Federal Court  Cour fédérale

Date: 20130925

Docket: T-2344-93

Citation: 2013 FC 983

Toronto, Ontario, September 25, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

CHIEF JOHN EAR ACTING ON HIS OWN BEHALF AND ON BEHALF OF ALL THE OTHER MEMBERS OF THE BEARSPAW BAND OF THE STONEY BAND AND TRIBE AND ON BEHALF OF THE STONEY TRIBE AND ALL ITS MEMBERS

AND

CHIEF KEN SOLDIER ACTING ON HIS OWN BEHALF AND ON BEHALF OF ALL THE OTHER MEMBERS OF THE CHIKINI BAND OF THE STONEY BAND AND TRIBE AND ON BEHALF OF THE STONEY TRIBE AND ALL ITS MEMBERS

AND

CHIEF ERNEST WESLEY ACTING ON HIS OWN BEHALF AND ON BEHALF OF ALL THE OTHER MEMBERS OF THE WESLEY BAND OF THE STONEY BAND AND TRIBE AND ON BEHALF OF THE STONEY TRIBE AND ALL ITS MEMBERS

AND

THE STONEY BAND AND TRIBE

Plaintiffs (Applicants)

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA, PARLIAMENT BUILDINGS, OTTAWA, ONTARIO

AND

THE HONOURABLE PAULINE BROWES, MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, PARLIAMENT BUILDINGS, OTTAWA, ONTARIO

AND

THE HONOURABLE GILLES LOISELLE, MINISTER OF FINANCE, PARLIAMENT BUILDINGS, OTTAWA, ONTARIO

Defendants (Respondents)

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] In its original form, this motion was for:

a. AN ORDER THAT the transfer of the present and future Wesley Share of Money from Her Majesty the Queen in Right of Canada (Canada) to the trustee appointed pursuant to the Wesley Trust Deed is authorized.

b. A FURTHER ORDER THAT the transfer of the present and future Chiniki and Bearspaw Shares of Money from Canada to the Nations' respective trustees appointed pursuant to the Nations' respective Trust Deeds is authorized subject to the approval by the respective Nation's membership.

c. A FURTHER ORDER THAT upon receipt by the Minister of Aboriginal Affairs and Northern Development (Minister) of a resolution of the Chief and Council of the Wesley First Nation attaching:

   i. the Wesley Trust Deed;

   ii. the Release, or such other form of release as the Stoney Tribal Council and Canada may agree upon and this Court may approve by way of subsequent Order;

   iii. the Referendum Regulations;

   iv. the Referendum Results; and

   v. the Order of this Court authorizing the transfer;

   the Minister shall be authorized and ordered to transfer the Wesley Share of Money to the trustee appointed under the Wesley Trust Deed to be held for the use and benefit of the Wesley First Nation pursuant to the terms of the Wesley Trust Deed.

d. A FURTHER ORDER THAT upon receipt by the Minister of a resolution of the Chief and Council of the Chiniki First Nation attaching:

   i. the Chiniki Trust Deed;

   ii. the Release, or such other form of release as the Stoney Tribal Council and Canada may agree upon and this Court may approve by way of subsequent Order;

   iii. the Chiniki Membership Approval; and

   iv. the Order of this Court authorizing the transfer;

   the Minister shall be authorized and ordered to transfer the Chiniki Share of Money to the trustee appointed under the Chiniki Trust Deed to be held for the use and benefit of Chiniki First Nation pursuant to the terms of the Chiniki Trust Deed.

e. A FURTHER ORDER THAT upon receipt by the Minister of a resolution of the Chief and Council of the Bearspaw First Nation attaching:

i. the Bearspaw Trust Deed;

ii. the Release, or such other form of release as the Stoney Tribal Council and the Crown may agree upon and this Court may approve by way of subsequent Order;

iii. the Bearspaw Membership Approval; and

iv. the Order of this Court authorizing the transfer;

the Minister shall be authorized and ordered to transfer the Bearspaw Share of Money to the trustee appointed under the Bearspaw Trust Deed to be held for the use and benefit of the Bearspaw First Nation pursuant to the terms of the Bearspaw Trust Deed.

f. A DECLARATION THAT the transfer of the Wesley, Chiniki and Bearspaw Shares of Money to the Nations' respective trustees appointed under the Nations' respect Trust Deeds is for the benefit of and in the best interests of the Stoney Nakoda Nations (SNNs) and the three constituent First Nations, the Wesley, Chiniki and Bearspaw First Nations, and that the Minister has the authority to authorize such transfers pursuant to section 64(1)(k) of the *Indian Act*, and a further declaration that it is proper and expedient for the Minister to effect the transfers, even if that section or any other provisions of the Indian Act are subsequently declared unconstitutional.

g. A FURTHER ORDER THAT the Wesley, Chiniki and Bearspaw Shares of Money be transferred to the three First Nations' respective trustees in accordance with the respective arrangements between the Wesley, Chiniki and Bearspaw First Nations and Canada or, failing such arrangements, by further order of this Court, all in the form of the draft Order submitted herewith subject to such terms and conditions as the Court may deem appropriate.

[2] Since the motion was filed and, as a result of on-going discussions between the parties, the Applicants have amended their motion to seek the following relief from the Court:

1. AN ORDER THAT the transfer of the present and future Wesley Share of Money from Canada to the trustee appointed pursuant to the Wesley Trust Deed is authorized.

2. A FURTHER ORDER THAT the transfer of the present and future Chiniki and Bearspaw Shares of Money from Canada to the Nations' respective trustees appointed pursuant to the Nations' respective Trust Deeds is authorized subject to approval by the respective Nation's membership.

3. A FURTHER ORDER THAT upon receipt by the Minister of a resolution of the Chief and Council of the Wesley First Nation attaching:

    a. the Wesley Trust Deed;

    b. the Release, or such other form of release as the Stoney Tribal Council and Canada may agree upon and this Court may approve by way of subsequent Order;

    c. the Wesley Referendum Regulations;

    d. the Referendum Results; and

    e. a further Order of this Court authorizing transfer;

    the Minister shall be authorized and ordered to transfer, no later than October 31, 2013, the Wesley Share of Money to RBC Trust, as custodian and interim trustee, to hold such funds until such time as such funds are settled upon the trustee appointed under the Wesley Trust Deed to be held for the use and benefit of the Wesley First Nation pursuant to the terms of the Wesley Trust Deed.

4. A FURTHER ORDER THAT upon receipt by the Minister of a resolution of the Chief and Council of the Chiniki First Nation attaching:

    a. the Chiniki Trust Deed;

    b. the Release, or such other form of release as the Stoney Tribal Council and Canada may agree upon and this Court may approve by way of subsequent Order;

    c. the Chiniki Membership Approval; and

d. a further Order of this Court authorizing the transfer;

the Minister shall be authorized and ordered to transfer, no later than January 31, 2014, the Chiniki Share of Money to RBC Trust, as custodian and interim trustee, to hold such funds until such time as such funds are settled upon the trustee appointed under the Chiniki Trust Deed to be held for the use and benefit of Chiniki First Nation pursuant to the terms of the Chiniki Trust Deed.

5. A FURTHER ORDER THAT upon receipt by the Minister of a resolution of the Chief and Council of the Bearspaw First Nation attaching:

a. the Bearspaw Trust Deed;

b. the Release, or such other form of release as the Stoney Tribal Council and the Crown may agree upon and this Court may approve by way of subsequent Order;

c. the Bearspaw Membership Approval; and

d. a further Order of this Court authorizing the transfer;

the Minister shall be authorized and ordered to transfer, no later than January 31, 2014, the Bearspaw Share of Money to RBC Trust, as custodian and interim trustee, to hold such funds until such time as such funds are settled upon the trustee appointed under the Bearspaw Trust Deed to be held for the use and benefit of the Bearspaw First Nation pursuant to the terms of the Bearspaw Trust Deed.

