 1982 Trust and for the benefit of the beneficiaries as defined in the 1982 Trust, being all present and future members of Sawridge.

II. STATEMENT OF FACTS

a. Source of Funds used to Purchase the Assets placed in the Sawridge Trusts

3. In 1966, Chief Walter Patrick Twinn became the Chief of Sawridge, and he remained in that position until his death on October 30, 1997.[1] When Walter Patrick Twinn became Chief 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.[2] Chief Walter Twinn believed that the lives of Sawridge members could be improved by creating businesses that gave rise to employment opportunities. He believed that investing a portion of Sawridge's oil and gas royalties would stimulate economic development and create an avenue for self-sufficiency, self-assurance, confidence and financial independence for Sawridge's members.[3]

4. As such, Sawridge began to invest some of its oil and gas royalties in land, hotels and other business assets in the early 1970s, and such assets were held on trust for Sawridge

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[1] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at para 6 [Tab A of Book of Documents of Sawridge First Nation ("BOD")]

[2] Affidavit of Darcy Twin sworn September 24, 2019, filed September 26, 2019 at para 7, Exhibit B (Excerpts of Transcript of Walter Patrick Twinn October 1993) at 3418, 3885-3887 (Twin Affidavit) [Tabs L & N of BOD]

[3] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at para 7 [Tab A of BOD]

by a number of individuals because it was unclear at that time whether Sawridge had ownership powers.[4]

5. 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.[5]

6. 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 Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained."[6]

7. 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.

8. Pursuant to section 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

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[4] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at para 8 [Tab A of BOD]

[5] Twin Affidavit at para 7, Exhibit B (Excerpts of Transcript of Walter Patrick Twinn October 1993) at 3953-3957, 4004-4005 [Tabs L and N of BOD]

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

> 4.(1) Despite the provisions of any contract but subject to subsection (2), whenever oil or gas is recovered from first nations lands, there is reserved to Her Majesty in right of Canada in trust for the first nation concerned a royalty consisting of the share of the oil or gas determined under the regulations, which the contract holders shall pay to Her Majesty in right of Canada in trust for the first nation in accordance with the regulations.
>
> Special agreements
>
> (2) The Minister may, with the approval of the council of a first nation, enter into a special agreement with any person, for any period and subject to any conditions set out in the agreement, for a reduction or increase in the royalty otherwise payable under subsection (1) or a variation in the method of calculation determining that royalty.[7]

9. 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 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.[8]

10. Section 61(1) of the *Indian Act* mandates that Indian money must only be expended for the "use and benefit" of Sawridge.[9] The Supreme Court of Canada has also confirmed that royalties (capital money) must only be paid out in accordance with the *Indian Act*.[10]

11. 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

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[7] *Indian Oil and Gas Act*, RSC 1985, c I-7, s 4 **[Tab 2]**
[8] *Indian Act*, RSC 1985, c I-5, s 61(1) [*Indian Act*] **[Tab 3]**
[9] *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 [*Ermineskin*] at para 100 **[Tab 4]**
[10] *Ermineskin* at para 94 **[Tab 4]**

all Indian moneys other than capital moneys shall be deemed to be revenue moneys of the band.[11]

12. 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.[12]

13. 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.[13]

14. 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.[14]

15. 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.[15]

16. Sawridge relies on this letter and the other evidence concerning the source of the funds used to invest in assets that have been settled into Sawridge's Trusts, to highlight that

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[11] *Indian Act*, s 62 **[Tab 3]**
[12] *Indian Act*, s 64 **[Tab 3]**
[13] *Indian Act*, s 64(1)(k) **[Tab 3]**
[14] *Ermineskin* at para 151 **[Tab 4]**
[15] Twin Affidavit at para 8, Exhibit C (December 23, 1993 letter) [Tab O of BOD]

such funds were released to Sawridge on its representation to the Crown and with the intention that such funds would be used for the benefit of its members, in accordance with the applicable legislation.

b. The 1982 Trust

17. The 1982 Trust was settled on April 15, 1982 by Walter Patrick Twinn, in his capacity as Chief of Sawridge.[16] The purpose of the 1982 Trust was to settle assets that were at the time held in trust by him and other individuals for present and future members of Sawridge into a formal trust to which any further assets acquired on trust for the present and future members of Sawridge could be added, in order to provide long-term benefits for members of Sawridge.[17]

18. A resolution was passed directing that all necessary documentation be prepared to transfer all such property into the 1982 Trust, and those assets were ultimately transferred into the Trust.[18]

19. 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.[19]

20. In June 17, 1983, the 1982 Trust deed was varied by Court Order, pursuant to section 42 of the *Trustee Act*, RSA 1980, c T-10, in order to provide for staggered terms for the Trustees.[20]

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[16] Twin Affidavit at paras 1, 5-6, Exhibit A (1982 Trust – Declaration of Trust) [Tabs L and M of BOD]

[17] Twin Affidavit, Exhibit A (1982 Trust – Declaration of Trust) at Preamble [Tab M BOD]; Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at para 9 [Tab A BOD]

[18] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at paras 10, 12 [Tab A BOD] and Exhibits B (Meeting of the Trustees and Settlors of the Sawridge Band Trust June 1982), D (Agreement – December 19, 1983), and E (Transfer Agreement – December 19, 1983) [Tabs B, D, and E of BOD]; Transcript from the Questioning on Affidavit of Paul Bujold on May 27 & 28, 2014 at 45:19-27; 53:7-13; 54:19-27 [Tab K of BOD]

[19] Twin Affidavit at para 7, Exhibit B (Excerpts of Transcript of Walter Patrick Twinn October 1993) at 3957 [Tabs L and N of BOD]

21. The 1982 Trust contains the following provisions which are relevant to this Application:

> 1. The Settlor and the Trustees hereby establish a Trust Fund, which the Trustees shall administer in accordance with the terms of this Agreement.
>
> ...
>
> 3. 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.
>
> ...
>
> 5. The Trustees of the Trust shall be the Chief and Councillors of the Band ... it being the intention that the Chief and all Councillors should be Trustees. In the event there are no Trustees able to act, any person interested in the Trust may apply to a Judge of the Court of Queen's Bench of Alberta who is hereby empowered to appoint one or more Trustees, who shall be a member of the band.
>
> 6. The Trustees shall hold the Trust Fund for the benefit of all members, present and future of the Band; provided, however, that at the end of twenty one (21) years after the death of the last decendant [sic] now living of the original signators of Treaty Number 8 who at the date hereof are registered Indians, all of the Trust Fund then remaining in the hands of the Trustees shall be divided equally among all members of the Band then living.
>
> Provided, however, that the Trustees shall be specifically entitled not to grant any benefit during the duration of the Trust or at the end thereof to any illegitimate children of Indian women, even though that child or those children may be registered under the Indian Act and their status may not have been protested under Section 12(2) thereunder; and provided further that the Trustees shall exclude any member of the Band who transfers to another Indian Band, or has become enfranchised (within the meaning of these terms in the Indian Act).

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[20] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at para 11, Exhibit C (Order of Mr. Justice D. H. Bowen dated June 15, 1983) [Tabs A and C of BOD]; Transcript from the Questioning on Affidavit of Paul Bujold on May 27 & 28, 2014 at 74:1-14 [Tab K of BOD]

> The Trustees shall have complete and unfettered discretion to pay or apply all or so much of the net income of the Trust Fund, if any, or to accumulate the same or any portion thereof, and all or so much of the capital of the Trust Fund as they in their unfettered discretion from time to time deem appropriate for the beneficiaries set out above: and the Trustees may make such payments at such time, and from time to time, and in such manner as the Trustees in their uncontrolled discretion deem appropriate.[21]

22. The foregoing provisions are unambiguous in stating that the assets held by the 1982 Trust were to be used only for the use and benefit of members, present and future, of Sawridge and that the powers of the 1982 Trustees were and are circumscribed by the terms and conditions of the 1982 Trust.

23. The terms of the 1982 Trust deed required the Trustees to deal with the trust assets in accordance with the terms and conditions of the deed.[22] Its terms prohibited 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.[23]

24. 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.[24] As duly elected Chief and Council, these individuals also represent the 45 current members of Sawridge, one of whom is a minor.[25] These members are, by definition, the only beneficiaries of the 1982 Trust.[26]

c. The Bill C-31 Amendments to the *Indian Act*

25. On April 17, 1982, the *Constitution Act*, 1982, including the *Canadian Charter of Rights and Freedoms*, came into force, but section 15 of the *Charter* did not come into effect

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[21] Twin Affidavit, Exhibit A (1982 Trust – Declaration of Trust) at paras 1, 3, 5-6 [Tab M of BOD]
[22] Twin Affidavit at Exhibit A (1982 Trust – Declaration of Trust) at para 3 [Tab M of BOD]
[23] Twin Affidavit at Exhibit A (1982 Trust – Declaration of Trust) at paras 3 and 6 [Tab M of BOD]
[24] Twin Affidavit at paras 1, 5-6, Exhibit A (1982 Trust – Declaration of Trust) at paras 5-6 [Tabs L and M of BOD]
[25] Twin Affidavit at paras 2-3 [Tab L of BOD]
[26] Twin Affidavit at para 2, Exhibit A (1982 Trust – Declaration of Trust) at preamble and para 6 [Tabs L and M of BOD]

until April 17, 1985 to give provincial and federal governments time to bring legislation into compliance.[27]

26. The federal government introduced Bill C-31, *An Act to amend the Indian Act*, to address certain discriminatory provisions of the *Indian Act* relating to Indian status and membership.[28] Bill C-31 also provided a mechanism to provide bands control of their own membership if desired.[29]

27. In accordance with section 10 of the *Indian Act*, as amended by Bill C-31 effective April 17, 1985, Sawridge assumed control of its membership process on July 8, 1985, being the day its membership rules, supporting documentation and bylaws were handed to the Deputy Minister of Indian and Northern Affairs who accepted them on behalf of the Minister.[30]

28. At that the time that Sawridge assumed control of its membership list, the Department of Indian and Northern Affairs Canada's band membership list included 37 members, several of whom were minors.[31]

d. The 1985 Trust and the Transfer of Assets from the 1982 Trust to the 1985 Trust

29. Chief Walter Patrick Twinn testified at the Bill C-31 trial that Sawridge was concerned that Bill C-31 would result in a large number of persons obtaining membership in Sawridge.[32]

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[27] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at para 13 [Tab A of BOD]

[28] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at para 13, Exhibit F (Bill C-31) [Tabs A and F of BOD]

[29] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011, Exhibit F (Bill C-31), s 10 [Tab F of BOD]

[30] Affidavit of Roland Twinn, sworn September 21, 2016, filed September 28, 2016 at para 7 and Exhibit 2 at para 2 [Tab V of BOD]; Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at para 13, Exhibit F (Bill C-31) at s 10 [Tabs A and F of BOD]

[31] Correspondence from INAC of attaching Band Lists, being documents SAW002316-2323 of the Supplemental Affidavit of Records sworn by Paul Bujold on April 27, 2018 [Tab W of BOD]

[32] Twin Affidavit at para 7, Exhibit B (Excerpts of Transcript of Walter Patrick Twinn October 1993) at 3761 [Tabs L and N of BOD]; Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at para 15 [Tab A of BOD]

30. The 1985 Trust was created on April 15, 1985,[33] two days before Bill C-31 came into force, in anticipation of the passage of Bill C-31, and with the objectives that the beneficiaries of the 1985 Trust would be the people who were considered Sawridge members before the passage of Bill C-31, that the people who might be declared to be 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 be declared to be Sawridge members under Bill C-31 would be excluded as beneficiaries.[34] 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).[35]

31. On April 15, 1985, the Trustees of the 1982 Trust passed a resolution to transfer all of the assets of the 1982 Trust to the 1985 Trustees pursuant to paragraph 6 of the 1982 Trust and their discretion to pay or apply all or such much of the net income or capital of the Trust Fund for the beneficiaries of the Trust.[36] Sawridge passed a resolution signed by nine members to approve the transfer of the assets from the 1982 Trust to the 1985 Trust.[37]

32. Subsequently all assets in the 1982 Trust were transferred to the 1985 Trust,[38] and the approximate net value of those assets as of December 31, 2010 was $70,263,960.[39]

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[33] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at para 16, Exhibit G (1985 Trust – Declaration of Trust) [Tabs A and G of BOD]

[34] Twin Affidavit at para 7, Exhibit B (Excerpts of Transcript of Walter Patrick Twinn October 1993) at 3906-3909 [Tabs L and N of BOD]

[35] Twin Affidavit at para 7, Exhibit B (Excerpts of Transcript of Walter Patrick Twinn October 1993) at 3948-3949 [Tabs L and N of BOD]; Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011, Exhibit K (1986 Trust – Declaration of Trust) at para 2(a) [Tab J of BOD]

[36] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at para 19, Exhibit H (Sawridge Band Trust Resolution of Trustees April 15, 1985) [Tab H of BOD]

[37] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at para 20, Exhibit I (Sawridge Band Resolution April 15, 1985) [Tab I of BOD]

[38] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at para 22 [Tab A of BOD]; Transcript from the Questioning on Affidavit of Paul Bujold May 27 & 28, 2014 48:4-27, 49:1-4; 53:7-8 [Tab K of BOD]; Band Council Resolution 54-117-85/86, being document SAW001895, of the Supplemental Affidavit of Records sworn by Paul Bujold on April 27, 2018 [Tab X of BOD]; Demand Debenture executed January 21, 1985, being document SAW000495-521 of the Affidavit of Records sworn by Paul Bujold on November 2, 2015 [Tab Y of BOD]; Assignment of Debenture, being document SAW000537-539 of the Affidavit of Records sworn by Paul Bujold on November 2, 2015 [Tab Z of BOD]

33. After April 15, 1985, no further funds or assets were put into the 1985 Trust,[40] with the possible exception of a debenture held in trust for Sawridge by Chief Walter Patrick Twinn which did not form part of the 1982 Trust and which was transferred to the 1985 Trustees on about April 15, 1985.[41] The debenture held on trust for the Sawridge before being assigned to the 1985 Trust, and the assignment specifies that it is subject to the terms of the debenture.

34. The two main differences between the 1982 Trust and the 1985 Trust is that they have different Trustees and a different definition of beneficiaries, with the beneficiary definition in the 1985 being substantially different than that of the 1982 Trust:

> "Beneficiaries" at any particular time shall mean all persons who at the time qualify as members of the Sawridge Band No. 19 pursuant to the provisions of the Indian Act, R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant to the said provisions as such provisions existed on the 15th day of April, 1982 and, for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions, as such provisions existed on the 15th day of April, 1982, shall be regarded as "Beneficiaries" for the purpose of this Settlement whether or not such persons become or are at any time considered to be members of the Sawridge Indian Band No. 19 for all or any other purposes by virtue of amendments to the Indian Act, R.S.C. 1970, Chapter I-6 that may come into force at any time after the date of the execution of this Deed or by virtue of any other legislation enacted by the Parliament of Canada or by any province or by virtue of any regulation, Order in Council, treaty or executive act of the Government of Canada or any province or by any other means whatsoever; provided, for greater certainty, that any person who shall become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band No. 19 under the Indian Act, R.S.C. 1970, Chapter I-6, as amended from time to time, or

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[39] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at para 27 [Tab A of BOD]
[40] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at para 30[Tab A of BOD]
[41] Transcript from the Questioning on Affidavit of Paul Bujold May 27 & 28, 2014 at at 50:11-27, 51:1&27, 52:1-14 [Tab K of BOD]

any consolidation thereof or successor legislation thereto shall cease to be a Beneficiary for all purposes of this Settlement;[42]

35. Since the transfer of assets from the 1982 Trust to the 1985 Trust, there have been no distributions of the assets held in the 1985 Trust to beneficiaries or anyone.[43] All benefits and programming and services have been paid out to or for members from the 1986 Trust.[44]

e. The 1986 Trust

36. The 1986 Trust was settled on August 15, 1986, after Sawridge took control of its membership list, and it defines its beneficiaries as members of Sawridge:

> "Beneficiaries" at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band under the laws of Canada in force from time to time including, without restricting the generality of the foregoing, the membership rules and customary laws of the Sawridge Indian Band as the same may exist from time to time to the extent that such membership rules and customary laws are incorporated into, or recognized by, the laws of Canada;[45]

37. As previously noted, Chief Walter Patrick Twinn testified that it was the intention that the assets from the 1985 Trust would ultimately be placed in the 1986 Trust (whose beneficiaries are defined as members of Sawridge).[46] Paul Bujold, on behalf of the Trustees, also deposed that this was the intention:

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[42] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011, at para 17 and Exhibit G (1985 Trust – Declaration of Trust) at para 2(a) [Tabs A and G of BOD]

[43] Transcript from the Questioning on Affidavit of Paul Bujold May 27 & 28, 2014 at 146:19-27, 147:1-3 [Tab K of BOD]

[44] Transcript from the Questioning on Affidavit of Paul Bujold May 27 & 28, 2014 at 98:1-14 [Tab K of BOD]

[45] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011, at para 29, Exhibit K (1986 Trust – Declaration of Trust) at para 2(a) [Tabs A and J of BOD]

[46] Twin Affidavit at para 7, Exhibit B (Excerpts of Transcript of Walter Patrick Twinn October 1993) at 3948-3949 [Tabs L and N of BOD]; Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011, Exhibit K (1986 Trust – Declaration of Trust) at para 2(a) [Tabs A and J of BOD]

> My investigation shows that the goal of the Settlor of the 1985 Trust had been to switch back to "members" of [Sawridge] as beneficiaries and combine the 1985 and 1986 Trusts once the result of Bill C-31 was known.[47]

f. The August 24, 2016 Consent Order

38. 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.

39. 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

[47] Affidavit of Paul Bujold sworn and filed February 15, 2017 at para 75, and see also paras 153-155 [Tab AA of BOD]

> a basis to oppose or prevent a beneficiary from seeking an accounting from the 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.[48]

40. 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.[49]

41. The position of Sawridge on the August 24, 2016 Consent Order and the letter cited by the OPGT in its written submissions filed October 25, 2019 on the intervention application was in response to an over-reaching application by the OPGT requesting that Sawridge be ordered to produce documents as a non-party.[50]

42. The position of Sawridge has been, and continues to be, that the Trust property of the 1982 Trust and the 1985 Trust is held for the benefit of members of Sawridge and not for persons who are registered as Indians but who are not members of Sawridge. Further, the position of Sawridge has always been to achieve a resolution of this matter without continuing to dissipate the assets of the trust for payment of legal fees.

g. The Subsequent Concerns raised by The Honourable Mr. Justice J.T. Henderson

43. 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

[48] Twin Affidavit at para 9, Exhibit D (August 24, 2016 Consent Order) [Tabs L and P of BOD]
[49] Twin Affidavit at paras 9-10, Exhibit D (August 24, 2016 Consent Order) [Tabs L and P of BOD]
[50] Sawridge Book of Documents for Oral Reply to Intervention Application filed October 29, 2019 at Tabs 2 and 5

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.[51]

44. 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.[52]

45. 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.
>
> 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

[51] 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 [Tabs Q, R, and S of BOD]

[52] Twin Affidavit at Exhibit I (December 18, 2018 Consent Order) [Tab U of BOD]

this is a foundational issue which needs to be addressed before considering whether the 1985 trust can be varied.[53]

46. 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.[54]

47. 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?"[55]

48. 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

[53] Twin Affidavit at para 11, Exhibit E (April 25, 2019 email from Justice Henderson) [Tabs L and Q of BOD]
[54] Twin Affidavit, Exhibit F (Transcript of April 25, 2019 Proceeding) at 3:21-41, 4:16-19 [Tab R of BOD]
[55] Twin Affidavit, Exhibit G (Transcript of September 4, 2019 Proceeding) at 13:16-21 [Tab S of BOD]

> 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 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.[56]

49. 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.[57]

50. 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.[58]

51. 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.[59]

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[56] Twin Affidavit, Exhibit G (Transcript of September 4, 2019 Proceeding) at 14:3-13 [Tab S of BOD]
[57] Twin Affidavit, Exhibit G (Transcript of September 4, 2019 Proceeding) at 20:25-27, 31-32 [Tabs S of BOD]
[58] Twin Affidavit at para 12, Exhibit G (Transcript of September 4, 2019 Proceeding) at 22:28-31 [Tabs L and S of BOD]
[59] Twin Affidavit, Exhibit G (Transcript of September 4, 2019 Proceeding) at 26:3-7 [Tab S of BOD]

52. 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.[60]

53. During the hearing on Sawridge's Application for Intervenor Status in the Jurisdiction Applications Justice Henderson again described the issue:

> ...this is an issue that I have raised, and I have raised it, the reasoning, because, in my view, until you have a trust on a solid foundation, talking about making changes to it doesn't make any sense to me. If you – if you start talking about making changes to a trust that isn't on a solid foundation, then it comes crashing down two to five years from now. That's not helping anyone out. So you – you may all have agreed, it may – it may have been a hard-thought negotiation which resulted in a consent order being placed to Justice Thomas. My question is, what does it mean?[61]

III. ISSUE

54. The issue on this application is as follows:

(a) What is the effect of the August 24, 2016 Consent Order, and in particular, on what terms are the assets transferred to the 1985 Trust held?

IV. LAW & ARGUMENT

a. WHAT IS THE EFFECT OF THE AUGUST 24, 2016 ORDER?

55. The August 24, 2016 Consent Order states: "The transfer of assets which occurred in 1985 from the [1982 Trust] to the [1985 Trust] is approved *nunc pro tunc*." It does not expressly address the terms pursuant to which those transferred assets are held.

56. The 1982 Trust is unequivocal as to who its beneficiaries are – all members, present and future, of Sawridge. The 1985 Trust was not a named beneficiary of the 1982 Trust and therefore should not have been able to receive the trust assets directly in 1985, as

[60] Twin Affidavit at para 13, Exhibit H (September 13, 2019 Application) [Tabs L and T of BOD]
[61] Transcript from the October 30, 2019 Proceedings at 30:4-11 [Tab BB of BOD]

noted by the 1985 Trustees in their brief in support of the August 24, 2016 Consent Order.[62]

57. The 1982 Trust assets can only have been "transferred" into the 1985 Trust via a resettlement or a variation. Sawridge submits that, in law, the transfer did not meet the requirements of either a permitted resettlement or a permitted variation.

(i) Were the powers granted to the Trustees in the 1982 Trust and the Pilkington Principle properly relied upon for the August 24, 2016 Order approving the asset transfer?

58. The purpose of a trust is to allow a settlor to ensure that his assets are held on specified terms for the benefit of specified individuals.

59. In support of the August 24, 2016 Consent Order approving the transfer of assets *nunc pro tunc,* the 1985 Trustees cited *Pilkington v Inland Revenue Commissioners*, a 1962 decision of the House of Lords.[63]

60. In *Pilkington* the trustees applied for a determination as to whether it was possible for them to exercise their discretion to resettle a part of a trust under a statutory power of advancement.[64] Funds had been settled by an uncle for, *inter alia,* the benefit of a nephew and that nephew's issue. For tax purposes, the trustees wanted, and the nephew appears to have agreed, to exercise the trustees' statutory power of advancement to effectively resettle a portion the nephew's funds on his young daughter, thereby avoiding estate duties. Section 32 of the *Trustee Act 1925*, provided a general power of advancement to all trustees, provided the settlor did not exclude such a power.[65] The trustees sought approval of the Court, which was granted. The tax authority appealed the order to the Court of Appeal. The Court of Appeal reversed the

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[62] Brief of the Trustees for Approval of the Transfer of Assets from the 1982 Trust to the 1985 Trust filed August 17, 2016 at para 18.

[63] *Pilkington v Inland Revenue Commissioners* (1962), [1964] AC 612 (Eng HL) [*Pilkington*], Tab A03 of the Brief of the Sawridge Trustees on the Application on Transfer Issue as Directed by the Court Returnable November 27, 2019.

[64] *Trustee Act 1925* 15 Geo 5, c19, s32 (UK) **[TAB 5]** (Section 32 of the *Trustee Act 1925* was not amended from enactment until after the relevant time period).

[65] *Trustee Act 1925* 15 Geo 5, c19, s32 (UK) **[TAB 5]**

order. On further appeal the House of Lords restored the initial order approving the resettlement.

61. In *Pilkington*, the other possible beneficiary to this portion of the trust fund, namely the nephew, appeared to approve of the proposed resettlement. There was no intention to deny the nephew the benefit of the funds without his consent, which was required by statute.

62. In effect, *Pilkington* allows a trustee in possession of a power of advancement or a discretion to encroach on capital to advance or encroach and resettle a new trust on different terms, provided the beneficiaries are not deprived of their interest without approval. Nothing in *Pilkington* suggests that a court may permit a trustee to encroach on capital to the benefit of one beneficiary and to the detriment of another unless the trustee is given that power by the settlor or by statute.

63. *Pilkington* differs from the transfer from the 1982 Trust to the 1985 Trust as the trustees in *Pilkington* had the authority to advance funds in the manner utilized. The 1982 Trustees did not have the authority or discretion to re-characterize funds held on trust for "current and future members" as effectively being held on trust for "current members" only and potentially for persons who may not even be members of Sawridge.

64. The Ontario Court (General Division) applied *Pilkington* in *Hunter Estate v Holton*.[66]

65. In *Hunter Estate* the executors and trustees of a testator applied for advice and direction following a request by the two main trust beneficiaries to bifurcate the trust. The testator father left the entire residue of his estate into a "Family Trust" for the benefit of his two adult children and their issue, with a gift over to certain other individuals should there be no surviving issue.[67] The testator's two children wished to bifurcate the Family Trust into two identical trusts, one trust for each child and that child's issue, containing identical assets and settled on "substantially the same terms

[66] *Hunter Estate v Holton*, 1992 CarswellOnt 537, 7 OR (3d) 372, 46 ETR 178 (ON SC) [*Hunter Estate*] **[TAB 6]**.
[67] *Hunter Estate* at paragraph 3 **[TAB 6]**.

and conditions as contained in the existing will", with the only exception being that only the issue of each child would be a beneficiary of that child's trust.[68] The gifts over to the certain other individuals would remain in both trusts and on identical terms to the Family Trust.[69]

66. The purpose of this bifurcation was to allow the trustees to administer each child's half interest in a manner suited to that child's circumstances.[70]

67. The Court held that the Family Trust trustees could effect this resettlement via the exercise of the following power contained within the Testator's will:

> to pay to or for the benefit of any one or more of my wife and my issue to the exclusion of any one or more of my wife and my issue as my trustees may determine such amounts out of the capital of the said Fund as my Trustees in their sole discretion may from time to time determine.[71]

68. The court held that it should not cut down a wide and discretionary power which was enacted for general use. The court applied *Pilkington* in finding that if a trustee has the power or discretion to advance, encroach, or otherwise appoint funds to a beneficiary directly, then the trustee also has the power or discretion to advance, encroach, or otherwise appoint those funds into a trust for the benefit of the beneficiary.[72]

69. However, both *Pilkington* and *Hunter Estate* show that the resettlement must be effected for the same beneficiaries as identified in the original trust. Specifically, the court says that "subject to the approved basic division into two family trusts rather than the one, the new trusts closely mirror the provisions of the will, with certain minor modifications. Basically, they provide the interests to the children, grandchildren and issue of the testator, with the ultimate gift over to the (certain named individuals)".[73]

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[68] *Hunter Estate* at paragraph 5 **[TAB 6]**.
[69] *Hunter Estate* at paragraph 5 **[TAB 6]**.
[70] *Hunter Estate* at paragraph 6 **[TAB 6]**.
[71] *Hunter Estate* at paragraph 2 **[TAB 6]**.
[72] *Hunter Estate* at paragraph 16. **[TAB 6]**.
[73] *Hunter Estate* at paragraph 20 **[TAB 6]**.

70. The court found that the retention of the identical beneficiaries meant that the proposed new trusts were not alien to the intention of the testator or beyond the scope of the powers of the trustees. All beneficiaries and contingent future interests were considered.[74]

71. The court ultimately approved the decision on the basis of the English case of *Re Hastings-Bass* which held that "the court should not interfere with his (a trustee's) action...unless (1) what he has achieved is unauthorized by the power conferred upon him".[75]

72. As the Family Trust trustees had the power there was no reason for the court to interfere.

73. This differs from the 1982 Trust to 1985 Trust transfer, where the entire objective of the alleged resettlement was to cut out persons who would have otherwise become beneficiaries. While on the surface the beneficiaries of the 1982 Trust and the 1985 Trust may have been the same persons on the day the 1985 Trust Declaration was made (April 15, 1985), it was believed that when Bill C-31 took effect two days later the beneficiaries of the two trusts would not be the same. Sawridge understands that the OPGT advances the position that as of April 17, 1985, the definition of beneficiaries contained in the 1985 Trust could permit non-members of Sawridge, who might otherwise "qualify" for membership under the 1982 *Indian Act* to be beneficiaries contrary to the express terms of the 1982 Trust. Further, the definition of beneficiaries contained in the 1985 Trust could exclude any person added to Sawridge membership by virtue of Bill C-31, contrary to the express terms of the 1982 Trust which was for the present and future members of Sawridge. This is not akin to *Pilkington* or *Hunter Estate* as these actions by the 1982 Trustees diluted the interests of actual members of Sawridge by potentially permitting non-members to be beneficiaries, and they

[74] *Hunter Estate* at paragraph 20 **[TAB 6]**.
[75] *Hunter Estate* at paragraph 19, citing *Re Hastings-Bass* p.41 Ch., p.203 All ER **[TAB 6]**.

extinguished the interests of those who would become members (and therefore beneficiaries of the 1982 Trust) under Bill C-31.

74. *Fox v Fox Estate*[76] also provides guidance as to the extent of a trustee's ability to use a discretion granted to the trustee to benefit one set of beneficiaries to the detriment of others.

75. *Fox* stands for the principle that such discretion cannot be used to deprive a beneficiary of his interest unless the will or trust deed explicitly authorizes such a deprivation.

76. In *Fox* a testator grandfather left the residue of his estate to his wife (the "grandmother"), son, and son's issue. His wife was to have a life interest in 75% of the estate's income and his son was to have the remaining 25%. The grandmother was sole testatrix and was given the following power by the will:

> (b) Out of the capital thereof, to pay such amount or amounts as my Trustee may in its absolute discretion, consider advisable to or for my said son.
>
> (c) Out of the capital thereof, to pay such amount or amounts as my Trustee may, in its absolute discretion, consider advisable from time to time to or for the benefit of my said son's issue or such one or more of them as my Trustee may select from time to time.[77]

77. After the testator's death the son remarried out of the family's faith. The grandmother elected to encroach on the entire corpus of the estate to the son's issue's benefit, to the detriment of the son's interest.[78] There were no assets left in the estate to provide the son with the income. Evidence advanced at trial suggested that the grandmother was

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[76] *Fox v Fox Estate*, 1996 CarswellOnt 317, 28 OR (3d) 496 (ON CA) [*Fox*] **[TAB 7]**.
[77] *Fox* at paragraph 41**[TAB 7]**.
[78] *Fox* at paragraph 5 **[TAB 7]**.

attempting to disinherit the son because she disagreed with his decision to re-marry out of the faith.[79]

78. The Ontario Court of Appeal was divided on the effect of the grandmother's motivation by *mala fides* towards the son. Justice McKinlay, whose reasons were adopted by all members of the panel, instead focused on whether the grandmother was empowered by the will to disinherit the son.[80]

79. McKinlay JA held that while the language used in the will appeared to give the grandmother an unlimited discretion to encroach on property for the benefit of the son's issue, the fact that the son was also given a life interest in 25% of the income meant that the testator's intention was to not give the grandmother the discretion to fully disinherit the son.[81]

80. Additionally, the testator had provided the discretion to encroach on capital in favour of the son's issue on a "from time to time" basis. Meanwhile, the discretion to encroach on capital in favour of the son did not have such a limitation. McKinlay JA held that this indicated that the testator intended to allow an absolute discretion in favour of the son but only partial, episodic encroachments in favour of the son's issue. This distinction suggested to McKinlay JA that the discretion to encroach in favour of the son's issue was constrained.[82] On this basis McKinlay JA allowed the appeal. In concurring with McKinlay JA, Galligan JA cited *Hastings-Bass*.

81. Finally, *Edell v Sitzer* provides some final guidance on the application of *Fox*.[83] In particular, the explicit authorization of the deprivation of a beneficiary is addressed. In *Edell*, the court considered, *inter alia*, whether an encroachment was motivated by bad faith or was otherwise an improper exercise of a power of encroachment, as in *Fox*.

