FILE NO.: SCT-5001-14
CITATION: 2021 SCTC 1
DATE: 20210118

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
MOSQUITO GRIZZLY BEAR'S HEAD LEAN MAN FIRST NATION Claimant	Ron Maurice, Ryan Lake and Melanie Webber, for the Claimant
– and –	
HER MAJESTY THE QUEEN IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent	Lauri Miller and Scott Bell, for the Respondent
	HEARD: December 16-20, 2019, February 18-19, 2020, March 13, 2020, April 8, 2020 and July 7-9, 2020

REASONS FOR DECISION

Honourable Harry Slade

Corrected version

NOTE: A Corrigendum was released by the Tribunal on April 8, 2021. The corrections have been incorporated in this document. This document is subject to editorial revision before its reproduction in final form.

Cases Cited:

Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada, 2016 SCTC 15; *Guerin v R*, [1984] 2 SCR 335, 1984 CarswellNat 813 (QL); *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, 1984 CarswellNat 813 (QL); *Whitefish Lake Band of Indians* v *Canada (AG)*, 2007 ONCA 744, 87 OR (3d) 321 (QL); *Hodgkinson v Simms*, [1994] 3 SCR 377, 1994 CarswellBC 438 (WL Can); *Daniels v Canada (Indian Affairs and Northern Development*), 2016 SCC 12, [2016] 1 SCR 99 (QL); *Southwind v Canada*, 2017 FC 906 (QL), appeal heard by SCC; *Guerin et al v R* (1981), [1982] 2 FC 385, [1982] 2 CNLR 83 (FCTD) (QL); *Wood v Grand Valley Railway Co* (1915), 51 SCR 283, 1915 CarswellOnt 15 (WL Can); *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14*; Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, 1995 CarswellNat 1278 (WL Can); *Lower Kootenay Indian Band v Canada* (1991), [1992] 2 CNLR 54 (*sub nom Luke v R*), 42 FTR 241 (FCTD), 1991 CarswellNat 226 (WL Can); *Fales v Canada Permanent Trust Co.* (1976), [1977] 2 SCR 302 (SCC); *Siemens v Bawolin*, 2002 SKCA 84, 2002 CarswellSask 448 (WL Can); *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 222 (QL).

Statutes and Regulations Cited:

Indian Act, RSC 1985, c I-5.

Specific Claims Tribunal Act, SC 2008, c 22, Preamble, ss 20, 14.

Financial Administration Act, RSC 1985, c F-11, s 90.

Authors Cited:

Canada, Department of Indian Affairs and Northern Development, *In all Fairness A Native Claims Policy Comprehensive Claims* (Ottawa: Supply and Services Canada, 1981).

Lord Hailsham of St. Marylebone, *Halsbury's Laws of England*, 4th ed., vol 48 (London Butterworths, 1984).

Donovan W.M. Waters, Mark Gillen & Lionel Smith, eds., *Waters' Law of Trusts in Canada*, 3d ed (Toronto: Thomson Carswell, 2005).

Headnote:

Overview

These Reasons for Decision determine the compensation due to the Mosquito Grizzly Bear's Head Lean Man First Nation (Claimant), as a result of breach of Crown fiduciary duty arising in 1905 out of a surrender of lands from Indian Reserve Nos. 110 and111 (IRs 110/111).

Pursuant to treaty obligations, the Crown set aside land for the benefit of Grizzly Bear's Head and Lean Man Bands as IRs 110/111. In 1905, the Crown took a surrender of a 14,670-acre parcel on IRs 110/111. The surrendered land comprised approximately two thirds of the Reserve.

The Parties reached agreement on the validity of the Claim. Canada admitted that it breached its pre-surrender fiduciary obligation to the Claimant, which breach rendered the 1905 surrender of lands from IRs 110/111 invalid.

Where reserve land is affected by an invalid surrender, paragraph 20(1)(g) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*] requires that the Specific Claims Tribunal (Tribunal) award compensation equal to the current unimproved market value (CUMV) of the subject lands. The Tribunal must also, under paragraph 20(1)(h) of the *SCTA*, award compensation equal to the value of the loss of use (LOU) of the lands, brought forward to the present value of the loss.

Principles of Compensation Applied by the Courts

Awards of compensation where a claim is found valid are also governed by paragraph 20(1)(c) of the *SCTA*, which provides that the Tribunal is to award compensation "that it considers just, based on the principles of compensation applied by the courts". Equitable compensation is a remedy applied by the courts where a breach of fiduciary duty is found.

Equitable compensation applies in the context of a breach of fiduciary duty with respect to a surrender of reserve land (*Guerin v R*, [1984] 2 SCR 335, 1984 CarswellNat 813 (QL) [*Guerin*], per Dickson J.).

The Parties agree that equitable principles apply to the assessment of compensation for LOU in this Claim. The application of equitable principles may stem from paragraph 20(1)(c) or from the phrase "in accordance with legal principles applied by the courts" in paragraph 20(1)(h) of the *SCTA*.

Although the agreement did not describe the events and actions that breached Crown fiduciary duty, the evidence introduced in the compensation phase of the proceeding reveals that the Crown took a surrender vote in contravention of the statutory requirement that permitted only members of the Grizzly Bear's Head and Lean Man Bands to vote, and later accepted and acted on the surrender. This was, from the outset, a breach of the duty of ordinary prudence.

This breach occurred within a treaty relationship, with respect to a treaty reserve, and the breach led directly to the permanent alienation of treaty reserve land from the Claimant.

Equitable compensation "attempts to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff's lost opportunity" (*Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 (QL) [*Canson*] at para 27, per McLachlin J.).

The underlying policies that guide the assessment of equitable compensation in this Claim include restitution (*Guerin* and *Canson*), reconciliation (*SCTA*, Preamble), deterrence (*Canson*), fairness, and proportionality (*Hodgkinson v Simms*, [1994] 3 SCR 377, 1994 CarswellBC 438 (WL Can)).

Current Unimproved Market Value

Both the Claimant and the Respondent introduced expert reports from land appraisers, with their respective opinions on the CUMV of the Claim Lands, effective September 21, 2017.

The Claimant's appraisal concluded a value per acre of $1,150, and a total value for the Claim Lands of $16,635,000.

The Respondent's appraisal concluded a value per acre of $960, and a total value for the Claim Lands of $13,843,872.

Both appraisers approached the task appropriately. Each critiqued certain aspects of the report of the other. The Tribunal settled on a number between the two values, and found a CUMV of $15,500,000, effective September 21, 2017.

Application of Principles of Equitable Compensation

In the assessment of equitable compensation in this Claim, the plaintiff is entitled to have compensation assessed as if it would have made the most favourable or advantageous use of the land in question (*Guerin*, per Wilson J., *Southwind v Canada*, 2017 FC 906 (QL), appeal heard by SCC, per Zinn J.).

Equitable compensation is an assessment, not a mathematical calculation (*Guerin* at para 359, *Whitefish Lake Band of Indians* v *Canada (AG)*, 2007 ONCA 744, 87 OR (3d) 321 (QL) at para 90).

The Tribunal approached the determination of LOU, at present value, based on the application of principles of equitable compensation.

The Claimant provided an expert report on LOU prepared by DEMA Land Services Inc. (DEMA Report).

The DEMA Report provided nominal estimates for three models for LOU of the Claim Lands from 1905 to 2020: Leasing, Proxy (RNI), and Generic Proxy (6.3%).

The Respondent provided a response report. This critiqued the LOU models advanced by the Claimant and identified contingencies that could be applied in relation to the estimates provided by DEMA. The Respondent did not propose an alternative model or alternative LOU values for the loss period.

The Proxy (RNI) Model estimates nominal LOU for each year by multiplying estimated unimproved land value by a rate of return reflective of the agricultural sector in Saskatchewan. The Generic Proxy (6.3%) Model annual nominal rate of return of 6.3% represents the overall

median rate of return based on Realized Net Income (RNI) between 1926 and 2018. The Tribunal found that the methodology employed by DEMA to conclude annual land values was flawed. Both Proxy Models were rejected.

In final argument, the Respondent suggested that the Tribunal be guided by the Leasing Model proposed by DEMA, subject to applicable contingencies, and adjusted on assessment to establish a compensation award that reflected the potential of the Claimant to develop the agricultural potential of the Claim Lands.

DEMA's approach to valuation is unlike a land appraisal, in which experts produce opinions based on readily available data describing similar comparators, and applying well-defined and widely accepted professional standards. The Tribunal determined that estimates of annual losses based on DEMA's Leasing Model, as applied, had sufficient evidentiary value to assist the Tribunal in making an assessment of the Claimant's losses, after considering contingencies, based on the application of principles of equitable compensation.

DEMA's estimates of the annual financial losses from the foregone opportunity for leasing provide a base against which contingencies may be applied in the somewhat subjective exercise of assessment.

The Claimant is entitled to recover for the foregone opportunity to use the land wrongfully surrendered from 1905 to the present in the most advantageous manner, and lost opportunity includes the foregone opportunity to benefit from revenues related to that use.

Assessment of Foregone Revenues

The approach to remedy must uphold the underlying policies at work. These include restitution, deterrence, reconciliation, fairness and proportionality.

The Parties agree that the most advantageous use of the trust property between 1905 and 2020 was for agricultural purposes.

The Claimant argues that compensation should be determined based on the highest and best use of the land that is financially feasible and legally permissible, without regard for whether it had the capability of developing the land to its highest and best use.

The Respondent argues that compensation should be based on the use of the land that the Claimant would, reasonably and probably, have carried out given the opportunity to retain the land.

The Claimant is entitled to the presumption that it would have put the land to its most advantageous use. However, the most advantageous use available is not the most advantageous use imaginable. The statutory framework under the *Indian Act*, RSC 1985, c I-5 would have applied. The land's character and local markets had undeniable features. While equity may in some circumstances of insufficient evidence favour the wronged, other underlying policies must also be observed. As occurred in *Guerin*, some matters with large degrees of uncertainty can only be treated as "global" amounts.

The Tribunal rejected both DEMA Proxy Models as inadequate to serve as the foundation of the findings on historical loss, although the Proxy (RNI) Model has some utility alongside the Leasing Model for roughly scoping some aspects of the award that are assessed globally. DEMA's Proxy Models are insufficiently grounded in the evidence of actual market values to be used as the foundation for a judicial determination. The evidence is simply insufficient to consider what revenues might have been generated had the Claimant had the opportunity to farm the entirety of the land themselves throughout the period of loss.

This left the Leasing Model from the DEMA Report.

The evidence offers no basis on which precise percentage adjustments for negative contingencies may be applied to the estimates. It is, however, necessary to make adjustments as account must be taken of contingencies. Equity calls for an assessment based on consideration of the entirety of the evidence. Adjustments for contingencies are part of the assessment.

DEMA's estimates of annual lease revenues did not take account of contingencies that would have a bearing on whether the estimated revenues, after expenses, could be achieved.

The evidence indicated a limited demand for undeveloped lease land in the area of the Claim Lands.

The DEMA Report estimates did not include an amount for the cost of developing internal roads. Account was not taken of costs associated with preparing the land for leasing or ongoing operational costs.

DEMA's estimates of the pace and ultimate extent of the take up of the land by lease were found by the Tribunal to be unrealistic.

DEMA's annual loss numbers are estimates. These are based on data that are not derived from the actual development for agriculture of the Claim Lands. They do not, therefore, represent calculated losses.

DEMA's estimates, once adjusted for contingencies, did assist the task of assessment of compensation on the application of the relevant equitable principles. Although these are not derived from evidence particular to the Claim Lands, they established a base, once adjusted for contingencies, from which the past losses could be brought forward to present value.

Bring Forward to Present Value

Equitable compensation is assessed at the time of trial, not the date of the breach. Therefore, the assessment is of the loss at present, with all losses represented by a single award.

Consistent with assessment as of the date of trial, losses are assessed with hindsight. Losses which were caused by the breach based on a common sense view of causation will be compensable.

There is a common sense connection between the LOU of the land and the loss of revenue that may have been paid into the Claimant's coffers if the land had been leased out to farmers.

The *SCTA* does not direct the Tribunal to assign annual losses (including associated contingencies) for each specific year in order to bring forward losses to current value. A final figure for current value of losses may be achieved by assessment.

The Claimant contends for the application of the principle of most advantageous use to DEMA's estimated annual losses due to the foregone opportunity to lease out parcels of the Claim Lands.

The Claimant provided an expert report bringing forward the LOU of the Claim Lands to the current value of the loss, from 1905 to 2019. This report provided schedules setting out alternative calculations of the present value of the estimated loss of use values for each model provided by DEMA. The alternative methods for bringing historical annual losses to present value were based on (i) the rates of return achieved by prudent investors; and, (ii) the Band Trust Account (BTA) rate.

The Respondent provided expert reports bringing forward the LOU of the Claim Lands to the current value of the loss, from 1905 to 2020. These reports set out calculations of the present value of DEMA's LOU estimates, using annual multipliers based on the percentage of growth in Gross Domestic Product per capita over the period of loss.

The Claimant argues that the return on the money based on contemporary practices of a "prudent investor" represents the most advantageous use, and thus is the measure to be applied in assessing the loss to the Claimant (Claimant's amended Memorandum of Fact and Law filed May 22, 2020, at para 165).

As an alternative, the Claimant also presented evidence based on present valuation using the BTA rates.

The Respondent argued that the fairest approach is to bring forward the hypothesized revenues using annual multipliers based on the percentage growth in Gross Domestic Product per capita over the period of loss, such that the Claimant would be restored on terms akin to the growth in economic wellbeing enjoyed by the average Canadian.

In assessing equitable compensation, it is necessary to consider the particular fiduciary relationship and breach, the "trust which is at its heart" (*Canson* at para 3), the restitutionary character of equitable compensation, and the necessity of fitting the remedy to the duty, breach, and harm suffered by the Claimant (summed in *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2016 SCTC 15 at paras 79, 86–87).

The facts are not that the Crown actually received money which it mismanaged or withheld from the Claimant.

The Crown-Indigenous relationship in the present matter is not that of a trustee in possession of funds of the beneficiary. The breach was with respect to land. The question now is what loss flows from *that* breach.

The central question is over the amount of compensation due today to restore to the Claimant the value of what was lost due to the breach in order to achieve a "fair and just result" (*Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2016 SCTC 15 at para 86). Counsel for the Claimant acknowledged in closing submissions that lease revenues would have been deposited to the Claimant's trust account with the Ministry's Department of Indian Affairs. Interest on the annual balance held in trust would be earned at the rates fixed from time to time and be compounded annually going forward.

The Claimant relied on authorities from the financial management context involving trustees in possession and discretionary control of funds. The primary authority relied upon involved the misappropriation of the funds of the *cestui que trust* by a trustee.

These texts and cases are distinguishable, as in the current matter, the breach is with respect to land, not funds. In this Claim, the hypothesized foregone revenues were never in fact in the hands of the fiduciary.

At all relevant times, the *Indian Act* applied to the Crown's management of the Claimant's funds. If any such funds had come into the control of the Crown, the Crown's duties would have existed within the statutory framework, as described in *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 222 (QL). If the land had been surrendered for leasing, the reality would be that lease revenue would have been deposited in the BTA.

The Tribunal adopted the BTA rate. The Tribunal found that this rate was particularly apt in the present matter, as revenue from leasing would if in fact received be deposited in the BTA, and would earn interest at the rate set annually on such funds, compounded annually.

Award

The Tribunal determined CUMV of $15,500,000, effective September 21, 2017.

The Tribunal assessed the present value of LOU to December 31, 2019, at $111,433,972. This amount is net of the payments made by the Crown to the Claimant in respect of the Claim Lands from 1906 to 1956.

The combined amount for CUMV and LOU, subject to adjustment, is $126,933,972.

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I. INTRODUCTION

[1] These Reasons for Decision determine the compensation due to the Mosquito Grizzly Bear's Head Lean Man First Nation (Claimant), as a result of breaches of fiduciary duty of the Crown (Respondent) in the surrender of land from Indian Reserve Nos. 110 and 111 (IRs 110/111). The reserve land of the Claimant, including Indian Reserve No. 109, totalled 46,208 acres.

[2] The Claimant is of Assiniboine, Nakoda and Stoney descent. The Claimant's ancestors adhered to Treaty 6 and Treaty 4. The Claimant is also a "band" within the meaning of the term in the *Indian Act*, RSC 1985, c I-5. As the name suggests, the Claimant was established by an amalgamation of three bands.

[3] Pursuant to treaty obligations, the Crown set aside land for the benefit of Grizzly Bear's Head and Lean Man Bands as IRs 110/111. In 1905, the Crown took a surrender of a 14,670 acre parcel on IRs 110/111. The surrendered land comprised approximately two thirds of the Reserves. Another reserve of the Claimant, Indian Reserve No. 109, was not affected by the surrender.

[4] It is common ground that the Claimant is, for the purpose of this proceeding, the successor in interest to any cause of action that may arise against the Crown as a result of the surrender.

II. AGREEMENT ON VALIDITY

[5] The Parties reached an agreement that the Claim is, for the purposes of this proceeding before the Specific Claims Tribunal (Tribunal), valid upon the following terms:

> Canada admits a breach of its pre-surrender fiduciary obligation to the Claimant, which breach rendered the 1905 surrender of lands from Indian Reserve 110/111 invalid.
>
> In light of Canada's admission, there are no outstanding validity issues and a hearing is not required. [Agreement on Validity Issues filed with the Tribunal on December 21, 2017, at paras 1–2]

[6] The Agreement does not set out particulars of the duty breached or the historical event that put the Crown in breach.

III. COMPENSATION PROVISIONS OF THE *SPECIFIC CLAIMS TRIBUNAL ACT*

[7] Paragraphs 20(1)(g) and (h) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*]

provide:

> **20 (1)** The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> …
>
> **(g)** shall award compensation equal to the current, unimproved market value of the lands that are the subject of the claim, if the claimant establishes that those lands were never lawfully surrendered, or otherwise taken under legal authority;
>
> **(h)** shall award compensation equal to the value of the loss of use of a claimant's lands brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes the loss of use of the lands referred to in paragraph (g);…

[8] Paragraphs 20(1)(a) and (b) of the *SCTA* limit the Tribunal to awards of monetary compensation to a maximum of $150,000,000. Punitive or exemplary awards are barred and no amount can be awarded for "any harm or loss that is not pecuniary in nature, including loss of a cultural or spiritual nature" (subparagraphs 20(1)(d)(i) and (ii) of the *SCTA*).

[9] Paragraph 20(1)(c) of the *SCTA* provides that the Tribunal "shall, subject to this Act, award compensation for losses in relation to the claim that it considers just, based on the principles of compensation applied by the courts". Lastly, subsection 20(3) provides:

> The Tribunal shall deduct from the amount of compensation calculated under subsection (1) the value of any benefit received by the claimant in relation to the subject-matter of the specific claim brought forward to its current value, in accordance with legal principles applied by the courts.

[10] The Parties agree that equitable principles apply to the assessment of compensation for loss of use (LOU) in this Claim. The application of equitable principles may stem from paragraph 20(1)(c) or from the phrase "in accordance with legal principles applied by the courts" in paragraph 20(1)(h).

IV. COMPENSATION ISSUES

[11] The Parties agree that the remaining issues to be determined by the Tribunal are:

> In accordance with subsection 20(1)(g) of the of the *Specific Claims Tribunal Act*, what is the appropriate award of compensation equal to the current, unimproved market value of the lands that are the subject of the Claim in accordance with legal principles applied by the courts?

> In accordance with subsection 20(1)(h) of the *Specific Claims Tribunal Act*, what is the appropriate award of compensation equal to the value of the Loss of Use of the Claimant's lands brought forward to the current value of the loss in accordance with legal principles applied by the courts? As part of this head of compensation the Tribunal will be asked to determine the following sub-issues:
>
> i. What is the appropriate methodology, including any appropriate contingencies to consider, for calculating historical loss of use values?
>
> ii. What is the appropriate methodology, including any appropriate contingencies to consider, for bringing forward historical loss of use values to the current value?
>
> [Agreed Statement of Issues filed with the Tribunal on May 16, 2019, at paras 1–2]

[12] The above references to "appropriate contingencies" reflect the Parties' agreement that paragraph 20(1)(h) calls upon the Tribunal to apply fiduciary law, including principles of equity, in an assessment of compensation for LOU. However, the Parties disagree on how key principles should apply to the facts and guide the discretion of the Tribunal in making its assessment.

[13] The context in which the admitted breach occurred is not in dispute. The fiduciary relationship was between treaty adherents. The interest over which the Respondent exercised discretionary control was an interest in reserve land set aside pursuant to the treaty. The breaches led to the indefinite alienation of substantial acreage from a treaty reserve: approximately 22.5 sections comprising about two thirds of IRs 110/111.

[14] The Parties began the proceedings with differing views of the breach, including the intentions and motives of agents of the Crown in and around the time of the surrender. The expert report of Dr. Peggy Martin McGuire (Martin McGuire Report), a historian, was in large measure directed to the question on whether Crown agents and others had pursued a plan to obtain a surrender vote from the Claimant and to sell quarter sections of the Claim Lands at under-value to a cohort of persons affiliated with the Liberal Party of Canada. The gravamen of the Martin McGuire Report is that the offering of the land at under-value, the lack of advertising, the appearance of a plan of the "surrendered land" on a plan of the Reserve that pre-dated the request of members of the Claimant for the conduct of a surrender, and the purchase of quarter sections by members of a Liberal Party of Canada cohort, all point to a co-ordinated effort to obtain a surrender and afford to insiders an opportunity to acquire farmland at below market prices.

[15] In submissions concerning the purpose and relevance of the Martin McGuire Report,

Counsel for the Claimant submitted that proof of the actions noted above would go to the application of principles of equitable compensation, in particular, deterrence.

[16] The Respondent's admission did not specify the paragraphs of subsection 14(1) of the *SCTA* grounding the Claim. The Respondent's admission and the Parties' identification of paragraphs 20(1)(g) and (h) of the *SCTA* left open the following questions:

a. Given the Parties' agreement that "[i]n light of Canada's admission, there are no outstanding validity issues" (Agreement on Validity Issues at para 2), is the evidence that suggests unlawful intent in relation to the surrender and sales nevertheless open for consideration to determine the character of the admitted breach, and if so, would the character of the breach have a bearing on the application of principles of equitable compensation flowing from the underlying equitable policies?

b. If the Claimant does not advance or make out a claim of wilful wrongdoing on the part of agents of the Crown, is the evidence tendered in support of the above nevertheless relevant to questions of land value in the early 20th century that may assist the assessment of compensation? In particular, does this evidence apply in respect of the question of the value of the Claim Lands at the time of the surrender?

[17] The Claimant did not pursue the question of whether the Crown sought to sell the surrendered lands at under-value to insiders in its closing Memorandum of Fact and Law (MOFL) or at the oral submissions hearing. In response to questioning from the Tribunal during the oral submissions hearing on whether some form of conspiracy was being advanced by the Claimant, Counsel for the Claimant did not suggest a conspiracy, but suggested that the Crown's actions with respect to the surrender and sale of land constituted "malfeasance", not "nonfeasance" or "simple negligence", and that this ought to be taken into consideration in determining the equitable compensation.

[18] The Claimant did not elaborate on the suggested distinction between malfeasance and nonfeasance in the application of principles of equitable compensation.

[19] The Agreement on Validity Issues states only that Canada breached "its pre-surrender

fiduciary obligation to the Claimant" (para 1). The question of unlawful intent is not before the Tribunal.

[20] The expert reports of Dr. Martin McGuire and Dr. Whitehouse-Strong remain on record and will be considered on the question of the value of the Claim Lands in the early 20th century.

[21] The following questions arise regarding compensation:

a. What is the current unimproved market value (CUMV) of the Claim Lands?

b. To be most consistent with the principles and underlying policies of equitable compensation in this Crown-Indigenous, fiduciary setting, how should LOU be assessed in the circumstances of this Claim? For the lost use of the land, the Parties focused on whether loss of use should be assessed by reference to:

    1. the most advantageous use of the land that was realistically available based on objective characteristics of the land, including factors and contingencies related to that use, under one of several models proposed by the Claimant (Owner-Operator, Leasing, or Proxy Models); or,

    2. the Claimant's most reasonable and probable experience in a hypothesized, non-breach history, reflecting a realistic rate of development.

c. What approach to the assessment of the present value of historical LOU values is most consistent with the policy of the law that a fiduciary will be held to account for a breach of duty in relation to an asset in which another has the beneficial interest? Here the Parties differed on whether present valuation should be done with reference to:

    1. Rates of return achieved by prudent investors (Claimant's position);

    2. The Band Trust Account (BTA) rates (Claimant's alternative position); or,

3. Annual multipliers based on the annual percentage of growth in Gross Domestic Product (GDP) per capita over the period of loss (Respondent's Position).