6. A DECLARATION THAT the transfer of the Wesley, Chiniki and Bearspaw Shares of Money to the Nations' respective trustees appointed under the Nations' respective Trust Deeds is for the benefit of and in the best interests of the SNNs and the three constituent First Nations, the Wesley, Chiniki and Bearspaw First Nations, and that the Minister has the authority to authorize such transfers pursuant to paragraph 64(1)(k) of the *Indian Act*, and that it is proper expedient for the Minister to effect the transfers, even if that paragraph or any other provisions of the Indian Act are subsequently declared unconstitutional.

7. A FURTHER ORDER THAT the Wesley, Chiniki and Bearspaw Shares of Money be transferred to the three

> constituent First Nations' respective trustees in accordance with the respective arrangements between the Wesley, Chiniki and Bearspaw First Nations and the Canada or, failing such arrangements, by further order of this Court.

[3] The motion arises in the context of complex litigation between the parties that continues to work its way towards a trial, with case management by the Court. In the underlying action, the Applicants allege various breaches of trust or fiduciary duties by Canada. These alleged breaches relate to Canada's management of mineral rights associated with the Applicants' reserve lands, and in particular the management of oil and gas leases on those lands and the resulting royalties.

[4] Through the case management process, the parties are attempting to narrow the issues for an eventual trial, both through settlement and by bringing forward discreet issues for decision by the Court as appropriate. Here, the Applicants seek the transfer of current and future moneys representing the royalties from oil and gas leases on the Applicants' reserve lands, and the interest earned on those royalties, which are held by Canada in trust for or for the benefit of the Stoney First Nation (Stoney or the Band). The Respondents say they have no objection in principle to such a transfer, but that certain preconditions must be met before the Minister can authorize the transfer under paragraph 64(1)(k) of the *Indian Act*, RSC, 1985, c I-5 (the Act). In addition, the parties disagree on whether there must be a single transfer of all of the funds held for the SNNs, or whether, as the Applicants contend, the Bearspaw, Chiniki and Wesley sub-groups of Stoney (who are not separately recognized bands under the Act) have a right to insist upon a transfer of their *per capita* share of the funds.

BACKGROUND

[5] Stoney is an Indian Band within the meaning of the Act, and is entitled to the benefit of Treaty No. 7, which was signed in 1877. It is made up of three distinct groups, Wesley, Chiniki and Bearspaw, which share the use and benefit of the Stoney Indian reserves. Each of Wesley, Chiniki and Bearspaw elects its own Chief and Council, but they are not recognized as separate bands under the Act. The parties agree that nothing in this application is intended to change that fact. Collectively, the elected representatives of Wesley, Chiniki and Bearspaw make up the Stoney Tribal Council, which is the governing body of Stoney, and has the status of a "council of the band" as defined in the Act.

[6] Wesley, Chiniki and Bearspaw are all seeking transfers of their *per capita* share of funds held for the benefit of Stoney by Canada (the Wesley Share, Chiniki Share, and Bearspaw Share, respectively) to an independent trust or trusts. Wesley conducted a referendum of its membership seeking approval for such a transfer, with the proposal receiving the support of 61% of eligible voters and 69% of those actually voting. The legitimacy of that referendum is questioned by the Respondents due to the use of *per capita* distributions (PCDs), as outlined below. Chiniki and Bearspaw have not yet conducted referenda, and have not yet decided whether they will do so. In their view, referenda are not required. Wesley is also further along in the process of drafting the trust deed required to facilitate the proposed transfer of the Wesley Share. As such, the requested orders contemplate a transfer of the Wesley Share immediately, and transfers of the Chiniki and Bearspaw Shares following approval by their respective memberships in a form to be determined by their Chiefs in Council.

[7] The funds that the Applicants seek to have transferred are derived from the royalties paid on oil and gas leases relating to the Applicants' reserve lands. Royalties are collected by Canada and held in designated accounts under a statutory scheme set out in the Act and the *Financial Administration Act*, RSC 1985, c. F-11 (*FAA*). These moneys are required to be deposited in the Consolidated Revenue Fund (CRF), and interest accrues at a rate set from time to time by the Governor in Council.

[8] The statutory scheme distinguishes between capital and revenue amounts, with different rules applying to each. Royalties from oil and gas are treated as capital, since they are derived from a non-renewable resource. Interest earned on these amounts is treated as revenue. A First Nation can request transfers or expenditures of funds from a capital or revenue account held in their name in the CRF, but the rules are more stringent for expenditures from capital accounts. Under subsection 64(1) of the Act, the Minister, with the consent of the relevant band council, can "authorize and direct the expenditure of capital moneys of the band" for one of a series of listed purposes or, under sub-paragraph (k), "for any other purpose that in the opinion of the Minister is for the benefit of the band." This is the provision at the centre of the current dispute.

[9] In order to preserve some of the funds received from oil and gas revenues for future generations, Stoney and Canada entered into an Agreement in Principle establishing a Stoney Tribe Heritage Account (Heritage Fund) in October 1996. Thereafter, a portion of Stoney's oil and gas royalties were deposited in the Heritage Fund. Stoney committed, subject to renegotiation, to refrain from spending these funds, and directed Canada to deposit them into the CRF and pay interest on them as described above until such time as either: a) Stoney invoked self-government

rights over the moneys; or b) the *Indian Act* was amended to permit the investment of the moneys under the control of Stoney. The Heritage Fund also included both a capital and a revenue account, with the capital portion growing through new royalty contributions, and the revenue portion growing through interest payments by Canada.

[10] In 2010, in response to financial constraints resulting from a steep decline in oil and gas royalties, Stoney adopted a Financial Sustainability Plan that requested transfers from the revenue portion of the Heritage Fund over a three year period to support Stoney's operating budgets, and a suspension of capital contributions to the Heritage Fund. Canada agreed to these requests.

[11] In February 2012, the Chief and Council of Wesley adopted a resolution asserting self-government rights with respect to the Wesley Share of Money, and directing Canada to transfer the Wesley Share of Money and a proportionate share of all future royalties to a secure trust to be established by Wesley. This was to be subject to ratification through a referendum of the membership of Wesley. In May 2012, the Stoney Tribal Council adopted a resolution consenting to and supporting the Wesley request for the transfer of the Wesley Share of Money.

[12] Canada responded to these resolutions by stating that it was prepared to explore a request for a transfer of Stoney's capital moneys under paragraph 64(1)(k) of the Act, but it remained to be seen whether Wesley's desires could be accommodated separately from those of Stoney as a whole. Canada also stated that it could not recognize the results of a referendum of the Wesley membership alone, since Wesley was not recognized as a band under the Act, and urged Wesley to postpone its planned referendum.

[13] In July 2012, Wesley held its referendum. In September 2012, the Stoney Tribal Council adopted another resolution directing Canada to transfer not only the Wesley Share of Money, but also the Chiniki and Bearspaw Shares of Money to one or more secure trust arrangements to be established, except that up to $45 million was to be transferred to Stoney directly pending approval of a revised budget for 2012-2013. This resolution also contemplated the current motion.

[14] In October 2012, Canada advised the Stoney Chief and Council that it could not accept the results of Wesley's referendum, that it would only consider requests for the full release of all capital trust moneys held in the CRF, that it had remaining concerns regarding the draft Wesley Trust Deed, and that the request for a $45 million transfer did not explain the purpose of the expenditure or identify the account(s) from which it was to come. Without prejudice discussions regarding the terms of the anticipated transfers and the approval procedures have followed and have resolved many, though not all, of the concerns expressed by Canada.

STATUTORY PROVISIONS

[15] The following provisions of the Act are applicable in these proceedings:

64. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band	64. (1) Avec le consentement du conseil d'une bande, le ministre peut autoriser et prescrire la dépense de sommes d'argent au compte en capital de la bande :
…	…
(k) for any other purpose that in the opinion of the Minister is for the benefit of the band.	k) pour toute autre fin qui, d'après le ministre, est à l'avantage de la bande.