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[79] *Fox* at paragraph 7 **[TAB 7]**.
[80] *Fox* at paragraph 43 **[TAB 7]**.
[81] *Fox* at paragraph 44 **[TAB 7]**.
[82] *Fox* at paragraph 45 **[TAB 7]**.
[83] *Edell v Sitzer*, 2001 CarswellOnt 5020, 55 OR (3d) 198 (ON SC) [*Edell*] **[TAB 8]**.

82. In *Edell*, the trustee father conveyed certain assets to his daughter on trust. After a falling out the father decided to encroach upon the assets for the benefit of the brother. The trustee relied upon the following power of encroachment:

> The Trustees shall have the right at any time or times...to pay to or for some one or more of the said children and more remote issue...who are then living...to the exclusion of any other or others, such amounts or amounts out of the capital of the Trust Property in such proportions as the Trustees in their unfettered discretion shall determine advisable or expedient.[84]

83. The Court relied on the above provision to distinguish *Edell* from *Fox*. The Court held that the specifics of the will in *Fox* required the trustee in that case to not encroach entirely on the property. The Court also held that the provisions of a will or trust deed must be "read in the light of the provisions and structure of a will taken as a whole".[85]

84. Reading the 1982 Trust deed as a whole indicates that the 1982 Trust settlors intended an outcome similar to *Fox* rather than *Edell*. Paragraph 6 of the 1982 Trust deed states that the trustees have the discretion to pay or apply any capital or income in unfettered discretion "for the beneficiaries". The first sentence of paragraph 6 states that the Trust Fund shall be held for the benefit of "all members, present and future" of the Sawridge Band. There is no power to pay to one beneficiary or set of beneficiaries to the exclusion of others.

85. The Court in *Edell* further relied upon *Re Hastings-Bass*, as cited in *Fox* and in *Hunter Estate*, re-iterating that a trustee's actions should not face curial interference if the act is authorized by the settlor.[86]

86. Read together, *Pilkington*, *Hunter Estate*, *Hunter-Bass*, *Fox*, and *Edell* show that a properly empowered trustee may advance, encroach on, or pay or apply capital by settling it into a new trust on new terms provided that it is for the benefit of the same beneficiary. A trustee may not use such a power to the detriment or exclusion of

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[84] *Edell* at paragraph 34 **[TAB 8]**.
[85] *Edell* at paragraph 105 **[TAB 8]**.
[86] *Edell* at paragraph 159 **[TAB 8]**.

another beneficiary unless the trust deed expressly provides the trustee with that power, or that beneficiary approves.

87. Nothing in the 1982 Trust allowed an advance or encroachment which would be to the detriment of the members of Sawridge, meaning that, per *Hunter-Bass*, the transfer was not permitted.

88. The powers of the 1982 Trustees were circumscribed by their duty to treat the beneficiaries of the 1982 Trust fairly and by the terms and conditions of the trust declaration, which expressly prohibit the Trustees from using or diverting any part of the trust assets to purposes other than those set out in the declaration. More specifically, the discretion granted to the Trustees to pay or apply any or all of the income or capital of the Trust Fund is constrained by the definition of beneficiaries in the Trust and by the requirement that any such payment or application be "appropriate for the beneficiaries set out above", those beneficiaries being defined as all members, present and future, of Sawridge.[87] They were not permitted to resettle the 1982 Trust Fund into the 1985 Trust as this diluted the interests of the members of Sawridge by potentially adding non-members as beneficiaries and extinguished the interests of those who would become members (and therefore beneficiaries of the 1982 Trust) under Bill C-31.

(i) Did the transfer amount to an unpermitted variation of the 1982 Trust?

89. While the Resolution of the 1982 Trustees signed on April 15, 1985 states that "the Trustees desire to exercise the said power [in paragraph 6 of the instrument] by resettling the assets of the Trust for the benefit of only those persons (the "Beneficiaries") who qualify, or would in the future qualify, for membership in the Band under the provisions of the Act in force on the 15th day of April, 1982," there is some documentary evidence to suggest that what occurred with the creation of the 1985 Trust was a purported variation of the 1982 Trust replacing its terms with those of the 1985 Trust deed.

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[87] Twin Affidavit, Exhibit A (1982 Trust – Declaration of Trust) at paras 3, 5-6 [Tab M of BOD]

90. The notes to the unaudited Financial Statements for the 1985 Trust for the year ending December 31, 1986, provide some support for a finding that what was done in 1985 was a purported variation of the 1982 Trust:

> 1. OPERATIONS
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> The Sawridge Band Trust was established on April 15, 1982 and during 1985 changed its name to "The Sawridge Band Inter-Vivos Settlement Trust.[88]

91. These accounting records suggest that the 1982 and 1985 Trusts were not treated separately, at least for accounting purposes, and that the 1982 Trust continued on having changed its name during the 1985 fiscal year.

92. It must be noted that the primary duty of a trustee is to carry out the terms of the trust, and at common law the Trustees may only vary a trust if the settlor expressly grants them such power:

> It is the first duty of the trustees to preserve the trust property and to carry out the trust terms. Unless the settlor chooses to give them such a power, they have no authority to vary the terms of the trust, any more than they can neglect their duty to preserve the trust property. Nor does it matter whether the term which the trustees would like to vary is concerned with the beneficial interests created by the trust or the powers of themselves as trustees. It follows that, even if the trustees honestly and reasonably believe that it would be for the benefit of the beneficiaries were the trustees to depart in any way from any term of the trust, nevertheless they would be in breach of the trust were they to do so.[89]

93. In this case, there is no such power of amendment conferred on the Trustees by the terms in the 1982 Trust.

94. A variation can also be effected by a trustee or under section 42 of the Trustee *Act*.[90] Section 42 of the *Trustee Act* has not been amended since prior to the creation of the

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[88] Financial Statement of Sawridge Band Inter Vivos Settlement Trust for 1985-1986, being document SAW000488-493 at 492 of the Affidavit of Records sworn by Paul Bujold on November 2, 2015 [Tab CC of BOD]

[89] Donovan Waters, Mark Gillen & Lionel Smith, eds, *Waters' Law of Trusts in Canada* 4th Edition (Toronto: Carswell, 2012) at 1358 [*Waters*] **[TAB 9]**.

[90] *Trustee Act* RSA 2000 c. T-8 **[TAB 10]**.

1982 trust. This section was in fact used by the 1982 Trustees in obtaining a court order to permit a variation of paragraph 5 of the 1982 Trust and provide for staggered terms for the trustees.[91]

95. Section 42 creates onerous requirements for any person seeking to vary a trust. There is no evidence suggesting that the 1982 Trust Trustees met the statutory requirements when transferring the 1982 Trust assets.

96. Section 42(2) requires the variation or termination of any trust to conform to the requirements of section 42.

97. The 1982 Trust Trustees did not apply for an order approving the transfer in 1985. The August 24, 2016 Consent Order[92] does not meet the section 42 requirements.

98. The August 24, 2016 Consent Order approves a "transfer of assets" *nunc pro tunc*. Nothing in section 42 suggests that an approval can be retroactive. Nonetheless, even if retroactive approval is permitted, section 42(4) only allows court approval of variation or revocation of a trust or a part of a trust, resettling of an interest under a trust, or enlarging the powers of a trustee. Section 42(4) does not allow a bald "transfer" from one trust into another. Nothing in the 2016 order suggests that the order contemplated a resettlement, variation, or revocation of the 1982 Trust. There is no evidence that the 1982 Trust deed was ever revoked.

99. Section 42(6) requires that a proposed variation, revocation or resettlement must receive the consent in writing of all beneficiaries to a trust who are capable of consenting prior to submitting the proposal to the court.

100. Section 42(5) allows the court to consent to a variation, revocation, or resettlement on behalf of any person with an interest in the trust who is otherwise unable to consent.

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[91] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at para 11, Exhibit C (Order of Mr. Justice D. H. Bowen dated June 15, 1983) [Tabs A and C of BOD]; Transcript from the Questioning on Affidavit of Paul Bujold on May 27 & 28, 2014 at 74:1-14 [Tab K of BOD]

[92] Twin Affidavit, Exhibit D (August 24, 2016 Consent Order) [Tab P of BOD]

Nothing in the August 24, 2016 Consent Order suggests that the Court consented on behalf of these individuals, which would have included, *inter alia*, minors and "any person, whether ascertained or not, who may become entitled directly or indirectly to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons," such as those persons who would have become members of Sawridge and beneficiaries of the 1982 Trust upon the enactment of Bill C-31.[93]

b. IT IS APPROPRIATE TO FIND THAT THE ASSETS IN THE 1985 TRUST ARE HELD SUBJECT TO THE TERMS OF THE 1982 TRUST

101. In this case, the August 24, 2016 Consent Order approved the transfer of the assets from the 1982 Trust to the 1985 trust, and the assets are in fact held in the 1985 Trust.

102. Sawridge submits that this Court should direct that the assets are held on trust for the beneficiaries of the 1982 Trust, and pursuant to the terms of the 1982 Trust, due to the *in rem* or proprietary remedy available to the 1982 beneficiaries arising from the 1982 Trustees acting outside of their authority by conducting an unpermitted transfer to the 1985 Trust or an unpermitted variation of the 1982 Trust.

103. The *in rem* proprietary right of the beneficiaries are discussed by Donovan Waters, who notes the starting point is that "trust property remains trust property":

> The starting point is that trust property remains trust property, unless the recipient positively establishes the defence that he acquired a legal interest in the property, in good faith, for value, without notice of the breach of trust or other want of authority on the part of the trustee. The defendant must establish all elements of the defence."[94]

104. In discussing equitable claims, Waters notes:

> If a third party, not being a *bona fide* purchaser of a legal interest for value without notice of the plaintiff's equitable interest, received trust property, he is himself a trustee...A trust beneficiary could obtain a declaration that the third

[93] *Trustee Act* RSA 2000 c. T-8, s 42(5) **[TAB 10]**.
[94] *Waters* at 1334-35 **[TAB 9]**.

> party holds the property on trust, and any appropriate consequential orders for transfer to the original or successor trustees.[95]
>
> ...
>
> The basic principle is that the traceable proceeds of trust property will themselves be trust property, if the beneficiary so elects.[96]

105. In this case, the 1985 Trust did not receive the assets for value and was essentially a donee, such that it should be found that the 1982 Trust property which was settled into the 1985 Trust remains 1982 Trust property.

106. The evidence is that all of the 1982 Trust assets were transferred to the 1985 Trust. After April 17, 1985, no further assets were transferred to the 1985 Trust, with the possible exception of a debenture. It is Sawridge's understanding that this debenture may no longer be of any value, and that, in any event, any interest in the debenture is more in the nature of a security interest as it not proprietary:

> If the claimant was not beneficially entitled to an asset, but only had a security interest in it, then it follows that while he may be able to establish a proprietary interest in any traceable proceeds of the original asset, this will be a security interest and not a beneficial interest.[97]

107. On the basis of the foregoing, this Honourable Court should find that the assets currently held in the 1985 Trust remain 1982 Trust property, subject to the terms of the 1982 Trust.

108. Sawridge notes that such a finding is consistent with the position of the 1985 Trustees who have put forth proposals that would see the definition of the beneficiary in the 1985 Trust amended to be defined as a member of Sawridge and is in keeping with the purpose of the Sawridge Trusts.[98]

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[95] *Waters* at 1340-41 **[TAB 9]**.

[96] *Waters* at 1341, and footnote 31: "It is usually understood to be a constructive trust but it may be best understood as resulting trust." **[TAB 9]**.

[97] *Waters* at 1345 **[TAB 9]**.

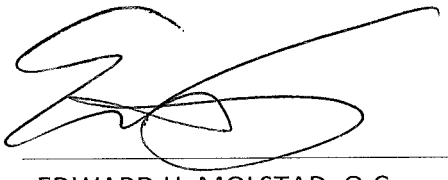
[98] Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011 at para 33 [Tab A of BOD]: "The Trustees believe that it is fair, equitable and in keeping with the history and purpose of the Sawridge Trusts that

V. RELIEF SOUGHT

109. For all of the foregoing reasons, Sawridge submits that the Court should direct that the assets held in the 1985 Trust are held subject to the terms of the 1982 Trust and for the benefit of the beneficiaries of the 1982 Trust, being the present and future of members of Sawridge.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of November, 2019.

PARLEE McLAWS LLP



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

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the definition of "Beneficiaries" contained in the 1985 Trust be amended such that a beneficiary is defined as a member of the Nation, which is consistent with the definition of "Beneficiaries" in the 1986 Trust."

VI. TABLE OF AUTHORITIES (ATTACHED TO BRIEF)

TAB	DOCUMENT
1.	"Treaty No. 8 – Indian and Northern Affairs", Woodward, *Consolidated Native Law Statutes, Regulations and Treaties 2019* (Thomson Reuters: Toronto, 2018)
2.	*Indian Oil and Gas Act*, RSC 1985, c I-7
3.	*Indian Act*, RSC 1985, c I-5
4.	*Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9
5.	*Trustee Act 1925* 15 Geo 5, c19 (UK)
6.	*Hunter Estate v Holton*, 1992 CarswellOnt 537, 7 OR (3d) 372, 46 ETR 178 (ON SC)
7.	*Fox v Fox Estate*, 1996 CarswellOnt 317, 28 OR (3d) 496 (ON CA)
8.	*Edell v Sitzer*, 2001 CarswellOnt 5020, 55 OR (3d) 198 (ON SC)
9.	Donovan Waters, Mark Gillen & Lionel Smith, eds, *Waters' Law of Trusts in Canada* 4th Edition (Toronto: Carswell, 2012)
10.	*Trustee Act* RSA 2000 c. T-8

VII. BOOK OF DOCUMENTS RELIED ON (BINDED SEPARATELY)

A.	Affidavit of Paul Bujold sworn September 12, 2011, filed September 13, 2011
B.	Exhibit B to the Affidavit of Paul Bujold sworn September 12, 2011 (Meeting of the Trustees and Settlors of the Sawridge Band Trust June 1982)
C.	Exhibit C to the Affidavit of Paul Bujold sworn September 12, 2011 (Order of Mr. Justice D. H. Bowen dated June 15, 1983)
D.	Exhibit D to the Affidavit of Paul Bujold sworn September 12, 2011 (Agreement – December 19, 1983)
E.	Exhibit E to the Affidavit of Paul Bujold sworn September 12, 2011 (Transfer Agreement – December 19, 1983)
F.	Exhibit F to the Affidavit of Paul Bujold sworn September 12, 2011 (Bill C-31)

G. Exhibit G to the Affidavit of Paul Bujold sworn September 12, 2011 (1985 Trust – Declaration of Trust)

H. Exhibit H to the Affidavit of Paul Bujold sworn September 12, 2011 (Sawridge Band Trust Resolution of Trustees April 15, 1985)

I. Exhibit I to the Affidavit of Paul Bujold sworn September 12, 2011 (Sawridge Band Resolution April 15, 1985)

J. Exhibit K to the Affidavit of Paul Bujold sworn September 12, 2011 (1986 Trust – Declaration of Trust)

K. Relevant Pages from the Transcript of the Questioning on Affidavit of Paul Bujold May 27 & 28, 2014

L. Affidavit of Darcy Twin sworn September 24, 2019, filed September 26, 2019

M. Exhibit A to the Affidavit of Darcy Twin (1982 Trust – Declaration of Trust)

N. Exhibit B to the Affidavit of Darcy Twin (Excerpts of Transcript of Walter Patrick Twinn October 1993)

O. Exhibit C to the Affidavit of Darcy Twin (December 23, 1993 letter)

P. Exhibit D to the Affidavit of Darcy Twin (August 24, 2016 Consent Order)

Q. Exhibit E to the Affidavit of Darcy Twin (April 25, 2019 email from Justice Henderson)

R. Exhibit F to the Affidavit of Darcy Twin (Transcript of the April 25, 2019 Proceeding)

S. Exhibit G to the Affidavit of Darcy Twin (Transcript of the September 4, 2019 Proceeding)

T. Exhibit H to the Affidavit of Darcy Twin (September 13, 2019 Application)

U. Exhibit I to the Affidavit of Darcy Twin (December 18, 2018 Consent Order)

V. Affidavit of Roland Twinn, sworn September 21, 2016, filed September 28, 2016 at para 7 and Exhibit 2 at para 2

W. Correspondence from INAC of attaching Band Lists, being documents SAW002316-2323 of the Supplemental Affidavit of Records sworn by Paul Bujold on April 27, 2018

X. Band Council Resolution 54-117-85/86, being document SAW001895 of the Supplemental Affidavit of Records sworn by Paul Bujold April 27, 2018

Y. Demand Debenture executed January 21, 1985, being document SAW000495-521 of the Affidavit of Records sworn by Paul Bujold on November 2, 2015

Z. Assignment of Debenture, being document SAW000537-539 of the Affidavit of Records sworn by Paul Bujold on November 2, 2015

AA. Affidavit of Paul Bujold sworn and filed February 15, 2017 at paras 75, 153-155

BB. Transcript from the October 30, 2019 Proceedings at page 30

CC. Financial Statement of Sawridge Band Inter Vivos Settlement Trust for 1985-1986, being document SAW000488-493 at 492 of the Affidavit of Records sworn by Paul Bujold on November 2, 2015

TAB 1

CARSWELL

CONSOLIDATED NATIVE LAW STATUTES, REGULATIONS AND TREATIES 2019

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

THOMSON REUTERS®

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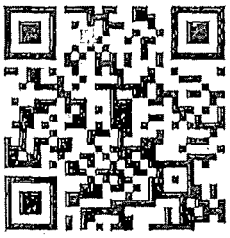

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TREATY NO. 8 — INDIAN AND NORTHERN AFFAIRS CANADA

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 August 28, 2019

Last amended on August 1, 2019

À jour au 28 août 2019

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Royalties

Royalties

4 (1) Despite the provisions of any contract but subject to subsection (2), whenever oil or gas is recovered from first nation lands, there is reserved to Her Majesty in right of Canada in trust for the first nation concerned a royalty consisting of the share of the oil or gas determined under the regulations, which the contract holder shall pay to Her Majesty in right of Canada in trust for the first nation in accordance with the regulations.

Special agreements

(2) The Minister may, with the approval of the council of a first nation, enter into a special agreement with any person, for any period and subject to any conditions set out in the agreement, for a reduction or increase in the royalty otherwise payable under subsection (1) or a variation in the method of determining that royalty.

R.S., 1985, c. I-7, s. 4; 2009, c. 7, s. 1.

Redevances

Redevances

4 (1) Malgré toute disposition d'un contrat, est réservée à Sa Majesté du chef du Canada, en fiducie pour la première nation concernée, la redevance constituée de la part réglementaire du pétrole ou du gaz extrait des terres de la première nation, que le titulaire du contrat est tenu de payer conformément au règlement à Sa Majesté du chef du Canada, en fiducie pour la première nation.

Accord spécial

(2) Le ministre peut toutefois, avec l'approbation du conseil de la première nation intéressée, conclure avec quiconque un accord spécial, pour toute période et sous réserve de toute condition dont celui-ci peut être assorti, portant sur la réduction ou l'augmentation de la redevance qui aurait par ailleurs été exigible au titre du paragraphe (1) ou sur la modification de la manière de déterminer celle-ci.

L.R. (1985), ch. I-7, art. 4; 2009, ch. 7, art. 1.

Regulations

Regulations

4.1 (1) The Governor in Council may make regulations respecting exploration for and exploitation of oil or gas situated in first nation lands, including regulations

(a) respecting contracts and classes of contracts, including regulations in relation to

(i) the granting, amendment, renewal, assignment and consolidation of contracts,

(ii) the terms and conditions of contracts and the rights and obligations of contract holders, and

(iii) the determination of rents or other amounts payable in respect of contracts, including by means of arbitration;

(b) respecting the suspension and cancellation of contracts, and authorizing the Minister to suspend or cancel contracts in specified circumstances;

(c) respecting the surrender of rights and interests under contracts, subject to any conditions that the Minister may specify;

(d) respecting the conversion of contracts from one class to another or the continuation of contracts, subject to any conditions that the Minister may specify,

Règlements

Règlements

4.1 (1) Le gouverneur en conseil peut prendre des règlements régissant l'exploration ou l'exploitation du pétrole ou du gaz situé sur les terres des premières nations, notamment des règlements :

a) concernant les contrats et leurs catégories et prévoyant entre autres :

(i) leur octroi, modification, renouvellement, cession ou fusion,

(ii) les conditions dont ils sont assortis et les droits et obligations de leurs titulaires,

(iii) la détermination, notamment par arbitrage, du loyer ou de toute autre somme exigible relativement à eux;

b) concernant la suspension et la résiliation de contrats et autorisant le ministre à en suspendre ou à en résilier dans certaines circonstances;

c) concernant la renonciation aux droits et intérêts que confèrent les contrats, sous réserve des conditions que peut préciser le ministre;

d) concernant la conversion des contrats d'une catégorie à une autre catégorie ou leur reconduction,

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 August 15, 2019

Last amended on August 15, 2019

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or delay, may issue temporary permits for the taking of sand, gravel, clay and other non-metallic substances on or under lands in a reserve, renewable only with the consent of the council of the band.

substances non métalliques se trouvant sur des terres ou dans le sous-sol d'une réserve, ou lorsque ce consentement ne peut être obtenu sans obstacle ou retard indu, peut délivrer des permis temporaires pour la prise du sable, du gravier, de la glaise et d'autres substances non métalliques sur des terres ou dans le sous-sol d'une réserve, renouvelables avec le consentement du conseil de la bande seulement.

Proceeds

(5) The proceeds of the transactions referred to in subsection (4) shall be credited to band funds or shall be divided between the band and the individual Indians in lawful possession of the lands in such shares as the Minister may determine.

R.S., 1985, c. I-5, s. 58; R.S., 1985, c. 17 (4th Supp.), s. 8.

Produit

(5) Le produit de ces opérations doit être porté au crédit des fonds de bande ou partagé entre la bande et les Indiens particuliers en possession légitime des terres selon les proportions que le ministre peut déterminer.

L.R. (1985), ch. I-5, art. 58; L.R. (1985), ch. 17 (4e suppl.), art. 8.

Adjustment of contracts

59 The Minister may, with the consent of the council of a band,

(a) reduce or adjust the amount payable to Her Majesty in respect of a transaction affecting absolutely surrendered lands, designated lands or other lands in a reserve or the rate of interest payable thereon; and

(b) reduce or adjust the amount payable to the band by an Indian in respect of a loan made to the Indian from band funds.

R.S., 1985, c. I-5, s. 59; R.S., 1985, c. 17 (4th Supp.), s. 9.

Ajustement de contrats

59 Avec le consentement du conseil d'une bande, le ministre peut :

a) réduire ou ajuster le montant payable à Sa Majesté à l'égard de toute opération touchant des terres cédées à titre absolu, des terres désignées ou toute autre terre située dans une réserve, ou le taux d'intérêt payable à cet égard;

b) réduire ou ajuster le montant qu'un Indien doit payer à la bande pour un prêt consenti à cet Indien sur les fonds de la bande.

L.R. (1985), ch. I-5, art. 59; L.R. (1985), ch. 17 (4e suppl.), art. 9.

Control over lands

60 (1) The Governor in Council may at the request of a band grant to the band the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable.

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.

Contrôle sur des terres

60 (1) À la demande d'une bande, le gouverneur en conseil peut lui accorder le droit d'exercer, sur des terres situées dans une réserve qu'elle occupe, le contrôle et l'administration qu'il estime désirables.

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

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

Administration de l'argent des indiens

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

purpose for which Indian moneys are used or are to be used is for the use and benefit of the band.

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;

(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;

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) 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) 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.

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 la bande pour un montant ne dépassant pas une part *per capita* de ces sommes.

L.R. (1985), ch. I-5, art. 64; L.R. (1985), ch. 32 (1er suppl.), art. 10.

Expenditure of capital moneys with consent

64.1 (1) A person who has received an amount that exceeds $1,000 under paragraph 15(1)(a), as it read immediately before 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)(a.1), (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

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

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)a.1), 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

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 n° 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 n° 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

Arrêts mentionnés : *R. c. Marshall*, [1999] 3 R.C.S. 456; *R. c. Sioui*, [1990] 1 R.C.S. 1025; *Fales c. Canada Permanent Trust Co.*, [1977] 2 R.C.S. 302; *R. c. Badger*, [1996] 1 R.C.S. 771; *Bande indienne de la rivière Blueberry c. Canada (Ministère des Affaires indiennes et du Nord canadien)*, [1995] 4 R.C.S. 344; *Guerin c. La Reine*, [1984] 2 R.C.S. 335; *McInerney c. MacDonald*, [1992] 2 R.C.S. 138; *Authorson c. Canada (Procureur général)*, 2003 CSC 39, [2003] 2 R.C.S. 40; *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; *Barrie Public Utilities c. Assoc. canadienne de télévision par câble*, 2003 CSC 28, [2003] 1 R.C.S. 476; *McDiarmid Lumber Ltd. c. Première Nation de God's Lake*, 2006

Lac Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574; *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Samson Indian Nation and Band v. Canada*, 2005 FC 136, [2005] 2 C.N.L.R. 358.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 15.
Constitution Act, 1982, ss. 35(1), 52.
Financial Administration Act, R.S.C. 1985, c. F-11, ss. 2 "public money", "Consolidated Revenue Fund", "securities", 17(1), 18 [rep. 1999, c. 26, s. 20], 21, 90(1).
Indian Act, R.S.C. 1927, c. 98, ss. 92, 93.
Indian Act, R.S.C. 1985, c. I-5, ss. 2 "band", 4, 61 to 69.
Indian Act, S.C. 1951, c. 29, s. 123.
Indian Oil and Gas Act, R.S.C. 1985, c. I-7, s. 4(1).
Indian Oil and Gas Regulations, 1995, SOR/94-753, s. 33(5).

Treaty

Treaty No. 6 (1876).

Authors Cited

Canada. House of Commons. *House of Commons Debates*, vol. I, 1st Sess., 30th Parl., October 21, 1974, p. 558.
Canada. House of Commons. *House of Commons Debates*, vol. II, 4th Sess., 21st Parl., March 16, 1951, p. 1352.
Waters, Donovan W. M., Mark R. Gillen and Lionel D. Smith, eds. *Waters' Law of Trusts in Canada*, 3rd ed. Toronto: Thomson Carswell, 2005.

APPEALS from a judgment of the Federal Court of Appeal (Richard C.J. and Sexton and Sharlow JJ.A.), 2006 FCA 415, [2007] 3 F.C.R. 245, 357 N.R. 1, [2007] 2 C.N.L.R. 51, [2006] F.C.J. No. 1961 (QL), 2006 CarswellNat 4511, affirming decisions of Teitelbaum J., 2005 FC 1623, 269 F.T.R. 188, [2005] F.C.J. No. 1992 (QL), 2005 CarswellNat 3953, and 2005 FC 1622, 269 F.T.R. 1, [2006] 1 C.N.L.R. 100, [2005] F.C.J. No. 1991 (QL), 2005 CarswellNat 3959. Appeals dismissed.

CSC 58, [2006] 2 R.C.S. 846; *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574; *Bande indienne Wewaykum c. Canada*, 2002 CSC 79, [2002] 4 R.C.S. 245; *Garland c. Consumers' Gas Co.*, 2004 CSC 25, [2004] 1 R.C.S. 629; *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143; *R. c. Kapp*, 2008 CSC 41, [2008] 2 R.C.S. 483; *R. c. Turpin*, [1989] 1 R.C.S. 1296; *Nation et bande indienne de Samson c. Canada*, 2005 CF 136, [2005] A.C.F. nº 156 (QL).

Lois et règlements cités

Charte canadienne des droits et libertés, art. 15.
Loi constitutionnelle de 1982, art. 35(1), 52.
Loi des Indiens, S.R.C. 1927, ch. 98, art. 92, 93.
Loi sur la gestion des finances publiques, L.R.C. 1985, ch. F-11, art. 2 « fonds publics », « Trésor », « valeurs » ou « titres », 17(1), 18 [abr. 1999, ch. 26, art. 20], 21, 90(1).
Loi sur le pétrole et le gaz des terres indiennes, L.R.C. 1985, ch. I-7, art. 4(1).
Loi sur les Indiens, L.R.C. 1985, ch. I-5, art. 2 « bande », 4, 61 à 69.
Loi sur les Indiens, S.C. 1951, ch. 29, art. 123.
Règlement de 1995 sur le pétrole et le gaz des terres indiennes, DORS/94-753, art. 33(5).

Traité

Traité nº 6 (1876).

Doctrine citée

Canada. Chambre des communes. *Débats de la Chambre des communes*, vol. I, 1re sess., 30e lég., 21 octobre 1974, p. 557, 558.
Canada. Chambre des communes. *Débats de la Chambre des communes*, vol. II, 4e sess., 21e lég., 16 mars 1951, p. 1380.
Waters, Donovan W. M., Mark R. Gillen and Lionel D. Smith, eds. *Waters' Law of Trusts in Canada*, 3rd ed. Toronto : Thomson Carswell, 2005.

POURVOIS contre un arrêt de la Cour d'appel fédérale (le juge en chef Richard et les juges Sexton et Sharlow), 2006 CAF 415, [2007] 3 R.C.F. 245, 357 N.R. 1, [2007] 2 C.N.L.R. 51, [2006] A.C.F. nº 1961 (QL), 2006 CarswellNat 4833, qui a confirmé des décisions du juge Teitelbaum, 2005 CF 1623, 269 F.T.R. 188, [2005] A.C.F. nº 1992 (QL), 2005 CarswellNat 5897, et 2005 CF 1622, 269 F.T.R. 1, [2006] 1 C.N.L.R. 100, [2005] A.C.F. nº 1991 (QL), 2005 CarswellNat 6710. Pourvois rejetés.

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 n° 6 pour la nation de Samson, et celle de Pigeon Lake en 1896 conformément au Traité n° 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 n° 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° 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.

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.

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

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

[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.

[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] 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.

[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] 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.

[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] 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

[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° 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

Trustee Act 1925

1925 CHAPTER 19

An Act to consolidate certain enactments relating to trustees in England and Wales. [9th April 1925.]

BE IT ENACTEDby the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

INVESTMENTS

1 Authorised investments

(1) A trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in manner following, that is to say:

(a) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom;

(b) On real or heritable securities in the United Kingdom, including the security of a charge on freehold land by way of legal mortgage and a charge under section thirty-three of the Finance Act, 1896;

(c) In the stock of the Bank of England or the Bank of Ireland;

(d) In India Seven, Five and a half, Four and a half, Three and a half, Three and Two and a half per cent. stock, or in any other capital stock which may at any time be issued by the Secretary of State in Council of India under the authority of any Act of Parliament, and charged on the revenues of India, or any other securities the interest in sterling whereon is payable out of and charged on the revenues of India;

(e) In any securities the interest of which is for the time being guaranteed by Parliament;

investing the same and the resulting income thereof from time to time in authorised investments, and shall hold those accumulations as follows :—

(i) If any such person—

(a) attains the age of twenty-one years, or marries under that age, and his interest in such income during his infancy or until his marriage is a vested interest; or

(b) on attaining the age of twenty-one years or on marriage under that age becomes entitled to the property from which such income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest;

the trustees shall hold the accumulations in trust for such person absolutely, but without prejudice to any provision with respect thereto contained in any settlement by him made under any statutory powers during his infancy, and so that the receipt of such person after marriage, and though still an infant, shall be a good discharge; and

(ii) In any other case the trustees shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as one fund with such capital for all purposes, and so that, if such property is settled land, such accumulations shall be held upon the same trusts as if the same were capital money arising therefrom ;

but the trustees may, at any time during the infancy of such person if his interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.

(3) This section applies in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in loco parentis to, the legatee, if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of court to the contrary) be five pounds per centum per annum.

(4) This section applies to a vested annuity in like manner as if the annuity were the income of property held by trustees in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant or his personal representatives absolutely.

(5) This section does not apply where the instrument, if any, under which the interest arises came into operation before the commencement of this Act.

32 Power of advancement

(1) Trustees may at any time or times pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event, or subject to a gift over on his death under any specified age or on the occurrence of any other event, and whether in possession or in remainder or reversion, and such payment or application may be made notwithstanding that the interest of such person is liable to be defeated by the exercise of a power of

appointment or revocation, or to be diminished by the increase of the class to which he belongs :

Provided that—

(a) the money so paid or applied for the advancement or benefit of any person shall not exceed altogether in amount one-half of the presumptive or vested share or interest of that person in the trust property; and

(b) if that person is or becomes absolutely and indefeasibly entitled to a share in the trust property the money so paid or applied shall be brought into account as part of such share; and

(c) no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest, whether vested or contingent, in the money paid or applied unless such person is in existence and of full age and consents in writing to such payment or application.

