FILE NO.: SCT-5009-19
CITATION: 2025 SCTC 5
DATE: 20250725

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

BETWEEN:	
DAY STAR FIRST NATION, FISHING LAKE FIRST NATION, GEORGE GORDON FIRST NATION, AND MUSKOWEKWAN FIRST NATION (FORMERLY "MUSCOWEQUAN FIRST NATION") Claimants	Ryan Lake, Steven Carey, Shane Varjassy and Logan Newlove, for the Claimants
– and –	
HIS MAJESTY THE KING IN RIGHT OF CANADA As represented by the Minister of Crown-Indigenous Relations Respondent	Josh Seib, Gabriela Fuentealba and David Culleton, for the Respondent
– **and** –	
KAWACATOOSE FIRST NATION (FORMERLY THE "POORMAN BAND") Intervenor	Donald Worme, Mark Ebert and David Werner, for the Intervenor
	HEARD: November 6, 2023, July 29–31, 2024, and December 16–17, 2024

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 CanLII 302 (SCC); *Saugeen First Nation et al v AG et al*, 2021 ONSC 4181; *Huff v Price*, 1990 CarswellBC 267, 76 DLR (4th) 138 (BCCA); *Cochrane v Cochrane*, 2021 ONSC 5228; *Stirrett v Cheema*, 2020 ONCA 288; *Snell v Farrell*, [1990] 2 SCR 311, 72 DLR (4th) 289; *Canson Enterprises Ltd v Boughton & Co*, 1991 CanLII 52 (SCC), [1991] 3 SCR 534; *Mitchell v Peguis Indian Band*, 1990 CanLII 117 (SCC), [1990] 2 SCR 85; *Madawaska Maliseet First Nation v Her Majesty the Queen in Right of Canada*, 2017 SCTC 5; *Ross River Dena Council v Canada*, 2002 SCC 54; *Southwind v Canada*, 2021 SCC 28; *Waterhen Lake First Nation v His Majesty the King in Right of Canada*, 2024 SCTC 5; *Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744, [2007] OJ No 4173; *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2016 SCTC 15; *Mosquito Grizzly Bear's Head Lean Man First Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 1; *Siska Indian Band v Her Majesty the Queen in Right of Canada*, 2021 SCTC 2; *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14; *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9; *McInerney v MacDonald*, [1992] 2 SCR 138.

Statutes and Regulations Cited:

Specific Claims Tribunal Act, SC 2008, c 22, preamble, ss 13, 14, 16, 20.

Indian Act, RSC 1906, c 81, ss 87, 89, 90.

Interpretation Act, RSC 1985, c I-21, s 12.

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

Headnote:

Indian Agent – Fraud – Misadministration of Money – Fiduciary Duty – Equitable Compensation – Present Value of Historical Loss

This Claim concerns the actions of an Indian Agent named John B. Hardinge, who supervised the Touchwood Agency in southeast Saskatchewan between 1920 and 1923. The Joint Claimants—the Day Star First Nation, the Fishing Lake First Nation, the George Gordon First Nation and the Muskowekwan First Nation—allege that Hardinge misappropriated and mismanaged their funds, and attempted to cover up his wrongdoing by fraudulently moving money between accounts to make the ledgers appear legitimate. The Joint Claimants also claim that the Crown's response to Hardinge's wrongdoing was inadequate, and breached the Crown's legal and fiduciary duties by utilizing the First Nations' trust accounts to pay back debts incurred by Hardinge.

The Respondent admitted the validity of the Joint Claimants' allegations and the Parties entered into negotiations, but could not agree on the proper compensation for the wrongdoing.

The Respondent argued that many of the debts incurred were debts of individuals, and therefore not compensable under the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*]. The Tribunal ruled that individual debts that breach the Crown's fiduciary duty can, in the right context, be compensable under the *SCTA* and, in any event, these individual debts were transformed into First Nations' debts when the Crown utilized the Joint Claimants' trust accounts to re-pay them, in violation of the *Indian Act* and its fiduciary duty. Based on the available evidence, the Tribunal determined that each of the Joint Claimants had suffered nominal losses, and was able to determine those losses.

The Respondent also argued that the Tribunal should apply a rate of return based on a Gross Domestic Product (GDP) per capita to bring the nominal losses forward to their present values. The Tribunal rejected this method noting that it did not accord with the principles of equitable compensation because it failed to apply the presumption of the most favourable use, failed to account for the accrual of interest and improperly considered the Joint Claimants' likely consumption.

The Joint Claimants argued that the Band Trust Account rates should be used as a rate of return to bring forward nominal losses to their present value until the year 2000, at which point the Tribunal should apply the rate of return achieved by the Canada Pension Plan from the year 2000 until the present. The Tribunal also rejected this method, determining that the Crown's fiduciary

duty does not include a duty to invest in third-party securities, and that the powers of a fiduciary can be constrained by legislation. The Crown's ability to invest a First Nation's funds into third-party securities is constrained by both the *Indian Act* and the *Financial Administration Act*, RSC 1985, c F-11.

Ultimately, the Tribunal applied the Band Trust Account rate on a compounding basis to the Joint Claimants' nominal losses, and determined that this level of compensation fulfilled the requirements of equitable compensation.

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I. INTRODUCTION

[1] This Claim is about mismanaged funds from four First Nations who are signatories to Treaty No. 4: the Day Star First Nation, the Fishing Lake First Nation, the George Gordon First Nation and the Muskowekwan First Nation (collectively, the Joint Claimants or the Claimants). Treaty No. 4 was signed in 1874 between the Saulteaux, the Cree and the British Crown, although adhesions continued for a few years afterward. The treaty covers much of what is now known as Saskatchewan, as well as small parts of Alberta and Manitoba.

[2] During the period this Claim covers, the Canadian government managed the Claimants and others collectively out of a centralized agency known as the Touchwood Agency (the Agency). The Claimants have long held that their funds were mismanaged and misappropriated by John B. Hardinge, the Indian Agent in charge of the Touchwood Agency in the early 1920s, that the Crown's response to the mismanagement was inadequate and that the Crown breached its fiduciary duty.

[3] This Claim was filed with the Specific Claims Tribunal (the Tribunal) on November 1, 2019. It fulfills the conditions precedent under section 16 of the *Specific Claims Tribunal Act*, SC 2008, c 22 [*SCTA*] for filing a claim, as it was first filed with the Department of Indian Affairs and Northern Development in 1993 and then accepted for negotiations in 1998 which, unfortunately, concluded in 2002 without a settlement.

[4] The Respondent (Canada or the Crown) has admitted that this Claim is valid under the *SCTA*. In its Response, filed January 27, 2020, the Crown wrote:

> Canada admits that it breached its fiduciary duty to the Claimant First Nations when the Indian Agent appointed by Canada mismanaged band moneys between 1920 and 1923. Canada admits it further breached its fiduciary duty to the Claimant First Nations in the manner it addressed the Agent's mismanagement. In certain cases these actions may have caused loss to the First Nations. Canada admits that the claim is valid on this basis. [para. 1]

[5] Despite this admission, the Claimants and Respondent have not been able to agree on the appropriate level of compensation for these breaches. This decision will determine what was taken, and the appropriate compensation.

[6] At the onset of this Claim one other First Nation was part of the Joint Claimants: the

Kawacatoose First Nation. On August 28, 2020, the Kawacatoose First Nation informed the Tribunal that it had ended its relationship with counsel for the Joint Claimants and hired its own counsel. On September 8, 2021, citing the "breakdown of the relationship between the Claimants' counsel and the Kawacatoose First Nation's counsel" and the delays such a breakdown had caused, the Tribunal ordered that the Kawacatoose First Nation be severed from the Claim, and granted the First Nation intervenor status. The Kawacatoose First Nation has continued to participate in this capacity while pursuing its own claim with the Tribunal: its interest in this Claim is primarily in preserving its share of compensation.

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

II. SOURCES OF EVIDENCE

[8] An oral history evidence hearing was held in Regina, Saskatchewan, on November 6, 2023, and an expert evidence hearing was held in the same city from July 29 to 31, 2024. In addition, nine expert reports were admitted into evidence, including a jointly commissioned report prepared during negotiations at the Specific Claims Branch, entitled "Touchwood Agency Mismanagement (1920–24) Specific Claim: Financial Accounting, Forensic Audit and Research Study," dated September 20, 2000, and authored by the firm Kroll Lindquist Avey (the KLA Report).

A. Oral History Evidence Hearing

[9] At the oral history evidence hearing, the Tribunal heard from eight Elders: Elders Lloyd Kinequon, Silver Wright, Max Itittakoose and Garry Kinequon testified on behalf of the Day Star First Nation; Elder Willard Young testified on behalf of the Fishing Lake First Nation; Elders Andrew Hunter and Earnest Williams Moise testified on behalf of the Muskowekwan First Nation; and Elder Mervin Frank Cyr testified on behalf of the George Gordon First Nation.

[10] Oral history is a unique and important aspect of Indigenous claims in Canada, and it is of special importance to the Tribunal. In *Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC),

the Supreme Court of Canada determined that because oral history is the primary way in which many Indigenous Nations in Canada record their history and laws, refusing to accept oral history as evidence would place parties on an unequal footing, and has the potential to negate treaty rights. 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]

[11] As previously noted, the Tribunal has a special relationship to oral history evidence. This relationship is grounded in paragraph 13(1)(b) of its enabling Act, the *SCTA*, which grants the Tribunal significantly more discretion than a court to accept oral history evidence. It reads:

> **Powers of the Tribunal**
>
> **13 (1)** The Tribunal has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all the powers, rights and privileges that are vested in a superior court of record and may
>
> …
>
> **(b)** receive and accept any evidence, including oral history, and other information, whether on oath or by affidavit or otherwise, that it sees fit, whether or not that evidence or information is or would be admissible in a court of law, unless it would be inadmissible in a court by reason of any privilege under the law of evidence; …

[12] Like any court, where oral history is accepted into evidence, the Tribunal is expected to place it "on an equal footing with the historical documents" (*Saugeen First Nation et al v AG et al*, 2021 ONSC 4181 at para. 46, rev'd in part 2023 ONCA 565). I found the testimony from the Elders to be very helpful in the making of this decision, and I thank them for their efforts and willingness to share their knowledge with the Tribunal.

