FILE NO.: SCT-5002-11
CITATION: 2023 SCTC 4
DATE: 20230606

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
LAC LA RONGE BAND AND MONTREAL LAKE CREE NATION Claimants	Robert Watchman and Todd Andres, for the Lac La Ronge Band Dawn Cheecham, for the Montreal Lake Cree Nation
– and –	
HIS MAJESTY THE KING IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent	David Culleton and Lauri Miller, for the Respondent
	HEARD: August 29–September 1, 2022, and February 1–2, 2023

REASONS FOR DECISION

Honourable Todd Ducharme

NOTE: This document is subject to editorial revision before its reproduction in final form.

Cases Cited:

Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada, 2014 SCTC 8; *Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada*, 2015 FCA 154, [2015] FCJ No 813; *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23, [2015] 2 SCR 182; *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, s 2, 13.

Indian Act, RSC 1886, c 43.

Indian Act, RSC 1985, c I-5, s 2.

Regulations for the Sale of Timber on Indian Lands in Ontario and Quebec, PC 1888-1788.

Headnote:

This Claim concerns the unlawful surrender in 1904 of white spruce timber on Indian Reserve No. 106A (IR 106A). The Reasons for Decision on validity for this Claim were issued on September 5, 2014 (*Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 8).

In the validity decision, Whalen J. found the Crown had breached its fiduciary duty to the Claimants in six ways: the Crown failed to diligently avail itself of the appropriate measures in the *Indian Act*, RSC 1886, c 43, and the *Regulations for the Sale of Timber on Indian Lands in Ontario and Quebec*, PC 1888-1788, to properly manage the reserve in the First Nations' best interests; failed to follow its own policies; failed to consult with the beneficiary First Nations; failed to diligently correct past mistakes; failed to perform an undertaking to sell all merchantable timber on IR 106A; and, failed to prevent the Sturgeon Lake Lumber Company from harvesting species other than those allowable under the licence.

A judicial review to the Federal Court of Appeal, initiated by the Claimants, resulted in the upholding of the Tribunal's validity decision. The court did note, however, that Whalen J. made an error when he wrote that the timber had been properly surrendered: in the Crown's Response to the Declaration of Claim, it admitted the surrender was invalid. Going forward, the court invited the Tribunal "to take note of the Crown's concession that the 1904 timber surrender failed to comply with the relevant statutory requirements" of the *Indian Act*, RSC 1886, c 43 (*Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada*, 2015 FCA 154 at para 45, [2015] FCJ No 813).

Following a validity decision, bifurcated claims at the Tribunal typically move into a compensation phase. Due to the complexity of this Claim's compensation phase, it was further divided into two sub-phases: one which would determine the volume of timber on the reserve just prior to the invalid surrender, and a second which would determine the appropriate compensation—if any—for provable losses stemming from the fiduciary breaches. Therefore, these Reasons for Decision deal solely with the question of the volume of timber on IR 106A at the time it was invalidly surrendered in January 1904.

Based on a variety of historical and expert evidence, the Tribunal determined that the volume of white spruce timber present on IR 106A as of its ostensible surrender in 1904 was 55,465,000 board feet.

TABLE OF CONTENTS

I. INTRODUCTION

[1] The Claimants, the Lac La Ronge Band and the Montreal Lake Cree Nation, are Saskatchewan-based First Nations within the meaning of paragraph 2(a) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], in that each First Nation is a "band" within the meaning of subsection 2(1) of the *Indian Act*, RSC 1985, c I-5. Treaty No. 6 was signed in 1876 and the Claimants adhered to it on February 11, 1889, as confirmed by Order in Council PC 895, dated April 20, 1889. As part of the treaty agreement, reserves were set aside for the two First Nations, including Indian Reserve No. 106A (IR 106A or the Reserve), also known as the Little Red Reserve, which was confirmed to the use of both First Nations on January 6, 1900.

[2] In 1903, following a request from Arthur J. Bell, manager of the Sturgeon Lake Lumber Company (SLLC or the company), the Crown sought the surrender of the white spruce timber on IR 106A. The timber was ostensibly surrendered January 16, 1904, and confirmed by Order in Council PC 2449 on February 12, 1904, although the Parties agree that the surrender did not follow the procedure set out in the *Indian Act*, RSC 1886, c 43 [*Indian Act, 1886*], and was therefore invalid. The spruce went to tender and two bids were received: SLLC's being the higher of the two, it was awarded the right to harvest the timber. The lumber company violated many of the regulations applicable to timber harvesting on reserve: it failed to pay its licensing fees, harvested in trespass, failed to file returns on time or accurately, failed to submit payments on time, and harvested species outside of its licence (*Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 8 at para 173). SLLC harvested intermittently on the Reserve from 1904 to 1909, when the Crown refused to renew the company's licence due to these regulatory violations. According to the company's returns, during this period it harvested 2,452,344 board feet of timber, of which 2,446,944 board feet was white spruce, the rest tamarack and pine (Exhibit 10, Tab 60 at 85]). Following the Crown's refusal to renew the licence, Bell opined that there was still 1,000,000 board feet of spruce left on IR 106A, but just weeks later said that there were only "scattered trees" left on the Reserve (Exhibit 2, Tab 99). As will be seen, the Claimants assert that there was considerably more spruce timber on the Reserve than these numbers would indicate.

[3] In 2004, the Claimants jointly filed a specific claim with the Specific Claims Branch which alleged that the surrender of timber on IR 106A in 1904 violated the surrender provisions of the

Indian Act, 1886, and that the Crown breached its fiduciary duty to the Claimants by allowing trespass logging to occur, mismanaging the resource, and not providing compensation for all of the timber taken. Beginning in August 2007, the Claimants and the Respondent undertook negotiations, but reached an impasse in the autumn of 2011. The Claim was then filed with the Specific Claims Tribunal (Tribunal) on December 8, 2011. At the request of the Parties, the Claim was bifurcated into a validity phase and a compensation phase, and a hearing on validity was held in November 2013. The Claim was found valid under the *SCTA* by Whalen J. in *Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 8 (validity decision). The Tribunal found the following six breaches of the Crown's fiduciary duty (paras 183–95):

1. A failure to diligently avail itself of the appropriate measures in the *Indian Act, 1886*, and the *Regulations for the Sale of Timber on Indian Lands in Ontario and Quebec*, PC 1888-1788, to properly manage the Reserve in the First Nations' best interests;

2. A failure to follow the Crown's own policies;

3. A failure to consult with the beneficiary First Nations;

4. A failure to diligently correct past mistakes;

5. A failure to perform an undertaking to sell all merchantable timber on IR 106A; and

6. A failure to prevent SLLC from harvesting species other than those allowable under the licence.

[4] At paragraph 27 of the validity decision, Whalen J. wrote, "There is no dispute that the spruce timber on the Reserve had been properly surrendered or that the surrender had been accepted." This statement was an unfortunate error, as the Crown had previously admitted that the surrender was invalid (Response to the Declaration of Claim at para 6). The Claimants applied for judicial review of the validity decision seeking, among other things, an order correcting this error. The Federal Court of Appeal, noting that the Tribunal maintained jurisdiction of the Claim until

after the compensation phase, dismissed the application for judicial review, but invited the Tribunal "to take note of the Crown's concession that the 1904 timber surrender failed to comply with the relevant statutory requirements" of the *Indian Act, 1886* (*Lac La Ronge Band and Montreal Lake Cree Nation v Her Majesty the Queen in Right of Canada*, 2015 FCA 154 at para 45, [2015] FCJ No 813 [*Lac La Ronge FCA*]).

[5] The Claimants further alleged to the Federal Court of Appeal that "certain comments made by [Whalen J.] give rise to a reasonable apprehension of bias" because, they argued, he had pre-judged the outcome of the compensation phase (*Lac La Ronge FCA* at para 36). At paragraph 197 of the validity decision, Whalen J. wrote:

> The Claimants were eventually paid for all the timber cut, including payment of all fees, dues, ground rents, and interest. It concerned me that there was no proven loss and that this first phase of hearing could end up being an academic exercise with great cost to all involved. … A band may believe it has incurred a loss as a result of a breach of fiduciary duty, but it may not succeed in proving it. … The question of compensation cannot be prejudged, and in the meantime, the costs of proof of loss are not incurred unnecessarily before validity has been determined.

[6] The Federal Court of Appeal determined that Whalen J.'s words did not rise to a reasonable apprehension of bias, noting that he "expressly recognized that the question of loss was not relevant to the first phase of the proceedings and the issue could not be prejudged" and that "the [Claimants] will have the opportunity to present evidence at the second phase to challenge it" (*Lac La Ronge FCA* at para 43).

[7] In addition, the Claimants have asserted that because Whalen J. did not hear evidence regarding the volume of timber on the Reserve prior to the ostensible surrender, he should not have concluded that the Claimants were "eventually paid for all the timber cut." How much timber was cut, and whether the First Nations were properly compensated for it, are determinations for the second phase of this Claim.

