**FILE NO.:** SCT-5008-19
**CITATION:** 2024 SCTC 5
**DATE:** 20240828

# SPECIFIC CLAIMS TRIBUNAL

# TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

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| **BETWEEN:** | |
| WATERHEN LAKE FIRST NATION<br><br>Claimant | Ron Maurice, Sheryl Manychief, Melanie Webber and Antonela Cicko, for the Claimant |
| **– and –** | |
| HIS MAJESTY THE KING IN RIGHT OF CANADA<br>As represented by the Minister of Crown-Indigenous Relations<br><br>Respondent | David Culleton, James Olchowy, Brady Fetch and Luke Brisebois, for the Respondent |
| | **HEARD:** July 25–26, 2022, June 5–9, 2023, and November 20–22, 2023 |

## REASONS FOR DECISION

**Honourable Todd Ducharme**

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

**Cases Cited:**

*Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193; *R v Marshall and Bernard*, 2005 SCC 43, [2005] 2 SCR 220; *Saugeen First Nation et al v AG et al*, 2021 ONSC 4181, 2021 CarswellOnt 11284; *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289; *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324; *R v Simon*, [1985] 2 SCR 387, 24 DLR (4th) 390; *Nowegijick v The Queen*, [1983] 1 SCR 29, 144 DLR (3d) 193; *R v Horseman*, [1990] 1 SCR 901, [1990] 3 CNLR 95; *R v Sioui*, [1990] 1 SCR 1025, 70 DLR (4th) 427; *Halalt First Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 12; *R v Marshall*, [1999] 3 SCR 456, 177 DLR (4th) 513; *Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816; *Watson v Canada*, 2020 FC 129; *Jim Shot Both Sides v Canada*, 2019 FC 789, [2019] 4 CNLR 19; *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245; *Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534, 85 DLR (4th) 129; *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14, [2013] 1 SCR 623; *Ontario (AG) v Restoule*, 2024 SCC 27; *Air Canada v British Columbia*, [1989] 1 SCR 1161, 59 DLR (4th) 161; *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14; *Southwind v Canada*, 2021 SCC 28, [2021] 2 SCR 450; *Mosquito Grizzly Bear's Head Lean Man First Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 1; *Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744, 287 DLR (4th) 480.

**Statutes and Regulations Cited:**

*Specific Claims Tribunal Act*, SC 2008, c 22, ss 2, 3, 16, 20.

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

*Constitution Act*, 1982, s 35.

**Authors Cited:**

Canada, Appraisal Institute of Canada, *Canadian Uniform Standard of Professional Appraisal Practice* (Ottawa, 2022).

**Headnote:**

*Reserve Creation – Treaty Adhesion – Fiduciary Duty – Capacity to Bind the Crown – Crown Intention – Equitable Compensation*

This Claim concerns the reserve creation process at the Waterhen Lake First Nation, located approximately 350 km north of Saskatoon, in the Province of Saskatchewan. The Claimant, the Waterhen Lake First Nation, claims that a reserve of 29,187.40 acres was created in 1921 at the time the First Nation adhered to Treaty No. 6: when the reserve was confirmed by the federal Crown by Order in Council PC 917 in 1930, however, the area of the reserve had been reduced to 19,772.80 acres. Given that the reserve had been created nine years previously, this reduction, the Claimant says, represents an illegal taking of reserve land, and therefore breaches the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], as well as the Crown's legal and fiduciary duties.

The Waterhen Lake First Nation also claims that, at the same time the reserve was created in 1921, a timber reserve of 7,680 acres was created for the First Nation's benefit. This timber reserve was not confirmed by Order in Council PC 917 in 1930. This, the Claimant says, also represents an illegal taking or, in the alternative, the Claimant argues that the timber reserve was promised to the First Nation by an individual capable of binding the Crown, and never delivered.

Evidence on validity and compensation was heard together.

The Specific Claims Tribunal (Tribunal) utilized the test for reserve creation from *Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816 [*Ross River*], which demands four elements for reserve creation: 1) the Crown has an intention to create a reserve; 2) the intention is possessed by Crown agents with sufficient authority to bind the Crown; 3) steps are taken in order to set apart land for the benefit of the First Nation; and 4) the relevant First Nation must have accepted the setting apart and must have started to make use of the land so set apart. Because the Crown's intention throughout the reserve creation process was to create a reserve according to the treaty land entitlement formula in Treaty No. 6, the Tribunal determined that the Waterhen Lake First Nation reserve was not created in law until 1930, when it was

confirmed by Order in Council PC 917. The Tribunal also found that the Crown communicated the treaty land entitlement formula, and its intention to utilize the formula in the creation of the Waterhen Lake First Nation reserve to the First Nation.

Similarly, based on the test for reserve creation from *Ross River*, the Tribunal found that no timber reserve was created in 1921. However, based on the test for the capacity to bind the Crown from *R v Sioui*, [1990] 1 SCR 1025, 70 DLR (4th) 427, the Tribunal determined that the Indian Agent who attended the reserve in 1921 did have the capacity to bind the Crown and did indeed promise that a timber reserve would be set aside for the First Nation. The failure to fulfill this promise was determined to be a breach of the Crown's fiduciary duty to the Waterhen Lake First Nation, and a breach of the *SCTA*.

In the compensation section of this decision, the Tribunal determined that although no illegal taking occurred, the effect of the broken promise was akin to an illegal taking, and therefore compensation under paragraphs 20(1)(g) and (h) of the *SCTA* applied to the breach. The Claimant was therefore awarded compensation for the current unimproved marked value of the proposed timber reserve, as well as for its loss of use from the time the promise was made in 1921 until the date of this decision.

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## I. INTRODUCTION

[1] The Claimant, the Waterhen Lake First Nation, is a First Nation within the meaning of paragraph 2(a) of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*], in that the Waterhen Lake First Nation is a "band" within the meaning of subsection 2(1) of the *Indian Act*, RSC 1985, c I-5. The First Nation is located about 350 km north of Saskatoon, in the Province of Saskatchewan. The Claim brought before the Specific Claims Tribunal (Tribunal) has to do with land that, the Claimant says, was confirmed as a reserve by the Crown in 1921 when the First Nation adhered to Treaty No. 6 but was illegally alienated in 1930, and a timber reserve which the Claimant says was promised to the First Nation at the time of adhesion, but never confirmed. The Crown opposes these claims.

[2] The Waterhen Lake First Nation's Claim fulfills the condition precedent set out in paragraph 16(1)(a) of the *SCTA*. The First Nation submitted its specific claim to the Specific Claims Branch in 2008 and was notified in January 2010 that it was not accepted for negotiation on the basis that the Government of Canada bore no outstanding obligation to the Waterhen Lake First Nation (Declaration of Claim at paras. 3–4). A Declaration of Claim was filed with the Tribunal on August 26, 2019. Three in-person hearings were held: an oral history evidence hearing was held in the Claimant's community on July 25–26, 2022; an expert evidence hearing was held in Saskatoon on June 5–9, 2023; and an oral submissions hearing was held on November 20–22, 2023, again in Saskatoon.

[3] Unlike most of claims that come before the Tribunal, this Claim has not been bifurcated into separate phases for validity and compensation. Instead, this decision covers both aspects of the Tribunal's mandate to "decide issues of validity and compensation relating to specific claims of First Nations" (section 3 of the *SCTA*).

[4] The Tribunal acknowledges that using the term "Indian" to refer to Indigenous Peoples in Canada is considered not only incorrect, but pejorative. It is used in this decision when referring to the *Indian Act*, as well as in some historical references. The use of the term "Indian" is not an endorsement of the term. Where possible, the Tribunal prefers to use the terms First Nations or Indigenous.

## II. SOURCES OF EVIDENCE

[5] Two of the three hearings held were evidentiary: the oral history evidence hearing and the expert evidence hearing.

[6] The oral history evidence hearing was held at the Waterhen Lake First Nation, where the Tribunal, along with counsel for the Claimant and the Crown, were welcomed into the community. At the hearing, the Tribunal heard from eight Elders of the Waterhen Lake First Nation: Sidney Fiddler, Robert Fiddler, Michael Ernest, Albert Fiddler, Edward Martell, Armand Fiddler, Richard Fiddler and Alex Mistickokat, who shared the history of their community before and after the adhesion to Treaty No. 6, the First Nation's understanding of the negotiations, the treaty agreement and the setting apart of the reserve. In addition, the Tribunal received a sworn affidavit from Elder Edward Running Around, whose health at the time prevented him from testifying. The Tribunal was honoured to hear from these Elders, and honoured to spend time and share meals with them and other members of the community.

[7] Oral history is a unique and important aspect of Indigenous claims in Canada, and it is of vital importance to the Tribunal. As Elder Sidney Fiddler put it at the oral history evidence hearing: "[W]e have to use oral history because how else are you going to ever hear that Indigenous perspective, that Indigenous voice?" (Hearing Transcript, July 25, 2022, at p. 20). This perspective is echoed by the Supreme Court of Canada in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193, which determined that, for many Indigenous Peoples, oral history is the primary way in which nations record their histories, and not allowing oral history testimony into evidence would place parties on such an unequal footing that treaty and Aboriginal rights risk being negated. The Court wrote:

> … the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents. This is a long-standing practice in the interpretation of treaties between the Crown and [A]boriginal peoples. To quote Dickson C.J., given that most [A]boriginal societies "did not keep written records", the failure to do so would "impose an impossible burden of proof" on [A]boriginal peoples, and "render nugatory" any rights that they have. This process must be undertaken on a case-by-case basis. [citations omitted; para. 87]

[8] To receive Indigenous oral history as evidence, the Tribunal must be convinced that the

testimony is both useful and reasonably reliable. McLachlin CJC explained the meaning of the test for usefulness and reasonable reliability this way:

> Usefulness asks whether the oral history provides evidence that would not otherwise be available or evidence of the [A]boriginal perspective on the right claimed. Reasonable reliability ensures that the witness represents a credible source of the particular people's history. In determining the usefulness and reliability of oral histories, judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts. [*R v Marshall and Bernard*, 2005 SCC 43 at para. 68, [2005] 2 SCR 220 [*Marshall 2005*]]

[9] I found the testimony received from the Elders to be both useful and reliable, as well as very helpful in the making of this decision. As such, the Tribunal, like any court, is expected to place oral history "on an equal footing with the historical documents" (*Saugeen First Nation et al v AG et al*, 2021 ONSC 4181 at para. 46, 2021 CarswellOnt 11284, rev'd in part 2023 ONCA 565).

[10] I thank all of the Elders and the whole community for their efforts and willingness to share their knowledge.

[11] The expert evidence hearing was held in Saskatoon, where the Tribunal heard from four experts: Alana J. Kelbert and Greg W. Scheifele for the Claimant, and Gwynneth C. D. Jones and Bradley D. Slomp for the Respondent. The Parties agreed upon the qualifications of all the experts who testified (Exhibit 46 at pp. 3–4). Bradley Slomp and Alana Kelbert are expert appraisers, who were qualified as follows:

> Mr. Bradley D. Slomp holds the designations of Accredited Appraiser (AACI) and Professional Appraiser (P. App) with the Appraisal Institute of Canada, wherein he remains a member in good standing. He also holds the designation of Accredited Rural Appraiser (ARA) with the American Society of Farm Managers and Rural Appraisers, wherein he remains a member in good standing. In addition, he holds a Bachelor of Management degree (Finance), with Great Distinction, from the University of Lethbridge, and a Post-Graduate Certificate in Real Property Valuation from the University of British Columbia. Mr. Slomp is experienced in assessing rural lands for a variety of uses, including recreational, future developments, and commercial/industrial operations. His professional practice includes providing objective opinions throughout rural western Canada on land claims, including Indigenous land claims; on compensation, damages and injurious affection matters; on loss of use analyses; on asset valuations, including current and retrospective appraisals of all types of rural and agricultural real property assets and operations; and on easement and development restriction assessments. Mr. Slomp has been previously qualified as an expert before the Specific Claims Tribunal. Mr. Slomp is qualified to provide expert evidence on land use models and valuations of real property assets and operations for all types of rural real estate

> and rural business operations. He is also qualified to provide expert evidence on market value trends, land use impacts, land use compensation analysis, investment due diligence, and loss of use.
>
> Alana Kelbert is an Accredited Appraiser (AACI), Professional Appraiser (P.App.), Professional Agrologist (P.Ag.), and has a Master of Science (M.Sc., Plant Science). Ms. Kelbert is qualified to give expert evidence in current and historical land valuation and historical loss of use determinations in western Canada. Ms. Kelbert has prepared expert appraisal, loss of use, and damages reports with respect to First Nations land claims since 2005 for agricultural, recreational, and urban land uses within Treaties 1, 3, 4, 6, 7, and 8. Ms. Kelbert has appeared as an expert witness before the Specific Claims Tribunal.

[12] Greg Scheifele testified as an expert in forestry. His agreed-upon qualifications were as follows:

> Greg Scheifele is a Registered Professional Forester (R.P.F.) and Ecologist with over 45 years of related work experience. He also has a Master of Arts degree in Regional Planning and Resource Development. Mr. Scheifele is qualified to give expert evidence in current and historical forest valuation and historical loss of use determinations in Canada. Since 1993 Mr. Scheifele has prepared or peer reviewed over 40 forestry loss of use and damage reports for First Nations land claims. These forestry loss of use studies were conducted in Nova Scotia, Quebec, Ontario, Saskatchewan, Alberta and British Columbia. Mr. Scheifele has previously provided expert testimony before the Specific Claims Tribunal, as well as at Provincial and Federal Court cases pertaining to First Nation land claims.

[13] Gwynneth Jones testified as an expert historian. Her agreed-upon qualifications were as follows:

> Ms. Gwynneth C.D. Jones is an historian and independent research consultant with over 35 years experience in the areas of historical research, historical methodologies, Indigenous and Canadian history, and Government-Indigenous relations. Ms. Jones holds a Bachelor of Arts degree (History, First Class Honours) from Queen's University, a Master of Public Administration degree from Queen's University, and a Master of Arts degree (History) from York University. On nine occasions, Canadian courts have qualified Ms. Jones as an historical expert. She is qualified to give expert evidence on Canadian history; on the interpretation of historical documents, especially in relation to Canadian governments and Indigenous peoples; on historical methodologies; and on Government-Indigenous relations in Canada.

[14] Finally, a wealth of historical and other documents provided further context to this Claim. The Common Book of Documents, a joint effort of the Parties, contains almost 300 documents across three volumes (Exhibits 37, 38 and 39), and is over 900 pages. In addition to the Common Book of Documents, each Party filed a Condensed Book of Documents and Expert Books of

Documents, in various volumes, to support the conclusions of their respective experts, and these books together contain over 600 documents.

## III. VALIDITY

### A. Facts

[15] The Waterhen Lake First Nation is located in Treaty No. 6 territory, a vast swath of prime agricultural land that encompasses the central regions of what are now the provinces of Alberta and Saskatchewan. Cree people have lived at Waterhen Lake for generations, well before the arrival of any Europeans to the area. Elder Sidney Fiddler testified that his community has lived at Waterhen Lake for "thousands of years" (Hearing Transcript, July 25, 2022, at p. 32). Elder Alex Mistickokat described the First Nation prior to contact as "a very independent people" who "lived off the land … lived traditionally like their fathers did before them … a strong, noble people" (Hearing Transcript, July 26, 2022, at p. 131).

[16] Treaty No. 6 was negotiated and signed in 1876. The people of the Waterhen Lake First Nation attended the negotiations, but they did not sign onto the treaty with the Crown at this time: as Elder Sidney Fiddler testified, the people of Waterhen Lake questioned how the Crown could claim to hold the underlying title to land they had lived on for generations and, "because they didn't get a satisfactory answer," refused to sign (Hearing Transcript, June 25, 2022, at p. 37). The Claimant would eventually adhere to the treaty on November 8, 1921, as confirmed by Order in Council PC 4512, dated December 1, 1921 (Exhibit 38, Tab 161).

[17] The most important clause for the purposes of this Claim is typically referred to as the "treaty land entitlement" or TLE formula. In Treaty No. 6, the formula is as follows:

> And Her Majesty the Queen hereby agrees and undertakes to lay aside reserves for farming lands, due respect being had to lands at present cultivated by the said Indians, and other reserves for the benefit of the said Indians, to be administered and dealt with for them by Her Majesty's Government of the Dominion of Canada; provided, all such reserves shall not exceed in all one square mile for each family of five, or in that proportion for larger or smaller families, in manner following, that is to say: that the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them. [emphasis added; Exhibit 37, Tab 14]

[18] Treaty No. 6 was signed in 1876, but the people of Waterhen Lake do not appear in the

Crown's records until 1903. The reason the people of Waterhen Lake did not sign onto the treaty until 1921 is two-fold: first, the Crown was unaware of them; and second, the people of Waterhen Lake did not want to sign the treaty and resisted entering into a relationship with the Crown for many years.

[19] The first mention of people at Waterhen Lake comes in a memorandum written by J. A. J. McKenna, Assistant Indian Commissioner and Chief Inspector for Manitoba, Keewatin and the Northwest Territories, dated March 18, 1903, and addressed to the Minister of the Department of the Interior. He refers to "information" collected via an interview with a Bishop Pascal which suggests, among other things, that "300 Crees" live at "Water Hen River, close to the boundary of Treaty 6" (Exhibit 4, Tab J-018). The Assistant Indian Commissioner and Chief Inspector admits that he has "never been in the country referred to." The memorandum goes on to cast doubt on the accuracy of the information it contains: after recounting a variety of statistics collected about "Indians" and "Halfbreeds" living in what is now Northern Saskatchewan, McKenna concludes by stating that "the country contains 2000 Indians and 235 Halfbreeds" according to Bishop Pascal. He goes on to state, however, "that 2000 Indians would be found to be beyond the number of those who would classify as Indians and that the estimate of Halfbreeds will be found much below the mark."

[20] The next mention of the Waterhen Lake First Nation in the Crown's records appears to be in 1909 when, while delivering annuities in Treaty No. 10 territory, Inspector of Indian Agencies W. J. Chisholm met a few members of the community. He reported that he did not allow the Waterhen Lake people to take annuities as they were not under treaty and recommended that "steps be taken to offer to them the privileges of the treaty" (Exhibit 4, Tab J-027). Based on information he had received, he wrote that the population at Waterhen Lake numbered, "I understand, about one hundred souls."

[21] Chisholm sent a follow up on May 3, 1910, which referred again to the "Waterhen Lake Indians, a band of about 100 Crees who have their abode around the Waterhen and Big Island Lakes" and said, "I would suggest the advisability of some officer of the Department being sent to look into the condition of these Indians and to offer them admission to treaty" (Exhibit 37, Tab 18). The Crown sent Chisholm himself, who visited on June 24 and 25 of that year. He reported

back on November 15, 1910, and noted a total of 94 persons between the populations at Waterhen Lake and Big Island Lake. Chisholm explained that "I endeavoured to secure a census, which I succeeded in doing with something near accuracy, although many of the Indians resented the enumeration and I could ascertain the number of persons in their families only by Inquiry of others" (Exhibit 37, Tab 20).

[22] Chisholm also included in his report how the First Nation described its territorial claims at the meeting on June 25:

> They claim as their own the country south and east as far as the Beaver River; and they wish to be left in undisturbed possession of it. This claim was put forward by several of their principal men, with much variety of expression, but all to the same purpose. They maintain that this stretch of country was given to them by the Great Spirit, as a hunting ground, from which to derive their subsistence; and they would regard it as impious to take any measures toward a surrender of rights and privileges conferred in this way. They maintain that they and their ancestors have dwelt here, under the favour of their God, in peace and happiness; and they believe they would have reason to expect calamity and retribution should they willingly abandon the land from which had been assigned to them by Heaven for their use.

[23] Chisholm explained what the people at Waterhen Lake could expect from treaty:

> It was explained to them at length that one of the advantages to be derived from entering into treaty would be that they could expect to have a limited area of land and water definitely set apart, and held for their sole use, in the possession of which they would be protected, just as the rights and property of every subject are protected by the laws of the country; and I pointed out that for some time at least their entering into treaty and the setting apart of land for them would not affect their present pursuits nor necessitate their removal from their present abodes and hunting-grounds. … What they object to mainly is being themselves a party to the surrender of the lands and waters of the locality.

[24] An internal memorandum dated November 24, 1910, and based on Chisholm's reporting, noted that the people at Waterhen Lake "appear to be strongly opposed to take Treaty" (Exhibit 37, Tab 21).

[25] In a letter to headquarters dated January 15, 1913, Chisholm reported that he had received a letter from J. H. Reid, Manager of the Île-à-la-Crosse post of the Hudson's Bay Company, which showed concerns of the people of Waterhen Lake about the advancement of survey parties into their territory, because "the work of sub-dividing the land has advanced so rapidly that the Indians have apparently become alarmed lest they should be deprived, not only of the extensive area to

which they laid claim, but even of the limited area which is provided for in the treaty" (Exhibit 37, Tab 28; Exhibit 3 at p.33). He further reported that the people of Waterhen Lake "are prepared to enter into treaty relations during the coming summer and wish to have lands set apart." In the same letter, Chisholm also reported that the population at Waterhen Lake was "about 90 persons according to the best information available."

[26] Around the same time, Surveyor General of Canada Édouard Deville reported that one of his survey parties had been stopped in the Waterhen Lake area and wrote that "[t]he Indians objected to this land being surveyed as they claimed it was their land" (Exhibit 37, Tab 29; Exhibit 3 at pp. 33–34). The letter also reported that "from 50 to 75 Indians resid[e] along the shores of Waterhen Lake in this township and they are not treaty Indians."

[27] After some back and forth between people and departments, the Crown determined it would attempt to bring the Waterhen Lake First Nation into treaty: it sent Chisholm to make the arrangements, and provided money to be paid as "arrears" for prior payments missed because the First Nation was not yet under treaty (Exhibit 37, Tab 34; Exhibit 3 at p. 36).

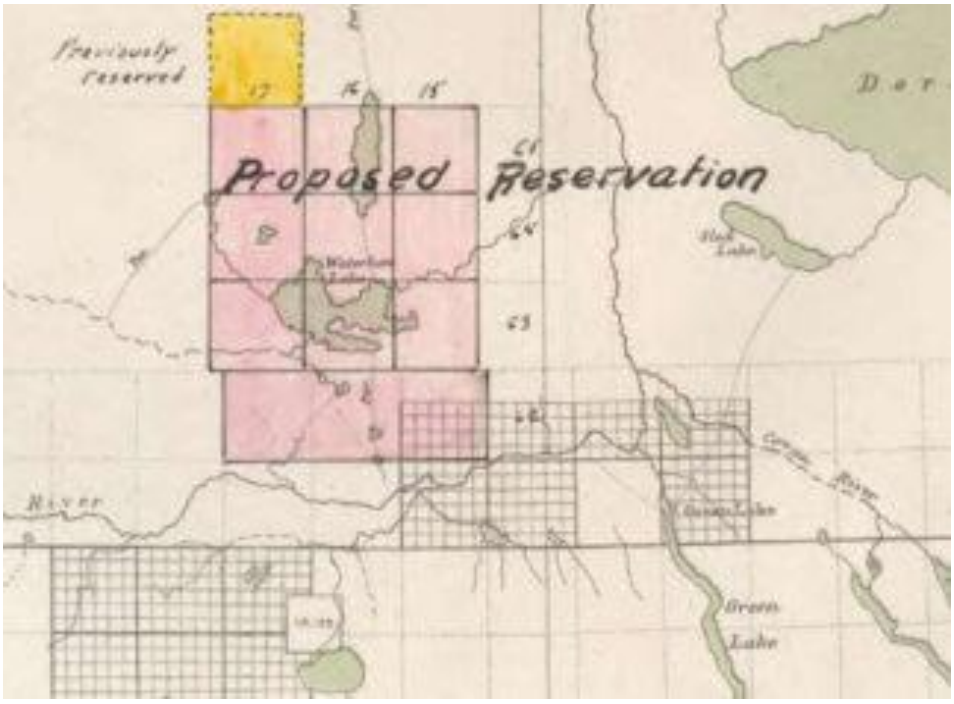
[28] Chisholm met with the Waterhen Lake First Nation between June 22 and 26, 1913 (Exhibit 3 at pp. 39–41). According to his report to headquarters dated August 16, 1913, he informed the First Nation that:

> … while the Government would be very considerate toward them under any circumstances yet in view of the present demand for land for settlement purposes the best way for them to secure at once a definite area in that locality, to which they are so much attached, would be to accept the term of the Treaty. [Exhibit 37, Tab 41]

[29] Chisholm also reported that the people from Waterhen Lake "absolutely refused to give their names or any particulars regarding their families" and "claim the entire district for many miles around and would wish to be left in undisturbed possession of it." However, "if they are to be allowed only a reserve of limited area they would wish to have it on the south and south-eastern side of the lake, including the shore from about a mile west of the mouth of the Island River to the outlet of the lake at the Waterhen River."

