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Dockets: T-2022-89
T-1254-92

Citation: 2015 FC 836

Ottawa, Ontario, July 9, 2015

PRESENT: The Honourable Mr. Justice Russell

Docket: T-2022-89

BETWEEN:

CHIEF VICTOR BUFFALO ACTING ON HIS OWN BEHALF AND ON BEHALF OF ALL THE OTHER MEMBERS OF THE SAMSON INDIAN NATION AND BAND, AND THE SAMSON INDIAN BAND AND NATION

Respondents
(Plaintiffs)

and

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

Applicants
(Defendants)

Docket: T-1254-92

AND BETWEEN:

CHIEF JOHN 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 COUNCILORS OF THE ERMINESKIN INDIAN BAND AND NATION SUING ON THEIR OWN BEHALF AND ON BEHALFOF ALL THE OTHER MEMBERS OF THEERMINESKIN INDIAN BAND AND NATION

Respondents (Plaintiffs)

and

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

Applicants (Defendants)

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I. INTRODUCTION

[1] These are two motions for summary judgment. The Defendants (Applicants) [Canada] bring the same motion in actions T-2022-89 and T-1254-92 under Rule 213(1) of the *Federal Courts Rules*, SOR/98-106. Canada asks for summary judgment on the basis that the Plaintiffs' claims in both actions are time-barred. Due to the similarities in the factual background, the nature of the broader litigation of which these motions are a part, and the submissions before the Court, one set of reasons will be provided and filed in both T-2022-89 and T-1254-92. The Plaintiffs (Respondents) in action T-2022-89 will be referred to as the "Samson Plaintiffs" or "Samson," and the Plaintiffs (Respondents) in action T-1254-92 will be referred to as the "Ermineskin Plaintiffs" or "Ermineskin." Collectively, the Samson Plaintiffs and the Ermineskin Plaintiffs will be referred to as the Plaintiffs.

II. BACKGROUND

[2] These motions are brought in the context of ongoing litigation concerning oil royalties and taxes levied on oil produced on the Pigeon Lake Reserve [Reserve] between 1973 and 1985.

Samson and Ermineskin are two of the four First Nations with interests in the Reserve [collectively, "Four Bands"], and are both parties to Treaty No. 6.

[3] In 1946, Samson and Ermineskin surrendered their mineral interests in the Reserve to Canada [Surrender]. The Surrender allowed Canada to grant leases to oil and gas companies who paid royalties to Canada on behalf of Samson and Ermineskin.

[4] In January 1974, the *Oil Export Tax Act*, SC 1973-74, c 53 received royal assent with retroactive effect to October 1, 1973. The *Oil Export Tax Act* was part of a national strategy to ameliorate the domestic effects of rapidly rising international oil prices. The *Oil Export Tax Act* created a "made-in-Canada" oil price and imposed a tax on oil exports. The revenue from the export tax was intended to subsidize the cost of oil imports and the cost of Canadian oil production.

[5] The *Oil Export Tax Act* was replaced with the *Petroleum Administration Act*, SC 1974-75-76, c 47 which imposed an oil export charge and had retroactive effect to April 1, 1974. The cumulative effect of the *Oil Export Tax Act* and the *Petroleum Administration Act* was that oil exports were subject to a tax or charge from October 1, 1973 to June 1, 1985. The "made-in-Canada" oil price program constituted by the *Oil Export Tax Act* and the *Petroleum Administration Act* will be referred to as the "Program."

[6] The oil produced from the Reserve was subject to the price restrictions and export tax and charge. The funds received were deposited into the Consolidated Revenue Fund [CRF] with notional accounts kept to distinguish the amounts belonging to Samson and Ermineskin.

[7] The broader litigation raises issues of the amount of royalties collected, the amount that should or could have been collected, and the amounts properly credited to Samson and Ermineskin.

[8] The Samson Plaintiffs filed their Statement of Claim on September 29, 1989. They claim, *inter alia*, that Canada breached its trust, fiduciary, treaty and other obligations in failing to give full and proper effect to their constitutionally-protected royalty interests in the oil and gas produced on the Reserve and sold by the lessees. They claim that Canada improperly credited their royalties based on the "made-in-Canada" price, and seek a crediting to their CRF account of the royalty on the actual sales price of the exported oil. They also claim Canada has unjustly enriched itself by appropriating the difference between the domestic and international oil prices.

[9] The Ermineskin Plaintiffs filed their Statement of Claim on May 28, 1992. They claim Canada breached its trust and fiduciary duties by levying taxes on Ermineskin's royalty interests contrary to s 87 of the *Indian Act*, RSC 1985, c I-5 and by appropriating the difference between the domestic and international oil prices.

[10] Canada says these claims are barred by both statutory and equitable limitation periods.

[11] The Samson Plaintiffs filed a Notice of Constitutional Questions on May 25, 2000, and the Ermineskin Plaintiffs filed a Notice of Constitutional Questions on November 2, 2004. Consequently, the Attorney General of Alberta [Intervener] intervenes in this motion as of right in accordance with s 57 of the *Federal Courts Act*, RSC 1985, c F-7.

III. ISSUES

[12] Canada says there is no genuine issue to be tried with respect to the following:

1) Whether the Plaintiffs' claims are statute-barred because:

    a. The Plaintiffs knew of the facts giving rise to their claims more than six years prior to filing their Statements of Claim on September 29, 1989 and May 28, 1992; and,

    b. The applicable limitation period under the *Federal Courts Act* is six years, whether by referential incorporation of the Alberta legislation pursuant to s 39(1), or alternatively under s 39(2); and,

2) Whether the Plaintiffs' claims are barred by the equitable doctrines of laches and acquiescence.

[13] In their response to these motions, the Plaintiffs also raise a variety of issues that will be dealt with as part of the Court's analysis.

IV. STATUTORY PROVISIONS

[14] The following provisions of *Federal Courts Rules* are applicable in this proceeding:

Summary Judgment and Summary Trial	**Jugement et procès sommaires**
Motion and Service	**Requête et signification**
Motion by a party	**Requête d'une partie**
213. (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.	213. (1) Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l'égard de toutes ou d'une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heure, date et lieu de l'instruction soient fixés.
Further motion	**Nouvelle requête**
(2) If a party brings a motion for summary judgment or summary trial, the party may not bring a further motion for either summary judgment or summary trial except with leave of the Court.	(2) Si une partie présente l'une de ces requêtes en jugement sommaire ou en procès sommaire, elle ne peut présenter de nouveau l'une ou l'autre de ces requêtes à moins d'obtenir l'autorisation de la Cour.
Obligations of moving party	**Obligations du requérant**
(3) A motion for summary judgment or summary trial in an action may be brought by serving and filing a notice of motion and motion record at least 20 days before the day set out in the notice for the hearing of the motion.	(3) La requête en jugement sommaire ou en procès sommaire dans une action est présentée par signification et dépôt d'un avis de requête et d'un dossier de requête au moins vingt jours avant la date de l'audition de la requête indiquée dans l'avis.
Obligations of responding party	**Obligations de l'autre partie**
(4) A party served with a	(4) La partie qui reçoit

motion for summary judgment or summary trial shall serve and file a respondent's motion record not later than 10 days before the day set out in the notice of motion for the hearing of the motion.

signification de la requête signifie et dépose un dossier de réponse au moins dix jours avant la date de l'audition de la requête indiquée dans l'avis de requête.

Facts and evidence required

Faits et éléments de preuve nécessaires

214. A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.

214. La réponse à une requête en jugement sommaire ne peut être fondée sur un élément qui pourrait être produit ultérieurement en preuve dans l'instance. Elle doit énoncer les faits précis et produire les éléments de preuve démontrant l'existence d'une véritable question litigieuse.

If no genuine issue for trial

Absence de véritable question litigieuse

215. (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

215. (1) Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

Genuine issue of amount or question of law

Somme d'argent ou point de droit

(2) If the Court is satisfied that the only genuine issue is

(2) Si la Cour est convaincue que la seule véritable question litigieuse est :

[…]

[…]

(b) a question of law, the Court may determine the question and grant summary judgment accordingly.

b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.

Powers of Court	**Pouvoirs de la Cour**
(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may	(3) Si la Cour est convaincue qu'il existe une véritable question de fait ou de droit litigieuse à l'égard d'une déclaration ou d'une défense, elle peut :
(a) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or	a) néanmoins trancher cette question par voie de procès sommaire et rendre toute ordonnance nécessaire pour le déroulement de ce procès;
(b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.	b) rejeter la requête en tout ou en partie et ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.

[15] The following provisions of the *Federal Courts Act* are applicable in this proceeding:

Prescription and limitation on proceedings	**Prescription — Fait survenu dans une province**
39. (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.	39. (1) Sauf disposition contraire d'une autre loi, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale dont le fait générateur est survenu dans cette province.

Prescription and limitation on proceedings in the Court, not in province	**Prescription — Fait non survenu dans la province**
(2) A proceeding in the Federal Court of Appeal or the Federal Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.	(2) Le délai de prescription est de six ans à compter du fait générateur lorsque celui-ci n'est pas survenu dans une province.

[16] The following provisions of the *Limitation of Actions Act*, RSA 1980, c L-15 [*LAA*] are applicable in this proceeding:

> **LIMITATION PERIODS**
>
> 4(1) The following actions shall be commenced within and not after the time respectively hereinafter mentioned:
>
> […]
>
> (c) actions
>
> (i) for the recovery of money, other than a debt charged on land, whether recoverable as a debt or damages or otherwise, and whether on a recognizance, bond, covenant or other specialty or on a simple contract, express or implied, or
>
> (ii) for an account or for not accounting,
>
> within 6 years after the cause of action arose;
>
> (e) actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with, within 6 years from the discovery of the cause of action;
>
> (g) any other action not in this Act or any other Act specifically provided for, within 6 years after the cause of action therein arose.
>
> […]
>
> 6 When the existence of a cause of action has been concealed by the fraud of the person setting up this Part or Part 2 as a defence,

> the cause of action shall be deemed to have arisen when the fraud was first known or discovered.
>
> […]
>
> **TRUSTS AND TRUSTEES**
>
> 40 Subject to the other provisions of this Part, no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of a breach of the trust, shall be held to be barred by this Act.
>
> 41(1) In this section, "trustee" includes an executor, an administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee, and also includes a joint trustee.
>
> (2) In an action against a trustee or a person claiming through him,
>
> (a) rights and privileges conferred by this Act shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in the action if the trustee or person claiming through him had not been a trustee or person claiming through a trustee and
>
> (b) if the action is brought to recover money or other property and is one to which no limitation provision of this Act applies, the trustee or person claiming through him is entitled to the benefit of and is at liberty to plead the lapse of time as a bar to the action in the like manner and to the same extent as if the claim had been against him in an action for money had and received, except when the claim is founded on a fraud or fraudulent breach of trust to which the trustee was a party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use.
>
> (3) Notwithstanding subsection (2), the limitation provisions in this Act do not begin to run against a beneficiary unless and until the interest of the beneficiary becomes an interest in possession.

[17] The following provisions of the *Judicature Act*, RSA 1980, c J 1 are applicable in this proceeding:

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

V. ARGUMENT

A. *Canada*

[18] Canada says that summary judgment is granted when the Court determines there is "no genuine issue for trial": *Federal Courts Rules*, Rule 215. Rule 215 seeks to avoid the costs associated with allowing unmeritorious claims to proceed to trial: *Canada (Attorney General) v Lameman*, 2008 SCC 14 at para 10 [*Lameman* SCC]. The applicant has the onus of showing there is no genuine issue for trial. If the applicant discharges its burden, the respondent must refute or counter the applicant's evidence or risk summary dismissal: *Federal Courts Rules*, Rule 214; *Lameman* SCC, above, at para 11.

[19] On a motion for summary judgment, the Court may make inferences of fact based on the evidence before it: *Lameman* SCC, above, at para 11; *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2004 ABQB 655 at paras 60-61 [*Lameman* ABQB]. In these actions, the record clearly establishes that the Plaintiffs had the requisite knowledge of their claims long before any limitation periods expired. Their claims ought to be determined by summary judgment because they are large and complex claims which are doomed to fail.

[20] Legal proceedings must be commenced on a timely basis: *Abbott v Canada*, 2005 FC 163, aff'd 2006 FCA 342, leave to appeal to SCC refused, 31816 (May 10, 2007) [*Abbott*]; *Abbott v Canada*, 2007 FC 1338 at paras 11-13; *Tacan v Canada*, 2005 FC 385 at paras 78-85 [*Tacan*]; *Canada (Fisheries and Oceans) v Perrot*, 2009 NLTD 172 at paras 27-40. The Plaintiffs knew the material facts for the purposes of these claims from the inception of the

Program. The Plaintiffs chose to pursue political solutions to their grievances, but this did not postpone the running of the relevant limitation period.

[21] There is no merit to the Plaintiffs' constitutional claims regarding s 39 of the *Federal Courts Act*. Aboriginal claims are not constitutionally immune from the operation of limitation periods: *Lameman* SCC, above; *Wewaykum Indian Band v Canada*, 2002 SCC 79 [*Wewaykum*]; *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at paras 106-122 [*Blueberry River*]; *Kruger v The Queen* (1985), [1986] 1 FC 3 at 54-56 (CA) [*Kruger*]. Limitation periods do not extinguish constitutionally-protected Aboriginal and treaty rights. They simply impose time limits on the commencement of legal proceedings. This merely bars the pursuit of a remedy. The Ontario Court of Appeal has also rejected the argument that equitable limitation periods are invalid because they operate to extinguish Aboriginal rights: *Chippewas of Sarnia Band v Canada (Attorney General)* (2000), 51 OR (3d) 641 at paras 262-267, 291, 297-302 (CA) [*Chippewas*], leave to appeal to SCC refused 28365 (November 8, 2001). The Supreme Court of Canada confirmed the Ontario Court of Appeal's decision in *Wewaykum*, above, at paras 110-112.

[22] The Supreme Court of Canada has also rejected the argument that the application of limitation periods is inconsistent with Canada's special fiduciary relationship with Aboriginal peoples: *Wewaykum*, above, at paras 121-124; *Blueberry River*, above, at paras 106-122; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 138, 143, 145 [*Manitoba Metis*]. While the majority in *Manitoba Metis* found that the declaratory relief sought was exempt from a limitations defence, the Supreme Court of Canada restricted its

analysis to the specific constitutional claim before the Court (at para 134); see also *Peepeekisis Band v Canada*, 2013 FCA 191 at para 54 [*Peepeekisis* FCA]). The Plaintiffs' claims are properly characterized as claims for breaches of statutory or fiduciary duties and so fall outside of the narrow constitutional exception established in *Manitoba Metis*, above, at paras 72, 81.

[23] Section 39 of the *Federal Courts Act* is applicable to the Plaintiffs' claims. The Court only needs to decide whether s 39(1) or s 39(2) applies. Canada submits that s 39(1) is applicable. All elements of the claims arose in Alberta and so s 39(1) referentially incorporates Alberta's limitations legislation: see *Ermineskin v Canada*, 2006 FCA 415 at paras 323-326, Sexton JA, dissenting [*Ermineskin* FCA]. Under the *LAA*, the applicable limitation period is six years: see *Stoney Tribal Council v PanCanadian Petroleum Ltd*, 2000 ABCA 209 at paras 27-32; *Lameman* ABQB, above, at para 127.

[24] In response to Samson's submission that Samson's claim arose in Ontario, Canada submits that were the Court to find that some elements of the claim have a connection to Ontario while others have a connection to Alberta, this could lead to a finding that the cause of action arose in more than one province so that s 39(2) of the *Federal Courts Act* would apply. However, s 39(2) also provides for a six-year limitation period: *Markevich v Canada*, 2003 SCC 9 at para 38 [*Markevich*]; *Apotex Inc v Pfizer Canada Inc*, 2004 FC 190 at paras 14-18.

[25] If the Court characterizes the claims as concerning breach of fiduciary duty, then s 4(1)(e) of the Alberta *LAA* applies. The limitation period is then six years from the date of actual discovery of the claims: *Austec Electronic Systems Ltd v Mark IV Industries Ltd*, 2001 ABQB

349 at para 30; *Ermineskin* FCA, above, at para 334, Sexton JA, dissenting. The record clearly establishes that the Plaintiffs and their legal counsel had full knowledge of the Program and its impact upon their royalty entitlements from the time of its inception in 1973.

[26] If the claims are found to relate to an alleged breach of any other duty, then s 4(1)(g) of the Alberta *LAA* applies. This “catch-all” provision provides that the six-year limitation period commences from the time the claim was discovered or discoverable.

[27] Contrary to the Plaintiffs’ assertions, there can be no claim for breach of common law trust obligations. Canada’s actions cannot give rise to common law trust duties to the Plaintiffs when it acts in accordance with its obligations to all of Canada. In earlier proceedings, the Supreme Court of Canada found that neither Treaty No. 6, the 1946 Surrender, nor the *Indian Oil and Gas Act*, SC 1974-75-76, c 15 supported an intention to impose the duties of a common law trustee on Canada with respect to the Plaintiffs’ royalties: *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 at paras 50, 72-74, 85 [*Ermineskin* SCC]. The revenue obtained pursuant to the oil tax and charge was never a trust asset beneficially belonging to the Plaintiffs. It came from the oil companies and not the Plaintiffs. The only trust funds were the royalties paid to Canada by the oil companies and held in trust for the Plaintiffs. These are not the funds at issue in this motion; the Plaintiffs are claiming for additional funds which they never received.

[28] In any event, even if the Court finds the claim is properly characterized as a breach of trust, the limitation period remains six years. The Alberta Court of Queen’s Bench has already interpreted the interaction between the *Judicature Act* and the Alberta *LAA* and has held that

limitation periods apply to claims for breach of trust commenced between 1980 and 1999: *Lameman* ABQB, above, at para 123; see also *Ermineskin* FCA, above, at paras 327-332, Sexton JA, dissenting. There are only two exceptions to the limitation periods applicable to a breach of trust (*Lameman* ABQB, above, at para 126): (1) if the trustee is still in possession of the trust property or the proceeds of the trust property, or has converted the trust property for his or her own use; or (2) if the trustee has engaged in fraudulent breaches of trust. Neither of these exceptions is applicable in this proceeding. As a result, the six-year limitation period remains applicable, even if the claim is properly characterized as a breach of trust.

[29] Canada rejects the Plaintiffs' claim that the relevant limitation periods have not commenced because their interest in the royalties that Canada received is not an interest in possession. Canada says that the Plaintiffs enjoyed a present right to receive the royalties throughout the time the oil tax and charge was collected. This right was an interest in possession and the Plaintiffs have received their full entitlement under that right.

[30] Canada submits that discoverability suspends the running of a limitation period until the material facts upon which a cause of action is based are discovered, or ought to have been discovered, by the plaintiff exercising reasonable diligence: *Central Trust Co v Rafuse*, [1986] 2 SCR 147 at 224; *Lameman* ABQB, above, at para 136. Discoverability applies to facts, not law: *Luscar Ltd v Pembina Resources Ltd*, 1994 ABCA 356 at para 129 [*Luscar Ltd*]; *Ermineskin* FCA, above, at para 334, Sexton JA, dissenting; *Lameman* SCC, above, at paras 16-17. A claim is discovered when the plaintiff knows all of the facts it needs to know to bring its action: *Luscar Ltd*, above, at para 138; *Ermineskin* FCA, above, at para 334, Sexton JA, dissenting; *Lameman*

SCC, above, at paras 16-17. The principle of discoverability applies to all statutory limitation provisions unless there is clear legislative language in place to displace the rule: *Peixeiro v Haberman*, [1997] 3 SCR 549 at para 38.

[31] Canada says the distinction between actual discovery and discoverability is irrelevant in this proceeding. The Plaintiffs knew all the facts required to make their claims in the 1970s and discovered their claims well before the six-year limitation period expired. The Plaintiffs were sophisticated, well informed, and used a variety of professional and legal advisors as early as the 1970s. The use of legal advisors by an Indian Band is a significant factor in determining discoverability: *Wewaykum*, above, at paras 57, 123; *Kruger*, above, at para 90; *Lameman* ABQB, above, at para 139. Crown officials shared information with the Plaintiffs' legal counsel, including the substance of legal opinions, throughout the development and implementation of the Program. There is nothing to rebut the evidence that Canada advised the Plaintiffs that their claims for a return of the oil tax had been rejected in the mid-1970s. There is evidence that the Plaintiffs considered commencing litigation in 1981. As a result, December 1987 was the very latest that the Plaintiffs could have started their actions without being barred by a limitations defence.

[32] Canada also disputes the Plaintiffs' submission that their claims are based on continuing breaches. The Supreme Court of Canada rejected this proposition in *Wewaykum*, above, at para 135; see also *Huang v Drinkwater*, 2005 ABQB 40 at paras 73-77 [*Huang*]; *Alberta Municipal Retired Police Officers' Mutual Benefit Society v Alberta*, 2010 ABQB 458 at paras 79, 83-85, 92 [*Mutual Benefit Society*]. The Plaintiffs' claims crystallized in the mid-1970s.

[33] However, even if the claims could be properly characterized as recurring or continuing breaches, then they are limited to the breaches arising six years before the claims were filed: see *Chitty on Contracts*, 29th Ed, London: Sweet & Maxwell, 2004 cited in *James H Meek, Jr Trust v San Juan Resources Inc*, 2005 ABCA 448 at para 48; see also *Epcor Power LP v Petrobank Energy and Resources Ltd*, 2010 ABQB 463 at para 73, aff'd 2010 ABCA 378 [*Epcor Power*]. As such, the Plaintiffs could only succeed in regard to any incremental royalty amounts payable within the six years prior to the commencement of their actions.

[34] Finally, Canada submits that equitable limitation periods apply to Aboriginal claims: *Wewaykum*, above, at paras 110-111. The Plaintiffs' claims are barred by both laches and acquiescence.

B. *Samson Plaintiffs*

[35] Samson says that the Supreme Court of Canada recently recast the test for summary judgment in *Hryniak v Mauldin*, 2014 SCC 7 at para 49 [*Hryniak*]:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[36] The Supreme Court of Canada has explained that what is "fair and just" depends on the nature of the issues, the nature and strength of the evidence, and the selection of the proportional procedure. A partial summary judgment is not in the interests of justice when it runs the risk of

duplicative proceedings or inconsistent findings of fact. The oil tax and charge issues in the present case are one piece of a large action. Summary judgment would simply bifurcate the further phases of the action.

[37] The Court can only make "findings of fact or law where the relevant evidence is available on the record and does not involve a serious question of fact or law which turns on the drawing of inferences": *Source Enterprises Ltd v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 966 at paras 14-21 [*Source Enterprises*], citing *Apotex Inc v Merck & Co*, 2002 FCA 210. Material findings of fact in this motion could prejudice the Samson Plaintiffs' claims in the broader action. This motion is an inappropriate attempt to minimize Canada's exposure to damages. Canada has already acknowledged that it is liable for six years of damages (Canada's April 15, 2000 "Position on the Issues").

[38] The Samson Plaintiffs characterize their claims as involving breaches of treaty rights, the *sui generis* fiduciary relationship it shares with Canada, and the express trust under which Canada took possession, management and control of Samson's mineral rights on the Reserve. This trust is governed by both common law and statute (the *Indian Oil and Gas Act* and the *Indian Act*). Canada is an express trustee who has committed a breach of trust. The Samson Plaintiffs seek an accounting and recovery of the trust property and money that Canada received, held, managed, and retained on behalf of Samson.