B. Expert Evidence Hearing

[13] The Claimants presented three expert witnesses: Carol Hodgson, a historian, as well as Dean Das and Scott Schellenberg, both accountants. The Respondent presented two expert

witnesses: Glenn Smith and Dr. Howard Johnson, both accountants.

[14] The qualifications of the expert witnesses were agreed upon by the Parties and set out in their Joint Plan of Proceeding filed before the hearing. These agreed-upon qualifications are found below:

> [*Carol Hodgson*]
>
> (a) Carol Hodgson holds a bachelor's degree in Anthropology and a master's degree in Canadian Studies. She has extensive experience providing historical research services for Indigenous claims and litigation, including preparing expert reports on the establishment of reserves, management of trust funds, and land sales. Many of these projects have included the analysis and presentation of large volumes of historical data concerning funding, revenues, and expenditures. Ms. Hodgson is qualified to provide expert opinion evidence on all matters addressed in her expert report and also those subject areas mentioned above, in which she has expertise.
>
> [*Dean Das*]
>
> (b) Dean Das is a Chartered Professional Accountant and Chartered Business Evaluator. He is Certified in Financial Forensics. Mr. Das has over nineteen years of experience providing professional services in the areas of litigation support, disputes analysis, business valuations, forensic accounting, and audit. He has previously been qualified as an expert witness and provided testimony in that capacity at the Alberta Court of King's Bench. Mr. Das is qualified to give expert opinion evidence on all matters addressed in his expert report, and also those subject areas mentioned above, in which he has expertise.
>
> [*Scott Schellenberg*]
>
> (c) Scott Schellenberg is a Chartered Professional Accountant, a Chartered Financial Analyst, and a Chartered Business Valuator. He is also a specialist in Investigative and Forensic Accounting. Mr. Schellenberg has extensive experience in forensic accounting, economic loss qualification, and business valuation. He has previously been qualified as an expert by, and provided expert opinion evidence for, the Specific Claims Tribunal. Mr. Schellenberg is qualified to give expert opinion evidence on economic damages generally, and on the methodology by which the present value of nominal historical losses may be determined, including, without limitation, the researching of returns on financial investments and applying equity investment returns to historical losses.
>
> [*Glenn Smith*]
>
> (d) Glenn Smith is a graduate of the University of Waterloo, where he received an Honours Bachelor of Science, Environmental in 1996. Since he joined KPMG in 2002 he has acquired experience and analytical skills in the areas of forensic accounting, loss quantification, accounting systems, internal controls and financial procedures relating to a variety of financial, contractual and investigative issues. His background has given him a solid understanding of forensic accounting, financial controls and methodologies, financial statement preparation, review and

> presentation. Mr. Smith has appeared as an expert witness with respect to business valuation and damage quantification in the Ontario Superior Court. Mr. Smith is qualified to give expert opinion evidence on all matters addressed in his expert report, and also those subject areas mentioned above in which he has expertise including forensic accounting and damage quantification.
>
> [*Dr. Howard Johnson*]
>
> (e) Howard Johnson is a managing Director at Kroll Canada Limited (formerly known as Duff & Phelps Canada Limited). Prior to joining Kroll, Dr. Johnson was the co-owner of Campbell Valuation Partners Limited and its sister firm, Veracap M&A International Inc. Prior to its acquisition by Kroll in 2016, CVPL was Canada's longest established independent business valuation and damages quantification firm. He holds the designations of a Chartered Financial Analyst (CFA), Certified Public Accountant (Illinois), Chartered Director (C.[D]ir) and Accredited Senior Appraiser (ASA). Dr. Johnson has been recognized as a Fellow of both the Chartered Professional Accountants of Canada (ECPA) and the Canadian Institute of Chartered Business Valuators (FCBV). Dr. Johnson has previously been qualified as an expert by, and provided expert evidence for, the Specific Claims Tribunal. Dr. Johnson is qualified to give expert opinion regarding the current value of historical monetary losses from a financial and economic basis, and in particular the development and application of methodologies for calculating the current value of historical monetary losses. [Joint Plan for Expert Hearing July 29 to July 31, 2024, filed July 17, 2024, at para. 4]

C. KLA Report

[15] The KLA Report dates from September 2000, when this Claim was being negotiated between the Parties at the Specific Claims Branch. It was jointly commissioned by the Crown, the Claimants and the Intervenor Kawacatoose First Nation which, at the time, was a claimant. The Parties and the Intervenor rely considerably on the report, although they disagree—among other things—about which losses are compensable.

[16] The report states that its purpose "was to establish the nature and extent of the financial mismanagement which took place at the Touchwood Agency from 1920 – 1924" and "to produce as precise an accounting as possible of the losses sustained by the First Nations of the Touchwood Agency during that time period" (Exhibit 9 at p. 3). As will be explained, the nature of the Crown's misappropriation has created significant challenges in determining exactly what was lost by the Claimants. Therefore, the KLA Report breaks down the losses suffered into four categories: identified losses, probable losses, potential losses and other losses. These are defined in the report as follows:

> • Identified Losses are items that have been clearly identified and clearly quantified from the available information;

> • Probable Losses are items that we believe have probably or possibly occurred and the amount is reasonably quantifiable from the available information;
>
> • Potential Losses are items that we believe have probably or possibly occurred but there are significant limitations in our calculations in attempting to quantify the loss;
>
> • Other Losses include several other areas we identified and analyzed, many of which are not specifically quantifiable. [p. 4]

[17] The report concludes that the identified losses have a nominal value of $59,490.57, the probable losses a nominal value of $80,350.72 and the potential losses a nominal value of $93,838.00. The other losses identified by the KLA Report are, as the report notes, not quantifiable, and include such losses as "giving up farming, the use of inefficient equipment, being disadvantaged in the marketplace, fear and mistrust of the law and other areas" (Exhibit 9 at p. 7). The report does caution that, due to the incompleteness of the records, "the possibility exists that certain amounts contained within our summary schedules may represent double counting if **all** loss items are considered as part of the settlement" (emphasis in original; p. 5).

[18] The term "nominal value" is used to describe these losses because these numbers represent the value of what was misappropriated at the time it was misappropriated: the early 1920s. To compensate for historic misappropriation such as this, courts and the Tribunal typically apply compound interest to "bring forward" the loss and compensate for the time value of money. The Claimants and the Crown disagree on the most appropriate method for applying compound interest, and much of the work of their respective accounting experts focused on the differing approaches each Party suggests for bringing the losses forward to the present day.

III. FACTS

[19] The *Indian Act* in place during the relevant time period is the 1906 version: *Indian Act*, RSC 1906, c 81. Three sections of the Act are especially important in the context of this Claim: subsection (2) of section 87, as added in 1910; section 89, as amended in 1919; and section 90. These read:

> **[87.]** 2. No contract or agreement binding or purporting to bind, or in any way dealing with the moneys or securities referred to in this section, or with any moneys appropriated by Parliament for the benefit of Indians, made either by the chiefs or councillors of any band of Indians or by the members of the said band, other than and except as authorized by and for purposes of this Part of the Act, shall be valid

> or of any force or effect unless and until it has been approved in writing by the Superintendent General. [*An Act to amend the Indian Act*, SC 1910, c 28, s 2]
>
> **89.** With the exception of such sum not exceeding fifty per centum of the proceeds of any land, timber or other property, as is agreed at the time of the surrender to be paid to the members of the band interested therein, the Governor in Council may, subject to the provisions of this Part, direct how and in what manner, and by whom, the moneys arising from the disposal of Indian lands, or of property held or to be held in trust for Indians, or timber on Indian lands or reserves, or from any other source for the benefit of Indians, shall be invested from time to time, and how the payments or assistance to which the Indians are entitled shall be made or given. [*An Act to amend the Indian Act*, SC 1919, c 36, s 2]
>
> **90.** The Governor in Council may, with the consent of a band, authorize and direct the expenditure of any capital moneys standing at the credit of such band, in the purchase of land as a reserve for the band or as an addition to its reserve, or in the purchase of cattle for the band, or in the construction of permanent improvements upon the reserve of the band, or such works thereon or in connection therewith as, in his opinion, will be of permanent value to the band, or will, when completed, properly represent capital.

[20] In July 1924, section 90 was amended to read (changes underlined):

> **90.** (1) The Governor in Council may, with the consent of a band, authorize and direct the expenditure of any capital moneys standing at the credit of such band, in the purchase of land as a reserve for the band or as an addition to its reserve, or in the purchase of cattle, implements or machinery for the band, or in the construction of permanent improvements upon the reserve of the band, or such works thereon or in connection therewith as, in his opinion, will be of permanent value to the band, or will, when completed, properly represent capital or in the making of loans to members of the band to promote progress, no such loan, however, to exceed in amount one-half of the appraised value of the interest of the borrower in the lands held by him. [*An Act to amend the Indian Act*, SC 1924, c 47, s 5]

[21] Section 90 restricts the ability of the Crown to spend a First Nation's money to specific purposes, while section 89 gives the Governor in Council almost complete control over the funds of First Nations and individual members—control that was typically exercised via the Indian Agent. Subsection 2 of section 87 makes it impossible for a First Nation or members of a First Nation to enter into contracts without the consent of the Superintendent General—this subsection had the effect of making it impossible for an Indigenous person to purchase supplies, groceries, equipment or anything else from local merchants.