[30] At around the same time Chisholm met with the Waterhen Lake First Nation, T. W. Dwight of the Forestry Branch of the Department of the Interior recommended to W. W. Cory, Deputy

Minister of the Interior, that "a temporary reservation from sale or settlement" be made for Townships 62, 63, 64 and 65, Ranges 15, 16 and 17 west of the Third Meridian, based on fire rangers' reports that the land was "rather heavily timbered with spruce and Jack pine" with "fair-sized tracts of large timber" but no "agricultural land of any account" (Exhibit 4, Tab J-067; Exhibit 3 at p. 42). According to a map attached to the recommendation, this proposed reservation included all of Waterhen Lake, and much of the surrounding country. Cory approved the temporary reservation, and the Dominion Lands Office at Battleford was "advised accordingly" (Exhibit 4, Tab J-068; Exhibit 3 at p. 42). Below is a detail of the map sent by Dwight to Cory:




[31] There was some confusion within the Crown's various departments about the availability of lands near Waterhen Lake. On June 6, 1914, a sketch of the lands reserved around Waterhen Lake by the Forestry Branch was received by Samuel Bray, Chief Surveyor of the Department of Indian Affairs—although the material had been sent in October the previous year. This plan was passed to Chisholm with a request "at as early a date as may be convenient have indicated on the said sketches the lands which it is desired to reserve for the Waterhen and Big Island Lake Indians" (Exhibit 37, Tab 51; Exhibit 3 at p. 44).

[32] Shortly after the material was passed to Chisholm, on June 11, 1914, the Assistant Deputy

and Secretary to the Department of Indian Affairs, J. D. McLean, wrote to Surveyor General Deville to inform him that "we have not yet had a selection made of the lands required for an Indian Reserve at Waterhen Lake" but hoped it would be made within the next 30 days (Exhibit 4, Tab J-078; Exhibit 3 at pp. 44–45). Chisholm sent his recommendation to the Department of Indian Affairs on June 26, 1914. On July 4, 1914, McLean described the recommendation in a letter to Deville as consisting of:

> … the Sections, Fractional Sections and Islands included within … the North boundary is the North limits of Sections 35 and 36, Township 63, Range 17 … and the North limits of Sections 31, 32, 33 and 34, Township 63, Range 16 …
>
> …
>
> The South boundary consists of the South limits of Sections 3, 4, 5 and 6, Township 63, Range 16 … and the South limits of Sections 1 and 2, Township 63, Range 17 …
>
> The West limit consists of the West limits of Sections 2, 11, 14, 23, 26 and 35, Township 63, Range 17 …
>
> … In addition to the above described block Sections 31 and 32, Township 61, Range 16 … are required for these Indians. [Exhibit 37, Tab 54; Exhibit 3 at p. 45]

This set off a flurry of correspondence within the Department of the Interior about whether the lands referred to by Chisholm were available to the Waterhen Lake First Nation, or if they were unavailable due to having previously been made a timber reserve.

[33] Two Elders testified that an Elder who lived in the community when they were children told them that he participated in a survey of the reserve's boundaries in 1914 (Hearing Transcript, July 25, 2022, at pp. 40–42, 71–74). Elder Sidney Fiddler testified that the man's name was Henry Brayband, while Elder Robert Fiddler knew him only as "Moose." This Elder, in or around 1990, took Robert Fiddler and a number of others to the places where survey stakes had been placed to denote the boundaries of the reserve at that time. These stakes, which were no longer located there, would have been outside the boundaries of the current reserve.

[34] Elder Michael Ernest testified that in or around 1997 or 1998, he and his brother-in-law went looking for boundary stakes and found one south of the Waterhen River, near Otter Creek, at Township 63, Range 17, Section 4. He did not indicate what year this boundary stake was placed at this location, but the location itself is outside the boundaries of the current reserve.

[35] Elder Richard Fiddler testified that one of the reasons the stakes may be gone is that they were pulled up and used by members of the First Nation. As he said, "people used to take them and use them … they used to put them in there and use them for hangers for their cooking pots … they used [them] to make fireplaces" (Hearing Transcript, July 26, 2022, at pp. 99–100).

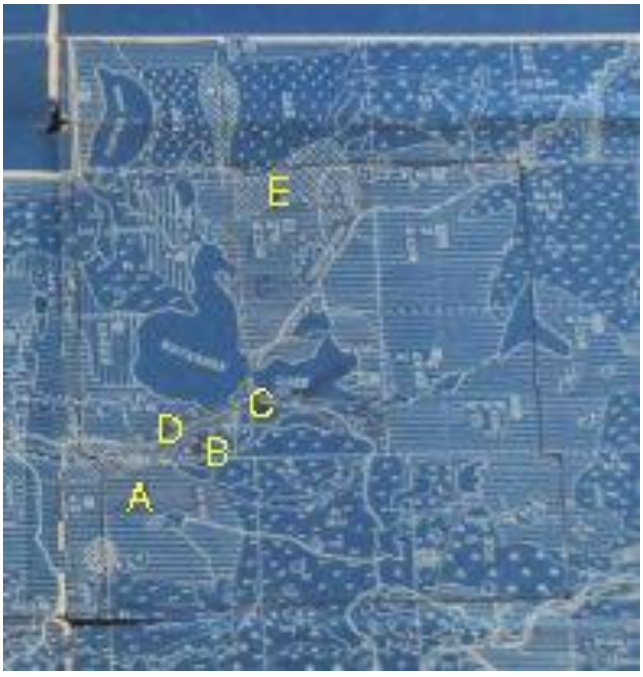
[36] A timber cruise moved through the area between May and September 1914, led by University of Toronto forester A. V. Gilbert. Gilbert reported that the land around Waterhen Lake was "worthless from an agricultural point of view" and should be "reserved from settlement" for that reason (Exhibit 5, Tab J-106, at pp. 9–10; Exhibit 3 at p. 48). Gilbert produced a map of a proposed timber reserve significantly larger than the one created in 1913, but which still contained the whole of Waterhen Lake (Exhibit 37, Tab 45). This proposed reserve was never created. A blueprint map of the proposed reserve was printed, and this map was used subsequently by the Crown to collect and display information, so it is worth seeing in its entirety:


[37] Between 1914 and 1917, there are mentions of the people at Waterhen Lake in Crown records, but no representative visited the community until Chisholm's successor, W. B. Crombie, visited in March 1917. His instructions were to induce the people at Waterhen Lake to take treaty so that "the selection of the lands to which they are entitled under the Treaty … [could] be made as soon as possible because settlement is progressing towards the North very rapidly" (Exhibit 37,

Tab 69; Exhibit 3 at p. 57).

[38] At the meeting, Crombie took what he called an "approximate census" of all the people living in the vicinity of Waterhen Lake, which he divided into the "Waterhen [Lake First Nation]" and a "Band of Stragglers" (Exhibit 37, Tab 74; Exhibit 3 at p. 59). He noted that there were "eighty-three souls" at Waterhen Lake and "thirty-two souls" among the people he referred to as Stragglers.

[39] Crombie used the blueprint map created by Gilbert in 1914 to mark the areas that the two groups wished to have reserved for their use. Nothing in the below map has been changed, but the letters placed there by Crombie have been enhanced based on historical expert Gwynneth Jones' interpretation (Exhibit 3 at pp. 60–62), to make them easier to read. Crombie's report (Exhibit 37, Tab 74) said that area "A" was near to where the Band of Stragglers was already living, and ought to be reserved for them, along with good haylands at the area marked "B". For the Waterhen Lake people, Crombie suggested reserving the area marked "C" which is where they dwelled, along with haylands at the area marked "D" and timber at the area marked "E."




[40] The Waterhen Lake First Nation was represented at this meeting with the Crown by a man named Running Around, who was later named Chief. Crombie reported that Running Around

expressed a desire to enter treaty, but only on the condition he be granted the land he asked for. Running Around commented:

> I am going to tell him what I think and if what I ask be granted I am ready to treat with the Government, but if the Government don't grant what I ask for I will not accept treaty nor will I deal with the Government in the future. [Exhibit 37, Tab 73; Exhibit 5, Tab J-134 at pp. 13–14; Exhibit 3 at p. 64]

[41] Crombie also reported that, as part of this conversation, he explained "about [the] size of reserves" to Running Around. Crombie does not say exactly what the explanation entailed, but does record Running Around's response:

> I expected to also get a piece of timber and some hay land in addition to a reserve larger than Meadow Lake. The reason that I am so anxious about getting a reserve of a suitable size is because I am convinced that in the future I will have a band of a size to be able to use it.
>
> …
>
> … upon two points of his remarks I feel a little disappointed. First He says that it may happen under certain circumstances that the reserve if given to me might have to be made smaller than what I want it to be. [emphasis in original; Exhibit 37, Tab 73; Exhibit 5, Tab J-134 at pp. 16, 19; Exhibit 3 at pp. 65–66]

[42] Because there was an expectation that more would join, Crombie suggested that "a reserve be figured out on the basis of one hundred souls" which would accommodate any future adherents to the Waterhen Lake First Nation.

[43] Elder Richard Fiddler testified that, around this time, there were two political factions at Waterhen Lake. One faction saw Running Around as their leader, and "Running Around's group were willing to accept treaty and be part of Treaty 6" (Hearing Transcript, July 26, 2022, at p. 87). The other faction "wouldn't accept treaty … they had to go where the food was … and they didn't want to be put in a situation where [they were] on a block of land and you can't go out and hunt."

[44] Crombie's report again set off a flurry of correspondence within the Department of the Interior about whether the lands were available for a reserve, considering they had been previously reserved by the forestry department. In a letter sent May 4, 1917, Indian Affairs Deputy Superintendent General Duncan Campbell Scott suggested to the Deputy Minister of the Interior, W. W. Cory, that:

> According to the terms of treaty these Indians are entitled to land in the proportion of 640 acres to each family of five. I am enclosing herewith a map on which is indicated within the green border the lands which the Indians expressed a desire to have reserved for their use. They were not able, however, to make a definite selection and it is requested that the entire tract coloured red be temporarily reserved until we are able to send in a surveyor to define the exact limits.
>
> In addition, a small reserve will be required for a band of stragglers, numbering thirty-two, who have for many years been residing on Island or Waterhen River, four miles from the trading post.
>
> These Waterhen Indians have lived in this vicinity for generations and are opposed, and I think reasonably so, to removing to any other locality.
>
> I trust, therefore, that you will make the required reservation. [Exhibit 37, Tab 77; Exhibit 3 at pp. 70–71]

[45] By June 6, 1917, the Department of the Interior agreed to release much of what had been made a temporary timber reserve to be made into a temporary Indian reserve. A letter on that date sent from the Department of the Interior to Duncan Campbell Scott agreed to give up the tract save for some heavily timbered land to the north of Waterhen Lake:

> … I beg to say that sections 25 to 36 inclusive in township 64 Range 16 West of the 3rd Meridian are heavily timbered and therefore cannot be reserved for the Indians. A note of the temporary reservation against all the remaining lands … has been made in the records of this Branch and the Agent of Dominion Lands at Battleford is being requested to make the necessary notation in his records and not to dispose of these lands until further advised. [Exhibit 5, Tab J-150; Exhibit 3 at p. 73]

[46] Following this agreement, Chief Surveyor Bray informed Duncan Campbell Scott that "[t]he portion left to be temporarily reserved for the purpose of selecting hereafter an Indian reserve for the Waterhen [Lake First Nation] is ample and should be quite satisfactory" and that he intended to schedule the survey work in spring 1918 (Exhibit 37, Tab 81; Exhibit 3 at p. 74).

[47] The intended survey did not occur in 1918.

[48] On November 12, 1917, Peter Villebrun—who had provided translation between Cree and English during Crombie's March 1917 visit to Waterhen Lake—wrote to Crombie to express Running Around's dissatisfaction with the lack of communication from the Crown. He wrote:

> I have just come back from Waterhen Lake and your friend Running Around came along to Green Lake with me, his idea was to wire you and find out from you if you were coming sometime at all. He wanted me to say that when he consented to

> accept treaty and help from the Government, he thought he was accepting real and actual treaty and help and not merely a bunch of promises that were likely to drag along indefinitely for years. He also wants me to say that if there was anything in what you said last March and if you have been working on this matter since, you should be in a position to know by this time just exactly what the Department wants to do regarding Waterhen Lake Indians. Running Around says if you are able to pay them treaty as requested by him last March, to be in a hurry about doing so and not to bother about getting surveyors as that part of the matter could be looked into and arranged later on, but in the matter of treaty money and help that is needed now, as the winter is coming on and those who are going to take treaty and help from the Government wants it now. Running Around will thank the Inspector to look into this matter as early as possible. [Exhibit 37, Tab 83]

[49] Crombie passed this letter onto the Department of Indian Affairs on December 4, 1917. A memorandum by an accountant within the department, addressed to Duncan Campbell Scott, provided a "rough estimate" of the money and supplies that would be necessary to take the adhesion, and suggested that Crombie pay another visit to the First Nation in order to effect the adhesion (Exhibit 37, Tab 86). The memorandum has a marginal note on the first page which reads "Approved."

[50] In spring 1918, treaty papers, supplies and money were set aside for Crombie to return and get the First Nation's adhesion to Treaty No. 6 but, in a letter dated November 29, 1918, Crombie informed the Department of Indian Affairs that he did not make the trip:

> As you are aware arrangements were made for me to visit Waterhen in the Spring of this year for the purpose of taking an adhesion of these stragglers, to treaty, and the necessary supplies were contracted for with Revillon Freres Co., Green Lake and documents, medals, etc., forwarded to me. About that time, however, I was instructed to proceed to Regina on Greater Production work and have since been continuously engaged in this section of Department work. [Exhibit 37, Tab 118; Exhibit 3 at pp. 77–78]

[51] Following the end of the First World War in 1918, there was a need for the Canadian government to provide land to returning soldiers, and enquiries were made in a variety of departments about reserved tracts and whether their reservation remained necessary. Inquiries were made regarding the lands reserved at Waterhen Lake, but none were released.

[52] In July 1920, the fact of the Waterhen Lake First Nation's not being in treaty arose at the annuity payments for the nearby Joseph Bighead First Nation (now known as the Big Island Lake First Nation): two men from Waterhen Lake arrived and sought payment, but the Indian Agent refused, telling them they were not in treaty. The Agent reported that a third man, older than the

others, explained that the Waterhen Lake First Nation was prepared to enter treaty, and "would like to have someone with the necessary authority visit them for that purpose" (Exhibit 5, Tab J-195; Exhibit 3, at pp. 80–81).

[53] In December 1920 and January 1921, the Department of the Interior refused a number of applicants seeking to graze livestock on the lands reserved for the Waterhen Lake First Nation. In response to a Member of Parliament advocating for one of the applicants, the department wrote that "[t]his reservation still stands and, therefore, the two sections are not available for grazing purposes" and "[a]lthough this block of land is designated on the approved township plan as Waterhen Lake Indian Reserve it has not yet been set apart as a reserve by Order in Council" (Exhibit 5, Tab J-199; Exhibit 3 at p. 82).

[54] The enquiries into grazing leases created new urgency about getting the Waterhen Lake First Nation into treaty and finally settling the boundaries of the reserve. In the early part of 1921, the Department of the Interior put pressure on the Department of Indian Affairs to make a final selection so that the rest of the lands could be opened to settlement and other uses. J. D. McLean explained in February 1921 that the department "intended to make a selection of lands for Indians at and near Waterhen Lake … this season" (Exhibit 37, Tab 127; Exhibit 3 at p. 83). In June 1921, Chief Running Around wrote to the department to complain that he and his people had been disappointed by a lack of communication and the department's failure to return every year since 1917. He had not given up on the process, however, stating:

> … I am writing your department to find out whether or not your department intends to get into touch with us once more and if po[s]sible getting into arrangements by which your department could now have some land, in the vicinity of Water Hen Lake, set aside for our Band and also arrange for us to get and receive treaty money from the Government. [Exhibit 37, Tab 130; Exhibit 3 at p. 85]

[55] In August 1921, departmental accountant F. H. Paget wrote to McLean and, after referencing the instructions given to Agent Crombie in 1918 to take an adhesion and never followed up on, he remarked:

> I think that another effort should be made as soon as possible to treat with these Indians and as Mr. Indian Commissioner Graham is in possession of all the instructions given Mr. Crombie, I would suggest that the question be referred to him and that he be requested to send a qualified official at a convenient time to

> visit these Indians and ascertain what their intentions are now with regard to joining Treaty. [Exhibit 37, Tab 136; Exhibit 3 at pp. 85–86]

[56] Around the same time, a department surveyor named Donald Robertson informed Chief Surveyor Bray:

> Referring to my conversation with you in June 1919: Pending the making of treaty, we now have reserved for selection at Waterhen Lake for the Indians of that locality, approximately 88 sections. Crombie's list shows about 83 Indians; this means that we have at least 5 times the area held in reserve than the amount to which these Indians would be entitled if they take treaty. [Exhibit 37, Tab 134; Exhibit 3 at p. 86]

He also suggested, after noting that not all members of the band were prepared to adhere to the treaty:

> … would it not be a good arrangement to suggest that someone be sent from the Surveys Branch to make the selection of what would be the reserve if the Indians all took Treaty, in order to reduce our reservation on the books of the Interior Department to the probable land that we will require[?]

[57] Bray endorsed Robertson's recommendation and, after some back and forth with various members of the department, J.D. McLean wrote to Indian Commissioner W. M. Graham on August 19, 1921, to outline the department's previous efforts at Waterhen Lake, and suggested:

> Apart from the desirability of taking these Indians into Treaty, as apparently promised to Running Around, it is especially necessary to withdraw from reservation and return to the Department of the Interior, the lands in that locality not actually required for the reserve. As the present is the best season of the year for the work, it would be quite convenient to send Mr. Fairchild [a Department of Indian Affairs surveyor] at once to take the adhesion, and also to select the reserve and make any necessary surveys in connection with the selection. It is however to be noted that Mr. Agent Taylor, who has been transferred from Norway House to take charge of the Isle a la Crosse Agency and whose headquarters will it is understood be at Prince Albert during the winter, might be a good man to deal with these Indians and to select their reserve. [Exhibit 37, Tab 138]

[58] Graham responded on August 26, 1921:

> In regard to the selection of a reserve for them and the taking of the adhesion, Mr. Agent Taylor will return from Norway House very shortly and I think it would be preferable if he should proceed to Waterhen Lake to interview the Indians and perform the necessary service, and when I receive … any further instruction you may wish to give, I will take up the matter with Mr. Taylor. [Exhibit 37, Tab 139]

[59] On September 3, 1921, McLean responded to Graham's letter and informed him that "as

to further instructions, I beg to say that there are none other than those given Mr. Crombie under cover of letter of the 15th February, 1918, which no doubt you will find on file in your office" (Exhibit 37, Tab 141). Three days later, a second letter signed by A. F. MacKenzie on behalf of McLean was sent to Graham, which approved sending Agent W. R. Taylor, and asked:

> Will you be good enough to instruct Mr. Taylor to select the lands which should be retained as a reserve, in order that the balance of the temporary reservation now held by this Department may be released to the Department of the Interior? If the limits of the tract so selected require to be surveyed, this may be attended to next summer. [Exhibit 37, Tab 142]

[60] At this point, the instructions to Taylor included those previously given to Crombie, as well as the additional instruction that he "select the lands which should be retained as a reserve." Below, reproduced almost in their entirety from the original, are the instructions sent to Crombie in February 1918:

> Sir,-
>
> Referring to your letter of the 22nd ultimo, regarding the admission to Treaty of the Water Hen Lake Indians and dealing with the Loon Lake Stragglers, I beg to enclose herewith blank forms of adhesion to be signed by the Principal men of the Water Hen Lake Band.
>
> I also enclose form of agreement to be signed by the principal men of the Loon Lake Stragglers in the event of their accepting the terms offered to them in settlement of their case.
>
> You will observe that the provisions of the Treaty are those of Treaty No. 6, as the country in which they have their abode lies within the limits of the territory covered by that Treaty. The documents provide for the payment of a gratuity of $7.00 once and for all in addition to the annuity in extinguishment of all past claims. The annuity payment for 1918 should be made along with the gratuity in both cases at the time of signing the adhesion and agreement, and the two payments should be recorded in the same book, the gratuity being entered in the columns ruled for "Arrears". You will observe that the adhesion shall not be retroactive in its terms and that the benefits of the Treaty begin on the date on which it is signed.
>
> You may assure the Indians that a reasonable supply of provisions will be furnished for issue during each winter to the sick and destitute members of their bands.
>
> The Water Hen Lake Band may be allowed to select one Chief and one Councillor to manage their affairs.
>
> With regard to the Loon Lake Stragglers, although they are not entitled to a Chief and Councillors, the Department is willing to recognize their principal man as a

> Councillor, if they insist on having one, and he may be paid the extra annuity allowed that office.
>
> I am forwarding by Canadian Northern Express the following, viz:-
>
> 1 Silver Medal for the Chief
>
> 2 Bronze Medals for Councillors
>
> 2 Flags – One for the Chief and one for the Councillor of the Loon Lake Indians.
>
> 2 Blank Pay books.
>
> 2 Forms of Estimates. [Exhibit 37, Tab 117]

[61] Following this was a discussion of how much money the department planned to send, based on the latest estimates of the population of the two communities, and instructions for acquiring cash for payments. That is the whole of the instructions.

[62] A few months passed as Taylor gathered the necessary supplies and waited for the people of Waterhen Lake to return from their summer hunting sites. He did not leave Regina until October 27, 1921, and arrived at Waterhen Lake on November 5, 1921. When he arrived, the people were still away hunting but, after a few days and a number of messengers dispatched by Taylor, they arrived to meet with him on November 7, 1921. In his report, Taylor mentions that the local Indian Agent, a Mr. Macdonald who was the agent at Battleford, took a census of the people at Waterhen Lake with the assistance of J. H. Morin, identified as "a halfbreed, who lives among and knows the Indians" (Exhibit 37, Tab 154). The number of people in the Waterhen Lake First Nation at this time is reported as "seventy" which "included a family of four of the Loon Lake Stragglers." Taylor wrote that he "dwelt strongly upon the terms of Treaty No. 6 and the advantages extended toward them therein." Elder Sidney Fiddler testified that the terms of the treaty were well understood by the people of Waterhen Lake from having attended the treaty negotiations in 1876, and from the subsequent meetings regarding adhesion.

