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The *Victor Buffalo* Case: An Exploration of the Spirit of Treaty 6 and the Meaning of the Honour of the Crown

Keynote Luncheon Address

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The *Victor Buffalo* Case: An Exploration of the Spirit of Treaty 6 and the Meaning of the Honour of the Crown*

> All empire is no more than power in trust.
>
> John Dryden 1631-1700

> Oil is an essential resource in our society. Consequently, those who have oil resources have earned large sums of money when they permit others to exploit those resources. Such large sums of money may be placed with trustees who have expertise in investing and those trustees are expected to manage the moneys by prudently investing them. ...
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> Sexton J.A. Dissenting Reasons in *Chief Victor Buffalo et al. v. Her Majesty the Queen in Right of Canada et al.*, Reasons for Judgment December 20, 2006, at para. 175

You all I am sure recall the wonderful opening lines of T.S. Eliot's *The Waste Land* invoking memory, desire and stirring hope :

> April is the cruellest month, breeding
> Lilacs out of the dead land, mixing
> Memory and desire, stirring
> Dull roots with spring rain.[1]

And here am I in April 2007 recalling the struggle of the Samson Cree Nation to survive and prosper and their fervent desire to be understood. It is a story of hope, indeed radical hope.

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* I disclose that I acted as one of the Samson Cree Nation's legal team at trial and before the Federal Court of Appeal. Samson has applied for Leave to Appeal the Judgment of the Federal Court of Appeal to the Supreme Court of Canada. The case, therefore, is as of this date still before the Courts. It is not my purpose to critique the judgments of the Federal Court or Federal Court of Appeal (in certain instances quite the contrary) but rather to examine them in the context of the perspective of the Samson Cree Nation – something that the Supreme Court of Canada directs us all to do....

[1] T.S. Eliot, Selected Poems, Faber paper covered Editions, at p. 51.

I get the term "radical hope" from an excellent book I have just read by Jonathan Lear with that title and subtitled *Ethics in the face of cultural devastation.* It is a moving account of the Crow Nation and its last Great Chief Plenty Coups, who were faced with the threatened collapse of their culture.

Towards the end of his life Plenty Coups told the story to his friend Frank B. Linderman, an account of the exploits of the young man growing up at the time when the Crow were still a vibrant tribe of nomadic hunters. At the end of his book, Linderman says that he was unable to get Plenty Coups to talk about anything that had happened after the Crow were confined to a reservation.

> Plenty Coups refused to speak of his life after the passing of the buffalo, so that his story seems to have been broken off, leaving many years unaccounted for. "I have not told you half of what happened when I was young," he said, when urged to go on. "I can think back and tell you much more of war and horse-stealing. But when the buffalo went away the hearts of my people fell to the ground, and they could not lift them up again. After this nothing happened. There was little singing anywhere. Besides," he added sorrowfully, "you know that part of my life as well as I do. You saw what happened to us when the buffalo went away."[2]

Jonathan Lear in his book explores what Plenty Coups might have meant by "after this nothing happened". What did the Great Chief mean? For the reality was that he buoyed and led his people through a period of ecological, cultural and, in Lear's terms, conceptual devastation. Jonathan Lear concludes his work with the reflection that "although Plenty Coups was advocating a new way of life for the Crow he was drawing upon the past in vibrant ways. And thus I think the case can be made that Plenty Coups offered the Crow a *traditional* way of going forward."[3]

In a book review by Charles Taylor appearing in the New York Review of Books, Professor Taylor brings us face to face with the Indigenous universality of Plenty Coups' statement and why although European society has been largely responsible for the

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[2] Jonathan Lear, *Radical Hope – Ethics in the face of cultural devastation*, at p. 2
[3] Jonathan Lear, *Radical Hope – Ethics in the face of cultural devastation*, at p. 154.

cultural disaster facing those peoples, in a sense, we cannot understand what we have done.