[22] It is not disputed that sale proceeds from the Claim Lands and received by the Claimant in the early 20th century must be brought forward to present value in a manner comparable to the estimate of the present valuation of foregone revenues, and the present value of the sale proceeds must be deducted from the compensation determined by the Tribunal.

V. ISSUES OF FACT RELATING TO THE BREACH AND ADMISSION

[23] The Respondent admits that the 1905 surrender of 14,670 acres of land from IRs 110/ 111 was invalid, and that the Crown was in breach of its "pre-surrender" fiduciary duties in taking and accepting the surrender. The Claimant accepts that it "[s]uffice[s] to say" that the Respondent permitted the surrender vote to proceed incorrectly and identified the wrong group of beneficiaries to share in the proceeds (Claimant's amended MOFL filed with the Tribunal on May 22, 2020, at para 40). A detailed review of the evidence and analysis leading to findings of fact grounding the admission is not necessary.

VI. OVERVIEW OF THE EXPERT EVIDENCE

[24] The evidence is for the most part comprised of the filed expert reports, their respective reliance documents, and the testimony of the authors on direct and cross-examination. Other documents were introduced by consent and form part of the record.

[25] The expert reports address the historical context of the breach, the CUMV of the Claim Lands, LOU models describing foregone revenues from the Claim Lands from 1905 to present, and present valuation of foregone revenues.

[26] Below is a list of the final versions of all expert reports in evidence, with a brief description of the contents of the report. More detailed descriptions of the expert evidence are provided later in these Reasons for Decision.

A. Claimant's Expert Reports

[27] The final versions of the expert reports of the Claimant are as follows:

1. Dr. Peggy Martin McGuire Expert Report

- Author: Dr. Peggy Martin McGuire, Ph.D. Cultural Anthropology
- Filed: May 8, 2015
- Subject Matter: History of the Mosquito, Grizzly Bear's Head and Lean Man Bands prior to the 1905 surrender of the Claim Lands; and, historical circumstances of the surrender and sale of the Claim Lands

2. Phase II Mosquito, Grizzly Bear's Head, Lean Man First Nations Surrender Claim: Land Value Estimate (Altus Report I)

- Authors: Norris Wilson and Gina Gallant, Accredited Appraisers
- Filed: December 4, 2019
- Subject Matter: Opinion of the current market value of the unimproved Claim Lands

3. Mosquito, Grizzly Bear's Head, Lean Man First Nations Surrender Claim: Land Value Estimates, 1906, 1908 & 1910

- Authors: Norris Wilson and Gina Gallant, Accredited Appraisers
- Filed: April 4, 2017
- Subject Matter: Retrospective fair market value of the Claim Lands as of 1906, 1908 and 1910

4. Agricultural Loss of Use Report of a Portion of the Mosquito Grizzly Bear's Head Lean Man First Nation Indian Reserves No. 110/111 surrendered in 1905 (DEMA Report)

- Author: Alana J. Kelbert, Accredited Appraiser and Professional Agrologist
- Filed: February 21, 2020 (This report replaces the earlier DEMA Report filed on September 30, 2019 and again on December 4, 2019, which the Claimant later withdrew based on concerns raised about its admissibility)
- Subject Matter: Presentation of four models for determination of nominal agricultural loss of use of Claim Lands from 1905 to 2020: Owner-Operator, Leasing, Proxy (Realized Net Income (RNI)) and Generic Proxy (6.3%)

5. Mosquito Grizzly Bear's Head Lean Man First Nation Agricultural Loss of Use – Report on Present Value of Loss of Income: Expert Report of Scott Schellenberg (Schellenberg Report)

- Author: Scott Schellenberg, Chartered Professional Accountant and Chartered Financial Analyst
- Filed: May 20, 2020 (This updated report incorporates the numbers contained in the DEMA Report filed on February 21, 2020, and replaces the earlier version of the Schellenberg Report and Index of Schedules filed on January 21, 2020)
- Subject Matter: Provides three alternative methodologies for calculation of present value of moneys the Claimant would have earned from the use of the Claim Lands from 1905. The methodologies are: Band Trust Fund (Band Trust Account), Generic Balanced Portfolio; and, Pension/Endowment Benchmark Returns

6. Mosquito Grizzly Bear's Lean Man First Nation Agricultural Loss of Use: Reply Report of Scott Schellenberg (Schellenberg Reply Report)

- Author: Scott Schellenberg, Chartered Professional Accountant and Chartered Financial Analyst
- Filed: February 12, 2020
- Subject Matter: Review of Howard E. Johnson report dated January 27, 2020

7. Mosquito Grizzly Bear's Head Lean Man First Nation – Loss of Use Present Value of Loss of Use – Working Schedules

- Author: Scott Schellenberg, Chartered Professional Accountant and Chartered Financial Analyst
- Filed: June 5, 2020
- Subject Matter: Working schedules (excel spreadsheets) of Scott Schellenberg's model for the loss of use calculation

B. Respondent's Expert Reports

[28] The final versions of the expert reports of the Respondent are as follows:

1. A Review and Analysis of Dr. Peggy Martin McGuire's Expert Report (Whitehouse-Strong Report)

- Author: Dr. Derek Whitehouse-Strong, Ph. D., Historian

- Filed: December 3, 2019 (replacing earlier report filed July 31, 2017)

- Subject Matter: Analysis of historical report prepared by Dr. Peggy Martin McGuire

2. Technical Peer Review Report Re: Mosquito Grizzly Bear's Head Lean Man First Nation Claim SCT 5001-14 on Appraisal Report: Land Value Estimate as of September 21, 2017 (Love Report I)

- Authors: Hal Love, Accredited Appraiser and Michael Lamont, Candidate Member, Appraisal Institute of Canada

- Filed: December 11, 2019

- Subject Matters: Review of Altus Report I on current market value of Claim Lands; Respondent's opinion on current market value of the Claim Lands as of September 21, 2017; and, opinion on retrospective unimproved land value of the Claim Lands in 1921 and 1935

3. Technical Peer Review Report Prepared by Hal Love, AACI, P.App and Michael Lamont, Candidate Member AIC, Hal Love Real Estate Advisory Services

- Authors: Hal Love, Accredited Appraiser and Michael Lamont, Candidate Member, Appraisal Institute of Canada

- Filed: September 15, 2017

- Subject Matter: Review of Altus report filed on April 4, 2017, on retrospective fair market value in 1906, 1908 and 1910

4. Response Report to DEMA Agricultural Loss of Use Report – Mosquito First Nation (SCT 5001-14) (Serecon Report)

- Author: Bruce R. Simpson, Accredited Appraiser and Professional Agrologist

- Filed: March 12, 2020

- Subject Matter: Review of DEMA Agricultural Loss of Use Report

5. Mosquito Grizzly Bear's Head Lean Man First Nation v. H.M.Q. (in Right of Canada) SCT 5001-14: Proposed Model for Establishing Current Value of Historical Monetary Losses (Johnson Report)

- Author: Howard E. Johnson, Chartered Professional Accountant, Chartered Financial Analyst

- Filed: January 27, 2020

- Subject Matter: Methodology for calculation of current value of historical monetary losses based primarily on GDP

6. Mosquito Grizzly Bear's Head Lean Man First Nation v. H.M.Q. (in Right of Canada) SCT 5001-14: Limited Critique Report (Johnson Limited Critique Report)

- Author: Howard E. Johnson, Chartered Professional Accountant, Chartered Financial Analyst

- Filed: February 7, 2020

- Subject Matter: Analysis of Schellenberg Report filed on January 21, 2020

7. Mosquito Grizzly Bear's Head Lean Man First Nation v. H.M.Q. (in Right of Canada) SCT 5001-14: Addendum to the Proposed Model for Establishing Current Value of Historical Monetary Losses (Johnson Addendum)

- Author: Howard E. Johnson, Chartered Professional Accountant, Chartered Financial Analyst

- Filed: May 8, 2020

- Subject Matter: Addendum to Johnson Report filed on January 27, 2020 incorporating numbers contained in the DEMA Report filed on February 21, 2020, and providing Compound Annual Growth Rate (CAGR) multipliers.

VII. ANALYSIS OF EVIDENCE AND FINDINGS RELATING TO THE BREACH

A. Dr. Peggy Martin McGuire

[29] This analysis is provided not to address the grounds of validity of the Claim but rather to resolve whether the Martin McGuire Report, which contains information relevant to the value of the Claim Lands in 1905, has probative value for the question of the 1905 value of the Claim Lands when assessing LOU of those lands. As will be seen, the methodologies applied by the Claimant's expert, DEMA, for valuing the LOU of the Claim Lands use a separate appraisal of the per acre value in 1905 as the starting point.

[30] In addition to material that bears directly on the question of the value per acre of the Claim Lands in 1905, Dr. Martin McGuire's Report provides the broader historical context in which the transaction in question, namely the 1905 surrender, took place. Her report, and the report prepared by Dr. Whitehouse-Strong, address the per acre value of the Claim Lands around the time of the surrender.

[31] The Martin McGuire Report contains four parts, as follows:

> Part 1-The Origin of the Mosquito First Nation
>
> Part 2-The Eagle Hills reserves in changing times, 1882-1905
>
> Part 3-The Time of Surrender and Sale, 1903 to 1910
>
> Part 4-The Aftermath of Surrender, 1906-1950

[32] Martin McGuire offers a Précis of her findings:

> 1) The three bands had separate and distinct histories before their reserves were surveyed. Undoubtedly there were some kinds of kinship bonds, as this was typical of the nature and formation of small bands, especially in times of turmoil. Leadership was essential to the formation and integrity of the bands.
>
> 2) The three bands, collectively known as "the Stonies", were active in the events of 1885. Residents of the small community of Battleford were wary of them, and Indian agents spoke of their insistence on retaining language and culture.
>
> 3) The three bands lived together in a single community, but did not, at the time of surrender, think of themselves as a single band. The Department did not recognize a chief at that time for any of the bands, but understood traditional leadership.
>
> 4) All three bands suffered from privation and starvation in the late 1870s and early 1880s. This was not unlike other First Nations in the region. In the years leading to 1905, they remained in a somewhat weakened state, with a low birth rate and high death rate for young children. They tried to establish a mixed economy, with some success in raising livestock and root crops for food, and selling hay, wood, and other resources for cash. The people of the surrounding region were afraid of them in 1885, and retained a distance that included an aversion to agricultural competition from farmers and entrepreneurs on reserve.
>
> 5) The bands may have initiated the surrender, as Agent George Day described, but they were very interested in his views, in cash for food, and in food itself. Indian agents had considerable power at that time in controlling access to food and other resources. There is certainly a question in my mind about whether Day initiated the surrender, but I have no hard evidence for that. It seems questionable that the Stonies would need a surrender in order to get tools and

provisions, as there were already means in place to provide these, albeit on a limited basis.

6) George Day's assertion that the three bands were essentially united in a single community led to the Department treating the Mosquito band as if they had an interest in the surrendered lands.

7) The first auction was somewhat unique among other Indian land sales in that, in spite of alleged advertising, the buyers were all known to the agent, and, for the most part, to each other. Battleford was a small world in 1906, and was actively seeking railway connections, immigrants and new commercial opportunities. It was a time and place where real estate speculation seemed possible for any man with some minimal means.

8) George Day had social, political and business connections with the larger purchasers, such as Edward White and Champagne, Speers and Simpson, and was an ardent Liberal. He was involved in political efforts to get Battleford connected with the world by rail. He had access to upset prices, and he solicited buyers the day of the sale. Further, he advocated for several private sales to people known to him.

9) Having said that, there are no data to support the idea that he benefitted personally, other than buying land through his wife for resale purposes. The same can be said of Edward White, the man who made the most purchases, and who was truly within the upper strata of Battleford. A search through the local newspaper has yielded frequent references to the social interactions between these men, and both funnelled their lands through Wilbur Van Horne Bennett of Omaha, employee of the Department of the Interior and businessman. Bennett freely mixed his position with the Canadian government with his real estate investments. We know he had regular contact with Deputy Superintendent General Frank Pedley.

10) The year after the first sale, 1907, was notably depressed in terms of land sales and access to capital. The many purchasers in 1906 bailed on their second instalments, and the band had no principal from which to draw their interest distributions. Since most buyers seem to have bought the land for speculation, this was undoubtedly discouraging for them as well. In the end, some sales were cancelled, and the rest were transferred to other buyers. White moved to begin to sell to American farmers and capitalists, and I have no doubt that he brought Wilbur Bennett into the picture. White's father, William J. White, had collaborated with Bennett in a previous attempt to gain Assiniboine Indian lands for speculation. Most likely White had some financial gain, but no records have been found to support this.

11) Bennett, through his banking and investment associates, supplied the capital to pay off the principal and interest for many quarter sections in the period from 1910-1913, and knew enough about outstanding debts to contact the Department about particular defaults and threatened cancellations. In 1913 Frank Pedley came under scrutiny for some of his personal gains while in office, and he worked hard in the first half of that year to get these lingering,

unpaid land purchases off the books. He and Bennett were in frequent communication to that end. Interest distributions to the three bands peaked.

12) All three bands benefited from interest distributions. In the early years, the distribution paylists match the interest bearing account. When buyers were making their payments, the bands got more interest. No attempt has been made to determine whether the bands received the optimal amounts they could have received, or to determine the relative distribution awarded to members of Mosquito and Grizzly Bear's Head. As there was only one member of Lean Man until the 1930s, when he passed away, this is easier to determine. [Martin McGuire Report at 3–6]

1. The Time of Surrender and Sale, from 1903 to 1910

[33] In Part 3 of her report, Martin McGuire relates historical events related to:

1. Market for agricultural land in the north Battleford area;

2. Initiation and taking of the surrender;

3. Valuation and sale process;

4. Identity and political and community affiliations of purchasers;

5. The four auctions; and,

6. Speculators, cancelled purchases and resales.

a) Market for Agricultural Land in the North Battleford Area

[34] The Grand Trunk Pacific Railway was incorporated in 1903. A feeder line route to Battleford that would cross the Mosquito and Grizzly Bears Head/Lean Man reserves was announced. In the same year, Frank Pedley, Deputy Superintendent General of the "Indian Department o[f] the Interior" (Department of Indian Affairs (DIA)) sent J. Lestock Reid, a surveyor, to resurvey the reserves in the Battleford agency (Martin McGuire Report at 54). Reid's map shows the land later surrendered and the railway route.

[35] Martin McGuire relates it that throughout 1905 the Saskatchewan Herald newspaper was "full of enthusiastic reports of homesteaders pouring into the area" (Martin McGuire Report at 55). McGuire asserts that "[a]t the very least there was considerable speculation going on".

b) Initiation and the Taking of the Surrender

i) The Broad Context

[36] In a previous section of the report, Martin McGuire discusses the pre-1905 economy of the Stoney peoples Freighting was a source of revenue. This was lost with the advent of the railway. They put in hay and raised cattle. George Day became the Indian Agent in 1902. The area under crop had increased over the previous year. The population of the Mosquito reserves numbered 74 in 1906, 24 of whom were adult males. Day's predecessor reported that the available farming equipment was minimal, Day considered the band "well enough off for present needs" (Martin McGuire Report at 43). As noted above, Pedley, Deputy Superintendent General, instructed Reid to survey the reserves in order to "avoid conflicts with incoming settlers" (Martin McGuire Report at 44).

[37] In 1904, "the bands got smaller, as did the cattle herds and the area under crop" (Martin McGuire Report at 44).

[38] As of 1905, Martin McGuire states:

> There was undoubtedly a land boom going on in the region, then, at a time when the local Indian bands were being cut out of the economy. Old Battleford was somewhat cut off of the commercial trade, but the railway made the region more attractive to farmers, both grain growers and ranchers. Of all the bands in the Battleford Agency, the Stony lands were by far the most productive of hay. [Martin McGuire Report at 44–45]

[39] Martin McGuire discusses the pro-surrender policy of the Liberal government under the responsible Minister, Clifford Sifton and his successor, Frank Oliver. She adverts to the increased control by the Deputy Minister over "local affairs" and allegations of wrongdoing by both Sifton and Oliver. Further:

> Other Liberal cronies went into positions of power: C.W. Speers of Griswold, Manitoba, became the General Colonization Agent for the Immigration Branch, and Frank Pedley, also formerly of Cobourg, and a lawyer in Toronto, went into the new position of Superintendent of Immigration. A third, William White, sold the *Sun* in 1897 to the Western Publishing Company, owned by Sifton, as was, in 1898, the *Winnipeg Free Press.* White became one of the Canadian Government Agents who were paid to bring in immigrants, promoted Inspector of United States Immigration Agencies. White did not have a high bureaucratic position, but when he moved to the American mid-West he had an excellent opportunity to bring American buyers, and settlers, to the Canadian west as part of the market for lands,

> including Indian lands. Part of White's job was bringing parties to Canada, including newspaper editors from the U.S. and Europe. Sifton also corresponded extensively with J Obed Smith, who became Immigration Commissioner. [footnote omitted; Martin McGuire Report at 46–47]

[40] Martin McGuire chronicles, at length, "the story of the earliest land surrenders under the Liberal administration" (Martin McGuire Report at 50). There were many. DIA officials were, in relation to surrenders of reserve lands of other First Nations, alleged to have been implicated in the acquisition of other First Nations' surrendered reserve lands by tender, and resale at personal profit.

ii) The Surrender

[41] By letter dated February 6, 1905, Indian Agent Day informed the Indian Commissioner that:

> …the band asked him to petition for a surrender of 22 and one/half sections land in reserves 110/111, on the basis that the bands were diminishing, had no need of the land, and that the old people would like to see some benefit from the land while still alive. He suggested that they all lived together as one band… [Martin McGuire Report at 55]

[42] It soon followed that:

> Pedley recommended the surrender to Wilfrid Laurier on March 23. The same language is repeated, and no mention is made of the terms of the surrender, for the bands, other than the need for the general benefit of old people. Assistant Indian Commissioner McKenna closed the loop on April 12, 1905, by writing Agent Day with instructions for the taking of the surrender. Again, the letter stated that 'provision was to be made' to the old and disabled who could not benefit from tilling the soil or looking after livestock. More specifically, the sale proceeds should be placed to the credit of the band and the interest paid annually or semi-annually. The whole series of permissions occurred quite quickly. [footnotes omitted; Martin McGuire Report at 56]

iii) The Sales

[43] Senior officials of the DIA directed that the 22.5 sections of surrendered land, as surveyed by Reid in September 1905, be sold by auction rather than by invitations to tender. The DIA relied on valuations made by J. K. McLean, a surveyor, to set the upset prices, which ranged from $2.50 to $5 per acre. The first auction was held in Battleford on June 13, 1906.

[44] In April 1906, the Kane Land Company presented an offer to Day for the purchase of all sections at $7 per acre, one-fifth cash, the balance in four equal annual payments at 5% interest.

Day presented this to the Secretary, DIA, with a favourable recommendation. However, by the time of the auction, "Day had pulled back his endorsement, saying that the 'man' had bluffed on his offer" (Martin McGuire Report at 60).

[45] Martin McGuire opines that the upset prices were "low for agricultural land" (Martin McGuire Report at 59), apparently relying on the offer from Kane.

[46] The first auction resulted in the sale of 59 of the 90 quarter sections. It took three more auctions over four years to sell the remaining quarter sections. Most of the land was sold to people with no interest in farming, people hoping to turn a profit on resale. Some failed to pay installments against the purchase price and sales were cancelled. Others managed to make payments with financing from United States lenders. Agricultural land was in short supply in the United States at the time.

[47] Martin McGuire's evidence of resales reveals gains for the original purchasers and their assignees over the ensuing decade.

[48] The first auction commenced on June 13, 1906. Day reported on the results on June 19, commenting that the sale had been poorly advertised and the attendance was small. Martin McGuire details the measures taken by the DIA to advertise the auction. She relies on a 1996 report for her observation that "[i]t appears that there was very limited publication of the advertisement, in spite of payments made to various newspapers" (Martin McGuire Report at 60; Expert Book of Documents, Vol 3, Tab PMM-00158 (*Report on the Specific Claim Submitted by the Mosquito/Grizzly Bear's Head/Lean Man First Nations*, May 1996)).

[49] The average upset price for the sold sections was $3.83/acre. The average price realized was $4.01/acre.

[50] McGuire names the purchasers of the bulk of the sections sold, and notes their Liberal affiliations.

[51] On June 19, 1906, a delegation from the Claimant asked Day that money from the sale be used to purchase:

> …a disc harrow, 5 mowers, 3 rakes, 3 combination plows, 3 breaking plows, 3 harrows, 5 wagons, 3 ox harness, 6 sets of horse harness, and 3 sets bobsleighs. A hay press was added in handwriting. [Martin McGuire Report at 63]

[52] The next sale was "seemingly prompted by the bands" (Martin McGuire Report at 64). Day submitted values to his superior, and was instructed by Pedley to proceed with an auction on November 4, 1908. Day's valuation figure is illegible.

[53] The auction was advertised in Edmonton, Toronto, and Winnipeg newspapers. Only 12 quarter sections were sold, all at the upset price, apparently $4/acre. McGuire notes that E. H. White, the major purchaser at both auctions, was "one of many people on the patronage list who were sent notices" as were the Kane Land Company and others she implicates as benefitting from the availability for purchase of the surrendered land (Martin McGuire Report at 65).

[54] On April 19, 1909, the Kane Land Company offered $4/acre for the unsold land.

[55] A third auction was advertised, and held on June 16, 1909. Day had set the upset prices at $6-$7/acre. Few showed up, there were no sales. Day reported that people felt that the upset prices were too high given the quality of the land and for the current income potential from agriculture.

[56] Day reported receipt of a private offer for the remaining land, 19 quarters, at $3.75/acre.

[57] The remaining 19 quarters, together with land surrendered for sale of two other bands were advertised for auction set for June 1, 1910. E. H. White bought six quarters, "Margaret A. Simpson, sister of Alex Speers, daughter of Robert G. Speers and wife of S.S. Simpson, bought 7 quarters, and all the sales were eventually cancelled" (Martin McGuire Report at 66–67).

[58] The information in the quotation above is elaborated on in a section of Dr. Martin McGuire's Report entitled "Land Purchase Networks":

> Sydney Seymour Simpson was a Liberal with connections all the way up to Sifton. He homesteaded early in the Regina district, and then moved to the Battleford area in 1887 to be a farm instructor at the Industrial School. In 1889 he married Margaret Ann Speers, the daughter of farmer R.G. Speers, who was mayor at the time of the first sale. [Martin McGuire Report at 71]

[59] There were four additional purchases. One by R. J. Coulter, an accountant, banker and Dominion Land Agent, one by A. J. McCormack, an employee of the Prince Brothers, merchants

"who held, among other advantages, the Liberal patronage right to supply the Indian Department" (Martin McGuire Report at 67). Another, Joseph Daudelin, "a well-known 'old timer' in the area, who worked on occasional contracts for the Department as a livery driver" and, finally, John Barr, "the man who seemed intent upon acquiring land in both 1906 and 1908, bought several quarters and sold them right away to merchant C. J. Rollefson of Hanley" (Martin McGuire Report at 68). The sales to Coulter, McCormack and Daudelin were later cancelled for non-payment of instalments, likewise the sale to Barr which was transferred to Rollefson, and the sale to Margaret Simpson.

[60] The remaining content of the Martin McGuire Report names and speaks of the political, business and community relationships of those who purchased at auction or acquired from original purchasers all but a few of the quarter sections carved out of the surrendered land. McGuire concludes, at page 82, that the sales were at less than market value as "[a] note in a Winnipeg newspaper in early 1906 suggested that land values had risen $2-3 an acre over the past year in the Battleford district" due to the advent of the railway and "[o]ther advertisements in 1906 place agricultural lands at $8 to $14/ acre, averaging about $10" (Martin McGuire Report at 82). She also cites the offer from the Kane Land Company at $7/acre:

> What makes the land sales for Grizzly Bear's Head and Lean Man unique, then, is the high degree of familiarity among the buyers, who were almost all part of the social and business elite of Battleford, a community that was growing in the shadow of the new town of North Battleford, and seeking to maintain its value. Agent George Day was at the nexus of the surrender and sale. Although Day and others demeaned the surrendered tract as substandard, and although the area was subject to early frost, the fact is that the general real estate market would have sustained, in June 1906, a value twice the upset prices. M.J. Kane's letter of April 1906 offering $7 an acre probably reveals more than anything else that he thought he would buy it at this price and sell it higher. There is no record of the local community clamouring for this particular reserve land, only a record that Agent Day promised money and provisions to an aging population, a band that showed a propensity for cash transaction over farming. [Martin McGuire Report at 83]

B. Dr. Derek Whitehouse-Strong

[61] Dr. Whitehouse-Strong prepared a report entitled A Review and Analysis of Dr. Peggy Martin McGuire's Expert Report.