(2) This section applies only where the trust property consists of money or securities or of property held upon trust for sale calling in and conversion, and such money or securities, or the proceeds of such sale calling in and conversion are not by statute or in equity considered as land, or applicable as capital money for the purposes of the Settled Land Act, 1925.

(3) This section does not apply to trusts constituted or created before the commencement of this Act.

33 Protective trusts

(1) Where any income, including an annuity or other periodical income payment, is directed to be held on protective trusts for the benefit of any person (in this section called " the principal beneficiary ") for the period of his life or for any less period, then, during that period (in this section called the " trust period ") the said income shall, without prejudice to any prior interest, be held on the following trusts, namely:—

(i) Upon trust for the principal beneficiary during the trust period or until he, whether before or after the termination of any prior interest, does or attempts to do or suffers any act or thing, or until any event happens, other than an advance under any statutory or express power, whereby, if the said income were payable during the trust period to the principal beneficiary absolutely during that period, he would be deprived of the right to receive the same or any part thereof, in any of which cases, as well as on the termination of the trust period, whichever first happens, this trust of the said income shall fail or determine;

(ii) If the trust aforesaid fails or determines during the subsistence of the. trust period, then, during the residue of that period, the said income shall be held upon trust for the application thereof for the maintenance or support, or otherwise for the benefit, of all or any one or more exclusively of the other or others of the following persons (that is to say)—

(a) the principal beneficiary and his or her wife or husband, if any, and his or her children or more remote issue, if any; or

(b) if there is no "wife or husband or issue of the principal beneficiary in existence, the principal beneficiary and the persons who would, if he were actually dead, be entitled to the trust property or the income thereof or to the annuity fund, if any, or arrears of the annuity, as the case may be;

as the trustees in their absolute discretion, without being liable to account for the exercise of such discretion, think fit.

TAB 6

1992 CarswellOnt 537
Ontario Court of Justice (General Division)

Hunter Estate v. Holton

1992 CarswellOnt 537, 32 A.C.W.S. (3d) 335, 46 E.T.R. 178, 7 O.R. (3d) 372

Re the Estate of DONALD FLEMING HUNTER, late of the City of Toronto, in the Municipality of Metropolitan Toronto, deceased

JOHN MILLER HOLTON, DONALD HOLTON HUNTER and MARY MARGARET McCALLUM (Continuing Executors and Trustees of the Estate of DONALD FLEMING HUNTER, deceased) v. JOHN MILLER HOLTON, DONALD HOLTON HUNTER, MARY MARGARET McCALLUM, D. HOLTON HUNTER, JOHN HUNTER, JOHN EDWARD HUNTER, KATINA MARIE HUNTER, WENDY JEANNE HUNTER, LINDA SCHUR and OFFICIAL GUARDIAN

Steele J.

Heard: February 17-19, 1992
Judgment: March 5, 1992
Docket: Doc. Toronto RE 2282/91

Counsel: *Barbara L. Grossman*, for applicants.
Maurice C. Cullity, Q.C. and *Christina H. Medland*, for Mary Margaret McCallum.
Ronald R. Anger, for Official Guardian.

***Steele J.*:**

1 This is an application by the executors and trustees of the estate of Donald Fleming Hunter, deceased (the "trustees") under s. 60 of the *Trustee Act*, R.S.O. 1990, c. T.23, and r. 14.05(3)(*a*) [*Rules of Civil Procedure*], requesting the court to interpret the will of Donald Fleming Hunter (the "testator"), and for the opinion, advice and direction of the court upon the following question:

> Having regard to the provisions of the Will as a whole and the language of ClauseIII(i)(C) thereof in particular, do the Applicants have the power and is it lawful for them to transfer all of the assets of the Family Fund established pursuant to the provisions of the Will to two newly created trusts referred to as the 1992 Hunter Family Trust No. 3 and the 1992 McCallum Family Trust No. 3?

2 The applicable clause of the will is as follows:

> III(i)(C)
>
> Until the death of my wife or the twentieth anniversary of my death, whichever event shall last occur, to pay to or for the benefit of any one or more of my wife and my issue to the exclusion of any one or more of my wife and my issue as my Trustees may determine such amounts out of the capital of the said Fund as my Trustees in their sole discretion may from time to time determine.

3 The application is supported by the children of the testator and notice has been given to all interested parties either directly or by service on the Official Guardian with a request that he be appointed to act for many of the parties. Most of the interested parties have consented to the application and others did not appear. The only party that opposes the application is the Official Guardian. The Official Guardian has been served with notice of a request to be appointed to represent the unborn issue of the testator and the unborn issue of Horace William Hunter (a brother of the deceased), and the employees of MacLean Hunter

Limited. The infant grandchildren of the testator were served with notice of this application. Under r. 9.01(2)(*aa*) such infant grandchildren should have been made parties. Under s. 102(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the Official Guardian must act as litigation guardian of all minors. Because I felt that there was no prejudice, I added the infant grandchildren as parties and appointed the Official Guardian to act on their behalf. I also appointed the Official Guardian to represent all unborn infant children and unborn issue. The Official Guardian was also appointed under s. 102(3) of the *Courts of Justice Act* to represent the very future contingent interest of the employees of Maclean Hunter Limited.

4 The trustees are the continuing executors and trustees of the will of the testator, who died on October 3, 1976. John Miller Holton ("Holton") is the brother-in-law of the testator and the other two are the children of the testator. The testator's wife died on January 11, 1988. At the present time, the testator has two living children (Donald Hunter and Margaret McCallum), each of whom have three living children. Only one of the grandchildren is an adult. The will provides that after the death of his wife, the Family Fund that was set up is to be held for the issue of the deceased to be dealt with as specified therein until October 3, 2006. The Family Fund now represents the entire residue of the estate and has an exceptionally large value. After October 3, 2006, the net income of the Family Fund is to be divided among the issue of the deceased, excluding his children, Donald and Margaret, in equal shares per stirpes, until the twentieth anniversary of the death of the last survivor of certain named persons who are all family members, when the balance is to be distributed to the issue of the deceased in equal shares per stirpes. If there are then no issue surviving, provision is made for division amongst the applicant, Holden, the living issue of Horace Hunter, and the employees of MacLean Hunter Limited.

5 The trustees, upon the request of Donald Hunter and Margaret McCallum, propose to enter into certain transactions whereby the assets of the Family Fund will be settled on two new trusts. The new trusts are in draft form and have been presented to the court. The new trusts will have substantially the same terms and conditions as contained in the existing will, except that the primary beneficiaries of one of the two new trusts will be Margaret McCallum and her issue, and the primary beneficiaries of the other new trust will be Donald Hunter and his issue.

6 The object of the proposed transactions is to separate the interests of Margaret McCallum's family in the Family Fund from the interests of Donald Hunter's family, so that future decisions regarding the administration of the former Family Fund may be made having regard to the separate circumstances of each family, and to have the new trusts for the McCallum Family Trust administered by different trustees than the new trusts for the Donald Hunter family, and vice versa. Holton has sworn that it is the belief of the trustees that this will have benefits and advantages, and that future decisions in each trust can be made having primary regard to the circumstances of one family separate from the circumstances of the other. Holton is one of the present trustees and initially he will be one of the trustees of both the new trusts.

7 Apart from this application for advice of the court and establishing the new trusts, complex corporate reorganizations of assets of the Family Fund have already taken place, and advance income tax rulings have been received to confirm that there will be no adverse tax consequences. The trustees have made their decision to set up the new trusts and are asking the court whether or not that decision is within their power.

8 The new trusts will have substantially the same terms as those set out in the will, because no new beneficiaries are being added and no beneficiaries are being excluded, except relating to contingent benefits to the extent necessary as a result of the separation of the two families' interests. The basic issue is whether or not the words in clause III(i)(C) of the will, read in the context of the will as a whole, permit the trustees to exercise their discretion to encroach upon the entire assets of the Family Fund and settle them in the two new trusts. If there is such a power, is the purpose stated legitimate, and, lastly, would it be an abuse of the discretion to resettle the assets into the specific two trusts?

9 The court will not normally grant approval or advice to trustees as to how they should exercise their power of discretion where such power is clear. See *Re McKay* (Court of Appeal, November 29, 1991, unreported) [now reported *(*sub nom. *McKay Estate v. Love)* 44 E.T.R. 190, 6 O.R. (3d) 511 at 519, *(*sub nom. *Re McKay Estate)* 52 O.A.C. 159 (C.A.)]. The present application is not a case concerning the exercise of a discretion, but requires the interpretation of the will to determine whether or not there is a power to do what is proposed. The proposed scheme is complex and has far-reaching ramifications to the entire estate.

Although it was not expressly relied upon, it is obvious that there are tax ramifications because the trustees have obtained advance tax rulings.

10 I believe that the court should exercise its power in the present case. Section 60 of the *Trustee Act* authorizes an application for the opinion or direction of the court on any question respecting the management or administration of trust property. Rule 14.05(3)(*a*) allows an originating application to the court for such opinion. In a proper case, I do not think that the court should limit its opinion narrowly when all of the issues are before it. A trustee should not be required to face the risk of acting upon the limited opinion of the court and then face another possible action after it has acted on the same issues. I believe that s. 148 of the *Courts of Justice Act* mandates the avoidance of multiplicity of proceedings and r. 1.04(1) requires the most expeditious and least expensive determination of proceedings on their merits.

11 Cases similar to the present are common in England. Only two unreported Ontario cases were brought to the attention of the court. Both of these were considered under the same procedure and advice was given. No case was referred to that held the procedure to be improper where dealing with the establishment of new trusts. It was argued that the British Columbia case of *Re Lohn Estate* (1991), 41 E.T.R. 159 (B.C. S.C.), was authority for refusing to answer the question relating to the establishment of new trusts. In my opinion, that case was solely a tax case and no details of the requested advice were set out. I do not consider it to be a deterrent to giving advice in the present case.

12 In construing a will, the court must ascertain the intention of the testator by looking at the whole will, and the court can look to other cases only to the extent that they explain applicable rules of construction and principles of law. In looking at the present will, it is clear that the testator gave the trustees power to encroach on the entire estate which, if done, would make the balance of the will redundant.

13 It was conceded by counsel for the Official Guardian that the clause in the will would allow the trustees to exercise their power of encroachment to pay out all the assets of the Family Fund, one-half to Donald Hunter and one-half to Margaret McCallum, but he contended that there is no power given to the trustees to resettle the assets into the new trusts. *McLean Estate v. Stewart* (June 1, 1988), Doc. RE 822/82, Barr J. (Ont. H.C.) (unreported) is the only similar case for which any reasons were given. The terms of that will are not the same as the present will but I believe that the principle is the same. The reasons are brief and refer to no prior authorities, but include the following statement:

> It would be incongruous if the law were to hold that the trustees might pay to the beneficiaries their shares outright, but might not pay them to trustees to be held in trust for them. Nor need the terms of the new trust be the same as those in the original trust providing they are beneficial.

14 I agree with that statement if it is supported by authority.

15 The leading English authority is *Pilkington v. Inland Revenue Commissioners*, [1964] A.C. 612, [1962] 3 All E.R. 622 (H.L.). In that case, reliance was made upon a provision of the English *Trustee Act, 1925* [15 & 16 Geo. 5, c. 19], which permitted the application of any capital money for the "advancement or benefit" of a beneficiary. The issue before the House was the resettlement of the funds into a new trust and most of the arguments made were the same as have been advanced by the Official Guardian in the present case. At p. 631, Viscount Radcliffe, in effect, stated that it was irrelevant as to who the trustees of the old and new trusts were. He said, "What matters is that there are new trusts, not that there are old trustees." I agree. That case relied on the interpretation of the words of a statute but it was stated, at pp. 634 and 635, that the statute merely adopted the customary common law terminology that is often included in wills. I do not believe that the decision is limited to statutory provisions.

16 I adopt the following statements in *Pilkington* at pp. 638 and 639 as being applicable to the present case:

> The commissioners' objections seem to be concentrated upon such propositions as that the proposed transaction is 'nothing less than a resettlement' and that a power of advancement cannot be used so as to alter or vary the trusts created by the settlement from which it is derived. Such a transaction, they say, amounts to using the power of advancement as a way of appointing or declaring new trusts different from those of the settlement. The reason why I do not find that these propositions have any compulsive effect upon my mind is that they seem to me merely vivid ways of describing the

> substantial effect of that which is proposed to be done and they do not in themselves amount to convincing arguments against doing it. Of course, whenever money is raised for advancement on terms that it is to be settled on the beneficiary, the money only passes from one settlement to be caught up in the other. It is therefore the same thing as a resettlement. But, unless one is to say that such moneys can never be applied by way of settlement, an argument which, as I have shown, has few supporters and is contrary to authority, it merely describes the inevitable effect of such an advancement to say that it is nothing less than a resettlement. Similarly, if it is part of the trusts and powers created by one settlement that the trustees of it should have power to raise money and make it available for a beneficiary upon new trusts approved by them, then they are in substance given power to free the money from one trust and to subject it to another. So be it: but, unless they cannot require a settlement of it at all, the transaction they carry out is the same thing in effect as an appointment of new trusts.
>
> In the same way I am unconvinced by the argument that the trustees would be improperly delegating their trust by allowing the money raised to pass over to new trustees under a settlement conferring new powers on the latter. In fact I think that the whole issue of delegation is here beside the mark. The law is not that trustees cannot delegate: it is that trustees cannot delegate unless they have authority to do so. If the power of advancement which they possess is so read as to allow them to raise money for the purpose of having it settled, then they do have the necessary authority to let the money pass out of the old settlement into the new trusts. No question of delegation of their powers or trusts arises.

I also adopt the statement at pp. 640-641 as follows:

> That would be a proper answer from a court to which trustees had referred their discretion with a request for its directions; but it does not really solve any question where, as here, they retain their discretion and merely ask whether it is impossible for them to exercise it.
>
> . . . . .
>
> ... First, I do not believe that it is wise to try to cut down an admittedly wide and discretionary power, enacted for general use, through fear of its being abused in certain hypothetical instances. ...

17 I believe that *Re Hampden Settlement Trusts*, [1977] T.R. 177 (Ch. D.), *Re Hastings-Bass*, [1975] Ch. 25, [1974] 2 All E.R. 193 (C.A.) and *Re Ropner's Settlement Trusts*, [1956] 1 W.L.R. 902, [1956] 3 All E.R. 332 (Ch. D.), and other cases, confirm this proposition. Counsel for the Official Guardian frankly conceded that he was not aware of any case anywhere in the Commonwealth that has been decided to the contrary.

18 While "advancement" may have a technical meaning, "benefit" does not. In *Pilkington*, supra, both "advancement" and "benefit" were considered and it was held that the word "benefit" was very wide in its meaning. In the present case, clause III(i)(C) gives an unfettered right to pay "for the benefit" of the testator's issue. In my opinion this includes the settlement of new trusts. I therefore find that the trustees have the power and it is lawful for them to transfer all of the assets of the Family Fund to new trusts.

19 The next question is whether the court should approve the transfer to these specific two trusts. Trustees must act in good faith and be fair as between beneficiaries in the exercise of their powers. There is no allegation of bad faith in the present case. A court should be reluc tant to interfere with the exercise of the power of discretion by a trustee. I adopt the following criteria in *Re Hastings-Bass*, supra, at p. 41 [Ch.] as being applicable to the court's review of the exercise of such power:

> To sum up the preceding observations, in our judgment, where by the terms of a trust (as under section 32) a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorized by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account. ...

Put in the reverse wording, I also adopt the opinion of Middleton J. in *Dunlop v. Ellis* (1917), 41 O.L.R. 303 (H.C.) at 307:

> Where there is, as here, a trust coupled with a discretionary power, the Court is entitled and bound to interfere when there is no attempt to exercise the discretion for the purpose for which it was given, but an attempt to accomplish a purpose quite alien from the intention of the testatrix, the author of the power.

20 It is not the function of the court to approve the specific words of the proposed new trusts and I do not do so. However, I have reviewed the proposed new trusts to determine whether or not they are alien to the intention of the testator, or would be beyond the scope of the power of the trustees. As I have stated, subject to the approved basic division into two family trusts rather than the one, the new trusts closely mirror the provisions of the will, with certain minor modifications. Basically, they provide the interests to the children, grandchildren and issue of the testator, with the ultimate gift over to the Horace Hunter family and the employees of MacLean Hunter Limited. Counsel for the Official Guardian submits that some of the changed provisions in the new trusts are so great that the court should interfere and refuse approval. I would like to comment upon some, but not all, of these issues.

21 1. Under the will, if only one person shall be acting as an executor, then such trustee is directed to appoint a trust company to act as an additional trustee. Also, no reference is made to trustee's compensation, which presumably would be set in the normal way by the courts. Under one of the new trusts, Holton, Donald Hunter and R.G.H. McAslin are to be the trustees, and in the other, Holton, Margaret McCallum and Donald Campbell are to be trustees. In the event of a vacancy, the continuing trustees have power to appoint any person to fill the vacancy. In the event of Margaret McCallum ceasing to be a trustee, each of her children who attains the age of 30 years has the right to be appointed a trustee. Decisions shall be made by a majority of trustees and a maximum compensation to be paid to trustees is imposed. There is to be no compensation paid to any child or grandchild of the testator. In view of the size of the estate, the old trustees believe that this compensation is less than would be commonly awarded by a court. I believe that this change is within the discretion of the trustees.

22 2. There is a possibility of a violation of the rule against perpetuities under the terms of the new trusts. However, in view of s. 3 of the *Perpetuities Act*, R.S.O. 1990, c. P.9, I do not believe that this is sufficient ground for the court to say that the trustees have exceeded their discretion.

23 3. In the new trusts there is a new total exculpatory clause in favour of the new trustees for any of their acts. In my opinion this is a detail of the new trust and is within the discretion of the trustees in setting up the new trusts.

24 4. The effect of the new trusts is to divide the Family Fund into two units. Counsel for the Official Guardian submits that this deprives some beneficiaries of future potential gifts over while conceding that it may benefit them under different circumstances. I believe that this is within the general discretion of the trustees in setting up the new trusts.

25 I believe that the trustees have the power to establish new terms in the new trusts within the parameters of the overall principles that I have set out. I have reviewed the provisions of the new trusts and find that they are substantially for the benefit of the family members within the contemplation of the testator, and find that they do not go beyond the powers of the trustees.

26 For these reasons the answer to the question presented to the court is yes.

27 Costs of all parties on a solicitor-and-client basis are to be paid out of the Family Trust. The costs of the Official Guardian may be agreed upon, but otherwise are to be assessed.

Order accordingly.

TAB 7

Most Negative Treatment: Distinguished
Most Recent Distinguished: Spence v. BMO Trust Co. | 2016 ONCA 196, 2016 CarswellOnt 3345, 346 O.A.C. 108, [2016] O.J. No. 1162, 395 D.L.R. (4th) 297, 14 E.T.R. (4th) 31, 263 A.C.W.S. (3d) 550, 129 O.R. (3d) 561 | (Ont. C.A., Mar 8, 2016)

1996 CarswellOnt 317
Ontario Court of Appeal

Fox v. Fox Estate

1996 CarswellOnt 317, [1996] O.J. No. 375, 10 E.T.R. (2d) 229, 28 O.R. (3d) 496, 61 A.C.W.S. (3d) 211, 88 O.A.C. 201

WALTER FOX v. MIRIAM FOX (executrix of estate of RALPH FOX, deceased, and in her personal capacity), RALPH JAMES FOX and SHAYNE MELISSA FOX

McKinlay, Catzman and Galligan JJ.A.

Heard: October 10-11, 1995
Judgment: February 7, 1996
Docket: Doc. CA C20011

Counsel: *Bernard L. Eastman, Q.C.*, and *Cindy Cohen*, for appellant.
Rodney Hull, Q.C., and *Ian Hull*, for respondent Miriam Fox.
Sandra A. Forbes, for respondents Ralph James Fox and Shayne Melissa Fox.

***Galligan J.A.*:**

1 Walter Fox is a lawyer. He is the only child of Miriam Fox and the late Ralph Fox. Ralph made his will in 1961 when Walter was 20 years of age and still a student. Ralph died in 1969, two years after Walter was called to the bar. Walter married a few months before his father's death. He has two children from this marriage, a son and a daughter. Both were born after Ralph died. By his will Ralph appointed Miriam as his sole executrix.

2 In its essential parts the will gives Miriam a life interest in 75% of the residue and it gives Walter a life interest in the remaining 25%. It provides that, if Walter survives his mother, upon her death he is to receive the residue.

3 The will gives Miriam a very wide power to encroach "for the benefit of"; Walter's children. Miriam has exercised that power. She has given all of the residue to Walter's children with the result that Walter has been deprived of any interest in the residue and of any income from it. The issue in this appeal is whether Miriam was lawfully entitled to exercise her power to encroach in that fashion. The value of the residue is not insubstantial. It appears from information given to the court during argument that the value of the assets which make up the residue is upwards of $750,000.

4 For the purposes of my decision an extensive review of the evidence is not necessary. However, some reference to the circumstances surrounding the encroachments is required to see the issue in its factual context. Walter's son is age twenty-five and his daughter is twenty-two. His marriage to their mother was an unhappy one which ended by separation in 1984 and divorce in 1986. Following the separation Walter's son lived with him for a few years. His daughter lived with her mother. Both children are close to Miriam, their grandmother, particularly the son. The breakdown of the marriage was bitter. It involved much litigation mainly about support payments.

5 Some time after the divorce Walter became romantically involved with his long-time secretary. In the Spring of 1989 they decided to marry. This was a source of some tension for the Fox family. This is because the members of the Fox family are

Jewish; Walter's secretary is a gentile. In late April 1989 Walter told his mother about his plans to marry. She was upset and immediately made a new will disinheriting Walter. She also made the first of a series of encroachments in favour of her two grandchildren. With these encroachments she transferred all of the assets forming the residue of the estate to the grandchildren.

6 The trial was long and bitter [reported at (1994), 5 E.T.R. (2d) at p. 174]. It pitted a mother and her grandchildren against her son. The trial judge described the trial as the vehicle for exposing bitterness, general animosity and a desire to retaliate among the parties. No one came out of it looking very noble. The real issues, however, were narrow. The principal question concerned Miriam's reason for exercising her power to encroach. A second concomitant question was whether the exercise of the power was a proper one. The first issue was factual; the second was legal.

7 The trial judge's finding on the factual issue is clear. She found that Miriam used her power to encroach in order "... to deprive the applicant of his interest in the bulk of the residue of the estate *because he had married a gentile*. [Emphasis added.] There was overwhelming evidence to support that finding even though Miriam denied that this was her motive. The trial judge found that Miriam's motive was "perhaps coupled" with her concern for the welfare of her grandchildren but that her dislike of Walter's marriage was throughout "her prime motivation in encroaching as she did."

8 Unquestionably, concern for the welfare of her grandchildren would be a proper motive to encroach on their behalf. Initially, I was of the view that because Miriam's primary motive was "perhaps coupled" with a concern for her grandchildren's welfare, that the latter concern might support the exercise of the power of encroachment. However, upon reading the trial judge's reasons for judgment together with the reasons which she gave for her disposition of costs, I think I would be doing a disservice to the clear and unambiguous finding of fact made after a long, difficult and emotional trial if I relied on the possible concern of Miriam for her grandchildren's welfare to dispose of this case. I have concluded that I must examine the legal issue in the light of an unassailable finding of fact that Miriam's disapproval of Walter's proposed marriage to a gentile was her motivation for exercising her power to encroach.

9 The grant of the power to encroach is found in the following clause in the will:

> Out of the capital thereof, to pay such amount or amounts as my Trustee may, in its absolute discretion, consider advisable from time to time to or for the benefit of my said son's issue or such one or more of them as my Trustee may select from time to time.

The discretion conferred upon the trustee is absolute.

10 After a review of a number of leading cases, the trial judge concluded that because she did not find *mala fides* on Miriam's part, the exercise of her discretion had been a proper one.

11 The entire question of the degree of control which the courts can and should exercise over a trustee who holds an absolute discretion is filled with difficulty. The leading case, or at least the case to which reference is almost always made, is *Gisborne v. Gisborne* (1877), 2 App. Cas. 300 (H.L.). It stands for the proposition that so long as there is no *"mala fides"* on the part of a trustee the exercise of an absolute discretion is to be without any check or control by the courts.

12 The courts, however, have not always equated *mala fides* with fraud. I am spared an extensive review of authority by a very learned paper written by Professor Maurice Cullity, "*Judicial Control of Trustees' Discretions*" (1975), 25 U.T.L.J. 99. I think it can safely be said in the light of Professor Cullity's analysis of the authorities that some conduct which does not amount to fraud will be categorized as *mala fides* so as to bring it within the scope of judicial supervision. I am in respectful agreement with Professor Cullity when he expresses the opinion, at p. 119, that the term *mala fides* is sufficiently broad "to make the use of the term undesirable." Nevertheless, the term is still used. While I am not bold enough to attempt to define its outside limits, I think the cases do support Professor Cullity's conclusion at p. 117 that the courts may interfere if a trustee's decision is influenced by extraneous matters. I make particular reference to the judgment of Steele J. in *Hunter Estate v. Holton* (1992), 7 O.R. (3d) 372 (Gen. Div.), at p. 379:

Trustees must act in good faith and be fair as between beneficiaries in the exercise of their powers. There is no allegation of bad faith in the present case. A court should be reluctant to interfere with the exercise of the power of discretion by a trustee. I adopt the following criteria in *Re Hastings-Bass* ... at p. 41 Ch., p. 203 All E.R., as being applicable to the court's review of the exercise of such power:

> To sum up the preceding observations, in our judgment, where by the terms of a trustee ... a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, *unless* (1) what he has achieved is unauthorised by the power conferred upon him, or (2) *it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account*, or (b) had he not failed to take into account considerations which he ought to have taken into account.

[Emphasis added.]

13 In this case, in my view, the fact that her son intended to marry a gentile was completely extraneous to the duty which the will obviously imposed upon Miriam, namely to be concerned about the welfare of her grandchildren. This extraneous consideration demonstrated sufficient *mala fides* to bring her conduct within any reasonable interpretation of that term.

14 The circumstances bear some similarity to those in *Klug v. Klug*, [1918] 2 Ch. 67 (Ch. D.). In that case a trustee refused to exercise a discretion allowing her to pay money for the advancement or benefit of her daughter because her daughter had married without her consent. In those circumstances Neville J. held at p. 71:

> ... it is the duty of the Court to interfere and, in the exercise of its control over the discretion given to the trustees, to direct that a sum be raised out of the capital sufficient to pay. ...

15 The duty which rested with the trustee was to pay monies for the advancement or benefit of the children if the trustee saw fit to do so. While Neville J. did not specifically state that the mother's displeasure at her daughter's marriage was an extraneous circumstance, it seems to me that the situation was analogous to this one. In the context of all the facts, disapproval of the marriage was extraneous to the child's advancement or benefit. The court interfered with the trustee's discretion in that case and I think this court ought to do the same.

16 There is another reason why the discretion which Miriam exercised in this case was improper and must be set aside. It is abhorrent to contemporary community standards that disapproval of a marriage outside of one's religious faith could justify the exercise of a trustee's discretion. It is now settled that it is against public policy to discriminate on grounds of race or religion. This is made clear in the reasons delivered by Robins J.A. in *Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 74 O.R. (2d) 481 (C.A.), at pp. 495-96:

> To say that a trust premised on these notions of racism and religious superiority contravenes contemporary public policy is to expatiate the obvious. The concept that any one race or any one religion is intrinsically better than any other is patently at variance with the democratic principles governing our pluralistic society in which equality rights are constitutionally guaranteed and in which the multicultural heritage of Canadians is to be preserved and enhanced. The widespread criticism of the Foundation by human rights bodies, the press, the clergy, the university community and the general community serves to demonstrate how far out of keeping the trust now is with prevailing ideas and standards of racial and religious tolerance and equality and, indeed, how offensive its terms are to fair-minded citizens.
>
> To perpetuate a trust that imposes restrictive criteria on the basis of the discriminatory notions espoused in these recitals according to the terms specified by the settlor would not, in my opinion, be conducive to the public interest. The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and equal respect.

17 In that case, Robins J.A. was discussing the restraint which public policy puts upon the freedom of the settlor to dispose of his property as he saw fit. If a settlor cannot dispose of property in a fashion which discriminates upon racial or religious grounds, it seems to me to follow that public policy also prohibits a trustee from exercising her discretion for racial or religious reasons.

18 I am of the view that in this case it would be contrary to public policy to permit a trustee effectively to disinherit the residual beneficiary because he dared to marry outside the religious faith of his mother. While there were decisions in the past which have upheld discriminatory conditions in wills, in response to a query from the bench, counsel in this case were not prepared to argue that any court would today uphold a condition in a will which provides that a beneficiary is to be disinherited if he or she marries outside of a particular religious faith. I find compelling Mr. Eastman's argument that if a testator could not do so then his trustee could not do it for him.

19 Counsel for the grandchildren argued that if Ralph were still alive there would have been nothing to prevent him from revoking his will and making a new one in which he left nothing to Walter. She argued therefore, that in the exercise of her absolute power to encroach Miriam should be able to do that for him. Even if it were accepted that Ralph, if alive, would have disinherited Walter because of his intention to marry out of Ralph's religious faith, that argument cannot succeed.

20 It is of course a given, assuming testamentary capacity, that a person is entitled to dispose of property by will in any fashion that he or she may wish. The exercise of a testator's right of disposition is not subject to supervision by the court. But a trustee's exercise of discretion is subject to curial control. Admittedly, because he would not be subject to judicial supervision, Ralph, if alive, could have disinherited Walter for reasons which would have contravened public policy. However, Ralph is not alive and is not preparing a new will. Miriam, while acting as a trustee, on the other hand is subject to judicial control and that control can and must prevent her from exercising her discretion in a fashion which offends public policy.

21 With great deference to the experienced trial judge who held a different view, it is my opinion that Miriam's exercise of discretion to the prejudice of Walter because he married outside of Miriam's and his own religious faith was unlawful and must be set aside. It follows that as a result of her improper dealing with the assets of the estate Miriam can no longer remain the executrix.

22 For these reasons it is my opinion that this appeal should succeed. I have read the reasons for judgment prepared by McKinlay J.A. and I agree that the appeal should also be allowed for the reasons which she has given. I would dispose of the appeal in the fashion which she proposes.

McKinlay J.A.:

23 I agree with the result reached by Galligan J.A. in this appeal. I am not satisfied, however, that marriage outside the Jewish faith was the sole reason for the transfer of estate assets by the trustee to her grandchildren. Thus, I consider that it is necessary to consider some of the evidence and the specific terms of the will itself.

Cottage Property

24 I will first discuss the question of the proceeds of the cottage property, because it is clear from the reasons of Haley J. [reported at (1994), 5 E.T.R. (2d) 174 (Ont. Gen. Div.)] that Mrs. Fox intended to dispose of those proceeds to her grandchildren because of the possible marriage of Walter outside the faith. I see no reason to question that finding. The cottage property was sold, and the proceeds turned over by the executrix to her grandson before other estate property was transferred to her grandson and granddaughter. Mrs. Fox was of the view that all of the proceeds of the cottage property were hers personally to dispose of as she wished. Haley J. agreed with that position, in error, in my view.

25 There can be no doubt that the apartment building and the matrimonial home were intended to be held by the parties as tenants in common; indeed, that was never in issue in this case. However, there was no evidence, other than evidence of the testatrix, that there was ever an intent that the cottage be held by the parties in any form of joint tenancy. It was registered in

the sole name of the testator, there was no declaration of trust in favour of Mrs. Fox, and he made a clear disposition of the cottage property in paragraph 3 of his will, which reads as follows:

> 3. To permit my said wife to use, as long as she may desire, my summer cottage at Lake Simcoe.

26 Mrs. Fox had the right to use the physical cottage property during her lifetime, and a general power in the will to sell estate assets. On a sale of those assets, of course, the proceeds became part of the residue of the estate. In her reasons, Haley J. stated [at pp. 179-180, E.T.R.]:

> There is no explanation why the cottage property was not included in the statutory declaration of 1961 [which dealt with the apartment building, the matrimonial home, and a mortgage receivable] nor why it was treated specifically in Ralph's will as his separate property. If the property was Ralph's alone there is also no reason why Mr. Day who acted as estate solicitor and who also drew the statutory declarations of 1961, would have included it in the succession duty affidavit with the specific note to the contrary. I am satisfied that Miriam accepted the one-half sharing of all the real estate at the time of Ralph's death.