> A culture's disappearing means that a people's situation is so changed that the actions that had crucial significance are no longer possible in that radical sense. It is not just that you may be forbidden to try them and may be severely punished for attempting to do so; but worse, you can no longer even try them. You can't draw lines or die while trying to defend them. You find yourself in circumstances where, as Lear puts it, "the very acts themselves have ceased to make sense."
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> This is the explanation of the lapidary statement of Plenty coups: "After this nothing happened." Nothing of significance could happen anymore. This is a terrible reality, and it is one that we have trouble understanding, but it is a fate that we in "advanced," more "complex" societies have been imposing for many centuries on "indigenous" or "tribal" peoples.[4]

What does this have to do with the Samson Cree Nation and the Victor Buffalo case? It has everything to do with them, for as the Federal Court heard in some considerable detail during the trial, the 1870s, the time when the Crees concluded Treaty No. 6 with the Crown, brought first the threat and soon the reality of ecological and cultural devastation. With the disappearance of the buffalo, confinement on reserve, starvation and, perhaps most important, loss of control to do anything to help themselves.

The radical hope of Plenty Coups was to listen "like the Chickadee"[5], to observe others and find new ways of going on – that the Crow way of life might continue in a yet to be defined new form.

The Plains Cree and the Samson Cree Nation also used hope to survive. In the face of looming ecological and cultural disaster the people maintained their hope in the Creator and believed that the Creator was indeed a party to Treaty No. 6. They also engaged in a form of radical hope, first that the Crown and its officers through Treaty No.

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[4] Charles Taylor, *A Different Kind of Courage*, The New York Review of Books, Volume 54, Number 7 – April 26, 2007.

[5] Jonathan Lear, *Radical Hope – Ethics in the face of cultural devastation* at pp. 80-81. The Chickadee had an established position in traditional Crow life. « He is least in strength but strongest of mind among his kind. He is willing to work for wisdom. The Chickadee-person listening to their words. » Becoming a chickadee, then, is a virtue – a form of human excellence.

6 would assist them in finding a *traditional* way of going forward and, second, in the contemporary scene, the hope that the Courts would lend the assistance that the Crown had failed to provide.

The Samson Crees' faith in their Creator was vindicated when the Crown's officials unwittingly moved them on to a reservation that stood astride one of North America's largest oil and gas deposits. These natural resources were to replace the endless herds of buffalo in sustaining these Plains Cree. In my view, this radical hope came true and the response of the Crown and its officials and latterly the courts, lies at the heart of the dispute that is *Victor Buffalo v. Her Majesty the Queen.*

In *Mikisew*, Justice Binnie made the following important observation:

> ... Treaty making is an important stage in the long process of reconciliation, but it is only a stage. What occurred at Fort Chipewyan in 1899 was not the complete discharge of the duty arising from the honour of the Crown, but a rededication of it.[6]

What is true for Treaty 8 is equally true for Treaty 6 and indeed all treaties concluded between the Aboriginal people of Canada and the Crown over the past 400 years.

Justice Binnie suggests three phases in the relationship between Aboriginal peoples and the settler society: an initial and early contact hence the reference to rededication; treaty formation; and the post-treaty relationship hence the reference to the treaty not being the "complete discharge of the duty arising from the honour of the Crown".

There are two myths about the *Victor Buffalo* case that I wish to take on and hopefully dispel. The first is that this case is essentially about a duty to account on the part of the Crown for its management, lack of management or mismanagement of oil and gas resources and the resulting royalties -- that it is a case involving an "oil rich band"

[6] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, at para. 54.

seeking to extract more from the Crown. The second is that the Samson Cree Nation has not prevailed at least in the first two rounds in the Federal Court ending in the trial judgment of November 30, 2005 and the judgment of the Federal Court of Appeal of December 20, 2006.

With respect to Myth No. 1, I am proposing with great confidence that for the Samson Cree Nation, this case is not first and foremost about money but rather about promises kept or not kept, a sacred trust honoured or not honoured. It is in essence a case about a momentous event in the history of the Cree Nation and in the history of Canada – the making of Treaty No. 6.

As the Supreme Court of Canada so correctly stated in *Reference Re: Secession of Quebec*:

> ... The "promise" of s. 35, as it was termed in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. ...[7]

In Samson's submissions there could be nothing of greater importance for Canada than honouring the mutual undertakings and acts of reconciliation upon which this country was founded and the price the participants were willing to pay to see it accomplished.

