Date: 20051130

Docket: T-1254-92

Citation: 2005 FC 1623

BETWEEN:

CHIEF ERMINESKIN, LAWRENCE WILDCAT, GORDON LEE, ART LITTLECHILD, MAURICE WOLFE, CURTIS ERMINESKIN, GERRY ERMINESKIN, EARL ERMINESKIN, RICK WOLFE, KEN CUTARM, BRIAN LEE, LESTER FRAYNN, the elected Chief and Councillors of the Ermineskin Indian Band and Nations suing on their own behalf and on behalf of all the other members of the Ermineskin Indian Band and Nation

Plaintiffs

- and -

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

Defendants

REASONS FOR JUDGMENT

TEITELBAUM, J.

I. Introduction

A. Overview

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

[2] The origins of this relationship are steeped in history. Treaty 6 was concluded in August and September 1876. The Dominion of Canada came into being on July 1, 1867, with Confederation. While the country was young at treaty time, European presence on the

North American continent, and in the Canadian Northwest in particular, dated back centuries. Of course, it is too simplistic to speak of one history. There are many, and they are rich and varied. They include the origins, cultures, and lives of the tapestry of First Nations across the continent; the fur trade and economic history; the political histories of French, British, and American colonies; and of course, the development of Canada.

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

[4] A vast quantity of evidence and documents was produced at trial. For example, exhibit SEC-427 comprises 48 binders containing 1243 documents. Exhibit EC-429 marks a series of 32 binders housing 969 documents. Then there are several other smaller series of binders consisting of documents tendered by one party but objected to by the other or agreed to by all the parties. Clearly, much ink has been spilled and reams of paper devoured over the course of this action.

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

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

[7] On June 2, 2000, this Court set out the manner in which evidence was to be treated in these actions. The Federal Court of Appeal amended paragraphs 3 and 4 of that Order,

on September 11, 2000, for purposes of clarity. The effect of the Order is that the actions were not conducted on the basis of common evidence. A system was established whereby a plaintiff could elect to adopt a witness's evidence, before that witness testified, so that the entirety of the witness's evidence was evidence in that plaintiff's case. Thus, each plaintiff retained control and discretion over the manner in which it chose to litigate its case, subject, of course, to the Court's ultimate control over the proceedings. While the two actions were heard together, each maintained its integrity as a separate, discrete action.

[8] The parties agreed to proceed with the trial in phases: General and Historical, Money Management, Oil and Gas, Other Oil and Gas Issue (plaintiffs call it the Tax Issue; the Crown refers to it as the Regulated Price Regime Issue), and Programs and Services (including Per Capita Distribution Issue, which I note seems to have morphed into its own phase at some point). By Order, dated June 12, 2000, the Programs and Services phase was severed from the Ermineskin action, but without prejudice to a future resolution of those issues. Soon after the trial of this action began, however, it became readily apparent that all of these phases could not be heard within the 120 trial days originally forecasted by the parties. Indeed, that forecast was completely divorced from reality and may better be described as an example of wishful thinking or perhaps boundless optimism. Accordingly, and on consent of the parties, I ordered, on September 17, 2002, that I would continue as trial judge for the first two phases only and that the other phases be severed off to be heard by another judge at some point in the future.

B. Objections Taken Under Reserve

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

> (i) Transcript volume 197, pp. 28008-28023: the Crown's objection to SE-453 is denied.
>
> (ii) Transcript volume 201, pp. 28407-28409: the plaintiffs' objection is denied.
>
> (iii) Transcript volume 202, pp. 28565-28576: the plaintiffs' objection is denied. The question relates to facts and is not seeking to elicit a legal opinion.

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

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

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

(vii) Transcript volume 255, pp. 37375-37378: plaintiffs' objection is allowed; the evidence relates to the Ermineskin Heritage Trust proposal and is irrelevant.

(viii) Transcript volume 285, pp. 67-86 and 125-133: plaintiffs' objection is denied; C-688 and C-692 are admissible.

(ix) Transcript volume 286, pp. 36-83: plaintiffs' objection is allowed. Evidence pertaining to the Ermineskin Heritage Trust proposal is irrelevant and therefore inadmissible.

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

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

(xii) Transcript volume 339, pp. 165-168: the Crown's objection is allowed. Oil and gas valuations are not relevant for the first two phases of this action. Transcript volume 339, pp. 178-182: the Crown's objection is allowed. The cut-off issue and the Crown's subsequent settlement of that issue are of no relevance to the ongoing action.

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

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

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

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

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

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

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

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

C. Issues

[11] In the first of their two volume closing arguments brief, Ermineskin sets out its view of the issues to be decided in both phases of the action which, for clarity's sake, are reproduced in full below:

> (a) is and was the Crown in breach of its duties as a trustee (or, alternatively, as a fiduciary with obligations identical to those of a trustee) by:
>
> > (i) using Ermineskin's moneys for its own purposes rather than investing them;
> >
> > (ii) failing to provide a proper return through prudent investment or otherwise;
> >
> > (iii) failing to monitor the trust fund and its rate of return adequately or at all;
> >
> > (iv) failing to obtain and to properly consider appropriate investment advice; and
> >
> > (v) failing to maintain proper accounts, and to report properly to the beneficiary; and
>
> (b) if the Crown is in breach of its duties as a trustee, what is the proper approach to assessing damages or equitable compensation for the breach; that is:
>
> > (i) what ought the Crown to have done in terms of investing the moneys, if it had invested them;
> >
> > (ii) what is the difference between what would have been the value of the fund if properly invested, compared with its actual value at the time of judgment;
> >
> > (iii) alternatively, if the Crown did not have a duty to actually invest the moneys, what formula or benchmark ought the Crown to have adopted in order to calculate the amount payable to Ermineskin, and by what amount would that calculation have exceeded the amount actually paid by the Crown (in Ermineskin's submission, the answer to this question ought to be the same as the answer to (ii), above); and
> >
> > (iv) in the alternative, what is the amount by which the Crown benefited in using Ermineskin's moneys for its own purposes, rather than borrowing the moneys at arms length from third parties?

(Closing Argument of the Ermineskin Plaintiffs, Volume 1, pp. 3-4)

[12] Ermineskin also filed a Notice of Constitutional Question, dated November 2, 2004, in which it challenges, among other things, what it terms the "Indian Moneys Enactments" insofar as they have been interpreted to preclude investment of its moneys or to provide a rate of return commensurate with the return which a reasonable trustee ought to have obtained by investing the money prudently.

[13] The Crown, for its part, addressed both the Samson and Ermineskin actions in the same closing arguments briefs. As the Crown sees it, Ermineskin has put forth two broad theories of Crown liability. First, the Crown should have adopted a different method of investing Indian moneys or calculating interest, dating back to the mid-1970s. Second, the Crown placed itself in a conflict of interest by depositing Indian moneys to the Consolidated Revenue Fund (CRF); the Crown benefited by paying a lower rate of interest than it would have paid to borrow the same amount of money from arm's-length third parties.

[14] The following constitutes the Crown's view of the issues the Court is faced with in the money management phase of the trial (with those portions relevant to the Samson action edited out):

(a) In general terms, how is the relationship between the Crown and the Plaintiffs with respect to their moneys to be characterized? In particular, are there significant differences between this relationship and that between an ordinary private law trustee and beneficiary? The Crown's position is that there are significant differences. The Crown is a trustee of the Indian moneys, but the only terms of that trust are those set out in the governing legislation. Any other obligations which the Crown has with respect to Indian moneys can only be characterized as fiduciary obligations or as implied statutory obligations – not private trust law obligations.

(b) Are the objectives set by [Ermineskin], the degree of long-range planning in which they engaged, and the pattern of their expenditures, significantly different than those typical of pension and endowment funds generally or the PSSA in particular? The Crown submits that they are.

(c) By virtue of the combination of the *Indian Act* and the *Financial Administration Act* (and since 1977 the *Indian Oil and Gas Act* as well):

> (i) Must the Crown deposit Indian moneys in the CRF rather than investing them in the private markets? The Crown submits that it must.
>
> (ii) Must the Crown accord the same rate of interest to all Indian Bands? The Crown submits that it must.

* * *

(d) Does the legislation governing the Crown's handling of Indian moneys infringe some Treaty or aboriginal right of the Plaintiffs, or does it otherwise offend the Constitution in some way? More specifically:

* * *

> (iii) Does the legislative scheme governing the treatment of Indian moneys infringe the right to equality before the law granted to individuals under Section 15 of the Charter? The Crown submits that it does not.
>
> (iv) Is any infringement of constitutionally protected rights of the Plaintiffs a justifiable one in all of the circumstances? The Crown submits that it is.

In summary, the Crown submits that the legislation governing the Crown's handling of Indian moneys is constitutional. It infringes no Treaty or aboriginal right of the Plaintiffs, and in the alternative is a justifiable infringement in the circumstances.

* * *

(f) Does the Parliament of Canada owe any fiduciary duty to the Plaintiffs with respect to the creation of legislation concerning Indian moneys? The Crown submits that it does not.

(g) Does the Governor-in-Council owe any fiduciary duty to the Plaintiffs in establishing the interest rate to be paid on Indian moneys pursuant to Section 61(2) of the *Indian Act*? The Crown submits that it does not.

(h) Is the establishment of the interest rate by the Governor-in-Council subject to one or more standards that may be implied in Section 61(2) of the *Indian Act*, such as an obligation to act in good faith, an obligation to take the Indian interest into account, an obligation to establish a rate not designed to benefit the Crown, or an obligation to establish a rate which is reasonable in all of the circumstances? The Crown does not concede that any such standards can be read into the legislation, but submits that if there are to be, the Crown has met all of them.

(i) In establishing the interest rate to be paid on Indian moneys pursuant to Section 61(2), is the Governor-in-Council entitled to take into account:

> (i) the fact that the rate applies to all Indian Bands across the country?
>
> (ii) the fact that Indian moneys are not committed to remain in the CRF for any particular period of time?
>
> (iii) the fact that higher rates benefit Indian Bands but at the expense of increased borrowing costs for Canada?

The Crown submits that the Governor-in-Council is entitled to take into account all of these things.

(j) Is the Indian moneys interest rate formula a reasonable one given all of the circumstances surrounding it, and in particular that:

> (i) It includes a risk premium by virtue of the use of a long bond rate;
>
> (ii) At the same time, it involves no risk to [Ermineskin] of any decline in principal value;
>
> (iii) The long bond rate is typically the highest rate paid by the Crown to finance its borrowing requirements;
>
> (iv) The formula applies to all Indian Bands across the country;
>
> (v) Indian moneys are not committed to remain in the CRF for any particular period of time, but instead may be withdrawn at any time upon request by [Ermineskin] and approval by the Minister;
>
> (vi) The Crown has been prepared to work with [Ermineskin] to establish new mechanisms whereby [Ermineskin itself] can pursue higher rates of return by assuming greater risk with [its] moneys?

The Crown submits that it is a reasonable formula in all of the circumstances.

(k) At any point in time, was the prospect of declining interest rates so certain that it was unreasonable for the Crown not to have taken steps to lock-in current rates for the Indian moneys, bearing in mind *inter alia* the competing risks entailed in doing so, the fact that Indian moneys were not locked in for any particular time period in the CRF, and the aspirations of the Bands to in fact remove them in the near term. The Crown submits that it was not unreasonable in all of the circumstances.

(l) If the Crown had any authority to make investments with Indian moneys:

> (i) Was the conservatism inherent in the Indian moneys formula nevertheless appropriate for the Plaintiffs given their level of long range planning, objectives, risk tolerance and spending patterns? The Crown submits that it was.
>
> (ii) Was the Crown entitled to respect the spending decisions of [Ermineskin] in view of [its] demands for increased respect by the Crown for [its] decision-making and increased powers of self-government? The Crown submits that it was, and that it had no obligation to impose upon the Plaintiffs a restricted spending policy contrary to their wishes.

(m) If Indian moneys had not been deposited in the CRF, how would the Crown have met its incremental borrowing costs, and would it have inevitably involved more cost to the Crown? The Crown submits that no increased cost was inevitable because the Crown could have replaced the Indian moneys with the issuance of additional Treasury Bills at lower cost to the Crown. The Crown further submits that this is in fact what it would have done, and that its overall debt management costs would have been lower under any alternative scenario as well.

(Written Closing Argument of the Crown, Moneys Phase, Volume 1, tab 1, pp. 26-30)

[15] The starting point is Treaty 6. Ermineskin contends that Treaty 6 governs the relationship between the parties and that Treaty 6 is the source, or one of the sources, of the trust and fiduciary relationship between the parties.

[16] I am mindful of the fact that there is a phase that may be heard later, even though Ermineskin had it severed from this action, tentatively called Programs and Services. I will not attempt to define the exact parameters of that phase, but I do note that it will deal with, at least in part, treaty rights and entitlements. It is inescapable that Treaty 6 – the historical context and surrounding circumstances of its creation, as well as its content – has been put into issue in this first phase. Unlike the Samson action, however, Ermineskin have deliberately chosen not to litigate the meaning and interpretation to be given to the surrender clause of Treaty 6. Ermineskin is not, in this action at least, challenging the off-reserve surrender issue.

[17] Ermineskin asserts that there is a trust relationship between Ermineskin and the Crown. Ermineskin contends that the foundation for this trust and its essential terms were laid down in Treaty 6. According to the plaintiffs, the trust corpus comprises the capital received by the Crown, on behalf of Ermineskin, after Ermineskin surrendered its mineral rights in the Pigeon Lake Reserve in 1946.

[18] Ermineskin contends that that there have been serious breaches by the Crown of its trust obligations relating to the control and management by the Crown of Ermineskin's moneys. The plaintiffs argue that the Crown ought to have conducted itself as a trustee according to standard industry practice – as a commercial trustee. In Ermineskin's submission, the Crown ought to have invested its royalty moneys in a balanced, diversified portfolio; alternatively, the Crown ought to have paid the plaintiffs an equivalent return, tied to a benchmark or market index.

II. Phase One: General and Historical

A. Witnesses

I. Experts

1. *For the plaintiffs*

Professor Arthur Ray

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

Professor Douglas Sanders

[20] Professor Sanders, a lawyer and legal historian, tendered an expert report titled “Historical Thinking and Practice on the Relationship Between Indian Tribes and the Crown in Canada” (S-49). Professor Sanders received his Master of Laws from the University of California, Berkeley in 1963. Professor Sanders practised law in Vancouver from 1964 until 1969 and in Victoria from 1975 until 1977. He was an Associate Professor in the Faculty of Law at the University of Windsor from 1969 to 1972. He was director of the Native Law

Centre at Carleton University from 1972 until 1974. Professor Sanders acted as legal counsel and research coordinator for the Union of British Columbia Indian Chiefs from 1974 to 1975. At the time of his testimony, in January 2001, he had been a Professor of Law at the University of British Columbia since 1977. His C.V. lists his principal teaching areas as Indigenous Peoples, federalism, international human rights, and sexuality. Professor Sanders was qualified at trial as "an expert legal historian with particular expertise in comparative policy and international developments in relation to indigenous peoples, and with particular attention to the evolution of government policy in Canada relating to aboriginal peoples, including the role of treaties and the development of government policy relating to Aboriginal self-government."