27 With respect, the fact that Mrs. Fox accepted a one-half sharing of the cottage property does not create any right for her to do so. The asset was registered in the sole name of the deceased, and when he signed his will he dealt with it specifically. In any event, Mrs. Fox disposed of the *total* proceeds to her grandson when even her own position would have entitled her to only one half of those proceeds. (There can be no suggestion that she was entitled to any interest in the cottage under any prevailing family law, since the *Family Law Reform Act*, R.S.O. 1980, c. 152, the predecessor of the *Family Law Act, 1986*, S.O. 1986, c. 4, had not yet been enacted in 1961.)

28 Mrs. Fox executed a "Memorandum of Decision of the Trustee of the Estate of Ralph Fox" expressing her purported reasons for her exercise of discretion in paying the cottage proceeds over to her grandson. However, that declaration was not drafted by her, but by her counsel two full years after the fact.

29 In my view, on the sale of the cottage, the total net proceeds fell into the residue of the estate to be dealt with accordingly, and the disposition of those proceeds by Mrs. Fox as if they were her own constituted a breach of trust.

Other Estate Property

30 The appellant signed a release in favour of Mrs. Fox as executrix of the estate with respect to his income entitlement out of the estate up to December 31, 1991. Although that release purports to release Mrs. Fox with respect to all matters pertaining to the estate to that date, the application which is the subject of this appeal alleges surreptitious and intentional misuse of the entire corpus of the estate.

31 On October 17, 1992, the grandson of the executrix, who was living with her, wrote to the solicitor of the executrix stating:

> ... included in this letter is a statement from my Grandmother which sets out her reasons for exercising an encroachment of the proceeds from the sale of the cottage.
>
> Late last week my father contacted Jonathon Suttner asking him to provide an income statement for 1992. It is the opinion of both myself and my Grandmother that the estate of Ralph Fox must formally be dissolved as soon as possible. We look forward to hearing from you in the near future so that *we may begin to take further action* in that direction. [Emphasis added.]

Of course, Mrs. Fox's grandson had no right to participate in a decision to "dissolve" the estate of his grandfather, who died before he was born.

32 The statement included with that letter was drafted by the grandson, and included many expressions of love of the grandmother for her grandchildren, and also references to the appellant's dereliction of duty toward his children. It states, among other things, the following:

... Walter's estrangement from his own family can be attributed to his ambition of remarrying and starting up a new family. In essence his plans were to begin a new family while simply discarding his old one.

... It was only several months ago upon the receipt of a legal document from my son asking for a financial statement of Ralph Fox's estate did I first become aware of the terms that my husband's will had prescribed for the estate. I had naively assumed that because I was an equal partner in building the Estate, and since I have exclusively attended to all matters concerning the Estate, that I had complete discretion over the assets of the Estate and the distribution of its income.

33 In her *viva voce* evidence, Mrs. Fox made it quite clear that she had no understanding whatever of her duty as executrix of her husband's estate. She in effect said that she was of the view that all of the assets were hers to dispose of as she pleased because she had worked with her husband to acquire them. The following are but a few relevant examples of that evidence.

p. 585 I had to send him to school [her grandson] and I had to see that he should get somewhere in this world and whatever I have, I want to give to those two children [her grandson and granddaughter].

p. 587 Well, I don't worry about him now [the appellant] ... I used to, but not now, now he's married and he's got a wife, let her worry about him.

p. 598-9 Q.... When you got this order [a court order freezing estate assets], did you, at that point, understand the difference between your half of the apartment building and the estate's half?

A. No.

Q. Did you at that point —

A. No, I didn't separate it, no.

Q. Did you at that point think that the whole apartment building was yours?

A. Yes.

Q. And that all the money was yours?

A. That's right.

Q. Did you do anything different —

A. No nothing.

Q. — as a result of this order?

A. No, I didn't do nothing.

Q. And so you kept paying the money out —

A. The same —

Q. — the same way that you did before?

A. Yes, I did.

Q. And treating all the money from the apartment building as if it was your own?

A. That's right ...

p. 609-10 Q. Now Mrs. Fox, you said, concerning the cottage property, I believe, that you thought it was yours from day one?

A. Yes.

Q. And in 1989 when it was sold, you received the proceeds and you put them in your account; correct?

A. Mm-hm.

Q. Now, what was your understanding at that point of who owned those proceeds?

A. Me.

Q. You personally?

A. Yeah.

Q. And was it your understanding at that time that if you wanted to, you could go out and spend that money —

A. Exactly.

Q. — on anything you wanted?

A. Yes, that's what I thought it was.

Q. And did that apply — in 1989, is that the same way you thought about the apartment building?

A. Yes.

Q. That all the income was yours?

A. Right.

Q. So then anything you gave from the apartment, or from the cottage to anybody was something that you didn't have to do, you felt that this was something that was completely up to you?

A. Yes.

Q. And it was as if you were dealing with your own property?

A. Right.

p. 630-1 Q. Mrs. Fox, you indicated that you had no concern about giving all the money and property to Ralph and Shayne, right?

A. No.

Q. And did you feel, when you were doing that, that it was necessary to have some kind of an agreement so that you could still be in charge of things?

A. No. I'm in charge of things even if I gave it to them.

Q. So really, Mrs. Fox, as far as you're concerned, everything is continuing as before?

A. I hope so.

Q. With you being able to —

A. As long as I'm able to —

Q. With you being able to deal with all the property as if it's your own during your lifetime?

A. That's right.

Q. And the only difference is now you're sure that Walter can't get anything and that it will go to your grandchildren?

A. Well, to my knowledge, that's the way I see it.

Q. And otherwise everything is the same as before?

A. Everything is the same as before.

34 It is obvious that Mrs. Fox in no way considered the terms of the will when she made the encroachments she did. What she did, she did in the firm belief that she was dealing with her own property. In addition, she had no intention of giving up her own interest in the estate income. As she said, "I'm in charge even if I gave it to them." To this end, she had her solicitor draft an agreement between her and her grandchildren which required her signature to deal in any way with funds in the Canadian Imperial Bank of Commerce totalling $53,500 and with the income from and ownership of the Palmerston Boulevard apartment building.

35 The property of the estate, as sworn for Succession Duty purposes, included the matrimonial home at 16 Lilywood Road, North York, where it appears Mrs. Fox was still living with her grandson at the time of the trial; the apartment building at 532-534 Palmerston Blvd., Toronto; the cottage property in Innisfil Township; $18,674.99 in cash or deposits; and $1,556 in other assets. Nonetheless, a "Memorandum of Encroachment with Respect to the Estate of Ralph Fox", dated December 30, 1992, and signed by Mrs. Fox, and obviously drafted with legal advice, states in paragraph 6:

> The estate initially consisted of two assets: cottage property on Lake Simcoe and a 50% interest in real property in the City of Toronto, municipally known as 532-534 Palmerston Boulevard (the "property"). The cottage property on Lake Simcoe was sold in June 1989.

36 It is interesting to note that this memorandum indicates that the whole cottage property, and not merely a 50% interest in it, was an asset of the estate. Obviously missing from the list of original assets are the matrimonial home, the cash and other assets.

37 At the time of his father's death, the appellant was 29 years of age. After Mrs. Fox's grandson went to live with her, some twenty years after her husband's death, there was a breakdown in communications between the appellant and his mother. There is no evidence that before that time the appellant took issue with his mother's handling of estate assets. He seemed content to have her live in the matrimonial home and to give to him a share of income of the estate as determined by her. However, there was no contact with him, and obviously no consideration of the terms of the will when Mrs. Fox dealt with capital assets of the estate as if they were her own personal property.

38 It appears from the evidence that the appellant was not aware of capital encroachments until he received a letter from Mrs. Fox's solicitor on May 26, 1993 informing him as follows:

> The executrix has asked me to advise you that she has exercised her right of encroachment and transferred the entire estate to Ralph Fox and Shayne Fox pursuant to the provisions of the will.
>
> In fact the proceeds with respect to the summer cottage were transferred on December 31, 1991. The 50% in 532-534 Palmerston Boulevard was effectively transferred on December 30, 1992.

I have asked Mr. Jonathan Suttner to prepare estate accounts from the closing date of the last accounts sent to you to the wind up of the estate on December 30, 1992. I will provide you with a copy of those accounts as soon as they are received.

39 This letter makes no mention of the matrimonial home, cash, and other original estate assets.

40 Whether or not these encroachments were appropriate depends on whether they were made within the terms of the will. As stated earlier, I agree with Galligan J.A. that a capital encroachment made because of the appellant's involvement with a person not of the Jewish faith does not constitute a *bona fide* exercise of discretion. However, I wish also to look at the terms of the will for the purpose of determining whether there was a proper exercise of discretion within the terms of the will apart from religious considerations.

41 The relevant provisions of the will state:

4. During the lifetime of my said wife, if she shall survive me, to hold the residue of my estate upon the following trusts:

(a) To pay to my said wife, for her own use and benefit absolutely, 75% of the net income derived therefrom, and to pay the remaining 25% thereof as follows:

(i) For so long as my said son shall be living, to my said son,

(ii) After the death of my said son, to or for my said son's issue, or some one or more of them, in such proportions as my Trustee may, in its absolute discretion, consider advisable from time to time.

(iii) After the death of the last survivor of my said son and his issue, to my said wife, for her own use and benefit absolutely.

(b) Out of the capital thereof, to pay such amount or amounts as my Trustee may in its absolute discretion, consider advisable to or for my said son.

(c) Out of the capital thereof, to pay such amount or amounts as my Trustee may, in its absolute discretion, consider advisable from time to time to or for the benefit of my said son's issue or such one or more of them as my Trustee may select from time to time.

5. After the death of the survivor of me and my said wife, subject as hereinafter provided, to hold the residue of my estate upon trust to pay the net income therefrom to my said son until he attains the age of twenty-five years, and at that time or at the death of the survivor of me and my said wife, whichever be later, to pay, transfer and convey unto my said son the residue of my estate; provided that if my said son shall die before attaining the age of twenty-five years, either in my lifetime or after my death, the residue of my estate shall, after the death of the last survivor of me and my said wife and my said son, (hereinafter referred to as "the time of determination") be held in trust, in equal shares per stirpes, for the issue of my said son living at the time of determination, or, if there be no issue of my said son living at the time of determination. .....

42 With respect to the interpretation of the discretion provisions of the will, the trial judge stated in her reasons, at pp. 20-1 [p. 186 E.T.R.]:

Ralph was free at the time of making his will to consider the circumstances in which he wanted the power to be exercised. He elected to place utmost faith in the discretion of the executrix and by the discretion gave her power to re-make his will if she saw fit in the circumstances. Instead of using the will to reach into the future from the grave, Ralph decided to allow his executrix to take the actions framed by the power of encroachment to achieve his goals in events which he could not himself foresee. Therefore, if Walter made a marriage which his executrix considered unfortunate, in giving the power to his executrix that he did, it should be taken that Ralph approved her actions based on her disapproval.

43 If the discretion of the executrix was exercised in this case because of her religious bias, then the decision of Galligan J.A., in my view, is decisive. If she had reasons in addition to the religion of her son's proposed spouse, then the meaning of the will, and the nature of her exercise of discretion should be considered.

44 The law is clear that if there is any ambiguity in the terms of a will, the court should attempt to ascertain the intention of the testator at the time it was executed. The son of the testator was born on March 8, 1941. At the time of the execution of the will, on July 12, 1961, he was an only son, twenty years of age, and unmarried. With respect to income from the estate, it is clear that the appellant has a right to income during his life and that his issue take benefits under the will only on his death. (see clause 4(a)(ii)). The first provision for encroachment on capital is in sub-paragraph 4(b). It is in favour of the appellant, and permits encroachment to the extent of paying "such amount or amounts" as the trustee "may in its absolute discretion consider advisable". I think it is fair to say that all of the cases cited to us indicate that such a discretion, standing alone, permits the trustee to exercise discretion without the fear of intervention of the court other than in cases such as those referred to by Galligan J.A. However, there are a number of provisions in this will which would be defeated if sub-paragraph 4(c) were interpreted to permit a total capital encroachment.

45 The discretion to encroach on capital in favour of the issue of the appellant is found in sub-paragraph 4(c). It permits payment of "such amount or amounts" as the trustee "may, in its absolute discretion consider advisable from time to time". That wording is slightly different from that in sub-paragraph 4(b) which permits capital encroachment in favour of the appellant. The only apparent difference between the two provisions is that sub-paragraph 4(b) seems to permit a total encroachment in favour of the appellant at one time, whereas sub-paragraph 4(c) permits only periodic encroachments in favour of his issue.

46 Without reference to other provisions in the will, that difference might not seem significant. However, no cases were cited to us where there is a discretion provided in a will which, upon its exercise, would wipe out the possibility of an encroachment in favour of another beneficiary in whose favour there is a life interest in income and a remainder interest in capital. If the encroachment made in this case is permitted by the terms of the will, it raises startling possibilities. For instance, had Mrs. Fox been unable, perhaps because of infirmity, to act as trustee, another trustee could have transferred the entire estate (excepting only the cottage before its sale) to the appellant, and wiped out Mrs. Fox's life interest in income and her remainder interest without any consideration of her rights or the rights of other beneficiaries. Surely the court would have interfered in such a case, because it was clearly the intention of the testator that his widow should have a life interest in his estate. This intention was also clear with respect to his son. Grandchildren who, it should be remembered, were not born when the will was executed, were only to have an interest in income following the death of the appellant. Their interest in the remainder of the estate was also to fall in only after the death of their father.

47 In my view, it was the obvious intent of the testator that his son have a life income from his estate, and the remainder outright following the death of his mother. The power to encroach must be viewed in the light of that intent.

48 In addition, although the encroachment to the extent of the cottage proceeds was of an "amount" within the terms of 4(c), the encroachment to the extent of the transfer of the estate interest in the apartment building was not the payment of an "amount", but was the transfer of an interest in real property, which was the major source of estate income. Were it necessary to do so, I should hold that at least the transfer of the estate interest in the apartment building was not an encroachment within the terms of the will. However, I do not consider it necessary to do so.

49 It is clear that the testatrix, in transferring all of the property she did to her grandchildren, did not consider the provisions of the will at all. She arbitrarily decided to treat the estate assets as her own property and, even after an order of the court freezing estate assets, continued to do so. After the appellant properly requested an accounting of disbursements from the estate, Mrs. Fox obtained legal advice and her counsel drafted a memorandum of encroachment using all of the appropriate words to support the encroachment. However, her own clear *viva voce* evidence indicates that she always considered the estate assets to be hers to deal with as she pleased, and that she wished to disinherit her son. She can do that with her own estate, but not with that of her deceased husband. It is my view that all of the encroachments made by Mrs. Fox constitute breaches of trust.

50 In result, I would allow the appeal, set aside the judgment in appeal and replace it with judgment in favour of the appellant in the following terms:

1. Declaring that Miriam Fox is in breach of the trust provisions of the last will and testament of her deceased husband Ralph Fox.

2. Removing Miriam Fox as executrix of the estate of Ralph Fox, and replacing her by an executor or executrix, other than any of the other parties to this action, to be agreed upon by the parties. In the event that the parties cannot agree upon a new executor or executrix, one may be appointed upon application to the Ontario Court of Justice (General Division).

3. Ordering an accounting of all original estate assets, including the estate interest in the matrimonial home, the cash, and other original assets.

4. Ordering repayment of any funds improperly removed from the estate, plus appropriate interest thereon, including 100% of the net proceeds of the sale of the cottage property, from funds into which they can be traced, or from Miriam Fox personally where tracing is not possible.

5. Ordering a retransfer into the name of the estate of a one half interest in the Palmerston Avenue apartment building.

6. Ordering costs in favour of the appellant to be paid by Miriam Fox personally.

Catzman J.A.:

Introduction

51 I have read, in draft form, the reasons for judgment of my colleagues. They would allow the appeal on the grounds that:

(1) Miriam had no right to dispose of the cottage property in any capacity;

(2) Miriam did not exercise her discretion as executrix at all, but rather dealt with the estate assets as if they were her own;

(3) if Miriam did purport to act as executrix,

(a)the exercise of her discretion to encroach cannot be sustained because it was motivated by her disapproval of Walter's marriage outside the Jewish faith; and

(b)the power to encroach conferred by the will did not entitle her to encroach in the manner she did.

52 I agree with the conclusions identified above as items (1), (2) and (3)(b). If, however, those conclusions are wrong, and if this appeal falls to be determined on the basis of the nature of the motivation underlying the exercise of Miriam's discretion to encroach, I respectfully disagree with the views of my colleagues. I consider it advisable, in the event that this litigation proceeds further, to record the basis of my disagreement.

Miriam's Motivation

53 Galligan J.A. has concluded that Haley J. found as a fact that "Miriam's disapproval of Walter's proposed marriage to a gentile was her motivation for exercising her power to encroach". I agree with Galligan J.A. that, if Miriam's exercise of her discretion to encroach was actuated solely by her displeasure with her son's choice of spouse, her exercise of discretion should not permitted to stand. However, I have a different assessment of Miriam's motivation.

54 I begin by looking at what Haley J. said on the subject. Her reasons for judgment following the trial are reported at (1994), 5 E.T.R. (2d) 174 (Ont. Gen. Div.). At pp. 184-185, she says:

> I am satisfied that the first encroachment, being of the cottage proceeds, was motivated by Miriam's concern about the marriage and that this motive continued *and was perhaps coupled with her concern for the welfare of Walter's children as stated in the Memorandum of Encroachment of December 1992*. However, the conversation with Percy Freedman took place as late as August 1992 and I am satisfied that Miriam's dislike of Walter's marriage continued *as her prime motivation* in encroaching as she did.

(Emphasis added.)

55 Her reasons for judgment respecting costs, delivered some two months later, are reported at (1994), 5 E.T.R. (2d) 188 (Ont. Gen. Div.). At p. 191, she says:

> The central issue of this trial was whether the executrix had properly exercised the broad power of encroachment the testator had given her under the will when she had used it to deprive the applicant of his interest in the bulk of the residue of the estate because he had married a gentile.

56 Galligan J.A.'s view is that these passages reflect a clear and unambiguous finding of fact that Miriam's motivation for exercising her power to encroach was exclusively her disapproval of Walter's marriage. His reasons proceed on that premise, and I have no quarrel with the conclusion he reaches if that premise is correct. With deference, however, I read Haley J.'s reasons for judgment somewhat differently. On my reading, while Haley J. does clearly indicate that Miriam's displeasure with Walter's choice of spouse was the primary reason for her exercise of the power to encroach, she also indicates that Miriam's actions were motivated, at least in part, by her concern for the financial welfare and security of her grandchildren.

57 In fairness, Miriam's motivation for encroaching as she did was not the focus of Haley J.'s reasons for judgment. Her focus, rather, was on the broad and uncontrolled nature of the power to encroach conferred by the will. Although, unlike Galligan J.A., I do not find Haley J.'s finding of fact to be clear and unambiguous, I think it fair to say that the imprecision arises because she did not consider it necessary to be precise on the subject. On her analysis, the question whether Miriam was entitled to encroach as she did was far more important than the question why Miriam encroached as she did.

58 As Galligan J.A. has pointed out, there was evidence at the trial to support the finding that Miriam, despite her denials, exercised the power to encroach because Walter chose to marry out of the Jewish faith. But there was also evidence, none of which Haley J. purported to reject, that Miriam was moved as well by her concern for the financial welfare and security of her grandchildren. Indeed, it should be borne in mind that, in encroaching as she did, Miriam was acting against her own interest, for she thereby forfeited the portion of the income on the residue that would have otherwise accrued to her under her husband's will.

59 Walter's son, Ralph, testified that Miriam had expressed concern that Walter's new wife was after money, both Walter's and Miriam's. This concern was reflected in a memorandum prepared by Miriam's lawyer in May 1989, in which he wrote:

> Miriam's major concern is related to Walter's present folly. He appears to be deeply involved with his secretary — about whom his mother has very strong feelings and historial *(sic)* grounds for objection. She has made up her mind to "disinherit" Walter *so as to prevent this woman from getting her hands on any of her money.*

(Emphasis added.)

60 In Walter's own evidence, he acknowledged that, since 1989, he had no contact with Ralph and provided no financial support to him. Walter also acknowledged that his daughter, Shayne, was aware of the continuing court battles between him and his former wife on the issue of child support. The memorandum of encroachment signed by Miriam in December 1992 (to which Haley J. referred in the first of the two passages quoted above) recited, in part:

> Among my many reasons for giving positive consideration to exercising my discretion to transfer a major portion or all of the assets of the estate to my grandchildren are the following:

(a) My son, Walter, went through an extremely acrimonious divorce with his wife (the mother of Ralph and Shayne) in or about 1984. Through his actions, Walter has alienated both of his children, has not acted as a responsible parent to them either financially or emotionally and I have concerns that if any portion of the estate eventually passed to Walter on my death (as is provided under the will) he would not make proper provision for Ralph and Shayne, as was the hope of my late husband.

(b) I am aware that at various times Walter's financial circumstances have been very insecure. Therefore, I am concerned that a major portion of any part of the estate which is left to him would only go to satisfy his indebtedness.

(c) Both Ralph and Shayne attend school and Ralph particularly may be in university for many years. Walter has not been providing the financial support to Shayne that he was required to pursuant to Court Order and despite the fact that Shayne's mother has gone to the court on a number of occasions to attempt to have Walter meet his obligations. As a consequence, I have been personally paying for my grandson's, Ralph, university education.

(d) I have a very close relationship with my grandchildren, Ralph and Shayne, and I know them to be mature well beyond their years. As a result of the actions of their father, they have experienced a great deal of uncertainty in their lives and I believe that they would maturely benefit from a degree of financial security that would be provided by transferring the estate to them.

(e) Although I would lose my entitlement to income from the estate if I transferred the remaining assets to Ralph and Shayne, I have reviewed my own financial situation with my accountant and have concluded that my lifestyle and security will not be affected.

(f) I understand that at this particular time an incidental benefit of making the encroachment as regards the property is the fact that the estate would avoid the deemed capital disposition that would occur pursuant to the *Income Tax Act* on January 2, 1993 and would avoid the necessity of relying upon the proposed new legislation to attempt to defer the deemed capital disposition.

(g) Walter is fifty years old, has remarried, is a lawyer, and has been in his own private practice for over twenty-five years. He suffers no disability and is certainly able to fully support himself and his wife and maintain his lifestyle.

These were legitimate factors for Miriam to take into account in exercising the discretion conferred upon her by her husband's will.

61 As I read the evidence, therefore, having regard to the history of the estranged and unhappy relationship between Walter and his children and to Miriam's historically justified apprehension regarding Walter's sense of responsibility to provide for them, their financial welfare was a real and operating concern influencing Miriam to exercise her discretion as she did. I therefore conclude, as I understand Haley J. to have concluded, that there were two bases, both supported by credible evidence, on which Miriam exercised her discretion to encroach:

(1) the first, and inappropriate, basis, her displeasure with Walter's choice of spouse; and

(2) the second, and appropriate, basis, her concern for the financial welfare and security of her grandchildren.

62 While the first basis was undoubtedly primary and would, if standing alone, warrant intervention by the court, the second basis is a legitimate foundation for the exercise of discretion by the executrix under the will.

The Significance of Miriam's Motivation

63 If I am right that there were two bases on which Miriam exercised her discretion to encroach, one appropriate (her concern for his grandchildren's financial welfare and security) and one inappropriate (her displeasure with Walter's choice of spouse), what is the significance of her duplex motivation? Does the inappropriate motive fatally infect Miriam's decision to encroach,

notwithstanding the appropriate motive? Or does the appropriate motive save her decision to encroach, notwithstanding the inappropriate motive?

64 The point was not argued before us, and my research has failed to find any clear answer. There is some slender support for the former view — that the inappropriate motive is fatal — in the article, "*Judicial Control of Trustees' Discretions*" (1975) 25 U.T.L.J. 99, in which Professor Cullity writes, at p. 115:

> Extraneous benefits, motives, or desires will vitiate an attempt to exercise a discretion only if they actuate *or form part of the basis* upon which the trustee's decision was reached.

(Emphasis added.)

65 No authority is cited for that proposition and, in the absence of authority, I have difficulty in accepting that the exercise of discretion by an executrix on an appropriate basis must necessarily fail because of a concomitant inappropriate basis. In light of our proposed disposition of this appeal on other grounds, I need not resolve this question. I incline to the view, however, that if an executrix exercises her discretion to encroach for a "good" reason, clearly within the contemplation of the power conferred upon her by the will, we should be reluctant to interfere on the ground that she was, additionally, motivated by a "bad" reason that the court is unprepared on public policy grounds to support.

Disposition

66 Having regard to my agreement with those aspects of the reasons of my colleagues set out in the introduction to these reasons, I would dispose of this appeal in the manner proposed by McKinlay J.A.

Appeal allowed.

TAB 8

2001 CarswellOnt 5020
Ontario Superior Court of Justice

Edell v. Sitzer

2001 CarswellOnt 5020, [2001] O.J. No. 2909, [2001] O.T.C. 547, 106 A.C.W.S. (3d) 1136, 40 E.T.R. (2d) 10, 55 O.R. (3d) 198

Jodi Edell and Cara Edell, Hayden Edell, Samantha Edell, Marek Edell and Mayson Edell, by Their Litigation Guardian, Jodi Edell, Plaintiffs and Paul Sitzer and Michael Sitzer, Defendants

Michael Sitzer, Plaintiff by Counterclaim and Jodi Edell and Cara Edell, Hayden Edell, Samantha Edell, Marek Edell and Mayson Edell, by Their Litigation Guardian, Jodi Edell, Paul Sitzer Holdings Limited, Geraldine Sitzer Holdings Ltd. and Paul Sitzer in All of His Capacities, Defendants by Counterclaim

Cullity J.

Heard: January 3 - March 30, 2001
Judgment: July 13, 2001
Docket: 98-CV-150785

Counsel: *Harry Underwood*, for Plaintiffs, Jodi Edell, Cara Edell, Hayden Edell, Samantha Edell, Marek Edell, Mayson Edell, by their Litigation Guardian, Jodi Edell
Benjamin Zarnett, Jessica A. Kimmel, for Paul Sitzer, Paul Sitzer Holdings Limited, Geraldine Sitzer Holdings Ltd., Paul Sitzer in all of his capacities
Harvey Strosberg, David L. Robins, for Michael Sitzer

***Cullity, J.*:**

1 In this action, Jodi Edell ("Jodi") sues in her personal capacity and as litigation guardian for her children. The defendants are her father, Paul Sitzer ("Paul") and her brother, Michael. At the trial I appointed Mr. Hugh M. DesBrisay to replace another solicitor as litigation guardian for Michael's children. They must also be added as defendants and the style of cause amended accordingly.

2 I also made orders pursuant to rule 10.01(1) appointing Jodi to represent her unborn issue who are potential beneficiaries of two *inter vivos* trusts (the "Michael Trust" and the "Jodi Trust") established by Paul in 1989 and 1990 respectively. I made similar orders appointing Mr. DesBrisay to represent Michael's unborn issue.

3 The litigation concerns the interests of Jodi in her deceased mother's estate, the alleged interests of Jodi and her issue in Paul's estate under the doctrine of mutual wills, or otherwise pursuant to a constructive trust or other equitable obligation, and their interests as beneficiaries of the Jodi Trust. Among other relief, Jodi seeks the removal of Paul as trustee of the mother's estate and the Jodi Trust, a declaration that he now holds all of his own property on the trusts set out in his will dated June 24, 1993 and an order that Michael transfer 50 class D common shares of Paul Sitzer Holdings Ltd. ("Paulco") to the Jodi Trust.

4 Michael has counterclaimed for a declaration that he is the beneficial owner of the 50 shares of Paulco that the plaintiffs seek to have transferred to the Jodi Trust. In the alternative, he requests orders that would reverse the effects of a reorganization of the assets of the two *inter vivos* trusts that was implemented in 1991.

5 The legal and factual issues in this action were of some difficulty and, to the extent that Mr. Underwood argued that the limits of the mutual wills doctrine should be expanded in the light of recent developments relating to constructive trusts, they had novel features.

6 The principal issue raised with respect to the other relief requested concerns the propriety of Paul's conduct as the trustee of his late wife's estate and as the sole surviving trustee of the Jodi Trust. There is, in addition, an initial question relating to the interpretation of words conferring a power of encroachment on the trustees in the provisions of the Jodi Trust.

7 The trial lasted for 21 days. Much of that time was taken up with evidence intended to establish, on one side, that, in encroaching on the capital of the Jodi Trust for the benefit of Michael, Paul was actuated by anger towards — and a desire to punish — Jodi and that, in consequence, he abused his discretion as a trustee; and, on the other side, that, in view of Jodi's personality and behaviour, Paul exercised his discretion for the benefit and protection of Michael who was one of the objects of the power and in the interests of all his descendants.

8 In attempting to sustain the allegations on each side, the relationship between Jodi and Paul and, to a lesser extent, between Jodi and Michael, was explored in great detail with emphasis — in the evidence of Jodi and her husband, Stephen Edell ("Stephen") — on incidents that are said to throw light on Paul's failings as a parent as well as a trustee, and a concerted attempt by Paul and his brother Sidney Sitzer ("Sidney") to demonstrate that Jodi is, by character, personality and temperament, a troublemaker whose participation in the ownership of the family businesses would be severely detrimental to their success and preservation and to the interests of the other descendants of Paul and Sidney. Several of the incidents were trivial and, at the most, they threw some light on the clash between the personalities of Jodi and Paul that provides part of the backdrop to the litigation. While I will refer in general terms to the evidence of such incidents, I do not believe it is necessary to give them a further airing in detail in these reasons.

Background

9 Paul is 69 years of age. He was born in Toronto where he spent the first 13 years of his life. His parents were hardworking immigrants to Canada who were, initially, without financial resources but had a capacity for hard work. From an early age he assisted his mother in the operation of a hand laundry on Bloor Street while his father operated a pressing machine at Tip Top Tailors. In 1946, when he was 14 years of age, his parents, with Paul and his two siblings, Sidney and Annette, moved to Lucan, Ontario where they acquired and lived in a small hotel that was primarily a beer parlour. Paul worked in that business until he graduated from high school and then enrolled in an arts course at the University of Western Ontario. For the most part he paid for his own education.

10 Having obtained his B.A., Paul attended Osgoode Hall Law School and was called to the Bar in 1957. Sidney had also graduated from University of Western Ontario and Osgoode Hall and was admitted to practise in 1955.

11 While Paul was an articling student, he married Geraldine Stern and they lived together until her death on October 28, 1991. At the trial he described his marriage as his most successful endeavour. Michael and Jodi are their only children. They were born in 1956 and 1959 respectively.

12 When he received his call to the bar, Paul joined Sidney and another lawyer in a legal partnership in Richmond Street, Toronto, where his practice was concentrated on real estate matters including conveyancing, leasing and mortgage financing. He and his partners also began to invest in mortgages of real estate on their own behalf. They gradually extended their personal interests into more direct real estate investment including, increasingly as the years passed, the construction, acquisition, renovation and management of shopping centres. They also acquired a restaurant, a hotel in Stratford, a car wash, and the

property on which it was located, in Toronto and they managed the Monarch Tavern that was originally owned by their father. At the same time, Paul continued to practise law.

13 By the mid-1980s, Paul and Sidney were wealthy individuals. They had acquired a number of substantial properties and their activities in managing and developing them had become virtually their full-time occupation. Most of their significant real estate acquisitions were indirectly owned by them through a corporation, Victern Developments Limited ("Victern"). Other investments were held by them equally in separate corporations. Others were transferred to corporations owned by their wives separately. Victern was, and remains, however, the centre of the principal active businesses and it is clear that its shares have a considerable value. Paul and Sidney have always had a harmonious working relationship and they are satisfied that it is the key to their success.

14 Sidney has two sons and two daughters. One of the sons, Howard, works in the business. So does Michael. Jodi has not done so and has had no direct contact with it. After graduating from high school, she attended York University and graduated with a Bachelor of Arts degree. After graduation, she worked as a fashion model and in various retail stores. In 1981 she met Stephen Edell and they were married in the following year shortly before her 23 rd birthday. They now have five children whose ages range from nine to 17 years.