[22] The combination of governmental control over a First Nation's funds and the inability to enter into contracts made life quite difficult for Indigenous people in the late 19th and early 20th centuries: they had little access to funds and, even if they did have funds, little ability to use them

to provide for themselves. To address these difficulties, the Department of Indian Affairs (the Department) introduced the "order system" in the 1890s to "control relations between merchants and individual Indians" (Carol Hodgson's report entitled "Touchwood Agency Financial Mismanagement Report", revised April 2023 and filed with the Tribunal on July 26, 2024, at p. 10 (Hodgson Report)). Essentially, the order system placed the Agent between the First Nation member who required supplies and local merchants who could provide them. The system "used a paper certificate, issued by the Indian agent, that advised merchants of the amount of credit that could be advanced to an individual Indian" and "[t]he order form stated that the Indian agent would redeem the stated sum using money owed to the individual," money which the Agent expected to be received from future grain or cattle sales—the proceeds of which he controlled (p. 10). In a 1921 memorandum to the Department's Deputy Superintendent General Duncan Campbell Scott, departmental accountant Frederick Paget described the operation and purpose of the order system as follows:

> … the Indian desiring to purchase supplies was given an order for what the Agent considered would be useful or requisite in the form of groceries, provisions etc., so that the Indian would not squander his earnings on useless articles. [Exhibit 5, Tab 68]

[23] In the 1910s and 1920s, opposition to the order system grew within the Department. Commissioner W. M. Graham stated in a September 1921 letter that the system encouraged "loose business methods" and, by October 1921, "agents in the Prairie Provinces were informed that the Department had decided to abolish the order system" (Hodgson Report at pp. 10–11), and the forms that had been used were sent back to the Department. Despite this, "the order system continued to be used at Touchwood Agency, with or without the official order forms" (p. 17).

[24] John B. Hardinge was appointed Indian Agent for the Touchwood Agency in June 1920. The first known example of his use of the order system comes from a note dated April 20, 1921, to a Mr. McPhail of Lestock, Saskatchewan, that reads: "If you can let Peter Windigo have a team of horses, I will see that $100.00 is paid this fall and the balance later" (Exhibit 5, Tab 57). There is evidence that Hardinge was not strictly following departmental policy about the order system less than a year into his tenure: another note to McPhail dated May 11, 1921, ends with the postscript: "Kindly send me notes for all sales to Indians this year for signature" (Exhibit 5, Tab 62). This suggests, according to Carol Hodgson's testimony, that he was "signing sales after the

fact," which was "not how the departmental order system is intended to work" (Exhibit 22 at p. 89).

[25] Hardinge evidently continued to not follow departmental policy regarding the order system. In February 1922, Commissioner Graham met with Hardinge in Regina to discuss the level of indebtedness at the Touchwood Agency (Hodgson Report at p. 20). Hardinge followed up the meeting with a letter dated February 8, 1922, which stated that his Agency's total debt stood at approximately $38,000. At the time, Hardinge claimed that only $6,685.50 of the debt was incurred during his two-year tenure, and the rest was pre-existing. Hardinge did, however, suggest a plan to pay off the creditors immediately:

> The situation in my opinion is this, that to liquidate the present debt by crop earnings is an impossibility in one or two years, and as the creditors have already had to wait considerable time, I would earnestly recommend the advance of $38,000 from Indian Funds and I feel the burden of recollection will be comparatively easy compared to that of keeping present claimants just moderately satisfied. [Exhibit 5, Tab 80]

[26] Along with this letter, Hardinge submitted copies of Band Council Resolutions from three First Nations: the Kawacatoose First Nation (then known as the Poorman Band), the Day Star First Nation and the Muskowekwan First Nation (then known as the Muscowequan Band). The resolutions are nearly identical, and request that the Crown "advance sufficient [f]unds for the liquidation of our debts for stock and equipment." Elder Willard Young testified that his Elders had told him that "when the Indian agent used to come to the reserve, he would sit with his rifle, and he would dictate to these people" and that "[h]e would sit with his rifle, and he would say, you sign here" (Exhibit 21 at p. 37).

[27] In March 1922, noting that the Fishing Lake First Nation had significant funds in its account, Deputy Superintendent General Scott recommended that this money be used to pay off the debts of the Fishing Lake, Day Star, George Gordon and Muskowekwan First Nations. Because the debts were considered to be individual debts, the Department sent Hardinge the following instructions for documenting loans to individuals:

> A loan will be made … to pay these debts, to be repaid within five years with interest at five per cent. The accounts should be rendered in detail and cover only legitimate items for farming purposes, and be acknowledged by each Indian and certified by yourself as to its correctness etc. Each Indian will also be required to sign an agreement, one copy of which should be sent to the Department, to repay

> his advance from [the] sales of grain produce or cattle, these sales to be controlled and collections made by you. [Exhibit 5, Tab 91]

[28] By the end of the fiscal year in 1922–23, the government had used $26,632.81 of the Fishing Lake First Nations' funds to cover its debts and the debts of three other First Nations in the Touchwood Agency.

[29] Around this time, early warnings of mismanagement began to reach the Crown. The clerk at the Agency, Robert Hick, sent a letter to Commissioner Graham sometime around October 1922 alerting him to "irregularities" in the financial operations of the Touchwood Agency (Hodgson Report at p. 26). Hick and Hardinge continued to clash, and Hardinge eventually complained about Hick to his superiors. By April 1923, Graham sent one of two Saskatchewan-based inspectors of Indian Agencies, Mindy Christianson, to the Touchwood Agency to investigate. It turned out that Hardinge was not entering certain cash transactions into the Agency's books, and Hick was upset that this made it difficult to do a proper accounting. Christianson concluded that "when the grain was harvested in 1922, the only part of the payments that was recorded on the books was the money individual Indians paid on their debts" (p. 29). Christianson instructed Hardinge to be more careful in documenting financial transactions.

[30] At this time, however, neither Hick nor Christianson appear to have been under the impression that Hardinge was misappropriating money. This would change beginning in September 1923. In that month, the farm instructor at the Kawacatoose Reserve, H. A. Whaley, wrote Commissioner Graham to complain about his own interactions with Hardinge. Christianson was again sent out to investigate the matter and, in the course of that investigation, found additional debts not entered into the Agency's ledgers. This led to further enquiries, and the discovery of a significantly larger problem. In October 1923, Commissioner Graham reported Christianson's findings to Secretary J. D. McLean:

> I regret exceedingly to inform you that [Christianson] has found Mr. Hardinge to be untruthful and that he has deliberately made false statements to him, not only on the occasion of this inspection but on the previous inspection which was made practically ten months ago. Mr. Christianson has discovered an indebtedness of approximately $30,000.00 that is not recorded in the books, nor has it been reported to you, nor reported to Mr. Taylor at the time he audited the Agency books a year ago, although he was asked by Mr. Taylor at that time if the amount shown in the office records was the total indebtedness and Mr. Taylor was assured that it was. The same question was asked by Inspector Christianson a year ago and he

> was assured that the records and books covered all outstanding indebtedness. At the time Mr. Hardinge made these statements there must have been at least an indebtedness of $25000.00 incurred with his authority of which there was no record. [Exhibit 6, Tab 234]

[31] Hardinge resigned in October 1923.

[32] Further investigation uncovered further debts and mismanagement of the accounts. A lengthy report by Christianson dated January 8, 1924, notes that Hardinge was in the habit of moving money from one person to another within the ledgers—without their knowledge—simply to ensure that the accounts were balanced. He wrote that "[t]he manner in which the financial administration of the agency has been handled is the most terrible mix-up that could be imagined, the figures in the books are simply made to agree" whether the cash was available or not (Exhibit 6, Tab 194). Where cash was not available, Hardinge "would put through loans with the bank to cover up the amount that he was short in the cash."

[33] There is also evidence that Hardinge was choosing which debts to pay based on his relationships to local merchants: Christianson opined that "all he was interested in was to see that a lot of his friends got their accounts cleaned up."

[34] Hardinge also apparently received money on behalf of First Nations and used it to clear up debts without telling them, and took money from individuals to use in ways that remained a mystery to investigators. Christianson wrote that the Muskowekwan First Nation had received three payments for land surrenders but "were not aware of two of these" which gave Hardinge "a good chance to get considerable money for other people out of this transaction." He also wrote that "[t]here was a transfer of over $600.00 from the estate of Ale[c] Mahinginess" of the Muskowekwan First Nation that could not be accounted for. When the deceased's children came looking for their inheritance "the funds of this estate were all used up in transfers." Christianson reported that there were "a number of widows and old people whose money has been used up in the same way."

[35] Elder Willard Young testified that his father, his uncles, his grandfather and his grandmother all recounted stories about the actions of Agent Hardinge. He said that whenever a member of the First Nation sold grain or cattle, "a big percentage of that money would go to the Indian Agent" and "[Agent Hardinge] said that was for the people of the reserve," but "the people

on the reserve did not believe that"; they said that "the Indian agent had other plans for that money" (Exhibit 21 at p. 31). This type of thing "happened all the time." Elder Earnest Williams Moise testified similarly: he said that when members of his First Nation sold wood or cattle, "[t]hey had to go through the Indian Agent, and they never got their full money" (p. 45). Elder Andrew Hunter testified that this state of affairs caused his grandfather to refuse to grow wheat: "he said he would never grow wheat because he would never see anything out of it" and that "[h]e would grow oats so his animals could eat" (p. 54). Even at the time, some members of the First Nations knew they were not being treated fairly. Elder Garry Kinequon recounted a story that his father told him:

> … they took 17 steers to Punnichy. And these were all three-year-old steers … They were all in the 1,200, 1,300-pound range. And they shipped these cattle to Winnipeg. The Indian agent shipped them out for our family, for my grandpa. My grandpa, my dad, and his brothers sold these cattle back then. And a few weeks later, I guess the cheque came back … when they get paid for their cattle, they got $3 a head. In the meantime, my dad could read and write a little bit, and he always said, 'I studied the market.' The Winnipeg market, eh? And he knew what … those steers went for. They went for … anywhere from $50 to $75 a head. What happened to … that money? I don't know. Did it go to the Indian [A]gent? Did it go to the government? Where did it go? [pp. 104–05]

[36] By February 1924, the Crown appears to have been convinced that Hardinge had not only mismanaged the accounts but also had stolen money. Scott wrote to Graham on February 19 and suggested that in "regards [to] Mr. Hardinge's apparent defalcations, you may consult Messrs. Cross, Jonah, Hugg & Forbes [a law firm], with a view to prosecuting him and endeavouring to recover" (Exhibit 6, Tab 284). Graham noted in a June 24, 1924, letter that Hardinge would have had the opportunity to steal money by selling grain by the load, and not entering the returns into the Agency's books (Exhibit 7, Tab 322). A departmental accountant who joined Christianson's investigation, E. S. Biggs, suggested that the total amount stolen could have been more than $7,000 (Hodgson Report at p. 36).