[63] The Waterhen Lake First Nation did not agree to treaty that day, but the next day—after the arrival of more people from their hunting camps—the majority of the First Nation agreed. Also at the meeting, Taylor reported, was Round Sky, who had been deputized by the people of Loon Lake to act on their behalf. He accepted treaty on their behalf and therefore Taylor reported that "about thirty" additional people were to be included in the Waterhen Lake First Nation: a marginal

note on the report reads "Loon Lake stragglers absorbed in Water Hen Lake band." Taylor also reported that "[t]he amalgamation of these two Bands eliminated the question of a reserve for the stragglers at Island River."

[64] Taylor then discusses the reserve at Waterhen Lake. This is his report on that subject in its entirety:

> The matter of a reserve for this new band was discussed at some length. Running Around wanted that the lake to be included in the reserve. I had some difficulty in convincing him that we could not survey the lake for him. He was evidently convinced and satisfied to have land on either shore of the small portion of the lake and along the Waterhen Lake River to the north. As there is no hay along the lake, a piece of hay meadow was asked for along the river Des Isles or Waterhen coming into the lake from the South.
>
> The lands from which a reserve will be allotted is as follows, Sections 25 to 36, Township 62, Range 16, W. 3rd Mer. Sections 1 to 10 fractions of 14, 15, 16, 17 and 18, 27, 28, 29, 30, 31, 32 and 33, township 63, Range 16 W 3rd. Sections 1 to 12, township 64 Range 16 W 3rd. For a hay reserve, Sections 2, 3, 4, 10, 11 and 12 Township 63 Range 17 West 3rd.

[65] Taylor also discusses the timber reserve:

> A timber reserve was also asked for in the northern portion of the township 64, but … from Sections 25 to 36 is forest reserve. This could be arranged by the s[u]rveyor who surveys the Reserve. There is no timber of any size on lands selected. It being mostly small white and black poplar, white spruce and birch with some jack pine.

[66] Elder Albert Fiddler discussed Running Around's reasoning for requesting timber and hay, saying that "[h]e had the foresight to see things that he wanted for the reserve[,] [h]e wanted grass for the horses [and] [h]e wanted the timber for houses" (Hearing Transcript, July 26, 2022, at p. 12). Elder Armand Fiddler testified that the location of the promised timber reserve was north of the main reserve, in the top half of Township 64, Range 16. Elder Alex Mistickokat testified similarly, saying, "[n]orth of Waterhen, straight north, you'll see the timber reserve, the area," and referenced the same Township and Range as Elder Armand Fiddler (pp. 159–60).

[67] Taylor then mentions the reserve and the census again:

> I would draw the attention of the Department to the fact that although at present this band numbers only forty nine, it will in all probability be increased to one hundred and nineteen at the next annuity payments. I would therefore suggest that this number be taken into consideration when surveying the reserve.

[68] On November 17, 1921, Taylor's report was forwarded by Indian Commissioner Graham to the Deputy Superintendent General of Indian Affairs, Duncan Campbell Scott, in Ottawa. His accompanying letter provided several clarifications on the report, and included this paragraph:

> Enclosed with this report is a map of the Battleford land district, and on this map Mr. Taylor has shaded a section of the country surrounding the Waterhen Lake, from which should be chosen the reserve for the Waterhen Indians. It is not the intention of Mr. Taylor that the whole of the land shaded should be set aside, but that the reserve should be chosen from the area marked. The exact amount of land to be set aside will have to be determined by the number of Indians who come in; but I may say, after discussing the matter with Mr. Taylor, he is of the opinion that we could strike off at least two rows at the bottom which would amount to twelve sections and perhaps one row of six sections at the top. With these Sections struck off, I think the Reserve would be nearer the proper size, and the allotment for each would be in keeping with what has been granted per head at other Reserves. [Exhibit 37, Tab 155]

[69] At around the same time that Taylor's forwarded report arrived in Ottawa, a more detailed narrative about the treaty council, also written by Taylor, arrived. This document is undated, but is stamped as received by the Department of Indian Affairs November 21, 1921. The portion relevant to the reserve reads:

> After Mr. Macdonald and myself had spoken to the Indians assembled, Running Around spoke as follows–
>
> "I want all the men present to speak. I wish now to say all that is in my mind, and what I want the Government to know. The reason I want the men to speak, is because what I may say might be agreeable or not to them. It is always possible for me to make mistakes. If the Govt. agrees to my requests I am ready to deal with them. If not I cannot deal with them. I want the size of the land given me, to be laid out now. I don't want the land to be kept as a promise. I have seen promises made by Indian Agents not kept. I have known many times a treaty Indian crying on account of unfulfilled promises" To this I answered, "It is always the policy of the Government to fulfill any reasonable promise made to their red children. I also assured him that as the lands now held in reserve were urgently wanted for settlement and leasing, the survey would be made at an early date. I was not a surveyor, and could not lay out the land now". Running Around continued, "I would like to ask a question. I was born here. Is it not right that I should pick out the land on which I am to live? As to the size of the reserve I want to have the say, and not the Government" Here I again pointed out to him the liberal allowance of land made to them under treaty No. 6. Asking him where he wanted the reserve, I found it was [on] the townships reserved for this purpose. I could therefore promise that the reserve would be laid out where he wanted it. [Exhibit 37, Tab 151]

[70] The adhesion of the Waterhen Lake First Nation to Treaty No. 6 was confirmed by Order in Council PC 4512 on December 1, 1921. No mention of the reserve boundaries or a confirmation

of a reserve is made in the Order in Council itself.

[71] On November 3, 1925, an Order in Council was prepared by the Department of the Interior which would have confirmed the setting apart of an Indian reserve "containing 29187.40 acres more or less" to the Waterhen Lake First Nation (Exhibit 38, Tab 226). On November 28, however, J. D. McLean put a halt to the Order in Council process by writing to the Department of the Interior and stating that when the land was first requested, "the Department had very vague information as to the number for which the reserve would ultimately be required" and while 82 people had agreed to take treaty by that point, and the Department of Indian Affairs expected this number to double in the "next few years", it was "doubtful" that the "final number will be great enough to justify the transfer of all the land for which we have asked temporary reservation" (Exhibit 38, Tab 229). Instead, McLean suggested, the confirmation of the reserve "should be delayed for several years."

[72] In light of McLean's report that the temporary reserve would likely prove too large for the number of people who would ultimately come into treaty as part of the Waterhen Lake First Nation, the Department of the Interior sought to release some tracts of land from the reserve. On February 23, 1926, N. O. Coté, a controller in the Department of the Interior, wrote to McLean and, after referring to a number of sections by their Dominion Land Survey designations, said that "it is proposed to remove the reservation of the lands within the Reserve mentioned above and to make [them] available for disposal in the ordinary manner under the Dominion Lands Act" (Exhibit 38, Tab 235). McLean responded with "considerable surprise" on March 8, 1926, writing that the Department of the Interior's attitude "must surely result from a misunderstanding of my letter of 28th November last" (Exhibit 38, Tab 236). He continued:

> … the Crown is already obligated to locate a reserve for the 82 Indians in the Waterhen District who have already taken Treaty, which would necessitate a reservation of approximately 11,000 acres and on account of the number of non-Treaty Indians in the vicinity, it is thought that this number will probably be doubled in the next few years. In view of the above, I must again ask you to have these lands temporarily reserved from disposal pending the final selection of these reserves.

[73] McLean continued by suggesting that if the temporary reservation could not be continued in its present form that, before any lands were released, the Department of Indian Affairs "be given an opportunity to send an official into that district for the purpose of selecting the acreage for those Indians already under Treaty and an additional acreage of approximately 10,000 acres to be

withheld pending the admission … of the other non-Treaty members of the band."

[74] The Department of the Interior acceded to this request and McLean instructed Surveyor H. W. Fairchild to proceed to Waterhen Lake and "select from the lands now temporarily held at Waterhen Lake a reserve of sufficient area to provide for the 82 members of that band who are now under Treaty" (Exhibit 38, Tab 245). He reminded Fairchild that the entitlement to land was "under the provisions of Treaty No. 6, which entitles them to 128 acres per head." He also requested that Fairchild:

> … select an additional number of ¼ sections or frac[tional] ¼ sections with a total acreage not to exceed 10,000 acres. It is the intention that these latter sections will be temporarily held in order to take care of those non-Treaty Indians who may come into Treaty in the next two or three years.
>
> …
>
> While you are at Waterhen Lake, you are requested to obtain such information as you can as to the number of non-Treaty Indians for whom it may be necessary for the Department to provide land at that point. If when there you are able to interview the Chief or headmen or other Indians of the band, you are requested to notify them that the Department is selecting sufficient land to take care of the non-Treaty Indians and that an endeavour will be made to prevent such lands being disposed of for any other purpose for the next two or three years, but after the Treaty payment of 1928, or possibly 1929, a final selection of the reserve at that point will be made for those Indians who have entered Treaty and after that time the Department will withdraw its temporary reservation of all lands other than the actual area required for the Treaty Indians.

[75] Fairchild reported back to the Department of Indian Affairs in a letter dated November 30, 1926. He wrote that after some discussion with Chief Running Around and the First Nation, he "advised them … that it would be advantageous to them if they would agree to have the lands selected by me constitute their reserve" (Exhibit 38, Tab 247). He informed the department that "Chief Running Around spoke at some length and seemed perfectly satisfied with the selection … and no objections were raised by any Indian present." After commenting on the quality of the lands in the reserve, as well as some nearby squatters and what had been done to deal with them, he reported that "[t]here are now 93 Indians of this band who have accepted Treaty and from what information I could gather there are in the neighbourhood of 50 who are considering accepting Treaty." On this basis, Fairchild reported that he selected the "choicest lands" for the 93 already in Treaty, then selected a subsequent 6,537 acres for the non-Treaty members of the First Nation, which, he said "will be sufficient for 51 Indians."

[76] According to expert historian Gwynneth Jones, Fairchild's math is a little off: having examined the lists of sections noted in his letter, she determined that the combined total of lands reserved at this point, for both Treaty and non-Treaty members of the Waterhen Lake First Nation, was "19,698.6 acres, or an entitlement for 153.9 people" (Exhibit 3 at p. 130).

[77] Fairchild also reported:

> At the last meeting, I impressed upon those in attendance, which included one or two non-Treaty Indians, that the lands selected for those not in Treaty would not be held any longer than Treaty payment in 1929 and after that date any lands not required would be released and be at the disposal of the Department of the Interior.

[78] Elder Alex Mistickokat testified that Crown officials did not speak to the First Nation regarding a potential reduction of the reserve in the 1920s. Elder Armand Fiddler testified similarly. Elder Sidney Fiddler testified that "at no point did anybody consult them, advise them, or let them know that it was reduced … to 19,000 [acres]" and "[n]o one in our oral history of the [E]lders that would know said that" (Hearing Transcript, July 25, 2022, at p. 57).

[79] The process of dividing the lands into two parcels—one parcel for those who had taken treaty, and the other parcel reserved temporarily to accommodate anyone who may come into treaty—was described by Elder Albert Fiddler as the Crown taking "part of our [land] … [for] safekeeping for a little while" until "we got the numbers" (Hearing Transcript, July 26, 2022, at p. 6). Elder Edward Martell testified that "[i]t was taken away because they … overestimated the number that joined the reserve and … the final tally of the people that came to form the reserve, there was not enough" (p. 36).

[80] When Saskatchewan entered Confederation as a province in 1905, it—like Manitoba, British Columbia and Alberta—was not given the same control over land and natural resources that the original provinces of Confederation had. This would change in 1930 with the Natural Resource Transfer Agreements, which placed jurisdiction over land and resources with the provincial governments . One consequence of these agreements was that if the federal government sought to create a reserve after 1930 in these provinces, it would need to involve a provincial government. This reality created an urgency within the Department of Indian Affairs to finalize the Waterhen Lake First Nation reserve.

[81] On September 11, 1929, A. F. MacKenzie, on behalf of the Department of Indian Affairs, wrote to J. W. Martin, Commissioner of Dominion Lands for the Department of the Interior, to request that "in view of the pending transfer of the Natural Resources to the Province that these reserves may now be set apart by Order in Council" (Exhibit 38, Tab 256). A number of internal processes—such as removing some land from a forestry reserve so it could be made into an Indian reserve, and the creation of a technical description that would form the basis of the Order in Council—had to be completed before an Order in Council could be created. On April 24, 1930, the Minister of the Interior forwarded a recommendation to the Governor General in Council to finalize the reserve via an Order in Council: Order in Council PC 917 was executed on May 2, 1930, confirming a reserve of 19,772.80 acres to the Waterhen Lake First Nation.

[82] In 1943, thirteen years after the reserve's boundaries were delineated by Order in Council, the Indian Agent at Battleford, J. P. B. Ostrander, sent a letter to the Indian Affairs Branch in Ottawa, asking that lands adjacent to the reserve be added into it . He informed headquarters that members of the First Nation were told that the lands they had cut hay on since the treaty was signed were now the subject of leases to incoming white settlers. Ostrander reported:

> The Indians of this band state that, in 1921, at their request, Mr. H.W. Fairchild, Departmental Surveyor, made a visit to their reserve to look over and survey this land, as they assumed, to be set aside for their hay lands. They have used the hay thereon ever since and have only recently discovered that they have no claim upon it. [Exhibit 38, Tab 286]

[83] Elder Armand Fiddler testified that the reason Waterhen Lake First Nation members were haying in the area was because based on "their understanding where the reserve was [as of] 1921 … they'd been haying there for years" (Hearing Transcript, July 26, 2022, at p. 57).

[84] Ostrander's request reached D. J. Allan, Superintendent of Reserves and Trusts, who, in a letter dated April 5, 1943, offered to discuss with the Province of Saskatchewan "the matter of obtaining a lease of these parcels for Indian use" (Exhibit 38, Tab 287). No further documentation regarding this request is in evidence.

### B. Parties' Positions on Validity

#### 1. Respondent's Admissions

[85] Before discussing the Parties' positions, it is important to consider admissions made early

in this Claim by the Crown. In its Amended Response to the Declaration of Claim, filed December 23, 2020, the Crown made the following admissions:

> However, Canada admits that it breached its fiduciary duty in the reserve creation process by not fully informing the Waterhen Lake First Nation that not all of the 1921 lands would necessarily be created as a reserve. Canada failed to provide full disclosure to the Waterhen Lake First Nation by not making clear the extent and location of later reductions to the 1921 lands.
>
> Canada further admits that it breached its fiduciary duty in the reserve creation process by significantly reducing lands requested by the Waterhen Lake First Nation in 1921 for timber and hay. [emphasis in original; paras. 14–15]

### 2. Position of the Claimant on Validity

[86] The Claimant essentially makes two claims, each about a different parcel of land.

[87] The first parcel, what might be considered the main reserve, the Claimant refers to as the "Alienated Lands." The Claimant alleges, based on the test for reserve creation in Canadian jurisprudence, that a reserve of 29,187.40 acres, more or less, was created in 1921 when the Waterhen Lake First Nation adhered to Treaty No. 6. As such, Order in Council PC 917, which confirmed a reserve of 19,772.80 acres to the Waterhen Lake First Nation in 1930, breached the *Indian Act*'s clauses on reserve surrender and represents an illegal alienation of reserve land, as well as the breach of the Crown's fiduciary obligations and the honour of the Crown.

[88] The second parcel, the Claimant refers to as the "Timber Reserve." The Claimant alleges that when Agent Taylor visited Waterhen Lake in 1921 to take the First Nation's adhesion to Treaty No. 6, he promised that a surveyor would return to set apart a timber reserve for the exclusive use and benefit of the people of Waterhen Lake. This promise echoed the visit of Crombie in 1917, where the location of the desired timber reserve was plotted on a map. By making the promise and failing to deliver, the Claimant alleges that the Crown breached Treaty No. 6, breached its fiduciary obligations to the First Nation and breached the Honour of the Crown.

### 3. Position of the Respondent on Validity

[89] The Crown submits, again based on the test for reserve creation in Canadian jurisprudence, that the Waterhen Lake First Nation reserve was not created in law until 1930. As such, there has been no illegal alienation. The Crown further submits, with regard to the main reserve, that despite

admitting to a failure to provide full disclosure to the Waterhen Lake First Nation about the potential for the reserve land to be reduced, because the Claimant received more land than it was entitled to under the TLE formula, no loss flows from the admitted fiduciary breach, and it is therefore not compensable.

[90] With regard to the timber reserve, the Crown disputes whether Taylor made a promise to the First Nation: according to his report, Taylor did not say a surveyor "would" lay out a timber reserve, he said that it "could be arranged" by a surveyor in the future. Again, although the Crown has admitted to a breach of its fiduciary duties, the fact that the First Nation received the land it was entitled to, and because that land contained a reasonable amount of timber, no loss flows from the breach, and it is therefore not compensable.

### C. Issues

[91] There are two issues the Tribunal must address to determine validity:

1. Was the reserve for the Waterhen Lake First Nation created in 1921, as the Claimant alleges, or in 1930, as the Crown submits?

2. Did Agent Taylor promise that the Crown would set apart a timber reserve for the Waterhen Lake First Nation?

[92] Issues of compensation, if necessary, will be determined in the compensation section of this decision.

### D. Analysis

#### 1. Important Legal Concepts

[93] Before analysing the wealth of evidence in this Claim, it is important to keep in mind two important legal concepts applicable to the dispute between the Waterhen Lake First Nation and the Crown: the first is the rules for interpreting statutes and evidence in a dispute between a First Nation and the Crown; and the second is the test for reserve creation in Canadian jurisprudence.

##### a) Rules for Interpreting Statutes and Evidence

[94] In a variety of contexts, the Supreme Court of Canada has long insisted on a generous

approach to interpreting statutes and evidence in disputes between Indigenous Peoples in Canada and the Crown. The reasoning is, typically, three-fold: first, a lack of shared language makes it difficult to ascertain exactly what each party understood about an agreement or interaction; second, many disputes between Indigenous Peoples and the Crown have to do with events that are decades, even centuries old, and therefore it can be difficult to bear in mind all aspects of the context of an agreement or interaction, given that the context is so different from our own; third, and finally, the need for a generous interpretation rests on the nature of the relationship between Indigenous Peoples and the Crown—a relationship that is fiduciary in nature.

[95] For example, in *R v Van der Peet*, [1996] 2 SCR 507 at paras. 24–25, 137 DLR (4th) 289—a claim regarding Aboriginal rights—the Supreme Court of Canada, referring to the interpretation of section 35 of the *Constitution Act, 1982*, wrote:

> The Crown has a fiduciary obligation to [A]boriginal peoples with the result that in dealings between the government and [A]boriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implication of the honour of the Crown, treaties, s. 35(1), and other statutory and constitutional provisions protecting the interests of [A]boriginal peoples, must be given a generous and liberal interpretation …
>
> The fiduciary relationship of the Crown and [A]boriginal peoples also means that where there is any doubt or ambiguity with regards to what falls within the scope and definition of s. 35(1), such doubt or ambiguity must be resolved in favor of [A]boriginal peoples.

[96] In the same decision, the Court also addressed how judges must approach evidence in disputes between Indigenous Peoples and the Crown:

> In determining whether an [A]boriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive [A]boriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of [A]boriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by [A]boriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case. [para. 68]

[97] In a treaty context, the Supreme Court of Canada has taken a consistent approach. In *R v Badger*, [1996] 1 SCR 771 at para. 52, 133 DLR (4th) 324 [*Badger*], the Court wrote:

> Treaties and statutes relating to Indians should be liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians. In addition, when considering a treaty, a court must take into account the context in which the treaties were negotiated, concluded and committed to writing. The treaties, as written documents, recorded an agreement that had already been reached orally and they did not always record the full extent of the oral agreement. The treaties were drafted in English by representatives of the Canadian government who, it should be assumed, were familiar with common law doctrines. Yet, the treaties were not translated in written form into the languages (here Cree and Dene) of the various Indian nations who were signatories. Even if they had been, it is unlikely that the Indians, who had a history of communicating only orally, would have understood them any differently. As a result, it is well settled that the words in the treaty must not be interpreted in their strict technical sense nor subjected to rigid modern rules of construction. Rather, they must be interpreted in the sense that they would naturally have been understood by the Indians at the time of the signing. This applies, as well, to those words in a treaty which impose a limitation on the right which has been granted. [citations omitted]

[98] This approach is consistent with other treaty-rights cases, such as: *R v Simon*, [1985] 2 SCR 387 at p. 402, 24 DLR (4th) 390 [*Simon*]; *Nowegijick v The Queen*, [1983] 1 SCR 29 at p. 36, 144 DLR (3d) 193; *R v Horseman*, [1990] 1 SCR 901 at pp. 906–08, [1990] 3 CNLR 95; and *R v Sioui*, [1990] 1 SCR 1025 at pp. 1035–36, 70 DLR (4th) 427 [*Sioui*].

[99] The Tribunal has acknowledged that statutes relating to Indigenous Peoples—including the *SCTA* itself—must "be given a broad and liberal interpretation" (*Halalt First Nation v Her Majesty the Queen in Right of Canada*, 2014 SCTC 12 at para. 63).

[100] In *R v Marshall*, [1999] 3 SCR 456 at para. 14, 177 DLR (4th) 513 [*Marshall 1999*], again in the treaty context, the Supreme Court of Canada discusses the limits of the generous approach, as well as the reasoning behind it:

> "Generous" rules of interpretation should not be confused with a vague sense of after-the-fact largesse. The special rules are dictated by the special difficulties of ascertaining what in fact was agreed to. The Indian parties did not, for all practical purposes, have the opportunity to create their own written record of the negotiations.

[101] I will keep these principles in mind during the course of this analysis.

### b) The Test for Reserve Creation in Canadian Jurisprudence

[102] The test for reserve creation in Canadian jurisprudence comes from *Ross River Dena Council Band v Canada*, 2002 SCC 54, [2002] 2 SCR 816 [*Ross River*]. Noting that, in Canadian

history, the "process of reserve creation went through many stages and reflects the outcome of a number of administrative and political experiments," the Supreme Court of Canada determined that there was no singular method for creating a reserve in law (para. 43). Therefore, the Court conceived a four-element test that would allow courts to determine if a reserve was created, regardless of what method was used to set the land apart (para. 67, as restated in *Watson v Canada*, 2020 FC 129 at para. 268). The four elements are:

1. The Crown has an intention to create a reserve;

2. The intention is possessed by Crown agents with sufficient authority to bind the Crown;

3. Steps are taken in order to set apart land for the benefit of the First Nation; and

4. The relevant First Nation must have accepted the setting apart and must have started to make use of the lands so set apart.

### 2. The Test for Reserve Creation and the "Alienated Lands"

[103] The Claimant says that all the elements of the *Ross River* test are fulfilled. It ties the Crown's intention to create a reserve to the Crown's desire to have the Waterhen Lake First Nation adhere to Treaty No. 6: when Agent Taylor arrived, it says, he was "prepared to depart from any kind of slavish adherence to the formula" in an effort to convince the First Nation to adhere to treaty, which had been the Crown's goal for over a decade (Hearing Audio Recording, Oral Submissions, November 22, 2023, 00:13:31). Although the Claimant admitted that the TLE formula was explained to the First Nation as part of the negotiations, it says that the formula is a "red herring" because although the Claimant is prepared to "assume that the treaty formula was discussed" it also claims that Taylor did not pay "much attention" to it (Hearing Audio Recording, Oral Submissions, November 22, 2023, 00:15:55 and 00:19:10). Therefore, according to the Claimant, the intention was to create a reserve of whatever size necessary to convince the Waterhen Lake First Nation to adhere to Treaty No. 6.