Professor H.C. Wolfart

[21] Professor Wolfart, a linguist, tendered an expert report titled "Linguistic Aspects of Treaty Six" and a surrebuttal report titled "Aspects of Linguistics" (S-68). Professor Wolfart earned an M.A. in 1966, M. Phil. in 1967, and Ph.D. in 1969 from Yale University. Since 1969, Professor Wolfart has been at the University of Manitoba. From 1969 to 1972, he was an Assistant Professor; and from 1972 until 1977, he was an Associate Professor, both positions in linguistics / anthropology. From 1977 to 1984, he was a Professor in linguistics / anthropology, and he served as head of the Anthropology Department from 1977 to 1978. Professor Wolfart was a Professor of Linguistics from 1969 to 1987, and was head of the

Linguistics Department from 1987 until 1996. Since 1993 until at least the time of his testimony in March and April 2001, he has held the rank of University Distinguished Professor in Linguistics. His C.V. (S-66) demonstrates that he has published rather extensively in, among many other things, the area of Algonquian linguistics, and more particularly, the Cree language. Professor Wolfart was qualified at trial as "an expert in general and historical linguistics, the history of linguistics, with an emphasis on linguistic and philological methods, the linguistic analysis of Cree, and the analysis of texts and their structures."

2. *For the defendants*

Dr. Thomas Flanagan

[22] Dr. Flanagan, a political scientist, tendered a report titled "Analysis of Plaintiffs' Experts' Reports in the Case of *Chief Victor Buffalo* v. *Her Majesty the Queen et al.*" (C-286) and a rebuttal report to Professor Wolfart's report (C-287). Dr. Flanagan earned his Ph.D. in political science from Duke University in 1970 for his dissertation "Robert Musil and the Second Reality." He has been with the University of Calgary's Department of Political Science since 1968 and until at least the time of his testimony in January and March 2002. He became a Professor in 1979 and served as department head from 1982 until 1987. He was academic policy advisor to the president from 1988 to 1990. Dr. Flanagan served as the director of policy, strategy, and communications, then director

of research for the Reform Party of Canada from 1991 to 1992. At the time of his testimony in May 2002, he indicated he would be seeking a secondment from the University of Calgary so as to become the director of operations for the Office of the Leader of the Opposition in Ottawa. Dr. Flanagan has published extensively, including the book *First Nations? Second Thoughts* (C-277). Dr. Flanagan was qualified at trial as “a political scientist and historian whose expertise includes Western Canadian Political History generally and, in particular, the history of aboriginal and government relations, including treaties and the administration of government programs. He also has expertise in the use of historical research methodologies, including the analysis and interpretation of historical primary source documents.”

Dr. Alexander von Gernet

[23] Dr. von Gernet, an anthropologist, tendered the following reports: “Aboriginal Oral Documents and Treaty Six” (C-341); “An Assessment of Certain Evidence Relating to Plains Cree Practices” (C-323), which serves as a rebuttal to Ms. Holmes’s report; “Cree Territory at the Time of First European Contact” (C-322); “Comments on Winona Wheeler’s ‘Indigenous Oral Tradition Histories, An Academic Predicament’” (C-321); and “Treaty Six: An Assessment of the Written and Oral Documents” (C-320), which, I note, replaces and updates an earlier report (C-342) (I did not consider those portions of his reports that deal

with witnesses not adopted by Ermineskin). Dr. von Gernet received a Ph.D. in anthropology from McGill University in 1989, where he specialized in ethnohistory and archaeology of Aboriginal peoples in North America. Since 1989, he has been at the Department of Anthropology, University of Toronto, Mississauga campus, where he is an Adjunct Professor. He has consulted for the Government of Canada on various occasions on aboriginal issues; he has also testified as an expert witness, including in *Benoit* v. *Canada*, [2002] F.C.J. No. 257. Dr. von Gernet was qualified at trial as "an anthropologist and ethnohistorian specializing in the use and analysis of archaeological evidence, written documentation and oral traditions to reconstruct the history and past cultures of Aboriginal peoples (including the Cree), as well as the history and past cultures of Aboriginal peoples and European newcomers throughout Canada."

ii. Lay Witnesses

For the plaintiffs

John Ermineskin

[24] Mr. Ermineskin was born and raised on the Ermineskin reserve at Hobbema, Alberta. He served as Chief of the Ermineskin Indian Band and Nation for two terms, from 1990 to 1996. He also served as an elected councillor from 1988 to 1990 and 1998 to 2001.

Brian Wildcat

[25] Mr. Wildcat is a member of the Ermineskin Indian Band and Nation. Mr. Wildcat earned a Bachelor of Physical Education from the University of Calgary in 1987. He received his M. Ed. from the University of Alberta in 1995. At the time of his testimony, on December 11, 2001, Mr. Wildcat had spent the past two decades working as an administrator, primarily in the field of education, with Ermineskin. As well, since 1994, he has been the director of education for Miyo Wahakowtow Community Education Authority, which runs and operates the Ermineskin schools.

B. Legal Framework

[26] Counsel for Ermineskin submitted two volumes, containing 25 authorities back in May 2000, at the outset of the opening statements. During the course of the trial – and indeed after it closed in January 2005 – counsel for all parties have continued to supply the Court with jurisprudence they believe is helpful. I thank counsel for their Herculean efforts and excellent arguments. However, I think it is unnecessary to refer to many of the cases insofar as this particular section is concerned because the Supreme Court of Canada has, in recent jurisprudence, lessened the work of trial judges somewhat by summarizing and listing the relevant legal principles and tests for treaty interpretation, oral history evidence, and aboriginal rights. Thus, I need not review the long development of the case law, but

instead I defer to the Supreme Court's wisdom on the current state of the law in these areas.

Treaty Interpretation

[27] Treaty 6 is part of a series of treaties the government made with various aboriginal peoples often referred to as the numbered treaties, or western numbered treaties. A contentious issue in the trial of this action was what the Cree understood they were giving up when they took treaty. The meaning and interpretation of Treaty 6 have been put in issue in this trial and I intend to make certain, specific findings, based on the evidence tendered in Court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

At the second step, the meaning or different meanings which have arisen from the wording of the treaty right must be considered against the treaty's historical and cultural backdrop. A consideration of the historical background may suggest latent ambiguities or alternative interpretations not

Dans un deuxième temps, le ou les sens dégagés du texte du droit issu de traité doivent être examinés sur la toile de fond historique et culturelle du traité. Il est possible que l'examen de l'arrière-plan historique fasse ressortir des ambiuités latentes ou d'autres interprétations que la première lecture detected at first reading. Faced with a possible range of interpretations, courts must rely on the historical context to determine which comes closest to reflecting the parties' common intention. This determination requires choosing "from among the various possible interpretations of the common intention the one which best reconciles" the parties' interests: *Sioui*, *supra*, at p. 1069. Finally, if the court identifies a particular right which was intended to pass from generation to generation, the historical context may assist the court in determining the modern counterpart of that right: *Simon*, *supra*, at pp. 402-3; *Sundown*, *supra*, at paras. 30 and 33.

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

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

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

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

> intérêts des Mi'kmaq et ceux de la Couronne britannique (*Sioui*, le juge Lamer, à la p. 1069 (je souligne)).

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

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

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

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

[34] Having set out the relevant jurisprudence, I turn my sights now to a consideration of the historical background relating to the making of Treaty 6.

C. Historical Background

i. Treaty-Making in Ontario and the West

Pre-Robinson Treaties

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

> Until the end of the War of 1812, Upper Canada was highly vulnerable to attack by American forces. Consequently, courting Native support remained a cornerstone of British policy until 1816. For this reason, colonial governments adhered to the practice of following the guidelines set out in the Royal Proclamation of 1763 for the surrender of aboriginal title. These principles were:
>
> 1. Surrenders had to be voluntary.

> 2. Aboriginal land could only be surrendered to the Crown.
>
> 3. Negotiations had to take place in public at meetings specifically called for the purpose of negotiating the surrenders of title.
>
> (S-4, pp. 37-38)

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

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

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

[38] After 1818, the British Crown initiated a change in policy whereby the colonies would shoulder the burden of paying for aboriginal land. Colonial governments, however, lacked

the cash for these purchases. Sir Peregrine Maitland, Lieutenant-Governor of Upper Canada, devised a solution. Instead of a lump sum payment, the colonial government would pay the Indians – those who signed the treaties and their descendants – annuities in perpetuity. The money for the annuities would come from interest payments made by the land developers and settlers who would subsequently purchase the land from the government.

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

Robinson Treaties of 1850

[40] While the pre-Robinson treaties were motivated by the desire for land for agricultural and colonial development, the Robinson treaties of 1850 had their genesis in the great mineral wealth found in the upper Great Lakes region. By the 1840s, non-natives were developing copper mines along the shores of Lake Huron and Lake Superior. The colony of Canada, formed by the union of Upper and Lower Canada in 1840, began issuing mining licences, despite not having secured any land surrenders from the aboriginal people in the

area. Professor Ray testified that the Ojibway, too, were issuing their own mining licences (transcript vol. 23, p. 2949). Faced with the uncertainty of who had the right to issue these licences, Métis and Ojibway seized the Quebec Mining Company's property at Mica Bay in 1849 in a bid to force the colonial government to the negotiating table.

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

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

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

(S-3, p. 40)

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

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

Numbered Treaties, 1 - 5

Pressures for Treaties

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

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

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

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

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

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

[48] Hind's report refers to the HBC's role as a stabilizing force in Rupert's Land. Native relationships and alliances with the HBC, dating back hundreds of years in some instances,

had helped keep the peace; however, growing unrest among Indians over the increasing numbers of settlers and diminishing numbers of buffalo threatened that peace.

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

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

(S-3, pp. 52-53)

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

> Edmonton House, 13th April, 1871.
>
> On the 13th instant (April) I had a visit from the Cree Chiefs, representing the Plain Crees from this to Carlton, accompanied by a few followers.
>
> The object of their visit was to ascertain whether their lands had been sold or not, and what was the intention of the Canadian Government in relation to them. They referred to the epidemic that had raged throughout the past summer, and the subsequent starvation, the poverty of their country, the visible diminution of the buffalo, their sole support, ending by requesting certain presents *at once*, and that I should lay their case before Her Majesty's representative at Fort Garry. Many stories have reached these Indians through various channels, ever since the transfer of the North-West Territories to the Dominion of Canada, and they were most anxious to hear from myself what had taken place.
>
> I told them that the Canadian Government had as yet made no application for their lands or hunting grounds, and when anything was required of them, *most likely Commissioners* would be sent beforehand to treat with them, and that until then they should remain quiet and live at peace with all men. I further stated that Canada, in her treaties with Indians, heretofore, had dealt most liberally with them, and that they were now in settled houses and well off, and that I had no doubt in settling with them the same liberal policy would be followed.
>
> As I was aware that they had heard many exaggerated stories about the troops in Red River, I took the opportunity of telling them why troops had been sent; and if Her Majesty sent troops to the Saskatchewan, it was as much for the protection of the red as the white man, and that they would be for the maintenance of law and order.
>
> They were highly satisfied with the explanations offered, and said they would welcome civilization. As their demands were complied with, and presents given to them, their immediate followers, and for the young men left in camp, they departed well pleased for the present time,

with fair promises for the future. At a subsequent interview, with the Chiefs alone, they requested that I should write down their words, or messages to their Great Masters in Red River. I accordingly did so, and have transmitted the messages as delivered. Copies of the proclamation issued, prohibiting the traffic in spirituous liquors to Indians or others, and the use of strychnine in the destruction of animal life, have been received, and due publicity given to them. But without any power to enforce these laws, it is almost useless to publish them here; and I take this opportunity of most earnestly soliciting, on behalf of the Company's servants, and settlers in this district, that protection be afforded to life and property here as soon as possible, and that Commissioners be sent to speak with the Indians on behalf of the Canadian Government.

MEMORANDA:

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

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

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

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

W.J. CHRISTIE, *Chief Factor,*

In charge of Saskatchewan District,

Hudson's Bay Company.

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

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

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

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

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

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

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

We invite you to come and see us and to speak with us. If you can't come yourself, send some one in your place.

We send these words by our Master, Mr. Christie, in whom we have every confidence. – That is all.

2. Ki-he-win, The Eagle.

GREAT FATHER, – Let us be friendly. We never shed any white man's blood, and have always been friendly with the whites, and want workmen, carpenters and farmers to assist us when we settle. I want all my brother, Sweet Grass, asks. That is all.

3. The Little Hunter.

You, my brother, the Great Chief in Red River, treat me as a brother, that is, as a Great Chief.

4. Kis-ki-on, or Short Tail.

My brother, that is coming close, I look upon you, as if I saw you; I want you to pity me, and I want help to cultivate the ground for myself and descendants. Come and see us.

(S-4, Morris, pp. 169-171)

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

> I desire also to call the attention of His Excellency to the state of affairs in the Indian country on the Saskatchewan. The intelligence that Her Majesty is treating with the Chippewa Indians has already reached the ears of the Cree and Blackfeet tribes. In the neighbourhood of Fort Edmonton, on the Saskatchewan, there is a rapidly increasing population of miners and other white people, and it is the opinion of Mr. W.J. Christie, the officer in charge of the Saskatchewan District, that a treaty with the Indians of that country, or at least an assurance during the coming year that a treaty will shortly be made, is essential to the peace, if not the actual retention, of the country.
>
> (S-4, p. 168)

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

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

[53] Campbell replied on August 6, 1873:

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

(S-3, supporting documentation, volume II, tab 55, pp. 2-3)

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

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

(S-3, supporting documentation, volume II, tab 55, pp. 1-2)

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

> That the Council of the North-West are of opinion, that in view of the rapid increase of Settlement in the North-West Territories, and the present disturbed condition of the Indians and their anxiety as to the future, it is imperatively necessary that a Treaty should be concluded with the bands of Indians living between the Western Boundary of that portion of the Territory in which the Indian Title has already been extinguished, and Fort Carlton or thereabouts.

> The Council are of opinion that to defer the negotiation of a Treaty of this nature beyond the earliest time possible in the year 1874 would be attended with unfortunate results.

(S-3, supporting documentation, volume II, tab 56, p. 1000)

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

Treaty Negotiations, 1-5

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

> The question of the relations of the Dominion of Canada to the Indians of the North-West, is one of great practical importance. The work, of obtaining their good will, by entering into

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

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

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

Until the railway was built, this was an important thoroughfare for those travelling to the west.