[37] Hardinge was never prosecuted.

[38] In September 1924, an audit had determined that the Touchwood Agency faced a total of $59,959 in debts (Hodgson Report at p. 39). Despite an early suggestion that the debts be paid by the Department, ultimately the Crown decided to again seek the money from the First Nations themselves. Again, Band Council Resolutions were prepared and passed, although the members of the First Nations in the Touchwood Agency were upset about the solution the Crown chose. In

a letter from April 1925, Graham recounted to Scott that "it was with difficulty we were able to get this money from them, as many of them contributed money to pay accounts for which they were not responsible" (Exhibit 8, Tab 468).

[39] Despite the fact that the Crown utilized the by-then-revised section 90 of the *Indian Act* to justify using Band funds to pay down individual debts, there is evidence that the Crown knew at the time that to do so was a violation of the Act. Less than a year after the decision was made, and in response to ongoing claims from local merchants, Acting Deputy Superintendent General J. D. McLean wrote to Superintendent General Charles Stewart:

> … we have already used a large amount of the capital funds, which have been voted by the Indians, for the purpose of paying individual debts, although the admissibility of this procedure under the sections of the Indian Act respecting the expenditure of capital funds is very questionable. [Exhibit 8, Tab 482]

[40] Conditions at the Touchwood Agency did not improve following the departure of Hardinge. A letter from Graham to Scott dated December 18, 1928, describes the state of the reserves, as well as the efficacy of Hardinge's successor, Agent S. S. Moore. Graham wrote that "definite action will have to be taken immediately to rectify matters," because the "houses there are merely hovels … not fit for animals to live in, let alone human beings". He continued:

> The farming in this agency amounts to practically nothing … there has been a steady backward movement during the last eight years, under the administration of Indian Agents Hardinge and Moore. There has been no improvement at all under Mr. Moore. In fact, there has been a decrease in the farming operations, and the cattle herds have dwindled away to almost nothing … The Agent there is incompetent, as has been pointed out in all reports by Inspectors Christianson and Hamilton who visited this agency. [Exhibit 2, Tab 39]

[41] The actions of the Crown via Agent Hardinge—as well as his successor—left the members of the Claimant First Nations distrustful of the very government that had promised to teach them a new way of life. As Elder Mervin Frank Cyr testified: "They looked down on us. They fixed it so we couldn't get ahead. They would hold us down … they weren't there to help us. They were there to put us down and just to keep us quiet" (Exhibit 22 at pp. 36, 44).

IV. ISSUES

[42] Given the Crown's admission of validity in this Claim, there are two main issues for this Tribunal to determine:

1. What were the nominal losses suffered by the Joint Claimants and the Intervenor?

2. What is the present-day value of the nominal losses suffered by each of the Joint Claimants?

V. NOMINAL LOSSES

[43] As explained above, the KLA Report divides the nominal losses it has identified into four categories:

> • Identified Losses are items that have been clearly identified and clearly quantified from the available information;
>
> • Probable Losses are items that we believe have probably or possibly occurred and the amount is reasonably quantifiable from the available information;
>
> • Potential Losses are items that we believe have probably or possibly occurred but there are significant limitations in our calculations in attempting to quantify the loss;
>
> • Other Losses include several other areas we identified and analyzed, many of which are not specifically quantifiable.

[44] It is particularly difficult to determine exactly how much money was stolen or mismanaged. As the KLA Report notes, the types of fraud carried out by Hardinge make quantification of the losses challenging:

> The investigation by Christianson and Biggs describes revenue diversion, known as a "front-end" fraud, and the transfer and mix-ups between various accounts that is an indication of a "lapping" fraud. Quantification of losses resulting from these types of frauds is very difficult as, in a "front-end" fraud, there is little, if any, accounting evidence available to quantify the amount that may have been misappropriated and, in a "lapping" fraud, the accounting records … must essentially be re-created. Consequently, the quantification of the losses, even at that time, apparently proved to be very difficult. [Exhibit 9 at pp. 81–82]

[45] Despite this difficulty, the KLA Report summarizes the total nominal losses—identified, probable and potential, but leaving out 'other losses'—between the Joint Claimants and the Intervenor as being $233,679.29 (Exhibit 9, Schedule 2). This is further broken down by individual First Nation as follows:

> Day Star First Nation: $2,610.20
>
> Fishing Lake First Nation: $53,844.13
>
> George Gordon First Nation: $6,532.31

Muskowekwan First Nation: $35,256.89

Kawacatoose First Nation: $38,508.62

[46] Some of these losses are identified as "Band Losses" and others are identified as "Individual Losses." In addition, The KLA Report shows $96,596 in nominal losses that cannot be attributed to a specific First Nation, as well as $331.14 that is included in the total losses, but is attributed to the Nut Lake Band. This is explained in the report in this way:

> Although the Nut Lake First Nation was part of the Agency during this time period, we understand that they are not currently party to this claim. … on several occasions, transactions regarding Nut Lake were included with those of the other First Nations. As a result, they are included in parts of this report only for purposes of explanation and completeness with respect to the other First Nations. [Exhibit 9 at pp. 8–9]

[47] The report warns, however, that up to $10,566.81 of the losses included could represent "double counting" (Exhibit 9, Schedules 11 and 13).

[48] The Parties are generally in agreement that losses occurred and need to be compensated. However, the Claimants and Respondent disagree about which losses are compensable based on two factors: the onus and burden of proving the losses, and the alleged individual nature of some of the losses.

A. Claimants' Position

[49] The Claimants argue that the identified losses, the probable losses and the potential losses are proven and compensable. Despite the fact that the KLA Report fails to identify the probable and potential losses to the standard demanded by a court of law—that is, proof on the balance of probabilities—and instead refers to "possibilities" when describing the losses, the Claimants rely on the legal maxim *omnia praesumuntur contra spoliatorem*, which means "everything is presumed against the wrongdoer." In their written submissions, they argue:

> When assessing damages for fraud and breach of fiduciary duty, the courts will not require proof of precise loss in circumstances where the beneficiary has adduced sufficient evidence to arouse the court's suspicion regarding the fiduciary's administration of trust property. Instead, the fiduciary carries the heavy burden of accounting for the trust property to thereby *disprove* the amount and cause of the loss … [emphasis in original; para. 80]

[50] The Claimants cite *Huff v Price*, 1990 CarswellBC 267, 76 DLR (4th) 138 (BCCA), and

argue that once a breach of fiduciary duty is proven, a claimant's burden of proving loss is very slight. The greater burden, they say, lies with a respondent. As the British Columbia Court of Appeal wrote:

> Once the fraud or breach of fiduciary duty is shown, then the court assessing damages will not be exacting in requiring proof of the precise loss in circumstances where all reasonable efforts have been made by the plaintiff to establish the amount of the loss and the cause of the loss. The burden of leading the evidence to disprove the amount of the loss and the cause of the loss will then fall on the defendant who has been found to have been fraudulent or in breach of fiduciary duty. [para. 38]

[51] The reason for this shift in onus lies in another duty of a fiduciary: the duty to account. Under this duty, a fiduciary must keep precise records and be prepared to discharge its "legal burden to prove that all the expenditures from the trust are appropriate" (*Cochrane v Cochrane*, 2021 ONSC 5228 at para. 16). As the Claimants assert, the Respondent has not attempted to lead competing evidence of losses, nor justified any specific transactions. In these circumstances, the Joint Claimants argue, the Crown has not fulfilled its duty to account, and the Tribunal must consider the impugned transaction as a loss.

[52] The duty to account also underlies the Claimants' argument that, despite the lack of legal certainty in the KLA Report, the Respondent should be held responsible for not only the identified losses, but also the probable and potential losses as well. They say that "[t]he lack of supporting documentation which could 'prove' these losses is the fault of the Crown, who was responsible for creating and maintaining such records" (Claimants' written submissions at para. 91).

[53] The Claimants adopt the nominal losses listed above, which can be found in Schedule 2 of the KLA Report, and say that "the Joint KLA Report represents the best (and only) quantification of [the Claimants'] nominal losses in relation to the Crown's admitted breaches of fiduciary duty" (Claimants' written submissions at para. 95).

B. Respondent's Position

[54] The Respondent argues that some of the probable losses and all of the potential losses, as defined in the KLA Report, are not proven and therefore not compensable. In addition, the Respondent argues that individual losses, under any of the categories, are not compensable under the *SCTA*.

[55] The Respondent takes the position that "not all the losses included under the category of 'Probable Losses' have been established on a balance of probabilities given the fact that they include possible losses" (Respondent's written submissions at para. 30). An appendix attached to the Respondent's written submissions argues that: (a) some of the losses included in the probable category were losses suffered by the Kawacatoose First Nation, and should be excluded from this Claim; (b) some occurred outside the "claim period"; (c) some were losses of the Department and not the Claimant First Nations; (d) some have insufficient evidence to support them; and (e) some were individual losses. Ultimately, the Respondent argues that $21,829.60 of the probable losses identified by the KLA Report should be excluded from compensation.