[104] The rest of the elements are then easy to identify: Agent Taylor's authority to bind the Crown is shown by his instructions; the relevant steps to set apart land are provided by Taylor's

meeting with Chief Running Around and the rest of the First Nation, where he plotted the reserve onto the Dominion Land Survey map before forwarding it to his superiors, as well as the communications between the Department of the Interior and the Department of Indian Affairs over the nature of the reserves in the area; and because the First Nation had lived in and had made use of the area since time immemorial, it having accepted the setting apart can be presumed.

[105] I agree the last three elements of the test are fulfilled. However, I do not agree with the Claimant's characterization of the Crown's intention, and the "Alienated Lands" aspect of the Claim fails on the first element.

[106] In the trial-level decision *Jim Shot Both Sides v Canada*, 2019 FC 789, [2019] 4 CNLR 19 [*Jim Shot Both Sides*] (rev'd on other grounds 2022 FCA 20, 468 DLR (4th) 98, leave to appeal to SCC granted, 2024 SCC 12), Zinn J. remarked that "[i]t is unclear from the jurisprudence whether the intention must be to create a *specific* reserve or whether a general intention is sufficient" (emphasis in original; para. 290). He determined, based on Lebel J.'s statement in *Ross River* that a treaty promise is "so definitive or conclusive that it is unnecessary to prove a subjective intent on the part of the Crown," that the Treaty—in this case, Treaty No. 7—showed not only the Crown's intention, but also the contours of that intention (paras. 291–93, quoting *Ross River* at para. 50). As such, he determined that "[t]here is no evidence that from the signing of Treaty 7 onwards Canada had any intention other than to create a reserve for the Blood Tribe in keeping with the TLE formula" (emphasis added; para. 294).

[107] Although *Jim Shot Both Sides* was reversed by the Federal Court of Appeal—on grounds other than the Federal Court's treatment of the *Ross River* test—Zinn J.'s approach is consistent with the jurisprudence.[1] In *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245, the Supreme Court of Canada was called upon to determine the Crown's intention regarding two reserves located in British Columbia, both of which were claimed by two different First Nations. After recounting that the reserve creation process in British Columbia was contentious and drawn-

[1] The Federal Court of Appeal reversed *Jim Shot Both Sides* on the grounds that Alberta's *Limitation of Actions Act*, RSA 1970, c 209, section 5, applies to a claim for breach of treaty, such that remedial relief was time-barred (2022 FCA 20 at para. 228, 468 DLR (4th) 98). The Supreme Court of Canada upheld this aspect of the Federal Court of Appeal's judgment (*Shot Both Sides v Canada*, 2024 SCC 12).

out due to conflicts between the federal and provincial governments, the Court determined that "it was clear that at the highest levels of both governments the *intention* was to proceed by way of mutual agreement" (emphasis in original; para. 51). One issue—among many—that the two governments struggled to reach mutual agreement on was the TLE formula. The Court wrote:

> … the British Columbia government initially considered the federal government's target of 80 acres *per capita* for reserve lands to be excessive. The provincial position was that a *per capita* allocation of 20 acres was sufficient, particularly where the principal source of livelihood of a band was fishing. [italics in original; para. 17]

[108] Without first determining the TLE formula, the two governments could not reach mutual agreement. Consequently, the federal Crown could not form the definitive intention to create a reserve with precise geographical boundaries. To create a reserve, then, the Crown's intention must be specific, not general, and may include a population-based TLE formula.

[109] In the Claim currently before the Tribunal, it is not that the Crown did not have the intention to create a reserve—that much is obvious—but throughout the entire process of treaty adhesion and reserve creation, the Crown's intention was to create a reserve at Waterhen Lake according to the TLE formula in Treaty No. 6. Despite the Claimant's contention that the TLE formula was ignored to effect adhesion, the Crown's intention to comply with the formula appears clearly in almost every meeting between it and the First Nation.

[110] For example, when Chisholm first visited the area in 1910, he explained that a benefit of adhering to the treaty is that the First Nation "could expect to have a limited area of land and water definitely set apart." The limited nature of reserves under treaty appears to have made an impression on the community, because at a subsequent meeting in 1913, Chisholm reported that although the First Nation "claim[s] the entire district for many miles around and would wish to be left in undisturbed possession of it," its leaders conceded that "if they are to be allowed only a reserve of limited area they would wish to have it on the south and south-eastern side of the lake, including the shore from about a mile west of the mouth of the Island River to the outlet of the lake at the Waterhen River."

[111] This intention continues and becomes even more explicit in subsequent years. Chisholm's successor, Agent Crombie, arrived in 1917 with instructions to secure an adhesion so that "the

lands to which they are entitled under the Treaty" could be selected soon thereafter. At this meeting, Crombie reported that he explained "about [the] size of reserves" to Chief Running Around, who then expressed disappointment that "it may happen under certain circumstances that the reserve if given to me might have to be made smaller than what I want it to be." When this report reached headquarters, Duncan Campbell Scott, at that time the Indian Affairs Deputy Superintendent General, requested the Department of the Interior "temporarily" reserve land at Waterhen Lake out of the existing timber reserve "until we are able to send in a surveyor to define the exact limits." These exact limits, Scott wrote, were to be determined "[a]ccording to the terms of treaty" which meant that Waterhen Lake First Nation was "entitled to land in the proportion of 640 acres to each family of five."

[112] In 1918, the Department of Indian Affairs intended to send Agent Crombie back to Waterhen Lake to take the First Nation's adhesion. Included in his instructions was a reminder that "the provisions of the Treaty are those of Treaty No. 6, as the country in which they have their abode lies within the limits of the territory covered by that Treaty" (Exhibit 37, Tab 117). There were no instructions, however, to select the final boundaries of the reserve out of what had been previously reserved. Despite collecting supplies and provisions, this visit never occurred.

[113] Nothing much happened between 1918 and 1920 but, in 1921, the Department of Indian Affairs was urgently seeking to finalize the reserve boundaries at Waterhen Lake in order to release parts of the reserved area back to the Department of the Interior for settlement and grazing use. That year, Indian Affairs Surveyor Donald Robertson wrote to Chief Surveyor Bray that, based on what was known of the population at Waterhen Lake at the time, "we have at least 5 times the area held in reserve than the amount to which these Indians would be entitled if they take treaty." Agent Taylor was eventually selected as the person to send to take the adhesion. He was given Agent Crombie's instructions from 1918—which made reference to the terms of Treaty No. 6—as well as the additional instruction to "select the lands which should be retained as a reserve."

[114] During the selection process itself, Taylor kept the provisions of Treaty No. 6 in mind. With his first report to the Department of Indian Affairs, he forwarded a shaded map which contains nearly all of the land around the lake. This shaded map is the land that the Claimant says constituted the reserve in 1921. However, Taylor's report is clear that these are not the final

boundaries, writing that "[t]he lands from which a reserve will be allotted is as follows" (emphasis added; Exhibit 37, Tab 154). His commitment to the entitlement of the treaty is also evidenced in his second report, where he recounts a conversation with Chief Running Around:

> … I again pointed out to him the liberal allowance of land made to them under treaty No. 6. Asking him where he wanted the reserve, I found it was [on] the townships reserved for this purpose. I could therefore promise that the reserve would be laid out where he wanted it. [emphasis added]

[115] Taylor also made clear that, despite Chief Running Around's desire for the reserve land to be laid out immediately, because he was not a surveyor he was unable to complete that aspect of the process. Claimant's counsel argued in oral submissions that a survey is not demanded by the test from *Ross River*—and they are correct—but that does not change the fact that, as of 1921, Taylor informed Chief Running Around that the reserve selection process had not yet been completed.

[116] This begins to touch on the second element of the test, although it is not necessary to go into it in significant depth at this point: it is enough to say that, whether or not he had sufficient authority to bind the Crown—and I agree that he did—Agent Taylor himself reported that he did not bind the Crown to the dimensions of the land that remained reserved after his visit.

[117] In a letter accompanying Taylor's original report to the Department of Indian Affairs, it is made even clearer that the Crown's intention is to grant only as much reserve land as the treaty allows for, when Indian Commissioner Graham explains to his superiors:

> It is not the intention of Mr. Taylor that the whole of the land shaded should be set aside, but that the reserve should be chosen from the area marked. The exact amount of land to be set aside will have to be determined by the number of Indians who come in … and the allotment for each would be in keeping with what has been granted per head at other Reserves.

[118] In oral submissions, Claimant's counsel argued that internal Crown communications would have been unknown to the First Nation, as would any elaborate internal process necessary to confirm the reserve—it was reasonable, then, for the First Nation to believe that the reserve was set apart in 1921, following the adhesion.

[119] At the oral history evidence hearing, a number of Elders testified to a longstanding belief within the Waterhen Lake First Nation that the reserve had indeed been set apart in 1921. Elders

Alex Mistickokat, Armand Fiddler and Sidney Fiddler each explained that based on what they had heard from their Elders and members of the community, there had been no consultation with the First Nation about the potential for a reduction in reserve size at any point before the reserve was confirmed in 1930. However, other Elders—Albert Fiddler and Edward Martell—testified differently: from what they had learned from their Elders and members of the community, the government had informed the First Nation that the amount of land under the TLE formula was dependent on population size. Given the repeated complaints made by Chief Running Around that the lands granted could be smaller than he would have liked, I prefer the latter evidence.

[120] There is also the matter of Surveyor Fairchild's visit in 1926. It must be recalled that Fairchild arrived under instructions to reduce the amount of land then temporarily reserved so that some could be released back to the Department of the Interior. In his account of this meeting to the Department of Indian Affairs, Fairchild reported that he had suggested to the members of the First Nation that "it would be advantageous to [Waterhen Lake First Nation] if they would agree to have the lands selected by me constitute their reserve" and, having made the selection, reported that Chief Running Around and all the others present were satisfied with it. My impression of Chief Running Around from both the oral history of the Waterhen Lake First Nation and the documentary record of the Crown is that he was nothing if not brave, intelligent and persistent. He had no issue complaining to the Crown, directly or through others, and was not afraid to inform the Crown about his desires, disappointments or opinions. It is not logical, if Chief Running Around and the rest of the community believed that the reserve had been finalized in 1921, that Fairchild would be welcomed into the community in 1926 and allowed to reduce the acreage of the reserve.

[121] Claimant's counsel argued that little credence should be given to Fairchild's report, given that it does not provide a verbatim account, and is contradicted by the events of 1943, when members of the First Nation were informed they were cutting hay on lands they thought was part of the reserve but which, to their surprise, was not. The lack of verbatim account does not trouble me—the Claimant relies on other, non-verbatim accounts without issue, and there does not seem to be a discernable difference between those that the Claimant relies on and Fairchild's report, nor does anything in Fairchild's report make me question its reliability—and the events of 1943 are difficult to discern from the record. This, again, is Agent Ostrander's 1943 report of the complaint

on behalf of the Waterhen Lake First Nation:

> The Indians of this band state that, in 1921, at their request, Mr. H.W. Fairchild, Departmental Surveyor, made a visit to their reserve to look over and survey this land, as they assumed, to be set aside for their hay lands. They have used the hay thereon ever since and have only recently discovered that they have no claim upon it.

[122] It is clear from this paragraph that there is a misapprehension of facts within the community as of 1943. According to the Crown's records, it was Agent Taylor who visited in 1921, whereas Fairchild's visit occurred in 1926. The Claimant does not dispute the sequence of events. Further, as Claimant's counsel pointed out in oral submissions, neither Taylor nor Fairchild conducted a survey, despite the above claim: the reserve for the Waterhen Lake First Nation was set apart by choosing sections within the Dominion Land Survey, which had already been completed in the area. For these reasons, I accept that Fairchild's report is accurate.

[123] The matter of the Crown's admission with regard to the "Alienated Lands" must be addressed before moving forward to discuss the timber reserve. Here again is the text of the admission:

> … Canada admits that it breached its fiduciary duty in the reserve creation process by not fully informing the Waterhen Lake First Nation that not all of the 1921 lands would necessarily be created as a reserve. Canada failed to provide full disclosure to the Waterhen Lake First Nation by not making clear the extent and location of later reductions to the 1921 lands. [emphasis in original]

[124] The Crown admits that it breached its fiduciary duty in the reserve creation process. Indeed, the Crown's conduct in the reserve creation process leaves a lot to be desired, beyond even the failure to provide full disclosure the Crown has already admitted to. During oral submissions, I put it to Claimant's counsel that one hypothetical outcome of the Claim was that I would find no illegal taking but would still have enough evidence—including this admission by the Crown—to find one or more breaches of the Crown's fiduciary duty. I noted that I had received no evidence regarding compensation for a fiduciary breach in the reserve creation process in the absence of a finding of an illegal taking, and asked for the Claimant's position in the event of such a finding. Claimant's counsel agreed with the Crown that, in the absence of an illegal taking, there is no measurable loss to the Waterhen Lake First Nation, and therefore no possibility of compensation for any fiduciary breach(es) I might find. Claimant's counsel also took the position that the *SCTA* does not include

the jurisdiction to award compensation in the absence of loss.

[125] I am not certain I agree with the Claimant's position, especially given that the jurisprudence speaks of equitable compensation for a fiduciary breach as something ordered "not only to compensate the plaintiff, but to enforce the trust which is at [equity's] heart" (*Canson Enterprises Ltd v Boughton & Co*, [1991] 3 SCR 534 at 543, 85 DLR (4th) 129 [*Canson*]). However, because the Claimant has taken such a position, I need not determine the issue.

[126] To answer the question as stated above, I find that the Waterhen Lake First Nation's reserve was created in law in 1930 by Order in Council PC 917, not in 1921 as alleged by the Claimant.

### 3. The Timber Reserve

[127] With regard to the timber reserve, the Claimant has also argued that it was created in law in 1921. Obviously, my finding that the Waterhen Lake First Nation reserve was created in law in 1930 precludes such an argument. However, the Claimant argued in the alternative that Agent Taylor promised that such a reserve would be set aside in 1921, and the promise was never fulfilled. This broken promise, the Claimant says, breaches the fiduciary and honourable obligations of the Crown.

[128] It is important, at this point, to review some of the evidentiary presumptions applicable to disputes between the Crown and Indigenous Peoples in Canada. In *Marshall 2005*, McLachlin CJC wrote that there is a "need for a sensitive and generous approach to the evidence tendered to establish [A]boriginal rights" which demands that "evidence, oral and documentary, must be evaluated from the [A]boriginal perspective" before translating "the facts found and thus interpreted into a modern common law right" (paras. 68–69).

[129] There is no reason to belabour the point: I find that a promise to create a timber reserve was made to the Waterhen Lake First Nation by the Crown in 1921, via Agent Taylor, that this promise was not fulfilled and that the failure to fulfill breaches the Crown's fiduciary duty.

[130] It will be important in the compensation section of this decision to note that the compensation period begins in 1921 because the Crown is required "to act diligently in pursuit of its solemn obligations and the honourable reconciliation of Crown and Aboriginal interests"

(*Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14 at para. 78, [2013] 1 SCR 623). The Crown's duty of diligent fulfillment was recently reinforced by the Court in *Ontario (AG) v Restoule*, 2024 SCC 27. Based on this duty, compensation must be determined beginning at the point the promise was made, not the date the reserve was created in law—without the promised timber lands—by Order in Council in 1930.

[131] Before turning to the nature of the promise, it becomes necessary at this point to determine whether Agent Taylor was authorized to bind the Crown, thereby making a promise by Taylor a promise of the Crown. In *Sioui*, the Supreme Court of Canada established the requirements for the capacity to bind the Crown:

> To arrive at the conclusion that a person had the capacity to enter into a treaty with the Indians, he or she must thus have represented the British Crown in very important, authoritative functions. It is then necessary to take the Indians' point of view and to ask whether it was reasonable for them to believe, in light of the circumstances and the position occupied by the party they were dealing with directly, that they had before them a person capable of binding the British Crown by treaty.

[132] The test has two elements, each from a different perspective. The first element asks whether, from the Crown's perspective, the person at issue has represented the Crown in "very important, authoritative functions." The second element asks whether, from the Indigenous perspective, it would be reasonable to believe that the person with whom they are dealing is capable of making a promise that can bind the Crown.

[133] From the Crown's perspective, Agent Taylor certainly qualifies. The adhesion of the Waterhen Lake First Nation to Treaty No. 6 was clearly important to the Crown, and Taylor was given the authority over effecting the agreement. After more than a decade of trying to convince the First Nation, by August 1921, the Crown felt that the Waterhen Lake First Nation's adhesion to treaty was imminent, and it began to make concrete plans to take the adhesion. As such, J. D. McLean, Acting Deputy Superintendent General of Indian Affairs, wrote to Indian Commissioner W. M. Graham on August 19, 1921. After recounting the Crown's previous overtures to the people of Waterhen Lake, McLean went on to recommend sending Department of Indian Affairs surveyor "Mr. Fairchild at once to take the adhesion" but also noted that "Mr. Agent Taylor, who has been transferred from Norway House to take charge of the Isle a la Crosse Agency and whose headquarters will it is understood to be at Prince Albert during the winter, might be a good man to

deal with these Indians and to select their reserve." After being sent up the chain of command in the department, Taylor was approved as the man to take the adhesion by A. F. MacKenzie on behalf of the Assistant Deputy and Secretary of the Department of Indian Affairs. Instructions were then sent from MacKenzie to Taylor, via Graham, on September 7, 1921, and while these instructions are somewhat fixed, they do allow for a fair amount of discretion and decision making on Taylor's part. He is even identified on the adhesion document as "His Majesty's Special Commissioner" (Exhibit 37, Tab 152). For all intents and purposes, from the Crown's perspective, Agent Taylor was the "delegate and legal representative of His Majesty the King" and, as such, could bind the Crown (*Simon* at p. 401, quoted in *Sioui* at p. 1040).

[134] From the Indigenous perspective, the answer is the same: it was reasonable for the people of Waterhen Lake to believe they were dealing with an individual who could bind the Crown. Agent Taylor arrived and, like his predecessors, attempted to convince the First Nation to enter into an agreement with the Crown. He actively represented the Crown's interests at the meeting. The First Nation understood the seriousness and the solemnity of the agreement and, from knowledge of the experiences of nearby First Nations who had already taken treaty, understood how the relationship to the land itself could change by entering into treaty. As Elder Sidney Fiddler testified, "… they understood what the terms and conditions would be for signing treaties …" (Hearing Transcript, July 25, 2022, at p. 39). Agent Taylor, the person authorized to make the deal on the Crown's behalf was—from any perspective—clearly a person with the ability to bind the institution he represented.

[135] With the question of Agent Taylor's authority settled, the next question is the nature of the promise made. Here, again, is what Taylor's report says about the timber reserve:

> A timber reserve was also asked for in the northern portion of the township 64, but … from Sections 25 to 36 is forest reserve. This could be arranged by the s[u]rveyor who surveys the Reserve. There is no timber of any size on lands selected. It being mostly small white and black poplar, white spruce and birch with some jack pine.

[136] Although Taylor only says that a timber reserve was "asked for," the fact that he reports there is "no timber of any size" on the lands reserved shows that he considered the need for access to timber to be important, not only to the First Nation but to the Crown—responsible for the welfare of the people of Waterhen Lake—as well.

[137] In oral submissions, Crown's counsel argued that, when asked about the possibility of a timber reserve for the First Nation in 1921, Taylor did not say that such a reserve would be laid out for the First Nation by a future surveyor, he said that it could be laid out by a future surveyor. Crown's counsel continued, saying that "[t]here is actually a difference in meaning between 'could' and 'would': 'would' implies it will be done, that there is a commitment; 'could' suggests the possibility that something will be done" and "[i]n other words, there's no commitment, no certainty" (Hearing Audio Recording, November 21, 2023, 03:17:30). The position is, essentially, that the possibility was discussed, but no promise was made.

[138] While the Crown's interpretation of Agent Taylor's words is certainly reasonable, it is not the only possible—or reasonable—interpretation. For instance, when Taylor said that a future surveyor could lay out the timber reserve, he may not have been discussing the promise itself but the method by which the promise would be fulfilled. In other words, the promise to set apart a timber reserve in the area that the Waterhen Lake First Nation identified was a concrete promise, but its fulfillment could be achieved by any number of methods: it could be set out on the Dominion Land Survey and sent to the Department of the Interior, it could be registered with the nearest Dominion Lands Office or it could be set apart by a surveyor.

[139] With multiple reasonable interpretations possible, Taylor's words are patently ambiguous.

[140] In reply oral submissions, Claimant's counsel argued:

> When viewed from the Band's standpoint, and interpreting the words Taylor said he used and how they would naturally be understood by the Waterhen Lake people—which, of course, had no legal representation, they spoke Cree—I don't think that they would have appreciated the subtle differences between words like "would" or "could." [Hearing Audio Recording, November 22, 2023, 00:01:34]

[141] I agree with Claimant's counsel and note that the difficulties in communicating between Crown representatives and Indigenous Peoples is one of the justifications for the interpretive presumptions applied by courts to agreements between the Crown and Indigenous Peoples. In *Badger*, the Supreme Court of Canada wrote that "[t]reaties and statutes relating to Indians should be liberally construed and any uncertainties, ambiguities or doubtful expressions should be resolved in favour of the Indians" (para. 52), while in *Marshall 1999*, the Court wrote that these special rules of interpretation are "dictated by the special difficulties of ascertaining what in fact

was agreed to," which includes difficulties created by a lack of shared language, difficulties created by a difference in legal sophistication amongst the parties and difficulties created by the fact that only one party kept a written record (para. 14).

[142] Although in *Badger* the Court was discussing a promise made within a treaty, in *Ross River*, the Court wrote that, even outside of a treaty-making context, when "an agent of the Crown, duly authorized, acts in the exercise of a delegated authority to establish or further elaborate upon the relationship that exists between a First Nation and the Crown" then "the honour of the Crown rests on the Governor in Council's willingness to live up to those representations made to the First Nation" (para. 65). With the Honour of the Crown engaged, I must apply the required evidentiary presumptions in a way "which maintains the integrity of the Crown" (*Badger* at para. 41). Therefore, I must resolve the ambiguity of Taylor's words in favour of the Waterhen Lake First Nation, as dictated by *Badger*.

[143] To that end, and to answer the question as stated above, I find that, in 1921, Agent Taylor did promise that the Crown would set apart a timber reserve for the Waterhen Lake First Nation. This promise was never fulfilled, and this lack of fulfillment breaches both the Honour of the Crown, and the Crown's fiduciary duty.

### E. Conclusion on Validity

[144] The Claimant argued for the validity of this Claim on two bases.

[145] The first basis for validity, according to the Waterhen Lake First Nation, is that a reserve of 29,187.40 acres, more or less, was created in 1921 when the Waterhen Lake First Nation adhered to Treaty No. 6, and that Order in Council PC 917, which confirmed a reserve of 19,772.80 acres to the Waterhen Lake First Nation in 1930, breached the *Indian Act*'s clauses on reserve surrender, represented an illegal alienation of reserve land, breached the Crown's fiduciary obligations and breached the Honour of the Crown. I find that the Claimant has not proven the validity of this assertion.

[146] The second basis for validity, according to the Waterhen Lake First Nation, is that when Agent Taylor visited Waterhen Lake in 1921 to take the First Nation's adhesion to Treaty No. 6, he promised that a surveyor would return to set apart a timber reserve for the exclusive use and

benefit of the people of Waterhen Lake. By making the promise and failing to deliver, the Claimant alleges that the Crown breached Treaty No. 6, breached its fiduciary obligations to the First Nation and breached the Honour of the Crown. I find that this assertion by the Claimant is valid under paragraph 14(1)(c) of the *SCTA*.