[8] Due to the complexity of the second phase, it was further divided into two sub-phases: one which would determine the volume of timber on the Reserve just prior to the invalid surrender, and a second which would determine the appropriate compensation—if any—for provable losses stemming from the fiduciary breaches. Former Tribunal Chairperson Slade J., who had taken over for Whalen J. due to the latter's retirement, wrote:

> The Claimants advised that they will require two expert evidence hearings on compensation: the first one to determine timber volume and the second one to determine a compensation amount. The Claimants also indicated that it would be helpful if the Tribunal rendered a decision on timber volume prior to the commencement of the second expert evidence hearing on valuation of compensation. [Endorsement dated October 2, 2019, at para 1]

[9] Therefore, these Reasons for Decision deal solely with the volume of timber on IR 106A at the time it was invalidly surrendered in January 1904.

II. PARTIES' POSITIONS

A. Claimants' Position

[10] The Lac La Ronge Band and the Montreal Lake Cree Nation rely on the expertise of Greg W. Scheifele, whose testimony and report, entitled *Forestry Loss of Use Study for the Little Red (IR 106A) 1904 Timber Surrender Claim of the Montreal Lake Cree Nation and the Lac La Ronge Indian Band: Final Report* (Scheifele Report) (Exhibit 7), offers the opinion that 55,465,000 board feet of spruce existed on the Reserve prior to any cutting by SLLC. Details of Scheifele's opinion and qualifications will be presented in the "Expert Evidence" section, below.

B. Respondent's Position

[11] The Crown takes the position that all timber harvested by SLLC on the Reserve was accounted for, and the First Nations were fully compensated. At most, it says, there was 1,000,000 board feet remaining on the Reserve, as per Bell, when the Crown refused to renew SLLC's licence, for a maximum total of 3,452,344 board feet of timber as of the invalid surrender (Respondent's Written Submissions at para 18). The Respondent relies on a variety of historical evidence, as well as the expertise of John Peebles and Bruce McClymont. Details of the historical evidence is presented below in the "Historic Evidence" section, and details of the Crown's experts' qualifications and opinions are presented in the "Expert Evidence" section.

III. HISTORIC EVIDENCE

[12] The Crown, in violation of the prevailing timber regulations, did not obtain a valuation of the timber on IR 106A prior to offering it for sale (*Regulations for the Sale of Timber on Indian Lands in Ontario and Quebec*, PC 1888-1788, section 3, extended to the whole of the Dominion via PC 1896-1457). Nevertheless, there are a number of historic estimates in evidence, most of

which are contemporaneous to the ostensible surrender.

[13] The earliest historic evidence comes from Dominion land surveyor Archibald W. Ponton, who surveyed the Reserve in 1897, before it was confirmed to the First Nations (Exhibit 10, Tab 60 at 4). Ponton surveyed the perimeter of the Reserve, making annotations about what he saw there, as well as some less-reliable insights about what was in the interior. Crown expert John Peebles opined in his report that "it was probable that Ponton completed one or more general traverses of IR106A, in addition to the legal survey of the Reserve boundaries given the annotations" he recorded about aspects of the interior (Exhibit 20 (*Land Ethic Consulting – 1904 Timber Surrender Report* (Peebles Report)) at 40). At the oral submissions hearing in this sub-phase, however, the Claimants showed that Ponton's insights about the interior are far from accurate, especially with regard to the course of the Little Red River which flowed through the Reserve (Hearing Transcript, February 1, 2023, at 91–95). Nevertheless, Ponton reliably noted that there was "*timber, which, although covering no large area, is of the finest spruce, and is also very accessible*" along the western perimeter of the Reserve (emphasis in original; Exhibit 10, Tab 60 at 30).

[14] The aforementioned request to log the white spruce on IR 106A from Bell was sent in 1903. In the letter addressed to the Superintendent of Indian Affairs, Bell informs the Department of Indian Affairs (the department) that he is the registered owner of a nearby timber limit and seeks permission to log the Reserve. He estimates that the amount of white spruce timber available for harvest is 1,500,000 board feet, for which he offers to pay $1,500. Bell's estimate is not particularly reliable: he does not come close to the 2,446,944 board feet of spruce his company demonstrably harvested according to its own returns, and his offer is significantly out of step with the bids that would eventually be garnered. Once the timber went to public tender, SLLC won it with a bid of $5,500, against a bid by another company of $4,500 (Exhibit 1 at para 13).

[15] More historical evidence comes from a letter sent by Indian Agent J. Macarthur to the department, dated October 1, 1903. Agent Macarthur states that the amount of spruce timber on the Reserve has been "variously estimated at from one and a half to three million feet board measure," and that his own estimate "is two and a half million feet" (Exhibit 2, Tab 4). He also opined that "[w]hen the lumber men move" from the area, they would "hardly care to return for

such a small cut." However, there is no evidence Agent Macarthur attended IR 106A in order to make his estimate, nor was the agent a timber cruiser with the expertise to make an accurate estimate (Hearing Transcript, August 29, 2022, at 208–09). His reference to various estimates raises the distinct possibility that Agent Macarthur was simply repeating what he had heard from others.

[16] A memorandum from Dominion timber inspector George L. Chitty to the Deputy Minister of Indian Affairs, dated April 14, 1904—after the ostensible surrender—offers a similar estimate to Macarthur's, but the memorandum itself reveals why: Chitty is merely reporting to the department that "[t]he Agent [Macarthur] reported on the 1st of October last that the standing Spruce timber on this Reserve is estimated at from 1,500,000 to 3,000,000 of feet B.M." and that Macarthur's ultimate estimate was 2,500,000 board feet (Exhibit 2, Tab 5). Chitty was writing from his office in Ottawa, there is no reason to believe he ever inspected the timber he was writing about.

[17] On August 30, 1906, Bell wrote to Alan J. Adamson, a member of Parliament, to suggest that the ground rent being charged to SLLC be reduced considerably. He wrote that the department expected to be paid "$3 per square mile per annum ground rent" for the whole of the Reserve—about 56 square miles—but reported that "[t]he area of land actually covered by Timber [is] less than Three (3) square miles" (Exhibit 2, Tab 39).

[18] As previously mentioned, SLLC reported that 2,446,944 board feet of spruce was removed from the Reserve between 1904 and 1909, along with 1,800 board feet of pine, and 3,600 board feet of tamarack, for a total of 2,452,344 board feet of timber removed from the Reserve prior to the Crown's refusal to renew the company's licence. It should be noted, however, that there are irregularities in the returns for every year the company operated on IR 106A and, in some years, the company was forced by the department to revise and resubmit accurate returns (Exhibit 10, Tabs 60 at 76, 80, 82–84).

[19] In a letter dated April 29, 1909, Bell paid the expected ground rent and renewal fee for SLLC's licence on IR 106A for the next season, the winter of 1909–1910. This letter was likely sent prior to receiving a letter dated April 23, 1909, from Secretary John D. McLean of the Department of Indian Affairs which informed the company that its licence to harvest timber on

IR 106A would expire April 30 of that year, and that "no further cutting of timber can be permitted thereon" (Exhibit 2, Tab 89). Bell replied on May 1, 1909, stating that the company was "at a loss to understand the meaning of this letter" and informed the department that there was "still a million feet of Timber to take of[f] this Reserve, which we expected to cut next winter" (Exhibit 2, Tab 93). McLean replied on May 8, 1909, and confirmed the licence would not be renewed. On May 28, 1909, Bell again wrote to the department to request the return of the $171 remitted with his April 29 letter. A handwritten postscript suggests that the $171 "would be a fair purchase price for any scattered trees that remain on this limi[t]" (Exhibit 2, Tab 99). It is difficult to ascertain what became of the 1,000,000 board feet described by Bell in his May 1 letter, based on his paradoxical suggestion less than four weeks later.

[20] Finally, in 1928, Herbert W. Fairchild completed a survey of the western part of IR 106A which revealed almost no spruce: of 308 descriptive entries into his field book, there are only 29 mentions of spruce, 20 of which describe the spruce as limited or burnt (Exhibit 7, Appendix 7, Table 2).