15 On the surface, Paul and Geraldine had what was once called a traditional marriage. However, particularly in the early years, Paul's energies were almost entirely consumed with business matters. He worked in the evenings and at some times through the night as well as throughout the day from Monday to Friday. On Sundays he would attend at the Monarch Tavern to meet with the accountant and deal with administrative matters for a number of hours. For many years he was involved in managing four different businesses and practising law at the same time. In consequence, as well as looking after the home, Geraldine had almost complete responsibility for the upbringing of Jodi and Michael and the relationship she developed with them and, particularly, with Jodi was much closer than their relationship with Paul. Each of the witnesses who knew her spoke warmly of her caring personality. She was devoted to her children as, I believe, they were to her.

16 Geraldine had little direct involvement with the businesses other than, occasionally, in assisting with the more aesthetic aspects of the construction, design and renovation of buildings and in landscaping and gardening. Paul testified that she enjoyed her sporadic participation in these matters, that she was a delight to be around but that they would not occupy a large part of her time — perhaps not more than a week in any year.

17 When Michael and Jodi were born, the family lived in a bungalow in North York. In 1971 they built a more substantial, architect-designed residence in Nomad Crescent. The funds were derived from the businesses. The home was placed in Geraldine's name.

18 Despite Paul's constant preoccupation with his business affairs, the family took regular summer vacations to Georgian Bay and visited Florida in the winter. By the time the children were teenagers, the family was more than comfortably off financially. Michael and Jodi were amply looked after as they were growing up. Paul paid for their education, they attended summer camps and he provided each of them with automobiles while at university. Until the events that directly led to this litigation, he provided Jodi, as well as Michael, with funds for the education and care of their children.

19 I found Paul Sitzer to be an entirely credible — and generally reliable — witness. He stated that he loves his children and has always intended to deal with them fairly. I believed him. If I had doubts about this, the evidence of his behaviour towards Jodi and Michael throughout their lives-until the relatively recent events that gave rise to this litigation- would be sufficient to remove them. There is no doubt that the litigation has been painful for him. He testified, for the most part, without rancour and with a degree of resignation. At the same time, it was clear that he was determined to defend himself from what he considers to be unjust allegations made against him by Jodi and Stephen and to prevent the dissipation of the assets that he had acquired through hard work and had intended to be preserved for the ultimate benefit of all of his children and grandchildren.

20 In the evidence of Paul and Sidney, Jodi was depicted as a problem child from an early age — possessive, demanding and hypercritical of others. It is said that these characteristics became more marked as she grew older and were reflected in

her attitude towards Paul and Michael and, ultimately, in the behaviour that led Paul to conclude that her ownership of equity of the family businesses would be ruinous to them and, in consequence, detrimental to the interests of all his descendants, as well as the descendants of Sidney. While some of the evidence about Jodi's behaviour as a child — like that of Paul's alleged deficiencies as a parent — smacked of overkill, the traits of personality attributed to her are apparent in the evidence of events that occurred between August 1993 and January 1998 and which precipitated this litigation as well as in her testimony at trial. I will say more about this later. Certainly, Jodi's relationship with Paul has never been easy. Whatever the reason, she has often been an irritant to him. Each is strong-willed and intelligent and each is prepared to speak, and to criticise, bluntly. Although, in the past, he was generous financially to her and her family, appreciation for this was not particularly evident when she was testifying. She appears to be far more conscious of what she conceives to be her rights than of the considerable benefits she has received from him.

21 Stephen was called to the bar of Ontario in 1983. For most of his career he has practised as a litigation lawyer. He is confident, intelligent, aggressive, confrontational and has, in the past, demonstrated that he is not averse to commencing litigation in his own interests.

22 Stephen's intervention exacerbated the tension that existed between Jodi and Paul. To an appreciable extent, it was his reaction to a family meeting I will mention that was responsible for injecting Jodi's financial interests into the relationship between Jodi and Paul. I am satisfied on the evidence that this reaction was not explicable on any rational basis. It was entirely emotional reflecting a mixture of resentment at what, without justification, he regarded as unjust discrimination against his wife, jealousy of Michael and, I have no doubt, disappointment at the impact that Paul's planning might have on Stephen's family's financial situation in the short term.

23 Stephen's increasing involvement in the dispute — and, in particular, his intemperate letters to Paul, Paul's solicitor, Prager, and Michael and his threats of litigation — ultimately helped to convince Paul that Stephen and Jodi had "declared war".

24 In the reasons that follow, I have generally accepted Paul's evidence where it conflicts with that of Jodi or Stephen. In many such instances Paul's evidence was corroborated by that of his solicitor, Mark Prager, and, on some aspects of the facts, by the evidence of Sidney or Michael. Stephen and Jodi are obviously intelligent individuals but they were not impressive witnesses as to the material facts of this case. While Paul's evidence was generally consistent and coherent, I had a strong impression that, as a result of the combative attitude adopted by Jodi and Stephen, they found themselves in a situation from which they were temperamentally incapable of withdrawing — one where they were forced to give a strained, distorted and unconvincing version of the facts in order to justify unfounded allegations they had made against Paul with respect to his management of Geraldine's estate and other alleged violations of Jodi's rights. The encroachment of which the plaintiffs now complain occurred after Stephen had informed Paul that legal proceedings against him in his personal capacity and as a trustee of Geraldine's estate were imminent.

Chronology

25 The following summary of facts relating to the estate planning of Paul and Geraldine are not materially in dispute. They provide a framework in which the evidence that bears directly on the issues can be analysed.

26 Paul and Geraldine made wills on 27th August, 1984. The will of each bequeathed personal effects to the other and an income interest for life, with a limited power of encroachment on capital, in the residue of the estate. The capital interest in remainder was to be divided equally between their children and held in separate trusts for them. Subject to powers of encroachment, a partial distribution of capital was to be made at age 30 and the remaining part would vest at age 35. There were gifts over to their respective issue in the event of a child's death under that age. If either Michael or Jodi was not alive at the death of the parent, a stirpital distribution was to be made among their issue then living. The only significant differences between the wills were that Geraldine devised their home to Paul if he survived her and that Geraldine, Michael and Jodi were to be Paul's executors while Paul was to be the sole executor of Geraldine if he survived her.

27 The wills were revised on September 4, 1984 when, in new wills executed on that date, a substitutional gift to the spouse of a child who predeceased Paul, or Geraldine, was inserted and Geraldine became Paul's sole executrix if she survived him. The wills were otherwise identical to those executed a week earlier.

28 Around the same time, Paul and Sidney had some inconclusive discussions with the solicitor who drew the wills with respect to a possible freeze of their interests in Victern and the other corporations in order to avoid death taxes on future capital growth. In 1988 these discussions were renewed with another solicitor, Mr. Mark Prager, who is a specialist in taxation, estate planning and corporate law. By this time, Michael and Howard were actively engaged in the management of the businesses and they participated in the meetings with Prager. Neither Geraldine nor Jodi was present.

29 With the expert assistance of Prager, the participants conducted a thorough exploration of a variety of options with a view not only to the tax consequences at which a freeze would be directed but, also, to the questions of management and succession to the assets of the two families after the deaths of Paul and Sidney. Ultimately, it was decided that, as Michael and Howard were intended to succeed to the management of the businesses owned by Victern, shares, whose value would reflect any future growth of the businesses, would be settled in trust for the benefit of Michael and his issue, and Howard and his issue, while shares to which future growth in the value of the other assets, and those owned by the spouses of Paul and Sidney, would accrue would be settled on Jodi and her issue and the other issue of Sidney. For this purpose, Paul's shares of Victern were to be transferred to Paulco in return for voting preference shares, and the Michael Trust would be created to subscribe for and hold participating shares of Paulco.

30 A similar structure and reorganisation was to be created to deal with Sidney's shares of Victern, with the growth shares of a holding company placed in a trust for Howard and his issue.

31 The other real estate investments of Paul and Sidney were to be transferred to a new corporation ("Millfield") whose shares were, in turn, to be transferred to holding companies ("Gerico") and ("SJS") in return for preference shares to be issued to Paul and Sidney respectively. Participating shares of Gerico would be issued to the Jodi Trust. Participating shares of SJS were similarly to be issued to a trust principally for the benefit of Sidney's issue other than Howard and his descendants. Geraldine's assets that were already held in Gerico would be frozen in the same manner as the shares of Millfield by an exchange of her common shares of Gerico for voting preference shares.

32 For reasons that are not material, the reorganisation was completed in two stages. The intended freeze of the value of Victern was accomplished in June, 1989. On the 29th of that month, Paul's mother, Minnie Sitzer, settled the Michael Trust with a cheque for $100 payable to Paul and Geraldine as trustees of the trust. The proceeds of the cheque were used to subscribe for 100 Class D non-voting participating shares of Paulco. Voting shares that were redeemable and retractable for $100 were issued to Paul together with non-voting redeemable and retractable preference shares with an intended fair market value equal to the value of the shares of Victern that he transferred to Paulco.

33 The second stage of the reorganisation was effected in January, 1990, when Geraldine received voting preference shares of Gerico and non-voting preference shares were issued to Paul in return for the assets transferred by them to that corporation. The Jodi Trust — settled with a cheque for $100 from Minnie Sitzer — subscribed for 100 Class F non-voting participating shares.

34 The terms of the Michael Trust and the Jodi Trust were identical apart from the names given to them and the provisions for distribution of any capital remaining on the Distribution Date. In each case, Paul and Geraldine were the trustees. In the event of the death of one of them, the survivor had power — but was not obligated — to appoint a replacement. Subject to an absolute discretionary power of the trustees to terminate the trust at an earlier time, the Distribution Date in each trust is May 31, 2010 or 30 days after the death of the survivor of Paul and Geraldine — whichever first occurs. Until the Distribution Date, the trustees of each trust have an "unfettered" discretion to divide the income among any one or more of the children and more remote issue of Paul and Geraldine over the age of 18 years, to the exclusion of any others, as they shall determine to be advisable or expedient. Until the Distribution Date, clause 8 of each trust confers upon the trustees a discretionary power to distribute capital in the following terms:

8. The Trustees shall have the right at any time or times before the Distribution Date to pay to or for some one or more of the said children and more remote issue of Paul Sitzer and Geraldine Sitzer who are then living and are at least eighteen (18) years of age, to the exclusion of any other or others, such amount or amounts out of the capital of the Trust Property in such proportions as the Trustees in their unfettered discretion shall determine advisable or expedient.

35 Clause 9 of each trust deals with the distribution of any capital remaining on the Distribution Date as follows:

(The Michael Trust)

9. On the Distribution Date, the Trustees shall pay and transfer the Trust Property then remaining (if any) to Michael Barry Sitzer if he is then alive, provided that if he is not then alive, the Trust Property then remaining shall be divided among the issue of Paul Sitzer and Geraldine Sitzer then alive in equal shares per stirpes.

(The Jodi Trust)

9. On the Distribution Date, the Trustees shall distribute the Trust Property then remaining among the issue of Paul Sitzer and Geraldine Sitzer then alive in equal shares per stirpes, provided that, for the purposes of such distribution, if Michael Barry Sitzer is then alive, he shall be deemed to have died before the Distribution Date, having left no issue him surviving, (it being the intention that neither Michael Barry Sitzer nor his issue shall be entitled to any of the Trust Property on the Distribution Date if Michael Barry Sitzer is then alive.).

36 As the efficacy of the tax planning implemented in 1989 and 1990 depended on Paul's and Geraldine's receipt of preference shares equal to the value of the shares of Victern and Millfield that each had transferred to Paulco or Gerico, the participating shares transferred to the Michael Trust and the Jodi Trust should have had, in each case, a fair market value of $100. To that extent, the transactions did not create immediate inequality between the beneficiaries of each trust. The assets owned by Victern were, however, of significantly greater value than those of the corporations whose shares were held in Gerico and the potential for their future growth in value was also likely to be considerably greater.

37 In order to eliminate, or reduce, the potential inequality between the two trusts in the future, it was contemplated that attempts would be made to increase the value of the participating shares of Gerico by transferring assets from Victern to Millfield, or by some other means. At the same time, it was contemplated that recognition should be given to the extent that future growth was attributable to the efforts of Michael and Howard in managing assets.

38 By March 1991, Paul and Sidney had decided that there was no practical method of equalising the potential value of the assets of the two trusts if Michael and Howard were to manage the assets then held in Victern and they and their descendants were to be entitled, exclusively, to future growth in the value of such assets. On March 31, 1991 the participating shares of each of Paulco and Gerico were divided equally between the two trusts. 50 of the shares of Paulco held by the Michael Trust were purchased for cancellation for $50 and 50 shares of the same class were issued to the Jodi Trust. Similarly, 50 participating shares of Gerico were acquired by the Michael Trust after 50 shares were purchased by the corporation from the Jodi Trust.

39 From the outset of the discussions with Prager in 1988 it had been agreed that shareholders' agreements would be desirable to deal with corporate distributions and control of Victern and Millfield after the deaths of Paul and Sidney. The details of the agreements continued to be worked out throughout 1991, 1992 and the first six months of 1993.

40 In the meantime, Paul executed new wills on June 30, 1992 and June 24, 1993. As well as making changes consequential upon the death of Geraldine on October 28, 1991, the first of these bequeathed his voting shares of Paulco to Michael and provided for elaborate trusts of substantial amounts to be established for each of his grandchildren. The residue of his estate was to be held in trust for his children equally with vesting postponed to age 35 and substitutional gifts to issue in the event of a child's death under that age. Michael and Jodi were appointed executors with Ellen and Stephen as alternatives. The will of June 24, 1993 was substantially identical except for the removal of restrictions on the trustees' powers of investment.

41 The shareholders' agreements were executed on July 21, 1993. The first dealt primarily with annual distributions by Victern and Millfield to the holding companies after the death of the first to die of Paul and Sidney, decision-making by Michael and Howard with respect to those corporations and the possibility of "butterfly" transactions in the event that either Michael or Howard wished to separate, and divide, the assets of Victern and Millfield between Paul's and Sidney's descendants respectively. The holding companies and trusts for each family, as well as Paul, Sidney, Victern and Millfield were parties to the agreement.

42 A secondary agreement was executed by each brother and by the trusts and holding companies established for the benefit of his family. This agreement also provided for annual distributions to shareholders and, otherwise, dealt mainly with the consequences for such parties in the event of a division of the assets of Victern and Millfield between the families of Paul and Sidney in accordance with the first shareholders' agreement. Among other things, it enabled Michael to initiate a further butterfly that would divide and allocate the assets of Paulco and Gerico into separate holding companies owned by Michael's family and Jodi's family respectively.

43 Consistently with the general planning objectives — and with very limited exceptions — these agreements gave extensive powers to Michael and Howard to manage the operations and affairs of Victern and Millfield, without interference from other family members, after the deaths of their respective parents. In addition, as I have indicated, Paul's will of June 24, 1993 contained a bequest of the voting shares of Paulco to Michael.

44 After the execution of the shareholders' agreements, a meeting of the families of Paul and Sidney — including the spouses of their children — was held on August 3, 1993. In anticipation of this, Prager wrote letters to Michael and Jodi summarising the provisions of Paul's will and referring to insurance purchased on his life which was intended to fund the taxes that would be payable as a result of the deemed realisation of capital gains on his preferred shares that would occur on his death. Prager also wrote to the children of Paul and Sidney, and their spouses, outlining the objectives, and the implementation, of the corporate reorganisation and the provisions of the shareholders' agreements.

45 The purpose of the family meeting was to explain the measures that had been taken to provide for the succession and future management of the family business and the hopes and desires of Paul and Sidney with respect to its preservation for the benefit of their descendants. Neither Jodi nor Stephen had participated in the long and thorough consideration of the objectives of Paul and Sidney and the manner in which they were to be implemented. There is no evidence that either of them had previous knowledge of the details of the business or its value.

46 Sidney addressed the meeting and handed out typewritten copies of his remarks. He began as follows:

> On behalf of Paul and myself, I welcome all of you to this first meeting of our families.
>
> The purpose of this meeting is to acquaint everyone with the family business and make you aware of our visions and goals regarding the business.
>
> Paul and I have chosen to establish a real-estate business as a family trust for the benefit of our children, grandchildren and their children and grandchildren after them. We want you to be aware that with the family trusts that we have established, that you are not only beneficiaries of the trust but also trustees. As such you have a responsibility to preserve and to promote the success of the business for future generations. That may mean that your personal interests may have to be subrogated to the interest of the company and your children.
>
> It is the success of the company that is paramount. If the company is successful you and future generations will benefit. If your personal interests are paramount to the best interests of the company, the company may not survive and our goal for future generations benefiting, will fail to be realised.

47 Sidney recounted how his parents were penniless when they arrived in Canada and how they had slowly and gradually made their way through hard, and initially, menial, work over long hours. He described how Paul and he had inherited their parents' work ethic and how Victern had reached a stage in its development where it could be anticipated to continue to grow and

prosper. He said that Michael and Howard were now running the business on a day-to-day basis, he praised their performance and announced that they would have responsibility for the stewardship of the family business for the next generation.

48 Sidney asked the members of the families to preserve confidentiality with respect to the business and he concluded:

> We hope that the company will become a bond that unifies the family, and brings you closer together. The last thing Paul and I want is for the success and wealth that we have been fortunate enough to create, to be a divisive force in this family.

49 Paul then spoke to the meeting about the details of the business and, among other things, gave a possibly exaggerated estimate of its value — or the gross value of its assets.

50 Between 1993 and 1996 the relationship between Paul and Jodi underwent a serious deterioration. On November 25, 1996 Paul made a will in which all of his property was left to Michael and his issue. The same dispositive plan is contained in Paul's present will of February 13, 1997.

51 In February and March, 1997 amendments to the shareholders' agreements were executed to delete the requirement of annual distributions to shareholders and to diminish further the possibility of interference by other family members in the operation of the businesses.

52 On January 6, 1998 Paul purported to exercise the power of encroachment conferred in clause 8 of the Jodi Trust by appointing the Class D participating shares of Paulco to Michael absolutely.

Analysis

53 The issues of fact that arise in this case are concerned, in the first place, with communications or understandings, between Paul and Geraldine prior to her death in October, 1991. The findings to be made on these issues will determine whether the orders requested with respect to Jodi's interest in Paul's estate under the doctrine of mutual wills, or otherwise, should be granted.

54 The factual issues that relate to Paul's conduct as a trustee are concerned primarily with events that occurred after the family meeting of August 3, 1993, although, as indicated at the outset of these reasons, an attempt was made at the trial to influence the findings to be made by depicting Jodi's, and Paul's alleged behaviour as consistent with, and stemming from, traits of personality and character that have been evident for most of their lives.

Claims Against Paul's Assets

55 The plaintiffs' claim for a declaration that Paul holds his property in trust for them on the terms set out in his will of June 24, 1993, is based on the following grounds that, although expressed in the alternative, are not, I think, intended to be mutually exclusive:

> 1. An alleged agreement between Paul and Geraldine that "in all the dispositions of their property, whether by their wills or by inter vivos transfers he and she would accord Jodi and Michael equal treatment in all respects, and that their individual grandchildren, too, would receive the same treatment as one another. Paul and Geraldine agreed, moreover, that they would not revoke or change such equal dispositions of their property".
>
> 2. An alleged pooling of the assets of Paul and Geraldine and a declaration of trust in favour of their children and grandchildren in terms essentially the same as the alleged agreement in 1. above.
>
> 3. Geraldine's alleged detrimental reliance on representations by Paul that their children and grandchildren would be treated equally during the lives of Geraldine and Paul and on the death of the survivor.
>
> 4. An alleged equitable obligation of Paul to hold his assets, including any he received from Geraldine's estate, on trust for his children and grandchildren in accordance with the same principles of equality contemplated above. Such obligation is said to be one that "in conscience should be enforced".

56 In support of the existence of a trust on each of the above grounds, Mr. Underwood relied on the authorities in which constructive trusts have been found in the context of mutual wills but, also, on more recent decisions of the Supreme Court of Canada where such trusts have been enforced on the basis of unjust enrichment, detrimental reliance, fiduciary relationships and, generally, in situations in which "good conscience requires that such a trust to be imposed". He submitted that, further, that in the light of the recent decisions, a new approach to the doctrine of mutual wills is appropriate.

57 The doctrine of mutual wills has traditionally been applied in cases where individuals have made separate wills pursuant to an agreement with respect to their terms. Most commonly, they have agreed that each will obtain a benefit under the other's will and that other specified individuals will receive the property of each of them on the death of the survivor. In some cases of this sort, the benefit obtained by the survivor under the other's will has been a life interest; in other cases, it has taken the form of an outright gift. Where the requirements for the application of the doctrine are satisfied, the survivor will not be permitted to defeat the agreement by revoking his or her will after the death of the other. This result is achieved by the imposition of a constructive trust on the survivor's estate for the benefit of those who were intended to benefit under the agreement.

58 The most fundamental prerequisite for an application of the doctrine is that there be an agreement between the individuals who made the wills. It has been repeatedly insisted in the cases that: (a) the agreement must satisfy the requirements for a binding contract and not be "just some loose understanding or sense of moral obligation" (*Goodchild, Re* (1995), [1996] 1 All E.R. 670 (Eng. Ch. Div.), at page 681). It must be proven by clear and satisfactory evidence; and (c) it must include an agreement not to revoke the wills.

59 There is some ambiguity in references to "mutual wills" in the authorities. In some cases the terminology has been employed narrowly to refer only to wills that, in accordance with the "doctrine of mutual wills" satisfy the requirements for the imposition of a trust. In others — as in *Gillespie, Re* (1968), [1969] 1 O.R. 585 (Ont. C.A.), at page 587 — the term refers to all wills that merely reflect the same intention that the property of each shall devolve in a particular manner upon the death of whoever is the survivor. This usage includes wills that do not satisfy the requirements for the imposition of a trust as well as those that do. I will adopt the broader use of the term in these reasons.

60 There has, also, been some disagreement with respect to the theoretical basis of the doctrine of mutual wills which emerged before the full development of the rule denying to third-party volunteers a right to enforce contracts made for their benefit. In his scholarly article, *The Mutual Wills Doctrine* (1979), 29 University of Toronto Law Journal 390, at page 390, Professor T.G. Youdan preferred the view that the doctrine of mutual wills is an "anomalous survivor of a now repudiated general principle that a contract for the benefit of a third party could be enforced in equity by the third party on the basis of a fictitious trust of the benefit of contract".

61 More recently, Morritt J. in *Dale, Re*, [1993] 4 All E.R. 129 (Eng. Ch. Div.), at page 142 found the basis of the doctrine to lie in the equitable jurisdiction for the prevention of fraud — an analysis that appears to have been also approved by Dixon J. in *Birmingham v. Renfrew* (1937), 57 C.L.R. 666 (Australia H.C.), at page 688. After finding that there must be a legally binding contract to make, and not to revoke, mutual wills after which one testator has died having performed his part of the agreement, Morritt J. accepted as correct the following statement of Lord Camden L.C. in *Dufour v. Pereira* (1769), 2 Juridical Args. 304 (Eng. Ch. Div.), page 304:

> If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice. By engaging to do something that is in his power, he is made a trustee for the performance, and transmits that trust to those that claim under him.

62 In the light of recent developments in the law of constructive trusts in this country and elsewhere, the doctrine of mutual wills has, I think, lost some of its anomalous appearance. As Nourse J. stated in *Cleaver, Re* (1980), [1981] 1 W.L.R. 939 (Eng. Ch. Div.), at page 947:

> It is also clear from *Birmingham v. Renfrew*, 57 C.L.R. 666 that these cases of mutual wills are only one example of a wider category of cases, for example secret trusts, in which a court of equity will intervene to impose a constructive trust.... The

principle of all these cases is that a court of equity will not permit a person to whom property is transferred by way of gift, but on the faith of an agreement or clear understanding that it is to be dealt with in a particular way for the benefit of third person, to deal with that property inconsistently with that agreement or understanding. If he attempts to do so after having received the benefit of the gift equity will intervene by imposing a constructive trust on the property which is the subject matter of the agreement or understanding.

63 Nourse J. proceeded to emphasise "that the agreement or understanding must be such as to impose on the donee a legally binding obligation to deal with the property in a particular way" and, as I have indicated above, this requirement has been repeatedly insisted upon:

> "There is no doubt that for the doctrine to apply there must be a contract at law": *Re Dale*, at page 133; *Re Gillespie*, [1969] 1 O.R. 585 (C.A.), at pages 587 and 593; *Birmingham v. Renfrew*, at pages 674 - 5 and 683; *Gray v. Perpetual Trustee Co.*, [1928] A.C. 391 (P.C.), at page 394; *Gillett v. Holt*, [2000] 2 All E.R. 289 (C.A.), at pages 304 - 5; Ford and Lee, *Principles of the Law of Trusts* (2nd edition, 1990), para 2227; Underhill and Hayton, *Law of Trusts and Trustees* (15th edition, 1995), page 391.

64 As the authorities on mutual wills insist that there be a binding contract between the deceased and the survivor, I agree with Professor Youdan that it should not matter whether, as has most commonly been the case, the wills are made pursuant to an agreement or whether there is an agreement not to revoke existing wills. It should also follow that the nature and extent of the property to which the trust attaches and the rights of the survivor to consume, or dispose of, it after the others death should depend upon the terms of the agreement as disclosed by the evidence. It is also consistent with this analysis that, despite the statement from *Cleaver, Re* that I have quoted above it has been held unnecessary for the survivor actually to obtain a benefit under the other's will (*University of Manitoba v. Sanderson Estate* (1998), 47 B.C.L.R. (3d) 25 (B.C. C.A.) or even for that will to purport to confer such a benefit: *Dale, Re*, above.

65 I also agree with Professor Youdan that the contractual basis of the doctrine should also mean that a promise not to revoke the original wills should not always be required. It should be sufficient if the parties agreed that any subsequent will would adhere to the agreed scheme of disposition.

66 I mention the above points because, although the effect of the alleged agreement between Geraldine and Paul in this case would be very extensive, and although the parties seek to enforce the provisions of Paul's will of 1993 and not those of his will of September 4, 1984, I do not believe these facts would prevent a constructive trust from arising if the alleged agreement not to depart from an equal division of assets between Jodi and Michael and their children has been proven. I do not think it should matter whether the alleged agreement was made at the time of the execution of the original wills in 1984 or, subsequently, at any time before the death of Geraldine in 1991. Nor do I believe any such agreement should necessarily be considered to have been revoked by the reorganisation involving the estate freeze and the creation of the trusts in 1989 and 1990 and the subsequent equalisation of their holdings before Geraldine's death in 1991. That is not to say that the scope of the alleged agreement is of no relevance when the question is whether its existence should be inferred.

67 In order to appreciate more fully the nature and implications of the alleged agreement between Paul and Geraldine, I asked Mr. Underwood to provide me with a draft terms of the declaration requested by the plaintiffs. These are as follows:

> 1. THIS COURT ORDERS that Paul Sitzer holds all of his property, either as legal or beneficial owner, in trust upon the following terms:
>
> (a) during his lifetime, Paul Sitzer shall have unrestricted use of his property subject to the other provisions of this order.
>
> (b) Paul Sitzer shall not make any inter vivos gifts, whether of money or of assets of equivalent value, in excess of $ 50,000 per annum, with the exception of charitable gifts which shall not exceed $ 100,000 per annum.

(c) Paul Sitzer shall not make loans in excess of $ 100,000 per annum.

(d) On Paul Sitzer's death, his remaining assets shall be distributed in accordance with his will dated June 24, 1993,...

2. THIS COURT ORDERS that Paul Sitzer shall irrevocably designate Jodi Edell and, in the event that she predeceases him, her issue, as the beneficiary of any life insurance policy currently owned by him to the extent of 50 per cent of the proceeds thereof.

3. THIS COURT ORDERS that Paul Sitzer shall provide annually to counsel designated by Jodi Edell an accounting of any inter vivos gifts or loans, charitable or otherwise, made by him.

4. THIS COURT ORDERS that either of the plaintiffs and Paul Sitzer may move, upon notice to the other, for an order varying the terms of this order.

68 I do not understand Mr. Underwood to have submitted that everything in the proposed order — for example, the references to the specific maximum amounts of *inter vivos* gifts and loans — to have been expressly agreed between Paul and Geraldine. Rather, I believe that the argument is that these provisions may reasonably be implied from the alleged agreement to preserve the property of each so that on the survivor's death it will devolve upon their descendants in accordance with the dispositive provisions of Paul's 1993 will. On this point Mr. Underwood relied on the following statement of Dixon J. in *Birmingham v. Renfrew* (at page 689):

> There is a third element which appears to me to be inherent in the nature of such a contract or agreement, although I do not think it has been expressly considered. The purpose of an arrangement for corresponding wills must often be, as in this case, to enable the survivor during his life to deal as absolute owner with the property passing under the will of the party first dying. That is to say, the object of the transaction is to put the survivor in a position to enjoy for his own benefit the full ownership so that, for instance, he may convert it and expend the proceeds if he choose. But when he dies he is to bequeath what is left in the manner agreed upon. It is only by the special doctrines of equity that such a floating obligation, suspended, so to speak, during the lifetime of the survivor can descend upon the assets at his death and crystallise into a trust. No doubt gifts and settlements, inter vivos, if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition, inter vivos, is, therefore, not unqualified. But, substantially, the purpose of the arrangement will often be to allow full enjoyment for the survivor's own benefit and advantage upon condition that at his death the residue shall pass as arranged.

69 Similar views have been expressed and applied in courts in the United States that were cited by Mr. Underwood. In *Smith v. Smith Estate*, 293 Ark. 32 (U.S. Ark. S.C. 1987) , for example, the following statement of principle was applied:

> Where an agreement as to mutual wills does not define the survivor's power over the property, but merely provides as to the disposition of the property at his death, the survivor may use not only the income, but reasonable portions of the principal, for his support and for ordinary expenditures, and he may change the form of the property by reinvestment and the like but he must not give away any considerable portions of it or do anything else with it that would be inconsistent with the spirit or the obvious intent and purpose of the agreement.

70 It is clear, nonetheless, from the submissions of counsel and the terms of the proposed order that I am asked to declare the existence of a trust that would have extraordinarily sweeping and drastic effects. In Mr. Underwood's submission, this was not the case of a "floating" trust that would attach only to the assets held by Paul at the date of his death. The trust is said to have arisen at the time of Geraldine's death and to have attached then to the property owned by Paul at that time. Limited powers of disposition are, as the draft order indicates, to be implied. On this approach, Paul's rights after Geraldine's death with respect to what had formerly been his property — as well as his rights to Geraldine's personal effects and the matrimonial home that he received under her will — would be very similar to those of a life tenant with very limited rights of encroachment.

71 Paul Sitzer was 59 years of age when Geraldine died. The declaration requested would mean that, for the remaining years of his life, he would be a trustee administering property, of which he was formerly but was no longer, the sole beneficial owner, subject to the onerous obligations of a trustee with significant restrictions on his powers of enjoyment and dispositions and an obligation to account to his daughter and, although this is not mentioned in the draft order, presumably also to his grandchildren as they become adults and to the Children's Lawyer in the meantime.

72 I have referred to the insistence in the cases that a contract that will bring into play the doctrine of mutual wills must be proven by clear and satisfactory evidence. I have no hesitation in finding that no such contract was created in this case. I accept Paul's evidence that there was no contract, or other agreement, between him and Geraldine with respect to the inability of the survivor to vary the estate planning arrangements that had been put in place while each was alive or to deal freely with his or her own property after the first death. Paul testified that he never agreed with her that he would not revoke his will, change its dispositions or exercise any of his powers under the trusts so as to depart from equality and that she never requested him to do this. The question was never referred to or discussed. I accept his evidence to this effect. I have, moreover, no doubt that he would never have entered into such an agreement and I believe it is highly improbable, to say the least, that Geraldine would have asked, or expected, him to do so. The nature and degree of the trust she reposed in him was quite antithetical to any desire or intention to have the kind of binding agreement that would fetter his power to dispose of his property — or property inherited absolutely from her — by dispositions *inter vivos*, or by will, and that would, in law, convert him into a trustee.