[147] The next section determines compensation for the valid breach.

## IV. COMPENSATION

[148] This section determines what compensation is appropriate, having found a breach of the Crown's fiduciary duty to the Waterhen Lake First Nation. Prior to discussing the Parties' positions and the general principles of equitable compensation, however, there is a preliminary evidentiary issue that must be addressed.

### A. Compensation Evidence and the *Specific Claims Tribunal Act*

[149] Having found that the Crown has breached paragraph 14(1)(c) of the *SCTA*, I am now faced with a challenge: this Claim was not bifurcated into separate validity and compensation phases, and the majority of the compensation evidence heard in this Claim relates to different heads of validity than what I have found.

[150] The Claimant argued that a reserve was created in law as of 1921 but, when confirmed by Order in Council in 1930, the reserve was significantly smaller than what had been agreed nine years previously. This, the Claimant alleged, indicated an illegal taking of reserve land. An illegal taking of reserve land, if proven, attracts compensation under paragraphs 20(1)(g) and (h) of the *SCTA*, which read:

> **Basis and limitations for decision on compensation**
> **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); …

[151] As paragraph (g) determines, compensation equal to the current, unimproved market value of the lands in question—as well as compensation for the loss of use of those lands under paragraph (h)—is only available where a claimant has established "that those lands were never lawfully surrendered, or otherwise taken under legal authority." As the Claimant has not established an illegal taking, these heads of compensation are not available to the Claimant.

[152] The only applicable head of compensation to this Claim is under paragraph 20(1)(c) of the *SCTA*, which reads:

> **Basis and limitations for decision on compensation**
> **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;
> …

[153] The words "subject to this Act" alludes to the fact that there are restrictions to the way the "principles of compensation applied by the courts" can be applied at the Tribunal. For instance, whereas equitable compensation in a court can include the return of real property, the Tribunal is restricted to awards of monetary compensation via paragraph 20(1)(a). Further, there is a limit to the compensation available under paragraph 20(1)(b)—$150 million—and, under subparagraphs 20(1)(d)(i) and (ii), the Tribunal cannot award punitive damages, or compensate for non-monetary loss.

[154] Arguably, no monetary loss flows from the breach in the sense that there is a difference between a loss and the absence of a gain. The Crown has argued that the Waterhen Lake First Nation received timber lands on the main reserve and therefore, while a fiduciary breach occurred, no loss flows from the breach because the Crown provided everything it was responsible for. The Crown further argued that "[a]lthough Canada did not include all the timber and hay lands requested by Waterhen Lake, Canada was mindful throughout the reserve creation process that timber and hay lands had been requested and were important, and reasonable timber and hay lands were ultimately included in IR130" (Respondent's Amended Memorandum of Fact and Law at para. 117). In other words, the admitted fiduciary breach centres around mismanaged expectations and a failure to communicate, not a broken promise.

[155] I reject the Crown's submission that reasonable timber was included in the Waterhen Lake First Nation's reserve: Agent Taylor, in his first report of the treaty council, informed the Crown that "no timber of any size" was present surrounding Waterhen Lake, which was part of the impetus for the request by the First Nation. I have found that Agent Taylor had the capacity to bind the Crown, and did bind the Crown to a promise of a specific timber reserve in a specific place. The broken promise is the fiduciary breach, but the question of monetary loss is an open one.

[156] The Supreme Court of Canada has found, however, that—in certain contexts—a failure to gain is the equivalent of a monetary loss. In *Air Canada v British Columbia*, [1989] 1 SCR 1161 at pp. 1202–03, 59 DLR (4th) 161 [*Air Canada*], for instance, La Forest J. wrote, for the majority:

> The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. [emphasis added]

[157] This reasoning was relied upon in the subsequent case of *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574, 61 DLR (4th) 14, which involved two mining companies, Corona Resources Ltd (Corona) being the smaller company with fewer resources than its counterpart LAC Minerals Ltd (LAC). Corona was investigating mineral deposits on a property in Northern Ontario and LAC, having learned of Corona's activities, suggested forming a joint venture to purchase the property and harvest the minerals. To advance the potential deal, Corona shared the results of its explorations, after which LAC suggested Corona bid on the property in order to advance the proposed joint venture. However, unbeknownst to Corona, LAC put in its own solo bid, which was successful. The Supreme Court of Canada determined that LAC had committed a breach of confidence by misusing the results of Corona's explorations to acquire the property. It also determined that, but for the breach, Corona would have acquired the property. La Forest J. wrote:

> In my view the facts present in this case make out a restitutionary claim, or what is the same thing, a claim for unjust enrichment. When one talks of restitution, one normally talks of giving back to someone something that has been taken from them (a restitutionary proprietary award), or its equivalent value (a personal restitutionary award). As the Court of Appeal noted in this case, Corona never in fact owned the Williams property, and so it cannot be "given back" to them. However, there are concurrent findings below that but for its interception by LAC, Corona would have acquired the property. … the fact that Corona never owned the

> property should not preclude it from pursuing a restitutionary claim … [emphasis added; pp. 669–70]

[158] Although La Forest J. found that a limited fiduciary duty had arisen (pp. 634–35), the decision turned on the breach of an equitable duty—the duty of confidence—and determined that an equitable remedy—a constructive trust over the property—was appropriate. As a general proposition, then, when a party that owes an equitable duty to another breaches that duty, and the breach itself prevents the other party from acquiring property it would have acquired but for the breach, the failed acquisition is a loss that can be compensated for via an equitable remedy.

[159] While it could be the appropriate remedy in a court of law, the Tribunal does not have the jurisdiction to award a constructive trust: per paragraph 20(1)(a) of the *SCTA*, remedies at the Tribunal are restricted to monetary compensation. Therefore, the only appropriate remedy for this Claim in this venue is equitable compensation.

[160] However, as mentioned, the evidence regarding the appropriate level of equitable compensation presented in this Claim does not conform to the finding of validity in this decision: whereas the Claimant presented evidence appropriate to a finding of validity mentioned in paragraphs 20(1)(g) and (h) of the *SCTA*, this evidence is not necessarily appropriate to a finding of validity mentioned in paragraph 20(1)(c). I have determined, however, that the evidence of the current unimproved market value and loss of use presented by the Claimant and Respondent can be applied to this case, as a proxy for the loss suffered by the Waterhen Lake First Nation because of the Crown's breach of fiduciary duty.

[161] Such evidence cannot serve as a proxy for loss in every context: it is clear from the *SCTA* that parliament intended for different compensation in a claim for an illegal taking than in claims which violate other sections of the *SCTA*. A case-by-case analysis will be necessary to determine if evidence regarding the current unimproved market value and loss of use is appropriate in a valid claim without an illegal taking.

[162] The evidence can serve as a proxy in this context because of the conceptual differences underpinning the compensation referred to in paragraphs 20(1)(g) and (h) of the *SCTA*, and compensation under other sections of the *SCTA*. For example, paragraph 20(1)(e) applies where lands were legally surrendered but inadequate compensation was paid. Under paragraph 20(1)(e),

a claimant that proves inadequate compensation in an historical surrender is entitled to "the market value of a claimant's reserve lands at the time they were taken brought forward to the current value of the loss" to reflect the present-day value of money from that time. The reason a claimant would not, in that context, receive the current value of the land is because the First Nation agreed to surrender the land in prior years—the breach has to do solely with the adequacy of the compensation, not with the loss of the land. As of the decision to surrender, conceptually, a First Nation would no longer own the land. Under paragraph 20(1)(g), however, but for the illegal taking, a claimant would ostensibly still own the land—and is therefore entitled to its current value.

[163] The loss of use works similarly: under paragraph 20(1)(e) of the *SCTA* there is no compensation for the loss of use where a surrender for inadequate compensation occurred. Again, conceptually, when a First Nation agrees to surrender land, the agreement means the land is no longer in its possession—no longer available for its use—and therefore there is no compensation for its loss of use. However, where a taking is illegal, a First Nation would ostensibly have continued to own the land, and continued to benefit from the use of it, therefore it is entitled to compensation for the loss of use to the date of the judgement.

[164] In the Claim currently before the Tribunal, but for the Crown's broken promise, the Waterhen Lake First Nation would have come into possession of the timber reserve or—in the words of *Air Canada*—the lands "would have accrued" for the benefit of the First Nation. Ostensibly, had the promise been fulfilled, the First Nation would continue to possess the timber lands to this day. Therefore, the current unimproved market value and loss of use are appropriate heads of compensation in this Claim.

### B. Parties' Positions on Compensation

[165] It should be noted that the Parties produced a wealth of evidence on compensation but, based on the validity finding I have made and my finding that a proxy could be used to establish compensation amounts owed, this decision will only consider the compensation evidence that relates to the promised timber reserve.

[166] The Parties' experts agree on the location and boundaries of the promised timber reserve: it consists of approximately 7,680 acres located in Sections 25–36, Township 64, Range 16, west of the Third Meridian (Exhibit 12, Appendix 1, at p. 1; Exhibit 17 at p. xiii; Exhibit 34 at p. 6).

### 1. Position of the Claimant on Compensation

[167] The Claimant relies on its compensation experts on the subject of the appropriate compensation based on the finding of validity in regard to the promised timber reserve. As indicated, Alana Kelbert provided expert evidence on the current unimproved market value of the lands themselves, as well as an assessment of the agricultural loss of use. Greg Scheifele provided expert evidence on the loss of use in regard to timber.

#### a) Current Unimproved Market Value

[168] It is important to keep in mind exactly what Alana Kelbert—and the Crown's appraisal expert, Bradley Slomp—were asked to do regarding the current unimproved market value of the promised timber reserve. "Market value" is largely self-explanatory, as is "current," but the definition of "unimproved" needs to be borne in mind. Kelbert testified that unimproved, in this context, means that the promised timber reserve lands "are to be valued as though vacant … and no regard shall be had for the buildings, crops, fences, any structures or improvements thereon" (Hearing Transcript, June 7, 2023, at p. 328).

[169] Although there are a variety of ways to value land, Kelbert testified that the direct comparison approach was the most appropriate, given that it "is the most common approach … provided that you find adequate sales" (p. 344). She explained the direct comparison approach looks at a variety of property sales an appraiser feels are "comparable" to the subject lands, then undertakes "a process of comparison and adjustments" to the comparators in an effort to reach an apples-to-apples comparison (p. 345). For example, an adjustment may be made if a comparator is a different size than the subject property, has different soil capacity, has different accessibility, contains a water body, was sold at a different time or any number of other differences identified as consequential by an expert. The approach is built on the "principle that a buyer's top price will only be as much as they would pay for reasonable substitutes" to the land in question (Exhibit 17 at p. 40).

[170] To undertake the direct comparison approach, an appraiser begins by determining the highest and best use of the property to be appraised, which the Appraisal Institute of Canada defines as "*[t]he reasonably probable use of real property, that is physically possible, legally permissible, financially feasible and maximally productive, and that results in the highest value*"

(italics in original; Exhibit 17 at p. 32, citing the *Canadian Uniform Standard of Professional Appraisal Practice* (Ottawa, 2022)). Highest and best use is the foundation of the approach because it allows an appraiser to identify comparable properties based on the use an owner could or would make of them, and therefore identify reasonable substitutes. Kelbert testified that the highest and best use of the timber reserve, currently, is "for livestock grazing or combination of recreation, conservation purposes into the foreseeable future with timber harvesting happening in that 20- to 50-year period once the trees reach maturity" (Hearing Transcript, June 7, 2023, at p. 344). The Claimant takes the position—in regard to both the current unimproved market value and loss of use—that livestock grazing and timber harvesting could take place concurrently in the timber reserve, because "logging would happen in the winter, and grazing would happen in the summer" (p. 411).

[171] Grazing capacity, Kelbert testified, is defined by the ability to sustain a thousand-pound cow—with or without a calf—for one month. A mature cow, she said, requires "920 pounds of forage per acre" to sustain itself for one month, so 920 pounds of forage is known as one "animal unit month" or AUM (p. 341). Knowing how much feed an animal requires allows the grazing capacity of a plot of land to be measured and defined: for instance, a plot of land where one acre can sustain two cows per month would have an AUM of 2.00, whereas a plot of land that requires two acres to sustain one cow would have an AUM of 0.50.

[172] Kelbert found eight reasonably comparable properties in and around the subject lands, with the majority located north of Meadow Lake (Waterhen Lake is approximately 50 kilometres north of Meadow Lake). These properties all sold between October 2017 and December 2021. She grouped these properties into three categories, based on their grazing capacities, which corresponded to the grazing capacities found in the subject lands. The grazing capacity of the timber lands is relatively low: group A, making up 7 percent of the timber lands, had the highest grazing capacity and was the most productive, at greater than 0.20 AUM; group B, making up 92 percent of the timber lands, had the next highest productivity, at 0.10–0.20 AUM; and group C, which makes up only 1 percent of the timber lands, had the lowest grazing capacity, at less than 0.10 AUM (Exhibit 17 at p. 42).

[173] The comparables were then adjusted based on the time between the sale and the writing of

Kelbert's expert report. Further adjustments were not necessary, based on the fact that the comparable properties were located near the subject property, were zoned the same, had similar levels of access, and there was no discernable difference in the market for lot size (Exhibit 17 at p. 46). Having divided the comparable properties by productivity, Kelbert was then able to determine an average price per acre for each category of land, and then apply those price averages to her determination of the makeup of the timber reserve by category. Kelbert offered an initial estimate of value per category in her original report but, following discussions with the Crown's expert, Bradley Slomp, adjusted these estimates slightly downward based on concerns raised by him. These criticisms mostly focused on the time adjustments Kelbert made to the value of the comparable properties—Slomp testified that he felt these adjustments were "inflated" (Hearing Transcript, June 8, 2023, at p. 557). The additional report also adjusts some of Slomp's calculations upward based on concerns Kelbert had regarding Slomp's determinations, as will be discussed in a subsequent section of this decision.

[174] Ultimately, lands in group A were valued at $470 per acre, lands in group B at $340 per acre and, in group C, $155 per acre. In the timber reserve, Kelbert calculated that 537.60 acres were group A, 7,065.60 acres were group B and 76.80 acres were in group C. Applying the per acre value to the number of acres in each category results in the following calculations:

| Category | Acres | Value per Acre | Total Value |
|---|---|---|---|
| **A** | 537.60 | $470 | $252,672 |
| **B** | 7,065.60 | $340 | $2,402,304 |
| **C** | 76.80 | $155 | $11,904 |
| **Total** | 7,680 | | $2,667,000 (rounded) |

[175] Kelbert ultimately concluded that the current unimproved market value of the timber lands is approximately $2,667,000.

### b) Agricultural Loss of Use

[176] Alana Kelbert described the agricultural loss of use as the "foregone net revenue from

agricultural activities on the claim lands" (Hearing Transcript, June 7, 2023, at p. 375). For the timber reserve, because the promise was made in November 1921, the time period that foregone revenue was measured was from then until the end of December 2022.

[177] The process began by assessing economic activity in the area near the timber reserve, in an effort to determine what would have been the most reasonable and prudent use of the lands, given their capacity for agriculture. Kelbert testified that, throughout the claim period, "[a]griculture was pretty diverse in this area of Saskatchewan," and included activities such as cattle ranching, commercial fishing, berry harvesting, mink farming and wild rice harvesting (pp. 380–81).

[178] The claim period is lengthy—just over a century—and to reflect economic changes in Saskatchewan agriculture over the entire period, Kelbert relied on the work of economist Richard Schoney, who developed timeframes of economic activity in the Province of Saskatchewan that reflect its progression over time.

[179] The first era was the 'pioneer epoch' which lasted from 1871 until 1910, and is not particularly important in the context of this Claim (Exhibit 20 at p. 14). The next era, the 'mechanization epoch' lasted from 1910 until 1960, and is the era in which agricultural production began near Waterhen Lake ( p. 16). Kelbert testified that the mechanization epoch contained "real boom and bust periods" including "the Dirty '30s … two world wars that impacted labour but also a huge demand for food supply" as well as the Greater Production Campaign, which offered "real incentive to increase production to [be able to feed the] soldiers" (Hearing Transcript, June 7, 2023, at p. 386). This era was marked by "leaps and bounds" in technology related to agriculture, and the 1930s were a particularly good time for grazing near Waterhen Lake because while the southern half of Saskatchewan was a dust bowl, the northern portion had "higher precipitation levels [and] good pasture conditions" which led a "flush of settlers" to enter the area looking to feed and water their livestock (pp. 386–87). Kelbert found evidence that demand for grazing in the area near Waterhen Lake was strong, particularly between the 1920s and 1950s.

[180] Following the mechanization epoch was the 'chemical epoch' (Exhibit 20 at p. 30) which Kelbert described as "another transformation on how agriculture happened in Saskatchewan [which] involved the introduction of pesticides" as well as antibiotics (Hearing Transcript, June 7, 2023, at pp. 396–97). Agricultural yields increased via the use of these chemicals, and the use of

fertilizers, herbicides and equipment advances allowed for "continuous crop[ping]" and the end of the practice of leaving fields fallow to allow nutrients to return to the soil (Exhibit 20 at pp. 30–31).

[181] Finally, beginning in the 1990s and continuing through to today is the 'integrated package epoch' (Exhibit 20 at p. 31) which Kelbert described as "a very integrated system of relying upon technology, mechanization, genetics, your animal and plant protection package for your fertilizers and your pesticides" (Hearing Transcript, June 7, 2023, at p. 397). The growth of agriculture as an industry, and the technological advances which drive the industry, mean that "costs in agriculture have been increasing over time relative in comparison to [the] revenues that have been generated … it is a very specialized industry today [that has] very, very, high risks involved, given the costs that have to be invested" (p. 398).

[182] Once all of this information is collected and analyzed, it is fed into an economic model to estimate the amount of revenue foregone by the First Nation. Kelbert utilized two different models: the first, an owner-operator model where the First Nation owns the lands and generally utilizes them to graze its own animals; and the second, a leasing model where the First Nation simply leases out as much of the lands to others as it can.

[183] The owner-operator model has four steps: 1) determine land use and productivity throughout the Claim period; 2) estimate acres ranched by the First Nation or leased out to third parties; 3) estimate gross returns from agricultural uses; and 4) estimate net income from ranching by the First Nation.

[184] In the first step, by utilizing forestry expert Greg Scheifele's re-creation of vegetation types in the claim area—which will be explained in the next section—Kelbert determined that, at the beginning of the claim period, only 93 percent of the timber reserve would have provided effective grazing but, as logging proceeded and trees were removed, the timber reserve became 99 percent productive. She was also able to determine how many cows could be grazed on the timber reserve, by determining the AUM of the land, per acre. In the timber reserve, the average AUM is 0.15, which means that approximately 267 cows—or animal units—could graze the area at the beginning of the claim period. Kelbert also collected a significant amount of information regarding the number of farm animals in the rural municipality of Meadow Lake (the nearest to the Waterhen

Lake First Nation) as well as for the whole Province of Saskatchewan, to determine trends over time and the demand for grazing areas.

[185] At the second step, by utilizing the Province of Saskatchewan's Census of Agriculture for the Rural Municipality of Meadow Lake, Kelbert was able to determine that, at the beginning of the claim period, approximately 20 percent of privately-owned land in the area was leased to third parties and, at the end of the claim period, this number was closer to 40 percent. This led her to conclude that "the most reasonable and probable use of the Claim Land would be to lease out a portion to third parties" especially because the economic model takes into account the fact that there are startup costs and activities—fencing for example—that could not have been achieved immediately (Exhibit 20 at pp. 79–81). In her model, however, she assumes that as of 1938, the First Nation would have stopped leasing to third parties and would be using all of the productive areas of the timber reserve to graze its own livestock during the summer months.

[186] At the third step, Kelbert faced a choice: she could estimate gross agricultural returns in a number of different ways, some of which are more involved than others. The method Kelbert relied on—the hay-equivalent model—simply asks how much hay would be necessary to replace the amount of food foraged on the timber reserve by cows and the price of that hay—once the costs associated with baling, transportation, storage, and marketing of hay are removed—is the value of the equivalent forage, and therefore the value foregone by the First Nation over the claim period. Bradley Slomp, as will be seen, utilized a cow-calf model which Kelbert felt was less reliable given the greater number of inputs, and the fact that some necessary inputs were missing from the data in some years, which meant that estimates would be necessary, decreasing the reliability of the conclusion. Nevertheless, as she testified, by comparing the results of the two models, she determined that the hay-equivalent model does not account for any value added by "putting that hay through an animal" which meant that the "hay-equivalent model is undervaluing" the gross returns in comparison to the cow-calf model (Hearing Transcript, June 7, 2023, at p. 421). This led her to conclude that the hay-equivalent model was the more conservative of the two approaches.

[187] In the fourth step, calculating net revenue, Kelbert testified that this "simply means take your expenses off of your gross returns" (p. 422). To determine the expenses that the First Nation,

or anyone using land for grazing cattle, would face in Saskatchewan, she turned to aggregate data from Statistics Canada. As she testified, "They reported expense data and income data since 1926 [for] the [P]rovince of Saskatchewan." The reliance on Statistics Canada data over almost the entire claim period allowed for an accurate look at what the First Nation would have faced as cattle ranchers throughout the period, she testified, because "it really has built into it all those phases of development that agriculture has experienced over time, right, and it captures the general trends as well as year-specific trends."

[188] Once the expenses are subtracted from the gross revenues for each year of the claim period, the total nominal loss of use can be calculated over the entirety of the claim period. After submitting her original report, Kelbert slightly revised some of her conclusions and inputs based on comments offered by the Crown's expert, Bradley Slomp. She offered her ultimate conclusion of the agricultural loss of use as a range which changes based on how much labour is done at no expense by family or community members, or has to be paid to third parties.

[189] Kelbert's ultimate conclusion is that the foregone agricultural revenue, or agricultural loss of use, from the timber reserve over the claim period, in nominal dollars, is $821,417 to $851,454.

### c) Forestry Loss of Use

[190] Greg Scheifele testified that the purpose of his forestry loss of use report was to "determine the net financial benefit per year that could have been reasonably accrued to the Waterhen Lake First Nation from forestry activities if the claim lands had remained in their possession" (Hearing Transcript, June 6, 2023, at p. 201). Scheifele testified that the claim period for the forestry loss of use of the timber reserve that he considered was the same as Kelbert in her determination of the agricultural loss of use: 1921 until, essentially, the present.

[191] The report itself outlines two major steps to determine the foregone net financial benefit, although there are dozens of interim steps. First, the report says it must "determine the forestry activities, which could reasonably have been undertaken" by the Waterhen Lake First Nation in the promised timber reserve and, second, "the study must determine the annual net financial benefit to the [Waterhen Lake First Nation] from probable forestry activities that yielded marketable products at fair market prices" (Exhibit 12 at p. 3).

[192] To complete the first step, Scheifele had to determine what timber resources were present on the timber reserve at various points in time. He testified that the promised timber reserve is located in an area known as the "Southern Boreal Ecoregion of Saskatchewan within an area commonly referred to as 'the mixedwood section,' which encompasses a band about 35 to 285 kilometres in width across northern Saskatchewan" (Hearing Transcript, June 6, 2023, at p. 215). This section of forest, he said, is easily accessible, and "exhibit[s] what has been termed 'superior forest production capabilities.'" The timber reserve is comprised of 92 percent woodland and, according to Scheifele's report, while thirteen species of trees are associated with the mixedwood section, primarily the timber consists of trembling aspen (35 percent), black spruce (19 percent) and jack pine (17 percent) (Exhibit 12 at p. 19).