IV. EXPERT EVIDENCE

A. Claimants' Expert: Greg Scheifele

[21] Greg Scheifele was qualified as "an expert in ecology, forestry, soil survey and analysis, forest inventory, timber loss of use analysis and valuation, logging practices, cruising and scaling" (Hearing Transcript, August 29, 2022, at 16, 41). He described the work he undertook as a method to "reconstruct the original forest conditions in 1904" on IR 106A (Hearing Transcript, August 29, 2022, at 51). He further described his method as "iterative" in the sense that there were a number of steps which added data—and acted as checks on previous data—all of which culminated in a map of the forest in 1904 that is intended to be a "reasonable and probable" estimate of where and how much white spruce was on the Reserve (Hearing Transcript, August 29, 2022, at 175, 177). In its written submissions, the Claimant Lac La Ronge Band described the method as a six-step process, which included the following:

a) the creation of a 1949 forest inventory map based upon contemporaneous aerial photography;

b) on-site attendance to conduct forest cruising, soil sampling and tree growth measurements across IR 106A;

c) the creation of a map of soil associations for IR106A and the identification of forest ecotypes;

d) an analysis of historical documents relating to prevailing lumbering practices and capacities on the Reserve and the surrounding area;

e) an analysis of the applicable operability and merchantability criteria; and, finally,

f) the re-creation of a 1904 forest cover type and calculation of spruce timber volume. [para 14]

[22] An important concept to bear in mind throughout all of these steps is that of "forest succession." According to Scheifele, the forest in the region of Saskatchewan under consideration—known as both the "boreal transition ecoregion" where the southern edge of the boreal forest meets the northern edge of the prairie grasslands, as well as the "mixedwood section" based on the variety of species present (Hearing Transcript, August 29, 2022, at 141–44)—progresses over time in a predictable way. When a disturbance to the forest occurs—forest fire or harvesting—the first species to grow will be aspen, which has a competitive advantage over spruce because it is fast growing and "capable of reproducing from stump sprouts, from root suckers, as well as from seed" whereas "spruce will only reproduce itself through seed" (Hearing Transcript, August 29, 2022, at 143). Aspen will grow relatively quickly following a disturbance, but spruce "will survive in the understory of the aspen stands for quite some time" until, after about 70 to 100 years, the aspen decays and gives way to the spruce (Hearing Transcript, August 29, 2022, at 152–53). Spruce is "considered a climax forest species in the mixedwood belt" as it lives a long time, and its canopy blocks further development of aspen, which is intolerant of shade—unlike spruce itself. The concept of forest succession and its predictability in the mixedwood section of the boreal transition ecoregion is not controversial between the Parties' experts.

[23] According to Scheifele, the creation of the 1949 forest inventory map required a number of different inputs. The first was a collection of aerial photographs from 1946 and 1949, which were obtained from the Saskatchewan government (Hearing Transcript, August 29, 2022, at 135). Through the use of a stereoscope—a device which allows a viewer to see two adjacent photographs at the same time, thus rendering them in three dimensions—a company called LGL Limited created a "mosaic" of the forest as it existed circa 1949. By judging the relative heights and characteristics of what appeared in the mosaic, Scheifele was able to recreate the vegetation conditions as of 1949

and say with some accuracy what trees existed on IR 106A at that time. This interpretation was then compared to a forest inventory undertaken by the Saskatchewan government in 1952–1953 which Scheifele described as "a check on our interpretations" (Hearing Transcript, August 29, 2022, at 136). The results of this first step were uncontroversial: the Parties' experts came to similar conclusions regarding forest cover circa the mid-20th century (Hearing Transcript, August 30, 2022, at 420).

[24] The next step was attendance on the Reserve itself to conduct a timber cruise, sample soil, and take measurements of existing trees. This step allowed Scheifele to learn more about the relationship between soil and drainage types, soil class, and the age and height of tree species in the area. This research was informed, as well, by reference texts, including a technical bulletin published by the Province of Saskatchewan in 1971, authored by A. Kabzems, entitled *The Growth and Yield of Well Stocked White Spruce in the Mixedwood Section in Saskatchewan* (Kabzems). As he testified, "white spruce will generally be found … where there is more soil moisture. It will be in moderately well-drained soils to perfectly drained soils … Spruce also does much better on soils rich in nutrients, particularly if derived from, you know, limestone, bedrock … and parent materials" (Hearing Transcript, August 29, 2022, at 146). In the third step, Scheifele used his observations and data to refine existing provincial soil maps, and produced a map of soil types and their associated tree species at Appendix 6 of his report (Scheifele Report at 168–69).

[25] The fourth step in his method involved the interpretation and application of much of the historic evidence recounted in the previous section. In cross-examination, Scheifele agreed that those making contemporaneous observations of the Reserve prior to its ostensible surrender would "have the best ability" of reporting how much timber was on the Reserve, such that his interpretations of his other measurements "would get adjusted" to take into account these observations (Hearing Transcript, August 30, 2022, at 309). In addition to reviewing contemporaneous accounts, Scheifele also gathered data on the productive capacity of nearby mills, the locations of nearby mills, and transportation methods and routes for harvested timber (Hearing Transcript, August 29, 2022, at 75–76, 106–08). Transportation methods and routes are an important aspect of Scheifele's theory because, via the use of steam-driven tractors called "dinky engine[s]," he theorizes that SLLC could have transported timber to its mill without the necessity of marking its origin as the company would have to if it was being driven down a river

(Hearing Transcript, August 30, 2022, at 275).

[26] These inquiries begin to touch upon Scheifele's fifth step: an analysis of operability and merchantability. Scheifele testified that three criteria are necessary for timber to be merchantable: first, the timber itself must be of a desirable species which, at the time, white spruce certainly was; second, there must be enough volume per acre of a desirable species to "make it worthwhile to commence harvesting"; and, third, the quality of the timber must be similarly sufficient to make harvest worthwhile (Hearing Transcript, August 29, 2022, at 183). The minimum yield necessary, he testified, to make harvest worthwhile in 1904 would have been 5,000 board feet per acre. By Scheifele's investigations and calculations, he estimates the Reserve had an average volume per acre of 10,400 board feet prior to its invalid surrender (Hearing Transcript, August 29, 2022, at 197). As he often stressed during his testimony, he considers this a conservative estimate for what was probably on the Reserve (Hearing Transcript, August 29, 2022, at 198). This volume per acre estimate is, in fact, lower than contemporary estimates of nearby timber berths: A. L. Mattes, president of the Prince Albert Lumber Company, reported an average of 11,000 to 12,000 board feet per acre, and stands could go as high as 15,000 board feet of spruce per acre (Exhibit 20 at 45). If one considers contemporary estimates of timber on the Reserve—1,500,000 to 3,000,000 board feet—along with Bell's 1906 letter which stated the timber existed only on three square miles of IR 106A, this would mean that these three square miles—not even the Reserve as a whole—averaged only 1,302 to 1,562 board feet per acre (Exhibit 20 at 44). This number is too low to attract the interest of lumber companies, according to Scheifele (Hearing Transcript, August 30, 2022, at 249).

[27] At the sixth and final stage, Scheifele combined the fruits of his various investigations to come up with a probable estimate for the volume of white spruce timber on IR 106A prior to any harvesting by SLLC. He began with the forest cover as of 1949, determined by the aerial photographs (Exhibit 7 at 37–38). He used what he had learned about the soil types in the area from reference works and his attendance on the Reserve, as well as the concept of forest succession, to transform the forest cover backward to 1904 at a general level—whether hardwood or softwood would be present, and in what proportions to each other and other cover types such as brushland or grassland. This model of the forest as of 1904 was further revised based on the 1928 survey by Fairchild, and revised soil mapping. He made a number of assumptions based on

historical evidence, especially evidence of IR 106A's "commercial significance" (Exhibit 7 at 44). These assumptions include: because white spruce was the most commercially significant timber in the area at the time, he assumed that stands identified as softwood contained 80 percent white spruce whereas stands that contained softwood and hardwood—but were softwood leading—contained 50 percent white spruce; he assumed that softwood stands occurred on Class I soils, whereas softwood/hardwood stands occurred on a 50/50 mix of Class I and Class II soils; he assumed that all the softwood and softwood/hardwood stands were mature to overmature—ready to be harvested—and therefore between 80 and 160 years, or an average age of 120 years; for similar reasons, he assumed that all stands of trees were fully stocked, at levels consistent with the Kabzems reference book mentioned earlier; finally, he deducted 10 percent from the gross merchantable volume for cull, and another 10 percent for breakage, for a total 20 percent deduction (Exhibit 7 at 44–46).

[28] The calculations led to a conclusion that, prior to any harvesting by SLLC, there were 55,465,000 board feet of white spruce timber in a harvestable state on IR 106A.

[29] Scheifele did not apply his methodology solely to IR 106A, however. Immediately to the west of the Reserve is Timber Berth 598 (TB 598), a site controlled directly by the Department of the Interior, and for which "fairly complete records of the lumber produced" are available, due to that department's better supervision and recordkeeping (Exhibit 7 at 47). Scheifele applied the same methodology to this berth as he did for IR 106A so that "the relative accuracy of forest reconstruction procedures could be tested and compared to the actual harvest" from TB 598 (Exhibit 7 at 47). His methodology resulted in "an estimated total spruce harvest" from TB 598 of 25,330,000 board feet—over 7,000,000 board feet *less* than the harvest as reported to the authorities (Exhibit 7 at 48). This underestimate is, Scheifele says, further evidence of the conservative approach inherent in his methodology, and further evidence of the reasonability of his conclusions in regard to IR 106A.