73 The evidence on which Mr. Underwood relied includes alleged statements by Geraldine to Jodi and Stephen, and in letters from Prager to Jodi and Michael, that the wills and estate planning that had been completed would implement equality and that this was in accordance with the wishes of Paul and Geraldine at that time. As has often been pointed out, evidence that spouses or others intended property to devolve in accordance with their mutual wills does not even touch the question whether they had agreed that the survivor would not be able to vary such dispositions in the future. By definition, a will is a statement of an individual's testamentary intentions at the time it is executed. The fact that, of its nature, it is a revocable instrument reflects the fact that testamentary intentions, and the contents of a person's will, may change. Evidence of statements of the testamentary intentions of spouses at a particular time does not, by itself, give rise to any inference with respect to an agreement that such intentions would not change in the future. Thus, it was recognised in the reasons delivered for the majority of the Court of Appeal in *Gillespie, Re* — perhaps the high watermark of judicial willingness to infer an agreement not to revoke from the existence of a joint will — that such an agreement cannot be inferred solely from the fact that mutual wills have been executed. Similarly, in the dissenting judgment of Laskin J.A. the following statement from *Birmingham v. Renfrew* (at pages 674-675) was quoted with approval:

> Perhaps most husbands and wives make wills "by agreement" but they do not bind themselves not to revoke their wills. They do not intend to undertake or impose any kind of binding obligation. The mere fact that two persons make what may be called corresponding wills in the sense that the existence of each will is naturally explained by the existence of the other will is not sufficient to establish a binding agreement not to revoke wills so made.

74 Mr. Underwood invited me to discount Paul's evidence on the ground that he was an interested party and that Geraldine is not alive to testify. I agree that Paul's interest and Geraldine's absence are factors that I should take into account when weighing his evidence and making judgments with respect to the credibility and reliability of his testimony. I have done so and I have exercised similar caution with respect to the evidence of Jodi and Stephen. In the few instances where the evidence of these witnesses on this aspect of the case is materially in conflict, I prefer that of Paul as being, in my judgment, more reliable and more credible.

75 Jodi, for example, testified that Paul stated at the family meeting in August 1993 that the rearrangement of the assets of the Jodi Trust and Michael Trust in 1991 was effected only at the insistence of Geraldine. Stephen's evidence to the same effect was embellished with a recollection that Paul looked at Jodi with hostility as he made the statement. Paul flatly denied having said anything of the sort and each of the other witnesses who were present at the meeting either corroborated Paul's denial or testified that they had not heard any such statement. Prager, who had been involved in the planning from the outset, said that he would have been shocked to hear it. Sidney, who denied that the statement was made, was also emphatic that no wishes of

Geraldine were instrumental in the decision to reorganise the holdings of the various trusts in 1991 — a reorganisation that involved the trusts established for members of his family as well as those for the families of Michael and Jodi.

76 I have already indicated that I found Paul to be a credible witness and, especially on this question, and on others where Paul's evidence with respect to the family meeting conflicted with that of Jodi and Stephen but was corroborated by other witnesses, I have no hesitation in rejecting their version.

77 Geraldine had not participated in any of the discussions with Prager that led up to the estate freeze implemented in 1989 and 1990. Prager testified that he met with her professionally for the first time at the matrimonial home when he attended to obtain her signatures to various documents including those relating to the Michael Trust. He corroborated Paul's evidence that, on that occasion, Paul had told Geraldine that there would be a potential disparity between the values of the assets of the two trusts and that it might be difficult to achieve equality. According to Prager, Geraldine's response was to the effect that Paul was smart and would find a way to do it. This exchange and statements in letters from Prager to members of the two families prior to the meeting in August 1993 were relied on heavily by Mr. Underwood.

78 Prager's statements referred to "the overriding philosophy... that the children in each family should receive assets of equal value upon the death of their parents" and (in a letter to Jodi) "both your mother and father expressed very strong concerns that their estates be divided equally between you and Michael". Prager testified that the choice of words in each case was his and that the word "concerns" was misleading as there were no concerns as such. His statements confirm the undisputed fact that the arrangements in place at the time of Geraldine's death were intended to achieve equality and that this met with Geraldine's approval. They do not, however, speak to the existence of an agreement that was intended to bind Paul not to depart from it after her death. Prager testified that throughout the numerous meetings at which the estate planning arrangements were discussed, no mention was made of any such agreement or understanding. On the contrary, the retention of flexibility with respect to future planning and to the ultimate distribution of the growth shares of the holding companies was an essential concern of Paul and Sidney.

79 Similarly, the comments of Paul and Geraldine at the time of the execution of the trust instruments are, in my judgment, insufficient to establish that there was any such agreement. The fact that two people hope and wish that it will be possible to achieve a particular result does not, by itself, mean that, once achieved, the result can never be departed from without the consent of each. Even if I were to disregard the evidence of Paul that he had no intention of entering into an agreement that would restrict his ability to deal with his property in the future, I do not believe I would be justified in attributing to Geraldine a reasonable understanding to the contrary. In consequence, I am not prepared to find that there was a contract, or any other agreement, to that effect and it follows that the requirements for an application of the traditional rules governing mutual wills are not satisfied. As I have indicated, however, in Mr. Underwood's submission that is not the end of the matter.

80 In paragraph 14A of the statement of claim, as amended at the trial, the plaintiffs claim, in the alternative, that:

> ...Paul and Geraldine, by their words and actions, pooled their assets and declared a trust over these assets, or individually declared a trust over their assets, to the effect that their assets would be used by them during their respective lifetimes to reasonably maintain their lifestyles, and that at death or through inter vivos gifts the children and grandchildren would benefit equally.

81 Insofar as this paragraph is to be understood as alleging the existence of an express trust created by way of declarations of trust by Paul and Geraldine, it must, I consider, fail for lack of evidence of any such declaration. Obviously, no such declaration can be inferred from the execution of the mutual wills in 1984 as, if it existed, the wills would have been redundant. The two forms of disposition are not compatible.

82 It seems clear that any argument that Paul and Geraldine made declarations of trust over their assets must rely upon their intentions at the time of the estate freezing arrangements implemented in 1989, 1990 and 1991. As far as these are concerned, it has been repeatedly stated in the cases that, before a person will be held to have made a declaration of trust, there must be evidence of words or conduct that establishes an intention to divest himself, or herself, of the beneficial ownership of property

and thereafter to hold it as a trustee. In the words of Professor Waters (*Law of Trusts in Canada*, second edition, 1984, at page 162), there must be "unambiguous evidence of the firm intention of the donor to constitute himself a trustee".

83 There is, in my judgment, no evidence from which it should be inferred that Paul and Geraldine intended to divest themselves of their beneficial ownership and become trustees of property at the time of the reorganisation other than the property expressly settled in the Michael Trust and the Jodi Trust.

84 To the extent that that they may be considered to have "pooled" their property, in a sense, by transferring it to Paulco and Gerico whose shares were ultimately held in the two *inter vivos* trusts, the authorities cited by Mr. Underwood do not support any inference that, by doing this, they should be considered to have declared themselves trustees of the shares of the holding companies issued to each of them. References to a pooling of assets in *Kerr, Re*, [1948] 3 D.L.R. 668 (Ont. H.C.), aff'd., [1949] 1 D.L.R. 736 (Ont. C.A.) and *Gillespie, Re*, the authorities relied on by Mr. Underwood, were made in the context of joint wills for the purpose of an inference of an agreement not to revoke the wills. The pooling in each case was seen to arise from the decision to execute a joint will.

85 The conclusion of the majority in *Gillespie, Re* must be read in the light of the strong dissenting judgment of Laskin J.A. and, in any event, I am not dealing with a joint will and, in my judgment, neither case offers any support for a proposition that declarations of trust should be inferred from the execution of the mutual wills of Paul and Geraldine in 1984 or, subsequently, when the estate freezing plans were implemented.

86 Mr. Underwood's alternative submissions for the claims set out in paragraphs 14B and 14C of the statement of claim were more elaborate. These claims may conveniently be considered together and are as follows:

> 14B. In the alternative, Geraldine relied on Paul's representation, by words or by conduct, that their children and grandchildren would be treated equally during their lifetimes and upon the later death of Paul or Geraldine, and were it not for those representations Geraldine would not have made her will as she did or would have changed her will prior to her death.
>
> 14C. In the alternative, Paul is under an equitable obligation that in conscience should be enforced to hold his assets including those assets received from Geraldine's estate, on trust for Jodi, Michael and their children and to benefit his children equally and his grandchildren equally either during his lifetime, or at his death.

87 In the light of the developing Canadian jurisprudence on constructive trusts, the court should, Mr. Underwood submitted, be willing to reconsider, and modify, the requirements that must be satisfied before mutual wills give rise to a constructive trust that binds the survivor. For this purpose, the court should be influenced by authorities that have — in different contexts where constructive trusts have been held to arise or have been imposed — given weight to notions of detrimental reliance, unjust enrichment, fiduciary relationships and requirements of good conscience. These authorities, together with others that reflect an emphasis on objectively determined reasonable expectations, invite, in Mr. Underwood's written submission, a reformulation, or restatement, of the requirements of the doctrine of mutual wills so that it would apply where: (a) there are identical or similar wills made with an agreement, an expectation, or reliance by the parties, or one party, that the other party will not change the substance of his or her will after the death of the first party or will ensure property passes in the terms of the mutual wills; and (b) it would be inequitable for the surviving party to change the disposition of the "joint estate" in all the circumstances. The agreement, expectation or reliance can be inferred from the evidence, including evidence as to the type of relationship between the parties and more particularly where the relationship is properly characterised as fiduciary.

88 The suggested restatement departs significantly from the traditional doctrine of mutual wills in that it would not require the existence of a promise by the survivor not to depart from the provisions of the wills, let alone an agreement between them that was intended to be binding. Actual or, it seems, reasonable expectations *or* reliance on representations of Paul by word or conduct would be sufficient.

89 On the basis of the findings of fact I will make, it is unnecessary to decide whether I am free to accept the extension of the legal principles contemplated by Mr. Underwood's submissions. It is, I believe, certain that, notwithstanding striking

developments in the law relating to constructive trusts in this country in recent years, the extension would be very significant. In particular, none of the cases cited by Mr. Underwood involved trusts in favour of third parties. The beneficiary of the constructive trusts imposed on the basis of reasonable expectations, detrimental reliance or the existence of a fiduciary relationship — in cases such as *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.), *Gillett v. Holt* (above) and *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.) — has always been the person whose expectation or reliance was in question or to whom the party held to be a constructive trustee was a fiduciary. Here the plaintiffs do not assert the existence of any equity arising out of promises, representations or conduct of Paul, or Geraldine, to, or towards, them. The rights they claim are based exclusively on an equity said to be raised in favour of Geraldine by virtue of her relationship with Paul, his alleged representations by words or conduct and her alleged reasonable expectations. The significance of the distinction was asserted by the Court of Appeal in *Gillett v. Holt* when rejecting the existence of a close parallel between the principles of mutual wills and secret trusts, on one hand, and those of proprietary estoppel on the other:

> ...although both doctrines show equity intervening to prevent unconscionable conduct, the special feature of the mutual wills and secret trusts cases is that they involve not only two parties but three. In mutual wills cases they are (typically) a testator (A), a testatrix (B) and an intended beneficiary or class of beneficiaries (C). In secret trusts cases they are the testator (A), the secret trustee (B) and the beneficiary (C). There must be an agreement between A and B as to conferring a benefit on C because it is the agreement (and not C's moral claims) which would make it unconscionable for B to resile from his agreement....

90 The feature of the traditional doctrine of mutual wills that has been considered most anomalous is that it confers rights on third party beneficiaries of a contract who are volunteers: see Youdan, *op. cit.*, at pages 391-393; Ford and Lee, *op. cit.* para 2226. I must, of course, recognise that particular developments in the law governing constructive trusts and fiduciary relationships, in general, in this country may not be consistent with English jurisprudence to date and it may be that future developments in Canada will recognise the possibility that in the absence of an express trust or binding agreement, third parties may still obtain rights in equity on the basis of the principles on which Mr. Underwood relied. However, I do not think they should do so on the facts of this case.

91 I have found as a fact that there was no agreement between Paul and Geraldine that would bind him not to depart from equality in any future changes to his will or to the other estate planning arrangements that had been implemented before her death. Paul made no promises or representations to that effect and, in my judgment, the evidence does not justify a conclusion that Geraldine formed, or would reasonably have formed, a conclusion to the contrary.

92 As far as reasonable expectations are concerned, Paul and Geraldine might well have hoped and even, perhaps, anticipated that equality would be maintained and implemented on the death of the survivor. I believe, however, that, in the absence of evidence to the contrary, it would be entirely unreasonable to attribute to Geraldine an expectation that this would occur irrespective of changes in the circumstances relating to the family, or to the businesses, in the future. The fact that, at a particular time, or times, parents wish, and intend, to treat their children equally, does not, without more, justify a conclusion, or presumption, that they intend, or would reasonably expect, to do this whatever may happen in the future. By itself a present intention to do something does not exclude the possibility that the intention may change or support any presumption that this will not occur.

93 To the extent that reliance may be relevant, it would be entirely speculative to suppose that Geraldine would have changed her will if she had known that Jodi would be disinherited by Paul in the circumstances that have occurred. There is simply no evidence to support such a conclusion. The relationship between Paul and Geraldine was, indeed, one of mutual trust and confidence. In financial matters and dealings with the properties he had accumulated, she relied and trusted in his judgment. I have no doubt she expected and anticipated that he would act fairly as between Michael and Jodi. I am not prepared to conclude, and find, that she would have questioned his judgment as to what was fair, or would have wished to fetter its exercise.

94 On the basis of the evidence, I am satisfied that I could only find for the plaintiffs if I accepted a rebuttable presumption that parents who make mutual wills, or who otherwise engage in estate planning, intend or would reasonably expect, such planning to be irrevocable in particular respects after the death of the first to die. In the ultimate analysis, I believe this is what Mr.

Underwood was seeking to have me do. In his written submission, he suggested that it was instructive to "re-frame" a passage from the reasons delivered by Cory J. in *Peter v. Beblow*, above, at page 1017:

> The parties entering into *identical wills in the context of* a marriage or a common law relationship will rarely have considered the question of *an agreement not to revoke*. If asked, they might say that because they loved and trusted their partner, each worked to achieve the common goal of creating a home and establishing a good life for themselves *and they trusted and expected their partner to abide by the terms of the mutual wills*. It is just and reasonable that the situation be viewed objectively and that an inference be made that, in the absence of evidence establishing a contrary intention, the parties expected *that the other party would abide by the terms of the wills after his or her death*. [italics where words have been inserted or words of Cory J. removed].

95 I note that, consistently with his suggested restatement of the doctrine of mutual wills, the above reformulation does not refer to reliance in any sense as an essential requirement. Whether or not that was intended, I do not believe that the authorities cited support the extension he has suggested. Nor do I believe that it would represent a desirable legal development. It would, in my opinion, be an unnecessary, and unwarranted, interference by the courts in family affairs and testamentary freedom.

96 As I have found there was no agreement between Paul and Geraldine that would bind Paul to adhere to the principle of equality in disposing of his assets after Geraldine's death, it is not necessary to consider Mr. Strosberg's submissions based on subsection 54(1) of the *Family Law Reform Act* R.S.O. 1980, Chapter 152 and subsection 55(1) of the *Family Law Act* R.S.O. 1990, c. F3. These provisions require domestic contracts, as defined, to be made in writing, signed by the parties and witnessed. The main difference between the provisions is that, in the event of non-compliance, a contract will be void if subsection 54(1) applies, and unenforceable if subsection 55(1) is applicable.

97 The questions raised by Mr. Strosberg are of some difficulty. They include the following: (a) whether the statutory provisions apply only in proceedings instituted pursuant to the particular Act as was held in *Sanderson v. Sanderson* (1982), 40 O.R. (2d) 82 (Ont. H.C.); (b) whether the provisions are limited to attempts to contract out of the provisions of the legislation as may be suggested by *dicta* in *Arvelin v. Arvelin* (1996), 20 R.F.L. (4th) 87 (Ont. Gen. Div.); (c) whether the alleged agreement between Paul and Geraldine should be considered to fall within the statutory definition of a domestic contract as an agreement under which the parties "agree on their respective rights and obligations. Upon death" with respect to "ownership in or division of property...[or] any other matter in the settlement of their affairs"; (d) whether an agreement made before 1st March, 1986 (the day on which the *Family Law Act* came into force) that would have been void pursuant to subsection 54(1) of the *Family Law Reform Act* is now merely unenforceable pursuant to subsection 60(2) of the *Family Law Act* that provides that contracts that would have been "valid" if entered into after that day are not to be "invalid" only because they were entered into before that date; and (e) whether the plaintiffs' claim to be entitled as beneficiaries of a constructive trust would be barred if the alleged agreement between Paul and Geraldine was void or unenforceable.

98 Of course, if Mr. Underwood's submission that a binding contract is, or should, not be required for an application of the mutual wills doctrine is correct, Mr. Strosberg's submissions would lose most, if not all, of their force. There is, moreover, the principle that equity will not permit a statute to be used as an instrument of fraud. According to Hargrave, in a passage cited by Dixon J in *Birmingham v. Renfrew* (at pages 685 and 690), this principle had been applied before the end of the 18th century to absolve agreements that satisfied the doctrine of mutual wills from a requirement of writing under the *Statute of Frauds* that would otherwise have made the agreements unenforceable. This would extend the principle beyond its limits under the doctrine of part performance and, to that extent, it would appear to add a further anomalous feature to the enforcement of agreements with respect to mutual wills.

99 The above comments are made in deference to Mr. Strosberg's learned submissions. Given the findings I have made, and the length of these reasons, I do not believe any further *obiter* discussion would be appropriate.

Validity of the Encroachment

100 Mr. Underwood challenged the validity of the encroachment in favour of Michael on 6th January, 1998 on the ground that the words "to pay... such amounts out of the capital of the trust property" in clause 8 of the Jodi Trust authorise only payments of money and not distributions, or transfers, of shares of Paulco. In the alternative, he submitted that Paul acted in bad faith in his purported exercise of the power and, in consequence, that it should be set aside.

101 While on a strict literal construction of clause 8, there might appear to be some force in Mr. Underwood's first submission, it is not consistent with the manner in which dispositive powers have traditionally been interpreted. For example, under the power of advancement contained in section 32 of the *Trustee Act* 1925 (UK), trustees are given power to "pay or apply any capital money... for the advancement or benefit... of any person entitled to the capital of the trust property or of any share thereof". This provision — which is stated in Underhill and Hayton, *Law of Trusts and Trustees* (15th edition, 1995), page 699 to be to the same effect as the advancement clause formerly contained in well-drafted wills and settlements — has been held to permit a distribution of trust property in *specie*: see, for example, *Collard's Will Trusts, Re*, [1961] Ch. 293 (Eng. Ch.); *Pilkington v. Inland Revenue Commissioners* (1962), [1964] A.C. 612 (U.K. H.L.), at page 639. It has been construed as authorising, but not requiring, funds to be realised for the purpose of distribution under an exercise of the power. As Lord Radcliffe stated in *Pilkington v. IRC*, at page 631:

> I do not think it can make any difference whether they actually realise the sum or merely appropriate existing investments.

102 Similarly, in *Hunter Estate v. Holton* (1992), 46 E.T.R. 178 (Ont. Gen. Div.), trustees were held to have power to resettle assets consisting principally, if not entirely, of corporate securities by an exercise of a power "to pay to or for the benefit [of the objects of the power]... such amounts out of the capital of the said Fund as my Trustees in their sole discretion may from time to time determine".

103 I note, also, that clause 8.04(tt) of Schedule A to the Jodi Trust confers an express power to make distributions in *specie* of "personal property forming part of the Trust Property in its then actual condition or state of investment in or towards satisfaction or payment of any share of the Trust Property".

104 In support of his submission that clause 8 should be narrowly interpreted, Mr. Underwood relied upon an *obiter* comment of McKinlay J.A. in *Fox v. Fox Estate* (1996), 10 E.T.R. (2d) 229 (Ont. C.A.), at page 245 to the effect that a power "to pay such amount or amounts" out of the capital of the residue of an estate would not authorise a transfer of the estate's interest in an apartment building. On the interpretation of the will, the learned judge held that the testator did not intend the power to be exercised so as to defeat the interest of a beneficiary who was given an income interest and a defeasible capital interest in the residue. She continued:

> In addition, although the encroachment to the extent of a cottage proceeds was of an "amount" within the terms of 4(c), the encroachment to the extent of the transfer of the estate interest in the apartment building was not the payment of an "amount", but was the transfer of an interest in real property, which was the major source of the estate income. Were it necessary to do so, I should hold that at least the transfer of the estate interest in the apartment building was not an encroachment within the terms of the will. However, I do not consider it necessary to do so.

105 The comment of the learned judge must, I believe, be read in the light of the provisions and structure of the particular will taken as a whole. I do not think she was intending to make a general statement with respect to the interpretation of powers authorising payments of amounts in wills and *inter vivos* trusts instruments. In the circumstances here, including the fact that the Jodi Trust was established to hold shares of family holding companies which it might be undesirable — as well as difficult — to sell, I do not believe it would be reasonable to place the narrow construction on the words of clause 8 that Mr. Underwood urged me to accept.

106 While, in the absence of ambiguity, evidence of Paul's intention in establishing the trust is not admissible for the purpose of interpreting its provisions, I believe I am entitled — and obliged — to read them in the light of the factual context in which the trust was created. The armchair principle referred to in *Perrin v. Morgan*, [1943] A.C. 399 (U.K. H.L.), at page 420, is, in

my view, as applicable to an *inter vivos* trust as it is to wills with the difference, of course, that the individual most instrumental in the creation of the trust is available to give evidence of the surrounding circumstances. These include the details of the estate planning arrangements of which the trust was a part and the nature of the assets — namely, participating shares of Paulco — it was intended to hold. It would make no sense to shut my eyes to these matters. I do not believe I am required to do so. I should add that I attach no significance to the fact that Paul was not, in terms, the settlor of the Jodi Trust. Although there is no evidence of the motivation of Minnie Sitzer as settlor, all the evidence indicates that this was a trust that Paul intended to create and that was established as part of his estate planning. There is no evidence of any independent desire of her to benefit the beneficiaries of the trust or of any consultation between her and Paul. It was not suggested that she was anything more than a nominee of Paul who acted at his request in signing documentation that he approved and in providing $100 to constitute the trust.

107 I note, also, that the income-tax consequences if trustees were forced to sell assets in order to exercise such a power would be prohibitive in many cases. As a general rule, distributions of assets in specie to beneficiaries do not give rise to a realisation of capital gains.

108 *Fox Estate* was a case where the provisions of the will as a whole — including differences in the words conferring separate powers of encroachment — were considered by McKinlay J.A. to justify a more narrow construction of the provisions conferring the power in question than might have been adopted if they had been read in isolation and out of context. In other cases, where the context has been different, such powers have been given a broader interpretation and have been held to permit a resettlement of the trust property on individuals who were objects of the power. In *Hunter Estate* , for example, the power was held to permit a partition of the trust into separate trusts for different beneficiaries. In *Roper-Curzon v. Roper-Curzon* (1871), L.R. 11 Eq. 452 (Eng. M.R.) a power to encroach in favour of one beneficiary was exercised, at the direction of the court, in favour of that beneficiary and his wife and children. Other cases in which different forms of resettlement have been permitted include *Pilkington v. IRC*, and *Hampden Settlement Trusts, Re*, [1977] T.R. 177 (Eng. Ch. Div.).

109 For the above reasons, I do not accept the submission that the provisions of clause 8 of the Jodi Trust are not sufficiently broad to authorise a distribution of shares of Paulco.

110 Finally, on the question of the interpretation of clause 8, I should mention that Mr. Underwood relied on a memorandum from Prager dated June 30, 1989 for a submission that the power of encroachment was inserted solely for tax reasons and was not intended to permit a distribution in favour of Michael. As I have already indicated, I do not believe statements of Paul's intention are admissible for the purpose of construing the provisions of the trust instruments in the absence of ambiguity: *Scott on Trusts* (4th edition), paragraph 164.1. Prager's statements can be in no better position. My task in this case would be much easier if the law were otherwise and I were able to rely on Paul's evidence with respect to his instructions given to Prager with respect to clause 8. In any event, if my understanding of the law on the admissibility of statements of intention is not correct, I do not think the memorandum would assist the plaintiffs as, in order to achieve the tax objectives referred to, it would have to be given its literal meaning and effect: namely, to permit an encroachment for the benefit of Michael or his issue.

111 Mr. Underwood's alternative submission that the encroachment made on January 6, 1998, did not reflect a *bona fide* exercise of Paul's discretion as a trustee of the Jodi Trust requires a consideration of the events leading up to the encroachment.

112 In the three years immediately following the family meeting on August 3, 1993, the relationship between Jodi and Paul deteriorated. Although designed principally to allow Paul and Sidney to explain the planning that had been put in place for the ultimate benefit of their descendants, the meeting also gave them an opportunity to provide those present with detailed information about the successful growth of the family businesses that some of them — including Jodi and Stephen — had not previously possessed. It is a sad irony that an occasion that Sidney and Paul must have looked forward to with a legitimate sense of pride and satisfaction provided the catalyst for the creation of a serious and, so far, enduring rift between Jodi and her father and brother.

113 I have referred to the existence of tension between Jodi and Paul since she was a teenager. She displayed many of the attributes of the stereotypical spoilt child. There is convincing evidence that she was demanding, possessive and hypercritical in her personal relationships. She has persistently complained of what she perceives to be Paul's lack of affection for her. She was

bitterly jealous of the attention Geraldine showed to Michael and, in particular, his wife. For several years prior to Geraldine's death, Jodi was estranged from Michael. Nor did Geraldine escape unscathed. She was distraught when, on more than one occasion — as a close friend testified — Jodi denied her access to her grandchildren.

114 Notwithstanding the strains and tension created by Jodi's demanding and combative personality, Paul, as well as Geraldine, took great pains to see that she and her children received financial support no less than that received by Michael's family. Paul helped her with a gift of $100,000 when she and Stephen were purchasing their first home. He subsequently paid her children's private school fees and other annual expenses in substantial amounts that, in total, were in excess of those provided for Michael's family. On one occasion when Paul felt that Jodi and Stephen and their five children required a larger house, he found one he thought might be suitable and offered Jodi a gift of the purchase price of $1 million. Jodi showed no interest and there was no indication in her evidence at trial that she was grateful for the offer or the other financial assistance she has received from Paul. When testifying, she was critical of Paul. She said she did not think he had worked long hours in the business and that, while she was living at home, he spent a great deal of his time in bed sleeping, reading or watching television. She testified that she did not enjoy it when he praised her profusely in his speech at her wedding as she did not think he was sincere.

115 The death of Geraldine in October, 1991, brought Jodi, Paul and Michael together and for the next two years the relationship was closer than before or since. They dined together on a weekly basis and Jodi and the children made regular visits to Paul's home.

116 The beginnings of the collapse of the newly-established relationship between Jodi and her father and brother — and of the process that culminated in this litigation — can be traced back to the family meeting of August 3, 1991. Jodi and, in particular, Stephen, reacted extremely negatively to what was said by Sidney, Paul and Prager on that occasion. At the trial, neither was able to provide a coherent or particularly intelligible explanation for their reaction and I have serious doubts about their ability to recollect many details of what was said on that occasion. I have already rejected the evidence of each with respect to Paul's alleged statement that the planning then in place was effected at Geraldine's insistence. Each testified that particular documents — including a report of Coopers and Lybrand — were handed out at the meeting — evidence that was refuted by Paul, Sidney and Prager. Stephen thought that the letters Prager had mailed to Jodi before the meeting were handed to her just before it began and he testified that he had no prior knowledge of the purpose of the meeting. Jodi's recollection was different. Jodi testified that she did not understand details of the reorganisation and the effect of the shareholders' agreements and Stephen also conceded that he did not really understand the estate planning concepts that were referred to.

117 Nevertheless, the negative reaction of Jodi and, especially, Stephen, is beyond doubt. One or two days later, Paul received a phone call from Jodi in which she demanded to know whether he was trying to break up her marriage. She criticised the planning as unfair because her children would, she said, be excluded from management and because each would receive fewer shares of the holding companies than Michael's two children. Paul testified that he was "dumbfounded" by Jodi's comments after a meeting that had been intended to enlighten the families as to their good fortune. He pointed out that there was nothing to prevent Jodi's children from becoming involved in the management of the businesses and that, in his will, he had provided gifts of $7 million to her children as against $3 million for the children of Michael.

118 Michael also received a phone call from Jodi in which she made similar criticisms. He said she was extremely upset and described the reorganisation as unfair because Michael would be able to fix his own salary and there would be no place in the management of the business for her children. Michael testified that he could hear Stephen prompting Jodi in the background.

119 On August 6, 1993, Stephen and Jodi met with Prager to raise questions about the information they had received at the family meeting. Stephen also spoke to Prager by phone. It is not clear whether this occurred before or after August 6 although the former seems more likely. Prager took notes of the comments and questions of Jodi and Stephen and I regard his evidence as more reliable than what I believe to be a watered-down version provided by Stephen and Jodi. I might add, at this point, that, generally, Stephen's testimony was most unconvincing when he attempted to deny, or explain, statements made by him to Prager or Paul at different times and to dilute the apparent force, aggression and, even, belligerence, of written statements that he could not deny having made.

120 Prager testified that, in the telephone conversation, Stephen stated that the evident purpose of the meeting was to praise Michael and Howard in front of their siblings and that, as no one would benefit until the deaths of Paul and Sidney, the meeting was insulting, a useless exercise, a sham and a facade. He queried why shareholders' agreements were necessary unless it was to protect Michael and Howard from their siblings and that this, and the meeting in general, was insulting to Jodi and would not help her sense of insecurity.

121 At the meeting with Prager, Jodi asked whether, as she had five children and Michael had only two, she should not receive $^{5}/_{7}$ of the shares of Paulco. She also raised issues with respect to Michael's ability, and her inability, to "butterfly" assets out of the corporations.

122 Michael and Prager reported their conversations with Jodi and Stephen to Paul and, although the issues raised were not mentioned again for a number of years, a fundamental change occurred in Paul's relationship with Jodi and Stephen during that period. As Paul testified, "the seeds of resentment, discord and distrust were planted and they started to grow".

123 However, while Paul testified that Stephen otherwise ceased to communicate with him, the family at first continued its practice of dining together once a week that had been followed since the death of Geraldine, Paul continued to give financial support to Jodi's family, as well as Michael's family, it was in this period that he offered to buy Jodi a new home for $1 million and he acceded to requests from Stephen for loans of $50,000 and $10,000 to assist in the establishment of a nightclub. Paul testified that there was nevertheless a strain in the relationship which continued to grow.

124 In 1994 Paul met the person who is now his fiancée and, after initial concerns expressed by Jodi and Michael, this change in his life was accepted by them.

125 In August, 1995, the day before Paul and his fiancée were to leave for an extended holiday in France, an altercation occurred between Paul and Jodi. She had, in his opinion, behaved extremely rudely and abrasively in berating a pharmacist the family had dealt with for some years. Jodi left Paul's house with her children without saying goodbye to him. He was hurt and upset.

126 Prior to Paul's departure for France he left cards and gifts with Jodi for his grandchildren whose birthdays would occur while he was abroad. To his disappointment, these cards and gifts were not delivered. When he phoned his grandchildren from France, he found they knew nothing about them. Jodi testified that she had forgotten that he had left them with her.

127 On Paul's return, he invited his children and their families to stay with him at a house he had rented in Florida. Jodi asked to meet with him first to clear the air with respect to the problems with their personal relationship. A meeting took place on November 25, 1995 at which Paul began by expressing doubts whether it was the right way to address the "undeniable family problem which exists between us (meaning you, Stephen and I)". He stated, if the meeting was to lead to positive and better family relationships, "I do feel that we have to be absolutely honest with each other even though some of the things we have to say may be unsettling to each of us". He suggested that each should speak in turn without interruption.

128 Paul then summarized bluntly what he considered to be personality defects of Jodi that contributed to her unhappiness and her alienation of so many family members and friends. He mentioned different aspects of her behaviour, and Stephen's, that he had found disappointing. He prefaced his remarks with the statement that loving Jodi wasn't easy because of her behaviour.

129 The meeting lasted for several hours. In the course of it, Stephen raised the issue of the estate planning that had been discussed at the family meeting in August, 1993. He was critical. He said that Jodi had been reduced to the position of a coupon clipper, that he would not receive any money until he was 70 years of age and that Paul shouldn't trouble himself with supplying Stephen with financial statements as he had no say in the business, was not receiving any benefits and had thrown the last ones in the garbage. Paul had not intended to discuss business affairs or the estate planning at the meeting and, when he left, he concluded that it had not, even in a small way, achieved what he had intended.

130 Notwithstanding Paul's pessimism about the result of the meeting, the family shared what he described as a happy holiday in Florida. After Jodi's return in early January he learned for the first time that she was planning a bat mitzvah for her oldest daughter. Jodi asked whether he would be prepared to pay for his guests and he agreed to do so although, as he testified, he was not happy with what he described as a "further expanded request for financial assistance".