[193] To determine the more specific makeup of the forest in and around the Waterhen Lake First Nation, Scheifele began with the Dominion Land Surveys which occurred in the area between 1911 and 1913 and which, he testified "provided anecdotal information on [the forest] conditions in the area" (Hearing Transcript, June 6, 2023, at p. 207). The next piece of evidence he looked at was a forest inventory study completed by the Department of the Interior in 1914, which showed that, at that time, the promised timber reserve was made up of "predominantly stands of white spruce and poplar, which occurred in softwood or mixedwood stands."

[194] Two million hectares of land in northern Alberta and Saskatchewan burned in 1919, including some in the Meadow Lake area, in an event dubbed the Great Fire. Scheifele testified that not only were standing trees lost, but stacked logs already cut and being stored for transport were lost as well. It was "basically the demise of much of the forest industry at that time because of the extent of [the] losses," Scheifele testified, as sawmills and lumber companies moved elsewhere in order to continue harvesting (pp. 207–08). Logging did still occur following the Great Fire, however, as "not everything would have been burnt" and "remnant stands" could still be found in the area (pp. 207–09).

[195] The history of fire in the area is important to understand. Scheifele testified that "about every 15 to 20 years, you get a cycle of fires, depending on weather conditions and forest conditions and so on" and that this cycle resulted in a "patchy distribution" of timber, and an "irregular" forest canopy by 1946, the first year in which aerial photography of the area was

available (Hearing Transcript, June 6, 2023, at pp. 207–09). Aerial photography from that year, as well as 1969, 1988 and 2020 was obtained to see not only the progression of the forest in the area in terms of species and volume, but evidence of cutting and logging throughout the claim period.

[196] Scheifele also carried out a site inspection in September and October 2020, which occurred over four days. His report outlines that the site inspection's major focus "was to collect supplemental data on site characteristics and tree growth, particularly from stands with mature white spruce and jack pine" in order to provide "further details on the timber production capability of the land base" (Exhibit 12 at p. 22). All of the collected details about the specific characteristics of the timber reserve could then be cross-checked against reference material: Scheifele testified that a particularly important reference for the area was a technical bulletin produced by the Department of Natural Resources of Saskatchewan in 1971, called "The Growth and Yield of Well Stocked White Spruce in the Mixedwood Section in Saskatchewan" by Alfred Kabzems, often referred to simply as "Kabzems" (Hearing Transcript, June 6, 2023, at p. 222). This reference contains the empirical yield of white spruce stands in the mixedwood section of Saskatchewan, and "shows the difference in volume, productivity, and the size of trees as you go from a good site to an average site to a poor site." By identifying the site quality via records and the site inspection, Scheifele could use Kabzems to estimate the merchantable volume per acre of timber that could be harvested from the timber reserve.

[197] Scheifele also testified that he met with the Waterhen Lake First Nation Elders to collect their recollections on forest conditions throughout their lives, and anything they had learned from their own Elders about forest conditions in the vicinity.

[198] After collecting a significant amount of information, Scheifele was able to create maps of the forest's makeup in the timber reserve at various points in time: his report contains detailed maps of the forest conditions in the area in 1914, 1946, 2000 and 2020, as well as the aerial photographs from 1969 and 1988 (Exhibit 12 at Appendices 5–8, 10). By having a reasonable estimate of the forest's conditions and volume of merchantable timber at various points in time, Scheifele has essentially answered the first step in his process: by determining what type and what volume of timber was available, he has determined what types of forestry activities could reasonably have been undertaken in the timber reserve.

[199] The second step is essentially an economic analysis: after determining how much wood was available, Scheifele had to determine what it would be worth each year to the First Nation, which included determining the demand for timber, the ability and expense of harvesting and exportation, the price of timber throughout the claim period and other factors. Much of this step, again, involved the collection of historical information.

[200] Scheifele testified that the railway extended into the Meadow Lake area by 1931, and that the arrival of the railway was, essentially, the genesis of the timber industry in the area. Harvesting had occurred for decades south of the Waterhen Lake First Nation in the Prince Albert area, but the arrival of the railway "allowed for the forest industry to expand in the area and, in particular, extract the forest resources to the north of Meadow Lake … without a transportation network in place, this doesn't happen" (Hearing Transcript, June 6, 2023, at p. 208). This information, combined with the distance of the First Nation from Meadow Lake and the aerial photographs from 1946 which showed only "a relatively small cut-over area at that time," caused Scheifele to conclude that it would not have been feasible to harvest timber in the Waterhen Lake area beginning in 1921 (Exhibit 12 at p. 38). Instead, timber harvesting in the promised forest reserve would have "commenced in the winter of 1944/45 and there would be no loss of forestry income prior to that date".

[201] Based on the 1946 aerial photographs, Scheifele concluded that at that time "the Timber Reserve had 7,087 acres of productive forest land which represented 91.3% of the entire area" and that "[m]ature merchantable softwood and mixedwood forest accounted for 2,860 acres or 40% of the productive forest cover" (Exhibit 12 at p. 39). These numbers are important to the calculation of economic loss because, at that time, "sawmilling companies operating in the vicinity of Meadow Lake were only interested in mature softwood dominated stands that contained a sufficient merchantable volume of white spruce and jack pine" so that it was economically beneficial to harvest.

[202] Once Scheifele determined what types of timber were on the timber reserve as of 1946, the approximate age in terms of merchantability and where it was located, via the aerial photographs, he could turn to Kabzems to determine the relationship between the forest itself and the volume of marketable timber that could be reasonably harvested. Merchantable timber is typically measured

using foot board measure per acre, or fbm/acre. He divided the forest canopy into "types" and then defined what those types contained. The most important types in the timber reserve, it would appear, are "S Type," "SL Type," and "M Type" (Exhibit 12 at p. 43). S Type is defined as 90 percent white spruce and 10 percent poplar, and he calculated the timber reserve would yield 24,600 fbm/acre merchantable timber. SL Type is defined as 40 percent black spruce, 30 percent tamarack, 20 percent white spruce and 10 percent poplar, and the timber reserve would yield 10,920 fbm/acre. Finally, M Type is defined as 60 percent white spruce, 20 percent poplar, 10 percent jack pine and 10 percent birch, and the timber reserve would yield 21,160 fbm/acre.

[203] After determining yield, Scheifele made deductions for cull and breakage. Cull, he testified, refers to "decay and defects in timber" which makes it unmerchantable, whereas breakage "reflects losses of timber that occurred during the logging operation," caused by decisions made by the cutters, freezing and cracking of stored logs, wet conditions at the end of the season or any other reason (Hearing Transcript, June 6, 2023, at pp. 236–37). He testified that for jack pine dominated stands of trees, cull is 5 percent, and his report noted that for white spruce dominated stands cull is 10 percent. Scheifele testified that breakage at the beginning of the harvesting period, in 1944, would be around 10 percent, but that over time logging has become more efficient, so that "in more mechanized harvesting of today, it's much less … about … 3 to 5 percent."

[204] Knowing what timber existed, and in what volume, on the timber reserve at the beginning of its potential harvest, in the winter of 1944/1945, allowed Scheifele to construct a harvesting scenario that would allow the First Nation to make the most profit off the wood, while ensuring that harvesting numbers are reasonable in terms of the historic practices of logging in the area. Scheifele determined that three periods of harvesting would have occurred between 1944 and the date of his report, in 2022. The most reasonable harvesting scenario was three harvesting periods: one that would begin in 1945 and cut trees selectively based on demand; a second beginning in 1975 which would again cut trees selectively; and a third and final harvest that would occur in 1995, and would be a clear cut.

[205] In his report, Scheifele outlines how a harvest beginning in 1944/1945 would have been undertaken, based on the practices and regulations of the time:

> In 1944 the merchantable spruce and pine timber in the Alienation Claim area and the Timber Reserve would have been advertised for sale by the DIA [Department of Indian Affairs] and sold to a local logging company who operated in the Meadow Lake area. The DIA would have issued a licence to the successful bidder, likely for a 10 year term subject to annual renewal as was commonly done during the 1940's. Work on each timber berth would have commenced in 1945 and the logging company would have to pay a licence fee of $4.00 and ground rent on 27 square miles (17,094.6 acres) at $5.00 per square mile in accordance with the 1923 Indian Timber Regulations. In addition, the company would have to pay a bonus which would be payable as stumpage in addition to the timber dues at tariff rates. [Exhibit 12 at p. 44]

[206] The method of cutting at this time was known as "high grading" which means that the "biggest and best quality trees of desirable species are cut and smaller, inferior trees are left behind." Cutting would be species specific, and "would have entirely focused on dense, mature upland softwood and mixedwood stands … that yielded significant volumes of merchantable sawlogs and railway ties." Scheifele also reports that "softwood lumber production in Saskatchewan peaked in the mid 1940's so there was clearly a very strong demand for spruce and pine sawlogs at this time" (p. 46).

[207] After determining the location and volume of species in the timber reserve, cross-referencing with demand and lumbering techniques, and taking away cull and breakage, Scheifele concludes that in the first harvesting period 34,007,000 fbm would be harvested from the timber reserve, or 11,900 fbm/acre.

[208] A second harvesting period would commence in 1975. Again, Scheifele outlines in his report how this harvesting period would be undertaken:

> The Waterhen [Lake First Nation] would have surrendered the merchantable softwood timber which would have again been sold by public tender and subsequently harvested under the authority of a licence issued by the DIA. Harvesting would have focused on conifer sawlogs and pulpwood found in dense immature softwood, lowland softwood and mixedwood stands that are now 70 to 90 years old, along with dense mature lowland softwood stands that were left unharvested in the 1940's and are now 150 years old. … The licensee would have to pay the annual licence fee and ground rent in accordance with the 1949 and 1978 Indian Timber Regulations as well as timber dues at prevailing rates. [citation omitted; Exhibit 12 at p. 46]

[209] Scheifele testified that, by 1975, 1,671 acres of merchantable timber was available for harvest . He also testified that harvesting had changed by 1975:

> The loggers are using chainsaws and what's called line skidders where they could be rubber-tired, or they may have tracks like a bulldozer that are equipped with a winch, and they drag out the timber to landing areas where they're then loaded on trucks. So breakage and wastage is not as significant during … this period of mechanized harvesting or in subsequent harvesting periods. [Hearing Transcript, June 6, 2023, at pp. 242–43]

[210] Again, he testified that timber which was not in demand at that time—such as poplar—would be left behind. Ultimately, after doing similar calculations regarding the location and volume of available timber, and cross-referencing this against demand and lumbering techniques—including appropriate deductions for cull and breakage—Scheifele determined that 14,846,000 fbm would be harvested and sold from the timber reserve during this period.

[211] The third harvest would have been a clear cut of any merchantable timber, beginning around 1995. By this time the business context of logging in the area had changed significantly. First, Scheifele reports that, in 1994, the Waterhen Lake First Nation established Waterhen Forestry Products, which "has carried out all the timber harvesting in the … Timber Reserve" since that time (Exhibit 12 at p. 18). Second, he also reports that Waterhen Forestry Products "became a fully mechanized logging operation" shortly after it was founded. Finally, sometime before 1995, hardwood became a more marketable species as the data shows that, between 1991 and 2012, hardwood pulpwood accounted for 84 percent of the volume of timber harvested in the promised timber reserve. He also reports, however, that white birch was not a merchantable species, and would have either been left behind or taken for personal use firewood. Scheifele also testified that because hardwoods such as poplar are "a short lived species that's very prone to decay" the percentage of wood lost to cull reaches as high as 26 percent in some areas, depending on age (Hearing Transcript, June 6, 2023, at pp. 244–45).

[212] In the timber reserve, the vast majority of timber harvested would be hardwoods, as most of the softwood in the area "would not have grown sufficiently to be commercially attractive at this time" (Exhibit 12 at pp. 53, 49). Scheifele's report determines that, inside the timber reserve, and after the appropriate deductions for cull and breakage, 2,791,000 fbm of white spruce softwood and 53,729 cords of hardwood pulpwood was available for harvest.

[213] Having determined how much merchantable timber was available in the three harvesting periods, the final step to determine the value foregone by the Waterhen Lake First Nation is to

calculate what the First Nation would have received for the timber that could have been harvested.

[214] Scheifele testified that at the beginning of the first harvesting period, in 1944, "the 1923 Indian Timber Regulations would have been applicable at that time, so the ground rent's at $5 a square mile, licence fee at $4, $2 for renewal" (Hearing Transcript, June 6, 2023, at p. 246). In 1949, however, "the ground rental charge increased from $5 to $10, and the licence fee increased from $4 to $10 with a renewal at $5" therefore, subsequent to that year his calculations take into account these increases (pp. 246–47). In terms of the volume harvested per year, Scheifele "assumed an even flow harvest over a ten-year period, so the same amount of volume harvested in each year" which "seemed like the most reasonable way to allocate the harvest" (p. 247).

[215] Loggers would also have to pay dues on the volume cut. Scheifele testified that the dues on timber cut on provincial land and those cut on an Indian reserve were different at this time—the dues on provincial land were higher, at $3 per thousand board foot for both pine and spruce, rather than $2.50 on pine and $1.50 on spruce under the Department of Indian Affairs rates. He decided to apply the provincial dues in an effort to account for the fact that logging companies would be expected to not only pay the statutory dues, but a "bonus" as well, which would be part of the bid for the timber. He said that applying provincial rates "seems fair to me because there was always an expectation … for loggers to pay more than the basic dues, and this was a way of rationalizing that by utilizing the provincial dues" (pp. 247–48). Scheifele also testified that, again in 1949, "provincial dues changed for both species, and they were increased to $4 per thousand board feet on the pine, but up to $5 per thousand board feet on the spruce." Scheifele then testified about how the foregone revenue is calculated:

> … in terms of calculating revenues, what you do is you … multiply the volume times the dues rate to get the value for both pine sawlogs and the white spruce sawlogs, and then you total the values for each year, ground rental licence fees, plus the value of the pine sawlogs, plus the value of the spruce sawlogs to get your total revenue in that year. [p. 248]

[216] Once each year's revenue is calculated, these figures can be added together to determine the total foregone revenue from the harvesting period. Scheifele testified that the total foregone revenue from the promised timber reserve in the first harvesting period, from 1944 to 1954, was $134,561.

[217] A number of changes to a variety of timber regulations occurred between the end of the first harvesting period and the beginning of the second. For one, the Government of Canada changed the rates in the regulations for harvesting on Indian reserves so that "timber dues were to be charged at prevailing rates, which essentially … meant the provincial stumpage rates" (Hearing Transcript, June 6, 2023, at p. 250). Saskatchewan also changed the way it determined its dues: rather than set fixed prices in the regulations, the province "increased their timber dues on spruce and pine saw timber based on the average annual selling price of spruce lumber as given in Madison's Canadian Lumber Reporter" which created a sliding scale of dues based on the prices in the market. The dues on pulpwood, however, stayed consistent throughout the period, at $1.75 per cord (p. 251).

[218] Keeping these values in mind, Scheifele testified that he next went through "the same kinds of calculations as before when you add licence fees and ground rentals to the value of sawlogs, plus the value of the pulpwood" each year, before totalling the years for the final economic benefit foregone by the Waterhen Lake First Nation (p. 251). Scheifele concluded that the loss of use from the timber reserve in the second harvesting period, from 1975 to 1979, was $994,497.99.

[219] During the third harvesting period, which like the second runs for five years with harvestable volumes equally proportioned, timber dues from Indian reserve lands continued to be charged at "prevailing rates which essentially meant provincial stumpage rates" (Exhibit 12 at p. 62). This means that, like the period from 1975 to 1979, "dues on spruce and pine sawtimber fluctuated with the price of lumber." The price of pulpwood was consistent at $0.75 per cord.

[220] One major difference between the third harvesting period and the earlier two is the revenue from ground rents and licensing: Scheifele testified that "because the harvesting is carried out by the First Nation, there's no ground rental or licence fee charges because they're not applicable in this situation" (Hearing Transcript, June 6, 2023, at pp. 251–52). Therefore, the only foregone revenue to the Waterhen Lake First Nation in this period is that generated strictly from the sale of the timber itself. Scheifele concluded that the loss of use from the timber reserve during the third harvesting period, from 1995 to 1999, was $434,944.15.

[221] By totalling the numbers from each harvesting period, the total foregone revenue to the Waterhen Lake First Nation from timber harvesting in the promised timber reserve, according to

Scheifele, is $1,564,003.14 in nominal dollars.

[222] The foregoing analysis is a hybrid model in the sense that in the first two harvesting periods the lands are leased out to logging companies at market rates, whereas in the third harvesting period the First Nation is both the owner of the lands and the operator of the logging activities. Scheifele delivered a supplemental report, dated February 2, 2023, that analyzed what the loss of use would be if the Waterhen Lake First Nation operated in all three harvesting periods as both owner and operator.

[223] Scheifele began by defining how much labour would be necessary to fulfill the harvesting volumes in his original report, and found that the First Nation would not likely be able to maximize its harvesting capacity without hiring third-party workers. Therefore, he had to determine average wages in the first and second harvesting periods. In the first harvesting period, 1944–1954, wage data in the earlier years came from the archives of newspapers, such as the *Saskatoon Star-Phoenix* and *Regina Leader-Post*, as well as from a master's thesis entitled "Beat Around the Bush: The Lumber and Sawmill Workers Union and The New Political Economy of Labour in Northern Ontario 1936–1988" by Douglas Thur. After 1946, however, Scheifele testified that he could not find relevant data, so he used Thur's numbers and the Bank of Canada's inflation calculator to increase wages annually based on the rate of inflation. Because of the size and density of timber available in the timber reserve, Scheifele estimated that "the crew size would be … 60 men needed to harvest the timber there within a ten-year period" (Hearing Transcript, June 6, 2023, at p. 259). Scheifele estimates that the total cost of labour in the timber reserve during the first harvesting period would be $538,980.

[224] These men would require era-appropriate equipment, and they would need to be fed. Scheifele testified that in the first harvesting period, equipment "such as axes, axe handles, crosscut saws, logging chains, ropes, [and] cant hooks" would be necessary (p. 263). He also said that he "couldn't find any information on historical costs of this equipment" so he found contemporary prices for similar equipment and used "the Bank of Canada's inflation calculator to work back in time to get a historic value in 1944" (p. 263). Scheifele's supplemental report does not break down the costs between the two areas this Claim is focused on, however he does indicate that the camp at the timber reserve would be approximately double the size of a camp on the main reserve, and

therefore require approximately two-thirds of the total equipment. The total reported cost for equipment is $2,047 in 1944 dollars, of which two-thirds would be approximately $1,365.

[225] Food requirements are significant in a logging camp. Scheifele testified that although an average man might consume 2,500 calories in a day, sources showed that lumberjacks routinely "burned an estimated amount of 9,000 calories a day" (p. 265). Information on the types of foods that would be consumed in logging camps was available, but not prices. Scheifele took contemporary data on average weekly food prices from the Government of Alberta, adjusted it upwards to account for supplies not included in the data such as condiments, baking supplies, coffee and tea, then used the Bank of Canada's inflation calculator to work backwards from contemporary prices. This allowed him to work out a weekly cost, which he converted into a monthly cost, then multiplied that number by the number of men in the camp, and the number of months in a logging season to arrive at a total price for food costs. Scheifele's supplemental report again does not break down food costs for the camps at the main reserve and the timber reserve, but again by taking two-thirds of the total cost as was done in the previous paragraph, an approximate value can be arrived at. Scheifele reports that the total food costs for both camps would be $410,400 over the ten-year harvesting period, of which two-thirds is approximately $273,600

[226] The way that profits would be realized in an owner-operator model also changes. Scheifele's supplemental report notes that if the First Nation carried out the harvesting itself, it would not benefit from ground rental charges or license fees that would be paid by a third-party under a lease agreement. However, the profit realized from the logging itself would go to the First Nation: based on historical and contemporary practices, Scheifele determined that a reasonable profit margin would be 10 percent of production costs. He does not break this down solely for the timber reserve, however. Nevertheless, considering the costs above, the margin can be determined. If labour accounts for $538,980, equipment $1,365 and food $273,600, then total production cost just in the timber reserve is $813,945 and, therefore, the profit margin is approximately $81,395. This number "represents the [Waterhen Lake First Nation] lost income over the 10-year harvesting period for cutting and skidding/forwarding logs to landing areas accessible by trucks" (Exhibit 13 at p. 8).

[227] Trucking also adds value to the timber, according to Scheifele. His supplemental report

notes that "Erickson Box Mill in Meadow Lake would have been the major local market for softwood sawlogs harvested" in the Waterhen Lake First Nation during the first harvesting period, and he testified that while the mill could have hauled the logs from the First Nation, assuming the First Nation would want to maximize its profits means that "the value added to sawlogs from trucking should have gone to the First Nation" (Exhibit 13 at p. 9; Hearing Transcript, June 6, 2023, at p. 268). Again, data on trucking costs was not available for the first harvesting period, so data from 1999 was worked backward using the Bank of Canada's inflation calculator. Also, Scheifele's supplemental report does not distinguish between the main reserve and the timber reserve in terms of trucking revenues. After assuming a 10-percent profit margin to costs, Scheifele testified that the total foregone revenue from trucking in the first period was $19,594, of which two-thirds is approximately $13,063.

[228] Scheifele's supplemental report notes that major changes occurred in logging practice between the first harvesting period and the second. He wrote that "[m]echanical harvesting with chainsaws and line skidders significantly reduced manpower requirements and increased logging productivity" and that these technological improvements also "meant that logging could be carried out year-round" rather than just in the winter season (Exhibit 13 at p. 9). Although logging could be carried out year-round, Scheifele assumed "only about 200 working days/year for logging crews due to weekend breaks, holidays, sickness, bad weather, and mechanical breakdowns" (p. 10). He determined that "[a]verage daily production for a 3-man cut and skid crew doing tree length logging would have probably been 15,000 fbm" which, given the amount of merchantable timber on the timber reserve at this time means that a three-man crew would take "5 years to harvest 14,413,000 fbm of sawlogs and 865 cords of pulpwood from the Timber Reserve."

[229] To determine wages in the second harvesting period, Scheifele used data on logging wages from 1999 and worked backward using the Bank of Canada's inflation calculator to arrive at the rates from 1975 to 1979, which ranged from $21.77 to $29.94 per thousand board foot. Scheifele checked these estimates against the recollections of: Al Martin, former Operations Manager at Mistik Management Ltd, a forestry company located in nearby Meadow Lake; James Burkhart, owner of Edgewood Lumber Ltd. in Hawkesville, Ontario; and Elders Richard Fiddler and Albert Fiddler of the Waterhen Lake First Nation, both of whom worked in the lumber industry near Waterhen Lake during this period. They informed him that these wage rates were reasonable, so

Scheifele set an average rate per thousand board foot of $26 for each year of the period.

[230] No mention is made in Scheifele's supplemental report or in his testimony about equipment acquisition, maintenance or food costs during this second harvesting period.

[231] In cross-examination, Scheifele was asked about the cost of lodging, especially as it pertained to the first harvesting period which had significant labour needs. He testified that "there didn't seem to be a great deal of consistency" in terms of whether logging companies would charge workers for lodging or not (Hearing Transcript, June 6, 2023, at p. 300). He expressed similar sentiments about the cost of transporting workers from the main reserve to the timber reserve, saying that the timber reserve is "so close to the home Reserve that I don't see that as being a big deal" and therefore he did not account for any costs (p. 301).