[62] Dr. Whitehouse-Strong's analysis of the same documentary record relied upon by Dr. Martin McGuire to arrive at her conclusions set out above in paragraph 32 led him to conclude the

following:

- there was a consistent effort by representatives of the Department to sell the lands that had been surrendered by the Stoney Indians;
- the lands were valued by persons who were familiar with local conditions;
- upset prices were set for the lands and were based upon local valuations;
- the lands were sold at auction and were subject to a bidding process that required meeting or surpassing the upset price;
- market forces played a key role in determining what lands were sold when and for how much;
- there was a consistent effort to ensure that successful bidders for the surrendered lands paid what they were obligated to pay;
- just because purchasers of lands advertised them for resale did not mean that those lands sold at the asked-for price (or even sold at all);
- Day's position as Indian Agent and as the person who the Department assigned as being responsible for overseeing the auctions, necessarily made him the nexus for the sales and for information relating to the sales;
- certain portions of the surrendered land were of significantly better quality than other portions and the higher quality lands sold first with those that were of lower quality taking much longer to sell.
- Dr. Martin McGuire's assertion that "the general real estate market would have sustained, in June 1906, a value twice the upset prices" is not supported by the document collection:
    - the lands were sold by auction in a process that would have allowed speculators to bid up to levels that they believed would allow them to turn a profit;
    - the lands sold at or above upset prices, including premiums but not to the level of 100%.
- Dr. Martin McGuire's assertion that "M.J. Kane's letter of April 1906 offering $7 an acre probably reveals more than anything else that he thought he would buy it at this price and sell it higher" (PMM, p. 83) ignores the fact that Kane's offer was far in excess of any successful auction bid, that Kane never followed through with the offer, and that Day dismissed the offer as a bluff.

- In fact, into the 1920s and 1930s, lands that were forefeited and resold were placed on the market with upset prices of $4.00 per acre.

- Dr. Martin McGuire's asserts that "There is no record of the local community clamouring for this particular reserve land" but her analysis of the purchasers explicitly ignores "lands purchased and used by local farmers" and only considers "lands that later were assigned to others." Dr. Martin McGuire's analysis therefore ignores purchases that were made by persons who intended to make direct and immediate use of the land.

[footnote omitted] [emphasis in original; Whitehouse-Strong Report at 71–73]

[63] As for Agent Day's involvement in the taking of the surrender and the financial gain ascribed to E. H. White, Dr. Whitehouse-Strong says:

- Dr. Martin McGuire's assertion that "Agent Day promised money and provisions to an aging population, a band that showed a propensity for cash transaction over farming" is accurate but does not acknowledge that the Band:
  - supported the surrender;
  - voiced no objections to the surrender after it had been taken;
  - pressed for the sale of lands that were slow to be sold;
  - sought to use the funds that were received from the surrender and sale to assist its current population with their contemporary needs; and
  - sought to use of the funds that were received from the surrender and sale to diversify its economy in light of:
    - new opportunities relating to farming and livestock operations on Indian reserves in this period;
    - declining on-reserve resources that could be sold in the local cash economy;
    - declining opportunities to undertake paid labour in the local cash economy.

With these points in mind, it is necessary to go back to Dr. Martin McGuire's *Precis*, and specifically points 5, 9 and 10 (PMM, pp. 3-6) as these points illustrate the difficulty with properly analyzing many elements of Dr. Martin McGuire's research report. In point 5, Dr. Martin McGuire writes: "There is certainly a question in my mind about whether Day initiated the surrender, but I have no hard evidence for that"; in point 9, Dr. Martin McGuire writes: "Having said that, there are no data to support the idea that he [Indian Agent Day] benefitted personally, other than buying land through his wife for resale purposes. The same can be said of Edward White…"; in point 10, Dr. Martin McGuire writes: "I have no doubt that he brought Wilbur Bennett into the picture. White's father, William J. White,

> had collaborated with Bennett in a previous attempt to gain Assiniboine Indian lands for speculation. Most likely White had some financial gain, but no records have been found to support this." It is not possible to properly analyze these types of statements or aspects of the overall presentation that are centred around these types of statements because, as Dr. Martin McGuire herself notes, there is no evidence to support such an analysis. This is disconcerting because, as has been seen, much of the narrative of the report, the very story that it tells, is rooted in these types of unsupported suppositions rather than upon evidence. To be sure, from a historian's perspective, evidence is open to interpretation and historical analysis is open to debate, but when a narrative is based solely upon conjecture and supposition, it is not a historical analysis because supporting evidence is absent. [Whitehouse-Strong Report at 73–74]

C. Analysis: 1905 Sales at "Undervalue"

[64] The evidence of Dr. Martin McGuire that bears on the 1905 value of the Claim Lands is entwined with the evidence that the Claimant had, at an earlier stage of the proceeding, intended to rely on to establish a plan to induce a surrender, secure the land by purchase at under market value, and profit from re-sale. As with Dr. Martin McGuire's analysis of the motives and interests of government officials and people seeking to acquire farmland, Dr. Whitehouse-Strong's observations on conjecture and speculation are engaged on the subject of the value of the Claim Lands at the time of the surrender.

[65] There is no evidence that Agent Day initiated the process of surrender of the land for any reason other than the request from members of the bands that the land be sold so that some benefit may accrue to the old people. The evidence does not establish that the land was sold at below market value.

[66] There is no evidence that the upset price was influenced by any other person or was below the value per acre of undeveloped land with agricultural potential in the region. The sales made at the first auction were at prices close to the upset price. The more reasonable inference is that the upset price and the amounts offered were at or around the market value of the land. Moreover, the sales over the four auctions held between 1906 and 1910 resulted in sales, on average, at prices between $3.75 and $4.01/acre. The upset price for the subsequent auctions would have been generally known. If the market supported a higher price than in 1906, there would have been higher offers.

[67] The evidence of advertisement of the first auction is equivocal. Advertisements were paid

for but, it seems, not published. There was no advance local notice of the 1906 auction, which left Agent Day scrambling to inform the community that it was to take place that very day. However, the auctions that followed were advertised.

D. The Fiduciary Breach to be Remedied

[68] The Respondent admits a breach of its pre-surrender fiduciary obligation to the Claimant, which rendered the 1905 surrender of lands from IRs 110/111 invalid. The Respondent's admission does not specify the particular pre-surrender fiduciary duty in breach. Based on the Parties' submissions, it can at least be said that this is on the basis that Mosquito band members voted on the surrender of land reserved for the Lean Man band, a breach of the surrender provisions of the *Indian Act*, and the Crown subsequently approved the improper surrender (Order in Council PC 1920/1905, November 3, 1905). This is sufficient to ground the Claim in paragraphs 14(1)(b) and (c) and to trigger compensation pursuant to paragraphs 20(1)(g) and (h) of the *SCTA*. Both Parties have framed their cases on the basis that principles of equitable compensation also apply.

VIII. HEADS OF COMPENSATION

[69] Where a claim of unlawful surrender under the *SCTA* has been found valid, compensation will be awarded based on paragraphs 20(1)(g) and (h) of the *SCTA*. In a nutshell, the Tribunal will award compensation equal to the CUMV of the lands in question, as well as compensation for the loss of the lands in question, brought forward to the current (or present day) value of the loss, subject to the conditions listed in paragraphs 20(1)(g) and (h):

> **20 (1)** The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> …
>
> **(g)** shall award compensation equal to the current, unimproved market value of the lands that are the subject of the claim, if the claimant establishes that those lands were never lawfully surrendered, or otherwise taken under legal authority;
>
> **(h)** shall award compensation equal to the value of the loss of use of a claimant's lands brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes the loss of use of the lands referred to in paragraph (g);…

IX. CURRENT UNIMPROVED MARKET VALUE

[70] The Parties generally agreed on many aspects of how to determine the current value of the

Claim Lands. As a result, the issues in dispute were quite limited and technical. The Parties' and experts' efforts in this regard were appreciated.

A. Expert Evidence on Current Unimproved Market Value: Common Ground

[71] Both Parties approached the task of determining the CUMV with expert evidence from land appraisers. The appraisers did not take it into account that the land in question would be unsurrendered reserve land. Both relied on comparables traded in the real estate market.

[72] The Claimant's expert report on the CUMV of the Claim Lands was written by Norris Wilson and Gina Gallant, of Altus Group Limited (Altus Report I). Norris Wilson is an Accredited Appraiser with the Canadian Institute (AACI). He has extensive experience in First Nations land claims and has appeared as an expert witness before various courts and tribunals. Ms. Gallant is an Accredited Appraiser with the Canadian Institute (AACI). She has experience preparing expert reports evaluating First Nations land claims. She has appeared as a witness in mediation hearings and tribunal hearings.

[73] The Respondent's expert on CUMV is Hal Love of Hal Love Real Estate Advisory Services. Mr. Love is an Accredited Appraiser with the Canadian Institute (AACI). He has experience in appraisal of agricultural properties and advising on First Nations land valuations, LOU studies and highest and best use studies.

[74] The experts for the Claimant and the Respondent estimated the value of the Claim Lands based on their highest and best use as of September 21, 2017. The values provided have not been brought forward to the date of the Tribunal hearing.

[75] The Parties agree that the highest and best use of the Claim Lands is agricultural; and that the use of the direct comparison approach is the appropriate valuation method (Altus Report I at 6, 27; Love Report I at 5–6).

[76] The "highest and best use" of land is defined by the Appraisal Institute of Canada as:

> The reasonably probable use of Real Property, that is physically possible, legally permissible, financially feasible, and maximally productive, and that results in the highest value. [*Canadian Uniform Standards of Professional Appraisal Practice* (CUSPAP) (Canada, Appraisal Institute of Canada, (Ottawa, 2020)), section 3.30,

> at 8; Altus Report I at 26, citing the CUSPAP version effective 05/01/2016; Love Report I at 4, citing the CUSPAP 2018 version]

[77] The Parties cite similar definitions for the "Direct Comparison Approach". Altus Report I defines it as follows:

> The Direct Comparison Approach recognizes the principle of substitution, according to which a buyer will not pay more for one property than for another that is equally desirable. By this approach, an opinion of value is developed by applying a comparative analysis of properties that are similar to the Subject Property that have recently sold, are listed for sale or are under contract. [Altus Report I at29]

[78] Love Report I defines it similarly as follows:

> **DIRECT COMPARISON APPROACH TO VALUE:** A set of procedures in which a value indication is derived by comparing the property being appraised to similar properties that have been sold recently, applying the appropriate units of comparison, and making adjustments to the sale prices of the comparables based on elements of comparison. The Direct Comparison Approach may be used to value improved properties, vacant land, or land being considered as though vacant. It is the most common and preferred method of land valuation when comparable sales data is available. [Love Report I at 5]

[79] Love Report I cites three sources for its definitions: CUSPAP (*Canadian Uniform Standards of Professional Appraisal Practice*) (2018), *The Appraisal of Real Estate* (Second Canadian Edition), The Appraisal Institute of Canada, 2005, and *The Dictionary of Real Estate Appraisal*, Third and Fifth Editions, Appraisal Institute (Love Report I at 5).

[80] Gina Gallant for the Claimant advised that while Altus adjusted the values of the comparable sales for the percentage of arable land and soil quality of the comparable parcel, compared to the Claim Lands, Mr. Love did not do this (Hearing Transcript, December 18, 2019, at 149). Mr. Love advised that it was not necessary to adjust values for soil classifications as the comparable sales used were all in close proximity to the Claim Lands and the soil classifications were similar (Hearing Transcript, December 19, 2019, at 53). Both Parties used the Saskatchewan Assessment Management Agency (SAMA) data indicating that the Claim Lands are 72% arable.

[81] The Claimant's expert concluded that the CUMV of the Claim Lands was $1,150 per acre as at September 21, 2017, and that therefore the total estimated cost to replace the 14,465 acres of the Claim Lands, including lands that were later set aside for developed and undeveloped road allowances was $16,635,000 as at September 21, 2017. The Altus Report used the acreage of

14,465 acres for the Claim Lands, which they describe as being 14,670 acres minus 205 acres for existing developed roads (Altus Report I at 18).

[82] The Respondent's expert concluded that the CUMV of the Claim Lands was $960 per acre. Mr. Love used the acreage of 14,421 acres for the Claim Lands, calculating the CUMV of the Claim Lands as of September 21, 2017 to be $13,843,872.

B. Conclusions on Current Unimproved Market Value

[83] The Claimant's appraisal experts, Norris Wilson and Gina Gallant of Altus Group Limited, estimate, as of September 21, 2017, a value per acre of $1,150, and value of the Claim Lands at $16,635,000.

[84] The Respondent's appraisal expert, Hal Love, estimates, as of September 21, 2017, a value per acre of $960, and value of the Claim Lands at $13,843,872.

[85] Both appraisers have approached the task appropriately and with considerable skill and professional judgement. Yet their concluded values differ. Each appraiser has raised valid concerns over factors applied and methodologies employed by the other. I have not attempted to adjust their respective conclusions in light of these. The 'right' number is somewhere in the middle. I conclude a CUMV of $15,500,000, effective September 21, 2017.

X. LOSS OF USE

A. Introduction

[86] Where a specific claim is found valid based on a finding or admission that a breach of a legal obligation of the Crown related to an invalid surrender has been established, the Tribunal is required to place a monetary value on the LOU to the Claimant of the land in question (paragraph 20(1)(h) of the *SCTA*).

[87] The period for valuation of LOU in the present matter is 1905–2020. The evidentiary challenges for the determination of losses over a period of such long duration are daunting, likewise the task of assessment of losses as of the date of decision upon trial. Claims before the Tribunal are "historical" not only due to the antiquity of the event that establishes the legal grounds, but also their historical significance. For example in *Beardy's & Okemasis Band #96 and*

#97 v Her Majesty the Queen in Right of Canada, 2016 SCTC 15 [*Beardy's*] the grounds for the claim arose out of the North-West Rebellion of 1885.

[88] It is no small challenge for First Nation claimants to marshal the evidence required to quantify in dollars the historical LOU over time starting from the date of the breach. Both Parties, the Claimant First Nation and the Crown, as Respondent, turn to experts in various fields for reports which assist the Tribunal in making its determinations.

[89] The experts are similarly challenged in their work due to the lack of information on which they can base their analysis and conclusions.

[90] The matter is further complicated by the requirement that historical losses be brought forward to current value "in accordance with legal principles applied by the courts" (paragraph 20(1)(h) of the *SCTA*).

[91] Paragraph 20(1)(h), appears to be understood by participants in proceedings before the Tribunal to require that the monetary value of LOU be determined for each year from the date of the breach to the present, then adjusted to present value. This results in attempts to determine negotiated outcomes by means of calculation which, as will be seen below, does not accord with the approach of the law in the application of principles of equitable compensation.

B. Lost Opportunity

[92] In the Claimant's approach, the "lost opportunity" is the opportunity to retain the land, and use the land to its highest and best use, and invest the proceeds that could have been derived from the land (Claimant's amended MOFL at para 48,. The Claimant says the presumption of most advantageous use applies to how the land could have been developed and how the resulting revenues could have been invested (Claimant's amended MOFL at paras 44, 165).

[93] The Respondent, in written submissions, was critical of DEMA for failing to consider:

> a. what the Mosquito First Nation intended or wanted to do with the subject lands at the time of the surrender;
>
> b. the capacity of the Mosquito First Nation to develop the subject lands;
>
> c. how the Mosquito First Nation has developed its remaining reserve lands over the last 115 years ; and

d. that the subject lands would not necessarily have been broken and brought into agricultural production in the same manner and at the same rate (the rate of development) as arable land was brought into agricultural production in two neighbouring rural municipalities. [Respondent's MOFL at para 44]

[94] The correct approach does not ask, as does the Respondent in (a) and (c) above, and in (b) and (d) which are somewhat ambiguous, what the Claimant would have done with the land but for the surrender, but rather what could have been done if the land was put to its most advantageous use. The task is to identify the most advantageous use of the land that was realistically available based on objective characteristics of the land and the operative legal regime. Factors relating to the land's highest and best use are taken into account. Here, the application of the principle of most advantageous use applies to identify agriculture as the highest and best use. On this, the Parties agree. The Claimant relies on the DEMA Report as evidence of losses due to the foregone opportunity to engage in commercial agriculture.

[95] The points raised by the Respondent in (b) and (d) above may include objective considerations, and as such may pertain to contingencies which may be taken into account in the assessment of equitable compensation.

[96] The Claimant's approach requires a connection between the breach and the Claimant's loss of the land in issue, but does not require the Claimant to prove that absent the admitted breach, the Claimant would, most probably, have earned the claimed historical revenues and then would have invested them in a particular way. Indeed, the Claimant agrees that "[t]here is almost no doubt that the First Nation would have failed to develop the Claim Lands to their most advantageous use" (Claimant's Reply MOFL at para 19). The Claimant also stated: "…we can safely assume that an economically disadvantaged First Nation would have spent the majority of whatever funds were available to it" (Claimant's Reply MOFL at para 38).

C. Positions of the Parties on How to Model Foregone Revenues

[97] The Claimant used appraisals and other data relating to agricultural activities to model agricultural returns for the Claim Lands for each year since the fiduciary breach. The Claimant, through the DEMA Report, presented several ways of modeling these agricultural returns, based on hypotheses of farming by the Claimant ("Owner-Operator"), Leasing, and Proxy Models. DEMA's preferred approach was the Owner-Operator Model, but it was unable to complete the

research and analysis necessary to complete an owner-operator based estimate of LOU. The Claimant relied on the one of the two Proxy Models in evidence ("Proxy (RNI)").

[98] The several models for DEMA's estimates of the dollar value of LOU of the Claim Lands reflect the practice of valuation of losses through the use of proxies in negotiations for the settlement of claims accepted by the Minister in the process established by government policy, namely: Canada, Department of Indian Affairs and Northern Development, *In all Fairness A Native Claims Policy Comprehensive Claims* (Ottawa: Supply and Services Canada, 1981). The Tribunal is not bound by the methods of valuation used in First Nations/Crown negotiation of specific claims. However, these methods may, to the extent that they provide a sound basis for quantifying historical losses, be found to apply in Tribunal proceedings.

[99] The several models discussed below are "proxies", in that they are not based on data from the actual use of the Claim Lands. They are, however, grounded in the actual highest and best use of the Claim Lands as revealed by the evidence, namely agricultural use. They likewise are built around economic uses to which the land could actually have been put, namely farming for profit and leasing land for farming.

[100] Each Model concludes with estimates of the monetary value of the Claimant's annual losses consequential on the Crown acting on the terms of an invalid surrender. These estimates are based on methodologies that rely on farm data for Saskatchewan kept by various federal and provincial departments mandated to exercise oversight over agriculture.

[101] The data sets include acreage under production, crop revenues by type of crop and in the aggregate, gross revenue from farming, farm expenses, freehold and lease acreage, farm and family labour inputs, available subsidies, and other metrics.

[102] Each Party submitted expert evidence on how the estimates of foregone agricultural returns, whatever the Tribunal may determine them to be, should be present valued. As with the Claimant's agricultural modeling, the present value experts offered several scenarios for how the calculations should be done on the application of principles of equitable compensation.

[103] The data, and adjustments made to adjust general data to better reflect agricultural attributes similar to those of the Claim Lands are presented in spreadsheets. The complexity of

DEMA's methodologies is revealed by the numerous headings under which farm data has been used, for example in the Leasing Model to measure farm acreage under crops, farmland usable only for grazing, waste lands, gross and net income, ratio of owned to leased farmland, and other metrics.

[104] The most complex methodology, as revealed by the data entry points and adjustments revealed by the spreadsheet, Schedule E, is the Proxy (RNI) Model.

[105] The applied methodologies are presented mathematically, so the estimates are the product of calculations. They are not, however, calculations of the actual losses based on evidence that is specific to the actual use of the Claim Lands.

[106] The Respondent submitted responsive expert evidence critiquing the Claimant's expert reports, but did not present an independent estimate of foregone agricultural returns.

D. Evidence: THE DEMA REPORT

[107] The Claimant relies on an expert report dated February 21, 2020, prepared by DEMA Land Services Inc. for valuation of the LOU of the Claim Lands between 1905 and 2020.

[108] This report was co-authored by Mr. Dallas Maynard and Ms. Alana Kelbert. Mr. Maynard died before the date set for hearing of testimony before the Tribunal with respect to the DEMA Report. His loss is, to be sure, felt by many beyond his family and personal friends. His contributions to the resolution of specific claims over the course of his career are recognized by the Tribunal.

[109] Mr. Maynard was an accredited Land Appraiser. He had a long history of service to First Nations and other entities in the valuation of historical losses, including those related to farmland. He brought his personal knowledge, being a farmer, to the task. Ms. Kelbert is qualified as an Accredited Land Appraiser and Professional Agrologist. She comes from a farming family. She has completed LOU studies for other First Nation claims in Saskatchewan and Ontario, and has completed appraisal assignments for litigation support and other purposes. She and Mr. Maynard worked together on many professional assignments.

[110] As stated in paragraph B.3 of the DEMA Report:

> The initial task of this study is to provide an overview on:
>
> 1) the historic trends in agricultural activity both within the reserve lands of Mosquito as well as within the surrounding area;
>
> 2) the agricultural resources of the Claim Lands; and
>
> 3) the agricultural development and activity on lands surrounding the Claim Lands.

[111] The assignment is described generally in paragraph C.1:

> This Agricultural Loss of Use Study is prepared for the purpose of estimating the net nominal loss of use to the Mosquito Grizzly Bear's Head Lean Man First Nation (Mosquito First Nation, MFN) resulting from the surrender of lands in 1905.

[112] The estimates of the nominal loss to the Claimant in consequence of the surrender are not based on data specific to the Claim Lands. The responding opinion of the Respondent's expert, Mr. Bruce Simpson of Serecon Inc., notes on page 11 of the Serecon Report, that DEMA's attribution of production of the Claim Lands from agriculture and grazing (Owner-Operator Model) is not based on the use of the Claim Lands, but is inferred based on all of the lands within the Regional Municipalities (RMs) of Buffalo and Battle River:

> The information presented pertains to the area surrounding the Claim Land (assumedly in the RMs of Buffalo and Battle River). The tables indicate that the data is for the Claim Area but the headings within the table states "Mosquito" which could suggest to a reader that the data pertains specifically to the Mosquito Claim Land. In our opinion, it is important to clarify that the data pertains to all of the lands within the RMs of Buffalo and Battle River and does not specifically pertain to the Claim Land.

[113] The Owner-Operator Model and the Leasing Model both rely on agricultural production statistics for the "surrounding" area of the RMs of Buffalo and Battle River. The two Proxy Models rely on aggregate data for all agricultural lands in Saskatchewan.

[114] In short, little of the data for the Owner-Operator, Leasing, or Proxy Models are derived from the actual use of the Claim Lands or comparable reserve land. There are two exceptions. First, conclusions about the percentage of crop share payable to the "Owner" under the "Leasing" Model are to some extent based on "[r]esearch through the Indian Lands Registry System (ILRS) to document historical agricultural lease agreements on the [remaining portion of IRs 110 and 111]" (DEMA Report at para B.6). Second, the DEMA Report provides actual soil zone,

topography, and ecozone data from the Claim Lands (para G.9).

[115] The DEMA Report uses data from the SAMA to attribute to the Claim Lands the following potential for farm uses: of the 14,465 acres in the Claim Lands, 72.2% is arable (i.e., capable of raising crops), 15.2% is native pasture (grazing land), and 12.6% is waste land.

[116] DEMA's Terms of Reference, provided by Claimant's counsel for developing its opinion on CUMV and LOU, includes the following:

> This study has been conducted in accordance with the following Terms of Reference:
>
> *a)* ***The Claim Lands should be considered to have been Reserve lands within the meaning of the Indian Act, and subject to its provisions in force from time to time****. While the Claim Lands are to be considered subject to the provisions of the Indian Act, these provisions shall not be presumed only to be applied or administered in a negative or detrimental manner to the First Nations, as they relate to the Claim Lands.*
>
> *…*
>
> *c) The agricultural loss of use value shall be estimated via two models, including:*
>
> *(i) net returns to the First Nation as farm operator-owners (Owner-Operator), and*
>
> *(ii) net return to the First Nation as farm lessors (Leasing)*
>
> *d) The agricultural loss of use value shall be based on the most reasonable and probable use, which does not preclude the most advantageous use, as revealed by agricultural activity* ***which could reasonably have been undertaken had the Claim Lands remained in possession of the First Nations.*** [italics in original; bolded added; DEMA Report at para D.2]

[117] Sections F, G and H of the DEMA Report set out the information and methodology by which conclusions are drawn on:

1. the two agricultural uses, namely growing crops and grazing, for which the Claim Lands is suited; and,

2. estimated crop yields for the Claim Lands.