ARGUMENT

Applicants

[16] The Applicants argue that the three requested transfers are justified in that they are: (a) in the best interests of the SNNs individually and collectively, meeting the test set out in paragraph 64(1)(k) of the Act; and (b) an exercise of the inherent rights of self-government of each of the constituent SNNs, which are capable of handling their own moneys and have determined that the contemplated secure trust arrangements represent the best way of handling these funds in the long term.

[17] The Agreement in Principle establishing the Heritage Fund provided that Stoney would not have access to the funds "[u]ntil such time as the Stoney Band shall invoke inherent self-government rights" with respect to those funds. The Stoney Tribal Council Resolution of September 24, 2012 invoked inherent rights of self-government. The *United Nations Declaration on the Rights of Indigenous Peoples* (UN Declaration), formally endorsed by Canada in November 2010, affirms the Applicants' rights (with limitations), to self-determination (Article 3), to participate in decision-making in matters that would affect their rights (Article 18), and to be secure in the enjoyment of their own means of subsistence and development, and engage freely in all their traditional and other economic activities (Article 20(1)): *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 61st Sess, Supp No 49 Vol III, UN Doc A/61/49 (2007) [*UN Declaration*]. The UN Declaration reflects emerging international norms and "minimum standards" of state conduct with respect to the rights of indigenous peoples (Article 43).

[18] The Applicants expect that, over time, the return on these moneys through the proposed trust arrangements will exceed the statutory interest rate currently paid, which is sufficient in itself to justify the transfers. Canada's failure to act prudently with respect to these funds is another reason the motion should be granted. All trust beneficiaries have the right to apply to the courts to have a trustee removed for serious breaches of duty: Donovan W.M. Waters, Q.C., Mark R. Gillen & Lionel D. Smit, eds., *Waters' law of Trusts in Canada*, 3rd ed. (Toronto: Carswell, 2005) at 843 [*Waters*]; *Letterstedt v Broers*, (1883-84) LR 9 App Cas 371 at 387 (PC); *Conroy v Stokes*, [1952] 4 DLR 124, 1952 CarswellBC 51 (BCCA) at para 7. It is appropriate to remove a trustee where that trustee has failed to exercise its discretion in considering the factors relevant to its decision-making authority, such as the wishes and best interests of the beneficiaries or a class thereof: *Re Smith*, [1971] 2 OR 541, 1971 CarswellOnt 629 (ONCA).

[19] Canada has appropriated and then expended SNN moneys for its own use. It continues to borrow funds from its beneficiary and declines to borrow such funds from third-party lenders. While the Supreme Court of Canada has ruled that such borrowing is authorized under the *FAA*, and is thus lawful, this does not change the fact that Canada, the trustee, is borrowing from the beneficiary without the beneficiary's consent, pursuant to legislation passed by Canada without the beneficiary's consent: *Ermineskin Indian Band & Nation v Canada*, 2009 SCC 9 [*Ermineskin*]. Stoney, the beneficiary, is thus entitled to seek to terminate the trust relationship. Canada has also made transfers out of trust property over the objections of the SNN, and without lawful authority to do so, when it repaid purported overpayments of oil and gas royalties to energy companies.

[20] Canada has also refused to provide basic accounting information to allow Stoney to independently verify credits and debits to its account, as is normally required of a trustee. The royalties in question are payable to the Receiver General, and the Applicants have no ability to verify that the payments have been properly credited to their accounts in the CRF. The accounting mechanisms used are not statutory creations under the *FAA*, and are not auditable or readily transparent.

[21] Canada is also in a conflict of interest, and trustees can be removed on this basis without proof that they have actually acted to the detriment of the beneficiary: *Waters*, above, at 846-47. Canada receives a benefit from borrowing SNN moneys for its own use, thus avoiding the task of borrowing in the marketplace or the obligation to pay prevailing interest rates: see *Gladstone v Canada (Attorney General)* (2003), 233 DLR (4^{th}) 629 (BCCA). Having been deprived of the ability to control their own moneys, the SNNs have experienced a corresponding deprivation: *Semiahmoo Indian Band v Canada*, [1998] 1 FC 3 (CA). Thus, Canada has been unjustly enriched. In addition, Canada's attempts to direct the structuring of the proposed secure trusts may relate to the future taxability of income flowing into and out of those trusts. The incompatibility of the program delivery and trust fund management roles of the Department of Indian Affairs was observed in the Penner Report on Indian Self-Government: House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee* ("Penner Report"), 1983 at 128.

[22] There is ample precedent for the orders requested in this motion. In particular, in the context of similar litigation (Court File T-2022-89, the "Samson Action") between Canada and the Samson Cree Nation (Samson), this Court issued a series of orders effecting a very similar transfer.

Justice Teitelbaum declared that such a transfer was in the best interests of Samson, and was therefore authorized under paragraph 64(1)(k) of the Act, subject to compliance by Samson with certain conditions set out in the order. Justice Teitelbaum also issued subsequent orders approving steps taken toward the implementation of his initial order, and finally issued an order approving the transfer. Following this precedent, in a similar action against Canada (Court File T-1254-92, the "Ermineskin Action"), Prothonotary Lafrenière issued a series of orders effecting a similar transfer to the Ermineskin Cree Nation (Ermineskin), based on similar conditions precedent. In issuing these orders, this Court has agreed either expressly or by implication that the transfers were in the best interests of the First Nations concerned. The Supreme Court of Canada held that such transfers are in keeping with the Crown's fiduciary obligations and paragraph 64(1)(k) of the Act if the transfer is in the best interest of the First Nation: *Ermineskin*, above at paras 150-52.

[23] The facts before the Court in the present motion are on all fours with those before the Court in the Samson and Ermineskin Actions. Specifically: the source of the funds was oil and gas revenues collected by Canada; Samson and Ermineskin commenced similar actions against Canada and sought similar transfers into one or more secure trusts; and the plaintiffs in each case sought the apportionment of royalty moneys on a *per capita* basis, and agreed to have the transfers approved by their respective memberships in advance. The Applicants stand in an identical position to that of Samson and Ermineskin, and are entitled to the same outcome.

[24] With respect to the proposed *per capita* division of the capital funds in the present motion, the Applicants argue that this is just as valid as a single transfer, and is more in keeping with the wishes of Stoney. It is no different from what has occurred with respect to the Pigeon Lake Indian

reserve, which is shared by four different First Nations bands. As a result of the orders in the Samson and Ermineskin Actions, a *per capita* share of capital dollars was and continues to be transferred to the SCN and ECN for deposit into independent secure trusts managed for their benefit, while the *per capita* shares of the Louis Bull Band and the Montana Band continue to be deposited into the CRF to the credit of those bands respectively.

[25] The Court has endorsed *per capita* distributions even where the sub-groups are not recognized as Indian bands under the Act. For example, the Court authorized payment to a sub-group of the Saddle Lake Indian band in October 2012.

[26] In addition, Canada already recognizes the separate character of the three SNNs for annual budgeting and other administrative purposes. Under the terms governing the Heritage Fund, Canada agreed that funds paid from the CRF would be split amongst the three SNNs, and that delays by one would not affect funding for the others. Both annual budgets submitted to the Minister and expenditures from the CRF approved by the Minister under section 64 of the Act have been explicitly based upon a division among the three SNNs involved in this motion. The only difference here is that the funds will be placed in a trust for long term use, rather than being spent within one year through the approved annual budget.

[27] A single referendum of all Stoney members is not the most appropriate form of member approval, if such approval is required at all. Rather, only through three separate referenda will Canada have an accurate indication of how the members of each of the three SNNs wish their royalty moneys to be handled and protected. It has been the practice of the SNNs to handle

governance and administrative matters on a joint but separately elected basis. Their Chiefs and Councils are elected separately, in different years, and for differing electoral terms of two, three, or four years, making a single referendum impractical.