[39] Canada's trust, fiduciary, and trust-like obligations to Samson are rooted in the historic relationship between Canada and Aboriginal peoples and the text of Treaty No. 6. Parliament

does not have the authority to create limitation periods to extinguish the Samson Plaintiffs' claims. Canada must express its intention to extinguish an Aboriginal right in "clear and plain" language: *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313 [*Calder*]. This requires "clear evidence that [Canada] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty" right: *R v Van der Peet*, [1996] 2 SCR 507 at para 286 [*Van der Peet*], quoting *United States v Dion*, 476 US 734 (1986) at 739-740. The Ontario Court of Appeal has applied the "clear and plain" test to limitations statutes: *Chippewas*, above, at para 229. Limitations legislation constitutes substantive, rather than procedural limits, on a cause of action: *Tolofson v Jensen*; *Lucas (Litigation Guardian of) v Gagnon*, [1994] 3 SCR 1022 at 1070-1071 [*Tolofson*]. The application of s 39 of the *Federal Courts Act* would constitute not only a substantive bar to the Samson Plaintiffs' treaty rights but would extinguish any part of their claim arising before September 1983. However, Parliament did not use "clear and plain" language in s 39 of the *Federal Courts Act* to create a limitation period for the Samson Plaintiffs' Aboriginal rights claims. Provincial law cannot extinguish treaty rights even if incorporated into federal legislation.

[40] The application of a limitations statute to eliminate Samson's royalty interest would render Samson's treaty right to the minerals underlying the Reserve meaningless. The ability to enforce Samson's rights is an integral party of its bundle of treaty rights. Samson's treaty rights existed prior to s 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 and so prevail over inconsistent legislation: *R v Sparrow*, [1990] 1 SCR 1075 at 1105-1109 [*Sparrow*]; *R v Marshall*, [1999] 3 SCR 456 at paras 48, 67; *Reference re Secession*

of Quebec, [1998] 2 SCR 217 at para 72. Since 1982, limitations statutes do not apply *per se* to Aboriginal claims but must first meet the test for infringement and justification: *Sparrow*, above. This requires that: (1) the government must demonstrate that it was acting pursuant to a valid legislative objective; and (2) that the government demonstrate its actions are consistent with its fiduciary duty towards Aboriginal peoples: *R v Gladstone*, [1996] 2 SCR 723 at paras 54-55 [*Gladstone*]. Canada has not presented any evidence or argument to justify the infringement. Neither the *Oil Export Tax Act* or the *Petroleum Administration Act* express any need to appropriate First Nations' royalty interests. Canadian consumers' interests were protected without the need to resort to appropriation. The Court cannot find justification in the absence of evidence from Canada: *R v Badger*, [1996] 1 SCR 771 at para 98 [*Badger*]. Special consideration must also be given to the Honour of the Crown: *Badger*, above, at para 97. Canada is invoking a limitations defence to avoid liability for conduct which is inconsistent with the Honour of the Crown, treaty principles and trust principles.

[41] Samson says that if the Court finds that s 39(1) of the *Federal Courts Act* is constitutionally valid and enforceable, the Court should apply the equitable principle which prevents a fiduciary from setting up a statute of limitations to bar a plaintiff's suit: *Taylor v Davies* (1919), [1920] 1 WWR 683 at para 19, 51 DLR 75 (PC) [*Taylor*].

[42] If the Court applies s 39(1) of the *Federal Courts Act*, Ontario is the proper *situs* of this action. The legal *situs* of Her Majesty's Government of the Dominion of Canada is the Parliament Buildings in Ottawa, Ontario: *Constitution Act, 1987*, s 16; *Canadian Pacific Railway Company v Outlook (Town)*, [1924] 3 WWR 494 at para 7 (SKQB). Both the Receiver General

and the CRF are located in Ottawa, Ontario and so Canada's breaches respecting the management of the funds took place in Ontario. Further, in actions respecting the administration of a trust, the law of the residence of the trustee applies: Donovan W.M. Waters, QC, ed, *Waters' Law of Trusts in Canada*, 3rd ed (Toronto: Thomson Canada Ltd, 2005) at 1379-1380; *Branco v Veira* (1995), 8 ETR (2d) 49, [1995] OJ no 1071 (QL) at paras 19-22 (CJ). If s 39(1) of the *Federal Courts Act* applies then it incorporates Ontario's limitations legislation.

[43] Under the Ontario *Limitations Act*, RSO 1980, c-240, a trustee cannot use a limitations defence to bar a claim from a beneficiary to recover trust property or the proceeds of trust property that the trustee still retains: s 43(2); *Lameman* ABQB, above, at paras 127, 149. Absent evidence regarding what the trustee used the trust property for, the Court will assume the trust property was retained and is held by a trustee: *Wassell v Leggatt*, [1896] 1 Ch D 554 at 558; *In Re Eyre-Williams*, [1923] 2 Ch D 533 at 541. The Ontario *Limitations Act* also prevents a trustee from barring a claim against trust property that a trustee has converted to his or her own use: s 43(2); *In Re Sharpe*, [1906] 1 Ch D 793. Canada has retained the funds for its own benefit without Samson's consent. Contrary to Canada's submissions, Justice Rothstein did not find that Canada owed no common law trust duties in relation to the oil royalties. Justice Rothstein found that Canada was a fiduciary with trust-like capabilities. He only found that Canada had no common law trust duty to invest the Band's funds: *Ermineskin* SCC, above, at paras 72, 181.

[44] If the Court finds that none of these barriers to a trustee relying on limitation periods applies, then the Samson Plaintiffs say there is no limitation period applicable to their beneficial interest because it cannot be characterized as a common law property interest in possession:

Guerin v The Queen, [1984] 2 SCR 335 at 382 [*Guerin*]; *St Mary's Indian Band v Cranbrook (City)*, [1997] 2 SCR 657 at paras 14-16. In the alternative, Samson's interest became an interest in possession in 2006 when Canada paid Samson the monies it held in trust in the CRF.

[45] If the Court finds a six-year limitation period applies, then the time period did not begin to run until the Samson Plaintiffs discovered, or ought reasonably to have discovered, the facts with respect to the remedy they seek: *Mackey Estate v Mackey* (1986), 24 ETR 174 at para 25, [1986] OJ no 410 (QL)(SCJ). A breach of trust or trust-like obligations is not discoverable until the beneficiary appreciates that there has been an actionable breach of the fiduciary obligation: *M(K) v M(H)*, [1992] 3 SCR 6 at 47-48; *Switzer v Switzer* (1995), 176 AR 150 at para 13 (QB) [*Switzer*]. The Federal Court of Appeal has held that, before *Guerin*, "it could not be said that the reasonable plaintiff would have viewed the band's cause of action [breach of Canada's fiduciary duty] as having 'a reasonable prospect of success'": *Semiahmoo Indian Band v Canada* (1997), [1998] 1 FC 3 at para 86, 148 DLR (4th) 523 (CA) [*Semiahmoo*]; see also *Blueberry River*, above. In the present case, Canada had exclusive possession of the relevant facts and information. The Samson Plaintiffs could not have been aware of the potential cause of action for the underpayment of the royalties due and owing on exported Reserve oil. They commenced their action within six years after the cause of action was reasonably discoverable or discovered.

[46] If the Court does not apply the trustee limitation periods, then there is no doubt that Canada was acting and holding Samson's property as a fiduciary. There is no limitation period for a breach of fiduciary duty under Ontario limitations statutes: *M(K) v M(H)*, above, at 70; *Chippewas of Sarnia Band v Canada (Attorney General)*, [1999] OJ no 1406 (QL) at para 506 (SCJ). Further, Ontario's limitations statute does not include a "catch-all" provision. Every possible limitation period is included in the statute.

[47] If the Court finds that Alberta's limitations legislation is referentially incorporated and applicable under s 39 of the *Federal Courts Act*, then the Samson Plaintiffs submit that no limitations statute can bar a claim from a beneficiary against a trustee: *Judicature Act*, s 14. The Alberta *Judicature Act* was in force when the Samson Plaintiffs brought their claim. It expressly and constitutionally overrides s 41 of the Alberta *LAA*: *Chaba v Chaba* (1995), 166 AR 392 at para 11 (QB); *Taylor*, above, at para 19; *Soar v Ashwell*, [1893] QB 390 at 394, 397 (Eng CA); *Gregory v Torquay Corporation*, [1911] 2 KB 556 at 559-561 (Eng CA); *In re Fountaine*, [1909] 2 Ch D 382 at 389-392 (Eng CA). If the Court does not apply the Alberta *Judicature Act*, then the Samson Plaintiffs reiterate their earlier arguments on the six-year trustee limitation period.

[48] The Alberta *LAA* requires actual discovery of the facts which led to the cause of action in a claim for damages arising from a breach of trust or fiduciary obligations: s 4(1)(e); *Seidel v Kerr*, 2003 ABCA 267 at para 59 [*Seidel*]. Actual discovery requires that the beneficiary appreciate that there has been an actionable breach of a fiduciary obligation: *M(K) v M(H)*, above; *Switzer*, above, at para 13.

[49] Further, the Alberta *LAA* provides that "[w]hen the existence of a cause of action has been concealed by the fraud of the person setting up this Part or Part 2 as a defence, the cause of action shall be deemed to have arisen when the fraud was first known or discovered" (s 6). Canada did not disclose the actual volume of Reserve oil sold into the United States or the prices paid for the oil at any time between 1973 and 1985.

[50] If the Court applies a six-year limitation period, the Samson Plaintiffs say they are still entitled to recover damages for losses from September 1983 to September 1989, and a full trial of the oil tax and oil charge issue will be required.

[51] There is no basis for the application of the equitable doctrines of laches or acquiescence. Given the historic, legally unique and fiduciary relationship between Canada and Samson, the balance of justice lies in favour of Samson.

C. *Ermineskin Plaintiffs*

[52] Ermineskin says that the expansion of summary judgment powers in *Hryniak* is inapplicable to the summary judgment procedure under the *Federal Courts Rules* because the Ontario rules of civil procedure incorporate elements of a summary trial into a summary judgment. Under the *Federal Courts Rules*, and in other jurisdictions like British Columbia, the powers under a summary judgment and a summary trial remain distinct: see *Century Services Inc v LeRoy*, 2014 BCSC 702 at paras 82-88 [*Century Services*]; *NJ v Aitken Estate*, 2014 BCSC 419 at paras 33, 38 [*Aitken Estate*]; *The Owners, Strata Plan BCS 1348 v Travelers Guarantee Company of Canada*, 2014 BCSC 1468 at paras 57-62; *Canada (Citizenship and Immigration) v Savic*, 2014 FC 523 at para 15. However, the Supreme Court of Canada's warning to exercise caution against "litigating in slices" in summary judgment procedures applies regardless of the jurisdiction and applicable rules of procedure: see *Century Services*, above, at paras 89-90; *Aitken Estate*, above, at paras 36, 39-44; *International Sausage House Ltd v Hammer*, 2014 BCSC 1442 at para 102.

[53] The Court's discretion to answer a question of law or fact under Rule 215 of the *Federal Courts Rules* is limited and should only be exercised where the question: (a) is not a serious or difficult question of fact or law which turns on the drawing of inferences; (b) can be decided on the material before the Court; and, (c) can be separated from the other pending issues in the

action: see *Macneil v Canada*, 2004 FCA 50 at para 33; *Grainville Shipping Co v Pegasus Lines Ltd*, [1996] 2 FC 853 at para 8, 111 FTR 189 [*Grainville Shipping*]; *Potskin v Canada*, 2006 FC 1469 at paras 8, 10, 16, 28. It is rare that questions of discovery or discoverability will be suitable for determination by way of summary judgment: *Aguonie v Galion Solid Waste Material Inc* (1998), 38 OR (3d) 161, 156 DLR (4th) 222 at para 36 (CA); *Apotex Inc v Eli Lilly and Company*, 2005 FCA 361 at para 56; *Clay v Yassin* (2002), 62 OR (3d) 676, [2002] OJ no 5122 (QL) at paras 22-24 (SCJ); *Sheeraz v Kayani* (2009), 99 OR (3d) 450, [2009] OJ no 3751 at paras 35, 40 (SCJ).

[54] The Court also retains a residual discretion to decline to grant summary judgment if it would be unjust to do so: *Grainville Shipping*, above, at para 8. The novel questions of law arising in this proceeding should not be decided on a motion for summary judgment: *Pyrrha Design Inc v 623735 Saskatchewan Ltd*, 2004 FCA 423 at para 13 [*Pyrrha Design*]; *Royal Bank v Société Générale (Canada)* (2006), 219 OAC 83, [2006] OJ no 5081 at paras 51-55 (CA) [*Royal Bank*]. Further, Ermineskin's claim for declaratory relief is not subject to any limitations period and will remain outstanding after this motion: *Manitoba Metis*, above.

[55] The Ermineskin Plaintiffs submit that s 39 of the *Federal Courts Act* is of no force and effect in relation to their claims. Canada's obligations under the Surrender have their source in Treaty No. 6 and so are constitutionally protected by s 35 of the *Constitution Act, 1982*: see e.g. *Ermineskin* SCC, above, at para 54; *Badger*, above, at paras 51-53. The Federal Court of Appeal has held that Canada owes trust and fiduciary duties to Ermineskin based on Treaty No. 6: *Ermineskin* FCA, above, at para 110, aff'd *Ermineskin* SCC, above, at paras 54-67. Section 39 of

the *Federal Courts Act* unjustifiably infringes Ermineskin's treaty right to "insist that its reserve interests, including its mineral interests as surrendered to the Crown, are managed in the manner most advantageous to the Ermineskin people" (Ermineskin Memorandum at para 46). No cases have determined the applicability of limitations legislation to treaty rights, and it is inappropriate for the Court to consider a constitutional question at first instance on a motion for summary judgment: *Pyrrha Design*, above, at para 13; *Royal Bank*, above, at paras 5-55. It would be unprecedented and unjust for the Court to rule on the nature or scope of a First Nation's treaty rights on a motion for summary judgment.

[56] No legislation may unjustifiably infringe treaty rights and, to the extent that an enactment does so, it is constitutionally inapplicable to the right in question: *Constitution Act, 1982*, s 35; *Badger*, above, at paras 74-82. A treaty right is *prima facie* infringed where there is more than an insignificant interference with that right: *R v Morris*, 2006 SCC 59 at para 53; *Badger*, above, at para 90. Ermineskin asserts a treaty right to insist that Canada act as Ermineskin's trustee or fiduciary in connection with the management of Ermineskin's oil and gas reserves and the proceeds therefrom. A limitation period which bars the ability to pursue this claim is a substantive and significant interference with a treaty right.

[57] The infringement of a constitutionally-protected treaty right must be justified by demonstrating that: (a) the relevant provisions were enacted, and were made applicable to the constitutionally-protected right, pursuant to a "valid legislative objective"; and, (b) the manner in which the objective is or was attained upholds the Honour of the Crown: see *Sparrow*, above, at 1110, 1114; *Gladstone*, above, at para 54; *Badger*, above, at paras 96-97. Clear evidence of

justification is required: *R v Sundown*, [1999] 1 SCR 393 at para 46. Canada's efforts to protect itself from legitimate First Nations' claims cannot constitute a sufficiently compelling and substantial objective to justify interfering with the exercise of treaty rights. The policy objectives underlying limitations legislation must be balanced with the Honour of the Crown in a Crown-Aboriginal context: *Manitoba Metis*, above, at para 141. Canada is required to demonstrate that it turned its mind to, and sought to accommodate, the unique nature of Aboriginal and treaty rights in enacting s 39 of the *Federal Courts Act*. However, there is no evidence from Canada of this before the Court. Further, federal legislation which incorporates provincial legislation by reference cannot extinguish an Aboriginal or treaty right because of the constitutional barriers preventing provincial legislation from extinguishing an Aboriginal or treaty right: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 172-183.

[58] If the Court finds that s 39 of the *Federal Courts Act* is applicable to this proceeding, the Ermineskin Plaintiffs agree with Canada that the applicable section is s 39(1) and that Alberta's legislation is referentially incorporated. The Ermineskin Plaintiffs submit that their claims are properly characterized as claims for breach of an express trust. No limitation period applies to bar a beneficiary from claiming for his or her property against a trustee under the limitations law of Alberta: *Judicature Act*, s 14; *LAA*, s 40. Ermineskin adopts Samson's submissions that s 14 of the Alberta *Judicature Act* overrides the general limitations legislation. Ermineskin merely adds that the trust at issue in this proceeding is unusual in the sense that it is indefinite in duration and its beneficiary is a collective composed of both present and future Band members. When a beneficiary is a collective, future generations of the collective should not be foreclosed from requiring the trustee to account for its actions over the duration of the trust.

[59] If the Court finds the claims are more properly characterized as a breach of fiduciary duty, then Ermineskin says that the applicable limitation period began to run when the Ermineskin Plaintiffs actually discovered that Canada had breached its fiduciary duty. Ermineskin adopts Samson's characterization of the fiduciary breach but adds that Canada failed to act in Ermineskin's best interests when it did not examine and pursue taking Ermineskin's royalties in kind. The Ermineskin Plaintiffs say they did not learn that Canada had failed to properly evaluate avoiding the oil tax and charge for oil taken from the Reserve until May 1986.

[60] The Supreme Court of Canada has recognized that Canada's duties as a fiduciary may include those of a common law trustee: *Ermineskin* SCC, above, at paras 68, 73-74, 82-83. A trustee must act honestly and with the level of skill and prudence which would be expected of the reasonable person administering his own affairs. The "ordinary prudent man" would not attempt to manage a trust of the magnitude of the Ermineskin's royalty interests without the assistance of skilled advisors: *Re Miller Estate* (1987), 26 ETR 188, [1987] OJ no 2409 (QL) at paras 7-8 (Surr Ct); *Cowan v Scargill*, [1984] 2 All ER 750 at 762 (Ch Div). Canada failed to allocate sufficient resources to the agency charged with the administration of Ermineskin's oil and gas resources. As a result, the Bands were ill-informed and uneducated regarding their resources and what Canada was doing on their behalf.

[61] If the Court finds that the Alberta *Judicature Act* does not apply, then the Ermineskin Plaintiffs submit that their claim is for an "equitable ground of relief" and s 4(1)(e) of the Alberta *LAA* applies. Section 4(1)(e) provides that the limitation period does not start until discovery of the cause of action. In *Semiahmoo*, the Federal Court of Appeal found that the limitation period

did not commence until Canada had made full disclosure of all the relevant facts to the Band (above, at para 82). The Ermineskin Plaintiffs acknowledge that they immediately pursued a rebate of the funds that Canada was collecting. However, there is no evidence that Ermineskin was aware, prior to commencing this action, that Canada failed to adequately consider and pursue the option of taking royalties in kind. The circumstances of the plaintiff must be taken into account in determining when actual discovery occurred: *Seidel*, above, at para 59; *VAH v Lynch*, 2008 ABQB 448. The evidence in the present case demonstrates that many Band representatives lacked the requisite knowledge to independently manage their oil and gas assets, as well as the information relating to Canada's obligations in relation to Ermineskin. Further, the relationship between Canada and Ermineskin fostered a "culture of dependency." As the Federal Court of Appeal held in *Semiahmoo*, "it was not until the Supreme Court's 1984 decision in *Guerin* that courts clearly began to recognize a cause of action against the Crown for breach of fiduciary duty in land surrenders" (above, at para 84). Ermineskin says that, prior to May 1986, it lacked the base level of knowledge necessary to enable it to properly instruct its advisors and understand the advice it received. Further, Ermineskin and its advisors were required to rely on Canada's information and analysis regarding the royalties.

[62] Finally, the Ermineskin Plaintiffs submit that their claims are not barred by laches and acquiescence. The Supreme Court of Canada has confirmed that "it is rather unrealistic to suggest that the Métis sat on their rights before the courts were prepared to recognize those rights" (*Manitoba Metis*, above, at para 149). It took time for the implications of the *Guerin* decision to become apparent after it was released. Further, there is no reason to distinguish the Ermineskin claim from the Samson claim as they are both beneficiaries of the same trust. The

Samson Plaintiffs started their claim within six years of the end of the Program. At the most, the Samson Plaintiffs' claim is only partially time barred. There is no prejudice to Canada from the Ermineskin Plaintiffs' delay in bringing their action because Canada has been aware of the nature of the claim since the Samson Plaintiffs commenced their proceeding.

[63] If the Court applies any limitation period to the claims, Ermineskin submits that the doctrine of equitable fraud applies to postpone the limitation period. In the context of equitable fraud, "fraud" merely means "unconscionable" conduct: *M(K) v M(H)*, above, at 56-57. In *Guerin*, the Supreme Court of Canada found "equitable fraud" in Canada's failure to disclose to the plaintiff the terms of the lease Canada had entered into on the Band's behalf (at 355). "Fraudulent concealment" is also a bar to the application of the *LAA*, s 6.

D. *Canada's Reply Submissions*

[64] Canada submits that the Plaintiffs have failed to show that there is a genuine issue for trial. Their submissions focus on the substantive merits of their claims rather than the limitations issue before the Court. Complexity of legal issues does not render summary judgment inappropriate. Also, the evidence is clear that Canada considered the option of taking royalties in kind but was obligated to make a policy decision that balanced the Plaintiffs' interests with all other relevant interests. The Plaintiffs and their legal counsel were aware of all of the facts.

[65] Canada also submits that the policy principles developed in *Hryniak* are applicable to the *Federal Courts Rules*: *Hryniak*, above, at para 35; see also *Lac Seul First Nation v Canada*, 2014 FC 296 at paras 8-10 [*Lac Seul*]; *JEKE Enterprises Ltd v Philip K Matkin Professional Corp*,

2014 BCCA 227 at para 44; *Spring Hill Farms Limited Partnership v Nose*, 2014 BCCA 66 at para 21. However, the Court's warnings regarding litigating in slices is not applicable to this proceeding because that commentary was made in the context of a motion for summary judgment against only one of several defendants (*Hryniak*, above, at para 60).

[66] The Court is obliged to carefully review the record to determine whether there are undisputed facts sufficient to resolve the matter: *De Shazo v Nations Energy Company Ltd*, 2005 ABCA 241 at para 18. The relevant question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication: *Hryniak*, above, at para 60. Canada submits that by late-1978, the Plaintiffs' advisors knew that Canada had conclusively rejected their claim regarding the impact of the Program on their royalties. Neither Plaintiff has adduced evidence to establish what it was they learned after 1978 which permitted them to "discover" their claims. This failure gives rise to an adverse inference against the Plaintiffs: *Milliken & Co v Interface Flooring Systems (Canada) Inc*, [1998] 3 FC 103 at paras 25-26 (TD), aff'd (2000), 251 NR 358 (CA); *Johnson v Futerman*, 2012 ONSC 4092 at para 53.

[67] Canada submits that the Plaintiffs' constitutional arguments have already been rejected by the courts: *Blueberry River*, above, at para 122; *Ermineskin* FCA, above, at para 323.

[68] Canada rejects the Ermineskin Plaintiffs' argument that limitations do not apply because the trust is indefinite and the beneficiary is a collective. If this were the reality, no limitations could ever apply to First Nations. This proposition has been rejected by the courts.

[69] Finally, Canada submits that three findings are necessary for fraudulent concealment to suspend a limitations period (*Ambrozic v Burcevski*, 2008 ABCA 194 at paras 21-25, leave to appeal to SCC refused, 32745 (November 20, 2008) [*Ambrozic*]; *M(K) v M(H)*, above, at paras 56-58): (1) that the defendant perpetuated a type of fraud; (2) that the fraud concealed a material fact that the plaintiff has to prove to be successful at trial; and, (3) that the plaintiff exercised reasonable diligence to discover the fraud. None of these findings can be made on the evidence before the Court. Canada acknowledges that many documents were not provided until the present litigation started, but the Plaintiffs or their legal counsel were provided with the substance of most of the documents when they were created.