[60] Indians in the North-West Territories were aware of these changes and were anxious to secure a place for themselves in the new economic order. As we shall see further on in these Reasons, Indian negotiators placed great emphasis on economic issues and tangible goods during treaty talks.

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

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

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

[63] A controversy arose later over these treaties, having to do with what were called the "outside promises." A memorandum, signed by the treaty commissioners and containing their understanding of the treaties' terms, was attached to Treaty 1. However, certain verbal promises (also found in the memorandum) failed to be included in the written text of the treaties, and thus were not implemented. This caused great consternation and dissatisfaction amongst the affected Indians. Eventually, the Privy Council agreed to consider the memorandum as part of the treaties and agreed to carry out its terms. Additional payments of money and clothing were also made. Morris and the Indian Commissioner, Lieutenant-Colonel Provencher, were sent out in October 1875 to meet with the treaty bands and secure their consent to the revisions. Morris reflected upon this episode,

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

(S-4, p. 128)

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

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

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

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

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

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

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

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

(S-4, p. 70)

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

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

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

(S-4, p. 45)

[71] The next agreement, Treaty 4, is also known as the Qu'Appelle Treaty because it was concluded at Qu'Appelle Lakes in what is now the province of Saskatchewan. It was signed in September 1874. Once again, Morris acted for the government as a treaty

commissioner, along with the Hon. David Laird, Minister of the Interior, and W. J. Christie, now retired from working for the HBC. Morris described the negotiations,

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

[72] Treaty 5, the Lake Winnipeg Treaty, was signed in September, 1875 with the Saulteaux and Swampy Cree. Its terms were virtually identical to those of Treaties 3 and 4. Morris and James McKay acted as treaty commissioners. They travelled this immense lake using the HBC’s new steamship, the Colville. Morris noted the impetus for this treaty:

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

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

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

ii. The Making of Treaty 6

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

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

[76] Thus, contemporary documentary accounts of Treaty 6 consist of Morris's report and the Jackes narrative, contained within the Morris text. Another source is the book *Buffalo Days and Nights*, the autobiography of Peter Erasmus, as told by Erasmus to Henry

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

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

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

Documentary / Eyewitness Accounts

1. Prelude to a Treaty

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

[80] After Treaty 5 was concluded in 1875, the government finally turned its gaze towards Treaty 6 territory. In order to pave the way for negotiations, Morris engaged Rev. George McDougall to travel about the territory explaining the government's intentions. McDougall, father of Rev. John McDougall, was also a Methodist minister. The McDougalls had emigrated from Ontario to the west in 1862. They first established a mission at Victoria, near Edmonton, in 1862, and later one at Morley, in 1873. The elder McDougall perished in January 1876, after losing his way on the prairie one night.

[81] According to Morris, Rev. McDougall carried a letter from the Lieutenant-Governor, stating that commissioners would meet with the Indians the next summer for treaty talks (S-4, p. 173). Rev. McDougall reported to Morris on his travels and the councils he

attended. The report, dated October 23, 1875, is reproduced in the Morris text. Rev. McDougall noted that he was informed by Indians near Carlton that the Crees and Plain Assiniboines were united on two points:

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

(S-4, p. 173)

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

> "Tell the Great Chief that we are glad the traders are prohibited bringing spirits into our country; when we see it we want to drink it, and it destroys us; when we do not see it we do not think about it. Ask for us a strong law, prohibiting the free use of poison (strychnine). It has almost exterminated the animals of our country, and often makes us bad friends with our white neighbors. We further request, that a law be made, equally applicable to the Half-breed and Indian, punishing all parties who set fire to our forest or plain. Not many years ago we attribute a prairie fire to the malevolence of an enemy, now every one is reckless in the use of fire, and every year large numbers of valuable animals and birds perish in consequence. We would further ask that our chiefships be established by the Government. Of late years almost every trader sets up his own Chief and the result is we are broken into little parties, and our best men are no longer respected."

(S-4, pp. 174-175)

2. Negotiations at Fort Carlton

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(S-4, p. 204)

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

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

[98] Morris then explained how the size and location of reserves would be determined and the land surrender process. Secretary Jackes recorded Morris's comments as follows:

> "There is one thing I would say about the reserves. The land I name is much more than you will ever be able to farm, and it may be that you would like to do as your brothers where I came from did.
>
> They, when they found they had too much land, asked the Queen to sell it for them; they kept as much as they could want, and the price for which the remainder was sold was put away to increase for them, and many bands now have a yearly income from the land.
>
> But understand me, once the reserve is set aside, it could not be sold unless with the consent of the Queen and the Indians; as long as the Indians wish, it will stand there for their good; no one can take their homes."
>
> (S-4, p. 205)

[99] Morris went on to discuss maintenance of schools on reserves, prohibition of the sale or use of liquor on reserves, and the provision of various agricultural tools, equipment, livestock, and seed. He spoke of Chiefs and Councillors and the respect they deserved.

Morris also stated that the Queen expected her laws to be obeyed by everyone, native and non-native (S-4, p. 206). He also spoke of the 1873 Cypress Hills massacre, where a group of American wolfers killed some Assiniboines encamped in the hills. Morris related this to the presence of the NWMP and the security and protection they would provide. Morris indicated that chiefs and councillors would be given uniforms, medals, and flags, in recognition of their positions (S-4, p. 207).

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

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

> I was asked to attend the council with them and was personally escorted to the meeting by Mista-wa-sis and his ally Star Blanket. They said that I might be called upon to explain the talks, in case of any misunderstanding of my interpretations of the treaty terms. "There are many among us who are trying to confuse and mislead the people; that is why I thought it best to give them lots of time for their bad work. Today they will have to come out in the open and will be forced to show their intentions," said Big Child.

> The chiefs were in agreement that it was better to bring about an understanding among their own people before meeting with the Commissioner.

(C-7, pp. 245-246)

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

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

(C-7, p. 247)

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

> “These traders, who were not of our land, with smooth talk and cheap goods persuaded the southern tribes it would be a good thing to have a place to trade products of the hunt, the hides and tanned goods. The traders came and built strong forts, and with their long rifles that can kill at twice the distance of our own and the short guns that can spout death six times quicker than you can tell about it, they had the people at their mercy. The Blackfoot soon found out the traders had nothing but whisky to exchange for their skins. Oh, yes! They were generous at first with their rotten whisky, but not for long. The traders demanded pay and got Blackfoot horses, buffalo robes, and all other things they had to offer.

> “Those traders laughed at them for fools, and so they were, to sell their heritage for ruin and debauchery. Some of the bravest of the Blackfoot tried to get revenge for the losses but they were shot down like dogs and dragged to the open plains on horses to rot or be eaten by wolves.”
>
> (C-7, pp. 247-248)

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

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

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

[106] Erasmus noted that the councillors of these two chiefs indicated, by gestures, their acceptance of the chiefs' position. He further noted that the majority accepted their views as well. Mista-wa-sis ended the meeting by assuring everyone that they would have the chance to ask questions and that their interpreter would mark down the things they thought they should have under the treaty (C-7, p. 250).

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

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

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

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

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

[111] Erasmus painted a rather different picture. He described McKay's tone as arrogant and said he admonished the Cree for their excessive demands; he also noted that there

was a murmur of disapproval from the assembled Indians (C-7, p. 251). According to Erasmus, after McKay sat down, the Badger leapt to his feet and scolded McKay,

> "I did not say that I wanted to be fed every day. You, I know, understand our language and yet you twist my words to suit your own meaning. What I did say was that when we settle on the ground to work the land, that is when we will need help and that is the only way a poor Indian can get along."
>
> (C-7, pp. 251-252)

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

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

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

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

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

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

[116] Morris reported that the interpreter, Erasmus, read out the Crees' demands (S-4, p. 185). The Jackes narrative also contains this part of the proceedings (S-4, pp. 214-215). Both of these accounts specify the items and changes sought by the Crees. According to Erasmus, he explained to the commissioners that the list had been prepared by the main chiefs and their councillors and that it contained little more than what had been promised. Erasmus interpreted the list to the assembled Indians for their agreement and then handed it to Morris (C-7, p. 253).

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

to do so, but that if the Queen called on them to fight to protect their wives and children, he was sure they would do so (S-4, pp. 217-219).

[118] Poundmaker and Joseph Thoma spoke out after Morris's response, both objecting to what was offered. Thoma said that he was speaking on behalf of Red Pheasant, chief of the Battle River Indians. Some of his remarks, as recorded by Jackes, show an awareness of a previous treaty and also of the issue of land value:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The persistency with which these Indians clung to their endeavor to compel the Commissioners to proceed to Duck Lake was in part owing to superstition, the Chief, Beardy, having announced that he had a vision, in which it was made known to him that the treaty would be made there.
>
> It was partly, also, owing to hostility to the treaty, as they endeavored to induce the Carlton Indians to make no treaty, and urged them not to sell the land, but to lend it for four years.
>
> The good sense and intelligence of the head Chiefs led them to reject their proposals, and the Willow Indians eventually, as I have reported, accepted the treaty.
>
> (S-4, pp. 188-189)

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

3. Negotiations at Fort Pitt

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

> From Victoria to Fort Pitt, George and I made a rapid trip. Here we found the Indians assembling in large numbers from the prairies and the woods. No such event as this had ever taken place in all their history and all through the camps now becoming numerous dotting the hills back of the fort there was much speculation as to what was about to happen.
>
> Many of my old friend and acquaintances came to see me in the fort and also invited me to their lodges. I continued to assure them that the representatives of the Queen would do what was right and fair. I asked them to wait patiently until the commissioners came to place before them the proposals of the government.

> Sweetgrass was the head chief of the Plains Crees and Chief Pakan of the Wood and semi-Wood Crees. It was very evident that the chiefs were feeling keenly the responsibility of the time. There were some rebellious elements among the tribes. These men who had lived in absolute freedom did not want any change. It was a question of just how much influence they might exert among the lodges when matters came to an issue. Thus these days were tense.
>
> (C-8, pp. 56-57)

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

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

> I was questioned at some length about the attitude of the tribes who signed the treaty at Carlton, about details in reference to treaty concessions, and the terms agreed upon, which by that time I had memorized by heart. I gave them a review of the discussions of the council meeting of the chiefs at Carlton, reporting the objections raised by those who opposed the signing, and spoke of the petition that had been drawn up for the Commissioner, with the points agreed to and those refused. I mentioned Poundmaker's and The Badger's efforts at trying to block or misinterpret the terms of the treaty, at which there were some expressions of disgust about their attitude. Then I wound up my talk by a report of the two speeches made by Mista-wa-sis and Ah-tuk-a-kup that had swung the whole opinion of the assembly in favour of the signing.
>
> Sweet Grass, who was the most important chief among those gathered in council, rose to his feet to speak to their people.
>
> "Mista-wa-sis and Ah-tuk-a-kup, I consider, are far wiser than I am; therefore if they have accepted this treaty for their people after many days of talk and careful thought, then I am prepared to accept for my people."

> Chief Seenum then took his place and spoke. "You have all questioned Peter Erasmus on the things that have taken place at Carlton. He is a stranger to many of you but I am well acquainted with him. I have respect for his words and have confidence in his truthfulness. Mista-wa-sis and Ah-tuk-a-kup both sent their sons all the way from Carlton to where he lives, and he is married to one of our favourite daughters. He was not at home but they followed him to the prairie where he was hunting buffalo with our people. Little Hunter is a chief and brings back a good report of his work during treaty talks. He would not tell us something that was not for our good. Therefore, as those other chiefs who are in greater number than we are have found this treaty good, I and my head man will sign for our people. I have spoken."
>
> Each of the other chiefs with their councillors expressed agreement, each man expressing in his own words ideas that conformed to the general acceptance of treaty terms. They were all willing to sign the treaty and there was not a single dissenting voice.
>
> (C-7, pp. 258-259)

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

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

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

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

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

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

[138] The Erasmus account of Fort Pitt differs somewhat from those of Morris, Jackes, and McDougall. He described the opening ceremonies and mentioned Morris's speech, but did not provide details. His account then diverges in that he recalled that Chief Eagle (Ku-

ye-win) responded to Morris by urging the people not to be afraid to speak their minds on anything they did not understand or wished to know. No one did and then, according to Erasmus, Sweet Grass made a speech accepting the treaty's terms.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[149] Treaty payments and the distribution of provisions were completed by Christie on the 11th of September. Morris noted in his report that the Great Bear (named Big Bear in the Jackes account) paid him a visit on the 12th of September. He had been out hunting,

but upon hearing of the treaty talks, had been sent in by the Crees and Assiniboines to speak for them. Morris reported that he told the Great Bear of what went on at Forts Carlton and Pitt and they resolved to meet again the next day (S-4, p. 192).

[150] On the morning of the 13th of September, Chief Sweet Grass and the other chiefs and head men came to the fort to pay their respects and bid farewell to the commissioners. Jackes recorded their remarks to Morris. Big Bear again expressed that he was there on behalf of several bands that were out on the plains hunting. Sweet Grass and the White Fish Lake chief urged Big Bear to agree to the treaty and take the hand of Morris. Big Bear told them to stop, that he had never seen Morris before, but that he had seen Christie many times. Big Bear asked that Morris save him from what he dreaded most, that a rope should be around his neck. Morris answered that murder was punishable by death, except in instances of self-defence. Big Bear also spoke of protecting the buffalo. Morris told Big Bear to tell the others out on the plains that they could join the treaty next year. He also asked Big Bear to tell them the following,

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

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

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

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

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

4. Blackfoot Crossing: Bobtail's Adhesion

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

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

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

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

D. The Historical Context and Meaning of Treaty 6: The Expert Opinion

i. The Treaty Commissioners

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

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

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

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

[161] The three commissioners representing Canada at the Treaty 6 negotiations had, between them all, extensive experience in the treaty negotiation process. Two were experienced in government, and the other had spent his adult life working as an HBC trader in the west. Two of the commissioners, Christie and McKay, spoke Cree. Thus, they were not unfamiliar with conditions in the west, nor were they unfamiliar with, or to, aboriginal people.

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

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

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

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

[166] Dr. von Gernet offered a slightly different opinion on the military threat posed by the Cree; he did not think they had the capability to mount a war against Canada in the 1870s. Dr. von Gernet testified that he did not think that the government viewed the threat of an Indian war as a major reason for Treaty 6. In his opinion, the government was more likely interested in preventing friction or hostilities between settlers and natives (transcript volume 168, p. 23269). Dr. von Gernet characterized the *raison d'être* of treaty making, on the part of the government, as land cessions, or quit claims. He noted that the language of the land surrender clause of Treaty 6 is similar to dozens of pre-Confederation instruments (C-320, pp. 26-27).