[118] Section F, "HISTORIC TRENDS IN AGRICULTURAL ACTIVITY", attributes the development of agriculture in the area to the 1905 extension of the Canadian Northern Railway

line near Battleford in 1905, where the population increased from 5,562 in 1901 to 38,830 by 1911, and "we can assume that the area had been completely taken up for farms by at least 1920 as well" (DEMA Report at para F.16).

[119] Section G, "AGRICULTURAL RESOURCES OF THE CLAIM LAND", uses data from SAMA which records the actual uses within the Claim Lands to conclude that, of the 14,465 acres in the Claim Lands, 72.2% is arable (i.e., capable of raising crops), 15.2% is grazing land, and 12.6% is waste land.

[120] Section H, "AGRICULTURAL ACTIVITY ON THE SURROUNDING LANDS", compares the production capacity of the comparator lands to that of all agricultural lands in Saskatchewan using statistics from historical and current reports of the Saskatchewan Department of Agriculture. It is noted that crop production from the improved land within the Claim Lands exceeded that in Saskatchewan throughout the period.

[121] In paragraph H.14 of the DEMA Report, DEMA discusses average farm size, percentage of land in crops, fallow and pasture, and owned versus rented land between 1916 and 2016:

> Table 14 presents the trend in farm structure, detailing the average farm size and proportion of owned versus rented land as recorded by the Census. Average farm size [in the RMs of Buffalo and Battle River] shows a steady increase in size since 1936, with the average farm today nearly 1,600 acres. Farm size has increased through the acquisition of lands over time given [the RMs of Buffalo and Battle River] ha[ve] maintained a similar ratio of +/-70% owned land and +/-30% rented land between 1921 and 2016. This is in comparison to the provincial data which indicates an increasing percent of land is leased over the claim period.

[122] For the period of the loss, 30 % of farmland in the RMs of Buffalo and Battle River was leased. For all of Saskatchewan, 30 to 40 % of farmland was leased.

[123] In 1921, the average farm size in the RMs of Buffalo and Battle River was 371 acres (Hearing Transcript, March 13, 2020, at 166).

E. The Four Loss of Use Models in the DEMA Report

[124] The following is a summary on methodologies employed by DEMA to estimate the LOU by several different models. First, the Owner-Operator Model, second, the Leasing Model, third, the Proxy (RNI) Model, and fourth, the Generic Proxy (6.3%) Model.

[125] The Leasing and Proxy Models estimate the income loss to the Claimant in consequence of the 1905 surrender of 14,670 acres within IRs 110/111. The Owner-Operator Model did not provide an estimate of the loss.

1. Owner-Operator Model

[126] As the census data indicates that 30% of the comparator land was leased over the claim period, and the remaining 70% was farmed by the landowner, DEMA says this ratio of uses would have been the most probable (DEMA Report at para I.10). However, based on the most profitable use, and to scope different options for assessment, DEMA posited an assumption of 100% farming by the Claimant for the Owner-Operator Model, and 100% leasing for the Leasing Model:

> For the purposes of this report, we have assumed the First Nation would have farmed 100% of the claim land over the claim period to take advantage of the most profitable use of the land over the 115 year period.
>
> …
>
> Under a leasing model, we have assumed the landowner would fully lease out the claim land over the entire claim period to third parties to farm and ranch the land under its highest and best use, given the characteristics of the land. [DEMA Report at paras I.11, I.27]

[127] The Owner-Operator and Leasing Models had certain common inputs, so some aspects were discussed together by DEMA, as noted below, to avoid repetition in the section on the Leasing Model.

[128] DEMA proffers as its preferred means of estimating the revenue loss to the Claimant a method it calls the "Owner-Operator Model". This is "an economic model whereby the land is utilized under its highest and best use to generate returns based on the productivity potential of the land" (DEMA Report at para I.1). It does not, however, develop the model fully "as [they] were unable to develop the Owner-Operator Model within the allotted timeframe" (DEMA Report at para K.13).

[129] The Claimant elected to proceed based on the present DEMA Report.

[130] DEMA recognizes that reserve lands have attributes that would reduce the cost to the First Nation owner operator and thus increase its per acre net income. These are primarily the absence of land acquisition debt and thus the annual expense of principal and interest, and the exemption

from taxation of the land and income derived from the use of the land.

[131] The approach taken for the Owner-Operator Model is as follows:

1. Determine land use patterns throughout the claim period, including the amount of land used for agriculture and the rate at which such land transitioned from grazing to cultivation from 1906 to present in the nearby regional municipalities;

2. Estimate the acres hypothesized to have been farmed/ranched by the Claimant in each year from 1906 to present, with cultivated acres increasing in step with the rate of development of the RMs (and when considering the Leasing Model, the same data is used to identify the acres leased out to third parties for grazing versus cultivation purposes in each year);

3. Estimate gross returns from various agricultural land uses, based on crop mix, yields and prices, and cow herd carrying capacity; and,

4. Estimate net income from farming/ranching foregone by the Claimant (for the Leasing Model, this data feeds into crop share calculations).

[132] For the Owner-Operator Model and Leasing Model, DEMA sets out as the first step in assessing the losses, the need to take into account the following agricultural activities "which could have reasonably been undertaken" (DEMA Report at para I.2):

- Cultivated land farmed by the First Nation (Owner-Operator Model)
- Cultivated land leased to third parties (Leasing Model)
- Native grass and bush utilized for livestock grazing

[133] The model also takes into account areas not used for agriculture including unimproved acres yet to be cultivated and non-productive areas including roads, building sites, mineral extraction sites, temporary and permanent water bodies (DEMA Report at para I.2).

[134] Initially the land would have been mainly grazed, with cultivation gradually increasing as unimproved land became improved land over time. Some of the land would have been non-productive for the entire period, "including roads, building sites, mineral extraction sites, temporary and permanent water bodies" (DEMA Report at para I.2).

[135] The specific historical agricultural activities within the Claim Lands could not be determined. Such evidence was not available. DEMA noted that on most projects, they would review current and historical aerial photographs to determine "land uses and their respective acreage" of the subject lands, but in this case "this was beyond the scope of [their] engagement" (DEMA Report at para I.3). DEMA noted that prior to 1946 there were no aerial photographs for Saskatchewan (Hearing Transcript, March 13, 2020, at 150).

[136] Table 15 sets out the estimated rate of development of the Claim Lands for growing crops between 1905 and 2016 (DEMA Report at para I.3). It is based on the census of agricultural data for the RMs of Buffalo and Battle River for the period. Prior to 1916 census data does not exist for RMs, but for the years from 1905 to1915, DEMA relied on the census of agriculture data for the crop district (Hearing Transcript, March 13, 2020, at 169–70). The census data was also used to estimate the amount of unimproved land for livestock grazing from 1905 to 2016.

[137] As noted above, DEMA applied Saskatchewan Assessment Management Agency (SAMA) data "to indicate the land use specific within the claim land today" and "assumed the SAMA data reflects current land use and that a maximum of 72.2% of the claim land or 10,444 acres would be available for cultivation over the claim period" (crop area) (DEMA Report at para I.3).

[138] Using historical census data from public sources, DEMA took into account crop mix, crop yield, and crop prices from the RMs of Buffalo and Battle River to calculate gross annual income from crop production from 1905 to the present, which it then applied to the Claim Lands. They also "relied upon Saskatchewan Assessment Management Agency (SAMA) rating of the rangeland carrying capacity of the Claim Land" and other public information to determine the annual number of "cow units" which could be supported by the unimproved pasture within the Claim Lands (DEMA Report at para I.19). Based on this, they could estimate the "Gross Income From Livestock" (DEMA Report at para I.22).

[139] DEMA added "Supplemental Farm Income", i.e., government farm subsidies, and "Income in Kind" (family farm "free" labour) to estimate an annual "Total Gross Income From Farming/Ranching" (DEMA Report at para I.24).

[140] A common feature of the Owner-Operator and Proxy Models is the backing out of farm labour expenses from the SAMA data.

[141] DEMA excludes family farm labour as an expense in determining "*net returns to the First Nation as* ***farm operator-owners***" (emphasis in original; DEMA Report at para J.8). It therefore deducts farm family income from the SAMA farm labour expense to arrive at an annual RNI per acre of farmland. Although hired labour remains included in operating expenses for all years, there is no analysis of the need for non-family hired labour for an owner-operated farm of 14,670 acres relative to numerous family farms comprising in the aggregate a like acreage, and over a period when farm size averages increased from 371 to 1,600 acres.

[142] The DEMA Report does not explain whether the Claimant would have had enough labour among its members for the modelled rate of development or would have required more hired labour than the model assumes, based on the expense data for Saskatchewan. In 1905, the year of the surrender, there were a total of 24 adult males for the three bands. In 1906, the year after the surrender, the total population of all three bands was 74 (Martin McGuire Report at 85). There is no evidence and no estimate of the number of farms DEMA attributed to the Claim Lands between 1905 and 1996. Many farms that existed in Saskatchewan as a whole during that period, or within the Claim Lands, would have been family farms. There is no evidence or estimate of the number of family members capable of contributing labour to the breaking of raw land for crop production between 1905 and 1996 or the extent of labour effort that would be required. It is obvious that there would have to have been a good many farms within the Claim Lands staffed by family members for the Claim Lands to be fully developed using DEMA's assumed ratios of family labour to hired labour.

[143] As for expenses, in order to arrive at an annual "Net Income from Farming/Ranching", these were "determined from aggregate provincial data from Statistics Canada for 'Total Gross Income' and 'Total Expenses' for all farms in Saskatchewan" (DEMA Report at para I.25).

[144] On the basis that the Claim Lands would, if unsurrendered, be reserve lands, DEMA backed out of the aggregate data as, instructed by Claimant's counsel, "[t]hose expenses not considered applicable (property taxes, irrigation, interest on land mortgages, rent)…to estimate total farm expenses applicable to Mosquito First Nation" in order to "calculate a ratio of total aggregate farm

expenses to total aggregate farm income for the Province of Saskatchewan" (DEMA Report at paras I.25–I.26). Then "[t]his ratio is then used to determine the annual 'Total Farm Expenses' to be deducted from the 'Total Gross Income From Farming/Ranching'" (DEMA Report at para I.26).

[145] The entire crop area of the region had not been improved for cultivation in 1905. The full crop area of 10,444 acres was considered to have been reached, on the basis of cultivable areas in the RMs, in 1996 (DEMA Report at para H.5).

[146] In order to estimate crop yields DEMA first considered the mix of wheat, oats, barley and canola, their changing proportions, and respective revenue streams from historical patterns in Saskatchewan.

[147] To estimate the net income for farming and ranching DEMA added the gross income from crops, gross income from livestock (based on "the annual number of cow units in which the unimproved pasture within the Claim Land could support") and "[s]upplementary [i]ncome" from crop insurance programs and various other government subsidies for Saskatchewan farmers from 1940 onward (DEMA Report at paras I.19, I.23). The total is their estimate of an annual "Total Gross Income From Farming/Ranching" (DEMA Report at para I.24).

[148] To complete the estimate:

> All applicable farm expenses are deducted from total gross income to arrive at annual "Net Income from Farming/Ranching". The determination of applicable farm expenses is determined from aggregate provincial data from Statistics Canada for "Total Gross Income" and "Total Expenses" for all farms in Saskatchewan (see Schedule H). Those expenses not considered applicable (property taxes, irrigation, interest on land mortgages, rent) are backed out of the aggregate data to estimate total farm expenses applicable to Mosquito First Nation. [DEMA Report at para I.25]

[149] DEMA did not, however, arrive at a net revenue loss estimate within its analysis under the Owner-Operator Model.

2. Leasing Model

[150] The methodology used to estimate revenue from leasing relies upon the same land use model as described in the Owner-Operator Model.

[151] Under this model, as in the Owner-Operator Model, it is assumed that the Claim Lands

would have been developed at the same rate as in the surrounding RMs. To account for land clearing costs a three year rent "holiday" is assumed for the first three years after each cleared acre came under cultivation (which occurred gradually up to 1996, when the peak for the 10,444 cultivable acres was achieved), with zero income generated from the land for that three year period (Hearing Transcript, March 13, 2020, at 106–07).

[152] As with the Owner-Operator Model, DEMA estimated crop mix from census data, farm-gate crop prices from Saskatchewan agriculture and Statistics Canada and crop yield (reported by crop district or RMs) from Saskatchewan agriculture (DEMA Report at para I.30).

[153] However, unlike in the Owner-Operator Model, DEMA explains that this model does not return the benefit from landowner labour and management (family farm "free" labour). In addition, agricultural supplementary payments (government subsidies) are not captured within the model (DEMA Report at iii).

[154] To determine foregone income from leasing, DEMA, based on its "experience from other first nation land claims in Saskatchewan" used a quarter crop share (landlord's share) for the period prior to 1940 and the period subsequent to 1979 and, from 1940 to 1980, a one third crop share (DEMA Report at para I.31). For the latter period there was evidence of lease rates for seven parcels of land that remained in IRs 110/111.

[155] To estimate the gross returns from leasing out that land for grazing, DEMA relied upon lease rates reported by Agriculture Canada's Community Pasture Program for grazing of unimproved pasture lands. DEMA obtained lease rates back to 1960 and then estimated lease rates back to 1905 relying upon the Consumer Price Index (CPI) to index rate of change to the start of the claim period (DEMA Report at paras I.33–I.34; Exhibit 57 (Amended Schedule D, Column J); Hearing Transcript, March 13, 2020, at 106). In this respect, the Leasing Model differs from the Owner-Operator Model, and therefore DEMA was able to calculate a nominal value for the Leasing Model.

[156] Total estimated returns from livestock grazing are estimated from the total grazing capacity of the Claim Lands (animal unit months or AUMs) x the lease rate ($/AUM) (DEMA Report at paras I.33–I.34, Schedule D). Essentially, this involves looking at the carrying capacity of the

unimproved lands of the Claim Lands and determining how many animal unit months the Claim Lands could support.

[157] Schedule D to the DEMA Report tabulates gross crop revenue. It applies average crop revenue per acre figures from the RMs of Buffalo and Battle River to the improved acreage of the Claim Lands.

[158] DEMA estimates the 1905–2020 nominal LOU based on the Leasing Model at $22,725,005 (corrected in the Hearing Transcript, March 13, 2020, at 115; see also Exhibit 57 (Amended Schedule D)).

3. Proxy (RNI) Model

[159] Under section J. "PROXY MODEL", a model is used "*to estimate the lost economic opportunity on the basis that return from the land is dependent upon land value*. The model estimates the LOU in each and every year by multiplying estimated unimproved land value by a rate of return reflective of the agricultural sector in Saskatchewan" (emphasis added; DEMA Report at para J.1).

[160] The italicized passage from the above quotation suggests that DEMA commenced its analysis on an unreliable footing. The return from agricultural use of a particular piece of land would be a factor affecting that land's value, but this does not mean that land values and rates of return for Saskatchewan as a whole can be relied upon to estimate foregone income on the Claim Lands specifically. However, DEMA's Proxy Models assume that relationship is sufficiently tight to provide the foundation of their estimates. The annual rates of return used by DEMA are determined in each year by dividing the net income for all farmland in Saskatchewan into the value of all farmland in Saskatchewan.

[161] In summary, the approach taken in advancing its Proxy Models uses statistics on agricultural productivity and farm revenue for the whole of the Province of Saskatchewan and statistics on the aggregate value of all Saskatchewan farmland to calculate:

1. The total net income from farming and leasing in Saskatchewan in each year;

2. The total value of agricultural land in Saskatchewan in each year; and,

3. The rate of return in each year, expressed as a percentage of land value.

[162] To calculate these totals, DEMA uses statistical information, as discussed above, to establish a figure representing the annual RNI for all farms in Saskatchewan, for each year between 1926 and 2016.

[163] The spreadsheet for the Proxy (RNI) Model, Schedule E, sets out all-Saskatchewan values for farmland, all-Saskatchewan net revenue for all farms, and several adjustments to derive annual values for the Claim Lands. From these DEMA derives annual percentage rates of return which in turn form the basis for annual estimates of the nominal monetary losses.

[164] For each year from 1926 onward, data and calculations for the estimates of annual losses, by year (Column A) are set out in 13 columns (B to O):

1. B: All-Saskatchewan land & building value $/acre;
2. C: Land value only $/acre;
3. D & E: % Change in land value per acre (up or down from previous year);
4. F: All-Saskatchewan RNI;
5. G: RNI minus inapplicable expenses due to reserve status;
6. H: Number of farms in Saskatchewan;
7. I: Total farmed acres in Saskatchewan;
8. J: Average farm size in Saskatchewan;
9. K: Total value of Saskatchewan farmland;
10. L: RNI (Rate of Return);
11. M: Value of Claim Lands per acre;
12. N: Total estimated value of Claim Lands; and,

13. O: Annual LOU value, Nominal (L times N).

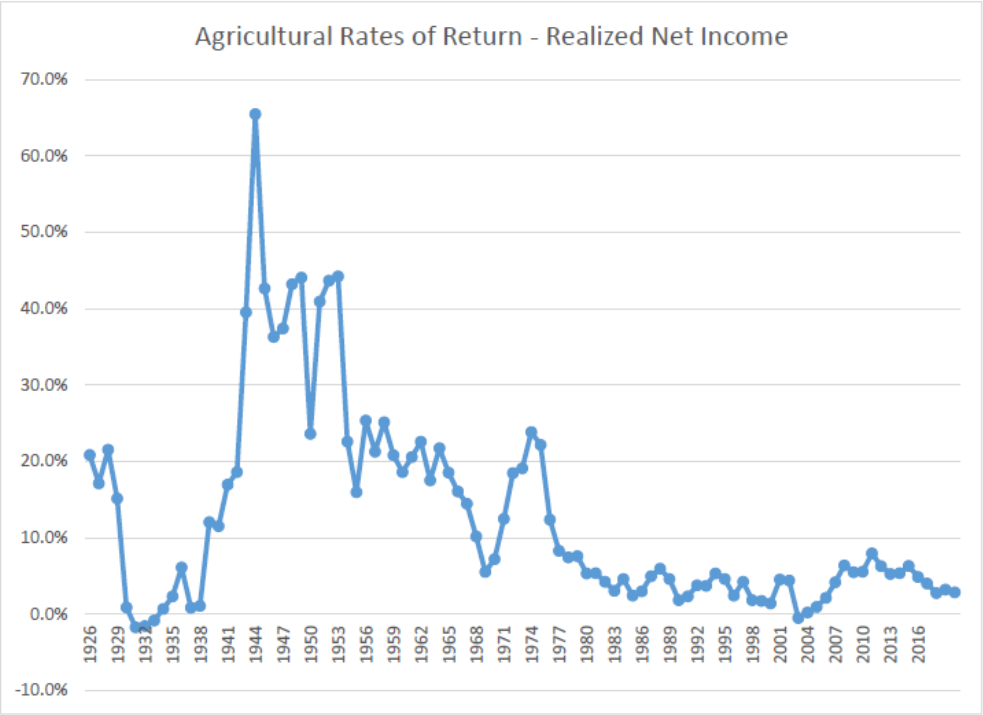
[165] DEMA suggests in the heading to M above that it modeled the rate of change in land values for the Claim Lands using land values provided by the appraisers for both Parties. It explains in the text of the report that DEMA modelled land value starting from Altus' CUMV for 2017 of $1,150/acre and worked backwards, based on the increase or decrease set out in columns D and E to estimate a per acre land value of the Claim Lands for each and every year over the claim period. DEMA used Love's two retrospective valuations ($6.30/acre, effective 1935, and $12.60/acre, effective 1921) to suggest that their approximate alignment with the adjusted annual land values/acre for the Claim Lands supports the use of their model; the model estimates land value at $6.43/acre effective 1906, falling between the two appraisers' valuations of the Claim Lands as of 1906 (i.e., Altus at $7.00 to $8.00/acre and Love at $6.00/acre) (DEMA Report at para J.3; Schedule E (Column M)).

[166] DEMA calculated the rate of return as follows:

> **Rate of Return** = Realized Net Farm Income / Value of Farmland [emphasis in original; DEMA Report at para J.19]

[167] Realized Net Farm Income, Column G, is defined as the sum of cash receipts (crops and livestock), income in kind and supplementary payments (crop/hail insurance, government programs, subsidies) less operating and depreciation expenses (DEMA Report at para J.19).

[168] The year to year variability in rate of return for agricultural production in Saskatchewan between 1926 and 2016 is reflected in the graph set out at Figure 12, entitled "Calculated Rate of Return from Realized Net Income" (DEMA Report at para J.21):



[169] For the period between 1905 and 1925, DEMA concluded an annual rate of return on land value of 6.3%. The explanation:

> Statistics Canada did not produce Realized Net Income (RNI) statistics prior to 1926 and therefore we are required to estimate a reasonable rate of return between 1905 and 1925.The overall average rate of return based on RNI between 1926 and 2018 is calculated at 12.8% and the median is calculated at 6.3%, whereas the average and median between 1926 and 1944 is calculated at 13.0% and 11.5% respectively. While it [may be] possible that the rate of return between 1905 to 1925 was higher than the overall calculated median between 1926 and 2018, we have relied upon the overall median of 6.3% for a reasonable rate of return between 1905 and 1925. We have also relied upon this overall median of 6.3% for the rate of return for the Generic Proxy Model. [DEMA Report at para J.22]

[170] As explained above, DEMA states that the Owner-Operator Model would be the best indicator to estimate agricultural LOU under the most advantageous use of the land. However, as they were unable to develop the Owner-Operator Model within the allotted timeframe, the results from the Proxy (RNI) Model are considered to be a reasonable indicator of loss from agricultural uses of the Claim Lands (DEMA Report at para K.13). DEMA states that the Proxy (RNI) Model "reflects" or "represents" an Owner-Operator Model (DEMA Report at para K.10; Hearing Transcript, March 13, 2020, at 45).

4. Generic Proxy (6.3%) Model

[171] The Generic Proxy (6.3%) Model provides a "generic/ static rate of return" (DEMA Report at para K.12)(6.3%) for every year over the claim period. It estimates net returns over the claim period without capturing the "more realistic volatility" of the agriculture industry as compared to the Proxy (RNI) Model (DEMA Report at para K.11).

[172] Here, as with the Proxy (RNI) Model, the revenue from farming in Saskatchewan is adjusted upward to remove expenses that DEMA considered inapplicable to reserve based farms (mortgage, labour and taxes, as discussed above), and then divided by the total value of agricultural land in Saskatchewan, to yield a rate of return for each year of loss. The median of the annual rates of return is then calculated. This figure (6.3%) is multiplied by the total value of the subject land in each year to complete the estimate of the annual LOU.

[173] Unlike the Proxy (RNI) Model, the "Generic" Proxy Model uses a fixed rate of return, 6.3%. The rationale for the use of a 6.3% annual rate of return for the 'Generic' Model is repeated below:

> Statistics Canada did not produce Realized Net Income (RNI) statistics prior to 1926 and therefore we are required to estimate a reasonable rate of return between 1905 and 1925.The overall average rate of return based on RNI between 1926 and 2018 is calculated at 12.8% and the median is calculated at 6.3%, whereas the average and median between 1926 and 1944 is calculated at 13.0% and 11.5% respectively. While it [may be] possible that the rate of return between 1905 to 1925 was higher than the *overall calculated median* between 1926 and 2018, we have relied upon the overall median of 6.3% for a reasonable rate of return between 1905 and 1925. *We have also relied upon this overall median of 6.3% for the rate of return for the Generic Proxy Model.* [emphasis added; DEMA Report at para J.22]

[174] The "overall calculated median" referred to above is the median of all the returns based on RNI between 1926 and 2018. The median is of the percentage returns on land value between 1926 and 2020. As can be seen in the Figure 12 graph referred to in paragraph 168 above, the returns fluctuate between an all-time low of -1.7% in 1931 to a high of 65.5% in 1944. There are several more peaks and valleys, albeit less dramatic, over the period. Farm returns are known to be volatile, but the evidence should offer some explanation and analysis of the changes in the market beyond the raw statistics.

[175] DEMA estimates the 1905–2020 nominal LOU based on the Generic Proxy (6.3%) Model

at $20,429,200, approximately $4,000,000 greater than the Proxy (RNI) Model (DEMA Report at para K.14).

[176] However, DEMA says that no reliance should be given to the Generic Proxy (6.3%) Model as there was reliable data available for the development of the rate of return based on annual RNI from agriculture (the Proxy (RNI) Model) (DEMA Report at iii).