[30] The Scheifele Report also contains a theory of how and over what time period the additional spruce timber could have been removed from the Reserve but, as this sub-phase is focused solely on timber volume in 1904, it need not be considered at this time.

B. Respondent's Experts: Bruce McClymont and John Peebles

[31] At the outset, it is important to remember that the expert evidence presented by the Respondent is not aimed at showing how much timber existed on the Reserve in 1904: the Respondent has consistently taken the position that the findings of fact in the validity phase of this Claim include the fact that "the total amount of timber on the reserve was about 3,452,344" board feet, and that the "Parties should be entitled to rely on facts found during the validity phase of a hearing" (Respondent's Written Submissions at para 18). Rather, the Respondent has presented expert evidence—especially that of Bruce McClymont—that, it argues, shows the proper method for transforming a forest backward in time (Hearing Transcript, February 2, 2023, at 60–61).

[32] Bruce McClymont was qualified as an "expert inventory forester," something he described as a "narrow scope of practice within the profession of forestry" (Hearing Transcript, August 30, 2022, at 325, 327). An inventory forester interprets aerial photos, primarily, as well as other documents to produce a record of what vegetation exists in a given area. McClymont wrote a report entitled *Review of the Forestry Loss of Use Study for the Little Red Indian Reserve 106A 1904 Timber Surrender Claim of the Montreal La[ke] Cree Nation and the Lac La Ronge Indian Band Final Report*, dated May 2020 (Exhibit 15). This report, which both reviewed Scheifele's report and presented an alternative method of determining the historic volume of timber on the Reserve, was completed at the behest of Peebles, because—as Peebles testified—inventory forestry is "an area of specialization" that he lacks (Hearing Transcript, August 31, 2022, at 477). McClymont's report was relied upon "extensively" by Peebles in the writing of his own expert report (Hearing Transcript, August 31, 2022, at 492).

[33] McClymont's method, as previously noted, had a similar starting point to Scheifele's. He began with aerial photography from 1946 and 1950 but, rather than use a stereoscope to interpret the images, McClymont and a team of certified photo interpreters used "specialized software which allows you to view those photographs in 3D and creates a virtual environment that you work in" (Hearing Transcript, August 30, 2022, at 347–48). Once the images are in three dimensions, interpreters can make measurements using a technique known as photogrammetry "whether it be length, the height of trees, or area of polygons" (Hearing Transcript, August 30, 2022, at 351). With the height of the trees determined, a standard yield curve for the area can be applied—which takes into account site conditions—and the age of the trees determined. The yield curve utilized

by McClymont was from the same reference text as that used by Scheifele: the Kabzems text mentioned earlier, although McClymont classified the soil differently, leading to less volume (Hearing Transcript, August 30, 2022, at 355–56, 372). This methodology, McClymont testified, meets the criteria set by a number of different agencies, including the standards set by the *Saskatchewan Forest Vegetation Inventory 2004 Version 4.0*, which he felt was an important standard to adhere to as each province's standards are "geared, specifically, to the forest conditions in their province" and therefore he "felt it was important to use the Saskatchewan standards because this project was in Saskatchewan" (Hearing Transcript, August 30, 2022, at 353).

[34] Once the stands are identified and the three-dimensional environment is created, the vegetation is delineated into polygons, which is a technical way of saying that it is subdivided based on cover type—such as treed and non-treed—and then further divided by species and density. Because McClymont utilized only aerial photographs, only vegetation visible from above appears in his inventory: as he testified, anything suppressed by the forest cover would not appear in the photographs, and therefore will not appear in his inventory (Hearing Transcript, August 30, 2022, at 357). Having delineated the polygons, the findings were applied to a map of IR 106A. This resulted in a map that, generally, showed the eastern half of the Reserve predominantly covered in poplar-leading stands, and the western half "covered predominantly in prairie grassland and brushland," with some burned areas (Hearing Transcript, August 30, 2022, at 359). McClymont also identified some areas where logging had occurred, as well as "small amounts of white spruce leading mixedwood stands … a small number of conifer leading stands, either the black spruce, white spruce, or jack pine" and some agricultural areas (Hearing Transcript, August 30, 2022, at 360). As previously mentioned, these findings are similar to those of Scheifele in regard to forest conditions on IR 106A in the mid-20th century (Hearing Transcript, August 30, 2022, at 420).

[35] The methodologies and findings depart at McClymont's next stage, however. Because the aerial photos he was working with were from 1946 and 1950, once he had determined the ages of the tree stands on the Reserve based on their measurements, he simply subtracted either 42 or 46 years from those ages—depending on which set of photographs they appeared in—in order to determine what would have been on the Reserve in 1904 (Hearing Transcript, August 30, 2022, at 370). This meant, however, that much of the vegetation observed on the Reserve in the mid-20th

century was too young to have been present on the Reserve in 1904: it reached an age of zero once the years were subtracted.

[36] Part of the reason these trees reached an age of zero was the ages attributed to them in the mid-20th century based on the Kabzems yield curve, and differences of opinion between McClymont and Scheifele on the soil class attributable to the Reserve. Whereas Scheifele determined that the Reserve contained Class I and a mixture of Class I and II soils, McClymont testified that "based on the descriptions that we found in Kabzems and what was evident in the imagery, we felt that the [Class II] curves were the most appropriate to use" in areas with spruce, and Class III curves for areas with aspen (Hearing Transcript, August 30, 2022, at 372–73).

[37] The fact that much of the vegetation apparent in the 1946/1950 images cannot be accurately attributed to the Reserve in 1904 means, however, that "there's a significant amount of area on the eastern side of the study area and as well in the south that are simply described as 'unknown cover'" (Hearing Transcript, August 30, 2022, at 376). McClymont testified that there was "no way to adequately predict what that would have been" in those parts of the Reserve, and that he and his team "weren't prepared" to offer conjecture (Hearing Transcript, August 30, 2022, at 377). Areas classified as "developed agricultural land, burned, or logged" in the 1946/50 images were "also grouped into the unknown type because, again, we didn't know what existed prior" (Hearing Transcript, August 30, 2022, at 378). Ultimately, more than 43 percent of IR 106A is classified as "unknown" in McClymont's report (Hearing Transcript, August 30, 2022, at 417).

[38] Having transformed the forest back to 1904—although 43 percent was unidentifiable—McClymont returned to the Kabzems yield tables to attribute a volume of timber to the Reserve (Hearing Transcript, August 30, 2022, at 379–80). Again, it is important to recognize that the Crown does not take the position that McClymont has accurately identified the volume of white spruce on the Reserve in 1904. Even McClymont, in cross-examination, agreed that his work was not in accord with the documentary evidence: it did not identify the stands of spruce identified in Ponton's 1897 survey, nor could it account for the 2,446,944 board feet of spruce that SLLC's records show was harvested from IR 106A (Hearing Transcript, August 31, 2022, at 432–35). Instead, the Crown argues that McClymont has illustrated the correct way to transform a forest back in time, and therefore his work shows how much white spruce was *demonstrably* on the

Reserve when the ostensible surrender occurred. McClymont testified that 43,933 board feet of spruce existed on the Reserve in 1904 (Hearing Transcript, August 30, 2022, at 380).

[39] John Peebles was qualified as "an expert in forestry and in analyzing historic … documents regarding the probable condition of lands and vegetative cover … [i]ncluding the impact of human and natural disturbances, early forest practices, and behaviour of forest companies [,] …[t]heir employees and regulators" (Hearing Transcript, August 31, 2022, at 503–05). He testified that his report was divided into two sections: Part I is an analysis of the forest cover prior to the ostensible surrender of the timber, and Part II reviews and responds to Scheifele's report (Hearing Transcript, August 31, 2022, at 492). As previously mentioned, Part I of Peebles' report relies "extensively" on the work of McClymont. In addition, it uses documentary evidence to assess "whether local forest companies, including Sturgeon Lake Lumber, Prince Albert Lumber and/or other forest companies, removed 55,454[,000 board feet] of timber from IR106A without authorization" (Exhibit 20 at 23).

[40] Peebles referred to his methodology as a "two-pronged approach" which was intended to reconcile the "archival and documentary information" he located at a variety of archives with the "scientific research based on forest inventory reconstruction" conducted, at his behest, by McClymont (Hearing Transcript, August 31, 2022, at 495–96). Peebles' archival research appears thorough: he testified that, in addition to the Prince Albert archives, he retrieved materials from the University of Saskatchewan, the Province of Saskatchewan, Library and Archives Canada, the Western Development Museum, and the Canadian Forestry Service. In addition, he met with a forest historian. This research was intended to "identify economic conditions in the early 1900s … the prominent forest companies, logging, and log transportation practices, what some of the lumber mill capacities were, and some of the information -- documentary records about human and natural disturbances" in the area (Hearing Transcript, August 31, 2022, at 493).