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

[168] Professor Ray also believes that the Canadian government appointed Christie as a treaty commissioner so as to establish a link with the tradition of the HBC serving as the Crown’s de facto representative in the west (transcript volume 23, pp. 3111-3112). This would effectively tap into Cree familiarity with that tradition, including their long history of negotiating various accords with the HBC and, of course, their longstanding relationship based on the fur trade.

ii. The Cree Side

[169] In his book, Morris characterized Mista-wa-sis and Ah-tuk-uh-kup as head chiefs of the Cree at Fort Carlton, and Sweet Grass as the principal chief of the Plains Cree (S-4, pp. 176 and 179). The signature page of Treaty 6, included in the appendix to the Morris book, describes Mista-wa-sis and Ah-tuk-uh-kup as Head Chiefs of the Carlton Indians; several other chiefs and their councillors are also recognized on the written document of

the treaty and its various adhesions. Thus, the treaty was concluded with the Cree leadership. But what were their intentions and objectives?

[170] According to Professor Ray, the Cree's treaty-making objectives were largely determined by their immediate needs and concerns (S-3, pp. ii-iii). Smallpox and other epidemics had caused great suffering and death amongst the Cree. By the 1870s, the buffalo herds were greatly reduced in size and the collapse of the buffalo hunting economies of the Plains Cree was imminent. The Cree wanted assistance in making the transition to agriculture as their primary means of survival. They were angry over the sale of their lands by the HBC to Canada in 1870, and also disturbed to see surveyors entering their territory and running lines for railways, telegraphs, and the Canada-United States boundary. But it was the impending collapse of the buffalo and the change in their relationship with the HBC that drove the Cree to the bargaining table (S-3, p. 93).

[171] In Professor Ray's opinion, the Cree would have used Treaties 1 through 5 as their primary reference points; they would have had knowledge about these treaties through native informants, white traders, and government negotiators (S-4, p. iii). Professor Ray also noted that Indians received advice from HBC officers and servants, as well as missionaries, all of whom would be reasonably well-informed about the economic changes that were in the wind (S-3, p. 64). A central issue in all of the treaty negotiations of the

1870s related to livelihood rights, that is, hunting, trapping, and fishing rights (S-3, pp. 64-65). The Cree were attempting to secure their future in ways that were compatible with their traditions (transcript volume 23, pp. 3025-3026).

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

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

[174] The other expert witness called on behalf of Ermineskin was Professor Wolfart. He testified about the linguistic aspects of the making of Treaty 6 and discussed an oral history

document he has analysed that deals with Treaty 6. I shall comment on his evidence further in these Reasons.

E. Other Evidence: Lay Witnesses

[175] Ermineskin did not adopt as witnesses any of the elders called by Samson in its action, nor did Ermineskin call any elders of its own to testify or give oral histories of the making of Treaty 6. Ermineskin's lay witnesses for the first phase of the trial are Mr. John Ermineskin and Mr. Brian Wildcat.

[176] Mr. Ermineskin was born and raised on the Ermineskin Reserve and is a former Chief of the Ermineskin Indian Band and Nation. Mr. Ermineskin can trace his ancestry directly back to Bobtail, who adhered to Treaty 6 in 1877 at Blackfoot Crossing (E-257; see E-528, a photograph of Chief Bobtail).

[177] Mr. Ermineskin did not purport to give oral history testimony, and was not put forth as giving such. He did, however, provide the Court with information gleaned from his grandmother, Isabelle Smallboy, now deceased. She taught him things about Treaty 6 (transcript volume 142, pp. 19442-19448).

[178] According to Mr. Ermineskin's understanding of what his people knew, or understood, when they took treaty, the relationship between the two parties "was meant for life, as long as the sun shines and the river flows." At the signing of the treaty, it was understood that their reserve lands would be "totally under the control of the Indian Affairs." It was also understood that that Indian Affairs would handle all of their affairs, including health, education, and resources (transcript volume 142, pp. 19448-19449).

[179] Mr. Ermineskin also testified about the pervasive control and influence that Indian Affairs had, and have, over the lives of his people. Indian Agents lived on the Ermineskin Reserve until the late 1960s. At that time, the Cree name for the Indian Agent was Sooni-yaw Okeymaw, or money chief. Mr. Ermineskin testified about the power and authority the agents had over band matters. For example, a band member who wanted to sell grain had to get a permit from the Indian Agent (transcript volume 142, pp. 19449-19452).

[180] Since the late 1960s, when the last Indian Agent left the Ermineskin Reserve, Indian Affairs still controls virtually aspect of band affairs, according to Mr. Ermineskin. He testified that the Department has the right to refuse the Ermineskin budget and, if that happens, then they do not get their revenue money (transcript volume 142, pp. 19452-19453).

[181] According to Mr. Ermineskin, there are approximately 3000 members of the Ermineskin Indian Band and Nation today (transcript volume 142, p. 19447).

[182] The second lay witness for the plaintiffs in the first phase was Mr. Wildcat. During the past twenty years, he has worked for the Ermineskin Indian Band and Nation as the director of education for Miyo Wahakowtow Community Education Authority, which runs and operates the Ermineskin schools (transcript volume 142, p. 19469).

[183] Mr. Wildcat's testimony was primarily about the contemporary state of affairs of the Ermineskin Indian Band and Nation. According to Mr. Wildcat, who was 43 years old at the time of his testimony on December 11, 2001, only two other band members graduated from high school the same year that he did. The graduation rates continue to be dismal: in 1997, no band members finished high school; three did so in 1999; and in 2001, there were 10 graduates. As far as he knows, only 23 band members have post-secondary education (transcript volume 142, pp. 19470-19472).

[184] Mr. Wildcat further testified that, in the past fifty years, only eight Ermineskin Band Council members have finished high school. At that time, none of their chiefs had ever graduated from high school (transcript volume 142, pp. 19472-19473).

[185] In Mr. Wildcat’s experience, this low level of education and high rate of illiteracy have, among other things, contributed to low self-esteem and dependency on the government to take care of needs (transcript volume 142, pp. 19475 and 19478-19480).

F. Findings

i. Treaty 6:

[186] Although Ermineskin did not litigate the meaning and interpretation to be placed on the land surrender clause of Treaty 6, they did adopt the evidence of Professor Wolfart, who asserted, among many other things, that the Cree could not possibly have surrendered their land because they could not understand such a concept. In Professor Wolfart’s opinion, Peter Erasmus, the main translator during the treaty negotiations, did such a horrible job that it led to an entire breakdown in the communication between the two sides.

[187] Professor Wolfart’s testimony also dealt with an oral history document. He analysed a treaty story told by Jim Kâ-Nîpitêhtêw. It is not clear whether the story relates to Fort Pitt or Fort Carlton, or conflates accounts of both proceedings. There is precious little information about the story’s provenance. Accordingly, I cannot place much weight on this account.

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

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

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

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

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

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

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

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

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

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

[197] The Morris and Jackes accounts were generated in the past, contemporaneous to the events which they record. Thus, their pastness does not have to be demonstrated and the records are immune from present-day influences.

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

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

[200] It is clear that Rev. McDougall understood what was being asked of the Crees, *viz*. to surrender their rights to the land in return for certain promises from the government. His remark that he referred to notes he took during the speech by Morris as to what the treaty terms were only enhances the reliability of his explanations to his Cree audience. His pro-treaty stance does not diminish his role or his ability to explain to the Cree council what the treaty entailed. Indeed, Rev. McDougall's remarks at the end of his book demonstrate that he understood what the treaty meant in terms of the parties' relations to the land:

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

[201] In my opinion, the purpose of Treaty 6, insofar as the Canadian government was concerned, was to secure the surrender of aboriginal title to a vast tract of land so as to open it up for settlement and development. The treaty was also an instrument of peace and friendship, in that it forged an alliance between the aboriginal people of that area with the Canadian government. Thus, from the government's perspective, the land surrender was absolutely non-negotiable – unlike various other parts of the treaty, such as money, agricultural implements, and livestock. The amounts of such provisions were open to revision and increase, whereas the land surrender clause was not. In my opinion, the Cree leadership was aware of this and accepted it going into treaty, hence the lack of protracted

discussion on this topic. The focus of the treaty talks were on what the Cree would receive, not what they were giving up. The evidence shows that the Cree were aware of previous treaties to the east. Chief Sweet Grass sent a letter, through William Christie, to the government asking for a treaty in 1871. During the Treaty 6 talks, the Cree had the advice and counsel of people like Erasmus and McDougall, who understood the purpose of Treaty 6 and would have no motive to sugarcoat, or indeed misrepresent, the land surrender clause.

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

[203] For their part, the Cree leadership was concerned with their people's economic security. The bison herds, which once blanketed the Great Plains, were fast diminishing

and retreating. The leadership was aware of this, and other crises, such as epidemics, which had caused terrible hardship and suffering. They were keen to protect their people from famine and disease, hence the focus of the treaty talks on what the Cree would receive.

ii. Lay Witnesses

[204] As for the plaintiffs' lay witnesses in the first phase, their evidence deals, for the most part, with the current state of affairs of the Ermineskin Indian Band and Nation. The understanding of Treaty 6 that Mr. Ermineskin told the Court about is plausible and certainly accords with what the historical records have shown, in that the Crown undertook, by Treaty 6, to provide the Cree with certain things, such as health care (although it was, of course, not called such in the Treaty, but rather termed a "medicine chest") and education. Moreover, the reserves would be set aside for the Cree and would be administered by the Crown.

[205] As for Mr. Wildcat's testimony, I have no doubt that he presented the Court with an accurate assessment of the plaintiffs' struggles with illiteracy and low levels of education. This would, in turn, lead to a high degree of dependency on their part – however undesirable and lamentable that may be – on the federal government for various things.

The plaintiffs assert that this high degree of dependency consequently informs the duties owed by the Crown. Accordingly, I will address this point further in these Reasons.

III. Phase Two: Money Management

A. Witnesses

I. Experts

1. *For the plaintiffs*

Allen Lambert

[206] Mr. Lambert, a former President and CEO of the Toronto Dominion Bank, tendered an expert report (SE-351), rebuttal report (SE-354), and surrebuttal report (SE-355). Mr. Lambert's involvement with the Canadian banking and financial industry spans some seventy years, beginning in Victoria in 1927 (SE-348). Mr. Lambert was qualified at trial as an "expert in Canadian banking, financial management and money management generally, including investment and trust fund management and Canadian financial services, with considerable experience in monetary policy" (SE-347).

Donald McDougall

[207] Mr. McDougall, Director of RBC Global Services' Benchmark Investment Analysis practice, submitted an expert report (ES-382) and a surrebuttal report (SE-377), as well as a further report updating the performance investment data to December 31, 2003. According to his C.V., before joining RBC Global Services in 2000, Mr. McDougall spent 14 years with SEI Investments (SE-374). At SEI, he was responsible for advisory services to plan sponsors, with particular expertise in policy planning, investment structure, and investment performance analysis. At trial, Mr. McDougall was qualified as an expert "investment consultant specializing in investment performance measurement" (SE-373).

Ronald Parks

[208] Mr. Parks is a Chartered Accountant with Kroll Lindquist Avey. He submitted an expert report titled "Trust Accounting and Reporting Standards" (SE-424) and a surrebuttal report (SE-425). Mr. Parks is a designated specialist in investigative and forensic accounting. He has worked in the area of investigative and forensic accounting since 1987 (SE-416). At trial, Mr. Parks was qualified as a "Chartered Accountant who is a Designated Specialist in Investigative and Forensic Accounting, and an expert in the field of accounting standards and forensic accounting. He has expertise relating to generally accepted

accounting principles and to accounting and reporting standards, practices and objectives, including trust accounting and reporting" (SE-423).

Alan Marchment

[209] Mr. Marchment's career spans over forty years as an officer, director, and trustee of various companies, institutions, and funds. He provided the Court with an expert report (SE-457), rebuttal report (SE-458), and surrebuttal report (SE-459). Mr. Marchment's C.V. reveals that his work experience includes directly managing funds or advising on investment policy through memberships on investment committees acting for individuals and corporations (SE–455). Mr. Marchment was qualified at trial as a "Chartered Accountant with expertise in the area of trusts, investment management, banking, finance and money management generally. He has particular expertise with respect to the management of trust funds, pension funds and endowment funds, including expertise with respect to trust industry practices and standards such as those relating to segregation, borrowing, management, investment and monitoring of trust funds and the formulation of investment policies, procedures, strategies and objectives" (SE-454).

Alan Hockin

[210] Mr. Hockin, a former Assistant Deputy Minister of Finance and Executive Vice-President of the Toronto Dominion Bank, provided the Court with an expert report (SE-470), rebuttal report (SE-471), and surrebuttal report (SE-472). His C.V. shows many years of experience and involvement with various institutions' investment boards or committees (SE-468). Mr. Hockin was qualified as an "expert in Canadian and International banking, financial management and money management, including supervision of investments and trust funds. He is also an expert in investment committee management and the standards and practices of investment boards and committees including the establishment of investment policy and the monitoring of performance" (SE-467).

Tony Williams

[211] Mr. Williams is an actuary with Buck Consultants. He tendered an expert report (ES-478), rebuttal report (SE-479) and two surrebuttal reports (SE-480 and SE-481). Mr. Williams's C.V. indicates he became fully qualified as an actuary in 1985, and is a Fellow of the Society of Actuaries and a Fellow of the Canadian Institute of Actuaries (SE-474). His professional memberships include the Association of Canadian Pension Management, the Canadian Pension and Benefits Institute, and the Investment Practice Committee of the Canadian Institute of Actuaries. Mr. Williams was qualified at trial as an

“actuary with expertise relating to the application of mathematics, statistics, probabilities and risk theories to financial problems, including expertise in the development of models to evaluate the financial implications of uncertain future events. He also has expertise as an investment consultant specializing in investment management, investment policy, asset allocation, the selection of investment managers, investment performance monitoring and pension fund asset and liability forecasting, with particular expertise in the management and analysis of private sector and public sector pensions and other large funds (SE-475).

Arthur Drache

[212] Mr. Drache, a lawyer specializing in taxation, provided the Court with an expert report (E-507). His C.V. shows he has been published widely in the area of taxation, especially as it relates to the arts and charitable organizations (SE-496). In the past, Mr. Drache has taught at Queen’s University (1969 to 1973, 1984 to 1988, 2000, and 2002) and the University of Ottawa (1974 to 1981). At trial, Mr. Drache was qualified as an “expert in the areas of taxation, tax planning and the tax treatment of charities and non-profit organizations, with particular expertise in regard to the use of trusts as a tax planning vehicle. Mr. Drache also has special expertise as a professor, writer and practitioner in regard to these subject-matters” (SE-495).