5. Discussion: Proxy (RNI) Model and Generic Proxy (6.3%) Model (aka "Generic Proxy Model")

[177] At paragraph I.3 of the DEMA Report, DEMA says:

> [A] detailed analysis of current and historical aerial photographs typically assists in determining the various land uses and their respective acreage within the claim lands at various time intervals over the claim period. Such information also provides another indicator as to the rate of development of the Claim Land. *Given this was beyond the scope of this engagement,* we have relied upon data Census of Agriculture data for rate of development and data by the Saskatchewan [Assessment Management] Agency (SAMA) to indicate the land use specific within the claim land today. [emphasis added]

[178] Aerial photographs, even if unavailable before 1946, would have assisted in the evaluation of the applicability of the data to the Claim Lands.

[179] At paragraph K.9 of the DEMA Report, DEMA says: "The model is dependent upon estimated land value of the claim land." There must then, for the purposes of an assessment of losses over the claim period, be confidence in the reliability of the estimates.

[180] The Proxy (RNI) Model estimates the annual rate of return on agricultural land in Saskatchewan by dividing the total adjusted net income from farming by the total value of farmland in the same year. The annual LOU estimates for each year are then calculated by applying the rate of return for a given year (for all of Saskatchewan) to the estimated value of the Claim Lands in that year. The reliability of the LOU estimates generated in this way is therefore highly dependent on: (a) the reliability of the land values used in the calculations; and, (b) the accuracy of the assumption that the rate of return for Saskatchewan approximates a fair rate of return for the Claim Lands.

[181] DEMA starts with the appraisal values provided in the expert reports for 2017, 1935, 1921 and 1906–1910 (using the appraiser's midpoint of $6.43 for 1906), and then models the change in

land value between these dates based on Saskatchewan data for land value only. To do this, DEMA used the Saskatchewan data for each year since 1981 regarding land value including buildings and the data for the value of buildings only to calculate the percentages attributable to buildings (Schedule F). For each year since 1981, DEMA used these percentages to remove the values of buildings and calculate the percentage of the total value that was attributable to land only. Prior to 1981, DEMA used the median of the percent attributable to land (88.4%; Schedule F, Column D, and Schedule E, Column C). DEMA then calculated the year-to-year change in land-only values for Saskatchewan and used those to model the change in land value for the Claim Lands for all years between the appraisal years provided by the experts, starting with 2017 and moving backwards year by year (Schedule E). DEMA relies on appraisal evidence tendered by both Parties to fix the 1906 land value at $6.43/acre. However, the best evidence of the per acre land value are the prices obtained at auction, averaging $4.01/acre, as noted in an internal Memorandum dated July 20, 1906 from W. A. Orr of the Lands and Timber Branch to the Deputy Minister referred to by both historical experts Dr. Martin McGuire and Dr. Whitehouse-Strong.

[182] As the second auction did not, on average, yield prices exceeding those achieved in the first auction it appears that a lack of advertising of the first auction was not a factor that resulted in sales at prices below market value.

[183] DEMA aligns its attributed land values with checks against evidence from the Claimant's appraisal report (Altus Report I) for 1921 and 1935. At paragraph K.9 of the DEMA Report, DEMA explains:

> The model is dependent upon estimated land value of the claim land. Land value is modelled for each year of the claim period. The overall model is improved when there are retrospective land value estimates available to correct the model at various intervals throughout the claim period. For this claim, *we have the benefit of not only current unimproved market values, but estimated land values as of 1921 and 1935 to input into the model and 1905 values relied upon as a check to ensure the model is estimating land value reasonably.* [emphasis added]

[184] As the Respondent observes in written argument:

> Having so few data points (historical appraised values) over such a long period of time (1935 to 2017) means the land values on which the estimated annual loss of use is based can substantially over or under estimate the value of the land over a long period of time. This is demonstrated with the size of the correction necessary between the estimated 1936 per acre land value of $12.51 and the appraised 1935 per acre value of $6.30. Such discrepancies draw into question the reliability of the

> loss of use estimates produced by the model. [footnote omitted; Respondent's MOFL at para 65]

[185] The method DEMA uses to estimate the value/acre of all farmland in Saskatchewan produces, in 1905, a per acre value of $5.77, which is considerably higher than the 1905 value, $4.01/acre, as supported by evidence of the market. This illustrates the general unreliability of the DEMA Proxy models use of data to derive annual per acre land values for the Claim Lands up to 1926, when the per acre value derived with DEMA's method aligns with evidence based on appraisal. As noted by the Respondent, a similar check against appraisal evidence is provided for 1935, with no explanation other than the operation of the model for the doubling of the per acre value in 1936.

[186] DEMA explained, at paragraph J.3 of the DEMA Report, its method for estimating land values for the claim period, from 1905 to 2020:

> This land value data [allows] us to model the rate of change from the estimated land values of the claim land, including Altus's current unimproved market valuation ($1,150/acre, year effective 2017) and Love's retrospective valuations ($6.30/acre, effective 1935 and $12.60/acre, effective 1921). We have modelled land value starting from Altus's CUMV and worked backwards to estimate a per acre land value of the claim land each and every year over the claim period (Column M, Schedule E). The model estimates land value at $6.43/acre effective 1906, falling between the two appraiser's valuations of the claim land as of 1906 (i.e. Altus at $7.00 to $8.00/acre and Love at $6.00/acre).

[187] As will be seen in my findings on CUMV, it was valued at less than concluded by Altus. Hence, in light of the above, none of the annual per acre values used by DEMA in the Proxy Models is 'correct'.

[188] An error of far greater significance is also apparent. DEMA adjusted the per acre value downward from $12.51/acre in 1936 to $6.30/acre in 1935. This was done to align the 1935 value with the appraisal evidence, and establish a starting value against which DEMA adjusted land values back to 1920 based on the annual rate of change derived from the SAMA statistics. However, the SAMA data shows an **increase** in the per acre value of farmland (including buildings) between 1936 ($12) and 1935 ($14). There is no explanation of the apparent failure of the model, resulting in a dramatic 'correction' between the 1935 and 1936 estimates of land value, or the disparity between the rates of change in farmland values generally and the Claim Lands in particular.

[189] At paragraph K.9 of the DEMA Report, DEMA says:

> The model is dependent upon estimated land value of the claim land. Land value is modelled for each year of the claim period. The overall model is improved when there are retrospective land value estimates available to correct the model at various intervals throughout the claim period. *For this claim, we have the benefit of not only current unimproved market values, but estimated land values as of 1921 and 1935 to input into the model and 1905 values relied upon as a check to ensure the model is estimating land value reasonably.* [emphasis added]

[190] Between 2016 and 1936, and between 1920 and 1905, downward adjustments to appraised values made, respectively, in 2017 ($1,150) and 1921 ($12.30), were made based on data from SAMA.

[191] The dollar value/acre estimates derived from SAMA data aligned with the 1921 appraisal evidence ($12.30). The values using annual changes for farmland revealed by SAMA data going "backwar[d]" from 1920 to 1905 aligns, in 1905 and 1906, with the appraised values.

[192] The wrench in the works for DEMA's estimates is the 1936–1935 downward adjustment from $12.51/acre to $6.30. DEMA asserts in paragraph J.3 of the DEMA Report (emphasis added): "*We have modelled land value starting from Altus's CUMV and worked backwards to estimate a per acre land value of the claim land each and every year over the claim period (Column M, Schedule E). The model estimates land value at $6.43/acre effective 1906, falling between the two appraiser's valuations of the claim land as of 1906 (i.e. Altus at $7.00 to $8.00/acre and Love at $6.00/acre).*" If this is correct, the application of the model would have estimated an increase in the value of the Claim Lands between 1935 and 1936. It would also have resulted in a much higher estimate of the value of the Claim Lands in the early years of the period of the loss. The 1905 values, which are derived from appraisals, could therefore not be "*relied upon as a check to ensure the model is estimating land value reasonably*" (emphasis added; DEMA Report at para K.9).

[193] As the model skews the pre-1936 values in a way that is out of alignment with DEMA's core method for deriving annual values for the Claim Lands, it casts serious doubt on the reliability of DEMA's methodology for estimating historical land values for the Claim Lands based on the use of Saskatchewan wide statistics for the annual rate of change in Saskatchewan farmland over the period of loss.

[194] Inaccurate estimates of annual land values result in questionable estimates of annual losses,

as these are the product of multiplying the Column M values by the Column L percentages.

[195] One further observation: for 1926, DEMA projected a 20.8% rate of return on land value to estimate the annual LOU value. The rates of return based on DEMA's methodology varied in the following years from negative 1.7% up to positive 65.5%. It may be surmised that these fluctuations are attributable to periods of depression, war, and rebounds that followed. But this is left to surmise, not explained. Moreover, the effect of bringing annual estimated losses forward to present value by applying periodic, compounded, rates of return on capital amplifies the effect of any error in the "calculation" of annual land values and retained earnings.

6. Farm Size

[196] Between 1921 and 2016 the size of the average farm in the RMs grew from 371 to 1,598 acres, where it remains. To attribute the same return per acre to all farms of all sizes is to use the most general measure available, in the present matter the statistics kept by SAMA.

[197] The model attributes the same value to each farm acre without regard for the number of acres comprised by each farm. In appraisal, parcel size is one aspect of comparability when using information on the value of one property to determine the value of a subject property. The average farm size in 2016 in the RMs of Buffalo and Battle River was 1,598 acres; the Claim Lands comprise 14,670 acres. The need for analysis of whether, in relation to agricultural land, large differences in farm size are relevant to land value, one way or the other, is indicated. There is no evidence or analysis of the relationship between farm size and expenses for Saskatchewan farms generally, much less so for a farm of 14,670 acres. While economies of scale tend to favour the large, larger capital costs raise the question of access to capital and security for loans. In the context of reserve lands, some examination and analysis of these matters is necessary, but absent.

7. Cow Units

[198] DEMA assigns value to the entirety of the Claim Lands, except for 205 acres dedicated to roads, and a small adjustment for "waste land", for the entire period of loss. The percentage of crop land increases up to 1996, when the potential for cropping of the Claim Lands is considered to have been achieved at 10,444 acres.

[199] The estimate of losses attributed to foregone use of grazing land depends on the number of

"cow units" that could have been supported by the acreage available for grazing. This changed annually over the period of loss.

[200] The working assumption is that the principle of most advantageous use implies that the Claimant should have the benefit of the assumption that the Claim Lands would have been fully utilized throughout the period of loss. Translated to a Saskatchewan-wide scale, this is equivalent to assuming that there would, over the entire period of loss, be cattle production on a scale that would take up all farmland in Saskatchewan not yet broken for planting crops. There is no evidence that this would have been possible on the Claim Lands for all years since 1905 from a logistical and market perspective.

8. Summary and Conclusion

[201] The following factors point to the unreliability of the Proxy Models:

1. The use of incorrect values to estimate the historical annual values of the Claim Lands;

2. The failure to consider the variability of per acre land values as a function of size of otherwise comparable parcels of land;

3. The absence of analysis of cost of farming at a large scale and related demands for capital;

4. The assumption that sufficient number of family farm workers would have been available to develop the lands as modelled without relying on a greater proportion of hired labour than was reflected in the Saskatchewan-wide data for farm expenses; and,

5. The assumption underlying the estimates of loss based on foregone cow unit production.

[202] I find that the Proxy Model, as presented, does not provide a sound evidentiary basis for the assessment of equitable compensation in the present matter. This should not be understood as a wholesale rejection of the Proxy (RNI) Model applied by DEMA to estimate historical losses in

a claim based on the loss of reserve land with agricultural potential. If further developed to address the above "factors" the model may result in estimates that would assist the Tribunal in the task of assessing compensation in circumstances of breach of fiduciary duty.

XI. RESPONDENT'S EVIDENCE: SERECON REPORT

[203] The Respondent relies on a report authored by Mr. Bruce Simpson, a member of Serecon Inc., specialists in the business of agriculture. His professional qualifications are in the fields of Agrology and Land Appraisal.

[204] Mr. Simpson comments on DEMA's Proxy Model:

> Utilizing general farmland and building value statistics that pertains to the whole Province of Saskatchewan requires numerous assumptions in order to make the data somewhat applicable to the subject scenario which reduces the reliability of the results. The data is utilized to determine the rate of change in land value estimates, year over year. In our opinion, this could be a reasonable approach to fill a relatively small number of gap years. However, the rate of change is applied to the vast majority of the years in the study since only three years were pegged with market valuation; those being 2017 (Altus), 1935 (Love) and 1921 (Love). The DEMA report notes that the model produces results in 1906, 1908 and 1910 that are similar to the value estimates from the Altus and Love reports at those dates. As outlined earlier in our comments, we have concerns that the Altus reports in particular, and possibly the Love reports, have overstated the value estimates. In addition, it is considered that the original valuations of the Claims Lands from 1905 by J.K. Maclean valued the majority of the quarter sections at between $3 and $4 per acre whereas the proxy model indicates a value of $5.77 per acre for 1905 which is notably higher than the valuation by J.K MacLean that was completed at the time. Thus, the limitations of the proxy model are noted by this example. [Serecon Report at 15]

[205] Serecon comments on the use of statistical data as information from which estimates of agricultural are made:

> The DEMA report utilizes Census data for the crop mix on the Claim Lands (Paragraph I.14: page 46). The crop mix utilized included wheat, oats, barley and canola. Conversely, the above table indicates that the Statistics Canada data includes more than just the crop mix utilized in the DEMA report. As a result, the proxy model is likely to produce results that are not reflective of the likely crop mix on the Claim Lands as noted in the DEMA report.
>
> The same can be said to the livestock data utilized. The following table indicates that the Statistics Canada data may not be overly representative of what could reasonably occur on the Claim Lands.
>
> …

> The DEMA report utilizes cattle production for the proxy model. However, the statistics utilized include data about hogs, supply managed livestock and other livestock. Thus, the proxy model is likely to produce results that are not reflective of the cattle production figures on the Claim Lands as noted in the DEMA report. [Serecon Report at 16–17]

[206] In summary with respect to the Proxy Models:

> Overall, the proxy model provides a poor indication of loss of use in our opinion. It uses general land value indications; general income data that includes crops and livestock statistics that are not likely to occur on the Claim Lands; it assumes direct correlation between net income and farmland values on a year to year basis; and it does not consider how the lands on the existing reserve were or were not developed for agricultural uses. As a whole, the conclusions of the proxy model are not reliable in our opinion regardless of what rate of return indications are utilized to calculate the loss of use estimates. [Serecon Report at 17]

[207] With respect to the Leasing Model:

> In our opinion, the following points address concerns with the leasing model, relating to timing and rate of land development, that we do not believe are addressed in the DEMA report.
>
> Point 1: The leasing model assumes a rate of land development consistent with how the Claim Lands developed after the surrender by incoming settlers. The report provides minimal support in 1905 for the rental demand for the Claim Lands. There would have to be significant area demand to take up the acreage outlined in Table 15. From a leasing model perspective, getting to 5,776 cultivated acres by 1912 is a significant acreage with limited analysis. In our opinion, there would have to be a significant number of prospective lessees considering the small size of most farms in that era. However, based on the rate of development within the RMs of Buffalo and Battle River at that time, it is likely that many landowners in the greater subject area were committed to improving their own lands and may have had limited opportunity or demand to rent the Claim Lands. Thus, the rate of development may have been slower than the surrounding area. The rate of development based on renting on the existing reserve lands should also be relied upon as an indication of the likely rate of development on the Claim Lands. Thus, the leasing model may overstate the agricultural activity on the Claim Lands. [Serecon Report at 14–15]

[208] The above reference to "renting on the existing reserve lands" adverts to the fact that the Claim Lands is contiguous to the remainder of the Claimant's IRs110/111 land comprising some 8,498 acres, of which approximately 2,000 acres were leased for terms of three to five years at various times between 1940 and 1982.

[209] Mr. Simpson's comments have considerable merit. Yet, the Respondent suggests that the Tribunal might use the Leasing Model, despite its deficiencies, as a base upon which adjustments

for contingencies may be applied to determine a more realistic number for LOU from 1905 to 2020.

XII. PRESENT VALUE OF HISTORICAL LOSSES

A. Expert Evidence on Present Valuation

1. Claimant's Expert

[210] The Claimant relies on the expert report of Mr. Scott Schellenberg. He is a Chartered Professional Accountant, a Chartered Financial Analyst, and a Chartered Business Valuator. He is also a specialist in Investigative and Forensic Accounting. His report sets out methodologies for calculation of present value of moneys the Claimant would have earned from the use of the Claim Lands from 1905 to 2019.

[211] Schellenberg approached the task based on the following principles:

> - *"Equity presumes that the trust funds will be invested in the most profitable way or put to the most advantageous use", but any award shall "reflect realistic contingencies.""*
>
> - *"Modern portfolio theory or "prudent investor rule" which provides that the standard of care applicable to a fiduciary or trustee "in investing money for the benefit of another person, [is that] a trustee shall exercise the judgment and care that a person of prudence, discretion and intelligence would exercise in administering the property of others.""* [emphasis in original; Schellenberg Report at para 8; citing the engagement letter dated January 7, 2020 (Exhibit 4)]

[212] Schellenberg proposes three distinct alternative methodologies to calculate the present value of moneys that, based on the DEMA Report, the Claimant would have earned from the use of their lands from 1905 to 2019. These moneys are calculated net of the present value of any payments received from the Crown as compensation for the surrender of the Claim Lands (Schellenberg Report at 2, Schedule 2.1 filed on June 5, 2020). These methodologies are: the BTA (Scenario, Generic Balanced Portfolio Scenarios, and Pension/Endowment Benchmark Returns. He recommends the Pension/Endowment Benchmark Returns. Each of the three methodologies is discussed below:

1. BTA Scenario

- Assuming the money would have been invested at the BTA rates from 1905 to December 31, 2019, Schellenberg calculates current values for the three models set out in the DEMA Report as follows (net of payments made by the Crown):
    - Leasing Model: $289,556,756
    - Proxy (RNI) Model: $310,510,753
    - Generic Proxy (6.3%) Model: $176,173,093

2. Generic Balanced Portfolio Scenarios

- Schellenberg states:

> Under this set of scenarios, we assumed that a fiduciary would have remained invested solely in fixed income products until some point between 1970 and 1990, at which point they would have switched to a generic balanced portfolio of 60% equities and 40% fixed income. [Schellenberg Report at para 14]

- Schellenberg then calculates a number of possible scenarios for the 60% equity portion of this portfolio. For all of these scenarios, Schellenberg calculates the fixed income portion using the BTA rate.
    - Using the S&P 500 as the benchmark for the 60% equity portion of the portfolio, Schellenberg calculates present values as follows for the three LOU models set out in the February 21, 2020 DEMA Report (Leasing, Proxy (RNI), and Generic Proxy (6.3%)):

        Switch in 1970: $494M to $899M

        Switch in 1980: $528M to $971M

        Switch in 1990: $422M to $763M

    - Using the TSE instead of the S&P 500 for the 60% equity portion of the portfolio, Schellenberg calculates present values as follows for the three LOU models set out in the February 21, 2020 DEMA Report (Leasing, Proxy (RNI), and Generic Proxy (6.3%):

Switch in 1970: $306M to $554M

Switch in 1980: $276M to $490M

Switch in 1990: $274M to $488M

3. Pension/Endowment Benchmark Returns

- Under this set of scenarios, Schellenberg analyzed the actual returns of various types of fiduciary-managed investment portfolios over time. These investment portfolios were: Canada's largest pension plans, and Canada's largest university endowments. For sake of comparison, he also looked at returns from two United States-based university endowments.

[213] Schellenberg used the BTA rate to bring forward losses set out in the DEMA Report from 1905 until the date actual returns for each pension fund or endowment are available. These dates range from 1964 to 2006 depending on the specific pension fund or university endowment. Starting from the relevant date for the specific pension fund or endowment, the losses were then brought forward using the rate of return for that pension fund or endowment.

[214] Schellenberg calculated the median values as at December 31, 2019, for the Canadian asset managers, based on the returns of BCIMC, which manages the pensions of civil servants in British Columbia, and Caisse de Depot et Placement du Quebec (CDPQ) which manages the Quebec pension plan), to calculate a range of $341M to $609M for the three models for which DEMA provided nominal values – the Leasing Model, Proxy (RNI) Model, and Generic Proxy (6.3%) Model.

[215] Mr. Schellenberg calculates a range of present values as at December 31, 2019, for each of the three DEMA models for which DEMA provided nominal values – the Leasing Model, Proxy (RNI) Model, and Generic Proxy (6.3%) Model, using actual returns from ten Canadian pension plans and endowments, as well as two United States endowments for comparison. These values range from $230.3M to $1,508.5M. They are provided at Table 1, paragraph 128 of Mr. Schellenberg's Report filed May 20, 2020.

[216] From the values set out in Table 1, Mr. Schellenberg uses the median values for the

Canadian asset managers (based on the returns of BCIMC, which manages the pensions of civil servants in British Columbia, and CDPQ, which manages the Quebec Pension Plan) to calculate present values within a range of $341M to $609M for the three models for which DEMA provided nominal values (the Leasing Model, Proxy (RNI) Model, and Generic Proxy (6.3%) Model).

a) Mr. Schellenberg's Conclusions on Values

[217] In Schellenberg's "**Overall Conclusion**" he states that had the annual loss amounts calculated by DEMA been invested in the same manner that other fiduciaries were investing in Canada, the present value of the lost income would be in the range between $341M to $609M (emphasis in original; Schellenberg Report at para 20).

[218] These values are based on the Pension/Endowment Benchmark Returns scenario. Mr. Schellenberg explains that pension funds are a good comparator for the moneys the First Nation did not receive, because pension funds are fiduciary investors investing on behalf of beneficiaries, and "they do have an aversion to risk, or they -- they do not want to take on undue risk" (Hearing Transcript, February 18, 2020, at 48). He also explains that pension funds "generally have a longer time horizon" for investment. With a longer time horizon, the pension fund can accept more risk as over time the "risk reward will pay off a higher return". Mr. Schellenberg suggests that the First Nation would have invested the monies over 115 years.

[219] The values provided are net of any payments that the First Nation received from the Crown as compensation for the surrender of the Claim Lands, as shown in Schedules 2.1 and 2.2 of the Schellenberg Report filed on May 20, 2020.

b) Realistic Contingencies

[220] Mr. Schellenberg notes that realistic contingencies in his recommended methodology would include investment management fees, and losses incurred by investment in equities (Hearing Transcript, February 18, 2020, at 101; see also Schellenberg Reply Report at para 48).

c) Consumption

[221] Mr. Schellenberg considers that the rate of return should *not* be reduced to take into consideration the fact that the Claimant may have spent some of the money over the years. He explains that the Claimant should be compensated for being unable to consume the income over

the years. He states:

> …a rate of return is required to compensate them for the inability to consume the entire amount of each year's annual loss of income over the period from 1905 to date.
>
> …reducing the rate of return for consumption that could have taken place penalizes the Claimants for consumption they did not get the opportunity to consume. [Schellenberg Reply Report at paras 44–45]

2. Respondent's Expert

[222] The Respondent relies on reports authored by Dr. Howard E. Johnson. Dr. Howard Johnson has been recognized as a Fellow of both the Chartered Professional Accountants of Canada (FCPA) and the Canadian Institute of Chartered Business Valuators (FCBV). He is also a Chartered Financial Analyst and Accredited Senior Appraiser. He has a Doctorate in Business Administration.

[223] The Respondent asked Dr. Johnson to propose a method to assist the Tribunal in calculating the current value of historical monetary losses and the quantification of the current value of those losses for the claim.

[224] Dr. Johnson provides a methodology for bringing forward DEMA's annual LOU estimates to December 31, 2019, and detailed schedules estimating the current value of LOU as of December 31, 2019, based on the nominal values provided by DEMA. He states that his methodology could be applied "to any loss of use figures adopted by the Tribunal" (Johnson Report at para 2.5).

a) Overview

[225] Dr. Johnson's methodology relies primarily on the GDP per capita in Canada. For the years from 1927 to 2019, Dr. Johnson uses Compounded Annual Growth Rate (CAGR) multipliers based on the annual change in GDP. He applies the CAGR to the estimated nominal annual historical values for LOU provided by DEMA, and then adds these values together to arrive at a total current value of LOU. He does this for each of the three models for which DEMA estimated dollar values: the Leasing Model, Proxy (RNI) Model, and Generic Proxy (6.3%) Model.