[28] Canada has been inconsistent in its demands with respect to authorizing referenda. In a court proceeding where a land designation referendum was challenged on the basis that separate referenda were not held for each of the SNNs, the government declined to support the validity of the single referendum, thus implicitly supporting the view that there should have been three separate referenda: *Mini Thni Land Management Ltd and Poul Mark, as agents for the Stoney Nakoda First Nations (also know as the Stoney Indian Band) v Eliza Holloway, Winnie Francis, Alice Twoyoungman, Jane Doe, John Doe and Unnamed Persons*, Alberta Court of Queen's Bench #0501-12034.

[29] Referenda are not mandatory for Ministerial approval under section 64 of the Act. Moreover, Canada has made transfers from the capital funds held for Stoney on previous occasions without authorizing referenda. It did so pursuant to the Stoney's Financial Sustainability Plan in 2010 and thereafter. It also did so when it retrieved funds from the capital account to repay a purported "overpayment" of royalties to an energy company, without an authorizing resolution of the Stoney Band Council and over that Council's objections.

[30] The purpose of referenda in the current context is to assist and protect the Minister. As such, Canada has provided hundreds of thousands of dollars in funding to Samson and Ermineskin and other First Nations to cover the costs of referenda and the drafting of trust deeds. It has arbitrarily and capriciously refused such funding to Stoney or the three constituent SNNs involved in this

motion. Should further referenda be agreed to or ordered by the Court, the Applicants reserve their right to seek ancillary relief in the form of compensation for the costs of holding them.

[31] The concerns raised by the Respondents regarding PCDs in connection with the Wesley referendum are without merit. Such payments are simply designed to ensure maximum turnout of eligible voters. PCDs have been used in referenda approving previous settlements of claims against Canada without Canada's objection. In another vote relating to one of these settlements, Band members were told that an additional PCD would be made if a transfer to a new trust was approved, but this proposition was rejected. This is good evidence that Stoney members are quite capable of making informed decisions with or without the promise of cash payments, particularly when such payments are made from their own beneficially-owned funds. The referendum regulations were approved by the Wesley Chief and Council at a duly convened meeting, and the referendum was carried out in accordance with those regulations. Thus, the membership of Wesley has approved the proposed transfer.

Respondents

[32] The Respondents raise both procedural and substantive objections to the proposed orders. At the same time, they maintain that Canada has no objection in principle to a transfer of the funds in question to a secure outside trust and, in fact, would like to achieve an arrangement similar to those reached with Samson and Ermineskin. While arguing that the procedural issues raised are determinative against the motion, the Respondents express a desire to have the Court provide direction on the substantive issues as well, and specifically the steps needed to effect a transfer.

[33] The Respondents say the motion is procedurally flawed because it seeks, in effect, an order of mandamus to compel the Minister to exercise his discretion in a particular way: to approve the transfer of a part of Stoney's capital moneys to a trust for the benefit of a part of Stoney. There are two problems with this: first, a mandamus order is available only in a judicial review application under section 18 of the *Federal Courts Act*, RSC 1985, c. F-7 (*FCA*), as outlined in subsection 18(3) of that Act, and that is not the form in which the Applicants have brought this motion; and second, even if this were a judicial review application, mandamus is not available to require a Crown official to exercise a statutory discretion in a particular manner: *Apotex Inc. v Canada (Attorney General)*, [1994] 1 FC 742 at para 55, aff'd [1994] 3 SCR 1100 [*Apotex*]. While both parties may desire and take comfort from Court approval of transfers under paragraph 64(1)(k), the Act obliges the Minister, and not the Court, to form an opinion that the arrangements are for the benefit of the Band. This is a discretionary decision that involves the balancing of many different factors, including the financial goals, level of risk and other characteristics of the proposed trust, the financial circumstances and track record of the Band, whether the arrangements reflect the informed wishes of the Band membership, and any potential governance issues. As long as the Minister exercises his discretion reasonably, a refusal to authorize disbursements of capital funds under section 64 of the Act is not amenable to a mandamus order: *Ermineskin Indian Band and Nation v Canada*, 2008 FC 1065 at para 37.

[34] Substantively, the Respondents say there is no merit in the Applicants' position. The conditions established by Canada for any transfer to a private trust are reasonable ones, and Stoney should be encouraged to meet them. The Applicants' proposals are flawed, and the Applicants have failed to demonstrate the support of the Band membership, or even commit to doing so in the future.

As such, neither the Minister nor the Court can be satisfied that the arrangements are in the best interests of the Band. The Minister is not prepared to make the proposed transfers until these concerns are resolved.

[35] As the Supreme Court of Canada stated in *Ermineskin*, Canada cannot simply transfer the funds. Under paragraph 64(1)(k) of the Act, and in accordance with its fiduciary obligations, Canada must be satisfied that any transfer is in the best interests of the Band. The Supreme Court found that for Canada to have agreed to the transfers to Samson prior to Justice Teitelbaum's order in 2005 would have been imprudent because circumstances prevented Canada from assuring itself that transferring the funds would be in the best interests of the band: *Ermineskin*, above, at paras 152, 169-70.

[36] Furthermore, the Court in the *Samson* case did not order the Minister to make the transfer. Rather, it laid out several conditions that needed to be satisfied by Samson before the transfer could occur, and noted Crown counsel's confirmation that the Minister would authorize the transfer upon compliance with the conditions established. Subsequent steps to fulfill those conditions were approved by the Court with no objection from Canada. A similar process occurred in the *Ermineskin* case.

[37] Contrary to what the Applicants claim, the circumstances here bear no resemblance to the *Samson* and *Ermineskin* cases. In each of those cases, there was a single transfer of the band's entire capital account to a trust for the benefit of the entire band. Important details were negotiated between Canada and Samson and Ermineskin and then submitted to the Court for approval, such as

the trust deed and investment policy, the identities of the trustees, the release of Canada from liability, and the referendum procedures and information package. All of this occurred before the referenda took place, and the Minister was able to confirm to the Court that upon a referendum demonstrating band membership approval, he would exercise his discretion to approve the transfers.

[38] Here, by contrast, the Applicants began with a request from only part of Stoney for part of the money. Canada's input was only recently sought on the trust deeds, and there remain substantive concerns. Further, the Minister has no way of knowing whether the three proposals collectively have the support of the Band membership, because Wesley refuses to conduct a proper referendum and Chiniki and Bearspaw have not decided whether to conduct referenda at all. The Wesley referendum was conducted without arrangements acceptable to the Minister, despite Canada's urging that it be postponed, and was tainted by a promise of PCD's to Band members following a favourable vote. The practice of tying PCD's to a particular outcome makes the result of that vote unreliable: neither the Minister nor the Court can be satisfied that the promise of an additional PCD did not improperly influence the outcome.

[39] Canada concedes that there is no requirement in paragraph 64(1)(k) for a referendum, but it is reasonable for the Minister, in satisfying himself that the transfer is "for the benefit of the band," to want some assurance that it is supported by the Band membership. Such considerations take precedence over any alleged impracticality of a single Band referendum, which are not insurmountable in this case.

[40] While changes have been made to the Wesley Trust Deed that respond to many of the Crown's concerns, some concerns remain – notably the absence of a finalized investment policy, the ability to later amend that policy without Band membership or Court approval, and questions about the adequacy of provisions for preservation of capital. In addition, the Wesley Trust Deed as it currently stands is not the same as that provided to Band members prior to the Wesley referendum.

[41] The Respondents reject the contention that Canada is setting up unreasonable roadblocks for ulterior purposes as being without merit and offensive. Canada's concerns with the proposed transfers to sub-groups of Stoney are real, and not merely "roadblocks." These concerns are both legal and practical in nature. The legal concern arises from the language of paragraph 64(1)(k) of the Act, which requires the Minister to be satisfied that a transfer is "for the benefit of the band." There is a legitimate question as to whether this test can be satisfied by a transfer of only a portion of Stoney's capital moneys to a trust for only part of the Band. The practical concern relates to the fluid membership of the three SNNs, with periodic movement from one group to another. Such movement would present no concern if the moneys were transferred to a single trust for the benefit of the entire Band, but might adversely affect some members' interests if Stoney's capital moneys have been permanently divided among three separate trusts on a *per capita* basis. For this reason, it is important at a minimum to be sure that the entire Band understands and supports the proposed arrangements. The refusal to undertake a proper referendum of the entire Band precludes that. As an alternative proposal, separate distribution arrangements could be built into a single trust to accommodate any wish for separate allocations.