[56] The Respondent argues that the potential losses "have few if any facts to support the transactions giving rise to them" and that "[f]urthermore, the losses are to individual farmers" (Respondent's written submissions at paras. 35–36). It says that "[n]o evidence was proffered to suggest the Potential Losses were anything other than merely possible" and that these losses should be excluded on that basis (Respondent's written submissions at para. 38).

[57] The category of other losses is non-quantifiable and should be excluded (Respondent's written submissions at para. 39).

[58] The Respondent argues that the losses identified as "Individual Losses" in the KLA Report should not be compensated, because individual compensation is not contemplated by the *SCTA*. Subsection 14(1) of the *SCTA* reads, in part, that "a **First Nation** may file with the Tribunal a claim based on any of the following grounds, for compensation for **its losses** arising from those grounds" (emphasis added), which the Respondent says "allows for only First Nations, not individual members, to be compensated for their losses" (Respondent's written submissions at para. 60).

[59] The Respondent also argues that the Claimants have not discharged their burden of proof. First, a claimant must "discharge the persuasive burden of proof to establish the breaches occurred" (Respondent's written submissions at para. 43). Next, the Respondent says, the claimant must "establish that the losses occurred in order for compensation to follow." The Respondent cites *Stirrett v Cheema*, 2020 ONCA 288 at para. 65, where the Ontario Court of Appeal wrote that "[s]imply put, for compensation to be awarded for breach of fiduciary duty, the plaintiff must

establish that the defendant's breach caused the plaintiff's loss."

[60] Finally, the Respondent offered an expert report written by Glenn Smith and Kas Rehman of KPMG Forensic Inc. (the KPMG Report), as well as testimony by Glenn Smith, that proposed an alternative way to quantify the nominal losses.

[61] The report acknowledges that Hardinge misappropriated some funds, but takes issue with the idea that simply using First Nations' funds to pay off debts or paying one First Nation's debt with the earnings of another First Nation necessarily represents loss to the Joint Claimants.

[62] Using a First Nation's funds to pay debts incurred by individuals does not create loss because the "Touchwood Agency and the Government of Canada used the reserve funds based on appropriate direction from the First Nations in the form of a Band Council Resolution" (Exhibit 10 at para. 41). The real issue, the report states, were the transactions "that made it necessary to borrow funds from the reserves in the first place."

[63] In terms of the transfers between First Nations, these do not represent loss to the Joint Claimants overall because a loss to one First Nation is a gain by another: when one First Nation's funds were taken, another had its debts cleared and was able to utilize whatever goods were acquired in exchange for the debt that was incurred. The KPMG Report states that both the "loss and gain must be considered when calculating damages" (Exhibit 10 at para. 42).

[64] Rather than focus on the money coming out of the accounts to determine loss, the KPMG Report suggests that focusing on the necessity of the purchases made through the order system will give a clearer picture of the Claimants' losses. The report discusses definitions of necessary and unnecessary purchases in this way:

> When considering necessary vs unnecessary purchases, it is important to note that the necessity of a purchase is independent of whether or not the purchase resulted in debt. For example, a purchase may be necessary for a Band member despite the fact that they lack funds to make the purchase. In those situations, the Band may elect to assist the member through a relief payment either through their Reserve Accounts or through other means.
>
> Conversely, a purchase made by a Band member who did have adequate funds to pay for the purchase may be considered unnecessary. It is possible that the Band member, had they been fully aware of their financial position, would have elected not to make an unnecessary purchase in order to preserve funds for anticipated future purchases that are necessary. [Exhibit 10 at paras. 44–45]

[65] The report also raises the idea that even an unnecessary purchase may not result in a total loss. It offers the hypothetical example of the purchase of farming equipment that "would have been considered excessive by an informed member" but which ultimately results in gains in farming revenue (Exhibit 10 at para. 47).

[66] To calculate nominal losses appropriately, the KPMG Report suggests utilizing the following formula:

> *Total amounts misappropriated by Hardinge*
> *+ Total unnecessary purchases made by members under the Order System*
> *- Total value gained through unnecessary purchases*
> [emphasis in original; Exhibit 10 at para. 49]

[67] This formula, however, is not feasible, as Smith and the KPMG Report readily admit that there simply is not enough available evidence to determine which purchases were necessary and which were unnecessary (Exhibit 10 at para. 50; Exhibit 23 at p. 416). The report suggests that the formula offers an opportunity to consider applying a discount to the calculations in the KLA Report, to account for the value gained through unnecessary purchases. However, given a lack of evidence, the report is "not able to provide a specific discount rate that could be considered adequately supported" (Exhibit 10 at para. 51).

[68] Given the fact that the approach is not feasible, ultimately the KPMG Report concludes that "there is not sufficient evidence to provide an appropriate estimate of damages suffered by the Claimants" (Exhibit 10 at para. 52).

C. Intervenor's Position

[69] Given that the Kawacatoose First Nation's primary interest in this Claim is preserving its share of compensation, it may come as no surprise that its submissions were focused on the unallocated losses identified in the KLA Report. The Intervenor writes that "neither the Claimants nor the Respondent, for the most part, have attempted to specify and/or particularize who those Unallocated Losses should be allocated to between the Kawacatoose and the Claimants" (Intervenor's written submissions at para. 51). The Kawacatoose First Nation notes that it has a separate claim in front of the Tribunal and argues that an allocation of these losses could affect its own compensation. The Intervenor states that "Kawacatoose should not be responsible nor

penalized for this failure of the Claimants and Respondent" to particularize the unallocated losses (para. 52).

[70] The only person to turn their mind to allocating the unallocated losses was the Respondent's expert Dr. Howard Johnson. In his report and as confirmed in his testimony, Dr. Johnson followed the instructions of Respondent's counsel and allocated the unallocated losses equally across the four Claimant First Nations and the Intervenor, the Kawacatoose First Nation (Exhibit 18 at p. 9, footnote 5; Exhibit 24 at p. 544).

[71] The Kawacatoose First Nation opposes an equal division of the unallocated losses because such a division "is arbitrary and fails to consider the actualities on the ground such as, *inter alia*, the relative populations of and the amounts of money held in trust for those First Nations" (Intervenor's written submissions at para. 57). According to the KLA Report, "[f]urther valuation of the potential losses in this area would necessitate additional investigation into individual band members accounts together with a comprehensive agricultural-economic study" (Exhibit 9, Schedules 18 and 19), which the Intervenor argues is "a viable method to identify which specific First Nations the Unallocated Losses should be apportioned to" (Intervenor's written submissions at para. 60).

[72] Alternatively, the Tribunal could allocate these losses proportionally based on the relative identified losses in the KLA Report, could allocate them proportionally based on population, or could "have Kawacatoose, the Claimants and the Respondent once more jointly retain an expert"—as happened with the KLA Report—who would "work at particularizing the Unallocated Losses based on current approaches to evidentiary requirements in litigation involving First Nations" (Intervenor's written submissions at para. 72).

VI. ANALYSIS

[73] A major question at the heart of determining the nominal damages in this Claim is the question of burden: who bears the initial burden and what happens if, and when, it shifts?

[74] The Respondent argues that the Claimants have not fulfilled their burden of proving loss, and it does so in three ways: first, by alleging that the Claimants have not discharged "the persuasive burden of proof to establish the breaches occurred" referring to the breaches of the

Crown's fiduciary duty nor have the Claimants established "that the losses occurred"; second the Respondent says that even after the burden shifts to the Respondent, "reasonable efforts are still required to be made by the Claimants" (Respondent's written submissions at para. 45) to show losses; and, third, per the KPMG Report, the Respondent argues that benefits were received by the First Nations via the order system and other impugned transactions that must be accounted for in any analysis of loss.

[75] The Respondent's focus on whether the fiduciary breaches occurred is misplaced given its admission in this Claim:

> Canada admits that it breached its fiduciary duty to the Claimant First Nations when the Indian Agent appointed by Canada mismanaged band moneys between 1920 and 1923. Canada admits it further breached its fiduciary duty to the Claimant First Nations in the manner it addressed the Agent's mismanagement. In certain cases these actions may have caused loss to the First Nations. Canada admits that the claim is valid on this basis.

[76] This admission is enough to find that the fiduciary breaches alleged by the Joint Claimants did, in fact, occur. That persuasive burden is therefore met. The losses themselves can be discerned from the KLA Report which, as a reminder, was jointly-commissioned in 2000 and directly connects the theft and mismanagement of the Claimants' monies to the actions of Agent Hardinge, a Crown servant. Despite difficulties caused by the nature of the fraud committed and the failure to retain records—both of which are the fault of the Crown—the precise calculation of the losses proved challenging. Nevertheless, the KLA Report is the only evidence available of these losses.

[77] The KLA Report also represents an objectively reasonable effort by the Claimants to show the losses in the sense that it would be unreasonable to ask for additional evidence from them: if the Respondent believed the losses as denoted in the KLA Report were overestimated, it has had nearly a quarter of a century to commission an alternative accounting. It did not.

[78] In *Huff v Price*, the British Columbia Court of Appeal referred to a decision of the Supreme Court of Canada, *Snell v Farrell*, [1990] 2 SCR 311, 72 DLR (4th) 289, and the reasons of Justice Sopinka to conclude:

> … if the circumstances justify it a very slight amount of evidence led on the part of the plaintiff will shift the evidentiary burden to the defendant. In a case where fraud or breach of fiduciary duty has been established, the burden of proof in

> relation to causation and damages will readily be discharged, at least in a prima facie way, by the plaintiff. [*Huff v Price* at para. 39]

[79] In *Snell v Farrell*, a medical malpractice tort case, the reasoning behind the determination that "very little affirmative evidence" will suffice to prove damages was based on the fact that "the facts lie particularly within the knowledge of the defendant" (p. 328). This is the circumstance in the Claim at bar: it was the Crown's responsibility, as a fiduciary, to not only keep careful records but also to be prepared to account for spending out of the Claimants' accounts. The Crown cannot do that; therefore, I accept that the KLA Report discharges the burden on the Claimants to show loss, and I accept the figures and calculations within it as the best available representation of the Claimants' losses.