Laurier Perreault

[213] Mr. Perreault, an actuary and Chartered Financial Analyst, tendered an expert report (S-518) and a surrebuttal report (SE-512), as well as additional data updated to December 31, 2003. According to his C.V., Mr. Perreault's consulting practice deals with asset management and pension plan liability, as well as the establishment of investment structure, monitoring, and selecting money managers (SE-510). Mr. Perreault was qualified at trial as an "actuary with expertise relating to the application of mathematics, statistics, probabilities and risk theories to financial problems, including expertise in the development of models to evaluate the financial implications of uncertain future events. He is also a Chartered Financial Analyst with expertise as an investment consultant specializing in investment management, investment policy, asset allocation, the selection of investment managers, investment performance monitoring and pension fund asset and liability forecasting, with particular expertise in the management and analysis of public sector and private sector pensions and other large funds" (SE-509).

Laurence Booth

[214] Dr. Booth is a Professor of Finance at the Rotman School of Management at the University of Toronto. He submitted a rebuttal report (SE-548) and a surrebuttal report (SE-549). Dr. Booth earned his M.B.A. and D.B.A. from Indiana University in 1976 and 1978,

respectively. His C.V. indicates that his main teaching areas are domestic and international corporate finance (SE-546). Dr. Booth's research focusses on the cost of capital, empirical corporate finance, and capital market theory. His C.V. also contains an extensive list of publications. Dr. Booth was qualified at trial as a "Professor of Finance, with expertise relating to financial market and capital market theory and the application thereof, including the areas of investment management, investment policy, investment strategy, investment portfolio construction and asset allocation" (SE-545).

Derek Malcolm

[215] Mr. Malcolm, a Chartered Accountant, tendered an expert report titled "Interest Calculation Errors - Pigeon Lake Capital Account" (SE-625) and a surrebuttal report titled "Pigeon Lake Account - An Accounting Perspective" (SE-626). According to his C.V., Mr. Malcolm's practice has centred exclusively on forensic and investigative accounting since 1994, and in 2000 he became a designated specialist (SE-623). At trial, Mr. Malcolm was qualified as a "Chartered Accountant who is a Designated Specialist in Investigative and Forensic Accounting, with expertise including generally accepted accounting principles" (SE-624).

2. *For the defendants*

Robert Bertram

[216] Mr. Bertram, Executive Vice-President of the Ontario Teachers Pension Board, submitted an expert report (C-896), rebuttal report (C-897), and surrebuttal report (C-898). Mr. Bertram's C.V. indicates that he is an investment management executive with experience in all aspects of pension investment management, and that his background includes time spent as a director of various private companies (C-894). In his current capacity, Mr. Bertram is responsible for all aspects of the investment program at Ontario Teachers, which has assets in the range of $68 billion. Mr. Bertram was qualified at trial as a "chartered financial analyst and is an expert in the design, analysis and management of investment portfolios. He has extensive experience with different types of assets. His expertise covers investment strategy, policy, valuation and risk management and also covers matching investment portfolios to expected cash flow" (C-895).

Keith Ambachtsheer

[217] Mr. Ambachtsheer, President of KPA Advisory Services Ltd., presented the Court with an expert report (C-910), rebuttal report (C-911), and surrebuttal report (C-912). His C.V. shows that he earned his M.A. in Economics from Western University in 1967 (C-905). He is also a co-founder and partner of the firm Cost Effectiveness Measurement. At trial,

Mr. Ambachtsheer was qualified as an “expert in the following areas relating to large funds of money, including pension and endowment funds: the structural and organizational dimensions of institutional investment; financial issues surrounding fund management; investment policy and strategy; [and] measurement of investment performance and management costs” (C-909).

Gordon King

[218] Mr. King, an economist, submitted to the Court an expert report (C-987), rebuttal report (C-988), and surrebuttal report (C-989). According to his C.V., Mr. King earned his M.A. in Economics from Cambridge in 1966 (C-987; Appendix A). From 1970 until 1980, he held various positions in the Monetary and Financial Analysis Department at the Bank of Canada. After that, he moved to the Department of Finance, where he was Director of the Capital Markets Division and later General Director of the Financial Sector Policy Branch. From 1992 until his retirement in 1995, Mr. King was Advisor and Project Director of the Department’s review of deposit insurance. Mr. King was qualified at trial as an “economist with specific expertise in the following areas: debt management, including specifically government debt management, and the use for that purpose of both external financing and internal sources of funds; government fiscal and monetary policy and fiscal operations; [and] financial institutions and markets” (C-986).

Stewart Scalf

[219] Mr. Scalf, a Chartered Accountant and Chartered Business Valuator, provided the Court with a rebuttal report to the calculations conducted by Mr. T. Williams and Mr. Perreault (C-998) and a summary of financial calculations, which amended some of the calculations contained in his initial report (C-999). His C.V. indicates that he practices in the areas of business valuations, financing, mergers and acquisitions, and the preparation of expert reports for use in litigation (C-994 and S-995). Mr. Scalf was qualified at trial as a "chartered accountant and chartered business valuator with expertise in the areas of collection, quantitative and qualitative assessment and analysis of financial data, and the application of financial models for those purposes" (C-997).

John Williams

[220] Mr. Williams, a Chartered Accountant and Chartered Business Valuator, tendered a rebuttal report titled "Report on Trust Accounting and Reporting Standards" (C-1008). His C.V. sets out in detail his experience in accounting and auditing; conducting investigations for private and public corporations, as well as various levels of government; and litigation services, where he determined economic losses, business valuations, and evaluation of insurance claims (C-1003). Mr. Williams was qualified at trial as a "Chartered Accountant who is a Designated Specialist in Investigative and Forensic Accounting and a Chartered

Business Valuator, and an expert in the field of accounting standards and forensic accounting with expertise relating to generally accepted accounting principles" (C-1004).

ii. Lay

1. *For the plaintiffs*

Curtis Ermineskin

[221] Mr. Ermineskin was born and raised on the Ermineskin reserve. He can trace his ancestry back to the first Chief Ermineskin, who was his great-great-grandfather. Mr. Ermineskin served five terms as an elected band councillor, spanning the years 1979 to 1999.

Gordon Lee

[222] Mr. Lee is an Ermineskin elder. His first job was as chief of the Ermineskin Nation from 1975 to 1978. He then served as an elected band councillor for various terms from 1985 until 1996. He was employed as the band's director of research until 2002. Since that time, Mr. Lee has been involved in coordinating the collection of information for various matters for the band's chief and council.

Chief George Leslie Minde

[223] Chief Minde was elected to that position in October 2001. He was raised on the Ermineskin reserve and can trace his family tree back to the first Chief Ermineskin (E-798). From 1993 until 1996, he served as the administrator for Ermineskin Tribal Enterprises. As administrator, he oversaw band operations and departments that provided programs and services, acted as liaison between chief and council and the band's administrative arm, and also dealt with band members.

Owen Jackson

[224] Mr. Jackson, a Chartered Accountant, has audited the Four Nations organization and the Samson Cree Nation since 1988 and 1993, respectively.

2. *For the defendants*

Dennis Wallace

[225] Mr. Wallace joined DIAND in 1975. In 1978, he was District Manager in Kenora, Ontario. In 1981, he worked for one year on the Department's Management Improvement Project. Following that, Mr. Wallace moved to Toronto, where he became Director of

Operations, a position he held for four years. From 1985 until 1988, he was a Director General in the Department, based in Edmonton. For the next ten years, Mr. Wallace continued his career in the federal civil service, but worked outside of DIAND. In 1998, he returned to DIAND as Associate Deputy Minister in Ottawa, where he remained until September 2001. Mr. Wallace ended his career with the government in 2003.

Donald Goodwin

[226] Mr. Goodwin worked for the Federal Government in various positions from 1967 until his retirement in 1992, and was with DIAND from 1980 until 1992 (C-830). He was Assistant Deputy Minister, Indian and Inuit Affairs from 1980 until 1985. For the next six years, Mr. Goodwin was the Assistant Deputy Minister, Lands, Revenue and Trusts. During his final year, Mr. Goodwin worked as a Special Advisor to the Deputy Minister on *Indian Act* alternatives.

B. Background

[227] A Surrender of Minerals was executed on behalf of the plaintiffs on June 10, 1946. It reads as follows:

> KNOW ALL MEN BY THESE PRESENTS THAT WE, the undersigned Chief and Principal men of the Ermineskin Band of Indians, resident on our Reserve Ermineskin No. 138 in the Province of Alberta and Dominion of Canada, for and acting on behalf of the whole people of our said Band in Council assembled, Do hereby release, remise, surrender, quit claim and yield up unto our Sovereign Lord the King, His Heirs and Successors forever, ALL the land deemed to contain salt, petroleum, natural gas, coal, gold, silver, copper, iron and other minerals, underlying the surface of the area within the boundaries of the Ermineskin Reserve ... and such timber contained within the boundaries of any mineral claim staked or leased in accordance with the Regulations, as may be necessary for the development and proper working of such mineral deposits, subject to the payment of stumpage dues thereon; providing however, that a recorded holder of a mineral claim may, free from dues, lop, top or cut down trees growing on the mineral claim, removal of which is necessary for the proper working of the claim.
>
> TO HAVE AND TO HOLD the same unto his said Majesty the King, his Heirs and Successors, forever, in trust to grant in respect of such land the right to prospect for, mine, recover and take away any or all minerals contained therein, to such person or persons, and upon such terms and conditions as the Government of the Dominion of Canada may deem most conducive to our welfare and that of our people;
>
> and upon further condition that money received from the permit proceeds of 10 ¢ per acre to be paid immediately on a per capita distribution.
>
> AND WE, the said Chief and Principal men of the said Ermineskin Band of Indians do on behalf of our people and for ourselves, hereby ratify and confirm, and promise to ratify and confirm, whatever the said Government may do, or cause to be lawfully done in connection with the management and operation of the said lands and the disposal and sale of the minerals contained therein.
>
> (EC-261, tab 72)

[228] The Crown used a standard printed form for the surrender document. On the second page of the surrender, a paragraph was crossed out and initialled in the left margin by Hobbema Indian Agent W.P.B. Pugh, and amended to read,

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

[229] The part that was crossed out reads,

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

[230] By Order-in-Council P.C. 2662-1946, dated June 28, 1946, the Crown accepted the Surrender so that the mineral interests and accompanying mining rights could be leased for the benefit of Ermineskin, Samson, Montana, and Louis Bull (EC-261, tab 80; see also SEC-427, binder 3, tab 5, document 80).

[231] In 1952, commercial quantities of oil and gas reserves were discovered underlying the surface of the Pigeon Lake Reserve – known as the Bonnie Glen D3A pool – and production began in that same year (E-796 and E-797, paras. 24-26).

[232] The Crown prepared and executed leases with oil and gas companies with regard to the exploration and extraction rights. Since that time, significant royalty moneys have been paid to the Crown on behalf of Ermineskin (E-796 and E-797, paras. 22 and 29).

[233] The Crown treats Ermineskin's's royalty moneys as "public moneys" pursuant to the *Financial Administration Act*, R.S.C. 1985, c. F-11 and, upon receipt by the Receiver

General, they are deposited into the Consolidated Revenue Fund (CRF) (E-796 and E-797, para. 35).

[234] The Crown maintains public accounts, which are published annually in a series of volumes called “Public Accounts of Canada.” These contain the audited financial statements of the federal government. As part of these accounts and for the purposes of its annual financial statements, the Crown maintains and reports on “Specified Purpose Accounts.” Specified Purpose Accounts include the Canada Pension Plan Account, the Federal Public Service Superannuation Account (PSSA), and Trust Accounts (E-796 and E-797, paras. 42-45).

[235] The Crown treats revenues from non-renewable resources on Indian reserves as “capital moneys” and revenue from renewable resources as “revenue moneys.” The Crown treats production stemming from oil and gas from Indian reserves as a non-renewable resource (E-796 and E-797, paras. 48 and 49).

[236] The Crown reports on the plaintiffs’ royalty moneys by reference to “Indian Band Funds – Capital Accounts” and it reports on the interest it pays on the capital and revenue

accounts by reference to “Indian Band Funds – Revenue Accounts” (E-796 and E-797, para. 50).

[237] The Crown reports on the capital and revenue accounts as a liability in the Public Accounts of Canada. The Crown treats the amount of these accounts as a liability within the Specified Purpose Accounts and there is no corresponding asset. The Crown treats this liability as an internal borrowing and as a part of the public debt. The interest credited by the Crown in respect of Ermineskin’s royalty moneys is treated by the Crown as interest on the public debt (E-796 and E-797, paras. 51 and 40).

[238] The system used by the Crown to calculate interest on the capital and revenue accounts can be summarized as follows:

> (a) From Confederation to December 31, 1882, the annual interest rate was fixed at 5%.
>
> (b) From January 1, 1883 to June 30th, 1892, the annual interest rate was fixed at 4%.
>
> (c) From July 1st, 1892 to December 31st, 1897, the annual interest rate was fixed at 3 ½%.
>
> (d) From January 1st, 1898 to March 31st, 1917, the annual interest rate was fixed at 3%.
>
> (e) From April 1st, 1917 to March 31st, 1969, the annual interest rate was fixed at 5%.
>
> (f) Since 1969, Capital and Revenue Accounts respecting the Ermineskin Plaintiffs and the Pigeon Lake Account as well as the Capital and Revenue Accounts respecting all other Indian Bands in Canada have been credited by the Crown with interest determined by Order-in-Council at a rate calculated with reference to formulas ... .
>
> (g) From April 1,1969, the method of determining the interest rate on moneys to the credit of Ermineskin Plaintiffs in respect to the Capital or Revenue Accounts respecting the Ermineskin

> Plaintiffs, and in respect to the Pigeon Lake Account, has been by reference to average market yields of Government of Canada Bonds of 10 years or more to maturity. This method is used in both the 1969 and 1981 Orders-in-Council (P.C. 1969-1934; P.C. 1981-3/255) ... .
>
> (h) Under the 1969 Order-in-Council, the monthly average of the market yields of the Government of Canada bond issues was prescribed in determining the rate of interest. Under the 1981 Order-in-Council the quarterly average of such market yields was prescribed.
>
> (i) The methods of calculating interest from 1969 to 1980 varied. From the period of April 1, 1969 to March 31, 1974, interest was calculated and credited by the Crown on the basis of the opening balance in the Ermineskin Plaintiffs' accounts as of April 1 of each year.
>
> (j) From April t, 1974 to March 31, 1980 interest was credited in "advance" at the beginning of each fiscal year and adjusted at the end of each fiscal year. The interest "credited" in advance was calculated on the April 1st balance, using an "advance" interest rate. The adjustment was determined by comparing the amount of the "advance" to the amount of the interest "earned" during the fiscal year. The interest "earned" was calculated as follows. The annual average month end balances were determined, from which the interest "advance" was then deducted. The actual average annual rate of interest was then applied to determine the interest "earned" for the year. The interest "earned" for the year would then have the interest "advance" deducted from it to arrive at the final interest adjustment, which was recorded at the end of the fiscal year. This adjustment could be positive or negative.
>
> (k) From April, 1980 to the present, the interest has been calculated on the quarterly average month-end balances and compounded semi-annually.
>
> (l) Under the 1981 Order-in-Council, interest is not paid in "advance" but is credited semi-annually based on interest rates and average month-end balances as determined for each quarter.