[42] None of the circumstances cited by the Applicants as establishing a precedent for the division of band moneys on a *per capita* basis is analogous to the current situation. The provisions cited from the Heritage Fund Agreement in Principle have no relevance here, as they relate to small one-time distributions of funds from the revenue account, not the permanent disposition of the capital account. Similarly, Stoney's annual budgets do not involve a permanent division of all of the Band's accumulated capital, and the amounts involved are a small fraction of the nearly $200 million at stake here. The Pigeon Lake Reserve is shared by four separate bands, and not sub-groups of a single band. The Samson and Ermineskin transfers involved the entire capital account of each band, following a referendum of the entire band in each case. In the Saddle Lake case, the funds being distributed were not Indian moneys held by Canada in trust, but rather moneys paid by Canada as damages in settlement of claims against it. As such, these moneys were not subject to section 64 of the Act or other provisions governing the Minister's discretion.

[43] With respect to the argument that Canada should be removed as trustee following common law and equitable principles, the Supreme Court of Canada has specifically rejected the view that Canada can be regarded as a common law trustee: *Ermineskin*, above, at para 49. Canada stands in a fiduciary relationship with the Band, with discretion to act in its best interests, but its fiduciary duties and discretion are validly limited by the legislation governing Canada's handling of Indian moneys: *Ermineskin*, above, at paras 74-75.

[44] Furthermore, the Applicant's allegations of breach of trust and fiduciary duty are without merit, and this is fatal to the claim for removal. The allegations that Canada benefits from the use of First Nations' funds in the CRF, is unjustly enriched, or is in a conflict of interest were conclusively

rejected by the Supreme Court of Canada in *Ermineskin*, above, at paras 149, 182, 184, as well as by the Federal Court and Federal Court of Appeal. The *Gladstone* case cited by the Applicants has no application here: Canada was found to have benefited in *Gladstone* only because it paid no interest whatsoever on moneys obtained from an improper seizure.

[45] There have been no improper transfers from accounts designated for Stoney. The evidence presented by the Applicants on this point establishes only that, on one occasion, Canada refunded an overpayment of royalties to an oil and gas company. Stoney is not entitled to retain overpayments of royalties. The allegation that Canada has "thwarted" Stoney's efforts to collect royalties is also not credible, and no evidence has been presented in support of it.

[46] There is also no evidence presented in support of the contention that Canada has failed to provide basic accounting information, or that its accounting is opaque or cannot be audited. The affidavits of the Applicants make no mention of concerns about Canada's accounting or the Applicants' ability to understand the status of their accounts. Had they done so, they would have been cross-examined on it. As public accounts of Canada, the special purpose accounts in the CRF for Band trust funds are subject to audit by the Auditor General: *Auditor General Act*, RSC 1985, c A-17, s. 5.

[47] Canada's comments on the Wesley Trust Deed were given at the request and for the benefit of the Band, and have nothing to do with attempting to make the trust taxable after any transfer.

[48] Canada's handling of Indian moneys in general, and the Stoney moneys in particular, involves no violation of self-government or human rights. As the Court found in *Ermineskin*, rejecting the argument that Canada had acted in a discriminatory manner contrary to subsection 15(1) of the *Canadian Charter of Rights and Freedoms*, a transfer without appropriate safeguards and evidence of membership support would be imprudent and inconsistent with Canada's obligations as a fiduciary: *Ermineskin*, above, at paras 195-96, 200-202. The Penner Report was in evidence in that case, and nothing in the UN Declaration detracts from the validity of this reasoning.

The Applicants' Reply Submissions

[49] The Applicants dispute the assertion that they are seeking a transfer of only part of Stoney's capital moneys, for the benefit of only part of the Band; rather, they are seeking an order for the transfer of all of the moneys held by Canada in trust for the Band, albeit divided three ways.

[50] With respect to the Respondent's procedural objections, mandamus is available under section 44 of the *FCA*, and not only in the context of a judicial review under s. 18. The same is true of relief in the form of a declaration: *Canada v Ahenakew* (*sub nom Federation of Saskatchewan Indian Nations v Canada)*, 2003 FCT 306, [2003] FCJ No 429 at para 26 [*Ahenakew*]. In view of this, and the fact that the relief sought here is also included in the Amended Statement of Claim in the present action, launching a separate judicial review would not be an efficient use of the Court's resources.

[51] Furthermore, the Applicants are not seeking an order in the nature of mandamus here. Rather, the Court is being asked to issue the same orders it did in the Samson and Ermineskin Actions which have already delineated the conditions under which a transfer of Indian moneys for settlement into a secure trust is appropriate. If these conditions are met, then the Minister's "statutory discretion" is spent. If there is any discretion remaining to the Minister, it is further constrained by his conflict of interest and Canada's continuing to benefit if the moneys are not transferred. Thus, the Minister has no choice but to grant authorization for the transfer. The 2005 order of Justice Teitelbaum, which received the blessing of the Supreme Court of Canada, is equivalent to the relief sought here. No mandamus order or judicial review was deemed necessary in the Samson Action, and none is necessary in the present application. After the Court has twice previously ordered the transfer of moneys, the Applicants, in the context of a substantively identical action, are entitled to rely upon the overall process that was previously approved by the Court.

[52] The distinctions raised by the Respondents between the present circumstances and the *Samson* and *Ermineskin* cases are distinctions without a difference. Here, as there, the order requested contemplates that the trust deed or deeds, the investment policy or policies, the identities of the trustees, and the release of Canada's liability will all be presented to the Court. While there are differences in the timing of when this order is being sought, there were also differences in timing between the Samson and Ermineskin orders, and these are of no consequence. The only real difference here is that Canada is opposing the orders requested, whereas in the previous cases Canada neither consented to nor opposed the Notices of Motion, but simply represented to the Court that it did not object to the approval of the Court.

[53] With respect to the Respondent's concerns that voters in the Wesley referendum were improperly influenced by PCDs, the Applicants submit as follows:

> Why is it improper to pay voters with their own money? Are the Respondents suggesting that in Canadian elections voters are never enticed with the promise of future payments? To characterize payments to voters as somehow improper is overly simplistic and reflects a double standard.

[54] The Respondents contrast the "guaranteed security" of the CRF with greater potential risks associated with an outside trust. However, this guaranteed security is a misnomer and a misrepresentation, when Canada has transferred funds out of the Band's accounts to repay a purported overpayment of royalties, despite case law authority that this should not be done: *Chevron Canada Resources v Canada (Executive Director of Indian Oil and Gas Canada)* (1997), 53 Alta LR (3d) 153, 1997 CarswellAlta 893 [*Chevron*].

[55] With respect to changes to the Wesley Trust Deed since the July 2012 referendum, the Respondents have cited no authority or justification for the proposition that members of Stoney must approve the specific wording of the trust deed via a referendum before the Minister can approve a transfer. Referenda may be appropriate for questions of principle, but they are not appropriate to approve detailed matters such as contractual wording in a trust deed. Indeed, such a requirement is unheard of in the Canadian parliamentary system, the common law, or the Stoney tradition.

[56] There are no remaining substantive concerns with any of the trust deeds that could justify a refusal by the Minister to authorize the proposed transfers. The Applicants, and not the Respondents, are the settlors of the proposed trusts. The Minister's role in approving the transfers

does not warrant dictating all of the terms of the trust deeds, particularly those that may affect taxation.