[41] Peebles testified that he felt the bids received for the timber on IR 106A by the Dominion government were important information, saying that "having sold land with considerable amounts of timber on it, the bonus bids that you receive and the number of bidders who participate in a bid tell you something about the volume and quality of the timber that's being sold" (Hearing Transcript, August 31, 2022, at 497). He provided additional details of the tendering process

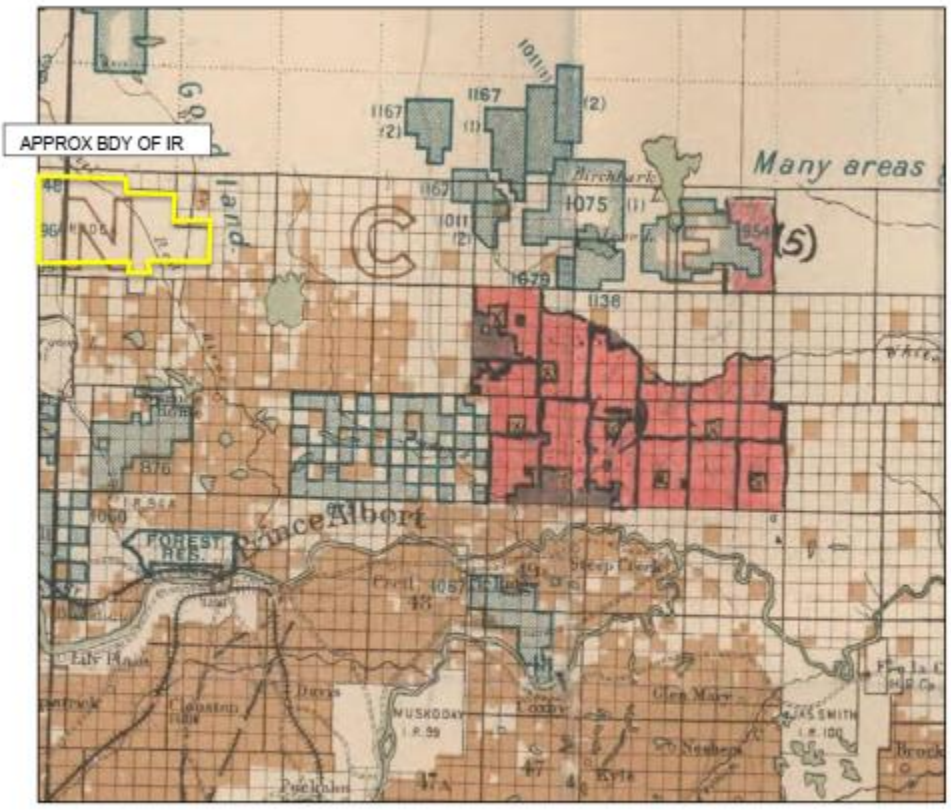
leading up to the two bids, saying that "it was sent to 35 people … in addition to the advertising that was put in local newspapers" which included the *Manitoba Free Press*, the *Battleford Times*, the *Saskatoon Star Phoenix*, and the *Prince Albert Advocate* (Hearing Transcript, August 31, 2022, at 520). He noted that "a number of potential tenderers" set out to examine the property, but that "there was only two tenders that were received for spruce timber" (Hearing Transcript, August 31, 2022, at 521). His opinion as to why only two bids were received is that "there probably wasn't a lot of it to attract more than two bidders" (Hearing Transcript, August 31, 2022, at 522).

[42] In the course of his research, Peebles found "documentary records … that indicate there was some human disturbance logging and perhaps land clearing prior to 1905" that is also reflected in Ponton's survey (Hearing Transcript, August 31, 2022, at 516). He did not appear to believe that this logging had much effect on the amount of spruce timber on the Reserve at that time, however, as he ultimately concluded that there was "likely to be some logging in the area, although perhaps not of any great extent." Scheifele agreed with Peebles that "there was likely some logging of IR106A prior to 1904" (Exhibit 13 at 2).

[43] Peebles offered an opinion on the incongruity between the estimates of spruce per acre of A. L. Mattes and A. J. Bell in nearby areas. He noted that Bell did not offer a volume per acre estimate, but rather an estimate of the total amount of spruce on the Reserve, and therefore it is "probabl[e]" the spruce was "found in clumps … which were not uniform throughout the entire area … [a]nd perhaps not spruce dominant" whereas Mattes' timber was in "fairly large contiguous bands of spruce, so they're going to have a lot of timber in it within a section of land" (Hearing Transcript, August 31, 2022, at 524–25). Nevertheless, despite such a low volume per acreage, Peebles opined that the spruce on the Reserve would probably still "have been attractive to … harvest" (Hearing Transcript, August 31, 2022, at 526).

[44] Peebles discussed the history of forest fire in the vicinity of Prince Albert in the early 1900s, and his report makes the claim that it was "probable that one or more wide spread fire events during the assumed Claim Period impacted the extent and volume of operable merchantable timber in IR106A circa 1904" (Exhibit 20 at 55). In both his testimony and his report, however, Peebles discussed fires which occurred in 1908 and 1910, neither of which could have affected the volume of timber on IR 106A as of the time of the ostensible surrender (Hearing Transcript, August

31, 2022, at 530–31). Further, Peebles did not point to any evidence that showed that these fires reached the Reserve itself. In his report, Peebles reproduced a map sent by P. Z. Caverhill, an employee of the forestry branch of the Department of the Interior, to the Superintendent of Forestry, which shows the extent of the damage caused by the 1910 fire. Based on this map, Peebles concludes that it is "probable that the fire would have spread to lands near the eastern portion of IR106A, or extended into IR106A, assuming there was remaining poplar or spruce forest cover to provide fuel" (Exhibit 20 at 50). Looking at the map, however, it is not immediately apparent how one could arrive at such a conclusion. The damage caused by the fire—the red portions of the map—is miles away from the Reserve, outlined in yellow:



EXTRACT FROM FOREST FIRES IN THE PRINCE ALBERT DISTRICT MAP APPENDED TO NOVEMBER 6, 1911 LETTER - BURNT AREA DEPICTED IN SOLID RED

[45] In his report, Peebles wrote that the arrival of settlers and logging itself were factors in the frequency of forest fires in the early part of the 20th century. He wrote that a "contributing factor was debris (slash) left from wide spread logging combined with the flammable nature of forest litter, and escaped fires from brush clearing of homesteads" (Exhibit 20 at 49). This debris could

not have been on the Reserve in any great amount prior to logging by SLLC, so it stands to reason that prior to this date the chance of forest fire affecting the harvestable volume of timber on the Reserve was less probable than it was after the harvesting had occurred.

[46] Peebles also testified about the "Scribner rule" for log scaling. Log scaling is "the process of actually identifying the volume of cut timber" and the Scribner rule is "one of the early forms of log volume measurement … developed in 1842" (Hearing Transcript, August 31, 2022, at 537–38). Peebles described the development of the Scribner rule as involving the creation of metal tubes that approximated the size and taper of different tree species, then stuffing the tube with lumber at different dimensions until it was full, before making further allowances for the fact that a sawblade needs to cut through, and for the fact that the outside of a tree cannot be used for lumber. The problem with the Scribner rule, however, is that "it tends to … quite dramatically, underreport the amount of lumber you can … recover from a log" (Hearing Transcript, August 31, 2022, at 539). In his report, he opined that the Scribner rule could cause underreporting of lumber recovery by as much as 40 percent (Exhibit 20 at 62). In the conclusion of his report, Peebles wrote that the "lack of consistency in log scaling practices" led to the "possibility that Sturgeon Lake Lumber did not accurately report the total volume of cut timber" it removed from the Reserve (Exhibit 20 at 104). He estimated that the inaccuracy would be in the range of five to ten percent of the total volume reported, such that if some timber was taken from IR 106A without payment, it would be in the range of 122,617 to 245,234 board feet in total.

[47] Peebles testified as to the unlikeliness of SLLC being able to get away with logging without payment, saying "it was unlikely that Sturgeon Lake Lumber would have continued to trespass log on 106A after the timber licence was issued or after the expiration of the timber licence on April the 30th, 190[9], without Indian Affairs' officials being notified" (Hearing Transcript, August 31, 2022, at 557). In oral submissions, the Claimants noted that very few members of either the Lac La Ronge Band or the Montreal Lake Cree Nation lived on IR 106A, and that timber cut in the surrounding timber berths moved almost constantly through the Reserve via trails and the little Red River on its way to nearby sawmills: according to the Claimants, the people who did live on the Reserve were unlikely to know where the timber moving through was cut, and whether it was cut legally or illegally (Hearing Transcript, February 2, 2023, at 171).