[232] Scheifele's supplemental report determines that "a total harvest of 26,349,500 fbm" was available between the timber reserve and the main reserve in the second harvesting period, but does not break this down between the two locations (Exhibit 13 at p. 11). In his first report, however, it appears that the timber available from each location was about equal: he writes that the "Harvestable Volume of Pine/Spruce Sawlogs" on the main reserve was 11,505,000 fbm in the main reserve, and 14,846,000 fbm from the timber reserve (Exhibit 12 at pp. 50–51). Therefore, it is reasonable to divide the total harvest number from the supplemental report in half—13,174,750 fbm—in order to estimate the loss of use. He notes in his supplemental report that in this period, as in the previous one, a 10 percent margin for profit would be reasonable. Therefore, the loss of use strictly from the timber reserve would be calculated by multiplying the cost to harvest—$26/thousand board foot, or $0.026/board foot—by the total number of board feet available—13,174,750 board feet in the timber reserve, for a total production cost of $342,543.50—and determining what 10 percent of that number is, to determine the total profit. Therefore, the total profit strictly from the timber reserve during the second harvesting period would be approximately $34,254.

[233] Similar to the first harvesting period, there is also the matter of the value added by trucking. Scheifele again used data from 1999, worked backwards using the Bank of Canada's inflation calculator, and determined that the average cost of trucking in this period was $12/thousand board foot, or $0.012 per board foot. Because he did not divide the second harvesting period into the two

locations, the calculation must be performed with the total harvest divided in half, as above. Therefore, trucking costs solely for the timber reserve would be the average cost of trucking multiplied by the available timber, or $0.012 per board foot multiplied by 13,174,750 board feet, for a total cost of $158,097. The foregone revenue is the 10 percent profit margin, or approximately $15,810.

[234] Scheifele testified that these additional profits must be added to the stumpage fees in his first report to determine the overall loss of use under an owner-operator model, but that the rental and licensing fees must be taken out of the calculations, as the First Nation would not be entitled to these fees if it is doing the harvesting itself.

### 2. Position of the Respondent on Compensation

[235] The Respondent did not put forward evidence on the forestry loss of use, but did put forward evidence on the current unimproved market value and agricultural loss of use via its appraisal expert, Bradley Slomp, who provided testimony as well as a number of reports.

#### a) Current Unimproved Market Value

[236] Like Alana Kelbert, Bradley Slomp valued the timber reserve using the direct comparison approach, testifying that because he was valuing bare lands, and because it is the "most commonly accepted and understood approach to evaluation in the marketplace," it was the most appropriate choice (Hearing Transcript, June 8, 2023, at p. 511). He testified, however, that his definition of the highest and best use—the starting point in a valuation such as this—put more emphasis on access than did Kelbert. Slomp defined the highest and best use as:

> … recreational unlimited agricultural purposes for areas with no access and prospective country residential uses for areas with direct access along Highways 903 and 951. This prospective country residential usage would include secondary recreational and agricultural uses. [p. 508]

[237] It should be noted that Highway 951 enters the promised timber reserve at the southwest corner and runs along the southern boundary for some distance before heading northeast and exiting the timber reserve at the eastern boundary. Highway 903 does not provide any access to the promised timber reserve. Slomp testified that because a current unimproved market valuation requires a "valuation of the lands as though in their natural state," his instructions from the Crown

were to consider the "roadways up to the boundaries of the lands" but no further (p. 509).

[238] Slomp visited the site of the claimed lands in September 2022. He testified that "it's important to inspect the subject lands in person, often from municipal roadways, [to] get the lay of the land with your own eyes" which includes considering how access is provided (p. 511).

[239] Before considering relevant comparables, Slomp developed a better understanding of the subject lands via a number of considerations, all linked to his definition of the highest and best use. He turned to a resource by the Government of Canada called the Canada Land Inventory, which he testified is a way to "rate the lands in developed areas of Canada for different features, including recreation, ungulates, waterfowl, and agriculture" (p. 526). He explained that lands are given a rating between one and seven, with one being the most superior in a particular category, and seven being the least. Slomp looked at four categories to judge the quality of the lands in the promised timber reserve: land capability for recreation, land capability for ungulates, land capability for waterfowl and land capability for agriculture.

[240] This is an important step in the direct comparison approach, because it allows for better comparison between properties. Slomp testified:

> … you want your comparable properties to also have that same highest-and-best use as it pertains to zoning, similar zoning, physical features, generally similar location, generally similar land use prospects. Yes, there are going to be differences. That's normal. Appraisers make adjustments for those differences. [p. 538]

[241] In terms of land capability for recreation, the timber reserve is "primarily Class 6" with "a small amount of Class 5" (p. 528). His report notes the definition of Class 6, in terms of recreation:

> Class 6 lands lack the natural quality and significant features to rate higher, but have the natural capability to engender and sustain low total annual use based on dispersed activities. [Exhibit 29 at p. 28]

[242] As for the land's capability for ungulates, ungulate refers to large mammals with hooves and can include agricultural animals such as cows, horses and pigs but, in this context, appears to refer strictly to wild ungulates (p. 33). Slomp's report notes that a parcel of land's capability to support ungulates is based on the "individual requirements of the species or group of species under consideration, the physical characteristics of the land, and those factors, such as climate, that

influence the plant and animal communities" (p. 31). Slomp testified that the timber reserve is denoted Class 3, Subclass G. Class 3 is defined in his report as:

> Capability on these lands is moderately high, but productivity may be reduced in some years. Slight limitations are due to characteristics of the land that affect the quality and quantity of habitat, or to climatic factors that limit the mobility of ungulates or the availability of food and cover. [p. 32]

[243] Subclass G is defined as a "Poor distribution or interspersion of landforms necessary for optimum ungulate habitat" (p. 33). Slomp testified that deer, elk and moose would all be found in the timber lands.

[244] Slomp testified that the rating for waterfowl in the Canada Land Inventory is "an indication of hunting prospects primarily" (Hearing Transcript, June 8, 2023, at p. 529). The timber reserve, he testified, is far from Waterhen Lake, and therefore has an inferior rating compared to lands which are closer. In terms of capacity for waterfowl, the timber reserve is "primarily Class 6" with a "small amount of Class 4 and 5" (p. 530). The Canada Land Inventory describes Class 6 as lands that "have severe limitations to the production of waterfowl" (Exhibit 29 at p. 36).

[245] Finally, the capacity for agriculture. Slomp testified that the timber reserve is made up of "a mix of Classes 3, 4, 5, and organic" soils (Hearing Transcript, June 8, 2023, at p. 533). It would appear from a map in his report that although there are some Class 5 soils in the area, predominantly the timber reserve is made up of Classes 3 and 4. The Canada Land Inventory describes Class 3 soils as soils that "have moderately severe limitations that restrict the range of crops or require special conservation practices" (Exhibit 29 at p. 41). The Inventory describes Class 4 soils as soils that "have severe limitations that restrict the range of crops or require special conservation practices, or both" (p. 42).

[246] Slomp also commented on the grazing capacity of the timber reserve: he determined that grazing capacity is 0.15 AUM per acre.

[247] With a fuller understanding of the characteristics of the lands at issue, Slomp then determined the appropriate comparables. With his focus on access as an indicator of value, Slomp found seven nearby properties with highway access, and seven more without highway access, in order to develop an accurate estimate of value.

[248] The seven properties with highway access are all in the vicinity of Waterhen Lake, with the majority north of Meadow Lake. These properties sold between 2020 and 2022 and, because the market in the area has been stable for the last decade, Slomp's report notes that no adjustments have been made for time. The selling price of these seven properties was between $356 per acre and $775 per acre but, when adjusted for similarity to the claim lands, this value changes to between $475 and $638 per acre. Slomp writes that the level of adjustments needed to make a reasonable comparison drove the amount of weight given to each property in his calculations, with properties requiring more or greater adjustments weighted lower. Slomp determined that parcels with highway access in the timber reserve would sell for approximately $518 per acre. Given that there are 1,440 acres with highway access in the timber reserve, the total current unimproved market value for these areas is $745,920.

[249] The seven properties without highway access are, again, in the vicinity of Waterhen Lake, although this time the majority of comparables are south of Meadow Lake. These properties sold between 2020 and 2022, and again there is no adjustment for time. The selling prices were between $220 and $429 per acre which, when adjusted for similarities to the claim lands, changes to between $264 and $338 per acre. After similarly weighted calculations, Slomp determined that parcels without highway access in the timber reserve would sell for approximately $276 per acre. Given that there are 6,240 acres in the timber reserve without developed access, the total current unimproved market value for these areas is $1,722,240.

[250] Therefore, Slomp testified, the current unimproved market value of the entire promised timber reserve is $2,468,160.

[251] Slomp also testified regarding Kelbert's aforementioned additional report which made adjustments not only to Kelbert's calculations based on Slomp's critique, but also to Slomp's calculations, based on a critique by Kelbert.

[252] The main adjustment Kelbert made to Slomp's determinations in this additional report had to do with highway access. The additional report states that Kelbert "determined two additional parcels containing 160 acres or more that each has developed access" and, when these additional parcels are adjusted to reflect the value ascribed by Slomp to parcels with highway access, his total current unimproved market value for the timber reserve would become $2,545,600 (Exhibit 24 at

pp. 22–26). In her testimony, Kelbert adopted her adjustments, whereas Slomp did not, although he testified that the "math is reasonable" (Hearing Transcript, June 8, 2023, at p. 558). Noting that their estimates of the current unimproved market value were very close, and made closer by Kelbert's adjustments to both estimates, Slomp testified that "it indicates the appraisers are pretty close [to the] right estimate" (p. 559).

### b) Agricultural Loss of Use

[253] Like Kelbert, Slomp also provided an appraisal of the agricultural revenue foregone by the First Nation over the claim period from the timber reserve, or the loss of use. He testified that he used two different models to determine the potential foregone revenue: a leasing model and an owner-operator model. A leasing model, he testified, is "fairly straightforward" (Hearing Transcript, June 8, 2023, at p. 561): "In this case, fencing costs need to be considered, and then the leasing rate needs to be considered, and then the economic capability of making a return on investment is, of course, an important consideration." An owner-operator model has, he said, "a little more to it":

> Essentially, it becomes a rancher operating a cow-calf operation. … The grazing period[']s over four months, yet need eight months of wintering cattle. Same fencing cost, clearing costs considerations. You have to have an estimate of the herd size, calf production, hay hauling considerations, and [the] exercise is a model, provides annual profit or losses, which is an indication of [the] lost opportunity. [pp. 561–62]

[254] When asked, Slomp agreed that his and Kelbert's determinations of the AUM in the timber reserve is the same, at 0.15 AUM. Slomp also appeared to agree with Kelbert that the loss of use with regard to grazing is only part of the story, testifying that "the grazing of livestock is a compatible use with [harvesting] of timber" (p. 574).

[255] Slomp testified that for both the leasing and the owner-operator model, he concentrated on finding data from the local marketplace that would allow him to determine what opportunity an "average ranch operation" would have to economically benefit in the vicinity of Waterhen Lake (p. 575). By doing so, it "takes out any advantages that any given rancher would have, and it would disregard the disadvantages that any given rancher would have. Hence it's just about the opportunity lost itself" (p. 576).

[256] Slomp laid out the steps that he went through to conduct a leasing analysis, saying that it involved determining and considering "the productivity for grazing purposes … fence considerations … the demand for leasing, and then also a key consideration is the economic feasibility" and "[a]ny rancher who invests in fencing would want to make an economic return" (pp. 575–76).

[257] Slomp determined that, once you removed wetlands and roadways, "approximately 7,500 acres are suitable for grazing" in the timber reserve (p. 577). He testified that, from his perspective, he and Kelbert generally agreed on how much land was available for grazing. To be usable, he said, "any grazing unit needs to be enclosed" by fencing, and it would require approximately 16 miles of fencing to enclose the promised timber reserve entirely (p. 578). He did testify that while fencing on prairie lands is common, and costs around $7,400 per mile, "in forested areas, it's generally atypical" and while data on costs is not readily available due to its rarity, costs are "notably higher" according to discussions he had with fence builders (pp. 580, 583). He also found an article which estimated that fencing in forested areas in British Columbia cost between $19,000 and $32,000 per mile, as of 2021. The higher cost in a forested area is caused by a variety of factors: building costs are higher due to the need to clear trees and brush, remove stumps and cut a "16-foot path" for the fence line, to allow equipment to enter the property; four-strand barbed wire is recommended in forested areas as additional protection against the loss of fencing due to animals jumping over the top strand and breaking it, or the bottom strand being eroded by snow and mud; in forested areas, trees are more likely to fall into and break the fence, leading to increased maintenance costs; fence posts may need to be longer so they remain secure within muskeg, and they certainly need to be closer together, leading to higher material and labour costs. While labour costs in contemporary prairie fencing—Slomp's pricing data came, he testified, from the Province of Saskatchewan and was current to 2022—are "roughly 25 percent of the total cost," historically fencing would utilize less machinery and more people, and therefore "far more labour is going to be needed to do the same work" (p. 582).

[258] Taking all of the above into account, Slomp set the cost to the First Nation for fencing the timber reserve at the bottom end of the range for four-strand barbed wire fencing in a forest: $19,000 per mile. Because there is a profit margin built into this number for a fence-building company, and members of the First Nation could do the work themselves without need for a built-

in profit, Slomp reduced the cost by 20 percent, bringing it down to approximately $15,800 per mile. He increased this number by $3,000 per mile to account for clearing costs, which he testified is "typically … outsourced by ranchers" because it requires special equipment (p. 586). This resulted in a total fencing and clearing cost, as of 2022, of $18,800 per mile. Slomp utilized an inflation calculator based on the Consumer Price Index and provided by Statistics Canada to determine that this number would translate into $1,154 per mile in 1921 and $1,081 per mile in 1930.

[259] There are also regular maintenance costs. His report notes, too, that maintenance costs are higher in forested areas. Manitoba, the report says, considers a 2 percent annual maintenance rate for fencing to be standard and, after consulting with a rangeland consultant, Slomp determined that this was a reasonable amount. Therefore, the "annual maintenance cost is estimated to be $316 per mile in 2022" and, based again on the Statistics Canada inflation calculator, the cost is "estimated to be $18.99 in 1922 and $16.31 in 1931" (Exhibit 32 at p. 43). Based on contemporary costs and moving backward via the inflation calculator, Slomp calculated the cost to build a fence and the cost to maintain a fence for every year between 1921 and 2022, so that he could utilize these numbers in his analysis.

[260] To determine grazing demand, Slomp turned to census data for Census Division No. 17, which includes the Rural Municipality of Meadow Lake, to determine how much livestock was in the area in any given year. He testified that he chose this dataset over the one utilized by Kelbert—which only considered the Rural Municipality of Meadow Lake—because it "provides a [greater] sample size year over year, [over a] wider area, northwest Saskatchewan" (Hearing Transcript, June 8, 2023, at p. 589). He also testified, however, that both datasets showed "largely a similar trend [in demand] … ups and downs over the years peaking in the later portion of [the] claim period."

[261] Using this dataset, Slomp determined that 2006 "was the peak year for the amount of livestock in the area" (p. 591). He set this year as 100 percent capacity, and then, by utilizing the numbers from other years, determined what percentage of demand should be applied to the available acres.

[262] Once he had determined demand, Slomp used a dataset from the Prairie Farm

Rehabilitation Administration for annual grazing rental rates between 1938 and 2017, when the program ended. These rates, he testified, are "based on [the] AUM" of the available land (p. 593). To determine rates prior to 1938—for which there was no available data—Slomp looked at the relationship between grazing rental rates and steer prices between 1938 and 1974, and determined that "[o]ver that time period, the average indication was that the [Prairie Farm Rehabilitation Administration] rates were 6 percent of steer prices" (p. 592). Therefore, he "applied a 6 percent rate to steer prices that go back to 1921" in order to determine leasing rates in those years. To determine leasing rates post-2017, he utilized information published periodically by Saskatchewan's Ministry of Agriculture. He testified that information was available for 2012, 2016 and 2020: he plotted these rates on a graph, which allowed him to estimate rates for the years between 2016 and 2020. Finally, Slomp said that "since we have no information for lease rates since 2020, we held the rate steady to 2022" (p. 593).

[263] Once the information is collected, the revenue can be calculated for any given year using the following formula:

> Number of acres in demand x AUM/acre x $/AUM = Grazing Revenue
> [Minus] Fencing Costs
> = Net Returns
> [Exhibit 32 at p. 48]

[264] Knowing the costs of fence building, fence maintenance, and the available economic benefit from leasing in any given year, Slomp then determined the most lucrative scenario for an average rancher who might find themselves in the position of the Waterhen Lake First Nation in 1921: owning a large parcel of lands with timber on it, which they wish to lease out for grazing. Because of the costs involved and the relatively low demand, Slomp determined that "starting fencing in 1921 was not feasible" because "it would have been taken a long time for the rancher [to] break even" (Hearing Transcript, June 8, 2023, at pp. 593–94). In fact, he said, the fence would need to be replaced before it could have been fully paid for from revenue from leasing. Slomp looked at a number of starting points after, and sometimes well after, 1921, and determined that the most reasonable time to begin leasing out the land was in 1973. He testified that "if a fencing and clearing was invested in in 1973, the break[-]even would be about 16 years, and [during] the ten-year period following that investment, a 5 percent annual return was achievable" (p. 597). This,

he said was a "reasonable" time to base the model on.

[265] According to a chart in Slomp's report, taking these costs and benefits into account, the total nominal returns to the First Nation from leasing the timber reserve for grazing beginning in 1973 and continuing until 2022 would be $461,123.

[266] In discussing the parameters of the owner-operator model, Slomp said this:

> … the owner-operator approach, essentially becomes a hypothetical cow-calf operation. So … it goes beyond just the leasing where the leasing only considers the land, but the cow-calf operation also considers … a livestock enterprise wherein the investments of capital labour and management typically produce higher returns. [Hearing Transcript, June 8, 2023, at pp. 599–600]

[267] His report notes that an owner-operator would still be "responsible for the construction of fencing" and "would also need to source the cattle which would also come at an expense" (Exhibit 32 at pp. 55–56). It also notes that "most cow-calf operations have long-term considerations wherein a maximal herd size is targeted and generally maintained."

[268] The first requirement Slomp discussed was feed. He noted that, in Northern Saskatchewan, "you need to winter cattle, and it takes eight months of wintering versus four months of grazing" (Hearing Transcript, June 8, 2023, at p. 600). The average rancher would need to provide hay for eight months, and would need to either grow this hay themselves or purchase it. But, if the First Nation decided to clear part of the timber reserve to grow hay, "you lose that potential timber revenue" in subsequent years (p. 601). Based on the characteristics of the timber reserve, the costs that would be associated with clearing a large area to produce hay for winter feed are so high that "[a] prudent rancher would purchase hay" rather than grow it themselves.

[269] Transportation also factors into feed: Slomp testified that whether a rancher purchased hay or grew it elsewhere, it would need to be transported to the wintering site. Slomp said that a "substantial amount" of hay is necessary—eight months' worth—and therefore "[y]ou got equipment needed to haul that … heavy duty equipment …[and] need a quality roadway in order to have efficiencies given the quantity of hay that is needed" (p. 602).

[270] To determine how big a herd a particular piece of land can sustain, Slomp testified that he needed to weigh "how many useable acres there are" as well as "the appropriate amount of animal

units you can put on the land without overgrazing it" (p. 602). He also said that "[y]ou have to take into consideration, you know, a little bit of area for [a] wintering yard site" as well as "the fact that cattle have increased in size over the years" (pp. 602–03). Slomp testified that the AUM standard—while still employed in the industry—is not as accurate as it once was, due to the increased size of cattle. He said that it is commonly accepted that "it's about 1.5 animal unit equivalent for a modern cow versus the animal unit definition" (p. 603). Because the change in size has occurred over time, and the claim period is over a century, Slomp utilized an average of 1.25 animal unit equivalents to determine the size of herd that could be sustained on the timber reserve.

[271] Slomp's report notes that, at a standard AUM, the stocking rate of the timber reserve—due to the area's AUM rating of 0.15—would be 26.68 acres/AUM but that, because he chose to use a 1.25 animal unit equivalent, this number is multiplied by 1.25, and becomes 33.35 acres/animal unit equivalent. Then, based on the available acreage at the timber reserve—which Slomp testified is smaller than the total area because a rancher would require "a little bit of area for [a wintering] yard site," and which his report puts at 7,485 acres (Hearing Transcript, June 8, 2023, at p. 603; Exhibit 32 at p. 58)—Slomp calculated that 225 animal unit equivalents could be sustained on the timber reserve.

[272] Knowing the size of herd that can be sustained on the timber reserve allows for an estimate of the number of calves that can be produced on an annual basis. To produce calves, however, Slomp testified that "[a]ny ranch operation needs bulls" (Hearing Transcript, June 8, 2023, at p. 604). According to data from the Canadian Cow-Calf Cost of Production Network, "the cow-to-bull ratio is 23 to 1" which led to a deduction in the number of cows that would be on the timber reserve, in order to produce calves (p. 604; Exhibit 32 at p. 59). Based on a total of 215 cows—and, presumably based on his prior conclusion that 225 animal unit equivalents could be sustained, 10 bulls—Slomp testified that "191 calves" would be produced annually in the timber reserve. His report noted that to sustain a cow-calf operation, some heifers would need to be retained each year: data from the Canadian Cow-Calf Cost of Production Network indicates that, in Saskatchewan, the average heifer retention rate is 15 percent. Therefore, each year, 177 calves would be available in the timber reserve for an annual sale.

[273] Slomp testified that ranchers "most commonly bring their cattle to market in the 500- to

600-pound range" and therefore he set an average of 550 pounds for calves that would ostensibly be sold from the timber reserve (Hearing Transcript, June 8, 2023, at p. 605). Data about calf prices is readily available, although it is recorded for steers only. Slomp testified that because "heifers take more feed to put on the same amount of weight" these cows are less valuable in the market and "steers typically sell for more than heifers" (p. 606). Data from the last ten years showed that the difference was about 13 percent, so Slomp held this as the average discount for heifers during the period.

[274] Slomp also had to consider the cost of production to determine the foregone profit. His report says that he relied on "cost of production studies from the Canadian Cow-Calf Cost of Production Network and the Alberta Agriculture and Forestry department" to estimate how much revenue garnered by calf sales would be consumed by the cost of production, and how much would have gone to the average rancher (Exhibit 32 at p. 61). Utilizing the data, Slomp testified that the First Nation could expect a "0.8 expense ratio to revenue" (Hearing Transcript, June 8, 2023, at pp. 607–08).

[275] There is also the cost to haul hay. After determining the necessary amount of hay to feed the size of herd that could be placed on the timber lands over the winter period, increasing the tonnage by 15 percent to account for moisture, and then increasing this number another 20 percent to account for spoilage, trampling and general waste, he determined that 1,094 tonnes would need to be hauled into the timber reserve per year, at a cost of $5/tonne in 2022. Therefore, the cost to haul hay in 2022 was estimated at $5,485: having determined the price for 2022, Slomp could then use an inflation calculator to adjust this number backwards through the claim period.

[276] As in the leasing scenario, Slomp does not believe beginning a ranching operation would be economically feasible until 1973, and therefore that is when the First Nation would first undertake the project. In cross-examination, Slomp testified that based on market demand, lease rates and the high cost of fencing, it would not be economically feasible to lease the timber lands in prior years before starting a cow-calf operation in 1973.

[277] As did Kelbert, following correspondence between the two experts, Slomp revised some of the inputs in his model. A supplementary report shows the formula he used to calculate the lost revenue to the First Nation under an owner-operator model:

> Clearing and fencing investments
>
> Cow-Calf Revenue
>
> Less: Cost of Production, including operation costs and additional hay hauling
>
> Less: annual fencing maintenance and fencing rebuild in 50 years
>
> = Net Returns
>
> [Exhibit 36 at p. 6]

[278] Slomp's ultimate conclusion is that the agricultural loss of use in an owner-operator model from the timber reserve over the claim period, in nominal dollars, is $809,707 (Exhibit 36 at p. 8).