[226] GDP data is not available prior to 1926. For the years from 1905 to 1926, Dr. Johnson derived a CAGR from a weighted average of the CPI and BTA rates (Johnson Addendum, Schedule 6).

b) Rationale for Use of Gross Domestic Product

[227] Dr. Johnson defines GDP as follows:

> …the total market value of all final goods and services produced domestically during a specific period, usually one year. It is inclusive of private consumption, investment, public spending, and net exports to foreign countries. [footnote omitted; Johnson Report at para 7.9]

[228] Dr. Johnson used GDP data from Statistics Canada for each year divided by the number of people in Canada to calculate annual GDP per capita. This figure increased in some years and decreased in others, reflecting expansion or contraction of Canada's economy.

[229] Dr. Johnson explains that GDP per capita is used as a measure of "historical economic well-being" and of "standard of living" (Johnson Report at para 7.27; Hearing Transcript, February 19, 2020, at 62–63). He states that GDP per capita can tell us "how the average Canadian has fared over the Loss Period, especially in terms of income and spending power" (Johnson Report at para 7.28). The rate of change in GDP per capita reflects the improvements to the standard of living that the Mosquito First Nation might have enjoyed with income from the subject lands.

c) Consumption

[230] Dr. Johnson explains that GDP includes the effect of inflation. It also includes private consumption, valuing consumption beyond inflation, as people need to be compensated for more than just the rate of inflation in order to forego consumption (Hearing Transcript, February 19, 2020, at 94).

d) Realistic Contingencies

[231] Dr. Johnson states that:

> …GDP per capita effectively incorporates "realistic contingencies" over a long period, since it reflects the consequences of both positive and negative outcomes arising from both individual consumption and government spending. [Johnson Report at para 7.29]

[232] The fluctuations in the Canadian economy's growth due to depression, war, stock market changes and other factors represent realistic contingencies within the GDP per capita model (Hearing Transcript, February 19, 2020, at 69).

e) Methodology for the Years from 1905 to 1926

[233] For the years from 1905 to 1926, Dr. Johnson derived an annual CAGR from a weighted average of the CPI and BTA rates. He adopted a weighting of 30% for CPI rates and 70% for BTA rates as a proxy for the change in GDP per capita for the period from 1905 to 1926.

[234] Dr. Johnson explained that the growth in the CPI is a proxy for purchasers' power in constant dollars and does not include returns on saving and investing. He also explained that BTA rates account for both the change in purchasing power in constant dollars from year to year and a rate of return on savings.

f) The Year from January 1, 2020 to December 31, 2020

[235] For the year from January 1, 2020 to December 31, 2020, Dr. Johnson did not apply a CAGR factor. Said another way, he included DEMA's LOU values for the year ended December 31, 2020 at a CAGR factor of 1.0x (Johnson Addendum at para 6.6).

g) Dr. Johnson's Conclusion on Values

[236] Dr. Johnson calculates the current value of LOU as at December 31, 2020 for each of DEMA's three models, net of the present value of any payments received from the Crown as compensation for the surrender of the Claim Lands. Dr. Johnson explains that these amounts have not been adjusted for contingencies:

Loss of Use Net of Payments received by Claimant for Claim Lands

Leasing Model:	$147,045,243
Proxy (RNI) Model:	$159, 382, 306
Generic Proxy (6.3%) Model:	$94, 082, 884

(Johnson Addendum at para 6.15; see also Schedule 1, Schedule 2 and Schedule 3)

3. Respondent's Response to Mr. Schellenberg's Evidence

[237] The Respondent contends that Mr. Schellenberg's approach does not take into account realistic contingencies involved in how the Mosquito First Nation would have used the income. The Respondent states that the Mosquito First Nation might have, for example, "reinvested some

of the income into agricultural operations or on other needs such as schools, education, roads, health, medical facilities and commercial endeavors" (Respondent's MOFL at para 107; see also Johnson Limited Critique Report at paras 2.13–2.14).

[238] Dr. Johnson also notes that Mr. Schellenberg's adoption of a pension plan methodology is inconsistent with the likely investment objectives and timelines of the Mosquito First Nation. The Respondent argues that the investment time line of pension plans such as the Canada Pension Plan is very long-term and therefore pension plans are able to make very long-term investments in equities which fluctuate and are higher risk (Johnson Limited Critique Report at para 2.15; Hearing Transcript, February 19, 2020, at 53). By contrast, the Mosquito First Nation's income from the subject lands most likely would have been used in a variety of ways including reinvestment in the community as well as investment in the BTA. Dr. Johnson states that "the Mosquito First Nation would have different investment objectives and timelines than a pension fund, as well as a more volatile spending pattern" (Johnson Limited Critique Report at para 2.16).

[239] Dr. Johnson notes that the pension plans used in Schellenberg's analysis hold funds that are many times larger than the value of the LOU to Mosquito being discussed in this proceeding. He indicates that the larger size of the funds managed by pension plans and endowments means that they have access to "a set of investments, such as direct investment in large global infrastructure projects, that would not be available to the Mosquito First Nation" (Johnson Limited Critique Report at paras 2.21–2.22).

[240] Dr. Johnson says that BTA rates "effectively reflect an 'optimal return' and do not incorporate 'realistic contingencies'" (Johnson Report at para 8.6 (b)). He says that, as a result, BTA rates effectively overstate the current value of the Claimant's historical monetary losses.

4. Claimant's Response to Johnson's Evidence

[241] Mr. Schellenberg's main criticism was Johnson's use of GDP as a methodology to bring forward the amounts the First Nation had not received. He states that "GDP per capita is not a rate of return" (emphasis in original; Schellenberg Reply Report at para 25) or "investment return" but a "measure of wellbeing" (Hearing Transcript, February 18, 2020, at 83–84).

[242] Mr. Schellenberg compares his rates of return and the rates of return set out in Johnson's

report. He notes that until approximately 1980, the rates of return used by himself and by Johnson result in very similar calculations (Schellenberg Reply Report at para 34). However, from 1980 onwards, Mr. Schellenberg says, in effect, that Johnson's report does not take into consideration the shift in investment strategy made by prudent fiduciary investors commencing in the 1980s. Mr. Schellenberg says that commencing in the 1980s:

> …prudent fiduciary inve[s]tors appear to have shifted their investments away from fixed income and into higher returning investments. The [Johnson] Report appears to imply the opposite would have been true, and that in the 1980s the rate of return would have declined to a level below that which would have been returned if the money was simply left in the BTA. [Schellenberg Reply Report at para 37]

[243] Mr. Schellenberg concludes:

> …it would not have been reasonable for a prudent fiduciary investor to invest in something that is consistently generating a rate of return that averages only around 1% to 2% more than the rate of inflation. [Schellenberg Reply Report at para 38]

XIII. EQUITABLE COMPENSATION

A. General Principles: The fiduciary Setting of the Claim

[244] The starting point for fashioning an appropriate remedy is consideration of the particular fiduciary setting of the claim.

[245] *Guerin v R*, [1984] 2 SCR 335, 1984 CarswellNat 813 (QL) [*Guerin*], is authority for the proposition that equitable compensation applies in the context of a breach of fiduciary duty with respect to a surrender of reserve land. In *Guerin*, Dickson J. stated:

> The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians. [para 85]

[246] Since *Guerin*, the Supreme Court of Canada has considered equitable compensation in some very different contexts, and has provided further guidance on how courts should approach the remedy. The analysis in *Beardy's* summarized this, commencing at paragraph 79:

> In her judgment in *Canson,* Justice McLachlin discussed the significance of the fiduciary obligation and the rationale for equitable compensation:
>
> > My first concern with proceeding by analogy with tort is that it overlooks the unique foundation and goals of equity. The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence and contract. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently the law seeks a balance between enforcing obligations by awarding compensation and preserving

> optimum freedom for those involved in the relationship in question, communal or otherwise. The essence of a fiduciary relationship, by contrast, is that one party pledges herself to act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged. The freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken - an obligation which "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest": Canadian Aero Service Ltd. v. O'Malley, [1974] S.C.R. 592, at p. 606. In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.
>
> [emphasis added in *Beardy's*; citing *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, 85 DLR (4th) 129 [*Canson*]]

[247] The analysis continued through to paragraph 86, with the following:

> The objective of equity is to reach a fair and just result. To that end, a court is not precluded from considering principles of remoteness and causation:
>
> > How do *Canson* and *Hodgkinson* fit together? *Canson* appears to award compensation for breach of fiduciary duty that could equally have been assessed as damages in negligence. *Hodgkinson*, on the other hand, appears to take a more expansive approach to compensation. LaForest J. offered a full explanation of how the two cases stand together in his reasons in *Hodgkinson* at 443-446, which I shall quote at length:
> >
> > > … *Canson* held that a court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result. Canson does not, however, signal a retreat from the principle of full restitution; rather it recognizes the fact that a breach of a fiduciary duty can take a variety of forms, and as such a variety of remedial considerations may be appropriate;….. [see also McInerney v. MacDonald, supra, at p. 149.] Writing extra-judicially, Huband J.A. of the Manitoba Court of Appeal recently remarked upon this idea, in "Remedies and Restitution for Breach of Fiduciary Duties" in *The* 1993 *Isaac Pitblado Lectures, supra*, pp. 21-32, at p. 31:…
> >
> > [emphasis added in *Beardy's*; citing Justice Thomas Cromwell, *Money Remedies: Towards a Functional Approach* (Isaac Pitblado Lectures: 2010 Manitoba) at I-12–I-13 (*Money Remedies*)]

[248] And, at paragraph 87:

> Equitable compensation does not necessarily apply in circumstances of breach of fiduciary duty. The breach may be of such a nature that damages assessed on principles of common law be appropriate. As Justice Cromwell observes, adopting extra-judicial comments of Huband J.A.:
>
> > A breach of a fiduciary duty can take many forms. It might be tantamount to deceit and theft, while on the other hand it may be no more than an innocent and honest bit of bad advice, or a failure to give a timely warning. [*Money Remedies*, at I-13]
> >
> > [emphasis added]

[249] The point taken from the above passages cited in *Beardy's* is that the nature of both the trust relationship and the breach are relevant considerations in crafting the remedy.

[250] In this Claim, important aspects of the fiduciary setting of the breach include (without necessarily being exhaustive), the treaty relationship and how the Parties came to be in the circumstance of the Crown taking a surrender on behalf of the Claimant's predecessors, the nature of the interest the Crown undertook to protect, and the harm suffered by the Claimant.

[251] Here, the Crown took a surrender vote in contravention of the statutory requirement that permitted only members of the Grizzly Bear's Head and Lean Man Bands to vote. The Parties agree that this led to an "invalid surrender", which was approved by the Respondent (Order in Council PC 1920/1905, November 3, 1905). Members of the Mosquito Band also signed the surrender document. This was a breach of the duty of ordinary prudence.

[252] While this was a breach of ordinary prudence, it occurred within a treaty relationship, with respect to a treaty reserve, and the breach led directly to the permanent alienation of treaty reserve land from the Claimant. This aspect of the nexus between the breach and the claimed loss is undisputed.

[253] The type of relationship and type of interest involved in this Claim are factors pointing toward equitable intervention. In *Canson*, La Forest J. drew a distinction between fiduciaries who control property and other fiduciary settings (para 72;see also *Whitefish Lake Band of Indians v AG*, 2007 ONCA 744 at para 53, 87 OR (3d) 321 (QL) [*Whitefish*]). McLachlin J. preferred a flexible and principled rather than categorical approach to fiduciary relationships:

> My second concern with proceeding by analogy with tort is that it requires us to separate so called "true trust" situations, where the trustee holds property as agent for the beneficiary, from other fiduciary obligations. This distinction is necessary if one proceeds by analogy with tort because the tort analogy cannot apply in the former category (see La Forest J., at p. 578). In my view, however, this distinction is artificial and undercuts the common wrong embraced by both categories -- the breach of the obligation of trust and utmost good faith which lies on one who undertakes to control or manage something -- be it property or some other interest -- on behalf of another. Nor do the cases support the distinction, as illustrated by the analysis which follows of Guerin v. The Queen, [1984] 2 S.C.R. 335.
>
> Differences between different types of fiduciary relationships may, depending on the circumstances, dictate different approaches to damages. This may be significant as the law of fiduciary obligations develops. However, such differences must be related in some way to the underlying concept of trust -- the notion of special powers reposed in the trustee to be exercised exclusively for the benefit of the person who trusts. The distinction between the rights of a claimant in equity for maladministration of property as opposed to wrongful advice or information

> resides in the fact that in the former case equity can and does require property wrongfully appropriated to be restored to the cestui que trust together with an account of profits. Where there is no property which can be restored, restitution in this sense is not available. In those cases, the court may award compensation in lieu of restitution. This is a pragmatic distinction in the form of the remedy which must not obscure the fact that the measure of compensation remains restitutionary or "trust-like" in both cases. [*Canson* at paras 9–10]

[254] Further on, McLachlin J. discussed the interest at stake in *Guerin* in which, unlike here, the reserve land in issue remained under lease rather than being lost to the claimant, and affirmed that trust principles applied in that case:

> Guerin was not concerned with abuse of trust property in the classic trust sense. There were no assets or property which had been misappropriated. The wrong was the failure to adhere to the conditions of surrender and to consult with the band in accordance with the Crown's fiduciary duty. Both the judgment of Dickson J. (as he then was) (Beetz, Chouinard and Lamer JJ. concurring), and the judgment of Wilson J. (Richie and McIntyre JJ. concurring), held that, notwithstanding that the legal relationship was not a true trust but a fiduciary duty, the appropriate measure of damages was trust damages. [*Canson* at para 16]

[255] The Supreme Court has since had more to say about the proprietary aspects of reserve interests and Aboriginal title. Generally, the Crown-Indigenous relationship has been found to support the application of equitable principles.

[256] In *Whitefish*, the Court of Appeal for Ontario referred to *Guerin* and then said, at paragraph 57:

> The Crown's fiduciary duty to our Aboriginal people is of overarching importance in this country. One way of recognizing its importance is to award equitable compensation for its breach. The remedy of equitable compensation best furthers the objectives of enforcement and deterrence. It signals the emphasis the court places on the Crown's ongoing obligation to honour its fiduciary duty and the need to deter future breaches.

[257] The Supreme Court has also made it clear that equitable compensation is an assessment, not a mathematical calculation: *Guerin* at para 47; see also *Whitefish* at para 90. The Supreme Court in *Guerin* noted that the trial judge, whose award the Court upheld, "acknowledged that this figure could not be mathematically documented but stated…that it was 'a considered reaction based on the evidence, the opinions, the arguments and, in the end, my conclusions of fact'" (para 47).

[258] In exercising the discretion of assessment, proportionality is a further consideration. In

Hodgkinson v Simms, [1994] 3 SCR 377, 1994 CarswellBC 438 (WL Can) [*Hodgkinson*], La Forest J. said:

> Put another way, equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour. On the contrary, where the common law has developed a measured and just principle in response to a particular kind of wrong, equity is flexible enough to borrow from the common law. As I noted in *Canson*, at pp. 587-88, this approach is in accordance with the fusion of law and equity that occurred near the turn of the century under the auspices of the old *Judicature Acts*; see also *M. (K.) v. M. (H.)*, *supra*, at p. 61. Thus, properly understood *Canson* stands for the proposition that courts should strive to treat similar wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded. As I stated in *Canson*, at p. 581:
>
> > *. . . barring different policy considerations underlying one action or the other*, I see no reason why the same basic claim, whether framed in terms of a common law action or an equitable remedy, should give rise to different levels of redress.
>
> In other words, the courts should look to the harm suffered from the breach of the given duty, and apply the appropriate remedy. [emphasis added; para 81]

[259] The underlying policies that guide the assessment of equitable compensation in this Claim include restitution (*Guerin* and *Canson*), reconciliation (*SCTA*, Preamble), deterrence (*Canson*), fairness, and proportionality (*Hodgkinson*). An implicit consideration is that when supervising the fiduciary relationship and fashioning the appropriate remedy, the remedy should reflect consistency with fiduciary loyalty and avoid perverse incentives.

[260] Regarding reconciliation, the Preamble of the *SCTA* states: "resolving specific claims will promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations". In *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 SCR 99 (QL), Abella J. recognized that reconciliation is a wide-reaching policy:

> The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the *Report of the Royal Commission on Aboriginal Peoples*, and the *Final Report of the Truth and Reconciliation Commission of Canada*, all indicate that reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal. [emphasis in original; para 37]

[261] Regarding deterrence, the specific events grounding this Claim belong to the early 20th century and the particular context of that time. Nevertheless, treaty relationships are ongoing. The

Indian Act remains in effect and Indian reserve interests continue to exist. Resolving disputes relating to past historical wrongs in a timely, reconciliatory, fair and proportionate way remains a matter of great importance to not only the Parties, but also other First Nations and Canada as the existence of this Tribunal attests.

[262] Underlying policies not only guide the identification of when equitable principles should apply to the remedy, but also provide the justification for continuing to maintain differences (*Canson* at para 3 quoted above). McLachlin J. referred to the "danger" of failing to observe the differences at paragraph 8:

> The danger of proceeding by analogy with tort law is that it may lead us to adopt answers which, however easy, may not be appropriate in the context of a breach of fiduciary duty. La Forest J. has avoided one such pitfall in indicating that compensation for a breach of fiduciary duty will not be limited by foreseeability, but what of other issues? For instance, the analogy with tort might suggest that presumptions which operate in favour of the injured party in a claim for a breach of fiduciary duty will no longer operate, for example, the presumption that trust funds will be put to the most profitable use.

[263] McLachlin J. summarized the distinct approach as follows:

> In summary, compensation is an equitable monetary remedy which is available when the equitable remedies of restitution and account are not appropriate. By analogy with restitution, it attempts to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff's lost opportunity. The plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight. Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach. The plaintiff will not be required to mitigate, as the term is used in law, but losses resulting from clearly unreasonable behaviour on the part of the plaintiff will be adjudged to flow from that behaviour, and not from the breach. Where the trustee's breach permits the wrongful or negligent acts of third parties, thus establishing a direct link between the breach and the loss, the resulting loss will be recoverable. Where there is no such link, the loss must be recovered from the third parties. [*Canson* at para 27]

[264] The flexible approach outlined by McLachlin J. retains scope for fiduciary settings that warrant it to be remedied with reference to trust principles, while truly similar wrongs may be remedied similarly. This was affirmed later in *Hodgkinson*, where underlying policies were again emphasized as the source for guidance when applying the general to the specific (*Hodgkinson* at para 81, quoted above).

[265] The above matters are all important considerations in fashioning an appropriate remedy in

the particular circumstances of this Claim. Notably, the breach of fiduciary duty with respect to treaty reserve land admitted in this Claim was one of ordinary prudence during administration, but in a context far removed from the fiduciary setting of *Canson*. The approach to remedy should reflect these features of the Claim.

B. Valuation of Loss in *Southwind*: Calculable and Non-quantifiable Losses

[266] In *Southwind v Canada*, 2017 FC 906 (QL) [*Southwind*], appeal heard by the Supreme Court of Canada, Zinn J. dealt with both calculable and non-quantifiable losses.

[267] Zinn J. determined the award of compensation in an action brought by the Lac Seul First Nation (LSFN) for equitable compensation against Canada for breach of fiduciary duties and obligations. The claim arose out of flooding of 11,304 acres of a reserve of the LSFN following the construction of a storage dam in 1929.

[268] Zinn J. addressed issues that arise in the present matter, including the question of bringing historical losses forward to present value. This included the appropriate rate of return and whether account is to be taken of consumption in fixing the 'bring forward' rate of return compounded annually.

[269] At paragraphs 443 and 444, Zinn J. categorized the losses sustained by the plaintiff in two categories; calculable and non-quantifiable. The former included:

> a. $14,582.16 in 1929 for the flowage easement over its Reserve lands;
>
> b. $34,917.33 in 1929 for timber dues; and
>
> c. $1,750,000.00 in 2008 for community infrastructure. [*Southwind* at para 443]

[270] It was the above figures plus historical values for lost land and timber (in 1943) that were brought forward by applying an annual rate, compounded annually, to yield the calculable loss figure (*Southwind* at paras 505–08). This, net of the current value of money that had been applied to the credit of the LSFN, formed part of the assessment of equitable compensation ($13,847,870.40), to which non-quantifiable losses were added to reach $30,000,000 (*Southwind* at paras 511–12).

[271] The non-quantifiable losses included:

1. Loss of livelihood both on and off-Reserve; and

2. Loss of easy shore access, damage to boats, and overall damage to the aesthetic of the lake shore due to the failure to remove the timber prior to flooding. [*Southwind* at para 444]

[272] Zinn J. included the 1929 value of the flooded land, timber dues, and the 2008 value of community infrastructure as calculable losses. The findings on calculable losses appear to be based on expert evidence from land appraisers and experts in infrastructure construction.

[273] The distinction between calculable losses and non-quantifiable losses as found in *Southwind* is, in relation to loss of use, blurred in the present matter. The DEMA Report sets out mathematical calculations of annual losses using numbers generated in an application of its methodology. The concluded annual losses are described as "estimates". These estimates included matters that were so difficult to quantify that they may, in some sense, be considered as being in part "non-quantifiable", while being pecuniary in nature. This feature of the evidence will be discussed further below as it figures in to how the assessment of compensation can appropriately balance the underlying policies.

C. Calculation and Assessment in the Trial Decision in *Guerin*

[274] In *Guerin et al v R* (1981), [1982] 2 FC 385, [1982] 2 CNLR 83 (FCTD) (QL) [*Guerin FC*], Collier J. did not calculate the remedy but instead assessed it. He stated:

> Even though damages may be difficult, or almost impossible of calculation, if a court is satisfied damage or loss has indeed been sustained, then a court must assess damages as best it can, even if it involves guess-work. [para 222]

[275] Trial judges faced with evidentiary difficulties must assess as best they can, in equity and at common law. Collier J. cited the Supreme Court of Canada decision in *Wood v Grand Valley Railway Co* (1915), 51 SCR 283, 1915 CarswellOnt 15 (WL Can), in support of assessment for damages. In that case, Davies J. stated:

> It was *clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs,* but it seems to me to be clearly laid down there by the learned judges that such an impossibility cannot "relieve the wrongdoer of the necessity of paying damages for his breach of contract" and that on the other hand the tribunal to estimate them whether jury or judge must under such circumstances do "the best it can" and its conclusion will not be set aside even if the amount of the verdict is a matter of

> guess work. [emphasis added; *Guerin FC* at para 224, citing *Wood v Grand Valley Railway Co* (1915), 51 SCR 283 at 289]

[276] The above discussion of DEMA's methodologies positions the present Claim in the category of "clearly impossible under the facts of that case to estimate with anything approaching to mathematical accuracy the damages sustained by the plaintiffs".

[277] In *Guerin*, the Supreme Court confirmed both the approach taken to assessment of damages by Collier J. and the quantum awarded (vide Dickson J. for the majority at paras 75, 117, Wilson J. in a minority concurring judgment at paras 47–57, and Estey J., concurring in the result at para 128). Wilson J. found no error in principle in the learned trial judge approaching the matter as a lost opportunity for residential development (para 53). She would not have interfered with the quantum of the trial judge's award (para 54). She described the approach taken by Collier J. as follows:

> Based then on the possibility that this type of development might have taken place on the 162 acres and applying the anticipated return from such development against the return from the golf club lease, the learned trial judge came up with a global assessment of $10 million. He acknowledged that this figure could not be mathematically documented but stated, at p. 441, that it was "a considered reaction based on the evidence, the opinions, the arguments and, in the end, my conclusions of fact". However, he did go on to set out the various factors and contingencies that he had taken into account in reaching his assessment. He did not allocate percentages to these contingencies.
>
> It seems to me that what the trial judge was doing once he rejected the value of a golf club lease (either the one the Band authorized or one which could be described objectively as "fair") as the value against which the Band's loss was to be measured was to put a value as of the date of trial on the Band's lost opportunity to develop the land for residential purposes and assess the Band's damages in terms of the difference between that figure and the value of the golf club lease. [paras 47–48]

[278] Wilson J. held at paragraph 50 of *Guerin* that damages were to be assessed on the basis of the principles stated by Mr. Justice Street in in the Australian case of *Re Dawson: Union Fidelity Trustee Co v Perpetual Trustee Co* (1966), 84 WN (Pt 1) (NSW) 399, at 406:

> …in equity a defaulting trustee must make good the loss by restoring to the estate the assets of which he deprived it notwithstanding that market values may have increased in the meantime. The obligation to restore to the estate the assets of which he deprived it necessarily connotes that, where a monetary compensation is to be paid in lieu of restoring assets, that compensation is to be assessed by reference to the value of the assets at the date of restoration and not at the date of deprivation.

[279] As will be discussed further below, the DEMA Report sets out estimates of annual losses for each of the Proxy Models and the Leasing Model. While these are the product of mathematical calculations, their foundation is in methodologies that apply diverse data sets and their application within the several models. Their approach to valuation is unlike a land appraisal in the present day in which, on the basis of readily available data describing truly similar comparators, and with the application of well-defined and widely accepted professional standards, experts produce opinions of the value of the subject lands.