[57] The Respondents mischaracterize the Supreme Court's findings in *Ermineskin* regarding Canada's conflict of interest in managing Indian moneys. Justice Rothstein, writing for the Court, found that Canada did in fact borrow Indian moneys held in the CRF, and was in an inherent conflict of interest. This conflict did not amount to a breach of Canada's fiduciary obligations, because these were validly modified by the Act: *Ermineskin*, above, at paras 74-75, 79, 125-131. While the Respondents may not be in breach of their obligations to the Applicants so long as they act in strict compliance with the governing statutory regime, this does not change the fact that they remain in a conflict of interest position, and continue to borrow funds from the Applicants. The issues of "Crown benefit" and unjust enrichment of the Crown also remain live issues here, because the Supreme Court dealt with them very narrowly in *Ermineskin*.

[58] The Respondents also understate the importance of the UN Declaration to this case. The UN Declaration elaborates and contextualizes rights and obligations that are binding on Canada under international law. These include the right of peoples to self-determination and the obligation not to discriminate on the basis of race under international treaty law, and principles such as *pacta sunt servanda* (a treaty is binding and must be performed in good faith) under international customary law. These principles and obligations play a role in statutory interpretation, because Parliament is presumed to act in compliance with its international obligations: *Canadian Human Rights Commission v Canada (Attorney General)*, 2012 FC 445 at paras 351-353.

[59] While the Applicants concede that there remain administrative and logistical decisions to be made to facilitate the proposed transfers, these should not be used as a pretence for delay. The system for dealing with Indian moneys under the Act is archaic and unjustified. Canada's position that it has no objection in principle to a transfer to an outside trust can only mean that it has already determined that, in principle, such a transfer is for the benefit of the Applicants. The remaining issues can only be addressed through the granting of the orders and other relief requested in this motion.

ANALYSIS

General

[60] The parties have agreed in principle to the transfer of Stoney's moneys from the CRF to secure outside trust arrangements pursuant to paragraph 64 (1)(k) of the Act. They have not yet agreed to the full terms of that transfer or the approvals required to satisfy the Minister that the transfer will be in the best interest of the Band. The Applicants have their own position on what can and should be done to effect any such transfer or transfers, and they have come before the Court seeking an endorsement of their approach and an order compelling the Minister to accept it and comply with it. This is not, then, a request that the Minister should exercise his discretion under paragraph 64 (1)(k) of the Act; it is either a request that the Minister be compelled to exercise his discretion in accordance with the way the Applicants say that discretion should be exercised, and irrespective of any concerns or reservations that the Minister may have to the proposed transfer arrangements, or it is a request that the Minister be sidelined because his discretion is spent and, subject to the satisfaction of certain conditions precedent, that the Court both authorize and order the Minister to transfer funds to third-party trustees.

[61] Although the parties agree on many things, the Minister has made a decision not to effect the transfer of moneys from the CRF to a secure outside trust in accordance with the present terms proposed by the Applicants. The Applicants, however, have not brought an application for judicial review of any such negative decision. The Applicants are seeking to by-pass the Minister's discretionary powers under paragraph 64(1)(k) of the Act entirely, and request the Court to simply accept and endorse the terms of transfer which they propose and to order the Minister to comply with them. In my view, however, they do not establish or adequately explain the legal basis upon which the Court could accept and endorse their terms of transfer and order the Minister to comply, irrespective of the powers granted to the Minister – and not the Court – under the Act.

Specific Grounds and Arguments

[62] In order to support and justify the approach outlined above, the Applicants have raised various grounds and arguments that I will deal with in turn.

The Samson/Ermineskin Analogy

[63] The Applicants say that they are not seeking mandamus, but a series of orders similar to those issued by the Court in the Samson Action and the Ermineskin Action and that

> the material facts before the Court in the present application (sic) are on all fours with the material facts before the Court in the Samson Action and in the Ermineskin Action and that the Defendants are raising impediments to the proposed transfers that were not at issue in the Samson Action nor in the Ermineskin Action.

[64] If the Minister is raising impediments that were not raised in *Samson* and *Ermineskin*, this could support a judicial review application which argues that the Minister's decision not to approve

the transfers on the present terms is unreasonable. However, this is a motion. I have not been asked to review any such decision by the Minister. I have been asked to issue an order based upon allegations that, at least implicitly, say that "impediments" raised by the Minister to the proposed arrangements do not arise out of legitimate and reasonable concerns. However, I can see no legal basis upon which I could make such an order and usurp the Minister's unreviewed exercise of discretion under paragraph 64(1)(k) of the Act.

[65] The orders made in *Samson* and *Ermineskin* involved no such usurpation of ministerial discretion by way of motion. In *Samson* and *Ermineskin*, the Court was asked to review and endorse transfer arrangements that had already been agreed to by the plaintiffs and Canada. In the present motion, the Court is being asked to endorse multiple transfers of significant sums of money on terms that have not yet been fully developed and to order the Minister to agree to, and comply with, those terms. In my view, the Court cannot do this. The Applicants have not argued or established that the Minister's failure to exercise his discretion to transfer the funds under paragraph 64(1)(k) was a reviewable error. They argue before me that the Minister is imposing unnecessary "impediments" to the proposed transfer for devious and unjustified reasons and that the Minister's discretionary power under the Act is "spent." The Minister, on the other hand, has explained the reasons why he cannot, at this juncture, exercise his discretion to approve the transfers. I do not see how the Minister's discretion under the Act can be said to be "spent" in the present case on the basis that the Court endorsed the arrangements made in *Samson* and *Ermineskin* under the particular circumstances that came before the Court in those cases. The Court cannot now simply countermand the Minister's unchallenged exercise of his discretion under the Act on the basis of, in my view, a mistaken allegation in this motion that this case is on all fours with the situation that was

endorsed in the Samson and Ermineskin Actions. As the Supreme Court of Canada said in *Ermineskin* at para 152:

> However, the Crown cannot simply transfer funds. In accordance with its fiduciary obligations and s. 64(1)(k) of the *Indian Act*, it must be satisfied that any transfer is in the best interests of the bands. […]

[66] If Canada was satisfied in *Samson* and *Ermineskin*, that doesn't mean that Canada is compelled to be satisfied in this case where no judicial review application has been brought alleging unreasonableness, and where the circumstances are significantly different.

[67] The Applicants are simply asking the Court by way of motion to disregard the discretion granted to the Minister under the Act and to exercise that discretion itself and order that the Stoney moneys be transferred on the basis of the terms proposed by the Applicants, but not yet fully agreed to by the Minister. The Court is being asked by the Applicants to agree with them and declare that the transfers which they propose "are in the best interest of the Stoney Nakoda Membership." This is a request that the Court disregard the powers under the Act that Parliament has granted to the Minister and to substitute its own assessment as to what is in the best interests of the Band. In my view, no convincing legal authority or principle has been provided to ground or justify any such substitution.

[68] In neither *Samson* or *Ermineskin* did the Court "order" the Minister to make the transfer as is contemplated by this motion. In those cases, the Court confirmed that terms and procedures agreed to by the parties were satisfactory to the Court and in the best interest of the First Nations involved.

[69] It seems obvious to me that, in *Samson* for instance, Canada had no objections to the trust deed and its statement of investment policies. Nor was there a disagreement concerning the band confirmations that were required. These are important matters of controversy and disagreement in the present case. In my view, they are not groundless "impediments" which the Court can disregard and simply order terms and procedures proposed by the Applicants but not accepted by the Minister in a legitimate exercise of his discretion under the Act that has not been challenged by way of judicial review.

[70] The Applicants' arguments that the Minister's discretion is "spent" and that they are entitled to rely upon the overall process approved by the Court in *Samson* and *Ermineskin* is, in my view, untenable for a variety of reasons.

[71] First of all, in *Samson* and *Ermineskin* the parties had agreed on the required documentation and procedures and the Minister took the position that the transfers in accordance with what had been agreed were in the best interests of the bands, and so did not oppose the transfer motions before the Court. That is not the case here.