### C. General Principles of Equitable Compensation

[279] The general principles of equitable compensation were recently restated in *Southwind v Canada*, 2021 SCC 28 at para. 83, [2021] 2 SCR 450 [*Southwind*]:

> In summary, equitable compensation deters wrongful conduct by fiduciaries in order to enforce the relationship at the heart of the fiduciary duty. It restores the opportunity that the plaintiff lost as a result of the fiduciary's breach. The trial judge must begin by closely analyzing the nature of the fiduciary relationship so as to ensure that the loss is assessed in relation to the obligations undertaken by the fiduciary. The loss must be caused in fact by the fiduciary's breach, but the causation analysis will not import foreseeability into breaches of the Crown's fiduciary duty towards Indigenous Peoples. Equitable presumptions—including most favourable use—apply to the assessment of the loss. The most favourable use must be realistic. The trial judge must be satisfied that the assessment reflects the value the beneficiary could have actually received from the asset between breach and trial and the importance of the relationship between the Crown and Indigenous Peoples.

[280] From this restatement, a number of things become clear. First, equitable compensation is a restitutionary remedy that returns the opportunity lost as a result of the fiduciary's breach. This is the justification for applying equitable presumptions, especially the most favourable use: whether or not a claimant would have used its property in a specific and lucrative way, it could have done so, and it is the return of the opportunity to do so that concerns equity most of all. Second, this restatement makes clear the steps an adjudicator must take to determine the appropriate level of equitable compensation: first, a causation analysis is necessary to ensure the loss is caused by the breach; second, equitable presumptions must be applied; and third, assessment takes place in light of the special relationship between the Crown and Indigenous Peoples in Canada.

## D. Analysis

### 1. Compensation Evidence

#### a) Current Unimproved Market Value and Agricultural Loss of Use

[281] One of the most interesting aspects of the expert evidence on compensation for the current unimproved market value and agricultural loss of use is how close the Claimant's and Crown's experts are in their conclusions. On the loss of use, the Claimant's expert Alana Kelbert determined that a range in value, running from $821,417 to $851,454, was appropriate; the Crown's expert, Bradley Slomp, determined that the value of the foregone revenue form the timber reserve over the claim period was $809,707. Even taking Kelbert's upper value, these numbers are only about 5 percent apart. It is similar for the current unimproved market value: whereas Kelbert determined the value of the timber reserve is approximately $2,667,000, Slomp determined that it is $2,468,160, a difference of around 8 percent.

[282] Despite the similarity of their conclusions, in testimony it emerged that the experts had significant differences in what they thought were relevant inputs and reasonable expenses.

[283] In the loss of use analysis, for example, with regard to fencing, Kelbert's additional report utilizes an academic study from 1979 to determine fencing costs as of 1907, which were then run through an inflation calculator to determine a cost for 1922. The additional report opines that going the opposite way—as Slomp did, by taking a contemporary cost and de-inflating it backward in time—is not as appropriate a method, and meant that the "fence installation costs utilized within [Slomp's report] are overstated." (Exhibit 23 at p. 9). According to Kelbert, because the members of the Waterhen Lake First Nation "would have fenced the perimeter of the lands themselves," only material costs need to be considered: as of 1922, material costs would be $102.73 per mile. This is a significant difference from Slomp, who determined that the cost of fencing would be $1,154 per mile as of 1921, an amount that includes labour. During cross-examination, Slomp testified that the fact that Kelbert did not include labour costs means that the two experts' conclusions are "really not comparable" (Hearing Transcript, June 8, 2023, at p. 665).

[284] Related to the idea that the First Nation would be involved in the labour to set up and run an agricultural operation, in cross-examination Slomp was asked whether he considered "the

labour force of the First Nation" in determining costs, and he said that he had not because his task was to consider "labour in general in the greater marketplace" of Northern Saskatchewan (p. 673). He said that "since the task is about opportunity lost" his approach was to "take the average rancher" and determine what their reasonable expenses and profits might look like. Kelbert, on the other hand, took an approach more specific to the context of the Waterhen Lake First Nation, and removed from agricultural expenses a portion of labour costs, writing:

> Given we have assumed the net returns to the Owner-Operator are a function of land, labour and management, wages paid to family members should not be included as an expense. However, wages paid to non-family members should be considered a relevant expense in the calculation of net returns. [emphasis in original; Exhibit 20 at pp. 88–89]

[285] She explains leaving wages paid to family members out of the expenses via the fact that Statistics Canada has separated these statistics since 1981. The government agency, Kelbert says, explains its reason for separating the two types of expenses by writing:

> *Cash wages and room and board estimates include farm wage and salary expenses for hired labour. Wages for the family, including the spouse and children, are also part of this estimate. An increase in family wages would decrease net farm income but leave family income unchanged.* [italics in original; p. 88, quoting Statistics Canada]

[286] There are also disagreements within the current unimproved market value reports. As already noted, Slomp put a premium on access considerations when determining the value of the timber reserve. The difference in value, in his opinion, between parcels with highway access and parcels without highway access is rather stark: sections with highway access would sell for $518 per acre, whereas sections without would sell for only $276 per acre.

[287] Kelbert took a different approach: while she divided the lands into three categories, her divisions were based on grazing capacity. Lands in group B, the classification given to 92 percent of the lands in the timber reserve, has a grazing capacity of 0.10–0.20 AUM, and Kelbert valued these lands at $340 per acre. She valued groups A and C—which make up 7 percent and 1 percent of the acreage—at $470 per acre and $155 per acre, respectively.

[288] Despite these differences, none of the estimates, inputs, calculations or decisions made by these experts appear to be unreasonable. And while each expert had reasonable criticisms of the other's work, each also accepted these criticisms and—in some cases—took them into account

while revising their estimates.

[289] For instance, in terms of the current unimproved market value, having learned of Slomp's decision not to apply a time adjustment to his market value comparables based on the fact that the area around Waterhen Lake had "been more or less a stable marketplace" during the period he found his relevant comparators (Hearing Transcript, June 8, 2023, at p. 553), Kelbert dramatically reduced—although she did not do away with—her own time adjustments. To give the most significant example, Kelbert's earliest comparator, from October 2017, was time-adjusted by just over 27 percent in her original report, but this was reduced to only 6.89 percent in her additional report (Exhibit 17 at p. 46; Exhibit 24 at p. 19).

[290] Similarly, with regard to the loss of use reports, Slomp testified that he adjusted his inputs based on criticism by Kelbert. In cross-examination, he agreed that the two inputs he removed were the costs associated with purchasing a herd, and those involved in building a wintering yard site, as these expenses had already been accounted for within the year-on-year modelling.

[291] In their testimony, both appraisers used the same words to describe the differences in their ultimate conclusions on value: each said that their appraisals were "pretty close." Slomp went on to describe what an, essentially, inconsequential difference in value would be, saying that a "[g]eneral rule of thumb--not a standardization at all--but general rule" is "if two different appraisers are within 5 percent, [you're] sitting quite good[;] [e]ven within 10 percent, you're pretty good" (Hearing Transcript, June 8, 2023, at p. 559). I have already noted that, in terms of the loss of use, the experts are around 5 percent apart; in terms of the current unimproved market value, they are around 8 percent apart.

[292] One of the steps in applying the principles of equitable compensation is determining a realistic starting point for assessment. Both experts have offered realistic starting points, and although each might place more emphasis on different inputs, there is no basis on which to prefer one report over another.

[293] In *Mosquito Grizzly Bear's Head Lean Man First Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 1, former Chairperson of the Tribunal, Slade J., was faced with a similar challenge. He received two appraisals for current unimproved market value, and found not only

was each a reasonable appraisal, but the differences in value were minimal as well. Noting that "equitable compensation is an assessment, not a mathematical calculation" (para. 257), he wrote:

> 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. [para. 85]

[294] Slade J.'s determination that the right number is "somewhere in the middle" is equally applicable to both the current unimproved market value evidence and the agricultural loss of use evidence in the Claim currently before the Tribunal. Therefore, I will take the midpoint between the experts' conclusions on both aspects of compensation: in terms of the current unimproved market value, the midpoint rounded to the nearest thousand is $2,568,000; for the agricultural loss of use, utilizing the upper end of Kelbert's range, the midpoint rounded to the nearest thousand is $831,000.

### b) Forestry Loss of Use

[295] Greg Scheifele produced two reports on behalf of the Claimant to assist the Tribunal in determining the proper compensation in this Claim. The Crown led no evidence with regard to the forestry loss of use.

[296] In the first report, Scheifele suggested a scenario whereby the Waterhen Lake First Nation would surrender the timber on the timber reserve in 1944 to be harvested by a local logging company, surrender the timber again in 1975 for harvest by a local logging company and then, utilizing its own logging company, the First Nation itself would harvest all remaining merchantable timber on the timber reserve around 1995. This scenario would realize a nominal revenue of $1,564,003.14 from the timber reserve over the course of the claim period.

[297] In his supplemental report, he considered how the foregone revenue might change if the Waterhen Lake First Nation acted as an owner-operator during all three harvesting periods. He testified that, as an owner-operator, additional revenue would accrue to the First Nation not only via the harvesting itself, but by making decisions that add value to the harvest, such as providing transportation to sawmills and other purchasers. Unfortunately, however, Scheifele's supplemental report is less useful given the determination I have made on validity, because its ultimate

conclusion does not delineate between the main reserve and the timber reserve. Having found that this Claim is valid only in regard to the promised timber reserve, the supplemental report is difficult to apply.

[298] It is made more difficult to apply by the fact that it appears not all expenses are fully explained. For instance, after recounting in significant detail the food and equipment needs during the 1940s harvest, Scheifele does not touch on this topic during the 1970s harvest.

[299] There may be good reason to simply ignore this deficiency, but it is not made clear. For instance, in his testimony, Scheifele discussed the significant difference in labour requirements due to increased mechanization between the 1940s and 1970s harvesting periods:

> So, assuming 200 working days per year, which is reasonable, because you have to make deductions for weather, for mechanical breakdowns, for holidays for sickness, et cetera, crew production doing tree length logging at 15,000 board feet a day times 200 days, we're looking at about 3 million board feet per year.
>
> So, given that and given the available timber during this period in the two different areas, you would need about two logging crews of 3 men who would then be capable of completing the harvesting of merchantable timber from this area -- from these areas within a five-year period. So quite a difference where you're going from, you know, 30 to 60 men down to 3 guys with machines. But that's -- that's progress, I guess. [Hearing Transcript, June 6, 2023, at p. 270]

[300] It may be that, by the 1970s, logging crews had grown so small that, even with the significant caloric requirements, the cost to feed six men—or three, if you only consider the timber reserve—is so miniscule that it need not be considered. But neither Scheifele nor the Claimant said so.

[301] Equipment and maintenance may be similar in the sense that, by the 1970s, it may not have been a cost borne by an owner-operator. The following exchange occurred during cross-examination:

> Q: Okay. And correct me if I missed this, Mr. Scheifele, but have you accounted for fuel costs for equipment? So, this is -- I'm talking about the post-mechanized era, this kind of 1970 time. Are there fuel costs in your supplemental report?
>
> A: Not necessary. It's built into the piecework rates.
>
> Q: It's built into the piecework?

> A: Yeah.
>
> Q: Okay. Thank you for clarifying.
>
> A: That's why I used that method of estimating the costs, because the contractors would have to cover -- those costs were covered on whatever their agreed-upon piecework rate is.
>
> Q: Thank you. Do you have equipment maintenance costs in your owner/operator model?
>
> A: No. Not really relevant to, you know, the initial harvest. You know, when you -- I guess there was a requirement to sharpen axes, but it's hard to put a handle on what that cost would be.
>
> Q: Right.
>
> A: It's not too great, and the 1975 to '79 situation where we're using the piecework rates of contractors, again, their maintenance requirements are built into the piecework rates. That's the responsibility of the contractors. [Hearing Transcript, June 6, 2023, at pp. 302–03]

[302] From this we know that fuel costs and equipment maintenance costs are built into the piecework rates that Scheifele used in his supplemental report. We do not know, however, whether these rates also include the acquisition of the equipment, which would be a significant expense for any owner-operator, or any contractor, depending on who is responsible.

[303] Under the principles of equitable compensation, a claimant is entitled to the presumption of the most favourable use. The Supreme Court of Canada explained the operation of this presumption in *Southwind*:

> The focus is always on whether the plaintiff's lost opportunity was caused in fact by the fiduciary's breach. Equity will assess that opportunity under the *presumption* that the beneficiary would have put the asset to its most favourable use. The most favourable use must be realistic. The common law requires a plaintiff to lead evidence to that effect. [emphasis in original; para. 80]

[304] In the ultimate conclusion of his first report, Scheifele writes that the grand total of foregone revenue—from both the main reserve and the timber reserve—is $3,383,084.74. In the ultimate conclusion of his supplemental report, Scheifele writes that the grand total of foregone revenue from both areas is $3,621,591. It is clear that an owner-operator model is a more favourable use than one that involves two surrenders.

[305] The second conclusion represents a 7 percent increase over the first. Simply put, this 7

percent represents the value lost to the First Nation by not being the owner-operator in all three periods or, in other words, the lost revenue by not applying the presumption of the most favourable use.

[306] Due to the missing information, however, and the lack of certainty around what increase in value can be ascribed specifically to the promised timber reserve, I will not simply increase Scheifele's conclusion on foregone value from the timber reserve in his first report by 7 percent. It is clear that the First Nation would receive some additional value, however, so I will apply a 4 percent increase to the first report's conclusion regarding the timber reserve—which was $1,564,003.14—to account for both the additional value and the lingering uncertainty.

[307] Therefore, I find that $1,626,563.27 is the nominal foregone revenue—or the loss of use—from the promised timber reserve during the claim period.

### 2. Applying the Principles of Equitable Compensation

[308] Determining the proper amounts for the current unimproved market value and loss of use is not the end of the analysis. The Supreme Court of Canada has been clear that there are proscribed steps a court or tribunal must undertake to determine the appropriate award of equitable compensation.

#### a) Causation Analysis

[309] In *Canson*, McLachlin J. (as she then was) wrote that, in determining the appropriate level of equitable compensation, "it is essential that the losses made good are only those which, on a common sense view of causation, were caused by the breach" (p. 556).

[310] The first thing that must be defined is the loss itself: I have determined that the loss in this Claim is the whole of the timber reserve, which consists of approximately 7,680 acres, located in Sections 25–36, Township 64, Range 16, west of the Third Meridian. This loss persisted from 1921 until the date of this decision. In addition to the loss of the lands themselves, the First Nation lost the opportunity to utilize the lands as it saw fit.

[311] The breach in this Claim is the broken promise: Agent Taylor, who had the authority to bind the Crown, promised that the timber reserve would be set aside for the Waterhen Lake First

Nation and the Crown did not fulfill the promise it had made via its agent. But for the broken promise, the timber reserve—in the dimensions stated above—would have accrued to the First Nation as of 1921 and, ostensibly, would still be in its possession today.

[312] On that basis, the loss was caused by the breach.

### b) Equitable Presumptions

[313] The most important equitable presumption to be applied to this Claim is the presumption of most favourable use. In *Southwind*, the Supreme Court of Canada wrote that "[e]quity presumes that the plaintiff would have made the most favourable use of the trust property" (para. 79).

[314] In the same decision, the Court discusses the limits of the presumption of most favourable use:

> The most favourable use must be realistic. The trial judge must be satisfied that the assessment reflects the value the beneficiary could have actually received from the asset between breach and trial and the importance of the relationship between the Crown and Indigenous Peoples. [para. 83]

[315] Having analyzed the compensation evidence presented by the Parties, I have determined that the current unimproved market value of the lands is $2,568,000. This determination was arrived at by taking the midpoint between two appraisals, which were only about 8 percent different from each other. The similarity in conclusions between the appraisers satisfies me that this determination reflects the value that the First Nation could have actually received from the asset.

[316] I have determined that the agricultural loss of use, in nominal dollars over the course of the claim period, is $831,000. This number was arrived at not only by taking the midpoint between the values presented by the two appraisers—which were only about 5 percent apart—but also by taking the upper end of the range presented by the Claimant's expert, Alana Kelbert. The similarity in the appraisers' conclusions, satisfies me that the midpoint represents the true value of the agricultural loss, and taking the upper end of Kelbert's range to determine the midpoint satisfies me that this determination also satisfies the need to apply the most favourable use presumption.

[317] Greg Scheifele presented two loss of use reports, one which offered a scenario whereby the

First Nation would surrender timber in two harvesting periods, and harvest the timber themselves during the third period, and another report which considered what the loss would be if the First Nation acted as an owner-operator in all three periods. The supplemental report had some issues, but it showed an increase to the amount of foregone revenue in the neighbourhood of 7 percent, making the owner-operator model the most favourable use of the timber reserve. Given the issues with the supplemental report itself, I increased the total foregone revenue from the timber reserve in the first report by 4 percent, to $1,626,563.27, which satisfies me that the total reflects the value that the First Nation could have actually received from the timber reserve, and fulfills the presumption of most favourable use.

[318] Another equitable presumption is known as the "Brickenden Rule," as it stems from *Brickenden v London Loan & Savings Co.*, [1934] 3 DLR 465 (PC). This presumption "applies where the fiduciary breached a duty to disclose material facts" and prevents the fiduciary "from arguing that the outcome would be the same regardless of whether the facts were disclosed" (*Southwind* at para. 82). Although arguments were made in oral submissions about the Brickenden Rule, these arguments related solely to the Crown's conduct in regard to the main reserve and its failure to communicate about the potential for reduction. Based on my finding of validity in this Claim, the rule need not be considered here.

[319] There are other presumptions applicable to the determination of equitable compensation in a general sense, but none are applicable to this Claim.

### c) Assessment

[320] Assessment can be broken down into three further stages: determining a realistic starting point, applying realistic contingencies and ensuring the deterrent function of equity is fulfilled.

[321] In *Southwind*, the Supreme Court of Canada wrote that the "fiduciary obligations must always be defined first, and then the trial judge assesses reasonable, or realistic, outcomes in light of those obligations" (para. 132). Having determined that the *sui generis* fiduciary duty—with its attendant obligations of loyalty, good faith, full disclosure appropriate to the subject matter and with ordinary diligence in what the Crown reasonably regards as the best interest of the beneficiaries—applies, I now turn to the realistic outcomes that would have occurred had the Crown not breached its duty by failing to deliver on its promise to provide a timber reserve to the

Waterhen Lake First Nation.

[322] The realistic outcomes are those determined from the expert evidence on compensation, above. In terms of the current unimproved market value of the lands themselves, and based on the presumption of most favourable use, I have determined that the value that would have accrued to the First Nation is $2,568,000. In terms of foregone revenue from agriculture on the timber reserve, and again based on the presumption of most favourable use, I have found that what would have accrued to the First Nation over the claim period—in nominal dollars—is $831,000. Finally, in terms of the forestry loss of use, and again based on the presumption of most favourable use, what would have accrued to the First Nation over the claim period—again, in nominal dollars—is $1,626,563.27.

[323] To apply realistic contingencies, "the trial judge must take into account 'events that could have occurred had the fiduciary duty not been breached and that might have increased (or decreased) the value of what the beneficiary lost as a result of the breach'" (*Southwind* at para. 132, quoting *Southwind v Canada*, 2019 FCA 171 at para. 82).

[324] The period of time at issue in this Claim is lengthy, stretching from 1921 until the date of this decision. Thankfully, in terms of the value of the lands themselves, no contingencies need to be applied as this decision has considered the current unimproved market value, which provides a contemporary value that—essentially—has already taken into account the actual events that occurred during the claim period and affected the value of the lands.

[325] In terms of the loss of use evidence, I have similarly determined that no contingencies need be applied. The experts, in both the agricultural and forestry realms, determined the losses on a per-year basis, sometimes based on direct historical evidence of economic inputs, and other times based on inflation calculators. This method builds any necessary contingencies into the process because it allows for general trends in economic activity—including events that might have increased or decreased the value of what the beneficiary lost—to be accounted for as part of the process.

[326] In the final step, having assessed the lost opportunity, I "must determine whether the new total compensation award is sufficient to fulfill the deterrent function of equity" (*Southwind* at

para. 144). To do so, I "must seriously consider whether the total award will be an effective deterrent, thus reflecting the honour of the Crown and the goal of reconciliation."

[327] The current unimproved market value of the lands is $2,568,000. This represents the actual value of the lands at the date of this decision and thereby fulfills the ultimate objective of equity, which is "putting the beneficiary in the position it would have been in but for the fiduciary's breach of duty" (*Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744 at para. 90, 287 DLR (4th) 480 [*Whitefish*]).

[328] The amounts for the loss of use in agriculture and forestry are $831,000 and $1,626,563.27, respectively. These, however, do not represent amounts that would put the First Nation in the same position it would have been but for the Crown's breach, because these sums are simply the product of taking each year's loss and adding them up—they do not take into account the time value of money. In *Whitefish*, the Court of Appeal for Ontario wrote that "to give effect to equity's objective of putting the beneficiary in the position it would have been in but for the fiduciary's breach of duty, equity's assessment may take compound interest into account" (para. 90). That will need to be the case here.

[329] The Parties have reached a prior agreement on how to bring forward the historic amounts to the present day using compound interest. In a document titled "Agreement on Bring Forward Evidence," filed with the Tribunal on March 21, 2023, and signed by counsel of both the Claimant and Respondent, the Parties write:

> … if a historic loss is proven, the parties jointly submit to the Tribunal that the historic loss (and any related set-off amounts) should be brought forward to current value by applying Band Trust Account rates published by Canada, compounded annually at 100 percent. [para. 1]

[330] Noting that I have increased the total nominal value in Scheifele's first report by 4 percent to account for the most favourable use, I direct that when applying the Parties' prior agreement on bring forward evidence, the total value arrived at before bringing per-year values in the first report forward via compound interest shall be increased by 4 percent.

### E. Conclusion on Compensation

[331] As compensation for the fiduciary breach found valid in this Claim, the Claimant is entitled

to compensation for the current unimproved market value of the promised timber reserve, being $2,568,000.

[332] Additionally, the Claimant is entitled to compensation for the loss of use of the timber reserve from 1921 until the date of this decision. In nominal dollars, the foregone revenue—or the loss of use—from agriculture is $831,000; in nominal dollars, the loss of use from forestry is $1,626,563.27. Compound interest in the amounts agreed upon by the Parties in their agreement filed March 21, 2023, must be applied to these amounts, a process I trust the Parties to undertake themselves.

[333] If the Parties face difficulties applying their agreement on bringing forward historical losses, they may contact the Tribunal for direction.

TODD DUCHARME

Honourable Todd Ducharme

**SPECIFIC CLAIMS TRIBUNAL**

**TRIBUNAL DES REVENDICATIONS PARTICULIÈRES**

**Date: 20240828**

**File No.: SCT-5008-19**

**OTTAWA, ONTARIO August 28, 2024**

**PRESENT: Honourable Todd Ducharme**

**BETWEEN:**

**WATERHEN LAKE FIRST NATION**

**Claimant**

**and**

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

**Respondent**

**COUNSEL SHEET**

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|---|---|
| **TO:** | **Counsel for the Claimant WATERHEN LAKE FIRST NATION**<br>As represented by Ron Maurice, Sheryl Manychief, Melanie Webber and Antonela Cicko<br>Maurice Law Barristers & Solicitors |
| **AND TO:** | **Counsel for the Respondent**<br>As represented by David Culleton, James Olchowy, Brady Fetch and Luke Brisebois<br>Department of Justice |