E. *Intervener - Alberta*

[70] The Intervener largely adopts Canada's submissions. Its own submissions ask the Court to exercise judicial restraint in considering the constitutional questions in this proceeding. The Court should only determine the applicability or validity of limitations legislation to Aboriginal claims in this motion if necessary: *Moysa v Alberta (Labour Relations Board)*, [1989] 1 SCR 1572 at 1579-1580; *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at para 6 [*Phillips*]. An unnecessary constitutional pronouncement may prejudice future cases and have unforeseen consequences: *Phillips*, above, at para 9; *Native Council of Nova Scotia v Canada (Attorney General)*, 2007 FC 45 at paras 40, 45.

[71] The Intervener submits that the independent application of Alberta's limitations legislation is not at issue. The Supreme Court of Canada has confirmed that s 39 of the *Federal*

Courts Act applies the referentially incorporated provincial legislation as federal law: see e.g. *Wewaykum*, above, at paras 113-116; *Blueberry River*, above, at para 107.

[72] The Intervener submits that the policies underlying limitations statutes are equally applicable to all actions including those that involve the breach of an Aboriginal or treaty right. A clear analogy can be drawn between constitutionally-protected *Charter* rights and Aboriginal or treaty rights. The Supreme Court of Canada has held that constitutional remedies are subject to limitations defences: *Kingstreet Investments Ltd v New Brunswick (Finance)*, 2007 SCC 1 at paras 12-16, 59-61; see also *Ravndahl v Saskatchewan*, 2009 SCC 7 at paras 17-24 [*Ravndahl*]; *Nagy v Phillips*, 1996 ABCA 280 at paras 9-13. The Intervener rejects Samson's argument that the Alberta *LAA* cannot apply because of the *sui generis* relationship between Samson and Canada. When read in its full context, and in its ordinary meaning, s 39 of the *Federal Courts Act* clearly applies to all causes of actions: *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at paras 26-27; *RJG v Canada (Attorney General)*, 2004 SKCA 102 at para 15, leave to appeal to SCC refused, 30540 (March 3, 2005). Further, the claims in these actions are for personal remedies and so are subject to limitations.

[73] Limitations defences bar the ability to bring a claim relating to a breach of a right or obligation but do not operate to extinguish or infringe the right itself. The objective of the Alberta *LAA* is to encourage the prompt advancement of claims: Institute for Law Research and Reform, *Report 4 on Limitations, Report for Discussion No. 4, September 1986*, at 325. Cases which describe limitation periods in terms of "extinguishment" are speaking of the extinguishment of remedies, not the underlying right: *Wewaykum*, above, at paras 115-133;

Chippewas, above. The Intervener acknowledges that conflicts of laws view limitations defences as substantive matters, but they are considered procedural matters in all other areas of law: *Tolofson*, above, at 1067, 1071-1073; *Castillo v Castillo*, 2005 SCC 83 at paras 3-5; *Ravndahl*, above, at paras 17-18; *Epcor Power*, above, at para 24. Practically speaking, the application of a limitations defence to an Aboriginal or treaty right may have the effect of sterilizing a claim if the right and remedy are essentially the same. However, the application of a limitations defence to an Aboriginal or treaty right does not logically result in the right being lost. The Plaintiffs have failed to show that the application of a limitations defence would be unreasonable, or result in any meaningful diminution of any Aboriginal or treaty right, or constitute an infringement of any alleged rights: see *Van der Peet*, above, at para 2.

F. *Samson Plaintiffs' Reply to Intervener*

[74] Samson submits that the Intervener is improperly addressing the substantive issues before the Court because Alberta has an interest in related litigation which will be impacted by this proceeding. The Intervener acknowledges itself that the independent application of Alberta's legislation is not at issue in these proceedings.

[75] Samson disputes the Intervener's argument that there are no trust relationship issues in this motion. The Alberta Court of Queen's Bench confirmed in *Stoney Tribal Council v Imperial Oil Resources Ltd*, 2014 ABQB 408 at para 49 [*Stoney Tribal Council*] that the "common law of trusts …applies to the obligation of Canada to collect royalties from surrendered lands."

[76] Whether limitations legislation extinguishes substantive rights remains a live issue in Canadian jurisprudence: see e.g. *Hueman (next friend of) v Andrews*, 2005 ABQB 832; *Moody Estate, Re*, 2011 ABQB 222; *Aucoin v Murray*, 2013 NSSC 37; *Markevich*, above, at para 41. If limitations legislation is applied in a way that all remedies or causes of action are barred and a plaintiff has no ability to enforce its right, then in effect the right is extinguished. There is no evidence before the Court that Parliament considered the conflict between extinguishing a claimant's right generally and extinguishing treaty and Aboriginal rights when it enacted s 39 of the *Federal Courts Act*.

[77] The Samson Plaintiffs reject the Intervener's contention that the policy implications of limitations statutes apply equally to Aboriginal claims. The Supreme Court of Canada expressly rejected this argument in *Manitoba Metis*, above; see also *Lac Seul*, above, at para 19.

[78] If the Court finds that the Plaintiffs are only entitled to declaratory relief, then the Court can grant declaratory relief awarding the amount that the Plaintiffs are entitled to in their CRF capital accounts. This would not be an award of damages.

G. *Ermineskin Plaintiffs' Reply to Intervener*

[79] The Ermineskin Plaintiffs submit that they are not raising an issue of extinguishment; they say the limitations statute unjustifiably infringes its "treaty right to insist that the Crown act as Ermineskin's fiduciary in connection with the management of Ermineskin's reserves and the proceeds therefrom" (Reply of the Ermineskin Cree Nation to the Attorney General of Alberta at

para 2). The Alberta limitations statute deprives Ermineskin of the ability to judicially enforce Canada's treaty obligations.

[80] The Ermineskin Plaintiffs reject the contention that the constitutional issues have been decided by the Supreme Court of Canada. Ermineskin acknowledges that this proceeding may share certain factual elements with previous cases but submits that none have involved treaty rights or s 35 of the *Constitution Act, 1982*. It cannot be said that any case has decided whether limitation statutes unjustifiably interfere with treaty rights: *Grabber and Janes v Stewart*, 2000 BCCA 206 at paras 21-22; *Canada (Attorney General) v 311165 BC Ltd*, 2011 BCCA 409 at para 11.The Supreme Court of Canada specifically declined to address the issue of limitation statutes in *Blueberry River*, above (at para 122). In *Canada v Stoney Band,* 2005 FCA 15, the Federal Court of Appeal only rejected an argument that the Honour of the Crown prevented Canada from relying on limitations defences (at paras 24, 30-32, leave to appeal to SCC refused, 30826 (September 15, 2005)). Neither of these cases answers the question of whether s 39 of the *Federal Courts Act* adequately accounts for the unique nature of Aboriginal interests and treaty rights, and the historical juridical and practical disabilities of First Nations, so as to constitute a justifiable interference with the rights of those First Nations. Even if those cases did decide issues relating to treaty rights, the treaty right that Ermineskin asserts was not analyzed in any of these cases.

[81] There is no clear analogy between the application of limitation periods to *Charter* rights and the application of limitation periods to treaty rights. Limitation statutes apply to *Charter* claims because the courts have found that the statutes themselves do not infringe *Charter* rights:

St-Onge v Canada (1999), 178 FTR 104 at para 5, aff'd 2001 FCA 308, leave to appeal to SCC refused 28983 (August 15, 2002). In the present case, the issue before the Court is whether the limitation statute itself infringes treaty rights. An otherwise valid law of general application may infringe treaty rights despite a lack of discrimination against Aboriginal people: *R v Côté*, [1996] 3 SCR 139 at paras 85-87.

[82] The Ermineskin Plaintiffs ask the Court to decline to hear the Intervener's submissions regarding the interpretation of Alberta's legislation. The interpretation of Alberta's legislation does not assist the Court in determining the constitutional applicability of s 39 of the *Federal Courts Act*. The Intervener is improperly attempting to bolster Canada's submissions. Its role is not to support Canada in relation to substantive issues before the Court.

VI. ANALYSIS

[83] Canada is seeking summary judgment on a portion of the Plaintiffs' claims in both actions pursuant to Rules 213(1) and 215 of the *Federal Court Rules.* Canada says that there is no genuine issue for trial on those aspects of the claims that relate to the federal Government's regulation of Canadian oil prices from October 1, 1973 until June 1, 1985 because they are statute-barred pursuant to the *Federal Courts Act* and the Alberta *LAA*, and are also barred by the equitable doctrines of laches and acquiescence.

[84] In essence, Canada says that both Plaintiffs knew of the facts that gave rise to their Program-related claims more than six years prior to filing their Statements of Claim on September 29, 1989 (Samson) and May 28, 1992 (Ermineskin) respectively. As a result, both

claims are statute-barred by the relevant six-year period under the *LAA* referentially incorporated under s 39(1) of the *Federal Courts Act*, or the six-year period under s 39(2) of the *Federal Courts Act*, as well as being barred by laches and acquiescence.

A. *The Actions*

[85] The Program-related claims referred to in this motion are part of broader litigation. In an order dated September 17, 2002, Justice Teitelbaum divided the overall action into six (6) phases:

a) General and Historical;
b) Money Management;
c) Oil and Gas;
d) Other Oil and Gas Issue (the "Tax" or the "Regulated Price Regime" issue);
e) Per Capita Distribution; and
f) Programs and Services (for Samson Plaintiffs only).

[86] Justice Teitelbaum then went on to deal with the General and Historical and the Money Management phases at trial. These phases have now also been dealt with on appeal by the Federal Court of Appeal and the Supreme Court of Canada.

[87] The present motion relates only to phase d) above: Other Oil and Gas Issue.

[88] In dealing with the Program-related matters in this motion, the Court must be careful to remain consistent with findings and rulings that are already part of the general record as a result

of the litigation in phases a) and b) above, and wary of making findings of fact and reaching conclusions that may hamper the Court when the time comes to deal with the remaining phases of the action. In fact, one of the primary issues for the Court in this motion is whether the Program aspect of the action can, or should, be dealt with by way of summary judgment rather than proceeding to trial.

B. *The Merits of the Claims*

[89] It should always be borne in mind that in deciding whether summary judgment based upon the expiry of a limitation period is appropriate, the Court is not pronouncing upon the merits of the underlying claims. In the present case, the Plaintiffs may well have legitimate complaints, in both fact and law, about the impact of the Program upon their royalty entitlement and Canada's handling of the royalties arising from oil and gas extraction on the Plaintiffs' Reserves. But the law of limitations provides that, generally speaking, even a legitimate claim must be brought within a prescribed period of time unless, of course, the claim is one that is not subject to a limitations defence. It may be necessary at times to look at the merits in order to understand what is at stake in these motions and the role that a limitations defence should play given the nature of the claims in question but, in the end, the Court is deciding whether or not there is a genuine issue for trial on the limitations defence and not whether the claims have merit.

C. *Summary Judgment*

[90] The policy generally behind summary judgment rules was articulated by the Supreme Court of Canada in *Lameman*, above :

> [10] …The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

[91] The Supreme Court of Canada recently provided further general guidance in *Hryniak*, above:

> [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[92] The parties have different views on the applicability of *Hryniak* to this proceeding. Samson says that *Hryniak* has recast the test for summary judgment. Ermineskin says that *Hryniak* did not change the test for summary judgment because it involved the application of Ontario's rules of civil procedure and not the *Federal Courts Rules*. Canada says that *Hryniak* applies to this proceeding notwithstanding the different rules involved. Following the hearing of this proceeding, the Federal Court of Appeal released its decision in *Manitoba v Canada*, 2015 FCA 57 [*Manitoba v Canada*] which provides the following guidance on the applicability of *Hryniak* to the summary judgment procedure under the *Federal Courts Rules*:

> [11] In my view, *Hryniak* does bear upon the summary judgment issues before us, but only in the sense of reminding us of certain principles resident in our Rules. It does not materially

change the procedures or standards to be applied in summary judgment motions brought in the Federal Court under Rule 215(1).

[12] *Hryniak* considered the summary judgment rules in Ontario's *Rules of Civil Procedure*. The summary judgment rules in the *Federal Courts Rules* are worded differently from those in Ontario.

[13] The *Federal Courts Rules* are a federal regulation and have the status of laws that the Federal Courts cannot change. Care must be taken not to import the pronouncements in *Hryniak* uncritically, thereby improperly amending the *Federal Courts Rules*.

[14] The summary judgment rules in the *Federal Courts Rules* were amended just six years ago to take into account the sorts of considerations discussed in *Hryniak* and the challenges posed by modern litigation: see SOR/2009-331, section 3. Foremost among these amendments was the introduction of an elaborate and aggressive summary trial procedure in Rule 216, available in accordance with the specific wording of the *Federal Courts Rules*. I turn now to the specific wording of Rules 215 and 216.

[15] Under Rule 215(1) of the *Federal Courts Rules*, where there is "no genuine issue for trial" the Court "shall" grant summary judgment. The cases concerning "no genuine issue for trial" in the Federal Courts system, informed as they are by the objectives of fairness, expeditiousness and cost-effectiveness in Rule 3, are consistent with the values and principles expressed in *Hryniak*. In the words of *Burns Bog Conservation Society v. Canada*, 2014 FCA 170, there is "no genuine issue" if there is "no legal basis" to the claim based on the law or the evidence brought forward (at paragraphs 35-36). In the words of *Hryniak*, there is "no genuine issue" if there is no legal basis to the claim or if the judge has "the evidence required to fairly and justly adjudicate the dispute" (at paragraph 66). *Hryniak* also speaks of using "new powers" to assist in that determination (at paragraph 44). But under the text of the *Federal Courts Rules* those powers come to bear only later in the analysis, in Rule 216.

[16] Where, as the Federal Court found here, there is a genuine issue of fact or law for trial, then the Court "may" (*i.e.*, as a matter of discretion), among other things, conduct a summary trial under Rule 216: Rule 215(3). As is evident from Rule 216, summary trials supply the sort of intensive procedures for pre-trial determinations that the Court in *Hryniak* (at paragraph 44) called "new powers" for the Ontario courts to exercise.

> [17] For all of the foregoing reasons, like the Alberta Court of Appeal in *Can v. Calgary (Police Service)*, 2014 ABCA 322, 560 A.R. 202, I conclude that *Hryniak* does not change the substantive content of our procedures. However it does remind us of the imperatives and principles that reside in our summary judgment and summary trial rules – imperatives and principles that, by virtue of Rule 3, must guide the interpretation and application of our Rules.

[93] The governing jurisprudence clearly establishes that, in order to succeed on this motion, Canada must demonstrate to the Court that there is no genuine issue for trial which, in this instance, means no genuine issue regarding the existence and application of a limitations defence to time-bar the Program-related claims. See *Lameman* SCC, above at para 11; *Manitoba v Canada*, above, at para 15.

[94] It is also well-established in the jurisprudence that both sides in a summary judgment motion must put their best foot forward with respect to the material issues to be tried. As the Supreme Court of Canada said in *Lameman* SCC, above:

> [11] For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial": *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 27. The defendant must prove this; it cannot rely on mere allegations or the pleadings: *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.); *Tucson Properties Ltd. v. Sentry Resources Ltd.* (1982), 22 Alta. L.R. (2d) 44 (Q.B. (Master)), at pp. 46-47. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal: *Murphy Oil Co. v. Predator Corp.* (2004), 365 A.R. 326, 2004 ABQB 688, at p. 331, aff'd (2006), 55 Alta. L.R. (4th) 1, 2006 ABCA 69. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried: *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), at p. 434; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14, at

> para. 32. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts: *Guarantee Co. of North America*, at para. 30.
>
> […]
>
> [19] We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. This applies to Aboriginal claims as much as to any others.

[95] The same principles appear in Rule 214 of the *Federal Courts Rules*:

> 214. A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.

[96] What these general rules mean is that summary judgment should only be granted in the clearest of cases where the Court is satisfied that a trial on the issue is unnecessary. It should not be granted where, on the whole of the evidence before the Court in the motion, the Court cannot find the necessary facts, or where it would be unjust to do so. If there are factual or legal issues that must be resolved before a decision is made, then the case is not suitable for summary judgment. See *Garford Pty Ltd v Dywidag Systems International, Canada, Ltd*, 2010 FC 996 at para 10, aff'd 2012 FCA 48.

[97] On the other hand, on a motion for summary judgment, both sides must file such evidence as is reasonably available to them and which will assist the Court in determining if there is a genuine issue for trial. The responding party, for instance, cannot rest on its pleadings and must provide evidence of specific facts showing there is a genuine issue for trial. See *Federal Courts Rules*, Rule 214; *Kanematsu GmbH v Acadia Shipbrokers Ltd* (2000), 259 NR 201 at para 13, [2000] FCJ no 978 (CA). This means that a failure to file evidence on the points at issue without a reasonable explanation may lead to an adverse inference. See *Riva Stahl GmbH v Combined Atlantic Carriers GmbH* (1999), 243 NR 183 at para 11, [1999] FCJ no 762 (CA).

[98] It is also well-established that it is not appropriate to grant summary judgment on an issue that cannot be separated from other pending issues in the overall action. See *Marine Atlantic Inc v Blyth* (1994), 77 FTR 97 at para 19 [*Marine Atlantic*]. The Supreme Court of Canada, in *Hryniak*, above, at paragraph 60, also warned against granting partial summary judgment that "may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of the powers may not be in the interest of justice."

[99] Finally, it is clear that the applicant in a motion for summary judgment (in this case, Canada) bears the burden of showing that there is no genuine issue for trial. If Canada discharges this burden, then the Plaintiffs must provide evidence and legal argument to counter Canada's position, or risk summary dismissal. See *Federal Courts Rules*, rule 214; *Lameman* SCC, above, at para 11.

(1) Canada's Position

[100] Canada says that the Plaintiffs' Program–related claims are large and complex, and will be extremely costly for the parties to litigate. These claims should be dealt with by way of summary judgment because, if they go to trial, they will inevitably fail on the limitations issue alone. This is so, says Canada, because the clear and uncontroverted record shows that the Plaintiffs and their advisers had full knowledge of the claims long before the limitation period expired so that the claims are clearly time-barred.

[101] Canada's argument is fairly straightforward and can be summarized as follows:

a. The governing jurisprudence clearly establishes that, generally speaking, limitations defences apply to Aboriginal claims. See *Lameman* SCC, above; *Wewaykum*, above; *Blueberry River*, above; *Manitoba Metis*, above;

b. There is an inherently reliable documentary record before the Court in this motion that establishes that the Plaintiffs knew of the Program-related claims well before the expiry of the relevant limitation period. The Plaintiffs have not taken material issue with the record;

c. The Plaintiffs' extended pursuit of a political solution to their grievances over the impact of the Program on their royalty entitlement during the material period did not postpone the running of the applicable limitation period. See *Abbott*, above; *Tacan*, above, at paras 78-85; *Canada v Perrot*, 209 NLTD 172 at paras 27-40;

d. Both causes of action arose in Alberta so that, in accordance with s 39 of the *Federal Courts Act,* the Program-related claims are governed by Alberta limitations legislation and the applicable limitation period is six (6) years under s 4 of the *LAA* which was in force at the material time;

e. Section 4 of the *LAA* applies because the claims at issue are properly characterized as claims for damages for a breach of fiduciary or some other duty by Canada in failing to exempt the Plaintiffs from the indirect impact of the Program. The Program was adopted in the national interest in response to dramatic increases in the price of oil precipitated by the action of the international cartel known as OPEC (Organization of Petroleum Exporting Countries). As a result of this national program, the Plaintiffs received less royalty monies than they would otherwise have received in the absence of domestic oil price controls; and

f. The Program-related claims are also barred by laches and acquiescence.

[102] With considerable overlap, the Plaintiffs have advanced numerous grounds as to why Canada’s position on limitations is not tenable and why there remains a genuine issue for trial. I will deal with these grounds in turn.

(2) T-2022-89 – Samson's Position

(a) *No Constitutionally Enacted Limitation Period*

[103] Samson says there is no constitutionally enacted limitation period applicable to the Samson causes of action at issue here, which are based upon Samson's constitutionalized treaty and Aboriginal rights.

[104] Samson says the claims at issue include claims against Canada as Samson's trustee and fiduciary who should be treated by a Court of Equity, such as the Federal Court, as an express trustee, as a result of the historic relationship between Canada and Aboriginal people, and as a result of Treaty No. 6 and the Surrender of mineral rights.

[105] As a consequence of the historic *sui generis* relationship between Canada and Samson, and because of the trust, fiduciary and trust-like obligations assumed by Canada when it acquired Samson's mineral rights and the proceeds from leases, Parliament did not have before 1982, and has not since 1982, the authority to create a limitation period that could extinguish Samson's causes of action. In addition, Samson says that provincial laws, even if incorporated under a federal statute of limitations, cannot affect, let alone purport to extinguish treaty rights.

[106] In other words, Samson takes the position that limitation periods do not apply to the Program-related claims at issue in this motion because they would, in effect, destroy Samson's constitutionally-protected Aboriginal and treaty rights. When Parliament enacted s 39 of the

Federal Courts Act, it did not express a "clear and plain" intention to extinguish any Aboriginal and treaty rights, as required by *Calder*, above.

[107] In practical terms, Samson says that the application of a limitations statute to the royalty interest at stake in the Program-related claims would render meaningless Samson's treaty right to the minerals underlying the Pigeon Lake Reserve. These are rights that were in existence when s 35 of the *Constitution Act*, *1982* came into force, so that they are recognized and affirmed by s 35(1) and must prevail over inconsistent legalisation.

[108] What is more, Samson argues that, in this motion, Canada is invoking a limitations defence to avoid liability for conduct that is inconsistent with the Honour of the Crown, as well as treaty and trust principles. In addition, Canada has not led evidence that s 39 of the *Federal Courts Act* infringes treaty and/or Aboriginal rights "as little as possible," so that there is no justification offered for these statutory provisions as required by the *Sparrow* framework.

[109] Samson argues that the particular claims in these motions are different from those decided by the Supreme Court of Canada in *Wewaykum*, above, and other leading cases which say that limitation periods apply to Aboriginal claims. Samson's principal argument is that previous claims did not involve a cause of action that could ever arise between subject and subject (see *Stoney Tribal Council*, above) and so clearly do not fall under laws related to prescription and the limitation of actions in force in any province between subject and subject.

[110] Because s 39 of the *Federal Courts Act* cannot apply to Samson's treaty and Aboriginal rights, Samson says there is no limitation period that Canada can invoke as a defence against Samson's Program-related claims.

[111] Many of the constitutional arguments advanced by Samson are not new, and have appeared before in these proceedings as well as other cases. I am not considering these arguments in a precedential vacuum, and I am bound to follow what the Supreme Court of Canada, and others, have said and ruled on these issues.