[80] For similar reasons, I also accept those losses in the identified, probable and potential categories as representing the extent of the Joint Claimants' losses. Due to the factual existence of the breaches, and the reasonable efforts on the part of the Claimants to prove the extent of the losses via the KLA Report, the burden shifted to the Respondent to **disprove** the amount of the loss, as per *Huff v Price*. The Respondent has not led sufficient evidence to disprove the losses it impugns; therefore, I consider these losses to be proven.

[81] I also cannot accept the proposition from the KPMG Report that benefits were gained that should be deducted from the losses suffered. An example in the report that the Respondent points to is the "trade-in of a 25HP steam engine suitable for farming purposes for a 20x40 gasoline tractor of inferior quality" (Exhibit 10 at para. 68). The KPMG Report criticizes the KLA Report for including the original debt for the 25HP engine without considering the trade-in value of the 20x40 gasoline tractor of inferior quality. Forensic accountant Dean Das, testifying for the Claimants, commented on this criticism in his testimony:

> Let's just say for some odd hypothetical reason my neighbour at home somehow intercepts my banking mail and is able to withdraw money and get through the controls of my bank and is able to withdraw money from my bank account … Then if my neighbour has me over for, say, a pizza party, some of which that he paid for with the money that he took from my bank account, when I go and confront my bank, I'm not going to reduce the money that was taken from my account for the pizza that I ate, right? [Exhibit 22 at pp. 246–47]

[82] As will be further discussed in the next section, the point of equitable compensation is "to restore to the plaintiff what has been lost as a result of the breach; i.e., the plaintiff's lost

opportunity" (*Canson Enterprises Ltd v Boughton & Co*, 1991 CanLII 52 (SCC), [1991] 3 SCR 534 at p. 556 [*Canson*]). Restoring lost opportunity demands the return of the full value of what was taken—the full value here being the cost of a replacement steam engine—otherwise a claimant does not gain back their lost opportunity, they gain back merely a part of it. For this reason, I decline to apply a discount to the figures in the KLA Report on account of concurrent "gains" made by the Claimants.

[83] I also do not accept the Respondent's argument that some of the losses outlined in the KLA Report are non-compensable because they are individual losses, for two reasons. First, the Respondent has interpreted subsection 14(1) of the *SCTA* too narrowly and, second, ultimately these individual losses were transformed into First Nations losses by the Crown's actions.

[84] When one interprets the *SCTA*, two related canons of statutory interpretation must be borne in mind: liberal construction, and the special rules of construction that apply to legislation that deals with Indigenous peoples in Canada.

[85] As per the *Interpretation Act*, RSC 1985, c I-21, section 12, the canon of liberal construction applies to every law in Canada, given that all law is remedial:

> **Enactments deemed remedial**
>
> **12** Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[86] To determine the objects of the *SCTA*, all one needs to do is refer to the statute's preamble, which reads, in part:

> … resolving specific claims will promote reconciliation between First Nations and the Crown and the development and self-sufficiency of First Nations;
>
> there is a need to establish an independent tribunal that can resolve specific claims and is designed to respond to the distinctive task of adjudicating such claims in accordance with law and in a just and timely manner; …

[87] Two objects become clear from this preamble: the first, and most important, is the promotion of reconciliation and self-sufficiency; second is the adjudication of such claims in a spirit of justice and efficiency. Promoting reconciliation and delivering justice between the Crown as fiduciary and the Joint Claimants as beneficiaries will be made more difficult if the *SCTA* is interpreted narrowly so as to exclude clear—and admitted—wrongs committed by the Crown,

simply because these wrongs primarily affected individual members of a First Nation rather than a First Nation as a whole.

[88] Additionally, however, as a statute that relates to Indigenous peoples in Canada, any interpretation of the *SCTA* requires that particular attention be paid to the maintenance of the rights contained within it. In *Mitchell v Peguis Indian Band*, 1990 CanLII 117 (SCC), [1990] 2 SCR 85, Justice La Forest wrote:

> … it is clear that in the interpretation of any statutory enactment dealing with Indians, and particularly the *Indian Act*, it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them. [p. 143]

[89] The combination of the general need for liberal construction, the clear objects of the *SCTA* and the need for particular attention to the maintenance of rights held by Indigenous peoples in Canada militates toward including the losses by individual members of each First Nation within the scope of the Joint Claimants' overall losses.

[90] But even if this is incorrect and individual losses are never compensable under the *SCTA*, the actions the Crown took to pay off the debts—which, the Respondent has admitted, violated the fiduciary duty—transformed these individual losses into losses of the First Nations as they were ultimately paid for out of the First Nations' trust accounts, in violation of the *Indian Act*. As Das testified:

> … the individual losses refer to, effectively, debtors of the order system where the debtor or the borrower, through the order system, was an individual versus a [B]and. That said … it is very clear from the KLA report that the individual losses, as well as the [B]and losses, all, ultimately, were paid out of [the] trust account. [Exhibit 22 at pp. 233–34]

[91] For these reasons, I accept that the losses labelled "individual" in the KLA Report are part of the losses suffered by the Joint Claimants and the Intervenor.

[92] I reject the argument of the Respondent that some losses in the KLA Report occurred outside of the Claim period. It is difficult, if not impossible, to define a "claim period" in this Claim. The Respondent's admission refers to a breach of its fiduciary duty "in the manner it addressed the Agent's mismanagement," which indicates that the wrongs to which the Respondent has admitted began in 1920 and continued until the Crown's response to these wrongs concluded.

Given the history of the Claim, that conclusion appears to have occurred in the mid-1930s, when the remaining debts had been cleared, according to Hodgson's report (Hodgson Report at pp. 56–57).

[93] Despite the arguments of the Intervenor regarding the unallocated losses, I have determined that they will be split equally amongst the four Joint Claimants and the Kawacatoose First Nation, based on the Tribunal's aforementioned mandate for efficiency and justice. The Joint Claimants deserve justice and, having waited more than a century since the wrongs were committed by Agent Hardinge, they similarly deserve finality in that justice. Putting the Kawacatoose First Nation's argument in favour of further study into effect may be viable, as the Intervenor argues, but would cause delay to the Joint Claimants, and the Intervenor has presented no persuasive evidence that further study would result in the clarity or precision it seeks. It would, however, force the Joint Claimants to participate in the potentially lengthy and expensive process of obtaining further study, which will delay their ability to move on and put their compensation to good use. I cannot create that kind of prejudice for the Joint Claimants without violating the Tribunal's mandate.

[94] The Claimants' written submissions make a brief reference to a "Misadministration of Trust Claim Joint Protocol Agreement" which, they say, apportions the unallocated losses amongst the Joint Claimants by agreement (Claimants' written submissions at para. 126). This agreement is not in evidence, and was not referred to in oral submissions. The Tribunal has no details about this agreement, the method by which it apportions these losses or if the Kawacatoose First Nation is a party to the agreement. The Kawacatoose First Nation did not mention the agreement in either its written or oral submissions. Given that the Kawacatoose First Nation suffered from the same breaches at issue in this Claim, but is pursuing a separate claim before this Tribunal, in the interests of justice I cannot allow the Joint Claimants to apportion the unallocated losses amongst themselves without regard for the Kawacatoose First Nation. Additionally, I do not want to allow the final resolution of the Claim to drag on if the Claimants and Intervenor must negotiate the apportionment. Instead, I will apportion the unallocated losses.

[95] Therefore, I will accept the identified losses, the probable losses and the potential losses, both to the Claimant First Nations and their individual members, as forming the majority of the nominal losses in this Claim. I will divide the $96,596 in unallocated losses five ways equally, and

assign one-fifth to each of Day Star, Fishing Lake, George Gordon and Muskowekwan First Nations, leaving the last fifth available within the context of the Kawacatoose First Nation's separate claim. Thus, in terms of the unallocated losses, each of the Joint Claimants is entitled to $19,319.20. Finally, with respect to the $331.14 attributed to individual losses of the Nut Lake Band, the KLA Report concludes that these losses were part and parcel of the misuse of the Joint Claimants' accounts. Therefore, they will also be divided five ways as there is no further information in the report as to exactly where the money was taken from to clear these debts. That will result in an additional $66.23 in losses to each of the four Joint Claimants and leave the same available in the context of the Intervenor's claim.

[96] In their reply written submissions, the Claimants noted that the KLA Report identifies double counting as merely "possible" and states that the uncertainty of the situation has been caused by "the completeness of the documentation" (para. 8). Documentation of the impugned transactions was the responsibility of the Crown itself, the Claimants say, so the ambiguities created by a failure to keep accurate records should be resolved in favour of the Claimants. The Claimants invoke a previous Tribunal decision, *Madawaska Maliseet First Nation v Her Majesty the Queen in Right of Canada*, 2017 SCTC 5 [*Madawaska Maliseet*], as support. That decision read, in part:

> I find that the Honour of the Crown in this instance, where the record is incomplete and important key documents which could shed further light on this question are missing as a result of Crown mismanagement of these important documents, requires that any ambiguity on this question, should it exist, must be resolved in favour of the Maliseet Madawaska. [para. 368]

[97] *Madawaska Maliseet* is distinguishable based on the question being asked: in that claim, the missing documentation regarded whether a reserve had been created, not financial records (para. 353). The question of reserve creation is the subject of a legal test, based on the Supreme Court of Canada case *Ross River Dena Council v Canada*, 2002 SCC 54 [*Ross River*]. In *Madawaska Maliseet*, Justice MacDougall ran the test from *Ross River* and determined, on the strength of the test, that a reserve had been created (para. 356).