[48] Peebles also testified and reported, as Scheifele did, on the capacity of nearby lumber companies to log the Reserve in trespass, but as this sub-phase is focused solely on timber volume in 1904, I will consider that evidence at a future sub-phase, if necessary.

C. Challenges to the Expert Evidence

1. Challenges to the Evidence of Greg Scheifele

[49] The Crown criticizes Scheifele's evidence on four main bases: first, it asserts that many of his assumptions are not based on evidence; second, it criticizes his use of soil analysis, arguing it is novel and unreliable; third, it argues that his conclusions cannot be reconciled with the historical evidence; and, fourth, and related to the above criticisms, it claims that his assumptions and determinations were made in an effort to support the Claimants' theory of the case, and therefore reveal bias.

[50] The assumptions the Respondent takes issue with are: Scheifele's assumption that the trees on IR 106A in 1904 were an average of 120 years old; the assumption that the stands of trees on the Reserve were fully stocked in 1904; his assumptions about cover type and species composition; and, his use of the Class I and Class I and II yield curves on the Reserve (Respondent's Written Submissions at paras 37–38, 64–71, 76).

[51] On the topic of the age of the trees, the Respondent quotes Scheifele, who testified that "to be mature for the purposes of commercial harvesting … you're looking at trees that are, generally, over a hundred years old … and that's why I went with 120 years", and argues that he "did not choose this average based on principle or on evidence" but "because it supported the desired result" (Hearing Transcript, August 29, 2022, at 154–55; Respondent's Written Submissions at para 64). The Crown makes the exact same complaint about Scheifele's assumption that stands of spruce trees on the Reserve in 1904 were fully stocked, alleging that this is not "grounded upon evidence" and "that he made assumptions to ensure his opinion supported the Claimants' position" (Respondent's Written Submissions at para 37).

[52] I do not understand Scheifele's testimony the same way the Respondent does: when Scheifele says that "to be mature for the purposes of commercial harvesting" trees are generally over 100 years old, he begins from the knowledge that these trees were commercially desired by

SLLC, and therefore must have been mature for commercial harvesting. That leads to a justified assumption that they were generally over 100 years old, which I accept. He also testified that white spruce "can actually live well past 200" years (Hearing Transcript, August 29, 2022, at 155) and with evidence from Peebles that any disturbance by harvesting or fire on IR 106A prior to 1904 was minor or nonexistent, it stands to reason that the forest—which had not suffered a major disturbance prior to its harvest by SLLC—was older than the minimum necessary for commercial harvesting. Therefore, I accept the opinion that these trees were, on average, 120 years old in 1904.

[53] I see similar support for the opinion that spruce stands on IR 106A were fully stocked as of 1904: without a demonstrable history of disturbance, forest succession makes justifiable the assumption that the forest in 1904 was in a climax phase, and that spruce would have grown undisturbed by other species. I accept that what spruce stands existed on the Reserve in 1904 were fully stocked.

[54] On the topic of cover type and species composition, the Respondent argues that many of Scheifele's "forest cover types inexplicably changed" in his transition from the mid-20th century to 1904, and that "[g]iven the fact that the majority of stands present in 1946/1950 were aspen-leading hardwood and hardwood/softwood, the 1904 unknown forest cover types were most likely trembling aspen Hardwood and hardwood/softwood forest cover types as well" as McClymont opined (Respondent's Written Submissions at paras 66, 75). The Respondent makes a similar complaint about Scheifele's species composition determinations (Respondent's Written Submissions at paras 68–69). I do not find these transformations inexplicable. In his report, Scheifele explains these transformations in a number of ways. First there is a comparison between TB 598 and IR 106A in 1949: this comparison shows that there was no softwood on TB 598 as of that year but, based on the superior recordkeeping regarding this timber berth, we know a significant amount of softwood—in the form of white spruce—was present in the early-20th century. This makes it possible to believe, contrary to the opinion of McClymont, that it is possible for cover type or species composition to change in the way Scheifele has suggested. Scheifele's report also states that his cover type transformation "decisions were also guided by the soil mapping" he undertook on the Reserve (Exhibit 7 at 39). He also testified that cover type and species composition was influenced by the surveys of Ponton and Fairchild, and their observations of what was growing on the Reserve and where (Hearing Transcript, August 29, 2022, at 172–75).

For these reasons, I accept his expert opinion on the subject of cover type and species composition.

[55] The final assumption the Respondent attacks is Scheifele's use of Class I and Class I and II yield curves. The Respondent argues that "McClymont's calculations should be preferred over Scheifele's, as McClymont chose the most appropriate yield curve" because the "Site II curve best describes upland white spruce, and the photo interpretation process found most of the white spruce in upland sites" (Respondent's Written Submissions at para 70). This may be true of the mid-20th century, but it tells me nothing about where spruce was found on the Reserve in 1904. Scheifele testified that he spent nine days on IR 106A in 2009, locating stands of spruce, measuring trees and stand sizes, sampling soil and seeing forest conditions (Hearing Transcript, August 29, 2022, at 52, 56–57). I find his evidence about soil quality and categorization more reliable than McClymont's.

[56] The second main criticism the Respondent makes regarding Scheifele's evidence is his use of soil analysis to determine tree species, which the Respondent refers to as "a nonstandard and less reliable process used to generate a forest inventory," based on the testimony of McClymont (Respondent's Written Submissions at para 59). This statement is at odds with a document in evidence, however, entitled "Experts' Areas of Agreement and Disagreement." In this document, it should be noted that Scheifele is referred to as GWS based on the name of his company, GWS Ecological & Forestry Services Inc., while Peebles is referred to as LEC based on the name of his company, Land Ethic Consulting Ltd. Under the areas of agreement, there is an entry for the "GWS Approach based on the relationship between soil types (i.e., soil typing) and White Spruce" (Exhibit 13 at 3). In the next column, it reads "GWS and LEC agreed that the GWS approach using soil typing was an acceptable practice to establish probable White Spruce growing sites." The process is considered acceptable by two of the three experts who testified, including the Crown's lead expert in the Claim. On that basis, I accept the relevance and legitimacy of the evidence.

[57] On the topic of documentary evidence, the Crown points to the Ponton survey in 1897, Bell's estimate in 1903, Macarthur's estimate in the same year, Chitty's 1904 estimate, Bell's 1906 letter complaining about ground rent, SLLC's timber returns, and Bell's 1909 estimate that 1,000,000 board feet remained on the Reserve, and remarks that "[i]t is not plausible that surveyors, Indian Agents, timber operators, a Dominion Timber Inspector, and others could have

somehow overlooked or been unaware of additional white spruce timber totaling over 55 million [board feet]" (Respondent's Written Submissions at paras 79–92). These Reasons have already discussed some of the limitations of this evidence, such as the fact Macarthur likely—and Chitty definitely—did not personally observe the timber, and the unreliability and incongruity of Bell. And while the Crown argued that Ponton traversed the Reserve, this is unlikely for reasons explicated above: his survey delineated the perimeter of the Reserve, and his observations of the interior are unreliable. Further, Scheifele testified that he discovered mistakes in the survey performed by Ponton, noting that the surveyor "identified some marsh or willow swamp in locations where there was absolutely no other evidence of a wetland feature occurring" (Hearing Transcript, August 29, 2022, at 172).

[58] Based on the above criticisms, the Respondent also alleges that "Scheifele's evidence displays bias in favour of the Claimants" writing that "[h]e made baseless assumptions that supported the Claimants' position" (Respondent's Written Submissions at paras 37, 34). In *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23, [2015] 2 SCR 182, the Supreme Court of Canada wrote that, to be unbiased, an expert witness must not "*unfairly* favour one party's position over another" (emphasis added; para 32). The court continued that "[t]he acid test is whether the expert's opinion would not change regardless of which party retained him or her" but added that the "realities of adversary litigation" must be taken into account when assessing bias, including the fact that most experts are hired and instructed by one party in an adversarial proceeding. Scheifele stated in his report that the "analyses, opinions and conclusions represent my unbiased professional judgement which is only limited by the stated restrictions, limitations, assumptions and understandings, unless stated otherwise" and confirmed he had no financial stake in the outcome of the Claim (Exhibit 7 at 55). Because I disagree that Scheifele's assumptions are unsupported, I also disagree that he displays bias. Ultimately, to admit expert opinion evidence, "the judge must be satisfied that the potential helpfulness of the evidence is not outweighed by the risk of the dangers materializing that are associated with expert evidence" (*White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 54, [2015] 2 SCR 182). I am satisfied that the helpfulness of Scheifele's evidence outweighs any risk associated with expert evidence.