[112] First of all, it seems clear to me that limitations legislation, as well as the principles of laches and acquiescence, are applicable to claims against Canada even where the rights at stake are constitutionally-protected treaty and Aboriginal rights. This is how I read the Supreme Court of Canada guidance in *Wewaykum*, above:

> [110] The doctrine of laches is applicable to bar the claims of an Indian band in appropriate circumstances: *L'Hirondelle v. The King* (1916), 16 Ex. C.R. 193; *Ontario (Attorney General) v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (H.C.), at p. 447 (aff'd on other grounds (1989), 68 O.R. (2d) 394 (C.A.), aff'd [1991] 2 S.C.R. 570); *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.). There are also dicta in two decisions of this Court considering, without rejecting, arguments that laches may bar claims to aboriginal title: *Smith v. The Queen*, [1983] 1 S.C.R. 554, at p. 570; *Guerin*, *supra*, at p. 390.
>
> […]
>
> [121] The Cape Mudge Band argues that the limitation periods otherwise applicable in this case should not be allowed to operate as "instruments of injustice" (factum, at para. 104). However, the policies behind a statute of limitations (or "statute of repose") are well known: *Novak v. Bond*, [1999] 1 S.C.R. 808, at paras. 8 and 64; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at para. 34. Witnesses are no longer available, historical documents are lost

> and difficult to contextualize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today. As the Law Reform Commission of British Columbia wrote in support of an "ultimate" 30-year limitation period in 1990:
>
> > If there are limitation periods, conduct which attracts legal consequences is more likely to be judged in light of the standards existing at the time of the conduct than if there are no restrictions on the plaintiff's ability to litigate. This rationale for the limitation of actions is of increasing importance, given the rate at which attitudes and norms currently change. New areas of liability arise continually in response to evolving sensitivities.
> >
> > (*Report on the Ultimate Limitation Period: Limitation Act, Section 8* (1990), at pp. 17-18)

[113] The Plaintiffs point out that there were no treaty rights at issue in *Wewaykum*. However, the Supreme Court of Canada applied this holding in *Lameman* SCC, where there was a treaty right at issue:

> [13] This Court emphasized in *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245, 2002 SCC 79, that the rules on limitation periods apply to Aboriginal claims. The policy behind limitation periods is to strike a balance between protecting the defendant's entitlement, after a time, to organize his affairs without fearing a suit, and treating the plaintiff fairly with regard to his circumstances. This policy applies as much to Aboriginal claims as to other claims, as stated at para. 121 of *Wewaykum*:
>
> > Witnesses are no longer available, historical documents are lost and difficult to contextualize, and expectations of fair practices change. Evolving standards of conduct and new standards of liability eventually make it unfair to judge actions of the past by the standards of today.

[114] The Supreme Court of Canada most recently confirmed this jurisprudence in *Manitoba Metis*, above, at paras 138, 147, see also paras 269-270, 298-299, Rothstein J, dissenting.

[115] This general issue was also addressed by Justice Sexton in the present proceedings when previous phases of the Plaintiffs' actions were before the Federal Court of Appeal. Justice Sexton held that the claims were barred by the limitations legislation and dismissed the Plaintiffs' claims to the contrary (see *Ermineskin* FCA, above, at paras 323-336).

[116] I realize that both Plaintiffs feel there were different fact situations at issue in prior cases that have to be considered and that, on the particular facts of the present case, it cannot be said that there is no genuine issue for trial. But when we look at previous decisions and, in particular, the Supreme Court of Canada cases, I do not see how I can exempt the present situation from the general import of the established precedents and the general principles that underlie each case.

[117] The general guidance provided by Justice Binnie's judgment in *Wewaykum*, above, cannot be simply dismissed as irrelevant to claims arising on a different set of facts, because that guidance was cited and applied by the Supreme Court of Canada in *Lameman* SCC, above, and *Manitoba Metis*, above. Justice Binnie, in *Wewaykum*, above, also dealt with the applicability of laches to Aboriginal claims (at paras 110-111), as well as the effect of s 39 of the *Federal Courts Act* (at paras 113-114), the impact of provincial legislation upon Aboriginal interests and the division of powers issue (at paras 115-120), the impact of the *Guerin* decision (at para 124), and the continual breach issue (at paras 134-136).

[118] The Supreme Court of Canada also dealt with a direct breach of treaty obligations in *Lameman* SCC, above. It cited *Wewaykum*, above, and agreed that limitation periods apply to

Aboriginal claims for the same policy reasons as they apply to other claims (*Lameman* SCC, above, at para 13).

[119] As the motion for a re-hearing before the Supreme Court of Canada in *Lameman* SCC makes clear, the Court had before it many of the arguments that the Plaintiffs raise before me in this motion, notably that:

a. The effect of the Court's decision was to permit the extinguishment of Aboriginal treaty rights;

b. The claims were for unextinguished treaty rights that were protected by s 35 of the *Constitution Act, 1982*;

c. The treaty rights were continuing obligations of Canada;

d. That the referential incorporation of provincial limitations legislation fails to demonstrate the necessary plain and clear intention to interfere with treaty rights; and

e. *Wewaykum* should be distinguished because it did not involve a treaty right.

[120] Read in its full context, I do not think that *Lameman* SCC, above, is distinguishable on the basis that there was no Notice of Constitutional Question filed in that case. In my view, *Lameman* SCC leaves no doubt that the Supreme Court of Canada felt there was no issue of constitutionality when it comes to applying limitations legislation to claims involving Aboriginal and treaty rights.

[121] It also seems clear that the application of limitation periods to claims for breach of fiduciary duty is supported by the recent Supreme Court of Canada decision in *Manitoba Metis*, above. In doing so, the Supreme Court cites and affirms the continuity of its jurisprudence on this point since *Wewaykum* and *Lameman* SCC. At paragraph 138, the Supreme Court of Canada says:

> The respondents argue that this claim is statute-barred by virtue of Manitoba's limitations legislation, which, in all its iterations, has contained provisions similar to the current one barring "actions grounded on <u>accident</u>, <u>mistake</u> or <u>other equitable ground of relief</u>" six years after the discovery of the cause of action: *The Limitation of Actions Act*, C.C.S.M. c. L150, s. 2(1)(k). Breach of fiduciary duty is an "equitable ground of relief". We agree, as the Court of Appeal held, that the limitation applies to Aboriginal claims for breach of fiduciary duty with respect to the administration of Aboriginal property: *Wewaykum*, at para. 121, and *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 13.
>
> [Emphasis in original]

[122] In other words, I cannot find a recognized exception in the governing jurisprudence for constitutionally-derived claims of the kind at issue in this motion. In my view, the case law says there is no such exception. In carving out a narrow and specific exception in *Manitoba Metis* for the particular declaratory relief sought in that case, the Supreme Court of Canada first affirmed the general rule of applicability and rejected what the Plaintiffs urge upon me in this motion.

[123] In the present case, it is my view that the claims at issue in this motion are clearly for breach of fiduciary duty and equitable relief. In my view, then, the law is clear that such claims are subject to a limitations defence.

[124] The Plaintiffs have also failed to establish any basis that would bring them within the narrow constitutional exception carved out by the majority decision in *Manitoba Metis*. The Supreme Court in that case emphasized that it was addressing “a narrow and circumscribed duty, which is engaged by the extraordinary facts before us” (para 81). There is nothing in the present case that is analogous to the constitutional obligations in s 31 of the *Manitoba Act*.

[125] There are two additional arguments in particular that I need to address regarding Samson’s claim that its Program-related claims are not caught by the general jurisprudence referred to above. First of all, Samson says that the inclusion of a declaration in its prayer for relief means that it falls within either the *Manitoba Metis* exception or the general rule that declaratory relief is not subject to a limitations defence.

[126] In my view, there is nothing in *Manitoba Metis*, above, that supports Samson’s argument. In fact, quite the contrary. In *Manitoba Metis*, the Supreme Court of Canada allowed a narrow and very specific exception to the general rule that limitations apply to Aboriginal claims. That exception was for a declaration that Canada had not acted honourably in implementing the express constitutional obligation in s 31 of the *Manitoba Act*. The Supreme Court made it very clear that if the Métis in the action had been seeking personal remedies, the exception would not be available (*Manitoba Metis*, above):

> [136] In this case, the Métis seek a declaration that a provision of the *Manitoba Act* — given constitutional authority by the *Constitution Act, 1871* — was not implemented in accordance with the honour of the Crown, itself a “constitutional principle”: *Little Salmon*, at para. 42.
>
> [137] Furthermore, the Métis seek no personal relief and make no claim for damages or for land. Nor do they seek restoration of the title their descendants might have inherited had the Crown acted

honourably. Rather, they seek a declaration that a specific obligation set out in the Constitution was not fulfilled in the manner demanded by the Crown's honour. They seek this declaratory relief in order to assist them in extra-judicial negotiations with the Crown in pursuit of the overarching constitutional goal of reconciliation that is reflected in s. 35 of the *Constitution Act, 1982*.

[138] The respondents argue that this claim is statute-barred by virtue of Manitoba's limitations legislation, which, in all its iterations, has contained provisions similar to the current one barring "actions grounded on accident, mistake or other equitable ground of relief" six years after the discovery of the cause of action: *The Limitation of Actions Act*, C.C.S.M. c. L150, s. 2(1)(k). Breach of fiduciary duty is an "equitable ground of relief". We agree, as the Court of Appeal held, that the limitation applies to Aboriginal claims for breach of fiduciary duty with respect to the administration of Aboriginal property: *Wewaykum*, at para. 121, and *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 13.

[139] However, at this point we are not concerned with an action for breach of fiduciary duty, but with a claim for a declaration that the Crown did not act honourably in implementing the constitutional obligation in s. 31 of the *Manitoba Act*. Limitations acts cannot bar claims of this nature.

[140] What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Constitution Act, 1982* and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and constitutional import. The courts are the guardians of the Constitution and, as in *Ravndahl* and *Kingstreet*, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less: see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72.

[141] Furthermore, many of the policy rationales underlying limitations statutes simply do not apply in an Aboriginal context such as this. Contemporary limitations statutes seek to balance protection of the defendant with fairness to the plaintiffs: *Novak v. Bond*, [1999] 1 S.C.R. 808, at para. 66, *per* McLachlin J. In the

Aboriginal context, reconciliation must weigh heavily in the balance. As noted by Harley Schachter:

> The various rationales for limitations are still clearly relevant, but it is the writer's view that the goal of reconciliation is a far more important consideration and ought to be given more weight in the analysis. Arguments that provincial limitations apply of their own force, or can be incorporated as valid federal law, miss the point when aboriginal and treaty rights are at issue. They ignore the real analysis that ought to be undertaken, which is one of reconciliation and justification.

("Selected Current Issues in Aboriginal Rights Cases: Evidence, Limitations and Fiduciary Obligations", in *The 2001 Isaac Pitblado Lectures: Practising Law In An Aboriginal Reality* (2001), 203, at pp. 232-33)

Schachter was writing in the context of Aboriginal rights, but the argument applies with equal force here. Leonard I. Rotman goes even farther, pointing out that to allow the Crown to shield its unconstitutional actions with the effects of its own legislation appears fundamentally unjust: "*Wewaykum*: A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples?" (2004), *U.B.C. L. Rev*. 219, at pp. 241-42. The point is that despite the legitimate policy rationales in favour of statutory limitations periods, in the Aboriginal context, there are unique rationales that must sometimes prevail.

[142] In this case, the claim is not stale — it is largely based on contemporaneous documentary evidence — and no third party legal interests are at stake. As noted by Canada, the evidence provided the trial judge with "an unparalleled opportunity to examine the context surrounding the enactment and implementation of ss. 31 and 32 of the *Manitoba Act*": R.F., at para. 7.

[143] Furthermore, the remedy available under this analysis is of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available. As argued by the intervener the Assembly of First Nations, it is not awarded against the defendant in the same sense as coercive relief: factum, at para. 29, citing *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 193 D.L.R. (4th) 344, at paras. 11-16. In some cases, declaratory relief may be the only way to give effect to the honour of the Crown: Assembly of First Nations' factum, at para. 31.

> Were the Métis in this action seeking personal remedies, the reasoning set out here would not be available. However, as acknowledged by Canada, the remedy sought here is clearly not a personal one: R.F., at para. 82. The principle of reconciliation demands that such declarations not be barred.
>
> [144] We conclude that the claim in this case is a claim for a declaration of the constitutionality of the Crown's conduct toward the Métis people under s. 31 of the *Manitoba Act*. It follows that *The Limitation of Actions Act* does not apply and the claim is not statute-barred.

[127] In the present case, neither of the Plaintiffs' claims are for a declaration expressing a constitutional obligation of the kind that was at issue in *Manitoba Metis*. The Plaintiffs base their claims upon a breach of trust or fiduciary duty in relation to a constitutionally-protected treaty right. What is more, the Plaintiffs are claiming damages (i.e. the kind of personal remedy that the Supreme Court, in *Manitoba Metis,* says does not qualify for an exception to the general rule that limitation periods apply to Aboriginal claims). The Plaintiffs appear to be suggesting that a monetary claim ceases to be time-barred if it is accompanied by a claim for a declaration. I see nothing in *Manitoba Metis*, or any other case, to support this position.

[128] In *Athabasca Chipewyan First Nation v Alberta (Minister of Energy)*, 2011 ABCA 29, the Alberta Court of Appeal dealt with a claim for a declaration of the validity of oil sands leases. The claim was dismissed on the basis that the declaratory relief sought was equivalent to an application to quash the licences. The case suggests that a declaration cannot be used to avoid a limitations defence where it is no more than an equivalent for relief that would have been available if the claim had been brought in time.

[129] Samson's second argument is that the application of a limitation period effectively expunges or infringes constitutionally-enshrined Aboriginal and treaty rights. In my view, Samson is simply asking the Court to ignore clear authorities that tell us that limitation periods do not expunge rights, they bar remedies based upon those rights. As *Chippewas*, above, makes clear, the seeking of a remedy is not an Aboriginal or treaty right, and limitations periods merely bar the remedy. Samson ignores the line of cases that makes a distinction between substantive and procedural law in the context of limitations and relies upon *Tolofson*, above, a conflict of law case, for the motion now before the Court where we have an established line of authority on point, where the Supreme Court of Canada has told us that limitation periods do apply to this kind of case.

[130] The debate over this issue was recently referred to, albeit in *obiter*, in the recent Saskatchewan case of *Peter Ballantyne Cree Nation v Canada (Attorney General)*, 2014 SKQB 327:

> [139] The traditional common law approach has been that limitation periods are merely procedural in that they bar a remedy, rather than substantive in that they extinguish the underlying right. However, since *Tolofson v Jensen*, [1994] 3 SCR 1022 [*Tolofson*], this matter has remained unsettled.
>
> [140] In *Tolofson* the plaintiff was a resident of British Columbia and was involved in a serious automobile accident with the defendant while driving in Saskatchewan. The plaintiff brought an action eight years later against the defendant for injuries sustained and claimed that the law of British Columbia applied so as to avoid the limitation period imposed by Saskatchewan law. The Supreme Court held that Saskatchewan law applied by virtue of the rule of *lex loci delicti* (application of the law of the place where the tort occurred) which included the limitations law. Having found this, the court then had to determine whether the limitations legislation was substantive or procedural because, in a conflict of laws scenario, the substantive rights of the parties to an action may be governed by a foreign law, but all matters of procedure are

governed exclusively by the law of the forum. Against this factual background, the court held at para. 85 that the provincial limitations legislation was substantive.

[141] Courts across Canada have treated this case with differing precedential value, with some confining the holding as being applicable only to conflict of laws cases. With some exceptions, this seems to be the case in Saskatchewan.

[142] In *Ravendahl v Saskatchewan*, 2007 SKCA 66, [2007] 10 WWR 606 [*Ravendahl*], the Court of Appeal was faced with this issue. The plaintiff claimed that certain pension legislation was *ultra vires* the province in order to have her pension reinstated and a claim for damages succeed. The claim was brought outside the prescribed time period in the limitations legislation. The court considered *Tolofson* but held that there was no authority outside the conflict of laws cases which held that limitation periods were substantive rather than procedural (*Ravendahl*, at para. 17).

[143] This distinction was also recently discussed by the Saskatchewan Court of Appeal in *Johnson v Johnson*, 2012 SKCA 87, 399 Sask R 196 [*Johnson*], which involved the recovery of a debt. The court stated at para. 26:

> [26] I note that in the context of a conflicts of law issue, or in certain specific rights *in rem* actions, a limitation period is considered to be a substantive rather than a procedural right. See: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at para. 81-82;*Castillo v. Castillo*, 2005 SCC 83, [2005] 3 S.C.R. 870 at para. 10; and *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94 at para. 41. None of the aforementioned circumstances exist in the instant appeal.

[144] The plaintiff relies on a recent case of this court which disposed of this distinction. In *Neudorf Estate v Sellmeyer*, 2012 SKQB 463, [2013] 3 WWR 349, this court held that a beneficiary's debts to an estate were statute barred and as such were extinguished by virtue of limitations legislation being substantive in nature. The court relied on *Tolofson* and declined to accept the distinction drawn between conflicts of laws cases:

> [15] In *Tolofson* Justice La Forest examined the historical reasons for holding that a statutory limitation provision is procedural and he rejected those reasons, concluding that the Saskatchewan

> limitation provision under consideration was substantive. *Tolofson* was a conflict of laws case, but there is no reason for thinking that Justice La Forest's analysis would differ in any other context. No reason is apparent for limitation periods being substantive in a conflict of laws context but being procedural in other contexts. To the contrary, Justice La Forest's analysis was not tied to the conflict of laws context. Rather, it was concerned with the logic and practicality of statutory limitation provisions generally being substantive rather than procedural.
>
> [16] Indeed, at paragraph 85 Justice La Forest adopted the "substantive" view in broad terms, then remarked on its particular - but not exclusive - application in the conflict of laws context:
>
> > ... So far as the technical distinction between right and remedy, Canadian courts have been chipping away at it for some time on the basis of relevant policy considerations. I think this Court should continue the trend. It seems to be particularly appropriate to do so in the conflict of laws field ... [Emphasis in original]
>
> [17] Since *Tolofson* the Supreme Court has repeated its view that limitation provisions are substantive, as represented by its remarks in *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, at paragraph 41, and in *Castillo v. Castillo*, 2005 SCC 83, [2005] 3 S.C.R. 870, at paragraph 7.

[145] The Supreme Court has not made a direct pronouncement on this issue since *Tolofson*, and as such I am bound by the decisions of the Saskatchewan Court of Appeal.

[146] This is not a conflict of laws issue, nor are there any *in rem* claims of the plaintiffs which have survived scrutiny. This is an issue of damages, and as such the appeal court of this province has stated that in claims of this nature the limitation periods are procedural in that they merely act to bar the remedy sought, rather than extinguish the underlying right.

[147] This conclusion is also consistent with cases like *Lameman* wherein the plaintiff claimed recovery due to breach of treaty

> rights but was barred by statute. This case makes clear that just because a limitation period effectively bars an Aboriginal group from a remedy it does not mean that the legislation infringes the right from which the claim may have arisen. The legislation merely limits the time in which the claim can be brought.

[131] In the present case, the Plaintiffs have filed a Notice of Constitutional Question with regard to the applicable limitations legislation. They are also suggesting that *Wewaykum*, *Lameman* SCC, and *Manitoba Metis*, all above, have not dealt with limitations in the context of such a constitutional challenge. The suggestion is that the Supreme Court of Canada has held that limitations legislation is applicable to claims of breach of fiduciary obligations in the Aboriginal context without considering the constitutionality of the underlying statutes.

[132] I think it is worth bearing in mind at this point that the constitutional arguments before me in this motion were also placed before the Supreme Court of Canada by the Plaintiffs as interveners in *Blueberry River*, above, and were found not to be persuasive. As Canada points out, the Plaintiffs made the following constitutional arguments in *Blueberry River*:

> a. s. 39 of the *Federal Courts Act* is unconstitutional as it extinguishes constitutionally protected aboriginal and treaty rights and does not express a clear and plain intention to do so;
>
> b. s. 39 is inconsistent with the fiduciary duties of the Crown towards aboriginal people;
>
> c. a claim based on an aboriginal interest in land is not subject to a limitation period because the cause of action has not yet been finally extinguished, given an aboriginal interest in land is a *sui generis* collective right that accrues to members individually as they are born;
>
> d. any limitation period should be postponed pursuant to discoverability provisions which postpone limitation periods until the claimant ought to have known they had a reasonable cause of action, on the basis that prior to the enactment of the

Constitution in 1982 and the Supreme Court decisions in *Guerin* and *Sparrow*, the law surrounding First Nations was poorly understood and aboriginal people have been educationally disadvantaged and in a relationship of unquestioning dependence with the Crown;

e. s. 39 cannot apply to an Indian Band's *sui generis* causes of action for breaches of the Crown's trust or fiduciary obligation because s. 39 only applies to the limitation periods in force in any province between subject and subject; and

f. Given the relationship between the Crown and aboriginal peoples is a unique trust or fiduciary one, no limitation periods should ever apply against aboriginal beneficiaries and the Court should adopt the historical rule applied in the Courts of Equity that no limitation periods apply to a trust beneficiary while the trust remains in effect.

[133] It was Justice McLachlin (as she then was) who dealt with these arguments in *Blueberry River*:

> [122] Other arguments, neither presented nor considered below, were presented by the Bands and interveners in support of relaxing or not applying the limitation periods prescribed by the Limitation Act of British Columbia. I find them unpersuasive in the context of this case and consider them no further.

[134] There is no indication in *Blueberry River* that the Plaintiffs' (in that case as Interveners) constitutional arguments were only rejected because no Notice of Constitutional Question was filed.

[135] In addition, in *Lameman* SCC, above, the Supreme Court of Canada applied the applicable provisions of the Alberta limitations statute in force at the time. There was no discussion of the fact that limitations legislation could not apply to constitutionally-protected treaty or Aboriginal rights. I cannot accept that the Supreme Court of Canada would have applied

legislation that was constitutionally inapplicable because it lacked a Notice of Constitutional Question. As outlined above, these arguments have been before the Supreme Court of Canada many times.

[136] In *Manitoba Metis*, the Supreme Court of Canada specifically acknowledged that "although claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period, courts retain the power to rule on the constitutionality of the underlying statute" (at para 134). In my view, the Supreme Court of Canada is telling us here that, in saying what it says about the applicability of limitations to Aboriginal claims, it is fully aware of, and has in mind, that limitations do not bar constitutional challenges to the underlying statute. Given the implications of a ruling of unconstitutionality of a limitations statute, I cannot accept that the Supreme Court of Canada would have repeatedly asserted in *Wewaykum*, *Lameman* SCC and *Manitoba Metis*, that limitations periods are applicable to Aboriginal claims it if had any doubt regarding their constitutional validity.

(b) *The Characterization Issue*

[137] Assuming, as I think I must, that there is no issue for trial that the claims against Canada are subject to a limitation period, the next issue to decide is whether there is no issue for trial as to which a limitation period is applicable. This in turn requires me to consider how the Plaintiffs' claims should be characterized for limitations purposes. There is some dispute between the parties on this issue.

[138] From Samson's perspective, characterization goes to two issues: discoverability and the applicable limitation period. In written argument, Samson describes its own cause of action as follows:

> 129. It is submitted that Samson's claims are in respect to the oil issues and in relation to treaty rights, especially those related to the lands reserved and set aside for Samson under Treaty No. 6 lands which included the underlying mineral rights. Samson's claims are also for breach by the Crown of the *sui generis* fiduciary and express trust relationship under which the Crown took possession, management and control of Samson's surrendered mineral rights and the royalties paid and payable for those mineral rights under leases granted to various oil companies. The claims are also based on a common law trust and statutory trust (*Indian Oil and Gas Act* and the *Indian Act*).
>
> 130. Samson's claims include an accounting by the Crown of Samson's property and moneys received, held, managed and retained by the Crown for and on behalf of Samson.
>
> 131. Samson's claims include claims against the Crown as Samson's trustee or as a fiduciary who, as a result of the historic relationship between the Crown and aboriginal peoples and as a result of Treaty No. 6 and the 1946 surrender of mineral rights, should be treated by the Courts of Equity as an express trustee.