131 Jodi hoped to have the religious ceremonies at Beth Tzedec Synagogue. Paul had been a member of the congregation there for 40 years. Although he had suggested at one time that Jodi and Stephen might become members and he had paid their initial dues, they had not chosen to do so. Jodi's and Steven's wishes with respect to their daughter's participation in the ritual were not in accordance with the interpretation of Jewish law that prevailed at the synagogue. The Rabbi testified at the trial that Jodi became upset and angry when she was informed of the difficulties and that he told her he would give the matter further consideration. Subsequently, after she was informed by an executive officer of the Congregation that the type of ceremony she wanted would not be permitted at the synagogue, or in the chapel at an associated school, she phoned Paul and was severely critical of the Rabbi whom she accused of betraying her, going back on his word and lying to her. Paul was extremely upset with her comments about the Rabbi — for whom he had great respect — and he was disturbed when she indicated that she wanted to contact the Rabbi that night. He testified that he was concerned that, as had happened several times in the past, when he had introduced people to Jodi "the arrangements end up badly for everyone".

132 After the termination of the phone call, Paul was still angry and he wrote out, and dispatched to Stephen's business address, a fax message to Jodi. He remonstrated with her for attempting to arrange the bat mitzvah at short notice and for her attempt to arrange to have the ceremony at Beth Tzedec without speaking to him. He repeated his disappointment at her difficulties in dealing with a long list of reputable people that he respected — difficulties that he attributed to her use of "vinegar" as a philosophy of life — and he indicated his embarrassment at her intention to confront the Rabbi. He expressed his concern that "everyone I have ever referred to you has turned out badly for both you and I". He offered to pay her fees to Beth Tzedec so that she would not have to use his name as a reference and he expressed a similar desire that she should not rely on his membership of a golf and country club where he had been a member for 30 years, where she had proposed to have a celebration of the bat mitzvah and where she would, sooner or later, he said, prejudice his association by finding fault with something. He told her that he was not prepared to pay to have his friends attend the bat mitzvah and that he was "getting tired of all the financial support I am still providing to you at this stage of your life". He asked her to treat the letter as personal and not to communicate its contents to Michael who had enough problems of his own.

133 In a heated and sarcastic response by fax from Stephen, that was read and approved by Jodi, Stephen denied knowledge of any requests by them for money for their "immediate use" and indicated his intention to immediately repay the interest-free loan Paul had made to him more than twelve months previously. He continued:

> That having been said, we would respectfully request that you immediately terminate any perceived and "tiring" findings including health coverage, further camp fees, any additional school dues, etc. What you may elect to do for your grandchildren in the future is your business, but please wholly disassociate Jodi and I from this process.
>
> It would be best for all concerned if we disassociated ourselves one from the other for all purposes. In that we bring you grief and, as you are aware, you bring Jodi (and to me by extension) incalculable anguish, please refrain from communicating with us in all regards. In accordance with your wishes, Jodi will not use you as a reference and, to ensure compliance, will not refer to you as her father.
>
> I do not mean to be disrespectful but I offer the following for your future thoughts: with all the money that you now believe you will be saving, and restored energy from not being tired from spending it, you might consider erecting a magnificent monument to yourself, suitably inscribed with those achievements in life you hold most dear — that way, in the future, strangers (your estranged daughter and her children included), can come forward and learn just how wonderful a guy you thought that you were.

134 Notwithstanding the diatribe he had received from Stephen, Paul made a number of attempts in the following nine months of 1996 to re-establish contact with Jodi. He sent cards and gifts to them for their wedding anniversary in March and for Jodi's birthday on April. When he returned from Florida on June 1, he phoned Jodi and asked her to bring the grandchildren to dinner. Jodi refused the invitation. He wrote to his grandchildren while they were at camp. In one such letter he expressed the hope that his eldest granddaughter could have dinner with him. He received no response to the suggestion. Nor did he receive any communication from Jodi after her rather cool acknowledgement of the receipt of the cards and gifts in March and April. These, she said, would "go towards paying for the little ones' camp". Paul had paid these expenses previously on receipt of invoices from Jodi. No further invoices were provided to him.

135 The final episode occurred in October, 1996. It had been the custom for the grandchildren to attend the synagogue with Paul on the anniversary of his father's death. Jodi refused to allow this to occur, or to bring the children to dinner with Paul. Paul responded that this was the last time he was going to beg to see his grandchildren and that Jodi would have to initiate nay further communication with him. To his great regret, he has had no direct contact with Jodi's children since then although he has continued to send birthday gifts to them which they acknowledge.

136 As a result of the estrangement, Paul gave instructions to Prager to redraft his will to delete Jodi's appointment as an executrix and all gifts to her and her children. The will, as executed, on November 25, 1996 contained a purported reason for Paul's decision to leave nothing to Jodi or her issue. The reason differed from that in a preliminary draft prepared by Prager. The relevant passage in the will was varied, again, in Paul's present will executed on 13th February, 1997. I will refer to these changes, and their possible significance, later in these reasons.

137 On November 29, 1996, Stephen wrote to Prager requesting a copy of Geraldine's will and information with respect to the identity of the executor and the professionals who advised her in connection with the estate planning and the preparation of the will. He also asked for details of any material changes in Geraldine's assets in the five years immediately preceding her death as part of the family estate planning in which Prager had been involved. The letter was said to have been written at Jodi's request and was signed by Stephen as "Barrister & Solicitor" under his legal letterhead. At the trial Stephen testified that the letter was written after he received a guarded phone call from Prager telling him that it would be in Jodi's best interest to consider her legal position but that he could not provide details. Stephen stated that he had not told Jodi about the phone call because Prager had said that he was going out on a limb in making the call and could get into trouble. Prager denied making any such call or, indeed, speaking to Stephen at any time after their discussions following the family meeting in 1993. He also denied having received any instructions from his client, Paul, to contact Stephen or Jodi at this time.

138 I have referred previously to my preference for the evidence of Prager and of Paul where conflicts between it and that of Stephen raise issues of credibility. The question of this alleged phone call raises such a question and, again, it is the evidence of Prager that I feel compelled to accept rather than that of Stephen notwithstanding the fact that Stephen's letter of the 29th of November followed a few days after the execution of Paul's will that disinherited Jodi. Stephen testified that numerous factors, including discussions with Jodi, led to the decision to write the letter. In answer to an undertaking to provide his reasons for writing the letter, no mention was made of the alleged phone call from Prager. The likelihood that Prager would commit a serious breach of his duty of confidentiality to Paul, or that the latter would instruct him to pretend to do so is, I believe, remote. It is more probable that Stephen's evidence on this point reflected either a conversation in February, 1997 between Paul and Jodi when Paul advised her to consult a lawyer or an attempt by Stephen to raise doubts concerning Prager's professionalism and to diminish his stature as a reliable and credible witness.

139 Having received no immediate response from Prager, Stephen repeated his request in a letter of December 2 in which he indicated that he was making arrangements for Jodi to obtain appropriate and independent advice from a lawyer who specialised in estates.

140 Paul interpreted Steven's letters as a threatened attack on the estate planning that had been effected in 1993 and as raising the prospect of litigation. Amendments to the shareholders' agreements were then discussed with Prager, Sidney, Michael and Howard in an attempt to protect the assets in the holding companies, and the management of the active business assets, from

interference. At the same time, Paul gave instructions to Prager to see if a financial settlement could be reached under which the Edell family would agree to separate themselves from the financial affairs of the other members of the Sixter families. Prager had, inevitably, given some consideration to the possibility of using the power of encroachment in the Jodi Trust for this purpose. Contrary to Paul's recollection, Prager discussed this possibility with Paul before the execution of the will of November 25, 1996 and Steven's letters of November 29 and December 2, 1996. The draft will that had been prepared by Prager earlier in November referred to Paul's anticipation that Jodi would sue his estate, or Michael, for an interest in Victern and expressed a wish and desire that Michael would make a gift to her if she was prepared to release his estate and Michael from any claims "which she may have by reason of her having been a beneficiary of the Jodi Beth Edell and the Michael Barry Sitzer trust...".

141 Prager testified that, when giving instructions for the will of November 25, Paul had asked him to look for a method of ensuring that Jodi would not receive the shares of Paulco that were held in the Jodi Trust. He stated that the possibility of an encroachment had occurred to him when he was drafting the will and that he had raised the possibility with Paul when they discussed the draft. He mentioned, and said Paul was aware of, the distinction between his ability to dispose of his own assets and his powers as a trustee of the Jodi Trust. Prager told Paul that it was likely that Jodi would sue if an encroachment was made. It was decided not to encroach and that some method would have to be found to buy Jodi out. I accept the evidence of Paul and Prager that this was what Paul wished to do. He did not wish her to be deprived of her defeasible beneficial interest in the shares of Paulco without compensation and he did not make a decision to encroach until, more than twelve months later, he became convinced that Jodi was about to commence legal proceedings to attack the estate freeze as well as to enforce what she perceived to be her rights to her mother's estate. The passage in the draft will was replaced with a reference to the fact that Jodi would inherit not only a substantial amount from Geraldine's estate but also a significant interest in various companies owned by the Jodi Trust. The will, as executed on November 25, 1996 contained an expression of Paul's wish that Jodi should transfer her interest in the companies to Michael in consideration for a payment equal to the difference between the proceeds of insurance on Paul's life and the taxes payable as a result of his death.

142 After instructions had been given to Prager to attempt to negotiate a financial settlement with Jodi, he wrote to her on February 11, 1997 to the effect that Paul was in the process of reviewing his estate. He suggested that she should contact an estate lawyer to discuss the concerns raised in Stephen's letters of November 29, and December 2, 1996. Paul repeated this advice when Jodi phoned him. The passage in Paul's will was replaced in his latest will of February 13, 1997, with a simple statement that he had left nothing to Jodi "in view of the existing relationship between us".

143 Negotiations with respect to a financial settlement with Jodi under which she would release her interest in the Jodi Trust continued, without success, throughout 1997. Paul offered Jodi $100,000 free of tax per annum until his death and a lump sum of $10 million when that occurred. No valuations of the shares of Paulco held in the Jodi Trust were available and the offer was not accepted. On December 8, Stephen wrote to Prager informing him that he was now acting as Jodi's lawyer and that he wanted a full review of Geraldine's estate and the "entire Sitzer estate freeze process.". He referred to Jodi's failure to obtain information with respect to Geraldine's estate and complained that, in 1996, Paul had "unilaterally withdrawn" financial support for Jodi's children in an intentional attempt to place untimely financial pressure on her and that this was "the first indication that your client was not content to honour promises and/or understandings that pre-dated the passing of Geri Sitzer... and to prejudice the innocent grandchildren". He described Paul's "arbitrary decision" to withdraw financial assistance for his grandchildren's education as "beyond comprehension" and indicative of his willingness to jeopardise his grandchildren's wellbeing for "strategic advantage and/or in spite which, no doubt, his late wife would never have tolerated". Stephen accused Paul of *mala fides* and stated that Jodi was of the view that her legal rights had been violated in connection with the administration of her mother's estate, promises made between Geraldine, Paul, Michael and Jodi which were the consideration for Geraldine's participation in the estate freeze, the distribution of Geraldine's personal effects, the treatment of Jodi's children and the fact that Jodi "has thus far enjoyed no benefits, direct or indirect from her late mother's estate or from the family wealth." The letter concluded as follows:

> Mrs. Edell is of the view that her rights have been abused.... She is being left with no alternative but to assert her rights in a legal and public forum. She intends to do so, now, unless the parties can come to terms by year's end. Do not take lightly Mrs. Edell's desire to seek a just termination, however long it takes.

I suggest that you may be in a conflict of interest.... From hereon in and until further notice, you/your client's new counsel will be dealing with me. Please advise immediately by a return letter if Mr. Sitzer will agree to be removed as executor and trustee and on what terms. Please also advise your client that if (as I am told before happened) there are any comments about "people representing themselves as having fools for a client" or the like, this writer will not cower and will forthwith exert his legal remedies to the full extent of the law.

144 The specific "legal concerns" that the letter purports to identify lack precision in some cases and substance in others. Allegations that Jodi had not received an inventory, or accounting, of Geraldine's estate or "timely proper and complete reporting as to the Jodi Edell Trust" appear to be based on a misapprehension of Paul's obligations as trustee when no request for the information had been made. Allegations relating to promises made to Jodi by Geraldine, Jodi's rights to receive continuing financial assistance for the education of her children and her rights to receive immediate benefits from her mother's estate and "the family wealth" do not assert any clear factual basis from which legal rights could reasonably be said to arise. On the most benevolent interpretation of the letter, the assertion that legal rights of Jodi to receive immediate benefits had been violated requires the provisions of Geraldine's will conferring benefits on Paul, and those of the will and the Jodi Trust postponing the vesting of Jodi's interests, to be ignored and some other kind of trust superimposed on Paul with respect to the estate and his own assets.

145 The following day Stephen wrote an emotional letter to Michael in which he set out at some length Jodi's criticisms of Paul as a parent and his "irrational dislike of Jodi that is inconsistent with the unconditional love that a healthy parent has for a child". He urged Michael to get involved and said that his lack of action and Paul's intransigence and threats were forcing Jodi to go to court. Stephen stated that, if Jodi was compelled to do this for the purpose of properly asserting her rights, Michael might have to be named as a defendant, numerous other family members and friends would be involved and allegations would be made that would be extremely uncomfortable, embarrassing and devastating. Stephen stated that it would be "a shameless act of cowardice and betrayal" if Michael did nothing or blamed Jodi for what had occurred or what would occur. He concluded with the statement that Jodi intended to commence legal proceedings early in January.

146 Jodi subsequently phoned Michael and told him that, if he did not put pressure on Paul, he would be involved in a lawsuit and a disgrace to his mother's memory. Jodi and Michael have not spoken since.

147 Paul subsequently received copies of Stephen's letters and concluded that litigation could not be averted, that any relationship between Michael and the Edell family had been severed and that, if Jodi ever received shares of Paulco, a total fragmentation and disintegration of the business interests would follow. Sidney advised Paul that he would not continue to carry on the business if the Edells were involved and that he would take steps to separate the interest of his family from that of Paul's. Paul had no doubt that Michael would, similarly, wish to sever his, and his children's interests from those of Jodi and her issue. This, in Paul's view, would have very negative effects on the Michael Trust and the Jodi Trust. Paul then sought the advice of litigation counsel and, having done so, decided to exercise the power of encroachment and at the same time to make a further offer of a settlement. He testified that he was convinced that, without the encroachment, everyone in the family would suffer.

148 The encroachment was effected by a deed of appointment dated January 6, 1998. The recitals to the deed referred to the detrimental effect on Michael's financial interests of the reorganisation in 1991, Paul's desire to protect the long-term financial enterprises against corporate division and discord, requests by Jodi and Stephen for financial assistance contrary to the long-term estate planning of Paul and Sidney and Paul's concern that co-ownership of Paulco shares by Michael and Jodi would interfere with effective business operations of Victern and its financial viability.

149 The deed further recited that Paul wished to encroach on the capital of the Jodi Trust to restore Michael and Jodi to substantially the same positions that they were in prior to the 1991 reorganisation "in order to protect the long-term financial and management integrity of the Sitzer family enterprises by preventing his daughter Jodi (who Paul reasonably believes to act under the influence of her husband Stephen Edell) hereafter from interfering in the established business plans and programme of the Sitzer family companies".

150 The operative part of the deed reads as follows:

> 1. In accordance with the terms of the trust, the undersigned hereby transfers, assigns and pays over to Michael Sitzer, fifty (50) class D (common) shares in the capital of Paul Sitzer Holdings Ltd.
>
> 2. The undersigned hereby agrees to use his best efforts to take all necessary steps to effect the distribution referred to above.

151 On the following day, Paul's litigation counsel, Mr. Warren H.O. Mueller QC, wrote a "not without prejudice" letter to Stephen in his capacity as Jodi's solicitor. After describing the estate planning effected by Paul and Sidney, including the provisions of a shareholder agreement, Mr. Mueller summarized the assets in Geraldine's estate and estimated their total value to be slightly in excess of $2.7 million. He set out Paul's concerns that Stephen had poor business judgment and was incapable of relating effectively with any of the other family members with whom he would be in contact if he and Jodi were permitted to continue to have the prospect of significant involvement in the family businesses. Jodi, he said had no business experience whatsoever. He said that it was indisputable that there was an irreparable gulf of misunderstanding between, on the one hand, Paul and other extended Sitzer family members and, on the other hand, Stephen and Jodi. Mr. Mueller stated that Paul had no desire to punish Jodi or her children, that he was deeply disappointed but bore no ill will to any of them. "His attitude is one of deep sadness rather than anger."

152 Mr. Mueller stated that, given the matters he had mentioned, Paul had two "concurrent and overriding objectives":

> (a) He wants to eliminate any possibility of Jodi and/or you disrupting or even influencing the future business affairs of at least Victern; and
>
> (b) He wants to financially protect both Jodi and his grandchildren both in terms of long-term capital and in terms of current income, especially bearing in mind your many expressions of monetary concern and Jodi's lack of any entitlement to income or capital from either the Jodi Trust or Geraldine's Estate until Paul's death.

153 The letter then provided Jodi with two options. The first was to restore the position prior to the reorganisation of March 3, 1991 by encroaching for her on the 50 shares of Gerico held in the Michael Trust. In return, Jodi and her children would have to release Paul (in all his capacities), Michael and the other members of the Sitzer families and the various corporations from all conceivable claims they might have against them.

154 The second option was to provide Jodi with an immediate income of $50,000 per year tax-free during Paul's lifetime and $3 million on his death. In addition each of Jodi's children would receive a life annuity funded with a capital amount of $750,000 less the amounts of bonds already purchased for them. Neither Jodi nor her children would receive any additional amounts from Paul or his estate. If Jodi accepted the second option she and her children would release their remaining interests under the Jodi Trust and all their interests under Geraldine's will.

155 The letter concluded with a statement that Paul's offers were made on a "not without prejudice" basis to ensure that everyone, including any court, would realise that they did not constitute an exercise in punishing Jodi, but rather an exercise in protecting the integrity of the family businesses, coupled with very significant financial benefits to Jodi and the children in lieu of an indirect interest in the business assets. Mr. Mueller also provided his opinion that, having researched with care the law relating to discretionary encroachments, he had no doubt that Paul was entitled to make the encroachment and that, in any event, a claim to set it aside would lead to a counterclaim to set aside the 1991 reorganisation in favour of Jodi "since these two transactions are either equally justifiable or questionable".

156 Following receipt of this letter, mediation was apparently proposed in accordance with a suggestion of Mr. Mueller and some valuations of assets provided. No agreement was reached and the statement of claim was issued on July 3, 1998.

157 The primary purpose, and great utility, of dispositive powers in estate planning is to provide flexibility. While powers to distribute capital are often described generically in this country as "powers of encroachment", this description is not a term of

art if that would imply that it encompasses only powers that have substantially uniform effects on other dispositive provisions of wills and trusts instruments and which create essentially the same degree of flexibility. Great variations are possible in the purposes for which powers of encroachment are created, the circumstances in which they may be exercised and their potential effects on other dispositive provisions. As the decision in *Fox Estate* illustrates, these factors may bear directly on the propriety of a trustee's exercise of a power and it is clear from the decision of the Court of Appeal that they must be determined in this case on the construction of the provisions of the trust instrument in their entirety and not on the interpretation of the words of clause 8 considered in isolation. The decision to place the growth shares of the holding companies in *inter vivos* trusts that provided for deferred vesting for the maximum period permitted by the *Income Tax Act* if taxation of capital gains was to be avoided, and the extensive dispositive powers over income and capital exercisable by Paul and Geraldine, and the survivor, in the meantime indicate a clear intention that control of the destination of the capital and income of the trust property was to be retained by the trustees until the trusts terminated by the effluxion of time, the deaths of Paul and Geraldine or a decision of the trustees, or the survivor of them, to declare an earlier Distribution Date.

158 It is evident from the terms of clause 8 that it was not intended to be merely a power to advance capital to the primary capital beneficiaries. Like the power to distribute income, it was exercisable at any time prior to the Distribution Date in favour of all, or any, of the issue of Paul and Geraldine and, therefore, was exercisable in favour of Michael or any one, or more, of Paul's descendants to the exclusion of any others notwithstanding the priority given to the interests of Jodi and her issue in clause 9. In these circumstances the words of the trust instrument by themselves are sufficient to indicate that the power was created in order to provide sufficient flexibility to permit the dispositions of capital in clause 9 to be overridden if the trustees considered this to be for the benefit of any one or more of the objects of the power. To that extent this not uncommon form of a power of encroachment has some of the important attributes of a power of appointment as well as those of a power of advancement. It is, however, exercisable by the trustees and for that reason is subject to fiduciary standards, and the supervision of the court, to an extent that would not be applicable to powers vested in individuals in their personal capacities: Maclean, *Trusts and Powers* (Sweet & Maxwell, 1989), at page 88. The application and extent of fiduciary standards — such as the duties to avoid conflicts of interest, to act with reasonable prudence and to observe impartiality or, in other words, to maintain an even hand — may, of course, be limited by the provisions of the trust instrument that indicate both the scope of a power and the purposes for which it may be exercised: *Ballard Estate v. Ballard Estate* (1991), 41 E.T.R. 113 (Ont. C.A.); *Armitage v. Nurse*, [1997] 2 All E.R. 705 (Eng. C.A.); *Edge v. Pensions Ombudsman* (1999), [2000] Ch. 602 (Eng. C.A.), at pages 621 and 627-630.

159 The grounds on which the court will strike down an attempt by a trustee to exercise discretionary powers — even where, as here, the discretion is intended be as unfettered as possible — have been described in different terms over the years. The old approach that limited the court's intervention to cases of "*mala fides*" has been reformulated in the more recent cases in terms of a concept of abuse of discretion that is similar to the criteria applied in other areas of the law concerning the exercise of discretionary powers by administrative bodies and officials — including judges. Non-interference is still the general rule. The court is not to substitute an exercise of its discretion for that of the trustee; it is not exercising a *parens patriae* jurisdiction. In *Fox Estate* — the leading case in this jurisdiction — Galligan J.A. quoted with approval the following statements of the governing principles by Steele J. in *Hunter Estate* (at page 186):

> Trustees must act in good faith and be fair as between beneficiaries in the exercise of their powers. There is no allegation of bad faith in the present case. A court should be reluctant to interfere with the exercise of the power of discretion by a trustee. I adopt the following criteria in *Re Hastings-Bass*... p. 41 Ch., p.203 All. E. R. as being applicable to the court's review of the exercise of such power:
>
> > To sum up the preceding observations, in our judgment, where by the terms of a trust... a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, *unless* (1) what he has achieved is unauthorised by the power conferred upon him, or (2) *it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account*, or (b) had he not failed to take into account considerations which he ought to have taken into account. [emphasis added.]

160 In Mr. Underwood's submission, the evidence here requires a finding that Paul exercised the power of encroachment motivated by anger at Jodi's conduct with the sole or, at least, a dominant purpose of punishing her. Whether this is characterised as a case where extraneous matters determined his decision, a case of improper purpose or one of *mala fides* in the literal sense- or all of these- the result in counsel's submission is that the purported exercise of the power must be set aside.

161 Mr. Zarnett submitted that the finding Mr. Underwood asked me to make with respect to Paul's motivation and purpose in exercising the power was not justified on the evidence. In his submission, I should find that Paul was actuated solely by a desire to protect and preserve the trust property, and the underlying assets, for the benefit of Michael and his family and that in the circumstances, this was an entirely legitimate and proper exercise of his discretion. Mr. Zarnett submitted that I should find that, as a result of the events that occurred in the years immediately after the family meeting and the increased intransigence and aggression exhibited by Jodi and Stephen, Paul ultimately realised that his original belief that it would be in no one's interests for Jodi to be involved in direct or indirect ownership of shares of the active family businesses was correct. He became convinced that her participation- or that of her children- in the ownership would give rise to dissension, disputes and, most probably, litigation that would be a disaster for the businesses and would be severely detrimental to the interests of all of his descendants.

162 It is not the function of the court to pass judgment on the conduct of the parties by blaming one side or the other for the estrangement that occurred. Nor, if Mr Zarnett's submission with respect to Paul's motives is accepted, would it be the court's function to determine whether he was correct in his belief that the continued participation of Jodi and her family in the equity of Paulco would be detrimental to the interests of all his descendants. The discretion was conferred on Paul and not on the court and it necessarily involves an exercise of personal judgment with which the court should not readily interfere. If, of course, the discretion was exercised on the basis of a belief that no reasonable person could hold, it would be legitimate for the court to infer that extraneous matters — whether emotional or otherwise — must have influenced his judgment.

163 I note also that the authorities in this jurisdiction do not attribute significance to a distinction between motives — in the sense of sentiments, such as love, generosity, anger, pride, displeasure or feelings of moral obligation — that influence a trustee in exercising the power in a particular manner — and purposes in the sense of the end results that the trustee intends to achieve. As the decision in *Fox Estate* illustrates, particular motives, as well as particular purposes, may be considered extraneous to the exercise of the power.

164 Judicial consideration of the purposes for which powers in trust instruments have been exercised has a long history in the context of the doctrine of a fraud on a power. This was developed — and it still applies — to powers given to persons who are not trustees. Such powers have, in the recent past, I think, been more commonly found in offshore jurisdictions than in Ontario. Donees of powers who are not trustees are held to less stringent standards and, in consequence, enjoy a greater immunity from judicial interference which, for the most part, is limited to annulling attempts to exercise a power for a purpose that is considered to be "fraudulent" in a special sense.

> The donee of a special power of appointment must exercise the power bona fide and for the end designed and not for any purpose which is foreign to the power. If the power is exercised not bona fide, but for a purpose beyond the scope of the instrument creating the power, or not justified by it, the appointment is said to be a fraud on the power, and equity holds it bad.: *Snell's Principles of Equity* (29th edition, 1990), at pages 562-563.

165 There is, however, no doubt that any act that would be a fraudulent exercise of a power if done by a person who is not a trustee will be invalid if it is done by a trustee.

166 The principal difficulty in this case is that, during the period leading up to the exercise of the power, Paul was undoubtedly hurt and angry with Jodi and Stephen but he was also very concerned about the detrimental consequences for all of his issue if shares of Paulco that constituted an indirect interest in Victern were ultimately distributed to Jodi. There is, therefore, a possibility of mixed motives or purposes. Expressed in terms of mixed motives, there was possibly displeasure and anger towards Jodi, as well as concern for the interests of his other descendants; in terms of mixed purposes, there is the possibility

that the power was exercised partly in order to punish Jodi and partly to protect and benefit Michael and his issue who were objects of the power.

167 The first issue that arises requires a determination of the actual motive or motive — purpose or purposes. This is a question of fact: *Brook's Settlement, Re*, [1968] 3 All E.R. 416 (Eng. Ch. Div.), at page 421. On the basis of Paul's evidence — tested, as it was, by Mr. Underwood's searching and comprehensive cross-examination — I am satisfied that Paul's decisive motivation when exercising the power was his concern that it would be detrimental to all of his descendants if Jodi — or the children for whom she is acting as litigation guardian — continued to have beneficial rights to receive shares of Paulco at the termination of the trust. He was convinced that, if this occurred, there would inevitably be dissension, discord and, most probably, litigation between Jodi and Michael and their respective families that was likely to lead to the break-up of the businesses and the dissipation of their assets to the detriment of all of his descendants. In view of the statutory rights of minority shareholders he did not believe that the fact that the participating shares were not voting was sufficient to obviate these concerns. As I have already indicated, on a question such as this, which involves an exercise of personal and business judgment by the person on whom the discretion was conferred, I believe the court should be slow to characterise Paul's conviction and concern as unwarranted or unreasonable and should certainly not do so where, as here, there is ample evidence on which such a conclusion might reasonably be based.

168 I have no doubt that Paul's avowed purpose of ensuring that at least some of his descendants would benefit from the business assets was genuine and that it, and not, as Mr. Underwood submitted, a desire to punish Jodi, was the purpose of — his decision to encroach. I accept Paul's evidence to this effect.

169 The final breakdown of the relationship between Paul and Jodi occurred in October, 1996 when she again rebuffed his attempts at reconciliation. He disinherited her in the following month and I do not think it could seriously be disputed that this decision with respect to the disposition of his own assets was motivated, albeit quite legitimately, by the kinds of considerations that, in Mr. Underwood's submission, invalidated Paul's subsequent exercise of the power of encroachment. However, more than 12 months elapsed before Paul made the decision to exercise the power and, during that period, he attempted to reach a financial settlement with Jodi. This was, in my judgment, a genuine attempt by him to deal fairly with her while obtaining her consent to a release of her indirect interest in Victern: a release that he was convinced was required to prevent harm to the interests of all his descendants. It was only when the settlement discussions broke down and Paul became convinced that Jodi and Stephen were determined to litigate to sustain their unsubstantiated and, in my judgment, quite unfounded, allegations that her rights had been violated and abused, that he exercised the power to deprive her of her interest in Paulco, though not in Gerico.

170 The burden of establishing that, when he exercised the power, Paul was motivated, wholly or in part, by extraneous considerations is, in my opinion, on the plaintiffs. There is some suggestion in the cases that the burden can shift. *Halsbury* states: (4th edition, Volume 36(2), paragraph 365):

> The burden, which may be shifted, initially lies on the person seeking to avoid the appointment and he must prove the corrupt purpose. A mere possibility of benefit, or improper motives, such as anger or resentment, will not suffice.

171 The authorities relied upon by *Halsbury* with respect to a shifting burden do not, in my opinion, extend further than to establish that, if those challenging the exercise of the power can establish on a balance of probabilities that an intention to exercise it for an improper purpose existed at a time prior to the actual exercise of the power, the court will presume that this intention continued unless there is proof of the contrary: see, for example, *Wright, Re* (1919), [1920] 1 Ch. 108 (Eng. Ch. Div.) and contrast *Crawshay, Re* (1947), [1948] 1 All E.R. 107 (Eng. C.A.), at page 115 where the court held that the burden of proof was irrelevant when it was possible to determine the question from the evidence. As I have indicated, in my opinion the same is the case here. I believe, and find, that the evidence establishes on a balance of probabilities that Paul's displeasure and disapproval of Jodi's conduct were not considerations that contributed materially to his decision. I have no doubt that, during the period in which the power was exercised, he had such feelings and it is possible that they may have influenced his judgment to some extent but, as the statement in the *Halsbury* indicates, the *possibility* that they provided all of part of the motivation for his decision is not sufficient.

172 Having found that Paul's motivation and purpose in exercising the power in favour of Michael was to remove what he saw as an almost certain threat to the interests of all his descendants and to ensure that some of them would benefit from the assets of the trust that held the greater potential for future capital growth, I believe that this is not a case where the court should intervene and strike down the purported exercise of the power. A concern for the interests of the objects of the power and an intention to benefit one or more of them has been held to be a prerequisite, and not only a legitimate reason, for a trustee's exercise of a dispositive power: *Pauling's Settlement Trusts, Re* (1963), [1964] 1 Ch. 303 (Eng. C.A.), at page 333. The provisions of clause 8 are broad enough to permit an encroachment on part of the trust property for the benefit of Michael and just as the court should not, in my opinion, substitute its own judgment for that of Paul with respect to the probable consequences if the power was not exercised, I do not believe it would be appropriate for me to inquire whether the outright distribution to Michael was the best way of achieving the purpose for which the power was exercised. The discretion was given to Paul and not to the court.

173 Mr. Underwood relied on the well-established duty of a trustee to act impartially — the so-called even hand rule. This, he submitted, required Paul to consider and give weight to Jodi's interests when exercising the power of encroachment. While such a proposition has meaning, and is supported by authority, in the context of administrative powers, it is clear that it cannot be applied strictly and literally to preclude any exercise of a dispositive power in favour of a single beneficiary where the power is, as here, expressed in the trust instrument to be exercisable in favour of one or more beneficiaries to the exclusion of the others. The correct position is, I believe, as stated in *Edge v. Pension Ombudsman* at page 627:

> Properly understood, the so-called duty to act impartially ... is no more than the ordinary duty which the law imposes on a person who is entrusted with the exercise of a discretionary power: that he exercises the power for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant. If ... trustees do that, they cannot be criticised if they reach a decision which appears to prefer the claims of one interest... over others. The preference will be the result of a proper exercise of the discretionary power.