Recall the words of the Supreme Court of Canada spoken through Mr. Justice Cory in *R. v. Sundown*:

> Treaties may appear to be no more than contracts. Yet they are far more. <u>They are a solemn exchange of promises made by the Crown and various First Nations. They often formed the basis for peace and expansion of European settlement.</u>[8]

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[7] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 82.
[8] *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 24.

Recall as well the eloquent reminder by Justice Norris in *R. v. White and Bob* so often cited as authority by the Supreme Court of Canada that the word treaty:

> ... embraces all such engagements made by persons in authority as may be brought within the term "the word of the white man" the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied.[9]

For Samson this case involves an assessment of the trust and fiduciary duties of the Crown resulting from those foundational undertakings, and those acts of reconciliation, in this instance through Treaty 6, but in fact relevant to all treaty arrangements between European settlers and the country's first occupants spanning 400 years, continuing to this day and covering territory and resources in virtually every province and territory in Canada.

In the Opening Statement for the General and Historical phase at trial, I stated the following:

> This case involves many issues but undeniably the vindication of Treaty No. 6 constitutes its heart and its soul.
>
> Representatives of the Crown and the Plaintiffs' ancestors came together on the western plains in the period of 1876-77 to seek what the Supreme Court of Canada is still directing - reconciliation of the distinctive pre-existing Aboriginal societies with the Crown's sovereignty. The parties came together not to conclude an episode in Canadian history but rather to open a new chapter. They did not come together as victor and vanquished; they did not even come together as dominant and subservient parties. In stark contrast to what was occurring south of the U.S.-Canada border, they came together in a valiant attempt at reconciliation, accommodation and mutual support. They came with their respective histories, cultures, languages, economic, military and political concerns and, perhaps most important of all, their concerns for achieving a secure and prosperous future for their peoples.
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> [...]

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[9] *R. v. White and Bob,* 50 D.L.R. (2d) 613 at p. 649.

> In 1876-77 no town or cityscapes and no oil rigs parted the endless prairies from the endless sky. Neither party could possibly have anticipated the invasion of the prairie landscape by these structures and accompanying populations that was to come. The Crees to the contrary had a relationship with non-Aboriginal society for decades which had not involved displacement or divestiture but rather had involved economic partnership and mutual assistance.
>
> In this segment of the case, my Lord, we submit that it is crucial that we cast ourselves back to that time prior to cityscapes and oil rigs and even before the meeting of the representatives of the same Plains Crees and the Crown in 1876-77. ...[10]

What about Treaty 6 and the Crown's duties under that Treaty? The majority of the Federal Court of Appeal finds, in paragraphs 143 to 145:

> Samson and Ermineskin argue, in slightly different ways, that their rights in relation to their capital money are treaty rights, and thus must be recognized as constitutional rights pursuant to section 35 of the *Constitution Act, 1982*, and cannot be abrogated by statute. It follows, they argue, that if the statutory scheme precludes the Crown from investing Indian money as a trustee is obliged to do, then either the statutory scheme cannot stand, or it must be read down.
>
> We are prepared to assume, without deciding, that Treaty 6 might have been understood by the Indian signatories as establishing a promise on the part of the Crown to hold Indian money in trust, at least in so far as the Indian money was derived from the disposition of reserve land or an interest in reserve land. In 1876, when Treaty 6 was signed, the *Indian Act* gave the Governor in Council complete control over Indian money held in trust, and permitted the money to be invested without band consent.
>
> However, the record contains nothing from which we can infer that the Crown promised that the statutory investment power in the *Indian Act* would remain forever unchanged. In fact, that investment power was repealed in 1951, after consultation, with no evidence of any objection by Samson or Ermineskin, or any other band. In our view, the repeal of the statutory investment power does not infringe or deprive Samson and Ermineskin of any of their rights under Treaty 6.[11]

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[10] Samson Opening Statement, General, Historical and Constitutional Issues, at pp. 1-2.

[11] *Chief Victor Buffalo et al. v. Her Majesty the Queen in Right of Canada et al.*, Reasons for Judgment December 20, 2006, at paras. 143-145 (emphasis added).

Of course, as I have mentioned, Samson has applied for Leave to Appeal to the Supreme Court of Canada on these findings.