[139] There are points in the arguments where Samson attempts to narrow its claims for purposes of dealing with this motion and asserts that the acts of Canada complained of took place in Ottawa after royalties were collected and are related to the "management of monies." In my view, this is a mischaracterization of the basis of Samson's claim. Samson is asserting Aboriginal and treaty rights to royalties from the oil and gas produced on Samson's Reserve lands at the material time, and Samson claims that "the price or value of oil exported from Pigeon Lake on which the Indian Oil and Gas royalty was calculated was incorrect for the years 1973 to 1985, years when the international market price of oil rose substantially" (Samson Memorandum at para 23, footnote omitted). Samson says that "the oil export tax should only

have been levied after the Plaintiffs [*sic*] royalty share had been calculated" (Samson Memorandum at para 25, emphasis removed). It is the levying of the export tax, and then the charge, before the Plaintiffs' royalties were calculated that is the basis of their claims. The cause of action pled is a breach of trust or fiduciary duty for permitting the Plaintiffs' royalty revenues to be reduced as an indirect impact of the Program, that is the heart of the claim. What happened to monies that reached Ottawa after the alleged miscalculation of royalties cannot be separated from, and is a mere particular of, the breach of statutory, treaty, and common law obligations that Samson says occurred when the Plaintiffs were not exempted from the Program, so that royalties were calculated after the export tax and charge were levied in accordance with the Program. The Plaintiffs' claims arose when the Program went into effect and deprived them of royalties that they feel they should have received by virtue of treaty, statute, common law and equity.

[140] In this motion, I am not concerned with, and make no findings regarding, whether the alleged breaches occurred. I am simply concerned with characterizing the claims for limitations purposes.

[141] As Samson points out, the interests that Samson seeks to protect enjoy special recognition under the *Indian Oil and Gas Act* which provides that monies paid to Canada as royalty monies on oil and gas production have to be held in trust for the use and benefit of Samson. In essence, I think it is clear that the claims are based upon the breach by Canada of some kind of *sui generis* fiduciary or trust-like obligations (arising from statute or otherwise) that required Canada to exempt the Plaintiffs from the indirect impact of the Program upon their royalty entitlement from oil and gas produced on their reserves.

[142] In the appeal of the "Money Management" phase of these actions, the Supreme Court of Canada went to considerable pains to characterize the relationship between Canada and the Plaintiffs, and the nature of the claims in that instance. I see no reason why the relationship should be any different for the purposes of this phase of the actions. Clearly, Canada does not occupy the same position of a common law trustee and the "Other Oil and Gas Issue" is essentially a claim for breach of fiduciary duty in which the fiduciary relationship has certain *sui generis* characteristics. As the Supreme Court said (*Ermineskin* SCC, above):

> [124] It is next necessary to determine whether the Crown's actions under the authority of the FAA and the *Indian Act*, including the Indian moneys formula, were consistent with its fiduciary obligations to the bands.
>
> [125] A fundamental principle underlying the fiduciary relationship is the requirement that a fiduciary acts "exclusively for the benefit of the other, putting his own interests completely aside" (Waters, Gillen and Smith, at p. 877). This is the duty of loyalty and it requires the trustee to avoid conflicts of interest. A fiduciary is required to avoid situations where its duty to act for the sole benefit of the trust and its beneficiaries conflicts with its own self‑ interest or its duties to another (see Waters, Gillen and Smith, at p. 877, and *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at pp. 646‑ 47).
>
> [126] At common law, a trustee is not permitted to borrow from the trust, as this would constitute a conflict of interest. The bands argued that the Crown was in a position of conflict of interest and therefore in breach of its fiduciary duty to them because their royalties were held in the CRF for use by the Crown. The bands have characterized the fact that the royalties are held in the CRF for use by the Crown as a "forced borrowing", and that without their consent it is improper or unlawful.
>
> [127] The Crown is in a unique position as a fiduciary with respect to the royalties and the payment of interest. The Crown is borrowing the bands' money held in the CRF. However, the borrowing is required by the legislation. According to s. 61(2) of the *Indian Act*, "[i]nterest on Indian moneys held in the Consolidated Revenue Fund shall be allowed at a rate to be fixed from time to time by the Governor in Council." As the majority of the Court of Appeal noted, this borrowing is an "inevitable

> consequence of the combined operation of the *Indian Act* and the *Financial Administration Act*" (para. 120).
>
> [128] A fiduciary that acts in accordance with legislation cannot be said to be breaching its fiduciary duty. The situation which the bands characterize as a conflict of interest is an inherent and inevitable consequence of the statutory scheme.
>
> [129] The Crown's position in the setting of the interest rate paid to the bands is also unique. On the one hand, it has fiduciary duties that are owed to the bands, including the duty of loyalty and the obligation to act in the bands' best interests. On the other hand, the Crown must pay the interest owed to the bands with funds from the public treasury financed by taxpayers. The Crown has responsibilities to all Canadians, and some balancing inevitably must be involved.
>
> [130] As Binnie J. stated in *Wewaykum Indian Band v. Canada*, 2002 SCC 79, [2002] 4 S.C.R. 245, at para. 96, "[t]he Crown can be no ordinary fiduciary; it wears many hats and represents many interests, some of which cannot help but be conflicting". In the present case, the Crown must consider not only the interests of the bands but also the interests of other Canadians when it sets the interest rate paid to the bands.

[143] In my view, I have to be consistent with what the Supreme Court had already said in these actions and hold that this characterization is equally applicable to this phase of the actions.

[144] In reading the claims and the submissions of both Plaintiffs, there is some doubt as to whether some of the rights claimed can be said to be treaty rights at all. For example, both Plaintiffs claim "prudent management" of royalties as a treaty right. Given the *Ermineskin* SCC decision, above, it might be argued that some of the conduct complained of does not involve a treaty right so that s 35(1) of the *Constitution Act, 1982* is not engaged. The Supreme Court of Canada has already determined that "investments" is not a right under Treaty No. 6 (see *Ermineskin* SCC, above, at paras 49-67).

[145] However, as I read the claims and submissions of both Plaintiffs, it seems clear to me that the Plaintiffs are seeking damages for lost royalty revenues that resulted from their not being exempted from the Program. Did Canada incur a treaty obligation not to subject royalty revenues from the exploitation of oil and gas on the Reserve to the kind of Canada-wide legislation that enacted the Program? That issue has not been decided and cannot be decided on the record before me. Hence, this application must be determined on the basis that the Plaintiffs' claims do invoke rights that derive from Treaty No. 6 and involve an alleged breach of the *sui generis* fiduciary relationship between the Plaintiffs and Canada.

(c) *The Applicable Jurisdiction*

[146] Canada says it is obvious that s 39 of the *Federal Courts Act* applies to this case so that Alberta limitations legislation is referentially incorporated, and this means that the relevant period is six (6) years.

[147] Samson says that if there is no issue for trial over whether s 39 of the *Federal Courts Act* is constitutionally applicable to its claims (and I think for reasons given that there is no such issue), then the limitations law of Ontario should apply.

[148] In written argument, Samson argues strongly on this point as follows:

> 173. The Crown's breaches of its *sui generis* trust or trust-like fiduciary obligations respecting the management of monies, which breaches are the subject of this action, thus took place in Ottawa, Ontario, where the constitutional and legal responsibility lies for the decisions that were (or were not) made in respect of Samson's land, minerals, royalties and moneys, including any oil export tax

> purported to be levied on Samson's oil. The Receiver General and the CRF are both located in Ottawa.
>
> 174. The proper law applicable in actions respecting the administration of a trust, including actions respecting the liability of the trustees for breach of the trust, is the law of the residence of the trustees.
>
> 175. The limitation law applicable is therefore the law of the legal "residence" of the Crown; and, the legal situs of the Crown being in Ottawa, Ontario, the limitation law of the Province of Ontario would be applicable if section 39(1) of the Federal Court [*sic*] Act can apply and if principles of equity do not preclude the Crown *qua* trustee from invoking any such statute of limitations.
>
> [Footnote omitted]

[149] It seems to me that the legislative acts that brought the Program into force took place in Ottawa and that some administrative elements took place there. However, the Program was not directed at the Plaintiffs and was Canada-wide. The Plaintiffs' claims are about royalties that they say they should have been credited with for oil and gas production on their Reserve lands in Alberta. As Canada points out, both the Plaintiffs and the Crown agency that administered the leases with producers on behalf of the Plaintiffs during the currency of the Program (Indian Minerals West) which later became Indian Oil and Gas Canada were located in Alberta. In addition, the land from which the oil was taken is located in Alberta. It is also the case, as Samson points out, that the monies collected under both the tax and the charge from producers were paid into the CRF in Ottawa. But it seems to me that in doing so Canada was administering the Program - which may have indirectly impacted the Plaintiffs - and was not attempting to deal with or alter whatever fiduciary or trust-like obligations Canada owed to the Plaintiffs.

[150] Similar arguments to those now before me were placed before the Federal Court of Appeal by Samson when the Court dealt with the Plaintiffs' appeal on the prior phases of this dispute. They were only dealt with by Justice Sexton in dissent, but, despite the fact that Justice Sexton characterized the claim as for a breach of trust, I see no reason to deviate from his reasoning in the case before me in any way that raises an issue for trial (*Ermineskin* FCA, above, at paras 324-326)

[151] Ermineskin does not agree with Samson's position on this issue and, in written argument, makes the following telling points:

> 113. The courts in cases arising out of surrenders have, pursuant to Section 39(2) [*sic*] consistently applied the limitations legislation of the province where the surrender took place. This, in Ermineskin's submission, is logical since the surrender is ordinarily the instrument which confirms the operation of the fiduciary and trust obligations that flow from the Crown's discretionary control over a band's assets. In relation to Ermineskin's royalty moneys, the relationship is a trust and the Treaty and Surrender are the trust instrument. The trust relationship is central to the issues in this case.
>
> 114. The cause of action in the present case is very strongly related to Alberta and not connected in any manner whatsoever to any other provincial jurisdiction:
>
> (a) the terms of the trust have their origins in Treaty No. 6, adhered to by Ermineskin in Alberta;
>
> (b) the source of the royalties or potential royalties which are the subject of the Energy Program Claims in this case is lands in Alberta;
>
> (c) the trust arises from a surrender of those lands in Alberta;
>
> (d) the beneficiaries of the trust are in Alberta; and
>
> (e) the damage is suffered in Alberta, where the beneficiaries are.

> 115. The "residence" of the trustee is not a relevant factor in this case. To put it another way, the federal Crown has no provincial residence: "the Crown is present throughout Canada and may be sued anywhere in Canada."
>
> [Citations omitted]

[152] On this point, then, I do not think there is any issue for trial. Alberta clearly has "the most substantial connection" to the breaches of fiduciary and trust-like duties that are before me in this motion.

(d) *Relevant Alberta Limitation Period*

[153] The relevant sections of the *LAA* in force when the Plaintiffs commenced their actions were as follows:

> 4(1) The following actions shall be commenced within and not after the time respectively hereinafter mentioned:
>
> […]
>
> (c) actions
>
> (i) for the recovery of money, other than a debt charged on land, whether recoverable as a debt or damages or otherwise, and whether on a recognizance, bond, covenant or other specialty or on a simple contract, express or implied, or
>
> (ii) for an account or for not accounting,
>
> within 6 years after the cause of action arose;
>
> […]
>
> (e) actions grounded on...other equitable grounds of relief not hereinbefore specifically dealt with, within 6 years of the discovery of the cause of action;
>
> […]

> (g) any other action not in this Act or any other Act specifically provided for, within 6 years after the cause of action therein arose.

[154] I have already concluded that the Plaintiffs' claims are for breach of fiduciary or trust-like duties that the Plaintiffs say are owed to them by Canada in the circumstances of this case. In my view, then, the clearly applicable period is "within 6 years of the discovery of the cause of action" under s 4(1)(e) of the *LAA*. Section 4(1)(e) also happens to be the most advantageous limitation period for the Plaintiffs, so I will assume that we are dealing with s 4(1)(e) because even if the claims are characterized another way and fall under s 4(1)(c) or s 4(1)(g), this is of no assistance to the Plaintiffs.

[155] The Plaintiffs raise various arguments to avoid the applicability of s 4(1)(e). None of them is convincing or raises a genuine issue for trial.

[156] First of all, the Plaintiffs say that their claims are for breach of trust, so that when ss 40 and 41 of the *LAA* are read in conjunction with s 14 of the Alberta *Judicature Act* there is no applicable limitation period.

[157] What the Plaintiffs are contending here is that Canada occupied the position of a common law trustee for the Plaintiffs during the period when the Program impacted their royalties and they were the *cestui que trust*. It seems to me that this was clearly not the case and continues not to be the case. The *Indian Oil and Gas Act* requires Canada to hold the Plaintiffs' royalties "in trust" (see s 4(1)), but even the Plaintiffs refer to the Crown as having fiduciary or trust-like duties in their argument. In fact, the Supreme Court of Canada said when dealing with the earlier

appeal in this litigation that neither Treaty No. 6, the 1946 Surrender, nor the *Indian Oil and Gas Act* support an intention to impose the duties of a common law trustee on Canada with respect to royalties. See *Ermineskin* SCC, above, at paras 50, 72-74 and 85. I have to maintain consistency with earlier findings in this litigation and do not see a genuine issue for trial on this issue.

[158] It would also appear that the Alberta *Judicature Act* does not assist the Plaintiffs. In *Lameman ABQB*, above, the Alberta Court of Queen's Bench concluded that Part 7 of the *LAA* had impliedly repealed s 14 of the *Judicature Act* so that limitation periods were applicable to claims for breach of trust commenced between 1980 and 1990. The only exceptions are set out at paragraph 126 of the Alberta Queen's Bench decision in *Lameman* ABQB:

> The overall effect of the statutes protecting trustees between 1903 and 1999 is the following:
>
> (a) Under the combined readings of section 40 and 41(2)(a), trustees are entitled to take the benefit of limitation periods, subject to certain exceptions.
>
> (b) Particular exceptions are that:
>
> > (i) under the proviso in Section 41(2), there is no limitation on fraudulent breached of trust by any kind of trustee, and
> >
> > (ii) under the proviso to Section 41(2), there is no limitation on any claim to recover trust property or the proceeds thereof still in the possession of the trustee, or converted to his own use by the trustee. By its terms, this proviso can only apply to those types of fiduciaries who hold property.
>
> (c) Section 41(2)(b) enacts a default limitation of 6 years, essentially confirming that ss. 4(1)(c) and (g) apply to trustees: see *Wewaykum Indian Band*, *supra*, at para. 131; *Fairford First Nation v. Canada (Attorney General)*, [1999] 2 C.N.L.R. 60 (F.C.T.D.), at para. 287.
>
> These provisions applied equally to true trustees and many fiduciaries: s. 41(1); *Wewaykum Indian Band*, *supra*.

[159] I also see no basis to distinguish Justice Sexton's analysis on this point (*Ermineskin* FCA, above):

> ***b. Does section 14 of the* Judicature Act *of Alberta prevent the Crown from relying on the Alberta* Limitations of Actions Act*?***
>
> [327] The appellants argue that if the breach of trust is found to have occurred in Alberta, no statutory limitation period is applicable to them by virtue of section 14 of the *Judicature Act*, R.S.A. 1980, c. J-1, which states:
>
> > No claim of a cestui que trust against his trustee for any property held on an express trust or in respect of a breach of the trust shall be held to be barred by a Statute of Limitations.
>
> [328] The respondents submit, however, that section 14 of the *Judicature Act* has no application, having been displaced by sections 40 and 41 of the Alberta *Limitation of Actions Act*, which provide as follows:
>
> > 40. Subject to the other provisions of this Part, no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of a breach of the trust, shall be held to be barred by this Act.
> >
> > 41 (1) In this section, "trustee" includes an executor, an administrator, and a trustee whose trust arises by construction or implication of law as well as an express trustee, and also includes a joint trustee.
> >
> > (2) In an action against a trustee or a person claiming through him,
> >
> > > (a) rights and privileges conferred by this Act shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in the action if the trustee or person claiming through him had not been a trustee or person claiming through a trustee, and
> > >
> > > (b) if the action is brought to recover money or other property and is one to which no limitation provision of this Act applies, the trustee or person claiming through him is entitled to the benefit of and is at liberty to plead the lapse of time as a bar to the action in the like manner and to the same extent

> > as if the claim had been against him in an action for money had and received,
>
> except when the claim is founded on a fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use.

[329] Reconciling section 14 of the *Judicature Act* and sections 40 and 41 of the *Limitation of Actions Act* is not an easy task. The case law is conflicting without any appellate level decisions. However, I find the comments made by Girgulis J. in *Nilsson Livestock Ltd. v. Donald A. MacDonald* (1993), 11 Alta L.R. (3d) 155 (*Nilsson Livestock*) the most compelling. Justice Girgulis held at paragraphs 61-71, that there was no conflict between section 14 of the *Judicature Act* and Part 7 of Alberta's *Limitation of Actions Act*, which deals with actions by trust beneficiaries and includes sections 40 and 41. Instead, he concluded that both section 14 of the *Judicature Act* and paragraph 41(2)(b) of the *Limitation of Actions Act* carve out exceptions to the general applicability of limitations legislation to trustees. Specifically, he held that section 14 of the *Judicature Act*, when interpreted properly, prevents limitations legislation from applying to trustees who still have the trust property in their possession, whether they obtained it as a result of an express trust or as a result of a breach of trust. Similarly, Girgulis J. held that section 41 of the *Limitation of Actions Act* carves out further exceptions – namely it prevents limitation periods from applying to claims based on fraudulent behaviour or to property recovery where the proceeds are still retained by the trustee or were previously received by the trustee and converted to their use. Consequently, according to Girgulis J.'s interpretation of the two sections, both can be read together without one having to give way to the other.

[330] The interpretation proposed in *Nilsson Livestock* is compelling because it accords with the presumption of coherence within a body of legislation. As stated in Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 263: "[i]t is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable without coming into conflict with any other." Under Girgulis J's interpretation of the two statutes, both pieces of legislation can be applied without any conflict.

> [331] In addition, Girgulis J.'s interpretation of the legislation is consistent with the plain wording of section 14 of the *Judicature Act*, which states that limitation periods shall not bar a claim of a beneficiary "against his trustee for any property…" Beneficiaries should always have recourse against a trustee who is holding their property given that every day that a trustee wrongly holds the beneficiary's property is arguably a new breach. Furthermore, this interpretation of the legislation does not arbitrarily deprive a trustee of all the normal protections that other defendants receive under the statute of limitations, but instead restricts the trustee's use of the legislation only in situations that the special nature of a trust relationship requires.
>
> [332] The action in this case is not for the recovery of property held by the trustee but for damages and accordingly, section 14 does not operate to bar the Crown from raising a limitations defence in this case. There has also been no allegation of fraudulent behaviour on the part of the Crown. For these reasons, the appellants are likewise unable to rely on either of the exceptions in subsection 41(2) to the application of the limitation period.

[160] It is my view that there is no issue for trial that any of these exceptions apply in the present case so that, even if these claims could be said to be for a breach of trust, they are still subject to a six (6) year limitation period.

[161] I say this because, although the Plaintiffs allege "notional" accounts for their royalty entitlement, there is, in fact, no trust property, or the proceeds thereof, that was in the possession of Canada at the material time or that had been converted to Canada's own use. The evidence before me is clear that the export tax and the charge under the Program were imposed on the producers and not on the Plaintiffs. The producers paid a royalty to Canada which was a percentage of the sale proceeds from the oil and gas production. These royalty monies were pooled with other public monies in the CRF and were used to subsidize energy costs in Eastern Canada. Hence, there was and is no trust property, or proceeds of trust property to which the

Plaintiffs can lay claim. What the Plaintiffs are attempting to recover in the Program-related phase of their actions is the indirect loss they suffered as a result of the Program. The only funds that could be described as a trust asset were the royalties that were, in fact, paid to Canada, and held in trust for the Plaintiffs at the material time. The Plaintiffs are not claiming these funds in this phase of the action. The Plaintiffs are claiming for the loss of funds which they say should have been paid but were not because of the impact of the Program.

[162] The record shows that the oil production was severed from the Plaintiffs' lands and, under leases, was refined and sold by producers. Hence, the Plaintiffs ceased to have an interest in the oil and gas.

[163] There is also no evidence of a fraudulent breach of trust that could bring the Program-related claims under the other exception set out in *Lameman* ABQB, above.

[164] The Plaintiffs also argue that their interest in their royalty entitlement has not yet become an interest in possession so that, by virtue of s 40(3) of the *LAA,* no limitation period has started to run. Once again, I think this argument clearly mistakes the nature of the indirect loss that the Plaintiffs are attempting to recover.

[165] Beneficiaries who do not have an interest in possession (either a right to actual occupation or possession of trust property or a right to enjoy it) and whose interest is a mere reversion, remainder or expectancy (see *Stroud's Judicial Dictionary of Words and Phrases*, 8th ed, *sub verbo* "possession: real property") are in a special position when it comes to litigation. As

the Ontario Court of Appeal pointed out in *Lamport v Thompson*, [1940] 2 DLR 619 at 640 at para 22, [1940] OR 201 at 229 (SCJ):

> This construction of the statute is, I think, in accordance with its purpose. A beneficiary whose interest in a trust has not become an interest in possession may not be fully awake to the importance of protecting it. The interest may be a contingent one, and there may be little prospect of any benefit from it, so that the beneficiary would not be warranted in commencing litigation to protect it. Considerations of this kind, it may reasonably be assumed, gave rise to the qualifying clause in question. When the beneficiary has, however, an interest in possession, the reason for allowing his delay has ceased to exist. He should be alert then to protect his interest or interests. For the foregoing reasons I am of opinion that the Limitations Act applies and is an answer to this claim.

[166] The Plaintiffs are not in this position at all. The evidence is clear that, throughout the whole period that the Program was in place, and however the Plaintiffs' interest is described, it was an interest in possession. The Plaintiffs had a right to receive and enjoy a royalty entitlement and they were fully aware of the impact of the Program upon this entitlement. Their interest has never been contingent. I see no genuine issue for trial on this point.

[167] My conclusion is that there is no arguable issue for trial over the applicability of s 4(1) of the *LAA* in this case. In my view, we are dealing with a six (6) year limitation period under s 4(1)(e) of the *LAA*. However, even if the claim was characterized as a different breach, such as a breach of trust, the limitation period provided by s 4(1)(e) remains the most advantageous. The evidence will be considered to determine whether the claim was brought within six years from actual discovery of the claim.

(e) *The Terminus a Quo*

[168] Under s 4(1)(e) of the *LAA*, the six (6) year period began to run when the Plaintiffs discovered the cause of action. In this context, discovered means when the Plaintiffs knew all the facts they needed to know to commence their claims for the losses they suffered as a result of the indirect impact of the Program. See *Luscar Ltd*, above, at para 141. In *Lameman* SCC, above, the Supreme Court of Canada had the following to say on point:

> [16] The applicable definition of when a cause of action arises was articulated by this Court in *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 224:
>
> > ... a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence ... [Emphasis added.]
>
> [17] It is argued that the causes of action here advanced were discoverable as early as the 1880s and 1890s. We do not find it necessary, however, to go back so far. The evidence filed by the government establishes that in the 1970s the causes of action now raised would have been clear to the plaintiffs, exercising due diligence. In the mid-1970s, an Edmonton lawyer, James C. Robb, sent letters of inquiry to the Department of Indian and Northern Affairs on behalf of unidentified Papaschase descendants. The ensuing correspondence reveals that in 1974, a group of Papaschase descendants intended to submit a land claim "in the near future". This suggests some actual knowledge of the relevant facts, but there is more. When the Department advised Mr. Robb that the Enoch Band had already submitted a claim regarding the surrender of the Papaschase Reserve, Mr. Robb responded that a joint claim would not be possible. Having been informed of the Enoch Band's claim, these Papaschase descendants knew that the Enoch Band had or was in the process of gathering the relevant information. Indeed, in 1979 the Enoch Band provided funding to Kenneth James Tyler to write a Master's thesis on the events surrounding the surrender of the Papaschase Reserve. The Tyler Thesis covers most if not all of the facts that form the basis of the claims in this action. Mr. Tyler interviewed several Enoch Band elders in the course of his research. It is thus clear that members of

> the Enoch Band were aware of the facts on which this action was based in 1979. The chambers judge, on all the evidence, concluded that any interested party exercising due diligence could have uncovered the same facts Mr. Tyler did.