(E-796 and E-797, para. 56)

[239] The first of the Orders-in-Council referred to above, Order-in-Council P.C. 1969-1934, was issued effective April 1, 1969. Its Appendix provides:

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

> together with an adjustment to correct for the amount by which rates during the course of the previous year will have varied from the rate established at the commencement of that year.

(SEC-427, binder 7, tab 36, document 286)

[240] The second one, Order-in-Council P.C. 1981-3/255, is dated January 29, 1981 and reads:

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

(SEC-427, binder 18, tab 3, document 602)

C. Legislative Framework

[241] I shall now outline the various provisions of the *Indian Act*, R.S.C. 1985, c. I-5, the *Financial Administration Act*, and the *Indian Oil and Gas Act*, R.S.C. 1985, c. I-7, as well as the Orders in Council relating to the Indian moneys regime.

[242] Sections 61 through 69 of the *Indian Act* are grouped under the heading "Management of Indian Moneys." Under section 2(1) of the Act, "Indian moneys" are defined as "all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands." Section 61 reads as follows:

> 61. (1) Indian moneys to be held for use and benefit – Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which Indian moneys are used or are to be used is for the use and benefit of the band.
>
> (2) Interest – Interest on Indian moneys held in the Consolidated Revenue Fund shall be allowed at a rate to be fixed from time to time by the Governor in Council.

[243] Section 62 divides Indian moneys into capital and revenue:

> 62. Capital and revenue – All Indian moneys derived from the sale of surrendered lands or the sale of capital assets of a band shall be deemed to be capital moneys of the band and all Indian moneys other than capital moneys shall be deemed to be revenue moneys of the band.

[244] Section 64 governs the expenditure of capital moneys:

> 64. (1) Expenditure of capital moneys with consent – With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band
>
> > (a) to distribute per capita to the members of the band an amount not exceeding fifty per cent of the capital moneys of the band derived from the sale of surrendered lands;

(b) to construct and maintain roads, bridges, ditches and watercourses on the reserves or on surrendered lands;

(c) to construct and maintain outer boundary fences on reserves;

(d) to purchase land for use by the band as a reserve or as an addition to a reserve;

(e) to purchase for the band the interest of a member of the band in lands on a reserve;

(f) to purchase livestock and farm implements, farm equipment or machinery for the band;

(g) to construct and maintain on or in connection with a reserve such permanent improvements or works as in the opinion of the Minister will be of permanent value to the band or will constitute a capital investment;

(h) to make to members of the band, for the purpose of promoting the welfare of the band, loans not exceeding one-half of the total value of

(i) the chattels owned by the borrower, and

(ii) the land with respect to which he holds or is eligible to receive a Certificate of Possession,

and may charge interest and take security therefor;

(i) to meet expenses necessarily incidental to the management of lands on a reserve, surrendered lands and any band property;

(j) to construct houses for members of the band, to make loans to members of the band for building purposes with or without security and to provide for the guarantee of loans made to members of the band for building purposes; and

(k) for any other purpose that in the opinion of the Minister is for the benefit of the band.

[245] Sections 66 and 69 relate to the expenditure of revenue moneys:

66. (1) Expenditure of revenue moneys with consent of band – With the consent of the council of a band, the Minister may authorize and direct the expenditure of revenue moneys for any purpose that in the opinion of the Minister will promote the general progress and welfare of the band or any member of the band.

> 69. (1) Management of revenue moneys by band – The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order.
>
> (2) Regulations – The Governor in Council may make regulations to give effect to subsection (1) and may declare therein the extent to which this Act and the *Financial Administration Act* shall not apply to a band to which an order made under subsection (1) applies.

[246] No section similar to section 69 exists allowing a band to control, manage, and expend its capital moneys.

[247] The *Financial Administration Act* defines "public money" in section 2 as follows:

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

[248] Section 17 of that same Act requires all public money to be deposited to the credit of the Receiver General. Section 2 defines the "Consolidated Revenue Fund" as "the aggregate of all public moneys that are on deposit at the credit of the Receiver General." Thus, if Indian moneys are considered public moneys – as will be discussed later – they

must be deposited in the CRF and subsequently receive interest pursuant to section 61(2) of the *Indian Act*.

[249] Turning to the *Indian Oil and Gas Act*, the important provision, for our purposes, is section 4(1), which governs royalties:

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

[250] The *Indian Oil and Gas Act* was assented to on December 20, 1974. Previously, oil and gas production on Indian lands was governed by regulations under the *Indian Act*, which were similar to Alberta's regulations concerning exploration, drilling, and production.

[251] Section 61(2), as noted above, provides that the Governor in Council shall establish the interest rate to be paid on Indian moneys held in the CRF. From the time of the 1946 Surrender until March 31, 1969, the rate of interest was set at 5%. Since 1969, the Crown has paid interest pursuant to a formula set out in two Orders-in-Council, issued in 1969 and

1981. The first of these, Order-in-Council P.C. 1969-1934, was issued effective April 1, 1969; its Appendix reads as follows:

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

(SEC-427, binder 7, tab 36, document 286)

[252] The second one, Order-in-Council P.C. 1981-3/255, was issued in January 1981 and provides:

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

(SEC-427, binder 18, tab 3, document 602)

[253] The 1969 and 1981 Orders-in-Council are quite similar; the difference between them arises in the manner in which interest is calculated. In 1969, monthly averages of certain Government of Canada bond issues were used, whereas in 1981, that was changed to quarterly averages. While the rate is short-term in the sense that it floats and is subject to change – by 1981 – every 90 days, the rate nonetheless is based on long-term bond issues.

[254] The Crown treats all Indian band accounts in the same manner in that they are all subject to the same interest rate methodology, regardless of their balances.

[255] Before moving on, I find it useful to briefly review some history behind the moneys regime of the *Indian Act*. In a letter to the Deputy Minister of Finance, dated August 28, 1969, the Deputy Minister of Indian Affairs and Northern Development, J.A. MacDonald, provides an overview of interest rates paid on Indian moneys in the past. The letter, which advocates for an increase to the interest rate paid on Indian moneys, reads in part,

> The fund had its beginning with the settlement of Upper Canada and the surrender for sale of Indian lands in that Province. The moneys were at first held by the Receiver General for investment in commercial securities, municipal debentures, etc. In the year 1859 by Order-in-Council dated August 25th the Government assumed these investments which at that time were producing a uniform revenue of 6%.
>
> By Order-in-Council dated September 24, 1861, the amount of 6% was guaranteed on that portion of the fund invested, and 5% on new credits. The payment of interest at the rate of 5% was continued until the year 1883 when it was reduced to 4%. There was no reduction made in

that part on which 6% was paid, nor was there any reduction on the rate paid on the capitalized annuities amounting to $620,400.10.

In 1892 the 4% rate was reduced to 3 ½%, and in 1898 was further reduced to 3%. These reductions were made by reason of the continued fall in the value of money, and the resulting decreases from time to time in the rate of interest paid to the depositors on bank savings accounts. As of April 1, 1917, however, due to a general advance in the rate of interest in Canada, the rate paid was increased to 5%, at which it still remains.

(EC-429, binder 6, tab 40, document 167)

[256] With regard to the August 25, 1859 Order-in-Council, a document signed by John A. Macdonald on the same date shows the government's concern with the system, which at that time involved actual investments. Macdonald's letter reads in part,

In dealing with the Indians of whom the Government has constituted itself the Guardian, it would appear desirable so to secure the funds as to prevent the possibility of any failure in the payment of the Annual Sums required for the Indians, as such failure would certainly be attributed to a breach of faith on the part of the Government and could more be explained to the satisfaction of the Tribes. By maintaining the present system of investment, it might also result that one Tribe would find its Annual interests regularly paid, while others would meet with disappointment. Should such an event arise, Parliament would probably find it necessary to make good the losses of the Trust, and it would therefore be more advisable to carry the funds at the credit of the Trust to the Consolidated Fund, and to charge the annual interest upon that Fund at such scale as might appear equitable to the Legislature.

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

(SEC-427, binder 1, tab 20, document 20, pp. 1-2)

[257] Thus arose the practice, which continues today, of depositing Indian moneys into the CRF and paying a rate of interest, as opposed to purchasing marketable securities. However, for a time, the Act provided authority for the Crown to purchase actual investments with Indian moneys. The *Indian Act*, R.S.C. 1927, c. 98 provided:

> 92. With the exception of such sum not exceeding fifty per centum of the proceeds of any land, timber or other property, as is agreed at the time of surrender to be paid to the members of the Band interested therein, the Governor in Council may, subject to the provisions of this Part, direct how and in what manner, and by whom, the moneys arising from the disposal of Indian lands, or of property held or to be held in trust for Indians, or timber on Indian lands or reserves, or from any other source for the benefit of Indians, shall be invested from time to time, and how the payments or assistance to which the Indians are entitled shall be made or given.

[258] This legislative power to invest Indian moneys was repealed following the enactment of the 1951 *Indian Act*, S.C. 1951 c. 29. The Act, insofar as it relates to the moneys regime, has remained essentially unchanged since 1951.

D. Crown's Obligations and Duties

[259] The Crown concedes that it holds the Indian moneys as a trustee (Written Closing Argument of the Crown, Moneys Phase, Volume 1, tab 2, p. 1). However, the Crown argues that the legislation informs its obligations and duties, and contends that, in any event, its conduct should not be judged against the standard of a private law trustee.

[260] The plaintiffs contend that the Crown is indeed a true trustee and urge the Court to hold the Crown liable for its failure to actively manage their funds in the same manner as a private law trustee. This failure, according to the plaintiffs, resulted in a less than adequate, or reasonable, return being earned by their funds. The plaintiffs submit that, in the alternative, if the Crown was not permitted to make actual investments with the funds, then the rate of return should have been commensurate with that which might have been earned by making actual investments in the market. The plaintiffs suggest that this could have been done by linking the interest rate formula to a benchmark portfolio or market indices of various types. Much expert evidence was presented to the Court on the sorts of actual or notional investments that the plaintiffs submit the Crown should have made with their funds.

[261] I agree that the Crown is a trustee insofar as the Indian moneys at issue in this action are concerned, and that those moneys are trust funds. Even if the Crown had not admitted the obvious, I would, in any event, have found it to be a trustee.

[262] The *Indian Act* defines “Indian moneys” in section 2(1) as follows,

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

[263] The *Financial Administration Act* defines "public money" in its section 2 as follows,

> "public money" means all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person authorized to receive or collect such money, and includes
>
> (a) duties and revenues of Canada,
>
> (b) money borrowed by Canada or received through the issue or sale of securities,
>
> (c) money received or collected for or on behalf of Canada, and
>
> (d) all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract.

[264] At first glance, the public money definition seems to exclude Indian moneys through the use of the words "belonging to Canada." It cannot be argued that the Indian moneys at issue *belong* to the Crown. The Crown clearly has no beneficial interest in those moneys. However, the use of the words "and includes" has the effect of expanding the ambit of the definition.

[265] Further on this point, I note *Callie* v. *Canada*, [1991] 2 F.C. 379, which involved a class action for damages for breach of trust or fiduciary duty by the Crown in its administration of war veterans' pension funds from 1946 to 1986. The Department of Veterans Affairs deposited the pension moneys to the credit of the Receiver General. The plaintiff argued that the pension funds were not public money within the meaning of the *Financial Administration Act* and thus were not subject to that Act. Justice Joyal considered the meaning of the public moneys definition and held that an expansive interpretation of that section was appropriate, given its use of the word "includes." Those words amplify the meaning of the preceding words. I agree with his words at p. 397 and make them mine:

> As was pointed out in *Nova*, *supra*, when the word "includes" is used in a definition, it is used to amplify or extend the ordinary meaning of the term being defined. That is precisely what paragraph 2(*d*) of the *Financial Administration Act* accomplishes in the present case. The term "public money" has been enlarged to include sums of money which might not otherwise come within the ordinary or everyday meaning of that term.

[266] I note further that section 61(2) of the *Indian Act* contemplates the holding of Indian moneys in the Consolidated Revenue Fund. Such funds would not be held in the CRF if Parliament did not also intend for them to be considered as public money. Accordingly, Indian moneys are public moneys for the purposes of the *Financial Administration Act* and that they must be deposited into the CRF, pursuant to section 17(1) of that Act. However, I also note that even though Indian moneys are considered public money, it does not follow that they lose their character as trust funds.

[267] My opinion that the Crown is a trustee for the Indian moneys is further based on the reasoning of Dickson J. in *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335. *Guerin* is a watershed decision in that the Supreme Court found the Crown liable for breach of its fiduciary duty to an Indian band with regard to the disposition of part of the band's reserve on terms less favourable than those approved by the band. The Court flatly rejected the old notion of a judicially unenforceable political trust as inapplicable. Instead, the Crown was subject to a fiduciary duty, which courts could supervise and enforce. Dickson J. held, at p. 376 that the origin of this duty lies in the proposition that the aboriginal interest in land is inalienable except upon surrender to the Crown:

> The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian Bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.
>
> An Indian Band is prohibited from directly transferring its interest to a third party. Any sale or lease of land can only be carried out after a surrender has taken place, with the Crown then acting on the Band's behalf. The Crown first took this responsibility upon itself in the Royal Proclamation of 1763. It is still recognized in the surrender provisions of the *Indian Act*. The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians.

[268] Further on, Dickson J. held, at p. 383, that the essential obligation of the Crown was to prevent exploitation:

> (c) The Crown’s Fiduciary Obligation
>
> The concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in Chancery. In the present appeal its relevance is based on the requirement of a “surrender” before Indian land can be alienated.
>
> The Royal Proclamation of 1763 provided that no private person could purchase from the Indians any lands that the Proclamation had reserved to them, and provided further that all purchases had to be by and in the name of the Crown, in a public assembly of the Indians held by the governor or commander-in-chief of the colony in which the lands in question lay. As Lord Watson pointed out in *St. Catherine’s Milling*, *supra*, at p. 54, this policy with respect to the sale or transfer of the Indians’ interest in land has been continuously maintained by the British Crown, by the governments of the colonies when they became responsible for the administration of Indian affairs, and, after 1867, by the federal government of Canada. Successive federal statutes, predecessors to the present *Indian Act*, have all provided for the general inalienability of Indian reserve land except upon surrender to the Crown, the relevant provision is the present Act being ss. 37-41.
>
> The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that “great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians ... .”