[280] DEMA's "estimates" of the annual financial losses from the foregone opportunity for leasing provide a base against which contingencies may be applied in the somewhat subjective exercise of assessment.

D. Most Advantageous (Favourable) Use

[281] In *Guerin*, the Supreme Court assessed compensation at the date of trial. The evidence indicated that the contemplated land use (leasing for a golf course) was not the most advantageous. In discussing how to approach the gap between the date of breach and the date of trial, Wilson J. affirmed that the wronged beneficiary had the benefit of unforeseeable market changes in land value, and the presumption of most advantageous use applied when considering the opportunity lost to the Musqueam Indian Band. Wilson J. stated that in equity, it is presumed that the claimant would have used the lost asset in the most advantageous way possible during the period of the loss:

> The lost opportunity to develop the land for a period of up to seventy-five years in duration is to be compensated as at the date of trial notwithstanding that market values may have increased since the date of breach. The beneficiary gets the benefit of any such increase. It seems to me that there is no merit in the Crown's submission that "if a trustee is under a duty to alienate land by lease or otherwise, the date to assess compensation for breach of that duty is the date when the alienation should have taken place not the date of trial or judgment". Since the lease that was authorized by the Band was impossible to obtain, the Crown's breach of duty in this case was not in failing to lease the land, but in leasing it when it could not lease it on the terms approved by the Band. The Band was thereby deprived of its land and any use to which it might have wanted to put it. Just as it is to be presumed that a beneficiary would have wished to sell his securities at the highest price available during the period they were wrongfully withheld from him by the trustee (see McNeil v. Fultz (1906), 38 S.C.R. 198,) so also it should be presumed that the Band would have wished to develop its land in the most advantageous way possible during the period covered by the unauthorized lease. …In contract it would have been necessary for the Band to prove that it would have developed the land; in equity a presumption is made to that effect. [para 52]

[282] In this Claim, as in *Guerin* and *Southwind*, the application of the principle of most advantageous use is central to the dispute between the Parties. Zinn J. discussed this principle in *Southwind*. At paragraph 239 in *Southwind*, Zinn J. set out "four presumptions relevant to the assessment of equitable compensation". It is the first, namely that "the plaintiff is entitled to have compensation assessed as if he would have made the most favourable use of property", that grounded the principal claim of the LSFN to rent or royalties, which the LSFN argued flowed from the wrongful taking of their reserve land for hydroelectric storage.

[283] Zinn J. noted that:

> The first presumption was reiterated and applied in *Guerin v Canada*, [1982] 2 FC 385 (TD) [*Guerin FC*], *Whitefish*, and *Beardy's & Okemasis Band #96 and #97* [*v Her Majesty the Queen in Right of Canada*], 2016 SCTC 15 [*Beardy's*]. [*Southwind* at para 240]

[284] *Beardy's* and *Whitefish* dealt with specific money that ought to have been received in the past (treaty annuities and timber rights sold for an inadequate sum, respectively). *Guerin* dealt with foregone leasing income over many years. After a discussion of the referenced authorities, Zinn J. blended these into the following:

> All three judgments may be summarized as holding that where there is a breach, the beneficiary is entitled to recover (1) the sum that it ought to have received at the time but for the breach [if a sum was due at the time], and (2) the foregone opportunity to use that trust property or the funds it ought to have received in the most advantageous manner. [*Southwind* at para 244]

[285] To be clear, Zinn J.'s statement at paragraph 244, point (1), should not be understood as meaning that the beneficiary's loss is always first assessed at the time of breach, plus a form of present valuation to achieve assessment as of the trial date. Rather, in considering the lost opportunity being remedied, the practical steps of application may, depending on the breach in issue, require looking at a single historical sum or multiple foregone revenues, plus the foregone opportunity to use the funds advantageously. For example, in *Beardy's*, specific annuities were known to have been withheld. In a lawful taking of an entire interest in land for below value, the lost opportunity may involve not having received the proper value at the time and then, not having the use of those funds over the years. In contrast, *Guerin* and *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14 [*Huu-Ay-Aht*] involved assessing foregone leasing and timber revenues, respectively, over many years. The fiduciary breach and harm

suffered in each case led to differences in remedy, and different circumstances may require another approach again. Equitable compensation is a flexible remedy.

[286] Zinn J. summarized the source and content of Crown duties to the LSFN:

> The legal duties of the Crown vis-à-vis the LSFN in 1929 were governed by the provisions of Treaty 3, the *Indian Act*, RS 1927, c 84, and those otherwise imposed, as discussed above. In summary, Canada's duties were: (1) to act with loyalty and good faith to the LSFN in discharging its mandate; (2) to provide full disclosure and consult with the LSFN; (3) to act with ordinary prudence with a view to the best interest of the LSFN; and (4) to protect and preserve the band's proprietary interest in its Reserve from exploitation. [*Southwind* at para 296]

[287] Like duties were owed to the Claimant in the present matter. The Crown has, in the present matter, admitted liability. The record reveals that members of the Mosquito Band were permitted to vote on the 1905 surrender of the Grizzly Bear's Head and Lean Man Bands' reserves 110/111. This breached the surrender provisions of the *Indian Act*.

[288] The apparent breach was of the fiduciary duty to act with ordinary prudence in the best interests of the Lean Man and Grizzly Bear's Head Bands. As stated in *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344, 1995 CarswellNat 1278 (WL Can):

> The duty on the Crown as fiduciary was "that of a man of ordinary prudence in managing his own affairs": *Fales v. Canada Permanent Trust Co*....
>
> …
>
> Where a party is granted power over another's interests, and where the other party is correspondingly deprived of power over them, or is "vulnerable", then the party possessing the power is under a fiduciary obligation to exercise it in the best interests of the other: *Frame v. Smith*, *supra*, *per* Wilson J.; and *Hodgkinson v. Simms*, *supra*. [paras 104, 115]

[289] In the circumstances of this Claim, an unlawful surrender of reserve land, the Respondent has agreed that equitable compensation is appropriate. This is consistent with the statutory instruction for consistency with principles of compensation applied by courts that is found in paragraphs 20(1)(c) and (h) of the *SCTA*:

> **20 (1)** The Tribunal, in making a decision on the issue of compensation for a specific claim,
>
> …

> **(c)** shall, subject to this Act, award compensation for losses in relation to the claim that it considers just, based on the principles of compensation applied by the courts;
>
> …
>
> **(h)** shall award compensation equal to the value of the loss of use of a claimant's lands brought forward to the current value of the loss, in accordance with legal principles applied by the courts, if the claimant establishes the loss of use of the lands referred to in paragraph (g);…

[290] It is thus common ground that paragraph 20(1)(h) applies in this Claim and provides for compensation for the foregone opportunity to use the trust property.

[291] Equitable compensation is a remedy applied by the courts. The principles call for an assessment based on most advantageous use.

[292] It follows that the Claimant would be entitled, if the Tribunal is not otherwise directed by the *SCTA*, on the application of principles of equitable compensation, to recover for the foregone opportunity to use the land wrongfully surrendered from 1905 to the present in the most advantageous manner, and this lost opportunity includes the foregone opportunity to benefit from revenues related to that use.

[293] The *SCTA* further directs the Tribunal to determine compensation for an unlawful surrender based on the CUMV:

> **20 (1) (g)** shall award compensation equal to the current, unimproved market value of the lands that are the subject of the claim, if the claimant establishes that those lands were never lawfully surrendered, or otherwise taken under legal authority;…

[294] This amount, additional to the LOU since the breach, compensates the Claimant for not having the land from now into the future. The Claimant does not claim compensation based on the value of the Claim Lands at the time of the taking. It relies on paragraph 20(1)(g) to claim compensation based on current market value. This is a calculable loss, as it is based on market value and the evidence to evaluate it is readily available. The factors that affect market value are established by precedent and applied by land appraisers in compliance with well-established professional standards.

E. Realistic Contingencies

[295] In *Guerin FC*, Collier J. considered "realistic contingencies", or factors that could have

either negatively or positively impacted the band's ability to earn revenue on the lost land had the band kept the land. Hindsight can be used in considering applicable realistic contingencies. On the facts in *Guerin*, realistic contingencies included the possibility that the golf club would have decided to terminate the lease, the "astonishing increase in land values, inflation, and interest rates since 1958", and the timing of the hypothesized development of the land (para 228). These and other factors could increase or decrease the value of the LOU of the land. Collier J. did not attempt to quantify these factors, but explained that he "had in mind" these contingencies in his assessment of the remedy (para 228).

[296] In *Southwind*, Zinn J. reviewed the approach taken by Collier J. and described the determination of compensation as a process of "assessment and judgment" (para 465). Zinn J. stated that:

> …the Court must take into account any realistic contingencies (positive or negative) that, with the benefit of hindsight, may be present, and in so doing adjust any calculation that might otherwise be employed. [para 465]

[297] Zinn J. describes Collier J.'s description of "realistic contingencies" in *Guerin FC* as contingencies that "relate to the band's land, its development, or its lease options, and the other contingencies he considers relate to the 'investment return' on the monies the band would have received from the use to which the land was put" (*Southwind* at para 466).

[298] In *Lower Kootenay Indian Band v Canada* (1991), [1992] 2 CNLR 54 (*sub nom Luke v R*), 42 FTR 241 (FCTD), 1991 CarswellNat 226 (WL Can), Dubé J. of the Federal Court, Trial Division, considered what can be described as "realistic contingencies" in the context of assessing the award payable to the plaintiffs for lost revenue from the surrender of reserve land. The Court accepted expert evidence indicating the following points (among others): (1) that market rents would rise in the same general pattern as the CPI (a positive contingency); (2) that the plaintiffs would have been "able to either rent or utilize the land themselves (the measure of this benefit is the market rental value of the land less appropriate deductions)"; and, (3) that 20% of market rent should be deducted for costs that the plaintiffs would incur in maintaining infrastructure for the rented lands (a negative contingency), although Dubé J. does not use the language of "contingencies" in the decision (para 268–69).

F. "Consumption" and Hypotheses About How the Claimant Likely Would Have Used Foregone Revenues, Had They Been Received

[299] Unlike in *Southwind* and *Huu-Ay-Aht*, the Respondent did not argue that the Claimant's spending patterns ought to be analysed for consumption, savings, and investment patterns and that proportional amounts ought to be treated in particular ways during present valuation. Nevertheless, the general idea that had the Claimant received the assessed historical losses (whatever they may be), the Claimant would have consumed a very significant share of them, was brought up by the Respondent to support the reasonableness of Dr. Johnson's approach to present valuation.

[300] Zinn J. explains that none of the contingencies considered by Collier J. "relate in any way to how the band might have spent the money had it received it in the first place" (*Southwind* at para 466). Zinn J. concludes that "that is not a contingency in my view that requires consideration at law".

[301] Zinn J. noted that in *Huu-Ay-Aht*, Whalen J. found that in determining the quantum of equitable compensation on the evidence before him, it made little difference whether the funds would have been saved, invested or "consumed". All would have been for the benefit of Huu-Ay-Aht First Nations, and all were foregone. Equitable compensation has as its purpose restitution for a lost opportunity, and to fail to remedy the entire lost opportunity would be unfair:

> …[Whalen J.] found that equitable compensation should remedy the lost opportunities that flow from the particular breaches in question noting that in *Canson*, Justice McLachlin stated that equitable compensation "attempts to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff's lost opportunity."
>
> Justice Whalen found that the band had powers and obligations set out in the *Indian Act*, including decisions to save or spend the monies in trust accounts. While the Band Council made decisions to spend money on schools, roads, bridges, etc., it also made decisions regarding transfers to individual members for consumption as well as other expenditures characterized by the expert witnesses as consumption. The Tribunal held that it made little difference whether the funds were earmarked for consumption or infrastructure -- both categories of expenditure were for the benefit and progress of the band. It further held that not recognizing consumption as an important element of the overall lost opportunity would be unfair.
>
> Justice Whalen accepted Professor Hosios' view that consumption may have great impact but short "shelf life". The unpaid funds would have been spent on food, medicine and other non-durables that would have had a significant impact on the well-being of individual band members and therefore also on the collective. [*Southwind* at paras 275–77]

[302] In *Beardy's*, the Tribunal emphasized that equitable compensation should be assessed without regard to whether the First Nation would have spent the money:

> The factor of most advantageous use operates from the time of the loss until the time of recoupment. It guides the assessment of compensation for the loss. It has nothing to do with what the beneficiary would likely have done with the asset, money, if it was in hand. [para 151]

[303] Zinn J. also commented on the time, expense and complexity of pursuing expert reports hypothesizing and tabulating claimants' probable behaviour. He expressed agreement at paragraph 463 of *Southwind* with Whalen J.'s comment at paragraph 275 of *Huu-Ay-Aht*:

> I must say, however, that the approach used here leads to great expenditure of time and money. It is very complicated. I am concerned that it also complicates the Specific Claims resolution process, and makes First Nations' access to justice more difficult. I doubt that Justice Laskin foresaw the process that would unfold in the present case, and that may be repeated in other cases.

[304] Zinn J. concluded the analysis stating that "this need not, and should not, be complicated, time consuming or expensive", and reiterated the statement in *Whitefish* that "compensation is assessed, not calculated" (emphasis added in *Southwind*; *Southwind* at para 465, citing *Whitefish* at para 90). In the end, Zinn J. adopted the approach of Mr. Lazar and Mr. Prisman, applying the BTA rate to the entire amounts of the assessed nominal losses (*Southwind* at para 482). Zinn J. concluded that this approach had fewer assumptions, and:

> …a less complex approach saves litigants, the Crown, and the Court significant time, and in particular helps ensure that those who have been wronged are not put to unnecessary trouble to quantify the exact nature and value of their wrong. Obviously a balance must be struck between accuracy and the burden we place on plaintiffs to prove the specific of their case. Moreover, in cases such as this that involve historic wrongs, often one cannot assess equitable compensation with mathematical certainty. [*Southwind* at para 496]

[305] This concern with respect to litigation efficiency and access to justice is engaged by the present Claim and others before the Tribunal.

G. Assessment of Foregone Revenues: Application of the Principle of Most Advantageous Use and Related Factors and Contingencies

[306] The approach to remedy must uphold the underlying policies at work. These include restitution, deterrence, reconciliation, fairness and proportionality.

[307] The Parties agree that the most advantageous use of the trust property between 1905 and

2020 was for agricultural purposes, but that does not end the question of what use is being assessed: Is it highest and best use of the land that is financially feasible and legally permissible (Claimant's position, Altus Report I at 26) or the use the Claimant would, most probably, have carried out given the opportunity to retain the land (Respondent's position, Respondent's MOFL at paras 47, 58)?

[308] In a claim such as this, *Guerin* instructs that the Claimant is entitled to the presumption that it would have put the land to its most advantageous use. The Claimant need not prove that it would have. *Guerin* is also clear that the most advantageous use available is not the most advantageous use imaginable. The statutory framework under the *Indian Act* would have applied. The land's character and local markets had undeniable features. While equity may in some circumstances of insufficient evidence favour the wronged, other underlying policies must also be observed. As occurred in *Guerin*, some matters with large degrees of uncertainty can only be treated as "global" amounts.

[309] With these points in mind, I have rejected both DEMA Proxy Models as inadequate to serve as the foundation of the findings on the monetary value of the historical LOU. As will be explained, the Proxy (RNI) Model has some utility alongside the Leasing Model for roughly scoping some aspects of the compensation that must, in the circumstances, be awarded on a global basis. Proxy models of various kinds may be useful for negotiators, but given the limitations of DEMA's Generic Proxy (6.3%) and Proxy (RNI) Models, these Models are insufficiently grounded in the evidence of value by any known means of precise measurement to be used as the foundation for a judicial determination. I must look to the Leasing Model for the foundation of the award, as the evidence is simply insufficient to consider what revenues might have been generated had the Claimant had the opportunity to farm the entirety of the land themselves throughout the period of loss.

XIV. ASSESSMENT BASED ON LEASING MODEL

A. Application of Leasing Model

[310] This leaves the Leasing Model from the DEMA Report. As DEMA did not provide values for the Owner-Operator Model, and given the *Indian Act*, leasing would have been the only possible approach to commercial farming within the statutory framework.

[311] The premise of the Leasing Model is that the Claim Lands (excluding roadways) would be fully leased for the entire period of the loss, from 1905 to 2020. Of the total, 10,440 acres were considered suitable for crops. DEMA assumed that 73.1% of the unimproved Claim Lands was used for grazing purposes, and the remaining 26.9% of the unimproved Claim Lands is assumed to encompass those areas not used for agriculture (DEMA Report at para I.8). The full use of the 10,440 acres for crops would be achieved in 1996. The ratio of cropland to grazing land would change over the period of the loss. For the period of the loss, 30% of farmland in the RMs of Buffalo and Battle River was leased. For all of Saskatchewan, 30 to 40% of farmland was leased. This, however, does not mean that the entirety of the Saskatchewan farmland base was in farm use, whether for crops or grazing, for the entire period of loss. DEMA assumes that the entirety of the Claim Lands would, for almost the entire loss period, be taken up by leasing. DEMA makes no reference to data that would establish a strong market for leasehold land for grazing in the early to middle years of the loss period.

[312] The stated premise of DEMA's Leasing Model is that the Claim Lands would be developed by lessees for crops at the same rate as all farmland in the RMs of Buffalo and Battle River (DEMA Report at 50). DEMA does not express an opinion, but rather infers from data for all of Saskatchewan that 22.5 sections of farmland that came on the market in 1905 for lease would have been developed for crops at the same pace as freehold land.

[313] The average size of farms in the RMs of Buffalo and Battle River in 1921 was 371 acres. In 2016 the average farm size for the two RMs was 1,598 acres.

[314] As noted by Serecon, settlers arriving in the early 1900s would have been concerned with breaking the farmland they purchased and laying in crops.

[315] The logistics of farming would obviously favour leasing of land adjacent to owned land under cultivation. There is no evidence to establish when the expansion of family farms by leasing locally available farmland took hold in the vicinity of the Claim Lands, or the pace at which this developed over time.

[316] DEMA reports that throughout the period of loss, 30% of farmland in the RMs of Buffalo and Battle River was leased, and 30 to 40% for all of Saskatchewan. The proposition that the

entirety of the Claim Lands that are suitable for cultivation or grazing would be taken up with leasing suggests a local concentration of leasing that distorts the ratio for the RMs and for Saskatchewan.

[317] There is no evidence of farming entirely on leased land. The gradual increase in average farm size suggests that growth in the size of farms has been incremental through acquisition of neighbouring properties and leasing. I infer this from the evidence of Alana Kelbert, who spoke of handshake leasing deals made between owners of adjacent farms.

[318] The Claim Lands is bordered to the east by reserve land of the Claimant, and to the north, south and west by freehold agricultural land. Over the claim period there has been very little agricultural development within the remaining reserve land. Over the claim period, farming progressed on adjacent freehold land. If the growth of farm size in Saskatchewan is representative of that which occurred in the RM of Buffalo, which includes the Claim Lands, the average farm size in 2016 is about 1,600 acres. If 30% of farmed land is leased, and the overall ratio of 70% freehold to 30% leasehold also applies, it would at present require 13 farms of 1,600 acres, of an average of 70% owned to 30% leased, adjacent or in reasonable proximity to the north, west and south perimeters of the Claim Lands to take up the entirety of the Claim Lands based on leasing. As the size of farms steadily increased from 371 acres to up to 1,600 over the claim period, with consequential changes in the number of farms in operation from time to time, the business model of leasing of parcels of land within the Claim Lands would have been complex to administer.

[319] The adjacent reserve land is suitable for agricultural use but is only marginally less so than the Claim Lands. The DEMA Report provides evidence of only seven leases of reserve land, on the portion of IRs 110/111 that was not surrendered. These occurred between 1940 and 1970. No evidence of subsequent leasing has been provided. Notwithstanding the average ratio of owned to leased land in Saskatchewan as a whole, and in the RMs of Buffalo and Battle River, the evidence of leasing activity in the vicinity of the Claim Lands does not suggest a strong demand for leasehold land throughout the period of loss. Given the length of time involved, this is a significant contingency.

[320] The unfamiliarity of available reserve land tenures and Crown administration of the land could be factors as well. However, the fact that the Claim Lands would, in the Claimant's scenarios

of loss, have attributes that enhance the value and thus increase the loss means that any negative attributes in the marketplace should be taken into account as well. As the Respondent has neither produced evidence of the latter nor argued that the reserve status of the land is a negative contingency, fairness dictates that the lack of evidence of an active leasing market for comparable land proximate to the Claim Lands be considered generally indicative of limited local demand for leasehold land for agriculture.

[321] DEMA estimates that 205 acres of the land would be dedicated to developed road allowances. There is, however, no attribution of the cost of developing internal roads, connections to provincial or local roads, or costs associated with bringing other services to the land. There is no attribution of cost for the maintenance of infrastructure as needed to operate a 14,670-acre parcel of land based on leasing, or annual expenses incurred in managing a leasehold business over a long period of time in which farm size and farming practices have undergone much change.

[322] Regarding crop mix (and thus the potential returns), Serecon also raises a question over the comparability of the crop mix used by DEMA to the crop mix attributed to the Claim Lands. The former are the basis for the net revenue estimates that DEMA applies to estimate net revenue from leasing based on a percentage of crop share to the lessee. These considerations speak to factors and uncertainties that feed into DEMA's leasing estimate and are relevant to characterization of the foregone use. Over a long historical period, any over-estimates would be magnified during present valuation. Such factors and contingencies must be considered when assessing a fair and proportionate remedy.

[323] The Respondent submits that the application of principles of equitable compensation would support an assessment and award of $100,000,000. This figure is advanced as the sum of the annual losses adjusted to bring historical losses to current value, added to the CUMV of the Claim Lands, less the amounts received by the Crown to the credit of the First Nation (Respondent's MOFL at para 16).

[324] The Respondent has not provided a detailed analysis of the evidence in support of its view of a fair and restitutionary compensation award.

[325] Schedule D, Column L, of the DEMA Report, sets out its estimates of the annual, historical,

LOU value based on leasing (Exhibit 57, Amended Schedule D, provided by Ms. Kelbert at the March 13, 2020 hearing). DEMA's estimates assist the task of assessment of compensation on the application of the relevant equitable principles. Although these are not derived from evidence particular to the Claim Lands, these assist as a starting point against which the application of contingencies may be considered.

[326] I emphasize once again that DEMA's annual loss numbers are estimates. These are based on data that are not derived from the actual development for agriculture of the Claim Lands. They do not, therefore, represent calculated losses.

[327] The evidence offers no basis on which precise percentage adjustments for negative contingencies may be applied to the estimates. It is, however, necessary to make adjustments as account must be taken of contingencies. Equity calls for an assessment based on consideration of the entirety of the evidence. Adjustments for contingencies are part of the assessment.

B. Other Loss of Use

[328] The evidence of Dr. Martin McGuire and Dr. Whitehouse-Strong is that the Claimant was turning to agriculture and raising livestock in the years prior to the 1905 surrender.

[329] Dr. Martin McGuire observes that in the years leading to 1905, the Claimant had "some success in raising livestock and root crops for food, and selling hay, wood and other resources for cash" (Martin McGuire Report at 4).

[330] In early 1902, Agent Day reported that while the Claimant's reserves "were suitable for raising cattle and growing barley and oats, the possibility of summer frosts meant that they were less well-suited to growing wheat" (Whitehouse-Strong Report at 25). Dr. Whitehouse-Strong goes on to say that hay and wood sales were "significant sources of income" for the Claimant, although he also notes that they did "not do much arable farming" (Whitehouse-Strong Report at 25; Joint Book of Documents (JBD), Vol 6, Tabs JB-00194, JB-00208). In 1903, Agent Day reported that "[f]arming has come to be considered a failure here, even coarse grains not being grown with success" (Whitehouse-Strong Report at 25; see also Martin McGuire Report at 43; JBD, Vol 6, Tabs JB-00206, JB-00210). Day did report in 1903 that "oats and barley appear to do well here", and that "[t]here is an abundance of hay and water, which makes it splendid for raising stock"

(Whitehouse-Strong Report at 25; JBD, Vol 6, Tabs JB-00205, JB-00211).

[331] In 1904, Day reported that the Claimant did "not go in extensively for agriculture", but the land was "well adapted for cultivation" and "grazing and stock raising" (JBD, Vol 6, Tab JB-00215). He noted that "[t]he cattle of this reserve are the fattest in the agency" (Martin McGuire Report at 44; JBD, Vol 6, Tab JB-00214). He noted that a pasture field was planned and later set up to help better control the herd and increase its size (Whitehouse-Strong Report at 26). Dr. Martin McGuire noted that in 1904, "the bands got smaller, as did the cattle herds and the area under crop" (Martin McGuire Report at 44). However, in 1905, "farming prospects seemed a bit brighter; herds were increasing, slightly" (Martin McGuire Report at 44). The bands sold wood and hay.