2. Challenges to the Evidence of Bruce McClymont and John Peebles

[59] The Claimants centre their criticisms of the Respondent's expert witnesses around four

main bases: the qualifications of the experts, and the objectivity, relevance, and necessity of their evidence. The Claimants say that the evidence of McClymont and Peebles should be rejected, accorded little weight, or that there is no basis on which the Tribunal can accept the evidence (Claimant's Written Submissions, Lac La Ronge Band, at paras 106, 131; Claimant's Written Submissions, Montreal Lake Cree Nation, at paras 96–97).

a) Bruce McClymont

[60] On the topic of McClymont's qualifications, Montreal Lake Cree Nation notes that he has a Forest Technologist Diploma, an Honours Bachelor of Science in Forestry, a Masters of Business Administration, is a certified photo interpreter in British Columbia, and a registered professional forester in two provinces, but contends that "none of these educational achievements, certifications, nor his work experience directly relates to forest reconstruction, except as it relates to the use of aerial photography" (Claimant's Written Submissions, Montreal Lake Cree Nation, at paras 83–88). Lac La Ronge Band contends that McClymont did not follow the guidelines of his own profession when he carried out photo interpretation but did not conduct a second phase of inquiry, ground sampling, which would "verify the accuracy of the photo estimates" (Claimant's Written Submissions, Lac La Ronge Band, at para 80, quoting Exhibits 17 and 18). I am not concerned about these criticisms: McClymont was clear that the basis of his opinion was primarily photo interpretation, and he has extensive experience conducting photo interpretation to produce forest inventories (Hearing Transcript, August 30, 2022, at 321–27). On cross-examination, when asked about the lack of ground sampling, McClymont explained that while he is qualified to conduct such sampling, it "wasn't a component of the project" because it "wasn't part of the five things we were asked to do" (Hearing Transcript, August 30, 2022, at 410–12). Although this limits my ability to compare and contrast the evidence of McClymont against that of Scheifele, litigation strategy is ultimately a decision of each Party, and I will not discount the evidence that has been presented by McClymont on the basis of evidence that has not been.

[61] The Claimants also allege a lack of objectivity on the basis that McClymont made a number of misinterpretations of Scheifele's work, such that his critique of Scheifele's methodology and findings cannot be relied upon (Claimant's Written Submissions, Lac La Ronge Band, at paras 83–95). While I accept that this may affect the reliability of McClymont's critiques of Scheifele, it does not affect his forest re-creation circa 1904: that being the only question in front of the Tribunal

in this sub-phase, any alleged lack of objectivity regarding Scheifele's work is not relevant.

[62] The Claimants call the relevance of McClymont's evidence into question on the basis that he took no further steps beyond photo interpretation to determine timber composition, species and volume as of 1904, as Scheifele did (Claimant's Written Submissions, Lac La Ronge Band at para 97). This lack of further steps contributed to the fact that 43 percent of the area studied by McClymont is categorized as "unknown forest cover type" in his report (Claimant's Written Submissions, Lac La Ronge Band, at para 100). On this basis, the Claimants allege that the report "contains no meaningful conclusion or findings" (Claimant's Written Submissions, Lac La Ronge Band, at para 102). I disagree that McClymont's report lacks *any* meaningful conclusions or findings and note that the Respondent has been clear: it does not take the position that McClymont's report offers an accurate estimate of timber volume on IR 106A in 1904 but, instead, the proper way to conduct a historical re-creation of a forest. I accept the evidence only for the reason, and only insofar as, it is proffered.

[63] Finally, on the topic of necessity, the Claimants make similar allegations: because so much of IR 106A's forest cover cannot be identified by McClymont, his report "is of no practical use" to the Tribunal (Claimant's Written Submissions, Lac La Ronge Band, at para 105). Again, I accept McClymont's evidence only insofar as it is proffered, not as an accurate estimate of timber volume on IR 106A but as an alternative—and, the Respondent argues, correct—way to re-create a historical forest.

b) John Peebles

[64] Regarding Peebles' qualifications, the Claimants allege that he lacks both the expertise and the experience to offer expert evidence in the context of this Claim. They note that while Peebles testified he has experience in the valuation of land and timber, "most of his professional experience involves real estate appraisal," a fact Peebles admitted in cross-examination (Claimant's Written Submissions, Montreal Lake Cree Nation, at para 92. The Claimants also raise the fact that Peebles "acknowledged that he had no experience in ground sampling or soil testing, scaling, conducting a historical forest cover inventory, determining the value of timber apart from the value of a property, or conducting a forensic reconstruction of a forest" (Claimant's Written, Lac La Ronge Band, at para 110). During the course of the expert evidence hearing, I acknowledged that Peebles'

expertise and experience in the methodologies used by Scheifele are limited, but felt that these limitations should go to the weight I place on the evidence, rather than be the basis on which I reject his opinion entirely. I continue to hold this opinion: based on the context of the sub-phase this Claim is in, where the only question before the Tribunal is the volume of timber on IR 106A in 1904, Peebles' lack of expertise in the steps Scheifele took to re-create the historical forest does not disqualify him from testifying about his understanding of historical documents through the lens of his expertise in forestry, which accords with the language of his tender.

[65] The Claimants also criticize Peebles' objectivity on the basis that, they say, he "chose to ignore or failed to report on facts and details that were inconsistent with [the Peebles Report's] findings or positions" (Claimant's Written Submissions, Lac La Ronge Band, at para 127). The Claimants point to the documented trespass logging and other failures of SLLC to comply with the timber regulations which included "cutting timber without a licence, failing to employ a certified culler, cutting species of trees other than those specified in their licence, and, thereafter, failing to identify species harvested contrary to the Timber Regulations" (Claimant's Written Submissions, Lac La Ronge Band, at para 126). Peebles, they claim, mischaracterized these events by testifying that they amounted to "sloppy bookkeeping" and by characterizing the trespass logging as "minor" (Hearing Transcript, September 1, 2022, at 720–21). Peebles testified that his experience working as a forester for the government of British Columbia allowed him to characterize SLLC's trespass logging as minor, and he agreed that the "sloppy bookkeeping" to which he referred was not appropriate behaviour for a lumber company. His opinions, while only one piece of evidence for the Tribunal to consider, are properly founded upon his experience and expertise, and there is no basis upon which to reject them.

[66] Finally, the Claimants point to three aspects of Peebles' evidence that, they say, show it "demonstrated a lack of care and attention" (Claimant's Written Submissions, Lac La Ronge Band, at para 115). First, they point to two instances where, they claim, he misunderstood documents, something which—based on his tender—he ought to have expertise in; second, the Claimants question Peebles' conclusion that fire had damaged the Reserve; and, third, they say that Peebles failed to consider evidence of trespass logging by SLLC on a nearby reserve.

[67] In his reply report entitled *Little Red Indian Reserve 106A 1904 Timber Surrender Vicinity*

of Prince Albert, Sask, Peebles wrote that in order to steal as much timber as the Claimants allege, widespread collusion would have been necessary amongst a significant number of players in the Saskatchewan lumber industry, including by "four cullers" employed by SLLC, who would have had to have kept illegal harvesting a secret for more than four years—an unlikely feat (Exhibit 21 at 3). In forestry, a culler is the person who measures the harvested logs so that the company can pay the dues necessary on them. In cross-examination, the Claimants showed Peebles that he had misinterpreted the report to which he referred: a reference to a culler turned out not to be the four individuals to which Peebles referred, but a single individual who may or may not have worked for SLLC. Rather, these four men were "cutters"—the name for supervisors in the lumber industry. When asked, "would it be fair for me to say … you simply got it wrong?" Peebles answered, "Yes" (Hearing Transcript, September 1, 2022, at 688–94).

[68] A second example has to do with Peebles' understanding of the capacity of sawmills in the Prince Albert area during the relevant time period. The Scheifele Report stated that the productive capacity of sawmills in the area exceeded the reported amount of lumber produced by at least 15,000,000 board feet each year (Exhibit 7 at 14–16). Peebles challenged this by alleging that Scheifele failed to apply any correction for the underreporting caused by the use of the Scribner rule but, as he eventually agreed in cross-examination, Peebles had misread Scheifele's report: whereas Peebles thought the report was discussing timber volumes—to which the Scribner rule would apply—Scheifele's evidence actually referred to manufactured lumber volumes, to which the rule does not apply (Hearing Transcript, September 1, 2022, at 751–55).

[69] These Reasons have already discussed the lack of evidence for Peebles' contention that forest fire disturbed the timber on IR 106A in or around 1904. On cross-examination, Peebles agreed with the Claimant Lac La Ronge Band's counsel that the evidence to which he referred showed fire disturbances "a considerable ways" from IR 106A (Hearing Transcript, September 1, 2022, at 761).