[269] Dickson J. aptly characterized the relationship, at p. 385, as *sui generis*, trust-like in nature, but not a true trust, insofar as land is concerned.

[270] The minority in *Guerin*, per Wilson J. at p. 355, found that the Crown’s fiduciary duty, which existed at large, to hold the reserve land for the band’s use and benefit, crystallized into an express trust of land for a specific purpose upon the surrender. Dickson J., however, refused to define the Crown’s obligations in that case as a trust. He held, at p. 388:

> I agree with Le Dain J. that before surrender the Crown does not hold the land in trust for the Indians. I also agree that the Crown's obligation does not somehow crystallize into a trust, express or implied, at the time of the surrender. The law of trusts is a highly developed, specialized branch of the law. An express trust requires a settlor, a beneficiary, a trust corpus, words of settlement, certainty of object and certainty of obligation. Not all of these elements are present here. Indeed, there is not even a trust corpus. As the *Smith* decision, *supra*, makes clear, upon unconditional surrender the Indians' right in the land disappears. No property interest is transferred which could constitute the trust *res*, so that even if the other *indicia* of an express or implied trust could be made out, the basic requirement of a settlement of property has not been met. Accordingly, although the nature of Indian title coupled with the discretion vested in the Crown are sufficient to give rise to a fiduciary obligation, neither an express nor an implied trust arises upon surrender.

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

[272] As for the source of this trust, I do not agree with the plaintiffs' assertion that the trust arises from either the historical relationship between the Crown and aboriginal people, or Treaty 6. In my opinion, the treaty is of no assistance in this matter. It does not speak to the issue of how Indian moneys are to be held and administered. The only part of the

treaty that may possibly pertain to this issue – and it is a most tenuous connection at best – is the clause dealing with reserve creation. That part of Treaty 6 reads as follows:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada, provided all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: –
>
> That the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them;
>
> Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as she shall deem fit, and also that the aforesaid reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained; and with a view to show the satisfaction of Her Majesty with the behavior and good conduct of her Indians, she hereby, through her Commissioners, makes them a present of twelve dollars for each man, woman and child belonging to the bands here represented, in extinguishment of all claims heretofore preferred.

(S-4, pp. 352-353; underlining is mine)

[273] Morris also made some remarks to the Cree during the treaty talks on this matter of selling reserves or portions of reserves. Commission Secretary Jackes recorded Morris's comments:

> "There is one thing I would like to say about the reserves. The land I name is much more than you will ever be able to farm, and it may be that you would like to do as your brothers where I came from did.
>
> They, when they found they had too much land, asked the Queen to sell it for them; they kept as much as they could want, and the price for which the remainder was sold was put away to increase for them, and many bands now have a yearly income from the land.

> But understand me, once the reserve is set aside, it could not be sold unless with the consent of the Queen and the Indians; as long as the Indians wish, it will stand there for their good; no one can take their homes."

(S-4, p. 205)

[274] In my opinion, both the reserve clause in Treaty 6 and Morris's remarks cannot be relied on as the source of the trust. At the time Treaty 6 was signed, the Indian moneys that are the subject matter of this action did not exist. They came into being subsequent to the execution of the 1946 Surrender of Minerals document. The words contained in that document are sufficient to create a trust: there are certainties of intent, subject-matter, and object. The agreement explicitly contemplates a trust; the subject-matter is the royalty moneys; and the object, or beneficiary, is clearly the plaintiffs.

[275] Having discussed the Crown as a trustee for Indian moneys, I will now examine the nature of its obligations as such.

[276] Many of the duties owed by a trustee are similar to those of a fiduciary. The trustee may not realize a profit from its custody of the trust property, or misuse it in any way. The trustee owes a duty of loyalty and good faith to the beneficiary. The trustee also owes a duty to be evenhanded as between different beneficiaries. However, unlike a fiduciary, a

trustee owes a positive duty to invest the corpus – or, put another way, make it productive – when the corpus is a wasting asset, such as money. The trust corpus may not lie fallow. This is the duty to invest.

[277] The standard of care applicable to a trustee carrying out the administration of a trust was set out by the Dickson J. in *Fales et al.* v. *Canada Permanent Trust Company*, [1977] 2 S.C.R. 302 at p. 315:

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

[278] Thus, the standard of care, in terms of the duty to invest, is that of reasonable care and skill of an ordinary prudent person.

[279] The plaintiffs contend that the Crown did not fulfill its duty to invest and that the Crown should have either made actual investments in the market with their funds, or tied the interest rate to benchmarks or market indices. The plaintiffs assert that section 61(2) of the *Indian Act* does not require that Indian moneys be held in the CRF. Ermineskin submits that the purpose of section 61(2) is to ensure that, if the Crown does hold Indian

moneys in the CRF, then the Crown must pay interest at an appropriate rate, consistent with its duties as trustee or fiduciary regarding those moneys.

[280] I cannot agree with Ermineskin's submission regarding section 61(2) of the *Indian Act*. I am satisfied that the legislation informs the Crown's duties as trustee for Indian moneys. There is no doubt that the royalty moneys are to be held in trust. That language appears in the 1946 Surrender and later in section 4 of the *Indian Oil and Gas Act*. Although that piece of legislation was enacted in 1974 and royalties had been collected by the Crown long before that date, the *Indian Oil and Gas Act* found its genesis in the world oil crisis of 1973. Section 4 and the words "in trust" confirm what was an already existing situation and in no way altered the manner in which the funds were to be held and administered.

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

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

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

[284] The plaintiffs also contend that the Crown is in breach of its duty as a trustee not to commingle their money with its own by depositing the Indian moneys into the CRF. I have

already found that the Crown may rely on the legislation in carrying out its duties as a trustee. The legislation requires that Indian moneys be deposited into the CRF. While in a sense they are commingled, the Crown keeps accounts for the Indian moneys. As I noted earlier in these Reasons, the Crown reports on the royalty moneys by reference to “Indian Band Funds – Capital Accounts.” The Crown reports on the interest it pays on the capital and revenue accounts by reference to “Indian Band Funds – Revenue Accounts” (E-796 and E-797, para. 50). The duty to keep trust property separate exists so as to protect the property – perhaps from embezzlement or misappropriation – and prevent it from losing its identity. In the instant case, the trustee is the Crown and the Crown cannot be said to an akin to an ordinary trustee in every possible way. The plaintiffs’ moneys are deposited into the Consolidated Revenue Fund; however, they are reported on and accounted for separately. There is no danger that the moneys are unaccessible or that the Crown will be unable to pay them out. Accordingly, I find there is no breach by the Crown of its duties by depositing the Indian moneys into the CRF.

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

E. Unjust Enrichment Claim

[286] The plaintiffs make a claim for equitable disgorgement of the profit or benefit which they allege the Crown has gained through its access to and use of their moneys. Ermineskin also submits that a claim for unjust enrichment is applicable in the circumstances of this case.

[287] The Crown contends that the definition of "public money" in section 2 of the *Financial Administration Act* includes "Indian moneys":

> 2. In this Act,
>
> "public money" means all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person authorized to receive or collect such money, and includes
>
> > (d) all money that is paid to or received or collected by a public officer under or pursuant to any Act, trust, treaty, undertaking or contract, and is to be disbursed for a purpose specified in or pursuant to that Act, trust, treaty, undertaking or contract.

[288] The Crown submits that since Indian moneys are public money, then pursuant to section 17(1) of the *Financial Administration Act*, they "shall be deposited to the credit of the Receiver General." This means that the royalty moneys must be held in the CRF and, pursuant to section 61(2) of the *Indian Act*, interest must be paid on them.

[289] The Crown submits that if section 61(2) and the Orders-in-Council issued pursuant to it are found to be valid, then this constitutes an insurmountable obstacle for the plaintiffs' unjust enrichment claim.

[290] In the recent Supreme Court decision in *Garland* v. *Consumers' Gas Co.*, [2004] 1 S.C.R. 629, Justice Iacobucci held at para. 30,

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

[291] Because I have found the Crown to be a trustee for Indian moneys and that it may rely on the money management provisions of the *Indian Act* to carry out its duties as a trustee, that leads to the conclusion that there can be no unjust enrichment claim. The Crown has paid the proper amount of interest and the plaintiffs have therefore suffered no deprivation within the confines of the existing legislative regime. Moreover, section 61(2) amounts to a juristic reason. However, in the event that I am incorrect in finding that the

Crown may rely on the legislation, I shall briefly consider the three elements necessary for an unjust enrichment claim to succeed.

[292] With regard to the first element, enrichment, the plaintiffs contend that because their moneys have been on deposit in the CRF for long periods of time and the Crown did not lock in the interest rates, the Crown thereby enjoyed an enrichment in that it paid more for other long-term borrowing than it did for the Indian moneys.

[293] The plaintiffs' assertion of the Crown enjoying such a benefit depends upon finding that if the Crown did not have access to the Indian moneys, it would have replaced them with long-term borrowing (i.e., bonds) at fixed rates. The plaintiffs' experts who examined this issue did so in terms of looking at what it would have cost the Crown to replace the Indian moneys with borrowing from a single long-term investor. They did not approach it on the basis of simply asking what the Crown would have done.

[294] Ermineskin expert Mr. Hockin, who is a former Assistant Deputy Minister of Finance, testified that the Crown would have replaced Indian moneys through issuing ten year and over long bonds (transcript volume 203, pp. 28814-28815). I note, however, that his statement of qualifications did not mention anything about Crown debt management or debt

strategy and I have some reservations with placing much weight on his opinion on this particular issue (SE-467).

[295] Another Ermineskin expert, Mr. Lambert, was of the strong opinion that the Crown received a clear benefit by way of the operation of the Indian moneys formula (transcript volume 181, p. 25416; SE-351, p. 12). Mr. Lambert testified that he thought the Crown would replace the Indian moneys with long-term borrowing, but he agreed that the Crown expert, Mr. King, was better placed to explain federal government debt strategy, since Mr. King was qualified as an economist with specific expertise in government debt management strategy (transcript volume 181, pp. 25418-25419; C-986).

[296] Mr. Tony Williams, an actuary who testified for the plaintiffs, examined the issue from the perspective of the Crown externally financing the same amount of debt as the Indian moneys represented and in the same fashion – what he referred to as an independent arm's length borrower with a long-term horizon. He specifically disagreed with Mr. King's approach, *viz.* asking what the Crown would have done instead (transcript volume 216, 31014). However, Mr. Williams did agree that if the Crown did not have access to the Indian moneys, it would not have to replace them entirely with one single arm's length borrower. He also agreed that Treasury Bills – short-term debt – would have been

an available option for the Crown in such a scenario (transcript volume 216, pp. 31016-31017).

[297] Yet another of the plaintiffs' experts, Mr. Perreault, conceded that if the Crown had to replace Indian moneys with alternate borrowing, there was no obligation for the Crown to resort exclusively to long-term bonds. Mr. Perreault also agreed that if the Crown went entirely with T-bills, the Crown would have saved over $100 million (transcript volume 232, pp. 33639-33670). However, he did not perform such calculations as his terms of reference did not mandate him to assess what it would have cost the Crown to replace the Indian moneys with alternate forms of borrowing (transcript volume 232, pp. 33638-33639).

[298] The Crown's expert on this matter was Mr. King. As noted earlier in these Reasons in the section profiling the witnesses, Mr. King is an economist and has held various positions at the Bank of Canada and Department of Finance (C-987, Appendix A). He was qualified as an expert on government debt management and the use of both external financing and internal sources of funds for that purpose (C-986). I prefer his evidence on this issue over that of the plaintiffs' experts.

[299] Mr. King testified that the Crown's debt strategy in the early 1980s was based on a target ratio between fixed and floating debt and that the ratio was set at 50/50 (transcript volume 335, pp. 92-95). The target ratio involved a trade-off between short-term and long-term debt with regard to stability in the public debt charges and interest savings (transcript volume 335, pp. 106-109; transcript volume 348, pp. 157-159). In his opinion, if the Crown did not have access to Indian moneys – if they had never existed – the Crown would have gone with a strategy of Treasury Bill financing, which has the advantage of lowering the long run cost of funds (C-987, p. 7).

[300] Mr. King did consider a second possible strategy. In his opinion, given the relatively small size of the Indian moneys as compared to the Crown's overall borrowings, the loss of the Indian moneys would have simply been regarded as an increase in the amount of money which had to be borrowed and would be replaced by a mix of Treasury Bills and whatever long bonds the Crown had targeted. By Mr. King's calculations, this would still result in a lower cost than what the Crown actually paid on the Indian moneys from 1971/72 to 1999/2000 (C-987, p. 7; transcript volume 336, pp. 115-116).

[301] In my opinion, the correct approach to this issue is to ask what the Crown would have done had it not had access to the Indian moneys. Assume the moneys simply never existed. I do not agree with the approach used by the plaintiffs' experts where they

assessed the costs of borrowing assuming there was a single borrower with a long-term horizon. It is clear from the evidence, not only of Mr. King, but also of some of the plaintiffs' experts, that the Crown would have used cheaper short-term debt financing in the absence of Indian moneys. The fact that the Indian moneys may have been on deposit for a long period of time was not the result of any legal requirement. The moneys were never committed to remain in the CRF for any period of time and were always available for withdrawal, subject to section 64 of the *Indian Act*.

[302] The Supreme Court discussed the benefit element of the test for unjust enrichment in *Peel (Regional Municipality)* v. *Canada*, [1992] 3 S.C.R. 762. Justice McLachlin held, at p. 790,

> To date, the cases have recognized two types of benefit. The most common case involves the positive conferral of a benefit upon the defendant, for example the payment of money. But a benefit may also be "negative" in the sense that the benefit conferred upon the defendant is that he or she was spared an expense which he or she would have been required to undertake, i.e., the discharge of a legal liability.

[303] It certainly cannot be argued in the case at bar that the plaintiffs spared the Crown an expense which it was required to undertake. The Crown had no obligation – legal or otherwise – to pay someone else, in the absence of the Indian moneys, an interest rate higher than that paid on the Indian moneys.

[304] As for whether there was a positive benefit, in the sense that the plaintiffs conferred upon the Crown a benefit by virtue of the payment of their royalty moneys into the CRF and the subsequent borrowing by the Crown, the evidence shows that this did not amount to a benefit. At first glance, it may appear that there was a benefit because the plaintiffs' money was collected, held, and borrowed by the Crown. However, when one looks at what the Crown would have done had it not had any recourse to that money, it leads to the conclusion that the Crown would have sought any additional debt financing through use of short-term instruments. This form of debt financing would have allowed the Crown to reduce its costs, whereas with the Indian moneys on deposit in the CRF, the Crown ended up paying more for access to them.

[305] There can be no corresponding detriment because I have found that the Crown as trustee may rely on section 61(2) of the *Indian Act*, and the Orders-in-Council establishing the interest rate methodology, in carrying out its duties as a trustee.