174 I refer also to the analysis at first instance of Scott V.C. at pages 618-619 which was expressly approved by the Court of Appeal.

175 Paul was satisfied that the exercise of the power was required to preserve the trust property for the benefit of some of his descendants who were objects of the power and that a failure to do so would be detrimental to all of his issue. I do not believe that his decision can be legitimately criticised on the ground that he ignored Jodi's interests when the threat to the interests of the objects of the power was perceived to arise on the basis of her behaviour in the past and likely behaviour in the future.

176 Even if, contrary to the finding I have made, Paul's decision to exercise the power was motivated, as well, by extraneous considerations, it would not follow necessarily that the exercise of the power should be struck down.

177 In *Fox Estate* , Catzman J. stated, in an *obiter* passage (at page 251):

> ...I have difficulty in accepting that the exercise of discretion by an executrix on an appropriate basis must necessarily fail because of a concomitant inappropriate basis. In light of our proposed disposition of this appeal on other grounds, I need not resolve this question. I incline to the view, however, that if an executrix exercises her discretion to encroach for a "good" reason, clearly within the contemplation of the power conferred upon her by the will, we should be reluctant to interfere on the ground that she was, additionally, motivated by a "bad" reason that the court is unprepared on public policy grounds to support.

178 There is ample authority for the proposition that extraneous motives or purposes will vitiate an attempt to exercise a discretion if they form part of the basis upon which the trustee's decision was reached. I believe that proposition must be correct if it is understood to refer to motives, or purposes, that must be considered to have operated in combination in the sense that the exercise of the power would not have occurred without the existence of each of them. To adapt the language of causation, when neither is a sufficient cause but each is a necessary precondition to the exercise of the power, it will be invalid: *Portland v. Topham* (1864), 11 H.L.C. 32 (U.K. H.L.), at page 54; *Brook's Settlement, Re*, (above) at page 421; Maclean; *op. cit.*, at page 118. This possibility is excluded here by my findings of fact.

179 I do not understand Catzman J. to have been addressing that situation but, rather, a case where a power was exercised for two motives, or purposes, of which one was legitimate and, in the opinion of the trustee was, by itself, a sufficient reason for exercising the power in the particular manner. The other authorities I have cited do not advert to the distinction but, if my understanding of his comment is correct, I am in respectful agreement with it and it would be applicable to the facts of this case if, contrary to my finding, Paul's displeasure and disapproval of Jodi's behaviour were additional motives for his decision to encroach.

180 In addition to the above reasons for my finding that the encroachment should not be interfered with, I believe it is legitimate to construe the provisions of the Jodi Trust in the light of the general principles accepted by Paul and Sidney and reflected in the estate planning of which the establishment of the trust was an integral element. The planning was premised on a conviction that its success — like that already achieved in the growth of the family businesses — would depend on co-operation and an avoidance of disharmony and discord among members of the family. The power of encroachment was inserted to provide Paul with a measure of control over the ultimate distribution of the trust property and he was, in my judgment, entitled to exercise it in accordance with, and to protect and implement, the principles on which the planning was based.

181 While, at first blush, it might appear to be a startling proposition that a trustee may properly bargain with a beneficiary to obtain a release of her interest in the trust, I do not believe there can be any absolute rule excluding this possibility where the trustee's motives are to protect the interests of other beneficiaries. The fact that Paul offered payments to Jodi both before and after the encroachment does not, in my opinion, vitiate an exercise of the power if, as I have found, it was otherwise unobjectionable. The propriety of the encroachment does not depend upon the fairness of the offers or their equivalence to the value of the interests of Jodi and her children under the Jodi Trust and the estate of Geraldine. No such offers were required. Nor do I believe it is relevant to ask whether the court would have approved the terms of any proposed settlement on behalf of her children and unborn issue.

182 While, in his letter of January 7, 1998 to Stephen, Mr. Mueller denied that Paul was attempting to purchase the interests in the Jodi Trust and the estate at their fair market value, he suggested that Paul's offers were worth more in dollar terms than such interests and he stated that Paul's intention was to achieve "general fairness".

183 To the extent that the fairness of the offers may throw light on Paul's *bona fides* at the time of the encroachment, Mr. Mueller's statements and his estimates of the value of the beneficial interests were supported by expert evidence of Mr. Colin Loudon C.A., the National Director of Real Estate Advisory Services of KPMG LLP. Mr. Loudon provided an opinion that, as of December 31, 1997, the value of the beneficial interests of Jodi in the Jodi Trust and her mother's estate, on the assumption that such interests would ultimately vest, fell within a range of approximately $4 million to $4.8 million.

184 Mr. Loudon's valuations were challenged by Mr. Underwood on a number of grounds including the possibility that the value of the preference shares received by Paul at the time of the estate freezes did not reflect the fair market value of the assets transferred to the holding companies. The forms filed by Revenue Canada at that time required the fair market value to be stated and there is no evidence on which I could find that the amounts reported were, as Mr. Underwood suggested, underestimated so that the participating shares received by the Jodi Trust had an immediate value in excess of the amount — $1 per share — for which they were issued — a result that could have attracted immediate adverse tax consequences.

185 There was, indeed, a conflict in the expert evidence on various assumptions to be made for the purpose of valuing the interests in the Jodi Trust. If I were asked to approve a settlement on behalf of Jodi's children, it might well be necessary for me to adjudicate with respect to the differing views of the experts on these somewhat controversial questions. However, I do not believe their resolution is required where, as here, the issue relates to Paul's *bona fides* at the time of the encroachment. The amounts offered Jodi in 1997 were, I believe, extremely generous. The expert testimony of Mr. Loudon satisfied me that those made in 1998 were reasonably supportable and that, I believe, is sufficient for the purpose of this case.

186 If, contrary to my opinion, the encroachment could only have been justified in return for payments to Jodi and her children equal to the value of the interests they would relinquish, I would have directed a reference to determine the question of

valuation or, at least, requested more detailed and specific evidence and submissions with respect to the values of the underlying assets at the relevant times as well as the appropriate assumptions to be made in valuing the interests under the trusts.

187 Paul was, of course, wearing several different hats: he was a trustee of the two *inter vivos* trusts and of the testamentary trust created in Geraldine's will and he was the controlling shareholder, and the owner of preference shares that represented a substantial part of the value, of Paulco. To the extent that these different capacities could involve him in conflicts of interest, they were authorised by the circumstances in which such capacities were conferred upon him: namely, as part of the estate planning implemented by him and his spouse. As Professor Waters has stated (*Law of Trusts in Canada*, (2nd edition, 1984, at page 715)):

> It is important to remember... that the rule does not involve a total prohibition upon activities which present a conflict of interest and duty. The person who asks the fiduciary to undertake the task, or who condones the assumption of the task, is perfectly free to permit such activity on the part of the fiduciary.

188 I have given careful consideration to the plaintiff's request for the removal of Paul as the trustee of the trust under Geraldine's will and as trustee of the Jodi Trust. While the existence of animosity and ill-will between a trustee and the beneficiaries of a trust has been considered relevant to the question of removal, I do not believe the existing relationship between Paul and Jodi warrants his replacement in either case. As far as the testamentary trust is concerned, he was chosen by Geraldine to be the trustee and no misconduct has been proven against him. Throughout the litigation and the events that preceded it, he has demonstrated a willingness to take, and act upon, legal advice and an awareness of his fiduciary obligations. I see no reason to infer that he will not continue to exercise his responsibilities in a proper manner. Given the interlocking assets of the estate and two *inter vivos* trusts, Paul's control of Paulco in his personal capacity, his continued involvement in the business operations of Victern and the fact that the *inter vivos* trusts will terminate, at the latest, in 2010, I see no advantage to be gained by the appointment of another trustee, or other trustees.

189 The plaintiffs are, of course, entitled to an order requiring Paul to pass his accounts as executor and trustee under Geraldine's will and the Jodi Trust. Such an order with respect to the estate and the testamentary trust could have been obtained, at any time by Jodi, *ex parte*, pursuant to rule 74.15(1)(h). My understanding is that there may be nothing to account for in the Jodi Trust except the receipt and disbursement of the amount of $100 from Minnie Sitzer and the receipt and disbursement of $50 at the time of the reorganisation of the holdings of the two *inter vivos* trusts in 1991. If this is correct, I presume that a passing will be waived by the plaintiffs on being provided with satisfactory evidence and the formal order of the court will permit this to be done.

190 The plaintiffs also seek damages and an order requiring Paul to name Jodi as a beneficiary of any policies of insurance on his life. No case for these orders has been made out and they are refused.

191 Michael is entitled to a declaration that he is the beneficial owner of the 50 shares of Paulco as requested in his counterclaim. As this declaration is granted, it is unnecessary for me to consider Mr. Strosberg's forceful argument that, if the encroachment was invalid, the reorganisation in 1991 must also have been invalid as it involved similar exercises of discretion by Paul as trustee of the Jodi Trust and the Michael Trust. This, as I have mentioned, was also the opinion of Mr. Mueller but, as Paul's motives and purposes in each case were quite different, I am not convinced that it is correct. However, I express no firm view on this question.

192 At the trial I was informed that the plaintiffs did not intend to pursue certain claims with respect to a corporation that provided management services to the business and the reinstatement of the original shareholders' agreements. Mr. Underwood informed me that he accepted Mr. Strosberg's objection that these claims should not be adjudicated as neither the management company nor other persons who were signatories to the shareholders' agreements were made parties to the proceedings. He asked me to declare that my judgment in this case would be without prejudice to the rights of the plaintiffs to bring these claims against the appropriate parties in the future.

193 Mr. Strosberg submitted that the claims should be dismissed as against the defendants as his objection had been communicated to Mr. Underwood at the time of the examinations for discovery and no motion to amend the statement of claim to join additional parties as defendants or to delete the claims was made either before or at the trial.

194 I believe Mr. Strosberg's submission is well-founded. The material facts pleaded with respect to the claims in question would have raised essentially the same issues that I have determined in favour of the defendants. They have been put to the expense of 21 days of trial and it would be unjust to permit the plaintiffs to withdraw claims against them arising out of the same facts without prejudice to their rights to relitigate the issues in separate proceedings against these defendants and others. Pursuant to rule 5.04(1) I am permitted to give judgment with respect to the rights of the parties to these proceedings notwithstanding the non-joinder of other persons as parties. As the plaintiffs did not seek judgment with respect to the particular claims and did not move to amend the statement of claim to delete them — and as there is nothing in the evidence that would suggest that the claims may have merit or may raise issues that I have not decided — the claims will be dismissed as between the parties to this action.

195 This difficult case was exceptionally well presented, and argued, by counsel.

196 I may be spoken to on the question of costs or, if the parties so agree, I will receive written submissions within 28 days of the release of these reasons.

TAB 9

WATERS' LAW OF TRUSTS IN CANADA

Fourth Edition

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I. INTRODUCTION

A. Proprietary Remedies

A beneficiary may bring his action for breach of trust in order to assert an interest of his own in the trust property, denied or overlooked by the trustee, or he may be suing, effectively on behalf of all the beneficiaries, because trust property has been misappropriated or otherwise improperly handled. In either case his prime remedy is against the trustee (or trustees) personally, and in most cases this remedy secures to the beneficiary compensation for the loss which the breach has caused. If the trustee successfully pleads one of the defences to an action for breach, is the beneficiary or the trust left without compensation? If the trustee or each trustee is insolvent, has the trust beneficiary or the trust to be content with a claim in bankruptcy and to take his or its place with the trustee's creditors? Insolvency of the trustee is a frequent companion of the misappropriation of trust property.

The answer is that, placed in either of these positions, the beneficiary has another recourse, namely, the pursuit and recovery of the wrongly alienated or misappropriated trust property. Again he is seeking to restore the trust corpus to its original condition, but instead of requiring the trustee to reconstitute the trust fund out of his own pocket, the beneficiary's object is to make good the loss by recovering the trust property. To make the Latin distinction, the remedy against the trustee is personal or *in personam*, the remedy to recover the trust property is proprietary or *in rem*. It will be clear that the particular value of the *in rem* remedy arises when the trustee is insolvent or the trust property has got into the hands of innocent third parties.

B. Tracing, Following and Claiming

There are really two distinct ideas which are involved when tracing of trust property is discussed. The first is the possibility of recovering the property from some third party into whose hands it has come. The starting point is that trust property remains trust property, unless the recipient positively establishes the defence that he acquired a legal interest in the property,[1] in good faith, for value, without notice of the breach of trust or other want of authority on the part of the trustee.[2] The defendant

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[1] The defence cannot be used by someone who only acquired an equitable interest; equitable interests are ranked according to the time of their creation.

[2] The crucial time for determining whether the transferee lacked notice is the time at which value was given, not the time of the acquisition of the legal interest, which might have been earlier or later: see *Bailey v. Barnes*, [1894] 1 Ch. 25 (Eng. C.A.); *McCarthy & Stone Ltd. v. Julian S. Hodge & Co.*, [1971] 1 W.L.R. 1547; and *MacMillan Inc. v. Bishopsgate Investment Trust plc (No. 3)*, [1995] 1 W.L.R. 978, 1000, 1003-4, affirmed on other grounds, [1996] 1 W.L.R. 387 (C.A.); see also *Botiuk v. Collison* (1979), 26 O.R. (2d) 580, 103 D.L.R. (3d) 322 (Ont. C.A.).

must establish all elements of the defence.[3] The defence may be modified in certain contexts, especially in relation to land where registration may partially or entirely displace the work done by the idea of notice, whether actual, constructive or imputed. The effect of this is that subject to a wide-ranging protection for third parties, the status of an asset as subject to a trust is capable of surviving the transfer of that asset to someone other than the original trustee. This represents one of the most important manifestations of the beneficiaries' proprietary rights in the trust property.[4] The decision that some property in the hands of a third party is subject to a trust will mean that the third party is liable to hand the property over to the trustees. This might be the original trustees, or, if those trustees have been removed, their successors. Only if the trust was a bare trust, giving the beneficiaries the right to demand the property from the trustees, will the third party recipient be liable likewise to transfer it directly to the beneficiaries. However, the third party is not automatically *personally* liable. If, for example, he no longer has the property, he is not necessarily liable for a kind of breach of trust. Personal liability of a non-trustee depends on a finding of wrongdoing.[5]

The second is a quite different idea, which operates when an unauthorized disposition of trust property is made by a trustee. The proceeds of the disposition, in the hands of the trustee, will themselves be treated as trust property if the beneficiaries so elect. In other words, a new asset is subjected to the trust in the hands of the original trustee, rather than (as in the discussion in the previous paragraph) the original asset being subject to the original trust, in the hands of some new transferee. The process of tracking a particular asset as it moves from hand to hand can be called *following*, while the process of identifying exchange products or substitutes can properly be called *tracing*.[6] These are very different ideas, even though they will often both be found in the same factual setting. For example, a trustee might wrongly sell trust property, use the proceeds to buy a yacht, and give the yacht to his accomplice. The beneficiaries could trace into the yacht, and then follow the yacht

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[3] In other words, if the defendant was a donee, it will be unnecessary to show that he was or ought to have been aware that the transfer to him was in breach of trust: *Banton v. CIBC Trust Corp.* (2001), 53 O.R. (3d) 567, 197 D.L.R. (4th) 212 (Ont. C.A.), leave to appeal refused (2001), [2001] S.C.C.A. No. 242, 2001 CarswellOnt 3069 (S.C.C.).

[4] For a conceptual and historical analysis, see L. Smith, "Transfers" in *Birks and Pretto* at 119.

[5] For a full discussion, see chapter 11. Though to date this has not been accepted by the courts, there is an argument (there discussed) that a third party recipient should be strictly personally liable (subject to defences) based on unjust enrichment (which does not require wrongdoing). Although, as the law stands, an innocent recipient is not liable in unjust enrichment at the moment of receipt of the trust property, it is arguable that he becomes liable in unjust enrichment if he later spends the money, so impoverishing the trust beneficiaries, in a way which gives the defendant some benefit or enrichment. See L. Smith, "Restitution: The Heart of Corrective Justice" (2001) 79 Texas L.R. 2115 at 2172-74.

[6] This terminology has been adopted by the House of Lords in *Foskett v. McKeown* (2000), [2001] 1 A.C. 102, [2000] 3 All E.R. 97 (U.K. H.L.); see also *Armstrong DLW GmbH v. Winnington Networks Ltd.*, [2012] EWHC 10 (Ch) at paras. 65-69. See *Smith*, especially at 6-14; *Grant v. Ste. Marie*, 2005 CarswellAlta 71, 39 Alta. L.R. (4th) 71 (Alta. Q.B.) at para. 18. In *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 CarswellBC 809, 2009 CarswellBC 810, [2009] 1 S.C.R. 504, 304 D.L.R. (4th) 292 (S.C.C.) at para. 75, the Supreme Court of Canada stated that "[t]racing is an identification process." The older usage of "following" in law, and "tracing" in equity is also often seen in Canada.

insolvency of the defendant.[28] By contrast, if the plaintiff can follow and identify his original property, which remains his, there will be insolvency priority; a trustee in bankruptcy or a receiver must surrender it, or be personally liable for damages.

The common law claims in relation to proceeds are not of much importance in the modern world given the availability of constructive trusts. If a thief stole the plaintiff's car and sold it, most courts, at least in North America, would hold that the proceeds are subject to a constructive trust, and so the plaintiff would be able to plead the case against any third party recipient of the proceeds using trust law principles.[29] And in the context of a trust, with which we are concerned, even if the third party received the original trust property, the beneficiary must generally rely on his equitable rights.[30]

B. Equitable Claims

1. Claims to Original Trust Property

If a third party, not being a *bona fide* purchaser of a legal interest for value without notice of the plaintiff's equitable interest, receives trust property, he is himself a trustee. This is quite separate from any personal liability he might have incurred (for example, for "knowing receipt of trust property" if he knew or should

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[28] In contrast, the plaintiff did obtain an insolvency priority in *Taylor v. Plumer* (1815), 3 M. & S. 562, 105 E.R. 721 (Eng. K.B.), which is often considered the root case for common law claims to traceable proceeds. Ironically, the case was actually decided when the Court of King's Bench applied the rules of equity governing constructive trusts. This was suggested in R.A. Pearce, "A Tracing Paper" (1976) 40 Conv. (N.S.) 277 and in S. Khurshid and P. Matthews, "Tracing Confusion" (1979) 95 Law Q. Rev. 78, and was proved by reference to contemporary sources in L. Smith, "Tracing in *Taylor v. Plumer:* Equity in the Court of King's Bench" [1995] L.M.C.L.Q. 240. See also L. Smith, "The Stockbroker and the Solicitor General: The Story Behind *Taylor v. Plumer*" (1994) 15 J.L.H. 1. It is often said that the common law cannot trace through a mixture, but since this is said to be based on the *Taylor* case, and that case was actually applying equitable principles, there seems little point in perpetuating that supposed limitation; see *Smith* at 162-74, arguing that the supposed limitation rests on neither authority nor principle. This was accepted by the Supreme Court of Canada in *B.M.P. Global Distribution Inc. v. Bank of Nova Scotia*, 2009 CarswellBC 809, 2009 CarswellBC 810, [2009] 1 S.C.R. 504, 304 D.L.R. (4th) 292 (S.C.C.) at paras. 80-85.

[29] This is effectively what happened in *Taylor v. Plumer*, *ibid.* See also L. Smith, "Simplifying Claims to Traceable Proceeds" (2009) 125 Law Q. Rev. 338, arguing that all claims to the proceeds of unauthorized dispositions of the plaintiff's assets are actually trust claims; the common law may allow a claim in money had and received, but this is because it was established in the 19th century that such a claim could be brought by a trust beneficiary who had a claim to a determined amount of money.

[30] A trust beneficiary might have an action in conversion against a third party recipient if the beneficiary could show that he was entitled to immediate possession of the thing transferred (*M.C.C. Proceeds Inc. v. Lehman Brothers International (Europe)*, [1998] 4 All E.R. 675 (Eng. C.A.)). Otherwise the person with an equitable title only must join the trustee as co-plaintiff, and the action is in fact enforcing the trustee's common law rights against the third party. See Chapter 24. If it is the trustee who has acted in abuse of the trust, the express trust beneficiary must look to actions in equity. If the trustee made a gift of the property to the third party, there is no claim in conversion, held by the trustee, which the beneficiary can require him to pursue.

have known of the trust). A trust beneficiary could obtain a declaration that the third party holds the property on trust, and any appropriate consequential orders for transfer to the original or successor trustees. If the original trust was a bare trust, entitling the beneficiary to call for the property at any time, then the third party can be ordered to transfer the property directly to the beneficiary. This claim is one which will prevail in the insolvency of the third party because that is nothing more than the insolvency of a trustee, which does not prejudice the beneficiaries insofar as they can locate their trust property.

2. Claims to Traceable Proceeds

(a) Trust or Equitable Lien

The basic principle is that the traceable proceeds of trust property will themselves be trust property, if the beneficiary so elects.[31] In some cases, beneficiaries may choose other remedial possibilities. One of these is the equitable lien, which gives the plaintiff a proprietary security interest to secure a personal claim. Assume that a trustee misappropriated $10,000 of trust property, combined it with his own $10,000 and invested the $20,000 in land. The plaintiff can claim a 50 per cent beneficial interest in the land, and this is what he will do if it has risen in value; that claim will allow the plaintiff to capture half of the gain. If, however, the land has now dropped to a market value of $14,000, this would give the plaintiff a claim worth only $7,000. In this situation, the plaintiff would instead be allowed to assert a personal claim for recovery of the $10,000, and to secure that claim by asserting an equitable lien or charge over the land.[32] The charge, a proprietary non-possessory security interest arising by operation of law, carries with it the possibility of a court-ordered sale if the debt is not paid. Such a charge may be ordered on terms, taking account of the defendant's position.[33]

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[31] It is usually understood to be a constructive trust but it may be best understood as a resulting trust (*Chambers* at 104ff). The typical case of a purchase money resulting trust always requires the tracing of the plaintiff's value into the property subjected to the trust.

[32] *Foskett v. McKeown* (2000), [2000] 3 All E.R. 97, [2001] 1 A.C. 102 (U.K. H.L.), at 130 [A.C.].. The charge would not be available in a case in which the contributors to the purchase were innocent against one another (as where funds from two different trusts were misappropriated); in this case, the victims must be treated equally.

[33] *Re Gareau Estate* (1995), 9 E.T.R. (2d) 25 (Ont. Gen. Div.), additional reasons at (1996), 13 E.T.R. (2d) 316 (Ont. Gen. Div.). A lien was also imposed in *International Corona Resources Ltd. v. Lac Minerals Ltd.*, (sub nom. *LAC Minerals Ltd. v. International Corona Resources Ltd.*) [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 (S.C.C.), in favour of the otherwise unsuccessful defendant to secure its right to recover the costs of developing a mine which it was declared to hold on constructive trust for the plaintiff. This, however, was not a lien arising from tracing property, but one arising from the improvements. If a lien is to be based on tracing, the plaintiff must show that her value went into the acquisition of the property in question: *Siemens v. Bawolin*, 2002 CarswellSask 448, 46 E.T.R. (2d) 254 (Sask. C.A.), at para. 29.

pay customers. The agreement was that Christie Grant would set aside for the plaintiff equivalent sums to answer to these money orders; these sums would be held separate and in trust for the plaintiff. Each week thereafter Christie Grant sent a cheque to the plaintiff to cover the sums due, but on the bankruptcy and liquidation of the mail order house it was found that these cheques had been drawn on the general account of the payor. Into this account the customers' money had been paid on receipt, but at no time had any sum been set aside for the plaintiff. The promised trusts had never been created. In these circumstances, the plaintiff was an unsecured creditor.[55]

In many cases, a promise to make a trust will be executed by operation of law: Equity treats that as done which ought to be done. A promise to create a trust itself creates a trust for the same reason that a promise to convey land makes a kind of constructive trust of the land. This will occur where the promise was specifically enforceable, or, even if not, where the promisee has given value as agreed in exchange for the promise.[56] Even where one or the other of those is satisfied, there is another requirement for the trust to arise by operation of law: it must be clear what is the property that the trustee promised to hold in trust. A promise to put sums of money into trust does not identify any particular money as that which is destined to become trust property. The result is that even if, as in *Re Christie Grant Ltd.*, value was given for the promise, the trust cannot arise by operation of law, due to uncertainty of subject-matter.[57]

(d) Original Asset was a Security Interest

If the claimant was not beneficially entitled to an asset, but only had a security interest in it, then it follows that while he may be able to establish a proprietary interest in any traceable proceeds of the original asset, this will be a security interest and not a beneficial interest. For personal property, this possibility is now generally governed and controlled by provincial personal property security legislation. There are some situations not governed by legislation where this principle may still be important.[58]

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[55] See the similar English case, with the same holding, *MacJordan Construction Ltd. v. Brookmount Erostin Ltd.*, [1992] B.C.L.C. 350 (C.A.). Compare *British Columbia v. National Bank of Canada* (1994), 99 B.C.L.R. (2d) 358, 119 D.L.R. (4th) 669 (B.C. C.A.), leave to appeal refused [1995] S.C.C.A. No. 18, [1995] 9 W.W.R. lxxix (note) (S.C.C.), where, however, there was not even an intention to create a trust.

[56] This is "value" in equity's extended sense, which in the case of marriage settlements includes "marriage consideration".

[57] Note, however, the controversial decision of the English Court of Appeal in *Hunter v. Moss*, [1994] 1 W.L.R. 452 (Eng. C.A.), in which a declaration of trust in relation to some shares out of a larger holding of that kind of shares was held to be effective. The logical problem remains that the moment after the declaration one could not say which shares were held in trust and which belonged to the settlor/trustee beneficially. See the critique by Hayton, (1994) 110 L.Q.R. 335.

[58] For example, if a secured creditor had a mortgage over land and the debtor was somehow able to sell the land free of the mortgage, the creditor could claim an interest in the proceeds, but it would only be a security interest: see *Central Capital Corp. v. Clausi* (1993), 13 O.R. (3d) 335 (Ont. Gen. Div.), affirmed (1994), 21 O.R. (3d) 95 (Ont. C.A.). In *Lord Napier and Ettrick v. Hunter* (1992), [1993] A.C. 713 (U.K. H.L.), an insurer had indemnified its insured, which gave the insurer a subrogated

I. THE BACKGROUND TO THE VARIATION OF TRUSTS LEGISLATION

It is the first duty of the trustees to preserve the trust property and to carry out the trust terms. Unless the settlor chooses to give them such a power, they have no authority to vary the terms of the trust, any more than they can neglect their duty to preserve the trust property. Nor does it matter whether the term which the trustees would like to vary is concerned with the beneficial interests created by the trust or the powers of themselves as trustees. It follows that, even if the trustees honestly and reasonably believe that it would be for the benefit of the beneficiaries were the trustees to depart in any way from any term of the trust, nevertheless they would be in breach of trust were they to do so.

As we saw when examining the termination of a trust,[1] the only persons who can set aside the terms of a trust are the beneficiaries.[2] If the sole beneficiary is of age, mentally competent, and entitled to the whole beneficial interest in the trust property, he can call for the trust property from the trustees, and thus wind up the trust whatever the trustees may wish. His sole right to enjoyment of the property overrides the trustees' right as legal owners of the trust property to carry out the terms of the trust. From this it followed, as we saw, that, if there are two or more beneficiaries, including persons who may take on the occurrence of some contingency, they can get together, being all adult and mentally competent, and wind up the trust, even if it is over the objection of the trustees. In the same way, it is possible for such beneficiaries effectively to vary an existing trust by terminating the old one and creating a new one with terms that suit them.[3]

However, if the sole beneficiary, or one or more beneficiaries, is not an adult, or, being of age, is not mentally competent, he has no legal capacity to terminate the trust or to agree to its termination. And, of course, most trusts include children among the beneficiaries. After all, as a family provision device it is to be expected that children, both alive and yet to be born, will be found among the trust beneficiaries, together with persons who are not mentally competent. Prior to 1945 it did not much matter that such trusts could not be terminated under the rule in *Saunders v. Vautier*.[4] It might be irritating to the trustees as well as to the beneficiaries that the terms of the trust were not as they would have drawn them, and occasionally it might even cause some hardship, but seldom could it be said that disaster of some sort would ensue unless a variation of the terms of the trust was made. Indeed, if disaster did threaten, it normally took the form either that some part of the trust property, usually

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[1] *Supra*, chapter 23.

[2] Subject to any power the settlor or testator has conferred authorizing termination.

[3] Two points should be made. First, this may attract unwelcome fiscal consequences. Second, the existing trustees cannot be forced to hold on the new trusts because no one can be made an express trustee without his consent. If the existing trustees are unwilling to hold on the new trusts, the beneficiaries would have to find new trustees. See *Re Brockbank*, [1948] Ch. 206 (Eng. Ch. Div.); and *Stephenson (Inspector of Taxes) v. Barclays Bank Trust Co. Ltd.*, [1975] 1 W.L.R. 882, [1975] 1 All E.R. 625; *supra*, chapter 23, note 23.

[4] (1841), Cr. & Ph. 240, 41 E.R. 482 (Eng. Ch. Div.).

TAB 10

TRUSTEE ACT

Chapter T-8

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definition

1 In this Act, "trustee" includes

(a) an executor, an administrator or a trustee of the estate of a person,

(b) a trustee whose trust arises by construction or implication of law as well as an express trustee, and

Variation of Trusts

Variation of trusts

42(1) In this section, "beneficiary", "beneficiaries", "person" or "persons" includes charitable purposes and charitable institutions.

(2) Subject to any trust terms reserving a power to any person or persons to revoke or in any way vary the trust or trusts, a trust arising before or after the commencement of this section, whatever the nature of the property involved and whether arising by will, deed or other disposition, shall not be varied or terminated before the expiration of the period of its natural duration as determined by the terms of the trust, except with the approval of the Court of Queen's Bench.

(3) Without limiting the generality of subsection (2), the prohibition contained in subsection (2) applies to

(a) any interest under a trust where the transfer or payment of the capital or of the income, including rents and profits

(i) is postponed to the attainment by the beneficiary or beneficiaries of a stated age or stated ages,

(ii) is postponed to the occurrence of a stated date or time or the passage of a stated period of time,

(iii) is to be made by instalments, or

(iv) is subject to a discretion to be exercised during any period by executors and trustees, or by trustees, as to the person or persons who may be paid or may receive the capital or income, including rents and profits, or as to the time or times at which or the manner in which payments or transfers of capital or income may be made,

and

(b) any variation or termination of the trust or trusts

(i) by merger, however occurring;

(ii) by consent of all the beneficiaries;

(iii) by any beneficiary's renunciation of the beneficiary's interest so as to cause an acceleration of remainder or reversionary interests.

(4) The approval of the Court under subsection (2) of a proposed arrangement shall be by means of an order approving

(a) the variation or revocation of the whole or any part of the trust or trusts,

(b) the resettling of any interest under a trust, or

(c) the enlargement of the powers of the trustees to manage or administer any of the property subject to the trusts.

(5) In approving any proposed arrangement, the Court may consent to the arrangement on behalf of

(a) any person who has, directly or indirectly, an interest, whether vested or contingent, under the trust and who by reason of minority or other incapacity is incapable of consenting,

(b) any person, whether ascertained or not, who may become entitled directly or indirectly to an interest under the trusts as being, at a future date or on the happening of a future event, a person of any specified description or a member of any specified class of persons,

(c) any person who after reasonable inquiry cannot be located, or

(d) any person in respect of any interest of the person's that may arise by reason of any discretionary power given to anyone on the failure or determination of any existing interest that has not failed or determined.

(6) Before a proposed arrangement is submitted to the Court for approval it must have the consent in writing of all other persons who are beneficially interested under the trust and who are capable of consenting to it.

(7) The Court shall not approve an arrangement unless it is satisfied that the carrying out of it appears to be for the benefit of each person on behalf of whom the Court may consent under subsection (5), and that in all the circumstances at the time of the application to the Court the arrangement appears otherwise to be of a justifiable character.

(8) When an instrument creates a general power of appointment exercisable by deed, the donee of the power may not appoint to himself or herself unless the instrument shows an intention that he or she may so appoint.

(9) When a will or other testamentary instrument contains no trust, but the Court is satisfied that, having regard to the circumstances and the terms of the gift or devise, it would be for the benefit of a minor or other incapacitated beneficiary that the Court approve an arrangement whereby the property or interest taken by that beneficiary under the will or testamentary instrument is held on trusts during the period of incapacity, the Court has jurisdiction under this section to approve that arrangement.

RSA 2000 cT-8 s42;2004 cP-44.1 s52