[98] In the Claim at bar, however, the missing documentation is financial records. Despite the admitted challenges in dealing with not only missing but also intentionally confusing financial records, the KLA Report offers the best available evidence of what Hardinge misappropriated. The

Claimants themselves refer to the KLA Report as "an impartial, accurate, and clear measurement of the Joint Claimants' nominal losses" (Claimants' reply written submissions at para. 25). Having accepted that the losses identified in the report are sufficiently proven, I will likewise accept that the double counting it identifies is also sufficiently proven. Therefore, I will remove the $10,566.81 that the KLA Report identifies as double counting from the Joint Claimants and the Intervenor—again, in equal measure.

[99] This means that each of the four Claimants will have $2,113.36 removed from their nominal losses.

[100] The following chart shows the calculations:

First Nation	Losses (Band and Individual)	Unallocated Losses	Nut Lake Losses	Double Counting	Total
Day Star	$2,610.20	$19,319.20	$66.23	($2,113.36)	**$19,882.27**
Fishing Lake	$53,844.13	$19,319.20	$66.23	($2,113.36)	**$71,116.20**
George Gordon	$6,532.31	$19,319.20	$66.23	($2,113.36)	**$23,804.38**
Muskowekwan	$35,256.89	$19,319.20	$66.23	($2,113.36)	**$52,528.96**

[101] Therefore, I find as a fact that the nominal losses of the Day Star First Nation are $19,882.27, the nominal losses of the Fishing Lake First Nation are $71,116.20, the nominal losses of the George Gordon First Nation are $23,804.38 and the nominal losses of the Muskowekwan First Nation are $52,528.96.

[102] As the Kawacatoose First Nation is not a party to this Claim, and is pursuing a separate claim in front of this Tribunal, none of what I have discussed above should be construed as fact finding with regard to the Intervenor. For similar reasons, I will not discuss how the present-day value of the Intervenor's nominal losses should be calculated.

[103] The next section determines how to bring forward the nominal losses to present-day values.

VII. PRESENT DAY VALUE

[104] Before discussing the Parties' positions on bringing forward the nominal losses to their present-day values, it will be beneficial to review the general principles of equitable compensation in Canadian law.

A. General Principles of Equitable Compensation

[105] Recently, the Supreme Court of Canada made a comprehensive restatement of the general principles of equitable compensation, in *Southwind v Canada*, 2021 SCC 28 [*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. [para. 83]

[106] As I recently stated in *Waterhen Lake First Nation v His Majesty the King in Right of Canada*, 2024 SCTC 5 [*Waterhen Lake*], this passage makes clear both the reasoning behind equitable compensation as a remedy, as well as the steps an adjudicator must follow to determine the appropriate level of compensation.

[107] Equitable compensation is a restitutionary remedy that is designed to return the **opportunity** lost via the fiduciary's breach, and enforce the trust at the heart of fiduciary relationships (*Canson* at p. 543). Because it restores opportunity instead of providing damages, the courts have seen fit to apply the equitable presumption of the most favourable use: whether or not the Joint Claimants would have used their property in a specific and lucrative way, they could have done so, and it is the return of the opportunity to do so that concerns equity most of all.

[108] The steps an adjudicator must take include analyzing the nature of the fiduciary relationship to ensure that the loss compensated for is connected to the duties undertaken by the fiduciary, a causation analysis to ensure the loss is caused by the breach, the application of equitable

presumptions and an assessment of the total compensation in light of the special relationship between the Crown and Indigenous peoples in Canada.

[109] Finally, equitable compensation provides a "global" assessment of lost opportunity, not a precise calculation because, as the Supreme Court of Canada noted in *Southwind*, it is "unlikely that the trial judge could recreate with mathematical precision what would have happened nearly a century ago had Canada fulfilled its duty" (para. 123). The assessment "needs to be realistic." The principle in *Southwind* that equitable compensation is "assessed, not calculated" is cited to *Whitefish Lake Band of Indians v Canada (AG)*, 2007 ONCA 744 at para. 90, 87 OR (3d) 321 [*Whitefish*], and this principle has been scrupulously followed in most, if not all, Tribunal decisions on compensation: *Beardy's & Okemasis Band #96 and #97 v Her Majesty the Queen in Right of Canada*, 2016 SCTC 15 [*Beardy's*] at para. 7; *Mosquito Grizzly Bear's Head Lean Man First Nation v Her Majesty the Queen in Right of Canada*, 2021 SCTC 1 [*Mosquito*] at para. 304; *Siska Indian Band v Her Majesty the Queen in Right of Canada*, 2021 SCTC 2 [*Siska*] at para. 343; *Huu-Ay-Aht First Nations v Her Majesty the Queen in Right of Canada*, 2016 SCTC 14 at para. 259; *Waterhen Lake* at para. 293.

[110] The Parties agree that to bring the nominal losses forward to the present day requires the application of compound interest but disagree on the appropriate rate of return.

B. Claimants' Position

[111] The Claimants argue that the appropriate rate of return is "[t]he Band Trust Fund Rate up to the year 2000, and the rate of return generated by the Canada Pension Plan Investment [B]oard thereafter" (Claimants' written submissions at para. 125). This method was put forward in the report and testimony of the Claimants' expert Scott Schellenberg. The reason for the switch in the year 2000, according to Schellenberg's report, is that since about that time, long-term investment portfolios:

> … have shifted … from being almost 100% fixed income to the point where, nowadays, it is not uncommon for Canada's major pension funds to hold as little as 20% to 30% of their portfolios in fixed income instruments, with the remainder held in publicly traded equities, private equity and hedge funds, and real estate/infrastructure. [Exhibit 15 at para. 45]

[112] Given this significant shift in investment strategy in the wider Canadian community, the

Claimants argue that compensating them differently would not restore the opportunity lost via the Crown's breach, nor would it satisfy the need for the Tribunal to apply the presumption of the most favourable use. The most favourable use for these monies would have been investment into the market, which would have offered a higher rate of return than the statutorily determined rates in the Band Trust Account (BTA). Therefore, it is this opportunity that must be restored.

[113] The Tribunal has shown a historical preference for applying the BTA rates to the entirety of a claimant's losses, although it has always maintained that the rate applied is "discretionary" (*Siska* at para. 344). Applying the BTA rate to the entirety of the Joint Claimants' losses in this Claim would not suffice according to the Claimants, however, as "the BTA rate neither fully compensates the Joint Claimants for their loss nor does it effectively deter the breaches of fiduciary duty which resulted in the same" (Claimants' written submissions at para. 114).

[114] The main reason that the BTA rates alone will not effectively deter fiduciary breaches is because a return on the money in the accounts at the BTA rates is what should have happened in the first place. The Claimants say that to simply apply the BTA rates "would leave the Crown 'no worse off' than before the breach" and therefore fails to satisfy the "deterrence element of equitable compensation" (Claimants' written submissions at para. 119).

[115] The Claimants do not appear to make any alternative arguments on the question of present-day value, but they did instruct their expert, Schellenberg, to provide present-value calculations of the Joint Claimants' nominal losses utilizing the BTA rates until the year 2000 and the Canada Pension Plan (CPP) rates thereafter, as well as the BTA rates by themselves (Exhibit 15 at para. 4).

C. Respondent's Position

[116] The Respondent argues that not only is a rate that combines the BTA and CPP rates unrealistic, but even the simple application of the BTA rates would be unrealistic as, had the Claimants been in possession of the monies, they "would have used them for the benefit of the community" during the more than a century they were without them (Respondent's written submissions at para. 83). This means that the Claimants would have consumed at least part of the money, and it would no longer be available to them.

[117] Instead, the Respondent puts forth its own expert—Dr. Howard Johnson—who proposed using the Gross Domestic Product (GDP) per capita as a rate of return, applying the rate of growth in Canada's GDP over the last century to the Joint Claimants' nominal losses. The method, the Respondent argues, reflects not only the consumption that the Claimants would have engaged in, but any other realistic contingency that would have affected the Claimants' communities. By doing so, GDP represents "the most realistic perspective to restore the Claimants to the position they would have been in but for the breach of fiduciary duty" (Respondent's written submissions at para. 72). In his report, Dr. Johnson describes his task in the following way:

> To estimate the current value of Day Star's historical monetary losses … I asked myself "what would the economic impact on Day Star have been if the funds … had not been mismanaged from 1920 through 1931 and instead have been expended on legitimate matters for the benefit of the First Nation?" [Exhibit 18 at para. 7.1]

[118] The Respondent also argues that the application of the CPP rates is barred by the decision of the Supreme Court of Canada in *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 [*Ermineskin*]. There the Court determined that while the Crown, as fiduciary, has a duty to "guarantee that [a First Nation's] funds would be preserved and would increase," it simply does not have a duty to invest a First Nation's funds into any particular investment, including market securities (para. 67). The Court goes further and states that because paragraph 90(1)(b) of the *Financial Administration Act*, RSC 1985, c F-11, prohibits the acquisition of securities by the Crown without an Act of Parliament, it would be impossible for the Crown to have invested a First Nation's funds into securities unless such investment was authorized by the *Indian Act* (para. 98). Such investment, the Court concludes, is not authorized by the *Indian Act* (para. 122).

[119] In the alternative, the Respondent argues that "[i]f the Tribunal does not find the nominal GDP per capita rate appropriate to fix equitable compensation, the BTA rates should be followed" (Respondent's written submissions at para. 94).