[70] Finally, the Claimants allege that Peebles neglected to consider evidence of SLLC's misconduct in harvesting timber at nearby Indian Reserve No. 101 (IR 101), directly south of IR 106A (Claimant's Written Submissions, Lac La Ronge Band, at paras 128–29). IR 101 was, apparently, the subject of a settlement agreement between the Crown and the Sturgeon Lake First

Nation in 2001 (Exhibit 12 at 16). As the Respondent points out, Peebles did make multiple references to IR 101 in his report (Respondent's Written Submissions at para 44). Further, at the oral submissions hearing, the Respondent asserted that the evidence upon which the IR 101 claim was founded is subject to settlement privilege, and therefore not properly in front of this Tribunal. I note, too, that the Tribunal is barred by statute from admitting evidence subject to privilege (*SCTA*, paragraph 13(1)(b)). Therefore, I place no importance on Peebles' alleged failure to consider evidence from IR 101, beyond that which he did consider.

V. ANALYSIS

[71] Despite the focus of this sub-phase, the Respondent has offered no expert evidence on the volume of timber on the Reserve at the time of the invalid surrender. Instead, the Crown argued that the Claimants' expert, Scheifele, erred in re-creating the historical forest cover on IR 106A, presented evidence of what it says is the proper way to conduct such a re-creation, and argued that the decision rendered by Whalen J. in the validity phase of this Claim included a finding of fact that "the total amount of timber on the reserve was about 3,452,344" board feet. The Respondent further asserts that "Parties should be entitled to rely on facts found during the validity phase of a hearing." I disagree with the Respondent, for two reasons.

[72] The first is that, despite not utilizing the term, the Crown appears to be making an argument similar to issue estoppel. In *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, [2001] 2 SCR 460 [*Danyluk*], the Supreme Court of Canada adopted a definition of issue estoppel from an earlier case at the Ontario Court of Appeal:

> When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [emphasis in original; para 24, quoting *McIntosh v Parent*, [1924] 4 DLR 420 at 422]

[73] In the same decision, the Supreme Court of Canada outlined the preconditions for a finding of issue estoppel:

> (1) that the same question has been decided;

> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies [para 25, quoting *Angle v Minister of National Revenue* (1974), [1975] 2 SCR 248 at 254]

[74] While the third precondition is satisfied, the second is not: the bifurcation order in this Claim means that the validity decision was not *final* as demanded by the test from *Danyluk*. Furthermore, and related to the first precondition, is the second reason I disagree with the Respondent on this issue: the question was not *decided* in the validity phase as Whalen J. did not have evidence of timber volume before him, and determined only the validity of the Claimants' allegations with regard to breaches of fiduciary duty. Because of this, the question of timber volume was not a "fact distinctly put in issue and directly determined" by the Tribunal in the validity phase, as demanded in *Danyluk*: Whalen J.'s comments were *obiter*. The Respondent was aware when it decided on its litigation strategy that this sub-phase of the Claim was specifically to determine the volume of timber on IR 106A at the time of the ostensible surrender (Endorsement, October 2, 2019).

[75] This leaves the Tribunal in a strange position: the focus of this sub-phase is the volume of timber present on IR 106A as of 1904, but the only evidence of timber volume in front of the Tribunal comes from the Claimants' expert, Scheifele. Therefore, the only questions that need to be answered are: whether Scheifele's evidence establishes the *probability* that 55,465,000 board feet of white spruce timber was present on IR 106A as of the ostensible surrender, or merely the possibility; and, whether Scheifele's evidence can be adequately reconciled with the historic documentary evidence.

[76] To make Scheifele's evidence a probability, the Tribunal must accept three things: first, that the merchantability standard of spruce timber in Saskatchewan in the early-20th century was 5,000 board feet per acre; second, the Tribunal must accept Scheifele's determination of the species composition on IR 106A; and, third, the Tribunal must accept Scheifele's determination that, as of 1904, the spruce on IR 106A was an average of 120 years old.

[77] Scheifele was qualified as an expert in logging practices, and while the Respondent took issue with one aspect of his expert qualification—his ability to perform a loss of use analysis—the

Crown did not object to any other elements of his tender (Hearing Transcript, August 29, 2022, at 41). Further, the Crown offered no contradictory evidence to the foot board per acre merchantability standard offered by Scheifele. Having accepted his expertise on the topic, and with no contradictory evidence in front of me, I accept that 5,000 board feet per acre was the minimum merchantability standard for white spruce in Saskatchewan as of 1904.

[78] These Reasons have already discussed Scheifele's efforts to determine species composition on IR 106A as of 1904, and accepted their relevance and legitimacy based on the fact that both Scheifele and Peebles agree that "soil typing was an acceptable practice to establish probable White Spruce growing sites." This, combined with the fact that Scheifele's analysis of species composition in 1904 was also based on the survey evidence of Ponton and Fairchild, the comparison to records from TB 598, and the concept of forest succession in the mixedwood section of the boreal transition region, causes me to conclude that his determination of species composition in 1904 is, on the balance of probabilities, correct.

[79] Similarly, these Reasons have discussed Scheifele's determination that the white spruce on IR 106A as of 1904 was an average of 120 years. To reiterate, the fact that the white spruce on the Reserve was commercially desirable leads to a justified assumption that the trees were over 100 years old. The lack of any significant, provable disturbance prior to the ostensible surrender, combined with the concept of forest succession, justifies the determination that the trees were somewhat older than 100 years. Therefore, on the balance of probabilities, I accept Scheifele's opinion that white spruce stands on IR 106A as of 1904 were, on average, 120 years old.

[80] Reconciling Scheifele's evidence with the historic record is more difficult. Even setting aside the documentary evidence that is too unreliable to consider—the estimates by Agent Macarthur and Inspector Chitty for not being eyewitness accounts, and the various estimates of SLLC manager Bell for their incongruities—the Tribunal is left with the 1897 survey evidence of Ponton, and the fact that only two tenders were received for the spruce, which caused Peebles to opine that "there probably wasn't a lot of it to attract more than two bidders."

[81] I do not find the fact that only two tenders were received for the spruce persuasive of the idea there was little timber there. Evidence from Mattes, from TB 598, as well as from both Scheifele and Peebles show that there was considerable spruce in the area. As well, during the

five-year period SLLC was harvesting timber on IR 106A, in some years the company cut very little, and in others it cut nothing. In the timber season of 1904–1905, for instance, the company cut only "20 sticks" of timber, and in the season of 1907–1908 the company cut nothing at all because it was "cleaning up another limit" near to IR 106A (Exhibit 1 at paras 20, 39). Many factors, including the availability of manpower, could have contributed to the paucity of bids.

[82] That leaves only surveyor Ponton who wrote that spruce "covering no large area" could be found along the western perimeter of IR 106A. I accept this evidence and, furthermore, conclude that this evidence means it is probable the rest of the Reserve's perimeter contained little to no spruce. This tells me nothing about the interior of the Reserve, however.

[83] I find as a fact that Ponton did not traverse the Reserve as Peebles suggested—Ponton's inaccurate conclusions about the path of the Little Red River make it clear he did not know what was beyond the perimeter he surveyed, apart from the possibility that a small number of accurate observations were made from sufficiently high vantage points. Therefore, the Tribunal is left with no reliable documentary evidence of the volume of spruce in the interior of the Reserve.

[84] In oral submissions, the Claimants noted that IR 106A contained 56.5 sections (Hearing Transcript, February 2, 2023, at 185). They further noted that at 5,000 board feet per acre—the minimum merchantability standard, according to Scheifele—only 17 sections would need to be stocked with mature white spruce to make probable Scheifele's estimate that 55,465,000 board feet of spruce was present on the Reserve. If Scheifele's volume per acre estimate of 10,400 board feet per acre is utilized, the number of sections needing to be stocked with spruce becomes less than half of that (Hearing Transcript, August 29, 2022, at 197). In other words, less than $1/6^{th}$ of the entire area of the Reserve needed to be stocked with spruce in order for Scheifele's estimate of total volume to be probable. Having determined that Scheifele's expert evidence is reliable, and without documentary evidence on the volume of spruce in the interior of the Reserve, I conclude that Scheifele's overall estimate of white spruce timber volume is not merely possible, but probable.

VI. CONCLUSION

[85] I find that the volume of white spruce timber present on IR 106A as of its ostensible

surrender to the Crown in 1904 was 55,465,000 board feet.

TODD DUCHARME

Honourable Todd Ducharme

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20230606

File No.: SCT-5002-11

OTTAWA, ONTARIO June 6, 2023

PRESENT: Honourable Todd Ducharme

BETWEEN:

LAC LA RONGE BAND AND MONTREAL LAKE CREE NATION

Claimants

and

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

Respondent

COUNSEL SHEET

TO: **Counsel for the Claimants LAC LA RONGE BAND AND MONTREAL LAKE CREE NATION**

As represented by Robert Watchman and Todd Andres
Pitblado LLP, Barristers and Solicitors
(For the Lac La Ronge Band)

As represented by Dawn Cheecham
Bainbridge Jodouin Cheecham, Barristers and Solicitors
(For the Montreal Lake Cree Nation)

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