Now let's look at what happened. The evidence of the witnesses called by Samson Appellants in the first phase dealt with the Plains Cree world view and perspective, before, at the time of and following Treaty No. 6. It was designed to assist the Court in understanding the meaning of Treaty No. 6. It included evidence respecting the Plains Cree society, its components, including the ancestors of Samson, the characteristics of the Plains Cree, their spirituality and spiritual ceremonies and practices, their language, culture, practices and traditions, their laws, their self-determination or self-government, the territory occupied or used by the Plains Cree, their way of life and livelihood.

Considerable evidence, was led by Samson, notably through expert witnesses such as Dr. Arthur Ray, Bob Beal, Prof. Douglas Sanders and Joan Holmes, regarding the relationship between the Plains Cree and the HBC, Plains Cree historical presence on the Plains, trading of the Plains Cree, alliances, treaties and conflicts with other Indian Nations, the historical development of Indian-European relations in North America, the constitutional development of present-day Canada, British, French and American recognition of rights of Aboriginal Peoples, the existence of Indian Nations and their interaction with European powers, the treaty process between the European powers and Indian Nations and the circumstances leading to Treaty No. 6.

In addition to that of the Elders, evidence was led in regard to the Plains Cree approach to Treaty No. 6, the deliberations and ceremonies of the Plains Cree in relation to Treaty No. 6, the objectives, fears and concerns of the Crown relating to Treaty No. 6, the negotiations relating to Treaty No. 6, the representations, promises, assurances and commitments of the Crown in respect to Treaty No. 6, the position of the Plains Cree at treaty time, the oral version of Treaty No. 6, the Cree understanding of Treaty No. 6, the accounts of Lieutenant Governor Morris and Dr. Jackes, the problems of translation between English and Plains Cree, the difficult concepts of the legal terminology, the

written version of Treaty No. 6 and the refusal or reluctance of certain Plains Cree Nations or groups to join Treaty No. 6.

Much evidence was submitted to the Court in regard to adhesions to Treaty No. 6, including the adhesion of Samson Cree Nation to Treaty No. 6, the conduct of the Crown post-treaty, the dramatic and unpredicted quick disappearance of the buffalo, the starvation endured by the Treaty No. 6 bands, the failure of the Crown to fulfill its treaty promises and the economic history of the Plains Cree post-treaty until the middle of the 20th century.

The evidence submitted by Samson also dealt with Canadian constitutional development and the relationship between the Crown and Aboriginal Peoples in the 19th and 20th centuries, the Indian Act, policies thereunder, the different positions of the Crown and the Plains Cree respecting the interpretation, status and implementation of Treaty No. 6, the failure of the Crown to implement Treaty No. 6 and Indian self-government, efforts of the Indians, including Plains Cree, to obtain recognition of their rights, the White Paper, the Red Paper, Crown initiatives respecting a limited form of Indian self-government in the 1970's, Indian efforts to obtain recognition of and respect for treaty rights, Plains Cree opposition to the patriation of the Constitution of Canada, court challenges regarding Indian rights, the constitutional recognition of treaty and aboriginal rights of Aboriginal Peoples in 1982, the Penner Report, the repudiation of the Indian Act as colonial and oppressive by successive Ministers of DIAND and the officials of the Department but the continued restrictive implementation thereof, the trust and fiduciary relationship, the events leading to the RCAP and the evolution of Crown views of Indian self-government.

The phase of the trial dealing with these matters lasted 174 days with 35 witnesses called by Samson. On this record no-one could allege that these matters were not of crucial, if not central, importance to the Crees. In no trial to date in Canada has such an effort been expended to instruct a Court on the true spirit and intent of a Crown/First Nation treaty as in the *Buffalo* case.

With respect to Myth No. 2 – that the Samson Cree Nation has failed in its attempts to achieve vindication for its positions in the Federal Court Trial Division and the Federal Court of Appeal consider the following.

