2. *L. Douglas Rae* Says:
March 21st, 2009 at 4:02 pm

At first blush the SCC decision in Ermineskin appears to be complete and conclusive. However, the decision is much like George Bush's invasion of Iraq — what first appeared to end the matter may over time lead to a number of issues that were not anticipated.

In following a strict interpretation of the provisions of the Financial Administration Act and the Indian Act, the SCC has laid some land mines for the federal bureaucracy. The SCC held that Canada is obligated to strictly follow the provisions in these statutes and the Regulations passed thereunder. However, and perhaps unbeknownst to those arguing the case, Canada's officials have always had difficulty in following the strict letter of the law in their handling of "Indian monies".

For example, over the years there were a number of arithmetical errors made in calculating interest on Indian monies — opening balances, cut-off dates, compounding, etc. While these arithmetical errors as they affected the Samson and Ermineskin bands were corrected over the course of their lengthy litigation (by Canada being forced to add as a result of the litigation some $30 million to the bands' accounts in the Consolidated Revenue Fund), for many other First Nations, perhaps most of them, similar adjustments to their capital and revenue accounts in the CRF have not been made. It is likely that many of these First Nations are not even aware of these computational errors in the calculation of the interest accruing on their monies in the CRF.

It remains to be seen whether Canada will disclose to these First Nations the existence of these errors as a result of the SCC's reasoning in the Ermineskin decision, let alone credit any additional interest owing on these monies. From the First Nations' point of view, the question to be asked is whether the decision can be used to get around obvious limitations issues that would apply to any claims by them for additional interest owing.

Another potential leftover landmine from the decision is Canada's use of so-called "suspense" accounts over the years. The SCC decision made it clear that "Indian monies" had to be deposited into the CRF as "capital" or "revenue" monies of the beneficiary First Nation and that they could not be invested outside the CRF. Unfortunately, Canada, when faced with any type of uncertainty (whether the amount was calculated correctly, who the beneficiary was, when Indian monies were mixed in with other funds paid to the Receiver General, etc.) or the possibility that such monies might have to be returned to the payor (payments under protest, accidental overpayments, payments that Department officials felt were not owing, etc.), has frequently created an unauthorized category of account - a "suspense" account — to hold these funds. Some of these suspense accounts were part of the CRF and sometimes they were in interest-bearing accounts with Canadian chartered banks. Neither are expressly authorized under the Financial Administration Act and the SCC did not appear to be aware of the existence of these accounts, a result that may attributable to the fact that aspects of the Court's reasons for the decision were not argued before the Court. It is believed that there is presently millions of dollars held in these suspense accounts.

The SCC decision in Ermineskin may prove problematic to Canada in its ability to continue to use such suspense accounts and in terms of whether it must now deposit into the CRF such suspense account monies or disburse them to third parties.

It is to be hoped that eventually the wars over Canada's handling of First Nations' monies will end and that the troops can come home. The conflict has been going on for 20 years.