[169] As Justice Sexton made clear when the Federal Court of Appeal dealt with the previous phases of this action, it is discovery of the facts, not the law, that is at issue:

> [334] However, discoverability applies only to the facts of a situation and not to the law. In *Luscar Ltd. v. Pembina Resources Ltd.*, [1994] A.J. No. 864 (Alta. C.A.), Conrad J.A. found at paragraph 127 that "[d]iscoverability refers to facts, not law. Error or ignorance of the law, or uncertainty of the law, does not postpone any limitation period." The Court also held, with specific reference to the Alberta limitations legislation applicable in this case, that "'cause of action', as that phrase is used in s. 4(1)(e) of the *Limitation of Actions Act*, refers to facts and not legal principles." In addition, the Court held that subsequent clarification or evolution of the law will not postpone the discovery of the material facts so as to extend the limitation period and that the onus of disproving discovery rests on the appellant when the respondent raises a limitation period.

[170] The evidence that Canada has presented to the Court makes clear that the Plaintiffs knew all the facts that they needed to know to pursue these claims in the 1970s. The Plaintiffs had, in fact, begun political negotiations at that time to try to have themselves exempted from the indirect impact of the Program on their royalty entitlements. By 1978 at the latest, the Plaintiffs could have been in no doubt that Canada had rejected their political claims and that their only recourse was legal action. In fact, the documentary evidence makes it clear that they considered legal action. Even though a political solution was no longer possible and the Plaintiffs contemplated legal action, Samson did not commence legal action until 1989, and Ermineskin did not commence legal action until 1992. Both claims were brought well beyond the applicable six-year period.

(i) The Evidence

[171] The documentation before the Court on this issue is detailed, comprehensive and reliable. In my view, it makes it abundantly clear that the Plaintiffs and their advisers were fully aware of the Program and its impact upon their Aboriginal, treaty and other rights (in particular, the Plaintiffs' royalty income) from the time that the government of Canada implemented the Program. Most of the documents come from government files and have been produced for the purposes of the underlying actions. There are also excerpts from *Hansard* and Commons Debates that took place at the material time in which the Plaintiffs' claims under the Program were repeatedly addressed and advanced by Members of Parliament and Ministers. The evidence reveals that clear positions were stated and communicated to the Plaintiffs throughout this time period. There is also documentation originating from the Plaintiffs and their lawyers and advisers (Band Council Resolutions [BCR], Meeting Minutes, Memos, correspondence, and the like) that also makes it abundantly clear that the Plaintiffs were fully aware of all of the facts they needed to commence their claims in the 1970s. In general, the Court has objective business records that could not be plainer and that do not require the Court to draw inferences because they go directly to these particular claims.

[172] Strangely, what the Court does not have is evidence from any individuals identified in the documentation to challenge their obvious import. At this point, many of these individuals are, no doubt, dead, but there is a particular concern that, in a motion where the Plaintiffs are obliged to put their best foot forward, they have produced no evidence from Mr. Roddick who acted for them throughout the relevant period and was obviously – as the documentation reveals – well-

versed in and heavily involved with protecting the Plaintiffs' rights in the face of the negative impact of the Program upon their rights and royalties. Mr. Roddick testified for Samson in the earlier phases of these actions and his knowledge and involvement would have been invaluable to the Court in dealing with the issues before me in this motion. The Plaintiffs' excuses for not asking him to provide evidence are unconvincing, but the fact that neither he nor any other individual actively involved at the material has provided no evidence means that Canada's case on the knowledge issues is overwhelming.

[173] There is an extensive record and, in summary, this is what it reveals:

a) That the Plaintiffs were immediately aware upon the implementation of the Program of the negative impact it would have upon their royalty entitlements. On September 19, 1973, the Chiefs, Councillors and Band Administrators of the Edmonton-Hobemma District wrote to Edward Moore, District Supervisor of Indian Minerals – West, Department of Indian and Northern Affairs [Indian Affairs], requesting information about what effect the new export tax would have on their royalties (Affidavit of Debra Lee Degenstein, sworn August 29, 2013 [Degenstein Affidavit], Exhibit 6). On September 28, 1973, Mr. Moore advised that had Canada not implemented the new tax, or price freeze as it was initially described, the Plaintiffs would have seen a ten percent increase in their royalty revenues. He also advised that it was "highly unlikely" that the tax funds would be returned to the Plaintiffs (Degenstein Affidavit, Exhibit 7). See also the minutes of a Four Band Special Meeting, dated January 21, 1974, where representatives from the Four Bands, Mr. Roddick and representatives from Indian Affairs were present. The Chiefs of the Bands proposed to try to obtain one hundred percent of the export tax (Degenstein Affidavit, Exhibit 13);

b) Throughout the 1970s, the Plaintiffs took great pains to deal with the government (both federal and provincial) to reverse the negative impact of the Program upon their royalties. See, for example, a Band Council Resolution, dated February [illegible], 1974, where the Four Bands requested that all income from the Reserve be returned to the Four Bands and that "immediate consultation be commenced with the Department of Energy Mines and Resources for a return of income collected to date" (Degenstein Affidavit, Exhibit 18). See also Degenstein Affidavit, Exhibit 22, a Department of Finance representative's report of a Four Band meeting that he attended on February 6, 1974. He says that about twenty-five representatives from the Four Bands were present, in addition to two solicitors (of which Mr. Roddick was one), and representatives from the Department of Justice, the Department of Finance, Indian Affairs, and Indian Minerals. The purpose of the meeting was to discuss the Four Bands' request for the "revenues accruing from the

federal export tax on oil." See also Degenstein Affidavit, Exhibit 48, a letter from Mr. Roddick to Indian Affairs, dated April 24, 1975, requesting Indian Affairs' position and an update as to whether any representations have been made to the Department of Finance regarding a rebate of the export tax;

c) That the Plaintiffs repeatedly sought a political solution in the assertion of their rights, but were fully aware that legal action was an option, and even threatened legal action. See, for example, a letter from Mr. Moore to a number of Bands (including the Plaintiffs), dated March [illegible], 1974 in which he detailed the effects of the *Oil Export Tax Act*. He closed with: "Should any of the Bands wish to have added representation such as legal or other professional assistance, we would very much appreciate being advised in order that we may coordinate our efforts to ensure that we are not working at cross purposes" (Degenstein Affidavit, Exhibit 29). See also Exhibit 36 where Mr. Moore responded to a letter from the Bands, including the Plaintiffs, requesting more information regarding the export tax and its effect. Mr. Moore ended his response with the comment: "I would expect that the larger oil producing Bands might wish to consult further with Mr. Roddick and/or other legal advisors." See also Exhibit 44 which is a hand-written account of a Four Band Council Meeting, dated December 17, 1974, at which both Mr. Roddick and Mr. Moore were present, and a note indicates that Mr. Moore shared that after meeting with the Department of Finance, there was "no chance to get any portion of export tax." Mr. Moore said that he suggested the Department of Finance "take a long hard look at the position they are taking in the light of the fact [*sic*] that the 4 Band is not short of money and could take in to court in a hurry." See also Degenstein Affidavit, Exhibit 88, where minutes from a phone call from Mr. Roddick (it's not clear who the phone call was made to but it bears Texaco and Amoco stamps), dated December 4, 1979, states that Mr. Roddick said he was "prepared to file an action on the oil export tax against the Crown if that is what it takes but will not do so until he is sure nothing is being done in Ottawa to alleviate the situation";

d) That the Plaintiffs' Band councils were highly attentive to the issues and took appropriate action to try and reverse the negative impact of the Program. See, for example, the Four Band Special Meeting Minutes, dated December 6, 1973, where a workshop discussing the effects of the export tax was discussed and scheduled (Degenstein Affidavit, Exhibit 10). See also a BCR requesting that all income from the export tax be returned, dated February [illegible], 1974 (Degenstein Affidavit, Exhibit 18); a Four Band Regular Meeting, November 18, 1975, discussing the importance of oil-producing Bands presenting a unified position (Degenstein Affidavit, Exhibit 55); Oil & Export Tax Special Four Band Chief & Council, June 21, 1976, where a research committee was organized and Mr. Roddick was asked for a brief on his advice regarding the export tax (Degenstein Affidavit, Exhibit 57);

e) That the Plaintiffs were assisted in their efforts to reverse the impact of the Program by several government departments (notably Indian Affairs) and officers. See particularly Indian Affairs' efforts to advocate for the Plaintiffs' position on the export tax issue before Cabinet (Degenstein Affidavit, Exhibits 74, 77, 79); and

f) That the Plaintiffs had knowledgeable and effective support throughout from, among others, Mr. Schellenberger, the M.P. for Wetaskiwin and from their lawyer, Mr. Roddick whose untiring efforts on behalf of the Plaintiffs are everywhere apparent throughout the documentation. See Exhibit 16 where Mr. Schellenberger wrote to the Minister of Indian Affairs to ask that the Plaintiffs be consulted on Canada's plans to distribute the export tax funds. See also Exhibit 13 where Mr. Schellenberger attended a Four Band Special Meeting and "informed Council that if at any time they need his assistance he will be willing to meet with the Council." See also Exhibit 12 where Mr. Roddick attended a "Conference on Indian Band Revenues from Oil and Gas" representing "certain Bands including the Hobbema group" (of which the Plaintiffs were a part). See also Exhibit 20 where Mr. Roddick wrote to the Assistant Deputy Minister of Indian Affairs in which he wrote to advise that a number of Bands, including the Plaintiffs, wished a return of the export tax.

[174] Ultimately, the evidence shows that the federal Cabinet conclusively rejected the Plaintiffs' claims for a rebate on their lost royalties. And, in the late 1970s, Mr. Roddick threatened to file a lawsuit to assert the Plaintiffs' rights and reclaim their losses. See Degenstein Affidavit, Exhibit 88. However, the record before me shows that no claims were filed by the Plaintiffs with regard to the Program-related claims until they were included as part of these proceedings in 1989, and 1992 respectively, and well outside of the relevant limitation period.

[175] The Plaintiffs have not seriously contested the basic facts that appear in the evidentiary record and which support the conclusions listed above. However, they attempt to offset what the evidence tells us in several ways that are not supported by any evidence. For example, they suggest that their knowledge was incomplete during the 1970s and they knew a lot more when they did decide to initiate these actions. It is well established that the law does not require perfect knowledge, before a limitation period applies (see *De Shazo v Nations Energy Co*, 2005 ABCA 241 at paras 31-32) and additional information is inevitably picked up as matters move forward, actions are commenced, and the discovery process takes effect. Samson does not, however,

identify any essential fact of which the Band or its lawyers did not know and that was required to bring their action within the limitation period.

[176] Samson also suggests that the claim they are now making is somehow different from the claim they would have made in the 1970s. But conceptually different arguments thought up by new counsel do not change the underlying facts and cause of action; the arguments raised by Samson now are all based upon the same facts that were available in the 1970s. The application of a limitations defence cannot depend upon whether new counsel comes up with new arguments. If this were the case, it would always be possible to circumvent a limitation period. See generally *Wewaykum*, above, at para 124; *Ioannou v Evans*, [2008] OJ no 21 (SCJ).

[177] Ermineskin refers the Court to documentation for the implication that the Band's interest did not receive sufficient attention from Canada, and that those offices, departments and organizations that dealt with the Band were underfunded. Much of the documentation referred to by Ermineskin dates from the mid-1980s and evidences no real connection to the state of the Band's knowledge and the availability of advice and assistance at the material time in the 1970s. The evidence before me for the relevant period is quite clear that the Plaintiffs' assertions and concerns received a great deal of attention and were eventually dealt with by the relevant Ministers and the federal Cabinet.

[178] As I mention in more detail later, Ermineskin goes to considerable lengths to persuade the Court that the Band was not aware of the facts needed to bring the "taking in kind" aspect of its claim, and that Canada did not properly evaluate taking oil in kind as a possible way of

avoiding the made-in-Canada oil price and alleviating the negative impact of the Program upon the Plaintiffs' royalties. Once again, however, I think the evidence clearly establishes that taking royalty in kind was considered, that the Plaintiffs and their lawyer always knew that the royalty was not being taken in kind throughout the 1970s, and that the Plaintiffs were not receiving any kind of exemption from the Program by taking oil in kind or in any other way. As Canada points out, taking in kind is simply a particular way in which Canada could have attempted to avoid the negative impact of the Program upon the Plaintiffs' royalties and is not some separate cause of action. There is no evidence to suggest that the Plaintiffs did not bring their actions during the 1970s because they were not aware of the taking in kind implications for Canada's fiduciary obligations, and the evidence is, in any event, that the Plaintiffs were fully aware of what taking in kind could have meant for them, and that Canada had rejected it as a possible way of dealing with the Plaintiffs' complaint (See Affidavit of Raymond Cutknife, sworn June 11, 2014 [Cutknife Affidavit], Exhibit A at 85-86).

[179] Ermineskin also refers to documentation that deals with the general socioeconomic challenges that First Nations have faced in Canada and the "culture of dependency" that has developed as a consequence. Canada does not take issue with these observations but points out that the evidence does not specifically reference the Plaintiffs and has nothing to do with the Plaintiffs who were fully advised and were fully aware of the material facts needed for their claims during the 1970s. I agree with Canada on this issue.

[180] The Plaintiffs' attempts to establish equitable fraud are likewise without an evidentiary base. In my view, the evidence is clear that the Plaintiffs knew everything they needed to bring

their Program-based claims during the 1970s, that they were well-advised, and that they continued to examine the impact of the Program and seek a political solution that, in the end, they were told was not available to them. They considered legal action but, for some reason that they have not explained, decided not to pursue it until these actions were commenced.

[181] This is not a case about a lack of knowledge, sophistication, advice, resources or opportunity. I can see nothing that would have prevented the Plaintiffs from bringing their Program-related claims during the limitation period had they chosen to do so. For whatever reasons, they made a strategic choice not to do so. This means that the Plaintiffs are now left to rely upon legal arguments to avoid Canada's limitation defence. Those legal arguments amount to an assertion of immunity from limitations law. The Plaintiffs are claiming a special position that, as I discuss elsewhere in these reasons, I cannot find the jurisprudence to support. The Supreme Court of Canada has made it clear that limitation periods apply to claims for breach of fiduciary duty in relation to Aboriginal property: *Manitoba Metis*, above, at para 138, citing *Wewaykum*, above, at para 121 and *Lameman* SCC, above, at para 13. I am bound by precedent in this matter.

[182] The Plaintiffs have called no evidence to rebut what Canada's evidence establishes: i.e. that the Plaintiffs were fully aware of the facts giving rise to their claims and that the government of Canada had rejected any political solutions that would exempt them from the indirect effect of the Program.

[183] In fact, it seems very strange that, in a motion where the Plaintiffs must put their best foot forward, the Plaintiffs have provided no evidence from Mr. Roddick who acted for the Plaintiffs throughout the period of the Program and who was very active in dealing with the relevant Ministers, officials and politicians on behalf of the Plaintiffs. Canada's evidence reveals Mr. Roddick to have been active and knowledgeable on behalf of his clients. If there was any doubt on the part of the Plaintiffs regarding the facts that give rise to the Program-related claims, then Mr. Roddick would have been able to speak to it. The Court asked Samson for an explanation and was told by Samson's counsel that (Transcript of Hearing (29 January 2015), Calgary at 7-8):

> [I]t's Samson's position that Mr. Rodic [*sic*] wasn't involved in the present issue before the Court. He was involved with a lobbying effort and a rebate of the oil export tax. Most importantly… he was representing a raft of parties from time to time. Not just Samson and Ermineskin, not even just the four nations from Hobbema, but from time to time he was representing all the oil producing First Nations. For him to be – for him to give evidence in the present matter would be a complex matter of obtaining the consent of all those parties, and the context of solicitor client privilege would undoubtedly be waived… Mr. Rodic [*sic*] was not privy to the details of oil production and oil export from Pigeon Lake. He wasn't made aware of the volumes that were being exported, he wasn't made aware of the prices that the oil was being exported at, and…he wasn't even made aware of the consequences of what would transpire were the Crown to take Samson and Ermineskin royalty oil in kind and attempt to export it.

[184] This is not a convincing response, and there is no evidence before me to support it, especially when the record shows the extent of Mr. Roddick's involvement to have the Plaintiffs exempted from the negative impacts of the Program and his awareness that legal action was an option when negotiations proved fruitless, and that Mr. Roddick was called by Samson in the trial of the earlier phases of these actions and testified extensively as to how Crown officials

shared information with the Plaintiffs' counsel. The failure to provide evidence from Mr. Roddick for this motion, and the absence of any convincing explanation, means, I think, that I must draw a negative inference: i.e. that the legal counsel who was closely involved with dealing with the adverse impact of the Program upon the Plaintiffs' royalties during the limitation period has nothing to tell the Court that would assist the Plaintiffs and that the Plaintiffs had full knowledge of the facts to support their claims in 1974 or, in any event, by 1978 when Canada conclusively rejected their claims in relation to the Program and any political solution to their grievances.

(ii) Recurring Cause of Action

[185] One of the ways in which the Plaintiffs seek to avoid the consequences of Canada's limitations defence is an allegation that their claims are based upon continuing breaches by Canada that continue to the present day. Once again, I do not think there is any issue for trial on this point.

[186] The Plaintiffs' Program-related claims crystallized in the early-1970s, and certainly no later than 1978, when they became aware of the impact of the Program upon their royalty entitlements and were told in clear terms that oil and gas production on their reserves would not be exempted from the Program. This was the breach and the injurious act that grounds their claims. The alleged breach may have had continuing monetary consequences but, once the Program took effect, legal action was an option that they could have pursued immediately even though, as the evidence shows, they decided against legal action for reasons that they have

declined to explain and have failed to provide evidence from Mr. Roddick who would have been able to explain to the Court why the threatened legal option was not taken up.

[187] The situation in the present case leads the Court back to Justice Binnie's guidance in *Wewaykum*, above:

> [135] Acceptance of such a position would, of course, defeat the legislative purpose of limitation periods. For a fiduciary, in particular, there would be no repose. In my view such a conclusion is not compatible with the intent of the legislation. Section 3(4), as stated, refers to "[a]ny other action not specifically provided for" and requires that the action be brought within six years "after the date on which the right to do so arose". It was open to both bands to commence action no later than 1943 when the Department of Indian Affairs finally amended the relevant Schedule of Reserves. There was no repetition of an allegedly injurious act after that date. The damage (if any) had been done. There is nothing in the circumstances of this case to relieve the appellants of the general obligation imposed on all litigants either to sue in a timely way or to forever hold their peace.

[188] Canada also cites *Peepeekisis Band v Canada*, 2012 FC 915 at para 94, *Huang*, above, at paras 73-77, and *Mutual Benefit Society*, above, at paras 79, 83-85, 92, which I think are directly on point and suggest why a continuing breach is just not applicable to the Plaintiffs' claims on the facts of the present case.

(iii) Equitable Breach

[189] Samson makes several allegations of concealment or equitable fraud on Canada's part. None of them are supported by the evidentiary record.

[190] The documentation referred to above makes it very clear that Indian Affairs fully supported the Plaintiffs in their attempts to reverse the negative impacts of the Program. Indian Affairs officials worked closely with Mr. Roddick as he pursued the Plaintiffs' claims with the government. Indian Affairs attempted to convince other government departments (Finance and Energy, Mines and Resources) that they should consider the Plaintiffs' claims, and Mr. Roddick actually thanks Indian Affairs for their efforts on behalf of the Plaintiffs. See Degenstein Affidavit, Exhibit 20.

[191] The Plaintiffs point to an "Oil Export Tax – Return to Indian Bands" Memorandum from Mr. van de Voort, the District Supervisor, Indian Affairs, Edmonton-Hobbema District, as evidence that Canada withheld information from them (Degenstein Affidavit, Exhibit 37). They even suggest that a portion of Mr. Moore's letter, upon which the memorandum was based (Degenstein Affidavit, Exhibit 36), was deliberately deleted by Mr. van de Voort when he wrote his memorandum to "All Chiefs & Councillors, Four Band Administration." The record is clear, however, that what the Applicants refer to as an "internal document" was provided to their own auditors, and the auditors refer to it in documentation copied to Mr. Bull, the Four Band Administrator (Degenstein Affidavit, Exhibit 40).

[192] The record also shows that legal opinions provided to Canada may not have been copied to the Plaintiffs, but that their essence was conveyed to Mr. Roddick (See i.e. Degenstein Affidavit, Exhibit 38). And the Court has to bear in mind that the Plaintiffs have not provided any evidence from Mr. Roddick that he was unaware of any aspect of the Plaintiffs' claims.

[193] There is no evidence to support concealment or equitable fraud in this case. Indeed, the evidence before me suggests forthright opinions and genuine concern by Crown officials to place the Plaintiffs' case before the relevant decision-makers and to assist Mr. Roddick in pressing the Plaintiffs' Program-related claims.

(f) *Suitability for Summary Judgment*

[194] Samson suggests that, when all is said and done, the Program-related claims are just not suitable for summary judgment.

[195] Samson reminds the Court that, in accordance with the Federal Court decision in *Source Enterprises*, above, at paras 14-21, I can only make findings of fact and law where the relevant evidence is available on the record and does not involve a serious question of fact or law which turns on the drawing of inferences. This principle, however, tells heavily against the Plaintiffs, who make a considerable number of assertions for which there is no evidence.

[196] Samson also reminds the Court that the Supreme Court of Canada, in *Hryniak*, above, at paragraph 49, recently emphasized what it is I must do to determine that there is no genuine issue for trial:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[197] The evidence put forward by Canada in this motion establishes that the Plaintiffs were fully aware of all the facts they needed to commence their Program-related claims by 1978 at the latest, that they were legally represented and were fully advised of their legal options, that they were told clearly by Canada that there would be no political solution to the adverse impact of the Program upon their royalty entitlements, that they threatened legal action, and that, for reasons that they have declined to explain to the Court, they chose not to pursue legal action at the material time.

[198] In my view, Samson has not materially challenged any of this evidence. Instead, Samson has chosen to oppose the motion on various legal grounds. In my view, the evidence provided to the Court is more than sufficient to apply the law to the facts. It also seems clear to me that summary judgment is a proportionate, more expeditious and less expensive means to achieve a just result (*Hryniak*, above, at para 49; *Manitoba v Canada*, above, at para 17).

[199] I can say this because, given the historical nature of the available evidence, a trial judge would be in no better position than I am to make the necessary findings of fact. If Mr. Roddick, for instance, has anything to say that would assist the Plaintiffs, it could and should have been placed before me. The Plaintiffs have not suggested any way in which the relevant evidentiary record could improve between now and trial.

[200] The evidentiary record tells me that this is not a case about fairness when it comes to limitations issues. It is about a shift in strategy. There is nothing to suggest that these actions could not have been commenced within the relevant limitation period. The Plaintiffs knew

everything they needed to know and were well advised. The evidence suggests that, although the Plaintiffs threatened legal action, they made a deliberate choice not to pursue legal remedies during the limitation period. There were, no doubt, strategic reasons for this decision, but they have not been fully articulated before me. There is a suggestion from Canada that the Plaintiffs were securing other concessions from the government at the material time, but that does not affect my conclusions that the Plaintiffs made up their own minds not to pursue the legal options of which they were fully aware. They later changed their minds and are now pursuing the Program-related claims. In doing so, they really have presented no evidence that they were unable to bring their claims within the limitation period. They are simply seeking immunity from the usual consequences of ignoring a limitation period and allowing it to lapse. They are saying that limitation laws should not apply in this case, mainly because their claims are based upon rights that are constitutionally recognized.