With respect to the first phase, the Trial Judge decided to either ignore virtually all the Cree evidence or to give it little or no weight. He decided to focus almost entirely on the issue of off-reserve surrender. The majority of the Court of Appeal summarized what they considered the most important conclusions reached by the Trial Judge:

1. In assessing the oral history evidence, the approach advocated by Dr. von Gernet (an expert witness for the Crown) is preferable to the approach advocated by Dr. Wheeler (an expert witness for Samson) (Judge's reasons in Samson, paragraph 453).
2. The oral history evidence of the Samson elders should be discounted because the story probably was not transmitted to them as they recalled it, and alternatively because it is implausible that the Crown representatives who negotiated Treaty 6 would have agreed to accept a surrender of the land only to a certain depth (Judge's reasons in Samson, paragraphs. 458 to 494).
3. The evidence represented by the Cree language text attached to the expert report of Professor Wolfart bears little weight because there is little evidence as to the provenance of the story it contains (Judge's reasons in Samson, paragraph 495).
4. The evidence of Professor Wolfart that the Cree leaders who signed Treaty 6 could not have understood the "cede, surrender and release" clause bears little weight because his evidence does not explain how he reached that conclusion (Judge's reasons in Samson, paragraph 503, and in Ermineskin, paragraph 195).
5. The contemporaneous accounts of the signing of Treaty 6 that were written by Alexander Morris, A. G. Jackes, Peter Erasmus and John McDougall are reliable (Judge's reasons in Samson, paragraphs. 504 to 508, and in Ermineskin, paragraphs 196 to 200).
6. The Cree leaders were aware that, for the Crown, the purpose of Treaty 6 was to secure the surrender of aboriginal title to a vast tract of land so as to open it up for settlement and development, and that the land surrender clause was absolutely non-negotiable, unlike certain other clauses such as those relating to money, agricultural implements and livestock (Judge's reasons in Samson, paragraph 509, and in Ermineskin, paragraph 201).
7. Alexander Morris, who represented the Crown at the negotiation of Treaty 6, assured the Cree that they could continue to hunt and fish as before except on land taken up for settlement, that reserves would be set aside for the Cree, that no one

could take their homes from them, that if they wanted to sell all or part of their reserves, this could be done only by the Crown with their consent, and that the proceeds would be kept by the Crown and "put away to increase" (Judge's reasons in Samson, paragraph 510, and in Ermineskin, paragraph 202).

8. The evidence does not justify interpreting the "cede, release and surrender" clause as being limited to the land only to a certain depth (Judge's reasons in Samson, paragraph 512).

9. It is likely that the theory relating to such a limitation has emerged within the past few decades as a motif within the Cree oral traditions, and may represent a present day reconstruction of what current generations wished had happened, or thought should have happened, in 1876 (Judge's reasons in Samson, paragraph 513).

10. The "cede, release and surrender" clause in Treaty 6 was explained to the Cree leaders in 1876, and they understood that clause when they signed Treaty 6 (Judge's reasons in Samson, paragraph 532).

11. For the purposes of the test in *R. v. Van der Peet* (cited above), the date of contact between the Cree and the European settlers is 1670 (Judge's reasons in Samson, paragraph 550).

12. Before European contact, the Cree people occupied what is now Manitoba and Saskatchewan, but they are not indigenous to central Alberta and were not present there until sometime after European contact (Judge's reasons in Samson, paragraph 576).

13. The evidence does not establish pre-contact trade by the Cree in any particular item. Specifically, there is no evidence of any trade by the Cree in minerals, including salt, oil, gas, or anything analogous (Judge's reasons in Samson, paragraph 588).[12]

The Majority of the Court of Appeal concluded with respect to these findings:

> ... all parties agreed at the close of the trial, and still agree, that the conclusions summarized above are not relevant to any of the claims made in the Money Management Phase. We agree also. For that reason we express no opinion as to whether those conclusions are correct. As a matter of legal analysis, they are *obiter dicta*. It follows that the "off reserve surrender question" remains unresolved.
>
> However, none of the conclusions summarized above are binding on any judge who hears the subsequent phases. If, during the trial of the subsequent phases, a party wishes to refer to any of the evidence from the General and Historical

[12] *Chief Victor Buffalo et al. v. Her Majesty the Queen in Right of Canada et al.*, Reasons for Judgment December 20, 2006, at para. 41.