[72] Secondly, Justice Teitelbaum's Reasons for Order and Order of January 27, 2005 clearly do not suggest that the Minister is ordered to do anything, and do not suggest any legal basis upon which such an order could have been based. Paragraph 9 of that decision reads as follows:

> [9] Samson must then submit a Band Council Resolution ("BCR") to the Minister requesting the transfer, except for the sum of $3 million which will be held back to resolve any outstanding issues. The trust agreement, liability release, and referendum results will be

> attached to the BCR. In view of my conclusion that the transfer and future transfers is for the benefit of the Samson Cree Nation, the Minister may then authorize the transfer of Samson's existing and future capital monies to the agreed upon trust pursuant to paragraph 64(1)(k) of the *Indian Act*. Crown counsel advised the Court that they have received confirmation and instructions that the Minister will in fact authorize the transfer of the existing capital monies upon compliance with the conditions established herein.

[73] Saying that the Minister "may then authorize the transfer…" is not ordering the Minister to do anything. In *Samson*, the Minister had exercised his discretion under paragraph 64(1)(k) of the Act and had decided to authorize the transfer if the agreed conditions were satisfied. Paragraph 5 of Justice Teitelbaum's Order merely declares that, if the Minister authorizes the transfer, following receipt of the band council resolution and satisfaction of the conditions precedent, then he has the Court's endorsement that the transfers "are for the benefit of the Samson Cree Nation, and that the Minister of Indian Affairs and Northern Development has the authority to authorize such transferor pursuant to paragraph 64(1)(k) of the *Indian Act*."

[74] In my view, there is nothing in Justice Teitelbaum's Order that relieved the Minister of his obligation to satisfy paragraph 64(1)(k) of the Act and ensure that the transfers were, in the opinion of the Minister, for the benefit of Samson. And there is nothing in that Order or reasons to suggest that the Court could or would have authorized the transfers in *Samson* had the Minister not been satisfied that the proposed transfers were for the benefit of Samson.

[75] I think the Applicants and the Respondent in this motion agree that the processes and conditions approved in *Samson* and *Ermineskin* for the transfer of funds to secure outside trusts provide a model and a precedent as to what is needed to authorize and effect the transfers proposed

in the present case. The disagreement is over what *Samson* and *Ermineskin* establish in this regard. Those cases do not, in my opinion, provide the legal basis for a motion that seeks to disregard the position of the Minister and allow the Court to decide in the face of disagreement by the Minister what is in the best interests of a First Nation and order that funds be transferred.

[76] In my view, also, the Minister's discretion is not "spent." The Minister is required by the Act to exercise his discretion on the basis of each set of facts that comes before him, and that is what has happened in this case. The Applicants say that they are not requesting a mandamus order, but rather an order based upon the fact that *Samson* and *Ermineskin* have already established the conditions under which a transfer should be authorized, so that the Minister does not have discretion to refuse a transfer if those conditions are met. In my view, this is an order in the nature of mandamus, and such an order requires a judicial review application under section 18.1 of the *FCA*. See *Williams v Lake Babine Band*, 194 NR 44, [1996] FCJ No 173 (FCA) at para 4; *Stoney Band v Stoney Band Council* (1996), 118 FTR 258, [1996] FCJ No 1113 (FCTD) at paras 13-16; and *Meggeson v Canada (Attorney General)*, 2012 FCA 175 at para 34 [*Meggeson*]. While the Applicants point to case law suggesting that declaratory relief can be sought in the context of an action (*Ahenakew*, above; see also *Ward v Samson Cree Nation*, [1999] FCJ No 1403 [*Ward*]), the Courts in those cases explicitly noted that the declarations of rights sought did not in substance seek to set aside a decision of a federal board, commission or tribunal (see *Ahenakew*, above, at para 27; *Ward*, above, at para 42, per Isaac CJ). That is in substance what the Applicants seek to do here (though they also seek to go beyond that with a mandamus order), and this can only be achieved by way of an application for judicial review.

[77] Even accepting that judicial economy favours allowing a declaration to be included in the prayer for relief in an action before this Court in an appropriate case, by effectively treating the prayer for declaratory relief as a judicial review application that is to proceed as an action under s. 18.4(2) of the *FCA* (see *Ward*, above, at para 49, per Décary and Rothstein JJ), is a far cry from saying that rights to a particular exercise of administrative discretion can be declared and then enforced through a mandamus order on a motion in advance of the trial of the action. The Applicants have cited no authority that would enable the Court to grant such relief, including the orders in the *Samson* and *Ermineskin* actions properly understood.

[78] In addition, it is my view that, in any event, the conditions established in *Samson* and *Ermineskin* have not been met in this case.

[79] My first conclusion is that the Applicants are essentially asking the Court to order the Minister to transfer funds to third-party trusts. This is a request for an order in the nature of mandamus which I have no jurisdiction to grant in the context of this motion. In addition, the Applicants have not argued that they have satisfied the grounds for mandamus (see *Apotex*, above) and, in my view, they have not. Secondly, even if the motion could be said to be based upon some separate legal basis established by the Court in *Samson* and *Ermineskin*, the Applicants have not satisfied the conditions for a transfer of trust funds and it seems to me that the Minister is, on the facts of this case, attempting in good faith to effect a transfer in accordance with the *Samson* and *Ermineskin* models as necessarily modified to address the particular problems that arise in this case.

Mere "Impediments" – Outstanding Problems

[80] The Applicants have put forward various grounds to convince the Court that transferring moneys from the CRF to secure trusts would be a good thing and to justify the Court's ordering the transfer of funds at this time. I don't think that Canada disagrees that such a transfer is desirable. The difficulty is how to effect the transfer. For reasons given above, I think the Court must deny this motion. However, both sides wish to move this matter forward and seek the guidance of the Court so I think I need to say something about the various assertions and accusations made by the Applicants by way of assessing how best to proceed.

[81] The Applicants allege various forms of bad faith, conflict of interest, failure to act prudently and breaches of fiduciary duty on the part of Canada. The allegations include the following:

(a) Canada's concerns are not legitimate and Canada is raising mere "impediments" to the transfers because it wishes to retain the funds in the CRF to further its own interests;

(b) Canada obtains a benefit from borrowing Band funds;

(c) Canada is attempting to control the settlement process and the terms of the trusts so that it can trick or force the Applicants into taxable status;

(d) Canada's resistance to transferring the funds at this time is a violation of the Applicant' rights of self-government and/or Human Rights;

(e) Canada has made improper disbursements of moneys that belong to the Applicants;

(f) Canada's accounting practices are opaque and inaccessible to the Applicants so that there can be no reconciliation, checking and accountability;

(g) Canada has acted inconsistently when it comes to *per capita* allocations;

(h) Canada has acted inconsistently when it comes to requiring band referenda;

(i) Canada is refusing to provide referendum funding to the Applicants, although Canada provided such funding in *Samson* and *Ermineskin*;

(j) Canada's concern over PCD – Influenced votes is inconsistent and groundless.

[82] For the most part these allegations are lacking in a sufficient evidentiary basis, are sometimes contradicted by the record, or are just not convincing. For example, even where we have evidence that Canada refunded, against the wishes of Stoney, a $109,439 overpayment to a company that paid out gas royalties, there is no convincing justification offered as to why Canada, in conformity with the obligations to properly manage royalty payments in accordance with governing legislation, acted improperly, or in breach of its fiduciary obligations, in refunding an overpayment. The Court is merely asked to accept this as a self-evident breach of fiduciary duty that justifies an immediate transfer of funds to a third-party trustee. The Applicants cite *Chevron*, above, as authority that such repayments may be improper. However, the court in that case merely considered the possibility that funds might be non-exigible under ss. 89 and 90 of the Act once paid into the Indian oil and gas royalty system, and found that it was inappropriate to decide at that stage of the proceedings. This is not sufficient authority to conclude that there was anything improper about Canada's actions in refunding the alleged overpayments in the current case, nor was sufficient evidence or argument put forward to allow the Court to come to such a conclusion.