D. Analysis

[120] As noted, there are four major steps in applying the principles of equitable compensation. First, the nature of the fiduciary relationship must be analyzed to ensure the losses compensated for are logically connected to the duties undertaken by the fiduciary; second, a causation analysis is necessary to ensure that the losses have been caused by the breach; third, the relevant equitable

presumptions must be applied including the most favourable use; and, fourth, the total compensation is assessed in light of the special relationship between the Crown and Indigenous Peoples in Canada. All this is done with the benefit of hindsight (*Southwind* at para. 74).

[121] Pursuant to the *Indian Act*, the Crown unilaterally took on significant responsibility for the management of the Joint Claimants' property, including their funds. The control of First Nations' funds in the 1920s was total: as shown by the testimony of the oral history witnesses as well as the necessity of the order system, there were significant restrictions on both a First Nation and its members when it came to both knowledge of and access to money and other property held in trust by the Crown. This is a significant level of authority and control, most of which was exercised locally by the Indian Agent.

[122] The losses complained of by the Claimants are financial and are connected to the breaches that the Crown has admitted. The Crown has admitted that "the Indian Agent appointed by Canada mismanaged band moneys between 1920 and 1923" and that the mismanagement and the Crown's failure to adequately address the mismanagement "may have caused loss to the First Nations." Pursuant to the jointly commissioned KLA Report, I have been able to determine the nominal losses of the Claimants.

[123] Applying the equitable presumption of the most favourable use is more difficult. The most favourable use of a claimant's funds is directly connected to the rate of return by which the Tribunal brings losses forward to the present day because the hypothetical use to which a claimant's funds might have been put defines the profit a claimant might have expected to receive from its investment. Before determining the most favourable use, I need to discuss some of the evidence that the Parties presented regarding rates of return and the most favourable use.

[124] Dr. Howard Johnson's GDP-based method has been previously considered and rejected by this Tribunal. In *Siska*, the Tribunal rejected the method because it failed to account for the accrual of interest, and because the method includes the consideration of a claimant's likely consumption, a concept that does not accord with the principles of equitable compensation (para. 340). In *Mosquito*, Dr. Johnson's method was also rejected for the way it treated consumption (para. 372). In *Beardy's*, the Tribunal rejected an argument that a compensation award for withheld annuities should be discounted on the basis that "the unpaid annuities would, if paid, have been spent

immediately" (para. 152). The Tribunal wrote that to reduce an award on the basis that the money, if the First Nation had possessed it, would have been spent would "treat a portion of the loss as having no compensable value" and would "eliminate the deterrent value of equitable compensation" by reducing the amount of compound interest applied to a loss caused by an equitable breach (*Beardy's* at paras. 153–55).

[125] I reject Dr. Johnson's GDP-based method for similar reasons. I also reject this method on the basis that it fails to apply the most favourable use. Dr. Johnson's report states that he asked himself what the economic impact would have been on the Joint Claimants if their funds had been used for legitimate purposes—but this is not the right question. The proper question to ask is what would have been the most favourable use of the property that was taken. This should not be discounted based on hypothetical expenditures that never occurred.

[126] I also reject the Claimants' argument that the CPP rates should be applied as a rate of return after the year 2000. In *Ermineskin*, the appellants argued that "the Crown's fiduciary obligations required it to invest oil and gas royalties received on behalf of the appellants as a prudent investor would … in a diversified portfolio" (para. 2). The argument was rejected by the Supreme Court of Canada. The Joint Claimants make a similar argument, saying that "the Crown promised to **protect and grow** the Joint Claimants' trust moneys much like the promise an [investment broker] would give to their clients" (emphasis in original; Claimants' reply written submissions at para. 36).

[127] The Supreme Court of Canada in *Ermineskin* reiterated an earlier determination that "not all fiduciary relationships and not all fiduciary obligations are the same; these are shaped by the demands of the situation" (para. 72, quoting *McInerney v MacDonald*, [1992] 2 SCR 138 at p. 149). One of the "demands of the situation" that applies is legislation: the Court wrote that "legislation may limit the discretion and actions of a fiduciary, whether that fiduciary is the Crown or anyone else" (*Ermineskin* at para. 75). The Court determined that the Crown did not have a duty to invest a First Nation's funds but, rather, "had the obligation to guarantee that the funds would be preserved and would increase," an obligation it fulfilled by paying interest at the statutory BTA interest rates (para. 67). The Court also determined that the Crown was, in fact, barred by legislation from investing First Nations' funds in third-party securities, citing restrictions under both the *Financial Administration Act* and the *Indian Act* (paras. 98, 122–23).

[128] While a claimant is entitled to the equitable presumption that it would put its assets to their most favourable use, the most favourable use "must be realistic" (*Southwind* at para. 80). It is not realistic for this Tribunal to rule that the Joint Claimants are entitled to a rate of return based on investment in third-party securities because investment in third-party securities would be impossible under the legislation in place during the period. In *Beardy's*, the Tribunal wrote:

> Compensation and deterrence are the objectives of equitable compensation. Both are served by the application of compound interest at a rate that is realistic in the sense of being consistent with the practice of the Crown in the management of money held for the benefit of First Nations. [para. 136]

[129] In this context, I agree: applying the BTA rates to the Claimants' losses gives effect to the presumption of the most favourable use while remaining realistic. Having to pay the money back—with interest—provides a deterrent effect. I further address the question of deterrence below.

[130] As part of his testimony, Claimants' expert Scott Schellenberg provided a document entitled "Summary of PV Multiplier Factors" (Exhibit 17) which he described as "an accumulation of the different present value multipliers" (Exhibit 23 at p. 439). The document is a chart that shows by what factor a dollar of nominal loss could be multiplied to bring it forward to the present day, based on the amount of interest that would be applied, compounded over time. Schellenberg presents a variety of options, including 100 percent BTA rates, BTA rates up to 2000 and CPP rates afterward, BTA rates up to 2000 and a variety of mutual funds returns afterward, and he also includes a multiplier factor for Dr. Howard Johnson's GDP method, for comparison.

[131] The chart is divided into years, beginning in 1921, because losses in different years attract different factors based on the compounding effects of interest. So, under the BTA rates at 100 percent, the multiplier factor for 1921 is 402, the factor for 1922 is 383, the factor for 1923 is 365 and the factor for 1931 is 347. Schellenberg testified that whatever year a nominal loss is assigned to, to bring that nominal loss to its present value one would "multiply that nominal amount by that factor, and that would be what it would be worth today" (Exhibit 23 at p. 440). So, $1 in 1921 is now worth $402, $1 in 1922 is now worth $383, and so on.

[132] Bearing in mind that equitable compensation is "assessed, not calculated," and recognizing both the need to deter future misconduct by fiduciaries and "enforce the trust" at the heart of the fiduciary relationship (*Canson* at p. 543), I have chosen to divide each of the Joint Claimants'

losses equally amongst the three earliest years in Schellenberg's chart: 1921, 1922 and 1923. These dates correspond, roughly, with Hardinge's tenure. Given the quality of the forensic accounting evidence in this Claim, it would be possible to assign some losses—though certainly not all—to specific years with a fair degree of accuracy, but I have chosen to assign the losses to the earliest years as deterrence to the Crown: assigning the losses to the three earliest years is not only more efficient, it increases the effect of compound interest by applying larger multiplier factors, thereby maximizing the Claimants' compensation in a realistic way.

[133] The calculations are below:

First Nation	Year	Nominal Loss	Multiplier	Present Value
Day Star	1921	$6,627.42	402	$2,664,222.84
Day Star	1922	$6,627.42	383	$2,538,301.86
Day Star	1923	$6,627.42	365	$2,419,008.30
TOTAL				**$7,621,533**

First Nation	Year	Nominal Loss	Multiplier	Present Value
Fishing Lake	1921	$23,705.40	402	$9,529,570.80
Fishing Lake	1922	$23,705.40	383	$9,079,168.20
Fishing Lake	1923	$23,705.40	365	$8,652,471
TOTAL				**$27,261,210**

First Nation	Year	Nominal Loss	Multiplier	Present Value
George Gordon	1921	$7,934.79	402	$3,189,785.58
George Gordon	1922	$7,934.79	383	$3,039,024.57
George Gordon	1923	$7,934.79	365	$2,896,198.35
TOTAL				**$9,125,008.50**

First Nation	Year	Nominal Loss	Multiplier	Present Value
Muskowekwan	1921	$17,509.65	402	$7,038,879.30
Muskowekwan	1922	$17,509.65	383	$6,706,195.95
Muskowekwan	1923	$17,509.65	365	$6,391,022.25
TOTAL				**$20,136,097.50**

[134] I am satisfied that these compensation amounts are reflective of the special relationship between the Crown and First Nations in Canada, adequately compensate the Claimants and sufficiently deter future breaches by the fiduciary.

VIII. CONCLUSION

[135] Under the authority of paragraph 20(1)(c) of the *SCTA*, I make the following equitable compensation awards to each of the Joint Claimants:

- Day Star First Nation: $7,621,533;
- Fishing Lake First Nation: $27,261,210;
- George Gordon First Nation: $9,125,008.50; and
- Muskowekwan First Nation: $20,136,097.50.

TODD DUCHARME

Honourable Todd Ducharme

SPECIFIC CLAIMS TRIBUNAL

TRIBUNAL DES REVENDICATIONS PARTICULIÈRES

Date: 20250725

File No.: SCT-5009-19

OTTAWA, ONTARIO Jul 25, 2025

PRESENT: Honourable Todd Ducharme

BETWEEN:

DAY STAR FIRST NATION, FISHING LAKE FIRST NATION, GEORGE GORDON FIRST NATION, AND MUSKOWEKWAN FIRST NATION (FORMERLY "MUSCOWEQUAN FIRST NATION")

Claimants

and

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

Respondent

and

KAWACATOOSE FIRST NATION (FORMERLY THE "POORMAN BAND")

Intervenor

COUNSEL SHEET

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AND TO: **Counsel for the Intervenor**
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