> Phase, the relevance of that evidence to those phases will have to be determined anew, and fresh consideration will have to be given to its credibility, reliability and weight.[13]

Given the relevance and importance of the General, Historical and Constitutional issues to the remaining phases of the trial, Samson had requested the following relief from the Federal Court of Appeal:

> e) an Order setting aside all findings of the Trial Judge with respect to the General and Historical Phase and ordering a new trial in respect to the issues in such phase on the basis that the new Trial Judge may consider admissible evidence tendered to date and contained in the Trial Record;
>
> f) alternatively, an Order setting aside all findings of the Trial Judge and ordering that such issues be considered anew in the continuation of the trial respecting other phases on the basis that the new Trial Judge may consider admissible evidence tendered to date and contained in the Trial Record; [14]

In my opinion, Samson's alternative relief is exactly what the Federal Court of Appeal provided thus vindicating the evidence of the Cree elders, other Cree representatives, the Experts who testified on behalf of Samson as well as the Ministers and Commissioners.

And now what about Samson's capital monies in the hands of the Crown? As is stated in the 2006 Annual of Samson Heritage Trust:

> Since at least the 1970s, the Samson Cree Nation made persistent efforts to obtain the transfer of Samson capital moneys to an independent trust for the benefit of Samson. Throughout this entire period Samson Cree Nation took the position that it had the right to control its own capital moneys as an aspect of its inherent rights of self-determination, as an aboriginal right and as part of its treaty rights pursuant to Treaty No. 6. [15]

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[13] *Chief Victor Buffalo et al. v. Her Majesty the Queen in Right of Canada et al.*, Reasons for Judgment December 20, 2006, at paras. 48 and 50.
[14] Samson Memorandum of Fact and Law, April 30, 2006, at para. 1353.
[15] Kisoniyaminaw Heritage Trust – 2006 Annual Report, at p. 5.

During the final arguments on the first two phases at trial, in December 2004, Samson requested that the Federal Court order the transfer of Samson capital moneys to an independent trust controlled by Samson. The Trial Judge indicated his willingness to grant such an Order and stated that the Court wanted to see the funds transferred to Samson as soon as possible. The Court took full control and jurisdiction over the transfer issue and basically removed this matter from the control of Canada and the Minister of Indian Affairs. At Samson's request, the Court set the conditions for the transfer and an Order for the transfer and conditions for the transfer was issued on January 27, 2005.

On December 22, 2005 the Trial Judge made an order confirming that the conditions for the transfer of Samson capital moneys had been fulfilled and that the transfer would take place on or about February 1, 2006. And that is what happened.

In the message from the Chairman for the 2006 Annual Report of the Fund we read:

> I am pleased to report that for the 11 months ended December 31, 2006 the return on investment for the total balanced fund was 12.85%. This rate of return, after taking in to account all expenses, including significant one-time start-up expenses, is more than three times higher than the rate paid by the Department of Indian Affairs on Capital Moneys for the same period of time. As a result the Kisoniyaminaw Heritage Trust Fund gained an extra $27.3 million.[16]

In fact over the 11 month period the Heritage Trust Fund experienced a net increase of $41 million.

All this does not sound to me like a losing result.

It is true that both the Trial Judge and the majority in the Court of Appeal did not award damages against the Crown finding that, while the Crown clearly was a trustee for the Indian moneys its obligations as such were determined by the statutory regime. The majority concluded:

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[16] Kisoniyaminaw Heritage Trust – 2006 Annual Report, at p. 3.

> The Crown's obligations as trustee of the royalties received for the benefit of Samson and Ermineskin are substantially different from the obligations of a common law trustee, because of the combined operation of the *Financial Administration Act* and the *Indian Act*. Those obligations fall on the Minister in relation to the management of Indian money, and on the Governor in Council in establishing how much interest is to be paid on Indian money.[17]

Interestingly and I would say significantly, Justice Sexton dissenting, would have found the Crown liable for any damages caused by failing to invest the Samson monies as a prudent trustee would have done. He opened his Dissenting Reasons by affirming:

> Oil is an essential resource in our society. Consequently, those who have oil resources have earned large sums of money when they permit others to exploit those resources. Such large sums of money may be placed with trustees who have expertise in investing and those trustees are expected to manage the moneys by prudently investing them. The main issue in this case is whether the appellant Aboriginal Bands who were entitled to the benefits from oil resources beneath their reserves, and obliged by law to surrender their oil resources to the Crown as trustee, can be deprived of the same right to have their moneys invested by the Crown when it is acting as their trustee. In the present case the Crown has taken the position that legislation which it has passed has precluded its officials from investing the oil moneys of Samson and Ermineskin (collectively referred to in these Reasons as "the Bands") and instead has deposited those moneys into its own account, used the moneys itself, and paid interest to the Bands. The Bands say they could have earned many millions of dollars more if the moneys had been prudently invested.
>
> As will be elaborated more fully below, I think the Crown was bound to invest the trust moneys, provided it first obtained the consent of the Bands. Because it failed to even attempt to obtain the Bands' consent to invest, it is liable for any damage this failure has caused. I am not persuaded that any of the defences proposed by the respondents exonerate the Crown. [18]

And so after 370 days of submissions before the Federal Court, 15 days of submissions before the Federal Court of Appeal and 11 months since the creation of the Heritage Trust, Samson Cree Nation has patriated its trust funds and controls its

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[17] *Chief Victor Buffalo* et al. v. Her Majesty the Queen in Right of Canada et al., Reasons for Judgment December 20, 2006, at para. 171.

[18] *Chief Victor Buffalo et al. v. Her Majesty the Queen in Right of Canada et al.*, Reasons for Judgment December 20, 2006, at paras. 172 and 182.

management, has increased the funds in the 11 month period by $41 million and has a considerable body of eloquent testimony presented during the General and Historical phase detailing the Cree perspective on Treaty 6, the Cree worldview and their appropriate place in the history, the present and the future of this country that remains untouched and available for the next Trial Judge.

All this sounds like success to me.

The report of Alexander Morris on his negotiations at Fort Carlton in August 1876 included the following:

> The whole day was occupied with this discussion on the food question, and it was the turning point with regard to the treaty.
>
> The Indians were, as they had been for some time past, full of uneasiness.
>
> They were anxious to learn to support themselves by agriculture, but felt too ignorant to do so, and they dreaded that during the transition period they would be swept off by disease or famine – already they have suffered terribly from the ravages of measles, scarlet fever and small-pox.[19]

The radical hope exemplified by the Crees in concluding Treaty No. 6 may have been a very distant hope. But it was one undertaken by the Crees in dignity and honour and although power swung to the Crown the Courts have reminded us clearly, if not always consistently, whether in Charter cases or Aboriginal cases, that as John Dryden observed in my head note: "all empire is no more than power in trust". The radical hope of the Crees in seeking relief from the Courts at the end of the 20th and the beginning of 21st centuries on the basis of their treaty with the Crown seems most justified.

At the end of the submissions in the Court of Appeal, I refered to the symbolism of the shaking of hands and the holding of hands as denoting friendship, helping, hope

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[19] *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the Negotiation on which they were based, and other information relating thereto,* Alexander Morris, Toronto, 1880, at p. 185.

and trust. The negotiations of Treaty No. 6 were replete with this symbolism and in fact the act itself.

At Fort Carleton, Lieutenant Governor Morris spoke as follows:

> And now, Indians of the plains, I thank you for the open ear you have given me; I hold out my hand to you full of the Queen's bounty and I hope you will not put it back. We have no object but to discharge our duty to the Queen and towards you. Now that my hand is stretched out to you, it is for you to say whether you will take it and do as I think you ought – act for the good of your people.[20]

These words were spoken to the Crees at a time when Cree society was threatened and under stress. They were designed to offer hope and inspire trust.

I used another example of the taking of hands, this from the Christmas broadcast of King George VI in 1939, the time of great foreboding and stress for his nation. He quoted Minnie Louise Haskins saying:

> And I said to a man who stood at the gate of the year: 'Give me a light that I may tread safely into the unknown.' And he replied: 'Go out into the darkness and put your hand into the hand of God. That shall be to you better than a light, and safer than a known way.'[21]

However this litigation unfolds, no one will be able to take from the Cree Nation the courage, dignity and honour that they showed in 1876 and again in the seven years already spent in their quest for vindication of their radical hope in concluding Treaty No. 6.

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[20] *The Treaties of Canada with the Indians of Manitoba and the North-West Territories including the Negotiation on which they were based, and other information relating thereto,* Alexander Morris, Toronto, 1880, at p. 208.

[21] Haskins, Minnie Louise (1875-1957)