[83] In argument before me in relation to PCD – Influenced votes, the Applicants asserted that such votes are allowed under the Act, that the practice is well-established, and that the Wesley electorate was merely encouraged to vote in the referendum, but was not influenced to vote in any particular way. Yet the Wesley Newsletter for June 2012 shows that Wesley electors were to be

paid a $500 PCD to vote and a further $500 PCD conditional upon a favourable outcome in a resulting transfer of funds. Clearly this reveals that only some of the Stoney Members (the Wesley electors) received a $500 PCD and that those electors were encouraged to vote in a particular way. Canada's concern that the Wesley voters may have been improperly influenced is not groundless or unreasonable. Yet the Applicants simply deny that such could have been the case.

[84] The concerns of Canada can hardly be described as mere "impediments." Canada has expressed legitimate concerns over certain aspects of the Wesley Trust Deed, some of which have been addressed, as well as legitimate concerns that the Wesley referendum was conducted on the basis of draft documentation which did not even identify the trustee and which contained no investment policy. Wesley has indicated that it will not be seeking approval of its membership for a finalized version of its trust deed, and it would appear that Bearspaw and Chiniki do not even intend to seek approval of their members through referenda, and there is no intention of allowing the whole Stoney Membership to vote on a complete package before transfers occur. In my view, Canada's concerns are not mere impedimenta.

[85] The Applicants say they have complied with the *Samson* and *Ermineskin* models approved by the Court. However, in *Samson*, for instance, the Court made it clear that an outright transfer of a large sum of money would be inappropriate unless conditions were attached, and then went about setting the conditions, which I have referred to and quoted above.

[86] Both sides in this motion are committed to the transfers of funds and both sides agree that the *Samson* and *Ermineskin* models should be the guide. In this motion, Canada has represented to

the Court that the "Samson and Ermineskin precedents demonstrate what is required, and the Crown has been clear about the deficiencies which exist with the Wesley proposal as it stands."

[87] The Applicants agree that *Samson* and *Ermineskin* should be followed but say they have complied with these precedents so that the proposed transfers can be ordered. Yet even Wesley Members have not had an opportunity to vote on a final package presented to them in accordance with paragraph 8 of Justice Teiteilbaum's reasons in *Samson*.

[88] In addition to the *Samson* and *Ermineskin* precedents, however, it has to be kept in mind that Justice Teitelbaum had the agreement of the Minister to effect the transfer on the fulfillment of the conditions he set. He did not interfere with the Minister's discretion to decide whether or not to effect a transfer under paragraph 64(1)(k) of the Act. The Minister indicated a willingness to transfer funds if the conditions set out were satisfied, but made this willingness "subject to the Court laying out certain conditions and declaring the Minister of Indian Affairs and Northern Development has the legal authority to make such a transfer." That declaration required the Court to conclude that such a transfer could be made under paragraph 64(1)(k) (not an issue in the present case) and that "the transfer, and transfers of future capital moneys, are for the benefit of the First Nation (which is the issue in this case)." Even if the Court could usurp the Minister's authority and effect the transfer of funds itself, the Court could not, on the record before it, declare that the benefit issue has been resolved, and for the very reasons that Canada has raised as its residual concerns.

[89] This does not mean that the Applicants are at the mercy of Canada when it comes to finalizing the conditions for the transfer. The Minister's decisions in this regard are subject to

review before the Court and to directions from the Court. This motion reveals that the Applicants wish to have the Court remove the Minister from the process and order what they see as being required, subject to further direction and supervision from the Court. For reasons given, I don't think that this is possible and I don't think it would conform with the precedents in *Samson* and *Ermineskin*, which both sides agree should be followed.

Removal of Canada as Trustee

[90] In my view, the Applicants have not established grounds upon which to remove Canada as trustee. As the Supreme Court of Canada made clear in *Ermineskin* at para 49, the Crown cannot be regarded as a common-law trustee. The Crown stands in a fiduciary relationship with the Band and must act in the Band's best interest, but is also limited by the legislation which governs the handling of Indian moneys. I am not convinced on the evidence presented to me in this motion that Canada has acted in a way that justifies immediate removal, particularly in a case where the Minister is obliged to exercise his discretion in accordance with paragraph 64(1)(k) of the Act and it has not been established that this has not been done reasonably, or, indeed, that a breach of fiduciary duty has occurred in this case.

[91] It is also difficult to see how the Minister could be removed, even to the limited extent of holding and controlling Band moneys in the CRF, without an acceptable substitute trustee to which those moneys could be transferred in a way that is for the benefit of the beneficiaries, and without the safeguards stipulated in *Samson* and *Ermineskin*.

The Way Forward

[92] Nothing in what I say is intended to suggest that the Applicants do not have a legitimate and pressing interest in having their moneys transferred from the CRF to a secure outside trust or trusts as quickly as possible. There are important economic and self-government issues at play here.

[93] As I have said, I find the bad faith and mere "impediment" accusations unconvincing, but I can certainly understand the level of frustration that lies behind these accusations and the need to effect the transfer as quickly as possible. In my view, however, the record before me shows that the frustration and the tardiness of the process are the result of:

(a) The complex social and legal structure of the Stoney First Nation and the inherent difficulties of coordinating the relatively autonomous First Nation groups that make up that structure;

(b) The difficulties of ensuring conformity with the *Samson* and *Ermineskin* precedents, upon which both sides rely, given the complex governance structure of the Stoney First Nation that was not a problem in *Samson* and *Ermineskin*;

(c) The difficulties of ensuring that the fiduciary obligations of Canada are met in this complex situation. The Applicants rely upon those fiduciary obligations, and they cannot be set aside because they have become inconvenient when Canada has to satisfy itself on certain matters (the benefit issue) in a context that Canada does not control because Stoney, Wesley, Chiniki and Bearspaw exercise autonomy on reserve lands.

[94] It is these factors which make it difficult to conform easily with the spirit and intent of the *Samson* and *Ermineskin* precedents where there was a single transfer of the band's entire capital to a

trust for the benefit of the entire band, and where the trust deed and the investment policy, the identity of the trustees, the release, as well as the information package and the referendum procedures were all negotiated between Canada and the bands before they were presented to the Court for approval, and where referenda were then held.

[95] As both sides agree that *Samson* and *Ermineskin* are the precedents to follow, it seems to me that what is required in the present case is:

a) A decision on whether only a single transfer is possible or whether it is possible to accommodate Stoney's wishes that three separate transfers take place at different times;

b) A decision on whether all arrangements need to be finalized and approved by all Stoney Members before any transfer (single or multiple) can take place;

c) Agreement between the Band and Canada on the trust deed and the matters set out in paragraph 6 of Justice Teitelbaum's reasons in *Samson*;

d) Agreement on the form of release;

e) Agreement on the necessity for and the form and procedure for a referendum or referenda;

f) Notification from the Minister to the Court that he is ready and willing to effect the transfer;

g) A Court order along the lines of the *Samson* order with the required confirmations, declarations and reservations.

[96] Counsel have indicated to me that there should be no problem with the form of release and that any continuing concerns with the trust deed(s) and it’s investment policies can likely be

quickly addressed. The major roadblocks appear to be the form of the transfer (single or multiple) and the referenda requirements.

[97] The parties have been working at these issues for some time and I am sure they are well aware of each other's differences. I have not been apprised of these discussions as part of this motion and I have not heard full arguments on the points of concern. Hence, I am in no position to resolve them as part of this motion. Unless the Court is brought fully up to date with what remains at issue it is not possible to suggest what role the Court might play in resolving outstanding points of difference.

[98] The Court's future involvement will require a full itemized statement of the outstanding differences between the parties, argument in support of the respective positions, and submissions as to how unresolved matters requiring input for the Court can be brought on and dealt with in the quickest possible way. I suspect the parties already have a good idea of what is required. In my view, then, this matter should go back into case management with a view to identifying the remaining issues that require resolution and the process that will yield a resolution in the shortest possible time.

ORDER

THIS COURT ORDERS that the motion is dismissed with costs to the Respondents.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2344-93
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PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	September 4, 2013
REASONS FOR ORDER AND ORDER BY:	RUSSELL J.
DATED:	September 25, 2013

APPEARANCES:

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