[306] Finally, there is the juristic reason element. In *Garland*, at para. 49, the Court held,

> Disposition of law is well established as a category of juristic reason. In *Rathwell*, *supra*, Dickson J. gave as examples of juristic reasons "a contract or disposition of law" (p. 455). In *Reference*

> *re Goods and Services Tax*, [1992] 2 S.C.R. 445 ("*GST Reference*"), Lamer C.J. held that a valid statute is a juristic reason barring recovery in unjust enrichment. This was affirmed in *Peter*, *supra*, at p. 1018. Most recently, in *Mack* v. *Canada (Attorney General)* (2002), 60 O.R. (3d) 737, the Ontario Court of Appeal held that the legislation which created the Chinese head tax provided a juristic reason which prevented recovery of the head tax in unjust enrichment. In the leading Canadian text, *The Law of Restitution*, *supra*, McCamus and Maddaugh discuss the phrase "disposition of law" from *Rathwell*, *supra*, stating at p. 46:
>
> > ... it is perhaps self-evident that an unjust enrichment will not be established in any case where enrichment of the defendant at the plaintiff's expense is required by law.
>
> It seems clear, then, that valid legislation can provide a juristic reason which bars recovery in restitution.

[307] Thus, even if I am wrong on the enrichment and deprivation elements, the plaintiffs' unjust enrichment claim still fails because valid legislation requires the Crown to deposit the Indian moneys into the CRF pay interest thereon, pursuant to the Orders-in-Council.

F. Constitutional Issues

[308] In its Notice of Constitutional Question, Ermineskin submits that to the extent that the money management provisions of the *Indian Act* do not require, or result in, the payment of a sufficient rate of interest – one that matches the return which a reasonable trustee ought to obtain through prudent investments – then the legislation breaches their treaty rights. Ermineskin also relies on section 15 of the *Charter*.

[309] Ermineskin submits that the relevant provisions of the *Indian Act* and the *Indian Oil and Gas Act* must be interpreted in a manner consistent with the Crown's trust duties and the honour of the Crown. Ermineskin contends that the source of the Crown's duties lies in the promises made by the Crown in Treaty 6 and in the interests in land granted pursuant to, and protected by, that treaty. Ermineskin contends that if it is found that the enactments deprive Ermineskin of its rights as a beneficiary of a trust, then the enactments are constitutionally invalid to the extent of that conflict.

[310] Ermineskin does not assert, as Samson did in its action, an aboriginal right, treaty right, or inherent right to self-government.

[311] Ermineskin submits that the Crown's trust obligations find their source in the reserve clause of Treaty 6, which reads,

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, <u>to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada</u>, provided all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: –
>
> That the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them;
>
> Provided, however, that Her Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as she shall deem fit, and also that the aforesaid reserves of land or any interest therein may be sold or otherwise disposed of by Her Majesty's Government for the use and benefit of the said Indians entitled thereto, with their consent first

> had and obtained; and with a view to show the satisfaction of Her Majesty with the behavior and good conduct of her Indians, she hereby, through her Commissioners, makes them a present of twelve dollars for each man, woman and child belonging to the bands here represented, in extinguishment of all claims heretofore preferred.

(S-4, pp. 352-353; underlining is mine)

[312] Ermineskin also relies on the remarks made by Morris in conjunction with this clause of the treaty, regarding the possibility of selling reserves. The plaintiffs contend that these words amount to a treaty promise or undertaking. Commission Secretary Jackes recorded Morris's remarks as follows,

> "There is one thing I would like to say about the reserves. The land I name is much more than you will ever be able to farm, and it may be that you would like to do as your brothers where I came from did.
>
> They, when they found they had too much land, asked the Queen to sell it for them; they kept as much as they could want, and the price for which the remainder was sold was put away to increase for them, and many bands now have a yearly income from the land.
>
> But understand me, once the reserve is set aside, it could not be sold unless with the consent of the Queen and the Indians; as long as the Indians wish, it will stand there for their good; no one can take their homes."

(S-4, p. 205)

[313] The language in Treaty 6 is clear that the Crown shall administer and deal with Indian reserves.

[314] Morris's remarks reflect the long-standing Crown policy, dating back to the Royal Proclamation of 1763, which provided that only the Crown could purchase or take possession of Indian lands. This responsibility passed on to colonial governments when they took over the administration of Indian affairs. Following Confederation in 1867, the federal government of Canada assumed this special responsibility. In *Guerin*, at p. 383, Dickson J. held,

> The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself which prefaces the provision making the Crown an intermediary with a declaration that "great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interest and to the great Dissatisfaction of the said Indians... ." Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act.

[315] The written text of Treaty 6 and the surrounding negotiations and historical context show that the administration and management of reserve lands and resources were to be functions and responsibilities of the Crown. This responsibility dates back to the Royal Proclamation of 1763.

[316] Through the terms of Treaty 6, Ermineskin placed itself under the protection of the Crown. That may not be fashionable to state today, but that is indeed the effect of the treaty. Certainly, one can view the treaty as forming or solidifying an alliance or partnership,

but it also meant that Ermineskin's ancestors agreed to allow the Crown to look to their interests. In return, Ermineskin secured certain benefits, set out in the treaty. Crown policy, dating back centuries in some aspects, and legislation flowing therefrom, was to respect and protect Indian interests. That may not always have been the way things operated in reality, but that is the Crown's acknowledged policy, and it has since become enshrined in the jurisprudence. The relationship between the Crown and aboriginal people is ancient and complex. It is also an evolving thing. Ideas of wardship, tutelage, and assimilation have been abandoned in favour of increased decision-making and empowerment.

[317] As I have stated earlier, in my opinion, the trust arises from the 1946 Surrender of Minerals and, as such, does not fall under the rubric of treaty rights. While the Crown set itself up as their protector by way of Treaty 6 and agreed to administer and manage Indian reserves, the Indian moneys trust only came into existence upon the surrender by Ermineskin of its interests and rights in the minerals.

[318] Because the Crown has taken on the responsibility to interpose itself between aboriginal interests and third parties, it has the duty to set out rules governing how that is to play out. In the case of the Indian moneys, the Crown agreed by the 1946 Surrender to safeguard Ermineskin's interests. The Indian moneys enactments contained in the *Indian Act* exist for that purpose. Section 61(1) states that the Crown holds the Indian moneys for

the "use and benefit" of the Indian or band on whose behalf they are held. The Crown must pay interest on this money, pursuant to section 61(2); that is mandatory. Expenditures of capital, governed by section 64, may only be authorized and directed by the Minister with the consent of the band council and for a list of enumerated purposes, ending with (k) which is a sort of catch-all clause. But the point of section 64 is that expenditures must be for the *benefit* of the band. The Crown has retained the discretion for itself to decide where best interests lie, but this goes to the heart of the parties' relationship, which is deep, historical, and *sui generis* in nature. The honour of the Crown is always at stake in its dealings with aboriginal people and that "core precept" supervises and governs the exercise of its discretion.

[319] The plaintiffs also invoke section 15 of the *Charter*, which is found under the heading "Equality Rights" and reads as follows:

> 15. (1) Equality before and under law and equal protection and benefit of law – Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[320] In *Nechako Lakes School District No. 91* v. *Patrick*, [2002] B.C.J. No. 37, the British Columbia Supreme Court had occasion to consider the applicability of section 15 of the *Charter* to Indian bands. The defendant bands were sued for school fees they owed; the

bands counterclaimed and, among other things, alleged discrimination pursuant to section 15(1) of the *Charter*. Garson J. analysed the legal character of an Indian band at paras. 103 to 111 and concluded that bands are not individuals for the purposes of the *Charter*. After making that finding, he declined to consider the discrimination argument on its merits:

¶ 103 The *Indian Act*, R.S.C. 1985, C. I-5, s. 2(1) defines "band":

"band" means a body of Indians

(a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,

(b) for whose use and benefit in common, moneys are held by Her Majesty, or

(c) declared by the Governor in Council to be a band for the purposes of this Act;

¶ 104 The *Indian Act* defines "council of the band" in s. 2(1) as the council established pursuant to s. 74 of the *Indian Act*, which states that a band council "shall be selected by elections to be held in accordance with this Act."

¶ 105 In his text *Native Law* (Toronto: Carswell, 1994), J. Woodward at p. 398 says, "[t]he band, as an enduring entity with its own government is a unique type of legal entity under Canadian law."

¶ 106 In the case of *William* v. *Lake Babine Indian Band* (1999), 30 C.P.C. (4th) 156 (B.C.S.C.), Taylor J. had to determine the proper method of service of a Writ and Statement of Claim on an Indian Band and Band Council. He decided that an Indian Band was more like a trade union than a corporation because it performs a representative function on behalf of its members.

¶ 107 In the case of *Montana* v. *Canada*, [1998] 2 F.C. 3 (F.C.T.D.) at para. 20, Reed J. stated "neither a band nor a band council have corporate status; nor is either a natural person in the eyes of the law." She went on to note that a band has been described as an "unincorporated association of a unique nature, because it is created by statute rather than by consent of its members," and that other commentators have noted that "[t]he rights and obligations of the band are quite distinct from the accumulated rights and obligation of the members of the band ... [i]n law a band is in a class by itself".

¶ 108 Reed J. noted that in *Clow Darling Ltd.* v*. Big Trout Lake Band* (1989), 70 O.R. (2d) 56 (Ont. (Dist. Ct.)) the court stated "... a band council has the capacity to function and to take on obligations separate and apart from its individual members, as does a corporation ...". She quoted from *Joe* v. *Findlay* (1987), 12 B.C.L.R. (2d) 166 (S.C.), where the court stated "[t]his band council is elected by its members to exercise statutory and other rights and duties ...".

> ¶ 109 With respect to Charter actions brought in a representative form, the B.C. Court of Appeal recently refused standing to two trade unions who brought an action for breach of s. 2(d) of the *Charter* (which refers to "everyone") and sought relief under s. 24(1) not on their own behalf, but as agents on behalf of their members (*C.L.A.C*. v. *B.C. Transportation Financing* (2001), 91 B.C.L.R. (3d) 197).
>
> ¶ 110 The impugned Local Education Agreements are not between individuals. In my view a band is a representative body, and also a governing body, but a band does not stand in the place of the individual Indian children as argued by the Bands. A band is not a "human being". The Local Education Agreements are between levels of government or governing bodies. The Local Education Agreements provide for a funding route between levels of government, and enable the Bands to have input into the quality and nature of the education of their children. In no way is any parent of any child required under a Local Education Agreement, to pay on an individual basis for the schooling of his or her child contrary to the School Act. The Band or the Band Council as a party to a Local Education Agreement is acting in a governing or representative capacity. In this capacity it is taking on "rights and obligations separate and apart from its individual members".
>
> ¶ 111 It follows that the Bands and Band Councils are not individuals, and hence s. 15(1) of the *Charter* does not in this case apply to them."

[321] I agree with the analysis and conclusion of Garson J. and adopt them for the purposes of this case. Section 15 of the *Charter* is not available to Ermineskin in the case at bar. I therefore need not delve any further into the discrimination argument.

G. Costs

[322] Rule 400 of the *Federal Court Rules* sets out the Court's power to award costs. This power is entirely within the Court's discretion. Although I have found in favour of the Crown and that it is not liable for its handling of the Indian moneys, I will not award them their costs. Given the length and complexity of this action, as well as the important issues at stake, each party will bear its own costs

H. Conclusion

[323] For the Reasons set out herein, the action against the Crown is dismissed. Furthermore, as there is no liability on the part of the Crown for its conduct, I need not address the issues relating to limitations of actions.

MAX M. TEITELBAUM

JUDGE

CALGARY, Alberta
November 30, 2005

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1254-92

STYLE OF CAUSE: CHIEF JOHN ERMINESKIN ET AL v. HER MAJESTY THE QUEEN ET AL

PLACE OF HEARING: CALGARY, ALBERTA/SAMSON CREE NATION HOBBEMA, ALBERTA

DATE OF HEARING: **2000 MAY:** 1 to 4; 8 to 10; **JUNE:** 5 to 9; 12 to 15; 19 to 23; **OCTOBER:** 3 to 6; 11 to 13; 16 to 18; 30 to 31; **NOVEMBER:** 1; 7 to 9; 13 to 16; 27 to 30; **DECEMBER:** 4 to 7; 11 to 13; **2001 JANUARY:** 8 to 11; 15 to 17; 22 to 25; **MARCH:** 12; 14 to 15; 19 to 22; 26 to 29; **APRIL:** 2 to 5; 17 to 19; 30; **MAY:** 1 to 2; 14 to 17; 23 to 25; **JUNE:** 4 to 7; 11 to 14; 18 to 21; **SEPTEMBER:** 4 to 7; 10 to 12; **OCTOBER:** 1 to 4; 9 to 12; 15 to 18; 29 to 31; **NOVEMBER:** 1; 5 to 8; 12 to 15; 27 to 29; **DECEMBER:** 3, 5 to 6; 10 to 11; **2002 JANUARY:** 7 to 8; **MAY:** 6 to 9; 13 to 15; 21 to 24; **JUNE:** 3 to 5; 11 to 14; 19 to 20; **JULY:** 16; **AUGUST:** 26 to 30; **SEPTEMBER:** 10 to 13; 17 to 20; 30; **OCTOBER:** 1 to 3; 7 to 9; 15 to 17; 28 to 29; **NOVEMBER:** 12 to 15; 18 to 21; 25 to 28; **DECEMBER;** 2 to 5; 9; **2003 JANUARY:** 13 to 16; 20; 22 to 23; 27 to 30; **FEBRUARY:** 18 to 21; 24 to 27; **APRIL:** 7; 22 to 23; 29 to 30; **MAY:** 1 to 2; 12 to 16; 20 to 23; 26 to 28; **JUNE:** 9 to 13; 16 to 20; **SEPTEMBER:** 3 to 4; 9; 24; **OCTOBER:** 15 to 17; 20 to 22; 27 to 30; **NOVEMBER:** 3 to 5; 10 to 12; 26 to 28; **DECEMBER:** 1 to 4; **2004 JANUARY:** 12 to 15; 19 to 22; 26 to 29; **FEBRUARY:** 19; 23 to 25; **MARCH:** 24 to 26; 29 to 31; **APRIL:** 1 to 2; 13 to 16; 19 to 22; 26; 28 to 30; **MAY:** 10 to 14; 17 to 21; 25 to 27; **JUNE:** 6 to 8; 10 to 11; 22 to 25; **JULY:** 5 to 9; 13 to 16; 19 to 20; **NOVEMBER:** 30; **DECEMBER:** 1 to 3; 6 to 10; 13 to 17; 20 to 21; **2005 JANUARY:** 20 to 21;

REASONS FOR JUDGMENT : TEITELBAUM, J.

DATED: November 30, 2005

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