[201] That Samson has chosen to approach the limitations issues in this way suggests to me that Samson's principal objective is to argue legal points and, in particular, the constitutionality of applying a limitations defence to the Aboriginal and treaty rights that underlie the Program-related claims. In my view, however, the law on this issue is clear and we have Supreme Court of Canada authority for the applicability of a limitation period to the facts of this case. In effect, by not challenging the materials facts, Samson is saying that it does not matter if the Plaintiffs knew they had claims based upon the negative impact of the Program and could have brought those claims in the 1970s. Their position appears to be that the Plaintiffs, at least where constitutional and treaty rights are involved, should not be subjected to any time restrictions. This means that the Plaintiffs are claiming the right to bring the Program-related claims at any time that is

convenient to them, and without having to provide any explanation as to why they might choose one time rather than another. To allow this would be to deprive Canada of any repose from legal action on such claims. That may, or may not, be what the law should be. The Plaintiffs obviously feel that it raises an issue for trial and they should be allowed to argue it. But given the fact that the evidence before me is clear, the trial judge will be in no better position than I am to decide whether Canadian law exempts these particular claims from a limitations defence, or indeed any of the issues that the Plaintiffs have brought before the Court in these motions. In other words, I do not see any disadvantage for either side in deciding these issues now. If they disagree with me, and one side no doubt will, they both have legal recourse available to them. In addition, I think that addressing the limitations issues now will be a time and resource saver for both sides. Both sides need to know whether limitations remains an issue before they put in the, no doubt, enormous amount of work that will be required to deal with the merits of the Program-related claims in the context of extremely important, but cumbersome, overall actions.

[202] Samson has put forward a number of other reasons why it would be inappropriate for the Court to grant summary judgment. In my view, none of them is convincing or is substantiated by the record before me.

[203] Samson says, for example, that the Supreme Court of Canada has warned that granting "partial summary judgment may run the risk of duplicative proceedings or inconsistent findings of fact and therefore the use of powers may not be in the interest of justice" (*Hryniak*, above, at para 60). Such risks may well arise in some cases, but I fail to see how they arise here, and

Samson has not really addressed this point fully. On the record before me, in the full context of these actions, I see no danger of duplicative proceedings or inconsistent findings of fact.

[204] Samson also points out that this Court has held that it is inappropriate to grant summary judgment on an issue that cannot be separated from other pending issues in the action. See *Marine Atlantic*, above. I do not think anyone would take issue with this general proposition, but I fail to see how it arises on the record before me and, once again, Samson has not really elaborated other than to say that the Program-related claims are but a piece of the overall actions. Samson refers the Court to Justice Teitelbaum's Order dated September 17, 2002. This Order, however, divides the actions up into a series of distinct phases, and phases a) "General and Historical" and b) "Money Management" have already been dealt with separately. I fail to see why phase d) "Other Oil and Gas Issue (the "Tax" or the "Regulated Price Regime" issue) cannot be dealt with in a discrete way and, in particular, why Canada's limitations defence on this aspect of the overall actions cannot be separated from the remaining issues.

[205] Samson says that it fears that a finding of a material fact in this motion may prejudice its claims in the lawsuit as a whole with respect to the oil and gas issue but does not explain how it could, except to the extent that the limitations defence will remove phase d) from the actions, which is no more than what happens every time a limitation period applies.

[206] Samson's only specific allegation along these lines is that:

> 119. A finding that the value of the Samson Plaintiffs [*sic*] exported oil for royalty calculation purposes was something less than the price or value of this oil and the international market may impact the value of royalty oil that was not exported.

[207] The Court has no intention of making any such finding. Such an issue is irrelevant to what I am called upon to decide in this motion. The issue is simply not before me.

[208] I see nothing in the record before me to suggest that summary judgment in this motion is unfair or somehow inappropriate, provided the necessary facts are established and I can apply the law to those facts. I think the facts have been established and the law is clear.

(3) T-1254-92 – Ermineskin's Position

[209] As I have already pointed out, there is considerable overlap between Samson's and Ermineskin's grounds for resisting this motion. Where I see no difference between both Plaintiffs I will point this out and simply refer to my comments on Samson. Most of what I have to say on Ermineskin deals with points where Ermineskin differs from Samson.

(a) *No Constitutionally Enacted Limitation Period*

[210] Ermineskin also lays a great deal of emphasis on the constitutional issues raised in these motions. The Plaintiffs' position is that the motions raise a novel question of law regarding the constitutional applicability of limitations statutes to claims based on Aboriginal and treaty rights. Both Plaintiffs adopt each other's arguments on this point, but Ermineskin's submissions seem to me to be more trenchant. The importance of this issue for both Plaintiffs requires me to address Ermineskin's arguments in some detail.

[211] Generally speaking, Ermineskin argues that there is a genuine issue for trial regarding Ermineskin's treaty rights under Treaty No. 6 because s 39 of the *Federal Courts Act*, by virtue of s 35 of the *Constitution Act, 1982,* unjustifiably infringes the treaty right in question and so is of no force or effect in relation to the Plaintiffs' Program-related claims. Ermineskin has filed a Notice of Constitutional Question challenging the constitutional applicability of s 39 of the *Federal Courts Act*. This raises a genuine issue for trial, Ermineskin argues, because there is no previous decision that has considered a direct challenge to the constitutional validity of s 39 of the *Federal Courts Act* pursuant to s 35 of the *Constitution Act, 1982*. Ermineskin says that this constitutional issue should not be determined on a motion for summary judgment.

[212] Ermineskin refers the Court to *Sparrow*, above, where the Supreme Court of Canada confirmed the existence of a general fiduciary relationship between Canada and all Aboriginal people (at 1108). Ermineskin has referenced many well-known cases on point, but it seems to me that we must assume that the Supreme Court of Canada was fully aware of the historical and jurisprudential background on this issue when it came to consider *Wewaykum*, *Lameman* SCC, and *Manitoba Metis*, so that we can look to these leading cases to determine how limitations issues should be dealt with in the full context of Canada's relationship with Aboriginal people, and the Plaintiffs in particular.

[213] Ermineskin says that it "cannot be said that Ermineskin has not raised a genuine issue for trial as to the existence of these treaty rights" (Ermineskin Memorandum at para 70). This is confusing because I do not understand Canada to be saying that the Plaintiffs do not have treaty rights. Canada is simply saying that those rights should have been enforced within the relevant

limitation period. So the only issue for trial would be whether those rights can be subject to a limitations defence. Ermineskin's argument requires the Court to accept that limitation periods expunge rights and, for reasons I have already given, I do not think the jurisprudence supports this position.

[214] Ermineskin correctly points out that the Federal Court of Appeal has already made significant comments upon the matters now before me, which were affirmed by the Supreme Court of Canada with regard to the claims dealt with in phases a) and b) of the actions. In essence, the Federal Court of Appeal has said that Canada owes fiduciary obligations rooted in treaty to the Plaintiffs with respect to the use and exploitation of the Plaintiffs' oil and gas resources (*Ermineskin* FCA, above):

> [110] …if the *Indian Oil and Gas Act* had never been enacted, the Crown would have been a trustee of any royalties derived from the exploitation of the oil and gas reserves in relation to the surrendered interests in the Samson Reserve and the Pigeon Lake Reserve. That conclusion is compelled by the promises of Treaty 6, as well as the provisions of the *Indian Act* relating to reserves and the management of Indian money. The Crown clearly has fiduciary obligations to Ermineskin and Samson with respect to the use and exploitation of their respective shares of the oil and gas resources on the Pigeon Lake Reserve and the Samson Reserve, and also with respect to their respective shares of the royalties derived from the exploitation of those resources…

[215] Canada does not, in my view, take issue with any of this and I am not being asked to rule otherwise in this motion. Indeed, it seems to me that the Federal Court of Appeal confirms Canada's position that the claims at issue in this motion are claims for breach of fiduciary obligations. However, as I have said elsewhere in these reasons, whether the fiduciary duty is rooted in treaty obligations, the surrenders, or the legislative schemes does not matter. We have

Supreme Court of Canada jurisprudence which says that limitations statutes apply to bar remedies for such breaches. And the Plaintiffs are presently getting the benefit of the most advantageous limitation period applicable under the Alberta *LAA*.

(b) *No Previous Case*

[216] A basic tenet of Ermineskin's argument is that there is a genuine issue for trial in that "no previous decision of any Canadian court has considered whether a limitations statute is constitutionally inapplicable to a treaty claims on the basis that its application, in the circumstances, would unjustifiably infringe treaty rights" (Ermineskin Memorandum at para 79).

[217] It may be that the issue has never been precisely formulated in this way, and it may be that the particular facts of this case and the particular rights asserted, have not been litigated. But this does not mean that we do not have guiding jurisprudence that clearly answers the question. The Supreme Court of Canada, in particular, often provides general guidance that is meant to be extrapolated to particular circumstances that will arise in future cases. So I think we have to look at what the Supreme Court has said on this matter to determine whether there is a genuine issue for trial in this case.

[218] In this regard, I think we have to go directly to *Manitoba Metis*, above, where the Supreme Court cites and purports to follow and/or distinguish previous case law, including the important decisions in *Wewaykum*, and *Lameman* SCC, both above.

[219] Ermineskin offers the Court - and these submissions are adopted by Samson - its views of what *Manitoba Metis*, does and does not, tell us:

> 78. …
>
> e) in *Manitoba Métis*, the majority of the Court accepted that limitation periods could apply to “Aboriginal claims for breach of fiduciary duty”; however, the Court went on to point out that the case did not involve a claim for breach of fiduciary duty but rather a claim of a constitutional nature. In the present case, Ermineskin’s constitutionally protected treaty rights are directly in issue. Moreover, it is apparent from the reasons of both the majority and the minority in *Manitoba Metis* that the constitutionality of the relevant limitations statute was not challenged in that case (see paras. 225-226, *per* Rothstein J.). Neither the majority nor the majority [*sic*] considered whether the statute unjustifiably infringed aboriginal or treaty rights;

[220] In my view, Ermineskin is misreading *Manitoba Metis*, above. I do not see the Supreme Court saying that limitation periods “could apply” to Aboriginal claims for breach of fiduciary duty. The Supreme Court says that they “do” apply. The majority judgment on point reads as follows:

> [138] The respondents argue that this claim is statute-barred by virtue of Manitoba’s limitations legislation, which, in all its iterations, has contained provisions similar to the current one barring “actions grounded on <u>accident</u>, <u>mistake</u> or <u>other equitable ground of relief</u>” six years after the discovery of the cause of action: *The Limitation of Actions Act*, C.C.S.M. c. L150, s. 2(1)(k). Breach of fiduciary duty is an “equitable ground of relief”. We agree, as the Court of Appeal held, that the limitation applies to Aboriginal claims for breach of fiduciary duty with respect to the administration of Aboriginal property: *Wewaykum*, at para. 121, and *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372, at para. 13.
>
> [Emphasis in original]

[221] The appeal was allowed in *Manitoba Metis* on the basis that the claims before the Court were *not* about breach of fiduciary duty:

> [139] However, at this point we are not concerned with an action for breach of fiduciary duty, but with a claim for a declaration that the Crown did not act honourably in implementing the constitutional obligation in s. 31 of the *Manitoba Act*. Limitations acts cannot bar claims of this nature.
>
> […]
>
> [143] Furthermore, the remedy available under this analysis is of a limited nature. A declaration is a narrow remedy. It is available without a cause of action, and courts make declarations whether or not any consequential relief is available. As argued by the intervener the Assembly of First Nations, it is not awarded against the defendant in the same sense as coercive relief: factum, at para. 29, citing *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539, 193 D.L.R. (4th) 344, at paras. 11-16. In some cases, declaratory relief may be the only way to give effect to the honour of the Crown: Assembly of First Nations' factum, at para. 31. Were the Métis in this action seeking personal remedies, the reasoning set out here would not be available. However, as acknowledged by Canada, the remedy sought here is clearly not a personal one: R.F., at para. 82. The principle of reconciliation demands that such declarations not be barred.

[222] The Program-related claims that underlie these motions <u>are</u> for a breach of fiduciary duty.

[223] Justice Rothstein in *Manitoba Metis* dissents on the result, but agrees with the majority on the applicability of limitation periods to Aboriginal claims against Canada:

> [269] The application of limitations periods to claims against the Crown is clear from the cases generally and also specifically in the area of Aboriginal claims. For example, in both *Wewaykum* and *Lameman*, this Court applied a limitations period to bar an Aboriginal claim against the government.

> [270] Application of limitations periods to the Crown benefits the legal system by creating certainty and predictability. It also serves to protect society at large by ensuring that claims against the Crown are made in a timely fashion so that the Crown is able to defend itself adequately.
>
> [271] The relevance of limitations periods to claims against the Crown can clearly be seen on the facts of this case. My colleagues rely on "unexplained periods of inaction" and "inexplicable delay" to support their assertion that there is a pattern of indifference. In my view, it cannot reasonably be ruled out that, had this claim been brought in a timely fashion, the Crown might have been able to explain the length of time that it took to allocate the land to the satisfaction of a court. The Crown can no longer bring evidence from the people involved and the historical record is full of gaps. This case is the quintessential example of the need for limitations periods.

[224] I read *Manitoba Metis* to say clearly that limitation periods are applicable to "Aboriginal claims for breach of fiduciary duty with respect to the administration of Aboriginal property" (at para 138) and "Aboriginal claim[s] against the Crown" (at para 298). The relevant limitation period was not applied on the facts of that case because the majority said it was "not concerned with an action for breach of fiduciary duty" (at para 139). Clearly implicit in this statement is that a limitation would have applied if the majority had felt it was dealing with a claim for breach of fiduciary duty.

[225] In fact, the majority goes further and makes it clear that the remedy available under its analysis "is of a limited nature" and "[w]ere the Métis in this action seeking personal remedies, the reasoning set out here would not be available" (*Manitoba Metis*, above, at para 143). The Supreme Court also points out that "the Métis seek no personal relief and make no claim for damages or for land" (*Manitoba Metis*, above, at para 137). In the present case, the Plaintiffs are seeking damages for breach of fiduciary duty.

[226] It is true that, in *Manitoba Metis*, the Supreme Court of Canada does not specifically say that limitation periods are applicable to a breach of fiduciary duty based upon a constitutionally enshrined treaty right. In my view, however, the general language is clear that Aboriginal claims against Canada for damages for breach of fiduciary duty are subject to a limitations defence. And that is, after all, what the present claims are about. The fact of a constitutionally-enshrined treaty right does not change the remedy, and it was the remedy sought in *Manitoba Metis* that made all the difference to the general availability of a limitations defence.

[227] The Supreme Court does say in *Manitoba Metis* that although the Court retains "the power to rule on the constitutionality of the underlying statute," the Court has held that "claims for personal remedies flowing from the striking down of an unconstitutional statute are barred by the running of a limitation period" (at para 134) Once again, the focus is on the remedy (because this is what limitations bar) and not the right. The Plaintiffs' position is that it is the nature of the "right" that is important for limitations purposes. *Manitoba Metis* tells me that the Supreme Court takes the position that limitations bar remedies, which is why, in my view, the general language about the applicability of limitation periods to Aboriginal claims against the Crown that we find in the case law is equally applicable to the facts, rights and cause of action at issue in this motion.

(c) *Section 39 Prima Facie Infringes Ermineskin's Treaty Rights*

[228] Ermineskin argues that there "can be little doubt that limitation periods which entirely bar the ability to pursue claims against the Crown are a substantive, and not merely a significant, interference" with Ermineskin's treaty right and "[l]egislation such as Section 39 which purports

to interfere with Ermineskin's ability to enforce the Crown's obligations as trustee constitutes at least a *prima facie* infringement of Ermineskin's treaty rights" (Ermineskin Memorandum at para 85).

[229] There is no factual or legal basis for this assertion. Section 39 of the *Federal Courts Act*, which incorporates the Alberta *LAA* by reference does not "purport" to interfere, or in fact interfere, with the Plaintiffs' ability to enforce Canada's obligations. As with most limitations legislation, it simply requires the Plaintiffs to act upon their rights within a specified time. There was nothing to prevent the Plaintiffs from acting upon their treaty rights during the limitation period in this case.

[230] What the Plaintiffs are really saying is that it is unconstitutional for the law to require them to take any legal action based on Aboriginal and treaty rights within a specified period of time. They offer no legal support for this position. This amounts to claiming a constitutional right to take legal action whenever it is convenient or advantageous for the Plaintiffs to do so, irrespective of any disadvantage to Canada. This would mean that the Plaintiffs, or anyone in their position, could simply wait until Canada is not in a position to defend because of the passage of time, however long this takes. But the right to sue at any time that suits a litigant, irrespective of whether the time chosen allows for any defence or meaningful adjudication of the claims, is not a treaty right, and I see no support for it in the jurisprudence referred to by the Plaintiffs. There has been no "meaningful diminution" of the Plaintiffs' treaty rights in this case. Those rights existed at the time the causes of action arose and became known to the Plaintiffs, and they continue to exist. The Plaintiffs are saying that their treaty rights have been abrogated

or diminished because, even though they could have taken action during the limitation period, they decided not to do so. But they have not explained or proved that there was anything to prevent them from taking action on those rights at the material time. They are simply claiming the right to enforce their treaty rights and seek damages whenever they choose to do so and without restriction. They have provided no authority to support this position and, in my view, the Supreme Court of Canada, in the cases referred to above, has made it clear there is no such right.

(d) *The Honour of the Crown*

[231] Ermineskin makes further arguments that:

> 86. The honour of the Crown requires that the Crown be held accountable to its treaty beneficiaries in regard to treaty promises and obligations. As the Supreme Court of Canada recently noted, in *Manitoba Metis*, *supra*, constitutional considerations support holding the Crown accountable despite the lapse of time where aboriginal grievances of a constitutional nature are concerned: "So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in section 35 of the *Constitution Act, 1982*…remains unachieved."
>
> [Citation omitted]

[232] Ermineskin is here decontextualizing words in *Manitoba Metis* from the Supreme Court of Canada that were meant to address the specifics of that case. Paragraph 140 of *Manitoba Metis* reads in full as follows:

> [140] What is at issue is a constitutional grievance going back almost a century and a half. So long as the issue remains outstanding, the goal of reconciliation and constitutional harmony, recognized in s. 35 of the *Constitution Act, 1982* and underlying s. 31 of the *Manitoba Act*, remains unachieved. The ongoing rift in the national fabric that s. 31 was adopted to cure remains unremedied. The unfinished business of reconciliation of the Métis people with Canadian sovereignty is a matter of national and

> constitutional import. The courts are the guardians of the Constitution and, as in *Ravndahl* and *Kingstreet*, cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter. The principles of legality, constitutionality and the rule of law demand no less: see *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 72.

[233] The Supreme Court is not here addressing claims for damages based upon constitutionalized treaty rights. The Supreme Court is addressing a particular constitutional grievance (not *all* constitutional grievances) that went back over a century and a half and that created an "ongoing rift in the national fabric that s. 31 was adopted to cure [but which] remains unremedied" (*Manitoba Metis*, above, at para 140). As the Supreme Court point out, this meant that "we are not concerned with an action for breach of fiduciary duty" (at para 139), for which there would have been a remedy and, thus, a limitations defence. The Plaintiffs have always had a remedy for the breaches they are asserting in their Program-related claims. They simply decided not to pursue their remedies during the relevant limitation period. We are not here dealing with an "ongoing rift in the national fabric" for which no remedy was available and which leaves "unfinished business of reconciliation" of the Plaintiffs "with Canadian sovereignty" (*Manitoba Metis*, above, at para 140) The Honour of the Crown, as the jurisprudence makes clear, does not require that a damages claim for breach of fiduciary duty be exempted from a limitations defence.

(e) *Historical Grievances Should Not Be Ignored*

[234] Ermineskin seeks to enlist the words of Justice Binnie in *Wewaykum*, above, about historical grievances and then refers the Court to Professor Rotman's commentary in

"Wewaykum: A New Spin on the Crown's Fiduciary Obligations to Aboriginal Peoples?" (2004) 37 UBC L Rev 219 at 241-242 (Ermineskin Memorandum at para 87):

> Often a band's claim against the Crown arises long after the alleged breach of duty occurred. This creates particular problems for contemporary breach of fiduciary duty claims since, for many years, Aboriginal peoples in Canada were not in a position to challenge the Crown when their rights were ignored, infringed, or extinguished and were unaware of their rights under Canadian law for considerable periods of time. Even when they were potentially able to mount challenges to the Crown's treatment of their rights, Aboriginal peoples were denied adequate consideration of their claims, either because they were statutorily prevented from commencing legal actions against the federal Crown under the *Indian Act*, or were confronted with the lack of understanding of the nature of their rights and claims by the overwhelming majority of Canadian Judges.
>
> The historic relationship between the Crown and Aboriginal peoples was not only unique, but had profound effects upon both parties. Aboriginal peoples received the short end of the bargain from their alliances and treaties with the Crown and suffered tremendous abuses of their rights over the years. These abuses often occurred with the knowledge of the Crown or, in a number of circumstances, were perpetrated by the Crown itself. Moreover, the Aboriginal peoples faced distinct disadvantages vis-á-vis the Crown in attempting to enforce their rights in the Crown's own courts, and stacking their limited means against the vast resources available to the Crown. In light of these inequities, to have the Crown escape liability for its actions because of the effects of its own legislation - or legislation that it has taken the positive action of referentially incorporating, as in the case of the federal Crown - appears fundamentally unjust, notwithstanding the legitimate policy rationales underlying the existence of statutory limitation periods.
>
> [Footnotes omitted]

[235] Clearly, Justice Binnie's words about historical grievances and Professor Rotman's commentary have no relevance for the factual situation before the Court in these motions. In the present case, the Plaintiffs were, and are, sophisticated Bands who had the advice and support of

Indian Affairs, as well as their own qualified legal advisers, and did not lack the knowledge or resources to take action upon their treaty rights. In fact, they threatened to do so if they did not get what they wanted through negotiations with Canada. There was nothing to prevent them from taking legal action at the material time. They were well positioned to challenge Canada, they were fully aware of their rights, and their rights were not extinguished.

(f) *The Fundamental Conflict*

[236] Ermineskin also asserts the following:

> 88. As will be addressed further below, the assertion of limitation defences in First Nations claims against the Crown is fundamentally in conflict with the Crown's obligation – in the present case its constitutional obligation – to act in the best interest of First Nations:
>
> > If a fiduciary has a duty to act in the best interests of its beneficiary and it breaches that obligation, allowing that same fiduciary to escape liability by hiding behind a statutory shield appears inconsistent with the nature of the fiduciary's duty.
>
> The conflict is even more stark where the Crown has undertaken the obligation by way of a solemn treaty promise. Thus, the availability of statutory limitation periods is not an "insignificant interference" with the enforcement of the treaty right; rather, it seriously undercuts the right itself.
>
> [Citation omitted]

The reference is, once again, to Professor Rotman.

[237] It is not possible, in my view, to reconcile these assertions with the Supreme Court of Canada jurisprudence cited above. The limitation period did not, in fact, in this case interfere

with the Plaintiffs' treaty or other rights. The Plaintiffs were entirely free to enforce those rights. They simply had to do so during the relevant limitation period. The Plaintiffs have not explained, or proved, how having to enforce their treaty rights during a particular period of time interfered with or diminished those rights. If there had been some impediment to the exercise of those rights during the limitation period, then I can see how it could be argued that, on the facts, the limitation period did lead to an interference with, or a diminution of rights. But there is nothing before me to suggest any such impediment.