[332] The application of the Leasing Model, as found, would not result in the entirety of the Claim Lands being put to agricultural use. Offering the land for lease would not, assuming the land was conditionally surrendered for leasing, preclude the Claimant community from using portions of the land for crops.

[333] There is sufficient evidence for a finding that the Claimant could have continued to use any unleased lands in the Claim Lands to raise livestock, sell hay, and grow barley and oats but for the surrender. Allowing for notional use of land which, based on the Leasing Model, would remain unleased takes into account the lost opportunity for the use of the entirety of the Claim Lands for sustenance of the community.

[334] Some value should be attributed to the 'unleased' acreage within the Claim Lands as part of a "global" assessment of compensation, although not quantifiable. Assessment can sometimes involve guesswork (*Guerin FC* at para 222).

C. Assessment of Applied Contingencies

[335] As the *SCTA* requires that historical losses be brought forward to present value a way must be found to assign values to the losses. Calculation of percentages for contingencies is not possible given the limits of the evidence. The percentage values set out below are estimates. They include an unquantified allowance for the likelihood that Claim Lands in excess of those having leasing potential could have been put to use for the direct needs of the Claimant community through agricultural production. Overall, I consider the adjustments for contingencies to be conservative,

and thus to favour the Claimant.

[336] DEMA estimates the annual nominal losses for each year from 1905 to 2020. To assess global values for the losses, I have applied the following percentages to DEMA's estimates for the periods set out below:

1. 1905–1910: 8%
2. 1911–1915: 23%
3. 1916–1925: 33%
4. 1926–1940: 38%
5. 1941–1960: 43%
6. 1961–1970: 53%
7. 1971–1995: 63%
8. 1996–2005: 70%
9. 2006–2019: 75%

D. Bring Forward to Present Value

[337] The objectives of the principles of equitable compensation include restitution, deterrence, reconciliation, fairness, and proportionality. Compensation is assessed at the time of trial, not the date of the breach. Therefore, the assessment is of the loss at present, with all losses represented by a single award.

[338] Consistent with assessment as of the date of trial, losses are assessed with hindsight. Losses which were caused by the breach based on a common sense view of causation will be compensable. The common law principles of causation, foreseeability and remoteness do not readily apply in equitable compensation cases (*Canson* at para 20 per McLachlin J.).

[339] There is a common sense connection between the LOU of the land and the loss of revenue

that may have been paid into the Claimant's coffers if the land had been leased out to farmers. The common sense connection extends in a general way to present valuation of the loss, in keeping with assessment at date of judgment and the restitutionary character of the remedy. But on what terms should the value be brought forward?

[340] The *SCTA* also directs the Tribunal to bring historical losses forward to current value. However, the *SCTA* does not direct that the Tribunal must approach the task by assigning annual losses (including associated contingencies) for each specific year with an eye for detail that goes to cents on the dollar as a first step, then making a finding on the rate of return for each year, and then adding up the results mathematically. The historical losses at current value can be assessed and presented by the award of compensation in the sum of money the Tribunal considers adequate to achieve restitution for the entire loss as at the date of the decision following trial. The final figure, expressed in today's dollars, is achieved by assessment.

[341] The Claimant contends for the application of the principle of most advantageous use to bring forward DEMA's estimated annual losses due to the foregone opportunity to lease out parcels of the Claim Lands.

[342] The Claimant argues that the return on the money based on contemporary practices of a "prudent investor" represents the most advantageous use, and thus is the measure to be applied in assessing the loss to the Claimant (Claimant's amended MOFL at para 165). As an alternative, the Claimant also presented evidence based on present valuation using the BTA rates, applied to the entire amount of the hypothesized foregone revenues. The practice of the Crown over the entire period of loss was to compound the interest paid on funds on deposit in the BTA at the rates and compounding intervals set by Order in Council.

[343] To advance the "prudent investor" approach, the Claimant seeks to treat the "trust assets" as both the land and the money that, based on DEMA's estimates, could have gone to the Claimant had it retained the land. The Claimant says the Respondent would be responsible for investing the money in the hypothetical scenario, because trustees at common law have a duty to invest prudently, trustees in non-breach scenarios are presumed to act according to their duties, and "but for" the *Indian Act*, this duty to invest would apply.

[344] The Claimant agreed that if money had in fact been received, it would have gone into the Claimant's trust account, but it did not receive the money. The Claimant submitted that the Respondent therefore had a duty to invest the moneys as would a trustee, and that the standard of care required of a trustee is that of what a "man of ordinary prudence in managing his own affairs" would do (Claimant's amended MOFL at para 167, citing *Fales v Canada Permanent Trust Co* (1976), [1977] 2 SCR 302 (SCC) at 315).

[345] In the Respondent's view the question is not "what is an appropriate rate of return for present valuation" but "what would have happened to the income if it had been received" (Respondent's MOFL at para 105)? The Respondent argued that it should be assumed the money would be used for the benefit of the Claimant, based on its needs and goals. However, the Respondent said a close analysis of the Claimant's spending and investment patterns through the period is not the way to approximate this. Rather the fairest approach overall is to bring forward the hypothesized revenues using multipliers based on the percentage growth in GDP per capita over the period of loss, such that the Claimant would be restored on terms akin to the growth in economic wellbeing enjoyed by the average Canadian (Respondent's MOFL at para 84; Johnson Report at para 7.28).

[346] The Respondent acknowledged that this is a global way forward for assessment rather than an approach directly connected to the Claimant's actual history or a particular investment rate of return for the assessed historical losses. A Canadian average for spending, investing, and consuming, is instead globally captured. This approach would accord the Claimant a measure of the economic benefits received by the general population since 1905, would remove the need for "arbitrary assumptions" about how the Claimant would have used the funds if it had had the opportunity, incorporates "realistic contingencies" in a broad and general way, and overall, the approach "strikes the right balance" (Respondent's MOFL at paras 94–97).

[347] Both Parties say that some rate of return should be applied to the full amount of the assessed foregone revenues as determined by the Tribunal. The Respondent acknowledged this and did not put in evidence of what the Claimant would most probably have done with the foregone revenues. Instead, the Respondent urges an assessment of present value based on the percentage change in GDP per capita, applied to the assessed historical losses.

[348] As discussed above, a clear thread in the case law on general principles articulated by the Supreme Court of Canada and applied by this Tribunal is the emphasis of the significance of the particular fiduciary relationship and breach, the "trust which is at its heart" (*Canson* at para 3), the restitutionary character of equitable compensation, and the necessity of fitting the remedy to the duty, breach, and harm suffered by the Claimant (summed in *Beardy's* at paras 79, 86–87).

[349] The Claimant need not prove what it most probably and realistically would have done with the foregone revenues, had it had the opportunity to receive them. Problems with this approach were reviewed in *Southwind*, discussed further below. Nor do the prudent investor scenarios provide a good fit. To the extent that precedents are available for present valuation in related circumstances, the precedents suggest a more straight forward approach is appropriate in all the circumstances of this Claim.

[350] The Claimant relies on the idea that the foregone revenues should be considered a "trust asset". Care is necessary with terminology.

[351] The Crown-Indigenous relationship in the present matter is not that of a trustee in possession of funds of the beneficiary. The breach was with respect to land. The question now is what loss flows from *that* breach.

[352] The central question is over the amount of compensation due in 2020 to restore to the Claimant the value of what was lost due to the breach in order to achieve a "fair and just result" (*Beardy's* at para 86). I have, based on the evidence, found that DEMA's Leasing Model supports a finding of most advantageous use. Counsel for the Claimant acknowledged in closing submissions that lease revenues would have been deposited to the Claimant's trust account with the Ministry's DIA. Interest on the annual balance held in trust would be earned at the rates fixed from time to time and be compounded annually going forward.

[353] The facts are not that the Crown actually received money which it mismanaged or withheld from the Claimant. The Claimant has drawn too close a parallel between that circumstance and the presumption that trustees will act in accordance with their duties.

[354] Fiduciaries can be held to a duty to invest in appropriate circumstances. The Claimant cites texts and cases from the financial management context involving trustees in possession and

discretionary control of funds under contractual and common law duties (*Fales v Canada Permanent Trust Co.* (1976), [1977] 2 SCR 302 (SCC) and a case involving a constructive trust (*Siemens v Bawolin*, 2002 SKCA 84, 2002 CarswellSask 448). These cases are clearly in the trust law context (*Fales* at 315); Lord Hailsham of St. Marylebone in *Halsbury's Laws of England*, 4th ed., vol 48 (London Butterworths, 1984); Donovan W. M. Waters, Mark Gillen & Lionel Smith, eds., *Waters' Law of Trusts in Canada*, 3d ed (Toronto: Thomson Carswell, 2005) at 941, all cited in the Claimant's amended MOFL at paras 167–69).

[355] The Claimant argues that the Respondent should be thought of as a constructive trustee of the money that is considered to be the Claimant's historical losses, by analogy to *Siemens v Bawolin*. The Claimant relies on Siemens as authority for an award that takes into account how a "prudent investor" would use her own funds for long term growth:

> 231 I conclude that Viola Siemens is entitled to compensation on the basis of what the funds in Kaspar Bawolin's control from time to time would have earned had they been appropriately invested, for her benefit.
>
> 232 In order to determine the loss of income resulting from Kaspar Bawolin's breach of duty, the plaintiff called Terri Lemke, investment advisor and vice-president of Nesbitt Burns. She was qualified as an expert witness to address the following questions:
>
> > (1) How would the reasonably prudent investment advisor have invested Viola Siemens' funds given her age, financial needs and the instructions that she wanted to invest in low-risk investments which would allow her to live off the investment income and not have to touch the principal amount?
> >
> > (2) If the funds were invested in such a manner, how much income would have been earned during the relevant time frame?
>
> [*Siemens v Bawolin*, 1999 CarswellSask 116 (WL Can) at paras 231–32, [1999] SJ No 121SK QB para 233, reversed in part on appeal *Siemens v Bawolin*, 2002 SKCA 84, 2002 CarswellSask 448]

[356] The remedy followed from the nature of both the relationship and the breach. It was held that:

> It was Bawolin's duty, with regard to all of the funds entrusted to him, to invest them for the benefit of Mrs. Siemens, not for his own business purposes. Instead, he misappropriated these funds for his own use, making some payments to Viola Siemens from time to time, as he saw fit. He is therefore accountable for the income these funds would have earned had they been so invested. [*Siemens v Bawolin*, 1999 CarswellSask 116 (WL Can) at para 165, [1999] SJ No 121]

[357] In that case, the fiduciary was a financial adviser and manager who was deemed to be a constructive trustee of Siemens' assets. However, the breach in this Claim is not that the Respondent improperly administered the Claimant's monies. The breach is with respect to land. *Siemens* is distinguishable.

[358] In Reply submissions, the Claimant also sought to make an analogy to a scenario in which the Crown would have in fact received money, kept it from the Claimant, perhaps benefited from the monies according to the Crown's own investment or borrowing practices, and so should be accountable in a way that is different from the BTA approach. But in this Claim, the hypothesized foregone revenues were never in fact in the hands of the fiduciary.

[359] The Claimant further argued that in fashioning the remedy at the present valuation stage, the potential rates of return should not be considered limited by the *Indian Act*.

[360] Crown duties in relation to moneys held in BTAs were considered by the Supreme Court in *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9, [2009] 1 SCR 222 (QL) [*Ermineskin*].

[361] There, it was argued that the Crown's fiduciary obligations required it to invest moneys held in a BTA, as would a prudent investor, in a diversified portfolio of stocks and bonds. The Supreme Court of Canada in *Ermineskin* did recognize a duty to invest, but further said that legislation can limit the duty:

> In my opinion, if the situation is such that the Crown is in the position of a fiduciary, although not strictly speaking a trustee at common law, and holds fund on behalf of the bands, it is not improper to ascribe to the Crown a duty to invest those funds in the manner of a common law trustee, subject to any legislation limiting its ability to do so. [para 73]

[362] The Supreme Court analyzed relevant sections of the *Financial Administration Act*, RSC 1985, c F-11 and the *Indian Act*. Paragraph 90(1)(b) of the *Financial Administration Act* was found to prohibit the acquisition of securities by the Crown unless authorized by an Act of Parliament (*Ermineskin* at para 98).

[363] Rothstein J. found, for the Supreme Court, that:

> The relevant applicable statute is the *Indian Act* because it is the statutory scheme governing the control and management of Indian moneys. It provides no authority for any expenditure or payment of Indian moneys other than for the purposes provided for in the Act. The *Indian Act* does not provide for investment. [*Ermineskin* at para 122]

[364] At all relevant times, the *Indian Act* applied to the Crown's management of the Claimant's funds. Recognition of this is consistent with the presumption that the fiduciary keeps up to its duties, since if any such funds had come into the control of the Crown, the Crown's duties would have existed within the statutory framework of the *Indian Act*, as described in *Ermineskin*.

[365] To say that the revenues could not be treated as if deposited in a BTA because these are equitable compensation proceedings, and estimates of foregone revenues are thus not "Indian moneys", misses the mark. If, in reality, the land had been surrendered for leasing the reality would also be that lease revenue would have been deposited in the BTA.

[366] Applying *Ermineskin* satisfies the requirement of paragraph 20(1)(h) of the S*CTA* that the Tribunal bring "forward to the current value of the loss, in accordance with legal principles applied by the courts".

[367] It is unnecessary to further consider whether estimates of foregone annual revenues from leasing are to be brought forward based on theories of how an investment manager must, or a "prudent investor" would manage the money found due to the Claimant in an assessment of compensation for breach of fiduciary duty.

[368] The BTA rate is, in the present circumstances, the upper limit to be applied to bring past losses to present value. The Respondent argues that a lower rate may be found to apply, and relies on the opinion of Dr. Johnson for GDP based multipliers to bring past losses to present value.

E. Further Components of a Restitutionary Approach to Adjustment to Present Value

[369] A determination in 2020 of compensation for a breach of fiduciary duty that occurred in 1905 brings into view the assessment of contingencies, including consideration of the compounding of estimation errors and uncertainties.

[370] Proportionality considerations may also be in play. On the one hand, the effects of

compounding over long periods of time must be noted. On the other hand, the significance of the lost use of revenues to the Claimant and the harm suffered as a result of delay in resolution and remedy for the breach established require due consideration.

1. Inflation

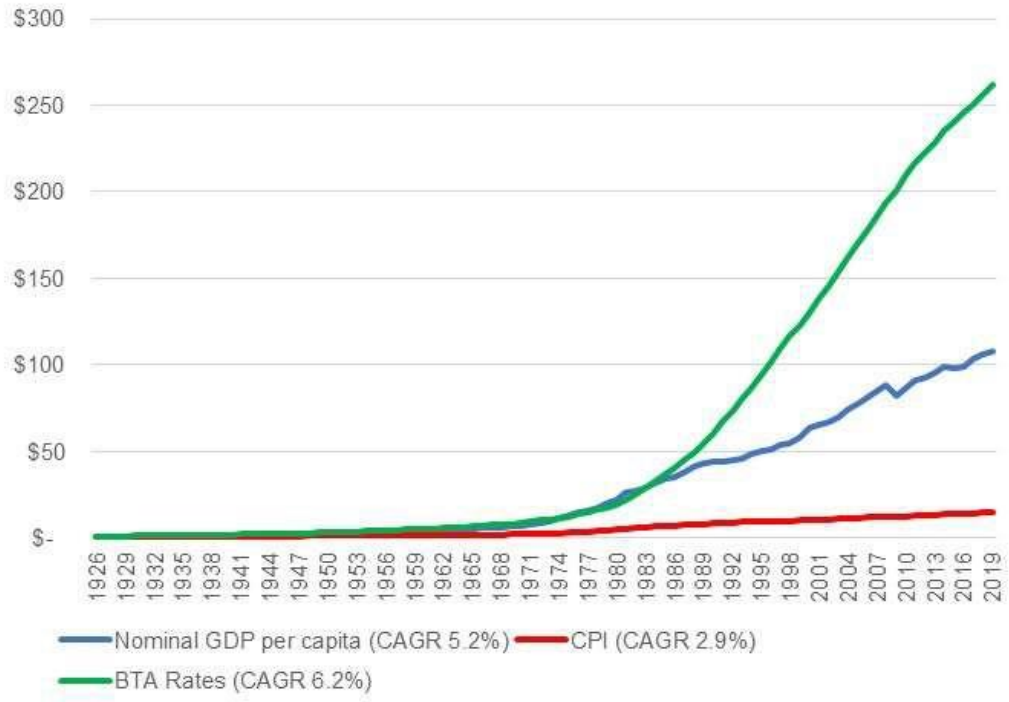
[371] Bringing past losses to present value must include an allowance for inflation; this can be determined by changes in the CPI. Adjustment for CPI does not, however, compensate for the loss of the ability to enjoy the use the money at the time it should have been received. It only replicates the spending power at present of the dollar that was not received in the past. The loss of the benefit of the use of the money is compensated for by the difference between CPI and whatever rate of return is selected.

2. Consumption in the GDP Model

[372] The idea that the rate of return on foregone revenue should not include that portion which, if received in the past would most likely have been consumed, was in issue in *Huu-Ay-Aht*, *Beardy's* and *Southwind*. It was rejected in all three decisions, in essence on the ground that, as the money had not been received, the claimant was deprived of the opportunity to make any choice to use the land or treaty annuity and enjoy the benefits. The inefficiencies and complexities of the methodologies in those cases were also drawbacks.

[373] The Respondent has not argued for a consumption based adjustment to determine the net rate of return in the present matter. Reliance is placed on the GDP adjustment model as explained in the expert report of Dr. Johnson. There, consumption is counted as a contributor to GDP. Dr. Johnson develops the argument for GDP based multipliers based in part on spending for necessities and facilities, for example schools, for the betterment of the community. This spending increases GDP, in effect an investment in communities. The graph below illustrates the difference in the return between CPI, and the BTA rates and the GDP based indices. It also illustrates the difference between the BTA and GDP based indices for the years that the GDP per capita is available.

Figure 6: Comparing the compounding effects of CPI, BTA rates and Nominal GDP per capita, from 1926 to 2019



[374] As is shown in the above graph, the average annual rate of return based on the BTA is 6.2%. The average based on GDP is 5.2% (Johnson Report, Figure 6, at 16).

[375] Although other aspects of *Southwind* were appealed to the Court of Appeal and are now before the Supreme Court, the application of the BTA rate for present valuation has not been the focus of the appeals to date.

[376] In *Southwind*, Zinn J. discussed at length the rationale for applying the BTA rate, compounded, to the entire amount considered to be the historical loss of the LSFN in that case. Zinn J. had expert reports that addressed questions over realistic contingencies, bring forward methodology, and consumption. An expert witness, Professor Lazar, testified in part:

> Unfortunately, this has added a lot of confusion in this particular case and involve trying to figure out how the money would be spent, trying to figure out how to bring it forward. And as I've said, all that is unnecessary. [emphasis in original; *Southwind* at para 466]

[377] Zinn J. found at paragraph 467 of *Southwind*:

> As I conclude below, I adopt this view. I further adopt the view that the Lazar-Prisman model of creating a multiplier based on the historic Indian Trust Fund Rates, absent contrary evidence, is the appropriate basis to bring a past loss forward to the present day for equitable compensation purposes.

[378] After a detailed review and analysis of the evidence of the several experts that weighed in on the question (paragraphs 468–497), Zinn J. concluded:

> I agree with Mr. Prisman that the most realistic vehicle for determining return on money is the annual Indian Trust Account rates set by Canada. As he testified "why would they go to an investment that might be a risky investment when they have a risk-free vehicle, the Indian Trust Account that does not suffer from default risk -- it's backed by the government ...?" [*Southwind* at para 498]

[379] Zinn J. added:

> While I do not necessarily agree that every decision about the value of consumption is as Mr. Prisman states, I do accept that the model he uses is as good as any to determine the present value of the lost opportunities to invest, save, and consume. Moreover, it is less complex than the models proposed in the Hosios Report or the Booth-Kirzner Report. [*Southwind* at para 501]

[380] The Respondent's GDP based approach is also a one-size fits all method, but a different one. The model does not draw from the Claimant's own experiences or probable uses of funds. Instead it would make use of an average, per capita value derived from an objectively determined measure: GDP.

[381] The BTA rate as set from time to time by Canada is particularly apt in the present matter, as the lost opportunity for lease revenue would be restored by treating estimated annual losses after adjustment for contingencies as if invested at the trust fund rate, compounded annually.

XV. AWARD

A. Current Unimproved Market Value

[382] Compensation under this heading is determined at $15,500,000 as of the effective date of September 21, 2017, set out in the Claimant's Altus Report I on land value estimates.

B. Equitable Compensation/Loss of Use

[383] The Endorsement to the Case Management Conference held on this matter on May 20, 2020, provided as follows:

> The Tribunal requested that the Parties file with the Tribunal a "multiplier" provided by their respective bring forward experts, which the Tribunal can apply to its conclusions on the loss of use numbers, individually or in the aggregate, in order to establish the bring forward number. [Endorsement dated May 22, 2020, at para 1]

[384] Counsel for the Respondent provided a letter dated May 20, 2020, explaining the use of Mr. Johnson's "CAGR Multipliers [3] B".

[385] The Claimant provided a set of spreadsheets created by Mr. Schellenberg with correspondence filed on June 5, 2020. Mr. Schellenberg explained as follows:

> **Working with the Model**
>
> Schedule 2.1 is where His Honour can insert alternate nominal annual cash flows (in lieu of those calculated by DEMA) into the bordered area on Column B. Column B currently contains annual values from the DEMA Report's "Leasing" model.
>
> His Honour can enter alternate values into Column B. The model will then update the detailed present value schedules (Schedules 4.1 through 7), which in turn feed into the Overall Summary tab. This tab will show His Honour what MDD would calculate (and what Duff and Phelps would calculate) based on the same methodologies outlined in their respect reports.

[386] For the reasons outlined above, I have accepted the Leasing Model as the most appropriate model for assessment of LOU on the facts of this Claim.

[387] For the reasons outlined above, I have discounted the annual nominal amounts set out for LOU in DEMA's Amended Schedule D, Column L (Exhibit 57 as provided by DEMA at the March 13, 2020 hearing) by applying the percentage values set out above to DEMA's annual nominal values.

[388] These are brought forward to 2019 with the use of Mr. Schellenberg's schedules discussed above. Mr. Schellenberg's Schedule 4.1 deducted the payments made by the Crown to the Claimant in respect of the Claim Lands in the year in which they were paid, applying the BTA rates annually to these amounts (Schellenberg Report at para 117). In this manner I arrive at a present value for LOU of $111,433,972 to December 31, 2019, net of the offset amounts already paid. December 31, 2019, is selected as it is the "Valuation Date" used in Mr. Schellenberg's report and schedules.

[389] The Parties will seek agreement on an adjustment of the LOU value of $111,433,972 for the period from December 31, 2019, to the date of these Reasons for Decision.

[390] The Parties may apply to the Tribunal if they cannot agree.

[391] I assess compensation under this heading, as of the present date, in the sum of $111,433,972.

XVI. CURRENT UNIMPROVED MARKET VALUE AND LOSS OF USE

[392] The combined amount, subject to adjustments as aforesaid, is $126,933,972.

[393] The award, $126,933,972 will be adjusted by agreement of the Parties or, failing agreement, by the Tribunal to take account of the adjustment of LOU from December 31, 2019, to the date of these Reasons for Decision, and an adjustment to present value of the CUMV for the period from September 21, 2017, to the date of these Reasons for Decision.

[394] The amount of the time adjusted LOU and CUMV will be reflected in a Corrigendum to these Reasons for Decision.

XVII. COSTS

[395] The Parties have liberty to apply in relation to costs.

HARRY SLADE

Honourable Harry Slade

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20210118

File No.: SCT-5001-14

OTTAWA, ONTARIO January 18, 2021

PRESENT: Honourable Harry Slade

BETWEEN:

MOSQUITO GRIZZLY BEAR'S HEAD LEAN MAN FIRST NATION

Claimant

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA
As represented by the Minister of Crown-Indigenous Relations

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimant MOSQUITO GRIZZLY BEAR'S HEAD LEAN MAN FIRST NATION**
As represented by Ron Maurice, Ryan Lake and Melanie Webber
Maurice Law Barristers & Solicitors

AND TO: **Counsel for the Respondent**
As represented by Lauri Miller and Scott Bell
Department of Justice