(g) *Infringement Not Justified*

[238] Ermineskin further asserts that an "infringement of a constitutionally-protected treaty right must be justified," and then refers the Court to the relevant jurisprudence on "valid legislative objective" and "the honour of the Crown" (Ermineskin Memorandum at para 90).

[239] In these motions, the Court is not dealing with Canada's infringement of a "constitutionally protected treaty right." Whether Canada breached the Plaintiffs' treaty rights when it did not exempt the Plaintiffs from the negative impact of the Program on their royalty entitlements is a merits issue.

[240] I have already dealt with the issue of whether s 39 of the *Federal Court Act* infringes the Plaintiffs' constitutionally-protected treaty rights and, on the facts of this case, and for reasons already given, I do not see an issue for trial that it did. It seems to me that in order to establish that requiring the Plaintiffs to take legal action within a prescribed period of time either infringed or diminished their treaty rights in this case, the Plaintiffs would have to show that, for some

reason, they were not in a position to take legal action on those rights at the time. Yet the evidence before me is not only that they were fully aware of the negative impact of the Program upon their treaty rights, but that they actually considered and even threatened to take legal action based upon those rights. Without any impediment, I just do not see how those rights could be said to be infringed or diminished by s 39 of the *Federal Courts Act*. Are rights infringed or diminished because you choose not to assert them legally over a six-year period when you had every opportunity and resource available to assert those rights? I do not think so. As I said earlier, the Plaintiffs are really asserting immunity from limitation periods and a right to sue on their treaty rights at any time that they please. A right that cannot be asserted legally, or a right for the breach of which there is no remedy, may be said not to be a right at all. But a right you choose not to assert legally when you could have, or a right for which there was a remedy for breach that you choose not to pursue, remains a right.

(h) *The Characterization Issue*

[241] Ermineskin agrees with Canada that if s 39 of the *Federal Courts Act* is constitutionally applicable, then Alberta is the relevant jurisdiction for purposes of limitations. I have already indicated above why I agree with Canada and Ermineskin on this point and why I think there is no issue for trial in this regard.

[242] However, Ermineskin disagrees with Canada as to the applicable limitation period under the Alberta *LAA* so that, once again, the characterization of Ermineskin's cause of action has to be identified. Ermineskin feels that the relevant statutory provisions are those that refer to an

"express trustee" under Alberta law. These provisions include s 14 of the Alberta *Judicature Act* and ss 40 and 41 of the Alberta *LAA*.

[243] I have already indicated, in relation to Samson, why I think there is no issue for trial on this matter. As with Samson, there is no trust property received, or previously received, by Canada for Ermineskin, and Ermineskin has no contingent interest that could become an interest in possession. This applies to both present members of Ermineskin and future generations.

[244] Also, I have already indicated why I think Canada cannot be regarded as a common law trustee and why there is no issue for trial that Canada is a fiduciary for purposes of the Alberta *LAA,* and why the limitation period is six (6) years.

[245] Ermineskin argues that if the Program-related claims are properly characterized as being a breach of fiduciary duty, then the applicable limitation period did not begin to run until Ermineskin actually discovered that Canada was in breach of its fiduciary duty. Ermineskin says that the issue of discovery is factually and legally complex and ought not to be determined by way of summary judgment.

[246] Once again, I have already discussed why I think the evidentiary record is clear that both Plaintiffs were fully aware of the impact of the Program upon their royalty entitlement in the 1970s, and, by 1978 at the latest, were fully aware that political concessions from the government of Canada would not be forthcoming, and that their only option was legal action. I have already pointed to the sophistication and knowledge of the Plaintiffs, their advisers and

their legal counsel on all matters related to the impact of the Program upon royalties. In addition, I have before me the record that would be before the trial judge on this point. If there was any other evidence relevant to this issue (such as evidence from Mr. Roddick), then the Plaintiffs were obliged to place it before me in these motions.

[247] Ermineskin says that Canada's limitations argument "is premised on a mischaracterization of Ermineskin's claim" and that the claim "is broader than the Crown suggests in that it does not rest solely on the fact that the Crown failed to exempt Ermineskin from the Energy Program" (Ermineskin Memorandum at para 129).

[248] It is my view that, at this point in the arguments, Ermineskin concedes the true nature of the claims of both Plaintiffs and we get down to the realities of dealing with the evidence. First, Ermineskin says that it "agrees with and adopts Samson's argument that the Crown breached its duties to Samson and Ermineskin when it failed to calculate royalties in accordance with the *Indian Oil and Gas Regulations* and that this claim is not statute barred" (Ermineskin Memorandum at para 130). This is, in fact, an accurate summary of the Plaintiffs' basic claim. The Plaintiffs seek damages because royalties were not calculated in accordance with the Plaintiffs' treaty and statutory rights. This fact is, however, often ignored by the Plaintiffs in other arguments where they rely upon the existence of trust property and interests in possession.

(i) *Taking in Kind*

[249] Ermineskin also says that (Ermineskin Memorandum at para 133):

> While Ermineskin was aware that the Energy Program had a negative impact on its interest, Ermineskin was not aware until at least May 1986 that the Crown had failed to properly evaluate whether the Export Tax and the Export Charge could be avoided through taking Ermineskin's oil royalties in kind. The Crown failed to communicate this fact to Ermineskin.

[250] I have already dealt with what the evidence on "taking in kind" tells us. It seems to me that if "Ermineskin was aware that the Energy Program had a negative impact on its interest," then Samson was also aware of that fact. This is because the same evidence concerning knowledge, sophistication, advice and threats of legal action applies to both Plaintiffs. So, the basis of the claim – that "the Crown breached its duties to Samson and Ermineskin when it failed to calculate royalties in accordance with the *Indian Oil and Gas Regulations*" – was, according to Ermineskin, known to both Plaintiffs upon the implementation of the Program. Samson has attempted to avoid this obvious fact, and to problematize its claim for limitation purposes, by asking the Court to focus upon aspects of its Program-related claims that refer to the administration of monies collected under the Program in Ottawa. As I have already pointed out, this does not affect my finding that Samson had full knowledge of the facts it needed to make its claim by the 1970s when the Program was implemented and, in any event, by no later than 1978. Ermineskin takes a somewhat different tack and singles out the "royalties in kind issue" as an aspect of the Program-related claim that it alleges it did not discover until 1986:

> 131. Further, the Crown failed to act in Ermineskin's best interests when it did not examine and pursue taking Ermineskin's royalties in kind. The Crown failed to meet its obligations as a fiduciary, as addressed further below, in that it did not adequately consider this means to ameliorate the consequences of the Energy Program on Ermineskin. In other words, the Crown breached its fiduciary duty by failing to consider and pursue all reasonable alternatives to avoid, or alternatively mitigate, the effects of the Energy Program.

> 132. At the materials times, section 31(4.1) of the *Indian Oil and Gas Regulations* vested a discretion in the Minister, on Ermineskin's behalf, to take Ermineskin's oil royalties "in kind". If the Minister had exercised this discretion, the Crown on behalf of Ermineskin could have sold Ermineskin's royalty oil on the world market to avoid the Export Tax and Export Charge. Yet, the evidence demonstrates that the Crown failed to properly consider the option of taking in kind and failed to take expert advice as required in order to evaluate whether to do so would benefit Ermineskin. Moreover, to the extent that the Crown can be said to have actually made a decision not to take in kind, the decision was merely one of expediency from the Crown's perspective. The Crown was simply not willing to allocate the necessary resources to a strategy that appeared, "at first glance", to "present some complex operating and administrative problems which will require a not inconsiderable effort to pursue."
>
> 133. Upon a proper characterization of Ermineskin's claims, it is not evident that they are statute barred, While Ermineskin was aware that the Energy Program had a negative impact on its interests, Ermineskin was not aware until at least May 1986 that the Crown had failed to properly evaluate whether the Export Tax and the Export Charge could be avoided through taking Ermineskin's oil royalties in kind. The Crown failed to communicate this fact to Ermineskin.
>
> 134. The evidence in this regard raises genuine issues for trial which, in Ermineskin's submission, cannot be determined on this summary judgment application.
>
> [Citations removed]

[251] Ermineskin reminds the Court of Canada's trust-like obligations and then concludes as follows (Ermineskin Memorandum at para 140):

> Ermineskin submits that the above principles provide ample support for the proposition that the Crown was under a duty to examine all reasonable and lawful measures to protect and maximize the Pigeon Lake Production, and to take expert advice as to such measures where it was prudent to do so. The Crown itself recognized that an important objective was to ensure that Indian bands received the maximum return from their natural resources. The failure to exercise its discretion to do so – that is, by taking royalties in kind – resulted in a significant reduction to

> Ermineskin's oil royalties and resulted in a situation that was, in essence, exploitative for Ermineskin when, in fact, there was a way to the Crown to avoid it.

[252] Once again, Ermineskin emphasizes the merits of its claim, but the matter before me is whether the "in kind" issue is some discrete aspect of the claim that was unknown to Ermineskin at the material time, and whether there is a genuine issue for trial on this issue.

[253] Ermineskin concedes that Canada's internal documents do address "taking in kind," but says the references are only "cursory." Ermineskin also points to concessions made by Canada to the effect that Canada did not initiate any action to take royalties in kind at the material time. Once again, however, most of this goes to the merits of the claims themselves and not to the issues before me.

[254] As I have already made clear, I am not convinced that the "taking in kind" issue amounts to some kind of discrete claim that requires separate consideration in this motion. The causes of action pled by the Plaintiffs are, in essence, claims for breach of trust and breach of fiduciary duty in allowing the Plaintiffs' royalty revenues to be reduced by the indirect impact of the Program. One of the ways it is alleged that Canada allowed this to happen is by failing to fully consider the use of "taking in kind" as a way of off-setting the negative impact of the Program. In my view, this is merely one particular of the cause of action, not some discrete claim with its own limitation period. In fact, the Plaintiffs do not even mention it in their Statements of Claim. There is no evidence before me that the Plaintiffs did not commence their Program-related claims within the limitation period because they lacked knowledge about the taking in kind issue. In my view, the knowledge required for the claim was simply knowledge of the negative impact

of the Program upon the Plaintiffs' royalties. The Plaintiffs have provided no evidence to suggest that they delayed in bringing their actions because they were unaware of the implications of the "taking in kind" issue and its effect upon their treaty or other rights. However, the evidence is also clear, in my view, that the Plaintiffs were aware of the taking in kind issue at the material time and of its implications for their royalty entitlements based upon treaty rights.

[255] The evidence before me indicates that taking in kind was discussed and explored by Canada, but Indian Affairs came to the conclusion that it could not be pursued because it would not be accepted by other departments of Canada. See Examination for Discovery of J. Eichmeier pp 09403 and 11664.

[256] More importantly for the present motions, however, the evidence before me shows that the Plaintiffs and their legal counsel were aware of and alive to the implications of the "in kind" issue. Mr. Moore, who was the Manager of Indian Minerals West at the material time, and who assisted the Plaintiffs in their efforts to persuade Canada to exempt them from the impact of the Program on their royalty entitlement, discussed the matter with Mr. Roddick, the highly involved and knowledgeable legal counsel for the Plaintiffs (See Cutknife Affidavit, Exhibit A at 85-86):

> This is in response to your telex of September 20, 1973 requesting, on behalf of the Chiefs and Counsellors [*sic*] of Bands in your District, information as to the effect of the new 40¢ per barrel Federal tax on crude oil exported from Canada.
>
> It is pointed out that the situation is somewhat unclear at the present moment and this letter is intended to be a brief qualitative rather than a quantitative review of the situation as it exists at the present time. Should it be necessary to review the situation later on at a greater depth in a quantitative manner we would be glad to work with your office and the Bands concerned.

To understand the effect of the tax, it must first be realized that the Federal Government initiated the process by requesting oil companies to refrain from any further price increases in either crude oil or gasoline as sold at the service station. Presumably, the request would have been backed by legislation or other 'teeth' if the companies had not complied. As a result of the price freeze as it relates to crude oil, the oil exported to the United States was some 40¢ less than the price of oil obtained from other sources in that country. This meant that Canada was losing 40¢ on each barrel of oil sold. When I say Canada, there are a variety of opinions as to whether this 40¢ should belong to the Provincial Government, the Federal Government, the oil company or the royalty owner. In any case, the Federal Government instituted a 40¢ per barrel federal tax effective October 1, 1973. At the time of writing, we understand that the mechanics of collection of the tax are under question. To the best of our knowledge, the Federal Government and the Province of Alberta are in serious discussion as to how much of the tax may be rebated to Alberta since virtually all of the exported oil comes from Alberta.

If there had not been a price freeze, the price of crude oil would no doubt have been increased by the oil companies by about 40¢ per barrel. If this had happened, the Indian [*sic*] would have received 40¢ per barrel more for their royalty oil. In view of the fact that 40¢ is slightly over 10% of the value of a barrel of oil, this would have meant that Bands receiving royalties from oil would have received an increase in royalty revenues of slightly over 10%. For the Pigeon Lake reserve this figure would be in the neighbourhood of from $300,000 to $400,000.

If a two-price system had been instituted such that the increased price was allowed only for exported crude the problem becomes somewhat more complex since one would have to consider whether the oil produced from various Indian reserves was exported or used within Canada. On the other hand, it might be reasonable to say that some 75% of the oil is exported and therefore the effect on Indian revenues from royalties would be reduced by 25% from the figures quoted in the previous paragraph. A two-price system and its immediate effect on the revenues to Indian people would be difficult to assess and perhaps administer since the oil company that produces the oil would probably not be the exporter of the oil. It is likely that the oil would pass from an oil company to a pipeline company thereby making it difficult to determine just which oil was exported.

At the present moment, the Federal Government has not announced its intention respecting possible taxes on natural gas

> and I have not had time to review the effects on liquid products derived from gas such as natural gasolines, condensates, propanes and butanes.
>
> As pointed out above, we do not know whether the Federal Government will rebate to the province any of the 40¢ tax and if so how much. If it is rebated in the form of a tax it would appear highly unlikely that there would be a rebate to freehold owners and Indian people.
>
> No attempt is made herein to either justify or condemn the Federal procedure. The price freeze on the price of oil and gasoline is an attempt to prevent the spiralling costs of living and any price freeze affects each of us in a different manner. In this particular case, the price freeze will affect those Bands having oil revenues. We do not know what the situation may be with respect to natural gas at a later time.

See also Reply Affidavit of Debra Lee Degenstein, sworn March 20, 2014, Exhibits A & B.

[257] The Hansard Record for House of Commons Debates for April 10, 1978 also makes it clear that the taking in kind issue was known and debated generally (Degenstein Affidavit, Exhibit 80):

> Mr. Stan Schellenberger (Wetaskiwin) moved:
>
> That, in the opinion of this House, the government should consider the advisability of taking steps to ensure that the question of repayment of the export tax on oil taken from Indian lands be satisfactorily dealt with.
>
> He said: Mr. Speaker, I rise today on a matter I have introduced in this House many times, not in the form of a motion but by way of questions during the question period, questions in the committees of the House of Commons, and by way of the late show which we have from ten o'clock until 10:30 in the evening.
>
> […]
>
> Immediately after the oil export tax was initiated the Indian people began to ask a number of key questions. They were questions such

> as these. Should oil produced, both lessee and lessor shares, from under Indian reserves be exempt from the tax under the provisions of the Indian Act? If either or both of the shares be exempt, would it be possible to have the oil exported to share in the higher price of exported oil? Could Her Majesty – that is the Department of Indian Affairs and Northern Development – form a marketing board to export either the royalty share of oil taken in kind or both the lessee and lessor shares, thereby avoiding the tax and obtaining higher prices? Could the Department of Indian Affairs and Northern Development obtain a rebate for the producing bands on an appropriate share of production which might be deemed to have been exported? What could be done to get higher prices for domestic oil? These are all questions that have been brought forward by members in this House, and directly to the department.
>
> […]
>
> I think it is pretty generally agreed that if Her Majesty, as represented by the Minister of Indian Affairs and Northern Development, attempted to export the oil then Her Majesty, as represented by the Minister of Finance, would try to find a way of making the oil subject to the tax. A somewhat similar situation existed when the Department of Finance made royalties payable to the Department of Indian Affairs and Northern Development and the Department of Energy, Mines and Resources subject to a tax ruling related to corporate income tax.
>
> […]

[258] Mr. Schellenberger who is mentioned in the excerpt was the M.P. for Wetiaskiwin, which is the federal electoral district where the Reserve is located, and he was actively assisting the Plaintiffs with their efforts to have the government of the day exempt them from the impact of the Program.

[259] This evidence shows that the Plaintiffs, and those who were advising and assisting them, were fully aware of the "in kind" issue and that it was generally debated. They were also fully

aware that the government would not use taking "in kind" to off-set the negative impact of the Program upon the Plaintiffs' royalty entitlement.

[260] Once again, it is highly significant and telling that the Plaintiffs have not provided evidence from Mr. Roddick to off-set what the general record tells us about this issue. I can only conclude that, even if the "in kind" issue could be considered some discrete aspect of the Plaintiffs' claims, they had all the facts they needed by 1978 at the latest to take the government of Canada to task on this issue by way of legal action. They knew that taking in kind was a possible way of off-setting the negative impact of the Program upon their royalties, and they knew that the government had made a decision that they would be neither exempted from the Program or assisted by taking in kind. The Plaintiffs have provided no evidence to show what they knew when they began these claims that they did not know before the expiry of the limitation period. They threatened legal action but they chose not to pursue it.

(j) *Legal and Practical Impediments*

[261] Relying upon the decision in *Guerin*, above, decided in 1984, Ermineskin says that there were legal and practical impediments to bringing the Program-related claims earlier than the Plaintiffs did. Once again, Ermineskin refers to the issues that have arisen in other cases – dependence upon Canada, Canada's encouragement to rely upon Canada and its experts and seek a political solution, a lack of base knowledge to instruct professionals – but the evidence before me is quite different. That evidence shows an immediate understanding of the negative impact of the Program upon the Plaintiffs' royalties, and an immediate and prolonged engagement by the Plaintiffs, their advisers, and their legal counsel with the government of Canada, to gain a

political exemption from the Program, as well as assistance from the Department of Indian Affairs, Indian Minerals West, and others in dealing with the Canadian government and its Ministers. This was followed by a definite rejection of a political solution by Canada. At this point the Plaintiffs knew they were faced with a definite "No" from the government and obviously considered their legal options because they actually threatened legal action. The evidence suggests a complete awareness of the impact of the Program, a full understanding of the options, including legal action, and a conscious and advised decision not to take legal action. There is no evidence to support the assertions of practical impediment.

[262] It is, in any event, odd that Ermineskin would invoke *Guerin* when their own Statement of Claim was issued some eight (8) years after the decision in *Guerin*.

[263] In this regard, the present case is very much like *Lameman* SCC, above, where the Supreme Court of Canada found that the cause of action would have been clear to the Plaintiffs in the 1970s. As in *Lameman* SCC, the Plaintiffs in the present case have not filed evidence to show that they were not aware of the relevant facts and the legal options at the material time, or to show that they were not fully advised and assisted by competent professionals and government officials of the full implications surrounding the implementation of the Program and ways of dealing with its negative impact upon royalties. In *Lameman* SCC, above, the Supreme Court of Canada concluded that the lack of evidence and explanation as to how the plaintiffs could have been unaware of the facts to support the claim gave rise to an inference that the "causes of action became discoverable within the meaning of [Alberta's] *Limitations of Action Act* in the 1970s, and that the claims are now statute-barred" (at para 18).

[264] The fact that the Plaintiffs in the present case later acquired new lawyers and received different advice after the expiry of the limitation period does not mean that a limitations defence is not available to Canada, and it does not mean that the Plaintiffs were not fully aware of the facts they needed to commence action or that they were ill-advised at an earlier date. The Plaintiffs have provided no evidence regarding the changes that led them to eventually take legal action. There is some suggestion by Canada that the Plaintiffs were able to gain some political concessions during the relevant period which may have caused them to forego legal action, but this is speculation in my view and is, in any event, not relevant to the issue before me as to whether the Plaintiffs knew the facts required to commence legal action within the limitation period.

(k) *Equitable Fraud*

[265] Ermineskin also raises equitable fraud, or fraudulent concealment, as a ground for postponing the running of the limitation period. Ermineskin's argument is that:

> 204. If any statutory limitation period is applicable to the Energy Program Claims, then there is a genuine issue for trial regarding whether or not the doctrine of equitable fraud applies to postpone the limitation period. However, this issue should not be decided on a motion for summary judgment because a motions judge should not make a finding with respect to a serious question of fact that turns on the drawing of inferences. The fraud in this case is the failure of the Crown to disclose to Ermineskin that it did not intend to consider taking royalties in kind, and its failure to disclose that it did not have the means to properly consider all of the options available to Ermineskin in relation to its resources when the *Oil Export Tax Act* came into effect.

[266] Ermineskin's argument for equitable fraud simply disregards the evidence before me in this case which tells the Court that the Plaintiffs were not only fully aware of all the facts they

needed for their claims that the indirect impact of the Program would, and did, result in their receiving less royalties than they would otherwise have received. It also reveals that the Plaintiffs were fully aware that the government of Canada would not pursue a "taking in kind" option as a way of, perhaps, alleviating the impact of the Program upon the Plaintiffs' royalties.

[267] Once again, the Court is hampered in understanding the Plaintiffs' case for fraudulent concealment by the lack of evidence from the Plaintiffs as to what they knew when they commenced these claims and what they did not know during the limitation period, and which facts were concealed from them that were needed to commence their Program-related claims.

[268] I have no evidence before me that Canada perpetuated some type of fraud, or that the fraud concealed a material fact that the Plaintiffs would have to prove in order to succeed at trial, or that the Plaintiffs exercised reasonable diligence to discover the fraud. See *Ambrozic*, above.

[269] I also see no evidence of unconscionability on the part of Canada throughout the relevant period. The Plaintiffs obviously feel that it was unconscionable for Canada not to exempt them from the Program, but the Canadian government made policy choices and clearly communicated those choices to the Plaintiffs and their advisers. In the end, I can find no evidence to support a claim for equitable fraud or a justification for suspending the limitation period.

(4) Laches and Acquiescence

[270] Canada has also raised laches and acquiescence as reasons why there is no genuine issue for trial for this phase of the Plaintiffs' claims. Because of the conclusions I have reached above, there is no reason to consider these grounds.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. Pursuant to Rule 215 of the *Federal Courts Rules*, the Plaintiffs' claims under paragraph d) of Justice Teitelbaum's Order of September 17, 2002 related to the Regulated Price Regime issue are dismissed as being statute-barred.
2. The parties may address the Court on the issue of costs for these motions. This should be done in writing.
3. This Judgment and Reasons will be placed on T-2022-89 and T-1254-92.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2022-89
STYLE OF CAUSE:	CHIEF VICTOR BUFFALO ACTING ON HIS OWN BEHALF AND ON BEHALF OF ALL THE OTHER MEMBERS OF THE SAMSON INDIAN NATION AND BAND ET AL V HER MAJESTY THE QUEEN IN RIGHT OF CANADA ET AL
AND DOCKET:	T-1254-92
STYLE OF CAUSE:	CHIEF JOHN ERMINESKIN ET AL V HER MAJESTY THE QUEEN IN RIGHT OF CANADA ET AL
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	JANUARY 26 - 30, 2015
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	JULY 9, 2015

APPEARANCES:

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